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State v. Schall Appellant's Brief Dckt. 41645

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. GARY L. SCHALL, Defendant-Appellant.	NO. 41645 BANNOCK COUNTY NO. CR 2011-13693 APPELLANT'S BRIEF ON REVIEW

STATEMENT OF THE CASE

Nature of the Case

This Court granted the State's Petition for Review which relates to the Idaho Court of Appeals in *State v. Schall*, Docket Number 39891, 2013 Opinion No. 47 (September 5, 2013) ("Opinion"). In the Opinion, a unanimous panel of the Court of Appeals held that when the State is prosecuting a defendant for felony driving under the influence of alcohol ("DUI"), the requirement that a foreign DUI conviction substantially conforms to I.C. § 18-8004, Idaho's DUI statute, is an element of the offense which the State bears the burden of establishing at the preliminary hearing.

In its brief in support of its petition for review the State argues, for the first time in this matter, that the requirement that the foreign conviction substantially conforms to I.C. § 18-8804 is a legal determination made by the magistrate court and is, therefore, not an element of the offense because it is not an issue of fact for the jury to determine. Contrary to the State's assertion, Mr. Schall argues that the "substantially conforming" requirement is an element of the offense because the magistrate must make the threshold legal determination that the foreign conviction substantially conforms to I.C. § 18-8004 before the foreign conviction can be considered for purposes of enhancing the misdemeanor to a felony and binding the matter over to the district court further, the State bears the burden of putting the foreign statute into evidence at the preliminary hearing.

Mr. Schall argues, in the alternative, that the Wyoming DUI statute does not substantially conform to the applicable portions of I.C. § 18-8004 and, thus, his motion to dismiss should have been granted on that basis.

Statement of the Facts & Course of Proceedings

Mr. Schall was charged, by information, with DUI. (R., pp.38-39.) The State also filed an Information Part II, charging Mr. Schall with a felony enhancement for having previously been convicted of two prior DUIs in the previous ten years. (R., pp.38-39.) One of the two prior offenses was alleged to have occurred in the State of Wyoming. (R., p.41.) According to one of the arresting Wyoming police officers, Mr. Schall submitted to an "intoximeter" breath analysis, which resulted in a reading that Mr. Schall's blood alcohol content ("BAC") was .066 and .068. (Affidavit of John H. Harris attached to the Amended Motion to Augment, p.2.)

At the preliminary hearing, Mr. Schall argued that the State did not have probable cause to bind him over on a felony because the Wyoming DUI statute did not substantially conform to the Idaho DUI statute. (09/13/11 Tr., p.20, L.25 – p.21, L.6.) While making this argument, the magistrate asked Mr. Schall if he had either a certified copy of the applicable Wyoming statute or an expert to lay a foundation for the Wyoming statute. (09/13/11 Tr., p.29, Ls.4-6.) Mr. Schall did not, but requested that the magistrate take judicial notice of the Wyoming DUI statute. (09/13/11 Tr., p.29, Ls.7-18.) The district court then asked the State if it wanted to comment on the question of whether the magistrate could take judicial notice of the Wyoming statute or if Mr. Schall had to lay the appropriate foundation. (09/13/11 Tr., p.29, Ls.19-20.) The State provided no comment. (09/13/11 Tr., p.29, L.21 - p.30, L.2.) The magistrate suggested it was the defense's burden to "prove the statute." (09/13/11 Tr., p.30, Ls.5-6.) Mr. Schall then argued that it was the State's burden to establish the Wyoming conviction substantially conforms to the I.C. § 18-8004 and, therefore, the State has the burden to put the Wyoming statute into the magistrate court's record. (09/13/11 Tr., p.30, Ls.7-18.) The magistrate disagreed and concluded that it could not take judicial notice of a foreign statute, according to the rules of evidence, and it is the defense's burden to put the statute in the record. (09/13/11 Tr., p.30, L.19 - p.31, L.2.) The magistrate also concluded, based on an implicit theory that the substantial conformity requirement is an affirmative defense, that it was Mr. Schall's burden to establish that the Wyoming DUI statute does not substantially conform to the Idaho DUI statute and that argument should occur before the district court. (09/13/11 Tr., p.31,

Ls.11-16.) The magistrate then bound Mr. Schall over to the district court. (09/13/11 Tr., p.31, Ls.16-17.)

In the district court, Mr. Schall filed a motion to dismiss, wherein he alleged that the magistrate improperly refused to take judicial notice of the Wyoming DUI statute. (R., pp.49-50.) Mr. Schall also argued that the Wyoming DUI statute does not substantially conform to the Idaho DUI statute because, under the Idaho statute, a defendant with a test result showing a BAC under 0.08 cannot be prosecuted, but in Wyoming a defendant with a BAC between 0.05 and 0.08 can be prosecuted for a DUI. (R., p.50.) The district court denied the motion to dismiss and, in doing so, first concluded that the magistrate could take judicial notice of the Wyoming statute, but that was not a requirement at the preliminary hearing. (R., p.64.) It also concluded that Mr. Schall had the burden to prove that the Wyoming DUI statute did not substantially conform to the Idaho DUI statute, and that, in fact, the Wyoming DUI statute does substantially conform to Idaho's DUI statute. (R., pp.63-68.)

Mr. Schall entered a conditional guilty plea to the DUI and the felony enhancement, preserving the ability to challenge the denial of his motion to dismiss on appeal. (R., pp.72, 76-78.) Thereafter, the district court imposed a unified sentence of five years, with two years fixed, but suspended the sentence and placed Mr. Schall on probation.[1] (R., pp.80-84.) Mr. Schall timely appealed. (R., pp.88-90.)

[1] Both the Information and the Judgment of Conviction state that Mr. Schall's felony enhancement was pursuant to I.C. § 18-8005(5). (R., pp.40-41, 80.) However, facts alleged in the Information were that Mr. Schall was previously convicted of two DUIs. Thus, the information and judgment of conviction should have referenced I.C. § 18-8005(6).

In his Appellant's Brief, Mr. Schall argued that the "substantially conforming" requirement is an element of the felony enhancement and that the State has the burden to establish that the foreign conviction substantially conforms to I.C. § 18-8004 at the preliminary hearing. Mr. Schall went on to argue that he should not have been bound over to the district court because the State failed to put evidence of the Wyoming statute into the record before the magistrate court. Mr. Schall also argued that the Wyoming statute at issue, Wyoming Statute Section 31-5-322, does not substantially conform to I.C. § 18-8004. In its Respondent's Brief, the State only argued the merits of the question of whether the Wyoming DUI statute substantially conforms to I.C. § 18-8004 it ignored the questions of whether the "substantially conforming" requirement is an element of the offense and whether it had the burden to provide evidence of the Wyoming DUI statute at the preliminary hearing. The Court of Appeals agreed with Mr. Schall and held that the "substantially conforming" requirement is an element of the offense and, to ensure that Mr. Schall received the benefit of his conditional guilty plea, remanded this matter to the district court.

The State timely filed a petition for review, which was granted by this Court.

ISSUE

Did the district court err when it denied Mr. Schall's motion to dismiss where the State failed to establish, at the preliminary hearing, that Wyoming's DUI statute, Wyoming Statute Section 31-5-322, substantially conforms to Idaho's DUI statute, Idaho Code Section 18-8004?

ARGUMENT

The District Court Erred When It Denied Mr. Schall's Motion To Dismiss Because The State Failed To Establish, At The Preliminary Hearing, That Wyoming's DUI Statute, Wyoming Statute Section 31-5-322, Substantially Conforms To Idaho's DUI Statute, Idaho Code Section 18-8004

A. Introduction

Mr. Schall argues that insufficient evidence was presented at the preliminary hearing to bind him over to the district court on a felony DUI. A DUI is, by default, a misdemeanor offense in Idaho. I.C. § 18-8005. However, if a person has two prior DUIs and, within ten years, receives a third DUI conviction, I.C. § 18-8005(6) allows the state to charge the third DUI as a felony. That same statute allows the State to use a prior DUI conviction from a foreign jurisdiction for felony enhancement purposes if the statute under which that foreign conviction was predicated substantially conforms to I.C. § 18-8004(1). Both the magistrate and the district court treated the substantial conformity requirement as an affirmative defense, as opposed to an element of the charging enhancement, shifting the burden of proof from the State to Mr. Schall.

Mr. Schall argues that at the preliminary hearing it is the State's burden to prove that probable cause exists for every element of a charging enhancement, and that the substantial conformance requirement is an element of the charging enhancement. It follows that it is the State's burden to place the foreign statute in the magistrate court's record in order to establish that the foreign conviction substantially conforms to the applicable portions of I.C. § 18-8004. Since the Wyoming statute was not in the magistrate court's record, and since there was no evidence indicating that the Wyoming DUI statute substantially conforms to I.C. § 18-8004, the district court erred when it

denied Mr. Schall's motion to dismiss. In other words, the foreign statute is evidence which must be considered by the magistrate in order to determine whether the foreign conviction substantially conforms to I.C. § 18-8004.

If this Court finds that there was a sufficient record at the preliminary hearing to bind Mr. Schall over to the district court on the Information Part II, Mr. Schall argues, in the alternative, that the Wyoming DUI statute does not substantially conform to the applicable portions of I.C. § 18-8004 and thus, his motion to dismiss should have been granted on that basis.

B Standard Of Review

"Issues of statutory interpretation present questions of law over which this Court exercises free review." *State v. Morales*, 127 Idaho 951, 953 (1996).

C. The District Court Erred When It Concluded That It Was Mr. Schall's Burden To Establish That Wyoming's DUI Statute Does Not Substantially Conform To Idaho's DUI Statute, As The Substantially Conforming Requirement Is An Element Of The Offense

1. The Requirement That A Foreign DUI Conviction Substantially Conform To Idaho's DUI Statute, I.C. § 18-8004, Is An Element Of The Felony Charging Enhancement

"At a preliminary hearing, the state must prove only that a crime was committed and that there is probable or sufficient cause to believe that the defendant committed it." *State v. Fain*, 116 Idaho 82, 84 (1989) (citing I.C.R. 5.1(b)). "The finding of probable cause must be based upon substantial evidence upon every material element of the offense charged." *State v. Munhall,* 118 Idaho 602, 606 (Ct. App. 1990) (citing I.C.R. 5.1(b)). In the context of I.C. §§ 18-8004 and 18-8005, the Idaho Court of Appeals has

held that "charging enhancements" which elevate misdemeanor offenses to felony offenses constitute elements of the enhanced crimes. *State v. Moore*, 148 Idaho 887, 891 n.2 (Ct. App. 2010). The applicable charging enhancement in this case is I.C. § 18-8005(6), which follows:

> Except as provided in section 18-8004C, Idaho Code, any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, who previously has been found guilty of or has pled guilty to two (2) or more violations of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, or any substantially conforming foreign criminal violation, or any combination thereof, within ten (10) years, notwithstanding the form of the judgment(s) or withheld judgment(s), shall be guilty of a felony.

In order for a DUI to be charged as a felony under I.C. § 18-8005(6), the State has the burden of proving the two prior convictions. However, if the State decides to use a foreign conviction as one of the prior convictions, as opposed to a conviction under I.C. § 18-8004, the statute adds an element which requires that the foreign conviction substantially conform to I.C. § 18-8004(1).

In addition to the *Moore* opinion, there is authority which supports the proposition that the substantial conformance requirement contained in I.C. § 18-8005(6) is an element of the statutes and not an affirmative defense. In *State v. Monaghan*, 116 Idaho 972 (Ct. App. 1989), the statute criminalizing the act of failing to yield for an emergency vehicle was at issue on appeal.[2] The relevant statutes were I.C. §§ 49-645 and 49-606. Idaho Code Section 49-645 stated that "[u]pon the immediate approach of an authorized emergency vehicle making use of an audible or visible signal, meeting the

[2] Failing to yield to an emergency vehicle was originally enacted as a criminal statute, but the Idaho Legislature has since reduced it to an infraction. *Monaghan*, 116 Idaho at 974. However, the *Monaghan* Court interpreted the relevant statutes, I.C. §§ 49-645 (repealed and replaced by I.C. § 49-625) and 49-606 (repealed and replaced by I.C. § 49-623), in accordance with their meaning when originally enacted. *Id.*

requirements of section 49-606, Idaho Code, the driver of every other vehicle shall yield the right of way . . . ." *Id.* at 973-974. Idaho Code Section 49-606 contained specific standards, such as decibel levels, for the audio and visual signals. *Id.* The narrow issue on appeal was whether the requirements of former I.C. § 49-606 constituted elements of I.C. § 49-645, which had to have been proven by the State. The Court of Appeals employed the following rationale in ruling on this issue:

> It is said generally that "the elements of a crime are its requisite (a) conduct (act or omission to act) and (b) mental fault (except for strict liability crimes)—plus, often, (c) specified attendant circumstances, and, sometimes, (d) a specified result of the conduct." W. LaFAVE & A. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.8(b), n. 13 (1986) (hereafter referred to as LaFAVE). The dispute here centers on whether the "conditions" specifically listed in section 49–606 and referred to in section 49–645 are elements of the offense. We believe that such conditions are what LaFAVE has described as "specified attendant circumstances."
>
> Section 49–645 clearly states that drivers of all vehicles must yield the right of way to authorized vehicles "making use of an audible or visible signal, meeting the requirements of section 49–606, Idaho Code...." Those conditions are set out specifically. Among other things, the vehicle must be making use of an audible warning signal having a decibel rating of 100 at a distance of ten feet or must be displaying a flashing light or lights visible from any direction at a distance of 1000 feet under normal atmospheric conditions. We can only conclude from the language of the statutes that the Legislature intended these conditions to be met before any driver could be found guilty of failure to yield to an emergency vehicle. The statutory conditions are elements of the offense. The state had the burden to prove that at least one of the emergency warning devices was in compliance with the statutes.

Id. at 974-975 (footnote omitted). The Court of Appeals held that the standards governing the audio and visual signals contained in former I.C. § 49-606, constituted "special attendant circumstances," which are an element of the offense. As such, it is the State's burden to establish that the audio or visual signals meet the standards set forth in former I.C. § 49-606.

In this case, the requirement that a foreign conviction being used to establish a charging enhancement is a special attendant circumstance, which constitutes an element of the offense. Similar to I.C. §§ 49-645 and 49-606, the Idaho Legislature stated in I.C. § 18-8005(6), that when a foreign conviction is used as a predicate conviction for a felony DUI charging enhancement, the conviction must substantially conform to a conviction obtained pursuant to I.C. § 18-8004(1). There is little difference between the requirement that a police siren have a minimum decibel range and the requirement that a foreign conviction substantially conform to I.C. § 18-8004(1). Due to these similarities, the "substantially conforming" requirement is a special condition which must be met before a foreign conviction can be used to establish a charging enhancement. As such, the district court erred when it concluded that the State does not bear the burden of establishing that a statute in a foreign jurisdiction substantially conforms to I.C. § 18-8004(1). (R., pp.63-64.)

Further support for Mr. Schall's position can be found in *State v. Cope*, 89 Idaho 64, 69 (1965), where a habeas corpus petitioner challenged the validity of a Washington State warrant, which was the basis the Washington State's request for extradition. Cope argued that the affidavit for the warrant failed to set forth sufficient facts to constitute an offense under Washington law because it did not state facts illustrating that an exemption to liability under Washington law was applicable to the petitioner. While addressing this issue, this Court approvingly quoted the United States Supreme Court's holding in *United States v. Cook*, 84 U.S. 168 (1872), which identified the proper inquiry as follows:

> Commentators and judges have sometimes been led into error by supposing that the words 'enacting clause,' as frequently employed, mean

> the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is, whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading; but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence.

Cope, 89 Idaho at 69 (quoting *Cook*, 84 U.S. at 176).

Additional support can be found in *State v. Segovia*, 93 Idaho 208 (1969), where this Court dealt with the question of whether an exception contained in a criminal statute functioned as an element of the offense which the state had the burden to negate, or if the exception was an affirmative defense which the defendant had the burden to prove. The language of that statute follows:

> Except as otherwise provided in this act, every person who possesses any narcotic except upon the written prescription of a physician, dentist, podiatrist, osteopath or veterinarian licensed to practice in this state, may be punished by imprisonment in the state prison for a term of not to exceed ten (10) years.

I.C. § 37-3202[3] (emphasis added). In resolving this issue, this Court noted the general rule, which follows:

> In the absence of a statute, the general rule is that the burden is upon the state in a criminal case to negative any exception or proviso appearing in that part of the statute which defines the crime if the exception is "so incorporated with the language describing and defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted . . . ."

[3] Idaho Code Section 37-3202 has been subsequently revised and bears no relationship to the version which existed in 1969.

Segovia, 93 Idaho at 210 (Quoting 41 Am.Jur.2d, Indictments and Informations, § 98, pp.940-941). This Court went on to note that the State must aver the exception in the Information. *Id.* The *Segovia* Court ultimately held that the exception, or lack of a prescription, was an "integral" part of the statute because it defined that scope of the crime because it is not a crime to possess a narcotic drug pursuant to a prescription. *Id.* If an exception to liability contained in a statute can be deemed an element of an offense because it is an integral aspect of the crime.

Moreover, if the State did not have to prove that the foreign conviction substantially conformed to I.C. § 18-8004(1), then any foreign conviction, including ones unrelated to DUI offenses, could be used to establish a felony DUI charging enhancement at a preliminary hearing, because without the phrase "substantially conforming" in I.C. § 18-8004(1), there is nothing left in the statute controlling the type of foreign conviction which can be used to establish the charging enhancement. For example, a foreign conviction, such as assault, theft, or criminal trespass could be used as a prior foreign offense for a felony DUI enhancement. If the State's argument is taken to its logical conclusion it would defeat the purpose of a preliminary hearing and allow a magistrate to bind defendants over to the district court for a felony DUI when one of the predicate foreign convictions is entirely unrelated to drinking alcohol and driving. Under those circumstances, only after a full jury trial would the defendant be able to argue, as an affirmative defense, that his/her foreign conviction was unrelated to drinking and driving and, therefore, the conviction is not substantially conforming to I.C. § 18-8004. Therefore, the "substantially conforming foreign conviction" requirement is an integral portion of I.C. § 18-8005(6), because it actually defines the scope of the

type of foreign convictions which can be used by the State for the charging enhancement of felony DUI.

Turning to the rationale employed by the district court concerning this issue, the district court relied on *State v. Beloit*, 123 Idaho 36 (1992), and its progeny for the proposition that it is not the State's burden to establish that a prior foreign conviction substantially conforms to I.C. § 18-8005(6). (R., pp.63-64.) The district court's reliance on this case was misplaced because *Beloit* dealt with the question of whether a prior conviction can be collaterally attacked, not whether the "substantially conforming" requirement is an element of I.C. § 18-8005(6). In that case, Beloit was charged with a felony DUI based on three prior DUI convictions. *Id.* at 36. Beloit entered into a conditional guilty plea and argued on appeal that:

> two of the three prior DUI convictions used by the State in enhancing his charge from a misdemeanor to a felony were not valid convictions for purposes of the felony enhancement provisions because Beloit was not provided all of his constitutional rights under the United States or Idaho Constitution at the time of those convictions.

Id.

Beloit does not control the issue at hand because the question of whether a prior conviction is valid is entirely distinct and separate from the question of whether a prior foreign conviction substantially conforms to I.C. § 18-8004. For example, in *Moore*, *supra*, the appellant, Moore, made various appellate challenges to the State's use of a foreign conviction for enhancement purposes. *Moore*, 148 Idaho at 891-892. One of those challenges was whether the foreign conviction was constitutionally valid, *i.e.* the conviction was obtained without the assistance of counsel, and another one of those challenges was whether the foreign conviction substantially conformed to I.C. § 18-

8004(1)(a), (b) or (c). *Id.* at 894-900. The Court of Appeals dealt with these issues in separate sections of the *Moore* opinion and employed an entirely different analysis for each issue, as they are distinct and separate issues. *Id.* In fact, the Court of Appeals discussed the *Beloit* opinion in the section of the *Moore* opinion dealing with the question of whether the foreign conviction was constitutionally valid. *Id.* at 894-895. As such, the district court erred when it relied on the *Beloit* opinion to conclude that the State did not have the burden to establish that Wyoming's DUI statute substantially conforms to I.C. § 18-8004(1).

In sum, charging enhancements constitute elements of the offense. In this case, the requirement that the foreign Wyoming DUI statute substantially conforms to I.C. § 18-8004(1) is an element of I.C. § 18-8005(6) because it is a special condition which must exist before the foreign conviction can be used to enhance a misdemeanor DUI to a felony DUI. In fact, the "substantially conforming" requirement literally defines the scope of the charging enhancement and, without that language, any foreign conviction unrelated to DUI could be used to enhance a misdemeanor DUI to a felony. It follows that the district court erred when it concluded that Mr. Schall bore the burden to establish that the Wyoming conviction did not substantially conform to I.C. § 18-8004(1) because substantial conformance is an element of the charging enhancement, for which the State bore the burdens of production and persuasion to establish at the preliminary hearing.

2. The Fact That The Question Of Whether A Foreign DUI Conviction Substantially Conforms To Idaho's DUI Statute, I.C. § 18-8004, Requires A Legal Determination Does Not Alter The Fact That The "Substantially Conforming" Requirement Is An Element Of The Felony Charging Enhancement

Based on reasoning substantially similar to the argument and authority set forth in Section I(C)(1), *supra*, the Court of Appeals held as follows:

> As noted above, subsection 18-8005(10) specifies that "[t]he determination of whether a foreign violation is substantially conforming is a question of law to be determined by the court." The magistrate at a preliminary hearing must make the initial legal determination whether the foreign statute is substantially conforming, for without that determination there can be no probable cause for a felony offense and the case may not be bound over to the district court. In the present case, the magistrate could not make that determination because the State neither presented evidence of the content of the Wyoming statute nor asked the magistrate to take judicial notice of it. Therefore, probable cause to bind Schall over to the district court on a charge of Felony DUI was not established.

(Opinion, p.7.) In its brief on review, the State argues for the first time in this matter, that the "substantial conforming" requirement is not an element of the charging enhancement because it is a question of law for the court, rather than a jury, to determine, and, therefore, there is no burden of proof. (Respondent's Brief in Support of Petition for Review, p.8.) The State goes on to argue as follows:

> If, as determined by the Court of Appeals, the state bears the burden of proving a foreign statute's substantial conformity as an element of DUI, the element must be proven beyond a reasonable doubt to a jury at trial. See Apprendi v. New Jersey, 530 U.S. 466 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt"). It makes no sense for a jury to determine the existence or contents of a foreign statute before the court determines the legal question of whether the conviction is "substantially conforming." The Court of Appeals' holding that the state has the evidentiary burden to prove a foreign statute is irreconcilable with I.C. § 18-8005(10), and contrary to existing case law. Because the issue in this case was solely a legal issue for the court to decide, there was no element for which the state had an evidentiary burden.

(Respondent's Brief in Support of Petition for Review, p.8.) Contrary to the State's assertion, the substantial conformity requirement does place a burden of production on the State at the preliminary hearing because the foreign DUI statute at issue is evidence which can only be considered by the magistrate court pursuant to the Idaho Rules of Evidence.

At the preliminary hearing, Mr. Schall took it upon himself to request that the district court take judicial notice of Wyoming Statute Sections 31-5-233(b)(i), (b)(ii), and (c)(ii). (09/13/11 Tr., p.29, Ls.4-18.) The magistrate refused to take judicial notice of the statute based on the belief that the defense had to lay the proper foundation for the statute because it was "the burden of the defense to prove the statute." (09/13/11 Tr., p.29, L.4 - p.31, L.2.) After the case was bound over to the district court, that court noted that the magistrate could take judicial notice of the Wyoming statute without any foundation, but went on to hold that there was no requirement for the Wyoming statute to be included in the magistrate's record. (R., p.64.)

The district court correctly recognized that Idaho courts can take judicial notice of foreign statutes. *White v. White*, 94 Idaho 26, 30 (1971). Prior to the *White* Opinion, "[t]he rule in Idaho has been that the proponent of the law of a sister state must prove such law, and Idaho courts cannot take judicial notice of a sister state's law." *Id.* at 29. The *White* Court reasoned that this rule is anachronistic because "[m]odern communications have put the statutory compilations of other states within easy access of Idaho's courts." *Id.* The *White* Court went on to hold that:

> Where the laws of sister states are ascertainable with verifiable certainty those laws should be the subject to judicial notice by Idaho's courts, for the reasons supportive of judicial notice generally: economy of time and

> effort in the judicial process by doing away with the necessity of formal proofs of facts where such proofs are not necessary to the sure ascertainment of the particular facts.
>
> . . . .
>
> We hold that when a party to an action requests that the trial court notice the statutory law of a sister state, the trial court shall have the authority to ascertain that law, just as it has the authority to determine the law of Idaho.
>
> . . . .
>
> [Proof] of a sister state's statutory law could be achieved simply by introducing a semiofficial compilation of that law.
>
> In the case at bar, appellant made no request that the trial court take judicial notice of the law of Pennsylvania as to majority age. Having failed to request judicial notice of that law, she cannot now complain that the court did not exercise this power. A request for judicial notice of the law of a sister state serves the function of alerting the trial court to the contention that the law of another state is applicable, gives opposing counsel an opportunity to become familiar with that law, and enables the proponent to submit the applicable law.
>
> In the absence of appellant submitting the Pennsylvania statute, the trial court was fully justified in applying Idaho law.

Id.

There are two main points which can be adduced from the foregoing authority. First, a proponent of a foreign statute has a burden of production and, at a minimum, must request that the court take judicial notice of the statute. Second, and more importantly, the actual existence and exact content of the foreign statute is considered a "fact" which must be introduced into evidence.

The *White* Court's determination that a foreign statute is evidence governed by the rules controlling the admission of evidence comports with modern court rules and the current form of the Idaho Code. For example, Idaho Rule of Evidence 201, controls a court's ability to take judicial notice. The Court of Appeals held that I.R.E. 201, is the

court rule which governs the admission of local ordinances into evidence. *Doe v. Doe*, 146 Idaho 386, 389 (2008) ("The existence of an ordinance that relates to the adjudication of the dispute before the trial court is a question well suited to the application of I.R.E. 201(b).").[4] Moreover, Idaho Code Section 9-101, is entitled "Facts Judicially Noticed and the relevant portions of that statute state as follows:

> Courts take judicial notice of the following facts:
>
> . . . .
>
> 2. Whatever is established by law.
>
> 3. Public and private official acts of the legislative, executive, and judicial departments of this State and the United States.
>
> . . . .

I.C. § 9-101. As such, the language of the Wyoming DUI statute is considered a fact, the admission of which is controlled by the Idaho Rule of Evidence, and that it could not be considered by the magistrate court until it took judicial notice of the statute.

The fact that the language of the Wyoming DUI statute is evidence that is controlled by the Rules of evidence is important because it refutes the State's argument that since "the issue in this case was solely a legal issue for the court to decide, there was no element for which the state had an evidentiary burden." (Respondent's Brief in Support of Petition for Review, p.8.) Contrary to the State's assertion, the Wyoming

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[4] Idaho Rule of Evidence 201b) provides that:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

I.R.E. 201(b) (emphasis added).

DUI statute is a fact and the proponent of that fact must seek its admission through the Rules of Evidence. It follows that the magistrate could not consider Mr. Schall's Wyoming DUI for the purposes of felony enhancement without first admitting the Wyoming DUI statute into evidence *via* judicial notice. Therefore, the magistrate erred when it bound Mr. Schall over to the district court and the district court erred when it denied Mr. Schall's motion to dismiss because there was nothing in the record which could be used to enhance Mr. Schall's misdemeanor DUI in a felony DUI.[5]

The foregoing authority establishes that the State bore the burden to produce the Wyoming DUI statute at the preliminary hearing. Further, support for Mr. Schall's position can be found from other jurisdictions. In *State v. Hulbert*, 217 W.Va. 217 (2001), the Supreme Court of Appeals of West Virginia, was dealing with an felony enhancement which required the use of foreign domestic violence convictions. In West Virginia, when a foreign conviction is used for enhancement purposes, the trial court must determine as a matter of law whether the foreign statute has the same elements as the West Virginia statute. *Id.* at. 222-226. According to the *Hulbert* Court, it "is incumbent upon the State to introduce the relevant statutes of the foreign states to enable the trial court to take judicial notice of those statutes." *Id.* at 226.

In West Virginia if the elements of the foreign statute differ enough from the West Virginia statute at issue, then the trial court must review the factual predicate of the foreign offense in order to establish that the defendant's actions in the foreign

[5] It should be noted that the magistrate provided the State an opportunity to advocate for the admission of the Wyoming DUI statute, but the State declined to accept that offer. (09/13/11 Tr., p.29, L.21 - p.30, L.2.)

jurisdiction would be considered criminal in West Virginia.[6] *Hulbert*, 217 W.Va., at 226. When a trial court engages in that factual analysis, the State bears the burden of proving the facts of the foreign convictions. *Id.* In support of this holding the *Hulbert* Court quoted from the Washington Supreme Court, as follows:

> The ... State's burden under the SRA [Sentencing Reform Act] ... is not overly difficult to meet. The State must introduce evidence of some kind to support the alleged criminal history... The SRA expressly places this burden on the State because it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove."

Id. (quoting *State v. Ford,* 137 Wash.2d 472, 480 (1999).) The *Hulbert* court went on to hold, in reliance on *In re Winship*, 397 U.S. 358 (1970), that "[u]nder longstanding rules of criminal law, the burden of alleging and proving each element of an offense beyond a reasonable doubt rests with the state and may not be shifted to the defendant." *Id.* Mr. Schall recognizes that these cases deal with more than a pure statutory analysis, but they stand for the proposition that when comparing foreign statues in order to ensure that the foreign conviction can be used for the purposes of either a charging or sentencing enhancement, the State carries the burden of getting the foreign statute into the record. Further, the State bears all other evidentiary burdens required for the trial court to make the determination of whether the foreign convictions can be used for the enhancement.

In sum, the magistrate did not have a sufficient record to bind Mr. Schall over to the district court because the State offered no facts from which the magistrate could use

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[6] In *State v. Schmoll*, 144 Idaho 800 (Ct. App. 2007), the Idaho Court of Appeals held that the question of whether a foreign DUI statute substantially conforms to I.C. § 18-8004, is a pure legal analysis and the facts relating to the underlying conviction are not relevant to that analysis. *Schmoll*, 144 Idaho 800, 803-804. However, this Court is not bound by the Court of Appeals holding on this issue.

to determine whether Mr. Schall's Wyoming violation substantially conforms to I.C. § 18-8004(1). Even though the question of whether the foreign conviction substantially conforms to I.C. § 18-8004, is a pure legal analysis, that does not alleviate the State of the burden to provide the magistrate court the foreign statute in order for the magistrate to undertake the substantial conformity analysis. As such, the district court erred when it denied Mr. Schall's motion to dismiss.

D. Mr. Schall's Wyoming DUI Conviction Does Not Substantially Conform To The Applicable Portions Of Idaho Code Section 18-8004(1), Because Wyoming Prohibits Behavior Which Is Legal In Idaho

In the event that this Court disagrees with the arguments set forth in Section I(C), *supra*, Mr. Schall argues, in the alternative, that the magistrate did not have probable cause to bind him over to the district court because the applicable sections of the Wyoming statute at issue, to wit: W.S. § 31-5-233, do not substantially conform to I.C. § 18-8004. Mr. Schall argues that W.S. § 31-5-233 does not substantially conform to the relevant portions of I.C. § 18-8004(1) because I.C. § 18-8004(2) precludes the State from prosecuting a DUI in Idaho if the defendant has a BAC determined to be under 0.08 percent, while in Wyoming the fact a defendant's BAC is between 0.06 and 0.08 does not preclude the State from prosecuting a defendant for a DUI. In other words, W.S. § 31-5-233 potentially criminalizes a class of defendants that cannot be prosecuted in Idaho as a matter of law and, therefore, W.S. § 31-5-233 does not substantially conform to the applicable portions of I.C. § 18-8004(1).

When engaging in the substantial conformance analysis required under I.C. § 18-8005(6), I.C. § 18-8005(8) requires that "the comparison should be on the elements of the statutes, and not the specific conduct giving rise to the prior violations."

State v. Schmoll, 144 Idaho 800, 803 (Ct. App. 2007). "The elements of the violation in each state must substantially conform to each other." *Id.* However, "[s]ubstantial conformity does not require exact correspondence between the two statutes." *Id.* at 804.

Idaho Code Section 18-8004(1)(a) allows the State to prosecute a defendant that is either under the influence of alcohol or has a BAC of 0.08 percent or higher. These are generally referred to as the impairment theory and the *per se* theory. *State v. Andrus*, 118 Idaho 711, 713 (Ct. App. 1990). In the event the defendant submits to a scientific test and the test results indicate that the defendant's BAC is below 0.08, I.C. § 18-8004(2) precludes the State from prosecuting the defendant for a DUI even if the defendant could be found guilty of a DUI under the impairment theory. However, in Wyoming, if a defendant submits to a scientific test and the test indicates that the defendant's BAC is between 0.05 and 0.08, then the State can charge the defendant under the impairment theory and use the result of the defendant's BAC test results as evidence against the defendant. W.S. § 31-5-322(c)(ii). In comparing the elements of the Idaho *per se* statute and the Wyoming *per se* statute, they are not substantially similar because Idaho defines a person as with a BAC below 0.08 as a matter of law as not being under the influence of alcohol, while Wyoming allows for the prosecution of defendants with a BAC below 0.08.

In this case, the district court relied on *Schmoll* for its determination that W.S. § 31-5-233 substantially conforms to the applicable portions of I.C. § 18-8004. (R., pp.65-68.) In *Schmoll* the Idaho Court of Appeals considered an issue of first impression in Idaho, namely "which factors to compare and the standard with which to

compare them" in determining whether an out-of-state conviction was a "substantially conforming foreign criminal violation" under what was then Idaho Code § 18-8005(8).[7] *Schmoll*, 144 Idaho at 803. At issue in *Schmoll* was Montana's felony DUI statute, which was being used as the basis to elevate a DUI to a felony in Idaho. Under the Montana statute, "a fourth or subsequent DUI conviction within the defendant's lifetime is automatically a felony." *Id.* at 801. Mr. Schmoll sought to strike the felony enhancement, asserting that the Montana statute under which he was convicted was not a substantially conforming foreign criminal statute because the Montana "conviction could not have been charged as a felony if brought in Idaho." *Id.*

In comparing the Montana and Idaho statutes, the Court of Appeals noted that Montana does not have a *per se* DUI law; under Montana law if the testing "reveals a concentration of 0.08 or more, there is a rebuttable inference that the person was in fact under the influence of alcohol when driving." *Id.* at 804 (citing M.C.A. § 61-8-401(1)(a) (2005)). The Court of Appeals explained the difference with Idaho law, noting, "Idaho does not consider a BAC of 0.08 or more as merely rebuttable evidence of being under the influence either; it is a *per se* violation of the statute to drive with a BAC of 0.08 or more." *Id.* (citing I.C. § 18-8004(1)(a)). Regardless of this difference, the Court of Appeals found it significant that both statutes "prohibit the same essential conduct – driving while under the influence of alcohol." *Id.* It further noted, "Proving that a person is under the influence absent a BAC test requires a greater degree of impairment in Montana than in Idaho, since in Idaho, the ability to be impaired 'to the slightest degree,' while in Montana, the ability to drive 'safely' is the quality that must be diminished." *Id.*

[7] The provision has since been renumbered to § 18-8005(10).

In conclusion, the Court of Appeals noted, "Montana's higher standard surpasses the elements required for a violation in Idaho. These two statutes frame their prohibitions using the same language, requiring substantially conforming elements to be met to sustain a violation." *Id.*

With respect to the argument advanced by Schmoll before the district court-that the Montana statute did not substantially conform to the Idaho statute because his Montana conviction would not have been a felony under Idaho law-the Court of Appeals concluded that the argument was "misplaced" in light of Idaho Code I.C. § 18-8005(8)'s express provision "that the comparison is between section 18-8004 and the foreign state statute that was violated . . . [which] is entirely independent from the consideration of whether the violation results in a misdemeanor charge or a felony charge."[8] *Id.* at 804-05.

In this case, the district court relied on the fact that in Idaho a person can be found guilty of a DUI if his/her ability to operate a vehicle is impaired to the slightest degree, and in Wyoming a defendant can be found guilty of a DUI if the ability to drive safely is diminished. (R., pp.66-67.) The district court noted that W.S. § 31-5-233(b)(iii)[9] contains similar safety language to the Montana statute (from

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[8] Mr. Schall recognizes that, under the Court of Appeals' current case law, the facts of his Wyoming conviction are not relevant to the statutory comparison. However, this Court is not bound by the Court of Appeal holding. Moreover, it should be noted that approximately one hour and forty minutes after the stop, Mr. Schall participated in a scientific test which indicated that his BAC was 0.066 and 0.068. (09/13/11 Tr., p.21, Ls.8-12; *see also* Affidavit of John H. Harris attached to the Amended Motion to Augment, p.2.) As such, Mr. Schall could not have been prosecuted for his Wyoming DUI if it had occurred in Idaho.

[9] Wyoming Statute § 31-5-322(b)(iii), contains Wyoming's impairment theory of DUI conviction and states that a person shall not operate a vehicle if he/she is under the influence of alcohol to a degree that renders him/her "incapable of safely driving . . . ."

the *Schmoll* Opinion). (R., pp.66-68.) Based on the safety language, the district court concluded that *Schmoll* was controlling because it is easier to be convicted of a DUI in Idaho than it is in Wyoming and, therefore, all Wyoming DUI convictions would constitute a DUI in Idaho. (R., pp.66-68.) However, the district court did not employ any statutory analysis to Mr. Schall's argument that under the *per se* theory in Idaho a defendant cannot be prosecuted in his/her BAC is below 0.08. (R., p.68.)

The district court's reliance on *Schmoll* was misplaced because Mr. Schall's Wyoming conviction was pursuant to the Wyoming *per se* DUI statutes and not the impairment statute. (Wyoming Information and Judgment attached to Augmentation as Plaintiff's Exhibit 2.) Since Mr. Schall was not charged under Wyoming's impairment statute, W.S. § 31-5-322(b)(iii), comparisons of that statute with Idaho's impairment theory provides no guidance as to the question of whether Mr. Schall's Wyoming conviction is substantially similar. This distinction is critical because in Idaho there is a significant difference between pursuing a DUI based on the *per se* theory versus the impairment theory. In *Andrus*, the Idaho Court of Appeals noted the importance between these two theories as follows:

> While I.C. § 18-8004 establishes only one crime of driving under the influence, it may be proved in either of two separate and distinct ways. It may be proved, as here, by the direct and circumstantial evidence of impairment of ability to drive due to the influence of alcohol. Alternatively, if chemical testing was performed in accordance with the statute, the crime may be proved by forensic evidence that the defendant's alcohol concentration exceeded the statutory percentage. The statutory percentage is contained within the definition of the crime and is conclusive, not presumptive, of guilt; driving a vehicle while one has an alcohol concentration of .10% or more is deemed *per se* to be a violation of the law. Evidence relevant under the *per se* theory of proof is not necessarily relevant under the impairment theory.

Andrus, 118 Idaho at 713. *Andrus* is instructive, as the impairment theory and the *per se* theory are two distinct and separate ways to pursue a DUI, both of which require separate forms of evidence. It follows that comparing the impairment portions of Idaho's DUI statute and Wyoming's DUI statute will not provide any guidance as to whether Mr. Schall's Wyoming conviction is substantially similar to Idaho's because Mr. Schall's Wyoming conviction is based on a *per se* theory of DUI. Therefore, the district court erred when it relied on *Schmoll* because that holding primarily deals with the impairment theory as opposed to the *per se* theory.

When the Court of Appeals' rationale in *Schmoll* is used in the context of comparing Idaho and Wyoming's *per se* DUI statutes, it leads to the conclusion that Wyoming's statute does not substantially conform to Idaho's. As mentioned above, the Court of Appeals determined, under Idaho's impairment theory, that a defendant can be under the influence if his/her driving ability is impaired to the slightest degree and in Montana a defendant is under the influence if he/she is not safe to drive. *Schmoll*, 144 Idaho at 804. The Court of Appeals then concluded that Idaho's standard is lower than Montana's because a person that is impaired to the slightest degree might still be safe to drive and, thus, all Montana DUI convictions based on the impairment theory would constitute convictions in Idaho. *Id.* The exact opposite is true when one compares Idaho's *per se* DUI statute to Wyoming's *per se* DUI statute. In Idaho, a defendant with a BAC determined to be under 0.08 cannot be prosecuted for driving under the influence, while in Wyoming that same class of defendants can be prosecuted. It follows that Idaho has a higher *per se* standard than Wyoming. So while all Idaho's DUI convictions based on the *per se* theory would constitute a DUI in Wyoming, not all of

Wyoming's DUI *per se* convictions constitute a DUI in Idaho. Based on the logic of *Schmoll*, the Wyoming *per se* DUI statute does not substantially conform to Idaho's, as Wyoming criminalizes the behavior of a class of defendants that Idaho has determined is not criminal as a matter of law.

There is an additional difference between Idaho's *per se* DUI statute and Wyoming's. In addition to being unlawful to drive while under the influence of alcohol or with a blood alcohol concentration of 0.08, in Wyoming it is also unlawful to have a blood alcohol concentration of 0.08 or greater *within* two hours of driving, regardless of whether the person's blood alcohol concentration was below 0.08 at the time of driving. In contrast, Idaho's statute criminalizes the act of driving (or being in physical control) *while* under the influence of alcohol (whether actually under the influence or under the *per se* standard of 0.08 or greater). W.S. § 31-5-322(b)(ii). As relevant to this difference, in *Schmoll* the Court of Appeals concluded that the two statutes at issue were substantially conforming because both statutes "prohibit the same essential conduct – *driving while* under the influence of alcohol . . . ." *Schmoll*, 144 Idaho at 804 (emphasis added). The plain language of the Wyoming's statute prohibits different conduct than Idaho's statute, namely Wyoming's statute also criminalizes driving *followed by* a blood alcohol concentration of 0.08 or greater *within two hours of driving*.

In sum, under Idaho's *per se* DUI theory, a defendant with a BAC under .08 cannot be prosecuted because as a matter of law, he/she is not under the influence. In Wyoming, the same defendant could be prosecuted if his/her BAC is between 0.05 and 0.08. As such, all *per se* Idaho convictions will be a conviction in Wyoming, but not all Wyoming *per se* DUI convictions will constitute a DUI in Idaho. In fact, the State would

not have been able to prosecute Mr. Schall's Wyoming DUI had it occurred in Idaho. As such, and based on the logic of *Schmoll*, the district court erred when it denied Mr. Schall's motion to dismiss.

CONCLUSION

Mr. Schall respectfully requests that this Court reverse the district court's order denying his motion to dismiss and remand this case to the district court for further proceedings.

DATED this 4th day of February, 2014.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of February, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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DISTRICT COURT JUDGE
E-MAILED BRIEF

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