

**The Trial Lawyer's Role in Maximizing Success
on Appeal
and Idaho Supreme Court Criminal Law Update**

Idaho Supreme Court Building
December 15, 2008

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AGENDA

- 8:30-8:45 Welcome and opening remarks by Justice Roger Burdick
- 8:45-9:15 The Trial Lawyer's Role in Preparing for Appeal - *presented by Thomas J. McCabe, Esq.*
- 9:15-9:45 The Importance of an Adequate Record, A View from the Bench -
presented by Judge Karen Lansing, Idaho Court of Appeals
- 9:45 -10:15 Ethical Issues and Obligations in Filing an Appeal - *presented by Brad Andrews, Idaho State Bar Counsel*
- 10:15-10:30 BREAK
- 10:30 -Noon Idaho Supreme Court Criminal Law Update - *presented by Thomas J. McCabe, Esq.*

PROVIDING A RECORD ON APPEAL -- A VIEW FROM THE BENCH

Presented by Hon. Karen L. Lansing
Idaho Court of Appeals

I. Requesting the Clerk's Record

- A. It is the appellant's and cross-appellant's burden to supply a sufficient record to support the claims of error. Missing portions of the record will be presumed to support the action of the trial court. *E.g., Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 983, 895 P.2d 581, 584 (Ct. App. 1995); *Western Stockgrowers Ass'n v. Edwards*, 126 Idaho 939, 942, 894 P.2d 172, 175 (Ct. App. 1995).
- B. What should be included?
 1. The pleadings, motions, affidavits, or other documents that frame the issue being presented on appeal.
 2. Everything that was in front of the trial court on which the trial court could have based the decision that is being appealed. Appellant should include all evidence that was before the trial court, not just that which favors appellant. Otherwise, appellant may lose for having provided an inadequate record on appeal.
 3. Anything that expresses the trial court's decision and its reasoning. If the trial court ruled from the bench, include the transcript of that ruling. If the final decision is a written judgment or order, but the judge's reasoning is in a separate memorandum decision, include the memorandum decision.
- C. The appellant must designate in the Notice of Appeal the documents to be included in the clerk's or agency's record in addition to the standard record specified in Rule 28(b)(2). I.A.R. 17(i).
 1. The registry of action for cases going back to 1995 in all counties can be viewed on the Supreme Court's website (click on judiciary data repository). When preparing the notice of appeal, examine the registry of action and use it to designate the records and hearing transcripts that you need.
 2. Do not automatically just ask for the "standard record." In criminal cases, the standard record does not include such things as affidavits and jury instructions. In civil cases it will not include such potentially important things as dispositive motions, affidavits, discovery orders or jury instructions.

3. In your request for record, identify what you want with specificity, i.e., "Affidavit of John Doe dated xx/xx/xx"; *not* "All affidavits in support of motion to suppress evidence."
 4. If your client will be represented on appeal by the State Appellate Public Defender, request the following items, as the SAPD will otherwise request them by amending the notice of appeal or moving to augment the record, which will delay the appeal:
 - a. Suppression motion and any supporting documents
 - b. Motion for a *Franks* hearing and any supporting documents;
 - c. Motion by defendant to proceed pro se and any supporting documents.
- D. The respondent has 14 days to request additions to the record after the Notice of Appeal is filed. I.A.R. 19(a). Don't let this deadline pass without examining the appellant's request to see if additional items are needed. A form for this request is provided in I.A.R. 19(b).

II. Requesting the Transcript

- A. The appellant must also designate the requested transcripts in addition to the standard transcript specified in Rule 25(c). I.A.R. 17(h).
 1. Do not automatically just ask for the "standard transcript." It will include little but trial testimony and colloquies between the court and counsel at trial. It will not include such potentially important matters as jury voir dire, opening and closing arguments, jury instructions and pretrial or post-trial motion hearings.
 2. If you don't need all or part of the standard transcript, say so in your notice of appeal so the court reporter won't prepare it and your client (or your county) won't have to pay for it. *See* I.A.R. 25(a).
- B. To show that an error is reversible (not harmless) may require the entire trial transcript.
- C. The respondent may request additional transcript in the same manner as requesting additional clerk's record.
- D. Either party may request (but must separately pay for), computer-searchable disks of some or all of the transcript by filing a request with the trial court and serving it on the court reporter within fourteen days from the notice of appeal or notice of

cross-appeal. I.A.R. 26.1. If your client will be represented by the State Appellate Public Defender, request disks.

- E. The parties may also request that the transcript be provided in compressed format. I.A.R. 26(m).
- F. Depositions or statements that have been read into the record will be included in the reporter's transcript. I.A.R. 25(e). Depositions or statements that are admitted as exhibits, or that were otherwise considered by the court at a trial or evidentiary hearing, but not read into the record, will *not* be in the reporter's transcript but will be included in the clerk's or agency's record if specifically requested by a party, I.A.R. 25(e); otherwise, they will be in the exhibits. I.A.R. 31(a). To avoid cost, request it as an exhibit.
- G. Recorded testimony placed in evidence by an audio or audiovisual recording (i.e., a videotaped deposition) played during trial will be reported by the reporter and included in the reporter's transcript like other testimony. I.A.R. 25(f). The recording will also be in the exhibits. I.A.R. 31(a)(4).
- H. Motions to augment the record with additional transcripts is a huge cause of delays on appeal. Therefore, it is important to request *all* of the needed transcripts in the notice of appeal. If your client will be represented on appeal by the State Appellate Public Defender, you are asked to request all of the following transcripts; if you do not do so, the SAPD will move to augment them into the appellate record, which will cause delays:
 - 1. Guilty plea hearings;
 - 2. Sentencing hearings;
 - 3. Any evidentiary hearing, such as hearings on suppression motions or motions to dismiss;
 - 4. Hearings on requests for a *Franks* hearing;
 - 5. Hearings on a defendant's motion to proceed pro se;
 - 6. Hearings on motions claiming jurisdictional defects;
 - 7. In the request for trial transcript include jury voir dire, jury instructions, opening statement, and closing argument;
 - 8. Rule 35 motion hearings if testimony was presented.

III. Correcting or Augmenting the Record or Transcript

A. If you goofed and did not request needed record or transcript, or if the clerk or court reporter omitted something that you requested, you have two ways to correct the problem:

1. Within 28 days after service of the transcript and clerk's record, you may file in the district court an objection to the record or request for additions to or deletions from the transcript or record. If no such motion is made, or after the ruling on such a motion, the transcript and record will be deemed settled, and the transcript and record will then be filed with the Supreme Court. I.A.R. 29(a).

a. Within that 28 days counsel should examine the record to see if it includes all the requested documents and their attachments.

2. After the record has been settled, any request for additions, deletions or corrections may be made by motion or stipulation filed with the Supreme Court, or the Court of Appeals if the case has been assigned to it. I.A.R. 30. If done by motion, the other party has fourteen days to object. I.A.R. 30 and 30.1.

a. A motion to augment may be made *at any time*. Appellant should read the respondent's brief and *pay attention* if it says that necessary portions of the record are missing—then move to augment. If a judge or justice tells you at oral argument that portions of the record are missing, *pay attention*. You can *still* move to augment.

b. You must attach to your motion a copy of any document you wish to have augmented in, unless you are requesting a transcript that has not yet been prepared. The document must bear the trial court's filing stamp. I.A.R. 30.

c. It is very important to examine the record before it is settled to avoid delay in your client's appeal and to create a record in a form that is convenient for the court to use and for you to use in citing to the record in your briefs.

B. Never attempt to "augment" the record by attaching documents to your brief. The court will disregard anything that is not in the official appellate record. *State ex rel. Ohman v. Talbot Family Trust*, 120 Idaho 825, 827, 820 P.2d 695, 697 (1991).

IV. Exhibits

A. Copies (not originals) of all documentary trial exhibits, transcripts filed with the district court, and all audio or video recordings offered or played during

proceedings should be automatically lodged with the Supreme Court by the district court or agency clerk. I.A.R. 31(a).

- B. Other types of exhibits (such as the “defective” product, an article of clothing, oversize photographs, etc.) will be forwarded only upon order of the Supreme Court. I.A.R. 31(a)(1). One exception: in death penalty cases all exhibits are sent to the Supreme Court.
- C. Always check the clerk’s certificate of exhibits (contained at the end of the clerk’s record) to confirm that the exhibits you need have been included.

V. Judicial Notice

- A. Items of which the trial court took judicial notice (such as the court records in a different but related case) will *not* be included in the exhibits. You will need to specifically request these and may need to file a motion in the trial court to have them included as exhibits.
 - 1. In the trial court proceedings, specify the particular records that you wish the court to take judicial notice of; do not request judicial notice of the entire file in another case. For example, if in a post-conviction action you ask the court to take judicial notice of the whole file in the criminal case, in an appeal of the post-conviction case the district court clerk may have to copy the entire record from the criminal file instead of just the pertinent documents. This greatly increases costs and makes the record harder to work with.
 - 2. It is far better to mark as exhibits and place in evidence copies of such records from another case instead of asking the trial court to take judicial notice.
 - 3. If the court announces that it has taken judicial notice of the criminal file *sua sponte* (as in a notice of intent to dismiss a post-conviction action), request that the court comply with Idaho Rule of Evidence 201(c) by designating the specific documents from the criminal case file that it is relying upon in the post-conviction action so that only those documents need be made part of a record in the post-conviction appeal.
- B. A party may file a motion with the Supreme Court to take judicial notice of a transcript or record from a prior appeal, but exhibits from the prior appeal probably won’t be available that way.

VI. Waiver of Clerk’s Fee and Court Reporter’s Fee

- A. An indigent party, other than a prisoner, may obtain a waiver of the clerk's fee and court reporter's fee by application to the district court pursuant to I.C. § 31-3220. I.A.R. 24(g) and 27(e).
- B. Prisoners appealing in a post-conviction relief action may obtain a waiver of the fees by order of the district court pursuant to I.C. § 19-4904.
- C. Prisoners appealing in habeas corpus actions or other civil actions must comply with I.C. § 31-3220A to obtain an order from the district court for waiver of appeal costs.

VII. Frequent Problems With the Completeness of the Clerk's Record or Exhibits

- A. The clerk may fail to include documents that were attachments to affidavits, pleadings, or briefs.
- B. The parties often fail to request items of which the trial court took judicial notice but which were not formally made an exhibit, such as pleadings or transcripts from a separate but related case.
- C. When there has been an intermediate appeal from the magistrate division to the district court, necessary transcripts from the magistrate division should be included as an exhibit on appeal to the Supreme Court, I.A.R. 31(3), but may be overlooked by court clerks. (A request for the transcript of all proceedings in the notice of appeal from the district court to the Supreme Court will get you only the transcript of the appellate proceedings in the district court.)
- D. Don't assume that the appellate court has received every transcript that is in your file. Sometimes the parties have a transcript because it was prepared for the attorney's use, e.g., a transcript of the preliminary hearing, but it was not filed in the trial court.
- E. If you comply with I.A.R. 35(a)(6) and 35(b)(6), you will know when essential parts of record are missing.

VIII. Troubleshooting

- A. If you encounter difficulties with a district court clerk's office or court reporter, notify the Supreme Court clerk's office and they will promptly get involved to facilitate development of the necessary record or transcript.
- B. If there has been a temporary remand, as for a ruling on a pending motion, and the district court does not act on the matter within a reasonable time, contact the Supreme Court clerk's office for help to get the case "unstalled."

IX. Future Developments

- A. Several important amendments to the appellate rules have recently been proposed by the Appellate Rules Advisory Committee. These have not yet been adopted by the Supreme Court, but likely will be adopted and made effective July 1, 2009 or earlier:
1. Instead of preparing only hard copies of the reporter's transcript, court reporters will be required to prepare an original and one additional hard copy and one electronic copy for the Supreme Court. The court reporter will prepare one copy of the transcript for the appellant and one for the respondent, with each party electing whether to receive it in electronic format or in hard copy. Once an original transcript in either hard copy or electronic format has been paid for, any party may request an additional electronic copy upon payment of a modest sum (perhaps \$20) to the court reporter.
 2. Rule 47 would be amended to require that, with the exception of persons appearing pro se, all parties participating in an appeal must provide an e-mail address that the clerk of the Supreme Court may use for service.
 3. A proposed new rule 30.2 would provide procedures to augment the record with a copy of a local government ordinance.
 4. Rule 31 would be amended to provide that the exhibits on appeal would no longer automatically include all documents, charts and pictures offered or admitted as exhibits in a trial. Instead, parties would have to designate in the notice of appeal the documentary exhibits that they wish to have included.
 5. A subcommittee was appointed to develop a new rule specifying procedures to expedite appeals in child custody cases.
- B. The court has undertaken a pilot project to test a new system for providing a record on appeal similar to that now used by the Ninth Circuit. The appellant would be required to prepare an excerpt of record that included the documents necessary for the appeal and would provide copies to the Supreme Court. The district court clerk would also scan the entire record and provide it to the Supreme Court either on disk so the Court would have access to all documents in the record even if they were not included in the excerpt of record. This would cost less than the current process of making multiple photocopies of designated portions of the record and would also eliminate the problem of documents being omitted from the record on appeal. As part of the pilot project, documentary exhibits will also be scanned and delivered on a disk rather than being provided by photocopies.

IDAHO SUPREME COURT
CRIMINAL LAW UPDATE

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DUI

STATE OF IDAHO v. VAL J. BUELL

Published: 1/3/2008

DUI - search and seizure - performance of field sobriety tests. Defendant was asked to perform field sobriety tests after a police officer observed him drive into a bar parking lot and then lose his footing in attempting to exit his vehicle. Defendant contends that the officer misrepresented the law in telling defendant that he was required by law to perform the tests and this misrepresentation, in conjunction with the officer's touching of defendant, coerced his consent to perform the tests. Defendant also asserted, in the alternative, that the investigative detention turned into a de facto arrest unsupported by probable cause. Opinion concludes that defendant's coercion argument is irrelevant because constitutional standards did not require his voluntary consent to the field sobriety tests. Opinion discusses the exception to the warrant requirement which allows an officer to conduct field sobriety tests on reasonable suspicion and concludes that involuntary performance of the tests demonstrates no Fourth Amendment violation. Opinion declines to find that the officer's slight misstatement of the law and light touch on defendant's back amounted to a show of force so as to convert the encounter into an arrest. Where the officer's alleged mistake of law did not cause the detention, it did not render the detention per se unreasonable. Order denying motion to suppress is affirmed.

Citation: 08.1 ICAR 32

Docket: 33435

Other Citations: 175 P3d 216

STATE OF IDAHO v. SHAWN PATRICK DEWITT

Published: 4/29/2008

DUI - search and seizure - unconscious subject blood draw - suppression order reversed. Case concerns suppression of blood testing done on defendant while he was unconscious and hospitalized following a single-car accident. The magistrate found that drawing blood from the unconscious defendant was a warrantless seizure in violation of Fourth Amendment rights. The state appeals from the district court's affirmation of the suppression order. Opinion rejects defendant's argument that the exigent circumstances exception to the warrant requirement does not apply where defendant was charged with misdemeanor DUI rather than a felony. Opinion notes that the implied consent statute applies and discusses defendant argument that his implied consent was nullified because defendant was unconscious when he was "informed" of the consequences of refusal and did not have an opportunity to refuse to submit. Opinion reiterates that informing a suspect about the consequences of refusing an evidentiary test is not intended to be an opportunity to withdraw consent, but is an administrative tool designed to increase compliance. Opinion addresses the authority of law enforcement officers to order hospital personnel to draw blood with probable cause. Opinion concludes the blood draw was lawful and reverses.

Citation: 08.9 ICAR 429

Docket: 33706

Other Citations: 184 P3d 215

STATE OF IDAHO v. KENT JAY LESLIE

Published: 9/29/2008

Felony DUI - repeat offender - penalty enhancement for blood alcohol levels. Defendant was charged with misdemeanor DUI, but because his previous record included two DUI convictions, one of which was enhanced for excessive alcohol concentration, the charge was amended to felony DUI. Appeal challenges the denial of defendant's motion to strike a previous DUI conviction with the excessive alcohol concentration enhancement. Opinion addresses the enhanced penalty provision for elevated blood alcohol levels found in I.C. § 18-8004C. Opinion concludes the I.C. § 18-8004C does not create a separate offense, but is an enhanced penalty provision that presupposes a finding of guilty under I.C. § 18-8004(1)(a). Opinion concludes that I.C. § 18-8005(5) does not preclude the use of a previous conviction for which the penalty was enhanced under I.C. § 18-8004C, in its computation for felony enhancement for a repeat DUI offender. Affirmed.

Citation: 08.20 ICAR 1029

Docket: 34590

License Suspension

DOUGLAS JOEL AHO v. IDAHO TRANSPORTATION DEPARTMENT

Published: 1/29/2008

Administrative driver's license suspension - failure to meet scheduling order - lack of prejudice. Plaintiff filed a petition for review of an ITD order suspending his driver's license. The petition was dismissed after plaintiff failed to file a brief within the time limit specified by the scheduling order. Plaintiff's motion to set aside the dismissal was also denied. Opinion concludes that the district court erred by granting the Department's motion to dismiss before the time for plaintiff's response to that motion had expired, but this procedural error does not call for relief on appeal because plaintiff's motion to set aside the dismissal order allowed presentation of his evidence and argument opposing the dismissal. Opinion applies the provisions of I.R.C.P. 84, noting that dismissal is a sanction that should be used sparingly and generally only when the delay has prejudiced the opposing party. Opinion notes that Supreme Court authority emphasizes that prejudice is an essential factor to justify a dismissal and concludes that the district court erred in dismissing plaintiff's petition. On remand, lesser sanctions may be considered. Reversed and remanded.

Citation: 08.3 ICAR 125

Docket: 33837

Other Citations: 177 P3d 406

IN THE MATTER OF THE DRIVER'S LICENSE SUSPENSION OF FRANK...

Published: 3/27/2008

Administrative license suspension - lack of calibration documentation does not satisfy driver's burden of proof. The Department appeals from reversal of the Department's administrative order suspending petitioner's commercial driver's license after he failed a BAC test. The district court vacated the suspension because it concluded that petitioner proved that the breath test he received was not conducted in accordance with the methods proscribed by the Idaho State Police. Opinion rejects the argument

that because a calibration record was not attached to the subject test, the test failed to meet the requirements of I.C. § 18-8004(4). A driver does not satisfy his burden merely by showing that the documents received by the ITD are inadequate. Decision vacating the suspension is reversed.

Citation: 08.7 ICAR 350

Docket: 33725

Other Citations: 181 P3d 543

REISENAUER v. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION

Published: 6/12/2008

DUI - presence of Carboxy-THC. A urinalysis conducted subsequent to arrest detected the presence of Carboxy-THC in defendant's urine and defendant's driving privileges were suspended. The district court held on appeal that a test indicating the presence of Carboxy-THC was not sufficient evidence to satisfy the suspension statute. The Department appeals. Opinion notes that the presence of Carboxy-THC indicates some past use of marijuana; Carboxy-THC is a metabolite of a drug and its presence in a urine sample is not evidence of the presence of any drug; and the drug that must be present also must be intoxicating. Where the Department did not allege or prove that Carboxy-THC is intoxicating, the test results did not show the presence of drugs or other intoxicating substances. Affirmed. Justice J. Jones concurs in the result and writes separately to discuss several aspects of the case that cause concern.

Citation: 08.13 ISCR 650

Docket: 33678

Other Citations: 188 P3d 890

Search & Seizure Traffic Stop

STATE OF IDAHO v. CHRISTOPHER WILLOUGHBY

Published: 1/8/2008

DUI - search and seizure - use of squad car's overhead lights. The state appeals from suppression of evidence obtained by police to prosecute defendant for DUI. Officers were dispatched to a parking lot where a fight was reported. The magistrate determined that the officers' conduct in arriving at the lot with the overhead lights on their vehicles operating and leaving those lights on while they interrogated the people in the lot about the reported fight constituted a seizure of the persons present. The magistrate also determined that the officers did not have reasonable suspicion to believe that the persons seized were engaged in, or about to engage in, criminal activity. Opinion discusses the use of the overhead lights and the way in which police parked their cars in relation to defendant's car and concludes that for Fourth Amendment purposes, defendant was seized when the officers arrived and remained so during the DUI investigation. Where the officers had no other information, they lacked a reasonable suspicion of criminal activity and improperly continued the detention. The evidence subsequently obtained to prosecute defendant for DUI was properly suppressed. Affirmed.

Citation: 08.1 ICAR 37

Docket: 33350

STATE OF IDAHO v. WILLIAM CAMPBELL

Published: 2/28/2008

Search and seizure - offense committed in officer's presence issue - driving without privileges - possession with intent to deliver - marijuana. While conducting a traffic stop a white El Camino drove past two officers and one recognized the vehicle as matching the description of a vehicle involved in a reported stalking incident. Police soon found the vehicle in a parking lot. One officer observed defendant in the driver's seat. The passenger told the officers that defendant had driven the vehicle into the parking lot, defendant admitted that he had been driving and that his driver's license was suspended. A search subsequent to a DWP arrest yielded drug evidence. Opinion rejects the assertion that where neither officer reported that they personally observed defendant as the driver, the offense of DWP could not have been committed in the officers' presence, making the drug evidence suppressible. Affirmed.

Citation: 08.5 ICAR 244

Docket: 33688

Other Citations: 185 P3d 266

STATE OF IDAHO v. JEFFORY A. STEWART

Published: 3/28/2008

Search and seizure - drug evidence - traffic stop for failure to signal - subtly coerced consent to search. The state appeals from order granting defendant's suppression motion. The district court found that although the initial traffic stop was lawful and the duration reasonable, the evidence discovered during the search must be suppressed because the intensity of the stop became unreasonable and alternatively, because consent to the search was involuntary. The district court cited the presence of five police officers in four vehicles for a traffic violation, an officer informing defendant that he was the target of a narcotics investigation, and questioning about an unrelated no contact order as a prelude to get defendant's consent to search the vehicle. Opinion declines to adopt a rigid classification defining the boundary between permissible and impermissible detentions and rejects the state's argument that any restraint short of placing the suspect in custody constitutes a permissible investigative detention. Opinion concludes that the district court erred in holding that the intrusive, disconcerting questions and statements of the officers constituted a Fourth Amendment violation. The presence of multiple officers by itself does not render the detention unreasonable. Opinion addresses the equivocal evidence of police coercion and concludes that although the coercive conduct was subtle it was sufficient to support the findings that the state did not meet its burden of proving voluntary consent. Order suppressing evidence is affirmed.

Citation: 08.7 ICAR 352

Docket: 33410

Other Citations: 181 P3d 1249

STATE OF IDAHO v. JESUS RAMIREZ

Published: 6/11/2008

Search and seizure - possession of marijuana - questioning about transporting drugs did not impermissibly extend traffic stop. Appeal asserts the traffic stop for speeding was unlawfully extended when the officer asked questions about drugs, waited for a drug dog to arrive and asked for consent to search defendant's van. Opinion concludes that the officer's direct questions about how many pounds of

methamphetamine, marijuana, cocaine, and heroin defendant was transporting were not impermissible where the period of time that passed was a matter of seconds. Appeal argues the trooper intentionally delayed issuing citations in order to allow time for another officer to arrive with his drug dog and to conduct a perimeter sniff. Opinion defers to the district court's findings that the stop was not longer than necessary for its purpose. Conviction affirmed.

Citation: 08.13 ICAR 687

Docket: 32387

Other Citations: 187 P3d 1261

STATE OF IDAHO v. JEFFERY E. MARTIN

Published: 7/9/2008

Search and seizure - possession of methamphetamine - due process challenge. Case concerns a traffic stop and a weapons frisk that produced a number of unused syringes from defendant's pocket. Defendant then consented to a vehicle search and a small amount of a substance suspected to be meth, another syringe, and other paraphernalia were found. Appeal from denial of defendant's motion to suppress the physical evidence and statements defendant made during the detention and from denial of motions to have the syringe tested for DNA at state expense and to have the substance retested at public expense. Appeal contends the pat-down search for weapons was unjustified and that consent to search the vehicle was derived from exploitation of that illegal search. Opinion notes that the officers were investigating whether the vehicle defendant was driving was stolen because the license plates did not belong to that vehicle; the officers knew that defendant had no driver's license, that he had recently been released from prison and that he admitted he was carrying a weapons. Opinion concludes the frisk was reasonable to ensure the officers' safety. Opinion examines whether defendant made a threshold showing that the identity of the substance as meth was likely to be a significant issue at trial and notes that both a field test and a state lab test confirmed the substance was meth. The threshold showing was not made for either the identity of the substance or the DNA on the syringe. Conviction affirmed.

Citation: 08.15 ICAR 809

Docket: 33081

STATE OF IDAHO v. MARTIN J. REYES

Published: 10/7/2008

Search and seizure - open container laws - conflict between city ordinance and state statute - possession of a controlled substance. Defendant was a passenger in a car stopped for a traffic infraction and was arrested after admitting he had an open container of alcohol. A search incident to arrest yielded drug paraphernalia and methamphetamine. Appeal challenges the denial of his suppression motion and argues that the open container city ordinance conflicts with state law because the ordinance classifies possession of an open container by a passenger as a misdemeanor, whereas the state statute classifies this conduct as an infraction. Opinion notes that the legislature decriminalized possession of an open container of alcohol by a passenger by amending I.C. § 23-505 to reclassify possession of an open container of alcohol by a passenger from a misdemeanor to an infraction while the city increased the classification to a misdemeanor. Opinion concludes that the ordinance directly conflicts with the state statute. Opinion discusses policy implications of allowing local governments to criminalize matters the legislature has specifically chosen to decriminalize. Opinion concludes the city ordinance is unconstitutional and

defendant was neither subject to arrest nor to a search. Order denying the suppression motion is reversed. Conviction vacated.

Citation: 08.21 ICAR 1047

Docket: 34815

STATE OF IDAHO v. EDDY MAX GRANTHAM

Published: 10/30/2008

Search and seizure - trafficking in a controlled substance, methamphetamine - unlawful search, mistrial, prosecutorial misconduct claims. Defendant was a passenger in a vehicle stopped for suspicion of DUI. Based on inconsistency in the driver's story, the appearances of driver and defendant, and their behavior while answering questions, the deputy requested a drug-detection dog. The dog alerted and a subsequent hand-search revealed drugs, paraphernalia, and identifying clothing and paperwork. Appeal asserts the deputy impermissibly based his suspicion on a profile of a drug-user, and therefore the stop was unlawfully extended in both duration and scope. Opinion notes the deputy did not use a profile, but observed behavior and direct evidence of drug use, including physical characteristics which cumulatively are evidence of extended meth use. Opinion concludes defendant's motion to suppress was properly denied. Opinion next addresses the parties' stipulation not to discuss drug evidence found at defendant's house in Montana subsequent to his arrest, noting the evidence was admitted in response to a juror question. Opinion discusses the trial court's response to the admission and concludes the jury would be capable of following the instruction to disregard the answer. Opinion also notes the evidence would not be devastating to defendant where other properly admitted testimony established defendant's drug use and possession; the jury would have reached the same verdict without the admission of the challenged evidence. Motion for mistrial, properly denied. Opinion examines whether the prosecutor committed misconduct by asking defendant about marks or imperfections on his inner arms during cross-ex to "prove" whether he had injection marks. Where the state's witness, the vehicle driver, testified she saw defendant inject himself the morning of their arrest and where defendant challenged this testimony by testifying that he never injects himself but only smokes or snorts meth, the contradictory testimony made the appearance of his inner arms material to the issue of possession. There was no prosecutorial misconduct. Conviction affirmed.

Citation: 08.23 ICAR 1131

Docket: 32657

Warrant Exception

STATE OF IDAHO v. DAVID D. PURDUM

Published: 1/23/2008

Search and seizure - possession of controlled substance - police as de facto probation officers - probationer's waiver of Fourth Amendment rights. As a condition of probation, defendant signed a waiver of his rights to be free of searches of his person, vehicle, and real or personal property. A police officer on patrol saw and recognized defendant, was aware of his probation conditions and decided to stop him and ask him to submit to a drug test without any suspicion that defendant was violating his probation. Appeal challenges the officer's authority to seize and detain defendant without suspicion and demand that he submit to a drug test. Opinion declines to recognize any distinction between the rights of parolees and probationers for the

purpose of applying the Fourth Amendment. Opinion holds that because of defendant's reduced expectation of privacy, the police officer was empowered to conduct a suspicionless search (drug test). The police officer had the same authority as a probation officer to conduct random testing, but a police officer does not have any greater authority than a probation officer in this regard. How a detention for purposes of conducting a body fluid test may be implemented is not discussed because in this case defendant was properly handcuffed after he attempted to flee. Denial of suppression motion, affirmed. Judge Pro Tem Schwartzman writes separately to emphasize the limits of this ruling, noting that the holding transforms police officers into de facto probation officers which raises complications about the permissible scope of the detention and search when conducted by a patrol officer.

Citation: 08.3 ICAR 122

Docket: 33073

STATE OF IDAHO v. DAVID PRUSS

Published: 3/27/2008

Search and seizure - tent structure ("hooch") on public land - expectation of privacy. Defendant was arrested on outstanding warrants inside a backpacking tent pitched beneath a tarp-covered frame structure erected on public land. After defendant was handcuffed and transported from the scene, sheriff deputies conducted a warrantless search of the structure. Defendant sought to suppress items found. The district court held that the search and seizure violated the Fourth Amendment and ordered all items seized suppressed. Opinion upholds the finding that defendant had a subjective expectation of privacy in his dwelling, even if it is a temporary structure. Opinion discusses respect for the sanctity of the home and notes that a structure need not be one's "home" in order for the occupant to have a legitimate expectation of privacy there. Opinion holds that a person using a temporary shelter on public lands as his or her living quarters has a reasonable expectation of privacy in that shelter. Opinion rejects the state's argument that defendant did not have a reasonable expectation of privacy because he was a squatter and trespasser on state land; it rejects as irrelevant, the state's contentions that defendant's camp was not a designated campground and defendant was not engaged in ordinary outdoor recreation. The fact that defendant was armed with a rifle and handgun is also irrelevant to his expectation of privacy. Where the interior of defendant's hooch was not an open field, the open fields doctrine did not justify law enforcement entry into the hooch. The district court properly held that the intrusion could not be justified as a search incident to arrest; observation of items in plain view from outside the hooch could have been submitted to obtain a search warrant, but does not justify the warrantless intrusion to search the dwelling. Suppression order affirmed.

Citation: 08.7 ISCR 312

Docket: 33617

Other Citations: 181 P3d 1231

KEVIN PIRO v. STATE OF IDAHO

Published: 4/25/2008

Post-conviction relief - rape, burglary - warrantless DNA testing. Petitioner drank from a water bottle provided during questioning regarding an attempted lewd conduct. Officers later submitted the bottle for DNA testing and the national database provided a match with a sample taken from an unsolved rape case. Opinion addresses trial and appellate counsel's failure to argue that the DNA evidence should have been suppressed on Fourth Amendment grounds. Opinion discusses the expectation of privacy test and concludes that he had no reasonable expectation of privacy in the water bottle. The claim of ineffective assistance based on failure to argue suppression

on Fourth Amendment grounds fails because his motion and any appeal would not have been successful if brought. Opinion concludes it was not deficient performance to fail to argue for a novel theory that petitioner had a privacy interest in his genetic identity, because the DNA was used solely for identification purposes. Opinion upholds dismissal of claims based on failure to communicate with defendant and failure to communicate a plea offer. Affirmed.

Citation: 08.9 ICAR 424

Docket: 33409

Other Citations: 190 P3d 905

STATE OF IDAHO v. DANIEL M. DEISZ

Published: 5/27/2008

Search and seizure - aggravated battery - aggravated assault - evidence of shooting upon presumed illegal police entry not suppressible. Defendant was subject to a protection order when four police officers accompanied defendant's wife to the couple's residence in order to retrieve some of her property. After defendant clearly refused the officers' requests to cooperate, police entered using the wife's key. Defendant shot one officer and pointed his gun at another before police retreated. Defendant sought to suppress evidence of the shooting that was given to the magistrate in support of a search warrant request. Opinion concludes that the officers did not exploit the intrusion to obtain any evidence and upholds the district court's ruling that the exclusionary rule does not require suppression of evidence of physical attacks on police in response to an unlawful search or seizure. Defendant's acts of shooting and aiming his gun were independent of any police coercion caused by the intrusion. Opinion discusses the use of a victim impact statement in non-capital cases and upholds the district court's application of sentencing factors. Conviction and sentences, affirmed.

Citation: 08.11 ICAR 530

Docket: 33434

Other Citations: 186 P3d 682

STATE OF IDAHO v. MICHAEL S. BALLOU - AMENDED OPINION -

Published: 5/22/2008

Search and seizure - grand theft - burglary - eluding a peace officer - hot pursuit exception inapplicable - voluntary consent by defendant's wife. The amended opinion clarifies footnote #5 to remove reference to sentence enhancements, but is otherwise unchanged. Opinion discusses why the initial entry into defendant's apartment was not justified by the hot pursuit exception. Appeal argues that a threat an officer first issued to defendant's wife upon arrival at the apartment, along with the circumstances surrounding the entire encounter, rendered involuntary any subsequent consents the wife provided. Where officers had probable cause to obtain a search warrant based on the offense of felony eluding, the officers honestly told defendant's wife that a warrant could be obtained and the district court incorrectly applied the law to the facts in determining that the "threat" rendered the initial consent involuntary. Opinion upholds the district court's determination that subsequent consents were voluntary. Opinion concludes that the scope of the consents was not exceeded given the circumstances. Conviction and concurrent unified terms of thirty-five years, with fifteen years fixed for twenty-eight felonies and a persistent violator enhancement, affirmed.

Citation: 08.11 ICAR 524 / 08.13 ICAR Docket: 33247 / 33248

Other Citations: 186 P3d 696

STATE OF IDAHO v. ROBERT MARTIN FANCHER

Published: 6/5/2008

Search and seizure - possession of marijuana with intent to deliver - consent to search. Case arises from a search of the home of an incapacitated adult requested by his authorized temporary emergency guardian and conservator where police found drug evidence in a locked bedroom used by defendant. Defendant was living with and managing the affairs of the incapacitated adult and the opinion concludes he had a reasonable expectation of privacy in his locked bedroom. Opinion notes that the district court reversed the burden of proof to establish common authority and placed it with defendant to disprove. Opinion notes a complete lack of evidence showing that the homeowner had access to defendant's room, customarily entered the room in defendant's absence, or kept his belongings in defendant's room and concludes the state failed to establish common authority. Without common authority over defendant's room, the conservator lacked actual authority to consent to the search. The officers had a heightened obligation to inquire further as to the conservator's authority to consent to the search of defendant's room and it was not reasonable for them to rely on the conservator's letter as demonstrating apparent authority to consent. The drug evidence seized inside defendant's room was obtained as a direct result of an illegal search and must be suppressed; any incriminating responses defendant made to police immediately after the search must be suppressed. Evidence discovered pursuant to interviews with other residents of the home are admissible. Order denying the motion to suppress is reversed in part and affirmed in part.

Citation: 08.12 ICAR 599

Docket: 33253

Other Citations: 186 P3d 688

STATE OF IDAHO v. HEATHER LUSBY

Published: 6/5/2008

Search and seizure - felony battery on a law enforcement officer - possession of paraphernalia. Defendant was arrested for resisting and obstructing an officer who had followed her into her apartment after she retreated there from an investigation of a disturbance. The district court found that the officer entered the apartment without a legal justification and suppressed evidence of defendant's resistance and battery on the officer and the subsequent search where paraphernalia was found. The state argues that evidence of the battery or other forceful resistance to the officer, and evidence of the paraphernalia was not gained by exploitation of the unlawful entry and ought not to be suppressed. Opinion notes that defendant's use of physical violence against the officer was a crime not justified by the unlawful entry and holds that evidence of defendant's alleged battery on an officer is not suppressible; evidence of paraphernalia found in the search incident to arrest is admissible. Order suppressing evidence and dismissing the battery and obstruction charges, reversed. Case remanded.

Citation: 08.12 ICAR 602

Docket: 34217

STATE OF IDAHO v. JOHN DOE, A MINOR

Published: 6/17/2008

Search and seizure - possession of marijuana - juvenile - burglary investigation - suppression of drug evidence and admissions not justified. The district court reversed the magistrate's denial of defendant's suppression motion on the ground that the

officer had no justification for the frisk which led to the discovery of marijuana. The state appeals. Defendant concedes that the stop was justified and the state argues that the officer was also justified in conducting a Terry frisk for weapons because the encounter occurred at night in response to a possible burglary, defendant and his friend were dressed in black, and police had been called to the same location one week prior on a break-in report. Opinion declines to adopt a bright-line rule that officers are automatically entitled to frisk every burglary suspect, but acknowledges that specific circumstances combined with certain crimes make it more likely that a suspect will be armed and dangerous. Opinion concludes the Terry frisk was justified and when the officer felt a cigarette box in defendant's pocket and learned the defendant was underage he was justified in removing the contraband. Defendant's admission that he had marijuana in another pocket created probable cause for arrest and for removing the marijuana as a search incident to arrest. Reversed and remanded to the magistrate to reinstate the decree and adjudication vacated by the district court.

Citation: 08.13 ICAR 695

Docket: 33986

STATE OF IDAHO v. KANAY AONGOLA MUBITA

Published: 6/11/2008

Search and seizure - transfer of body fluid which may contain HIV - eleven counts - I.C. § 39-608 - privacy interest in medical records - Standards for Privacy of Individually Identifiable Health Information (HIPAA Standards). Defendant appeals from denial of his motion to suppress information or documents released by the Health Department to the prosecutor regarding defendant's HIV status and statements made to law enforcement officials regarding his sexual activity. Opinion notes that defendant voluntarily turned over lab results in order to obtain the Health Department's HIV-related services and other documents were Health Department business records. Opinion concludes that HIPAA does not itself create a protectable Fourth Amendment interest in the documents and the Idaho Constitution does not provide greater protection of privacy rights in this case. Opinion concludes that the prosecutor explicitly requested documents pursuant to HIPAA and notes that even if the State had violated HIPAA Standards, suppression is not the proper remedy. Denial of the suppression motion based on alleged HIPAA violation is affirmed. Opinion notes the increasing use of contracting labs, technicians and specialists to perform analyses of body fluids and examines whether a lab report requested and used by a physician, but which he did not actually "make," qualifies for the business records exception. Opinion concludes that the records were improperly admitted under the current language of Rule 803(6), but where there was overwhelming evidence presented at trial that defendant knew he was infected with HIV, even without the lab results, the trial result would not be changed and the admission error is harmless. Opinion relies on the plain language of I.C. § 29-608 to conclude that oral-genital contact violates the terms of the statute. Opinion addresses and upholds the district court's modification of the language of the statutory defense in instructing the jury. Affirmed.

Citation: 08.13 ISCR 638

Docket: 33252

Other Citations: 188 P3d 867

STATE OF IDAHO v. JOHN ROBERT ADAMS, JR.

Published: 7/15/2008

Search and seizure - trafficking in a controlled substance - Fourth Amendment waiver by probationer - search of girlfriend's vehicle. Defendant, a probationer who had waived his right to be free from searches delivered meth to a confidential informant.

Later, under an agent's arrest warrant, police stopped and searched a vehicle belonging to defendant's girlfriend in which defendant was a passenger. Cash and 50.8 grams of meth were found. The district court held that the consent to searches in defendant's supervision agreement constituted valid consent and extended to the girlfriend's car. The state asserts that because defendant was in control of the car just prior to the stop, the search was justified. Opinion notes that the search was initiated based upon a reasonable suspicion that defendant was selling drugs. Opinion holds that defendant was entitled to no greater Fourth Amendment protections in his girlfriend's car than he would have received in his own. Conviction affirmed.

Citation: 08.15 ICAR 816

Docket: 32876

Other Citations: 191 P3d 240

STATE OF IDAHO v. ERIC A. REYNOLDS

Published: 7/14/2008

Search and seizure - possession of marijuana - illegal initial entry into home - wife's voluntary consent to search. Officers responding to a domestic disturbance call entered defendant's home through a partially-opened front door while defendant remained outside with other officers. After officers smelled an odor they believed to be marijuana defendant's wife indicated there was marijuana and a handgun in the home and consented to a search. Officers found a large locked plywood box the size of a closet and used a key to unlock it where they found marijuana plants and grow lamps inside. Appeal challenges the denial of the suppression motion. Opinion concludes that the initial entry was illegal where defendant was outside when officers arrived and his wife was inside and there was no exigency that would justify entry without first knocking or calling out. Opinion discusses why defendant's wife had authority to consent to a search of the house and concludes her consent was voluntary. Absent evidence that the officers knew that defendant had attempted to forbid or prevent his wife's access to the locked box, the officers were justified in a belief that she had at least apparent authority to consent to a search of the box's interior. Absent evidence that the wife's cooperation and consent were products of the unlawful entry, the consent was not acquired by exploitation of the illegality. Order denying motion to suppress evidence is affirmed.

Citation: 08.15 ICAR 812

Docket: 34399

STATE OF IDAHO v. CHARLES V. CHAPMAN

Published: 8/27/2008

Search and seizure - possession of cocaine. Defendant was a passenger in a car initially stopped for speeding. The driver failed to produce a driver's license or other proof of her identity and gave the trooper a false name. She was arrested for driving without a license and during a search of the car, the trooper discovered evidence of her true identity and of drug activity. The driver then confessed her identity and told the trooper that defendant had cocaine in his pants. Opinion addresses whether the trooper's search inside defendant's clothing was lawful. The district court held that the search was permissible because the officer possessed probable cause to arrest defendant for possession of cocaine and because a search incident to arrest can precede the announcement of a formal arrest. Opinion rejects appellant's argument that based on the driver's lie about her identity, the driver's allegation that defendant had cocaine hidden in his pants was not reliable enough to give probable cause. Opinion notes that by the time the driver disclosed the location of the cocaine, she was aware that the officer knew her true identity, and she was under arrest and was

aware she could suffer adverse consequences if she gave false information at this point; this circumstance tended to indicate that the information would be reliable. Opinion also notes independent corroborative observations made by the trooper and concludes that viewed in totality, the facts known to the trooper gave rise to probable cause, and the search was lawful. Order denying the suppression motion is affirmed.

Citation: 08.18 ICAR 969

Docket: 33859

STATE OF IDAHO v. TERRY LYNN MARSHALL

Published: 9/5/2008

Search and seizure - probationer's consent search - indeterminate probation period. Defendant's girlfriend consented to warrantless searches as a condition of her probation. During such a search of the residence defendant shared with his girlfriend, cocaine was found. Defendant challenges the legality of the search conducted after the girlfriend's three-year term of probation had expired. Opinion notes that the probation order first imposed a three-year period of probation, but then made the term indeterminate through a further provision that the probation would not be terminated "until the Court has both reviewed the performance of the probationer and has signed an order discharging the probationer." Opinion discusses the burden-shifting process of presenting evidence on the suppression motion and notes that it was the State's burden to prove that no order discharging the girlfriend from probation had been entered before the search was conducted, but the state was relieved of that burden because defendant conceded that no discharge order had been entered. Order denying the suppression motion is affirmed.

Citation: 08.19 ICAR 993

Docket: 33764

IN THE INTEREST OF JANE DOE I, A CHILD UNDER 18 YEARS OF ...

Published: 11/13/2008

Search and seizure - juvenile probation - parental drug test requirement - Fourth Amendment warrantless search violation. Appeals by parents of a juvenile offender challenge an order requiring that they submit to random drug tests as a condition of their daughter's juvenile probation stemming from her crime of petit theft. Opinion discusses the magistrate's application of I.C. § 20-520(1)(i), which expressly authorizes magistrates to order parents to comply with reasonable conditions enforced through contempt proceedings. Appellants' argument that the magistrate lacked statutory authority to order them to conform to conditions against their will is without merit. Opinion discusses the special needs doctrine upon which the state relies to justify the drug test order. Opinion examines whether the state has an interest amounting to a special need that outweighs the parents' privacy interests. Opinion notes that it is only the expectation of privacy in common areas of the residence that is affected by cohabitation with a probationer, not the expectation of privacy in bodily fluids and concludes that the privacy interest was not diminished by the status of parents of a juvenile probationer; the magistrate's order for random drug testing infringed a reasonable and legitimate expectation of privacy. Opinion discusses the state's contention that the special need is the government's interest in rehabilitating a juvenile offender who is on probation and living in an environment where drugs are being used and where the parents admitted that they intended to continue to use marijuana in the home. Opinion concludes that both a strong state interest and a laudable purpose are served by the drug testing order, but also concludes that the special needs exception to the warrant requirement does not legitimize the order because the threat of possible criminal prosecution was the means used to deter

parental drug use. The magistrate's order compelling the parents to submit to random urinalyses violates the Fourth Amendment and is vacated. Reversed.

Citation: 08.24 ICAR 1161

Docket: 33997 / 34008

Warrants

STATE OF IDAHO v. JIMMY WAYNE TEAL

Published: 6/19/2008

Search and seizure - possession of methamphetamine - technical error in search warrant - plain view doctrine. Police obtained a warrant during investigation of a possible theft of currency from a tavern's poker machine. Appeal challenges the particularity of the warrant that described defendant's apartment, but authorized a vehicle search and that listed currency, but that yielded drug evidence. Opinion notes that although none of the items seized were listed on the warrant, they were in plain view inside defendant's apartment during the search. The state asserts that the use of the word vehicle is a typographical error and the obvious intent was to authorize the search of the residence based on the detailed description found in the affidavit and warrant. Opinion concludes the use of the word vehicle was a technical error and the officers did not exceed the scope of the warrant by searching defendant's apartment instead of an unknown vehicle. Opinion concludes "currency" was a sufficiently particular description in this case and the officers were lawfully inside the apartment when they found drug evidence in plain view. Conviction affirmed.

Citation: 08.14 ICAR 746

Docket: 32600

Other Citations: 188 P3d 927

Prosecutorial Misconduct

STATE OF IDAHO v. JEFFREY BRIAN GROSS

Published: 7/15/2008

Prosecutorial misconduct - Felony DUI - new trial required. Appeal asserts that the prosecutor committed misconduct by disparaging defendant and defense counsel, vouching for the credibility of the arresting officer and the prosecutor, and appealing to the passions and prejudices of the jury. Opinion notes that defendant testified that he falsely told the arresting officer he had not consumed alcohol, and placed his own credibility in issue by implying that police had edited out portions of an audio recording of the arrest encounter. Opinion notes that during the prosecutor's closing argument he repeatedly called defendant a liar and concludes that the excessive use of the term is troubling, but did not amount to misconduct where defendant had admitted to lying in connection with the case and had placed his credibility in issue. Opinion describes comments that disparaged defense counsel's argument and his integrity and concludes the comments constituted misconduct. Where the prosecutor made general pleas for the jury to believe his case because he and the state were only motivated by the truth, this was also misconduct. Where the prosecutor improperly vouched for the completeness of the audio recording and referred to defendant's theory of selective recording or editing as ridiculous and asked jurors to make their decision based upon the officer's and the prosecutor's self-proclaimed moral rectitude and integrity rather

than addressing the evidence, this was misconduct. Where the prosecutor asked jurors to find defendant guilty based on imagining themselves as a hypothetical victim of defendant's alleged drunk driving this was improper inflammatory tactics. Opinion addresses the cumulative effect of the improper comments and concludes they constituted fundamental error because even timely objections or curative instructions would not have removed the taint. Where the evidence supported a finding of innocence or a finding of guilty, the improper statements were not harmless. Conviction vacated, case remanded for a new trial.

Citation: 08.15 ICAR 820

Docket: 32614

Other Citations: 189 P3d 477

Evidence

STATE OF IDAHO v. JOHN SHELDON - ON REVIEW

Published: 1/28/2008

Trafficking in methamphetamine - concealing a dangerous weapon - state's failure to file I.R.E. 404(b) notice. Appeal challenges admission of testimony regarding nearly \$7000 in cash found in defendant's vehicle, as well as testimony that defendant admitted having dealt drugs in the past. On review of a Court of Appeals opinion reported at 07.6 ICAR 241, in which the conviction was affirmed. Opinion examines whether the state's failure to provide notice of its intent to present I.R.E. 404(b) evidence is reversible error. Opinion discusses why the cash is not "other acts" evidence that should have been excluded and concludes that the evidence was relevant and it was not an abuse of discretion to admit the cash evidence. Opinion concludes that the district court failed to recognize that defendant's statements to a detective that he had dealt drugs in the past were 404(b) evidence for which the state had not served notice. Opinion holds that compliance with I.R.E. 404(b) is mandatory and a condition precedent to admission of other acts evidence; defendant's statements were inadmissible and the admission of them constitutes reversible error. Conviction vacated, remanded.

Citation: 08.3 ISCR 100

Docket: 34286

Other Citations: 178 P3d 28

STATE OF IDAHO v. MAXIMO CHACON

Published: 2/28/2008

Conspiracy to traffic in methamphetamine - admission of jail cell note - confidential informant not accomplice. Appeal asserts error in admitting a note found under defendant's jail cell door in which the author suggested to the intended recipient (a jailed alleged co-conspirator) a strategy for aligning their stories. Opinion discusses authentication requirements of I.R.E. 901(a) and upholds admission of the note based on circumstantial evidence; the state was not required to present expert testimony or forensic evidence establishing conclusively that defendant authored the note in order to properly authenticate it. Opinion concludes that any statements in the note offered to prove the truth of the matters asserted were nonhearsay admissions of a party-opponent and it was not an abuse of discretion to admit the note over defendant's hearsay objection. Appeal contends that the district court erred in denying defendant's motion for a judgment of acquittal because the state only connected him to the

conspiracy with the uncorroborated testimony of an accomplice -- a confidential informant -- in contravention of I.C. § 19-2117. Opinion notes that the confidential informant participated in the controlled drug buys as an agent of law enforcement and was not an accomplice; the rule prohibiting an accomplice's uncorroborated testimony did not apply. Affirmed.

Citation: 08.5 ICAR 241

Docket: 33197

Other Citations: 186 P3d 670

STATE OF IDAHO v. JIMMY THOMAS GLASS

Published: 4/14/2008

Enticing a child over the Internet - I.C. § 18-1509A- proposal of masturbation. Appeal from conviction challenges the admission of evidence and its sufficiency to establish that defendant was the online perpetrator. Opinion addresses admission of an online conversation between law enforcement posing as a fifteen-year-old girl and an Internet user with a screen name Aletsgetkinky831". Appeal asserts the state failed to lay the proper foundation to show that defendant was the person behind the screen name and online profile. Opinion discusses how the state provided the necessary foundation for admitting the transcript and profile and for allowing the detective to offer expert testimony in regard to the uniqueness of screen names and the applications of the Internet service provider. Opinion concludes that the detective was not required to have specific computer program training; it was for the jury to decide what weight to give to the training and experience the detective did have. Opinion agrees with appellant's argument that the act of proposing to masturbate in front of a child would not be criminal under the enticement statute because there was no proposed contact with the child. Opinion examines whether there was sufficient evidence presented to conclude that defendant sought to seduce or lure "the child" to participate in sexual activity in addition to the proposal of masturbation. Opinion discusses statements from the online conversation that are evidence that defendant intended to participate in activity that involved sexual contact. Opinion concludes that the context of the conversation makes it evident that the proposed masturbation was only a step in the process toward sexual contact. Conviction affirmed.

Citation: 08.8 ICAR 380

Docket: 31422

Other Citations: 190 P3d 896

STATE OF IDAHO v. VANCE A. WATKINS

Published: 5/30/2008

Lewd conduct with a minor child under sixteen - hearsay rule violation - new trial - DNA testing testimony. Appeal contends allowing the state's expert to testify about DNA testing that she did not conduct but where her testimony was based upon information she obtained through conversations with her colleague who did perform the tests and was based upon his notes amounted to inadmissible hearsay. Opinion concludes that hearsay evidence was elicited and examines whether any exceptions urged by the state apply. Opinion rejects the business record exception because there was no writing or other record placed into evidence and oral statements cannot be considered a business record. Opinion discusses why I.R.E. 803(8) requires exclusion of the evidence. Notes documenting where DNA evidence was found on the items tested and prepared as factual findings for a law enforcement agency are not admissible as a business record where the state relied upon the hearsay evidence for the truth of the statements in the tester's notes concerning the chain of custody,

testing methods and location of DNA evidence. The presentation through the expert of the tester's activities deprived defendant of any opportunity to cross-examine the only person with personal knowledge of how the evidence was handled and tested. This error requires that the conviction be vacated and the case remanded for a new trial.

Citation: 08.12 ICAR 590

Docket: 32710

Trial Errors

STATE OF IDAHO v. ALESE STEWART-MEYERS

Published: 1/8/2008

Aiding and abetting assault - jurisdictional challenge - alleged deficiency in charging information amended to add a different offense. The state charged defendant by information with second degree kidnapping. Defendant did not object when the state moved to amend the information by adding the aiding and abetting assault charge prior to trial. Appeal from conviction contends that the court lacked subject matter jurisdiction because I.C.R. 7 allows the information to be amended only if no additional or different offense is charged. Opinion concludes that the fact that the amendment was made in violation of a procedural rule does not deprive the court of jurisdiction, and the rule violation affords no basis for appellate relief because defendant did not object to the amendment. Conviction affirmed.

Citation: 08.1 ICAR 40

Docket: 32037

Other Citations: 181 P3d 531

STATE OF IDAHO v. MICHAEL DUANE ALLEN - SUBSTITUTE OPINION

Published: 1/7/2008

DUI - reversal of conviction for state's non-compliance with discovery. The state appeals from the district court's reversal of defendant's DUI conviction on the grounds that the magistrate abused its discretion by declining to exclude a non-disclosed state's witness as a discovery sanction. Opinion replaces that reported at 07.22 ICAR 869. The substitute opinion notes that the state maintains that the prosecutor's omission of the name of the person who drew blood was not a discovery violation because the prosecutor never intended to call that person as a witness and did not need her testimony to lay a foundation for the test results. Opinion clarifies that the question on appeal is whether defendant was so prejudiced by the state's alleged discovery violation that the refusal to exclude the witness as a sanction constituted an abuse of discretion. Where defendant made no showing that timely pretrial disclosure would have enabled him to impeach or rebut this testimony, there is no reversible error in allowing the witness to testify. The district court's appellate decision reversing the magistrate court's judgment is reversed, conviction reinstated.

Citation: 08.1 ICAR 34

Docket: 33402

Other Citations: 177 P3d 397, 144 Idaho 875

STATE OF IDAHO v. ROBERT ANDERSON - ON REVIEW -

Published: 1/9/2008

Excessive DUI - conflicting BAC test results. The state appeals the intermediate appellate decision and order reversing, on the ground of insufficient evidence,

defendant's conviction for misdemeanor DUI with an alcohol concentration of .20 or more. Defendant cross appeals. On review of a Court of Appeals opinion reported at 07.9 ICAR 393. Case concerns the breathalyzer results for three samples where the first registered .22, the second .19 and the third .24. The district court reasoned that if the state's evidence is that a defendant's BAC is both greater than and less than .20, the statutory threshold for this offense, then the evidence is insufficient as a matter of law to meet the burden of proof; the district court concluded that the state failed to present evidence that the second sample could be disregarded as invalid and reversed. Opinion declines to forbid the prosecution of a person who registers alcohol concentration tests both below the statutory limit and above the statutory limit of the enhancement statute. Opinion discusses the reasons why the result of .19 should be disregarded and concludes that the jury's determination of guilt was supported by sufficient, though conflicting, evidence. The district court erred in reversing defendant's conviction. Opinion upholds the magistrate's decision not to exclude the state's expert witness on breathalyzer tests as a discovery sanction where the defendant suffered little or no prejudice and where the discovery answer was known almost a year before trial and defendant did not object until trial. Opinion addresses defects in the charging document and concludes that because defendant failed to bring a due process challenge as to the sufficiency of the charging document prior to trial, the claim is waived. Opinion also concludes that where defendant stipulated prior to trial to having a blood alcohol concentration of .08 or more, the jury was not required to find him guilty of simple DUI prior to finding him guilty of excessive DUI. Conviction affirmed, case remanded for sentencing.

Citation: 08.2 ISCR 55

Docket: 34411

Other Citations: 175 P3d 788

STATE OF IDAHO v. MARK MELVILLE MEAD

Published: 2/14/2008

Leaving the scene of an injury accident - severity of injury issue - sufficiency of evidence - excessive sentence claim. The charges stem from an incident in which a woman riding a bicycle on a sidewalk at night was struck by a car from behind, resulting in a relatively minor scrape on her big toe. Defendant was later identified as the driver of the car. Appeal contends that the injury suffered in this accident, a scraped toe, is below the level of injury contemplated by the statute. Opinion relies on the plain meaning of I.C. § 18-8007(1) to conclude that any knowledge or basis to know of any injury triggers the further requirements of stopping and staying to provide information and aid, which defendant did not do. Jury conviction is affirmed. Given defendant's extensive criminal history, it was not an abuse of discretion to require the sentence to run consecutively to a sentence in a prior case. Affirmed.

Citation: 08.4 ICAR 195

Docket: 32959

Other Citations: 179 P3d 341

STATE OF IDAHO v. SHAMI YAKOVAC / YAKOVAC v. STATE - ON R...

Published: 2/13/2008

Possession of a controlled substance, methamphetamine - direct appeal and post-conviction relief. On review of a Court of Appeals opinion reported at 06.23 ICAR 974. At trial defendant asserted that she had retrieved her coat from the home of another person, that person had hit her causing a bleeding wound and defendant did not know the coat pocket contained a meth pipe later found by police in a search subsequent to arrest on outstanding warrants. Defendant's appeal challenged the admission of urinalysis results and asserted that comments by the judge regarding the stipulation to

the admission of the urinalysis and his drug court duties were prejudicial. Petitioner's complaint for post-conviction relief asserted ineffective assistance claims. Opinion concludes that neither the comment that the parties stipulated to the presence of meth in the urinalysis nor the comment about the judge's duties in drug court amounted to fundamental error. Where defendant never objected to the positive result for meth, but only objected to positive results for cocaine and marijuana, there was no adverse ruling on the admission of the meth evidence to review. Opinion refuses to allow defendant to use a claim of fundamental error to have her ineffective assistance issues addressed both on direct appeal and in her p-c relief petition. Opinion addresses but rejects petitioner's claims that her counsel provided ineffective assistance by failing to object to the mention that defendant was arrested on outstanding warrants, by stipulating to the admission of a positive urinalysis test, by failing to fingerprint the pipe and by failing to admit the coat into evidence. Conviction affirmed, dismissal of petition for p-c relief, affirmed.

Citation: 08.4 ISCR 151

Docket: 34171

Other Citations: 180 P3d 476

STATE OF IDAHO v. MICHAEL E. BRYAN

Published: 3/25/2008

Operating a commercial vehicle in excess of allowable weight limits - three violations - double jeopardy claim. Appeal contends that the state violated defendant's right against double jeopardy by subjecting him to multiple criminal punishments for the same offense. Opinion discusses the separate citations issued: the first alleged that defendant violated I.C. § 49-438 by operating a commercial vehicle in excess of the registered gross weight by 11,900 pounds; the second alleged defendant committed two additional violations by operating a commercial vehicle in excess of the allowable weight for groups of two or more consecutive axles as set forth in I.C. § 49-1001(1). The magistrate ruled that the state was prosecuting defendant for three separate offenses. Defendant's appeal to the district court asserted the three weight violations constituted only one offense - transporting too much weight in his tractor-trailer. Opinion rejects the state's assertion that defendant waived his double jeopardy argument by not filing a motion to dismiss prior to trial pursuant to I.C.R. 12(b)(6) because defendant had not been in former jeopardy for the alleged conduct. Opinion addresses the prohibition against multiple punishments for the same offense and concludes that multiple fines did not offend defendant's right against double jeopardy where each weight violation required proof of one element that was not required for the other violation and where the legislature clearly authorized cumulative punishment for multiple violations of the weight limits for groups of consecutive axles. Affirmed.

Citation: 08.7 ICAR 344

Docket: 34315

Other Citations: 181 P3d 538

STATE OF IDAHO v. CHARLES T. WARBURTON

Published: 5/13/2008

Conspiracy to deliver a controlled substance, methamphetamine - general conspiracy statute - intent to deliver to third party not shown. Appeal from conviction argues that the state failed to prove that the co-conspirators intended the meth to be delivered to a third party. Opinion notes that at no time did the state argue or present any evidence to show that defendant intended to deliver the drug to a third party and the jury was never instructed that it needed to find intent to deliver to a third party. Conviction vacated.

Citation: 08.11 ICAR 517

Docket: 32601

Other Citations: 185 P3d 272

STATE OF IDAHO v. COREEN RAE CULBRETH

Published: 6/9/2008

Burglary - intent element – “theft” does not include non payment of financial obligations - animal shelter fees. Defendant broke into an animal shelter to get her impounded dog. The jury convicted defendant of both malicious destruction of property and burglary. Appeal asserts that although defendant illegally broke into the shelter, there was no evidence that she intended to do so with the intent to commit a theft or any felony. The state’s theory was that defendant entered the shelter with the intent to steal by evading payment of the shelter’s fees. Opinion concludes that the act of taking her dog from the shelter without authorization in order to avoid paying shelter fees could not constitute a theft of the shelter’s labor or services because defendant’s dog was taken to the shelter by a third party and housed there without her knowledge or consent. Opinion next concludes that the word “steals” in I.C. § 18-2403(1) cannot include nonpayment of a debt. Conviction for burglary, reversed.

Citation: 08.12 ICAR 607

Docket: 33842

STATE OF IDAHO v. MIGUEL ORTIZ MORALES

Published: 6/2/2008

Felony injury to a child – “care or custody” includes any adult in household with oversight of child. Case arises from significant brain and other injuries suffered by defendant’s twenty-one-month-old nephew whose care givers included several different extended family members living in the same household. Opinion discusses the meaning of “care or custody.” Opinion notes that testimony from the detective and medical personnel along with defendant’s admissions regarding the child’s injuries and his reoccurring visits to the hospital followed by the child’s return to the same conditions provide substantial evidence that defendant willfully permitted the child to be placed in a situation where his health was endangered and defendant knew of the danger. Conviction affirmed. Chief Judge Gutierrez’s specially concurring opinion elaborates on Idaho’s position in defining “care or custody” in contrast with other jurisdictions.

Citation: 08.12 ICAR 592

Docket: 33547

Other Citations: 192 P3d 1088

STATE OF IDAHO v. NICK MCDOWELL HENSLEY

Published: 6/11/2008

Lewd conduct with and sexual abuse of a minor under age sixteen - Idaho Communications Security Act (I.C.S.A.) violation - vicarious consent on behalf of child not shown. The district court found that a recorded conversation between defendant’s daughter and her mother violated the I.C.S.A. and excluded the recording from trial. Defendant’s appeal alleges that the conversation consists of the mother persuading her daughter to falsely accuse defendant of molestation and challenges the Supreme Court’s refusal to allow appellate counsel to listen to the recording. Opinion notes that the recording was made by defendant’s spouse during a custody dispute involving one of the victims. Opinion declines to find an exclusionary rule exception for phone calls recorded in the home. Opinion rejects the argument that defendant gave vicarious

consent for the recording on behalf of his daughter because he did not have her best interest in mind, and did not act with a belief that recording the conversation was necessary to protect her. Opinion declines to address whether a parent's interest in protecting his or her child will ever outweigh the child's interest in private telephone conversations. Where defendant did not raise any need to use the recording to impeach the victim or her mother, there was no deprivation of his right to a fair trial or the opportunity to cross-examine witnesses. Opinion concludes that the information in the recording is irrelevant to whether the trial court erred in excluding the recording and no due process violation on appeal is shown. Decision finding the recorded conversation in violation of the I.C.S.A. inadmissible is affirmed.

Citation: 08.13 ISCR 635

Docket: 32902

Other Citations: 187 P3d 1227

STATE OF IDAHO v. SARAH MARIE JOHNSON

Published: 6/26/2008

First degree murder - variance between charging document and verdict on aiding and abetting. A jury found defendant guilty of first-degree murder of both her parents. Appeal asserts the charging document did not support a jury instruction on aiding and abetting, and the given instruction constituted an impermissible variance or a constructive amendment. Opinion notes that Idaho has abolished the distinction between principals and aiders and abettors, and treats aiding and abetting as a theory under which first-degree murder can be proved and not as a separate offense. Opinion examines whether the last clause of I.C. § 19-1430, is procedural or substantial and concludes the entire statute is substantive. Opinion concludes that I.C. § 19-1430 and I.C.R. 7, can be reasonably interpreted so that there is no conflict between them and rejects appellant's argument that the purported conflict means the statute has no effect. Opinion addresses appellant's assertion that her due process rights were violated by the lack of reference to aiding and abetting in the charging document and notes that aiding and abetting was a theory of liability, and not the underlying charge. Opinion holds there was no variance, constructive amendment, or due process violation and no prejudice to the defense. Opinion also concludes that a specific unanimity instruction was not necessary. Opinion next addresses appellant's argument that defendant had passed the jury panel for cause before a certain juror revealed he might have difficulty disregarding certain expert evidence and notes that both attorneys were later given an opportunity to again challenge for cause those jurors who had expressed concern, but defense chose not to do so. Opinion discusses the steps taken by the judge to address the concerns of jurors and concludes there was no error. Opinion holds defendant waived the right to object to the juror remaining on the panel. Conviction affirmed.

Citation: 08.14 ISCR 729

Docket: 33312

Other Citations: 188 P3d 912

STATE OF IDAHO v. MICHAEL R. JONES

Published: 7/15/2008

Intermediate appellate procedure - misdemeanor domestic battery. Appeal from the district court's appellate order vacating the judgment of conviction entered after a bench trial and remanding the case to the magistrate to reconsider the evidence in accordance with the correct burdens of proof. Appeal argues the case should be remanded for a new trial. Opinion discusses issues of fairness and rejects defendant's argument that a blanket ban is necessary on a lower court reconsidering a case where it had erred during a bench trial. Opinion notes that the disqualification procedure in

I.C.R. 25 addresses concern about a magistrate who is unable to be fair given the circumstances of the remand. Affirmed.

Citation: 08.15 ICAR 818

Docket: 34090

Other Citations: 193 P3d 457

STATE OF IDAHO v. EDWARD JOHN STEVENS

Published: 7/23/2008

First-degree murder - shaken baby syndrome - newly discovered evidence claim. Case arises from the death of eleven-month-old Casey Whiteside, who suffered a fatal head injury that occurred while defendant was caring for him. Opinion discusses defendant's challenge to admission of a videotape of computer generated objects falling down stairs to illustrate testimony of the state's expert that Casey could not have received his injuries from falling downstairs as claimed by defendant. Opinion concludes that the video was relevant and admissible as it was used to illustrate the expert's testimony where the jury had to determine whether defendant caused the injuries and death or whether it was possible for the injuries to have come from a fall. The decision to admit the video for illustrative purposes is affirmed. Opinion next addresses the denial of defendant's motion for a new trial based on the cumulative effect of newly discovered evidence regarding the dangers and effects of a drug Casey was taking at the time of death, evidence that Casey's eyes were removed after embalming, and the false testimony the state's expert gave as to his credentials. Where the issue for the jury was whether Casey's skull fracture was caused by a fall or by battering and where the jury concluded the injuries were caused by defendant, offering new evidence to explain why Casey may have fallen in the first place would not probably produce an acquittal. Opinion addresses whether evidence that Casey's eyes were removed after embalming for investigation of injuries, was newly discovered and concludes it was not. Where the resume of the state's expert was available to defendant over a year before he testified, the expert's statements relating to the number of peer reviewed articles he published and his false statement regarding his affiliation with Temple University was not newly discovered evidence and was not material. Opinion declines to apply the cumulative error doctrine to a motion for a new trial. Opinion holds that the district court did not violate the Fifth Amendment or abuse its discretion by considering defendant's failure to take responsibility for his action when fashioning the fixed life sentence. The district court's discussion of defendant's intent was not an abuse of sentencing discretion. Justice Horton writes a specially concurring opinion to explain his opinion relating to the issue of Casey's eyes. Justice Pro Tem Trout dissents as to the analysis of the denial of defendant's motion for a new trial based on the discovery of evidence related to the removal of Casey's eyes. Affirmed.

Citation: 08.16 ISCR 851

Docket: 25688

Other Citations: 191 P3d 217

STATE OF IDAHO v. ROBERT R. GAMBLE

Published: 7/23/2008

Trafficking in methamphetamine, delivery of a controlled substance, trafficking by manufacturing, persistent violator, unlawful possession of a firearm - dismissal of conspiracy charge - Rule 404(b) evidence. Defendant's arrest resulted from Idaho State Police surveillance on defendant's residence and observation of another individual who received a bag from defendant's residence that was later found to contain items including drugs. Opinion discusses issues of joinder, defendant's request for substitute counsel, and dismissal of the conspiracy charge. Opinion holds

that the district court did not err in joining the cases despite the fact that the conspiracy charge was later dismissed. Opinion discusses implications of the co-defendant and concludes there was no Bruton problem precluding joinder and antagonistic defenses did not exist to make joinder inappropriate. Opinion addresses but rejects defendant's argument that it was error to deny his motion for a mistrial because the basis for joinder -- conspiracy charge -- was dismissed and defendant was prejudiced because the dismissed charge was the only basis for the admission of Rule 404(b) evidence of defendant's earlier attempt to elude police. Where the evidence was overwhelming that defendant had gone beyond attempting to manufacture and had, in fact, completed manufacture of meth, any prosecutorial misstatement of the law regarding the steps in the manufacturing process was harmless. Even assuming alleged judicial and prosecutorial misconduct along with the allegedly erroneous use of Rule 404(b) evidence, reversal is not required. Conviction affirmed.

Citation: 08.16 ICAR 872

Docket: 33240

STATE OF IDAHO v. MARCUS ANTHONY MITCHELL, II

Published: 8/18/2008

Aggravated battery, robbery, and burglary - corroboration of accomplice testimony. Defendant, his girl friend, and another accomplice developed and executed a plan to take cash from an acquaintance-drug dealer. The acquaintance was shot five times and the accomplice was shot once in the hand. Appeal asserts that there was insufficient evidence to corroborate the testimony from the alleged accomplice and therefore that testimony should not have been considered by the jury. Opinion enumerates evidence presented by witnesses other than the alleged accomplice that tends to connect defendant with the forced entry, robbery, and shooting and concludes it was sufficient. Appeal contends the state did not prove the mental element that is necessary to convict defendant for aiding, abetting, encouraging, or soliciting the battery because the accomplice admitted that shooting the victim was never part of the plan. Where evidence showed that defendant provided at least one loaded gun for use in the robbery, that was sufficient to support the jury's inference that defendant knowingly aided and abetted the use of a deadly weapon to unlawfully and intentionally cause bodily harm. Appeal contends the court abused its discretion for failing to reduce his determinate sentence after receiving notice from the accomplice that the original sentence was based on material misinformation the accomplice provided at trial that defendant provided both guns used. Opinion notes that the sentencing court's belief that defendant provided both of the loaded guns did not alone form the basis for the sentence and finds no abuse of sentencing discretion. Conviction and sentences are affirmed.

Citation: 08.17 ICAR 914

Docket: 32857

STATE OF IDAHO v. SARAH KATHLEEN PEARCE - ON REVIEW

Published: 8/28/2008

Conspiracy to commit robbery, robbery, conspiracy to commit first degree kidnapping, first degree kidnapping, aggravated battery, aiding and abetting attempted first degree murder - line up procedures - accuracy of eyewitness identifications. On review of a Court of Appeals opinion reported at 07.12 ICAR 528. Case arises from an attack by three men and a woman upon an Interstate driver. At trial defendant steadfastly contended she was not the woman involved. Opinion discusses the exclusion of defendant's expert testimony regarding procedures and problems associated with lineups and eyewitness identification. Opinion affirms the district court's discretionary exclusion of expert testimony about police photo and video lineup methodology based

on the expert's lack of academic or practical experience specific to lineup procedures. Opinion concludes the trial court did not err in failing sua sponte to instruct the jury on the inherent dangers of eyewitness identification where defendant did not request such an instruction and where its omission does not constitute fundamental error. Opinion addresses the state's change of position about the credibility of a co-defendant witness regarding the identity of the female assailant and concludes defendant did not suffer a violation of her due process rights. Opinion examines whether a party may admit a prosecutor's prior statements in related cases as admissions of a party opponent and concludes that defendant's motion to present the prosecution's arguments from co-defendants' trial and sentencing hearing as evidence of inconsistency was properly denied because the prosecutor was engaged in advocacy as to the credibility of witnesses. Conviction affirmed. Chief Justice Eismann's specially concurring opinion notes that defendant may have a claim for post-conviction relief if additional material should have been presented regarding the expert witness's qualifications. Justice W. Jones's dissenting opinion asserts the district court's finding that the expert was not sufficiently qualified to testify was reversible error and discusses several facts omitted from the majority opinion.

Citation: 08.18 ISCR 954

Docket: 34491

Other Citations: 192 P3d 1065

STATE OF IDAHO v. ANTONIO VASQUEZ ROLON

Published: 10/23/2008

Conspiracy to traffic in controlled substances, heroin and cocaine - specific intent element - conspiracy hearsay exception. Appeal from conviction. Defendant's arrest came after several months of police investigation into a drug ring where police used a confidential informant, tracked vehicles used by sellers during controlled buys, acquired information about phone numbers used by the police to contact sellers and arrested other participants in the ring and executed search warrants. The state alleged that defendant directed the conspiracy members in selling and delivery of drugs and that he had delivered or arranged for delivery of drugs to conspiracy members by phone from Utah. Opinion addresses defendant's argument that the district court erred because the jury instructions permitted them to find him guilty of conspiracy based on a general, rather than specific, intent standard and allowed the jury to find him guilty of conspiring to traffic in more than 28 grams of cocaine and heroin by relying on the amounts actually delivered by the local distribution ring, regardless of whether the state proved that he actually agreed to traffic in those quantities. Opinion concludes that the jury instructions read as a whole were erroneous because they created the impression that only a general intent was required to find defendant guilty. Negating the specific intent element of conspiracy amounts to fundamental error. Opinion enumerates evidence that amply implicated defendant in the conspiracy and concludes the instructional errors were harmless and did not contribute to the verdict. Opinion addresses the admission of testimony under the hearsay rule exception for co-conspirator statements and defendant's contention that the statements were not made in furtherance of the conspiracy but were made in idle conversation. Opinion concludes the statements were properly admitted under the conspiracy hearsay exception where both comments were made during a co-conspirator's orientation into the drug ring where the operations and roles of the conspiracy were explained. Opinion notes that the Confrontation Clause has no application to nontestimonial hearsay statements; there was not Confrontation Clause violation by the admission of the statements. Conviction affirmed.

Citation: 08.22 ICAR 1108

Docket: 32989

Jury Instructions

STATE OF IDAHO v. TRAVIS ERIC JONES

Published: 1/7/2008

Trafficking in methamphetamine by manufacturing - failure to record confession - jury instructions. Appeal from conviction asserts that the district court erred in failing to instruct the jury that it could consider the investigating officer's failure to record defendant's confession as a factor in assessing the officer's credibility. Opinion discusses cases that addressed the consideration of a lack of a recording in determining an officer's truthfulness, but declines to hold that the cases stand for the proposition that the defendant is entitled to a jury instruction specifically commenting on the lack of a recording and drawing attention to one witness's credibility. Conviction affirmed.

Citation: 08.1 ICAR 35

Docket: 33850

Other Citations: 181 P3d 1247

STATE OF IDAHO v. DEAN KEITH HICKMAN

Published: 4/25/2008

Grand theft - theft of financial transaction cards - misleading jury instructions. A casino video surveillance showed defendant bending down to pick something up off of the floor near a man who later reported his wallet was missing. Appeal from conviction and ten year sentence with one year fixed. Opinion discusses the jury instructions regarding grand theft and concludes that as a whole the instructions misled the jury because it was unclear whether it was necessary for the state to prove the property taken was a financial transaction card. The omission of this material element constitutes fundamental error, so although there was no objection made below, the error can be reviewed on appeal. Where defendant was accused of taking another person's wallet and its contents and the evidence that the taken wallet contained financial transaction cards was uncontroverted, the omission of the element that the property taken be financial transaction cards is harmless error. Where defendant was not embarrassed in the preparation of his defense -- which was that he did pick up a wallet, but it was his own -- there was no impermissible variance between the Amended Information and the jury instructions. Opinion discusses the sufficiency of the evidence to convict and notes that the evidence does require the jury to make inferences but holds it is sufficient to convict. Opinion construes I.C. § 18-2407(a)(b)(3) and concludes that the legislature intended grand theft of a financial transaction card involve only valid cards and not revoked or expired cards. Where the victim canceled the cards immediately upon noticing his wallet was missing, it was reasonable to conclude that he was the card holder, the cards were issued by an issuer, and that the cards were valid when taken. The jury verdict and the denial of defendant's motion for a directed verdict are affirmed. Justice Jones's partly concurring and dissenting opinion discusses the scanty evidence and argues that imposition of a ten-year sentence should require somewhat deeper proof.

Citation: 08.9 ISCR 413

Docket: 33750

Other Citations: 191 P3d 1098

STATE OF IDAHO v. JENNIFER ELIZABETH EDNEY, aka BILLIE EDNEY

Published: 4/22/2008

Trafficking in methamphetamine - state's destruction of meth lab evidence - bad faith element not shown - jury instructions. Law enforcement officials destroyed the hazardous portions of a meth lab and did not collect finger prints because a prescription bottle in defendant's name was found in one of the boxes and defendant admitted that she participated in the manufacturing process and in sampling the drug. Opinion discusses the district court's decision not to give the defendant's requested jury instructions concerning the state's decision not to record her admissions and the destruction of the lab. Opinion holds it was not error to decline the instruction on recording law enforcement interviews while reiterating an admonishment that audio recordings can prevent difficult and time-consuming trial and appellate issues. Opinion discusses and upholds the decision not to give an instruction on the spoliation of evidence. Conviction affirmed.

Citation: 08.9 ICAR 422

Docket: 33919

Other Citations: 183 P3d 782

BILLY G. SHEAHAN v. STATE OF IDAHO

Published: 6/13/2008

Post-conviction relief - first degree murder - ineffective assistance claim - erroneous jury instruction on malice. Appeal asserts that trial counsel's failure to object to an erroneous instruction on malice aforethought and failure to raise this error in the instructions as an issue on appeal, constituted ineffective assistance. Opinion discusses the given instruction on malice noting that because I.C. § 18-4002 provides a different definition of malice as that word is used in murder statutes, the I.C. § 18-101(4) definition is inapplicable. The incorrect expansion of the definition lowered the state's burden of proof on that element and counsel's failure to object was deficient. However, the jury's finding that the murder was premeditated eliminates any possibility that the jury relied upon the incorrect portion of the malice instruction. Where the record proves that there is no prospect that the trial outcome would be different had counsel objected, defendant was not prejudiced and the summary dismissal of his petition for p-c relief is affirmed.

Citation: 08.13 ICAR 690

Docket: 34180

Other Citations: 190 P3d 920

SHANE McKAY v. STATE OF IDAHO

Published: 7/2/2008

Post-conviction relief - vehicular manslaughter - ineffective assistance claim - erroneous elements instruction prejudiced trial outcome. Defendant was driving an automobile that struck a motorcycle from behind, killing its driver; defendant was found guilty on the allegation that his driving under the influence caused the death. Opinion notes that the causation element was contested and defendant contended the motorcycle was stopped in the dark in the traffic lane without a taillight. Appeal claims defense trial counsel was ineffective for failing to properly object to an erroneous jury instruction that omitted words requiring the jury to find that defendant's conduct must be a significant cause of death and his driving while under the influence was a significant cause of death. Opinion rejects the district court finding that the omission of the word "significant" did not prejudice defendant, but benefited him, and also

concludes that omission of the words "in such unlawful manner" was also a substantial error. Opinion concludes the deficient performance prejudiced the trial outcome. Reversed and remanded.

Citation: 08.14 ICAR 765

Docket: 34271

STATE OF IDAHO v. BENNY DALE COFFIN

Published: 7/24/2008

Felony domestic violence - jury instructions on willful infliction of a traumatic injury element. Appeal from conviction argues that by giving the less culpable conduct-oriented meaning of the term "willfulness", the state's burden of proof in regard to the mental element was reduced. Opinion notes that the instruction regarding willfulness consisted of the first half of I.C. § 18-101 and agrees with the state's argument that the court's deletion of the last sentence of the statutory "willfulness" definition conveyed that an act is done "willfully" when it is done on purpose. Opinion concludes that the given instruction did not misstate the law. The court's instruction that each juror take out their writing instruments and make corrections on their individual copies of another challenged instruction was not erroneous procedure. Opinion discusses the prosecutor's misstatement of the law during closing argument, but finds it did not constitute fundamental error necessitating a reversal. Conviction and sentence, affirmed.

Citation: 08.16 ICAR 879

Docket: 32772

Other Citations: 191 P3d 244

Miranda & Voluntariness

STATE OF IDAHO v. MARIANO PEREZ, JR.

Published: 2/20/2008

Aggravated assault, aggravated battery - suppression motion - incriminating statements - Fifth Amendment claim. Defendant was apprehended in Nevada after shooting a police officer in Idaho while trying to avoid arrest on aggravated assault charges. Appeal examines whether the district court erred in denying motions to suppress incriminating statements defendant made to law enforcement officers, and later to television reporters, after being informed of his Miranda rights. The district court held that defendant never unequivocally invoked his right to silence or requested counsel and that the television reporters were not acting as agents of the police. Appeal also addresses the denial of defendant's Rule 35 motions to reduce concurrent fixed life sentences. Opinion discusses the standard of clarity required to unequivocally invoke the right to counsel and concludes that defendant's statement, "Yeah, I think I need advice, man" would not be understood as a request for an attorney. Defendant's statement that he would "rather wait" to talk to the Idaho officers was not a clear invocation of the right to remain silent. Opinion sets forth the egregious nature of the offenses, defendant's extensive history of violence and holds that fixed life imprisonment was reasonable. Affirmed.

Citation: 08.5 ICAR 227

Docket: 33003 / 33004

Other Citations: 179 P3d 346

STATE OF IDAHO v. EDWIN CONTRERAS-GONZALES

Published: 6/3/2008

Trafficking in methamphetamine - Sixth Amendment right to counsel - validity of waiver. Appeal challenges partial denial of defendant's motion to suppress evidence, the admission of evidence of a chemical analysis of the substance found and claims prosecutorial misconduct. Appeal argues that the district court erred in denying the motion to suppress incriminating statements defendant made when it considered only the fact that defendant initiated the contact with police, and did not consider whether he also made a valid waiver of his rights. Opinion agrees that the district court omitted the necessary consideration of defendant's waiver. Opinion notes that although defendant asked to speak to the officers he also refused to sign a card to acknowledge waiver of his rights. Issue remanded for findings. Opinion addresses each of seven statements made by the prosecutor alleged to constitute misconduct during opening statement and closing arguments. Opinion describes two serious misstatements of the evidence but concludes there was no fundamental error.

Citation: 08.12 ICAR 595

Docket: 33700

Other Citations: 190 P3d 197

STATE OF IDAHO v. DUSTIN L. JAMES

Published: 6/13/2008

Possession of methamphetamine - suppression motion regarding confession - Miranda violation. Defendant confessed to owning a bag of meth found on the backseat of a car after the car's owner consented to a search of the vehicle and before Miranda warnings were given. Appeal from denial of suppression motion. Opinion discusses facts that distinguish this case from an ordinary traffic stop and lead to the conclusion that when defendant admitted ownership of the drugs he was subjected to a restraint on his liberty equivalent to formal arrest. Opinion concludes that the officer's threat to arrest all occupants of the car combined with other factors changed the detention into a custody situation that required Miranda warnings. Reversed and remanded. Judge Perry's dissent argues that the threat of arrest does not ipso facto turn an investigative detention into custody.

Citation: 08.13 ICAR 692

Docket: 33895

Sentencing / Rule 35

STATE OF IDAHO v. CARL ADAIR, II

Published: 1/29/2008

Sexual battery of a minor child sixteen or seventeen - Rule 35 motion - sentence reduction - jurisdictional challenge. Opinion rejects the state's argument that the recent decision in *State v. Huffman*, 07.2 ISCR 17, denies the Supreme Court jurisdiction to review a denial of a Rule 35 motion for reduction of sentence as excessive absent the presentation of new evidence by the defendant. The Supreme Court retains jurisdiction, but will not allow use of Rule 35 motions to review the underlying sentence without the presentation of new evidence. Opinion discusses why *Huffman* is applicable to the present case. Where no additional information was provided to indicate that the sentence was excessive, the denial of defendant's Rule 35 motion is affirmed.

Citation: 08.3 ISCR 103

Docket: 33270

Other Citations: 181 P3d 440

STATE OF IDAHO v. WILLIAM ARTHUR - ON REVIEW

Published: 1/29/2008

Motion to withdraw guilty plea - Rule 35 sentence reduction - special circumstances standard - disparity between indeterminate life sentence and determinate portion - effect of terminal illness. On review of a Court of Appeals opinion reported at 06.11 ICAR 533. Prior to sentencing, but after seeing his PSI, defendant sought to withdraw his plea as to the admittance of being a persistent violator. Opinion addresses confusion as to the standard of review applied in sentence review based on dicta from State v. Herrera and as applied by the Court of Appeals in some cases. Opinion notes that while an unreasonable disparity between the fixed and indeterminate sentences may be grounds for reversal, in this case the disparity appears to be based on the judge's leniency in fixing the determinate portion based on defendant's medical condition and his recognition that defendant is a danger to society in fixing the indeterminate portion. Defendant's criminal history shows that he presents a danger to society and although the current offense of grand theft is relatively minor, his sentence is reasonable and is tailored to meet sentencing purposes. Affirmed.

Citation: 08.3 ISCR 105

Docket: 34172

Other Citations: 177 P3d 966

STATE OF IDAHO v. BENJAMIN CASTRO JR.

Published: 1/25/2008

No contact order - domestic violence - specific expiration date requirement - I.C.R. 46.2. Defendant was the subject of a no contact order made in 2003 prior to amendment to I.C.R. 46.2 that required a specific expiration date. Following defendant's release from incarceration the district court held in 2006 that because the no contact order was valid at the time it was entered, it remained in effect "until further order of court." Appeal asserts error in failing to vacate the no contact order or modify the order to provide a termination date. Opinion declines to address defendant's claim of error because the state, not defendant raised the issue below, but concludes that in the future, in all cases before trial courts for hearing on a motion to modify or terminate a no contact order entered prior to July 1, 2004, judges must provide a termination date, regardless of whether the motion to modify or terminate the no contact order is granted. Affirmed.

Citation: 08.3 ISCR 89

Docket: 33452

Other Citations: 177 P3d 387

STATE OF IDAHO v. BARRY I. McCARTHY

Published: 2/28/2008

Possession of methamphetamine - credit for time served as a consequence of a probation violation - concurrent sentences. While on probation from conviction for possession, defendant twice delivered meth to an undercover officer. The district court granted defendant's Rule 35 motion to give credit for time served on the delivery sentence from the date of service of the delivery arrest warrant until the entry of judgment, but denied relief for any incarceration following defendant's arrest for

probation violations, stating that an individual is not entitled to receive credit for time served on a probation violation. Appeal challenges sentences imposed for possession and for delivery of meth and the order denying defendant's motion for credit on his possession sentence for the period of incarceration served as a consequence of a probation violation. Opinion notes that I.C. § 19-2603 provides that when a defendant has been arrested on a bench warrant for a probation violation and the probation has been revoked, the sentence counts from the date the warrant was served; the district court erred by concluding otherwise. Opinion rejects the state's argument that because defendant already received credit on his sentence in the delivery case for a portion of the incarceration that occurred after his arrest for probation violations, he cannot receive credit for the same period in his possession case. Where defendant's incarceration on a probation violation in the possession case and on a new criminal charge in the delivery case were based upon the same conduct and concurrent sentences were imposed, defendant is entitled to credit on each concurrent sentence. Case remanded for entry of an order granting credit. Affirmed in all other aspects.

Citation: 08.5 ICAR 236

Docket: 33201 / 33411

Other Citations: 179 P3d 360

STATE OF IDAHO v. KATHLEEN ANN BLANC - WITHDRAWN

Published: 2/28/2008

Probation revocation - sequential periods of retained jurisdiction without intervening probation - sentence reinstatement - felony injury to a child. After a period of retained jurisdiction the district court ordered another period of retained jurisdiction without first placing defendant on probation. The state contends that the district court lacked jurisdiction to order a second rider making this appeal untimely. Opinion construes the language dealing with a second period of retained jurisdiction in I.C. § 19-2601(4) and concludes that the state's reading of the statute would conflict with the statute's stated purpose to give courts added flexibility in sentencing. Opinion concludes that the statute does not require that a defendant serve a period of probation before a second retained jurisdiction can be ordered. Order revoking probation and requiring execution of the original sentence, affirmed. Judge Lansing disagrees with the analysis of I.C. § 19-2601(4).

Citation: 08.5 ICAR 245

Docket: 33879

Other Citations: DISMISSED AS MOOT

STATE OF IDAHO v. LUCIO TINOCO-PEREZ

Published: 2/26/2008

Aggravated assault - sentence reduction request - non-citizen defendant - impact on immigration status. Defendant has lawful permanent resident status but faced mandatory deportation because the district court imposed a sentence of more than 354 days. Appeal from denial of defendant's Rule 35 motion to reduce his sentence to less than one year so that he could become eligible to apply for relief that would allow him to remain in this country. Opinion concludes that the district court properly considered the collateral consequences, but also properly concluded that they did not supplant other sentencing factors. Affirmed.

Citation: 08.5 ICAR 233

Docket: 33890

Other Citations: 179 P3d 363

STEVEN JAMES COOK v. STATE OF IDAHO / STATE OF IDAHO v. S...

Published: 3/14/2008

Grand theft by deception - sentence review and modification - change from consecutive to concurrent sentences. Defendant admitted to stealing about 1.5 million dollars from nine families through a fraudulent securities scheme. Appeal from imposition of a combined seventy-eight year sentence, with twenty-nine years fixed, for nine counts of grand theft by deception and from denial of a Rule 35 motion for sentence reduction. Opinion addresses both direct and post-conviction appeals. Opinion reviews defendant's entire sentence to assess whether the cumulative period is reasonable. Opinion concludes that ordering that the terms for all the counts be served consecutive to each other was an abuse of discretion. Opinion comments on the circumstances of the criminal acts, punishments in other jurisdictions for related criminal conduct, lack of prior criminal record and defendant's relatively advanced age. Opinion modifies the sentence to reduce the aggregate period to forty-six years, with seventeen years fixed. Opinion addresses summary dismissal of the post-conviction application for relief that alleged ineffective assistance. Opinion concludes that even if defendant's attorney had filed a motion to dismiss based on I.C. § 19-315, it would not have succeeded. Opinion addresses petitioner's grounds for alleging bias on the part of the trial judge and concludes that petitioner made multiple informed decisions with the assistance of counsel not to pursue disqualification. Opinion addresses petitioner's effort to present victims' testimony that they would prefer a plan of restitution to defendant's imprisonment and concludes that the abuse of discretion under I.R.E. 403 was harmless error where no viable job opportunity was present by which defendant could realistically undertake paying restitution. Opinion addresses claims of ineffective assistance at sentencing and Rule 35 proceedings for counsel's failure to call witnesses and present evidence of an employment plan. Opinion concludes that given significant flaws in the plan, the arrangement was not feasible and even if it had been presented, it would not have made a difference in defendant's sentence. Counsel's performance was not deficient for not presenting the employment plan. Conviction affirmed. Sentences modified. Dismissal of p-c claims, affirmed.

Citation: 08.6 ICAR 278

Docket: 33534 / 33594

Other Citations: 180 P3d 521

KIM BRENT TAYLOR v. STATE OF IDAHO

Published: 3/10/2008

Credit for time served on probation - post-conviction relief. The state appeals grant of petitioner's motion for credit for time served and petitioner cross appeals from denial of his petition for p-c relief. Petitioner was granted credit for time served for the time he spent on probation until the Supreme court invalidated the placement on probation due to jurisdictional limitations. Petitioner argues that because the order placing him on probation was voided, he was not "legally" on probation and thus remained committed to the Board of Correction's custody. Opinion notes that I.C. § 18-309 entitled a defendant to credit for any period of incarceration and incarceration and custody are not synonymous. Where petitioner was not incarcerated in any sense of the word between the time he was granted probation and the invalidation of that action, his time spent at liberty does not qualify for credit. Opinion notes that the district court erroneously relied on the analysis of State v. Wolfe (overruled by State v. Coassolo) which held that prisoners were entitled to a hearing at the correctional facility to address matters that would be considered in development of a report to the court regarding whether jurisdiction would be relinquished. Opinion rejects the argument that by simply scheduling a hearing, the district court created a liberty interest in having that hearing held within the 180-day rider period. Counsel's failure to

secure an updated psychosexual evaluation within that same time frame was not ineffective assistance. Affirmed.

Citation: 08.6 ICAR 275

Docket: 33222

Other Citations: 187 P3d 1241

STATE OF IDAHO v. EDUARDO IZAGUIRRE

Published: 3/27/2008

Second degree murder - sentence review - neuropsychological evaluation. Appeal contends that defendant's unified life sentence, with a sixty-year fixed term is excessive; that the district court erred by denying his motion for a neuropsychological evaluation to support his sentence reduction motion; and erred by imposing excessive restitution. Opinion examines the manner in which the district court arrived at the sentence and the denial of the Rule 35 motion. Opinion discusses a number of reasons for concluding that the order denying the request for a neurocognitive evaluation must be reversed, the sentence vacated and a resentencing conducted. Where defendant was requesting reconsideration of a unified life sentence with a sixty-year fixed term and where he has shown through the affidavit of a psychologist that there is reason to suspect neurocognitive abnormalities that would warrant consideration by the court, the motion for an evaluation should have been granted. The trial court unduly limited the information it would consider when it declined to give attention to the content of articles from professional journals on brain development. The district court's declaration that a twenty-five-year sentence can never be sufficient for murder is not consistent with Idaho law. Opinion notes that the court may have added thirty-five years to the twenty-five-year fixed term recommended by counsel for both parties because of defendant's misbehavior in jail and finds this reasoning unsound. Reversed, vacated, remanded.

Citation: 08.7 ICAR 347

Docket: 33519

Other Citations: 186 P3d 676

STATE OF IDAHO v. CHRISTOPHER ALLEN SANCHEZ

Published: 5/8/2008

Probation revocation reversed - failure to maintain contact with probation officer. Opinion examines whether the violation justified revoking probation and asks whether the violation was willful where defendant testified that his noncompliance with the weekly phone contact order stemmed from his inability to pay for long distance calls, which was attributable to his inability to obtain work because California parole authorities required his attendance at numerous rehabilitative classes. Opinion concludes that the state did not prove a willful violation. Opinion discusses the adequacy of probation supervision and concludes that the violation is too minor to justify revocation. Reversed. Judge Perry's dissent discusses the district court's analysis, arguing that it considered the totality of the circumstances whereas the appellate court focused on one violation.

Citation: 08.10 ICAR 485

Docket: 34032

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Published: 5/8/2008

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weekly phone contact order stemmed from his inability to pay for long distance calls, which was attributable to his inability to obtain work because California parole authorities required his attendance at numerous rehabilitative classes. Opinion concludes that the state did not prove a willful violation. Opinion discusses the adequacy of probation supervision and concludes that the violation is too minor to justify revocation. Reversed. Judge Perry's dissent discusses the district court's analysis, arguing that it considered the totality of the circumstances whereas the appellate court focused on one violation.

Citation: 08.10 ICAR 485

Docket: 34032

STATE OF IDAHO v. NATHAN JENS CROCKETT

Published: 6/10/2008

Lewd conduct with a minor under sixteen - two counts - Rule 35 sentence modification - lifetime probation. Case arises from defendant's sexual abuse of his five-year-old daughter over the course of two years. Appeal from grant of defendant's Rule 35 motion that suspended the sentence, ordered probation for life and ordered defendant to serve 360 days in jail. Opinion notes that when a defendant is placed on probation, the court retains jurisdiction and may respond to any rehabilitative progress -- an option that does not exist when the defendant is imprisoned or paroled. Opinion concludes that probation for life is not as onerous as incarceration for life and finds no abuse of sentencing discretion. Affirmed.

Citation: 08.12 ICAR 614

Docket: 32130

Other Citations: 189 P3d 475

STATE OF IDAHO v. JOHN DOE (34295)

Published: 6/9/2008

Restitution - medical expenses - aggravated battery by juvenile defendant - victim's testimony along with medical bills presents a prima facie case for restitution award. After defendant admitted he had struck another person in the face and head, a restitution hearing was held at which defense counsel objected to admission of six different medical bills, arguing there was insufficient foundation that the services rendered were reasonable, medically necessary, and "linked" to defendant's actions. The state appeals from the district court's order affirming the magistrate's denial of restitution. The state argues that because the victim provided foundation for the exhibits by testifying the bills were those he received for medical services rendered as a result of the battery, the magistrate erred in refusing to admit them. Opinion examines the admissibility of each exhibit and concludes that all but one should have been admitted because they could be linked to the victim and the date of the attack. Opinion construes the restitution statute and concludes that the factors of reasonableness and necessity are inherent in the finding of actual economic loss; the statute does not mandate the strict level of evidentiary requirements in restitution hearings that is required in trials. Case remanded to the magistrate to consider the admissible exhibits in conjunction with other factors to determine whether to award restitution and to what extent. The issue of who is responsible for any restitution must also be decided on remand. Reversed and remanded.

Citation: 08.12 ICAR 610

Docket: 34295

Other Citations: 192 P3d 1101

STATE OF IDAHO v. TIM A. TIMBANA - ON REVIEW

Published: 6/4/2008

Plea agreement violation claim - Rule 35 sentence reduction motion - probation revocation - clerical error in written judgment. On review of a Court of Appeals opinion reported at 07.13 ICAR 569 that concluded the state breached its agreement and that held that the prosecutor's correction of his mistake in opposing the motion was an adequate remedy for the violation. Opinion discusses the effect of a clerical error in the written judgment that misstated the fixed portion of the sentence noting that the sentence can be corrected by a Rule 36 motion. Opinion concludes that where the state immediately corrected its error and performed the agreement, there was no breach. Order denying Rule 35 motion of a sentence reduction is affirmed.

Citation: 08.12 ISCR 558

Docket: 34624

Other Citations: 186 P3d 635

STATE OF IDAHO v. MICHAEL EDWIN CLEMENTS

Published: 5/29/2008

Attempted second degree murder - weapon enhancement - Rule 35 limited scope of review. Defendant shot two people, one of whom died as a result of the shooting. Defendant pled guilty and was sentenced to a unified term of life, with fifteen years fixed for second degree murder plus a fifteen-year weapon enhancement and a unified term of fifteen years with ten years fixed for attempted second degree murder plus a five year weapon enhancement. Defendant's Rule 35 motion to correct an illegal sentence argued that because both shootings arose from the same indivisible course of conduct, the two enhancements were illegal. The state appeals from the order vacating defendant's conviction and sentence and asserts the district court lacked jurisdiction. Defendant cross-appeals. The state argues that adjudicating a Rule 35 motion is a legal question and the district court had no jurisdiction to review the underlying facts of the case. Opinion adopts a limited scope of review approach to a Rule 35 motion and concludes that defendant's Rule 35 motion did not grant jurisdiction to review the underlying facts, especially since defendant pled guilty instead of going to trial. Order vacating conviction and sentence for attempted second degree murder with a weapon enhancement is reversed. Remanded to reinstate conviction and sentence.

Citation: 08.12 ICAR 588

Docket: 33481

STATE OF IDAHO v. DARRELL EDWARD PAYNE / PAYNE v. STATE

Published: 6/18/2008

First-degree murder, kidnapping, robbery, rape - death sentence - post-conviction relief - impermissible victim impact statements. Case arises from the kidnapping, rape and murder of Samantha Maher in 2000. Opinion addresses the guilt and sentencing phases of trial, defendant's post-conviction claims of ineffective assistance, and the state's cross-appeal setting aside the death sentence on post-conviction relief. Where victim witnesses commented on defendant's personal characteristics and the appropriate sentence, this was reversible error requiring a new sentencing hearing; victim impact statements are limited to the crime victim and the victim's immediate family members. Conviction affirmed. Case remanded for resentencing before a different district judge.

STATE OF IDAHO v. ROBERT T. CARD**Published:** 7/2/2008

Restitution - contested massages, footbaths, colon cleansing treatments. Appeal from district court's affirmation of the magistrate's award of restitution to a victim injured in a collision caused by defendant's unlawful driving. Appeal challenges the costs for massages, detoxifying footbaths, and herbal colon cleansings. Opinion notes a lack of any medical evidence of any kind indicating that a medical professional had found the victim suffered from any identifiable physical condition causally related to the collision or treatable by the contested methods and notes that the victim's personal assessment of the cause of her physical complaints and her personal determination of beneficial treatments provided the basis for the award. Opinion holds that medical or expert evidence in some form was necessary in order to establish the symptoms were caused by defendant's criminal conduct and that the treatments were reasonable and necessary. Reversed with respect to the award for massages, colon cleansing, and footbath. Remanded for amendment.

Citation: 08.14 ICAR 769

Docket: 34115

Other Citations: 190 P3d 930

STATE OF IDAHO v. THOMAS H. THOMAS**Published:** 7/1/2008

Sentence reduction - probation revocation - timeliness discussion. Opinion discusses whether defendant's appeal from the order revoking his probation was timely where it was filed ninety-six days after probation was revoked. Appeal contends that the time within which to appeal the revocation did not begin to run until the district court denied his Rule 35 motion for reduction of sentence. Opinion notes that revocation order was incorrectly entitled a judgment and addresses defendant's contention that the revocation order should be treated as a judgment. Opinion concludes the revocation order is not a judgment, but is an order made after judgment. Defendant's Rule 35 motion was not filed within fourteen days of entry of the judgment and did not terminate the running of the time for appeal. The filing of appeal was untimely and the Court lacks jurisdiction to review the probation revocation. Order denying Rule 35 motion is affirmed.

Citation: 08.14 ISCR 744

Docket: 34741

STATE OF IDAHO v. LARRY DWIGHT HANSLOVAN**Published:** 6/25/2008

Motion to withdraw guilty pleas - sentence reduction motion - package plea agreement - delivery of a controlled substance - kidnapping. Defendant and his girlfriend sold drugs to an undercover police officer and a confidential informant and defendant later kidnapped two victims who were beaten in an attempt to obtain confessions regarding items missing from the girlfriend's residence. Opinion discusses the nature of the joint plea agreement involving the girlfriend and a secret deal offering external financial inducements for defendant to accept the agreement. Opinion notes that the district court may not have accepted the plea if it had been informed of the secret inducements, but concludes that revealing the deal after the fact did not necessarily create a just reason for withdrawal of the plea. Opinion discusses defendant's assertion of innocence and the role his concern for the welfare of his girlfriend played

in his plea and concludes that there was no abuse of discretion in finding no just reason to support the motion to withdraw the plea to the kidnapping charge. Denial of Rule 35 motion for reduction of sentence, affirmed. Judge Pro Tem Schwartzman writes separately to highlight troubling aspects of package plea agreements, especially ones calling for automatically setting aside the agreement if one defendant withdraws a plea.

Citation: 08.14 ICAR 756

Docket: 33127

STATE OF IDAHO v. JAMES JOSEPH EVERETT DURHAM

Published: 7/15/2008

Mental condition as sentencing factor - failure to order psychological evaluation requires resentencing - robbery. Opinion notes that less than three weeks prior to the robbery, defendant had checked himself in to a psychiatric facility for two days of inpatient care and did not pursue the recommended follow-up treatment. Appeal asserts that in failing to sua sponte order a psychological evaluation prior to sentencing, the district court disregarded I.C.R. 32. Opinion discusses factors that made defendant's crime uncharacteristic and factually irrational and notes that the PSI investigator thought a mental health evaluation was necessary, information in the PSI from defendant's father indicated a family history of mental illness and the state's assertion at sentencing that defendant was a threat to the community because his mental health issues made self-control problematic. Opinion concludes that there was sufficient information to show that mental condition would be a significant factor and the evaluation should have been ordered. Opinion concludes that information before the district court did not meet the requirements of I.C. § 19-2522(3). Conviction affirmed. Sentence vacated and remanded for resentencing upon receipt of a psychological report.

Citation: 08.15 ICAR 824

Docket: 34082

STATE OF IDAHO v. SHAWN LEE DEMPSEY

Published: 7/7/2008

Probation violations - order reinstating and amending to probation for life - collateral estoppel - due process challenge. Case arises from allegations that defendant violated the terms of his probation in two separate cases where the terms of probation were identical and the same acts of misconduct were alleged. Opinion addresses whether the doctrine of collateral estoppel prohibits a probationer from relitigating the merits of an alleged probation violation after a trial court has already found that the probationer violated the same term of probation in a separate case. Opinion notes federal court decisions holding that a certified copy of a new criminal conviction is sufficient proof for revocation of probation and concludes that application of the doctrine of collateral estoppel did not deprive defendant of his right to due process. Affirmed.

Citation: 08.15 ICAR 807

Docket: 34309

STATE OF IDAHO v. CARTER J. ARMSTRONG

Published: 8/15/2008

Subject matter jurisdiction - breach of plea agreement claim - lewd and lascivious conduct with a minor under sixteen - prior judgment for felony injury to children. Defendant was originally charged with lewd conduct with a minor under age sixteen and pleaded guilty to an amended charge of felony injury to children as part of a plea agreement with a term that the State would not request a psychosexual evaluation.

When defendant later refused a psychosexual evaluation required as part of a sex offender evaluation by his probation officer, he was allowed to withdraw his guilty plea and the original lewd conduct charge was reinstated. Another plea agreement followed and provided for defendant to plead guilty to an amended charge of infamous crime against nature for a sentence of four years' supervised probation following success in the retained jurisdiction program. When the district court placed defendant on probation for five years, this appeal followed and asserted violation of the second plea agreement. The State argues that the district court had no subject matter jurisdiction to allow defendant to withdraw his guilty plea and asserts that the original guilty plea, conviction, and sentence for felony injury to children must be reinstated. Opinion discusses the serious ramifications of subject matter jurisdiction and the precision required when using the term "jurisdiction." Opinion examines whether, when the Idaho Supreme Court said in *Jakoski* that a court has no jurisdiction to rule on a motion for withdrawal of a guilty plea that was filed after the judgment of conviction became final, the Court was truly referring to subject matter jurisdiction or was only using the term "jurisdiction" in the more general sense to refer to the trial court's lack of authority under applicable statutes and rules to reopen a case that had been concluded by a final judgment. Where defendant's motion to withdraw his guilty plea to felony injury to children was untimely and no appeal was pending, under *Jakoski*, the district court lacked subject matter jurisdiction; the conviction and sentence for felony injury to children are reinstated.

Citation: 08.17 ICAR 911

Docket: 33868

STATE OF IDAHO v. JESUS ARIEL CHACON, JR.

Published: 9/10/2008

Conspiracy to traffic in methamphetamine - breach of confidential informant agreement - doctrine of impossibility. Under terms of a plea agreement and confidential informant agreement with the State, defendant was expected to purchase drugs from a specifically-named target and provide testimony and cooperation in the prosecution of members of the target's organization. After about seven months without any buys or any actionable leads, defendant's case proceeded to sentencing where the State took the position that defendant had breached the agreement and the State was excused from any obligation to dismiss four of the five counts or to recommend the agreed sentence. Appeal argues that defendant's nonperformance was excused under the contract law doctrine of impossibility of performance because his drug dealing contacts were suspicious that he was cooperating with law enforcement. Opinion concludes that where it was not impossible for others to make a drug purchase from the target, the claimed impossibility was personal to defendant and is not excused due to impossibility. The determination that defendant's failure to perform was a material breach is upheld. Conviction and sentences affirmed. Chief Judge Gutierrez concurs in affirming the conviction, but disagrees that the contract law doctrine of impossibility of performance should be strictly applied in this case.

Citation: 08.19 ICAR 994

Docket: 33394 / 33613

STATE OF IDAHO, ex rel. CITY OF SANDPOINT v. TAMMY L. WHITT

Published: 9/4/2008

Criminal record - amending judgments. Almost six years after a judgment of conviction was entered for DUI and misdemeanor injury to a child, defendant sought to amend the judgment to a withheld judgment, after her efforts to expunge her record failed. The magistrate denied the motion concluding it did not have jurisdiction to grant a withheld judgment after almost six years. On appeal to the district court, it concluded that, because there was no statute of limitation in I.C.R. 33(d), I.C. § 19-2604(1), nor

Misdemeanor Criminal Rule 10, the magistrate had jurisdiction to decide the motion on the merits, but also held that the magistrate had impliedly denied the motion to amend, by denying the motion to expunge. Appeal argues that, because M.C.R. 10 does not impose a statute of limitation on obtaining a withheld judgment, the magistrate had jurisdiction to grant a withheld judgment and denying the motion was an abuse of discretion. Opinion concludes that M.C.R. 10 clearly contemplates withholding judgment before a period of probation is granted and before a judgment of conviction is entered and the rule does not provide a vehicle by which a defendant may move for a withheld judgment years after a judgment of conviction is entered. The order affirming the magistrate's denial of defendant's motion to amend her judgment of conviction is affirmed on different legal theory.

Citation: 08.19 ICAR 991

Docket: 34584

Other Citations: 192 P3d 1116

STATE OF IDAHO v. ALEXANDER BARCLAY, III

Published: 10/22/2008

Sentencing issues - multiple periods of retained jurisdiction. Defendant appeals from order relinquishing jurisdiction and seeks review of his sentence of four years, with a two-year minimum, for possession of a controlled substance. Opinion first addresses the state's contention that the district court did not have the statutory authority to order a second period of retained jurisdiction without first placing defendant on probation pursuant to I.C. § 19-2601(4). Opinion concludes that the legislature did not give the authority exercised in this case to grant a second, consecutive retained jurisdiction that extended the period of retained jurisdiction from 180 to 360 days without an intervening period of probation. Opinion rejects defendant's challenge to the district court's failure to place him on probation after the second period of retained jurisdiction. The district court's written recommendation that defendant not be considered eligible for parole until completion of a therapeutic community program in the order relinquishing jurisdiction, but that was not stated on the record at hearing is not part of defendant's sentence. Order and sentence, affirmed.

Citation: 08.22 ICAR 1106

Docket: 33602

STATE OF IDAHO v. MELANIE LAMPIEN

Published: 11/3/2008

Harboring a felon - plea agreement violation alleged where law enforcement officers advocated harsher sentence. Defendant's husband was wanted for outstanding felony probation violations and for questioning about burglaries. Defendant hid her husband in her apartment and told officers outside that she had not seen him and did not know his whereabouts. Not believing defendant's statements, two police officers and two probation and parole officers entered the apartment without their weapons drawn about one hour after questioning defendant. Inside they confronted the armed husband. In the ensuing struggle one of the police officers and the two probation and parole officers were injured by gun shots and the husband died during the struggle. Appeal challenges the charging information, officers' victim impact statements, and the five year, three year minimum sentence. Opinion finds meritless appellant's argument that the charging information was defective because it did not allege the felon committed a new felony offense. Opinion addresses several arguments regarding officers who made victim impact statements at the sentencing hearing and concludes there was no error in the district court's conclusion that the officers were victims of defendant's criminal offense. Opinion addresses defendant's argument that the officers who advocated a harsher sentence were acting as agents of the

prosecutor and their recommendations breached the prosecutor's plea agreement. Opinion acknowledges there is authority which states that officers are bound by sentencing recommendations in a plea agreement, but concludes that the officers were also victims; in their dual role as investigating officers and victims, they did not breach the plea agreement. Conviction and sentence, affirmed. Judge Lansing's dissenting opinion notes that defendant was not asked -- and did not lie to the officers about -- whether her husband was armed so that defendant's lie to the officers caused neither their entry nor the ensuing shootings. The dissent argues the officers were not victims of defendant's criminal offense because their injuries were not a result of her offense of harboring a felon, and shifting the responsibility for the shootings onto defendant is not justified.

Citation: 08.23 ICAR 1135

Docket: 34145

STATE OF IDAHO v. WILLIAM EDWARD CLARK

Published: 11/14/2008

Sentencing under plea agreement - two day waiting period requirement of I.C.R. 33(a)(1) - leaving the scene of an injury accident - injury to a child. The state concedes it failed to comply with the waiting period strictures of I.C.R. 33(a)(1). Opinion concludes the error was harmless because the sentence was imposed pursuant to a binding I.C.R. 11 plea agreement and resentencing would not change the outcome. Affirmed.

Citation: 08.24 ICAR 1164

Docket: 34537

Post Conviction / Habeas Corpus

DARRYL ROBIN KUEHL v. STATE OF IDAHO

Published: 1/8/2008

Post-conviction relief - ineffective assistance claims - deprivation of right to testify - first degree murder, grand theft, five counts of forgery - prejudice prong of Strickland test not satisfied. Appeal from dismissal of application that asserted that trial counsel provided ineffective assistance by depriving petitioner of his right to testify. Opinion addresses the applicable prejudice standard and declines to adopt the standard for ineffective assistance of counsel used to analyze a guilty plea because petitioner was not deprived of any judicial proceedings. Opinion compares the proposed testimony with evidence produced at trial and finds that although circumstantial, the evidence was overwhelming and the lack of petitioner's testimony did not affect the verdict. Summary dismissal of application is affirmed.

Citation: 08.1 ICAR 41

Docket: 30786

Other Citations: 181 P3d 533

DARRELL BOYD BALDWIN, JR. v. STATE OF IDAHO - ON REVIEW

Published: 1/10/2008

Post-conviction relief - search and seizure - ineffective assistance of counsel - felony drug possession (heroin). On review of an unpublished Court of Appeals opinion. Appeal from summary dismissal of petition. Opinion discusses the conflicting accounts of the events on the night that three law enforcement officers spoke with defendant, conducted a search of his person and room, and seized drug evidence.

Petitioner claims his public defender was ineffective in his failure to file a motion to suppress evidence allegedly seized in violation of the Fourth Amendment and asserts the district court erred when it dismissed the p-c petition based on the admission of certain statements allegedly in violation of the Fifth Amendment. Petitioner argues he was improperly denied the opportunity to depose one of the officers who might have recorded the events in order to prove his allegation that the search was illegally conducted. Where petitioner's affidavit describing his version of the interaction sets forth facts that would be admissible at trial and would, if proved, entitle him to relief, the district court erred in summarily dismissing the petition. Opinion notes that the district court and the court of appeals held the seizure met the plain view exception, or alternatively, the stop and frisk exception; this is correct if the detectives' account is true, but if petitioner's account is true, the seizure does not meet either exception. For the purposes of reviewing whether failure to file a suppression motion constitutes ineffective assistance it was proper to consider the probability of success of the suppression motion, but in doing so petitioner's allegations must be taken as true. According to petitioner, some of the seized evidence was not in plain view, but was discovered in his jacket pocket and other evidence was discovered during an illegal search of the premises without consent. Opinion concludes there is an issue of material fact that requires an evidentiary hearing to prove the allegations. If the search violated the Fourth Amendment, a suppression motion could have succeeded and altered the outcome of the case. Vacated and remanded. Opinion notes that petitioner should be provided the opportunity to learn whether an audiotape does exist and what the officer may have to say regarding the interaction on the night of petitioner's arrest.

Citation: 08.2 ISCR 57

Docket: 34353

Other Citations: 177 P3d 362

LINDA ELAINE SCHWARTZ v. STATE OF IDAHO

Published: 1/29/2008

Post-conviction relief - ineffective assistance of prior p-c counsel - equitable tolling of statute of limitation claim. Opinion addresses petitioner's assertion that her letter to the district court should be treated as an initial, timely application for p-c relief and her application almost three years later treated as a successive application. Opinion addresses her assertion that her appointed counsel's ineffective assistance prevented her from timely filing an initial application. Opinion notes that petitioner and her appointed counsel did not object when the district court failed to open a separate civil case after receiving the letter that petitioner now asserts was an initial application for p-c relief and further notes that petitioner's asserted failure to understand her guilty plea could not be considered as an application. Opinion concludes that the letter's substance did not provide basis to be treated as an initial application. Opinion holds that petitioner's allegation of ineffective assistance of p-c counsel, even if true, does not entitle her to have the letter treated as her initial application and even if it was, petitioner did not demonstrate that her successive application was timely filed. Opinion concludes that a delay of almost twelve months was too long to be reasonable. Summary dismissal of application is affirmed.

Citation: 08.3 ICAR 127

Docket: 33326

Other Citations: 177 P3d 400

ROBIN ROW v. STATE OF IDAHO

Published: 1/25/2008

Post-conviction relief - alleged new evidence - aggravated arson - capital murder, three counts. Appeal from dismissal of a successive petition contends that the state wrongfully withheld information that a deputy prosecuting attorney and a sheriff's detective were present at the residence of petitioner's friend when she recorded a telephone conversation with Row. Opinion addresses petitioner's argument and facts and concludes that the alleged new evidence was available prior to trial in the detective's report. Appeal dismissed pursuant to I.C. § 19-2719(5)(a). Opinion also concludes that the evidence allegedly wrongfully withheld was not material because Row knew prior to trial that her friend was cooperating with law enforcement to obtain incriminating statements and that the friend had lied at the detective's request and had followed the detective's instructions. Opinion concludes that evidence that law enforcement were present during the recorded phone call has no significance where the result of the trial or sentencing would not have been different. Appeal dismissed.

Citation: 08.3 ISCR 81

Docket: 31962

Other Citations: 177 P3d 382

STEVEN E. THOMAS v. STATE OF IDAHO

Published: 2/28/2008

Post-conviction relief - ineffective assistance claims - failure to communicate - first degree arson - corpus delicti requirement. Petitioner was found guilty of arson after a woman from an escort service cooperated with police to obtain a video of his confession to her and this evidence was admitted at trial. Opinion addresses but rejects petitioner's claim that, if his trial attorney would have communicated with him the attorney would have interviewed various witnesses, more aggressively cross-examined the escort, hired an investigator, and filed various motions. Opinion addresses petitioner's claims that it was improper for his finding of guilt to stand on his confession alone and that there was no corroborating evidence introduced at trial. Appeal asserts that trial and appellate attorneys performed deficiently by failing to argue that the corpus delicti rule in arson cases requires proof that the fire is of incendiary origin. Opinion notes that there was evidence of a fire, there was evidence that the fire occurred in a period when petitioner was the sole occupant of the home, and the fire investigator testified that petitioner's confession about how he started the fire was consistent with the physical evidence. Claims based on the attorney's failure to file a motion to dismiss and failure to appeal the sufficiency of the evidence were properly denied. Absent a demonstration of prejudice to petitioner, the dismissal of the p-c application is affirmed.

Citation: 08.5 ICAR 238

Docket: 33356

Other Citations: 185 P3d 921

DEREK W. HAYES v. STATE OF IDAHO

Published: 2/27/2008

Post-conviction relief - ineffective assistance claims - vacated restitution order cures ineffective assistance claim. Appeal from summary dismissal of petition. In a previous opinion reported at 06.12 ICAR 579, the case was remanded on two ineffective assistance claims. On remand, the state's offer to stipulate with petitioner to vacate

the restitution order was refused. The state's subsequent motion to vacate the restitution was granted. The district court found deficient performance, but held that because the restitution had been eliminated, petitioner had not been prejudiced by his attorney's error and dismissed. Appeal argues that because petitioner was not informed before pleading guilty that restitution could be imposed, the district court should have permitted him to withdraw the guilty plea rather than merely striking the restitution order. Opinion discusses the procedural posture of this case and concludes that with the restitution extinguished, any prejudice that may have existed has been purged. Affirmed.

Citation: 08.5 ICAR 234

Docket: 33451

GERALD ROSS PIZZUTO, JR. v. STATE OF IDAHO - SUBSTITUTE O...

Published: 2/22/2008

Post-conviction relief - fifth petition - claim of mental retardation in capital murder case - reasonable time standard for filing successive petition. Petitioner challenged the death sentence following the U.S. Supreme Court decision in *Atkins v. Virginia* on the ground that he was mentally retarded. The substitute opinion replaces that reported at 07.24 ISCR 928 and clarifies that the district court's finding of defendant's low intelligence as an aggravating factor rather than a mitigating factor is not grounds for disqualification of the judge. The substitute opinion addresses and clarifies the disposition of defendant's motions to disqualify the judge for cause in Section III, B of the opinion. Affirmed.

Citation: 08.5 ISCR 213

Docket: 32679

SCOTT LEE LINT v. STATE OF IDAHO

Published: 3/6/2008

Post-conviction relief - manufacturing methamphetamine - ineffective assistance claims - search and seizure issues. At issue is evidence found in a shed on leased property which defendant kept locked and which was entered when the lessee gave police permission to "check the property." Opinion upholds the summary dismissal of petitioner's due process claims on the basis that they were conclusory allegations, unsubstantiated by fact. Opinion upholds dismissal of the deficient performance claim based on counsel's failure to file a motion to compel discovery. Opinion examines whether petitioner would have succeeded on a motion to suppress the evidence discovered during the search of the shed. Petitioner's averment that he had a verbal contract with the lessee to occupy the shed and the fact that he locked the shed and kept his belongings inside may have given him a reasonable expectation of privacy in the shed. Counsel should have identified defendant's custody and control of the shed as the critical factual determination, and counsel had a duty to conduct inquiry into defendant's right to use the shed. Opinion addresses the state's argument that the lessee possessed apparent authority to consent to a search of the shed and examines evidence of consent. Opinion concludes that issues of fact exist material to the determination of whether defendant would have succeeded on a motion to suppress; summary dismissal of the claim that counsel's failure to file a suppression motion amounted to ineffective assistance was error. The district court must reconsider whether defendant was coerced by counsel to plead guilty. Affirmed in part, reversed in part, remanded.

Citation: 08.6 ICAR 268

Docket: 33702

Other Citations: 180 P3d 511

RICHARD MATTOON v. RANDY BLADES, Warden; I.S.C.I. et al.

Published: 3/28/2008

Habeas corpus - parole revocation hearing procedure. The parole violation hearing officer found petitioner in violation of several conditions, but requested reinstatement of parole. The Commission determined a parole revocation hearing was needed. Petitioner claims he was denied due process and equal protection of the law when the Commission revoked his parole and forfeited time he had served on parole. Appeal from dismissal of petition for writ of habeas corpus examines whether the procedure employed by the Commission in revoking parole violated governing statutes and whether the decision to forfeit 2,021 days violated petitioner's equal protection rights. Opinion addresses petitioner's argument that when a parole revocation hearing is held before a hearing officer the Commission does not have the authority to review the hearing officer's decision. Opinion notes that all relevant statutes pertaining to the parole process must be considered together and concludes that nothing in the statutes supports the proposition that the duties of the Commission can be carried out solely by one member, let alone a hearing officer. Opinion concludes that nothing in the relevant IDAPA rules gives the hearing officer authority to make the decision to revoke or continue parole. Petitioner's lack of an opportunity to speak on the number of days that might be forfeited was not a due process violation. Dismissal of application for writ of habeas corpus is affirmed.

Citation: 08.7 ISCR 318

Docket: 34583

Other Citations: 181 P3d 1242

JAMES MONAHAN v. STATE OF IDAHO

Published: 4/22/2008

Post-conviction relief - unpled ineffective assistance claim. Opinion declines to address petitioner's unpled claim that defense counsel provided ineffective assistance with regard to an effort to withdraw the guilty plea. Opinion addresses arguments regarding alleged implied consent to the trial of an unpled issue. Opinion strongly discourages attempts to use a broad category as a means to raise other arguments as "part and parcel" of the general claim. Affirmed.

Citation: 08.9 ICAR 419

Docket: 32878

Other Citations: 187 P3d 1247

EUSEBIO NEVAREZ v. STATE OF IDAHO

Published: 4/30/2008

Post-conviction relief - ineffective assistance of counsel, inadequate interpretation claims. Opinion addresses, but rejects the claim that counsel unreasonably failed to preserve the issue of inadequate interpretation and the claim that poor interpretation rendered the guilty plea unknowing, involuntary, and unintelligent. Opinion discusses the state's original plea offer that defendant rejected and concludes that the terms of the original plea offer were not a part of defendant's ultimate plea agreement, and there was no breach of that agreement. Opinion addresses petitioner's arguments that counsel misrepresented the terms of the plea agreement, but concludes that the arguments are contradicted by the record that shows the trial court's clear statements that the mandatory minimum sentence for trafficking in meth would apply and where defendant proceeded with the plea. Opinion addresses the contention that counsel had an actual conflict of interest because the reason for attempting to withdraw the

plea was counsel's own failings. Dismissal of the petition is affirmed.

Citation: 08.10 ICAR 480

Docket: 33509

Other Citations: 187 P3d 1253

TIMOTHY LEONARD QUEEN v. STATE OF IDAHO

Published: 5/23/2008

Post-conviction relief - grand theft by deception - due process claim - duty of prosecution under Brady - NCIC database access. Petitioner purchased a diamond from a private contractor with a check written on a closed account. Defendant filed a discovery request asking the state to provide a list of the prior felony convictions of its potential witnesses, particularly regarding the diamond wholesaler who was the husband of the diamond retailer. When the wholesaler refused to testify at the hearing on the p-c application, petitioner and the state stipulated that this witness had two felony convictions and that neither the state nor law enforcement involved in this case had actual knowledge of the prior convictions. The district court concluded that the information was not within the knowledge or possession of the state and the failure to disclose it was not willful or inadvertent and no prejudice was shown. Appeal argues that the prior felony information was accessible by the state through a records check. The state argues petitioner is estopped from raising this issue on appeal because of the stipulation. Opinion notes that the state's disclosure duties under I.C.R. 16(b)(6) do not extend to persons called as rebuttal witnesses. Where the diamond wholesaler testified regarding the value of the diamond and whether the victim was actually responsible for the financial loss to rebut defendant's testimony, the state did not commit a discovery violation by failing to disclose the felony record. Opinion declines to treat the information contained in the NCIC database the same as a witness statement that only the police have knowledge of because the database is maintained by the FBI, not the state, and the state's access to the database is restricted to defendants charged in pending crimes. Opinion concludes that Brady does not place an affirmative duty on the state to seek out information for the defense. Order dismissing application is affirmed.

Citation: 08.11 ICAR 528

Docket: 33536

DAVID E. CURLESS v. STATE OF IDAHO

Published: 5/15/2008

Post-conviction relief - lewd conduct with a minor under sixteen - ineffective assistance claim - evidence of defendant's impotency. Appeal from order denying petition following remand and an evidentiary hearing. Opinion examines whether counsel was deficient for failing to introduce evidence of petitioner's claimed impotency and whether failure to file a timely Rule 412 notice was a prejudicial deficiency. Opinion notes that the only testimony offered was that of petitioner and his wife and difficult-to-interpret handwritten notes on petitioner's condition -- allegedly from a urologist. Where petitioner did not offer or failed to establish that there existed admissible medical evidence that he actually suffered from consistent erectile dysfunction, he has shown neither deficiency in counsel's performance nor prejudice. Opinion addresses failure to disclose evidence under Rule 412 that the two victims had been engaged in oral sex and other sexual acts with each other in a bathtub and that petitioner told the boys' mother about the incident. Opinion agrees that this testimony would have been just as likely to corroborate the boys' claims of abuse as to exonerate petitioner. Opinion discusses why there is no reasonable possibility that this evidence would have convinced the jury of petitioner's theory that the boys fabricated the story of abuse out of anger and revenge. Opinion upholds the district

court's determination that counsel's failure to give notice in order to introduce Rule 412 evidence was not prejudicial. Order denying petition is affirmed.

Citation: 08.11 ICAR 519

Docket: 33550

Other Citations: 190 P3d 914

TIMOTHY A. DUNLAP v. STATE OF IDAHO

Published: 6/10/2008

Post-conviction relief - capital case procedure - first-degree murder. Petitioner filed a successive petition for p-c relief, raising issues that the Supreme Court refused to address in Dunlap III, reported at 04.24 ISCR 926. Petitioner appeals from summary dismissal. Opinion notes that the district court has jurisdiction over all post-conviction claims, regardless if the petitioner has been sentenced to death; the district court properly waited for petitioner's re-sentencing prior to making a ruling because there were alternative theories for dismissal contingent on the applicable statutory framework. Where petitioner challenges facts surrounding his 1991 guilty plea and where these facts were known at the time of his original petition, the Supreme Court is without statutory authority to consider the claims. The district court's findings that the petition is untimely are affirmed. Opinion declines to address whether petitioner's attorney was without authority to waive any issues that were not raised in his original petition because the issue of agency authority is being raised for the first time on appeal. Affirmed.

Citation: 08.12 ISCR 585

Docket: 33061

Other Citations: 192 P3d 1021

DAVID WILLIAM HOOTS v. OLIVIA CRAVEN - SUBSTITUTE OPINION

Published: 6/6/2008

Petition for writ of habeas corpus - parole revocation. The pro se petition asserted that petitioner was illegally imprisoned by the improper use of pending criminal charges that were later dismissed. The substitute opinion replaces that reported at 08.6 ICAR 272 and clarifies that the decision to revoke parole was based on conduct unrelated to pending criminal charges. Affirmed.

Citation: 08.12 ICAR 604

Docket: 33327

Other Citations: 192 P3d 1095

DARRELL EUGENE MC CABE v. OLIVIA CRAVEN et al. - ON REVIEW

Published: 6/12/2008

Wrongful imprisonment - state tort claim - federal civil rights claim - credit for time served prior to sentencing - equitable tolling of statute of limitations. Plaintiff's complaint alleged he was wrongfully imprisoned for 228 days. Appeal from summary dismissal based on the running of the statute of limitations. On review of a Court of Appeals decision reported at 07.9 ICAR 382, the opinion discusses the accrual of this cause of action and concludes the § 1983 claim was timely, and consists of the entire period of false imprisonment, not just the last day of false imprisonment as the Court of Appeals held. Vacated and remanded.

Citation: 08.13 ISCR 648

Docket: 34451

Other Citations: 188 P3d 896

TODD ROBERT BRIGGS v. WARDEN KEVIN KEMPF, ICI-O et al.

Published: 7/31/2008

Prisoner civil rights complaint. Petitioner was placed in detention following a failed escape attempt and later placed in administrative segregation following release from detention due to the ongoing escape risk. Petitioner's civil rights complaint for damages alleged he was deprived of his personal property and the privileges ordinarily afforded to inmates in administrative segregation status. Appeal from order on intermediate appeal affirming the magistrate's grant of summary judgment and dismissing the complaint. Opinion conducts a due process analysis regarding the 58 days following petitioner's release to administrative segregation status during which he was held in the same disciplinary detention cell, and denied the personal property and privileges associated with administrative segregation. The state concedes that petitioner was denied weekly placement reviews, documentation, and privileges provided for in prison directives, but petitioner has not shown that the denial was an atypical or significant hardship when compared to normal prison life. Petitioner failed to demonstrate the violation of a protected liberty interest. Opinion concludes that the loss of special shoes, clothing, and entertainment was not an atypical and significant hardship. Affirmed.

Citation: 08.16 ICAR 882

Docket: 34394

Other Citations: 191 P3d 250

LEE A. RIDGLEY v. STATE OF IDAHO

Published: 8/6/2008

Post-conviction relief - severe grief, depression as factors in rational guilty plea decision. Appeal from summary dismissal. Defendant was convicted on a guilty plea of lewd and lascivious conduct with a minor, his twelve-year-old stepdaughter. Opinion notes that petitioner's wife had died two days before his arrest. Appeal asserts that at the time of his guilty plea, petitioner was emotionally distraught, suffering from severe depression and grief over his wife's sudden death, and in a state of emotional shut-down and confusion, but that his defense attorney did not recognize that his emotional condition made impossible a rational decision whether to plead guilty. Opinion discusses the facts of the circumstances at the time of the plea and evidence of petitioner's emotional condition. Opinion concludes that petitioner's evidence is sufficient to raise a genuine issue of fact regarding his emotional state and the competence of the lawyer's representation. Summary dismissal reversed as to allegations that counsel's failure to request a mental evaluation or otherwise ensure that the plea decision was not the product of severe depression or emotional breakdown was ineffective performance. Dismissal of other claims of ineffective assistance are affirmed.

Citation: 08.17 ICAR 905

Docket: 33782

SHEY MARIE SCHOGER v. STATE OF IDAHO

Published: 8/26/2008

Post-conviction relief - ineffective assistance claim - drug trafficking - rejection of Alford plea. Police executing a search warrant for the residence of petitioner and her boyfriend found substantial quantities of illegal drugs. The district court refused to

accept petitioner's guilty plea as part of a plea agreement when plaintiff did not admit to the quantity of drugs she possessed and the case proceeded to trial resulting in sentencing more severe than what had been offered in the plea agreement. Appeal alleges that petitioner asserted a claim that the district court erred in refusing to accept her guilty plea, but the opinion addresses the claim only within the context of petitioner's ineffective assistance claims. Opinion discusses the performance of trial counsel and petitioner's assertion that, with proper knowledge of the elements of constructive possession, she would have informed the court that she had the requisite intent to exercise control over the drugs round in the residence. Opinion concludes petitioner raised an inference that she would have admitted to constructive possession had she understood the legal concept and the district court erred in determining that she failed to show prejudice resulting from trial counsel's deficient performance. Case remanded for an evidentiary hearing on this issue. Opinion next addresses claims that appellate counsel provided ineffective assistance by failing to challenge the rejection of the attempt to enter an Alford plea and discusses the trial court's discretion to accept or reject such a plea. Opinion concludes that absent favorable Idaho precedent, appellate counsel did not perform deficiently in failing to recognize and raise this issue of first impression on appeal. Where the district court recognized its discretionary authority to accept or reject the plea and where it expressed concern about the voluntariness of the plea because defendant continued to look to counsel throughout the plea colloquy for answers, an appellate court was very likely to defer to the district court's decision not to accept the Alford plea. Affirmed in part, reversed in part, remanded.

Citation: 08.18 ICAR 965

Docket: 33976

Miscellaneous

UNITED STATES OF AMERICA v. DOUGLAS SHARP

Published: 1/25/2008

Certified question of law: Does an outstanding withheld judgment based on a guilty plea qualify as a conviction under Idaho law? - State v. Cliett overruled. A felony burglary case in which defendant received a withheld judgment in Idaho is the predicate felony for a federal firearm possession charge. Opinion discusses the meaning of the term "conviction." Opinion overrules State v. Cliett insofar as it interpreted State v. Barwick as implicitly holding that there must be a judgment in order for there to be a conviction. Opinion clarifies that Barwick only stands for the proposition that when a judgment, sentence, and conviction were vacated apparently for some error, the defendant does not have a conviction. Opinion concludes that an outstanding withheld judgment based on a guilty plea qualifies as a conviction under Idaho law.

Citation: 08.3 ISCR 84

Docket: 34092

Other Citations: 179 P3d 1059

STATE OF IDAHO v. MYRON DALE LOOMIS, JR

Published: 2/6/2008

Aggravated assault - appealability of self-defense determination at preliminary hearing - applicability of Ruiz. After the preliminary hearing the magistrate dismissed the case, finding that defendant's actions were justified by self-defense. On the state's appeal, the district court remanded the case for reconsideration of its probable cause

determination and defendant appeals. Opinion discusses as a threshold issue, the applicability of the holding in State v. Ruiz that a dismissal following a preliminary hearing is not appealable when the state can refile the case and go before a different magistrate. Opinion discusses Justice Bakes' dissent in Ruiz wherein he proposed two options for the state when a complaint is dismissed at the preliminary hearing state as well as other consequences of requiring refiling. Opinion discusses the issue of raising affirmative defenses during a preliminary hearing and whether or how the magistrate should consider that evidence. Opinion concludes that the state's appeal from the magistrate's dismissal of the complaint following a preliminary hearing was not authorized under I.C.R. 54.1(c) and the state's appeal to the district court should have been dismissed. Order remanding the case for a probable cause redetermination is vacated. The state's remedy is to refile before a different judge.

Citation: 08.4 ICAR 191

Docket: 33978

STATE OF IDAHO v. JAMES H. KIMBALL, JR.

Published: 3/28/2008

Sex Offender Registry - petition for removal - degree of risk to reoffend. The district court found defendant represented virtually no risk of reoffense, but felt constrained to deny his petition for registry removal based upon the interpretation of I.C. § 18-8310 in State v. Knapp, and the failure of the psychosexual evaluation to say that defendant posed "no risk" of reoffending. Opinion clarifies application of I.C. § 18-8310 noting that the statute requires evidence that the offender is "not a risk" to reoffend, not that he poses no risk. Opinion notes that practice standards for certified psychosexual evaluators forbid them from stating that a client is cured or no longer at any risk to reoffend. Opinion concludes the district court is required to make an independent evaluation of the evidence of risk, in which a psychosexual evaluator's opinion plays an important, but not exclusive, part. Vacated and remanded.

Citation: 08.7 ISCR 316

Docket: 33673

Other Citations: 181 P3d 468

IN THE MATTER OF KATHLEEN J. ELLIOTT / STATE OF IDAHO v. ...

Published: 3/28/2008

Criminal contempt - defense attorney. Case concerns contempt sanctions against a criminal defense attorney who relied on a district court's order that she believed allowed her to select among several options to meet prosecution's request for information on anticipated testimony of a potential defense witness. Opinion discusses why the summary adjudication of contempt was inappropriate absent evidence of willful disobedience. Opinion concludes that this controversy resulted from a mutual misunderstanding of the court's order and vacates the finding of contempt. Chief Justice Eismann writes a concurring opinion to discuss the requirement that the judge have personal knowledge of the conduct constituting contempt. Justice Horton's concurring opinion discusses the judge's written order and its unambiguous requirements.

Citation: 08.7 ISCR 327

Docket: 32265

Other Citations: 181 P3d 480

STATE OF IDAHO v. RAUDEL SALAZAR-GARCIA

Published: 4/17/2008

Plea withdrawal - grand theft - livestock valuation element. Defendant was charged for stealing a day-old calf from his employer. The magistrate held that theft of livestock of any value constituted grand theft, so the state did not have to prove a value. The district court denied defendant's motion for withdrawal of the guilty plea, agreeing with the magistrate's interpretation of I.C. § 18-2407(1)(b)(7). Opinion notes that the value element was critical and defendant was affirmatively misinformed about this element and noting was done to correct this misinformation. Defendant's pro forma answer to a valuation question that he regarded to be irrelevant was not a knowing and intentional admission of a critical element of the offense. Where neither the defendant, his counsel, nor the court correctly understood the essential elements of the crime, a guilty plea is constitutionally invalid. Order denying defendant's motion to withdraw his guilty plea is reversed. Case remanded.

Citation: 08.9 ICAR 418

Docket: 33893

Other Citations: 183 P3d 778

STATE OF IDAHO v. JACK K. COOK

Published: 5/20/2008

Infamous crime against nature, fellatio - constitutional challenge of I.C. § 18-6605 as applied. Defendant performed fellatio on a male adult with Down's Syndrome, in the sauna at a local gym. Defendant entered a conditional guilty plea and now appeals from the denial of his motion to dismiss. The state argues that the conduct was not consensual. Opinion reviews the amended information to which defendant plead guilty and examines the entire record to determine whether the conduct is constitutionally protected. Opinion finds support from the record demonstrating that the other male was unable to consent or did not consent and that the conduct occurred in public. The district court's order upholding the constitutionality of I.C. § 18-6605 as applied to defendant and denying defendant's motion to dismiss is affirmed.

Citation: 08.11 ICAR 522

Docket: 33775

Other Citations: 192 P3d 1085

STATE OF IDAHO v. BENJAMIN SAVAGE

Published: 5/13/2008

Unlawful transportation of an alcoholic beverage - jurisdiction - appellate procedure - permissive appeal of magistrate's interlocutory order. During a traffic stop to serve defendant with a domestic protection order, police discovered a cup with alcoholic beverage in the console of defendant's truck. Defendant's suppression motion was denied and on an interlocutory permissive appeal of the magistrate's denial, the district court affirmed the magistrate. Defendant elected to proceed on remand to the magistrate in defense of the charge and in a written plea agreement reserved the right to appeal the order denying his motion to suppress. After the magistrate imposed a fine defendant filed a notice of appeal in the magistrate court stating he was appealing directly to the Idaho Supreme Court. Opinion discusses the application of I.A.R. 21 and concludes that defendant did not file a notice of appeal challenging the magistrate's order and the district court's affirmation within the prescribed forty-two day period. Opinion discusses interpretation of I.A.R. 11(c)(7) and concludes that it and I.C.R. 54.1(d) do not render I.A.R. 11(c)(10) ambiguous. Defendant's failure to file a notice of appeal within forty-two days from the district court's appellate decision was jurisdictional and requires automatic dismissal of appeal. Opinion declines to remand

the case to the district court. Dismissed.

Citation: 08.11 ICAR 515

Docket: 34086

Other Citations: 185 P3d 268

STATE OF IDAHO v. GERMAN CASTRO and STEVEN ELLEFSON dba B...

Published: 6/23/2008

Bail bond forfeiture - discrepancy in case number. Case concerns a discrepancy between the case number provided by jail personnel and that on the forfeited bond. Bail bond company appeals from the order denying a motion to set aside forfeiture, dismiss the action, or in the alternative exonerate bond. Appeal claims there was no actual valid bond agreement where the case number on the bond did not match the copy in the bond company's possession. Opinion looks to the surrounding circumstances and concludes the parties intended to enter into the bond agreement. The fact that the case number was initially incorrectly designated and later altered on the court's copy, will not result in the bond being invalid and unenforceable where the intent of the parties was clear. Opinion discusses the sufficiency of notice of forfeiture that listed a different case number than the company's records and concludes the notice contained sufficient information to identify which bond was at issue. Denial of motion to exonerate bond is affirmed.

Citation: 08.14 ICAR 750

Docket: 33622

Other Citations: 188 P3d 935

STATE OF IDAHO v. JANE DOE

Published: 9/25/2008

Curfew - judicial notice of local ordinances. Appellant was the subject of a petition filed by the state under the Juvenile Corrections Act that alleged a violation of the Caldwell City Code regarding curfew. Appeal challenges the grounds found by the district court to support the magistrate's decision to take judicial notice of the Caldwell City Code. Where the City Code provision was generally known within the territorial jurisdiction of the court and was readily capable of accurate determination, the magistrate did not abuse its discretion by taking judicial notice of the ordinance. Affirmed.

Citation: 08.20 ICAR 1027

Docket: 34766

EVAN EDWARD MORGAN, JR. v. SEXUAL OFFENDER CLASSIFICATION...

Published: 11/14/2008

Violent sexual predator (VSP) designation. Appeal from order affirming the Sexual Offender Classification Board's designation. Opinion notes that the charged conduct related to inappropriate touching of a five-year-old girl and also notes petitioner was and is confined to a wheelchair and lacks feeling below his waist. Appeal asserts that it was error to deny petitioner access to the documents used by the board to make the VSP designation, noting petitioner did receive a summary of the information used in calculating the designation. Opinion examines whether the district court complied with the guidelines in I.C. § 18-8321 in determining what information to release to petitioner. Opinion concludes there was no error in denying access to the complete file. Opinion discusses why it rejects petitioner's assertion that, because of his physical condition, he should not be designated as a VSP. Affirmed.

Citation: 08.24 ICAR 1165

Docket: 34851

