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I. INTRODUCTION

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

A. STATEMENT OF THE CASE

This is a “Driving Without Privileges” case. (Idaho Code § 18-8001). Davidson pled guilty to DWP while reserving his right to appeal the denial of his motion to dismiss the charge on constitutional grounds.

B. REPLY TO THE RESPONDENT’S STATEMENT OF THE FACTS AND COURSE OF THE PROCEEDINGS

An accurate recital of the timeline of prior proceedings is contained in the Appellant’s brief, pp. 1 – 2. The “Statement of the Facts and Course of the Proceedings” contained in the Respondent’s brief, p. 1, (excerpted verbatim from the District Court’s “MEMORANDUM DECISION ON APPEAL”) contains certain errors in the second paragraph.

To clarify: Davidson was originally assigned counsel from the Public Defender’s Office. This attorney refused to file a motion to dismiss and then pressured Davidson to plead guilty, based on legally incorrect advice. Davidson later filed a *pro se* motion to withdraw his plea, which was granted by the court. The court then tried to reassign the same deficient counsel to Davidson, who objected. It was at this point the court ordered conflict counsel to represent Davidson, who also refused to file a motion to dismiss. On October 28, 2008, Davidson failed to attend a pretrial conference and the court issued a bench warrant for his arrest. After the pretrial conference, in discussion with Davidson’s attorney, the Prosecutor offered to reduce the charge from a DWP to an Invalid License and agreed to stipulate to quash the bench warrant and not file additional charges for the failure to appear, if Davidson agreed to a \$150 fine, and court costs of \$75.50. Davidson did not respond to his counsel’s letter offering the deal. Later, without

Davidson's consent, his attorney filed a proposed plea bargain on his behalf with the court. At the sentence hearing, Davidson refused to accept the plea. Nonetheless, it appeared that the bench warrant had been dismissed as a result of Davidson's appearance. Davidson once again asked his attorney to file a motion to dismiss. He again refused. Presented with no other option, Davidson signed a document so that he could proceed *pro se* and file a motion to dismiss by himself, even though it was never his desire to proceed without counsel. During this "hearing," the magistrate judge did not appear on the bench or question Davidson as to his actual desire to proceed *pro se*. Davidson's attorney told him that the judge would not talk to him and that he needed to sign a document stating he wanted to proceed *pro se*. Davidson later filed his motion to dismiss, the denial of such by the magistrate and district court judge is what triggered the appeal before the Supreme Court.

C. STANDARD OF REVIEW

This case did not have a trial, as the Appellant entered a conditional plea of guilty so that he could appeal the denial of his motion to dismiss his charge on constitutional grounds. There do not seem to be any contested issues of fact in this appeal. The appeal deals with the interpretation of certain statutes and rules, as well as constitutional challenges to various processes used by the state. Over questions of law and constitutional interpretations, the Supreme Court exercises free review. *State v. O'Neill*, 118 Idaho 244, 245, 796 P.2d 121, 122 (1990).

II. ISSUES ON APPEAL

- 1) Davidson reaffirms and restates the six issues on appeal that were presented in his Appellant's brief, p. 3.
- 2) In their Respondent's brief, p. 3, the State rephrases the issues on appeal as:
 - a). Has Davidson failed to show that the district court erred in affirming the magistrate's order denying his motion to dismiss?
 - b). Has Davidson failed to establish that he is entitled to an award of attorney fees on appeal?
- 3) In addition, Davidson raises the following new issues on appeal:
 - a). That a majority of the State of Idaho's brief does not conform to Idaho Appellate Rule 35 (b).
 - b). Davidson also expands upon his fourth issue on appeal relating to the denial of counsel. It can be shown that Davidson's Sixth Amendment rights were also violated by the court when it did not inquire on the record whether or not Davidson's right to counsel was knowingly and intelligently waived.

III. ARGUMENT

1.

THE STATE OF IDAHO'S BRIEF DOES NOT COMPLY WITH I.A.R. 35

Preliminarily, Davidson must object to a large portion of the State's reply brief. The State does not offer argument or analysis of its own relating to five out of six of Davidson's issues on appeal. Instead, the State simply incorporates the District Court's memorandum as its argument on appeal. *Brief of Respondent*, p. 5, ¶ C. This does not appear to be a practice consistent with the rules.

Idaho Appellate Rule 35 (b) (6) states:

Argument. The argument shall contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

This rule seems to contemplate that the Respondent should be drafting their own arguments, not simply cross-referencing court decisions. The State's brief does not contain *their* contentions and the reasons therefore, nor does it cite authorities, statutes, or parts of the transcript. At a minimum, the citations in the District Court's memorandum should have been incorporated into the brief's table of authorities.

If an Appellant fails to include argument with respect to any issue on appeal, that issue is considered waived by the Supreme Court. *Weaver v. Searle Bros.*, 129 Idaho 497, 927 P.2d 887, 892-93 (1996); *Haight v Dale's Used Cars, Inc.*, 139 Idaho 853, 87 P.3d 962, n.1 (2003): "Because Haight has provided insufficient argument and no authority to support his contentions, the rule will not be relaxed and these issues will not be considered on appeal." Of course, in an appeal the burden of proof rests with the Appellant, and a Respondent's failure to argue an issue in its brief does not mandate a reversal of the District Court's decision under the theory of a waiver. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204, 1211 (2000).

Nonetheless, *there is still the rule*, and while the Court in *Idaho Power, id.*, did not find that a violation of the rule on the part of the Respondent warranted a reversal, it did not close the door on *any* possible sanction. In *Sprinkler Irrigation Co., Inc. v. John Deere Ins. Co., Inc.*, 139 Idaho 691, 85 P. 3d 667, 674 (2004), the Court found an attorney’s compliance with I.A.R. 35 (a) so deficient that it triggered sanctions under I.A.R. 11.1. The Court sanctioned the attorney by requiring him to pay attorney fees and costs jointly and severally with his client.

In the immediate appeal, the Court should determine and state on the record whether the Respondent has complied with I.A.R. 35, even if such determination has no bearing on the eventual outcome of the Appellant’s case. While the Respondent has no burden of proof to meet in their arguments, the rule is nonetheless mandatory and imposes a duty: “The argument *shall* contain the contentions of the respondent...” The adversarial system works best when both sides actually compete. At a minimum, failure to comply with Rule 35 should be considered a dereliction of duty to the Supreme Court. A properly researched brief aids the development of arguments and assists the Court in their decision-making process. If a violation of the rule is found, the articulation of such in the Court’s eventual decision could in itself constitute a mild form of sanction. By simply documenting the infraction, the State Bar may decide to investigate, as may the attorney’s employer. Finally, the public has a right to know about the quality of the legal work being done in their name, and subsidized by their tax dollars.

2.

**SUMMARY OF APPELLANT’S REBUTTAL TO
THE DISTRICT COURT’S MEMORANDUM**

As the State has incorporated the District Court’s MEMORANDUM DECISION ON APPEAL (R. Vol.1, pp.139-151) as their argument, the Appellant will endeavor to specifically address the arguments contained therein. The lynchpin of the District Court’s opinion can be boiled down as follows: After Davidson’s license was suspended, he failed to appeal pursuant to Idaho Code § 49-1505 (6). As such, he is barred from using as a defense to the charge of DWP the argument

that the license suspension was illegal or unconstitutional. *Memorandum*, p. 7, ¶ 2-3.

Davidson disagrees with this conclusion. The basics of his defense against the preceding are the following facts: Neither the court nor I.T.D. ever sent Davidson written notice of the provisions of Idaho Code § 49-1505 (6). Indeed, such notice is never sent out to *any* motorist. As due process requires *adequate notice* along with opportunity for a hearing, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950), Davidson cannot be held responsible for not utilizing the appellate procedure of § 49-1505 (6). The State's failure to inform Davidson of his appellate options under the statute violated his Due Process rights. That the statute is "*on the books*" and there for any motorist to discover does not constitute adequate notice. Hence, Davidson's license was suspended without due process. However, even if the state *had* sent Davidson notice of this post-suspension procedure, his license was still suspended without due process, because in this *particular instance*, due process requires a pre-suspension hearing. *Redmond v. Moore*, 151 Wash.2d 664, 91 P.3d 875 (2004).

Secondly and finally, the above argument *can* be used as a defense to the charge of DWP; it is not barred under the theory of collateral estoppel or failure to exhaust administrative remedies. In general, Davidson agrees with the principle of failure to exhaust, but an exception must always be made when it is alleged that the *process itself* violates due process. Fundamentally, how can a person be expected to comply with a statutory process that they allege to be unconstitutional for lack of procedural safeguards? When such an allegation is made, the court should first make a determination whether the suspect process violates due process. If not, failure to exhaust would be a factor. If the court finds the process unconstitutional, failure to exhaust would not come into play. The District Court overlooked precedents from the Supreme Court of Washington that very specifically deal with the issue of collateral estoppel and failure to exhaust remedies in DWP cases. The cases cited in the Appellant's district court brief were *State*

v. Dolson, 138 Wash.2d 773, 783, 982 P.2d 100, 105 (1999), and *Redmond v. Moore*, 151 Wash.2d 664, 670, 91 P.3d 875, 879 (2004) which both held that a failure to challenge a license suspension at the time it was issued did not bar a due process challenge as a defense to the charge of DWP. In his Supreme Court Appellant's Brief, (pp. 22-23) Davidson buttressed these arguments by providing the additional citations of *State v. Betschart*, 2005 WL 1177580, 1-2 (Wash.App. Div. 2); *State v. Storhoff*, 133 Wash.2d 523, 946 P.2d 783, 785 (1997); *State v. Whitney*, 78 Wash.App. 506, 514, 897 P.2d 374, review denied, 128 Wash.2d 1003, 907 P.2d 297 (1995); *City of Seattle v. Foley*, 56 Wash.App. 485, 488, 784 P.2d 176, review denied, 114 Wash.2d 1016, 791 P.2d 534 (1990); *State v. Baker*, 49 Wash.App. 778, 782, 745 P.2d 1335 (1987), statutory abrogation recognized by *State v. Rogers*, 127 Wash.2d 270, 276, 898 P.2d 294 (1995); *State v. Thomas*, 25 Wash.App. 770, 610 P.2d 937 (1980); *State v. Summers*, 120 Wn.2d 801, 810, 846 P.2d 490 (1993); *Bresolin v. Morris*, 86 Wash.2d 241, 543 P.2d 325 (1975); and *Peyton v. Peyton*, 28 Wash. 278, 68 P. 757 (1902). This extensive caselaw from our sister state supports the idea that a conviction for DWP cannot be achieved if the original license suspension violated a defendant's due process rights. The State of Idaho provided no contradictory caselaw from this or any other jurisdiction. Fundamentally, the District Court misconstrued Davidson's defense. Davidson is not so much challenging the original suspension¹; he is challenging the *process* by which his license became suspended.

3.

OVERVIEW OF THE CONSTITUTIONAL CRISIS IN IDAHO'S TRAFFIC COURT

The above constitutes a general summary of Davidson's rebuttal to the main holding of the District Court's memorandum (and for that matter, the State's argument). Of course, as

¹ Davidson *does* include argument relating to the fact that his license should never have been suspended in the first place. If Davidson's procedural due process rights had not been violated, and he had been granted a valid hearing to contest his license suspension, he would have had a valid, substantive argument. *Appellant's Brief*, pp. 18-21. But the fact that his license should never have been suspended at all is secondary to the overall argument that the entire process by which a license is suspended for failure to pay a fine is unconstitutional. Again, the District Court did not seem to notice the distinction.

demonstrated by the Appellant's opening brief, he has numerous arguments and extensive research that he believes will warrant a reversal. Davidson has appeared in front of the Idaho Supreme Court once before. *Davidson v. Wright*, 143 Idaho 616, 151 P.3d 812 (2006). There are parallels between the two cases. In both cases, what appeared to the Appellant to be a simple issue would get absolutely no traction in the lower courts. This caused the Appellant to perform extensive research in order to vindicate his position. Again, in both cases, the research uncovered far-reaching problems with the administration and enforcement of the laws at issue, which extended far past the Appellant's personal case.

The reason for these systemic problems in the administration of the various laws in the two cases appears to be identical -- a lack in developed caselaw at the Supreme Court level. *Davidson v. Wright, id.*, was a case about municipal initiative law. The Idaho Supreme Court had only decided three other cases on that subject in the last 100 years. The Appellant's immediate case deals with driver's license suspensions for failure to pay infraction fines (I.C. § 49-1505), and the misdemeanor charge of Driving Without Privileges. Infraction cases rarely make it to the Idaho Supreme Court. Defendants are not entitled to public defenders, and to retain a private attorney is cost-prohibitive, as appealing an infraction case to the Idaho Supreme Court might cost around 1000 times the amount of the original ticket. Similarly, Driving Without Privileges cases (I.C. § 18-8001) cases are rarely taken to the Idaho Supreme Court. Prosecutors will regularly tend to plead down a DWP to an Invalid License charge, which usually carries a fine with no jail time – an offer too good to refuse for most defendants. Public defenders (as aptly demonstrated in this case) do not want to put in the effort to challenge the legitimacy of DWP laws. And again, hiring a private attorney is cost prohibitive, as the costs of their services would far outweigh the cost of the original fine. Idaho Code § 49-1505 is one of many suspension statutes, something of a bridge between an infraction and a DWP. When you consider that indigency plays a large role in drivers' license suspensions (inability to pay the

original citation leads to suspension which leads to a DWP) it becomes apparent that the class of people *most* likely to be charged with DWP are the *least* likely to be able to afford competent counsel. Therefore, despite the fact that many thousands of Idahoans find their driver's license suspended each year, virtually no challenges to these suspensions make their way to the Idaho Supreme Court. (The one exception seems to be challenges to DUI-related suspensions, as apparently alcoholism knows no socioeconomic boundaries.) In 2005 alone, over 65,000 Idahoans had their driver's licenses suspended.² The most common suspension was pursuant to Idaho Code § 49-1505 for failure to pay an infraction penalty, accounting for over 19,000 individual suspensions. Yet, in the history of the Idaho Supreme Court, not one case has been presented to it calling for a constitutional analysis of the statute³. Even more astounding is that no such cases have been brought to the Supreme Court since 2004 – the year that the Supreme Court of Washington found a similar statutory scheme unconstitutional. The case of *Redmond v. Moore* 151 Wash.2d 664, 91 P.3d 875 (2004) figures prominently into Davidson's defense, and is extensively analyzed in his opening brief. The *Redmond* court recognized the inherent risk of illegal suspensions that can occur within a massive traffic court bureaucracy:

“With regard to risk of error, DOL notes it issued 386,114 notices of suspension in 1999, 401,471 in 2000, and 391,265 in 2001, based on information it received from the courts. Although the record does not include statistical evidence of the rate of error, the record does provide the illustrative examples of errors discussed above. Those examples, taken in conjunction with the sheer volume of information DOL receives from the courts, weigh heavily in favor of Moore and Wilson's argument that the risk of error under the current legislative scheme is substantial.”

Redmond, at 674. That no Idaho attorney has apparently even attempted to use this precedent to defend a client against a DWP charge is a shocking indictment on both the legal profession in

² Article: *Stuck in the System -- How Idaho's traffic laws lead to ruin for the poor*; by Will Schmeckpeper, Boise Weekly, January 4, 2006. See Exhibit 'A.' Online at: <http://www.boiseweekly.com/boise/stuck-in-the-system/Content?oid=925491>

³ *Adams v. City of Pocatello*, 91 Idaho 99, 416 P.2d 46 (1966) involved a completely different version of § 49-1505 -- one that dealt with insurance requirements.

this state, and on the lack of checks and balances inherent in Idaho's traffic court system.

So, as in *Davidson v. Wright*, it is once again up to a crusading *pro se* litigant to unravel a legal morass that has been left to fester by Idaho's legal establishment. Instead of crafting a narrow argument focusing specifically on the facts of the Appellant's situation, Davidson has expanded his argument to include broad constitutional questions, for which the resolution of such will affect the rights of thousands. As stated by author Will Schmeckpeper in the article "Stuck in the System - *How Idaho's traffic laws lead to ruin for the poor*":

"Until the Idaho Legislature chooses to rethink their stance on driving laws and how they affect our ever-growing lower economic class, the city of Boise considers overhauling its public transportation system, or public defenders are allowed the time and resources to present more thorough representation for their clients, everyone interviewed agrees, the "Joes" of our society are likely to be stuck where the economically downtrodden have always been stuck: fighting the system ... and losing."

Boise Weekly, January 4, 2006 (Exhibit 'A'). The fourth option for the "Joes" is for the Idaho Supreme Court to give a thorough review of I.C. § 49-1505 and to ferret out the due process violations that are contributing to the "ruin of the poor."

4.

ANALYSIS OF THE OVERALL SUSPENSION PROCESS AND THE ACTIONS DAVIDSON TOOK PURSUANT TO IT

A. INTRODUCTION

The State's argument (which, as pointed out before, is nothing but the incorporation of the District Court's memorandum) places much weight on actions taken or neglected by Davidson when dealing with the suspension of his driver's license. Although the original infractions, the suspension that occurred as a failure to pay the judgment, and the attempted appeal of such all fall under different case numbers, they are still necessarily a part of *this* case. See MEMORANDUM DECISION ON APPEAL, pp. 1 – 4. (R. Vol. 1. pp. 139 *et seq.*) The actions of the Appellant in the other case were touched upon in the opening brief. Because of the focus of

the State and the lower court on the specifics of those actions, it will necessary for Davidson to analyze those actions in greater detail. This will give the Appellant a better opportunity to document the legal problems with Idaho's infraction penalty enforcement scheme. Davidson can show that much of the process is unconstitutional. However, the Appellant will also show that even if the enforcement scheme is completely legal, it was not followed in Davidson's case, which in turn violated his right to due process, rendering the suspension invalid for purposes of charging him with DWP.

B. THE WRITTEN OPINIONS TO BE DISCUSSED IN THIS BRIEF

For purposes of analysis, it will be important to note all the adverse written opinions to Davidson's arguments that have so far occurred in this case. Between the infraction and DWP cases, there have four adverse court opinions and two briefs filed by the opposing party.

Written decisions:

1) MEMORANDUM DECISION AND ORDER RE: MOTION FOR TEMPORARY REINSTATEMENT OF DRIVER'S LICENSE PENDING APPEAL, Case No. T0724995, issued March 19, 2008, Honorable John T. Hawley, Magistrate.⁴

2) NOTICE OF INTENT TO DISMISS APPEAL AND DENYING MOTION TO WAIVE FEES, Case No. H0800230, issued March 31, 2008, Honorable Cheri C. Copsey, District Judge.

3) MEMORANDUM DECISION ON MOTION TO DISMISS, Case No. M0716222, issued May 14, 2009, Honorable Thomas P. Watkins, Magistrate Judge (R. Vol.1, pp. 49 - 53).

4) MEMORANDUM DECISION ON APPEAL, Case No. M0716222, issued October 1, 2010, Honorable Cheri C. Copsey, District Judge (R. Vol.1, pp. 139 – 151).

Briefs:

5) RESPONDENT'S BRIEF, Case No. M0716222, filed February 26, 2010, Jared B Stubbs, Assistant Boise City Attorney (R. Vol.1, pp.124 – 134).

⁴ Davidson will attempt to place this document, and others resulting from the original suspension, into the record.

6) BRIEF OF RESPONDENT, Case No. 38266, filed September 28, 2011, Nicole L. Schafer, Deputy Attorney General.

With respect to opinion number 2 above, virtually all of it was reprinted verbatim in opinion number 4. As such the opinion does not need to be analyzed separately and is not included in the record. With respect to document number 6, as stated previously, it simply incorporates number 4 as its argument. Therefore it does not need to be referred to separately in the following analysis. That leaves us with four separate written documents (three court opinions and one state's brief) which may be discussed in the next section.

C. INCONSISTENT RULES REGARDING PAYMENT AFTER JUDGMENT ON INFRACTIONS

Before we proceed through the chronology of events in the proceedings below – along a detailed analysis of each step taken – we must preface the discussion with an examination of the “payment demand” provisions currently in place.

If a person who receives an infraction citation does not appear before the clerk (or mail in payment) before the date specified on the ticket, a default judgment is entered and a notice is sent to the person demanding payment by a certain date, generally two weeks from the date of the notice. Idaho Infraction Rule 8 (c). The notice also states that the person may appear in front of the clerk before the payment date and schedule a hearing to show why their driver's license should not be suspended for failure to pay a fine. I.I.R. 8 (d). This is also what happens when an individual first appears on an infraction citation, schedules a trial, but then fails to appear at the trial.⁵ This is an appropriate process, as it notifies an individual that they must pay their fine by a

⁵ When a person making a first appearance on an infraction citation requests a trial from the clerk, they are given a notice which contains the trial date. The notice also contains the following:

“THIS CHARGE IS AN INFRACTION - YOU ARE HEREBY NOTIFIED that if you do not appear in court at said time and place for trial, judgment will be entered against you for the infraction violation in the sum of \$__. In addition, a copy of the judgment will be forwarded to the Idaho Department of Transportation which may count as driver violation points against you, or be forwarded to your home state pursuant to the Interstate Nonresident Violator Compact. IF YOU THEREAFTER FAIL TO PAY THE TOTAL AMOUNT DUE, YOUR DRIVER'S LICENSE MAY ALSO BE SUSPENDED IF THIS IS A TRAFFIC INFRACTION.”

date certain, and informs them that they may request a hearing prior to the payment date.

Now, what happens when an individual schedules a court trial on an infraction citation, appears, and is found guilty? When is their payment due? Is the process the same as in a default judgment? A review of the rules reveals an important inconsistency: *there is no rule governing payment after trial.*

Idaho Infraction Rule 9 (a) gives four scenarios in which the court will enter a judgment against the recipient of an infraction citation:

Entry of Judgment. Upon, (1) the entry of an admission to an infraction citation or complaint in person or by mail under Rule 6(a) or, (2) the payment of the total amount, which includes fixed penalty and court costs, by the defendant, or, (3) a finding by the court upon trial that the defendant committed the infraction offense, or, (4) a failure of the defendant to appear in court or before the clerk as provided in Rule 8, the court shall enter judgment against the defendant for the infraction which shall order the defendant to pay the fixed penalty and court costs provided in this rule.

The rule states that the court shall “order the defendant to pay,” but does not say when payment is due. With respect to scenario 4 above, we know when payment is due. The clerk sends a default notice with a definitive payment date that is not less than 14 days from the date of the notice. I.I.R. 8 (c). But what of scenario 3? Is payment also due within 14 days? When is payment due after a finding of guilt at trial? No rule addresses this subject. To add to the confusion, Idaho Infraction Rule 10 (a) states:

Suspension of License. If a defendant fails to pay a traffic infraction, (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 court shall sign a notice of nonpayment and send it to the

This notice is problematic, because it does not inform the individual that they have a right to a hearing prior to their license being suspended for failure to pay.

Department of Transportation for suspension of defendant's driver's license as provided by law.

This rule is correct for scenario 1 & 2 above. But 1 & 2 do not address failure to pay after a court trial on an infraction. Scenario 3 is “within such further time as allowed by order of the court...” What does this mean? Can a defendant motion the court for additional time to pay a fine – more time than the rules allow? In any event, none of the three scenarios from Rule 10 address when payment is due after trial. When an individual is found guilty at trial (at least in Ada County) the court does not then hand the defendant a notice – similar to the default notice – stating that payment must be made by a date certain, and failure to do so will result in a license suspension, but the individual has the right to a hearing to show cause why their license should not be suspended for failure to pay. Why does the court not do this? And why is there no rule creating a procedure for payment after a trial when there is a procedure for every other scenario? The Appellant does not have an answer to these questions.

At this point, the question inevitable follows: How exactly do traffic courts interpret these rules and how do they implement a procedure that is not on the books, but should be? The infraction citation that led to the suspension of Davidson’s driver’s license was processed through the Ada County Magistrate Court. The Appellant cannot speak to the processes of other county courts. Additionally, the Appellant does not know if procedures vary from judge to judge within Ada County. But within the court that Davidson was found guilty of the infraction, the process seemed to be as follows: After trial, a defendant must pay the penalty before 5 PM that day. Failure to do so triggers a notice of non-payment to the Transportation Department, bypassing any notice being sent to the defendant apprising him of his right to a show cause hearing.

The lack of an actual, articulated process contained in the Idaho Court Rules for dealing with payment after infraction trials raises serious due process concerns with statewide

implications. How can a motorist comply with a process that doesn't exist?

The next step is to discuss what the process *should be*. In light of the statutory scheme already in place, the answer is obvious: all traffic court defendants should be treated equally. A motorist who receives an infraction who forgets to make an initial appearance should be processed the same way as a motorist who appears at an infraction trial and is found guilty but who doesn't pay. Both should receive notices that demand payment by a date certain, but also inform the defendants of their right to a show cause hearing. To not send such a "show cause" notice to trial-attending defendants who fail to pay is both a violation of their due process rights (as articulated in the many cases cited in the Appellant's brief), their equal protection rights, and is a violation of Idaho Code § 49-1505, which *requires* such a notice be sent prior to suspension of a driver's license for failure to pay. In summary, when a defendant is found guilty at an infraction trial, the court should give them notice of when payment is due. It might be due at the end of the day, or in two weeks. If the defendant fails to make the payment by the specified date, they should receive a notice from the court that states that they must pay the penalty by a certain date, or their driver's license will be suspended. But the notice should also state that they have a right to request a hearing to show cause why their license should not be suspended for failure to pay. Essentially, it would be the same notice as the default notice specified in I.I.R. 8. Traffic courts around the state should immediately implement this policy in order to protect the due process rights of their citizens, but until an actual process is inserted into the court rules, a dark cloud of unconstitutionality will hover over each courthouse.

D. THE STEPS TAKEN BY DAVIDSON AFTER CONVICTION

With the above analysis in mind, we proceed to examine the specific steps taken by both the court and the Appellant following his conviction of the underlying infraction.

1) **The Court fails to give Davidson proper notice after conviction.** Davidson was convicted at trial of two infractions on July 23, 2007 (Case No. T0724995.) The court gave

him no notice of when payment would be due. However, it became apparent that the court believed that payment was due on the same day. The “Notice of Nonpayment” sent by the court to the Transportation Department (*see* Appellant’s Brief, Exhibit ‘B’) states that “judgment was entered against the above-named defendant on July 23, 2007...and that said defendant was given until July 23, 2007 and has failed and refused to pay the penalty.” The Appellant believes that courts, in failing to notify those convicted of infractions at trial of when payment is due, violate the due process rights of defendants.

It is clear Davidson did not pay the penalty on July 23, 2007. On July 24th, an automatic default notice should have been generated by the court and mailed to the defendant. This was not done in Davidson’s case, and it is believed that this is never done for defendants who fail to pay after trial, because as discussed previously, *there is no rule addressing this issue anywhere in the infraction rules*. Failure to send Davidson this notice violated his due process rights. There is also no question that state law requires that such notice be sent. According to Idaho Code § 49-1505, a notice of nonpayment cannot be sent to the Department unless a defendant has received “notice and hearing, or opportunity for hearing.” Even on the very “Notice of Nonpayment” itself – the one that was filed against Davidson by the magistrate court – the court must certify that the defendant failed to pay the penalty “after notice of judgment and opportunity for hearing,” or “after hearing and finding by the court that the defendant does not have a complete and continuing financial inability to pay the penalty.” Strangely enough, neither box is checked. (This should have been grounds for I.T.D. to refuse to process the suspension.)⁶

To summarize: After conviction, Davidson never received a notice of payment date, or notice and opportunity for hearing from the court on why his license should not be suspended for failure to pay, and it is likely that courts never send this notice out to anyone similarly situated.

⁶ It should also be pointed out that the “Notice of Nonpayment,” form that Ada County sends out on a regular basis, (the form of which is specified in I.I.R. 10), does not contain the mandatory certification that the judgment is not for a bicycle or pedestrian infraction, pursuant to Idaho Code § 49-1505.

As such, his due process rights were violated and the driver's license suspension was invalid, which means it can not be used to convict him for Driving Without Privileges.

2) **Davidson files a Motion for Discharge of Judgment.** At the time, Davidson had some inkling of the procedural problems contained in the infraction rules, although nowhere near the level of understanding he currently has, and so instead of waiting for a notice that he suspected may never come, and in an attempt to stave off a suspension of his license, Davidson, indigent at the time, filed a motion three days after his court trial on the infraction citation. The motion was entitled "Motion for Discharge of Judgment" and was filed pursuant to Idaho Infraction Rule 9 and/or 11⁷. Rule 9 contains a provision similar to the "complete and continuing financial inability" provision of Rule 11:

(g) Discharge of Judgment. If, after entry of a judgment for the payment of a penalty, court costs or payment of money to any person or entity, the court determines that the unpaid portion of the judgment is not reasonably collectible for any reason, the court may enter an order discharging the judgment and close the file. A discharge of a judgment on a citation may be entered by endorsing the word "discharged" on the face of the citation together with the date and the signature of the court.

It is questionable whether or not the "discharge" provision of Rule 9 is actually something that can be converted into a motion and filed by a defendant. The wording seems to indicate that a "discharge" is an administrative decision to be made by the courts without any input from the defendant. On the other hand, Rule 11 governs the "show cause" hearings discussed previously. It states:

(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

⁷ To be added to the record.

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.

Much like the rule analyzed before, this rule makes no mention of the scenario where a defendant is found guilty at trial but then does not pay. Scenario 1 & 2 are fine, in both those cases defendants would have received the notice informing them of their right to a show cause hearing. But failing to grant the same hearing to someone who shows up to trial would violate due process and equal protection. The third option above states that a show cause hearing can be held “at any other time in the discretion of the court.” This curious catch-all provision raises some interesting questions. Firstly, why is no defendant ever given notice of it? None of the notices sent out by the court ever mention this provision. How far does “at any other time” extend into the future? If a defendant misses the deadline to request a hearing as stated in their default notice, can they still request one using this provision?

Next, we must analyze the attributes of a show cause hearing. Perhaps the most important attribute of the show cause hearing is the automatic stay of license suspension proceedings. While no rule explicitly states that a “stay” is part-and-parcel of a show cause hearing, there is a strong inference based on the wording of the rule. See, *e.g.*, I.I.R. 10 (a), I.I.R. 11 (a), I.C. § 49-1505 (1). So, when the court received Davidson’s “Motion for Discharge of Judgment,” (assuming they were treating it as a motion for a show cause hearing), the court should have immediately stayed the license suspension process in Davidson’s case, pending the outcome of the show cause hearing. What was the result of the motion? On August 2, 2007, the court entered an order which states, “Denied, all data is stale: 2006. Must submit current financial affidavit.”⁸ Davidson had included older financial information with his motion, but his motion clearly stated that the information was still relevant and applicable. Further, there does not appear to be any rule that states that financial information has to be current, if the movant

⁸ To be added to the record.

attests that the same numbers are still relevant. In any event, the court's response did not seem to end the matter, even though it said "Denied" on the face of it. It ordered Davidson to submit a current financial affidavit. It did not give a deadline. It gave no other instructions. In apparently treating Davidson's motion as a motion for a show cause hearing, the court should have stayed all license suspension actions pending the outcome of the eventual hearing. What actually happened? The court ordered Davidson to submit a current financial affidavit on August 2. On August 27, Davidson filed the affidavit. Unbeknownst to Davidson, however, the week before, on August 22, the court had sent a "Notice of Nonpayment" to the Transportation Department. (The notice seems to have been generated on August 9 -- just seven days after the court sent Davidson the request for an additional affidavit. *See* Appellant's brief, Exhibit 'B.')

This is the notice that directly triggers the suspension of an individual's driver's license. Once again, Davidson's rights had been violated, as the suspension was done without due process of law. The court did however schedule Davidson a hearing after he filed his updated affidavit. The show cause hearing was set for September 28th, 2007, eleven days after the Department of Transportation started the suspension of Davidson's driver's license. On September 28th, the court denied Davidson's motion at hearing. On November 29, Davidson was arrested for DWP.

3) Davidson files a Motion for a Show Cause Hearing. On December 10, 2007, Davidson filed another motion for a show cause hearing (this one was actually titled "Motion for Show Cause Hearing), alleging not indigency, as before, but rather some of the various due process violations that were analyzed in these appeal briefs. On February 6, 2008, the motion was denied.

One of the arguments against Davidson's position is that he received two hearings before the magistrate: the motion to discharge (indigency) hearing, and the motion for show cause (constitutional issues) hearing. How can Davidson claim he was denied due process when he received two hearings before the magistrate? This was raised by the magistrate in the

“MEMORANDUM DECISION ON MOTION TO DISMISS,” (R.Vol.1, p. 51.) In dealing with the second motion first – the “show cause motion” – it should be noted that Davidson was asking the court to not suspend his license for failure to pay the penalty on the grounds that his due process rights had been violated, and because the law had not authorized a suspension of his license in the first place, as he had only been convicted of non-moving violations. Those very requests disqualified Davidson’s motion. He had no authority to file it and the court had no authority to rule on it. Why? Because the ONLY grounds for a show cause hearing is indigency. Idaho Infraction Rule 11 directly ties the show cause hearing to indigency. There is no current process on the books that allows an individual to bring issues other than indigency to a court prior to the suspension of a license. The magistrate did not possess the authority under the court rules to consider anything *other than indigency*. This lack of a viable process was discussed extensively by the Appellant in his brief, pages 15 - 17. And yet, the lower court found that the existence of the Rule 11 show cause hearing saves § 49-1505 from being found unconstitutional.

“Davidson cites this court to *Redmond v. Moore* 151 Wash.2d 664, 91 P.3d 875 (2004) in support of his claims. In *Redmond*, the court did uphold the dismissal of a charge of driving without privileges against the defendants, finding that Washington provided no pre-suspension hearing for a driver to challenge his suspension for failure to pay fines. This case is not applicable, however, since Washington State provided no mechanism for hearing prior to the suspension of one’s driving privileges. Idaho Infraction Rules 10 and 11 clearly provide what the State of Washington did not.”

R.Vol.1, p.52. But what the court fails to realize is that an “indigency only” hearing is not sufficient to protect against improper suspensions. Nowhere in the *Redmond* case did the defendants make the claim that they were denied an indigency hearing. They demanded a hearing that could address “ministerial errors that might occur when DOL processes information obtained from the courts pertaining to license suspensions and revocations, *e.g.*, misidentification, payments credited to the wrong account, the failure of the court to provide

updated information when fines are paid.” *Id.* at 674-75. Rule 11 does not protect the due process rights of a defendant.

With respect to the first “discharge” hearing, as shown before, Davidson received no notice of his right to have a hearing. Further, his license was suspended before the hearing ever took place. In this instance, due process demands that the hearing be held *before* the suspension of the license. Overall, Davidson has demonstrated that the process in the Idaho Court Rules for dealing with 1) payments after trials, 2) notices, and 3) hearings, is so completely defective, that its very nature violates the right to due process that is guaranteed to all citizens. One cannot be sanctioned for attempting to navigate through a defective process, and failing to choose an option which doesn’t exist, but should.

4) Davidson’s failure to utilize I. C. § 49-1505 (6). Much was made in the lower court about Davidson’s failure to proceed under Idaho Code § 49-1505 (6) after his license was suspended. The law states as follows:

Any person whose driver's license has been suspended under this section may appeal to the district court in the county where the infraction judgment was entered within the time and in the manner provided for criminal appeals from the magistrates division to the district court. The appeal shall be expedited as provided by rule of the supreme court. If the district court finds that the notice of nonpayment of the infraction penalty should not have been sent to the department for suspension of the driver's license, privileges or permit, the district court shall order the privileges be reinstated by the department and upon receipt of a copy of such order the department shall reinstate the privileges without payment of a fee.

In her “MEMORANDUM DECISION ON APPEAL,”⁹ Judge Copsey states, “...Davidson admitted that he had received the notice form the Department of Transportation issued on August 28, 2007, but failed to avail himself of the judicial review process provided in I.C. § 49-1505 (6) ... Therefore, any challenge to the decision to suspend his license for his failure to pay fees had to be filed in the District Court within forty-two (42) days of the Notice dated August 28, 2007. ...

⁹ Case No. M0716222, issued October 1, 2010, Honorable Cheri C. Copsey, District Judge (R. Vol.1, pp. 139–151).

He failed to exhaust his remedies afforded him under the statute, I.C. § 49-1505 (6).” *Memorandum*, pp. 6-7. The magistrate court, in “MEMORANDUM DECISION AND ORDER RE: MOTION FOR TEMPORARY REINSTATEMENT OF DRIVER’S LICENSE PENDING APPEAL,”¹⁰ wrote, “This court previously ruled that Defendant failed to avail himself of the judicial review provided in I.C. Section 49-1505 (6). Having failed to timely appeal or seek judicial review of the suspension of driving privileges Defendant cannot now claim that he was denied due process.” *Memorandum*, p. 3.

Davidson spent time in his brief arguing his failure utilize post suspension procedures should not bar his due process defense against the charge of driving without privileges. Extensive authority was cited, *e.g.*, “An invalid revocation cannot later support a conviction for driving with a revoked license, even if [defendant] had knowledge of the underlying suspension.” *State v. Dolson*, 138 Wash.2d 773, 783, 982 P.2d 100, 105 (1999). *Appellant’s Brief*, pp. 22-24.

The lower court’s focus on § 49-1505 (6) warrants an analysis of the section. Primarily, it can be noted that § 49-1505 (6) is a *post-suspension* process. The vast majority of Davidson’s brief is dedicated to the proposition that due process requires a *pre-suspension* hearing in this case. In the MEMORANDUM DECISION AND ORDER¹¹, the court holds that an individual is *not* entitled to a pre-suspension hearing after failing to pay an infraction fine. The court cites the correct cases, but does not perform the analysis required by the cases. Rather, they are taken at face value and applied to Davidson’s case. This is not what the U.S. Supreme Court intended.

The lower court correctly cites to *Adams v. City of Pocatello*, 91 Idaho 99, 416 P.2d 46 (1966), and *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977) for the proposition that “the legislature may, where a compelling public interest justifies the action,

¹⁰ Case No. T0724995, issued March 19, 2008, Honorable John T. Hawley, Magistrate.

¹¹ Case No. T0724995, issued March 19, 2008, Honorable John T. Hawley, Magistrate.

provide for summary action (pre-hearing suspension of driving privileges) subject to later judicial review of the validity thereof.” *Memorandum*, p. 3. Both these cases dealt with driver’s license suspensions. However, there are likely a dozen or more ways in which a driver’s license can be suspended. Each type of suspension has to be analyzed separately. There is no “blanket rationale” for all driver’s license suspensions. (Quite a chasm between suspending a license for drunk driving and suspending for failure to pay an infraction penalty.) Yet, the lower court takes the justifications of the *Adams* and *Dixon* courts and applies them to Davidson’s case, without even discussing the vagaries of the particular type of suspension Davidson was subjected to. The first step of an *Adams* / *Dixon* analysis is to identify the compelling state interest for the suspension. The second step is to determine whether public safety would be put at risk by affording a defendant a pre-suspension hearing. In *Adams*, the compelling state interest was “to protect the public using the highways against hardship which may result from use of automobiles by financially irresponsible persons.”¹² In *Dixon*, the compelling state interest was “safety on the roads and highways, and in the prompt removal of a safety hazard.” 431 U.S. at 114. In both cases, the courts went on to determine that a pre-suspension hearing was not required, as it would affect public safety. Meanwhile, nowhere in their decision does the lower court attempt to identify Idaho’s compelling state interest for the suspension of a driver’s license for failure to pay a fine without a prior hearing. In fact, throughout the entire proceedings of this litigation, neither the state nor the court has attempted to identify a compelling state interest in pre-hearing suspensions for failure to pay. In their brief, the state simply restates the compelling interest from *Dixon* and seems to imply that it applies in the current case, despite the fact that the suspensions in the two cases were completely different. “As has been stated, the purpose of Idaho’s suspension statute is to assure the effective administration and safety of its roads and

¹² *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) -- decided five years after *Adams* -- likely overturns the main holding in that case. *Bell* analyzed a similar statutory scheme, but determined that public safety was not an issue, and as such a defendant was entitled to a pre-suspension hearing.

highways. See *Dixon v. Love*.” RESPONDENT’S BRIEF, (R. Vol.1, p.131). On its face, how can one say the purpose of the state of Idaho’s statute is identical to the state of Illinois statute? The analysis is also absurd, because the “suspension statute” in *Dixon* was related to a violation of points system, while in the Appellant’s case, the suspension was for failure to pay an infraction fine. One involves public safety, the other does not. Only the Appellant has attempted to offer what the state’s interest may be in these types of suspensions. The Supreme Court of Washington, in analyzing an identical statutory scheme, held:

“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.”

Redmond v. Moore, 151 Wash.2d 664, 677, 91 P.3d 875, 882 (2004). The Appellant believes that – *at most* – this can also be the compelling state interest for Idaho’s suspension for failure-to-pay statute. However, it is not for the Appellant to say what the state’s interests are. That was the job of the Attorney General’s office, and they failed to do so in their Respondent’s brief. But, if the above is applicable to Idaho, then in proceeding to the “public safety step” of an *Adams / Dixon* analysis, it should be noted that the Supreme Court of Washington went on to say in *Redmond, supra.*, “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.” *Id.* at 677. It is clear from the caselaw that Davidson *was* entitled to a pre-suspension hearing, and the post-suspension process of § 49-1505 (6) does not meet the due process requirement. It is therefore irrelevant whether Davidson made use of the § 49-1505 (6) process or not. And of course, neither the court nor the state of Idaho has attempted to explain the inconsistency of how a motorist can be guaranteed a pre-suspension indigency hearing, but not a pre-suspension hearing on any other matter, on the grounds of administrative efficiency. Is

it efficient to have one hearing pre-suspension and one post-suspension? If efficiency is the goal, then a motorist should be entitled to both hearings pre-suspension, and there is no reason they could not be consolidated. In other words, if an individual neglects to pay their infraction penalty, they should receive a notice from the court informing them of their right to a hearing, where they can raise both indigency or any other legal issue *at the same time*.

5) **Additional legal problems with I. C. § 49-1505 (6).** There are several additional problems with Idaho Code § 49-1505 (6).

The law states, “Any person whose driver's license has been suspended under this section may *appeal* to the district court...” What exactly is an individual appealing? The ministerial duty of the court sending a notice of non-payment to the Transportation Department? By using the word “appeal” this law gives the impression that there would have been a previous hearing that the defendant would have been appealing from. The law also says that if the license was suspended “under this section...” there is a right to an appeal. “This section” (§ 49-1505) mandates a hearing (or opportunity) prior to suspension proceedings. This was a hearing that the court never sent notice of to Davidson, as described previously. That raises an interesting question: If an individual, having received proper notice of their right to a “show cause” hearing, fails to request one in a timely fashion, and their license is suspended, would they be barred from then filing an appeal pursuant to § 49-1505 (6)? Is it failure to exhaust administrative remedies?

Another important question about § 49-1505 (6) involves the scope of the appeal. What issues can be raised? Because the only type of suspension hearing enumerated in the rules relates to indigency, it is logical to think that the scope of any appeal would also be limited to indigency. If the hearing were so limited, it would be unconstitutional, as previously discussed. The statutory scheme that seems to be set up would say that prior to the suspension of a driver’s license for failure to pay, a defendant is entitled to a hearing to show that they cannot afford to pay the penalty. If the magistrate rules against them, they are entitled to an appeal pursuant to §

49-1505 (6). But this process violates the rights of an individual to bring up any issue other than indigency as a defense to the suspension of their license.

The problems with § 49-1505 (6) continue. Part of the law states, “The appeal shall be expedited as provided by rule of the supreme court.” An admirable attempt to speed the process along for an individual with a suspended license. Yet, a review of the court rules reveals that this “expedited process” does not exist. It would appear that the Supreme Court has never promulgated rules pursuant to § 49-1505 (6). Therefore, even if Davidson had attempted to comply with § 49-1505 (6) in a timely fashion, he would still be wandering in the wilderness. Nothing can be more of a violation of due process than a failure to create an actual process.

The Appellant would also take issue with the fact that there is *any deadline whatsoever* for challenging a license suspension. “Any person whose driver's license has been suspended under this section may appeal to the district court in the county where the infraction judgment was entered within the time and in the manner provided for criminal appeals from the magistrates division to the district court.” § 49-1505 (6). Implementing a deadline necessarily will have the effect of prejudging any motorist who has not received notice of the suspension. Consider the “evil twin” scenario: A twin takes his brother’s driver’s license and goes on a joy ride, eventually receiving a speeding ticket, then fails to pay the judgment. The twins are roommates, and the scofflaw brother intercepts the notices from the court addressed to his brother. Eventually, the innocent brother’s license is suspended by I.T.D. without his knowledge. That brother will end up driving with a suspended license for weeks, months, or possibly years before he gets pulled over for an infraction and finds himself imprisoned, or happens to stumble upon the fact that his license has become suspended. According to the District Court, the innocent motorist would have no defense to the charge of DWP, because he failed to appeal the underlying suspension in a timely fashion pursuant to § 49-1505 (6). This failure to protect innocent motorists by the imposition of an arbitrary filing deadline for

challenging license suspensions would appear to violate the right of due process. In *Reese v. Kassab*, 334 F.Supp. 744 (W.D. Pennsylvania 1971) the court pointed out:

“[T]hat even if the convictions cannot be contested, there still remain the possibilities, among others, that the convictions were those of another person with the same name; that the fines and costs were paid on an information at variance with that for which the minor judiciary entered a conviction as plaintiff contends occurred in this case; . . . or that there were errors on the report of conviction form.”

Id. at 747. In such cases there should be no deadline to contest an improper suspension, and there is no compelling interest for the state to limit such a right.

Another substantial problem with § 49-1505 (6) is that neither the court nor I.T.D. ever give defendants notice of this crucial provision. Never ever. This lack of notice is a major due process violation. The state cannot argue that it would be burdensome to send out this additional notice when I.T.D. already sends out pending suspension notices, which mislead motorists into thinking they have no appeal rights. After I.T.D. receives a notice of non-payment from the court, they send out a computer generated notice to the motorist which informs them that unless they pay the penalty, their license will be suspended within two weeks. The form gives no indication that a motorist apparently has a right to appeal pursuant to § 49-1505 (6)¹³. By giving no other option than “pay or get suspended” the motorist is left with the impression that no other option exists. *Expressio unius est exclusio alterius*. This lack of notice is a critical due process violation. However, even if the notice requirements were met, it is entirely likely that it would not pass constitutional muster because it is still a *post-suspension* procedure, as opposed to a *pre-suspension* procedure.

“What is more, unlike chapter 46.20 RCW, the statute invalidated in *Warner* provided a postdeprivation right to appeal from suspension. See 75 Pa. Stat. Ann. § 620 (“Any person whose operator's license or learner's permit has been suspended, or who has been deprived of the privilege of applying for an operator's

¹³ The notice that Davidson received is included in his opening brief as Exhibit ‘A.’

license or learner's permit under the provisions of this act, shall have the right to file a petition, within thirty (30) days thereafter, for a hearing in the matter in the court of common pleas of the county in which the operator or permittee resides")... Parties could obtain a stay of suspension until the appeal had been heard. See, e.g., *Commonwealth v. Scavo*, 206 Pa.Super. 544, 214 A.2d 309 (1965) (upon notice of appeal, driver obtained an order of supersedeas to stay suspension of his license pending outcome of appeal); see also *In re Turney*, 44 Pa.Cmwlth. 333, 403 A.2d 1350, 1351 (1979) (noting the driver's notice of suspension provided the following guaranty: " 'You have the right of Appeal to the Court of Common Pleas of the County wherein you reside within thirty (30) days of receipt of this notice. Notice to this Department of timely Appeal will stay the action herein set forth pending final outcome of the Appeal.' "). RCW 46.20.289 provides no such appeal process and even if a court schedules a hearing to correct an alleged error, it is unclear whether it has the authority to stay the suspension pending the outcome of the hearing. Thus, the challenged provisions of the statute in this case offer far fewer procedural guaranties of due process than the statute invalidated in *Warner*."

Redmond v. Moore, 151 Wash.2d 664, 73-74, 91 P.3d 875, 80-81 (2004). The above analysis should make it clear that Davidson's failure to appeal his license suspension pursuant to I. C. § 49-1505 (6) cannot be any sort of bar to raising a due process challenge as a defense to DWP.

E. CONCLUSION: THE PROCESS IS BROKEN AND THE COURT MUST FIX IT

The above analysis was undertaken for two purposes: 1) To review the state's process for suspending licenses for failure to pay from top-to-bottom, and to expose the due process problems with the process along the way, and 2) to demonstrate that the actions taken by Davidson pursuant to the defective process cannot and should not work as some sort of an estoppel against his right to use a due process challenge as a defense to DWP. This case gives the court the opportunity to correct some of the constitutional flaws in the process.

It was never the Legislature's intent that so many Idahoans would find themselves arrested for DWP as a result of the traffic infraction system now in place. When the Legislature completely revamped the vehicle code and created the process now embodied in § 49-1505, they did it with the specific intent to reduce arrests in Idaho. In the *Statement of Purpose* for House

Bill 18,¹⁴ they wrote:

Idaho has recently enacted a Traffic Infractions Act with the stated purpose to reduce congestion in the court system, to improve the ability of peace officers to regulate and control motor vehicle traffic, and to achieve significant economies in the administration of justice. This act has made all minor traffic violations noncriminal in nature, and no person may be arrested or jailed for an infraction violation. However, an inconsistency still exists under the law in that a person may not be incarcerated for a traffic infraction, but that nonpayment of a traffic infraction may result in a driver's being held in contempt of court and jailed until payment is made. *A better method of enforcement of nonpayment of infraction penalties is needed other than jailing people for nonpayment of a civil penalty.*

...Additionally, the bill sets up a new method for enforcing nonpayment of traffic infraction penalties, by providing that a driver's license may be suspended for nonpayment. This method of enforcement through the licensing process is more consistent with regulating the privilege of driving on state's highways, *and also avoids invoking criminal-type treatment and incarceration of drivers for a civil violation of the state's laws.*

(Emphasis added.) The passage of time has proven this policy something of a failure, as DWP arrests follow “failure-to-pay” license suspensions like night follows day for far too many Idahoans, with indigency often the main contributing factor. In drafting the process, the Legislature likely assumed that it was protecting those on the lower rung of the socioeconomic ladder by including the provision that a defendant's license would not be suspended if they had “a complete and continuing financial inability to pay the penalty.” It may be that this phrase sets a “poverty bar” a little too high. “Complete and continuing financial inability” conjures an image of a homeless man living under a bridge. But for an individual to receive an infraction citation, they likely own a car, and are able to pay for their driver's license renewal. Perhaps a more realistic standard would be the one the court uses to determine whether or not a criminal defendant is entitled to a public defender. In the article *Stuck in the System -- How Idaho's*

¹⁴ HB 18 / RS 8745, 1983. I.C. § 49-3408, as added by 1983, ch. 25, § 20, p. 66. Later recodified as § 49-1505, 1988 Session Laws, ch. 265, § 372, p. 757. See Exhibit ‘B.’

traffic laws lead to ruin for the poor,¹⁵ the author, along with a former state legislator, suggests community service as an alternative to infraction fines. This may better suit the needs of Idaho's working poor. Whatever the answer, it is clear that it would be a policy decision for the Legislature to decide. The court must deal with the law as written. But when interpreting § 49-1505, the court should always keep in mind the intent of the Legislature who wrote it. That body was trying to keep Idahoans out of jail. Therefore, the court should construe § 49-1505 as broadly as possible to give citizens *every* conceivable opportunity to avoid a license suspension through the use of constitutionally adequate notice and hearing procedures.

This case presents several issues of first impression for the Supreme Court. The court has never analyzed I.C. § 49-1505 or subjected the failure-to-pay suspension process to a due process analysis. The court has touched on similar issues related to other suspension statutes. The excerpt below is from a case that dealt with an individual's failure to read a notice from I.T.D. that was mailed to him. The following paragraph may be instructive in the immediate case. It may be *dicta*, or it may be the smoking gun:

“Preliminarily, we note that the deprivation of the continued possession of a valid driver's license is subject to due process requirements under the fourteenth amendment to the United States Constitution. Accordingly, a notice of suspension and an opportunity to be heard are mandated whenever the state seeks to suspend a license. *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). The notice must be one reasonably calculated, under all the circumstances, to inform the affected party of the impending action and to give him an opportunity to present his objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).”

State v. Quenzer, 112 Idaho 756, 735 P.2d 1067, 68-69 (1987). In the case of *Bell v. Burson*, the U.S. Supreme Court held that a hearing was required *prior* to the suspension of a driver's license. The court of appeals goes on to state that a notice from I.T.D. must give the affected

¹⁵ Article: *Stuck in the System -- How Idaho's traffic laws lead to ruin for the poor*; by Will Schmeckpeper, Boise Weekly, January 4, 2006. See Exhibit 'A.' Online at: <http://www.boiseweekly.com/boise/stuck-in-the-system/Content?oid=925491>

party an opportunity to present his objections. As shown previously, neither the “show cause” notice from the court, nor the “suspension” notice from I.T.D., ever notify an affected party that they may present their objections. In the case of the “show cause” notice, a party may only raise indigency; in the case of the “suspension” notice, there is no mention of an opportunity for a hearing whatsoever. In the *Quenzer* case, however, the constitutional sufficiency of the notice was not challenged by either party. Hopefully the court in this case will be able to do what did not happen in *Quenzer*.

5.

SUBSTANTIVE DUE PROCESS

Davidson also raised a substantive due process challenge in his opening brief. The argument is that Davidson cannot be convicted of DWP since the original license suspension violated his substantive due process rights. Because the suspension of a driver’s license must bear a reasonable relationship to the reason for granting it in the first place, § 49-1505 is unconstitutional, because the suspension is related to fine enforcement, as opposed to highway safety. The District Court made no mention of this argument in their MEMORANDUM DECISION ON APPEAL. The only time this issue was discussed by someone other than the Appellant was in the City of Boise’s brief on intermediate appeal. R. Vol.1, p.131. The City spends one half page arguing against points the Appellant never made. The City attempts to make the point that prohibiting pre-suspension hearings is rationally related to administrative efficiency, when Davidson was actually arguing that the suspension itself was not rationally related to public safety. The State of Idaho has provided no argument to the contrary in their brief. Davidson stands by his argument.

In 1984, the Idaho Attorney General’s office analyzed another suspension statute and found it violated both procedural and substantive due process. It determined that Idaho Code § 18-1502 (c) – which requires I.T.D to suspend the driving privileges of any person under the age

of 19 who has been convicted of alcohol offenses not related to the operation of a motor vehicle – was unconstitutional:

“Paragraph (c) of Idaho Code § 18–1502 is unconstitutional on equal protection grounds—and probably on substantive due process grounds—because the suspension of driver's licenses of minors following convictions for offenses having no rational relationship to the operation of a motor vehicle does not substantially further a legitimate, articulated state purpose.”

1984 Idaho Op. Atty. Gen. 48 (Idaho A.G.), Idaho Op. Atty. Gen. No. 84-5 (Idaho A.G.), 1984 WL 162404 (Idaho A.G.) The Idaho Legislature subsequently made amendments to the statute, and in 1991 the Attorney General’s office was again called upon to give an opinion of the statute’s constitutionality. While the Attorney General felt that the procedural due process problems had been fixed; he also felt that the statute could still be held unconstitutional:

“Nothing in the 1989 or 1990 amendments to this statute serves to cure what was identified as “the lack of a rational relation” between the penalty of denying driving privileges and the crime of possession, use, procurement, attempted procurement or dispensing of any beer, wine or other alcoholic beverage.”

Idaho A.G. Guideline 10/16/1991, Ref. No. 8218, online at www.ag.idaho.gov/publications/op-guide-cert/1991/g101691.pdf. Similarly, the state has failed to articulate any rational relationship between the suspension of a driver’s license for failure to pay an infraction penalty and highway safety. Since no rational relationship exists, the state cannot suspend an individual’s license for failure to pay a fine. As such, Davidson’s suspension was illegal, and he cannot be convicted of DWP.

6.

INEFFECTIVE ASSISTANCE OF COUNSEL

A. DAVIDSON’S COUNSEL FAILED TO OFFER ANY DEFENSE WHATSOEVER

In his opening brief, Davidson alleges ineffective assistance of counsel. On intermediate appeal, the District Court ruled against this point in the MEMORANDUM DECISION ON APPEAL, R.Vol.1, pp. 148-150. The District Court cites *Strickland v. Washington*, 466 U.S. 668, 104

S.Ct. 2052 (1984) and performs a lengthy analysis pursuant to it. Davidson believes that *Strickland* is inapposite and unhelpful in this case. The test of *Strickland* is to identify errors made during the course of trial, to analyze if those errors fell outside the level of professional competence, and finally, to determine if such errors prejudiced the outcome of the trial. Davidson does not attempt to point to an error here and there committed by counsel; Davidson is alleging an *absolute denial* of the right to counsel. To put it rather bluntly, both of Davidson's public defenders were either too lazy, overworked, underpaid, unmotivated, or incompetent to offer *any defense whatsoever*. Davidson *demand*ed a defense from his counsel, but they had no interest in anything but a plea bargain. The District Court claims that Davidson was not prejudiced, because he wanted a motion to dismiss filed with the court, and although counsel refused to file one, Davidson was able to file it himself *pro se*. The District Court misses the point. Davidson wanted some sort of legal defense. Having some legal ability, Davidson identified what seemed to be a valid constitutional challenge and presented it to his counsel. But Davidson did not know if what he discovered was the only possible defense available. There may be a dozen other legal defenses that could have been identified by a skilled attorney. But counsel refused to investigate this possibility. In fact, it seemed the only legal research done by either counsel was to justify their refusal to represent their client. The District Court says that Davidson was able to present his defense, and it was a losing defense, so it makes no difference that counsel did not present it. He was not prejudiced. *But Davidson is not an attorney*. A skilled attorney may have been able to take Davidson's losing motion and convert it into a winning motion. Certainly an attorney wouldn't have to deal with the additional hurdle of *pro se* bias that occasionally occurs. It is difficult to know what the court is giving sanction to: that a defendant's right to counsel can be abridged if the defendant can figure out how to file his own motions? Davidson's counsel both claimed that the arguments he wanted to bring were "frivolous." The Sixth Amendment cannot possibly allow court-appointed counsel to throw up

the “frivolous flag” as a dodge to doing some actual legal work. “A court-appointed attorney who believes that his or her client’s appeal is without merit must still submit a brief in accordance with this rule.” *Freeman v. State*, 131 Idaho 722, 963 P.2d 1159 (1998). The principle announced by the U.S. Supreme Court in *Anders v. California*, 386 U.S. 738 (1967) would seem to be applicable here:

“[The attorney’s] role as advocate requires that he support his client’s appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.”

Anders v. California, 386 U.S. 738, 744 (1967). No one wants to “crack the books” if they don’t have to. But if Davidson’s counsel didn’t want to do actual legal work they shouldn’t have become attorneys.

B. THE COURT FAILED TO SECURE A KNOWING, INTELLIGENT WAIVER OF COUNSEL

Davidson will further expand upon his denial of counsel claims by alleging that the court did not adequately inquire as to whether Davidson’s waiver of counsel was intelligently made.

On February 9, 2009, Davidson attended a pre-trial conference. At this “conference” Davidson sat alone in a courtroom with his second public defender, Randy Barnum. It was during this time that Barnum unequivocally stated that he would not reconsider filing a motion to dismiss on Davidson’s behalf. Davidson asked to speak to the judge, but Barnum stated that the judge would not come out of chambers to speak with him. At this point, Davidson did not feel

like he had any option but to sign away his rights to counsel. Barnum returned the document to chambers while Davidson left. At no point did the magistrate ever question Davidson about his desire to proceed *pro se*. The Ada County Magistrate Minutes, R.Vol.1, p.41, simply state, “[Defendant] wishes to proceed *pro se*.” The United States Supreme Court has held that the decision to waive counsel must be made knowingly and intelligently. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); accord *State v. Clayton*, 100 Idaho 896, 606 P.2d 1000 (1980). The standard to be applied in determining whether there has been a valid waiver of the right to counsel is whether there has been a knowing and intelligent waiver of a known right, and that determination rests on the facts of each individual case. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378 (1981); *State v. Ruth*, 102 Idaho 638, 642, 637 P.2d 415, 419 (1981).

“In *Balough*, the Ninth Circuit Court of Appeals stated, “In order to waive the right to counsel knowingly and intelligently, a criminal defendant “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” Accordingly, we have held that “[a] waiver of counsel cannot be knowing and intelligent unless the accused appreciates the possible consequences of mishandling these core functions and the lawyer’s superior ability to perform them.” *Balough*, 820 F.2d at 1487 (citations omitted).”

State v. Coby, 128 Idaho 90, 910 P.2d 762, 765 (1996) (Schroeder, dissenting.)

“The right to private counsel is separate from the right to court-appointed counsel. Even where there is a clear waiver, which is supported by findings, by a defendant of the right to a public defender, there still must be a separate waiver, also supported by findings, of the right to private counsel. Only then can it be said that a defendant has fully waived the right to counsel.”

State v. Maxey, 125 Idaho 505, 873 P.2d 150 (1994).

No such inquiries or findings were ever made in Davidson’s case. If the magistrate had questioned Davidson on the record, Davidson would have been able to express his frustration with his appointed counsel. The court may have ordered Mr. Barnum to prepare a motion to

dismiss, it may have required him to file an *Anders* brief, or it may have appointed new counsel to Davidson's case. Finally, because of the important nature of the right to counsel, it would seem that the court should "re-up" the waiver at each level of appeal. A *pro se* defendant representing himself at trial may wish to have a public defender on appeal. The rule should be that courts must make inquiries of *pro se* defendants at each level of appeal, and secure a valid waiver each time.

7.

ABUSE OF DISCRETION IN SENTENCING

A. THE MAGISTRATE ABUSED HIS DISCRETION BY IMMEDIATELY JAILING DAVIDSON

In his opening brief, Davidson argued that the magistrate judge abused his discretion in immediately remanding Davidson into custody after sentencing. *Appellant's brief*, pp. 34-38. On intermediate appeal, the District Court ruled against Davison on this point. R.Vol.1, p. 145-147. Both the District Court and Davidson agree that the magistrate had the discretion to *not* immediately remand Davidson. The difference of opinion, then, is that Davidson feels that the magistrate believed that *he did not have the discretion*. The District Court feels that the magistrate believed he *did* have the discretion, and that he exercised it appropriately. Both Davidson and the District Court refer to the same part of the transcript, but each interprets it differently. The most illustrative portion of the transcript is as follows:

THE COURT: 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, where 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. 2, p. 13, L. 3. This comment was in response to Davidson begging the court to give him time to file his paperwork. This paragraph clearly demonstrates that the judge felt he had no choice but to remand Davidson pursuant to I.C.R. 11. As Davidson pointed out in his opening brief, there is nothing in I.C.R. 11 or in any other rule that mandates an immediate remand into

custody of a defendant after sentencing. Therefore, the magistrate did not act “consistently with the legal standards applicable to the specific choices available to him.”

B. AN EXAMINATION OF THE ENTIRE SENTENCING HEARING

The entire sentencing hearing may have violated Davidson’s rights. Davidson clearly told the court he wished to enter a conditional plea. The court recognized Davidson’s intent. Tr. Vol. 2, pp. 2 - 3. Yet, the court proceeds with a standard I.C.R. 11 plea process. It would seem that this is not a good policy. If, during a plea hearing, a defendant makes it known on the record that he wishes to enter a conditional plea of guilty, but has not yet filed any related documents, the court should stop the proceedings. Since a conditional plea requires “the approval of the court and the consent of the prosecuting attorney,” I.C.R. 11 (a) (2), the court should immediately make a determination if it “approves,” and then should inquire of the prosecutor if they consent. If so, the court should order the defendant and the prosecutor to immediately write out the terms of the conditional plea – a process which would take no longer than five minutes, especially if the conditions had been discussed in open court during the court’s approval discussion. This should be the established rule.

In Davidson’s case, it made little sense, and may have contravened the rule, for the court, knowing that Davidson was attempting a conditional plea, to continue on without first obtaining the written conditions. If submitting written conditions is a part of the rule, then it would seem like if a defendant orally enters a conditional plea without the written counterpart, there is nowhere else for the court to go. The court must either wait for the written conditions, or the defendant must withdraw the request and proceed with a standard guilty plea.

Even assuming it was appropriate for the court to proceed as it did in Davidson’s case, there were still problems with the way the plea was accepted by the court. Firstly, it should be noted that Davidson entered his plea without the assistance of counsel. As stated in the previous section, there was never a valid waiver of counsel entered on the record.

“It is plain from the face of the record that the court allowed Beloit to plead guilty without the benefit of counsel or a valid waiver thereof. The United States Supreme Court has held that the decision to waive counsel must be made knowingly and intelligently.

...Here the court did not make a finding on the record that Beloit was acting with the full awareness of his rights and the consequences of his action, nor does the record show that the court considered any of the I.C. § 19-857 factors. In my view, this colloquy was insufficient to establish a knowing and intelligent waiver of Beloit's right to counsel as required by *Faretta* and *Clayton*.

State v. Beloit, 123 Idaho 36, 844 P.2d 18 (1992). If the entry of Davidson’s plea was governed by I.C.R. 11, then it should be examined whether or not the requirements of that rule were met. Five requirements must be met under I.C.R. 11 (c) before a guilty plea can be accepted. A review of the sentencing transcript reveals that the court only met three of the requirements of I.C.R. 11 (c), relating to the voluntariness of the plea, informing the defendant of the nature of the charge, and inquiring whether any promises had been made to Davidson.¹⁶ The court did not advise Davidson that by pleading guilty he would be waiving certain rights, pursuant to I.C.R. 11 (c) (3). The court made some attempt to inform Davidson of “the consequences of the plea, including minimum and maximum punishments, and other direct consequences which may apply,” although these issues were discussed *after* Davidson had entered his guilty plea. But perhaps the most glaring omission of the court was failing to tell Davidson that a “direct” consequence of his plea would that he would be immediately incarcerated. If the court had notified Davidson of this consequence, he would not have pled guilty.

In particular, “[t]he defendant should be informed of the possible consequences of pleading guilty including the maximum sentence and other *direct* consequences which may apply, such as the persistent violator statute.” 98 Idaho at 36, 557 P.2d at 630. *Accord State v. Rodriguez*, 117 Idaho 292, 787 P.2d 278 (1990).

State v. Beloit, 123 Idaho 36, 844 P.2d 18 (1992) (Bistline, J., dissenting.)

¹⁶ The court inquired about “threats or promises,” but didn’t ask about the other factors listed in I.C.R. 11 (c) (5).

The plea must be entered with a full understanding of what the plea connotes and of its consequences. *Ray*, 133 Idaho at 99, 982 P.2d at 934; *State v. Mauro*, 121 Idaho 178, 180, 824 P.2d 109, 111 (1991). In Idaho, the trial court must follow the minimum requirements of I.C.R. 11(c) in accepting guilty pleas. *Ray*, 133 Idaho at 99, 982 P.2d at 934; *Mauro*, 121 Idaho at 180, 824 P.2d at 111. If the record indicates that the trial court followed the requirements of Rule 11(c), this is a prima facie showing that the plea is voluntary and knowing. *Ray*, 133 Idaho at 99, 982 P.2d at 934; *State v. Miller*, 134 Idaho 458, 460, 4 P.3d 570, 572 (Ct.App.2000). Thus, the procedures outlined in I.C.R. 11(c) are intended to protect the underlying constitutional requirements that guilty pleas be entered voluntarily, knowingly and intelligently.

State v. Weber, 140 Idaho 89, 90 P.3d 314 (2004). It is clear that there was never a valid waiver of counsel in this case. Davidson's Sixth Amendment rights were violated here.

8.

DAVIDSON IS ENTITLED TO ATTORNEY FEES

Davidson has taken the unusual step of requesting attorney fees and reasonable expenses on appeal. This was the one issue that the State of Idaho decided to address on their own. BRIEF OF RESPONDENT, pp. 5 – 7. The State disagrees with Davidson that he should be awarded fees and expenses. Davidson requested fees and expenses based on two general theories, as stated in his brief. In this reply brief, Davidson will focus on his request pursuant to the P.A.G.D.

Davidson hereby requests that this court extend the Private Attorney General Doctrine into the realm of criminal cases. To do so would be in the interests of justice. Any attorney could come along and take Davidson's research and use it for a class-action civil rights lawsuit. If they prevailed, they would be entitled to fees under the P.A.G.D. Why should the civil attorney be treated so much more favorably than the criminal defendant, when both seek to adjudicate the same constitutional questions? The criminal defendant risks much more than the civil attorney, as they have likely turned down a comfortable plea bargain to press their constitutional challenge. The defendant risks incarceration or other penalties by bringing their challenge, the civil attorney risks nothing so substantial. Therefore, the Idaho Supreme Court

should hold that a criminal defendant is entitled to an award of fees and expenses if they can meet same the three-prong criteria for such an award in civil cases.

The three criteria for an award of fees pursuant to the P.A.G.D. are 1) the strength or societal importance of the public policy indicated by the litigation; 2) the necessity for private enforcement and the magnitude of the resultant burden on the Plaintiff; and 3) the number of people standing to benefit from the decision. *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524 (1984); *Serrano v. Priest*, 141 Cal.Rptr. 315, 569 P.2d 1303 (1977). Davidson believes he has met all three criteria; the state argues he has met none.

With respect to the first criteria, this case addresses both procedural and substantive due process challenges to a driver's license suspension scheme. An individual's right to their license has been described as "very important" by the U.S. Supreme Court: "*Once licenses are issued... their continued possession may become essential in the pursuit of a livelihood.*" *Bell v. Burson*, *supra*. With respect to the second criteria, the state of Idaho proved that private enforcement of these due process rights was necessary, as they did not acquiesce to Davidson's arguments in their reply brief. The magnitude of the burden on Davidson in carrying this appeal forward has been substantial. Clearly, it would be a burden for any attorney to carry a case from the magistrate court to the Supreme Court of Idaho. The burden is greatly magnified for a *pro se* litigant to do the same thing. This case is about to reach its four year anniversary. Davidson was arrested for DWP on November 29, 2007. For all intents and purposes, Davidson is "poor." He does not have any personal wealth nor does he live in comfort. Therefore, the many, many hours he has spent dealing with this case constitute a lost "opportunity cost" that will likely never be recovered. With respect to the third criteria, there are a large number of citizens who stand to benefit from a favorable decision in Davison's case. Every Idaho resident who possesses a driver's license will have increased due process protections. As stated previously, in 2005 nearly 65,000 Idahoans had their driver's license suspended, and nearly 19,000 of those were related to

a failure to pay an infraction penalty. Davidson has clearly met all three criteria of the P.A.G.D.

If the court finds that Davidson has met the criteria, the next step is to resolve the conflict that *pro se* litigants, in general, are not entitled to an award of attorney fees, because the term “attorney fee” denotes an attorney / client relationship. This can be overcome without overturning any existing caselaw. Under the P.A.G.D., a de facto attorney / client relationship is created between the litigant and the public. The litigant assumes the role of “The Private Attorney General,” representing the people of the state at large; fighting for their constitutional rights. Because of the substantial benefit received by the public, they are expected to “pay their attorney.” In this case, Davidson is serving as the private attorney general; his clients are the people of Idaho.

If the court does not want to go so far as to give an award of “attorney fees” to Davidson, it could still grant him “reasonable expenses” pursuant to the P.A.G.D.. In the context of a *pro se* litigant, reasonable expenses could include the cost of his time, or the lost opportunity costs. The Supreme Court of Idaho has never held that “reasonable expenses” cannot include compensation for a *pro se* litigant’s time in preparing their case.

Therefore, Davidson should be awarded his reasonable expenses if he prevails on any constitutional issue in front of the Supreme Court, in an amount to be determined by the court at a later time.

IV. CONCLUSION

The Appellant has made a compelling case that a majority of the driver's license suspension statute, Idaho Code § 49-1505, is unconstitutional. Davidson has also demonstrated that he was denied effective assistance of counsel, that the magistrate court abused its discretion when it immediately remanded Davidson into custody after sentencing, and that Davidson is entitled to an award of attorney fees. Davidson's conviction of Driving Without Privileges cannot be upheld. The Appellant hereby requests that this Court reverse the decisions of the District Court and the Magistrate Court.

Dated this 14th day of November, 2011.

/S/

Ryan Davidson, *Pro Se*
On behalf of Himself

CERTIFICATE OF SERVICE

I, Ryan Davidson, hereby certify that a true and correct copy of the "Appellant's Reply Brief" was sent to the following individuals by hand delivery:

IDAHO ATTORNEY GENERAL'S OFFICE
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Dated this 14th day of November, 2011.

/S/

Ryan Davidson, *Pro Se*
On behalf of Himself

EXHIBITS

EXHIBIT 'A'

<http://www.boiseweekly.com/boise/stuck-in-the-system/Content?oid=925491>

[January 04, 2006](#)

[News](#)

Stuck in the System

How Idaho's traffic laws lead to ruin for the poor

by [Will Schmeckpeper](#)

If you're like one of over 68,000 Idahoans, in 2005 you found yourself with a suspended drivers license. Maybe it was revoked for driving under the influence (5,971 suspensions), or perhaps the ex is tired of waiting for a child support payment (2,259 suspensions), but whatever the reason (refusal to submit to Breathalyzer testing? 1,640 suspensions), you found yourself in a sticky situation--and if you're poor, living paycheck-to-paycheck, the more you struggle, the worse it seems to get.

Ada County deputy public defenders Ann Cosho and David J. Smethers estimate that 90 percent of the repeat offenders they represent come from "a lower economic class." And they say that once in the system, many of these people experience a snowball effect. Smethers outlines the common scenario like this: Average Joe gets pulled over for an equipment problem (e.g. a faulty taillight), and he gets cited. Joe then forgets to pay his fine--hey, he's got two jobs and a kid at home with the flu--and the ticket goes through the system as unpaid, at which point the Idaho Department of Transportation is informed and they suspend Joe's driving privileges, just like they did to over 19,000 Idaho drivers this year. (Failure to pay a fine is the most common reason for license suspensions in Idaho.)

But it gets worse for Joe. Let's say he's moved in the past six months--maybe he's been sleeping in his truck, maybe shacking up at a friend's house. The news that his license has been suspended doesn't ever find Joe, he thinks everything's all right, and then he gets pulled over for that pesky taillight he still can't afford to get fixed. Only now, Joe is cited for DWP (driving without privileges) and--like over 5,000 Idaho drivers in 2005--gets his license *further* suspended. Now he's facing

reinstatement fees and citation fines--and, remember, Joe couldn't afford any of this in the first place. One more DWP, and Joe faces a mandatory 20 days in jail (10 days *more* than the mandatory minimum jail time for a second DUI)--all from a broken taillight and a little bit of laziness.

Or, in another scenario, let's say Joe's still living paycheck-to-paycheck, but instead of having a broken taillight, he forgets to send in his insurance payment one month. Last year, over 14,000 Idaho drivers had their licenses suspended due to lack of proof of insurance, along with another 8,500 failed to maintain their insurance and over 1,400 who had no liability insurance whatsoever. Joe would've been better off with the shot taillight, because now he's invoked the wrath of the SR-22, a state-requested "red-flag" that informs the Department of Transportation if Joe's insurance has lapsed, which--if Joe doesn't promptly reinstate his insurance--then results in the revoking of his license.

Unfortunately for Joe, however, the SR-22 also serves as a warning to insurance companies. According to Bob Henry of Henry Insurance Agency of Nampa, Joe now has to seek out "specialty" insurance, because most "preferred" companies won't issue an SR-22. "It also wouldn't be unreasonable to expect a 50 percent increase in premiums," adds Henry.

Joe now has a choice to make, according to Boise criminal attorney Thomas McCabe: "Find the money, stop driving and move closer to work, or break the law." McCabe says the damaging effects of an SR-22 are like getting stuck in a tar-pit: "The more you fight, the more you get stuck." McCabe also says that people can expect to forfeit, "their right arm and left leg and first born" if they face an SR-22.

Joe likes his right arm. So maybe he's smart enough to get a public defender to keep this nasty stuff from happening. After all, he can't afford a private attorney. But is that enough?

"I suspect--nothing against quality--I suspect they [public defenders] are over-worked to where they cannot devote sufficient time to their cases," says Jack Van Valkenburgh of ACLU Idaho.

McCabe adds, "The more prep time, the better the chances for a good result. It's a practical matter. As a private attorney, I can limit my case load. With a public defender, with their case load, the sky's the limit."

So let's stand Joe up, dust him off and take a look at him. He's broke, there's little chance of him moving closer to work (check the cost of property here lately?) and he's faced with the choice of breaking the law or... you know, destitution. Starvation. Stuff like that. Of course, he could always ride the bus.

"I see a lot of repeat offenders because of this situation. In a town like Boise where you have to drive, transportation is a huge issue for my clients," says Cosho. But there's a problem: The bus system in Boise is limited at best, and woefully inadequate the rest of the time. McCabe rates it a 2 out of 10, and says he doesn't plan on seeing it get any better any time soon.

"[Society's] not interested in public transportation except for economic or legal reasons," he says. "We're enslaved to the individuality of a car."

This situation hasn't gone unnoticed by state legislators. "We need to have public transportation alternatives, particularly for low-income, restricted, and the handicapped," says District 19 Representative Michael Burkett (D-Boise). "Our bus system needs to be expanded and enhanced." Still, Joe could make do with what the bus offers--provided he didn't have to be anywhere after 7:40 p.m. (when ValleyRide shuts down for the night), further limiting the type of job and hours he is able to work. How ya' feeling, Joe? Don't you wish you'd stopped at that railroad crossing (another of over 60 different reasons why nearly 5 percent of Idaho drivers have had their licenses suspended)?

"People make economic and survival choices all the time," says McCabe. "The problem is, when you have laws like this, you create a larger and larger outlaw mentality. We need to eliminate the criminal and outlaw mentality, but we're doing things that are counterproductive."

Smethers and Cosho concur, saying that the repeat offenders whom they serve quickly develop a "mindset of 'them against the government.'"

What *would* be productive, says Burkett, is to rethink our mandatory minimum sentences. "What we need is to leave this to the discretion of the judges," he says. "This is the type of crime that cries out for traditional discretion." One avenue for exploring alternatives to the affect of the DWP downward spiral is the use of community service, rather than fees, for traffic violations. "Community service is a real, valid way to approach criminal sanctioning that works in many situations," says Burkett. "But we're not utilizing it as much as we used to. I'd like to see it used more."

Until the Idaho Legislature chooses to rethink their stance on driving laws and how they affect our ever-growing lower economic class, the city of Boise considers overhauling its public transportation system, or public defenders are allowed the time and resources to present more thorough representation for their clients, everyone interviewed agrees, the "Joes" of our society are likely to be stuck where the economically downtrodden have always been stuck: fighting the system ... and losing.

<http://www.boiseweekly.com/boise/stuck-in-the-system/Content?oid=925491>

EXHIBIT 'B'

STATEMENT OF PURPOSE

RS 8745

Idaho has recently enacted a Traffic Infractions Act with the stated purpose to reduce congestion in the court system, to improve the ability of peace officers to regulate and control motor vehicle traffic, and to achieve significant economies in the administration of justice. This act has made all minor traffic violations noncriminal in nature, and no person may be arrested or jailed for an infraction violation. However, an inconsistency still exists under the law in that a person may not be incarcerated for a traffic infraction, but that nonpayment of a traffic infraction may result in a driver's being held in contempt of court and jailed until payment is made. A better method of enforcement of nonpayment of infraction penalties is needed other than jailing people for nonpayment of a civil penalty.

This bill would make a number of technical corrections in the code needed to correct references to the Traffic Infractions Act and clarify procedures to be followed in implementing the new law. Additionally, the bill sets up a new method for enforcing nonpayment of traffic infraction penalties, by providing that a driver's license may be suspended for nonpayment. This method of enforcement through the licensing process is more consistent with regulating the privilege of driving on state's highways, and also avoids invoking criminal-type treatment and incarceration of drivers for a civil violation of the state's laws.

This bill would also prohibit the arrest of a person for refusing to sign a uniform citation, thus avoiding many needless altercations between citizens and police officers. The bill provides that a citation may be served upon the defendant by an officer as an alternative to obtaining a signature on the citation.

Another change in the bill is to deal with the problem of nonpayment of traffic infraction penalties by minors, who might be insolvent by providing that a person who signs the application by a minor for a driver's permit or license shall be liable for the payment of any infraction penalty assessed by the courts. This theory of liability is consistent with the existing liability of a parent or guardian for damage caused by a minor operating a motor vehicle.

To offset any increased cost to the Department of Transportation's Division of Motor Vehicles in suspending licenses for nonpayment of infraction penalties, this bill would require payment of a fifteen dollar (\$15.00) fee to reinstate a revoked or suspended driver's license.

FISCAL NOTE

The only fiscal impact on the state general account of this bill is a possible increase in operating costs to the Department of Transportation by reason of additional personnel and operating expenses incurred by the Division of Motor Vehicles in suspending and reinstating driver's licenses for nonpayment of infraction penalties. No additional hearing responsibilities would be placed on the department, as suspensions would be automatic by court order and appeals would be to the district court. This bill provides for a license reinstatement fee of fifteen dollars (\$15.00) to offset any increased costs incurred by the department.

By establishing a new method for enforcement of nonpayment of traffic penalties through the license suspension process, this bill would result in savings to local governments by making unnecessary the current expenses of issuing and serving arrest warrants and prosecuting defendants for nonpayment of traffic fines.