STATE OF IDAHO)
County of KOOTENAI)ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, *Plaintiff,*

vs.

JIM HOWARD, III, *Defendant.*

Case No. **CRF 2008 5287**

MEMORANDUM DECISION AND ORDER REGARDING PART II AND PART III

I. PROCEDURAL HISTORY AND BACKGROUND.

On June 2 and 3, 2008, the DUI charge in the Information in this case was tried to a jury but ended in a mistrial due to jury deadlock. At the beginning of that trial, defendant Jim Howard III (Howard) pled guilty to the charge of Driving Without Privileges, and was sentenced on that charge on June 26, 2008.

The State of Idaho decided to re-try the DUI charge, and on July 8, 2008, Howard was found guilty of DUI by jury verdict. Prior to the jury reaching its verdict, Howard, with the advice of his attorney, stipulated that Part II and Part III of the Information could be tried to the Court. Part II of the Information alleged two prior DUI offenses, making this underlying third offense, of which the jury had just found him guilty, a felony. Part III of the Information alleged two prior felony convictions, which, if convicted of the underlying DUI, and if that underlying DUI were a felony, would make Howard a Habitual Offender under Idaho Code § 19-2524.

A trial to this Court on Parts II and III was held on July 9, 2008. At this trial,

Howard's attorney objected that the evidence of these prior convictions was not properly before the Court. Those objections were sustained, and the deputy prosecutor on behalf of the State of Idaho made a motion to continue to allow him to get those documents in proper order for admission into evidence. Over objection by Howard's attorney, the continuance was granted. The continuance was granted for two reasons. First, the continuance was only for six days, to July 15, 2008. Second, the continuance was granted because Howard was not being held on this DUI. At the time, Howard was incarcerated on the sentence imposed on the misdemeanor Driving Without Privileges charge. On June 26, 2008, due to his extensive criminal record, Howard was sentenced to the maximum 180 days in jail for the offense of Driving Without Privileges and was given credit for 102 days time served. As of the date of this decision, Howard is still in custody on that Driving Without Privileges sentence.

The trial before this Court resumed on July 15, 2008. At the beginning of that trial, the State submitted the "State's Memorandum in Support of Admissibility of California Documentation and Motion to Reconsider." Over Howard's objection, the Court considered such briefing. That brief was focused on Plaintiff's Exhibit 7, which comprised photocopies of what purported to be court records and court minutes (register of actions/docket) regarding an August 8, 2001, citation for DUI, and what appears to be a December 4, 2002, conviction on that charge in Superior Court, Kern County, California. At the bottom of the tenth and last page of Exhibit 7 is the following in what appears to be a stamp:

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF KERN, METROPOLITAN DIVISION
THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE ORIGINAL DOCUMENT ON FILE IN THE OFFICE OF THE CLERK OF THIS COURT.
DATED: 4-14-08 [handwritten]
TERRY McNALLY
BY: Dawn Kapp [handwritten] DEPUTY

The State of Idaho argues Exhibit 7 is properly authenticated under I.R.E. 902(4) as the stamp contains both a certification and a seal. Idaho Evidence Rule 902(4) reads:

> **Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any law of the United States, or rule proscribed by the Idaho Supreme Court.

Idaho Rule of Evidence 902(1) reads:

> **Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

The "stamp" found at the end of the last page of Exhibit 7 complies with much but not all of I.R.E. 902(4) and none of I.R.E. 902(1) is complied with. Regarding I.R.E. 902(4), there is nothing in the stamp telling us what Dawn Kapp is "deputy" of, and if we can assume it is a deputy clerk of court, there is nothing in the stamp telling us whether Dawn Kapp as "deputy" is the person authorized by the Clerk of the Court (apparently Terry McNally but that isn't clear) to make such certification. All of that is implicit, but not explicit, from the stamp. Regarding I.R.E. 902(1), this stamp is not a "seal" of the State of California, nor does the signature purport to be an attestation or an execution. This is simply a stamp with part of it in bold face. California's definition of "seal" (Cal.Code § 1931) reads:

> A public seal in this State is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister State or foreign country, and there recognized as a seal, must be so regarded in this State.

Idaho Code § 9-401 is identical. This is a "stamp" but nothing about it says it was a stamp made "with an instrument provided by law". A stamp suggests an official has handled the document, read it and decidedly marked it as being official.

At the continued trial on Part II and Part III, Exhibit 7B was admitted into evidence. Exhibit 7B comprises the same documents (in different order) as Exhibit 7, but with all the requirements of I.R.E. 902(4) and 902(1) having been met. In Exhibit 7B, Dawn Kapp explains exactly who she is and her capacity, she uses a seal of the Superior Court of California, County of Kern, and she makes an attestation

At the conclusion of the continued trial on Part II and Part III, based on the Court's concern over the status of the evidence, the State again moved to continue. Defendant objected. The Court sustained the objection and denied the motion to continue because the State had this evidence prepared (or not) for the first trial, the second trial, the first trial to the Court and now this trial to the Court. At the conclusion of the evidence as to Part II of the Information, this Court ordered simultaneous briefing on July 22, 2008, by both sides on the applicability of the Full Faith and Credit Clause. The Court then heard evidence and argument on Part III of the Information. At the conclusion of the evidence the Court ruled that Part III of the Information had not been proven, but that the Court would revisit its ruling after reading the briefing on the issue of Full Faith and Credit. Both sides briefed the issue and this Court has read those briefs, thus, Part II and Part III are now at issue.

II. ANALYSIS.

A. Idaho Rules of Evidence.

If admissibility under the Idaho Rules of Evidence were the end of the inquiry, Howard would be guilty of Part II, due to the admission of Exhibit 7B and Exhibit 8. However, that is not the end of the inquiry. This Court will discuss the Full Faith and Credit

issues next.

As to Part III, Howard is not guilty from an Idaho Rules of Evidence analysis alone. Three prior convictions were charged (the State must prove two in order to satisfy the Habitual Offender enhancement statute, Idaho Code § 19-2524) in the Information: 1) Burglary in the Second Degree, State of Oklahoma, Case No. CRF-83-195, Date of Judgment and Sentence 08-24-83; 2) Burglary in theSecond Degree, State of Washington, Case No. 87-1-000197-3, date of Judgment and Sentence 01-08088, and 3) Possession of a Controlled Substance, State of California, Case No. F98300369-6, date of Judgment and Sentence 08-18-98. Amended Information, p. 3. Evidence was presented as to all three crimes. Only Exhibit 9 was admitted at trial because Exhibit 9 contained a "seal" of Superior Court, State of California, County of Fresno. However, Exhibit 9 was only proof to an evidentiary standard that Howard had pled guilty to the crime of possession of methamphetamine. Exhibit 9 is not the proof of the controlled substance **conviction** in California in 1998. Exhibit 9 is simply a copy of the Complaint and a copy of a document entitled "Felony Advisement, Waiver of rights, and Plea Form." Exhibit 10 is a copy of the records from Grant County, Washington. Exhibit 10 was refused because it was sought to be introduced by the State under I.R.E. 803(6) and I.R.E. 803(8). Regarding I.R.E. 803(6), there was neither the foundation laid for that rule nor were the requirements of I.R.E.902(11) met due to no statement on the certificate that the preparer was under oath and subject to perjury. Idaho Rule of Evidence 803(8) is not applicable as there is a specific "exception" to that exception to the hearsay rule, prohibiting the exception when it is a "factual findings offered by the government in criminal cases." I.R.E. 803(8)(C). Exhibit 11 is a copy of the records from Oklahoma, and it had the same deficiencies as Exhibit 10. As to Part III, two of the offered exhibits were refused, and the only exhibit

offered and admitted was not admitted to prove a conviction. From an evidentiary standpoint alone, Howard is NOT GUILTY as to Part III of the Information.

B. Full Faith and Credit Clause.

Howard argues that because the State did not comply with either the Full Faith and Credit Clause of the Constitution or the Idaho Code, the State has not established the foundation necessary to admit the prior out-of-state felony convictions and has therefore not proven a felony DUI conviction or that Howard is a persistent violator. (Defendant's) Memorandum Re: Full Faith and Credit Clause, p. 4. The State argues in order for an out-of-state judgment to be admissible in Idaho, Idaho courts cannot require more stringent rules than those found in 28 U.S.C. §1738, but instead, can allow judgments from sister states to be admitted with fewer requirements than that federal statute. State's Memorandum Regarding Full Faith and Credit Clause, p. 3. The State argues admitting the California judgment into evidence does not violate the Full Faith and Credit Clause. *Id.,* p. 4. The language at issue in Title 28, Section 1738 is:

> The records and judicial proceedings of any court of any State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the court of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (emphasis added). In Idaho, the applicable language is very similar and requires:

> A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of another state or

> territory may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

I.C. § 9-312 (emphasis added). Clearly, the language of the second phrase of Idaho Code § 9-312 tracks the requirements in the federal statute. The State of Idaho argues that it is proper for Idaho to have chosen to allow judgments from sister states to be admitted with fewer requirements that 28 U.S.C. § 1738. State's Memorandum Regarding Full Faith and Credit Clause, p. 3. The State of Idaho argues that "States may enact a statues [sic] or rules authorizing the introduction of a judicial record of a sister state in evidence without strict adherence to the language of 28 U.S.C.A. § -- although the state statute or rule may not impose requirements *in excess* of those imposed by the federal statute." *Id., citing Garden City Sand Co. v. Miller,* 157 Ill. 225, 41 N.E. 753 (1895); *Willock v. Wilson,* 178 Mass. 68, 59 N.E. 757 (1901); *Ellis v. Ellis,* 55 Minn. 401, 56 N.W. 1056 (1893). The problem with the State's argument is Idaho Code § 9-312 and 28 U.S.C. § 1738 are essentially **identical**, so none of this authority is of any significance.

Compliance with both Idaho Code § 9-312 and 28 U.S.C. § 1738 is mandatory. *State v. Prince,* 64 Idaho 343, 132 P.2d 146 (1942) tells us that. Compliance with Idaho Code § 9-312 and 28 U.S.C. § 1738 is not all that difficult, and *Prince* demonstrates that as well. "[The judicial record] of another state or territory may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, *together* with a certificate of the chief judge or presiding magistrate, that the attestation is in due form." 64 Idaho 343, 348, 132 P.2d 146, 148, quoting from I.C. § 16-310, the predecessor of I.C. § 9-312. (italics added). It is the portion after the italicized word which is completely lacking in any of the proof submitted in the present case by the State of Idaho. There is no certificate from any judge as to any of these documents offered by the State of Idaho.

Counsel for the State of Idaho argues neither *Prince* nor the federal Full Faith and Credit statute impose the requirement of a "certificate of a judge of the court." State's Memorandum Regarding Full Faith and Credit, p. 2. The State doesn't tell this Court "why" it has that interpretation. In addition to that interpretation being baseless, the above quote from *Prince* which in turn quotes from I.C. § 16-310, the predecessor of I.C. § 9-312, shows the State's interpretation is simply false.

In *State v. Prince,* 64 Idaho 343, 132 P.2d 146 (1942), the Idaho Supreme Court held that the judgments of the courts of Oregon convicting appellants of felonies were properly authenticated. Thus, in prosecutions under the Idaho persistent violator of the law statute, they were entitled to the full faith and credit that would have been accorded them in Oregon. 64 Idaho 343, 348, 132 P.2d 146, 148. As Howard points out, the federal and state statutes quoted by the Court in *Prince*, despite now bearing different numbers, remain substantially the same. (Defendant's) Memorandum Re: Full Faith and Credit Clause, p. 3. The only change is that the previous federal statute did not contain any reference to Possessions and did allow the certification as to the attestation to come from a judge, chief judge, or presiding magistrate. *Id, see* 28 U.S.C. § 687. The Idaho statute, previously Idaho Code § 16-310, remains substantively unchanged. Specifically, in *Prince* the Court stated, "[s]aid exhibits established the fact that the Oregon Courts had a presiding judge, a clerk and a seal." *Id.*

The State then argues that *United States v. Weiland,* 420 F.3d. 1062 (9th Cir. 2005), stands for the proposition that the Full Faith and Credit statute can be complied with by complying with that statute (28 U.S.C. § 1738), *or,* by complying with the rules of evidence. State's Memorandum Regarding Full Faith and Credit, p. 3. The problem with that argument is it is limited to federal prosecutions and the Federal Rules of Civil Procedure.

The State of Idaho in its brief provides the following quote from *Weiland:*

> We can find no authority for this proposition, [10] nor does reason support it. To the contrary, the commentary to Federal Rule of Civil Procedure 44, incorporated into Federal Rule of Criminal Procedure 27, specifically indicates that, under circumstances in which § 1738 is applicable, proof may be made *either* by compliance with the Federal Rules of Evidence *or* in compliance with § 1738. *See Mateo-Mendez,* 215 F.3d at 1045.
>
> Section 1738 is designed to ensure that each state and federal court provides full faith and credit to appropriately authenticated judicial judgments rendered in the other states. The contents of the "penitentiary packet" challenged in this case would be admissible in an Oklahoma criminal court pursuant to the state hearsay exception for public records, *Frazier v. State,* 874 P.2d 1289, 1291-92 (Okla.Crim.App.1994), and § 1738 provides no bar to its admission here. *Huffhines,* 967 F.2d at 320.

State's Memorandum Regarding Full Faith and Credit, p. 3. What distinguishes the present case from *Weiland* is the fact that *Weiland* is a federal prosecution, and the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure apparently allow the interpretation announced in *Weiland*. This Court is not free to embrace the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure in the present case. Federal Rule of Civil Procedure 44 reads:

> **Proof of Official Record.** An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, , when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

Idaho has no equivalent of Federal Rule of Civil Procedure 44.

In the instant case, because of the State's failure to follow either 28 U.S.C. § 1738 or I.C. § 9-312, this Court is unable to give Full Faith and Credit to the documents offered by

the State of Idaho. *Prince* has not been overruled. In 1982, the Idaho Court of Appeals certainly felt compliance with I.C. § 9-312 was still necessary. *State v. Martinez,* 102 Idaho 875, 880, 643 P.2d 555, 560 (Ct.App. 1982). The Idaho Supreme Court has held that I.C. § 9-312 must be complied with *even in a civil case*. *Smith v. Smith,* 95 Idaho 477, 483, 511 P.2d 294, 300(1973). Idaho Code § 9-312 is clear, as is the mandate of 28 U.S.C. § 1738. These are significant charges. Part II can result in a felony conviction and up to 10 years in the State prison and Part III can result in a life sentence in the State prison. The burden on the State to present this proof in a form which satisfies not only the Idaho Rules of Evidence, but also Idaho Code § 9-312 and 28 U.S.C. § 1738, is not onerous. *State v. Martinez,* 102 Idaho 875, 880, 643 P.2d 555, 560 (Ct.App. 1982) spells out how to provide the proper proof to the Court or to a jury. This Court provides certificates and attestations of convictions from this Court to other State and federal courts frequently. It involves only a slight amount of effort. Perhaps the State in this case relied on the lower standard used at probation violations, where certified copies and even collateral estoppel can be used to prove prior convictions. *State v. Dempsey,* 2008 Opinion No. 66, Docket No. 34209, 08.15 ICAR 807 (Ct.App. July 7, 2008). The difference lies in the fact that with Part II and Part III, the State of Idaho bears the burden of proof beyond a reasonable doubt. *Id.,* citing *United States v. Dixon,* 509 U.S. 688, 710 n. 15 (1993); *United States v. Smith-Balthier,* 424 F.3d 913, 921 (9th Cir. 2005); *United States v. Arnett,* 353 F.3d 765, 766 (9th Cir. 2003); *United States v. Gallardo-Mendez,* 150 F.3d 1240, 1246 (10th Cir. 1998); *United States v. Pelluto,* 14 F.3d 881, 891 (3d Cir. 1994). This Court cannot give the foreign judicial record full faith and credit as the requirements of I.C. § 9-312 and 28 U.S.C. § 1738 were not met. Under the Full Faith and Credit analysis, Howard is NOT GUILTY as to Part II and Part III of the Information.

III. ORDER.

IT IS HEREBY ORDERED that the defendant, Jim Howard, III, is NOT GUILTY as to Part II of the Information.

IT IS FURTHER ORDERED that the defendant, Jim Howard, III, is NOT GUILTY as to Part III of the Information.

IT IS FURTHER ORDERED that the defendant, Jim Howard, III, appear on Monday, August 25, 2008, 1t 11:30 a.m., in a courtroom in the Kootenai County Justice Building, for a sentencing hearing on the misdemeanor charge of Driving Under the Influence.

DATED this 13th day of August, 2008.

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2008 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Dennis Reuter
Prosecuting Attorney – Shane Greenbank

KOOTENAI County Sheriff

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy