

# FOR THE ROAD

*Idaho Prosecuting Attorneys Association*



## COLLECTING ORAL FLUID EVIDENCE IN DRUGGED DRIVING CASES

By Phil Rennick, California TSRP and Janette Flintoft, Deputy LA City Attorney

The detection and prosecution of drugged drivers continues to present challenges for criminal justice practitioners across the United States as the incidence of drug impaired driving escalates. Unlike alcohol, the effect of drugs on the human body is not as predictable. Different drugs target different parts of the brain, the effects of which can vary significantly among users depending on dosage amounts. Adding to these challenges are new synthetic drugs appearing daily that thwart efforts to render them illegal and are typically not detectable in most criminal labs. The issue is further complicated by the varying approaches nationally to drugged driving enforcement protocols and impaired driving laws - rendering it difficult to establish uniform best practices.

As jurisdictions across the country struggle with how to address the rising number of

drugged drivers on the road and their associated challenges, new evidentiary tools involving oral fluid collection have the potential to assist law enforcement and prosecutors in their public safety missions. In California, where the Drug Recognition Expert (DRE) program originated, the City of Los Angeles began in November 2012 to utilize oral fluid for driving under the influence (DUID) cases. The results are measurable: cases filed with oral fluid evidence are pleading out earlier with this additional evidence, which is available at the time of filing, contrasted with cases awaiting blood test results from the lab. While no matter has yet to proceed to an actual trial, Los Angeles city prosecutors intend to seek to admit oral fluid into evidence and are ready to overcome anticipated challenges on this front.

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## Oral Fluid Evidence in Drugged Driving Cases . . . Continued from Page 1

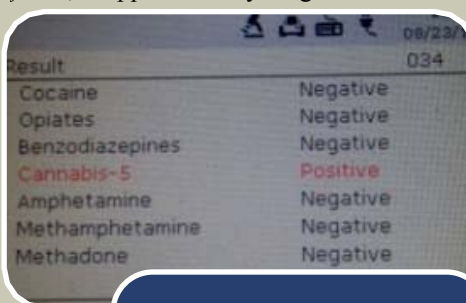
### Expanding Use of Oral Fluid Testing

Other jurisdictions are taking note of oral fluid as an evidentiary tool. Representatives from Tennessee, Idaho, and Louisiana have participated in recent site visits to Los Angeles to observe oral fluid collection by law enforcement officers. Through the assistance of the California Office of Traffic Safety, oral fluid collection will soon expand to three additional California cities: Fullerton, Bakersfield, and Sacramento. In addition to Los Angeles, these regions will participate in a study assessing oral fluid technology and its utility for criminal justice practitioners. Two sites will utilize the Dräger DT5000 device and two sites will utilize the Alere™ DDS@2 device. Research goals will include evaluating the oral fluid collection devices, associated costs and benefits with oral fluid technology, potential barriers to application, and how affiliated labs provide confirmation testing of samples. This aligns with other research efforts underway. Through federal grant funding, the Pacific Institute of Research and Evaluation (PIRE) has been analyzing advancements associated with saliva/oral fluid collection.

### How Oral Fluid is being Implemented in the City of Los Angeles

The Los Angeles Police Department (LAPD) currently utilizes the Dräger DT5000 at sobriety checkpoints. The collection protocol entails the DRE officers' first performing a DRE evaluation and forming an opinion regarding the driver's impairment. Thereafter, a blood sample is requested and either obtained or refused. The officer next requests a voluntary oral fluid sample. The collection method entails the subject inserting a handheld cartridge containing a cotton tip into his or her mouth. Once sufficient oral fluid is collected (between one to four minutes), the DRE officer places the cartridge into a portable screening device that detects the presence of active drugs in a matter of minutes. The device then provides a print-out that identifies seven of the most commonly abused drugs, including THC, amphetamines, methamphetamines, cocaine, benzodiazepines, opiates, and methadone.

While the instrument is analyzing the sample, a second sample is taken for overnight shipping to NMS Labs to conduct confirmation tests to later be introduced into court. The prosecutor secures these test results online and, if necessary, obtains a litigation packet prepared by NMS Labs in anticipation of trial. Of the samples collected thus far, the most common drug detected is THC. The cut-off level for the Dräger DT5000 to detect Delta-9 THC, the primary psychoactive compound in marijuana, is approximately 5 ng/ml.



Result	
Cocaine	Negative
Opiates	Negative
Benzodiazepines	Negative
Cannabis-5	Positive
Amphetamine	Negative
Methamphetamine	Negative
Methadone	Negative

Result from Dräger DT5000

### Additional Criminal Justice Benefits

In addition to DUID enforcement, oral fluid technology has significant benefits for criminal practitioners. Since oral fluid can be collected in the field, officers can obtain critical evidence close in time to the initial contact when the objective signs of impairment are present. For example, when marijuana is smoked, THC is rapidly absorbed into the brain and the effects are immediate. As time passes, the body metabolizes the drug to an inactive form before it is eliminated from the body. When 2 or 3 hours pass from the time of use, to the time of the driving, and finally to the time of subsequent blood collection, the results of the blood test may show very little active THC. Whereas, the oral fluid test can be administered in the field within minutes of the driving and the arrest.

Another benefit of oral fluid technology is its use as an effective training tool for law enforcement. For example, during DRE training a urine sample is collected for later analysis—but the DRE does not get the results back for several weeks or

months, rendering it difficult to correlate the details of the exam and the test results. With the oral swab device, the officer gets immediate feedback on his or her roadside evaluation, which serves to strengthen their capabilities later in the field. From a cost standpoint, oral fluid test can be administered by officers instead of a trained phlebotomist. In addition, obtaining an oral fluid sample is less intrusive than drawing a blood sample and the confirmatory test results usually take less time to get back.

### Use of Oral Fluid Outside the U.S.

Since 2004, oral swab devices have been utilized in Australia and the United Kingdom to collect and analyze oral fluid in drugged drivers. This evidence has proven to be reliable and accurate for DUID enforcement purposes. In 2008, Canada passed legislation giving officers the authority to demand oral fluid from suspected drugged drivers following the DRE evaluation. Although the United States has made progress during the last 30 years in lowering the deaths on our highways related to alcohol impaired driving, on the issue of drug impaired driving, we still have challenges ahead.

Even one death is too many. As the vetting of this oral swab technology moves forward throughout the country, lives will be saved as more drugged impaired drivers are removed from our roadways.

**\*\*Reprinted from TNDAGC DUI News - October 2013 edition. [Click Here to view.](#)**



Officer Conducts an Oral Drug Swab Test

# Idaho Traffic Law Update

## State v. Schall, (Ct.App.2013):

On appeal, Schall argues the magistrate and district court incorrectly held it was the defendant's burden to show the Wyoming DUI statute was "substantially conforming" to Idaho's DUI statute. The Court of Appeals agreed reversing the lower courts by concluding the State bore the burden to show a foreign conviction substantially conforms to Idaho's statute. The Court explained that the district court's approach was error because Schall did not challenge the validity of his Wyoming conviction. Rather, the argument was whether the Wyoming DUI statute substantially conformed to the Idaho DUI statute. The magistrate at the preliminary hearing must make this determination, for without that determination there can be no probable cause for a felony offense and the case may not be bound over to the district court.

## State v. Davis, (Ct.App.2013):

During her DUI trial, Davis sought to introduce the officer's audio recording of the traffic stop. The prosecutor objected on the ground Davis' statements contained in the recording were inadmissible hearsay when offered by Davis herself. The prosecutor argued Davis was attempting to introduce into evidence various statements – i.e. her statement regarding how much wine she had consumed – rather than testifying and being subject to cross-examination.

The magistrate held defense counsel failed to describe any nonhearsay purpose for the use of the audio recording. On appeal, the district court found the issue of Davis' nonhearsay rationale for use of the recording was not preserved. Similarly, the district court held Davis failed to properly preserve her additional argument that she was precluded from cross-examining the officer about his remark that "you're probably on your way up," in relation to Davis' breath test results.

The Court of Appeals upheld the district court finding these issues were not properly preserved for appeal. The Court said, "Where it is contended that the statement is not hearsay because it is not submitted for the truth of the matter asserted, the proponent of the evidence must identify a

nonhearsay purpose that has relevance to prove or disprove a fact that is of consequence to the determination of the action."

The Court explained Davis was given an opportunity to identify an applicable hearsay exception or nonhearsay purpose for its admission, and hearing none, properly sustained the prosecutor's objection. Furthermore, Davis failed to lay a proper foundation under Idaho Rule of Evidence 702 that the officer had any special knowledge as to how alcohol is absorbed into the body once consumed. Therefore, the magistrate did not impermissibly preclude questioning of the officer about his opinion that Davis' alcohol concentration was going up. Davis' judgment of conviction was affirmed.

## ITD v. Kalani-Keegan, (Ct.App.2013):

The Idaho Transportation Department appealed the order vacating Kalani-Keegan's driver's license suspension. The hearing officer vacated the suspension because the required documents were not forwarded to ITD in compliance with I.C. 18-8002A(5)(b). The hearing officer held because the probable cause affidavit did not contain the original signature of the arresting officer, the notary certificate that followed was invalid. The Court of Appeals reversed the district court's decision and vacated the hearing officer's decision.

The Court of Appeals listed and described 7 ways in which the hearing officer erred. First, the hearing officer erred in determining "sworn statement" in the statute means an original document with original signature, which is not compelled by statute or the IDAPA. However, upon request, parties shall be given an opportunity to compare the copy with the original if available. Second, the Rules of Evidence do not apply at the ALS proceeding, therefore it is error for the hearing officer to make an evidentiary ruling that nothing but the original signature sworn statement will be accepted. Third, there was no legal authority cited of how the lack of an original signature invalidates the notary certificate. Fourth, there is nothing in the Idaho Code that demands the suspension be vacated upon failing in the documentation. Fifth, the failure to forward documentation men-

tioned in I.C. 18-8002A(5) does not appear as a ground for vacating a suspension set forth in I.C. 18-8002A(7). Sixth, it appears the hearing officer had identified a problem with the sworn statement before the hearing, but incorrectly determined there were no steps that could be taken to address the concern. Finally, the Court held the issue could have been remedied had the hearing officer taken up his duties with respect to the motion for reconsideration.

## Unpublished Opinion

### Dabrowski v. ITD, (Ct.App.2013):

Dabrowski appeals his driver's license suspension. He had consented to a blood draw as part of a DRE evaluation. The test results indicated the presence of morphine, carisprodol, meprobromate, diazepam, nordiazepam and carboxy-THC.

Dabrowski argued the hearing officer erred by considering a document from the internet and, that without this document, the evidence did not show the presence of drugs or other intoxicating substances. Dabrowski asserted the record must contain evidence that drugs were not only present, but they were also intoxicating. The Idaho Supreme Court expressly rejected this argument in *ITD v. Van Camp*, 153 Idaho 585 (2012). The burden is still on the licensee to affirmatively prove that the drug was not intoxicating. Thus, the State does not bear a threshold burden of production to show that the drug complained of constituted an intoxicating drug. *Id.*

Dabrowski next argues ITD erred in denying his motion for reconsideration wherein he submitted a letter from a toxicologist indicating the drugs in the lab report were not quantified and, therefore, did not allow the toxicologist to determine if Dabrowski was driving under the influence. However, the Court of Appeals previously held that, in an ALS hearing, the State is not required to establish a driver ingested a sufficient quantity or concentration of prescription drugs to cause impairment. *Feasel v. ITD*, 148 Idaho 312, 315 (Ct.App.2009).

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ITD Office of Highway Safety

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

Idaho POST Academy

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

National Highway Traffic  
Safety Administration

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

National Association of  
Prosecutor Coordinators

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

NDAA's National Traffic Law  
Center (NTLC)

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

Idaho State Police Forensics

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

Alcohol Beverage Control

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



## Breath Taking News

The Idaho Breath Alcohol Standard Operating Procedure has been revised. The changes for revision 5 as of August 20, 2013 are outlined as follows:

1. Idaho State Police Forensic Services (ISPFS) established revocation criteria for Breath Testing Operators (BTO) and Breath Testing Specialists (BTS). These criteria were not addressed in previous revisions and this was added a legal consideration for disciplinary action in the breath testing program.

2. The expiration date for individuals certified under the online program was changed to 2 years for BTO and BTS. The two month grace period under the previous 26 month standard is no longer needed with the on-demand online training program. Individuals certified under previous revisions of the SOP keep their current 26 month expiration date. All individuals after July 1, 2013 must certify or re-certify under the online training program.

3. Clarifies the role of a BTS as a proficiency testing proctor under the new online program requirements. The BTS and BTO are now required to take and pass a proctored proficiency test as part of the online training program. Other changes were made to the SOP to accommodate the new online training program.

4. The SOP was updated to allow for dry gas calibration and performance verification. This is a scientifically valid method and ISPFS is validating dry gas for use in Idaho.

5. Clarification was added that standards should not be used beyond their expiration date.

6. The term "at least" was removed from the 15-minute monitoring period because the language is not necessary to define the monitoring period.

7. The term "duplicate" was changed to "subsequent" to more accurately define tests done in succession.

8. The glossary was updated to reflect the most current terms and their scientific usage within the discipline. The definitions allow for future expansion of the discipline without need for changing the terms again.

The new online training can be accessed on the POST Academy e-learning website at <https://post.idaho.gov/eLearning/>. Students will choose between the BTO track or the BTS track. Students are expected to read the breath testing instrument instruction manuals and the SOPs prior to taking the online training. The revised SOP is also available to view online at: [www.isp.idaho.gov/forensics/index.html](http://www.isp.idaho.gov/forensics/index.html).

## 2013 SFST Curriculum Update

The National Highway Traffic Safety Administration (NHTSA) and International Association of Chiefs of Police (IACP) have released the 2013 Update to the Standardized Field Sobriety Testing (SFST) course, the Advanced Roadside Impaired Driving Enforcement (ARIDE) course, and the Drug Recognition Expert (DRE) course. These new curricula now synchronize the terminology used in the SFST, ARIDE and DRE courses.

The Idaho State Impaired Driving Coordinator and Traffic Safety Resource Prosecutor are coordinating to provide these updated materials and offer refresher courses to Idaho prosecutors and law enforcement officers. *Stay tuned for courses coming to your area!*

## Training & Conferences Notice

(Click on Course Names for More Information)

2013 NAPC Winter Conference — December 9-11, Austin, Texas

2014 IPAA Winter Conference — February 5-7, Boise, Idaho

Idaho 2014 Highway Safety Summit — April 14-15, Boise, Idaho

National Lifesavers Conference — April 27-29, Nashville, Tennessee

# LAST CALL

At the 2013 National Association of Prosecutor Coordinators (NAPC) Summer Conference, I was introduced to the oral fluid testing for drugged driving prosecutions. Janette Flintoft and Michelle De-Casas from the Los Angeles City Attorney's Office, along with LAPD DRE Instructor Kameron Sardor spoke to our group of TSRPs about their oral drug fluid testing pilot project. When I heard Tom Kimball and Jim Camp (Tennessee TSRPs) were scheduling a site visit, it took less than a second for me to realize I needed to tag-a-long. I am glad I did!

We spent a day visiting the Los Angeles County Attorney's Office, Los Angeles County Coroner's Office, the LAPD Scientific Investigation Lab, and Lisa Harb from Dräger who answered questions about the Dräger DT5000 oral fluid testing instrument.

Later that evening, LAPD Officer Don Inman treated us to a sobriety checkpoint. It was a pleasure to witness the efficiency and professionalism of the Los Angeles Police Department in conducting this checkpoint. Over 1,000 cars were proc-

essed (six at a time) through the sobriety checkpoint in 3 hours. Drivers were briefly detained to determine if they were under the influence of alcohol and/or other drugs. Most were sent on their way in less than 30 seconds. Most drivers were appreciative of the work the officers were doing to keep the roads safe. Twelve drivers were removed from the street and arrested for driving under the influence.

During this process, we witnessed a DRE conduct an evaluation of a driver suspected to be under the influence of marijuana. Upon completion of the DRE evaluation, the driver voluntarily submitted to the oral drug swab. Prior to the test, the DRE had come to the conclusion the driver was under the influence of cannabis. Once the sample was collected, it took about 8 minutes for the instrument to analyze the sample and provide a printout indicating the Delta-9 THC was present. This will be a great investigative tool.

Referring back to the *January 2013 edition* of **For The Road**, where the difficulties of marijuana drugged driving prosecutions is discussed, you will understand how intriguing this oral fluid testing



is. We have had too many deaths and too many injuries on Idaho roadways due to drivers under the influence of marijuana. The advancement of oral drug fluid testing will be a way for Idaho to move **Towards Zero Deaths!**

Thank you to our friends in Los Angeles for being such excellent hosts and for piloting such an important project. Thank you Tom & Jim for allowing me to join in on your exploration!! --- **Jared Olson**



**Idaho  
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