DRIVEN

to successfully prosecute DUI cases in Mississippi

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On July 1, 2009, a new law went into effect in an effort to combat distracted driving among Mississippi teens. Miss. Code Ann. § 63-1-73 prohibits drivers under an intermediate license, temporary learning permit, or temporary driving permit from texting while driving. Violators can be fined up to $500 for texting while driving or $1,000 for contemporaneously being involved in a wreck while texting and driving. This law does not apply in emergency situations or while the vehicle is parked.[1]

Distracted driving is a serious, life-threatening practice. It involves any non-driving activity that takes your eyes off the road, your mind off driving, or your hands off the wheel—including eating, drinking, changing the radio, and talking on the phone. In 2009, there were 5,474 fatalities and 448,000 injuries associated with distracted driving in the US.[2] Of the incidents involving death, 995 were known to have a cell phone involved. The worst were those in the 30-39 age range with teens close behind.[3]

In 2009, there were 5,474 fatalities and 448,000 injuries associated with districted driving in the US.

Thirty states, the District of Columbia, and Guam ban text messaging for *all* drivers. Twelve of these laws were enacted in 2010 alone. Eight states, the District of Columbia, and the Virgin Island prohibit all drivers from using handheld cell phones while driving.[4]

Ray Lahood, the US Transportation Secretary, is considering a nationwide ban of cell phone use in cars. It is an uphill struggle, though, as each state would have to ratify the ban, and special interest groups are opposed to it. The Transportation Department's powers to push further limits on distracted driving range from exhortations to setting standards backed by the federal government's financial clout.[5] The full NHTSA report can be found at www-nrd.nhtsa.dot.gov/pubs/811379.pdf.

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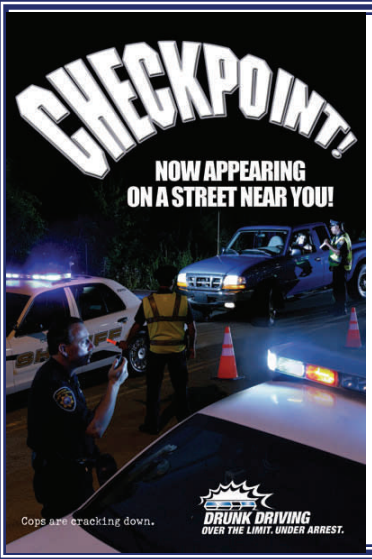
1. Miss. Code Ann.§ 63-1-73(a)-(b).
2. National Highway Traffic Safety Administration, Traffic Safety Facts, Research Note: Distracted Driving 2009 (2010), http://www-nrd.nhtsa.dot.gov/Pubs/811379.pdf.
3. *Id.*
4.See; LSA-R.S. 32:289; V.T.C.A., Transportation Code § 545.425.
5. Angela Greiling Keane & Jeff Green, LaHood Weighs Urging Ban on All Driver Phone Use in Cars, Bloomberg (2010), http://www.bloomberg.com/news/2010-10-08/lahood-weighs-urging-u-s-ban-on-all-driver-phone-use-in-cars.html (last visited Dec. 20, 2010).



Here are some tips from the Mississippi State Department of Health (MSDH) to avoid distracted driving—

Before You Drive:

- Develop a habit of turning off your cell phone when you get in your vehicle, and turning it back on when you are done driving.
- Put your cell phone in your trunk to avoid temptation.
- Record a voice mail greeting telling callers it is not safe to make calls while driving, and you will return their call as soon as you are able.
- Organize your route and schedule to allow time to make and return phone calls from the parking lot of one location before leaving to drive to the next one. This strategy has helped employees who drive frequently to maintain productivity and accessibility.

While You Drive:

- Do not make or answer cell phone calls, even with hands-free and voice recognition devices. If you must make an emergency call, leave the road and park in a safe area.
- Do not send or read text messages or email.
- Have a passenger use the phone for you.
- Let someone else drive so that you can freely make or receive calls.
- Enjoy phone-free driving; focus on the road. Protect your life and those around you.

Ignition Interlocks: The Overlooked Option

According to Mississippi law, "for any second or subsequent [DUI] convictions, the court *shall* order either the impoundment or immobilization of all vehicles registered to the person convicted for the entire length of license suspension to commence upon conviction and persist during the entire driver's license suspension period" (emphasis added).[1] An overlooked option is the use of the ignition interlock device. Miss. Code Ann § 63-11-31(2)(a) states, "If other licensed drivers living in the household are dependent upon the vehicle subject to impoundment or immobilization for necessary transportation, the court may order the installation of an ignition interlock system on the vehicle in lieu of impoundment or immobilization."[2]

If an interlock is used as an alternative to impoundment or immobilization, "the court *shall* order the installation of an ignition interlock system on all vehicles registered to the person [convicted of a second or subsequent DUI] for a minimum period of six (6) months to occur upon reinstatement of the person's driver's license if the court determines it is a vehicle to which the person has access and which *should* be subject to ignition interlock" (emphasis added).[3]

Implementing the use of an ignition interlock has many benefits. In addition to mitigating the negative effects suffered by an offender's family, research shows the use of ignition interlock devices reduce[s] recidivism among both first-time and repeat offenders in subsequent DUI arrests ranging from 50 to 90 percent while the interlock is installed on the vehicle.[4] This is important because, according to Mothers Against Drunk Driving (MADD), 50 - 75% of convicted drunk drivers continue to drive even when their license is suspended.[5] Additionally, the implementation of these devices comes at no additional cost to the courts or taxpayers. Miss. Code Ann. § 63-11-31(2)(a) states that the cost associated with an ignition interlock device are to be paid by the person convicted.[6]

MADD has been actively campaigning for all states to *mandate* the installation of ignition interlock devices for all persons convicted of DUI.[7] Currently, 13 states require all first time convicted offenders of DUI to use interlocks.[8]

HOW DOES IT WORK?

Ignition interlock device is rooted in the car's starter system. The driver is required to blow into a handheld device before the car starts.

The car ignition will not work unless the driver's blood alcohol content is below the set limit.

To protect from manipulating the device, the driver is required to give further breath samples during select intervals.

To prevent circumvention, most interlock devices are equipped with a variety of safety features. Many ignition interlock devices have pressure and temperature sensors to avoid the simple use of a balloon or compressed air to get around the device.[9] Once the car is started, most interlock devices ask for further periodic breath samples to make sure the driver's BAC *remains* below the set limit.[10] If the driver fails to give a passing breath sample within a given time period, most interlock devices will record the data and give some type of warning.[11] For example, one ignition interlock model causes the vehicle to continuously honk its horn until the driver provides either a "passing" breath sample or it shuts off the car. In Mississippi, it is a misdemeanor to tamper with, or in any way circumvent the immobilization or impoundment of vehicles ordered by the court.[12] If convicted, punishment includes up to a $1,000 fine and/or a year in prison.[13]

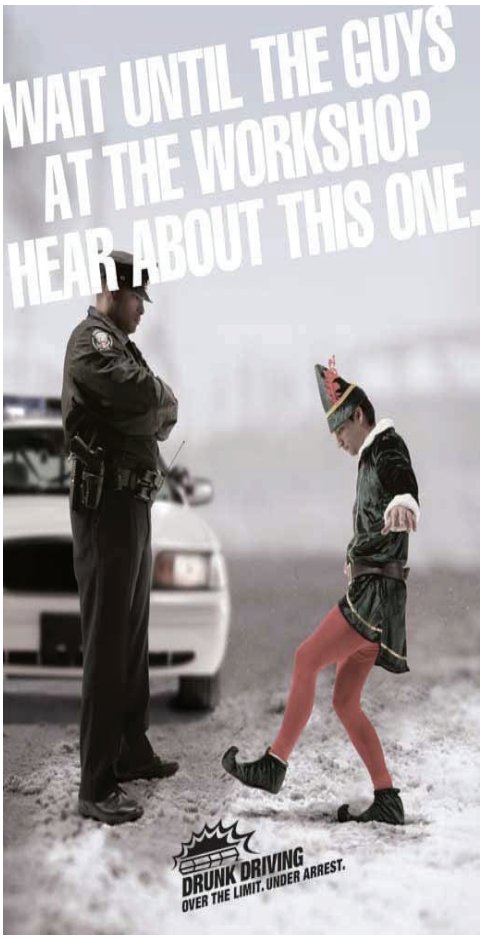
There are many myths and arguments against the use of these devices. One criticism is that similar to an intoxilyzer, residual mouth alcohols from the use of mouthwash can register on an interlock device. However, this problem can easily be resolved by simply waiting a few minutes and allowing the alcohol to dissipate before attempting to start the vehicle.

Another argument against the use of an interlock device is that it places an unreasonable financial burden on offenders. However, according to MADD, a New Mexico Study found the average cost to maintain an interlock device was merely $2.25 a day, which is comparable to the cost of one or two alcoholic beverages.[14] Moreover, you do not need a court order to get an interlock device installed. Many companies are more than willing to install the device on a personal vehicle without a court order. Several reasons for doing so include: enabling a purchaser to monitor their teen driver, preventing others from

driving their car under the influence, or simply preventing an DUI before it happens.

As technology advances, more tools are becoming available to assist the criminal justice system in deterring crime and rehabilitating offenders. And while impaired driving continues to be a tremendous problem effecting thousands of lives, the use of an interlock device is one way to prevent drunk drivers from getting behind the wheel.

1. Miss Code Ann. § 63-11-31(1).
2. Miss. Code Ann. § 63-11-31(2)(a).
3. *Id.*
4. Karen Sprattler, Ignition Interlocks – What You Need to Know: A Toolkit for Policymakers, Highway Safety Professionals, and Advocates (2009), http://www.nhtsa.gov/staticfiles/nti/impaired_driving/pdf/811246.pdf (citing: Voas, R. B., & Marques, P. R. (2003). Commentary: Barriers to Interlock Implementation. *Traffic Injury Prevention* 4(3), 183-187).
5. Mother Against Drunk Drivers, Statistics, http://www.madd.org/statistics (citing: Effects of Ignition Interlock License Restrictions on Drivers with Multiple Alcohol offenses: A Randomized Trial in Maryland. American Journal of Public Health, 89 vol. 11 (1999): 1696-1700)(last visited December 20, 2010).
6. Miss Code Ann. § 63-11-31(2)(a).
7. Mothers Against Drunk Driving, Ignition Interlocks: Every State, For Every Convicted Drunk Driver, http://www.madd.org/laws/law-overview/Draft-Ignition_Interlocks_Overview.pdf.
8. Id.
9. Karen Sprattler, Ignition Interlocks – What You Need to Know: A Toolkit for Policymakers, Highway Safety Professionals, and Advocates (2009), http://www.nhtsa.gov/staticfiles/nti/impaired_driving/pdf/811246.pdf (citing: Voas, R. B., & Marques, P. R. (2003). Commentary: Barriers to Interlock Implementation.
10. *Id.*
11. *Id.*
12. Miss. Code Ann. § 63-11-31(2)(b).
13. *Id.*
14. Mothers Against Drunk Driving, Support Ignition Interlocks for All Convicted Drunk Drivers (Revised 2010), http://www.madd.org/laws/law-overview/Draft-Ignition_Interlocks_for_all_Offenders_Overview.pdf.



Mississippi Joins List of States to ban Synthetic Drugs

On September 3, 2010, Mississippi became one of several states to ban the sale, possession and use of various synthetic cannabinoids. Senate Bill 2004 classified these compounds, often commercially sold as K2 or Spice, as a Schedule I controlled substance. The punishment for the sale, possession, and use of these various substances is synonymous to that of marijuana under Miss. Code Ann. § 41-29-139. However, while these compounds are often associated with marijuana, their reported effects are more tantamount to that of a hallucinogen or dissociative anesthetic (PCP). **As a result, they are extremely dangerous.**

K2/Spice is a plant material laced with various synthetic compounds that behave like THC (Δ-9tetrahydrocannabinol). Each package of K2/Spice contains up to five different varieties of the over 100 available synthetic cannabinoids, with a potency from 4 to 800 times that of THC. The effects of K2/Spice include: panic attacks; heart palpitations; hallucinations; delusions; vomiting; increased agitation; dilated pupils; and a longer, more intense high.

On August 12, 2010, a Biloxi police officer seized 320 pounds (approx. 145 kilograms) of K2/Spice. The estimated retail value was approximately $1.1 million in Mississippi and 3x that in Florida. Although prior to the state law, the City of Biloxi had passed an ordinance making K2/Spice illegal in their jurisdiction.

To assist in the DUI detection of this drug and others, the MS LEL Office has recently started teaching Advanced Roadside Impaired Driving Enforcement (ARIDE) training classes. ARIDE is a two-day training class designed to help bridge the gap between SFST and the DRE (Drug Recognition Expert) training. To attend, officers must have successfully completed SFST training. Officers interested in attending the class should contact Melissa Harvey at moharvey8@yahoo.com.

Caselaw Update

McDonald v. State

No. 2009-KA-0970-COA
(Miss. Ct. App. June 29, 2010)

FACTS:

McDonald was convicted of DUI maiming after striking a man on a motorcycle with his truck. The victim testified that McDonald, who was traveling in the opposite direction, without warning, "gassed it" and turned left into his lane causing the wreck. The victim was thrown from his motorcycle and suffered numerous serious injuries.

An off-duty sheriff who was driving by pulled over to assist with the wreck. The sheriff testified McDonald smelled like alcohol and, in his opinion, was under the influence of alcohol. He further testified that McDonald had difficulty finding and removing his license from his wallet, was unable to stand without periodically using his truck for support, and had slurred speech.

The responding DUI officer also testified that McDonald was intoxicated. Specifically, McDonald had exhibited a strong smell of both an alcoholic beverage and burnt marijuana from his breath and clothing. When administered field sobriety tests, McDonald showed 6 out of 8 signs on the walk and turn test, and could not complete the one leg stand. McDonald subsequently refused the Intoxilyzer 8000.

Fourteen months after the wreck, an accident reconstructionist viewed the scene/photos, discussed the relevant facts, and viewed the damage to both vehicles. It was his opinion that the truck and motorcycle were traveling in opposite directions, and the truck turned to its left immediately before impact with the motorcycle. In

addition, damage to the motorcycle indicated that it was moving to the right at the time of collision. During cross examination, the reconstructionist admitted to not having all the information needed to make a complete reconstruction of the wreck.

On appeal, McDonald argued: (1) there was insufficient evidence to show he was "under the influence" of alcohol at the time of the wreck, (2) the jury's finding that he negligently caused mutilation or disfigurement was against the overwhelming weight of the evidence, and (3) the lower court erred in denying his motion for retrial.

HELD:

The Court held that although McDonald's BAC was never determined due to his refusal, evidence that McDonald had slurred speech, smelled of an alcoholic beverage, could not complete the one leg stand, and exhibited 6 out of 8 clues on the walk and turn. This was sufficient to show that McDonald was under the influence of alcohol (See also *Saucier v. City of Poplarville*, 858 So.2d 933, 036 (Miss. Ct. App. 2003)). The evidence was also sufficient to show McDonald's negligence caused the wreck and was the proximate cause of the injuries the victim sustained: compound fracture to the clavicle protruding through the skin, AC separation, road rash on both legs, broken ribs, broken finger, and a puncture would to his left thigh which removed a "chunk of meat" missing from the victim's leg all the way down to his femur. The Court held these serious injuries constituted maiming or disfigurement.

McDonald's argument for a mistrial arose from the testimony of officers who stated that McDonald remained silent after he was Mirandized. The Court held that McDonald had declined a limiting instruction, and he was not entitled to a mistrial. The comments, while impermissible, could not be said to have deprived him of a fair trial or prejudiced him in any way. The Court held that any error was harmless. Affirmed.

Irby v. State

No. 2009-KA-01005-SCT
(Miss. Dec. 9, 2010)

FACTS:

Irby was involved in a near head on collision with the victim and his wife. The victim's wife testified upon coming over a hill, she saw Irby's truck driving in her lane traveling in the opposite direction. Due to there being a ditch on her right side, she veered into the left lane to avoid an accident. As soon as she did, Irby suddenly came back into his lane and the cars collided.

Irby, the victim, and victim's wife, were all injured. The victim sustained brain injuries because of the wreck, and was in a coma for four weeks following the wreck. At trial, the victim only had use of his left arm and was unable to speak clearly. His medical bills amounted to $2,000,000 and his prognosis was unknown as to whether he would ever walk again.

Both the victim's wife and the responding officer testified that they smelled alcohol coming from Irby after the wreck. At the hospital, the officer asked for and received consent from Irby for a blood sample. Irby's blood tested positive for Xanax, Hydrocodone and Benzoylecgonine. The toxicologist concluded that due to the concentration of drugs found in Irby's system,"it can be stated with reasonable scientific certainty that if the individual showed signs of impairment...then these substances can be responsible for the production of that impairment, especially in absence of a more competent cause…." The toxicologist further stated, "These decrements can cause the individual to be impaired to and beyond the point of rendering the individual unfit to operate a motor vehicle safely."

Irby raised three points on appeal: (1) blood evidence was improperly admitted; (2) his confrontation rights were not protected; and (3) the evidence was insufficient to support the verdict.

HELD:

The Court held that the blood test was properly admitted as Irby voluntarily consented to it. The Court found no error in admitting the blood analysis evidence because Irby did not properly raise the validity-of-consent issue. Irby also argued diminished capacity, but the Court held the burden was on him to prove it, and there was no evidence of diminished capacity. Impaired consent or diminished capacity requires more than the mere assertion Irby made during cross examination of the officer.

Irby's confrontation rights were not violated even though the nurse signed the consent form but was not called to testify. The Court held there was no error allowing the deputy to testify the nurse also read a consent form to Irby. The officer witnessed Irby sign the consent form, and had personal knowledge of the consent.

Additionally, the trial court did not err in limiting the cross-examination of the officer as to his "motive" of getting Irby's consent for the blood sample. The officer testified Irby was conscious and capable of giving consent, as well as, informed of his right to withhold consent. The Court held it was irrelevant whether or not the officer thought he could compel a blood sample pursuant to Miss. Code Ann. § 63-11-7.

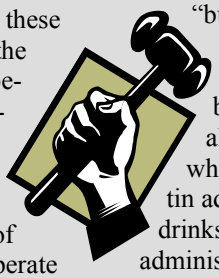
The evidence was also sufficient to support the verdict Affirmed.

Martin v. State

No. 2009-KM-01026-COA
(Miss. Ct. App. Sept. 7, 2010)

FACTS:

Martin was pulled over for careless driving after an officer witnessed him "bumping the fog line" with his vehicle. When questioning Martin, the officer noticed he had blood shot eyes and smelled of alcohol. Upon asking Martin whether he had been drinking, Martin admitted to having "a couple" of drinks. A portable breathalyzer was administered and indicated the presence of alcohol. Martin was taken to the jail, and the Intoxilyzer 8000 was administered, indicating a BAC of .08%. Martin was charged DUI under subsection (a) and (c). On appeal, Martin argued the arresting officer never had probable cause to stop him.



HELD:

The decision to stop an automobile is reasonable where the police has probable cause to believe that a traffic violation has occurred (citing *Henderson v. State,* 878 So. 2d 246 (Miss. Ct App 2004)).

Additionally, "this Court has determined that failure to have regard for the width and use of the street by swerving off the side of the road or by crossing the marker lines constitutes probable cause for a traffic stop."

Here, the officer testified Martin's vehi-

cle "went from Point A to Point B and right back. He didn't [simply] drift over to the fog line." The officer also testified Martin actually crossed over the fog line, but he did not remember him driving off the pavement. The trial judge held that hitting the fog line while driving constituted careless driving. In *Henderson*, the vehicle approached the curb twice, and the Court held that he was driving without due regard for the width and use of the street. Thus, the officer possessed probable cause for the traffic stop. The Court held this assignment of error lacked merit. Affirmed.

Delker v. State

No. 2008-CT-00114-SCT
(Miss. Oct. 7, 2010)

FACTS:

Delker was observed by the chief of police speeding on Christmas Eve. The police chief followed Delker mistakenly believing the road was within his jurisdiction. Subsequently, the chief proceeded to pull Delker over, but Delker did not stop until he reached his driveway.

Delker had trouble getting out of his car, difficulty standing, and had slurred speech. When asked why he did not stop, Delker responded that, "he knew he was going to jail, and he didn't want to leave his car alongside the roadway." Another officer called to the scene offered Delker a PBT. He refused. At the station, Delker failed some of the field sobriety tests, and he refused the intoxilyzer.

Delker was indicted for Felony DUI. He filed a motion to suppress all evidence, arguing the police chief who made the initial stop was not within his jurisdiction. Thus, the search and seizure was a 4th amendment violation subject to the exclusionary rule.

The court of appeals held the chief's arrest was permissible because he had the authority to initiate pursuit as a private citizen since Delker had committed an indictable offence in his presence (Felony DUI). Further, the court of appeals held even if the arrest was illegal, the evidence obtained should not be suppressed under the exclusionary rule (relying on *Herring v. State*, 129 S. Ct. 695 (2009)). On writ of certiorari, the MS Supreme Court limited the issue on appeal as to whether the exclusionary rule should be applied.

HELD:

The Mississippi Supreme Court held that an officer not knowing the exact jurisdictional boundaries of his town, at worst was an innocent mistake and the exclusionary rule should not be applied.

In the event there was a 4th amendment violation, the United States Supreme Court requires a case-by case balancing test in order to determine whether the exclusionary rule should apply. Following *Herring*, 129 S. Ct. at 702; "[t]o trigger the exclusionary rule, [the officer's] conduct must be sufficiently deliberate that exclusion can meaningfully deter it….[and] such deterrence is worth the price paid by the … justice system." The exclusionary rule is used to deter *deliberate*, *reckless*, or *grossly negligent* conduct (emphasis added). There was no evidence that the chief's mistake amounted to deliberate, reckless or gross negligence as mandated to invoke the exclusionary rule.

Nevertheless, even if an officer's mistake amounts to more than a mere mistake, exclusion is only proper if the deterrence gained by the exclusion is greater than the harm to the justice system. Here, the deterring effect of encouraging officers to be aware of their jurisdictional boundaries cannot be said to significantly outweigh the compelling social interest in protecting innocent citizens from drunk drivers. Affirmed.

Winters v. State

No. 2009-KM-00178-SCT
(Miss. Nov. 4, 2010)

FACTS:

Winters, a 20 year old minor, was arrested for his third DUI after registering a BAC of .09% on the intoxilyzer. The charging indictment, which was headed "Felony DUI MCA Section 63-11-30(1)(c)," stated: "The defendant did unlawfully, willfully and feloniously drive or otherwise operate a vehicle while under the influence of an intoxicating liquor, while having two one-hundredths percent (.02%) or more by weight volume of alcohol in his blood...."

Winters argued the indictment was ambiguous as to whether he was charged under the Felony DUI statute or under the "Zero Tolerance for Minors" law. The State argued the indictment put Winters on notice he was being charged with a DUI and any sentence would be based on Winters' BAC at the time of arrest. Furthermore, the determination of Winters' BAC was a question of fact for the trial court to determine.

HELD:

The Court held that the indictment fully notified Winters of the "nature and cause of the accusation against him." Miss. Code Ann. § 63-11-30(c) which was referred to in Winters' indictment, defines the crime and is the starting point for subsequent sections which provide for the sentencing guidelines. Contained within Miss. Code Ann. § 63-11-30 is the "Zero Tolerance for Minors" law which establishes less severe penalties for persons under 21. However, the "Minors law" applies ***only*** to underage person with a BAC or more than .02%, but less that .08%. While Winters is a minor under 21, the Zero Tolerance for Minors law does NOT apply because the trial judge found Winters' BAC to be higher than .08%. Thus, Winters' conviction would fall under Miss. Code Ann. § 63-11-20(2)(c), not Miss. Code Ann. § 63-11-30(3)(a).

In addition, while Winters' indictment had not specifically stated .08%, it did state that (1) Winters operated a vehicle with a BAC or .02% or *more,* and (2) Winters *feloniously* drove…. Furthermore, the indictment's heading was listed " Felony DUI" and listed Winters' previous DUI convictions. The Court held there was no substantial doubt as to which statute should be applied in this case, and thus, Winters was properly sentenced. Affirmed.

ADDITIONAL RESOURCES

Distracted Driving
http://www.distraction.gov

Mississippi Department of Public Safety
http://www.dps.state.ms.us

National Highway Traffic Safety Administration
http://www.nhtsa.gov

Office of Highway Safety Traffic Safety Data
http://www.psdl.ssrc.msstate.edu

Sobriety Trained Officers Representing Mississippi (STORM)
http://www.msstorm.net

Happy Holidays

A little holiday cheer can sometimes unfortunately go a long way.

Remember, *Buzzed Driving is Drunk Driving.*

The holidays are a time to eat, drink and be merry, but when drivers fail to be responsible, those few glasses of eggnog can quickly turn one of the happiest times of the year into a nightmare. Too often impaired drivers don't plan ahead and end-up making the roads unsafe for everyone.

Impaired driving is one of America's most-often-committed and deadliest crimes. The holidays are particularly deadly due to the high number of drunk drivers on the roads. During the month of December 2009, 753 people were killed in crashes that involved a driver or motorcycle rider (operator) with a blood alcohol concentration (BAC) of .08 or higher.

Another eight (8) percent of the population also admitted to riding in a vehicle with a driver who they believe had too much to drink. Young males were at particularly high risk, with nearly 1/4 admitting to riding with someone who should not have been behind the wheel.

While many people have gotten the message loud and clear, there are still millions that just don't understand that alcohol and driving are a deadly combination!

No matter who you are, drunk driving has serious consequences.

Not only do you risk killing or injuring yourself or someone else, but the trauma and financial costs of a crash or an arrest for driving while impaired can be significant. Drunk driving violators often face jail time, the loss of their driver's license, higher insurance rates, and dozens of other unanticipated expenses ranging from attorney fees, court costs, car towing and repairs, and lost wages due to time off from work.

Don't let your 2010 end with an arrest…or worse, death. Plan before you go out, and remember, whether you've had way too many or just one too many, it's just not worth the risk.

Here are a few simple tips to avoid a drunk driving disaster:

Plan a safe way home before the festivities begin. Before drinking, designate a sober driver. If you're impaired, use a taxi, call a sober friend or family member, or use public transportation so you are sure to get home safely. If you happen to see a drunk driver on the road, don't hesitate to contact your local law enforcement. And remember, ***Friends Don't Let Friends Drive Drunk.***

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Mark your 2011 Calendar!!

January 4-6	CTS class - Columbus, MS
January 11-13	SFST class - Oxford, MS
January 18-20	SFST class - Biloxi, MS
January 25-27	SFST class - Hattiesburg, MS
February 21-25	SFST Instructor School, Vicksburg, MS
March 1-3	CTS class - Gulfport, MS
March 8-10	SFST class - Vicksburg, MS
May 3-5	STORM Conference Vicksburg, MS
June 1-19	DRE School, Olive Branch, MS

*SFST-Standardized Field Sobriety Testing
*CTS-Complete Traffic Stop