

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

STATE OF IDAHO,)	
)	
Plaintiff,)	
)	
-vs-)	CASE NO. CR-01-01738
)	
CLARENCE HAROLD CAMPBELL,)	
)	
Defendant.)	ORDER DENYING
<hr/>)	MOTIONS IN LIMINE
)	
STATE OF IDAHO,)	
)	
Plaintiff,)	
)	
-vs-)	CASE NO. CR-01-02094
)	
MICHAEL L. MORRIS,)	
)	
Defendant.)	
<hr/>)	
)	
STATE OF IDAHO,)	
)	
Plaintiff,)	
)	
-vs-)	CASE NO. CR-01-01740
)	
FRANK HART WAKELEY, JR.)	
)	
Defendant.)	
<hr/>)	

Defendants in each of the above-entitled cases are charged with Driving Under the Influence of Alcohol, a violation of Idaho Code 18-8004. Defendants have each filed

Motions in Limine seeking to exclude Alco-Sensor III-A BAC test results from evidence at trial. The Defendants' BAC test result printouts were admitted in each case as Exhibit A, copies of which are attached hereto as Exhibit A, pages 1 – 3. Those test results were as follows:

.158, .166—Clarence Harold Campbell in Case No., CR-01-01738

.198, .195—Michael L. Morris in Case No. CR-01-02094

.121, .112—Frank Wakeley, Jr. in Case No. CR-01-01740

Defendants' Motions in Limine were heard January 2, 2002. Defendants were all represented by counsel Fred Palmer. The State was represented by Bonner County Deputy Prosecuting Attorney Roger Hanlon. Defendants Motions In Limine assert as follows:

- (1) the Idaho State Police failed to either properly approve the Alco-Sensor III-A for evidentiary use at trial or have not established a record capable of judicial review to determine proper approval, and
- (2) the underlying statutory and regulatory authority, specifically, Idaho Code 18-8004(4), violates the doctrine of separation of powers because it seeks to regulate the admission of evidence in an Idaho court.

Validity of Procedures Used by Idaho Department of Law Enforcement to Approve Alco-Sensor III-A

Defendants assert that the Idaho Department of Law Enforcement either has failed to approve the Alco-Sensor III-A¹ or has failed to maintain an adequate record by which a court may verify any approval.

¹ Mr. Hanlon noted at the hearing that the Alco-Sensor III-A is distinguished from an Alco-Sensor III in that the Alco-Sensor III-A is equipped with a printer. Otherwise, Mr. Hanlon states that the instruments are identical.

The Idaho legislature has given the Idaho Department of Law Enforcement the authority to approve evidentiary testing devices for analysis for blood alcohol concentration. Idaho Code 18-8004(4) states:

For purposes of this chapter, an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath or sixty (67) milliliters of urine. Analysis of blood, urine, or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho department of law enforcement or by a laboratory approved by the Idaho department of law enforcement or by the Idaho department of law enforcement under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho department of law enforcement.

Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho department of law enforcement or by any other method approved by the Idaho department of law enforcement shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

The State asserts that it can demonstrate approval because the department has approved any instrument appearing on the “Conforming Products list of Evidential Breath Measurement Devices” published in the Federal Register by the United States Department of Transportation. The State directs this court’s attention to IDAPA 11.03.01 of the 1998 Idaho Administrative Code, Section 013, a copy of which is attached hereto as Exhibit B, and which provides in pertinent part as follows:

013. Requirements for Performing Breath Alcohol Testing.

01. Instruments. Breath testing instruments shall either have been approved by the department or shall be listed in the “Conforming Products List of Evidential Breath Measurement Devices” published in the Federal Register by the United States Department of Transportation, or appear in the list’s successor whatever its current name may be.

The State notes that in **Trautman v. Hill, 116 Idaho 337, 775 P.2d 651 (Ct.App. 1989)**, which was an action by a landlord seeking to enforce a rent escalator clause in a commercial lease, the Court of Appeals took judicial notice of official reports of the federal government, specifically, the Consumer Price Index published by the Bureau of Labor Statistics, United States Department of Labor, in upholding provisions of the lease. The State in this case contends by analogy that this court can take judicial notice of, and the Department of law enforcement was not remiss in relying upon, the “Conforming Product List of Evidential Breath Measurement Devices” approved by the National Highway Traffic Safety Administration of the United States Department of Transportation as published in Vol. 65, No. 141 of the Federal Register, on July 21, 2000. A copy of the pertinent portion of that publication is attached hereto as Exhibit C.

Defendants’ response to the State’s argument is set forth in their Brief; it is as follows:

Unsigned memoranda and/or automatic approval through listing in the “Conforming Products List of Evidentiary Breath Measurement Devices” (ADAPA 11.03.01.013.01) are insufficient. The ISP needs to explain why, when and how it has decided to approve the Alco-Sensor III. Documented evidence of formal procedural action would satisfactorily establish approval. **State v. Carver, Kootenai County Case No. CRF-00-81666** (issued November 5, 2001, by the Hon. Charles W. Hosack, District Judge).

In **Carver**, in response to the Defendant’s Motion in Limine seeking to exclude the BAC test results from an Alco-Sensor III in a felony DUI case, the State presented two unsigned memoranda from the Bureau of Forensic Services of the Idaho Department of Law Enforcement. Judge Hosack determined that the unsigned memoranda were insufficient to prove Department of Law Enforcement approval and granted the Defendant’s Motion in Limine. Although Judge Hosack mentioned the “Conforming

Products List of Evidential Breath Measurement Devices” in passing, he did not analyze the sufficiency of agency approval on that basis.

Judge Hosack’s decision included dicta about the Alco-Sensor III that is inconsistent with this Court’s experience with the Alco-Sensor III over the past several years. Judge Hosack referred to the Alco-Sensor III as a “preliminary” breath-testing device, and this Court’s experience is that the Alco-Sensor III has been used by a number of officers in various law enforcement agencies in Bonner County over the last several years as an evidentiary testing device. The widespread use as an evidentiary testing device in Bonner County is evidenced by use by the citing officers in these three cases, that is, three different officers from two different agencies used the Alco-Sensor III-A as an evidentiary testing device, namely, Troopers Chris Yount and Kevin Bennett of the Idaho State Police in Case Nos. CR-01-02094 and CR-01-01740 and Deputy Clint Mattingly of the Bonner County Sheriff’s Office in Case No. CR-01-01738.

Judge Hosack compared the Alco-Sensor III as a “preliminary testing device” to “laboratory type equipment, such as the Intoximeter 3000 and the Intoxilyzer 5000.” Specifically, Judge Hosack stated at page 7 of his decision that “[t]here may be a trend over time towards acceptance of preliminary breath testing devices, including the Alco-Sensor III, in place of laboratory type equipment, such as the Intoximeter 3000 and the Intoxilyzer 5000.” However, this Court determines that the essential difference is the mobility of the instruments, that is, the Intoximeter 3000 and Intoxilyzer 5000 are relatively large and stationary, and the Alco-Sensor III is relatively small and mobile. The State must still lay adequate foundation for the admissibility of the Alco-Sensor III test results, such as the 15-minute waiting period and notice of the 18-8002 form.

Defendant cites **United States v. Iron Cloud**, 171 F.3d 587 (8th Cir. 1999) as authority for the unreliability of portable or preliminary breath testing devices. The Eighth Circuit Court of Appeals in that case determined that the State had failed to establish the reliability of the instrument (which was not specifically identified) according to the **Daubert** standard. **Iron Cloud** cited a number of cases which likewise questioned the reliability of preliminary breath testing devices; again, the specific instruments were not identified in several of those cases. At least some of those cases addressed operator-induced factors of use of the instrument in the field, and not necessarily the particular instrument itself. However, at least in Idaho in this Court's view, the foundation for admissibility is the same whether the instrument is mobile and the test is administered in the field or whether the instrument is stationary and the test is administered at a police station.

So the issue presented in these cases is whether the Department of Law Enforcement can rely upon approval of the Alco-Sensor III and III-A by the United States Department of Transportation as published in the Federal Register, Vol. 65, No. 141, p. 45419. The Department clearly has the statutory authority to do so. Idaho Code 18-8004(4) states that approval may be "by any other method approved by the Idaho department of law enforcement." Idaho Code 18-8002A(3) gives the Department rule-making authority to prescribe "what testing is required to complete evidentiary testing" and "what calibration or checking of testing equipment must be performed to comply with the department's requirements." The Department, by regulation, a copy of which is attached as Exhibit B, has approved all breath testing instruments listed in the "Conforming Products List of Evidential Breath Measurement Devices" published in the Federal Register by the United

States Department of Transportation. The Defendants in these cases have asserted no irregularity in the adoption of that regulation.

The Notice published July 21, 2000 by the United States Department of Transportation at **65 FR 45419**, a copy of which is attached as Exhibit C, states in pertinent part:

Supplementary Information: On November 5, 1973, the National Highway Traffic Safety Administration (NHTSA) published the Standards for Devices to Measure Breath Alcohol (*38 FR 30459*). A Qualified Products List of Evidential Breath Measurement Devices comprised of instruments that met this standard was first issued on November 21, 1974 (*39 FR 41399*).

On December 14, 1984 (*49 FR 48854*), NHTSA converted this standard to Model Specifications for Evidential Breath Testing Devices, and published a Conforming Products List (CPL) of instruments that were found to conform to the Model Specifications as Appendix D to that notice (*49 FR 48864*).

On September 17, 1993, NHTSA published a notice (*58 FR 48705*) to amend the Model Specifications. The notice changed the alcohol concentration levels at which instruments are evaluated, from 0.000, 0.050, 0.101, and 0.151 BAC, to 0.000, 0.020, 0.040, 0.080, and 0.160 BAC; added a test for the presence of acetone; and expanded the definition of alcohol to include other low molecular weight alcohols including methyl or isopropyl. On June 4, 1999, the most recent amendment to the Conforming Products List (CPL) was published (*64 FR 30097*), identifying those instruments found to conform with the Model Specifications.

Since the last publication of the CPL, two (2) instruments have been evaluated and found to meet the model specifications, as amended on September 17, 1993, for mobile and non-mobile use. They are: (1) Intoxilyzer 400PA manufactured by CMI, Inc. of Owensboro, KY. This device is a hand-held breath tester with a fuel cell alcohol sensor. (2) Alco Sensor IV-XL manufactured by Intoximeters, Inc. of St. Louis, MO. This device is a hand-held breath tester with a fuel cell alcohol sensor that is microprocessor controlled. It is designed to minimize operator involvement in performing the test and processing the test data.

The CPL has been amended to add these two instruments to the list.

In accordance with the foregoing, the CPL is therefore amended, as set forth below.

It is undisputed that the Alco-Sensor III and III-A are on the Conforming Products List published in **65 FR 45419**.

The standard adopted by the Idaho Department of Law Enforcement by incorporating all instruments listed in the Conforming Products List is readily reviewable; it is the Model Specifications for Devices to Measure Breath Alcohol which are published at **58 Federal Register 48705**. A copy of that publication is attached hereto as Exhibit D.

Finally, it is important to note that before the Alco-Sensor III-A test results can be admitted under Idaho Code 18-8004(4), the State must not only show that the instrument was approved by the Department, but also that the equipment was operated and the test administered in conformity with the Department's standards. Idaho Code 18-8004(4) creates a rebuttable presumption that the instrument and test procedures are valid and reliable. However, any Defendant may question accuracy or reliability. That is, any Defendant may seek exclusion of the test results by presenting evidence of unreliability. *See State v. Nickerson, 132 Idaho 406, 411, 973 P.2d 758 (Ct. App. 1999)*.

In conclusion, this Court determines that the Idaho Department of Law Enforcement has both approved the Alco-Sensor III-A and that an adequate record exists by which this Court can verify its approval. Defendants' Motions in Limine on these grounds is denied.

Separation of Powers

Defendants argue that the effect of interpreting Idaho Code 18-8004(4) "so as not to require a sufficient record of ISP actions taken in approving the Alco-Sensor III-A...would be to allow the Idaho Legislature to grant unfettered discretion to the ISP to select testing devices admissible in trial without foundation." Defendants submit this constitutes an unconstitutional delegation of judicial power by the legislature.

Initially, this Court has determined that there is a sufficient record of agency approval. Moreover, Idaho appellate authority is dispositive of this issue. The separation of powers issue was first addressed by the Idaho Court of Appeals in **State v. Van Sickle, 120 Idaho 99, 813 P.2d 910 (Ct. App. 1991)**, which involved admissibility of breath test results of an Intoximeter 3000. Therein, the Court of Appeals noted that Rule 901(b)(10) of the Idaho Rules of Evidence provides alternative means by which foundational requirements may be met, namely through “any method of authentication or identification provided by Supreme Court rule *or by a statute* or as provided in the Constitution of this State.” The **Van Sickle** court then recognized Idaho Code 18-8004(4) as such a statutory method. Similarly, in **State v. Nickerson, 132 Idaho 406, 973 P.2d 758 (Ct.App. 1999)**, involving the admissibility of breath test results of an Intoxilyzer 5000, the Court of Appeals held that Idaho Code 18-8004(4) does not conflict with Rule 1102 of the Idaho Rules of Evidence, which states that that statutory provisions governing admissibility of evidence are of no force or effect to the extent they contradict the Rules of Evidence.

The **Nickerson** court stated at 132 Idaho at 410, 411:

In our view, contrary to Nickerson’s assertion, IC 18-8004(4) does not eliminate the foundation requirement for the admission of evidence, but, rather, specifies one means by which the necessary foundation may be established for alcohol concentration tests. The statute provides that a foundation may be laid by evidence that the testing procedure was a “method approved by the Idaho department of law enforcement.” The Idaho courts have long approved use of this statutory mode of laying a foundation. *See, e.g., State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct.App. 1988); *State v. Hartwig*, 112 Idaho 370, 374-375, 732 P.2d 339, 343-344 (Ct.App. 1987). To gain admission of a test result, the prosecution may provide a foundation consisting of *either* expert testimony *or* by a showing that the test was administered by a method approved by the Department of law Enforcement and in conformity with the Department’s approved procedure. *Bell*, 115 Idaho at 39-40, 764 P.2d at 116-117.

Finally, Judge Hosack in **Carver, supra**, found Idaho Code 18-8004(4) to be constitutional. Judge Hosack noted at page 5 of his decision that “[i]ndeed, the defendant in his briefing concedes that the trial court would have to disregard established Idaho appellate cases if it were not to enforce the statute.”

This Court likewise determines that there exists no conflict between the statute and the rules which would render the statute unconstitutional.

NOW, THEREFORE,

IT IS HEREBY ORDERED that Defendants’ Motion in Limine is denied.

DATED: January 22, 2002.

Debra A. Heise

I hereby certify that a true and correct copy of the foregoing ORDER was mailed/faxed this ____ day of _____, 2002, as follows:

Mr. Roger Hanlon
Deputy Prosecuting Attorney
Courthouse Mailbox

Mr. Fred Palmer
Attorney at Law
106 West Superior Street
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Secretary/Deputy Clerk