

IN THE SUPREME COURT OF THE STATE OF NEVADA

\* \* \* \* \*

JUSTIN PATRICK KELLEY.                     )  
   )  
                  Appellant,                     )  
   )  
vs.   )  
   )  
THE STATE OF NEVADA,                     )  
   )  
                                  Respondent     )

NO. 67777 Electronically Filed  
May 18 2015 10:41 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

Appeal from the Fourth Judicial District  
Court of the State of Nevada  
In and For the County of Elko

APPELLANT'S FAST TRACK STATEMENT APPENDIX

FREDERICK B. LEE, JR  
ELKO COUNTY PUBLIC DEFENDER  
569 Court Street  
Elko, Nevada 89801  
NV Bar Number 1257

ADAM PAUL LAXALT  
ATTORNEY GENERAL  
100 N Carson Street  
Carson City, Nevada 89701-4717  
NV Bar Number 12426

ROGER H. STEWART  
Chief Deputy Public Defender  
569 Court Street  
Elko, Nevada 89801  
NV Bar Number 3823

MARK D. TORVINEN  
ELKO COUNTY DISTRICT ATTORNEY  
540 Court Street  
Elko, Nevada 89801  
NV Bar Number 551

Attorney for Appellant

Attorneys for Respondent

1 The Appellant, JUSTIN PATRICK KELLEY, by his attorney, ROGER H.  
2 STEWART, of the Elko County Public Defender's Office, appends herewith the  
3 following exhibits in support of the Appellant's Fast Track Statement:  
4

- 5 1. Amended Motion to Dismiss filed December 2, 2014.....57-67
- 6 2. Complaint filed February 28, 2014..... 1-2
- 7 3. Criminal Information filed April 30, 2014..... 5-7
- 8 4. Judgment of Conviction filed March 26, 2015..... 89-92
- 9 5. Motion to Dismiss filed November 26, 2014..... 46-56
- 10 6. Notice of Appeal filed April 8, 2015.....93-94
- 11 7. Opposition to Motion to Dismiss filed December 5, 2014.....68-77
- 12 8. Order Binding Over filed April 24, 2014..... 3-4
- 13 9. Order Denying Motion filed December 30, 2014.....82-88
- 14 10. Pretrial Order filed November 12, 2014.....36-45
- 15 11. Response to Opposition to Motion filed December 10, 2014..... 78-81
- 16 12. Transcript – Motion Hearing filed April 27, 2015.....95-102
- 17 13. Transcript – Preliminary Hearing filed May 21, 2014..... 8-35

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1 RESPECTFULLY SUBMITTED this \_\_\_\_ day of \_\_\_\_\_, 2015.

2  
3 FREDERICK B. LEE, JR.  
4 ELKO CO. PUBLIC DEFENDER  
5 569 Court Street (Physical Address)  
6 571 Idaho Street (Mailing Address)  
7 Elko, Nevada 89801  
8 (775)738-2521

9 By: \_\_\_\_\_  
10 ROGER H. STEWART  
11 Chief Deputy Public Defender  
12 Nevada Bar Number 3823  
13 [rstewart@elkocountynv.net](mailto:rstewart@elkocountynv.net)

14 CERTIFICATE OF SERVICE BY ELECTRONIC FILING

15 I hereby certify, pursuant to the provisions of NRAP 25, that I am an employee  
16 of the Elko County Public Defender's Office, and that on the \_\_\_\_ day of  
17 \_\_\_\_\_, 2015, I electronically filed a copy of the foregoing, Appendix to  
18 Appellant's Fast Track Statement, and the following parties have consented to  
19 receive electronic filings in this matter:

20 CLERK OF THE SUPREME COURT  
21 Supreme Court Building  
22 201 S Carson Street  
23 Carson City, NV 89701-4702

24 OFFICE OF THE ATTORNEY GENERAL  
25 100 N. Carson Street  
26 Carson City, NV 89701-4717

27 ROBERT J. LOWE  
28 Deputy Elko County District Attorney  
29 ELKO COUNTY DISTRICT ATTORNEY'S OFFICE  
540 Court Street  
Elko NV 89801

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Mr. Justin Kelley  
Wells NV

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NO. 14-CR-00198

2014 FEB 28 PM 2:20

ELKO JUSTICE COURT

IN THE ELKO JUSTICE COURT

IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

---

STATE OF NEVADA,

Plaintiff,

**CRIMINAL**

vs.

**COMPLAINT**

JUSTIN PATRICK KELLEY,

Defendant.

---

COMES NOW, THE STATE OF NEVADA, the Plaintiff in the above-entitled cause, by and through its Counsel of Record, the Elko County District Attorney's Office, and based upon the crime report attached hereto and the officer declaration included within said report, complains and alleges that the Defendant above-named, on or about the 8th day of February, 2014, at or near the location of in the City of Wells, within the County of Elko, and the State of Nevada, committed the following described criminal offense(s):

**COUNT 1**

**ELUDING A POLICE OFFICER, A CATEGORY B FELONY AS  
DEFINED BY NRS 484B.550 (FORMERLY NRS 484.348)**

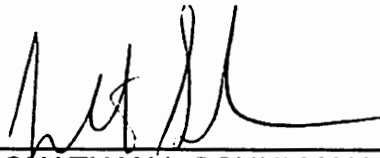
The Defendant willfully failed and/or refused to bring the vehicle he/she was operating to a stop, and/or otherwise fled from, or attempted to elude a peace officer, one Deputy Shelley, who was in a readily identifiable vehicle of any police department, law enforcement agency, or regulatory agency, after said peace officer had given the Defendant a signal, a flashing red lamp and a siren, to bring his/her vehicle to a stop, and furthermore operated the motor vehicle in a manner which endangered or is likely to endanger any other person or the property of any other person by driving the vehicle (ATV) where the passenger almost fell off several times, and/or almost hitting fuel pumps and/or nearly striking buildings and/or nearly striking Deputy Shelley's patrol car and/or almost hitting a road marker.

All of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Nevada. Said Complainant, therefore, prays that the Defendant be dealt with according to law.

The undersigned hereby declares under penalty of perjury the foregoing Complaint is true to the best of his/her knowledge, information and belief.

Dated: February 26, 2014.

**MARK TORVINEN**  
**ELKO COUNTY DISTRICT ATTORNEY**



---

**JONATHAN L SCHULMAN**  
Deputy District Attorney  
State Bar No.: 9180

- {     }     Check if the victim in misdemeanor cases appears to have incurred uncompensated expenses because of the defendant's acts.
- {     }     Check if prosecutor wishes to be present at misdemeanor sentencing.

Pursuant to NRS 174.234 and NRS 171.1965 or NRS 174.235, discovery herein contains the name and last known address or place of employment of the witnesses the State intends to call during the case-in-chief in a misdemeanor trial.

DA #F-14-94267 /REPORT #:14EL00178 / OFFICER: JEREMY SHELLEY / AGENCY: ELKO COUNTY SHERIFF'S OFFICE

1 CASE NO. CR-14-0198

FILED  
ELKO TOWNSHIP  
JUDICIAL CLERK

2014 APR 24 PM 2: 24

CLERK \_\_\_\_\_

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6 IN THE JUSTICE COURT OF THE ELKO TOWNSHIP  
7 IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA  
8

9 THE STATE OF NEVADA,

10 Plaintiff,

**ORDER BINDING OVER**

11 vs.

**(BAILED)**

12 JUSTIN PATRICK KELLEY,

13 Defendant.  
14

15 It appearing from the evidence adduced at a Preliminary Hearing held in the above-  
16 entitled Court on the 23rd day of April, 2014, in which the Defendant was represented by  
17 Attorney ROGER H. STEWART, and the State was represented by JONATHAN L  
18 SCHULMAN, of the Elko County District Attorney's Office. That there is sufficient probable  
19 cause to believe that the following crime has been committed and that the Defendant has  
20 committed it or them.

21 I HEREBY ORDER that the Defendant be held to answer upon the following  
22 charge(s):

23 CT.# CHARGE(S) TYPE NRS  
24 001 ELUDING A POLICE OFFICER F 484B.550  
25

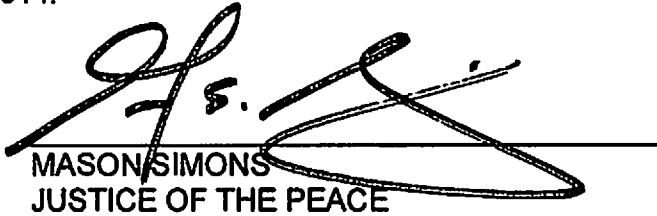
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1 And that Defendant be held to answer in the Justice Court of the Elko Township of  
2 the State of Nevada, in and for the County of Elko, said Defendant having posted  
3 \$20,000.00, bail, said bail bond is hereby continued by the Court.

4 Dated this 24<sup>th</sup> day of April, 2014.

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8 MASON SIMONS  
JUSTICE OF THE PEACE

9 DA# 94267  
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FILED

2014 APR 30 AM 10:06

ELKO CO DISTRICT COURT

CLERK \_\_\_\_\_ DEPUTY \_\_\_\_\_ *R*

NO. CR-FP-14-0198  
DEPT. 2

IN THE FOURTH JUDICIAL DISTRICT COURT  
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

\_\_\_\_\_  
STATE OF NEVADA,

Plaintiff,  
vs.

**CRIMINAL**  
**INFORMATION**

JUSTIN PATRICK KELLEY,

Defendant(s).  
\_\_\_\_\_ /

COMES NOW THE STATE OF NEVADA, the Plaintiff in the above-entitled cause, by and through its Counsel of Record, the Elko County District Attorney's Office, and informs the above-entitled Court that Defendant(s) above-named, on or about the 8th day of February, 2014, at or near the location of City of Wells, within the County of Elko, and the State of Nevada, committed a crime or crimes described as follows:

**COUNT 1**

**ELUDING A POLICE OFFICER, A CATEGORY B FELONY AS  
DEFINED BY NRS 484B.550 (FORMERLY NRS 484.348)**

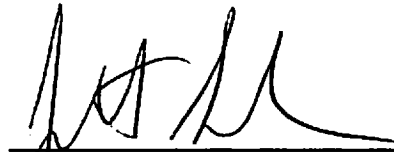
The Defendant willfully failed and/or refused to bring the vehicle he/she was operating to a stop, and/or otherwise fled from, or attempted to elude a peace officer, one Deputy Shelley, who was in a readily identifiable vehicle of any police department, law enforcement agency, or regulatory agency, after said peace officer had given the Defendant a signal, a flashing red lamp and a siren, to bring his/her vehicle to a stop, and furthermore operated the motor vehicle in a manner which endangered or is likely to endanger any other person or the property of any other person by driving the vehicle (ATV) where the passenger almost fell off several times, and/or almost hitting fuel pumps and/or nearly striking buildings and/or nearly striking Deputy Shelley's patrol car and/or almost hitting a road marker.

APR 30 2014 AM 10:49

All of which is contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nevada.

Dated: April 23, 2014.

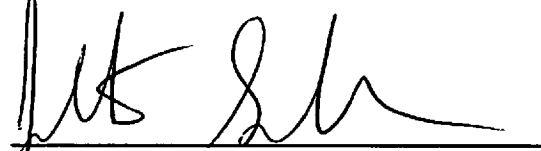
**MARK TORVINEN**  
**ELKO COUNTY DISTRICT ATTORNEY**



JONATHAN L SCHULMAN  
Deputy District Attorney  
State Bar Number: 9180

**Declaration By State's Counsel Estimating  
The Number Of Days Needed For Trial**

**COMES NOW THE STATE OF NEVADA**, by and through its Counsel of Record the Elko County District Attorney's Office and, specifically by the Deputy District Attorney assigned the above-entitled matter, who, by his signature hereunder, would declare to the above-entitled Court that it is State's Counsel's estimate that 2 days, including jury selection, should be set aside for the trial of this matter.



JONATHAN L SCHULMAN  
Deputy District Attorney  
State Bar Number: 9180

Witnesses' names and addresses known to the District Attorney at the time of filing the above Criminal Information, if known, are as follows.

JEREMY SHELLEY, 775 W SILVER ST, ELKO, NV 89801  
ROBERT THORNAL, 775 W SILVER STREET, ELKO, NV 89801  
JUSTIN PATRICK KELLEY, 1975 LAKE AVE, WELLS, NV 89835

**CERTIFICATE OF SERVICE**

I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko County District Attorney's Office, and that on the 29<sup>th</sup> day of April, 2014, I hereby served a copy of the Criminal Information, by delivering, mailing, faxing, or causing to be delivered, faxed, or mailed, a copy of said document to the following:

HONORABLE ALVIN R. KACIN  
FOURTH JUDICIAL DISTRICT COURT  
ELKO COUNTY COURTHOUSE  
ELKO, NV 89801

ROGER H. STEWART  
ELKO COUNTY DEPUTY PUBLIC DEFENDER  
569 COURT ST.  
ELKO, NV 89801

  
MERCEDES WOSTER  
CASEWORKER

DA#F-14-94267

FILED

2014 MAY 21 AM 10:35  
ELKO CO DISTRICT COURT

1 CASE NO. 14 CR 00198 4E

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3

4 IN THE JUSTICE COURT OF THE ELKO TOWNSHIP  
5 IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

6

7 THE STATE OF NEVADA, PRELIMINARY HEARING

8 Plaintiff,

9 vs.

10 JUSTIN PATRICK KELLEY,

11 Defendant.

12

13

14 TRANSCRIPT OF PROCEEDINGS

15 Held: April 23, 2014

16 Before HONORABLE MASON E. SIMONS

17

18 Counsel for Plaintiff MR. JONATHAN L. SCHULMAN  
19 DEPUTY DISTRICT ATTORNEY  
20 540 Court Street  
Elko, Nevada 89801

21 Counsel for Defendant MR. ROGER H. STEWART  
22 CHIEF DEPUTY PUBLIC DEFENDER  
23 569 Court Street  
Elko, Nevada 89801

24

25 REPORTED BY CATHERINE A. FISHER - CCR 279

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I N D E X

WITNESSES FOR THE STATE

Direct

Cross

RD

RX

JEREMY SHELLEY

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14

19

EXHIBITS

ADMITTED

1 BE IT REMEMBERED that the Preliminary Examination in the  
2 above-entitled matter was held April 23, 2014, before  
3 MASON E. SIMONS, Judge of said court. The Court Reporter,  
4 CATHERINE A. FISHER, has been duly sworn.

5 THE COURT: The time is 10:33 a.m. The date Wednesday,  
6 April 23rd of 2014. We're here on Case No. 14 CR 00198 4E.  
7 This is a Justice Court matter, State of Nevada, Plaintiff,  
8 versus Justin Patrick Kelley. We're here on a complaint  
9 filed February 28th of 2014 which charges Count 1, eluding a  
10 police officer, a Category B felony. This is the time set  
11 for preliminary hearing on that complaint.

12 The Defendant, Mr. Kelley, is not present at this time.  
13 Mr. Stewart is present from the Public Defender's Office on  
14 behalf of Mr. Kelley. We have Mr. Schulman here from the  
15 District Attorney's Office. Mr. Stewart, have you had any  
16 contact with your client?

17 MR. STEWART: Yes, I have, Your Honor. I'm surprised  
18 he's not here 'cause we've talked about the case and I was  
19 expecting him to be here.

20 THE COURT: Okay. Mr. Schulman, did you wish to be  
21 heard at this time?

22 MR. SCHULMAN: Yes, Your Honor. He's not here. The  
23 Defendant has a long criminal history. He hasn't showed up.  
24 He's got a violent history. At this point we're asking for a  
25 warrant to a cash only warrant on whatever the standard B

1 felony is. I think it's \$50,000 cash only. He evidently  
2 needs a ride to court.

3 THE COURT: Okay. Mr. Stewart, did you wish to be heard  
4 any further?

5 MR. STEWART: I was just going to comment that  
6 remembering that among B felonies, this is the lowest that  
7 you can get. A one to six range. So I would kind of think  
8 that, you know, whereas there are B felonies that go up to I  
9 think about two to twenty, I hope the Court would keep that  
10 in mind.

11 THE COURT: Well, when he was initially booked on this  
12 particular charge, he had a bail amount of \$20,000. What I'm  
13 going to do is issue a bench warrant of \$20,000 cash only on  
14 this particular case. Anything further before we adjourn?

15 MR. SCHULMAN: No, Your Honor.

16 MR. STEWART: Nothing.

17 THE COURT: This matter is concluded. Thank you very  
18 much.

19 (Whereupon the Preliminary Hearing was then concluded.)

20 THE COURT: We're back on the record in  
21 Case 14 CR 00198 4E. It's a Justice Court matter, State of  
22 Nevada, Plaintiff versus Justin Patrick Kelley. We're here  
23 on a complaint filed February 28, 2014. It charges Count 1,  
24 eluding a police officer, a Category B felony.

25 We do have the Defendant now present here in the

1 courtroom. He's out of custody, along with his attorney,  
2 Mr. Stewart. Mr. Schulman is present from the District  
3 Attorney's Office. The Court had previously convened this  
4 matter. The Defendant not being present, the Court issued a  
5 bench warrant. That warrant is rescinded at this time.  
6 However, we will entertain a contempt matter following this  
7 proceeding about why he wasn't here on time. Are the parties  
8 ready to proceed with the preliminary hearing?

9 MR. SCHULMAN: State is.

10 MR. STEWART: We are, Your Honor.

11 THE COURT: Any witnesses to name, Mr. Schulman?

12 MR. SCHULMAN: Yes. Deputy Shelley and Deputy Thornal.

13 THE COURT: Any witnesses to name, Mr. Stewart?

14 MR. STEWART: None other than those, Your Honor.

15 THE COURT: Either party wish to invoke the rule of  
16 exclusion?

17 MR. STEWART: Please, Your Honor.

18 THE COURT: The rule of exclusion has been invoked.  
19 That means anyone who was just named as a potential witness  
20 in this particular proceeding will be required to have a seat  
21 in the hallway until you're specifically called in to  
22 testify. While you're seated out in the hallway, feel free  
23 to have casual conversation amongst anyone out there, but  
24 please do not discuss anything specifically related to this  
25 case. If either of the attorneys needs to step out into the



1 hallway to discuss your testimony with you, please talk  
2 quietly so your conversation is not potentially overheard by  
3 another witness. Okay. Who's your first witness,  
4 Mr. Schulman?

5 MR. SCHULMAN: Deputy Shelley.

6 THE COURT: So Deputy Thornal will have a seat in the  
7 hallway at this time. Deputy Shelley will come up to the  
8 stand. Raise your right hand to be sworn.

9 JEREMY SHELLEY,  
10 produced as a witness at the instance of the Plaintiff,  
11 having been first duly sworn, was examined and testified as  
12 follows:

13 THE COURT: Go ahead and have a seat. If I can get you  
14 to state your full name, and then I want you to spell your  
15 first and last name for the record.

16 A. Jeremy Shelley. J-e-r-e-m-y S-h-e-l-l-e-y.

17 THE COURT: Go ahead, Mr. Schulman.

18 DIRECT EXAMINATION BY MR. SCHULMAN:

19 Q. Thank you. Please tell the Court your occupation.

20 A. Deputy Sheriff for Elko County.

21 Q. For how long?

22 A. Almost three years with the county. Prior to that I  
23 had seven years with Elko Police Department.

24 Q. I'd like to draw your attention to February 8, 2014  
25 around midnight, 12:30 in the morning. Were you on duty

1 then?

2 A. Yes, I was.

3 Q. Did you come into contact with a Justin Kelley?

4 A. Yes, I did.

5 Q. Is he in court today?

6 A. Yes.

7 Q. Please point to the person, describe an article of  
8 clothing he's wearing.

9 A. He's wearing a black shirt.

10 Q. May the record reflect the witness is identifying  
11 the Defendant?

12 THE COURT: The record will so reflect.

13 Q. How did you come into contact with him?

14 A. I noticed an ATV four wheeler at the Love's Travel  
15 Center.

16 Q. What road is that on?

17 A. It is on U.S. 93.

18 Q. Thank you. Is that in the County of Elko?

19 A. Yes, it is.

20 Q. Okay. So you saw at the Love's -- ATV at the Love's  
21 travel Center. What was it doing?

22 A. It was driving in the parking lot. It drove towards  
23 the back of the parking lot near the semi tire repair center.

24 Q. Okay. And what did you do then?

25 A. I watched as it drove into the dirt lot that

1 surrounds the truck stop, and then it drove west through the  
2 sage brush to Moore Avenue.

3 Q. And then where did you see it go from there?

4 A. It began to drive -- turned right on Moore, driving  
5 north and then that road turns to the left and drives west  
6 towards Shoshone Avenue.

7 Q. On this road was he allowed to drive an ATV on that  
8 road?

9 A. If the ATV is licensed for highway travel and has  
10 the necessary turn signals, brake lights, and the necessary  
11 permit, as well as a licensed driver, yes.

12 Q. Did it have the turn signals? Did it have the brake  
13 lights?

14 A. Not that I noticed.

15 Q. And they would have been lit if you noticed it at  
16 this time, correct?

17 A. Yes.

18 Q. So when you saw him driving without the brake lights  
19 or without the turn signals, what did you do?

20 A. I was following it. I also noticed it was driving  
21 on the left side of the road facing oncoming traffic. I  
22 activated my overhead lights. Followed it with just my  
23 overhead lights for 3 to 500 yards. As the ATV approached  
24 Shoshone Avenue, I saw the driver look back over his  
25 shoulder. At that point I could see he was wearing

1 coveralls, had a hood on, and what appeared to be a ski mask  
2 with only his eyes visible. I activated my siren at that  
3 point.

4 Q. Before you activated your siren, after you looked at  
5 each other, what happened?

6 A. After he looked back at me, and at that point I had  
7 my overhead lights on, he turned back forward and  
8 accelerated, turning right on Shoshone Avenue, going through  
9 the posted stop light.

10 Q. You said the overhead lights. Were those the red  
11 lights?

12 A. Yes, red and blues.

13 Q. You turned your siren on and then what did you do?

14 A. I followed it as it went under the freeway overpass  
15 on Shoshone, turned left on to Dover Street, which is a dirt  
16 road that parallels the freeway. It rode 5 or 600 yards down  
17 that road as I followed. It braked abruptly, causing me to  
18 pass it. I stopped as well. It made a big U-turn, drove  
19 back east to Shoshone Avenue, through that intersection, and  
20 made a big wide left sweeping turn on to an adjacent dirt  
21 lot. So it went out on to the pavement of Shoshone Avenue,  
22 continued a wide left sweeping turn on to a dirt lot. It  
23 tipped at that point a little bit, causing the passenger to  
24 become -- nearly become unseated from the ATV.

25 Q. How many people were on the ATV?

1           A.    Two.

2           Q.    And the Defendant, was he driving or was he the  
3 passenger?

4           A.    The Defendant was driving.

5           Q.    Okay.  So you saw the passenger almost fall off,  
6 correct?

7           A.    Yes.

8           Q.    What happened next?

9           A.    It continued.  Ultimately it was a large 180 degree  
10 turn and ultimately ended up back on Dover, driving west  
11 again.  And I continued to follow it, I accelerated and came  
12 nearly beside it as it appeared to be attempting to turn  
13 right on Ruby Avenue.  It slowed at that point and then  
14 accelerated again towards Clover Avenue.

15          Q.    How fast were you able to estimate that the  
16 Defendant was driving his ATV?

17          A.    I estimated it at 45 to 50 miles an hour.

18          Q.    So after -- so you said he got on to Ruby Avenue and  
19 was turning straight towards Clover?

20          A.    Ruby Avenue turns north.  He was driving west.  It  
21 appeared that he was going to turn on to Ruby.  I got  
22 alongside him just prior to that, preventing him from  
23 turning.  After he braked, he then continued west on Dover  
24 towards Clover Avenue.

25          Q.    Did he at any time did he almost strike a curb?

1       A.    Yes.  As we approached Clover, he again braked  
2 abruptly, causing me to almost pass him again.  He then  
3 turned left into a vacant parking lot there, accelerated  
4 through the parking lot, nearly striking a curb upon exit.

5       Q.    Anything happen with the passenger at that point?

6       A.    Again, due to the quick turn of the ATV, the  
7 passenger was nearly unseated from the vehicle.

8       Q.    What happened after that?

9       A.    Continued on to -- now that was Easy Street which is  
10 on the south end of the city park, driving west.  I again  
11 accelerated, catching up to it, and coming beside it to  
12 prevent it from turning on to the soccer fields which would  
13 have made it difficult for me to continue to follow it.

14      Q.    So he continued driving on that road?

15      A.    Yes.  Continued driving west towards Humboldt  
16 Avenue.  Upon nearing Wells Propane, which is a card lock  
17 fuel -- gasoline fuel station as well as the Wells Propane  
18 offices, it abruptly turned left into towards the fuel pump  
19 area, striking the curb that goes into the parking lot.  And  
20 again, the passenger was nearly unseated.  At that time I  
21 heard the passenger scream.

22      Q.    How far away were you from the ATV when you heard  
23 her scream?  Or heard the passenger scream?

24      A.    20, 25 feet maybe.

25      Q.    It was a pretty loud scream?

1           A.    Yes.

2           Q.    At this point, did the ATV almost tip again?

3           A.    Yes. Hitting the curb caused it to tip. It was

4 then going towards the fuel pumps. Another evasive maneuver

5 by the driver to avoid the fuel pumps causing it to teeter

6 again, and then it continued around the fuel pumps to the

7 side of the corner of the building, nearly striking the

8 building as it went through the grass, and back out on to

9 Humboldt Avenue, at that point driving south.

10          Q.    Let's go back to the fuel pumps. How close did it

11 come to the fuel pumps -- the ATV come close to fuel pumps?

12          A.    It appeared to be less than five feet.

13          Q.    So he almost -- to the best of your knowledge, did

14 he almost strike the fuel pumps?

15          A.    Yes.

16          Q.    So now he's on Humboldt Avenue, correct?

17          A.    Yes.

18          Q.    Where did he go now?

19          A.    Went south under the freeway, began to turn left as

20 if it was going to enter the I-80 freeway on ramp. I began

21 to follow. Turned left to follow it at that point. He then

22 abruptly turned back right to avoid the freeway, nearly

23 striking me. At that point I had to turn right and brake to

24 avoid a collision.

25          Then continued south, went through a ditch, off the left

1 side of the roadway. Again as it was driving on Humboldt it  
2 was driving in the oncoming, the northbound lane. He was  
3 driving south. Turned left back on to Moore Avenue, at that  
4 point nearly striking a reflector, and went through a ditch.  
5 Came back on to Moore Avenue, now traveling east on Moore.

6 Q. You said a reflector. What kind of reflector was  
7 it?

8 A. Just the standard roadside steel reflector post.

9 Q. And what kind of vehicle were you driving?

10 A. A Ford F150 pickup.

11 Q. So he went through a ditch, I believe you said, and  
12 then what happened?

13 A. I went around, turned on to Moore and again was able  
14 to catch up with it. As I came alongside, it again abruptly  
15 braked, and at that point I don't know if it stalled or if  
16 the driver chose to quit running. At that point I opened my  
17 door, drew my duty weapon and ordered both occupants to the  
18 ground. The driver stood up, put his hands up, and as I  
19 ordered him to the ground he got off and proned out on the  
20 ground.

21 Q. During this entire time around the fuel pumps, when  
22 you heard the passenger scream, you had your red light and  
23 your siren on?

24 A. Yes.

25 Q. So at some point you handcuffed the Defendant,



1 correct?

2 A. Yes.

3 Q. Was he cooperative at that point?

4 A. He didn't fight me going into handcuffs, but he was  
5 verbally combative and caused problems with my attempts to  
6 take the female into custody as well.

7 Q. Do you recall what he was saying?

8 A. Not specifically. It was just comments about not  
9 touching her, not hurting her, or that there had to be a  
10 female to be able to search her or something to that effect.

11 Q. At any point did you end up looking at the ATV that  
12 he was on?

13 A. Yes.

14 Q. Do you know whether it was registered?

15 A. It did not have any registration, the City of Wells  
16 registration required for use on the public streets, as I  
17 don't believe it had the required state registration either.

18 Q. During the entire time did the Defendant or the  
19 passenger wear a helmet?

20 A. No.

21 MR. SCHULMAN: Thank you. I'll pass the witness.

22 THE COURT: Cross examination, Mr. Stewart.

23 CROSS EXAMINATION BY MR. STEWART:

24 Q. Thank you, Your Honor. Let's see. You indicated  
25 originally that for some of these four wheelers are legal to

1 be driving on the street if they are licensed and if they  
2 have certain brake and turn signal lights, is that right?

3 A. Yes.

4 Q. Now, where would the license plate have been if this  
5 were licensed?

6 A. I'm not sure. Each person -- it's a sticker, to my  
7 understanding, and it's not a specific place to be affixed.  
8 It's depending on the vehicle.

9 Q. So they don't get a license plate? They just get a  
10 sticker?

11 A. That's my understanding, yes.

12 Q. And how big a sticker is that?

13 A. I'm not sure.

14 Q. Okay. But what I was wondering is it like, for  
15 example, on my license plate I would have a little sticker  
16 that would say "4", meaning I renewed it in April. Might it  
17 be that small, the sticker?

18 A. No.

19 Q. Okay. Have you ever seen any of these four wheelers  
20 that have the stickers on them?

21 A. No.

22 Q. So you didn't know what to actually look for on this  
23 to see if it had the sticker then, is that right?

24 A. Are you referring to after it was stopped and I  
25 inspected it?

1 Q. No. When you first saw it.

2 A. In the dark there's no way I would have been able to  
3 see the sticker.

4 Q. Even if it had had one.

5 A. I don't believe so.

6 Q. But if it had had one, you normally would not be  
7 able to see it? That's what you're saying?

8 A. I don't believe I would, no.

9 Q. Sorry. I kind of misunderstood you. Now, but you  
10 indicated later on after stopping the vehicle you looked for  
11 a sticker, is that right?

12 A. Yes.

13 Q. Okay. And at that point you did not find one, you  
14 said.

15 A. Correct.

16 Q. Do I understand you correctly?

17 A. Yes.

18 Q. Now, you indicated at one point that the vehicle was  
19 going you estimated 45 miles per hour, is that right?

20 A. 45 to 50, yes.

21 Q. Okay. Beg your pardon. And was that how fast it  
22 was going most of the time or just at its peak or what are we  
23 talking about here?

24 A. That's what I estimated the speed at during the  
25 majority of the time.

1 Q. Okay. Now, a couple of times I gather that he  
2 stopped the vehicle and you went past him, I'm guessing when  
3 he would stop it, then obviously he was going considerably  
4 slower to get to the stop, right?

5 A. No. An ATV like that is able to stop much faster  
6 than a full size automobile.

7 Q. Okay. But you do, when you stop, go down in your  
8 speed obviously.

9 A. Well, of course.

10 Q. Okay. Now, the road that you described there, what  
11 were the speed limits on these roads?

12 A. 25.

13 Q. Okay.

14 A. I believe Shoshone -- or excuse me, Humboldt in that  
15 area is 35.

16 Q. And were there any other variance other than 25 or  
17 35 that he was on that you knew of?

18 A. No.

19 Q. Okay. Now, I gather that towards the end of this  
20 chase he was heading in the north lane going south, is that  
21 right?

22 A. Yes. As well as upon my initial observation of him  
23 on Moore, he was in the oncoming travel lane driving on the  
24 left side of the road.

25 Q. Okay. And were those the only times that he was

1 driving on the wrong side of the road or were there others?

2 A. Actually I believe throughout the entire time he was  
3 on the wrong side of the road because I would come up beside  
4 him on the right side. So as I recall, the entire time that  
5 he was driving, as I was following him, he was on the left  
6 side of the road or facing oncoming traffic, had there been  
7 any.

8 Q. Okay. And gathering -- was there any oncoming  
9 traffic?

10 A. No.

11 Q. Okay. Now, you said something about him  
12 complaining, I guess, about that you needed a female officer  
13 to search the woman that was with him or something like that?

14 A. There was something to that effect, yes.

15 Q. Okay. Was the woman with him arrested, too, or  
16 what?

17 A. Yes.

18 Q. Okay. What was she arrested for?

19 A. Obstructing.

20 Q. Okay. And was that the only charge against her?

21 A. Yes.

22 Q. And now, you said you did not see turn signals or  
23 brake lights on this vehicle, is that right?

24 A. I said I don't recall seeing any.

25 Q. Okay. But you checked the vehicle, I guess, after

1 you finally apprehended these people, right?

2 A. Yes. There were no turn signals. As far as whether  
3 or not there was a functioning brake light, I don't recall.

4 Q. Okay. But you're certain there were no turn  
5 signals.

6 A. Yes.

7 Q. Okay. And that would mean also you're certain then  
8 that you didn't see any turn signals during the chase then.

9 A. That's correct.

10 Q. Okay. And I'm guessing if you'd seen any brake  
11 lights during the chase you would have noted that, is that  
12 right?

13 A. Under the circumstances, brake lights were the least  
14 of my concern.

15 MR. STEWART: Fair. Thank you. Nothing further.

16 THE COURT: Redirect.

17 REDIRECT EXAMINATION BY MR. SCHULMAN:

18 Q. Thank you. When did you notice that neither one  
19 was -- neither the passenger or the Defendant was wearing a  
20 helmet?

21 A. I believe when I got close enough after I turned my  
22 lights on and I got close enough and the driver looked back,  
23 I could see that there were no helmets.

24 Q. What were the road conditions like during this  
25 entire joy ride?

1           A.    There was light snow on the road.  It was slick.

2           MR. SCHULMAN:  Thank you.  No further questions.

3           THE COURT:  Recross.

4           MR. STEWART:  Nothing based on that.

5           THE COURT:  Did either party wish this witness to be

6 retained or can he be excused at this time?

7           MR. SCHULMAN:  He can be excused for the State.

8           MR. STEWART:  Yes, he can be excused.

9           THE COURT:  Okay.  You're free to go.  Thank you very

10 much.  Next witness, Mr. Schulman.

11          MR. SCHULMAN:  The State's going to rest.

12          THE COURT:  Okay.  Defense case in chief.  Anything to

13 present, Mr. Stewart?

14          MR. STEWART:  Defense rests, too, Your Honor.

15          THE COURT:  Okay.  Please let the Officer know he's free

16 to come in or he can leave.  And we'll proceed with argument.

17 Mr. Schulman.

18          MR. SCHULMAN:  State will submit.

19          THE COURT:  Mr. Stewart.

20          MR. STEWART:  As will the Defense, Your Honor.

21          THE COURT:  What's that?

22          MR. STEWART:  As will the Defense, Your Honor.

23          THE COURT:  Okay.  Based on the testimony and evidence

24 that's been adduced at this preliminary examination, the

25 Court hereby finds there has been a showing of at least

1 slight or marginal evidence that on or about the 8th day of  
2 February 2014 at or near the location of, or in the City of  
3 Wells, within the County of Elko and the State of Nevada,  
4 that the Defendant, Justin Patrick Kelley, committed the  
5 following described criminal offenses: Count 1, eluding a  
6 police officer, a Category B felony as defined by  
7 NRS 484B.550, formerly NRS 484.348.

8 (Whereupon contempt of court proceedings were held.)

9 THE COURT: Okay. Is there anything further then before  
10 I order this matter bound over?

11 MR. STEWART: No, Your Honor.

12 MR. SCHULMAN: No, Your Honor.

13 THE COURT: This matter will be bound over to the Fourth  
14 Judicial District Court for further proceedings. And the  
15 Defendant is continued released on his previously posted bail  
16 bond, and the matter is adjourned.

17 (Whereupon the Preliminary Hearing was then concluded.)

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1 I, MASON E. SIMONS, Justice of the Peace of Elko  
2 Township, County of Elko, State of Nevada, hereby certifies:  
3  
4

5 That CATHERINE A. FISHER was duly appointed and sworn to  
6 report the testimony of the witnesses in all proceedings had  
7 in the case of THE STATE OF NEVADA, Plaintiff, vs. JUSTIN  
8 PATRICK KELLEY, Defendant; that the witnesses were first duly  
9 sworn, and their testimony taken in stenotype notes,  
10 verbatim, and thereafter transcribed into longhand  
11 typewriting as herein appears.  
12

13 That when the examination of the witnesses at the  
14 presentation of evidence was closed, it appearing from the  
15 evidence adduced at said Preliminary Examination that there  
16 was reasonable cause and sufficient grounds to believe that  
17 the Defendant committed the said crime as charged, the said  
18 Defendant was therefore bound over to the District Court for  
19 trial.  
20  
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22  
23 \_\_\_\_\_  
24 Justice of the Peace of Elko  
25 Township, County of Elko,  
State of Nevada.

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IN THE JUSTICE'S COURT OF ELKO TOWNSHIP  
IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

\_\_\_\_\_

THE STATE OF NEVADA,  
  
Plaintiff,  
  
vs.  
  
JUSTIN PATRICK KELLEY,  
  
Defendant.

\_\_\_\_\_

REPORTER'S CERTIFICATE

I HEREBY CERTIFY: That I was duly appointed and sworn by the Justice of the Peace of Elko Township, Elko County, Nevada to report the testimony and proceedings in the above-entitled cause, and that I was present in Court on the 23rd day of April, 2014, and reported the proceedings had and testimony given in said cause in verbatim stenotype notes, which are thereafter transcribed under my direction.

That the foregoing transcript consisting of Pages 1 through 21, both inclusive, contains a full, true and complete transcript of my said stenotype notes, and is a full, true and correct record of the testimony taken and proceedings had at said time and place.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_

CATHERINE A. FISHER - CCR 279

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Case No.: CR-FP-14-198

Dept. No.: 2

FILED

2014 NOV 12 PM 3:27

ELKO CO DISTRICT COURT

CLERK DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

\*\*\*\*\*

THE STATE OF NEVADA,

Plaintiff,

vs.

**PRETRIAL ORDER**  
**(Criminal Case)**

JUSTIN PATRICK KELLEY,

Defendant.

**IT IS HEREBY ORDERED that:**

1. The above-entitled case shall be tried before a jury commencing Tuesday, the 6<sup>th</sup> day of January, 2015, at 9:00 o'clock a.m., through Thursday, the 8<sup>th</sup> day of January, 2015. This is a Priority #1 setting and was set on November 12, 2014. Further, the Elko County Jury Commissioner shall draw a panel consisting of 90 prospective jurors two (2) weeks prior to the scheduled trial date.

2. The Early Case Conference will not be conducted in this matter, however, a Pre-trial Conference will be held in the District Judge's chambers at 8:30 a.m., on the day the trial is to begin.

3. The hearing on all Pretrial Motions will be held on Thursday, December 18, 2014, at 11:00 o'clock a.m. Additionally, the Court will conduct a contempt hearing on this date and time to address the Defendant's failure to appear on May 12, 2014. All Pretrial Motions, including but not limited to Motions in Limine, Motions to Suppress filed



1 by the State or Defense, and Offers of Proof by the State of Nevada, alleging uncharged  
2 crimes or misconduct by the Defendant that the State intends to introduce in its case in  
3 chief, shall be filed on or before November 26, 2014, and any oppositions thereto shall be  
4 filed and served within ten (10) days thereafter. The foregoing Pretrial Motions and Offers  
5 of Proof shall be accompanied by written points and authorities that clearly articulate that  
6 parties' position as to why the evidence in question should be admitted or excluded at the  
7 trial. A courtesy copy of any motion, or opposition or reply shall be delivered to the Court  
8 personally, by facsimile, or by mail.

9           4. All exhibits shall be marked by the Clerk prior to trial. All parties shall  
10 contact and schedule with the Elko County Clerk's Office (753-4600) a time prior to trial  
11 when all exhibits shall be marked. All Plaintiff's exhibits shall be marked in numerical  
12 sequence (*Exhibit 1, 2, 3, etc.*). All Defense exhibits shall be marked in alphabetical  
13 sequence (*Exhibit A, B, C, etc.*). All exhibits shall be so marked by the Friday prior the  
14 scheduled trial date. All exhibits marked by the Clerk shall be retained by the Clerk until  
15 trial.

16           5. Counsel for the respective parties shall meet prior to trial to resolve as  
17 many evidentiary disputes and proposed jury instructions as possible.

18           6. Should the parties negotiate a resolution of the case, a written  
19 Memorandum of Plea Agreement shall be filed before the case is taken off calendar.

20           7. All proposed jury instructions shall be submitted to the Court no later than  
21 4:00 o'clock p.m., on the Friday prior to the scheduled trial date. All jury instructions  
22 agreed upon by the parties shall be identified as such. Any jury instructions not agreed  
23 upon shall be submitted by the party requesting the instruction.

24           8. The Court shall give Instructions 1 and 2 to the jury prior to the  
25 commencement of the trial as required by Supreme Court Order. Any objection to the

26 ///

1 Court giving Instructions 1 and 2 (attached hereto) shall be filed at least 21 days prior to  
2 the scheduled trial date.

3 DATED this 12 day of November, 2014.

4  
5   
6 HONORABLE ALVIN R. KACIN  
District Judge / Department II

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Alvin R. Kacin, District Judge, Fourth Judicial District Court, Department II, and that on this 12 day of November, 2014, I served by hand delivery by placing a true copy of the foregoing document in the agency box located in the Elko County Clerk's Office, to:

**Elko County District Attorney**

**Roger H. Stewart, Esq.**

**Elko County Jury Commissioner**

  
Stefanie Pattani

1 Case No.: CR-FP-14-198

2 Dept. No.: 2

3  
4  
5  
6 **IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**  
7 **OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO**  
8

9 \_\_\_\_\_  
10 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

13 JUSTIN PATRICK KELLEY,

14 Defendant.  
15 \_\_\_\_\_ /

16 **INSTRUCTION NO. 1**

17 **LADIES AND GENTLEMEN:**

18 This instruction is intended to serve as an introduction to the trial of this case. It is  
19 not a substitute for the detailed instructions on the law and the evidence which I will give  
20 you at the close of the case and before you retire to consider your verdict.

21 This is a criminal case commenced by the State of Nevada, which I may sometimes  
22 refer to as "the State," against **JUSTIN PATRICK KELLEY**. The case is based on a  
23 Criminal Information, which has been read to you.

24 You should distinctly understand that the Criminal Information simply contains a  
25 charge. It is not, in any sense, evidence of the allegations it contains, nor is it a substitute  
26 for the instructions which detail the elements of the crime charged which I will give you at  
27 the close of this case.

28 ///

1 The Defendant has pled "not guilty" to the crime charged in the Criminal Information.  
2 The State, therefore, has the burden of proving each of the essential elements of the crime  
3 charged beyond a reasonable doubt. The purpose of the trial is to determine whether the  
4 State can meet this burden.

5 The trial will proceed in the following order:

6 **First:** The parties have the opportunity to make opening statements. The State may  
7 make an opening statement at the beginning the case. The Defendant may make an  
8 opening statement following the opening statement for the State, or may defer the making  
9 of an opening statement until the close of the State's case. Neither party is obliged to  
10 make an opening statement. What is said in the opening statements is not evidence. The  
11 Statement simply serves the purpose of an introduction to the evidence which the party  
12 making it intends to produce.

13 **Second:** The State will introduce evidence in support of the charge contained in the  
14 Criminal Information.

15 **Third:** After the State has presented its evidence, the Defendant may present  
16 evidence, however, he is not obliged to do so. The burden is always on the State to prove  
17 every element of the offense charged beyond a reasonable doubt. The law never imposes  
18 on the defendant in a criminal case the burden of calling any witnesses or introducing any  
19 evidence.

20 **Fourth:** I will instruct you on the applicable law. Your verdict must be unanimous.

21 **Fifth:** After the reading of the instructions, each party has the opportunity to present  
22 oral argument in support of the respective case of each. What is said in closing argument  
23 is not evidence, just as what is said in the opening statement is not evidence. The  
24 arguments are designed to present to you the contentions of the parties as to what the  
25 evidence has shown, and what inferences may be drawn from the evidence. The State  
26 has the right to open and close the argument.

1 Your purpose as jurors is to find and determine the facts. Under our system of  
2 criminal procedure you are the sole judge of the facts. If, at any time, I should make any  
3 comment regarding the facts, you are admonished to disregard it. It is especially  
4 important that you perform your duty of determining the facts diligently and conscientiously,  
5 for ordinarily there is no means of correcting an erroneous determination of the facts by a  
6 jury.

7 On the other hand, and with equal emphasis, I instruct you that the law as given by  
8 the Court constitutes the only law for your guidance. It is your duty to accept and follow  
9 it. It is your duty to follow the law as I give it to you even though you may disagree with the  
10 law.

11 You are to determine the facts in the case solely from the evidence produced at trial,  
12 which consists of the testimony of witnesses and exhibits received in evidence. Questions  
13 asked by lawyers are not evidence, for the evidence consists of answers given by  
14 witnesses to questions posed by the lawyers. Again, statements and arguments of counsel  
15 are not evidence. Counsel, however, may enter into agreements or stipulations of facts  
16 which are not in dispute. When they do so, you are to accept the facts as stipulated by  
17 counsel. On occasion, I may tell you that I am taking judicial notice of certain facts. You  
18 then may accept those facts as true, but are not required to. It is up to you to decide what  
19 inferences are to be drawn from the evidence, and what facts are established by the  
20 evidence.

21 The parties may sometimes present objections to some of the testimony or other  
22 evidence. It is the duty of a lawyer to object to evidence which he believes may not  
23 properly be offered, and you should not be prejudiced in any way against a lawyer who  
24 makes objections or against the party he represents. At times I may sustain objections,  
25 or direct that you disregard certain testimony or exhibits. You must not consider any

26 ///

1 evidence to which an objection has been sustained, or which I have instructed you to  
2 disregard.

3 In considering the weight and value of the testimony of any witness, you may take  
4 into consideration the appearance, attitude and behavior of the witness; the extent of his  
5 opportunity and ability to see or hear or otherwise become aware, and to remember and  
6 communicate; the interest of the witness in the outcome of the case, if any; the existence  
7 or non-existence of a bias or other motive; the inclination of the witness to speak truthfully  
8 or not; the probability or improbability of the statements of the witness; a statement  
9 previously made by him or her that is inconsistent with his or her testimony; evidence of  
10 the existence or non-existence of any fact testified to by him; and all other facts and  
11 circumstances in evidence.

12 No statement, ruling, remark or comment which I may make during the course of the  
13 trial is intended to indicate my opinion as to how you should decide the case, or to  
14 influence you in any way in your determination of the facts. At times I may ask questions  
15 of witnesses. If I do so, it is for the purpose of bringing out matters which I feel should be  
16 brought out, and not in any way to indicate my opinion about the facts or to indicate the  
17 weight I feel you should give the testimony of the witnesses. I may also find it necessary  
18 to admonish the lawyers. If I do, you should not show prejudice toward a lawyer or his  
19 client because I have found it necessary to admonish him.

20 It is the duty of an attorney to present to you his client's case in the most favorable  
21 light consistent with the truth and the law. During the trial, I ask you not to communicate  
22 with the attorneys even on matters having no connection whatsoever with this case. The  
23 attorneys are officers of the court, and they are aware of their responsibilities as such.  
24 Even if you are acquainted with the attorney, you will observe that he will avoid any contact  
25 with you during the trial, and you should not be offended thereby. He will be attempting

26 ///

1 merely to comply with the rules of professional conduct in avoiding any appearance of  
2 impropriety.

3 Not only must your conduct as jurors be above reproach, but you must avoid the  
4 appearance of improper conduct. Do not talk to the parties, attorneys or witnesses during  
5 the trial, even upon matters unconnected with the case. In the event that anyone should  
6 attempt to improperly influence you in any manner, you should promptly report the matter  
7 to me or to the bailiff. If you notice anything out of the ordinary, you should properly report  
8 the matter to me or to the bailiff.

9 You must not consider anything you may have read or heard about the case outside  
10 the courtroom, whether before or during the trial.

11 Under our system of criminal procedure you are not to concern yourself in any way  
12 with the sentence which the Defendant might receive if you should find him guilty. Your  
13 function is solely to decide whether he is guilty or not guilty at the charge against him. If,  
14 and only if, you find him guilty on the charge in this case, then it becomes the duty of the  
15 Court to pronounce sentence.

16 Until this case is submitted to you, you must not discuss it with anyone, even with  
17 your fellow jurors. After it is submitted to you, you must discuss it only in the jury room with  
18 your fellow jurors. It is important that you keep an open mind and not decide any issue in  
19 the case until the entire case has been submitted to you under instructions from the Court.



**INSTRUCTION NO. 2**

You will be given the opportunity to ask written questions of any of the witnesses called to testify in this case. However, I caution that you are not to consider yourselves advocates, and you are not encouraged to ask large numbers of questions because it is the primary responsibility of each lawyer to present his client's case and evidence. You may ask a question which you need to have answered in order to obtain all of the facts necessary for your deliberations.

Questions may be asked only in the following manner:

After the lawyers have finished questioning a witness, I will ask the jury if it has any questions. Your questions must be written with your juror number on each question. In order to ask a question, simply raise your hand, and the bailiff will deliver your written question to the Court. Questions must be directed to the witness instead of the lawyers or the judge. After consulting with counsel at a sidebar conference, the Court will determine if your written question is legally proper. If it is, I will ask it. Only questions permissible under the rules of evidence will be asked. No adverse inference should be drawn if the Court does not allow a particular question to be asked. After the question has been answered, the Court may ask follow-up questions and will permit the attorneys to ask follow-up questions. The jury must not place undue weight on the responses to its questions.

It is not necessary that you spell each word in a given jury question correctly. Please try to be specific with your questions, and cover only one subject with each question. Phonetic spelling is acceptable. Do not concern yourselves with the form of the question because I will reword it so that it is presented to the witness in the proper manner.

RS pub  
deb

FILED

2014 NOV 26 AM 10:38

ELKO CO DISTRICT CLERK

CLERK — DEPUTY

No. CR-FP-14-0198  
Dept. II

IN THE FOURTH JUDICIAL DISTRICT COURT  
COUNTY OF ELKO, STATE OF NEVADA

\* \* \* \* \*

STATE OF NEVADA,  
Plaintiff,

vs.

MOTION TO DISMISS

JUSTIN PATRICK KELLEY,  
Defendant.

COME NOW, FREDERICK B. LEE, JR., ESQ., Elko County Public Defender, and  
ROGER H. STEWART, ESQ., Chief Deputy, Attorneys for the Defendant JUSTIN PATRICK  
KELLEY, and move this court for an order, under the Fifth, Sixth, and Fourteenth Amendments to  
the United States Constitution, and the Nevada Constitution, dismissing this case for a violation of  
double jeopardy. This motion is based on the Points and Authorities attached hereto, all documents  
and pleadings on file herein, and all relevant rules of law.

DATED this 26 day of November, 2014.

FREDERICK B. LEE, JR., ESQ.  
Elko County Public Defender  
569 Court St.  
Elko NV 89801

BY: RHS  
ROGER H. STEWART, ESQ.,  
Chief Deputy Public Defender  
Bar No. 3823

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ISSUE PRESENTED

ISSUE ONE: Whether the cases should be dismissed because of double jeopardy.

FACTS

Based on a chase through Wells on February 8, 2014, Kelley is charged with felony eluding an officer—violating NRS 484B.550 [formerly NRS 484.348] in that he “willfully failed and/or refused to bring the vehicle he/she was operating to a stop and/or otherwise fled from, or attempted to elude a police officer, one Deputy Shelley, who was in a readily identifiable vehicle of any police department, law enforcement agency, or regulatory agency, after said peace officer had given the Defendant a signal, a flashing red lamp and a siren, to bring his/her vehicle to a stop, and furthermore operated the motor vehicle in a manner which endangered or is likely to endanger any other person or the property of any other person by driving the vehicle [ATV] where the passenger almost fell off several times, and/or almost hitting fuel pumps and/or nearly striking buildings and/or nearly striking Deputy Shelley’s patrol car and/or almost hitting a road marker.” Information (of this case). His jury trial on this matter is set to begin January 6, 2015.

In Wells, based on the same incident he was charged with “Reckless Driving, as defined by Wells City Code 8-11-1 (N.R.S. 484.377)” [now NRS 484B.653] alleging that “The Defendant drove an ATV in willful or wanton disregard of the safety of persons or property in the area of Moor Avenue and Shoshone Avenue within the city of Wells, to wit: The Defendant, Justin Patrick Kelley, did drive an ATV westbound at a high rate of speed, on the left side of Moor Avenue and into oncoming traffic.” Exhibit A, Municipal Complaint.

The chase included, inter alia, Kelley looking back at Shelley’s vehicle after its overhead lights were activated while driving in the wrong lane on Moor Avenue. Preliminary Hearing [PH] Transcript at 8-9. He turned back around and Shelley--who could see the driver was wearing coveralls, a hood, and what appeared to be a ski mask-- turned his siren on. PH 8-9. Alternatively, the transcript may be read to indicate that the siren was turned on after Kelley turned back around,

1 accelerated, and turned the vehicle right on to Shoshone “going through the posted stop light.” See  
2 PH 9. During the majority of the chase Kelley was going 45-50 MPH in areas zoned at 25 or 35  
3 MPH. PH 10, 16-17.

4 On November 14, 2014, Kelley pled no contest to the above reckless charge—along with a  
5 resisting or interfering with an officer count based on conduct after he was apprehended---and was  
6 sentenced on these matters. E.g., Exhibit B, Wells Court Sentence.

## 7 8 POINTS AND AUTHORITIES

9 ISSUE ONE: Whether the cases should be dismissed because of double jeopardy.  
10

11 Double jeopardy applies to prevent conviction of a greater offense if a defendant is already  
12 convicted of a lesser included offense. *Green v United States*, 355 U.S. 184 (1957)(second degree  
13 and first degree murder); *Colin v. Lampert*, 233 F. Supp. 2d 1293 (D. Or. 2002) (second and first  
14 degree kidnapping); *State v. White*, 577 N.W.2d 741 (Neb. 1998)(second and first degree murder).  
15

16 Nevada applies the *Blockburger* [*v. United States*, 284 U.S. 299 (1932)] test for double  
17 jeopardy violations by interpreting whether the criminal statutes implicated each require proof of  
18 different elements than the other. E.g., *LaChance v. State*, 321 P.3d 919, 130 Nev. Adv. Rep. 29  
19 (2014); *Jackson v. State*, 128 Nev. Adv. Rep. 55, 291 P.3d 1274 (2012).

20 Under Blockburger, it would normally seem as if felony eluding and reckless driving don’t  
21 each require proof of different elements the other does not. Reckless requires proof of (1) driving a  
22 vehicle with (2) willful or wanton disregard for the safety of persons or property. This would seem  
23 to require no proof of anything more than what is required for felony eluding since felony eluding  
24 requires proof of (1) failing to bring a vehicle to a stop or otherwise fleeing or attempting to elude  
25 the peace officer who (2) in a readily identifiable vehicle of any police department or regulatory  
26 agency (3) gives a signal to stop by flashing red light and siren and (4) endangers or likely  
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1 endangers another person or another person's property. NRS 484B.550. If element (4) is not  
2 present the Eluding is merely a misdemeanor. NRS 484.550(1).

3 However, the above Blockburger argument is not even necessary in Nevada because NRS  
4 484B.550 and NRS 484B 653 themselves declare the relationship between the two statutes. Under  
5 NRS 484B.550(3) "Unless the provisions of NRS 484B.653 [reckless driving] apply if, while  
6 violating the provisions of subsection 1, the driver of the motor vehicle: (a) Is the proximate cause  
7 of damage to the property of any other person; or (b) Operates the motor vehicle in a manner which  
8 endangers or is likely to endanger any other person or the property of any other person" the driver is  
9 guilty of an Eluding felony. (Emphasis added). Similarly, the NRS 484B 653 notes that "a  
10 violation of NRS 484.B.550(1) [the underlying misdemeanor version of Eluding] constitutes  
11 reckless driving." NRS 484B653(1).  
12

13 Thus, NRS 484B.653 obviously applies here. Subsection (b) likewise applies here because  
14 of, inter alia, the traveling well above the speed limit, in the wrong lane, and accelerating through a  
15 red light into a turn. Therefore, Kelley's no contest plea and sentencing under NRS 484B.653 for  
16 the beginning of the same events makes it clear he can no longer be convicted of Eluding without a  
17 violation of double jeopardy. As in *Sacco v. State*, 105 Nev. 844, 846-47, 984 P.2d 947 (1989)--  
18 where the court interpreted a statute precluding subsequent prosecution following the conviction or  
19 acquittal in another state or territory where jurisdiction is concurrent to give more protection against  
20 double jeopardy than the Fifth Amendment-- it seems clear that when the statute itself gives greater  
21 protection against double jeopardy the additional protection prevails. See NRS 171.070  
22 (convictions or acquittals in states or territories as bars)(construed in Sacco); see also NRS 171.075  
23 (convictions or acquittals in Nevada counties with concurrent jurisdiction as bars); cf. *State v.*  
24 *Rutledge*, 194 P.3d 1212, 2008 Kan. App. Unpub. Lexis 936 (double jeopardy applied to  
25 convictions of felony eluding and reckless where one prong of felony eluding included driving  
26  
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recklessly), overruled on other grounds, State v. Breeder, 304 P.3d 660 (2013); State v. Mulder 755 S.E.2d 98 (N.C. App. 2014)(where speeding and reckless driving aggravated eluding to a felony, double jeopardy precluded punishments for speeding and reckless driving).

#### CONCLUSION

For the reasons argued above the case should be dismissed.

DATED this 26 day of November, 2014.

FREDERICK B. LEE, JR., ESQ.  
Elko County Public Defender  
569 Court St.  
Elko NV 89801



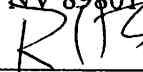
\_\_\_\_\_  
ROGER H. STEWART, ESQ.,  
Chief Deputy Public Defender  
Bar No. 3823

#### NOTICE OF MOTION

Please take notice that hearing on the Motion to Dismiss is requested. It is estimated that one hour should be set aside for this motion.

DATED this 26 day of November, 2014.

FREDERICK B. LEE, JR., ESQ.  
Elko County Public Defender  
571 Court Street  
Elko, NV 89801



\_\_\_\_\_  
ROGER H. STEWART, ESQ.,  
Chief Deputy Public Defender  
Nev. Bar #3823

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Elko County Public Defender's Office  
and that on the 26<sup>th</sup> day of November, 2014, I served a copy of the MOTION TO DISMISS by  
delivering a copy to:

Gelman

# EXHIBIT A



ORIGINAL

CASE NO. 14-0005

FILED 3-17-14 TIME 11:10  
✓  
D

IN THE MUNICIPAL COURT OF THE CITY OF WELLS,  
COUNTY OF ELKO, STATE OF NEVADA

THE CITY OF WELLS,

Plaintiff,

-vs-

COMPLAINT

JUSTIN PATRICK KELLEY,

Defendant.

Upon information and belief, THOMAS J. COYLE, JR., ASSISTANT CITY ATTORNEY, based upon the attached crime report and officer declaration, complains and says that JUSTIN PATRICK KELLEY on or about the 8<sup>th</sup> day of February, 2014, at approximately 12:36 a.m., in the City of Wells, County of Elko, State of Nevada, committed violations of Wells City Code, described as follows:

COUNT 1

RESISTING, INTERFERING WITH, OR HINDERING IN ANY WAY AN OFFICER,  
AS DEFINED BY WELLS CITY CODE 7-1-4(N)(1).

THE DEFENDANT UNLAWFULLY RESISTED, INTERFERED WITH OR HINDERED A POLICE OFFICER, OR PERSON DULY EMPOWERED WITH POLICE AUTHORITY, WHILE IN THE DISCHARGE OR APPARENT DISCHARGE OF HIS DUTY, TO WIT: THE DEFENDANT, JUSTIN PATRICK KELLEY, AFTER BEING HANDCUFFED AND PLACED IN A KNEELING POSITION BEHIND DEPUTY SHELLEY'S PATROL VEHICLE, REPEATEDLY REFUSED TO STAY IN THE KNEELING POSITION BEHIND THE OFFICER'S PATROL WHILE THE OFFICER

APR 03 2014

GOICOCHEA, DI GRAZIA, COYLE & STANTON, LTD.  
ATTORNEYS AT LAW  
530 IDAHO STREET - P. O. BOX 1358  
ELKO, NEVADA 89801  
(775) 738-8091

Ch 10:45 Am

1 WAS DEALING WITH ANOTHER SUSPECT AT OR NEAR MOOR AVENUE AND SHOSHONE  
2 AVENUE WITH IN THE CITY OF WELLS.

3 **COUNT 2**

4 **RECKLESS DRIVING,**

5 **AS DEFINED BY WELLS CITY CODE 8-11-1 (N.R.S. 484.377).**

6 THE DEFENDANT DROVE AN ATV IN WILLFUL OR WANTON DISREGARD OF THE  
7 SAFETY OF PERSONS OR PROPERTY IN THE AREA OF MOOR AVENUE AND SHOSHONE  
8 AVENUE WITHIN THE CITY OF WELLS, TO WIT: THE DEFENDANT, JUSTIN PATRICK  
9 KELLEY, DID DRIVE AN ATV WESTBOUND AT A HIGH RATE OF SPEED, ON THE LEFT  
10 SIDE OF THE MOOR AVENUE AND INTO THE ONCOMING TRAFFIC LANE.

11 Complainant has in his possession a Crime Report completed by Deputy Shelley, known to  
12 Complainant to be an officer with the Elko County Sheriff's Office, a copy of which report is attached  
13 hereto and incorporated by reference herein for the limited purpose of this Complaint.

14 The actions of JUSTIN PATRICK KELLEY are against the form, force and effect and in  
15 violation of Wells City Code, Section 7-1-4(N)(1) and 8-11-1 (N.R.S. 484.377), and against the peace  
16 and dignity of the City of Wells. Said complainant therefore prays that JUSTIN PATRICK KELLEY  
17 be dealt with according to law.

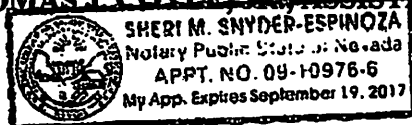
18 DATED this 13<sup>th</sup> day of March, 2014.


19   
20 **THOMAS J. COYLE, JR.**  
**DEPUTY CITY ATTORNEY**

21 STATE OF NEVADA )  
22 ) : ss.  
23 COUNTY OF ELKO )

24 Signed and sworn to (or affirmed) before me on this 13<sup>th</sup> day of March, 2014, by

25 **THOMAS J. COYLE, JR., ASSISTANT CITY ATTORNEY.**



27   
28 **SHERI M. SNYDER-ESPINOZA**  
**NOTARY PUBLIC**

**CHECK IF VICTIM(S) IN THIS CASE APPEAR(S) TO HAVE INCURRED  
UNCOMPENSATED EXPENSES CAUSED BY DEFENDANT AND/OR PROSECUTOR  
WISHES TO BE PRESENT AT SENTENCING.**

GOICOECHEA, DI GRAZIA, COYLE & STANTON, LTD.  
ATTORNEYS AT LAW  
530 IDAHO STREET - P. O. BOX 1358  
ELKO, NEVADA 89801  
(775) 738-8081

# EXHIBIT B

WELLS JUSTICE/MUNICIPAL COURT  
PO BOX 297 - WELLS, NEVADA 89835

(775) 752-3726

NAME: Jose M. Gonzalez Case# 2014-4696 Conviction Date: 11-14-14 F.E.  
Sentence: 5pr Fine: 120.00 Adm Assmt: 75.00 Fac Fee 10.00 SPF: 7.00 3.00  
Dom. Viol Fine: 200.00 Adm Assmt: 85.00 Fac Fee 10.00 SPF: 7.00 3.00  
Fine: \_\_\_\_\_ Adm Assmt: \_\_\_\_\_ Fac Fee \_\_\_\_\_ SPF: \_\_\_\_\_  
Contempt Fine: 9 days Adm Assmt: \_\_\_\_\_ Fac Fee \_\_\_\_\_ SPF: \_\_\_\_\_

Dom Viol Fee : \_\_\_\_\_ RESTITUTION: \_\_\_\_\_  
DUI Analysis Fee : \_\_\_\_\_ Pay to: Office of Elko D.A.  
Alcohol Eval Fee : \_\_\_\_\_ Elko County Courthouse  
Pub Def Reimb: : \_\_\_\_\_ Elko NV 89801

TOTAL DUE: 570.00

DUI SCHOOL TO BE COMPLETED AND NOTICE

Credit: \_\_\_\_\_ days @ \$ \_\_\_\_\_

MUST REACH THIS COURT BY: \_\_\_\_\_

less credit \$200.00

JAIL TIME TO BE COMPLETED AS FOLLOWS:

Balance due: \$370.00

TIME TO BE SERVED: 8 days CREDIT: 8 days

DATE DUE PAYMENT

BALANCE TO BE SERVED: \_\_\_\_\_

given Monetary Credit

GO TO JAIL        SERVE       

Time Served

Defendant Remanded back into the custody of the Elko County Sheriff's Dept for release upon the Wells charges only.

\_\_\_\_\_

COMMUNITY SERVICE: \_\_\_\_\_ hrs. Credit \_\_\_\_\_

Balance: \_\_\_\_\_ Completion Notice to court by: \_\_\_\_\_

VICTIM IMPACT PANEL

COUNSELING: ALCOHOL - DRUG - DOMESTIC VIOLENCE

Completion Notice to

Notice of sign up to court by: \_\_\_\_\_

Court by: \_\_\_\_\_

PROGRESS REPORTS to court \_\_\_\_\_ ea mo Begin: \_\_\_\_\_

COMPLETION NOTICE to court by: \_\_\_\_\_

SUSPENDED SENTENCE: Charge(s): \_\_\_\_\_

YOU ARE ORDERED TO SERVE \_\_\_\_\_ DAYS IN JAIL with \_\_\_\_\_ days suspended for \_\_\_\_\_ mo(s). \_\_\_\_\_ yr(s). UPON THE FOLLOWING CONDITIONS:

1. YOU MUST PAY ALL FINES AND ASSESSMENTS AND COMPLY WITH EVERY COURT ORDER AS STATED ON THIS SENTENCING SUMMARY.
2. You are not to be arrested or convicted for any crime(s) within Elko County, except MINOR traffic violations.
3. You must complete AA or NA meetings: \_\_\_\_\_ x Mo / Wkly for \_\_\_\_\_ mos/yrs  
Completion notice must be filed with court by: \_\_\_\_\_
4. You must attend & Complete, at your own expense, treatment as ordered: \_\_\_\_\_
5. You are not to consume ANY alcohol, marijuana or any illegal drugs, except drugs prescribed for you by a licensed physician.
6. You may be required to submit to alcohol/drug testing by law enforcement
7. You are order to install and maintain @ your own expense an interlock device on vehicle(s) owned/operated by you for \_\_\_\_\_ mos as condition of reinstatement/restricted license.

IT IS YOUR RESPONSIBILITY TO ASSURE SIGN UP NOTICE(S), MONTHLY PROGRESS REPORTS AND COMPLETION NOTICE(S) ARE FILED WITH THIS COURT AS REQUIRED.

IMPORTANT: ANY SUSPENDED SENTENCE WILL REMAIN IN EFFECT FOR TOTAL TIME PERIOD ORDERED BY THE COURT OR UNTIL IT IS ORDERED SERVED. IF A BENCH WARRANT ISSUES FOR FAILURE TO COMPLY WITH ANY PART OF THE JUDGMENT, AND A SUSPENDED SENTENCE IS PENDING, COURT MAY ORDER SUSPENDED SENTENCE BE SERVED. IF YOU ARE NOT ABLE TO COMPLY WITH ANY PART OF THE JUDGMENT AS

STATED ABOVE, YOU MUST APPEAR AT 4:00 P.M. ON THE DATE SCHEDULED FOR PAYMENT OR COMPLETION, TO STATE UNDER OATH WHY YOU ARE NOT ABLE TO COMPLY. IF YOU FAIL TO COMPLY OR APPEAR AS STATED, A BENCH WARRANT FOR YOUR ARREST WILL ISSUE FOR A CONTEMPT CHARGE. IF FOUND IN CONTEMPT, THE MAXIMUM PENALTY IS 25 DAYS IN JAIL AND/OR \$500.00 FINE, OR BOTH, PLUS REQUIRED ASSESSMENTS. NO PAYMENT BASIS IS ALLOWED AFTER A BENCH WARRANT IS ISSUED. ALL CASES IN ARREARS ARE REFERRED TO THE COUNTY COLLECTIONS DEPARTMENT FOR ACTION ON YOUR CREDIT HISTORY.

Appendix 000056  
1/2011

1 No. CR-FP-14-0198

2 Dept. II

FILED

DEC -2 PM 3:51  
CO DISTRICT COURT

CLERK DEPUTY

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7 IN THE FOURTH JUDICIAL DISTRICT COURT  
8 COUNTY OF ELKO, STATE OF NEVADA

9 \* \* \* \* \*

10 STATE OF NEVADA,  
11 Plaintiff,

12 vs.

AMENDED MOTION TO DISMISS

13 JUSTIN PATRICK KELLEY,  
14 Defendant.

15  
16 COME NOW, FREDERICK B. LEE, JR., ESQ., Elko County Public Defender, and  
17 ROGER H. STEWART, ESQ., Chief Deputy, Attorneys for the Defendant JUSTIN PATRICK  
18 KELLEY, and move this court for an order, under the Fifth, Sixth, and Fourteenth Amendments to  
19 the United States Constitution, and the Nevada Constitution, dismissing this case for a violation of  
20 double jeopardy. This motion is based on the Points and Authorities attached hereto, all documents  
21 and pleadings on file herein, and all relevant rules of law.

22 DATED this 2 day of December, 2014.

23 FREDERICK B. LEE, JR., ESQ.  
24 Elko County Public Defender  
569 Court St.  
Elko NV 89801

25  
26 BY: RHS  
27 ROGER H. STEWART, ESQ.,  
Chief Deputy Public Defender  
28 Bar No. 3823

DEC 2 2014 PM 4:27

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## ISSUE PRESENTED

ISSUE ONE: Whether the cases should be dismissed because of double jeopardy.

## FACTS

Based on a chase through Wells on February 8, 2014, Kelley is charged with felony eluding an officer—violating NRS 484B.550 [formerly NRS 484.348] in that he “willfully failed and/or refused to bring the vehicle he/she was operating to a stop and/or otherwise fled from, or attempted to elude a police officer, one Deputy Shelley, who was in a readily identifiable vehicle of any police department, law enforcement agency, or regulatory agency, after said peace officer had given the Defendant a signal, a flashing red lamp and a siren, to bring his/her vehicle to a stop, and furthermore operated the motor vehicle in a manner which endangered or is likely to endanger any other person or the property of any other person by driving the vehicle [ATV] where the passenger almost fell off several times, and/or almost hitting fuel pumps and/or nearly striking buildings and/or nearly striking Deputy Shelley’s patrol car and/or almost hitting a road marker.” Information (of this case). His jury trial on this matter is set to begin January 6, 2015.

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7  
8 POINTS AND AUTHORITIES

9 ISSUE ONE: Whether the cases should be dismissed because of double jeopardy.  
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16 jeopardy violations by interpreting whether the criminal statutes implicated each require proof of  
17 different elements than the other. E.g., *LaChance v. State*, 321 P.3d 919, 130 Nev. Adv. Rep. 29  
18 (2014); *Jackson v. State*, 128 Nev. Adv. Rep. 55, 291 P.3d 1274 (2012).

19  
20 Under Blockburger, it would normally seem as if felony eluding and reckless driving don’t  
21 each require proof of different elements the other does not. Reckless requires proof of (1) driving a  
22 vehicle with (2) willful or wanton disregard for the safety of persons or property. This would seem  
23 to require no proof of anything more than what is required for felony eluding since felony eluding  
24 requires proof of (1) failing to bring a vehicle to a stop or otherwise fleeing or attempting to elude  
25 the peace officer who (2) in a readily identifiable vehicle of any police department or regulatory  
26 agency (3) gives a signal to stop by flashing red light and siren and (4) endangers or likely  
27  
28

1 endangers another person or another person's property. NRS 484B.550. If element (4) is not  
2 present the Eluding is merely a misdemeanor. NRS 484.550(1).

3 However, the above Blockburger argument is not even necessary in Nevada because NRS  
4 484B.550 and NRS 484B 653 themselves declare the relationship between the two statutes. Under  
5 NRS 484B.550(3) "Unless the provisions of NRS 484B.653 [reckless driving] apply if, while  
6 violating the provisions of subsection 1, the driver of the motor vehicle: (a) Is the proximate cause  
7 of damage to the property of any other person; or (b) Operates the motor vehicle in a manner which  
8 endangers or is likely to endanger any other person or the property of any other person" the driver is  
9 guilty of an Eluding felony. (Emphasis added). Similarly, the NRS 484B 653 notes that "a  
10 violation of NRS 484.B.550(1) [the underlying misdemeanor version of Eluding] constitutes  
11 reckless driving." NRS 484B653(1).  
12

13 Thus, NRS 484B.653 obviously applies here. Subsection (b) likewise applies here because  
14 of, inter alia, the traveling well above the speed limit, in the wrong lane, and accelerating through a  
15 red light into a turn. Therefore, Kelley's no contest plea and sentencing under NRS 484B.653 for  
16 the beginning of the same events makes it clear he can no longer be convicted of Eluding without a  
17 violation of double jeopardy. As in *Sacco v. State*, 105 Nev. 844, 846-47, 984 P.2d 947 (1989)--  
18 where the court interpreted a statute precluding subsequent prosecution following the conviction or  
19 acquittal in another state or territory where jurisdiction is concurrent to give more protection against  
20 double jeopardy than the Fifth Amendment-- it seems clear that when the statute itself gives greater  
21 protection against double jeopardy the additional protection prevails. See NRS 171.070  
22 (convictions or acquittals in states or territories as bars)(construed in Sacco); see also NRS 171.075  
23 (convictions or acquittals in Nevada counties with concurrent jurisdiction as bars); cf. *State v.*  
24 *Rutledge*, 194 P.3d 1212, 2008 Kan. App. Unpub. Lexis 936 (double jeopardy applied to  
25 convictions of felony eluding and reckless where one prong of felony eluding included driving  
26  
27  
28



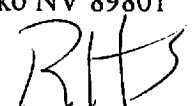
1 recklessly), overruled on other grounds, State v. Breeder, 304 P.3d 660 (2013); State v. Mulder 755  
2 S.E.2d 98 (N.C. App. 2014)(where speeding and reckless driving aggravated eluding to a felony,  
3 double jeopardy precluded punishments for speeding and reckless driving).

4  
5  
6 CONCLUSION

7  
8 For the reasons argued above the case should be dismissed.

9  
10 DATED this 2 day of December, 2014.

11 FREDERICK B. LEE, JR., ESQ.  
12 Elko County Public Defender  
13 569 Court St.  
14 Elko NV 89801

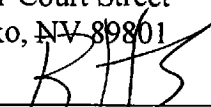
15   
16 ROGER H. STEWART, ESQ.,  
17 Chief Deputy Public Defender  
18 Bar No. 3823

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NOTICE OF MOTION

29 Please take notice that hearing on the Amended Motion to Dismiss is requested. It is  
30 estimated that one hour should be set aside for this motion.

31  
32 DATED this 2 day of December, 2014.

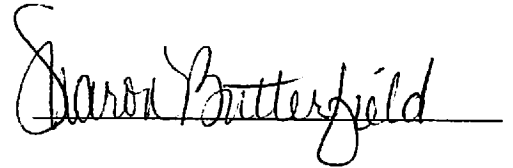
33 FREDERICK B. LEE, JR., ESQ.  
34 Elko County Public Defender  
35 571 Court Street  
36 Elko, NV 89801

37   
38 ROGER H. STEWART, ESQ.,  
39 Chief Deputy Public Defender  
40 Nev. Bar #3823

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Elko County Public Defender's Office  
and that on the 2<sup>nd</sup> day of December, 2014, I served a copy of the AMENDED MOTION TO  
DISMISS by delivering a copy to:



# EXHIBIT A

ORIGINAL

CASE NO. 14-0005

FILED 3-17-14 TIME 11:10  
WELLS  
✓  
D

IN THE MUNICIPAL COURT OF THE CITY OF WELLS,  
COUNTY OF ELKO, STATE OF NEVADA

THE CITY OF WELLS,

Plaintiff,

-vs-

COMPLAINT

JUSTIN PATRICK KELLEY,

Defendant.

Upon information and belief, THOMAS J. COYLE, JR., ASSISTANT CITY ATTORNEY, based upon the attached crime report and officer declaration, complains and says that JUSTIN PATRICK KELLEY on or about the 8<sup>th</sup> day of February, 2014, at approximately 12:36 a.m., in the City of Wells, County of Elko, State of Nevada, committed violations of Wells City Code, described as follows:

COUNT 1

RESISTING, INTERFERING WITH, OR HINDERING IN ANY WAY AN OFFICER,  
AS DEFINED BY WELLS CITY CODE 7-1-4(N)(1).

THE DEFENDANT UNLAWFULLY RESISTED, INTERFERED WITH OR HINDERED A POLICE OFFICER, OR PERSON DULY EMPOWERED WITH POLICE AUTHORITY, WHILE IN THE DISCHARGE OR APPARENT DISCHARGE OF HIS DUTY, TO WIT: THE DEFENDANT, JUSTIN PATRICK KELLEY, AFTER BEING HANDCUFFED AND PLACED IN A KNEELING POSITION BEHIND DEPUTY SHELLEY'S PATROL VEHICLE, REPEATEDLY REFUSED TO STAY IN THE KNEELING POSITION BEHIND THE OFFICER'S PATROL WHILE THE OFFICER

APR 03 2014

10:45 AM

GOICOECHEA, DI GRAZIA, COYLE & STANTON, LTD.  
ATTORNEYS AT LAW  
530 IDAHO STREET - P. O. BOX 1358  
ELKO, NEVADA 89801  
(775) 738-8091

Appendix 000064

1 WAS DEALING WITH ANOTHER SUSPECT AT OR NEAR MOOR AVENUE AND SHOSHONE  
2 AVENUE WITH IN THE CITY OF WELLS.

3 **COUNT 2**

4 **RECKLESS DRIVING,**


5 **AS DEFINED BY WELLS CITY CODE 8-11-1 (N.R.S. 484.377).**

6 THE DEFENDANT DROVE AN ATV IN WILLFUL OR WANTON DISREGARD OF THE  
7 SAFETY OF PERSONS OR PROPERTY IN THE AREA OF MOOR AVENUE AND SHOSHONE  
8 AVENUE WITHIN THE CITY OF WELLS, TO WIT: THE DEFENDANT, JUSTIN PATRICK  
9 KELLEY, DID DRIVE AN ATV WESTBOUND AT A HIGH RATE OF SPEED, ON THE LEFT  
10 SIDE OF THE MOOR AVENUE AND INTO THE ONCOMING TRAFFIC LANE.

11 Complainant has in his possession a Crime Report completed by Deputy Shelley, known to  
12 Complainant to be an officer with the Elko County Sheriff's Office, a copy of which report is attached  
13 hereto and incorporated by reference herein for the limited purpose of this Complaint.

14 The actions of JUSTIN PATRICK KELLEY are against the form, force and effect and in  
15 violation of Wells City Code, Section 7-1-4(N)(1) and 8-11-1 (N.R.S. 484.377), and against the peace  
16 and dignity of the City of Wells. Said complainant therefore prays that JUSTIN PATRICK KELLEY  
17 be dealt with according to law.

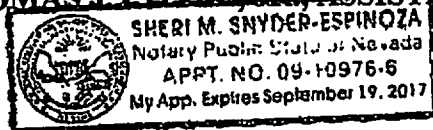
18 DATED this 13<sup>th</sup> day of March, 2014.


19   
20 **THOMAS J. COYLE, JR.**  
**DEPUTY CITY ATTORNEY**

21 STATE OF NEVADA )  
22 : ss.  
23 COUNTY OF ELKO )

24 Signed and sworn to (or affirmed) before me on this 13<sup>th</sup> day of March, 2014, by

25 **THOMAS J. COYLE, JR., ASSISTANT CITY ATTORNEY.**



27   
28 **SHERI M. SNYDER-ESPINOZA**  
**NOTARY PUBLIC**

— **CHECK IF VICTIM(S) IN THIS CASE APPEAR(S) TO HAVE INCURRED  
UNCOMPENSATED EXPENSES CAUSED BY DEFENDANT AND/OR PROSECUTOR  
WISHES TO BE PRESENT AT SENTENCING.**

# EXHIBIT B

25

WELLS JUSTICE/MUNICIPAL COURT  
PO BOX 297 - WELLS, NEVADA 89835  
(775) 752-3726

NAME: Justin P. Kelley Case# 2014-005 Conviction Date: 11-14-14  
Sentence: Resisting Fine: 25 days Adm Assmt: \_\_\_\_\_ Fac Fee \_\_\_\_\_ SPF: \_\_\_\_\_  
Reckless Fine: 250.00 Adm Assmt: 85 Fac Fee 10.00 SPF: 7.00 3.00  
Contempt Fine: 25 days Adm Assmt: \_\_\_\_\_ Fac Fee \_\_\_\_\_ SPF: \_\_\_\_\_  
Concurrent Fine: 25 days Adm Assmt: \_\_\_\_\_ Fac Fee \_\_\_\_\_ SPF: \_\_\_\_\_  
Dom Viol Fee \_\_\_\_\_ RESTITUTION: \_\_\_\_\_  
DUI Analysis Fee \_\_\_\_\_ Pay to: Office of Elko D.A.  
Alcohol Eval Fee \_\_\_\_\_ Elko County Courthouse  
Pub Def Reimb: \_\_\_\_\_ Elko NV 89801

TOTAL DUE: 355.00 DUI SCHOOL TO BE COMPLETED AND NOTICE  
Credit: \_\_\_\_\_ days @ \$ \_\_\_\_\_ MUST REACH THIS COURT BY: \_\_\_\_\_  
less credit \$ \_\_\_\_\_ JAIL TIME TIME TO BE COMPLETED AS FOLLOWS:  
Balance due: \$ \_\_\_\_\_ TIME TO BE SERVED: 25 days CREDIT: 24 days  
DATE DUE PAYMENT BALANCE TO BE SERVED: 1 Day  
GO TO JAIL SERVE

Contempt  
Run  
Concurrent  
with  
Court I.

3/16/15

Status hearing  
March 16, 2015  
at 9:30 A.M.

Remanded back into custody of Elko County  
Sheriff's Dept. for release upon the Wells charges  
COMMUNITY SERVICE: \_\_\_\_\_ hrs. Credit \_\_\_\_\_ only after serving  
Balance: \_\_\_\_\_ Completion Notice to court an additional  
by: \_\_\_\_\_ one day.

VICTIM IMPACT PANEL COUNSELING: ALCOHOL - DRUG - DOMESTIC VIOLENCE  
Completion Notice to Court by: \_\_\_\_\_ Notice of sign up to court by: \_\_\_\_\_  
PROGRESS REPORTS to court \_\_\_\_\_ ea mo Begin: \_\_\_\_\_  
COMPLETION NOTICE to court by: \_\_\_\_\_

SUSPENDED SENTENCE: Charge(s): \_\_\_\_\_  
YOU ARE ORDERED TO SERVE \_\_\_\_\_ DAYS IN JAIL with \_\_\_\_\_ days suspended  
for \_\_\_\_\_ mo(s). \_\_\_\_\_ yr(s). UPON THE FOLLOWING CONDITIONS:  
1. YOU MUST PAY ALL FINES AND ASSESSMENTS AND COMPLY WITH EVERY COURT  
ORDER AS STATED ON THIS SENTENCING SUMMARY.  
2. You are not to be arrested or convicted for any crime(s) within  
Elko County, except MINOR traffic violations.  
3. You must complete AA or NA meetings: \_\_\_\_\_ x Mo / Wkly for  
\_\_\_\_\_ mos/yr  
Completion notice must be filed with court by: \_\_\_\_\_  
4. You must attend & Complete, at your own expense, treatment as  
ordered: \_\_\_\_\_  
5. You are not to consume ANY alcohol, marijuana or any illegal  
drugs, except drugs prescribed for you by a licensed physician.  
6. You may be required to submit to alcohol/drug testing by law  
enforcement  
7. You are order to install and maintain @ your own expense an inter-  
lock device on vehicle(s) owned/operated by you for \_\_\_\_\_ mos as condi-  
tion of reinstatement/restricted license.

IT IS YOUR RESPONSIBILITY TO ASSURE SIGN UP NOTICE(S), MONTHLY PROGRESS  
REPORTS AND COMPLETION NOTICE(S) ARE FILED WITH THIS COURT AS REQUIRED.  
IMPORTANT: ANY SUSPENDED SENTENCE WILL REMAIN IN EFFECT FOR TOTAL TIME  
PERIOD ORDERED BY THE COURT OR UNTIL IT IS ORDERED SERVED. IF A BENCH  
WARRANT ISSUES FOR FAILURE TO COMPLY WITH ANY PART OF THE JUDGMENT, AND  
A SUSPENDED SENTENCE IS PENDING, COURT MAY ORDER SUSPENDED SENTENCE BE  
SERVED. IF YOU ARE NOT ABLE TO COMPLY WITH ANY PART OF THE JUDGMENT AS  
STATED ABOVE, YOU MUST APPEAR AT 4:00 P.M. ON THE DATE SCHEDULED FOR  
PAYMENT OR COMPLETION, TO STATE UNDER OATH WHY YOU ARE NOT ABLE TO  
COMPLY. IF YOU FAIL TO COMPLY OR APPEAR AS STATED, A BENCH WARRANT FOR  
YOUR ARREST WILL ISSUE FOR A CONTEMPT CHARGE. IF FOUND IN CONTEMPT, THE  
MAXIMUM PENALTY IS 25 DAYS IN JAIL AND/OR \$500.00 FINE, OR BOTH, PLUS  
REQUIRED ASSESSMENTS. NO PAYMENT BASIS IS ALLOWED AFTER A BENCH WARRANT  
IS ISSUED. ALL CASES IN ARREARS ARE REFERRED TO THE COUNTY COLLECTIONS  
DEPARTMENT FOR ACTION ON YOUR CREDIT HISTORY.

000242014-01103

FILED

2014 DEC -5 PM 3:12

ELKO CO DISTRICT CLERK

CLERK \_\_\_\_\_ DEPUTY *MM*

IN THE FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR THE COUNTY OF ELKO, STATE OF NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JUSTIN PATRICK KELLEY,


Defendant.

**OPPOSITION TO**  
**MOTION TO DISMISS**

COMES NOW, Plaintiff, State of Nevada, by and through its attorneys, MARK TORVINEN, District Attorney for the County of Elko, and JONATHAN L. SCHULMAN, Deputy District Attorney, and submits the following Points and Authorities in support of this Opposition together with all pleadings and papers on file herein.

Dated this 5<sup>th</sup> day of December, 2014.

MARK TORVINEN  
Elko County District Attorney

By:   
JONATHAN L. SCHULMAN  
Deputy District Attorney  
State Bar Number: 9180

Affirmation Pursuant to NRS 239B.030

SSN Does Appear

SSN Does Not Appear Appendix 000968



## POINTS AND AUTHORITIES

### I. Facts

The State will adopt the Defendant's facts for the purpose of this opposition.

### II. Analysis

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb." This protection applies to Nevada citizens through the Fourteenth Amendment to the United States Constitution. Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), and is also guaranteed by the Nevada Constitution, Nev. Const. art. 1, § 8.

"In accord with principles rooted in common law and constitutional jurisprudence," the Supreme Court "presume[s] that 'where two statutory provisions proscribe the "same offence," a legislature does not intend to impose two punishments for that offense.'" Jackson v. State, 291 P.3d 1274, 1278 (2012) citing Rutledge v. United States, 517 U.S. 292, 297, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996) (quoting Whalen v. United States, 445 U.S. 684, 691-92, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)) (interpreting federal legislation). The Court should look to Blockburger to determine whether two statutes penalize the same offence. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006) ("Nevada utilizes the Blockburger test to determine whether separate offenses exist for double jeopardy purposes."). The Blockburger test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); see Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103,

1 1107 (2001) ("under Blockburger, if the elements of one offense are entirely included within  
2 the elements of a second offense, the first offense is a lesser included offense and the  
3 Double Jeopardy Clause prohibits a conviction for both offenses").  
4

5 The relevant portions of NRS 484B.653 states:

6 1. It is unlawful for a person to:

7 (a) Drive a vehicle in willful or wanton disregard of the  
8 safety of persons or property.

9 (b) Drive a vehicle in an unauthorized speed contest on  
10 a public highway.

11 (c) Organize an unauthorized speed contest on a public  
12 highway.

13 A violation of paragraph (a) or (b) of this subsection or  
14 subsection 1 of NRS 484B.550 constitutes reckless driving.

15 6. Unless a greater penalty is provided pursuant to  
16 subsection 4 of NRS 484B.550, a person who does any act  
17 or neglects any duty imposed by law while driving or in  
18 actual physical control of any vehicle in willful or wanton  
19 disregard of the safety of persons or property, if the act or  
20 neglect of duty proximately causes the death of or  
21 substantial bodily harm to another person, is guilty of a  
22 category B felony and shall be punished by imprisonment in  
23 the state prison for a minimum term of not less than 1 year  
24 and a maximum term of not more than 6 years and by a fine  
25 of not less than \$2,000 but not more than \$5,000.

26 The relevant portions of NRS 484B.550 states:

27 1. Except as otherwise provided in this section, the driver  
28 of a motor vehicle who willfully fails or refuses to bring the  
vehicle to a stop, or who otherwise flees or attempts to elude  
a peace officer in a readily identifiable vehicle of any police  
department or regulatory agency, when given a signal to  
bring the vehicle to a stop is guilty of a misdemeanor.

2. The signal by the peace officer described in  
subsection 1 must be by flashing red lamp and siren.

1  
2 3. Unless the provisions of NRS 484B.653 apply if,  
3 while violating the provisions of subsection 1, the driver of  
4 the motor vehicle:

5 (a) Is the proximate cause of damage to the property of  
6 any other person; or

7 (b) Operates the motor vehicle in a manner which  
8 endangers or is likely to endanger any other person or the  
9 property of any other person,

10 the driver is guilty of a category B felony and shall be  
11 punished by imprisonment in the state prison for a minimum  
12 term of not less than 1 year and a maximum term of not  
13 more than 6 years, or by a fine of not more than \$5,000, or  
14 by both fine and imprisonment.

15 Applying the Blockburger test and after the Nevada Supreme Court Jackson decision,  
16 felony eluding and reckless driving convictions would not be double jeopardy as NRS  
17 484B.653 and NRS 484B.550 have different elements. NRS 484B.500 prohibits drivers from  
18 refusing to stop for a peace officer who has his lights and sirens on while NRS 484B.653  
19 prohibits driving in a willful and wanton disregard for safety of persons or property. The felony  
20 portion of NRS 484B.550 has the additional element of proximate cause of damage to  
21 property or operates a vehicle in a manner which endangers or is likely to endanger any  
22 other person or property. Felony eluding is not the same as reckless driving as it requires  
23 that the officer's lights and sirens be on, and it does not say anything about driving in a willful  
24 and wanton disregard for safety of persons or property. The two statutes in question do not  
25 have the same elements, and thus are not double jeopardy.

26 The Defendant's next argument that it is double jeopardy because of NRS  
27 484B.550(3) is a rather interesting one. "Unless the provisions of NRS 484B.653 apply..."  
28 might be considered a little vague. It appears pretty straight forward just by looking at it at

1 that statement, but upon longer review it can be considered a little vague. What does "unless  
2 the provisions of NRS 484B.653 apply..." actually mean because the way the Defendant  
3 interprets it is that NRS 484B.550(3) can never be charged. The statute does not say  
4 convicted, but applies. The Defendant's interpretation of that statute would prevent the State  
5 from ever charging anyone with that crime because under the Defendant's thinking reckless  
6 driving is the same thing as felony eluding a police officer. What if the Defendant was never  
7 charged with reckless driving? The Defendant's interpretation of that statute would mean  
8 that he could not be charged with felony eluding since even though reckless driving wasn't  
9 charged, it would still apply to the facts of this case. Surely the legislature could not have  
10 meant that when it passed NRS 484B.550 as it would not make sense to pass a statute that  
11 could never be used.

12  
13  
14 Legislative history can often be useful in trying to figure out why a law is amended, but  
15 that is not necessarily true in this case. Prior to the 2003 Legislative Session, NRS  
16 484.348(3)<sup>1</sup> read

17  
18 "Except as otherwise provided in subsection 2 of NRS  
19 484.377, if, while violating the provisions of subsection 1, the  
20 driver of the motor vehicle:

21 (a) Is the proximate cause of the death of or bodily  
22 harm to any person other than himself or damage to the  
23 property of a person other than himself; or

24 (b) Operates the motor vehicle in a manner which  
25 endangers or is likely to endanger any person other than  
26 himself or the property of any person other than himself,  
27 the driver is guilty of a category B felony and shall be  
28 punished by imprisonment in the state prison for a minimum  
term of not less than 1 year and a maximum term of not  
more than 6 years, or by a fine of not more than \$5,000, or  
by both fine and imprisonment."

A.B. 335, 72<sup>nd</sup> (2003) session.

---

<sup>1</sup> NRS 484.348 later became NRS 484B.550.

1 NRS 484.377(2)<sup>2</sup> prior to 2003 amendment read:

2 2. [Any] A person who does any act or neglects any duty  
3 imposed by law while driving or in actual physical control of  
4 any vehicle in willful or wanton disregard of the safety of  
5 persons or property, if the act or neglect of duty proximately  
6 causes the death of or substantial bodily harm to [any] a  
7 person other than himself, is guilty of a category B felony  
8 and shall be punished by imprisonment in the state prison for  
a minimum term of not less than 1 year [nor] and a maximum  
term of not more than 6 years, or by a fine of not more than  
\$5,000, or by both fine and imprisonment.

9  
10 Id. It is clear that prior to the 2003 Legislative Session, that if the driving conduct  
11 proximately caused the death or substantial bodily to someone other than the driver, then the  
12 appropriate charge is felony reckless driving and not felony eluding. The 2003 Legislative  
13 session changed the working of NRS 484.348(3) to: "Unless the provisions of NRS 484.377  
14 apply if, while violating the provisions of subsection 1, the driver of the motor vehicle..." The  
15 amendment also struck from section 3(a) the language dealing with the death of or bodily  
16 harm to any person other than himself because the legislature added section 4 which stated

17  
18 If, while violating the provisions of subsection 1, the  
19 driver of the motor vehicle is the proximate cause of the  
20 death of or bodily harm to any other person, the driver is  
21 guilty of a category B felony and shall be punished by  
22 imprisonment in the state prison for a minimum term of not  
23 less than 2 years and a maximum term of not more than 15  
24 years, or by a fine of not more than \$10,000, or by both fine  
25 and imprisonment.

26 The Legislature's main purpose was to increase the penalty for evading a peace  
27 officer which results in death or substantial bodily harm. Id. The assembly minutes that  
28 discussed the amendments spent most of the time discussing the need to raise the penalties

---

<sup>2</sup> NRS 484.377 later became NRS 484B.653.

1 for causing death or substantial bodily harm due to a police chase. Minutes of the Meeting of  
2 the Assembly Committee on Judiciary, 72<sup>nd</sup> Session, March 28, 2003 available at  
3 <http://www.leg.state.nv.us/Session/72nd2003/Minutes/Assembly/JUD/Final/2361.html>. There  
4 was also significant discussion about the need for the use of lights and sirens, but there was  
5 no discussion why section 3 was amended to state "Unless the provisions of NRS 484.377  
6 apply if, while violating the provisions of subsection 1, the driver of the motor vehicle..." Lt.  
7 Olsen, one of the people testifying in support of the bill, did state that "this particular law and  
8 the bill itself are not dealing with the normal traffic stop; it is dealing with the pursuit-type  
9 situation." Id. The Legislature's purpose was to toughen the penalties for eluding a police  
10 officer, not weaken them. The Defendant's interpretation of the law would be the opposite of  
11 what the Legislature intended when they amended NRS 484.348. It would have been nice if  
12 the minutes stated why they modified the first part of section 3 to what they did, but they did  
13 not. The Court should find that the Legislature did not intend to weaken the felony eluding  
14 law when they made that change because their purpose for the rest of the bill was to stiffen  
15 the penalties if a driver caused death or substantial bodily harm to a person. It would make  
16 no sense for the Legislature to stiffen the laws if a driver caused death or substantial bodily  
17 harm, but then weaken them as it pertains to operating a vehicle in a manner which  
18 endangers or is likely to endanger any person other than the driver.

19  
20  
21  
22  
23 Finally, the Wells' City Attorney's charging document charges different conduct in its  
24 case for reckless driving. The Defendant pled to driving an ATV westbound at a high rate of  
25 speed, on the left side of the Moor Avenue and into the oncoming traffic lane as well as  
26 driving in willful or wanton disregard of the safety of persons or property in the area of Moor  
27 Avenue and Shoshone Avenue. Compare that with what the State charged the Defendant  
28

1 with in the Information. The relevant portion is:

2           The Defendant willfully failed and/or refused to bring  
3 the vehicle he/she was operating to a stop, and/or otherwise  
4 fled from, or attempted to elude a peace officer, one Deputy  
5 Shelley, who was in a readily identifiable vehicle of any  
6 police department, law enforcement agency, or regulatory  
7 agency, after said peace officer had given the Defendant a  
8 signal, a flashing red lamp and a siren, to bring his/her  
9 vehicle to a stop, and furthermore operated the motor  
10 vehicle in a manner which endangered or is likely to  
11 endanger any other person or the property of any other  
12 person by driving the vehicle (ATV) where the passenger  
13 almost fell off several times, and/or almost hitting fuel pumps  
14 and/or nearly striking buildings and/or nearly striking Deputy  
15 Shelley's patrol car and/or almost hitting a road marker.

16           The City charged reckless driving on Moor Avenue and Shoshone Avenue, but the  
17 Defendant's actions that are the subject of this case occurred on Moor Avenue as well as  
18 Shoshone Avenue, Dover Avenue, Ruby Avenue, Clover Avenue, and Humboldt Avenue.  
19 Even though the reckless driving came out of the same event as this case, the City only  
20 charged a small segment of the entire incident. The events that led specifically to the felony  
21 eluding—endangering other people—did not occur on Moor Avenue, but on Shoshone  
22 Avenue, Dover Avenue, Ruby Avenue, Clover Avenue, and Humboldt Avenue. Even if the  
23 Defendant's interpretation of NRS 484B.653 and 484B.550 is correct, the actual activity that  
24 was charged by the City and State are different so it would not be double jeopardy.

25 ///

26 ///

27 ///

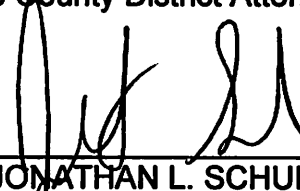
28 ///

1           III.    Conclusion

2           The State requests that the Defendant's motion to dismiss be denied for the above  
3 mentioned reasons.

4           Dated this 5<sup>th</sup> day of December, 2014.

6                           MARK TORVINEN  
7                           Elko County District Attorney

8                           By:   
9                           JONATHAN L. SCHULMAN  
10                          Deputy District Attorney  
11                          State Bar Number: 9180

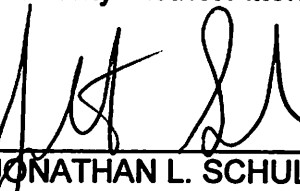
12                           NOTICE

13  
14 TO:    ROGER H. STEWART, Attorney for the above-named Defendant and  
15           The Clerk of the Fourth Judicial District Court.

16           A hearing on this Opposition is requested and a court reporter is requested. It is  
17 estimated that one-half (1/2) hour should be set aside for the hearing on this Opposition.

18           Dated this 5<sup>th</sup> day of December, 2014.

19                           MARK TORVINEN  
20                           Elko County District Attorney

21                           By:   
22                           JONATHAN L. SCHULMAN  
23                          Deputy District Attorney  
24                          State Bar Number: 9180



1 CERTIFICATE OF SERVICE

2 I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the  
3 Elko County District Attorney's Office, and that on the 5<sup>th</sup> day of December, 2014, I  
4 served the foregoing Opposition, by delivering, mailing or by facsimile transmission or  
5 causing to be delivered, mailed or transmitted by facsimile transmission, a copy of said  
6 document to the following:

7 By delivering to:

8 THE HONORABLE ALVIN R. KACIN  
9 FOURTH JUDICIAL DISTRICT COURT  
10 ELKO COUNTY COURTHOUSE  
ELKO, NV 89801

11 By delivering to:

12 ROGER H. STEWART  
13 ATTORNEY AT LAW  
14 569 COURT STREET  
ELKO, NV 89801

15   
16 KURRI SULLIVAN  
17 FELONY CASEWORKER

18 DA# 94267  
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Case No. CR-FP-14-0198  
Dept. II

FILED

2014 DEC 10 PM 3:35

ELKO CO DISTRICT COURT

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

\*\*\*\*\*

STATE OF NEVADA,

Plaintiff,

vs.

RESPONSE TO OPPOSITION TO DISMISS

JUSTIN PATRICK KELLEY,

Defendant.

COME NOW, FREDERICK B. LEE, JR., ESQ., Elko County Public Defender, and  
ROGER H. STEWART, ESQ., Chief Deputy, Attorneys for the Defendant JUSTIN PATRICK  
KELLEY, and responds to Opposition to Motion to Dismiss as follows. This motion is based on the  
Points and Authorities attached hereto, all documents and pleadings on file herein, and all relevant  
rules of law.

DATED this 10 day of December, 2014.

FREDERICK B. LEE, JR., ESQ.  
Elko County Public Defender  
495 Idaho Street, Suite 201  
Elko NV 89801

BY: RHS  
ROGER H. STEWART, ESQ.,  
Chief Deputy Public Defender  
Bar No. 3823

DEC 10 2014 PM 3:55

1 ISSUES PRESENTED

2  
3 ISSUE ONE: Whether the Reckless Driving misdemeanor [Reckless] requires proof of anything  
4 that Felony Eluding does not.  
5

6 ISSUE TWO: Whether regardless of legislative intent or confusion the Felony Eluding statute must  
7 still be construed liberally in favor of the defendant.  
8

9 FACTS

10 No additional facts are alleged.  
11  
12

13 POINTS AND AUTHORITIES

14  
15 ISSUE ONE: Whether the Reckless Driving misdemeanor [Reckless] requires proof of anything  
16 that Felony Eluding does not.  
17

18 The opposition brief seems to indicate that Reckless requires the proof of something not  
19 required to prove Felony Eluding. E.g., Opposition at 2. Here the standard of proof for Reckless  
20 Driving is willful or wanton disregard for safety of persons or property; and for Felony Eluding is  
21 willfully failing or refusing to bring a vehicle a stop, fleeing or otherwise attempting to elude . . . in  
22 a manner which endangered or is likely to any other person or the property of another. Obviously,  
23 Reckless is subsumed by Felony Eluding here since the willful or wanton standard is less than the  
24 willful one. See Thedford v. Sheriff, 86 Nev. 741, 476 P.2d 25 (1970)(open murder includes  
25 lessers including Involuntary Manslaughter). Likewise, the driving required in disregard for safety  
26 of persons or property for Reckless is less but included in the proof of the endangering another  
27 person of property of another required for Felony Eluding. Last, Felony Eluding requires proof of  
28 failure or refusal to stop, fleeing, or otherwise attempting to elude--again additional elements to

1 those contained in Reckless. Thus, Reckless is a lesser included offense of Felony Eluding.

2 In addition, the Opposition suggests that that because the acts constituting Felony Eluding  
3 occurred not only on Moor and Shoshone Avenues, but on other streets in the chase double  
4 jeopardy is somehow avoided. Opposition at 7-8. On the contrary, this merely shows again that  
5 Felony Eluding may include proof of more elements but includes those for Reckless to which  
6 Kelley has already pled.

7 Similarly, the Opposition's argument that the defense is arguing that Felony Eluding cannot  
8 be charged when Reckless is not charged, Opposition at 5, is just plain wrong. The situation here  
9 is that because Reckless is a lesser included offense of Felony Eluding--both "element-wise" and  
10 "statute-wise"--Kelley who has already been convicted of Reckless can no longer be prosecuted for  
11 Felony Eluding.

12 ISSUE TWO: Whether regardless of legislative intent or confusion the Felony Eluding statute must  
13 still be construed liberally in favor of the defendant.

14  
15 The Opposition appears suggest that the history of the statute and a possible confusion in  
16 drafting to increase the Felony Eluding penalty means that that its meaning should be so inferred  
17 rather than construed liberally in favor of the defendant as per the standard rules of statutory  
18 construction. See Opposition at 5-7. Certainly, the legislative history material is relevant but it  
19 does not supersede rules of construction as to the plain meaning here. See State v. Colosimo, 122  
20 Nev. 950, 960-61, 142 P.3d 352 (2006)(where actual intended victim of intent to have sex with  
21 minor was not under sixteen, case was dismissed); State v. Wheeler, 22 Nev. 143 152-53, 44 P. 430  
22 (1986); see also Buschauer v. State, 106 Nev. 890, 895-96, 804 P.2d 1046 (1990)(Court will also  
23 narrowly construe criminal statutes where ambiguous).

## 24 CONCLUSION

25  
26 Thus, the motion to dismiss should be granted.  
27  
28

1 DATED this 10 day of December, 2014.

2  
3 FREDERICK B. LEE, JR., ESQ.  
4 Elko County Public Defender  
495 Idaho Street, Suite 201  
Elko NV 89801

5 RHS  
6 ROGER H. STEWART, ESQ.,  
7 Chief Deputy Public Defender  
Bar No. 3823

8  
9  
10  
11 CERTIFICATE OF SERVICE

12 I hereby certify that I am an employee of the Elko County Public Defender's Office  
13 and that on the 10 day of December, 2014, I served a copy of the RESPONSE TO  
14 OPPOSITION TO MOTION TO DISMISS,, by delivering a copy to:

15  
16 MARK D. TORVINEN, ESQ.  
17 District Attorney  
Elko County  
Elko, NV 89801

18 Sierra Butterfield  
19  
20  
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RS

FILED

2014 DEC 30 AM 9:35

CLERK OF DISTRICT COURT

CLERK OF DISTRICT COURT

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

THE STATE OF NEVADA,

Plaintiff,

vs.

**ORDER DENYING MOTION TO DISMISS**

JUSTIN PATRICK KELLEY,

Defendant.

In this case, Defendant Justin Patrick Kelly (Defendant) is charged with Eluding a Police Officer, a Category B Felony as defined by NRS 484B.550 (felony eluding).

On November 26, 2014, Defendant filed a motion to dismiss the criminal information on file herein. Defendant amended the motion on December 2, 2014. The State opposed it, as amended, on December 5, 2014.

The parties agree that on March 17, 2014, Defendant was charged with Reckless Driving, a Misdemeanor as defined by Wells City Code 8-11-1 (misdemeanor reckless driving), in the Wells Municipal Court. See Exhibit A, Copy of Criminal Complaint in Wells Municipal Court Case No. 14-0005. The parties also agree that on November 14, 2014, Defendant pled no contest to and was sentenced on the charge. See Exhibit B, Copy of Sentencing Minutes in Case No. 14-0005.

The theory of prosecution for the Wells Municipal Court case is that Defendant "did drive an ATV westbound at a high rate of speed, on the left side of the Moor Avenue and into the oncoming traffic lane." The theory of prosecution in the instant case is that Defendant "wilfully failed and/or refused to bring the vehicle [he] was operating to a stop, and/or otherwise fled from, or attempted to elude a peace officer, one Deputy Shelley, who was in a readily identifiable vehicle of any police

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1 department, law enforcement agency, or regulatory agency, after said peace officer had given the  
2 Defendant a signal, a flashing red lamp and a siren, to bring [his] vehicle to a stop, and furthermore  
3 operated the motor vehicle in a manner which endangered or is likely to endanger any other person or the  
4 property of any other person by driving the vehicle (ATV) where the passenger almost fell off several  
5 times, and/or almost hitting fuel pumps and/or nearly striking buildings and/or nearly striking Deputy  
6 Shelley's patrol car and/or almost hitting a road marker."

7 The parties agree that the course of conduct underlying the charge in this case is, in part, that  
8 alleged in the Wells Municipal Court. Defendant claims that the prosecution of the felony eluding  
9 charge violates his constitutional right not to be placed twice in jeopardy for the same offense. The  
10 Court disagrees.

11 **1. Law of Double Jeopardy**

12 The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides  
13 that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."  
14 Jackson v. State, 128 Nev. \_\_\_\_ (2012). This protection applies to Nevada citizens through the  
15 Fourteenth Amendment to the United States Constitution, Benton v. Maryland, 395 U.S. 784, 794  
16 (1969), and is additionally guaranteed by the Nevada Constitution, Nev. Const. art. 1, § 8. The Double  
17 Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after  
18 acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments  
19 for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted), *overruled*  
20 *on other grounds* by Alabama v. Smith, 490 U.S. 794 (1989). It is the second protection that is at issue  
21 in this case.

22 "In accord with principles rooted in common law and constitutional jurisprudence," the Supreme  
23 Court "presume[s] that 'where two statutory provisions proscribe the "same offen[c]e," a legislature  
24 does not intend to impose two punishments for that offense.'" Rutledge v. United States, 517 U.S. 292,  
25 297 (1996) (quoting Whalen v. United States, 445 U.S. 684, 691-92 (1980)) (interpreting federal  
26 legislation). To determine whether two statutes penalize the "same offence," both the U.S. Supreme  
27 Court and the Nevada Supreme Court look to Blockburger v. United States, 284 U.S. 299, 304 (1932).  
28 Ball v. United States, 470 U.S. 856, 861 (1985) ("This Court has consistently relied on the test of

1 statutory construction stated in Blockburger[ ] to determine whether Congress intended the same conduct  
2 to be punishable under two criminal provisions.”); Estes v. State, 122 Nev. 1123, 1143 (2006) (“Nevada  
3 utilizes the Blockburger test to determine whether separate offenses exist for double jeopardy  
4 purposes.”). The Blockburger test “inquires whether each offense contains an element not contained in  
5 the other; if not, they are the ‘same offence’ and double jeopardy bars additional punishment and  
6 successive prosecution.” United States v. Dixon, 509 U.S. 688, 696 (1993); see Barton v. State, 117  
7 Nev. 686, 692 (2001) (“under Blockburger, if the elements of one offense are entirely included within  
8 the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy  
9 Clause prohibits a conviction for both offenses”), *overruled on other grounds* by Rosas v. State, 122  
10 Nev. 1258 (2006).

11 The Blockburger test “determines whether the statutes violated penalize the same or several  
12 distinct offenses, and if so, whether a presumption arises against cumulative punishment.” Jackson, 128  
13 Nev. at \_\_\_\_\_. If Congress or a state legislature has clearly authorized multiple punishments for the same  
14 offense—as routinely occurs when a statute authorizes incarceration and a fine for a given crime—dual  
15 punishments do not offend double jeopardy, even though they are imposed for the “same offence.” See  
16 Whalen, 445 U.S. at 688-89 (but noting that, “if a penal statute instead provided for a fine or a term of  
17 imprisonment upon conviction, a court could not impose both punishments without running afoul of the  
18 double jeopardy guarantee of the Constitution” (citing Ex parte Lange, 85 U.S. (18 Wall.) 163, 176  
19 (1873))). The converse also holds. If Congress or a state legislature has created mutually exclusive  
20 alternative offenses, thereby prohibiting multiple punishment for what are separate offenses under  
21 Blockburger, that prohibition controls. United States v. McLaughlin, 164 F.3d 1, 9 (D.C. Cir. 1998)  
22 (“Just as failing Blockburger does not preclude punishment under multiple provisions, passing  
23 Blockburger does not mandate it.”); cf. Braunstein v. State, 118 Nev. 68, 79 (2002) (since NRS 201.230  
24 makes “[t]he crimes of sexual assault and lewdness . . . mutually exclusive[,] . . . convictions for both  
25 based upon a single act cannot stand”).

26 ///

27 ///

28 ///



1 **2. NRS 484B.550 (Eluding)**

2 NRS 484B.550 provides in relevant part:

3 1. Except as otherwise provided in this section, the driver of a motor vehicle who willfully  
4 fails or refuses to bring the vehicle to a stop, or who otherwise flees or attempts to elude a peace  
5 officer in a readily identifiable vehicle of any police department or regulatory agency, when given  
6 a signal to bring the vehicle to a stop is guilty of a misdemeanor.

7 2. The signal by the peace officer described in subsection 1 must be by flashing red lamp  
8 and siren.

9 3. Unless the provisions of NRS 484B.653 apply if, while violating the provisions of  
10 subsection 1, the driver of the motor vehicle:

11 (a) Is the proximate cause of damage to the property of any other person; or

12 (b) Operates the motor vehicle in a manner which endangers or is likely to endanger  
13 any other person or the property of any other person,

14 the driver is guilty of a category B felony and shall be punished by imprisonment in the state  
15 prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years,  
16 or by a fine of not more than \$5,000, or by both fine and imprisonment.

17 4. If, while violating the provisions of subsection 1, the driver of the motor vehicle is the  
18 proximate cause of the death of or bodily harm to any other person, the driver is guilty of a  
19 category B felony and shall be punished by imprisonment in the state prison for a minimum term  
20 of not less than 2 years and a maximum term of not more than 20 years, or by a fine of not more  
21 than \$50,000, or by both fine and imprisonment.

22 **3. NRS 484B.653 (Reckless Driving)**

23 NRS 484B.653 provides in relevant part:

24 1. It is unlawful for a person to:

25 (a) Drive a vehicle in willful or wanton disregard of the safety of persons or property.

26 (b) Drive a vehicle in an unauthorized speed contest on a public highway.

27 (c) Organize an unauthorized speed contest on a public highway.

28 A violation of paragraph (a) or (b) of this subsection or subsection 1 of NRS 484B.550  
constitutes reckless driving.

6. Unless a greater penalty is provided pursuant to subsection 4 of NRS 484B.550, a person  
who does any act or neglects any duty imposed by law while driving or in actual physical control  
of any vehicle in willful or wanton disregard of the safety of persons or property, if the act or  
neglect of duty proximately causes the death of or substantial bodily harm to another person, is  
guilty of a category B felony and shall be punished by imprisonment in the state prison for a  
minimum term of not less than 1 year and a maximum term of not more than 6 years and by a  
fine of not less than \$2,000 but not more than \$5,000.

7. A person who violates any provision of this section may be subject to the additional  
penalty set forth in NRS 484B.130 unless the person is subject to the penalty provided pursuant

1 to subsection 4 of NRS 484B.550.

2 **4. Analysis**

3 In the Court's view, it is clear that reckless driving is not a lesser included offense of eluding.

4 A defendant is guilty of misdemeanor reckless driving if the State proves beyond a reasonable  
5 doubt that:

- 6 (1) the defendant
- 7 (2) drove a motor vehicle
- 8 (3) in willful or wanton disregard of persons or property.

9 A defendant is guilty of felony eluding if the State proves beyond a reasonable doubt that:

- 10 (1) the defendant
- 11 (2) drove a motor vehicle
- 12 (3) and willfully either
  - 13 (a) failed or refused to bring the vehicle to a stop, or
  - 14 (b) otherwise fled or attempted to elude in the vehicle
- 15 (4) a peace officer both
  - 16 (a) in a readily identifiable vehicle of any police department or regulatory
  - 17 agency, and
  - 18 (b) giving a signal to bring to a stop the vehicle driven by the defendant
- 19 (5) while the defendant operated the motor vehicle in a manner that
  - 20 (a) endangered any other person or the property of any other person, or
  - 21 (b) was likely to endanger any other person, or the property of any other person.

22 In order to find a defendant guilty of misdemeanor reckless driving, a fact finder must conclude  
23 that the defendant drove a motor vehicle *in willful or wanton disregard of persons or property*. That is  
24 not the case with felony eluding. In order to find the defendant guilty of felony eluding, a fact finder  
25 must conclude among other things that the defendant drove a motor vehicle and *willfully either failed or*  
26 *refused to bring the vehicle to a stop or otherwise fled or attempted to elude a peace officer*. Thus,  
27 misdemeanor reckless driving and both misdemeanor and felony eluding have different actus rei to  
28 which the culpable mental state of willfulness is applied. Of course, both misdemeanor and felony

1 eluding have several other elements that misdemeanor reckless driving does not. Misdemeanor reckless  
2 driving and eluding, whether misdemeanor or felony, each contain an element that the other does not;  
3 therefore, misdemeanor reckless driving is not the "same offense" as felony eluding under Blockburger.  
4 In drawing this conclusion, the Court notes that *misdemeanor* eluding is counted as misdemeanor  
5 reckless driving under NRS 484B.653(1). However, that does not mean the opposite is true, or that  
6 misdemeanor reckless driving is a lesser-included offense of felony eluding.

7 In the Court's view, it is also clear that felony eluding and misdemeanor reckless driving are not  
8 mutually-exclusive alternative offenses for which multiple prosecutions/punishments are prohibited.  
9 Again, the Court notes that *misdemeanor* eluding is counted as misdemeanor reckless driving by law  
10 under NRS 484B.653(1). While some might conclude that *felony* eluding and misdemeanor reckless  
11 driving are such mutually exclusive alternative offenses given NRS 484B.550(3), to read the statute in  
12 that way would render the final sentence of NRS 484B.653(1) superfluous. Such a reading is untenable.  
13 See Southern Nev. Homebuilders v. Clark County, 121 Nev. 446, 449 (2005) (statutes should be read as  
14 whole so as not to render superfluous words or phrases, or make provisions nugatory). Instead, the  
15 Court is convinced that NRS 484B.550(3), NRS 484.653(6), and NRS 484B.550(4) define mutually-  
16 exclusive alternative felony offenses for which multiple punishments are prohibited. Braunstein, *supra*.

17 **5. Order**

18 For all of the foregoing reasons, the motion to dismiss is DENIED.

19  
20 DATED this 29 day of December, 2014.

21  
22 

23 The Honorable Alvin R. Kacin  
24 District Judge/Department 2  
25  
26  
27  
28

1 CERTIFICATE OF SERVICE

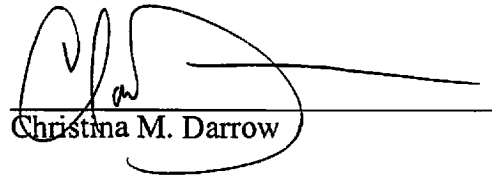
2 Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of Alvin R. Kacin, District  
3 Judge, Fourth Judicial District Court, Department 2, and that on this 30 day of December, 2014,  
4 served by the following method of service:

- 5 ( ) Regular US Mail ( ) Overnight UPS  
6 ( ) Certified US Mail ( ) Overnight Federal Express  
7 ( ) Registered US Mail ( ) Fax to # \_\_\_\_\_  
8 ( ) Overnight US Mail ( ) Hand Delivery  
9 ( ) Personal Service (X) Box in Clerk's Office

10 a true copy of the foregoing document addressed to:

11 Jonathan Schulman, Esq.  
12 Elko County District Attorney's Office  
13 [Box in Clerk's Office]

14 Roger Stewart, Esq.  
15 Elko County Public Defender's Office  
16 [Box in Clerk's Office]

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Christina M. Darrow

RS

1 CASE NO. CR-FP-14-0198

2 DEPT. NO. 2

FILED  
2015 MAR 26 AM 10:09  
ELKO CO DISTRICT COURT  
CLERK \_\_\_\_\_ DEPUTY \_\_\_\_\_ *RS*

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5  
6 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
7 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO  
8

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 JUSTIN PATRICK KELLEY,

13 Defendant.  
14

**JUDGMENT OF CONVICTION**

(Probation / Guilty Plea)

15 On January 5, 2015, the above-named Defendant, JUSTIN PATRICK KELLEY, (date  
16 of birth: 05/19/1991 {age: 23}, place of birth: Modesto, California) entered a plea of guilty to  
17 the crime of **COUNT 1: ELUDING A POLICE OFFICER, A CATEGORY B FELONY AS**  
18 **DEFINED NY NRS 484B.550 (FORMERLY NRS 484.348)**, which crime occurred on or  
19 about the 8th day of February, 2014.  
20

21 At the time said Defendant entered his plea of guilty, this Court informed him of the  
22 privilege against compulsory self-incrimination, his right to a speedy trial, his right to a trial by  
23 jury, and his right to confront his accusers. At said time Defendant was also advised of the  
24 maximum penalty for the crime to which he would plead guilty and the elements of that  
25 crime. After being so advised, the Defendant stated that he understood these rights and that  
26 he still desired this Court to accept his plea of guilty.  
27  
28

MAR 26 2015 AM 11:00

1 As a result of the foregoing, this Court on March 23, 2015, finds the above-named  
2 Defendant guilty of the crime(s) of **COUNT 1: ELUDING A POLICE OFFICER, A**  
3 **CATEGORY B FELONY AS DEFINED NY NRS 484B.550 (FORMERLY NRS 484.348)**, for  
4 which he was found guilty and hereby sentences said Defendant on this 23rd day of March,  
5 2015, as follows:  
6

7 **IT IS HEREBY ORDERED** that the Defendant shall submit to testing  
8 to determine his genetic markers in accordance with the provisions  
9 of NRS 176.0913, and shall pay the One Hundred Fifty Dollar  
10 (\$150.00) genetic testing fee in accordance with the provisions of  
11 NRS 176.0915. In addition, the Defendant shall pay a Three Dollar  
12 (\$3.00) genetic administrative assessment fee.

13 For Count 1, the Defendant is hereby sentenced to serve a maximum  
14 term of forty-eight (48) months in the Nevada Department of  
15 Corrections with a minimum parole eligibility after twelve (12)  
16 months.

17 **IT IS FURTHER ORDERED** that the sentence for Count 1 is hereby  
18 suspended and the Defendant placed on a term of probation of sixty  
19 (60) months. While on probation, the Defendant shall comply with  
20 the standard rules of probation, including the following special  
21 conditions:

- 22 1. That the Defendant shall enter and successfully complete the  
23 Fourth Judicial District Court Adult Drug Court Program;
- 24 2. That the Defendant completely abstain from the use, possession  
25 or consumption of any alcoholic beverage. Further, that the  
26 Defendant completely abstain from being present in any cocktail  
27 lounge, bar or similar establishment for which the primary  
28 purpose is serving alcoholic beverages, unless required to be so  
present during actual employment;
3. That the Defendant obtain a substance abuse evaluation at his  
own expense, and shall receive credit for completing said  
evaluation;
4. That the Defendant completely abstain from gambling, or from  
being present in a gambling establishment except for  
employment purposes.

1       **IT IS FURTHER ORDERED** in accordance with the provisions of NRS 176.062, that  
2 the Defendant shall forthwith pay to the Elko County Clerk, the sum of Twenty-five Dollars  
3 (\$25.00), as an administrative assessment fee, and judgment therefore is hereby entered  
4 against the Defendant.  
5

6       At the time said Defendant entered his plea of guilty, and at the time he was  
7 sentenced, he was represented by Roger H. Stewart, Esq.

8       THEREFORE, the Clerk of the above-entitled Court is hereby directed to enter this  
9 Judgment of Conviction as part of the record in the above-entitled matter.  
10

11       **DATED** this 25 day of March, 2015.

12  
13   
14 ALVIN R. KACIN  
15 District Court Judge  
16  
17  
18  
19  
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28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Fourth Judicial District  
3 Court, Department 2, and that on this 26 day of March, 2015, I served by hand delivery  
4 by placing a copy of said document in the agency box located in the Elko County Clerk's  
Office, a true copy of the foregoing document to:

5 Elko County District Attorney (2)

6 Roger H. Stewart, Esq.

7  
8 State of Nevada, Division of Parole & Probation

9  
10   
11 Stefanie Pattani



1 CASE NO.: CR-FP-14-198  
2 DEPT. NO.: II

FILED

2015 APR -8 A 10: 29

3  
4  
5 IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
6 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO

7  
8 THE STATE OF NEVADA,

9 Plaintiff,

10 vs.

11 JUSTIN PATRICK KELLEY,

12 Defendant.

NOTICE OF APPEAL

13 TO: MARK D. TORVINEN, Elko County District Attorney

14 NOTICE is hereby given that the above-named Defendant hereby appeals to the Supreme  
15 Court of Nevada from the Judgment of Conviction filed on March 26, 2015, in the above-entitled  
16 action.

17 This appeal is to all issues of law.

18 DATED this 7 day of April, 2015.

19  
20 FREDERICK B. LEE, JR.  
21 ELKO COUNTY PUBLIC DEFENDER  
22 569 Court Street (Physical Address)  
23 571 Idaho Street (Mailing Address)  
24 Elko, NV 89801

25 By: RHS  
26 ROGER H. STEWART  
27 Elko County Deputy Public Defender  
28 NV Bar Number 3823  
29

1 CERTIFICATE OF SERVICE

2 I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko  
3 County Public Defender's Office, and that on the 8 day of April, 2015, I served the  
4 foregoing NOTICE OF APPEAL, by delivering or causing to be delivered a copy of said document,  
5 to the following:

6 HONORABLE ALVIN R. KACIN  
7 District Judge, Department II  
8 Elko County Courthouse  
9 Elko NV 89801

10 ELKO COUNTY DISTRICT ATTORNEY'S OFFICE  
11 540 Court Street  
12 Elko NV 89801

13 OFFICE OF THE ATTORNEY GENERAL  
14 100 N. Carson Street  
15 Carson City NV 89701-4717

16   
17

18 CERTIFICATE OF MAILING

19 I hereby certify, pursuant to the provisions of NRCP 5(b), that I am an employee of the Elko  
20 County Public Defender's Office, and that on the 8 day of April, 2015 I mailed,  
21 postage prepaid, a copy of the foregoing NOTICE OF APPEAL, to the following:

22 Justin Kelley  
23 PO Box 311  
24 Wells NV 89835

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ELKO CO DISTRICT COURT  
CLERK DEPUTY

1 Case No. CR-FP-14-198  
2 Dept. II  
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6 IN THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF  
7 NEVADA, IN AND FOR THE COUNTY OF ELKO

8 ooOoo

9 THE STATE OF NEVADA :  
10 Plaintiff, :  
11 v. : MOTIONS HEARING  
12 JUSTIN PATRICK KELLEY, :  
13 Defendant. :  
14 \_\_\_\_\_/

15  
16 TRANSCRIPT OF PROCEEDINGS  
17

18 BE IT REMEMBERED that the above-entitled matter came  
19 on for hearing on December 18, 2014, at the hour of  
20 11:25 a.m. of said day, before the HONORABLE ALVIN R.  
21 KACIN, District Judge.

22  
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24  
25 Reported by Lisa M. Manley, CCR #271

APR 28 2015 AM 10:50

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A P P E A R A N C E S

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4 For the Plaintiff: JONATHAN SCHULMAN, ESQ.  
Deputy, Elko County District  
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540 Court Street, 2nd Floor  
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9 For the Defendant: ROGER H. STEWART, ESQ.  
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12 VERSION.

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17 PLEASE CONTACT THE COURT REPORTER FOR FURTHER ASSISTANCE.

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1 THE COURT: This is Case CR-FP-2014-0198. The  
2 State of Nevada is plaintiff. Justin Patrick Kelley is the  
3 defendant

4 We do have the State represented by Jonathan  
5 Schulman, Elko County deputy district attorney.

6 We have Mr. Kelley here. He is represented by  
7 counsel Roger Stewart, Elko County deputy public defender.

8 This is the date and time set for pre-trial  
9 motions hearing in this case. We have a trial coming up in  
10 January.

11 Parties ready for the hearing today?

12 MR. SCHULMAN: Yes, Your Honor.

13 MR. STEWART: Yes, Your Honor.

14 THE COURT: All right. The defendant is charged  
15 in the Information from April 30th this year with one count  
16 of eluding a police officer, a category B felony.

17 At some point he failed to appear. There was a  
18 motion -- bench warrant was issued, motion was to quash  
19 that.

20 I don't think that is an issue today because  
21 he got arrested on the bench warrant, correct?

22 MR. SCHULMAN: True.

23 THE COURT: Court will deny that motion as moot  
24 at this point.

25 You have got a motion to release on own

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1 recognizance, or, in the alternative, reduce bail. That  
2 has been opposed by the State, it looks like.

3 There was a motion to dismiss this charge filed  
4 by the defense November 26.

5 Offer of proof concerning impeachment of  
6 defendant with prior felony convictions.

7 The State, of course, has opposed the motion to  
8 dismiss, which was amended, it looks like.

9 So it's just argument on the motion to dismiss;  
10 is that correct?

11 MR. STEWART: I would think so.

12 MR. SCHULMAN: I believe so, yes.

13 THE COURT: Then the offer of proof concerning  
14 impeachment, that's just argument as well? Or is the  
15 defense submitting that?

16 MR. STEWART: We'll submit that, Your Honor.

17 THE COURT: Assuming the State can -- has  
18 certified copies of judgments of conviction, the -- from  
19 Stanislaus County, California, I would think that if the  
20 defendant testifies, if he elects to testify, the defense  
21 could ask him whether he has been convicted of a felony,  
22 and if he admits, then that's the end of the inquiry.

23 If he denies it, he can be cross-examined on  
24 his prior felony convictions, all of which were -- it looks  
25 like were suffered within the seven years prior to trial.

5

1 It looks like they occurred in 2011 and 2009. The State  
2 could cross-examine him on it. If he denies, then the  
3 State could produce certified copies of the judgment.

4 That would be the order of the Court, unless  
5 the parties have any other -- that is traditionally what we  
6 do, unless the parties have any other method you would like  
7 to approach that issue?

8 MR. SCHULMAN: No, Your Honor.

9 MR. STEWART: No.

10 THE COURT: That will be the order of the Court.

11 All right. Now, we can have argument on the  
12 motion to dismiss, if you would like. Court will take it  
13 under consideration, issue a written order later.

14 Mr. Stewart.

15 MR. STEWART: Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. STEWART: Let's see, I guess, where to start.  
18 It seems to me that as I was talking to my client earlier,  
19 I said that these -- the double jeopardy issues are not  
20 only complex but somewhat messy. It oftentimes, I think,  
21 gives all of us a headache, kind of going through it and  
22 trying to apply the Blockburger test correctly and asking  
23 what is implicated here, whether there is anything beyond  
24 that here.

25 I think one of the ways to understand it in this

6

1 case that reckless is -- certainly qualifies as a -- as an  
2 underlying offense under Blockburger, is to note what I  
3 call inverse venn circles.

4 Because I think part of the -- the times I  
5 have had a hard time working on this in my mind is when I  
6 try to apply the venn circles in the way that we normally  
7 do it in math.

8 And actually the greater offense, which  
9 includes the lesser offense, would be the smaller circle,  
10 because it's got the additional element.

11 And I think if we keep that in mind, a lot of  
12 this gets a bit easier to analyze.

13 From that, we -- I think we have laid out rather  
14 clearly why we think that even without the statutory  
15 provisions that apply here, why indeed that reckless would  
16 be an underlying one here or a lesser included offense of  
17 eluding -- of the eluding felony.

18 But even stronger comes along the argument about  
19 the statutes involved. The language about "unless reckless  
20 applies" that is in the -- in the felony eluding statute  
21 seems to take care of the fact that, obviously, reckless  
22 applied here and, obviously, he entered a no contest plea  
23 and was sentenced on it.

24 Likewise, even in the -- in the -- I guess it's  
25 the reckless statute, we have the statute itself noting

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1 that a violation of -- of eluding constitutes reckless  
2 driving. So that by statute then eluding would be that --  
3 even misdemeanor eluding would be that smaller venn circle  
4 that -- that you can't get eluding, even misdemeanor  
5 eluding, unless you're reckless.

6 And so that again the analysis would be a lesser  
7 included offense.

8 Now, we have further the notion that not only do  
9 we have Nevada statutes on point, but we have a Nevada  
10 court ruling similarly, when other jurisdictions were  
11 involved, using language about giving greater protection  
12 than the Fifth Amendment. Which we don't see that often  
13 from the Nevada Supreme Court.

14 And last, we had in the -- in the brief here,  
15 that the cases I thought were from Kansas and North  
16 Carolina that seem to be rather on point wherein  
17 jurisdictions like Nevada have connected the reckless and  
18 the eluding charges.

19 So it seems to us that those cases are quite  
20 persuasive as to what happens when a jurisdiction is doing  
21 what Nevada has done here.

22 The analysis that I give in the -- in our  
23 response to their opposition -- I think that should have  
24 been reply, I apologize, Your Honor -- is that again  
25 basically an analysis of the lessers, which I think is most

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1 easily understood when one considers again sort of those  
2 inverted venn circles.  
3 And at last, what we were trying do here with  
4 regard to -- I thought Mr. Schulman made a good argument  
5 about the purpose of the statutory language, in particular,  
6 as it applied to the felony eluding one that I quoted first  
7 in our brief.

8 He may well be right as to that's what our  
9 legislature was intending, but obviously the plain language  
10 of it didn't get it right there.

11 And we know, again, Nevada is quite strict on  
12 the idea that when you have a criminal statute and when --  
13 that these will be construed liberally in favor of the  
14 defendant when there is any doubt as to what the meaning  
15 was there.

16 And it seems to us that the -- although there  
17 is a very good argument that Mr. Schulman makes that "this  
18 is what they really meant despite what they said,"  
19 nonetheless, it's got to be construed otherwise.

20 Thank you, Your Honor.

21 THE COURT: Okay. Thank you, Mr. Stewart. Mr.  
22 Schulman.

23 MR. SCHULMAN: Thank you. As for the Blockburger  
24 argument, under Dixon, as quoted in the Opposition, the  
25 test actually inquires whether each of the offense contains

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1 an element not contained in the other; if not, they're the  
2 same offense.

3 Felony eluding requires lights and sirens to be  
4 on, unlike reckless driving. Under Blockburger we don't  
5 believe this would be double jeopardy.

6 However, I think Mr. Stewart's other argument  
7 definitely gave me more of a headache while looking at it,  
8 because that's actually a very interesting point, that what  
9 it says in the felony eluding statute that unless reckless  
10 driving applies --

11 THE COURT: Of course, you could avoid the  
12 whole headache by calling the city attorney's office,  
13 saying, "hey, why don't you drop the misdemeanor charge?"

14 MR. SCHULMAN: Well, we are going to have a  
15 separate conversation about that now.

16 But unfortunately, we're here. We are where we  
17 are right now.

18 THE COURT: Oh, yeah. We are.

19 MR. SCHULMAN: I looked at that and I'm like,  
20 "Oh, dear."

21 THE COURT: I'm sure that will be on your radar  
22 next time.

23 MR. SCHULMAN: Absolutely.

24 THE COURT: It would be easier than taking  
25 Tylenol. Go ahead.

10

1 MR. SCHULMAN: I have got to tell you, Mr.  
2 Stewart's argument gave me a pretty bad headache and raised  
3 my blood pressure when I saw this.

4 MR. STEWART: Please take it easy.

5 MR. SCHULMAN: And I promptly looked at  
6 Mr. Stewart's exhibit and found that he was correct, that  
7 his client did plead no contest to reckless driving, which  
8 I will get to also in a couple minutes.

9 However, looking at the legislative history,  
10 prior to the amendment, that "unless reckless driving  
11 applies" was not in there.

12 They had all these hearings that basically  
13 started from -- it was a metro officer down in Las Vegas  
14 that was arguing that one to six years for causing  
15 substantial bodily harm or possibly causing substantial  
16 bodily harm while running from the police would not be  
17 enough.

18 And the legislature -- and their intent  
19 obviously when they modified this statute was to strengthen  
20 that portion. That's why you have some of that language in  
21 there.

22 However, when they did that, they put in the  
23 "unless the provisions of reckless driving apply."

24 But during the whole legislative session, their  
25 thing was, the legislature's intent was to strengthen and

11

1 add a longer prison sentence for people with substantial  
2 bodily harm.

3 Nothing in there was that they wanted to weaken  
4 the felony eluding statute. Which reading things the way  
5 Mr. Stewart is arguing, it would ruin -- it would  
6 definitely lessen the penalties for running from the police  
7 and possibly causing substantial bodily harm.

8 They did -- the legislature did modify subsection  
9 3, which was -- what is now 484B.550. They took out the  
10 substantial bodily harm and put the proximate cause of  
11 damage to property. But they left subsection B, which is  
12 what is relevant in this case, to the "operating a motor  
13 vehicle in a manner when endangers or is likely to endanger  
14 any other person or the property of another person." That  
15 part they left in there. And they left that portion to be  
16 the one to six years because nobody was seriously injured.  
17 But that's why they put in that.

18 As for the actual reckless driving being a lesser  
19 included offense, if we take a look at what the City of  
20 Wells actually charged, that he pled -- that the defendant  
21 pled to, the no contest to driving an ATV westbound at a  
22 high rate of speed on the left side of Moor Avenue and into  
23 oncoming traffic, as well as driving in a willful and  
24 wanton disregard for the safety of persons or property in  
25 the area of Moor Avenue and Shoshone Avenue.

12

1 The -- what the defendant is charged with -- that  
2 comes out of this -- out of the felony case is partially  
3 what that is, but greatly expanded.

4 This was a car chase that was on more than --  
5 I'm sorry, an ATV chase that was on more than just one or  
6 two roads. It went over Shoshone, Dover, Ruby Avenue,  
7 Clover Avenue, Humboldt Avenue, as well as some private  
8 property.

9 Based on all that, we don't believe that reckless  
10 driving is a lesser included offense. This would not be  
11 double jeopardy. Ask that the Court deny the defendant's  
12 motion. Thank you.

13 THE COURT: Any reply, Mr. Stewart?

14 MR. STEWART: Yes, Your Honor. I guess the key  
15 thing with regard to the last analysis that Mr. Schulman  
16 was doing there is interesting. Essentially he is saying  
17 something like, well, Mr. Coyle only charged Mr. Kelley  
18 with doing A, B, and C, and we're charging him with A  
19 through F or G. I kind of lost track.

20 But the -- and when you get into that kind of  
21 analysis, it makes you -- I tried to research the largely  
22 discredited transactional analysis of double jeopardy.  
23 Because the basic principle is that pretty much everywhere  
24 in the United States Blockburger prevails. But he is  
25 essentially making, I think, a -- some sort of

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1 transactional thing there.

2 And way back when, when people are arguing  
3 about these transactional things, the -- the key thing  
4 would have seemed at that time to be, Was what he was  
5 charged with in the, I guess, lesser transaction, or the  
6 portion of the transaction, still enough then to find him  
7 guilty of the greater offense, the felony eluding?

8 It would seem that the very things that he read  
9 from -- that Mr. Schulman read from Mr. Coyle's complaint  
10 there, the driving on the wrong side of the street, running  
11 a light, and the fact that the testimony below at the  
12 preliminary hearing indicates that during these -- this  
13 kind of A, B, C part, the lights were on and the siren was  
14 put on; so that if one wanted to indulge in that kind of  
15 analysis, saying that -- that it's fair to do that based on  
16 there being A, B, C here, as opposed to A through G there,  
17 it would still seem that that which was alleged in Mr.  
18 Coyle's complaint certainly rises to the elements of felony  
19 eluding.

20 And so even with the discredited kind of analysis  
21 there, but going on the idea that because these items are  
22 different here, nonetheless, the Court can perhaps find  
23 some kind of area of transactional stuff that is still  
24 viable, those would also support dismissing the case  
25 because of a violation of double jeopardy.

14

1 THE COURT: Okay. I can tell you preliminarily  
2 the way it hit me when I read these briefs was that I would  
3 be surprised if, taking the Blockburger analysis, that  
4 reckless driving is a lesser included offense of eluding.

5 I think if you look at the language of the  
6 statutes, it looks to me like each requires proof of an  
7 element that the other does not.

8 The more interesting analysis, I think, is this  
9 statutory analysis. The legislature provided in NRS  
10 484B.653(1) that a violation of the eluding statute,  
11 subsection 1 of NRS 484B.550, constitutes reckless driving.

12 And I'm thinking that if the defendant had pled  
13 guilty or no contest, the Court accepted the plea at the  
14 misdemeanor level to a misdemeanor eluding charge, and he  
15 was charged here perhaps with reckless driving causing  
16 substantial bodily harm, I think the State would be in real  
17 trouble. That's what I think.

18 But you have got the inverse here. He was  
19 charged with reckless driving down there, he pled no  
20 contest, Court accepted his plea.

21 The question is whether now this precludes a  
22 felony prosecution on the eluding charge.

23 I would like to do more research on that issue. I  
24 would be amazed if there aren't some cases dealing with  
25 similar issues in other jurisdictions.

15

1 So I would like to look at this and do some  
2 additional research as well. To me, that's probably where  
3 the proverbial rubber hits the road in this case.

4 I'm real eager to read the cases cited by  
5 Mr. Stewart, including that one from North Carolina, and,  
6 you know, see what shakes out.

7 But this is definitely one where the Court has  
8 to take it under consideration. Double jeopardy, I agree  
9 with Mr. Stewart, is a -- an issue that always seems to be  
10 in flux and can be difficult.

11 Anyway, preliminarily, those are sort of my views  
12 of the case as it stands now.

13 The Court will do a written order on that.

14 Did you want to have a hearing on the motion to  
15 release on O.R.?

16 MR. SCHULMAN: Was there already one on -- at his  
17 arraignment?

18 MR. STEWART: I'm trying to remember.

19 MR. SCHULMAN: There was an arraignment, I think,  
20 about a month ago. I would have thought that would have  
21 been --

22 THE COURT: Did the Court dispose of that  
23 already, do you think?

24 MR. SCHULMAN: I would have thought they -- it  
25 would have come up already. I wasn't here for law and

16

1 motion that day, so I can't say for sure.  
2 THE COURT: Okay. Let me look at the minutes. A  
3 lot of times, I'll deal with these on -- without a written  
4 order. So I thought perhaps there would have been a  
5 written order in this case.

6 There was a motion to release on O.R.,  
7 alternatively to reduce bail, filed October 29. State  
8 opposed it. Parties argued. The Court denied the motion  
9 to release on O.R., but did order the bail reduced to  
10 \$50,000 bondable.

11 So it looks like we already had disposed of  
12 that.

13 All right. That will be the order of the  
14 Court. We'll send the defendant back to the custody of the  
15 jail in lieu of posting previously set bail.

16 MR. STEWART: One other thing, Your Honor. At  
17 least my notes indicated that today was also the contempt  
18 hearing.

19 THE COURT: For failure to appear?

20 MR. STEWART: Correct.

21 THE COURT: All right. Well, we can have that.  
22 Does the State have a position?

23 MR. SCHULMAN: We'll submit that to the Court.

24 THE COURT: Mr. Stewart.

25 MR. STEWART: Well, I talked to my client about

17

1 say?

2 DEFENDANT KELLEY: No, sir.

3 THE COURT: All right. Well, I think clearly  
4 there is contempt. He was advised of the hearing, he  
5 didn't appear.

6 Court will simply order that he serve 10 days in  
7 jail. You've got credit for time served.

8 Anything else?

9 MR. SCHULMAN: No.

10 THE COURT: Bail still has to be set in this  
11 case, though, given the defendant's criminal history, for  
12 all the reasons I indicated, I'm sure, at the last hearing.

13 You need to be in court and he wasn't.

14 Was this one of these cases where he had  
15 trouble getting to court in justice court?

16 MR. SCHULMAN: He came in 10 minutes late. I  
17 believe he said a dental problem. I know Judge Simons said,  
18 don't be late again, otherwise, whoever the district judge  
19 is would not be happy.

20 THE COURT: Sage advice. Have a nice day,  
21 everyone.

22 (WHEREUPON, the hearing was concluded at 11:48 a.m.)

23

24

25

19

1 this.

2 Obviously, he admits he is guilty. But he  
3 does wish that I would remind the Court, besides the  
4 factors in his motion for release or lower bail, that he  
5 does have a good support system.

6 And I think this was -- the fact that this was  
7 kind of shown in the sense that that was the day, I'm sure  
8 the Court remembers, one of those days where someone called  
9 in a bomb threat.

10 And he's the fellow who had it confused as to  
11 the -- which -- the other case in Wells. And when I called  
12 him up and he -- when he wasn't here in the morning, he  
13 then got confused about that and went to the court in Wells  
14 actually trying to -- thinking that was it.

15 Then he talked with me again and was told to  
16 come here. And then I was going to do the "ain't too proud  
17 to beg" thing to see if I could get the Court to arraign  
18 him that afternoon.

19 Obviously that wasn't in the cards, among  
20 other things, because of the bomb threat, even if the Court  
21 had wanted to do it.

22 As failure-to-appears go, at least this fellow  
23 made it to Elko on the right day.

24 THE COURT: All right. You don't have to make a  
25 statement. You can if you would like. Anything you want to

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4 STATE OF NEVADA )

5 ) SS.

6 COUNTY OF ELKO )

7

8 I, Lisa M. Manley, Official Reporter for the Fourth  
9 Judicial District Court, Dept. II, of the State of Nevada,  
10 in and for the County of Elko, was present in the  
11 above-entitled court on December 18, 2015;

12 The foregoing transcript is an uncertified rough draft  
13 transcription of my stenotype notes of said proceedings.  
14 This transcript has not been edited, proofread, finalized,  
15 indexed or certified.

16

17 DATED: At Elko, Nevada, this 27th day of April, 2015.

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