IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO

RYAN THOMAS DAVIDSON, **Appellant,** **vs.** **THE STATE OF IDAHO,** **Respondent.**	**Case No. CR-MD-2007-0016222**

BRIEF OF APPELLANT RYAN DAVIDSON

Appeal from the Magistrate Court of the
Fourth Judicial District of the State of Idaho
In and for the County of Ada

HONORABLE THOMAS WATKINS
Presiding Magistrate Judge

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DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
APPELLATE DIVISION

RYAN THOMAS DAVIDSON, Appellant, *vs.* THE STATE OF IDAHO, Respondent.	Case No. CR-MD-2007-0016222 **APPELLANT'S OPENING BRIEF**

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I.
INTRODUCTION

COMES NOW, Ryan Davidson, Appellant in the above-entitled action, with this brief in support of his appeal.

A. <u>STATEMENT OF FACTS AND SUMMARY OF PRIOR PROCEEDINGS</u>

In June of 2007, Davidson was charged with the infractions of "driving on an expired license" and "fictitious display of plates," violations of Idaho Code sections §§ 49-319 and 49-456, respectively. A trial was held on July 23, 2007, where Davidson was found guilty on both counts and was sentenced to the statutory penalties. Davidson failed to pay the penalties. Thereafter, Davidson received a notice of driver's license suspension from the Idaho Transportation Department.

On November 29th, 2007, Davidson was arrested for driving without privileges – the offense which is currently before the Court. Based on legally incorrect advice supplied by the Public Defender, Davidson pled guilty to the charge. Later, when the ineffective assistance of Davidson's counsel became manifest, Davidson filed a *pro se* motion to withdraw his guilty plea, which was granted.

The Court then attempted to re-assign the same deficient counsel to Davidson, who objected. Based on the objection, the Court assigned conflict counsel from outside the Public Defender's office. When the conflict counsel refused to file a motion to dismiss the case, Davidson opted to proceed *pro se*, and filed his own motion to dismiss. The motion was denied by the Magistrate Judge in a written ruling dated May 14th, 2009.

Instead of proceeding to a jury trial, Davidson made it known that he wished to file a conditional plea of guilty, reserving his right to appeal the denial of his motion to dismiss. At a special sentencing hearing held on June 16th, 2009, Davidson orally motioned for a

conditional plea of guilty which was not objected to by the City of Boise. The Court took Davidson's guilty plea, and sentenced him to three days jail with a six-month license suspension. Instead of staying the execution of the sentence – as Davidson requested – the Court immediately remanded Davidson into custody to serve his jail sentence, on the grounds that Davidson's conditional plea had not been "in writing."

Through a third party, Davidson, while still incarcerated, had his written conditional plea and proposed order for immediate stay of execution delivered to the Magistrate Judge for his signature. However, the order was not signed for two more weeks, and as a result, Davidson served his entire jail sentence. This appeal is not moot, however, as Davidson still has the 180-day license suspension hanging over his head.

B. ISSUES ON APPEAL

This brief is entered in support of Davidson's conditional appeal of the denial of his motion to dismiss. Davidson also raises an additional assignment of error in that his arrest and detention by the Court was an abuse of discretion.

As argued in the motion to dismiss, the charge against Davidson of driving without privileges should be dismissed of the following grounds:

1) Davidson's drivers' license was suspended without procedural due process. Although some procedural due process is available, it is not enough to satisfy the 14th Amendment.

2) The suspension of Davidson's license was illegal under Idaho Code. That a suspension was illegal should be a valid defense to the charge of DWP, and should not be considered waived by failure to address it prior to the criminal charge.

3) The law which authorized a suspension of Davidson's license is unreasonable and an unnecessary infringement, and constitutes a violation of substantive due process.

4) Davidson's counsel was so ineffective it should be deemed to be no counsel, which violates his rights under the Sixth Amendment of the United States Constitution.

5) Davidson's immediate remand to jail after sentencing by the court constituted an abuse of discretion.

The Magistrate Judge ruled against Davidson on all the issues presented above. Davidson hereby requests that this Court reverse the decision of the lower Court and dismiss the charge of driving without privileges filed against him.

II.
ARGUMENT

1.
DAVIDSON WAS DENIED PROCEDURAL DUE PROCESS UNDER § 49-1505

A. INTRODUCTION

Idaho Code § 49-1505 mandates that the Transportation Department immediately suspend an individual's drivers' license upon receiving a notice of non-payment of a traffic infraction from a court. After Davidson was convicted of two infractions, he failed to pay the judgment. This led to him receiving the standard notice from the Transportation Department stating that his license would be suspended in thirty days if he did not pay the penalty. (*See* Exhibit 'A'.) However, this notice did not inform Davidson of any right to appeal or TO challenge the suspension on any grounds. Prior to Davidson's receipt of the notice of suspension, he was not sent any notice from the court that offered him an opportunity for either an administrative or court hearing, wherein he could contest the suspension on legal or administrative grounds. As such, he was deprived of his liberty and/or property (the driver's license and use of his automobile) without the appropriate procedural due process safeguards.

In the immediate case, such due process considerations are relevant to Davidson's defense, because a driver cannot be convicted of driving without privileges if the suspension violates due process. *State v. Dolson*, 138 Wash.2d 773, 783, 982 P.2d 100 (1999); *Redmond v. Moore*, 151 Wash.2d 664, 670, 91 P.3d 875, 879 (2004).

B. ANALYSIS OF PROCEDURAL DUE PROCESS LAW AND PRECEDENT

In Idaho, a citizen's use of a motor vehicle on the highway is a right, and not a privilege. *Adams v. Pocatello*, 91 Idaho 99, 101, 416 P.2d 46, 48 (1966). It is well settled that driver's licenses may not be suspended or revoked "without that procedural due process required by the Fourteenth Amendment." *Dixon v. Love*, 431 U.S. 105, 112, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977) (quoting *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)); *City of Redmond v. Arroyo-Murillo*, 149 Wash.2d 607, 612, 70 P.3d 947 (2003). Though the procedures may vary according to the interest at stake, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).)

C. PROCEDURAL DUE PROCESS APPLIED TO DRIVER'S LICENSE SUSPENSIONS

Many due process challenges to drivers' license suspension statutes have been filed in this and other jurisdictions. The general theme of these challenges is that due process requires that an individual must be afforded a hearing prior to the suspension of their drivers' license in all cases. In analyzing these challenges, courts use a due process balancing test enumerated in *Matthews v. Eldridge*, *supra.*, which weighs the public interests against the rights of the individual. From the U.S. Supreme Court on down, the caselaw has stated that the government *may* summarily suspend a driver's license without hearing, *if* failing to do so

would put the public's safety at risk, and a prompt post-suspension hearing is available. See *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *State v. Ankney*, 109 Idaho 1, 704 P.2d 333 (1985); *Matter of McNeely*, 119 Idaho 182, 804 P.2d 911 (Ct.App.1990).

However, using the *Eldridge* scale, the courts have also held that as the risk to public safety decreases, the individual's right to a pre-suspension hearing increases. See *Redmond v. Moore*, 151 Wash.2d 664, 91 P.3d 875 (2004)[1]; and *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).[2]

In *Redmond, supra*, the Supreme Court of Washington held that it would violate procedural due process if an individual whose license was suspended for failure to pay an infraction penalty was not afforded a pre-suspension hearing. The *Redmond* decision is well reasoned and persuasive, and the Idaho Courts should adopt the decision as law. The *Redmond* case does not stand for the proposition that a hearing must be offered prior to *any* type of driver's license suspension. For instance, it does not apply when the government's compelling interest is in keeping the public safe from intoxicated or unsafe drivers. *Id.* at 676-77. Therefore, it is not in conflict with the line of Idaho authority finding due process

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[1] "The public safety interest present in *Stauffer* is not at issue here. The State's interest in suspending an individual's driver's license for failing to appear, pay, or comply with a notice of traffic infraction is in the efficient administration of traffic regulations and in ensuring offending drivers appear in court, pay applicable fines, and comply with court orders. Although undoubtedly important, this interest does not rise to the level of the State's compelling interest in keeping unsafe drivers off the roadways. Simply put, failing to resolve a notice of traffic infraction does not pose the same threat to public safety as habitually unsafe drivers do." 91 P.3d at 882.

[2] In *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977), the Supreme Court discusses a sliding scale of public safety concerns when determining what level of due process should be required: "Far more substantial than the administrative burden, however, is the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard. This factor fully distinguishes *Bell v. Burson, supra*, where the "only purpose" of the Georgia statute there under consideration was "to obtain security from which to pay any judgments against the licensee resulting from the accident". In contrast, the Illinois statute at issue in the instant case is designed to keep off the roads those drivers who are unable or unwilling to respect traffic rules and the safety of others." 431 U.S. at 114 - 115 (internal citations omitted).

does not require a hearing prior to suspending a suspect's license for failure to submit to a blood/alcohol evidentiary test. *See, e.g. State v. Ankney*, 109 Idaho 1, 704 P.2d 333 (1985). *Redmond* is also not in conflict with *Adams v. Pocatello*, 91 Idaho 99, 416 P.2d 46 (1966), where the compelling government interest was in protecting the public from uninsured drivers. In the case of Davidson's suspension, as was the case in *Redmond*, the government's compelling interest is, at most, to promote "...the efficient administration of traffic regulations and in ensuring offending drivers appear in court, pay applicable fines, and comply with court orders." *Id*. at 677. This interest is not substantial enough to deprive a citizen of a driver's license without a pre-suspension hearing.

D. DOES IDAHO CODE § 49-1505 VIOLATE PROCEDURAL DUE PROCESS?

Idaho Code § 49-1505 is the law under which Davidson's license was suspended. It should be viewed through the prism of *Redmond*, with the assumption that if it fails to afford an individual a meaningful pre-suspension hearing, it would be in violation of the Due Process clause of the Fourteenth Amendment.

An examination of the statute seems to indicate that it contains the necessary procedural due process protections, and would therefore be considered constitutional. It states as follows:

> The department shall immediately suspend the driver's license, permit and operating privileges of any driver upon receiving notice from any court of the state that a person has failed to pay the penalty for a traffic infraction judgment. The notice may be sent to the department by any court which shall certify that a judgment for an infraction not involving a pedestrian or a bicycle violation has been entered against the person and that <u>he has failed to pay the penalty after notice and hearing, or opportunity for hearing, as prescribed by rule of the supreme court.</u> No notice of nonpayment of an infraction penalty shall be sent to the department if the court finds that the person failing to pay the penalty has a complete and continuing financial inability to pay the penalty.

Idaho Code § 49-1505 (1)

The underlined portion indicates that an individual has a right to a court hearing to contest a license suspension before it goes into effect. It further mandates that a notice be sent to the individual informing them of their right to a hearing.

E. THE LOWER COURT FAILED TO ABIDE BY IDAHO CODE § 49-1505

In Davidson's case, he was found guilty of committing two infractions. He did not pay the penalty. At this point, he should have received a notice from the court informing him of his right to a hearing to contest the proposed suspension of his drivers' license for failure to pay – a proceeding completely separate from the infraction trial. But Davidson did not ever receive this mandatory notice. A search of the casefiles reveals no attempt by the court to send Davidson a notice.[3] Davidson did receive a suspension notice from the Idaho Transportation Department, but this *is not* the notice contemplated in § 49-1505. According to the notice itself, (See Exhibit 'A'), it was generated after I.T.D. received a notice of non-payment from the District Court. Section 49-1505 requires the court to give an individual notice and opportunity for hearing before it sends the notice of non-payment to I.T.D. A copy of the court's "notice of nonpayment" to I.T.D. is included as Exhibit 'B'. It states that Davidson was convicted of an infraction on July 23, 2007, and that he was given until July 23, 2007 to pay the penalty, but did not. Beneath this language are two check boxes, which state, "*After notice of judgment and opportunity for hearing,*" and, "*After hearing and finding by the Court that the defendant does not have a complete and continuing financial inability to pay the penalty.*" Tellingly, neither box is checked.

Not only did the court fail to send Davidson the critical notice, it submitted its notice

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[3] This includes both the casefile in the immediate case and the casefile of the original infraction: No. T0724995

of nonpayment to I.T.D. prematurely in violation of statute. Idaho Code § 49-1505 states that the court shall send notice to the department that an individual has failed to pay a traffic infraction judgment. "Judgment" is defined at Idaho Code § 49-111 (1):

> "Judgment" means a decree which shall have become final by expiration without appeal by the time within which an appeal might have been perfected, or by final affirmation on appeal, rendered by a court of competent jurisdiction of any state or of the United States, upon a cause of action arising out of the ownership, maintenance or use of any motor vehicle...

Therefore, a conviction on an infraction does not become a "judgment" until the time for an appeal has expired, or until the appellate process is exhausted. Appeals of infraction convictions are taken and processed in the manner prescribed for criminal appeals from the magistrates division to the district court by the Idaho Criminal Rules. I.I.R. 15. Idaho Criminal Rule 54.3 states that the time in which to file an appeal expires 42 days after conviction. Davidson was found guilty of the two non-moving violations on July 23, 2007. The notice of non-payment that the court sent to I.T.D. is dated August 22, 2007. (*See* Exhibit 'B'.) That's twelve days prior to the expiration of the time to file an appeal. As such, the Magistrate Judge violated Davidson's rights under § 49-1505.

F. CONCLUSION

Because the court did not send the mandatory notice with opportunity for hearing to Davidson prior to sending a notice of nonpayment to I.T.D., Davidson's rights were violated under both the Due Process clause of the Fourteenth Amendment and under the statute itself. "This Court has consistently recognized that a permit of the nature here involved is a valuable property right and can be revoked only in the manner provided by statute." *Arrow Transportation Co. v. Idaho Public Utilities Commission*, 85 Idaho 307, 379 P.2d 422 (1963). Therefore the Court should dismiss the charge of driving without privileges against Davidson

since his license was suspended in violation of both Idaho Code § 49-1505 and procedural due process.

2.
IDAHO COURT RULES DEPRIVE DAVIDSON OF PROCEDURAL DUE PROCESS

A. INTRODUCTION

Even if § 49-1505 is considered constitutional by the standards set forth in *Redmond v. Moore,* and if the Court rules against the Appellant on the lack of notice claim above, Davidson's right to due process was still violated because the Idaho Infraction Rules do not provide adequate procedural safeguards and are in conflict with state code.

In crafting § 49-1505, the Idaho Legislature decided to leave much of the procedural mechanics up to the discretion of the Supreme Court.

> The department shall immediately suspend the driver's license, permit and operating privileges of any driver upon receiving notice from any court of the state that a person has failed to pay the penalty for a traffic infraction judgment. The notice may be sent to the department by any court which shall certify that a judgment for an infraction not involving a pedestrian or a bicycle violation has been entered against the person and that he has failed to pay the penalty after notice and hearing, or opportunity for hearing, as prescribed by rule of the supreme court. No notice of nonpayment of an infraction penalty shall be sent to the department if the court finds that the person failing to pay the penalty has a complete and continuing financial inability to pay the penalty.

Idaho Code § 49-1505 (1)

If the Supreme Court has failed to promulgate rules pursuant to the above law, or if their rules are illegal or defective, an individual's right to due process would be violated, since the process itself would be flawed.

B. <u>DOES I.I.R. 11 PROVIDE ADEQUATE PROCEDURAL DUE PROCESS SAFEGUARDS?</u>

An examination of the Idaho Infraction Rules reveals two separate rules that seem to have been promulgated pursuant to § 49-1505:

> **Rule 10. (a) Suspension of License.** If a defendant fails to pay a traffic infraction penalty, (1) within the time allowed by a Notice of Default Judgment under Rule 8(d), or (2) within the time allowed by Deferred Payment Agreement under Rule 9(f), or (3) within such further time as allowed by order of the court; then, unless the court makes a finding under Rule 11 that the defendant has shown that the defendant has complete and continuing financial inability to pay the penalty, the court shall sign a notice of nonpayment of penalty and send it to the Department of Transportation for suspension of defendant's drivers' license as provided by law.
>
> **Rule 11. (a) Show Cause Hearing.** A show cause hearing as to whether a defendant's driver's license should be suspended for nonpayment of a penalty shall be held by the court, (1) if a defendant appears in court at the time indicated in a Deferred Payment Agreement made under Rule 9(f), or (2) if the defendant requests a hearing before the payment date for a penalty as authorized under a Notice of Default Judgment issued under Rule 8(d), or (3) at any other time in the discretion of the court. The show cause hearing shall be an evidentiary hearing to determine if the defendant has the complete and continuing financial inability to pay the penalty. The defendant shall testify under oath and be subject to cross examination.
> **(b) Finding of Court.** After a hearing under this rule, if the court finds that the defendant has a complete and continuing financial inability to pay the penalty, no notice of nonpayment shall be sent to the Department of Transportation but the court may enter appropriate orders regarding the judgment which may include the cancellation of the penalty. If the court finds that the defendant does not have a complete and continuing financial inability to pay the penalty but has not paid the penalty, it may sign a notice of nonpayment of penalty and send it to the Department of Transportation for the suspension of defendant's driver's license and may enter other appropriate orders to enforce payment of the penalty. The court shall not be required to make written findings other than to issue a notice of nonpayment or enter other appropriate orders.
> **(c) Effect of Suspension of Driver's License**. If a defendant's driver's license is suspended for nonpayment of a penalty, upon the expiration of such ninety (90) day suspension the clerk of

> the court will continue to maintain the citation on which the penalty was imposed for a period of three (3) years. If the penalty is not paid within such three (3) year period, the clerk shall then cancel the delinquent penalty and close the file.

Because Rule 10 cross-references the procedure of Rule 11, it does not need to be analyzed separately. There do not appear to be any other rules relating to the "notice and hearing" provision of § 49-1505.

The question, then, is whether or not the *process* of Idaho Infraction Rule 11 meets the requirements of the Due Process clause and of Idaho Code. This answer to this question is definitively *no*.

For this analysis, it needs to be asked exactly *what kind* of hearing needs to take place prior to the suspension of a driver's license for failure to pay a fine? When weighing a suspect process, the *Eldridge* test inquires as to what the risk of an erroneous deprivation is through the procedures used. *Id*. at 335. How might a drivers' license be erroneously suspended?

> "Ministerial errors in the record, such as misidentification, miscalculation of the fine, or errors in the conviction form." *Redmond, supra*., at 669

> "The record indicates DOL erroneously suspended the driver's license of one person for eight months after it was misinformed by the court that he had been convicted of driving under the influence. The record also indicates another person had his license erroneously suspended after having been falsely identified by the court as the recipient of an unpaid speeding ticket." *Redmond* at 673

> "...[M]isidentification, payments credited to the wrong account, the failure of the court to provide updated information when fines are paid." *Redmond* at 675

Davidson himself has experienced ministerial error or inadvertence by court personnel related to the suspension of his license. In this very case, no less. When Davidson originally

pled guilty to DWP his sentence included the suspension of his license. After Davidson successfully withdrew his guilty plea, the court, for whatever reason, neglected to send notice to I.T.D. to lift the suspension. This caused Davidson to receive a citation for driving on an invalid license from the investigating officer who arrived on the scene after Davidson struck a deer while driving through Camas County. Luckily, Davidson was able to resolve the matter without having to return to Camas County, but it was not without headache. I.T.D. would not restore the license without a court order. The Magistrate's clerk had to be contacted, who had to send an order to I.T.D. Davidson had to obtain copies to fax to the Camas County Court and Prosecutor's office, who agreed to drop the charge with such verification. (*See* Exhibit 'C'.) While this is not directly on point, it is illustrative of the very real possibility of ministerial error in Idaho's traffic court system.

The type of error that can happen in the license suspension process that Davidson is most concerned about is the error he believed happened in this case: That the infractions he was convicted of do not fall under the purview of § 49-1505. Stated another way, Idaho Code did not mandate the suspension of Davidson's license for failure to pay the fines of the particular infractions he was convicted of.

With the above-listed examples of error in mind, we must now proceed to examine Rule 11 to see how effective it would be in preventing these types of mistakes from leading to an erroneous suspension.

> **Rule 11. (a) Show Cause Hearing.** A show cause hearing as to whether a defendant's driver's license should be suspended for nonpayment of a penalty shall be held by the court, (1) if a defendant appears in court at the time indicated in a Deferred Payment Agreement made under Rule 9(f), or (2) if the defendant requests a hearing before the payment date for a penalty as authorized under a Notice of Default Judgment issued under Rule 8(d), or (3) at any other time in the discretion of the court. The show cause hearing shall be an evidentiary

> hearing to determine if the defendant has the complete and continuing financial inability to pay the penalty. The defendant shall testify under oath and be subject to cross examination.

A simple reading of the rule demonstrates – *quite clearly* – that *no*, this rule would not in any way, shape, or form protect a defendant from an erroneous license suspension. Why? Because the *SOLE* issue to be determined in a Rule 11 hearing is whether or not a defendant has a complete and continuing inability to pay the penalty. Rule 11 is essentially a hardship provision, and not a process whereby ministerial or other errors can be brought before the court. In *State v. Gibbar*, 143 Idaho 937, 155 P.3d 1176, 1186 (2006), the Idaho Supreme Court held that failure to allow relevant evidence into a suspension hearing would be a violation of due process. Therefore, because its scope is so narrow, Rule 11 violates the Due Process clause, since it does not afford a defendant a "meaningful hearing," and the risk of an erroneous suspension is very high. So, even if the court had complied with § 49-1505 and had sent Davidson a timely notice with opportunity for hearing, his right to due process would still have been violated, since the only hearing he could have had was an indigency hearing.

C. RULE 11 WAS WRITTEN IN VIOLATION OF IDAHO CODE § 49-1505

The reason Rule 11 was written the way it was seems to be based on a misreading of § 49-1505:

> The department shall immediately suspend the driver's license, permit and operating privileges of any driver upon receiving notice from any court of the state that a person has failed to pay the penalty for a traffic infraction judgment. The notice may be sent to the department by any court which shall certify that a judgment for an infraction not involving a pedestrian or a bicycle violation has been entered against the person and that he has failed to pay the penalty after notice and hearing, or opportunity for hearing, as prescribed by rule of the supreme court. No notice of nonpayment of an infraction penalty shall be sent to the department if the court finds that the person failing to pay the penalty has a complete and continuing financial inability to pay the penalty.

Idaho Code § 49-1505 (1)

It would seem that the drafter of Rule 11 did not properly construe the last two sentences of this section. There are two ways to construe these provisions. The first way would be to say that the last sentence is a continuation of the thought expressed in the previous sentence. The previous sentence speaks of notice and a hearing. What type of hearing? The next line clarifies it: a hearing to determine whether a person has a financial inability to pay the penalty. This last sentence modifies the word "hearing" in the previous sentence, and limits the scope of that hearing to an indigency hearing. This seems to be the conclusion reached by the author of Rule 11. However, this is not a reasonable construction under the circumstances.

The proper construction of these two provisions is that they refer to two separate things. The word "hearing" refers to the type of hearing that Davidson has been advocating: one where ministerial or legal errors can be brought before the court. The last sentence is merely a statutorily created right to use poverty as a defense at the hearing. Absent this provision, a defendant would not be able to argue financial hardship, as the court would have no authority to waive the penalty on those grounds. If this interpretation is correct, § 49-1505 would be constitutional pursuant to *Bell* and *Redmond*, but Rule 11 would not be. If this interpretation is incorrect, § 49-1505 would violate the constitutional right to a meaningful pre-suspension hearing. Either way, Davidson's procedural due process rights have been violated.

3.
IDAHO CODE DID NOT EVEN MANDATE A SUSPENSION IN DAVIDSON'S CASE

A. INTRODUCTION

As shown above, Davidson was denied the right to a meaningful hearing to contest the proposed suspension of his license; firstly, since the court did not send him the required notice, and secondly, because the court rules only allow for an indigency hearing. *If* Davidson had received the correct notice, and *if* the rules had allowed for a proper hearing, Davidson would have appeared to contest the proposed suspension on the grounds that it was contrary to Idaho Code, as demonstrated below. Davidson should not have been convicted of DWP since the suspension of his license was statutorily illegal.

B. NON-MOVING VIOLATIONS ARE NOT INCLUDED WITHIN THE PURVIEW OF § 49-1505

Idaho Code § 49-1505 governs the process by which a driver's license can be summarily suspended by I.T.D. for failure to pay a fine. It states, in relevant part:

> The department shall immediately suspend the driver's license, permit and operating privileges of any driver upon receiving notice from any court of the state that a person has failed to pay the penalty for a ***traffic*** infraction judgment.

(Emphasis added.) By using the word "traffic," the Legislature intended for this section to only apply to moving violations. See Idaho Code § 49-121 (3):

> "Traffic" means pedestrians, ridden or herded animals, vehicles, streetcars and other conveyances either singly or together while using any highway for purposes of travel.

This law implies movement on a highway. A person walking down the street would be considered *traffic*. A person standing still on the street would not be considered *traffic*. Similarly, a car driving down the street is *traffic*, while a car parked on the street in not *traffic*, pursuant to the above law. So when Idaho Code § 49-1505 uses the word *traffic*, it refers to an infraction committed while one is engaged in traffic, *i.e.* moving down the highway *i.e.* a

moving violation. “Traffic infraction” is not a legal term found in Chapter 1, Title 49. The two words are defined separately. The definition of “traffic” is seen above, the definition of “infraction” is found at § 49-110 (5):

> “Infraction” means a civil public offense, not constituting a crime, which is not punishable by incarceration and for which there is no right to a trial by jury or right to court-appointed counsel, and which is punishable by only a penalty not exceeding one hundred dollars ($100) and no imprisonment.

It is not uncommon for state code and the court rules to differentiate between moving and non-moving automobile-related infractions. See, *i.e.*, Idaho Infraction Rule 9 (b) (5)&(22) (Imposing fewer court costs on non-moving infractions.); I.I.R. 9 (c) (Allowing consolidation of court costs for multiple non-moving infractions.); IDAPA 39.02.71 (Establishing a “point system” for moving infractions only.)

Therefore, a construction of Idaho Code § 49-1505 which makes it applicable only to moving vehicle infractions is the only reasonable interpretation. Davidson was convicted of two non-moving infractions (expired license and fictitious plates). Shortly thereafter, the court sent a notice of nonpayment to I.T.D. Davidson does not know if the notice was sent based on ministerial error, or if it was sent because the court defines “traffic” in § 49-1505 differently than the Appellant. Davidson assumes that the court has given a meaning to word “traffic” that would be along the lines of “*as having anything to do with automobiles*.” But this notion can be further dispelled by additional examination of § 49-1505.

> The department shall immediately suspend the driver's license, permit and operating privileges of any driver upon receiving notice from any court of the state that a person has failed to pay the penalty for a traffic infraction judgment. The notice may be sent to the department by any court which shall certify that a judgment for an infraction not involving a **pedestrian or a bicycle violation** has been entered against the person and that he has failed to pay the penalty after notice and hearing, or opportunity for hearing, as prescribed by rule of the supreme

> court. No notice of nonpayment of an infraction penalty shall be sent to the department if the court finds that the person failing to pay the penalty has a complete and continuing financial inability to pay the penalty.

Idaho Code § 49-1505 (1)

If the word "traffic" in this section simply means anything automobile related, then why did the Legislature in the next line make reference to pedestrians and bicycles? If it is self-evident that *traffic* means "automobile related," then the reference to bicycles and pedestrians is useless surplusage. In fact, if it was legislative intent to suspend a driver's license for any and all automobile-related infractions, why didn't it simply use the words "motor vehicle" instead of "traffic" in § 49-1505? As in, "The department shall immediately suspend the driver's license, permit and operating privileges of any driver upon receiving notice from any court of the state that a person has failed to pay the penalty for a *motor vehicle* infraction judgment." If it had been written this way, there would be no question that a license could be suspended for moving, non-moving, parking, or any other automobile-related infractions. Also, if it had been written this way, there would have been no need to make a reference to bicycles and pedestrians. They would have been excluded based on the very clear definition of "motor vehicle."

But the fact that the legislature used the word "traffic," followed by "bicycle and pedestrian" is a very clear indication that they were referring to the definition of traffic law at § 49-121 (3) which states that "traffic" is moving down the highway for purposes of travel. A car moving down the highway is "traffic." A bicycle moving down the highway is "traffic." A person walking down the street is "traffic." The legislature excluded pedestrian and bicycle traffic infractions from the license suspension statute because you don't need a driver's license to engage in that form of traffic.

Many states have nearly identical driving statutes. The State of Washington's version of § 49-1505 is (in relevant part) as follows:

> The department shall suspend all driving privileges of a person when the department receives notice from a court...that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, *other than for a standing, stopping, or parking violation.*

R.C.W. 46.20.289

The process and structure of this law is very similar to that of Idaho's process. However, in this law, the word "traffic" apparently is used as a synonym for motor vehicle. This law clearly applies only to moving violations, because the Washington Legislature exempted non-moving violations (standing, stopping, or parking) from its purview. While not dispositive, it lends credence to the theory that the Idaho Legislature was also attempting to exclude non-moving violations from their license suspension statute.

Based on the preceding analysis, it is clear that Idaho Code § 49-1505 only authorizes the suspension of a driver's license for failure to pay a moving violation, and that Davidson's license was suspended illegally.

C. THIS CAN BE USED AS A DEFENSE TO A CHARGE OF DRIVING WITHOUT PRIVILEGES

The question, then, is whether Davidson should be allowed to use the fact that his license should not have been suspended as a defense to the charge of DWP? The State will likely argue that even if Davidson's interpretation of § 49-1505 is correct, the defense should be considered waived, since Davidson could have attempted to reverse the suspension prior to his DWP charge, but did not do so, or failed in attempting.

As stated previously, the Washington Supreme Court has held that an individual cannot be convicted of DWP if the underlying suspension was in violation of due process.

State v. Dolson, 138 Wash.2d 773, 783, 982 P.2d 100 (1999); *Redmond v. Moore*, 151 Wash.2d 664, 670, 91 P.3d 875, 879 (2004). The *Redmond* case involved two defendants charged with DWP whose cases were consolidated. Both defendants' licenses had been suspended for a period of months when they were cited for DWP. *Id*. at 667. That they had not challenged the suspensions prior to their citations for DWP did not work an estoppel against their due process defense. Even though, as the State argued, the defendants could have petitioned the court for relief from a suspension due to a clerical error by filing a writ of review, a writ of mandamus, or an injunction. The court discounted this. *Id*. at 676.

Does a court who erroneously orders that a license be suspended based on an incorrect interpretation of a statute commit a violation of due process? Or would it simply be considered a statutory violation? And is there a practical difference between the two for our purposes here? Even if the act does not technically constitute a due process violation, the Appellant should still be entitled to use the defense. To hold otherwise would only compound the injury to an already innocent motorist. "This Court has consistently recognized that a permit of the nature here involved is a valuable property right and can be revoked only in the manner provided by statute." *Arrow Transportation Co. v. Idaho Public Utilities Commission*, 85 Idaho 307, 379 P.2d 422 (1963). The State's failure to comply with the law should not be so easily excused by disallowing the introduction of such as a defense to DWP. A drivers' license is a valuable right in Idaho. "The right to operate a motor vehicle upon the public streets and highways is not a mere privilege. It is a right or liberty, the enjoyment of which is protected by the guarantees of the federal and state constitutions." *Adams v. Pocatello*, 91 Idaho 99, 101, 416 P.2d 46, 48 (1966). To disallow such a defense against a charge of DWP would impermissibly infringe on the right by creating undue hardships, with no corresponding compelling interest by the State. As such, a defense that an individual's

license should not have been suspended in the first place should be allowed in a prosecution for DWP.

4.
IDAHO CODE § 49-1505 VIOLATES SUBSTANTIVE DUE PROCESS

A. INTRODUCTION

As an alternative to the procedural due process defenses enumerated above, Davidson also launches a substantive due process challenge to § 49-1505. Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures. *Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir.1994). The state does not license drivers to assure they can extract infraction fines from them; they license drivers to promote highway safety. By the same token, revocation of a driver's license for a reason completely unrelated to the only legitimate police power justification for the license in the first place violates due process.

B. THE RELATIONSHIP BETWEEN FINE COLLECTION AND HIGHWAY SAFETY

For a law or regulation to satisfy due process, it must (1) be aimed at achieving a legitimate public purpose, (2) use means that are reasonably necessary to achieve that purpose, and (3) not be unduly oppressive on individuals. *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). The problem here is that there is not only no "reasonably" necessary" relationship between road safety and the collection of fines, there is no rational relationship at all. In other words, the legitimate end of licensing drivers to promote highway safety does not justify the means of revoking a driver's license to encourage the payment of infraction fines.

Many cases illustrate the necessity of connecting the ground for revocation with the purpose of the license. Otherwise the State could simply license every human endeavor (newspaper boys?) simply to deter anyone from undesirable conduct of any nature through the threat of license revocation.

C. STANDARD OF REVIEW – STRICT SCRUTINY AND RATIONAL BASIS TESTS

Government may not deprive one of life, liberty, or property without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article 1, section 13 of the Idaho Constitution. "The right to operate a motor vehicle upon the public streets and highways is not a mere privilege. It is a right or liberty, the enjoyment of which is protected by the guarantees of the federal and state constitutions." *Adams v. Pocatello*, 91 Idaho 99, 101, 416 P.2d 46, 48 (1966). But how important a right or liberty?

Because in today's age the use of an automobile is generally necessary for one to earn a living, travel, and pursue happiness, it should be considered a fundamental right.

To evaluate whether a statute violates due process, the court must first consider the nature of the right affected. If the statute limits a fundamental, constitutionally secured right or implicates a suspect class, the standard of review is strict scrutiny. Strict scrutiny is satisfied only if the State can show that it has a compelling interest, and the regulation is narrowly tailored to serve that compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). As stated previously, the right to use an automobile should be considered fundamental since it implicates other fundamental rights. However, even if that were not the case, due process requires at least a "rational relation" between licensing for driving and revocation for failure to pay infraction fines.

The only reason to require drivers' licenses is "to make the highways as safe as possible by requiring each potential operator to demonstrate a knowledge of rules and

regulations of the road, a history of compliance with those rules and regulations, and the physical ability to safely operate a motor vehicle." *State v. Clifford*, 57 Wn.App. 127, 132, 787 P.2d 571 (1990).

Just as initially granting or withholding a driver's license must at least be rationally related to promoting the safety of the streets and highways, revocation of that license must similarly be necessary to achieve that goal. *State v. Hopkins*, 109 Wn.App. 558, 564, 36 P.3d 1080 (2001). Drivers' licenses should be considered remedial (i.e. protecting highway safety) and not punitive. The State of Washington has adopted this policy, and Idaho should as well. "[T]he general rule in Washington has long been 'the suspension or revocation of a drivers' license is not penal in nature and is not intended as punishment, but is designed solely for the protection of the public in the use of the highways." *State v. McClendon*, 131 Wn.2d 853, 868, 935 P.2d 1334 (1997); *State v. Griffin*, 126 Wn.App. 700, 705, 109 P.3d 870, 873 (2005).

D. THE STATE'S INTEREST RELATING TO IDAHO CODE § 49-1505

Idaho Code § 49-1505 authorizes the suspension of a driver's license if an individual fails to pay a traffic infraction penalty. As shown in a previous section, when the Washington Supreme Court analyzed their State's nearly identical provision, it held that "The State's interest in suspending an individual's driver's license for failing to appear, pay, or comply with a notice of traffic infraction is in the efficient administration of traffic regulations and in ensuring offending drivers appear in court, pay applicable fines, and comply with court orders. ...This interest does not rise to the level of the State's compelling interest in keeping unsafe drivers off the roadways. Simply put, failing to resolve a notice of traffic infraction does not pose the same threat to public safety as habitually unsafe drivers do." 91 P.3d at 882. The State of Idaho does not suspend one's driver's license for committing a traffic

infraction, even an unsafe one. It suspends it for failing to pay a fine. So the State is willing to tolerate unsafe drivers on the road, but what it will not tolerate is getting stiffed on a fine. The purpose of Idaho Code § 49-1505 is therefore to incentivize drivers to pay the State its money owed; it has nothing to do with highway safety whatsoever.

Are the means necessary to achieve the legitimate purpose? To determine whether the means are necessary to achieve the end, we must look to the purpose and lawful justification of requiring driver's licenses in the first place, i.e., the license requirement must be justified by a legitimate exercise of the police power. Any attempt to revoke the license must similarly be tied to that same legitimate exercise of the police power.

States may require a variety of licensees to protect health, safety, and welfare. However, the power to regulate by granting or revoking licenses is not unlimited. To legitimately exercise the police power, the means of the regulation must have a real and substantial relation to the legitimate reason for licensing the activity. *Chicago, Burlington & Quincy Railway. v. Illinois ex rel. Drainage Commissioners,* 200 U.S. 561, 593, 26 S.Ct. 341, 350, 50 L.Ed. 596 (1906). In sum, the police power to revoke licenses must be rationally related to the goal or purpose of requiring the particular license in the first place. *Montejano v. Rayner,* 33 F.Supp. 435 (D. Idaho E.D. 1939).

E. CONCLUSION – IDAHO CODE § 49-1505 FAILS BOTH TESTS

People v. Linder, 127 Ill.2d 174, 180, 535 N.E.2d 829, 129 Ill. Dec. 64 (1989) applied this principle to driver's licenses. There the Illinois Supreme Court struck down a section of the Illinois Vehicle Code which required mandatory driver's license suspension of defendants convicted of various felonies, including sex and drug offenses. Applying the rational relationship test, the court concluded that the means chosen by the Illinois Legislature –

license suspension – was not a reasonable method to accomplish the goal of the licensing statute – the safe and legal operation and ownership of motor vehicles:

> "Under the rational-basis test, a "legislative enactment must bear a reasonable relationship to the public interest intended to be protected, and the means adopted must be a reasonable method of accomplishing the desired objective.""

Id. (internal quotation marks omitted) (quoting *People v. Wick*, 107 Ill.2d 62, 65-66, 481 N.E.2d 676, 89 Ill. Dec. 833 (1985)). *Accord State v. Gowdy*, 64 Ohio Misc.2d 38, 40, 639 N.E.2d 878 (1994) (relying on *Lindner*, 127 Ill.2d 174, holding the statutory provision mandating license suspension for drug offenses does not bear a reasonable relationship to the statute's purpose of providing for the safe and legal operation and ownership of motor vehicles.)

There is no immediate connection between highway safety and fine enforcement. There are other ways to collect fines absent license suspensions. The second prong of the *Lawton v. Steele* test states that for a law to satisfy due process, it must use means that are reasonably necessary to achieve a legitimate public purpose. The State cannot argue it "needs" § 49-1505 to promote highway safety, when other existing procedures more effectively accomplish that goal. IDAPA 39.02.71 establishes the "point system" which allows the department to suspend the driver's license of an individual who has committed a certain number of moving violations. Unlike § 49-1505, the license suspension is directly tied to unsafe conduct on the highway, as opposed to the payment of a fine. And while the collection of infraction fines is no doubt a legitimate interest of the State, the Infraction Rules already provide for an alternate method of collection:

> **Rule 10.2. Forms and procedures for other non-traffic infractions**. The forms provided for in these Infraction Rules and the procedures set forth in these rules for the handling of defaults of an infraction shall be modified for non-traffic

> infractions by eliminating references therein to the suspension of a driver's license. The judgment shall be sent to the office of the prosecuting attorney rather than the Department of Transportation.

In conclusion, under either a rational basis or strict scrutiny test, Idaho § 49-1505 violates the Appellant's due process rights. A license suspension under § 49-1505 is a tool of fine enforcement, and not highway safety. Because a driver's license is a valuable liberty and property right, it cannot be taken away without substantive due process. A law that suspends a driver's license that bears no relationship to highway safety is unreasonable, and cannot stand under the Fourteenth Amendment.

5. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment of the United States Constitution guarantees those accused of a crime the assistance of qualified counsel. Ineffective assistance of counsel constitutes a Sixth Amendment violation. Based on the record before it, the Court should conclude that the Davidson received such severely deficient representation from his public defenders that his rights were violated.

A. PUBLIC DEFENDER KEVIN ROGERS

The Appellant's first public defender, Kevin Rogers of the Ada County Public Defender's Office, refused to provide a legal defense or to file a motion to dismiss, despite substantial authority for such a defense. He also gave the Davidson legally incorrect information which caused him to plead guilty to the charge. Davidson was forced – by himself and without the assistance of counsel – to file and argue a motion to withdraw his guilty plea. This motion was granted by the Court with little controversy, as the mistakes

made by the public defender were facially egregious. The motion and supporting affidavit are in the record, and they spell out in great detail the extent of Mr. Rodgers' incompetence.

B. Public Defender Randall Barnum

The Court then assigned Davidson a new public defender, Randall Barnum, a private practice attorney. Mr. Barnum also provided ineffective assistance to the Appellant. On one occasion, Davidson forgot to attend a pre-trial conference. Despite the fact that Mr. Barnum was there, he never telephoned Davidson to inform him that he needed to be at that hearing. This caused a bench warrant to be issued for his arrest. When Davidson questioned Mr. Barnum as to why he did not call him, Mr. Barnum replied that he did not have his phone number, despite the fact that the Appellant's phone number was on numerous documents in the case file.

Like the first public defender, Mr. Barnum refused to provide the Appellant with a legal defense or to file a motion to dismiss. He failed to properly investigate Davidson's legal theories before claiming that he would not file a motion to dismiss. Mr. Barnum made it clear that he would not file a motion to dismiss for the Appellant because he thought the defense was frivolous. Davidson provided him with a copy of *Redmond v. Moore, supra.*, a very persuasive case from Washington that was on all fours with the Appellant's case. He then provided the Appellant with a different Washington case that was clearly not on point to justify his conclusion. (*Amunrud v. Board of Appeals*, 158 Wn.2d 208 (2006).) (*See* Exhibit 'D'.) When the Appellant later questioned Mr. Barnum, it became clear that he had not even read the case that the Appellant was relying on for his defense. The Appellant told Mr. Barnum to read the case, and if he still thought that the defense was frivolous, that he should be removed from the defense. He agreed to do so, however, in a subsequent letter to

Davidson, Mr. Barnum still claimed, without any serious analysis, that he would not file a motion to dismiss because the defense lacked merit.

Mr. Barnum has since withdrawn from this case. It was not Davidson's intention to waive the right of counsel. The Appellant still desired to have the assistance of counsel. However, it became apparent that the public defender system was not interested in anything other than negotiating a plea bargain.

The Court should declare that the Appellant received ineffective assistance of counsel, and that, under current circumstances, the public defender's office is not equipped to do any actual research and writing that would be necessary for the type of defense the Appellant needs. In other words, it is not possible for the Appellant, or any other Appellant, who needs a well written and researched memorandum, to receive one from the public defender's office. This Court should therefore dismiss the Appellant's charge on Sixth Amendment grounds.

6. THE COURT ABUSED ITS DISCRETION IN SENDING DAVIDSON TO JAIL

A. SUMMARY OF THE PROCEEDINGS

On June 16, 2009, Davidson appeared before the court for sentencing. He requested to enter a conditional plea of guilty for the purpose of appealing the denial of his motion to dismiss. *See* Transcript, Vol. 1, P. 2, L. 20. The court accepted the conditional plea. Tr. Vol. 1, P. 3, L. 19. The court sentenced Davidson to a 180 day license suspension, Tr. Vol. 1, P. 7, L. 3, but offered to delay its implementation for three weeks so that Davidson could file for a temporary restricted permit. Tr. Vol.1, P. 7, L 12. Davidson motioned for a stay pending the outcome of the appeal, but the court would not accept an oral motion, stating, "I think that has to be a written motion filed with the Court to do so." Tr. Vol. 1, P. 7, L. 25. After other

discussion, the court then sentenced Davidson to three days in jail. Tr. Vol. 1, P. 9, L. 22. The court ordered Davidson to immediately begin serving his jail sentence, Tr. Vol. 1, P. 10, L. 18, and stated that once he had filed a written motion for a stay he would entertain it. Davidson moved for a one-day stay of execution so that he could write up a motion to stay execution pending the outcome of his appeal. Tr. Vol. 1, P. 10, L. 22. The court denied the motion, stating that a written motion would have had to have been filed prior to the event. Tr. Vol. 1, P. 11, L. 1. After non-related discussions, Davidson again moves the court to stay the execution of the jail sentence, this time for a few minutes, so that he could write out a motion on the spot. Tr. Vol. 1, P. 12, L. 8. The court denies the motion, stating:

> "Well, all I can tell you is that there are certain requirements under Rule 11 and I'm simply following the letter of the law here that requires that, whether it is – I understand the practical effect in your case, but that's the way that the – the manner in which the rule is written up and I think I'm bound to follow it."

Tr. Vol. 1, P. 13, L. 3

> "But, like I said, I think that's the requirement that I have to follow here."

Tr. Vol. 1, P. 13, L. 20

The court then has Davidson arrested by the Marshall and taken into custody. Despite the fact that Davidson was able to get both a written conditional plea and a motion for an immediate stay of execution to the Judge's office on his second day of incarceration, the proposed order was not signed for approximately two weeks, and Davidson was forced to serve the entire jail sentence. This immediate remand of Davidson into custody constituted an abuse of discretion by the Magistrate Judge.

The judge, through his comments on the record, appeared to be making the following rulings:

1) That if an individual fails to put their conditional plea in writing, they must immediately begin serving their sentence after the plea is orally taken, pursuant to Rule 11.

2) That a motion for a stay of execution of sentence pending the outcome of a conditional appeal cannot be given orally to the court, and must be in writing.

B. ABUSE OF DISCRETION STANDARDS

In order to evaluate a claim of abuse of discretion, the reviewing court must analyze: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991), quoting *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

C. ABUSE OF DISCRETION DEMONSTRATED

The lower court, in immediately remanding Davidson to jail despite his objection, stated that "there are certain requirements under Rule 11 and I'm simply following the letter of the law..." The section of Rule 11 that deals with conditional pleas is as follows:

> (2) Conditional Pleas. With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving in writing the right, on appeal from the judgment, to review any specified adverse ruling. If the defendant prevails on appeal, the defendant shall be allowed to withdraw defendant's plea.

Idaho Criminal Rule 11(a) (2)

While this section *does* require a conditional plea to be in writing, and while it is true that Davidson *did not* have his plea in writing at the time he entered it orally, there is nothing here to indicate that a defendant must be immediately placed in custody to serve a sentence if

they failed to have their paperwork submitted in time. An examination of the rest of Rule 11 shows no requirement for immediate remand. In fact, a review of other court rules shows that judges have broad and wide-reaching discretion when it comes to deciding *when* a defendant will have to serve their sentence. See, *e.g.*, I.C.R. 33 (a)(1) (After a plea or verdict of guilty...the court must appoint a time for pronouncing judgment and sentence...) I.C.R. 38 (b) (The judgment of imprisonment shall be stayed if an appeal is taken and the defendant is admitted to bail.) I.C.R. 46 (b) (A defendant may be admitted to bail or released upon defendant's own recognizance by the court in which defendant was convicted pending an appeal...) I.C.R. 54.5 (a) (Execution of the sentence, if any, imposed by the trial court, shall be stayed... when ordered by the magistrate...) M.C.R. 6 (b) (If the defendant enters a plea of guilty, the court may thereupon impose the sentence or may appoint a later time for imposing sentence.) Clearly, the judge had discretion to grant Davidson time in which to write out a conditional plea. Rule 11 (b) says, "With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea..." This rule gives the impression that an informal sidebar or conference with the prosecutor should take place during the sentence hearing so that the two sides can hash out agreeable conditions. Here, the court could have simply told Mr. Davidson to get with the prosecutor and write out a conditional plea, which could have even been on a pre-printed, court-supplied plea form. The court also clearly had authority to set another sentence hearing for another date in order to allow Davidson the time to write out his own conditions at home and submit them later. Strangely, the court seemed to perceive other sentencing issues as discretionary. The court both waived the fine in Davidson's case, Tr. Vol. 1, P. 9, L. 19, and offered to delay the start of the license suspension so that Davidson could file a request for a temporary restricted

permit. Tr. Vol. 1, P. 7, L. 13. Why the court did not feel a similar discretion was available regarding the jail sentence is unknown.

Because the court did not correctly perceive the issue of Davidson's sentencing as one of discretion, and because the court incorrectly thought that Rule 11 mandated actions which it did not, the court committed an abuse of discretion.

Secondly, the court committed an abuse of discretion when it would not accept an oral motion for a stay of execution pending the outcome of the conditional appeal. Idaho Criminal Rule 47 states:

> An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally...)

So primarily, we see that in general, motions can be made orally during hearings. Further, a judge has discretion to hear oral motions outside of hearings or a trial. The only question, then, is whether or not there is some other specific rule or law that applies to motions for stays pending a conditional appeal. Rule 11 is silent of the subject of stays of execution. Though no other rule seems to specifically discuss "conditional" appeals, there are several rules dealing with stays of execution pending appeal. Some of those rules were cited above. The Appellant is unable to find any reference in those rules that mandate motions for stays be in writing and filed before sentencing. "Execution of the sentence, if any, imposed by the trial court, shall be stayed [pending appeal]... when ordered by the magistrate..." I.C.R. 54.5. The court clearly had discretion to entertain an oral motion for stay of execution, and no rule appears to require such motions to be in writing.

Therefore, when the Magistrate Judge stated, "You are able to do that, but... I think that has to be a written motion filed with Court to do so," in response to Davidson's motion for a stay, the Judge abused his discretion, since he did not believe he had any discretion to

rule on an oral motion. *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). The Judge signed a proposed written stay order weeks after sentencing. The Judge should have granted Davidson's oral motion at hearing, to spare him three days of incarceration.

III.
CONCLUSION

Based upon the above arguments, Davidson's charge of driving without privileges should be dismissed by this Court. Davidson should be awarded costs. Additionally, Davidson should be awarded attorney fees, to be paid to himself for acting as his own attorney. In the alternative, "reasonable expenses" to compensate Davidson for his time should be awarded. Davidson is also entitled to an award of attorney fees or reasonable costs for his time pursuant to the Private Attorney General Doctrine. Finally, whether or not he prevails on this appeal, the Appellant requests a finding by this Court that the defenses as enumerated in this brief are based on law, and are not frivolous or without merit.

Dated this 4th day of February, 2010.

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Ryan Davidson, *Pro Se*
On behalf of Himself

CERTIFICATE OF SERVICE

I, Ryan Davidson, hereby certify that a true and correct copy of this document:

"APPELLANT'S BRIEF"

was sent to the following individuals by hand delivery:

BOISE CITY ATTORNEY'S OFFICE
P.O. Box 500
Boise, ID 83701-0500
(208) 384-3870

Dated this 4th day of February, 2010.

____

Ryan Davidson, *Pro Se*
On behalf of Himself

EXHIBITS