IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW LEON MOULTRIE, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 65390

ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF NYE, THE HONORABLE ROBERT S. LANE PRESIDING

STATE'S ANSWER TO APPELLANT'S PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEALS

Respondent STATE OF NEVADA, by and through its attorney of record, Robert E. Glennen III, Esq., Esmeralda County District Attorney, hereby files its Answer to Appelant's Petition For Review of Decision of the Court of Appeals, as Ordered by the Nevada Supreme Court on February 18, 2016.

This Motion is made and based upon SCR 40B, the following Points and Authorities, all papers, pleadings and documents on file herein, as well as any oral arguments that may be entertained at the hearing of this matter.

POINTS AND AUTHORITIES

NRAP 40B allows review of decisions by the Court of Appeals where the Appellate Court has made a ruling in a case which is or

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may be inconsistent with prior or subsequent rulings of this court, or where an important issue should be ruled upon by the entire court.

Here, the court of appeals' decision is uniform with prior decisions, and offers no new grounds in precedential or constitutional law.

1. FACTUAL BACKGROUND

(All citations are to the State's Appendix filed with the Fastrack Response in the Court of Appeals) This case originates in a traffic stop performed by the Esmeralda County Sheriff s Office on December 11, 2011. (Appx. 17). During the stop, a deputy received permission to search the vehicle (Appx. 22), and allegedly discovered methamphetamine belonging to the Defendant, a passenger in the vehicle. (Appx. 31, 32, 44).

At preliminary hearing held on March 21, 2012, the Justice of the Peace upheld a hearsay objection to prevent the deputy from testifying about whether he received consent to search the vehicle the Defendant was riding in, then based the refusal to bind defendant over on that hearsay objection. (Appx. 24, 56). Additionally, although the State filed the charge as a second offense, it was unable to provide evidence of a prior conviction at the preliminary hearing. The State moved to amend the Complaint to conform to the evidence to charge PCS for Sale, first offense, which the court refused. (Appx. 56).

On the basis of the hearsay objection and the State's failure to prove a prior conviction, the Justice of the Peace

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discharged the Defendant and dismissed the charge. (Appx. 56).

On May 28, 2012, 68 days after the court discharged and set Moultrie free, a Motion for Leave to File Information by affidavit was filed. After hearing, the District Court granted leave to file Information by Affidavit on July 2, 2012. That information was filed July 5, 2012, THREE days after the State was ordered to file it.

2. NRS 173.035 HAS NECESSARILY BEEN INTERPRETED AS ALLOWING INFORMATION BY AFFIDAVIT TO BE FILED MORE THAN 15 DAYS AFTER PRELIMINARY HEARING

NRS 173.035 states in pertinent part:

> 1. An information may be filed against any person for any offense when the person:
>
> (a) Has had a preliminary examination as provided by law before a justice of the peace, or other examining officer or magistrate, and has been bound over to appear at the court having jurisdiction; or
>
> (b) Has waived the right to a preliminary examination.
>
> 2. If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the Attorney General when acting pursuant to a specific statute or the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process must forthwith be issued thereon. The affidavit need not be filed in cases where the defendant has waived a preliminary examination, or upon a preliminary examination has been bound over to appear at the court having jurisdiction.

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> 3. The information must be filed within 15 days after the holding or waiver of the preliminary examination. Each information must set forth the crime committed according to the facts

NRS 178.566 states, as applicable here:

> 1. If no indictment is found or information filed against a person within 15 days after the person has been held to answer for a public offense which must be prosecuted by indictment or information, the court may dismiss the complaint.

In Nevada, NRS 173.035(2) has been interpreted by this court on twelve (12) occasions, as found by undersigned. Hicks v. Sheriff, 86 Nev. 67, 464 P.2d 462 (1970), Martin v. Sheriff, 88 Nev. 303, 496 P.2d 754 (1972), Ryan v. Eighth Judicial Dist. Court, 88 Nev. 638, at 640, 503 P.2d 842 (1972), Lamb v. Loveless, 86 Nev. 286, 468 P.2d 24 (1970), Woofter v. Kelly, 90 Nev. 345, 526 P.2d 337 (1974), Cranford v. Smart, 92 Nev. 89, 545 P.2d 1162 (1976), Murphy v. State, 110 Nev. 194, at 197, 871 P.2d 916 (1994), Cipriano v. State, 111 Nev. 534, at 539, 894 P.2d 347 (1995), Feole v. State, 113 Nev. 628, at 631, 939 P.2d 1061 (1997), Parsons v. State, 115 Nev. 91, at 93, 978 P.2d 963 (1999), Parsons v. State, 116 Nev. 928, at 938, 10 P.3d 836 (2000), and State v. Sixth Judicial Dist. Court (Warren), 114 Nev. 739, at 742, 964 P.2d 48 (1998).

In NONE of those 12 occasions was the fifteen day time limit discussed. In ALL those 12 occasions, the fifteen day time limit had been far surpassed. In Parsons, supra, mention was made of 97 days elapsing between the preliminary hearing and arragnment after filing the information, without any application of the 15

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day requirement of NRS 173.035(3). This is certainly not an integral part of the decision, but was NOT disapproved in either decision.

Finally at least three of those cases cite approvingly of the State filing a Request for Information by Affidavit, after appeal, briefing, argument and decision, all of which must have taken months, not 15 days. State v. Sixth Judicial Dist. Court (Warren), 114 Nev. 739, at 742, 964 P.2d 48 (1998); Martin v. Sheriff, 88 Nev. 303, 496 P.2d 754 (1972); and Sheriff, Carson City v. Cross, 88 Nev. 423, at 424, 498 P.2d 1341 (1972). Again, this is dicta but is specifically raised by this court as an option even after direct appeal.

Thus, Appellant's interpretation of NRS 173.035(3) as requiring a dismissal of a charge if not filed within 15 days necessarily requires overruling 45 years of necessary dicta in a dozen previous Nevada Supreme Court cases.

3. NRS 173.035 DOES NOT REQUIRE DISMISSAL IF NOT TIMELY

NRS 173.035 requires that an Information MUST be filed within 15 days. It does not prescribe a sanction for violating that provision. NRS 178.556 does prescribe a sanction for violation of NRS 173.035 in the context of a bindover, and requires the Defendant to prove prejudice in order to obtain that dismissal.

Nevada follows the maxim "expressio unius est exclusio alterius," the expression of one thing is the exclusion of another. Cramer v. State, DMV, 126 Nev. ___, ___, 240 P.3d 8, 12

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(2010); State v. Javier C., 128 Nev. , 128 Nev. Adv. 50, ___ P.3d ___ (2012). Omissions of subject matters from statutory provisions are presumed to have been intentional. State, Dep't of Taxation v. DaimlerChrysler, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005); Galloway v. Truesdell, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Here, the fact that there is a specific remedy, dismissal, for violation of NRS 173.035(3) after a bindover, but NONE after a discharge, requires this court NOT dismiss a charge after discharge.

Finally "This court generally avoids statutory interpretation that renders language meaningless or superfluous." Karcher Firestopping v. Meadow Valley Contr., 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009); Duncan v. Walker, 533 U.S. 167, 174 (2001). Here, courts must give effect, if possible, to every clause of a statute. The interpretation requested by Appellant gives no effect to any provision for requesting an Information by Affidavit.

4. INTERPRETATION OF TIME LIMIT ON INFORMATION BY AFFIDAVIT REQESTED BY APPELLANT LEADS TO ABSURD RESULTS

Here, Appellant requests that this court overrule the Court of Appeals and find that NRS 173.035 requires that the State MUST file an information by Affidavit within 15 days, and that the sole exception, that of NRS 178.556, only applies to persons bound over for trial and STILL IN CUSTODY! Applying the mandatory 15-day time limit to the filing of an information by affidavit pursuant to NRS 173.035(2) is impossible. NRS

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173.035(3), an information must be filed within 15 days of the holding of a preliminary examination.

If a defendant is held to answer, the State exercises an executive or administrative function by filing the information in district court. See NRS 173.045. The 15-day limitation is a logical restriction in the case of a defendant being held to answer because filing an information simply involves retitling the complaint as an information and endorsing the names of witnesses. Id.

If a defendant is discharged, however, an information by affidavit may only be filed if the State first obtains the transcript, which must be prepared, researches and files a motion, obtains a hearing, attends that hearing and is granted leave of court, a judicial decision, without that same deadline on the court to make its decision. See NRS 173.035(2). The State is thus put in an untenable position because it cannot comply with the time requirement in NRS 173.035(3) without judicial sanction, in contrast to when a defendant is held to answer. See Moultrie Affirmation, f.n. 3, pg. 4, 5. It would be a statutory interpretation that renders the entire Information by Affidavit subsection nugatory, in violation of statutory construction rules. Southern Nev. Homebuilders v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

In addition, this absurd result would be compounded by the fact that those out of custody would be allowed to apply the 15 day limit in a draconian manner, while those whose rights are

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being infringed, those in custody, would have to prove prejudice. Compare NRS 178.556 with NRS 173.035. Finally, those in a large enough county for a standing Grand Jury would be charged at the State's leisure after presenting the same evidence to the grand jury, without any time limit other than the statute of limitations. See NRS 172.255; State v. Sixth Judicial Dist. Court (Warren), 114 Nev. 739, at 742, 964 P.2d 48 (1998).

5. EGREGIOUS ERROR HAS BEEN INTERPRETED IN ACCORD WITH NEVADA LAW

Appellant's second reason for review asserts this decision breaks with precedent regarding egregious error. This is far from the truth. A brief summary of that term is that failure to present evidence to support an element of the crime at preliminary hearing is NOT egregious error. This court has held that NRS 173.035(2) contemplates a safeguard against egregious error by a magistrate in determining probable cause, [and is] not a device to be used by a prosecutor to satisfy deficiencies in evidence at a preliminary hearing. Cranford v. Smart, 92 Nev. 89, 91, 545 P.2d 1162, 1163 (1976).

In contrast, the Nevada Supreme Court has found egregious error where there was plain error effecting the bindover decision. Parsons v. State, 116 Nev. 928, at 938, 10 P.3d 836 (2000). Here, just like in Parsons, the Court made a plain error in erroneously granting a bogus hearsay objection, without which probable cause existed to bind defendant over. Thus, egregious as previously defined has been met.

CONCLUSION

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In conclusion, the appellate court has applied the law and facts of previous Court decisions applicable to the above matter. Rehearing that matter in the Nevada Supreme Court is unnecessary because a contrary ruling would overrule 45 years of necessary dicta by this court, torture the rules of statutory construction, overrule plain language, render impotent the Information by Affidvavit process, and require overruling precedent on egregious error. Thus, rehearing should be denied.

SUBMITTED this 3rd day of March, 2016.

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CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that I am an agent or employee of the above attorney, and that on the 4th day of March, 2016, I served the above and foregoing STATE'S ANSWER TO APPELLANT'S PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEALS by depositing a copy in the United States mails, postage prepaid, addressed to the following persons or parties at their last known addresses as indicated below:

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