BRIEF BANK

WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE

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MEMORANDA OF LAW AND ARTICLES

ABANDONED PROPERTY - PRIVACY

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTIONS TO SUPPRESS EVIDENCE AND TO DISMISS THE INFORMATION WHERE APPELLANT CONSENTED TO A SEARCH OF HIS APARTMENT, VOLUNTARILY REVEALED CONTROLLED SUBSTANCES TO OFFICERS, AND DISAVOWED ANY INTEREST IN A BOX CONTAINING METHAMPHETAMINE.

1. Standard of Review

This Court has held that "a district court's findings of fact in a suppression hearing will not be disturbed on appeal if supported by substantial evidence." Stevenson v. State, 114 Nev. Adv. Opn. 77, No. 28851 (June 25, 1998).

2. The Suppression/Dismissal Order

This Court should affirm the district court's denial of the motions to suppress and to dismiss the information. First, Defendant has not provided this Court with a transcript of the suppression hearing; thus, this Court should summarily reject his suppression arguments. Riggins v. State, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) ("It is the responsibility of the objecting party to see that the record on appeal before the reviewing court contains the material to which they take exception. If such material is not contained in the record on appeal, the missing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary."), rev'd. on other grounds, 504 U.S. 127 (1992).[1]

[1]In arguing that the district court erred in denying his motion to suppress, Defendant cites his trial testimony, arguing that his trial testimony is more credible than Officer Elkins' trial testimony as to whether the officer was lawfully present in his apartment without a warrant. Since the district court determined the motion to suppress prior to trial, how can Defendant now argue that the district court erred in reference to testimony that Defendant offered subsequent to the court's denial

Nonetheless, the facts presented at trial, as referenced above, support the district court's finding that Officer Elkins's search and seizure of the methamphetamine did not violate Defendant's reasonable expectation of privacy. First, Defendant disclaimed any interest or ownership in the box. United States v. Tolbert, 692 F. 2d 1041 (6th Cir. 1982)(disclaiming ownership to property vitiates reasonable expectation of privacy to such property). Second, the cigar box was abandoned property. Taylor v. State, 114 Nev. Adv. Opn. 118 (Nov. 25, 1998)("A person who voluntarily abandons his property has no standing to object to its search or seizure because he 'loses a legitimate expectation of privacy in the property and thereby disclaims any concern about whether the property or its contents remain private.'")(quoting United States v. Veatch, 674 F.2d 1217, 1220 (9th Cir. 1981)). Third, Officer Elkins had probable cause to arrest Defendant, and a reasonable belief that the evidence would be destroyed. Cupp v. Murphy, 412 U.S. 291 (1973)(where there is probable cause to arrest, a limited search may be made, even if there has been no arrest, where there is reason to believe the evidence will be destroyed); Ker v. California, 374 U.S. 23 (1963)(unannounced entry into a home to prevent the destruction of evidence). Fourth, even though Officer Elkins searched the box before he arrested Defendant, the search was incident to a lawful arrest. Rawlings v. Kentucky, 448 U.S. 98, 111 (1980)("Where the formal arrest followed quickly on the heels of the challenged search of

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of his motion?

petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."); Chimel v. California, 395 U.S. 752 (1969)(search incident to valid arrest is confined to the person and the area from within which he might have reached weapons or destructible evidence). Fifth, the search was part of a protective sweep. Banks v. State, 94 Nev. 90, 97, 575 P.2d 592, 596 (1978); United States v. Hernandez, 941 F.2d 133, 137 (2d Cir. 1991)(protective search can involve search for "weapons within the grab area of an individual whom the government agents have reasonably concluded is dangerous."); 2 La Fave, Search and Seizure Sec. 6.4(c), p. 649("Even if the crime for which the arrest was made is not that serious, a protective search elsewhere in the premises may be warranted because the police suspect others therein are engaged in much more serious conduct, or have good reason to conclude that there were weapons in the premises."). Finally, because Defendant consented to a search of his apartment, the methamphetamine would have been eventually discovered. Carlisle v. State, 98 Nev. 128, 130, 642 P.2d 596, 597-98 (1982)("We have held that evidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence.").

ALFORD PLEA

The Alford plea or guilty plea pursuit to Alford finds its origin in the case of the same name: North Carolina v. Alford, 400 U.S. 32 (1970). There, the Court observed that the validity of a plea is not undermined when the accused waives a trial, but refuses to admit guilt: "An individual," the Court said, "may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." The Court reached this conclusion ostensibly for three reasons: First, the defendant intelligently concluded that his interest required entry of a guilty plea; secondly, the record before the judge contained strong evidence of actual guilt, and finally, because the trial judge inquired into and sought to resolve the conflict between the waiver of a trial and the claim of innocence. This Court has reached the same legal conclusion and, ostensibly, for the same reasons. See Tiger v. State, 98 Nev. 555, 558, 654 P.2d 1031 (1982); Lyons v. State, 105 Nev. 317, 775 P.2d 219 (1989).

A careful reading of Defendant's brief reveals that he is attacking the procedural validity of the plea on all of the lines mentioned by Alford and its local progeny. These claims, however, based on a review of the entire record and a totality of circumstances, not just the technical sufficiency of the plea canvass, State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701 (1996),

reveal that Defendant's arguments lack merit, and that the lower court order should be affirmed.[2]

a. The lower court did not err in finding and concluding that Defendant entered his plea pursuant to Alford for a valid reason.

Defendant contends that his plea is invalid because it was not premised on a "valid reason," specifically, a plea bargain. This contention lacks merit.

Aside from referencing to the general language of Alford itself, and the self-serving testimony of his expert witnesses, witnesses Judge Agosti found incredible, Defendant provides absolutely no authority for the proposition that, as a matter of law, an Alford plea is invalid without a plea bargain. In this respect, the testimony of Defendant's experts revealed a remarkable unfamiliarity with the substantive requirements of a valid Alford plea, and, when pressed, they could not even cite one specific authority holding a plea bargain is a prerequisite to a valid Alford plea, the very linchpin of the experts opinions. The best they could do was cite to a host of anecdotes, but nothing

[2]It should be noted that Defendant offered the testimony of two lawyers, Martin Wiener and Charles Diaz, who provided the court with their interpretation of Alford. Appellant's Appendix, hereinafter AA, III, pp. 253-57, 312-16, 318; Opening Brief, pp. 67-70, 72-73. This testimony forms the backbone of Defendant's entire argument under this heading, particularly the notion that a valid Alford plea requires a plea bargain. AA, Vol. 3, 270-76, 394. Just as these witnesses, who were repeatedly pressed on cross-examination to come up with some authority, any authority, to support their self-serving interpretation of Alford, Defendant cites absolutely no authority to support that testimony either. These gentlemen therefore either misread Alford or, for obvious reasons, simply read too much into it.

with any legal significance. Indeed, this Court's decision in Tiger merely requires a valid reason. Moreover, the mere fact that the death penalty is still a possibility, without any perceived benefit, does not ruin an Alford plea. See State v. Ray, 427 S.E.2d 171, 173 (SC 1993) - an Alford plea may form a basis for the imposition of the death penalty.

Moreover, what is a valid reason is measured by a subjective standard, on a case-by-case basis. If the measure is objective and the reason presented here is not "valid," then Defendant should cite some authority establishing a bright line objective legal standard or objective minimum for Alford plea validity. He has failed to do so.

In short, the credible evidence presented below established that Defendant had a valid reason for entering the Alford plea. The reason seemed invalid only in retrospect.

BRADY

1. The Guiding Legal Principles.

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecutor. In determining whether information should be considered Brady material, the Court should look to the following elements, each of which the defendant must prove: (1) suppression by the prosecution after a request by the defense, (2) the favorable character of the evidence for the defense, and (3) the materiality of the evidence. Homick v. State, 112 Nev. 304, 314, 913 P.2d 1280 (1996); Lopez v. State, 105 Nev. 68, 78 n.9, 769 P.2d 1276 (1989). The third element focuses on whether or not the suppressed evidence undermines confidence in the outcome of the trial. In construing this latter element, the courts consider whether the defendant made no request, a general request for exculpatory evidence or Brady material, as was the case here, or whether there was a specific request for a specific item. United States v. Bagley, 473 U.S. 667, 682 (1985); accord Kyles v. Whitley, 115 S.Ct. (1555, 1565 (1995)); see also Jiminez v. State, 112 Nev. 610, 619, 918 P.2d 687 (1996). Accordingly, if a defendant makes a general request for exculpatory evidence, the materiality is tested by the reasonable possibility test: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," i.e., it creates a reasonable doubt as to the defendant's guilt which did not otherwise exist. Bagley, 473 U.S. at 682; Jiminez, 112 Nev. at 619; Kevin Lisle v. State, 113 Nev. ___ (Adv. Opn. 56, April 24, 1997); Kyles, 115 S.Ct. at 1566 - the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

If, however, the request is specific, then the reasonable probability test applies: "The evidence is material if there exists a reasonable possibility that the claimed evidence would have affected the judgment of the trier of fact, and thus the outcome of the trial. Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1 (1994); Homick, 112 Nev. at 314.

In either event, the suppressed evidence must be "considered collectively, not item by item." Kyles, 115 S.Ct. at 1567; see also Lisle, 113 Nev. ___ at Slip Op. p. 5 - the undisclosed evidence must be evaluated item by item to determine its importance, but the collective effect of the items determines whether or not the non-disclosure violates Brady.

In contrast, the Brady principle has limitations. For instance, the Constitution, as interpreted by Brady and its progeny, does not require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant. Smith v. Secretary of New Mexico, Dept. of

Corrections, 50 F.3d 801, 823 (10th Cir. 1995). Similarly, Brady does not require the prosecution to make a complete and detailed accounting to the defense of all investigatory work on a case. Moore v. Illinois, 408 U.S. 786, 795 (1972) - wherein a potential suspect was developed and later abandoned but the information was not disclosed. The prosecution has no duty to disclose possible theories of defense to a defendant. United States v. Comonona, 848 F.2d 1110, 1115 (10th Cir. 1988); see also United States v. Griggs, 713 F.2d 672 (11th Cir. 1983) - Brady does not give defendants a right to have the prosecution construct the defense and identify defense witnesses. Also, if the substance of exculpatory evidence, contained in a written report, is disclosed but the written report is not, there is no Brady violation unless the prosecution "misleads the defense" into believing the evidence will not be favorable to the defendant. Hughes v. Hopper, 629 F.2d 1036, 1039 (5th Cir. 1980); see also Williams v. Scott, 35 F.3d 159 (5th Cir. 1994), cert. denied, 513 U.S. 1137 (1995) - wherein the failure to disclose a full written statement was not Brady error because the prosecutor gave a summary, including a cross-reference to a written statement which defense counsel ultimately failed to read. Finally, Brady does not require the State to disclose evidence which is available to the defendant from other sources, or could have been obtained from other sources, including a diligent investigation by the defense. Steese v. State, 114 Nev. ___ (Adv. Op. 58, May 19, 1998); see also Poole

v. State, 97 Nev. 175, 178, 625 P.2d 1163 (1981); Rippo v. State, 113 Nev. ____ (Adv. Op. 136, October 1, 1997).[3]

CONFESSIONS TO LAY PEOPLE

UNAFFECTED BY RULE IN BRUTON - 1990

The statements that were made by the defendants and testified to during the course of the preliminary hearing, which was conducted on November 8 and 9, 1989, were not confessions in the traditional sense of the word and, therefore, do not fall under the protection of Bruton and subsequent cases. See Bruton ~'. United States, 88 S. Ct. 1620 (1968) (defendant orally confessed to a postal inspector that he and the codefendant had committed an armed postal robbery); Richardson V. Marsh, 107 S. ~t. 1702 (1987) (a confession given by a codefendant to police shortly after his arrest); Cruz v. New York, 107 S. Ct. 1714 (1987) (a confession to police followed by a detailed videotaped confession to an assistant district attorney); McRoy v. State, 35 Nev. 406 (1969) (confession given to police by codefendant which contained no direct references to McRoy imposed no substantial threat to his rights); and Stevens v. State, 97 Nev. 443 (1981) (statements made "to the authorities in grand jury proceedings and to a United States Secret Service Special Agent).

As can be seen, all of the cases that follow the Bruton line concern a pretrial confession to law enforcement by one defendant implicating the codefendant. Bruton has not been extended to included statements made by a defendant outside of the formal law enforcement community, particularly to friends and relatives.

In Richardson, supra, the United States Supreme Court refused to extend Bruton to cover a confession made by a defendant when all reference to the codefendant had been

[3]In Rippo, this Court cited the following cases with approval: Williams v. Scott, supra, wherein the Court ruled Brady claim fails where appellant could have obtained exculpatory statements through reasonable diligence; United States v. Griggs, supra, wherein the Court observed that where the prosecution disclosed the identity of a witness, it was within the defendant's knowledge to have ascertained the alleged Brady material possessed by the witness; United States v. Dupuy, 760 F.2d 1492, 1501 n.5 (9th Cir. 1985) - wherein the Court observed that if the means of obtaining the exculpatory evidence has been provided to the defense, the Brady claim fails; United States v. Brown, 582 F.2d 197, 200 (2nd Cir. 1978) - wherein the Court observed that no violation of Brady occurs where the defendant was aware of the essential facts enabling him to take advantage of the exculpatory evidence.

redacted. As indicated above, Richardson did deal with a formal confession being given to police shortly after his arrest.

Statements made by co—conspirators in the furtherance f the conspiracy are not hearsay. NRS 5l.035(3)(e). The State is only required to show "slight evidence" that the conspiracy existed in order to use out-of—court declarations against co-conspirators. Fish v. State, 92 Nev. 272 (1976); McDowell v. State, 103 Nev. 527 (1987).

The Nevada Supreme Court, citing Goldsmith v. Sheriff, 85 Nev. 295 (1969), the premier case in Nevada on the use of co—conspirator's statements, stated that the duration of a conspiracy is not limited to the commission of the crime, but can continue during the period when co—conspirators perform affirmative acts of concealment. Foss v. State, 92 Nev. 163 (1976); Crew v. State, 100 Nev. 38 (1984).

In Crew, supra, one of the defendants had plans to move the bodies in order to avoid detection and that such a plan was an attempt to "get away with it." In the instant case, as reflected in the above facts, both defendants were involved in giving statements to the police, which proved to be false, and were attempts at alibis to cover their time during the commission of the murder. Additionally, they were involved in discarding evidence and attempting to discard property which belonged to the victim. This course of conduct continued by both defendants to even after their arrest. All of the statements that were made to friends and/or relatives, and which the State intends to introduce at trial, occurred prior to the arrest of both defendants on October 23, 1989.

As can be seen from the above discussion, the statements made by the defendants to others outside of the law enforcement community are not subject to Bruton and the subsequent line of cases in both the United States Supreme Court and the Nevada Supreme Court. Since both defendants were actively involved in trying to conceal their involvement in the murder, as recently as October 30th for Defendant HENDRICKS and December 9th for Defendant PRESTRIDGE, the statements that they made to people other than law enforcement should be considered co—conspirator statements and should be allowed in the State's case in chief at trial.

SEVERANCE - BRUTON

A district court may sever trials of multiple defendants when the defendant is prejudiced by joinder. NRS 174.165. A motion to sever is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. Ducksworth v. State, 113 Nev. 780, 794, 942 P.2d 157 (1997). The mere fact that evidence is introduced in a joint trial that would not necessarily be admissible in each separate trial is not dispositive. Instead, as this Court noted in denying rehearing in Ducksworth, the issue is whether all the circumstances together lead to the conclusion that the jury was unable to separate the evidence against the various defendants. Ducksworth v. State, 114 Nev. ___, 966 P.2d 165, 167 (1998).

The mere fact that a defendant might have a better chance at acquittal in a separate trial does not make the joinder inappropriate. Lisle v. State, 113 Nev. 679, 689-90, 941 P.2d 459, 466 (1997).

In Bruton v. United States, 391 U.S. 123, 126 (1968), the Court ruled that where a non-testifying co-defendant confesses and implicates a second defendant, that second defendant may be deprived of a fair trial.

This Court is being asked to determine if a trial must be severed where the statements of one co-defendant do not tend to implicate a second defendant. This Court should decline that invitation. The Bruton case and its progeny all dealt with the right to confront witnesses. Where that right is not compromised

by joinder, there is no abuse of discretion in denying severance. McRoy v. State, 92 Nev. 758, 557 P.2d 1151 (1976).

Even if the defenses were antagonistic, severance would be an option, but would not be mandatory. Generally, even where severance would be allowed, due to such circumstances as conflicting defenses, the trial court is not required to sever. Instead, the trial court is in the best position to fashion a remedy to ensure a fair trial. Zafiro v. United States, 506 U.S. 534 (1993). In Zafiro, the Court recognized the problem can be minimized through appropriate instructions to the jury, and that as a fundamental tenant of our system of justice, jurors are presumed to follow the instructions. Even with conflicting defenses, ruled the Court, an instruction that each charge and each defendant must be considered separately served to negate any prejudice. 506 U.S. at 541..

This Court has ruled that the guilt by association theory does not require severance. Lisle v. State, supra. The Court should affirm that ruling and hold, once again, that we trust jurors to follow the instructions of the court. Where the record shows the diverse verdicts found in this case, there is just no reason to conclude that the jury could not, and did not, properly evaluate each charge and each defendant separately.

VICTIMS CHARACTER IN SELF DEFENSE CASE

Evidence of Specific Acts of Violence By the Victims, Which Were Not Known to the Defendant, Would Not Be Admitted to Prove the Character of the Victims in Order to Show That the Defendant Acted in Self-Defense.

There are two related issues. Defendant argues that the court erred in excluding evidence of specific acts of violence of the victims which were unknown to Defendant. He also argues that the district court erred in quashing a subpoena by which Defendant sought in part to find evidence of specific acts of violence of the victims (and witnesses) which were not known to the defendant. Given the relationship between these issues, the State will first address the evidentiary issue and then discuss the protective order.

In Burgeon v. State, 102 Nev. 43, 714 P.2d 576 (1986), this Court ruled that in a homicide case the victim's character for violence may be proved in order to show that the victim was the aggressor. However, ruled the Court, "the character of the victim cannot be established by proof of specific acts." 102 Nev. at 46. Instead, the victim's character for violence may only be proved by evidence in the form of opinion and reputation. Id. See also NRS 48.055(1). That limitation on the manner of proving a victim's character appears to be the general rule throughout the country. See e.g., 1A, Wigmore on Evidence, Section 63.1, p. 1382 (1983) (character of the victim may not be shown by particular

instances of conduct unless they are independently admissible to show some matter apart from character).

Defendant's reliance on NRS 48.055(2) is misplaced. That section provides that specific prior acts may be proven when "character of a person is an essential element of . . . a defense." Contrary to Defendant's assertion, the victim's character for violence is not an essential element of the claim of self-defense. The defense may be made out even where a person of generally peaceful character acts in such a way as to inspire a reasonable belief in the accused that the use of deadly force is necessary in response. There are few occasions where character is an essential element of a claim or defense. Claims that the defendant is an habitual criminal would certainly be one such claim. More rare, perhaps, is where character is an element of a defense. One example of such a defense would arise in an action for libel. If the libelous statement questioned the character of the plaintiff by suggesting, for instance, that the plaintiff was a dishonest person, the civil defendant could defend the action by showing that the plaintiff is in fact a dishonest person. In that case, and in very few others, it would be permissible under NRS 48.055(2) to prove character by specific instances of conduct because character is an essential element of the defense.

In the instant case, the character of the victims was not an essential element of the defense of self-defense. That defense can be made out even if the victims were generally peaceful people, so long as the evidence showed that their actions on this specific occasion gave rise to the justification for the

use of deadly force. Accordingly, this Court should rule that the district court correctly ruled that the character of the victims could be proven but only by specific acts known to the defendant and by opinion or reputation evidence.

CHILD ABUSE – GENERAL OR SPECIFIC INTENT

Appellant alters some of his arguments in the opening brief by combining them, and asserting that there is "something fundamentally wrong" with this conviction. He then invites this Court to enter into the legislative arena and create a different crime than that defined by the legislature. He invites this Court to ignore the clear language employed by the legislature, and to create a new and different crime of child abuse by which one may abuse a child nearly to death, and then effectively argue that he is entitled to acquittal because he did not specifically intend to inflict the specific injury on the child. This Court should decline that invitation.

Because children need special protections, our legislature has deemed it to be a crime to "willfully" injure a child, to inflict the injury by "non-accidental" means. NRS 200.508.

NRS 200.508 defines the crime in part as a "willful" act. Where the act consists of an omission, such as failure to seek medical care, then the law also requires that the defendant be aware of the urgent need for medical care. See e.g., Rice v. State, 113 Nev. 1300, 949 P.2d 262 (1997). The State does not disagree with that construction. One ought not to be convicted of an omission to act unless one is aware of the need to act. This case, however, does not involve a mere omission. Instead, it was alleged and proven that the defendant himself willfully injured the child by pushing him, that the defendant "threw or pushed the child on more than one occasion against a wall, shook the victim

violently, and otherwise battered or abused the victim." See Information at AA Vol. VI at 1357; jury instructions at AA Vol. VI at 1478, 1497, 1498, 1499, 1501.

When the legislature created the crime of child abuse, the legislature clearly and unambiguously provided that the requisite *mens rea* was "willfully." NRS 200.508(1)(a). That term has a well-defined meaning in Nevada jurisprudence that precludes the conviction of those whose children are injured accidentally, or those whose omission is a result of lack of knowledge. See Rice v. State, supra; Smith v. State, 112 Nev. 1269, 927 P.2d 14 (1996); Childers v. State, 100 Nev. 280, 283, 680 P.2d 598 (1984).

If the legislature had wanted to create a specific intent crime, as it did with attempted murder, that body was fully capable of doing so. It is not for this Court to change the crime as it is defined by the legislature, unless some constitutional provision requires such a construction. Here, of course, there is no argument that either the state or federal constitution precludes defining child abuse as a general intent crime. The argument is only that some other jurisdictions have defined their crimes of child abuse differently. To that the State can only reply, "So what?"

That being said, it may also be instructive to inquire into some of those jurisdictions that define child abuse differently. For instant, appellant relies on State v. Trevino, 833 P.2d 1170, 1175 (N.M. App. 1991). In that case, the Court found no reversible error in a trial involving unlawful sexual contact

with a child, where the trial court did not instruct the jury on the element of "unlawfulness." What that has to do with the instant case is somewhat unclear.

Similarly, appellant relies on People v. Noble, 635 P.2d 203 (Colo. 1981), where the Court undertook the analysis urged here and concluded that a statute prohibiting child abuse while acting "knowingly," created a general intent crime. That hardly seems to support the proposition that courts all over the country are judicially creating a requirement of specific intent.

In People v. Sargent, 70 Cal.Rptr.2d 203 (Cal.App. 1997), the Court was called upon to construe a statute where the legislature had not clearly defined the scienter requirement. That seems more a question of how California courts will construe ambiguous statutes than anything else. The Court also noted that, as it construed the pertinent legislative enactment, the defendant could not be held criminally liable unless he was aware that his willful act was a dangerous act. That hardly seems pertinent to the issue of whether the Nevada legislature intended to create a specific intent crime.

In Ellis v. Commonwealth, 513 S.E.2d. 453 (Va.App. 1999), the Court reversed a conviction where the omission was inadvertent. A young mother had briefly left the home while her children slept. She had forgotten that a gas burner was on. The resultant fire and injuries did not create criminal liability. The State suggests that to describe that decision as representative of a trend of having courts overrule legislatures to create specific intent crimes is stretching it just a bit.

In short, the definition of crimes is a legislative function. Our legislature could have made child abuse a specific intent crime, but they have not done so. It is not for this Court to override the legislative will to protect children from those who would willfully abuse them.

Competency to stand trial – apura
No information for this title at this time.

Competency to stand trial - amnesia
No information for this title at this time.

DEADLY WEAPON DEFINED

Appellant Defendant contends that he was not subject to the weapons enhancement because he used a folding pocket knife in his crimes, and because in one of the crimes he never opened the knife.

As to the contention that the State did not prove that the implement laid on the counter before Carol Sanchez was a knife because it was never opened, the State's response is brief. Ms. Sanchez saw enough of the implement to swear that the thing she saw was a knife. There was no evidence that this particular knife was constructed in such a fashion that no portion of the blade was visible to the observer. Excepting switchblades, one would think that a folding knife must have some portion of the blade visible to allow the user to grasp it and open it. That was apparently the case here because Ms. Sanchez did not describe a knife handle, she described a knife. Although the jury heard that the knife was not opened in her presence, the jury was entitled to determine what weight to apply to the evidence and determine that Ms. Sanchez had a basis for her testimony that Defendant had produced a knife to buttress his threats.

The weight of evidence is for the jury to determine, not for this Court. Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136 (1994). This jury made that evaluation and declined to draw the inference that she must have made unfounded assumptions because the knife was not fully opened in her presence. Because that is the jury's role -- to evaluate evidence and determine what inference should be drawn -- the judgment should not be disturbed.

Defendant also would have this Court rule that the folding pocket knife that he displayed to two of his victims as a matter of law was not a deadly weapon. The State must again disagree.

Prior to 1995 NRS 193.165 included no definition of what constituted a "deadly weapon." This Court had supplied that definition through common law development. In Clem v. State, 104 nev. 351, 760 P.2d 103 (1988), this Court adopted the so-called functional test. Shortly thereafter, this Court overruled Clem and announced the "inherently dangerous" test. Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990).

In 1995, the legislature amended the statute to provide three definitions. The legislature declared that a deadly weapon was any device that fit the prior common law definition under the "functional" test, or the subsequent "inherently dangerous" test, or which was specifically described in any of several other statutes. 1995 Statutes of Nevada at 1431.

The proper question before this Court is, then, whether this Court should rule as a matter of law that a folding knife cannot ever constitute a deadly weapon. In Hutchins v. State, this Court distinguished scissors from knives, noting that a knife is quite obviously a deadly weapon. The waters were muddied somewhat when the Court subsequently declared that an "exacto" knife as a matter of law is not a deadly weapon. Unfortunately, the opinion did not describe the characteristics of an "exacto" knife as distinguished from the knives that are obviously deadly weapons.

The ambiguity arises because common parlance ascribes the term "knife" to any number of things. A device used to spread butter, for instance, is often called a "butter knife" despite the fact that it is generally unsuitable for use as a weapon. Similarly, any given home tool box may contain a "putty knife" which lacks a sharpened edge or a point. Certainly when the court declared in Hutchins that a knife was definitely a deadly weapon, the court did not have in mind a putty knife.

Most of those things to which we append the term "knife" ought to be seen as deadly weapons. If they are a shallow incline plane, designed to pierce or slice impeding materials, and are of a sufficient size that when used in that fashion are capable of causing a lethal injury, then they ought to be considered deadly weapons. As applied, the victims described a knife of some six inches in length before being opened. Such a knife is clearly capable of causing a lethal injury.

Recently, this Court had occasion to recognize the discrepancy in the rulings regarding knives as inherently dangerous weapons. The Court recognized that not all devices described as a "knife" are inherently dangerous, but ruled nonetheless that a 5-7 inch "butcher's knife" of the sort designed to cut meat in a kitchen is, as a matter of law, an inherently dangerous weapon. Steese v. State, 114 Nev.___, ___ P.2d ___, Adv. Op. No. 58 (May 19, 1998). In that case, the Court found no error in the trial court's instruction that the knife was a deadly weapon as a matter of law. The State contends that the trial court in the instant case would have been justified in making that

same determination. That the court submitted it to the jury instead served only to benefit the defendant.

In Zgombic, this Court ruled that in most cases the trial court should determine if an implement is a deadly weapon. In those few close cases, the Court should submit the issue to the jury and allow the jury to decide. The jury in this case heard descriptions of the weapon and description of the manner in which it was deployed and determined that it was in fact a deadly weapon. Unless this Court were to rule that a folding knife cannot ever be a deadly weapon, either inherently or functioDefendanty, then that decision of the jury should be left undisturbed.

C. THE DISTRICT COURT DID NOT ERR IN DENYING THE PRE-TRIAL PETITION FOR WRIT OF HABEAS CORPUS.

Defendant was bound over for trial upon a finding of probable cause at a preliminary hearing. He then sought a pretrial writ of habeas corpus asserting that the evidence was insufficient to support the conclusion that he "used" a deadly weapon or that the implement he used constituted a "deadly weapon." He now contends that the district court should have granted the petition and dismissed the charges. The State disagrees.

A finding of probable cause may be supported by even "slight or marginal" evidence. Sheriff v. Shade, 109 Nev. 826, 858 P.2d 840 (1993). Here, the evidence at the preliminary hearing was not greatly different from that at the trial. Both of the pertinent victims testified that they saw the knife and that

they reacted to it. Mr. Meanor testified that he was "shocked" and that he "just did whatever he [Defendant] wanted." App. at 242.

That evidence was enough to warrant a jury verdict beyond a reasonable doubt and it was certainly enough to constitute "slight or marginal" evidence. Therefore, this Court should rule that the district court did not err in denying relief to Defendant.

D. THE DISTRICT COURT DID NOT ERR IN FAILING TO SUA SPONTE GIVE AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE(S) OF ROBBERY.

Defendant was charged with armed robbery and that was what was submitted to the jury. The jury instructions were settled on the record. Defendant did not request an instruction allowing for consideration of the lesser included offense of unarmed robbery. Trial Transcript, Vol. II at 153-163. The record does not demonstrate whether Defendant insisted on the "all or nothing" approach. Perhaps that will eventually be brought to light in a post-conviction hearing. As it is, though, defense counsel had every opportunity to object to instructions and to propose instructions. The defense elected against consideration of the lesser offenses.

Defendant now contends that the district court had a duty to override the tactical decisions of the defense camp and to sua sponte allow consideration of the lesser offense. The State disagrees.

The state of the law concerning the duty to instruct sua sponte on lesser offenses is somewhat ambiguous. This Court has

often summarily ruled that absent a request for an instruction, the court will not consider the propriety of the instruction on appeal. See e.g., Hollis v. State, 95 Nev. 664, 667, 601 P.2d 62, 64 (1979). On the other hand, this Court has ruled that there are circumstances in which the court should give an instruction even without a request. See e.g., Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966). The State contends first that this case does not fall within the guidelines discussed in Lisby, and second, that a request for an instruction would have been properly rejected and fiDefendanty that the Court should reject the reasoning of Lisby and hold that a defendant has a right to be tried on the charges in the information. If a defendant elects to "roll the dice" and seek an acquittal of all charges rather than risk a possible compromise verdict of guilty of a lesser offense, the district court should not be required by law to overrule that decision and force an instruction on a lesser included offense on a defendant who has no wish for such an instruction.

The State contends that even under the reasoning of Lisby, there was no error in failing to give instructions relating to unarmed robbery. The Lisby court described four situations involving lesser included offenses. The first is where "there is evidence which would absolve the defendant from guilt of the greater offense or degree but which would support a finding of guilt of the lesser offense or degree." 82 Nev. at 187. In that case, held the Court, the district court should give the

instruction sua sponte.[4] In contrast, the fourth situation described by the court is where the State has met its burden of proof on the greater offense, "[b]ut, if there is any evidence at all, . . . on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, the court must if requested, instruct on the lower degree or lesser included offense." 82 Nev. at 188 (emphasis added). The casual reader may believe that the two situations are identical. They are not.

In subsequent cases, this Court has explained that the duty to instruct sua sponte arises only where there is affirmative evidence tending to show the commission of the lesser offense. Davis v. State, 110 Nev. 1107, 1115, 881 P.2d 657, 662 (1994). That is, where the grounds for an argument on a lesser included instruction focus on the strength of the State's evidence in support of a disputed element, then the court must give the instruction only upon request. In contrast, where the evidence includes affirmative evidence tending to show the commission of only the lesser offense, only then should the court give the instruction sua sponte. As applied, the question here is whether there was affirmative evidence tending to show that Defendant committed an unarmed robbery. There is none. While the arguments of counsel did touch on the strength of the evidence presented concerning the use of the weapon, there was no affirmative evidence put forth tending to show that Defendant robbed his

[4]Below, the State will ask this court to reject that ruling.

victims without the use of a weapon. Accordingly, this would appear to be a case where the court may have been required, at most, to give an instruction on lesser offenses upon request, but not sua sponte.

Not only did this case not give rise to a duty to sua sponte instruct on a lesser offense, Defendant may not have been entitled to such an instruction even upon request. It has long been the rule of law that an instruction on a lesser offense is appropriate only where the defendant's theory of the case is that he is only guilty of the lesser. In Johnson v. State, 111 Nev. 1210, 902 P.2d 48 (1995), this Court ruled that an instruction on a lesser offense should be allowed only where the defendant concedes or admits some conduct which constitutes the lesser crime. Here, although counsel may have argued that the evidence that the robbery was committed with the use of weapon was slight, there was nothing approaching an admission of even minimal culpability. The State also suggests that this Court should reconsider the reasoning behind the pertinent portion of Lisby. In Moore v. State, 109 Nev. 445, 447, 851 P.2d 1062 (1993), one of the grounds for reversal was that the court had given an instruction on a lesser related offense over the objection of the defendant. This Court suggested that the defendant has the right, if his chooses, to elect an all-or-nothing strategy, avoiding a potential conviction on a lesser charge.[5] This Court may want to

[5]Such a right would be of particular interest to an alleged habitual criminal for whom there would be no advantage in conviction of a lesser felony.

reconsider Lisby and adopt the more intuitive rule to the effect that a defendant may, if he wishes, form his defense around the technical elements of the sole offense charged. If a defendant may elect that approach, it would follow that the failure to request an instruction on a lesser included offense precludes the defendant from asserting error on appeal from the district court's failure to sua sponte override that tactical decision. That would be in keeping with the general rule of appellate procedure that the failure to bring an error to the attention of the trial court precludes raising that same alleged error on appeal.

E. THE STATUTE DEFINING A DEADLY WEAPON IS NOT UNCONSTITUTIODEFENDANTY VAGUE.

Appellant contends that the reasonable person could not know if the penal law of this state precluded him from committing a robbery while displaying a knife. The State again disagrees.

A criminal statute must be sufficiently specific to allow a person of ordinary intelligence to determine if a proposed course of conduct is prohibited. Sheriff v. Anderson, 103 Nev. 560, 562, 746 P.2d 643, 644 (1983). A *caveat*, one who engages in clearly proscribed conduct, cannot be heard to complain that the statute may be vague as applied to others. Id. A term in a statute ought not to be considered vague if reference to a standard dictionary would clear up the ambiguity. Id.

Defendant's argument is premised on the contention that he might have placed an empty knife handle on the counter of the store while threatening the clerk. As indicated above, that premise is unsound. There was no affirmative evidence that the

handle was empty. Instead, it seems that enough of the blade was visible to allow the victim to be certain that what she saw was indeed an unopened folding pocket knife. Therefore, the State contends that the proper question before this Court is whether NRS 193.165 is sufficiently clear to allow one to know that it is unlawful to display an unopened knife to a store clerk while threatening to "get wild" and demanding money.

Prior to the 1995 amendment adding the statutory definitions of a deadly weapon, the statute was not unconstitutioDefendanty vague. Woods v. State, 95 Nev. 29, 588 P.2d 1030 (1979); Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975). Thus, Defendant now contends that by amending the statute and including both of the prior common law definitions, the statute became vague.

He first argues that the subsection adopting the "inherently dangerous" test is vague because there has been dispute in the courts over whether a knife is an inherently dangerous instrument. As noted above, the confusion has arisen because the term "knife" has been applied to things such as an "exacto" knife. When it comes to the type of device ordinarily thought of as a "knife," there has been no dispute. A knife, an implement designed for cutting and stabbing, is a deadly weapon. See Steese v. State, supra (butcher knife); Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996)(boning knife). It defies logic to argue that a reasonable person could not know that a real knife such as an ordinary folding pocket knife is a deadly weapon. Anyone who wished to know could readily determine that such an

implement is considered a device that when used as designed is likely to cause deadly harm.

Defendant also contends that he could not know that it was a crime to place an innocuous item such as a string on the counter during a robbery. Fortunately, that is not the instant case. He used a knife. In order to be complete, however, the State would point out that NRS 193.165 requires that a device other than an inherently dangerous weapon must be actually used or threatened to be used in a deadly fashion before the enhancement applies. That is, placing string on a counter during a robbery does not make it an armed robbery unless the robber threatens to fashion a cravat and kill the victim. Here, the threat to deploy the knife in a deadly weapon was fairly explicit and clearly perceived by the victim. Anyone who wished to know could readily determine by reading the statute that a crime will become an armed crime if the defendant actually uses or threatens to use an ordinary implement in a deadly fashion.

Under the functional test as defined at common law and now by statute, the focus was on the acts of the accused. For instance, mere possession of a table fork during the commission of a crime would certainly not subject the defendant to the enhancement. On the other hand, where the defendant actually uses or threatens to use a red hot table fork in the commission of the crime, then the crime is properly enhanced. Clem v. State, 104 Nev. 351, 357, 760 P.2d 103, 106 (1988). If Defendant had used some household implement rather than a knife, he would not be subject to the enhancement unless he actually used or threatened

to use it in a deadly fashion. As it is, though, that rule would not be available to this defendant because the knife was inherently dangerous and because he threatened to use it in a deadly fashion.

Defendant seems to argue that the statute became vague because the legislature adopted both of the prior common law definitions. He proposes that the definition of an inherently dangerous weapon is subsumed by the definition of an implement used in a deadly fashion and that as a consequence neither section may stand. This state will contend that the two definitions stand separately. The primary question, though, is what rule of constitutional law would invalidate the statute if in fact it were drafted so that one subsection described a variant of the other? Such a construction might make a statute somewhat silly, or in counsel's words, "tautological," but that does not mean that it violates some rights of accused persons.

The State contends further that the two statutory definitions are indeed different. Where the weapon at issue is an inherently dangerous weapon, then it matters naught how it was employed. For instance, a burglar who used a gun to shoot out a window and thereby effect entry into an unoccupied building has used a deadly weapon in the crime even though no person was endangered by the shot. On the other hand, if the same burglar used a baseball bat to prop the door open, he would not be subject to the enhancement. Although the ball bat can be used in a deadly fashion, because it is not an inherently dangerous weapon there is

no enhancement until and unless a perpetrator uses it in a deadly fashion.

The statute is sufficiently clear to allow appellant Defendant, as well as other hypothetical defendants, to know just what conduct is prohibited. It is unlawful to use an inherently dangerous weapon in any felony and it is unlawful to use or threaten to use other implements in a deadly fashion. Therefore, this Court should rule that the district court did not err in refusing to strike the allegation that the crimes were committed with the use of a deadly weapon.

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III. CONCLUSION

Appellant Defendant was fairly tried and convicted. The judgment of the Second Judicial District Court should be affirmed.

DATED: May 13, 2003.

RICHARD A. GAMMICK
District Attorney

By_____
TERRENCE P. McCARTHY
Deputy District Attorney

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CERTIFICATE OF SERVICE

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I forwarded a true copy of the foregoing document, through the Washoe County Interagency Mail, addressed to:

CHERYL BOND

Appellate Deputy
Washoe County Public Defender's Office
Reno, Nevada 89501

DATED: May 13, 2003

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I

understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this _____ day of June, 1998.

_____
TERRENCE P. McCARTHY
Deputy District Attorney
Nevada Bar No. 2745
Washoe County District Attorney
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DEADLY WEAPON

The weapons enhancement statute, NRS 193.165, was first enacted in 1973. The law at that time provided for certain consequences for one who commits crimes with the use of firearm or other deadly weapon, but it gave no definition of what constitutes a "deadly weapon." Accordingly, this Court was called upon to provide a common law definition. It did so in Clem v. State, 104 Nev. 351, 357, 760 P.2d 103 (1988). The Clem Court announced what came to be known as the "functional" test, subsequently codified in 1995 at NRS 193.165(5)(a).

Two years after Clem, the Court considered the question of whether steel-toed boots could constitute a deadly weapon. By a majority decision this Court overruled Clem and announced that the common law definition would be the "inherently dangerous" test. Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990). That decision was based on this Court's re-interpretation of the intent of the legislature. 106 Nev. at 574. That test was later codified in NRS 193.165(5)(b).

Application of Zgombic led to several decisions in which implements used to commit crimes were determined to not be deadly weapons. See e.g., Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992)(automobile); Hutchins v. State, 110 Nev. 103, 867 P.2d 1136 (1994)(scissors); Smith v. State, 110 Nev. 1094, 881 P.2d 649 (1994)(hammer); Collins v. State, 111 Nev. 56, 888 P.2d 926 (1995)(undescribed "exacto" knife).

In 1995, the legislature removed the previous ambiguity and made its intent clear by enacting subsection 5 of NRS 193.165. By the amendment, the legislature declared that a "deadly weapon" is any device that would have constituted a deadly weapon under either the functional or the inherently dangerous test.

The question now before this Court seems to be whether the judiciary should attempt to usurp the role of the legislature and construe the "functional" test out of the statute.

The State contends that the legislature has the authority to create penal statutes through its police powers. State v. Eighth Judicial District Court, 101 Nev. 658, 708 P.2d 1022 (1985). The State further contends that the sequence of events and the plain terms of the statute evince the intent of the legislature to overturn the decisions of this Court and make clear that the weapons enhancement is available in a wide variety of circumstances.

Courts should construe statutes so as to give effect to the intent of the legislature. Binegar v. Eight Judicial District Court, 112 Nev.___, 915 P.2d 889, 893 (1996). Where the language of the statute is sufficiently clear, there is no room for interpretation and the court must rule that the legislature intended just what it said. Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975).

The law now provides that where an inherently dangerous weapon is used in any way in the commission of a crime, then the actor is subject to the enhancement. See Ruland v. State, 102 Nev.

529, 533, 728 P.2d 818 (1986); Culverson v. State, 95 Nev. 433, 596 P.2d 220 (1979). In contrast, when the actor employs a more pedestrian implement, the enhancement applies only where the implement is actually used or threatened to be used in a deadly fashion. NRS 193.165(5)(b).

While it is true that under certain circumstances both provisions might apply, that does not mean that either portion of the statute is faulty. For example, where murder is committed by the actual deployment of an inherently dangerous dagger, both provisions of the statute would apply. It does not follow that one of the provisions must be declared to be void. It is not at all unusual that a single act contravenes multiple laws. As a further example, a murder committed during the course of a robbery, where the killer acts with premeditation and actual malice is first degree murder under two different laws. It is first degree murder under both NRS 200.030(1)(a) and under the felony-murder law of NRS 200.030(1)(b).

The State contends that the legislature has clearly and unambiguously declared the state of the law. The mere fact that the weapons enhancement law is broader now than it was before the 1995 amendments does not negate any portion of the law.

Deadly weapon use of
No Information Available on This Topic at This Time

DEMONSTRATIVE EVIDENCE

THE LOST GUN - 1989

Although the actual firearm used in the commission of the offenses has not been found to date, it has long been held that a firearm of similar caliber and appearance to what we know the defendant possessed or owned is admissible as demonstrative evidence.

By way of example, the Court, in People v. Frausto, 135 Cal. App. 3d 142 (1982), discussed the testimony and evidence of a firearms expert concerning two different handguns as examples to show the difference between a revolver and a semi—automatic pistol, and stated:

> Where the actual weapon is not found, it is quite proper to introduce a replica or similar weapon to the jury as an example of the type of weaponry that might have been used in a crime.

In Commonwealth v. McAndrews, 430 A.2d 1165 (Penn. 1981), the Court addressed a situation where two witnesses in a murder case had been shown a snub—nosed .38 caliber pistol with a two—inch barrel and a pearl handle by the defendant. Relying on this description, the State secured a similar weapon and their ballistics expert used it to demonstrate to the jury that considerable pressure must be exerted to pull the trigger,

thereby rebutting any argument of accidental discharge. The similar gun was presented into evidence for the purpose of a graphic demonstration.

In Grandison v. State, 506 A.2d 580 (Md. 1986), the court was addressing a first degree murder case in which a handgun had been used. The trial court admitted a Mac—l1 pistol into evidence which looked like the weapon that was seen by a witness in defendant's possession. Additionally, a weapons expert concluded at trial that the pistol he identified as a Mac—li was the only type of firearm that could have discharged the bullets and ejected the particular cartridges found at the scene. Finally, the jury was told that the actual weapon that fired the fatal shots had never been found. The appellate court held there was ample evidence of similarity between the weapon in the exhibit and the weapon used in the crime to render it admissible as demonstrative evidence.

In the case of People v. Ham, 86 Cal. Rptr. 906 (Cal. App. 1970), the victim of an armed robbery and assault with a deadly weapon identified a gun as substantially similar to one used in the robbery, and the defendant's wife testified that the defendant had owned a similar small gun. It was proper to show

the witness the gun which the victim had testified was similar to the one used in the robbery.

Demonstrative evidence is premised upon the theory that it is easier and more effective simply to show the jurors what is being described, rather than waste time and risk possible confusion by relying solely upon descriptive oral testimony. The treatise of McCormick on Evidence, 3d Ed. 1984, Secs. 212 at p.668, discusses this type of evidence as follows:

> Demonstrative evidence, however, is by no means limited to items which may properly be classed as "real" or "original" evidence. It is today increasingly common to encourage the offer of tangible items which are not themselves contended to have played any part in the history of the case, but which are instead tendered for the purpose of rendering other evidence more comprehensible to the trier of fact. Examples of types of items frequently offered for purposes of illustration and clarification include models, maps, photographs, charts and drawings. If an article is offered for these purposes, rather than as real or orginal evidence, its specific
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> identity or source is generally of no significance whatever. Instead, the theory justifying admission of these exhibits requires only that the item be sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact.

In the case of State v. Gray, 395 P.2d 490 (Wash. 1964), the Court admitted into evidence a knife for illustrative purposes only, although the knife itself was not connected with

the wounding of the victim in the case. In upholding the trial court, the Supreme Court ruled that such evidence was admissible for illustrative purposes as long as the evidence is relevant, material, and is supported by proof "showing such evidence to be substantially like the real thing and substantially similar in operation and function to the object or contrivance in issue." 395 P.2d at 492. The rule in Gray has been followed in the more recent case, State v. Barr, 515 P.2d 840 (Wash. App. 1973). In the Barr case, two handguns, a ski mask, a stocking cap and nylon stocking were admitted into evidence as illustrative of the objects used in the crime, and not as the objects themselves. The State, in that case, met its burden of showing that the illustrative evidence was substantially like the real evidence. 515 P.2d at p.842.

Following this same type of procedure, this office has been involved in prosecutions in the Second Judicial District in which similar type guns have been admitted as evidence for demonstrative purposes when the actual weapons used were not recovered during the course of the investigation. In Second Judicial District Court Case No. C 83—1432, Department 6, State of Nevada v. David Phillips, the defendant was charged with and convicted of murder in the first degree with the use of a gun. A handgun similar to the type known to be owned by the defendant

was admitted into evidence for demonstrative purposes only. This procedure was also followed and allowed in C 85—1164, Department 8, State of Nevada v. Anthony Cocucci, where the defendant was charged with robbery with the use of a deadly weapon. The evidence showed that the defendant was known to own a Smith & Wesson Model 29 .44 caliber magnum handgun, and witnesses described a large gun. A similar model was allowed in evidence for demonstrative purposes during the course of the prosecution.

Department No. 1 has also followed this procedure by allowing a sawed—off .22 rifle into evidence in State of Nevada v. Bejarano, C 87—678. Witnesses described the weapon as a .22 rifle with the barrel and stock sawed off. The prosecutor presented a similar weapon to the Court, since the original had not been recovered, and after laying a foundation, it was admitted into evidence. In an attempted murder case, State of Nevada v. Smithart, C 87—556, Judge BREEN, of Department No. 7, allowed a knife described by witnesses as being similar to the actual weapon into evidence. This was done after the prosecutor advised the jury that the actual weapon had never been recovered and this knife came from another source.

In State of Nevada v. Joe Tony Torres, C 87—1719, tried in Department No. 2, the Court allowed the use of a similar 9mm

Browning semi—automatic pistol when it was shown to be in possession of the defendant before the killing. There was also evidence that the victim had been killed with a weapon consistent with a 9mm.

The cases and law relating to the use of demonstrative evidence of this type make it clear that so long as the State properly makes a showing that the firearm to be introduced is substantially similar to the firearm used in the offenses, the evidence is admissible and should be allowed to be considered by the jury.

DIMINISHED CAPACITY

1993

The State of Nevada does not recognize the doctrine of diminished capacity or partial responsibility. See Fox **V.** State, 73 Nev. 241, 316 P.2d 924 (1957); Sollars v. State, 73 Nev. 248, 316 P.2d 917 (1957); Singleton v. State, 90 Nev. 216 (1974); Ogden v. State, 96 Nev. 258, at pp.261—262, 607 P.2d 576 (1980)

When the sanity of the defendant is brought into issue, the only test to be applied in this State is the one enunciated under M'Naughten. The Nevada Supreme Court, in Rogers v. State, 101 Nev. 464 (1985) stated:

We are invited by the defendant to disavow the M'Naughten rule as the test for criminal responsibility and supplant it with the standard device by the American Law Institute. Defendant's invitation is declined. We have recently rejected such a request and reaffirm Nevada's use of the M'Naughten test for criminal insanity. Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984); Poole v. State, 97 Nev. 175, 625 P.2d 1163 (1981); Clark v. State, 95 Nev. 24, 588 P.2d 1027 (1979). Defendant also contends that requiring him to bear the burden of proving insanity deprived him of due process because sanity is an element of the charged crime. In Ybarra, we also reaffirmed our position that sanity is not an element of the offense which the prosecutor must plead and prove. Insanity is an affirmative defense which the accused, who is presumed sane, must prove by a preponderance of the evidence. See also Clark v. State, 95 Nev. 24, 28, 588 P.2d 1027, 1030 (1979); In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197, 205—207 (1977).

In some cases in recent history the defense has been able to bootstrap psychiatric/psychological testimony into trials which have not involved an insanity defense claiming that such testimony reflects on whether the defendant had the requisite malice, intent, deliberation and premeditation to commit murder. It is rather amazing that this testimony has been allowed in light of what the Nevada Supreme Court said in 1968 in Dawson v. State, at 84 Nev. 260, 261. In Dawson the trial court refused to allow the testimony of a psychiatrist on the issue of whether or not the defendant had the requisite malice, intent, deliberation and premeditation to commit murder. The Nevada Supreme Court, in upholding that decision, stated:

1. We held in Jackson v. State, 84 Nev. 203, 438 P.2d 795 (1968), that expert opinion relative to an ultimate fact in issue may properly be received. But no simple problem of handwriting identification or blood test analysis or the like are presented here. The ultimate fact needed for a determination of the degree of the crime was the state of mind of the accused at the time of the shooting. Such a subjective conclusion must be found by the jury. The doctor could give them no help that they didn't already have from the facts. An expert witness may state conclusions on matters within his expert knowledge provided the conclusion is one laymen would not he capable of drawing for themselves. Lightenburger v. Gordon, 81 Nev. 553, 407 P.2d 728 (1965); 7 Wigmore 3 1918, 1923 (3rd ed. 1940) . Sometimes laymen may state conclusial impressions from collective facts such as, "He seemed to be frightened," "He was greatly excited," "He was pleased," "He was angry," but the doctrine of collective facts does not necessarily permit an evaluation of another's state of mind (absent the issue of insanity) regardless if the witness giving the opinion is an expert or layman. The conduct of a person and other circumstances are factors which may be detailed to the jury so as to equip them with the necessary inferences. Wigmore, supra, ~ 1962, et seq.; Commonwealth v. Phelan, 234 A.2d 540, 584 (Pa. 1967). No so—called expert conclusions can serve the jury's function. See also 41 Denver Law Journal 226 (1964)

The question did not call for an expert's assistance in an area foreign to the jury's knowledge for it really amounted to no more than summation of the evidence and asking whether or not Ella Mae had malice aforethought or intent to kill. Nothing would have been added by the doctor's answer beyond what the jury could have decided for itself. 7 Wigmore, supra, 3 1920, et seq.; McLeod v. Miller & Lux, 40 Nev. 447, 472—73, 167 P. 27 (1917). The question was properly rejected. (Emphasis added).

Dismissal By Prosecutor NRS 174.085 (5)

NRS 174.085

The primary issue in this case concerns the 1997 amendments to NRS 174.085. As indicated above, the prosecutor in this case dismissed the original misdemeanor charges, without prejudice, and then re-filed the same charges and caused a summons to be issued.[6] The Justice Court ruled that the procedure was allowed by virtue of the 1997 amendments. The district court, in the subsequent habeas corpus action, gave a rather curt ruling and apparently ruled that the amendments did not prevail over the prior common law rulings of this Court.

A few historical comments are appropriate here. The general rule at common law was that a prosecutor had the unbridled discretion to enter a "nolle prosequi" at any time before jeopardy attached and that such a dismissal was not a bar to subsequent prosecution for the same offense. See 3 Wharton's Criminal Procedure, Section 455, pp. 926-933 (13th Ed. 1991). See also, Bucolo v. Adkins, 424 U.S. 641 (1976)(Nolle prosequi, if entered before jeopardy attaches, neither operates as an acquittal nor prevents further prosecution of the offense). See also, United States v. Salinas, 693 F.2d 348 (5th Cir. 1982)(providing a brief history of the development of F.R.Crim.P. 48(a)). Nevada cases

[6]Actually, the record reveals that the prosecutor did not exactly exercise his own authority to dismiss. Perhaps due to the newness of the statute, the prosecutor asked the court for leave and the court ordered the dismissal. It is clear, however, that the authority for the dismissal was NRS 174.085.

on the subject are somewhat unclear because in most cases the second charging document was filed before the first was dismissed. See e.g., Turpin v. Sheriff, 87 Nev. 236, 484 P.2d 1083 (1971). The exception is Ex Parte Rankin, 45 Nev. 73, 199 P.2d 474 (1921)(allowing dismissal followed immediately by filing of a new information charging same offense). Whether the common law of this state would have followed the general rule became essentially moot with a series of decisions concerning the statutory right to a speedy trial or speedy preliminary hearing. In those cases this Court held that when the legislature created time limits on various stages of a prosecution, that body required the state to adhere to those limits, or to diligently try to adhere to them, or to suffer dismissal. See Maes v. Sheriff, 86 Nev. 317, 319, 468 P.2d 332, 333 (1970). This case involves the legislative determination to alter the previous legislatively created rights and allow the prosecutor to dismiss once without prejudice.

Over time, some jurisdictions sought to impose checks on the prosecutor's authority. For instance, in federal courts the Rules of Criminal Procedure provide that a prosecutor must seek leave of the court to enter a dismissal, although the trial court must give great deference to the executive decision. F.R.Crim.P. 48(a); United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988). Furthermore, the federal legislature enacted certain other restrictions designed to protect the defendant's right to a speedy trial in the event of a prosecutor's dismissal. See 18 USC 3161(d)(1).

Other jurisdictions took different approaches. For instance, the modern rule in Hawaii is that the prosecutor has the absolute power to dismiss and to reinstate unless to do so would violate some specific constitutional right of the accused. State v. Miyazaki, 645 P.2d 1340 (Haw. 1982). Similarly, in Colorado the prosecutor may dismiss and then reinstate unless to do so would violate the constitutional (not statutory) right to a speedy trial. People v. Small, 631 P.2d 148 (Colo. 1981). Other courts have recognized that the prosecutor's decision to dismiss and then re-file the charge is limited to the same extent as other prosecutorial decisions in that they must not be vindictive. State v. Brule, 943 P.2d 1064 (N.M. App. 1997). A prosecutor's intent to harass the defendant may negate the power to dismiss and re-file. State v. Gilbert, 837 P.2d 1137 (Ariz. App. 1991).

In 1997, the legislature amended NRS 174.085. The new law, set out in the margin, recognized a prosecutor's ability to dismiss without prejudice but sought to protect the rights of defendants in a manner different from that selected in the federal arena. The new Nevada law did not call for manipulating the speedy trial clock, but instead provided for the release of the defendant from custody. Unlike the federal system, the new Nevada law also provided that the new charge must not begin with an arrest but instead with a summons. The law also provided safeguards against prosecutorial judge-shopping by requiring that the second complaint be heard by the original judge. Cf. Salinas, supra (dismissal and re-filing improper where prosecutor acted

because he was dissatisfied with the composition of the jury). Finally, the legislature sought to prevent prosecutorial harassment by declaring that the prosecutor could dismiss and then reinstate a misdemeanor only once.

The 1997 amendments pertinent to this case give rise to several questions. First, whether the statute indeed gave the prosecutor the ability to "nolle prosequi." Second, whether the legislature or the courts have the authority under Nevada law to enact rules of criminal procedure. Third, if the legislature has the authority to enact rules of criminal procedure, whether the specific enactment at issue violates constitutional limitations on criminal procedure. The State will address each in turn.

Turning to the merits, the first question is whether the legislature has given Nevada prosecutors the ability to enter a dismissal without prejudice as prosecutors could before the enactment of F.R.Crim.P. 48(a) and its state counterparts. Resolution of that question would seem rather simple. The 1997 amendments clearly and unambiguously vested that power in the prosecutor. The current version of NRS 174.085 reads in pertinent part: "The prosecuting attorney, . . . may voluntarily dismiss a complaint . . . 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." If there were any ambiguity it would be removed by the other provisions which require that the

charge, once it is re-filed, must be initiated by summons and must be heard by the original judge.

The State contends that there is no room for construction in this statute. The legislature has vested in the prosecutor the power to dismiss, once, and to re-file just as prosecutors could at common law and as they can in the vast majority of other jurisdictions. Where a statute is clear, the only remaining question is whether it does violence to any constitutional provisions. Binegar v. District Court, 112 Nev. 544, 550, 915 P.2d 889, 893 (1996). As will be demonstrated below, the current version of the statute is not unconstitutional on its face or as applied in the instant case.

There next comes the question of whether the legislature has the authority to enact rules of criminal procedure. It should be noted here that the prior decisions of this Court providing for dismissal by the court if the prosecutor could not meet the standards for a continuance, were rendered in order to give effect to rights which were themselves created by the legislature. For example, in Hill v. Sheriff, 85 Nev. 234, 452 P.2d 918 (1969), this Court ruled that the statutory right to a preliminary hearing within 15 days of an arrest required the State to meet that time limit or to show due diligence in attempting to obtain the presence of the necessary witnesses. Presumably, since the legislature created the right, the legislature can modify it. See Miller v. Ignacio, 112 Nev. 930, 921 P.2d 882 (1996)(power of pardons board may be altered but not retroactively).

Here, the legislature clearly attempted to undercut the continuing vitality of this Court's prior rulings by allowing a prosecutor one dismissal, subject to certain limitations.

The authority to fix rules of criminal procedure in Nevada is vested in the legislature. Colwell v. State, 112 Nev. 807, 813, 919 P.2d 403 (1996). This Court is empowered to act only as it is called upon to interpret the Constitution or to fill in a "void" left by legislative inaction. Mazzan v. State, 109 Nev. 1067, 1072, 863 P.2d 1035 (1993). See also NRS 2.120 (Supreme Court has authority to make rules of appellate and civil procedure). Thus, it would seem that the first two issues are readily resolved: the legislature has granted the prosecutor the power to enter a nolle prosequi and then to re-file, and that grant of authority is within the bailiwick of the legislature.

The sole remaining question is whether the legislative action is unconstitutional on its face or as applied.

There are a number of potentially relevant constitutional clauses. First would be the constitutional entitlement to a speedy trial. NRS 174.085 does not violate the speedy trial clause because the speedy trial clause is itself flexible with no firm requirements. Barker v. Wingo, 407 U.S. 514 (1972). Furthermore, where the charges are dismissed by the prosecutor and the defendant is free to go as he pleases, with no restrictions on his liberty, the Constitutional speedy trial right has no application to the time between dismissal and re-filing. United States v. Loud Hawk, 474 U.S. 302, 311 (1986).

The double jeopardy clause could also be considered but it has been authoritatively held that where the dismissal is pre-trial, before the attachment of jeopardy, and not the product of a plea bargain, the clause does not bar further prosecution. Bucolo v. Adkins, 424 U.S. 1086 (1976).

The more general due process clause could also be implicated. One court has held that a defendant has a due process right to be notified of the nolle prosequi motion if that occurs after jeopardy has attached. State v. Estrada, 787 P.2d 692 (Haw. 1990). However, the State is unaware of any court that has ruled that the common law rule or the modern version of the rule embodied in F.R.Crim.P 48 is fundamentally unfair. Quite the contrary. No less a scholar that Justice Traynor once ruled "it would exalt form over substance to hold that broad constitutional principles of separation of powers and due process of law permit vesting complete discretion in the prosecutor before the case begins, but deny him all such discretion once the information is filed." People v. Sidener, 375 P.2d 641, 644 (1962). There may be due process implications in certain cases but not as to the general rule allowing dismissal and re-filing. For instance, in Brule, supra, the Court found that the evidence called for the conclusion that the prosecutor had acted in retaliation for the defendant's exercise of his rights. Thus, the re-filing was as unfair as would be an initial vindictive charging decision. In the instant case, in contrast, the Justice of the Peace expressly

found that the District Attorney had not acted with any untoward motive. SA at 38.

As noted earlier, the general and common law rule vested in the prosecutor the power to dismiss and to then reinstate a prosecution. It seems unlikely that a rule that prevails throughout the country and which was adopted by the Supreme Court in part in F.R.Crim.P 48 should be seen as fundamentally unfair. Indeed the concept of due process generally is seen as encompassing generally accepted notions of fair play. International Shoe v. State of Washington, 326 U.S. 310, 316 (1945). Given that prosecutors throughout the land, both state and federal, enjoy the power to dismiss and then to reinstate charges, it seems that Nevada law on the subject, with its built-in barriers to harassment and forum shopping, would also tend to pass constitutional muster.

LSD – IS IT A MIXTURE?

NRS 453.336 - 1991

The only issue raised in the above—mentioned writs of habeas corpus was whether the blotter paper and the pure form of LSD sold and used in the manner described above would constitute a mixture as envisioned under NRS 453.3385. That is the issue that will be addressed below. NRS 453.3385, in pertinent part, provides:

> any person who knowingly or intentionally sells, manufactures, delivers or brings into this state or who is knowingly or intentionally in actual or constructive possession of any controlled substance which is listed in Schedule I, except marijuana, or any mixture which contains any such controlled substance shall be punished, if the quantity involved: ... (Underlining added).

Words and statutes are to be given their commonly understood meaning, unless the context of the statute indicates otherwise. Scott v. Justice's Court, 84 Nev. 9 (~968); Wilmeth v. State, 96 Nev. 403 (1980); Princess C Industries Inc., v. State of Nevada, 97 Nev. 534 (1981) (concurring opinion; Sheriff v. Martin, 99 Nev. 336 (1983). The Nevada Supreme Court, in Nevada Power Company v. Public Service Commission, 102 Nev. Adv. Op. 1 (1986), stated:

> It is well—established that the language of a statute is plain and unambiguous, there is simply no room for construction of that statute by the Court. See Blaisdell v. Conklin, 62 Nev. 370, 373 (1944).

The College Edition of the New Webster's Dictionary of the English Language defines "mixture" as the act of mixing, or the state of being mixed; a product of mixing; an assemblage of ingredients mixed together but not chemically combined; any combination of differing elements, kinds, or qualities.

The term "mixture" is one that has not been defined by the Nevada Supreme Court, and therefore, its general, plain meaning must be used. However, the Supreme Court of the State of Georgia, in Lavelle v. State, 297 S.E. Rptr.2d at 234 (1982), when discussing a mixture which contained cocaine, stated:

> The scheme adopted to do this involves greater penalties for those possessing greater quantities of cocaine, either in pure form or in combination with other materials. Because cocaine is often mixed with milk, sugar and other substances before being sold, the general assembly included cocaine mixtures and Paragraph 79 A—811(j), and it is reasonable for the general assembly to deal with cocaine as it is actually marketed, rather than deal with pure cocaine, which is rarely found.

As to the constitutionality of trafficking statutes wherein the conviction is based on the total weight of mixtures, and not the pure form of the controlled substance, that issue has been addressed in numerous jurisdictions to include federal, New York, Georgia, Michigan, Florida, "Illinois, Delaware, and North Carolina, but has not been discussed in an opinion in Nevada. All of these cases have dealt with mixtures of cocaine and heroin, with only one case having dealt with an LSD mixture, wherein the LSD was contained in tablet form. That decision was reversed on other grounds, but the Court did uphold the mixture of LSD in a tablet form. People v. Behnke, 353 N.E.2d 684 (1976). All of the courts in the above—named jurisdictions have upheld the statutory law which has made it a crime of trafficking whenever a person is in possession of a mixture of various controlled substances and other non—controlled substances. See U.S. Ex rel Daneff v. Henderson, 501 F.2d 1180 (Second Cir. 1974); State v. Perry, 340 S.E.2d 450 (N.C. 1986); State v. Muncy, 339 S.E.2d 466 (N.C. 1986); State v. Dorsey, 322 S.E.2d 405 (N.C. 1984); State v. Willis, 300 S.E.2d 420 (N.C. 1983); State v. Tindell, 284 S.E. 2d 575 (N.C. 1981); Lavelle v. State, supra; People v. Lembele, 303 N.W.2d 191 (Mich. 1981); People v. Porterfield, 339 N.W..2d 683 (Mich. 1983); People v. Puertas, 332 N.W.2d 399 (Mich. 1983); Peo?le v. Campbell, 320 N.W.2d 381 (Mich. 1982); State v. Yu, 400 S.2d 762 (Fla. 1981); People v. Merryberry, 345 N.E.2d 97 (Ill. 1976) ~S. cert. denied 429 U.S. 828; Shy v. State, 489 A.2d 122 (Del 1983); Traylor v. State, 458 A.2d 170 (Del. 1983); State v. Benitez, 395 S.Rpt:.2d 514 (Fla. 1981).

DUI – ACTUAL PHYSICAL CONTROL

1. Defendant was under the influence of alcohol

2. Defendant was seated, in the driver's seat, directly behind the steering wheel.
3. Defendant was asleep.
4. Defendant started the motor of his car and left the keys in the ignition.
5. Defendant permitted the motor to continue running.
6. The lights were on.
7. The heater was on.
8. Defendant drove the car to this parked location.
9. Defendant's car was parked in a public street.
10. Defendant tried to operate the vehicle by starting it (even though it was already running) when he was awakened by the policeman.

These facts standing alone are sufficient to affirm Defendant's conviction that he was in actual physical control. In light of the standard quoted above, this conclusion becomes overwhelmingly clear. If these facts alone are not sufficiently

telling enough, the State's appellate argument, just the prosecution's case in the trial court, only gets better given Defendant's own testimony. Frankly, Defendant's decision to take the stand in own defense was a serious mistake.

Obviously, the jury found Defendant's story incredible and rightly so. Accord, Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20 (1981) - wherein the Court held that it is for the jury to determine the weight and credibility of witness testimony.

Accordingly, Defendant's conviction rests on sufficient evidence given the applicable standard of review. Accord, Rogers v. State, 105 Nev. 230, 233-34, 773 P.2d 1226 (1989). Defendant's contention to the contrary should be rejected.

As Defendant has conceded, the essential definition of actual physical control requires proof of "existing or present bodily restraint, directing influence, domination or regulation of the vehicle." Obviously, being intoxicated in/about a motor vehicle, i.e., being a "passive occupant" does not require proof of these additional elements. Actual physical control requires proof of more than being merely intoxicated and sitting in a car.

Indeed, Defendant's own authority, Commonweath v. Byers, 650 A.2d 468 (Pa. Super. 1994), makes the case better than the State could. In that case, the police found Byers passed out in the

driver's seat of his car which was parked in a private parking lot; the motor was running and the headlights were on; after being awakened by the police, Byers did not try to operate the car. After Byers was convicted of being in actual physical control, he appealed, claiming he was convicted on insufficient evidence. On appeal, the court reversed, and in doing so made these telling remarks:

> In interpreting the phrase "actual physical control," this court has made it clear that actual movement of the vehicle is not required. We have also stated, however, that it is not enough to be merely sitting in the car while intoxicated. A brief review of the cases which consider the concepts of actual physical control reveals that, at a very minimum, a parked car should be started and running before a finding of actual physical control can be made. This case requires us to examine that minimum and determine whether the act of starting a parked car, by itself, is enough to prove actual physical control. A review of the case law indicates that the key factor in these cases is not the mere starting of the engine; rather, it is a combination of the motor running, the location of the vehicle, and additional evidence showing that the defendant had driven the vehicle. In a majority of cases, the suspect location of the vehicle, which supports an inference that it was driven, is a key factor in finding of actual control. (Citations omitted.) In other cases, the location is not a factor, but there is additional evidence showing that the defendant had driven the vehicle. [Citations omitted.] Therefore, the cases do not rely solely on the starting of the car's engine.

> Instead of focusing mechanically on whether the car's motor is running or not running, the case law applies a common sense approach to achieving the legislature's goal: public safety. . . . Our courts, therefore, have properly focused on the danger that the defendant poses to society in determining what constitutes actual physical control. This danger or threat to society is not shown merely by proving that defendant started the engine of a car. It is shown through a combination of factors discussed above. . . . In the present case, Byers never got onto the road and was not a threat to public safety.

Byers, 650 A.2d at 469-71.

Several things ring true from Byers. It addressed what we already know here in Nevada: namely, that actual physical control is a multi-factor, not single factor analysis. Moreover, it shows that, just as Defendant suggests, Bullock and Byers are virtually identical cases, but absolutely distinct from Defendant's own case. Indeed, had Defendant's case been presented to the Pennsylvania Appellate Court, that court would have affirmed his conviction given the standards announced in Byers and the facts of Defendant's own case.

C. "ACTUAL PHYSICAL CONTROL" IS NOT VOID FOR VAGUENESS.

Defendant's next argument is that "actual physical control" is void for vagueness. This contention lacks merit.

Since this Court has construed the actual physical control provisions several times, for example in Rogers v. State, Defendant's void for vagueness challenge lacks merit. Wainwright v. Stone, 414 U.S. 21, 23 (1973); accord Adams v. State, 697 P.2d 622, 624-25 (Wyo. 1985) - wherein the court held "actual physical control" is not vague. Moreover, this Court's judicial interpretation adds meaning to the statute as certainly as if it had been placed there by our legislature. This is particularly true when dealing with identifiable conduct like Defendant's.

Nevertheless, Defendant argues that, because Rogers and its progeny, decisions each involving identifiable conduct, have not reached consistent, reconcilable results, it is this Court's fault that he lacks fair notice of what conduct is prohibited. In other words, even if he wanted to read the statute and the cases interpreting it, he would still have to guess at what was prohibited, because this Court has been inconsistent and has never decided whether the precise facts of his case constitutes actual physical control. Consequently, his conduct can only be prohibited retroactively.

If Defendant's position were law, then any case decided on its facts would be subject to a vagueness challenge, and we would immediately re-enter a state of nature, epitomized by chaos and lawlessness. It is for similar reasons that mathematical

precision and metaphysical certainty are not the test, but ordinary intelligence is.

Nevertheless, Defendant's conduct is substantially similar to that prohibited in Rogers and Isom v. State, 105 Nev. 391, 776 P.2d 543 (1989). Therefore, Defendant was clearly on fair notice.[7]

The State cannot conclude this portion of the brief without picking up the gauntlet thrown down so boldly on page 26 of Defendant's Opening Brief. There, Defendant challenges the State and the combined forces of this Court "to find one case from any jurisdiction" that has upheld a conviction on facts similar to those found in Defendant's own case. The undersigned knows the Court's time is overwhelmed by its case load, so we will provide the case for the Court to save it time and trouble: State v. Rivera, 947 P.2d 168 (N.W. App. 1997).

In Rivera, the Court upheld Rivera's DUI conviction, premised on actual physical control, wherein the undisputed evidence showed (1) Rivera's car was parked on his yard, (2) he was napping in the car, (3) he was behind the wheel of the car,

[7]Defendant, for obvious reasons, tries to squeeze his case into the narrow confines of Bullock v. DMV, 105 Nev. 326, 775, 225 (1989), but unlike Mr. Bullock, Defendant was not parked in a private parking lot. Defendant was one volitional act from driving his vehicle on a public road. Even by Defendant's own lights, this is the very reason and policy why we have an actual physical control provision. AA, p. 9 - defendant's rejected instruction.

(4) the motor was running and the key was in the ignition, but (5) he liked to sit in his car and listen to the radio and that was all he was doing, according to his wife.

Certainly, Defendant could say Rivera is not identical to his case, because Rivera's intent was not mentioned. This rings hollow. The clear inference from Rivera is that he did not intend to drive his car, because, as Defendant is so fond of saying, "he was already home!!" Moreover, hopefully this Court will not fall for Defendant's implicit claim that the subjective intent of a person in actual physical control of a motor vehicle while intoxicated has any significance whatsoever. Courts have viewed similar arguments as "absurd," "would defeat the legislative purposes" and "achieve absurd results." Accord, State v. Harrison, 846 P.2d 1082, 1086-87 (N.W. App. 1992); McDougall v. Superior Court, 845 P.2d 508, 512 (Ariz. App. 1992). This point is made very nicely in State v. Barnart, 850 P.2d 473, 479 (Utah App. 1993):

> The subjective intent of a defendant not to operate the vehicle does not prevent a finding that the defendant was in actual physical control. "[A]n intent to control a vehicle [may] be inferred from the performance of those acts which we have held to constitute actual physical control." Whether or not a person has the subjective intent to subsequently operate a vehicle is irrelevant to the question of whether the person has the present ability to start and move the vehicle. It is therefore permissible

> for a trial court to find that a person had actual physical control over a vehicle even though the person did not objectively intend to exercise it.

Defendant contends that City of Falcon Heights v. Pazderski, 352 N.W.2d 85 (Minn. App. 1989), is the closest case to his. In truth, the two cases have little in common. Unlike our case, the Minnesota case involved a car that was not running, nor was the key in the ignition. "No other devices of the car [were] in operation," and it was not parked on or near a roadway. Closest indeed.

By the same token, Defendant's claim that, if he were "thoroughly schooled" in DUI law, he "would have to conclude" that Pazderski is the closest case to his own and, it would not criminalize his acts, Opening Brief, p. 25, ll. 15-19, is truly flippant. First, the facts are distinct, and secondly, if Defendant were "thoroughly schooled," by Pazderski he would not have started the car along with the "other devices." Since Defendant did and Pazderski did not, Defendant's conviction, unlike Pazderski's, should be affirmed.

ABSENT GIDEON ERROR, COLLATERAL ATTACKS ON PRIOR

DUI COLLATERAL ATTACKS ON PRIOR CONVICTIONS

The majority of this appeal centers around whether Defendant's prior DUI convictions are valid; for that question Defendant has submitted a four volume appendix of nearly nine hundred pages for this Court's review. The State submits that this case presents the very reason why a number of federal and state jurisdictions now prohibit collateral attack of convictions, except where an accused is deprived of his right to counsel, in proceedings where prior convictions are used for sentencing enhancement. The cases recognize that such collateral attacks tax scarce judicial resources, diminish the finality of judgments, weaken public confidence in the criminal justice system, complicate and delay sentencing proceedings, and strain relationships between courts in the federal and state systems.

In Custis v. United States, 511 U.S. 485 (1994), the United States Supreme Court restricted the grounds upon which a defendant may collaterally attack the validity of a prior conviction used to enhance his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C., Section 924(e) (1988). Custis was originally charged with federal drug and firearm offenses. After he was convicted, the prosecutor sought to enhance his sentence under the ACCA by relying on three prior state felony convictions. Custis challenged two of the prior convictions in the enhancement proceeding by arguing that they were obtained in violation of Boykin v. Alabama, 395 U.S. 238 (1969), and of his right to the

effective assistance of counsel. The Supreme Court held that the federal statute upon which Custis based his attack did not authorize collateral attacks upon prior convictions. Custis argued that even if collateral attacks were not permissible under the ACCA, the Federal Constitution required that he be given the opportunity to challenge the validity of the prior convictions.

The Supreme Court disagreed, holding that a defendant has no constitutional right to collaterally attack sentences used for sentence enhancement under the ACCA, with the sole exception of convictions obtained in violation of the right to appointed counsel established in Gideon v. Wainwright, 372 U.S. 335 (1963). The Court reasoned that Gideon error presents a unique constitutional defect that stands as a jurisdictional bar to a valid conviction. Further, while discerning Gideon error is relatively easy, the Court observed that there are serious policy and administrative concerns in collateral attacks based on other grounds:

> Ease of administration also supports the distinction. As revealed in a number of the cases cited in this opinion, failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state court transcripts or records that may date from another era, and may come from any one of the 50 states.
>
> The interest in promoting the finality of judgments provides additional support for our constitutional conclusion. As we have explained, '[i]nroads on the concept of

> finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice. [Citation.] We later noted . . . that principles of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing. By challenging the previous conviction, the defendant is asking a district court 'to deprive [the] [state court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgmen[t].' [Citation.] These principles bear extra weight in cases in which the prior convictions, such as the one challenged by Custis, are based on guilty pleas, because when a guilty plea is at issue, 'the concern with the finality served by the limitation on collateral attack has special force.'

Custis v. United States, 511 U.S. at 496-497 (1994). The Court recognized, however, that Custis could challenge his prior convictions in a separate proceeding by habeas corpus or other means.

Numerous federal circuit courts of appeal have adopted and expanded Custis and hold that there is no constitutional basis to allow, and many policy reasons to deny, collateral attacks on prior convictions used in sentencing proceedings. United States v. Burke, 67 F.3d 1, 3 (1st Cir. 1995) ("Absent specific language allowing collateral attack, none is permitted in a sentencing proceeding except as respects the appointment of counsel"; "[t]o rule otherwise would hopelessly complicate sentencing under the federal guidelines"; records for federal convictions "may be more accessible, but the complexity and delay would nonetheless be considerable. Moreover, to reexamine the legality of a sentence imposed in another federal jurisdiction without participation by

the parties involved in the earlier case could easily lead to error, and would strain the relations between coordinate courts in the federal system. Additionally, the finality doctrine that serves to conserve scarce judicial resources and promote efficiency would be compromised."); United States v. Jones, 27 F.3d 50, 52 (2nd Cir. 1994)("A defendant may not collaterally attack prior state court felony convictions during a federal sentencing hearing unless the defendant was deprived of counsel in the state court proceedings"; the rule applies to any sentencing situation under federal law); United States v. Thomas, 42 F.3d 823, 824 (3rd Cir. 1994)("no principled way to distinguish a challenge to a prior conviction used to justify an enhancement under the guidelines from a prior conviction used to justify an enhancement under the [ACCA]. Custis teaches that unless the statute under which the defendant is sentenced explicitly provides the right to attack collaterally prior convictions used to enhance the sentence, no such right should be implied."); United States v. Bacon, 94 F.3d 158, 163 (4th Cir. 1996)("Obviously, with the noted exceptions, a federal sentencing court is an improper forum for airing a defendant's grievances concerning a prior conviction, whether in the context of statutory or guidelines sentencing."); United States v. Bonds, 48 F.3d 184, 186 (6th Cir. 1995)(Collateral attacks not allowed at sentencing unless there

was a Gideon violation or prior ruling that conviction is invalid; "district judges should not (and often may not) investigate the circumstances leading to prior convictions." "Looking behind the judgments would complicate sentencing without offering much of value to defendants."); United States v. Elliott, 128 F.3d 671 (8th Cir. 1997)(defendant convicted of being a felon in possession of a firearm could not argue prior felony conviction violated Boykin); United States v. Zarate-Martinez, 133 F.3d 1194, 1199 (9th Cir. 1998)("We hold that the teachings of Custis preclude collateral attacks on prior state court convictions whether they underlie the charged offense or are used to enhance sentence, unless a Sixth Amendment issue is involved."); United States v. Garcia, 42 F.3d 573 (10th Cir. 1994)(Custis analysis applies equally to sentencing proceedings under the guidelines or any other statutory scheme); United States v. Phillips, 120 F.3d 227, 231 (11th Cir. 1997)("Collateral attacks on prior convictions are allowed in federal sentencing proceedings in one narrow circumstance only: when the conviction was obtained in violation of the defendant's right to counsel."); United States v. Atkins, 116 F.3d 1566 (D.C. Cir. 1998) (same).

State courts have also adopted the reasoning in Custis in a broad range of circumstances, including drunk driving cases. For example, in State v. James, 684 A.2d 499 (N.H. 1996), the

defendant was convicted of driving while intoxicated. At trial, he moved in limine to collaterally attack a prior conviction for the same offense, arguing that the plea upon which it was based did not meet Boykin standards. The trial court rejected the argument. On appeal, the New Hampshire Supreme Court affirmed the use of the prior conviction as a sentence enhancement because the Boykin claim did not rise "to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." James, 684 A.2d at 500 (N.H. 1996), citing Custis, 511 U.S. at ____ (1994). See also, Garcia v. Superior Court, 14 Cal. 4th, 953, 956, 928 P.2d 573, 574 (1997)(defendant not entitled to attack prior conviction used as penalty enhancement because of alleged ineffective assistance of counsel; "[c]ompelling a trial court in a current prosecution to adjudicate this type of challenge to a prior conviction generally would require the court to review the entirety of the record of the earlier criminal proceedings, as well as matters outside the record, imposing an intolerable burden upon the orderly administration of the criminal justice system."); State v. Chiles, 260 Kan. 75, 917 P.2d 866 (1996)(defendant sentenced as habitual criminal not allowed to attack prior conviction in subsequent motion to correct sentence where prior conviction is element of current crime or used to enhance sentence); People v. Padilla, 907 P.2d 601 (Colo. 1995)(absent

Gideon error, defendant not entitled to evidentiary hearing to challenge constitutional validity of prior convictions whose existence is a factor that may be considered by the court in exercising discretion at sentencing); State v. Orduna, 250 Neb. 602, 550 N.W.2d 356 (1996)(defendant convicted of shoplifting and given enhanced sentence based on prior, similar convictions foreclosed from attacking convictions unless Gideon error appears); Graham v. Commonwealth of Kentucky, 952 S.W.2d 206 (Kent. 1997)(prior convictions used to enhance sentence under persistent felony offender statute may only be challenged for lack of counsel).

The foregoing cases persuasively hold that absent Gideon error, trial courts should not be engaged in determining the validity of prior convictions. That process is better left to a habeas corpus proceeding in the court where the conviction occurred. Although this Court, in Dressler v. State, 107 Nev. 686, 694, n.3, 819 P.2d 1288, 1296 (1991), stated that "a defendant must be afforded an opportunity in any proceeding in which a prior judgment of conviction is offered for enhancement purposes to challenge the constitutional validity of the prior conviction," the State submits that if collateral attacks are permitted at sentencing, they should be restricted to Gideon error. See Davenport v. State, 112 Nev. 475, 478, 915 P.2d 878,

880 (1996)("The one fact which all of our previous cases in this area have in common is that the defendant lacked counsel when convicted of the prior offenses.").

Here, although Defendant raises a Sixth Amendment issue regarding whether he was properly canvassed in his request to represent himself, he does not contend that he was completely deprived of his right to counsel. Accordingly, the Custis line of reasoning should apply to preclude the kind of collateral attack that Defendant seeks.

DUI – FARETTA

The United States Supreme Court in Faretta v. California, 422 U.S. 806, 821 (1975), held that the Sixth Amendment of the Constitution "implies a right of self-representation" for a defendant in a criminal action. The Court added that

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." Johnson v. Zerbst, 304 U.S., at 464-465, 58 S.Ct. at 1023 [citation omitted].

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v. United States ex rel. McCann, 317 U.S. at 279, 63 S. Ct., at 242. Faretta, 422 U.S. at 835 (1975). Defendant submits that because neither trial judge followed the advice of Faretta in Defendant's previous DUI cases, his convictions should be set aside.

Although Defendant does not expressly argue how his previous convictions violate Faretta, presumably he Defendant

means that he was never canvassed as to the dangers and disadvantages of self-representation in his previous cases. The State submits that there is no constitutional requirement that a defendant be specifically warned about the possible dangers of self-representation, and that even if there is, the requirement is not applicable to misdemeanor cases.

In Wayne v. State, 100 Nev. 582, 691 P.2d 414 (1984), the defendant argued on appeal that he had not knowingly and intelligently waived his right to counsel when he represented himself at trial and was convicted of several felonies, including second degree kidnapping. Like Defendant, the defendant argued that he should have been specifically canvassed regarding the dangers of self-representation. In response, this Court stated as follows:

> Wayne does not claim that the waiver was not knowingly and intelligently made, but he argues that the absence of a specific canvass mandates reversal. This Court has not held that a failure to canvass alone, when the record otherwise supports the finding that the accused made an intelligent and knowing waiver of his right to counsel, is reversible

error. We decline to do so in the case at bar.

. . . .

. . . "the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

. . . The trial judge failed to question Wayne formally about his knowledge of certain aspects of the case and his awareness of the problems of self-representation. Wayne argues that the omission of a canvass is reversible error under Cohen and Anderson without claiming that his waiver was not knowing and intelligent. This argument ignores the purpose underlying the canvass. Trial courts are urged to canvass defendants concerning their waiver of the right to counsel to ensure that a waiver is knowing and intelligent and that its validity is clearly reflected on the record. However, this Court has not reversed a conviction because of a failure to canvass where the

record otherwise indicates that the waiver was knowingly and intelligently made.

We note that the Ninth Circuit's interpretation of its own similar rule, set forth in United States v. Dujanovic, 486 F.2d 182, 185 (9th. Cir. 1973), is in accord with our decision in this case. In Cooley v. United States, 501 F.Ed 1249, 1252 (9th. Cir. 1974), cert. denied, 419 U.S. 1123 (1975) the court held, with regard to the requirement for addressing a defendant who seeks to represent himself: "While the procedure described may be preferred, its omission is not, per se, reversible error, where it appears from the whole record that the defendant knew his rights and insisted upon representing himself." Furthermore, the court has suggested that prior self-representation could justify an application of this exception.

Wayne, 100 Nev. 582, 583-84 (1984)(emphasis added) (citations omitted); see also, Graves v. State, 112 Nev. 118, 125, 912 P.2d 234, 238 (1996)(holding that the Court has previously rejected "the necessity of a mechanical performance of a Faretta canvass."). Accordingly, Defendant's argument that his prior convictions are per se invalid because of the absence of specific warnings is not well taken.

A number of California courts have analyzed a judge's duty under Faretta when she is presented with a request for self-

representation. In People v. Barlow, 163 Cal. Rptr. 664 (1980), the defendant argued that he did not intelligently enter his guilty plea merely because the trial court never advised him of the dangers of self-representation. In considering the claim, the court noted as follows:

> Turning to an analysis of the precedential origins of the judicial responsibility here under scrutiny, we see the need for a return to basics so to speak. What is it that Faretta decided?
>
> The actual and only issue decided by Faretta was that the defendant had a constitutional right to act as his own counsel in a criminal case. If there is any question about this, we quote the language: "In forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense." (Faretta v. California, supra, 422 U.S. 806, 836, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562.) We repeat, that is all that Faretta decided.

Barlow, 163 Cal. Rptr. 664, 673 (1980). Acknowledging the wisdom that a court should inform a defendant of the pitfalls of self-representation, the court further observed that

> we do not translate the validity of such concepts into a rote requirement of just how the trial court should proceed in making the determination contemplated by this language. In this vein, the implication of the manner in which the assignment of error is phrased would have us apply these Faretta dicta in a kind of "knee-jerk" reaction fashion, i.e., we are asked to rule that there was an unconstitutional deprivation per se unless the record shows that the trial court mouthed the exact words necessary to embody the warning above quoted. We find no authority for any such limited and question-begging proposition.
>
> The cases call for something different which involves not a proof of a negative but a search for an affirmative.

. . . .

> We have gone to some lengths to dig into the true decisional origins of the Faretta dicta because of the way in which the assignment of error has been fashioned, i.e., that it is error not to warn in some particular way. The results of that digging, as above recorded, we repeat, leave no doubt whatsoever that the judicial task of the trial court here prescribed is not some mindless mouthing of a rote incantation but instead is a pragmatic search within the unique framework of the given case for that point where it clearly appears to the trial court that the defendant has in the language of Lopez made "a knowing and intelligent election . . ."
>
> . . . The pronouncements of the United States Supreme Court cases cited in the Faretta dicta make clear that each case sets the course of such inquiry and, of equal importance, that in any collateral attack on the judgment the burden is on the defendant to demonstrate unconstitutional deprivation.

Barlow, 163 Cal.Rptr. at 673, 675 (1980) (citation omitted).

In People v. Paradise, 166 Cal. Rptr. 484, 485 (1980), the issue was "whether before accepting a guilty plea to a misdemeanor a trial court must expressly advise a defendant who appears without counsel of the dangers and risks of self-representation." In analyzing the issue, the court noted the following:

> While this language [informing the accused of the risk of self-representation] is not the holding of the case, and is what other decisions have termed "dicta," the import of the language is clear: Courts must be certain that defendants who insist on going to trial without benefit of counsel have made that decision knowingly and intelligently.

> It is apparent that Faretta was concerned primarily with the constitutional right of a defendant to represent himself - not with the issue of whether an express advisement or warning of the consequences of a defendant choosing to do so is required. Appellant argues that an express admonishment of the dangers and risks of self-representation must appear of record, thus in effect adding to those advisements already required by the Boykin-Tahl cases and with regard to his right to an attorney by In re Johnson (1965) 62 Cal.2d 325, 42 Cal.Rptr. 228, 398 P.2d 420.
>
> However, one would peruse Faretta in vain to find a requirement or suggestion that a trial court must expressly admonish a defendant of the dangers and risks of self-representation. What the law requires is that it appear from the whole record that a defendant's waiver of counsel and decision to represent himself was knowing and intelligent; that in choosing to represent himself he knew what he was doing and made the decision with eyes open. This is clearly the import of the decisions in Adams v. United States ex rel. McCann (1942) 317 U.S. 269, 279-281, 63 S.Ct. 236, 242-243, 87 L.Ed. 268, and Johnson v. Zerbst (1938) 304 U.S. 458, 464-465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, upon which the Faretta court placed primary reliance.

Paradise, 166 Cal. Rptr. at 487 (1980).

Noting that a number of federal courts have rejected the rule that trial courts must "engage in a mechanical advisement of the risks of self-representation", the court in Paradise held that "whether a valid waiver of counsel occurred must be determined by reviewing the entire record and circumstances of the case." Paradise, 166 Cal. Rptr. at 487. The court further noted that while it may be desirable to expressly advise an accused of the risks of self-representation in order to reduce the number of future collateral attacks, "weighing that possibility against the

ever-increasing and time-consuming burden placed upon trial courts to intone ritualistic incantations, we believe the scales tip in favor of the less formalistic determination of whether a defendant has knowingly and intelligently waived his right to counsel." Paradise, 166 Cal. Rptr. at 488. The court also noted the following considerations from a prior California case:

> "We must recognize that the typically crowded arraignment calendars of our courts pose urgent problems in the administration of justice in California. This is particularly true of those courts in large municipalities which are called upon to deal with an unending stream of traffic violations drunk cases, vagrancies, and similar petty offenses. While there can be no impairment of the fundamental constitutional rights of any defendant, however minor his crime, in certain situations there may be a choice of valid ways to implement these rights. Where such is the case - and constitutional rights are respected - the convenience of the parties and the court should be given considerable weight."

Paradise, 166 Cal. Rptr. at 488 (1980)(quoting In re Johnson, 62 Cal.2d 325, 336, 42 Cal.Rptr. 228, 235, 398 P.2d 420, 427 (1965)).

Finally, the Paradise court held that "it is also clear that the burden is upon appellant to demonstrate that he did not intelligently and understandingly waive his right to counsel with knowledge of the dangers and risks involved." Paradise, 166 Cal. Rptr. at 487. The defendant in Paradise failed to carry his burden because he merely asserted that he was "never advised of the dangers or disadvantages of self representation . . ." Paradise, 166 Cal. Rptr. at 488. Accordingly, the defendant's conviction was affirmed.

Similarly, in In People v. Longwith, 178 Cal. Rptr. 136 (1981), the defendant, convicted of sexual assault, argued on appeal that he had not made a knowing and intelligent waiver of his right to counsel when he decided to represent himself at trial. In determining whether an intelligent waiver occurred, the court stated as follows:

> Some case authority requires that the trial court give a specific, on the record, warning to the defendant prior to allowing the waiver. The trend, however, is not to mandate the giving of some specific warning prior to allowing the defendant to waive his right to counsel. Instead, contemporary case authority seems to require that whenever a defendant insists on proceeding without counsel the trial court does whatever is necessary relative to the circumstances to determine that the defendant made a knowing and intelligent election. A valid waiver of the right to counsel is not determined by any ritualistic advisements as to the dis-advantages of self-representation but is determined by reviewing the entire record and circumstances of the case.
>
> Further, it is clear the burden is on defendant to prove that he did not intelligently and knowingly waive his right to counsel.

Longwith, 178 Cal. Rptr. at 140 (1981) (citations omitted). Based on the record, the court in Longwith found that the defendant had made an intelligent waiver of his right to counsel.

In Benge v. People, 167 Cal. Rptr. 714 (1980), a defendant who had pleaded guilty to DUI moved to strike the conviction on the basis that he had not intelligently waived his right to counsel when he entered his plea. In considering the

claim, the court noted that advising a defendant of the dangers of self-representation

> makes good sense inasmuch as such advisements may assist both the defendant and the court in the determination of whether any waiver of counsel is being competently given. It is quite clear however, and we hold, that there is no constitutional mandate to advise a defendant of the hazards of self-representation, the failure of which results in the invalidity of any guilty plea taken.

Benge, 167 Cal. Rptr. at 717 (1980).

The court further held that "[h]aving rejected the thrust of appellant's collateral attack that the record must affirmatively show that appellant was advised of the risks of self-representation," if the record "reflects that the court made an inquiry and found that appellant rendered a knowing and intelligent waiver of counsel," then "the burden is upon the defendant to establish by a preponderance of the evidence that his waiver was not competently made." Benge, 167 Cal. Rptr. at 719 (1980). Since the defendant in Benge argued for reversal on the single ground that he had not been given a specific advisement, but did not provide a declaration or statement that he was not aware of the gravity or the risks of self-representation, he failed to carry his burden.

Other California decisions have followed the same analysis. Zimmerman v. Municipal Court, 168 Cal. Rptr. 434 (1980)(because there is no constitutional mandate to advise a defendant of the hazards of self-representation, defendant's prior DUI conviction ruled valid where he waived his right to counsel,

without any warning as to risk of self-representation, and he failed to provide an affidavit or declaration that his waiver was not competently made); White v. People, 174 Cal. Rptr. 676 (1981)(same); People v. Miller, 197 Cal. Rptr. 9 (1983) (defendant's pro se representation resulting in armed kidnapping conviction valid despite absence of specific warnings against self-representation because "Faretta did not specifically require a state trial court to adopt any fixed method for dealing with a self-representation request").

Alabama has followed the foregoing analysis as well. Teske v. State, 507 So.2d 569 (Ala. Crim. App. 1987)(where defendant merely told the court that he did not want a lawyer, and the court did not inquire into nature and consequences of the waiver of counsel, waiver of counsel was valid where defendant failed to meet his burden of presenting evidence that his waiver was not voluntary).

The foregoing cases persuasively demonstrate that the appropriate test in deciding whether a pro se litigant has validly waived his right to counsel is whether the record demonstrates a voluntary and intelligent waiver, as opposed to whether the court has invoked the use of specific phrases or warnings against the waiver of counsel. In the present case, Defendant pled no contest to misdemeanor DUI in 1991 and 1997. On each occasion, Defendant entered his plea by reading and signing a written waiver of rights and entry of plea; in both cases Defendant attested that he freely and voluntarily waived his right to proceed to trial with counsel,

where he could confront and cross-examine witnesses, subpoena witnesses on his behalf, and remain silent; in both cases the trial judge also attested that he or she personally canvassed Defendant regarding the elements of the offense, the possible penalties, the constitutional rights that Defendant was waiving, and that Defendant freely and voluntarily entered his guilty plea (AA, 11-12, 19-22).

Moreover, in the 1997 waiver, Defendant acknowledged that he had "the right to have an attorney represent me, that his representation can be very valuable in evaluating the facts, the law, in presenting my evidence and in challenging the State's evidence, I understand that if I cannot afford an attorney the Court will appoint an attorney to represent me" (AA, 21). See, Graves v. State, 112 Nev. 118, 125, 912 P.2d 234, 238 (1996)("Even the omission of a canvass is not reversible error if 'it appears from the whole record that the defendant knew his rights and insisted upon representing himself.'")(quoting Cooley v. United States, 501 F.2d 1249, 1252 (9th Cir. 1974), cert. denied 419 U.S. 1123 (1975) in Wayne v. State, 100 Nev. 582, 585, 691 P.2d 414, 416 (1984)).[8] Accordingly, the record in this case adequately

[8]It is important to note Defendant is no stranger to DUI's and the criminal justice system: besides the three convictions involved in this case, Defendant has two other convictions for DUI, and an arrest for another (Sentencing Transcript, May 25, 1999, 12). See, Wayne v. State, 100 Nev. 582, 691 P. 2d 414 (1984)(failure of trial court to canvass defendant not reversible error where defendant had previously represented himself and was otherwise aware of danger of proceeding pro se).

reveals that Defendant's decision to waive counsel and proceed pro se should be respected.[9]

FARETTA IS OF DIMINISHED CONCERN IN MISDEMEANOR CASES.

In State v. Maxey, 125 Idaho 505, 873 P.2d 150 (1994), the defendant entered a conditional plea of guilty to felony DUI, reserving the right to contest the validity of his prior DUI convictions on appeal. On appeal, the defendant argued that one of his prior misdemeanor DUI convictions was invalid because the trial court had not advised him of his right to counsel and the dangers of representing himself. During the defendant's arraignment in one of his prior cases, the trial court had asked the defendant if he wanted to fill out an application for an appointed lawyer. When the defendant said "no," the court asked him if he gave up his right to counsel. The defendant replied "yes"; accordingly, the trial court accepted the defendant's

[9]The documents supporting the 1991 conviction do not reflect whether the court orally advised Defendant regarding the dangers of representing himself, and it appears from the record that Defendant never testified that the court did not so advise him. Thus, while the waiver and entry of plea forms, by themselves, evidence that Defendant knowingly and voluntarily waived his right to counsel, he further failed to carry his burden of providing any evidence that he did not validly waive the right to counsel. See, Dressler v. State, 107 Nev. 686, 693, 819 P.2d 1288, 1292-93 (1991)("If the state produces valid records of judgment of conviction which do not, on their face, raise a presumption of constitutional deficiency, then the defendant has the burden of presenting evidence rebutting the presumption of regularity given to a judgment of conviction.").

representations as a waiver of his right to counsel. In response to the defendant's assertion that he had not knowingly waived his right to counsel, the Idaho Supreme Court stated as follows:

> The dangers of self-representation at trial are obvious. The intricacies of the procedures, the rules of evidence, and the law are sufficient to justify extra care in making sure the defendant appreciates the difficulties in conducting a trial without the assistance of a lawyer. Certainly a guilty plea is an important part of a criminal proceeding. We are not convinced, however, that the judgments that confront a defendant who pleads guilty in a misdemeanor case are sufficiently difficult to warrant a requirement that the trial court must advise the defendant of the problems inherent in entering a plea without counsel.

Maxey, 873 P.2d at 154 (1994) (citation omitted). See also, State v. Coby, 128 Idaho 99, 101, 910 P.2d 771, 773 (Idaho App. 1994)("a failure to warn a pro se defendant of the dangers and disadvantages of self- representation will not render a subsequent guilty plea constitutionally invalid for enhancement purposes."); In Re Moss, 221 Cal. Rptr. 645 (Cal. App. 2 Dist. 1985)(holding that where a defendant signs a waiver form providing for waiver of counsel and other constitutional rights, the form is a sufficient waiver, "[e]ven when a defendant is not represented by counsel, . . . provided the court is assured that a defendant has signed and understands the form."); People v. Spencer, 200 Cal. Rptr. 693, 701, n. 9 (Cal. App. 5 Dist. 1984)(recognizing that in misdemeanor cases when an accused signs a waiver informing him of his

constitutional rights, including the right to counsel, "the duty of the court to inform the defendant of the consequences of his waiver [is] fulfilled by the form itself and the burden then shift[s] to the defendant to prove the absence of a knowing and intelligent waiver.").

The upshot of the foregoing cases is that a signed waiver form, absent contrary evidence, is sufficient evidence of a knowing waiver of important constitutional rights. Nevada also seems to abide by this principle. Koening v. State, 99 Nev. 780, 789, 672 P.2d 37, 43 (1983)("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.").

Since Defendant freely and intelligently signed the appropriate forms to waive his rights and enter his pleas, there is sufficient evidence to conclude that he validly waived his right to counsel. Defendant has never demonstrated otherwise. That Defendant's prior convictions were DUI misdemeanors, which

were used later to enhance his felony conviction, is not a significant reason to require courts to warn specifically of the dangers of pro se representation. See Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 635, 748 P.2d 494, 501 (1987)("[w]hile this court does not condone the commission of any crime, the offense of DUI is no more opprobrious than other crimes over which the municipal court has jurisdiction, such as indecent exposure or lewd behavior."); see also, Nichols v. United States, 511 U.S. 738 (1994)(due process does not require misdemeanor defendant to be warned that his conviction might be used for enhancement purposes in a subsequent conviction).

DUI – GUILTY PLEA CANVAS

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT A DEFENDANT BE PERSONALLY CANVASSED BEFORE PLEADING TO A MISDEMEANOR; ACCORDINGLY, THE DISTRICT COURT PROPERLY ADMITTED LARSON'S PRIOR CONVICTION WHERE LARSON KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS CONSTITUTIONAL RIGHTS, AND CHOSE TO ENTER A WRITTEN PLEA OF NO CONTEST INSTEAD OF PERSONALLY APPEARING BEFORE A JUDGE.

Several constitutional rules apply when a defendant desires to plead guilty. First, "as a matter of due process, a defendant must enter a guilty plea with 'real notice of the true nature of the charge against him.'" Bryant v. State, 102 Nev. 268, 270, 721 P.2d 364, 366 (1986)(citing Smith v. O'Grady, 312 U.S. 329, 334 (1941)). In Bryant, this Court noted that "our legislature and this Court have adopted this constitutional rule by requiring a trial court to address a defendant personally at the time he enters his plea to determine whether he understands the nature of he charge to which he is pleading guilty." Id.

In addition, in order to assure that there is a trustworthy basis for believing that a defendant is in fact guilty, a court is constitutionally required to ensure that the defendant "either (1) admit[s] that he committed the crime charged, . . . or (2) that he enter[s] the plea knowing what the elements of th[e] crime were . . ." Hanley v. State, 97 Nev. 130, 134, 624 P.2d 1387, 1390 (1981). In Hanley, the Court noted that

an attorney's explanation of the elements of the crime to his client "does not seem to abide by these principles nor comply with the statutory requirement that the defendant be addressed 'personally' concerning the 'nature of the charge.'" Hanley, 97 Nev. at 135 n. 3 (1981)(emphasis added). Under Hanley, then, the requirement of a personal canvass is recognized as a statutory obligation, not a constitutional one; see also, Koerschner v. State, 111 Nev. 384, 386, 387, 892 P.2d 942, 944 (1995)("NRS 174.035(1) requires the district court to 'personally' address criminal defendants who plead guilty"; "[t]he brief exchange between the district court and appellant completely failed to determine, as required under NRS 174.035(1), whether appellant understood the nature of the charges and whether appellant pleaded voluntarily"; "The legislative mandate to personally canvass defendants compels a more comprehensive canvass than was conducted in this case.")(emphasis added).

Thus, while due process requires notice and understanding of the nature of the charge, it does not follow there is a corresponding constitutional requirement that a court must personally canvass the defendant before accepting a guilty plea. For example, Rule 11 of the Federal Rules of Criminal Procedure, the federal counterpart to NRS 174.035, establishes guidelines to ensure that a guilty plea is made knowingly and

voluntarily. Pursuant to the Rule, the judge must address the defendant in open court before accepting a guilty plea; at that time, the judge must ensure that the defendant understands the nature of the charge, the sentencing range for the charge, the constitutional rights waived by a guilty plea, and that the plea is free from force, threat, or promise apart from the plea agreement.

However, the procedure enunciated in Rule 11 is not constitutionally mandated. McCarthy v. United States, 394 U.S. 459, 472 ("although the procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary."). Instead, the rule is an expression of the "Supreme Court['s] exercise[] [of] its supervisory powers over the federal courts to enforce the rule because it assists trial courts in making the constitutionally required determination of voluntariness." The Georgetown Law Journal, Vol. 85:983, 1152 n. 1362 (April 1997); Standen v. State, 99 Nev. 76, 657 P.2d 1159 (1983)(acknowledging Rule 11 as a supervisory rule under McCarthy); Higby v. Sheriff, 86 Nev. 774, 476 P.2d 959 (1970)(same).

Given the legislature's authority to adopt reasonable methods to ensure a defendant's understanding of the criminal process, the legislature in this state has declared that:

> In prosecutions for offenses punishable by fine or by imprisonment for not more than 1 year, or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence, if the court determines that the defendant was fully aware of his applicable constitutional rights when he gave his consent.

NRS 178.388(3). Unless this statute is unconstitutional, a misdemeanor DUI conviction is valid even though the defendant has not been personally canvassed by the court.[10]

It is important to note that NRS 178.388(3) can validly be used only when the "defendant is fully aware of his applicable constitutional rights." Accordingly, where the statute is properly followed, the constitutional concerns of notice and understanding the charge will be satisfied, even without a personal canvass by the court. In this case, Larson did not assert in the district court, nor does he on appeal, that he did

[10]California follows a similar rule. California Penal Code, Section 1429 ("In a misdemeanor case the plea of the defendant may be made by the defendant or by the defendant's counsel.") Olney v. Municipal Court of El Cajon Judicial Dist., 184 Cal. Rptr. 78, 133 Cal.App. 3d 455 (App. 4 Dist. 1982)(holding that a defendant who absents himself from a misdemeanor proceeding must do so with full knowledge of pendency of criminal proceedings, as waiver of right to be present must be a knowing and intelligent one; moreover, court must be confident that acts of counsel are authorized by absent defendant).

not understand his rights when he pled no contest in San Mateo. He merely argues that, despite the fact that he could have personally appeared in court, but voluntarily chose not to, the technical absence of a personal canvass should invalidate the plea. This Court has rejected such technical arguments in similar situations. See e.g., Wayne v. State, 100 Nev. 582, 583-84, 691 P.2d 414, 415 (1984) ("This Court has not held that a failure to canvass [pursuant to Faretta v. California, 422 U.S. 806 (1974)] alone, when the record otherwise supports the finding that the accused made an intelligent and knowing waiver of his right to counsel, is reversible error."); Bryant v. State, 102 Nev. 268, 271, 721 P.2d 364, 367 (1986)("as an appellate court reviewing the validity of plea, we cannot be constrained to look only to the technical sufficiency of a plea canvass to determine whether a plea has been entered with a true understanding of the nature of the offense charges"; "an appellate court should review the entire record"); Patton v. Warden, 91 Nev. 1, 2, 530 P.2d 107 (1975)("we have held that there need be no such express waiver [of Boykin rights] when an accused is represented by counsel and it appears from the record that the guilty plea was otherwise voluntarily and intelligently entered with knowledge of its consequences.")(citing Armstrong v. Warden, 90 Nev. 8, 518 P.2d 147 (1974).

Larson submits that a personal canvass is particularly necessary in DUI cases, because convictions for such offenses can be used as enhancements for subsequent convictions. The legislature, however, has not seen fit to recognize such a

distinction. NRS 178.388(3). Further, this Court said in Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 635, 748 P.2d 494, 501 (1987), that "[w]hile this Court does not condone the commission of any crime, the offense of DUI is no more opprobrious than other crimes over which the municipal court has jurisdiction, such as indecent exposure or lewd behavior." See also, Nichols v. United states, 511 U.S. 738 (1994)(due process does not require misdemeanor defendant to be warned that his conviction might be used for enhancement purposes in a subsequent conviction).

Finally, it appears that this Court has at least impliedly recognized the validity of entering a guilty plea in a misdemeanor case without a personal, judicial canvass. Davenport v. State, 112 Nev. 475, 479, n.2, 915 P.2d 878, 880-81 (1996)(where defendant was represented by counsel and submitted his case to the judge on the record and signed a form indicating that he understood he was waiving his right to a jury trial, to confront and cross-examine witnesses, to compel the attendance of witnesses, and the right to testify, the resulting conviction honored the spirit of constitutional principles); Dixon v. State, 103 Nev. 272, 274, 737 P.2d 1162, 1164 (1987)(prior DUI convictions properly admitted where the "[w]aiver forms adequately evidenced a knowing and voluntary waiver of rights"); Koenig v. State, 99 Nev. 780, 790 n.6, 672 P.2d 37, 43 (1983)(prior convictions valid where defendants signed forms indicating that they understood their rights and desired to waive them in order to plead guilty).

DUI – Validity of Priors – Waiver of Counsel

THE DISTRICT COURT CORRECTLY DETERMINED THAT

"[I]n order to rely on a prior misdemeanor judgment of conviction for enhancement purposes, the State ha[s] the burden of proving either that the defendant was represented by counsel or validly waived that right, and the spirit of constitutional principles was respected in the prior misdemeanor proceedings." Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991).

In both of his prior DUI cases, Defendant signed a written waiver of rights and initialled a section indicating that he was waiving his right to counsel. In both cases, the court canvassed Defendant regarding his right to counsel; and in both cases, Defendant told the court that he desired to represent himself. Accordingly, the State presented more than sufficient evidence that Defendant had validly waived his right to counsel in his previous cases.

Furthermore, Defendant was not deprived of court-appointed counsel in his first case because he was not indigent. Defendant submits that Judge Wong improperly determined Defendant's financial status. Judge Wong, however, remarked that he did not always find Defendant to be truthful (JA, 99). Further, the district court found that Judge Wong's decision as to Defendant's indigence was supported by substantial evidence, because although Defendant's home was in his wife's name,

Defendant acquired an interest in the home when he built it (Supplemental Appendix, 3-4). The district court also noted that Defendant had told Judge Wong that he had an occupation (Supplemental Appendix, 3). Because Judge Wong's ruling as to Defendant's indigence is supported by substantial evidence, which ruling has been reviewed and upheld by the district court, this Court should decline to revisit the issue. Steese v. State, 114 Nev. 479, ___, 960 P.2d 321, 332 (1998)("This court will not set aside a district court's findings of fact unless such findings are not supported by substantial evidence.").

Finally, Defendant was not entitled to counsel in his first case because he was not sentenced to a term of imprisonment. See Scott v. Illinois, 440 U.S. 367 (1979)(where no sentence of imprisonment is imposed, defendant charged with a misdemeanor has no constitutional right to counsel); Nichols v. United States, 511 U.S. 738, 748-49 (1994)("we hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."). Defendant argues that he was sentenced to a term of imprisonment because he was given credit for five hours of jail time (Opening Brief, 7 n. 9). The State disagrees.

ENTRAPMENT

"Entrapment as a matter of law exists where the uncontroverted evidence shows (1) that the State furnished an opportunity for criminal conduct (2) to a person without the requisite criminal intent." Shrader v. State, 101 Nev. 499, 501, 706 P.2d 834, 835 (1985). In Shrader, this Court held "that when the police target a specific individual for an undercover operation, they must have reasonable cause to believe that the individual is predisposed to commit the crime." Shrader, 101 Nev. at 501-02 (1985). In the present case, Foster argues that his conviction should be reversed pursuant to Shrader because the police did not have reasonable cause to believe that he was predisposed to sell drugs when he met the police. The State disagrees.

In Shrader, an informant approached Shrader and asked Shrader where he could obtain marijuana; the informant had no knowledge whether Shrader was inclined to sell marijuana. Shrader told the informant that he did not have any marijuana to sell. When the informant persisted and told Shrader that he needed the drug to relax because he had been in jail, Shrader relented and sold the informant a quarter ounce of marijuana. One month later, the informant importuned Shrader for additional marijuana; Shrader again told the informant that he did not have any marijuana to

sell, but that he could secure an ounce from someone else. Ultimately, without realizing any benefit to himself, Shrader obtained marijuana for the informant. This Court reversed Shrader's convictions because the absence of Shrader's predisposition to sell marijuana revealed "a substantial risk that the criminal intent originated in the mind of the entrapper and not in the mind of the entrapped." Shrader, 101 Nev. at 504 (1985).

Opportunity To Commit A Crime, Without More, Is Not Entrapment As A Matter Of Law.

In United States v. Jacobson, 503 U.S. 540 (1992), the United States Supreme Court explained that testing one's predisposition by merely affording a single opportunity to commit crime, without more, does not constitute entrapment. In Jacobson, the court reversed the conviction of a defendant contacted by postal and customs officials who had been informed that the defendant ordered two magazines containing pictures of nude children from an adult bookstore. Although the purchase was legal at the time, it became illegal three months later. For 26 months thereafter, the defendant was the target of repeated mailings from government officials operating as fictitious organizations. The officials sent surveys to determine the defendant's interests and then "mirrored" his responses by sending materials that "not only

excited [his] interest in sexually explicit materials banned by law but also exerted substantial pressure on [him] to obtain and read such material as part of a fight against censorship and infringement of individual rights." Jacobson, 503 U.S. at 552 (1992). The Supreme Court reversed the defendant's conviction for receiving child pornography through the mail, reasoning that there was insufficient evidence to prove that his predisposition to commit the crime had existed before the substantial government contacts that were intended to create that disposition. Nevertheless, the Court made clear that police could still use the typical sting operation:

> . . . Likewise, there can be no dispute that the Government may use undercover agents to enforce the law. "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises." [citations omitted].
>
> In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. [citations omitted]. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. [citation omitted].

> Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrated the defendant's predisposition. [citation omitted]. Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner--who must be presumed to know the law--had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction. [citation omitted].

Jacobson, 503 U.S. 540 at 548-550 (1992) (emphasis added).

Nevada also holds that a police officer who merely furnishes a suspect the opportunity to commit crime does not entrap the suspect. Hill v. State, 95 Nev. 327, 332, 594 P.2d 699, 703 (1979)("where the criminal intent originates in the mind of the accused and the offense is completed, the mere fact that the accused is furnished an opportunity to commit a crime or was aided in the commission thereof by an agent of the State should constitute no defense."); Sheriff v. Gleave, 104 Nev. 496, 761 P.2d 416 (1988) (defendant predisposed to commit drug sale where arresting officer, acting on informant's tip, met defendant in a bar and mentioned once to defendant that he was interested in obtaining some methamphetamine, and defendant volunteered that she

could get the drug and then left with the officer's money and returned an hour later with methamphetamine); see also, United States v. Borum, 584 F.2d 424, 428 (D.C. Cir. 1978)("mere solicitation" by the Government, to which "the defendant acquiesced with reasonable readiness," does not evince inducement); State v. Walker, 914 P.2d 1320, 1332 (Ariz. App. Div. 1995)(no entrapment where state agents "have merely afforded an opportunity for a predisposed person to commit a crime.")(quoting State v. Gessler, 142 Ariz. 379, 382, 690 P.2d 98, 101 (App. 1984)); State v. DeAngelo, 830 P.2d 630, 632 (Or. App. 1992)("We do not read the opinion [Jacobson] to require that a government agent have reasonable suspicion of wrongdoing before it may afford opportunities or facilities for the commission of an offense. We conclude that the lack of any reasonable suspicion that defendant was engaged in criminal activities does not mean that there was entrapment as a matter of law."). State v. Sweet, 954 P.2d 1133, 1137 (Mont. 1998) ("merely affording the defendant the opportunity or facility for committing an offense is not entrapment."); State v. Vallejos, 924 P.2d 727, 730 (N.M. App. (1996) (same); State v. Canelo, 924 P.2d 1230, 1236 (Idaho App. 1996) (same); State v. Lively, 921 P.2d 1035, 1039-40 (Wash. 1996); People v. Jackson, 627 P.2d 741, 745 (Colo. 1981); State v. J.D.W., 910 P.2d 1242, 1243 (Utah App. 1995); State v. Van Winkle, 864 P.2d 729, 732

(Kan. 1993); State v. Wright, 851 P.2d 12, 14 (Wyo. 1993); State v. Cooper, 810 P.2d 1303, 1305 (Okla. Crim. App. 1991); State v. Tookes, 699 P.2d 983, 987 (Hawaii 1985); People v. Barraza, 591 P.2d 947, 955 (Cal. 1979); State v. Noetzelmann, 721 P.2d 579, 581 (Wyo. 1986) ("The decisions in cases involving the illegal sale of drugs are practically unanimous in holding that the offense of entrapment is not available where the only solicitation is an offer to buy.").[11]

[11]It is interesting to note that contrary to Shrader, a majority of the federal courts hold that the government is not required to have a reasonable belief of wrongdoing before it investigates or targets a suspect. United States v. King, 73 F.3d 1564, 1568 (11th Cir. 1996)(government not required to have evidence of predisposition before it begins investigation of defendant); United States v. Gamble, 737 F.2d 853, 860 (10th Cir. 1984)("government need not have reasonable suspicion of wrongdoing in order to conduct an undercover investigation"); United States v. Luttrell, 923 F.2d 764, 764 (9th Cir. 1991)(rejecting a "reasoned grounds" requirement for investigation of an individual under the due process clause); United States v. Jacobson, 916 F.2d 467, 469 (8th Cir. 1990), rev'd on other grounds, 503 U.S. 540 (1992); United States v. Hollingsworth, 9 F.3d 593, 596-97 (7th Cir. 1993)("The government is no more required to establish probable cause, or even a lesser degree of cause such as reasonable suspicion, before launching a sting operation than it is required to establish probable cause or reasonable suspicion in order to employ an undercover agent to worm his way into the confidence of persons suspected (whether or not reasonable) of being criminals in order to obtain evidence of their criminal activity."); United States v. Mitchell, 67 F.3d 1248, 1256 (6th Cir. 1995)(government need not have proof of predisposition prior to initial contact with defendant); United States v. Allibhai, 939 F.2d 244, 249 (5th Cir. 1991)(same); United States v. Blevins, 960 F.2d 1252, 1258 (4th Cir. 1992)("The government's knowledge of this state of mind is irrelevant, and thus there is no requirement that the government prove that it had a reasonable suspicion of wrongdoing before conducting an undercover investigation."); United States v. Jannotti, 673 F.2d 578, 609 (3d Cir. 1982)("the mere fact the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait."), cert. denied, 457 U.S. 1106 (1982); United States v.

3. The Reasonable Cause Requirement of Shrader Does Not Apply to Decoy Operations.

Because the present case is essentially a sting or decoy operation, the reasonable cause requirement of Shrader does not apply. Shrader v. State, 101 Nev. at 507, n.1 (1985)(reasonable cause requirement before targeting suspect "inapplicable in situations where the police are conducting for articulable purposes proper decoy operations in a particular geographic area. Obviously, the police cannot be required to have previous knowledge of the predispositions of persons whose identities are unknown until apprehension."); Oliver v. State, 101 Nev. 308, 309, 703 P.2d 869, 870 (1985)(decoy operations permissible if state does not "employ extraordinary temptations or inducements");

Harvey, 991 F.2d 981, 990 (2d Cir. 1993); United States v. Jenrette, 744 F.2d 817, 824, n.13 (D.C. Cir. 1984)(no constitutional violation where FBI targeted defendant without "reasonable suspicion" of wrongdoing), cert. denied, 471 U.S. 1099 (1985). See also, People v. Snelling, 484 P.2d 784, 786 (Colo. 1971) ("so long as this investigation and surveillance activity does not constitute an invasion of privacy constituting an infringement upon constitutional rights, then no probable cause requirement need be met to initiate and carry out the investigation and surveillance activities."). The rationale of these cases seems to be that "[i]n circumstances in which an investigation unfortunately ensnares a nonpredisposed individual, the defense of entrapment serves as an effective bar to conviction." Allibhai, 939 F.2d at 249 (5th Cir. 1991). Certainly, there is no constitutional prohibition against targeting a person by merely speaking with him on a consensual basis. As Justice White remarked in his concurring opinion in Terry v. Ohio, 392 U.S. 1, 34 (1968), "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked, but may refuse to cooperate and go on his way."

compare Roberts v. State, 110 Nev. 1121, 881 P.2d 1 (1994)(Shrader test applicable where defendant alleged that confidential informant begged and pleaded with defendant to obtain cocaine so that informant's customer would not kill him).

4. Defendant Was Predisposed To Selling Drugs.

"[T]he entrapment defense is of little use because the ready commission of the criminal act amply demonstrated [Foster's] predisposition." Jacobson, 503 U.S. at 550 (1992). Unlike Shrader, this is not a case where the officers incessantly importuned Foster in an effort to manufacture crime. See Hale v. State, 105 Nev. 397, 398, 776 P.2d 547, 548 (1989)("In Shrader, we were concerned with the indiscriminate encouragement of crime by the police. Shrader was led astray by an overzealous police informant who had no reason to believe that Shrader was predisposed to sell marijuana.").

CROSS EXAMINATION OF STATE'S WITNESSES

INTRODUCTION OF EXTRINSIC EVIDENCE - 1991

Although the defense does have a wide amount of latitude in cross—examining the State's witnesses, that latitude is limited. See NRS 48.025, 48.035, 48.045, 50.085, 50.095, 51.035, and all case law which interprets these statutes.

NRS 50.085(3) prohibits presentation of extrinsic evidence to prove collateral matters. In Moore v. State, 96 Nev. 220 at 225 (1980), the Nevada Supreme Court stated:

> Professor McCormick writes the facts showing misconduct of the witness (for which no conviction has been had) are collateral, and if denied on cross—examination, cannot be contradicted. McCormick, evidence section 47 at 99 (2 ed. 1972). Having received a negative answer to his question, the prosecutor was foreclosed from proving otherwise. But cf. Harris v. New York, 401 U.S. 222 (1971) (use of accused's voluntary statements taken in violation of Miranda to impeach accused's testimony permissible to prevent perjury).

This prohibition against a collateral attack by extrinsic evidence has been upheld by the Nevada Supreme Court in Rembert v. State, 104 Nev. 680 (1988) and Rowbottom v. State, 105 Nev. 472 (1989).

The State suggests first that these type of claims ought to be viewed in terms of "invited error." See Sonner v. State, 112 Nev. 1328, 1345, 930 P.2d 707, 718 (1996); Rhodes v. State, 91 Nev. 720, 542 P.2d 196 (1975). When a competent defendant stands and announces that he wishes to discharge his lawyer, he ought not to be heard to complain that the court acceded to his wishes. Indeed, it may well be reversible error for a court to deny the competent defendant's request. See Harris v. State, 113 Nev. 799, 942 P.2d 151 (1997).

The State also contends that there was no error. There can be no doubt but that Defendant knew he had the right to counsel. The fact that he showed up with his lawyer in tow would tend to support that proposition. Furthermore, there is no assertion that he was incompetent to decide whether to represent himself. The issue should not focus on Defendant's ability to defend himself, but instead on his ability to choose to defend himself. Graves v. State, 112 Nev. 118,124, 912 P.2d 234, 238 (1996). As this Court has noted, the trial court has the advantage of face-to-face interactions with the defendant and is in the best position to judge whether the decision to proceed without counsel is a competent and intelligent choice. Graves, 112 Nev. at 124. Whether waiving counsel is a wise choice is irrelevant.

There was a time when this Court required a "penetrating and comprehensive examination of the waiver." See Beals v. State, 106 Nev. 106 Nev. 729, 732, 802 P.2d 2 (1990). It did not take long for reviewing courts to realize that the penetrating canvass was being used to persuade defendants to waive their absolute right to represent themselves. Thus, the recent trend has been to recognize that the examination should focus on the competence of the defendant, not into the wisdom of the decision to assert the right to self-representation. See Graves, supra; Moreno v. Stewart, 171 F.3d 658,(9th Cir. 1999).

Defendant also contends that he did not knowingly waive the right to stand-by counsel. The State has two responses. First, he had no right to stand-by counsel. Harris v. State, 113 Nev. 799, 942 P.2d 151 (1997). Second, he got stand-by counsel despite the lack of the right.

GRAND JURY

WHO MAY BE PRESENT - 1987

NRS 172.235 entitled "Who may be present when grand jury is in session," states:

> Except as otherwise provided in subsection 2, the following persons may be present while the grand jury is in session:
>
> (a) The district attorney;
>
> (b) The witness who is testifying;
>
> (C) An attorney who is accompanying a witness pursuant to NRS 172.239;
>
> (d) Any interpreter who is needed;
>
> (e) The certified shorthand reporter who is taking stenographic notes of the proceeding;
>
> (f) Any person who is engaged by the grand jury pursuant to NRS 172.205; and
>
> (g) Any other person requested by the grand jury to be present.
>
> 2. No person other than the jurors may be present while the grand jury is deliberating or voting.

In Lujan v. State, 85 Nev. 16 (1969), the Nevada Supreme Court stated:

> During the trial, appellant moved to set aside the indictment against him on the ground that Detective Albright was present in the grand jury room while various witnesses testified. He was there with permission of the grand jury. He was not present during the grand jury's deliberations which resulted in appellant's indictment. The lower court properly refused to grant the motion.
>
> The motion came too late. A motion to set aside an indictment as permitted by NRS 174.160 must be made before demurrer or plea or it is waived. NRS 174.170,

Ex parte Esden, 55 Nev. 169, 28 P.2d 132 (1934); State v. Rothrock, 45 Nev. 214, 200 P. 525 (1929) ; State v. Hamilton, 13 Nev. 386 (1878); State v. Harris, 12 Nev. 414 (1977).

Moreover, the grand jury may require persons other than the district attorney to be present when witnesses are being examined. NRS 172.320. The record indicates that was the situation here.

This issue was addressed again in Turpin v. Sheriff, 87 Nev. 236 (1971) at 239, where the claim was that an unauthorized person was in the grand jury since a secretary from the district attorney's office had been present.

Addressing that issue, the Nevada Supreme Court said:

It is next contended that the presence of an unauthorized person while the grand jury was in session requires a dismissal of the indictment. The transcript of the grand jury proceedings reveals the presence of a secretary from the district attorney's office, which the appellant charges is in violation of NRS 172.235. However, the minutes of the grand jury proceedings, which are part of the record on this appeal, specifically list the name of the secretary from the district attorney's office as being among "others whose presence is required by the grand jury." Thus, the appe1~ant has not carried the burden of persuasion in making it apparent that there was an unauthorized person present during the grand jury session, and there is no charge at all that the secretary from the district attorney's office was present during the grand jury deliberations or voting. Lujan v. State, 85 Nev. 16, 449 P.2d 244 (1969).

In Franklin v. State, 89 Nev. 382 (1973), this issue was addressed again when the appellant claimed prosecutorial. misconduct and error because five members of the district attorney's staff were present when evidence was presented to the grand jury. In addressing this issue, the Nevada Supreme Court said:

> To accomplish an explanation of the law and the presentation of the evidence a prosecutor may have present from time to time such reasonable number of assistants as he deems appropriate. Commonwealth v. Favulli, supra. Here, there was never more than three assistant district attorneys present. This was not an unreasonable number. The other two members from the district attorney's staff who were present were a secretary and a bailiff. Both were specifically requested by the grand jury and authorized by statute to be present when the grand jury was in session but not deliberating or voting. NRS 172.205; NRS 172.235; Turpin v. Sheriff, 87 Nev. 236, 484 P.2d 1083 (1971). Furthermore, the appellant admits that there was nothing "illegal or impermissible" about their presence. There is nothing in this record to indicate that the conduct of the district attorney's staff was contrary to those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions. (Palko v. Connecticut, 302 U.S. 319 (1937).) There was no violation of due process. Cf., State v. Joao, 491 P.2d 1089 (Haw. 1971).

One of the cases relied upon by the defense in this matter is State v. Revere, 94 So.2d 25 (1957). In that case the presence of a chief investigating officer in the grand jury was found to be grounds for setting aside the indictment. However, that case can be distinguished from Nevada law in several instances. Citing 4 A.L.R.2d 292, the Supreme Court of the state of Louisiana in Revere stated:

> Although it appears well established that an indictment returned by a grand jury will be quashed or abated where the presence of an authorized person during the grand jury proceedings results in prejudice to the accused, there is a decided difference of opinion as to whether the mere presence of an unauthorized person, without a showing of prejudice, is a sufficient ground to set aside the indictment. The prevailing view, apart from statutes expressly affecting the question, is that the presence of an unauthorized person during the grand jury proceedings is, at most, a mere irregularity, not sufficient to constitute a ground for setting aside the indictment returned by the grand jury, unless prejudice to the accused is shown. (Emphasis added.)

Under the laws of the state of Louisiana at the time that case was decided, the accused either with or without counsel was not allowed to attend the sessions of the grand jury nor to know anything of the matters that occurred there. Additionally, the laws of that jurisdiction were very specific as to who may be in the grand jury room at the time it was in session. The Louisiana Supreme Court went on to state:

> "However, an analysis of the cases sustaining the majority view discloses they are, for the most part, decided under certain

broadly written statutes " The state of Louisiana had very strictly drawn statutes regarding the presence of persons within the grand jury and violation of those statutes was taken as being fatal to the indictment.

In a decision by the Supreme Court of Alabama, State ex rel. Baxley v. Strawbridge, 296 So.2d 784 (1974), when addressing the Revere decision, stated:

> Even so, the dissent in Revere points out that the conclusion reached by the majority is contrary to the prevailing view throughout the country.

The defense also relies on Commonwealth v. Pezzano, 438 N.E.2d 841 (Mass. 1982). The decision reached by the Supreme Judicial Court of Massachusetts in this case was not based on a statutory scheme for the grand jury, but instead was based upon Article 12 of the Declaration of Rights which reads, "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty ~: estate, but by the judgment of his peers or the law of the land." Out of this Declaration of Rights the courts of the state of Massachusetts have carved out the rules to be followed for grand jury proceedings. This scheme is in apposite to the law followed in Nevada, which is specifically laid out by statute.