UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

5-23-2012

Ada Cty. Prosecuting Atty. v. Motorcycle Respondent's Brief Dckt. 39359

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation
"Ada Cty. Prosecuting Atty. v. Motorcycle Respondent's Brief Dckt. 39359" (2012). *Idaho Supreme Court Records & Briefs*. 3831.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3831

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

SUPREME COURT NO. 39359-2011

ADA COUNTY PROSECUTING ATTORNEY,	)
	)
APPELLANT,	)
	)
vs.	)
	)
2007 LEGENDARY MOTORCYCLE, VIN	)
4B7H8469X35007098, APPROXIMATELY,	)
THIRTEEN (13) GRAMS METHAMPHETAMINE;	)
ONE (1) MOTOROLA VGA CELL PHONE; ONE	)
(1) BLACK VEST; and ONE (1) BLACK JACKET,	)
	)
RESPONDENTS.	)
____	)

RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District
for the County of Ada, State of Idaho

HONORABLE KATHRYN A. STICKLEN,
Senior Judge, Presiding

GREG H. BOWER
Ada County Prosecuting Attorney
LORNA K. JORGENSEN
Deputy Prosecuting Attorney – Civil Division
200 W. Front Street, Room 3191
Boise, Idaho 83702
Telephone: (208) 287-7700
Facsimile: (208) 287-7719

ATTORNEY FOR APPELLANT

G. SCOTT GATEWOOD
Attorney at Law
Sallaz & Gatewood, Chtd.
P.O. Box 8956
Boise, Idaho 83707

Telephone: (208) 336-1146
Facsimile: (208) 336-1263

ATTORNEY FOR RESPONDENTS

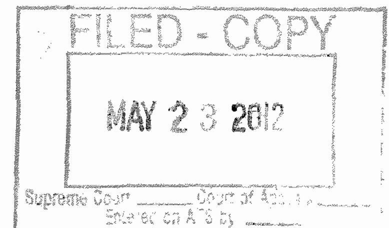


TABLE OF CONTENTS

Table of Cases and Authorities 3-5

Nature of the Case 6

Course of Proceedings Below 6-7

Statement of the Facts 7

Standard of Review 8

Respondent's Restatement of the Issues 8

Argument 8

A. The Decision Of The District Court That I.C. § 37-2744(a)(4) Is Not Ambiguous Should Be Affirmed, Such That Any Resort To Statutory Construction Or Legislative History Is Unnecessary 8

B. The Legislative History Of The Now-Repealed Misdemeanor Exemption To I.C. § 37-2744 (a)(4) Is Not Relevant To The Determination Of Whether That Statute Provides For Forfeiture Arising Out Of A Felony Conviction Based Only Upon Mere Possession 12

C. Distinctions Between Idaho's Civil Forfeiture Statute And The Comparable Provisions In Both Federal Law And The Law Of Other States Make The Precedents From Those Other Jurisdictions Inapplicable To The Interpretation Of I.C. § 37-2744(a)(4) 19

Conclusion 32

TABLE OF CASES AND AUTHORITIES

CASES

Ameritel Inns, Inc. v. Pocatello-Chubbuck Auditorium or Community Center Dist., 146 Idaho 202, 192 P.3d 1026 (2008) 23

Butler v. Cortner, 42 Idaho 302, 246 P. 314 (1926) 12-13

Cade v. One 1987 Dodge Lancer, 125 Idaho 731, 874 P.2d 542 (1994) 30-32

Featherston v. Wood, 1985 WL 4551 (Tenn.Ct.App. 1985) 26-27

Hendrix v. Gold Ridge Mines, Inc., 56 Idaho 326, 54 P.2d 254 (1936) 20

Hoskins v. Howard, 132 Idaho 311, 971 P.2d 1135 (1998) 20

Hughes v. Dept. of Safety, 776 S.W.2d 111 (Tenn. App.1989) 27-28

Idaho Dept. of Law Enforcement v. $34,000 U.S. Currency, 121 Idaho 211, 824 P.2d 142 (Ct.App.1991) 29

In re Forfeiture of One 1982 Ford Bronco (State v. Stevens), 673 P.2d 1310 (N.M.1983) 24-26

In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170, 148 Idaho 200, 220 P.3d 318 (2009) 9-10

Intermountain Health Care, Inc. v. Blaine County Board of Commissioners, 109 Idaho 299, 707 P.2d 410 (1985) 22

Kootenai Hosp. Dist. v. Bonner County Bd. of Com'rs, 149 Idaho 290, 233 P.3d 1212 (2010) 9

Mintun v. State, 144 Idaho 656, 168 P.3d 40 (Ct.App.2007) 22

Mix v. Gem Investors, Inc., 103 Idaho 355, 647 P.2d 811 (Ct.App.1982) 19

Montalbano v. Saint Alphonsus Reg. Med. Center, 151 Idaho 837, 264 P.3d 944 (2011) 9

Nixon v. Triber, 100 Idaho 198, 595 P.2d 1093 (1979) 20

Oldcastle Precast, Inc. v. Parktowne Const., Inc., 142 Idaho 376, 128 P.3d 913 (2005) 20

Odenwalt v. Zaring, 102 Idaho 1, 624 P.2d 383 (1980) 21

People v. Ah Choy, 1 Idaho 317, 1870 WL 2456 (1870) 20

People v. Ten Thousand One Hundred Fifty Three Dollars and Thirty Eight Cents, 179 Cal.App.4th 1520, 102 Cal.Rptr.3d 584 (Cal.App.2009) 13

Pfau v. Comair Holdings, Inc., 135 Idaho 152, 15 P.3d 1160 (2000) 21-22

Purdy v. Farmers Ins. Co. of Idaho, 138 Idaho 443, 65 P.3d 184 (2003) 21

Schlegel v Hansen, 98 Idaho 614, 570 P.2d 292 (1977) 12

Snohomish Regional Drug Task Force v. Real Property, 208 P.3d 1189 (Wash.App.2009) .. 14

State v. Anderson, 145 Idaho 99, 175 P.3d 788 (2008) 13

State ex rel. Dept. of Public Safety v. Ortega, 857 P.2d 44 (N.M.1993) 24

State v. Groce, 133 Idaho 144, 983 P.2d 217 (Ct.App.1999) 19

State v. Jones, 151 Idaho 943, 265 P.3d 1155 (Ct.App.2011) 13

State v. Key, 149 Idaho 691, 239 P.3d 796 (Ct.App.2010) 29-31

State v. Nunez, 2 P.3d 264 (N.M.1999) 13

State v. Schwartz, 139 Idaho 360, 79 P.3d 719 (2003) 8

State v. Stevens, 139 Idaho 670, 84 P.3d 1038 (Ct.App.2004) 29-32

State v. Troughton, 1126 Idaho 406, 884 P.2d 419 (Ct.App.1994) 27

State v. Yzaguirre, 144 Idaho 471, 163 P.3d 1183 (2007) 23

Stuart v. Dept. of Safety, 963 S.W.2d 28 (Tenn.1998) 24

Sunset Mem. Gardens, Inc. v. Idaho State Tax Comm., 80 Idaho 206, 327 P.2d 766 (1958) . . 15

United States v. $39,480.00 in U.S. Currency, 190 F.Supp.2d 929 (W.D.Tex.2002) 14

Weber v. Eastern Idaho Packing Corp. 94 Idaho 694, 496 P.2d 693 (1972) 21

Worley Highway Dist. v. Kootenai County, 104 Idaho 833, 663 P.2d 1135 (Ct.App.1983) . . . 21

STATUTES

I.C. § 37-2732(c) 6, 14-18

I.C. § 37-2744(a)(4) 6, 8, 11, 12, 14-19, 22-23, 26-29, 32

I.C. § 45-513 20

Tenn. Code Ann. § 53-11-409(a)(4) 26-27

28 U.S.C. § 881(a)(4) 22-23, 27

SESSION LAWS

1971 Ida.Sess.L, ch. 215, Section 1, at pg. 958 16

1971 Ida.Sess.L, ch. 215, Section 1, at pg. 965 16

1972 Ida.Sess.L, ch. 133, Section 6, at pg. 273 17

1972 Ida.Sess.L, ch. 409, Section 1, at pg. 1197 17

1986 Ida.Sess.L, ch. 286, Section 1, at pp. 712-13 16

1989 Ida.Sess.L, ch. 268, Section 2, at pg. 656 17

1990 Ida.Sess.L, ch. 312, Section 1, at pp. 852-53 18

1981 N.M. Laws, Ch. 31, pp. 95, 104-05 24

1986 Tenn. Pub. Acts, Ch. 783, pg. 759 . . . . 24, 27

I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal presents a question of statutory interpretation under the civil forfeiture statute, I.C. § 37-2744(a)(4), concerning whether a purpose of "distribution or receipt" (trafficking) is required for all civil forfeitures under that statute, or whether that statute can be construed to allow for civil forfeiture arising out of nothing more than an offense based upon mere possession.

B. COURSE OF PROCEEDINGS BELOW

The civil forfeiture complaint was filed on May 20, 2009 (R., pp. 5-9). At a status conference held in July 2009 the magistrate court was asked, and agreed, to hold the forfeiture case pending until resolution of the criminal case (R., pg. 49). The owner of the motorcycle that was the subject of the civil forfeiture proceeding, Christopher Rubey, pled guilty to a reduced charge of felony possession of a controlled substance, I.C. § 37-2732(c) in November 2009. *State v. Rubey*, Fourth Dist., Ada County Case No. CR-FE-2009-007177 (R., pp. 224-27).

A subsequent status conference before the magistrate court was held on December 7, 2009 (R., pg. 52). The State filed a motion for summary judgment on January 4, 2010 (R., pp. 63-64) and a hearing on that motion was held on February 1, 2010 (Tr., at pp. 348-62). The magistrate court issued its memorandum decision and entered its order granting summary judgment to the State on February 25, 2010 (R., pp. 316-27). A final judgment was entered on January 14, 2011 (R., 432-33).

An appeal to the district court was filed on April 7, 2010 (R., pp. 329-332).

The district court reversed the magistrate court, finding that the statute was unambiguous and that the magistrate court had read the phrase, "for the purpose of distribution or receipt" out of the statute (R., pp. 434-41). This appeal followed (R., pp. 442-45).

C. STATEMENT OF FACTS

There is very little dispute as to the facts underlying this appeal. The Statement of Facts that has been provided by the State in its opening brief primarily relies upon the summary of facts that is set out in the magistrate court's decision (R., pp. 316-18) and that is set out in the decision of the district court (R., pp. 434-35). In addition, the record on appeal contains the affidavits of Cassandra Poulton (R., pp. 254-57), and Christopher Rubey (R., pp. 258-263).

As is further supported by the Poulton and Rubey affidavits, it is undisputed that on April 22, 2009 Christopher Rubey was traveling towards Kuna, Idaho while on his 2007 Legendary Motorcycle. He was accompanied by Cassandra Poulton as a passenger on his motorcycle. Anthony Pezzaza was driving a blue Chevrolet truck in which the infant son of Ms. Poulton was a passenger. Christopher Rubey was unaware at the time that the jacket he was wearing included a container of methamphetamine. Rubey Aff., ¶¶ 4 & 20 (R., pp. 259, 261-62); Poulton Aff., ¶ 12 (R., pg. 256).

While Mr. Pezzaza was stopped at a gas station at Deer Flat he was placed under arrest based upon an existing outstanding warrant. Mr. Rubey rode his motorcycle up to the place where the police were placing Mr. Pezzaza under arrest and voluntarily made contact with those officers in the

interest of Ms. Poulton's infant who was a passenger in the Pezzaza truck. Rubey Aff., ¶ 15, (R., pg. 261). Mr. Rubey was interviewed and subjected to two pat down searches. As an incident to these searches a prescription bottle with approximately 13 grams of methamphetamine was discovered in Mr. Rubey's coat. Mr. Rubey's eventual conviction for the possession of this methamphetamine was the basis for bringing the civil forfeiture action underlying this appeal.

D. STANDARD OF REVIEW

Issues of statutory interpretation present questions of law subject to free review on appeal. *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003).

II.

THE RESPONDENT'S RESTATEMENT OF THE ISSUE THAT HAS BEEN PRESENTED ON APPEAL BY THE APPELLANT

Whether proof of a purpose of distribution or receipt (trafficking) is required for forfeiture of a conveyance under I.C. § 37-2744(a)(4)?

III.

ARGUMENT

A. **The Decision Of The District Court That I.C. § 37-2744(a)(4) Is Not Ambiguous Should Be Affirmed, Such That Any Resort To Statutory Construction Or Legislative History Is Unnecessary**

The State has devoted most of its argument on this appeal to examining the legislative history of I.C. § 37-2744(a)(4), and the interpretation of similar, but not identical statutes, that are also based upon the Uniform Controlled Substances Act. These legislative history arguments are only relevant

to the issue that has been raised on this appeal if this Court first makes the determination that the statute is ambiguous. If a statute is not ambiguous, then a court does not construe it, but simply follows the law as it is written. *Montalbano v. Saint Alphonsus Regional Medical Center*, 151 Idaho 837, 840, 264 P.3d 944, 947 (2011). Only if this Court first determines that the statute is ambiguous does it then engage in a determination of its meaning by resort to the rules of statutory construction and to legislative history. The determination and meaning of an ambiguous statute presents a question of law over which the Court exercises free review. *Kootenai Hosp. Dist. v. Bonner County Bd. of Com'rs*, 149 Idaho 290, 293, 233 P.3d 1212, 1215 (2010).

The State has barely addressed this threshold question, and has simply concluded that because the district court did not find the statute to be ambiguous, and because the magistrate court did find the statute to be ambiguous, that the statute is obviously susceptible to different interpretations, and therefore must be ambiguous. Appellant's Brief, at pg. 4. Something more than this rather superficial analysis is required to make the threshold determination of whether the statute is ambiguous.

In, *In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 220 P.3d 318 (2009), the Court summarized the basic analysis that should be undertaken in making the threshold determination of whether a statute is ambiguous:

> The goal of statutory interpretation is to discover the intention of the legislature in drafting a statute, and to apply the statute accordingly, examining "not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history."

Hayden Lake Fire Prot. Dist. v. Alcorn, 141 Idaho 388, 398-99, 111 P.3d 73, 83-84 (2005) (internal quotation marks omitted) (quoting *State v. Schwartz,* 139 Idaho 360, 362, 79 P.3d 719, 721 (2003))." Where the language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to construe the language. Where language of a statute or ordinance is ambiguous, however, this Court looks to rules of construction for guidance." *Friends of Farm to Market v. Valley County,* 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). In *Canty v. Idaho State Tax Commission*, this Court established that a statute is ambiguous when:

> [T]he meaning is so doubtful or obscure that "reasonable minds might be uncertain or disagree as to its meaning." *Hickman v. Lunden,* 78 Idaho 191, 195, 300 P.2d 818, 819 (1956). "However, ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous. . . . [A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it." *Rim View Trout Co. v. Higginson,* 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

138 Idaho 178, 182, 59 P.3d 983, 987 (2002) (second alteration in original) (quoting *State v. Browning,* 123 Idaho 748, 750, 852 P.2d 500, 502 (Ct.App.1993)).

"Constructions that would lead to absurd or unreasonably harsh results are disfavored." *In re Daniel W.,* 145 Idaho 677, 680, 183 P.3d 765, 768 (2008). "Language of a particular section need not be viewed in a vacuum. And all sections of applicable statutes must be construed together so as to determine the legislature's intent." *Friends,* 137 Idaho at 197, 46 P.3d at 14 (internal quotation marks omitted) (quoting *Lockhart v. Dept. of Fish and Game,* 121 Idaho 894, 897, 828 P.2d 1299, 1302 (1992)). This Court "will construe a statute so that effect is given to [all of] its provisions, and no part is rendered superfluous or insignificant." *Moreland v. Adams,* 143 Idaho 687, 690, 152 P.3d 558, 561 (2007) (internal quotation marks omitted) (quoting *Idaho Cardiology Assocs., P.A. v. Idaho Physicians Network, Inc.,* 141 Idaho 223, 226, 108 P.3d 370, 373 (2005)).

148 Idaho at 210-11, 220 P.3d at 328-29.

The question that is presented on this appeal is whether the civil forfeiture statute that is in

question, I.C. § 37-2744(a)(4), only requires the mere possession of a controlled substance, or whether that possession must be related to trafficking ("distribution or receipt"). The language of I.C. § 37-2744(a)(4) declares as follows:

> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, delivery, receipt, possession or concealment, **for the purpose of distribution or receipt** of property described in paragraph (1) or (2) hereof . . . .

(Emphasis added).

The Respondents have argued throughout this matter that the highlighted language in the above quotation modifies the entire subsection such that, in paraphrase, this statute provides that any conveyance is subject to civil forfeiture only if it is used, or intended for use, to transport or to facilitate the transportation of a controlled substance for the purpose of trafficking (distribution or receipt) (R. pp. 267-72; 385-89). This is the interpretation of the statute that the district court declared after finding that the statute was unambiguous. (R., pp. 438-39).

In contrast, prior to the argument that it has made on this appeal, the State has previously argued that in order to be properly construed this statute must be divided in two clauses, with only the second clause that begins with the phrase, "to facilitate the transportation," as being modified by the, "for the purpose of distribution or receipt," language. As read by the State, the first clause of the statute, which ends with the phrase, "to transport," would not be modified by the, "for the purpose of distribution or receipt" language, and therefore the statute as so construed would allow for civil forfeiture based upon the mere transportation of a controlled substance under that first

clause, without the necessity of proof that the transport was, "for the purpose of distribution or receipt," of a controlled substance. *See*, State's Response Brief on Appeal to the District Court, at pg. 3 (R., pg. 397).

As based upon the legal standards that apply in determining whether a statute is ambiguous, as set out above, the Respondents on this appeal argue that this Court should, as a threshold inquiry, uphold the finding of the district court (R., pg. 439) that I.C. § 37-2744(a)(4) is not ambiguous, and that the clearly expressed intent of the legislature, without the need for resort to rules of statutory construction or legislative history, is that this statute in every application for civil forfeiture requires proof of a purpose of distribution or receipt of a controlled substance.[1]

B. The Legislative History Of The Now-Repealed Misdemeanor Exemption To I.C. § 37-2744(a)(4) Is Not Relevant To The Determination Of Whether That Statute Provides For Forfeiture Arising Out Of A Felony Conviction Based Only Upon Mere Possession

To the extent that this Court should find that I.C. § 37-2744(a)(4) is ambiguous, such that resort to statutory construction and legislative history is necessary, then this Court is urged to adopt, as a rule in aid of construction, the principle that in the context of civil forfeitures those forfeitures are not favored and should be strictly construed against the state and in favor of the defendant.

Other than the broadly stated rule that forfeitures in general are not favored, *Schlegel v Hansen*, 98 Idaho 614, 615, 570 P.2d 292, 293 (1977) (forfeiture of a lease); and *Butler v. Cortner*,

---

[1] For the sake of brevity, the Respondents have only referred to, "a controlled substance," but acknowledge that under the statute the "purpose of distribution or receipt" language includes any "property," described in either subsections (1) or (2) of I.C. § 37-2744(a).

42 Idaho 302, 313, 246 P. 314, 317 (1926) (forfeiture of real estate); and the rule that criminal statutes should be construed narrowly and in favor of defendants, *State v. Anderson*, 145 Idaho 99, 103, 175 P.3d 788, 792 (2008); and *State v. Jones*, 151 Idaho 943, 947, 265 P.3d 1155, 1159 (Ct.App.2011); no Idaho case law has spoken to this precise question.

The New Mexico Supreme Court, in *State v. Nunez*, 2 P.3d 264 (N.M.1999), has outlined the significant public policy reasons for such a rule of strict construction:

> We regard forfeiture with mistrust because it divests the individual of the right "of acquiring, possessing and protecting property" – one of the most fundamental liberty interests. *See* N.M. Const. art. II, § 4. It is "not a mere restraint on use, temporary loss, or a device used to satisfy pre-existing debts or secure jurisdiction." [citation omitted] It is the most extreme sanction the state can bring against the property owner. *Id.* ("Forfeiture is to fines what capital punishment is to incarceration."). With regard to the fundamental right to property, the state can devise no penalty more extreme than taking away property without compensation. It is true that the state may impose penalties more harsh or expensive than the forfeiture of such property as an old car or a small amount of cash. But with regard to that car or cash, and the fundamental right of ownership, no penalty is more extreme than stripping a person of that right without compensation.

2 P.3d at 284 (bracketed reference added).

Numerous other jurisdictions follow a similar rule of strict construction in respect to forfeitures initiated under Uniform Controlled Substances statutes. *See e.g.*, *People v. Ten Thousand One Hundred Fifty Three Dollars and Thirty Eight Cents*, 179 Cal.App.4th 1520, 1525-26, 102 Cal.Rptr.3d 584, 588 (Cal.App.2009) ("'[S]tatutes imposing forfeitures are not favored and are to be strictly construed in favor of the persons against whom they are sought to be imposed,' .... This disfavor applies 'notwithstanding the strong governmental interest in stemming illegal drug

transactions. . . .'"); *United States v. $39,480.00 in U.S. Currency*, 190 F.Supp.2d 929, 931-32 (W.D.Tex.2002) ("[A]s a general rule, forfeitures are not favored by the law and statutes providing for forfeitures are strictly construed."); and *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 208 P.3d 1189, 1191 (Wash.App.2009) ("Forfeitures are not favored and such statutes are construed strictly against the seizing agency."). Therefore, should this Court find it necessary to engage in statutory construction, it is urged to adopt a rule of strict construction.

In response to the State's statutory construction argument, the Respondents observe that after having previously limited the arguments that it made to the magistrate court – and then to the district court on intermediate appeal – to straight-forward principles of statutory construction, the State has now argued for the first time on this appeal that the joint legislative history of I.C. § 37-2744(a)(4) and I.C. § 37-2732(c) supports its argument that the Respondent 2007 Legendary Motorcycle should be subject to civil forfeiture based upon nothing more than Christopher Rubey's mere possession of methamphetamine while riding that motorcycle, without the necessity of any further required proof of trafficking ("distribution or receipt").

In making this argument the State has traced the history of the amendments made to both the civil forfeiture statute that is at issue on this appeal, I.C. § 37-2744(a)(4), and to the statute under which Christopher Rubey pled guilty to felony possession of methamphetamine in this action, I.C. § 37-2732(c), beginning with those two statutes first enactment in 1971, and continuing through amendments that were made in1990. *See*, Appellant's Brief, pp. 5-9. One tool for determining

legislative intent is tracing the history of the statute in question. *Sunset Memorial Gardens, Inc. v. Idaho State Tax Commission*, 80 Idaho 206, 217, 327 P.2d 766, 772 (1958).

Based upon this history, it is now apparent that both the Appellant State and the Respondents are now in agreement that, as originally enacted in 1971 and until amended in 1990, there existed a categorical exemption from civil forfeiture under I.C. § 37-2744(a)(4)(C) of conveyances arising out of any **misdemeanor conviction** under I.C. § 37-2732(c). *See*, Appellant's Brief at pg. 6 ("When read together, the two statutory provisions, Idaho Code § 37-2744(a)(4) and Idaho Code § 37-2732(c) indicate a conveyance could not be subject to forfeiture for misdemeanor possession of a controlled substance in 1971.").

Where the Appellant State and the Respondents on this appeal do part company is on the question of the effect – if any – that this particular legislative history has on the question that has been presented for decision by this Court on this appeal. No question has been presented on this appeal concerning the civil forfeiture of a conveyance arising out of a misdemeanor conviction. It is undisputed that Christopher Rubey pled guilty to felony possession of methamphetamine under I.C. § 37-2732(c). Instead, the question that has been presented for decision – and that the Respondents have argued below before both the magistrate and district courts – is whether any civil forfeiture of a conveyance can occur under the express provisions of I.C. § 37-2744(a)(4) in the absence of proof that the conveyance at issue was used "for the purpose of distribution or receipt" (trafficking) of a controlled substance, or the products that are associated with the manufacture or

delivery of a controlled substance?

When I.C. § 37-2744(a)(4) was first enacted as a part of the Uniform Controlled Substances Act in 1971, it contained the following declaration, which has since been repealed:

> (C) a conveyance is not subject to forfeiture for a violation of section 37-2732(c), Idaho Code; . . .

See, 1971 Ida.Sess.L, ch. 215, Section 1, at pg. 965.

The referenced section 37-2732(c), under which Christopher Rubey pled guilty to felony possession of methamphetamine in this case, which was formerly referred in I.C. § 37-2744(a)(4)(C), declared as follows in 1971:

> (c) It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this subsection is guilty of a misdemeanor.

See, 1971 Ida.Sess.L, ch. 215, Section 1, at pg. 958.

The express exemption of conveyances from civil forfeiture for violations of I.C. § 37-2732(c), which was stated in I.C. § 37-2744(a)(4)(C) as set out above, remained unchanged for fifteen years, until 1986. *See*, 1986 Ida.Sess.L, ch. 286, Section 1, at pp. 712-13. In 1986 that express exemption of conveyances from civil forfeiture was amended to only apply to misdemeanor offenses that were then-described under subsection "(2)" of I.C. § 37-2732(c).

Fourteen years earlier, in 1972, the Idaho Legislature had, by two separate enactments, amended I.C. § 37-2732(c) to divide it into subsection "(1)" offenses, which were felonies, and into

subsection "(2)" offenses, which were misdemeanors. *See*, 1972 Ida.Sess.L, ch. 133, Section 6, at pg. 273; and 1972 Ida.Sess.L, ch. 409, Section 1, at pg. 1197. Notwithstanding this division of felony and misdemeanor offenses within I.C. § 37-2732(c) that was made in 1972, section 37-2744(a)(4)(C) continued to declare that no conveyance was subject to civil forfeiture, "for a violation of section 37-2732(c)," in the same language that had been originally adopted in 1971, until later amended in 1986 to thereafter only include misdemeanor offenses committed under subsection (2) of that statute, as already noted above.

In 1989 the Idaho Legislature again amended I.C. § 37-2732(c). This time a new subsection was added that directly addressed issues involving the possession of LSD (lysergic acid diethylamide). This new "LSD subsection" was codified as subsection "(2)," which since it first had been enacted in 1972 had only described misdemeanor offenses. The former subsection "(2)" describing misdemeanor offenses was renumbered as subsection "(3)." *See*, 1989 Ida.Sess.L, ch. 268, Section 2, at pg. 656. As amended in 1989, both subsections (1) and (2) of I.C. § 37-2732(c) now described felonies, and subsection (3) of that statute described misdemeanors. This is the division of the statute that remains in effect at the current time.

Unamended, I.C. § 37-2744(a)(4)(C) still declared a categorical exemption of conveyances from civil forfeiture, "for a violation of section 37-2732(c)(2)." But after the 1989 amendments to I.C. § 37-2732(c) went into effect this categorical exemption of conveyances from civil forfeiture no longer described misdemeanor offenses, but instead, as now amended that section exempted

offenses arising from the felony possession of LSD, rather than misdemeanors.

One year later in 1990 the Idaho Legislature fixed this "problem," but not by the simple expedient of amending the categorical exemption in I.C. § 37-2744(a)(4)(C) to again refer to the misdemeanor violations that were now codified in subsection "(3)," rather than as previously codified in subsection "(2)," but instead by simply repealing that entire categorical exemption that had been provided by subpart (C) since its first enactment in 1971. As a result, former subpart "(D)" addressing security interest issues was re-labeled as "(C)," which is how that provision now appears in the current law. *See*, 1990 Ida.Sess.L, ch. 312, Section 1, at pp. 852-53. As the State has declared in its Appellant's Brief, the State Legislature noted its 1989 blunder in a one-line declaration made in the "Statement of Purpose" that accompanied the 1990 repealing legislation: "The purpose of this amendment is to repeal the section of the forfeiture law that immunizes a person transporting LSD from forfeiture of his or her conveyance." *See*, Appellant's Brief pg. 8, n. 5.

In sum, the only thing that the legislative history that the State has offered in its opening brief establishes, is the previously-long standing, but now-repealed, policy to exempt all misdemeanor convictions under I.C. § 37-2732(c) from civil forfeiture actions under I.C. § 37-2744(a)(4). Because Christopher Rubey pled guilty to a felony, the existence or non-existence of an exemption for misdemeanor offenses is of no relevance to the question presented on this appeal. As the Respondents concede in their argument presented further below, there must be a predicate violation of the Uniform Controlled Substances Act in order to allow a civil forfeiture action to go forward.

But in providing an answer to the question that is presented here, as to whether there can be any right to civil forfeiture in the absence of proof by a preponderance of the evidence of a trafficking purpose, the State's proffered legislative history concerning this former misdemeanor exemption is of no help.

C. Distinctions Between Idaho's Civil Forfeiture Statute And The Comparable Provisions In Both Federal Law And The Law Of Other States Make The Precedents From Those Other Jurisdictions Inapplicable To The Interpretation Of I.C. § 37-2744(a)(4)

The Appellant State has argued throughout its opening brief that this Court should find the authority construing similar provisions to I.C. § 37-2744(a)(4) in federal law, and from the law of sister states, as persuasive in construing the Idaho statute on the basis that Idaho's law was enacted as a part of this State's adoption of the Uniform Controlled Substances Act, and that it furthers the goal of uniformity in the law for the various adopting jurisdictions to conform their interpretations of similar provisions in that law. *See e.g.*, *State v. Groce*, 133 Idaho 144, 149-151, 983 P.2d 217, 222-24 (Ct.App.1999). But in other contexts that involve the adoption and amendment of a uniform act the goal of uniformity has been recognized as necessarily yielding to unique language that has been added to that uniform act by the Idaho legislature. *See e.g.*, *Mix v. Gem Investors, Inc.*, 103 Idaho 355, 357, 647 P.2d 811, 813 (Ct.App.1982) (construing the bulk transfer provisions of the Idaho Uniform Commercial Code, in consideration of the fact that only Idaho's statute, "extends coverage—or apparently intends to extend coverage—beyond those businesses specifically identified, by inclusion of the six word phrase, 'but shall not be limited to.'").

Over the years a number of rules of construction have developed out of Idaho's adoption of

statutes from other states and jurisdictions, which Idaho has either at the time of adoption, or at some subsequent time, amended so that the adopted statutes are no longer perfectly congruent with the source from which they were adopted. Initially, the general rule of statutory interpretation that applies when the Idaho Legislature enacts a statute that has been previously enacted in another jurisdiction is that there arises a presumption that the statute has been adopted with the "prior construction placed upon it by the courts of such other jurisdiction." *Hoskins v. Howard*, 132 Idaho 311, 315, 971 P.2d 1135, 1139 (1998) (quoting *Nixon v. Triber*, 100 Idaho 198, 200, 595 P.2d 1093, 1095 (1979)). *See also*, *People v. Ah Choy*, 1 Idaho 317, 319, 1870 WL 2456, *2 (1870) ("The laws of this territory are conceded to be copies from the laws in force in California; that being so, the supreme court of Idaho may very properly, in construing its laws, follow the decisions of the supreme court in California.").

But when the Idaho Legislature adopts a statute from another jurisdiction, and makes changes to that statute before enacting it, that Idaho law does not necessarily carry the interpretation placed upon it by the courts of the jurisdiction from which it was adopted. For example, in *Oldcastle Precast, Inc. v. Parktowne Const., Inc.*, 142 Idaho 376, 382, 128 P.3d 913, 919 (2005) the Court noted that long-standing Idaho precedent dating from the decision in *Hendrix v. Gold Ridge Mines, Inc.*, 56 Idaho 326, 54 P.2d 254 (1936) had construed I.C. § 45-513 as not permitting the recovery of attorney fees even though the California statute from which that section was adopted did provide for attorney fees. ("The Court reasoned that this particular statute was adopted from the California lien statutes which expressly provided for attorney fees in the supreme court but since that proviso

was deleted in the Idaho statute the intent of the legislature was to disallow attorney fees on appeal." citing to *Weber v. Eastern Idaho Packing Corp.* 94 Idaho 694, 698, 496 P.2d 693, 697 (1972)).

There are other instances where the Idaho Legislature has looked to another jurisdiction's statutes as a model for statutes to be enacted in Idaho but after enactment the Idaho courts have been careful in discerning the differences between the Idaho law as enacted, and the statute from another state that the Idaho statute was based upon. *See e.g., Odenwalt v. Zaring*, 102 Idaho 1, 7, 624 P.2d 383, 389 (1980) ("[W]hile it [the Idaho Legislature] may have copied language from Wisconsin to enact the modified comparative negligence system, it did not choose to enact the entire Wisconsin scheme. Thus it is improper to pluck out Wisconsin case law and apply it to but one section of this comparative fault scheme without considering the entire scheme adopted by the legislature." (bracketed reference added)). *See also*, *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 450, 65 P.3d 184, 191 (2003) where the court rejected an interpretation of an insurance policy based upon a California statute that had not been enacted in Idaho, concluding that, "The above discussion illustrates the hazards inherent in holding that decisions regarding issues of law in other jurisdictions can be used, through the doctrine of collateral estoppel, to determine questions of law in this state."

When the Idaho legislature adopts a statute it is presumed to be aware of all existing Idaho statutes, *Worley Highway Dist. v. Kootenai County*, 104 Idaho 833, 839, 663 P.2d 1135, 1141 (Ct.App.1983), and the existing case law decisions interpreting Idaho statutes. *Pfau v. Comair Holdings, Inc.*, 135 Idaho 152, 156, 15 P.3d 1160, 1164 (2000). Based upon these presumptions, when the legislature amends a statute it is presumed that it intends for that statute to have a different

meaning than it had before it was amended. *Intermountain Health Care, Inc. v. Blaine County Board of Commissioners*, 109 Idaho 299, 302, 707 P.2d 410, 413 (1985). For a court to engraft upon a statute a meaning not plainly written there amounts to a judicial amendment of that statute and violates the fundamental doctrine that a court cannot legislate through the pretext of engaging in statutory construction. *Mintun v. State*, 144 Idaho 656, 664, 168 P.3d 40, 48 (Ct.App.2007).

In its argument in support of reversing the district court on this appeal the State has cited and relied upon authority that interprets § 881(a)(4) of the federal Comprehensive Drug Abuse Prevention Control Act. Idaho Code § 37-2744(a)(4) is virtually identical to the federal law with the exception of the phrase, "<u>for the purpose of distribution or receipt</u>," which was added by the legislature when the Idaho statute was first enacted in 1971. The federal statute provides as follows:

> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraphs (1), (2), or (9) ["property" referring to "controlled substances" as described in the referenced paragraphs]

28 U.S.C. § 881(a)(4) (bracketed referenced added). By means of comparison the Idaho statute, with the additional phrase that was added by the Idaho Legislature that was not included in the federal statute highlighted, declares:

> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, delivery, receipt, possession or concealment, **<u>for the purpose of distribution or receipt</u>** of property described in paragraph (1) or (2) hereof. . . . ["property" referring to "controlled substances" as described in the referenced paragraphs]

I.C. § 37-2744(a)(4) (emphasis and bracketed reference added).

Notwithstanding the underlying purpose in both the drafting of uniform legislation and the intent of the adopting jurisdictions to obtain a degree of uniformity in the application and enforcement in areas of the law involving common concerns and interests, the Idaho Legislature must have had a reason for adding the language "for the purpose of distribution or receipt" to § 2744(a)(4) that affects that statute's meaning and application. A primary objective of statutory construction is to construe a statute so as give meaning to every word and phrase found in that statute. *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). One of the most fundamental rules of statutory construction is that no part of a statute should be construed so as to render it a nullity or mere surplusage, *Ameritel Inns, Inc. v. Pocatello-Chubbuck Auditorium or Community Center Dist.*, 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008).

Because the federal cases that have construed 28 U.S.C. § 881(a)(4) have interpreted and applied a statute that does not include the phrase, "for the purpose of distribution or receipt," those cases are necessarily of little, if any, assistance in construing I.C. § 37-2744(a)(4), in respect to the very question of the meaning and application of that precise phrase as included in the Idaho statute.

The State has also argued that because Idaho's Uniform Controlled Substances Act is almost identical to statutes that previously existed in Tennessee and New Mexico, that in the interest of uniformity Idaho's statute should be construed so as to be consistent with those two states' interpretation of their own former statutes which recognized that merely transporting a controlled substance was all that was required for the civil forfeiture of a conveyance. There is a certain irony in this argument, as based upon the goal of current uniformity, since the applicable statutes that are

currently in force both New Mexico and Tennessee do not provide for civil forfeiture for the mere possession of a controlled substance. The New Mexico statute was amended in 1981. *See*, 1981 N.M. Laws, Ch. 31, pp. 95, 104-05. The Tennessee statute was amended in 1986. *See*, 1986 Tenn. Pub. Acts, Ch. 783, pg. 759. *See also*, *Stuart v. Dept. of Safety*, 963 S.W.2d 28, 35 (Tenn.1998) ("Finally, we note that Tennessee's forfeiture statutes embrace the proportionality approach. Under Tenn Code Ann. § 53-11-451(a)(4)(C) (Supp.1997), the simple possession of a small amount of drugs or drug paraphernalia *cannot* trigger a forfeiture action. Apparently, the legislature has determined that forfeiture would be disproportionate to those crimes." (italicized emphasis in original)).

The State admits as much in its citation, in footnote 9 of its opening brief, to the New Mexico Supreme Court's later decision in *State ex rel. Dept. of Public Safety v. Ortega*, 857 P.2d 44 (N.M.1993).[2] But even in the earlier New Mexico decision, upon which the State relies, *In re Forfeiture of One 1982 Ford Bronco (State v. Stevens)*, 673 P.2d 1310 (N.M.1983), the New Mexico Supreme Court had observed that its reliance upon the "Last antecedent rule," which controlled the Court's decision in that case, would not apply to a statute that was grammatically drafted in the very manner that Idaho's statute has been drafted:

---

[2] The New Mexico Supreme Court in the 1993 *Ortega* decision precisely described the legislative amendment that removed the effect of the "Last antecedent rule" that had been declared in the earlier *Ford Bronco* decision: "The 1981 amendment to Section 30-31-34(D) removed three commas: one between the words 'used' and 'or,' one between the words 'use' and 'to,' and one between the words 'transport' and 'or.'" 857 P.2d at 47.

> Applying these rules, the restrictive clause at issue in Section 30-31-34 is "for the purpose of sale." It is not separated by a comma from "or in any manner to facilitate transportation", which is the immediately preceding phrase. The clause restricts this phrase. But it does not restrict "to transport", which is set off by a comma and is more remote. **The only way in which the restrictive clause could apply to the phrase "to transport" is if commas were to enclose the clause "for the purpose of sale." If so, then the restriction would apply to several antecedents which are themselves separated by a comma**. *See St. Louis-San Francisco Railroad v. Bengal Lumber Co.*, 145 Okl. 124, 292 P. 52 (1930).

673 P.2d at 1312 (emphasis added). The phrase, "for the purpose of distribution or receipt of property described in paragraph (1) or (2) hereof," in the Idaho statute is in fact set off by commas. So under the rationale of the 1983 New Mexico *Ford Bronco* decision, the "Last antecedent rule" would not apply to the Idaho statute, and instead, the qualifying phrase, "for the purpose of distribution or receipt [of a controlled substance]," would modify the entire statute, such that mere possession, without proof by a preponderance of the evidence of a trafficking purpose, would not satisfy that statute's requirements for civil forfeiture.

The Tennessee authority upon which the State has also relied is even more tenuous than the just-cited New Mexico authority. The unreported decision of the Tennessee Court of Appeals upon which the State relies, *Featherston v. Wood*, 1985 WL 4551 (Tenn.Ct.App. 1985),[3] offers no supporting authority whatsoever for its even more narrow parsing of that state's former statute, which declared as follows:

---

[3] Apparently the publication of a Tennessee Court of Appeals decision is the exception, rather than the rule. A review of the cited Tennessee Court of Appeals Rules 11 and 12 reveals that the Tennessee Court has adopted set of routine guidelines for determining when a decision of the Court of Appeals will be published.

> all conveyances, including aircraft, vehicles or vessels, which are used or intended for use, to transport, or in any manner **to facilitate** the **transportation**, for the purpose of sale or receipt of property described in subdivisions (a)(1) or (a)(2).

Tenn. Code Ann. § 53-11-409(a)(4) (emphasis added).

The Tennessee Court of Appeals in the *Featherston* decision held that the final phrase of this statute that declared, "for the purpose of sale or receipt of property," only modified the single word "transportation," but not the immediately preceding phrase, "to facilitate," which itself modified the word "transportation." The State on this appeal has seized upon this interpretation of a statute that was similar to Idaho's § 37-2744(a)(4) and has argued that the Tennessee Court of Appeal's determination that the phrase, "to facilitate," was not modified by, "purpose of sale or receipt" can only further support its own argument in respect to the Idaho statute that the entire preceding phrase that ends in, "to transport," is also not modified by "purpose of sale or receipt."

No known rule of statutory interpretation or rule grammar supports the determination that was made by the Tennessee Court of Appeals in *Featherston*. In contrast, the "Last antecedent rule," upon which the New Mexico Supreme Court had relied in the 1983 *Ford Bronco* decision, has also been recognized in Idaho, subject to the exception when the context of the statute clearly indicates a contrary interpretation. *See*, *State v. Troughton*, 126 Idaho 406, 411, 884 P.2d 419, 424 (Ct.App.1994). The Tennessee Court in the *Featherston* case had been confronted by an argument made by the appellant that the statute required a vehicle to have been used to facilitate the "sale" of a controlled substance in order to be subject to forfeiture. The Tennessee Court was attempting to avoid an interpretation of their statute that seemingly would have made it applicable to any vehicle,

no matter how remotely involved in the facilitation of the sale of a controlled substance, including U.S. mail vehicles used in transporting funds submitted in payment. 1985 WL 4551 at pg *4. The Tennessee Court construed the statute so as to avoid this result in the case before it, but in doing so it imposed a construction upon that statute that is not supported by any accepted rule of statutory construction or rule of grammar.

The *Featherston* case was handed down by the Tennessee Court of Appeals on December 18, 1985. Just four months later the statute interpreted by that decision, Tenn. Code Ann. § 53-11-409(a)(4) was repealed in its entirety by the Tennessee Legislature and replaced effective April 15, 1986. *See*, 1986 Tenn. Pub. Acts, Ch. 783, pg. 759. The Court in, *Hughes v. Dept. of Safety*, 776 S.W.2d 111 (Tenn. App.1989) determined that as a result of this 1986 amendment, "the relevant portion of Tenn. Code Ann. § 53-11-409(a)(4) had become identical to language used in 21 U.S.C. § 881(a)(4) (1982)." 776 S.W.2d at 113. As already pointed out in this brief, the Idaho statute, § 37-2744(a)(4), and the corresponding federal statute, § 881(a)(4), differ as a result of the Idaho Legislature's addition of the phrase, "for the purpose of distribution or receipt." Consequently, when the Tennessee Court of Appeals in *Hughes* declared that, "We hold, therefore, that the transportation of any amount of illegal drugs comes within the letter of Tenn. Code Ann. § 53-11-409(a)(4)," 776 S.W.2d at 113, in construing its statute as amended in 1986, it recognized the conformance of that statute with the federal law, and as applied to this appeal, necessarily differentiates the Tennessee statute from the Idaho statute.

It is worth noting that the Tennessee Court in *Hughes* went on to analyze an exception in that

state's law similar to that discussed above in respect to the misdemeanor exemption that was also a part of Idaho law between 1972 and 1989. The Tennessee Court concluded that notwithstanding that exception, "we are convinced that the use of a vehicle to drive to the point where an illegal sale is made and the further use to transport the controlled substance away from the point of sale will subject the vehicle to confiscation regardless of the purpose for which the controlled substance was purchased." 776 S.W.2d at 115. Since the absence of any proof of "purpose of distribution or receipt" is the issue at the core of the question presented on this appeal, that distinction has no bearing on the outcome of this appeal. Christopher Rubey only pled guilty to felony possession.

In sum, neither the federal authority, nor the authority from sister states, that has been cited by the Appellant State on this appeal aids its argument that civil forfeiture under I.C. § 37-2744(a)(4) can occur based only upon the mere possession of a controlled substance while in operation of a vehicle. Instead, proof by a preponderance of the evidence is required of a purpose of distribution or receipt (trafficking) in order for the State to be entitled to civil forfeiture under that statute.

Finally, the State has argued, as based upon the Court of Appeal's recent decision in *State v. Key*, 149 Idaho 691, 239 P.3d 796 (Ct.App.2010), that the Respondents on this appeal have urged an interpretation of I.C. § 37-2744(a)(4) that would "eviscerate the difference between criminal and civil forfeiture," and that the Respondents have also argued that civil forfeiture cannot occur unless the vehicle "facilitated the specific crime of delivery or receipt of methamphetamine." *See*, Appellant's Brief at pp. 16-17. The State is in error on both points. These were not the arguments that the Respondents made below on intermediate appeal to the district court (R., pp. 381-82, 384-

85), nor are they the arguments that are being made to this Court on this appeal.

The burden of proof in a civil forfeiture action is a preponderance of the evidence. I.C. § 37-2744(d); and *Idaho Dept. of Law Enforcement v. $34,000 U.S. Currency*, 121 Idaho 211, 216, 824 P.2d 142, 147 (Ct.App.1991). Consequently, neither a criminal conviction, nor evidence sufficient to establish a criminal standard of proof is required to establish a civil forfeiture of a vehicle under I.C. § 37-2744(a)(4).

Both decisions of the Idaho Court of Appeals in *State v. Key, supra*; and in *State v. Stevens*, 139 Idaho 670, 84 P.3d 1038 (Ct.App.2004), the decision upon which the Court in *Key* primarily relied, involved criminal, rather than civil, forfeitures. The Court in *Key* quoted substantial sections from its decision in *Stevens*, 149 Idaho at 703, 239 P.3d at 808. The primary distinction between those two cases is that in *Stevens* the Court found no connection between the drugs and the vehicle, whereas in *Key*, the drugs were found in the vehicle itself. 149 Idaho at 704, 239 P.3d at 809. Apart from this specific distinction, the recent *Key* decision does not in any way alter the analysis that the Respondents previously undertook in reliance upon the *Stevens* decision, and upon *Cade v. One 1987 Dodge Lancer*, 125 Idaho 731, 874 P.2d 542 (1994).

In *Cade* the Idaho Supreme Court held that a violation of the Uniform Controlled Substances Act is a prerequisite to a civil forfeiture action.

> Since a violation of the Act is a prerequisite to a forfeiture action, it follows that the forfeiture cannot occur without the violation.

125 Idaho at 733, 874 P.2d at 544. The Idaho Court of Appeals in *State v. Stevens*, 139 Idaho 670,

84 P.3d 1038 (Ct.App.2004) compared and contrasted Idaho's criminal and civil forfeiture statutes and declared that an action for criminal forfeiture requires a direct nexus between the crime committed and the property that is subjected to forfeiture, while in contrast a civil forfeiture action only requires the use of a vehicle,

> . . . for the purpose of distribution or receipt of" controlled substances that have been possessed or distributed in violation of the UCSA, I.C. § 37-2744(4) [sic]. Unlike this civil forfeiture statute, section 37-2801(2) limits criminal forfeiture to property that facilitated the crime for which the defendant has been convicted.

139 Idaho at 675, 84 P.3d at 1043.

The *Stevens* and *Cade* decisions can be summarized as standing for the propositions that: (1) there must be a predicate violation of the Uniform Controlled Substances Act in order to allow a civil forfeiture action to go forward (*Cade*), and (2), the civil forfeiture action must be based upon the use of a vehicle for the purpose of distribution or receipt of a controlled substance that was possessed or distributed in violation of the Act, but that vehicle does not have to have been used to facilitate the crime for which the defendant who is being subjected to the forfeiture has been convicted under the Act (*Stevens*).

As applied to the facts presented by this appeal, there has been no issue concerning the existence of the predicate violation of the Act by Rubey (*Cade*). He pled guilty to felony possession of methamphetamine. Furthermore, the second part of the *Stevens* test is not at issue because Rubey's conviction for possession, standing alone – without the use of the vehicle being a necessary element of that offense – only provides a sufficient basis upon which to request civil forfeiture of

that vehicle so long as the first part of the *Stevens* test is met, which requires that the use of a vehicle was undertaken for the purpose of distribution or receipt of a controlled substance that was possessed or distributed in violation of the Act. That element is absent in this case.

The distinction between criminal and civil forfeiture that was made by the Idaho Court of Appeals in *State v. Stevens*, 139 Idaho 670, 675, 84 P.3d 1038, 1043 (Ct.App.2008), and that was recently applied in *State v. Key*, 149 Idaho 691, 239 P.3d 796 (2010), is that the property being subjected to civil forfeiture does not have to have been used to facilitate the crime for which the defendant was convicted. As applied to the facts of this case, in order to be entitled to civil forfeiture the State must establish by a preponderance of the evidence – not by criminal conviction – that the vehicle was used "for the purpose of distribution or receipt" of a controlled substance, which when coupled with Rubey's underlying conviction for possession, would be sufficient to establish a right to civil forfeiture. Unlike a criminal forfeiture, no direct nexus is required between the underlying conviction for possession, and the determination that the vehicle was used for the purpose of distribution or receipt, but also neither is a criminal conviction required for trafficking arising from either "distribution or receipt" in order to obtain a civil forfeiture.

In sum, the Idaho Legislature has provided that civil forfeiture of a vehicle can only occur when the owner of that vehicle has committed predicate offense under the Uniform Controlled Substances Act. *Cade v. One 1987 Dodge Lancer*, 125 Idaho 731, 733, 874 P.2d 542, 544 (1994). The Idaho Legislature has also provided that the commission of the required predicate offense under the Act does not require that the vehicle being subjected to civil forfeiture was used in the

commission of that predicate offense. *State v. Stevens*, 139 Idaho 670, 675, 84 P.3d 1038, 1043 (Ct.App.2004).

In addition, Idaho Legislature has also declared that a civil forfeiture under the authority of I.C. § 37-2744(a)(4) should not be based upon a determination of only possession, standing alone, but that in addition, there must be a finding that the vehicle, which is being subjected to forfeiture, was used, or intended to be used, "for the purpose of distribution or receipt" of a controlled substance. The federal precedents that construe the federal Act do not involve this additional requirement of Idaho law, which is virtually unique to the Idaho Act.

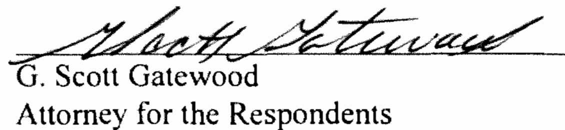
This is not an "either-or" situation, as characterized the State's argument. The State can elect to charge a defendant with a non-trafficking offense, such as possession, and still request civil forfeiture, but in order to succeed on the civil forfeiture claim the State is required to establish distribution or receipt by a preponderance of the evidence – not by criminal conviction. Because there was no evidence of distribution or receipt (trafficking), there was no right to civil forfeiture under I.C. § 37-2744(a)(4) in this case.

IV.

CONCLUSION

The decision of the district court should be affirmed.

Dated this 23rd day of May, 2012.



G. Scott Gatewood
Attorney for the Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 23rd day of May, 2012, two true and correct copies of the foregoing RESPONDENTS' BRIEF were served upon the following:

Lorna K. Jorgensen	___ U.S. Mail
Ada County Prosecuting Attorney	___ Facsimile
Civil Division	___ Overnight Mail
200 W. Front Street, Room 3191	_X_ Hand Delivery
Boise, Idaho 83702	___ ___________
Telephone: 208-287-7700	
Facsimile: 208-287-7719	
Email: ljorgensen@adaweb.net	

Attorney for the Appellant

G. Scott Gatewood