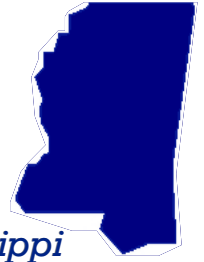




DRIVEN

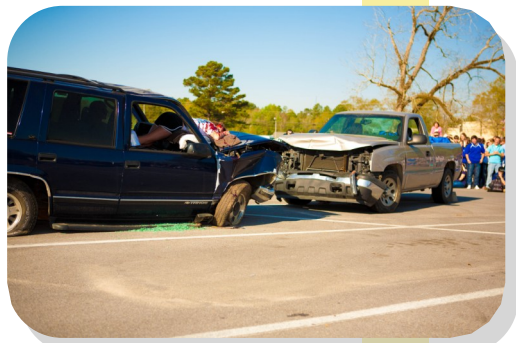


to successfully prosecute DUI cases in Mississippi

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Local Sheriff's Department promotes awareness



In an effort to promote awareness of the danger involved in driving under the influence of alcohol, the Jackson County Sheriff's Department has developed a creative way to get their message across. The sheriff's office has created multiple mock DUI wreck's around area high schools. In March, the wreck at Vancleave High School featured four drama students from the school's own student body. Seeing fellow classmates makes the situation more realistic. "They get overwhelmed by it. The pure emotion of seeing their friends in that type of situation is more than some of them can handle," said Jackson County Sheriff's Department Capt. Boomer White.

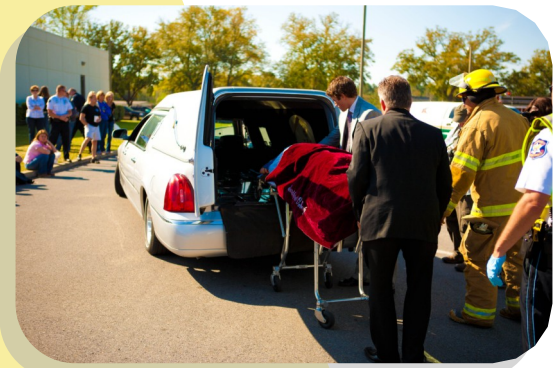
The wreck was recreated around 9:30 am, and included sheriff's deputies, paramedics, and firefighters responding to the scene. In order to prepare for the crash, the drama students underwent an hour of make-up that included fake blood, penetrating shattered glass, and skin piercing metal objects to make the scene more believable. The scene was covered by tarps as the students assembled outside to view the wreck. As the tarps were removed, the wreck revealed the four teens. The wreck included one victim being airlifted by a helicopter, another by ambulance, one fatality at the scene, and of course, the drunk driver. The wreck also replicated a 911 call which was broadcast over the intercom for the students to hear. The Jaws of Life were used to open the car in order to remove the two "injured" victims, while the "driver" was arrested and placed in the sheriff's custody. The "fatality" was taken from the scene in a hearse. "When those kids see that hearse and their friend -- that's all the message we need," White said.

Principal Todd Knight gave a stern warning to his students: "Don't just remember this just prom night April 9th, but every time you get behind the wheel of a car. You never know when this will be for real." The student's reaction to the wreck was strong. At least two female students passed out, and others were visibly affected. Some students were treated by the local

medical workers who were on the scene for that purpose. One student stated, "I think it had a big impact on us. It seemed so real that I was speechless."

"Remember this every time you get behind the wheel of a car.... You never know when this will be for real," stated Principal Todd Knight.

"This saves lives and we'll be glad to put this on at any school -- in the county or cities. Teenagers need to see what happens when you drink and drive," said Sheriff Mike Byrd. Anyone interested in learning more about the mock DUI wreck or any in staging one can contact the Jackson County Sheriff's Department at 228-769-3063.



The mock DUI crash was sponsored by the Jackson County Sheriff's Dept., Acadian Ambulance, Vanclave Volunteer Fire Department, Chevron Pascagoula Refinery, Bradford O'Keefe Funeral Home, Students Against Drunk Driving, and numerous others.

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Recently in the United States Supreme Court:

Bullcoming v. New Mexico

case no. 09-10876

June 23, 2011

In an opinion authored by Justice Ginsburg, the US Supreme Court held that the prosecution in a criminal case may not introduce a forensic lab report containing a testimonial certification through the in-court testimony of another lab analyst who did not sign the certification, or who was involved in the performance of or who observed the test which is at issue. It is recognized that a defendant has the right confront the analyst who made the certification, unless he or she is unavailable at trial, and the defendant has had an opportunity to cross-examine him or her prior to trial.

If an out-of-court statement is testimonial, it may not be used against a defendant at trial unless the witness who made the statement is unavailable and the defendant has had a prior opportunity to confront the witness. Here, the State never asserted that the analyst was unavailable, nor did the defendant have a prior opportunity to cross-examine him.

Justice Sotomayor, in concurrence, emphasized the limited holding of the case noting that the substitute analyst had no involvement whatsoever with the testing, was not an expert witness asked to give an independent opinion about testimonial reports not admitted into evidence, there was no suggested alternative purpose for the report - such as medical treatment, and that the State sought to admit the first analyst's statements - not just a printout. Thus, "the court's opinion does not address any of these factual scenarios."

Justice Kennedy authored a dissent in the case which was joined by Justice Breyer, Justice Alito and the Chief Justice. According to Justice Kennedy, "requiring the State to call the technician who filled out a form and recorded the results of a test is a hollow formality."

Mississippi Hosts State's 2nd Drug Recognition Expert School

Mississippi law enforcement officers recently received specialized training to enhance their abilities to detect and arrest drugged drivers during the state's second Drug Recognition Expert (DRE) course. Eighteen officers from local and county police agencies and the Mississippi Highway Safety Patrol participated in the intensive two week course.

DREs are trained to recognize signs of impairment in drivers under the influence of drugs other than, or in addition to, alcohol and to identify the category, or categories, of drugs causing the impairment. DREs conduct a 12 - step evaluation process to make this determination. The course took place June 1st through 19th in Olive Branch, MS.



2011 MS DRE School Class Photo

2011 Mississippi DRE School Graduates

Deputy Bela Alford, Carroll Co. Sheriff's Department
 Deputy Tony Boyd, Jackson Co. Sheriff's Department
 TFC Bill Chandler, Mississippi Highway Safety Patrol
 Deputy Hunter Forbes, Marion Co. Sheriff's Department
 Officer Michael Goins, Gulfport Police Department
 Melissa Harvey, MS Law Enforcement Liaison's Office
 Officer Marcus Holland, Raymond Police Department
 Officer Shane Kelly, Starkville Police Department
 Officer Ben Kent, New Albany Police Department
 TFC Chad McKnight, Mississippi Highway Safety Patrol
 Officer Jason Olivera, Olive Branch Police Department
 Officer Paul Rhodes, Gulfport Police Department
 Deputy Chip Roberts, Leflore Co. Sheriff's Department
 Officer Andy Round, Starkville Police Department
 Officer Ashley Ruple, Petal Police Department
 Officer Hildon Sessums, Oxford Police Department
 Officer Robert Taylor, Pass Christian Police Department
 Officer Michael Whitehead, Senatobia Police Department
 Deputy Ryan Winters, Yalobusha Sheriff's Department

The DRE program, also referred to as the Drug Evaluation Classification program, began in the 1970s with the Los Angeles Police Department. The program operates under the guidelines and direction of the International Association of Chiefs of Police and is supported by the National Highway Traffic Safety Administration (NHTSA). There are more than 7,300 DREs across the nation. Mississippi became the 45th DRE state in 2009 (currently, there are 48 states that utilize DREs).

Nationally, 18 percent of all drivers killed in crashes in 2009 tested positive for drugs, according to NHTSA. Prior to the implementation of the DRE Course in Missis-

issippi, our state was noted as having the highest DUI Drug rate in the country at 16%¹. The DRE courses are vital to the state's ability to successfully arrest and prosecute these drugged drivers, and to reduce fatalities. The importance of the DRE program cannot be over-emphasized. Success depends in ensuring that police officers receive the training and skills they need to make proper decisions at roadside and post-arrest when dealing with suspected drug impaired drivers.

¹ Statistics from NHTSA.com, "Drug Impaired Driving: Understanding the Problem and Ways to Reduce It" A report to Congress, dated Dec. 2009, p. 8.

CASELAW UPDATE

Matthies v. State

No. 2010-KM-00783-COA
(Miss. Ct. App. May 31, 2011)

On September 13, 2009, Madison PD stopped Matthies for speeding. The officer testified he smelled alcohol emitting from the vehicle and that defendant's eyes were red. Matthies told the officer he had a few beers. The officer administered field sobriety tests and a PBT which resulted in the officer arresting Matthies. At the station, Matthies consented to the intoxilyzer which showed a BAC of .11%. Calibration certificates were deemed admissible at trial, and Matthies was found guilty of speeding and DUI. On appeal, he argued that the Confrontation Clause required the person who calibrated the intoxilyzer to testify as to the calibration records in court. This argument had been previously rejected by the Court in *Harkins v. State*, *Zoerner v. State*, and *McIlwain v. State*; all of which ruled the certificates admissible without testimony of the person who calibrated the machine. However, these cases were decided prior to the US Supreme Court's decision in *Crawford* and the most recent *Melendez-Diaz* case.

The Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." *Crawford* states that when an out of court statement is testimonial, it is inadmissible unless (1) the declarant is unavailable to testify, and (2) the defendant had prior opportunity to cross examine the declarant.

Melendez-Diaz held that a confronta-

tion clause violation occurred by the admission of "certificates of analysis" without the testimony of the lab analyst who prepared them. The US Supreme Court also stated that "documents prepared in the regular course of equipment maintenance may well qualify as non-testimonial records." Since the *Melendez-Diaz* case did not address the issue specifically, the Court looked to other jurisdictions—which almost uniformly

agreed that such calibration records are non-testimonial in nature. The Court held that these certificates do not comprise ex parte in-court testimony, are not formalized testimonial material, and are not created for the prosecution of any "particular" defendant (citing the Indiana Court of Appeals *Ramirez* case). The Court held that the certificate at issue here merely verified the accuracy of the equipment and were different from the lab-analyst report in *Melendez-Diaz* which were prepared after the drug seizure to establish that the substance obtained from him was cocaine. Here, the Court found that the records were non testimonial in character, and that the Confrontation Clause did not require the testimony of the preparer. Affirmed.

Taylor v. State

No. 2009-KA-01846-COA
(Miss. Ct. App. Apr. 26, 2011)

Defendant was DUI (BAC of .22%) when she drove across the oncoming lane of traffic and continued off road where she hit and killed a man walking. The defendant was convicted of DUI Manslaughter and sentenced to 18 years. On appeal, the defendant argued: the indictment was defective; she was too intoxicated to waive her right to remain silent; it was error to allow evidence from the black box; destruction of the blood sample was prejudicial; there was insufficient evidence to find her guilty/verdict contrary

to the weight of evidence; and cumulative errors required a new trial.

An indictment's purpose is to adequately inform the defendant of the charge against her and to give notice of the specific charge the State is going to proceed on. The Court held the indictment was legally sufficient to place the defendant on notice, especially considering the DA's policy of full disclosure of



its case in discovery. Furthermore, even if there is a finding that an indictment was defective, the analysis does not end, and a harmless error analysis is used to prevent unfair prejudice to the State. Here, assuming for the sake of argument that the indictment was insufficient, any error would be harmless because the defendant's attorney admitted he was aware the prosecution was going to argue the defendant was negligent at the time she hit and killed the victim in that she was driving on the wrong side of the road, and she was driving 23-27 mph over the speed limit.

The Court found the defendant was not too intoxicated to have waived her right to remain silent. The deputy stated the defendant was responsive & although appeared to be intoxicated, she was oriented to place & time. She did not have difficulty understanding her questions and responded appropriately to preliminary questions. "Intoxication does not automatically render a confession involuntary...the degree of intoxication is a matter which may be considered by the court in making its determination as to whether a statement should be suppressed." *Morris v. State*, 913 So. 2d 432 (Miss. Ct. App. 2005). The Court held that a search warrant authorized the seizure of any evidence that tended to demonstrate that the defendant was intoxicated at the time she hit & killed the victim. The black box & data contained information that would assist in that regard. Moreover, the au-

thentication of the black box report by the deputy was proper as he was “present” when the other officer extracted the data from the black box. The deputy had personal knowledge that the report was what it claimed to be as required in MRE 901.

As to the destruction of the blood sample, the Court held a defendant must be able to show *bad faith* on the part of the police. Mere failure to preserve potentially useful evidence does not constitute a denial of due process of law. Here, no evidence of bad faith on the part of the crime lab was evident. Crime lab policy is to dispose of evidence 6 months after testing. The Court found the disposal of the blood was handled in a routine manner.

As it was undisputed that the defendant was driving the truck when it hit the victim, the Court found a jury could have reasonably concluded the defendant was driving in a negligent manner when she killed the victim. There was evidence the defendant left her lane of travel, drifted left into the opposite lane, and continued to drift left off the main road, where she hit & killed the victim as he stood off the main road. These facts provided ample evidence to support the verdict, and the Court found no errors which would require a new trial. Conviction affirmed.

Nelson v. State

No. 2010-KA-00097-COA
(Miss. Ct. App. Jun. 7, 2011)

Nelson was stopped at a checkpoint, admitted he had been drinking, and had a suspended license. Officer testified his speech was slurred and that he held onto the side of the car for balance as he walked. A PBT was positive for the presence of alcohol, and a breath test administered at the jail indicated a BAC of .13%. At trial, the State entered evidence of two previous convictions—an Abstract of

Court Record which revealed a previous conviction of DUI on June 7, 2006, with an arrest date of February 6, 2006; and a second Abstract of Court Record which showed a second DUI conviction on June 19, 2006, for an offense that occurred March 13, 2006. Defendant was convicted of felony DUI and appealed arguing the State failed to prove he committed three DUI offenses within a five year period, and that the indictment failed to allege the essential elements of the crime with certainty. After the first appellate brief, which raised two issues, the defendant filed a reply brief through a new attorney. The reply brief stated that the first issues were without merit, and asserted new issues. After the reply brief was filed, the defendant filed a motion to assert new issues in the reply brief.

The Court denied the motion to assert the new issues, but still analyzed the two initial issues.

Court held that the first issue, whether the state failed to prove that the defendant had committed three DUI offenses within five years, was without merit because although the abstract had the “offense date” rather than “arrest date”, a reasonable juror could infer that the date of arrest for the DUI was the same date that the offense occurred (see *Smith v. State*, 950 So.2d 1056 (Miss.Ct.App. 2007)). The Defendant’s argument that the language in the indictment was vague since it used the phrase “weight volume” instead of “alcohol concentration” was without merit. While the statute does not use the term “weight volume”, the supreme court has held that an indictment is not required to have the exact terms of the statute “if the crime can be substantially described without using the term.” *Winters v. State*, 52 So.3d 1172, 1174-75 (Miss. 2010). Here, the indictment clearly notified the defendant of the State’s allegation that he had a .08% or more alcohol content in his blood. The indictment was legally

sufficient to charge the defendant with a DUI offense. Affirmed.

Moreno v. State

No. 2009-CP-01001-COA
(Miss. Ct. App. Mar. 1, 2011)

Defendant appealed his conviction of DUI Manslaughter and 2 counts DUI Mayhem arguing: trial court lacked jurisdiction, his sentence violated double jeopardy, and he received ineffective assistance of counsel.

The Court recently held a claim of improper venue will fail *unless supported by sufficient evidence within the record*. Here, the Court found the defendant failed to support with the record that the accident occurred in Forrest County. Defendant failed to point to any evidence in the record to support the claim that the intersection where the crash occurred was within Forrest County. The defendant’s claim that DUI Manslaughter and two counts of DUI Mayhem subjected him to double jeopardy because DUI constitutes one offense was barred by res judicata. The Court had previously addressed this issue during defendant’s first motion for post-conviction relief: “The [L]egislature, in 2004, amended and made clear that one may be charged under...63-11-30 for multiple felonies arising from the same act of driving under the influence.” Each count of the defendant’s indictment was predicated upon separate felonies. Thus, no double jeopardy violation. Lastly, defendant’s argument for ineffective assistance of counsel was without merit. “A petitioner who has entered a guilty plea and claims ineffective assistance of counsel must show that trial counsel committed ‘unprofessional errors of substantial gravity,’ without which he would not have pled guilty.” *Cole v. State*, 918 So.2d 890, 894 (Miss.Ct.App. 2006). Defendant, through his translator, stated under oath he had confidence in his attorney and that his attorney had explained the charges against him. He also stated that he had entered a guilty plea against the advice of his attorney. Affirmed.



Mississippi Court of Appeals

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BACK TO THE BASICS: PROVING THE IMPAIRED DRIVING CASE

by: Elizabeth Earleywine

Trials are Boring. Police officers and attorneys focus on the evidence; jurors don't. Real-life trials are not what jurors think they should be; they expect them to look and be like something they see on television or in the movies. Juries expect trials to look like Law and Order or My Cousin Vinny. They expect the evidence to look like that found in the CSI style shows. These shows give their audience something to pay attention to, to remember and to talk about – visual imagery. Most people do not retain words, most of us are visual. People think in pictures. Once your audience, be it the prosecutor, hearing officer, judge or jury, can visualize what you relate, then understanding, credibility and believability are assured. A visual depiction of the incident will grab and keep the listener's attention. Not only are your words important, but tone, delivery and style are critical as well.

LAYING THE GROUNDWORK

A successful DUI prosecution begins at the first observations of the suspected impaired driver and continues throughout the DUI investigation and arrest procedures, culminating at the trial. The use and presentation of visual information starts with the officer's documentation of these events and is the foundation for everything that comes after. Throughout your entire case, think about the ultimate audience. Who is it you need to convince?

DUI cases are among the most difficult a patrol officer or a misdemeanor attorney will handle, particularly so early in their careers. Defense attorneys routinely take advantage of this. Additionally, popular culture has raised the burden of proof in all types of criminal cases. Jurors expect to be presented with "scientific" evidence even where none should be expected to exist. Officers and prosecutors must answer these challenges proactively, by educating themselves in the science and the law and presenting their information in a manner that will be remembered and believed by the finders of fact.

So, if these are the challenges we face, how do we meet them? Get back to basics. Conduct a thorough, complete investigation. Record the evidence in detail, don't assume an in-car camera video will be available by the time of trial. Prepare before court. Use detail and words with impact to paint the

picture for the judge or jury. It starts with the officer making the arrest and ends with the prosecutor giving the closing argument. The following are some reminders for getting back to basics at each stage in the investigation and prosecution.

DETAIL THE TRAFFIC STOP

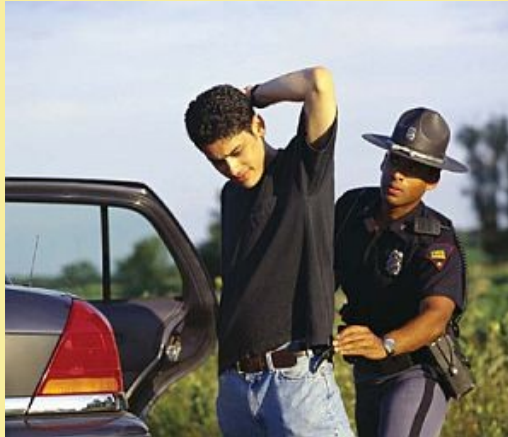
The DUI investigation starts with the traffic stop. Focus on your observations of the defendant's driving behaviors and any evidence that may suggest impairment. Was your attention drawn to the defendant's vehicle by a moving violation, an equipment violation, an expired registration or inspection sticker, unusual driving actions, (i.e., weaving within a lane or moving at slower than normal speed), and/or evidence of drinking in the vehicle (alcoholic beverage containers, coolers, etc). Was your attention drawn to the defendant's personal behavior or appearance by such things as eye fixation, tightly gripping the wheel, slouching in the seat, gesturing erratically, face close to windshield, drinking in the vehicle and/or driver's head protruding from vehicle? These are just some of the indications that can paint that picture necessary for conviction. Articulate the manner in which the defendant responded to your signal to stop, and how the defendant handled the vehicle during the stopping sequence, such as attempting to flee; no response; slow response; an abrupt swerve; sudden stop; and/or striking curb or other object.

BE DESCRIPTIVE

Describe your personal contact and interview of the defendant, focusing on SIGHT: bloodshot eyes, soiled clothing, fumbling fingers, alcohol containers, drugs or drug paraphernalia, bruises, bumps or scratches, and/or unusual actions; HEARING: slurred speech, admission of drinking, inconsistent responses, abusive language, unusual statements; and SMELL: alcoholic beverages, marijuana, "cover up" odors like breath sprays, and/or unusual odors. Once you decide to instruct the defendant to step from the vehicle, how the defendant stepped out of and walked from the vehicle also will provide evidence of impairment, such as angry or unusual reactions; inability to follow instructions; inability to open the door; leaving the vehicle in gear; "climbing" out of the vehicle; leaning against the vehicle for balance; keeping hands on vehicle; and/or inability to remain in an upright, standing position.

These are observations that everyone can relate to, as opposed to field sobriety tests that some jurors may think they “couldn’t do sober.”

Standardized field sobriety tests are not to be discounted, of course. But when analyzing them and presenting them at trial, focus should be on common place observations, as opposed to “clues” and “points.” Why is a field sobriety test important to driving? Not because the subject cannot stand on one leg for thirty seconds without putting their foot down or raising their arms. They are important because they are divided attention activities. What is driving? A divided attention activity. If a person cannot follow simple instructions and maintain attention to the task at hand when that task is a relatively easy one, how can they expect to maintain attention to the task at hand when driving a 2000 pound vehicle? Tell the story in terms of the observations made in the field sobriety tests. It paints the picture and tells the story much more vividly than talking about them in the standardized manner.



PREPARE EARLY

Next come hearings and trial. The importance of preparation cannot be overstated. Make it a habit to prepare as early as possible. The prosecutor must first read and then re-read the case file. This should be a thorough evaluation of the overall strength of the case. The case review should include the following:

- Verify that you can prove each element of DUI beyond a reasonable doubt, and develop your case theory.
- Ensure the officer had legal justification for the stop of the vehicle and had probable cause to believe that each element of the offense was present.
- Identify witnesses whose testimony will be required to prove the elements of DUI.

Identify evidence or other necessary relevant information that is mentioned in the reports, but is not in your case file. Each case is only as strong as the facts of the case, and the witnesses and exhibits that will establish those facts. Even good cases may not always remain strong; for instance, a necessary witness may refuse or become unable to testify. It is extremely important to know your community, your

jury pool and your judge. What will it take to convince your judge and jury the defendant is guilty? What defense arguments are you likely to face? Some pieces of evidence do not, by themselves, make a case stronger or weaker. However, when viewed together, even seemingly innocent facts may add something to your theory of the case. Therefore, don't ignore any of the facts in the officer's report.

DEVELOP A THEORY

You must develop a theory of the case. The theory of the case is simply your unified approach to all of the evidence that explains what happened. You have to integrate the undisputed facts with your version of the disputed facts to create a cohesive, logical position. Your theory must remain consistent during each phase of trial. The jury must accept your theory of the case as the truth. Thus, you need both a factual and a persuasive theory of the case to intelligently select a jury, prepare your opening statement, conduct witness examinations, and prepare your closing argument.

After you do this, you should have a good idea of what evidence will be contested. You should gather as much additional evidence as you can, both direct and circumstantial, to bolster your weaknesses and attack the defendant's theory of the case. After you have reviewed all the evidence, you can formulate your theory of the case. Once you have your theory of the case, you should try to determine the defendant's probable theory of the case. This will help you prepare both your case in chief and to cross-examine defense witnesses. A theory of the case will also help you convey the picture to the fact finder. Once the judge or jury can picture the incident in their own mind, credibility and believability are assured. Remember your ultimate goal, to present the evidence, direct and circumstantial in such an overwhelming manner that the fact finder has no choice but to convict.

Editor's Note: Elizabeth Earleywine is the Traffic Safety Resource Prosecutor for the state of Illinois, as well as the statewide DRE/SFST Coordinator. Elizabeth previously served as the Senior Attorney at NDAA's National Traffic Law Center (NTLC) in Alexandria, Virginia. She is recognized and respected as a leading expert in impaired driving prosecutions, training, and education throughout the country.

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additional resources:

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

Sobriety Trained Officers Representing
 Mississippi—STORM
<http://www.msstorm.net>

MS Department of Public Safety
<http://www.dps.state.ms.us>



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Impaired Driving Labor-Day National Enforcement Crackdown



In Mississippi, state and local law enforcement officers will join nearly 10,000 other law enforcement agencies nationwide in support of an intensive crackdown on impaired driving **August 19–September 5, 2011**

known as “*Drive Sober or Get Pulled Over*”. The problem of impaired driving is a serious one. The crackdown will include law enforcement officers in every state, Washington, D.C., and many U.S. cities and towns. For more information, visit the High-Visibility Enforcement Campaign Headquarters at www.StopImpairedDriving.org.

Upcoming Training, Conferences & Campaigns

September 2011

- September 5, 2011 Labor Day
- September 13 ~ 14, 2011
Tupelo A.R.I.D.E.¹ Class
- September 20 ~ 22, 2011
Starkville SFST² Class
- September 27 ~ 29, 2011
Olive Branch SFST Class

October 2011

- October 4, 2011
MLEOTA³ DUI Refresher Course & Rules of the Road, Pearl, MS
- October 4 ~ 7, 2011
Justice Court Judges Conference,
Pearl River Resort, Choctaw, MS
- October 26 ~ 28, 2011
Prosecutor’s Conference, Tunica, MS
- October 26 ~ 28, 2011
Trial & Appellate Judges Conference, Jackson, MS
- October 16, 2011 ~ November 1, 2011
Halloween Impaired Driving Crackdown

November 2011

- November 15 ~ 17, 2011
STORM⁴ Conference
- November 28 ~ December 1, 2011
SFST Class & DUI Basic for Mississippi
Highway Safety Patrol Cadet Class

December 2011

- December 12 ~ 13, 2011
Training for New Justice Court Judges
- December 16, 2011 ~ January 2, 2012
Holiday Season Impaired Driving Crackdown

¹ Advanced Roadside Impairment Driving Enforcement

² Standardized Field Sobriety Testing

³ Mississippi Law Enforcement Officers Training Academy

⁴ Sobriety Trained Officers Representing Mississippi