



HIGHWAY SAFETY

LAW UPDATE



February 4, 2015

Office of the Prosecuting Attorneys Training Coordinator

Jan, Feb, 2015

The DCI Breath Testing Statistics for 2014

The DCI Laboratory's Breath Alcohol Testing section reports that in calendar year 2014, law enforcement officers administered 14,579 evidential breath alcohol tests on the 165 DataMaster DMTs in service throughout the State of Iowa.

The Breath Alcohol Testing section, staffed by criminalists Jim Bleskacek and Mike Tate, is responsible for maintaining and certifying the DataMaster DMT, the evidential breath testing device used in Iowa.

The section maintains a website (<https://breathalcohol.iowa.gov/>) which permits searches of breath alcohol results throughout the state. Each breath test is stored in the respective DataMaster DMT and periodically the information from that instrument is transmitted to the website. The data is then searchable by county, date range, instrument serial number, officer and gender. The website makes it possible to find specific test results if the date, time and officer is known. (For security purposes, the individual subject's name and drivers license number have been removed from the website data.)

Of the 14,597 evidential test requests recorded in 2014, 42 attempted tests failed because of mechanical failure, a failure rate of .29%. An additional 551 attempted tests (3.77%) failed because the instrument detected an issue (radio frequency interference, ambient air concerns, or other issues) which caused the instrument to abort the test—in other words, the instrument stopped the testing because conditions were not right for an accurate test. Taken together, these 593 “no test” cases represented 4.06% of the requested tests.

In addition, there were 866 tests in which no alcohol was detected. These cases may be accounted for by the Drug Recognition Expert protocol (DREs request breath tests to rule out alcohol as a cause of impairment before requesting a urine sample) or by the practice in some jurisdictions where subjects are not released from jail unless they have no alcohol on their breath.

In addition, 1,377 subjects refused to test—a refusal rate of 9.83%.

In total, there were 10,795 tests in which alcohol was detected on the breath. The average of these tests was a 0.153 g/210L, which is a slight increase over historical averages. Slightly over half (50.09%) of the alcohol detected tests were 0.150 g/210L or higher and 18.91% of the tests represented alcohol levels 0.200 g/210L or higher. Tests that were a 0.300 g/210L or higher represented 1.14% of the total number of alcohol detected tests.

There were 5 tests in which the subject's alcohol level was greater than 0.400 g/210L. The highest breath test in 2014 was a 0.436 g/210L.

(The Breath Alcohol Testing section of the DCI Laboratory also evaluates portable breath testing instruments used in Iowa (“PBTs”) and ignition interlock devices (“IIDs”) to make certain that those non-evidential devices comply with Iowa's standards for such devices.)

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Traffic Tuesdays: The National TSRP Webinar Series

Susan Glass, Traffic Safety Resource Prosecutor (TSRP) for Missouri has announced the schedule for "Traffic Tuesdays", a series of traffic safety webinars open to prosecutors and law enforcement officers.

The next webinar, "Defending a Blood Test Result" is scheduled for Tuesday, February 10, from 2:00-3:30 p.m., (central time.) This webinar will focus on defending a blood test result from claims that it was inaccurate or otherwise unreliable, and will focus on common defense challenges to blood test results including the use of alcoholic antiseptics, storage issues, procedural issues with the blood draw, contamination of the sample and others.

This session will be presented by Beth Barnes, the Arizona TSRP. Ms. Barnes has been a prosecutor for over twenty years and has responded to many of the common attacks that will be discussed. Ms. Barnes also played an instrumental role in the development of Arizona's law enforcement phlebotomy program.

Click here to register:

<https://www3.gotomeeting.com/register/967626270>

After registering you will receive a confirmation email containing information about joining the webinar. In order to make sure that you are able to log on, please register at least 4 hours in advance of the webinar. Also, please make sure you retain the confirmation email. The confirmation email will come from GoToWebinars.Notifications@citrixonline.com, so please add this address to your list of safe addresses so that it does not go to your spam or junk mail folder. Also, please be careful to enter your email address correctly. You will not be able to join the webinar if you do not receive a confirmation email.

Future webinars in the "Traffic Tuesdays" series (all times are Central Time):

March 10, 2:00-3:30, Synthetic Marijuana: From the Road to the Lab

This webinar will discuss the investigation and prosecution of individuals who drive under the influence of synthetic cannabinoids. It will discuss what officers should be looking for at roadside and how prosecutors can interpret and use lab results in these cases.

Registration link:

<https://attendee.gotowebinar.com/register/83524763676870914>

April 14, 2:00-3:00, State to State Enforcement Issues

This webinar will discuss issues that arise when DWI or other traffic violations cross state borders. When can a law enforcement officer pursue a suspect across state lines? Can an officer from one state arrest a suspect in another state? If a suspect is transported across state lines for medical treatment, can an officer still get a chemical sample for testing? How can this be accomplished?

Registration link:

<https://attendee.gotowebinar.com/register/20000000028625322>

May 12, 2:00-3:30, Properly Preserving Cell Phone and Mobile Device Evidence in Traffic Crashes

This webinar will focus on the basic functions of how a cell phone works and the information officers can retrieve to help prove or disprove a case. Basic methods and techniques will be shown on how these devices should be handled to preserve the data available for review on the device which has been seized. The webinar will discuss "tips and tricks" on how to use this data to achieve the results you desire. In addition, the impact of the recent United States Supreme Court decision of [Riley v. California](#) will be discussed.

Registration link:

<https://attendee.gotowebinar.com/register/7847115894925236993>

June 9, 2:00-3:00, Local Level Collaboration and Partnerships

The successful investigation and prosecution of an impaired driving case, or really any criminal case, requires that law enforcement officers and prosecutors work as a team. A case cannot move forward if officers don't do a thorough and complete investigation, and a prosecution will be unsuccessful if prosecutors do not have a full understanding of the facts and the law. Officers and prosecutors need to rely on each other.

Registration link:

<https://attendee.gotowebinar.com/register/8145944463325913858>

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July 14, 2:00-3:30, Oral Fluid Testing in Impaired Driving Investigations

This webinar will discuss the use of oral fluid testing in impaired driving investigations. Oral fluid can be collected quickly and with minimal intrusion to the impaired driving suspect. It has the potential to be a viable sample for chemical testing in impaired driving cases.

Registration link:

<https://attendee.gotowebinar.com/register/6517167520043966465>

August 18, 2:00-3:00, The 7 Deadly Impaired Drivers

"The 7 Deadly Sins" committed by impaired drivers and what law enforcement officers and prosecutors can do to better hold these offenders accountable.

Registration link:

<https://attendee.gotowebinar.com/register/1845608695814275074>

September 8, 2:00-3:00, Turning the Sword into a Shield: Using the NHTSA Manual to Cross Examine the Defense Expert

Defense attorneys sometimes attack an officer's administration of SFSTs, or hire former police officers or others to analyze police reports and dash cam videos looking for any real or imagined mistake in the SFSTs. Cases can be lost when this type of testimony goes unchallenged, but the NHTSA manual can be used to support the officer's SFST testimony and to undermine the defense expert's opinions about whether the tests were properly administered and how the results should be interpreted.

Registration link:

<https://attendee.gotowebinar.com/register/7888731310193084162>

This webinar series is conducted on the national TSRP Program webinar account, funded through the NAPC/NHTSA Cooperative Agreement, Project Number DTNH22-10-H-00289.

Published Opinion of the United States Supreme Court

'Mistake of law' traffic stops valid under U.S. Constitution (but not in Iowa: State v. Tyler, 830 N.W.2d 288)

Heien v. North Carolina, 574 U. S. ____ (12/15/14) (No. 13-604, United States Supreme Court, filed December 15, 2014.) Chief Justice Roberts. The defendant was stopped when he was observed applying his brakes and only one brake light came on. Officers asked for consent to search the car and cocaine was found. The defendant filed a motion to suppress the stop and the search, arguing that the reason for the stop (only one brake light) did not support the stop, because North Carolina law required only one brake light—and therefore, the officer's stop was based upon a "mistake of law". (The term "mistake of law" is used when an officer believes observed conduct is a violation of the law, but the officer is mistaken.) The trial court rejected the motion and the defendant entered a guilty plea, reserving the right to appeal the suppression decision. (Note: this "reservation" is not possible in Iowa, so an Iowa defendant in the same situation would probably go to trial on the minutes of testimony and be found guilty by the court so the suppression decision would be preserved for appellate review.) The North Carolina Court of Appeals reversed on the basis that the officer's mistake of law was "objectively unreasonable" and therefore, a violation of the Fourth Amendment. The North Carolina Supreme Court reversed, finding that the officer "could have reasonably, even if mistakenly, read the vehicle code to require that both brake lights be in good working order" and therefore, the officer's "mistake of law" was reasonable. The North Carolina Court held that "(W)hen an officer acts reasonably under the circumstances, he is not violating the Fourth Amendment." The defendant sought review by the United States Supreme Court.

The United States Supreme Court affirmed. The Court reviewed cases in which it upheld police action where the officer involved was mistaken in his or her understanding of the *facts* of a case. For example, the Court cited a case where officers mistakenly arrested a person who matched the description of the person who was being sought and then, in a search incident to the arrest the officers discovered contraband which was ultimately admissible against the actual person being sought. Although the wrong person was arrested, the police were objectively reasonable in their mistake of fact, so the evidence was admissible against the "real" defendant. Hill v. California, 401 U.S. 797 (1971).

Chief Justice Roberts reasoned as follows: "(b)ut reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. . . Whether the facts turn out to be not what was

thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.”

Note: In Iowa, objectively reasonable “mistake of fact” stops are permitted. See State v. Lloyd, 701 N.W.2d 678 (Iowa, 8/5/05). However, the Iowa Supreme Court has determined that “mistake of law” stops, like the stop in this case, violate the Iowa Constitution. State v. Tyler, 830 N.W.2d 288 (Iowa, 4/26/13).

Published Opinion of the Iowa Supreme Court

Officer—not driver—chooses which test to administer; no requirement of blood test in suspected drug cases

State v. Mclver, ___ N.W.2d ___ (Iowa, 1/9/15) (No. 13-1106, Iowa Supreme Court, filed January 9, 2015.) Chief Justice Cady. The defendant was the driver of a pickup which was stopped in a parking lot in front of a closed business. The pickup was operating and its headlights were on. A police officer observed the pickup leave the lot by driving over a grassy area and down a sidewalk and then crossing a curb to enter the main road. The pickup then weaved within its own lane of travel. The officer initiated a traffic stop and in the process of stopping, the pickup went up over the curb on the passenger side. The defendant’s speech was slurred and she was slow to respond to the officer. She was given “a variety of field sobriety tests”, most of which she failed. The officer did not detect an odor of alcohol, but after unsuccessfully trying to administer a PBT, the officer arrested the driver for improper use of lanes. At the station, the officer detected a “slight odor of alcohol” on the driver and requested a breath test. The driver refused the breath test and instead requested a blood test, because “she was taking prescription medication.” The officer told her that she could get an independent blood test after she submitted to the breath test. “She continued to refuse a breath test and insisted on a blood test. The deputy continued to insist on a breath test.” No test was administered. The driver was subsequently charged with OWI. She filed a motion to suppress the stop and also “claimed the implied consent statute was violated when the deputy failed to administer a blood test after acquiring reasonable grounds to believe she was impaired by a prescription drug.” The trial court rejected the motions and she was convicted and appealed.

The Iowa Supreme Court affirmed the conviction. A review of “all the circumstances together” supported the officer’s reasonable suspicion that the defendant could have been operating while intoxicated, so the stop was valid. The Court also analyzed the wording and history of the implied consent statute and found that the statute did *not* require that, when a person was suspected of operating while under the influence of drugs or a combination of drugs and alcohol, it was necessary to offer a blood test rather than a breath test. The statutory scheme followed by the officer (offer of a breath test to be possibly followed by a blood or urine test) comported with the legislative intent of Iowa Code section 321J.6. The legislature “was mindful that the administration of a test designed to detect alcohol may need to be followed by a test designed to detect drugs other than alcohol, and so provided statutory discretion for the peace officer to seek the additional test. It also reveals the reality that a peace officer may only begin to suspect drugs other than alcohol may be involved to explain impaired driver conduct after a test geared to detect the presence of alcohol fails to detect any alcohol or enough alcohol to explain the impaired conduct. In other words, multiple testing may be needed so that the purpose of the law can be accomplished.” Conviction affirmed.

Note: By requesting a breath test before possibly requesting other testing, an officer is able to both rule out intoxication by alcohol alone and at the same time gather evidence of alcohol—i.e., a low alcohol test—to determine the viability of a potential prescription drug defense. See Iowa Code section 321J.2(11)(a) (prescription drug defense available only “if there is no evidence of the consumption of alcohol and the medical practitioner or pharmacist had not directed the person to refrain from operating a motor vehicle.”)



Opinion of Interest: Iowa Supreme Court

Directive to Judges in Sentencing Orders

State v. Thompson, ___ N.W.2d ___ (Iowa, 12/12/14)

“A judge must give his or her reasons for the defendant’s sentence either on the record at a hearing or in the written sentencing order. And from this time forward, a defendant does not waive his or her right to an appeal when the defendant waives reporting of the sentencing hearing and the judge fails to include his or her reasons for the sentence in the sentencing order.”

Published Opinion of the Iowa Court of Appeals

Mandatory prison for serious injury by motor vehicle if OWI is ‘involved’

State v. Rouse, ___ N.W.2d ___ (Iowa, 7/16/14) (No. 3-1256 / 13-0981, Iowa Court of Appeals, filed July 16, 2014; published by Order of January 2, 2015.) Judge Vaitheswaran. The defendant was charged with reckless driving causing serious injury, in violation of Iowa Code section 707.6A(4) and OWI. The defendant entered an *Alford* plea to the offenses, and filed a motion to adjudicate law points asking the court to determine whether he was eligible for probation.

The offense of OWI causing serious injury requires incarceration whereas the offense of reckless driving causing serious injury is eligible for probation. See Iowa Code section 907.3(10) which makes persons ineligible for probation if “(t)he offense is a violation of section 707.6A, subsection 1; or a violation of section 707.6A, subsection 4, *involving operation of a motor vehicle while intoxicated.*” (Emphasis added.) In addition, Iowa Code section 707.6A(7) provides “Notwithstanding the provisions of sections 901.5 and 907.3, the court shall not defer judgment or sentencing, or suspend execution of any part of the sentence applicable to the defendant for a violation of subsection 1, or for a violation of subsection 4 *involving the operation of a motor vehicle while intoxicated.* (Emphasis added)

The trial court determined that given the statutory language, the court had no authority to suspend the defendant’s sentence. The defendant was sentenced to five years in prison on the offense of reckless driving causing serious injury and one year on the OWI, to be served concurrently. The defendant appealed.

The Court of Appeals affirmed. Reviewing the statutory language and the facts of the case, the Court found that “the prohibition of suspension contained in section 707.6A(7) is not limited to the means set forth in subsection 1.” (Subsection 1 is vehicular homicide—OWI causing death.) The Court found that “there is no question (the) crime of serious injury by vehicle ‘involved’ operating a motor vehicle while intoxicated.” The defendant was charged with and entered an *Alford* plea to OWI “at the same time and in the same proceeding as his plea to serious injury by vehicle. Because his crime ‘involved’ the operation of a motor vehicle while intoxicated, the district court lacked authority to suspend his sentence for serious injury by vehicle.”



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Peter J. Grady
Pete.Grady@iowa.gov

Office of the Prosecuting
Attorneys Training
Coordinator

1st Floor, Hoover Bldg.
Des Moines, Iowa 50319

Phone:
(515) 281-5428

(Recent Unpublished Decisions Arranged by County)

Black Hawk County State v. Leonard Terrell Haynes, No. 13-1057 (Iowa Court of Appeals, filed December 24, 2014.) **Guilty pleas and sentences affirmed.** Defendant's guilty pleas and sentences for OWI and possession of a controlled substance (third offense) affirmed; in a lengthy opinion, the Court rejected defendant's complaints regarding his attorney and the substance of the plea offer.

Cerro Gordo County State v. Wayne David Lones Jr., No. 14-0351 (Iowa Court of Appeals, filed December 24, 2014.) **Driving while revoked sentence affirmed.** Trial court provided sufficient reasons for imposing sentence in case.

Dubuque County State v. Maria A. Meyer, No. 14-0661 (Iowa Court of Appeals, filed January 29, 2015.) **Defense attorney acting within scope of authority may waive speedy trial.** Defense attorney who, at 'final' pre-trial conference requested a continuance beyond the speedy trial deadline "and informed the court he would file a written waiver of . . . speedy-trial rights" was acting within the scope of his authority and, even though no written waiver was ever filed, the attorney's representation effected a waiver; subsequent dismissal of case on speedy trial grounds reversed and case remanded for trial.

Linn County State v. Pierre Tobias Baugh, No. 14-0460 (Iowa Court of Appeals, filed December 10, 2014.) **"OWI" and "DWB" sufficiently descriptive to identify the elements of the offenses.** Defendant's plea to "OWI" and "DWB" valid; although it would have been preferable to spell out the names of the offenses in the guilty plea, these descriptions are sufficient to satisfy requirement that the defendant understood the nature of the offenses; as to "OWI", the Supreme Court has previously held that the term adequately describes the offense, and as to "DWB" "it is not a complex crime with multiple elements, and the record indicates (the defendant) had been convicted of driving while barred on twelve prior occasions, indicating a familiarity with the crime and its elements."

Linn County State v. Pierre Tobias Baugh, No. 14-0460 (Iowa Court of Appeals, filed December 10, 2014.) **Factual basis for OWI and DWB.** Record contained a factual basis which supported defendant's plea to the charges where the minutes of testimony showed that officers observed a bag of garbage fall off the defendant's car and stopped him, that they noted signs of intoxication and he ultimately tested .192; and further, the minutes stated that the defendant's license had been barred.

Linn County State v. Theodore Ray Bascom, No. 14-0024 (Iowa Court of Appeals, filed January 28, 2015.) **OWI conviction affirmed; ineffective assistance claim preserved for possible post-conviction relief.** Defendant's claim of ineffective assistance of counsel could not be decided due to inadequate record; conviction affirmed and claim preserved for possible post-conviction relief.

Muscatine County Toby Richards v. State, No. 13-1931 (Iowa Court of Appeals, filed December 10, 2014.) **Anonymous tip corroborated by officer's investigation supports stop.** Where officer received an anonymous tip that the defendant was operating a motor vehicle while his license was barred and the officer investigated the tip and confirmed the defendant's driving status was barred, defense counsel had no duty to challenge the basis of the stop and was not ineffective in failing to file such a motion. (The Court also noted that State v. Kooima, 833 N.W.2d 202 (Iowa 2013) was filed after this defendant's conviction was final and therefore not applicable to the case, and further that "this case is easily distinguished" because in this case, unlike Kooima, the officer conducted an independent investigation to verify the status of the defendant's driving privileges.)

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Peter J. Grady
Pete.Grady@iowa.gov

Office of the Prosecuting
Attorneys Training
Coordinator

1st Floor, Hoover Bldg.
Des Moines, Iowa 50319

Phone:
(515) 281-5428

Polk County State v. Joy Renae Martin, No. 13-1819 (Iowa Court of Appeals, filed December 10, 2014.) **Factual basis for burglary of a motor vehicle.** Defendant's guilty plea was supported by sufficient facts where defendant was observed in a motor vehicle not her own, and when questioned stated that she was "looking for food or money"; fact that investigating officer's report characterized event as "attempted burglary" does not detract from the existing factual basis; conviction affirmed.

Polk County State v. Justin James Norman, No. 12-1148 (Iowa Court of Appeals, filed December 24, 2014.) **Interference with official acts conviction affirmed.** Defendant violated Iowa Code section 719.1 (interference with official acts) by standing very close to officers and videotaping them while they were investigating a traffic stop of "someone else despite (the officers') repeated requests to back up, and . . . thereby created a safety concern and distraction that hindered their investigation of the traffic stop" (emphasis in original); in addition, the trial court did not "abuse its broad discretion" in denying an "overbroad motion to produce" and denial of the defendant's claim of a speedy trial violation (a right which is inapplicable to simple misdemeanors.)

Polk County State v. Kenneth Ray Washington, No. 13-1840 (Iowa Court of Appeals, filed January 14, 2014.) **Malfunctioning rear window brake light supports stop.** Officer's testimony that brake light was not working found credible and justified traffic stop.

Pottawattamie County State v. Creighton Paul Catlett, No. 14-0500 (Iowa Court of Appeals, filed January 28, 2015.) **Serious injury by reckless driving and serious injury by OWI are separate offenses.** State may charge both serious injury by reckless driving and serious injury by OWI where a single injury has occurred if a factual basis exists for both offenses; because the two offenses require proof of dissimilar elements, double jeopardy is not violated by prosecution of both charges arising out of a single incident.

Scott County State v. Walter Baylor, No. 14-0390 (Iowa Court of Appeals, filed December 24, 2014.) **State must prove inventory search and failed to do so with minutes of testimony.** To prove an inventory search the state "must produce evidence that the impoundment and the inventory search procedures were in place and that law enforcement complied with those procedures" and with a trial based solely on the minutes of testimony the evidence "completely fail(ed) to provide even the barest of information to support the State's assertion the inventory-search exception applied in this case."

Scott County State v. Nicole J. Lacey, No. 13-1898 (Iowa Court of Appeals, filed January 28, 2015.) **Cell phone search violated Fourth Amendment.** Officer's warrantless search of cell phone violated Fourth Amendment and evidence derived from the search (justified at the time as a search incident to arrest) should have been suppressed (trial court ruling preceded U.S. Supreme Court's cell phone decision in Riley v. California, 573 U.S. ___, 134 S.Ct. 2473 (6/25/14)); a review of the facts of the case indicated both that there was no exigency to permit the search and that the error in admission of the cell phone evidence was not harmless; conviction reversed and remanded for new trial without the cell phone evidence.

Story County State v. James Lyle Johannes, No. 14-0589 (Iowa Court of Appeals, filed January 14, 2014.) **Grounds to stop car.** Officer had grounds to stop car where the officer knew the owner of a car had an arrest warrant (which the officer confirmed through dispatch) and then pulled up beside the car to confirm that the physical description on the warrant matched that of the driver.

Story County State v. James Lyle Johannes, No. 14-0589 (Iowa Court of Appeals, filed January 14, 2014.) **Search supported by probable cause and justified by impoundment and inventory policy.** Search of vehicle after valid stop and arrest of the driver was based upon probable cause (officer saw burnt aluminum foil and knew

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that was evidence of drugs); further, officers decided (pursuant to their written policy) to impound and inventory the vehicle; drugs found were admissible and conviction for possession of a controlled substance affirmed.

Woodbury County State v. Jonathan Brian Kisse, No. 14-0219 (Iowa Court of Appeals, filed January 28, 2015.) **'Heavy cracking' of windshield supports stop.** Officers who observed "heavy cracking across the windshield both vertically and horizontally" had reasonable suspicion to believe the defendant was in violation of Iowa Code section 321.438(1) and therefore, officers had grounds to stop the defendant.

Worth County State v. Aaron Dwayne Gunderson, No. 14-0529 (Iowa Court of Appeals, filed January 14, 2014.) **DARE surcharge limited to certain statutes.** The \$10.00 DARE surcharge of Iowa Code section 911.12 is to be applied to offenses involving Iowa Code Chapters 321J and 124; defendant was convicted of leaving the scene (Chapter 321) and reckless driving vehicular homicide (section 707.6A) so the trial court improperly taxed the surcharge to the leaving the scene offense; however, Iowa Code section 707.6A "does have a provision pursuant to section 321J" so the DARE surcharge should have been attached to the vehicular homicide conviction; case remanded for correction of illegal sentence; on remand, court to remove the DARE surcharge from the count which dealt with the leaving the scene conviction and impose it on the count which dealt with the vehicular homicide conviction.

**Citations from previous issue of the
Highway Safety Law Update**

In the Matter of Dean, 855 N.W.2d 186 (Iowa, 9/12/14)
State v. Hellstern, 856 N.W.2d 355 (Iowa, 11/21/14)
State v. Rogerson, 855 N.W.2d 495 (Iowa, 10/24/14)

**Prepared by the
Prosecuting Attorneys Training Coordinator (PATC)**

Under a project approved by the Governor's Traffic Safety Bureau (GTSB), in cooperation with the National Highway Traffic Safety Administration (NHTSA). The opinions, findings, and conclusions expressed in this publication are those of the author and not necessarily those of the PATC, GTSB, NHTSA, or the Iowa Department of Justice. **Snow, snow, go away! Come again some other day! Little Peter wants to be able to travel safely to and from work and not end up wasting all of his vacation days staying home and shoveling snow!**

Submissions and / or comments may be sent to:
Peter Grady, PATC
Iowa Dept. of Justice
1st Floor, Hoover State Office Building
Des Moines, IA 50319
Phone: 515-281-5428 ~ Fax: 515-281-4313
E-mail: pete.grady@iowa.gov