

For The Road



Idaho Prosecuting Attorneys Association, Inc.

New Breath Testing Instrument Announced

The New Year has brought with it the announcement of a new breath testing instrument approved for evidential use in Idaho. The Idaho State Police Forensic Services has validated the Lifeloc FC20, manufactured by Lifeloc Technologies, in accordance with Idaho Code § 18-8004(4). Beginning February 1, 2008, the FC20 may be used for evidentiary purposes in DUI investigations. The February 2008 date was chosen to allow Forensic Services to complete the necessary training manuals for Breath Testing Specialists and Operators.

The Lifeloc FC20 is a fuel cell based breath test instrument and will eventually replace the Alco-Sensor III/IIIA. Forensic Services will no longer certify newly purchased Alco-Sensors after March 1, 2008. It is their intention to cease support of all Alco-Sensor instruments as of January 2013.

Until that date, the Alco-Sensor III/IIIA will remain an approved instrument for evidential use in Idaho. A replacement became necessary when printers were no longer manufactured for the Alco-Sensor. This resulted in some Idaho courts not accepting the results, or at the very



Lifeloc FC20 Portable Breath Alcohol Tester by Lifeloc Technologies.

least, the lack of a printer required officers to take extra steps in their investigations, such as recording the results in front of a patrol car video camera.

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Web Sites

- Idaho TSRP
TSRP-Idaho.org
- Idaho Prosecuting Attorneys Association
www.ipaa.cc
- ITD Office of Highway Safety
itd.idaho.gov/ohs/
- Idaho POST Academy (includes DRE site)
www.idaho-post.org
- National Highway Traffic Safety Administration
www.nhtsa.dot
- National Association of Prosecutor Coordinators
www.napcsite.org
- NDAA/APRI & NTLIC
www.ndaa-apri.org

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Prosecuting the Drugged Driver — Register NOW!!

The IPAA is now taking applications for the *Prosecuting the Drugged Driver* course to be held in conjunction with the IPAA 2008 Winter Conference on **February 6-8, 2008**. *Prosecuting the Drugged Driver* is a joint training for prosecutors and Drug Recognition Expert (DRE) officers. It will be held at the Idaho POST Academy in Meridian.

This will be great “hands on” training for prosecutors and DRE officers to work together

through a drug impaired driving case. Topics include the area of optometry, toxicology and trial advocacy. There is an excellent faculty of national and local subject matter experts. [\(Click Here to See Tentative Agenda\)](#)

Space is limited, so register today! The registration form and tentative agenda can be found on pp. 5-8. [\(CLICK HERE\)](#). Please fax (884-7295) or email the completed form to ja-red.olson@post.idaho.gov.

New Breath Testing Instrument Announced (From Page 1)



Lifeloc FC20 w/ Printer

Breath testing instruments currently approved for evidential use in the State of Idaho:

- Intoxilyzer 5000
- Intoxilyzer 5000EN
- Alco-Sensor III/IIIA
- Lifeloc FC20

With the Lifeloc FC20 officers will not have to take the printer into the field. They can run the evidentiary test and then print out the results at the end of their shift. The Lifeloc FC20 not only has printing capability but includes other features that should prove useful to law enforcement officers and prosecutors. For example, the FC20 is equipped with a breath flow graph, which will give the officer another observational tool to ensure suspects are blowing properly into the instrument.

Prosecutors should note that the FC20 should not be considered new technology requiring a *Daubert* hearing, although we can expect the defense bar to raise this challenge. The FC20 is a fuel cell based breath test instrument, just like the Alco-Sensor III/IIIA, which has long been accepted by Idaho courts. In addition to extensive testing by the Idaho State Police Forensic Services laboratory, the Lifeloc FC20 is listed in the "Conforming Products List of Evidential Breath Measurement Devices" published in the Federal Register by the United States Department of Transportation.

FC20 Breath Testing Specialist (BTS) classes will be held beginning in February 2008. A currently certified Alco-Sensor III BTS is NOT automatically certified on the FC20. To become an FC20 BTS will require attendance at one of these trainings! The Breath Testing Specialist will then train and certify the FC20 Operators. This training will be important for officers to understand the nuances and specific calibration check procedures for the new instrument. Prosecutors are invited and encouraged to attend these trainings, so they too may be familiar with the FC20.

Some law enforcement agencies have previously purchased the FC20, expecting its approval for evidential use. If an agency currently has an FC20, it must for go back to the manufacturer in Colorado for software updates, and then be sent to Idaho State Police Forensic Services for certification. If you have any questions or concerns regarding this announcement, please do not hesitate to contact me by email at jared.olson@post.idaho.gov.

First DUI Appellate Decision of 2008: *State v. Buell* (Ct.App.2008)

The Court of Appeals rang the right New Year's bell in its first DUI appellate decision of 2008. The Court shot down defendant's argument he was coerced in completing field sobriety tests. In this case, Buell claimed his consent to perform field sobriety tests was coerced when the officer said, "You're required by law to do them." Buell acknowledged his initial detention for investigation of DUI was permissible based on reasonable suspicion, but argued his consent to perform the SFSTs was coerced by the officer's statement and because at one point the officer touched Buell's back to encourage Buell to face the officer. In the alternative, Buell argued these factors turned the investigation into a de facto arrest unsupported by probable cause.

The Court of Appeals held that Buell's coercion argument was "irrelevant" because constitutional standards do not require his voluntary consent to the field sobriety tests. The Court analogized the performance of field sobriety tests to that of a warrantless pat-down search for weapons during an investigative detention. The Fourth Amendment does not require *both* reasonable suspicion and consent. Therefore, field sobriety tests may be conducted without consent during an otherwise permissible detention, where they are justified by reasonable suspicion. The Court once again distinguishes "refusal" (a physical reality) from "consent" (a legal act). Buell plainly had no recognized right in the law to refuse the tests, therefore his mere involuntariness in performing these tests was not a Fourth Amendment violation.

The Court of Appeals also rejected Buell's alternative argument of this being a de facto arrest. First, the Court said the officer's touching was "innocuous." The Court then said, "Whether the [officer's] statement even constitutes a misrepresentation of law is subject to debate." The Court found the officer was clearly justified in instructing Buell to perform the tests. Neither the officer's statement, nor the officer's touching, or even the combination of these factors, equaled a de facto arrest. Finally, the Court held that even if the officer's statement was a mistake of law, this alleged misstatement did not cause Buell's detention because he was already detained upon reasonable suspicion of driving under the influence. Therefore, the Court found that Buell's argument had "no logical merit."

Few Things to Note: First, the Court makes it clear that refusal to perform field sobriety tests is not subject to civil sanctions, as is refusing alcohol concentration testing (I.C. §§ 18-8002, 8002A). Regardless, the capacity to foil field sobriety testing is one of physical power, not legal right.

Second, this is a good case for your trial quiver regarding "refusal as evidence" arguments. Cases from Alaska and Arizona are cited where evidence of the refusal of consent was found to be admissible at trial. Therefore, in cases where the defendant refuses to submit either to field sobriety tests or the evidentiary tests for alcohol concentration, the prosecutor should be placing this evidence in front of the jury.

Breath Taking News — New Simulator Solutions Certified

ISP Forensics has certified new solution lots of 0.08 and 0.20. Shipping will start by the end of January. The 0.08 solution is lot 7804, with a target value of 0.081, and the acceptable range is 0.073 to 0.089. **Please note that this is a change from the past range for the 0.08 solutions.** Previously the range for the 0.08 has been plus or minus 0.01, but ISP has adopted a straight plus or minus 10% for the 0.08, which

is the same margin used for the 0.20. The use of plus or minus 0.01 led to many attorneys incorrectly believing that +/-0.01 was an established margin of error for the instruments. Alco-Sensor operators need to be advised of the new limits for the 0.08. The 0.20 solution is lot 7109. The target value is 0.206, and the acceptable range is 0.186 to 0.226. Talk to your local Breath Testing Specialist about this.



Case Law Update:

State v. Allen, ---Idaho--- (Ct.App.2007): A jury found Allen guilty of misdemeanor excessive DUI (I.C. § 18-8004C). The evidentiary test was a blood draw of 0.22 due to the breath instrument being out-of-service. During trial, the defense made an objection to the blood test results for lack of foundation. The court sustained the objection but allowed a continuance for the State to locate the person who drew the blood to establish this person was authorized under I.C. § 18-8003(1). The defense objected contending this witness had not been disclosed and should not be allowed to testify. The lawyer argued he had turned down a favorable plea offer in reliance on the State's discovery response believing the State would not be able to lay a foundation for admission of the blood results. Allen appealed to the District Court, which reversed the trial court finding prejudice from the discovery violation was shown by Allen's rejection of a favorable plea offer. The State appealed this decision.

The Court of Appeals held the State's late disclosure of the witness who drew the blood sample was not so prejudicial as to require exclusion of the witness' testimony as a discovery sanction. Turning down an attractive plea agreement was not the type of prejudice where exclusion of a witness is appropriate. Rather, the court said the prejudice to be considered is whether the defendant's ability to defend himself at trial was hampered because of the late disclosure. Allen made no showing that timely pretrial disclosure of the blood drawer would have enabled him to impeach or rebut this testimony. The Court of Appeals reinstated the judgment of conviction.

State v. Oliver, ---Idaho--- (2007): A jury found Oliver guilty of driving under the influence of alcohol and/or drugs. He appealed arguing there was not substantial, competent evidence to support the jury's verdict and his sentence was an abuse of discretion. The Idaho Supreme Court held there "clearly was" substantial and competent evidence and that the District Court did not abuse its discretion when sentencing him.

Note: This case is of particular interest because included in the evidence the Idaho Supreme Court relied on is the testimony of a Drug Recognition Expert (DRE). Currently, there are no Idaho appellate decisions specifically stating whether or not DRE officers are considered "experts" able to give an opinion to the "ultimate issue." Although this case does not specifically ad-

dress this issue, the Court obviously relies on the DRE's exam when finding the evidence admitted at trial was substantial and competent. This case will be useful to prosecutors in jurisdictions where DRE officers have yet to be allowed to testify as experts.

State v. Schmoll, ---Idaho--- (Ct.App.2007): Schmoll raised the issue of whether he could be charged with a felony DUI in Idaho based on a prior felony conviction in Montana. Specifically, Schmoll argues the Montana statute does not substantially conform to the Idaho statute, because his felony conviction in Montana would not have been a felony if it had occurred in Idaho. A fourth DUI conviction in a person's lifetime is automatically a felony in Montana, whereas in Idaho the penalty statute has certain time limitations. The Court of Appeals held Schmoll's argument was misplaced, because I.C. § 18-8005(8) expressly states the proper comparison is between I.C. § 18-8004 and the foreign state statute that was violated, not the penalty provisions in I.C. § 18-8005.

This is the first appellate case in Idaho dealing with the issue of substantially conforming foreign statutes. It will be a good future reference for prosecutors when considering whether or not the foreign statute substantially complies with Idaho's DUI statutes. In this decision, the court examines how other jurisdictions have considered this issue. The court then analyzes the similarities and differences between the Idaho and Montana statutes. The Court states that substantial conformity does not require exact correspondence between the two statutes. For example, in Montana there are BAC levels that give rise to "inferences" the individual is under the influence of alcohol. In Idaho, a BAC of 0.08 or more is a *per se* violation rather than a rebuttable inference. A person also cannot be prosecuted in Idaho with a BAC under 0.08, unless there is evidence of drug influence (or statutes involving underage and CDL drivers). Otherwise, both statutes essentially prohibit the same conduct. The court also discusses how the Montana statute requires the prosecutor to prove a greater degree of impairment in a BAC refusal case, than is required in Idaho. In a footnote, the court states it is possible a DUI violation in Idaho would not result in a violation in Montana, but a Montana violation automatically results in a violation in Idaho. This will be a case to keep close on hand when wading through the often murky waters of determining whether another state's DUI conviction can be used to enhance DUI penalties in Idaho.



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This material was developed through a project funded by the Idaho Transportation Department's Office of Highway Safety.

Idaho Transportation Department

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

UPCOMING TRAININGS & CONFERENCES NOTICE

- *MySpace & Teen Drinkers* — January 25, 2008, Idaho City Schools, Idaho City.
- 2008 IPAA Winter Conference — February 6-8, 2008, Boise.
- IPAA's *Prosecuting the Drugged Driver* — February 6-8, 2008, Meridian.
- Breath Testing Specialist Training for FC20 — Beginning February 2008, Meridian.
- Western States Law Enforcement Liaison Training — February 13-14, Denver, CO

Last Call:

The past year has brought many changes, both subtle and apparent, in the field of traffic safety, especially in impaired driving laws. The *State v. Diaz* decision is certainly making a difference in how evidence is being collected in DUI cases. Many agencies have developed policies to collect blood evidence when defendants refuse to submit to breath testing. On a recent ride-a-long with Coeur D' Alene Officer Nick Knoll, I was told about a multiple DUI offender who was arrested and refused to give a breath sample. Officer Knoll informed him he was going to be taken for an involuntary blood draw. The suspect replied, "How come no one has ever done this to me before?" Collecting this evidence is having a positive impact. This issue of *For The Road* includes other case law examples of significant decisions in prosecuting impaired drivers. They are evidence of the good work Idaho prosecutors and law enforcement officers are doing to make Idaho safer. The goal for 2008 remains the same and that is to eliminate drunk driving and work towards "Zero Deaths." There are still far too many casualties and injuries affecting innocent people in our state. I want to thank you all for the good work you are doing each day to make these goals a reality. — **Jared Olson, Idaho's TSRP.**

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 at jared.olson@post.idaho.gov.

IDAHO PROSECUTING ATTORNEYS ASSOCIATION, INC.

Prosecuting the Drugged Driver –February 6-8, 2008



REGISTER TODAY!
Space is limited!

Do not miss this unique opportunity for cross-training between Prosecutors & DRE Officers.

Agenda Coming Soon!

JARED OLSON
IDAHO'S TSRP

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In conjunction with the **IPAA 2008 Winter Conference**, the IPAA is excited to announce a joint training for prosecutors and Drug Recognition Experts (DRE). *Prosecuting the Drugged Driver* is a 3-day trial advocacy course designed to provide prosecutors and law enforcement officers with the knowledge and skills necessary to successfully try drug impaired driving cases. The training will be held at the P.O.S.T. Academy in Meridian, Idaho on February 6-8, 2008. **Registration is Free!!**

Topics will include: The DRE process, signs & symptoms of drug impairment, the role of the toxicologist, how to qualify the DRE as an expert in court, preparing for the defense expert and responding to common defense challenges. Each participant will have the opportunity to practice courtroom skills with assistance from their peers and a faculty of experienced prosecutors and DRE instructors.

REGISTRATION INFORMATION:

Prosecuting the Drugged Driver -- February 6-8, 2008, Idaho P.O.S.T. Academy

To register, please complete this form. Then fax or email this form to the Idaho Prosecuting Attorneys Association (c/o Jared Olson):

Fax: 208-884-7295

Email: jared.olson@post.idaho.gov

Registrations accepted until January 21, 2008 or as long as space is available.

Please TYPE or PRINT legibly. This will be used for your name tag & certificate.

Name _____ ISB/DRE # _____

Title/Rank _____

Office/Agency _____

Work Address _____

City _____ State _____ Zip _____

Telephone (____) _____ FAX (____) _____

E-Mail Address _____

REGISTRATION COSTS

There are no registration costs for participants. Registration fees will be paid by the Idaho Transportation Department.



Training Course Will Be Held at the Idaho P.O.S.T. Academy



700 S. Stratford Drive
Meridian, ID 83680

**Building #8
Classrooms J & H**

The Idaho P.O.S.T. Academy has partnered with the IPAA in providing facilities and instructors for this conference.

Participants completing the training will receive CLE or POST Credit.

Accommodations

The IPAA has obtained special accommodation rates at the Candlewood Suites Hotel for the attendees of the training course (\$70.00 per night). To make reservations, contact the hotel directly at (208) 888-5121. Please be sure to indicate attendance to the IPAA Course. To assure room availability you must make your reservations before January 21, 2008 as our room block will expire.

**Candlewood Suites
1855 S. Silverstone Way
Meridian, Idaho
(208) 888-5121**

Please Note: Cancellations are your responsibility. You will be charged if you do not adhere to the Hotel's Cancellation Policy.



2008
Idaho Prosecuting Attorneys Association
Prosecuting the Drugged Driver
AGENDA

*Idaho P.O.S.T. Academy – Meridian, Idaho
Building 8, Classrooms H & J*

WEDNESDAY, FEBRUARY 6

- | | |
|----------------------|--|
| 7:30 - 8:00 | Registration |
| 8:00 - 8:50 | Introduction to Drugged Driving (Course Overview)
<i>Jared Olson, Traffic Safety Resource Prosecutor
Kevin Bechen, Idaho Transportation Department</i> |
| 8:50 - 9:00 | Break |
| 9:00 - 10:50 | The Drug Recognition Expert
<i>Sgt. Dean Matlock, ISP -- Idaho DRE Coordinator</i> |
| 10:50 - 11:00 | Break |
| 11:00 - 11:30 | DUI Intensive Treatment Courts
<i>Judge Mike Padden, NHTSA Judicial Outreach Liaison (Region 10)</i> |
| 11:30 - 1:00 | Lunch (on your own) |
| 1:00 - 2:50 | HGN
<i>Karl Citek, OD, PhD, FAOO
Professor, College of Optometry, Pacific University</i> |
| 2:50 - 3:00 | Break |
| 3:00 - 3:50 | Evaluation & Preparation of the DUI-Drugs Case
<i>Trooper Robert Rausch, ISP -- DRE Instructor
Jared Olson, TSRP</i> |
| 3:50 - 4:00 | Break |
| 4:00 - 5:00 | Qualifying the DRE as an Expert
<i>Jill Longhurst, Ada County Deputy Prosecutor
Officer Casey Hancuff, Boise PD – DRE Instructor</i> |
| 5:00 | Adjourn |

THURSDAY, FEBRUARY 7

8:00 - 9:30	Toxicology <i>Gary Dawson, PhD</i>
9:30 - 9:40	Break
9:40 - 11:30	Putting on the State's Case <i>Brent Berkley, Utah TSRP</i> <i>Joanne Michaels, Director of National Traffic Law Center</i>
11:30 - 1:00	Lunch (on your own)
1:00 - 2:00	Cross Examination of Defense Expert <i>Idaho Prosecutor (To Be Announced)</i>
2:00 - 2:15	Break
2:15 - 5:00	Trial Practice (Direct & Cross Exams) <i>All Faculty</i>
5:00	Adjourn

FRIDAY, FEBRUARY 8

8:00 - 9:00	DRE/SFST: Challenges & Responses <i>Deena Ryerson, Oregon TSRP (Not Confirmed Yet)</i>
9:00 - 9:10	Break
9:10 - 10:15	Ethical & Victim Considerations in DUI Prosecutions <i>Joanne Michaels, Director NTLC</i>
10:15 - 10:30	Break
10:30 - 11:30	To Be Announced
11:30 - 12:00	Wrap-up Closing Remarks Certificates of Completion