

1-8-2009

State v. Howard Clerk's Record v. 2 Dckt. 37627

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LAW CLERK

V. # 2. v. 3

IN THE SUPREME COURT OF THE
STATE OF IDAHO

JIM HOWARD III
PLAINTIFF/RESPONDENT
VS
STATE OF IDAHO
DEFENDANT/APPELLANT

CLERK'S RECORD
APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF IDAHO, IN AND
FOR THE COUNTY OF KOOTENAI

LAWRENCE G. WASDEN
ATTORNEYS FOR RESPONDENT

DENNIS REUTER
PUBLIC DEFENDER
ATTORNEYS FOR APPELLANT

VOL # II

FILED - COPY

JAN - 8 2009

Supreme Court Court of Appeals
Entered on ATS by

3570537627

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO, COUNTY OF KOOTENAI
324 W. GARDEN AVENUE, P.O. BOX 9000, COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO V
JIM HOWARD III
109 BEARDSLEY AVE APT E
POST FALLS, ID 83854

SSN # [REDACTED] DL# [REDACTED]
DOB [REDACTED] AGENCY: KOOTENAI COUNTY SHERIFF
CASE # CR-2008-0005287 CITATION # 111607
CHARGE: 118-8001 DRIVING WITHOUT PRIVILEGES
AMENDED:

JUDGMENT FILED 6/26/08 AT 2:30 P.M.

CLERK OF THE DISTRICT COURT
BY [Signature], DEPUTY
BOND:

The defendant having been fully advised of his/her statutory and constitutional rights including the right to be represented by counsel, and

- Been advised of right to court appointed counsel if indigent
- Defendant waived right to counsel
- Defendant represented by counsel
- Judgment, Plea of Guilty / Rights Waived
- Withheld Judgment Accepted
- Dismissed
- Judgment--Not Guilty
- Judgment on Trial--Guilty
- Judgment for Defendant / Infraction
- Judgment for State / Infraction
- Bond Forfeited / Conviction Entered - Case Closed
- Bond Forfeited / Dismissed

MONIES ORDERED PAID:

A \$2.00 handling fee will be imposed on each installment.

- Fine / Penalty \$ 75.50 which includes costs, and probation fee if applicable. Suspended \$ 0
- To be paid by 6/26/09, or enroll in time payment program BEFORE due date.
- Community Service _____ hours by _____ Setup Fee \$ _____ Insurance Fee \$ _____

Must sign up within 7 days.

- Reimburse _____
- Restitution _____
- Bond Exonerated, provided that any deposit shall first be applied pursuant to Idaho Code 19-2923 in satisfaction of outstanding fines, fees and costs with any remainder to be refunded to the posting party. Authorization from defendant to pay restitution +/or infractions from bond.
- No Contact Order, as condition of bond, terminated.

INCARCERATION ORDERED:

- Jail 180 days, Suspended 0 days, Credit 02 days, Unscheduled Jail _____ days are imposed & will be scheduled by the Adult Misdemeanor Probation Office, or Court, for violations of the terms below or on the attached addendum.
- Report to Jail in custody now Release _____ Work Release Authorization (if you qualify).
- Sheriff's Community Labor Program in lieu of Jail (if you qualify) _____ hours by _____ Must sign up within 7 days.

DRIVING PRIVILEGES SUSPENDED 180 days commencing Sept 30, 2008
REINSTATEMENT OF DRIVING PRIVILEGES MUST BE ACCOMPLISHED before you can drive. Apply to DRIVER'S SERVICES, P.O. Box 7129, Boise, ID. 83707-1129.

- Temporary Driving Privileges Granted commencing _____
To, from and for work purposes / required medical care / court ordered alcohol program / community service. Must carry proof of work schedule and liability insurance at all times. Not valid if insurance expires.

PROBATION ORDERED FOR _____ YEAR(S) ON THE FOLLOWING CONDITIONS:

Supervised - See Addendum

- Violate no federal, state or local laws more serious than an infraction. Commit no similar offenses.
- Maintain liability insurance on any vehicle that you drive.
- Do not operate a motor vehicle with any alcohol or controlled substances in your bloodstream.
- You must submit to any blood alcohol concentration test requested of you, with reasonable cause, by a peace officer.
- Obtain a Substance Abuse/Battery Evaluation, and file proof of evaluation, within _____ days.
- Enroll in _____ program, and file proof, within _____ days. File proof of completion within _____ days.
- Notify the court, in writing, of any address change within 10 days. Agrees to accept future service by mail at the last known address.
- Interlock ignition device required on vehicle for _____ year(s). To be installed per attached addendum.
- Other _____

THE SUSPENDED PENALTIES ARE SUBJECT TO YOUR COMPLIANCE WITH ALL TERMS HEREIN

THE DEFENDANT HAS THE RIGHT TO APPEAL THIS JUDGMENT WITHIN 42 DAYS

Copies To: IC Date June 26, 2008 Judge # 116
Def. IC Def. Atty. IC Pros. IC [] Other 152
 Jail (fax 446-1407) [] KCSO RECORDS fax 446-1307 (re: NCO) Dr. Serv. [] Auditor [] Com. Serv. [] AMP (fax 446-1990)

ORIGINAL

WILLIAM J. DOUGLAS
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83816-9000
Telephone: (208) 446-1800

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 JUN 30 PM 3:33

CLERK DISTRICT COURT

Shane Greenbank
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|-----------------|---|-----------------------------|
| STATE OF IDAHO, |) | Case No. CR-F08-5287 |
| |) | |
| Plaintiff, |) | MOTION TO RELEASE |
| |) | PLAINTIFF'S EXHIBITS |
| vs. |) | |
| |) | |
| JIM HOWARD III, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMES NOW, DAVID C. WHIPPLE, Deputy Prosecuting Attorney for Kootenai County Idaho, and hereby moves the above entitled Court for an order releasing to the Prosecutor's office the Plaintiff's exhibit(s), admitted into evidence at the jury trial before Judge Mitchell. This request is made on the grounds that the exhibit(s) are needed for trial.

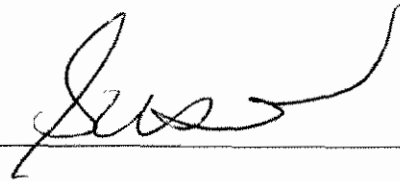
DATED this 27th day of June, 2008.

WILLIAM J. DOUGLAS
Prosecuting Attorney for
Kootenai County, Idaho

Shane Greenbank
SHANE GREENBANK
Deputy Prosecuting Attorney

Prosecutor's Certificate of Transmittal

I hereby certify that on the 30 day of July, 2008, a true and correct copy
of the foregoing was caused to be mailed:
PUBLIC DEFENDERS OFFICE
I.O.M.



A handwritten signature in black ink, appearing to be "Jus", is written over a horizontal line.

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 JUL -7 PM 3:54

Shane Greenbank
CLERK DISTRICT COURT
DEPUTY

WILLIAM J. DOUGLAS

Prosecuting Attorney
501 N. Government Way/P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Telephone: (208) 446-1800

Assigned Attorney:
SHANE GREENBANK

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|------------------|---|-----------------------|
| STATE OF IDAHO, |) | Case No. CR-F08-5287 |
| |) | |
| Plaintiff, |) | PLAINTIFF'S REQUESTED |
| |) | JURY INSTRUCTIONS |
| vs. |) | |
| |) | |
| JIM HOWARD, III, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

The Plaintiff herein respectfully submits the following requested jury instructions in addition to the Court's general instructions on the law.

DATED this 7th day of July, 2008.

WILLIAM J. DOUGLAS
Prosecuting Attorney for
Kootenai County, Idaho

Shane Greenbank
SHANE GREENBANK, 7845
Deputy Prosecuting Attorney

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 1

Under our law and system of justice, the defendant is presumed to be innocent. The presumption of innocence means two things.

First, the state has the burden of proving the defendant guilty. The state has that burden throughout the trial. The defendant is never required to prove his innocence, nor does the defendant ever have to produce any evidence at all.

Second, the state must prove the alleged crime beyond a reasonable doubt. A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It is the kind of doubt which would make an ordinary person hesitant to act in the most important affairs of his or her own life. If after considering all the evidence you have a reasonable doubt about the defendant's guilt, you must find the defendant not guilty.

CITATION NO.: ICJI 103A

GIVEN: _____
REFUSED: _____
MODIFIED _____
COVERED: _____ ✓

by Ct's stroke # 5

JUDGE

JM

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 2

The defendant, JIM HOWARD, III, is charged, with the crime of OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, allegedly committed as follows: That the defendant, JIM HOWARD, III, on or about the 17th day of March, 2008, in the County of Kootenai, State of Idaho, did drive or was in actual physical control of a motor vehicle, on or about a highway, street or bridge or upon public or private property open to the public, while under the influence of alcohol and/or drugs. To this charge the defendant has pled not guilty.

The Complaint is simply a description of the charge; it is not evidence.

CITATION: IDAHO CODE §18-8004

GIVEN: _____
REFUSED: _____
MODIFIED _____
COVERED: _____ ✓

by ct's stroke # 2

JUDGE 

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 3

In order for the defendant, JIM HOWARD, III, to be guilty of OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, the State must prove each of the following:

1. That on or about, the 17th day of March, 2008;
2. in the State of Idaho, County of Kootenai;
3. the Defendant, JIM HOWARD, III, drove or was in actual physical control of;
4. a motor vehicle;
5. upon a highway, street or bridge, or upon public or private property open to the public;
6. while under the influence of alcohol.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

CITATION: ICJI 1000 (MODIFIED: Replaced "Driving Under the Influence" with statutory language "Operating a Motor Vehicle While Under the Influence of Alcohol". Verdict and other proposed instructions follow suite).

GIVEN: _____ ✓
REFUSED: _____
MODIFIED: _____
COVERED: _____

JUDGE

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 4

To prove that someone was under the influence of alcohol, it is not necessary that any particular degree or state of intoxication be shown. Rather, the state must show that the defendant had consumed sufficient alcohol to influence or affect the defendant's ability to drive the motor vehicle.

The influence must be noticeable or perceptible and affect a physical or mental function that relates to one's ability to drive.

CITATION: ICJI 1006

GIVEN: ✓ ~~3~~

REFUSED: ~~3~~

MODIFIED: _____

COVERED: 1

*w/add'l sentence from Anders.
~~due to state in Anders.~~*

JUDGE Jim

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 5

The phrase "actual physical control," means being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving.

CITATION: ICJI 1003

GIVEN: _____ ✓
REFUSED: _____
MODIFIED _____
COVERED: _____

JUDGE _____

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|------------------|---|----------------------|
| STATE OF IDAHO, |) | Case No. CR-F08-5287 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | VERDICT |
| |) | |
| JIM HOWARD, III, |) | |
| Defendant. |) | |
| _____ |) | |

We, the Jury, duly empanelled and sworn to try the above entitled
action, for our verdict, say that we unanimously find the Defendant:

(CHOOSE ONE ONLY)

_____ **GUILTY** of OPERATING A MOTOR VEHICLE
WHILE UNDER THE INFLUENCE OF ALCOHOL

_____ **NOT GUILTY** of OPERATING A MOTOR VEHICLE
WHILE UNDER THE INFLUENCE OF ALCOHOL

DATED this _____ day of _____, 2008.

PRESIDING JUROR

PART II

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 8

Having found the defendant guilty of Driving Under the Influence, you must next decide whether the defendant has pled guilty to or was found guilty of Driving Under the Influence within the last ten years. The State alleges:

1. On or about the 4th day of December, 2002, the defendant pled guilty to or was found guilty of Driving Under the Influence in Kern County, California, in cause number BM608247A.
2. On or about the 10th day of December, 2003, the defendant pled guilty to or was found guilty of Driving Under the Influence in Kootenai County, Idaho, in cause number CR-2003-0017944.

The State must prove the existence of this event beyond a reasonable doubt.

CITATION: ICJI 1008

GIVEN: _____
REFUSED: _____
MODIFIED _____
COVERED: _____

JUDGE

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 9

In this portion of the case you will return a Special Verdict, consisting of a series of questions you should answer. Since the explanations on the form which you will have are part of my instructions to you, I will read the body of the Special Verdict form to you.

“We, the Jury, duly impaneled and sworn to try the above entitled action, unanimously answer the questions submitted to us in this Special Verdict as follows:

QUESTION NO. 1: Within the past ten (10) years did the defendant, JIM HOWARD, III, plead guilty to or was the defendant found guilty of Driving Under the Influence, in Kern County, California, in cause number BM608247A?

ANSWER: YES _____ **NO** _____

QUESTION NO. 2: Within the past ten (10) years did the defendant, JIM HOWARD, III, plead guilty to or was the defendant found guilty of Driving Under the Influence in Kootenai County, Idaho, in cause number CR-2003-0017944?

ANSWER: YES _____ **NO** _____”

Once you have answered the questions, your presiding juror should date and sign the verdict form and advise the bailiff that you have reached a verdict.

CITATION: ICJI 1009 (Modified: Using term "Special Verdict" rather than "verdict")

GIVEN: _____
REFUSED: _____
MODIFIED _____
COVERED: _____

JUDGE

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)
)
) Plaintiff,)
)
 vs.) **SPECIAL VERDICT**
)
)
 JIM HOWARD, III,)
)
) Defendant.)
 _____)

We, the Jury, duly impaneled and sworn to try the above entitled action, unanimously answer the questions submitted to us in this Special Verdict as follows:

QUESTION NO. 1: Within the past ten (10) years did the defendant, JIM HOWARD, III, plead guilty to or was the defendant found guilty of Driving Under the Influence, in Kern County, California, in cause number BM608247A?

ANSWER: YES _____ **NO** _____

QUESTION NO. 2: Within the past ten (10) years did the defendant, JIM HOWARD, III, plead guilty to or was the defendant found guilty of Driving Under the Influence in Kootenai County, Idaho, in cause number CR-2003-0017944?

ANSWER: YES _____ **NO** _____

DATED this ____ day of _____, 2008.

PRESIDING JUROR

PART III

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 10

Having found the defendant guilty of Driving Under the Influence, you must next consider whether the defendant has been convicted on at least two prior occasions of felony offenses.

The State alleges the defendant has prior convictions as follows:

1. On or about the 24th day of August, 1983, the defendant was convicted of Burglary in the Second Degree in the State of Oklahoma, and
2. On or about the 8th day of January, 1988, the defendant was convicted of Burglary in the Second Degree in the State of Washington, and
3. On or about the 18th day of August, 1998, the defendant was convicted of Possession of a Controlled Substance in the State of California.

The existence of a prior conviction must be proved beyond a reasonable doubt and your decision must be unanimous.

CITATION: ICJI 1601

GIVEN: _____
REFUSED: _____
MODIFIED _____
COVERED: _____

JUDGE

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 11

In this portion of the case you will return a Special Verdict, consisting of a series of questions you should answer. Since the explanations on the form which you will have are part of my instructions to you, I will read the body of the Special Verdict form to you.

“We, the Jury, duly impaneled and sworn to try the above entitled action, unanimously answer the questions submitted to us in this Special Verdict as follows:

QUESTION NO. 1: Was the defendant, JIM HOWARD, III, previously convicted of a Felony, Burglary in the Second Degree, in the State of Oklahoma?

ANSWER: YES _____ **NO** _____

QUESTION NO. 2: Was the defendant, JIM HOWARD, III, previously convicted of a Felony, Burglary in the Second Degree, in the State of Washington?

ANSWER: YES _____ **NO** _____

QUESTION NO. 3: Was the defendant, JIM HOWARD, III, previously convicted of a Felony, Possession of a Controlled Substance, in the State of California?

ANSWER: YES _____ **NO** _____”

Once you have answered the questions, your presiding juror should date and sign the verdict form and advise the bailiff that you have reached a verdict.

CITATION: ICJI 1009 (Modified: Using term "Special Verdict" rather than "verdict")

GIVEN: _____
REFUSED: _____
MODIFIED _____
COVERED: _____

JUDGE

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|------------------|---|------------------------|
| STATE OF IDAHO, |) | Case No. CR-F08-5287 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | SPECIAL VERDICT |
| |) | (Persistent Violator) |
| JIM HOWARD, III, |) | |
| Defendant. |) | |
| _____ |) | |

We, the Jury, duly impaneled and sworn to try the above entitled action, unanimously answer the questions submitted to us in this Special Verdict as follows:

QUESTION NO. 1: Was the defendant, JIM HOWARD, III, previously convicted of a Felony, Burglary in the Second Degree, in the State of Oklahoma?

ANSWER: YES _____ NO _____

QUESTION NO. 2: Was the defendant, JIM HOWARD, III, previously convicted of a Felony, Burglary in the Second Degree, in the State of Washington?

ANSWER: YES _____ **NO** _____

QUESTION NO. 3: Was the defendant, JIM HOWARD, III, previously convicted of a Felony, Possession of a Controlled Substance, in the State of California?

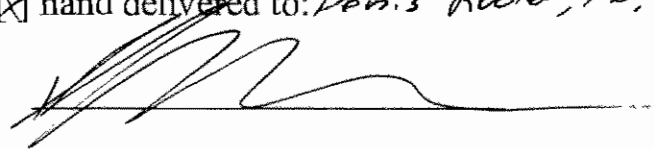
ANSWER: YES _____ **NO** _____

DATED this _____ day of _____, 2008.

PRESIDING JUROR

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2008, a true and correct copy of the foregoing Amended Criminal Complaint was caused to be faxed mailed first class hand delivered to: Donis Rector, PD.

A handwritten signature in black ink, appearing to be "Donis Rector", written over a horizontal line.

ORIGINAL

STATE OF IDAHO)
COUNTY OF KOOTENAI) SS
FILED:

Dennis Reuter, Deputy Public Defender
Office of the Kootenai County Public Defender
PO Box 9000
Coeur d'Alene, Idaho 83816-9000
Phone: (208) 446-1700; Fax: (208) 446-1701
Bar Number: 6154

2008 JUL -7 PM 3: 54

Stacy Wilson
CLERK DISTRICT COURT
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

| | | |
|------------------------|---|---------------------------------------|
| STATE OF IDAHO, |) | |
| |) | |
| Plaintiff, |) | CASE NUMBER CR-08-5287 |
| |) | Felony |
| V. |) | |
| |) | SECOND MOTION <i>IN LIMINE</i> |
| JIM HOWARD III, |) | (FOR RE-TRIAL) |
| |) | |
| Defendant. |) | |
| |) | |

Defendant, by and through his attorney, Dennis Reuter, Deputy Public Defender, hereby provides his Second Motion in Limine (in relation to the re-trial set for the week of July 7).

Defendant requests rulings as to the following matters:

- 1) *Pass or fail field sobriety tests (previously granted in part)*
- 2) *The use of pre-Miranda, post-arrest statements (previously granted in part and denied in part)*
- 3) *The use of Defendant's refusal to submit to the breath test – ex post facto.*
- 4) *Statements by the arresting officer of a specific level of blood alcohol based upon the FSTs and HGN.*

1) Pass of fail field sobriety tests

Mr. Howard requests that the Court prohibit the investigating officers from testifying that Howard “passed” or “failed” any of the field sobriety tests (FSTs). As set forth in the legal argument below, the coordination tests given to Howard are not sufficiently valid to exclude those people not under the influence and include all those who are under the influence.

The FST’s are more of an organizational tool to record the results of coordination tests than a scientific tool revealing who is or is not under the influence. The officer should not be allowed to elevate observations to a pseudo-scientific test that one can pass or fail.

Legal Argument

Scientific evidence is admissible in Idaho pursuant to Rule 702, Idaho Rules of Evidence (IRE). “This Court reaffirms that the appropriate test for measuring the scientific reliability of evidence is I.R.E. 702.” *State v. Gleason*, 123 Idaho 62 at 65, 844 P.2d 691 (1992).

The results of field sobriety tests and other tests conducted by the arresting officer cannot be said to be “scientific” in the context of Rule 702. As was also said in *Gleason, supra*,

Deputy Wolfinger's testimony relating to the HGN test results was not offered as independent scientifically sound evidence of Gleason's intoxication. Rather, it was offered and admitted for the same purpose as other field sobriety test evidence--a physical act on the part of Gleason observed by the officer contributing to the cumulative portrait of Gleason intimating intoxication in the officer's opinion.

All of the tests conducted by the officers in this case may be useful in remembering certain physical actions by Jim Howard, but without a proper foundation such tests are not to be admitted as scientific proof of use or intoxication.

2) *The use of pre-Miranda, post-arrest statements*

Statements made by a suspect after he has been arrested, but before he has been advised of his "Miranda" rights (*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)) cannot be used in the State's case in chief.

Such a violation of one's constitutional rights occurs when the State attempts to use such statements at trial. As was said in *United States v. Patane*, 542 U.S. 630 at 641-42, 124 S.Ct. 2620 (2004):

"It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. **Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.** And at that point, '[t]he exclusion of unwarned statements ... is a complete and sufficient remedy' for any perceived *Miranda* violation." (Emphasis added.)

Also, "[w]hen statements made by a defendant during the course of an in-custody interrogation are offered at trial, the state must establish a voluntary, knowing, and intelligent waiver of the suspect's rights" - *State v. Person*, 140 Idaho 934 at 937, 104 P.3d 976 (Ct.App. 2004).

The officer's questioning and his eliciting comments from Mr. Howard about why he was refusing the breath test, without *Miranda* warnings, cannot be condoned and the statements must be suppressed. See *Pennsylvania v. Muniz*, 110 S.Ct. 2638 at 2650-2652, 496 U.S. 582 (1990):

Officer Hosterman's dialogue with Muniz concerning the physical sobriety tests consisted primarily of carefully scripted instructions as to how the tests were to be performed. These instructions were not likely to be perceived as calling for any verbal response and therefore were not "words or actions" constituting custodial interrogation, with two narrow exceptions not relevant here. (Footnote 17) The dialogue also contained limited and carefully

worded inquiries as to whether Muniz understood those instructions, but these focused inquiries were necessarily "attendant to" the police procedure held by the court to be legitimate. Hence, Muniz's incriminating utterances during this phase of the videotaped proceedings were "voluntary" in the sense that they were not elicited in response to custodial interrogation. See *South Dakota v. Neville*, 459 U.S. 553, 564, n. 15, 103 S.Ct. 916, 923, n. 15, 74 L.Ed.2d 748 (1983) (drawing analogy to "police request to submit to fingerprinting or photography" and holding that police inquiry whether suspect would submit to blood-alcohol test was not "interrogation within the meaning of *Miranda* ").

Similarly, we conclude that *Miranda* does not require suppression of the statements Muniz made when asked to submit to a breathalyzer examination. Officer Deyo read Muniz a prepared script explaining how the test worked, the nature of Pennsylvania's Implied Consent Law, and the legal consequences that would ensue should he refuse. Officer Deyo then asked Muniz whether he understood the nature of the test and the law and whether he would like to submit to the test. Muniz asked Officer Deyo several questions concerning the legal consequences of refusal, which Deyo answered directly, and Muniz then commented upon his state of inebriation. 377 Pa.Super., at 387, 547 A.2d, at 422. After offering to take the test only after waiting a couple of hours or drinking some water, Muniz ultimately refused.

We believe that Muniz's statements were not prompted by an interrogation within the meaning of *Miranda*, and therefore the absence of *Miranda* warnings does not require suppression of these statements at trial. As did Officer Hosterman when administering the three physical sobriety tests, see *supra*, at 2651-2652, Officer Deyo carefully limited her role to providing Muniz with relevant information about the breathalyzer test and the Implied Consent Law. She questioned Muniz only as to whether he understood her instructions and wished to submit to the test. These limited and focused inquiries were necessarily "attendant to" the legitimate police procedure, see *Neville*, *supra*, at 564, n. 15, 103 S.Ct., at 923, n. 15, and were not likely to be perceived as calling for any incriminating response.

(Other footnotes omitted.)

Footnote:

FN17. The two exceptions consist of Officer Hosterman's requests

that Muniz count aloud from 1 to 9 while performing the "walk and turn" test and that he count aloud from 1 to 30 while balancing during the "one leg stand" test. Muniz's counting at the officer's request qualifies as a response to custodial interrogation. However, as Muniz counted accurately (in Spanish) for the duration of his performance on the "one leg stand" test (though he did not complete it), his verbal response to this instruction was not incriminating except to the extent that it exhibited a tendency to slur words, which we have already explained is a nontestimonial component of his response. See *supra*, at 2644-2646. Muniz did not count during the "walk and turn" test, and he does not argue that his failure to do so has any independent incriminating significance. We therefore need not decide today whether Muniz's counting (or not counting) itself was "testimonial" within the meaning of the privilege.

3) The use of Defendant's refusal to submit to the breath test – ex post facto.

Defendant was arrested for drinking and driving, and when he refused the breath test his license was suspended for 1 year and he was ordered to pay a fine of \$250 (two hundred fifty dollars). This is a form of punishment as it does not serve a primarily remedial purpose – it does not take an inebriated driver off the road, but someone who may actually be innocent (under a .08) but fearful. The resulting penalty is disproportionate to the harm – someone who is above a .08 would only lose their license for 30 days with 60 more with restrictions, and no fine.

Double jeopardy prohibits multiple punishments for the same conduct.

Using the refusal as evidence of guilt in his criminal trial punishes the defendant and in a way lessens the State's burden or difficulty to prove its case.

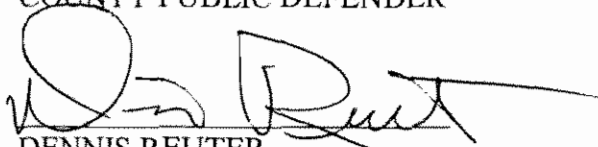
The State must be prohibited from using his refusal in any way at trial.

4) *Statements by the arresting officer of a specific level of blood alcohol based upon the FSTs and HGN.*

Just as the witnesses for the State cannot arrive at a specific BAC using HGN, the witnesses cannot use the FSTs to do so, either.

DATED this 7th day of July, 2008.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: 
DENNIS REUTER
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 7th day of July, 2008, addressed to:

Kootenai County Prosecutor



Court Minutes:

Session: MITCHELL070708A
Session Date: 07/07/2008
Judge: Mitchell, John
Reporter: Foland, Julie

Division: DIST
Session Time: 08:38

Courtroom: Courtroom8

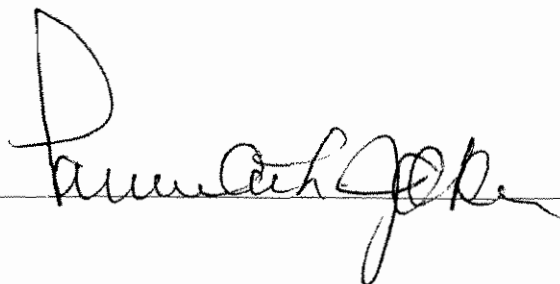
Clerk(s): Jokela, Pam

State Attorney(s): Greenbank, Shane

Public Defender(s): Reuter, Dennis

Prob. Officer(s):

Court interpreter(s):



Case ID: 0001

Case number: CR2008-5287

Plaintiff:

Plaintiff Attorney:

Defendant: Howard III, Jim

Pers. Attorney:

Co-Defendant(s):

State Attorney: Greenbank, Shane

Public Defender: Reuter, Dennis

Additional audio and annotations can be found in case: 0002.

07/07/2008

09:14:26

Recording Started:

09:14:26

Case called

09:14:31

Judge: Mitchell, John

Calls case - Jury trial - present with potential jurors

09:22:14

Introduces court staff, prosecutor, defense attorney and defendant; reviews

09:22:49

information; 35 potential jurors selected; voir

09:36:17 dire
09:36:17 Clerk give voir dire oath
09:39:25 Excuses juror #28
09:43:01 Excuses Juror #42

09:48:53 **State Attorney: Greenbank, Shane**
 Voir Dire

10:13:47 **Judge: Mitchell, John**
 Juror #41 excused
10:15:54 #30 excused

10:26:42 **State Attorney: Greenbank, Shane**
 Pass for cause

10:27:30 **Stop recording**
 (On Recess)

10:43:42 Recording Started:

10:43:42 **Record**
 Howard III, Jim

10:43:44 **Judge: Mitchell, John**
 Back on the record with jury present

10:43:57 **Public Defender: Reuter, Dennis**
 Voir Dire
11:03:11 Pass for Cause

11:04:28 **Stop recording**
 (On Recess)

11:23:03 Recording Started:

11:23:03 **Record**
 Howard III, Jim

11:23:08 **Judge: Mitchell, John**
 panel - #24, 57, 37, 36, 44, 46, 35, 13, 8, 48,
 55, 2 and 20

11:24:48 **State Attorney: Greenbank, Shane**
 Agrees

11:24:51 **Public Defender: Reuter, Dennis**
Agrees

11:24:54 **Judge: Mitchell, John**
Excuses the remainder of potential jurors

11:28:53 Clerk give try cause oath; reviews opening
instructions; recess until 1:00pm

11:40:49 Back on the record outside the presence of jury;
no obj to giving stock

11:41:07 instruction 1-9

11:41:13 **State Attorney: Greenbank, Shane**
Agrees

11:41:16 **Public Defender: Reuter, Dennis**
Agrees

11:41:19 **Judge: Mitchell, John**
Motions in limine

11:41:29 **Public Defender: Reuter, Dennis**
nothing to add to 1st motion; 2nd motion -
testimony Mr. Howard was placed

11:41:55 incustody prior to Dep Hilton present; Mr.
Howard's comments while in patrol

11:42:45 car should be excluded; statements made by
officer about refusal should be

11:43:34 excluded

11:43:41 **State Attorney: Greenbank, Shane**
Testimony for Hilton & Scortino - position is
that none that is excluded; no

11:45:26 custodial interrogation; nothing should be
excluded on basis of miranda

11:46:27 **Judge: Mitchell, John**
Same ruling as at last trial - if question is
asked at time of incustody than

11:46:53 that part is excluded (while in back of patrol
care); also applies to why

11:47:37 aren't you willing to take test - excluded

11:48:05 **Public Defender: Reuter, Dennis**
Tape shown to jury - denial of drinking as to
Hilton's testimony - that

11:48:30 should be redacted

11:49:03 **State Attorney: Greenbank, Shane**
questions we are dealing with are when he was
taken back out of patrol car &
11:49:53 handcuffs are taken off

11:50:04 **Judge: Mitchell, John**
out of back of patrol car, handcuffs are taken
off

11:50:19 **State Attorney: Greenbank, Shane**
correct

11:50:54 **Judge: Mitchell, John**

11:51:13 **Public Defender: Reuter, Dennis**
under control of officer - not free to leave
even though handcuffs were taken
11:51:29 off

11:51:59 **State Attorney: Greenbank, Shane**
may not be free to go, but they are no longer
under arrest

11:52:43 **Judge: Mitchell, John**
Unless have testimony of officer before hand; if
appears custody continues -
11:53:19 miranda applies; anything stated by deft will be
excluded

11:53:46 **State Attorney: Greenbank, Shane**
completed 3 sobriety test; pat down; mouth
checked; deft wouldn't take breath
11:54:18 test & officer asked him why he wouldn't if he
hadn't been drinking

11:54:37 **Judge: Mitchell, John**
If you would be taking breath
11:54:49 deft response & anything beyond that would be
excluded; item #3 double
11:55:12 jeopardy not expos factor

11:55:23 **Public Defender: Reuter, Dennis**
refusal of BAC had it punishment; refusal
doesn't get drunk drivers off road
11:56:21 not people who refuse to take test; horse of a'

11:56:46 different color; same refusal
in this case to help prove deft is guilty;
violates Idaho Consitution

11:57:57 **State Attorney: Greenbank, Shane**
not subject to jail on 2 different fronts; 2
seperate issues; if hadn't

11:59:24 consumed anything why not submit to breath test

11:59:37 **Judge: Mitchell, John**
Deny motion - never heard of any case of this
kind where double jeopardy

12:00:22 punishment

12:00:37 motion #4 is granted; certain results from field
sobriety tests would be a

12:01:39 certain BAC that would not be allowed; will be
no opinion of failing field

12:02:19 sobriety tests; same ruling as in last trial

12:03:10 **State Attorney: Greenbank, Shane**
motion for release of exhibits

12:03:29 **Judge: Mitchell, John**
get a different exhibit for admission & don't
want jury to know that there

12:04:38 **Stop recording**
(On Recess)

13:08:03
Recording Started:

13:08:03 **Record**
Howard III, Jim

13:08:04 **Plaintiff Attorney:**
Back on the record with out the jury

13:08:19 **Public Defender: Reuter, Dennis**
Admitted notice of suspension - still requesting
a mistrial; not relevant;

13:08:57 bottom of document there is evidence that his
license was suspended; provided

13:09:11 court with a redacted version - still don't want
it admitted; 404(b) evidence

13:09:41 etc

13:09:44 **State Attorney: Greenbank, Shane**
Has been previously admitted; don't like the
redacted version - yes should

13:10:33 also be taken off as well

13:10:39 **Judge: Mitchell, John**
Last trial defense going to present redacted
version and it wasn't; allow

13:11:07 redacted version to come in - yes DL surrendered
shall also be taken out

13:12:43 **State Attorney: Greenbank, Shane**
questions about video tape

13:13:02 **Public Defender: Reuter, Dennis**
objection to the beginning of the video tape;
object to showing Mr. Howard

13:14:11 handcuffed

13:14:14 **State Attorney: Greenbank, Shane**
Wasn't under impression that we were going to
mute anything; when video tape

13:14:35 starts - testified to natural progression;
didn't hear as order of court to

13:15:20 muteing

13:15:25 **Judge: Mitchell, John**
Denying motion to exclude Mr. Howard being shown
in handcuffs; it is what it

13:15:43 is; once he's in handcuffs he is still in custody
unless you can show me

13:16:31 otherwise; any questions by officer intended to
illicit a response should be

13:16:48 muted; if spontaneous than it doesn't need to be
muted

13:17:18 **State Attorney: Greenbank, Shane**
Video contains where he's in custody, but no
arrested

13:20:18 **Judge: Mitchell, John**
Back on the record with jury present

13:21:50 **State Attorney: Greenbank, Shane**
Opening statement

13:24:07 **Public Defender: Reuter, Dennis**
Opening statement

13:26:49 **State Attorney: Greenbank, Shane**
Calls Dep Sciortino

13:27:28 **Other: Sciortino, Deputy**
Officer for 13 yrs; started in Calif; 2.5 years
in Ko.Co.; 1 month in Spokane

13:28:01 Co. Sheriff; have been continually certified;
13:29:14 patrolman in Calif, K-9 Officer & Narcotics
Officer; ID accepts CA post

13:30:05 certificates & had to take a equivalency test;
patrol deputy in Ko.Co. -

13:31:06 answered calls for service; specific DUI
training thru academy; looking for

13:31:57 lack of coordination; smell intoxicant; driving
pattern; in Idaho learned how

13:32:32 to do DUI investigation for state of Idaho; 50
DUI investigations; observed

13:33:16 in hundreds; in some cases have released them to
a family member - not always

13:34:12 an arrest; test for balance, coordination &
gives good idea

13:34:49 **Public Defender: Reuter, Dennis**
objection - unresponsive

13:35:10 **Judge: Mitchell, John**
sustained

13:35:17 **Other: Sciortino, Deputy**
3/17/08 was on duty at 5:02pm; district 2
deputy; responded to traffic

13:36:06 collision; one vehicle was east bound Prairie &
another one was West bound and

13:36:40 was turning South onto Greensferry; both are two
lanes; no turning lanes or

13:37:28 turning lanes; Mr. Howard was driving a lumina
van & traveling E bound

13:37:53 Prairie; older man was going W & turning S bound
onto Greensferry; other car

13:38:22 turned in front of Mr. Howard; Prairie had no
traffic control device; 40mph

13:38:52 speed limit; snowing lightly; emergency vehicles
were there; 5-10 min to

13:39:35 figure out what had happened; 2 people involved;
asked for reg, DL &
13:40:48 ins; wasn't being attended by medical, but had
small cut or abrasion on
13:41:42 forehead; second time spoke to him noticed smell
of alcohol; he said he hadn't
13:42:30 been drinking at all; his eyes were extremely
bloodshot and watery; slurring
13:43:23 his words; didn't look at balance or anything;
tried to reason with him; had
13:44:57 to investigate for DUI based on observations; he
told me he wouldn't take any
13:45:24 tests; he wasn't arrested at this time & put in
patrol car

13:45:52 **Public Defender: Reuter, Dennis**
object - not relevant & unresponsive

13:46:21 **State Attorney: Greenbank, Shane**
Why put in patrol car is relevant

13:46:36 **Judge: Mitchell, John**
overruled

13:46:40 **Other: Sciortino, Deputy**
Didn't witness Mr Howard driving; was going to
make sure other driver
13:47:21 confirmed that Mr. Howard was driving vehicle &
other driver would sign a
13:47:44 statement; elderly gentleman was injured; called
Dep Hilton to come and
13:48:19 assist me; share work load; he performed field
sobriety test

13:50:34 **Public Defender: Reuter, Dennis**
objection- relevancy

13:50:46 **State Attorney: Greenbank, Shane**
level of impairment observation is foundational

13:51:18 **Other: Sciortino, Deputy**
Wanted to make sure if Dep Hilton is seeing the
same things that I did;
13:52:04 curiosity to see that I still know what I'm doing
out there; standard tests
13:53:18 felt he had in fact ingested alcohol and was

imparing

- 13:54:20 **Public Defender: Reuter, Dennis**
objection
- 13:54:23 **State Attorney: Greenbank, Shane**
- 13:54:38 **Judge: Mitchell, John**
overruled
- 13:54:45 **Public Defender: Reuter, Dennis**
Level of impairment will give a good indicator
of BAC; no further contact
- 13:55:27 with Mr. Howard after that; no alcohol
containers found; incident was in
- 13:56:02 Kootenai County
- 13:56:10 Cross
- 13:56:17 **Other: Sciortino, Deputy**
Wrote a crash report; other driver got ticket
for failure to yield; everyone
- 13:57:10 was doing their job; asked series of questions
at two different times; saw
- 13:58:09 Officer Hilton giving field sobriety tests;
watched test, but didn't do a
- 13:59:15 seperate report as to details; he wasn't being
cooperative
- 14:00:46 **State Attorney: Greenbank, Shane**
redirect
- 14:00:53 **Other: Sciortino, Deputy**
wasn't arguing with deft; symptomology of DUI;
watching Dep Hilton was one of
- 14:02:01 my primary duties; both drivers received a
ticket; injury had been bleeding,
- 14:04:10 but he didn't seek medical attention
- 14:04:32 **Public Defender: Renter, Dennis**
recross
- 14:04:36 **Other: Sciortino, Deputy**
didn't see medical personnel talking to Mr.
Howard

14:04:53 **State Attorney: Greenbank, Shane**

14:05:40 **Judge: Mitchell, John**
Recess for 15-20 min

14:06:44 Back on record outside presence of jury

14:06:52 **State Attorney: Greenbank, Shane**
Discussion about audio tape - really shouldn't
have any audio at all; deft's

14:08:04 statement as to drinking - "must have spilled on
my during crash"; no

14:09:08 evidence of alcohol containers; State V Harmon
131 ID 80-84; don't see as

14:10:59 bein prohibited under Miranda

14:11:38 **Judge: Mitchell, John**
Is defense objecting to audio of field sobriety
test

14:11:58 **Public Defender: Reuter, Dennis**
5 min into - have you been drinking & issue
comes up again(different words

14:12:24 but same thing; questions about prescription
meds & what have you been

14:12:53 taking

14:13:24 **Judge: Mitchell, John**
This is custodial - questions meant to illicit
an incriminal response;

14:13:59 anything done during field sobriety tests are
admissable; instructions are

14:14:26 admissable - not "have you been drinking" ...
courts ruling that he is still

14:14:51 in custody - he's not free to leave

14:15:13 **State Attorney: Greenbank, Shane**
not have audio on at all & then ask officer
about what happened

14:16:15 **Public Defender: Reuter, Dennis**
agrees

14:16:39 **Stop recording**
(On Recess)

14:33:13 Recording Started:

14:33:13 **Record**
Howard III, Jim

14:33:15 **Judge: Mitchell, John**
Back on record with jury present

14:33:41 **State Attorney: Greenbank, Shane**
Calls Dep Hilton

14:33:55 **Other: Hilton, Deputy**

14:33:56 **State Attorney: Greenbank, Shane**
Directs

14:34:02 **Other: Hilton, Deputy**
Been an officer for almost 10 yrs; was a reserve deputy in WA; started in St. Maries and then Ko.Co. presently; went to academy for reserve deputy;

14:34:44 certified; graduated from Post 3/05; Field Training Officer, Swat Team and a patrolman; respond to calls; have had DUI training - certified; yearly

14:35:40 re-certification; trained in administering tests; 200 DUI investigations

14:36:48 since been in Ko.Co.; 60 DUI arrest last year; 3/17/08 was on duty; responded

14:39:00 to Greensferry & Prairie helped with Officer Sciortino; observed mini van

14:40:30 overturned & crashed vehicle in middle of intersection; contacted Mr. Howard

14:42:15 after speaking to Officer Sciortino; Mr. Howard was sitting in back of patrol

14:42:57 car; when opened door smelled alcohol; reviews states exhibit #1 - deft's ID;

14:43:34 everything looks to be accurate

14:44:26

14:45:52

14:48:18 **State Attorney: Greenbank, Shane**
moves to admit pltf exhibit #2

14:48:33 **Other: Hilton, Deputy**
copy of card given to me by deft

14:49:07 **State Attorney: Greenbank, Shane**
motion to admit exhibit #2

14:49:15 **Public Defender: Reuter, Dennis**
no objection

14:49:18 **Judge: Mitchell, John**
Pltaif Exhibit #2 admitted

14:49:36 **Other: Hilton, Deputy**
Asked Mr. Howard to perform field sobriety tests
and he agreed to; he didn't

14:50:09 have trouble getting out of car; smelled odor of
alcohol; horizontal; walk &

14:50:41 turn & one legged turn; determines if there are
medical conditions that will

14:51:44 effect performance - he didn't have any; rug
burn over right eyebrow; eye

14:52:53 wasn't swollen, wasn't real significant; he told
me he didn't need medical

14:53:55 attention; he understood directions; he did all
3 tests; tape will show field

14:55:50 sobriety tests

14:56:17 **State Attorney: Greenbank, Shane**
moves to admit pltf's exhibit #3

14:56:25 **Public Defender: Reuter, Dennis**
no objection based on previous discussions

14:57:16 **State Attorney: Greenbank, Shane**
published to jury w/o volume

14:57:28 **Judge: Mitchell, John**
granted

15:08:41 **State Attorney: Greenbank, Shane**
Taped was stopped at 18;00;52

15:09:29 **Other: Hilton, Deputy**
Viewed video tape & was accurate; as walked to
the front of my patrol car he

15:10:42 had to make his steps deliberate; exaggerated
movements; did horizontal gaze

15:12:25 nostagnis; gave instructions 2-3 times; looking
for smooth pursuit; he had

15:18:24 maximum amount of points; next test was walk and
turn; he stepped out of
15:22:35 evaluation; Mr. Howard understood instructions;
he showed impairment, by
15:26:08 meeting decision points; he didn't look at feet
entire time as instructed;
15:32:26 swayed from side to side; put foot down & raised
one arm away from body; 6
15:34:48 points out of 6

15:35:09 **Public Defender: Reuter, Dennis**
objection

15:35:19 **Judge: Mitchell, John**
cumulative - overruled

15:35:31 **Other: Hilton, Deputy**
2 points on one legged stand; strong odor of
alcohol; slurred speech, slowed
15:36:02 movements - combination of everything shows
alcohol impairment; placed under
15:36:34 arrest at front of patrol car; reviews pltf's
exhibit #4 - ALS form;
15:38:50 describes what is on form; my signature is on
bottom; read form to him

15:39:54 **State Attorney: Greenbank, Shane**
motion to admit #4

15:40:01 **Judge: Mitchell, John**
Admitted Pltf's Exhibit #4

15:40:37 **Other: Hilton, Deputy**
reads form to Mr. Howard - gives him his rights;
fail breath test if blows
15:42:08 above .08

15:42:12 **Public Defender: Reuter, Dennis**
objection

15:42:43 **Judge: Mitchell, John**
sustained

15:42:47 **Other: Hilton, Deputy**
Transported him to KoCo. Jail & at that time
read warnings to him; he became

15:45:16 uncooperative at jail; was put in safety cell

15:50:19 **State Attorney: Greenbank, Shane**
Moves to admit exhibit #1

15:50:25 **Public Defender: Reuter, Dennis**
object - not relevant to #2; cumulative

15:51:20 doesn't seem to connected to this case any
differently that #2

15:51:44 **State Attorney: Greenbank, Shane**
certified copy of a putlic document; #2 isn't
certified

15:52:15 **Judge: Mitchell, John**
obey as to here say; cumulative overruled;
relevance is overruled

15:52:38 exhibit #1 is admitted

15:53:28 **Stop recording**
(On Recess)

16:04:36
Recording Started:

16:04:36 **Record**
Howard III, Jim

16:06:09 **Judge: Mitchell, John**
Back on the record with jury present

16:06:52 **Public Defender: Reuter, Dennis**
Cross

16:06:57 **Other: Hilton, Deputy**
Not part of point valuation; deft told me he
wasn't confused on instructions;

16:12:03 contest with other officer on amount of DUI
arrests; no problem with deft

16:15:31 getting out of car; turn off overhead lights at
night so won't distract

16:16:56 during tests; deft told me he was nervous

16:21:54 could've had him walk fogline as a guide, but
didn't - was for his

16:24:33 protection

16:24:58 **State Attorney: Greenbank, Shane**
redirect

16:25:02 **Other: Hilton, Deputy**
there are degrees of impairment; takes
everything into consideration; stood

16:26:32 correctly during instruction phase; didn't
complain *what a straight line was*;

16:28:15 never expressed any confusion about tests, but
didn't perform them *all*

16:28:58 completely correctly; keep track of all DUI
arrests in Kootenai County; not

16:29:42 driven by competition of DUI arrests; took into
consideration that he was in

16:30:30 a crash; college classes on first aid

16:34:27 **Judge: Mitchell, John**
Recess for today; will resume at 9:30am

16:35:53 Back on record w/o jury; issue of instructions ;

16:36:20 **State Attorney: Greenbank, Shane**
may have additional witnesses

16:36:39 **Judge: Mitchell, John**
court will resume at 9:15am w/o jury; evidence
should be done by 10:30am;

16:37:23 pltf's 1-11; 1 denied; 2 denied; 3 given; 4
given; 5 given; 6 denied; 7 given

16:39:20 **Public Defender: Reuter, Dennis**
agrees to have part II & Part III tried before
the court

16:39:46 **Judge: Mitchell, John**
reviews right to a jury trial for Part II & III
of information

16:40:08 **Defendant: Howard III, Jim**
understands

16:40:26 waives right to a jury trial on part 2 & 3

16:41:11 **Public Defender: Reuter, Dennis**
asking initial jury instructions be resubmitted
for this trial

16:42:29 **Judge: Mitchell, John**

will give deft #2; give #4 & add noticable &
rescepival; deft #3 given ICJI

16:46:12 303

16:46:57 **Public Defender: Reuter, Dennis**
exhibit tape #3 be release to me & will bring
back tomorrow

16:47:36 **State Attorney: Greenbank, Shane**
no objection; have another copy

16:48:34 **Judge: Mitchell, John**
in recess until 9:15am

16:48:49 **Stop recording**

Court Minutes:

Session: MITCHELL070708A
Session Date: 07/07/2008
Judge: Mitchell, John
Reporter: Foland, Julie

Division: DIST
Session Time: 08:38

Courtroom: Courtroom8

Clerk(s): Jokela, Pam

State Attorney(s): Greenbank, Shane

Public Defender(s): Reuter, Dennis

Prob. Officer(s):

Court interpreter(s):

Case ID: 0002

Case number: CR2008-5287

Plaintiff:

Plaintiff Attorney:

Defendant: Howard III, Jim

Pers. Attorney:

Co-Defendant(s):

State Attorney: Greenbank, Shane

Public Defender: Reuter, Dennis

Previous audio and annotations can be found in case: 0001

07/08/2008

09:23:45

Recording Started:

09:23:45

Case recalled

09:23:50

Judge: Mitchell, John

CALLS CASE - DAY TWO OF JURY TRIAL

09:23:59

OUTSIDE THE PRESENCE OF THE JURY

09:24:07 **State Attorney: Greenbank, Shane**

09:24:10 **Public Defender: Reuter, Dennis**
WAIVE THE PRESENCE OF THE DEFENDANT

09:24:34 I HAVE PREPARED A TAPE AND I WANT TO PLAY IT - I
DO KNOW WHAT IT STATES

09:24:54 **State Attorney: Greenbank, Shane**
I ALSO PREPARED AN AUDIO TAPE - REDACTED VERISON
- MR. REUTER DID COME INTO

09:25:14 MY OFFICE AND GAVE ME THE PAPER THAT HAD TIMES
REDACTED - I WANTED TO RECALL

09:25:36 OFFICER HILTON TO THE STAND - EXPRESS THAT THE
AUDIO GOES, THEN SHUT OFF - I

09:25:53 WAT THE OFFICER TO STATE THAT YES, THE TAPE DOES
CUT IN AND CUT OUT -

09:26:11 **Judge: Mitchell, John**
DUE TO COURT TULEING THAT THERE ARE PORTIONS OF
THE AUDIO TO BE CUT OUT -

09:26:24 **Public Defender: Reuter, Dennis**
THE WAY THAT THE TAPE IS - IT JUST SOUNDS LIKE
THE MICROPHIC -

09:26:42 THAT DOES HAPPEDN - WE DON'T NEED TO LAY THE
FOUNDATION FROM THE OFFICER

09:26:57 **Judge: Mitchell, John**
DISPUTE BETWEEN THE 2 VIDEO?

09:27:05 **Public Defender: Reuter, Dennis**
YES THERE IS - I WANT TO PLAY MINE

09:27:16 **Judge: Mitchell, John**
WHEN YOU GET A CHANCE - YOU CAN PLAY THAT

09:27:23 **State Attorney: Greenbank, Shane**
I DO WANT TO RECALL THE OFFICER - SO, I CAN
PROPERLY ADMIT THE VIDEO TO THE

09:27:48 COURT -

09:27:49 **Judge: Mitchell, John**
ANY ISSUE TO RE-OPENING -

09:27:57 **Public Defender: Reuter, Dennis**

THEY WANT TO PRESENT TOT HE JURY THAT IF HE BLEW
BELOW A .08 HE WOULD NOT BE
09:28:16 ARRESTED - IT GOES BEYOND THE ADVISORY NOTICE -
THIS HAS NOTHING TO DO WITH
09:28:35 BLOOD ALCOHOL - DUI CHARGE - CONCERN THAT THE
JURY IS NOT GOING TO DO WHAT
09:29:01 THEY WERE INSTRUCTED - RE-CROSS - SHOULD HAVE
BEEN HANDLED YESTERDAY - OBJECT

09:29:18 **State Attorney: Greenbank, Shane**
IT IS NOT IN APPROPRIATE - WE HAVE NOT RESTED AS
OF YET - COUPLE OF CASES -
09:29:49 STATE V. HANSON - READS A PORTION OF THE CASE
LAW - STATE V. LINBERGER -
09:30:45 READ A PORITON OF THE CASE LAW - IN THIS CASE -
THE DEFENDANT HAS NOT OPENED
09:31:39 THERE CASE - I HAVE NOT RESTED - WE ARE STILL IN
THE EVIDENCE PHASE OF OUR
09:31:59 CASE - HE WAS ADVISED THAT IF HE BLEW UNDER A .
08 HE WOULD NOT BE ARRESTED -
09:32:15 WY DID HE REFUSE - THAT IS THE ISSUE THAT HTE
JURY IS TO RULE

09:32:30 **Public Defender: Reuter, Dennis**
IT IS NOT AN ELEMENT THAT THE STATE HAS TO PROVE
- NEGATIVE INFLUCNE - IT IS
09:32:48 MORE PREJUDICIAL THAN PROVIDENT - THERE IS NO
JURY INSTRUCITON TO BE GIVEN -
09:33:14 WE ARE GOING BEYOND - IT IS NOT ON THE ADVISORY
FORM - CONFUSION OF THE JURY
09:33:54 - PREJUDICE -

09:34:03 **Judge: Mitchell, John**
ANY CASE LAW THAT COULD SUPPORT THIS - I HAVE
NOT SEEN ANYTHING

09:34:23 **Public Defender: Reuter, Dennis**
I DON'T HAVE ANYTHING TO STATE THAT - THEY
SHOULD NOT USE IT FOR THAT PURPOSE
09:34:37 - IT GOES ONE WAY OR THE OTHER

09:34:49 **Judge: Mitchell, John**
I WILL ALLOW THE STATE TO RECALL THE WITNESS - I
HAVE LOOKED AT THE SYNOPSIS
09:35:07 - READS SOME CASE LAW - THOSE WOULD ALL
INDICATED - IF THE STATE HAD RESTED -

09:35:27 IT WOULD ALLOW THEM TO RE-OPEN - UNFAIR
PREJUDICE VS PROBIATIVE VALUE - THIS
09:35:51 IS NOT AN ELEMENT OF THE STATE - IT IS RELATIVE
- IF THIS WAS IN FACT STATED
09:36:06 TO THE DEFENDANT - IT DOES NOT RUN COUNTER TO
THE INNOCENCE - IF IT HAPPENED -
09:36:26 IT IS AN EVIDENTIARY FACT - WITHOUT CASE LAW - I
WILL ALLOW IT BE - THAT IS
09:36:49 MY RULING
09:36:51 ARE WE READY TO BRING IN THE JURY?

09:36:58 **Public Defender: Reuter, Dennis**
AS TO THE TAPE - I OBJECT TO IT BEING ADMITTED
TO THE EXHIBIT

09:37:22 **Judge: Mitchell, John**
IF IT IS ADMITTED THEN IT GOES IN - YOURS MIGHT
GO IN AS WELL

09:37:55 **Public Defender: Reuter, Dennis**
IN YESTERDAY'S PROCEEDING - IT HAD NO SOUND AND
THEY STOPPED IT AT A CERTAIN
09:38:15 PART - MINE DOES - UNLESS HIS STOPS THERE - I DO
OBJECT

09:38:35 **State Attorney: Greenbank, Shane**
I WOULD BE HAPPY TO USE YOURS - ADMIT YOUR COPY

09:38:49 **Judge: Mitchell, John**
ADMIT DEFENSE
09:40:15 THE JURY IS BACK IN THE COURTROOM

09:40:24 **State Attorney: Greenbank, Shane**
RECALLS W#2 -

09:40:31 **Judge: Mitchell, John**
YOU ARE STILL UNDER OATH THAT WAS GIVEN TO YOU
YESTERDAY

09:41:17 **Other: W#2 - DEPUTY HILTON**
I DO HAVE AUDIO/VIDEO IN MY CAR

09:41:28 **State Attorney: Greenbank, Shane**
MOVE TO ADMIT PL #5 -

09:41:35 **Public Defender: Reuter, Dennis**

NO OBJECTION

09:41:38 **Judge: Mitchell, John**
PL #5 - ADMITTED

09:41:44 **State Attorney: Greenbank, Shane**
I WISH TO PUBLISH AT THIS TIME

09:41:58 **Public Defender: Reuter, Dennis**
NO OBJECTION

09:42:02 **Judge: Mitchell, John**
DOES BOTH PARTIES STIPULATE THAT THE COURT
REPORTER DOES NOT NEED TO

09:42:20 TRANSCRIBE THE AUDIO/VIDOE OF TAPE?

09:42:30 **State Attorney: Greenbank, Shane**
SITPULATE

09:42:34 **Public Defender: Reuter, Dennis**
STIPULATE

09:42:42 **State Attorney: Greenbank, Shane**
PL #5 IS BEING PUBLISHED TO THE JURY -

09:53:43 PL #5 IS DONE BEING PLAYED

09:54:11 CONT WITH RE-DIRECT OF W#2

09:54:20 **Other: W#2 - DEPUTY HILTON**
YES THAT IS COPY OF THE TAPE THAT WAS PLAYED
YESTERDAY - THIS ONE THE AUDIO

09:54:38 WAS PLAYED - HE WAS COMPLYING WITH ME - YES, THE
MICROPHONE DID CUT IN AND

09:55:04 OUT OF THE TAPE - YES IT IS THE CONSEQUENCES OF
THE REFUSAL OF THE TEST VS.

09:55:25 THE FAILURE OF THE TEST.

09:55:36 **Stop recording**
(Off Record)

09:57:01
Recording Started:

09:57:01 **Record**
Howard III, Jim

09:57:10 **State Attorney: Greenbank, Shane**

CONT WITH RE-DIRECT OF W#2

09:57:21 **Other: W#2 - DEPUTY HILTON**
YES I DID TELL THE DEFENDANT ABOUT TAKING HTE
BREATH TEST - I TOLD HIM IF HE
09:57:37 DD TAKE THE BREATH TEST AND HE BLEW BELOW A .08
I WOULD NOT ARREST HIM - HE
09:58:00 DID REFUSE - I TRANSPORTED HIM TO THE JAIL -

09:58:15 **Public Defender: Reuter, Dennis**
RE-CROSS OF W#2

09:58:23 **Other: W#2 - DEPUTY HILTON**
I WAS NOT HOLDING THAT AGAINST HIM - IT WOULD
HAVE BEEN A SIGN OF IMPAIRMENT
09:59:04 A THE BEGINNING IF HE DID NOT FOLLOW - HE
STARTED THE EVALUATION BEFORE I
09:59:23 TOLD HIM TO BEGIN

09:59:37 **State Attorney: Greenbank, Shane**
THE STATE RESTS

09:59:46 **Public Defender: Reuter, Dennis**
DEFENSE REST

09:59:52 **Judge: Mitchell, John**
THIS CONCLUDES THE EVIDENTIARY PORTION - WE WILL
TAKE A 10 MINUTE RECESS TO
10:00:09 GE THE JURY INSTRUCTIONS DONE - DO NOT SPEAK OR
DISCUSS THIS CASE UNTIL IT
10:00:25 HAS BEEN SUBMITTED TO YOU
10:01:02 MR. REUTER WANTED TO TAKE SOMETHING UP OUTSIDE
THE PRESENCE OF THE JURY -
10:01:23 PLEASE GO OVER THE INSTRUCTIONS

10:01:30 **Public Defender: Reuter, Dennis**
I HAD A FURTHER OBJECTION - HE ADVISED THE
DEFENDANT TAHT IF HE BLEW BELOW A
10:01:57 .08 - IT WAS A QUESTION THAT WENT BEYOND THE
NORMAL QUESTIONS THAT WERE ASKED
10:02:12 IN A DUI CASE - ADVISING DEFENDANTS OF THE
CONSEQUENCES - PRO AND CON ARE SET
10:02:28 FORTH ON THE ADVISORY FORM - IT IS OUTSIDE THE
REALM OF THE QUESTIONS -
10:02:53 OBJECTTO THAT - LEGAL OPINION GIVEN BY AN
OFFICER - COURT STILL OVERRULED THE

10:03:11 OBJECTION

10:03:26 **State Attorney: Greenbank, Shane**
THE DEFENDANTS ARGUEMENT - IF YOU BLOW UNDER A .
08 YOU WILL NOT BE ARRESTED -

10:04:01 THAT STATEMENT IS AN INQUIRY - INCREMINATING
RESPONSE - IT DOES NOT ASK FOR A

10:04:23 RESPONSE - GIVING A BREATH TEST IS NOT A MIRANDA
- ALLOWING THE OFFICER TO

10:04:56 TESTIFY -

10:04:59 **Judge: Mitchell, John**
RULING OFF THE BENCH - I WILL OVERRULED THE
OBJECTION - THE STATEMENT THAT IF

10:05:17 HE TOOK IT AT MY VEHICLE THAT IF HE BLEW UNDER A
.08 HE WOULD NOT BE ARRESTED

10:05:42 - THAT IS NOT A QUESTION - REQUIRED NO RESPONSE
- I DON'T KNOW IF IT IS A

10:06:13 LEGAL OPINION - YOU CAN STILL BE PROSECUTED FOR
BLOWING UNDER A .08 - DEPUTY

10:06:34 HLTON WOULD NOT BEEN BOOKED IF HE BLEW UNDER A .
08 - THAT IS THE COURTS

10:06:59 RULING - ADDITIONAL TIME FOR CLOSING STATEMENT -

10:07:09 **State Attorney: Greenbank, Shane**
I CAN DO IT WHILE WE DO JURY INSTRUCITONS

10:07:18 **Public Defender: Reuter, Dennis**
NO

10:07:23 **Stop recording**
(Off Record)

10:17:54
Recording Started:

10:17:54 **Record**
Howard III, Jim

10:17:55 **Judge: Mitchell, John**
BACK ON THE RECORD

10:17:59 OFFER THE OPPORTUNITY - PART 2 & 3 TO BE DEALT
WITH THE JURY?

10:18:13 **Defendant: Howard III, Jim**
I AM NOT SURE WHAT PART 2 & 3 ARE

10:18:23 **Judge: Mitchell, John**
EXPLAINS THE PART 2 & PART 3 OF THE INFORMATION
-

10:18:45 **Defendant: Howard III, Jim**
I UNDERSTAND THAT

10:18:49 **Judge: Mitchell, John**
PART 3 IS HABITUAL OFFENDER - 2 PRIOR FELONY -
THAT IS WHAT COUNTS AS A LIFE

10:19:11 SENTENCE - THAT IS WHY I AM ASKING IF YOU WANT
THE COURT TO TRY THOSE ISSUES

10:19:29 OR TRY THIS BEFORE THE JURY

10:19:50 **Defendant: Howard III, Jim**
YES PRESENT IT TO THE COURT

10:19:56 **Judge: Mitchell, John**
READY TO BRING IN THE JURY?

10:20:04 **State Attorney: Greenbank, Shane**
YES

10:20:05 **Public Defender: Reuter, Dennis**
YES

10:20:07 **Judge: Mitchell, John**
PLEASE BRING IN THE JURY

10:21:20 THE JURY IS PRESENT IN THE COURT ROOM

10:21:27 THE JURY INSTRUCTIONS ARE BEING HANDED OUT TO
YOU - EACH OF YOUR COPIES HAVE

10:21:56 A VERDICT FORM - I WILL BE SENDING IN ORIGINAL
JURY INSTRUCTIONS AND THE

10:22:20 ORIGINAL VERDICT FORM - MARK ON THE ORIGINAL
VERDICT FORM - JURY INSTRUCTIONS

10:22:35 1 - 9 ARE ATTACHED - I ALREADY READ THOSE TO YOU
YESTERDAY - READING THE REST

10:22:43 OF THE JURY INSTRUCTIONS

10:31:12 CLOSING ARGUMENTS

10:31:33 **State Attorney: Greenbank, Shane**
CLOSING ARGUMENT

10:55:23 **Public Defender: Reuter, Dennis**
CLOSING ARGUMENT

11:20:06 **State Attorney: Greenbank, Shane**
RESPONSE ARGUMENT

11:26:56 **Judge: Mitchell, John**
HAVE THE CLERK SWEAR THE BAILIFF

11:27:36 **Other: CLERK**
SWEARS THE BAILIFF

11:27:41 **Judge: Mitchell, John**
HAVE THE CLERK DRAW THE JUROR'S NUMBER FOR
ALTERNATIVE JURY

11:28:27 **Other: CLERK**
JUROR #55

11:28:33 **Judge: Mitchell, John**
EXPALINS TO JUROR #55 - HER RIGHTS AS AN
ALTERNATIVE JUROR - THE OTHER 12

11:29:07 JURORS YOU NEED TO DISREGARD WHAT I HAVE TOLD
YOU ABOUT NOT SPEAKING TO ONE

11:29:23 ANOTHER - THIS IS YOUR TIME TO DISCUSS

11:29:30 DELIBERATIONS

11:30:10 **Stop recording**
(Off Record)

11:30:25
Recording Started:

11:30:25 **Record**
Howard III, Jim

11:30:32 **State Attorney: Greenbank, Shane**
CONCERN THAT THE JURY SAW THE DEFENDANT BEING
TRANSPORTED -

11:30:58 **Judge: Mitchell, John**
HE IS BEING TRASPORTED TO THE UPPER PARKING LOT

11:31:18 **State Attorney: Greenbank, Shane**
DEPUTY HILTON TO REMAIN HERE OR WITHIN A CALL

11:31:35 **Judge: Mitchell, John**
IT DOES DEPEND ON WHEN THE JURY COMES BACK WITH
A VERDICT - ODDS ARE WE ARE

11:31:53 NOT GOING INTO EVIDENTIARY IF THEY DON'T COME
BACK BEFORE 2

11:32:57 YOU ALSO HAVE A RIGHT TO JURY TRIAL - CROSS EXAM
THE STATES WITNESS - THE

11:33:14 RIGHT TO REMAIN SILENT

11:33:18 **Defendant: Howard III, Jim**
YES I DO UNDERSTAND

11:33:23 **Judge: Mitchell, John**
PRIOR CONVICTONS - PART 2 AND PART 3 - YOU ALSO
HAVE THE RIGHT PRESENT A

11:33:45 DEFENSE EITHER BEFORE ME AND BEFORE A JURY

11:33:59 **Defendant: Howard III, Jim**
YES

11:34:45 **State Attorney: Greenbank, Shane**
I THINK MY DUCKS ARE IN A ROW - I AM NOT SURE
HOW LONG

11:34:59 **Public Defender: Reuter, Dennis**
I WOULD SAY NO MORE THAN A HOUR OR NO MORE THAN
1 1/2 HRS

11:35:22 **Judge: Mitchell, John**
TOMORROW AFTERNOON (07/09/08) @ 2 PM

11:35:40 **Stop recording**

12:35:24
Recording Started:

12:35:24 **Record**
Howard III, Jim

12:35:26 **Judge: Mitchell, John**
PLEASE BRING IN THE JURY

12:36:29 THE JURY IS PRESENT AND BACK WITH A VERDICT

12:36:40 I WAS INFORMED RIGHT AFTER DELIBERATION -
EVIDENCE SUBMITTED - THE BAILIFF

12:37:12 WAS STILL CARRYING IN THE MEAL - THEY HAD NOT
BEEN GIVEN THE EVIDENCE - THE

12:37:29 JURY HAS REACHED A VERDICT

12:37:40 READS THE VERDICT OUTLOUD - GUILTY OF DUI -

12:38:47 DO YOU WISH TAHT THE JURY BE POLLED?

12:38:53 **State Attorney: Greenbank, Shane**
NO

12:38:56 **Public Defender: Reuter, Dennis**
YES

12:38:57 **Judge: Mitchell, John**
EXPLAINS WHAT THE POLLING OF THE JURY IS

12:39:14 POLLS THE JURY

12:40:29 EXCUSES THE JURORS - WOULD LIKE FOR YOU TO STAY
IN THE JURY ROOM - YOU DON'T

12:40:44 HAVE TO - I WOULD LIKE TO COME BACK IN THERE AND
THANK EVERYONE FOR THERE

12:40:58 DUTY -

12:45:35 **Stop recording**

STATE OF IDAHO)
County of Kootenai) SS

FILED 07/08/08

AT 10:21 O'clock AM

CLERK OF THE DISTRICT COURT

[Handwritten Signature]
Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)

Plaintiff,)

vs.)

JIM HOWARD, III,)

Defendant.)

Case No. **CRF 2008 5287**

JURY INSTRUCTIONS

Attached hereto are the jury instructions given on the trial of the above matter. Copies have been given to counsel of record.

Dated this 8th day of July, 2008.

[Handwritten Signature]
John T. Mitchell, District Judge

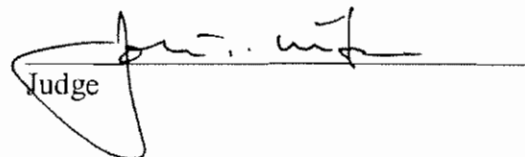
INSTRUCTION NO. 1

Now that you have been sworn as jurors to try this case, I want to go over with you what will be happening. I will describe how the trial will be conducted and what we will be doing. At the end of the trial, I will give you more detailed guidance on how you are to reach your decision.

Because the state has the burden of proof, it goes first. After the state's opening statement, the defense may make an opening statement, or may wait until the state has presented its case.

The state will offer evidence that it says will support the charge against the defendant. The defense may then present evidence, but is not required to do so. If the defense does present evidence, the state may then present rebuttal evidence. This is evidence offered to answer the defense's evidence.

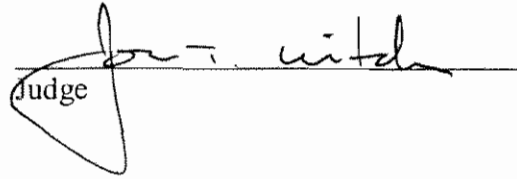
After you have heard all the evidence, I will give you additional instructions on the law. After you have heard the instructions, the state and the defense will each be given time for closing arguments. In their closing arguments, they will summarize the evidence to help you understand how it relates to the law. Just as the opening statements are not evidence, neither are the closing arguments. After the closing arguments, you will leave the courtroom together to make your decision. During your deliberations, you will have with you my instructions, the exhibits admitted into evidence and any notes taken by you in court.


Judge

INSTRUCTION NO. 2

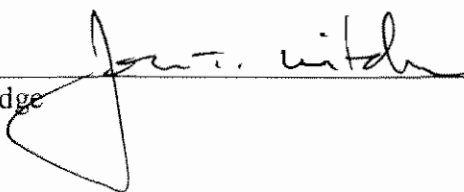
The Information charges OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL and alleges that the defendant, **JIM HOWARD, III**, on or about the 17th day of March, 2008, in the County of Kootenai, State of Idaho, did drive or was in actual physical control of a motor vehicle, on or about a highway, street or bridge or upon public or private property open to the public, while under the influence of alcohol.

To this charge the Defendant has pled not guilty.


Judge

INSTRUCTION NO. 3

The Information in this case is of itself a mere accusation or charge against the defendant and does not of itself constitute any evidence of the defendant's guilt; you are not to be prejudiced or influenced to any extent against the defendant because a criminal charge has been made.

Judge 

INSTRUCTION NO. 4

Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide the case. In so doing, you must follow my instructions regardless of your own opinion of what the law is or should be, or what either side may state the law to be. You must consider them as a whole, not picking out one and disregarding others. The order in which the instructions are given has no significance as to their relative importance. The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rules of law. At times during the trial, an objection may be made to a question asked a witness, or to a witness' answer, or to an exhibit. This simply means that I am being asked to decide a particular rule of law. Arguments on the admissibility of evidence are designed to aid the Court and are not to be considered by you nor affect your deliberations. If I sustain an objection to a question or to an exhibit, the witness may not answer the question or the exhibit may not be considered. Do not attempt to guess what the answer might have been or what the exhibit might have shown. Similarly, if I tell you not to consider a particular statement or exhibit you should put it out of your mind, and not refer to it or rely on it in your later deliberations.

During the trial I may have to talk with the parties about the rules of law which should apply in this case. Sometimes we will talk here at the bench. At other times I will excuse you from the courtroom so that you can be comfortable while we work out any problems. You are not to speculate about any such discussions. They are necessary from time to time and help the trial run more smoothly.

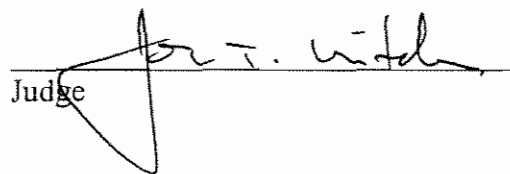
Some of you have probably heard the terms "circumstantial evidence," "direct evidence" and "hearsay evidence." Do not be concerned with these terms. You are to consider all the evidence admitted in this trial.

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your role is to think about the testimony of each witness you heard and decide how much you believe of what the witness had to say.

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

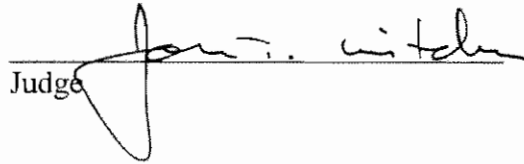
Judge 

INSTRUCTION NO. 5

Under our law and system of justice, the defendant is presumed to be innocent. The presumption of innocence means two things.

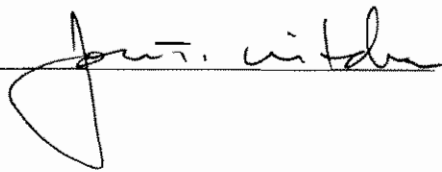
First, the state has the burden of proving the defendant guilty. The state has that burden throughout the trial. The defendant is never required to prove his or her innocence, nor does the defendant ever have to produce any evidence at all.

Second, the state must prove the alleged crime beyond a reasonable doubt. A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It is the kind of doubt which would make an ordinary person hesitant to act in the most important affairs of his or her own life. If after considering all the evidence you have a reasonable doubt about the defendant's guilt, you must find the defendant not guilty.

Judge 

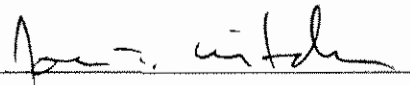
INSTRUCTION NO. 6

If during the trial I may say or do anything which suggests to you that I am inclined to favor the claims or position of any party, you will not permit yourself to be influenced by any such suggestion. I will not express nor intend to express, nor will I intend to intimate, any opinion as to which witnesses are or are not worthy of belief; what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine seems to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Judge 

INSTRUCTION NO. 7

Do not concern yourself with the subject of penalty or punishment. That subject must not in any way affect your verdict. If you find the defendant guilty, it will be my duty to determine the appropriate penalty or punishment.

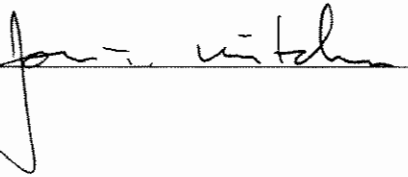


Judge

INSTRUCTION NO. 8

If you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. You should not let note-taking distract you so that you do not hear other answers by witnesses. When you leave at night, please leave your notes in the jury room.

If you do not take notes, you should rely on your own memory of what was said and not be overly influenced by the notes of other jurors. In addition, you cannot assign to one person the duty of taking notes for all of you.

Judge 

INSTRUCTION NO. 9

It is important that as jurors and officers of this court you obey the following instructions at any time you leave the jury box, whether it be for recesses of the court during the day or when you leave the courtroom to go home at night.

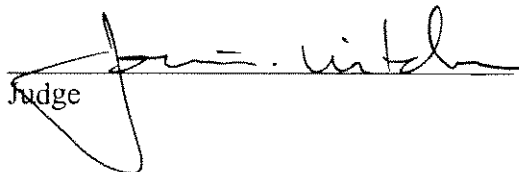
First, do not talk about this case either among yourselves or with anyone else during the course of the trial. You should keep an open mind throughout the trial and not form or express an opinion about the case. You should only reach your decision after you have heard all the evidence, after you have heard my final instruction and after the final arguments. You may discuss this case with the other members of the jury only after it is submitted to you for your decision. At that time, all such discussion should take place in the jury room.

Second, do not let any person talk about this case in your presence. If anyone does talk about it, tell them you are a juror on the case. If they won't stop talking, report that to the bailiff as soon as you are able to do so. You should not tell any of your fellow jurors about what has happened.

Third, during this trial do not talk with any of the parties, their lawyers or any witnesses. By this, I mean not only do not talk about the case, but do not talk at all, even if just to pass the time of day. In no other way can all parties be assured of the fairness they are entitled to expect from you as jurors.

Fourth, during this trial do not make any investigation of this case or inquiry outside of the courtroom on your own. Do not go any place mentioned in the testimony without an explicit order from me to do so. You must not consult any books, dictionaries, encyclopedias or any other source of information unless I specifically authorize you to do so.

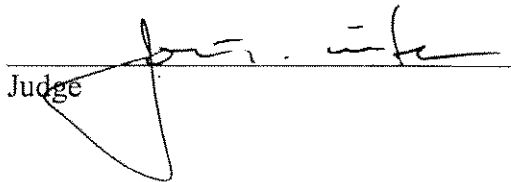
Fifth, do not read about the case in the newspapers. Do not listen to radio or television broadcasts about the trial. You must base your verdict solely on what is presented in court and not upon any newspaper, radio, television or other account of what may have happened.

Judge 

INSTRUCTION NO. 10

You have now heard all the evidence in the case. My duty is to instruct you as to the law.

You must follow all the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them. If anyone states a rule of law different from any I tell you, it is my instruction that you must follow.

A handwritten signature in black ink, appearing to read "J. W. White", is written over a horizontal line. The signature is written in a cursive style. Below the horizontal line, the word "Judge" is printed in a simple, sans-serif font.

Judge

INSTRUCTION NO. 11

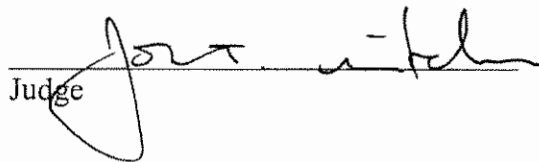
As members of the jury it is your duty to decide what the facts are and to apply those facts to the law that I have given you. You are to decide the facts from all the evidence presented in the case.

The evidence you are to consider consists of:

1. Sworn testimony of witnesses;
2. Exhibits which have been admitted into evidence; and
3. Any facts to which the parties have stipulated.

Certain things you have heard or seen are not evidence, including:

1. Arguments and statements by lawyers. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is included to help you interpret the evidence, but is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, follow your memory;
2. Testimony that has been excluded or stricken, or which you have been instructed to disregard;
3. Anything you may have seen or heard when the court was not in session.

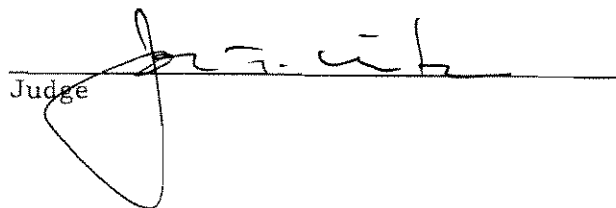

Judge

INSTRUCTION NO. 12

In order for the defendant, JIM HOWARD, III, to be guilty of OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, the State must prove each of the following:

1. That on or about, the 17th day of March, 2008;
2. in the State of Idaho, County of Kootenai;
3. the Defendant, JIM HOWARD, III, drove or was in actual physical control of;
4. a motor vehicle;
5. upon a highway, street or bridge, or upon public or private property open to the public;
6. while under the influence of alcohol.

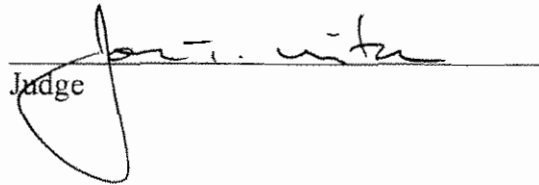
If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Judge 

INSTRUCTION NO. 13a

To prove that someone was under the influence of alcohol, it is not necessary that any particular degree or state of intoxication be shown. Rather, the state must show that the defendant had consumed sufficient alcohol to influence or affect the defendant's ability to drive the motor vehicle.

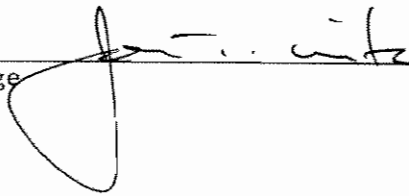
The influence must be noticeable or perceptible and affect a physical or mental function that relates to one's ability to drive.


Judge

INSTRUCTION NO. 136

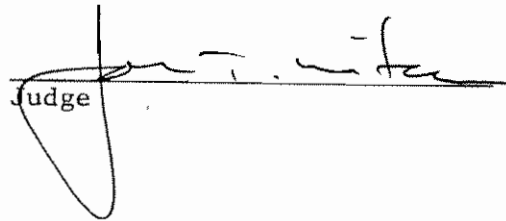
The phrase "actual physical control," means being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving.

Judge

A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be "J. Smith".

INSTRUCTION NO. 14

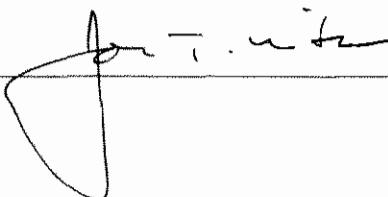
In every crime or public offense there must exist a union or joint operation of act and intent.

A handwritten signature in black ink, appearing to be "John A. ...". The signature is written over a horizontal line. Below the line, the word "Judge" is printed in a small, sans-serif font.

Judge

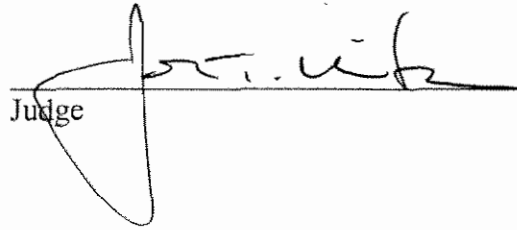
INSTRUCTION NO. 15

A defendant in a criminal trial has a constitutional right not to be compelled to testify. The decision whether to testify is left to the defendant, acting with the advice and assistance of the defendant's lawyer. You must not draw any inference of guilt from the fact that the defendant does not testify, nor should this fact be discussed by you, or enter into your deliberations in any way.

Judge  _____

INSTRUCTION NO. 16

It is alleged that the crime charged was committed "on or about" a certain date. If you find the crime was committed, the proof need not show that it was committed on that precise date.

A handwritten signature in black ink, appearing to be "J. Smith", written over a horizontal line. The signature is stylized and cursive.

Judge

INSTRUCTION NO. 17

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you, and then you will retire to the jury room for your deliberations.

The arguments and statements of the attorneys are not evidence. If you remember the facts differently from the way the attorneys have stated them, you should base your decision on what you remember.

The attitude and conduct of jurors at the beginning of your deliberations are important. It is rarely productive at the outset for you to make an emphatic expression of your opinion on the case or to state how you intend to vote. When you do that at the beginning, your sense of pride may be aroused, and you may hesitate to change your position even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

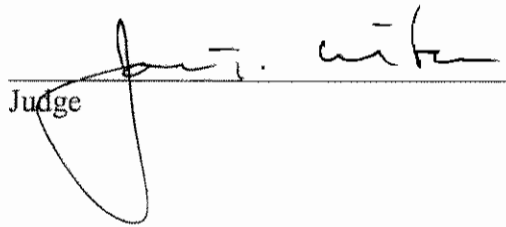
As jurors you have a duty to consult with one another and to deliberate before making your individual decisions. You may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case, together with the law that relates to this case as contained in these instructions.

During your deliberations, you each have a right to re-examine your own views and change your opinion. You should only do so if you are convinced by fair and honest discussion that your original opinion was incorrect based upon the evidence the jury saw and heard during the trial and the law as given you in these instructions.

Consult with one another. Consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you

must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

However, none of you should surrender your honest opinion as to the weight or effect of evidence or as to the innocence or guilt of the defendant because the majority of the jury feels otherwise or for the purpose of returning a unanimous verdict.

A handwritten signature in black ink, appearing to read "J. W. White", is written over a horizontal line. The signature is cursive and somewhat stylized. Below the line, the word "Judge" is printed in a simple, sans-serif font.

Judge

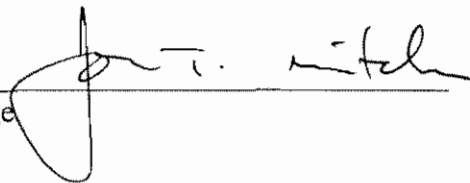
INSTRUCTION NO. 18

The original instructions and the exhibits will be with you in the jury room. They are part of the official court record. For this reason please do not alter them or mark on them in any way.

You will each receive a copy of the instructions. The copies will be presented to you in booklet form.

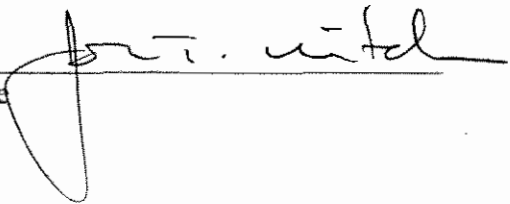
The instructions are numbered for convenience in referring to specific instructions. There may or may not be a gap in the numbering of the instructions. If there is, you should not concern yourselves about such gap.

Judge

A handwritten signature in cursive script, appearing to read "J. T. Mitchell", is written over a horizontal line. The signature is written in black ink and is positioned to the right of the word "Judge".

INSTRUCTION NO. 19

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.



Judge

INSTRUCTION NO. 20

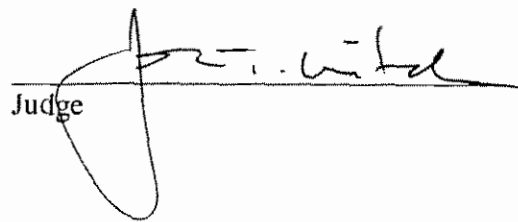
Upon retiring to the jury room, select one of you as a presiding officer, who will preside over your deliberations. It is that person's duty to see that discussion is *orderly*; that the issues submitted for your decision are *fully and fairly* discussed; and that every juror has a chance to express himself or herself upon each question.

In this case, your verdict must be unanimous. When you all arrive at a verdict, the presiding juror will sign it and you will return it into open court.

Your verdict in this case cannot be arrived at by chance, by lot, or by compromise.

If, after considering all of the instructions in their entirety, and after having fully discussed the evidence before you, the jury determines that it is necessary to communicate with me, you may send a note by the bailiff. You are not to reveal to me or anyone else how the jury stands until you have reached a verdict or unless you are instructed by me to do so.

A verdict form suitable to any conclusion you may reach will be submitted to you with these instructions.


Judge

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED: 07/08/08
 AT 12:37 o'clock P.M.
 CLERK, DISTRICT COURT
 [Signature]
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|-------------------|---|-------------------------------|
| STATE OF IDAHO, |) | |
| |) | |
| |) | |
| <i>Plaintiff,</i> |) | Case No. CRF 2008 5287 |
| |) | |
| vs. |) | VERDICT |
| |) | |
| JIM HOWARD, III, |) | |
| |) | |
| <i>Defendant.</i> |) | |
| _____ |) | |

We, the Jury, duly empanelled and sworn to try the above entitled action, for our verdict,
 say that we find the defendant, JIM HOWARD, III,

(MARK ONLY ONE OF THE FOLLOWING VERDICTS)

GUILTY of OPERATING A MOTOR VEHICLE WHILE UNDER THE
 INFLUENCE OF ALCOHOL.

NOT GUILTY of OPERATING A MOTOR VEHICLE WHILE UNDER THE
 INFLUENCE OF ALCOHOL.

DATED this 8 day of July, 2008.

William A Scott
 Presiding Officer

Court Minutes:

Session: MITCHELL070908P
Session Date: 07/09/2008
Judge: Mitchell, John
Reporter: Foland, Julie

Division: DIST
Session Time: 13:31

Courtroom: Courtroom8

Clerk(s): Clausen, Jeanne

State Attorney(s):
Greenbank, Shane
Raap, Marty

Public Defender(s):
Neils, Martin
Reuter, Dennis

Prob. Officer(s):

Court interpreter(s):



Case ID: 0001

Case number: CR2008-5287
Plaintiff:
Plaintiff Attorney:
Defendant: Howard III, Jim
Pers. Attorney:
Co-Defendant(s):
State Attorney: Greenbank, Shane
Public Defender: Reuter, Dennis

07/09/2008

14:06:54

Recording Started:

14:06:54

Case called

14:06:58

Judge: Mitchell, John
Calls case - in court trial in part 2 & 3 of
amended information; pltf has

14:07:23 burden to go first

14:07:45 **State Attorney: Greenbank, Shane**
Amended Information - Part 2 - conviction in
Kern County , CA; 12/10/03

14:08:30 CR03-17944 in Kootenai Co.

14:09:11 **Judge: Mitchell, John**
Will proceed with Part II first - argument

14:09:31 **Public Defender:**
will wait for opening statement

14:09:40 **State Attorney: Greenbank, Shane**
Stte has admitted all of the documents that the
state is relying upon; copy

14:10:01 of DL & Dept of Motor Vehicle information;
presents exhibit 6 copy of prior

14:15:42 record

14:15:46 **Judge: Mitchell, John**
Admits Exhibit #6

14:16:19 **State Attorney: Greenbank, Shane**
Reviews information on DL, DOB, Male, weight,
eye color & contains signature

14:16:49 on exhibit #2; exhibit #1 dept of MV has same
DOB and also has his signature;

14:17:32 seal from the State of California; presents
exhibit #7

14:19:06 **Public Defender:**
objects going thru this document until it has
been admitted or there is

14:19:22 foundation

14:19:23 **State Attorney: Greenbank, Shane**
need to satisfy court that these are true and
correct copies

14:19:44 **Judge: Mitchell, John**
objection is overruled - if what is being
pointed out are for purposes of

14:20:03 foundation

14:20:06 **Public Defender: Reuter, Dennis**

14:20:18 **State Attorney: Greenbank, Shane**
Same Name, DOB and reviews record - charge of
DUI; 1st doc is term of
14:20:50 probation; contains deft's sign; acknowledgment
of terms; case # corresponds
14:21:34 to previously cited case #; reviews ticket and
it also matches up with terms
14:22:38 and conditions of prob; middle of ticket BM#
written by officer; DOB is the -
14:23:44 same; VC23152(A) - plead guilty; page 2 of court
docket has booking # & also
14:24:37 appears on citation; page 4 deft acknowledges of
rights and has his signature;
14:25:15 submit that these docs; exhibit #6 23152(a) show
guilty plea; certified copy;
14:27:04 page 767 lists statute; submit that code is
conforming to our DUI law;
14:28:10 admitted exhibit 6; last page is certified in
exhibit 7

14:29:02 **Public Defender: Reuter, Dennis**
object if court going to use PA statements as
evidence

14:29:30 **State Attorney: Greenbank, Shane**
moving to admit pltf #7

14:29:40 **Public Defender: Reuter, Dennis**
object as to Mr. Howard to provide witnesses;
would need a witness from CA;
14:30:26 usng docs would viol right to confront witnesses

14:30:29 **State Attorney: Greenbank, Shane**
Heresay obj well established ; admissable under
the evidence rule; could do
14:31:11 research under Crawford

14:31:49 **Judge: Mitchell, John**
what is evidentiary rule under heresay exception

14:32:05 **State Attorney: Greenbank, Shane**
803(6); 803(8) public record; all admissable
under 803(24)

14:33:42 **Judge: Mitchell, John**
reviews Crawford; heresy?

14:34:32 **State Attorney: Greenbank, Shane**
Agrees is for heresy

14:34:38 **Judge: Mitchell, John**
reviews 2 heresy exceptions; clearly comes
under exception heresy 803(8)

14:37:01 exhibit 7; meet criteria under (8)

14:37:51 **State Attorney: Greenbank, Shane**
testimony only if going to be used for further
litigation; simply a public

14:38:31 record

14:40:07 **Judge: Mitchell, John**
in exhibit 7 - not reason primarily created
for this hearing; analysis

14:43:12 under Crawford - comes under heresy rule;
certification comes at very end

14:43:42 of exhibit

14:43:51 **Public Defender: Reuter, Dennis**
Objection

14:44:08 **Judge: Mitchell, John**
certification pertains to all 10 pages do to the
language herein

14:44:51 **Public Defender: Reuter, Dennis**
objection toat number of pages aren't stated in
certificate; others are just

14:45:27 documents attached; not self authenticated; not
under seal; just a stamp -

14:46:34 domestic document not under seal; don't have
certification of signature; doc

14:47:25 not under seal & properly authenticated

14:48:08 **State Attorney: Greenbank, Shane**
what seal pertains to - 1-6 pages seal appears
on bottom of page 6 - no real

14:48:43 legitimate claim; 803(24) first 1-5 documents
should be admissible; all

14:50:30 documents are referenced in 1-6 and all
documents have a seal; and everything

14:50:52 is tied together; authentication still fits w/i the rule

14:51:39 **Judge: Mitchell, John**
Self authentication is overruled; public records can come in; language at end

14:52:08 of packet is sufficient; those objections are overruled as well

14:53:21 **Public Defender: Reuter, Dennis**
subsection 4 - defer back to need for a seal or still need 902(4) - has to

14:54:06 meet requirement

14:54:55 **State Attorney: Greenbank, Shane**
language in seal should be sufficient

14:55:55 **Judge: Mitchell, John**
902(2) - superior of state of calif - satisfied; 901(1) & 902(2) read in

15:02:27 sequence exhibit #7 has to be sustained today; self authentication if has

15:02:52 something from state of california - all needs seal & a signature; under (2)

15:03:28 - would need a something from an official who has a seal & their signature is

15:04:10 genuine; obj to exhibit #7 is sustained

15:04:27 **State Attorney: Greenbank, Shane**
901(b) - documents are from a public office - rules contemplate records of

15:05:43 this nature be admitted

15:05:54 **Public Defender: Reuter, Dennis**
requires witness or some such thing in order to have authentication

15:06:40 **Judge: Mitchell, John**
would need an affidavit or testimony from Dep Clerk of court or same document

15:07:04 with seal from Calif identifying dep clerk and their signature; objection to

15:07:33 7 is sustained

15:07:39 **State Attorney: Greenbank, Shane**
comes down to court and if they are satisfied

with trustworthiness or have
15:08:25 something showing that that they are not what
they are supposed to be; sign
15:08:49 of McNalley gives substantial evidence of
trustworthiness

15:09:16 **Judge: Mitchell, John**
(24) of 803 deals with heresay evidence - has
nothing to do with
15:09:49 authentication; don't have somebody here to
authenticate

15:11:11 **State Attorney: Greenbank, Shane**
move for a continuance

15:11:21 **Add Ins: Reuter, Dennis**
object - has had month to prepare for trial &
are in admits of trial;
15:11:41 violation of do process

15:11:54 **State Attorney: Greenbank, Shane**
Mr. Howard is still incustody on this case &
will be until Sept - still
15:12:30 within custody of Ko.Co.

15:13:11 **Judge: Mitchell, John**
returns exhibit #7 back to PA
15:14:02 grant a continuance and it is going to be short;
courts descretion issue;
15:15:22 Gobler V Bow; can go either way; could be do
process violation if continuance
15:15:40 to go on for very long

15:16:26 **Public Defender: Reuter, Dennis**
middle of this trial not another one

15:16:43 **Judge: Mitchell, John**
state has had adequate time; no undo prejudice;
continue to 7/15/08 at 1pm;
15:18:35 yesterday given tentative sentencing date of
8/21/08 and will not issue order
15:18:57 at this time

15:19:13 **Stop recording**

Court Minutes:

Session: MITCHELL071508P
Session Date: 07/15/2008
Judge: Mitchell, John
Reporter: Foland, Julie

Division: DIST
Session Time: 09:18

Courtroom: Courtroom8

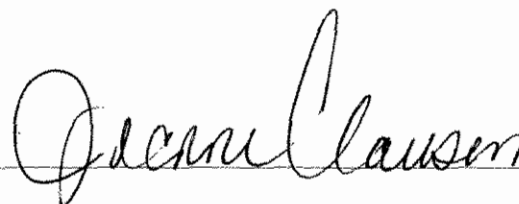
Clerk(s): Clausen, Jeanne

State Attorney(s): Greenbank, Shane

Public Defender(s):
Reuter, Dennis
Taylor, Anne

Prob. Officer(s):

Court interpreter(s):



Case ID: 0001

Case number: CR2008-5287
Plaintiff:
Plaintiff Attorney:
Defendant: Howard III, Jim
Pers. Attorney:
Co-Defendant(s):
State Attorney: Greenbank, Shane
Public Defender:

07/15/2008

13:04:00

Recording Started:

13:04:00

Case called

13:04:11

Judge: Mitchell, John
Calls case - continued hearing on Part II & III
of information; Mr. Greenbank

13:04:34

on behalf of state and Mr. Reuter present for
the deft

13:05:31 **Add Ins: Reuter, Dennis**
Object to court reviewing the document - court
has already made ruling; this
13:05:51 was continued so that state could get correct
docs

13:09:59 **Judge: Mitchell, John**
Read thru brief

13:10:06 **Add Ins: Reuter, Dennis**
State argument that certificate on doc is both
seal & certification; the
13:10:47 certification isn't in most formal manner;
document they have now has the
13:11:14 seal

13:11:30 **State Attorney: Greenbank, Shane**
will submit document w/seal

13:12:17 **Judge: Mitchell, John**
Understand more you argument on exhibit 7;
standing by my original ruling; no
13:13:11 doubt that you have authenticated that it is
public record; at issue is
13:13:33 certification; nothing on stamp that tells me
that it is provided for my law;
13:14:43 exhibit is still not admitted

13:14:53 **Add Ins: Reuter, Dennis**
Prepared to admit more documentation as was
offered in exhibit 7 as last
13:15:10
13:16:02

13:16:04 **State Attorney: Greenbank, Shane**
Moves to admit exhibit 7B

13:16:19 **Add Ins: Reuter, Dennis**
Objects; State V Prince - required that US
Constitution should be followed;
13:17:02 records from other states US1738 - certificate
of Judge of Court; clerks is
13:17:44 improper; state has not yet provided proper
foundation for authentication

13:18:12 **State Attorney: Greenbank, Shane**

- 13:18:42 Heresay issue last week; authentication has been satisfied; complied with rules of evidence
- 13:25:57 **Judge: Mitchell, John**
read state v prince; united states code; reviews exhibit 7B
- 13:29:18 **State Attorney: Greenbank, Shane**
Also reviewed Prince - doesn't stand for argument of this case; not sure how valuable it is for this case
- 13:30:29
- 13:30:38 **Judge: Mitchell, John**
Deft obj - 28USC1738 hasn't been complied with State V Prince
- 13:31:06 **Add Ins: Reuter, Dennis**
Constitution has control; congress has made rule how this is to be done
- 13:31:40 **Judge: Mitchell, John**
Is there obj 7b based on lack of seal (rule of evidence)
- 13:32:22 **Add Ins: Reuter, Dennis**
Obj that it is not self authenticated; appears to be domestic public document;
- 13:32:52 on surface appears to meet 902
- 13:33:55 **Judge: Mitchell, John**
exhibit 7b satisfies 902(1); domestic document under seal; authenticity is
- 13:34:22 established; that act of admissibility has been met
- 13:34:35 **Add Ins: Reuter, Dennis**
Confrontation clause still stand
- 13:34:45 **Judge: Mitchell, John**
Yes
- 13:34:47 **Add Ins: Reuter, Dennis**
obj; State V Prince - 28USC1738; acknowledge that duly authenticated

13:37:27 **State Attorney: Greenbank, Shane**
doesn't create additional argument - crt has
to decide if it should be
13:39:12 admitted by rules of evidence; full fact &
credibility; satisfied full faith &
13:41:12 credit

13:42:05 **Judge: Mitchell, John**
Find that 28USC1738 as analysed by Prince has
not been met full face and
13:42:31 credit; no certificate of a Judge - we don't
have that here; Part II &
13:43:20 habitual offender - 7b has been admitted under
rules of evidence

13:44:18 **State Attorney: Greenbank, Shane**
What is full face & credit; satisfying full faith
& credit - we are
13:44:47 acknowledging the judgments from state of
California

13:45:03 **Judge: Mitchell, John**
any other evidence for Part 2 & 3

13:45:47 **Add Ins: Reuter, Dennis**
9-324 requires transcript of judgment entered
still has to be a Judges
13:46:12 signature as well; obj under Idaho statute

13:48:38 **Judge: Mitchell, John**
why thinking limited to Justice of Peace; under
that ground overrules obj

13:49:46 **Add Ins: Reuter, Dennis**
limits under heresay provisions; public records
doc could be admitted without
13:50:21 factual basis

13:53:05 **State Attorney: Greenbank, Shane**
business records; People v Shrek - heresay
exceptions are really not an
13:54:26 issue

13:55:59 **Judge: Mitchell, John**
803(6) was overruled that there wasn't
foundation layed by custodian; focused

13:56:29 on 803(8); obj under 803(8)(c) is sustained; is
state offering at this time

13:59:54 7b under 803(6)

14:00:21 **State Attorney: Greenbank, Shane**
803(6)

14:00:37 **Judge: Mitchell, John**
not going to admit under 24 & 8

14:00:50 **State Attorney: Greenbank, Shane**
803(6)

14:01:04

14:01:06 **Add Ins: Reuter, Dennis**
803(6) doesn't comply with 902(11) so won't come
under 803(6)

14:02:36 128ID908, may prevent it coming in also;

14:04:20 **Judge: Mitchell, John**
Admit 7b under 803(6) business records exception
& find 902(11) has been met;

14:04:53 official court record & doesn't matter with
copies were made; still dealing

14:06:02 with full faith and credit

14:07:11 **Add Ins: Reuter, Dennis**
objection to 7b - question of heresay with
heresay; eventhough he signed doc

14:07:56 advising of rights - don't have exact language
court used; end of my

14:09:01 objections

14:09:38 **State Attorney: Greenbank, Shane**
Doc being offered name, sign, date of conviction
& case number; nothing have

14:10:01 to do with rights;

14:10:25 **Add Ins: Reuter, Dennis**
Constitutional infirmity & heresay w/i heresay;
challege to validity to prior

14:11:46 conviction; shown by doc itself to degree it is
not heresay

14:12:38 **State Attorney: Greenbank, Shane**
California has provision to allow to appeal;

intelligently waive rights;
14:13:21 don't know authority
14:13:53 admission by party opponent

14:14:19 **Judge: Mitchell, John**
not heresay - page three registered of actions -
obj is overruled

14:15:02 **State Attorney: Greenbank, Shane**
exhibit 6 court has to find substantially
conforming

14:15:53 **Judge: Mitchell, John**
6 is admitted

14:16:00 **State Attorney: Greenbank, Shane**
Part II - 12/10/03 - 03-17944 in Ko.Co.;
certified copy of judgment &
14:16:40 sentence, ticket

14:17:06 **Add Ins: Reuter, Dennis**
objection under Crawford; sufficiency of the
certificate; heresay not factual
14:18:07 findings by government. heresay w/i heresay

14:20:33 **State Attorney: Greenbank, Shane**
Take judicial notice of the file itself

14:23:17 **Judge: Mitchell, John**
obj under Crawford is overruled; 808(c) is
sustained; admitting 8 under 201;
14:24:56 admit under 803(6) - 902(11) have been satisfied
14:26:34 argument under part II - may be problem of
exhibit 7b under fullfaith &
14:27:01 credit; continue to brief issue or solve problem
from evidentiary standpoint

14:27:23 **State Attorney: Greenbank, Shane**
motion to continue

14:27:30 **Add Ins: Reuter, Dennis**
Obj to a continuance - middle of trial again;
state again has not provided
14:27:53 documentation to admit exhibit; serve no purpose
to continue so state can
14:28:25 correct their errors; objection to continuance

14:30:51 provided docs by state of what there were going
to submit as evidence; based
14:31:16 by strategy on those; not appropriate to
continue further

14:32:27 **Judge: Mitchell, John**
Granting a continue is up to court's discretion;
has to evaluation prejudice
14:32:50 to defense; prejudice is fact that Mr. Howard is
in custody

14:33:48 **Add Ins: Reuter, Dennis**
nothing to stop court to say enough is enough

14:34:11 **State Attorney: Greenbank, Shane**
continuance isn't to admit any further evidence;
don't know what is fully
14:34:49 required

14:35:17 **Judge: Mitchell, John**
if state's motion to continue is to obtain more
evidence than it is denied;
14:35:54 as to Part II any additional evidence to be
submitted

14:36:10 **Add Ins: Reuter, Dennis**
no further evidence

14:36:17 **Judge: Mitchell, John**
evidentiary of Part II is over

14:36:30 **State Attorney: Greenbank, Shane**
judgment & sentence Ko.Co. 1st page is
certificate of clerk of court (exhibit
14:36:55 8); DL #, dob, case # judgment on plea of guilty
12/10/03; 1 & 2 exhibits also
14:37:29 have identifiers; advise of rights form has
signature; has been previously
14:38:56 convicted in state of idaho; person convicted in
CA is same as person sitting
14:39:32 here today

14:39:41 **Add Ins: Reuter, Dennis**
7b still is not enough similarity of names is
not enough; exhibit 8 court
14:40:37 took judicial notice but is limited & still has

14:40:57 heresay withing heresay
problems; just because it is in court record
doesn't mean it is admissable;

14:41:20 question whether 8 proves that James Howard is
the same person

14:42:26 **Judge: Mitchell, John**
Take under advisement regarding full faith and
credit; give each side a week

14:42:47 to file simultaineous briefing; whether it is
need; if needed has the state

14:43:06 complied with that; due 7/22/08; part III

14:43:39 **State Attorney: Greenbank, Shane**
amended info - alleging 3 prior felonies - in
Oklahoma; State of California;

14:44:22 State of California 8/18/98

14:44:35 **Add Ins: Reuter, Dennis**
no opening statement for part III

14:46:28 **State Attorney: Greenbank, Shane**
exhibit 9

14:46:35 **Add Ins: Reuter, Dennis**
objects;confrontation under Crawford; full faith
& credit problem; heresay

14:47:54 public records ; not a business record
exception; heresay with heresay; 9-324

14:48:15 doesn't meet requirements

14:49:06 **Judge: Mitchell, John**
9-324 is overruled; 9-315

14:53:03 **Add Ins: Reuter, Dennis**
heresay is advisement - sought to prove this is
a felony

14:53:32 **Judge: Mitchell, John**
heresay within heresay is overruled

14:54:03 obj under 9-315(8) is sustained; confrontation
is overruled

14:54:36 **State Attorney: Greenbank, Shane**
803(6) - documents are appropriately
authenticated

14:55:28 **Add Ins: Reuter, Dennis**
certification for business records under 803(6)
- doesn't meet that

14:55:52 provision; 803(8)(c) is not allowed factual
findings of conviction itself

14:57:00 **State Attorney: Greenbank, Shane**

14:58:02 second page 8/18/98 judgment was signed by
judge; sentenced to charges deft

14:58:43 pled guilty to

14:59:01 **Add Ins: Reuter, Dennis**
Not a judgment of conviction

14:59:40 **State Attorney: Greenbank, Shane**
803(6) - 902(11) - lack of trustworthiness

15:00:47 **Judge: Mitchell, John**
803(6) disagree with way reading - bring in live
witness to testify of normal

15:01:19 course of business; no way state has met the
rules of 803(6); admit record

15:02:34 under 803(8) if it doesn't have factual finding
of a conviction

15:03:31 **State Attorney: Greenbank, Shane**
exhibit 9 plead guilty to felony charge & court
entered conviction

15:04:01 **Judge: Mitchell, John**
first reason admitted and second refused

15:08:15 **State Attorney: Greenbank, Shane**
exhibit 10 - maintains still admissable heresay
rule

15:09:03 803(24)

15:09:09 **Judge: Mitchell, John**
denying 803(24) under that subsection

15:09:52 **State Attorney: Greenbank, Shane**
consider to admit for conviction

15:10:02 **Judge: Mitchell, John**
object of defense is sustained and not allowing

15:11:52 in; 803(6) - 902(11) is not met; Exhibit #10 is refused if intended to prove a conviction; front page of
15:13:02 7b everything is satisfied - stamp on back of exhibit 10 is better than on
15:13:38 California; State of WA's doesn't meet any criteria of (1); 10 is refused

15:14:11 **State Attorney: Greenbank, Shane**
moves to admit exhibit 11

15:14:23 **Add Ins: Reuter, Dennis**
heresay objection is public record and is limited; DOB's are all different -
15:15:32 not sufficiently clear if this is the same person; heresay within heresay -
15:16:30 notations on photograph in upper right corner & another one 4 pages from end
15:18:07 -hand written comments; detainers, parole board written by some unknown
15:18:37 person

15:18:41 **State Attorney: Greenbank, Shane**
being offered for identity

15:19:10 **Add Ins: Reuter, Dennis**
still information by some unknown source

15:19:39 **State Attorney: Greenbank, Shane**
Oklahoma if within 803(6) & (8) well withing both & properly authenticated

15:21:01 **Judge: Mitchell, John**

15:22:00 **State Attorney: Greenbank, Shane**
doesn't show sign under penatly of perjury; offering to prove a conviction

15:23:06 **Judge: Mitchell, John**
803(8)(c) objection is sustained; 803(6) is sustained; heresay is overruled;
15:23:53 who record is this question is overruled; exhibit 11 refused

15:24:55 **State Attorney: Greenbank, Shane**

no other evidence to admit

- 15:25:05 **Add Ins: Reuter, Dennis**
no evidence to be admitted
- 15:25:13 **State Attorney: Greenbank, Shane**
ask court to reconsider admissability of
exhibits 9,10 & 11; evidence is
- 15:26:09 reliable; these documents are true and correct;
all info & exhibits taken as
- 15:27:22 whole allow admissablity of 9, 10 & 11
- 15:27:38 **Judge: Mitchell, John**
comply with 803(24)?
- 15:27:55 **State Attorney: Greenbank, Shane**
Yes I did - he has been provided with all of
these documents & amended
- 15:28:17 information; clerk of court would be declarant
- 15:28:52 **Judge: Mitchell, John**
name & address on 11; don't see address on 9 or
10
- 15:29:47 **Add Ins: Reuter, Dennis**
state provided me documents but didn't provide
me with info that it would be
- 15:30:43 submitted under this code section
- 15:30:50 **Judge: Mitchell, John**
decline pltf's request to admit 9,10 & 11 under
803(24); to exceptions that
- 15:31:27 could be applied here - (8) is problematic due
to (c); full faith & credit
- 15:32:03 goes to getting around 803(b); one or two
exceptions to heresay rule -
- 15:32:38 failure of certificate that has been submitted;
9 & 10 has to be refused
- 15:33:06 there is not address of declarant; declining the
reconsideration
- 15:34:01 **State Attorney: Greenbank, Shane**
nothing else to add to part III -
- 15:34:14 **Judge: Mitchell, John**
part III hasn't been proven; find something

under full faith & credit
15:34:56 803(8)(3) will revisit my rulings; won't set
this for sentencing - don't know
15:35:19 what set for sentencing for
15:36:53 **Stop recording**
(On Recess)

WILLIAM J. DOUGLAS
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene ID 83814
(208)-446-1800

SHANE GREENBANK

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED: 7-15-08
AT 5:00 O'CLOCK P.M.
CLERK, DISTRICT COURT
Shane Greenbank
DEPUTY

ATTORNEY ASSIGNED:
SHANE GREENBANK

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|------------------------|---|------------------------------------|
| STATE OF IDAHO, |) | |
| |) | Case No. CR-F08-5287 |
| Plaintiff |) | |
| |) | STATE'S MEMORANDUM IN |
| v. |) | SUPPORT OF ADMISSIBILITY OF |
| |) | CALIFORNIA DOCUMENTATION |
| JIM HOWARD III, |) | AND MOTION TO RECONSIDER |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMES NOW, Shane Greenbank, Deputy Prosecuting Attorney for Kootenai County, and hereby submits State's Memorandum in Support of Admissibility of California Documentation to prove prior DUI and requests the court reconsider its ruling on the issue of authentication.

PROCEDURAL POSTURE

On the 2nd day of June, 2008, a Jury Trial was conducted on the charges of Driving Without Privileges (DWP) and Felony DUI. Prior to opening statements, the defendant plead guilty to the charge of DWP. The jury hung on the DUI charge.

On the 13th day of June, 2008, the court, per the State's request, scheduled another Jury Trial for July 7, 2008.

On the 26th day of June, 2008, the court sentenced the defendant on the misdemeanor DWP to 180 days local jail, with credit for 102 days already served.

On July 7, 2008, the second Jury Trial began. The jury returned a guilty verdict the following day. The defendant waived his right to a jury for parts II and III of the Amended Information.

On July 9, 2008, the State attempted to admit documents from Kern County California to prove a prior DUI conviction from there. The defendant objected on the basis that the document was not appropriately authenticated under Evidence Rule 902. The court ruled that while the Kern County stamp on the documentation did in fact certify the documents to be true and correct, the stamp did not satisfy subsection (1), (2) or (3) of Evidence Rule 902 – as is required by Evidence Rule 902(4).

Following the courts ruling, the State requested a continuance. The defendant objected. The court granted a brief continuance, and set the trial to continue on July 15, 2008.

ARGUMENT

At trial, the State attempted to admit Exhibit #7 – documentation proving that defendant was previously convicted of a DUI in Kern County, California. The exhibit contains a stamp with the following language and in substantially the same form:

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF KERN, METROPOLITAN DIVISION
THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND
CORRECT COPY OF THE ORIGINAL DOCUMENT ON
FILE IN THE OFFICE OF THE CLERK OF THIS COURT.**

DATED: _____
TERRY McNALLY

BY: _____ DEPUTY

(Bold in original). The defendant argued that the document was not properly authenticated as a public record under Evidence Rule 902(4).

Evidence Rule 902(4) reads as follows:

Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public

office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this State, or rule prescribed by the Idaho Supreme Court.

The State argued, and still maintains, that the Kern County stamp is properly authenticated under ER 902(4) as the stamp contains both a certification and a seal – thereby complying with both 902(4) and (1). Evidence Rule 902(1) reads:

Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(Underline added). As was argued by the State at trial, the first portion of the Kern County stamp qualifies as a “seal” ER 902(1). As can be seen by reviewing the actual stamp, the first portion of the stamp is bold, centered, and in a larger font than the text which follows. That portion reads.

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF KERN, METROPOLITAN DIVISION**

The remaining text of the stamp is not bold, is not centered, and is of smaller font. It reads as follows:

THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND
CORRECT COPY OF THE ORIGINAL DOCUMENT ON
FILE IN THE OFFICE OF THE CLERK OF THIS COURT.

The State maintains that this portion is the “certification” referred to in ER 902(4).

Clearly, the definition of “seal” is at issue in this case. Numerous definitions can be found in dictionaries and on the internet. However, the most applicable definitions are found in statute. In this case, the State of California has statutorily defined what a “seal” is. California Code Section 1930 reads, “[a] seal is a particular sign, made to attest, in the most formal manner, the execution of an instrument.” California Code Section 1931 goes on to state:

A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon

the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister State or foreign country, and there recognized as a seal, must be so regarded in this State.

(Emphasis added)¹. Under this definition, it is apparent that the bolded portion of the stamp in this case is in fact a "seal" in the State of California. That is, it is a stamp made by a public officer used to attest the execution of an official or public document. This is the only logical interpretation of the reason why the first portion of the stamp differs from the second portion. Indeed, not only does it identify the specific state agency, it differs from the remaining text because it is bold, larger font, and centered.

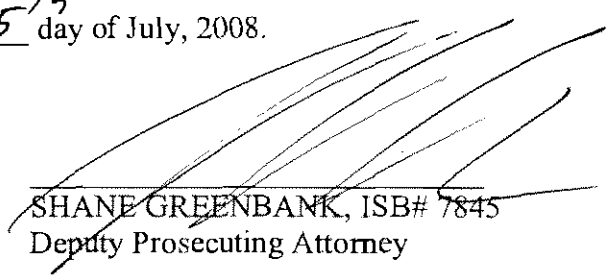
Furthermore, the court should accept California's "seal" in this instance in light of Idaho Code section 9-307. That section provides:

A copy of the written law, or other public writing, of any state, territory or country, attested by the certificate of the officer having charge of the original, under the public seal of the state, territory or country, is admissible as evidence of such law or writing.

CONCLUSION

For the reasons stated above, the State respectfully maintains that proposed Exhibit #7 is properly authenticated under Evidence Rule 902(4) and requests the court reconsider its ruling in that regard.

RESPECTFULLY SUBMITTED this 15th day of July, 2008.

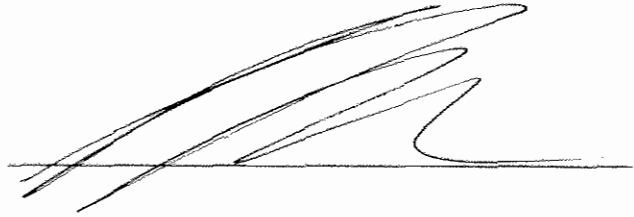

SHANE GREENBANK, ISB# 7845
Deputy Prosecuting Attorney

¹ Idaho has a similar provision in section 9-401:

A public seal in this state is a stamp or impression, made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign made in another state or territory or foreign country, and there recognized as a seal, must be so regarded in this state.

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of July, 2008, a true and correct copy of the foregoing memorandum was mailed; faxed; hand-delivered to: Dennis Reuter, attorney for defendant, office of the public defender.

A handwritten signature in black ink, consisting of several sweeping, overlapping strokes, positioned above a horizontal line.

ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 133

Dennis Reuter, Deputy Public Defender
Office of the Kootenai County Public Defender
PO Box 9000
Coeur d'Alene, Idaho 83816-9000
Phone: (208) 446-1700; Fax: (208) 446-1701
Bar Number: 6154

2008 JUL 21 AM 9:35

CLERK DISTRICT COURT

[Signature]
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

| | | |
|------------------------|---|-------------------------------------|
| STATE OF IDAHO, |) | |
| |) | |
| Plaintiff, |) | CASE NUMBER CR-08-5287 |
| |) | Felony |
| V. |) | |
| |) | MEMORANDUM RE: |
| JIM HOWARD III, |) | FULL FAITH AND CREDIT CLAUSE |
| |) | |
| Defendant. |) | |
| |) | |

Defendant, by and through his attorney, Dennis Reuter, Deputy Public Defender, hereby provides a memorandum regarding the relation of the Full Faith and Credit clause of the United State's Constitution (Article IV, §1) with the State's document-based proof of prior DUI convictions from a state outside Idaho.

When a conviction from another state is used by the prosecution to enhance a crime, it is invoking the full faith and credit clause of the United States Constitution. As was stated in *Merriweather v. Commonwealth*, 99 S.W.3d 448 at 452 (Ky. 2003):

Proof of Appellant's prior convictions was an indispensable element of the PFO [persistent felony offender] charge. Accordingly, proof beyond a reasonable doubt was required of the Commonwealth. *See Hall v. Commonwealth*, Ky., 817 S.W.2d 228 (1991), overruled on other grounds in *Commonwealth v. Ramsey*, Ky., 920 S.W.2d 526 (1996). Thus, when the Commonwealth is seeking to use a prior conviction to enhance a sentence, it is, in

fact, seeking “full faith and credit” of that prior conviction and the requirements of KRS 442.040 must be satisfied.

The Kentucky statute referred to, KRS 422.040, requires a judge’s certification of an out-of-state conviction, in line with the federal law. The Kentucky statute provides in part:

The records and judicial proceedings of any court of any state, attested by the clerk thereof in due form, with the seal of the court annexed if there be a seal, *and certified by the judge, chief justice, or presiding magistrate of the court*, shall have the same faith and credit given to them in this state as they would have at the place from which the records come. (Emphasis added.)

Kentucky’s position parallels that of Idaho. As was presented and argued during the trial relating to proof of the prior DUI convictions and prior felony convictions, the Idaho Supreme Court requires adherence to the full faith and credit clause of the United States Constitution and to the Idaho statutes which mirror the federal requirements.

In *State v. Prince*, 64 Idaho 343, 132 P.2d 146 at 148 (1942), the Idaho Supreme Court commented on the objection by a defendant as to the manner of proof of an out-of-state conviction made in his case. The court stated:

It is, therefore, with the method of proof of jurisdiction of the Oregon Court we are now concerned, and of what that proof must consist.

The Federal Constitution provides “Full Faith and Credit shall be given to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” Article IV, §1.

Congress has so provided: “The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation

is in due form. *And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.*" 28 U.S.C.A. § 687. [Emphasis ours.]

Section 16-310, I. C. A., provides: "A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of another state or territory may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form."

An examination of State's Exhibits "A" and "B", admitted in evidence, shows a compliance with the provisions of the Federal Constitution, the Act of Congress, and Section 16-310, supra; each exhibit being properly authenticated as and in the manner required by Act of Congress, and the statutes of this State, as above provided.

The federal statute in place in 1942, 28 U.S.C.A. §687, is now denominated 28 U.S.C.A. §1738. The current federal statute expanded the 1942 version by making it applicable to Possessions of the United States.

Idaho Code §16-310 is now numbered §9-312. , but the wording of the Idaho statute has not changed. Idaho Code §9-312 says (as it did in 1942 when numbered as §16-310):

A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of another state or territory may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

Even if the federal statute were not given the binding authority accorded to the United States Constitution, Idaho's statute must also be followed, as *Prince, supra* requires.

In *Smith v. Smith*, 95 Idaho 477 at 483, 511 P.2d 294 at 300 (1973), a party challenged the

use of an out-of-state record of a court proceeding. The Idaho Supreme Court had reversed the case and gave the following comment for guidance upon the retrial:

[The appellant] attacks the admission into evidence of Exhibit 47, which contained excerpts from a Washington State court proceeding, on the ground that it was improperly authenticated. Both Exhibit 47 and any other testimony from other trials should have been authenticated according to I.C. §9-312. Copies of testimony taken by other courts come within the scope of I.C. §9-310. Accordingly, the admissibility of these judicial records shall be determined pursuant to the requirements of I.C. §9-312 upon retrial of this cause. (Footnotes omitted.)

Conclusion

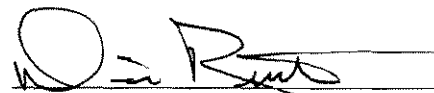
Because the State did not comply with the full faith and credit clause of the United States Constitution and Idaho Code §9-312 (as was argued at trial referencing *State v. Prince, supra*), and because other errors occurred, as previously argued, the State has not proven that Mr. Howard has been convicted of two prior DUI offenses. Therefore, the State has not proven a felony DUI conviction.

Furthermore, as previously argued, the State has not established the foundation necessary to admit the prior out-of-state felony convictions, nor met its burden of proof to convict Mr. Howard as a persistent violator.

DATED this 21st day of July, 2008.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY:



DENNIS REUTER
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 21st day of July, 2008, addressed to:

Kootenai County Prosecutor



ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 103

WILLIAM J. DOUGLAS
Prosecuting Attorney
501 Govt. Way/Box 9000
Coeur d'Alene ID 83814
(208)-446-1800

2008 JUL 21 AM 11:00

CLERK DISTRICT COURT

DEPUTY

ATTORNEY ASSIGNED:
SHANE GREENBANK

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|------------------------|---|-----------------------------|
| STATE OF IDAHO, |) | |
| |) | Case No. CR-F08-5287 |
| Plaintiff |) | |
| |) | STATE'S MEMORANDUM |
| v. |) | REGARDING FULL FAITH |
| |) | AND CREDIT CLAUSE |
| JIM HOWARD III, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

COMES NOW, Shane Greenbank, Deputy Prosecuting Attorney for Kootenai County, and hereby submits State's memorandum regarding the Full Faith and Credit Clause and evidentiary requirements for admissibility of the California judgment.

ARGUMENT

At trial, the defendant objected to the State's efforts to introduce a certified copy of a California DUI judgment and sentence on the basis that 28 U.S.C.A. § 1738 had not been complied with. The defendant argued that to admit the documents without absolute compliance with to language of 28 U.S.C.A. § 1738 would violate the Full Faith and Credit clause of the U.S. Constitution. The Full Faith and Credit Clause, Article IV, Section 1 of the U.S. Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The federal Full Faith and Credit statute, states, in relevant part:

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C.A. § 1738 (formerly § 687).

The defendant cites to State v. Prince in support of his position that a judgment and sentence from another state *must* be accompanied by a “certificate of a judge of the court” certifying that the clerk’s attestation is in proper form. 64 Idaho 343 (1942). However, Prince imposes no such requirement – nor does Full Faith and Credit. In Prince, the court was asked to determine whether the prosecution had to prove that the Oregon court had jurisdiction in the former action before the judgment from Oregon could be admitted to prove a prior conviction. The court found that the judgments of the Oregon courts were properly authenticated, but did not analyze the effect of 28 U.S.C.A. § 1738 on the admissibility of evidence in Idaho.

Clearly, Prince is not on point for the proposition it was cited for. It is well accepted that States may enact a statutes or rules authorizing the introduction of a judicial record of a sister state in evidence without strict adherence to the language of 28 U.S.C.A §1738 – although the state statute or rule may not impose requirements *in excess* of those imposed by the federal statute. See Garden City Sand Co. v. Miller, 157 Ill. 225, 41 N.E. 753 (1895); Willock v. Wilson, 178 Mass. 68, 59 N.E. 757 (1901); Ellis v. Ellis, 55 Minn. 401, 56 N.W. 1056 (1893). Accordingly, a copy of the proceedings of a court of one state is admissible in evidence in a court of another state, if authenticated according to the rules of the latter, even though not according to the acts of Congress. See Gradler v. Johnson, 373 Ill. 137, 22

N.E.2d 946, 159 A.L.R. 1123 (1930); Ellis v. Ellis, 55 Minn. 401, 56 N.W. 1056 (1893)(states are free to have rules regarding authentication which require less than that which may be prescribed by act of congress).

The issue presented by the defendant in this case has recently been considered however. In U.S. v. Weiland, the defendant claimed that the admission of his prior convictions violated 28 U.S.C.A. § 1738. 420 F.3d 1062 (9th Cir. 2005). The court disagreed, commenting that it was a “strained argument that § 1738 creates heightened evidentiary requirements for the admission of the records of a prior conviction.” Id. at 1075. The court went on to state:

We can find no authority for this proposition, nor does reason support it. To the contrary, the commentary to Federal Rule of Civil Procedure 44, incorporated into Federal Rule of Criminal Procedure 27, specifically indicates that, under circumstances in which § 1738 is applicable, proof may be made *either* by compliance with the Federal Rules of Evidence *or* in compliance with § 1738. See Mateo-Mendez, 215 F.3d at 1045.

Section 1738 is designed to ensure that each state and federal court provides full faith and credit to appropriately authenticated judicial judgments rendered in the other states. The contents of the “penitentiary packet” challenged in this case would be admissible in an Oklahoma criminal court pursuant to the state hearsay exception for public records, Frazier v. State, 874 P.2d 1289, 1291-92 (Okla.Crim.App. 1994), and § 1738 provides no bar to its admission here. Huffhines, 967 F.2d at 320.

Id. at 1075-76 (emphasis in original).

Contrary to the defendant’s argument in this case, for an out of state judgment to be admissible in Idaho, the prosecution need not jump through the hoops of 28 U.S.C.A §1738. The Full Faith and Credit statute does not create heightened evidentiary requirements which states must adhere to. Instead, what 28 U.S.C.A §1738 actually does is it establishes an upper limit on admissibility of judgments from sister states. So long as the rules of evidence adopted by a particular state do not require *more* than what §1738 does, the Full Faith and Credit clause is not violated. Here, Idaho has chosen to allow judgments from sister states to be admitted with fewer requirements than 28 U.S.C.A §1738. As noted, Idaho is free to do so. What Idaho could not do is require more stringent rules than appear in 28


U.S.C.A §1738. To do so would violate the Full Faith and Credit clause.

In this case, the California documentation offered by the State to prove a prior DUI is in proper form and admissible pursuant to Idaho Rules of Evidence ~ and the court has already so ruled. Furthermore, (in light of the discussion of the Oklahoma rules of evidence in Weiland), it should be noted that the California documentation in this case would also be admissible in California pursuant to their rules of evidence. (See Appendix). Hence, admission of the California judgment in this case complies with Idaho rules of evidence and does not violate the Full Faith and Credit clause.

CONCLUSION

For the reasons stated, the State respectfully maintains that admission of the California judgment into evidence does not violate the Full Faith and Credit clause of the U.S. Constitution.

RESPECTFULLY SUBMITTED this 21st day of July, 2008.



SHANE GREENBANK, ISB# 7845
Deputy Prosecuting Attorney

APPENDIX

CALIFORNIA EVIDENCE CODE

Evidence Code § 452. Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451 [where judicial notice SHALL be taken]:

...

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

....

Evidence Code § 452.5. (a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

Evidence Code § 1530. (a) A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if:

...

(2) The office in which the writing is kept is within the United States or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

...

Evidence Code § 1531. For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.

Evidence Code § 1280. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

- (a) The writing was made by and within the scope of duty of a public employee.
- (b) The writing was made at or near the time of the act, condition, or event.
- (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Government Code § 69844.5. On and after July 1, 1997, each clerk of the superior court shall prospectively certify and submit those court records specified by the Judicial Council which relate to criminal convictions for entry into a computer system operated by the Department of Justice that can be accessed by authorized agents of any district attorney or other state prosecuting agency. This section shall not be construed to require a superior court to acquire any new equipment or to implement any new procedures.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2008, a true and correct copy of the foregoing memorandum was [] mailed; [] faxed; [] hand-delivered to: Dennis Reuter, attorney for defendant, office of the public defender.



Court Minutes:

Session: MITCHELL072208A
Session Date: 07/22/2008
Judge: Mitchell, John
Reporter: Foland, Julie

Division: DIST
Session Time: 07:47

Courtroom: Courtroom8

Clerk(s): Clausen, Jeanne

State Attorney(s):
Greenbank, Shane
Raap, Marty
Rosen, Denise
Wick, Ann

Public Defender(s):
Anderson, Staci
Taylor, Anne

Prob. Officer(s):

Court interpreter(s):



Case ID: 0005

Case number: CR2008-5287
Plaintiff:
Plaintiff Attorney:
Defendant: Howard, Jim
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender: Taylor, Anne

07/22/2008

12:00:43

Recording Started:

12:00:43

Case called

- 12:01:27 **Judge: Mitchell, John**
Calls case - continue underadvisement for a
little longer; want to reread
12:01:49 briefs and federal rules; fullfaith issues & how
relates to rules of
12:02:17 evidence; is burden back on defense to prove
evidence is incorrect; will
12:02:43 write a decision
- 12:02:56 **Defendant: Howard, Jim**
50 days left incustody
- 12:03:05 **Judge: Mitchell, John**
will have a decision w/i 30 days
- 12:04:56 **Stop recording**

*set for sentencing 8/25/08 @ 11:30am if misd.
If felony will be set @ a later date.*

FILED 8-13-08

AT 2:45 o'clock P M
CLERK, DISTRICT COURT
John Johnson
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)
)
) *Plaintiff,*)
 vs.)
)
) JIM HOWARD, III,)
)
) *Defendant.*)

Case No. **CRF 2008 5287**

**MEMORANDUM DECISION AND
ORDER REGARDING PART II AND
PART III**

I. PROCEDURAL HISTORY AND BACKGROUND.

On June 2 and 3, 2008, the DUI charge in the Information in this case was tried to a jury but ended in a mistrial due to jury deadlock. At the beginning of that trial, defendant Jim Howard III (Howard) pled guilty to the charge of Driving Without Privileges, and was sentenced on that charge on June 26, 2008.

The State of Idaho decided to re-try the DUI charge, and on July 8, 2008, Howard was found guilty of DUI by jury verdict. Prior to the jury reaching its verdict, Howard, with the advice of his attorney, stipulated that Part II and Part III of the Information could be tried to the Court. Part II of the Information alleged two prior DUI offenses, making this underlying third offense, of which the jury had just found him guilty, a felony. Part III of the Information alleged two prior felony convictions, which, if convicted of the underlying DUI, and if that underlying DUI were a felony, would make Howard a Habitual Offender under Idaho Code § 19-2524.

A trial to this Court on Parts II and III was held on July 9, 2008. At this trial,

273

Howard's attorney objected that the evidence of these prior convictions was not properly before the Court. Those objections were sustained, and the deputy prosecutor on behalf of the State of Idaho made a motion to continue to allow him to get those documents in proper order for admission into evidence. Over objection by Howard's attorney, the continuance was granted. The continuance was granted for two reasons. First, the continuance was only for six days, to July 15, 2008. Second, the continuance was granted because Howard was not being held on this DUI. At the time, Howard was incarcerated on the sentence imposed on the misdemeanor Driving Without Privileges charge. On June 26, 2008, due to his extensive criminal record, Howard was sentenced to the maximum 180 days in jail for the offense of Driving Without Privileges and was given credit for 102 days time served. As of the date of this decision, Howard is still in custody on that Driving Without Privileges sentence.

The trial before this Court resumed on July 15, 2008. At the beginning of that trial, the State submitted the "State's Memorandum in Support of Admissibility of California Documentation and Motion to Reconsider." Over Howard's objection, the Court considered such briefing. That brief was focused on Plaintiff's Exhibit 7, which comprised photocopies of what purported to be court records and court minutes (register of actions/docket) regarding an August 8, 2001, citation for DUI, and what appears to be a December 4, 2002, conviction on that charge in Superior Court, Kern County, California. At the bottom of the tenth and last page of Exhibit 7 is the following in what appears to be a stamp:

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF KERN, METROPOLITAN DIVISION**
THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND
CORRECT COPY OF THE ORIGINAL DOCUMENT ON
FILE IN THE OFFICE OF THE CLERK OF THIS COURT.
DATED: 4-14-08 [handwritten]
TERRY McNALLY
BY: Dawn Kapp [handwritten] DEPUTY

274

The State of Idaho argues Exhibit 7 is properly authenticated under I.R.E. 902(4) as the stamp contains both a certification and a seal. Idaho Evidence Rule 902(4) reads:

Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any law of the United States, or rule proscribed by the Idaho Supreme Court.

Idaho Rule of Evidence 902(1) reads:

Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

The "stamp" found at the end of the last page of Exhibit 7 complies with much but not all of I.R.E. 902(4) and none of I.R.E. 902(1) is complied with. Regarding I.R.E. 902(4), there is nothing in the stamp telling us what Dawn Kapp is "deputy" of, and if we can assume it is a deputy clerk of court, there is nothing in the stamp telling us whether Dawn Kapp as "deputy" is the person authorized by the Clerk of the Court (apparently Terry McNally but that isn't clear) to make such certification. All of that is implicit, but not explicit, from the stamp. Regarding I.R.E. 902(1), this stamp is not a "seal" of the State of California, nor does the signature purport to be an attestation or an execution. This is simply a stamp with part of it in bold face. California's definition of "seal" (Cal.Code § 1931) reads:

A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister State or foreign country, and there recognized as a seal, must be so regarded in this State.

Idaho Code § 9-401 is identical. This is a "stamp" but nothing about it says it was a stamp made "with an instrument provided by law". A stamp suggests an official has handled the document, read it and decidedly marked it as being official.

At the continued trial on Part II and Part III, Exhibit 7B was admitted into evidence. Exhibit 7B comprises the same documents (in different order) as Exhibit 7, but with all the requirements of I.R.E. 902(4) and 902(1) having been met. In Exhibit 7B, Dawn Kapp explains exactly who she is and her capacity, she uses a seal of the Superior Court of California, County of Kern, and she makes an attestation

At the conclusion of the continued trial on Part II and Part III, based on the Court's concern over the status of the evidence, the State again moved to continue. Defendant objected. The Court sustained the objection and denied the motion to continue because the State had this evidence prepared (or not) for the first trial, the second trial, the first trial to the Court and now this trial to the Court. At the conclusion of the evidence as to Part II of the Information, this Court ordered simultaneous briefing on July 22, 2008, by both sides on the applicability of the Full Faith and Credit Clause. The Court then heard evidence and argument on Part III of the Information. At the conclusion of the evidence the Court ruled that Part III of the Information had not been proven, but that the Court would revisit its ruling after reading the briefing on the issue of Full Faith and Credit. Both sides briefed the issue and this Court has read those briefs, thus, Part II and Part III are now at issue.

II. ANALYSIS.

A. Idaho Rules of Evidence.

If admissibility under the Idaho Rules of Evidence were the end of the inquiry, Howard would be guilty of Part II, due to the admission of Exhibit 7B and Exhibit 8. However, that is not the end of the inquiry. This Court will discuss the Full Faith and Credit issues next.

As to Part III, Howard is not guilty from an Idaho Rules of Evidence analysis alone. Three prior convictions were charged (the State must prove two in order to satisfy the Habitual Offender enhancement statute, Idaho Code § 19-2524) in the Information:

- 1) Burglary in the Second Degree, State of Oklahoma, Case No. CRF-83-195, Date of Judgment and Sentence 08-24-83;
- 2) Burglary in the Second Degree, State of Washington, Case No. 87-1-000197-3, date of Judgment and Sentence 01-08088, and
- 3) Possession of a Controlled Substance, State of California, Case No. F98300369-6, date of Judgment and Sentence 08-18-98.

Amended Information, p. 3. Evidence was presented as to all three crimes. Only Exhibit 9 was admitted at trial because Exhibit 9 contained a "seal" of Superior Court, State of California, County of Fresno. However, Exhibit 9 was only proof to an evidentiary standard that Howard had pled guilty to the crime of possession of methamphetamine. Exhibit 9 is not the proof of the controlled substance **conviction** in California in 1998. Exhibit 9 is simply a copy of the Complaint and a copy of a document entitled "Felony Advisement, Waiver of rights, and Plea Form." Exhibit 10 is a copy of the records from Grant County, Washington. Exhibit 10 was refused because it was sought to be introduced by the State under I.R.E. 803(6) and I.R.E. 803(8). Regarding I.R.E. 803(6), there was neither the foundation laid for that rule nor were the requirements of I.R.E.902(11) met due to no statement on the certificate that the preparer was under oath and subject to perjury. Idaho Rule of Evidence 803(8) is not applicable as there is a specific "exception" to that exception to the hearsay rule, prohibiting the exception when it is a "factual findings offered by the government in criminal cases." I.R.E. 803(8)(C). Exhibit 11 is a copy of the records from Oklahoma, and it had the same deficiencies as Exhibit 10. As to Part III, two of the offered exhibits were refused, and the only exhibit offered and admitted was not admitted to prove a conviction. From an evidentiary standpoint alone, Howard is NOT GUILTY as to Part III of the Information.

B. Full Faith and Credit Clause.

Howard argues that because the State did not comply with either the Full Faith and Credit Clause of the Constitution or the Idaho Code, the State has not established the foundation necessary to admit the prior out-of-state felony convictions and has therefore not proven a felony DUI conviction or that Howard is a persistent violator. (Defendant's Memorandum Re: Full Faith and Credit Clause, p. 4. The State argues in order for an out-of-state judgment to be admissible in Idaho, Idaho courts cannot require more stringent rules than those found in 28 U.S.C. §1738, but instead, can allow judgments from sister states to be admitted with fewer requirements than that federal statute. State's Memorandum Regarding Full Faith and Credit Clause, p. 3. The State argues admitting the California judgment into evidence does not violate the Full Faith and Credit Clause. *Id.*, p. 4. The language at issue in Title 28, Section 1738 is:

The records and judicial proceedings of any court of any State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the court of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (emphasis added). In Idaho, the applicable language is very similar and requires:

A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of another state or territory may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

I.C. § 9-312 (emphasis added). Clearly, the language of the second phrase of Idaho Code

§ 9-312 tracks the requirements in the federal statute. The State of Idaho argues that it is proper for Idaho to have chosen to allow judgments from sister states to be admitted with fewer requirements than 28 U.S.C. § 1738. State's Memorandum Regarding Full Faith and Credit Clause, p. 3. The State of Idaho argues that "States may enact a statutes [sic] or rules authorizing the introduction of a judicial record of a sister state in evidence without strict adherence to the language of 28 U.S.C.A. § -- although the state statute or rule may not impose requirements *in excess* of those imposed by the federal statute." *Id.*, citing *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N.E. 753 (1895); *Willock v. Wilson*, 178 Mass. 68, 59 N.E. 757 (1901); *Ellis v. Ellis*, 55 Minn. 401, 56 N.W. 1056 (1893). The problem with the State's argument is Idaho Code § 9-312 and 28 U.S.C. § 1738 are essentially **identical**, so none of this authority is of any significance.

Compliance with both Idaho Code § 9-312 and 28 U.S.C. § 1738 is mandatory. *State v. Prince*, 64 Idaho 343, 132 P.2d 146 (1942) tells us that. Compliance with Idaho Code § 9-312 and 28 U.S.C. § 1738 is not all that difficult, and *Prince* demonstrates that as well. "[The judicial record] of another state or territory may be proved by the attestation of the clerk and the seal of the court *annexed, if there be a clerk and seal, together* with a certificate of the chief judge or presiding magistrate, that the attestation is in due form." 64 Idaho 343, 348, 132 P.2d 146, 148, quoting from I.C. § 16-310, the predecessor of I.C. § 9-312. (*italics added*). It is the portion after the italicized word which is completely lacking in any of the proof submitted in the present case by the State of Idaho. There is no certificate from any judge as to any of these documents offered by the State of Idaho.

Counsel for the State of Idaho argues neither *Prince* nor the federal Full Faith and Credit statute impose the requirement of a "certificate of a judge of the court." State's Memorandum Regarding Full Faith and Credit, p. 2. The State doesn't tell this Court "why"

it has that interpretation. In addition to that interpretation being baseless, the above quote from *Prince* which in turn quotes from I.C. § 16-310, the predecessor of I.C. § 9-312, shows the State's interpretation is simply false.

In *State v. Prince*, 64 Idaho 343, 132 P.2d 146 (1942), the Idaho Supreme Court held that the judgments of the courts of Oregon convicting appellants of felonies were properly authenticated. Thus, in prosecutions under the Idaho persistent violator of the law statute, they were entitled to the full faith and credit that would have been accorded them in Oregon. 64 Idaho 343, 348, 132 P.2d 146, 148. As Howard points out, the federal and state statutes quoted by the Court in *Prince*, despite now bearing different numbers, remain substantially the same. (Defendant's) Memorandum Re: Full Faith and Credit Clause, p. 3. The only change is that the previous federal statute did not contain any reference to Possessions and did allow the certification as to the attestation to come from a judge, chief judge, or presiding magistrate. *Id.*, see 28 U.S.C. § 687. The Idaho statute, previously Idaho Code § 16-310, remains substantively unchanged. Specifically, in *Prince* the Court stated, "[s]aid exhibits established the fact that the Oregon Courts had a presiding judge, a clerk and a seal." *Id.*

The State then argues that *United States v. Weiland*, 420 F.3d. 1062 (9th Cir. 2005), stands for the proposition that the Full Faith and Credit statute can be complied with by complying with that statute (28 U.S.C. § 1738), or, by complying with the rules of evidence. State's Memorandum Regarding Full Faith and Credit, p. 3. The problem with that argument is it is limited to federal prosecutions and the Federal Rules of Civil Procedure. The State of Idaho in its brief provides the following quote from *Weiland*:

We can find no authority for this proposition,¹⁰ nor does reason support it. To the contrary, the commentary to Federal Rule of Civil Procedure 44, incorporated into Federal Rule of Criminal Procedure 27, specifically indicates that, under circumstances in which § 1738 is applicable, proof

may be made *either* by compliance with the Federal Rules of Evidence or in compliance with § 1738. See *Mateo-Mendez*, 215 F.3d at 1045.

Section 1738 is designed to ensure that each state and federal court provides full faith and credit to appropriately authenticated judicial judgments rendered in the other states. The contents of the "penitentiary packet" challenged in this case would be admissible in an Oklahoma criminal court pursuant to the state hearsay exception for public records, *Frazier v. State*, 874 P.2d 1289, 1291-92 (Okla.Crim.App.1994), and § 1738 provides no bar to its admission here. *Huffhines*, 967 F.2d at 320.

State's Memorandum Regarding Full Faith and Credit, p. 3. What distinguishes the present case from *Weiland* is the fact that *Weiland* is a federal prosecution, and the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure apparently allow the interpretation announced in *Weiland*. This Court is not free to embrace the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure in the present case.

Federal Rule of Civil Procedure 44 reads:

Proof of Official Record. An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, , when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

Idaho has no equivalent of Federal Rule of Civil Procedure 44.

In the instant case, because of the State's failure to follow either 28 U.S.C. § 1738 or I.C. § 9-312, this Court is unable to give Full Faith and Credit to the documents offered by the State of Idaho. *Prince* has not been overruled. In 1982, the Idaho Court of Appeals certainly felt compliance with I.C. § 9-312 was still necessary. *State v. Martinez*, 102 Idaho 875, 880, 643 P.2d 555, 560 (Ct.App. 1982). The Idaho Supreme Court has held that I.C. § 9-312 must be complied with *even in a civil case*. *Smith v. Smith*, 95 Idaho 477, 483,

511 P.2d 294, 300(1973). Idaho Code § 9-312 is clear, as is the mandate of 28 U.S.C. § 1738. These are significant charges. Part II can result in a felony conviction and up to 10 years in the State prison and Part III can result in a life sentence in the State prison. The burden on the State to present this proof in a form which satisfies not only the Idaho Rules of Evidence, but also Idaho Code § 9-312 and 28 U.S.C. § 1738, is not onerous. *State v. Martinez*, 102 Idaho 875, 880, 643 P.2d 555, 560 (Ct.App. 1982) spells out how to provide the proper proof to the Court or to a jury. This Court provides certificates and attestations of convictions from this Court to other State and federal courts frequently. It involves only a slight amount of effort. Perhaps the State in this case relied on the lower standard used at probation violations, where certified copies and even collateral estoppel can be used to prove prior convictions. *State v. Dempsey*, 2008 Opinion No. 66, Docket No. 34209, 08.15 ICAR 807 (Ct.App. July 7, 2008). The difference lies in the fact that with Part II and Part III, the State of Idaho bears the burden of proof beyond a reasonable doubt. *Id.*, citing *United States v. Dixon*, 509 U.S. 688, 710 n. 15 (1993); *United States v. Smith-Balthier*, 424 F.3d 913, 921 (9th Cir. 2005); *United States v. Arnett*, 353 F.3d 765, 766 (9th Cir. 2003); *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1246 (10th Cir. 1998); *United States v. Pelluto*, 14 F.3d 881, 891 (3d Cir. 1994). This Court cannot give the foreign judicial record full faith and credit as the requirements of I.C. § 9-312 and 28 U.S.C. § 1738 were not met. Under the Full Faith and Credit analysis, Howard is NOT GUILTY as to Part II and Part III of the Information.

III. ORDER.


IT IS HEREBY ORDERED that the defendant, Jim Howard, III, is NOT GUILTY as to Part II of the Information.

IT IS FURTHER ORDERED that the defendant, Jim Howard, III, is NOT GUILTY as

to Part III of the Information.

IT IS FURTHER ORDERED that the defendant, Jim Howard, III, appear on Monday, August 25, 2008, at 11:30 a.m., in a courtroom in the Kootenai County Justice Building, for a sentencing hearing on the misdemeanor charge of Driving Under the Influence.

DATED this 13th day of August, 2008.


JOHN T. MITCHELL District Judge

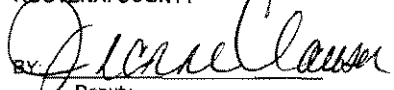
CERTIFICATE OF MAILING

I hereby certify that on the 18 day of August, 2008 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Dennis Reuter 446-1701
Prosecuting Attorney - Shane Greenbank 446-1833

KOOTENAI County Sheriff 446-1407

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: 
Deputy

Court Minutes:

Session: MITCHELL082508P
Session Date: 08/25/2008
Judge: Mitchell, John
Reporter: Foland, Julie

Division: DIST
Session Time: 07:32

Courtroom: Courtroom8

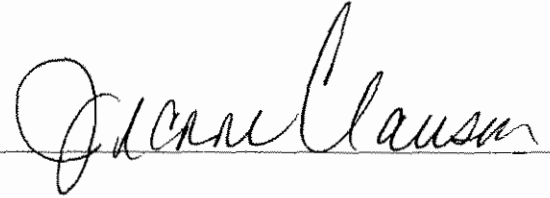
Clerk(s): Clausen, Jeanne

State Attorney(s): Greenbank, Shane

Public Defender(s): Reuter, Dennis

Prob. Officer(s):

Court interpreter(s):



Case ID: 0001

Case number: CR2008-5287
Plaintiff:
Plaintiff Attorney:
Defendant: Howard III, Jim
Pers. Attorney:
Co-Defendant(s):
State Attorney: Greenbank, Shane
Public Defender: Reuter, Dennis

08/25/2008

10:36:41

Recording Started:

10:36:41

Case called

10:36:47

Judge: Mitchell, John

Calls case - deft present and represented by Mr.
Reuter and state represented

10:37:10

by Mr. Greenbank; sentencing hearing on a misd

10:37:23

Defendant: Howard III, Jim

Thank everybody, most efficient courtroom I've

been in; fair sentence

- 10:37:55 **State Attorney: Greenbank, Shane**
Reviews prior record; based on criminal history
& inability to comply with
- 10:39:41 law and court order; probation won't help Mr.
Howard and citizens; 180 days
- 10:40:13 jail should be imposed and run consecutive to
misd DWP; DUI is a serious
- 10:40:40 offense; 180 DL susp also; no probation
- 10:41:11 **Public Defender: Reuter, Dennis**
Evidence showed as far as we know Jim Howard was
driving down road perfectly;
- 10:41:42 someone pulled out in front of him and called an
accident; performed field
- 10:42:00 sobriety tests and did quite well; I did refuse
the BAC test; no evidence of
- 10:42:35 any improper driving pattern; he does have a
pretty bad prior record;
- 10:43:02 incustody on DUI since 3/17/08; give him CTS
- 10:43:34 **State Attorney: Greenbank, Shane**
No credit on DUI charge because he has been held
on DWP charge; 6/26/08 he
- 10:44:20 has been held on DWP
- 10:53:03 **Judge: Mitchell, John**
misd DUI; \$1,000 find & 90.50 cc; 180 days jail
161 CTS; remaining sentence
- 10:53:32 runs consecutive to DWP charge; 180 days DL
suspension
- 10:54:25 **State Attorney: Greenbank, Shane**
no questions
- 10:54:29 **Public Defender: Reuter, Dennis**
earned and goodtime credit
- 10:54:49 **Judge: Mitchell, John**
I won't approve any goodtime credit; you have a
horrible prior record; I have
- 10:55:11 to protect society the best that I can
- 10:55:30 **Stop recording**

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO, COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO V
TIM HOWARD III
09 BEARDSLEY AVE APT E
EAST FALLS, ID 83854

ISN # [REDACTED]
DOB: [REDACTED] AGENCY: KOOTENAI COUNTY SHERIFF
CASE # CR-2008-0005287 CITATION # 111606
CHARGE: 118-8004 M DRIVING UNDER THE INFLUENCE
AMENDED:

JUDGMENT FILED 8/25/08 AT 2:30 a.m.
CLERK OF THE DISTRICT COURT
BY [Signature], DEPUTY
BOND:

The defendant having been fully advised of his/her statutory and constitutional rights including the right to be represented by counsel, and

- Been advised of right to court appointed counsel if indigent
- Defendant waived right to counsel
- Defendant represented by counsel
- Judgment, Plea of Guilty / Rights Waived
- Withheld Judgment Accepted
- Dismissed
- Judgment--Not Guilty
- Judgment on Trial--Guilty
- Judgment for Defendant / Infraction
- Judgment for State / Infraction
- Bond Forfeited / Conviction Entered - Case Closed
- Bond Forfeited / Dismissed

MONIES ORDERED PAID:

A \$2.00 handling fee will be imposed on each installment.

- Fine / Penalty \$ 1,090.50 which includes costs, and probation fee if applicable. Suspended \$ 0
- To be paid by _____, or enroll in time payment program BEFORE due date.
- Community Service _____ hours by _____ Setup Fee \$ _____ Insurance Fee \$ _____
Must sign up within 7 days.
- Reimburse _____
- Restitution _____
- Bond Exonerated, provided that any deposit shall first be applied pursuant to Idaho Code 19-2923 in satisfaction of outstanding fines, fees and costs with any remainder to be refunded to the posting party. Authorization from defendant to pay restitution +/or infractions from bond.
- No Contact Order, as condition of bond, terminated.

INCARCERATION ORDERED:

- Jail 180 days, Suspended 0 days, Credit 161 days, Unscheduled Jail _____ days are imposed & will be scheduled by the Adult Misdemeanor Probation Office, or Court, for violations of the terms below or on the attached addendum.
- Report to Jail _____ Release _____ Work Release Authorization (if you qualify).
- Sheriff's Community Labor Program in lieu of Jail (if you qualify) _____ hours by _____ Must sign up within 7 days. Follow the Labor Program schedule and policies.
- _____

Consecutive to DWP, which sentence ends 9/11/08.

DRIVING PRIVILEGES SUSPENDED 365 days commencing March 29, 2009

REINSTATEMENT OF DRIVING PRIVILEGES MUST BE ACCOMPLISHED before you can drive. Apply to DRIVER'S SERVICES, P.O. Box 7129, Boise, ID. 83707-1129.

- Temporary Driving Privileges Granted commencing _____
To, from and for work purposes / required medical care / court ordered alcohol program / community service. Must carry proof of work schedule and liability insurance at all times. Not valid if insurance expires.

PROBATION ORDERED FOR _____ YEAR(S) ON THE FOLLOWING CONDITIONS:

Supervised - See Addendum

- Violate no federal, state or local laws more serious than an infraction. Commit no similar offenses.
- Maintain liability insurance on any vehicle that you drive.
- Do not operate a motor vehicle with any alcohol or controlled substances in your bloodstream.
- You must submit to any blood alcohol concentration test requested of you, with reasonable cause, by a peace officer.
- Obtain a Substance Abuse/Battery Evaluation, and file proof of evaluation, within _____ days.
- Enroll in _____ program, and file proof, within _____ days. File proof of completion within _____ days.
- Notify the court, in writing, of any address change within 10 days. Agrees to accept future service by mail at the last known address.
- Interlock ignition device required on vehicle for _____ year(s). To be installed per attached addendum.
- Other _____

THE SUSPENDED PENALTIES ARE SUBJECT TO YOUR COMPLIANCE WITH ALL TERMS HEREIN

THE DEFENDANT HAS THE RIGHT TO APPEAL THIS JUDGMENT WITHIN 42 DAYS

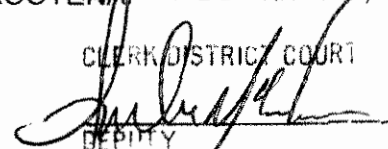
Copies To: Def. IC Def. Atty. IC [X] Pros. IC [] Other []
Date August 25, 2008 Judge # 116 286

[X] Jail (fax 446-1407) [] KCSO RECORDS fax 446-1307 (re: NCO) [X] Dr. Serv. [] Auditor [] Com. Serv. [] AMP (fax 446-1990)

324-8739

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

2008 AUG 28 AM 7:02
CLERK DISTRICT COURT



STATE OF IDAHO,)
)
)
 Plaintiff,)
)
 vs.)
 JIM HOWARD)
)
 Defendant.)

CASE NUMBER M08-5287

AFFIDAVIT FOR GOOD TIME

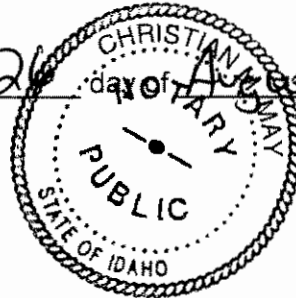
STATE OF IDAHO)
)
) ss.
 COUNTY OF KOOTENAI)

I, DEPUTY A. GAVIN, being first duly sworn, depose and say:

1. That I am the duly sworn Sheriff of Kootenai County (or am acting with his authority as a duly sworn deputy).
2. The above-named defendant is in custody of the Kootenai County Sheriff for a term of 198 days commencing on the 25TH day of AUGUST, 2008, pursuant to an order of this Court.
3. I am familiar with the actual behavior and/or record of behavior of the above named defendant throughout his incarceration and this defendant has a good record as a prisoner and has performed tasks assigned him in an orderly and peaceable manner.
4. I therefore recommend that the above named defendant be allowed five (5) days off of each and every month of their sentence pursuant to Idaho Code § 20-621 and that he be discharged from the custody of the Kootenai County Sheriff on the 01ST day of SEPTEMBER, 2008.
5. Contingent upon no rule violations before the release date.


AFFIANT

SUBSCRIBED AND SWORN to before me this 26 day of August, 2008




NOTARY PUBLIC FOR IDAHO

Commission expires: 8/11

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 8/29/08 SS
AT 9:00 O'CLOCK
CLERK, DISTRICT COU
DEF

STATE OF IDAHO,)

Plaintiff,)

CASE NUMBER M08-5287

vs.)

JIM HOWARD)
Defendant.)

ORDER FOR GOOD TIME

Having considered the foregoing affidavit and recommendation for commutation of sentence for good behavior ~~and good cause appearing,~~

request for Good Time is DENIED.
IT IS HEREBY ORDERED that ~~the above named defendant be allowed five (5) days off for each and every month of their sentence and that they be discharged from the custody of the Kootenai County Sheriff on the 01ST day of SEPTEMBER, 2008,~~ unless the defendant violates the Jail rules prior to such date.

Dated this 21st day of August 2008.

[Signature]
District Judge/Magistrate

Copies routed to:

- Court
- Sheriff's Department 446-1487
- Prosecuting Attorney 446-1833
- Probation & Parole
- Defense Attorney 446-1701

LAWRENCE G. WARDEN
Attorney General
State of Idaho

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Idaho State Bar # 4051
Deputy Attorney General
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2008 SEP 23 PM 12:57
ORIGINAL

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR KOOTENAI COUNTY

| | | |
|-----------------------|---|----------------------------------|
| STATE OF IDAHO |) | |
| |) | |
| Plaintiff-Appellant, |) | District Court No. CRF 2008-5287 |
| |) | |
| vs. |) | NOTICE OF APPEAL |
| |) | |
| JIM HOWARD, III, |) | |
| |) | |
| Defendant-Respondent. |) | |
| <hr/> |) | |

TO: THE ABOVE-NAMED RESPONDENT, JIM HOWARD, III, AND DENNIS REUTER, KOOTENAI COUNTY PUBLIC DEFENDER'S OFFICE, PO BOX 9000, COEUR D'ALENE, ID 83814 AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant, State of Idaho, appeals against the above-named respondent to the Idaho Supreme Court from the MEMORANDUM DECISION AND ORDER REGARDING PART II AND PART III, entered in the

above-entitled action on the 13th day of August 2008, and the JUDGMENT entered on August 25, 2008, The Honorable JOHN T. MITCHELL presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(c)(1 and 4), I.A.R.

3. The appellant requests the preparation of the following portions of the reporter's transcript:

- (a) The trial held on July 7-8, 2008;
- (b) The court trial on the Part II and Part III held July 9, 2008;
- (c) The continuation of the court trial held July 25, 2008.

The appellant requests the preparation of the transcript in compressed form as described in I.A.R. 26(m).

4. Appellant requests the normal clerk's record pursuant to Rule 28, I.A.R.

The appellant requests the following documents to be included in the clerk's record, in addition to those automatically included under Rule 28, I.A.R.:

(a) All briefing submitted on or about July 15 and 2, 2008, respectively, by either party.

5. I certify:

(a) That a copy of this notice of appeal is being served on the reporter.

(b) That the appellant is exempt from paying the estimated fee for the preparation of the record because the State of Idaho is the appellant (Idaho Code § 31-3212);

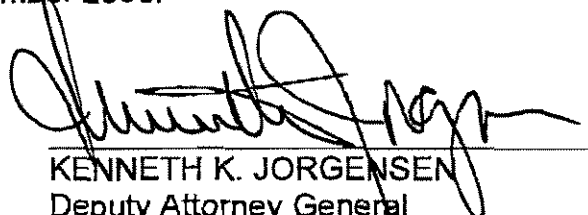
(c) That there is no appellate filing fee since this is an appeal in a criminal case (I.A.R. 23(a)(8));

(d) That arrangements have been made with the Kootenai County Prosecuting Attorney who will be responsible for paying for the reporter's transcript;

(e) That service is being made upon all parties required to be served pursuant to Rule 20, I.A.R.

6. The issue on appeal concerns whether the district court erred in concluding that the full faith and credit statute applied to the determination of whether the defendant had prior convictions for enhancement purposes.

DATED this 23rd day of September 2008.


KENNETH K. JORGENSEN
Deputy Attorney General
Attorney for the Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 23rd day of September 2008, caused a true and correct copy of the attached NOTICE OF APPEAL to be placed in the United States mail, postage prepaid, addressed to:

DENNIS REUTER
Kootenai County Public Defender's Office
PO Box 9000
Coeur d'Alene, ID 83814

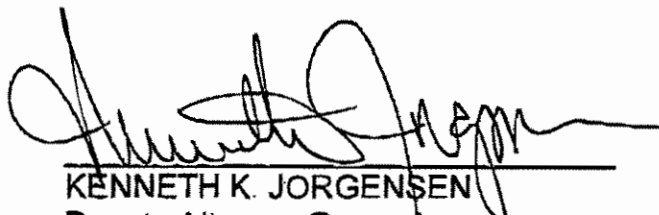
JULIE FOLAND
Court Reporter
Kootenai County District Court
PO Box 9000
Coeur d'Alene, ID 83816-9000

SHANE GREENBANK
Kootenai County Prosecuting Attorney's Office
PO Box 9000
Coeur d'Alene, ID 83816-9000

THE HONORABLE JOHN T. MITCHELL
Kootenai County District Court
PO Box 9000
Coeur d'Alene, ID 83816-9000

HAND DELIVERY

MR. STEPHEN W. KENYON
CLERK OF THE COURTS
P.O. Box 83720
Boise, Idaho 83720-0101


KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

| | | |
|----------------------|---|-----------------------|
| STATE OF IDAHO, |) | SUPREME COURT 35705 |
| Plaintiff/Respondent |) | CASE NUMBER CR08-5287 |
| JIM HOWARD III |) | |
| |) | |
| vs. |) | CLERK'S CERTIFICATE |
| |) | |
| |) | |
| Defendant/Appellant |) | |

I CINDY O'REILLY Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the foregoing Record in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellate Rule 28.

I further certify that the following will be submitted as exhibits to this Record on Appeal:

PLAINTIFF'S EXHIBIT'S (1,2,6,7,7B,8,9,10,11,1,2)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 8TH day of December 2008.

Clerk of the District Court
DAN ENGLISH
By: Cindy O'Reilly
Deputy Clerk

Clerk's Certificate

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

State of Idaho)
Plaintiff/Respondent)
JIM HOWARD III)
)
)
VS)
)
)
)
Defendant/Appellant)

SUPREME COURT #35705

CASE #CRF08-5287

CERTIFICATE OF SERVICE

I, Cindy O'Reilly, Deputy Clerk of the District Court of the First Judicial District
Of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have
personally served or mailed, by United States Mail, one copy of Clerk's Record to
each of the attorneys of record in this cause as follows:

DENNIS REUTER
PUBLIC DEFENDER
PO BOX 9000
Coeur d'Alene ID 83814

Mr. Lawrence Wasden
Attorney General
State of Idaho
700 W. Jefferson
Suite 210
Boise ID 83720-0010

Attorney for Appellant

Attorney for Respondent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of
Said Court this 10 day of Dec, 2008.

Dan English
Clerk of District Court

By Cindy O'Reilly
Cindy O'Reilly, Deputy Clerk

CERTIFICATE OF SERVICE