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# Elias-Cruz v. Idaho Dept of Transportation Appellant's Brief Dckt. 39425

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**IN THE SUPREME COURT OF THE  
STATE OF IDAHO**

**IN THE MATTER OF THE DRIVING )  
LICENSE PRIVILEGES OF ALMA )  
ELIAS-CRUZ )**

**39425-2011**

\_\_\_\_\_  
**ALMA A. ELIAS-CRUZ,** )

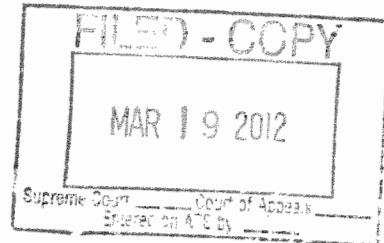
**Petitioner-Respondent,** )

**APPELLANT'S BRIEF**

**v.** )

**IDAHO DEPARTMENT OF )  
TRANSPORTATION,** )

**Respondent-Appellant.** )



**APPEAL FROM SECOND JUDICIAL DISTRICT, LATAH COUNTY**

**THE HONORABLE JOHN R. STEGNER, PRESIDING**

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## I. STATEMENT OF THE CASE

### a. Nature of the Case.

This is the opening brief of the Appellant, Idaho Transportation Department. Alma A. Elias-Cruz initially 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.

The District Court upon entertaining written briefs and Oral Argument determined that Ms. Elias-Cruz's due process rights were violated by the Department's Hearing Official's rejection of proof regarding the breath testing instruments inherent margin of error. The District Court further determined that the rejection of such evidence denied Ms. Elias-Cruz of an opportunity for a fair and impartial hearing before the suspension of her driving privileges by the Department's Hearing Official.

### b. Party References.

The Idaho Transportation Department is referred to as the "Department" for purposes of this argument. Ms. Eilas-Cruz is specifically referred to by name. Where "driver" is used, it is in reference to a hypothetical or to drivers generally.

### c. Reference to the Administrative Record.

The references to the Department's Administrative Record are made to the Appellate Record page number not the Administrative Record page number. The Transcript of the Administrative hearing is included in the Record on Appeal as an exhibit. The transcript (Tr.) of that hearing is referred to as Administrative License

Suspension (ALS) Tr. by page and number.

**d. Factual Statement and Procedural History.**

On October 21, 2010 at approximately 2109 hours, Idaho State Police Trooper Schwecke was 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 unsuccessfully performed the Horizontal Gaze Nystagmus, Walk and Turn and One Leg Stand tests. Trooper Schwecke informed Ms. Elias-Cruz that she was under arrest for DUI (R. p. 033). Ms. Elias-Cruz provided evidentiary test results of .021 and .020 (R. p. 035).

Ms. Elias-Cruz timely requested an administrative hearing with the Department of Transportation's Hearing Official (R. pp. 040-042).

A hearing was held telephonically with the Idaho Department of Transportation's Administrative Hearing Official (R. p. 067). 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. 072-084).

A Petition for Judicial Review was filed by Ms. Elias-Cruz (R. p. 008-012). The Court upon accepting written briefing and hearing oral argument vacated the Department's Hearing Official's decision concluding that sufficient due process was not provided to Ms. Elias-Cruz (R. 146-156).

The Department timely filed its Notice of Appeal.

### **ISSUES ON APPEAL**

Issue 1: The Hearing Official did not err by finding that there is not an inherent margin of error in the evidentiary test results produced by the Lifeloc FC20.

Issue 2: The Hearing Official properly determined that the Lifeloc FC20 had been calibrated in accordance with the Standard Operating Procedures of the Idaho State Police.

Issue 3: The Hearing Official did not violate due process in suspending Ms. Elias-Cruz's driving privileges. This issue has two parts; first the Hearing Official's decision does not implicate due process and second Ms. Elias-Cruz did not properly preserve a due process challenge to the suspension of her driving privileges as a result of a .02 evidentiary breath alcohol content test result.

### **III. STANDARD OF REVIEW**

Idaho Code § 18-8002A(7) sets out the burden of the driver to demonstrate to the Hearing Officer 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 burden of proof rests on the driver to prove any of the grounds to vacate the suspension of Idaho Code § 18-8002A(7), *Kane v. State, Dept. of Transp.*, 139 Idaho 586, 83 P.3d 130 at 143 (Ct. App. 2003).

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 Bd. of Com'rs*, 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. Department of Transp.*, 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 Transp.*, 136 Idaho 853, 41 P.3d 739 (2002).

Appellate review of the District Court’s decision requires the Court to review “the agency record independently of the District Court’s decision”, *Marshall v. Dept. of Transp.* 137 Idaho 337, 340, 48 P.3d 666,669 (Ct. App. 2002).

## IV. ARGUMENT

### ISSUE 1

*The Hearing Official did not err by finding that there is not an inherent margin of error in the test result produced by the Lifeloc FC20.*

Ms. Elias-Cruz argued to the Hearing Official and the District Court that the Lifeloc FC20 has an “inherent margin of error”, thereby meeting her burden to show that her breath alcohol was really not in excess of .02 and therefore not in violation of I.C. § 18-8004(1)(d).<sup>1</sup>

Idaho Code § 18-8004(4) defines the circumstances of the Hearing Officer’s consideration of the evidentiary test. Ms. Elias-Cruz, a twenty year old driver, was in violation of I.C. § 18-8004(1)(d) as a result of failing an evidentiary test for breath alcohol concentration as defined in I.C. § 18-8004(4). There is no question based upon this Record that the evidentiary test for breath alcohol content indicated an alcohol concentration of at least 0.02 (R. p. 030).

Ms. Elias-Cruz offered proof to the Department’s Hearing Official of an inherent margin of error in the operation of the Lifeloc FC20 breath testing device and argued that 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 introduced the testimony of Loring Beals and by argument sought to impose a standard of breath alcohol testing not required by the Idaho State Police, the Idaho Legislature, or the Idaho Courts.

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<sup>1</sup> I.C. § 18-8004(1)(d) provides:

It is unlawful for any person under the age of twenty-one (21) years who has an alcohol concentration of at least 0.02 but less than 0.08, as defined in subsection (4) of this section, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public. Any person violating this subsection shall be subject to the penalties provided in section 18-8004A, Idaho Code.

Ms. Elias-Cruz bases the argument for an inherent margin of error on an alleged sensitivity of 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 impacting an evidentiary test failure, *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 (ALS Hrg Tr. p. 10 L. 1-10). Mr. Beals does not 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 administrative 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(1)(d). The Hearing Official carefully considered the argument and evidence offered by Ms. Elias-Cruz (R. pp. 072-082).

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). 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. 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) is whether there is a failed evidentiary test. Here, Ms. Elias-Cruz's test result indicated a failed evidentiary test.

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), specifically rejects the analysis posed by Ms. Elias-Cruz.<sup>2</sup>

The Idaho State Police in the Breath Alcohol Standard Operating Procedures Manual do 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>3</sup>

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.

I.C. § 18-8004(1)(d) does not contain language permitting the consideration of an inherent margin of error. Ms. Elias-Cruz wants to read into I.C. § 18-8004(1)(d), a

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<sup>2</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>3</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, Revision 2 Effective 11/01/2010, pp. 10-11.

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).

I.C. § 18-8004(4) does not reference an inherent margin of error.

Neither do I.C. § 18-8002A(7)(c) or (d) contain language that requires the Department's Hearing Official to take into account any inherent margin of error in the reported breath test results before a license can be suspended for the failure of an evidentiary test. I.C. § 18-8004(1)(d) 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).

The Department's Hearing Official in *McDaniel* 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). The Department's Hearing Official here did not error finding that an evidentiary test result for breath alcohol content of 0.02 and 0.021 was sufficient evidence that Ms. Elias-Cruz did not meet her burden pursuant to I.C. § 18-8002A(7)(c).

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

Ms. Elias-Cruz argued below 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.<sup>4</sup>

However, Ms. Elias-Cruz did not make a substantive due process or equal protection argument to the Hearing Official or to the District Court.

The Hearing Official is not determining whether there was a reasonable doubt that Ms. Elias-Cruz's breath alcohol content was actually above a .02 and therefore was guilty of driving under the influence pursuant to I.C. § 18-8004(d). The Hearing Official only determined that Ms. Elias-Cruz failed to meet 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.<sup>5</sup>

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 for example *McDaniel's* .083 result). I.C. § 18-8004(1)(d) simply requires a failed evidentiary test.

Ms. Elias-Cruz's burden is not to show what her "actual" breath alcohol content might have been, instead Ms. Elias-Cruz's burden is to show that the elements of I.C. § 18-8002A(7) have been met..

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<sup>4</sup> *Buell v. Idaho Dept. of Transp.* 151 Idaho 257, 254 P.3d 1253 (2011) contains a significant analysis of the public's interest in the Administrative License Suspension process in the context of a double jeopardy analysis.

<sup>5</sup> 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) to demonstrate that the test result was not at least .02.

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, I.C. § 18-8004(1)(d).

## ISSUE 2

*The Hearing Official properly determined that the Lifeloc FC20 had been calibrated in accordance with the Standard Operating Procedures of the Idaho State Police.*

Ms. Elias-Cruz challenged 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 did not show that the breath testing instrument was not properly calibrated to meet her burden pursuant to I.C. § 18-8002A(7)(d) (R. p. 031).

There is nothing based upon this Record to support a finding that the .08 performance verification was not within the target range.

There is no statute, 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 manufacturer's recommendation.<sup>6</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, Revision 2 Effective 11/01/2010, pp. 10-11. (See also FN 2)

The manufacturer's recommendation relied upon Ms. Elias-Cruz before the Department's Hearing Official is not a requirement of the Idaho State Police's Standard Operating Procedures. Exhibit D (to the Administrative Record) (R. pp. 054-055) 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 Hearing Official, 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 had not been calibrated according to the manufacturer's suggestion.<sup>7</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 (R. p. 054) address how often a calibration check should be performed on the Lifeloc FC20: "Calibration check requirements vary depending on the program guidelines or internal procedures you're testing under. Please check with your program administrator." 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 Police's Standard Operating Procedures are not supplemental but are instead

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<sup>7</sup> Mr. Beals did not testify as to whether the tests were inaccurate based upon a performance verification not having occurred annually or that there was a Standard Operating Procedure of the Idaho State Police requiring annual calibrations.

construed “as rules”. *In re Schroeder*, 147 Idaho 476, 479, 210 P.3d 584, 587 (Idaho Ct. App. 2009).<sup>8</sup>

Here, the Court’s review is limited to considering whether Trooper Schwecke’s actions are consistent with the Idaho State Police’s Standard Operating Procedures not the Lifeloc FC20 manufacturer’s representations. Any other 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. The Idaho Court found the Idaho State Police Standard Operating Procedures are rules for purposes of judicial review because the Standard Operating Procedures constitute the only materials by which the Idaho State Police has acted upon pursuant to the I.C. § 18-8004(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 such requirement does not exist in the only materials which the Idaho State Police has acted on, then it is clear that the Standard Operating Procedures are not to be supplemented by manufacturer’s “recommendations” not contained within the Standard Operating Procedures.

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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).

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

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. 031) and is consistent with the Standard Operating Procedures.

A .20 calibration is not necessary here. The Standard Operating Procedures clearly address the circumstances and the effect of the .20 performance verification (see SOP § 5.1.4).<sup>9</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

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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.

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.<sup>10</sup>

### ISSUE 3

*The Hearing Official did not violate due process in suspending Ms. Elias-Cruz's driving privileges. This issue has two parts; first the Hearing Official's decision does not implicate due process and second Ms. Elias-Cruz did not properly preserve a due process challenge to the suspension of her driving privileges as a result of a .02 evidentiary breath alcohol content test result.*

The District Court concludes that due process is violated when the Hearing Official fails to consider the Lifeloc FC20's "inherent margin of error". Further, the District Court found that the rejection of such evidence by the Department's Hearing Official deprived Ms. Elias-Cruz of a fair and impartial hearing.

Ms. Elias-Cruz did not make a procedural due process challenge to the Hearing Official nor to the District Court. The District Court gratuitously and sua sponte provides the due process analysis.

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<sup>10</sup>

This argument would go only to the issue of whether the Lifeloc FC20 was not properly certified, an argument which was not made to the Department's Hearing Official.

The District Court does not engage in the *Mathews v. Eldridge*, analysis (424 U.S. 319 at 333, 96 S.Ct. 893, 47 LED 2d 18, 96 S.Ct. 893 (1976)) to demonstrate what process was due for its conclusion that it was inappropriate the Hearing Official to reject the Court of Appeals decision in *McDaniel* and conclude that an inherent margin of error must be considered.<sup>11</sup>

Contrary to the District Court conclusions, the Hearing Official heard the testimony of Loring Beals and permitted Ms. Elias-Cruz to create a record consistent with her argument that an inherent margin of error exists (R. p. 050 Ex A., R. pp. 051-052 Ex. B, R. p. 053 Ex. C, R. pp. 054-055 Ex. D.).

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Due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

The Hearing Official made specific findings of his decision making process demonstrating that he considered Ms. Elias-Cruz's arguments.<sup>12</sup>

The Hearing Official appropriately rejected the expert's opinion as to the Lifeloc FC 20's margin of error based on the present state of Idaho Law, *McDaniel*. There was nothing in the process of the conduct of the Hearing which violates due process. The Administrative License Suspension process has survived numerous due process

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- 3.1 Elias-Cruz submitted to breath testing October 21, 2010.
- 3.2 Elias-Cruz provided breath samples of .021/.020.
- 3.3 Idaho's legal limit for breath alcohol concentration (BRAC) for person's under 21 years of age is .02.
- 3.4 At the time of Elias-Cruz's stop and arrest, she was 20 years of age (Date of Birth [REDACTED]).
- 3.5 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.
- 3.6 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.
- 3.7 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.
- 3.8 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.
- 3.9 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.
- 3.10 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.
- 3.11 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.
- 3.12 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.
- 3.13 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.
- 3.14 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.
- 3.15 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.
- 3.16 Elias-Cruz's argument fails.
- 3.17 Elias-Cruz's BRAC results were in violation of I.C. § 18-8004, and the evidentiary test results are admissible evidence.

Findings of Fact and Conclusions of Law and Order p. 8, R. pp. 077-079.

challenges, for example the careful analysis, *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (Ct.App.2006).

Secondly, the driver must preserve a procedural due process challenge for the Court's review even if the Hearing Official could not actually rule on the constitutionality of the administrative action.<sup>13</sup>

A due process challenge was not preserved for the District Court's review and should not now be considered by the Supreme Court on Appeal.

The Idaho Court has clearly indicated that the only issues which the Court should sua sponte consider are subject matter jurisdiction ("with the exception of jurisdictional issues, an argument not raised below and not supported on the briefs is waived on appeal", *Doe v. Doe*, 150 Idaho 432, 247 P.3d 659 (2011)) and illegality, *Trees v. Kersey*, 158 Idaho 3, 56 P.3d 765 (2002).

The Court in *McDaniel* determined that the statutory language of I.C. 18-8004(1)(a) does not require a findings of the actual breath alcohol content by the Department's Hearing Official, the Question is what is the test result. Any other statutory language would lead to the analysis suggested by the District Court, an inquiry into the actual blood alcohol content at the time of evidentiary testing. The margin of error is simply not relevant in the administrative process under I.C. § 18-8002A(7), *McDaniel at 645*.

The Hearing Official acted consistently with the law existing at the time of the Department's administrative hearing eliminating consideration of the Lifeloc FC20

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"The actions of the hearing officer evidence little regard for Bell's substantial interest in receiving a decision before, or at least promptly after, the deprivation of his license, nonetheless because this constitutional issue was not raised to the Hearing Officer we will not resolve it on appeal, see *Viveros v. State Dept. of Health and Welfare*, 126 Idaho 714, 716, 889 P.2d 1104, 1106 (1996). *Bell v. Idaho Transp. Dept.* 151 Idaho 659, 262 P.3d 1030 (2011).



inherent margin of error.

The District Court disregards the administrative record which the driver created when it finds that the Hearing Official denied Ms. Elias-Cruz an opportunity for a fair and impartial hearing. Ms. Elias-Cruz was able to present evidence to the Hearing Official that was carefully and thoroughly considered by the Department's Hearing Official (R. pp. 077-079).

Sufficient due process was extended to Ms. Elias-Cruz.


#### V. CONCLUSION

Ms. Elias-Cruz did not meet her burden pursuant to Idaho Code § 18-8002A(7) to demonstrate that the Hearing Official's Decision was arbitrary or capricious or that the Hearing Official's Decision was not supported by substantial competent evidence on the Record.

Due process was provided to Ms. Elias-Cruz, there is no unlawful procedure present nor was the Hearing Official's action in excess to the Department's statutory authority consistent with I.C. § 67-5279(3).

The Hearing Official's decision to suspend Ms. Elias-Cruz's driving privileges should be sustained and Ms. Elias-Cruz's driving privileges should be suspended for ninety days.

DATED this 16 day of March 2012.

  
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Edwin L. Litteneker  
Special Deputy Attorney General

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And correct copy of the foregoing  
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On this 16 day of March, 2012.



Edwin L. Litteneker