

FOR THE ROAD

Idaho Prosecuting Attorneys Association



2011 HIGHWAY SAFETY SUMMIT TRAVELS TO EASTERN IDAHO Prosecutors and Law Enforcement Officers Should Plan to Attend - Register Now!

This year Idaho's annual Highway Safety Summit is being held at the **Red Lion Hotel in Pocatello, Idaho on April 21, 2011**. The Highway Safety Summit will provide highway and traffic safety professionals and advocates with innovative, results-oriented solutions to help save lives and reduce serious injuries from motor vehicle crashes.

The Summit is designed go foster discussion and interaction between presenters and participants on a variety of topics. Prosecutors and law enforcement officers are encouraged to attend. They will be joined by city and county officials, educators, counselors, traffic safety engineers, emergency responders and all other traffic safety advocates.

Registration is Free! There is no cost to participants. Breakfast, lunch and snacks

will be included. The event is sponsored by the Idaho Transportation Department Office of Highway Safety. A limited number of hotel rooms are available for participants traveling at least 100 miles outside the area.

To register for the training or to learn more about the Summit, visit:

www.highwaysafetysummit.com

Topics to include:

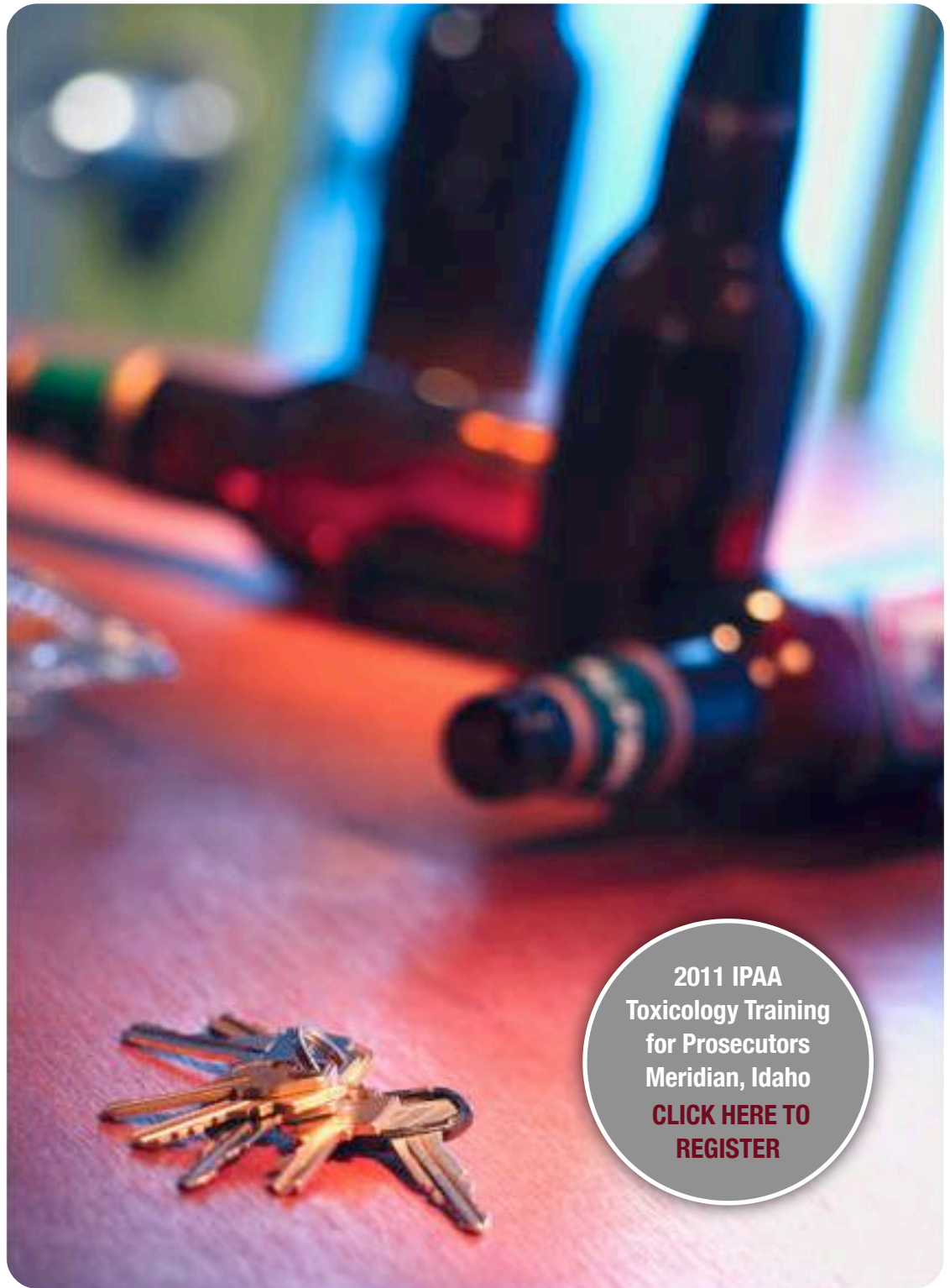
- DUI & aggressive driving enforcement;
- DRE -- New drug trends
- Crash reconstruction -- "Crash course"
- Traffic safety corridors; and
- An Executive Session for Chiefs, Sheriff's, Elected Prosecutors and Command staff.

REGISTER TODAY!!

TABLE OF CONTENTS	
Save the Date - Toxicology Training for Prosecutors	2
Idaho Traffic Law Update	3
Idaho Traffic Law Update Continued ...	4
Breath Taking News	5
2011 Legislative Watch	5
Last Call: Lewiston PD	6

**May
5th-6th**

**TRAINING
2011
CONFERENCE
MAY 5-6
MERCURY
HOTEL
MERIDIAN**



**2011 IPAA
Toxicology Training
for Prosecutors
Meridian, Idaho
CLICK HERE TO
REGISTER**



TOXICOLOGY TRAINING

Prosecutors are encouraged to attend IPAA 's Toxicology Training for Prosecutors at the POST Academy in Meridian, ID. This training will focus on issues in breath & blood testing in DUI cases.

TOPICS TO DATE

- Uncertainty Measurement
- Comparison of the breath testing instruments
- Discovery Issues
- Motions to Suppress
- Wet Lab - Testing the defense arguments
- And Many Other Topics

REGISTER NOW!!

Prosecutors -- Learn how to introduce & use toxicology evidence in your next DUI case.

Register now by emailing jared.olson@post.idaho.gov or calling 208-884-7325.

Idaho Traffic Law Update

State v. Howard, (2011):

Howard was charged with Felony DUI. However, the court found Howard's prior California judgment was not entitled to "full faith and credit," because it did not satisfy I.C. § 9-312 and 28 U.S.C. § 1738, even though the court did find the prior judgments admissible under the Idaho Rules of Evidence (I.R.E.). On appeal, the Court of Appeals dismissed citing double jeopardy, but the Idaho Supreme Court granted a petition for review.

The State argued the California judgment need only be admissible under the I.R.E. in order to be admitted and proved and did not need to comply with I.C. § 9-312 and 28 U.S.C. § 1738. The State argued this was accomplished in this case through the self-authentication requirements of I.R.E. 902(4). The Supreme Court agreed holding a judgment of conviction need only comply with the I.R.E. to be admitted to prove an enhancement. The Court held I.C. § 9-312 is not a separate, additional requirement for admitting and proving judicial records, but rather one method by which a public record may be certified in accordance with I.R.E. 902(4). Furthermore, the district court erred by requiring the California judgment to comply with 28 U.S.C. § 1738. The aim of this statute is to ensure states recognize the judgments of other states, not to set baseline requirements for admitting and proving prior judgments. The Court held Idaho may set lesser

requirements by which a judicial record can be admitted into evidence and proved.

However, in a split-decision, the Supreme Court held Howard could not be convicted of the felony DUI enhancement due to the prohibition against double jeopardy. The majority found the district court's order did not contain special findings of fact that enabled them to determine a general finding of guilty on the Felony DUI charge.

State v. Wanner, (2011):

Wanner appeals the suspension of his driving privileges after failing a breath test. Although Wanner failed to timely file a hearing request, he argues the "Notice of Suspension" form was not sufficient in explaining the suspension of his commercial driving privileges when operating a non-commercial vehicle, thereby denying him due process. The district court agreed with Wanner and the Idaho Transportation Department appealed.

The Court of Appeals reversed the district court finding Wanner not only failed to timely request a hearing but also failed to exhaust his administrative remedies relating to his disqualification from operating a commercial vehicle. In reaching this decision, the Court of Appeals discusses the interplay between the various Idaho statutes. Idaho Code § 18-8002A refers to the general suspension of a person's driver's license, whereas I.C. § 49-335 only applies to particular subset of driving privileges, i.e., Wanner's right to operate a commercial vehicle. Therefore, Wanner's driver's license was suspended and the court would not judicially review the suspension of his commercial driving privileges until he exhausted his administrative remedies under I.C. § 49-335.

State v. Jacobson, (Ct.App.2010):

Jacobson was arrested for DUI and transported to jail. He made two telephone calls to a bail bond company. He became aggravated with the bail bond company and as a result was escorted to a holding cell. About 30 minutes after he was booked, and over 3 ½

hours after failing his breath test, he was allowed to use the phone again. Jacobson argues he was denied access to a telephone to secure alternative evidentiary testing, thereby violating his due process rights.

The Court of Appeals held Jacobson did not demonstrate a violation of his due process rights. First, jail staff did not arbitrarily or unreasonably deny Jacobson's access to the necessary means of securing exculpatory evidence. He was provided the opportunity to make phone calls, and but for his conduct would have been allowed by jail policy to make additional phone calls. Second, Jacobson was in the holding cell for less than an hour. At no time did he request to make a phone call, to contact his attorney or be granted access to the means to secure alternative testing. He had been previously advised of his right to obtain alternative evidentiary testing and did not avail himself of this opportunity. Third, Jacobson's argument DUI suspects should be booked prior to other arrestees because of the inherent exigency associated with the metabolism of alcohol in the blood was not persuasive. The jail's procedures allowed DUI arrestees to secure timely release by moving to the front of the booking line upon securing bail. There was no evidence the jailers failed to follow jail procedure or unreasonably delayed Jacobson's booking.

State v. Masterson, (Ct.App.2010):

The issue on appeal is whether the ITD hearing officer erred in finding the police officer who conducted the breath test was properly certified to operate the Intoxilyzer 5000EN. In upholding Masterson's driver's license suspension, the hearing officer relied on a number of documents including information from the Intoxilyzer's manufacturer, CMI, Inc. These materials had not been provided to the parties prior to the hearing. The Court of Appeals held the CMI materials were not properly admitted and therefore the hearing officer erred in relying on them when making his findings of fact. Without the CMI materials the remainder of the record was insufficient to support the hearing officer's finding the arresting officer was properly certified to operate the Intoxilyzer 5000EN. Masterson's administrative license suspension was therefore vacated.

(Continued on Page 4)



State v. Kling, (Ct.App.2010):

Kling, who held a Washington state driver's license, was arrested for DUI in Blaine County. Before requesting Kling submit to evidentiary testing, the officer used an advisory form issued by the Idaho Transportation Department (ITD) to inform Kling of the consequences of refusing the test per I.C. § 18-8002(3). The ITD advisory form did not comply with I.C. § 18-8002 with respect to the action that would be taken with regard to a nonresident driver's license if testing were refused. Specifically, the officer did not seize Kling's license and issue a temporary permit. In fact, the form advised Kling her driver's license would not be seized by the officer.

The State argued that even if the advisory given to Kling did not comply with statutory requirements, her driver's license should still be subject to suspension because she was not misled by the deficient advisory. The Court of Appeals disagreed holding the advisory form did not substantially comply with the provisions found in both I.C. § 18-8002 and § 18-8002A. Therefore, the magistrate's decision not to suspend Kling's license was upheld.

However, the Court of Appeals did hold the magistrate court was incorrect in finding the officer deprived Kling of her due process rights when he failed to file an affidavit attesting to her refusal within 7 days of the refusal. Although the statute requires the driver to request a court hearing in writing within 7 days, the statute does not state a deadline for an officer to file the affidavit of refusal. The only purpose of the officer's affidavit of refusal is to obtain judicial suspension of the driver's license if no hearing has been requested. The Court of Appeals held that in this case there was not a due process violation as the officer filed the affidavit 10 days after the traffic stop and prior to Kling's hearing.

Editor's Note: Subsequent to the Kling decision, the Idaho Transportation Department has issued new advisory forms. Officers should ensure they are using the correct form. In addition, officers should note that out-of-state driver's licenses are now seized and a temporary permit is issued as directed by I.C. § 18-8002. Legislation (**House Bill 61**) has been introduced which, if passed, will remove the need for officers to seize a person's driver's license and issue a temporary permit. Stay Tuned!

State v. Scott, (Ct.App.2010):

Scott was arrested for DUI after a traffic stop for speeding. The magistrate suppressed the evidence because the city police officer obtained the evidence after stopping Scott's vehicle outside the city limits. The officer had witnessed the traffic violation within the city limits, but did not activate his overhead lights until catching up to Scott's vehicle about a mile outside the city limits. The State argued the magistrate erred in finding the officer was not in fresh pursuit of Scott before stopping him outside the city limits.

Upon discussing the Idaho statutes' authorizing and defining fresh pursuit, the Court of Appeals held the officer's stop of Scott's vehicle qualified as fresh pursuit. For the fresh pursuit exception to apply, the Court of Appeals explained that the officer must have knowledge a crime or infraction was committed within the jurisdiction and the officer pursued the suspect beyond the jurisdiction with the purpose of making an arrest, citing the suspect or investigating the offense. Whether the officer's lights are flashing and siren is blaring, is objective evidence of the fresh pursuit, but it is not necessary. It is well within the officer's discretion to wait for a safe point to stop a vehicle. Furthermore, it is within the officer's discretion to wait to turn on his flashing lights until the risk the suspect might flee is minimized. In this case, the officer activated his lights and made the traffic stop of Scott's vehicle at the officer's first opportunity. The Court found the officer followed appropriate police procedures for safely stopping suspects. There was no evidence the pursuit or stop was unreasonably delayed.

State v. LeClercq, (Ct.App.2010):

LeClercq appealed the decision denying her motion to suppress. LeClercq was arrested for DUI and was advised if she did not submit to a breath test, the officer would take her to the hospital for a "forced" blood draw. LeClercq argues the officer violated I.C. § 18-8002 through his statements resulting in an unreasonable search and seizure. She argues the officer's statement that blood would be forcibly drawn was coercive in light of the deviation from the statutory language, as well as having made the statement before LeClercq decided whether she would refuse or comply with the evidentiary test. The Court of Appeals rejected Le-

Clercq's argument holding the officer's statement under the totality of the circumstances did not amount to coercion rendering LeClercq's implied consent involuntary.

Citing past case law, the Court explains the following: (1) Whether or not the officer gives the required warnings bears nothing on the issue of consent, nor the admissibility of the evidence. The failure to advise a suspect is only significant with regard to the civil administrative suspension of the suspect's driver's license. (2) While a driver has the physical ability to refuse an evidentiary test, because there is no legal right to resist or refuse, there is no ability to revoke consent. (3) Where an officer informs a suspect he intends to do something the officer is legally authorized to do under the circumstances, such conduct does not amount to coercion.

In this case, the officer's use of the word "force" was ill advised, but under the totality of the circumstances, the officer's actions were permissible. He did not misstate the law or physically threaten LeClercq in any way. He simply informed LeClercq of his options and stated his intention should she choose to refuse the breath test. The officer was not required to remain mute or only reiterate the language set forth in the statute, when LeClercq asked questions. LeClercq did not demonstrate her consent was a result of coercion.

Editor's Note: Mom always told me to watch my language, and this continues to be good advice. Prosecutors and officers should never refer to the collection of blood evidence as "forcible" blood draws. The word "force" conjures up images of violence and coercion. As the Court of Appeals aptly hints, a better choice of words is preferable. In reality, the collection of blood evidence in these circumstances is a consensual blood draw by law. It is recommended this procedure be referred to as an "evidentiary blood draw."

****Click on case titles to read the cases****

Disclaimer: This newsletter is a publication of the Idaho Prosecuting Attorneys Association, Inc. Readers are encouraged to share varying viewpoints on current topics of interest. The views expressed in this publication are those of the authors and not necessarily of the State of Idaho, IPAA, or the Idaho Department of Transportation. Please send comments, suggestions or articles to jared.olson@post.idaho.gov.

WEB SITES

Idaho TSRP

www.TSRP-Idaho.org

Idaho Prosecuting Attorneys Association

www.IPAA-prosecutors.org

ITD Office of Highway Safety

<http://itd.idaho.gov/ohs/>

Idaho POST Academy

www.idaho-post.org

National Highway Traffic Safety Administration

www.nhtsa.gov

National Association of Prosecutor Coordinators

www.napcsite.org

NDAA National Traffic Law Center

www.ndaa.org

Idaho State Police Forensics

www.isp.idaho.gov/forensic/

Alcohol Beverage Control

www.isp.idaho.gov/abc/



Breath Taking News: Standard Operating Procedures Revised

On November 1, 2010 the Idaho State Police Forensic Services revised the Breath Alcohol Standard Operating Procedures. Idaho prosecutors and law enforcement officers should become familiar with the revised SOPs. A copy of the revised procedures can be found and downloaded at the following link:

www.isp.idaho.gov/forensic/alcohol.html

The most notable revision is a language change to remove the term “calibration check” and incorporate the more correct term “performance verification.” In addition, ambiguities associated with the 0.20 performance verifications are addressed. Next, scope and safety sections were added, along with a troubleshooting procedure when the field performance verification is outside the limits of the verification. Finally, a Minors in Possession Procedure has been included to ensure the breath testing instruments used in these investigations are properly certified by ISPFs. This new section outlines the differences in the standard operating procedures when using the instruments for these types of investigations. Prosecutors and officers should become familiar with these differences to guarantee the breath evidence collected will be admissible.

CLICK HERE to gain access to Idaho’s revised Breath Alcohol Standard Operating Procedures, along with Forms, Certificates of Analysis and Reference Manuals for the breath testing instruments. Recent revisions have also been made to the Intoxilyzer 5000/EN reference manual. Contact Forensic Services or the Idaho TSRP with any questions you may have.

Legislative Watch -- Keep Informed on Traffic Related Bills

The Idaho Legislature is back in session. Over the next few months they will be working on various bills, including many that are related to traffic enforcement. Issues include texting while driving, listing synthetic cannabinoids on the controlled substances list, to legalizing marijuana for “medical purposes.” Readers are encouraged to keep informed on the bills being proposed and become active where appropriate.

New bills will be introduced throughout the legislative session. Therefore, this article is not an exhaustive list of bills that are traffic related. For a complete list of the bills and calendar for the 2011 legislative session visit: www.legislature.idaho.gov.

Here are direct links to a few of the current legislative bills being introduced:

(Click on text for full bill information)

- **HB 19 - Compassionate Use Medical Marijuana Act.**
- **HB 61 - DUI Test Refusal, delete license seizure.**
- **S1011 - Passing emergency vehicles, duty to change lanes.**
- **S1024 - Cell phone use while driving, infraction.**
- **S1025 - Texting while driving prohibited, penalties.**

Stay tuned for other traffic safety related bills likely to be introduced before the end of the session.

Training & Conferences Notice

(Click on Course Names for More Information)

IPAA’s 2011 Winter Conference — February 9-11, The Grove Hotel, Boise, Idaho

Cops in Court — March 7-11, Multiple Locations in Northern Idaho & Western Montana

Lifesavers Conference — March 27-29, Phoenix Convention Center, Phoenix, Arizona

Idaho’s Highway Safety Summit — April 21, Red Lion Hotel, Pocatello, Idaho

IPAA’s Toxicology Training for Prosecutors — May 5-6, POST Academy, Meridian, Idaho

LAST CALL

For the Road would like to commend the Lewiston Police Department for hosting the “**Joining Forces**” event through the recent holiday season. Each year the Idaho Transportation Department promotes an impaired driving mobilization during. This year, Chief Steven Orr brought together 20 Idaho and Washington law enforcement agencies in an effort to reduce the number of impaired drivers by hosting a media event and high visibility enforcement campaign. An outstanding partnership, both regionally and across state borders, to impact our efforts *Towards Zero Deaths* on our shared highways.

Sgt. Ted Piche coordinated the “Joining Forces” media event on December 17, 2010. This event consisted of marked patrol vehicles from every agency visiting Locomotive Park with their emergency lights on and the community’s Christmas

lights illuminated in the background. The participating agencies then partnered together for high visibility enforcement from December 17th, 2010 through January 3rd, 2011.

Idaho participating agencies included: Lewiston Police Department, Nez Perce County Sheriff’s Office, Latah County Sheriff’s Office, Clearwater County Sheriff’s Office, Lewis County Sheriff’s Office, Idaho County Sheriff’s Office, Moscow Police Department, Orofino Police Department, Idaho State Police, Nez Perce Tribal Police and Idaho Fish & Game.

Washington participating agencies included: Asotin County Sheriff’s Office, Whitman County Sheriff’s Office, Garfield County Sheriff’s Office, Clarkston Police Department, Pullman Police Department, WSU Police Department, Washington State Patrol and the Washington Fish & Wildlife.



I want to personally thank these agencies and every other law enforcement officer in our nation who joined forces during the holidays to keep the impaired drivers off our roadways, thereby ensuring my family and your family made it home safe for the holidays. Thank you!!

-Jared Olson, TSRP



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Jared D. Olson
Traffic Safety Resource Prosecutor
Idaho POST Academy
700 S. Stratford Drive
Meridian, Idaho 83642

Phone: 208-884 7325
Fax: 208-884-7295
Email: jared.olson@post.idaho.gov

Addressee Name
4321 First Street
Anytown, State 54321



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Idaho Transportation Department

WE ARE ON THE WEB!!
WWW.TSRP-IDAHO.ORG