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3 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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Jun 08 2015 09:31 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

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6 **JUSTIN PATRICK KELLEY,**

7 Appellant,

Case No.

8 vs.

67777

9 **THE STATE OF NEVADA,**

10 Respondent.
11

12 **FAST TRACK RESPONSE**

13
14 1. **Name of party filing this fast track response:** The State of
15 Nevada.

16
17 2. **Name, law firm, address, and telephone number of attorney**
18 **submitting this fast track response:** Elko County Deputy District
19 Attorney, Jonathan L. Schulman, Office of the Elko County District
20 Attorney, 540 Court Street, Second Floor, Elko, NV 89801, (775) 738-
21 3101.
22

23
24 3. **Name, law firm, address, and telephone number of appellate**
25 **counsel, if different from trial counsel:** N/A.

26
27 4. **Proceedings raising same issues:** None
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1 **5. Procedural history:** Respondent is satisfied with the procedural
2 history set forth in the fast track statement.
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4 **6. Statement of facts:** Respondent is satisfied with the Statement of
5 facts set forth in the fast track statement.
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7 **7. Issues on appeal:** Whether the District Court was correct in denying
8 the Defendant's motion to dismiss because of double jeopardy.
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10 **8. Legal argument:** The Double Jeopardy Clause of the Fifth
11 Amendment to the United States Constitution provides that no one shall
12 "be subject for the same of-fence to be twice put in jeopardy of life or
13 limb." This protection applies to Nevada citizens through the Fourteenth
14 Amendment to the United States Constitution. Benton v. Maryland, 395
15 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), and is also
16 guaranteed by the Nevada Constitution, Nev. Const. art. 1, § 8.
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18 "In accord with principles rooted in common law and constitutional
19 jurisprudence," the Supreme Court "presume[s] that 'where two statutory
20 provisions pro-scribe the "same offen[c]e," a legislature does not intend to
21 impose two punishments for that offense." Jackson v. State, 291 P.3d 1274,
22 1278 (2012) citing Rutledge v. United States, 517 U.S. 292, 297, 116 S. Ct.
23 1241, 134 L. Ed. 2d 419 (1996) (quoting Whalen v. United States, 445
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1 U.S. 684, 691-92, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)) (interpreting
2 federal legislation). The Court should look to Blockburger to determine
3 whether two statutes penalize the same offence. Blockburger v. United
4 States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Estes v.
5 State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006) ("Nevada utilizes
6 the Blockburger test to determine whether separate offenses exist for
7 double jeopardy purposes."). The Blockburger test "inquires whether each
8 offense contains an element not contained in the other; if not, they are the
9 'same offence' and double jeopardy bars additional punishment and
10 successive prosecution." United States v. Dixon, 509 U.S. 688, 696, 113 S.
11 Ct. 2849, 125 L. Ed. 2d 556 (1993); see Barton v. State, 117 Nev. 686,
12 692, 30 P.3d 1103, 1107 (2001) ("under Blockburger, if the elements of
13 one offense are entirely included within the elements of a second offense,
14 the first offense is a lesser included offense and the Double Jeopardy
15 Clause prohibits a conviction for both offenses").

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

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21 1. It is unlawful for a person to:

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

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

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

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

7 ...

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

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

22 1. Except as otherwise provided in this section,
23 the driver of a motor vehicle who willfully fails or
24 refuses to bring the vehicle to a stop, or who
25 otherwise flees or attempts to elude a peace officer
26 in a readily identifiable vehicle of any police
27 department or regulatory agency, when given a
28 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
3 apply if, while violating the provisions of
4 subsection 1, the driver of the motor vehicle:

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

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

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

16 Applying the Blockburger test and after the Nevada Supreme Court
17 Jackson decision, felony eluding and reckless driving convictions would
18 not be double jeopardy as NRS 484B.653 and NRS 484B.550 have
19 different elements. NRS 484B.500 prohibits drivers from refusing to stop
20 for a peace officer who has his lights and sirens on while NRS 484B.653
21 prohibits driving in a willful and wanton disregard for safety of persons or
22 property. The felony portion of NRS 484B.550 has the additional element
23 of proximate cause of damage to property or operates a vehicle in a manner
24 which endangers or is likely to endanger any other person or property.
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1 Felony eluding is not the same as reckless driving as it requires that the
2 officer's lights and sirens be on, and it does not say anything about driving
3 in a willful and wanton disregard for safety of persons or property. The
4 two statutes in question do not have the same elements, and thus are not
5 double jeopardy.
6
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8 The Defendant's next argument that it is double jeopardy because of
9 NRS 484B.550(3) is a rather interesting one. "Unless the provisions of
10 NRS 484B.653 apply..." might be considered a little vague. It appears
11 pretty straight forward just by looking at it at that statement, but upon
12 longer review it can be considered a little vague. What does "unless the
13 provisions of NRS 484B.653 apply..." actually mean because the way the
14 Defendant interprets it is that NRS 484B.550(3) can never be charged. The
15 statute does not say convicted, but applies. The Defendant's interpretation
16 of that statute would prevent the State from ever charging anyone with that
17 crime because under the Defendant's thinking reckless driving is the same
18 thing as felony eluding a police officer. What if the Defendant was never
19 charged with reckless driving? The Defendant's interpretation of that
20 statute would mean that he could not be charged with felony eluding since
21 even though reckless driving wasn't charged, it would still apply to the
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1 facts of this case. Surely the legislature could not have meant that when it
2 passed NRS 484B.550 as it would not make sense to pass a statute that
3 could never be used.
4

5 Legislative history can often be useful in trying to figure out why a
6 law is amended, but that is not necessarily true in this case. Prior to the
7 2003 Legislative Session, NRS 484.348(3)¹ read
8

9 “Except as otherwise provided in subsection 2 of
10 NRS 484.377, if, while violating the provisions of
11 subsection 1, the driver of the motor vehicle:

12 (a) Is the proximate cause of the death of or
13 bodily harm to any person other than himself or
14 damage to the property of a person other than
15 himself; or

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

26 A.B. 335, 72nd (2003) session.

27 NRS 484.377(2)² prior to 2003 amendment read:

28 2. [Any] A person who does any act or neglects any duty
imposed by law while driving or in actual physical control of

¹ NRS 484.348 later became NRS 484B.550.

² NRS 484.377 later became NRS 484B.653.

1 any vehicle in willful or wanton disregard of the safety of
2 persons or property, if the act or neglect of duty proximately
3 causes the death of or substantial bodily harm to [any] a person
4 other than himself, is guilty of a category B felony and shall be
5 punished by imprisonment in the state prison for a minimum
6 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.

7
8 Id. It is clear that prior to the 2003 Legislative Session, that if the
9 driving conduct proximately caused the death or substantial bodily to
10 someone other than the driver, then the appropriate charge is felony
11 reckless driving and not felony eluding. The 2003 Legislative session
12 changed the wording of NRS 484.348(3) to: "Unless the provisions of
13 NRS 484.377 apply if, while violating the provisions of subsection 1, the
14 driver of the motor vehicle..." The amendment also struck from section
15 3(a) the language dealing with the death of or bodily harm to any person
16 other than himself because the legislature added section 4 which stated
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21 If, while violating the provisions of
22 subsection 1, the driver of the motor vehicle is the
23 proximate cause of the death of or bodily harm to
24 any other person, the driver is guilty of a category
25 B felony and shall be punished by imprisonment in
26 the state prison for a minimum term of not less
27 than 2 years and a maximum term of not more than
28 15 years, or by a fine of not more than \$10,000, or
by both fine and imprisonment.

1 The Legislature's main purpose was to increase the penalty for
2 evading a peace officer which results in death or substantial bodily harm.
3
4 Id. The assembly minutes that discussed the amendments spent most of
5 the time discussing the need to raise the penalties for causing death or
6 substantial bodily harm due to a police chase. Minutes of the Meeting of
7 the Assembly Committee on Judiciary, 72nd Session, March 28, 2003
8 available at
9 <http://www.leg.state.nv.us/Session/72nd2003/Minutes/Assembly/JUD/Final/2361.html>. There was also significant discussion about the need for the
10 use of lights and sirens, but there was no discussion why section 3 was
11 amended to state "Unless the provisions of NRS 484.377 apply if, while
12 violating the provisions of subsection 1, the driver of the motor vehicle..."
13
14 Lt. Olsen, one of the people testifying in support of the bill, did state that
15 "this particular law and the bill itself are not dealing with the normal traffic
16 stop; it is dealing with the pursuit-type situation." Id. The Legislature's
17 purpose was to toughen the penalties for eluding a police officer, not
18 weaken them. The Defendant's interpretation of the law would be the
19 opposite of what the Legislature intended when they amended NRS
20 484.348. It would have been nice if the minutes stated why the modified
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1 the first part of section 3 to what they did, but they did not. The Court
2 should find that the Legislature did not intend to weaken the felony eluding
3 law when they made that change because their purpose for the rest of the
4 bill was to stiffen the penalties if a driver caused death or substantial
5 bodily harm to a person. It would make no sense for the Legislature to
6 stiffen the laws if a driver caused death or substantial bodily harm, but then
7 weaken them as it pertains to operating a vehicle in a manner which
8 endangers or is likely to endanger any person other than the driver.

12 Finally, the Wells' City Attorney's charging document charges
13 different conduct in its case for reckless driving. The Defendant pled to
14 driving an ATV westbound at a high rate of speed, on the left side of the
15 Moor Avenue and into the oncoming traffic lane as well as driving in
16 willful or wanton disregard of the safety of persons or property in the area
17 of Moor Avenue and Shoshone Avenue. Compare that with what the State
18 charged the Defendant with in the Information. The relevant portion is:

22 The Defendant willfully failed and/or
23 refused to bring the vehicle he/she was operating
24 to a stop, and/or otherwise fled from, or attempted
25 to elude a peace officer, one Deputy Shelley, who
26 was in a readily identifiable vehicle of any police
27 department, law enforcement agency, or regulatory
28 agency, after said peace officer had given the
Defendant a signal, a flashing red lamp and a siren,

1 to bring his/her vehicle to a stop, and furthermore
2 operated the motor vehicle in a manner which
3 endangered or is likely to endanger any other
4 person or the property of any other person by
5 driving the vehicle (ATV) where the passenger
6 almost fell off several times, and/or almost hitting
7 fuel pumps and/or nearly striking buildings and/or
8 nearly striking Deputy Shelley's patrol car and/or
9 almost hitting a road marker.

10 The City charged reckless driving on Moor Avenue and Shoshone
11 Avenue, but the Defendant's actions that are the subject of this case
12 occurred on Moor Avenue as well as Shoshone Avenue, Dover Avenue,
13 Ruby Avenue, Clover Avenue, and Humboldt Avenue. Even though the
14 reckless driving came out of the same event as this case, the City only
15 charged a small segment of the entire incident. The events that led
16 specifically to the felony eluding—endangering other people—did not
17 occur on Moor Avenue, but on Shoshone Avenue, Dover Avenue, Ruby
18 Avenue, Clover Avenue, and Humboldt Avenue. Even if the Defendant's
19 interpretation of NRS 484B.653 and 484B.550 is correct, the actual
20 activity that was charged by the City and State are different so it would
21 not be double jeopardy.
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9. **Preservation of issues:** This issue was litigated in District Court, and preserved in the plea agreement.

Dated this 12 day of June, 2015.

Counsel For The Respondent

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I further certify that this fast track response complies with the type-volume limitations of NRAP 3C(h)(2) because it contains 2,408 words.

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or for failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this Fast Track

///

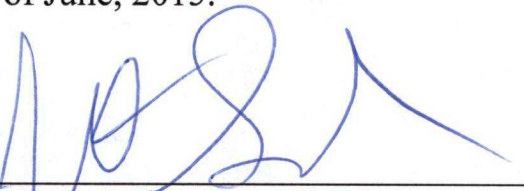
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1 Response is true and complete to the best of my knowledge, information
2 and belief.

3
4 DATED this 9th day of June, 2015.

5
6
7 
8 **JONATHAN L. SCHULMAN**
9 Elko County Deputy District Attorney
10 State Bar Number: 9180
11 Elko County District Attorney's Office
12 540 Court St., 2nd Floor
13 Elko, Nevada 89801

14
15 Counsel For The Respondent

16
17 CERTIFICATE OF COMPLIANCE

18 I hereby certify that this fast track response complies with the
19 formatting requirements of NRAP 32(a)(4), the typeface requirements of
20 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This
21 fast track response has been prepared in a proportionally spaced typeface
22 using Microsoft Office Word 2007, in size 14 point Times New Roman
23 font.

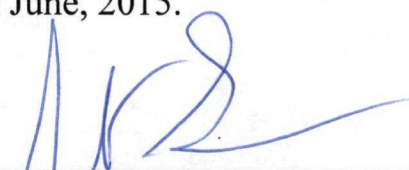
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1 I further certify that this brief complies with the type-volume
2 limitations of NRAP 32(a)(7) because, excluding the parts of the fast track
3 response exempted by NRAP32(a)(7)(C), it contains 2,408 words.
4

5 Finally, I further certify that I have read this fast track response, and
6 to the best of my knowledge, information, and belief, it is not frivolous or
7 interposed for any improper purpose. I further certify that this brief
8 complies with all applicable Nevada Rules of Appellate Procedure, in
9 particular NRAP 28(e)(1), which requires every assertion in the response
10 regarding matters in the record to be supported by a reference to the page
11 and volume number, if any, of the transcript or appendix where the matter
12 relied on is to be found. I understand that I may be subject to sanctions in
13 the event that the accompanying response is not in conformity with the
14 requirements of the Nevada Rules of Appellate Procedure.
15
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18

19 DATED this 9th day of June, 2015.
20

21
22 
23 **JONATHAN L. SCHULMAN**
24 Elko County Deputy District Attorney
25 State Bar Number: 9180
26 Elko County District Attorney's Office
27 540 Court St., 2nd Floor
28 Elko, Nevada 89801

Counsel For The Respondent

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9 Additionally, electronic service of the aforementioned Fast Track
10
11 Response in this matter filed electronically with the State in Supreme
12 Court Case Number 6777, as described above shall be made electronically
13
14 in accordance with the Master Service List for this matter as follows:

17 And

21
22
23

Kurri Sullivan
KURRI SULLIVAN
Felony Caseworker

-16-