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State v. Haynes Appellant's Brief Dckt. 41924

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. FELICITY KATHLEEN HAYNES Defendant/Appellant.	)	APPELLANT'S BRIEF SUPREME COURT NO. 41924 CR-13-0003541

APPELLANT'S BRIEF

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

HONORABLE RICH CHRISTENSEN
District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

RULES

CONSTITUTIONAL PROVISIONS

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 driven under the influence. At a motion to suppress hearing, the state moved to continue, claiming that its officer was unavailable. The Court granted the motion, finding that the officer's absence, whatever the cause, was good cause to continue the hearing.

At a later motions hearing, the defendant moved to have an *ex parte* hearing before an *ex parte* judge in order to request funds and the Court denied the motion, finding that a required showing had not been made. The defendant also moved to suppress the results of a breath test on the basis of a violation of the constitution's prohibition on warrantless searches, but the Magistrate Court found that the defendant's consent, provided after being told the consequences of a refusal, was not invalid. Finally, the defendant then moved for the breath test result to be excluded at trial because the state was in violation of I.C. § 18-8004(4) but the Court found that the ruling in *Besaw* controlled and that the newest changes did not mean that the Standard Operating Procedures were incapable of rendering accurate results. The Court also found there was nothing wrong with the way the standards were adopted, seemingly relying on *Besaw* for that ruling as well.

The defendant then entered a conditional plea of guilty while reserving her right to appeal the Court's rulings and the Court found her guilty.

On February 21, 2014, the defendant appeared before the Honorable Rich Christensen in the District Court of the First District. After hearing argument, the district court affirmed the judgment. The defendant now appeals from the findings and order of the District Court.

B. Course of Proceedings & Statement of Facts

On February 23, 2013, the defendant was arrested for driving under the influence by Trooper Keys of the Idaho State Police. On April 17, 2013, the defendant gave notice to the state that a Motion to Suppress hearing was set for June 4, 2013.

The defendant moved to suppress the stop of her vehicle on June 4, 2013. Tr. p. 1, L. 1-9. The state moved to continue because its witness, Trooper Keys, was babysitting. Tr. p. 2, L. 8-10. The Court granted the continuance:

> THE COURT: On the motion to suppress evidence seized following the vehicle stop, their witness is unavailable, and I'm gonna accept that Trooper Keys had some emergency come up where he just honestly couldn't make it here. Whether it's babysitting or hooky or whatever, I'm gonna give him the benefit of the doubt based on Mr. Reierson's inquiry that he just isn't available as a witness today.

Tr. p. 6, L. 12-18.

On July 18, 2013, the Magistrate Court finally heard the defendant's motions. The defendant began, per the Court's request, by moving the Court to appoint a judge for an *ex parte* hearing so that the defendant could apply for funds. Tr. p. 13, L. 15-25, p. 14, L. 1-16. The state objected on the grounds that it did not understand the motion. Tr. p. 14, L. 19-20. The Court

denied the motion, finding that the defendant had failed to provide the Court with information as to the particulars of the requested funds, failure to show that the state's experts would not suffice, failure to show that the public defender's office had or had not budgeted for the request, and that the request, for a prima facie showing, need not be ex parte. Tr. p. 15, L. 1-25, p. 16, L. 1-16.

The defendant and the state also stipulated to the entry of an Administrative License Suspension form, and that Trooper Keys had played an audio version of the advisory to the defendant on the night in question, and that only thereafter the defendant agreed to provide a breath sample. Tr. p. 17, L. 6-25, p. 18, L. 1-25. The defendant moved to suppress the samples and the results of the testing.

The Court found that the advisory did not invalidate the results because the consequences of the refusal were essentially the result of state law which had yet to be struck down. Tr. p. 40, L. 12-25, p. 41, L. 1-18.

Finally, the defendant moved for the results of the tests to be excluded on the basis of the fact that the Standard Operating Procedures used by the Idaho State Police for officers to do breath testing were not adopted in accordance with the Idaho Administrative Act and because they no longer guaranteed accuracy due to removing the fifteen minute waiting period and the ISP's history of putting the goal of conviction over scientific accuracy. The Court took judicial notice of the Standard Operating Procedures promulgated by the Idaho State Police from several points in time as well as other documents. Tr. p. 44, L. 18-25, p. 45, L. 1-2. The Court found that the Court of Appeal's opinion in *Besaw* controlled, and that the changes to the SOPs since those

noted by the Court of Appeals did not render them incapable of producing an accurate result, and that there was no issue with their adoption. Tr. p. 41, L. 19-25, p. 42, L. 1-25, p. 43, L. 1-25, p. 44, L. 1-17.

The defendant entered a conditional plea under I.C.R. 11. The defendant timely filed a notice of appeal under I.C.R. 54.1(a), *et.seq.* from the judgment of the Court.

On November 13, 2013, the defendant moved to augment the record to include a hearing from a separate matter, involving the same Magistrate issuing a warrant for an out-of-state defendant who had kept in contact with his attorney, simply because the state refused to excuse his presence. The District Court denied the motion.

On February 23, 2014, the defendant appeared before the Honorable Rich Christensen of the District Court for the First District. The Court took the defendant's arguments on appeal in turn. First, the Court found that the Magistrate had not abused his discretion on the facts of this case and that the Magistrate had a reputation for impartiality in granting or refusing continuances. Second, the Court found that an indigent defendant must request money to aid his defense in an open proceeding before the same judge who is handling the matter, and so upheld the Magistrate's denial of the defendant's Motion for Ex Parte Judge and Hearing on Ex Parte Applications. Third, the Court found that *Besaw* controls the issue of excluding breath test results due to various problems with the Standard Operating Procedure, though the judge did find that the holding in *Besaw* was incorrect. Lastly, the Court found that *McNeely* did not render the implied consent statute unconstitutional, resting its decision on *Neville*.

The defendant timely appealed the District Court's order and findings.

ISSUES ON APPEAL

I. Whether the state's failure to secure the presence of a necessary witness is good cause to continue a hearing that can determine the outcome of the matter.

II. Whether the Fifth, Sixth, Fourteenth Amendments and Idaho Judicial Cannon 3 require that a defendant applying for funds to assist in her defense be provided an *ex parte* hearing before an *ex parte* judge and what burden, if any, the defendant must meet prior to being granted such a hearing.

III. Whether the Idaho State Police have properly promulgated rules for the administration of breath testing.

IV. Whether the Idaho State Police have promulgated rules that ensure accuracy as required by I.C. § 18-8002A and I.C. § 18-8004(4).

V. Whether *State v. Besaw*, 306 P.3d. 219 (Idaho Ct.App.2013), is manifestly wrong and should be overruled.

VI. Whether the Administrative License Suspension advisory coerces and invalidates the defendant's consent to providing a breath sample under the Fourth Amendment of the United States Constitution and Article I § 17 of the Idaho Constitution.

ARGUMENT

I.

A. Introduction

The Magistrate Court erred when it found good cause to continue the defendant's motion to suppress because it failed to apply the proper balancing test and incorrectly determined that the witness was unavailable. The District Court erred in affirming the ruling based on the Magistrate's reputation for fairness.

B. Standard for 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). Where the lower court's decision turns on the interpretation of a criminal rule, an appellate court exercises free review. *State v. Weber*, 140 Idaho 89, 91–92 (2004) (reviewing the trial court's interpretation of I.C.R. 11(c)); *State v. Larios*, 129 Idaho 631, 633 (1997) (reviewing the trial court's interpretation of I.C.R. 25(a)). A decision to continue a hearing under I.C.R. 45 should require a bifurcated review: first, whether the record supports the Magistrate's finding that cause was shown, and second, abuse of discretion review of the Magistrate's decision to grant or deny the motion. *See State v. Payne*, 146 Idaho 548, 567 (2008).

C. The Magistrate Court abused its discretion in finding good cause to continue the Motion to Suppress where the state had two months to secure its necessary witness and failed to do so.

A motion to suppress evidence is made in accordance with constitutional principles, but its timing in controlled in Idaho only by I.C.R. 45. No law in Idaho controls the making of pretrial motions in a criminal proceeding. *Cf.* I.C. § 19-3926 (dealing with pre-judgment motions). I.C.R. 45 states in relevant part:

> **(b) Enlargement.** When an act, other than the filing of a notice of appeal, is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:
>
> (1) With or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order,
>
> (2) Enlarge the time upon motion made after the expiration of the specified period and permit the act to be done if the failure to act was the result of excusable neglect, or,
>
> (3) Enlarge the time upon stipulation of the parties; but the court may not extend the time for taking any action under Rules 29, 34 and 35, or for the perfecting of an appeal, except to the extent and under the condition stated therein.

Very little caselaw exists on the meaning of I.C.R. 45(b). The Court of Appeals has ruled that "extensions of time similar to the one at issue in this case are generally allowed only if requested prior to the original deadline" in a case involving an extension of time to decide whether to withhold a sentence where jurisdiction had been retained 180 days. *State v. Petersen*, 149 Idaho 808, 813 (Ct.App.2010) *citing* I.C.R. 45(b)(1).

In *State v. Ruiz*, 106 Idaho 336, 337 (1984), the Idaho Supreme Court held that the Idaho

Criminal Rules must be construed in accordance with I.C.R. 2(a):

> Purpose and construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay.

"When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605 (Ct.App.1987).

In this case, the Magistrate Court recognized that good cause needed to be shown in order to grant a continuance. However, the Magistrate Court failed to recognize that it needed to determine whether the state's motion was being made prior or after the period prescribed. Where a request to continue is made per I.C.R. 45 at the hearing itself, the Magistrate Court should find that this is after the period prescribed, as the requirement to show excusable neglect is rationally applied to such a scenario in view of I.C.R. 2(a). The failure to be prepared for a hearing which one has known about for two months, as in this case, and to request it be continued for a babysitting witness on the day of the hearing, is both unfair to the opposing party and a waste of the court's resources. Thus, the state should have had to show excusable neglect.

As to the cause shown, the record reflects that the state's necessary witness was absent. No record was made as to whether they had subpoenaed the Trooper. The Register of Actions

for the case does not reflect that a subpoena was issued. The state's claim, accepted by the Magistrate, that the Trooper was unavailable does not comport with the law on determining unavailability. While little law exists as to unavailability for purposes of continuing a hearing, much exists for determining whether hearsay may be admitted. I.R.E. 804(a)(4) directs that a witness may be deemed unavailable if he:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of declarant's statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of declarant's statement has been unable to procure declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of declarant's statement for the purpose of preventing the witness from attending or testifying.

Thus, in a case such as this, the state's claim that their witness had to babysit does not make him "unavailable." The Magistrate Court's claim that this was an "emergency" is not supported by the record. The Trooper and the state had two months to ensure his presence and to find the appropriate childcare. Further, there is no rule that the Trooper could not simply have the child come with him to court.

The District Court, reviewing the decision on appeal, found that the Magistrate had a reputation for fairness. Appellate Tr. p. 11, L. 25, p. 12, L. 1-4. The District Court also found no prejudice, in that the defendant eventually received the requested hearing. Appellate Tr. p. 12, L. 4-8. This is a very cynical view of prejudice. The defendant had thought it relevant, at first, to demonstrate that the Magistrate was in fact, not fair, and thus had attempted to illustrate the fact with a separate hearing. After that attempt was denied, the defendant recognized that the question under the abuse of discretion standard cannot possible hinge on the reputation of that particular judge. Rather, the issue must be quite simple- whether the court's finding of good cause is reflected in the record. The issue of the tribunal's fairness affects that question of good cause. The District Court's affirmance, and the Magistrate's decision, do not find support in the record, for the reason that it leaves the trial court with far too much discretion in determining when good cause appears for a continuance.

If a court can find good cause in a case where a party fails to secure a necessary witness, despite having two months notice, can the court also find that good cause does not exist under such circumstances? In other words, if in the end the trial judge may, on whim, grant or deny a hearing upon which the very existence of the entire matter hinges in a criminal case, can anyone trust that system? 'The history of American freedom is, in no small measure, the history of procedure." *Malinski v. People of State of New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., separate opinion). It will not do to make certain parts of that procedure, essential to the system, so vague and open to judicial interpretation that the parties cannot know what to expect. The

case before this Court is not close. It is a glaring failure on the part of the state to defend its claims. If a court may call this good cause, then that should be the law, such that no party need concern itself with securing necessary witnesses for essential hearings.

As to prejudice, the Magistrate Court's decision to continue the case harmed the defendant by essentially wasting her time and forcing her to drive to Court from Washington and take time out of her day for no reason. It wasted the court's time by filling the docket with a hearing that had no outcome. The Magistrate Court's decision further assisted the state and impugned the Court's neutrality. In fact, the Magistrate Court made it clear that it did not care what the Trooper was doing instead of being in Court. This flies in the face not only of the Idaho Criminal Rules but also the constitutional mandate that a neutral decision maker be provided for a criminal proceeding. *See* U.S. CONSTITUTION amend. XIV. Most importantly, the Magistrate took from the defendant what would have been a hearing that necessarily would have been decided in her favor and would have meant the dismissal of her case. The burden in a Motion to Suppress is on the state where the search and seizure are done without a warrant. *State v. Curl*, 125 Idaho 224, 225 (1993). In this matter, no warrant had existed, and without its officer, the state would necessarily have lost the hearing. Thus, the defendant was denied a fair hearing that would have ended in her favor. To the extent that it is somehow "unfair" because the state did not have its witness, that was the state's fault. Parties should not come to court unprepared and then complain when things do not turn out in their favor. To find otherwise would render continuances ipso facto only important to the defendant, as the state would be free to postpone

any hearing it wished so long as it did not violate the defendant's speedy trial rights, should those rights not already have been forfeited seeking to have the Motion to Suppress hearing. That is hardly a fair balance of power between the parties, and does nothing to encourage due diligence on the part of prosecutors.

The Court's error requires that this Court reverse the Court's decision, allow the defendant to withdraw her guilty plea, and require that the motion to suppress go forward without the trooper present. Since the state will be unable to meet its burden to show that the warrantless stop was made in accord with constitutional principles, the case will necessarily be dismissed. Therefore, this Court should simply reverse the conviction, reverse the Magistrate's order to continue, grant the motion to suppress, and dismiss this matter.

II.

A. Introduction

The Magistrate Court erred in denying the defendant's motion for an *ex parte* hearing before an *ex parte* judge in order to request funding. The Court created a requirement for a showing prior to the granting of the motion that does not exist and thereby prevented the defendant from having a trial that comported with the requirements of due process and rendered her attorney's assistance ineffective. The District Court further erred in affirming the denial by finding that the Constitution does not require either an *ex parte* hearing or an *ex parte* judge when the indigent seek funds for their defense.

B. Standard of 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 Constitution does not permit a showing be required before providing a defendant with an *ex parte* hearing before an *ex parte* judge in order to request funding for assistance.

The defendant has a right to Due Process of the law under the Fourteenth Amendment, which embodies a "standard of 'fundamental fairness.'" *State v. Olin*, 103 Idaho 391, 394 (1982) *quoting Watson v. Patterson*, 358 F.2d 297, 298 (10th Cir. 1966); *State v. Lee*, 221 Kan. 109 (1976). "[S]tate(s) must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). "It is equally evident that if a defendant is denied access to the basic tools of an adequate defense, then he has also been denied his due process right of a fair trial." *Olin*, 103 Idaho at 394 *citing Griffin v. Illinois*, 351 U.S. 585 (1956). "A defendant's request for expert or investigative services should be reviewed in light of all circumstances and be measured against the standard of "fundamental fairness" embodied in the due process clause." *State v. Lovelace*, 140 Idaho 53 (2003) *citing Olin*, 103 Idaho at 391.

In this case, the Magistrate agreed with the foregoing, but disagreed as to the appropriate procedure. The Magistrate made a number of findings as to the lack of a showing by the defendant as to the necessity of an *ex parte* judge and hearing. The judge stated that the defendant should reveal to the Magistrate at an adversarial hearing with the state: 1. What assistance was being requested 2. The cost of that assistance 3. Why the defendant could not procure that assistance through other means. However, to require such a showing from the

defendant would violate the requirements of due process, the defendant's right to effective assistance of counsel, and the defendant's right to remain silent, as shall be shown below.

This Court is called to decide what procedure is required by due process or other law or rules. The Court in *State v. Martin*, 146 Idaho 357 (2008), held only that the standard in *Ake v. Oklahoma*, 470 U.S. 68, 74, 83 (1985) applies in Idaho. The Court was not asked to and did not decide whether the procedure afforded Martin comported with due process. *See Martin*, 146 Idaho at 362-63 (Martin clearly had an adversarial hearing during his request for funds). In fact, the Court in *Ake* itself did not prescribe procedure, but merely held that an *ex parte* showing is all that is required. *Ake*, 470 US at 83. *Ake* was a case from Oklahoma. Thus, the Supreme Court was not relying on any particular procedural rule or law when it came to its conclusion as to the required standard.

In *State v. Wood*, 132 Idaho 88 (1998), relied upon heavily by the District Court, the Idaho Supreme Court held that nothing in *Ake* or I.C. § 19-852 guarantees an *ex parte* application for assistance. The Court further found that notice to the prosecutor that an application had been made did not deny the defendant due process, and that it was not ineffective assistance to make the request in open court with said notice to the state. *Id.* at 100.

That is why this Court must find that the procedural requirement for an automatic *ex parte* hearing when the defense is requesting funds is required under the Constitution. First, the hearing itself must be *ex parte* and before an *ex parte* judge in order for the trial court to remain neutral as guaranteed by the Fourteenth Amendment to the United States Constitution and Idaho

Judicial Cannon 3. *Tumey v. Ohio*, 273 U.S. 510 (1927); *State v. Lankford*, 116 Idaho 860 (1989). At the hearing, the defendant will likely need to reveal confidential information, such as trial strategy and aggravating or mitigating factors. *Yakima v. Yakima Herald-Republic*, 246 P.3d 768, 803 (Wash.,2011). To hold the hearing without an *ex parte* judge would deny fairness to both parties. Second and third, a criminal defendant cannot be forced to reveal to the state evidence that can be used against him in a criminal prosecution or his attorney's trial strategy. U.S. CONSTITUTION amend. V, VI. Lastly, it would not comport with the basic requirements of equality and fairness to force a poor defendant to reveal information to the state that a richer defendant may keep secret. U.S. CONSTITUTION amend. XIV. Many other states have held that this procedure is the only procedure that can comport with constitutional requirements. *Ex parte Moody*, 684 So. 2d 114, 83 A.L.R.5th 795 (Ala. 1996); *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 204 Cal. Rptr. 165, 682 P.2d 360 (1984); *Williams v. State*, 958 S.W.2d 186 (Tex. Crim. App. 1997); *State v. Barnett*, 909 S.W.2d 423 (Tenn. 1995); *Bright v. State*, 265 Ga. 265, 455 S.E.2d 37 (1995); *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993); *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693 (1993); *People v. Loyer*, 169 Mich. App. 105, 425 N.W.2d 714 (1988).

For essentially the same reasons, there cannot be a required showing before a defendant is allowed an *ex parte* hearing. In *Ex parte Moody*, the Alabama Supreme Court found:

> Requiring an indigent defendant to prematurely disclose evidence in a hearing where the state is present encroaches on the privilege against self-incrimination, which applies at all stages of a criminal proceeding. The privilege against self-incrimination "does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual

reasonably believes could be used against him in a criminal prosecution." *Maness v. Meyers*, 419 U.S. 449, 461 (1975).

There should be equality between "indigents and those who possess the means to protect their rights." *United States v. Tate*, 419 F.2d 131 (6th Cir.1969). An indigent defendant should not have to disclose to the state information that a financially secure defendant would not have to disclose. In *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir.1973), the court stated:

"The names of witnesses to be called by the defendant could easily aid the government in determining the strategy the defendant plans to use at trial. The government should not be able to obtain a list of adverse witnesses in the case of a defendant unable to pay their fees when it is not able to do so in the cases of defendants able to pay witness fees. When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised...."

The Sixth Amendment right to assistance of counsel encompasses the right to *effective* assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). This right includes access to expert witnesses where it is appropriate. *United States v. Wright*, 489 F.2d 1181, 1188 n. 6 (D.C.Cir.1973). Disclosure of the defense's trial strategy would impair the indigent defendant's right to effective assistance of counsel.

Looking to what other states have done with regard to this issue, we note that the legislatures in California, Kansas, Minnesota, Nevada, New York, South Carolina, and Tennessee have provided for an *ex parte* hearing when an indigent defendant has requested expert assistance.[FN1] The courts in the following states have held that an indigent defendant is entitled to an *ex parte* hearing regarding expert assistance: Arkansas, Florida, Georgia, Hawaii, Indiana, Michigan, Oklahoma, Washington.[FN2]

FN1. Cal.Penal Code § 987.9 (Deering 1985 and Supp.1992); Kan.Stat.Ann. § 22-4508 (1990 and Supp.1991); Minn.Stat. § 611.21 (1991); Nev.Rev.Stat.Ann. § 7.135 (Michie 1991); N.Y.County Law § 722-c (Consol.1992); S.C.Stat. § 16-3-26(C) (Supp.1992); and Tenn.Code Ann. § 40-14-207(b) (1991).

FN2. *Wall v. State*, 289 Ark. 570, 715 S.W.2d 208 (1986); *Clark v. State*, 467 So.2d 699 (Fla.1985); *Brooks v. State*, 259 Ga. 562, 385 S.E.2d 81 (1989), cert.

denied, 494 U.S. 1018, 110 S.Ct. 1323, 108 L.Ed.2d 498 (1990); *Arnold v. Higa*, 61 Haw. 203, 600 P.2d 1383 (1979); *Stanger v. State*, 545 N.E.2d 1105 (Ind.App.1989); *People v. Loyer*, 169 Mich.App. 105, 425 N.W.2d 714 (1988); *State v. Newcomer*, 48 Wash.App. 83, 737 P.2d 1285 (1987).

The courts in Louisiana, North Carolina, and Ohio all have held that it is within the trial court's discretion as to whether an indigent defendant is entitled to an *ex parte* hearing on the necessity of an expert.[FN3] In particular, the Louisiana Supreme Court requires an indigent defendant to show that he would be prejudiced if the hearing was not held *ex parte*. *State v. Touchet*, 642 So.2d 1213, 1221 (La.1994). We disagree with this requirement because we find no reason for first requiring an indigent defendant to show prejudice from a hearing where the state is to be a party when the right against self-incrimination, the right to effective assistance of counsel, and the right to equal protection are implicated in a hearing concerning expert witnesses needed for an adequate defense.

FN3. *State v. Touchet*, 642 So.2d 1213 (La.1994); *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178, cert. denied, 510 U.S. 984, 114 S.Ct. 487, 126 L.Ed.2d 438 (1993); and *State v. Peeples*, 94 Ohio App.3d 34, 640 N.E.2d 208 (1994), aff'd, 74 Ohio St.3d 153, 656 N.E.2d 1285 (1995).

Three state courts have expressly held that there is no constitutional right to an *ex parte* hearing for an indigent defendant seeking expert assistance at public expense, i.e., that the denial of such a hearing is not a denial of equal protection or effective assistance of counsel and does not violate the privilege against self-incrimination.[FN4] The South Dakota Supreme Court concluded that the state should be involved when public funds are being spent. *State v. Floody*, 481 N.W.2d 242 (S.D.1992). However, we believe that the trial court, in an *ex parte* hearing, can adequately protect taxpayers from unwise expenditures of money while at the same time protecting the constitutional rights of indigent defendants.

FN4. *State v. Apelt,* 176 Ariz. 349, 861 P.2d 634 (1993), cert. denied, 513 U.S. 834, 115 S.Ct. 113, 130 L.Ed.2d 59 (1994); *State v. Floody,* 481 N.W.2d 242 (S.D.1992).

684 So.2d at 120-21.

This Court should adopt the findings and holding of the Alabama Supreme Court, as well as the many other jurisdictions throughout the country, that a request for funds by a criminal

defendant must be *ex parte* and that no showing is necessary in order to receive that *ex parte* hearing. Thus, this Court should reverse the Magistrate's order denying the ex parte hearing and appointment of an ex parte judge, and allow the defendant to withdraw her guilty plea and have the benefit of that hearing.

III.

A. Introduction

The Magistrate Court erred in not finding that a violation of I.C. § 18-8004(4) would prevent the admission of breath test results because the statute requires that a method exist that ensures an extremely reliable result for the testing of breath for alcohol. The District Court correctly recognized that the findings of the Court of Appeals in *Besaw* were wrong, but incorrectly affirmed out of deference to that Court.

B. Standard of Review

An appellate court exercises free review over questions of law. *Button*, 134 Idaho 814; *Powell*, 130 Idaho at 125.

C. I.C. § 18-8004(4) requires the Idaho State Police to create a method for breath testing and without a method ensuring extremely reliable results the results are not admissible.

I.C. § 18-8004(4) states:

> For purposes of this chapter, an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath or sixty-seven (67) milliliters of urine. Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, the results of any test

> for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

This statute must be strictly construed. As the Idaho Supreme Court in *Sivak* wrote:

> Ordinarily, we must construe a statute to give effect to all of its parts, if we can, and not construe it in a way that makes mere surplusage of one of its provisions. However, there is another principle of statutory construction that must be considered here. Criminal statutes must be strictly construed. In *Thompson*, the Court said: "This principle extends not only to the elements of the substantive crime, but also to the sanctions potentially involved."

State v. Sivak, 119 Idaho 320, 324-25 (1990); *citing State v. Charboneau*, 116 Idaho 29, 153 (1989); *Hartley v. Miller–Stephan*, 107 Idaho 688, 690 (1984) (overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166 (1990)); *State v. Thompson*, 101 Idaho 430, 437 (1980); *State v. Alkire*, 79 Idaho 334, 338 (1957). Even if the result could be considered absurd, Idaho statutory construction no longer considers absurdity of the result a ground for voiding or changing a statute. *Verska v. Saint Alphonsus Regional Med. Center*, 151 Idaho 889, 895 (2011). The strict construction rule is the rigid foundation of the rule of law. As the Supreme Court of the United States found:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means * * *

> would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Miranda v. Arizona, 384 U.S. 436, 479-80 (1967) *quoting Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting opinion).

I.C. § 18-8004(4) unambiguously provides that the Idaho State Police shall create a method for the analysis of breath and that the results of breath testing and that method will be admissible despite any other law or court rule. The Idaho Court of Appeals has previously considered what the result should be if the method is not faithfully complied with in *State v. Bell*, 115 Idaho 36 (Ct.App.1988) and its progeny. The Court in *Bell* held:

> The pertinent language of I.C. § 18–8004(4), in effect at the time, stated:
>
> Analysis of blood, urine or breath for the purpose of determining the alcohol concentration *shall* be performed by a laboratory operated by the Idaho department of health and welfare or by a laboratory approved by the Idaho department of health and welfare under the provisions of approval and certification standards to be set by that department,.... [Emphasis added.] FN3
>
> FN3. "Analysis" as used in the quoted language of I.C. § 18–8004(4) refers only to that part of the testing procedure which must be performed in an approved laboratory. However, a critical part of the "analysis," in a broader sense, is the first step of collecting a sample for testing. The collection of blood, urine or breath samples obviously will not generally be made at an approved laboratory. Nevertheless, because collection of samples is an essential part of analysis, Department of Health and Welfare regulations extend to that activity and, for the collection of blood, include descriptions of the proper collection instruments, antiseptics and chemical additives for preserving the sample in optimum condition for testing.
>
> The question then is whether, in the absence of an express exclusionary provision, this language nevertheless requires exclusion of a test result where compliance with the Health and Welfare testing requirements is not shown.
> The admissibility of the result of a scientific test such as the blood-alcohol test in

I.C. § 18–8004 turns normally on a foundation which establishes the acceptability, validity, reliability and accuracy of the test and test procedures. In the admission of a test result for alcohol concentration the Legislature has concluded that certain foundational elements need not be presented at trial unless such elements are disputed. The Legislature has acknowledged that certain tests, due to a history of reliability and accuracy, are presumed to be valid and acceptable. This has also been acknowledged by the courts. *See State v. Hartwig*, 112 Idaho 370 (Ct.App.1987) (holding that Intoximeter 3000 test result may be offered into evidence without detailed foundation, but reliability of result may be challenged by defendant).

The Legislature has enacted a statutory scheme which allows an expedient method for admitting a blood-alcohol test result into evidence without the need for some expert testimony. As provided by I.C. § 18–8004(4):

Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho department of health and welfare or by any other method approved by health and welfare shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

When this proposed statute was presented to the Legislature the statement of purpose accompanying the legislation explained that expert witness testimony was an unnecessary burden on the state. Such testimony, if used merely to establish a foundation, provided superfluous verification of a test procedure which the Legislature believed to produce an "extremely reliable" result.
Inherent in this statutory scheme, however, is an awareness by the Legislature of the need for uniform test procedures. An "extremely reliable" test result can only be the product of a test procedure which from previous use is known to be capable of producing an accurate result. This benefit is best provided by strict adherence to a uniform procedure. This was recognized by the Legislature and is apparent first, from the statutory language which provides for the test procedure to be determined by the Idaho Department of Health and Welfare, and second, by the "shall" language mandating adherence to the standards set by that Department.

The acceptance by the Legislature of test procedures as designated by the Idaho Department of Health and Welfare does not wholly eliminate the need of establishing foundational requirements for a test result. This is required even in

> light of the legislative directive to utilize an expedient means to admit such evidence. The adoption of the particular test procedure merely recognizes the validity and reliability of that particular accepted test. It must still be established at trial that those procedures which ensure the reliability and in turn the accuracy of the test have been met. Absent such a showing, the expedient scheme adopted by the Legislature fails to guarantee the admission of reliable evidence. Without expert witness testimony to establish these necessary foundational elements, compliance with the test procedure must be shown. We hold that to admit the test result the state must provide adequate foundation evidence consisting either of expert testimony or a showing that the test was administered in conformity with the applicable test procedure. Of course, a test result, once admitted, still may be attacked by the defendant. In that event, the trier of fact will determine the ultimate weight to be given the test result.

Id. at 37-40. The Magistrate Court in this case seemingly broadened this holding to include the current situation where no method exists. However, the Court in *Bell* was quite clear in finding that the legislature had mandated that a method be created for breath testing. When the Idaho State Police choose to violate this directive, it is clear that no breath test results will be admissible. The lack of a uniform method creates a situation where the breath test results are unreliable, just as the existence of such a method shields that method from criticism because its constant, rigid application maintains its credibility.

The Court of Appeals recently ruled in *State v. Besaw*, 306 P.3d. 219 (Idaho Ct.App.2013) that I.C. § 18-8004(4) merely required that the method be "capable" of producing an accurate result. The Court's ruling is in error, both in that it overruled *Bell* without employing the proper test, and in that it misinterprets the legislature's requirements for the executive. Fundamentally, no expert, however well trained, can ensure the reliability of a breath test result done without a method. The rule of law cannot ignore the Rules of Scientific Procedure. The *laissez faire*

approach currently adopted by the Idaho State Police cannot ensure reliability to a standard necessary for I.C. § 18-8004(4) or the Fourteenth Amendment of the United States Constitution's due process protections. As the District Court found, particularly now that it is the very same branch that is both charging and investigating the crimes that determines the process for creating scientifically accurate results, the *Besaw* ruling does not comport with anything resembling fundamental fairness. Simply allowing the Idaho State Police to be the testing agency should be, in and of itself, reason to find that the results are unusable. This Court should find that the findings in *Besaw* were in error and overrule that case.

Further, this Court should find that the SOPs have been modified so that the word "must" has been replaced by the word "should" in the following instances:

1. The necessity to have the correct acceptable range limits and performance verification standard lot number set in the instrument prior to evidentiary testing- 2.2.11 (1/15/2009) cf. 5.2.10 (1/16/2013).
2. The need to monitor the subject for fifteen minutes prior to the test to ensure there is no alcohol being regurgitated or in the mouth. See 3.1, 3.1.5, 3.1.5.1, 3.1.5.2 (1/15/2009) cf. 6.1, 6.1.4, 6.1.4.1, 6.1.4.2 (1/16/2013).

These changes occurred between the April 23, 2012 version of the SOPs and the installment current at the time of the incident in the above-entitled matter.

Mouth alcohol is an enormous issue with breath testing. *See* Caddy, Sobell, and Sobell, Alcohol Breath Tests: Criterion Times for Avoiding Contamination by 'Mouth Alcohol', 10(6) BEHAVIOR RESEARCH METHODS AND INSTRUMENTATION 814-18 (1978); Breath-Alchohol Concentration May Not Always Reflect the Concentration of Alcohol in Blood, 18 J. ANALYTICAL TOXICOLOGY 225 (July/Aug. 1994); Colorado Department of Health, 6(11)

Drinking/Driving L. Letter 5 (May 29, 1987); Kechagias, Jonsson, Franzen, Andersson & Jones, Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease, 44(4) J. FORENSIC SCIS. 814 (1999); Gaylard, Sambuk & Morgan, Reductions in Breath Ethanol Readings in Normal Male Volunteers Following Mouth Rinsing with Water at Differing Temperatures, 22 ALCOHOL & ALCOHOLISM 113 (1987); P. Price, Intoxilyzer: A Bread Testing Device?, 15(4) Drinking/Driving L. Letter 52 (1996) (slope detector failures); Ethanol Content of Various Foods and Soft Drinks and their Potential for Interference with a Breath-Alcohol Test, 22 J. ANALYTICAL TOXICOLOGY 181 (May/June 1998); Michael P. Hlastala, Ph.D., Wayne J.E. Lamm, M.A. and James Nesci, J.D., The Slope Detector Does Not Always Detect the Presence of Mouth Alcohol, THE CHAMPION, (National Association of Criminal Defense Lawyers), 57-60 (March 2006).

This Court should find that the removal of this requirement renders the SOPs incapable of ensuring accuracy.

D. This Court should decide that no method exists.

Idaho Code 18-8004(4) mandates that testing for alcohol concentration be done in accordance with methods approved by the Idaho State Police. In supposed compliance with that mandate and authority, the Idaho State Police has issued both "Standard Operating Procedures: Breath Alcohol Testing," ("SOP" or "SOPs") (available at http://www.isp.idaho.gov/forensics/index.html) which purports to establish procedures for the maintenance and operation of breath testing equipment as well as training and operations manuals ("manual" or "manuals") (also available at

http://www.isp.idaho.gov/forensics/index.html) for the various breath testing devices, including the LifeLoc FC20 device used in this case.

The ISP, by using SOPs in the place of regulations, has made an end-run around the requirements of the Idaho Administrative Procedures Act, specifically I.C. §§ 67-5220 – 67-5232 and I.D.A.P.A. 44.01. The ISP promulgated 11.03.01.014.03, which merely states that breath tests shall be in conformity with standards established by the ISP. Thus, the various changes the ISP makes to its breath testing procedures receive no public scrutiny prior to implementation, which files in the face of what the legislature had in mind in passing I.C. § 18-8004(4). Under the statutory definition, an agency action is a rule if it (1) is a statement of general applicability and (2) implements, interprets, or prescribes existing law. *See Tomorrow's Hope, Inc. v. Idaho Department of Health and Welfare*, 124 Idaho 843, 846 (1993). The Idaho Supreme Court considers the following characteristics of agency action indicative of a rule: (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy. *Asarco Incorporated v. State*, 138 Idaho 719, 723 (2003). The standard operating procedures for breathalyzer testing promulgated by the Idaho State Police easily fits this definition of a rule.

A comparison of the Idaho Supreme Court's analysis in *Asarco* with I.C. § 18-8004(4) and the Idaho State Police's Standard Operating Procedures shows that the SOPs are rules that fall under the IAPA.

> *1. The TMDL has wide coverage.* The TMDL applies to all current and future dischargers in a specific water body, in this case, the Coeur d'Alene River Basin. Thus, the TMDL is accurately described by the trial court as applying to "a large segment of the general public rather than an individual or narrow select group."

Asarco, 138 Idaho at 723. In this case, the SOPs apply to all breath testing that takes place in the state of Idaho and thus to the entire driving population in the state. The scope of the SOPs easily meets this requirement.

> *2. The TMDL is applied generally and uniformly.* While the TMDL has characteristics that are both generally applicable and discharger specific, the TMDL, on the whole, is more appropriately described as generally applicable.
>
> The TMDL, in part, constitutes a numerical limit or budget for a given water body, based on the sum of the allowable pollution from all identified point source and nonpoint sources of pollution, as well as natural background levels of the pollutant. I.C. § 39–3602(27); 40 CFR 130.2(i). These sums are based on individual determinations, referred to as load allocations (LA's) and wasteload allocations (WLA's). LA's are defined as the "portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources." 40 CFR 130.2(g). The wasteload allocations (WLA's) represent the "portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 CFR 130.2(h). The federal regulations further describe the WLA's as "a type of water-quality based effluent limitation." *Id.* In addition, the EPA has used these individualized load allocations as enforceable limits modifying the Mining Companies' NPDES permits accordingly. Thus, focusing on the LA and WLA determinations alone, the TMDL process appears to be discharger specific.
>
> Nevertheless, the individual LA and WLA determinations are just a small part of the entire TMDL process. First, the TMDL considers the LA and WLA allocations in sum in order to determine an over-all effluent limitation budget for the identified water body. This budget applies to all existing and future point and nonpoint source dischargers in a general and uniform manner. Second, the TMDL process outlined by Idaho statute includes the following additional qualitative and quantitative determinations:
>
> (1) Identification of pollutants impacting the water body;

(2) An inventory of all point and nonpoint sources of the identified pollutant ...;

(3) An analysis of why current control strategies are not effective in assuring full support of designated beneficial uses;

(4) A plan to monitor and evaluate progress toward water quality progress and to ascertain when designated beneficial uses will be fully supported;

(5) Pollution control strategies for both nonpoint and point sources for reducing those sources of pollution;

(6) Identification of the period of time necessary to achieve full support of designated beneficial uses; and

(7) An adequate margin of safety to account for uncertainty.

I.C. § 39–3611. Clearly these procedures are generally and uniformly applicable and require DEQ to focus on the waterbody as a whole, as opposed to the individual sources of pollution. Therefore, for the above reasons, even though the TMDL involves determinations of specific applicability, the over-all scheme demonstrates the TMDL is more appropriately described as generally and uniformly applicable.

Id. at 723-34. The method required by I.C. § 18-8004(4) is intended by the legislature to act as gatekeeper for the introduction of breath test results in DUI cases. I.C. § 18-8004(4) explicitly requires courts to allow the introduction of the breath test results as long as the method is followed in spite of the rules of evidence. The procedures are meant to be "generally and uniformly applicable" so as to guarantee accuracy. *See Wheeler v. Idaho Transportation Department*, 148 Idaho 378, 387 (2009) (Wheeler, J. dissenting) *citing* Statement of Purpose, HB 284 (RS13389) (1987).

3. *The TMDL Operates Only in Future Cases.* The TMDL operates only prospectively and does not adjudicate past actions by the Mining Companies or

any other party.

Id. at 724. The method that the Idaho State Police must adopt is not retroactive.

> 4. *The TMDL Prescribes a Legal Standard Not Provided by the Enabling Statute.* As described above, the TMDL constitutes a numerical limit on the total allowable discharge in a specified waterbody. This limit is allocated between point sources and nonpoint sources of pollution. Even if DEQ does not intend to enforce these limitations, and this Court is not determining whether or not it may properly do so, EPA considers these numbers binding and has already used the TMDL in order to reduce the discharge limits reflected in several of the Mining Companies' NPDES permits. Thus, the TMDL in fact contains quantitative legal standards not provided by either the Clean Water Act or the Idaho Water Quality Act.

Id. The legislature requires the Idaho State Police to define a method. I.C. § 18-8004(4). That method creates a legal standard preventing the Court from requiring the state to provide an expert to establish a reliable and accurate breath test. *Id.* Therefore, the method is a legal standard not provided by I.C. § 18-8004(4).

> 5. *The TMDL Expresses New Agency Policy.* Even if the TMDL is nothing more than a planning tool, as DEQ argues, it is an expression of agency policy not previously addressed. This is true not only of the numerical limits contained in the TMDL, but also the additional requirements contained in the Idaho Water Quality Act, including (1) the analysis of why current control strategies are not effective in assuring full support of designated beneficial uses; (2) the plan to monitor and evaluate progress toward water quality progress and to ascertain when designated beneficial uses will be fully supported; and (3) the identification of pollution control strategies for both nonpoint and point sources for reducing those sources of pollution. I.C. § 39–3611.

Id. at 724-25. The method adopted by the Idaho State Police in its Standard Operating Procedures is policy inasmuch as it establishes requirements, parameters, and guidance for police officers performing breath testing.

> 6. *The TMDL Implements and Interprets Existing Law.* While DEQ argues the TMDL implements the water quality standards, which constitute a rule as opposed to a law, the TMDL actually implements and interprets the directives contained in both the Clean Water Act, as well as the more specific Idaho Water Quality Act.
>
> The central problem with DEQ's argument is the state water quality standards do not provide all of the information or direction necessary for promulgating a TMDL. While the water quality standards serve as a basis for the TMDL calculations, the TMDL requires much more. Under the Idaho Water Quality Act, not only must DEQ identify the pollutants and inventory point and nonpoint sources of pollution, the agency must also analyze why current control strategies are not effective and develop new pollution control strategies for point and nonpoint sources of pollution. I.C. § 39–3611. In addition, the Idaho Water Quality Act requires DEQ to allocate effluent limitations among point and nonpoint sources of pollution and develop planning processes to monitor and evaluate progress. *Id.* In making these types of decisions, DEQ is working far outside the scope of the water quality standards alone and is both implementing law and creating policy. Thus, DEQ's argument that the TMDL implements a rule as opposed to a law is unpersuasive.

Id. Unlike in *Asarco*, there is no colorable argument that the Idaho State Police are not implementing and interpreting I.C. § 18-8004(4). The legislature required the ISP to adopt a method that would act as a guarantor of admissibility in a criminal trial, and the ISP has acknowledged that the SOPs are its attempt to do so. *See* IDAPA 11.03.01.014.03.

Further, the Court of Appeals acknowledged in *Wanner v. State Dept. of Transp.*, 150 Idaho 164 (2011), that hearings held per I.C. § 18-8002A are agency action controlled by IDAPA. It is difficult to understand how the hearings provided are agency action but the methods and rules required are not agency action falling under the requirements of IDAPA.

Therefore, this Court must come to the same conclusion as the Supreme Court in *Asarco*:

> In conclusion, the district court correctly determined the establishment of the TMDL involved "rulemaking." Furthermore, because the TMDL is properly

considered a rule, it is invalid pursuant to the IAPA.

> The IAPA provides, "[a] temporary or final rule adopted and becoming effective after July 1, 1993, is voidable unless adopted in substantial compliance with the requirements of this chapter." I.C. § 67–5231. It is undisputed that DEQ did not comply with formal rulemaking requirements. Rather than arguing it had substantially complied with the rulemaking requirements, DEQ argued it did not have to do so. Thus, the district court correctly held the TMDL is void for failure to comply with state administrative law.

Asarco, 138 Idaho at 725. The ISP's SOPs are void. As such, no method exists and the ISP has failed to comply with the legislature's requirements under I.C. § 18-8004(4). Though the Court of Appeals has held that where the method is not complied with an expert may be called to establish reliability, where no method exists at all, reliability cannot be established. *State v. Healy*, 151 Idaho 734, 737 (Ct.App.2011). This is both because the legislature has fixed the admissibility requirements for breath tests and made them conditional on the existence of a method, and because the Court cannot find reliability exists where the agency responsible for establishing a method refuses to do so, ostensibly to take advantage of the fact that few defendants can afford an expert and the ISP's expert will be able to convince any court to introduce the breath test results.

The District Court also found that the above is compounded by the fact that the very agency that investigates and charges crimes is placed in charge of ensuring scientific reliability. This "fox watching the henhouse" scenario should further compel this Court to find that the method for breath testing requires public hearings before rules are promulgated or changed.

The District Court and Magistrate Court improperly found that *Besaw* already controlled

the outcome and had found that the rules either do exist or that regardless of their existence the results of the breath test would not be excluded. On the contrary, even under *Besaw*, a total lack of rules would necessarily mean that the method cannot ensure a reliable result, and thus, both courts erred in denying the request to exclude the result.

This Court should so hold and remand this case with instructions to exclude the breath test results in this case.

IV.

A. Introduction

The Magistrate Court erred in denying the defendant's motion to suppress her breath test because a law providing for various penalties for relying on one's constitutional rights is invalid, as is any consent provided after being warned of those penalties. The District Court further erred in relying on *Neville* to affirm the Magistrate, which was necessarily overruled by the holding in *McNeely*.

B. Standard of Review

An appellate court exercises free review over questions of law. *Button*, 134 Idaho 814; *Powell*, 130 Idaho at 125.

C. A valid consent cannot be produced after the Notice of Suspension for Failure of Evidentiary Testing has been read to a citizen without the state first obtaining a warrant.

In *Missouri v. McNeely*, 133 S.Ct. 1552 (U.S.Mo. 2013), the Supreme Court of the United States held that an officer's belief that a person is currently intoxicated and need to conduct an evidentiary test before the alcohol in their system evaporates does not *per se* create exigent circumstances that allow the officer to forego seeking a warrant.

The state of Idaho, like the other forty-nine states, has adopted what is called an implied consent law. *McNeely, supra*, at 1566-67. In Idaho, implied consent means that a person who has accepted the privilege of operating a motor vehicle upon Idaho's highways, provided that evidentiary testing is administered by a peace officer with reasonable grounds for suspicion of DUI, will physically consent to an evidentiary test. *See State v. DeWitt*, 145 Idaho 709, 712 (Ct.App.2008); I.C. § 18–8002(1). Implied consent is unrelated to and occurs after the warrant required under the Fourth Amendment to the United States Constitution and Art. I § 17 of the Idaho Constitution. *See State v. Woolery*, 116 Idaho 368, 372-374 (1989). However, because it was erroneously held by the Idaho Supreme Court that no warrant was required in a DUI case, the warrant issue has long been overlooked. *See id.*

The relevant text of *Woolery* will be reproduced below:

> As explained by the Wisconsin Supreme Court in *State v. Zielke*, 137 Wis.2d 39, 403 N.W.2d 427 (1987), "the implied consent law is an important weapon in the battle against drunk driving in this state. Neither the law, its history nor common sense allows this court to countenance its use as a shield by the defense to prevent constitutionally obtained evidence from being admitted at trial." 403 N.W.2d 427, 434.
>
> The South Dakota Supreme Court ruling in *State v. Buckingham*, 240 N.W.2d 84 (1976), that noncompliance with the implied consent statutes rendered the blood sample and test results inadmissible in a driving while intoxicated manslaughter prosecution, was overruled just one year later in *State v. Hartman*, 256 N.W.2d 131 (S.D.1977). The court explained:
>
> The *Buckingham* decision was without the benefit of argument from the state on the question of whether use of the "exclusionary rule" was necessary where there is a violation of the implied consent statutes. Upon further consideration, this court feels that it is necessary to modify the *Buckingham* decision.... Our consideration of the implied consent statutes must be prefaced upon the United

States Supreme Court's decision in *Schmerber v. California* [citations omitted in quote] ... The exclusionary rule is a judicially created means of protecting the rights of citizens under the Fourth Amendment and Art. VI, § 11 of the South Dakota Constitution as a deterrent to unlawful police conduct. However, evidence obtained in violation of statutory rights is not inadmissible per se unless the statutory rights are of constitutional proportions or there exists no other method of deterring future violations of the rights which the legislature has granted to its citizens.

Hartman, 256 N.W.2d 131, 134-135. In holding that the results of the blood test were admissible, the court explained that **despite the fact the legislature created a specific right of a driver to refuse to submit to a test to determine the alcohol content of his blood, failure to comply with the procedure as set forth in the implied consent statutes does not require suppression of the test results as long as the testing procedure complied with the driver's constitutional rights.** [emphasis added].

The Idaho Legislature has acknowledged a driver's *physical ability to refuse* to submit to an evidentiary test, but it did not create a *statutory right* for a driver to withdraw his previously given consent to an evidentiary test for concentration of alcohol, drugs or other intoxicating substances. [emphasis in original].

Importantly, the pre-1983 statute, I.C. § 49-352, covering implied consent to extract blood for a blood alcohol test, stated: "If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test the test shall not be given but the department shall suspend his license or permit to drive...." The 1984 legislature repealed I.C. § 49-352, the legislative precursor of § 18-8002, and adopted § 18-8002 as a part of the new chapter 80 of title 18. In addition to maintaining the pre-1983 implied consent language and the 1983 deletion of the language just discussed, this enactment added a section making it clear that a driver does not have the right to consult with an attorney before submitting to an evidentiary test. The state submits that the elimination of the statutory provision that the test shall not be given if it is refused, the continued use of the pre-1983 implied consent language, the addition of a specific statutory provision making it very clear that a driver does not have a right to consult with an attorney before submitting to the evidentiary test, along with the statement of purpose enacted as a part of the 1983 Act, reflect the legislative "get tough" policy. This legislative "get tough" policy did not include the creation of a statutory right for a driver to refuse to submit to an evidentiary test requested by an officer who has reasonable cause to believe

that such driver is under the influence.

The Oregon Supreme Court in *State v. Newton*, 636 P.2d 393 (1981), explained that the concept of implied consent is a statutory fiction which, at first, appears to be theoretically contradictory[:]

The contradiction disappears, however, when it is realized that the words "consent" and "refusal" are not used as antonyms, because they are not used in the same sense. "Consent" describes a legal act; "refusal" describes a physical reality. By implying consent, the statute removes the right of a licensed driver to lawfully refuse, but it cannot remove his or her *physical power* to refuse. As another court put it:

The obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is "deemed to have given his consent" is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates.

It is firmly established that a drunken driver has no *right* to resist or refuse such a test [citations omitted in quote]. [emphasis added]. It is simply because such a person has the *physical power* to make the test impractical, and dangerous to himself and those charged with administering it, that it is excused upon an indication of his unwillingness.... *Bush v. Bright*, 264 Cal.App.2d 788, 790, 792, 71 Cal.Rptr. 123 at 125 (1968) (original emphasis).

Thus refusal as contemplated by the statute is something other than withholding of consent because consent is legally implied. It is a refusal to comply with the consent which has already been given as a condition of a license to drive. The purpose of a warning of license suspension following a refusal ... is to overcome an unsanctioned refusal by threat instead of force. It is not to reinstate a right to choice, but rather to nonforcibly enforce the driver's previous implied consent.

636 P.2d 393 at 397-398 (original emphasis). *See also State v. Hoehne*, 78 Or.App. 479, 717 P.2d 237 (1986); *State v. Spencer*, 305 Or. 59, 750 P.2d 147 (1988); *Pears v. State*, 672 P.2d 903 (Alaska App.1983), *rev'd on other grounds*, 698 P.2d 1198 (Alaska 1985); *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

The Idaho Legislature has not created a statutory right to refuse to submit to an evidentiary test to determine a driver's blood alcohol level. It is difficult to believe that the Idaho Legislature would provide an individual with the statutory right to prevent the state from obtaining highly relevant evidence when a law enforcement

> officer has reasonable cause to believe that individual has committed a crime-whether it would be driving under the influence, vehicular manslaughter, sale of controlled substances, or murder. **If the driver's constitutional right to be free from unreasonable searches and seizures is complied with, the state should not be prevented from obtaining such relevant evidence as the alcohol content of the driver's blood.** [emphasis added].
>
> To put it more succinctly, the Court found that:
>
> [i]n *Schmerber*, the United States Supreme Court recognized that a warrantless seizure of the blood of a driver, as long as probable cause exists and the withdrawal of the blood is done in a reasonable fashion, does comply with the provisions of the fourth amendment.

Id. at 374. However, the Idaho Supreme Court was manifestly wrong in its interpretation of *Schmerber v. California*, 384 U.S. 757 (1966) and has now been overruled by the United States Supreme Court's ruling in *McNeely*. *See McNeely*, 133 S.Ct. at 1558-59. Therefore, a warrantless evidentiary test in a DUI case is presumptively unconstitutional, and a person does have the right to refuse to do the test unless and until a warrant has been secured or an exception to the warrant requirement exists.

After *Woolery*, cases involving implied consent and the Fourth Amendment followed its reasoning until *Goerig v. State*, 121 Idaho 26, 29 (Ct.App.1992) and *State v. Nickerson*, 132 Idaho 406 (Ct.App.1999). *See State v. McCormack*, 117 Idaho 1009 (1990); *State v. Burris*, 125 Idaho 289 (Ct.App.1994); *Matter of McNeely*, 119 Idaho 182 (Ct.App.1990). The Idaho Court of Appeals in *Nickerson* misinterpreted *Woolery* as follows:

> Nickerson's argument that his consent to the BAC at the police station was involuntary is of no consequence because he had impliedly consented as a matter of law. One who drives a motor vehicle on Idaho's highways is statutorily deemed to have consented to an evidentiary test for blood alcohol concentration. Idaho

> Code § 18–8002(1) provides that "[a]ny person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol" if the test is administered at the request of a peace officer having reasonable grounds to believe that the person has been driving under the influence of intoxicants. By terms of this statute, anyone who accepts the privilege of operating a motor vehicle upon Idaho's highways has thereby consented in advance to submit to a BAC test. By implying consent, the statute removes the right of a driver to refuse an evidentiary test. Hence, although an individual has the physical ability to prevent a test, there is no legal right to withdraw the statutorily implied consent.

132 Idaho at 410 *citing Woolery*, 116 Idaho at 372; *Burris*, 125 Idaho at 291; *Goerig* 121 Idaho at 29 (Ct.App.1992) ("By implying consent, the statute removes the right of a licensed driver to refuse to take an evidentiary test; however, recognizing that some individuals may refuse to comply with their previously given consent, the legislature provided an administrative process to revoke those persons' licenses." *citing Woolery*, 116 Idaho at 373); *McNeely*, 119 Idaho at 187. Nowhere in these opinions is there an explanation for how the Supreme Court in *Woolery*'s statement that no legal right exists to refuse an evidentiary test for alcohol in a DUI case and that implied consent only dealt with the physical ability to refuse became confused for implied consent itself taking away the legal right to refuse and a person having the physical ability to refuse. Once the mistake was made, however, the courts cited it repeatedly until at last the Supreme Court held it to be true in *Halen v. State*, 136 Idaho 829 (2002). Indeed, the Supreme Court of Idaho even cited to *Nickerson* as its only authority for the concept that implied consent was consent to a Fourth Amendment search, *sub silentio* overruling its holding in *Woolery*. *Id.* at 833.

However, the Supreme Court's holding is manifestly wrong. The state does not have the

power to require consent to a search in violation of the Constitution to use the road. *Woolery*, 116 Idaho at 372 *quoting Hartman*, 256 N.W.2d at 134-135. Certainly, it would be shocking that a state legislature could do to drivers what it cannot do to prisoners. *Hudson v. Palmer*, 468 U.S. 517 (1984) ("We have repeatedly held that prisons are not beyond the reach of the Constitution. No 'iron curtain' separates one from the other."). Rather than simply state that those who choose to live in general population rather than solitary impliedly consent to random shakedowns, the Court has held that prison regulations that inhibit rights are reviewed for their reasonableness. *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Once the Fourth Amendment was applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), one would imagine the states did not retain the ability to simply force their citizens to give up its protections whenever they pleased. The Court's holding would allow the state to vary the protections of the federal Constitution in a manner that hardly seems fitting to something titled "federal." As the federal Supreme Court stated in *Virginia v. Moore*, 553 U.S. 164 (2008) (footnote omitted) *citing Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), *Payton v. New York*, 445 U.S. 573, 583–584 (1980); *Boyd v. United States*, 116 U.S. 616, 624–627 (1886):

> We are aware of no historical indication that those who ratified the Fourth Amendment understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted. The immediate object of the Fourth Amendment was to prohibit the general warrants and writs of assistance that English judges had employed against the colonists. That suggests, if anything, that founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness.
>
> ...

> Incorporating state-law arrest limitations into the Constitution would produce a constitutional regime no less vague and unpredictable than the one we rejected in *Atwater*. The constitutional standard would be only as easy to apply as the underlying state law, and state law can be complicated indeed.

To the extent that the Supreme Court of Idaho has held that the state may force its citizens to waive their federal constitutional rights to participate in something as universal as driving, it is manifestly wrong. The Bill of Rights is a dead letter if the government it was designed to protect its citizens from may simply waive it on a whim.

McNeely holds that it is not reasonable to search a driver's body for signs of intoxication absent a warrant or when an exception to the warrant requirement applies. *McNeely*, 133 S.Ct. at 1558-59. Therefore, the Court has reviewed the reasonableness of the warrantless evidentiary test in DUI cases and indicated that the Constitution requires more than probable cause and the withdrawal of blood being done in a reasonable fashion. *Cf. Woolery*, 116 Idaho at 374. The Constitution requires a warrant.

Further, the state may not punish a citizen for exercising or standing on their constitutional rights. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000).

This Court must determine the validity of consent after a person has been read the Notice of Suspension for Failure of Evidentiary Testing (otherwise known as the ALS form) as it was at the time of this incident. This form is read by Idaho police to defendants and states:

> I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. **You are required by law to take one or more evidentiary test(s)** to determine the concentration of alcohol or presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you

> may, when practical, at your own expense, have additional test(s) made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary test(s) to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body. [emphasis added].

The form goes on to list a litany of punishments that will result if a person refuses, including loss of their driver's license and a fine. The obvious problem with this warning is that the law requiring those tests is unconstitutional until the officer has secured a warrant or has a valid exception to the warrant requirement. A state may not pass a law that visits penalties upon a citizen for exercising a constitutional right. *See Camara v. Municipal Court of the City And County of San Francisco*, 387 U.S. 523, 531-534 (1967) (striking down laws that allow for fines when individuals refuse to consent to warrantless searches of their dwellings); *Columbia Basin Apartment Association v. City of Pasco*, 268 F.2d 791, 797-798 (9th.Cir.2001) (plaintiff tenants have standing to challenge ordinance requiring tenants to allow warrantless searches of their homes or face eviction); *Wilson v. City of Cincinnati*, 346 N.E.2d 666 (Ohio 1976) (striking down ordinance requiring seller of a house to consent to a warrantless search or face a fine between $5 and $500 because it coerced a waiver of Fourth Amendment rights). An officer may not threaten to do what he is not legally or constitutionally authorized to do. *Bumper v. North Carolina*, 391 U.S. 543, 548-550 (1968); *State v. Smith*, 144 Idaho 482, 488-89 (2007). The policeman's threat vitiates any consent. *Id.*

The United States Supreme Court ruled in *South Dakota v. Neville*, 459 U.S. 553, 564 (1983), that a refusal was not being compelled because an officer could lawfully perform the

search. The Court relied on *Schmerber* to reach that conclusion:

> In contrast to these prohibited choices, the values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him. **The simple blood-alcohol test is so safe, painless, and commonplace, that respondent concedes, as he must, that the state could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice.** Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.

Id. at 563-64 *citing Schmerber*, 384 U.S. at 771 (emphasis added). Naturally, this does not hold true. The ruling in *McNeely* necessarily overruled this holding. An officer cannot lawfully force a blood draw. He must seek a warrant or be able to point to exigent circumstances. Despite this contradiction, the Supreme Court wrote in dicta in *McNeely* that the state could still rely on implied consent and that refusals may be used against them because they do not violate the Fifth Amendment, specifically citing *Neville*. *See McNeely*, 133 S. Ct. at 1566. This dicta does not save *Neville*. Since the officer cannot warrantlessly force a evidentiary testing, the state is coercing the respondent into choosing an option it has no right to compel.

Article I Section 17 of the Idaho Constitution affords greater protection than the Fourth Amendment to the United States Constitution based upon the long-standing jurisprudence of the Idaho appellate courts, the uniqueness of the State of Idaho, and the uniqueness of the Idaho Constitution. *See State v. Guzman*, 122 Idaho 981, 995 (1992) (not the exclusionary rule, but the

constitutional provision itself impedes fact-finding function of Court- but this is a "price the framers anticipated and were willing to pay"); *State v. Thompson*, 114 Idaho 746 (1988) (Idahoans have a higher expectation of privacy in the home); *State v. LePage*, 102 Idaho 387 (1981) (judicial integrity mandates exclusionary rule); *State v. Rauch*, 99 Idaho 586 (1978) (admission of illegally seized evidence itself a violation of constitution); *State v. Arregui*, 44 Idaho 43 (1927) (application of exclusionary rule in Idaho 34 years prior to *Mapp v. Ohio*, 367 U.S. 643 (1961)); *State v. Cada*, 129 Idaho 224 (Ct.App.1996) (Idahoans have higher expectation of privacy in their land). Thus, the results of the breath test, because they were taken in violation of Article I § 17, must be excluded at trial.

In this case, the defendant was read the ALS form without a warrant being secured. Therefore, the consent given was invalid, and the results of the test should be suppressed. This Court should reverse the denial of the Motion to Suppress the breath test and remand to allow the defendant to withdraw her guilty plea.

CONCLUSION

The case before this Court requires it to determine how far the state may go in violating a citizen's rights to prove a charge of Driving under the Influence. This Court should reverse the lower Court's granting of the state's motion to continue, grant the defendant's motion to suppress the stop (with or without reversing the state's motion to continue), reverse the conviction, and dismiss this matter. If this Court does not do so, then it should reverse the lower Court's denial of the Motion to Suppress the breath test, and/or the Motion in Limine, and remand for further

proceedings, including a requirement that the defendant be allowed to withdraw her plea. If the Court does not reverse those motions, then the Court should reverse the Motion for an *Ex Parte* Judge and *Ex Parte* Hearing, and remand for further proceedings, including a requirement that the defendant be allowed to withdraw her plea.

DATED this 4 day of June, 2014.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: _____
JAY LOGSDON, ISB 8759
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this 5th day of June, 2014, served a true and correct copy of the attached BRIEF SUPPORTING APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

X	Lawrence G. Wasden Attorney General P.O. Box 83720 Boise, Idaho 83720-0010	[X] First Class Mail [ ] Certified Mail [ ] Facsimile (208) 854-8071
X	Stephen W Kenyon Clerk of the Courts Idaho Supreme Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	[X] First Class Mail

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