

# FOR THE ROAD

*Idaho Prosecuting Attorneys Association*



## U.S. SUPREME COURT SAYS BREATH TEST IS A SEARCH INCIDENT TO ARREST

By Jared Olson, Idaho Traffic Safety Resource Prosecutor

According to the U.S. Supreme Court, the 4th Amendment permits warrantless breath tests incident to arrest for impaired driving crimes, but not warrantless blood tests.

The U.S. Supreme Court considered three separate cases involving state statutes criminalizing refusal of evidentiary testing. First in the *Birchfield* case out of North Dakota, the defendant refused to submit to a blood test and received a criminal penalty for refusing that blood test. Second in the *Bernard* case out of Minnesota, the defendant was charged with a separate criminal offense of refusing to take a breath test. Third, in the *Beylund* case also out of North Dakota, the defendant was asked to take a blood test, and after being informed about the fact that refusing a blood test would result in a separate criminal offense, agreed to provide a blood sample.

In the case of breath tests, the Court determined a breath test is a search incident to a lawful arrest. A search incident to a lawful arrest is an exception to the 4<sup>th</sup> Amendment's warrant requirement. The Court said:

“Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.”

The search incident to arrest doctrine does not apply to blood draws, therefore a state may not criminalize a refusal to submit to a blood draw. However, a state may criminalize a refusal to submit to a breath test.

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## Birchfield v. North Dakota, 579 U.S. \_\_ 2016

In Idaho, we do not have such criminal sanctions, but we do impose civil fines and license suspensions and we are allowed to comment on a person's refusal in trial – this has not changed. There is nothing in the Court's decision that would invalidate Idaho's implied consent statute. Implied consent laws that impose civil or administrative penalties for refusing to submit to a breath or blood test (urine is mentioned in Footnote 1) remain valid. The Court said the following:

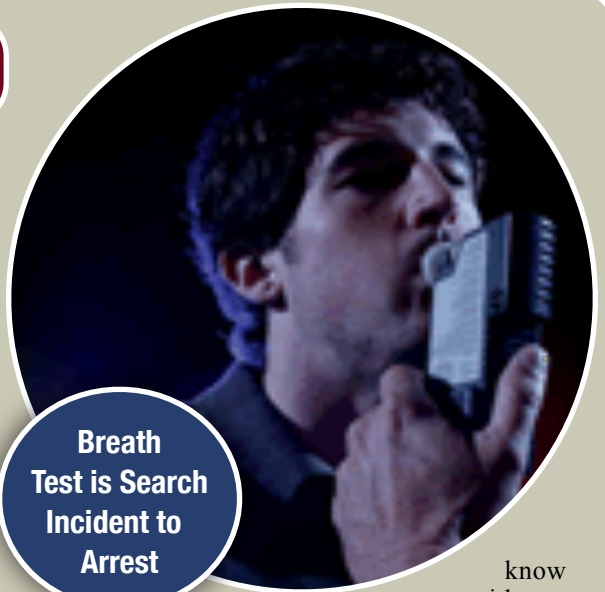
"It is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context. Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them."

The only potential impact of some significance to Idaho case law immediately apparent is in relation to unconscious drivers. Currently, Idaho case law holds that an Idaho driver has given their initial consent to evidentiary testing but this "implied consent" is revocable. Therefore, an unconscious driver has given their initial consent and the Idaho cases appear to hold a warrantless blood draw would remain valid

under the consent exception. In the *Birchfield* decision, the U.S. Supreme Court briefly mentions the unconscious driver. The Court said they have no reason to believe the situations are common, and when it arises, the police may apply for a warrant if need be. Although dicta, I would recommend applying for a warrant in cases with unconscious drivers, unless exigent circumstances apply, and NOT rely on Idaho's implied consent statute.

The Supreme Court continued to hold that taking a person's blood is more intrusive than obtaining a breath sample. Most importantly, the Supreme Court did NOT change its analysis of exigency that was outlined in the *McNeely* opinion. Law enforcement may obtain a blood sample pursuant to a warrant as well as in exigent circumstances where the state can prove probable cause and exigent circumstances. HOWEVER, it is more important than ever that if you are doing an exigency blood draw that you articulate the amount of time it would take to get a warrant and that you believe that evidence of alcohol and/or other intoxicating drugs is dissipating by the minute (this must consist of detailed testimony). You must be detailed in how long the warrant process would take, how much time has elapsed since the defendant's driving and that you

**Breath  
Test is Search  
Incident to  
Arrest**



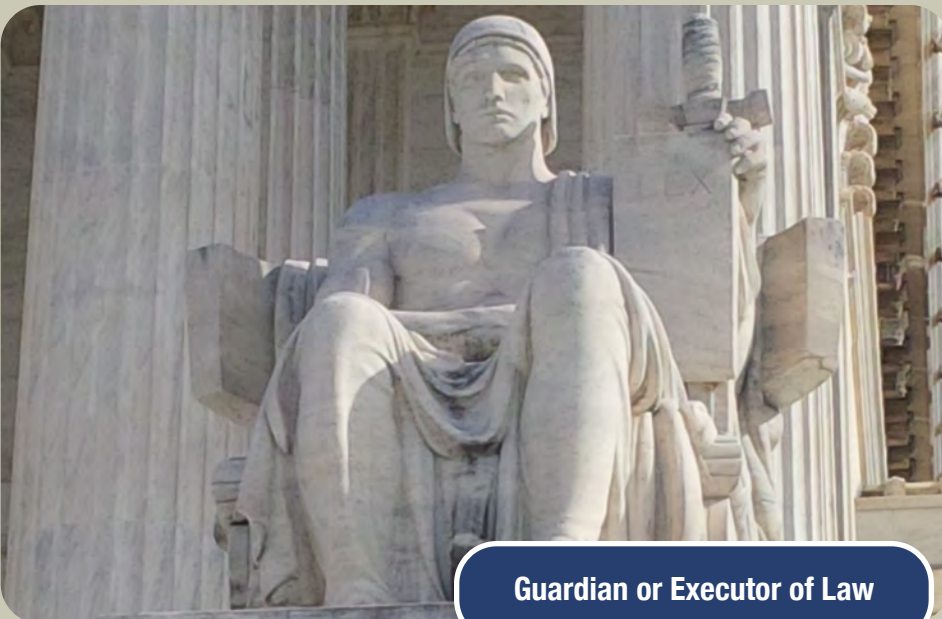
know  
evidence  
of alcohol and/

or drugs will be lost as time passes. In addition, when testifying about drugs, point out that in your training and experience you know drugs affect the body differently and leave the body at different rates.

The U.S. Supreme Court did recognize that an advantage to blood tests is their ability to detect not just alcohol but also other impairing substances. However, the Court would not extend the search incident to arrest doctrine based on this. The Court said, "Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not."

Finally, I think it worth mentioning that today's decision is not insignificant. Although it does not appear to have a major impact on current Idaho law and procedures, it is the first time the U.S. Supreme Court has ruled that (1) the legislature can make it a crime to refuse a breath test; and (2) breath testing is not based upon consent, but is a search incident to arrest. It should underscore that the administrative required procedures, such as reading the advisory form, are strictly for the civil cases and have no bearing on the admissibility of the breath test in criminal cases.

Therefore, a breath test is now admissible under a voluntary consent basis, an exigency basis based on probable cause, and now as search incident to arrest. Be prepared to argue all three in suppression motions.



**Guardian or Executor of Law**



# Idaho Traffic Law Update

## State v. Jones, (2016):

Jones was charged with Felony DUI under I.C. 18-8004C(2) with an evidentiary blood draw result of 0.207 with a measurement of uncertainty of +/- 0.0103. The prosecutor filed a motion *in limine* requesting the court to enter an order prohibiting any evidence regarding the measurement of uncertainty, which the court granted. Jones appealed arguing the district court erred and that *Elias-Cruz v. Idaho Dep't of Transp.*, 153 Idaho 200 (2012) should be overturned. The crux of the argument is that his actual alcohol concentration was just as likely 0.196 as it was 0.027 when considering the uncertainty of measurement. Jones also argued his constitutional right to present a complete defense was violated by the granting of this motion *in limine*.

The Idaho Supreme Court declined to overturn their holding in *Elias-Cruz* reaffirming the standard for determining alcohol concentration, as defined by I.C. 18-8004(4), is no longer the concentration of alcohol in the driver's blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver's breath, blood, or urine. Thus, the measurement of uncertainty as it relates to the actual alcohol concentration, rather than the reliability of the testing equipment or procedures, is irrelevant. Therefore, there is no due process violation in excluding irrelevant evidence.

## Warner v. ITD, (2016):

The issue presented in this case is whether an Idaho driver with a prior DUI conviction is entitled to have a subsequent foreign DUI conviction treated as a first offense in an administrative license suspension. Warner, a licensed driver in Idaho with a prior DUI conviction, received a second DUI conviction in Montana. Warner argued the Montana DUI plea agreement was akin to an Idaho prosecutor reducing a second offense DUI to a first offense DUI and the maximum license penalty would be 30 days.

The district court had agreed with Warner and reversed ITD's 1 year suspension. However, the Idaho Supreme Court held

the Idaho Transportation Department was authorized to suspend Warner's license under I.C. 49-326(1) and ITD did not err in applying I.C. 18-8005(4)(e) to administratively suspend Warner's license for 1 year. The district court's order was vacated.

## State v. Svelmoe, (2016):

Svelmoe appealed his felony DUI conviction contending the court erred in not granting his motions to dismiss, suppress and *in limine*. At the preliminary hearing the State did not present the breath test results because it did not have the necessary certified documents. The State believed the officer's testimony and field sobriety results would be enough. The magistrate held there was not probable cause to support the charge and dismissed the case. The State refiled the complaint and Svelmoe was ultimately convicted. Svelmoe argued his due process rights were violated when the State refiled the complaint. Next, he argued his breath samples were obtained through an unlawful search and seizure because the reading of the ALS advisory form was coercive. Finally, Svelmoe argued the State could not rely on the SOPs promulgated in violation of IDAPA.

First, the Idaho Supreme Court held Svelmoe provided no evidence showing the State refiled the complaint for an improper purpose after the first preliminary hearing was dismissed.

Next, the Court rejected Svelmoe's argument the reading of the ALS advisory form was coercive resulting in his involuntary consent. This argument was foreclosed by *State v. Haynes*, 159 Idaho 36 (2016) where the Court held requiring a person to submit to a breath test is not an unreasonable search, and whether consent is voluntary was immaterial because consent is an exception to the warrant requirement. Therefore, Svelmoe's argument his consent was involuntary is irrelevant.

**Note:** The U.S. Supreme Court has since held that breath testing may be conducted as a search incident to a lawful arrest in *Birchfield*. This is a categorical exception, therefore would be an additional exception to the warrant requirement in this case.

Finally, the Court held the district court erred in admitting the breath results because the 2013 SOPs, in effect at the time, were void because they were not adopted in compliance with IDAPA. Therefore, the testimony of the arresting officer alone did not establish the reliability of the testing procedures and the accuracy of the breath test results. Therefore, Svelmoe's conviction was vacated and the case remanded for further proceedings.

**Note:** This ruling only affects cases where the 2013 SOPs were being relied on. The current SOPs have been properly promulgated through IDAPA 11.03.01.

## State v. Luna, (Ct.App.2016):

Luna provided 7 breath samples, with 3 being under the illegal limit of 0.08. The officer testified Luna was attempting to defeat the test by blowing around the tube and by plugging the tube with her tongue and blowing out the sides of her mouth. Luna argued she could not be prosecuted for DUI per I.C. 18-8004(2) because three of her samples were under 0.08. On appeal, the district court found because the State did not produce a qualified expert to explain the low test results, the State did not produce sufficient evidence to establish the low results were unreliable. The State appealed.

The Court of Appeals affirmed the district court holding where a breathalyzer test result is below the illegal limit, in order to avoid dismissal, the State must produce an expert witness to establish the relationship between the administration of the test and the resulting unreliability of the test result. Here the officer was not found to be qualified as an expert having specialized knowledge of breathalyzer testing. The State was required to present expert testimony to explain how the manipulation by Luna rendered the low results unreliable.

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# WEB SITES

## Idaho TSRP

[www.TSRP-Idaho.org](http://www.TSRP-Idaho.org)

## Idaho Prosecuting Attorneys Association

[www.IPAA-prosecutors.org](http://www.IPAA-prosecutors.org)

## ITD Office of Highway Safety

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

## Idaho POST Academy

[www.post.idaho.gov](http://www.post.idaho.gov)

## National Highway Traffic Safety Administration

[www.nhtsa.gov](http://www.nhtsa.gov)

## National Association of Prosecutor Coordinators

[www.napc.us](http://www.napc.us)

## NDAA's National Traffic Law Center (NTLC)

[www.ndaa.org](http://www.ndaa.org)

## Idaho State Police Forensics

[www.isp.idaho.gov/forensics/](http://www.isp.idaho.gov/forensics/)

## Alcohol Beverage Control

[www.isp.idaho.gov/abc/](http://www.isp.idaho.gov/abc/)



## State v. Townsend, (Ct.App.2016):

Townsend was arrested for DUI. He did not comply with the breath test and was transported to jail, where a paramedic drew blood samples. Townsend filed a motion to suppress arguing exigent circumstances did not exist to justify the warrantless blood draw. The State argued the anticipated delays in the warrant application process did create exigency sufficient to justify the blood draw. The State submitted evidence that a warrant for a DUI case in March 2013 would be no less than 1 hour and 30 minutes. In addition, Ada County did not have a system in place for telephonic warrants at that time. However, a magistrate was on call to issue warrants and the officers made no attempt to secure a warrant.

The Court of Appeals found based on the totality of the circumstances in this case, an exigency did not exist to justify Townsend's warrantless blood draw. While the lack of access to expedited or telephonic warrants is a practical and relevant concern, the on-call magistrate alleviates the problem of obtaining a warrant. The Court found no other factors to suggest an exigency. The officers' failure to attempt to secure a warrant, makes the warrantless blood draw in this case unjustified.

**Note:** The district court had found the gradual and predictable loss of blood alcohol content is heightened in Idaho because of the bar to prosecution under I.C. 18-8004(2) when the driver has a BAC below 0.08. This additional factor in the exigency analysis was rejected by the Court of Appeals. The Court said this argument fails because it would create an exigency in every case. The Court held this would be a categorical exception prohibited by the U.S. Supreme Court in *Missouri v. McNeely*

## State v. Garcia-Rodriguez, (Ct.App.2016):

Garcia-Rodriguez was stopped when his tires crossed the fog line for several seconds on a highway off-ramp. He produced a Mexican consulate card, stated he did not have a driver's license, and could not locate registration or proof of insurance. The rental car he was driving was rented to someone else and prohibited other drivers. Garcia-Rodriguez was in the country illegally. He was arrested for driving without a driver's license and searched incident to arrest. Meth was discovered in his pocket.

The district court suppressed the evidence holding (1) a single incident of crossing over the fog line was not reasonable suspicion of a traffic violation; and (2) the arrest was unlawful under I.C. 49-1407 because the Mexican consulate card was sufficient evidence of identity, and the officer did not have reasonable and probable grounds to believe Garcia-Rodriguez would not honor a written promise to appear.

The Court of Appeals reversed holding (1) crossing over the fog line on a highway off-ramp is reasonable suspicion I.C. 49-630(1) has been violated. The Court previously held in *State v. Slater*, 136 Idaho 293 (Ct.App.2001) that crossing over the fog line on a highway on-ramp was a violation. The Court reasoned that on-ramps and off-ramps are essentially the same, thus, it was a valid stop. (2) The suppression of evidence was inappropriate because even if the officer did not have grounds to arrest Garcia-Rodriguez under I.C. 49-1407, his arrest was constitutionally lawful, and therefore, the search incident to arrest was lawful. I.C. 49-1407 does not provide an adequate remedy if the statute is violated, but this would be for the legislature to remedy by statute.

## Training & Conferences Notice

(Click on Course Names for More Information)

Traffic Tuesdays Webinars — Aug 9th, Sept 13th, Oct 11th (Online)

IPAA Summer Conference — August 10-12th, Boise, Idaho

National DRE Conference — August 13-15, Denver, Colorado

2016 GHSA Annual Meeting -- August 27-31, Seattle, Washington

# LAST CALL

The past few months the courts have been busy publishing case decisions applicable to impaired driving and other traffic crimes. This issue of *For The Road* has focused solely on the case law updates. Idaho Law enforcement agencies and prosecutor offices interested in receiving a live legal update training may contact me by email at [jared.olson@post.idaho.gov](mailto:jared.olson@post.idaho.gov). There is no cost to the training and I am willing and able to travel to your specific agency.

In addition to the legal update training, law enforcement agencies may also be interested in a training I have developed based on the growing trend of drivers who target law enforcement trying to catch officers doing something wrong or put the officers in a situation in hopes a constitutional right will be violated for future civil litigation to follow. Others may just be looking for their next YouTube video or spotlight moment with the media. Dealing with problem drivers during a traffic stop requires professionalism, confidence in knowing the law, and then applying that knowledge in a decisive manner.

Together we evaluate a number of scenarios and develop specific strategies to deal with the confrontational driver with professionalism and confidence. This training can be delivered in either a 2 hour or 4 hour block.

Agencies or offices interested in either or both of the above trainings may contact me by email at [jared.olson@post.idaho.gov](mailto:jared.olson@post.idaho.gov). The cost for these trainings will be covered by the Idaho Prosecuting Attorneys Association through an Idaho Transportation Department Office of Highway Safety grant.

Finally, I want to take a moment and thank the many dedicated law enforcement professionals who make Idaho a great place to live by quoting a case which states: "Police officers wear many hats: criminal investigator, first aid provider, social worker, crisis intervener, family counselor, youth mentor and peacemaker, to name a few. They are charged with the duty to protect people, not just from criminals, but also from accidents, natural perils and even self-inflicted injuries. We ask them to protect our property from all types of losses—even those occasioned by our own negligence. They counsel our youth. They quell disputes



between husband and wife, parent and child, landlord and tenant, merchant and patron and quarreling neighbors. Although they search for clues to solve crime, they also search for missing children, parents, dementia patients, and occasionally even an escaped zoo animal. They are society's problem solvers when no other solution is apparent or available." *State v. Matalonis*, 875 N.W.2d 567, 576-77 (Wis.2016) – quoting *Ortiz v. State*, 24 So. 3d 596, 607 n.5 (Ct.App.2009). -- Jared Olson



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

**Idaho Transportation Department**

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