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State v. Kramer Clerk's Record Dckt. 38786

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IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

STATE OF IDAHO

Plaintiff / Respondent

vs.

MICHAEL IAN KRAMER

Defendant / Appellant

LAW CLERK

*Appealed from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai.*

Lawrence G. Wasden
Attorney General
P.O. Box 83720
Boise, ID 83720-0010

Attorney for Respondent

Douglas Phelps
Phelps & Associates, Atty's at Law
2903 N Stout Rd
Spokane, WA 99206-4373

Attorney for Appellant

FILED - COPY

AUG 30 2011

38786

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

STATE OF IDAHO)	CRF2010-21212
Plaintiff/Respondent)	
)	
vs.)	
)	
MICHAEL IAN KRAMER	)	SUPREME COURT
Defendant/Appellant	)	38786

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for
the County of Kootenai.

HONORABLE BENJAMIN SIMPSON
District Judge

Attorney for Respondent
Lawrence G. Wasden
Attorney General
700 W. Jefferson, Suite 210
Boise, ID 83720-0010

Attorney for Appellant
Douglas Phelps
Phelps & Associates, Atty's at Law
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Spokane, WA 99206-4373

TABLE OF CONTENTS

PROBABLE CAUSE Filed March 16, 2009.....	07
CRIMINAL CITATION Filed March 19, 2009.....	13
PRE-TRIAL MOTIONS Filed March 18, 2009.....	14
DEFENDANT'S REQUEST FOR DISCOVERY Filed March 18, 2009.....	16
PLAINTIFF'S REQUEST FOR DISCOVERY Filed March 24, 2009.....	19
PLAINTIFF'S RESPONSE TO REQUEST FOR DISCOVERY Filed March 24, 2009.....	21
SUPPLEMENTAL RESPONSE TO DISCOVERY Filed April 1, 2009.....	24
2 nd SUPPLEMENTAL RESPONSE TO DISCOVERY Filed April 3, 2009.....	26
MOTION TO VACATE PRETRIAL CONFERENCE Filed May 26, 2009.....	28
ORDER TO VACATE PRETRIAL CONFERENCE Filed May 26, 2009.....	29
COURT MINUTES Jury Status Call Filed June 15, 2009.....	31
3 rd SUPPLEMENTAL RESPONSE TO DISCOVERY Filed June 12, 2009.....	33
AMENDED CRIMINAL COMPLAINT Filed June 24, 2009.....	35
SECOND AMENDED CRIMINAL COMPLAINT Filed August 11, 2009.....	38

COURT MINUTES	
Jury Trial/Status Filed November 13, 2009	41
COURT MINUTES	
Trial Set Filed March 8, 2010	43
PROPOSED JURY INSTRUCTIONS	
Filed March 10, 2010	45
PLAINTIFF'S SUPPLEMENTAL RESPONSE REGARDING EXPERT WITNESS	
Filed March 11, 2010	55
SUPPLEMENTAL WITNESS LIST	
Filed March 11, 2010	58
DEFENDANT'S EXHIBIT LIST	
Filed March 11, 2010	60
PLAINTIFF'S REQUESTED JURY INSTRUCTIONS	
Filed March 11, 2010	69
MOTION IN LIMINE	
Filed March 11, 2010	106
PLAINTIFF'S SUPPLEMENTAL RESPONSE TO DISCOVERY	
Filed March 11, 2010	108
MOTION OBJECTING TO INTRODUCTION OF BREATH TEST	
Filed March 12, 2010	117
COURT MINUTES	
Jury Trial Filed March 12, 2010	120
JURY INSTRUCTIONS GIVEN	
Filed March 12, 2010	155
VERDICT	
Filed March 12, 2010	176
VERDICT	
Filed March 12, 2010	177
VERDICT	
Filed March 12, 2010	178

MOTION TO DISMISS COUNT II	
Filed April 1, 2010	180
COURT MINUTES	
Sentencing Filed June 24, 2010	181
JUDGMENTS	
Filed June 24, 2010	184
NOTICE OF APPEAL	
Filed July 29, 2010	186
AMENDED NOTICE OF APPEAL	
Filed August 3, 2010	188
SUPPLEMENTAL REPORT	
Filed August 16, 2010	190
COURT MINUTES	
Motion to Stay Filed September 3, 2010	193
NOTICE OF LODGING OF TRANSCRIPT	
Filed September 9, 2010	196
ORDER STAYING SENTENCE AND SETTING CONDITIONS OF RELEASE PENDING APPEAL	
Filed September 16, 2010	198
NOTICE OF SETTling TRANSCRIPT ON APPEAL AND BRIEFING SCHEDULE	
Filed October 4, 2010	200
BRIEF OF APPEALLANT ON APPEAL FROM MAGISTRATE'S COURT	
Filed October 4, 2010	220
ORDER TO EXTEND BRIEFING SCHEDULE	
Filed December 20, 2010	223
STATE/REPOndENT'S BRIEF ON APPEAL	
Filed December 20, 2010	224
APPELLANT'S REPLY BRIEF ON APPEAL	
Filed January 10, 2011	234
MOTION TO CONTINUE	
Filed February 14, 2011	248

ORDER TO CONTINUE	
Filed February 16, 2010.....	249
COURT MINUTES	
Appeal Hearing Filed March 25, 2011	251
MEMORANDUM DECISION AND ORDER ON APPEAL	
Filed March 29, 2011	253
NOTICE OF APPEAL	
Filed May 9, 2011	273
AMENDED NOTICE OF APPEAL	
Filed May 27, 2011	275
NOTICE OF TRANSCRIPT LODGED	
Filed June 24, 2011	277
CLERK’S CERTIFICATE OF EXHIBITS	279
CLERK’S CERTIFICATE OF SERVICE	280

INDEX

2 nd SUPPLEMENTAL RESPONSE TO DISCOVERY Filed April 3, 2009	26
3 rd SUPPLEMENTAL REPONSE TO DISCOVERY Filed June 12, 2009	33
AMENDED CRIMINAL COMPLAINT Filed June 24, 2009	35
AMENDED NOTICE OF APPEAL Filed August 3, 2010.....	188
AMENDED NOTICE OF APPEAL Filed May 27, 2011	275
APPELLANT'S REPLY BRIEF ON APPEAL Filed January 10, 2011	234
BRIEF OF APPEALLANT ON APPEAL FROM MAGISTRATE'S COURT Filed October 4, 2010	220
CLERK'S CERTIFICATE OF EXHIBITS	279
CLERK'S CERTIFICATE OF SERVICE	280
COURT MINUTES Jury Status Call Filed June 15, 2009.....	31
COURT MINUTES Appeal Hearing Filed March 25, 2011	251
COURT MINUTES Jury Trial Filed March 12, 2010	120
COURT MINUTES Jury Trial/Status Filed November 13, 2009.....	41
COURT MINUTES Motion to Stay Filed September 3, 2010	193

COURT MINUTES	
Sentencing Filed June 24, 2010	181
COURT MINUTES	
Trial Set Filed March 8, 2010	43
CRIMINAL CITATION	
Filed March 19, 2009	13
DEFENDANT’S EXHIBIT LIST	
Filed March 11, 2010	60
DEFENDANT’S REQUEST FOR DISCOVERY	
Filed March 18, 2009	16
JUDGMENTS	
Filed June 24, 2010	184
JURY INSTRUCTIONS GIVEN	
Filed March 12, 2010	155
MEMORANDUM DECISION AND ORDER ON APPEAL	
Filed March 29, 2011	253
MOTION IN LIMINE	
Filed March 11, 2010	106
MOTION OBJECTING TO INTRODUCTION OF BREATH TEST	
Filed March 12, 2010	117
MOTION TO CONTINUE	
Filed February 14, 2011	248
MOTION TO DISMISS COUNT II	
Filed April 1, 2010	180
MOTION TO VACATE PRETRIAL CONFERENCE	
Filed May 26, 2009	28
NOTICE OF APPEAL	
Filed July 29, 2010	186
NOTICE OF APPEAL	
Filed May 9, 2011	273

SECOND AMENDED CRIMINAL COMPLAINT

Filed August 11, 2009.....38

STATE/REPOENDENT’S BRIEF ON APPEAL

Filed December 20, 2010.....224

SUPPLEMENTAL REPORT

Filed August 16, 2010.....190

SUPPLEMENTAL RESPONSE TO DISCOVERY

Filed April 1, 2009.....24

SUPPLEMENTAL WITNESS LIST

Filed March 11, 2010.....58

VERDICT

Filed March 12, 2010.....178

VERDICT

Filed March 12, 2010.....176

VERDICT

Filed March 12, 2010.....177

State of Idaho vs. Kathryn Anne Gomes

Date	Code	User		Judge
10/21/2010	NCRF	LSMITH	New Case Filed - Felony	To Be Assigned
	CRCO	LSMITH	Criminal Complaint	Clark A. Peterson
	AFPC	LSMITH	Affidavit Of Probable Cause	To Be Assigned
	ORPC	LSMITH	Order Finding Probable Cause	Clark A. Peterson
	HRSC	LSMITH	Hearing Scheduled (Arraignment/First Appearance 10/21/2010 02:00 PM)	Clark A. Peterson
	ARRN	LSMITH	Hearing result for Arraignment/First Appearance held on 10/21/2010 02:00 PM: Arraignment / First Appearance	Clark A. Peterson
	CONC	LSMITH	Consolidation of charges: 126488 126487	Clark A. Peterson
	ORPD	LSMITH	Defendant: Gomes, Kathryn Anne Order Appointing Public Defender Public defender Public Defender	Clark A. Peterson
	CVNC	LSMITH	No Contact Order: Civil No Contact Order Filed Comment: DEF TO STAY 300FT FROM JACOB DORN Expiration Days: 366 Expiration Date: 10/22/2011	Clark A. Peterson
	ORBC	LSMITH	Order Setting Bond and Conditions of Release	Clark A. Peterson
10/22/2010	PTSE	LSMITH	Pretrial Services Evaluation	To Be Assigned
			Document sealed	
	HRSC	HOFFMAN	Hearing Scheduled (Preliminary Hearing Status Conference 10/29/2010 08:30 AM)	Quentin F. Harden
	HRSC	HOFFMAN	Hearing Scheduled (Preliminary Hearing 11/04/2010 01:30 PM)	Scott Wayman
		HOFFMAN	Notice of Preliminary Hearing Status Conference and Preliminary Hearing	To Be Assigned
10/26/2010	NCOS	BROWN	No Contact Order Served	To Be Assigned
	NAPH	BROWN	Notice of Appearance, Request for Timely Preliminary Hearing, Motion for Bond Reduction and Notice of Hearing	To Be Assigned
	DFWP	BROWN	Defendant's Written Plea - Not Guilty - Misdemeanor only	To Be Assigned
	DRQD	BROWN	Defendant's Request For Discovery	To Be Assigned
10/28/2010	PRQD	BROWN	Plaintiff's Request For Discovery	To Be Assigned
	PSRS	BROWN	Plaintiff's Supplemental Response To Discovery	To Be Assigned
	DRSD	BROWN	Defendant's Response To Discovery	To Be Assigned
10/29/2010	HRHD	LARSEN	Hearing result for Preliminary Hearing Status Conference held on 10/29/2010 08:30 AM: Hearing Held	Benjamin R. Simpson
	DSRQ	BROWN	Defendant's Supplemental Req. For Discovery	To Be Assigned
	DRSD	BROWN	Defendant's Response To Discovery	To Be Assigned
	BNDS	OREILLY	Bond Posted - Surety (Amount 10000.00)	To Be Assigned
11/1/2010	NODF	OREILLY	Notice To Defendant	To Be Assigned

State of Idaho vs. Kathryn Anne Gomes

Date	Code	User		Judge
11/1/2010	WAVX	OREILLY	Waiver Of Extradition To Idaho	To Be Assigned
11/2/2010	SUBF	BAXLEY	Subpoena Return/found on 10/31/10 served Nickolas W Franssen	To Be Assigned
11/3/2010	SUBF	BAXLEY	Subpoena Return/found on 11/01/10 served Brett D Fletcher	To Be Assigned
11/4/2010	SUBF	CRUMPACKER	Subpoena Return/found 10/29/10 Jacob Dorn	To Be Assigned
	SUBF	CRUMPACKER	Subpoena Return/found 10/29/10 Roger Thom	To Be Assigned
	SUBF	CRUMPACKER	Subpoena Return/found 10/29/10 Charles Hupp	To Be Assigned
	CONT	BUTLER	Hearing result for Preliminary Hearing held on 11/04/2010 01:30 PM: Continued	Scott Wayman
11/8/2010	HRSC	HOFFMAN	Hearing Scheduled (Preliminary Hearing Status Conference 11/23/2010 08:30 AM)	James D Stow
	HRSC	HOFFMAN	Hearing Scheduled (Preliminary Hearing 11/24/2010 01:30 PM)	Penny E. Friedlander
		HOFFMAN	Notice of Preliminary Hearing Status Conference and Preliminary Hearing	To Be Assigned
		HOFFMAN	Notice of Preliminary Hearing Status Conference and Preliminary Hearing	To Be Assigned
11/16/2010	SUBF	BAXLEY	Subpoena Return/found on 11/14/10 served Brett D Fletcher	To Be Assigned
11/19/2010	SUBF	ROSENBUSCH	Subpoena Return/found/Nickolas Franssen/11-17-10	To Be Assigned
	SUBF	ROSENBUSCH	Subpoena Return/found/Roger Thom/11-16-10	To Be Assigned
	SUBF	ROSENBUSCH	Subpoena Return/found/Jacob Dorn/11-16-10	To Be Assigned
	SUBF	ROSENBUSCH	Subpoena Return/found/Charles Hupp/11-16-10	To Be Assigned
11/23/2010	INHD	WATKINS	Hearing result for Preliminary Hearing Status Conference held on 11/23/2010 08:30 AM: Interim Hearing Held	James D Stow
11/24/2010	PHWV	STONE	Hearing result for Preliminary Hearing held on 11/24/2010 01:30 PM: Preliminary Hearing Waived (bound Over)	Penny E. Friedlander
	ORHD	STONE	Order Holding Defendant	Penny E. Friedlander
12/1/2010	INFO	BROWN	Information	Lansing L. Haynes
12/6/2010	AFCR	BROWN	Affidavit of Failure to Comply with Conditions of Release for Pretrial Services	Lansing L. Haynes
12/8/2010	HRSC	SVERDSTEN	Hearing Scheduled (Arraignment in District Court 12/28/2010 01:30 PM)	Lansing L. Haynes
		SVERDSTEN	Notice of Hearing	Lansing L. Haynes
12/28/2010	DCHH	SVERDSTEN	Hearing result for Arraignment in District Court held on 12/28/2010 01:30 PM: District Court Hearing CONTINUED Court Reporter: JOANN SCHALLER Number of Transcript Pages for this hearing estimated:	Lansing L. Haynes

State of Idaho vs. Kathryn Anne Gomes

Date	Code	User	Judge
12/28/2010	HRSC	SVERDSTEN	Hearing Scheduled (Arraignment in District Court 01/13/2011 03:00 PM)
		SVERDSTEN	Notice of Hearing
12/29/2010	AGRC	MCCANDLESS	Agreement to Requirements and Conditions Under the Pretrial Services Program
	NFUS	BROWN	Notice of Filing Under Seal
	LETR	BROWN	Letter - From Kootenai Medical Center - Re: Admission To Kootenai Behavioral Health Center on 12/28/10
1/13/2011	DCHH	SVERDSTEN	Document sealed
			Hearing result for Arraignment in District Court held on 01/13/2011 03:00 PM: District Court Hearing Held
			Court Reporter: VAL NUNEMACHER
			Number of Transcript Pages for this hearing estimated:
	HRSC	SVERDSTEN	Hearing Scheduled (Arraignment in District Court 01/26/2011 02:30 PM)
		SVERDSTEN	Notice of Hearing
		SVERDSTEN	Notice Of Filing Under Seal
1/26/2011	DCHH	SVERDSTEN	Document sealed
			Hearing result for Arraignment in District Court held on 01/26/2011 02:30 PM: District Court Hearing Held CONTINUED
			Court Reporter: KERI VEARE
3/14/2011	HRSC	SVERDSTEN	Number of Transcript Pages for this hearing estimated:
		SVERDSTEN	Hearing Scheduled (Status Conference 03/14/2011 03:30 PM)
	ARRN	SVERDSTEN	Notice of Hearing
		JOKELA	Hearing result for Status Conference held on 03/14/2011 03:30 PM: Arraignment / First Appearance Arraignment
		JOKELA	A Plea is entered for charge: - NG (I18-907 Battery-Aggravated)
		JOKELA	A Plea is entered for charge: - NG (I37-2732(C)(1) Controlled Substance-Possession of)
		JOKELA	A Plea is entered for charge: - NG (I18-8007 Accident-Leaving the Scene of Accident Resulting in an Injury or Death)
	PLEA	JOKELA	A Plea is entered for charge: - NG (I37-2732(C)(3) Controlled Substance-Possession of)
		JOKELA	A Plea is entered for charge: - NG (I37-2734A(1) Drug Paraphernalia-Use or Possess With Intent to Use)

State of Idaho vs. Kathryn Anne Gomes

Date	Code	User	Judge
3/14/2011	PLEA	JOKELA	A Plea is entered for charge: - NG (149-1305 Accident-Fail to Give Immediate Notice of an Accident)
	HRSC	JOKELA	Hearing Scheduled (Pre-Trial Conference 03/24/2011 08:00 AM)
	HRSC	JOKELA	Hearing Scheduled (Jury Trial Scheduled 04/11/2011 09:00 AM) 3 DAY
		JOKELA	Notice of Hearing
	DCHH	JOKELA	District Court Hearing Held Court Reporter: Laurie Johnson Number of Transcript Pages for this hearing estimated:
3/16/2011	WITP	BROWN	Witness List - Plaintiff's
3/22/2011	SUBF	BAXLEY	Subpoena Return/found on 03/18/11 served Jacob W Dorn
	SUBF	BAXLEY	Subpoena Return/found on 03/20/11 served Nickolas W Franssen
3/24/2011	HRVC	SVERDSTEN	Hearing result for Jury Trial Scheduled held on 04/11/2011 09:00 AM: Hearing Vacated 3 DAY
	DCHH	SVERDSTEN	Hearing result for Pre-Trial Conference held on 03/24/2011 08:00 AM: District Court Hearing Held Court Reporter: ANNE MANMANUS Number of Transcript Pages for this hearing estimated:
	HRSC	SVERDSTEN	Hearing Scheduled (Jury Trial Scheduled 07/05/2011 09:00 AM) 3 DAYS
	HRSC	SVERDSTEN	Hearing Scheduled (Pre-Trial Conference 06/23/2011 08:00 AM)
		SVERDSTEN	AMENDED Notice of Hearing
	SRSD	BROWN	Supplemental Response To Discovery
	SUBF	BAXLEY	Subpoena Return/found on 03/22/11 served Sue A Dorn
	SUBF	BAXLEY	Subpoena Return/found on 03/22/11 served Roger D Thom
	SUBF	BAXLEY	Subpoena Return/found on 03/22/11 served Charles M Huff
3/25/2011	SUBF	BAXLEY	Subpoena Return/found on 03/21/11 served Brett D Fletcher
4/13/2011	SUBF	ROSENBUSCH	Subpoena Return/found/Nickolas Franssen/04-11-11
4/14/2011	SUBF	ROSENBUSCH	Subpoena Return/found/Brett Fletcher/04-12-11
4/22/2011	SUBF	ROSENBUSCH	Subpoena Return/found/Charles Hupp/04-20-11
4/25/2011	SUBF	BAXLEY	Subpoena Return/found on 04/21/11 served Roger D Thom

State of Idaho vs. Kathryn Anne Gomes

Date	Code	User	Judge
4/25/2011	SUBF	BAXLEY	Subpoena Return/found on 04/21/11 served Sue A Dorin
5/13/2011	SUBF	ROSENBUSCH	Subpoena Return/found/Jacob Dorn/05-11-11
6/23/2011	HRVC	SVERDSTEN	Hearing result for Jury Trial Scheduled held on 07/05/2011 09:00 AM: Hearing Vacated 3 DAYS
	DCHH	SVERDSTEN	Hearing result for Pre-Trial Conference held on 06/23/2011 08:00 AM: District Court Hearing Held Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated:
	HRSC	SVERDSTEN	Hearing Scheduled (Plea Change 06/29/2011 01:30 PM)
		SVERDSTEN	Notice of Hearing
6/29/2011	HRSC	BURRINGTON	Hearing Scheduled (Plea Change 07/20/2011 08:00 AM)
	DCHH	BURRINGTON	Hearing result for Plea Change scheduled on 07/20/2011 08:00 AM: District Court Hearing Held Court Reporter: Laurie Johnson Number of Transcript Pages for this hearing estimated: Under 100 Pages
	CONT	BURRINGTON	Continued
		BURRINGTON	Notice of Hearing
	PTSO	BURRINGTON	Pretrial Settlement Offer
	HRSC	BURRINGTON	Hearing Scheduled (Plea Change 07/20/2011 08:00 AM)
7/20/2011	PLEA	SVERDSTEN	A Plea is entered for charge: - GT (I37-2732(C)(1) Controlled Substance-Possession of)
	PLEA	SVERDSTEN	A Plea is entered for charge: - GT (I18-8007 Accident-Leaving the Scene of Accident Resulting in an Injury or Death)
	DCHH	SVERDSTEN	Hearing result for Plea Change scheduled on 07/20/2011 08:00 AM: District Court Hearing Held Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated:
	HRSC	SVERDSTEN	Hearing Scheduled (Sentencing 08/31/2011 03:30 PM)
	ORES	SVERDSTEN	Order for Evaluation(s) and Setting Sentencing
	AINF	SVERDSTEN	Amended Information
	ORDR	SVERDSTEN	Order to Amend Information
	PSIO1	SVERDSTEN	Pre-Sentence Investigation Evaluation Ordered & Sentencing Date
7/22/2011	AFCR	MCCANDLESS	Affidavit of Failure to Comply with Conditions of Release for Pretrial Services

Date: 7/28/2011

First Judicial District Court - Kootenai County

User: LSMITH

Time: 03:42 PM

ROA Report

Page 6 of 6

Case: CR-2010-0021212 Current Judge: Lansing L. Haynes
Defendant: Gomes, Kathryn Anne

State of Idaho vs. Kathryn Anne Gomes

Date	Code	User		Judge
7/28/2011	MEMR	BROWN	Memorandum Of Restitution	Lansing L. Haynes

Defendant's name: Micheal Ian Kramer
Date of arrest: March 14, 2009

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: LSS

2009 MAR 16 PM 12:11

ORDER

CLERK DISTRICT COURT

Based upon the above Affidavit, the Court hereby finds that there is Probable Cause to believe that the Defendant committed said crime or crimes.

Dated this 16 day of MAR, 2009, at 1145 hours,


MAGISTRATE

CHARGE	IDAHO CODE	VIOLATION
1.	<u>18-8004</u>	<u>D.U.I.</u>
2.	<u>18-3302B</u>	<u>Poss. of concealed weapon while intoxicated</u>
3.	<u>23-505(1)</u>	<u>Transport of an open container of alcohol</u>
4.	<u> </u>	<u> </u>

IN THE DISTRICT COURT OF THE 1ST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI.

2009 MAR 16 PM 12:11

THE STATE OF IDAHO,

Plaintiff,

CLERK DISTRICT COURT

DEPUTY

COURT CASE NUMBER _____
PROBABLE CAUSE AFFIDAVIT IN SUPPORT
OF ARREST AND/OR REFUSAL TO TAKE TEST

Michael Ian Kramer

Defendant.

DOB: [REDACTED]

DL#: [REDACTED]

State: Washington

State of Idaho,

County of Kootenai

SS

I, Cpl. S. Lind, the undersigned, being first duly sworn on oath, deposes and says that:

1. I am a peace officer employed by Idaho State Police.
2. The defendant was arrested on 031409 at 0540 ☒ AM ☐ PM for the crime of driving while under the influence of alcohol, drugs or any other intoxicating substances pursuant to Section 18-8004 Idaho Code. Second or more DUI offense in the last ten years? ☒ YES ☐ NO ☐ FELONY ☒ MISDEMEANOR
3. Location of Occurrence: I90 milepost 3.5
4. Identified the defendant as: Michael I. Kramer by: (check box)
☐ Military ID ☐ State ID Card ☐ Student ID Card ☒ Drivers License ☐ Credit Cards
☐ Paperwork found ☐ Verbal ID by defendant
Witness: _____ identified defendant.
Other: _____
5. Actual physical control established by: ☒ Observation by affiant ☒ Observation by Officer Cpl. S. Lind
☐ Admission of Defendant to: _____, ☐ Statement of Witness:
☐ Other: _____
6. I believe that there is probable cause to believe the defendant committed such crime because of the following facts:
(NOTE: You must state the source of all information provided below. State what you observed and what you learned from someone else, identifying that person):

008

PROBABLE CAUSE FOR STOP AND ARREST:

On March 14, 2008 at 0540 hours, I was stationary in the median of I90 near milepost 3.5. I visually estimated the speed of a vehicle traveling west at 80 mph. I activated my radar and confirmed the vehicle's speed at 84 mph in a posted 70 mph zone. I stopped the vehicle and contacted the driver, Michael Kramer and identified him with his Washington driver's license. Kramer said he did not realize he was going that fast. As I spoke with Kramer, I could see his eyes were glassy and sleepy looking. His speech was slurred and I could smell the odor of an alcoholic beverage. Kramer denied drinking but later said he had two beers. I had Kramer step out of the pickup for sobriety evaluations. (See results below.) I arrested Kramer and took him to the jail for a breath test. The results were .174/.157. A driver's status check revealed Kramer had a dui conviction in Washington on 3-22-05.

D.U. I. NOTES

Odor of alcoholic beverage ☒ Yes ☐ No
Admitted drinking alcoholic beverage ☒ Yes ☐ No
Slurred speech ☒ Yes ☐ No
Impaired memory ☒ Yes ☐ No
Glassy/bloodshot eyes ☒ Yes ☐ No

Sobriety Tests—Meets Decision Points?

Gaze Nystagmus ☒ Yes ☐ No
Walk & Turn ☒ Yes ☐ No
One Leg Stand ☒ Yes ☐ No

Crash Involved ☐ Yes ☒ No
Injury ☐ Yes ☒ No

Other _____

Drugs Suspected ☐ Yes ☒ No Drug Recognition Evaluation Performed ☐ Yes ☒ No
Reason Drugs are Suspected:

Prior to being offered the test, the defendant was substantially informed of the consequences of refusal and failure of the test as required by Section 18-8002 and 18-8002A, Idaho Code.

☒ Defendant was tested for alcohol concentration, drugs or other intoxicating substances. The test(s) was/were performed in compliance with Section 18-8003 & 18-8004 (4), Idaho Code, and the standards and methods adopted by the Department of Law Enforcement.

BAC: .174/.157 by: ☒ Breath Instrument Type: ☒ Intoxilyzer 5000 ☐ Alco-Sensor ☐ Lifeloc
Instrument Serial #

☐ Blood AND/OR ☐ Urine Test results pending? ☐ Yes ☐ No (attached)

Name of person administering breath test: Cpl. S. Lind Date certification expires: 113010

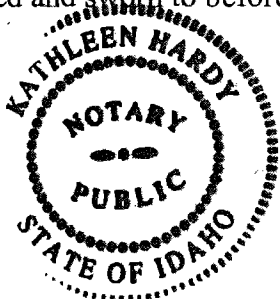
☐ Defendant refused the test as follows:

Videotape # 202-341.

By my signature and in the presence of a person authorized to administer Oaths in the State of Idaho, I hereby solemnly swear that the information contained in this document and attached reports and documents that may be included herein is true and correct to the best of my information and belief.

Signed: _____
(affiant)

Subscribed and sworn to before me on 3/15/09
(Date)



NOTARY PUBLIC FOR IDAHO

Residing at: KOTENAI
My Commission expires: 11/09/09



NOTICE OF SUSPENSION for Failure of Evidentiary Testing
(Advisory for Sections 18-8002 and 18-8002A, Idaho Code)

DR# 09-733

Driver's Name: KRAMER Michael
Last Name: KRAMER **First:** Michael **Middle:** IAN
Date of Birth: [Redacted]
Mailing Address: 2719 N Regal RD
Chattaroy WA 99003
City: Chattaroy **State:** WA **Zip:** 99003

County of Arrest: Kootenai **County of Residence:** Kootenai
Date of Arrest: 03/14/09
Driver's License Number: KRAMEM132418
Citation #: 1367681
Date of Issue: 2009 MAR 15 PM 12:11
Operating CMV? ☐ Yes ☒ No
Transporting Hazardous Materials? ☐ Yes ☒ No

SUSPENSION ADVISORY

- I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances.
- You are required by law to take one or more evidentiary tests to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional tests made by a person of your own choosing.
- You do not have the right to talk to a lawyer before taking any evidentiary tests to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body.
- If you refuse to take or complete any of the offered tests pursuant to Section 18-8002, Idaho Code:
 - You are subject to a civil penalty of two hundred fifty dollars (\$250).
 - Your Idaho driver's license or permit will be seized if you have it in your possession, and if it is current and valid you will be issued a temporary permit. Non-resident licenses will not be seized and will be valid in Idaho for thirty (30) days from the service of this notice of suspension unless modified or restricted by the court, provided the license is valid in the issuing state. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
 - You have a right to submit a written request within seven (7) days to the Magistrate Court of Kootenai County for a hearing to show cause why you refused to submit to or complete evidentiary testing and why your driver's license should not be suspended.
 - If you do not request a hearing or do not prevail at the hearing, the court will sustain the civil penalty and your license will be suspended with absolutely no driving privileges for one (1) year if this is your first refusal, and two (2) years if this is your second refusal within ten (10) years.
- If you take and fail the evidentiary test(s) pursuant to Section 18-8002A, Idaho Code:
 - Your Idaho driver's license or permit will be seized if you have it in your possession, and if it is current and valid you will be issued a temporary permit. Non-resident licenses will not be seized and shall be valid in Idaho for thirty (30) days from the service of this notice of suspension, provided the license is valid in the issuing state. If you were operating a commercial motor vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.
 - I will serve you with this **NOTICE OF SUSPENSION** that becomes effective thirty days from the date of service on this **NOTICE**, suspending your driver's license or privileges. If this is your first failure of an evidentiary test your driver's license or driving privileges will be suspended for ninety (90) days, with absolutely no driving privileges during the first thirty (30) days. You may request restricted driving privileges for the remaining sixty (60) days of the suspension. Restricted driving privileges will not allow you to operate a commercial motor vehicle. If this is not your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind during that period.
 - You have the right to an administrative hearing on the suspension before the **IDAHO TRANSPORTATION DEPARTMENT** to show cause why you failed the evidentiary test and why your driver's license should not be suspended. The request must be made in writing and be received by the department within seven (7) calendar days from the date of service of this **NOTICE OF SUSPENSION**. You also have the right to judicial review of the Hearing Officer's decision.

THIS SUSPENSION FOR FAILURE OR REFUSAL OF THE EVIDENTIARY TEST(S) IS SEPARATE FROM ANY OTHER SUSPENSION ORDERED BY THE COURT.

— PLEASE REFER TO THE BACK OF THIS SUSPENSION NOTICE FOR MORE INFORMATION —

NOTICE OF SUSPENSION: If you have failed the evidentiary test(s), your driving privileges are hereby suspended per #5 above, commencing thirty (30) days from the date of service of this notice. If a blood or urine test was administered, the department may serve a *Notice of Suspension* upon receipt of the test results.

Date of Service: 03/14/09

This Section Provides Temporary Driving Privileges.

(If the driver was operating a commercial vehicle, this permit will not provide commercial driving privileges of any kind.)

If issued, this permit grants the same driving restrictions and privileges as those granted by the license/permit seized (except as indicated above), and shall be valid for thirty (30) days from the date you were served this *Notice of Suspension* for failure or refusal of the evidentiary test(s), unless it is canceled or restricted by the court.

Permit Issued? ☒ Yes ☐ No License Surrendered? ☐ Yes ☒ No
A permit was not issued: ☐ Suspended ☐ Not in Possession ☐ Invalid ☐ Expired ☐ Issued by Another Jurisdiction ☐ Not Licensed

Signature of Temporary Licensee (if you are issued a permit, it is not valid until you sign it)

Signature of Reporting Officer: [Signature] First Name and Last Name of Reporting Officer (Print): TINSLEY Agency Code: 0001 Telephone Number: 781-0055

Department use only: Failure: ☒ Breath ☐ Urine/Blood ☐ Refusal

Booking # _____

BOOKING INFORMATION SHEET
KOOTENAI COUNTY PUBLIC SAFETY BUILDINGName ID # _____ Date 03-14-09**ARRESTEE:**Name Kramer Michael IanAKA NONE Last First MiddleAddress 27719 N Regal RDCity Chattaroy ST wa Zip 99003Home Phone 509-991-0872 SS# _____City/State of Birth Minneapolis, MN DOB _____D.L. # _____ State wa Occupation Plumber

Work Phone # _____

PHYSICAL DESCRIPTION:Height 5' 10" Weight 145 Sex M Hair BRO Eyes BRORace white Glasses Y/N Contacts Y/N Facial Hair BeardScars, Marks, Tattoo's NONEClothing Description jean pants 3/4 coat boots**ARRESTING OFFICER INFORMATION:**Date / Time of Arrest 3-14-09 / 0556 Location I-90 mp2 WTB Dist 27Arresting Officer S LIND # 464 Agency CSP Arrival at PSB 0653**CHARGES AND BAIL:** ARREST TYPE: (ON-VIEW) (WRNT) (CITIZEN) (OTHER)

M / F	Code	Charges	Bail	Sentence	Warrant or Case #
1. M	18-8004	DJC	2000		09-733
2. M	18-3302B	Poss of concealed weapon	300		
3. M	23-505(1)	unlawful transport of Alco	300		
4.					
5.					
6.					

Is the arresting officer aware of any mental or physical conditions this inmate may have which might affect his/her safety or ability to be held without special attention by jail staff? ☒ No, ☐ Yes (Explain) _____**VEHICLE INFORMATION:**Vehicle Lic. A23585R ST WA YR 02 Make Chevy Model _____ Body 4D pickup Color(s) RedVehicle Disposition Westside**CITIZEN ARREST:**

I hereby arrest the above named suspect on the charge(s) indicated and request a peace officer to take him - her into custody. I will appear as directed and sign a complaint against the person I have arrested.

Arresting Person Signature	Address	Phone #			
Arresting Persons Name (printed)	Race	Sex	DOB	Employer	Phone #
Officer	ID #	Approved By	ID #	Date	

VICTIM'S RIGHTS INFORMATION: Code: P=Physical Inj. T=Threat of Phy. Inj. S=Sexual Offense

Name:	Code	Mult. Victims	Address:	Phone:	
Occupation:	Race/Sex	Age	DOB	Business Address:	Bus. Phone:

Idaho State Police
INFLUENCE REPORT

04-733

Defendant's Name Michael I Kramer DOB [REDACTED]

Contacts [] Yes [☒] No PRE-TEST
Glasses [] Yes [☒] No Remove Glasses []

Eyes tracking equally [☒] Yes [] No

FIELD SOBRIETY TESTS

HORIZONTAL GAZE NYSTAGMUS

EYES

- ☒ L ☒ R Eye does not pursue smoothly
☒ ☒ Distinct Nystagmus at max. deviation
☒ ☒ Nystagmus onset before 45 degrees

☒ TOTAL

ADDITIONAL SOBRIETY TESTS

VERTICAL NYSTAGMUS

☐ Yes ☒ No

PUPIL SIZE _____ CONSTRICTED [] NORMAL [☒] DILATED []

WALK AND TURN

- ☐ Cannot keep balance during instructions
☐ Starts too soon
☐ Stops too soon
☒ Misses heel to toe
☒ Steps off line
☒ Raises arms
☒ Wrong number of steps
☒ Improper turn

☐ Cannot do test

☒ 5 Total

NYSTAGMUS

	0	1	2	3	4	5	6
0							
1							
2							
3							
4							
5							
6							
7							
8							

WALK
AND
TURN

OBSERVATIONS

Eye Color Red Eye Condition glassy Speech slurred

Breath Odor of Alcohol

Foot Wear Boots Ground Surface level pavement

ONE LEG STAND

- ☒ Sways
☒ Raises arms
☐ Hops
☒ Puts foot down

☐ Cannot do test

☒ 3 Total

CHEMICAL TEST

☒ Breath ☐ Blood

☐ Other Test Result 0.174 / 0.157

☐ Refused test, Why? _____

Audio Tape Y ☒ N

Video Tape ☒ N

Officer's Signature [Signature] Date 2-14-09

Defendant's Name:

Kramer Michael

1367682

IDAHO STATE POLICE

IDAHO UNIFORM CITATION

1367682

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

COMPLAINT AND SUMMONS

Infraction Citation

Misdemeanor Citation

Accident Involved

Michael Kramer
First Name Last Name

1367682
Middle Initial

USDOT TK

Operator ☐ Class A ☐ Class B ☐ Class C ☐ Class D ☐ Other ☐
GVWR 26001 + ☐ 8 + Persons ☐ Placard Hazardous Materials DR# 09-733
Home Address 2779 N Regal Chaffinway WA 98005
Phone 888-971-0573

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I certify I have reasonable grounds, and believe the above-named defendant,
or SS# KRAMER132418 State WA DOB 6-28-68 Sex: M F
Height 5'10 Wt 145 Hair BRN Eyes BRN Yr. of Vehicle 02 Make Chevy
Veh. Lic # A23585R State WA Yr. of Vehicle 02 Make Chevy
Model Pickup Color Red
Did commit the following act(s) on 14 MAR 20 at 0556 o'clock # M.
Vio. #1 Transport open container w/ driver 23-505(C)
Seal
Code Section

Vio. #2

Code Section

Location Hwy. C-90 Mp. 21/8 2 Coofeave County, Idaho.

Date 3/14/08 Officer/Party Tm Lind Serial #/Address 2866 Dept. 250

Witnessing Officer THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT

You are hereby summoned to appear before the Clerk of the Magistrate's Division of the District Court of Kootenai County, Idaho,

located at 1st on the day of 20, 20 (OR) on or after 20, 20

at o'clock M

I acknowledge receipt of this summons and I promise to appear at the time indicated.

I hereby certify service upon the defendant personally on the day of 20

Defendant's Signature

Officer

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

COURT COPY VIOLATION #1

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

COURT COPY VIOLATION #1

Defendant's Signature

I hereby certify service upon the defendant personally on the day of 20, 20

I acknowledge receipt of this summons and I promise to appear at the time indicated.

at o'clock M

Michael Kramer
First Name Last Name

1367682
Middle Initial

USDOT TK

Operator ☐ Class A ☐ Class B ☐ Class C ☐ Class D ☐ Other ☐
GVWR 26001 + ☐ 8 + Persons ☐ Placard Hazardous Materials DR# 09-733
Home Address 2779 N Regal RD Chaffinway WA 98005
Phone 888-971-0573

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or SS# KRAMER132418 State WA DOB 6-28-68 Sex: M F
Height 5'10 Wt 145 Hair BRN Eyes BRN Yr. of Vehicle 02 Make Chevy
Veh. Lic # A23585R State WA Yr. of Vehicle 02 Make Chevy
Model Pickup Color Red
Did commit the following act(s) on 14 MAR 20 at 0556 o'clock # M.
Vio. #1 D.V.I. 2, 2, 2 - Brac. 1741.124
Vio. #2 Possession of a concealed weapon 18-2302B
while under the influence of Alcohol
Code Section

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I certify I have reasonable grounds, and believe the above-named defendant,
or SS# KRAMER132418 State WA DOB 6-28-68 Sex: M F
Height 5'10 Wt 145 Hair BRN Eyes BRN Yr. of Vehicle 02 Make Chevy
Veh. Lic # A23585R State WA Yr. of Vehicle 02 Make Chevy
Model Pickup Color Red
Did commit the following act(s) on 14 MAR 20 at 0556 o'clock # M.
Vio. #1 D.V.I. 2, 2, 2 - Brac. 1741.124
Vio. #2 Possession of a concealed weapon 18-2302B
while under the influence of Alcohol
Code Section

Location Hwy. C-90 Mp. 21/8 2 Coofeave County, Idaho.

Date 3/14/08 Officer/Party Tm Lind Serial #/Address 2866 Dept. 250

Witnessing Officer THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT

You are hereby summoned to appear before the Clerk of the Magistrate's Division of the District Court of Kootenai County, Idaho,

located at 1st on the day of 20, 20 (OR) on or after 20, 20

at o'clock M

I acknowledge receipt of this summons and I promise to appear at the time indicated.

I hereby certify service upon the defendant personally on the day of 20

Defendant's Signature

Officer

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

COURT COPY VIOLATION #1

721

Phelps & Associates, PS
Attorneys At Law
2903 N. Stout Rd.
Spokane, WA 99206-4373
Ph:(509)892-0467; Fax:(509)921-0802

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2009 MAR 18 AM 10:52

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)

NO. CR-09-5447

MICHAEL I. KRAMER)
Defendant)
_____)

PRE-TRIAL MOTIONS

COMES NOW the Defendant, MICHAEL I. KRAMER, and moves the court for an order on the following matters:

1. Motions in limine, (reserved);
2. Motion to suppress based on violations of the defendant's right to be free from unreasonable search and seizure, right to remain silent, right to counsel, and related constitutional protections under the State of Idaho Constitution and the United States Constitution. Defendant's brief in support of motion will be filed upon receipt of Discovery, including any audio/video recordings, from the prosecuting attorney.

Dated this 18 Day of March, 2009.

PHELPS & ASSOCIATES, PS

Douglas D. Phelps
Attorney for Defendant
ISBA # 4755

Certificate of Service

I, Leah M. Holbert, hereby certify that on March 18, 2009, I caused a true and correct copy of the foregoing NOA, Demands, and Pretrial Motions to be forwarded with all of the required charges prepaid by the method indicated below.

Leah Holbert

Leah M. Holbert

PHELPS & ASSOCIATES, PS

Kootenai County District Court

P.O. Box 9000

324 West Garden

Coeur d'Alene, ID 83816-9000

 Hand Delivery U.S. Mail X Facsimile Overnight Mail

Kootenai County Prosecutor

501 Government Way

P.O. Box 9000

Coeur d'Alene, ID 83816-9000

 Hand Delivery U.S. Mail X Facsimile Overnight Mail

121
PHELPS & ASSOCIATES, PS
ATTORNEYS AT LAW
2903 N. Stout Rd.
Spokane, WA 99206-4373
Ph: (509)892-0467; Fax: (509)921-0802

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2009 MAR 18 AM 11:49

CLERK DISTRICT COURT

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.

MICHAEL I. KRAMER,

Defendant.

Case No. CR-09-5447

Citation No. 1367681/1367682

DEFENDANT'S REQUEST
FOR DISCOVERY

PLEASE TAKE NOTICE that the undersigned pursuant to Rule 16 of the Idaho Criminal Rules, the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and Article § 1, 2, 13 and 17 of the Constitution of the State of Idaho requests discovery inspection of all materials discoverable by defendant per I.C.R. 16 b (1-8) and the aforementioned Constitution provisions including but not limited to the following information, evidence and materials:

1. Any relevant recorded statement made by the defendant and copies thereof, custody or control of the State, the existence of which is known or which is known or which is available to the prosecuting attorney by the exercise of due diligence, and also the substance of any relevant or oral statement made by the defendant whether before or after arrest to a peace officer, prosecuting attorney or his agent, and the recorded testimony of the defendant before a Grand Jury which relates to the offense charged.
2. Any written or recorded statements by a co-defendant, and the substance of

any relevant oral statement made by a co-defendant whether before or after arrest in response to interrogation by any person known by the co-defendant to be a peace officer or agent of the prosecuting attorney, or which are otherwise relevant to the offense charged.

3. A copy of the defendant's prior record, if any, as is then or may become available to the prosecuting attorney.
4. Books, papers, documents, photographs, tangible objects, and copies and portions thereof, which are in the possession or control of the prosecuting attorney and which are material to the preparation of the defense, or intended for use by the prosecutor as evidence at trial, or obtained from or belonging to the defendant.
5. The results of reports of physical or mental examinations and of scientific tests or experiments made in connections with this particular case, and copies thereof, within the possession or control of the prosecuting attorney, the existence of which is known or is available to the prosecuting attorney by exercise of due diligence.
6. A written list of the names and addresses of all persons having knowledge of relevant facts who may be called by the prosecuting attorney as witnesses at trial, together with any record of prior felony convictions of any such person which is within the knowledge of the prosecuting attorney. Also the statements made by the prosecution witnesses, or prospective witnesses, made to the prosecuting attorney or his agents, or to any official involved in the investigatory process of the case. Provide a written list identifying by name, address, and relevant specialty, of all experts expected to testify or provide testimony at trial or hearing, and those have relevant knowledge of relevant facts, including their applicable medical, scientific or technical

backgrounds with their curriculum vitae.

7. All reports and memoranda in the possession of the prosecuting attorney or which may come into the possession of the prosecuting attorney which were made by a police officer or any investigator in connection with the investigation or the prosecution of this case.
8. The underlying facts or data that form the basis of any expert testimony pursuant to Idaho Rule of Evidence 705.
9. All documentation in support of or in connection with any search warrant issued in connection with this case, applications for search warrants (whether granted or denied), all affidavits, declarations and materials in support of such search warrants, all search warrants and all search warrant returns.
10. All material evidence within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976), *Kyles v. Whitley*, ____ U.S. ____, 115 S.Ct. 1555 (1985) and the progeny.
11. The existence and substance of any payments, promises of leniency, preferential treatment or other inducements or threats made to prospective witnesses, within the scope of the *United States v. Giglio*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 362 U.S. 264 (1959) and their progeny.
12. Disclose whether a defendant or any other person was identified by any lineup, showup, photo spread or similar identification proceeding relating to the offense charged, and produce any pictures utilized or resulting therefrom and the names, addresses, and telephone numbers of all identifying witnesses.
13. The criminal record of any and all witnesses who will testify for the State at

ORIGINAL

BARRY McHUGH
Prosecuting Attorney
501 Government Way; Box 9000
Coeur d'Alene, ID 83814-1800
Telephone: (208)446-1800
Facsimile: (208)446-1833

Assigned Attorney
Amy Nixon, *Deputy Prosecuting Attorney*

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: *SS*

2009 MAR 24 PM 3:48

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,
vs.
MICHAEL I. KRAMER,
Defendant.

Case No. CR- M09-5447

**PLAINTIFF'S REQUEST FOR
DISCOVERY**

TO THE ABOVE-NAMED DEFENDANT AND YOUR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that the Kootenai County Prosecuting Attorney, requests the following discovery:

1. That, pursuant to I.C.R. 16 (c)(1), the state be permitted to inspect, copy, and/or photograph any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant, and which the defendant intends to introduce as evidence at trial.
2. That, pursuant to I.C.R. 16 (c)(2), the state be permitted to inspect, copy, and/or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial when the results or report relates to the testimony of the witness.

3. That, pursuant to I.C.R. 16 (c)(3), the defendant provide a written list of the names and addresses of witnesses whom the defendant intends to call at trial.
4. That, pursuant to I.C.R. 16 (c)(4), the defendant provide a written summary or report of any testimony that the defense intends on introducing pursuant to Rules 702, 703, or 705 of the Idaho Rules of Evidence at trial or hearing. Please describe the witness's opinions, the facts and data for those opinions and the witness's qualifications. If the expert is expected to testify to his or her opinions regarding mental health, the state requests that the defendant comply with all requirements set fourth in I.C. § 18-207.
5. That, pursuant to I.C.R. 12.1 and I.C. § 19-519, the defendant provide notice of his or her intention to offer a defense of an alibi.

DATED this 24th day of March, 2009.

Amy Nixon

AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 24 day of March, 2009, a true and correct copy of the foregoing was mailed, faxed, and/or hand-delivered to:

Douglas D. Phelps
Fax: (509) 921-0802

th

ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: ss

BARRY McHUGH
Prosecuting Attorney
501 Government Way; Box 9000
Coeur d'Alene, ID 83816
Telephone: (208) 446-1800
Facsimile: (208) 446-1833

2009 MAR 24 PM 3:48

CLERK DISTRICT COURT

DEPUTY

Assigned Attorney
Amy Nixon, *Deputy Prosecuting Attorney*

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.
MICHAEL I. KRAMER,
Defendant.

Case No. CR- M09-5447

**PLAINTIFF'S RESPONSE TO
REQUEST FOR DISCOVERY**

COMES NOW, BARRY McHUGH, Prosecuting Attorney, for Kootenai County, Idaho,
and submits the following response to Discovery:

1. Pursuant to Idaho Criminal Rule 16 (a), the prosecution is unaware of any evidence within its possession or control that is exculpatory on its face relating to the offense charged other than that which may be included in the enclosed reports. With regards to evidence that may be exculpatory as used or interpreted, the prosecution requests that counsel submit, in writing, the defense to be asserted in the case so the prosecution can review its file to determine if any facts, evidence or witnesses may be material to the preparation of the defense.

PLAINTIFF'S RESPONSE TO
DEFENDANT'S REQUEST FOR DISCOVERY

021
1 of 3

2. The State has complied with defendant's request for discovery by furnishing the following information, evidence and materials:

ISP report/citation #09ISP0733, (pp.1-10)
The Defendant's criminal record, (pp.11-15)

If you have not received any of the foregoing copies, please contact this office immediately. The Prosecuting Attorney objects to any request beyond the scope of I.C.R. 16, and specifically objects to any request for copies of subpoenas issued by the state in this matter, for any witness's NCIC or Spillman report, and for any of the witness's misdemeanor criminal history under *Ramirez v. State*, 119 Idaho 1037 (1991).

3. Pursuant to Idaho Criminal Rule 16, the Prosecuting Attorney further informs the defendant that you are permitted to inspect and copy or photograph books, paper, documents, photographs, tangible objects, building or places or copies or portions thereof, which are mentioned or listed in the above listed documents and which are in the possession, custody or control of the prosecuting attorney and which are material to the preparation of the defense, or intended for use by the prosecutor as evidence at trial, or obtained from or belonging to the defendant.

4. The Prosecuting Attorney further informs the defendant that you are permitted to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies therefore, which are mentioned or listed in the above listed documents and which are within the possession, custody or control of the prosecuting attorney, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.

5. NOTICE is hereby given that any Information to be filed in this matter will include a Deadly Weapons Enhancement and a Habitual Offender Enhancement if applicable.

6. The State further reserves the right to call on any witnesses listed in the provided discovery or listed in the underlying police report, and any witnesses listed in the provided discovery or listed in any underlying reports or documentation submitted by the defense.

7. **NOTICE OF INTENT TO USE RULE 404(b) EVIDENCE:** Pursuant to Rule 404(b), the State hereby provides notice of its intent to use any of the evidence described or referred to in the provided discovery.

8. The State reserves the right to supplement discovery as it becomes available.

The Prosecuting Attorney further informs the defendant, the State may request an increase in bail and/or that condition(s) of release be established or modified at the time of the preliminary hearing scheduled in this matter.

_____ Offer of settlement included along with discovery.

DATED this 24th day of MARCH, 2009.

AMY NIXON
AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 24 day of March, 2009, a true and correct copy of the foregoing was mailed, faxed, and/or hand-delivered to:

Douglas D. Phelps
Fax: (509) 921-0802

ORIGINAL

BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83814
Telephone: (208) 446-1800
Facsimile: (208) 446-1833

ASSIGNED ATTORNEY
Amy Nixon, *Deputy Prosecuting Attorney*

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2009 APR -1 PM 3:55

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,)	
	)	Case No. CR-M09-5447
Plaintiff,)	
	)	SUPPLEMENTAL
vs.	)	RESPONSE TO DISCOVERY
)	
MICHAEL I. KRAMER,)	
)	
Defendant.)	
_____)	

COMES NOW, BARRY McHUGH, Prosecuting Attorney in and for the County of Kootenai,
State of Idaho, and submits the following Supplemental Response to Request for Discovery:

That the State has complied with such request by furnishing the following additional
evidence and materials with regard to defendant's request for disclosure on the following:

1. ISP Narrative Report #09ISP0733, (pp.16-19)

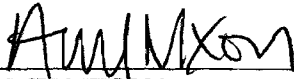
If you have not received any of the foregoing copies, please contact this office immediately.

Pursuant to Idaho Criminal Rule 16, the Prosecuting Attorney further informs the defendant
that you are permitted to inspect and copy or photograph books, paper, documents, photographs,
tangible objects, building, or places, or copies or portions thereof, which are material to the

preparation of the defense, or intended for use by the prosecutor as evidence at trial, or obtained from or belonging to the defendant.

The Prosecuting Attorney further informs the defendant that you are permitted to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the prosecuting attorney, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.

DATED this 21st day of March, 2009.



AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 1 day of April, 2009, a true and correct copy of the foregoing was mailed, faxed, and/or hand-delivered to:

Douglas D. Phelps
Fax: (509) 921-0802



BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83814
Telephone: (208) 446-1800
Facsimile: (208) 446-1833

2009 APR -3 AM 10: 18

CLERK DISTRICT COURT

DEPUTY

ASSIGNED ATTORNEY
Amy Nixon, *Deputy Prosecuting Attorney*

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-M09-5447
Plaintiff,)	
	)	2 nd SUPPLEMENTAL
vs.	)	RESPONSE TO DISCOVERY
)	
MICHAEL I. KRAMER,)	
)	
Defendant.)	
)	

COMES NOW, BARRY McHUGH, Prosecuting Attorney in and for the County of Kootenai,
State of Idaho, and submits the following Supplemental Response to Request for Discovery:

That the State has complied with such request by furnishing the following additional
evidence and materials with regard to defendant's request for disclosure on the following:

1. ISP Narrative Report (page 1 of 4) #09ISP0733, (pp.20)

If you have not received any of the foregoing copies, please contact this office immediately.

Pursuant to Idaho Criminal Rule 16, the Prosecuting Attorney further informs the defendant
that you are permitted to inspect and copy or photograph books, paper, documents, photographs,
tangible objects, building, or places, or copies or portions thereof, which are material to the

preparation of the defense, or intended for use by the prosecutor as evidence at trial, or obtained from or belonging to the defendant.

The Prosecuting Attorney further informs the defendant that you are permitted to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the prosecuting attorney, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.

DATED this 2nd day of April, 2009.

AMY NIXON
AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 2 day of April, 2009, a true and correct copy of the foregoing was mailed, faxed, and/or hand delivered to:

Douglas D. Phelps
Fax: (509) 921-0802

DDP

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2009 MAY 26 PM 12:59

CLERK DISTRICT COURT

DEPUTY

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

STATE OF IDAHO,

Plaintiff,

vs.

MICHAEL KRAMER,

Defendant.

Case No. CRM-2009-0005447

MOTION TO VACATE PRETRIAL
CONFERENCE

COMES NOW the above-entitled defendant, by and through his attorney of record PETER JONES, and hereby moves this court to vacate the pretrial conference set in this matter. Good cause exists, as defense counsel is required to appear in Moses Lake, Washington, at that time and will be unable to attend this pre-trial conference. Counsel have discussed resolution of this case telephonically and do not, at this time, have a resolution.

Respectfully submitted this 26th day of May, 2009,

Peter Jones

Attorney for Defendant

The State has no objection

/telephonic approval granted 5/26/09/

Amy Nixon

Deputy Prosecutor

STATE OF IDAHO } SS
 COUNTY OF KOOTENAI
 FILED: 5/26/09
 AT 8:02 O'CLOCK PM
 CLERK, DISTRICT COURT
Repp Knoll
 DEPUTY

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

STATE OF IDAHO,

Plaintiff,

vs.

MICHAEL KRAMER,

Defendant.

Case No. CRM-2009-0005447

ORDER TO VACATE PRETRIAL
 CONFERENCE

IT IS HEREBY ORDERED that the pre-trial conference set in this matter be
 VACATED and that this matter remain scheduled for jury trial.

By my hand this 26 day of May, 2009,

[Signature]
 Magistrate Judge Presiding 267

Certificate of Service

I, Leah M. Holbert, hereby certify that on May 26, 2009, I caused a true and correct copy of the foregoing Motion and Order to Continue to be forwarded with all of the required charges prepaid by the method indicated below.

Leah Holbert

Leah M. Holbert

PHELPS & ASSOCIATES, PS

Kootenai County District Court

P.O. Box 9000

324 West Garden

Coeur d'Alene, ID 83816-9000

☐ Hand Delivery ☐ U.S. Mail ☒ Facsimile ☐ Overnight Mail

Kootenai County Prosecutor

501 Government Way

P.O. Box 9000

Coeur d'Alene, ID 83816-9000

☐ Hand Delivery ☐ U.S. Mail ☒ Facsimile ☐ Overnight Mail

*Copies yated to D. Phelps & KPA
5/26/09 PC*

030

Court Minutes:

Session: CALDWELL061509A
Session Date: 06/15/2009
Judge: Caldwell, Robert
Reporter:

Division: MAG
Session Time: 08:08

Courtroom: Courtroom7

Clerk(s): Burrington, Talisa

State Attorney(s):
Laird, Terri
Ryan, Joel
Shulson, Jessica
Tinkey, Jennifer

Public Defender(s):
Clapin, Michael
Neils, Martin
Sears, Sarah
Szott, Paul
Whitaker, Jed
Zanetti, Craig

Prob. Officer(s):

Court interpreter(s):

Peggy Broll

Case ID: 0006

Case number: CR2009-5447
Plaintiff:
Plaintiff Attorney:
Defendant: KRAMER, MICHAEL
Pers. Attorney: Jones, Peter
Co-Defendant(s):
State Attorney: Laird, Terri
Public Defender:

06/15/2009

09:25:31 Recording Started:

09:25:31 Case called

09:25:36 Judge: Caldwell, Robert
JURY STATUS CALL

09:25:41 State Attorney: Laird, Terri

09:25:49 Pers. Attorney: Jones, Peter
MOVE TO CONT - DF HAS WA STATE LICENSE - SOME
CONFUSION - NEED MORE TIME TO

09:26:18 SORT ALL THIS OUT - HOPEFULLY CAN RESOLVE W/OUT
GOING TO TRIAL - DF WAIVES

09:26:33 SPEEDY TRIAL

09:26:35 State Attorney: Laird, Terri
NO OBJ

09:26:36 Defendant: KRAMER, MICHAEL
WAIVE SPEEDY TRIAL - UNDERSTAND WHAT THAT MEANS

09:26:48 Judge: Caldwell, Robert
GRANT MTN TO CONT - RESET TRIAL - FIND DF HAS
WAIVED RIGHT TO ST

09:27:50 Stop recording

BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83814-1800
Telephone: (208) 446-1800
Facsimile: (208) 446-1833

Assigned Attorney
AMY NIXON

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 JUN 12 PM 3:28

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,
vs.
MICHAEL I. KRAMER,
Defendant.

Case No. CR-M09-5447

**3RD SUPPLEMENTAL
RESPONSE TO DISCOVERY**

COMES NOW, BARRY McHUGH, Prosecuting Attorney for Kootenai County, Idaho,
and submits the following Supplemental Response to Request for Discovery.

The State has complied with Defendant's request by furnishing the following additional
evidence and materials:

1. Copy of video recording (available upon receipt of replacement DVD).

If you have not received any of the foregoing copies, please contact this office
immediately.

Pursuant to Idaho Criminal Rule 16, the Prosecuting Attorney further informs the
defendant that you are permitted to inspect and copy or photograph books, paper, documents,
photographs, tangible objects, building, or places, or copies or portions thereof, which are

material to the preparation of the defense, or intended for use by the prosecutor as evidence at trial, or obtained from or belonging to the defendant.

The Prosecuting Attorney further informs the defendant that you are permitted to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the prosecuting attorney, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.

DATED this 11th day of June, 2009.

Amy Nixon
AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that, on the 12 day of June, 2009, I caused the foregoing to be transmitted as followed:

DOUGLAS PHELPS, ATTORNEY AT LAW (FAX 509-921-0802)

Betsy

ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2009 JUN 24 AM 10:07

CLERK DISTRICT COURT

DEPUTY

BARRY McHUGH
Prosecuting Attorney
501 Government Way; Box 9000
Coeur d'Alene, ID 83814-1800
Phone: (208) 446-1800
Facsimile: (208) 446-1833

Assigned Attorney
AMY NIXON

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.

MICHAEL I. KRAMER,
D.O.B.: [REDACTED]
SS #: [REDACTED]
Defendant.

Case No. CR-M09-5447

**AMENDED CRIMINAL
COMPLAINT**

Agency Case: 09-1367681 KCSD
09-1367682 KCSD

COMES NOW, AMY NIXON, and does hereby amend the complaint as follows:
complains that the above-named defendant did commit the crime of **COUNT I, DRIVING
UNDER THE INFLUENCE**, a misdemeanor, Idaho Code §§ 18-8004, 18-8005(4); **COUNT
II, POSSESSION OF A CONCEALED WEAPON WHILE UNDER THE INFLUENCE
OF ALCOHOL**, a misdemeanor, Idaho Code § 18-3302B; **COUNT III, TRANSPORTING
AN OPENED CONTAINER OF ALCOHOL IN A MOTOR VEHICLE**, a misdemeanor,
Idaho Code § 23-505(1); committed as follows:

COUNT I

That the defendant, MICHAEL I. KRAMER, on or about the 14th day of March, 2009, in Kootenai County, Idaho, did drive a motor vehicle and/or was in actual physical control of said motor vehicle upon a street, highway, intersection, or other place open to the public while under the influence of alcohol, drugs, or other intoxicating substances, or, in the alternative, did drive the above described motor vehicle at the above described location, with an alcohol concentration of .08 percent or more, to-wit: .174/.157 as shown by an analysis of his breath; and

COUNT II

That the Defendant, MICHAEL I. KRAMER, on or about the 14th day of March, 2009, in the County of Kootenai, State of Idaho, did carry a concealed weapon, to-wit: a .40 caliber pistol on or about his person while intoxicated and/or under the influence of an intoxicating drink or drug; and

COUNT III

That the Defendant, MICHAEL I. KRAMER, on or about the 14th day of March, 2009, in the County of Kootenai, State of Idaho, did willfully and unlawfully transport an opened and/or unsealed container of alcohol in a motor vehicle; all of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of Idaho.

PART II

The State further informs the Court that the defendant, MICHAEL I. KRAMER, was previously convicted of DRIVING UNDER THE INFLUENCE, or a substantially conforming criminal violation, on one (1) prior occasion within in the last 10 years, to-wit: a conviction on March 22, 2005, Spokane County, Washington (Case No. B00040316).

DATED this 22nd day of June, 2009.

AMY NIXON
AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 23 day of June, 2009, a true and correct copy of the foregoing was cause to be mailed as follows:

Peter Jones, Phelps & Associates
Via Facsimile: 509-921-0802

[Signature]

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED:

2009 AUG 11 PM 4:06

CLERK DISTRICT COURT

DEPUTY

BARRY McHUGH
Prosecuting Attorney
501 Government Way; Box 9000
Coeur d'Alene, ID 83814-1800
Phone: (208) 446-1800
Facsimile: (208) 446-1833

Assigned Attorney
AMY NIXON

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.

MICHAEL I. KRAMER
D.O.B. [REDACTED]
SS #: [REDACTED]
Defendant.

Case No. CR-M09-5447

**SECOND AMENDED
CRIMINAL COMPLAINT**

Agency Case: 09-1367681 KCSD
09-1367682 KCSD

COMES NOW, AMY NIXON, and does hereby amend the complaint as follows:
complains that the above-named defendant did commit the crime of **COUNT I, DRIVING
UNDER THE INFLUENCE**, ~~SECOND OFFENSE~~, a misdemeanor, Idaho Code §§ 18-8004,
18-8005(4); **COUNT II, POSSESSION OF A CONCEALED WEAPON WHILE UNDER
THE INFLUENCE OF ALCOHOL**, a misdemeanor, Idaho Code § 18-3302B; **COUNT III,
TRANSPORTING AN OPENED CONTAINER OF ALCOHOL IN A MOTOR
VEHICLE**, a misdemeanor, Idaho Code § 23-505(1); committed as follows:

COUNT I

That the defendant, MICHAEL I. KRAMER, on or about the 14th day of March, 2009, in Kootenai County, Idaho, did drive a motor vehicle and/or was in actual physical control of said motor vehicle upon a street, highway, intersection, or other place open to the public while under the influence of alcohol, drugs, or other intoxicating substances, or, in the alternative, did drive the above described motor vehicle at the above described location, with an alcohol concentration of .08 percent or more, to-wit: .174/.157 as shown by an analysis of his breath; and

COUNT II

That the Defendant, MICHAEL I. KRAMER, on or about the 14th day of March, 2009, in the County of Kootenai, State of Idaho, did carry a concealed weapon, to-wit: a .40 caliber pistol on or about his person while intoxicated and/or under the influence of an intoxicating drink or drug; and

COUNT III

That the Defendant, MICHAEL I. KRAMER, on or about the 14th day of March, 2009, in the County of Kootenai, State of Idaho, did willfully and unlawfully transport an opened and/or unsealed container of alcohol in a motor vehicle; all of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the people of the State of Idaho.

PART II

Jim

The State further informs the Court that the defendant, MICHAEL I. KRAMER, was previously convicted of DRIVING UNDER THE INFLUENCE, or a substantially conforming criminal violation, on one (1) prior occasion within in the last 10 years, to-wit: a conviction on March 22, 2005, Spokane County, Washington (Case No. B00040316).

039

DATED this 11th day of August, 2009.

Amy Nixon
AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of Aug, 2009, a true and correct copy of the foregoing was cause to be mailed as follows:

Peter Jones, Phelps & Associates
Via Facsimile: 509-921-0802

K. Jones

C40

Court Minutes:

Session: CALDWELL111609A
Session Date: 11/13/2009
Judge: Caldwell, Robert
Reporter:

Division: MAG
Session Time: 15:27

Courtroom: Courtroom7

Clerk(s): Carroll, Theresa

State Attorney(s):
Chesebro, Lisa
Nixon, Amy
Shulson, Jessica
Somerton, Wes
VanValin, Tim

Public Defender(s):
Brooks, J. Lynn
Szott, Paul
Taylor, Anne
Walsh, Sean
Whitaker, Jed
Zanetti, Craig

Prob. Officer(s):

Court interpreter(s):

TheresaLynn

Case ID: 0009

Case number: CR2009-5447
Plaintiff:
Plaintiff Attorney:
Defendant: KRAMER, MICHAEL
Pers. Attorney: Phelps, Doug
Co-Defendant(s):
State Attorney: Nixon, Amy
Public Defender:

1/16/2009

09:38:49 Recording Started:
09:38:49 Case called
09:39:12 Add Ins: CALL, JURY TRIAL/STATUS
09:39:13 Add Ins: PHELPS, DOUGLAS
09:39:15 Defendant: KRAMER, MICHAEL
PRESENT
09:39:21 Pers. Attorney: Phelps, Doug
09:39:31 Judge: Caldwell, Robert
09:39:35 Pers. Attorney: Phelps, Doug
ASK FOR CONT - WAIVE RIGHT TO SPEEDY TRIAL -
FLYING OUT ON WEDS TO LAS VEGAS
09:39:57 - 2 DAYS TRIAL -
09:40:13 State Attorney: Nixon, Amy
NO OBJ
09:40:20 Judge: Caldwell, Robert
REVIEW RIGHTS TO SPEEDY TRIAL
09:40:31 Defendant: KRAMER, MICHAEL
WAIVE SPEEDY TRIAL
09:40:37 Judge: Caldwell, Robert
RESET FOR JURY TRIAL - WAIVE RIGHT TO SPEEDY
TRIAL
09:40:54 Stop recording

Court Minutes:

Session: BURTON030810A
Session Date: 03/08/2010
Judge: Burton, Robert
Reporter:

Division: MAG
Session Time: 07:51

Courtroom: Courtroom7

Clerk(s): Stone, Emma

State Attorney(s):

Brooks, Ken
Nixon, Amy
Ryan, Joel
Somerton, Wes
Van Valin, Tim

Public Defender(s):

Brooks, J. Lynn
Clapin, Michael
Sears, Sarah
Walsh, Sean
Whitaker, Jed
Zanetti, Craig

Prob. Officer(s):

Court interpreter(s):



Case ID: 0033

Case number: CR2009-5447

Plaintiff:

Plaintiff Attorney:

Defendant: KRAMER, MICHAEL

Pers. Attorney: Phelps, Doug

Co-Defendant(s):

State Attorney: Nixon, Amy

Public Defender:

03/08/2010

11:55:39 Recording Started:
11:55:39 Case called
11:55:43 Judge: Burton, Robert
TRIAL SET FOR FRIDAY
11:55:52 State Attorney: Nixon, Amy
I DONT HAVE PROOF FOR A SECOND OFFENSE
11:56:14 Pers. Attorney: Phelps, Doug
11:56:22 Judge: Burton, Robert
REVIEWS THE AMENDED COMPLAINT
11:56:35 COUNT ONE DUI COUNT TWO CARRYING A CONCEALED
WEAPON AND OPEN CONTAINER.
11:56:53 SET FOR FRIDAY AT 9:00AM
11:57:24 SEND INSTRUCTIONS BY THURSDAY 3PM
11:57:55 JURY WILL BE HERE AT 8:30
11:58:03 Stop recording

89.7

002/011

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

Phelps & Associates, PS
Attorneys at Law
2903 North Stout Rd.
Spokane, WA 99206
Ph: (509)892-0467; Fax(509)921-0802

2010 MAR 10 PM 1:21

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

vs.

MICHAEL I. KRAMER
Defendant

CASE NO. CR-09-5447

PROPOSED JURY
INSTRUCTIONS

COMES NOW the above-entitled defendant, by and through his attorney of
record DOUGLAS D. PHELPS, and hereby proposes that the following instructions be
submitted to the jury:

1. All standard instructions regarding jury trial procedures, burden of proof,
testimony, and presentation of evidence.
2. The attached instructions.

Respectfully submitted this 10th day of March, 2010



Douglas D. Phelps
Attorney for Defendant

INSTRUCTION NO. (

In order for the defendant to be guilty of Driving Under the Influence the state must prove each of the following:

1. On or about the 14th day of March, 2009,
2. in the state of Idaho
3. the defendant Michael I. Kramer, 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 having an alcohol concentration of 0.08 or more as shown by analysis of the defendant's breath.

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.

ICJI 1000

Covered

INSTRUCTION NO. 2

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.

ICJI 1003

covered

INSTRUCTION NO. 3

To prove that someone was under the influence of alcohol or any intoxicating substance, 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 or had used enough of intoxicating substance(s) to influence or affect the defendant's ability to drive the motor vehicle.

ICJI 1006

covered

INSTRUCTION NO. 4

In order for the defendant to be guilty of Carrying a Concealed Weapon, the state must prove each of the following:

1. On or about the 14th day of March, 2009,
2. in the state of Idaho,
3. the defendant Michael I. Kramer
4. carried a pistol
5. which was concealed on or about the defendant's person,
6. the defendant did not have a license to carry a concealed weapon, and
7. the defendant was in a motor vehicle
8. which was inside the limits or confines of a city.

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.

A pistol or revolver, whether loaded or unloaded, is not concealed in a motor vehicle if it is located in plain view.

A firearm may be concealed legally in a motor vehicle so long as it is disassembled or unloaded.

ICJI 1415

Refused

INSTRUCTION NO.

In order for the defendant to be guilty of Driving Under the Influence the state must prove each of the following:

1. On or about the 14th day of March, 2009,
2. in the state of Idaho
3. the defendant Michael I. Kramer, 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 having an alcohol concentration of 0.08 or more as shown by analysis of the defendant's breath.

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.

INSTRUCTION NO.

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.

INSTRUCTION NO.

To prove that someone was under the influence of alcohol or any intoxicating substance, 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 or had used enough of intoxicating substance(s) to influence or affect the defendant's ability to drive the motor vehicle.

INSTRUCTION NO.

In order for the defendant to be guilty of Carrying a Concealed Weapon, the state must prove each of the following:

1. On or about the 14th day of March, 2009,
2. in the state of Idaho,
3. the defendant Michael I. Kramer
4. carried a pistol
5. which was concealed on or about the defendant's person,
6. the defendant did not have a license to carry a concealed weapon, and
7. the defendant was in a motor vehicle
8. which was inside the limits or confines of a city.

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.

A pistol or revolver, whether loaded or unloaded, is not concealed in a motor vehicle if it is located in plain view.

A firearm may be concealed legally in a motor vehicle so long as it is disassembled or unloaded.

Certificate of Service

I, Leah M. Holbert, hereby certify that on March 10, 2010, I caused a true and correct copy of the foregoing Proposed Jury Instructions to be forwarded with all of the required charges prepaid by the method indicated below.

Leah Holbert

Leah M. Holbert

PHELPS & ASSOCIATES, PS

Kootenai County District Court

P.O. Box 9000

324 West Garden

Coeur d'Alene, ID 83816-9000

 Hand Delivery U.S. Mail X Facsimile Overnight Mail

Kootenai County Prosecutor

501 Government Way

P.O. Box 9000

Coeur d'Alene, ID 83816-9000

 Hand Delivery U.S. Mail X Facsimile Overnight Mail

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83816-1800
Phone: (208) 446-1800
Facsimile: (208) 446-1833

2010 MAR 11 AM 9:12

CLERK DISTRICT COURT

DEPUTY

Assigned Attorney
AMY NIXON

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.
MICHAEL KRAMER,
Defendant.

Case No. CR-M09-5447

PLAINTIFF'S SUPPLEMENTAL
RESPONSE REGARDING EXPERT
WITNESS

COMES NOW, Amy Nixon, Deputy Prosecuting Attorney for Kootenai County, and
hereby submits the following Supplemental Response to Discovery Regarding Expert Witness.

This supplemental response is made pursuant to defense counsel's indication at the trial conference on Monday, March 8, that he believes an additional fifteen minute waiting period would have been required after the Defendant's first invalid breath test. Following the first invalid result and termination of the test, Corporal Sean Lind offered the Defendant a second breath test which resulted in a sample of .174/.157. Although this issue has not been raised in a motion to suppress nor a motion in limine, should this issue arise at trial, the State intends to call the following expert witness.

1. Jeremy Johnston, Idaho State Police, Forensic Scientist

055

28

- a. **OPINION SUMMARY:** Mr. Johnston will testify that a second fifteen minute waiting period was not required after the Defendant's first test resulted in an invalid sample and termination of the test. Mr. Johnston will further testify that the breath testing procedures followed by Corporal Sean Lind complied with all required standards, and that the breath test result of .174/.157 is an accurate measure of the Defendant's breath alcohol content.
- b. **FACTS/DATA SUPPORTING OPINION:** Mr. Johnston is a breath testing specialist and is familiar with the Idaho State Police Standard Operating Procedures regarding breath tests. He will explain the scientific basis for the fifteen minute wait period; additionally, he will describe why an additional fifteen minute waiting period would not be required when suspected mouth alcohol was not the reason for the invalid sample and termination of the test. Here, because mouth alcohol was not the basis for termination of the first test, Mr. Johnston will explain the scientific basis of why the test results are still reliable.
- c. **QUALIFICATIONS:** See attached Curriculum Vitae.

DATED this 10th day of MARCH, 2010.

AMY NIXON

AMY NIXON

Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that, on the 11 day of MARCH, 2010 I caused the foregoing to be transmitted as followed:

Doug Phelps
509-921-0802

[Signature]

Curriculum Vitae**Name:** Jeremy T. Johnston**Position:** Forensic Scientist II**Education:** B.S. Natural Science, Lewis and Clark College, 1995M.S. Forensic Science, Virginia Commonwealth University, Richmond
VA, 1999Drug Chemistry, Virginia Institute of Forensic Science and Medicine,
Richmond VA, 2001**Additional Study:** Forensic Chemist Seminar, Drug Enforcement Administration, Chantilly
VA, February 2001

Crime Scene Technology 1 & 2, Coeur d' Alene ID, August 2003

Robert F. Borkenstein Course on Alcohol and Highway Safety: Testing,
Research and Litigation, University of Indiana, May 2004

ISP DRE Academy, January 2006

Intoxilizer Workgroup Meeting, August 2006

Intoxilizer Maintenance, CMI, Owensboro KY, April 2008

**Professional
Experience:** July 2003-present: Forensic Scientist II, Region 1 Laboratory,
Idaho State Police, Coeur d' Alene, ID.July 2000-July 2003: Forensic Scientist, Eastern Laboratory, Virginia
Division of Forensic Science, Norfolk, VA.March 1999-June 2000: Laboratory Technician Sr., Central Laboratory,
Virginia Division of Forensic Science, Richmond, VA.August 1995-August 1998: Senior Laboratory Assistant, Oregon Health
Sciences University, Portland, OR.**Professional
Organizations:**

Alpha Phi Sigma National Criminal Justice Honor Society, 1999

American Board of Criminalistics – Fellow

Northwest Association of Forensic Scientists member

Clandestine Laboratory Investigating Chemist member

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

BARRY McHUGH
Prosecuting Attorney
501 Government Way/ Box 9000
Coeur d'Alene, ID 83816
Telephone: (208) 446-1800
Facsimile: (208) 446-1833

2010 MAR 11 AM 9:11

CLERK DISTRICT COURT

DEPUTY

97

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.
MICHAEL KRAMER,
Defendant.

Case No. CR- 09-5447

**SUPPLEMENTAL WITNESS
LIST**

The Plaintiff may call the following witnesses at trial, although not necessarily in the same order as listed.

1. Corporal Sean Lind, Idaho State Police, (208) 772-6055
2. Jeremy Johnston, Idaho State Police, (208) 209-8700. *See attached.*

DATED this 10th day of March, 2010

AMY NIXON
AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 17 day of March, 2010, a true and correct copy of the foregoing was mailed, faxed, and/or hand-delivered to:

Doug Phelps

Via Fax: (509) 921-0802



PHELPS & ASSOCIATES, PS
Attorneys at Law
2903 N. Stout Road
Spokane, WA 99206
Phone: (509) 892-0467
Fax: (509) 921-0802

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2010 MAR 11 AM 11:06

CLERK DISTRICT COURT
DEPUTY
[Signature]

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.	)	Case No. CR-09-5447
)	
MICHAEL I. KRAMER	)	DEFENDANT'S EXHIBIT
Defendant	)	LIST
)	

COMES NOW the above named defendant, MICHAEL I. KRAMER, by and
through his attorney of record, PHELPS & ASSOCIATES, PS, and provides the
following exhibits:

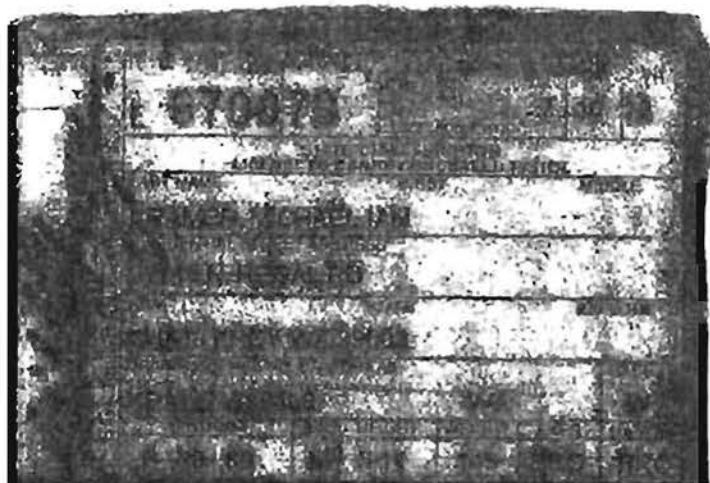
- 1: State of Washington - License to Carry Concealed Pistol
- 2: Concealed Pistol License - 07/10/02
- 3: Concealed Pistol License - 4/23/07

SUBMITTED this 11th day of March, 2010

[Signature]
DOUGLAS D. PHELPS

904

EXHIBIT 1



062



EXHIBIT 2

CONCEALED PISTOL LICENSE

- ☒ Original License fee-\$36.00 (5 years)
☐ Renewal License fee-\$32.00 (5 years)
☐ Late renewal & late penalty fee-\$42.00
☐ Replacement fee-\$10.00
☒ FBI fingerprint fee-\$24.00

FOR VALIDATION ONLY

\$60.00

DATE THIS APPLICATION INITIATED 06 10 02

CHK

LICENSE ISSUE DATE 07 10 02

0027

HOUR 1525

TIME 061002 0027

NOTE TO LICENSEE:
WHENEVER CARRYING A CONCEALED PISTOL, THIS WALLET-SIZE LICENSE
MUST BE CARRIED AND EXHIBITED TO ANY PROPER AUTHORITY UPON
DEMAND.

(PLEASE PRINT OR USE TYPEWRITER)

NOTE ANY DISTINGUISHING MARKS WHICH WILL AID IN IDENTIFICATION OF APPLICANT

(TYPE)

(LOCATION)

☐ PREVIOUS LICENSE NUMBER _____ EXP. DATE _____

 NAME LISTED ON _____ DATE OF BIRTH ON _____
 PREVIOUS LICENSE _____ PREVIOUS LICENSE _____

CAUTION: IF APPLICANT INTENDS TO APPLY FOR A RENEWAL, IT MUST BE DONE WITHIN 90 DAYS PRIOR TO THE EXPIRATION DATE OF A VALID LICENSE. RENEWAL APPLICATIONS MAY BE SUBMITTED WITHIN 1 TO 90 DAYS AFTER EXPIRATION, BUT A LATE FEE WILL BE ASSESSED. AFTER 90 DAYS, THE APPLICANT THEN BECOMES AN ORIGINAL APPLICATION. ALL RENEWALS BECOME EFFECTIVE AS OF THE EXPIRATION DATE OF THE PREVIOUS LICENSE.

U.S. CITIZEN _____ PLACE OF BIRTH _____

☒ YES _____ MINNEAPOLIS, MN

☐ NO _____ (CITY) _____ (STATE)

ALIEN FIREARMS LICENSE NUMBER _____ EXP. DATE _____

Local laws and ordinances on firearms are pre-empted by state laws and must be consistent with state law.

CAUTION: Although state and local laws do not differ, federal law and state law on the possession of firearms differ. If you are prohibited by federal law from possessing a firearm, you may be prosecuted in federal court. A state license is not a defense to a federal prosecution.

LICENSING AUTHORITY — HAVE APPLICANT READ AND SIGN THE FOLLOWING:

I certify that I am not ineligible to possess a pistol under RCW 9.41.040 or RCW 9.41.045, and that (1) I have not been convicted in this state or elsewhere of a) any felony offense, b) any domestic violence offense as described in RCW 9.41.040 committed on or after July 1, 1993; (2) I have not been convicted of three violations of chapter 9A.41 RCW within five (5) calendar years; (3) I have not been involuntarily committed for mental health treatment pursuant to RCW 71.05.320, 71.34.090, 10.77 or equivalent statute in another jurisdiction, unless my right to possess a firearm has been restored by a court pursuant to RCW 9.41.040(4); (4) I am not under twenty one years of age; (5) I am not subject to a court order or injunction regarding firearms possession; (6) I am not free on bond or personal recognizance pending trial, appeal, or sentencing for a felony offense; (7) I do not have an outstanding warrant for my arrest from any court of competent jurisdiction for a felony or misdemeanor; (8) I have not been ordered to forfeit a firearm under RCW 9.41.098(1)(e) within one (1) year prior to applying for this concealed pistol license; (9) and my concealed pistol license, if any, is not in a revoked status. I understand that by signing this license I am waiving confidentiality and requesting that the department of social and health services, mental health institutions and other health care facilities release information relevant to my eligibility to purchase a pistol to a court or law enforcement agency. I certify under penalty of perjury, and subject to the criminal penalties set out in RCW 9A.72.040 that the statements and other information set forth in this license are true and correct.

LICENSEE'S SIGNATURE

DISTRIBUTION OF COPIES: ORIGINAL (WHITE)
DUPLICATE (GREEN)

— TO LICENSEE

— SEND, WITHIN 7 DAYS OF ISSUANCE, WITH REMITTANCE VIA MAIL,

TO DEPARTMENT OF LICENSING, FIREARMS SECTION, P.O. BOX 9649, OLYMPIA, WASHINGTON 98507-9649

TRIPPLICATE (GOLDENROD)

TO BE DEPOSITED FOR SIX YEARS BY THE AUTHORITY OF ISSUE

065

E 372109

EXHIBIT 3



STATE OF WASHINGTON CONCEALED PISTOL LICENSE

FOR VALIDATION ONLY

\$32.00

- ☐ Original License fee - \$36.00 (5 years)
☒ Renewal License fee - \$32.00 (5 years)
☐ Late renewal & late penalty fee - \$42.00
☐ Replacement fee - \$10.00
☐ FBI fingerprint fee - \$24.00

NOTE TO LICENSEE:
WHENEVER CARRYING A CONCEALED PISTOL, THIS
WALLET-SIZE LICENSE MUST BE CARRIED AND
EXHIBITED TO ANY PROPER AUTHORITY UPON DEMAND.
(PLEASE USE TYPEWRITER)

DATE THIS APPLICATION INITIATED 4/23/2007

CHECK

LICENSE ISSUE DATE 4/23/2007

0025

HOUR 1:33:37 PM

TIME 042307 0025

NOTE ANY DISTINGUISHING MARKS WHICH WILL AID IN IDENTIFICATION OF APPLICANT (TYPE) (LOCATION)

☒ PREVIOUS LICENSE NUMBER E372109 EXP. DATE 7/10/07

NAME LISTED ON PREVIOUS LICENSE KRAMER MICHAEL IAN DATE OF BIRTH ON PREVIOUS LICENSE 01/01/68

CAUTION: IF YOU INTEND TO APPLY FOR A RENEWAL, IT MUST BE DONE WITHIN 90 DAYS PRIOR TO THE EXPIRATION DATE OF YOUR VALID LICENSE. RENEWAL APPLICATIONS MAY BE SUBMITTED FROM 1 TO 90 DAYS AFTER EXPIRATION, BUT A LATE FEE WILL BE CHARGED. AFTER 90 DAYS, YOUR APPLICATION BECOMES AN ORIGINAL APPLICATION. ALL RENEWALS ARE EFFECTIVE AS OF THE EXPIRATION DATE OF THE PREVIOUS LICENSE.

U.S. CITIZEN PLACE OF BIRTH

☒ YES
☐ NO (CITY) MINNEAPOLIS (STATE) MIN

ALIEN FIREARMS LICENSE NO. EXPIRATION DATE

Local laws and ordinances on firearms are pre-empted by state laws and must be consistent with state law.

CAUTION: Although state and local laws do not differ, federal law and state law on the possession of firearms differ. If you are prohibited by federal law from possessing a firearm, you may be prosecuted in federal court. A state license is not a defense to a federal prosecution.

LICENSING AUTHORITY - HAVE APPLICANT READ AND SIGN THE FOLLOWING:

I certify that I am not ineligible to possess a pistol under RCW 9.41.040 or RCW 9.41.045, and that (1) I have not been convicted in this state or elsewhere of a) any felony offense, b) any domestic violence offense as described in RCW 9.41.040 committed on or after July 1, 1993; (2) I have not been convicted of three violations of RCW 9.41 within five calendar years; (3) I have not been involuntarily committed for mental health treatment under RCW 71.05.320, RCW 71.34.090, RCW 10.77, or equivalent statute in another jurisdiction, unless my right to possess firearms has been restored by a court under RCW 9.41.040(4); (4) I am not under twenty-one years of age; (5) I am not subject to a court order or injunction regarding firearms possession; (6) I am not free on bond or personal recognizance pending trial, appeal, or sentencing for a felony offense; (7) I do not have an outstanding warrant for my arrest from any court of competent jurisdiction for a felony or misdemeanor; (8) I have not been ordered to forfeit a firearm under RCW 9.41.098(1)(e) within one year prior to applying for this concealed pistol license; (9) and my concealed pistol license, if any, is not in a revoked status. I understand that by signing this license I am waiving confidentiality and requesting that the department of social and health services, mental health institutions and other health care facilities release information relevant to my eligibility to purchase a pistol to a court or law enforcement agency. I certify under penalty of perjury, and subject to the criminal penalties described in RCW 9A.72.040 that the statements and other information provided in this license are true and correct.

LICENSEE'S SIGNATURE

DISTRIBUTION OF COPIES: ORIGINAL (WHITE) -
DUPLICATE (GREEN) -

TO LICENSEE

SEND, WITHIN 7 DAYS OF ISSUANCE, WITH REMITTANCE VIA MAIL, TO
DEPT. OF LICENSING, P.O. BOX 8048, OLYMPIA, WA 98507-9048
TRIPPLICATE (YELLOW) - TO BE PRESERVED FOR SIX YEARS BY THE AUTHORITY OF ISSUE

The Department of Licensing has a policy of providing equal access to its services. If you need special accommodation, please call (360) 664-6616 or TTY (360) 664-8885.

067

6/08/79

Certificate of Service

I, Leah M. Holbert, hereby certify that on March 11, 2010, I caused a true and correct copy of the foregoing Exhibit List to be forwarded with all of the required charges prepaid by the method indicated below.

Leah Holbert

Leah M. Holbert

PHELPS & ASSOCIATES, PS

Kootenai County District Court

P.O. Box 9000

324 West Garden

Coeur d'Alene, ID 83816-9000

 Hand Delivery U.S. Mail X Facsimile Overnight Mail

Kootenai County Prosecutor

501 Government Way

P.O. Box 9000

Coeur d'Alene, ID 83816-9000

 Hand Delivery U.S. Mail X Facsimile Overnight Mail

BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83816-1800
Phone: (208) 446-1800
Fax: (208) 446-1833

Assigned Attorney:
AMY NIXON

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2010 MAR 11 AM 11:53

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,

vs.

MICHAEL I. KRAMER,
Defendant.

Case No. CR-M09-5447

**PLAINTIFF'S REQUESTED
JURY INSTRUCTIONS**

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

DATED this 17th day of March, 2010

BARRY McHUGH
Prosecuting Attorney for
Kootenai County, Idaho

[Signature]
AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of March, 2010, a true and correct copy of the foregoing was mailed, faxed, and/or hand-delivered to:

Douglas D. Phelps
Fax: (509) 921-0802

nsp

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.

MICHAEL I. KRAMER,
Defendant.

CASE NO. CR-M09-5447

VERDICT

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

(CHOOSE ONE ONLY)

_____ GUILTY

_____ NOT GUILTY

OF POSSESSION OF A CONCEALED WEAPON WHILE UNDER THE INFLUENCE
OF ALCOHOL.

DATED the _____ day of _____, 2010.

PRESIDING OFFICER

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.

MICHAEL I. KRAMER,
Defendant.

CASE NO. CR-M09-5447

VERDICT

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

(CHOOSE ONE ONLY)

_____ GUILTY

_____ NOT GUILTY

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

DATED the _____ day of _____, 2010.

PRESIDING OFFICER

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.

MICHAEL I. KRAMER,
Defendant.

CASE NO. CR-M09-5447

VERDICT

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

(CHOOSE ONE ONLY)

_____ GUILTY

_____ NOT GUILTY

OF TRANSPORTING AN OPENED CONTAINER OF ALCOHOL IN A MOTOR
VEHICLE.

DATED the _____ day of _____, 2010.

PRESIDING OFFICER

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 1

YOU ARE INSTRUCTED that the defendant, MICHAEL IAN KRAMER, is charged in Count I with the crime of Operating a Motor Vehicle While Under the Influence of Alcohol and/or Drugs, alleged to have been committed as follows: that the defendant, MICHAEL IAN KRAMER, on or about the 14th day of March, 2009, in the County of Kootenai, State of Idaho, did drive or was in actual physical control of a motor vehicle, on or at a street, highway, intersection or other place open to the public, while under the influence of alcohol and/or drugs or, in the alternative, did drive or was in actual physical control of a motor vehicle, with an alcohol concentration of .08 or more, to-wit: .174/.157, as shown by an analysis of his breath. To this charge the defendant has pled not guilty.

Given:
Refused:
Modified:
Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that the defendant, MICHAEL IAN KRAMER, is charged in Count I with the crime of Operating a Motor Vehicle While Under the Influence of Alcohol and/or Drugs, alleged to have been committed as follows: that the defendant, MICHAEL IAN KRAMER, on or about the 14th day of March, 2009, in the County of Kootenai, State of Idaho, did drive or was in actual physical control of a motor vehicle, on or at a street, highway, intersection or other place open to the public, while under the influence of alcohol and/or drugs or, in the alternative, did drive or was in actual physical control of a motor vehicle, with an alcohol concentration of .08 or more, to-wit: .174/.157, as shown by an analysis of his breath. To this charge the defendant has pled not guilty.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 2

YOU ARE INSTRUCTED that the defendant, MICHAEL IAN KRAMER, is charged in Count II with the crime of Possession of a Concealed Weapon While Under the Influence of Alcohol, alleged to have been committed as follows: that the defendant, MICHAEL IAN KRAMER, on or about the 14th day of March, 2009, in Kootenai County, Idaho, did carry a concealed weapon, to-wit: a .40 caliber pistol on or about his person while intoxicated and/or under the influence of an intoxicating drink or drug. To this charge the defendant has pled not guilty.

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that the defendant, MICHAEL IAN KRAMER, is charged in Count II with the crime of Possession of a Concealed Weapon While Under the Influence of Alcohol, alleged to have been committed as follows: that the defendant, MICHAEL IAN KRAMER, on or about the 14th day of March, 2009, in Kootenai County, Idaho, did carry a concealed weapon, to-wit: a .40 caliber pistol on or about his person while intoxicated and/or under the influence of an intoxicating drink or drug. To this charge the defendant has pled not guilty.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 3

YOU ARE INSTRUCTED that the defendant, MICHAEL IAN KRAMER, is charged in Count III with the crime of Transporting an Opened Container of Alcohol in a Motor Vehicle, alleged to have been committed as follows: that the defendant, MICHAEL IAN KRAMER, on or about the 14th day of March, 2009, in Kootenai County, Idaho, did willfully and unlawfully transport an opened and/or unsealed container of alcohol in a motor vehicle. To this charge the defendant has pled not guilty.

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that the defendant, MICHAEL IAN KRAMER, is charged in Count III with the crime of Transporting an Opened Container of Alcohol in a Motor Vehicle, alleged to have been committed as follows: that the defendant, MICHAEL IAN KRAMER, on or about the 14th day of March, 2009, in Kootenai County, Idaho, did willfully and unlawfully transport an opened and/or unsealed container of alcohol in a motor vehicle. To this charge the defendant has pled not guilty.

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 4

YOU ARE INSTRUCTED that for the defendant to be guilty of Operating a Motor Vehicle While Under the Influence, the State must prove each of the following:

1. On or about the 14th day of March, 2009;
2. in the state of Idaho;
3. the defendant, MICHAEL IAN KRAMER,
4. drove and/or was in actual physical control of;
5. a motor vehicle;
6. upon a highway, street or bridge or upon public or private property open to the public;
7. while under the influence of alcohol and/or drugs, and/or while having an alcohol concentration of 0.08 or more as shown by analysis of the defendant's breath.

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, you must find the defendant guilty.

Citation: ICJI 1000 [Modified]

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that for the defendant to be guilty of Operating a Motor Vehicle While Under the Influence, the State must prove each of the following:

1. On or about the 14th day of March, 2009;
2. in the state of Idaho;
3. the defendant, MICHAEL IAN KRAMER,
4. drove and/or was in actual physical control of;
5. a motor vehicle;
6. upon a highway, street or bridge or upon public or private property open to the public;
7. while under the influence of alcohol and/or drugs, and/or while having an alcohol concentration of 0.08 or more as shown by analysis of the defendant's breath.

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, you must find the defendant guilty.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 5

YOU ARE INSTRUCTED that "it is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08, as shown by analysis of his blood, ~~urine~~, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public."

Citation: Idaho Code §18-8004(1)(a)

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that it is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, or who has an alcohol concentration of 0.08, as shown by analysis of his breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 6

"Actual physical control" shall be defined as being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving.

Citation: Idaho Code §18-8004(6)

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

"Actual physical control" shall be defined as being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 7

The term "highway" means the same as "street" and includes public roads, alleys, bridges and adjacent sidewalks and rights-of-way.

ICJI 1021

Given:
Refused:
Modified:
Covered:

JUDGE

INSTRUCTION NO. _____

The term "highway" means the same as "street" and includes public roads, alleys, bridges and adjacent sidewalks and rights-of-way.

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 8

To prove that someone was under the influence of alcohol and/or drugs, 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 and had used enough of any drug or intoxicating substance to influence or affect the defendant's ability to drive the motor vehicle.

ICJI 1006 (Modified)

Given:
Refused:
Modified:
Covered:

JUDGE

INSTRUCTION NO. _____

To prove that someone was under the influence of alcohol and/or drugs, 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 and had used enough of any drug or intoxicating substance to influence or affect the defendant's ability to drive the motor vehicle.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 9

"It is not necessary for the state to prove that the driver could not drive safely or prudently, but only that [his or] her ability to drive was impaired by the influence of alcohol."

State v. Bronnenberg, 124 Idaho 67, 70, 856 P.2d 104 (Ct. App. 1993)

Given:
Refused:
Modified:
Covered:

JUDGE

INSTRUCTION NO. _____

It is not necessary for the state to prove that the driver could not drive safely or prudently, but only that his or her ability to drive was impaired by the influence of alcohol.

PLAINTIFF'S REQUESTED
INSTRUCTION NO. 10

YOU ARE INSTRUCTED that for the defendant to be guilty of Possession of a Concealed Weapon While Under the Influence of Alcohol, the State must prove each of the following:

1. On or about the 14th day of March, 2009;
2. in the state of Idaho;
3. the defendant, MICHAEL IAN KRAMER,
4. while intoxicated and/or under the influence of an intoxicating drink or drug;
5. carried a firearm;
6. which was concealed on or about the defendant's person.

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, you must find the defendant guilty.

Citation: ICJI 1406 [Modified]; Idaho Code 18-3302B

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that for the defendant to be guilty of Possession of a Concealed Weapon While Under the Influence of Alcohol, the State must prove each of the following:

1. On or about the 14th day of March, 2009;
2. in the state of Idaho;
3. the defendant, MICHAEL IAN KRAMER,
4. while intoxicated and/or under the influence of an intoxicating drink or drug;
5. carried a firearm;
6. which was concealed on or about the defendant's person.

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, you must find the defendant guilty.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 11

YOU ARE INSTRUCTED that "[i]t [is] ~~shall be~~ unlawful for any person to carry a concealed weapon on or about his person when intoxicated or under the influence of an intoxicating drink or drug."

Citation: Idaho Code §18-3302B

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that it is unlawful for any person to carry a concealed weapon on or about his person when intoxicated or under the influence of an intoxicating drink or drug.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 12

YOU ARE INSTRUCTED that the term "firearm" means any weapon from which a shot, projectile or other object may be discharged by force of combustion, explosive, gas or mechanical means, whether operable or inoperable.

Citation: ICJI 1402

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that the term "firearm" means any weapon from which a shot, projectile or other object may be discharged by force of combustion, explosive, gas or mechanical means, whether operable or inoperable.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 13

YOU ARE INSTRUCTED that "[w]ith regard to the crime of carrying a concealed weapon, one can violate the law not only when a weapon is carried on or about his or her person, but also when he or she goes about with the weapon in such close physical proximity that it is readily accessible at a moment's notice." *State v. Burton*, 136 Idaho 526, 528, 37 P.3d 23, 25 (Ct. App. 2001).

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that with regard to the crime of carrying a concealed weapon, one can violate the law not only when a weapon is carried on or about his or her person, but also when he or she goes about with the weapon in such close physical proximity that it is readily accessible at a moment's notice.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 14

YOU ARE INSTRUCTED that for the defendant to be guilty of Transporting an Opened Container of Alcohol in a Motor Vehicle, the State must prove each of the following:

1. On or about the 14th day of March, 2009;
2. in the state of Idaho;
3. the defendant, MICHAEL IAN KRAMER,
4. either:
 - a. broke open and/or allowed to be broken or opened any container of alcoholic liquor, and/or
 - b. drank and/or used and/or allowed to be drunk and/or used any alcoholic liquor;
5. while the same was being transported in a motor vehicle.

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, you must find the defendant guilty.

Citation: Idaho Code 23-505 [Modified]

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that for the defendant to be guilty of Transporting an Opened Container of Alcohol in a Motor Vehicle, the State must prove each of the following:

1. On or about the 14th day of March, 2009;
2. in the state of Idaho;
3. the defendant, MICHAEL IAN KRAMER,
4. either:
 - a. broke open and/or allowed to be broken or opened any container of alcoholic liquor, and/or
 - b. drank and/or used and/or allowed to be drunk and/or used any alcoholic liquor;
5. while the same was being transported in a motor vehicle.

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, you must find the defendant guilty.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 15

YOU ARE INSTRUCTED that "alcoholic liquor" includes the following:

- (1) alcohol, meaning the product of distillation of any fermented liquor, rectified either once or oftener, whatever may be the origin thereof, or synthetic ethyl alcohol;
- (2) spirits, meaning any beverage which contains alcohol obtained by distillation mixed with drinkable water and other substances in solution, including, among other things, brandy, rum, whiskey, and gin;
- (3) wine, meaning any alcoholic beverage obtained by the fermentation of the natural sugar content of fruits (grapes, apples, etc.) or other agricultural products containing sugar (honey, milk, etc.); and
- (4) any liquid or solid, patented or not, containing alcohol, spirits, or wine, and susceptible of being consumed by a human being, for beverage purposes, and containing more than 4 per cent of alcohol by weight.

Citation: ICJI 1251; Idaho Code 23-105

Given:
Refused:
Modified:
Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that "Alcoholic liquor" includes the following:

- (1) alcohol, meaning the product of distillation of any fermented liquor, rectified either once or oftener, whatever may be the origin thereof, or synthetic ethyl alcohol;
- (2) spirits, meaning any beverage which contains alcohol obtained by distillation mixed with drinkable water and other substances in solution, including, among other things, brandy, rum, whiskey, and gin;
- (3) wine, meaning any alcoholic beverage obtained by the fermentation of the natural sugar content of fruits (grapes, apples, etc.) or other agricultural products containing sugar (honey, milk, etc.); and
- (4) any liquid or solid, patented or not, containing alcohol, spirits, or wine, and susceptible of being consumed by a human being, for beverage purposes, and containing more than 4 per cent of alcohol by weight.

PLAINTIFF'S REQUESTED

INSTRUCTION NO. 16

YOU ARE INSTRUCTED that an act is "willful" or done "willfully" when done on purpose. One can act willfully without intending to violate the law, to injure another, or to acquire any advantage.

Citation: ICJI 340

Given:

Refused:

Modified:

Covered:

JUDGE

INSTRUCTION NO. _____

YOU ARE INSTRUCTED that an act is "willful" or done "willfully" when done on purpose. One can act willfully without intending to violate the law, to injure another, or to acquire any advantage.

ORIGINAL

BARRY McHUGH
Prosecuting Attorney
501 Government Way/ Box 9000
Coeur d'Alene, ID 83816
Telephone: (208) 446-1800
Facsimile: (208) 446-1833

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

Preson
2010 MAR 11 PM 3:24
trial p. 12
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,
vs.
MICHAEL KRAMER,
Defendant.

Case No. CR- 09-5447

MOTION IN LIMINE

COMES NOW, AMY NIXON, Deputy Prosecuting Attorney for Kootenai County, and hereby moves this Honorable Court for its Order precluding the defense in this matter from arguing to the jury that a second fifteen minute waiting period would have been required before administering the second breath test. This motion is based on the grounds that the proper method to address this issue would have been a motion in limine noticed up by the Defendant before trial to allow the State to present evidence that a second fifteen minute waiting period was not required. By allowing the Defendant to argue to the jury that the breath test is somehow unreliable based on this theory, the State would be unfairly prejudiced. Moreover, allowing such evidence is likely to confuse and mislead the jury.

In the alternative, should the court allow such issue to be presented to the jury, the State moves for the admissibility of the expert testimony of Jeremy Johnston, a forensic scientist with

the Idaho State Police, to explain the scientific reliability of the test under this factual scenario.

This Motion is therefore based on I.R.E. 401, 402, and 403.

DATED this 11th day of March, 2010

Amy Nixon
AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of March, 2010, a true and correct copy of the foregoing was mailed, faxed, and/or hand-delivered to:

Doug Phelps
Via Fax: (509) 921-0802

W

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2010 MAR 11 PM 2:24

CLERK DISTRICT COURT
DEPUTY
[Signature]

BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83816-1800
Phone: (208) 446-1800
Fax: (208) 446-1833

Assigned Attorney:
AMY NIXON

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.
MICHAEL I. KRAMER
Defendant.

Case No. CR-M09-5447

**PLAINTIFF'S SUPPLEMENTAL
RESPONSE TO DISCOVERY**

COMES NOW, BARRY McHUGH, Prosecuting Attorney for Kootenai County, Idaho,
and submits the following Supplemental Response to Request for Discovery.

The State has complied with Defendant's request by furnishing the following additional
evidence and materials:

1. Certification Packet from Kootenai County Sheriff's Department, (7 pages)

If you have not received any of the foregoing copies, please contact this office
immediately.

Pursuant to Idaho Criminal Rule 16, the Prosecuting Attorney further informs the
defendant that you are permitted to inspect and copy or photograph books, paper, documents,
photographs, tangible objects, building, or places, or copies or portions thereof, which are

material to the preparation of the defense, or intended for use by the prosecutor as evidence at trial, or obtained from or belonging to the defendant.

The Prosecuting Attorney further informs the defendant that you are permitted to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the prosecuting attorney, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.

DATED this 11th day of March, 2010.

AMY NIXON
AMY NIXON
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that, on the 11 day of March, 2010, I caused the foregoing to be transmitted as followed:

Douglas D. Phelps
Fax: (509) 921-0802

nsp



ROCKY WATSON, SHERIFF
TAD LEACH, UNDERSHERIFF

KOOTENAI COUNTY SHERIFF'S DEPARTMENT

March 8, 2010

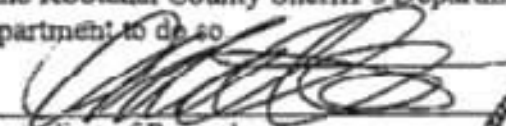
Kootenai County Prosecutor
501 Government Way
Coeur d'Alene, ID 83814

To Whom It May Concern:

Regarding the following document(s):

Operations Log for Instrument Number 68-013328 for the month of March 2009.
Certificate of Calibration for 68-013328
Instrument Certificate for 68-013328
Solution Certificates for 7109 and 7804

I, Linda J. Mattos, hereby swear under oath and certify under penalty of perjury, under the laws of the State of Idaho, that I am the custodian of records for the Kootenai County Idaho Sheriff's Department. I further certify that the foregoing list of documents, copies of which are attached hereto, are true, correct, exact, complete and unaltered photocopies of the original documents as the same appears in the files and records of this office. Said documents were made and retained at or near the time of the occurrence of the matters set forth therein, by persons with knowledge of those matters. These documents are kept in the course of regularly conducted business for the Kootenai County Sheriff's Department and it is the regular practice of the Sheriff's Department to do so.


Custodian of Records



State of Idaho)
) ss
County of Kootenai)

Subscribed and sworn before me this 9 day of March, 2010.
Signed by: Jennifer Cox
My Commission Expires: August 3, 2015

110

The Idaho State Police

Certifies that

Instrument Serial No. 68-013328

is approved for the performance of Forensic Alcohol Testing as per Idaho Code 18-18004(4) and the Idaho State Police Rules and Regulations.

Feb. 14, 2006

Date Certified



Forensic Services Commander

Kootenai Co SO/IZ 5000

Instrument / Agency

CERTIFICATE OF CALIBRATION

This is to certify that the calibration of INTOXILYZER serial number
08-013328, manufactured by CMI, subsidiary of MPD,
Inc. of Owensboro, Kentucky, was tested and found to be in compliance with
the National Highway Traffic Safety Administration Standard for Devices
to Measure Breath Alcohol (F.R., No. 179 48705-48710 Sept. 17, 1993).
Calibration solutions are traceable to NIST (NBS) standard material 1828.

Date 2/1/06

Signed Deb Schafeld
Technician

CMI

315 EAST 9TH STREET
OWENSBORO, KY 42303

CMI-204 Rev 5/1/95



Idaho State Police Forensic Services

CERTIFICATE OF ANALYSIS

The Department of Law Enforcement Idaho State Police Forensic Services hereby certifies that Simulator Solution Lot Number 0000007109 to be used to conduct calibration checks within the State of Idaho in accordance with the policies and/or procedures promulgated by the Department governing breath alcohol examinations. This lot has a target value of 0.206 with a range of 0.186 to 0.226 grams of ethyl alcohol/210 liters of vapor.

The expiration date for this lot number is April 3, 2009 at 11:59 PM.

December 19, 2007
Date

David A. Lanyon
Forensic Scientist

STATE OF IDAHO)
County of Ada) ss.

On this 19th of December, in the year 2007, before me, Jane Davenport, a notary public, personally appeared David A. Laycock, known to me to be the person whose name is subscribed to the within instrument as a Forensic Scientist for the Idaho State Police Forensic Services, and acknowledge to me that he executed the same as such Scientist.

James Brown Notary Public

My Commission Expires: 5/13/13





Idaho State Police Forensic Services

CERTIFICATE OF ANALYSIS

The Department of Law Enforcement Idaho State Police Forensic Services hereby certifies that Simulator Solution Lot Number 0000007804 to be used to conduct calibration checks within the State of Idaho in accordance with the policies and/or procedures promulgated by the Department governing breath alcohol examinations. This lot has a target value of 0.081 with a range of 0.073 to 0.089 grams of ethyl alcohol/210 liters of vapor.

The expiration date for this lot number is April 15, 2009 at 11:59 PM.

December 19, 2007
Date

David A. Hagedorn
Forensic Scientist

STATE OF IDAHO)
County of Ada) ss.

On this 19th of December, in the year 2007, before me, Jane Davenport, a notary public, personally appeared David A. Laycock, known to me to be the person whose name is subscribed to the within instrument as a Forensic Scientist for the Idaho State Police Forensic Services, and acknowledge to me that he executed the same as such Scientist.

Andrew J. West Notary Public

My Commission Expires: 5/31/13



INSTRUMENT OPERATIONS LOG

.08 SOLUTION LOT # 07804

BOTTLE # 0472

.20 SOLUTION LOT# 07109

BOTTLE # 0535

LOCATION: KCPSB

INSTRUMENT SERIAL NUMBER 68-013328

DATE	TIME	SUBJECT'S NAME	SUBJECT'S TEST RESULTS	OPERATOR'S NAME	AGENCY	CALIBRATION CHECK	SIM TEMP RANGE ()	REASON FOR TEST
3-2-09	0911	Cal. Check .20	N/A	Holecek, John	KCSO	.205/.208	✓	Changed Solution
3-2-09	0930	Cal. Check .08	N/A	Holecek, John	KCSO	.085/.085	✓	Changed Solution
3-3-09	0145	DUKE, NICOLE A	.117/.127	Dep. S. Ellis #2523	KCSO	.082	✓	A P P
3-4-09	1000	Madrigal, Dasha M.	N/A .000	L. ACOSTA K1139	PFPP	.085	✓	DUI
3-7-09	0244	BRUEHER, ANTHONY J	.103/.090	DEP DYER 2348	KCSO	.086	✓	P + P
3-13-09	0300	LIEN JORDAN R.	.000/.000	BRUMBACH	CDAPD	.085	✓	P + P
03/13/09	1150	Mitchell, Richard L	.136/.135	T. Sparks K42	CDAPD	.085	✓	DUI
3-13-09	1834	Warren, Gary S	.084/.083	Buhl 20	COA	.084	✓	DUI
3-14-09	0026	Heck, Gary D	.170/.166	Keller 554	CDAPD	.080	✓	DUI
3-14-09	0235	Kramer, Michael I	.174/.151	Kerr	ESP	.086	✓	DUI
03-19-09	2116	ALBERS, LORETTA J	.088/.090	Tim Hanna K48	CDAPD	.082	✓	DUI
03/21/09	1250	Taylor, Allen H	.199 Ambler	T. Sparks K42	CDAPD	.081	✓	P + P (had to use off the P + P machine)
03/27/09	2317	Kon, Jerry	.124/.121	MoAnse K77	COA	.080	✓	DUI 09-0300
03/29/09	0320	Molson, Zachary D	.153/.151	T Kelly	ESP	.082	✓	DUI
03/29/09	0229	Rones, Eugene A	.034/.034	G. Wessel (K21)	CDAPD	.084	✓	DUI
3-30-09	2312	RUPNICK, BENJAMIN	.151/.161	J. Graham	KCSO	.084	✓	DUI
04-01-09	1600	Rogstad, Jesse R	.067/.058/.060	G. Wessel K21	CDAPD	.083	✓	P + P

04-CF 2011 / 11 / 2011 / 0107

100

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A

[illegible]

PHELPS & ASSOCIATES, PS
ATTORNEYS AT LAW
2903 N. Stout Rd.
Spokane, WA 99206-4373
Ph: (509)892-0467; Fax: (509)921-0802

STATE OF IDAHO, 1 SS
COUNTY OF KOOTENAI
FILED 9/12/2019
AT 9:00 O'CLOCK A.M.
CLERK, DISTRICT COURT
DEPUTY

ORIGINAL

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-09-5447
)	
vs.	)	MOTION OBJECTING TO
	)	INTRODUCTION OF
MICHAEL I. KRAMER,	)	BREATH TEST
)	
Defendant.)	
_____)	

I. FACTS

The defendant is before the court on trial for DUI. The state is attempting to lay a foundation to admit the breath results of the evidentiary test which the defendant submitted to. In order to do this, the state has produced certified copies of the operations log and/or an affidavit from an expert about the simulator solution used to test the machine.

II. ISSUE

Would the admission of these documents be in violation of the defendant's Sixth Amendment right to confrontation under the case law of *Crawford v. Washington*, 541 U.S. 36 (2004)?

III. ARGUMENT

The central test as to whether a defendant's right to confrontation is violated is a determination as to whether an out-of-court statement is "testimonial." *Crawford v. Washington*, 541 U.S. 36 (2004).

"Various formulations of this core class of 'testimonial' statements exist: [1] *ex parte* in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial..." *In re Interest of Doe*, 140 Idaho 873 at 878, 103 P.3d 967 (Ct. App. 2004), *quoting Crawford*, 541 U.S. 36 (2004). In order to determine whether or not an objective witness would reasonably believe that the statement would be available for use at a later trial, the court must look to "the content of the statement, the circumstances under which it was made, and the interrogator's purpose in asking questions." *State v. Hooper*, ____ Idaho ____, ____ P.3d ____, (Ct. App. 2006 Opinion No. 55)

Should a piece of evidence be testimonial, the declarant must be subject to cross examination from the defendant or his counsel, otherwise the defendant's right to confront his accuser is violated. *Crawford*, 541 U.S. 36 (2004), *see also Davis v. Washington*, ____ U.S. ____ (2006).

The statements in front of the court today are (1) an affidavit, and (2) the operations log of a machine used for evidentiary testing. The affidavit is a document listed by *name* in both *Crawford* and in *Doe*; it is clearly testimonial.

The operations log is not exactly an affidavit, but the only purpose for an evidentiary testing machine is to produce evidence. Therefore, it stands to reason that the only purpose for creating a log about the operations of an evidentiary testing machine is to prove that the machine was working when it produced evidence. It is no coincidence that this is exactly the purpose for which the operations log is being introduced today. An objective person, looking at the content of the operations log and the circumstances under which the operations log was made, would reasonably believe that the log was being kept for purposes of presenting foundational evidence at trial. Therefore, the operations log is clearly testimonial.

The state does not have available for cross-examination the makers of the operations log, nor do they have the technician who generated the affidavit. In short, the state is unable to provide the makers of these testimonial statements for cross-examination. That being the case, it is clear that *Crawford* requires the exclusion of these statements from evidence.

Respectfully submitted this 10 day of March, 2010



Attorney for Defendant

Court Minutes:

Session: BURTON031210A
Session Date: 03/12/2010
Judge: Burton, Robert
Reporter:

Division: MAG
Session Time: 08:02

Courtroom: Courtroom7

Clerk(s): Darnell, Nicole

State Attorney(s): Nixon, Amy

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Nicole Darnell

Case ID: 0001

Case number: CR2009-5447

Plaintiff:

Plaintiff Attorney:

Defendant: KRAMER, MICHAEL

Pers. Attorney: Phelps, Doug

Co-Defendant(s):

State Attorney: Nixon, Amy

Public Defender:

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

03/12/2010

08:03:57

Recording Started:

08:03:57

Case called

08:04:10

Stop recording

09:09:21

Recording Started:

09:09:21

Record

KRAMER, MICHAEL

09:10:45 **Judge: Burton, Robert**
Explains process of calling Jurors and the pre-emptory challenges.

09:14:23 **Other: Clerk**
Calls Jurors names.

09:15:37 **Judge: Burton, Robert**
Reviews charging instructions w/the potential jurors.

09:18:57 Voir Dire

09:19:13

09:19:22 **State Attorney: Nixon, Amy**
State's Voir Dire

09:27:33 I would like to excuse Juror No 17 for Cause.

09:27:48 **Judge: Burton, Robert**
Can you listen to the witnesses and then follow the law?

09:28:00 **Other: 17, Juror No.**
Yes

09:28:01 **Judge: Burton, Robert**
I will leave her on the panel

09:28:07 **State Attorney: Nixon, Amy**
Continue w/State's Voir Dire

09:36:48 Pass for Cause.

09:43:01 **Add Ins: PHELPS, DOUGLAS**
Defendant's Voir Dire

09:56:08 I would like to excuse Juror No. 8 for Cause.

09:56:43 **Judge: Burton, Robert**
How would that effect your ability to be fair?

09:57:00 **Other: 8, Juror No**
I dont really want to be here.

09:57:04 **Judge: Burton, Robert**
A lot of people dont want to be here. It is a civic duty. Most people would

09:57:21 rather be doing somebody else. Can you listen to
testimony, determine the
09:57:34 facts and give both sides a fair trial?
09:57:43 Other: 8, Juror No
Yes
09:57:44 Judge: Burton, Robert
Denied then.
10:02:03 Add Ins: PHELPS, DOUGLAS
I would like to excuse Juror No. 28 for Cause.
10:02:11 Judge: Burton, Robert
Questions Juror No 28 to determine if whether or
not to excuse the juror.
10:03:31 Denied.
10:07:17 Add Ins: PHELPS, DOUGLAS
Pass Jury for cause.
10:07:22 Judge: Burton, Robert
Excuses remaining jury panel.
10:07:58 There will be 6 that actually serve. Attys and
myself will meet in chambers
10:08:11 an do the preemptory challenges.
10:08:20 Stop recording
10:18:30 Recording Started:
10:18:30 Record
KRAMER, MICHAEL
10:21:42 Stop recording

Court Minutes:

Session: BURTON031210A
Session Date: 03/12/2010
Judge: Burton, Robert
Reporter:

Division: MAG
Session Time: 08:02

Courtroom: Courtroom7

Clerk(s): Darnell, Nicole

State Attorney(s): Nixon, Amy

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0002

Case number: CR2009-5447

Plaintiff:

Plaintiff Attorney:

Defendant: KRAMER, MICHAEL

Pers. Attorney: Phelps, Doug

Co-Defendant(s):

State Attorney: Nixon, Amy

Public Defender:

Previous audio and annotations can be found in case: 0001

03/12/2010

10:23:35

Recording Started:

10:23:35

Case recalled

10:24:31

Other: Clerk

Try Cause Oath; Bailiffs Oath

10:24:48 **Judge: Burton, Robert**
Admonishes Jury

10:24:58 **Stop recording**

10:25:24
Recording Started:

10:25:24 **Record**
KRAMER, MICHAEL

10:46:04 **Judge: Burton, Robert**
We are back on the record in State vs. Kramer. I
have handed out the stock

10:46:21 instructions. Are there any objections to these?

10:46:32 **State Attorney: Nixon, Amy**
No objection.

10:46:42 **Add Ins: PHELPS, DOUGLAS**
No objection.

10:46:53 **State Attorney: Nixon, Amy**
Filed a Motion in Limine in re to the breath
test. The first test was

10:47:10 attempted to give to Def, that was terminated
and the new test resulted in

10:47:19 .174/.177. Defense states a second 15 minute
period should have been given.

10:47:35 State feels this should have been addressed at
an earlier time. This is an

10:47:47 issue of law, not something the jury should
consider.

10:47:57 **Add Ins: PHELPS, DOUGLAS**
Clearly, the credibility of the breath test is at
issue. This test, there was

10:48:17 one blow. Officer states it was shortly followed
by two others. It could be

10:48:30 an indication of mouth alcohol. I think that is
an issue for the jury to

10:48:47 establish. When you have 3 samples, one right
after the other. There is a

10:49:04 question about the liability. It is the state's
burden to prove this case.

10:49:14 This is a little related to some of my motions.

10:49:23 **Judge: Burton, Robert**
I will take them up one at a time. With this one I agree that any Mtns to

10:49:33 Suppress should have been brought up prior to today w/compliance w/the rules.

10:49:46 If you laid proper foundation as far as normal course of officer administered

10:50:00 the test.

10:50:06 **Add Ins: PHELPS, DOUGLAS**
We filed a demand for discovery on 3/18/09, the items 2;6;7;8;17 addressed

10:50:23 various issues re witnesses, chemical testing and the State never disclosed

10:50:36 any experts or any documents they intended to use to lay a foundation for a

10:50:45 breath test. Disclosure of those documents are required, we just red those by

10:51:02 fax filing yesterday. The State also added a Jeremy Johnson to their witness,

10:51:14 planning to use them for the breath test. State has failed to meet discovery

10:51:28 requests. I am specifically addressing No. 6, reads request No. 6.

10:53:22 **State Attorney: Nixon, Amy**
Specifically regarding the witness issue. Jeremy Johnson only became

10:53:37 necessary after Monday's conference. I dont think Jeremy Johnson is necessary

10:53:49 at this point. I would ask to have Jeremy Johnson allowed as a rebuttal

10:54:04 witness.

10:54:05 **Judge: Burton, Robert**
So it is whether or not to have breath test specialists?

10:54:28 **State Attorney: Nixon, Amy**
Yes

10:54:33 **Judge: Burton, Robert**
Sounds like she will not need to call this witness.

10:54:41 **Add Ins: PHELPS, DOUGLAS**

Reads Jury Instruction No. 7 out loud to Court.

10:54:54 **Judge: Burton, Robert**
7 does not seem to be applicable unless there is
an issue w/the officer not
10:55:06 submitting a report and submitting it to you.

10:55:11 **Add Ins: PHELPS, DOUGLAS**
Have not provided any calibration w/the
machine.

10:55:19 **Judge: Burton, Robert**
Your specific request is w/the officer's
reports.

10:55:35 **Add Ins: PHELPS, DOUGLAS**
I believe one of the documents provided, which
is a log, an instrument log.
10:55:56 Prepared by law enforcement, normally prepared
in course of conducting a
10:56:08 breath test. It is one of the documents that
were provided. It discusses
10:56:20 agency involved, solution used, storage of
machine. Certainly those are docs
10:56:32 prepared by officer. Also is the calibration of
the amchine, which is not
10:56:44 prepared by the officer and the forensic
documentation. I red those
10:56:55 yesterday.

10:57:02 **Judge: Burton, Robert**
Seems like your main issue is Discovery No. 17.

10:57:16 **Add Ins: PHELPS, DOUGLAS**
I think also this document here prepared by the
officer.

10:57:29 **Judge: Burton, Robert**
How many occassions did you go to Sherrif's
office to secure this
10:57:40 information?

10:57:40 **Add Ins: PHELPS, DOUGLAS**
This was something that was conected by the
State Patrol.

10:57:51 **Judge: Burton, Robert**
How many times did you go there?

10:57:58 **Add Ins: PHELPS, DOUGLAS**
I didnt, I figured if not provided to me then they intended to not use the

10:58:11 breath test. If I knew they were using the breath test, I would have brought

10:58:25 in an expert. They did not lay the foundation and just provided me w/the

10:58:41 documentation until yesterday. State did not provide them, I anticipated they

10:59:00 were not going fwd w/a breath test. Prejudice to my client, we do not have

10:59:14 time to get an expert. Also my belief prejudice goes beyond that. Do not

10:59:33 believe using the documentation only is enough to lay foundation.

11:01:11 Continues w/argument concerning discovery responses.

11:09:21 We are asking the Court to suppress the breath test and not allow it be

11:09:43 brought in. It is a motion that they cannot leave a proper foundation for the

11:09:53 evidence. States case law to support same.

11:10:07 **Judge: Burton, Robert**
This is a motion to suppress that you should have brought up prior to today.

11:10:23 **Add Ins: PHELPS, DOUGLAS**
This is not that Motion. I made discovery demands and the requested

11:10:49 information was not provided until yesterday.

11:11:04 **Judge: Burton, Robert**
It would have been better to bring this up prior to today when I have a jury,

11:11:26 a motion, and a 23 page case law to review. This could have been brought up

11:11:39 Monday during the status conference. I am stuck to make a decision. I do not

11:11:53 know if this case applies or not, in such a short time.

11:12:00 **State Attorney: Nixon, Amy**

11:12:13 In Plaintiff's initial response to discovery we
11:12:23 did send the breath test
11:12:38 certificate. Nowhere in Def's request do I see a
11:12:48 request for the calibration
11:13:05 documentation. I simply do not see it, from the
11:13:16 way I read the response. As
11:13:27 soon as I rec'd certification documents, I fwd'd the
11:13:36 same to the Defense. He is
11:13:38 raising these issues at the last minute. If I
11:13:48 really need to have witnesses
11:14:07 such as forensic witnesses it would confuse the
11:14:15 jury, that is something more
11:14:23 properly brought before the Court in a Motion to
11:14:33 Suppress. He was put on
11:14:43 notice a year ago at the time we provided the
11:14:53 breath test certificate to
11:15:03 defense.

11:15:38 **Judge: Burton, Robert**
11:15:48 Issue I see if this case he handed out does in
11:15:58 fact apply to breath testing
11:16:08 and documentation of that in Idaho then
11:16:18 certainly the requirement of the
11:16:28 State to provide the testimony of any person who
11:16:38 is responsible for the
11:16:48 testing procedures. This case law is a cocaine
11:16:58 case.

11:17:53 **State Attorney: Nixon, Amy**
11:18:03 The officer here could provide information if
11:18:13 the testing procedure were
11:18:23 correctly followed.

11:18:58 **Add Ins: PHELPS, DOUGLAS**
11:19:08 What she has provided is a certificate of
11:19:18 analysis. Discusses certificate.
11:19:28 Discusses what witnesses may be need to testify
11:19:38 that the instrument used was
11:19:48 done in accordance with the proper testing
11:19:58 procedures.
11:20:08 We are asking the Court to suppress the evidence
11:20:18 based on the state's lack to
11:20:28 provide the necessary witnesses.

11:20:43 **Judge: Burton, Robert**
11:20:53 I am going to find that this Mtn to Suppress was

untimely. I will allow the
 11:20:56 State, because they did disclose and will
 authorize them to bring in this Mr.
 11:21:07 Johnson to testify, certainly before any
 testimony will be given I will allow
 11:21:20 you to interview the witness.
 11:22:19 As far as this case law you have provided, I
 dont know if the factors are the
 11:22:31 same. I am at a disadvantage here. At this
 point, as far as actual
 11:22:45 suppression based on lack of foundation you can
 make that objection.

11:23:00 **State Attorney: Nixon, Amy**
 There is video and we did redact the last 2
 minutes.

11:23:10 **Add Ins: PHELPS, DOUGLAS**
 I agreed w/that.

11:23:12 **State Attorney: Nixon, Amy**
 There was a late disclosure by defense as to a
 concealed weapons permit.

11:23:27 **Add Ins: PHELPS, DOUGLAS**
 We will be asking to produce that document, I
 noted on video my client
 11:23:38 advised the officer that he did have that permit
 and I did disclose it.

11:23:48 **Judge: Burton, Robert**
 I dont see where that would be improper.

11:24:10 **Other: Bailiff**
 Brings in the Jury

11:26:13 **Judge: Burton, Robert**
 Jury is now present. We managed to work out
 issues and are now ready to
 11:26:24 proceed. Reviews initial jury instructions w/the
 jurors.

11:31:44 **State Attorney: Nixon, Amy**
 State's Opening Statement.

11:41:12 **Add Ins: PHELPS, DOUGLAS**

Defense Opening Statement.

11:43:55 **Judge: Burton, Robert**
We will break for lunch, and be back and ready to go at 1:15 p.m.

11:44:38 **Stop recording**
(On Recess)

13:21:38 **Recording Started:**

13:21:38 **Record**
KRAMER, MICHAEL

13:21:45 **Other: Clerk**
Jury Returns

13:23:19 **State Attorney: Nixon, Amy**
Calls First Corporal Sean Paul Lind; Direct.

13:23:35 **Other: Clerk**
Witness Oath

13:23:50 **Other: Lind, Sean Paul**
Trpr w/ISP since June 1997; discusses previous experience; first position was general patrolman, field training officer, etc. Explains various positions held while working w/ISP.

13:24:43

13:25:15

13:25:24 Currently referred to as a corporal, which is a rank. I am ranked as a master corporal. I am currently P.O.S.T. certified, discusses what certification is required to become P.O.S.T. certified.

13:25:46

13:26:06

13:26:20 I believe I recd that over a year ago. Was P.O.S.T. certified on 3/18/2009.

13:27:05 Discusses various DUI training recd. Discusses what is learned during classroom training; explains "wet labs" and what occurs during the "wet labs"; also

13:27:28

13:28:59 administer breath tests during these labs to determine their blood alcohol

13:29:14 content, helps gives us a baseline on how people would react at various

13:29:30 levels of intoxication; I have personally

13:29:55 investigated DUIs during course of
 employment; average probably 30 DUIs a year; DUI
 investigation is how all
 13:30:25 DUIs begin, occurs usually w/some sort of
 traffic violation and contact w/the
 13:30:35 driver, we interview the people, from there we
 start the investigation. The
 13:30:47 investigation includes speaking w/them, field
 investigation, and possibly
 13:31:02 breath test.
 13:31:13 Not all DUI investigations lead to DUI arrests.
 I do offer people I arrest
 13:31:24 for DUI a breath sample. Once I get to that
 point, I form an opinion the
 13:31:39 person is intoxicated. The breath test confirms
 the observations I had in the
 13:31:51 field. I probably have given thousands of field
 sobriety tests; explains
 13:32:15 various field sobriety tests. One is the eye
 test, one is walk and turn, and
 13:32:27 there is the one-leg stand. These are used to
 determine if somebody is
 13:32:40 impaired. Generally look to see if people can
 understand and perform
 13:32:54 evaluations as instructed, etc. If suspect
 somebody is driving under the
 13:33:14 influence, before we do the interview and
 sobriety evaluations; discusses
 13:33:34 scoring method used to score the sobriety tests.
 13:33:46 It is possible to pass the tests. Was on duty
 3/14/09 approx 5 am. I was
 13:34:29 running stationary radar on I90; area is
 generally flat, straight it is a
 13:34:48 divided highway w/a median. It was early morning
 and it was March weather,
 13:35:04 winter. Do not recall the weather conditions, it
 as dark no stars no moon.
 13:35:16 Some places it was icy. Approx 5:30 am a vehicle
 drew my attention as it was
 13:35:29 speeding. Posted limit is 70 mph, I was located
 in the median. I am in my
 13:35:43 patrol vehicle. I noticed the speeding vehicle
 and visually thought it was
 13:36:01 exceeding the limit. I activated radar and that
 confirmed the vehicle was
 13:36:12 traveling approx 84 mph. Explains visual

13:36:45 estimation of speed w/vehicles. Can
 13:37:08 visualize vehicles both coming towards me and
 13:37:20 traveling away from me. I
 13:37:33 visually estimated the speed of the vehicle and
 13:37:45 thought it was about 85 mph.
 13:38:02 I confirmed the speed w/radar. I stopped the
 13:38:12 vehicle by activating my
 13:38:25 emergency lights on my vehicle. Ultimately made
 13:38:41 contact w/the vehicle. I was
 13:39:00 outside the driver's door of the vehicle.
 13:39:16 Vehicle was full-size pick-up
 13:39:28 red/maroon color and was pulling a trailer
 13:39:38 w/snowmobiles. First told driver
 13:39:58 stopped for speeding, he was surprised and did
 13:40:09 not realize he was driving
 13:40:37 that fast. I identified that driver. Points to
 13:40:59 Defendant as the driver, that
 13:41:31 would be Michael Kramer. Immediately noticed his
 13:41:49 eyes were sleepy looking,
 13:41:58 also speech was slurred, slow and deliberate. As
 13:42:30 I spoke I could smell
 13:42:43 alcohol beverage coming from the vehicle. When
 13:42:53 asked the driver denied
 drinking. There was a passenger in the front and
 one in the back. The
 passenger in the back was laying down sleeping.
 I did suspect something and
 then asked the driver to step out of the vehicle
 to possibly conduct sobriety
 evaluations. I did ask if any weapons were in
 the vehicle. He said he had a
 pistol on his person. I ask those questions for
 officer safety. Discusses
 firearm training through ISP. I carry a glock
 pistol and also Colt rifle.
 Familiar w/Idaho laws regarding weapons. I do
 not see the Def's weapon while
 talking to him. It was on his right hip and did
 not see it until he stepped
 out of his vehicle. Recognized weapon to be a
 pistol. Do not recall whether
 it was loaded or not. Pistol was on the
 Defendant, he would have had access
 to it. He would have to just reach down and
 w/draw weapon from holster. I
 disarmed the Def took possession of firearm and

placed it in my patrol car. I
13:43:10 then ran procedural driver status checks and
then I was preparing to proceed
13:43:30 field sobriety tests. I had to reposition my car
to allow more room to
13:43:44 conduct those tests. Have been trained to
administer the tests. Prior to
13:44:03 tests I get a general history of the Defendant,
medical issues, shoe
13:44:14 comfortability, level of education, to get an
idea of the persons ability to
13:44:30 perform the tests. I did have Def submit to the
field sobriety tests. I did
13:44:42 explain the tests prior to administering the
tests. During the first test,
13:45:11 which is an horizontal stagymus test, we are
looking for eye movements. Three
13:45:55 categories, one is "smooth pursuit", Def did not
have "smooth pursuit" his
13:46:29 eyes were tracking in a jerky manner. I was
directly in front of Def w/in
13:46:41 arms' reach. Explains instructions given prior
to administering the tests.
13:46:58 Def did understand the instructions and he
performed the test. He failed the
13:47:07 test on all 6 points. Next one is maximum
deviation, explains what test
13:47:27 entails. Defendant also failed this test.
Discusses last category given and
13:47:48 Def also failed that test. Overall during the
horizontal stagymus test it was
13:48:12 determined that something was in the Def's
system. Reviews what is looked for
13:48:27 when conducting the walk and turn test.
**Demonstrates walk and turn test and
13:48:41 instructions given to Jury**
13:49:52 During this test the Def only counted e/o step
only took 18 steps fwd and 18
13:50:06 steps back, he did not turn as demonstrated,
also he failed to make heel to
13:50:20 to contact. I believe he extended his arms away
from his body, which would
13:50:39 score as a point. Discusses scoring process used
during the walk and turn
13:50:56 test.
13:51:39 Also offered the one-leg stand. **Demonstrates

one-leg stand and instructions
13:51:56 given to the Jury**
13:52:46 Def did perform that test and he did fail it; he
scored a 3 out 4, he put his
13:52:58 foot down, swayed and raised his arms. Did not
offer any further test. I then
13:53:13 placed him under arrest for suspension of DUI.
He did not pass the sobriety
13:53:57 tests, did not feel comfortable allowing Def to
drive off. Once placed under
13:54:10 arrest he was placed in my patrol car. I then
had to deal w/his vehicle and
13:54:27 the passengers. I started working on getting
them a ride and they also were
13:54:43 worried about getting the snowmobiles home.
Prior to towing a vehicle, we
13:55:01 inventory the vehicle and we do that for officer
protection and Def
13:55:11 protection in case he has valuables located in
the vehicle so we can document
13:55:20 prior to the vehicle being towed.
13:55:41 Believe that vehicle had 4 doors; believe it had
2 rows. I did inventory this
13:56:09 vehicle. I did find 3 bottles of liquor, 2
bottles were MacNaughton's Whiskey
13:56:27 and one was Jagermeister. These were glass
bottles. One bottle of Whiskey was
13:56:46 open and for most part Jagermeister was empty.
The seals were broken and the
13:57:03 bottles were not full. They were physically
located behind the driver's seat.
13:57:20 I then placed them on the back of the snowmobile
trailer to remind me that I
13:57:31 found them and they are there and also to put it
on my video. The passengers
13:57:44 during this time they were off to the side. I
had an officer assist me who
13:57:57 was w/them while doing my inventory. Passengers
had been drinking. I could
13:58:11 smell alcohol from them and they admitted to it.
Passengers got a ride and
13:58:22 left scene. The vehicle was towed, snowmobiles
went w/the passengers. During
13:58:39 all of this the Def is still in my patrol car. I
then took the Def to the
13:58:56 jail to complete various paperwork and to

administer the breath test.

13:59:21 Discusses technical requirements used to administer the breath test. The

13:59:40 machine used is physically located at the jail, there are some portable ones

13:59:51 that officers will carry with them in the field. Discusses training completed

14:00:12 in regards to administering breath tests and written tests required to pass

14:00:27 prior to be able to administer those tests. Considered a certified operator

14:00:39 of the Intoxilator machine. Did have Def perform a breath test, in

14:01:05 compliance w/the standards. Prior to breath test I had to check his mouth for

14:01:19 foreign objects, etc; he had nothing in his mouth; then a 15 min observation

14:01:46 period; this is given so if there is any residual alcohol in his mouth or

14:02:25 whatnot that time is given to allow the alcohol to dissipate; during that

14:02:42 time I presented the Def w/the alcohol advisory of what is required of him

14:02:59 audio. I observe the Def during those 15 mins; he did not swig mouthwash or

14:03:26 do anything to cause me concern.

14:03:44 At end of 15 min period he was asked if willing to take a breath test. He

14:04:05 said he would and then I began the breath testing procedure. Have operated

14:04:41 the breath test machine hundreds of times, explains what the machine looks

14:04:55 like. Keyboard on instrument is used to input date/time, time of arrest,

14:05:16 subjects information, my information, etc. Follow computerized instructions

14:05:46 which prompt me to know what would be next for what data is needing inputted.

14:06:00 Before I can have Def give the sample, I put a fresh mouthpiece on the tube

14:06:19 used to get the breath sample. Normally provide 2 samples, when administering

14:06:56 the breath test. Def gave 3 samples. First one was invalid because he was not

14:07:06 correctly blowing into the machine. He was starting and stopping. At that

14:07:32 point I then had him restart the test. Def then
 gave 2 more samples.
 14:08:12 Discusses what technical requirements that are
 needed prior to administer the
 14:08:25 test to ensure the machine is working correctly.
 14:09:26 The Def then retook the test by blowing into the
 intake tube. It appeared to
 14:09:40 be properly working, and the machine then
 accepted that sample. The machine
 14:09:52 then does another purge and it zeroes out again
 and then we take a 2nd sample
 14:10:04 from the Def. After samples are given the
 machine will ask me various
 14:10:18 questions such as if drugs were involved, etc.
 In other words the machine
 14:10:35 then does some internal checks. There was no
 indication that the machine was
 14:10:50 working improperly. Results of the samples were
 w/in the standard margin of
 14:11:09 error. There is a printout from the machine and
 also a log to indicate who
 14:11:45 used it and when, etc. The printout prints out a
 3 piece paper ticket. It
 14:12:03 lists dates/times, machine used, solution
 number, and then the person's
 14:12:15 information and the results as well as the
 blanks that were blown. The log is
 14:12:29 basically that states w/in the ISP who used that
 instrument, results, etc.
 14:12:46 That is for the jail staff so they know when to
 change the solution used to
 14:12:57 calibrate the system.
 14:13:47 There was a written log in this case, which
 recorded the results of Def's
 14:14:01 breath test.
 14:14:16 **State Attorney: Nixon, Amy**
 Hands State's Proposed Exhibit One to the
 witness.
 14:14:27 **Other: Lind, Sean Paul**
 I do recognize that document. It is the
 14:14:39 intoxilator printout from Def's
 breath testing. It has corresponding case
 number, his name, my name, etc. It
 14:14:56 is dated 03/14/2009. That information matches

what I remember from that date.

14:15:30 **State Attorney: Nixon, Amy**
Move to admit Exhibit 1

14:15:39 **Add Ins: PHELPS, DOUGLAS**
Objection to foundation

14:15:42 **Judge: Burton, Robert**
Sustain objection, there is still foundation
needing to be laid.

14:15:55 **Other: Lind, Sean Paul**
This document came from a machine that sits in
the booking area; have seen
14:16:14 this machine a few weeks ago. Recognize on
document to be Def, DOB is also
14:16:30 same as Def's Driver's License. On bottom left-
hand of document is my
14:16:53 handwriting.

14:16:59 **State Attorney: Nixon, Amy**
Remove for admission.

14:17:05 **Add Ins: PHELPS, DOUGLAS**
Obj to lack of foundation

14:17:10 **Judge: Burton, Robert**
You need to establish whether this is proved
device. I will sustain the
14:17:31 objection.

14:17:35 **State Attorney: Nixon, Amy**
I will hold off admitting that piece of evidence
at this time.

14:17:51 Handing you State's proposed exhibit No. 2

14:18:02 **Other: Lind, Sean Paul**
About 1/3 down the page of document is a
Instrument No. and also solution
14:18:47 numbers on that document. Page 2 of that packet
is the log for the
14:19:10 Intoxilator 5000 as I have used it many times
and I have also made a notation
14:19:23 on this log. This is log used on 3/14/09. This
information also matches the

14:20:03 information on State's Proposed Exhibit No. 1.
On 4th page is the
14:20:20 certification of the machine w/the serial number
which is same number on the
14:20:32 other documents.
14:20:38 On next page is another certificate w/gain the
same serial number.
14:20:58 Following page is the solution LOT No., which is
also listed on the other
14:21:22 documents.
14:22:03 Did have a video camera mounted on my car during
this traffic stop on
14:22:17 03/14/09. It was working that day as it had made
a video for me. It is not in
14:22:29 operation at all times, it is normally only if I
turn it on or when my
14:22:40 emergency lights are activated.
14:23:07 Believe camera adequately documented what took
place on 03/14/10.

14:24:49 **State Attorney: Nixon, Amy**
Presents witness w/ State's proposed Exhibit No.
3

14:25:20 **Other: Lind, Sean Paul**
Belive that to be the correct video at time of
stop on 3/14/10

14:26:24 **State Attorney: Nixon, Amy**
Move to Admit P's Ex No. 3

14:26:31 **Add Ins: PHELPS, DOUGLAS**
No objection

14:26:35 **Judge: Burton, Robert**
Admitted

14:26:36 **State Attorney: Nixon, Amy**
Propose to publish to jury

14:26:41 **Add Ins: PHELPS, DOUGLAS**
No obj

14:26:43 **Judge: Burton, Robert**
Go ahead

14:26:47 **State Attorney: Nixon, Amy**
****Plays video of stop/arrest to the Jury****

14:49:47 **General:**
Time stamp

14:56:25 **State Attorney: Nixon, Amy**
Video stopped at 28:30

14:57:01 **Other: Lind, Sean Paul**
At end of video is when I was pulling out the
liquor bottles. Def did have a

14:57:17 **flask on his person. The flask did contain**
alcohol.

14:58:12 **Judge: Burton, Robert**
Admonishes Jury

14:58:23 **Stop recording**
(On Recess)

15:10:37 **Recording Started:**

15:10:37 **Record**
KRAMER, MICHAEL

15:10:37 **Judge: Burton, Robert**
Please return the jury

15:11:02 **Other: Clerk**
Jury Returns

15:14:54 **Add Ins: PHELPS, DOUGLAS**
Cross-Examination

15:15:00 **Other: Lind, Sean Paul**
There was a period of time when I tried to reach
vehicle. Did not notice lane

15:15:15 **problems when pursuing the vehicle. Part of my**
training is to observe

15:15:34 **vehicles for weaving for DUI emphasis; have**
driven a pick-up w/a trailer; not

15:15:59 **always easy to maintain the lane of travel;**
vehicle was going 84 mph; did not

15:16:15 **notice trailer to weave from side to side; would**

have noted that if I saw
15:16:24 that; when traveling at that high of a speed a
15:16:32 slight movement on the
steering wheel could possibly cause the trailer
to sway from side to side.
15:16:47 When pursuing that vehicle I did activate my
overhead lights. Do not recall
15:17:01 if vehicle did or did not signal when pulling
off to side of the car. The
15:17:16 video would have showed that. There was a lot of
road noise at that time;
15:17:40 sometimes makes it difficult to hear at those
times; field sobriety tests to
15:17:58 involve ability to hear and follow instructions.
Tests I demonstrated was not
15:18:28 under same circumstances surrounding the test
performed by the Def. Recall
15:18:41 Def wearing a one piece snow suit, believe the
top was off. He had several
15:18:57 different layers of clothes on. People could
have naturally occurring
15:19:19 nystagmus, everyone does. People could have
nystagmus related to head
15:19:36 injuries. Lights from vehicles does not have an
effect on a subject's ability
15:19:51 to track. I had been trained that strobe lights
could have a nystagmus
15:20:07 effect, which is why we turn off our emergency
lights. Trained to look for
15:20:18 other factors that could cause nystagmus.
Everyone has nystagmus and
15:20:35 generally alcohol enhances the nystagmus. Def
was sitting on the trailer
15:20:59 while performing this test. It is easier to have
a person sit to keep them
15:21:14 from wandering. Training does not say whether
subject should be sitting or
15:21:27 standing. I did hold up my pen while performing
this test, I had him track my
15:21:42 thumb. I held my thumb at same level of Def's
eyes. Next test was walk and
15:22:00 turn test and 2 errors would cause a failure.
Not keeping hands to a side is
15:22:21 an error once they start walking. Moving his
feet during instructions would
15:23:12 be an error.

15:23:20 I told him to count each of his steps out loud.
Told him to 9 steps one
15:23:32 direction and 9 steps back.
15:24:57 Continues to discuss what constitutes an error
during the field sobriety
15:25:15 tests.
15:26:09 Discusses one-legged stand and what would
constitute during these tests.
15:27:41 Def had said he had been snowmobiling, I do not
know for how long he was out
15:27:54 doing this. Tired could have an effect on one's
ability to perform these
15:28:06 tests. Found alcohol in back seat also back
there was somebody sleeping. Do
15:29:07 not know who consumed alcohol in the vehicle,
assume it could have been all
15:29:17 of them. Do not know how many days they were up
snow mobiling. I believe it
15:29:28 was a Saturday. They could have consumed some of

15:29:40 **State Attorney: Nixon, Amy**
Obj, move to strike, speculation

15:29:47 **Add Ins: PHELPS, DOUGLAS**
It goes to my client's degree of intoxication.
It further goes to who else
15:31:14 could be drinking.

15:31:17 **Judge: Burton, Robert**
Overrule objection.

15:31:20 **Add Ins: PHELPS, DOUGLAS**
Continues w/cross-examine

15:31:26 **Other: Lind, Sean Paul**
I did find a flask in an inside pocket of Def's
coat. I opened it and smelled
15:31:40 it, smelled like whiskey. I do not recall if I
dumped that out or not. I do
15:31:57 not have here today. There were 2 whiskey
bottles and 1 Jagermeister. 1
15:32:15 whiskey bottle was still sealed. Indicated that
Def had red eyes, could be
15:32:49 caused from riding a snowmobile. I cannot tell
how much alcohol one consumes
15:33:02 from the odor. I did ask if Def had a weapon,

15:33:33 and he told me he had a
 15:33:58 concealed weapons permit. Explains what a
 15:34:10 concealed weapons permit is. I did
 15:35:11 not verify any paperwork regarding the concealed
 15:35:27 weapons permit. The gun
 15:35:38 found was placed back in his vehicle. Prior to
 15:35:48 the arrest of Def I was last
 15:36:02 certified approx 5/6 mos to administering Def
 15:37:19 these tests. That certification
 15:37:30 was at ISP Region One office. Did not check what
 15:37:42 simulator solution that was
 15:37:59 in the machine. Do not have an independant
 15:38:19 knowledge of what solution was in
 15:38:32 the machine. Significance of the solution is a
 15:40:04 baseline test for the machine. Explains the
 15:40:21 possibility of this w/jury.
 15:40:34 Discusses what could cause an invalid sample.
 15:40:48 That is part of our training, so we know what to
 15:41:06 watch for when administering
 15:41:37 the test. Which is why they are not to have any
 15:41:47 objects in their mouth. There
 15:42:01 is 2 machines in that room where I administered
 15:42:21 the machine.
 I think I used the left machine. Do not recall
 using a different machine
 after the first test was administered and was
 invalid. Could be other
 officers in the room, depends on the time of
 day. Know of radio how radio
 frequency could effect the machine. Explains the
 possibility of this w/jury.
 The locations of the machines must be certified.
 I believe the KCSO has their
 process of certifying these, believe these
 processes come from the State of
 Idaho to my belief. Temperature of store
 corresponds to subject's body
 temperature. There is a thermometer on the
 machine but it has to be 34
 degrees and I did check that day, do not believe
 I documented that anywhere.
 I believe on instrument log there is a checkmark
 indicating that it is in
 range. The temperature that day was 34 degrees.
 34 number is the number to
 remember from my training. It is an old fashion
 thermometer used to determine

15:42:35 the temperature. Did not individually determine
solution used in the machine
15:42:50 that day. Do not know how often the machines are
tested.
15:43:07 **State Attorney: Nixon, Amy**
Re-Direct
15:43:10 **Other: Lind, Sean Paul**
In field Def did not indicate he could not hear
my instructions, nor did he
15:43:24 indicate he was too tired. Def did not complain
about his clothing either.
15:43:33 When giving sobriety tests I do observe Def's
ability to pay attention, and
15:43:42 he appeared to be focused on me and he did not
follow those instructions. My
15:43:53 experience led me to believe Def was
intoxicated. His performance that day
15:44:03 was not consistent w/somebody who was just
tired.
15:44:25 Did not care if Def had a concealed weapon
permit
15:44:36 **Add Ins: PHELPS, DOUGLAS**
Objection asks for legal conclusion
15:44:41 **Judge: Burton, Robert**
Sustain
15:44:44 **Other: Lind, Sean Paul**
Did not ask if Def had a permit
15:44:53 **Add Ins: PHELPS, DOUGLAS**
Obj
15:44:55 **Judge: Burton, Robert**
Overruled
15:44:58 **Add Ins: PHELPS, DOUGLAS**
The weapon issue is mainly a safety concern, I
do not really care if they
15:45:18 have a permit or not. Not my responsibility to
check solution used in
15:45:29 breathalyzer machines. Followed the requirements
in having Def submit to a

15:45:37 breath test. Verifying solution LOT is also not part of my requirement.

15:45:55 **State Attorney: Nixon, Amy**
State's proposed exhibit 1

15:46:03 **Other: Lind, Sean Paul**
There are several times. First time is 0734, which is 7:34 am; machine operator's name is my name, instrument No. is 68-013328 that reflects the machine that was used which printed out this printout. Giving breath tests is regular activity for ISP; did actually make a photocopy of the printout, this is the copy. Of the orig I keep 2 parts of it and the other one is sent to the ALS agency; it also stays w/org rpt at the office.

15:47:06

15:47:24

15:47:38 **State Attorney: Nixon, Amy**
Move to admit State's exhibit No. 1

15:47:45 **Add Ins: PHELPS, DOUGLAS**
Obj to lack of foundation and there is no indication as to when the testing period began.

15:47:57

15:48:00 **Judge: Burton, Robert**
Sustained

15:48:22 **State Attorney: Nixon, Amy**
Move to admit State's Exhibit No 2

15:48:28 **Add Ins: PHELPS, DOUGLAS**
My obj is first we have not heard any testimony from forensic commander. Also to the first page of that document is an oath or an affirmation. I am not sure who indicates they are the custodian of those records. As to the certificate of calibration we have not heard any testimony from Deb Scofield regarding certification of calibration whether machine is approved for location at where it is placed. Additionally

15:49:04

15:49:16

15:49:26

15:49:33

15:49:45 as to the solution number
 there is something that appears to be a
 notarized stmt of a forensic
 15:49:59 evaluator who we have not heard any testimony
 from. I do not believe
 15:50:15 necessary foundation was used to admit these
 exhibits. Discusses case law
 15:50:41 that supports argument. There is nobody here to
 tell us what solution was
 15:51:04 placed in machine, when it was placed in the
 machine. There is no one here to
 15:51:18 say that those solutions were ever installed in
 machine and if they were that
 15:51:26 those were solutions in machine at time my
 client was giving the breath
 15:51:38 test.
 15:51:53 **Judge: Burton, Robert**
 We have discussed this before. Based on
 applicable case law in Idaho I will
 15:52:07 overrule the Obj. 2 will be admitted at this
 time.
 15:52:18 **State Attorney: Nixon, Amy**
 Move to admission to State's Ex No. 1
 15:52:24 **Add Ins: PHELPS, DOUGLAS**
 Same objections.
 15:52:30 **Judge: Burton, Robert**
 One will be admitted
 15:53:08 **Other: Lind, Sean Paul**
 Reviewing Admitted Exhibits 1 and 2. There are 2
 breath test results on those
 15:53:27 exhibits. Results was .174 and second was .157
 15:53:38 **Add Ins: PHELPS, DOUGLAS**
 No Re-Cross
 15:54:33 **State Attorney: Nixon, Amy**
 State rests
 15:54:37 **Add Ins: PHELPS, DOUGLAS**
 Would ask for the "half-time" Motion
 15:55:16 Would like to reserve to save that argument.

15:55:26 Calls Def to the stand. Direct

15:55:47 **Other: Clerk**
Witness oath

15:55:51 **Defendant: KRAMER, MICHAEL**
States and spells name; states address. On
03/14/09 Prior to the stop I was

15:56:16 out snow mobiling at Fernan. My 2 partners and
myself. First went to Fernan

15:56:34 early the AM the following day. Was snowmobiling
all day. Discusses

15:56:59 background w/the Court, including army, service.
Discusses carrer history.

15:57:30 I am a disable VA

15:57:34 **State Attorney: Nixon, Amy**
Obj to relevancy

15:57:37 **Judge: Burton, Robert**
Overruled

15:57:40 **Defendant: KRAMER, MICHAEL**
My back and neck where I have 2 dislodged disks.
Prolongs me from

15:57:59 sitting/standing too long; my feet feel like
they are pins and needles; I

15:58:21 also have lung disease, from being at the Gulf
War w/the burning oil fields.

15:58:34 I was there in first and second Iraq war. I was
in the Air Force. At some

15:58:55 point trained myself to be a plumber. I draw
disability but am also still

15:59:08 allowed to work as long as I dont exert myself.
I did tell trooper about my

15:59:28 neck problems and that I had not taken any
medication for several days. I did

15:59:44 make my best effort to take the tests. I was
fully dressed in thermals,

15:59:57 boots, etc. Quite a few layers of clothes. I did
tell the officer I had a

16:00:09 permit to carry the gun, I have that w/me today.
It is probably size of

16:00:23 business card. I have that because I carry a
weapon from time to time. I do

16:00:42 carry a weapon when up in the mountains. Have

16:00:54 never had to use it but have
come close. I did advise trooper that I did have
the weapon.

16:01:51 **Add Ins: PHELPS, DOUGLAS**
Handing witness Def's Exhibit A.

16:02:08 **Defendant: KRAMER, MICHAEL**
That is my permit

16:02:13 **Add Ins: PHELPS, DOUGLAS**
Move to admit

16:02:15 **State Attorney: Nixon, Amy**
Object to hearsay

16:02:20 **Add Ins: PHELPS, DOUGLAS**
I can lay more foundation

16:02:24 **Defendant: KRAMER, MICHAEL**
Was issued this upon application and was issued
by gov't agency; this is what

16:02:36 the agency gave me after I had sent in my
application. It takes approx 90

16:02:46 days.

16:02:53 **Add Ins: PHELPS, DOUGLAS**
Move to admit

16:02:59 **State Attorney: Nixon, Amy**
I dont believe there is testimony to foundation
and leave my objection to

16:03:11 hearsay

16:03:13 **Judge: Burton, Robert**
Does not fall under business records. Believe he
testified it was a copy of

16:03:25 what he had on his person. I will admit it
rather than have him submit the

16:03:36 original

16:03:57 **Defendant: KRAMER, MICHAEL**
Day prior to stop I had consumed a couple of
beers. Once in BAC room I was

16:04:14 put on a machine. After several attempts the
machine was not working. So I

16:04:34 sat back down and then proceeded to machine next
to it. Then went through
16:04:46 process of warming that machine up. First test
was invalid and then remaining
16:04:58 2 blows. I blew on 2 different machines that
night. I blew once it did not
16:05:09 take, then after that it was valid for the other
2 samples. Never found out
16:05:26 problem w/first machine I blew into. Officer did
not check my mouth nor did
16:05:48 he do an observation period b/w the switching of
machines. I have medical
16:06:06 condition w/my stomach and I take that when I
have a problem but it is hard
16:06:18 to explain it, I am a doctor. I have an acid
reflux type problem. It is a
16:06:33 burning sensation and I have to burp to help
relieve that.

16:07:09 **State Attorney: Nixon, Amy**
Cross-examination

16:07:36 **Defendant: KRAMER, MICHAEL**
Went snowboardin on 03/13/09 for an overnight
snowmobiling trip. Do have
16:07:52 problems in back and neck. My back is pretty
painful, it is painful majority
16:08:06 of time. It is at a level of 6 right now, just
by sitting here. Did go on all
16:08:21 day snowmobiling trip. Of course that hurts my
back, but I love going
16:08:37 snowmobiling. It is worth it to me. When sitting
on a snowmobile I sit and
16:08:53 will hold my arms out, which actually kind of
helps. Cannot describe pain
16:09:07 because of the adrenaline going through me. I
usually notice it the next day.
16:09:22 I did have a couple beers on the 13th. I did
tell officer about my neck, was
16:09:48 not asked if that problem would hinder my
ability to perform the tests.
16:10:09 Officer did question me about health problems.
Testified that he did not test
16:10:24 my mouth. Did not take any swigs of alcohol
prior to breath test, kind of
16:10:41 difficult to do when in hand cuffs. Permit

16:10:59 allows me to carry a concealed
weapon. Does not say anything about whether or
not okay to carry while
16:11:09 intoxicated.

16:11:32 **Add Ins: PHELPS, DOUGLAS**
Re-direct

16:11:35 **Defendant: KRAMER, MICHAEL**
Do not believe I was intoxicated that day.

16:11:42 **State Attorney: Nixon, Amy**
You did have a flask

16:11:46 **Add Ins: PHELPS, DOUGLAS**
That is beyond scope

16:11:50 **Defendant: KRAMER, MICHAEL**
Did have a flask and did have it while
snowmobiling.

16:12:06 **Add Ins: PHELPS, DOUGLAS**
We will rest.

16:12:15 **State Attorney: Nixon, Amy**
No rebuttal.

16:12:19 **Judge: Burton, Robert**
That is all the evidence. We will take a recess
to prepare final

16:12:34 instructions. I will then read those to you.

Closing argument will be given

16:12:45 then you will have opportunity to deliberate.

16:12:56 Admonishes jury.

16:13:07 **Stop recording**
(On Recess)

16:41:02
Recording Started:

16:41:02 **Record**
KRAMER, MICHAEL

16:41:03 **Judge: Burton, Robert**
Back on record. I have submitted the jury

instructions.

16:41:24 **State Attorney: Nixon, Amy**
No objection.

16:41:28 **Add Ins: PHELPS, DOUGLAS**
The one I would ask for the Court did not grant.
I had proposed an
16:41:44 instruction regarding because Def had a
concealed weapon permit it should be
16:42:08 allowed. Additionally, I know court submitted
evidence of the breath test
16:42:18 in light of argument. That should not have come
in.

16:42:29 **Judge: Burton, Robert**
Concerning your request to your proposed
instruction No. 4 you had submitted
16:43:02 it for the crime of concealing w/o permit w/in
city limit, which is not the
16:43:14 issue on this case. Issue is not if person had a
concealed weapon but whether
16:43:28 or not person was carrying while intoxicated.
Which is why I refused.

16:43:46 **Add Ins: PHELPS, DOUGLAS**
I do have a Rule 29 motion. I ask crt rule in
favor of Def, State has not
16:44:00 proven beyond reasonable doubt. Def has right to
have firearm additionally he
16:44:10 had a permit which grants further rights to
carry a firearm. States case law
16:44:25 to support argument. Reason he had the firearm
is because he was snowmobiling
16:45:49 in the mountains of Idaho. Think 2nd Amendment
prompts this law that if you
16:46:03 are intoxicated you forfeit that right. I would
ask Crt to dismiss that
16:46:14 count. As to my client being intoxicated, there
should be a dismissal at this
16:46:25 point. I think the evidence is in favor of non-
moving party, so I will not
16:46:39 waste court's time.

16:46:45 **Judge: Burton, Robert**
Court has to consider the facts of in favor of

16:46:58 non-moving party, which is the
 state since you are making Mtn to Dismiss. I
 think I will deny your Motion on
 16:47:16 all 3 counts. I don't think the case you stated
 stretches it quite as far as
 16:47:29 you would like to.
 16:47:38 Please bring in the jury.
 16:47:48 **Other: Bailiff**
 Brings back the Jury.
 16:49:17 **Judge: Burton, Robert**
 Reads final instructions to the jurors.
 16:56:13 **State Attorney: Nixon, Amy**
 State's Closing Argument.
 16:56:17 **Add Ins: PHELPS, DOUGLAS**
 Defendant's Closing Argument
 17:25:13 **State Attorney: Nixon, Amy**
 State's Rebuttal Closing Argument
 17:31:29 **Other: Clerk**
 Deliberation Oath to Bailiff
 17:31:37 **Judge: Burton, Robert**
 Excuses Jurors for deliberation.
 17:32:51 **Stop recording**
 (On Recess)
 18:25:01
 Recording Started:
 18:25:01 **Record**
 KRAMER, MICHAEL
 18:25:01 **Judge: Burton, Robert**
 The jury has submitted 2 questions. First
 question is "What is the definition
 18:25:24 of a concealed weapon"
 18:25:33 **State Attorney: Nixon, Amy**
 Refer to the instruction

18:25:39 **Judge: Burton, Robert**
Is there an instruction that refers to that in the Code?

18:25:57 I think if you look in 18-3302

18:26:16 I will check

18:26:30 **State Attorney: Nixon, Amy**
Maybe it was case law.

18:26:35 **Add Ins: PHELPS, DOUGLAS**
I am not sure.

18:27:10 **Judge: Burton, Robert**
Second question is does the weapon have to be intentionally hidden?

18:27:23 **Add Ins: PHELPS, DOUGLAS**
Has to be the combination of intent.

18:27:33 **Judge: Burton, Robert**
Discusses instruction that refers to that incident.

18:28:07 **State Attorney: Nixon, Amy**
I think there may be an ICJI for the concealed weapon.

18:28:25 **Judge: Burton, Robert**
If there is an ICJI I might be inclined to get it.

18:34:53 **State Attorney: Nixon, Amy**
Believe an instruction you did not give might have an instruction, but that

18:35:09 was case law I dont believe it was an ICJI.

18:37:22 **Judge: Burton, Robert**
Might just have to indicate that one of my instructions indicate to use your

18:37:44 common sense.

18:38:05 **Add Ins: PHELPS, DOUGLAS**
I would just refer them back to their instructions.

18:39:01 **Judge: Burton, Robert**

I will indicate that "you have all instructions
 that pertain to this case,
 please review them in its entirety"
 They also want to see the video.

18:39:14
18:39:45

18:40:57 **Stop recording**

20:06:12

Recording Started:

20:06:12 **Record**
KRAMER, MICHAEL

20:06:13 **Judge: Burton, Robert**
 I guess the Jury has reached a verdict. Go ahead
 and bring them in.

20:07:02 **Other: Clerk**
 Reads Verdicts Out Loud

20:09:14 **Other: Jury**
 Those are our verdicts

20:09:20 **Add Ins: PHELPS, DOUGLAS**
 We would like to poll our verdict.

20:11:30 **Other: Clerk**
 Polls the Jury

20:11:33 **Judge: Burton, Robert**
 As to Count Two since there is not an unaimous
 verdict. Do you think further

20:11:46 deliberation would lead to a verdict?

20:12:01 **Other: 3, Jury No.**
 Is it against the law to carry concealed while
 drunk?

20:12:16 **Judge: Burton, Robert**
 You have to find according the elements that
 were given to you. You have to

20:12:31 follow the law.

20:12:36 I think at the late hour, sounds like you are
 dead-locked on that. I will

20:12:49 excuse you from this.

20:13:12 We do thank you for your service.

20:13:48 As to Count One and Count Three, the Jury found
verdicts of guilty on those.
20:14:01 Count Two I will declare a mis-trial, so the
State may wish to re-file that.
20:14:13 Please let me know if you decide to do that one
way or another. So that it
20:14:26 can be rescheduled or dismissed. If you could do
that w/in a week. I assume
20:14:37 as far as the two counts I will set for
sentencing at a later day. I will
20:14:50 want an alcohol evaluation before the
sentencing.

20:14:56 **Add Ins: PHELPS, DOUGLAS**
We will do that.

20:15:13 **Stop recording**

FILED 3/12/10 AT 441p .M.
STATE OF IDAHO, COUNTY OF KOOTENAI
SS
CLERK OF THE DISTRICT COURT
BY Nicholas DEPUTY

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI
324 W. GARDEN AVENUE
COEUR D'ALENE, IDAHO 83814

STATE OF IDAHO

Plaintiff,

vs.

MICHAEL IAN KRAMER

Defendant.

DOB:

DL or SSN:

WA

Case No: CR-2009-0005447

JURY INSTRUCTIONS GIVEN

Attached hereto are the jury instructions given on the trial of the above matter.

Copies have been given to counsel of record.

DATED this 12th day of March, 2010.

Nicholas
Deputy Clerk

INSTRUCTION NO. 1A

YOU ARE INSTRUCTED that the defendant, MICHAEL IAN KRAMER, is charged in Count I with the crime of Operating a Motor Vehicle While Under the Influence of Alcohol

alleged to have been committed as follows: that the defendant, MICHAEL IAN KRAMER, on or about the 14th day of March, 2009, in the County of Kootenai, State of Idaho, did drive or was in actual physical control of a motor vehicle, on or at a street, highway, intersection or other place open to the public, while under the influence of alcohol or, in the alternative, did drive or was in actual physical control of a motor vehicle, with an alcohol concentration of .08 or more, as shown by an analysis of his breath. To this charge the defendant has pled not guilty.

INSTRUCTION NO. 1B

YOU ARE INSTRUCTED that the defendant, MICHAEL IAN KRAMER, is charged in Count II with the crime of Possession of a Concealed Weapon While Under the Influence of Alcohol, alleged to have been committed as follows: that the defendant, MICHAEL IAN KRAMER, on or about the 14th day of March, 2009, in Kootenai County, Idaho, did carry a concealed weapon, to-wit: a .40 caliber pistol on or about his person while intoxicated and/or under the influence of an intoxicating drink To this charge the defendant has pled not guilty.

INSTRUCTION NO. 1C

YOU ARE INSTRUCTED that the defendant, MICHAEL IAN KRAMER, is charged in Count III with the crime of Transporting an Opened Container of Alcohol in a Motor Vehicle, alleged to have been committed as follows: that the defendant, MICHAEL IAN KRAMER, on or about the 14th day of March, 2009, in Kootenai County, Idaho, did willfully and unlawfully transport an opened and/or unsealed container of alcohol in a motor vehicle. To this charge the defendant has pled not guilty.

INSTRUCTION NO. 2

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(s) 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.

INSTRUCTION NO. 3

A defendant in a criminal action is presumed to be innocent. This presumption places upon the state the burden of proving the defendant guilty beyond a reasonable doubt. Thus, a defendant, although accused, begins the trial with a clean slate with no evidence against the defendant. If, after considering all the evidence and my instructions on the law, you have a reasonable doubt as to the defendant's guilt, you must return a verdict of not guilty.

Reasonable doubt is defined as follows: It is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

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

INSTRUCTION NO. 5

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.

INSTRUCTION NO. 6

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.

INSTRUCTION NO. 7

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.

INSTRUCTION NO. 8

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

INSTRUCTION NO. 9

Each count charges a separate and distinct offense. You must decide each count separately on the evidence and the law that applies to it, uninfluenced by your decision as to any other count. The defendant may be found guilty or not guilty on any or all of the offenses charged.

INSTRUCTION NO. 10

YOU ARE INSTRUCTED that for the defendant to be guilty of Operating a Motor Vehicle While Under the Influence, the State must prove each of the following:

1. On or about the 14th day of March, 2009;
2. in the state of Idaho;
3. the defendant, MICHAEL IAN KRAMER,
4. drove and/or was in actual physical control of;
5. a motor vehicle;
6. upon a highway, street or bridge or upon public or private property open to the public;
7. while under the influence of alcohol and/or while having an alcohol concentration of 0.08 or more as shown by analysis of the defendant's breath.

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, you must find the defendant guilty.

INSTRUCTION NO. 11

"Actual physical control" shall be defined as being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving.

INSTRUCTION NO. 12

The term "highway" means the same as "street" and includes public roads, alleys, bridges and adjacent sidewalks and rights-of-way.

INSTRUCTION NO. 13

To prove that someone was under the influence of alcohol and/or drugs, 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 and had used enough of any drug or intoxicating substance to influence or affect the defendant's ability to drive the motor vehicle.

INSTRUCTION NO. 17

YOU ARE INSTRUCTED that for the defendant to be guilty of Possession of a Concealed Weapon While Under the Influence of Alcohol, the State must prove each of the following:

1. On or about the 14th day of March, 2009;
2. in the state of Idaho;
3. the defendant, MICHAEL IAN KRAMER,
4. while intoxicated and/or under the influence of an intoxicating drink or drug;
5. carried a firearm;
6. which was concealed on or about the defendant's person.

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, you must find the defendant guilty.

INSTRUCTION NO. 15

YOU ARE INSTRUCTED that the term "firearm" means any weapon from which a shot, projectile or other object may be discharged by force of combustion, explosive, gas or mechanical means, whether operable or inoperable.

INSTRUCTION NO. 16

YOU ARE INSTRUCTED that for the defendant to be guilty of Transporting an Opened Container of Alcohol in a Motor Vehicle, the State must prove each of the following:

1. On or about the 14th day of March, 2009;
2. in the state of Idaho;
3. the defendant, MICHAEL IAN KRAMER,
4. either:
 - a. broke open and/or allowed to be broken or opened any container of alcoholic liquor,
and/or
 - b. drank and/or used and/or allowed to be drunk and/or used any alcoholic liquor;
5. while the same was being transported in a motor vehicle.

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, you must find the defendant guilty.

INSTRUCTION NO. 17

YOU ARE INSTRUCTED that "Alcoholic liquor" includes the following:

- (1) alcohol, meaning the product of distillation of any fermented liquor, rectified either once or oftener, whatever may be the origin thereof, or synthetic ethyl alcohol;
- (2) spirits, meaning any beverage which contains alcohol obtained by distillation mixed with drinkable water and other substances in solution, including, among other things, brandy, rum, whiskey, and gin;
- (3) wine, meaning any alcoholic beverage obtained by the fermentation of the natural sugar content of fruits (grapes, apples, etc.) or other agricultural products containing sugar (honey, milk, etc.); and
- (4) any liquid or solid, patented or not, containing alcohol, spirits, or wine, and susceptible of being consumed by a human being, for beverage purposes, and containing more than 4 per cent of alcohol by weight.

INSTRUCTION NO. 68

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 themselves upon each question.

In this case, your verdict must be unanimous. When you all arrive at a verdict, the presiding officer 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.

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 3/12/10
AT 8:44 O'CLOCK
CLERK, DISTRICT COURT
recessed
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.
MICHAEL I. KRAMER,
Defendant.

CASE NO. CR-M09-5447

VERDICT

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

(CHOOSE ONE ONLY)

X GUILTY

 NOT GUILTY

OF TRANSPORTING AN OPENED CONTAINER OF ALCOHOL IN A MOTOR
VEHICLE.

DATED the 12 day of March, 2010.

Cari Hendry
PRESIDING OFFICER

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 3/12/10
AT 8:14 O'CLOCK
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,
vs.
MICHAEL I. KRAMER,
Defendant.

CASE NO. CR-M09-5447

VERDICT

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

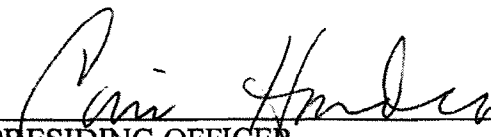
(CHOOSE ONE ONLY)

_____ GUILTY

X _____ NOT GUILTY

OF POSSESSION OF A CONCEALED WEAPON WHILE UNDER THE INFLUENCE
OF ALCOHOL.

DATED the 12 day of March, 2010.


PRESIDING OFFICER

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 3/12/10
AT 0:14 O'CLOCK
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,
vs.
MICHAEL I. KRAMER,
Defendant.

CASE NO. CR-M09-5447

VERDICT

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

(CHOOSE ONE ONLY)

 X GUILTY

 NOT GUILTY

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

DATED the 12 day of March, 2010.

Pam Henderson
PRESIDING OFFICER

BARRY McHUGH
Prosecuting Attorney
501 Government Way/Box 9000
Coeur d'Alene, ID 83816-9000
Telephone: (208) 446-1800
Facsimile: (208) 446-1833

Assigned Attorney
AMY NIXON

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 267

2010 APR -1 PM 3:37

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,

vs.

MICHAEL IAN KRAMER,
Defendant.

Case No. CR-09-5447

**MOTION TO DISMISS
COUNT II**

COMES NOW, BARRY McHUGH, Prosecuting Attorney for Kootenai County, State of Idaho, and hereby moves the Court for an Order to Dismiss COUNT II: POSSESSION OF A CONCEALED WEAPON WHILE UNDER THE INFLUENCE, Idaho Code §18-3302B in the above-entitled matter for the reason that it was a hung jury on this count at trial.

DATED this 1st day of April, 2010.



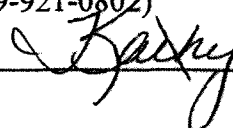
AMY NIXON

Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that, on the 1 day of April, 2010, I caused the foregoing to be transmitted as followed:

DOUGLAS PHELPS, ATTORNEY AT LAW (FAX 509-921-0802)



MOTION TO DISMISS COUNT II

2010

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED: 4-6-10
AT 11:51 O'CLOCK A M
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,
vs.
MICHAEL IAN KRAMER,
Defendant.

Case No. CR-09-5447

ORDER TO DISMISS

___ In Custody
___ Out of Custody

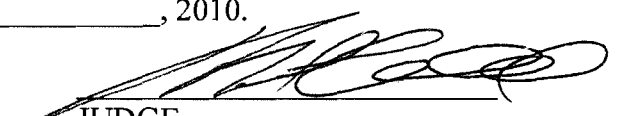
The Court having before it the Motion to Dismiss, and good cause thus appearing, now
therefore;

IT IS HEREBY ORDERED that COUNT II: POSSESSION OF A CONCEALED
WEAPON WHILE UNDER THE INFLUENCE, Idaho Code §18-3302B, in the above- entitled
matter, be dismissed.

IT IS FURTHER ORDERED that any bond posted shall be exonerated.

IT IS FURTHER ORDERED that any outstanding warrants shall be quashed.

ENTERED this 5 day of April, 2010.


JUDGE
#267

CLERK'S CERTIFICATE OF MAILING

I hereby certify that on the 6 day of April, 2010, that a true and
correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid,
Interoffice Mail, Hand Delivered, or Faxed to:
Prosecutor 208-446-1833 faxed Defense Attorney Douglas Phelps Defendant _____
KCPSB _____ Auditor _____ Police Agency _____
Bonding Co. _____ Other _____

4-6-10 Theresa A Carroll #488
ORDER TO DISMISS COUNT II

Court Minutes:

Session: CALDWELL062410P

Division: MAG

Courtroom: Courtroom 7

Session Date: 06/24/2010

Session Time: 09:38

Judge: Caldwell, Robert

Reporter:

Clerk(s): Reynolds, Peggy

State Attorney(s):

Gowey, Roy

Ryan, Joel

Stone, Kenneth

Public Defender(s):

Brooks, J. Lynn

Clapin, Michael

Szott, Paul

Walsh, Mayli

Zanetti, Craig

Prob. Officer(s):

Court interpreter(s):

Peggy Reynolds

Case ID: 0002

Case number: CR2009-5447

Plaintiff:

Plaintiff Attorney:

Defendant: KRAMER, MICHAEL I

Pers. Attorney: Phelps, Doug

Co-Defendant(s):

State Attorney:

Public Defender:

06/24/2010

13:51:13

Recording Started:

13:51:13 Case called

13:51:18 Judge: Caldwell, Robert
SENTENCING - DF, DA PRESENT - STATE WAIVES
APPEARANCE - CONVICTION AFTER JURY

13:51:54 TRIAL

13:51:57 Pers. Attorney: Phelps, Doug

13:52:05 Judge: Caldwell, Robert
DF WAS TO GET EVAL BY TODAY

13:52:17 Pers. Attorney: Phelps, Doug
WE HAVE THAT -

13:52:52 Judge: Caldwell, Robert
READS EVAL

13:53:05 Pers. Attorney: Phelps, Doug
RECS - SIGNIFICANT ISSUES - RE: APPEAL BOND -
THERE ARE SOME ISSUES HE MAY

13:54:22 WANT TO APPEAL -

13:54:57 Defendant: KRAMER, MICHAEL I
I WLD LIKE TO APPEAL THIS

13:55:10 Pers. Attorney: Phelps, Doug
THERE WAS AN ISSUE THAT CAME UP RE: BREATH TEST
THAT CAME UP AT TRIAL - RE:

13:55:29 BRNGING IN TECH TO TESTIFY - THAT IS PRIMARY
ISSUE TO BE APPEALED.

13:56:25 I HAVE NOT SEEN THE WAIVER OF APPEARANCE BY
STATE

13:56:37 General:
Time stamp

13:56:59 Pers. Attorney: Phelps, Doug
SURPRISED BY THAT REC - DF ALREADY SUFFERED ALS
- 4/14/09 - DF DID GET HIS

13:59:08 LICENSE REINSTATED -

13:59:38 Judge: Caldwell, Robert
REVIEWED EVAL - SENTENCE - F/C - 90/86, 16 HRS

SLP IN LIEU OF JAIL

14:00:33 Pers. Attorney: Phelps, Doug
ALS WAS 4/13/09 TO 7/09

14:00:55 Judge: Caldwell, Robert
90 DAY LIC SUSP BEGIN 4/13/09 - 2 YRS PROB -
CONDITIONS - OPEN CONTAINER -
F/C 30 DAYS TO PAY. EXON BONDS

14:01:28

14:03:25 Stop recording

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

IDAHO V
LIAN KRAMER
REGAL RD
AROY, WA 99003
RAMEM1324L8 WA
5/28/1968 AGENCY: IDAHO STATE POLICE
E # CR-2009-0005447 CITATION # 1367681
OFFENSE: I18-8004 M2 DRIVING UNDER THE INFLUENCE (SECOND OFFENSE)
ENDED:

JUDGMENT
FILED 6/24/10 AT 2:02pm
CLERK OF THE DISTRICT COURT
BY Theresa Sullivan DEPUTY
BOND:

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

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

MONIES ORDERED PAID:

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

- ☒ Fine / Penalty \$ 1000 which includes costs, and probation fee if applicable. Suspended \$ 500
☒ To be paid by 30 days, 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 90 days, Suspended 86 days, Credit _____ 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) 16 hours by 9-24-10 Must sign up within 7 days.
Follow the Labor Program schedule and policies.
☐

DRIVING PRIVILEGES SUSPENDED 90 days commencing 4/14/09 30 days absolute
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 2 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 ADIS program, and file proof, within _____ days. File proof of completion within 120 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. LC Def. Atty. LC ☒ Pros. _____ [] Other _____
☒ Jail (fax 446-1407) [] KCSO RECORDS fax 446-1307 (re: NCO) ☒ Dr. Serv. [] Auditor [] Com. Serv. [] AMP (fax 446-1990)
Date 6/24/10 Deputy Clerk Peggy Brode #433

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
MICHAEL IAN KRAMER
27719 N REGAL RD
CHATTAROY, WA 99003

AGENCY: IDAHO STATE POLICE
CASE # CR-2009-0005447 CITATION # 1367682

CHARGE: I23-505(1) ALCOHOL BEV-UNLAWFUL TRANSPORT/OPEN CONTAINER VIO
AMENDED:

JUDGMENT

FILED 6/24/10 AT 2:02 p.m.

CLERK OF THE DISTRICT COURT

BY [Signature] DEPUTY

BOND: Surety \$300.00

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

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

MONIES ORDERED PAID: A \$2.00 handling fee will be imposed on each installment.

- ☒ Fine / Penalty \$ 500 which includes costs, and probation fee if applicable. Suspended \$
☒ To be paid by 30 days, 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 days, Suspended days, Credit 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.
☐

DRIVING PRIVILEGES SUSPENDED days commencing

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. [Signature] Def. Atty. [Signature] [X] Pros. [] Other 185

[] Jail (fax 446-1407) [] KCSO RECORDS fax 446-1307 (re: NCO) [] Dr. Serv. [] Auditor [] Com. Serv. [] AMP (fax 446-1990)

Date 6/24/10 Deputy Clerk Peggy Brind

Phelps & Associates, PS
 Attorneys at Law
 2903 N. Stout Rd.
 Spokane, WA 99206-4373
 Phone:(509)892-0467; Fax:(509)921-0802
 phelps@phelpslaw1.com

STATE OF IDAHO
 COUNTY OF KOOTENAI } SS
 FILED:

2010 JUL 29 AM 10: 57

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-Respondent,)	
	)	NO. CR-09-5447
)	
vs.)	
	)	NOTICE OF APPEAL
MICHAEL I. KRAMER)	
Defendant-Appellant.)	
)	

TO: THE ABOVE NAMED RESPONDENT (State of Idaho), AND THE PARTY'S ATTORNEY (Jim Reiersen, Deputy Kootenai County Prosecutor, P.O. Box 9000, Coeur d' Alene, ID 83816), AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Michael I. Kramer, appeals against the above named respondent to the Idaho Supreme Court/Court of Appeals from the Judgment and Sentence entered in the above entitled action on the 24th day of June, 2010 by Judge Robert Caldwell.
2. That the party has a right to appeal to the Idaho Supreme Court/Court of Appeals and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 12(a) I.A.R.
3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, and such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal: The defendant appeals the court's ruling regarding denial of the Right of Confrontation under *Crawford v. Washington* and *Melendez-Diaz* in admitting breath test based upon affidavits certifying the breath test and equipment.
4. No order has been entered sealing all or any portion of the record.
5. (a) Is a reporter's transcript requested? YES

(b) The appellant requests the preparation of the following portions of the reporter's transcript in hard copy: The entire reporter's standard transcript as defined in Rule 25(a) I.A.R. supplemented by the following:

1. The conference on requested instructions, the objections of the parties to the instructions, and the court's ruling thereon.

6. 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) Complete copy of Court file.

7. I certify:

- (a) That a copy of this notice of appeal has been served on the reporter.

- (b) 1. ☒ That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript in the amount of \$200.00.

- (c) 1. ☒ That the estimated fee for preparation of the clerk's record has been paid in the amount of \$200.00

- (d) 1. ☐ That the appellate filing fee has been paid.

2. ☒ That the appellant is exempt from paying the appellate filing fee because this is a criminal appeal.

- (e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED THIS 28 day of July, 2010


DOUGLAS D. PHELPS, ISBA#4755

Phelps & Associates, PS
Attorneys at Law
2903 N. Stout Rd.
Spokane, WA 99206-4373
Phone:(509)892-0467; Fax:(509)921-0802
phelps@phelpsaw1.com

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 AUG -3 AM 8: 14

CLERK DISTRICT COURT

Cindy O'Reilly
DEPUTY

ORIGINAL

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,)	
	)	NO. CR-09-5447
)	
vs.	)	AMENDED
	)	NOTICE OF APPEAL
MICHAEL I. KRAMER)	
Defendant-Appellant.)	
)	

TO: THE ABOVE NAMED RESPONDENT (State of Idaho), AND THE PARTY'S ATTORNEY (Jim Reiersen, Deputy Kootenai County Prosecutor, P.O. Box 9000, Coeur d' Alene, ID 83816), AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Michael I. Kramer, appeals against the above named respondent to the Idaho Supreme Court/Court of Appeals from the trial and Judgment and Sentence entered in the above entitled action on the 24th day of June, 2010 by Judge Robert Caldwell.
2. That the party has a right to appeal to the District Court and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 12(a) I.A.R.
3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, and such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal: The defendant appeals the court's ruling regarding denial of the Right of Confrontation under *Crawford v. Washington* and *Melendez-Diaz* in admitting breath test based upon affidavits certifying the breath test and equipment.
4. No order has been entered sealing all or any portion of the record.
5. (a) Is a reporter's transcript requested? YES

(b) The appellant requests the preparation of the following portions of the reporter's transcript in hard copy: The standard transcript excluding jury selection as defined in Rule 25(a) I.A.R. supplemented by the following:

1. The conference on requested instructions, the objections of the parties to the instructions, and the court's ruling thereon.

6. 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) Complete copy of Court file.

7. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b) 1. ☒ That the clerk of the court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript in the amount of \$400.00

(c) 1. ☐ That the estimated fee for preparation of the clerk's record has been paid.

(d) 1. ☐ That the appellate filing fee has been paid.

2. ☒ That the appellant is exempt from paying the appellate filing fee because this is a criminal appeal.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED THIS 2 day of August, 2010


DOUGLAS D. PHELPS, ISBA#4755

Phelps & Associates, PS
Attorneys at Law
2903 North Stout
Spokane, WA 99206
(509)892-0467
FAX (509)921-0802

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 AUG 16 AM 11:30

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

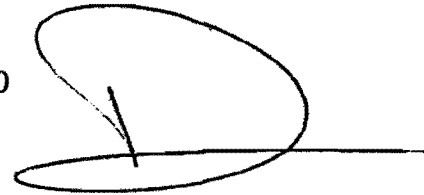
STATE OF IDAHO)
Plaintiff)
vs.)
MICHAEL I. KRAMER)
Defendant)
_____)

Case No. CR-09-5447

SUPPLEMENTAL REPORT

COMES NOW, the defendant, by and through his attorney of record, Douglas D. Phelps,
and respectfully submits the Proof of Completion of ADIS required by the court.

DATED this 16th day of August, 2010



DOUGLAS D. PHELPS, Attorney for Defendant

#944

legacy house™

Legacy House Counseling, LLC Certificate of Completion

Is hereby granted to

Michael Kramer

to certify that he has completed to satisfaction

Alcohol Drug Information School

Granted August 7, 2010

RECEIVED

AUG 09 2010

PHELPS & ASSOCIATES
Attorneys At Law

Victoria A. Purviance LCPC 8/7/10

Victoria A. Purviance, M.Coun. LCPC
Licensed DUI Evaluator - State of Idaho (OIH)

Certificate of Service

I, Leah M. Hill, hereby certify that on August 16, 2010, I caused a true and correct copy of the foregoing Supplemental Report to be forwarded with all of the required charges prepaid by the method indicated below.

Leah Hill

Leah M. Hill

PHELPS & ASSOCIATES, PS

Kootenai County District Court

P.O. Box 9000

324 West Garden

Coeur d'Alene, ID 83816-9000

 Hand Delivery U.S. Mail X Facsimile Overnight Mail

Kootenai County Prosecutor

501 Government Way

P.O. Box 9000

Coeur d'Alene, ID 83816-9000

 Hand Delivery U.S. Mail X Facsimile Overnight Mail

Court Minutes:

Session: SIMPSON090310A
Session Date: 09/03/2010
Judge: Simpson, Benjamin
Reporter: Schaller, Joann

Division: DIST
Session Time: 07:50

Courtroom: Courtroom9

Clerk(s): Larsen, Denice

State Attorney(s): Wick, Ann

Public Defender(s):
Chapman, Brad
Neils, Martin
Whitaker, Jed

Prob. Officer(s):

Court interpreter(s):

Case ID: 0011

Case number: CR2009-5447
Plaintiff:
Plaintiff Attorney:
Defendant: KRAMER, MICHAEL IAN
Pers. Attorney: Phelps, Doug
Co-Defendant(s):
State Attorney: Wick, Ann
Public Defender:

09/03/2010

09:04:41

Recording Started:

09:04:41

Case called

09:05:00

Add Ins: MOTION

Denice Schaller

MOTION TO STAY SETENCE PENDING APPEAL

09:05:17 Defendant: KRAMER, MICHAEL IAN
PRESENT NOT IN CUSTODY

09:05:21 Pers. Attorney: Phelps, Doug
HE HAS DONE EVAL AND ADIS-

09:05:38 Judge: Simpson, Benjamin
THIS IS ON APPEAL, WE HAVE NO TRANSCRIPT YET

09:05:53 State Attorney: Wick, Ann
PRESENT

09:05:59 Pers. Attorney: Phelps, Doug
HE HAS COMPLETED EVAL TREATMENT-HE DID HIS SCLP-
WE REALLY DON'T ANTICIPATE HE

09:06:25 WILL GET IN ADDITIONAL TROUBLE-ASKING FOR STAY
FOR LIC SUSPENSION AND

09:06:36 INTERLOCK-RIGHT NOW IT IS STAYED IN WASHINGTON
BECAUSE WE ADVISED THEM OF

09:06:51 THIS HEARING-I THINK HE HAS ALREADY CLEARED UP
THE IDAHO, THEY BACKDATED-BUT

09:07:04 WASHINGTON IMPOSED ADDITIONAL SUSPENSION AND
THEY ARE REQUIRING INTERLOCK-HE

09:07:19 WORKS AS PLUMBER AND IS DISABLED AND IS CAUSING
SOME PROBLEMS WITH

09:07:37 EMPLOYMENT, ALSO WITH DUI CONVICTION-

09:07:44 Judge: Simpson, Benjamin
IF I STAY IT IT WILL TOLL THE PROCEEDINGS

09:07:52 Pers. Attorney: Phelps, Doug
HE UNDERSTANDS

09:08:01 Judge: Simpson, Benjamin
IF NOT SUCCESSFUL ON APPEAL WE WILL START ALL
OVER-

09:08:14 Pers. Attorney: Phelps, Doug
ISSUE IS WHETHER COURT IS UNDER MELENDEZ/DIAZ-
WHETHER NOT TO BRING IN EXPERTS

09:08:38 OR CROSS EXAMINATION-DON'T THINK IT HAS EVER
BEEN DECIDED

09:08:52 State Attorney: Wick, Ann

NOT OPPOSED TO STAY

09:08:56 Judge: Simpson, Benjamin
DO YOU WANT SURETY POSTED

09:09:00 State Attorney: Wick, Ann
DEFER TO COURT

09:09:07 Judge: Simpson, Benjamin
I WILL ISSUE ORDER STAYING ANY LIC SUSPENSIONS,
INTERLOCK REQUIREMENTS,
09:09:32 PROBATIONARY CONDITIONS OR PAYMENT OF FINES
PENDING OUTCOME OF APPEAL-MR
09:09:42 PHELPS TO PREPARE ORDER

09:09:45 Pers. Attorney: Phelps, Doug
COULD WE LIMIT IT TO JUST LIC SUSPENSIONS

09:09:56 Judge: Simpson, Benjamin
OK-

09:10:02 Pers. Attorney: Phelps, Doug
INTERLOCK AND LICENSE SUSPENSIONS LIMIT IT TO-HE
HAS NO PROBLEM BEING ON
09:10:17 PROBATION-WE ARE ASKING FOR VERY LIMITED STAY

09:10:24 Judge: Simpson, Benjamin
OK

09:10:26 Pers. Attorney: Phelps, Doug
I THINK HE HAS SET UP PMT PLAN ALREADY

09:10:36 Defendant: KRAMER, MICHAEL IAN
YES, I HAVE MADE 2 PMT

09:10:47 Stop recording

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED: 9-9-10
AT 1:25 O'CLOCK P.M.
CLERK, DISTRICT COURT
Kristen Campbell
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/Respondent	)	CASE NO. CR-09-5447
)	
vs.	)	NOTICE OF LODGING OF TRANSCRIPT
)	
MICHAEL I. KRAMER,)	
	)	Jury Trial
Defendant/Appellant.	)	(excluding jury voir dire)

TO: THE PARTIES ABOVE NAMED OR THEIR ATTORNEYS:

YOU ARE HEREBY NOTIFIED PURSUANT TO ICR 54.9 that the transcript previously ordered in the Amended Notice of Appeal filed August 3, 2010, in the above entitled matter, has been lodged with the Clerk of the District Court, Magistrate Division of Kootenai County, State of Idaho.

YOU ARE FURTHER NOTIFIED that you have twenty-one (21) days from the date of this Order to secure your copy of the transcript from the Clerk of the District Court, Criminal Division, and to file any objections to the content thereof.

DATED this 9 day of September, 2010.

DANIEL J. ENGLISH,
CLERK OF THE DISTRICT COURT

BY *Kristen Campbell*
Deputy Clerk

I hereby certify that a true and correct copy of the foregoing
was mailed this 9 day of September, 2010, to-wit:

Barry McHugh
Prosecuting Attorney
Fax No. (208) 446-1841
211

Douglas Phelps
Attorney at Law
Fax No. (509) 921-0802
212

Honorable Benjamin Simpson
Appellate Judge

DANIEL J. ENGLISH
CLERK OF THE DISTRICT COURT

By Kristine Campbell
Deputy Clerk

Phelps & Associates, PS
 Attorneys At Law
 2903 N. Stout Rd.
 Spokane, WA 99206-4373
 Ph:(509)892-0467; Fax:(509)921-0802
 ISB #4755

STATE OF IDAHO } ss
 COUNTY OF KOOTENAI }
 FILED: 9-16-10
 AT 8:20 O'CLOCK A 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)	
Plaintiff)	
	)	NO. CR-09-5447
vs.)	
)	
MICHAEL I. KRAMER	)	ORDER STAYING SENTENCE
Defendant	)	AND SETTING CONDITIONS
	)	OF RELEASE PENDING APPEAL

After hearing argument and upon review of the court files herein it is the order of the court that during the pendency of the defendants appeal the following actions will be stayed:

1. The suspension of the license of the appellant pursuant to the conviction for the Driving Under the Influence charge.
2. Any requirement that the appellant have an ignition interlock device because of the conviction for DUI on this cause number.
3. Appellant is to comply with all other terms and conditions of the judgment and sentence during the pendency of the appeal.

This order is based upon the perfection of the appellants/defendants appeal. The stay is to remain in place until the appeal is complete or until further order of this court.

IT IS SO ORDERED.

DATED this 12 day of September, 2010

[Signature]
 JUDGE SIMPSON

ORDER STAYING SENTENCE AND
 SETTING CONDITIONS OF RELEASE
 PENDING APPEAL

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed through interoffice, postage pre-paid, or by facsimile on the 16th day of September, 2010 to:

KOOTENAI COUNTY PROSECUTOR
FAX: 208-446-1833

DOUGLAS D. PHELPS
FAX: 509-921-0802

IDAHO TRANSPORTATION DEPARTMENT
FAX: 208-334-8739

DANIEL J. ENGLISH,
CLERK OF THE DISTRICT COURT

by 
Deputy Clerk

1384

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,	)	CASE NO. CR-M09-5447
)	
vs.	)	Notice of Settling
	)	Transcript on Appeal
MICHAEL I. KRAMER,	)	and Briefing Schedule
)	
Defendant/Appellant.)	

TO: THE PARTIES ABOVE NAMED OR THEIR ATTORNEYS:

It appearing that on September 9, 2010, a transcript of the requested hearing in this matter was received by the Clerk, and that a Notice of Lodging such transcript was mailed or delivered by the Clerk to all attorneys of record or parties appearing in person on September 9, 2010, and that no objection to the transcript have been filed, and that more than twenty-one (21) days have elapsed since such notice of Lodging was mailed by the Clerk; and that such transcript is deemed settled pursuant to I.C.R. 54.9;

NOW, THEREFORE, PURSUANT TO I.C.R. 54.10, YOU ARE HEREBY NOTIFIED THAT such transcript together with the Clerk's record and any exhibits offered or admitted in the trial in this matter have been filed with the District Court, as the Appellate Court in this

matter, and

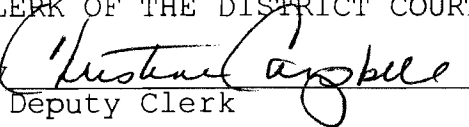
YOU ARE FURTHER NOTIFIED THAT PURSUANT TO I.C.R. 54.15 and I.A.R. 34, Appellant's Brief must be filed with the Court by November 8, 2010; Respondent's brief so filed by December 6, 2010; and any reply brief so filed by December 27, 2010.

YOU ARE FURTHER NOTIFIED that if briefs are not filed within the above referenced time limits, the Court may schedule this matter for argument pursuant to I.C.R. 54.16; or the Court may dismiss the appeal pursuant to I.C.R. 54.13.

Dated this 4th day of October, 2010.

DANIEL J. ENGLISH,
CLERK OF THE DISTRICT COURT

By


Deputy Clerk


I hereby certify that a true and correct copy of the foregoing was mailed this 4th day of October, 2010, to:

Barry McHugh
Prosecuting Attorney
Fax No. 446-1841 ⁶⁰¹

Douglas Phelps
Attorney at Law
Fax No. (509) 921-0802 ⁶⁰²

Honorable Benjamin Simpson
Appellate Judge

DANIEL J. ENGLISH,
CLERK OF THE DISTRICT COURT


Deputy Clerk

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 NOV -8 PM 4:17

CLERK DISTRICT COURT
[Signature]
DEPUTY

301
PHELPS & ASSOCIATES, PS
Attorneys at Law
2903 N. Stout Road
Spokane, WA 99206
Phone: (509) 892-0467
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO)	
Respondent	)	Case No. CR-09-5447
vs.)	
	)	BRIEF OF APPELLANT ON
MICHAEL L. KRAMER	)	APPEAL FROM MAGISTRATE'S
Appellant	)	COURT

Comes now, the above named defendant by and through his attorney, Douglas D. Phelps, hereby submits the following on appeal from his jury trial in Magistrate Court before the Honorable Robert Burton

I. FACTS

On Friday, March 12, 2010 a jury trial was held before the Honorable Robert Burton in Magistrate Court of Kootenai County. The defendant Michael Kramer was charged with Driving Under the Influence. At the time of trial the state argued that the breath test should be admissible even though the test was terminated after a first sample was taken followed shortly thereafter by two additional blows with readings of .174 and .175. No additional 15 minute observation period was taken before the breath tests were completed. (RP 2 line 22 to RP 2 line 15) The defense argued that this was an issue of

mouth alcohol that established a factual question for the jury to decide if that was an unreliable breath test. (RP 3-4)

The defense then indicated that there were issues regarding the documentation regarding the breath machine. (RP 4 line 25 to RP 5). At trial the defense argued that a discovery demand was filed on March 18, 2009. The defense demanded disclosure of documents and experts that the state intended to use to lay a foundation for the breath test. (RP 9 lines 11-17) A demand included the disclosure of all experts, basis of expert testimony pursuant to IRE 705, and all analyses performed with testing procedures, and reagents or solvents used in the testing procedures. (RP 9) The defense objected to the use of the breath test because the prosecution failed under IRE 702, 703, and 704 to disclose any discovery related to the breath test and failed to disclose Jeremy Johnson as an expert on the breath test. (RP 5 lines 1-19) The defense argued that this demand included the expert and certificates used for the breath test. (RP 6 lines 4-20)

The court inquired if the defense sought to obtain the documentation through a request from law enforcement. (RP 11) The defense argued that the government must timely produce the demanded material to allow the defense to prepare and respond to the state's documents and or witnesses. The prejudice to the defendant is from the failure to timely disclose denies the defense the ability to call witnesses or defense experts. (RP 11)

The defendant argued that pursuant to *Melendez-Diaz* and the U.S. Supreme Court that where scientific evidence is used the defendant has a Sixth Amendment right to confront the witnesses against him at trial. (RP 12-14) The defense clarified the motion was three-fold to exclude breath test for the failure to timely provide discovery, the prejudice is the inability to now bring an expert on the breath machine, and the denial of

the right of confrontation under the Sixth Amendment. (RP 15) The defense explained that the government needed to bring the person that calibrated the equipment (Deb Schofield), the forensic services commander (Mr. Powell), and the person that prepared the simulator solution a David Lacock. (RP 15) The defendant argued that these people must be called to testify to preserve the defendants right of confrontation under the Sixth Amendment. (RP 16 lines 1-21) The defense further argued that the government could not lay a proper foundation to introduce the breath test because the witnesses were not called as required by the Sixth Amendment confrontation clause. (RP 17)

The state responded that they provided, in response to the defense discovery demand, the breath testing ticket. (RP 18) The government provided the certification documents when they were received the week of trial. (RP 19) The prosecutor argued that bringing the forensic scientist from Kentucky, the forensic technician, "all those witnesses to present to the jury...is that gonna confuse and mislead the jury?" (RP 19 lines 15-20) The court then points to the question of the need to bring the person who did the analysis so they can be cross-examined. (RP 20 lines 12-21)

The prosecution argued that they had a Jeremy Johnson available to testify. The defense explained that David A. Lacock was the forensic scientist that prepared the simulator solution to the target value of .081 and .073 to .089 of ethyl alcohol per 210 liters of vapor. (RP 21) Mr. Johnson did not do that preparation of the simulator solution. (RP 22) Further, that Mr. Powell was the technician that needed to be called as technician to testify that the breath machine is properly certified. (RP 22) These people are needed to testify that the breath test was completed as required by 18-8004(4). (RP 23 lines 1-7) The government here is using a breath machine to prove that alcohol is present in the

defendant and this goes to the heart of the issue as in a drug case and if the defendant blows above .08 he is presumed guilty. (RP 23-24) The defense argues that notice was not required here because there is a constitutional right of confrontation under the Sixth Amendment. (RP 24) That the prosecution must bring these individuals that are testifying by certificates and not Jeremy Johnson. (RP 24-25)

The court rules that the motion to suppress was untimely and the state could bring Jeremy Johnson because he was disclosed. The court further ruled that Trooper Lind conducted the breath test and he will be present to testify. (RP 26) The court does not know that the technician who calibrated the instrument must appear pursuant to *Crawford*. The issue of lack of foundation may be renewed at that time in the trial. (RP 26)

The jury was called into the court and voir dire was conducted. (RP 27) The parties made opening statements. (RP 27-41) The state began their case with the testimony of Trooper Lind from ISP. Trooper Lind testifies regarding his training as a Trooper. (RP 45) Trooper Lind testified he was trained to do field sobriety tests. (RP 50-51) Then the Trooper testified that he observed on March 14, 2009 a vehicle traveling on I-90. The Trooper stated the vehicle appeared to be going faster than other traffic on the interstate. (RP 52) The vehicle was a full sized and four door pickup pulling a snowmobile trailer with snowmobiles on it. (RP 54)

The person driving the truck was identified as Michael Kramer. (RP 55) In conversation with Mr. Kramer the Trooper stated that Mr. Kramer had "sleepy looking, heavy, glassy" look to his eyes. (RP 55) The speech was called slurred and very slow and

deliberate. (RP 55) The characteristics were described as being indicators of intoxication.
(RP 56)

A pistol was on Mr. Kramer's hip which the Trooper did not see until Mr. Kramer exited his truck. (RP 58-59) The firearm was taken from Mr. Kramer and placed in the patrol car. (RP 59) Then the field sobriety tests were given to Mr. Kramer. (RP 61-69) At the conclusion of the field test the decision was made to arrest Mr. Kramer who was handcuffed and placed in the back of the patrol car. (RP 69) In conducting the inventory of the vehicle the Trooper found three bottles of liquor. (RP 71) There were passengers with Mr. Kramer who left with someone that picked them up. (RP 73)

Trooper Lind testified that he is trained in doing breath test on the Intoxilyzer 5000. (RP 75) The defendant's mouth was checked as required and nothing was found. (RP 77) The fifteen minute observation period was then completed. (RP 77) The machine is described that is used for the breath test. (RP 79) Information is entered into the breath test machine. (RP 80) The procedures were described in operating the breath machine. (RP 81-83) The machine will print out a reading after the person blows into the machine two times. (RP 82-87) The prosecutor sought to admit the breath test but a defense objection based upon lack of foundation was made as to exhibit 1, the breath test ticket. (RP 89) The court sustained the objection to the breath ticket based on lack of foundation. (RP 89) The prosecution conducts further questioning about the breath test document exhibit 1. Then the breath test document was offered again with another objection based on lack of foundation. (RP 91) The court sustains explaining that the prosecutor must show that the device was proved. (RP 91 lines 11-16)

The prosecutor proceeds to identify what is described as exhibit 2. (RP 91) Page one of that exhibit 2 provided solution numbers. (RP 91-92) The second page of exhibit 2 was a log for the test that the Trooper conducted. (RP 92) Page four of exhibit 2 was the certification for the Intoxilyer 5000. (RP 93) The next page was identified as a certificate for a solution lot number which was the same as appeared on the other forms. (RP 93) The last page of exhibit 2 was a calibration for the Intoxilyzer 5000. (RP 94)

Testimony then moves to the video camera that was in the patrol car. (RP 94) The Trooper testified that he activated a camera in his patrol car that recorded his contact with Mr. Kramer. The video was introduced as exhibit 3 without objection. (RP 97) The video was played for the jury and courtroom spectators. (RP 98) The testimony further provided that Mr. Kramer had a flask. (RP 99) The defense cross-examined Trooper Lind. (RP 100) Trooper Lind testified he did not observe the trailer moving from side to side as it traveled down the highway. (RP 102)

There was a lot of road noise along the highway according to Trooper Lind. (RP 104) The field test involved a need to hear and follow instructions. (RP 104) Mr. Kramer had on several layers of clothing as he had been snowmobiling. (RP 105) Head injuries and eye sight problems could affect a person's ability to do a gaze nystagmus test. (RP 105) Two errors on the walk and turn test would be considered a failure of that test. (RP 108) The defendant did not have it explained to him how the test was scored. (RP 110) There were questions of the officer regarding what acts would be a "fault" in the field test scoring. (RP 111) There were a number of passengers in the truck and they had all been drinking. (RP 116) The red eyes that Mr. Kramer had could be due to being in the wind.

(RP 117-118) Mr. Kramer told Trooper Lind that he had a concealed weapons permit for the handgun that he had with him. (RP 118-119)

The Trooper testified about the breath test and the ways that a person might give an invalid sample. (RP 120) The importance of the observation period and mouth alcohol was testified to including acid reflux and other contents in the mouth. (RP 121) There are two machines at the Kootenai County Jail and the Trooper was not certain if he switched machines after the first breath test. (RP 122) After the first invalid sample Trooper Lind testified that he stopped the test and started over. (RP 122)

The Trooper testified he did not know how often the breath machine is calibrated. The Trooper could not testify that the breath machine was certified for the location where it was located. (RP 123) Trooper Lind was aware that radio frequency interference could affect the breath test results. (RP 123) The temperature of the simulator solution must be verified by the operator according to the Trooper. (RP 125) On redirect the Trooper testified he did not check the simulator solution lot number on the breath test. The operator is not required to check the simulator lot number for the breath test. (RP 129) The prosecution moved to admit the breath test ticket as exhibit 1. (RP 131) The court sustained the objection noting that there had not been admitted exhibit 2 to establish the foundation for exhibit 1. (RP 131)

The prosecution then moved to admit exhibit 2. (RP 131) The defense objected based upon the government's failure to bring Mr. Powell the forensic services commander. (RP 131) Objection to the certificate of calibration page three of exhibit 2 and certificate of simulator solution lot 7804 of David Lacock who did not testify except by the document prepared by the state in anticipation of trial to provide the foundation for

the breath test. (RP 132) The defense objects to the denial of the right of confrontation under the Sixth Amendment under *Crawford* and *Melendez-Diaz*. (RP 132) Further, no one testified that either simulator solution 007109 or 007804 were placed in the breath machine used in this machine. (RP 133) The defense also asks the court to incorporate the prior arguments made to avoid rearguing the issues. (RP 133)

The trial court ruled that based on the Idaho Code 18-8004 and the applicable case law in Idaho and the earlier ruling (RP 133) the court overrules the objection and admits exhibit 2. (RP 134 lines 1-2) The prosecution moved to admit exhibit 1 and the defense maintained the same objection that were earlier argued. (RP 134) The court overruled those objections once more. (RP 134) The Trooper then testified about what the results of the breath test were at .174 and .157 on March 14, 2009. (RP 134) The court holds the Rule 29 motion until after further testimony from defense because the state rested. (RP 135) The defense then called Michael Kramer to the stand to testify on his own behalf. (RP 135) Mr. Kramer testified that he had been up for about 24 hours having left his house about 24 hours earlier. (RP 136) Mr. Kramer had been in the U.S.A Air Force in the Gulf War having served 10 years before being honorably discharged. He currently works as a plumber. (RP 137) Mr. Kramer testified as to his disability for a back injury which prevents him from standing or sitting for prolonged periods of time. His back is very painful and he takes medication for it from time to time. (RP 137) He has pain into his feet and it feels as though he is standing on pins and needles. (RP 138) Additionally, he suffers from lung disease. (RP 138) Mr. Kramer testified that he was in both the first and second Gulf Wars during the burning of the oil fields. (RP 138) Since that time he has retrained himself as a plumber. (RP 138)

On the day of his arrest he told the officer that he had neck problems. (RP 139)

Mr. Kramer testified that he did his best on the field agility test. (RP 139) He was dressed that day in bibs, thermals, heavy boots, thick socks, and quite a few layers of clothes. (RP 139) The gun was carried for protection up in the mountains and he told the Trooper that he had a carry permit. (RP 140) The weapon permit for the permit issued by the State of Washington was offered as exhibit A. The court admits a copy of the concealed weapons permit as exhibit A. (RP 143)

Mr. Kramer testified that the breath machine that was used first malfunctioned and that the Trooper then gave him a second test on the second machine. (RP 143) The first test was invalid then there were another two blows and the test that was entered into evidence. (RP 143) The Trooper never checked the defendant's mouth before the test on the second machine. (RP 144) He has a stomach condition like acid reflux where he brings fluids up from his stomach and part of the esophagus. (RP 145) The pain in his back on a scale from one to ten was at about a six on the day he was riding the snowmobile. (RP 147) He did not consume any alcohol after he was handcuffed. (RP 150) Mr. Kramer stated he did not believe he was intoxicated on the day of his arrest. (RP 151)

The defense argued that the court should not have instructed on the reading of .08 or above because the state failed to establish a proper foundation for the breath test. (RP 154) Also the defense argued the ICR 29 motion and the court denied that motion. (RP 155-156)

The court then instructed the jury. (RP 157-162) The state then made closing argument. (RP 162-170) The defense then argued in closing that the video was available

for the jury to view. (RP 170) The defense argued that the breath test was completed hours after driving. (RP 171) The defense argued the breath test was flawed by an invalid breath test and a re-test on a second machine. (RP 171) The defense challenges that exhibit 2 provided no credible evidence that the machine was properly calibrated. (RP 172) The Trooper testified that he had an invalid sample followed by two good breath samples. (RP 172) There was no testimony from anyone saying that they placed the simulator sample into the machine. (RP 172) Further, Deb Schofield, a technician from Kentucky, said the breath machine in this test was calibrated more than three years earlier on February 1, 2006. (RP 172) Lastly, a forensic services commander Mr. Powell certified that on February 14, 2006 the instrument was approved for Idaho Code 18-8004(4). (RP 173) There was a certificate from David A. Lacock that simulator solution 7804 and 7109 hit the proper target for values. (RP 174) The government says you must trust the breath test because of these certificates. (RP 175) The breath test here is not to be trusted. (RP 180) The jury was left then to deliberate and they left the courtroom. (RP 185)

The jurors had questions regarding what was the definition of a concealed weapon. (RP 186) At the same time the jury questioned: "Does the weapon have to be intentionally hidden?" (RP 187) The court instructs the jury that they have all the instructions that apply to this case. (RP 190) The jury also requested to view the video again which the court arranged for them to view. (RP 191-192) The jury later returns verdict of guilty on DUI and not guilty on possession of a concealed weapon. (RP 192) The court polls the jury on request of defense counsel. (RP 193) Juror number six indicates that it was not her verdict of not guilty on the concealed weapon charge. (RP

195) All six jurors found that the defendant was guilty of the open container. (RP 196)

The court rules the jury is deadlocked as to the concealed weapon count. (RP 197)

II. ISSUES ON APPEAL

- A. Did the trial court commit reversible error in admitting the breath test certificates to lay a foundation for the breath test where the prosecution failed to timely disclose the certificates after the defense timely filed a discovery demand?**
- B. Did the trial court commit reversible error in admitting the breath test certificates to lay a foundation for the breath test in violation of the defendant's right of confrontation under the Sixth Amendment and *Crawford v. Washington* and *Melendez-Diaz*?**

III. ARGUMENT ON APPEAL

- A. The trial court committed reversible error in admitting the breath test certificates to lay a foundation for the breath test where the prosecution failed to timely disclose the certificates after the defense timely filed a discovery demand.**

Idaho Criminal Rule 16 governs the duties of the government in disclosing evidence and materials. ICR 16(b)(5) requires that the prosecution disclose reports of examination and tests. ICR 16(b)(7) requires further disclosure based upon evidence rules 702, 703, or 705 these require disclosure of the facts and data used as a basis for the

expert opinion. ICR 16(b)(4) requires disclosure of any reports that the prosecution intends to introduce at trial. The response is to be made within 14 days of the service of the request pursuant to the rule.

The Idaho Criminal Code 18-8004(4) sets out that a method for the state to admit a chemical test allows that the test may be introduced based upon "provisions of approval and certification standards to be set by the department, or by any method approved by the Idaho State Police."

In the case before the court the defendant filed a written demand on March 18, 2009. (RP 5) The court acknowledged that number 17 of the defense demand required the state provide "copies of all test results that would be utilized by the prosecution for identification purposes, including types of testing, testing procedures reagents or whatever solvents, comparative analysis...." (RP 9) The government provided the documents the day before trial. (RP 11) The defense sought suppression based upon late disclosure and the prejudice that includes the inability to call expert witnesses due to late disclosure to address the breath test results. (RP 11) The defense argued that prior to the disclosure of the test certificates the state's case seemed to be based upon no chemical test. (RP 11 lines 13-19) The court ruled the motion to suppress for failure to comply with discovery was untimely. (RP 25)

Whether to impose a sanction for a party's failure to comply with a discovery request, and the choice of an appropriate sanction, are within the discretion of the trial court. *State v. Buss*, 98 Idaho 173, 174, 560 P.2d 495, 496 (1977); *State v. Hawkins*, 131 Idaho 396, 405, 958 P.2d 22, 31 (Ct. App. 1998); *State v. Matthews*, 124 Idaho 806, 812, 864 P.2d 644, 650 (Ct. App. 1993) Where a late disclosure witness has been allowed to

testify, despite the defendant's objection to the untimely disclosure, we will not reverse in the absence of a showing that the delayed disclosure prejudiced the defendant's preparation or presentation of his defense. *State v. Byington*, 132 Idaho 589, 592, 977 P.2d 203, 206 (1999); *State v. Pizzuto*, 119 Idaho 742, 751, 810 P.2d 680, 689 (1991), overruled on other grounds by *State v. Card*, 121 Idaho 425, 432, 825 P.2d 1081, 1088 (1991); *State v. Johnson*, 132 Idaho 726, 728, 979 P.2d 128, 130 (Ct. App. 1999) The magistrate here elected not to exclude the evidence or impose any sanction. Therefore the question on appeal is whether Mr. Kramer was prejudiced by the state's discovery violation that the trial court's refusal to exclude the evidence (certificates) constituted an abuse of discretion.

"The inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial." *Byington*, 132 Idaho at 592, 977 P.2d at 206; *State v. Smoot*, 99 Idaho 855, 858-59, 590 P.2d 1001, 1004-05 (1978); *State v. Pacheco*, 134 Idaho 367, 370, P.3d 752, 755 (Ct. App. 2000); *Johnson*, 132 Idaho at 728, 979 P.2d at 130; *Hawkins*, 131 Idaho at 405, 958 P.2d at 31; *State v. Hansen*, 108 Idaho 902, 904, 702 P.2d 1362, 1364 (Ct. App. 1985) This ordinarily requires that the complaining party demonstrate that the late disclosure hampered his ability to meet the evidence at trial. *State v. Miller*, 133 Idaho 454, 456-57, 988 P.2d 680, 682-83 (1999); *State v. Pizzuto*, 119 Idaho 742, 751, 810 P.2d 680, 689 (1991); *State v. Coburn*, 82 Idaho 437, 444, 354 P.2d 751, 755 (1960), had a deleterious effect on his trial strategy, *United States v. Marshall*, 132 F. 3d 63, 68 (D.C. Cir. 1998); *United States v. Camargo-Vergara*, 57 F.3d 993, 999 (11th Cir. 1995); *United States v. Lanove*, 71 F.3d 966, 976-78 (1st Cir.

1995), arrogated on other grounds by *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633, 136 L.Ed.2d 554 (1997); *United States v. Koe*, 821 F.2d 604, 607-08 (11th Cir. 1987), or that it deprived him of the opportunity to raise a valid challenge to the admissibility of evidence. *Camargo-Vergara*, 57 3d at 999.

Here the record establishes exactly this type of prejudice. The breath test in this case involved an invalid sample. (RP 119-121, 131-133) In the argument regarding the admissibility of the breath test the issue of the late discovery was raised and the prejudice stated by defense counsel. (RP 133 lines 11-21) The defendant here was hampered in his ability to challenge the admissibility and reliability of the breath test by the untimely disclosure of the breath test certificates. The court therefore on appeal should remand the case to magistrate court for retrial allowing the defense adequate time to prepare for the untimely disclosure evidence.

B. The trial court committed reversible error in admitting breath test certificates to lay a foundation for the breath test in violation of the defendant's right of confrontation under the Sixth Amendment and *Crawford v. Washington* and *Melendez-Diaz*.

The state addressing the charge of "persons under the influence of alcohol, drugs, or any other intoxicants" 18-8004(4) establishes various tests for "determining the alcohol concentration". But beyond that the statute declares: "Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho State Police or by any other method approved by the Idaho State Police shall be admissible in any proceeding in this state

without the necessity of producing a witness to establish the reliability of the testing procedure for examination."

The court admitted first exhibit 2 which included certificates of Mr. Powell the forensic services coordinator (RP 131), a certificate of David Lacock regarding the simulator solution (RP 131-133), and that no one testified which simulator solution was installed in the breath machine. (RP 133) The defense objected that these documents denied the defendant his right of confrontation under the Sixth Amendment both prior to trial. (RP 12-14, 16 lines 1-21) The defense had previously argued that Deb Schofield must be brought as she certified that she had calibrated the breath machine. (RP 15) The defense cited to both *Crawford v. Washington* and *Melendez-Diaz*. (RP 12-14)

The Idaho courts have considered issues of the right of confrontation after the case of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 36, 158 L.Ed.2d 177 (2004) and *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) The Idaho Supreme Court held that the videotaped interview in a lewd conduct case involving a forensic interview raised issues of Sixth Amendment confrontation. The decision led to the reversal of the trial court that admitted the video taped interview with the child witness. *State v. Hooper*, 145 Idaho 139, 176 P.3d 911 (Idaho 2007)

The United States Supreme Court has further clarified the requirements of the Sixth Amendment confrontation clause in *Melendez-Diaz v. Massachusetts*, 557 U.S. ____ 129 S. Ct. 2527, 174 L.Ed.3d 314 (2009). The U.S. Supreme Court held that analyst certificates showing the results of forensic analysis on seized substances were inadmissible absent testimony from the lab technician. In this case the court held that certificates that affidavits or declarations "are functionally identical to live, in-court


testimony, doing precisely what a witness does on direct examination." *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527 174 L.Ed.2d 314 (2009) citing *Davis v. Washington*, 547 U.S. 813, 830 (2006) The affidavits in *Diaz* were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Washington v. Crawford*, 541 U.S. 36, 52 (2004) The court in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009) held "analyst" affidavits were testimonial statements, and the analyst's were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analyst's were unable to testify at trial and that petitioner had an opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analyst at trial. *Crawford*, supra at 54

Here in a criminal prosecution the very issue before the jury is what was the alcohol level? The case involving Mr. Kramer raised a number of questions regarding the breath machine and the breath test. The issue of the calibration of the machine and what simulator solution was installed in the machine. (RP119-121, 131-133) All of these issues could not be adequately addressed without the opportunity to cross-examine the witnesses that appeared through the certificates admitted in exhibit 2. (RP 131-133) Absent the right to confront the states analyst there can be no effective method to challenge their assertions made by "certificate". The only effective remedy is remand for a trial where these witnesses can be cross-examined regarding their analysis.

IV. CONCLUSION

The Kramer case raises issues which can lead but to one conclusion that is a new trial must be held. The defendant was denied his due process right by the state's failure to provide analysis testimony in a timely manner. Secondly, this error is further compounded by the government's use of "certificates" to admit a drug analysis of the defendant's breath without allowing cross-examination of these critical witnesses.

Respectfully submitted this 8 day of November, 2010



Douglas D. Phelps
Attorney for Appellant

Certificate of Service

I, Leah M. Hill, hereby certify that on November 08, 2010, I caused a true and correct copy of the foregoing Appellant's Brief to be forwarded with all of the required charges prepaid by the method indicated below.

Leah Hill
Leah M. Hill
PHELPS & ASSOCIATES, PS

Kootenai County District Court
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324 West Garden
Coeur d'Alene, ID 83816-9000

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NO CO PROSECUTOR

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COUNTY OF KOOTENAI } SS
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RUSH

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CLERK DISTRICT COURT

DEPUTY

Assigned Attorney:
AMY BORGMAN

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.

MICHAEL I. KRAMER,

Defendant.

CASE NO. CR-2009-5447.

**STIPULATION TO
EXTEND BRIEFING SCHEDULE**

COMES NOW, BARRY McHUGH, Prosecuting Attorney for Kootenai County, State of Idaho, and DOUG PHELPS, attorney representing the above-named Defendant/Appellant, and hereby stipulate and move the court for an order to extend the briefing schedule for the Respondent's Brief to Monday, December 20, 2010. This motion is made for the reason that due to a clerical error, the State/Respondent's Brief was incorrectly calendared as due on December 27, 2010, the date of the Defendant/Appellant's Reply Brief. The actual due date of the State/Respondent's Brief was not brought to the State's attention until December 14, 2010; when counsel for both parties were in court on an unrelated matter; at that time, counsel for the Defendant/Appellant brought the error to the attention of the undersigned deputy prosecutor.

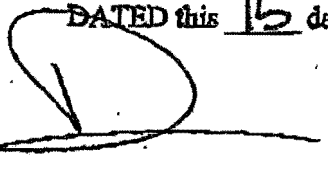
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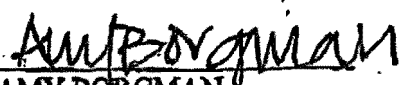
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IT IS ALSO stipulated that the reply brief, if any, will be due on the 10th day of January, 2011.

WHEREFORE, the parties respectfully request that the Court grant extension as stipulated by the parties.

DATED this 15 day of December, 2010,


DOUG PHELPS
Attorney for defendant


AMY BORGMAN
Deputy Prosecuting Attorney

STIPULATION EXTENDING BRIEFING SCHEDULE

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KO CO PROSECUTOR

FAX No. 208-446-1841

P. 004

CERTIFICATE OF MAILING

I hereby certify that on the 16 day of Dec, 2010, a true and correct copy of the foregoing was caused to be delivered to:

DOUG PHELPS
ATTORNEY OF LAW
FAXED

STIPULATION EXTENDING BRIEFING SCHEDULE

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STATE OF IDAHO } ss
COUNTY OF KOOTENAI
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CLERK, DISTRICT COURT
J. J. [Signature]
CT OF THE 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.

MICHAEL I. KRAMER,

Defendant.

CASE NO. CR-2009-5447

ORDER TO EXTEND BRIEFING SCHEDULE

The Court having before it the above Stipulation to extend the briefing schedule and good cause appearing now, therefore,

IT IS HEREBY ORDERED that the State/Respondents' Brief will be due on Monday, December 20th, 2010. Defendant/Appellant's reply brief, if any, will be due the 10th day of January, 2011.

ENTERED this 17 day of Dec., 2010.

JUDGE

CLERK'S CERTIFICATE OF MAILING

I hereby certify that on the 20th day of December, 2010, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered, or Faxed to: 509-921-0802

Prosecutor 446-1833

KCPSEB

Bonding Co.

Defense Attorney. Phelps Defendant

Auditor

Other

DANIEL ENGLISH
CLERK OF THE DISTRICT COURT

BY: David J. Smith, Deputy

ORDER EXTENDING BRIEFING SCHEDULE

223

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STATE OF IDAHO
COUNTY OF KOOTENAI
FILED:

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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,

V.

MICHAEL KRAMER,

Defendant.

CASE NUMBER CR-09-5447

**STATE/RESPONDENT'S
BRIEF ON APPEAL**

I. FACTS

On March 14, 2009, Defendant Michael Kramer was driving a full sized pickup truck pulling a snowmobile trailer with snowmobiles on it. Idaho State Police Trooper Lind observed the truck speeding on I-90, and he conducted a traffic stop. When he contacted the driver, Mr. Kramer, he noticed heavy, glassy looking eyes, and very slow, deliberate, and slurred speech. Based on Trooper Lind's training and experience, he suspected Mr. Kramer of driving under the influence. Trooper Lind asked Defendant Kramer to perform field sobriety tests, and based on Mr. Kramer's performance on the tests and his observations of Mr. Kramer's condition, he arrested Defendant Kramer for driving under the influence of alcohol. Three bottles of liquor

STATE/RESPONDENT'S BRIEF ON APPEAL - 1

were found during the course of the inventory search of the vehicle; Trooper Lind also found a pistol and charged Kramer with Possession of a Concealed Weapon While Intoxicated and Open Container. The interaction between Trooper Lind and Defendant Kramer was videotaped, and the videotape was played to the jury. After deliberation, the jury returned verdicts of guilty against Defendant Kramer on the charges of DUI and Open Container, and a verdict of not guilty on the charge of Possession of a Concealed Weapon While Intoxicated. Following the trial, the State subsequently dismissed that charge.

II. ARGUMENT

- 1. This court should follow the reasoning of *State v. Anderson* and conclude that the magistrate court did not abuse its discretion when it determined that no discovery sanctions were warranted against the State**

The decision whether to impose discovery sanctions is within the discretion of the trial court. *In re Doe*, 129 Idaho 663, 666, 931 P.2d 657, 660 (Ct.App.1997) (citing *Ashby v. W. Council, Lumber Prod. & Indus. Workers*, 117 Idaho 684, 686, 791 P.2d 434, 436 (1990)). The trial court does not abuse its discretion if (1) the decision is recognized as discretionary, (2) the actions are within the boundaries of that discretion and the correct legal standards are applied, and (3) the decision is reached through an exercise of reason. *In re Doe*, 129 Idaho at 666, 931 P.2d at 660 (citing *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989)). When imposing discovery sanctions, the court should balance the equities and make the punishment fit the crime. *In re Doe*, 129 Idaho at 668, 931 P.2d at 661 (citing *S. Idaho Prod. Credit Assoc. v. Astorquia*, 113 Idaho 526, 746 P.2d 985 (1987)). The judge should balance the culpability of the disobedient party against the resulting prejudice to the innocent party. *Id.* at 668, 931 P.2d at 661 (citing *S. Idaho Prod. Credit Assoc.*, 113 Idaho at 532, 746 P.2d at 991).

In *State v. Anderson*, 145 Idaho 99, 175 P.3d 788 (2008), the Defendant was convicted by jury trial for misdemeanor driving under the influence with an alcohol concentration of 0.20 or more. *Id.* at 99, 175 P.3d at 791. Following the trial, the Defendant raised a number of issues on appeal, including the State's failure to disclose the curriculum vitae of its expert witness. *Id.* at 105, 175 P.3d at 794. At trial, the Defendant objected to and moved to exclude the expert's testimony. *Id.* The magistrate found that the State had failed to disclose the required discovery materials, but that the State was minimally culpable and the Defendant was unable to show any prejudice as a result. *Id.* To remedy the situation, the magistrate called a recess and allowed the Defendant the opportunity to review the expert's curriculum vitae prior to cross-examination. *Id.* The magistrate also noted that the Defendant did not allege that he attempted but was unable to contact the expert prior to trial. *Id.* Because the Defendant had been issued the discovery answer close to a year before trial and did not object until trial, the Idaho Supreme Court concluded that there was no error in the magistrate's decision not to exclude the expert's testimony from trial. *Id.*

The facts of the present case are analogous to the facts of the *Anderson* case. Here, the Defendant was charged with a misdemeanor DUI. Defendant Kramer, at the time of his contact with law enforcement, submitted to a breath test, and was ultimately charged by Trooper Lind with being over the legal limit of alcohol, with an alcohol concentration of .174/.157. Based on the citation itself, the Defendant and Defense counsel were put on notice of the results of breath test. Thus, both were aware that if the matter proceeded to trial, the breath test would be introduced by the State at trial. Additionally, the State's Amended Complaint, filed June 24, 2009, and the State's Second Amended Complaint, filed August 11, 2009, further alleged that the

Defendant was over the legal limit, by again charging the Defendant with being over the legal limit at a .174/.157 level. When it became apparent that the matter would not be resolved before trial, the State attempted to obtain calibration documents; those documents were not in the possession of the Prosecutor's office until March 11, 2010, at which time they were promptly disclosed to Defense Counsel through a supplemental discovery response.

As with *Anderson*, this Court should conclude that the Defendant was unable to show any prejudice as a result of the late disclosure of the calibration and solution documents. Despite being put on notice of the breath test, the Defendant never disclosed an expert witness to challenge the results of the breath test. Nor did the Defendant indicate that he attempted to obtain calibration documents directly from law enforcement through a subpoena duces tecum, but was unable to obtain the documents in preparation of his defense. The State's three discovery responses were provided to Defense counsel in March, April and June 2009, yet the Defendant did not raise his objection until trial in March 2010.

For these reasons, the Court should conclude that there was no error in magistrate's decision not to impose discovery sanctions against the State.

2. Because the State complied with the express requirements of Idaho Code §18-8004(4), the breath test certificates were properly admitted by the trial court, and no violation of *Melendez-Diaz* can be established

a. Idaho Code §18-8004, by its plain terms, does not require the State to produce a witness to establish the reliability of the breath test

Idaho Code §18-8004 governs the crime of driving under the influence in the State of Idaho. Subsection (1) delineates the crime. That section provides:

It is unlawful for any person who is under the influence of alcohol, drugs or any other intoxicating substances, or any combination of alcohol, drugs and/or any other intoxicating substances, **or who has an alcohol concentration of 0.08, as**

defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to the public.

Idaho Code 18-8004(1)(a) (*emphasis added*).

To further clarify the .08 alcohol concentration limit, Idaho Code 18-8004(4) sets forth the appropriate standards by which to measure that limit. That section explains:

For purposes of this chapter, an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath or sixty-seven (67) milliliters of urine. Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, **the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.**

Idaho Code 18-8004(4) (*emphasis added*).

The admissibility and widespread acceptance of breath tests have been discussed in numerous Idaho cases. For example, in *State v. Hopkins*, the Court of Appeals discussed its previous ruling in *State v. Hartwig* regarding the scientific acceptance of the Intoximeter 3000:

There we held that the Intoximeter 3000 is sufficiently recognized **that it is not necessary for the state in each DUI case to adduce expert testimony on the machine's design and methodology in order to establish a foundation for evidence of a blood alcohol concentration test result.** We did *not* hold that a defendant is precluded from introducing his own evidence to challenge the scientific soundness of the Intoximeter 3000 result.

State v. Hopkins, 113 Idaho 679, 680, 747 P.2d 88, 90 (Ct. App. 1987) (citing *State v. Hartwig*, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987)). Also in *Hopkins*, the Court of Appeals recognized that direct experience with a particular breathalyzer machine goes to the weight of the testimony, rather than the admissibility. *State v. Pearce*, 146 Idaho 241, 257-58, 192 P.3d 1065, 1081-82 (2008) (citing *Hopkins*, 113 Idaho at 681, 747 P.2d at 90).

Here, as with *Hopkins*, the issues raised by Defendant Kramer should go to the weight of the breath test, and not its admissibility. “[T]he decision whether to admit evidence at trial is generally within the province of the trial court.” *State v. Ward*, 135 Idaho 400, 404, 17 P.3d 901, 905 (Ct. App. 2001). “[O]nce the trial court has made the threshold determination of admissibility, a defendant is free to attack the reliability and accuracy of the admitted evidence through the presentation of evidence at trial.” *Id.* “This evidence could include concessions elicited on cross-examination of the officer who administered the test or testimony from a defense expert.” *Id.*

In this case, Trooper Lind testified that he did not know how often the breath machine was calibrated, nor whether the machine was certified for its location. Trooper Lind did testify, however, as to his training and professional experience with the breathalyzer machine. He also testified as to how Defendant Kramer performed on the field sobriety tests as well as to Kramer’s overall physical state at the time of the stop, which corroborated the results of the breath test. Because the Defendant was permitted to cross examine Trooper Lind, as the officer who actually administered the breath test, and because the defense could have offered testimony from a defense expert as to the

reliability and accuracy of the breath test, the trial court did not commit error in admitting the breath test.

b. *Melendez-Diaz* does not require the State to call at trial everyone whose “hands laid” on the evidence; thus, the trial court properly admitted the results of the breath test

In *Melendez-Diaz v. Massachusetts*, the prosecution introduced certificates of state laboratory analysts stating that material seized by police was cocaine of a certain amount. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2529, 174 L.Ed.2d 314 (2009). As required by Massachusetts law, the certificates were sworn to before a notary public and were submitted as prima facie evidence of what they asserted. *Id.* Melendez-Diaz objected, asserting that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, required the analysts to testify in person. The U.S. Supreme Court ultimately agreed with Melendez-Diaz, concluding that the admission of the certificates violated petitioner's Sixth Amendment right to confront the witnesses against him.

In his decision, Justice Scalia reasoned that “[t]here is little doubt that the documents at issue in this case fall within the ‘core class of testimonial statements’ thus described.” *Id.* at 2532. “The documents at issue here, while denominated by Massachusetts law ‘certificates,’ are quite plainly affidavits: ‘declaration [s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.’” *Id.* (citing Black's Law Dictionary 62 (8th ed.2004)). More importantly, the Court reasoned that “[t]he fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine - the precise testimony the analysts would be expected to provide if called at trial.” *Id.* at 2532.

In the case before this court, Defendant Kramer alleges that the introduction of foundational documents for the breath test, including certificates relating to calibration and the simulator solution, violate the Defendant's right of confrontation under *Melendez-Diaz*. In that case, however, the U.S. Supreme Court directly refutes the issue raised by Defendant Kramer:

"...[w]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," *post*, at 2546, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *ibid.*, from *United States v. Lott*, 854 F.2d 244, 250 (C.A.7 1988), "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

Id. at 2532, FN1.

In this appeal, Defendant seeks to directly contravene the holding of *Melendez-Diaz*; specifically, he seeks a ruling that the State must produce in its case-in-chief "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device." That is not the holding of *Melendez-Diaz*. Defendant Kramer is attempting, despite the unequivocal language in the *Melendez-Diaz* case, to have testimony from every party who "laid hands on the evidence," including parties who do not necessarily even reside in the State of Idaho, such as Deb Schofield, the technician from Kentucky who calibrated the instrument. To agree to with the Defendant's position would force the State to incur unnecessary and unrealistic costs in prosecuting misdemeanor DUIs. It would also shift the jury's focus at trial from the issue of whether a particular defendant was driving under the

influence of an intoxicant to the issue of whether the testing procedures are reliable. While such evidence may be relevant, a blanket requirement of testimony from all such witnesses in the State's case would force the State to call on numerous witnesses in every single DUI trial regarding the calibration of the machine and the accuracy of the simulator solution. The practical result of agreeing with the Defendant's position would be a scheduling nightmare for those witnesses, along with increased pressure on law enforcement officers, prosecutors, and judges, to spend more time in DUI trials going over superfluous information that would likely confuse the jury. Such a ruling does not promote judicial economy, and does not comport with the holding of *Melendez-Diaz*.

In the present case, Defendant Kramer was permitted to confront Trooper Lind regarding Lind's compliance with the procedures set forth by the Idaho Code. This is the only confrontation contemplated by the very language of I.C. § 18-8004(4), which expressly relieves the state of the burden of "producing a witness to establish the reliability of the testing procedure for examination." I.C. § 18-8004(4). Because *Melendez-Diaz* does not contemplate the right of the Defendant to confront every single person who may have had a secondary function involved in the breath testing process, the introduction of the breath testing certificates at issue in this case in no way undermines the Defendant's right of confrontation.

III. CONCLUSION

The trial court was correct in admitting the certificates in support of the breath test, and the Defendant has shown no prejudice as a result of the late disclosure of the breath testing documents. Because the Defendant was permitted to cross examine the officer who performed

the test, and because the foundational documents go merely to weight and not admissibility, the Defendant's challenge under *Melendez-Diaz* should be denied.

DATED this 20th day of December, 2010.




Amy Borgman
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I hereby certify that on the 20 day of Dec, 2010, a true and correct copy of the foregoing was caused to be mailed, faxed, and/or hand-delivered to:

Doug Phelps:
Attorney for the Defendant



1001

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED:

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

STATE OF IDAHO)	
Respondent	)	Case No. CR-09-5447
vs.)	
	)	APPELLANT'S REPLY BRIEF
MICHAEL L. KRAMER	)	ON APPEAL
Appellant)	

I. FACTS

The facts were set out in the Appellant's Brief previously filed.

II. ISSUES ON APPEAL

- A. Must the state present at trial the individual responsible for performing the performance verification/calibration checks on the instant machine?**
- B. Must the state present at trial the forensic scientist/s responsible for certifying those simulator solutions used in conjunction with the performance verification/calibration checks and whose name/s appears on the Certificate of Analysis?**

III. ARGUMENT ON APPEAL

#435

Admissibility of breath test results requires a showing that those procedures which ensure the reliability and in turn the accuracy of the test have been met. Those procedures are set forth in the Idaho State Police Standard Operating Procedure for Breath Alcohol Testing. Performance verifications/calibration checks are required periodically as part of the Standard Operating Procedure, specifically to ensure that the Intoxilyzer is in proper working order and capable of producing accurate results. Those performance verification/calibration checks require not only that certain procedures be followed, but also that the BTS use only properly certified simulator solutions when conducting the verification/check. Thus, admissibility of breath test results requires proof that the performance verifications/calibration checks were performed correctly using simulator solutions properly prepared and certified.

I.C. § 18-8004(4) purports to allow for the admission of certain documents to satisfy this foundational burden without the need for witness testimony. However, the documents we have before us are deficient for that purpose, for by themselves, they fail to demonstrate compliance with the SOP with respect to either performance verification/calibration checks or simulator solution certification. Absent witness testimony showing compliance with the proper procedures, they are irrelevant and thus inadmissible in the instant case. Furthermore, that portion of I.C. § 18-8004(4) allowing for their admission without testimony, stands in violation of the Confrontation Clause of the 6th Amendment.

I. FOUNDATIONAL REQUIREMENTS FOR ADMISSIBILITY OF BREATH TEST RESULTS.

The Court of Appeals, in *State v. Bell*, did an excellent job of explaining the relationship of I.C. § 18-8004(4) to the admissibility of breath/blood alcohol results. In a nutshell, the Court held that while the legislature may deem a particular testing machine as extremely reliable, in this case the Intoxilyzer 5000, the admissibility of test results produced by the machine still requires establishment at trial of proof "that those procedures which ensure the reliability and in turn the accuracy of the test have been met." *State v. Bell*, 115 Idaho 36, 39, 764 P.2d 113, 116 (Idaho App., 1988)

In discussing the language of I.C. § 18-8004(4) the court highlighted the necessity of strict adherence to a uniform procedure designed to assure quality control as a prerequisite to admissibility:

[i]nherent in this statutory scheme, however, is an awareness by the Legislature of the need for uniform test procedures. An "extremely reliable" test result can only be the product of a test procedure which from previous use is known to be capable of producing an accurate result. This benefit is best provided by strict adherence to a uniform procedure. This was recognized by the Legislature and is apparent first, from the statutory language which provides for the test procedure to be determined by the Idaho Department of Health and Welfare, and second, by the "shall" language mandating adherence to the standards set by that Department.

State v. Bell, 115 Idaho 36, 39, 764 P.2d 113, 116 (Idaho App., 1988):

[t]he acceptance by the Legislature of test procedures as designated by the Idaho Department of Health and Welfare does not wholly eliminate the need of establishing foundational requirements for a test result. This is required even in light of the legislative directive to utilize an expedient means to admit such evidence. The adoption of the particular test procedure merely recognizes the validity and reliability of that particular accepted test. *It must still be established at trial that those procedures which ensure the reliability and in turn the accuracy of the test have been met.*

State v. Bell, 115 Idaho 36, 39, 764 P.2d 113, 116 (Idaho App., 1988)(emphasis ours). While the current incarnation of the statute vests approval of the proper procedures

and techniques in the Idaho State police rather than the Idaho Department of Health and Welfare, the holding of the Court remains the same. Prior to admissibility there must be evidence that the procedures put in place to ensure accurate and reliable results have been followed. Those procedures are currently set forth in the Idaho Standard Operating Procedure Breath Alcohol Testing manual.¹

II. THE IDAHO STANDARD OPERATING PROCEDURE REQUIRES PERIODIC PERFORMANCE VERIFICATION/CALIBRATION CHECKS UTILIZING CERTIFIED SIMULATOR SOLUTIONS.

The current Idaho Standard Operating Procedure sets forth its scope and purpose at the outset:

This method describes the Idaho State Police Forensic Services (ISPFS) procedure, for use by agencies external to ISPFS, for the analysis of breath for the presence of volatile compounds using an approved breath testing instrument. This method provides for the quantitative analysis of ethanol.

Following *all* the recommendations of this external procedure will establish the scientific validity of the breath alcohol test.

The SOP stresses the importance of performing periodic "performance verifications" also known as calibration checks, to ensure that the machine is in proper working order:

5. Performance Verification of Breath Testing Instruments

Performance verifications aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath testing instrument is functioning. Performance verifications are performed using a wet bath simulator performance verification solution. The solution is provided by and/or approved by ISPFS. The ISPFS analysis establishes the target value and acceptable range of the solutions used for the verification and includes the acceptable values on the Certificate of Analysis of each solution..."

P. 10 (emphasis ours) The important role which performance verification/calibration checks play in the breath testing process is underscored by the

¹ Please note that the current ISOP went into effect on 8/27/2010.

fact that should the machine fail to yield proper results during a performance verification/calibration check, the machine is to be placed out of service and sent back to ISPFS. ISOP p. 9, 11 It is thereafter not approved for evidentiary testing until it has been recertified:

5.2.5 ...if results after a total of three tests for any solution...are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range.

ISOP p.9

7.1.4 If the third performance verification is outside the verification limits, the instrument must be taken out of service and sent to the ISPFS or an approved service provider.

7.1.5 Upon return from service, the instrument should be recertified by ISPFS before being put back into service.

ISOP p. 11 (Emphasis theirs)

III. THE PERFORMANCE VERIFICATION/CALIBRATION CHECK

PRINTOUTS, BY THEMSELVES, ARE NOT RELEVANT.

ER 402 states "all relevant evidence is admissible...Evidence which is not relevant is inadmissible." In turn, ER 401 states:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The performance verification/calibration check printouts would only be relevant in the instant case if they resulted from performance verification/calibration checks performed according to the procedures set forth by the Idaho State Patrol. The documents themselves do not provide adequate information evidencing proper compliance.

The printouts do not show that the operator made sure that the simulator solution had been properly warmed. They do not show that the hoses were hooked up correctly. They do not show that the operator checked the temperature and that it was within the correct parameters. They do not show that he or she blew correctly. And, perhaps most importantly, they do not show whether the printout resulted from the operator's first, second, third, or even fourth or more attempt running the performance verification. Without evidence that a performance verification/calibration check was performed according to the proper procedures, it, like an evidential breath test, should not be admissible. *State v. Bell*, 115 Idaho 36, 40 (proof that blood alcohol test was administered in conformity with applicable procedure held to be prerequisite for admission of results). Absent testimony that it was performed correctly, the printout does not have a tendency to make any fact at issue more or less probable. Thus, by themselves, the documents are not relevant in this proceeding. Testimony would be necessary to shore up the documents deficiencies.

Absent witness testimony, any probative value the printouts might have is outweighed by the danger of unfair prejudice and misleading the jury. ER 403 states:

"Although relevant, evidence may be excluded its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..."

Admission of the printouts, absent witness testimony, presents a particularly thorny issue with respect to the danger of unfair prejudice and potential for misleading of the jury. As stated above, the documents themselves are signed. However, there is no indication on the document as to what that signature signifies. There is affirmation stating that by signing below the operator is signifying that he or she performed the necessary

procedures, or that the machine passed the check on its first, second, or third go around as is required by the SOP. That is not to say that a jury wouldn't draw such an unfounded conclusion, for to a layman, what else could the affixation of a signature mean? The admission of the documents, absent live testimony, would tend to mislead the jury. For that reason, their admission, without testimony from the responsible BTS operator, should not be permitted.

IV. THE "CERTIFICATES OF ANALYSIS" LIKEWISE ARE NOT RELEVANT

The certificates of analysis, like the performance verification/calibration checks, are void of any of the underlying information which would tend to make them relevant in the instant case. Thus, absent testimony from the forensic scientist "certifying" the particular simulator solutions, they are not admissible. Furthermore, just as is the case with the performance verification/calibration checks, the signature of a forensic scientist upon those documents would tend to mislead the jury to believe perhaps that proper procedures were followed in the preparation and certification of the solutions, when no such positive assertion is being made. Thus, the admission of such documents should likewise be precluded as any possible probative value is outweighed by unfair prejudice and the potential for misleading the jury.

V. THE EFFECT OF *CRAWFORD* AND *MELLENDEZ-DIAZ*

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2531 (U.S. Mass., 2009) In *Crawford*

v. Washington, after reviewing the Clause's historical underpinnings, the Supreme Court held that it guarantees a defendant's right to confront those "who 'bear testimony'" against him. *Crawford*, 541 U.S., at 51, 124 S.Ct. 1354 A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.*, at 54, 124 S.Ct. 1354

In determining what is to be considered against the accused and therefore covered by the Confrontation Clause, the Court in *Crawford* focused on what it described as the core class of testimonial statements:

Various formulations of this core class of testimonial statements exists: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements the declarants would reasonably expect to be used prosecutorially; extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonable to believe that the statement would be available for use at a later trial."

Id., at 51-52, 124 S.Ct. 1354 (internal quotation marks and citations omitted)

In the recent case of *Melendez-Diaz v. Massachusetts*, the Supreme Court applied *Crawford's* testimonial statements analysis to "certificates of analysis" performed by analysts in the Massachusetts crime lab which positively identified a controlled substance. The Court determined that such "certificates of analysis" fell within the core class of testimonial statements because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532

(U.S. Mass., 2009)(quoting *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354) In so holding, the Court stated:

[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose-as stated in the relevant state-law provision-wa reprinted on the affidavits themselves.

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2532 (U.S. Mass., 2009)

I.C. § 18-8004(4) was no doubt born out of desire for expediency and the legislature's belief that the particular testing device the state had chosen was reliable:

[w]hen this proposed statute was presented to the Legislature the statement of purpose accompanying the legislation explained that expert witness testimony was an unnecessary burden on the state. Such testimony, if used merely to establish a foundation, provided superfluous verification of a test procedure which the Legislature believed to produce an "extremely reliable" result.

State v. Bell, 115 Idaho 36, 39-40, 764 P.2d 113, 116-117 (Idaho App., 1988) While such a rationale may have been appropriate at the time of the drafting of the statute, it is clearly not acceptable under the Supreme Court's current interpretation of the Confrontation Clause.² In *Melendez-Diaz*, the Court refused to relax the application of the 6th Amendment's Confrontation Clause merely because the particular evidence sought to be admitted was scientific in nature or possessed perceived guarantees of trustworthiness:

...respondent and the dissent argue that confrontation of forensic analysts would be of little value because "one would not reasonably expect a laboratory professional...to feel quite differently about the results of his scientific test by having to look at the defendant." *Id.*, at 31 (internal quotation marks omitted); see *post*, at 2548-2549.

² The Idaho Legislature enacted I.C. § 18-8004 in 1984, four years after the Supreme Court's decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) *Roberts* had provided for relaxed standards for admission of out of court statements under circumstances where there were "particularized guarantees of trustworthiness." *Id.*, at 66 That rationale was rejected and *Roberts* overruled by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 138 L.Ed.2d 177 (2004)

This argument is little more than an invitation to return to our overruled decision in *Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, which held that evidence with "particularized guarantees of trustworthiness" was admissible notwithstanding the Confrontation Clause. *Id.*, at 66, 100 S.Ct. 2531. What we said in *Crawford* in response to that argument remains true:

"To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. ...*Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.* This is not what the Sixth Amendment prescribes."

Melendez-Diaz, 129 S.Ct. 2527, 2536 (U.S. Mass., 2009)(quoting *Crawford v.*

Washington, 541 U.S. at 61-62)

The Supreme Court recognized that confrontation may not always be the best way to challenge forensic tests, yet it held that it was an indispensable right guaranteed under the constitution:

Respondent and the dissent may be right that there are other ways-and in some cases better ways-to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation. We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2536 (U.S. Mass., 2009)(footnote

omitted) Furthermore, the right to confrontation is most certainly not dissipated in a case dealing with forensic analysis:

Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, *post*, at 2548, the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as *Amicus Curiae* 15-17 (discussing cases of documented "drylabbing" where forensic analysts report results of tests that were never performed); National Academy report 1-8 to 1-10 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false

testimony. See *Coy v. Iowa*, 487 U.S. 1012, 1019, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988). And, of course, the prospect of confrontation will deter fraudulent analysts in the first place.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent once as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, *Cheating the Constitution*, 59 Vand. L.Rev. 475, 491 (2006) One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L.Rev. 1, 14 (2009) And the National Academy Report concluded:

"The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report P-1 (emphasis in original).

Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Melendez-Diaz, 129 S.Ct. 2527, 2536-2537 (footnotes omitted)

Like the certificates of analysis analyzed in *Melendez-Diaz*, the documents at issue in the instant case were made under circumstances which would lead an objective witness reasonably to believe that the statement would be used later at trial. They are thus testimonial and therefore, absent a showing of unavailability and prior opportunity for cross examination, they are inadmissible.

As for the performance verification/calibration checks, their purpose is outlined in the SOP as necessary to assist in the admissibility of breath test results in criminal trials in order to demonstrate the reliability of the particular breath test machine. The SOP, from the outset, speaks to the importance of following the procedures set forth, including performance verification/calibration checks and does so specifically in relation to the

admissibility in court of breath alcohol tests. ISOP p.4 On page 20 of the Idaho Intoxilyzer 5000 Reference Manual the importance of their use in adversary proceedings is again stressed:

[w]hen doing maintenance and repairs on your instrument it is a good idea to do a performance verification check before and after to help prevent arguments that may arise.

(Idaho Intoxilyzer 5000 Series Reference Manual, Revision 0, Effective date 8-20-2010)

Additionally, they are to be performed only by operators certified by the Idaho State Police Forensic Services, i.e. law enforcement, who no doubt realize that they will be used in criminal trials. See ISOP, p. 4-5 The SOP calls for retention of these documents and any other maintenance/repair documents pertaining to the evidentiary used of breath testing instruments presumably for their use in later trials:

4.6 Record maintenance and management. It is the responsibility of each individual agency to store performance verification records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments...

P. 9 Lastly, I.C. § 18-8004(4) speaks directly to the use and admission of these documents in trial. All of these facts lead us to the safe assumption that the BTS operators performing the checks and signing the performance verifications/calibration check printouts are well aware that they will be used later in trial.

The same is likewise true with respect to the Certificates of Analysis. The top of the Certificate itself bears the Idaho State police insignia. Below that read "Idaho State Police Forensic Services." It is signed by an agent of the Department of Law Enforcement Idaho State Police Forensic Services, the very agency in charge of breath testing procedures. The heart of the document then states that the solution is certified "to be used to conduct calibration checks within the State of Idaho in accordance with the

policies and/or procedures promulgated by the Department governing breath alcohol examination..." Surely the purpose of the solutions is not lost upon the state police forensic services employee certifying the solution. The forensic scientist signing the Certificate of Analysis undoubtedly is aware that the document would later be used as evidence in trial. Therefore, it must be said that he Certificates of Analysis as well as performance verification/calibration checks are testimonial statements. As such, the confrontation clause of the 6th Amendment guarantees that their authors or the persons responsible for their creation must be brought by the state to testify concerning their contents and be subject to cross examination by Defendant.

IV. CONCLUSION

The performance verification/calibration check printouts and "Certificate of Analysis," by themselves, do not contain enough information within their four corners to afford them relevance in this criminal proceeding. Furthermore, even if they did contain sufficient information, they are testimonial in nature and therefore the Confrontation Clause of the 6th Amendment should have barred their admission in Defendant's trial because there was not a showing of unavailability and prior opportunity for cross examination. For the state to have presented Defendant's breath test results in its case in chief, in addition to providing other foundational evidence, it must have presented the responsible individuals as witnesses at trial.

Respectfully submitted this 10 day of January, 2011



Douglas D. Phelps

Certificate of Service

I, Leah M. Hill, hereby certify that on January 10, 2011, I caused a true and correct copy of the foregoing Appellant's Reply Brief to be forwarded with all of the required charges prepaid by the method indicated below.

Leah Hill
Leah M. Hill
PHELPS & ASSOCIATES, PS

Kootenai County District Court
P.O. Box 9000
324 West Garden
Coeur d'Alene, ID 83816-9000

☐ Hand Delivery ☐ U.S. Mail ☒ Facsimile ☐ Overnight Mail

Kootenai County Prosecutor
501 Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000

☐ Hand Delivery ☐ U.S. Mail ☒ Facsimile ☐ Overnight Mail

02/14/2011 MON 16:44 FAX 921-0802

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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

002/003

Phelps & Associates, PS
Attorneys at Law
2903 N. Stout Road
Spokane, WA 99206
Phone: (509) 892-0467
Fax: (509) 921-0802

2011 FEB 14 PM 4:15

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/Respondent,

Case No. CR-09-5447

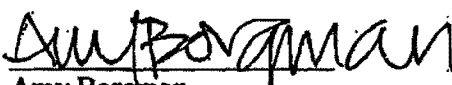
v.

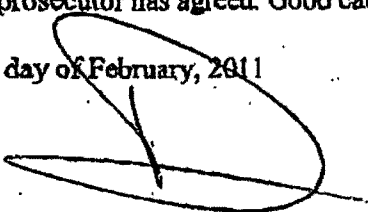
MOTION TO CONTINUE

MICHAEL I. KRAMER,
Defendant/Appellant.

COMES NOW the above-entitled defendant, by and through his attorney of record PHELPS AND ASSOCIATES, PS, and hereby moves this court to continue the Oral Argument scheduled for February 17, 2011 at 3:00pm to a date to be determined by the court. Our office has no attorney available to attend this hearing due to an ongoing felony jury trial in Spokane, WA.. The prosecutor has agreed. Good cause exists.

Respectfully submitted this 14th day of February, 2011


Amy Borgman
Prosecuting Attorney


Douglas D. Phelps
Attorney for Defendant

Phelps & Associates, PS
 Attorneys at Law
 2903 N. Stout Road
 Spokane, WA 99206
 Phone: (509) 892-0467
 Fax: (509) 921-0802

STATE OF IDAHO } ss
 COUNTY OF KOOTENAI }
 FILED: 2-16-11
 AT 10:40 O'CLOCK AM
 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/Respondent,	)	Case No. CR-09-5447
)	
v.	)	ORDER TO CONTINUE
)	
MICHAEL I. KRAMER,)	
<u>Defendant/Appellant.</u>)	

IT IS HEREBY ORDERED that the Oral Argument scheduled for February 17, 2011 at 3:00pm be rescheduled to a date to be determined by the court, pursuant to the agreement of both parties and the motion of the defendant.

By my hand this 16 day of Feb, 2011

Mr. Phelps is ordered
 to contact The court
 clerk to reschedule
 The oral argument.

[Signature]
 Honorable Judge Simpson

CERTIFICATE OF MAILING

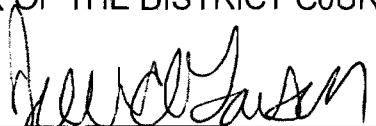
I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed through interoffice, postage pre-paid, or by facsimile on the 16th day of February, 2011 to:

KOOTENAI COUNTY PROSECUTOR
FAX: 208-446-1833

DOUGLAS D. PHELPS
FAX: 509-921-0802

7300

CLIFFORD T. HAYES,
CLERK OF THE DISTRICT COURT

by 
Deputy Clerk

Description	CR 2009-5447 Kramer, Michael Ian 20110325 Appeal Hearing Judge Simpson Clerk Denise Larsen Court Reporter JoAnn Schaller <i>Denise Larsen</i>		
Date	3/25/2011	Location	1K-COURTROOM8
Time	Speaker	Note	
10:32:43 AM	Judge Simpson	Calls case. Def present not in custody. Doug Phelps for def. Amy Borgman and Rich Whaley for State.	
10:33:16 AM	Judge Simpson	Issues on appeal are admission of breath test cert without testimony, also allegation that magistrate improperly imposed sanction for late test results, and whether calibration print outs should be omitted.	
10:34:08 AM	Douglas Phelps	Court admits breath test under statute. Officer couldn't testify what solution was in machine. Essentially we have cert that provides testimony about solution and that machine was properly calibrated. We received them very late. They are admitted and jury makes determination that machine was accurate and working properly.	
10:35:47 AM	Douglas Phelps	Def gets no opportunity to cross examine about nature of certification and whether or not solution is installed in machine. They are trying to test blood through breath sample and comparing with solution. We never had testimony that the solution was ever installed in machine.	
10:36:58 AM	Judge Simpson	Could the def have called them.	
10:37:05 AM	Douglas Phelps	We don't know where they are at.	
10:37:15 AM	Judge Simpson	so I would have to go back to manufacturers agent?	
10:37:33 AM	Douglas Phelps	Patrol should have technicians to testify. State is bringing in testimony and there is alternative to convict without breath test. State has attempted to go around requirement of confrontation by saying all they have to bring is certificate. Jury is looking to this number which essentially decides the entire case. RE Melendez case.	
10:39:59 AM	Douglas Phelps	Without bringing experts in we don't have opportunity to ask questions. Def has not been given his right of confrontation about how they conducted testing procedures, what solution was in machine. However another problem, there was late disclosure for certificates. Not def duty to bring in the experts to convict him.	
10:41:42 AM	Judge Simpson	As I recall you got the discovery and you didn't file a motion to compel	

<u>10:42:03 AM</u>	Douglas Phelps	I anticipated they weren't going ahead with breath test because they filed cert day before. I obj to it. No one testified that simulator solution was one installed in machine on night of testing. Trooper said he didn't know and wasn't required to know what solution was in machine. I don't understand how cert can be relevant if someone doesn't testify what was in machine on day test was conducted. Cert was never relevant, they never layed foundation for it. If solution they brought cert for was not solution in machine, not relevant. Jury doesn't get opportunity to hear how machine works.
<u>10:47:07 AM</u>	Judge Simpson	You didn't raise this 404b at trial
<u>10:47:24 AM</u>	Douglas Phelps	I obj and they didn't lay foundation. Ask court to rule that the gov't can't try a case by certificate, people have to come in to testify and def could have proper opportunity to testify.
<u>10:48:45 AM</u>	Amy Borgman	Mr. Whaley was intern for prosecutors office. I do not have 5 years practice and wouldn't be appropriate to supervise him. I will be primarily arguing. I will submit on brief.
<u>10:49:34 AM</u>	Judge Simpson	Will take matter under advisement. I will address first issue and take other 2 under advisement. Re untimeliness on disclosure. Essentially discovery sanction. Re State vs. Byington. There was no attempt by Mr. Phelps to notice matter. He was on inquiry notice state was going to use breath test. State testified it was not in custody of cert till week of trial. Def could have taken steps to get breath test. Find court below properly considered the issue to be one of discretion. First ground for appeal is denied, that being late discovery of certificate. I will get you decision on other 2 within 30 days.
<u>10:56:01 AM</u>		
<u>10:56:01 AM</u>	End	

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STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED: 3-29-11
AT 4:45 O'CLOCK P M
CLARK, DISTRICT COURT
[Signature]
DEPUTY
[Signature]

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, vs. MICHAEL L. KRAMER, Defendant/Appellant.	CASE NO. CR-09-5447 MEMORANDUM DECISION AND ORDER ON APPEAL
---	---

Appeal from the Magistrate Court of the First Judicial District, State of Idaho, Kootenai County. Hon. Robert Burton, Magistrate Judge.

Defendant appeals the Magistrate Court's admission of breath test certificates which Defendant argues were untimely produced by the State. Defendant also appeals the Magistrate Court's admission of breath test certificates to lay a foundation for the Defendant's breath test under the Sixth Amendment, *Crawford v. Washington* and *Melendez-Diaz v. Massachusetts*. Lastly, Defendant argues that performance verification/calibration check printouts or "Certificates of Analysis" should be excluded under I.R.E. 401-403. This Court concludes that: Defendant's motion for discovery sanctions was untimely, *Melendez-Diaz*, *Crawford* and the Sixth Amendment were satisfied by the testimony set forth at the trial below, the requirements of I.C. § 18-8004(4) were met, I.C. § 18-8004(4) is constitutional, , and the evidence admitted herein does not violate I.R.E. 401-403. Thus, the Magistrate Court's judgment is affirmed.

Douglas D. Phelps, PHELPS & ASSOCIATES, PS, for Appellant.

Amy Borgman, Kootenai County Deputy Prosecuting Attorney, for Respondent.

I.

PROCEDURAL AND FACTUAL HISTORY:

On March 14, 2009, Trooper Lind of the Idaho State Police was working patrol on Interstate 90. *Transcript of Proceedings*, at 51-52. At approximately 5:40 a.m., Trooper Lind initiated a traffic stop of a vehicle being driven by Mr. Kramer. *Id.* at 52-55. Mr. Kramer was pulled over for speeding. *Id.* at 53-55. Upon making contact with Mr. Kramer, Trooper Lind observed that Mr. Kramer's eyes appeared sleepy looking, heavy and glassy. *Id.* at 55. Mr. Kramer's speech was very slow and deliberate, and Trooper Lind smelled the odor of alcohol emanating from the vehicle. *Id.* at 55-56.

Trooper Lind ordered Mr. Kramer out of the car, and asked whether he had any weapons in the vehicle. *Id.* at 56-57. Mr. Kramer informed Trooper Lind that he was carrying a pistol on his person, which Trooper Lind then observed on Mr. Kramer's hip. *Id.* at 57-58. Trooper Lind took possession of the firearm, and placed it in his patrol car for safety. *Id.* at 59. Trooper Lind then commenced with field sobriety testing: Mr. Kramer failed the horizontal gaze nystagmus test (*Id.* at 63), he failed the walk and turn evaluation (*Id.* at 67) and he failed the one leg stand (*Id.* at 68). He was then placed under arrest for driving under the influence. *Id.* at 69.

There were passengers in Mr. Kramer's vehicle, who were not arrested, and were picked up from the scene by third parties. *Id.* at 70. Trooper Lind inventoried the vehicle in anticipation of it being towed. *Id.* During this inventory search, Trooper Lind found three bottles of alcohol in the vehicle, one sealed, one opened, and one essentially empty, with very little alcohol inside. *Id.* at 71-72. Thereafter, Trooper Lind transported Mr. Kramer to the jail, where Mr. Kramer gave three breath samples. *Id.* at 82. Three samples were taken because Mr. Kramer's first sample was

invalid. *Id.* Mr. Kramer's two valid samples revealed blood alcohol levels of .174 and .157. *Id.* at 134.

On the day of trial, March 12, 2010, Mr. Kramer argued that the State failed to provide all evidence required of it under a discovery request propounded on March 18, 2009. *Id.* at 4-5. Mr. Kramer argued that the State did not disclose documents (namely, the breath test certificates), which the State intended to use to lay a foundation for the breath test, until the day before trial, in violation Idaho Rules of Evidence 702, 703 and 704. *Id.* at 5. During argument on Mr. Kramer's motion, the Court asked defense counsel how many times he went to law enforcement himself in an attempt to secure the documentation regarding breath alcohol testing. *Id.* at 9-10. The following correspondence took place on the record:

THE COURT: -- did you go to the State Police and attempt to obtain it?

MR. PHELPS: Judge uh, I didn't because I figured that if [the State] didn't provide it to me and they didn't lay a foundation, that uh, they weren't intending to use the breath test. And that's -- that goes to the harm that's uh, given to me by the late disclosure, Judge. If I'd have known that they were gonna use the breath test, I certainly could have hired an expert to come in and testify about the accuracy of the breath test and the way it was conducted.

THE COURT: Well, but the --

MR. PHELPS: But they didn't --

THE COURT: -- very nature of the charge indicates a breath test, so it's not like you were surprised.

MR. PHELPS: Well, certainly I was, Judge. They didn't lay a foundation. They have to provide these documents.

Id. at 10.

Mr. Kramer also argued, in his motion to the trial court, that the case of *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527, 174 L.Ed.3d 314 (2009), required the State to subpoena and set forth the live testimony of the individual(s) responsible for calibrating the

breath testing machinery, the forensic services commander who certified the forensic alcohol test, and the person who prepared the simulator solution, in order for breath test certificates to be admissible in evidence to lay a foundation for the breath test administered. *Id.* at 15-16.

The Court ruled, first, that Mr. Kramer's motion was untimely. *Id.* at 25. Further, the Court stated, with regard to *Melendez-Diaz*:

THE COURT: . . . I do know that there is a difference, and uh, it was pointed out, this [*Melendez-Diaz*] is a situation where somebody examined cocaine, uh, made a conclusion that it was cocaine, put it into an affidavit and submitted it for trial purposes. That seems to be different than a situation where an officer actually conducts a test, provides the information and can be here to testify.

Now, whether or not the calibration of the instruments that this officer used is something that applies to Crawford, I don't know that this Court talked about whether the instruments that were used by this scientist in determining whether this was cocaine had to be calibrated by – and that person had to come into court and testify. I don't think that's in this case. I don't know. So I'm gonna – I'm kind of at a disadvantage here. This may be something that needs to be taken up at a later time. So at this point uh, as far as the actual suppression, I'll overrule that. . . .

Id. at 25-26. The Court also overruled similar defense objections when the State sought to have the applicable exhibits admitted during the trial. *Id.* at 131-134. The DVD recording of the traffic stop initiated by Trooper Lind on March 14, 2009, was also played for the jury. *Id.* at 98.

Following deliberations, the jury returned guilty verdicts as to the charges of driving under the influence and transporting an open container of alcohol. *Id.* at 192-93. Mr. Kramer was also tried on a third charge, possession of a concealed weapon, which resulted in a mistrial. *Id.* at 198.

Mr. Kramer appealed, and this matter came on regularly for hearing on March 25, 2011. On the record at the hearing, this Court orally ruled upon Mr. Kramer's request for discovery sanctions. This Court's ruling on that issue is set forth below. Additionally, at the March 25, 2011 hearing, this Court took the other two issues presented by Mr. Kramer under advisement.

This Court has reviewed the files and records herein and now being fully advised in the premises, and good cause appearing therefore, hereby sets forth its Memorandum Opinion.

II.

DISCUSSION

1. Did the Trial Court Commit Reversible Error in Admitting the Breath Test Certificates to Lay a Foundation for the Breath Test Where the Prosecution Failed to Timely Disclose the Certificates After the Defense Timely Filed a Discovery Demand?

Mr. Kramer first argues that the Court committed reversible error when refusing to order a discovery sanction against the State, in the form of excluding the breath test certificates. The decision of whether to impose a discovery violation, and the choice of an appropriate sanction, is left to the sound discretion of the trial court. *State v. Huntsman*, 146 Idaho 580, 586, 199 P.3d 155, 161 (Ct. App. 2008), citing *State v. Allen*, 145 Idaho 183, 185, 177 P.3d 397, 399 (Ct. App. 2008). In reviewing a discretionary decision, an appellate court considers “(1) whether the trial court correctly perceived the issue as one of discretion, (2) whether the trial court acted within the boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and (3) whether the trial court reached its decision by an exercise of reason.” *Roe v. Doe*, 129 Idaho 663, 666, 931 P.2d 657, 660 (Ct. App. 1996), citing *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). It is the duty of the trial court to “balance the equities by comparing the culpability of the disobedient party with the resulting prejudice to the innocent party.” *Id.* at 668, 931 P.2d at 662 (citation omitted). Thus, the court should balance the equities and make the punishment fit the crime. *Id.* (citation omitted).

Where the question is one of late disclosure rather than failure to disclose, the inquiry on appeal is whether the lateness of the disclosure so prejudiced the defendant’s preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial.

State v. Byington, 132 Idaho 589, 592, 977 P.2d 203, 206 (1999), *quoting State v. Olsen*, 103 Idaho 278, 283, 647 P.2d 734, 739 (1982). “To provide prejudice, a defendant must show there is a reasonable probability that, but for the late disclosure of evidence, the result of the proceedings would have been different.” *Id.* (Concerning late disclosure of a witness for the State) (citation omitted). This requires the reviewing court to:

examin[e] the record to see if there was substantial and competent evidence to support a finding of no unfair prejudice. This is the appropriate standard of review because of the factual nature of the trial court’s finding concerning unfair prejudice and is consistent with the manner in which we have reviewed other factual findings that underlie a trial court’s decision that we review under an abuse of discretion standard.

Id. (citation omitted).

The State argues that this matter is controlled by *State v. Anderson*, 145 Idaho 99, 175 P.3d 788 (2008). The Defendant in *Anderson* was found guilty of enhanced DUI, after breath testing evidenced alcohol concentration levels of 0.22, 0.19 and 0.24. *Id.* at 102-03, 175 P.3d at 791-92. On appeal, the Defendant argued, among other things, that the Magistrate erred in failing to issue discovery sanctions. *Id.* at 103, 175 P.3d at 792. This issue arose on appeal because the Defendant, at the trial court level, objected to and moved to exclude an expert’s testimony, based upon the State’s failure to disclose the curriculum vitae of its expert witness. *Id.* at 105, 175 P.2d at 794. There, the *Anderson* Court explained:

Discovery sanctions are within the discretion of the trial court. The magistrate found that the State was minimally culpable in this instance and that Anderson suffered little or no prejudice as a result. Anderson was issued the discovery answer close to a year before trial and did not object until trial. Anderson did not allege that he attempted but was unable to contact [the expert witness] prior to trial. The magistrate offered a lesser sanction, and Anderson refused, contending that the exclusion of the expert was the only appropriate means. There was no error in the magistrate’s decision not to exclude [the expert’s] testimony from trial.

Id. In contrast, Mr. Kramer argues herein that he was “hampered in his ability to challenge the admissibility and reliability of the breath test by the untimely disclosure of the breath test

certificates.” *Brief of Appellant on Appeal from Magistrate’s Court*, at 14.

However here, as in *Anderson*, the State testified that it was not in custody of the certificates in question until the week of trial. *Transcript of Proceedings*, at 19. The trial court pointed out that Mr. Kramer could not genuinely claim surprise, because “the very nature of the charge indicates a breath test.” *Id.* at 10. The court also concluded that the motion was untimely, *Id.* at 25, and that Mr. Kramer could have, but did not, take any independent step to obtain the certificates directly from the Idaho State Police. *Id.* at 10. Further, it was adduced at the hearing that the request for discovery was made on March 18, 2009, a year before the motion raised by defendant. *Id.* at 5. The trial court was certainly mindful of this when it inquired of defense counsel why “there was no attempt by you to secure any of these documents in advance in preparing for this trial, and there [were] no motions to compel filed by you . . .” *Id.* at 11. Additionally, the State informed the trial court that the breath testing ticket was provided to defense counsel approximately one year prior Defendant’s motion, and therefore defense counsel was properly put on notice that there was a breath test conducted. *Id.* at 19.

The prejudicial standard, as set forth above, requires a reasonable probability that, *but for the late disclosure*, the result of the proceedings would have been different. Here, however, Trooper Lind testified that, when initially pulled over on March 14, 2009, Mr. Kramer had red, heavy, glassy eyes, that his speech was slow and deliberate, and that the odor of alcohol emanated from his vehicle. Mr. Kramer then failed all three field sobriety tests conducted by Trooper Lind, and Trooper Lind found alcohol, including an open and an empty container of alcohol, inside Mr. Kramer’s vehicle. The jurors also watched a DVD which depicted the traffic stop, and thus the jurors were able to form their own conclusions as to Mr. Kramer’s level of sobriety at the time of the stop. Therefore, it is clear that the disclosure of the breath test

certificates, even on the eve of trial, did not result in a reasonable probability that the result of the trial would have otherwise been different.

In addition, defense counsel had been put on notice, for approximately a year, that a breath test was conducted, and defense counsel was provided the initial breath testing ticket which showed that there was a breath test result. Defense counsel could have contacted Idaho State Police in an attempt to obtain these certificates, or could have specifically sought these certificates through a motion to compel. However, defense counsel chose not to do so.

The record shows that the trial court saw its decision as one of discretion, as is clear by its weighing of the particular facts, such as Defendant's ability to bring his motion at an earlier time and his potential to independently procure the certificates, as well as the fact that the court "did not indicate that its ruling was dictated by any legal rule." *See, Weaver v. Searle Bros.*, 129 Idaho 497, 500, 927 P.2d 887, 890 (1996). "This analysis was tantamount to the trial court saying that it had discretion in determining reasonableness." *Id.* The trial court acted within its discretion when determining that Defendant had not suffered the requisite prejudice, specifically, because any claim of surprise by the Defendant was unreasonable. Lastly and as illustrated by the foregoing, the trial court very clearly reached its decision by an exercise of reason. Therefore, the trial court's decision to deny the discovery sanction sought by Mr. Kramer is affirmed.

2. Whether the Trial Court Commit Reversible Error in Admitting the Breath Test Certificates to Lay a Foundation for the Breath Test in Violation of the Defendant's Right to Confrontation under the Sixth Amendment, *Crawford v. Washington* and *Melendez-Diaz*?

a. The Principles Established in *Melendez-Diaz* are not Offended by the Admitted Certificates.

Mr. Kramer next argues that the United States Supreme Court's ruling in *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S. Ct. 2527, 174 L.Ed.3d 314 (2009) required the State to call

the individuals who signed the breath test certificates as witnesses at the trial, because admission of the certificates alone violated Mr. Kramer's Sixth Amendment right to confront witnesses against him. Constitutional issues are questions of law over which an appellate court exercises free review. *Urban Renewal Agency of City of Rexburg v. Hart*, 148 Idaho 299, 300, 222 P.3d 467, 468 (2009) (citation omitted). "The standard of review applicable to questions of law is one of deference to factual findings, but we freely examine whether statutory and constitutional requirements have been met in light of the facts as found." *State v. Hedges*, 143 Idaho 884, 886, 154 P.3d 1074, 1076 (Ct. App. 2007) (citation omitted).

In *Melendez-Diaz*, a Massachusetts court admitted affidavits into evidence which reported the results of forensic analysis of a substance seized by police. *Id.* at ___, 129 S.Ct. at 2530, 174 L.Ed.3d at ___. The defendant therein was charged with distributing and trafficking in cocaine. *Id.* At trial, the State submitted three "certificates of analysis", which showed results of forensic testing of a substance which was seized and associated with the defendant. *Id.* at 2530-31. The certificates stated the weight of the substance, and also stated that the bags "have been examined with the following results: The substance was found to contain: Cocaine." *Id.* at 2531. These certificates were signed by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, and the analysts' signatures were sworn to before a notary public. *Id.*

The defendant objected to admission of the certificates, arguing that the Supreme Court's Confrontation Clause decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004) required that the analyst testify in person. *Id.* The trial court overruled the defendant's objection and admitted the certificates as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." *Id.* (Citation omitted). Defendant

appealed, contending that the admission of the certificates violated the Confrontation Clause. *Id.* The Appeals Court of Massachusetts affirmed, and the Massachusetts Supreme Judicial Court denied review. *Id.*

The Supreme Court granted Certiorari. After citing *Crawford* for its description of the class of testimonial statements covered by the Confrontation Clause, the Court explained:

There is little doubt that the documents at issue in this case fall within the “core class of testimonial statements” thus described. Our description of that category mentions affidavits twice. See also *White v. Illinois*, 502 U.S. 346, 365, 112 S. Ct. 736, 116 L.Ed.2d 848 (1992) . . . The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: “declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” Black’s Law Dictionary 62 (8th ed. 2004). They are incontrovertibly a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Crawford, supra.* . . . The fact in question is that the substance founding the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The “certificates” are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.” *Davis v. Washington*, 547 U.S. 813, 830, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006) (emphasis deleted).

Id. at 2531-32. The Court, however, then went on to note:

Contrary to the dissent’s suggestion, *post*, at 2544-2545, 2546 (opinion of KENNEDY, J.), we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. While the dissent is correct that “[i]t is the obligation of the prosecution to establish the chain of custody . . . this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent’s own quotation, *ibid.*, from *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988), “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.” It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. *Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.*

Id. at 2532, nt. 1 (emphasis added).¹

¹ It is also important to review Justice Thomas’s concurring opinion. This is particularly important, as Justice Thomas’s vote was necessary for the Court to reach a majority vote, here, 5-4. In his concurrence, Justice Thomas explains:

I write separately to note that I continue to adhere to my position that “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in

To determine the fear that the majority intended to alleviate in the dissenting justices through its explanation in Note 1, *supra*, we must look to Justice Kennedy's dissent, at 2544-45, 2546. There, Justice Kennedy gives four examples of individuals which he perceives must now be called to testify in the face of Scalia's majority opinion:

Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine's printout . . . A second person interprets the graph the machine prints out- perhaps by comparing that printout with published, standardized graphs on known drugs. [Citation omitted]. Meanwhile, a third person- perhaps an independent contractor- has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth person- perhaps the laboratory's director- certifies that his subordinates followed established procedures.

Id. at 2544. The dissent thereafter opines that the scope of who, among these four examples, must provide testimony, is unclear from the majority's opinion. *Id.* ("It is not at all evident which of these four persons is the analyst to be confronted under the rule the Court announces today.").

Taking the majority's statement at Note 1, in context with the dissent's concerns set forth above, it is clear that the Court's majority opinion does not seek to require every individual who prepares documents in the regular course of maintaining machinery to testify, because these documents are not testimonial. Here, the person who extracted the sample from Mr. Kramer, and the person who received and interpreted the breath test results, *actually testified* at Mr. Kramer's trial. That person was Trooper Lind. Trooper Lind, under the facts of our case, is equivalent to the analyst in *Melendez-Diaz* who performed and reported the testing results therein. The

formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. . . . I join the Court's opinion in this case because the documents at issue in this case "are quite plainly affidavits," *ante*, at 2532. As such, they "fall within the core class of testimonial statements" governed by the Confrontation Clause.

129 S. Ct. at 2543 (Thomas, J., Concurring) (internal citations omitted). The clear import of this concurrence is that, had these documents not been plainly affidavits, the Court's ultimate decision could likely have been a 5-4 vote affirming the Appeals Court of Massachusetts.

certificates of the individuals who performed maintenance on the breath test machine herein are not “testimonial” under the holding in *Melendez-Diaz* because they are far from “quite plainly affidavits”, and therefore were not contemplated under the Supreme Court’s holding.

Further, the defendant in *Melendez-Diaz* argued that the analysts testing the substance for the presence of cocaine were not subject to confrontation because they were not “accusatory” witnesses, in that they did not accuse petitioner of wrongdoing. *Id.* at 2533. The Supreme Court noted that the Sixth Amendment guarantees the right of a defendant “to be confronted with the witnesses *against him*.” (Emphasis added.)” *Id.* The Court then stated, “[t]o the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction—that the substance he possessed was cocaine.” *Id.*

Here, the individuals signing the certificates are not “accusatory” witnesses, as a determination that a machine was working properly is not testimony that would “prov[e] one fact necessary for [defendant’s] conviction.” The fact that Trooper Lind performed breath tests on a properly functioning machine does nothing to implicate Mr. Kramer in any wrongdoing. It does nothing to prove that Mr. Kramer drove under the influence of alcohol. Therefore, the trial court should also be affirmed, because the individuals who signed the certificates were also not accusatory witnesses.

b. I.C. § 18-8004(4) Permits Admission of the Certificates, and Comports with the Confrontation Clause and *Melendez-Diaz*.

At the hearing on appeal, Mr. Kramer focused on Trooper Lind’s inability, at the trial, to articulate whether or not the calibration solution in the breath testing machine was the proper solution. At trial, defense counsel asked Trooper Lind if he independently verified what the solution lot was in the instrument on the day of Mr. Kramer’s testing, and Trooper Lind stated

that he did not. *Transcript of Proceedings*, at p. 126. On redirect, testimony was elicited that Trooper Lind is not responsible for checking which simulator solution is in the machine, as that is not part of his job requirements. *Id.* at 129. On objection to the admission of Plaintiff's Exhibit 2, which includes the documents complained of herein, counsel argued, in relevant part:

MR. PHELPS: And then uh, judge, uh, as to the certification – the certificate of calibration uh, which is the third page, we haven't heard any testimony from – I think its Deb Schofield (phonetic) uh, regarding the certification of calibration, whether or not this uh, machine is approved for the particular location where it's placed. Additionally, Judge, as to the simulator solution, uh, 0007109 uh, there's – there is something here that seems to be a notarized statement of David Lacock, and – who's a forensic scientist, and then there's a certification of simulator solution 7804 of another David Lacock. And Judge, we haven't heard any testimony from Mr. Lacock. Uh, this is a document prepared by the State in anticipation of trial and to certify and attempt to provide the necessary foundation for the breath test. . .

. . . But what's maybe even more significant uh, than the denial of his right of confrontation under *Melendez Diaz* in laying the foundation is we have no testimony from anyone that the simulator solution was placed in the machine. Uh, there's been no one here that can tell us what simulator solution was placed in the machine, when that was placed in the machine. Even if they could lay a foundation . . . there's no one here that can say that those particular simulator solutions were ever installed in the machine, and if they were installed in the machine, that those were the solutions that were in the – the machine on the night that my client was given the breath test. . . .

Id. at 132-33. The trial court overruled this objection. *Id.* at 133.

I.C. § 18-8004(4) provides:

For purposes of this chapter, an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath or sixty-seven (67) milliliters of urine. Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval or certification standards to be set by that department, or by any other method approved by the Idaho state police. *Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.*

Id. (Emphasis added).

Mr. Kramer argues that I.C. § 18-8004(4) allows for the admissibility of blood alcohol testing results, but as a prerequisite, there are requirements set forth in §18-8004(4) that must be met:

I.C. § 18-8004(4) purports to allow for the admission of certain documents to satisfy this foundational burden without the need for witness testimony. However, the documents we have before us are deficient for that purpose, for by themselves, they fail to demonstrate compliance with the SOP [standard operating procedure] with respect to either performance verification/calibration checks or simulator solution certification. Absent witness testimony showing compliance with the proper procedures, they are irrelevant and thus inadmissible in the instant case.

Appellant's Reply Brief on Appeal, at 2.

Defendant relies upon *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988) to support his argument. There, the Court analyzed the admissibility of certain documents under §18-8004(4), such as documents pertaining to calibration and quality control. The *Bell* court stated:

The acceptance by the Legislature of test procedures as designated by the Idaho Department of Health and Welfare does not wholly eliminate the need of establishing foundational requirements for a test result. This is required even in light of the legislative directive to utilize an expedient means to admit such evidence. The adoption of the particular test procedure merely recognizes the validity and reliability of that particular accepted test. It must still be established at trial that those procedures which ensure the reliability and in turn the accuracy of the test have been met. Absent such a showing, the expedient scheme adopted by the Legislature fails to guarantee the admission of reliable evidence. Without expert witness testimony to establish these necessary foundational elements, compliance with the test procedure must be shown. We hold that to admit the test result the state must provide adequate foundation evidence consisting either of expert testimony or a showing that the test was administered in conformity with the applicable test procedure. Of course, a test result, once admitted, still may be attacked by the defendant. In that event, the trier of fact will determine the ultimate weight to be given the test result.

Id. at 39-40, 764 P.2d at 117-18. Additionally, *Bell* explained that even though expert testimony pertaining to documents such as calibration posed “an unnecessary burden on the state,”

[i]nherent in this statutory scheme, however, is an awareness by the Legislature of the need for uniform test procedures. An “extremely reliable” test result can only be the product of a test procedure which from previous use is known to be capable of producing an accurate result. This benefit is best provided by strict adherence to a uniform procedure. This was

recognized by the Legislature and is apparent first, from the statutory language which provides for the test procedure to be determined by the Idaho Department of Health and Welfare, and second, by the "shall" language mandating adherence to the standards set by that Department.

Id. at 39, 764 P.2d at 116.

While Mr. Kramer correctly cites *Bell*, he also misconstrues the language of the court's opinion. The language set forth above does not support a conclusion that individuals who calibrate and check the machines for quality assurance must testify at trial. In fact, what is clear from the language of *Bell* is that testimony should be set forth which tends to show that the test itself was administered properly. Here, that testimony was set forth by Trooper Lind. Evidence that *Bell* did not intend to place more strenuous conditions upon the State is found in the Court's determination that the witnesses which were presented in the *Bell* trial were sufficient to meet the foundational requirements of I.C. § 18-8004(4):

We conclude that the district court erred in stating that compliance with the testing standards went to the weight of, rather than to the foundation for, the evidence. The next question is whether the proof presented at trial established the requisite compliance. *This proof included the test kit itself with the manufacturer's certificate, the testimony of the nurse, the officer who oversaw the blood withdrawal, and a state forensic officer who performed the test analysis.* The state contends the proof established that the kit was complete with all required contents including the chemical additives. We agree with this contention. Among the foundational proof presented, *the test kit, along with its certificate, constitute an adequate showing by the state of the presence of the required chemicals.*

Id. at 40, 764 P.2d at 117 (emphasis added).

In pertinent part, the record herein contains a Certificate of Calibration, a Certification that the testing instrument was approved for the performance of Forensic Alcohol Testing as per I.C. § 18-8004(4) and the Idaho State Police Rules and Regulations, and two Certificates of Analysis. Defendant argues that while these documents were admitted into evidence, they are insufficient to show compliance with I.C. § 18-8004 because witness testimony is necessary to ensure that proper procedures were followed when making these certifications. However, neither

§ 18-8004(4), nor *Bell*, require this testimony. Here, the Certificate of Calibration provides that the Intoxilyzer employed to measure Mr. Kramer's blood alcohol level was tested, and its calibration found to be in compliance with applicable standards. Another certificate provides that the Intoxilyzer employed was specifically "approved for the performance of Forensic Alcohol Testing as per Idaho Code 18-8004(4) and the Idaho State Police Rules and Regulations." The Certificates of Analysis provide the target values and ranges for Simulator Solution Lot Numbers 7109 and 7804, which, according to the Instrument Operations Log, were those used with the corresponding Intoxilyzer employed here. According to the Instrument Operations Log, also admitted at trial, the last solution change occurred on March 2, 2009, when the solution was changed from the .20 solution, to the .08 solution. The .08 solution, Solution Lot Number 7804, had a target value of 0.081 with a range of 0.073 to 0.089 grams of ethyl alcohol/210 liters of vapor, according to the Certificate of Analysis. The Instrument Operations Log further provides that Mr. Kramer's testing, which was performed on March 14, 2009, included a calibration check, and a reading of 0.086, which was within the range. This document is expressly admissible under I.C. § 18-8004(4), as it is a quality control document.

Additionally, the testimony of the person who performed the actual breath testing was presented through Trooper Lind. The printout from the breath testing machine, which showed the blood alcohol results from Mr. Kramer's breath testing, was subsequently admitted. Taking Mr. Kramer's argument to its natural conclusion, the *Bell* court should have required live testimony from the individual who signed manufacturer's certificate in order for the State to prove that the tubes in the kit contained the required chemical additives. Clearly, *Bell* did not require this. Therefore, this Court holds that Mr. Kramer's argument is not supported by the language of I.C. § 18-8004(4), nor is it supported by *Bell*, and therefore Mr. Kramer has not set forth sufficient

authority to support his argument.

Mr. Kramer was, of course, permitted to attack the accuracy and reliability of the State's evidence once the evidence was admitted by arguing, for example, that no one was able to testify that the correct calibration solution was in the machine used by Trooper Lind to test Mr. Kramer's blood alcohol level. *See State v. Ward*, 135 Idaho 400, 404, 17 P.3d 901, 905 (Ct. App. 2001) (citation omitted). The initial decision of whether to admit evidence at trial, however, is typically within the province of the trial court. *Id.* "Thus, a trial court's 'general admissibility of the results of [a breathalyzer test] in no way limits the right of a party to introduce before the jury evidence relevant to the weight and credibility of such evidence.'" *Id.*, quoting *State v. Van Sickle*, 120 Idaho 99, 104, n. 2, 813 P.2d 910, 915, n.2 (Ct. App. 1991). Therefore, if Mr. Kramer cared to do so, he could have subpoenaed the individuals who signed the certificates himself, in an attempt to discredit Mr. Kramer's test results, even though the State was not required to present the testimony of these individuals.

Additionally, this Court declines Mr. Kramer's invitation to find I.C. § 18-8004(4) unconstitutional. "The party attacking a statute on constitutional grounds must overcome a strong presumption of validity." *State v. Laramore*, 145 Idaho 428, 179 P.3d 1084 (Ct. App. 2007), citing *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). On appeal, courts are "obligated to seek an interpretation of a statute that upholds its constitutionality." *Id.* The Constitutionality of a statute is reviewed *de novo*. *Korsen*, 138 Idaho at 711, 69 P.3d at 131.

Defendant's argument is based upon the Confrontation Clause, and whether the evidence deemed admissible under I.C. § 18-8004(4) is testimonial under *Crawford* and *Melendez-Diaz*. Based upon the foregoing analysis of applicable case law and legal principles, this Court holds that I.C. § 18-8004(4) is constitutional under the State and Federal Constitutions, as well as

Melendez-Diaz.

3. Whether the Performance Verification/Calibration Check Printouts or “Certificates of Analysis” Should be Excluded Under I.R.E. 401-403?

In his Reply brief, Mr. Kramer argues that the Calibration Check Printouts and “Certificates of Analysis” are inadmissible because they are irrelevant, and that any relevance is outweighed by the danger of unfair prejudice and/or misleading the jury. Defendant cites I.R.E. 401-403 in support of his claims.

I.R.E. 402 provides that relevant evidence is admissible, and evidence which is not relevant is inadmissible. I.R.E. 401 provides that “‘Relevant Evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under I.R.E. 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Mr. Kramer argues that the performance verification/calibration check printouts would only be relevant, if they were shown to comply with Standard Operating Procedures set forth by Idaho State Patrol. Thus, without evidence that these procedures were complied with, the printout does not have a tendency to make any fact at issue more or less probable, and thus, the printout would not be relevant. Even if relevant, however, Mr. Kramer argues that admission of the printouts, absent witness testimony, is unfairly prejudicial and has the potential for misleading the jury.

Not only does Mr. Kramer fail to set forth any authority which clearly supports his argument, but his relevancy argument is also moot, as this Court has determined that the calibration check printouts and Certificates of Analysis were properly admitted and aid in meeting the foundational

requirements necessary for the State to admit into evidence the results of Mr. Kramer's breath testing.

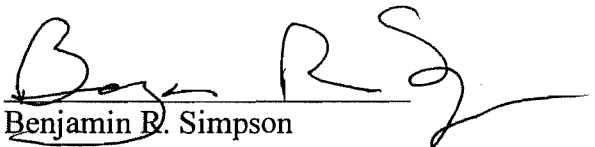
While the Court is mindful that these documents are prejudicial, I.R.E. 403 requires *unfair* prejudice. These documents are expressly admissible under I.C. § 18-8004(4), are highly relevant in establishing the requisite foundation of the breath test results, and are admissible "without the necessity of producing a witness to establish the reliability of the testing procedure for examination." *Id.* Therefore, the documentary evidence admitted by the State was both relevant, and outweighed any unfair prejudice or danger of misleading the jury.

ORDER:

The court being fully advised in the premises and good cause appearing therefore,
IT IS HERBY ORDERED, as follows:

1. That the decision of the Magistrate Court is hereby AFFIRMED.

DATED: The 29 day of March, 2011.


Benjamin R. Simpson
District Judge # 1001

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of March, 2011, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
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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-Respondent,)	
	)	NO. CR-09-5447
)	
vs.)	
	)	NOTICE OF APPEAL
MICHAEL I. KRAMER)	
Defendant-Appellant.)	
_____)	

TO: THE ABOVE NAMED RESPONDENT (State of Idaho), AND THE PARTY'S ATTORNEY (Amy Borgman, Deputy Kootenai County Prosecutor, P.O. Box 9000, Coeur d'Alene, ID 83816), AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Michael I. Kramer, appeals against the above named respondent to the Idaho Supreme Court/Court of Appeals from the Memorandum, Decision, and Order on Appeal entered in the above entitled action on the 30th day of March, 2011 by Judge Benjamin Simpson.
2. That the party has a right to appeal to the Idaho Supreme Court/Court of Appeals and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 12(a) I.A.R.
3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, and such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal: The defendant appeals the court's ruling regarding denial of the Right of Confrontation under *Crawford v. Washington* and *Melendez-Diaz* in admitting breath test based upon affidavits certifying the breath test and equipment and other evidentiary rulings asserted in appeal to District Court.
4. No order has been entered sealing all or any portion of the record.
5. (a) Is a reporter's transcript requested? YES

(b) The appellant requests the preparation of the following portions of the reporter's transcript in hard copy: The entire reporter's standard transcript as defined in Rule 25(a) I.A.R.

6. 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) The entire file from the District Court appeal.

7. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b) 1. ☒ That Joann Schaller has been paid the estimated fee for preparation of the reporter's transcript in the amount of \$60.00.

(c) 1. ☒ That the estimated fee for preparation of the clerk's record has been paid in the amount of \$200.00

(d) 1. ☐ That the appellate filing fee has been paid.

2. ☒ That the appellant is exempt from paying the appellate filing fee because this is a criminal appeal.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED THIS 9 day of May, 2011


DOUGLAS D. PHELPS, ISBA#4755

Phelps & Associates, PS
Attorneys at Law
2903 N. Stout Rd.
Spokane, WA 99206-4373
Phone:(509)892-0467; Fax:(509)921-0802
phelps@phelpslaw1.com

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED

2011 MAY 27 AM 10: 29

CLERK DISTRICT COURT

DEPUTY

ORIGINAL

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,)	
	)	NO. CR-09-5447
)	
vs.	)	AMENDED
	)	NOTICE OF APPEAL
MICHAEL I. KRAMER)	
Defendant-Appellant.)	
_____)	

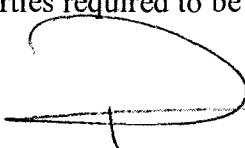
TO: THE ABOVE NAMED RESPONDENT (State of Idaho), AND THE PARTY'S ATTORNEY (Amy Borgman, Deputy Kootenai County Prosecutor, P.O. Box 9000, Coeur d' Alene, ID 83816), AND THE CLERK OF THE ABOVE ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Michael I. Kramer, appeals against the above named respondent to the Idaho Supreme Court/Court of Appeals from the Memorandum, Decision, and Order on Appeal entered in the above entitled action on the 30th day of March, 2011 by Judge Benjamin Simpson.
2. That the party has a right to appeal to the Idaho Supreme Court/Court of Appeals and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 12(a) I.A.R.
3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, and such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal: The defendant appeals the court's ruling regarding denial of the Right of Confrontation under *Crawford v. Washington* and *Melendez-Diaz* in admitting breath test based upon affidavits certifying the breath test and equipment and other evidentiary rulings asserted in appeal to District Court.
4. No order has been entered sealing all or any portion of the record.
5. (a) Is a reporter's transcript requested? YES

- (b) The appellant requests the preparation of the following portions of the reporter's transcript in hard copy: The entire reporter's standard transcript from the hearing conducted on March 25, 2011 commencing at 8:00a.m.
6. 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) The entire file from the District Court appeal.
7. I certify:
- (a) That a copy of this notice of appeal has been served on the reporter.
- (b) 1. ☒ That Joann Schaller has been paid the estimated fee for preparation of the reporter's transcript in the amount of \$60.00.
- (c) 1. ☒ That the estimated fee for preparation of the clerk's record has been paid in the amount of \$200.00
- (d) 1. ☐ That the appellate filing fee has been paid.
2. ☒ That the appellant is exempt from paying the appellate filing fee because this is a criminal appeal.
- (e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED THIS 26 day of May, 2011


DOUGLAS D. PHELPS, ISBA#4755



JoAnn Schaller
Official Court Reporter, 1D
324 West Garden Avenue • P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000
Phone: (208) 446-1136

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED 9000
2011 JUN 24 AM 11:57

TO: Clerk of the Courts
Idaho Supreme Court Building
P.O. Box 83720
Boise, Idaho 83720-0101

CLERK DISTRICT COURT

DEPUTY

DOCKET NO. 38786-2010
(Kootenai No. CR-09-5447)

(STATE OF IDAHO,
(
(Plaintiff/Respondent,
(
(vs.
(
(MICHAEL IAN KRAMER,
(
(Defendant/Appellant.

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on June 24, 2011, I lodged all assigned appellate transcript(s) requested of me in the above-referenced appeal, entitled Transcript on Appeal, totalling 19 pages, an original and three copies, with the District Court Clerk of the County of Kootenai, in the First Judicial District. An electronic PDF file is attached to e-mail and sent to sctfilings@idcourts.net. A copy of this notice with the Table of Contents of the appeal transcript attached is faxed to the Idaho Supreme Court at 208 334-2616.

JoAnn Schaller

(Date)

277

JAN 19 2011

2

TABLE OF CONTENTS

PROCEEDINGS:

March 25, 2011, APPEAL HEARING

Reporter's Certificate

PAGES:

3-18

19

278

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

STATE OF IDAHO)	CRF2010-21212
Plaintiff/Respondent)	
vs.)	
MICHAEL IAN KRAMER	)	SUPREME COURT
Defendant/Appellant	)	DOCKET 38786
)	

CLERK'S CERTIFICATE OF EXHIBITS

I, Leslie L Smith, 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 the foregoing Record in this cause was compiled and bound under my direction and is true, correct and complete Record of the pleadings and documents requested by Appellate Rule 28.

I further certify that the following documents will be submitted as exhibits to the Record:

Transcript - Jury Trial 3-12-10

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 29 day of July, 2011

Clifford T. Hayes
Clerk of the District Court

Leslie L Smith
Deputy Clerk

In the Supreme Court of the State of Idaho

STATE OF IDAHO,

Plaintiff-Respondent,

v.

MICHAEL IAN KRAMER,

Defendant-Appellant.

ORDER GRANTING MOTION TO
AUGMENT

Supreme Court Docket No. 38786-2011
Kootenai County Docket No. 2009-5447

A MOTION TO AUGMENT was filed by counsel for Appellant on October 3, 2011.
Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO AUGMENT be, and hereby is,
GRANTED and the augmentation record shall include the document listed below, file stamped copies
of which accompanied this Motion, as an EXHIBIT:

1. Transcript – Jury Trial, file-stamped September 9, 2010.

DATED this 5th of October, 2011.

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record

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

STATE OF IDAHO)	CRF2010-21212
Plaintiff/Respondent)	
)	
vs.)	
	)	SUPREME COURT
MICHAEL IAN KRAMER	)	38786
Defendant/Appellant)	

CLERK'S CERTIFICATE OF SERVICE

I, Leslie L. Smith, 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 follows:

Attorney for Respondent

Lawrence G. Wasden
Attorney General
700 W. Jefferson, Suite 210
Boise, ID 83720-0010

Attorney for Appellant

Molly J Huskey
State Appellate Public Defender
3647 Lake Harbor Lane
Boise, ID 83703

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 24 day of July, 2011.

