9-29-2015

State v. Jones Respondent's Brief Dckt. 42664

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 42664
Plaintiff-Respondent,	)	
	)	Ada Co. Case No.
vs.	)	CR-2013-14237
	)	
KENTSLER LEE JONES,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MELISSA N. MOODY
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Kentsler Lee Jones appeals from his conviction for felony operating a motor vehicle while under the influence of alcohol, excessive alcohol concentration (.20 or more), following his conditional guilty plea to that offense. Jones specifically challenges the district court's decision granting the state's motion in limine to exclude evidence regarding the "measurement of uncertainty" for the instrument used to measure his blood alcohol concentration following a blood draw.

Statement Of Facts And Course Of Proceedings

According to the presentence report ("PSI"), the facts underlying Jones' conviction for felony driving under the influence of alcohol, excessive alcohol concentration (.20 or more), are as follows:

> The appended Boise Police Department Reports reflect that on October 5, 2013, Officer Short observed a Pontiac driving the wrong way on Capitol near Main in Boise. Officer Short, who was walking in uniform, ordered the driver to stop. The driver, later identified as Kentsler Jones, made eye contact with Officer Short and drove around him without stopping. Officer Martinez was in the area and observed Mr. Jones' vehicle traveling south on Capital, approaching Front going against traffic. It turned west onto Front and Officer Martinez attempted to make a traffic stop. The vehicle continued south on 9th Street, east on Broad Street and then stopped in an alley between 9th Street and 8th Street.
>
> Upon contact with Mr. Jones, Officer Martinez could smell a strong odor of an alcohol beverage coming from his breath. He showed signs of intoxication by his slurred speech and bloodshot glassy eyes. Mr. Jones did not make sense when answering questions. When officers arrived to assist, Mr. Jones refused to perform any field sobriety tests, and he was placed into custody. He was not cooperative when officers tried to place him in the patrol car. Upon arrival at Ada County Jail, Mr. Jones acted like he was asleep and would not cooperate. Officers had to remove him from the backseat so paramedics could examine him. He was transported to St. Alphonsus for treatment, where a blood draw was completed.

> The appended Forensic Volatiles Analysis Report shows an ethyl alcohol level of 0.207 g/100 cc blood.

(PSI, p.3.)

The state charged Jones with (1) operating a motor vehicle while under the influence of alcohol with "an alcohol concentration of .20 or more, to wit, .207, as shown by an analysis of his blood while having pled guilty to or having been found guilty of one or more violations of I.C. § 18-8004 . . . in which the person has had an alcohol concentration of .20 or more within five years[,]" and (2) resisting or obstructing an officer. (R., pp.49-50.)

The state filed a motion in limine requesting "the Court enter an order prohibiting any witness from offering testimony regarding the measurement of uncertainty[1] of the instrument used to measure the defendant's blood alcohol level [and] that the Court allow the state to strike any reference to the measurement of uncertainty from any exhibit which is admitted at trial[,]" based on Elias-Cruz v. Idaho Dep't of Transp., 153 Idaho 200, 280 P.3d 703 (2012). (R., pp.73-76.) Jones, through counsel, filed an objection to the state's motion in limine (R., pp.89-94), and after both parties waived a hearing on the motion (R., p.95), the district court entered an order granting the state's motion in limine (R., pp.96-98). Jones filed a motion to reconsider the court's ruling on the state's motion in limine (R., pp.103-109), and the state filed an objection to that motion (R., pp.195-198). At the pre-trial conference hearing, the court reaffirmed its opinion that, under Elias-Cruz, "evidence regarding the measurement of uncertainty for the instrument used to measure the defendant's blood alcohol level is inadmissible

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[1] The measurement of uncertainty on the Forensic Volatiles Analysis Report of Jones' alcohol concentration is "+/- 0.0103 g/100 cc blood[.]" (PSI, p.55 (sequential order).)

because it's irrelevant[,]" and denied Jones' motion to reconsider. (5/9/14 Tr., p.5, L.22 – p.7, L.15.)

Pursuant to a plea agreement, Jones entered a conditional guilty plea to Count I, felony operating a motor vehicle while under the influence of an excessive alcohol concentration (.20 or more), preserving his right to challenge the district court's ruling on the state's motion in limine, and Count II (resisting/obstructing) was dismissed. (R., pp.202-206; see generally 8/15/14 Tr.) The court sentenced Jones to a unified sentence of five years with two years fixed, all suspended, and placed him on probation for five years. (R., pp.214-219.) Jones timely appealed. (R., pp.221-223.)

ISSUE

Jones states the issue on appeal as:

> Did the district court err by excluding the measurement of uncertainty in Mr. Jones' alcohol concentration test results because I.C. § 18-8004 and I.C. § 18-8004C criminalize driving with an actual alcohol concentration above the legal limit, not merely driving with a test result above the legal limit?

(Appellant's Brief, p.5.)

The state rephrases the issue as:

Should this Court reject Jones' argument that Elias-Cruz should be overturned, and affirm the district court's ruling that the "measurement of uncertainty" of the instrument used to analyze Jones' alcohol concentration is irrelevant and, therefore, inadmissible at trial?

ARGUMENT

This Court Should Reject Jones' Argument That *Elias-Cruz* Should Be Overturned, And Affirm The District Court's Ruling That The "Measurement Of Uncertainty" Of The Instrument Used To Analyze Jones' Alcohol Concentration Is Irrelevant And, Therefore, Inadmissible At Trial

A. Introduction

Before the 1987 amendments to I.C. § 18-8004, the driving under the influence statute (former I.C. § 49-1102) stated in part, "If there was at that time more than 0.10 percent by weight of alcohol *in the defendant's blood*,[2] it shall be presumed that the defendant was under the influence of intoxicating liquor." Elias-Cruz, 153 Idaho at 203, 280 P.3d at 706 (emphasis added). In Elias-Cruz, the Idaho Supreme Court explained:

> After the 1987 amendments, the standard is no longer the concentration of alcohol in the driver's blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver's breath, blood, or urine. Because the actual alcohol concentration in the driver's blood is no longer the standard, the testing machine's margin of error is irrelevant.

Elias-Cruz, 153 Idaho at 205-206, 280 P.3d at 708-709. Based on Elias-Cruz, the district court granted the state's motion in limine to preclude testimony about the

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[2] The Elias-Cruz decision further explained:

> Prior to the 1987 amendment, subsection (4) of the statute stated:
>
> > For purposes of this chapter, an evidentiary test for alcohol concentration *is a determination of the percent by weight of alcohol in blood* and 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.
>
> The 1987 amendment deleted the words stating that an evidentiary test for alcohol concentration "is a determination of the percent by weight of alcohol in blood."

Elias-Cruz, 153 Idaho at 204, 280 P.3d at 704 (emphasis added).

measurement of uncertainty of the instrument (or means) used to measure Jones' alcohol concentration – here, analysis of his blood following a blood draw – and allow the state to strike any reference to the measurement of uncertainty from the I.S.P. forensic services report. (R., pp.73-76; 5/9/14 Tr., p.5, L.22 – p.7, L.15.)

On appeal, Jones contends Elias-Cruz should be overturned because it is manifestly wrong. Specifically, he argues Elias-Cruz (1) overlooked the plain language of I.C. § 18-8004(4) and misinterpreted its 1987 amendments as making the driver's actual alcohol concentration irrelevant, (2) "nullifies subsection (4)'s requirement that alcohol concentration tests comply with certain standard operating procedures, which, in turn require that alcohol concentration test results include the measurement of uncertainty[,]" and (3) relied on two cases, Sutliff and Robinett,[3] that do not support its conclusion. (Appellant's Brief, pp.6-19.)

The district court correctly applied Elias-Cruz in granting the state's motion in limine to exclude testimony about the uncertainty measurement and to strike such measurement from the lab report on Jones' alcohol concentration as shown by an analysis of his blood. (R., pp.96-98; 5/9/14 Tr., p.5, L.22 – p.7, L.15.) Jones has failed to demonstrate Elias-Cruz is manifestly wrong and should be overturned.

B. Standard Of Review

"When a decision on a motion addressing the admissibility of evidence is challenged, [the appellate court] defer[s] to the trial court's findings of fact supported by substantial and competent evidence." State v. Besaw, 155 Idaho 134, 306 P.3d 219

[3] See State v. Sutliff, 97 Idaho 523, 547 P.2d 1128 (1976), and State v. Robinett, 141 Idaho 110, 106 P.3d 436 (2005).

(Ct. App. 2013), *review denied.* Questions of law, including whether the state has satisfied the foundational requirements for the admission of breath test results in a DUI prosecution, are subject to free review. State v. Carson, 133 Idaho 451, 452, 988 P.2d 225, 226 (Ct. App. 1999); State v. Remsburg, 126 Idaho 338, 339, 882 P.2d 993, 994 (Ct. App. 1994).

C. The District Court Correctly Applied *Elias-Cruz* In Granting The State's Motion In Limine

As apparently acknowledged by Jones, under Elias-Cruz, the margin of error or measurement of uncertainty associated with any of the three types of analyses for determining alcohol concentration (i.e., blood, breath, or urine) are irrelevant and inadmissible at trial. The Idaho Supreme Court made it clear in Elias-Cruz that the results of the particular type of test given are the relevant proof of a subject's alcohol concentration. The district court correctly granted the state's motion in limine, concluding, based on Elias-Cruz, that "evidence regarding the measurement of uncertainty for the instrument used to measure the defendant's blood alcohol level is inadmissible because it's irrelevant." (5/9/14 Tr., p.5, L.22 – p.6, L.5). Review of the relevant law and Elias-Cruz supports the district court's ruling.

Idaho Code Section 18-8004(1)(a) provides:

> It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an *alcohol concentration* of 0.08, as defined in subsection (4) of this section, or more, *as shown by analysis of his blood, urine, or breath*, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

(Emphasis added).

The Idaho Supreme Court has interpreted the foregoing language "as establishing one crime with two ways of proving a violation."[4] State v. Robinett, 141 Idaho 110, 112, 106 P.3d 436, 438 (2005) (citations omitted). As applied to Jones' case, "the first way to prove a violation is to show under the totality of the evidence that the defendant was driving under the influence." Id. "The second way to prove a violation is to establish the defendant drove with an alcohol concentration of [0.20] percent or more." Id. (explanation added). The second method is commonly referred to as the *per se* theory. See, e.g., State v. Juarez, 155 Idaho 449, 452, 313 P.3d 777, 780 (Ct. App. 2013) ("In regard to a per se violation under section 18–8004(1)(a), the criminal act is having an 'alcohol concentration of [0.20] . . . or more, as shown by analysis of his blood, urine, or breath.'") (explanation added). "The State may elect to proceed against the defendant under either or both theories of proof." Robinett, 141 Idaho at 112, 106 P.3d at 438. Further, "[e]vidence that is relevant under one theory of proof is not necessarily relevant under the other." Id. (citations omitted).

In this case, the state proceeded under the *per se* theory that Jones operated a motor vehicle "while under the influence of alcohol with an alcohol concentration of .20

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[4] Similar to 18-8004(1)(a), the enhancement statute, I.C. § 18-8004C(2), reads in relevant part:

> Any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004, Idaho Code, and who has an *alcohol concentration* of 0.20, as defined in section 18-8004(4), Idaho Code, or more, *as shown by an analysis of his blood, breath or urine* by a test requested by a police officer, and who previously has been found guilty of or has pled guilty to one (1) or more violations of the provisions of section 18-8004, Idaho Code, in which the person had an alcohol concentration of 0.20 or more . . . shall be guilty of a felony . . . .

(Emphasis added).

or more to wit, .207, as shown by an analysis of his blood" while having been convicted of a similar offense within five years. (R., p.50.) Given the state's theory, the prosecutor moved in limine to exclude evidence that is not relevant to a *per se* allegation. (R., pp.73-76.) Specifically, the state moved to "exclude any evidence regarding the measurement of uncertainty for the instrument used to measure the defendant's blood alcohol level because that evidence would be irrelevant."[5] (R., p.73.) In support of its motion, the state relied primarily on the Idaho Supreme Court's opinion in Elias-Cruz. (See R., pp.73-76.)

"[E]vidence which is not relevant is inadmissible, and should be excluded if a proper objection is made." State v. Edmondson, 125 Idaho 132, 134, 867 P.2d 1006,

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[5] The Idaho State Police Forensic Services Analytical Methods for Volatiles Analysis explains "uncertainty of measurement," in relevant part, as follows:

> Any measurement, no matter how carefully obtained, should not be considered as the true value for the measurement. Whenever any quantitative measurement is performed, the value obtained is only an approximation of the true value. According to JCGM 200:2008, the International vocabulary of metrology – Basis and general concepts and associated terms (VIM), measurement uncertainty is defined as "*A non-negative parameter associated with the result of a measurement/quantity value (number and measurement unit used together to express the magnitude of a quantity) that characterizes the dispersion of quantity values that could reasonably be attributed to the measurand (quantity intended to be measured).*" . . . Paragraph 5.10.3.1 states that when applicable, the test report should include a statement on the estimated uncertainty of measurement. For our purposes, it is applicable due to the uncertainty affecting the application of the test results which are compliant to a specification limit. In the analysis of forensic specimens, we do not know the true value for the specimen; hence this information is not the error associated with the analysis. Rather, it is a range of values likely to be encountered during the measurement process.

(R. p.116 (emphasis original; footnotes omitted).)

1008 (Ct. App. 1994). In Elias-Cruz, the Idaho Supreme Court considered a claim that a hearing officer in an administrative license suspension case violated the defendant's due process rights "by failing to take into account the margin of error of the Lifeloc FC20."[6] Elias-Cruz, 153 Idaho at 202-203, 280 P.3d at 705-706. In addressing this issue, the Court recited its prior holding in State v. Robinett, 141 Idaho 110, 106 P.3d 436 (2005), which was based on the 1984 version of I.C. § 18-8004, that where the state "seek[s] to establish a per se violation (the defendant's BAC exceeded the statutory limit), then it [is] not necessary to extrapolate the test results back to the time the defendant was driving." Elias-Cruz, 153 Idaho at 203, 280 P.3d at 706. The Court then reviewed the 1987 amendments to I.C. § 18-8004, which eliminated the need for a "determination of alcohol concentration in the blood to prove a per se violation," and instead allowed the state to establish such a violation "simply by the test results." Id. at 204, 280 P.3d at 707. Thus, the Court observed, "[a]fter the 1987 amendment, a violation can be shown simply by the results of a test for alcohol concentration that complies with the statutory requirements. With that change, the margin of error in the testing equipment is irrelevant." Id.

Addressing the legislature's authority to define crimes, the Court further stated:

> The legislature has the authority to make driving a motor vehicle with any alcohol in one's system a crime and/or a ground for suspension of one's driver's license. When the statute declared it a crime for a person to drive a motor vehicle with "alcohol in his blood" greater than a specified amount, we did not require the State to establish the precise amount of alcohol in the driver's blood at the time of driving, even though we knew that the alcohol concentration in the driver's blood at the time of the driving could

[6] Elias-Cruz had her driver's license suspended administratively under I.C. § 18-8002A after being arrested for driving under the influence of alcohol pursuant to I.C. § 18-8004(1)(d) – under the age of 21 and driving with "an alcohol concentration of at least 0.02 but less than 0.08 . . . ." Elias-Cruz, 153 Idaho at 201, 280 P.3d at 704.

> be lower than at the time of testing. In essence, we held that the driver took the risk that the concentration of alcohol in his blood at the time of testing would be greater than it was when he was actually driving an hour earlier. *After the 1987 amendments, the standard is no longer the concentration of alcohol in the driver's blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver's breath, blood, or urine. Because the actual alcohol concentration in the driver's blood is no longer the standard, the testing machine's margin of error is irrelevant.*

Elias-Cruz, 153 Idaho at 205-206, 280 P.3d at 708-709 (emphasis added).

Elias-Cruz made clear that the margin of error is irrelevant to determining whether a defendant committed a *per se* violation of a driving under the influence statute as a result of the test performed to determine the alcohol concentration in his or her blood, breath, or urine.[7] Id. The Elias-Cruz decision, and cases preceding it, also

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[7] Although Elias-Cruz involved an administrative license suspension following Elias-Cruz's arrest for driving under the influence of alcohol pursuant to I.C. § 18-8004(1)(d) (under 21 with an alcohol concentration of at least 0.02 but less than 0.08), the Idaho Supreme Court's opinion applies to criminal cases relying on I.C. § 18-8004. In State v. Tomlinson, 2015 WL 1529416 (Idaho App. 2015) (pet. rev. pending), the Idaho Court of Appeals considered whether Elias-Cruz applies to criminal cases such as Tomlinson's, who was charged with driving under the influence after providing breath tests showing alcohol concentrations of .083 and .082. The Court of Appeals stated:

> After recounting the legislative history of I.C. § 18-8004, the Court noted that the definition of "evidentiary test for alcohol concentration" in Section 18-8002A is the same as the definition in Section 18-8004(4) and the margin of error of the testing equipment in proceedings was likewise irrelevant to proceedings under I.C. § 18-8002A. Thus, contrary to Tomlinson's assertion, *Elias-Cruz* is not limited to only administrative proceedings; instead, it interpreted the criminal statute under which Tomlinson was prosecuted and applied that interpretation to the administrative proceedings. The context of the Court's interpretation of a criminal statute does not change the applicability of that interpretation. Indeed, what is relevant to proving a violation of I.C. § 18-8004 is the same regardless of the context. As a result, that interpretation is just as controlling as to the admissibility of the margin of error of a breathalyzer in a criminal case as it is in an administrative setting.

Tomlinson, 2015 WL 1528416 at *7 (pet. rev. pending) (citations omitted).

made clear that the relevant question under a *per se* theory of driving under the influence is the result of the particular alcohol concentration test at the time the test is given, not when the defendant was driving. Id. Based on Elias-Cruz, the district court granted the state's motion in limine, correctly concluding that "evidence regarding the measurement of uncertainty for the instrument used to measure the defendant's blood alcohol level is inadmissible because it's irrelevant." (5/9/14 Tr., p.5, L.22 – p.6, L.5).

D. Jones Has Failed To Show The *Elias-Cruz* Decision Is Manifestly Unjust And Should Be Overturned

Jones does not dispute that, under Elias-Cruz, the district court's ruling was correct. Instead, Jones argues that Elias-Cruz should be overturned. (See generally Appellant's Brief.) This Court should reject Jones' invitation to overrule Elias-Cruz. "The rule of stare decisis dictates that we follow controlling precedent unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." State v. Clontz, 156 Idaho 787, 789, 331 P.3d 529, 531 (Ct. App. 2014) (quotations, citations, and brackets omitted). None of the arguments advanced by Jones support overturning Elias-Cruz.

1. The Plain Language And 1987 Amendment Of I.C. § 18-8004(4) And The Plain Language Of I.C. § 18-8004C(2) Support The Holding In *Elias-Cruz*

Jones argues that "Subsection (4) [of I.C. § 18-8004] never states or even implies that only the test result, and not the driver's *actual* alcohol concentration, matters." (Appellant's Brief, p.12 (emphasis added).) Jones also contends that the 1987 amendments to I.C. § 18-8004(4) "do not indicate, as *Elias-Cruz* found, that the

Legislature intended to make the driver's actual alcohol concentration irrelevant." (Appellant's Brief, p.13 (capitalization and underlining omitted).) Jones' arguments do not have merit.

Jones cites two sections of I.C. § 18-8004 which require "*an alcohol concentration*" of either .08 (subsection (1)(a)) or .20 (subsection C(2)) "as shown by analysis of his blood, urine, or breath . . ." (Appellant's Brief, p.12 (emphasis added).) Without explanation, Jones repeatedly adds the word "actual" to create the phrase "actual alcohol concentration," which seems to denote actual or true blood alcohol concentration. (See Appellant's Brief, pp.10-15.) Jones argues that the statutory "sections *specifically* criminalize driving with an *actual* alcohol concentration, which the test result merely evidences." (Appellant's Brief, p.12 (emphasis added).) However, the word "actual" does not appear in the relevant statutes. See I.C. §§ 18-8004(4)[8] and 18-8004C(2). Jones' rephrasing of the statutory language is simply not accurate.

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[8] Idaho Code § 18-8004(4) reads:

> 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.

Next, Jones concedes that the 1987 amendment to I.C. § 18-8004(4) "shows that the legislature intended to remove the requirement that measurements of alcohol in breath or urine be converted into measurements of alcohol in blood[.]" (Appellant's Brief, p.14.) Despite that acknowledgment, Jones contends the statute kept "the requirement that the driver have an alcohol concentration over a certain amount in his or her *body*." (Id. (emphasis original).) In addition to pointing out that neither I.C. § 18-8004(4) nor I.C. § 18-8004C(2) makes any mention of "body," the state is uncertain what Jones means by "body." If "body" is intended to mean the actual or true alcohol concentration in a subject's blood, that notion has been dispelled by the 1987 amendment – as Jones admits by agreeing that conversion from one test into "measurements of alcohol in blood" is no longer required. (See id.) If, on the other hand, "body" refers to "breath, blood, or urine," the only measurements of alcohol concentration possible are the test results produced by whatever type of analysis is performed.[9] If there is some other measurement of alcohol concentration that is relevant, Jones has failed to identify it.

Most importantly, the plain language of I.C. § 18-8004(4), combined with the plain language of I.C. § 18-8004C(2), shows that "alcohol concentration" refers only to

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[9] In regard to the relevance of a testing machine's margin of error under the license suspension statute, but applicable here (see n. 7, supra), Elias-Cruz explained:

> The issue is not the alcohol concentration in the blood. It is the alcohol concentration as shown by the test results. *There is nothing to which to compare the test results.* All that is required is that the test results show that the alcohol concentration was above the legal limit.

153 Idaho at 206, 280 P.3d at 709 (emphasis added). Because the 1987 amendment of I.C. § 18-8004(4) removed the requirement that the test results correlate to the actual or true alcohol concentration of blood, "[a]ll that is required is that the test results show that the alcohol concentration was above the legal limit." Id.

the results of the particular test performed. Therefore, margin of error and measurement of uncertainty are irrelevant. I.C. § 18-8004(4) states that "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." I.C. § 18-8004(4) (emphasis added). Thus, there are three evidentiary tests for "alcohol concentration" – blood, breath, or urine. Under I.C. § 18-8004C(2), any person "who has an *alcohol concentration* of .20 . . . or more, *as shown by* an analysis of his blood, breath or urine" is guilty of a felony upon a second such offense within five years. See Elias-Cruz, 153 Idaho at 205, 280 P.3d at 708 ("It is simply the alcohol concentration shown by an approved and properly administered test of the driver's breath, blood, or urine."). It could not be more plain.

Moreover, as Elias-Cruz discussed, in 1987 the Idaho Legislature deleted language from I.C. § 18-8004(4) that an evidentiary test for alcohol concentration "is a determination of the percent by weight of alcohol in the blood." Elias-Cruz, 153 Idaho at 204, 280 P.3d at 707. The obvious import of that change is that an evidentiary test for alcohol concentration is no longer "a determination of the percent by weight of alcohol in the blood." Id.; see Hawkins v. Chandler, 88 Idaho 20, 30, 396 P.2d 123, 128 (1964) ("When the language of a statute is changed, it is presumed a change in application or meaning was intended."). Here, Jones essentially asks this Court to re-insert the phrase deleted by the 1987 amendment to I.C. § 18-8004(4) -- "is a determination of the percent by weight of alcohol in blood" – in order to use the margin of error or measurement of uncertainty and avoid the felony enhancement. See United States v. Handy, 761 F.2d 1279, 1280 (9th Cir. 1985) (rejecting a statutory construction that

"would have us give the phrase . . . precisely the meaning the phrase would have if the word [at issue] were deleted").

Based on the plain language of I.C. § 18-8004(4) and its 1987 amendments, Elias-Cruz concluded:

> After the 1987 amendments, the standard is no longer the concentration of alcohol in the driver's blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver's breath, blood, or urine. Because the actual alcohol concentration in the driver's blood is no longer the standard, the testing machine's margin of error is irrelevant.

Elias Cruz, 153 Idaho at 205-206, 280 P.3d at 708-709.

Both the plain language of the statutes (I.C. §§ 18-8004(4) and 18-8004C(2)) and the 1987 amendment to I.C. § 18-8004(4) show that "alcohol concentration" is determined by the test results of whichever one of the three designated types of tests is used – without accounting for margin of error or measurement of uncertainty. Jones has failed to show that the Idaho Supreme Court erred in Elias-Cruz by overlooking the plain, unambiguous language of the relevant statutes and has therefore failed to show Elias-Cruz should be overruled on that basis.

2. Jones Has Failed To Show That *Elias-Cruz* Has Had The Practical Effect Of Nullifying Parts Of I.C. § 18-8004(4)

Jones argues that, because the Standard Operating Procedures for determining alcohol concentration by blood analysis requires inclusion of the measurement of uncertainty on the lab report (see R., p.116 (defining "measurement uncertainty")), and because I.C. § 18-8004(4) requires that tests for alcohol concentration adhere to those procedures,

> [i]t would be nonsensical for Subsection (4) to require that the alcohol concentration test reports include the measurement of uncertainty, but at the same time declare the measurement of uncertainty irrelevant and therefore inadmissible in court. *Elias-Cruz*'s reading of Subsection (4) has done just that. Because *Elias-Cruz* has had the practical effect of nullifying parts of Subsection (4), it must be overturned.

(Appellant's Brief, p.17.) Jones' argument is misplaced.

Contrary to Jones' contention, it was the Idaho Legislature, not the Idaho Supreme Court, which rendered the margin of error and measurement of uncertainty irrelevant and inadmissible in court. By its 1987 amendments to I.C. § 18-8004(4), the legislature deleted any requirement that the results of the particular type of test performed (blood, breath, or urine) be correlated to a subject's actual or true blood alcohol concentration. As a result, margin of error and measurement of uncertainty are irrelevant and inadmissible at trial. As discussed, the Elias-Cruz decision recognized that fact and applied it in a driver's license suspension proceeding that involved I.C. § 18-8004(4). Elias-Cruz, 153 Idaho at 205-206, 280 P.3d at 708-709.

Even though the Standard Operating Procedures ("Idaho State Police Forensic Services Analytical Methods for Volatiles Analysis," see R., pp.116-121) were, arguably, not modified to reflect the 1987 legislative amendments to I.C. § 18-8004(4), it does not lead to the conclusion Jones proposes – that Elias-Cruz must be overturned "[b]ecause [it] has had the practical effect of nullifying parts of Subsection (4)[.]" (Appellant's Brief, p.17.) The only nullification of I.C. § 18-8004(4) was done by the Idaho Legislature in 1987 by deleting the phrase "is a determination of the percent by weight of alcohol in blood." Elias-Cruz, 153 Idaho at 204, 280 P.3d at 707. Because the legislature removed the thing "to which to compare the test results," the legislature also made "the

alcohol concentration as shown by the test results" the issue to be determined. Elias-Cruz, 153 Idaho at 206, 280 P.3d at 709.

Additionally, because the measurement of uncertainty was typewritten on Jones' lab report, the Standard Operating Procedures were, in fact, followed. (See PSI, p.55 (sequential).) Jones has not shown that the Standard Operating Procedures or I.C. § 18-8004(4) required more than that. Although I.C. § 18-8004(4) states, in part, that such information "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[,]" that provision does not require the admission of *irrelevant* evidence at trial. Rather, the statute allows certain (presumably relevant) evidence to be admitted for the purpose of establishing the reliability of the testing procedure without a witness.

A defendant has no right to present irrelevant evidence. State v. Meister, 148 Idaho 236, 241, 220 P.3d 1055, 1060 (2009). The measurement of uncertainty is irrelevant to Jones' case not only for the reasons previously stated, but also because, under I.C. § 18-8004(4), it could not have established the reliability of the testing procedure. (See R., p.116 (I.S.P. Forensic Services, Analytical Methods for Volatiles Analysis (i.e., Standard Operating Procedures) states, "[H]ence this information is not the error associated with the analysis. Rather, it is a range of values likely to be encountered during the measurement process."); see also I.C. § 18-8004(4); Elias-Cruz, 153 Idaho at 206, 280 P.3d at 709 ("There is nothing to which to compare the test results."). Inasmuch as the measurement of uncertainty would not have had any relevance to the reliability of the testing procedure used in Jones' case, he has failed to

show that I.C. § 18-8004(4) has in any way been nullified by the "practical effect" of Elias-Cruz.

3. Jones Has Failed To Show That *Elias-Cruz* Misread *Robinett* And *Sutliff*[10]

Jones contends that in Elias-Cruz, the Idaho Supreme Court misread the Sutliff and Robinett decisions when it stated, "In essence, we held that the driver *took the risk* that the concentration of alcohol in his blood at the time of testing would be greater than it was when he was actually driving an hour earlier." (Appellant's Brief, p.17 (quoting Elias-Cruz, 153 Idaho at 205, 280 P.3d at 708) (emphasis added).) Jones argues that the "took the risk" comment in Elias-Cruz shows the Court incorrectly cited Sutliff and Robinett for the notion that, in per se DUI cases, defendants are *not* permitted to present any extrapolation evidence.[11] (See Appellant's Brief, pp.17-19.) Jones' argument fails.

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[10] See State v. Sutliff, 97 Idaho 523, 547 P.2d 1128 (1976), and State v. Robinett, 141 Idaho 110, 106 P.3d 436 (2005).

[11] The relevant passage from Elias-Cruz bears repeating here:

> When the statute declared it a crime for a person to drive a motor vehicle with "alcohol in his blood" . . . , we did not require the State to establish the precise amount of alcohol in the driver's blood at the time of driving, even though we knew that the alcohol concentration in the driver's blood at the time of the driving could be lower than at the time of testing. In essence, we held that the driver took the risk that the concentration of alcohol in his blood at the time of testing would be greater than it was when he was actually driving an hour earlier. After the 1987 amendments, the standard is no longer the concentration of alcohol in the driver's blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver's breath, blood, or urine. Because the actual alcohol concentration in the driver's blood is no longer the standard, the testing machine's margin of error is irrelevant.

Elias-Cruz, 153 Idaho at 205, 280 P.3d at 708.

Jones correctly states that Sutliff and Robinett recognized that in per se DUI cases (prior to the 1987 legislative abolition of the "blood alcohol" standard), "a driver may affirmatively challenge [BAC] results by showing that his alcohol concentration was below the lawful limit when he actually drove." (Appellant's Brief, pp.17-18.) However, Jones' assertion that Elias-Cruz stated otherwise is not accurate.

First and foremost, Elias-Cruz quoted the portions of Sutliff and Robinett which clearly state that, although extrapolation evidence was not a prerequisite for *admission* of a BAC test result in a per se case, it was relevant to challenge the *weight* to be given such result by showing that the BAC content was different when driving. The Elias-Cruz court simply recognized that, at one point in the historical development of Idaho's DUI laws, extrapolation evidence was admissible to challenge the weight of a BAC test result, as follows:

> In *Robinett*, we held that "[u]nlike proceeding on a per se theory, *admission* of a numerical BAC [blood alcohol concentration] test result for purposes of demonstrating impairment must be extrapolated back to the time of the alleged offense to be relevant." *Id.* at 113, 106 P.3d at 439. If the prosecution was simply seeking to establish a per se violation (the defendant's BAC exceeded the statutory limit), then it was not necessary to extrapolate the test results back to the time the defendant was driving. We stated:
>
> > Where the prosecution elects to use the per se method, the question is what the alcohol level was at the time the sample was taken. "*The lapse of time prior to the extraction of samples goes to the weight to be afforded the test results and not to their admissibility.*" For that reason, it is appropriate to admit results drawn an hour or more after the alleged offense without having to actually extrapolate the evidence back to the time of the alleged offense. *Id.* (quoting *State v. Sutliff*, 97 Idaho at 523, 524, 547 P.2d 1128, 1129 (1976)).

Elias-Cruz, 153 Idaho at 203-204, 289 P.3d at 706-707 (emphasis added).

The above statement from Elias-Cruz (quoting, in turn, Robinett and Sutliff), that "[t]he lapse of time prior to the extraction of samples goes to the weight to be afforded the test results and not to their admissibility," id., reiterates Sutliff's and Robinett's understanding that although the state was not[12] required to present extrapolation evidence in order to admit a BAC test result in a per se case, a defendant could offer extrapolation evidence to challenge the weight of the result. Jones' assertion that Elias-Cruz misread Sutliff and Robinett on this point is incorrect. Compare Elias-Cruz, 153 Idaho at 203-204, 280 P.3d at 706-707 with Sutliff, 97 Idaho at 524-525, 547 P.2d at 1129-1130 and Robinett, 141 Idaho at 112-113, 106 P.3d at 438-439.

Nor did Elias-Cruz's "took the risk" comment indicate that Sutliff and Robinett stood for the idea that DUI defendants could not present extrapolation evidence. Elias-Cruz discussed Sutliff and Robinett within the context of reviewing the historical development of Idaho's DUI laws, a brief summary of which follows:

Sutliff was decided before the law was changed in 1984 to create a "per se" violation of the DUI statute based on evidentiary testing for alcohol concentration, and before the 1987 statutory amendment eliminated the need to correlate the test results to "a determination of alcohol concentration in the blood to prove a per se violation." Elias-Cruz, 153 Idaho at 203-204, 280 P.3d at 706-707. Prior to the 1984 changes in the DUI law (repealing the statutory presumptions and creating I.C. § 18-8004), an evidentiary test for alcohol concentration of over .08 percent was used as a *rebuttable* presumption

[12] Robinett, decided in 2005, was recalling the period of time before the 1987 legislative abolishment of the "blood alcohol" standard in DUI cases, but Sutliff was decided during the time that standard was in effect. See Robinett, 141 Idaho at 112-113, 106 P.3d at 438-439; Sutliff, 97 Idaho at 524-525, 547 P.2d at 1129-1130.

that a defendant was "under the influence of intoxicating beverages."[13] Sutliff, 97 Idaho at 525 n.3, 547 P.2d at 1130 n.3; see Elias-Cruz, 153 Idaho at 203, 280 P.3d at 706. As a result, when Sutliff was decided in 1976, a defendant *could* present extrapolation testimony to challenge the weight to be given the state's BAC test results and rebut the statutory presumption applicable to defendants with BACs of more than 0.08 percent "that the defendant was under the influence of intoxicating beverages." Id.; see Elias-Cruz, 153 Idaho at 203, 280 P.3d at 706.

In Robinett, decided in 2005, the Idaho Supreme Court specifically held "that a numerical BAC test result is relevant to a prosecution for driving under the influence (as opposed to a per se violation) only if a proper foundation is laid to assure the validity of the test result, including evidence extrapolating the result back to the time of the alleged offense." Robinett, 141 Idaho at 112, 106 P.3d at 438; see Elias-Cruz, 153 Idaho at 203, 280 P.3d at 706. In contrasting "per se" cases to "impairment" cases, Robinett quoted Sutliff's comment that, in a per se case, "[t]he lapse of time prior to the extraction of samples goes to the weight to be afforded the test results and not to their admissibility." Robinett, 141 Idaho at 113, 106 P.3d at 439 (quoting Sutliff, 97 Idaho at 524, 547 P.2d at 1129); see Elias-Cruz, 153 Idaho at 203, 280 P.3d at 706.

In considering Sutliff and Robinett in the context of the historical development of Idaho DUI law, Elias-Cruz explained that, during the time it was a crime for a person to drive a motor vehicle with "alcohol in his blood" greater than the legal amount (i.e., prior to the 1987 change in law), it held, "[i]n essence that the driver took the risk that the

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[13] Elias-Cruz explained that under the new 1984 law, "the test results no longer created merely a presumption of intoxication. They could be used to establish a per se violation of the statute[,]" which initially adopted a 0.10 percent BAC standard, but was amended to a 0.08 standard in 1997. Elias-Cruz, 153 Idaho at 203 n.2, 280 P.3d at 706 n.2.

concentration of alcohol in his blood at the time of testing would be greater than it was when he was actually driving an hour earlier." Elias-Cruz, 153 Idaho at 205, 280 P.3d at 708. Based on its reiteration of Sutliff's and Robinett's statements that "'[t]he lapse of time prior to the extraction of samples goes to the weight to be afforded the test results and not to their admissibility[,]'" and the existing DUI law prior to the 1984 and 1987 changes, the "risk" to defendants Elias-Cruz referred to was that BAC test results would be *admissible* at trial without the state first having to present extrapolation evidence of what the driver's BAC was at the time of driving -- even assuming extrapolation evidence would show a result under the legal limit. Elias-Cruz, 153 Idaho at 203, 280 P.3d at 706 (quoting Sutliff, 97 Idaho at 524, 547 P.2d at 1129) (emphasis added). Stated differently, given Elias-Cruz's understanding that Sutliff and Robinett recognized that, during the "blood alcohol" era, defendants in per se DUI cases could challenge the *weight* of a BAC test result with extrapolation evidence, Elias-Cruz's "took the risk" comment could only have meant that a per se DUI defendant took the risk that a BAC test result would be admitted at trial even if extrapolation evidence could show the BAC was lower at the time of driving.

In short, Jones has failed to show that Elias-Cruz misread Sutliff and Robinett, much less that it is "manifestly wrong," "has proven over time to be unjust or unwise," or that "overruling it is necessary to vindicate plain, obvious principles of law and remedy continued unjustice." Clontz, 156 Idaho at 789, 331 P.3d at 531. The district court's order that relied on Elias-Cruz as the basis to grant the state's motion in limine to exclude evidence reqarding the uncertainty measurement should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's decision granting the state's motion in limine, and affirm Jones' judgment of conviction and sentence.

DATED this 29th day of September, 2015.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of September, 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

MAYA P. WALDRON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/dd