5-3-2017

State v. Austin Appellant's Brief Dckt. 44276

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44276**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR 2015-5045**
v.	)	
	)	
JUSTIN KEITH AUSTIN,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

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

_____

HONORABLE MICHAEL REARDON
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Justin Keith Austin appeals from his judgment of conviction and challenges the district court's order granting the State's motion in limine to exclude expert testimony regarding the alcohol concentration in his system at the time he was driving. Mr. Austin asserts that the district court abused its discretion when it granted the State's motion because the precedent that it relied on did not support its decision. Alternatively, if this Court finds that the district court did not abuse its discretion in applying that precedent, Mr. Austin asserts that the district court abused its discretion when it granted the State's motion because the precedent establishes an unconstitutional prohibition on a defendant's right to present a complete defense. As such, this Court should overrule or narrow the precedent on which the district court relied. In the further alternative, if this Court holds that the precedent does not violate Mr. Austin's right to present a complete defense, Mr. Austin argues that the precedent renders Idaho's driving under the influence statute overbroad and void for vagueness as applied to this case.

Statement of the Facts and Course of Proceedings

In April of 2015, Mr. Austin finished his shift as a server in a restaurant at approximately midnight. (Tr. Vol.2, p.314, L.5 – p.315, L.10.)[1] When he left work, he drove to a Jackson's market to buy cigarettes and a beer. (Tr. Vol.2, p.316, Ls.10-14.)

[1] The transcripts in this case are contained in two independently bound volumes. For purposes of clarity, the volume containing the motion to suppress hearing held on October 14, 2015, the pretrial conference held on March 9, 2016, voir dire, opening statements, jury instructions, and closing arguments will be referred to as "Tr. Vol.1" The volume containing the pretrial conference held on January 20, 2016, the jury trial, and sentencing hearing will be referred to as "Tr. Vol.2"

When he walked into the market, he realized that all he had with him was a $100 bill, so he got back in his car and drove towards his home because he knew that convenience stores typically cannot make change for a large bill late at night. (Tr. Vol.2, p.316, L.15 – p.317, L.2.) However, since he still needed change, he stopped at a bar across the street from his apartment and ordered a shot of whiskey and a beer. (Tr. Vol.2, p.313, Ls.19-23, p.317, Ls.3-19.) He was in the bar about ten minutes, and, on his way out someone he knew bought him another shot, which he drank quickly before he left. (Tr. Vol.2, p.318, L.2 – p.319, L.10.) He then drove to a Maverick market that was about a quarter mile away, so he could buy the cigarettes and beer. (Tr. Vol.2, p.319, L.11 – p.320, L.6.) After that, he drove home. (Tr. Vol.2, p.320, Ls.7-9.)

As he drove into his apartment complex, Mr. Austin was stopped by Ada County Sheriff Deputy Richardson for failing to use his turn signal. (Tr. Vol.2, p.36, L.21 – p.38, L.4.) Deputy Richardson said he made the stop at 12:25 a.m. (Tr. Vol.2, p.175, Ls.20-25.) When he approached Mr. Austin's car, Deputy Richardson said he noticed the smell of alcohol as he talked with Mr. Austin. (Tr. Vol.2, p.41, Ls.4-7.) Therefore, after speaking with Mr. Austin, Deputy Richardson "called for an assist," so that he could perform field sobriety tests. (Tr. Vol.2, p.43, L.20 – p.44, L.19.) Deputy Richardson estimated that it took approximately five or ten minutes for the other deputy to arrive. (Tr. Vol.2, p.176, Ls.8-19.) After that deputy arrived, Deputy Richardson asked Mr. Austin if he had any physical problems that could affect his ability to perform field sobriety tests. (Tr. Vol.2, p.178, L.15 – p.180, L.3.) Mr. Austin said he had gout which caused him major joint pain. (Tr. Vol.2, p.180, Ls.4-13.) During the tests, Mr. Austin also mentioned several times that his feet and ankles were very painful, so he was

struggling with the tests. (Tr. Vol.2, p.181, Ls.4-11; State's Exhibit 2 at 0:35 – 0:45, 2:30 – 3:15.) Deputy Richardson testified that, at the conclusion of those tests, he believed Mr. Austin was impaired and arrested him. (Tr. Vol.2, p.69, L.23 – p.70, L.14.)

At that point, Deputy Richardson put Mr. Austin in the back of his patrol car for a fifteen minute "observation period" prior to administering breath tests. (Tr. Vol.2, p.195, Ls.2-22.) After that period—approximately 30 minutes after he was originally stopped—Mr. Austin gave two breath samples. (Tr. Vol.2, p.199, Ls.4-14.) The results of the two tests showed an alcohol concentration of .085 and .086. (Tr. Vol.2, p.98, Ls.3-23; State's Exhibit 3.)

Mr. Austin was charged by information with operating a motor vehicle while under the influence of alcohol and/or drugs. (R., p.40.) The State charged Mr. Austin under alternate theories; it alleged that he was driving while under the influence or driving with an alcohol concentration of .08 or more (a per se violation). (R., p.41.) The case was brought as a felony because Mr. Austin had two previous DUI convictions in Nevada within the preceding ten years. (*See* State's Exhibits 4 and 5.) Prior to trial, in response to the State's request for discovery, Mr. Austin indicated he would call Dr. Loring Beals as an expert witness to testify that—because of rising alcohol concentration levels—Mr. Austin's alcohol concentration when he was driving may have been below .08. (R., p.99.) He indicated he would use a process, which considers body weight and height along with the time alcohol was consumed, to extrapolate the test result back to the time of driving. (R., pp.120-21.)

The State then filed a motion in limine to exclude any testimony from Dr. Beals regarding Mr. Austin's alcohol concentration at the time he was driving. (R., pp.108-

109.) In its memorandum in support of the motion, the State noted that Dr. Beals submitted a letter in which he said that, based on Mr. Austin's physical characteristics, he calculated that his alcohol concentration at the time he was driving would have been approximately .06 to .065 "rising to the higher level by the time he was actually tested a half hour later." (R., p.114.) The State argued that, under *Elias-Cruz v. Idaho Department of Transportation*, 153 Idaho 200 (2012), and *State v. Tomlinson*, 159 Idaho 112 (Ct. App. 2015), evidence of Mr. Austin's alcohol concentration while he was driving was not relevant. (R., pp.114-118.)

Mr. Austin opposed the motion and argued that he had a constitutional right to present a complete defense, that evidence of a defendant's alcohol concentration at the time he was driving was relevant, and that his case was distinguishable from *Tomlinson* and *Elias-Cruz*. (R., pp.119-124.) Notably, he wrote that the Court of Appeals in *Tomlinson* reiterated that 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.'" (R., p.123.) He went on to argue that "[t]he reason why the lapse of time is relevant is that it goes to the fundamental issue of the charge: whether the suspect . . . had an alcohol concentration of .08 or higher at the time of driving." (R., p.123.) He also argued that, because alcohol concentration at the time of driving is an element of the crime, expert testimony to that effect is relevant because it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable . . . ." (R., p.123.) Finally, he wrote, "Clearly, such evidence directly goes towards the fundamental issue of the charge . . . whether or not the defendant had an alcohol

concentration of .08 or higher *at the time he was driving*. (R., p.123 (emphasis in original).)

At a pretrial conference, the parties discussed the motion. (*See* Tr. Vol.1, pp.45-71.) The State argued that expert testimony regarding Mr. Austin's alcohol concentration at the time he was driving was not relevant because "the standard under the statute as the Court of Appeals and Supreme Court have interpreted it is the BAC at the time of the test." (Tr. Vol.1, p.47, Ls.14-21.) The State went on to say, "The courts have explicitly stated . . . that the State, in order to present evidence of BAC at trial, does not need to present any kind of testimony that relates that BAC test back to the time of driving." (Tr. Vol.1, p.48, Ls.2-7.)

The district court then asked what would happen if the test was given two days after the time of driving. (Tr. Vol.1, p.48, Ls.9-12.) The State noted that the lapse of time between driving and taking the test is relevant and can be admitted. (Tr. Vol.1, p.48, L.13 – p.49, L.1.) The district court then asked, "Suppose . . . a defendant was stopped, charged, and then he had some alcohol and then he was tested." (Tr. Vol.1, p.50, Ls.9-12.) The district court went on to say that there was a due process issue with the State's premise because if there was a proper foundation laid to establish that "the BAC was less than .08 at the time the defendant was driving, regardless of the fact that when the test was taken it was over .08, that in effect the statute is preventing the defendant from establishing or putting on evidence of a valid defense and thereby depriving him of his due process rights." (Tr. Vol.1, p.56, L24 – p.57, L.24.) In response, the State argued that there was no constitutional right to present irrelevant evidence, and evidence of Mr. Austin's alcohol concentration when he was driving was

irrelevant because the State is not required to extrapolate back to the time of driving under the per se theory. (Tr. Vol.1, p.57, L.18 – p.58, L.5.) The district court then asked if there was a due process analysis in either *Elias-Cruz* or *Tomlinson*, and the State was unsure.[2] (Tr. Vol.1, p.58, Ls.6-14.)

Mr. Austin's counsel made several arguments. First, he argued that it was not clear that a rising alcohol concentration defense is irrelevant under *Tomlinson* because that statement was made in *dicta* by the Court of Appeals and was therefore not binding on the issue. (Tr. Vol.1, p.58, L.23 – p.59, L.6.) He then referred to the fact that the lapse of time between driving and taking the test is relevant because it addressed whether the driver was "under the influence or over the legal limit at the time of driving." (Tr. Vol.1, p.59, Ls.7-15.) He noted that it made no sense for a court to acknowledge the relevance of such information but then prevent a person from "drawing that out" with scientific testimony. (Tr. Vol.1, p.59, Ls.15-18.)

He also pointed out that the statute very clearly "states that it is the conjunction of either impairment or . . . alcohol concentration greater than .08 and driving." (Tr. Vol.1, p.59, Ls.19-23.) He went on to argue that the statute was not "so open-ended that simply a test within a period of time after driving is criminal conduct." (Tr. Vol.1, p.59, Ls.23-25.) He noted that Nevada had a statute under which a defendant could be convicted of a per se violation "within a certain time frame of driving," but Idaho's "statute clearly states greater than .08 and driving." (Tr. Vol.1, p.60, Ls.1-6.) He then reiterated that Mr. Austin had a due process right to present a defense to each element

[2] In *Elias-Cruz*, in response to a due process challenge, the Court stated that there was "no due process violation in excluding irrelevant evidence." 153 Idaho at 205.

of the crime charged, and one of those was driving with an alcohol concentration of .08 or higher. (Tr. Vol.1, p.63, Ls.11-15.)

Subsequently, the district court asked the State whether the statute indicated when the alcohol concentration test had to be given. (Tr. Vol.1, p.68, Ls.6-7.) The State said that there was no requirement for that, and the district court said, "It could be two days afterwards." (Tr. Vol.1, p.68, L.17.) The State replied, "Yeah, I mean, theoretically you could try to prosecute someone—I seriously doubt that any prosecutor in his right mind would try that. But . . . there's no time limit in Idaho." (Tr. Vol.1, p.68, Ls.18-22.)

The district court did not rule on the motion in limine that day. It said it was "leaning" towards a finding that the "the State's position may impair the defendant's due process right to a fair trial and it could be a due process violation." (Tr. Vol.1, p.69, Ls.19-24.) On the first day of trial, however, the district court held that—under the relevant precedent—evidence of Mr. Austin's alcohol concentration at the time of driving was irrelevant under the per se theory but had to be admitted under the impairment theory and thus granted the State's motion. (Tr. Vol.2, p.10, L.13 – p.11, L.6, p.28, Ls.4-15.)

Mr. Austin's counsel confirmed that "integral to Mr. Austin's defense to the per se theory is that he was under the legal limit at the time of driving. That is the evidence that we would seek to establish through our expert testimony." (Tr. Vol.2, p.11, L.25 – p.12, L.4.) The district court said, "I understand that . . . and while I personally agree with . . . the rationale of your thought, I think it's contrary to the existing case law in Idaho." (Tr. Vol.2, p.12, Ls.5-8.) After more discussion, Mr. Austin's counsel reiterated

his concern that he should be able to present extrapolation evidence "under his due process rights applied to the state under the 14th Amendment of the United States Constitution." (Tr. Vol.2, p.26, Ls.16-25.) The district court said, "Conceptually, I'll agree with you . . . and if I had a blank tablet that I was operating under, I would say, you know, you're right. But the Court of Appeals and the Supreme Court have ruled on the issue. Admittedly I don't think they ever discussed the due process concept." (Tr. Vol.2, p.27, Ls.4-10.)

Ultimately, the jury found Mr. Austin guilty. (R., p.156; Tr. Vol.1, p.282, Ls.9-12.) However, the jurors were instructed that they did not need to agree on a particular theory, so there was no indication as to whether he was convicted under the per se theory or the driving under the influence theory. (R., pp.144-45; Tr. Vol.1, p.258, L.4 – p.259, L.6.) Subsequently, the district court withheld judgment and placed Mr. Austin on probation for seven years. (R., pp.161-63.) Mr. Austin filed a notice of appeal that was timely from the district court's order withholding judgment and order of probation. (R., pp.169-70.)

ISSUES

1. Did the district court abuse its discretion when it granted the State's motion in limine because it did not apply the relevant precedent correctly and violated Mr. Austin's due process right to present a complete defense?

2. Does the dicta in *Tomlinson* render Idaho Code § 18-8004 overbroad and void for vagueness as applied?

ARGUMENT

I.

The District Court Abused Its Discretion When It Granted The State's Motion In Limine Because It Did Not Interpret Or Apply The Relevant Precedent Correctly, And It Violated Mr. Austin's Constitutional Right To Present A Complete Defense

A. Introduction

Idaho's DUI statute unambiguously states that driving with an alcohol concentration over the legal limit is unlawful. Therefore, one element the State must prove is that the driver's alcohol concentration be over the legal limit, at the time of driving. As due process requires the State to prove every element of a crime beyond a reasonable doubt, scientific evidence regarding Mr. Austin's alcohol concentration when he was driving was relevant, and Mr. Austin should have been allowed to present that evidence to rebut the State's test result evidence and present a complete defense.

B. Standard Of Review

A district court's decision on a motion in limine is reviewed for an abuse of discretion. *State v. Richardson*, 156 Idaho 524, 527 (2014). A trial court abuses its discretion unless it "(1) recognizes the issue as one of discretion, (2) acts within the boundaries of its discretion and applies the applicable legal standards, and (3) reaches the decision through an exercise of reason." *State v. Guess*, 154 Idaho 521, 528 (2013) (citation omitted).

C. Under The Plain Language Of I.C. § 18-8004(1), One Element Of The Prohibited Conduct is "Driving," So Evidence Of The Driver's Condition While Driving Is Plainly Relevant, And The District Court Did Not Interpret The Relevant Precedent Correctly

Mr. Austin had a right to present scientific evidence that his alcohol concentration, when he was driving, was not over the legal limit. However, despite its acknowledgment that it "[c]onceptually" agreed that Mr. Austin had a due process right to present such evidence, the district court held that such evidence was irrelevant under *Elias-Cruz v. Idaho Department of Transportation*, 153 Idaho 200 (2012) and *State v. Tomlinson*, 159 Idaho 112 (Ct. App. 2015), *review denied* (Oct. 14, 2015). (*See* Tr., Vol.2, p.26, L.21 – p.27, L.12.)[3] In this case, given that *Elias-Cruz* concerned the margin of error inherent in the machinery used for breath testing, and the Court of Appeals' statements in *Tomlinson* regarding a situation such as the one presented in this case were erroneous dicta, the district court abused its discretion when it granted the State's motion in limine because it did not apply the applicable legal standards or reach its decision through an exercise of reason. Alternatively, *Tomlinson* should be overruled or narrowed to its facts.

Elias-Cruz and *Tomlinson* did not remove the element of driving from the driving under the influence statute. Indeed, the prohibited conduct is not "submitting to breath testing when over the limit." The statute specifically prohibits driving when over the limit. Therefore, a conclusion that evidence of a driver's condition while driving is

[3] The district court ruled from the bench on this issue and thus did not issue a written decision. However, the arguments put forward by the State focused on these two cases (*See e.g.* Tr. Vol.1, p.46, L.14 – p.59, L.6), and a review of the discussions and briefing on the motion in limine makes it clear that the district court based its decision on this precedent. (R., pp.114-118).

irrelevant to his defense is unreasonable and misinterprets precedent.

The conduct prohibited by statute reads as follows: "It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or who has an alcohol concentration of .08, as defined in subsection (4) of this section, or more, as shown by an analysis of his blood, breath, or urine, *to drive* or be in actual physical control of a motor vehicle . . . ." Idaho Code § 18-8004(1)(a) (emphasis added). Clearly, the statute makes *driving* under the influence illegal.

Similarly, the Idaho pattern jury instructions, approved by this Court in 2010, list the elements as follows: (1) On or about a certain date; (2) in the State of Idaho; (3) the defendant *drove* or was in actual physical control of; (4) a motor vehicle; (5) upon a highway, street or bridge or upon public or private property open to the public; (6) while under the influence of alcohol or *while having* an alcohol concentration of 0.08 or more as shown by an analysis of the defendant's blood, urine, or breath. (ICJI 1000 (emphasis added).)

Nevertheless, the district court concluded, after Mr. Austin's counsel argued "certainly integral to Mr. Austin's defense to the per se theory is that he was under the legal limit at the time of driving," (Tr. Vol.2, p.11, L.25 – p.12, L.4), that the argument was "contrary to the existing case law in Idaho" because such evidence was irrelevant. (Tr. Vol.2, p.12, Ls.5-8). This conclusion misinterpreted and misapplied the precedent.

Tomlinson and *Elias-Cruz* relied on earlier cases that stand for the proposition that the State does not have to extrapolate back from the time of test results to prove a *per se* theory of a violation of the statute—as distinct from the impairment theory, where the State must provide such evidence if it intends to introduce evidence of alcohol

concentration to support the impairment charge. *See State v. Sutliff*, 97 Idaho 523 (1976); *State v. Robinette*, 141 Idaho 110 (2005). But it is an illogical, and unconstitutional, leap to say that because the State is not required to prove something, the defendant is not even permitted to introduce evidence of it.

Subsection (4) of the statute, which was at issue in *Elias-Cruz*—and is about the method and machinery of testing only—cannot be interpreted in such a way as to swallow up and ignore Subsection (1) of the statute, which criminalizes the conduct of *driving* in a certain condition.

Elias-Cruz concerned an argument that evidence regarding the margin of error inherent to a breath testing machine should not have been excluded. The case arose out of an administrative license suspension hearing under I.C. § 18–8002A. *Elias-Cruz*, 153 Idaho at 201. An officer suspended Ms. Elias-Cruz's license after she was pulled over and submitted to a breathalyzer test, which produced result of .021 and .02. *Id.* At an administrative hearing, she introduced expert testimony regarding the "margin of error" of the breath testing machine. *Id.* at 202. Because of that margin of error, she argued that her alcohol concentration could have been below the legal limit of .02. *Id*. The hearing officer upheld Ms. Elias-Cruz's suspension because it did not believe she met her burden of proof under I.C. § 18–8002A(7). *Id*. She appealed to the district court, which reversed, but the Department of Transportation appealed. *Id.*

This Court reversed, holding that the 1987 amendments to Subsection (4) rendered evidence about the margin of error in alcohol concentration testing machine results irrelevant. *Id.* at 203–04. The Court reached this conclusion because a 1987 amendment to the statute eliminated the need for the State to introduce evidence of the

machine's accuracy when presenting evidence of its testing results. Specifically, the Court stated:

> After 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. The equipment need not precisely measure the alcohol concentration in the person's blood. The test need only be based upon the correct formula, and the equipment must be properly approved and certified.

Id. at 204. The Court went on to discuss *Sutliff* and *Robinette* in dicta and wrote, "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." *Id.* at 205. In other words, a driver took the risk that the State could get test results admitted without having to extrapolate back to the time of driving. However, the Court did not hold that a driver took the risk that his due process rights would be violated because he would be barred from presenting his own extrapolation evidence. Further, the legislative amendment[4] concerned the testing method and machinery, and the issue in *Elias-Cruz* involved introduction of margin of error evidence. Here, Mr. Austin sought to introduce evidence of his condition while driving, not to dispute the

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[4] The statement of purpose of the amendment read as follows:

> [T]he amendment allows the results of an alcohol test to be introduced *without having to call expert witnesses on behalf of the state*. This amendment will make the practice uniform around the state, as several courts have already adopted this rule. The test results are extremely reliable and it becomes and economic burden to the state to have to furnish witnesses to provide superfluous verification.

Statement of Purpose, H.R. 119, 49th Leg., 1st Reg. Sess. (1987) (*see* Appendix A, p.6) (emphasis added). Therefore, it is evident that the amendment was, at least in part, an acknowledgment of this Court's holding in *State v. Sutliff*, 97 Idaho 523, 525 (1976), which is discussed in detail below.

accuracy of the method of testing. Therefore, *Elias-Cruz* is not controlling on the admissibility of Mr. Austin's proposed evidence.

However, the Court of Appeals, relying in part on *Elias-Cruz*, held that a defendant's evidence as to his alcohol concentration at the time of driving was also irrelevant. *Tomlinson*, 159 Idaho at 123. There, Mr. Tomlinson argued, *inter alia*, that the magistrate court erred when it excluded evidence regarding whether his alcohol concentration was rising between the time he was driving, and the time he submitted to the breath tests. *Id.* at 119. Mr. Tomlinson did not have an expert prepared to testify, so the Court of Appeals held that "the magistrate did not err in excluding evidence that Tomlinson did not have available and could not have introduced in any event." *Id.* at 122.

Although *Tomlinson* was decided on its facts, the Court of Appeals nevertheless wrote in dicta, "However, had Tomlinson retained an expert to discuss extrapolation of Tomlinson's breath test results back to the time he was driving, the magistrate still would not have erred in excluding that evidence." *Id.* It went on to state,

> Although evidence of the lapse of time between the stop and the evidentiary test is relevant to the weight afforded the test results, it does not necessarily follow that evidence regarding back extrapolation is relevant to defend against a per se violation of the statute. Indeed, where the prosecution elects to proceed under a per se theory of liability, the question is what the alcohol level was *at the time the sample was taken.*

Id. (emphasis in original) (citing *Robinett*, 141 Idaho at 112; *State v. Juarez*, 155 Idaho 449, 452 (Ct. App. 2013)). Finally, it wrote,

> No Idaho appellate court has ever held, under the post–1987 DUI statute, that evidence regarding a defendant's alcohol concentration at a time other than when an evidentiary test was performed is relevant under a per se theory of liability. Thus, the alcohol concentration in a defendant's blood, breath, or urine at the time he or she was driving is irrelevant.

Id.

This was not only dicta, it was also wrong. "Stare decisis requires that this Court follow controlling precedent unless that precedent is manifestly wrong, has proven over time to be unjust or unwise, or overruling that precedent is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *State v. Owens*, 158 Idaho 1, 4-5 (2015) (citation omitted). It is true that the cases *Tomlinson* relied on stand for the proposition that the State is not *required* to extrapolate back to have test results admitted. But they most certainly do not stand for the proposition that a defendant is not *allowed* to present extrapolation evidence in order to defend himself. One does not follow from the other. Indeed, *Tomlinson* conflated the evidentiary requirements for the State with the rights of a defendant. Removing the requirement that the State provide a witness to verify the test results does not also remove the requirement that a driver have an alcohol concentration above the legal limit, while driving, before he can be convicted of a DUI.

Tomlinson supported the conclusion to its hypothetical by pointing out, "The State is not required to extrapolate the result of an evidentiary test—whether it be for blood, breath, or urine—back to a time when the defendant was driving." *Id.* at 121-22 (citing *Elias-Cruz*, 153 Idaho at 203; *Robinett*, 141 Idaho at 112; *Sutliff*, 97 Idaho at 525). The State's evidentiary burdens, however, are completely different than a defendant's rights to defend himself against the State's charges. The cases relied on, *Sutliff* and *Robinette*, address the State's burdens—that the State does not have to extrapolate back to the time of driving to have alcohol concentration test results admitted. However, *Sutliff*, *Robinette*, and *Tomlinson* all held that the lapse of time

between driving and testing is relevant to the defendant's condition *while driving*, which is still the offense. *See Sutliff*, 97 Idaho at 524; *Robinette*, 141 Idaho at 113; *Tomlinson*, 159 Idaho at 122. Therefore, a defendant is clearly allowed to submit evidence of his condition at the time of driving by extrapolating back from the time that the test was taken because if the lapse of time is relevant, then evidence of what occurred—with respect to a defendant's alcohol concentration—during that lapse of time is also relevant.

Sutliff addressed whether test results had to be extrapolated back to the time of driving in the precursor to I.C. § 18–8004,[5] which created a presumption that a driver was under the influence if he drove with an alcohol concentration of more than .10. 97 Idaho at 524. Mr. Sutliff argued that the "the possibility that his blood alcohol was lower at the time of [driving] than at the time of" the testing "rendered the results inadmissible absent a witness qualified to extrapolate the results back to the time of [driving]." *Id.* The Court disagreed and reasoned 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.* at 524. And it ultimately held that the State was not required to extrapolate back in order to have the test results admitted. It wrote, "this statute does not require extrapolation back but establishes that the percentage of blood alcohol as shown by chemical analysis relates back to the time of the alleged offense for purposes of applying the statutory presumption." *Id.* at 525.

In *Robinett*e, the defendant argued that his alcohol concentration results should not have been admitted when the State proceeded under a driving under the influence

[5] I.C. § 49–1102.

theory as opposed to a per se theory. 141 Idaho at 112. This Court held that the results are relevant to that theory "only if a proper foundation is laid to assure the validity of the test result." *Id.* It compared that scenario with the situation in *Sutliff* and wrote,

> 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 back to the time of the alleged offense.

Id. at 113.

Therefore, *Robinette* clearly held that the *reason* it is appropriate not to require the State to extrapolate back in a per se case is *because* the defendant can present evidence of the lapse of time between the test and driving. And if that lapse of time is relevant to the weight to be afforded the results, then a defendant's evidence showing the *impact* or *significance* of that lapse of time is also relevant to the weight the jury should give the test results.

Yet the *Tomlinson* court wrote, "Although evidence of the lapse of time between the stop and the evidentiary test is relevant to the weight afforded the test results, *it does not necessarily follow* that evidence regarding back extrapolation is relevant to defend against a per se violation of the statute." 159 Idaho at 122 (emphasis added) (citing *Robinette*, 141 Idaho at 112; *Juarez* 155 Idaho at 452). This was an illogical conclusion. Because the lapse of time between driving and testing goes to the weight of the results, then in fact it does "necessarily follow" that back extrapolation evidence is relevant to a defense focused on the driver's condition while driving

In this case, Mr. Austin had an expert prepared to testify. (Tr. Vol.2, p.26, Ls.1-20.) But the district court erroneously relied on dicta in *Tomlinson* to reach its conclusion as to the state of the "existing case law in Idaho." (Tr. Vol.2, p.12, Ls.5-8.) In *State v. Hawkins*, 155 Idaho 69, 74 (2013), this Court held, "If the statement is not necessary to decide the issue presented to the appellate court, it is considered to be dictum and not controlling." *Tomlinson*'s conclusion affirming the magistrate's exclusion of the evidence rested on the fact that Mr. Tomlinson did not have an expert prepared to testify to his condition while driving, and thus further discussion as to facts not before the court were dicta. 159 Idaho at 122.

Evidence as to Mr. Austin's alcohol concentration at the time he was driving was relevant to the weight to be afforded the test results because the tests were given long after he was driving. Evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without he evidence" is relevant. I.R.E. 401. Here, one fact that was of consequence to the determination of the action was what Mr. Austin's alcohol concentration was while he was driving. That is why the lapse of time between when a defendant drives and when he takes the test is relevant to the weight of test results. Therefore, expert testimony regarding the effects of that lapse of time, his condition while driving, is also relevant.

Evidence of the effects of that lapse of time should have been provided to the jury. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of

an opinion or otherwise." I.R.E. 702. Dr. Beal's testimony would have assisted the jury to understand how the lapse of time could affect the test results in light of when Mr. Austin consumed alcohol and his physical characteristics. (Tr. Vol.2, p.26, Ls.1-20.) Indeed, Mr. Austin's counsel specifically argued that the lapse of time between driving and taking the test is relevant because it goes to show whether the driver was "under the influence or over the legal limit at the time of driving." (Tr. Vol.1, p.59, Ls.7-15.) He also argued that it made "no sense" for a court to acknowledge the relevance of such information but then prevent a person from "drawing that out" with scientific testimony. (Tr. Vol.1, p.59, Ls.15-18.)

Thus, the district court abused its discretion when it relied on distinguishable precedent and erroneous dicta to grant the State's motion in limine because it did not apply the applicable legal standards or reach its decision though an exercise of reason.[6] Alternatively, *Tomlinson* should be overruled because it is manifestly wrong and overruling it is necessary to remedy continued injustice in the form of due process violations. Further, while *Elias-Cruz* concerned a margin of error issue, to the extent that it supports the *Tomlinson* dicta at issue here and holds that the State does not need to show that a defendant was over the legal limit while driving, it is also manifestly wrong and should be overruled.

[6] The district court's reliance on *Tomlinson* also created confusion over the appropriate jury instructions. (*See* Tr. Vol.2, pp.13 – 22.) Most notably, the district court proposed adding the following: "Fifth, at the time the defendant drove . . . *or at reasonably close time thereafter* the defendant was given an approved and properly administered alcohol concentration test . . . ." (Tr. Vol.2, p.15, Ls.6-11.) Both parties objected to this instruction, so the district court ultimately did not include the "reasonably close time thereafter" language. (Tr. Vol.2, p.17, L.5 – p.20, L.13.)

D. The District Court Abused Its Discretion When It Granted The State's Motion In Limine Because Mr. Austin Had A Constitutional Right To Present Scientific Evidence That The Concentration Of Alcohol In His Blood, While He Was Driving, Was Not Over The Legal Limit

The district court was concerned that granting the State's motion in limine would violate Mr. Austin's due process right to present a complete defense. When considering the State's motion, it explained,

> My basic problem with the State's premise is the statutes are wonderful, but I think there is a due process issue in the sense of . . . if the proper foundation is laid to show that, in fact, the BAC was less than .08 at the time the defendant was driving, regardless of the fact that when the test was taken it was over .08, that in effect the statute is preventing the defendant from establishing or putting on evidence of a valid defense and thereby depriving him of his due process rights.

(Tr. Vol.1, p.57, Ls.1-11.)[7]

The district court was right, and it should have denied the State's motion on those grounds. I.C. § 18-8004, as interpreted by the Court of Appeals in *Tomlinson,* and by the district court in this case, violates Mr. Austin's right to due process because it denies him the opportunity to put on a complete defense. I.C. § 18-8004(1) makes it

[7] The district court expressed similar concerns throughout its discussions with the parties on this issue. It asked the prosecutor if there was a due process analysis in either *Elias-Cruz* or *Tomlinson*. (Tr. Vol.1, p.58, Ls.6-8.) It said it was "leaning" towards a finding that the "the State's position may impair the defendant's due process right to a fair trial and it could be a due process violation." (Tr. Vol.1, p.69, Ls.19-24.) It said that it "personally" agreed with Mr. Austin's position that he had a due process right to present such evidence, but that that "rationale" was "contrary to the existing case law in Idaho." (Tr. Vol.2, p.12, Ls.5-8.) When Mr. Austin's counsel reiterated his concern that he should be able to present extrapolation evidence under his due process rights, the district court responded, "Conceptually, I'll agree with you . . . and if I had a blank tablet that I was operating under, I would say, you know, you're right. But the Court of Appeals and the Supreme Court have ruled on the issue. Admittedly I don't think they ever discussed the due process concept." (Tr. Vol.2, p.26, L.16 – p.27, L.10.) Also, in discussing the precedent, it said, "I know it doesn't make much sense, but then I didn't write the decisions either." (Tr. Vol.2, p.11, Ls.1-6.)

clear that one of the elements of the crime of driving under the influence is having an alcohol concentration over the limit *while driving.* And, as discussed above, *Tomlinson* therefore misstated the law when it concluded in its hypothetical that expert testimony offered by the defendant as to his condition while driving is irrelevant and cannot be used to defend a charge that the statute was violated. To the extent that *Tomlinson* stands for this rule, it should be overruled or narrowed to the facts upon which the case was actually decided—that it is not error for a magistrate to exclude evidence a defendant did not have available and could not have introduced. Indeed, *Tomlinson's* conclusion that a defendant would not be allowed to present evidence of his condition while driving is flawed and misinterprets precedent. This led to a violation of Mr. Austin's right to due process.

Every defendant has a due process right to present a defense to each element of the crime of which he is accused. Indeed, the United States Supreme Court has held that the U.S. Constitution provides defendants "'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)); *see also* U.S. CONST. amends. VI, XIV; ID. CONST. art. I, §§ 7, 13; *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (declaring that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"). Limiting the types of evidence that a defendant presents in his defense may violate the defendant's right to due process, compulsory process, and confrontation. *See* U.S. CONST. amends. VI, XIV; ID. CONST. art. I, §§ 7, 13.

Further, the United States Supreme Court has "explicitly held" that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

In *Tomlinson* the Court of Appeals misapplied, and in doing so inappropriately extended, *Elias-Cruz*. *Elias-Cruz* held that a testing machine's margin of error was irrelevant based on amendments to Subsection (4). 153 Idaho at 205-06. But *Tomlinson* extended this to suggest that a defendant's evidence of his condition while driving—specifically evidence derived from the lapse of time before testing—is also irrelevant. This analysis ignores the statute's "to drive" language because if a defendant's evidence as to his condition while driving is irrelevant, then his condition while driving is apparently now irrelevant. And if this is true, then the words "to drive" have been read out of the statute. This Court has stated that it is incumbent upon appellate courts to interpret a statute in a way that will not nullify it, and appellate courts "will not construe a statute in a way which makes mere surplusage of provisions included therein." *Sweitzer v. Dean*, 118 Idaho 568, 572 (1990) (internal citations omitted). If the words "to drive" have been read out of the statute, then Mr. Austin has been denied his constitutional right to present a complete defense.

The district court—despite acknowledging that the precedent did not "make much sense"—apparently felt bound by that precedent and relied on *Tomlinson*'s suggestion that a defendant's evidence of his condition while driving is irrelevant. (Tr. Vol.2, p.11, Ls.1-6.) This was an abuse of discretion because it resulted in a violation of

Mr. Austin's due process right to raise a complete defense, which was a misapplication of applicable legal principles.

II.

The Dicta in *Tomlinson* Renders Idaho Code § 18-8004 Overbroad And Void For Vagueness As Applied

Barring Mr. Austin's ability to present evidence regarding his alcohol concentration at the time he was driving not only violated Mr. Austin's right to present a complete defense. Indeed, some of the due process discussions regarding the State's motion showed how *Tomlinson's* interpretation of I.C. § 18-8004 renders the statute overbroad and void for vagueness as applied to this case. "The constitutionality of a statute is a question of law which this Court reviews *de novo.*" *State v. Hart*, 135 Idaho 827, 829 (2001) (citations omitted).

This issue was not directly raised below. However, Mr. Austin asserts that the issue is preserved because, while the district court did not explicitly hold that the statute violated due process, Mr. Austin made several arguments to that effect, and the district court clearly realized that the statute posed due process problems in that it could fail to provide notice or be arbitrarily enforced. For example, Mr. Austin's counsel argued that the I.C. § 18-8004 was "not so open ended that simply a test within a period of time after driving is criminal conduct." (Tr. Vol.1, p.59, Ls.19-25.) Moreover, the district court asked what would happen if the test was given days after a defendant was driving, and it also asked what would happen if "a defendant was stopped, charged, and then he had some alcohol and then he was tested." (*See* Tr. Vol.1, p.48, L.9 – p.50, L.12.) These questions revealed its concern about vagueness in particular. This Court has

held that when an issue is "argued to or decided by the trial court," the issue is preserved. *State v. Duvalt*, 131 Idaho 550, 553 (1998). Here, the district court realized the issue was present, and generally seemed to agree with Mr. Austin's argument, but apparently felt bound by precedent.

Alternatively, Mr. Austin asserts that the error here is fundamental. An error is fundamental when it "so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due process." *State v. Draper*, 151 Idaho 576, 588 (2011), quoting *State v. Lavy*, 121 Idaho 842, 844 (1992). In *State v. Perry*, 150 Idaho 209, 226 (2010), this Court held it applies a three-part test to determine whether an error is fundamental: (1) whether the alleged error violates an unwaived constitutional right; (2) whether the error is plain and obvious from the record, including information as to whether the failure to object was a tactical decision; and, (3) whether the defendant can establish that the error affected the outcome of the proceedings.

Here, Mr. Austin never waived his due process rights. Also, the error is clear from the record as the district court's decision to grant the State's motion was a violation of Mr. Austin's due process rights because, under the dicta in *Elias-Cruz* and *Tomlinson*, the statute was rendered overbroad and void for vagueness as applied, and there was no indication that counsel did not explicitly raise the issue because of some strategic decision. And finally, violating Mr. Austin's due process rights affected the outcome of the proceedings because it denied him the right to present a defense.

"'The overbreadth doctrine is aimed at statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions constitutionally

protected freedoms.'" *State v. Manzanares*, 152 Idaho 410, 423 (2012) (quoting *State v. Korsen*, 138 Idaho 706, 713 (2003). "The two-part test for unconstitutional overbreadth asks (1) whether the statute regulates constitutionally protected conduct, and (2) whether the statute precludes a significant amount of that constitutionally protected conduct." *Id.* If the answer to both steps is in the affirmative, then the statute is overbroad. *Id.*

The void for vagueness doctrine is rooted in the Due Process clause of the Fourteenth Amendment. *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001). This "doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citation omitted). "The more important aspect of the vagueness doctrine 'is not actual notice, but the other principle element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Id*. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a 'standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* (quoting *Goguen*, 415 U.S. at 575). "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Goguen*, 415 U.S. at 575. Rather, the "absence of any ascertainable standard for inclusion or exclusion is precisely what offends the Due Process Clause." *Id.* at 578 (citation omitted). Simply put, a law is void for vagueness when it subjects a person "to criminal liability under a standard so indefinite that police, court, and jury [are] free to react to

nothing more than their own preferences . . . ." *Id.* "In scrutinizing a statute for intolerable vagueness as applied to specific conduct, courts must 'take the statute as though it read precisely as the highest court of the State has interpreted it.'" *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1348 (1984) (citations omitted).

As an initial point, Mr. Austin does not argue that the statute is vague on its face because he asserts that the statute as written allows for a defendant to put on evidence of his alcohol concentration at the time of driving as it is clear that this is the prohibited conduct. Under *Tomlinson*, however, such evidence is supposedly irrelevant. 159 Idaho at 122. Based on that interpretation, a defendant could be tested at any time after driving, and if his alcohol concentration was over the limit, he could be prosecuted for driving under the influence. As the district court pointed out, this could be days later. (Tr. Vol.1, p.68, L.17.)

In Idaho, there is no time limit at which point the test results can no longer be considered as evidence of the crime. (Tr. Vol.1, p.68, L.21 – p.69, L.2.) What makes the statute constitutional is the fact that the lapse of time between driving and when the test was administered is relevant as to the weight the jury gives the test results. But if the defendant is precluded from introducing evidence to educate the jury as to what occurred during the lapse of time because the test result is all that matters, then the statute fails to give notice of what the actual crime is because it is not driving with an alcohol concentration over the legal limit; it is simply testing with an alcohol concentration over the legal limit. If a defendant is precluded from presenting such evidence in his defense—whether that be, as in Mr. Austin's case, that his alcohol concentration was rising because he had consumed alcohol right before driving, or a

defendant who consumed alcohol *after* driving but *before* testing—the statute can be arbitrarily enforced.

Several courts have addressed this issue where the statute at issue allowed for a DUI conviction if the defendant's alcohol concentration was over the legal limit within a certain window of time after driving. *See e.g. Com. v. Barud*, 681 A.2d 162, 166 (1996), *disapproved of by Sereika v. State*, 955 P.2d 175 (1998); *State v. Baker*, 720 A.2d 1139, 1141 (Del. 1998).

In *Barud*, the defendant was stopped and consented to a blood test approximately 35 minutes after the stop. 681 A.2d at 163. Prior to trial, he filed a motion to dismiss the count that relied on the test result and argued that the statute at issue violated the due process clause. *Id.* The trial court held that the statute was unconstitutional and granted the motion. *Id.* On appeal, the Supreme Court of Pennsylvania stated that the issue was whether the DUI statute violated "substantive due process guarantees . . . ." *Id.* Mr. Barud argued that the statute violated his due process rights because it was void for vagueness, overbroad, and failed to "provide a rebuttable presumption that the accused's BAC at the time of testing accurately reflects their BAC at the time of driving and fails to provide for an affirmative defense requiring the state to prove that the accused's BAC was at least .10% at the time of driving." *Id.* at 164.

Prior to beginning its analysis, the court noted that, similar in some ways to Idaho, Pennsylvania did not require the State to present extrapolation evidence in order to have test results admitted if the result was significantly above the limit, and "there

was not a significant lapse of time between when the driver was stopped and when the blood test was administered." *Id.* at 165.

The relevant language of the statute at issue in *Barud* read as follows:

> **(a) Offense defined.**—A person shall not drive, operate or be in actual physical control of the movement of any vehicle:
>
> (5) if the amount of alcohol by weight in the blood of the person is 0.10% or greater at the time of a chemical test of a sample of the person's breath, blood or urine, which sample is:
> (i) obtained within three hours after the person drove, operated or was in actual physical control of the vehicle....
> **(a.1) Defense.**—It shall be a defense to a prosecution under subsection (a)(5) if the person proves by a preponderance of evidence that the person consumed alcohol after the last instance in which he drove, operated or was in actual physical control of the vehicle and that the amount of alcohol by weight in his blood would not have exceeded 0.10% at the time of the test but for such consumption.

Id. The court held that that the statute was overbroad and void for vagueness. *Id*. at 166. It stated, "without requiring any proof that the person actually exceeded the legal limit of .10% at the time of driving, the statute sweeps unnecessarily broadly into activity that has not been declared unlawful . . . that is operating a motor vehicle with a BAC below .10%." *Id.* The court went on to write,

> If, for example, a person was operating a motor vehicle with a BAC below the legal limit and he were pulled over at that time, the evidence could not sustain a charge for driving under the influence as determined by a blood alcohol test since his BAC was under the legal limit. However, if that same person's BAC rises above .10% within three hours after driving, he may now be prosecuted for driving under the influence of alcohol under the amendment to the statute in question since the statute eliminates the requirement that the Commonwealth must establish that the accused actually exceeded the legal BAC limit at the time of actual operation of the vehicle.

Id.

The court also found that the statute had the "effect of creating significant confusion as to exactly what level of alcohol in the blood is prohibited . . . ." *Id.* It noted

that the statute could be interpreted "as creating two situations in which a person could be prosecuted: either where a person had an actual BAC of .10% at the time of driving . . . or where a person has a BAC which is *somewhere* below .10% at the time of driving but which rises above .10% within three hours after driving . . . ." It held that this did not "provide a reasonable standard by which an ordinary person may contemplate their future conduct" because a citizen could not know when their actions became criminal conduct. *Id.* And it pointed out that the trial court had asked "How can one predict when and whether a 0.10% alcohol level will be reached within three hours after driving?" *Id.* It went on to state that the most "glaring deficiency" of the statute was that it did not require proof that the defendant's "blood alcohol level actually exceeded the legal limit *at the time of driving*. Rather, the statute criminalizes a blood alcohol level in excess of the legal limit up to three hours *after* the last instance in which the person operated a motor vehicle and without any regard for the level of intoxication at the time of operation." *Id.* (emphasis in original).

Most instructive with respect to this case, the *Barud* Court wrote, even with the defense in Subsection (a.1), the statute failed to provide a way for a defendant to either rebut the state's presumption that their alcohol concentration at the time of testing accurately reflected their concentration while driving or "*produce competent evidence that he or she was below the legal limit at the time of driving* (other than consumption after the fact) thereby requiring the Commonwealth to prove beyond a reasonable doubt that the defendant's BAC exceeded the legal limit at the time of driving." *Id.* (emphasis added). The court went on to hold that the statute at issue imposed "absolute liability on the accused regardless of any evidence to the contrary" because it precluded "the

admission of competent evidence that an accused's BAC was actually below the legal limit *at the time of driving." Id.* (emphasis in original). It wrote, "This is a result we cannot uphold." *Id.*

Similarly, in *McLean v. Moran*, 963 F.2d 1306, 1308-11 (9th Cir. 1992), the court held that Nevada's DUI statute was unconstitutional as applied because it created a "mandatory conclusive presumption" that a driver's alcohol concentration shown by the test result was the same as that at the time of driving. *Id.* at 1310. There, Ms. McLean was given a blood test 30 to 45 minutes after driving, but a police criminalist testified that, depending on the circumstances, Ms. McLean's alcohol concentration could have been under the limit when she was driving. *Id.* at 1307. However, the trial court stated, "When an individual is charged under the per se statute . . . the bottom line is the chemical test . . . ." *Id.* at 1310. As such, it "refused to consider whether the totality of the evidence rebutted or supported the statutory presumption that McLean's BAC at the time of the test was no less than the BAC at the time of driving." *Id.*

The court explained that "a mandatory conclusive presumption removes the presumed element from the case after the State has proved the predicate facts giving rise to the presumption." *Id.* at 1309 (citation omitted). As an example, it noted that, in *Morrissette v. United States*, 342 U.S. 246 (1952), the trial court "refused to submit the issue of intent to the jury, ruling the felonious intent could be presumed from the defendant's taking of the property, which was undisputed." *Id.* at 1309. But the United States Supreme Court wrote,

> A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of

> its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case*, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime*.

Id. (emphasis added).

As such, *McLean* ultimately held that "[a]bsent the statutory presumption, the testimony of the police criminalist and the evidence regarding McLean's conduct at the time of her arrest may have failed to establish beyond a reasonable doubt that the BAC at the time of driving was at least 0.10%." *Id.* at 1310. Therefore, "McLean's constitutional right to have the State prove every element of the crime beyond a reasonable doubt was violated by the conclusive presumption applied by the judge." *Id.*

In this case, under *Tomlinson's* interpretation of I.C. § 18-8004, Mr. Austin was not allowed to produce evidence of his condition while driving, and therefore the statute as applied imposed absolute liability and a mandatory conclusive presumption, which also violated Mr. Austin's right to have the State prove every element beyond a reasonable doubt. Moreover, Idaho has no window of time in which a test result above the limit would be considered as prima facie evidence of a per se violation. The test result, even if the test was administered days afterwards, could be used to prosecute a defendant. In fact, here the district court asked the prosecutor what would happen if the test was given two days after driving. (Tr. Vol.1, p.48, Ls.9-12.) The prosecutor said that the lapse of time between the stop and the test is relevant to the weight to be given the test result. (Tr. Vol.1, p.48, L.23 – p.49, L.1.) Later, the district court asked if there was a time limit in which the test must be given and revisited the fact that it "could be two days afterwards." (Tr. Vol.1, p.68, Ls.6-17.) The prosecutor acknowledged that

there was no time limit in Idaho, so "theoretically you could try to prosecute someone – I seriously doubt that any prosecutor in his right mind would try that." (Tr. Vol.1, p.68, Ls.18-21.) This statement indicates that if—as *Tomlinson* held—a defendant's expert testimony regarding his alcohol concentration at the time of driving is irrelevant, then the statute can be arbitrarily enforced because prosecutors could make decisions on whom to prosecute randomly.

Finally, much like the situation in *Barud*, the statute as interpreted by *Tomlinson* and applied to this case has the potential to create confusion about what level of alcohol concentration is prohibited because Mr. Austin could be prosecuted for having an alcohol concentration that rises after driving but is below the limit while driving. Under I.C. § 18-8004, it is not prohibited conduct to test above the limit, regardless of the timing. And as counsel for Mr. Austin argued, the DUI statute was "not so open ended that simply a test within a period of time after driving is criminal conduct, which the legislature would be allowed to do." (Tr. Vol.1, p.59, L.23 – p.60, L.1.) Under the *Tomlinson* dicta, however, the statute fails to give notice of what the prohibited conduct is because the test result is all that matters. Therefore, in theory, the acts of driving and drinking could be days apart, but the prosecutor could still prosecute. Thus, the statute could be arbitrarily enforced as law enforcement and prosecutors could "pursue their personal predilections." Moreover, under *Tomlinson* and *Elias-Cruz*, the State does not need to prove that a defendant's alcohol concentration was over the limit while driving, and thus the statute is unnecessarily broad as it affects activity that has not been declared unlawful—driving with an alcohol concentration below the limit. As such, as

applied in this case, the statute was void for vagueness as applied and overbroad and therefore violated Mr. Austin's right to due process.

CONCLUSION

Mr. Austin respectfully requests that this Court vacate his judgment of conviction, reverse the district court's order granting the State's motion in limine, and order that the district court admit expert testimony regarding his alcohol concentration when he was driving at a new trial.

DATED this 3rd day of May, 2017.

_____/s/_____
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of May, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JUSTIN KEITH AUSTIN
4106 N TREDWELL PLACE
BOISE ID 83703

MICHAEL REARDON
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E-MAILED BRIEF

DANIEL W TAYLOR
ADA COUNTY PUBLIC DEFENDER
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

RPA/eas