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State v. Sherman Appellant's Brief Dckt. 40995

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. NIKOLAS LEE SHERMAN, Defendant/Appellant.	)	APPELLANT'S BRIEF SUPREME COURT NO. 40995 CR-12-0008124

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a conditional plea under I.C.R. 11. The state alleged that the defendant had violated I.C. § 54-1732(3)(c). The Magistrate Court heard argument and found that I.C. § 54-1732(3)(c) on its face and as applied to this case did not violate the requirements of substantive due process embodied in the Fourteenth Amendment to the United States Constitution. Further, the Court heard argument on the defendant's proposed jury instruction as to the defense of being a warehouseman as defined in I.C. § 54-1705(36). The Court denied the requested instruction on the grounds that the Court believed the defendant would have to make a showing of being employed in the pharmaceutical business to be entitled to it. The defendant then entered a conditional plea of guilty to the charge of possessing a legend drug without a prescription in violation of I.C. § 54-1732(3)(c) while reserving his right to appeal the Court's rulings and the Court found him guilty.

On appeal, the District Court found that I.C. § 54-1732(3)(c) was constitutional both on its face and as applied. The District Court found that the Magistrate Court had erred in its definition of the affirmative defense the defendant had requested, but upheld its denial based on its own definition of that defense.

B. Statement of the Facts

On May 12, 2012, officers of the Post Falls Police Department arrested Nikolas Sherman for allegedly possessing a legend drug in violation of I.C. § 54-1732(3)(c). See Post Falls Police Report No. 12PF08556.

On September 17, 2012, the Magistrate Court of Kootenai County held a hearing on Mr. Sherman's Motions to Dismiss the charge against him on the grounds that it violated substantive due process as guaranteed by the Fourteenth Amendment to the United States Constitution both as applied and on its face. Tr. p. 1, L. 1, 18-21. Mr. Sherman and the state stipulated to the entry of the police report for purposes of the hearing to provide the Court with a factual basis for the as applied challenge. Tr. p. 1, L. 22-25; p. 2, L.1-7. After hearing argument and reviewing the defendant's memorandum and police report, the Court found the following in regards to the facial challenge:

> THE COURT: First of all, as to the – essentially the facial challenge, the rational basis, it seems to me that that somewhat speaks for itself, given the issue of dealing with a controlled substance. It seems to me that certain reasonable inferences from that are the controlled and highly regulated nature of the substance in and of itself and that that, frankly, is sufficient to meet the rational basis test.
>
> Tr. p. 17, L. 23-25; p. 18, L. 1-5.

The Court then made the following findings as to the facts of the case:

> THE COURT: The reasonable conclusion from [the police report] would be uh, that in fact Mr. Sherman had improperly acquired; that is, based on the evidence available within the police report that he had in fact stolen the prescription bottle out of the vehicle or I suppose the house of the Gallegos', which would uh, make it, first of all, a petty [sic] theft for obtaining the item. And secondly, potentially a burglary charge for entering either a

vehicle or the house. I think there was some reference to perhaps qualification as to whether – knowing whether the prescription was in the vehicle or not and then ultimately the officers returning the prescription to the Gallegos.

Under those circumstances, um, it seems to me that those are at least some other circumstances. Not – not just the underlying facts, but also the connective facts, that uh, Mr. Sherman was not particularly identifying the person that he was holding those for. That is, it wasn't uh, a circumstance of saying these are the pills for my mother. I've just picked them up at the pharmacy. Instead it was a reference to a female owner. There's a male name on the pill bottle. Later a different male's name is given as the friend, but still that doesn't match the pill bottle. And then of course the underlying circumstance where the name on the pill bottle actually matches up to the Gallegos or a nearby neighbor and no indication that that's somehow the friend that was referred to.

So in any event, I don't see the circumstances showing that the statute is overbroad as described or alleged in the motion to dismiss.

Tr. p. 19, L. 19-25; p. 20, L. 1-24.

Then, on October 26, 2012, during a pretrial hearing, the Court agreed to review Mr. Sherman's Motion to Reconsider his previous Motions to Dismiss. Tr. p. 23, L. 1; p. 24 L. 17-20. The Court found that there was no "particular new or novel argument within the motion before the Court as to the direct reconsideration of the Court's ruling" and so the Court declined to revisit the issue. Tr. p. 24 L. 22-25; p. 25, L. 1. The Court found that within the motion to

reconsider was essentially a request for a jury instruction. Tr. p. 25, L. 3-8. The Court invited argument on that subject. *Id.* Defense counsel for Mr. Sherman requested an instruction that the jury be told it would be a defense to the charge if he was found to fit the definition of a warehouseman in I.C. § 54-1705. See Defendant's Motion to Reconsider Motion to Dismiss I & II; Tr. p. 25, L. 18-25; p. 26, L. 1-6. The Court found that:

> THE COURT: In order for the Court to authorize that instruction, there would need to be essentially a showing through the evidence to support that, that the defendant would be a person who stores legend drugs for others. And it seems to, by the context of that, is in the business of that, whether that would have to be shown truly for hire, if you will, that is, for compensation, or other circumstances that might meet that. But I would see that that type of showing would be necessary; absent that showing that uh, the Court would not give such an instruction.
>
> Tr. p. 27, L. 12-22.

Defense counsel for Mr. Sherman informed the Court that he would be unable to make such a showing. Tr. p. 28, L. 12-15. The Court responded:

> THE COURT: And just to be clear, I was trying to distinguish that whether he's truly employed in that capacity. I suppose there could be some other circumstances where someone uh, technically not as a matter of employment but is sort of in the business of, whether for compensation or not, but in the business of holding such substances for others.

Tr. p. 28, L. 16-22.

Defense counsel for Mr. Sherman assured the Court that he was not engaged in economic activity involving the holding of legend drugs. Tr. p. 28, L. 16-22. The Court then denied the motion to reconsider and the proposed jury instruction. Tr. p. 29, L. 9-11. Mr. Sherman then entered a conditional plea. Tr. p. 35, L. 5-12. The Court then sentenced Mr. Sherman but ordered his sentence be stayed pending the resolution of his appeal pursuant to I.C.R. 54.5. Tr. p. 35, L. 20-25; p. 37, L. 1-25; p. 38, L. 1-25; p. 39, L. 1-22. Mr. Sherman timely filed a notice of appeal under I.C.R. 54.1(a), *et.seq*. from the judgment of the Court.

At the District Court the state never filed a brief. The District Court decided the matter without hearing argument and issued a written opinion on April 26, 2013. The defendant filed a timely notice of appeal from the District Court's decision under Idaho Appellate Rule 11(c)(10).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

I. Whether I.C. § 54-1732(3)(c) is on its face in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

II. Whether I.C. § 54-1732(3)(c) is as applied to the facts in this case in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

III. Whether the defendant was entitled to a jury instruction that it would be a defense to a charge of possessing a prescription drug without a prescription under I.C. § 54-1732(3)(c) to merely be a person storing that legend drug for another and has no control over its disposition beside that storage.

ARGUMENT

A. Introduction

The Constitution "protects against the Government; it does not leave us at the mercy of *noblesse oblige*. [The Supreme Court] would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 130 S.Ct. 1577, 1591 (2010) citing *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 473 (2001). The Magistrate Court erred when it found I.C. § 54-1732(3)(c) constitutional in spite of the fact that it criminalizes everyday behaviors of Idahoans which are without any reasonable relationship to a legitimate state objective.

B. Standard for Review

An appellate court exercises free review over questions of law. *Idaho v. Button*, 134 Idaho 814 (Ct.App.2000); *Powell v. Sellers*, 130 Idaho 122, 125 (Ct. App. 1997).

C. The I.C. § 54-1732(3)(c) violates the Fourteenth Amendment to the United States Constitution on its face.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as Article I § 13 of the Idaho Constitution, guarantee every citizen of Idaho the right to be free from arbitrary law. *See Aberdeen-Springfield Canal Company v. Peiper*, 133 Idaho 82, 90 (1999); *Smith v. Costello*, 77 Idaho 205, 209 (1955). The right to be free from an arbitrary law should not be confused with the overbreadth doctrine. "The overbreadth doctrine is aimed at statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions constitutionally protected freedoms." *State v. Korsen*, 138 Idaho 706, 713 (2003).

The two-part test for unconstitutional overbreadth asks (1) whether the statute regulates constitutionally protected conduct, and (2) whether the statute precludes a significant amount of that constitutionally protected conduct. *Id.* Substantive due process requires instead that "a statute bear a reasonable relationship to a permissible legislative objective." *In re McNeely*, 119 Idaho 182, 189 (Ct.App.1991). When dealing with legislation involving social or economic interests, the Court assumes a deferential standard of review. *See id.* In this context, substantive due process means "that legislation which deprives a person of life, liberty, or property must have a rational basis-that is, the reason for the deprivation may not be so inadequate that it may be characterized as arbitrary." *Id.*

A prime example of arbitrary law was held unconstitutional in *Smith*. The plaintiff in *Smith* had sued an officer who had shot his dog. *Smith*, 77 Idaho at 207. The officer relied on I.C. § 37-1407 (1952) to justify the killing. *Id.* at 208. The statute stated:

> '* * * Any dog running at large in territory inhabited by deer, is hereby declared to be a public nuisance and may be killed at such time by any game conservation officer or other person entrusted with the enforcement of the game laws, without criminal or civil liability.'

Id. The Idaho Supreme Court found that a dog was not a per se nuisance. *Id.* The Court further found that many other jurisdictions had found statutes "authoriz[ing] the summary destruction of dogs simply because said dogs might be running at large" unconstitutional. *Id.* The Court then found that "territory inhabited by deer" if construed to mean "where deer might be found" would "include the greater part of the state." *Id.* The Court held:

> [p]olice regulations cannot arbitrarily and without any sufficient reason authorize the killing or wounding of animals belonging to another. The legislature cannot declare something to be a nuisance which is not one in fact or per se; and to declare that a dog running at large in territory inhabited by deer is a public nuisance, without more, is an arbitrary, unreasonable and unconstitutional regulation.

Id. at 209.

The rational basis test was first developed in *Williamson v. Lee Optical, Co.*, 348 U.S. 483, 487-8 (1955). In that case, the Court held,

> [t]he Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription. It also appears that many written prescriptions contain no directive data in regard to fitting spectacles to the face. But in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition. The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. To be sure, the present law does not require a new examination of the eyes every time the frames are changed or the lenses duplicated. For if the old prescription is on file with the optician, he can go ahead and make the new fitting or duplicate the lenses. But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The Court thereby held constitutional a law which was clearly both over and underinclusive in its

scope. The arbitrariness of the law, however, was not so great in the eyes of the Court that it would violate the Constitution.

Since *Lee Optical*, the Supreme Court has considered a variety of statutes for possible violations of the rational basis test.

In *Kelley v. Johnson*, 425 U.S. 238, 248-9 (1976), the Supreme Court upheld a regulation requiring members of a police force in New York to have a certain haircut. While upholding the regulation, the Court suggested the same law could not be applied to the general public. *Id.* As Justice Powell stated in concurrence, "This process of analysis justifies the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context." *Id.*

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), Justice Brennan in a concurring opinion joined by three other justices, found that an Illinois statute that dismissed claims unless a hearing was held within 120 days regardless of the cause of the delay was irrational though the majority did not reach that claim in granting the petitioner relief. Justice Brennan described rational basis review as "not a toothless [standard]." *Id.* at 439 quoting *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). The justice further acknowledged that "[n]o bright line divides the merely foolish from the arbitrary law," but all the same laws "must "rationally advanc[e] a reasonable and identifiable governmental objective." *Id.* at 439-40, quoting *Schweiker*, 450 U.S. at 235, 243 (dissenting opinion). Justice Brennan found:

> [I]t is possible that the Illinois Supreme Court meant to suggest that the deadline contained in ¶ 858(b) can be justified as a means of thinning out the Commission's caseload, with the aim of encouraging the Commission to convene

> timely hearings. This rationale, however, suffers from the defect outlined above: it draws an arbitrary line between otherwise identical claims. In any event, the State's method of furthering this purpose-if this was in fact the legislative end-has so speculative and attenuated a connection to its goal as to amount to arbitrary action. The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis. That is not so here.

Id. at 442.

In *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 435 (1985), the Supreme Court struck down an ordinance requiring a home for the mentally disabled to seek a special use permit. The Court found no legitimate reason for the ordinance, dismissing private biases, vague, undifferentiated fears, an unjustified claim of a different or special hazard posed by the home, and an unjustified claim that some different density requirement should apply to such a home. *Id.* at 448-450. The Court concluded that the City had failed to give a rational reason justifying its ordinance:

> In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.

Id. at 44.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a statute criminalizing sodomy in the state of Texas. The Court in *Lawrence* took note of the direct and indirect penalties and stigma attached to a violation of the law. *Id.* at 575. The Court held

> [t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Id. quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992).

Lastly, in *Whalen v. Roe*, 429 U.S. 589 (1977) the Supreme Court upheld a legislative act aimed at precisely the same issue as confronted the Idaho Legislature when it passed I.C. § 54-1732(3)(c)- the improper use and abuse of prescription medications. The petitioners in the case challenged a law requiring a database to be created with the government listing patients, their doctors, and what medications they had been prescribed. *Id.* at 591. The petitioners alleged that the system infringed on privacy and presented evidence than some patients stop taking required medicine for fear of being labeled drug addicts. *Id.* at 595. In that case the Court found

> The New York statute challenged in this case represents a considered attempt to deal with such a problem. It is manifestly the product of an orderly and rational legislative decision. It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other States. There surely was nothing unreasonable in the assumption that the patient-identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs. For the requirement could reasonably be expected to have a deterrent effect on potential violators as well as to aid in the detection or investigation of specific instances of apparent abuse. At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control. For if an experiment fails if in this case experience teaches that the patient-identification requirement results in the foolish expenditure of funds to acquire a mountain of useless information the legislative process remains available to terminate the unwise experiment. It

> follows that the legislature's enactment of the patient-identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for the requirement had not been proved is not, therefore, a sufficient reason for holding the statutory requirement unconstitutional. (footnotes omitted).

Id. at 597-98.

In the case at bar, the statute at issue must be found irrational and arbitrary in its scope. I.C. § 54-1732 in relevant part states:

> (3) The following acts, or the failure to act, and the causing of any such act or failure are unlawful;
> ...
> (c) The possession or use of a legend drug or a precursor by any person unless such person obtains such drug on the prescription or drug order of a practitioner. Any person guilty of violating this paragraph shall be guilty of a misdemeanor and upon conviction thereof shall be incarcerated in the county jail for a term not to exceed one (1) year, or punished by a fine of not more than one thousand dollars ($1,000) or by both such fine and incarceration.

Possession is defined as either knowledge of an object's presence and physical control or power and intent to control the object. *State v. Blake*, 133 Idaho 237, 241 (1999). I.C. § 54-1705 defines person as "an individual, corporation, partnership, association or any other legal entity." Legend drug is defined as:

> a drug which, under federal law is required, prior to being dispensed or delivered, to be labeled with one (1) of the following statements:
>
> (a) "Caution: Federal law prohibits dispensing without a prescription"; or
>
> (b) "Rx Only"; or
>
> (c) "Caution: Federal law restricts this drug to use by or on the order of a licensed veterinarian";

> or a drug which is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by practitioners only.

Drug is defined as:

> (a) Articles recognized as drugs in the official United States Pharmacopoeia, official National Formulary, official Homeopathic Pharmacopoeia, other drug compendia or any supplement to any of them;
>
> (b) Articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animal;
>
> (c) Articles, other than food, intended to affect the structure or any function of the body of man or other animals; and
>
> (d) Articles intended for use as a component of any articles specified in paragraph (a), (b) or (c) of this subsection.

Precursor is defined as:

> a substance, other than a legend drug which is an immediate chemical intermediate that can be processed or synthesized into a legend drug, and is used or produced primarily for use in the manufacture of a legend drug by persons other than persons licensed to manufacture such legend drugs by the Idaho board of pharmacy, registered by the state board of health and welfare, or licensed to practice pharmacy by the Idaho board of pharmacy.

Practitioner is defined "as a person licensed in this state and permitted by such license to dispense, conduct research with respect to or administer drugs in the course of professional practice or research in this state." Prescription drug order "means a lawful written or verbal order of a practitioner for a drug or device for an ultimate user of the drug or device, issued and signed by a practitioner, or an order transmitted verbally from a practitioner or the practitioner's agent to a pharmacist in a pharmacy, or transmitted verbally from a practitioner and immediately

reduced to writing by a licensed practical nurse or licensed professional nurse in an institutional facility for a patient or resident of such facility."

Finally, I.C. § 54-1734 lists exceptions to I.C. § 54-1732(3)(c). It states in relevant part:

> The provisions of this chapter pertaining to the sale of prescription drugs are not applicable:
> ...
>
> (2) To the possession of legend drugs by such persons or their agents or employees for such use:
>
> (a) Pharmacists;
>
> (b) Practitioners;
>
> (c) Persons who procure legend drugs for handling by or under the supervision of pharmacists or practitioners employed by them, or for the purpose of lawful research, teaching, or testing, and not for resale;
>
> (d) Hospitals and other institutions which procure legend drugs for lawful administration by practitioners;
>
> (e) Manufacturers and wholesalers;
>
> (f) Carriers and warehousemen.

No other exceptions exist anywhere within the Act. I.C. § 54-1705 defines pharmacist as "an individual licensed by this state to engage in the practice of pharmacy or a pharmacist licensed in another state who is registered by the board of pharmacy to engage in the practice of telepharmacy across state lines." Practitioner is defined "as a person licensed in this state and permitted by such license to dispense, conduct research with respect to or administer drugs in the course of professional practice or research in this state." Manufacturer is defined as "a person

who by compounding, cultivating, harvesting, mixing or other process, produces or prepares legend drugs, and includes persons who prepare such drugs in dosage forms by mixing, compounding, encapsulating, entableting, or other process, or who packages or repackages such drugs, but does not include pharmacists or practitioners in the practice of their profession." Wholesaler is defined as "a person engaged in the business of distributing legend drugs that he himself has not produced or prepared, to persons included in any of the classes named in subsection (2)(a) through (f) of section 54-1734, Idaho Code." Warehouseman is defined as "a person who stores legend drugs for others and who has no control over the disposition of such drugs except for the purpose of such storage."

The Magistrate further defined a warehouseman as one employed in a capacity where he handles and stores prescription medications. Tr. p. 28, L. 16-22. The District Court overruled this holding, but instead defined the warehouseman as a person who stores legend drugs for others who are the legal owners of those drugs. *See* Decision on Appeal from Magistrate Division of District Court, p. 9 (April 26, 2013).

"Agency" is the relationship resulting from the manifestation of consent by one to another that the other shall act on his behalf and subject to his control and consent by the other so to act. *Gorton v. Doty*, 57 Idaho 792, 69 P.2d 136, 139 (1937).

In sum, the Act criminalizes possession of prescription drugs and their precursors unless those drugs were prescribed specifically to the person in possession, except where the above referenced narrow exceptions apply. The absurdity of the law is apparent on its face. While the state has a legitimate interest in stopping the misuse and abuse of prescription drugs, the state

had no interest in preventing caregiving or the ordinary actions that take place every day which constitute a violation of this law. To justify this law the state would need show that the population of the state of Idaho, aside from those employed in the pharmaceutical industry, is so disposed as to misuse and abuse any medication of which it comes into possession. To limit the legal possession of medication to the individual prescribed and pharmaceutical employees is utterly irrational.

Under I.C. § 54-1732(3)(c) only practitioners or their agents can administer medication to invalids, children, and animals. Not only are family members violating the law when they pick up a loved one's prescription from the pharmacy, but under the law, so are the pharmacist and the person prescribed for having "caused" the violation.

I.C. § 54-1734 cannot be read to include caregivers and parents in the immunity it grants. A parent is not an agent of a practitioner. While the parent may perform a task the practitioner is licensed to do, the practitioner is the one operating on the parent's child by contract. The practitioner is not providing authority to the parent to administer medications or controlling how they administer them. Nor is the parent "representing" the practitioner. Certainly, no court would recognize a right on the behalf of the child to sue a practitioner for a misadministration of a prescription drug by a parent.

Further, the parent has the right to raise their child. While no particular right to care for a sick child has ever been recognized as being a right contained in the Fourteenth Amendment, it should be enough to acknowledge that the government has no legitimate purpose criminalizing

perfectly natural parental behaviors that have existed before, and will continue to exist long after, the government. As the Supreme Court stated in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923):

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (citations omitted).

The Idaho Constitution also protects these rights under Article I § 1. The Idaho Legislature has further acknowledged the importance of care in I.C. § 16-1602(25)(a). That subsection states:

> Who is without proper parental care and control, or subsistence, medical or other care or control necessary for his well-being because of the conduct or omission of his parents, guardian or other custodian or their neglect or refusal to provide them; however, no child whose parent or guardian chooses for such child treatment by prayers through spiritual means alone in lieu of medical treatment shall be deemed for that reason alone to be neglected or lack parental care necessary for his health and well-being, but this subsection shall not prevent the court from acting pursuant to section 16-1627, Idaho Code. . .

This language suggests that the Idaho Legislature assumes that the care given by a parent to a child is not an area in which the government may interfere where it is being given in good faith. Certainly, without this language, no First Amendment violation could exist, as the statute regulates conduct without reference to religion. *See Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). The Legislature therefore was acknowledging the importance and inviolability of parent-child care.

While never ascribed a higher level of protection than rational basis review, the act of caring for another is not reasonably encompassed by the objectives of the government in passing I.C. § 54-1732(3)(c). Even if the government has a legitimate reason to keep track of prescription medication and to invade the privacy of the doctor-patient relationship, it does not have any justification for criminalizing acts that are crucial to providing care. To state otherwise is to accept that no parent, family member, or friend may ever again assist in the medication-related aspects of care. It is highly unlikely that the health care industry is ready or willing to shoulder that burden.

Further, it is absurd for the government to surmise that the only people who can be trusted not to misuse, abuse, or deal illegally in prescription drugs are doctors, pharmacists, warehousemen, and patients. The groups singled out to be immune from I.C. § 54-1732 by I.C. § 54-1734 have no reason to be less likely to pilfer and abuse medication than the friends and family of a patient. Prescription drug abuse is likely to have similar consequences for the employment of the abuser as stealing medication will have for a doctor. A friend or family member actually has the additional safeguard of caring about the person whose prescription it is. The law assumes that there may be people who will not be tempted, due to the conditions of their employment, not to misuse medications they hold for another, while also assuming that every other person cannot be trusted. Under this theory, the government could outlaw the storage of any potentially dangerous item. Guns, nonprescription drugs, knives, the precursors of bombs such as fertilizers, particularly heavy books, all of these things could be confined to the possession of their immediate owners because the government deems the rest of mankind

untrustworthy. Such thinking is irrational and has no place in our society. I.C. § 54-1732 treats prescription drugs like contraband, and leaves the liberties of the people no breathing room. Therefore, the law is absurd.

The Court should not accept any argument by the state that this law will be implemented in a constitutional way. As Chief Justice Roberts wrote in *Stevens*, 130 S.Ct. at 1591 citing *Whitman* 531 U.S. at 473, the Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The misuse of I.C. § 54-1732 is easy to imagine: a husband gets medication for his wife and is pulled over for a driving infraction, the officer sees he has a history of arrests for possession of a controlled substance and writes him a ticket for violating I.C. § 54-1732(3)(c). He has no defense: the statute does indeed criminalize the possession that took place. However, this conduct is in no way rationally related to the government's objective of preventing the husband from abusing or misusing the medication except in the most extremely attenuated fashion. Therefore, this Court should find I.C. § 54-1732(3)(c) unconstitutional.

II.

A. Introduction

The District Court erred in not finding that I.C. § 54-1732 is unconstitutional as applied to the facts of this case. The Court reviewed the statements made by the defendant and the Magistrate's findings and found no issue with the application of the statute. Criminalizing the act of temporarily possessing the property of another goes beyond the boundaries of rationality and this Court should find I.C. § 54-1732(3)(c) unconstitutional as applied to this case.

B. Standard of Review

On review of a decision of the district court, rendered in its appellate capacity, this Court reviews that decision directly and examines the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Losser v. Bradstreet*, 145 Idaho 670, 672 (2008); *State v. DeWitt*, 145 Idaho 709, 711 (Ct. App. 2008). An appellate court exercises free review over questions of law. *Powell*, 130 Idaho at 125.

C. I.C. § 54-1732(3)(c) violates the Fourteenth Amendment to the United States Constitution as applied to the facts of this case.

As argued above, the Fourteenth Amendment of the United States Constitution and Article I § 13 of the Idaho Constitution require that the laws passed by state legislatures be rationally related to a legitimate government purpose. In the case at bar, the Magistrate Court received a police report and was told these were the facts in the case. The Court found that the defendant merely possessed the legend drugs. Even though the Court found that the defendant was knowingly in possession of stolen medication, the problem remains that the law he was actually charged with does not distinguish between the defendant's proffered defense- that he had been given the medication by a friend to store while they played Frisbee golf and had not yet returned it- and the Court's finding that he likely stole it. The defendant's defense is no defense under I.C. § 54-1732(3)(c). As applied, I.C. § 54-1732(3)(c) seeks to punish the defendant for merely possessing a drug for which he had no prescription. How he came into possession is

immaterial so long as no practitioner prescribed him the medication and he does not fall into one of the exceptions under I.C. § 54-1734.

This case highlights the problem with statutes that criminalize behavior not reasonably related to their objective. Were the defendant to tell a jury that his friend gave him a bottle to hold while they played Frisbee golf he would only convict himself. I.C. § 54-1732(3)(c) makes it a crime to merely possess another's prescription drug unless you are prescribed it or are immune under I.C. § 54-1734. I.C. § 54-1734 specifically grants immunity to carriers and warehousemen, whose only job would be to store and carry medications that they themselves are not prescribed. There is no rational basis to punish the defendant for conduct allowed a warehouseman or a patient.

The District Court expanded the finding of the Magistrate by holding that it was unlawful for the defendant to possess stolen medication regardless of whether he knew it to be stolen. This holding is in conflict with I.C. § 18-114, *State v. Fox*, 124 Idaho 924 (1993), and the text of the statute. This is likely because possession of stolen property is already a violation of the law. *See* I.C. § 18-2403. However, as there are no criminal statutes in Idaho that do not at least require criminal negligence, and where no mental element is specified the requirements is general intent, and general intent at least requires that the person be conscious of the unlawful act, the District Court's ruling is in error. *See Fox*, 124 Idaho at 926. That is all beside the point because the law itself makes no distinction between the person the warehouseman received the drug from or whether the person is aware of and holding it for its true owner.

III.

A. Introduction

If the District Court did not err in finding that I.C. § 54-1732(3)(c) is constitutional, then the Court erred in upholding the Magistrate's refusal of the defendant's proposed jury instruction providing an affirmative defense to one merely storing the medication of another. The defendant is not required to produce sufficient evidence to prove the legal possession of the medication by the person from whom he received it.

B. Standard of Review

On review of a decision of the district court, rendered in its appellate capacity, this Court reviews that decision directly and examines the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Losser*, 145 Idaho at 672; *DeWitt*, 145 Idaho at 711. An appellate court exercises free review over questions of law. *Powell,* 130 Idaho at 125.

C. The defendant was entitled to his proposed jury instruction.

As explained above, I.C. § 54-1732(3)(c) makes it illegal for anyone to possess a drug they were not prescribed by a doctor. I.C. § 54-1734 provides immunity to "warehousemen and carriers." The concept of a carrier is not defined by the Act, but I.C. § 54-1705 defines a warehouseman as:

> a person who stores legend drugs for others and who has no control over the disposition of such drugs except for the purpose of such storage.

The defendant requested an instruction to the jury that it would be a defense if he was storing the legend drug for another and had no control over the disposition of the drug except for the purpose of such storage. The state successfully argued to the Magistrate Court that the text implied a person who is employed by an entity that stores medications. This interpretation of the text is wrong. When the legislature defines a word for the purposes of a law, it is not for the judiciary to insert additional language in order to serve a purpose never stated by the legislature. *See Williams v. State*, 153 Idaho 380, 283 P.3d 127, 137 (Ct.App.2012). While one may infer from the list of exemptions in I.C. § 54-1734 that the legislature was only intending to grant immunity to those employed in the pharmaceutical industry, the legislature never went so far as to say so. Under the Rule of Lenity, the statute must be strictly construed. *See State v. Jones*, 151 Idaho 943, 947 (Ct.App.2011). Thus, the District Court was correct to overrule the Magistrate's holding.

However, the District Court erred in requiring that the defendant be able to show lawful ownership of the drug by the person from whom he received it. The statute contains no such limitation. Further, even if this Court were to find it appropriate for the judiciary to place a "lawful ownership" element within the immunity granted by the legislature, the defendant should only need to produce evidence that he believed the person he received the drug from had lawful ownership, and the burden to persuade the jury that he did not believe that and knew it was not

the property of the person they received it from should be on the state. *State v. Rogers*, 30 Idaho 259, 271 (1917).

CONCLUSION

The case before this Court requires it to determine how broadly the legislature may partially criminalize the possession of an item which is legally in the possession of the vast majority of Idahoans. It is no exaggeration to say that almost every Idahoan will come legally into possession of a prescription drug during the course of a year. It is further no exaggeration to say that almost every Idahoan will come illegally into possession of a prescription drug during the course of a year. The reason for this is the absurd scope of I.C. § 54-1732(3)(c). This Court should find that I.C. § 54-1732(3)(c) is unconstitutional on its face or as applied in this case. If this Court does not find that the statute is unconstitutional, it should allow the defendant's requested affirmative defense be given to the jury.

DATED this 25 day of July, 2013.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: _____
JAY LOGSDON, ISB 8759
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25 day of July, 2013, served a true and correct copy of the attached APPELANT'S BRIEF via interoffice mail or as otherwise indicated upon the parties as follows:

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