



13, 2007, to wit: an April 29, 1999, conviction in CRM 97-10053 and December 13, 2004, conviction in CRM 04 9721. Part II of the Information, if proved, results in a felony as it would be Hoffman's third conviction within ten years. Idaho Code § 18-8005(5).

May is charged with Operating a Motor Vehicle while Under the Influence of Alcohol on February 1, 2007, a violation of I.C. § 18-8004, § 18-8005. Part II of the Information alleges that May has previously been convicted of Driving Under the Influence on two prior occasions within the ten years prior to February 1, 2007, to wit: a November 30, 2001 conviction in Latah County case No. CRM 01-1592, and an October 2, 2000 conviction in Latah County case No. CRM 00-1306. Part II of the Information, if proved, results in a felony as it would be May's third conviction within ten years. Idaho Code § 18-8005(5).

Prior to July 1, 2006, an enhanced felony charge of Driving Under the Influence required that the two prior DUI convictions be within five (5) years of the date alleged for the new DUI charge. Idaho Code § 18-8005(5). Effective July 1, 2006, the Idaho Legislature increased the enhancement period from five (5) years to ten (10) years. *Id.* May claims he should now be charged with only a second offense DUI (a misdemeanor), based on the 2001 DUI conviction. May argues that his 2000 DUI conviction, under the old law with a five-year "look back" on the enhancement provision for DUI, the statute of limitations passed on October 2, 2005 (five years after his October 2, 2000, DUI conviction), which occurred before the new ten (10) year "look back" provision went into effect. May claims this ten-year "look back" is a "new statute of limitations" violating the prohibition against *ex post facto* laws. Motion to Dismiss, p. 3.

The next section is the analysis from this Court's decision in *Hoffman*. Additionally, May argued at oral argument and in his "Supplement to Motion to Dismiss" that *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990) and *State v. Hodgson*, 108 Wash.2d 662, 740

P.2d 848 (1987), cert. denied, 485 U.S. 938, 108 S.Ct. 1117, 99 L.Ed.2d 277 (1988) are additional authority to show that this statutory change to Idaho's DUI laws in 2006 violates the prohibition against *ex post facto* laws. Those and other arguments set forth in May's "Supplement to Motion to Dismiss" are addressed in detail in Part III below.

## II. ANALYSIS FROM *HOFFMAN*.

Hoffman claims that: "An initial reading of the Idaho case *State v. Nickerson*, 132 Idaho 406, 973 P.2d 758 (App. 1999) seems to answer the issue against the Defendant's position, but it does not." Motion to Dismiss, p. 3. Nickerson had a prior felony DUI in 1991. Nickerson argued that since the legislature in 1992 changed I.C. 18-8005(7) to make it a felony DUI to have another DUI within ten (10) years of the prior DUI, the change violated the prohibition against *ex post facto* laws found in Article 1, § 10 of the United States Constitution and in Article 1, § 16 of the Idaho constitution, when applied to his circumstance. 132 Idaho 411, 973 P.2d 763. Citing and quoting from *Freeman v. State*, 131 Idaho 722, 963 P.2d 1159 (1998), the Idaho Court of Appeals in *Nickerson* rejected that argument, writing: "...Idaho courts have decided that enhancement provisions based on persistent violator status do not violate the prohibition on *ex post facto* laws", citing *State v. Polson*, 93 Idaho 912, 478 P.2d 292 (1970), and *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948). 132 Idaho 411, 973 P.2d 763. The Court of Appeals went on to hold:

We find the Idaho Supreme Court's rejection of Freeman's claim to be dispositive. It is also in accord with the great weight of authority. See *State v. Yellowmexican*, 142 ARix. 205, 688 P.2d 1097 (Ariz.App. 1984); *People v. Snook*, 16 Cal.4<sup>th</sup> 1210, 69 Cal. Rptr.2d 615, 947 P.2d 808 (1997); *Roberts v. State*, 494 A.2d 156 (Cel. 1985); *People v. Granados*, 172 Ill.2d 358, 217 Ill.Dec. 253, 666 N.E.2d 1191 (1996); *State v. Willis*, 332 N.W.2d 180 (Minn. 1983); *State v. Pratt*, 286 Mont. 156, 951 P.2d 37 (1997); *State v. Levey*, 122 N.H. 375, 445 A.2d 1089 (1982); *Akron v. Kirby*, 113 Ohio App.3d 452, 681 N.E.2d 444 (1996); *Commonwealth v. Hernandez*, 339 Pa.Super. 32, 488 A.2d 293 (1985). We therefore hold that the application of I.C. § 18-

8005(7) in Nickerson's case did not violate the constitutional provisions against ex post facto laws.

132 Idaho 411, 973 P.2d 763. *Nickerson* was affirmed in *Wilson v. State*, 133 Idaho 874, 993 P.2d 1205 (Ct.App. 2000). On facts very similar to *Nickerson*, *Wilson* took a different tack and argued that as a matter of statutory interpretation, since I.C. 18-8005(7) did not specifically encompass the use of pre-1992 DUI felony convictions for enhancement purposes, and a 1984 amendment of Idaho's DUI laws disallowed use of prior convictions committed before July 1, 1983, that *Wilson*'s 1990 felony conviction couldn't be used to enhance his 1995 charge to a felony. The Idaho Court of Appeals was not impressed with that argument, writing:

Idaho Code § 18-8005(7) was amended in 1992 to provide that “any person who has *pled* guilty or *has been found guilty* of a felony violation of the provisions of section 18-8004 ... and within ten (10) years *pleads* guilty or *is found guilty* of a further violation of the provisions of section 18-8004 ... shall be guilty of a felony.” (emphasis added) By using different tenses to describe the prerequisite DUI conviction, this code section plainly expresses the intent that a pre-1992 felony violation of I.C. § 18-8004 can be used to enhance a subsequent DUI charge to a felony. In describing the prerequisite DUI felony, the statute uses the word “pled” and the phrase “has been found guilty” to denote a past tense. Contrast this with the description of the triggering act that uses the word “pleads” and the phrase “is found guilty” to denote a present or subsequent action. A plain interpretation of the words chosen by the legislature in I.C. § 18-8005(7) evidences an intent that a pre-1992 felony DUI conviction may properly be used to enhance a post-1992 DUI charge to a felony.

Moreover, where a statute with respect to one subject contains a certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed. *Kopp v. State*, 100 Idaho 160, 164, 595 P.2d 309, 313 (1979). In 1984, the Idaho Legislature specifically excluded the use of misdemeanor DUI convictions committed prior to July 1, 1983, for enhancement purposes. 1984 Idaho Sess. Laws, ch. 22, § 2, p. 31. Conversely, the 1992 amendment does not contain such a provision excluding felony DUI convictions entered prior to 1992 for enhancement purposes. Had the legislature intended to exclude pre-1992 DUI felony convictions from the ambit of I.C. 18-8005(7), it could easily and clearly have done so in the enactment. See *Nickerson*, 121 Idaho at 929, 828 P.2d at 1334. By not doing so, the legislature is presumed to have a different intent regarding

the use of prior convictions in 1992 than it did in 1984. *Kopp*, 100 Idaho at 164, 595 P.2d at 313; see also *Stroud v. Dept. of Labor and Ind. Serv.*, 112 Idaho 891, 892, 736 P.2d 1345, 1346 (Ct.App.1987).

Finally, the Idaho Legislature, in dealing with DUIs from 1984 forward, has enacted criminal statutes imposing greater punitive measures designed to impress upon the defendant the serious consequences of subsequent violations, and thus deter the defendant from committing repeat offenses. *Nickerson, supra*. We do not think the Idaho Legislature intended to “wipe the slate clean” up to 1992 before the ten-year DUI felony conviction limitation would take effect. Accordingly, we decline to interpret I.C. § 18-8005(7) in such a fashion as would give offenders with a prior DUI felony conviction the opportunity to commit repeat violations without incurring those enhanced penalties.

133 Idaho 880-81, 993 P.2d 1211-12. There is nothing to indicate that in 2006 the Idaho Legislature intended to similarly “wipe the slate clean” and wait until 2011 for the amendment at issue in the present case to take effect.

Since *Nickerson* was authored in 1999, the Nebraska Supreme Court has had occasion to examine changes to that State’s “look back” provision. Nebraska’s “look back” provision for felony DUI crimes increased from eight (8) years to twelve (12) years, due to legislation passed in 1998. In *State v. Hansen*, 258 Neb. 752, 605 N.W.2d 461 (Neb. 2000), Hansen was arrested on a new DUI charge four months after the new statute went into effect. Hansen had two prior DUI convictions in 1988 that were beyond the previous eight year “look back”, but encompassed by the new twelve-year “look back”. Hansen challenged the new law as an *ex post facto* application as applied to his circumstances. The Nebraska Supreme Court noted, similar to the argument posed by Hoffman in the present case: “Hansen claims that once an offense becomes time barred, a later statute extending the period of limitations cannot revive the offense.” The Nebraska Supreme Court held:

While the principle cited by Hansen is correct, it has no application because the use of the two 1988 DUI convictions is not time barred in the instant case, as the amended enhancement provisions of § 60-6,196 (Reissue 1998) had become effective nearly 4 months prior to Hansen's

arrest on August 12, 1998. We considered a nearly identical contention in *State v. Steemer*, 175 Neb. 342, 121 N.W.2d 813 (1963), and our reasoning from that case is controlling. Elwood Steemer had been convicted in 1957 of driving on a suspended license in violation of Neb.Rev.Stat. § 60-418 (Reissue 1952). At that time, the penalty statute, Neb.Rev.Stat. § 60-430 (Reissue 1952), did not provide for an enhanced sentence for second offenses. Thereafter, the Legislature enacted Neb.Rev.Stat. § 60-430.01 (Reissue 1960), which provided for increased penalties against those who are convicted a second time for driving on a suspended license. See *State v. Steemer*, *supra*.

On October 9, 1962, Steemer was convicted for the second time of driving on a suspended license, and the trial court enhanced Steemer's penalty accordingly under § 60-430.01. On direct appeal, Steemer claimed that the consideration of his prior conviction via § 60-430.01 was unconstitutionally *ex post facto*. This court disagreed, explaining that “[t]he penalty for a second conviction was in existence when [Steemer] committed the second offense; it was not increased after his offense was committed.” *State v. Steemer*, 175 Neb. at 344, 121 N.W.2d at 815.

Likewise, the 12-year look-back provision was in existence in the instant case when Hansen committed his fourth-offense DUI, and the penalty therefore was not increased subsequent to his commission of the offense. Section 60-6,196, in effect at the time of Hansen's arrest in August 1998, provides a sentencing scheme under which an offender's punishment for DUI shall be increased in the event that same offender has been convicted of DUI in the 12 years prior to an instant conviction. See § 60-6,196 (Reissue 1998). The penalty provided in § 60-6,196 for a fourth-offense DUI was not increased *after* Hansen committed his fourth-offense DUI. Hansen was arrested for DUI 4 months after the amendments to § 60-6,196 became effective; therefore, the statute has not been applied in such a manner as to render it an *ex post facto* law. See *State v. Steemer*, *supra*. See, also, *Berry v. Wolff*, 193 Neb. 717, 228 N.W.2d 885 (1975).

As we said in *State v. Steemer*, 175 Neb. at 344, 121 N.W.2d at 815, § 60-6,196 is a “ ‘statute [which] deals with offenses committed after its passage, permits an inquiry whether [Hansen] has previously [been convicted], and in fixing the penalty does not punish him for his previous offences (sic) but for his persistence in crime.’ ” (Quoting *Taylor v. State*, 114 Neb. 257, 207 N.W. 207 (1926).) In the instant case, Hansen is not receiving additional punishment for his previous convictions, but he is being penalized under the newly amended statutory scheme for persisting in committing the offense of DUI. Hansen's assignment of error is therefore without merit.

605 N.W.2d at 464, 258 Neb. At 754-55. This Court finds this case to be on point and its reasoning compelling. In the present case, it is Hoffman's alleged choice to drink and drive under the influence of alcohol on February 13, 2007, which make up the alleged crime.

Hoffman made that decision eight months after the modification to the Idaho statute went into effect. Thus, the ten-year “look back” provision was in place when Hoffman made that decision. Any increase in the penalty resulting in the increase in the look back, occurred eight months before Hoffman committed the present offense. As stated by the Nebraska Supreme Court, Hoffman, in being charged with a felony, is not being punished for his previous offenses, but rather for his persistence in crime.

Before July 1, 2001, the State of Kansas had a statute that stated that for sentencing purposes, any conviction over five (5) years old would not be considered for charging purposes if the same person was later charged with another DUI. Effective July 1, 2001, that “decay period” was abolished and the new statutory language provided that “any convictions occurring during a person’s **lifetime** shall be taken into account when determining the sentence to be imposed for a first, second, third, fourth or subsequent offender. K.S.A. 2002 Supp. 8-1567(1)(3). (emphasis added). In holding that since the violation (the new DUI) occurred after the effective date of the statute, no violation of *ex post facto* laws occurred, the Kansas Supreme Court held:

...decisions in other states that have upheld amendments to their DUI statutes increasing the decay period for determining the level of punishment. See *State v. Stoen*, 596 N.W.2d 504, 507-08 (Iowa 1999) (upholding a 6-year increase in the decay period as applied to defendant who violated the amended statute only 52 days after the amendment was effective); *State v. Rolan*, 662 So.2d 446, 448-49 (La.1995) (upholding an amendment that extended the decay period from 5 years to 10 years); *State v. Chapman*, 685 A.2d 423, 424-25 (Me.1996) (upholding a 4-year increase in the decay period and noting that the defendant had fair notice of the change in the statute which occurred 92 days before the violation); *State v. Hansen*, 258 Neb. 752, 754-55, 605 N.W.2d 461, 463-64 (2000) (upholding 4-year increase in the decay period); *State v. Nilson*, 364 N.W.2d 532, 533-34 (S.D.1985) (approving 1-year increase in the decay provision of DUI statute even though it was not applicable to Nilson's two prior convictions).

Enhancement statutes, like sentencing guidelines or recidivist statutes, are common in state criminal laws and do not change the penalty imposed for the earlier conviction. *Nichols v. United States*, 511 U.S. 738,

747, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). The amended Norton ordinance did not operate retroactively to increase the penalty for Hurt's prior DUI offense. Instead, the amended ordinance became effective prior to Hurt's second DUI violation and increased the penalty for the second violation only. Because the amendment does not affect Hurt's actions prior to its effective date, it is not an *ex post facto* law.

*City of Norton v. Hurt*, 275 Kan. 521 at 524, 66 P.3d 870 at 872 (Kan. 2003).

In 1996, the Supreme Court of Montana dealt with a case more similar to *Nickerson*, in that it dealt with statutory changes that created a felony DUI (not a situation such as the present case or in *Hansen* dealing with a statutory change to the “look back” period). On October 1, 1995, the State of Montana legislature made it a felony for a fourth DUI offense. On October 30, 1995, Jerry Walter Brander (Jerry) was charged with a new offense of DUI based on driving on that date, while he had DUI convictions in 1986, 1993 and 1994. The Montana Supreme Court in *State v. Brander*, 280 Mont. 148, 930 P.2d 31 (Mont. 1996) addressed Jerry's claim that his constitutional right to not be subjected to *ex post facto* laws had been violated.

In *Maldonado* [176 Mont. 322, 578 P.2d 296 (1978)], we adopted the reasoning of the U.S. Supreme Court in *Gryger* [*v. Burke*, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed 1683 (1948)]. In *Gryger*, the defendant claimed that his being charged as a habitual offender under a statute which allowed consideration of a conviction occurring before the habitual offender statute was enacted was unconstitutionally retroactive and *ex post facto*. *Gryger*, 334 U.S. at 729, 68 S.Ct. at 1256. The Court disagreed, holding that consideration of the prior conviction was proper in sentencing under the new statute as the current sentence was not an additional penalty for the earlier crime, but, rather, was “a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.” *Gryger*, 334 U.S. at 732, 68 S.Ct. at 1258. Citing this language from *Gryger* in *Maldonado*, we rejected the defendant's similar challenge to the application of an amended persistent felony offender statute which took into consideration a conviction occurring prior to the effective date of the amendment. We stated:

The law did not punish defendant for past conduct, but merely notified defendant he was subject to increased punishment, if he in the future committed an additional felony crime.

*Maldonado*, 578 P.2d at 300.

The fallacy of Jerry's position, however, is that the increase in

punishment at issue here is a consequence of his present offense only and this enhancement neither punishes any previous conduct nor increases the penalty for any prior conviction of DUI. In point of fact, the enhancement of Jerry's present DUI to felony status is nothing more nor less than current punishment for his repetitive drunk driving offense. That Jerry's prior behavior is taken into account in charging the current offense as a felony rather than as a misdemeanor does not, without more, constitute *ex post facto* legislation. As we pointed out in *State v. Coleman* (1979), 185 Mont. 299, 605 P.2d 1000, “[s]imply because a statute operates on events antecedent to its effective date does not make the statute *ex post facto*, nor does such operation make a law prohibitively retroactive.” *Coleman*, 605 P.2d at 1010 (citing *Calder v. Bull* (1798), 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 and *Cox v. Hart* (1922), 260 U.S. 427, 435, 43 S.Ct. 154, 67 L.Ed. 332).

Rather, what is critical is that the sanctions of § 61-8-714, MCA, apply only to Jerry's present offense, committed following the effective date of the statutes under which he was charged and sentenced. While Jerry may not have foreseen in 1986 a change in the law in 1995, at the time he committed the instant offense of DUI on October 30, 1995, he was without question on notice that his prior DUI convictions would be considered for charging and sentencing purposes as regards his driving under the influence on that date. That the Legislature chose to punish his repetitive behavior more severely, does not impose a new penalty for an earlier crime. *Maldonado*, 578 P.2d at 300. Jerry had fair warning of what conduct was punishable, and he makes no showing that the Legislature amended § 61-8-714, MCA, arbitrarily or for vindictive purposes. The 1995 amendments to this statute do not change the legal consequences of actions committed prior to October 1, 1995, nor does the present law disadvantage Jerry by imposing an additional burden on his prior conduct that was not present when his earlier DUIs were committed. *Leistikio*, 844 P.2d at 100.

Accordingly, we hold that the District Court correctly concluded that the application of § 61-8-714(6), MCA, did not violate the *ex post facto* clauses of the federal or Montana Constitutions.

280 Mont. 153-55, 930 P.2d 34-35.

At oral argument, Hoffman's counsel cited *Stogner v. California*, 123 S.Ct. 2446, 539 U.S. 607, 156 L.Ed.2d 544 (2003). *Stogner* dealt with a 1993 California statute of limitations that revived actions for sex-related child abuse crimes in certain situations, where the limitations period specified in prior statutes of limitations had already expired. The pertinent difference is *Stogner* concerned a statute of limitations, where the present case does not concern the statute of limitations for prosecuting Hoffman's February 13,

2007, DUI offense. Instead, the present case concerns a “look back” period, or a “decay period”, which, as the Supreme Court of Nebraska stated in *Hansen*, simply penalizes Hoffman “under the newly amended statutory scheme for **persisting** in committing the offense of DUI”. 605 N.W.2d at 464, 258 Neb. At 754-55. (emphasis added). Or, as the Supreme Court of Montana noted: “the increase in punishment at issue here **is a consequence of his present offense only** and this enhancement neither punishes any previous conduct nor increases the penalty for any prior conviction of DUI” and the fact “That the Legislature chose to punish his **repetitive behavior** more severely, does not impose a new penalty for an earlier crime.” 280 Mont. 153-55, 930 P.2d 34-35. (emphasis added).

The majority opinion in *Stogner* noted the revised California statute of limitation which revived a previously time barred prosecution, falls within the “second category” of prohibited *ex post facto* laws. That category concerns situations where the “new law...inflicts punishments where the party was not, by law, liable to **any** punishment.” 123 S.Ct. 2446 at 2448, 539 U.S. 607 at 607. (emphasis added). In the present case, even if Hoffman were charged with a misdemeanor, he is subject to punishment (up to one year in jail). Thus, it is not a situation where the new law inflicts punishment where the party was not by law previously liable to **any** punishment.

*Stogner* is simply not on point. Hoffman’s claim at oral argument that *Stogner* overrules *Nickerson* is completely without merit.

Hoffman additionally claims: “Furthermore, the State statutes, court personnel, and basically everyone connected with the criminal justice system told Hoffman that there was a 5-year period of enhancement, which he successfully completed (in 2004) before any change was made in the law.” Motion to Dismiss, p. 4. Hoffman’s claim that he somehow

lacked notice of this enhancement provision, or that it “violates the legal expectations of a defendant in Hoffman’s position” (Motion to Dismiss, p. 4), is unavailing. Ignorance of the law is not a defense. Idaho juries are instructed that such is the law. ICJI 1511. *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993).

Finally, at oral argument, Hoffman claimed that the prior DUI convictions are an element of his crime, and not elements of an enhancement provision. This argument finds no support in Idaho law, nor in the cases from other jurisdictions cited above. The elements of the crime of Driving Under the Influence are set forth in ICJI 1000 and Idaho Code § 18-8004. Hoffman having been convicted of prior DUI offenses is simply not an element of his February 13, 2007, DUI. The fact that Hoffman has prior DUI offenses is nothing more than an enhancement feature. **If** the jury finds the elements of the February 13, 2007, offense have been proven beyond a reasonable doubt, **then** the jury must decide whether it has been proven (by additional and different evidence than the jury heard during the trial on the February 13, 2007, DUI), that Hoffman was beyond a reasonable doubt convicted of those earlier offenses. ICJI 1008. But those earlier offenses are simply not elements of the offense of Operating a Motor Vehicle while Under the Influence of Alcohol on February 13, 2007.

### **III. ANALYSIS OF ISSUES RAISED IN MAY’S “SUPPLEMENT TO MOTION TO DISMISS”.**

#### **A. Due Process.**

All of the reasoning set forth above applies to May’s Motion to Dismiss. In May’s “Supplement to Motion to Dismiss”, May also raised due process arguments and additional *ex post facto* arguments.

Regarding due process, May first argues that “Idaho Code § 18-8004A(1)(c) requires that a person be advised in writing what the penalties would be for subsequent

violations of the DUI laws.” Supplement to Motion to Dismiss, p. 1. The applicable code section is actually Idaho Code § 18-8005(1)(c). It does require a person be advised in writing what the subsequent penalties would be. However, *State v. Nickerson*, 121 Idaho 925, 828 P.2d 1330 (Ct.App. 1992), holds that the provision of that section, which require sentencing courts to advise defendants in writing of enhanced penalties for subsequent DUI violations, do not make that written advice a condition precedent to prosecution under the enhanced penalty provisions. 121 Idaho at 928-29, 828 P.2d 1333-34. First of all, the State of Idaho Court of Appeals held that the “state’s noncompliance with I.C. § 18-8005(2)(c) does not raise concerns about notice, due process, or fundamental fairness.” 121 Idaho at 928, 828 P.2d at 1333. In not being given notice by the court of enhanced penalties at his second DUI sentencing, the Court of Appeals said: “Nickerson has not claimed that he suffered any harm as a result of the district court’s noncompliance with subsection (2)(c), nor can he show any.” *Id.* In responding to Nickerson’s argument that the failure to give those warnings should preclude the state from being able to prosecute him for a felony on his third offense, the Court of Appeals said: “Based on the reasoning set forth above and below, we conclude that, in enacting subsection (2)(c), the legislature did not intend to create the right to written advice claimed by Nickerson, nor did it intend subsection (2)(c) to have the exclusionary remedial effect claimed by Nickerson.” *Id.* The Court of Appeals went on to hold: “When I.C. § 18-8005(2)(c) is read in its context as one of the section 18-8005’s sentencing provisions, it becomes apparent that its intended function is not to provide the defendant with notice, or to create in the defendant a right to such notice, but to achieve the well-established sentencing goal of deterrence.” *Id.* “When viewed in this context, it becomes clear that subsection (2)(c) is a punitive measure designed to impress upon the defendant the serious consequences of subsequent

violations, and **thus to deter the defendant from committing repeat offenses.**” *Id.* (emphasis added). At oral argument, when confronted with *Nickerson*, May’s counsel stated that in May’s case, once the notice of subsequent penalties has been made by the state, the state cannot change its mind. That argument has no merit. *Nickerson* clearly stands for the proposition that the warnings need not ever be given at the time of earlier DUI’s in order for the state to prosecute for subsequent DUI’s. If no warning need be given, why can’t the legislature change its mind? What May is arguing is “The state told me one thing, then changed its mind, so I should be able to drink alcohol and drive under the influence, because I thought I was only going to get a second offense misdemeanor this time that I drank and drove and got caught, not a felony.” That is untenable. *Nickerson* addressed essentially that untenable argument. Responding to *Nickerson*’s argument that since he didn’t receive the warnings from the court he “should be immune from prosecution under Idaho’s enhanced penalty provisions”, the Court of Appeals wrote:

In effect, *Nickerson* is arguing that he should not be prosecuted under the enhanced penalty provisions because the district court failed to apply a measure intended to deter his criminal conduct. This argument is untenable. Idaho Code § 18-8005(2)(c) was intended to deter defendants in the increasing serious consequences of those violations. We refuse to construe that same provision in a manner which would give *Nickerson* the right to commit a repeat violation without incurring those enhanced provisions.

121 Idaho at 929, 828 P.2d at 1334. The same logic and the same response applies to May’s untenable argument. May’s argument would completely gut the deterrence and protection of society the State of Idaho Legislature desired in changing the statute.

May’s next due process argument is that since these prior warnings of enhanced penalties were in writing, “the State is bound to honor the agreement” under contract law principles. Supplement to Motion to Dismiss, p. 2. “A written instrument is presumptive evidence of a consideration” argues May, citing Idaho Code § 29-103. *Id.* “A contract

between two parties cannot be impaired by legislation later imposed” claims May, citing *Lindstrom v. District Board of Health Panhandle District I*, 109 Idaho 956, 712 P.2d 657 (Ct.App. 1985). Neither case nor statute deal with criminal law. May argues there is “an existing contract between the State and a defendant so situated.” Supplement to Motion to Dismiss, p. 2. Essentially, what May wants this Court to hold is: “The State, told May on October 2, 2000, that May could drink and drive under the influence after October 2, 2005 (five years after his October 2, 2000, DUI conviction), and only be facing a misdemeanor, and May relied on that contract when he decided to drink and drive under the influence on February 1, 2007.” This is not a contract. No citizen has a contractual right to drink alcohol and drive under the influence. No citizen has a contractual right to a particular bargained for punishment (misdemeanor vs. felony) when he or she chooses to drink and drive at a later point in time. Again, the Court of Appeals in *Nickerson* has essentially answered May’s argument:

Had the legislature intended to require that defendants have actual written notice of enhanced penalties before the enhanced penalties could be imposed, and thus add another essential element for the state to prove when prosecuting under the enhanced penalty provisions, the legislature could have easily and clearly done so by stating that the enhanced penalties will apply only if the state proves that the defendant, prior to committing a subsequent violation, received written notice of the enhanced penalties applicable to subsequent violations. The legislature has not enacted such a requirement.

121 Idaho at 929, 828 P.2d at 1334. May’s argument is completely without merit.

**B. *Ex Post Facto*.**

May argues *State v. O’Neill*, 118 Idaho 244, 796 P.2d 121 (1990) and *State v. Hodgson*, 108 Wash.2d 662, 740 P.2d 848 (1987), cert. denied, 485 U.S. 938, 108 S.Ct. 1117, 99 L.Ed.2d 277 (1988) are show that this statutory change to Idaho’s DUI laws in 2006 violate the prohibition against *ex post facto* laws. Supplement to Motion to Dismiss,

p. 2.

*O'Neill* dealt with whether a statute of limitation in a criminal case may be extended prior to the expiration of the original statute of limitation without being violative of the *ex post facto* law provision of the United States and Idaho Constitutions. 118 Idaho at 246, 796 P.2d at 123. The Idaho Supreme Court held that it could.

*Hodgson* dealt with the same issue, and held the same way. In *dicta*, the Supreme Court of Washington stated “a prosecution once barred by the running of the applicable statute of limitation” cannot be revived by the Legislature.

That is simply not the fact situation here. May is not dealing with a statute of limitations. May is dealing with an enhancement provision that varies the level of punishment based on the number of similar prior offenses within a period of years. There is no “prosecution” that is “revived” in May’s case because the only “prosecution” at issue is the February 1, 2007 DUI. Whether the prior DUI convictions occurred in 2000 and 2001, or in the 1970’s and 1980’s, is really of no consequence. Whether the new offense is a misdemeanor or a felony the sentencing judge will have the information about the prior DUI’s, and can and should take that into consideration in imposing sentence. All the legislature has done when making your third DUI a felony is increase the “look back” period from five years to ten years. If proven guilty, May’s new DUI offense is not a felony because May drove while intoxicated on February 1, 2007; the new offense is a felony because May had two prior DUI convictions within ten years of his decision to drive while intoxicated on February 1, 2007.

The Supreme Court of Washington in *Hodgson* wrote:

Since they [statutes of limitations] are measures of public policy only, and subject to the will of the Legislature as such, they may be changed or repealed in any case where the right to a dismissal has not been absolutely acquired by the completion of the running of the statutory period of limitation.

108 Wash.2d at 667, 740 P.2d 851. In May's case, there is no right to a "dismissal" of any past DUI offense once it reached the five-year period, only the issue of whether it can be considered as an enhancement factor for subsequent DUI's. The Idaho Supreme Court has already spoken on this issue in *Nickerson*, that these enhancement provisions were:

...intended to deter defendants in the increasing serious consequences of those violations. We refuse to construe that same provision in a manner which would give Nickerson the right to commit a repeat violation without incurring those enhanced provisions.

121 Idaho at 929, 828 P.2d at 1334. May brings his past record to this February 1, 2007, DUI. Whether and in what circumstances that past record causes May to be charged with a felony is a matter that has been left to the Idaho Legislature. The Idaho Legislature has made the decision that protection of society and deterrence are better served by increasing the "look back" period from five years to ten years. As evidenced by *Nickerson*, the Idaho Supreme Court has backed the Idaho Legislature's decision in the past.

Finally, May quotes the following from *Hodgson*, which in turn, are quotes from Judge Learned Hand in *Falter v. United States*, 23 F.2d 420, 426-36 (2d Cir. 1928), *cert. denied*, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928). Supplement to Motion to Dismiss, p. 3. Keep in mind, *Hodgson* concerned a statute of limitation. This Court's comment that follows each quote shows why those concerns are not present with an enhancement provision such as in the present case: "Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease on life." An enhancement provision revives nothing. It is May's new DUI that puts his earlier DUI's back into play. "The question turns upon how much violence is done to our instinctive feelings of justice and fair play." May is charged with his third DUI. He should never drink and drive, but he has been convicted twice of such and caught this third time. Is there an injustice that the

DUI's were six and seven years ago, as compared to four and five years ago? "For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest." May has never been "safe" from the "pursuit" of prosecution for a new DUI if he chooses to continue to drink and drive.

**III. CONCLUSION AND ORDER.**

The 2006 amendment to Idaho Code § 18-8005(5) does not violate either the State of Idaho Constitution Article 1, § 16 or the United States Constitution Article 1 § 10 prohibitions against *ex post facto* laws.

**IT IS ORDERED** that May's Motion to Dismiss Part II of the Information is **DENIED**.

DATED this 15th day of May, 2007

\_\_\_\_\_  
John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the \_\_\_\_\_ day of May, 2007 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Dennis Reuter  
Prosecuting Attorney – Denise Rosen

**CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY**

BY: \_\_\_\_\_  
Deputy