BRIEF BANK

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

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DUI SPECIFIC

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Double jeopardy administrative suspension of DL
FST reasonable suspicion right to refuse
HGN admissibility
Hot pursuit
Jurisdiction to prosecute county vs. city
Justice of the Peace lay authority to sentence jail time
Priors admissibility for felony enhancement

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

_________________________________/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of ______________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By______________________
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The state opposes the appeal on two grounds:

1. The lower court was correct when it said that the facts met the definition of "actual physical control"

2. This court should not reverse the decision of the trier of fact absent egregious error.

I. ACTUAL PHYSICAL CONTROL

The Nevada Supreme Court has ruled on the issue "of actual physical control" a number of times. Four cases, all decided in 1989 are considered the controlling cases in the matter. They follow with a brief synopsis of the fact situation in each. Guilt was confirmed in three and the appeal allowed in one as noted below.

1. State v. Rogers, 105 Nev. 230 (1989)

The defendant was found parked on a public highway, partially in the travel lane, defendant apparently drove the car to the location, the vehicle's engine was running and its lights were on and the defendant, who was asleep and slumped over, was seated in the driver's position directly behind the steering wheel. The defendant's conviction was affirmed.

2. State v. Bullock, 105 Nev. 326 (1989)

The defendant's vehicle was parked in the parking lot of a bar, well off the road. The engine was running and the parking lights were on. The defendant was behind the wheel with the seat in a reclining position. The defendant was motionless with his eyes closed and his hands in his pockets. The defendant's conviction was overturned.

3. Isom v. State, 105 Nev. (1989)

The defendant was asleep in the driver's seat and the engine was running. The vehicle was parked at a closed gasoline station at 11:30 p.m. The court found as a fact that the defendant had driven to that location and could have returned to the highway at any moment. The court affirmed the defendant's conviction.

4. State v. Torres, 105 Nev. 558 (1989)

The defendant was discovered at 3:3:30 a.m., "passed out" in the drive thru lane of a restaurant. The defendant was slumped sideways, partially in the passenger seat, the keys were in the ignition with the switch in the "on" position but the motor was not running. It was necessary to shake the defendant awake. The conviction of the defendant was affirmed.

The court reversed the decision of the lower court in Bullock on a number of grounds not the least of which was the public policy issue when they found that drivers should be encouraged to "sleep it off". More importantly, they reasoned that there was no evidence that the defendant drove to the location in an inebriated condition but rather that he had become inebriated in the bar, left when it closed and turned on the motor to keep warm while he slept and sobered up.

In the Rogers case, the court provided us with a list of issues which could be considered in determining "actual physical control". They did not say that it was exclusive or in any way limited to those facts, only that the list could be used as a guide in making the determination. The list is as follows:

1. Where and in what position was the defendant found.
2. Whether the vehicle's engine was running.
3. Whether the defendant was asleep or awake.
4. If at night, were the vehicle's lights on.
5. The location of the vehicle's keys.
6. Whether Defendant was trying to move or had moved the vehicle.
7. Whether the defendant must, of necessity, have driven to the location where he was apprehended.

The Court did not suggest that there must be some type of numerical scoring, e.g. four out of seven equals a conviction or did it exclude any other possibilities.

It is notable that the one distinguishing fact between the Bullock conviction reversal and the others where the court upheld the convictions was number seven on their list; must the defendant of necessity have driven to the location. Having of necessity, driven to the location is a common thread through all of the conviction affirmations.

In confirming the Isom decision, the court pointed out that the defendant could have returned to the highway at any moment. The court rejected Isom's contention that she could not have been in actual physical control because she was asleep at the time. The court went on to define actual physical control as "when the person

has existing or present bodily restraint, directing influence, dominion, or regulation of the vehicle". While it is somewhat difficult to discern the court's meaning of the words, "present bodily restraint", "influence, domination and regulation" are words that are clear and unequivocal. They mean simply, does one have control of the motor vehicle to the exclusion of others and can you operate it if you wish or intend to do so.

In Rogers, the court made it clear that "in actual physical control" encompasses activity broader than or different from driving a motor vehicle. The court went on to say that the objective in requiring the arrest of those who are not driving but who are in actual physical control of a vehicle, is to prevent and discourage persons from placing themselves in control of a vehicle **where they may commence or recommence driving while in an intoxicated state, notwithstanding the fact that they are not actually driving at the time they are apprehended.** (Emphasis added).

The court hypothesized that if an intoxicated person started the car, drove onto a public highway, and pulled into an emergency lane to change a flat tire, that person would clearly be in actual physical control, notwithstanding the fact that he or she had stopped the vehicle before the police arrived.

The only fact which distinguishes the hypothetical adopted by the Court in the Isom case from the situation in the instant case is that the defendant was out of his vehicle to fix a hood latch as opposed to repairing a flat tire.

An examination and comparison of the list offered in the Rogers case with that of the instant case reveals that:

1. The defendant's vehicle was running and therefor operational.
2. The keys were in the ignition.
3. The defendant had moved the vehicle. (he admitted that he had driven to the location), and,
4. The defendant must, of necessity, driven to the location.

Responding to the issues in the order that they are raised by the defendant in his brief it is apparent that:

1. The defendant would not have sat by his vehicle after he repaired the hood latch. He was going fishing. He certainly had the mechanical ability to "return the vehicle to the paved roadway". He had only to walk six feet and put the truck in gear.

2. It is agreed that he made no attempt to move his vehicle when the trooper approached. He had not, at that time, completed the repairs. To point out that "he gave no indication that he intended to drive away from the location", is asking the trier of fact and this court to suspend all reason and accept the remote possibility that having repaired the vehicle, he would not then drive it away.

3. There is no rational relationship between these facts and those in Bullock. Bullock was asleep. Truran was wide awake. Bullock was totally passive. Truran was working on a problem that was only temporarily delaying the balance of his trip to the lake. There was no evidence that Bullock had driven to the location in an inebriated state. Truran admitted that he had driven to the location. Bullock was parked in a parking lot well off the travelled portion of the road. Truran was parked on the shoulder of a busy highway.

///

5. It is true that the trooper testified that from where the defendant was standing, he could only move the vehicle by pushing it. The answer to the question, "could he have entered the vehicle and driven off?" is obviously answered in the affirmative.

II. REVERSAL OF THE TRIER OF FACT

It is clear from the Magistrate's remarks as set out in the transcripts of both the trial and the sentencing that Judge Freitag was upset by the fact that the trooper arrested a man going fishing. As absurd as that may be, the record is equally clear that the magistrate found as a fact that the circumstances met the definition of actual physical control.

It is a well accepted rule that an appellate court should reverse the trier of fact only in circumstances where egregious error has been made. No such situation exists here. The judge did not reverse an erroneous ruling as suggested by the defendant. The judge substituted emotion two days later for a rational decision made at the end of the trial. There is no "going fishing" exception to be found in NRS 484.

CONCLUSION

The inference that the defendant would drive away after completing his repair is inescapable. If he drove the vehicle to the location as the defendant admitted at trial, and with the keys in the ignition and the motor running, it is absurd to suggest that he did not have dominion and control of his vehicle

One does not have to be sitting on a horse to have control over it.

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* * *

THE STATE OF NEVADA,

Plaintiff,

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Defendant.

______________________________________/

OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, State of Nevada, by and through RICHARD A. GAMMICK, and ,
Deputy District Attorney, and opposes the defendant's Petition for Writ of Habeas Corpus. This Opposition is based upon the attached Points and Authorities, all papers and pleadings on file herein and any oral argument which this Court deems appropriate.

DATED this ____ day of _________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_______________________

Deputy District Attorney

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

STATEMENT OF FACTS

ARGUMENT

I. THE DEFENDANT WAS IN **ACTUAL PHYSICAL CONTROL** OF HIS TRUCK.

Nevada Revised Statute 484.379 prohibits being in actual physical control of a vehicle while under the influence of alcohol. Many state courts have attempted to define the parameters of actual physical control. In Nevada, the Supreme Court addressed the issue in a seminal way in 1989, deciding three cases which set forth the standard for determining actual physical control. Those cases are Rogers v. State, 105 Nev. 230 (1989), Bullock v. State, 105 Nev. 326 (1989), and Isom v. State, 105 Nev. 391 (1989).

There are eight elements which must be weighed in determining whether actual physical control of a motor vehicle has occurred. Those eight elements are: 1) where and in what position the person is found in the vehicle; 2) whether the vehicle's engine is running or not; 3) whether the occupant is asleep or awake; 4) whether, if the person is apprehended at night, the vehicle's lights are on; 5) the location of the vehicle's keys; 6) whether the person was trying to move the vehicle or had moved the vehicle; 7) whether the property on which the vehicle is located is public or private; and 8) whether the person must, of necessity, have driven to the location where apprehended. Rogers, at 233-34.

The issue of whether a person can be in actual physical control of a vehicle which is inoperable has not been addressed by the Nevada Supreme Court. This Court must look to other jurisdictions to find case law on the issue. The is an abundance of case law which does address this very point.

There are two cases from Alaska, Lathan v. State, 707 P.2d 941 (Alaska App. 1985) and Mezak v. State, 877 P.2d 1307 (Alaska App. 1994), which are similar to the case at bar. The facts in Lathan were set out by the Court as follows:

> On the night of September 29-10, Mr. Lathan had driven his 1980 Chevrolet [Monza] from the L.K. Corral, where he had consumed some beer, to the College Inn liquor store. At that time, Mr. Lathan had not consumed enough alcoholic beverages to be "under the influence." When he arrived at the college Inn just before midnight, Mr. Lathan bought a twelve-pack of beer and drove down Farmers Loop... to the lower parking lot of the University of Alaska

> campus looking for a friend's car. The road surface was paved in the center but unpaved on the edges. Mr. Lathan got the left front wheel of his car stuck in a mudhole along the edge of the road.
>
> Mr. Lathan then spent between one-half and one and one-half hours attempting to extricate his vehicle from the mud. He was unsuccessful, but in the process he became cold, wet and muddy as it was raining out. Mr. Lathan then got back into his vehicle sitting behind the wheel in the normal driver's position, started the car and apparently turned on the heater. He then began drinking the beer from the twelve-pack he had purchased earlier, and over an unknown period of time, (but prior to 4:55 a.m.) consumed seven or eight twelve ounce cans of beer.
>
> Trooper Lovejoy responded to a call at about 4:55 a.m. from the University of Alaska security department, and found Mr. Lathan asleep, sitting behind the wheel with the engine running. Mr. Lathan had not intended to get his vehicle out, since he began drinking after getting stuck and did not intend to drive his vehicle [even] if he could have gotten it out of the mud. At the time Mr. Lathan was contacted, he was "under the influence of intoxicating liquor," and it was later determined that he had a blood alcohol concentration of .209 percent as of 6:06 a.m.
>
> Prior to Mr. Lathan's removal from the scene a wrecker was called.... Initial attempts to get the vehicle out by lifting the rear end with a "one ton" wrecker were unsuccessful. Eventually the vehicle was pulled out of the mud by use of a winch. The entire procedure took approximately thirty minutes. Once Mr. Lathan's vehicle was winched out, it was capable of being driven under its own power. Until it was removed from the mud, the vehicle was incapable of movement.

Id., at 942.

The Alaska Court of Appeals held that under the facts stated above the defendant was in actual physical control of the motor vehicle, despite the fact the car was not operable. The court stated that Alaska's DUI statute, similar to that found in Nevada, does not require that "moveability" of the vehicle be read into the statute. Id., at 943. In so holding, the Alaska court relied on a Montana case, State v. Taylor, 661 P.2d 33, 34-35 (1983), which held that "actual physical control" had been established despite the fact that the defendant's car was incapable of movement.

Another Alaska case addressing the issue of actual physical control of an inoperable vehicle is Mezak v. State, 877 P.2d 1307 (AlaskaApp. 1994). In that case, the Alaska Court of Appeals relied on Lathan, *supra*, and held that a boater could be charged with actual physical control of a boat even though the engine was totally inoperable. The facts in Mezak are as follows:

> On June 4, 1993, Bethel Police Sgt. John Bilyeu and Lt. Jean Achee went to the Brown Slough area in response to a report that three drunk males were leaving

> the area in a yellow boat. When the officers arrived, they observed the boat and saw that one of the three men, Joseph Andrews, was motoring the boat out of the slough. While the officers were obtaining a boat for their own use, the engine of the yellow boat stopped running; the officers then observed Mezak, one of the other two men in the yellow boat, exchange positions with Andrews, take controls of the boat, and repeatedly attempt to restart the engine. The officers admonished Mezak to stop and sit down. Mezak pulled the outboard motor out of the water and sat in the boat. At that point, the officers pulled along side the yellow boat, confirmed that the three men in it where intoxicated, and towed the boat ashore. The police arrested Andrews and Mezak for operating a watercraft wile intoxicated.

Id., at 1307-08. The Alaska court relied on the DUI statute, as well as a number of Alaska cases and held that even though the motor of the boat was not working while Mezak was at the controls he was in actual physical control of the boat.

Alaska is not the only state which holds that operability or "moveability" is not a requirement for a conviction for being in actual physical control of a motor vehicle. The New Mexico Appeals Court addressed this issue in State v. Harrison, 846 P.2d 1082 (N.M.App. 1992). The facts of Harrison are as follows:

> Defendant and a friend, Jude Mari (Mari), were at a mutual friend's home. Upon preparing to leave the residence, Mari noticed the Defendant was intoxicated and offered to drive for him. They got into the defendant's car. Mari drove and the Defendant was a passenger. Mari drove the vehicle for a short distance when the car stalled and would not restart. Mari testified that he steered the vehicle as close as he could to the curb and parked it. Mari further testified that he then took the keys out of the ignition, placed them under the seat, and placed bricks under the front and back tires of the vehicle. Mari instructed the Defendant not to leave the vehicle and then left in search of help.
>
> Officer Longobardi was dispatched to the area in response to a call that an individual was slumped over the steering wheel of a vehicle. Longobardi testified that upon arriving at the scene, he saw Defendant's vehicle in the southbound lane of traffic, positioned at least ten feet away from the curb. Longobardi confirmed that bricks were underneath the tires of the vehicle on the driver's side.
>
> Longobardi testified that, upon approaching the vehicle, he saw Defendant passed out behind the steering wheel of the car. He further testified that the key was in the ignition, the ignition was turned on, the transmission was in drive, and Defendant had his foot on the brake. The officer aroused Defendant, who spoke to Longobardi in a slurred manner. Longobardi smelled alcohol on Defendant's breath and noticed that Defendant had red, bloodshot eyes. On cross-examination, the officer admitted that he did not inquire of Defendant whether he had driven the vehicle to that location, or why the car was sitting there.

Id., at 1085 (citing Hughs v. State, 535 P.2d 1023, 1024 (Okla.Crim.App. 1975)). The overriding concern for the New Mexico Court of Appeals was not that the defendant had not driven the car, nor that the car was inoperable due to the bricks placed behind the wheels, but that the defendant **could** have driven the car at some point. This possibility to drive and injure others is the force behind most cases supporting the actual physical control rulings. Again, moveability is **not** an issue when analyzing actual physical control in this New Mexico decision.

A final case on the issue whether moveability is required for a conviction for actual physical control is State v. Larriva, 178 Ariz. 64, 870 P.2d 1160 (1993). In Larriva, a witness testified that early in the morning of March 11, 1992, he was informed by members of a racquet club that they smelled burning rubber in the parking lot. Upon investigation, the witness saw a car which was "high centered" on a curb at the edge of the parking lot, resting on a safety wire which prevented it from falling into the Rillito River. One of the rear tires was up in the air on the river side of the curb, and the other tire was touching the ground on the parking lot side of the curb. Appellee was sitting in the driver's seat, gunning the engine, which caused the tire to spin on the ground and produced the burning smell. Id., at 1160. The car was eventually removes from this position. The tow truck driver had to wedge the car over the curb. It was the driver's opinion that no one could have moved the vehicle simply by driving it and that, given the car's proximity to the river, it was impossible for anyone to have simply pushed the vehicle over the curb from behind. Id.

The Arizona Supreme Court in Larriva engages in a discussion of the necessity of operability of a vehicle for a conviction in a case of actual physical control of a motor vehicle. In doing so they state as follows:

> A similar factual situation was presented, ..., in Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982). The defendant in that case was convicted of being in actual physical control; of a vehicle under the influence after he was found in his car attempting to start the engine while intoxicated. Another car had parked behind the defendant's vehicle so that it was impossible for him to back out of his parking stall. The Utah Supreme Court found this fact to be no bar to conviction, agreeing with cases from other jurisdictions concluding that the inoperability of the vehicle does not preclude a finding of actual physical control. State v. Dubany, 184 Neb.337, 167 N.W.2d 556 (1969); State v. Schular, 243 N.W.2d 367 (N.D.1976).
>
> ... [O]ur supreme court's reliance on Garcia v. Schwendiman, together with case law from other jurisdictions, (footnote omitted) leads us to conclude that the operability of a vehicle is only tangentially relevant to the determination of actual physical control. As the Washington Court of Appeals noted in State v. Smelter, 36 Wash.app. 439, 444, 445, 674 P.2d 690, 693 (App.1984):

> The focus should not be narrowly upon the mechanical condition of the car when it comes to rest, but upon the status of its occupant and the nature of authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move. Where, as here, circumstantial evidential permits a legitimate inference that the car was were it was because of the defendant's choice, it follows that the defendant was in actual physical control. To hold otherwise could conceivably allow an intoxicated driver whose vehicle was rendered inoperable in a collision to escape prosecution.

Larriva, at 1161-62. Based on the reasoning of all the other courts cited in its opinion, and the Arizona Supreme Courts own prior rulings, the Court held that inoperability alone was not a bar to prosecution. The Arizona Supreme Court remanded the case back to the lower court for trial.

Ample case law exists which supports the proposition that moveability is not a requirement of being in actual physical control of a motor vehicle. For this reason, an intoxicated individual who is in actual physical control of an automobile should not be allowed to avoid prosecution simply because the automobile is rendered inoperable in some way. For an extensive discussion of this issue *see* James O. Pearson, Jr., Annotation, *What Constitutes Driving, Operating, or Being in Control of Motor Vehicle for the Purpose of Driving While Intoxicated Statute or Ordinance,* 93 A.L.R.3d 7 (1979). The State will provide numerous other citations to cases which support its position if this Court so requests. The citations and discussions of the case law, *supra,* was meant only as a concise overview of the issue.

The defendant contends that he should not be held to answer for the felony charge of Being in Actual Physical Control of a Motor Vehicle because the vehicle he was attempting to start may not have been operable. He relies upon the eight criteria set forth in Rogers, *supra,* in which moveability of the vehicle is not mentioned. The petitioner seems to be arguing that had our Supreme Court wanted to include this element in the actual physical control analysis they would have done so. They have not, therefore this Court should not increase the number of criteria when a higher court has decided that such action is not necessary.

However, many of the cases which hold that actual physical control does not require an operable motor vehicle were announced well before the Rogers decision in 1989. Our Supreme Court most surely knew of this issue when it announced the test to apply in Rogers. The court did not find it necessary to include the requirement of operability when determining if actual physical control had occurred.

The defendant's argument fails to address the entire issue which this court is currently facing. The common thread in all of the cases cited, *supra*, is the public safety concern which exists in the jurisprudence on this issue. The real issue is the concern that people should be safe from all those who choose to drink alcohol and then place themselves in the position of possibly operating a motor vehicle. These reckless individuals should not be allowed to avoid prosecution simply because the police have arrived in time to prevent them from driving. Though the driver may not be driving when apprehended the public should be safe from the possibility that they may drive sometime in the near future. As our own Supreme Court states, "the objective in requiring the arrest of those who are not driving but who are in actual physical control of a vehicle, is to prevent and discourage persons from placing themselves in control of a vehicle where they may commence or recommence driving while in an intoxicated state, notwithstanding the fact that they are not actually driving at the time apprehended." Rogers, at 233. It is in the interest in the public's safety from future harm that fuels the concern regarding these dangerous, yet momentarily, nonmoving drivers.

The overwhelming tragedy of drunk driving, and the damage and destruction which can result, is a problem that our society and our legal system struggles with on a daily basis. The automobile itself is at the core of this problem. It is a massive machine made of steel, plastic and other materials which is capable of great speed. With that speed comes the ability to do great damage upon impact. Even an automobile without an operable engine, as in this case, is capable of such destruction. The forces of gravity can propel an automobile down a street without the uses of the engine. Gravity, coupled with the weight of the car, will move the car. The speed which the car can attain is variable, and can be very fast under the right conditions. If the driver of this "non-engine" car is under the influence of alcohol he can do just as much damage to persons and property as he could with a car powered by a mechanical engine. If a car can reach a speed of 30 miles per hour it should not matter whether it is moved by a mechanical engine or gravity; it is still an instrument of great destruction.

CONCLUSION

Based upon the foregoing, the State respectfully submits that the defendant's Petition for a Writ of Habeas Corpus be denied and that the matter proceed to trail as scheduled.

Dated this __________ day of ________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By______________________________

Deputy District Attorney

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DATED this ___ day of _______________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By_______________________
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

PHLEBOTOMIST AFFIDAVIT WAS PROPERLY ADMITTED, THUS NEITHER THE STATE NOR THE COURT VIOLATED THE APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES.

The issue raised is whether Cindy Miller's Affidavit stating she was the phlebotomist who withdrew the Appellant's blood was properly admitted. The Appellant states both the State and Judge Schroeder are confused and do not understand. (Appellant's Opening Brief pg. 8, ln. 7-8.) However, the affidavit was properly admitted because the State complied with the requirements laid out in NRS 50.315 & 50.325, the Appellant did not comply with the requirements in NRS 50. 315(6), the caselaw relied on by the Appellant at trial has effectively been overruled and the affidavit possessed particularized guarantees of trustworthiness to satisfy the Confrontation Clause of the Sixth Amendment.

A. The Appellant Waived her Statutory Rights to Confrontation by Failing to Argue at the time Cindy Miller's Affidavit was Admitted that there was a Substantial and Bona Fide Dispute of Fact regarding her Affidavit.

Before a phlebotomist's affidavit can be admitted, the State must comply with NRS 50.325(2). Pursuant to NRS 50.325(2) the State must

1)make the request to use the affidavit 10 days before trial,

2) notice of the intent to use the affidavit must be sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney and

3) the notice must be accompanied by a copy of the affidavit or declarant.

The Respondent complied with all three requirements. On April 19, 1999, Respondent gave Notice to both the Appellant and her counsel through a letter sent certified mail of its intention to offer the affidavits of the phlebotomist along with a copy of Cindy Miller's affidavit. (TOP April 29, 1999, pg. 73, ln. 4-6.) On that same date, April 19, the Appellant filed with the Court its Objection, without any explanation, to the State's use of

Affidavits. (Notice by Defendant filed April 19, 1999.) However, the Appellant's Objection did not comply with the requirements set out in NRS 50.315(6). NRS 50.315(6) states:

If, at or before the time of the trial, the defendant establishes that:

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined, the court may order the prosecution to produce the witness and may continue or the trial for any time the court deems reasonably necessary to receive such testimony. . .

The Appellant failed to meet either requirement. Thus, the Appellant effectively waived her statutory rights by failing to argue, at the time the affidavit was offered, there was a substantial and bona fide dispute regarding the facts and it was in the best interest of justice that Cindy Miller be cross-examined. (TOP April 29, 1999, pg.70-77.) DeRosa v. Dist. Ct., 115 Nev. Adv. Op. 33 (August 27, 1999). The Nevada Supreme Court in DeRosa stated, "Trial counsel may effectively waive a defendant's statutory rights. Here, counsel for DeRosa and Thomas did so by failing to argue that there was a substantial and bona fide dispute of fact regarding the use of the phlebotomists' declaration. . ." Id. Thus Judge Schroeder was correct in admitting Cindy Miller's Affidavit pursuant to the statute. (TOP April 29, 1999, pg. 80, ln. 17-25.)

The only basis for the Appellant's objection to the admission of Cindy Miller's was its reliance on Raquepaw v. State, 108 Nev. 1020, 843 P.2d 364 (1992). (TOP April 29, 1999, pg. 74, ln. 5-11.) In DeRosa the Nevada Supreme Court effectively overruled Raquepaw. "We discern little distinction between the trustworthiness of the affidavits used in Raquepaw and the trustworthiness of the affidavits and declaration used in the instant cases. Thus, to the extent that our holding today is inconsistent with our holding in Raquepaw, Raquepaw is overruled. Id.

B. The Affidavit of Cindy Miller was Properly Admitted Pursuant to NRS 51.315 and the Confrontation Clause of the Sixth Amendment.

Assuming arguendo, the Respondent had not complied with NRS 50.315-50.325 Cindy Millers Affidavit was still admissible because the Respondent met the requirements of NRS 51.315(1). NRS 51.315 states:

1. A statement is not excluded by the hearsay rule if:

(a) Its nature and the special circumstances under which it was made offer strong assurances of accuracy; and

(b) The declarant is unavailable as a witness.

The Respondent met the unavailability requirement because on March 20, 1999, Cindy Miller passed away due to cancer. (See State's Exhibit A). Additionally, the Respondent met the first prong, because the Affidavit by its nature and the special circumstances under which it was made offered strong assurances of accuracy. (TOP April 29, 1999,

pg.71, ln. 2-25 & pg.72, ln.1-10.) Judge Schroeder before determining that Cindy Miller's Phlebotomist Affidavit offered strong assurances of accuracy he applied the rule pronounced in Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980). Judge Schroeder was correct in his determination as evidenced by the Nevada Supreme Court decision in DeRosa. "Such documents are prepared routinely and record objective facts, not subjective observations. The affiant and declarant are trained professionals whose employment depends on ensuring accuracy in the performance of their duties. Under the circumstances of the documents' preparation, we perceive little motive to lie or fabricate on the part of the affiant or declarant." DeRosa, 115 Nev. Adv. Op. 33. Thus the Court properly admitted Cindy Miller's Affidavit because it was an exception to the hearsay rule and the Affidavit was not violative of Appellant's Sixth Amendment right to confront witnesses.

Dated this __________ day of ________________, 2000.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No.CR

, Dept.No.

Defendant.

______________________________/

MOTION TITLE

COMES NOW, the State of Nevada, by and through RICHARD A. GAMMICK, District Attorney of Washoe County, Nevada, and , Deputy District Attorney, and hereby submits this (MOTION TITLE). This (MOTION or RESPONSE) is supported by all pleadings and papers on file herewith, the attached Points and Authorities, and any oral argument this Honorable Court may hear on this Motion.

DATED this ___ day of ______________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By______________________
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

A. Nevada Revised Statute 484.383 explicititly allows a police officer to direct a person previously convicted of a DUI offense within the last seven years, to submit to a blood test.

The Defendant by driving his Volkswagen upon Wells Avenue located in Washoe County, Nevada, impliedly consented to an evidentiary test of his blood in order to determine its alcoholic content. Nevada law states in pertinent part:

> 1. Except as otherwise provided in subsections 3 and 4, any person who drives or is in actual physical control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his consent to an evidentiary test of his blood, urine, breath or other bodily substance for the purpose of determining the alcoholic content of his blood or breath. . .
>
> Nevada Revised Statutes 484.383(1).

Subsections three and four of NRS 484.383 provide exceptions to the implied consent law. Subsection 484.383(3) exempts persons who are afflicted with hemophilia or use anticoagulants from an evidentiary blood test. Subsection 484.383(4)(a) explains when a person may refuse a blood test. Subsection 484.383(4)(b) describes when a person who requests an evidentiary blood test may have to pay for the requested test.

Under NRS 484.383(4) it is clear that as a general rule a defendant may refuse a blood test if a breath test is available. However subsection 484.383(4)(c) removes the breath test as a viable option for defendants who have a prior conviction for a driving under the influence offense.

> 4. If the alcoholic content of the blood or breath of the person to be tested is in issue:
>
> (c) A police officer may direct the person to submit to a blood test as set forth in subsection 7 if the officer has reasonable grounds to believe that the person:
> ...(2) Has been convicted within the previous 7 years of:
> (I) a violation of NRS 484.379,484.3795, subsection 2 of NRS 488.400, NRS 488.410 or 488.420 or a law of another jurisdiction that prohibits the same or similar conduct.

Nevada Revised Statute 484.383

The Defendant impliedly gave his consent to submit to an evidentiary blood or breath test. An evidentiary breath test was not available under Nevada law due to the Defendant's conviction on July 11, 1994, for driving under the influence. Therefore Trooper Lewis's conduct, in directing a blood test, was authorized under NRS 484.383(4)(c) and the Defendant's motion to suppress should be denied.

B. The Nevada Supreme Court has ruled forcing a blood draw from a suspect, who has a prior conviction for driving under the influence of alcohol, supports Nevada's public policy of keeping drunk drivers off the road.

In *Ebarb v. State of Nevada*, 107 Nev. 985, 822 P.2d 1120 (1991), the Nevada Supreme Court ruled that, "Once an arresting officer has determined that a suspect has a prior DUI conviction the suspect no longer has a right to refuse a blood test." *Ebarb* at 986. Additionally, the Nevada Supreme Court in interpreting DUI statutes has stated, "The implied consent statute should be liberally construed so as to keep drunk drivers off the streets." Id. at 988.

In *Nelson v.City of Irvine* 143 F.3d 1196 (9th Cir. 1998), the Court stated the issue of whether the actions of California police officers, who forced blood tests on suspects who requested a breath test, based on California statutes, was one of first impression in California. *Nelson* at 1201. The Ninth Circuit Court of Appeal[1] in *Nelson,* stated:

> "When interpreting state law, federal courts are bound by decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as a guidance. However, where there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts."
>
> Id. at 1206 &1207.

[1]The Ninth Circuit Court of Appeal in *Nelson* made the statement in deciding whether to dismiss Nelson's claim under California Civil Code § 52.1.

Unlike California, the Nevada Supreme Court has ruled on this issue. *Ebarb* at 107. Thus, the Appellate Court would look to the Nevada Supreme Court in interpreting Nevada's statutes. Therefore, based on the statements by the Ninth Circuit Court of Appeal it can be inferred it would not reach the same conclusion as to Nevada statutory law which allows officers to force a blood draw when there are reasonable grounds to believe the suspect has a prior conviction for driving under the influence.[2] As such *Nelson*, which does not address the issue of whether forcing a blood draw on a suspect, who has previously been convicted of a DUI, pursuant to an express statute is irrelevant to this case. Therefore the Defendant's evidentiary

blood test results should not be suppressed based on the Ninth Circuit Court of Appeal's decision in *Nelson*.[3]

C. Nelson v. City of Irvine has no application because it addressed an issue not raised by the facts of this case.

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[2] ". . . 4. If the alcoholic content of the blood or breath of the person to be tested is in issue:. . . (c) A police officer may direct the person to submit to a blood test as set forth in subsection 7 if the officer has reasonable grounds to that the person: . . . (2) Has been convicted with in the previous 7 years of: (I) A violation of NRS 484.379, 484.3795 subsection 2 of NRS 484.400, NRS 488.410 or 488.420 or a law of another jurisdiction that prohibits the same or similar conduct; N.R.S. 484.383.

[3] Assuming arguendo that *Nelson* effectively overrules *Ebarb* and an officer cannot force a blood draw from a suspect with a prior DUI conviction, NRS 484.383 is still constitutional. Pursuant to NRS 484.383(4)(c) the legislature has expressly stated an officer may direct a person to submit to a blood test if the officer has reasonable grounds to believe the person has previously been convicted of a driving under the influence within the previous seven years. However, the legislature also has expressly stated in NRS 484.383(4)(a) a person may refuse to submit to a blood test if means are reasonably available to perform a breath test. Thus, in Nevada unlike California, an officer may direct a defendant to take a blood test and not inform him/her of any other available tests, but may not force the blood draw unless the defendant refuses to take an evidentiary test required under 484.383(1).

Nevada's current statutory construction under NRS 484.383 is constitutional, thus the Defendant's request to suppress the results of the evidentiary blood test should be denied.

There are two reasons why *Nelson* is inapplicable to this case. First, *Nelson* is factually distinguishable and second, the Ninth Circuit Court of Appeals was interpreting the conduct of police officers under California, not Nevada law.

Nelson, addresses the issue of whether an officer can force a blood draw from a defendant, **when the defendant has expressed a preference for, or consented to, an available breath or urine test.** *Nelson at* 1200. In this case, the Defendant never requested, consented or expressed a preference for an evidentiary breath or urine test. The Court of Appeal specifically limited its holding to defendants who verbally requested or consented to undergo a breath test instead of a blood test. "However, the City of Irvine's insistence upon obtaining blood samples from Mauricio Fernandez, Jeffrey Capler, and other class members who requested or consented to undergo breath tests instead of blood tests was unreasonable if breath tests were actually available." Id. at 1203.

Additionally, Trooper was not under any statutory or constitutional duty to inform the Defendant of what methods could be used to test his blood alcohol level or which of those methods were available at the time of the Defendant's test. "The Supreme Court has not announced a *Miranda*-type requirement that suspects be advised of their Fourth Amendment rights." Id. "Thus, the Fourth Amendment is not violated by the City of Irvine's failure to advise class members, who did not request or consent to a urine or breath test, of their right to choose another the alternative tests." Id.

D. Nelson v. City of Irvine interprets California statutory law.

In *Nelson,* the Ninth Circuit Court of Appeal determined the constitutionality of arresting officers actions based on a California statute. "Further, California law requires that breath and urine tests be available: a DUI arrestee 'has the choice of whether the test shall be of his or her blood, breath, or urine, and the officer shall advise the person that he or she has that choice.' Cal. Veh. Code §23157 (West 1997). "Nevada has no such law. Thus any application of *Nelson* to the actions of Nevada police officers based on Nevada's statutory rules is misplaced.

DATED this _______ day of __________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By______________________________

Deputy District Attorney

03152800

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Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The State made a motion for a continuance pursuant to Hill v. Sheriff of Clark County, 85 Nev. 234 (1969) and Bustos v. Sheriff of Clark County, 87 Nev. 622 (1971). The Court found that the State had met all of the requirements of Hill and Bustos, and granted the continuance on the condition that the State prove that the officer received his subpoena. The State subsequently verified that the officer had in fact received the subpoena and prepared to present this evidence to the Court on the new date set for trial.

Under the Plain and Unambiguous Language of NRS 174.085, this Case Should be Dismissed Without Prejudice.

The issue before the Court is whether the State is entitled to dismiss this action without prejudice pursuant to **NRS 174.085(5).** It is the State's position that the language of the statute is clear and unambiguous and that under the plain meaning of the statute, the State is entitled to dismiss this matter without prejudice.

NRS 174.085 provides the means which the State must follow in order to dismiss a case before trial without prejudice. It provides:

> 5. The prosecuting attorney, in a case that he has initiated, may voluntarily dismiss a complaint:
> (a) Before a preliminary hearing if the crime with which the defendant is charged is a felony or gross misdemeanor; or
> (b) Before trial if the crime with which the defendant is charged is a misdemeanor, without prejudice to the right to file another complaint, unless the State of Nevada has previously filed a complaint against the defendant which was dismissed at the request of the prosecuting attorney. After the dismissal, the court shall order the defendant released from custody or, if he is released on bail, exonerate the obligors and release any bail.

NRS 174.085 (emphasis added).

When the language of a statute is clear, there should be no discussion of its intent and it should be applied according to its plain meaning unless it is unconstitutional. See generally Binegar v. District Court 112 Nev. 544 (1996). Under the plain and unambiguous language of the NRS 174.085(5), to be entitled to a dismissal without

prejudice, the State must only show that they have not "previously filed a complaint against the defendant which was dismissed at the request of the prosecuting attorney." Id. Here, there has never been a dismissal of this case and the State is therefore entitled to a dismissal without prejudice.

The Intent of the Legislature Is Evidenced by the Language They Chose to Include in the Statute.

The best indicator of the intent the legislature had when it drafted a statute is to look closely at the language they chose to include, or not to include in the statute. A careful reading of the provisions of NRS 174.085 make it clear that the legislature intended that in order to dismiss a misdemeanor before trial, the State need only show that they had not previously dismissed the case. If the legislature's intent was anything different, they would have made that known by including language setting out some other standard for the State to meet. However, they did not and we are therefore left with the standard they chose which allows the State to dismiss this matter without prejudice under these circumstances.

The intent of the legislature becomes even more evident when we look at the language they chose to include when they addressed the standard to be applied to felonies and gross misdemeanors. With regards to the State's right to dismiss a felony or gross misdemeanor, NRS 174.085(5)(a) states that the State is entitled to dismissal without prejudice, "[b]efore a preliminary hearing if the crime with which the defendant is charged is a felony or gross misdemeanor."

In subsection seven of NRS 174.085, the legislature addressed the specific burden the state must meet in seeking dismissal of a felony or gross misdemeanor. It provides that the State may "dismiss an indictment or information before the actual arrest or incarceration of the defendant without prejudice to the right to bring another indictment or information." Id. However, the State is entitled to dismiss an indictment or information, without prejudice, *after* the arrest or incarceration of the defendant, "only upon good cause shown to the court and upon written findings and a court order to that effect." Id.

It is clear from the language the legislature chose to include in this statute that they intended that the State meet a more stringent test when seeking to dismiss a felony without prejudice. This language was added at the same time as the language applying to misdemeanors in NRS 174.085(5). All of this language was included in the changes to the statute which were made by Assembly Bill 270 of the Sixty-Ninth Session of the Nevada Legislature in 1997.

The legislature carefully chose the language to include in this bill and they intentionally placed a higher burden on the State's right to dismissal of felonies. If they had intended that that burden, or some other, be applied to the misdemeanors, they would have stated so, but they didn't. What they did do in addressing this issue was to require that the State could not have previously dismissed a case before seeking dismissal of a misdemeanor. The legislature also then indicated the means the sate must follow in refilling this matter, specifically providing the defendant must not be arrested and the same judge must hear the case. See NRS 174.085(6).

The legislative history indicates that all of this language regarding these safeguards was a result of agreements between the District Attorney and Public Defender's Offices of both Clark and Washoe County, as well as input from other defense attorney's and concerned organizations.[4] The language was carefully chosen and agreed upon by the prosecutors and the public defenders. Id.

In fact, a review of the legislative history indicates the provisions regarding misdemeanors where never of concern or debate as there is not one mention of any question regarding its impact or the standard to be applied. Senate Judiciary Committee record for June 30, 1997, and Assembly Judiciary Committee record for April 7, 1997, June 13, 1997 and June 20, 1997. This is in strong contrast to the numerous issues presented regarding the implications in on felonies and the safeguards which should be required. It is clear from the legislative record that the standard adopted for misdemeanors was agreeable to all and of no controversy, in contract to the defense's assertions.

In State of Nevada v. Gregory Jonathon Gall, CR98-1200, the Court found a dismissal without prejudice under NRS 174.085 was inappropriate because the trial had begun for purposes of NRS 174.085(5) when the trial court had ruled on an evidentiary decision. The standard adopted by the court in Gall is a very liberal extension of the law regarding when a trial is deemed to have commenced.[5] However, even under this expanded

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[4] "Mr. Graham indicated there had been extensive discussions and negotiations with members of the "defense bar." The deputy public defenders, both in northern and southern Nevada, agreed with the language of A.B. 270 . . .." Senate Judiciary Committee record for June 30, 1997.

[5] The United States Supreme Court and Nevada Supreme Court have repeatedly held that in a bench trial, the trial does not begin until the first witness is called. See State v. Blackwell 65 Nev. 405 (1948).

definition, the State in this case would be entitled to a dismissal without prejudice as the Court in this matter has not decided any evidentiary issues and trial has therefore not begun under the broadest interpretation of the term. Accordingly, under the non-controlling case of Gall cited by Spainhour, the State is entitled to a dismissal without prejudice.

The second case Ryan Tyler Brandon v. State of Nevada, CR99-1230, involves a decision in which the judge simply refused to follow the language of the statute. The court in Brandon decided to adopt its own standard for application of NRS 174.085(5), which the State submits is contrary to the controlling authority and in violation of the United States Constitution's requirements for the separation of powers which requires the court's of our country not to legislate.

The court in Brandon relies upon Gall for support for its decision. However, the court in Gall followed the language of the statute. It decided the State was not entitled to the dismissal because the trial had begun. In Brandon, no such facts were evident, the court simply adopted a different standard then that mandated by the legislature, an undertaking the court was not empowered to do.[6]

However, even under the standard adopted by the court in Brandon, the State is entitled to a dismissal without prejudice in this case. The court in Brandon decided that when the State makes a motion to continue a case and it is obvious the State has no grounds for the continuance, any subsequent request for dismissal without prejudice must be denied.

CONCLUSION

DATED this _______ day of __________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By______________________________

Deputy District Attorney

[6] Colwell v. State, 112 Nev. 807, 813, 919 P.2d 403 (1996)(the authority to fix rules of criminal procedure in Nevada is vested in the legislature).

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POINTS AND AUTHORITIES

I. STATEMENT OF THE FACTS

II. ARGUMENT

THE REVOCATION OF ONE'S DRIVER'S LICENSE, FOLLOWING AN ADMINISTRATIVE PROCEEDING, IS NOT PUNISHMENT FOR PURPOSES OF DOUBLE JEOPARDY ANALYSIS AND DOES NOT BAR A SUBSEQUENT DUI PROSECUTION.

The question before the Court in the case at bar is whether the administrative revocation of one's driver's license is "punishment" within the meaning of the double jeopardy clause which would bar a subsequent DUI prosecution. The defendant points to language in United States v. Halper, 490 U.S. 435 (1989), and concludes that the civil sanction of the revocation of one's driver's license constitutes punishment for double jeopardy analysis because the sanction may not be fairly characterized as remedial but only as a deterrent or retribution. Halper, 490 U.S. at 447-448.

The actual holding of Halper is as follows:

> We therefore hold that under the double jeopardy clause a defendant who has already been punished in a criminal prosection may not be subjected to an additional civil sanction to the extent that the second sanction may not be fairly characterized as remedial, but only as a deterrent or retribution.

United States v. Halper, 490 U.S. at 448-449 (emphasis added).

The issue then clearly is whether the administrative revocation of a driver's license is remedial or punitive. This inquiry entails a "particularized assessment of the penalty imposed and the purpose that the penalty may fairly be said to serve." United States v. Halper, 490 U.S. at 448.

More than 50 years ago, Justice Louis Brandeis, writing for a unanimous United States Supreme Court, concluded that one remedy which is characteristically free of punitive criminal elements is the revocation of a privilege voluntary granted. Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

The purpose actually served by an administrative revocation of a driver's license is clearly remedial. In Department of Motor Vehicles v. Yohey, 103 Nev. 584, 747 P.2d 238 (1987), the Nevada Supreme

Court stated that the objective of administrative revocation of a driver's license for driving under the influence or with a blood alcohol of 0.10 or more is not to impose an additional punishment, but to protect the unsuspecting public from irresponsible drivers. Department of Motor Vehicles v. Yohey, 103 Nev. at 587; see also, Department of Motor Vehicles v. McLeod, 106 Nev. 852, 854-55, 801 P.2d 1390 (1990); Department of Motor Vehicles v. Beavers, 109 Nev. 435, 438, 851 P.2d 432 (1993), cert. denied, 114 S.Ct. 387 (1993).

Although the specific issue is pending before the Nevada Supreme Court, the overwhelming majority of courts that have addressed the issue have determined that the administrative revocation of a driver's license for DUI is a remedial function. See, State v. Jones, 666 A.2d 128 (Md. App. 1995); State v. Savard, 659 A.2d 1265 (Maine 1995); State v. Cassidy, 662 A.2d 955 (N.H. 1995); State v. Mertz, 907 P.2d 847 (Kan. 1995); Schwartz v. Kennedy, 904 P.2d 1044 (N.M. 1995); State v. Zimmerman, 539 N.W.2d 49 (N.D. 1995); State v. Talavera, 905 P.2d 633 (Idaho 1995); Butler v. Department of Public Safety, 609 S.2d 790 (La. 1995); Tench v. Commonwealth, 462 S.E.2d 922 (Va. App. 1995); State v. Hansen, 532 N.W.2d 598 (Minn. App. 1995); Baldwin v. Department of Motor Vehicles, 42 Cal.Rptr.2d 422 (Cal. App. 1995).

The issues before the Court in the case at bar have also been discussed in State v. Higa, 897 P.2d 928 (Hawaii 1995) and in State v. Zerkel, 900 P.2d 744 (Alaska App. 1995). In Higa, the trial judge granted a motion to dismiss a DUI prosecution based on the application of double jeopardy principles to driver's license revocation, but the appellate court reversed. After fully examining Halper and its progeny, the court concluded that driver's license revocation serve non-punitive and purely remedial functions. State v. Higa, 897 P.2d at 934. Accordingly, it was held that a subsequent DUI prosecution was not barred by double jeopardy principles.

Similarly, in State v. Zerkel, the court reviewed the same issued and stated:

> We, too, conclude that administrative revocation of a driver's license is remedial even though it may have a deterrent goal and achieve some deterrent effect. We hold that, when the government employs a licensing scheme to regulate an activity that affects the public welfare, administrative revocation or suspension of that license can legitimately serve to deter conduct and still remain remedial for double jeopardy purposes so long as the revocation or suspension is based on conduct that bears a direct relationship to the government's regulatory goals or to the proper administration and enforcement of the regulatory scheme . . . Therefore, the administrative revocation of the defendants' licenses is no impediment to their later prosecution for driving while intoxicated, refusing the breath test, or both.

State v. Zerkel, 900 P.2d at 757-758.

In the State of Nevada, as in the cited cases, holding a driver's license is a privilege, and the right to use it is conditioned upon observing specified rules of conduct. Its revocation due to its abuse can be done in the name of public safety and, therefore, it is not punitive.

CONCLUSION

Based upon the foregoing, the State respectfully requests that the defendant's motion to dismiss be denied.

Dated this __________ day of ________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By______________________________

Deputy District Attorney

DUI FST REASONABLE SUSPICION RIGHT TO REFUSE

Commonwealth Blais, 701 N.E.2d 314 (Mass. 1998).

Recognizing that requiring a motorist to perform roadside sobriety tests constitutes a “search” or “seizure” within the meaning of the Fourth Amendment,the Supreme Judicial Court of Massachusetts ruled that reasonable suspicion that a motorist is operating an automobile while under the influence of alcohol justifies requiring the motorist to perform roadside sobriety tests.

Disapproving prior case law in the state, *Commonwealth v. McGrail* 119 Mass. P1. 647 N.E.2d 712 (1995), the court ruled that a motorist lawfully detained on reasonable suspicion of DUI does not have a right to refuse to perform field sobriety tests, even though such refusal is not admissible as evidence against the motorist. Evidence produced by the tests is physical in nature, not testimonial.

We have stated that although refusal evidence may not he introduced at trial ‘the refusing party has no constitutional right to refuse to produce real or physical evidence.’ *Commonwealth v. Hinckley,* 422 Mass. 261, 264-265. 661 N.E.2d 1317 (1996).

To the extent that the statement in M*cGrail* is inconsistent with our later statement in *Hinckley* and with our decision today it is disapproved”

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Deputy District Attorney

POINTS AND AUTHORITIES

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II. STATEMENT OF THE FACTS

III. ARGUMENT

THE ADMISSION OF HORIZONTAL GAZE NYSTAGMUS EVIDENCE WAS PROPER

The Appellant complains that testimony concerning a **Horizontal Gaze Nystagmus test was improperly allowed** at trial and cites to People v. Kirk, 681 N.E. 2d 1073 (Ill.App. 4 Dist. 1997). That case, however, is founded upon Frye v. United States, 293 F. 1013 (D.C.Cir. 1923). The Nevada Supreme Court has never adopted that decision. Santillanes v. State, 104 Nev. 699 (1988).

The test, in Nevada, is "to assess the admissibility of scientific evidence, like other evidence, in terms of its trustworthiness and reliability." Santillanes v. State, 104 Nev. 699 (1988). Nor is it necessary to introduce new and redundant evidence of the "reliability and trustworthiness" of a scientific test that has been judicially accepted for many years. State, Dept. of Motor Vehicles v. Bremer, 113 Nev. 805 (1997). The Nevada Supreme Court has referred to the Horizontal Gaze Nystagmus test on at least four occasions without disapproving its use. See, State, Dept. of Motor Vehicles and Public Safety v. Evans, 114 Nev.Adv.Op. ___, 952 P.2d 958 (1998), Angle v. State, 113 Nev. 757 (1997), Johnson v. State, 111 Nev. 1210 (1995), State, Dept. of Motor Vehicles and Public Safety v. McLeod, 106 Nev. 852 (1990).

THE TROOPER WAS NOT AN EXPERT WITNESS AS CONTEMPLATED BY NEVADA'S DISCOVERY STATUTES

The State was required to provide notice of the Trooper pursuant to NRS 174.234(2) only if it intended to offer his testimony as that of an expert witness. NRS 174.234(2). The State did not offer the Trooper as an expert witness.

NRS 50.265 allows a lay witness to offer his opinion or draw inferences when rationally based upon the perception of the witness. NRS 50.265. If a witness has been qualified as an expert, then the witness may

testify to matters within the scope of his specialized knowledge. NRS 50.275. An expert's opinion may be based on facts other than that perceived by the witness. NRS 50.285.

Here, the Trooper was not qualified as an expert. As to evidence of a Horizontal Gaze Nystagmus test, the Trooper only testified that he gave such a test and, in conjunction with the results of other tests, was of the opinion that the Appellant had been driving under the influence of an intoxicating beverage. TOP, pages 20-21. The Trooper did not testify as to what he specifically observed, its correlation with any specific blood alcohol level or the scientific foundations for such a correlation.

Nor was the Trooper qualified as an expert as to the breath machine and the breath test. The Trooper merely testified that he, following a checklist, had the Appellant blow into the Intoxilyzer 5000 breath machine. TOP, pages 22-25 and 36-37. The Trooper did not testify as to the workings of the machine, either scientifically or mechanically. He testified only that the machine appeared to be working, the Appellant blew into it, and a result was obtained.

EVEN IF THE TROOPER WAS AN EXPERT THERE WAS NO ERROR IN ALLOWING HIS TESTIMONY

"A trial court is vested with broad discretion in fashioning a remedy when, during the course of the proceedings, a party is made aware that another party has failed to comply fully with a discovery order." Jones v. State, 113 Nev. 454 (1997). The appellate court "will not find an abuse of discretion in such circumstances unless there is a showing that the State has acted in bad faith, or that the non-disclosure results in substantial prejudice to appellant...." Jones v. State, 113 Nev. 454 (1997). There has been, nor can there be, any showing of bad faith on the part of the State. Indeed, the State maintains that it was not required to provide the requested notice. Furthermore, there can be no showing of prejudice to the Appellant. As mentioned at the trial, the defense was provided with a notice of witnesses, to include the Trooper, and complete discovery of the police reports. TOP, page 11.

CONCLUSION

For the above reasons, the State of Nevada respectfully requests that the Appellant's conviction be affirmed.

Dated this ___________ day of _________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_______________________________

Deputy District Attorney

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DATED this ___ day of ______________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By______________________
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

The first argument the Appellant raises is Welsh v. Wisconsin, limits the United States Supreme Court's ruling in U.S. v. Santana solely to felons. Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091(1984). United States v. Santana, 427 U.S. 38, 96 S.Ct. 2406 (1976). The Appellant's only basis for this argument is the fact that the Court in Welsh places brackets around (**hot pursuit** of a fleeing felon) following its citation to Santana. Welsh, 466 U.S. at 750. Nowhere in Welsh does the Supreme Court state that it is limiting its rule in Santana to felons. The Court in Welsh is focusing on the hot pursuit exception to the warrant requirement as evidenced by its second cite to Santana in the same sentence, "and has actually applied only the 'hot pursuit' doctrine to arrests in the home, see Santana, supra." Id. Never in the analysis and holding of Santana does the Court address either the seriousness of the crime nor how the crime was classified. Why would the Court without any analysis in Welsh suddenly limit Santana solely to felonies. The Court by its use of brackets is merely describing the case and it is not intending to limit its holding in Santana.

The second new argument raised by the Appellant is Edwards v. State,107 Nev. 150, 808 P.2d 528 (1991) does not apply Santana to misdemeanors because the majority opinion does not cite to Santana. The majority opinion does not directly cite Santana, however it follows the United States Supreme Court's analysis in Santana. The Court's analysis in Edwards first addresses the issue of whether Edwards committed a gross misdemeanor in a public place. Edwards, 107 Nev. at 154. The issue of whether the misdemeanor was committed in a public place is what determines whether the rule in Santana applies. In the Edwards case the Court determined the offense was not committed in a public place. Id. Thus, the Court did not apply Santana. If the Edwards Court had determined the offense was committed in public it would have applied the rule in Santana. Edwards 107 Nev. at 157 (Dissenting Opinion).

Additionally[7], the Appellant argues the State fails to provide this Court with a reason to apply the rule announced in Santana to misdemeanors. Beside the fact the Nevada Supreme Court adopted the reasoning of Santana in Edwards, the Respondent contends that if the rule in Santana does not apply to misdemeanors illogical and irrational conclusions will result. For example, an officer who witnessed a husband slap and hit his wife while in a public place and then flee after being told to stop by police could not then chase the husband after he fled the scene into his home to make an arrest for domestic battery. The Defendant contends Trooper O'Rourke's entry into the Defendant's garage was illegal because he did not have a reason to believe a serious crime was being committed and therefore the warrantless entry could not qualify under the exigent circumstances exception to the warrant requirement. However the Defendant ignores the first step to analyzing any Fourth Amendment warrant issue, which is whether a warrant to arrest is even required. Under the facts of this case, a warrant to arrest the Defendant was not required and therefore the Trooper's conduct did not violate the Fourth Amendment. Thus, the appeal should be denied.

CONCLUSION

Dated this __________ day of ________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada

By_____________________________

Deputy District Attorney

[7] Additionally, the Appellant argues Santana does not apply to misdemeanors because the other cases cited by the State are not controlling. However, the Appellant in its Opening Brief at pages 9 &10 cite to cases which are not controlling in this jurisdiction. Thus, the Court according to the Appellant's reasoning should disregard those cases.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v. Case No. CR

, Dept. No.

Defendant.

_______________________________________/

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POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

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III. ARGUMENT

CHARGING CRIMINAL MISCONDUCT AS A WASHOE COUNTY CODE VIOLATION

The Appellant alleges that it was improper to **prosecute** the defendant under the Washoe County Code. However, the lower court found that the crime was committed, in part, outside of the city limits. "So the trooper has stated that part of the time that he, the defendant -- at least he did on redirect examination, that part of the time he was going through county as well as through city. So that in and of itself brings it within the jurisdiction of the county."

Even if the crime had occurred completely within the city limits, dismissal or reversal would be improper. NRS 173.075(3) provides that:

> The indictment or information must state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission is not a ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

NRS 173.075(3). (Emphasis added).

The Supreme Court has applied this reasoning to criminal complaints, as well. See, Ex parte Noyd, 48 Nev. 120 (1924).

The criminal complaint, Counts I through III, alleged violations of Washoe County Code section 70.3865 and NRS 484.3792. Washoe County Code section 70.3865 alleges the same misconduct as NRS 484.379. Further, this county code section refers to NRS 484.379. NRS 484.3792 sets out punishments for and refers to violations of NRS 484.379.

THE STATE OF NEVADA WAS THE PROPER NAMED PLAINTIFF IN THIS ACTION

The Appellant fails to cite to any authority for his proposition that the State of Nevada is not a proper party to Washoe County Code violations. Although "[i]t is constitutionally permissible for City to prosecute violations of its ordinances in City's name rather than in the name of the State", Williams v. Municipal Judge of City of Las Vegas, 85 Nev. 425 (1969), it is likewise permissible to prosecute violations in the name of the State. In fact, the Constitution of the State of Nevada provides that: "The style of all process shall be 'The State of Nevada' and all prosecutions shall be conducted in the name and by the authority of the same." Nev. Art. 6, sec. 13. If a complaint is accompanied by an arrest warrant, the arrest warrant shall be in the name of the State of Nevada. NRS 171.108. NRS 171.1773 allows a citation to be in the name of the State of Nevada or in the name of the county, city or town. NRS 171.1773.

CONCLUSION

Dated this __________ day of ________________, .

RICHARD A. GAMMICK
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THE STATE OF NEVADA,

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REPLY TO DEFENDANT'S SENTENCING MEMO OF LAW

PRIOR DUI DOCUMENTATION INSUFFICIENT FOR FELONY ENHANCEMENT

The Reply is based on the following POINTS AND AUTHORITIES incorporated herein by this reference, Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 179 (Ill. 1997), North v. Russell, 427 U.S. 328, 96 S.Ct. 2709 (Ky. 1976), Dugan v. Ohio, 277 U.S. 61, 48 S.Ct. 321 (1928), Dressler v. State, 107 Nev. 687 (1991), Pettipas v. State, 106 Nev. 377 (1990), Jones v. State, 105 Nev. 124 (1989), Koenig v. State, 99 Nev. 780 (1983), Burleigh v. State Bar of Nevada,

98 Nev. 140 (1982), NRS 4.010, NRS 484.3792, all the pleadings, papers and documents on file with the Court in these matters, and any oral argument requested by the Court.

DATED this ___ day of ______________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By______________________
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

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III. ARGUMENT

ARGUMENT

The defendant's memo claims that the both prior criminal convictions are invalid because the magistrate who took the plea was not an attorney. Lay attorneys are specifically allowed in Nevada pursuant to the Nevada Constitution, Art. 6, § 8, and NRS 4.010. "Statutes are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality." Childs v. State, 107 Nev. 584, 587 (1991)(quoting Sheriff v. Martin, 99 Nev. 336 (1983)). The Nevada Supreme Court has held, "[c]ourts presume that a statute is constitutional, and are reluctant to invalidate a statute when the purpose of that statute is in the best interests of the public." Lucky v. State, 105 Nev. 804, 809 (1989)(citing Ex parte Iratacable, 55 Nev. 363 (1934)). Unless the defendant makes a "clear" showing that NRS 4.010 is unconstitutional this argument is not an appropriate reason to prohibit the use of either prior criminal conviction.

The defendant's memo relies on North v. Russell, 427 U.S. 328, 96 S.Ct. 2709 (1976), and a string cite to other cases as precedent for his proposition. Again, the defendant's memo performs legal slight of hand when it states, "[o]ther state jurisdictions have adopted the Defendant's argument in applying these minimum constitutional requirements *based on the United States Supreme Court decision in North v. Russell*." and then cites three state court opinions. Defendant's memo, p. 7, ll. 15-20 (emphasis added). The slight of hand comes from the

fact that two of the three opinions cited were decided prior to North v. Russell. They could not be "based" on North v. Russell, because the case did not even exist.

The one opinion which does cite to North v. Russell does not base its decision on that case. Further, that case was a first degree murder prosecution in a state which allowed lay judges on this type of serious matter. In State v. Dunkerley, 365 A.2d 131 (1976), the Vermont Supreme Court states, "the issue squarely before this Court that was not met by the Untied States Supreme Court in the North case is: Is it legally permissible, as a matter of due process, to be tried by a potentially lay court and no other?" Dunkerley, 365 A.2d at 132. The Dunkerley decision then goes on to adopt the rationale of the two dissenting justices in North v. Russell. For this reason, the position taken in the defendant's memo is disingenuous.

The defendant's memo makes the argument that North mandates legally trained judges in all cases where jail sentences are imposed. This argument is not correct. North addressed a two- tier judicial system which has no resemblance to the judicial system found in Nevada. The Court affirmed the convictions when a lay judge was used. The Court also noted that their, "concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent, neutral, and detached judgement, not at legal training. (Citations omitted)." North, 427 U.S. at 337. The Court then goes on to note its approval of the use of lay persons making legal decisions. Id., 427 U.S. at 337-38.

What is not found in any portion of the North decision is a requirement for trial de novo when a lay judge is used. It also bears noting that the appellant in North actually went to trial. The issue before this Court is a plea of guilty before a lay judge. This issue was also not addressed by the North decision. Lay judges in courts of lesser jurisdiction have a long and approved history in our country.[8] The type of training and qualification required of a judge are often left to legislatures and state constitutions to determine. Such a policy is approved by

[8] For a detailed discussion of the need for lay judges in states with sparse population *see generally*, North v. Russell, *supra*, Shelmidine v. Jones, 550 P.2d 207, 211 (Utah, 1976), and Young v. Konz, 91 Wn.2d 532, 540, 588 P.2d 1360, 1366 (Wash. 1979)(Young II). It is respectfully submitted that the lack of attorneys in outlying areas of Nevada is similar to the situations discussed in North, Young II and Shelmidine. The overpopulated status of both the bar and the state found in California were some of the reasons for the rejection of the lay judge system in Gordon, *infra*. The Gordon case is distinguishable for these reasons.

the United States Supreme Court. In Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 179 (Ill. 1997), the United States Supreme Court states:

> Of course, most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828, 106 S.Ct. 1580, 1588-89, 89 L.Ed.2d 823 (1986). Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. *See*, e.g. Aetna, *supra*, at 820-821, 106 S.Ct., at 1584-1585; Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927); 28 U.S.C. §§ 144, 455; ABA Code of Judicial Conduct, Canon 3C(1)(a)(1980). But the floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal," Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. *See*, e.g. Aetna, *supra*, at 821-822, 106 S.Ct. at 1585-1586; Tumey, *supra*, at 523, 47 S.Ct., at 441.

Bracy, 520 U.S. at ___, 117 S.Ct. at 1797. There exists no known United States Supreme Court case which holds that a plea taken by a lay judge is per se unfair and violative of the Due Process Clause of the United States Constitution.

The State will concede that the Nevada Supreme Court has not yet addressed this issue. A number of our sister jurisdictions have looked at North and its progeny. These cases also often address the case cited in the defendant's memo which requires all judges to be attorneys, Gordon v. Justice Court, 12 Cal.3d 323, 115 Cal.Rptr. 632, 525 P.2d 72 (1974), cert denied, 420 U.S. 938, 43 L.Ed.2d 415, 95 S.Ct. 148 (1975). Few courts follow the Gordon, decision. The Washington Supreme Court states that Gordon "is clearly the minority position." Young v. Konz, 91 Wn.2d 532, 540, 588 P.2d 1360, 1365 (1979)(Young II). The majority opinion is that states are free to have lay judges. *See*, State ex rel. Collins v. Bedell, 194 W.Va. 390, 460 S.E.2d 636 (1995), Walker v. State, 207 Ga.App. 559, ___, 420 S.E.2d 17, 18 (Ga.App. 1992)(noting that the decision in North, "did not hold that a system providing for a trial de novo was the only system which would satisfy due process requirements."), Canaday v. State, 687 P.2d 897 (Wyo. 1984), Young II, *supra*, Young v. Konz, 88 Wn.2d 276, 558 P.2d 791 (1977)(Young I), Treiman v. State ex rel. Miner, 343 So.2d 819 (Fla. 1977), Palmer v. Superior Court in and for Maricopa County, 114 Ariz. 279, 560 P.2d 797 (1977), People v. Sabri, 47 Ill.App.3d 962, 362 N.E.2d 739 (1977), Tsiosdia v. Rainaldi, 89 N.M. 70, 547 P.2d 553 (1976), Shelmidine v. Jones, 550 P.2d 207 (Utah 1976), and Ex Parte Ross, 522 S.W.2d 214 (Tex.App. 1975), *but see*, Gordon, *supra*, Dunkerley, *supra*, and City of White House v. Whitley, 979

S.W.2d 262 (Tenn. 1998)(Tennessee Supreme Court "reject[s] the rationale of North v. Russell," *supra*, and decides matter on State Constitutional grounds). It should be noted that not all systems cited above provided for a de novo trial when a lay judge has presided over a trial. The systems in Arizona, Georgia, Wyoming, New Mexico, Utah, and West Virginia all had a legally trained judge conduct a review of the record, but did not mandate a new trial. The majority of case law supports the system in Nevada. The defendant's memo presents no cogent argument for a departure from this policy.

The defendant's memo's next issue is that because administrative assessments are imposed the prior criminal convictions are invalid. The defendant's memo claims that because judges impose these statutory fees they somehow are no longer impartial. As support for this ludicrous position the defendant's memo cites Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1976) and Connally v. Georgia, 429 U.S. 245, 97 S.Ct. 546 (1977). The claim is incorrect. The citation to Ward and Connally are not on point. The defendant's memo fails to acknowledge the rulings of both the United States Supreme Court and the Nevada Supreme Court in area of financial bias of a judge. A brief survey of those cases will demonstrate
that the imposition of an administrative assessment fee is not unconstitutional.

The defendant's memo fails to address the two primary United States Supreme Court cases regarding judicial bias. The seminal cases which gave rise to this area of inquiry are Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), and Dugan v. Ohio, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928). *See,* United Farm Workers of America, AFL-CIO v. Arizona Agricultural Employment Relations Board, 727 F.2d 1475, 1477-1478 (C.A. 9 (Ariz.) 1984). By holding the issue raised by the defendant's memo up to the facts and reasoning of these cases it becomes clear that no impropriety has occurred.

In Tumey the United States Supreme Court held that a petitioners Due Process rights were violated when he was forced to trial before a judge who also happened to be the mayor. The mayor was responsible for both executive and judicial functions in the village. He was "chief conservator of the peace," and also responsible for the police in the village. Id., 273 U.S. at 519, 47 S.Ct. at 440. Between May and December of 1923, the mayor personally received $696.35 as a result of convictions he imposed while acting as a "liquor judge". Id., 273 U.S. at 522, 47 S.Ct. at 441. This sum was in addition to his regular pay. The Court noted that "no fees or costs in such cases are paid him, except by the defendant, if convicted. There is, therefore, no way by which the mayor

may be paid for his service as judge, if he does not convict those who are brought before him . . . . " Id., 273 U.S. at 520, 47 S.Ct. at 440. Finally, the Court noted that the mayor possessed primarily executive functions, with the duty to supervise law enforcement officers, other executive officers, and looking after the finances of the village. Id., 273 U.S. at 533, 47 S.Ct. at 444. With these factors in mind, the United States Supreme Court held that "[i]t is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal." Id., 273 U.S. at 532, 47 S.Ct. at 444.

One year after the Tumey decision the United States Supreme Court again had an opportunity to consider financial bias as it pertained to a judge. In Dugan v. Ohio, *supra*, the Court again addressed a "mayors" court in Ohio. The mayor of Xenia, Ohio, had no executive functions. The city was run by a commission. The mayor had only judicial functions. He received a salary which was not dependent on whether he convicted a particular person. The Court noted that it was "true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits." Id. 277 U.S. at 65, 48 S.Ct. at 440. With these facts in mind, the Court distinguished Dugan from Tumey, and found no violation of the petitioner's Constitutional rights. The Court also noted that even though the mayor sat on the commission his "relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote." Id.

The Nevada Supreme Court has had an opportunity to apply Tumey and Dugan in two cases: In the Matter of Ross, 99 Nev. 1 (1983), and Burleigh v. State Bar of Nevada, 98 Nev. 140 (1982). Both cases addressed the propriety of the State Bar of Nevada sitting as an adjudicative body over its members, and also the propriety of that body retaining fines it collected and applying them to the coffers of the State Bar. Ross and Burleigh both raised Due Process claims to this procedure. In Burleigh the Nevada Supreme Court, relying on Dugan, found that the procedures were not violative of Due Process because the panel members who fined the petitioner had no financial stake in the outcome of the decision, and they possessed no executive responsibilities for the finances of the Bar. Burleigh, 98 Nev. at 144.

The following year, the Nevada Supreme Court considered Ross. The facts were considerably different than those presented in Burleigh. In Ross the State Bar hired an investigator to look into alleged improprieties in the handling of an estate. The State Bar expended $34,000.00 in costs as part of its investigation. The State Bar was operating at a deficit of
$27,156.00 during the investigation. The sums expended to investigate the petitioners represented 20% of the annual budget of the State Bar. Id., 99 Nev. at 8. The State Bar president was also on record stating that if there was a finding of unethical behavior, "*later perhaps we could petition the Court to recoup some of the expenses which have been involved* . . . . " Id., 99 Nev. at 4 (emphasis in original). The Nevada Supreme Court found that the tribunal's financial interest in the outcome was a violation of the petitioners Due Process rights to a fair and impartial tribunal. The Court also distinguished these facts from Burleigh and Dugan based on the lack of financial interest found in those cases. Ross, 99 Nev. at 10-11.

In applying these four cases to the facts of the case under consideration it is clear that the de minimis assessment imposed in all criminal cases falls squarely within the logic of Dugan and Burleigh. Tumey and Ross can be distinguished because of the direct financial control and interest the tribunal had in the outcome of the proceedings. The cases cited in the defendant's memo were developed from the Tumey decision, and are distinguishable for the same reason.

The judge involved in both of the prior criminal convictions was paid the same amount whether the defendant was found guilty or not guilty. There is no indication that the judge was involved in any policy making for the cities where they worked. There is also no indication that they had any responsibility for law enforcement beyond their judicial duties. Finally, the defendant's memo does not cite to any control or interest in the financial affairs of Canal Township, or the City of Sparks that either judge may have had. There was no incentive for either judge to be anything other than the impartial finder of fact and law that the Constitution requires. The defendant's Due Process rights have not been violated. His memo makes a claim unsupported by the facts or the law. After viewing all the applicable law his claim clearly must fail.

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DATED this ___ day of ______________________, .

RICHARD A. GAMMICK
District Attorney
Washoe County, Nevada
By______________________
(DEPUTY)
Deputy District Attorney

POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

II. STATEMENT OF THE FACTS

III. ARGUMENT

ARGUMENT

The first issue raised by the defendant's memo is that the State is required to present proof of prior offenses at the sentencing hearing, citing Robertson v. State, 109 Nev. 1086 (1993).

The next point the defendant's memo makes concerns the Justice Court of Canal Township, Lyon County, Nevada prior criminal conviction (hereinafter, "Lyon County prior"). The argument is that because the defendant failed to initial three paragraphs of the form the prior is somehow invalid. The defendant's memo buttress this argument by citation to two cases which deal with the right to counsel. *See*, Pettipas v. State, 106 Nev. 377 (1990), and Bonds v. State, 105 Nev. 827 (1989). The defendant's memo then states that from "the State's documentation, there are the same types of *conflicts* in the submitted records that under these circumstances make it impossible to conclude that the unrepresented Defendant knowingly waived these **three constitutional rights** prior to entering his guilty plea . . . ." Defendant's memo, p. 4, ll. 19½ through 22½ (emphasis added).

The conclusion drawn by the defendant's memo is supported neither by the cases cited, nor by the facts presented. In Bonds there was actually a conflict present in the documentation. That conflict was that the

defendant both requested and did not request an attorney. No conflict exists in the Lyon County prior. The Lyon County prior contains a document which specifically lays out all the rights the defendant was waiving by entering his plea. That document shows that the defendant "READ MY RIGHTS, HEARD THEM EXPLAINED BY THE JUDGE, AND FULLY UNDERSTAND[s] THEM." Following this language is the defendant's signature and the date of the plea. The actual waiver of rights form also contains a signature line for the Justice of the Peace where it is indicated that the court specifically canvassed the defendant on the rights he was waiving. Consequently, the record is clear that there is no conflict similar to that found in Bonds or Pettipas which would invalidate the Lyon County prior.

The Nevada Supreme Court has long acknowledged that the standard of analysis for prior criminal convictions which emanate from justice courts and municipal courts is not the same as the stringent standards expected from district courts. In Koenig v. State, 99 Nev. 780 (1983), the Court distinguishes misdemeanor pleas from felony pleas and states:

> The same stringent standard does not apply to guilty pleas in misdemeanor cases. In evaluating the procedures used and the court record made in municipal and justice court prosecutions for misdemeanors, the realities of the typical environment of such prosecutions in these courts of limited jurisdiction cannot be ignored. So long as the court records from such courts reflect that the *spirit of constitutional principles is respected*, the convenience of the parties and the court should be given considerable weight, and the court record should be deemed constitutionally adequate. (Citations omitted)

Koenig, 99 Nev. at 789 (emphasis added). *See also*, Jones v. State, 105 Nev. 124 (1989) (The Nevada Supreme Court supports the "spirit of constitutional principles" analysis of Koenig when analyzing prior criminal convictions). The State would request that the Court look at the entirety of the Lyon County prior. That document demonstrates that the spirit of constitutional principles were respected when the defendant entered his plea and was sentenced. It would be a miscarriage of justice to allow a mistake by the defendant (failing to properly initial three lines after an exhaustive canvass of his rights) to obviate the use of a sound prior criminal conviction.

The defendant's memo then claims that the State can not enhance the offense to a felony because the date of conviction may be incorrect in the charging document and there is not enough specificity of the prior offense. Curiously, the defendant's memo cites no case law for this proposition. There is case law in Nevada which holds that the defendant's position is simply wrong. *See*, Dressler v. State, 107 Nev. 687 (1991). In Dressler a

bench trial was conducted on a felony DUI. The appellant was found guilty. At sentencing the State offered a prior criminal conviction from Lassen County, California. The charging document stated that the prior criminal conviction was from San Mateo County, California. The State moved to amend the information by interlineation after conviction, and noted that the prior criminal conviction had been admitted into evidence at the preliminary hearing and no prejudice would result from amending the information. Id., 107 Nev. at 688.

The Nevada Supreme Court addressed these facts and held, ". . . unless the defendant can show that an omission or inaccuracy in describing a prior conviction had prejudiced him, the state is not precluded from using that prior conviction in seeking an enhancement of the defendant's punishment." Id., 107 Nev. at 689. The Supreme Court stated that the charging document gave the appellant sufficient notice prior to the amendment even with a totally incorrect court. The Supreme Court went on to note that no prejudice was alleged by appellant and "it is unlikely [appellant] was misled by the typographical error complained of." Id.

It is difficult to imagine a case more factually on point with the issue presented by the defendant. The prior criminal convictions have both been extensively litigated by the defendant. There can be no claim that the defendant is in any way prejudiced by their use based on his lack of notice. The State can amend the Information, if it chooses to do so, at the sentencing hearing. If it chooses not to do so, Dressler would still allow their use.

The ensuing salvo in the defendant's onslaught is that the prior criminal convictions do not comply with NRS 176.105. Indeed, they may not. The Nevada Supreme Court has held that this does not constrain their use to enhance the defendant's sentence. In Pettipas, *supra*, the Court addressed the question of what is sufficient proof of a prior criminal conviction for enhancement in a felony DUI. The appellant claimed that "certified copies of formal, written judgements of conviction" were required. Id., 106 Nev. at 379. The Court disagreed, and stated:

> NRS 484.3792(2) does not require that a prior conviction be evidenced by a formal, written judgement of conviction. That statute merely requires that a prior offense be evidenced "by a conviction." In the present case, appellant's prior convictions were evidenced by certified copies of docket sheets and other documents from the courts in which the convictions were entered. These documents are sufficient to show that appellant was actually convicted of misdemeanor DUI in those proceedings. Therefore, the district court did not err when it determined that appellant's prior convictions did not have to be evidenced by certified copies of formal, written judgments of conviction.

Id.

The law is clear that the documentation presented is sufficient for proof of prior criminal convictions. *See also*, Koenig, *supra*, and its discussion of following the "spirit of constitutional principles."

A modicum of legal research reveals that NRS 176.105 has only been cited in the Nevada Reporter on five occasions. Bradley v. State, 109 Nev. 1090 (1993), Jones v. State, 105 Nev. 124 (1989), State v. Eighth Judicial District Court, 100 Nev. 90 (1984), Miller v. Hayes, 95 Nev. 927 (1979), and Reuvelta v. State, 86 Nev. 224 (1970). The defendant's memo again plays hide the ball when dealing with these cases. The defendant's memo cites to Bradley, however he provides no insight on why that case may be relevant to the issue presented. An explanation for such an omission is that the case is neither on point with the facts or the issues presented.

For some reason, known only to the defendant, he fails to address Jones. Jones is a case directly on point with the issue raised in the defendant's memo. The pertinent issue in Jones was that the appellant claimed that the district court improperly sentenced him on a third offense DUI because it relied on prior criminal convictions from California which did not comport with NRS 176.105. The Supreme Court, relying on Koenig, *supra*, specifically held that NRS 176.105 does not apply to these types of situations. Jones, 105 Nev. at 125-26. In conclusion, the attempt in the defendant's memo to say that this Court should not use the prior criminal convictions because they do not comply with NRS 176.105 is not supported by the holdings of the Nevada Supreme Court.

Next in order in the defendant's memo is the claim that Phipps v. State, 111 Nev. 1276 (1995), precludes the use of the Lyon County prior because the date of conviction may be plead incorrectly. Phipps is not persuasive authority for this proposition. Phipps addressed whether a prior criminal conviction where the date of the offense is either "not contained" or "not discernable" in the documentation presented can be used for enhancement. Phipps, 111 Nev. at 1280. The Nevada Supreme Court held that it can not. The Court noted that it was the date of the offense which triggered the enhancement language of NRS 484.3792(2).

Does the holding in Phipps require that this court not consider the Lyon County prior as alleged? Absolutely not. The error complained of in the defendant's memo calls attention to the date of conviction, not the date of the offense. Both the Nevada Supreme Court and the Nevada Revised Statues note that it is the date of offense which is critical for felony enhancement, not the date of conviction. *See*, Phipps, *supra*, Pfohlman v. State, 107 Nev. 552 (1991) and NRS 484.3792(2). There is no logical explanation presented in the defendant's memo for an extension of the ruling in Phipps to cover such a nonessential date in the pleading. The prior offenses alleged

both occurred within seven years of the pending cases. The dates of the offenses are correctly alleged. The State can amend the Information if it chooses to do so, and the defendant can be sentenced as a felon. *See*, Dressler, *supra*.