

2-6-2012

# Elias-Cruz v. Idaho Dept of Transportation Clerk's Record Dckt. 39425

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IN THE SUPREME COURT  
OF THE  
STATE OF IDAHO

**ALMA A. ELIAS-CRUZ,**  
**Petitioner-Respondent,**

vs.

**IDAHO DEPARTMENT OF TRANSPORTATION**  
**Respondent-Appellant.**

-----  
Appealed from the District Court of the Second  
Judicial District of the State of Idaho, in  
and for the County of Latah

**HON. JOHN R. STEGNER, DISTRICT JUDGE**  
-----

**BRIAN MORRIS, LEGAL INTERN**  
Legal Aid Clinic, University of Idaho

ATTORNEY FOR RESPONDENT

**EDWIN L. LITTENEKER**  
Special Deputy Attorney General

ATTORNEY FOR APPELLANT  
-----

Filed this \_\_\_\_ day of \_\_\_\_\_, 2012.

STEPHEN W. KENYON, CLERK

By \_\_\_\_\_  
Deputy

SUPREME COURT CASE NO. 39425-2011

VOLUME I OF I VOLUME

39425



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The Affidavit of Alma Elias-Cruz (May 13, 2011).....102

Alma A Elias-Cruz vs. Idaho Transportation Department

| Date      | Code | User   | Judge   |
|-----------|------|--------|---|
| 1/25/2011 | NCOC | BETH   | New Case Filed - Other Claims John C. Judge   |
|           |      | BETH   | Filing: L3 - Appeal or petition for judicial review or cross appeal or cross-petition from commission, board, or body to district court Paid by: ILAC Receipt number: 0182383 Dated: 1/25/2011 Amount: \$.00 (Cash) For: Elias-cruz, Alma A (plaintiff) John C. Judge |
|           | APER | BETH   | Plaintiff: Elias-Cruz, Alma A Appearance Patrick Costello John C. Judge   |
| 2/8/2011  | CHJG | SUE    | Change Assigned Judge John R. Stegner   |
| 2/14/2011 | NOTC | SUE    | Notice of Lodging of Agency Record John R. Stegner  |
| 2/16/2011 | NOAP | SUE    | Notice Of Appearance John R. Stegner  |
|           | APER | SUE    | Defendant: Idaho Transportation Department Appearance Edwin L. Litteneker John R. Stegner   |
|           | REQU | SUE    | Request for Scheduling Conference John R. Stegner   |
|           | NOTC | SUE    | Notice of Estimate of Transcript Cost John R. Stegner   |
|           | ORDR | TERRY  | Order for Stay of License Suspension John R. Stegner  |
| 2/28/2011 | NOTC | SUE    | Notice of Filing Agency Record John R. Stegner  |
|           | MISC | SUE    | Agency Record John R. Stegner   |
| 3/10/2011 | SMIS | MAGGIE | Summons Issued John R. Stegner  |
| 3/25/2011 | SMRT | MAGGIE | Summons Returned John R. Stegner  |
| 4/6/2011  | HRSC | TERRY  | Hearing Scheduled (Motion 04/20/2011 11:00 AM) Motion for Preparation of Transcript at County Expense John R. Stegner   |
| 4/8/2011  | NTHR | BETH   | Notice Of Hearing John R. Stegner   |
| 4/20/2011 | DCHH | TERRY  | Hearing result for Motion held on 04/20/2011 11:00 AM: District Court Hearing Held Court Reporter: Sheryl L. Engler Number of Transcript Pages for this hearing estimated: less than 20 pages John R. Stegner   |
|           | CTMN | TERRY  | Hearing result for Motion held on 04/20/2011 11:00 AM: Court Minutes Motion for Preparation of Transcript at County Expense John R. Stegner   |
|           | HRSC | TERRY  | Hearing Scheduled (Motion 04/27/2011 09:00 AM) Petitioner's Motion for Preparation of Transcript at County Expense John R. Stegner  |
| 4/25/2011 | NTHR | SUE    | Notice Of Hearing John R. Stegner   |
| 4/27/2011 | INHD | TERRY  | Hearing result for Motion held on 04/27/2011 09:00 AM: Interim Hearing Held Petitioner's Motion for Preparation of Transcript at County Expense John R. Stegner   |
|           | CTMN | TERRY  | Hearing result for Motion held on 04/27/2011 09:00 AM: Court Minutes Petitioner's Motion for Preparation of Transcript at County Expense John R. Stegner  |



Alma A Elias-Cruz vs. Idaho Transportation Department

| Date       | Code | User  |  | Judge           |
|------------|------|-------|--|-----------------|
| 5/13/2011  | HRSC | TERRY | Hearing Scheduled (Motion 05/23/2011 09:00 AM)   | John R. Stegner |
|            | MOTN | SUE   | Another Motion for Preparation of Transcript at County Expense   | John R. Stegner |
|            | AFFD | SUE   | Affidavit of Alma Elias-Cruz   | John R. Stegner |
|            | NTHR | SUE   | Notice Of Hearing  | John R. Stegner |
| 5/23/2011  | DCHH | TERRY | Hearing result for Motion held on 05/23/2011 09:00 AM: District Court Hearing Held<br>Court Reporter: Sheryl L. Engler<br>Number of Transcript Pages for this hearing estimated: less than 10 pages                  | John R. Stegner |
|            | CTMN | TERRY | Hearing result for Motion held on 05/23/2011 09:00 AM: Court Minutes Petitioner's Motion for Preparation of Transcript at County Expense   | John R. Stegner |
|            | ORDR | TERRY | Order For Preparation of Transcript at County Expense  | John R. Stegner |
| 6/13/2011  | NOTC | SUE   | Notice of Filing Transcript  | John R. Stegner |
| 6/20/2011  | HRSC | TERRY | Hearing Scheduled (Appellate Argument 08/24/2011 10:00 AM)   | John R. Stegner |
|            | ORDR | SUE   | Order Setting Briefing Schedule  | John R. Stegner |
| 6/28/2011  | BREF | SUE   | Petitioner's Brief   | John R. Stegner |
| 7/27/2011  | BREF | SUE   | Brief of the Idaho Transportation Department   | John R. Stegner |
| 8/19/2011  | REPL | SUE   | Petitioner's Reply Response to Idaho Transportation Dept Brief   | John R. Stegner |
| 8/24/2011  | DCHH | TERRY | Hearing result for Appellate Argument scheduled on 08/24/2011 10:00 AM: District Court Hearing Held<br>Court Reporter: Sheryl L. Engler<br>Number of Transcript Pages for this hearing estimated: less than 40 pages | John R. Stegner |
|            | CTMN | TERRY | Hearing result for Appellate Argument scheduled on 08/24/2011 10:00 AM: Court Minutes  | John R. Stegner |
| 10/24/2011 | OPIN | SUE   | Memorandum Opinion   | John R. Stegner |
| 11/10/2011 | NAPL | SUE   | Notice Of Appeal   | John R. Stegner |
| 11/15/2011 | NAPL | SUE   | Amended Notice Of Appeal   | John R. Stegner |
|            | BNDC | SUE   | Bond Posted - Cash (Receipt 190044 Dated 11/15/2011 for 81.25)   | John R. Stegner |

CASE NO CV 2011-00090

2011 JAN 25 PM 4:45

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY AM DEPUTY

Katie M. Sherritt- Legal Intern  
Patrick D. Costello- Supervising Attorney- ISBN 2491  
Legal Aid Clinic  
University of Idaho College of Law  
P.O. Box 442322  
Moscow, IID 83844-2322  
(208) 885-6541  
(208) 885-4628 (fax)  
Attorneys for Defendant

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF LATAH**

Alma Elias-Cruz,

Petitioner,

v.

IDAHO TRANSPORTATION  
DEPARTMENT,

Respondent.

Case No. CV 2011-00090

PETITION FOR JUDICIAL REVIEW  
AND REQUEST FOR STAY

Fee Category: G3

Fee: Exempt Pursuant to IRCP 10(c)

Pursuant to Idaho Code §§ 18-8002A and 67-5270, the petitioner, Alma Elias-Cruz, by and through her attorneys, the University of Idaho Legal Aid Clinic, Patrick D. Costello, Supervising Attorney, Katie M. Sherritt, Legal Intern, and Gregory Hurn, Legal Intern, and respectfully petitions this Court for judicial review of the Final Order entered by the Idaho Transportation Department, by and through Hearing Officer, David J. Baumann, in the Matter of

the Driving Privileges of Alma Elias Cruz, drivers' license number GB199299E, file number 657001427571, attached as exhibit "A" hereto and by this reference incorporated herein. The petitioner alleges as follows:

1. That the petitioner is aggrieved by the final findings of fact as entered by the Idaho Transportation Department's Hearing Officer, David J. Baumann, pronounced on the 30<sup>th</sup> day of December 2010, file number 657001427571.

2. The petitioner raises the following assignments of error

(a). That Ms. Elias-Cruz's breath test result is not in violation of Idaho Code § 18-8004.

(b) That the Lifeloc FC20 had not been calibrated according to the recommendations of the manufacturer and as such the results should not have been used in determining whether to suspend Ms. Elias-Cruz's license.

(c) That a margin of error should be taken into account when using test results from the Lifelock FC20.

(d) That Hearing Officer Baumann erroneously applied *State v. McDaniels*, xxx Idaho xxx, xxx P.3d xxx (2010) decision to this case when this case is distinguishable in both offense and level of intoxication.

(e). Evidentiary testing did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of §§ 18-8004(4), 18-8004C, or 18-8006 of the Idaho Code.

3. The hearing officer's findings and conclusions were not supported by substantial, competent evidence.

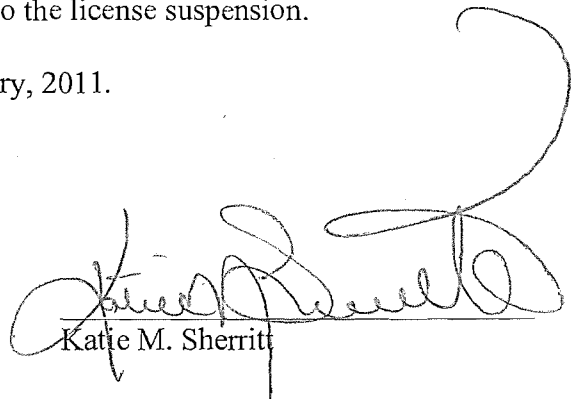
4. The hearing officer's findings and conclusions were clearly erroneous and unsupported by the evidentiary testing.
5. An immediate stay of the driver's license suspension is necessary in order for the petitioner to have a valid claim. The petitioner's license was suspended for 90 days beginning on November 20, 2010. If a stay is not granted, the suspension may expire and the petitioner would be denied the opportunity to appeal in the final order.

Furthermore, because the petitioner is indigent and qualifies for the waiver of court filing fees pursuant to I.R.C.P. 10 (a) (6) and for Legal Aid Clinic services, the petitioner asks that the Court prepare the transcript from the Administrative License Suspension hearing at the expense of the Latah County District Court Fund and waive the requirement that petitioner pay the transcript fee because of her indigent status.

WHEREFORE, in consideration of the above, the petitioner respectfully requests that the petitioner be afforded relief as follows:

1. That the Final Order be reviewed and reversed.
2. That this Court, in accordance with Idaho Code §18-8004(c), enter such order as the Idaho Transportation Department's Hearing Officer should have entered, vacating the petitioner's license suspension.
3. That this Court grant an immediate stay as to the license suspension.

Respectfully submitted this 25 day of January, 2011.



Katie M. Sherritt

Legal Intern

A handwritten signature in dark ink, appearing to read 'Patrick D. Costello', written over a horizontal line.

Patrick D. Costello  
Supervising Attorney

CERTIFICATE OF SERVICE BY MAIL

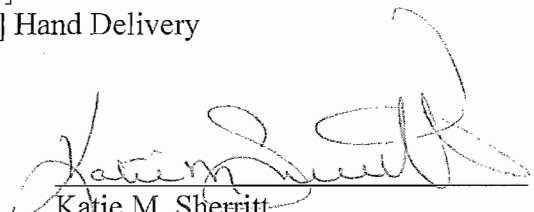
I HEREBY CERTIFY that on the 25 day of January 2011, a true and correct copy of the foregoing PETITION FOR JUDICIAL REVIEW AND REQUEST TO STAY was mailed or faxed to the following:

The Idaho Transportation Department  
Legal Section  
P.O. Box 7129  
Boise, Idaho 83707-1129

☒ US Mail  
☐ First Class Postage, pre-paid  
☐ Fax  
☐ Hand Delivery

Edwin L. Litteneker  
322 Main St.  
PO Box 321  
Lewiston, ID 83501-0321  
(208) 798-8387 (fax)

☐ US Mail  
☐ First Class Postage, pre-paid  
☒ Fax  
☐ Hand Delivery

  
Katie M. Sherritt  
Legal Intern

Beth Schiller  
Administrative Assistant, Driver Services  
Idaho Transportation Department  
3311 West State Street  
P.O. Box 7129  
Boise, Idaho 83701-1129  
Telephone: (208) 334-8755  
Facsimile: (208) 332-2002

CASE NO. CV 2011-00090

2011 FEB 14 AM 10:42

CLERK OF DISTRICT COURT  
LATAH COUNTY

BY *SA* DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

|                              |   |                          |
|------------------------------|---|--------------------------|
| Alma Elias-Cruz,             | ) |                          |
|                              | ) |                          |
| Petitioner,                  | ) | Case No. CV-2011-0000090 |
|                              | ) |                          |
| v.                           | ) | NOTICE OF LODGING        |
|                              | ) | OF AGENCY RECORD         |
| State of Idaho,              | ) |                          |
| Department of Transportation | ) |                          |
|                              | ) |                          |
| Respondent.                  | ) |                          |
| _____                        | ) |                          |

Beth Schiller, Administrative Assistant of the Idaho Transportation Department, hereby gives notice pursuant to I.R.C.P. 84(j) of lodging of the agency record in the above-captioned matter. The parties shall have fourteen (14) days from the date of the mailing of this notice in which to file with the agency any objections. If no objections to the record are filed with the agency within fourteen (14) days, the record shall be deemed settled. Parties may pick up a copy of the record between the hours of 8:00 a.m. and 5:00 p.m. at the Idaho Transportation Department, 3311 West State Street, Boise, Idaho 83703.

The Agency Record consists of the following documents:

| <u>Description</u>   |                        | <u>Page Number</u> |
|--|------------------------|--------------------|
| Notice of Suspension   | STATE'S EXHIBIT 1      | 1-2                |
| Evidentiary Test Results                                       | STATE'S EXHIBIT 2      | 3                  |
| Instrument Calibration Check                                   | STATE'S EXHIBIT 3      | 4                  |
| Sworn Statement  | STATE'S EXHIBIT 4      | 5-7                |
| Influence Report   | STATE'S EXHIBIT 5      | 8                  |
| Copy of Citation #1427571 & Driver's License                   | STATE'S EXHIBIT 6      | 9                  |
| Copy of Petitioner's Drivers License                           | STATE'S EXHIBIT 7      | 10                 |
| Envelope from Law Enforcement Agency                           | STATE'S EXHIBIT 8      | 11                 |
| Certification of Receipt of Law Enforcement Documents          | STATE'S EXHIBIT 9      | 12                 |
| Petitioner's Request for Hearing                               | STATE'S EXHIBIT 10     | 13-16              |
| Petitioner's Driver License Record                             | STATE'S EXHIBIT 11     | 17-19              |
| Order - Denial   | STATE'S EXHIBIT 12     | 20                 |
| Subpoena – Duces Tecum   | STATE'S EXHIBIT 13     | 21                 |
| Subpoena – Duces Tecum   | STATE'S EXHIBIT 14     | 22                 |
| Curriculum Vitae of Loring Beals                               | PETITIONER'S EXHIBIT A | 23                 |
| Operator's Reference Manual Lifeloc FC20                       | PETITIONER'S EXHIBIT B | 24-25              |
| FC Series Technical Specifications                             | PETITIONER'S EXHIBIT C | 26                 |
| Lifeloc Technologies FC20 Frequently Asked Technical Questions | PETITIONER'S EXHIBIT D | 27-30              |
| Notice of Telephone Hearing                                    |                        | 31-44              |
| Findings of Fact and Conclusions of Law and Order              |                        | 45-57              |
| Petition for Judicial Review and Request for Stay              |                        | 58-63              |
| Correspondence - Transcript                                    |                        | 64                 |

As of this DATE, February 10, 2011, a Transcript has [ X ], has not [ ] been requested by the petitioner or his attorney.

DATED this 10th day of February, 2011.

Beth Schiller  
 Beth Schiller  
 Idaho Transportation Department



CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

KATIE SHERRITT, LEGAL INTERN  
PATRICK COSTELLO, SUPERVISING ATTORNEY  
LEGAL AID CLINIC  
UNIVERSITY OF IDAHO COLLEGE OF LAW  
P.O. BOX 442322  
MOSCOW, ID 83844-2322

☒ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

EDWIN LITTENEKER  
ATTORNEY AT LAW

☒ ELECTRONIC MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

Beth Schiller  
Beth Schiller  
Idaho Transportation Department

Katie M. Sherritt- Legal Intern  
 Patrick D. Costello- Supervising Attorney  
 Idaho State Bar #2491  
 University of Idaho Legal Aid Clinic  
 P.O. Box 442322  
 Moscow, ID 83844  
 (208) 885-6541  
 fax: (208) 885-4628

Attorneys for Petitioner

CASE NO. CV 2011-90

February 16 2011 1:02 PM  
 CLERK OF DISTRICT COURT

LATAH COUNTY

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Alma Elias-Cruz )

Petitioner, )

vs. )

IDAHO DEPARTMENT OF,  
 TRANSPORTATION )

Respondent. )

Case No. CV 2011-90

Order for Stay of License Suspension

This Court, having considered Petitioner's Motion to Stay the License Suspension and Respondent having no objection thereto, it is HEREBY ORDERED that:

1. That the Motion to Stay the License Suspension is GRANTED. Petitioner's

driving privileges shall not be suspended by Respondent pending further order of  
the court.,

Dated this 16<sup>th</sup> day of February, 2011.

  
Honorable John Stegner

#### CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a true and correct copy of this document to be served on the following individual (s) in the manner indicated below:

Edwin L. Litteneker  
322 Main St.  
PO Box 321  
Lewiston, ID 83501-0321  
(208) 798-8387 (fax)

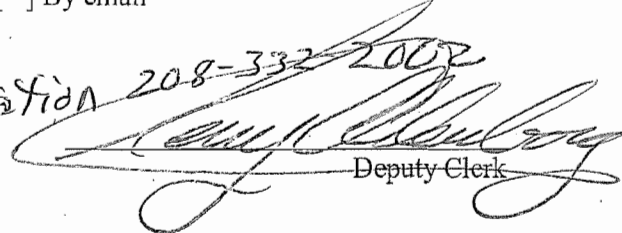
☒ US Mail  
☐ First Class Postage, pre-paid  
☒ Fax *fax failed*  
☐ Hand Delivery

Katie M. Sherritt Legal Intern  
University of Idaho Legal Aid Clinic  
PO Box 442322  
Moscow, ID 83844-2322  
(208) 885-6541  
(208) 885-4628 (fax)

☐ By hand-delivery  
☒ By Mail  
☒ By Facsimile *fax failed*  
☐ By email

*Idaho Dept of Transportation*

*208-332-2002*

  
Deputy Clerk

Order for Stay Suspension of License

Beth Schiller  
Administrative Assistant, Driver Services  
Idaho Transportation Department  
3311 West State Street  
P.O. Box 7129  
Boise, Idaho 83701-1129  
Telephone: (208) 334-8755  
Facsimile: (208) 332-2002

CASE NO. CV 2011-00117

2011 FEB 16 AM 10:31

CLERK OF DISTRICT COURT  
LATAH COUNTY

BY                      DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

|                              |   |                      |
|------------------------------|---|----------------------|
| Tracy M. Bennett             | ) |                      |
|                              | ) |                      |
| Petitioner,                  | ) | Case No. CV-2011-114 |
|                              | ) |                      |
| v.                           | ) | NOTICE OF LODGING    |
|                              | ) | OF AGENCY RECORD     |
| State of Idaho,              | ) |                      |
| Department of Transportation | ) |                      |
|                              | ) |                      |
| Respondent.                  | ) |                      |
|                              | ) |                      |


Beth Schiller, Administrative Assistant of the Idaho Transportation Department, hereby gives notice pursuant to I.R.C.P. 84(j) of lodging of the agency record in the above-captioned matter. The parties shall have fourteen (14) days from the date of the mailing of this notice in which to file with the agency any objections. If no objections to the record are filed with the agency within fourteen (14) days, the record shall be deemed settled. Parties may pick up a copy of the record between the hours of 8:00 a.m. and 5:00 p.m. at the Idaho Transportation Department, 3311 West State Street, Boise, Idaho 83703.

The Agency Record consists of the following documents:

| <u>Description</u>                                    |                        | <u>Page Number</u> |
|---|------------------------|--------------------|
| Notice of Suspension                                  | STATE'S EXHIBIT 1      | 1-2                |
| Evidentiary Test Results                              | STATE'S EXHIBIT 2      | 3                  |
| Instrument Operations Log                             | STATE'S EXHIBIT 3      | 4                  |
| CAL Check Log   | STATE'S EXHIBIT 4      | 5                  |
| Sworn Statement                                       | STATE'S EXHIBIT 5      | 6-8                |
| Copy of Citation #ISP0034476                          | STATE'S EXHIBIT 6      | 9                  |
| Envelope from Law Enforcement Agency                  | STATE'S EXHIBIT 7      | 10                 |
| Certification of Receipt of Law Enforcement Documents | STATE'S EXHIBIT 8      | 11                 |
| Petitioner's Request for Hearing                      | STATE'S EXHIBIT 9      | 12                 |
| Petitioner's Driver License Record                    | STATE'S EXHIBIT 10     | 13-14              |
| State vs. Kling                                       | PETITIONER'S EXHIBIT A | 15-21              |
| Photo – Close-up of Shoe                              | PETITIONER'S EXHIBIT B | 22                 |
| Photo - Shoe  | PETITIONER'S EXHIBIT C | 23                 |
| Audio Visual  | PETITIONER'S EXHIBIT D | DVD                |
| Notice of Telephone Hearing                           |                        | 24-29              |
| Findings of Fact and Conclusions of Law and Order     |                        | 30-41              |
| Petition for Judicial Review                          |                        | 42-46              |
| Correspondence – Transcript                           |                        | 47                 |
| Order for Stay Pending Appeal                         |                        | 48                 |

As of this DATE, February 11, 2011, a Transcript has [ X ], has not [ ] been requested by the petitioner or his attorney.

DATED this 11th day of February, 2011.

  
 Beth Schiller  
 Idaho Transportation Department

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

MARK T. MONSON  
ATTORNEY AT LAW  
P.O. BOX 8456  
MOSCOW, ID 83843

X U.S. MAIL  
       HAND DELIVERED  
       OVERNIGHT MAIL  
       TELECOPY (FAX)

EDWIN LITTENEKER  
ATTORNEY AT LAW

X ELECTRONIC MAIL  
       HAND DELIVERED  
       OVERNIGHT MAIL  
       TELECOPY (FAX)

Beth Schiller  
Beth Schiller  
Idaho Transportation Department

Edwin L. Litteneker  
Special Deputy Attorney General  
Idaho Transportation Department  
322 Main Street  
PO Box 321  
Lewiston, Idaho 83501  
Telephone: (208) 746-0344  
Facsimile: (208) 798-8387  
ISB No. 2297

CV 2011-0090  
CLERK NO.

2011 FEB 16 AM 10:32

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY DL DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

|                      |   |                             |
|----------------------|---|-----------------------------|
| Alma Elias-Cruz,     | ) | Case No. CV 11-0090         |
|                      | ) |                             |
| Petitioner,          | ) |                             |
|                      | ) |                             |
| vs.                  | ) |                             |
|                      | ) | <b>NOTICE OF APPEARANCE</b> |
| IDAHO TRANSPORTATION | ) |                             |
| DEPARTMENT,          | ) |                             |
|                      | ) |                             |
| Respondent.          | ) |                             |
| _____                | ) |                             |

TO: **ALMA ELIAS-CRUZ** and your attorneys **KATIE M. SHERRITT & PATRICK D. COSTELLO**.

The appearance of the Department of Transportation is hereby entered in the above-entitled action through the undersigned Special Deputy Attorney General. You are directed to serve all further pleadings or papers, except process, upon the said attorney at his address above stated.

DATED this 15 day of February, 2011.

  
\_\_\_\_\_  
Edwin L. Litteneker  
Special Deputy Attorney General

I DO HEREBY CERTIFY that a true  
And correct copy of the foregoing  
Document was:

☒ Mailed by regular first class mail,  
And deposited in the United States  
Post Office

☐ Sent by facsimile

☐ Sent by Federal Express, overnight  
Delivery

☐ Hand delivered

To: Katie M. Sherritt – Legal Intern  
Patrick D. Costello – Supervising Attorney  
Legal Aid Clinic  
University of Idaho College of Law  
P.O. Box 442322  
Moscow, Idaho 83844-2322

On this 15 day of February, 2011.



Edwin L. Litteneker





STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

December 14, 2010

**SPECIAL DEPUTY ATTORNEY GENERAL APPOINTMENT**

TO WHOM IT MAY CONCERN:

Edwin L. Litteneker, Attorney at Law, P. O. Box 321, Lewiston, Idaho 83501-0321, is hereby appointed Special Deputy Attorney General for the purpose of representing the State of Idaho in any appeal from a hearing officer's decision in Idaho Transportation Department District 2 filed pursuant to the authority of Idaho Code § 18-8002A, Automatic License Suspension Program.

This letter of appointment will be included in the files of any court case, hearing, or other matter in which he represents the State of Idaho in these appeals. This appointment is effective through December 31, 2011.

Any courtesies you can extend to Mr. Litteneker in his conduct of business for the State of Idaho, as my delegate, will be appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence G. Wasden", written over a horizontal line.

LAWRENCE G. WASDEN  
Attorney General

LGW:blm

Edwin L. Litteneker  
Special Deputy Attorney General  
Idaho Transportation Department  
322 Main Street  
PO Box 321  
Lewiston, Idaho 83501  
Telephone: (208) 746-0344  
Facsimile: (208) 798-8387  
ISB No. 2297

CASE NO. CV 2011-00092

2011 FEB 16 AM 10:32

CLERK OF DISTRICT COURT  
LATAH COUNTY

BY AL DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

|                      |   |                              |
|----------------------|---|------------------------------|
| Alma Elias-Cruz,     | ) | Case No. CV 11-0090          |
|                      | ) |                              |
| Petitioner,          | ) |                              |
|                      | ) |                              |
| vs.                  | ) | <b>REQUEST FOR</b>           |
|                      | ) | <b>SCHEDULING CONFERENCE</b> |
| IDAHO TRANSPORTATION | ) |                              |
| DEPARTMENT,          | ) |                              |
|                      | ) |                              |
| Respondent.          | ) |                              |
| _____                | ) |                              |

COMES NOW Edwin L. Litteneker, Special Deputy Attorney General for the Department of Transportation and pursuant to Rule 16(b) requests that this matter be set for a telephonic scheduling conference for purposes of the Court's entry of a scheduling order for filing briefs and scheduling a hearing on the Petition for Judicial Review.

DATED this 15 day of February, 2011.



Edwin L. Litteneker  
Special Deputy Attorney General

I DO HEREBY CERTIFY that a true  
And correct copy of the foregoing  
Document was:

☒ Mailed by regular first class mail,  
And deposited in the United States  
Post Office

☐ Sent by facsimile

☐ Sent by Federal Express, overnight  
Delivery

☐ Hand delivered

To: Katie M. Sherritt – Legal Intern  
Patrick D. Costello – Supervising Attorney  
Legal Aid Clinic  
University of Idaho College of Law  
P.O. Box 442322  
Moscow, Idaho 83844-2322

On this 15 day of February, 2011.



Edwin L. Litteneker

BETH SCHILLER  
ADMINISTRATIVE ASSISTANT, DRIVER SERVICES  
IDAHO TRANSPORTATION DEPARTMENT  
3311 WEST STATE STREET  
POST OFFICE BOX 7129  
BOISE ID 83707-1129  
TELEPHONE: (208) 334-8755  
FACSIMILE: (208) 332-2002

CASE NO. CV 2011-000090  
2011 FEB 28 AM 10:42  
CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY *Dr* DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

ALMA ELIAS-CRUZ,

PETITIONER,

v.

STATE OF IDAHO,  
DEPARTMENT OF TRANSPORTATION,

RESPONDENT,

CASE NO. **CV-2011-0000090**

**AGENCY RECORD**


THE FOLLOWING IS A LISTING OF THE DOCUMENTS CONSTITUTING THE AGENCY RECORD IN THIS MATTER:

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DATED THIS 25TH DAY OF FEBRUARY, 2011.

  
 Beth Schiller  
 Idaho Transportation Department



**NOTICE OF SUSPENSION** for Failure of Evidentiary Testing  
(Advisory for Sections 18-8002 and 18-8002A, Idaho Code)

OR # L10000735

**Issued To:**

Elias-Cruz, Alana A.  
Last Name First Middle Date of Birth  
135 E. 25th Street  
Mailing Address  
Idaho Falls ID 83404  
City State Zip

Latah 10-21-10 2147  
County of Arrest Date of Arrest Time of Arrest  
[Redacted] ID D  
Driver's License Number State License Class  
1427571  
Citation #  
Operating CMV? ☐ Yes ☒ No  
Transporting Hazmat? ☐ Yes ☒ No

**SUSPENSION ADVISORY**

- I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. You are required by law to take one or more evidentiary tests to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional tests made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary tests to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body.
- If you refuse to take or complete any of the offered tests pursuant to Section 18-8002, Idaho Code:
  - You are subject to a civil penalty of two hundred fifty dollars (\$250).
  - Your Idaho driver's license or permit will be seized if you have it in your possession, and if it is current and valid you will be issued a temporary permit. Non-resident licenses will not be seized and will be valid in Idaho for thirty (30) days from the service of this notice of suspension unless modified or restricted by the court, provided the license is valid in the issuing state. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
  - You have a right to submit a written request within seven (7) days to the Magistrate Court of Latah County for a hearing to show cause why you refused to submit to or complete evidentiary testing and why your driver's license should not be suspended.
  - If you do not request a hearing or do not prevail at the hearing, the court will sustain the civil penalty and your license will be suspended with absolutely no driving privileges for one (1) year if this is your first refusal; and two (2) years if this is your second refusal within ten (10) years.
- If you take and fail the evidentiary test(s) pursuant to Section 18-8002A, Idaho Code:
  - Your Idaho driver's license or permit will be seized if you have it in your possession, and if it is current and valid you will be issued a temporary permit. Non-resident licenses will not be seized and shall be valid in Idaho for thirty (30) days from the service of this notice of suspension, provided the license is valid in the issuing state. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
  - I will serve you with this **NOTICE OF SUSPENSION** that becomes effective thirty days from the date of service on this **NOTICE**, suspending your driver's license or privileges. If this is your first failure of an evidentiary test your driver's license or driving privileges will be suspended for ninety (90) days, with absolutely no driving privileges during the first thirty (30) days. You may request restricted driving privileges for the remaining sixty (60) days of the suspension. Restricted driving privileges will not allow you to operate a commercial motor vehicle. If this is not your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind during that period.
  - You have the right to an administrative hearing on the suspension before the IDAHO TRANSPORTATION DEPARTMENT to show cause why you failed the evidentiary test and why your driver's license should not be suspended. The request must be made in writing and be received by the department within seven (7) calendar days from the date of service of this **NOTICE OF SUSPENSION**. You also have the right to judicial review of the Hearing Officer's decision.
- If you become enrolled in and are a participant in good standing in a drug court approved by the supreme court drug court and mental health court coordinating committee under the provisions of chapter 56, title 19, Idaho Code, you shall be eligible for restricted noncommercial driving privileges for the purpose of getting to and from work, school or an alcohol treatment program, which may be granted by the presiding judge of the drug court, provided that you have served a period of absolute suspension of driving privileges of at least forty five (45) days, that an ignition interlock device is installed on each of the motor vehicles owned or operated, or both, by you and that you have shown proof of financial responsibility.

**EXHIBIT**

**THIS SUSPENSION FOR FAILURE OR REFUSAL OF THE EVIDENTIARY TEST(S) IS SEPARATE FROM ANY OTHER SUSPENSION ORDERED BY THE COURT.**

**— PLEASE REFER TO THE BACK OF THIS SUSPENSION NOTICE FOR MORE INFORMATION —**

**NOTICE OF SUSPENSION:** If you have failed the evidentiary test(s), your driving privileges are hereby suspended per #3 above, commencing thirty (30) days from the date of service of this notice. If a blood or urine test was administered, the department may serve a *Notice of Suspension* upon receipt of the test results.

Date of Service: X 10-21-10

**This Section Provides Temporary Driving Privileges.**

(If the driver was operating a commercial vehicle, this permit will not provide commercial driving privileges of any kind.)

If issued, this permit grants the same driving restrictions and privileges as those granted by the license/permit seized (except as indicated above), and shall be valid for thirty (30) days from the date you were served this *Notice of Suspension* for failure or refusal of the evidentiary test(s), unless it is canceled or restricted by the court.

Permit Issued? ☒ Yes ☐ No License Surrendered? ☒ Yes ☐ No  
A permit was not issued: ☐ Suspended ☐ Not In Possession ☐ Invalid ☐ Expired ☐ Issued by Another Jurisdiction ☐ Not Licensed

X [Signature]  
Signature of Temporary Licensee (if you are issued a permit, it is not valid until you sign it)

OCT 27 2010 ITD REC'D

|  |   |                             |  |
|--|---|-----------------------------|--|
| Signature of Reporting Officer:<br><u>Jacob A. Schwewe</u>   | Print Name and I.D. Number of Reporting Officer (PRINT):<br><u>Schwewe, Jacob A. 3577</u> | Agency Code:<br><u>0002</u> | Telephone Number:<br><u>(208) 799-5151</u> |
| Department use only: Failure: <input checked="" type="checkbox"/> Breath <input type="checkbox"/> Urine/Blood <input type="checkbox"/> Refusal |   |                             |  |

# **SUSPENSION INFORMATION:** The audio version of the suspension advisory substantially conforms to the written text of this suspension advisory.

## **FOR REFUSAL OF EVIDENTIARY TESTING (PURSUANT TO SECTION 18-8002, IDAHO CODE):**

You have the right to submit a written request within seven (7) days to the Magistrate Court indicated on the face of this notice for a hearing to show cause why you refused to submit to or complete evidentiary testing. This is your opportunity to show cause why you refused to submit or failed to complete evidentiary testing and why your driver's license should not be suspended. NOTE: A HEARING REQUEST FOR REFUSING EVIDENTIARY TESTING MUST BE SUBMITTED TO THE MAGISTRATE COURT.

If you fail to request a hearing or do not prevail at the hearing, you are subject to a \$250 civil penalty and the court will suspend your driver's license and privileges with absolutely no driving privileges for one (1) year for your first offense, or for two (2) years for your second offense within ten (10) years (unless you meet the provisions of section 4 as noted in the suspension advisory on the reverse side).

## **FOR FAILING EVIDENTIARY TESTING (PURSUANT TO SECTION 18-8002A, IDAHO CODE):**

You have been served this *Notice of Suspension* by a peace officer who had reasonable grounds to believe that you were operating a vehicle while intoxicated. After submitting to the test(s), you may, when practicable, have additional tests conducted (at your own expense).

If you take the evidentiary test(s) and the results indicate an alcohol concentration of .08 or greater (.02 or greater if you are under 21 years of age), or the presence of drugs or other intoxicating substances in violation of the provisions of Sections 18-8004, 18-8004C, and 18-8006, Idaho Code, the peace officer shall:

1. A. Seize your driver's license, (unless you are an out-of-state resident).
  - B. Issue you a temporary driving permit which shall be valid for thirty (30) days from the date of service indicated on the reverse side of this *Notice of Suspension*, if you have surrendered a current valid Idaho license. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
  - C. Serve you with this *Notice of Suspension* that becomes effective thirty (30) days after the date of service indicated on the reverse side of this notice. Failure of an evidentiary test will result in a ninety (90)-day suspension of driving privileges, with absolutely no driving privileges during the first thirty (30) days of the suspension. You may request restricted driving privileges during the final sixty (60) days of the suspension. If this is not your first failure of an evidentiary test within the last five (5) years, all of your driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind (unless you meet the provisions of section 4 as noted in the suspension advisory on the reverse side).
2. If you were operating or in physical control of a commercial vehicle and the evidentiary test results indicate an alcohol concentration of:
    - A. .04 to less than .08, your commercial driving privileges will be suspended for ninety (90) days. You will have absolutely no commercial driving privileges of any kind. Any temporary permit issued will be for Class D (non-commercial) driving privileges only.
    - B. .08 or greater (.02 or greater if you are under 21 years of age), or test results indicate the presence of drugs or other intoxicating substances, all of your driving privileges will be suspended for ninety (90) days, with possible Class D driving privileges for the final sixty (60) days of the suspension. You will have absolutely no commercial driving privileges of any kind during the full ninety (90)-day suspension.
    - C. If this is not your first failure of an evidentiary test within the last five (5) years, all of your driving privileges will be suspended for one (1) year and you will have absolutely no driving privileges of any kind (unless you meet the provisions of section 4 as noted on the reverse side).

## **HEARING REQUEST FOR FAILURE OF EVIDENTIARY TEST:**

You have the right to request an administrative hearing on the suspension **BEFORE THE IDAHO TRANSPORTATION DEPARTMENT**. Your request must be made in writing and be received by the department no later than seven (7) calendar days after the date of service of this *Notice of Suspension*. The request must state the issues intended to be raised at the hearing, and must include your name, date of birth, driver's license number, date of arrest, and daytime telephone number because the hearing will be held by telephone. The burden of proof, by preponderance of evidence, shall be upon the driver as to the issues raised in the hearing, pursuant to Section 18-8002A(7), Idaho Code.

If you request a hearing, it shall be held within twenty (20) days of the date the hearing request was received by the Idaho Transportation Department. (Section 18-8002A, Idaho Code) If you do not request an administrative hearing within seven (7) days of service of this *Notice of Suspension*, your right to contest the suspension is waived. This suspension is separate and apart from any suspension that may be ordered by the court as a result of any criminal charges that may be brought against you.

## **JUDICIAL REVIEW:**

You may appeal the decision of the Hearing Officer by seeking judicial review to the District Court. (Section 18-8002A, Idaho Code). Your appeal must be filed as a civil proceeding in District Court, pursuant to Chapter 52, Title 67, Idaho Code.

## **RESTRICTED DRIVING PERMITS:**

If your driving privileges are suspended for a period of ninety (90) days pursuant to Section 18-8002A, Idaho Code, you may request restricted driving privileges for the final sixty (60) days of the suspension (IDAPA Rule 39.02.70.) Restricted driving privileges will not allow you to operate a commercial motor vehicle. You may make your written request for restricted driving privileges any time after the service of this *Notice of Suspension*.

## **REINSTATEMENT REQUIREMENTS:**

Before being reinstated on this suspension, you will be required to pay a reinstatement fee. Any other suspension imposed by the court for this offense will require an additional reinstatement fee.

**To request an administrative hearing or apply for a restricted driving permit relating to an administrative license suspension for failing evidentiary testing:**

- Make your request in writing (including a daytime telephone number) to the Idaho Transportation Dept., Driver Services Section, PO Box 7129, Boise, ID 83707-1129, OR
- Fax your request to Driver Services at (208) 332-4124.

If you have questions or need additional information regarding this notice or your driving privileges, call Driver Services at 334-8735.

-----  
Lifeloc Technologies, Inc.  
Sequence v6.24d  
Serial No. 90203805  
Units: BrAC  
-----

Event No.: 156  
Date: 10/21/2010

| #  | Type      | Time  | Result |
|----|-----------|-------|--------|
| 1) | Air Blank | 21:39 | .000   |
| 2) | Auto Test | 21:39 | .021   |
| 3) | Air Blank | 21:41 | .000   |
| 4) | Auto Test | 21:42 | .020   |

Alma A. Elias-Cruz (01/03/1990)  
Subject

I.D. ALMA ELIASCRUZ

J. Schwecke  
Operator

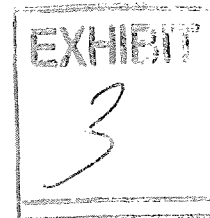




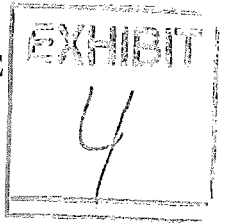
-----  
Lifeloc Technologies, Inc.  
Sequence v6.24d  
Serial No. 90203805  
Units: BrAC  
-----

Last Calibrated:  
Cal Standard: .206  
Time: 09:50  
Date: 08/18/2009

Last Check:  
Cal Standard: .080  
Result: .081  
Time: 19:30  
Date: 10/22/2010  
-----



IN THE DISTRICT COURT OF THE 2ND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH



THE STATE OF IDAHO,  
Plaintiff,

COURT CASE NUMBER \_\_\_\_\_  
PROBABLE CAUSE AFFIDAVIT IN SUPPORT  
OF ARREST AND/OR REFUSAL TO TAKE TEST

ELIAS-CRUZ, Alma A.  
Defendant.

DOB: [REDACTED]  
SSN/DL: [REDACTED]  
State: Idaho

State of Idaho,

County of LATAH

I, Trooper Jacob Schwecke the undersigned, being first duly sworn on oath, deposes and says that:

1. I am a peace officer employed by the Idaho State Police.
2. The defendant was arrested on **October 21, 2010** at **2147** hours for the crime of **driving while under the influence of alcohol, drugs, or any other intoxicating substances (person under 21)** pursuant to Idaho code section **18-8004(1)(d)**. Second or more DUI offense in the last ten years? **No - Misdemeanor**  
Other Offenses: **Open alcohol container**
3. Location of Occurrence: **Southbound U.S. 95 at approximately milepost 361.5**
4. Identified the defendant as: **ELIAS-CRUZ, Alma A.** by: **Driver's License**
5. Actual physical control established by: **Observation By Affiant**
6. I believe that there is probable cause to believe the defendant committed such crime because of the following facts:

(NOTE: You must state the source of all information provided below. State what you observed and what you learned from someone else, identifying that person):

**PROBABLE CAUSE FOR STOP AND ARREST:**

On October 21, 2010, at approximately 2109 hours, I, Trooper Jacob Schwecke, was patrolling southbound on U.S. 95 approximately milepost 361.5 in Latah County, Idaho. At this time I observed a purple colored Honda CR-V (California registration 4SVF366) on approaching my patrol vehicle from the rear that appeared to be travelling over the posted 45 mph speed limit. I visually estimated the speed at 50 mph plus. I activated my radar in the same lane moving mode (rear antenna) and received a reading of 52 mph with a consistent and audible tone. The reading held steady and consistent for 2 to 3 seconds. I pulled to the side of the roadway and let the Honda pass, then activated my emergency lights and conducted a traffic stop for speed. I checked my radar for proper function after the stop and it was functioning properly. I approached the vehicle identified myself and the reason for the stop. The driver identified herself as Alma A. ELIAS-CRUZ (date of birth: [REDACTED]) with her Idaho Driver's License. I smelled the odor of an alcoholic beverage coming from inside the vehicle. ELIAS-CRUZ admitted to consuming alcohol prior to driving. After running a driver's check, I asked ELIAS-CRUZ to exit the vehicle to perform the standardized field sobriety tests. ELIAS-CRUZ performed and showed signs of consuming alcohol. ELIAS-CRUZ showed 2 points on the HGN evaluation. I could smell the odor of an alcoholic beverage coming from ELIAS-CRUZ during the evaluations. I informed ELIAS-CRUZ she was under arrest for DUI. ELIAS-CRUZ was also booked for Open alcohol container.

D.U. I. NOTES

Odor of alcoholic beverage: Yes  
Admitted drinking alcoholic beverage: Yes  
Slurred speech: No  
Impaired memory: No  
Glassy/bloodshot eyes: No

Sobriety Tests—Meets Decision Points?

Gaze Nystagmus: No  
Walk & Turn: No  
One Leg Stand: No  
  
Crash Involved: No Injury: No

Other:

Drugs Suspected: No Drug Recognition Evaluation Performed: No  
Reason Drugs are Suspected:

Prior to being offered the test, the defendant was substantially informed of the consequences of refusal and failure of the test as required by Section 18-8002 and 18-8002A, Idaho Code.

Defendant was tested for alcohol concentration, drugs or other intoxicating substances. The test(s) was/were performed in compliance with Section 18-8003 & 18-8004 (4), Idaho Code, and the standards and methods adopted by the Department of Law Enforcement.

BAC: .021/.020      Breath Instrument Type: Lifeloc FC20      Serial # 058869  
Name of person administering breath test: Jacob Schwecke  
Date Certification Expires: 04/30/2011

Videotape # 208-032

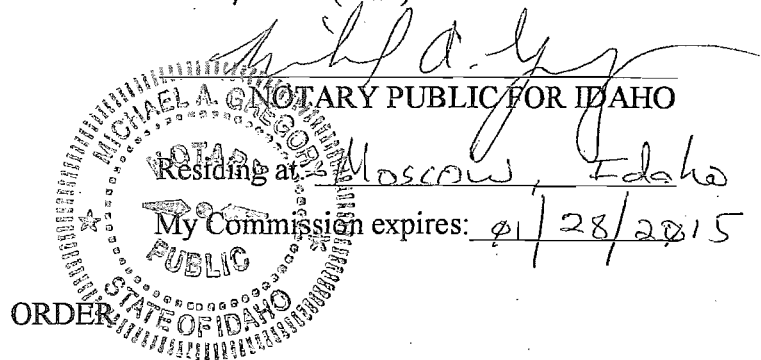
By my signature and in the presence of a person authorized to administer Oaths in the State of Idaho, I hereby solemnly swear that the information contained in this document and attached reports and documents that may be included herein is true and correct to the best of my information and belief.

Signed: \_\_\_\_\_

Jay A. Shwartz  
(affiant)

Subscribed and sworn to me on \_\_\_\_\_

10/22/10  
(Date)



Based upon the above Affidavit, the Court hereby finds that there is Probable Cause to believe that a crime or crimes has been committed, and that the Defendant committed said crime or crimes.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ hours.

\_\_\_\_\_  
MAGISTRATE

Idaho State Police  
INFLUENCE REPORT

Defendant's Name Elias-Cruz, Alma A.

DOB [REDACTED]

PRE-TEST

Contacts ☐ Yes ☒ No

Glasses ☐ Yes ☒ No

Remove Glasses ☐

FIELD SOBRIETY TESTS

Eyes tracking equally ☒ Yes ☐ No

HORIZONTAL GAZE NYSTAGMUS

EYES

L ☒

R ☒

Eye does not pursue smoothly

☐

☐

Distinct Nystagmus at max. deviation

☐

☐

Nystagmus onset before 45 degrees

☐ 2

TOTAL

ADDITIONAL SOBRIETY TESTS

EXHIBIT  
5

VERTICAL NYSTAGMUS

☐ Yes

☒ No

PUPIL SIZE \_\_\_\_\_

CONSTRICTED ☐

NORMAL ☒

DILATED ☐

WALK AND TURN

☐

Cannot keep balance during instructions

☐

Starts too soon

☐

Stops too soon

☒

Misses heel to toe

☐

Steps off line

☐

Raises arms

☐

Wrong number of steps

☐

Improper turn

☐

Cannot do test

☐ 1

Total

NYSTAGMUS

|   | 0 | 1 | 2 | 3 | 4 | 5 | 6 |
|---|---|---|---|---|---|---|---|
| 0 |   |   |   |   |   |   |   |
| 1 |   |   | ✓ |   |   |   |   |
| 2 |   |   |   |   |   |   |   |
| 3 |   |   |   |   |   |   |   |
| 4 |   |   |   |   |   |   |   |
| 5 |   |   |   |   |   |   |   |
| 6 |   |   |   |   |   |   |   |
| 7 |   |   |   |   |   |   |   |
| 8 |   |   |   |   |   |   |   |

WALK  
AND  
TURN

OBSERVATIONS

Eye Color \_\_\_\_\_ Eye Condition \_\_\_\_\_ Speech normal

Breath Smelled of Alcoholic Beverage

Foot Wear Black boots Ground Surface Asphalt

ONE LEG STAND

☐

Sways

☐

Raises arms

☐

Hops

☐

Puts foot down

☐

Cannot do test

☐ 0

Total

CHEMICAL TEST

☒

Breath

☐

Blood

☐

Other

Test Result .021/.020

☐

Refused test, Why? \_\_\_\_\_

Audio Tape

☒

N

Video Tape

☒

N

Officer's Signature

Garth A. Schwabe

Date

10-21-10

IDAHO STATE POLICE

IDAHO UNIFORM CITATION

1421511

IN THE DISTRICT COURT OF THE 2nd JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Latah  
STATE OF IDAHO

## COMPLAINT AND SUMMONS

- ☐ Infraction Citation  
OR  
☒ Misdemeanor Citation  
☐ Accident Involved

vs.  
Elias-Cruz  
Last Name  
Alma A  
First Name Middle Initial

USDOT TK

☐ Operator ☐ Class A ☐ Class B ☐ Class C ☒ Class D ☐ Other  
☐ GVWR 26001 + ☐ 8 + Persons ☐ Placard Hazardous Materials DR# L10000953  
Home Address 135 E 25th St. Idaho Falls, ID 83404  
Company Name \_\_\_\_\_ Phone # \_\_\_\_\_

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I, [REDACTED], do hereby certify and believe the above named defendant.  
ID or SS# [REDACTED] State ID  
Height 5'06" Wt. 185 Hair brn Eyes brn DOB [REDACTED]  
Veh. Lic # 4SVF366 State CA Yr. of Vehicle 01 Make Honda  
Model CRV Color Purple  
Did commit the following act(s) on 21 October 20 10 at 2109 o'clock p M

Vio. #1 Driving Under Influence of Drugs and/or 18-80044  
alcohol (under 21.0211.020) Code Book

Vio. #2 Purchase, possess open container 23-5056  
of alcoholic Code Book

Location \_\_\_\_\_  
Hwy. SBUS 95 Mp. 36.5 Latah County, Idaho  
10-21-10 Soschwecke 02-3577 ISP  
Date Officer/Party Serial #/Address Dent

Date \_\_\_\_\_ Witnessing Officer \_\_\_\_\_ Serial #/Address \_\_\_\_\_ Dk. \_\_\_\_\_

THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT

You are hereby summoned to appear before the Clerk of the Magistrate's Division of the  
District Court of Latah County Moscow Idaho  
located at Courthouse on the \_\_\_\_\_  
day of \_\_\_\_\_, 20 \_\_\_\_\_, (OR) on or after \_\_\_\_\_  
20 \_\_\_\_\_ and on or before \_\_\_\_\_, 20 \_\_\_\_\_  
at \_\_\_\_\_ o'clock \_\_\_\_\_ M

I acknowledge receipt of this summons and I promise to appear at the time indicated.

X In Custody Defendant's Signature

I hereby certify service upon the defendant personally on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_

Officer

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.  
COURT COPY VIOLATION #1

1427571

Elias-Cruz, Alma

OCT 27 2010 PM 1:00

009

036

OCT 27 2010 11:00 AM

50040

ELIAS-CRUZ, ALMA AMERICA  
GB199299E 01/03/90

EXHIBIT  
7

CLASS D

IDAHO

DRIVER'S LICENSE

RSTS.

NUMBER

ENDR:

ISSUED: 11/25/2008

ELIAS-CRUZ, ALMA AMERICA

135 E 25TH STREET  
IDAHO FALLS, ID 83404

*Alma Cruz*



SEX: F

HEIGHT: 5 08

WEIGHT: 180

HAIR: BRO

EYES: BRO

EXPIRES

01/08/2011

DATE OF BIRTH

01/03/90

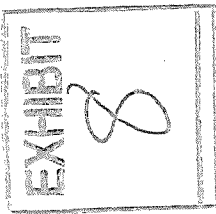
UNIT

01/03/90

DOB

037

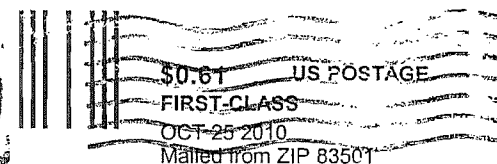
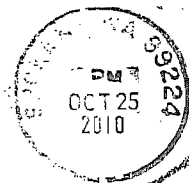
010



038  
011



Idaho State Police  
2700 N and S Highway  
Lewiston ID 83501-1732



endicia.com

071V00550503

ATTN: Driver Services - ALS  
Idaho Transportation Department  
PO Box 7129  
Boise, ID 83707-1129



OCT 27 2010 ITD Rec'd

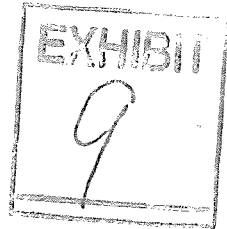




IDAHO TRANSPORTATION DEPARTMENT  
Driver Services • P.O. Box 7129  
Boise ID 83707-1129

(208) 334-8735  
dmv.idaho.gov

### Certification of Receipt of Law Enforcement Documents



I hereby certify that the following documents were received from the sender attached and/or incorporated together \*\*:

- |                                     |  |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | Notice of Suspension Advisory Form – Original    |
| <input checked="" type="checkbox"/> | Notice of Suspension Advisory Form – Goldenrod   |
| <input checked="" type="checkbox"/> | Evidentiary Test Results                         |
| <input checked="" type="checkbox"/> | Instrument Calibration Check                     |
| <input type="checkbox"/>            | Instrument Operations Log                        |
| <input type="checkbox"/>            | Certificate of Analysis                          |
| <input type="checkbox"/>            | Instrument Certification                         |
| <input type="checkbox"/>            | Officer Certification and/or Business Card       |
| <input checked="" type="checkbox"/> | Sworn Statement                                  |
| <input type="checkbox"/>            | Incident/Arrest/Narrative Reports                |
| <input type="checkbox"/>            | Witness Statements                               |
| <input type="checkbox"/>            | LAW Incident Table                               |
| <input type="checkbox"/>            | Main Radio Log                                   |
| <input type="checkbox"/>            | Affidavit and/or Order Finding Probable Cause    |
| <input checked="" type="checkbox"/> | Influence Report                                 |
| <input type="checkbox"/>            | D.U.I. Intoxicant Report                         |
| <input checked="" type="checkbox"/> | Pre-Booking Information Sheet                    |
| <input type="checkbox"/>            | Photocopy of Citation(s)                         |
| <input type="checkbox"/>            | Evaluations                                      |
| <input type="checkbox"/>            | Impound Report                                   |
| <input type="checkbox"/>            | Towed Vehicle Report                             |
| <input type="checkbox"/>            | Field Sobriety Tests                             |
| <input type="checkbox"/>            | Vehicle Collision Report                         |
| <input type="checkbox"/>            | Teletype Records                                 |
| <input type="checkbox"/>            | Request of Prosecuting Attorney for Information  |
| <input type="checkbox"/>            | Miranda Rights                                   |
| <input checked="" type="checkbox"/> | Driver License – evidenced by attached photocopy |

Other documents attached and/or incorporated together\*\*:

|                          |       |                          |       |
|--------------------------|-------|--------------------------|-------|
| <input type="checkbox"/> | _____ | <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ | <input type="checkbox"/> | _____ |
| <input type="checkbox"/> | _____ | <input type="checkbox"/> | _____ |

  
Signature of Driver Services Employee

\*\* Staples and other attaching devices are typically removed from documents for the purpose of photocopying and scanning.

Revised 7-2006

039

012

1 9 0 9  
CENTENNIAL  
2 0 0 9

College of Law

University of Idaho  
College of Law

Legal Aid Clinic

PO Box 442322  
Moscow ID 83844-2322

Phone: 208-885-6541

Fax: 208-885-4628

[www.law.uidaho.edu/clinics](http://www.law.uidaho.edu/clinics)

October 27, 2010

State of Idaho  
Transportation Department  
Driver Services

VIA FAX: 208-332-7810

Re: Request for Administrative Hearing for Alma A. Elias-Cruz

Dear Sir or Madam:

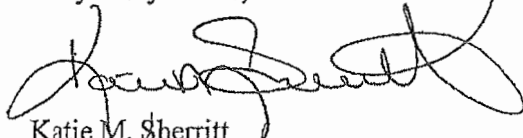
The University of Idaho College of Law, Legal Aid Clinic, is representing Alma A. Elias-Cruz, born 1/3/90, DL# GBI99299E, Citation# 142571, in the matter regarding the administrative suspension of her driver's license. This letter formally requests that an administrative hearing be scheduled to address the following issues, including but not limited to:

- 1) Whether or not the tests for alcohol, drugs, or any other intoxicating substances concentration administered at the direction of the peace officer were conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered.
- 2) Whether the arresting officer in this case, had legal cause to believe that Alma A. Elias-Cruz had been driving or was in actual physical control of a vehicle while under the influence of alcohol in violation of Idaho Code 18-8004;
- 3) Whether the arresting officer had legal cause to believe that Alma A. Elias-Cruz was in actual control of a vehicle while under the influence of alcohol because he did not have reason to believe that Alma A. Elias-Cruz had a blood alcohol level of above .02,
- 4) Whether the test results were inaccurate in showing an alcohol concentration level in violation of Idaho Code 18-8004;
- 5) Whether Alma A. Elias-Cruz was informed of the consequences of submitting to evidentiary testing as required in 18-8002A(2), Idaho Code.
- 6) Whether the officer was certified to operate the BAC testing device.
- 7) Whether the BAC testing device was properly certified and maintained.



Please send notice of the time of hearing to the Legal Aid Clinic. If you have any questions please feel free to contact the Legal Aid Clinic.

Very Truly Yours,



Katie M. Sherritt  
Legal Intern



Patrick D. Costello  
Supervising Attorney

C: Client

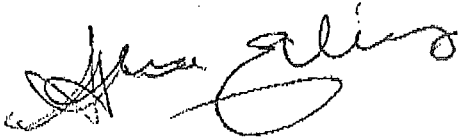
To whom it may concern:

My name is Alma Elias and I would like to request a hearing for an administration license suspension. I would like to request this hearing to tell my side of the story of my arrest on October 21, 2010 and to see if I can get driving privileges to go to work and school and run my personal errands. My birthday is [REDACTED] and my driver's license number is [REDACTED] and my mailing address is 701 w. Taylor ave #2, Moscow, Idaho 83843 and my phone number is 208-206-0213.

Thank you for your time and assistance,

Alma Elias

October, 25<sup>th</sup>, 2010



10/25/10

GB199299E

042

015

# University of Idaho

## Copier and Digital Imaging Services

### FAX Cover Sheet

Idaho Commons Copy Center  
875 Line Street  
P.O. Box 442520  
Moscow, ID 83844-2520

Phone: 208-885-7377 Copy Center  
208-885-5955 Digital Imaging  
FAX: 208-885-5555  
Web: [www.printonline.uidaho.edu](http://www.printonline.uidaho.edu)

Date: 10/25/10

Number of pages  
including cover sheet 2

TO:  
Boise Idaho Transportation  
Department

FAX: 208-332-4124  
Phone:

CC:

FROM:  
Alma Elias

Phone: 208-206-0213  
FAX: 208-885-5555

REMARKS: *please circle*

☒ Urgent

☐ For Your Review

☐ Reply ASAP

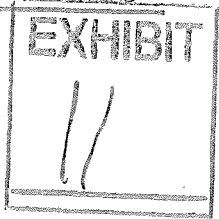
☐ Please Comment

Please let me know if I need to submit  
more information Thank You



IDAHO TRANSPORTATION DEPARTMENT  
Driver Services • P.O. Box 7129  
Boise ID 83707-1129

(208) 334-8735  
dmv.idaho.gov



50040-IA

(208) 334-8736

REQUESTED BY: ELIAS-CRUZ, ALMA AMERICA

PAGE 1

135 E 25TH STREET  
IDAHO FALLS ID 83404

D R I V E R L I C E N S E R E C O R D

11/02/2010

FOR:

ELIAS-CRUZ, ALMA AMERICA

LICENSE NO: [REDACTED]

ISSUE TYPE: DL

BIRTH DATE: [REDACTED]

CLASS: D

135 E 25TH STREET

ISSUED: 11/23/2008

OPR STATUS: VALID

IDAHO FALLS ID 83404

EXPIRES: 01/08/2011

CDL STATUS: NOTLIC

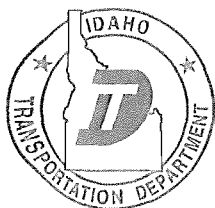
DRV TRAIN: NO

RSTR: NONE

| TYPE  | DATE     | DESC                           | CLS                           | DOC #               |
|-------|----------|--------------------------------|-------------------------------|---------------------|
| CITN  | 02/11/08 | VIOL RESTR                     | LOC:AMMON                     |                     |
| CONV  | 02/22/08 | GLTP PTS:0                     | CRT:IDAHO FALLS               | 736ISTAR8057        |
| ORD:  | INFR     |                                |                               |                     |
| FINE: | 33.50    | COSTS: 41.50                   | JAIL DAYS: 0                  | PROBATION: 0 BAC: . |
| CITN  | 02/11/08 | STOP SIGN                      | LOC:AMMON                     |                     |
| CONV  | 02/22/08 | GLTP PTS:3                     | CRT:IDAHO FALLS               | 736ISTAR8057        |
| ORD:  | INFR     |                                |                               |                     |
| FINE: | 33.50    | COSTS: 41.50                   | JAIL DAYS: 0                  | PROBATION: 0 BAC: . |
| L10A  | 02/28/08 | SUSCRTNOSRNORLP                |                               | 736CR0801740        |
| SUSP  | 03/17/08 | VIOL RESTR                     | TO 04/16/08 REIN 08/18/08 OPR | 736CR0801740        |
|       |          |                                | MFLM A01389935                |                     |
| L060  | 04/16/08 | FEE REQUIRED                   |                               | 736CR0801740        |
| COMM  | 08/15/08 | A.I. REIN-FEE: \$65.00         |                               | 001719751           |
| L050  | 08/18/08 | REINSTATEMENT                  |                               | 736CR0801740        |
| COMM  | 10/26/10 | STOP 90 DELETED BY: 50040 (DL) | 10/25/2010                    |                     |

CONTINUED

044  
017



IDAHO TRANSPORTATION DEPARTMENT  
Driver Services • P.O. Box 7129  
Boise ID 83707-1129

(208) 334-8735  
dmv.idaho.gov

50040-IA

(208) 334-8736

REQUESTED BY: ELIAS-CRUZ, ALMA AMERICA

PAGE 2

135 E 25TH STREET  
IDAHO FALLS ID 83404

D R I V E R L I C E N S E R E C O R D

11/02/2010

FOR:

ELIAS-CRUZ, ALMA AMERICA

LICENSE NO: [REDACTED]

ISSUE TYPE: DL

BIRTH DATE: [REDACTED]

CLASS: D

135 E 25TH STREET

ISSUED: 11/25/2008

OPR STATUS: VALID

IDAHO FALLS ID 83404

EXPIRES: 01/08/2011

CDL STATUS: NOTLIC

DRV TRAIN: NO

RSTR: NONE

| TYPE | DATE     | DESC                           | CLS | DOC #                              |
|------|----------|--------------------------------|-----|------------------------------------|
| COMM | 11/02/10 | STOP 78 DELETED BY: 50040 (DL) |     | 10/25/2010                         |
| L027 | 11/02/10 | ADMIN HEAR CASE                |     | 657001427571                       |
| PEND | 11/20/10 | ALS02+UNDR21 TO 02/18/11       |     | OPR 657001427571<br>MFLM A05765292 |

LICENSE IN FILE

12 MONTH POINTS: 0 24 MONTH POINTS: 0 36 MONTH POINTS: 3

POINTS ASSESSED ARE FOR DEPARTMENTAL USE ONLY, IN DETERMINING SUSPENSIONS  
FOR POINTS OR HABITUAL VIOLATIONS.

\*\*\* ACTION PENDING \*\*\*

\*\*\* ACTION PENDING \*\*\*

END OF EXISTING RECORD

CONTINUED

045

018



IDAHO TRANSPORTATION DEPARTMENT  
Driver Services • P.O. Box 7129  
Boise ID 83707-1129

(208) 334-8735  
dmv.idaho.gov

50040-IA

(208) 334-8736

REQUESTED BY: ELIAS-CRUZ, ALMA AMERICA

PAGE 3

135 E 25TH STREET  
IDAHO FALLS ID 83404

D R I V E R L I C E N S E R E C O R D

11/02/2010

FOR:

ELIAS-CRUZ, ALMA AMERICA

LICENSE NO: [REDACTED]

ISSUE TYPE: DL

BIRTH DATE: [REDACTED]

CLASS: D

135 E 25TH STREET

ISSUED: 11/25/2008

OPR STATUS: VALID

IDAHO FALLS ID 83404

EXPIRES: 01/08/2011

CDL STATUS: NOTLIC


DRV TRAIN: NO

RSTR: NONE

-----  
TYPE      DATE      DESC      CLS      DOC #  
-----

AS AN EMPLOYEE OF THE TRANSPORTATION DEPARTMENT, I AM AN  
OFFICIALLY APPOINTED CUSTODIAN OF DRIVING RECORDS. I  
HEREBY CERTIFY THE FOREGOING IS A TRUE AND CORRECT COPY  
OF THE ORIGINAL DRIVING RECORDS OF THIS DEPARTMENT.

NOVEMBER 02, 2010

  
CUSTODIAN OF DRIVER RECORDS

SECTION 49-203 IDAHO CODE PROHIBITS THE RELEASE OF PERSONAL INFORMATION  
CONTAINED IN DRIVER LICENSE RECORDS TO UNAUTHORIZED PARTIES, WITHOUT THE  
EXPRESS WRITTEN CONSENT OF THE INDIVIDUAL THE INFORMATION PERTAINS TO.

\*\*\*END OF DLR PRINT\*\*\*

046

019



EXHIBIT

12

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

|                          |   |                       |
|--------------------------|---|-----------------------|
| In the Matter of the     | ) | File No. 657001427571 |
| Driving Privileges of    | ) | D.L. No. GB199299E    |
|                          | ) |                       |
| ELIAS-CRUZ, ALMA AMERICA | ) |                       |
|                          | ) | ORDER                 |
|                          | ) |                       |

Idaho Code §18-8002A(7) allows for a subpoena to be issued by the hearing examiner ordering the appearance of the arresting officer, and IDAPA 39.02.72.300.01 provides for issuance of a subpoena for tangible evidence. The Hearing Examiner has issued Subpoena's for the evidence he deems relevant. All other requests are hereby denied.

DATED this 15<sup>th</sup> day of November 2010.



David J. Baumann  
Hearing Examiner

# SUBPOENA – CIVIL

IDAHO TRANSPORTATION DEPT.  
3311 W. STATE ST.  
BOISE, ID 83703

TELEPHONE # (208)332-2005  
PO BOX 7129  
BOISE, ID 83707



BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE OF IDAHO IN AND FOR THE IDAHO  
TRANSPORTATION DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE  
DRIVING PRIVILEGES OF  
ELIAS-CRUZ, ALMA AMERICA

SUBPOENA DUCES TECUM

THE STATE OF IDAHO TO: EVIDENCE CUSTODIAN -IDAHO STATE POLICE DISTRICT # 2

You are hereby commanded to produce evidence for an Administrative Hearing before the  
Idaho Transportation Department.

**You are commanded to provide the following items and documents:**

One copy of any audio and video of the stop/arrest/evidentiary testing of  
ELIAS-CRUZ, ALMA AMERICA on October 21, 2010, DR #L10000933.

**THE SUBPOENAED MATERIAL MUST BE RECEIVED BY November 29, 2010.**

Notice To Party To Whom This Subpoena is Directed: This subpoena is issued upon the  
condition that the requesting party, Attorney Katie Sherritt, Phone #208 885-6541 shall advance the reasonable  
cost of producing the books, papers, documents, or tangible things, to the agency providing the evidence.

**\*\*IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY  
CONTACT Mike AT (208) 334-8720.\*\***

Subpoenaed material must be sent via U.S. Mail to:

Idaho Transportation Department  
A.L.S. Hearing Unit  
Att: **Mike**  
PO Box 7129  
Boise ID 83707-1129

This subpoena has been issued in compliance with IDAPA rule 39.02.72.300.01

If you have any questions regarding this subpoena you can contact **Mike** at 334-**8720**

Witness my hand this 15<sup>th</sup> day of November 2010.

By David J. Baumann  
David J. Baumann  
Hearing Officer

***\*\*This subpoena is a single page document. Any additional documents requesting evidence  
attached to this subpoena have NOT been approved by the Hearing Examiner and should not be  
considered by the recipient of this subpoena.\*\****

# SUBPOENA - CIVIL

IDAHO TRANSPORTATION DEPT.  
3311 W. STATE ST.  
BOISE, ID 83703

TELEPHONE # (208)332-2005  
PO BOX 7129  
BOISE, ID 83707



BEFORE THE IDAHO TRANSPORTATION BOARD OF THE STATE OF IDAHO IN AND FOR THE IDAHO  
TRANSPORTATION DEPARTMENT

ADMINISTRATIVE HEARING

IN THE MATTER OF THE  
DRIVING PRIVILEGES OF  
ELIAS-CRUZ, ALMA AMERICA

SUBPOENA DUCES TECUM

-----  
THE STATE OF IDAHO TO: JEFF TALBOTT - NEZ PERCE COUNTY SHERIFF'S OFFICE

You are hereby commanded to produce evidence for an Administrative Hearing before the  
Idaho Transportation Department.

**You are commanded to provide the following items and documents:**

One copy of the INSTRUMENT OPERATION LOGSHEETS AND CALIBRATION RECORDS / PERFORMANCE  
VERIFICATION RECORDS for Lifeloc SN #90203805 for the period of September 21, 2010 thru October 22, 2010,  
showing the .08 and .20 calibration checks with the corresponding Simulator Solution Lot changes.

One copy of the INSTRUMENT CALIBRATION CERTIFICATE for Lifeloc SN #90203805.

**THE SUBPOENAED MATERIAL MUST BE RECEIVED BY November 29, 2010.**

Notice To Party To Whom This Subpoena is Directed: This subpoena is issued upon the  
condition that the requesting party, Attorney Katie Sherritt, Phone #208 885-5555 shall advance the reasonable cost of  
producing the books, papers, documents, or tangible things, to the agency providing the evidence.

**\*\*IF YOU ARE UNABLE TO COMPLY WITH THIS SUBPOENA, PLEASE IMMEDIATELY CONTACT  
Mike AT (208) 334-8720.\*\***

Subpoenaed material must be sent via U.S. Mail or Fax to:  
Idaho Transportation Department  
A.L.S. Hearing Unit  
Att: **Mike**  
PO Box 7129  
Boise ID 83707-1129  
FAX #208 332-2002

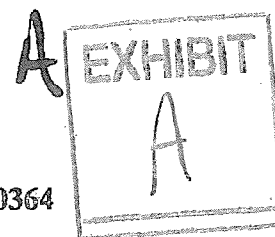
This subpoena has been issued in compliance with IDAPA rule 39.02.72.300.01

If you have any questions regarding this subpoena you can contact **Mike** at 334-**8720**

Witness my hand this 15<sup>th</sup> day of November 2010.

By David J. Baumann  
David J. Baumann  
Hearing Officer

EXHIBIT

**LORING BEALS, M.S.  
CLINICAL TOXICOLOGY****11997 W. Daniel Dr.  
Boise, ID 83713****2010****Phone: 208-376-0364****EDUCATION**

Northwest Nazarene University, Nampa, Idaho - Chemistry  
University of Utah, Salt Lake City, Utah-Graduate Studies-Biochemistry  
Northwestern University Feinberg School of Medicine, 2 yrs, Chicago, IL  
University of Maryland, Baltimore, Maryland -Toxicology

B.A.

M.S.

**GENERAL PROFESSIONAL BACKGROUND**

Instructor, Chemistry and Biological Sciences, Northwest Nazarene University, Nampa, ID 1956-1959  
Clinical Laboratory Manager, St. Alphonsus Regional Medical Center, Boise, ID 1960-1970  
Program Director, Schools of Medical Technology at both St. Luke's and St. Alphonsus  
Regional Medical Centers 1970-1977  
Clinical Chemist and Toxicologist, Veterans Affairs Medical Center, Boise, ID 1977-1998  
Faculty Appointment, Boise State University, School of Health Sciences, Boise, ID 1972-1993  
Consulting Toxicologist 1976-Present

**TOXICOLOGY EXPERIENCE**

One year in the Office of the Chief Medical Examiner, State of Maryland, under direction of the Chief Toxicologist, including:

Academic Training at the University of Maryland, including Toxicology, Pathology related to Toxicology, Pharmacology, Legal Medicine, etc.

Analytical testing for various drugs, carbon monoxide and other toxic gases, noxious chemicals, heavy metals, insecticides and breath and blood alcohol.

Assessment and correlation of above findings in tissues, body fluids or breath, and their physiological and pathological effects on the human body.

Over 30 years experience in toxicology, including:

Continual review of scientific literature and attendance at seminars/workshops on methodology and instrumentation.

Consultant in Toxicology, including numerous court appearances and ALS Hearings, as qualified expert witness regarding the toxicology of substance abuse, industrial chemical exposures, evaluation of DRE reports and blood or breath measurements of alcohol and their physiological significance.

Testified before the Idaho Legislature regarding alcohol levels in blood, breath and urine.

Testified in several cases argued successfully before the Idaho Supreme Court/Idaho Court of Appeals: State v. Hopkins (1987), State v. Presnall (1991), State v. Robinett (2005), State v. Reisenauer (2008), Coombs v. Curnow (2009).

**PROFESSIONAL MEMBERSHIPS**

American Association for Clinical Chemistry, Member  
AACC Therapeutic Drug Management and Clinical Toxicology Division, Member  
National Registry of Certified Clinical Chemists  
Idaho Academy of Science, Member

EXHIBIT

B



**Operator's Reference Manual  
Lifeloc FC20**



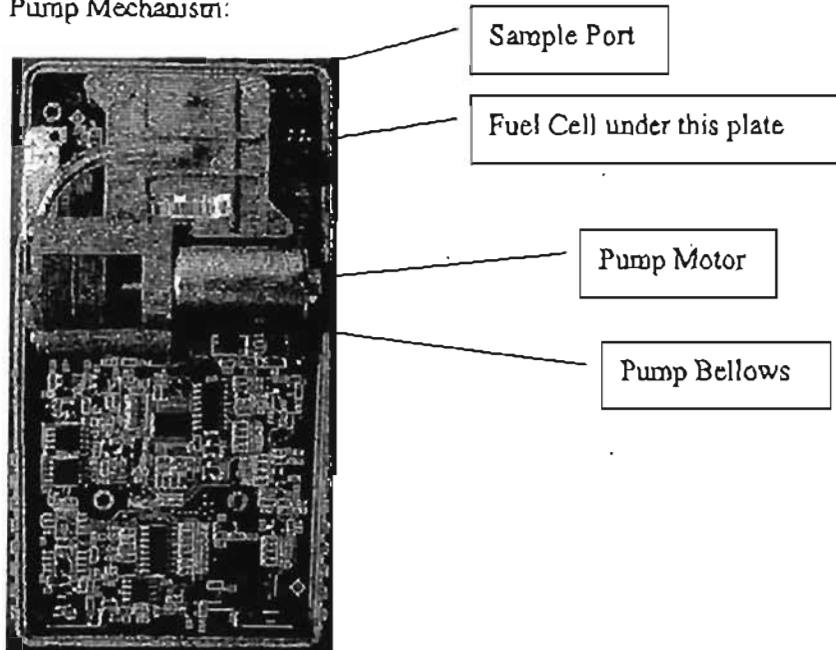
**Idaho State Police Forensics  
Version 1/July 2009**

## EXHIBIT

B

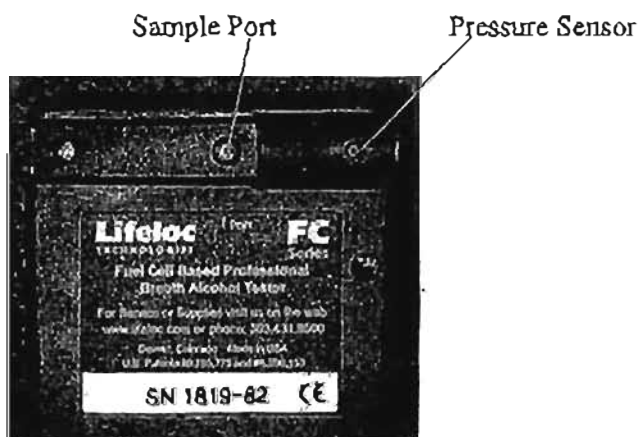
The manufacturer states the instrument is accurate to  $\pm 0.005$  at readings up to 0.100, then  $\pm 5\%$  from 0.100 to 0.400 BrAC.

## Pump Mechanism:



## Mouthpiece

The mouthpiece fits over two ports on the back of the instrument:



**FC Series Technical Specifications**

---

**Sensor**

High Quality Advanced Electrochemical Fuel Cell -Alcohol specific.

**Pump**

Automatically actuated electronic pump system. No cocking required.

**Units of Measure**

BAC Standard. Factory can set to any other common unit of measure.

**Response Time**

Immediate on negatives, under 10 seconds on positives.

**Recovery Time (ready for next test)**

Immediate on negatives, under 30 seconds on positives.

**Accuracy**

DOT Approved at +/- .005BAC to +/- 5% above a .100BAC.

**Operating Temperature Range**

32-105 degrees F (0-40C)

**Self Diagnostics**

Programmed self-check assures unit is operational upon power-up.

**Size**

2.6 x 5 x 1.25 inches (66 x 127 x 33 mm).

**Weight**

.56 lbs. (255 grams)

**Warranty**

One year limited warranty; parts and labor.

**Detection Range**

.000 to .600 BAC

**Power**

4AA Alkaline Batteries. Up to 8000 tests per battery set. Internal Lithium battery powers real time clock (FC20).

**Display**

1.7 x .85 inch viewing area graphic LCD. Extended temperature range. Automatic backlight for nighttime use.

**Mouthpieces**

Disposable.

**Memory**

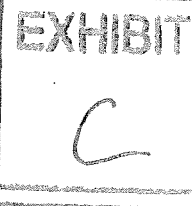
Permanent data storage survives on/off function or battery removal/failure.

Last test retention (FC10, FC10Plus)

Last 500 test retention and associated test data (FC20)

**Printer (included with kit)**

Accommodates 3-part paper. Rechargeable battery powered (charger included). Auto shut-off to preserve battery life. Automatic start integrated with the FC20.

**EXHIBIT****C**

Call today 800.722.4872

**Lifeloc**  
TECHNOLOGIES

\$ Place an Order

☎ Contact Us

① Request Pricing/More Info

EXHIBIT

D

Go to: [Law Enforcement](#) [Personal](#) [Corrections](#) [Workplace](#) [Schools](#) [International](#)[Home Page](#)[Products](#)[Supplies](#)[Training](#)[Tech Support](#)[About Us](#)[Contact Us](#)**FC20 Frequently Asked Technical Questions**[What Batteries should I use in my FC20?](#)[How often should I calibrate my FC20?](#)[How often should I perform a calibration check on my FC20?](#)[What is the recommended service interval of my FC20?](#)[What should I do before sending in my FC20 for service?](#)[What do I do if my FC20 constantly reboots?](#)

EXHIBIT

D

**What Batteries should I use in my FC20?**

High quality alkaline AA batteries such as Energizer® or Duracell® brand are recommended.

[<top of page>](#)**How often should I calibrate my FC20?**

Lifeloc recommends you calibrate your FC once a year or if it fails 2 consecutive calibration checks. In addition, check with your program administrator for any additional requirements or guidelines your organization may have.

[<top of page>](#)**How often should I perform a calibration check on my FC20?**

Calibration check requirements vary depending upon the program guidelines or internal procedures you are testing under. Please check with your program administrator.

[<top of page>](#)**What is the recommended service interval of my FC20?**

We recommend you send your FC20 in for a Factory Diagnostic Check every 2 years.

[<top of page>](#)**What should I do before sending in my FC20 for service?**

Prior to returning an instrument for service you should document all user settings and print or download all test results as this information is typically lost during the service process.

[<top of page>](#)**What do I do if my FC20 constantly reboots?**

This is typically caused by a battery failure. Replacement of all 4 batteries should fix the problem.

[<top of page>](#)***Alcohol Breath Testing Has Never Been This Easy***



---

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EXHIBIT

D

Name: Elias-Cruz, Alma America

D.L. #: [REDACTED]

File#: 657001427571

D.O.B.: [REDACTED]

PETITIONER'S EXHIBIT LIST

- A. Curriculum Vitae of Loring Beals
- B. Operator's Reference Manual Lifeloc FC20, Idaho State Police Forensics  
Version1/July 2009, P. 7
- C. FC Series Technical Specifications
- D. Lifeloc Technologies FC20 Frequently Asked Technical Questions

P.O. Box 442322  
Moscow, ID 83843  
(208) 885-6541  
(208) 885-4628

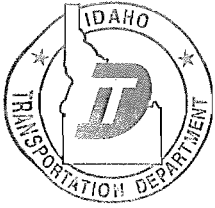
**Legal Aid Clinic  
University of Idaho  
College of Law**

# Fax

To: IDOT, Mr. Baumann From: Katie Sherritt  
Fax: 208-332-2002 Pages: \_\_\_\_\_  
Phone: \_\_\_\_\_ Date: 12/7/10  
Re: Elias Cruz 12/9/10 Hearing  
cc:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

• Comments:



IDAHO TRANSPORTATION DEPARTMENT  
Driver Services : P.O. Box 7129  
Boise ID 83707-1129

(208) 334-8735  
dmv.idaho.gov

PHONE: (208) 334-8736

ELIAS-CRUZ, ALMA AMERICA

NOVEMBER 02, 2010

135 E 25TH STREET

IDAHO FALLS

ID 83404

LIC/IDENT NO: [REDACTED]

FILE NUMBER: 657001427571

DATE OF BIRTH: [REDACTED]

NOTICE OF TELEPHONE HEARING

A HEARING WILL BE HELD PURSUANT TO YOUR REQUEST REGARDING THE ADMINISTRATIVE LICENSE SUSPENSION DATED OCTOBER 21, 2010 . THE HEARING WILL BE CONDUCTED BY TELEPHONE CONFERENCE CALL ON NOVEMBER 24, 2010 AT 9:00MT . THE TELEPHONE CALL WILL BE PLACED TO:  
( ) YOU, AT TELEPHONE #:  
(XXX) YOUR ATTORNEY: KATIE SHERRITT  
AT TELEPHONE #: 208 8856541

THE HEARING OFFICER PRESIDING AT THE HEARING WILL BE DAVE BAUMANN .

\*\*\*\*\*  
\* YOU HAVE 7 DAYS FROM THE DATE OF THIS NOTICE TO REQUEST A \*  
\* CONTINUANCE FOR GOOD CAUSE SHOWN. FAILURE TO REQUEST A \*  
\* CONTINUANCE WITHIN 7 DAYS MAY RESULT IN THE DENIAL OF REQUEST. \*  
\*\*\*\*\*

THE HEARING OFFICER WILL TAKE JUDICIAL NOTICE OF THE RECORDS REGULARLY MAINTAINED BY THE IDAHO TRANSPORTATION DEPARTMENT, THE IDAHO ADMINISTRATIVE PROCEDURE ACT RULES, ALL MANUALS ADOPTED UNDER IDAPA RULES 11.03.01 AND 39.02.72, IDAHO STATUTES, AND REPORTED IDAHO COURT DECISIONS.

THE HEARING WILL BE CONDUCTED ACCORDING TO THE PROVISIONS OF TITLE 67, CHAPTER 52, IDAHO CODE, AND THE RULES OF PRACTICE AND PROCEDURES OF THE IDAHO TRANSPORTATION DEPARTMENT. IF YOU NEED FURTHER ASSISTANCE, PLEASE CALL (208) 334-8720.

COPY

CC: KATIE SHERRITT

**IMPORTANT!**  
**INFORMATION ABOUT YOUR TELEPHONE HEARING**

- THE IDAHO TRANSPORTATION DEPT., ADMINISTRATIVE HEARING UNIT'S PHONE NUMBER IS (208) 332-2004. THE FAX NUMBER IS (208) 332-2002. THE MAILING ADDRESS IS PO BOX 7129, BOISE ID 83707-1129.
- The Hearing is YOUR chance of presenting witnesses and giving evidence before the Department. The Hearing also provides you or your attorney an opportunity to appeal. To stop the suspension YOU must demonstrate to the Hearing Officer by a preponderance of the evidence that:
  1. The peace officer did not have legal cause to stop you.
  2. The peace officer did not have legal cause to believe you were driving or in actual physical control of a motor vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provision of Section 18-8004, 18-8004C, or 18-8006 Idaho Code.
  3. The evidentiary test did not show an alcohol concentration or presence of drugs or other intoxicating substances in violation of Section 18-8004, 18-8004C or 18-8006 Idaho Code.
  4. The test for alcohol, drugs or other intoxicating substances was not conducted in accordance with the requirements of Section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered.
  5. You were not informed of the consequences of submitting to evidentiary testing.
- If you have not provided a telephone number at which you can be reached, or the number contained in the notice is wrong, or if you have a number that is more convenient for you, notify the Administrative Hearing Unit at (208) 332-2004. If you fail to provide a phone number for the given time and date contained in the Notice of Hearing, it will be concluded that you failed to attend the hearing and the matter may be decided in your absence. All hearings will be recorded.
- If you need assistance to participate in the hearing because of speech, hearing, language, or other special needs, immediately contact the Administrative Hearing Unit at (208) 332-2004. Necessary arrangements can be made to assist you.
- The Administrative Hearing must be held within twenty (20) days of the receipt of the Request for Hearing. However, upon showing good cause, the Hearing Officer may grant an extension of up to ten (10) additional days in which to hold the hearing. Any extensions shall not stay the suspension, or the duration of your temporary permit (if one was issued).
- Documents to be presented to the Hearing Officer at the hearing for his consideration are enclosed with this hearing notice. Any additional relevant documents received by the department after this initial notice will be mailed to you. You have a right to object to the inclusion of any documents into the hearing record. The Hearing Officer will make the final determination. You also have the right to submit other documents to the Hearing Officer for consideration. These documents must be provided prior to the hearing.
- An attorney or other adult representative may represent you at the hearing, but representation is not required. It is your responsibility to arrange for any type of representation.
- If you intend to call witnesses, it is your responsibility to have those witnesses available on the date and time of the hearing. The law does not require the arresting officer to be present at the hearing unless subpoenaed.
- If your witnesses are unwilling to participate voluntarily, or documents are not provided voluntarily, you may submit a request to the Hearing Officer that a subpoena be issued. Please mail or fax any requests for subpoenas to the information provided above. This should include the name of the witness and any documents or records in possession of the witness you wish to be produced. Upon issuance of the subpoena by the Hearing Officer, you will be responsible to serve the subpoena to the witness at least 72 hours prior to the hearing and provide a certificate of service to the Hearing Officer prior to the hearing date. You may be required to pay in advance, if demanded, witness fees and travel fees in accordance with Idaho Civil Procedures.
- Hearings are conducted in an informal but orderly manner. All testimony is taken under oath or affirmation. The Hearing Officer has the sole authority for the conduct of the hearing and will:
  1. Explain the issues and the meaning of terms that are not clearly understood.
  2. Explain the order in which you will testify, ask questions or offer rebuttal.
  3. Assist you in asking questions of other witnesses.
  4. Question you and witnesses to obtain relevant facts.
  5. Determine if testimony and documents being offered are relevant.
  6. Maintain control of the hearing so it will progress in an orderly manner that protects your rights.
  7. Issue a written decision following the hearing.
- Your rights in a hearing are:
  1. To have a representative.
  2. To testify.
  3. To present witnesses and documents.
  4. To question witnesses.
  5. To respond to the evidence presented.
  6. To make a brief statement of your position at the end of the hearing.
- You may petition for the disqualification of the assigned Hearing Officer and have a new one appointed if you have cause to believe that the assigned officer is bias, prejudiced or for some reason unable to give you a fair hearing on the matter. The petition must be sent to the Administrative Hearing Unit office. Your suspension shall not be stayed if such a petition results in the delay of the hearing.
- If you wish to cancel your hearing, your request must be mailed or faxed to the information provided above. Failure to do so will result in the hearing proceeding as scheduled and a default finding being made in your absence.
- If you need to request a continuance or reschedule the hearing. The request must be mailed or faxed to the information provided above prior to the hearing date. If the hearing cannot be held within 30 days from the date of service you will need to include a statement in your request that says you acknowledge that the hearing will not be held within the 30 day statutory time, and that you are aware that your suspension will remain in effect.

PHONE: (208) 334-8736

ELIAS-CRUZ, ALMA AMERICA

NOVEMBER 02, 2010

135 E 25TH STREET

LIC/IDENT NO: [REDACTED]

IDAHO FALLS

ID 83404

FILE NUMBER: 657001427571

DATE OF BIRTH: [REDACTED]

## SHOW CAUSE LETTER

THE DEPARTMENT RECEIVED YOUR HEARING REQUEST IN A TIMELY MANNER AND FORWARDED THE REQUIRED DOCUMENTS TO THE HEARING EXAMINER SECTION. THE HEARING EXAMINER HAS EXTENDED THE HEARING DATE, PURSUANT TO I.C. 18-8002A(7), DUE TO:

( ) DRIVER'S/ATTORNEY'S DATES OF AVAILABILITY

(XXX) A CONFLICT WITH THE HEARING OFFICER'S SCHEDULE

( ) ALLOW TIME FOR THE RECEIPT OF SUBPOENAED EVIDENCE REQUESTED BY THE PETITIONER

( ) OTHER:

\*\*\*\*\*  
 \*\*\*\*\* THE SCHEDULING OF THE HEARING SHALL NOT OPERATE \*\*\*\*\*  
 \*\*\*\*\* AS A STAY OF THE SUSPENSION AND ANY TEMPORARY \*\*\*\*\*  
 \*\*\*\*\* PERMIT SHALL EXPIRE THIRTY (30) DAYS AFTER \*\*\*\*\*  
 \*\*\*\*\* SERVICE OF THE NOTICE OF SUSPENSION. \*\*\*\*\*  
 \*\*\*\*\*

THE HEARING WILL BE CONDUCTED ACCORDING TO THE PROVISIONS OF TITLE 67, CHAPTER 52, IDAHO CODE, AND RULES OF PRACTICE AND PROCEDURES OF THE IDAHO TRANSPORTATION DEPARTMENT. THIS HEARING PROVIDES YOU OR YOUR ATTORNEY AN OPPORTUNITY TO APPEAL ON YOUR BEHALF. IF YOU NEED FURTHER ASSISTANCE, PLEASE CALL (208) 332-2005.

*David J. Bayman*

HEARING EXAMINER

CC: KATIE SHERRITT

1909  
CENTENNIAL  
2009

College of Law

University of Idaho  
College of Law

Legal Aid Clinic

PO Box 442322  
Moscow ID 83844-2322

Phone: 208-885-6541

Fax: 208-885-4628

[www.law.uidaho.edu/clinics](http://www.law.uidaho.edu/clinics)

November 10, 2010

State of Idaho  
Transportation Department  
Driver Services

VIA FAX: 208-332-7810

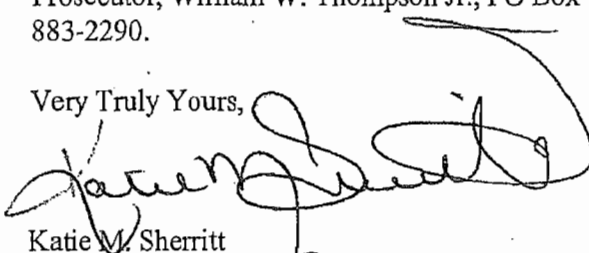
Re: Request for Administrative Hearing Extension for Alma A. Elias-Cruz and Request for Subpoenas.

Dear Sir or Madam:

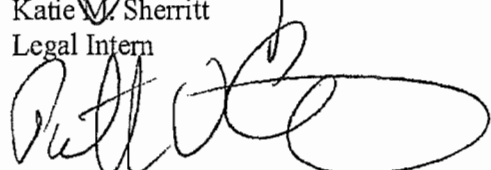
The University of Idaho College of Law, Legal Aid Clinic, is representing Alma A. Elias-Cruz, born 1/3/90, DL# GB199299E, Citation# 142571, in the matter regarding the administrative suspension of her driver's license. Due to time conflicts of both the driver and her attorney we respectfully request the administrative hearing be rescheduled for the week of November 29<sup>th</sup> through December 5<sup>th</sup>.

Additionally we request the attached information be subpoenaed from the Latah County Prosecutor, William W. Thompson Jr., PO Box 8068, Moscow, Idaho, 83843, Fax (209) 883-2290.

Very Truly Yours,



Katie M. Sherritt  
Legal Intern



Patrick D. Costello  
Supervising Attorney

C: Client

1. All relevant written or recorded statements made by the Defendant, or copies thereof, within your possession, custody or control and also the substance of any relevant oral statement made by the Defendant, whether before or after arrest, to a peace officer, prosecuting attorney or his agent;
2. Such copy or copies of the Defendant's prior criminal record, including any misdemeanor records, if any, as is now or may become available to the prosecuting attorney;
3. A written list of the names and addresses of all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial, together with any record of prior felony convictions of any such person which is within the knowledge of the prosecuting attorney. Also the statements made by the prosecuting witnesses or prospective prosecution witnesses to the prosecuting attorney or his agents, or to any official involved in the investigatory process of the case;
4. Reports or memoranda in your possession which were made by a police officer or investigator in connection with the investigation or prosecution of this case;
5. A copy of the log sheet for the breath testing device used to test the Defendant's blood alcohol, which log sheet should reflect all tests administered on the same date as the Defendant was tested or would have been tested.
6. A copy of the calibration certificate for the breath testing device used to administer a blood alcohol test to the Defendant.
7. A copy of any certificate or record indicating that the individual who administered the breath test to the Defendant is qualified to operate the machine used.



8. A copy of any record available indicating the extent of the training and experience in breath testing of the individual who administered with regard to the specific instrument used.
9. A copy of the manual of procedures governing the administration of breath tests at the facility where the Defendant was tested.
10. A copy of the Lifelock FC20 print-outs from the five tests administered prior to the test administered to the Defendant.
11. The date of any repairs or maintenance performed on the machine used to test the Defendant's blood alcohol during the three months prior to the testing of the Defendant, and the nature of any such repairs or maintenance.
12. The date of any repairs or maintenance performed on the machine used to test the Defendant's blood alcohol, from the date of testing of the Defendant up to the date of trial, and the nature of such repairs or maintenance.
14. The number of times within the last two years that the machine used to test the Defendant has been tested to determine its ability to detect acetone.
15. A copy of any repair or maintenance log kept with regard to the machine which was used to test the Defendant.
16. The results of any test conducted by any agent of the State of Idaho or any other governmental entity to determine the effect of radio frequency interference (RFI) on the machine used to determine the blood alcohol content of the Defendant.
17. The result of any test conducted by the manufacturer of the Lifelock FC20 to determine its susceptibility to interference by radio frequency interference (RFI).
18. A copy of any and all regulations adopted by the Idaho Department Law Enforcement with regard to the conduct of forensic alcohol examinations.

19. Instructions followed by the Idaho State Police and the County of Latah in calibrating the Lifelock FC20.

20. Any policy statements or memoranda concerning calibration check.

21. Any exculpatory or potentially exculpatory evidence, and any evidence tending to mitigate the appropriate punishment of the defendant.

The undersigned further requests permission to inspect and copy said information, evidence and materials within fourteen days of today's date, or earlier as needed to allow for preparation for trial.

DATED this \_\_\_\_\_ day of September, 2010.

---

Patrick D. Costello  
Supervising Attorney

---

Katie M. Sherritt  
Legal Intern

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice Request for Discovery was served upon the following on the \_\_\_\_ day of November, 2010:

William W. Thompson Jr.  
Latah County Prosecutor  
PO Box 8068  
Moscow, Idaho 83843  
Fax (208) 883-2290

☐ U.S. Mail  
☐ Fax  
☐ Hand Delivered

\_\_\_\_\_  
Katie M. Sherritt

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice Request for Discovery was served upon the following on the \_\_\_\_ day of November, 2010:

William W. Thompson Jr.  
Latah County Prosecutor  
PO Box 8068  
Moscow, Idaho 83843  
Fax (208) 883-2290

☐ U.S. Mail  
☐ Fax  
☐ Hand Delivered

\_\_\_\_\_  
Katie M. Sherritt



IDAHO TRANSPORTATION DEPARTMENT  
Driver Services • P.O. Box 7129  
Boise ID 83707-1129

(208) 334-8735  
dmv.idaho.gov

PHONE: (208) 334-8736

ELIAS-CRUZ, ALMA AMERICA

NOVEMBER 15, 2010

135 E 25TH STREET

IDAHO FALLS

ID 83404

LIC/IDENT NO: [REDACTED]

FILE NUMBER: 657001427571

DATE OF BIRTH: [REDACTED]

NOTICE OF RESCHEDULED TELEPHONE HEARING

THE DATE FOR THE HEARING REGARDING THE SUSPENSION OR DISQUALIFICATION  
OF YOUR DRIVING PRIVILEGES HAS BEEN RESCHEDULED.

PURSUANT TO 18-8002A(7) NO FURTHER CONTINUANCE WILL BE GRANTED.

\*\*\*\*\*  
\*THIS RESCHEDULE SHALL NOT OPERATE AS A STAY OF THE SUSPENSION, \*  
\*UNLESS OTHERWISE ORDERED BY THE HEARING OFFICER. ANY TEMPORARY \*  
\*PERMIT ISSUED SHALL EXPIRE THIRTY (30) DAYS AFTER SERVICE OF THE \*  
\*NOTICE OF SUSPENSION. \*  
\*\*\*\*\*

THE HEARING OFFICER HAS SCHEDULED YOUR HEARING TO BE CONDUCTED BY  
TELEPHONE CONFERENCE CALL ON DECEMBER 09, 2010 AT 9:00MT . THE  
TELEPHONE CALL WILL BE PLACED TO:

- ( ) YOU, AT TELEPHONE #:  
(XXX) YOUR ATTORNEY: KATIE SHERRITT  
AT TELEPHONE#: 208 885-6541  
( ) IF THIS TELEPHONE NUMBER IS INCORRECT, IMMEDIATELY CONTACT THE  
ADMINISTRATIVE HEARING STAFF AT (208) 332-2005.

THE HEARING OFFICER PRESIDING AT THE HEARING WILL BE DAVE BAUMANN

THE HEARING WILL BE CONDUCTED ACCORDING TO THE PROVISIONS OF TITLE  
67, CHAPTER 52, IDAHO CODE, AND THE RULES OF PRACTICE AND PROCEDURES  
OF THE IDAHO TRANSPORTATION DEPARTMENT. THIS HEARING PROVIDES YOU OR  
YOUR ATTORNEY AN OPPORTUNITY TO APPEAL ON YOUR BEHALF. IF YOU NEED  
FURTHER ASSISTANCE, PLEASE CALL (208) 332-2005.

COPY

## Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-15-2010  
2083322064

09:19:09 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

DRIVER SERVICES  
ADMINISTRATIVE HEARING SECTION  
PO BOX 7129  
BOISE ID 83707  
PHONE: 208 334-6720  
FAX: 208 332-2002

ADMINISTRATIVE  
HEARING SECTION

# Fax

|   |                         |
|---|-------------------------|
| To: Katie Sherritt  | From: MIKE              |
| Fax: 208 885-6541   | Date: November 15, 2010 |
| Phone:  | Pages: 2                |
| Re: RESCHEDULED A.L.S. HEARING  | CC:                     |
| FOR   |                         |
| ELIAS-CRUZ, ALMA AMERICA  |                         |
| <input type="checkbox"/> Urgent <input type="checkbox"/> For Review <input type="checkbox"/> Please Comment <input type="checkbox"/> Please Reply <input type="checkbox"/> Please Recycle |                         |

\*Comments:

Total Pages Scanned : 2

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| No. | Job | Remote Station | Start Time               | Duration | Pages | Line | Mode | Job Type | Results |
|-----|-----|----------------|--------------------------|----------|-------|------|------|----------|---------|
| 001 | 005 | 912088855555   | 09:17:59 a.m. 11-15-2010 | 00:00:19 | 2/2   | 1    | EC   | HS       | CP26400 |

### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

PL: Polled local  
PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

068

## Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-15-2010  
2083322064

09:20:12 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

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(reduced sample and details below)  
Document size : 8.5"x11"

**DRIVER SERVICES**  
**ADMINISTRATIVE HEARING SECTION**  
**PO BOX 7129**  
**BOISE ID 83707**  
**PHONE: 208 334-8720**  
**FAX: 208 332-2002**

**ADMINISTRATIVE  
HEARING SECTION**

# Fax

To: Katie Sherritt

From: MIKE

Fax: 208 885-5555

Date: November 15, 2010

Phone:

Pages: 2

Re: Order - Denial For

CC:

ELIAS-CRUZ, ALMA AMERICA

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

•Comments:

Total Pages Scanned : 2

Total Pages Confirmed : 2

| No. | Job | Remote Station | Start Time               | Duration | Pages | Line | Mode | Job Type | Results |
|-----|-----|----------------|--------------------------|----------|-------|------|------|----------|---------|
| 001 | 006 | 912088855555   | 09:18:56 a.m. 11-15-2010 | 00:00:15 | 2/2   | 1    | EC   | HS       | CP19200 |

### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

PL: Polled local  
PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fall

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group3  
EC: Error Correct

069

042

## Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-15-2010  
2083322064

09:20:40 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

DRIVER SERVICES  
ADMINISTRATIVE HEARING SECTION  
PO BOX 7129  
BOISE ID 83707  
PHONE: 208 334-8720  
FAX: 208 332-2002

ADMINISTRATIVE  
HEARING SECTION

# Fax

To: Katie Sherritt

From: MIKE

Fax: 208 885-5555

Date: November 15, 2010

Phone:

Pages: 2

Re: SUBPOENA DUCES TECUM

CC:

REQUEST FOR AUDIO AND

VIDEO FOR ELIAS-CRUZ, ALMA

AMERICA A.L.S. HEARING

Comments:

### \*\*\*\*\*IMPORTANT INFORMATION\*\*\*\*\*

Attached, please find the Subpoena Duces Tecum that has been issued, per your request, for the A.L.S. hearing on the above person. **YOUR OFFICE** will be responsible for serving the Subpoena. The Subpoena **MUST BE SERVED WITHIN 72 HOURS OF ISSUANCE**. Please fax a copy of the Certificate of Service prior to the scheduled time of the hearing to (208) 332-2002.

Thank You

Total Pages Scanned : 2

Total Pages Confirmed : 2

| No. | Job | Remote Station | Start Time               | Duration | Pages | Line | Mode | Job Type | Results |
|-----|-----|----------------|--------------------------|----------|-------|------|------|----------|---------|
| 001 | 008 | 912088855555   | 09:19:07 a.m. 11-15-2010 | 00:00:28 | 2/2   | 1    | EC   | HS       | CP19200 |

#### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

PL: Polled local  
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MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

070



## Transmission Report

Date/Time  
Local ID 1  
Local ID 2

11-15-2010  
2083322064

09:21:06 a.m.

Transmit Header Text  
Local Name 1  
Local Name 2

This document : Confirmed  
(reduced sample and details below)  
Document size : 8.5"x11"

DRIVER SERVICES  
ADMINISTRATIVE HEARING SECTION  
PO BOX 7129  
BOISE ID 83707  
PHONE: 208 334-8720  
FAX: 208 332-2002

ADMINISTRATIVE  
HEARING SECTION

# Fax

To: Katie Sherritt

From: MIKE

Fax: 208 685-5555

Date: November 15, 2010

Phone:

Pages: 2

Re: SUBPOENA DUCES TECUM

CC:

REQUEST FOR CALIBRATION

RECORDS/INSTRUMENT

OPERATIONS LOGSHEETS FOR

ELIAS-CRUZ, ALMA AMERICA

A.L.S. HEARING

\*Comments:

### \*\*\*\*\*IMPORTANT INFORMATION\*\*\*\*\*

Attached, please find the Subpoena Duces Tecum that has been issued, per your request, for the A.L.S. hearing on the above person. **YOUR OFFICE** will be responsible for serving the Subpoena. The Subpoena **MUST BE SERVED WITHIN 72 HOURS OF ISSUANCE.** Please fax a copy of the Certificate of Service prior to the scheduled time of the hearing to (208) 332-2002.

Thank You

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| 001 | 009 | 912088855555   | 09:19:17 a.m. 11-15-2010 | 00:00:27 | 2/2   | 1    | EC   | HS       | CP19200 |

#### Abbreviations:

HS: Host send  
HR: Host receive  
WS: Waiting send

PL: Polled local  
PR: Polled remote  
MS: Mailbox save

MP: Mailbox print  
CP: Completed  
FA: Fail

TU: Terminated by user  
TS: Terminated by system  
RP: Report

G3: Group 3  
EC: Error Correct

071

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

IN THE MATTER OF THE  
DRIVING PRIVILEGES OF

IDAHO D.L. NO. GB199299E  
FILE NO. 657001427571

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
AND ORDER**

**ALMA AMERICA ELIAS-CRUZ**

This matter came initially set for hearing November 24, 2010, by telephone conference, in reference to Alma Elias-Cruz being served with an Administrative License Suspension (ALS). At the request of Elias-Cruz and at the direction of the Hearing Officer, the matter was continued, with the hearing commencing December 9, 2010. Legal Interns Katie M. Sherritt, Gregory Hurn and Patrick Costello, Attorney at Law, represented Elias-Cruz. Alma Elias-Cruz waived her right to appear. Additionally, witness Loring Beals appeared.

The suspension set out in the Notice of Suspension for Failure of Evidentiary Testing served upon Alma Elias-Cruz pursuant to I.C. §18-8002A is **SUSTAINED.**

**DOCUMENTATION/INFORMATION**

**The Hearing Examiner received the following exhibits into evidence as part of the hearing record:**

1. Notice of Suspension Advisory form
2. Evidentiary test results
3. Calibration Check

4. Sworn Statement
5. Influence Report
6. Idaho Uniform Citation #1427571 and Idaho Driver's License (photocopy)
7. Idaho Driver's License
8. Envelope
9. Certification of Receipt of Law Enforcement Documents
10. Request for Administrative Hearing
11. Driver License Record
12. Order
13. Subpoena Duces Tecum
14. Subpoena Duces Tecum

**Alma Elias-Cruz supplemented the record with the following evidence/exhibits:**

- A. Curriculum Vitae of Loring Beals
- B. Operator's Reference Manual
- C. FC Series Technical Specifications
- D. FC20 Frequently Asked Technical Questions

**The Hearing Examiner took Judicial Notice of the following items:**

1. Records regularly maintained by the Idaho Department of Transportation (Department)
2. Idaho Administrative Procedure Act Rules
3. All manuals adopted under IDAPA Rule 11.03.01 and 39.02.72
4. Idaho State Police Standards and Procedures for Breath-Testing Instruments
5. All City and County Ordinances and Procedures
6. Idaho Statutes
7. Reported Court Decisions

## ADMINISTRATIVE HEARING PROCEEDINGS

Testimony and Argument summarized from audiotape record of hearing

Loring Beals was placed under oath and testified to the following:

1. He has testified previously in Administrative License Suspension hearings and in court proceedings as an expert witness.
2. Breath alcohol concentration (BRAC) testing falls into clinical chemistry.
3. For every measurement, there is a range.
4. A margin of error exists and ran with every test.
5. The lower the BRAC, the percentage of error increases at the lower end.
6. The manufacturer recognizes a margin of error of plus or minus 5%, and .005.
7. The driver had an alcohol concentration of .015 or .025 based on the range of the instrument or .016 or .026.
8. The allowable range would be below the .02 threshold.
9. The error of .10 is half of the blow.
10. At these levels, the driver would not exhibit intoxication.
11. There is no effect on the person's ability to operate a motor vehicle.

Legal Intern Katie Sherritt raised and/or argued the following points:

1. The driver's BRAC was just as likely below the legal limit as above it.
2. The McDaniel's decision was wrongly decided.
3. This case is distinguishable from the McDaniel's decision in that it deals with a much lower BRAC which has a higher rate of error.
4. A chemist cannot give an exact quantity of alcohol content, rather it was within a range and the range gets longer the lower the alcohol content is.
5. The actual BRAC could be as low as .015.
6. The instrument has a .005 margin of error.
7. The machine needs calibrated once per year, and Exhibit 2 shows the machine had not been calibrated in over a year.
8. The McDaniel's decision is wrong because the court is trying to make a distinction where there really is none.

9. The court is saying the test results are separate from the actual results, but they are not.
10. The test results should be based on an actual alcohol content, rather than a print-out from a machine that is subject to error.
11. The BRAC is at a lower level and the margin of error greater.
12. Notice is requested to be taken of the McDaniel's decision in that it is distinguishable between a .08 and a .02 legal limit.
13. When the BRAC is at the .02 level, that is the only evidence.

### **ISSUES RAISED BY ALMA ELIAS-CRUZ**

1. Whether the evidentiary test results are reliable and admissible evidence?

### **IDAHO CODE §18-8002A(7) ISSUES**

1. Did the peace officer possess legal cause to stop the driver's vehicle?
2. Did the peace officer possess legal cause to believe the driver was driving or in actual physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances in violation of the provisions of Idaho Code (I. C.) §§18-8004, 18-8004C, or 18-8006?
3. Did the test results show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of I. C. §§18-8004, 18-8004C, 18-8006?
4. Was the evidentiary test performed in compliance with Idaho Code, IDAPA Rule, and ISP Standard Operating Procedure?
5. Did the evidentiary testing instrument function properly when the test was administered?
6. Was the driver advised of the consequences of submitting to evidentiary testing as required by I. C. §18-8002A(2)?

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I having heard the testimony, having reviewed the issue raised by Alma Elias-Cruz; having reviewed the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact and Conclusions of Law:

**PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER CARRIES THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ISSUES.**

**1.**

### **DID OFFICER SCHWECKE POSSESS LEGAL CAUSE FOR THE STOP OF ALMA ELIAS-CRUZ'S VEHICLE?**

1. On October 21, 2010, at approximately 2109 hours, Trooper (Tpr.) Schwecke observed Elias-Cruz's vehicle traveling southbound on US 95, at approximately milepost 361.5, in Latah County, Idaho.
2. Tpr. Schwecke observed Elias-Cruz approaching from the rear that appeared to be traveling over the posted 45 mile per hour speed limit.
3. Tpr. Schwecke visually estimated Elias-Cruz's speed at 50 miles per hour.
4. Radar confirmed Elias-Cruz's speed at 52 miles per hour.
5. I. C. §49-654(2) provides that no person shall drive a vehicle at a speed in excess of the maximum limits.
6. Elias-Cruz violated I. C. §49-654.
7. Tpr. Schwecke possessed legal cause for the stop of Elias-Cruz's vehicle.

**2.**

**DID OFFICER SCHWECKE POSSESS LEGAL CAUSE FOR ELIAS-CRUZ'S ARREST, LEGAL CAUSE TO BELIEVE ELIAS-CRUZ WAS DRIVING IN VIOLATION OF IDAHO CODE §18-8004, AND LEGAL CAUSE TO REQUEST ELIAS-CRUZ SUBMIT TO EVIDENTIARY TESTING?**

1. Elias-Cruz's driving and actual physical control of the motor vehicle was established by the observation of Tpr. Schwecke.
2. Elias-Cruz exhibited the following behaviors:
  - a. Smelled of an alcoholic beverage
  - b. Admitted drinking alcoholic beverages
3. Tpr. Schwecke possessed legal cause for Elias-Cruz's arrest, legal cause to believe Elias-Cruz was driving in violation of I. C. §18-8004, and legal cause to request Elias-Cruz submit to evidentiary testing.

**3.**

**DID ALMA ELIAS-CRUZ'S EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §18-8004, AND ARE THE TEST RESULTS ADMISSIBLE EVIDENCE?**

1. Elias-Cruz submitted to breath-testing October 21, 2010.
2. Elias-Cruz provided breath samples of .021/.020.
3. Idaho's legal limit for breath alcohol concentration (BRAC) for person's under 21 years of age is .02.
4. At the time of Elias-Cruz's stop and arrest, she was 20 years of age (Date of Birth- [REDACTED]).
5. The acceptable performance verification check conducted October 22, 2010, at 1930 hours, with performance verification results of .081, approved the

breath testing instrument for evidentiary use in accordance with the ISP Standard Operating Procedure.

6. The Bureau of Forensic Services of the ISP, pursuant to IDAPA Rule 11.03.01, provides that a breath-testing instrument shall be checked on a schedule established by the Department for accuracy with a simulator solution provided by the Department.
7. So long as the performance verification results are within the allotted and acceptable range, the instrument is properly calibrated and all tests performed on the instrument are deemed reliable.
8. The Idaho State Police Standard Operating Procedure and the Operator Training Manuals do not require nor indicate that the actual tests performed on a properly calibrated instrument be adjusted due to the margin of error of the simulator solution or testing instrument.
9. Additionally, I. C. §18-8002A does not provide nor allow for the margin of error to be taken into consideration with respect to the breath test results.
10. In considering this argument, such reasoning would have the effect of making the legal limit a moving target depending on which evidentiary testing instrument was used in a particular case.
11. If the Petitioner's reasoning was adopted in this case this hearing officer would, in effect, rewrite the statute and establish a legal limit of 0.025, which this hearing officer is not inclined to do.
12. In *State of Idaho v. Bryan Lee McDaniel*, Court of Appeals of the State of Idaho, 2010 Opinion No. 58, the court held that the plain meaning of the statutory language is that a driver's license will be suspended upon *test results* indicating a BAC of 0.08 or more, not 0.08 plus or minus any margin of error. . . Nowhere does I. C. §18-8002A contain language that requires the hearing officer to take into account any inherent error within the breath test machine before a license can be suspended, it simply requires that the test results indicate a BAC in excess of the legal limit, which is 0.08. Therefore, any inherent margin of error in the test results is disregarded.
13. Based on the foregoing court ruling and decision, the same can be held true for an underage DUI where the legal limit is set at 0.02.



14. Other than argument and speculation, the record is absent of any affirmative evidence showing that Elias-Cruz's BRAC results were less than the legal limit of 0.02.
15. Contrary to argument, the evidentiary testing instrument was properly calibrated within 24 hours of Elias-Cruz's breath test as mandated by the Standard Operating Procedure.
16. Elias-Cruz's argument fails.
17. Elias-Cruz's BRAC results were in violation of I. C. §18-8004, and the evidentiary test results are admissible evidence.

**4.**

**WAS THE EVIDENTIARY TEST CONDUCTED IN ACCORDANCE  
WITH I.C. §18-8004(4), IDAPA RULES, AND THE IDAHO STATE  
POLICE (ISP) STANDARD OPERATING PROCEDURE?**

1. Alma Elias-Cruz submitted to evidential breath-testing October 21, 2010, at 2139 hours.
2. Tpr. Schwecke's sworn statement sets forth that the breath test was performed in compliance with statute and the standards and methods adopted by the Department of Law Enforcement (DLE)/ISP.
3. Tpr. Schwecke was duly qualified to administer evidentiary testing, and he was properly certified to operate the breath-testing instrument as evidenced by his operator certification expiration date of April 30, 2011.
4. Elias-Cruz's evidentiary test was conducted in accordance with the requirements of I. C. §18-8004, the IDAPA Rules, and ISP's Standard Operating Procedure.

5.

**WAS THE EVIDENTIARY TESTING INSTRUMENT PROPERLY  
CALIBRATED AND APPROVED FOR USE PURSUANT TO ISP  
STANDARD OPERATING PROCEDURE, AND WAS THE  
INSTRUMENT FUNCTIONING ACCURATELY AT THE TIME OF  
BREATH-TESTING?**

1. Alma Elias-Cruz submitted to an evidential breath test October 21, 2010, at 2139 hours.
4. The acceptable performance verification check conducted October 22, 2010, at 1930 hours, with performance verification results of .081, approved the breath testing instrument for evidentiary use in accordance with the ISP Standard Operating Procedure.
5. The breath testing instrument was properly calibrated and approved for evidentiary testing of alcohol concentration, and the testing instrument was functioning accurately at the time of breath-testing.

6.

**WAS ALMA ELIAS-CRUZ ADVISED OF THE CONSEQUENCES OF  
SUBMITTING TO EVIDENTIARY TESTING AND THE POSSIBLE  
SUSPENSION OF HER IDAHO DRIVING PRIVILEGES?**

1. Prior to being offered the breath test, Elias-Cruz was substantially informed of the consequences of refusal and failure of the test as required by Idaho Code §§18-8002 and 18-8002A.
2. Elias-Cruz was properly advised of the consequences of submitting to evidentiary testing, and the possible suspension of her Idaho driving privileges.

7.

**DID OFFICER SCHWECKE FOLLOW ALL PROCEDURES AND  
REQUIREMENTS SET FORTH PURSUANT TO IDAHO LAW AND  
THE ISP STANDARD OPERATING PROCEDURE?**

1. Tpr. Schwecke followed all procedures and satisfied all requirements pursuant to I. C. §§18-8002A and 18-8004, and the ISP's Standard Operating Procedure was properly adhered with.

**CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND  
REJECTED IN FAVOR OF THE FOREGOING CITED FACTS.  
BASED UPON THE FOREGOING FINDINGS OF FACT AND  
CONCLUSIONS OF LAW, I CONCLUDE THAT ALL OF THE  
STATUTORY REQUIREMENTS FOR SUSPENSION OF ALMA  
ELIAS-CRUZ'S DRIVING PRIVILEGES WERE COMPLIED WITH IN  
THIS CASE.**

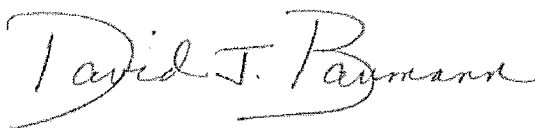
**THE FOLLOWING ORDER IS RENDERED:**

**ORDER**

The suspension set out in the Notice of Suspension, served pursuant to I.C. §18-8002A, is **SUSTAINED** and shall run for a period of 90 days commencing November 20, 2010, and shall remain in effect through February 18, 2011.

EXHIBIT 11, ALMA ELIAS-CRUZ'S DRIVER'S LICENSE RECORD, SETS FORTH THAT THIS IS ELIAS-CRUZ'S FIRST FAILURE OF EVIDENTIARY TESTING WITHIN THE IMMEDIATELY PRECEEDING FIVE YEARS.

DATED this 29th day of December, 2010

A handwritten signature in cursive script, reading "David J. Baumann". The signature is written in dark ink and is positioned above a horizontal line.

---

DAVID J. BAUMANN  
CERTIFIED HEARING OFFICIAL

## FINAL ORDER

(Hearings pursuant to Idaho Code § 18-8002A)

This is a final order of the Department.

A motion for reconsideration may be filed with the Idaho Transportation Department's Administrative License Suspension Hearing Unit, PO Box 7129, Boise, ID 83707-1129 within fourteen (14) days of the issue date of this order. If the hearing officer fails to act upon this motion within twenty-one days of its receipt, the motion will be deemed denied.

Or pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

1. A hearing was held;
2. The final agency actions were taken; or
3. The party seeking review of the order resides.

An appeal must be filed within twenty-eight (28) days of the issue date of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

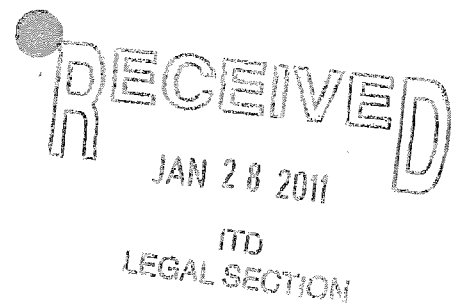
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 3<sup>rd</sup> day of January 2011, I mailed a true and accurate copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER by depositing the same in the US Mail, postage prepaid, addressed to:

Katie Sherritt  
Attorney At Law  
PO Box 442322  
Moscow, ID 83844-2322



---



Katie M. Sherritt- Legal Intern  
Patrick D. Costello- Supervising Attorney- ISBN 2491  
Legal Aid Clinic  
University of Idaho College of Law  
P.O. Box 442322  
Moscow, IID 83844-2322  
(208) 885-6541  
(208) 885-4628 (fax)  
Attorneys for Defendant

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE  
OF IDAHO, IN AND FOR THE COUNTY OF LATAH**

|                      |   |   |
|----------------------|---|---|
| Alma Elias-Cruz,     | ) | Case No. <u>CV-2011-0000090 (BA 2/9/11)</u> |
|                      | ) |   |
| Petitioner,          | ) | PETITION FOR JUDICIAL REVIEW                |
|                      | ) | AND REQUEST FOR STAY                        |
| v.                   | ) |   |
|                      | ) | Fee Category: G3                            |
| IDAHO TRANSPORTATION | ) | Fee: Exempt Pursuant to IRCP 10(c)          |
| DEPARTMENT,          | ) |   |
|                      | ) |   |
| Respondent.          | ) |   |
| _____                | ) |   |

Pursuant to Idaho Code §§ 18-8002A and 67-5270, the petitioner, Alma Elias-Cruz, by and through her attorneys, the University of Idaho Legal Aid Clinic, Patrick D. Costello, Supervising Attorney, Katie M. Sherritt, Legal Intern, and Gregory Hurn, Legal Intern, and respectfully petitions this Court for judicial review of the Final Order entered by the Idaho Transportation Department, by and through Hearing Officer, David J. Baumann, in the Matter of

the Driving Privileges of Alma Elias Cruz, drivers' license number GB199299E, file number 657001427571, attached as exhibit "A" hereto and by this reference incorporated herein. The petitioner alleges as follows:

1. That the petitioner is aggrieved by the final findings of fact as entered by the Idaho Transportation Department's Hearing Officer, David J. Baumann, pronounced on the 30<sup>th</sup> day of December 2010, file number 657001427571.

2. The petitioner raises the following assignments of error

(a). That Ms. Elias-Cruz's breath test result is not in violation of Idaho Code § 18-8004.

(b) That the Lifeloc FC20 had not been calibrated according to the recommendations of the manufacturer and as such the results should not have been used in determining whether to suspend Ms. Elias-Cruz's license.

(c) That a margin of error should be taken into account when using test results from the Lifelock FC20.

(d) That Hearing Officer Baumann erroneously applied *State v. McDaniels*, xxx Idaho xxx, xxx P.3d xxx (2010) decision to this case when this case is distinguishable in both offense and level of intoxication.

(e). Evidentiary testing did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of §§ 18-8004(4), 18-8004C, or 18-8006 of the Idaho Code.

3. The hearing officer's findings and conclusions were not supported by substantial, competent evidence.



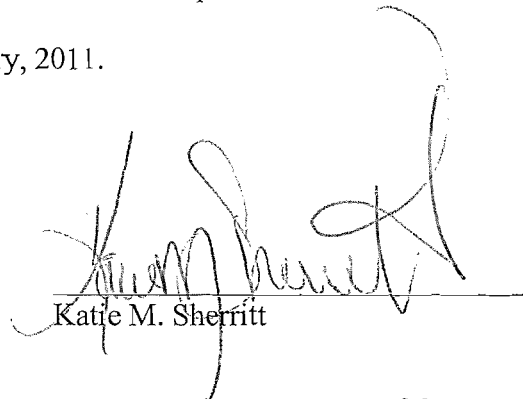
4. The hearing officer's findings and conclusions were clearly erroneous and unsupported by the evidentiary testing.
5. An immediate stay of the driver's license suspension is necessary in order for the petitioner to have a valid claim. The petitioner's license was suspended for 90 days beginning on November 20, 2010. If a stay is not granted, the suspension may expire and the petitioner would be denied the opportunity to appeal in the final order.

Furthermore, because the petitioner is indigent and qualifies for the waiver of court filing fees pursuant to I.R.C.P. 10 (a) (6) and for Legal Aid Clinic services, the petitioner asks that the Court prepare the transcript from the Administrative License Suspension hearing at the expense of the Latah County District Court Fund and waive the requirement that petitioner pay the transcript fee because of her indigent status.

WHEREFORE, in consideration of the above, the petitioner respectfully requests that the petitioner be afforded relief as follows:

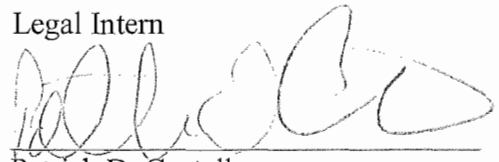
1. That the Final Order be reviewed and reversed.
2. That this Court, in accordance with Idaho Code §18-8004(c), enter such order as the Idaho Transportation Department's Hearing Officer should have entered, vacating the petitioner's license suspension.
3. That this Court grant an immediate stay as to the license suspension.

Respectfully submitted this 25 day of January, 2011.



Katie M. Sherritt

Legal Intern



Patrick D. Costello  
Supervising Attorney

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on the 35 day of January 2011, a true and correct copy of the foregoing PETITION FOR JUDICIAL REVIEW AND REQUEST TO STAY was mailed or faxed to the following:

The Idaho Transportation Department  
Legal Section  
P.O. Box 7129  
Boise, Idaho 83707-1129

☒ US Mail  
☐ First Class Postage, pre-paid  
☐ Fax  
☐ Hand Delivery

Edwin L. Litteneker  
322 Main St.  
PO Box 321  
Lewiston, ID 83501-0321  
(208) 798-8387 (fax)

☐ US Mail  
☐ First Class Postage, pre-paid  
☒ Fax  
☐ Hand Delivery

  
Katie M. Sherritt  
Legal Intern

University of Idaho

Legal Aid Clinic

PO Box 442322

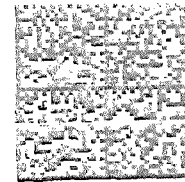
Moscow ID 83844-2322



DMV  
ALS

To

The Idaho Transportation Department  
~~Legal Section~~  
P.O. Box 7129  
Boise, Idaho 83707-1129



Master

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\$01.050

01/26/2011

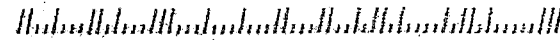
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US POSTAGE

RECEIVED

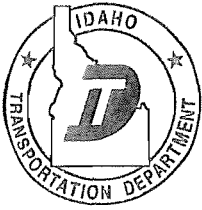
JAN 28 2011

ITD  
LEGAL SECTION

8370781129 E071



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060



IDAHO TRANSPORTATION DEPARTMENT  
Driver Services • P.O. Box 7129  
Boise ID 83707-1129

(208) 334-8735  
dmv.idaho.gov

Date: February 1, 2011

Wally Hedrick  
Hedrick Court Reporting  
PO Box 578  
Boise, Idaho 83701

Re: ELIAS-CRUZ, ALMA AMERICA, A.L.S. File #657001427571  
Administrative License Suspension, Date of Hearing: December 9, 2010

Dear Mr. Hedrick

Please find enclosed the recording of the administrative hearing as referenced above. The hearing is approximately 29 minutes long. Please prepare an estimate of the transcription cost, and submit the estimate to the State's assigned attorney. Please send a copy of the estimate to my attention as well. The attorney representing the State in this case is:

Edwin Litteneker  
Attorney At Law  
Po Box 321  
Lewiston, Id 83501  
208 746-0344

If the transcript cannot be completed within 14 days of the receipt of the estimated cost, please notify the State's attorney. Upon completion of the transcript send the original and two copies to the State's attorney for filing with the court along with the administrative record. The final billing, of course, should go to the State's attorney. If you have any questions, please contact me at (208) 334-4465.

Sincerely,

Hal Putnam, *By*  
Driver Records Program Supervisor  
Driver Services  
enc: cd recording for ELIAS-CRUZ, ALMA AMERICA

COPY

091  
064

COPY



February 10, 2011

EDWIN LITTENEKER, ESQ.  
Attorney at Law  
P.O. Box 321  
Lewiston, ID 83501

RE: Alma America Elias-Cruz, A.L.S. File #657001427571  
A.L.S., Date of Hearing: December 9, 2010

Dear Mr. Litteneker:

Per the request of the Supervisor of Driver Records,  
Hal Putnam, we are hereby providing you with an  
estimate of the transcription costs in the above  
entitled matter.

Cost of preparing an original plus two copies from the  
cassette tape provided by the state, with an estimated  
length of 29 minutes is:

\$220.00

Delivery time is 10 working days from the date that we  
receive written authority to proceed from Petitioner's  
legal counsel. Petitioner's payment must be received  
prior to delivery of the transcript.

Thank you.

Sincerely,

HEDRICK COURT REPORTING

Jerrie S. Hedrick  
ICSR #61

cc: Hal Putnam

*Serving the legal community since 1978*

POST OFFICE BOX 578  
BOISE, IDAHO 83701  
208-336-9208

065 092

Katie M. Sherritt- Legal Intern  
Patrick D. Costello- Supervising Attorney  
Idaho State Bar #2491  
University of Idaho Legal Aid Clinic  
P.O. Box 442322  
Moscow, ID 83844  
(208) 885-6541  
fax: (208) 885-4628

Attorneys for Petitioner

CASE NO.

CV 2011-90

February 16, 2011 1:02 PM  
CLERK OF DISTRICT COURT  
LATAH COUNTY

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

Alma Elias-Cruz

Petitioner,

vs.

IDAHO DEPARTMENT OF,  
TRANSPORTATION

Respondent.

Case No. CV 2011-90

Order for Stay of License Suspension

This Court, having considered Petitioner's Motion to Stay the License Suspension and Respondent having no objection thereto, it is HEREBY ORDERED that:

1. That the Motion to Stay the License Suspension is GRANTED. Petitioner's

driving privileges shall not be suspended by Respondent pending further order of  
the court.,

Dated this 16<sup>th</sup> day of February, 2011.

  
Honorable John Stegner

#### CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a true and correct copy of this document to be served on the following individual (s) in the manner indicated below:

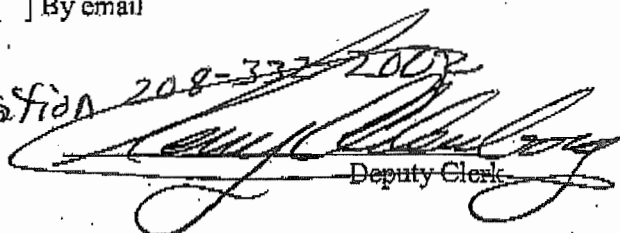
Edwin L. Litteneker  
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Katie M. Sherritt Legal Intern  
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Moscow, ID 83844-2322  
(208) 885-6541  
(208) 885-4628 (fax)

☐ By hand delivery  
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☒ By Facsimile  
☐ By email

*Idaho Dept of Transportation*

*208-333-2002*  
  
Deputy Clerk



CASE NO. CV 2011-000090

2011 FEB 28 AM 10:42

Beth Schiller  
Administrative Assistant, Driver Services  
Idaho Transportation Department  
3311 West State Street  
P.O. Box 7129  
Boise, Idaho 83701-1129  
Telephone: (208) 334-8755  
Facsimile: (208) 332-2002

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY AS DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

|                              |   |                          |
|------------------------------|---|--------------------------|
| Alma Elias-Cruz,             | ) |                          |
|                              | ) |                          |
| Petitioner,                  | ) | Case No. CV-2011-0000090 |
|                              | ) |                          |
| v.                           | ) | NOTICE OF FILING         |
|                              | ) | AGENCY RECORD            |
| State of Idaho,              | ) |                          |
| Department of Transportation | ) |                          |
|                              | ) |                          |
| Respondent.                  | ) |                          |
| _____                        | ) |                          |

Pursuant to I.R.C.P. 84(k), the attached agency record in the above entitled matter is now deemed settled and is hereby filed.

DATED this 25th day of February, 2011.

Beth Schiller  
Beth Schiller  
Idaho Transportation Department

CERTIFICATE OF SERVICE


I hereby certify that on this 25th day of February, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

KATIE SHERRITT, LEGAL INTERN  
PATRICK COSTELLO, SUPERVISING ATTORNEY  
LEGAL AID CLINIC  
UNIVERSITY OF IDAHO COLLEGE OF LAW  
P.O. BOX 442322  
MOSCOW, ID 83844-2322

☒ U.S. MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

EDWIN LITTENEKER  
ATTORNEY AT LAW

☒ ELECTRONIC MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELECOPY (FAX)

  
Beth Schiller  
Idaho Transportation Department

- COURT MINUTES -

Date: April 20, 2011

ALMA A. ELIAS-CRUZ

Petitioner,

vs.

IDAHO TRANSPORTATION  
DEPARTMENT,

Respondent.

Case No. CR-2011-90

APPEARANCES:

Petitioner represented by counsel,  
Carole Wells, Moscow, Idaho, and  
Greg Hurn, Legal Intern

Defendant not represented by counsel

***Subject of Proceedings:* Motion for Preparation of Transcript at County Expense**

This being the time fixed pursuant to written notice for hearing of the petitioner's Motion for Preparation of Transcript at County Expense in this case, Court noted the presence of counsel.

Mr. Hurn argued in support of the petitioner's Motion for Preparation of Transcript at County Expense but was unable to provide the Court with any authority by which the Court could grant the motion.

Upon motion of the petitioner, Court continued this matter until 9:00 A.M. on April 27, 2011.

Court recessed at 11:08 A.M.

APPROVED BY:

Jan 21/22

JOHN R. STEGNER  
DISTRICT JUDGE

*[Following the hearing, counsel waived the reporting of the April 27, 2011, hearing by a Court Reporter.]*

Terry Odenborg  
Deputy Clerk

## COURT MINUTES

- COURT MINUTES -

Date: April 27, 2011

ALMA A. ELIAS-CRUZ,

Petitioner,

VS.

IDAHO TRANSPORTATION  
DEPARTMENT,

Respondent.

Case No. CR-2011-90

APPEARANCES:

Petitioner represented by counsel,  
Patrick Costello, Moscow, Idaho, and  
Greg Hurn, Legal Intern

Defendant not represented by counsel

*Subject of Proceedings:*    **Motion for Preparation of Transcript at County Expense**

This being the time fixed pursuant to written notice for resumption of the hearing of the petitioner's Motion for Preparation of Transcript at County Expense in this case, Court noted the presence of counsel.

Mr. Hurn argued in support of the petitioner's Motion for Preparation of Transcript at County Expense, relying on Idaho Code 31-3220(5). Court was at ease to read the statute. In response to inquiry from the Court, Mr. Hurn stated that he had no affidavit to present in support of his motion as required by the statute.

For reasons articulated on the record, Court denied the motion without prejudice.

Court recessed at 9:06 A.M.

APPROVED BY:

JOHN R. STEGNER  
DISTRICT JUDGE

Terry Odenborg  
Deputy Clerk

COURT MINUTES

Gregory R. Hurn- Legal Intern  
Patrick D. Costello-Supervising Attorney  
Idaho State Bar # 2491  
Legal Aid Clinic  
University of Idaho College of Law  
P.O. Box 442322  
Moscow, ID 83844-2322  
Phone: (208)-885-6541  
Fax: (208) 885-4628

CV 2011-0090  
CASE NO

2011 MAY 13 PM 12:13

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY SH DEPUTY

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

ALMA ELIAS-CRUZ,  
Plaintiff,

Case No. CV 11-0090

vs.

**ANOTHER MOTION FOR PREPARATION  
OF TRANSCRIPT AT COUNTY EXPENSE**

IDAHO TRANSPORTATION  
DEPARTMENT,  
Defendant.

Pursuant to Idaho Code § 31-3220, the petitioner, Alma Elias-Cruz, by and through her attorneys, the University of Idaho Legal Aid Clinic, Patrick D. Costello, Supervising Attorney, Katie M. Sherritt, Legal Intern, and Gregory Hurn, Legal Intern, and respectfully submit  
ANOTHER MOTION FOR PREPARATION OF TRANSCRIPT AT COUNTY EXPENSE.


Petitioner's previous MOTION FOR PREPARATION OF TRANSCRIPT AT COUNTY EXPENSE, on April 27<sup>th</sup>, 2011, was denied without prejudice by the Court because petitioner had failed to file an affidavit in support of her indigent status as required by I.C. § 31-3220 (2)  
(a). At this time, the petitioner, again asks that the Court order that the transcript of the Administrative License Suspension hearing be prepared at the expense of the Latah County

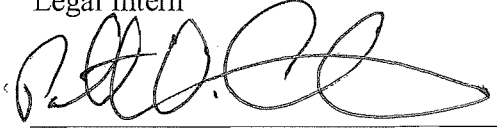
District Court Fund and waive the requirement that petitioner pay the transcript fee because of her indigent status. Petitioner has now submitted an AFFIDAVIT OF ALMA ELIAS-CRUZ, in support of this motion. Additionally, petitioner offers her indigent status that qualifies her for the waiver of court filing fees pursuant to I.R.C.P. 10 (a) (6) and for the services of the Legal Aid Clinic, as further support that she is unable to pay the costs associated with having the Administrative License Suspension hearing transcribed to adequately prepare her appeal of the decision of that hearing.

WHEREFORE, in consideration of the above, the petitioner respectfully requests that the Court order the preparation of the transcript from the Administrative License Suspension hearing at the expense of the Latah County District Court Fund and waive the requirement that petitioner pay the transcript fee.

Respectfully submitted this <sup>13<sup>th</sup></sup>~~12<sup>th</sup>~~ day of May, 2011.

  
FOR Katie M. Sherritt  
Legal Intern

  
Gregory R. Hurn  
Legal Intern

  
Patrick D. Costello  
Supervising Attorney

CERTIFICATE OF SERVICE BY MAIL

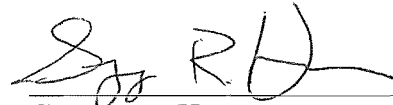
I HEREBY CERTIFY that on the <sup>13th</sup>~~14th~~ day of May 2011, a true and correct copy of the foregoing ANOTHER MOTION FOR PREPARATION OF TRANSCRIPT AT COUNTY EXPENSE was mailed or faxed to the following:

The Idaho Transportation Department  
Legal Section  
P.O. Box 7129  
Boise, Idaho 83707-1129

☒ US Mail  
☐ First Class Postage, pre-paid  
☐ Fax  
☐ Hand Delivery

Edwin L. Litteneker  
322 Main St.  
PO Box 321  
Lewiston, ID 83501-0321  
(208) 798-8387 (fax)

☐ US Mail  
☐ First Class Postage, pre-paid  
☒ Fax  
☐ Hand Delivery



Gregory R. Hurn  
Legal Intern

Gregory R. Hurn- Legal Intern  
Patrick D. Costello-Supervising Attorney  
Idaho State Bar # 2491  
Legal Aid Clinic  
University of Idaho College of Law  
P.O. Box 442322  
Moscow, ID 83844-2322  
Phone: (208)-885-6541  
Fax: (208) 885-4628

CASE NO. CV 2011-00090

2011 MAY 13 PM 12: 13

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY DO DEPUTY

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

ALMA ELIAS-CRUZ,  
Plaintiff,

Case No. CV 11-0090

vs.

THE AFFIDAVIT OF ALMA ELIAS-CRUZ

IDAHO TRANSPORTATION  
DEPARTMENT,  
Defendant.

STATE of Idaho )  
 ) ss.  
County of LATAH )

I, Alma Elias-Cruz, hereby state under oath that the following information is true:

1. I am the Plaintiff in this action.
2. I am a resident of Latah County, State of Idaho, and am over the age of eighteen (18) years, and competent to testify to the matters stated herein.
3. My monthly income is approximately \$650.00 gross.
4. I do not own any real property.
5. I do own a 2001 Honda CR-V, the approximate blue book value is \$5,000.00. I have approximately \$2500.00 in equity in the vehicle.
6. I do not own any other personal property of significant value.

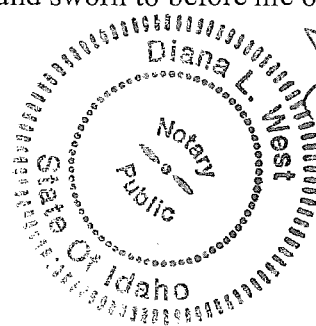


7. I have \$200.00 in my checking account and/or cash.
8. I have no dependents.
9. I have debts that total \$1000.00 that arise from student loans.
10. My monthly expenses total \$433.00, which represents rent, utilities, and other miscellaneous costs.
11. The legal action for which I am seeking Latah County to pay the costs of preparing a transcript is an appeal of the suspension of my driver's license.
12. I believe that I am entitled to redress in this matter because of the issues in this legal matter that I have brought forth in the Administrative License Suspension Hearing that I am appealing.
13. I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct.

Alma Elias  
Printed Name of Signature

[Signature]  
Signature

Subscribed and sworn to before me on May 9<sup>th</sup>, 2011.



[Signature]  
Notary Public for Idaho  
Residing at: MOSCOW, ID  
My commission expires: 11-6-2016

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

- COURT MINUTES -

John R. Stegner  
District Judge

Sheryl Engler  
Court Reporter  
Recording: Z: 3/2011-0523  
Time: 9:01 A.M.

Date: April 27, 2011

ALMA A. ELIAS-CRUZ,

Petitioner,

vs.

IDAHO TRANSPORTATION  
DEPARTMENT,

Respondent.

)  
) Case No. CR-2011-90  
)

) APPEARANCES:  
)

) Petitioner represented by counsel,  
) Patrick Costello, Moscow, Idaho  
)

) Defendant not represented by counsel  
)

=====

*Subject of Proceedings:* **Motion for Preparation of Transcript at County  
Expense**


This being the time fixed pursuant to written notice for hearing of the petitioner's Motion for Preparation of Transcript at County Expense in this case, Court noted the presence of counsel.

Mr. Costello argued in support of the petitioner's Motion for Preparation of Transcript at County Expense. Court granted the motion.

Colloquy was had between Court and counsel regarding scheduling. Court informed Mr. Costello that petitioner's opening brief is due one week following the filing of the transcript.

Court recessed at 9:05 A.M.

APPROVED BY:

  
JOHN R. STEGNER  
DISTRICT JUDGE

Terry Odenborg  
Deputy Clerk

COURT MINUTES

Patrick D. Costello-Supervising Attorney  
Idaho State Bar # 2491  
Legal Aid Clinic  
University of Idaho College of Law  
P.O. Box 442322  
Moscow, ID 83844-2322  
Phone: (208)-885-6541  
Fax: (208) 885-4628

CASE NO. CV 2011-90  
May 23 2011 11:46 AM  
CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY [Signature] DEPUTY

*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

ALMA ELIAS-CRUZ, )  
Petitioner, )  
 )  
vs. )  
 )  
IDAHO TRANSPORTATION )  
DEPARTMENT, )  
Respondent. )  
 )  
 )  
 )  
\_\_\_\_\_ )

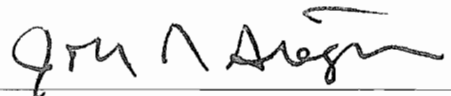
Case No. CV 11-0090

**ORDER FOR PREPARATION OF  
TRANSCRIPT AT COUNTY EXPENSE**

Pursuant to Idaho Code § 31-3220, the court finds, based on the AFFIDAVIT OF ALMA ELIAS-CRUZ and further from the fact the Petitioner is income eligible for legal services provided by the University of Idaho Legal Aid Clinic and thus is eligible for waiver of court filing fees pursuant to I.R.C.P. 10 (a) (6), that the petitioner, Alma Elias-Cruz, is indigent for the purposes of payment for a transcript of the Administrative License Suspension hearing conducted by the Idaho Department of Transportation herein.

THEREFORE, it is hereby ORDERED that the preparation of the transcript from the Administrative License Suspension hearing be done at the expense of the Latah County District Court Fund.

Dated this 23<sup>rd</sup> day of May, 2011.

  
Hon. John R. Stegner  
District Judge

CERTIFICATE OF SERVICE BY MAIL

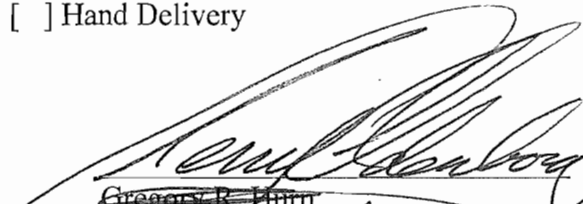
I HEREBY CERTIFY that on the 23<sup>rd</sup> day of May 2011, a true and correct copy of the foregoing ORDER FOR PREPARATION OF TRANSCRIPT AT COUNTY EXPENSE was mailed or faxed to the following:

Patrick D. Costello  
University of Idaho Legal Aid Clinic  
P.O. Box 442322  
Moscow, Idaho 83844-2322  
(208) 885-4628

☒ US Mail  
☐ First Class Postage, pre-paid  
☐ Fax  
☐ Hand Delivery

Edwin L. Litteneker  
322 Main St.  
PO Box 321  
Lewiston, ID 83501-0321  
(208) 798-8387 (fax)

☒ US Mail  
☐ First Class Postage, pre-paid  
☐ Fax  
☐ Hand Delivery

  
~~Gregory R. Hum~~  
~~Legal Intern~~ deputy clerk

Edwin L. Litteneker  
Special Deputy Attorney General  
Idaho Transportation Department  
322 Main Street  
PO Box 321  
Lewiston, Idaho 83501  
Telephone: (208) 746-0344  
Facsimile: (208) 798-8387  
ISB No. 2297

CASE NO. CV 2011-00090

2011 JUN 13 AM 11:17

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY AS DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

|                      |   |                         |
|----------------------|---|-------------------------|
| Alma Elias-Cruz,     | ) | Case No. CV 11-0090     |
|                      | ) |                         |
| Petitioner,          | ) |                         |
|                      | ) |                         |
| vs.                  | ) | <b>NOTICE OF FILING</b> |
|                      | ) | <b>TRANSCRIPT</b>       |
| IDAHO TRANSPORTATION | ) |                         |
| DEPARTMENT,          | ) |                         |
|                      | ) |                         |
| Respondent.          | ) |                         |
| _____                | ) |                         |

COMES NOW Edwin L. Litteneker, Special Deputy Attorney General, and files with the Court the original of the Transcript in the Matter of the Driving Privileges of Alma Elias-Cruz from the Idaho Transportation Department Driver's License Disqualification Hearing held on December 9, 2010.

DATED this 10 day of June, 2011.



Edwin L. Litteneker  
Special Deputy Attorney General

I DO HEREBY CERTIFY that a true  
And correct copy of the foregoing  
Document was:

☒ Mailed by regular first class mail,  
And deposited in the United States  
Post Office

☐ Sent by facsimile

☐ Sent by Federal Express, overnight  
Delivery

☐ Hand delivered

To: Patrick D. Costello – Supervising Attorney  
Legal Aid Clinic  
University of Idaho College of Law  
P.O. Box 442322  
Moscow, Idaho 83844-2322

On this 10 day of June, 2011.



Edwin L. Litteneker

CV 2011-00096

CASE NO

2011 JUN 20 PM 2:59

CLERK OF DISTRICT COURT  
LATAH COUNTY

BY                      DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

|                      |   |                               |
|----------------------|---|-------------------------------|
| ALMA A. ELIAS-CRUZ,  | ) |                               |
|                      | ) |                               |
| Petitioner,          | ) | Case No. CV- 2011-90          |
|                      | ) |                               |
|                      | ) |                               |
| vs.                  | ) | <b>ORDER SETTING BRIEFING</b> |
|                      | ) | <b>SCHEDULE</b>               |
| IDAHO TRANSPORTATION | ) |                               |
| DEPARTMENT,          | ) |                               |
|                      | ) |                               |
| Respondent.          | ) |                               |
|                      | ) |                               |
|                      | ) |                               |
|                      | ) |                               |

Alma A. Elias-Cruz has petitioned this Court for judicial review of the decision issued in this matter by Idaho Transportation Department Hearing Officer David J. Baumann.

The transcript was lodged with this Court on June 13, 2011. The record is therefore settled in this case. Consequently, a briefing schedule is now appropriate.

It is ORDERED that:


(1) Petitioner's opening brief shall be filed and served no later than June 27, 2011;

(2) Respondent's response brief shall be filed and served no later than July 26, 2011;

(3) Petitioner's reply brief, if any, shall be filed and served no later than, August 16, 2011;

(4) Oral argument is scheduled for August 24, 2011, at 10:00 a.m.

Dated this 20th day of June 2011.

  
\_\_\_\_\_  
John R. Stegner  
District Judge

### CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete, and correct copies of the foregoing order were delivered in the following methods to:


Edwin L. Litteneker  
Special Deputy Attorney General  
Idaho Transportation Department  
322 Main Street  
PO Box 321  
Lewiston, ID 83501

☐ U.S. Mail  
☐ Overnight Mail  
☐ Fax  
☐ Hand Delivery

Patrick D. Costello-Supervising Attorney  
Legal Aid Clinic  
University of Idaho College of Law  
P.O. Box 442322  
Moscow, ID 83844-2322

☒ U.S. Mail  
☐ Overnight Mail  
☐ Fax  
☐ Hand Delivery

On this 20 day of June 2011.

  
\_\_\_\_\_  
Deputy Clerk



CASE NO. CV-2011-00090

2011 JUN 28 AM 7:44

CLERK OF DISTRICT COURT  
LATAH COUNTYBY DC DEPUTY

Brian Morris – Legal Intern  
 Patrick Costello – Supervising Attorney  
 ISBN: 2491  
 Legal Aid Clinic  
 University of Idaho College of Law  
 PO Box 442322  
 Moscow, ID 83844-2322  
 Phone: (208) 885-6541  
 Fax: (208) 885-4628

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
 IDAHO, IN AND FOR THE COUNTY OF LATAH

|                      |   |                     |
|----------------------|---|---------------------|
| ALMA A. ELIAS-CRUZ,  | ) |                     |
|                      | ) | CASE NO. CV-2011-90 |
| Petitioner,          | ) |                     |
|                      | ) | PETITIONER'S BRIEF  |
| v.                   | ) |                     |
|                      | ) |                     |
| IDAHO TRANSPORTATION | ) |                     |
| DEPARTMENT,          | ) |                     |
|                      | ) |                     |
| Respondent.          | ) |                     |
| _____                | ) |                     |

COMES NOW the Petitioner, by and through her attorneys, Patrick Costello, supervising attorney, and Brian Morris, legal intern of the University of Idaho Legal Aid Clinic and submit this Petitioner's Brief.

## I. TABLE OF CONTENTS

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| ISSUES FOR REVIEW     | 6  |
| STANDARD OF REVIEW    | 6  |
| ARGUMENT              | 6  |
| CONCLUSION            | 14 |

## II. TABLE OF AUTHORITIES

|  |  |
|--|--|
| Idaho Code § 67-5279(3)  |  |
| Idaho Code § 67-5279   |  |
| Idaho Code § 18-8002   |  |
| Idaho Code § 18-8004(1)(d)   |  |
| Idaho Code § 18-8004(1)(a)   |  |
| IDAPA 11.03.01 through 11.13.03  |  |
| LIFELOC FC 20 OPERATOR'S REFERENCE MANUAL  |  |
| Idaho State Police Standard Operating Procedures Breath Testing                            |  |
| Alco-Sensor manual   |  |
| Ruble v. Kan. Dept. of Revenue, 26 Kan.App.2d. 1 (1999).                                   |  |
| Wieseler v. Prins, 167 Ariz. 223 (App. 1990).  |  |
| Nugent v. Iowa Dept. of Transp., 390 N.W.2d 125 (Iowa 1986).                               |  |
| McDaniel v. State of Idaho, Dept. of Transp., 149 Idaho 643, 239 p.3d 36 (Ct. App., 2010). |  |
| State v. Frickey, 332 Mont. 255, 136 P.3d 558 (2006).                                      |  |

State v. Onsurez, 51 P.3d 528 (N.M. App. 2002).

In re Schroeder, 210 P.3d 584 (Idaho App. 2009).

Archer v. Dept. of Trans., 145 Idaho 617 (2008).

Marshall v. Department of Transp., 48 P.3d 666 (Idaho App. 2002).

### III. STATEMENT OF THE CASE

This is an Administrative License Suspension (hereafter “ALS”) proceeding pursuant to Idaho Code §18-8002A. The Idaho Department of Transportation (hereafter “ITD”) issued a Notice of Suspension (hereafter “the *Notice*”), dated October 21, 2010 (Agency Record ((hereafter “AR”)), pg 001, 2010) . The *Notice* stated the specific basis for the suspension of Elias-Cruz’s Idaho driver’s license was that “upon test results received by the Idaho Transportation Department...for failing evidentiary testing.” *Id* at 040. The matter was set for an ALS hearing on December 9, 2010, by telephonic hearing. At the ALS hearing the Petitioner appeared through counsel. The state did not appear at the ALS hearing.

Following the ALS hearing, on December 30<sup>th</sup>, 2010 the ITD Hearing Officer, David J. Baumann, issued FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER that sustained the ALS. *Id* at 045. Subsequently, Petitioner filed this PETITION FOR JUDICIAL REVIEW AND REQUEST FOR STAY on January 25, 2011. *Id* at 058. An Order for Stay of License Suspension was entered on February 16, 2011, pending the outcome of the judicial review proceeding. *Id* at 066. The record was prepared by the State. The matter is now before this court for judicial review pursuant to Idaho Code §67-5270 et seq.

#### IV. STATEMENT OF FACTS

The Petitioner, Ms. Elias-Cruz, is a licensed Idaho driver who resides in Moscow, Idaho, while attending the University of Idaho. On October 21, 2010 at 9:09 pm, Elias-Cruz was driving on U.S. Highway 95 in Latah County, Idaho, when she was stopped by Trooper Jacob Schwecke (Schwecke) of the Idaho State Police at milepost 361 (approximately) for exceeding the posted speed limit. *Id* at 006-007.

Schwecke approached the car, identified himself to the Petitioner, and told her exceeding the speed limit was his reason for stopping her. Elias-Cruz identified herself by presenting her Idaho driver's license to Schwecke. Upon detecting an odor of alcohol coming from inside of the vehicle, Schwecke asked Elias-Cruz if she had been drinking, to which she admitted to consuming alcohol before driving. Schwecke asked her to exit her vehicle and field sobriety tests were administered. Petitioner did not meet any decision points in the field sobriety tests administered by Schwecke. *Id*. After Elias-Cruz passed the Field Sobriety Tests, Schwecke told her that he could smell the odor of an alcoholic beverage coming from her during the field sobriety tests and requested that she take a Breath Alcohol Test. Schwecke informed Elias-Cruz of the consequences of a refusal to take the test or a subsequent failure of the test under Idaho Code §§ 18-8002 and 18-8002A. Elias-Cruz offered to give a breath sample to the Trooper. Schwecke then used the Lifeloc FC20, a breath alcohol-testing device, to test her breath alcohol content (Br.A.C.) twice. Both breath samples resulted in readings of .020 and .021 respectively. Based upon those readings, Schwecke placed Elias-Cruz under arrest for driving while under the influence of alcohol pursuant to Idaho Code § 18-8004(1)(d) and transported her to the Latah County Jail.

The Idaho Department of Transportation issued a *Notice of Administrative License Suspension* to Elias-Cruz at the time of her arrest on October 21<sup>st</sup>, 2010. *Id* at 001. This *Notice* stated that Elias-Cruz's license was being suspended starting on November 20<sup>th</sup>, 2010, based upon a failed evidentiary test.

On December 9, 2010, Elias-Cruz, through her counsel, requested an ALS hearing to appeal her driver's license suspension. At the telephonic hearing, counsel for Elias-Cruz, argued that Petitioner's driver's license should not be suspended. First, the manufacturer recognizes a .005 margin of error associated with the testing device (Lifeloc FC20). Second, the effect this margin of error has at that lower BrAC amount (.020) increases the potential error rate up to +/- 25%. Finally, the device had not been calibrated as the manufacturer's operations manual and Idaho State Police manual require in order to operate correctly. This is evidence that Elias-Cruz's breath samples could have been as low as .015 and .016, which is below the statutory requirement of .020 for a license suspension under I.C. 18-8004(1)(d). Additionally, Elias-Cruz argued that *State v. McDaniel*, should not apply to this case because *McDaniel* involved a different Idaho statute, I.C. §18-8004 (1)(a). *McDaniel v. State of Idaho*, Dept. of Transp., 149 Idaho 643, 239 p.3d 36 (Ct. App., 2010).

In his FINDINGS OF FACT AND CONCLUSIONS OF LAW THE ALS hearing officer sustained the suspension. Elias-Cruz then filed her PETITION FOR JUDICIAL REVIEW, now before this court.

## V. ISSUES FOR REVIEW

- I. WHETHER THE HEARING OFFICER ERRED BY NOT CONSIDERING THE LIFELOC FC20 MARGIN OF ERROR IN SUSTAINING THE LICENSE SUSPENSION FOR A VIOLATION OF I.C. §18-8004(4).
- II. WHETHER THE HEARING OFFICER SHOULD HAVE SUSTAINED THE LICENSE SUSPENSION WHEN THE LIFELOC FC20 PROVIDING THE BrAC TEST HAD NOT BEEN CALIBRATED IN ACCORDANCE WITH THE RECOMMENDATION OF THE MANUFACTURER AND THE IDAHO STATE POLICE.

## VI. STANDARD OF REVIEW

Under Idaho Code §67-5279(3), 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.

## VII. ARGUMENT

### I. THE HEARING OFFICER ERRED BY FAILING TO CONSIDER THE LIFELOC FC20 MARGIN OF ERROR IN SUSTAINING THE LICENSE SUSPENSION FOR A VIOLATION OF I.C. §18-8004(4).

For every Breath Alcohol Concentration (BrAC) test, there is a margin of error inherent in the results generated by the device being used to test the BrAC. That margin of error should be taken into account in determining a license suspension pursuant to a BrAC result of .020 for a violation of Idaho Code §18-8004(1)(d) for two reasons: 1) a BrAC of .020 percent is such a minute quantity that the Lifeloc machine is incapable of functioning with enough sensitivity to meet the statutory requirement; and 2) there are no external signs of intoxication with a BrAC level of .020 percent compared to when a person has a BrAC of .08 percent or more.

The breath test analyzer used by the Idaho State Police (ISP) in the testing of Elias-Cruz's BrAC has a known margin of error. That device, the Lifeloc FC20 Breath Test Analyzer (the Lifeloc), has a margin of error of .005 that is recognized by the manufacturer that is applicable for any BrAC result given by the device. (AR, pg 025). The Idaho State Police Standard Operating Manual §5.1.5 also recognizes that an instrument that has a margin of error that is greater than +/- 10% when measured against a verification solution does not meet testing standards. The manufacturer of Lifeloc recognizes that the FC20 has a .005 margin of error on any given BrAC result and would not meet the requirements of being within +/- 10% when measured against a .020 verification solution. The FC20 would have a 25% margin of error at the .020 BrAC level.

In order to violate I.C. §18-8004(1) (d), an individual must have at least .020 or greater BrAC and be under the age of twenty-one (21). At the .020 level of intoxication, there are no external indicators of intoxication. (ALS Hearing, pgs 10-11). In fact, Elias-Cruz passed all the field sobriety tests administered by Schwecke, exhibiting no external signs of intoxication other than Officer Schwecke's detection of an odor of alcohol while the tests were administered by him. (AR, pg 006). Furthermore, there are no effects on a person's ability to operate a vehicle at the .020 statutory threshold. (ALS Hearing, pgs 10-11). Given that there are no external indicators of intoxication to corroborate a drivers intoxication at the .020 level and that an individual's ability to operate a vehicle is not effected at .020 level, the singular evidence of a driver's having any alcohol in her system that could be used in determining whether the driver is in violation of the statute, are the BrAC results. When the BrAC results are near the .020 level threshold, the Department should consider the margin of error of the device in considering whether to suspend a driver's license. When the BrAC level is so close to the threshold, the

results alone are not enough for a reasonable trier of fact to determine that Elias-Cruz's BrAC was above .020 percent. (*Nazerian v. Gourley*, 2005 WL 1576246 (Cal.App.2 Dist.).

Additionally, when a BrAC is at such a low level, the sensitivity of the testing machine is not accurate enough to produce a result that is acceptable for purposes of a low tolerance law. *Id.*

The impact of the margin of error of the Lifeloc increases as the level of the BrAC being tested decreases. At .080, the .005 margin of error of the Lifeloc results in a potential 6.25% error in the BrAC results. (ALS Hearing, pgs 7-9). At the .020 level of intoxication required by I.C. §18-8004(1)(d), the .005 margin of error of the Lifeloc results in a potential 25% error in the accuracy of the BrAC results. When applied to Elias-Cruz's case, her .020 and .021 BrAC results could potentially be as high as .025 and .026 respectively or as low as .015 and .016 respectively. *Id.* at 11. These margin of error values are outside of the Idaho Standard Operating Procedures requirement that values be within +/- 10% of the solution they are tested against. (6.0 Idaho Standard Operating Procedure Breath Alcohol Testing §§ 5.1.5 and 5.1.8) The inaccuracy of the Lifeloc being 25% in BrAC results at the .020 level should carry significant weight when considering whether a driver meets the .020 threshold of the statute. As a result of the significant increase in the margin of error when testing at the lower BrAC level of .020, test results should be based on the actual alcohol content in the body rather than a printout from a device that is subject to a 25% rate of error at the level being tested.

There are no Idaho cases that address taking into account a margin of error for a violation of 18-8004(d), which has a threshold of .020 for defendants under the age of 21. All of the states, including Idaho, that hold the margin of error does not need to be considered by the hearing officer, only address results that are at .080 percent or higher. See *Ruble v. Kansas Department of Revenue*, 26 Kan.App2d. 1, 973 P.2d 213 (1999) (a test of .087); *Wieseler v.*



*Prins*, 167 Ariz. 223, (App. 1990) (a test of .102); *Nugent v. Iowa Dep't of Transp.*, 390 N.W.2d 125, (Iowa 1986) (a test of .102). The controlling case in Idaho is *McDaniel v. State of Idaho, Dept. of Transp.*, 239 p.3d 36, 149 Idaho 643, (2010). While the Court in *McDaniel* held that the hearing officer was not required to consider the margin of error for a license suspension pursuant to a violation of 18-8004(a), that case is distinguishable from this case in a number of ways.

First, Elias-Cruz's license was suspended for violating I.C. §18-8004(1)(d), whereas the *McDaniel* suspension was for a violation of I.C. §18-8004(1)(a). Subsection (1)(d) has a threshold of .020 and applies to defendants who are under 21 while subsection (1)(a) has a threshold of .08 and applies to those over the age of 21. These sections apply to different situations and are intended to combat different social ills. The first is a policy directed at keeping underage people from drinking. The second is intended to keep dangerous vehicles off of public roadways and is directed at the safety of the general public and the hazards that intoxicated drivers pose.

Second, Elias-Cruz's case is further distinguishable from *McDaniel* because the inherent margin of error in the Lifeloc FC20 results in a significantly greater impact on the accuracy of the BrAC result in Petitioner's case than it would have in the *McDaniel* case. A .005 margin of error for a breath sample of .080 could produce results that are 6.25% higher or lower than the actual value versus a breath sample of .020 that could produce results that are 25% higher or lower than the actual value. Under I.C. §18-8004(1)(a), BrAC of .080, the margin of error inherent in the Lifeloc results in only a 6.25% rate of inaccuracy. In contrast, under the .020 BrAC result required under I.C. §18-8004(1)(d), for which Elias-Cruz was arrested, the margin of error inherent in the Lifeloc results in a 25% rate of inaccuracy, which is much more significant and a greater impact upon the validity of the BrAC results. Therefore, the hearing

officer erred in applying the *McDaniel* decision to Petitioner's case because the difference between offenses and BrAC requirements of the two statutes involved, coupled with the impact of the margin of error on the accuracy of the Lifeloc BrAC result, distinguishes Elias-Cruz's case from that of *McDaniel*.

The hearing officer erred by not considering the Lifeloc FC20 margin of error when he sustained the license suspension for violating I.C. §18-8004(4) because the Lifeloc margin of error of .005, when applied to the .020 statutory level, potentially results in a reading with a 25% rate of error. Therefore, the actual BrAC, as measured through a blood sample, should be used in determining whether to sustain a license suspension as opposed to a BrAC result received from a device that is potentially 25% inaccurate in giving a BrAC result. Because that rate of error is beyond the threshold of the ISP regulations of 10%, the results should not be considered sufficient evidence upon which to base the Elias-Cruz's license suspension.

Additionally, in *McDaniel*, the court wrongly held that the margin of error should not be considered in an administrative license suspension hearing. The court chose to distinguish between a statute requiring an *actual* BrAC and one requiring the *results* of a BrAC be above a certain threshold to determine whether a margin of error should be considered. We submit that there is no distinction and the suspension of a license should not be simply based on a printout of a machine but rather on a person's actual BrAC. In order to determine a person's actual BrAC, the margin of error of the machine used must be considered.

II. WHETHER THE HEARING OFFICER SHOULD HAVE SUSTAINED THE LICENSE SUSPENSION WHEN THE LIFELOC FC20 PROVIDING THE BrAC TEST HAD NOT BEEN CALIBRATED IN ACCORDANCE WITH THE RECOMMENDATION OF THE MANUFACTURER AND THE IDAHO STATE POLICE.

This license suspension rests solely on the results of the Lifeloc FC20 test. Therefore, it is imperative that the test results be accurate. The manufacturer of the Lifeloc FC20 recommends that the machine be both calibrated on an annual basis and have a calibration check done within 24 hours of a breath sample being taken. (AR, pg 027). In this case, the calibration check was done within 21 hours after Elias Cruz's breath sample was taken. However, the actual calibration had been done on August 18, 2009, 14 months before her breath test was taken. *Id* at 004. In a Montana case, the court held that test results from a breathalyzer machine were inadmissible when the machine had not been calibrated for 13 months and administrative rules required that the machine be calibrated on an annual basis. *State v. Frickey*, 332 Mont. 255, 136 P.3d 558 (2006). Here, Idaho's administrative rules are silent as to the time frame for the actual calibration of the Lifeloc FC20 but the manufacturer recommends that the machine be calibrated every 12 months. *See* Lifeloc FC20 Frequently Asked Technical Questions. Idaho's standards for approved BrAC testing machines "shall be issued in the form of policy statements and training manuals," (IDAPA 11.03.01 through 11.13.03). "Failure to abide by the regulations set forth in the standard operating procedures and training manuals for administration of breath tests renders the test inadmissible as evidence absent expert testimony that the improperly administered test nevertheless produced reliable results. *In re Schroeder*, 210 P.3d 584 (Idaho Ct. App. 2009)." Because the Idaho code states that the standards shall come from policy statements and training manuals, we can assume that the legislature intended for the Standard Operating Procedures to be supplemental rather than exclusive. Finding otherwise would have the effect of making all manufacturer guidelines and recommendations useless and essentially put the ISP in the role of writing all equipment user manuals. Therefore, we should look at both the ISP guidelines and the user manual to analyze whether the Lifeloc FC20 machine was calibrated with

sufficient accuracy to have the results be considered sufficient evidence for the Department to suspend Elias-Cruz's license.

First, it is important to distinguish a calibration check from the actual calibration. In this case the Lifeloc FC20 ISP manual differentiates between calibration checks and the calibration of the machine. P. 19 of the ISP manual states that "actual calibration and adjustment is done in the ISP laboratories and is password-protected." The fact that the ISP differentiates between calibration checks and actual calibration is persuasive evidence that both procedures achieve separate ends. A calibration check was performed within 24 hours of the breath test with a .080 verification solution rather than a .020 verification solution. (AR, pg 004). That check merely validates the defendant's blows against the test blow. It does not independently verify that the machine is working within the statutorily acceptable margin of error. *See* ISP margin of error p. ....); *Alco-Sensor* manual <http://www.alcopro.com/calibration.asp> (explaining the difference between an accuracy check and a calibration. "In an Accuracy Check procedure...In a Calibration Adjustment, the operator... and follows a procedure to adjust the Alco-Sensor to read more accurately. The specific instructions to do this vary with each model of Alco-Sensor."

Second, both the manufacturer and many other states have issued guidelines that the machine be calibrated at least every 12 months. The ISP user manual for the Lifeloc FC20 manual states on page 4 that one of the warnings that will show is when the calibration is expiring, which is set for every 6 months. This is actually a shorter period than the Lifeloc recommends to users on its website. (AR, pg 027) (stating the machine should be calibrated every 12 months). Failure to have the machine calibrated according to the manual should result in the test results being considered insufficient evidence to revoke a defendant's license. (See "police officer's testimony that breath test machine had been calibrated within seven days prior

to testing of defendant was not a proper foundation for the admission of breath test results from that machine; applicable regulation required an annual certification of the machine that was contingent upon satisfactory completion of several specific requirements, including annual inspection, agency maintenance of adequate records, and weekly calibration checks by the agency using the machine. N.M. Admin. Code 7.33.2.11.1 to 7.33.2.11.9. *State v. Onsurez*, 2002-NMCA-082, 51 P.3d 528 (N.M. Ct. App. 2002), cert. denied (N.M. July 29, 2002).

The court in *Archer v. Department of Transportation* held that the driver failed to meet his burden of proof when he failed to subpoena the records from the police department. *Archer* is distinguishable from this case in that here the calibration record was attached to the documents submitted by the state for the administrative hearing thereby eliminating the need to issue a subpoena. *Archer v. Dept. of Trans.*, 145 Idaho 617, 181 P.3d 543 (Id. App. 2008).

In reviewing administrative decisions, courts defer to the agency's finding of fact unless they are clearly erroneous or not supported by sufficient evidence. I.C. § 67-5279. *Marshall v. Department of Transp.*, 48 P.3d 666 (Idaho App. 2002). Here, there is no evidence to support the conclusion that the Lifeloc FC20 was properly calibrated and reporting accurately. Rather, there is only evidence that the machine had not been calibrated in over a year and the machine was documented as reporting erroneously high. When the machine's actual calibration was done, it reported a .206 percent when calibrated to a .200 verification solution. (AR, pg 004).

Failure to calibrate the machine annually according to the manufacturer specifications, regardless of whether the checks were performed, means that the results of the test should be rejected in an administrative license suspension hearing.

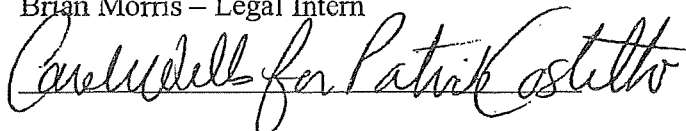
### VIII. CONCLUSION

Because the Department's decision was not supported by substantial evidence, Elias-Cruz respectfully submits the Hearing Officer's decision should be reversed, and the case remanded to the department with instructions to vacate the suspension of Elias-Cruz's driving privileges.

Respectfully submitted this 27th day of June, 2011.



Brian Morris – Legal Intern



Patrick Costello – Supervising Attorney

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petitioner's Brief was served by the following means to the following parties:


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CV 2011-00090  
CASE NO

2011 JUL 27 AM 11:41

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY *Sh* DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH**

|                      |   |                                  |
|----------------------|---|----------------------------------|
| Alma Elias-Cruz,     | ) | Case No. CV 11-0090              |
|                      | ) |                                  |
| Petitioner,          | ) |                                  |
|                      | ) |                                  |
| vs.                  | ) | <b>BRIEF OF THE IDAHO</b>        |
|                      | ) | <b>TRANSPORTATION DEPARTMENT</b> |
| IDAHO TRANSPORTATION | ) |                                  |
| DEPARTMENT,          | ) |                                  |
|                      | ) |                                  |
| Respondent.          | ) |                                  |
| _____                | ) |                                  |

**INTRODUCTION**

This is the responsive brief of the Idaho Transportation Department. Alma Elias-Cruz has asked the District Court to review the decision of the Department's Hearing Official, David J. Baumann. The Department's Hearing Official determined that the requirements for suspension of Ms. Elias-Cruz's driving privileges set forth in Idaho Code § 18-8002A were complied with and Ms. Elias-Cruz should have her driving privileges suspended for ninety days as a result of failing an evidentiary test for alcohol concentration.

## FACTUAL BACKGROUND

On October 21, 2010 at approximately 2109 hours, Idaho State Police Trooper Schwecke was on patrolling southbound on U.S. 95 near milepost 361.5 in Latah County, Idaho.

Trooper Schwecke observed a purple Honda CR-V that appeared to be travelling over the posted 45 mph speed limit. Trooper Schwecke activated his radar and received a steady reading of 52 mph. Trooper Schwecke pulled to the side of the roadway waiting for the vehicle to pass and then activated his emergency lights and conducted a stop for speeding. Upon approaching the vehicle the driver was identified as Alma A. Elias-Cruz.

Trooper Schwecke smelled the odor of an alcoholic beverage coming from the vehicle. Ms. Elias-Cruz admitted to consuming alcohol prior to driving. Trooper Schwecke then asked Ms. Elias-Cruz to exit the vehicle and perform standardized field sobriety tests. Ms. Elias-Cruz performed the Horizontal Gaze Nystagmus, Walk and Turn and One Leg Stand tests and did not pass. Trooper Schwecke informed Ms. Elias-Cruz that she was under arrest for DUI (R. p. 006). Ms. Elias-Cruz provided test results of .021 and .020 (R. p. 008).

Ms. Elias-Cruz timely requested an administrative hearing with the Department of Transportation's Hearing Official (R. pp. 013-015).

A hearing was held telephonically with the Idaho Department of Transportation's administrative Hearing Official (R. p. 040). The Hearing Official entered Findings of Fact, Conclusions of Law and Order sustaining the suspension of Ms. Elias-Cruz's driving privileges on (R. pp. 045-057).

## STANDARD OF REVIEW

Idaho Code § 18-8002A(7) sets out the burden of the driver to demonstrate to the Hearing Official that driving privileges should be reinstated because:

- (a) The peace officer did not have legal cause to stop the person; or



- (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or;
- (c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or
- (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.

The review of disputed issues of fact must be confined to the agency record for judicial review. Idaho Code § 67-5277.

Idaho Code § 67-5279(1) sets out the scope of review. “The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” *Howard v. Canyon County Board of Commissioners*, 128 Idaho 479, 915 P.2d 709 (1996).

Idaho Code § 67-5279(3) provides:

When the agency was required by the provisions of this chapter or by other provision of law to issue an order, the court shall affirm the agency action unless the court finds that the agency’s findings, inferences, conclusions or decisions 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.

The appropriate remedy pursuant to the Idaho Administrative Procedures Act is: “. . . if the agency action is not affirmed, it shall be set aside, in whole or in part and remanded for further proceedings as necessary.” Idaho Code § 67-5279(3).

The decision of the Transportation Department must be affirmed unless the order violates statutory or constitutional provisions, exceeds the agency’s authority, is made upon unlawful procedure, is not supported by substantial evidence or is arbitrary, capricious or an abuse of

discretion. *Marshall v. Idaho Transportation Department*, 137 Idaho 337, 48 P.3d 666 (2002). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in Idaho Code § 67-5279(3) and that a substantial right of that party has been prejudiced. *Druffel v. State, Dept. of Trans.*, 136 Idaho 853, 41 P.3d 739 (2002).

### **CHARACTERIZATION OF THE ISSUES**

The characterization of the issues by Ms. Elias-Cruz implicate the Department's Hearing Official's determination that Ms. Elias-Cruz failed to meet her burden pursuant to I.C. § 18-8002A(7)(c) that the breath test results were not at least .02 in violation of I.C. § 18-8004(1)(d) and that the tests for alcohol concentration were not administered pursuant to the requirements of I.C. § 18-8004(4), pursuant to I.C. § 18-8002A(7)(d). There is no challenge that the breath testing equipment was not properly functioning. Ms. Elias-Cruz does not challenge the Hearing Official's determination that she did not meet her burden pursuant to I.C. § 18-8002A(7) (a)(b) & (e).

### **ISSUE I.**

*Did the Hearing Official error by not considering the Lifeloc FC20 margin of error in sustaining the license suspension for a violation of I.C. § 18-8004(4).*

Ms. Elias-Cruz argues that by demonstrating that the Lifeloc FC20 has an "inherent margin of error", she met her burden to show that her breath alcohol was not really in excess of .02 and therefore not in violation of I.C. § 18-8004(1)(d).

Idaho Code § 18-8004(4) defines the circumstances for an evidentiary test. In this case Ms. Elias-Cruz, a twenty year old driver was in violation of I.C. § 18-8004(1)(d) as a result of having an alcohol concentration of at least .02 as defined in I.C. § 18-8004(4). There is no question based upon this Record that the analysis of Ms. Elias-Cruz's breath indicated an alcohol concentration of at least 0.02.

Ms. Elias-Cruz suggests that there is an inherent margin of error in the operation of the Lifeloc FC20 breath testing device and such margin of error should be taken into consideration to determine if there is a failed breath test under I.C. § 18-8002A(7). Ms. Elias-Cruz seeks by the testimony of Loring Beals and by argument to impose an element of breath alcohol testing not required by the Idaho State Police, Legislature, nor the Idaho Courts.

Ms. Elias-Cruz bases the argument for an inherent margin of error on the lack of sensitivity on the Lifeloc FC20 breath testing device and Ms. Elias-Cruz not demonstrating any external signs of intoxication. The Idaho Court has rejected proof of any external signs of intoxication as a basis for a test failure, see for example *Reisenauer v. State, Dept. of Transp.* 145 Idaho 948, 188 P.3d 890 (2008).

Ms. Elias-Cruz offers the testimony of Loring Beals for the proposition that Ms. Elias-Cruz's alcohol concentration was really less than the 0.02 at the time of testing. Mr. Beals testifies as to what he believes the blood alcohol would be (Tr. p. 10 L. 1-10). Nowhere does Mr. Beals testify that the Lifeloc FC20 was not properly functioning or was not properly calibrated leading to a conclusion that the breath test result was not administered consistent with I.C. § 18-8004, I.C. § 18-8002A(7)(d). The record does not provide any basis for a conclusion that the tests results did not show an alcohol concentration in violation of I.C. § 18-8004. The Hearing Official carefully considered the argument and evidence offered by Ms. Elias-Cruz (R. pp. 050-052).

Here, the standard isn't whether Ms. Elias-Cruz could be convicted of driving under the influence pursuant to I.C. § 18-8004(1)(d) beyond a reasonable doubt. There is no factual question here for the Court's review that the test results did not show an alcohol concentration in violation of I.C. § 18-8004. That is the only question for the Department's Hearing Official and

the only question for the Court upon review of the Hearing Official's conclusion pursuant to I.C. § 18-8002A(7)(c).

The Idaho Court has determined there is no basis to accept an inherent margin of error in the results of breath testing given the clear meaning of I.C. § 18-8004(1) in the Administrative License Suspension context.

The Idaho Court of Appeals decision in *McDaniel v. State, Dept. of Transp.*, 149 Idaho 643, 239 P.3d 36, 39 (Idaho Ct. App. 2010), as amended (Aug. 27, 2010) specifically rejects the analysis posed by Ms. Elias-Cruz.<sup>1</sup>

The Idaho State Police in the Breath Alcohol Standard Operating Procedures Manual does not recognize a margin of error in a performance verification. Instead of a margin of error, the Idaho State Police recognize a range of results which will indicate a sufficient performance verification.<sup>2</sup>

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<sup>1</sup> When statutory language is interpreted to require license suspension upon test results indicating a certain BAC, courts have ruled that a drivers license can still be revoked irrespective of the margin of error. Consequently any inherent margin of error is disregarded. *McDaniel v. State, Dept. of Transp.* 149 Idaho 643, 239 P.3d 36 (2010).

<sup>2</sup>

5.1.5 Acceptable results for a 0.08 or 0.20 performance verification is a pair of samples in sequence that are both within +/- 10% of the performance verification solution target value. Target values and ranges of acceptable results are included in a certificate of analysis for each solution lot series, prepared by, and available from, the ISPFs.

NOTE: Due to external factors associated with changing a performance verification solution the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained. However, if results after a total of three test series for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFs Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. The suggested troubleshooting procedure should be followed if the initial performance verification does not meet the acceptance criteria.

Idaho Breath Alcohol Standard Operating Procedures, Revisions 2 Effective 11/01/2010, pp. 10-11.

I.C. § 18-8004(1)(d) does not contemplate “an alcohol concentration of 0.02 plus or minus a margin of error”, instead I.C. § 18-8002A(7)(c) requires Ms. Elias-Cruz to show a test result of less than 0.02. In spite of Ms. Elias-Cruz’s policy argument that the Hearing Official should consider such testimony in a breath test case, the Idaho Court has clearly indicated that I.C. § 18-8004(1)(d) does not contain a reference to an inherent margin of error. Ms. Elias-Cruz wants to read into I.C. § 18-8004(1)(d), a requirement which is not found in the statute. Since the language is unambiguous, the Court does not have to engage in statutory analysis to apply the statute’s plain meaning, *Callies v. O’Neal* 147 Idaho 841,847, 216 P.3d 130 (2009).

Ms. Elias-Cruz cites a “not officially published” decision of the California Court of Appeals for the proposition that that court should consider an “inherent margin of error”. *Nazerian v. Gourley*, 2005 WL 1576246, Cal.Rptr.3d (2005).<sup>3</sup>

I.C. § 18-8004(4) does not reference an inherent margin of error. Additionally I.C. § 18-8002A does not contain language that requires the Department’s Hearing Official to take into account any inherent margin of error in the reporting of breath test results before a license can be suspended for the failure of a breath test. I.C. § 18-8004 simply requires that the test results indicate a breath alcohol test result in excess of the legal limit, substituting here 0.02 for 0.08, *McDaniel v. State, Dept. of Transp.*, 149 Idaho 643, 646, 239 P.3d 36, 39 (Idaho Ct. App. 2010), *as amended* (Aug. 27, 2010).

The Hearing Official did not error in sustaining the suspension of *McDaniel’s* driving privileges based upon a breath alcohol content of 0.083, I.C. § 18-8004(1)(a) and the Hearing Official here did not commit error finding that a breath alcohol content result of 0.02 and 0.021,

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<sup>3</sup> *Nazerian* does not employ the same statutory analysis of California’s .001 No Tolerance Law necessary here in considering the value of a preliminary alcohol screening performed in the field with an Alco Sensor testing instrument, a breath testing device, the use of which, this Court has been uniquely skeptical.

was sufficient evidence that Ms. Elias-Cruz did not meet her burden pursuant to I.C. § 18-8002A(7)(c).

The *McDaniel* case rejects out of hand any consideration of an inherent margin of error to be considered by a Hearing Official to conclude that a test results indicate something other than what the test results indicate.

Ms. Elias-Cruz attempts to use the Standard Operating Procedures references for performance verifications to indicate that the test results were not in a proper range, however, there is nothing based upon this Record to support a finding that the .08 performance verification was not within the target range (R. p. 004).

Ms. Elias-Cruz suggests that the social ills addressed by prohibiting drivers under the age of 21 who operate motor vehicles from having any measurable breath alcohol is not necessarily intended to keep under age people from driving. There is a reasonable relationship between the policy of prohibiting under age drivers from having measurable amounts of alcohol in the blood and safety for the traveling public. However, Ms. Elias-Cruz does not make a substantive due process or equal protection argument.

Ms. Elias-Cruz's argument may be best advanced in the criminal setting arguing that the State might not meet its burden to persuade the jury that Ms. Elias-Cruz was under the influence. However, the question here is whether Ms. Elias-Cruz met her burden pursuant to I.C. § 18-8002A(7)(c) that the test result was not at least .02.

The Hearing Official is not determining whether Ms. Elias-Cruz was guilty of driving under the influence pursuant to I.C. § 18-8004(d) only whether Ms. Elias-Cruz met her burden under I.C. § 18-8002A(7). The argument as to the inherent margin of error may well have a place in the Idaho criminal jurisprudence but the Idaho Court has clearly indicated that an inherent margin of error is not applicable in the Administrative License Suspension process.

There is nothing in this Record to distinguish Ms. Elias-Cruz's result from a failed evidentiary test with an adult driver whose blood alcohol concentration was in excess of .08. (See *McDaniels* .083 result) I.C. § 18-8004(1)(d) simply requires a failed evidentiary test.

Ms. Elias-Cruz simply argues that the *McDaniel* Court is wrong but offers only hyperbole and hypotheticals not based on the Record before the Hearing Official or an explanation of why the *McDaniels* statutory interpretation of I.C. § 18-8004(1)(a) is not correct.

Finally, Ms. Elias-Cruz closes this argument with: "in order to determine a person's actual BrAC, the margin of error of the machine used must be considered" (Petitioner's Brief p. 10). The standard here is not to determine Ms. Elias-Cruz's "actual" breath alcohol content, instead the standard is whether Ms. Elias-Cruz suffers a failed test result indicating a violation of I.C. § 18-8004 not what her actual breath alcohol content may have been at some point in time.

There is no requirement nor can one be reasonably read into the provisions of I.C. § 18-8002A(7) that Ms. Elias-Cruz meets her burden if she shows she is not physically under the influence or is not affected by the alcohol she consumed, instead the standard is whether she can show that the test result did not show a breath test result of at least .02.

Ms. Elias-Cruz has not met her burden and the Hearing Official's decision should be affirmed.

## ISSUE 2

*Whether the Hearing Official should have sustained the license suspension when the Lifeloc FC20 providing the BrAC test had not been calibrated in accordance with a recommendation of the manufacturer and the Idaho State Police.*

This argument challenges the Hearing Official's conclusion that Ms. Elias-Cruz's evidentiary tests were not conducted in accordance with the requirements of I.C. § 18-8004(1)(d), I.C. § 18-8002A(7)(d).

Ms. Elias-Cruz takes substantial liberties with the concept of statutory interpretation. There is no statutory, rule or Idaho State Police Standard Operating Procedure which require that a performance verification be done annually.

Ms. Elias-Cruz seeks to supplement the Idaho State Police Breath Alcohol Standard Operating Procedure by adding a new provision not part of the Standard Operating Procedures arguably based upon a manufacturers recommendation.<sup>4</sup>

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#### **5. Performance Verification of Breath Testing Instruments**

Performance verification aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath testing instrument is functioning correctly. Performance verifications are performed using a wet bath simulator performance verification solution. The solution is provided by and/or approved by ISPFS. The ISPFS analysis establishes the target value and acceptable range of the solutions used for the verification and includes the acceptable values on the Certificate of Analysis for each solution. Note: The ISPFS established target values may be different from those shown on the bottle label.

##### **5.1 Alco-Sensor and Lifeloc FC20-Portable Breath Testing Instrument Performance Verification.**

5.1.1 The Alco-Sensor and Lifeloc FC20 portable breath testing instrument performance verification is run using approximately 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.

5.1.2 The performance verification using the 0.08 and 0.20 performance verification solutions consist of two samples.

5.1.3 A performance verification of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 or 0.20 performance verification solution must be performed within 24 hours, before or after an evidentiary test to be approved for evidentiary use. Multiple breath alcohol tests may be covered by a single performance verification. Reference 5.1.4.1 for clarification on the use of the 0.20 solution in this capacity.

5.1.3.1 A 0.08 performance verification solution should be replaced with fresh solution approximately every 25 verifications or every calendar month, whichever comes first.

5.1.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications or until it reaches its expiration date, whichever comes first.

NOTE: The 0.20 performance verification was implemented for the sole purpose of supporting the instruments' results for an 18-8004C charge. Failure to timely perform a 0.20 performance verification will not invalidate test performed that yield results at other levels or in charges other than 18-8004C.

5.1.4.1 The 0.20 performance verification satisfies the requirement for performance verification within 24 hours, before or after an evidentiary test at any level. The 0.20 performance verification solution should not be used routinely for this purpose.

Idaho Breath Alcohol Standard Operating Procedures, Revisions 2 Effective 11/01/2010, pp. 10-11. (See also FN 2)



The manufacturers recommendation relied upon Ms. Elias-Cruz is not a requirement of the Idaho State Police's Standard Operating Procedures. Exhibit D (R. p. 027) indicates that "Lifeloc recommends you calibrate your FC once a year or if it fails two consecutive calibration checks". Ms. Elias-Cruz doesn't point out to the Court, the phrase following: "in addition check with your program administrator for any additional requirements or guidelines your organization may have." Nor can Ms. Elias-Cruz demonstrate based on this Record that the Lifeloc FC20 was not calibrated annually as suggested by the manufacturer. Nor does the Record contain any evidence of decertification if the Lifeloc FC20 is not calibrated according to the manufacturer's suggestion.<sup>5</sup>

Lifeloc Technologies defers to the Idaho State Police as to any guidelines for the calibration and operation of the Lifeloc FC20. The Frequently Asked Questions cited by Ms. Elias-Cruz goes on to specifically address how often a calibration check should be performed on the FC20. "Response: "Calibration check requirements vary depending on the program guidelines or internal procedures you're testing under. Please check with your program administrator." (R. p. 027). The Idaho State Police as the program administrator has not required annual calibrations.

The Court cannot assume that the Legislature intended the Standard Operating Procedures to be supplemental rather than exclusive. In fact the Idaho Court has specifically indicated in judicial review of an Administrative License Suspension that the Idaho State

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<sup>5</sup> Mr. Beals did not testify as to whether the tests were inaccurate based upon a performance verification not having occurred annually. There is nothing in the Standard Operating Procedures of the Idaho State Police that require annual calibrations.

Police's Standard Operating Procedures are not supplemental but are instead construed "as rules". *In re Schroeder*, 147 Idaho 476, 479, 210 P.3d 584, 587 (Idaho Ct. App. 2009).<sup>6</sup>

Here, the Court's review is limited to the action of the police officer implementing the Idaho State Police's Standard Operating Procedures not the Lifeloc FC20 manufacturer's representations. In fact to suggest such a statutory interpretation flies in the face of the Idaho Court's interpretation of the effect of the Idaho State Police's Breath Alcohol Standard Operating Procedures. Specifically the Idaho Court found the Idaho State Police Standard Operating Procedures and Manuals to be rules for purposes of judicial review because they constitute the only materials by which the Idaho State Police has acted upon pursuant to the I.C. § 18-80024(4) authorization for the promulgation of rules regarding breath alcohol testing instruments and methods, *In re Schroeder*, 147 Idaho 476, 481, 210 P.3d 584, 589 (Idaho Ct. App. 2009).

Nor is there anything in this Record to suggest that the use of the Lifeloc FC20 requires the adoption of the manufacturer's recommendations. If there is no such requirement in the only materials which the Idaho State Police has acted on, then it is clear that the Standard Operating Procedures are not supplemented by manufacturer's recommended actions outside the Standard Operating Procedures.

The Idaho State Police in adopting Standard Operating Procedures have clearly implemented the circumstances of performance verification of the Lifeloc FC20.

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The ISP has been given the responsibility to promulgate regulations for administration of breath alcohol tests, I.C. §§ 18-8002A(3), 18-8004(4); Idaho Admin. Code (IDAPA) 11.03.01.013.03, and has done so through creation of standard operating procedures and training manuals for the use of breath test instruments, including the Intoxilyzer 5000. *See* Idaho State Police, Standard Operating Procedure: Breath Alcohol Testing (Rev. November 2006) (SOP)<sup>1</sup>; Idaho State Police, Intoxilyzer 5000: Operator's Training Manual (Intoxilyzer 5000 Manual) (March 2007). Failure to abide by the regulations set forth in the standard operating procedures and training manuals renders the test inadmissible as evidence absent expert testimony that the improperly administered test nevertheless produced reliable results.

*In re Schroeder*, 147 Idaho 476, 478, 210 P.3d 584, 586 (Idaho Ct. App. 2009).

Ms. Elias-Cruz argues that the Standard Operating Procedures distinguish a calibration check from an actual calibration and then cites as authority the Alco Sensor manufacturer's manual as authority. The breath testing device employed here is not an Alco Sensor (R. p. 003). In spite of all the references that Ms. Elias-Cruz may employ to suggest that there is an annual testing requirement, she can find none applying to the Lifeloc FC20.

Ms. Elias-Cruz relies on *State v. Onsurez*, 132 N.M. 485, 51 P.3d 528 (2002) for the proposition that an annual calibration should be required. However, the Court in *Onsurez* finds that if the regulations call for an annual calibration, the absence of such a calibration call the certification of the Lifeloc FC20 into question. Ms. Elias-Cruz makes no argument here about the certification of the Lifeloc FC20, only that annual calibration would be appropriate relying on the breath testing instrument approval process in New Mexico. Nor does Ms. Elias-Cruz advise the Court that the Court sustained *Onsurez*'s conviction despite the lack of proof of an annual calibration.

Here, there is sufficient evidence in the Record for the conclusion that the Lifeloc FC20 was properly calibrated. The last .08 calibration was within an acceptable range and was performed within twenty four hours of the test administered to Ms. Elias-Cruz (R. p. 004) and is consistent with the Standard Operating Procedures.

Further, Ms. Elias-Cruz makes reference to a .20 calibration standard being performed on 08/18/2009. The Standard Operating Procedures clearly address the circumstances and the effect of the .20 performance verification (see SOPs § 5.1.4).<sup>7</sup>

Clearly, a .20 performance verification has nothing to do with sufficiency of the testing of Ms. Elias-Cruz's breath alcohol. Ms. Elias-Cruz's .02 result is not impacted by the lack of a .20 performance verification.

There is no basis for an argument for a statutory interpretation that would permit the consideration of recommendations not included by the Idaho State Police in the Breath Alcohol Standard Operating Procedures.

The performance of the Lifeloc FC20 was verified pursuant to the Idaho State Police's Breath Alcohol Standard Operating Procedures. The manufacturer's recommendations are not incorporated in the Lifeloc FC20 Standard Operating Procedures. There is no requirement that Ms. Elias-Cruz can point to indicating that the Lifeloc FC20 must have a performance verification completed within 12 months of testing where the result is not in excess of .20. This argument would only go to the certification of the Lifeloc FC20 an argument which was not made to the Hearing Official.

Ms. Elias-Cruz has not met her burden and the Hearing Official's decision is supported by substantial evidence in the Record.

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- 5.1.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications or until it reaches its expiration date, whichever comes first.

NOTE: The 0.20 performance verification was implemented for the sole purpose of supporting the instruments' results for an 18-8004C charge. Failure to timely perform a 0.20 performance verification will not invalidate test performed that yield results at other levels or in charges other than 18-8004C.

Idaho Breath Alcohol Standard Operating Procedures, Revisions 2 Effective 11/01/2010, p. 10.

**Conclusion**

Ms. Elias-Cruz has failed to meet her burden as required by Idaho Code § 18-8002A(7). The Hearing Official's Decision should be sustained and Ms. Elias-Cruz's driving privileges should be suspended for ninety days as provided for in I.C. § 18-8002A(7).

DATED the 76 day of July 2011.



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Edwin L. Litteneker  
Special Deputy Attorney General for  
Idaho Transportation Department

I DO HEREBY CERTIFY that a true  
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To: Patrick D. Costello – Supervising Attorney  
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On the 20 day of July 2011.

\_\_\_\_\_  
Edwin L. Litteneker

CV 2011-0090  
CASE NO

2011 AUG 19 AM 9:46

CLERK OF DISTRICT COURT  
LATAH COUNTY

BY fa DEPUTY

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Attorneys for Petitioner

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF LATAH

|                      |   |                                      |
|----------------------|---|--------------------------------------|
| ALMA A. ELIAS-CRUZ,  | ) |                                      |
|                      | ) | CASE NO. CV-2011-90                  |
| Petitioner,          | ) |                                      |
|                      | ) | PETITIONER'S REPLY RESPONSE TO IDAHO |
| v.                   | ) | TRANSPORTATION DEPARTMENT BRIEF      |
|                      | ) |                                      |
| IDAHO TRANSPORTATION | ) |                                      |
| DEPARTMENT,          | ) |                                      |
|                      | ) |                                      |
| Respondent.          | ) |                                      |
| _____                | ) |                                      |

### INTRODUCTION

This is a brief in reply to Idaho Department of Transportation's brief. Points of clarification are being presented and corrections of stated facts from Respondent's brief.

### CLARIFICATIONS

*Respondent indicated in their brief that Alma Elias-Cruz did not pass her field sobriety test. (Respondent brief, p. 2).* However, as indicated in the record, Ms. Elias-Cruz did not meet

any of the decision points during the field sobriety test. (R. p. 006). Because Ms. Elias-Cruz did not meet any of the decision points for Horizontal Gaze Nystagmus, Walk and Turn and One Leg Stand that means she in fact did pass the field sobriety test.

*Respondent indicates that there is no challenge that the breath testing equipment was not properly functioning. (Respondent's brief, p. 4).* This is actually the exact argument that is being made by Ms. Elias-Cruz. The Lifeloc FC20 has a margin of error of +/- .005 which renders it incapable of functioning properly at a .020 measurement level at any given time. Idaho Breath Alcohol Standard Operating Procedures that were quoted by the Respondent were not in effect until November 11, 2010, which is 10 days after Ms. Elias-Cruz was pulled over. However, it is still instructive. Procedure 5.1.5. indicates a performance verification is a pair of samples in sequence that are both within +/- 10% of the performance verification solution target value. The Lifeloc FC20 is not capable of testing within the +/- 10% requirement at the .020 level because of the .005 margin of error. Additionally, the performance verification solution utilized during the test was .080, not .020. This test solution is 4 times stronger than the amount being tested for and in no way indicates whether the Lifeloc FC20 was functioning properly at the level being tested for. Furthermore, the calibration check that was done on October 22, 2010 only shows one calibration test result, not the pair of tests that are required under the 5.1.5 procedure. And this test result showed that the Lifeloc FC20 was measuring higher levels than the test solution actually had. (R. p. 004).

### CONCLUSION

Ms. Elias-Cruz has met her burden showing that the Hearing Officials Decision was clearly erroneous. The decision of the Hearing Official should be set aside and the suspension of her driving privileges should be vacated.



Respectfully submitted this 18th day of August, 2011.

*B. Morris*

Brian Morris – Legal Intern

*Patrick Costello*

Patrick Costello – Supervising Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Petitioner's Brief was served by the following means to the following parties:


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DATED this 18<sup>th</sup> day of June, 2011.

  
\_\_\_\_\_  
Brian Morris – Legal Intern

- COURT MINUTES -

Date: August 24, 2011

ALMA A. ELIAS-CRUZ,

Petitioner,

vs.

IDAHO TRANSPORTATION  
DEPARTMENT,

Respondent.

Case No. CR-2011-90

APPEARANCES:

Petitioner represented by counsel, Ryan  
Morris, intern, with supervising attorney,  
Patrick Costello, Moscow, Idaho

Defendant represented by counsel,  
Edwin L. Litteneker, Special Deputy Attorney  
General

*Subject of Proceedings:*     **Appellate Argument**

This being the time fixed pursuant to written order of the Court for hearing appellate argument in this case, Court noted the presence of counsel.

Mr. Morris presented appellate argument on behalf of the petitioner and responded to inquiries from the Court. Mr. Litteneker presented appellate argument on behalf of the defendant and responded to inquiries from the Court. Mr. Morris argued in rebuttal. No surrebuttal.

Court took the matter under advisement, informing counsel that it would render its decision in writing.

Court recessed at 10:37 A.M.

APPROVED BY:

Jon & Alex

JOHN R. STEGNER  
DISTRICT JUDGE

Terry Odenborg  
Deputy Clerk

CASE NO. CV 2011-00090

2011 OCT 24 PM 4:23

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LATAH COUNTY

BY                      DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

ALMA A. ELIAS-CRUZ,

Petitioner,

vs.

STATE OF IDAHO

TRANSPORTATION DEPARTMENT,

Respondent.

Case No. CV-2011-0090

MEMORANDUM OPINION

INTRODUCTION

Alma A. Elias-Cruz ("Elias-Cruz") has petitioned this Court for judicial review of the administrative suspension of her driver's license by the Idaho Transportation Department ("the Department").

MEMORANDUM OPINION

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## BACKGROUND

On October 21, 2010, at approximately 9:09 p.m., Trooper Jacob Schwecke ("Schwecke") of the Idaho State Police stopped Elias-Cruz for driving her Honda CR-V above the legal speed limit. The stop took place on U.S. Highway 95 north of Moscow in Latah County, Idaho. After pulling Elias-Cruz over, Schwecke smelled the odor of alcohol coming from her vehicle. When questioned, Elias-Cruz admitted to drinking alcohol before driving. Pursuant to Schwecke's instructions, Elias-Cruz then exited her vehicle and performed field sobriety tests. While Elias-Cruz did not meet any of the decision points on the field sobriety tests, Schwecke observed signs that Elias-Cruz had consumed alcohol. Schwecke then placed Elias-Cruz under arrest for Driving Under the Influence of Alcohol. After Elias-Cruz was transported to the Latah County Jail, she submitted to a breathalyzer test using a Lifeloc FC20 instrument, which measured her breath alcohol content as 0.021 and 0.02.

Because Elias-Cruz was only twenty years old on October 21, 2010, the Department suspended her driver's license for ninety days pursuant to the Notice of Suspension it issued on that same date. Elias-Cruz timely requested an administrative hearing to review the suspension. An administrative hearing was held December 9, 2010, via telephone. At the hearing, Elias-Cruz presented expert testimony from Loring Beals, who testified that the Lifeloc FC20 had a margin of error of 0.005 and that therefore, Elias-Cruz's test results of 0.021 and 0.02 could

have been anywhere from 0.015 to 0.026. *ALS Hearing Transcript* at 10, lines 2-9. Elias-Cruz's counsel argued that the margin of error inherent in the Lifeloc FC20 machine should be considered by the Hearing Officer because the margin of error made it just as likely that Elias-Cruz's blood alcohol content was actually below the legal limit. Elias-Cruz's counsel also argued that the Lifeloc FC20 machine had not been calibrated in accordance with the Idaho State Police Standard Operating Procedures: Breath Alcohol Testing ("ISP SOPs") and the manufacturer's recommendation that the machine be calibrated annually.

In overruling Elias-Cruz's challenge to her license suspension, the Hearing Officer issued Findings of Fact and Conclusions of Law and entered a Final Order on January 3, 2011. The Hearing Officer's findings and conclusions included the following:

9. Additionally, I.C. § 18-8002A does not provide nor allow for margin of error to be considered with respect to breath test results.  
...
12. In *State of Idaho v. Bryan Lee McDaniel*, Court of Appeals of the State of Idaho, 2010 Opinion No. 58, the court held that the plain meaning of the statutory language is that a driver's license will be suspended upon *test results* indicating a BAC of 0.08 or more, not 0.08 plus or minus any margin of error. Therefore, any inherent margin of error is disregarded.
13. Based on the foregoing court ruling and decision, the same can be held true for an underage DUI where the legal limit is set at 0.02.

*Findings of Facts and Conclusions of Law and Order* at 7-8; (*Agency Record* at 51-52) (italics in original).

Elias-Cruz timely filed a Petition for Judicial Review of the Hearing Officer's decision and requested that this Court stay her license suspension. This

Court entered an Order for Stay of License Suspension on February 16, 2011. On appeal, Elias-Cruz raises three issues. First, she argues that the Hearing Officer erred by not considering the margin of error in the Lifeloc FC20 machine in sustaining her license suspension. Second, she argues that the Hearing Officer should not have sustained her license suspension because the Lifeloc FC20 had not been properly calibrated as required by the ISP SOPs and the manufacturer's recommendation. Third, she alleges that the verification test of the Lifeloc FC20, conducted on October 22, 2010, produced only one sample and not the pair of samples that were required by the ISP SOPs. (This latter argument was raised initially in the Petitioner's Reply Brief.) Because this Court concludes that the Hearing Officer erred by refusing to consider the margin of error in the breath-testing machine, it is unnecessary to reach either of the other issues.

### STANDARD OF REVIEW

According to I.C. § 18-8002A(8), "[a] party aggrieved by the decision of the hearing officer may seek judicial review of the decision in the manner provided for judicial review of final agency action provided in chapter 52, title 67, Idaho Code." A court must affirm the action under review unless the agency's 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 as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). To

succeed on review, a party challenging an agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3). *See* I.C. § 67-5279(4); *Price v. Payette County Bd. of County Comm'rs.*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998). The court's review "must be confined to the agency record." I.C. § 67-5277. Idaho Code § 67-5279(1) states that when reviewing an agency decision, a court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." An agency's factual determinations are binding on a reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial evidence on the record. *Marshall v. State Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct. App. 2002) (citations omitted). A constitutional issue is "purely a question of law" over which courts exercise free review. *Harris v. State, Dept. of Health & Welfare*, 123 Idaho 295, 297, 847 P.2d 1156, 1158 (1992) (citation omitted).

### ANALYSIS

**It was fundamentally unfair and a denial of Elias-Cruz's due process rights for the Hearing Officer to sustain her license suspension without considering the inherent margin of error in the Lifeloc FC20.**

There can be no doubt that the right to drive is constitutionally protected. The Idaho Supreme Court has held that "the right to operate a motor vehicle on public highways is a matter of constitutional dimension." *State v. Wilder*, 138 Idaho 644, 646, 67 P.3d 839, 841 (Ct. App. 2003) *relying on* *Adams v. City of Pocatello*, 91 Idaho 99, 101, 416 P.2d 46, 48 (1966). In *Adams*, the Court held that the right to drive "is a right or liberty, the enjoyment of which is protected by the



guarantees of the federal and state constitutions.” *Adams*, 91 Idaho at 101, 416 P. 2d at 48. “Consequently, the courts of this state must regard the right to drive a motor vehicle on public highways as constitutionally protected.” *Wilder*, 138 Idaho at 644, 67 P.3d at 841.

In Idaho, the constitutional right to due process can exceed whatever process is afforded by the legislature.

Due process of law is not necessarily satisfied by any process which the legislature may by law provide, but by such process only as safeguards and protects the fundamental, constitutional rights of the citizen. Where the state confers a license upon an individual to practice a profession, trade, or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

*Abrams v. Jones*, 35 Idaho 532, 546, 207 P. 724, 726 (1922).

In *McDaniel v. State Dep’t of Transportation*, 149 Idaho 643, 239 P. 3d 36 (Ct. App. 2010), the Idaho Court of Appeals was asked to determine “whether the license suspension statute [should be] interpreted to require a driver’s license to be suspended upon test results indicating a blood alcohol level in excess of the statutory limit, or alternatively upon an actual level in excess of the statutory limit.” *Id.* at 645-46, 38-39. In answering this question, and by focusing solely on the language in the statute, the Court of Appeals concluded that a license should be suspended merely upon a test result showing an alcohol level in excess of the statute. *Id.* at 646, 39.

Accordingly, an assessment of Elias-Cruz's challenge to her license suspension must include a determination of whether the established statutory process passes constitutional muster. The Court of Appeals' decision in *McDaniel*, in essence, holds a driver strictly liable whenever a test exceeds the statutory minimum, even if the machine was malfunctioning. The court focused only on the statutory interpretation without considering whether *McDaniel*'s constitutional rights to due process were violated by that analysis. A strict application of *McDaniel* would mean that even if a license holder could prove the breath alcohol machine malfunctioned she would still forfeit her driver's license. This cannot be the law. It would be fundamentally unfair to hold someone strictly liable for a test result that the manufacturer itself would consider to be outside the acceptable margin of error. Elias-Cruz's constitutional rights to due process were therefore violated by the Hearing Officer's wholesale rejection of the Lifeloc FC20's margin of error.

**The Hearing Officer erred by concluding that I.C. § 18-8002A does not allow for the consideration of the breath-testing machine's margin of error and violated Elias-Cruz due process right to a fair and impartial hearing by refusing to consider such evidence.**

Under I.C. § 18-8004(d), it is unlawful for an individual under the age of twenty one to operate a motor vehicle while having an alcohol concentration of .02 or higher. An individual's driver's license may be suspended if "test results indicated an alcohol concentration . . . in violation of section 18-8004 . . . ." I.C. § 18-8002A. One of the grounds for challenging one's license suspension is to prove

by a preponderance of the evidence that “the test results did not show an alcohol concentration” above the legal limit. I.C. § 18-8002A(7)(c).

The court in *McDaniel*, held that I.C. § 18-8002A does not “require[ ] the hearing officer to take into account any inherent error within the breath test machine before a license can be suspended . . . .” *McDaniel*, 149 Idaho at 646, 239 P. 3d at 39. The court then assumed, without citing any authority, that such evidence “is disregarded” by a Hearing Officer when presiding over a challenge to the Department’s administrative suspension of an individual’s driver’s license. *Id.*

Because Elias Cruz’s test results indicated that she was operating a vehicle with an alcohol content of 0.02 or higher, her license was properly suspended initially, under I.C. § § 18-8004(d) and 18-8002A.

While the court in *McDaniel* correctly concluded that the plain language of I.C. § 18-8002A does not require the consideration of a breath-testing machine’s inherent margin of error, the plain language of the statute does not preclude consideration of such evidence either. Furthermore, to challenge one’s license suspension under I.C. § 18-8002A(7)(c) on the basis that “test results did not *show* an alcohol concentration” above the legal limit, one must be allowed to attack the reliability of the test results. The definition of the word “show” is “[t]o make apparent or clear by evidence; to prove.” BLACK’S LAW DICTIONARY 1385 (7<sup>th</sup> ed. 1999). Thus, an individual challenging her license suspension should be able to

present evidence to prove that the test results did not make it apparent or clear that her alcohol concentration was actually above the legal limit.

In this case, Elias-Cruz presented expert testimony at the administrative hearing that showed that the Lifeloc FC20 had a significant margin of error. (This is especially true given that the level being measured in this case is so low.) Through this testimony, Elias-Cruz raised the issue of whether her test results showed that her alcohol concentration was actually above .02. The Hearing Officer should not have refused to even consider this evidence. The courts of this State have made it clear that due process requires a "fair and impartial hearing" before an individual's constitutionally protected "right or liberty" to drive can be denied. *See Abrams*, 35 Idaho at 546, 207 P. at 726; *Adams*, 91 Idaho at 101, 416 P. 2d at 48. By concluding that the Lifeloc FC20's inherent margin of error would not be considered, the Hearing Officer denied Elias-Cruz the opportunity to meet her burden of proof and violated her due process right to a fair and impartial hearing.

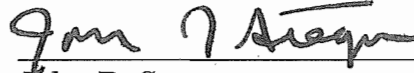
### CONCLUSION

Because it would be fundamentally unfair to hold someone strictly liable for a test result the manufacturer itself would consider to be outside the acceptable margin of error, Elias-Cruz's constitutional rights to due process were violated by the Hearing Officer's wholesale rejection of the expert testimony she presented regarding the Lifeloc FC20's inherent margin of error. The Hearing Officer's rejection of such evidence also deprived Elias-Cruz of her due process right to

receive a fair and impartial hearing before being deprived of her constitutionally-protected right to drive.

Consequently, the Hearing Officer's decision is VACATED and the case is REMANDED.

Dated this 24<sup>th</sup> day of October 2011.



John R. Stegner  
District Judge

## CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete and correct copies of the foregoing Memorandum Opinion were delivered in the following fashion to:

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Patrick D. Costello, Supervising Attorney  
Brian Morris, Legal Intern  
University of Idaho College of Law  
Legal Aid Clinic  
P.O. Box 442322  
Moscow, Idaho 83844-2322

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On this 25 day of October 2011.

  
Deputy Clerk

LAWRENCE G. WASDEN  
Attorney General

Edwin L. Litteneker  
Special Deputy Attorney General  
Idaho Transportation Department  
PO Box 321  
Lewiston, Idaho 83501  
Telephone: (208) 746-0344  
ISB No. 2297  
Attorneys for Appellant.

CV 2011-00090  
CASE NO

2011 NOV 10 AM 11:29

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY *Da* DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

|                            |   |                                     |
|----------------------------|---|-------------------------------------|
| ALMA A. ELIAS-CRUZ,        | ) | Case No. CV 2011-0090               |
|                            | ) |                                     |
| Petitioner/Respondent)     | ) |                                     |
|                            | ) |                                     |
| v.                         | ) | <b>NOTICE OF APPEAL</b>             |
|                            | ) | <b>Fee Category: L.</b>             |
| STATE OF IDAHO             | ) | <b>Fee: Exempt - I.C. § 67-2301</b> |
| TRANSPORTATION DEPARTMENT, | ) |                                     |
|                            | ) |                                     |
| Respondent/Appellant)      | ) |                                     |

TO: THE ABOVE NAMED RESPONDENT, ALMA A. ELIAS-CRUZ, AND YOUR ATTORNEY, PATRICK D. COSTELLO, UNIVERSITY OF IDAHO COLLEGE OF LAW, P.O. DRAWER 442322, MOSCOW, IDAHO 83844, AND THE CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, STATE OF IDAHO TRANSPORTATION DEPARTMENT (hereinafter referred to as "Department"), appeals to the Idaho Supreme Court from the Order of the 24<sup>th</sup> day of October 2011, entered by Honorable Judge Stegner vacating the Department's suspension of Ms. Elias-Cruz's driving privileges.

2. This appeal is taken on issues of law and fact. It is generally submitted that the issues on appeal will include the District Court's failure to affirm the decision of the Department's Hearing Official, particularly in regards to the circumstances of the margin of error in the Lifeloc FC20 machine. A more specific detailing of the issues on appeal will be supplied upon the briefing of this matter.

3. That the Department has a right to appeal to the Idaho Supreme Court as the state agency which originally administratively suspended the driving privileges of Ms. Elias-Cruz and appeared through its Special Deputy Attorney General in the Petition for Judicial Review proceedings before the Honorable Judge Stegner.

4. The order described in paragraph 1 above is an appealable order under and pursuant to Idaho Appellate Rule 11(f).

5. (a) The Appellant requests the preparation of the standard reporter's transcript as defined in Idaho Appellate Rule 25(a).

6. The Appellant requests the clerk's record be prepared as provided for under Idaho Appellate Rule 28(a)(1).

7. I certify:

(a) That a copy of the Notice of Appeal has been served on the reporter.

(b) That the Clerk of the District Court has been paid the estimated fee for preparation of the reporter's transcript.

(c) That the State of Idaho is exempt from paying the estimated fee for preparation of the clerk's record per Idaho Code Section 67-2301.

(d) That the State of Idaho is exempt from paying the appellate filing fee per Idaho Code Section 67-2301.



(e) That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 9 day of November 2011.



---

Edwin L. Litteneker  
Special Deputy Attorney General  
Attorney for Idaho Transportation Department

I DO HEREBY CERTIFY that a true  
And correct copy of the foregoing  
Document was:

☒ Mailed by regular first class mail,  
And deposited in the United States  
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To: Patrick D. Costello, Supervising Attorney  
University of Idaho College of Law  
Legal Aid Clinic  
P.O. Box 442322  
Moscow, Idaho 83844-2322

Sheryl Engler  
Certified Court Reporter  
P.O. Box 8606  
Moscow, Idaho 83843

On this 9 day of November 2011.



Edwin L. Litteneker

CV 2011-00090  
CASE NO.

2011 NOV 15 AM 11:11

CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY *fla* DEPUTY

LAWRENCE G. WASDEN  
Attorney General

Edwin L. Litteneker  
Special Deputy Attorney General  
Idaho Transportation Department  
PO Box 321  
Lewiston, Idaho 83501  
Telephone: (208) 746-0344  
ISB No. 2297  
Attorneys for Appellant.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

|                            |   |                                     |
|----------------------------|---|-------------------------------------|
| ALMA A. ELIAS-CRUZ,        | ) | Case No. CV 2011-0090               |
|                            | ) |                                     |
| Petitioner/Respondent)     | ) |                                     |
|                            | ) | <b>AMENDED</b>                      |
| v.                         | ) | <b>NOTICE OF APPEAL</b>             |
|                            | ) | <b>Fee Category: L.</b>             |
| STATE OF IDAHO             | ) | <b>Fee: Exempt - I.C. § 67-2301</b> |
| TRANSPORTATION DEPARTMENT, | ) |                                     |
|                            | ) |                                     |
| Respondent/Appellant)      | ) |                                     |

TO: THE ABOVE NAMED RESPONDENT, ALMA A. ELIAS-CRUZ, AND YOUR ATTORNEY, PATRICK D. COSTELLO, UNIVERSITY OF IDAHO COLLEGE OF LAW, P.O. DRAWER 442322, MOSCOW, IDAHO 83844, AND THE CLERK OF THE ABOVE ENTITLED COURT:

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AMENDED  
NOTICE OF APPEAL

2. This appeal is taken on issues of law and fact. It is generally submitted that the issues on appeal will include the District Court's failure to affirm the decision of the Department's Hearing Official, particularly in regards to the circumstances of the margin of error in the Lifeloc FC20 machine. A more specific detailing of the issues on appeal will be supplied upon the briefing of this matter.

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(a) That a copy of the Notice of Appeal has been served on the reporter.

(b) That the Clerk of the District Court has been paid the estimated fee for preparation of the reporter's transcript.

(c) That the State of Idaho is exempt from paying the estimated fee for preparation of the clerk's record per Idaho Code Section 67-2301.

(d) That the State of Idaho is exempt from paying the appellate filing fee per Idaho Code Section 67-2301.

(e) That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 14 day of November 2011.



---

Edwin L. Litteneker  
Special Deputy Attorney General  
Attorney for Idaho Transportation Department

I DO HEREBY CERTIFY that a true  
And correct copy of the foregoing  
Document was:

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And deposited in the United States  
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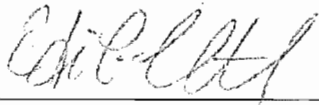
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To: Patrick D. Costello, Supervising Attorney  
University of Idaho College of Law  
Legal Aid Clinic  
P.O. Box 442322  
Moscow, Idaho 83844-2322

Sheryl Engler  
Certified Court Reporter  
P.O. Box 8606  
Moscow, Idaho 83843

On this 14 day of November 2011.



Edwin L. Litteneker



**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH**

ALMA A. ELIAS-CRUZ,

Petitioner-Respondent,

vs.

IDAHO DEPARTMENT OF  
TRANSPORTATION,

Respondent-Appellant.

Supreme Court Case No. 39425-2011

**CLERK'S CERTIFICATE**

I, Ranae Converse, Deputy Court Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, do hereby certify that the above and foregoing transcript in the above entitled cause was compiled and bound under my direction as, and is a true, full, complete and correct transcript of the pleadings and documents as are automatically required under Rule 28 of the Idaho Appellate Rules.

I do further certify that all exhibits, offered or admitted in the above entitled cause will be duly lodged with the Clerk of the Supreme Court along with the court reporter's transcript and the clerk's record, as required by Rule 31 of the Idaho Appellate Rules.

**IN WITNESS WHEREOF**, I have hereunto set my hand and affixed the seal of said Court at Moscow, Idaho this 5th day of January 2012.

Susan R. Petersen, Clerk of the  
District Court, Latah County, ID

By Ranae Converse  
Deputy Clerk



ALMA A. ELIAS-CRUZ,  
  
Petitioner-Respondent,  
  
vs.  
  
IDAHO DEPARTMENT OF  
TRANSPORTATION,  
  
Respondent-Appellant.

## CERTIFICATE OF SERVICE

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