11-17-2017

State v. McKie Appellant's Brief Dckt. 45239

IN THE SUPREME COURT OF THE STATE OF IDAHO

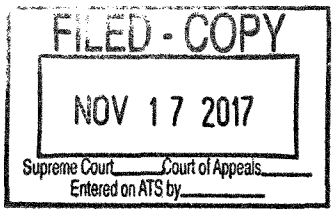
STATE OF IDAHO,	)	DOCKET NO. 45239
	)	
Plaintiff-Respondent,	)	Ada CR-MD-2015-12139
	)	
vs.	)	
	)	
CHAD C. MCKIE,	)	
	)	
Defendant-Appellant.	)	

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District
In and For the County of Ada

Honorable Gerald F. Schroeder, Presiding

Originating from the magistrate division,
Fourth Judicial District, State of Idaho,
In and For the County of Ada
Honorable Kevin Swain
Magistrate Judge



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I.

NATURE OF THE CASE

This appeal originated from a magistrate court involving a "moped", and what constitutes a "motor vehicle" in relation to the application of Idaho's DUI laws. The intermediate appeal before the Honorable Gerald F. Schroeder, presiding, affirmed the magistrate, applying the analysis within *State v. Trusdall*, 155 Idaho 965, 318 P.3d 955 (Idaho App. 2014) wherein they defined a "motor vehicle" to be what is "self-propelled", while addressing the operation of a UTV, not excluded or exempt from within the statute as is the case of a "moped", wherein certain exemptions are declared from "motor vehicle", as the statutes, pursuant to the 2008 legislative amendments, had modified the definition of a moped and excluded them from the definition of motor vehicle. The *Trusdall* case, *supra,* did not concern the issue presented in this appeal.

The Appellant, a Boise resident, was charged with a DUI offense, alleging he operated a "motor vehicle", upon a public street in Boise, Idaho, while under the influence of alcohol, in violation of I.C. §18-8004, alleged as an "excessive". Appellant was operating his "moped" [a stipulated fact with the State], and was then riding his moped in the designated bike lane on Boise Avenue during the early morning hours of August 23, 2015.

The statutory definition of a "moped" was amended during the 2008 Legislative sessions regarding "slow moving, limited speed, motor driven cycles", expressly excluding them from what is a "motor vehicle".

The lower district court relied upon *Trusdall, supra,* and a limited analysis of "self-propelled", failing to address the analysis of the exclusionary provisions created by the 2008 Legislative amendments that apply to mopeds.

Trusdall, supra, dealt solely with a "UTV", a "mode of movement" not listed among the statutory **exceptions** of a motor vehicle; the Legislature has the exclusive right to makes the laws, as the legislative branch, and may declare what **is not a "motor vehicle",** and as we focus upon "statutory definitions", the Legislature specifically **defined a "UTV"** to be a "motor vehicle", notwithstanding the circuitous analysis in *Trusdall,* as the definition begins with I.C. §49-122U(8), stating: "Utility type vehicle or UTV means a utility type vehicle or UTV as defined in section 67-7101, Idaho Code", wherein I.C. § 67-7101 defines a UTV:

(17) "Utility type vehicle" or "UTV" means any recreational **motor vehicle** other than an ATV, motorbike or snowmobile as defined in this section, designed for and capable of travel over designated roads, traveling on four (4) or more tires, maximum width less than seventy-four (74) inches, maximum weight less than two thousand (2,000) pounds, and having a wheelbase of one hundred ten (110) inches or less. A utility type vehicle must have a minimum width of fifty (50) inches, a minimum weight of at least nine hundred (900) pounds or a wheelbase of over sixty-one (61) inches. Utility type vehicle does not include golf carts, vehicles specially designed to carry a disabled person, implements of husbandry as defined in section 49-110(2), Idaho Code, or vehicles otherwise registered under title 49, Idaho Code. A "utility type vehicle" or "UTV" also means a recreational off-highway vehicle or ROV.

It remains of interest why the Court of Appeals found the need to engage in a "defining moment" to conclude a "UTV" is a "motor vehicle" because it is "self-propelled", when the existing statutory language defines it to be a "motor vehicle", and not excluded.

The *Trusdall* court engaged a contextual discussion of the general definition of "motor vehicle", acknowledging the 2008 legislative amendments, but failed to recite the legislative definition of "UTV", which effectively provided their answer for defining a "UTV" as a **"recreational motor vehicle",** nowhere excluded from the definition of "motor vehicle".

The legislature declared a "UTV" to be a **motor vehicle,** and dedicated much effort to describe specific design criteria, including tire contact with the road, the range of their width, weight, and wheelbase, and that definition did not meet any exempt or excluded criteria from the **recreational motor vehicle** definition, such as a golf cart, or a vehicle designed to carry a disabled person, implements of husbandry as defined in I.C. §49-110(2), or vehicles otherwise registered under title 49, Idaho Code. The *Trusdall* UTV *was* a "motor vehicle" under I.C. § 67-7101, and appeared unnecessary to analysis I.C. §49-123(V)(2)(h) to get the needed result.

Trusdall was not asked to address a "moped" in any manner, but *Trusdall*, did recognize there were declared exceptions to "motor vehicle", stating:

"However, the legislature has since amended I.C. §49-123(2)(g), adding the following emphasized language to the statute: Motor vehicle. Every vehicle which is self-propelled, and for the purpose of titling and registration meets federal motor vehicle safety standards as defined in section 49-107, Idaho Code. Motor vehicle does not include vehicles moved solely by human power, electric personal assistive mobility devices and motorized wheelchairs **or other such vehicles that are specifically exempt from titling or registration requirements under title 49, Idaho Code. [3]** (Emphasis ours).

The statutory citation to which *Trusdall* was referring is I.C §49-123(V)(2)(h), not I.C. §49-123(2)(g), as that provision (I.C. §49-123(V)(2)(g)), now refers to a glider kit. Within the statutory language that defines "moped", they are declared exempt from being titled (and apparently not to be registered either), as addressed hereafter.

What motivated the Court of Appeals to avoid the definition of "UTV", that in 2014 was cited as I.C. §49-122U(8), and I.C. § 67-7101(17), having before been defined that way ever since at least 2005, (as I.C. § 67-7101)(15)), and instead chose to engage statutory construction of various components of the "motor vehicle" definition, and explaining the need to avoid "superfluous language", provides no rational authority to apply that analysis to the statutory definition of "moped", as a moped is not the same "means of movement" as that of a "UTV, and more to the point, a moped is excluded from "motor vehicle" because mopeds are not to be titled.

Because of the "statutory definition" of a UTV, and the limited analysis within *Trusdall* to be only that which was before it, why our lower district court would cite the analysis presented in *Trusdall,* confronted only with a "UTV", when "moped" was never the subject, and the "exclusion" of a moped from the definition of motor vehicle was not before the Court of Appeals, presents the justification for the continuation of this appeal to the Idaho Supreme Court.

The "nature of this case" may be considered one of statutory interpretation, presenting a question of law to confirm that a "moped" is excluded from the definition of "motor vehicle" under Idaho law, and because of that, the lower appellate court erred when it determined Appellant was operating a motor vehicle, and was therefore committing a criminal act when he operated his Moped on Boise Avenue in the Bike lane, while having consumed alcohol, essentially no different than a bicyclist riding a bike along Boise Avenue, while having consumed alcohol.

II.

STANDARD OF REVIEW AND APPLICABLE LAW ON STATUTORY INTERPRETATIONS

The standard of review upon an appeal originating in the magistrate court is stated in various authorities, starting with *State v. DeWitt,* 145 Idaho 709, 184 P.3d 215 (App 2008), wherein it held:

> "The Supreme Court has recently altered the standard by which we review a decision of the district court acting in its appellate capacity. Rather than directly reviewing the magistrate court's decision independently of, but with due regard

for, the district court's decision, **we instead directly review the district court's decision.** *Losser v. Bradstreet,* 145 Idaho 670, 183 P.3d 758 (2008). We do examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. Id.; *Nicholls v. Blaser,* 102 Idaho 559, 633 P.2d 1137 (1981)." (Emphasis ours)

Thereafter it was again stated within *State v. Trusdall,* 155 Idaho 965, 318 P.3d 955 (2014):

"The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Pelayo v. Pelayo*, 154 Idaho 855, 858-59, 303 P.3d 214, 217-18 (2013) (quoting *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012)). Thus, the appellate courts do not review the decision of the magistrate court. *Bailey,* 153 Idaho at 529, 284 P.3d at 973. Rather, we are procedurally bound to affirm or reverse the decisions of the district court. *State v. Korn,* 148 Idaho 413, 415 n. 1, 224 P.3d 480, 482 n. 1 (2009)."

Again stated in *Veenstra v. Veenstra & H&W,* 40683 (Court of Appeals, 2/7/2014):

"On review of a decision of the district court, rendered in its appellate capacity, we examine the record from the magistrate court to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Losser v. Bradstreet,* 145 Idaho 670, 672, 183 P.3d 758, 760 (2008); *State v. DeWitt,* 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008). If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Losser,* 145 Idaho at 672, 183 P.3d at 760. Thus, this Court does not directly review the decision of the magistrate court. *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012). Rather, we are procedurally bound to affirm or reverse the decisions of the district court. Id. Over questions of law, including statutory interpretation, we exercise free review. *Fields v. State*, 149 Idaho 399, 400, 234 P.3d 723, 724 (2010); *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Downing v. State*, 136 Idaho 367, 370, 33 P.3d 841, 844 (Ct. App. 2001)."

Again stated in *Peterson v. Peterson,* 156 Idaho 85, 320 P. 3d, 1244 (2014):

"In an appeal from a judgment of the district court acting in its appellate capacity over a case appealed to it from the magistrate court, we review the judgment of the district court. We exercise free review over the issues of law decided by the district court to determine whether it correctly stated and applied the applicable law." *State Dep't of Health and Welfare v. Slane,* 155 Idaho 274, 277, 311 P.3d 286, 289 (2013) (citations omitted)."

Recently stated in *Workman v. Rich*, 44701, (Court of Appeals, August 31, 2017):

"For an appeal from the district court, sitting in its appellate capacity over a case from the magistrate division, this Court's standard of review is the same as expressed by the Idaho Supreme Court. The Supreme Court reviews the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *State v. Korn,* 148 Idaho 413, 415, 224 P.3d 480, 482 (2009). If those findings are so supported and the conclusions follow therefrom, and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. Id. Thus, the appellate courts do not review the decision of the magistrate. *State v. Trusdall,* 155 Idaho 965, 968, 318 P.3d 955, 958 (Ct. App. 2014). Rather, we are procedurally bound to affirm or reverse the decision of the district court. Id."

The standard of review for statutory interpretation remains one of free review, and the court's objective is to give effect to the legislative intent with respect to the interpretation of the Legislature's enactments. Among the more recent analysis is that expressed in *Hoffer v. Shappard*, 160 Idaho 870, 380 P.3d 681 (2016), wherein our Supreme Court reiterated the court's objective regarding statutory interpretation. It states:

"The objective of statutory interpretation is to give effect to legislative intent." *State v. Yzaguirre,* 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). "when interpreting a statute, the Court begins with the literal words of the statute...." *Williams v. Blue Cross of Idaho,* 151 Idaho 515, 521, 260 P.3d 1186, 1192 (2011). ***"If the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect...."*** *Idaho Youth Ranch, Inc. v. Ada Cnty. Bd. of Equalization,* 157 Idaho 180, 184-85, 335 P.3d 25, 29-30 (2014) (internal quotations omitted) (quoting *St. Luke's Reg'l Med. Ctr., Ltd. v. Bd. of Comm'rs of Ada Cnty.,* 146 Idaho 753, 755, 203 P.3d 683, 685 (2009)). ***This Court does not have the authority to modify an unambiguous legislative enactment.*** *Verska v. Saint Alphonsus Reg'l Med. Ctr.,* 151 Idaho 889, 895, 265 P.3d 502, 508 (2011) (quoting *Berry v. Koehler,* 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962))." (Emphasis ours).

In *State v. Lee*, 37213 (Idaho Ct. of Appeals, 6-29-2011) Docket No. 37213, filed June 29, 2011, the Court of Appeals provided reference to the standard of review and objective of

statutory interpretation to always be to give effect to the plain language used in a statute, stating:

> "This Court exercises free review over the application and construction of statutes. *State v. Reyes*, 139 Idaho 502, 505, 80 P.3d 1103, 1106 (Ct. App. 2003). ***Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction.*** *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The language of the statute is to be given its plain, obvious, and rational meaning. *Burnight*, 132 Idaho at 659, 978 P.2d at 219. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation. *Escobar*, 134 Idaho at 389, 3 P.3d at 67. When this Court must engage in statutory construction, ***it has the duty to ascertain the legislative intent and give effect to that intent.*** *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history. *Id.* It is incumbent upon a court to give a statute an interpretation which will not render it a nullity. *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). Constructions of a statute that would lead to an absurd result are disfavored. *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004); *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004). ***The Court will not deal in subtle refinements of the legislation, but will ascertain and give effect to the purpose and intent of the legislature, based on the whole act and every word therein, lending substance and meaning to the provisions.*** *State v. Payne*, 146 Idaho 548, 575, 199 P.3d 123, 150 (2008)." (Emphasis ours).

In *Ada County v. Gibson,* 126 Idaho 854, 893 P. 2d 801 (1995), the appellate court stated:

> "Interpretation of an ordinance, like construction of a statute, is an issue of law. Therefore, this Court exercises free review of the district court's decision. *See State v. Nelson,* 119 Idaho 444, 446, 807 P.2d 1282, 1284 (Ct.App.1991). It is axiomatic that ***the objective in interpreting a statute or ordinance is to derive the intent of the legislative body that adopted the act.*** *Ada County Assessor v. Roman Catholic Diocese of Boise,* 123 Idaho 425, 428, 849 P.2d 98, 101 (1993); *Cox v. Department of Insurance,* 121 Idaho 143, 146, 823 P.2d 177, 180 (Ct.App.1991). ***Any such analysis begins with the literal language of the enactment.*** *Matter of Permit No. 36-7200,* 121 Idaho 819, 823, 828 P.2d 848, 852 (1992); *Local 1494 of Intern. Ass'n of Firefighters v. City of Coeur d'Alene,* 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978); *Messenger v. Burns,* 86 Idaho 26, 29-30, 382 P.2d 913, 915 (1963). ***Where the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction.*** *Ada County v. Roman Catholic Diocese,* 123 Idaho at 428, 849 P.2d at 101; *Matter of Permit No. 36-7200,* 121 Idaho at 823, 828 P.2d at 852; *Sherwood v. Carter,* 119 Idaho 246, 254, 805 P.2d 452, 460 (1991). Where the language of a statute or ordinance is ambiguous, however, the court looks to rules of construction for guidance, *Lawless v. Davis,*

98 Idaho 175, 560 P.2d 497 (1977), and may consider the reasonableness of proposed interpretations. *Umphrey v. Sprinkel,* 106 Idaho 700, 706, 682 P.2d 1247, 1253 (1983). Constructions that would lead to absurd or unreasonably harsh results are disfavored. *Gavica v. Hanson*, 101 Idaho 58, 60, 608 P.2d 861, 863 (1980); *Lawless,* 98 Idaho at 177, 560 P.2d at 499." (Emphasis ours).

In *Wheeler v. Idaho Dept. of Health and Welfare,* 147 Idaho 257, 207 P.3d 988 (2009), the appellate courts again stated:

> "When interpreting a statute, this Court ***must strive to give force and effect to the legislature's intent in passing the statute.*** *Davaz v. Priest River Glass Co., Inc.,* 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994). "***It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole."*** *McLean v. Maverik Country Stores, Inc.,* 142 Idaho 810, 813, 135 P.3d 756, 759 (2006) (citations omitted). "***Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction."*** *State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). However, if the result is "palpably absurd," this Court must engage in statutory construction. Id. ***When engaging in statutory construction, this Court has a "duty to ascertain the legislative intent, and give effect to that intent."*** Id. " ***[T]he Court must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the legislature."*** *Davaz,* 125 Idaho at 336, 870 P.2d at 1295 (internal citation omitted). "[The Court] also must take account of all other matters such as the reasonableness of the proposed interpretations and the policy behind the statute." Id." (Emphasis ours).

The interpretation and application of a statute presents a question of law over which a court will exercise free review. *Grazer v. Jones*, 154 Idaho 58, 63-64, 294 P.3d 184, 189-190 (2013).

III.

SPECIAL REGARD TO CRIMINAL STATUTES

When a criminal statute is found to be constitutionally vague, such as with respect to the interpretation of the statutory language that becomes a specific element of the ***criminal act***, the statute may be constitutionally flawed (see *State v. Lopez*, 98 Idaho 581, 570 P.2d 259 (1976), wherein a statute was held unconstitutionally vague, failing to further define the terms used in the statute, and failing to apprise a defendant what conduct violated the statute. The *Lopez* court focused upon the complaint, and whether it charged a criminal offense and alleged conduct with sufficient particularity that an accused would be informed what conduct constituted a criminal

offense. That court held the complaint defective because it did not describe an offense, and due process requires description of an offense, and the accused must be adequately apprised regarding the elements of the criminal offense.

In *State v. Trusdall*, 155 Idaho 965, 318 P.3d 955 (2014), the Court stated:

> Additionally, if a criminal statute is ambiguous, the rule of lenity applies and the statute must be construed in favor of the accused. *State v. Morrison*, 143 Idaho 459, 461, 147 P.3d 91, 93 (Ct.App.2006). However, where a review of the legislative history and underlying public policy makes the meaning of the statute clear, the rule of lenity will not apply. *State v. Bradshaw,* 155 Idaho 437, 440, 313 P.3d 765, 768 (Ct.App.2013). If the ambiguity remains after examining the text, context, history, and policy of the statute, the interpretive tie between the two or more reasonable readings is resolved in favor of the defendant. Id. at 440-41, 313 P.3d at 768-69.

Since the Idaho Legislature excluded a moped from the titling requirement, thus excluding a moped from the definition of "motor vehicle" in 2008, the element of a "motor vehicle" in this criminal case is missing from the factual allegations filed against Appellant, as the State has stipulated Appellant was riding a moped, and by Idaho law, a moped is not a "motor vehicle".

A fundamental element in Idaho's DUI statute is the element the accused must be involved with the operation (to drive or be in actual physical control), of a *"motor vehicle"*, while under the influence of alcohol. As this appellate court is infinitely familiar, the Idaho Jury Instruction states:

> **Idaho Jury Instructions Criminal Instructions**
> **SECTION 1000. DRIVING WHILE UNDER THE INFLUENCE OR WITHOUT PRIVILEGES**
> **ICJI 1000. DRIVING WHILE UNDER THE INFLUENCE**
> INSTRUCTION NO_____
> In order for the defendant to be guilty of driving under the Influence the state must prove each of the following:
> 1. On or about [date]
> 2. in the state of Idaho
> 3. the defendant [name], [drove] [or] [was in actual physical control of]
> 4. a [commercial] ***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 (a combination of) (alcohol) (or) (drugs) (or) (an intoxicating substance).] (Emphasis added)

There is no definition of "motor vehicle" in Title 18, Idaho Code, and the only definition

is found within Title 49, Idaho Code. As the Court in *State* v. *Knott*, 132 Idaho 476, 974 P.2d 1 105 (1999) then specifically observed:

> "There is a close interaction between the Title 49 statutes and similar statutory provisions in Title 18, particularly the DUI provision found in section 18-8004. The statutes relate to the same subject matter and on occasions have been addressed by the legislature at the same time." 132 Idaho at 479, 974 P.2d at 1008.

After further observing that it was in 1984 that the DUI statute was transferred from Title 49 to Title 18, the Court then concluded that when identical terms are used in both sections they should be construed by reference to the common definitions provided in the Code. It stated:

> "Idaho Code § 73-113 [now I.C. § 73-113(3)] indicates that words and phrases used in the Idaho Code are to be "construed according to the context and approved usage of the language." Given that identical terms are used in the statutes, and the legislature amended the relevant phrase to statutes in both Title 49 and Title 18 in the same bill after the DUI statute was transferred to the criminal code, the "context and approved usage" of the relevant phrase indicates that its meaning is the same in both titles." 132 Idaho at 479, 974 P.2d at 1008 (bracketed reference to change in statutory citation added).

Therefore, a court is required to go to Title 49, and if "different opinions" exist as to what a "motor vehicle" is defined to be, that raises the constitutionality of the DUI laws, when the essential element of the crime (a "motor vehicle") is being materially disregarded, as every individual accused of criminal activity must be adequately apprised what conduct constitutes the criminal act before being charged, and that requires a concise definition as to what a "motor vehicle" is, as it is promulgated by the legislature, and correctly enforced by the courts.

This Appellant relied entirely upon a judicial determination that had been rendered by an Ada County Magistrate that declared Idaho's 2008 Legislative amendments specifically defined "moped" to be ***excluded*** and ***exempted*** from the definition of "motor vehicle". For prosecutorial agencies to dispute legislative intent and embrace conflicting judicial interpretations of the Statutory definition, creates inevitable concerns Idaho's DUI Statute may be unconstitutionally flawed, if inconsistent definitions as to various "modes of movement" are allowed to exist, when some are specifically declared not to be motor vehicles. To allow this inconsistency renders a fundamental element of the crime of DUI to be vague and ambiguous, if different courts in the same judicial district define "motor vehicle" differently. That consequence serves to benefit this Appellant, due to the **Rule of Lenity** in criminal cases, as it is also stated in *State v. Alley,* 155

Idaho 972, 318 P.3d 962 (Ct App 2014), that:

> "Additionally, if a criminal statute is ambiguous, the rule of lenity applies and the statute must be construed in favor of the accused. *State v. Dewey,* 131 Idaho 846, 848, 965 P.2d 206, 208 (Ct.App.1998); *State v. Martinez,* 126 Idaho 801, 803, 891 P.2d 1061, 1063 (Ct.App.1995). However, where a review of the legislative history makes the meaning of the statute clear, the rule of lenity will not be applied. *State v. Bradshaw,* 155 Idaho 437, 440, 313 P.3d 765, 768 (Ct.App.2013); *State v. Jones,* 151 Idaho 943, 947, 265 P.3d 1155, 1159 (Ct.App.2011). ***The rule of lenity applies only when grievous ambiguity or uncertainty in a criminal statute that is not resolved by looking at the text, context, legislative history, or underlying policy of the statute allows for multiple reasonable constructions.*** *Bradshaw,* 155 Idaho at 441, 313 P.3d at 769." (Emphasis ours).

As also recently stated in *State v. Olsen,* 161 Idaho 385, 386 P.3d 908 (2016), the Supreme Court held that:

> "Statutory interpretation is a question of law over which this Court exercises free review. ***'The rule of lenity states that criminal statutes must be strictly construed in favor of defendants.'"*** *State v. Anderson,* 145 Idaho 99, 103, 175 P.3d 788, 792 (2008)." (Emphasis ours).

It would therefore appear that the "Rule of Lenity" is an element of statutory construction, and not to be viewed as an issue that is being raised within the appeal.

IV.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BELOW

Appellant was stopped by a Boise City Police Officer because of a tail light failure. Appellant was operating what the Officer then described to be a "small motorcycle" in the bicycle lane, along Boise Avenue, on August 23, 2015, at 2:37 a.m.. The officer charged Appellant with two citations, No. 1454043, alleging the act of driving a ***motor vehicle*** while under the influence of alcohol (second offense), and a second Citation, containing two violations, No. 1454044, alleging Appellant was operating a ***motor vehicle*** with fictitious display, and Failure to carry or show proof of liability insurance while operating a ***motor vehicle***.

An initial plea of not guilty was entered; discovery exchanged, a motion to dismiss filed, though deemed untimely by the lower court, despite being perceived by Defense counsel as a jurisdictional issue under Rule 12(b)(2), I.C.R., capable of being raised any time during the proceedings, and following that denial, briefing ensued in the course of addressing what

instructions would be given to the jury.

Defense counsel believed dismissal was the only appropriate disposition, as Appellant was operating his "moped", not a "motor vehicle", defined by Idaho law, and from that definition, no criminal act had taken place, believing the lower court had no statutory authority to require Appellant to stand trial on a factually and legally flawed charge.

After the lower court held the motion untimely, declaring it not a jurisdictional issue, the controversy centered upon jury instructions, creating a debate with the magistrate court, serving to posture the case for eventual appeal over jury instructions, as the magistrate was unwilling to dismiss the matter, or properly instruct the jury as to the current law in Idaho, as expressly declared by the 2008 Legislature.

On the morning of the scheduled jury trial, the court and counsel met in chambers to discuss the controversy, and concurred the dispute centered on the act of *operating* a "moped" on the streets of Boise, and whether that constituted the *operation* of a "*motor vehicle*", for purposes of the application of Idaho's DUI laws. Through that discussion, the parties acquiesced in structuring the issue for appellate review in a manner that would avoid a trial and the dispute over the instructions to be given to the jury, and to instead have the appellate court determine the Legislative Intent when the Idaho Legislature declared a "moped" is excluded and exempted from the definition of "motor vehicle", under the 2008 Legislative amendments, the effect of which defined a "moped" to be a "slow moving, limited speed, motor driven cycle, not to be titled, and by virtue of the Senate Committee minutes of the 2008 Legislature, not to be registered, and expressly excluded from what constitutes a "motor vehicle" by the exclusionary language, using the plain and ordinary meaning of the words in defining a "Motor Vehicle", identifying several exclusions from the definition of what constitutes a "motor vehicle" in their statutory interpretation, specifically confirmed in various locations within the 2008 legislative amendments.

These statutory amendments were not included as part of the record in the appeal to the district court, and so a motion for the district court to take judicial notice of those statutory amendments was filed and that motion was granted, as any matter on which the court of original jurisdiction could have taken judicial notice will be considered b the appellate court. *City of Lewiston* v. *Frary*, 91 Idaho 322,325- 27, 420 P.2d 805, 808-10 (1966); I.C. § 9-101; Rule 201, I.R.E.; *See also, Crawford* v. *Department of Correction*, 133 Idaho'633, 636 n. 1, 991 P.2d 358,

361 n. 1 (1999) ("We take judicial notice of House Bill 73, which was not submitted as part of the record on appeal, but is contained in the public records maintained by the Office of Legislative Services located in the State Capitol Building. I.R.E. 201(f); *Trautman* v. *Hill*, 116 Idaho 337,340,775 P.2d 651,654 (Ct.App. 1989); *State* v. *Howell*, 122 Idaho 209, [213], 832 P.2d 1144, [1148] (Ct.App. 1992)." (bracketed references added)). For the convenience of this Appellate court, Appellant has attached to an Appendix to this Opening Brief those specific amendments, and to the extent preferred, to then file a motion with the Idaho Supreme Court to similarly take Judicial Notice of those 2008 Legislative amendments to the motor vehicle statutes.

The Parties elected to advance this case upon appellate review through a conditional plea, and formulated their stipulation of facts, eliminating need for a jury trial, and pursuant to those discussions, the magistrate court, the Boise City Attorney, the Appellant and his defense counsel formulated the factual presentation entitled STIPULATION TO FACTS, filed June 28, 2016, entered the conditional plea of guilty the morning of June 28, 2016, with disposition entered September 30, 2016, from which the Appeal was taken to the District Court, filed October 4, 2016, and entry of the Stay of Execution filed October 14, 2016.

The district court, Honorable Gerald F. Schroeder presiding, affirmed the magistrate, concluding that the analysis contained within *State v. Trusdall*, 155 Idaho 965, 318 P.3d 955 (2014), applied to a moped and would control the disposition in this case. The district court, relying upon *Trusdall,* concluded that:

> "The defendant's moped is a motor vehicle for purpose of his DUI conviction. It is a self-propelled vehicle, as has been stipulated. It is not a vehicle that is moved solely by human power, like a bicycle. It is not a vehicle such as a motorized wheelchair or "other electric assistive device used by disabled individuals, which are specifically excluded from the definition of a motor vehicle."

What the district court failed to undertake is the application of the entire expressed language contained in the statutory definition of "motor vehicle", as identified in I.C §49-123(V)(2)(h), which states:

> "(h) Motor vehicle. Every vehicle which is self-propelled, and for the purpose of titling and registration meets federal motor vehicle safety standards as defined in section 49-107, Idaho Code. **Motor vehicle does not include vehicles** moved solely by human power, electric personal assistive mobility devices and motorized wheelchairs **or other such vehicles that are specifically exempt from titling or registration requirements under title 49, Idaho Code.** (Emphasis ours)

V.

STIPULATIED FACTS

The district court recited the facts stipulated to by the State and Appellant in the intermediate appeal. Appellant provided the magistrate and Respondent photographic depiction of the physical features of the moped, available to the intermediate court for appellate review. This moped was personally constructed by Appellant from various salvaged small cycle parts discarded by cycle shops. The photographs illustrate the construction, mechanical composition, method of movement, pedals to start, operate, sprocket design for limited speed, small engine displacement (under 50cc), achieving the literal criteria defining a "moped" under Idaho law.

From those stipulated facts, listing those that are essential to this appeal, are the following:

1. On August 23rd, 2015, at 2:37 in the morning, the Defendant, Chad C. McKie, date of [redacted] was in actual physical control of and was driving a vehicle, in the bicycle lane, westbound on Boise Ave. near Beacon St. in Boise, Ada County, Idaho, which is a publicly maintained roadway and open to the public.
2. As he drove he was wobbling in his lane and the tail light of the vehicle was not functioning properly.
3. A traffic stop was initiated by Officer Adam Schloegel of the Boise Police Department. Officer Schloegel observed what he perceived to be signs of intoxication exhibited by the Defendant.
4. The vehicle driven by the Defendant is a self-propelled vehicle as defined by Idaho Code 49-123(h).
5. The vehicle driven by the Defendant is a moped as defined by Idaho Code 49-114(M)(9). It is a limited-speed motor-driven cycle having both motorized and pedal propulsion that is not capable of propelling the vehicle at a speed in excess of thirty (30) miles per hour on level ground, with two (2) wheels in contact with the ground during operation. Its internal combustion engine does not exceed fifty (50) cubic centimeters in displacement, and its power drive system functions directly or automatically without clutching or shifting by the operator after the drive system is engaged.
6. The moped driven by the Defendant was neither titled nor registered.

The Statutory amendments stemming from the 2008 legislation identified in I.C. §49-114(M)(9), established the exclusionary language from which a moped qualifies under I.C §49-123(V)(2)(h), excluded from "motor vehicle", as a moped is **not titled**, and provides **no registration requirement**, as discussed herein.

The legislature determines what mode of movement is to be titled and registered, and the legislature made clear mopeds are not "titled" and the Senate Committee, on March 8, 2008,

declared they are not "registered", as a "moped" is excluded and exempted by the effects of the 2008 Legislative amendments that a moped is not "titled", and not be "registered", under Idaho law.

VI.

ISSUE PRESENTED ON APPEAL:

Whether the District Court erred when declaring a "moped" to be a "motor vehicle" for purposes of the DUI laws, disregarding the amendments made by the Idaho Legislature in 2008 to Title 49, Statutes of the State of Idaho, exempting a "moped" from titling requirements, and excluding that mode of movement from a "motor vehicle" under Idaho law.

VII.

ARGUMENT

Whether the District Court erred when declaring a "moped" to be a "motor vehicle" for purposes of the DUI laws, disregarding the amendments made by the Idaho Legislature in 2008 to Title 49, Statutes of the State of Idaho, exempting a "moped" from titling requirements, and excluding that mode of movement from a "motor vehicle" under Idaho law.

(a). WHAT CONSTITUTES A "MOTOR VEHICLE" UNDER IDAHO LAW

The lower district court failed to apply the exclusionary language contained within the Idaho statutes that specifically relates to "mopeds", an issue not addressed in *Trusdall, supra,* as the subject of "moped" and its statutory exemption was not the issue in *Trusdall*, and why *Trusdall* found need to resort to "self-propelled" when a "UTV" is defined to be a motor vehicle (I. C. §67-7101(17)) is, in itself, an interesting element to ponder, as a UTV, being a motor vehicle by specific definition, is not exempted or excluded by the language in I. C. §67-7101(17), statutorily defined in I.C. §67-7101(17), in the following manner:

> (17) "Utility type vehicle" or "UTV" means any ***recreational motor vehicle*** other than an ATV, motorbike or snowmobile as defined in this section, designed for and capable of travel over designated roads, traveling on four (4) or more tires, maximum width less than seventy-four (74) inches, maximum weight less than two thousand (2,000) pounds, and having a wheelbase of one hundred ten (110) inches or less. A utility type vehicle must have a minimum width of fifty (50) inches, a minimum weight of at least nine hundred (900) pounds or a wheelbase of over sixty-one (61) inches. **Utility type vehicle does not include** golf carts, vehicles specially designed to carry a disabled person, implements of

husbandry as defined in section 49-110(2), Idaho Code, or vehicles otherwise registered under title 49, Idaho Code. A "utility type vehicle" or "UTV" also means a recreational off-highway vehicle or ROV. (Emphasis ours).

This appeal should be resolved by application of the Legislature's definition of what is excluded from "motor vehicle", the essence of which the district court declined to address in its analysis. The 2008 Legislative amendments employed specific language and careful consistency throughout their various definitions of various modes of movement, expressing consistently by the exclusion of "mopeds" from "motor vehicle", since they are non-titled.

The classification of a "motor vehicle", when reviewing these comprehensive statutory enactments within the series of Legislative amendments in 2008 to motorcycles, motorbikes etc., which demonstrates the painful effort the legislature took when declaring specific *exclusions* to the definition of "motor vehicle", and maintaining consistency throughout those definitions, is what becomes *relevant* to this case, as Appellant was operating a mode of movement within this ***exclusionary language*** from what a "Motor Vehicle" is defined to be under Idaho law.

In re-defining "motor vehicle", in 2008 the Legislature enacted specific amendments to I.C. §49-123(V), with full knowledge of the DUI criminal statute identified in I.C. §18-8004, to then include part (2)(h), thereby adding specific ***exclusionary aspects to the definition of motor vehicle***, so as to confirm *certain vehicles* [modes of movement]are *specifically exempted*, from what is ***defined to be a motor vehicle,*** which I.C. §49-123(V)(2)(h) therein states:

> "Motor vehicle" ***does not include vehicles*** that moved solely by human power, electric personal assistive mobility devices, motorized wheelchairs, ***or other such vehicles that are specifically exempt from titling "or" registration requirements under Title 49, Idaho Code.*** (Emphasis ours.).

I.C. §49-123(V)(2)(h), highlighted for the convenience, provides as follows:

> 49-123. DEFINITIONS -- V.
> (1).....
> ***(2) "Vehicle" means:***
> *(h)* ***Motor vehicle.*** Every vehicle which is self-propelled, and for the purpose of titling and registration meets federal motor vehicle safety standards as defined in section 49-107, Idaho Code. ***Motor vehicle does not include vehicles moved solely by human power, electric personal assistive mobility devices and motorized wheelchairs OR OTHER SUCH VEHICLES THAT ARE SPECIFICALLY EXEMPT FROM TITLING OR REGISTRATION REQUIREMENTS UNDER TITLE 49, IDAHO CODE.*** (Emphasis ours)

With respect to the exemption of "mopeds", I.C. §49-114, through the inclusion of the

amendment, Sub-Part (M)(9), specifically ***excludes*** "mopeds" from ***titling requirements***, so they are among those vehicles that are ***exempted*** by I.C. §49-123(V)(2)(h), and the relevant portion of this exclusionary provision that incorporates the titling exemption, is I.C. §49-114(M)(9), with relevant portion highlighted for convenience, states the following:

> 49-114. DEFINITIONS -- ***M.***
>
> *(9) **"Moped" means a limited-speed MOTOR-DRIVEN CYCLE having: (a) Both motorized and pedal propulsion that is not capable of propelling the vehicle at a speed in excess of thirty (30) miles per hour on level ground, whether two (2) or three (3) wheels are in contact with the ground during operation. If an internal combustion engine is used, the displacement shall not exceed fifty (50) cubic centimeters and the moped shall have a power drive system that functions directly or automatically without clutching or shifting by the operator after the drive system is engaged; or***
>
> *(b) Two (2) wheels or three (3) wheels with no pedals, which is powered solely by electrical energy, has an automatic transmission, a motor which produces less than two (2) gross brake horsepower, is capable of propelling the device at a maximum speed of not more than thirty (30) miles per hour on level ground and as originally manufactured, meets federal motor vehicle safety standards for motor-driven cycles. **A MOPED IS NOT REQUIRED TO BE TITLED AND NO MOTORCYCLE ENDORSEMENT IS REQUIRED FOR ITS OPERATOR.***

A moped is defined differently from other wheeled transport modes, excluded from other related definitions because other modes are either titled or defined to be a "motor vehicle", as highlighted and identified below:

> (10) "Motorbike" means a vehicle as defined in section 67-7101, Idaho Code. Such vehicle SHALL BE TITLED and MAY BE APPROVED FOR MOTORCYCLE REGISTRATION pursuant to section 49-402, Idaho Code, upon certification by the owner of the installation and use of conversion components that make the motorbike COMPLIANT WITH federal motor vehicle safety standards.
>
> (11) "Motorcycle" means every MOTOR VEHICLE having a seat or saddle for the use of the rider, designed to travel on not more than three (3) wheels in contact with the ground or designed to travel on two (2) wheels in contact with the ground which is modified by the addition of two (2) stabilizing wheels on the rear of the motor vehicle, that meets the federal motor vehicle safety standards as originally designed, and includes a converted motorbike, ***BUT DOES NOT INCLUDE A motor-driven cycle, a motorbike, a tractor or a MOPED.***
>
> (12) .....
>
> (13) ***"MOTOR-DRIVEN CYCLE"*** means a ***CYCLE*** with a motor that produces five (5) brake horsepower or less as ***originally manufactured that meets***

federal motor vehicle safety standards as originally designed, AND DOES NOT INCLUDE MOPEDS. Such vehicle shall be titled and a motorcycle endorsement is required for its operation.

(14).....

(15) "Motorized wheelchair" means a ***MOTOR VEHICLE*** with a speed not in excess of eight (8) miles per hour, designed for and used by a person with a disability.

(16).....

(17) "Motor vehicle." (See "Vehicle," section 49-123, Idaho Code)

(18) "Motor vehicle liability policy" means an owner's or operator's policy of liability insurance, certified as provided in section 49-1210, Idaho Code, as proof of financial responsibility, and issued by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

(19) "Motor vehicle record" means any record that pertains to a motor vehicle registration, motor vehicle title or identification documents or other similar credentials issued by the department or other state or local agency. (All emphasis ours).

To assist in this statutory analysis is the prior Idaho Supreme Court Decision in 2006, whereby our appellate court addressed the concept of ***moped,*** and specifically recognized it ***had exempt status in California,*** as identified in a California case cited within the Idaho's Decision rendered in 2006, while discussing what is and ***what is not*** a motor vehicle. This issue was addressed in *Armstrong v. Farmers Ins. Co. of Idaho,* 143 Idaho 135, 139 P.3d 737 (May 25, 2006), wherein the Idaho Supreme Court stated:

"At issue in *Galvin* was a provision excluding coverage for injuries sustained by a person occupying a ***motor vehicle*** owned by the insured but not covered in the policy. A father had obtained coverage for his 1979 Dodge, ***but not his moped***, and his son was injured ***while riding the moped.*** The father contended that the exclusion for other owned ***motor vehicles*** did not apply to the ***moped*** *because it was* ***not a motor vehicle.*** *The Galvin court* ***agreed,*** *relying upon the facts that* ***mopeds were designed to be propelled by pedaling in addition to their motors; that they were exempt from registration under the Vehicle Code;*** *and that while motorcycles were defined as being motor vehicles under the Vehicle Code,* ***mopeds were not.*** *It stated that while a* ***motorcycle*** *had been* ***held to be motor vehicle*** *under a similar exclusionary clause, "the implied analogy between mopeds and motorcycles is tenuous and* ***cannot be relied upon as the basis for finding that a moped is a motor vehicle."*** *170 Cal.App.3d at 1022, 216 Cal.Rptr. at 846.* ***The instant case involves a motorcycle, not a moped. A motorcycle is defined as a motor vehicle under the Idaho motor vehicle code. I.C. § 49-114(10)."*** (Now I.C. § 49-114(m)(11), after 2008. (Emphasis ours)

The current statutory citation for *motorcycle,* after the 2008 Legislative amendments, is

found in I.C. §49-114(M)(11), ***and excludes mopeds from the definition of motorcycle***. The statute, defining motorcycles, now provides as follows:

> (11) "Motorcycle" means every ***motor vehicle*** having a seat or saddle for the use of the rider, designed to travel on not more than three (3) wheels in contact with the ground or designed to travel on two (2) wheels in contact with the ground which is modified by the addition of two (2) stabilizing wheels on the rear of the motor vehicle, that meets the federal motor vehicle safety standards as originally designed, and includes a converted motorbike, ***BUT DOES NOT INCLUDE*** a motor-driven cycle, a motorbike, a tractor or a ***MOPED.*** (Emphasis ours)

The discussion within *Armstrong, supra,* focused upon the definition of *"motorcycle", "motor vehicle"*, and California's *exclusion of a "moped"* as a moped was defined under California law to be excluded from "motor vehicle". What Idaho's definition of motorcycle back in 2006 was then identified in I.C. §49-114(10), and now identified in I.C. §49-114(M)(11)). When the Idaho Legislature took the initiative in 2008 to amend definitions of various vehicles and modes of movement, it embraced aspects of California law, and Idaho's analysis in *Armstrong, supra* would now indicate that Idaho's Legislature embraced the California definition(s), and Idaho expressly ***excluded mopeds from "motor vehicle" and a moped no longer to be regarded a motor vehicle under Idaho law.*** To illustrate that point rather precisely, the legislature undertook to define a *moped separately* in (M)(9), referred to as a "limited speed, motor driven cycle", not titled, having no motorcycle endorsement requirements, and excluded from "motor vehicles", "motorcycle" and "motorbike" by specifically declaring they are not titled.

These statutory exemptions cannot be ignored or disregarded by the courts, and ***must be taken into account*** in the process of statutory interpretation, as it was not "superfluous" language when specifically ***exempting moped from motor vehicle because they are not titled cycles***.

"Mopeds" are very different from other two wheeled modes of movement, and quite to the contrary, are never used for off road recreational activities, being grossly underpowered and travel slowly on city streets.

Mopeds have an engine 50cc's or less, not "geared" for high speed, moving slower that 30 mph, and typically has a slip clutch, lever activated or foot activated, or automatically activated in conjunction with the rotation of the wheel-engine revolution, and the engine is

designed for a pedal/chain start so you can start the engine while riding and pedaling the bike. The typical speed that can be achieved on a moped "motorized bike" is usually between 20 and 25 mph, as it has very limited speed potential because of the very small cylinder displacement, and the limited horse power available, together with the weight of the bike itself and the weight of the rider, all of which weight friction limits the forward movement capabilities. The chain drive mechanism typically requires a sprocket reduction on the rear wheel assembly, and during prior test runs conducted with this moped, while being operated by this Defendant, his maximum speed was less than 25 mph, even on a slope, as the weight of the rider, the friction and drag caused through the moving parts from the limited engine output, as it transitions to the chain, to the sprocket, and to the friction of the road surface against the tire, consumes all the torque and power output generated.

(b). PRIOR JUDICIAL DETERMINATION OF "MOPEDS" UNDER IDAHO'S MOTOR VEHICLE LAWS

The operation of a moped, in Ada County, was decided in another case involving the question whether a driver's license was required to operate a moped.

That issue was addressed in the criminal case entitled *State of Idaho v. Elijah c. Udeochu*, Case NO. CR-MD-2011-0005485 (4th District Court, Ada County, 2011). The focus in that case was the definition of "Motor Vehicle", given the recent amendments in 2008.

That case brought forth a decision from Ada County Magistrate, the Honorable Michael J. Oths, wherein that Magistrate declared mopeds are specifically exempt from "titling" requirements, and Idaho law specifically states vehicles specifically exempt from *titling or registering requirements, and are* ***not*** *"motor vehicles"*, as defined within Title 49, *Idaho Code.*

The court went on to reason that a statutory requirement in Idaho, requiring an operator of a ***"Motor Vehicle"*** to have a driver's license, is an issue governed by Title 49, Chapter 3, and if the mode of transportation (moped) is not a "motor vehicle", then a driver's license is not required for its operation. The requirement for a "Motor Vehicle" Driver's License is contained in I.C. §49-301, which provides:

> No person, except those expressly exempted by the provisions of this chapter, shall ***drive any motor vehicle upon a highway*** unless the person has a current and valid Idaho driver's license.

Judge Oths concluded in his Order that:

> "a moped is specifically exempt from titling requirements, that vehicles that are specifically exempt from titling are not 'motor vehicles,' and that a moped is thus not a motor vehicle. Therefore, a driver's license is not required to operate a moped on a public highway, nor is liability insurance required. A lingering question remains as to whether it is possible to legally operate a moped on a public highway. Trying to read all of the statutes in concert is a daunting task, but it appears there is a way to legally ride a moped on a public highway. Idaho Code §49-402(10) prohibits registration of a vehicle for use on public highways unless it meets federal safety standards. Presumably if a moped were to meet the federal standards it could be registered and/or used on a public highway. Nothing would require the vehicle to be titled, nor would the operator need to be licensed . . . Should this matter proceed to trial, jury instructions consistent with the above opinion would be given." Order Re: Defendant's Motion to Dismiss, at 4-5.

It was that very Order rendered in the *Udeochu* case Appellant relied when constructing his moped, pursuant to the statutory definitions within Idaho's 2008 Legislative amendments, and rode that moped rather than operate a "motor vehicle", when he might consume any alcoholic beverages, following his prior experience and prior encounter with the law.

Appellant "slow-moving", "limited-speed", "motor-driven cycle" was constructed precisely as described within the statute to be a "moped", having blended parts of an old discarded bicycle frame with parts of a Honda Trail bike frame, incorporating into it the component parts of a bike peddling mechanism and a small engine, with the required starting and operation process. The engine was a small 49 cc single cylinder gas engine, following the criteria in the statute, less than the 50 cc maximum size. This bike-motor combination, being a "moped", was comparable to the conversion kits available through several bike shops in the Boise Valley. These "kits" are referenced to as "motorized bikes", which commercial kits are available on the market, featuring the small engine, usually a 41cc to a 49 cc, and called "Motor Bicycle", and these kits are called a "Motorized Bike Gas Engine Assembly Kit".

Quite often, a moped is referred to as a "motorized bicycle", and although that is physically descriptive, the Legislature used the name "moped" when the provisions of I.C. § 49-114(M)(9) (a)&(b) were enacted, and the exclusions announced in I.C. §49-123(V)(2)(h), defining what is a Motor vehicle, and what is not a motor vehicle.

The ***exception*** to "motor vehicle", is expressed in I.C. § 49-123(V)(2)(h):

> "(h) ..... **Motor vehicle <u>does not include vehicles</u> moved solely by human power, electric personal assistive mobility devices and motorized wheelchairs <u>or other such vehicles that are specifically exempt from titling or registration</u>**

requirements under title 49, Idaho Code." (Emphasis ours).

Appellant's case, just like the *Udeochu* case, involves a "moped", by legal definition, precisely constructed as defined and described within the statute, and in *Udeochu,* that Magistrate declared "mopeds" are not "motor vehicles", as a matter of Idaho law, and could not subject an operator to criminal acts associated with operation of "motor vehicles".

The district court, in ruling upon Appellant's appeal, should have applied the exclusionary language, and not stop at the words "self-propelled", as courts are bound to accept the plain, ordinary, and unambiguous language used by the Legislature in their statutory definitions, to and including exclusions and exceptions, and a vehicle specifically "excluded" from the definition of "motor vehicle", as statutorily declared, is binding on the courts, and our Lower District Court was in error when deciding to call a "moped" a "motor vehicle", merely because it had a "self-propelled" component by virtue of a small single cylinder 49cc engine, having very limited speed, and clearly not a motor vehicle as the courts have declared UTVs, ATVs, motorcycles, motorbikes, and snowmobiles, etc. to be. Despite being modestly and somewhat self-propelled, a moped is ***specifically exempt from titling or registration requirements under title 49, Idaho Code.***

For a district court to affirm a magistrate's finding, contrary to the exclusionary language within I.C. §49-123(V)(2)(h), and applies to mopeds by the defining words in I.C. § 49-114(M)(9) (a)&(b), constitutes fundamental error. The Legislative enactments require all courts to apply the entire exclusionary statutory language, and given the plain and ordinary meaning expressed thereby, when specific language is used to expressly state what a motor vehicle is defined ***not to be,*** the exclusionary effects require a lower court to apply all language, so it is not left to be "superfluous", and that requires the application of all exceptions to the definition, which this 2008 Legislature clearly and unambiguously undertook to accomplish, expressly excluding various forms of slow moving, limited speed, motor driven cycles, irrespective of being "somewhat" "self-propelled" when declaring them to be exempt from titling and/or registration mandates, as a "moped", is not to be titled/registered, and declared excluded.

(c). THE LAW ON "MOPEDS" and "MOTOR VEHICLES"

The fundamental issue before this court is **not** whether a "moped" has a component in being somewhat "self-propelled", but rather the recognition a "moped" has been defined as a slow

moving, limited speed, motor driven cycle excluded from the definition of "motor vehicle" because it is exempted from titling through the Legislative amendments of 2008.

As stated previously, the Lower Court embraced the *Trusdall* limited analysis of "self-propelling" and that brought an end to the conversation. UTV's, the only subject discussed in that case, is not excluded from "motor vehicle", and more accurately stated, a UTV was statutorily defined to be a ***recreational motor vehicle.*** This abbreviated focus of our lower court has served to perpetuate this controversy, as UTVs are different from mopeds, not excluded from titling requirements.

A UTV has an engine displacement greater than 500 cc's, exceeding more than ten (10) times allowable cc's for a moped, potentially able to attain high speeds, well exceeding 30 mph. Without belaboring the point, a UTV is not a "moped", and a UTV is defined to be a "motor vehicle" within I. C. §67-7101(17), so our district court's reference to *Trusdall, supra,* lacks the analysis of the statutory exclusions of "mopeds", which clearly are not UTVs, ATVs, a motorcycle, a motorbike, or a snowmobile, and the plain and ordinary language used to specifically exclude mopeds from titling requirements excludes mopeds from "motor vehicles", and the statutes are unambiguous from the legislative effects adopted through the 2008 Legislative amendments.

(d). STATUTORY INTREPRETATION AND CASE HISTORY

In prior years, the Idaho Supreme Court recognized that Title 18, Chapter 80, (Statutes of the State of Idaho) *did not have any definition* of the phrase "motor vehicle" with which to use in the application of I.C. § 18-8004, Idaho's DUI laws. Therefore, in *State v. Carpenter*, 113 Idaho 882, 749 P. 2d 501 (1988) and *State v. Lopez*, 133 Idaho 378, 987 P. 2d 290 (1999), the Appellate Courts relied upon Title 49 of the Idaho statutes, where they identified the only established definition for "motor vehicle", and the Supreme Court used that definition for Title 18, Chapter 80 criminal matters. The appellate courts relied upon Title 49 then, and that remains the case thereafter, and when the amendments were made to Title 49 by the Legislature in 2008, those amendments affected the only definition of the phrase "motor vehicle", and within those 2008 amendments, certain exclusions were then adopted by the Legislature, the effect of which has expressly served to exclude certain modes of movement from the definition of "motor vehicle".

Thusly, *Carpenter and Barnes* established the law as to where Courts go to find out what the Legislature has chosen to define "motor vehicle" to be, and it remains true today the only

definition to be applied to Title 18 is that as it is expressed within Title 49, and that constitutes the definition of what is, and what is not, a "Motor Vehicle" for application to Idaho law, including Title 18, Statutes of the State of Idaho. All Idaho lower courts must accept the Title 49 definition, and must apply the exclusionary language the Legislature has chosen to declare therein.

Additionally as it was stated in *State v. Knott*, 132 Idaho 476, 974 P.2d 1105 (1999):

> "There is a close interaction between the Title 49 statutes and similar statutory provisions in Title 18, particularly the DUI provision found in section 18-8004. The statutes relate to the same subject matter and on occasions have been addressed by the legislature at the same time. 132 Idaho at 479, 974 P.2d at 1008".

It was in 1984 that the DUI statute was transferred from Title 49 to Title 18, and the Court concluded that when identical terms are used in both sections, they should be construed by reference to the common definitions provided in the Code:

> Idaho Code § 73-113 [now I.C. § 73-113(3)] indicates that words and phrases used in the Idaho Code are to be "construed according to the context and approved usage of the language." Given that identical terms are used in the statutes, and the legislature amended the relevant phrase to statutes in both Title 49 and Title 18 in the same bill after the DUI statute was transferred to the criminal code, the "context and approved usage" of the relevant phrase indicates that its meaning is the same in both titles. 132 Idaho at 479, 974 P.2d at 1008 (bracketed reference to change in statutory citation added).

The 2008 statutory amendments distinguished various vehicles and modes of movement, and particularly in the category of "titled" vehicles and modes of movement, a moped is no longer to be titled, and was withdrawn from what was a "motor vehicle". After 2008, a "moped" is neither a "motorcycle" nor a "motor bike", as they also are defined separately. A motorcycle and a motorbike are "titled" and "registered" vehicles, while mopeds are <u>not</u> titled, and according to the Senate Transportation Committee, mopeds were <u>not</u> thereafter intended to be registered, according to their Senate Minutes in 2008. Mopeds were specifically excluded because they were considered "slow moving, limited speed, motor driven cycles", with a motor displacement <u>under</u> 50 cc in size, unable to attain 30 mph, has pedals to start and capable of being operated solely with those pedals (thereby human driven) and has the limited assistance of the small motor/engine (electrical or internal combustion) that has insignificant power output.

The 2008 Statutory Amendments should be held to control this controversy, and it was within the Legislature's exclusive right (as the legislative branch of government) to adopt

exclusions and exemptions to their definition of "motor vehicle", and the courts are bound to enforce what the Legislature adopted in 2008, and our Lower Courts are bound to give meaning and application of the Legislative branch exclusions and exceptions, as they were not meant to be or become superfluous amendments.

I.C. §49-123(V)(2)(h) adopted ***exclusions*** to "motor vehicle", and I.C. §49-114(M)(9)(b) identified "moped ***among those exclusions*** by specifically exempting them from "titling or registration" under I.C. §49-114(M)(9)(b), and "specifically authorized" their operation on Idaho roads by the language in (M)(9)(b), authorizing the "operator" of a "moped" to "operate" it "without a motorcycle endorsement", as a "moped" is not a motorcycle, as then being defined.

On March 6, 2008, the Senate Transportation Committee minutes indicated ***mopeds will not be required to be registered because people use them "in town" and they are not a "highway" vehicle.*** The distinction of "in town", from "highway" use supports the awareness and discussions the legislature had concerning their new definition and their intended usage.

The Idaho Senators recognized "mopeds" are to be "operated" "in town", and to that end, a "fact" stipulated to by the Parties was that Appellant was cited while operating his moped along Boise Avenue in the City of Boise in the "bike lane", where you would expect to find a two wheel, slow moving means of movement, travelling along a roadway in "town".

There are a series of cases that before addressed the process of *statutory construction* and *interpretation,* which Appellant will undertake to discuss in the course of this Opening Brief. The general rules of statutory interpretation have recently been summarized in *Hoffer v. Shappard*, 160 Idaho 870, 380 P.3d 681 (2016), stating the following:

> "The objective of statutory interpretation is to give effect to legislative intent." *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). "When interpreting a statute, the Court begins with the literal words of the statute. . . ." *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 521, 260 P.3d 1186, 1192 (2011). "If the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect. . . ." *Idaho Youth Ranch, Inc. v. Ada Cnty. Bd. of Equalization*, 157 Idaho 180, 184-85, 335 P.3d 25, 29-30 (2014) (internal quotations omitted) (quoting *St. Luke's Reg' l Med. Ctr., Ltd. v. Bd. of Comm'rs of Ada Cnty.*, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009)). This Court does not have the authority to modify an unambiguous legislative enactment. *Verska v. Saint Alphonsus Reg' l Med. Ctr.*, 151 Idaho 889, 895, 265 P.3d 502, 508 (2011) (quoting *Berry v. Koehler*, 84 Idaho 170, 177, 369 P.2d 1010, 1013 (1962)).
> 160 Idaho at 884, 380 P.3d at 695.

As addressed hereinabove, when a criminal statute is exposed to legitimate differences of opinion with respect to the interpretation of statutory language defining a criminal act, that serves to create a concern the statute may be constitutionally flawed and vague. *See State v. Lopez*, 98 Idaho 581, 570 P.2d 259 (1976), (wherein a statute was held unconstitutionally vague, because it did not define the terms used in the statute, nor apprise the defendant what conduct violated the statute and became a criminal act). If a criminal statute is determined to be ambiguous, the "rule of lenity," applies, as stated in *State v. Alley*, 155 Idaho 972, 318 P.3d 962 (Ct.App.2014), where the Idaho Court of Appeals held:

> Additionally, if a criminal statute is ambiguous, the **rule of lenity** applies and the statute must be construed in favor of the accused. *State v. Dewey*, 131 Idaho 846, 848, 965 P.2d 206, 208 (Ct.App.1998); *State v. Martinez*, 126 Idaho 801, 803, 891 P.2d 1061, 1063 (Ct.App.1995). However, where a review of the legislative history makes the meaning of the statute clear, the rule of lenity will not be applied. *State v. Bradshaw*, 155 Idaho 437, 440, 313 P.3d 765, 768 (Ct.App.2013); *State v. Jones*, 151 Idaho 943, 947, 265 P.3d 1155, 1159 (Ct.App.2011). The rule of lenity applies only when grievous ambiguity or uncertainty in a criminal statute that is not resolved by looking at the text, context, legislative history, or underlying policy of the statute allows for multiple reasonable constructions. *Bradshaw*, 155 Idaho at 441, 313 P.3d at 769.
> 155 Idaho at 976, 318 P.3d at 966.

It is disfavored to cause a statute to be declared vague and unconstitutional. An essential element of a DUI offense, however, as identified in Idaho Criminal Jury Instruction 1000, is the requirement the accused must drive or be in actual physical control of (4) a **motor vehicle**, and **If any of the above has not been proven beyond a reasonable doubt, the jury must find the defendant not guilty**.

If any single element is absent (in this instance the operation of a "Motor vehicle"), the charge must be dismissed or the defendant acquitted. In criminal matters, the law requires the state to prove every element of the offense charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *State v. Felder*, 150 Idaho 269, 274, 245 P.3d 1021, 1026 (Ct.App. 2010) ("The requirement that the State prove **every element of a crime** beyond a reasonable doubt is grounded in the constitutional guarantee of due process. *Jackson v. Virginia*, 443 U.S. 307, 313-14, 99 S.Ct. 2781, 2786, 61 L.Ed.2d 560, 569-70 (1979); *State v. Mubita*, 145 Idaho 925, 942, 188 P.3d 867, 884 (2008); *Erickson*, 148 Idaho at 685, 227 P.3d at 939. This standard of proof plays a vital role in the American scheme of criminal procedure because it provides concrete

substance for the presumption of innocence-that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, 374-75 (1970); *Erickson*, 148 Idaho at 685, 227 P.3d at 939." (Emphasis ours)).

The question presented throughout this appeal is whether the required element of a "motor vehicle" exists as a proven element in this case, since, as a matter of law, a "moped" is not a "motor vehicle" as it is exempted from titling, and specifically declared excluded from the definition of "motor vehicle."

The district court expressed concern with Appellants reference to the application of the "rule of lenity", stating that rule was not raised as an issue below in the magistrate court, and whether that be a correct interpretation as to the requirement for preserving the application of the rule of lenity on this appeal, it would appear the "rule of lenity" is a consequential doctrine to be applied, once there has been a statutory interpretation that determines the presence of statutory ambiguity, and it has no application until that has been determined. The rule would be justly applied if the statute is found to be lacking in clarity or is ambiguous in its content.

Appellant has pursued this appeal because of the clear expressions the Legislature used in their effort to exclude a "moped" from the definition of "motor vehicle", adopting exceptions and re-defining numerous modes of transportation, with careful and consistent recital of words within the legislature's choice of language, and the statutes' express modification by the new phrase ***"or other such vehicles that are specifically exempt from titling "or" registration requirements under Title 49, Idaho Code"*** regarding the definition of what is ***not a motor vehicle*** (I. C. §49-123(V)(2)(h)), and declaring that a moped is defined to be among those "non-titled" (I. C. §49-114(M)(9)). This legislative exclusion is clear and unambiguous, but should this appellate court find it to be otherwise, and determine the statutory codification is somehow ambiguous because this non-titled mode of movement is still somewhat "self-propelled", then the application of the rule of lenity should be given its consequential effect and result that follows from an appellate court's finding a statute is not clear or ambiguous, as this is a criminal statute that requires the presence of a "motor vehicle", and either a moped is excluded, like the Legislature specifically intended it to be, or the statutory definition is un-clear and ambiguous, because the lower courts are attempting to consider a moped differently than the legislature intended it to be treated under their adoption of Idaho law.

It does not necessarily follow logic to say that the "rule of lenity" has to be raised and preserved as an issue in the lower court, when there has yet to be a determination the issue of the statutory interpretation, which is the issue raised by the effects on this appeal. To argue that the rule of lenity must first be raised and preserved would logically appear to be placing the cart before the horse, having no purpose or application until there is a determination as to the legislative intent when enacting the amending statutes, where the Legislature intended to carve out the exceptions to motor vehicle, just as California has done years before.

The Idaho Supreme Court recently held in *Peterson v. Peterson*, 156 Idaho 85, 320 P.3d 1244 (2014), that under Idaho's Constitution, the operative authority for the declaration of the enactment of laws by the Idaho Legislature is the annual compilation known as the Idaho Session laws, and while the Court observes that commercially published compilations of the Idaho code to be merely "evidence" of the Idaho statutes, the Idaho Code does not represent the law itself. ("'All general laws enacted at any session of the legislature shall be printed in a volume known as the Session Laws.' I.C. § 67-904(1)). Immediately after the session laws are printed, they are delivered to the Secretary of State for distribution and sale. I.C. § 67-906." 156 Idaho at 88, 320 P.3d at 1247. "Thus, the compilation of statutes in the Idaho Code is merely evidence of the laws enacted by the legislature as set forth in the session laws. The Idaho Code is not the law." 157 Idaho at 90, 320 P.3d at 1249).

As a consequence of this ruling, the Supreme Court must take judicial notice of the session laws, and thusly, there will be a separate motion submitted to this appellate court, following presentation of Appellant's Opening Brief, requesting this appellate court take judicial notice of the 2008 session laws, relevant to the issues surrounding this motor vehicle code raised on this appeal, and the legislative history that accompanies the enactment of those 2008 amendments. On appeal, an appellate court may take judicial notice of any matter on which the court of original jurisdiction could take judicial notice. *City of Lewiston v. Frary*, 91 Idaho 322, 325-27, 420 P.2d 805, 808-10 (1966); I.C. § 9-101; I.R.E. 201. *See also*, *Crawford v. Department of Correction*, 133 Idaho 633, 636 n. 1, 991 P.2d 358, 361 n. 1 (1999) ("We take judicial notice of House Bill 73, which was not submitted as part of the record on appeal, but is contained in the public records maintained by the Office of Legislative Services located in the State Capitol Building. I.R.E. 201(f). Appellant requests this court engage such judicial notice, to be assured of the precise language used by the Idaho Legislature when they undertook the 2008

amendments.

An "interpretative" approach, in reviewing the statutory amendments enacted in 2008, may focus upon how this court will construe the phrase *"or other such vehicles that are specifically exempt from titling "or" registration requirements under Title 49, Idaho Code"*. There are various principles considered in statutory construction.

In *Pepple v. Headrick*, 64 Idaho 132, 128 P.2d 757 (1942), the court interpreted a gaming-gambling statute. The court addressed an interpretative doctrine, then set aside that analysis in construing the language in the statute. In that case, the court held the doctrine inapplicable, and went beyond what otherwise was that limiting doctrine, stating:

> 1. Under the "ejusdem generis" doctrine, where general words of the statute follow an enumeration of persons or things, the general words will be construed as meaning persons or things of like or similar class or character to those specifically enumerated.
> 2. **The rule of "ejusdem generis" is merely a rule of construction and does not warrant a court in confining the operation of a statute within narrower limits than intended by the legislature.**
> 3. **In construing statute making it a misdemeanor to operate certain enumerated gambling devices or "any other device" employed in gambling, the "ejusdem generis" doctrine was inapplicable, and the prohibition of the statute was not limited to devices similar to those enumerated.** (I.C.A., sec. 17-2301; Const., art. 3, sec. 20.) 64 Idaho 133. (Emphasis ours)
> That court then stated:
>
> "Statutes which are in their nature penal are strictly construed and should not be held to include anything not clearly and plainly within the scope of their provisions. (59 C.J., sec. 660, p. 1113; *In re Dampier, Supra; State v. Choate*, 41 Idaho 251; *In re Moore,* 38 Idaho 506.)
>
> It is a universally recognized rule of construction that where a statute specifies certain things upon which it is to operate or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned. (59 C.J., sec. 582, p. 984; 25 R.C.L., sec. 229, p. 989; *State v. Gossett*, 113 P.2d 415; *Peck v. State of Idaho*, 120 P.2d 820.)
>
> Where general words such as "other" or "any other" follow an enumeration of particular classes, such words are construed as applicable only to things of a like kind or nature to those enumerated. (59 C.J., sec. 581, p. 981; *In re Hull, Supra; Denver v. Taylor* (Colo.), 292 P. 594, 73 A.L.R. 833; *Ex parte Williams* (Cal.), 87 P. 565; *Kirkley v. Portland Electric Power Co.,* 298 P. 237.).....
>
> The doctrine of ejusdem generis refers to a **similarity of character or substance and not to a similarity of form.** (*State v. Hull, supra.*), (Emphasis ours)

The court then stated:

> The act before us now contains no word of limitation or modification and does not pretend to limit its prohibitive terms **to only such games and devices as previously enumerated, but places a prohibition on "any other device,"** employed in gaming and gambling.....
>
> We recognize and have often invoked the rule of construction that, where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of like or similar class or character to those specially enumerated; usually designated the "ejusdem generis" rule. (*In re Winton Lumber Co.,* 57 Idaho 131, 135, 63 P.2d 664; 28 C.J.S., p. 1049.)
>
> **"This rule is but one of construction and does not warrant a court in confining the operation of a statute within narrower limits than intended by the legislature."** (*Commonwealth v. Klucher,* 326 Pa. 587, 193 A. 28.)
>
> **In the case before us, the legislature evidently did not intend that the "ejusdem generis" rule should apply in the enforcement of this statute and emphasized that intent by the words "or any other device." Similar terms have received a like construction by other courts.** (*Grafe v. Delgado,* 30 N.M. 150, 228 P. 601; *People v. Carroll,* 80 Cal. 153, 22 P. 129; *Salt Lake City v. Doran,* 42 Utah 401, 131 P. 636, 637.) (Emphasis ours).

Given the above citation from *Pepple, supra,* our Legislature was well aware of the limiting effects of "ejusdem generis" as an interpretative doctrine; as the Supreme Court determined it was inapplicable in that case because of the inclusive language used in the statute, and concluded that the legislature "evidently did not intend the "ejusdem generis" rule should apply in the enforcement of that statute and emphasized that intent by the words "or any other device", by stating: "Similar terms have received a like construction by other courts". In projecting that same analysis in this appeal, it would be said: The enactment before us contains no words of limitation or modification and does not pretend to limit its exclusionary term ***to only such vehicles as previously enumerated, but prefaces the further exclusion with the word "or", and then goes on to state "any other such vehicles"*** that are ***exempt from the titling or registration requirements.....***

With *Pepple* in mind, we look to the two statutory amendments to see what the Legislature intended. We begin with I.C. § 49-123(V)(2)(h), where the Legislature adopted the criteria for "exclusions" of vehicles from the definition of "motor vehicle" (titling or registration), wherein the Legislature stated:

> h) Motor vehicle. Every vehicle which is self-propelled, and for the purpose of titling and registration meets federal motor vehicle safety standards as defined in section 49-107, Idaho Code. ***Motor vehicle does not include vehicles*** moved solely by human power, electric personal assistive

mobility devices and motorized wheelchairs ***OR other such vehicles that are specifically exempt from titling or registration requirements under title 49, Idaho Code.*** (Emphasis ours).

The emphasis throughout the statute is defining what is a "motor vehicles", being first the definition of what constitutes a motor vehicle, and then defining what is not a motor vehicle, recognizing some modes of movement are known to be designed to move slowly, and they are referenced as being specifically excluded, such as those that are human powered, those that are electric mobility devices, those that are motorized wheelchairs, and then those defined, where it goes to use the conjunctive word "OR", as among those other such vehicles [even though self-propelled], ***specifically exempt from titling or registration requirements under title 49, Idaho Code.*** The statute creates that further and separate category of excluded vehicles (with the use of the word "or"), being that category that is ***exempt from titling or registration.***

Through the enactment of I.C. §49-114(M)(9)(b), the Legislature specifically exempted a class of "vehicles" i.e.: "non-titled" (mopeds), and then "specifically authorized" the operation of that "non-titled" mode of movement, (a "moped) to be operated on Idaho roads without any endorsements, and then goes into another statutory provision that excluded mopeds from the definition of motorcycle. In this analysis, starting with (M)(9), it states:

> (9) "Moped" means ***a limited-speed motor-driven cycle*** having:
> (a) Both motorized and pedal propulsion that is not capable of propelling the vehicle at a speed in excess of thirty (30) miles per hour on level ground, whether two (2) or three (3) wheels are in contact with the ground during operation. If an internal combustion engine is used, the displacement shall not exceed fifty (50) cubic centimeters and the moped shall have a power drive system that functions directly or automatically without clutching or shifting by the operator after the drive system is engaged; ***or***
> (b) Two (2) wheels or three (3) wheels with no pedals, which is powered solely by electrical energy, has an automatic transmission, a motor which produces less than two (2) gross brake horsepower, is capable of propelling the device at a maximum speed of not more than thirty (30) miles per hour on level ground and as originally manufactured, meets federal motor vehicle safety standards for motor-driven cycles. ***A moped is not required to be titled and no motorcycle endorsement is required for its operator.***

The law declares a moped excluded from "motor vehicles" because it is a "non-titled" mode of movement, and no motorcycle endorsement is required because they are not motorcycles, as confirmed by the further amendment to I.C. §49-114(M)(11), which states:

(11) "Motorcycle" means every **motor vehicle** having a seat or saddle for the use of the rider, designed to travel on not more than three (3) wheels in contact with the ground or designed to travel on two (2) wheels in contact with the ground which is modified by the addition of two (2) stabilizing wheels on the rear of the motor vehicle, that meets the federal motor vehicle safety standards as originally designed, and includes a converted motorbike, **but does not include a motor-driven cycle, a motorbike, a tractor or a moped.**

Another statutory construction analysis is found in *State v. Troughton*, 126 Idaho 406, 884 P.2d 419 (1994), the court addressed the rules of construction in the following manner:

> "To answer these questions, we look to the ***grammatical construction of the statute as the legislature intended the statute to be construed according to generally accepted principles of English grammar.*** See *State v. Collinsworth*, 96 Idaho 910, 914, 539 P.2d 263, 267 (1975). The Nebraska Supreme Court has explained this concept well: "[I]t is the rule of interpretation that relative and qualifying words and phrases are to be applied to the words or phrases immediately preceding and as not extending to or including other words, phrases, or clauses more remote, **unless the extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire."** *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477, 481 (1976). Under this rule, known as the rule of the last antecedent clause, a referential or qualifying phrase refers solely to the last antecedent, ***absent a showing of contrary intent.*** Id. See also *Myer v. Ada County*, 50 Idaho 39, 41, 293 P. 322, 323 (1930).
>
> The question presented for determination is whether the phrase **"having a stimulant effect on the central nervous system"** in I.C. § 37-2707 **modifies the word "substances" or the word "quantity."** The trial court ruled that the phrase modifies the word "substances," and we agree. It is clear that the words "having a stimulant effect on the central nervous system," immediately following the word "substances" modifies that noun, and not the word "quantity" used earlier in the sentence. Furthermore, had the Idaho Legislature intended that a quantitative analysis be required under I.C. § 37-2707(d), the legislature would have set forth required amounts as it did for certain substances. See, e.g., I.C. §§ 37-2709(e), -2711(b), and -2713(c). (Emphasis ours)

In our case, the focus is upon "slow moving" "motor vehicles", and Legislative intent was to specifically exclude non-titled and non-registered slow moving vehicles/modes of movement from the definition of "motor vehicle". The language used was a series of categories that involved use of the "correlative conjunction" word — "or" — in defining the excluded slow moving vehicles, stating those that moved solely by human power, those vehicles that moved slowly as electric personal assistive mobility devices, those vehicles that moved slowly as motorized wheelchairs ***OR such other vehicles [slow moving] that are specifically exempt***

from titling or registration requirements under title 49, Idaho Code.

Nowhere within any of these statutorily defined categories do we find these "vehicles" 1) that "move slowly" (which are defined in I.C. § 49-120(S)(15)); 2) vehicles that are "electric personal assistive mobility devices" (which are defined in I.C. § 49-106(E)(1)), and 3) vehicles that are "motorized wheelchairs" (which are defined in I.C. § 49-123(M)(15)), to be among "vehicles" that are ***specifically exempted from being "titled" or "registered"***. The "conjunction" word — "or" — is being used to include a separate category of vehicles ("other vehicles") that are also exempted from "motor vehicle" because they not only move slowly but are non-titled or non-registered, which is categorically defined to include ***such other vehicles, as those that are specifically exempt from titling or registration requirements under title 49, Idaho Code.***

The "or" serves to create the final category of these slower moving vehicles (that includes mopeds) found in various configurations from other specifically described "slow moving vehicles". As part of the amendment to the statute, the Idaho Legislature specifically re-defined a "moped" to be among "slow moving vehicles" as mopeds are so defined to mean ***a limited-speed motor-driven cycle.***

Another interpretative case is *State v. Yzaguirre*, 144 Idaho 471, 163 P.3d 1183 (2007), involving statutory construction to determine the intended scope of the "litigation exception" under the open meeting law established through I.C. § 67-2345(l)(f). That court stated:

> "The **objective of statutory interpretation is to give effect to legislative intent.** *Robison v. Bateman-Hall*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because "**the best guide to legislative intent is the words of the statute itself," the interpretation of a statute must begin with the literal words of the statute.** *In re Permit No. 36-7200*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992); accord *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006). Where the statutory language is unambiguous, the Court does not construe it but simply follows the law as written. *McLean,* 142 Idaho at 813, 135 P.3d at 759. **The plain meaning of a statute therefore will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results.** *Gillihan v. Gump,* 140 Idaho 264, 266, 92 P.3d 514, 516 (2004). In determining its ordinary meaning "effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." *State v. Mercer*, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006) (quoting *In re Winton Lumber Company*, 57 Idaho 131, 136, 63 P.2d 664, 666 (1936))." (Emphasis

ours).

The court went on to say:

> "If the language of the statute is capable of more than one reasonable construction it is ambiguous. *Carrier v. Lake Pend Oreille Sch. Dist. No. 84,* 142 Idaho 804, 807, 134 P.3d 655, 658 (2006). **An ambiguous statute must be construed to mean what the legislature intended it to mean.** Id. **To ascertain legislative intent, the Court examines not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its legislative history.** Id." (Emphasis ours)

The court then said:

> "Ambiguity is not established merely because the parties present differing interpretations to the court. *In re Permit No. 36-7200,* 121 Idaho at 823-24, 828 P.2d at 852-53. If the language of the statute is reasonably susceptible of only one interpretation, the statute is unambiguous and there is no occasion to look beyond the text of the statute. See Id. at 822-24, 828 P.2d at 851-53; *Carrier,* 142 Idaho at 807, 134 P.3d at 658. **The first step is to examine the literal words of the statute to determine whether they support the parties' differing interpretations."**

From that analysis, a court will focus upon a "grammatically acceptable interpretation", and it appears a "grammatically acceptable interpretation" shows the legislature's intent was to exclude mopeds from motor vehicles by excluding them from titling, and in light of the declaration of the Senate Transportation Committee, because they are slow moving vehicles-cycles designed for a limited speed in-town use, the Committee excluded them from registration requirements also.

"Mopeds" were re-defined in I.C. § 49-114(M)(9)(a)&(b), described to be "limited-speed motor-driven cycles," known to exist in several different forms, described in detail as:

"Moped" means a **limited-speed motor-driven cycle having**:

> (a)***Both motorized and pedal propulsion*** that is **not capable of propelling the vehicle** at a speed in excess of thirty (30) miles per hour on level ground, whether two (2) or three (3) wheels are in contact with the ground during operation. **If an internal combustion engine is used**, the displacement shall not exceed fifty (50) cubic centimeters and the moped shall have a power drive system that functions directly or automatically without clutching or shifting by the operator after the drive system is engaged; **or**
>
> (b)Two (2) wheels ***or*** three (3) wheels **with no pedals**, which is **powered**

> **solely by electrical energy**, has an automatic transmission, a motor which produces less than two (2) gross brake horsepower, is capable of propelling the device at a maximum speed of not more than thirty (30) miles per hour on level ground and as originally manufactured, meets federal motor vehicle safety standards for motor-driven cycles. **A moped is not required to be titled and no motorcycle endorsement is required for its operator.** (Emphasis ours).

Mopeds can be two wheel, three wheel, and depending upon their energy source, may be petroleum fueled or electrical powered, and depending upon the power source, may or may not be pedal activated.

From the statutory exclusion of "moped," it becomes inconsistent to attempt to call them a "motor vehicle," when they are specifically defined to be slow moving "limited speed motor driven cycles" specifically exempted from titling, and given the Senate Transportation Committee Minutes, not to be registered, because of their limited in-town usage, meeting all exclusion/exemption criteria from "motor vehicle" declared as being "slow moving", "no title", "no registration", and no "licensing" or "endorsement" requirements under I.C. § 49-301.

It remains logical to conclude our Legislature excluded mopeds from the definition of "motor vehicles", intentionally following the footsteps of the California Legislature, as addressed in the *Armstrong* case decided in 2006.

The stipulated facts confirm this moped was not titled and was not registered, consistent with the statutory exclusions that declared mopeds exempt from "titling" and/or "registration" requirements, and further realizing the Senate Transportation Committee confirmed in the minutes of their March 6, 2008 committee session, stating that mopeds were not intended to be registered because they are a slow moving unit used for in-town purposes.

When an amendatory enactment defines a moped to be exempt from "titling" and then "registration" requirements by definition, and upon reading the definition of "motor vehicle", I.C. § 49-123(M)(2)(h) that specifically states "Motor vehicle does not include vehicles ***moved solely*** ..... or ***other such vehicles that are specifically exempt from titling or registration requirements*** under title 49, Idaho Code", the "only grammatically acceptable interpretation" of that statutory language, given the intent of the legislature to exclude "slow moving vehicles", that includes those exempt from titling or registration", is to embrace the Legislature's intention to exclude mopeds from "motor vehicles", and respect the fact the Legislature had to then engage in further careful amendatory action to re-define "motorcycles", which, but for the moped

exemption they enacted, such re-definition would have been unnecessary. Those provisions, along with the Senate stating mopeds are not required to be registered because they are for in-town use, and defined to be "slow moving motor-driven cycles" provides cumulative reasons to recognize the legislative intent was to exclude mopeds from the definition of "motor vehicles".

A driver's license is not required to operate any of these limited speed-human powered-fuel-motor driven vehicles-cycles on Idaho streets for in town use, and there can be no criminal conduct stemming from their operation under the DWP or DUI statutes, or any citation for failing to carry liability insurance or failing to have a current registration.

(e). WHAT "OTHER SUCH VEHICLES" MEANS

A reasonable response would be: what is a "grammatically acceptable interpretation"!! The Legislature intended to include, with the use of the conjunction word "or" to announce their final category of "slow moving vehicles" that are not titled, and now included within their reference to "other such vehicles" that are identified to be "exempt from titling or registration requirements", and the need for that category becomes relevant when you review the definition of the other previously described vehicles, as none of them (electric personal assistance mobility devices and motorized wheelchairs) are anywhere described as being exempt from *titling or registration.* Their definitions were cited above, and no title or registration exemption is stated within their definition. Therefore the "category" of other such vehicles, preceded by "or", is an additional classification of another form of "slow moving vehicles" that have been specifically exempted from titling or registration requirements, and that becomes a separate category of another form of slow moving vehicles, identified within the comprehensive statutory definitions of other vehicles exempted by the 2008 Legislative amendments. ***What is not*** a "motor vehicle," is what had become the focus of the 2008 amendments.

A reasonable grammatical interpretation of the language utilized by the 2008 Legislative amendments would support a definition of "motor vehicle" to be: ***must be self-propelled, and cannot be specifically declared exempt from titling/registration requirements***.

The amendatory enactments "re-defined" what a "motor vehicle" is, and in doing so, incorporated certain named "slow moving vehicles", and formulated a specific category for "other such [slow moving] vehicles that are non-titled/non-registered vehicles, all of which are excluded from the definition of "motor vehicle".

In re-defining "motor vehicle," the Legislature was aware that it would necessarily

impact what I.C. §18-8004 would cover, and what then would be excluded from being a crime, as the 2008 Amendatory Legislation changed the I.C. § 49-123(V) definitions, with full knowledge of the existence of all criminal statutes, and when they included part (2)(h), adding specific "definitions" and specific "exclusionary" aspects to their "re-definition" of what is not a motor vehicle, and that new definition undertakes to specifically define their exemptions in I.C. § 49-123(V)(2)(h), that now specifically states:

> "Motor vehicle" ***does not include*** vehicles that moved solely by human power, electric personal assistive mobility devices, ***and*** motorized wheelchairs, ***or other such vehicles*** that are ***specifically exempt*** from ***titling "or" registration requirements*** under Title 49, Idaho Code.

It is to be noted that a "motorized wheelchair", by definition, **is a "motor vehicle"**. It's definition is contained in I.C. § 49-123(M)(15), which states: "Motorized wheelchair" means a ***motor vehicle*** with a speed not in excess of eight (8) miles per hour, designed for and used by a person with a disability. Because it is defined to be a **motor vehicle**, and is not within the category of what is non-titled or non-registered, it had to have its own categorical exclusion. It had to be excluded separately from "motor vehicle" because it ***was*** a motor vehicle, and was not otherwise "exempted" within the category of "other such vehicles" from a titling/registration requirements. The statutory language is clear that no such exemption is anywhere stated in the definition for "electric personal assistive mobility devices as no such exemption is stated within their definitions.

The placement of the word "such", is not an "antecedent reference" to the earlier mentioned vehicles (electric personal assistive mobility devices and motorized wheelchairs), as the use of the word "or" has broken up the categories, and requires the focus to be upon "slow moving" in the context of the phrase "motor vehicle does not include", since the correlative conjunctive word "or" creates another category of what are also slow moving vehicles, and they are excluded, as it relates to "other such [slow moving] vehicles", which are exempted from titling or registration requirements.

Would it make a difference in the grammatical analysis if "or" was followed with the phrase "such other vehicles" rather than "other such vehicles"? It would appear to render the same message, saying "such other [slow moving] vehicles" or "other such [slow moving] vehicles". Because the category is separated with the word "or", which then addresses a specific and different "exempt status", it then presents a different category of "slow moving vehicles"

and their focus is then on their "exempt status", is based upon their non-titled and/or non-registered status. The legislature had to specifically name certain slow moving modes of movement because they were defined to be "motor vehicles" by their definition, and not within their "exempt status", and that was the very situation with what they defined a "motorized wheelchair" to be.

It is essential to remember that there was a "definition" of a "moped" that existed before 2008, but its exempt status from titling requirements did not exist until **after** the 2008 amendatory enactments. Amendatory enactments **means a change was intended**. The "general rule" with respect to "amendatory" enactments of the legislature is that the amendments of existing statutes are **presumed to change the law.** 1A Sutherland Statutory Construction § 22:30 *Construction of amendatory acts – Presumption of Change. See e.g., St. Alphonsus Regional Medical Center v. Gooding County*, 159 Idaho 84, 89, 356 P.3d 377, 382 (2015) ("When a statute is amended, it is presumed that the legislature intended it to have a meaning different from that accorded to it before the amendment." (Citations omitted)).

It was before addressed in I.C. § 49-114(M), through the inclusion of what was then subsection (9), but now provides that mopeds are expressly exempted from titling requirements, intending to exclude mopeds from the definition of "motor vehicle" as that phrase is used in I.C. § 49-123(V)(2)(h) as cited above.

These "exclusions" were adopted, firstly, within I.C. §49-123(V)(2)(h), where they addressed titling or registration requirements, then the "exempting" provision from titling in the definition of "moped" in I.C. §49-114(M)(9)(a)&(b); then the definition of "motorbike", I.C. §49-114(M)(10), where they made reference to I.C. §67-7101(9), declaring them to be a "motorcycle or motor-driven cycle", with a definition of "motorcycle" and "motor driven cycle", wherein mopeds are specifically excluded, as "motorcycle" is defined in I.C. §49-114(M)(11), wherein it expressly excludes a moped; then the definition of "motor-driven cycle", I.C. §49-114(M)(13), which specifically excludes mopeds from what they call "motor-driven cycles", and then the definition of "Motorized wheelchair" in I.C. §49-114(M)(15), where it's defined to be a motor vehicle. These definitions, when considered together, confirm the legislative intent in their re-defining certain vehicles-cycles, focused also upon **what are not** "motor vehicles", and they became an exclusion by specific reference, or a specific categorical exception. These specific definitions are set forth below, wherein they state:

I. C. §49-114. Definitions -- M. . . .

(9) "Moped" means a limited-speed ***MOTOR-DRIVEN CYCLE*** having:
(a) ***Both motorized and pedal propulsion*** that is not capable of propelling the vehicle at a speed in excess of thirty (30) miles per hour on level ground, whether two (2) or three (3) wheels are in contact with the ground during operation. If an internal combustion engine is used, the displacement shall not exceed fifty (50) cubic centimeters and the moped shall have a power drive system that functions directly or automatically without clutching or shifting by the operator after the drive system is engaged; or
(b) Two (2) wheels or three (3) wheels with no pedals, which is powered solely by electrical energy, has an automatic transmission, a motor which produces less than two (2) gross brake horsepower, is capable of propelling the device at a maximum speed of not more than thirty (30) miles per hour on level ground and as originally manufactured, meets federal motor vehicle safety standards for motor-driven cycles. ***A MOPED IS NOT REQUIRED TO BE TITLED AND NO MOTORCYCLE ENDORSEMENT IS REQUIRED FOR ITS OPERATOR.***

(10) "Motorbike" means a vehicle as defined in section 67-7101, Idaho Code. Such vehicle ***SHALL BE TITLED*** and ***MAY BE APPROVED FOR MOTORCYCLE REGISTRATION*** pursuant to section 49-402, Idaho Code, upon certification by the owner ***OF THE INSTALLATION AND USE OF CONVERSION COMPONENTS THAT MAKE THE MOTORBIKE COMPLIANT WITH FEDERAL MOTOR VEHICLE SAFETY STANDARDS.***

{I. C. §67-7101(9) "Motorbike" means any self-propelled two (2) wheeled **motorcycle or motor-driven cycle,** excluding tractor, designed for or capable of traveling off developed roadways and highways and also referred to as trailbikes, enduro bikes, trials bikes, motocross bikes or dual purpose motorcycles.}

(11) "Motorcycle" means every ***MOTOR VEHICLE*** having a seat or saddle for the use of the rider, designed to travel on not more than three (3) wheels in contact with the ground or designed to travel on two (2) wheels in contact with the ground which is modified by the addition of two (2) stabilizing wheels on the rear of the motor vehicle, that meets the federal motor vehicle safety standards as originally designed, and includes a converted motorbike, ***BUT DOES NOT INCLUDE a motor-driven cycle, a motorbike, a tractor OR A MOPED.***

(13) "MOTOR-DRIVEN CYCLE" means a ***CYCLE*** with a motor that produces five (5) brake horsepower or less as originally manufactured that meets federal motor vehicle safety standards as originally designed, ***AND DOES NOT INCLUDE MOPEDS.*** such vehicle shall be titled and a motorcycle endorsement is required for its operation. . . .

(15) "Motorized wheelchair" means a ***MOTOR VEHICLE*** with a speed

not in excess of eight (8) miles per hour, designed for and used by a person with a disability.

Whatever a "motor vehicle" is defined to be, it remains axiomatic the Legislative intention was to adopt **exclusions** from what is a "motor vehicle" through specific references and a specific classification of exemptions resulting from non-titling and non-registration status.

It is this appellate court's opportunity to confirm what the legislature clearly intended would not be a motor vehicle, and that is to be accomplished by embracing what the Legislature specifically excluded from the definition of "motor vehicle" by virtue of the exemption of the titling/registration requirement.

The definition of "motor vehicle", prior to 2008, was set forth in I.C. 49-123(V)(2)(h):

> (g) Motor vehicle. Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires but not operated upon rails, except vehicles moved solely by human power, electric personal assistive mobility devices and motorized wheelchairs.

The Legislature made changes to adopt the new definition, and expanded the exclusions with a special class of exemption, to wit: non-titled/non-registered. The Legislature intended to expand upon the exclusions, based upon the adoption of their exemptions that would be addressed and identified elsewhere within the motor vehicle code.

As before stated above, what likely influenced these 2008 motor vehicle code modifications by our Legislature is the analysis the Idaho Supreme Court undertook in their discussion regarding **mopeds** in 2006, when addressing the concept of a mopeds in contrast to motorcycles, and specifically recognized mopeds had "exempt" status from "Motor vehicle" in California, when discussing what is and what is not a "motor vehicle". In that case, *Armstrong v. Farmers Ins. Co. of Idaho*, 143 Idaho 135, 139 P.3d 737 (2006), our Supreme Court specifically took the occasion to state:

> "At issue in *Galvin* was a provision excluding coverage for injuries sustained by a person occupying ***a motor vehicle*** owned by the insured but not covered in the policy. A father had obtained coverage for his 1979 Dodge, ***but not his moped,*** and ***his son was injured while riding the moped.*** The father contended that ***the exclusion for other owned motor vehicles did not apply to the moped because it was not a motor vehicle. The Galvin court agreed, relying upon the facts that mopeds were designed to be propelled by pedaling in addition to their motors; that they were exempt from registration under the Vehicle Code;*** and that while ***motorcycles were defined as being motor vehicles under the Vehicle Code, mopeds were not.*** It stated that while a motorcycle had

been held to be motor vehicle under a similar exclusionary clause, ***"the implied analogy between mopeds and motorcycles is tenuous and cannot be relied upon as the basis for finding that a moped is a motor vehicle."*** 170 Cal.App.3d at 1022, 216 Cal.Rptr. at 846. ***The instant case involves a motorcycle, not a moped. A motorcycle is defined as a motor vehicle under the Idaho motor vehicle code. I.C. § 49-114(10).*** [Now I.C. § 49-114(11)] 143 Idaho at 138, 139 P.3d at 740 (bracketed reference added)" (Emphasis ours).

Now we have not only the California analysis, but also the 2008 Legislative enactments that defines mopeds to be excluded from "motor vehicle" by their specific exemption. The *Armstrong* case drew the attention of the Idaho Legislature to consider the exclusionary aspects of mopeds when addressing the comprehensive re-defining process of "motor vehicle" that took effect in 2008, just as in California. Idaho elected to specifically exempt mopeds with the titling exclusion, but given the determination by the Senate Transportation Committee on March 6, 2008, the Senate did not intend for mopeds to be registered either, so they are exempted from motor vehicle through both non-titling and non-registration exceptions.

The discussion within *Armstrong*, *supra*, in 2006 focused upon definitions of "motorcycle", of "motor vehicle," and of California's exclusion of a "moped" from "motor vehicle", as a moped was defined (even back in 2006) under California law, to be excluded from a "motor vehicle." What Idaho's definition of a motorcycle in 2006 was then identified in I.C. § 49-114(10), and is now contained in I.C. § 49-114(M)(11). When the Idaho Legislature took the initiative in 2008 to amend its definitions of various vehicles and modes of movement, it does appear Idaho embraced aspects of California's laws, and benefitted with the analysis set forth in *Armstrong*, *supra*. Idaho's Legislature essentially adopted these California definition(s), and as a consequence, Idaho expressly excluded mopeds from its definition of a "motor vehicle" as well as from "motorcycle," and from "motorbike", clearly a moped can no longer be regarded a "motor vehicle" under Idaho law. These new definitions of motor vehicle, motorcycle, motorbike, and moped deliberately adopted and repeatedly emphasized the intended exclusion of mopeds from motor vehicles, motorcycles, and motorbikes, and specifically addressed "moped" separately in I.C. § 49-114(M)(9), as a "limited speed, motor driven cycle," that is not titled, having no motorcycle endorsement requirements, and painfully defined separately from what constitutes "motor vehicles," "motorcycles" and "motorbikes."

Given the combined definitions, exemptions, and exclusions now found in the law, there is no basis to require a moped operator to have a policy of "motor vehicle" liability insurance

under Idaho's "Motor Vehicle" Financial Responsibility Act, Title 49, Chapter 12, enacted under I.C. § 49-1229, as the Statute provides:

> Required *motor vehicle* insurance. (1) Every owner of a ***motor vehicle which is registered*** and operated in Idaho by the owner or with his permission shall continuously, except as provided in section 41-2516, Idaho Code, provide insurance against loss resulting from liability imposed by law for bodily injury or death or damage to property suffered by any person caused by maintenance or use of *motor vehicles described therein* in an amount not less than that required by section 49-117, Idaho Code, and shall demonstrate the existence of any other coverage required by this title or a certificate of self-insurance issued by the department pursuant to section 49-1224, Idaho Code, for each ***motor vehicle to be registered.*** (Emphasis ours).

The mode of movement requiring insurance is a ***"registered motor vehicle"***. Neither the "motor vehicle" definition, nor the "registration" requirement exists with respect to various slow moving vehicles that now include a moped since 2008. When a moped is "excluded" from the definition of a "motor vehicle" (no titling), and when not required to be registered (Senate Transportation Committee), it cannot be subject to "insurance" requirements, as only "registered" "motor vehicles" are required to be insured under Idaho's Motor Vehicle Financial Responsibility Act.

(f). MOPEDS ARE UNIQUE UNDER IDAHO LAW

A "moped", as defined above in I.C. §49-114(M) (9)(a)&(b), can be in several forms, two wheel, three wheel, and depending on its energy source, may be a small fuel powered engine, or an electrical powered motor.

Because mopeds are not a "motor vehicle" under the law, the operator is not subject to the "licensing" requirements under I.C. §49-301 or liability insurance requirements.

VIII.

CONCLUSION

This Appellant did not operate a "motor vehicle" while under the influence of alcohol, but rather, as the facts and law has established, was operating a "slow moving" "limited speed" "motor driven cycle" that is non-titled, declared by the Idaho Legislature to be a "moped", within the 2008 Legislative amendatory enactments, specifically excluded from the definition of "motor vehicle", under Idaho law. The decision of the district court, affirming the conviction of Appellant, upon his conditional plea of guilty, must be set aside, vacated and reversed, as Appellant did not violate the provisions of I. C. §18-8004 when he was operating his "moped" as his mode of

movement was not a "motor vehicle" as declared by the Idaho Legislature, and the matter must be remanded with instructions to enter an order vacating the conviction and dismissing the amended complaint filed in the case.

Respectfully submitted this 17th day of November, 2017.

Vernon K. Smith,
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 17th day of November, 2017, I caused a true and correct copy of the above and foregoing Appellant's Opening Brief to be filed/delivered/served as required by the Idaho Appellate Rules to the following, at the following addresses:

STATE OF IDAHO ATTORNEY GENERAL Criminal Law Division 700 W. Jefferson Street P.O. Box 83720 Boise, Idaho 83720-0010	(x) ( ) ( ) ( )	U.S. Mail Fax Hand Delivered ICourt E-filed
Honorable Gerald F. Schroder District Court Appellate Court Ada County 200 West Front Street Boise, Idaho 83720	( ) ( ) (x) ( )	U.S. Mail Fax Hand Delivered ICourt E-filed
Honorable Kevin Swain Magistrate Judge Ada County 200 West Front Street Boise, Idaho 83702	( ) ( ) (x) ( )	U.S. Mail Fax Hand Delivered ICourt E-filed
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