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State v. Riendeau Appellant's Reply Brief Dckt. 41982

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. JESSE CARL RIENDEAU Defendant/Appellant.	)	APPELLANT'S REPLY BRIEF SUPREME COURT NO. 41982 CR-13-0005363

APPELLANT'S REPLY BRIEF

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

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District Judge

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ARGUMENT

I.

A. *Besaw*

The state argues in its response that this Court should not overrule *State v. Besaw*, 155 Idaho 134 (Ct.App.2013). The state also contends that nothing has changed since 2011 when the record in *Besaw* was created that should cause this Court to find that, in point of fact, the ISP's SOPs cannot be reliable.

The state, interestingly, recognizes that for the Court of Appeals to overrule *Besaw*, it must find it was manifestly wrong or that its holding over time has proven unwise or unjust. First, the Court of Appeals in *Besaw* overruled *State v. Bell*, 115 Idaho 36 (Ct.App.1988), by changing the requirement for a method from "highly reliable" to "capable of providing an accurate result." The Court employed no test when it overruled its prior case. Second, circumstances have changed. The fifteen minute waiting period, one of the widest acknowledged requirements for accurate breath testing, stopped being a requirement in January, 2013. Standard Operating Procedure Breath Alcohol Testing (January 16, 2013). If this Court needs proof that *Besaw's* holding was unwise, it need only review the behavior of the ISP from 2008 to today. Lastly, the Court's ruling was manifestly wrong. The Court failed to recognize as it did when it decided *Bell*, that the method is only reliable where it is, in fact, a method. The *Wheeler* dissent did not rely on that to come to its holding any more than the majority rejected it when it arrived at its holding. *Wheeler v. Idaho Transp. Dept.*, 148 Idaho 378, 223 P.3d 761 (Ct. App. 2010), *review denied*. *Wheeler* was a case involving statutory construction being applied to the SOPs.

Period. Nothing about the majority opinion held that a method could exist where there were no mandatory procedures. The Court of Appeals has *never* gone that far. The reason *Besaw* is so wrong is that it can see what the ISP had begun doing at the time that case was at the trial level, but rather than realize that under these circumstances there was no way to trust anything the ISP was promulgating, it approved of the agency's behavior. The defendant is not interested in walrus tears. *See State v. Phillips*, 144 Idaho 82, 88 (Ct.App.2007) *quoting Darden v. Wainwright*, 477 U.S. 168 (1986). Fundamental fairness and Due Process demand more.

B. Idaho Administrative Procedures Act

The state begins its argument by claiming that agencies only need to promulgate rules where specifically authorized by statute. State's Brief at 34 quoting I.C. § 67-5231(1). That is a fundamental misunderstanding of the Idaho Administrative Procedures Act. Rather:

> The regulations that have the "force and effect of law" did not come through legislative enactment directly, but were adopted by administrators by authority of the legislature embodied in a statute.

Mead v. Arnell, 117 Idaho 660, 668 (1990). The same misunderstanding of government power was posited by the executive in the *Asarco* matter:

> As a preliminary matter, contrary to DEQ's arguments, an agency action is not a rule because it was promulgated according to rulemaking authority and has the force and effect of law. Rather, an agency action characterized as a rule must be promulgated according to statutory directives for rulemaking in order to have the force and effect of law. *See* I.C. § 67–5231 (declaring rules void unless adopted in substantial compliance with the requirements of the IAPA); *Mead v. Arnell*, 117 Idaho 660, 664, 791 P.2d 410, 414 (1989) (holding rules promulgated by agency action have the force and effect of law). *See also Minidoka Memorial Hospital v. Idaho Department of Health and Welfare*, 108 Idaho 344, 699 P.2d 1358 (1985) (holding state policy, implemented as a rule without being promulgated as a rule, was unenforceable) and *Bingham Memorial Hospital v. Idaho Department of Health and Welfare*, 108 Idaho 346, 699 P.2d 1360 (1985) (same). Furthermore, even if DEQ has the discretion under the Clean Water Act to determine whether

> or not the TMDL will have the force and effect of law in Idaho, under Idaho administrative law, the TMDL is still a rule and must be promulgated in accordance with the IAPA in order to be valid.

Asarco, Inc. v. State, 138 Idaho 719, 723 (2003). Thus, it is not that the executive can do whatever it wants except when authorized by statute, but that it has no power, whatsoever, to create rules that can have the force and effect of law *except* when granted that power by the legislature. Considering what an incredible misunderstanding of IDAPA this is, defense counsel is less surprised by the history of irresponsible and illegal acts on the part of the ISP. Evidently, the executive was under the impression that it could choose to make rules or not, except where explicitly told it was authorized to do so. *See* State's Brief at 35.

The Attorney General would clearly benefit from a thorough reading of *Mead*, so as to remind itself that:

> Article 2, § 1 of the Idaho Constitution provides for the separation of powers among the three branches of Idaho's government. Article 3, § 1 provides that the power to pass bills is vested in the legislature. Article 3, § 15 provides that, "[n]o law shall be passed except by bill, ..." Read together, these three constitutional provisions stand for the proposition that, of Idaho's three branches of government, only the legislature has the power to make "law." *See State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923); *State v. Purcell*, 39 Idaho 642, 228 P. 796 (1924); *Suppiger v. Enking*, 60 Idaho 292, 91 P.2d 362 (1939); *Board of County Com'rs of Twin Falls County v. Idaho Health Fac. Auth.*, 96 Idaho 498, 531 P.2d 588 (1975).
>
> While the power to make law lies exclusively within the province of the legislature, (Idaho Constitution, art. 3 §§ 1, 15) "the legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose, and to that end may prescribe suitable rules and regulations." *State v. Taylor*, 58 Idaho 656, 664, 78 P.2d 125, 128 (1938). Administrative agencies do this by enacting rules and regulations. *See* Idaho Code tit. 67, ch. 52. However, while these rules and regulations may be given the "force and effect of law," they do not rise to the level of statutory law. Only the legislature can make law. *Idaho Power v. Blomquist*, 26 Idaho 222, 141 P. 1083 (1914); *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923);

> overruled on other grounds, *Greater Boise Aud. v. Royal Inn of Boise*, 106 Idaho 884, 684 P.2d 286 (1984); *State v. Purcell*, 39 Idaho 642, 228 P. 796 (1924); *Marshall v. Department of Agric.*, 44 Idaho 440, 258 P. 171 (1927); *Chambers v. McCollum*, 47 Idaho 74, 272 P. 707 (1928); *State v. Heitz*, 72 Idaho 107, 238 P.2d 439 (1951); *Idaho Savs. & Loan Ass'n v. Roden*, 82 Idaho 128, 350 P.2d 225 (1960); *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972); *Board of County Com'rs of Twin Falls County v. Idaho Health Fac. Auth.*, 96 Idaho 498, 531 P.2d 588 (1975); *and Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978).

Mead, 117 Idaho at 664. Once one recognizes that the executive has no power to make law, that IDAPA must be followed if an agency wishes to create rules that affect the rights of others, and that the foundation for the admission of evidence at the defendant's criminal trial affects the defendant's right to Due Process, then it becomes clear that the ISP must follow IDAPA when promulgating the procedure that will be the sole foundation for evidence in a criminal trial.

The Idaho Court of Appeals' precedent is not to the contrary. The Court held in *Bell* that the legislature had created a short form to introduce evidence by passing I.C. § 18-8004. The Court found in *State v. Van Sickle*, 120 Idaho 99 (Ct.App.1991) that I.R.E. 901(b)(10) allows the legislature to determine a condition whereby evidence is authenticated, in that case, the reliability of an Intoxilyzer 3000 breath testing machine. In both of those cases, the Court was reviewing the administrative rules promulgated by the Idaho Department Health and Welfare. In *State v. Mills*, 128 Idaho 426 (Ct.App.1996), the Court for the first and only time encountered the issue of whether "policy statements" could affect rights, but did not reach the issue because it was not preserved below. In *State v. Nickerson*, 132 Idaho 406, 410-11 (Ct.App.1999), the Court rejected the argument that I.C. § 18-8004 violated the separation of powers and I.R.E. 1102. The Court in *Nickerson* with little explanation held that I.C. § 18-8004 "specifies one means by which the necessary foundation may be established..." *Id.* at 411. That is of course not true, as the state so

points out. State's Brief at 35. The state does not believe that even IDAPA can affect I.C. § 18-8004. It is hard to understand how the *Nickerson* Court came to the conclusion that I.C. § 18-8004 was not the sole foundation that could be laid so long as the executive promulgated rules. It is also unclear what the Court was relying on for the principle that, simply because the Court had addressed procedures adopted by the Department of Health and Welfare ten year prior, there was no conflict with I.R.E. 1102 when a law purported to determine the proper foundation for evidence and waive the requirement for expert testimony. Moreover, the Court simply ignored the fact that the legislature had given those powers to the executive, and so essentially the wolf had been placed in charge of the hen house.

None of these cases, however, actually *held* that I.C. § 18-8004(4) allowed the executive to come up with whatever rules it pleased. In other states, the procedures for breath testing are set by statute. *See, e.g.,* A.R.S. § 5-395.02; C.G.S.A. 14-227a; 10 G.C.A. § 69202. Even Idaho requires a fifteen minute wait period between breath samples for the Employer Alcohol and Drug-Free Workplace Act. *See* I.C. § 72-1704. The Idaho Court of Appeals has ruled, despite I.R.E. 1102, that the legislature may set the procedure in Idaho for the foundational procedure for the introduction of breath samples in criminal trials. The Court of Appeals has tacitly allowed that task to be delegated to the executive. But the Court has never held that I.C. § 18-8004(4) was a blank check to admit evidence in criminal cases. It has never held that the ISP did not have to comply with IDAPA before creating rules that would have the force and effect of law. And this Court must not do so now.

To do otherwise would undo our legal system. There is nothing about DUI cases so unique that the concept that the legislature may simply give the executive *carte blanche* to

determine what foundation is required for evidence will not spread to every type of case imaginable. If this Court does not believe it surrendered power to the legislature in *Nickerson*, it should review with a critical eye the legislature's wholesale provision of this branch's power to the executive. Unless we are to be ruled by tyrants, the flow of powers from the judiciary to the executive must stop.

The state also argues for several pages that if the SOPs are rules then the defendant cannot challenge them. That is true, in a sense. But by "challenge," that does not mean that they cannot be "challenged" as to their validity for being the foundation of evidence in this case. Rather, the Court of Appeal's oft repeated holding that the defense can always rebut the presumption that the procedures adopted by the executive are adequate would be untrue in the context of a criminal case. Rather, challenging the procedures' accuracy would necessarily have to be done through the channels etched out by IDAPA. *See* Kay Manweiler, Somewhere Over the Rainbow and Through the Looking Glass: Administrative Law Practice and Procedure, Advocate (Feb. 2002). The state's profound misunderstanding of IDAPA is likely what leads to its confusion expressed in footnote seven on the thirty-ninth page of its brief. The *Asarco, Inc. v. State*, 138 Idaho 719 (2003) ruling is not confusing when one realizes that if an agency has a "policy" that it is treating, and forcing others to treat, as a rule with the force and effect of law, then it is well within the rights of any citizen and this Court to point out to said agency that its "policy" has no such power, and is, in point of fact, null and void.

The state ends with an illogical argument that the SOPs are simply internal guidelines "that, if followed by law enforcement, permit a BAC test result to be introduced in a criminal proceeding with the necessity of expert testimony pursuant to I.C. § 18-8004(4)." State's brief at

43. Assuming the state did not mean this to be ironic, the defense would point this Court to *State v. Jones*, 154 Idaho 412, 417 (2013). It is hardly a fair trial or tribunal where the accuser is also the judge determining whether the evidence comes in.

II.

In its response, the state argues that state governments may threaten away federal rights with "civil penalties" in the context of blood and breath searches for evidence of alcohol or substances because, though a warrant is required, something less than "actual consent" is sufficient to overcome that requirement. The state, which below had argued *Missouri v. McNeely*, 133 S.Ct. 1552 (U.S.Mo. 2013) had no effect on consent, now seems to have accepted that perhaps consent is revocable. The state further argues that the "consent" a *McNeely* warrant requires for an exception is not "actual consent." State's Response at 27, *quoting State v. LeClercq*, 149 Idaho 905, 911-12 (Ct.App.2010). In essence, the state is arguing that what *McNeely* created for those accused of DUI and confronted by the state's wish to search their breath or blood is a quasi-Fourth Amendment right. If one were to view Fourth Amendment protections on a spectrum, with border searches on one end and homes on the other, breath and blood would evidently fall just after automobiles and just before boxes (not in an automobile or near/on a person during arrest). *Cf. United States v. Thirty-seven Photographs*, 402 U.S. 363, 376 (1971) *and Kyllo v. United States*, 533 U.S. 27 (2001); *Arizona v. Gant*, 552 U.S. 1230 (2008); *and compare United States v. Chadwick*, 433 US 1 (1977) *with Chimel v. California*, 395 US 752 (1969) *and United States v. Robinson*, 414 US 218 (1973) *and California v. Acevedo*, 500 U.S. 565 (1991)). Of course, the United States Supreme Court has never before recognized a quasi-warrant requirement where a warrant is required, but the government may force consent. Either a

warrant was required or it was not.

The state provides as authority for its argument cases which, as the defendant already demonstrated, confuse the original understanding of implied consent from *State v. Woolery*, 116 Idaho 368 (1989), in which implied consent was not "actual consent" as it was not related to the Fourth Amendment, and the improper understanding of *State v. Nickerson*, 132 Idaho 406 (Ct.App.1999), where implied consent suddenly began to affect Fourth Amendment rights. If this Court will return to the proper understanding of implied consent, then the state's argument, while correct in the sense of what implied consent means, cannot withstand scrutiny when applied to the warrant requirement of the Fourth Amendment. Once a warrant has issued the state's argument would be correct. But prior to a warrant, no state law may force from a citizen his right to be free from warrantless search and seizure.

DATED this 23 day of October, 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 27 day of October, 2014, served a true and correct copy of the attached APPELLANT'S REPLY BRIEF 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
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Denise Cox