

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK PAUL BANKA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Apr 08 2020 07:37 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 80181

RESPONDENT'S APPENDIX

MICHAEL D. PARIENTE, ESQ.
Nevada Bar #009469
JOHN G. WATKINS, ESQ.
The Pariente Law Firm, P.C.
396 Howard Hughes Pkwy., Suite 615
Las Vegas, Nevada 89169
(702) 966-5310

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar # 007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

INDEX

<u>Document</u>	<u>Page No.</u>
Amended Information, filed 07/10/18	98-101
Amended Motion to Withdraw Previously Entered Plea of Guilty, filed 11/19/19	149-161
Criminal Bindover, filed 07/06/18.....	1-24
District Court Minutes of 04/08/19 (Calendar Call).....	102
District Court Minutes of 06/17/19 (Calendar Call).....	103
District Court Minutes of 06/19/19 (Calendar Call).....	104-105
District Court Minutes of 08/14/19 (Defendant's Motion for Substitution of Attorney_	109
District Court Minutes of 10/23/19 (Sentencing)	110-111
Motion to Withdraw Previously Entered Plea of Guilty, filed 11/15/19.....	143-148
Recorder's Transcripts of 02/24/20 (Defendant's Motion for Bail Pending Appeal Pursuant to NRS 178.488 and Nevada Case Law), filed 03/04/20.....	230-253
Reply to State's Opposition to Defendant's Amended Motion to Withdraw Previously Entered Plea of Guilty, filed 12/02/19	199-229
Reply to the State's Opposition of Defendant's Motion in Arrest of Judgment Pursuant to NRS 176.525, filed 11/12/19	133-142
Reporter's Transcripts of 06/28/18 (Preliminary Hearing), filed 02/12/19.....	25-97
Second Amended Information, filed 06/24/19	106-108
State's Opposition to Defendant's Amended Motion to Withdraw Previously Entered Plea of Guilty, filed 11/25/19	162-198
State's Opposition to Defendant's Motion in Arrest of Judgment Pursuant to NRS 176.525, filed 11/06/19	112-132

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 8th day of April, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

MICHAEL D. PARIENTE, ESQ.
JOHN GLENN WATKINS, ESQ.
Counsel for Appellant

TALEEN PANDUKHT
Chief Deputy District Attorney

/s/ J. Garcia

Employee, Clark County
District Attorney's Office

TP/Ronald Evans/jg

Heather S. Hemin
CLERK OF THE COURT

JUSTICE COURT, HENDERSON TOWNSHIP

CLARK COUNTY, NEVADA

C-18-333254-1

V

STATE OF NEVADA,

Plaintiff

-vs-

JACK PAUL BANKA,
ID #: 8353273

Defendant(s)

CASE NO. 17CRH000046-0000
16FH2036X

I hereby certify the above and foregoing to be a full, true and correct copy of the
proceedings as the same appear in the above entitled matter.

WITNESS MY HAND this date: June 28, 2018.



**D.S. GIBSON, SR.,
JUSTICE OF THE PEACE
HENDERSON TOWNSHIP**

RA 000001

JUSTICE COURT, HENDERSON TOWNSHIP

CLARK COUNTY, NEVADA

CASE NO. 17CRH000046-0000
16FH2036X

STATE OF NEVADA,

Plaintiff

-vs-

JACK PAUL BANKA,
ID #: 8353273

Defendant(s)

COMMITMENT

and

ORDER TO APPEAR

An Order having been made this day by me, that JACK PAUL BANKA be held to answer upon the charge(s) of:

DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM

LEAVING THE SCENCE OF AN ACCIDENT

committed in said County, on or about the 1st day of December, 2016.

IT IS FURTHER ORDERED that unless the Defendant(s) have/has been previously released on bail or by order of the Court, that the Sheriff of the County of Clark receive the above named Defendant(s) into custody, and detain such Defendant(s) until such Defendant(s) be legally discharged, and that such Defendant(s) be admitted to bail in the sum of \$N/A Cash or Surety Bond; and

IT IS FURTHER ORDERED that said Defendant(s) is/are commanded to appear in the Eighth Judicial District Court, Clark County Courthouse, Las Vegas, Nevada at 10:00 am on the 10th day of July, 2018 for arraignment and further proceedings on the within charge.

Dated: June 28, 2018



**D.S. GIBSON, SR.,
JUSTICE OF THE PEACE FOR HENDERSON TOWNSHIP**

RA 000002

JUSTICE COURT. HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 17CRH000046-0000 16FH2036X DAVID S GIBSON - DEPT # 3
State **BANKA, JACK PAUL** 8353273 (SCOPE)
Charge(s) DUTY TO STOP AT SCENE OF ACCIDENT INVOLVING DEATH OR BOUND OVER
PERSONAL INJURY
DUI ALCOHOL AND/OR CONT/PROHIBIT SUB, ABOVE THE LEGAL BOUND OVER
LIMIT, W/SUBSTANTIAL BODILY HARM

LINKED CASES FOR: 17CRH000046-0000

CASE #	STATUS	EVENT DATE	EVENT DESCRIPTION
16PCH001779-0000	CRIMINAL COMPLAINT FIL	NO FUTURE EVENTS	72 HOUR HEARING (VIDEO) HND

**DATE, JUDGE, OFFICERS
OF COURT PRESENT**

**PROCEEDINGS
APPEARANCES - HEARING**

EVENTS

JUSTICE COURT. HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 17CRH000046-0000 16FH2036X DAVID S GIBSON - DEPT # 3
State BANKA, JACK PAUL 8353273 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
June 28, 2018 E.L. THOMSON, PRO-TEM FOR D. S. GIBSON SR, JP M. LAVELL, DDA T. BOLEY, ESQ. E. VANOSTRAND, CLK L. BRENSKE, CR	PRELIMINARY HEARING: DEFENDANT PRESENT STATE READY. DEFENSE READY. MOTION TO EXCLUDE WITNESSES. GRANTED. HAMID HIDERA CALLED AS WITNESS BY STATE. SWORN IN BY CLERK. DIRECT. CROSS. WITNESS EXCUSED. MARTIN LUBER CALLED AS WITNESS BY STATE. SWORN IN BY CLERK. DIRECT. CROSS. WITNESS EXCUSED. MAXINE LUBER CALED AS WITNESS BY STATE. SWORN IN BY CLERK. DIRECT. WITNESS EXCUSED. GREGORY LARSON CALLED AS WITNESS BY STATE. SWORN IN BY CLERK. DIRECT. WITNESS I.D.'d DEFENDANT. CROSS. WITNESS EXCUSED. JORDAN VARGANSON CALLED AS WITNESS BY STATE. SWORN IN BY CLERK. DIRECT. WITNESS I.D.'d DEFENDANT. STATE'S EXHIBITS 2 AND 3 ADMITTED BY STIPULATED. WITNESS EXCUSED. STATE'S EXHIBIT 1 ADMITTED BY STIPULATION. STATE RESTS. DEFENDANT WAIVES HIS RIGHT TO MAKE STATEMENT. DEFENSE RESTS. MOTION TO DISMISS AND ARGUMENT IN FAVOR OF SAID MOTION BY DEFENSE. ARGUMENT AGAINST MOTION BY STATE. MOTION TO DISMISS DENIED. Thereupon Court ORDERED defendant held to answer to said charge in the Eighth Judicial District Court. SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: DISTRICT COURT ARRAIGNMENT HND Date: 07/10/2018 Time: 10:00 am Location: LOWER LEVEL DISTRICT COURT ARRAIGNMENT	DISTRICT COURT ARRAIGNMENT HND Date: July 10, 2018 Time: 10:00 am Location: DISTRICT COURT ARRAIGNMENT
May 22, 2018 D. S. GIBSON SR, JP S. WATERS, DDA J. ALDABBAGH, ESQ FOR T. BOLEY, ESQ E. VANOSTRAND, CLK L. BRENSKE, CR	STATUS CHECK: DEFENDANT NOT PRESENT PRELIMINARY HEARING DATE SET SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 06/28/2018 Time: 9:30 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	

JUSTICE COURT. HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 17CRH000046-0000 16FH2036X DAVID S GIBSON - DEPT # 3
 State BANKA, JACK PAUL 8353273 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
April 10, 2018 D. S. GIBSON SR, JP M. LAVELL, DDA M. COBURN, ESQ FOR T. BOLEY, ESQ E. VANOSTRAND, CLK L. BRENSKE, CR	STATUS CHECK: DEFENDANT NOT PRESENT CONTINUED FOR POSSIBLE NEGOTIATIONS SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 05/22/2018 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
March 08, 2018 D. S. GIBSON, SR., JP M. LAVELL, DDA T. BOLEY, ESQ. E. VANOSTRAND, CLK S. GRAHAM, CR	PRELIMINARY HEARING: DEFENDANT NOT PRESENT CONTINUED FOR POSSIBLE NEGOTIATIONS SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 04/10/2018 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
January 24, 2018 D. S. GIBSON, SR., JP R. SCOW, DDA T. BOLEY, ESQ. E. VANOSTRAND, CLK L. BRENSKE, CR	MOTION: DEFENDANT NOT PRESENT MOTION BY STATE TO FILE AMENDED CRIMINAL COMPLAINT. MOTION GRANTED. AMENDED CRIMINAL COMPLAINT FILED IN OPEN COURT PRELIMINARY HEARING DATE SET FOR 03/08/2018 STANDS SURETY BOND CONTINUES	
January 23, 2018	ORDER RELEASING CERTIFIED MEDICAL RECORDS RE: MR. AND MRS. M. L. SIGNED AND FILED	
January 22, 2018	EX PARTE MOTION FOR RELEASE OF CERTIFIED MEDICAL RECORDS RE: MRS. M. L. FILED ORDER RELEASING CERTIFIED MEDICAL RECORDS RE: MRS. M. L. FORWARDED TO CHAMBERS EX PARTE MOTION FOR RELEASE OF CERTIFIED MEDICAL RECORDS RE: MR. M. L. FILED ORDER RELEASING CERTIFIED MEDICAL RECORDS RE: MR. M. L. FORWARDED TO CHAMBERS	

JUSTICE COURT. HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 17CRH000046-0000 16FH2036X DAVID S GIBSON - DEPT # 3
 State BANKA, JACK PAUL 8353273 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
January 18, 2018	SET FOR COURT APPEARANCE Event: MOTIONS HND Date: 01/24/2018 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3 Result: CRIMINAL HEARING HELD STATE'S NOTICE TO PLACE ON CALENDAR FOR THE PURPOSES OF FILING AN AMENDED CRIMINAL COMPLAINT FILED	
January 11, 2018 D. S. GIBSON, SR., JP S. WATERS, DDA T. BOLEY, ESQ. E. VANOSTRAND, CLK L. BRENSKE, CR	STATUS CHECK: DEFENDANT PRESENT PRELIMINARY HEARING DATE RESET SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 03/08/2018 Time: 9:30 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
December 07, 2017 E. LEE THOMSON, PROTEM FOR D. S. GIBSON, SR., JP S. WATERS, DDA T. BOLEY, ESQ. E. VANOSTRAND, CLK L. MURPHY, CR	STATUS CHECK: DEFENDANT NOT PRESENT CONTINUED FOR POSSIBLE NEGOTIATIONS SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 01/11/2018 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
November 21, 2017 D. S. GIBSON, SR., JP S. WATERS, DDA T. BOLEY, ESQ. E. VANOSTRAND, CLK L. BRENSKE, CR	STATUS CHECK: DEFENDANT PRESENT CONTINUED FOR POSSIBLE NEGOTIATIONS SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 12/07/2017 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	

JUSTICE COURT. HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 17CRH000046-0000 16FH2036X DAVID S GIBSON - DEPT # 3
State BANKA, JACK PAUL 8353273 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
October 16, 2017 D. S. GIBSON SR, JP S. WATERS, DDA T. BOLEY, ESQ. E. VANOSTRAND, CLK L. BRENSKE, CR	PRELIMINARY HEARING: DEFENDANT NOT PRESENT CONTINUED FOR POSSIBLE NEGOTIATIONS SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 11/21/2017 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
September 13, 2017 D. S. GIBSON SR, JP S. WATERS, DDA R. COLQUITT, ESQ FOR T. BOLEY, ESQ E. VANOSTRAND, CLK L. BRENSKE, CR	PRELIMINARY HEARING: DEFENDANT NOT PRESENT MOTION BY DEFENSE TO CONTINUE PRELIMINARY HEARING. MOTION GRANTED. PRELIMINARY HEARING RE-SET SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 10/16/2017 Time: 9:30 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
August 01, 2017 D. S. GIBSON SR, JP M. LAVELL, DDA S. SULLIVAN, CLC M. COBURN, ESQ. FOR T. BOLEY, ESQ. E. VANOSTRAND, CLK L. BRENSKE, CR	STATUS CHECK: DEFENDANT NOT PRESENT PRELIMINARY HEARING DATE SET SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 09/13/2017 Time: 9:30 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
June 28, 2017 D. S. GIBSON SR, JP M. LAVELL, DDA T. BOLEY, ESQ. E. VANOSTRAND, CLK S. GRAHAM, CR	STATUS CHECK: DEFENDANT NOT PRESENT CONTINUED FOR POSSIBLE NEGOTIATIONS AND FOR DEFENSE TO OBTAIN EXPERT WITNESS REPORTS SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 08/01/2017 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
April 13, 2017	STIPULATION AND ORDER FORWARDED TO CHAMBERS STIPULATION AND ORDER SIGNED AND FILED. COPIES RETURNED TO DISTRICT ATTORNEY'S OFFICE VIA 1K MILER.	

JUSTICE COURT. HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 17CRH000046-0000 16FH2036X DAVID S GIBSON - DEPT # 3
 State BANKA, JACK PAUL 8353273 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
March 23, 2017 D. S. GIBSON SR, JP M. LAVELL, DDA F. COFER, ESQ. FOR T. BOLEY, ESQ. E. VANOSTRAND, CLK L. BRENSKE, CR	PRELIMINARY HEARING: DEFENDANT NOT PRESENT CONTINUED FOR STATUS CHECK ON EXPERT WITNESS DOCUMENTS SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 06/28/2017 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
February 21, 2017 D. S. GIBSON SR, JP M. LAVELL, DDA T. BOLEY, ESQ. E. VANOSTRAND, CLK L. BRENSKE, CR	INITIAL ARRAIGNMENT: DEFENDANT NOT PRESENT DEFENSE COUNSEL ACKNOWLEDGES, WAIVED READING OF THE COMPLAINT BY AND THROUGH HIS ATTORNEY, DEFENDANT ASKED FOR DATE CERTAIN FOR HEARING WAIVED 15 DAY RULE PRELIMINARY HEARING DATE SET SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 03/23/2017 Time: 9:30 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3	
January 19, 2017	SUMMONS RETURNED VIA MAIL WITHOUT RETURN STICKER. MAILED AGAIN TO ADDRESS.	
January 11, 2017	COMPLAINT FILED SET FOR COURT APPEARANCE Event: ARRAIGNMENT SUMMONS Date: 02/21/2017 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3 Result: ARRAIGNMENT HEARING HELD SUMMONS ISSUED, FILED AND MAILED	
December 06, 2016	BAIL POSTED \$153,000 SURETY BOND POSTED. Charge #1: DUTY TO STOP AT SCENE OF ACCIDENT INVOLVING DEATH OR PERSONAL INJURY	

JUSTICE COURT. HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
DOCKET SHEET...CRIMINAL

CASE # 17CRH000046-0000 16FH2036X DAVID S GIBSON - DEPT # 3
State BANKA, JACK PAUL 8353273 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
December 05, 2016	FIRST APPEARANCE HELD BAIL SET: \$153,000 CASH OR SURETY BOND The following event: 72 HOUR HEARING (VIDEO) HND scheduled for 12/05/2016 at 8:30 am has been resulted as follows: Result: FIRST APPEARANCE HELD Judge: BATEMAN, SAM Location: DEPARTMENT 1	
December 02, 2016	PROBABLE CAUSE DETERMINATION	
December 01, 2016	SET FOR FIRST APPEARANCE Event: 72 HOUR HEARING (VIDEO) HND Date: 12/05/2016 Time: 8:30 am Judge: BATEMAN, SAM Location: DEPARTMENT 1 Result: FIRST APPEARANCE HELD	

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA #8353273,

Defendant.

HENDERSON JUSTICE COURT
1/24/18
FILED IN OPEN COURT

17CRH000046-0000

CASE NO: 16FH2036X

DEPT NO: III

AMENDED

CRIMINAL COMPLAINT

The Defendant above named having committed the crime of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430 - NOC 53906) and LEAVING THE SCENE OF AN ACCIDENT (Category B Felony - NRS 484E.010 - NOC 53743), in the manner following, to-wit: That the said Defendant, on or about the 1st day of December, 2016, at and within the County of Clark, State of Nevada,

COUNT 1 - DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM

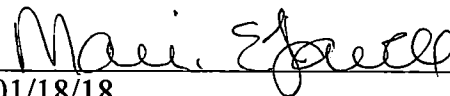
did then and there willfully and unlawfully drive and/or be in actual physical control of a motor vehicle on a highway or on premises to which the public has access, to wit: 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada, Defendant being responsible under one or more of the following theories of criminal liability, to wit: 1) while under the influence of intoxicating liquor to any degree, however slight, which rendered him incapable of safely driving and/or exercising actual physical control of a motor vehicle, 2) while he had a concentration of alcohol of .08 or more in his blood, and/or 3) when Defendant was found to have a concentration of alcohol of .08 or more in his blood sample which was taken within two (2) hours after driving and/or being in actual physical control of a vehicle, defendant failing to pay full time and attention to his driving, and/or failing to exercise due care, and/or

1 failing to drive in a careful and prudent manner, which acts, or neglect of duties, proximately
2 caused the vehicle being driven by defendant to strike and collide with a vehicle being
3 driven by MAXINE LUBER, said collision proximately causing substantial bodily harm to
4 MAXINE LUBER and/or MARTIN LUBER.

5 COUNT 2 - LEAVING THE SCENE OF AN ACCIDENT

6 did then and there willfully, unlawfully, and feloniously, while driving a motor vehicle
7 on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive,
8 Henderson, Clark County, Nevada and after being involved in an accident resulting in bodily
9 injury or death to MAXINE LUBER and/or MARTIN LUBER, fail to immediately stop his
10 vehicle at the scene of the accident, or as close thereto as possible.

11 All of which is contrary to the form, force and effect of Statutes in such cases made and
12 provided and against the peace and dignity of the State of Nevada. Said Complainant makes
13 this declaration subject to the penalty of perjury.

14
15 
16 01/18/18

17
18
19
20
21
22
23
24
25
26
27 16FH2036X/erg/L-5
28 HPD EV# 1621674
(TK)

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
COURT

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA #8353273,

Defendant.

2017 JAN 11 A 10: 26 EVO

FILED

CASE NO: 16FH2036X

DEPT NO: 3

17C7A060046-0000

CRIMINAL COMPLAINT

The Defendant above named having committed the crime of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430 - NOC 53906) and LEAVING THE SCENE OF AN ACCIDENT (Category B Felony - NRS 484E.010 - NOC 53743), in the manner following, to-wit: That the said Defendant, on or about the 1st day of December, 2016, at and within the County of Clark, State of Nevada,

COUNT 1 - DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM

did then and there willfully and unlawfully drive and/or be in actual physical control of a motor vehicle on a highway or on premises to which the public has access, to wit: 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada, Defendant being responsible under one or more of the following theories of criminal liability, to wit: 1) while under the influence of intoxicating liquor to any degree, however slight, which rendered him incapable of safely driving and/or exercising actual physical control of a motor vehicle, 2) while he had a concentration of alcohol of .08 or more in his blood, and/or 3) when Defendant was found to have a concentration of alcohol of .08 or more in his blood sample which was taken within two (2) hours after driving and/or being in actual physical control of a vehicle, defendant failing to pay full time and attention to his driving, and/or failing to exercise due care, and/or

1 failing to drive in a careful and prudent manner, which acts, or neglect of duties, proximately
2 caused the vehicle being driven by defendant to strike and collide with a vehicle being driven
3 by MAXINE LUBER, said collision proximately causing substantial bodily harm to MAXINE
4 LUBER.

5 COUNT 2 - LEAVING THE SCENE OF AN ACCIDENT

6 did then and there willfully, unlawfully, and feloniously, while driving a motor vehicle
7 on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive,
8 Henderson, Clark County, Nevada and after being involved in an accident resulting in bodily
9 injury or death to MAXINE LUBER, fail to immediately stop his vehicle at the scene of the
10 accident, or as close thereto as possible.

11 COUNT 3 - LEAVING THE SCENE OF AN ACCIDENT

12 did then and there willfully, unlawfully, and feloniously, while driving a motor vehicle
13 on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive,
14 Henderson, Clark County, Nevada and after being involved in an accident resulting in bodily
15 injury or death to MARTIN LUBER, fail to immediately stop his vehicle at the scene of the
16 accident, or as close thereto as possible.

17 All of which is contrary to the form, force and effect of Statutes in such cases made and
18 provided and against the peace and dignity of the State of Nevada. Said Complainant makes
19 this declaration subject to the penalty of perjury.

20
21
22 01/10/17
23
24
25
26

27 16FH2036X/mah
28 HPD EV# 1621674
(TK)

HENDERSON
JUSTICE COURT

2018 JAN 23 A 9:04

FILED

1 STEVEN B. WOLFSON
2 Clark County District Attorney
3 Nevada Bar #001565
4 MARIA E. LAVELL
5 Chief Deputy District Attorney
6 Nevada Bar #010120
7 200 Lewis Avenue
8 Las Vegas, Nevada 89155-2212
9 (702) 671-2500
10 Attorney for Plaintiff

11 JUSTICE COURT, HENDERSON TOWNSHIP
12 CLARK COUNTY, NEVADA

13 THE STATE OF NEVADA,
14 Plaintiff,

15 -vs-

16 JACK PAUL BANKA,
17 #8353273
18 Defendant.

19 CASE NO: 16FH2036X

20 DEPT NO: 3

17CPH000046-000

21 ORDER RELEASING CERTIFIED MEDICAL RECORDS

22 Upon the ex parte application and representation of STEVEN B. WOLFSON, Clark
23 County District Attorney, by and through MARIA E. LAVELL, Chief Deputy District
24 Attorney, that certain records containing protected health information are necessary for the
25 prosecution of the above-captioned criminal case are being held in the custody of ST. ROSE
26 SIENNA HOSPITAL; that said information is relevant and material to a legitimate law
27 enforcement inquiry; that the application was specific and limited in scope to the extent
28 reasonably practicable in light of the purpose for which the information is sought; and that de-
identified information could not reasonably be used;

///

///

///


///

///

1 NOW THEREFORE, pursuant to 45CFR164.512(f), and GOOD CAUSE
2 APPEARING, ST. ROSE SIENNA HOSPITAL, shall release to a representative of the
3 DISTRICT ATTORNEY'S OFFICE, any and all certified medical records concerning
4 diagnosis, prognosis, and/or treatment of MAXINE LUBER, whose date of birth is May 8,
5 1932, for the time period December 1, 2016.


6 IT IS HEREBY ORDERED.

7 DATED this 23 day of January, 2018.

8
9 
10 JUSTICE OF THE PEACE

11 STEVEN B. WOLFSON
12 Clark County District Attorney
13 Nevada Bar #001565

14 BY


15 MARIA E. LAVELLE
16 Chief Deputy District Attorney
17 Nevada Bar #010120
18
19
20
21
22
23
24
25
26

27 erg/L-5
28

HENDERSON
JUSTICE COURT
2018 JAN 23 A 9:03
SM
FILED

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273

Defendant.

17921-000046-0000
CASE NO: 16FH2036X

DEPT NO: 3

ORDER RELEASING CERTIFIED MEDICAL RECORDS

Upon the ex parte application and representation of STEVEN B. WOLFSON, Clark County District Attorney, by and through MARIA E. LAVELL, Chief Deputy District Attorney, that certain records containing protected health information are necessary for the prosecution of the above-captioned criminal case are being held in the custody of ST. ROSE SIENNA HOSPITAL; that said information is relevant and material to a legitimate law enforcement inquiry; that the application was specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and that de-identified information could not reasonably be used;

///

///

///

///

///

RA 000016


1 NOW THEREFORE, pursuant to 45CFR164.512(f), and GOOD CAUSE
2 APPEARING, ST. ROSE SIENNA HOSPITAL, shall release to a representative of the
3 DISTRICT ATTORNEY'S OFFICE, any and all certified medical records concerning
4 diagnosis, prognosis, and/or treatment of MARTIN LUBER, whose date of birth is March 29,
5 1932, for the time period December 1, 2016.

6 IT IS HEREBY ORDERED.

7 DATED this 23 day of January, 2018.

8
9 
10 JUSTICE OF THE PEACE

11 STEVEN B. WOLFSON
12 Clark County District Attorney
13 Nevada Bar #001565

14 BY 
15 MARIA E. LAVELLE
16 Chief Deputy District Attorney
17 Nevada Bar #010120
18
19
20
21
22
23
24
25
26

27 erg/L-5
28

HENDERSON JUSTICE
JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

2018 JAN 18 P 2:35

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273

Defendant.

FILED

17CRH000046-0000

CASE NO: 16FH2036X

DEPT NO: 3

STATE'S NOTICE TO PLACE ON CALENDAR

Upon the application of STEVEN B. WOLFSON, Clark County District Attorney, it is hereby requested that the above entitled matter be placed on the arraignment calendar on the 24th day of January, 2018, at 9:00 o'clock A.M. for the purpose of filing an Amended Criminal Complaint.

DATED this 18th day of January, 2018.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY

Maria E. Lavell
MARIA E. LAVELL

BY

CLERK OF THE COURT

Chief Deputy District Attorney
Nevada Bar #010120

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing was made this 18th day of January, 2018 by facsimile transmission to:

THOMAS BOLEY, ESQ.
(702) 475-6567

BY /s/ E. Goddard

E. Goddard

Secretary for the District Attorney's Office

erg/L-5

1 STEVEN B. WOLFSON
2 Clark County District Attorney
3 Nevada Bar #001565
4 MARIA E. LAVELL
5 Chief Deputy District Attorney
6 Nevada Bar #010120
7 200 Lewis Avenue
8 Las Vegas, Nevada 89155-2212
9 (702) 671-2500
10 Attorney for Plaintiff

HENDERSON JUSTICE
COURT

2010 JAN 22 A 10:53

FILED

7 JUSTICE COURT, HENDERSON TOWNSHIP
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 JACK PAUL BANKA,
13 #8353273

14 Defendant.

CASE NO: 16FH2036X

DEPT NO: 3

15 **EX PARTE MOTION FOR RELEASE OF CERTIFIED MEDICAL RECORDS**

16 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
17 District Attorney, through MARIA E. LAVELL, Chief Deputy District Attorney, and moves
18 this Honorable Court for an Order Releasing which includes protected health information
19 being held by ST. ROSE SIENNA HOSPITAL consisting of any and all certified
20 medical records for patient MARTIN LUBER, DOB: March 29, 1932, concerning diagnosis,
21 prognosis and/or treatment given or provided on or about December 1, 2016, to be released
22 to a representative of the DISTRICT ATTORNEY'S OFFICE for the purpose of prosecuting
23 the above referenced case charging the crime of DRIVING UNDER THE INFLUENCE
24 RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110,
25 484C.430, 484C.105 - NOC 53906) and LEAVING THE SCENE OF AN ACCIDENT
26 (Category B Felony - NRS 484E.010 - NOC 53743).

27 ///

28 ///

RA 000019

1 Pursuant to 45CFR164.512(f), Movant represents that the information sought is
2 relevant and material to a legitimate law enforcement inquiry; that the request is specific and
3 limited in scope to the extent reasonably practicable in light of the purpose for which the
4 information is sought; and that de-identified information could not reasonably be used.

5 DATED this 18th day of January, 2018.

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY 
10 MARIA E. LAVELL
11 Chief Deputy District Attorney
12 Nevada Bar #010120
13
14
15
16
17
18
19
20
21
22
23
24
25
26

27 erg/L-5
28

1 STEVEN B. WOLFSON
2 Clark County District Attorney
3 Nevada Bar #001565
4 MARIA E. LAVELL
5 Chief Deputy District Attorney
6 Nevada Bar #010120
7 200 Lewis Avenue
8 Las Vegas, Nevada 89155-2212
9 (702) 671-2500
10 Attorney for Plaintiff

HENDERSON JUSTICE
COURT

2018 JAN 22 A 10: 53

FILED

7 JUSTICE COURT, HENDERSON TOWNSHIP
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10 Plaintiff,

11 -vs-

12 JACK PAUL BANKA,
13 #8353273

14 Defendant.

17CR400046 (900)
CASE NO: 16FH2036X

DEPT NO: 3

15 **EX PARTE MOTION FOR RELEASE OF CERTIFIED MEDICAL RECORDS**

16 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
17 District Attorney, through MARIA E. LAVELL, Chief Deputy District Attorney, and moves
18 this Honorable Court for an Order Releasing which includes protected health information
19 being held by ST. ROSE SIENNA HOSPITAL consisting of any and all certified medical
20 records for patient MAXINE LUBER, DOB: May 8, 1932, concerning diagnosis, prognosis
21 and/or treatment given or provided on or about December 1, 2016, to be released to a
22 representative of the DISTRICT ATTORNEY'S OFFICE for the purpose of prosecuting the
23 above referenced case charging the crime of DRIVING UNDER THE INFLUENCE
24 RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110,
25 484C.430, 484C.105 - NOC 53906) and LEAVING THE SCENE OF AN ACCIDENT
26 (Category B Felony - NRS 484E.010 - NOC 53743).

27 ///

28 ///

RA 000021

1 Pursuant to 45CFR164.512(f), Movant represents that the information sought is
2 relevant and material to a legitimate law enforcement inquiry; that the request is specific and
3 limited in scope to the extent reasonably practicable in light of the purpose for which the
4 information is sought; and that de-identified information could not reasonably be used.

5 DATED this 18th day of January, 2018.

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY Maria E. Lavell
10 MARIA E. LAVELL
11 Chief Deputy District Attorney
12 Nevada Bar #010120
13
14
15
16
17
18
19
20
21
22
23
24
25
26

27 erg/L-5
28

1 **STIP**

2 **BOLEY & ALDABBAGH, LTD.**

3 **THOMAS D. BOLEY, ESQ.**

4 Nevada Bar No. 11061

5 1900 E. Bonanza Rd.

6 Las Vegas, NV 89101

7 T: (702) 435-3333

8 F: (702) 475-6567

9 *Attorney for Defendant*

10 **JUSTICE COURT - HENDERSON TOWNSHIP**

11 **CLARK COUNTY, NEVADA**

12 **STATE OF NEVADA,**

13 **Plaintiff,**

14 **vs.**

15 **JACK PAUL BANKA #8353273,**

16 **Defendant.**

17 **CASE NO: 16FH2036X**

18 **DEPT NO: 3**

19 **STIPULATION AND ORDER**

20 IT IS HEREBY STIPULATED AND AGREED by and between the above-captioned
21 parties, through their undersigned counsel of record, that the blood samples of the above-named
22 Defendant, currently in the possession of the Henderson Police Department ("HPD") Forensic
23 Laboratory, located at 5605 W. Badura Avenue, Suite 120-B, Las Vegas, Nevada 89118,
24 regarding LVMPD Incident No. 16-21674, may be released to the Defendant's attorney or his
25 Agent, Daniel Berkabile, for the purpose of having said blood samples retested to determine its
26 alcohol content under the following terms and conditions:

- 27 1. The Defendant's attorney or his agent shall be responsible for picking up the
28 blood kit/samples from the HPD evidence vault;
2. The Defendant's attorney or his agent shall record and preserve the chain of
custody for the blood kit/samples;
3. The laboratory utilized by the Defendant for the retesting of the blood sample
shall record and maintain the chain of custody of the blood kit/samples, and shall

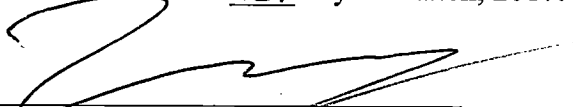
HENDERSON
JUSTICE COURT

2017 APR 13 P 5:44

FILED SM

- 1 preserve the integrity of the blood kit/samples during the retesting procedure;
- 2 4. The Defendant's attorney or his agent shall promptly return the blood kit/samples
- 3 to the HPD evidence vault in substantially the same condition as it was
- 4 received (with the exception of accessing the blood kit/samples for the purposes
- 5 of the retesting process);
- 6 5. The Defendant waives any claims relating to chain of custody for said blood
- 7 sample arising from his retesting of the blood; and
- 8 6. The Defendant stipulates to the admission of the blood test results from
- 9 HPD's testing at his bench trial in the event that the blood samples are lost.

10 DATED this 12 day of ~~March~~^{April}, 2017.

11 


12 **THOMAS D. BOLEY, ESQ.**

13 Nevada Bar No. 11061

14 **BOLEY & ALDABBAGH, LTD**

15 1900 E. Bonanza Rd.

16 Las Vegas, Nevada 89101

17 

18 **MARIA LAVELL, ESQ.**

19 Nevada Bar No. 10120

20 **DEPUTY DISTRICT ATTORNEY**

21 200 Lewis Avenue

22 Las Vegas, Nevada 89101

23 **ORDER**

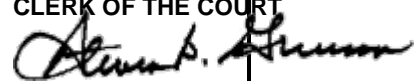
24 The parties having entered into the above stipulation, the same is HEREBY ORDERED.

25 DATED this 13 day of ~~March~~^{April}, 2017.

26 

27 JUSTICE COURT JUDGE

28



TRAN

CASE NO. C333254

IN THE JUSTICE'S COURT OF HENDERSON TOWNSHIP
COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,)	
)	
Plaintiff,)	
vs.)	
)	CASE NO. 16FH2036X
)	
JACK PAUL BANKA,)	
)	
Defendant.)	
_____)	

REPORTER'S TRANSCRIPT
OF

PRELIMINARY HEARING
BEFORE THE HONORABLE E. LEE THOMSON, PRO TEM
JUSTICE OF THE PEACE

THURSDAY, JUNE 28, 2018

APPEARANCES:

For the State: MARIA LAVELL
Chief Deputy District Attorney

For the Defendant: THOMAS BOLEY, ESQ.

Reported by: Lisa Brenske, CCR #186

RA 000025

12:00AM

1

W I T N E S S E S

2

HAMID HAIDER

3

Direct Examination by Ms. Lavell

5

Cross-Examination by Mr. Boley

15

4

MARTIN LUBER

12:00AM

5

Direct Examination by Ms. Lavell

18

Cross-Examination by Mr. Boley

26

6

MAXINE LUBER

7

Direct Examination by Ms. Lavell

28

8

GREGORY LARSON

Direct Examination by Ms. Lavell

34

Cross-Examination by Mr. Boley

49

9

12:00AM

10

JORDAN VARGASON

Direct Examination by Ms. Lavell

54

Cross-Examination by Mr. Boley

67

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

12:00AM

1

INDEX OF EXHIBITS

2

ExhibitDescriptionAdmitted

3

STATE'S 1

CAD LOG

69

4

STATE'S 2

BLOOD DRAW

65

12:00AM

5

STATE'S 3

LAB REPORT

66

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

RA 000027

12:00AM 1 HENDERSON, NEVADA, JUNE 28, 2018

2

3 * * * * *

4

12:00PM 5 THE COURT: Calling 16FH2036X, Jack Paul

6 Banka. This is the time set for preliminary hearing.

7 State states they're ready to proceed.

8 MS. LAVELL: Yes, your Honor, and I'm

9 assuming the defense would invoke the exclusionary

12:00PM 10 rule. I've already asked everyone to step out but the

11 first witness and that is Dr. Hamid Haider.

12 THE COURT: Okay.

13 MS. LAVELL: May I remain seated while I

14 question the doctor?

12:00PM 15 THE COURT: You may.

16 THE CLERK: Raise your right hand.

17 Do you solemnly swear that the testimony

18 that you are about to give will be the truth, the whole

19 truth and nothing but the truth, so help you God?

12:00PM 20 THE WITNESS: Yes.

21 THE CLERK: Please be seated.

22 Please state your first and last name and

23 spell each for the record.

24 THE WITNESS: First name is Hamid,

12:00PM 25 H-A-M-I-D. Last name is Haider, H-A-I-D-E-R. I am a

RA 000028

12:00PM 1 physician.

2 MS. LAVELL: May I proceed, your Honor?

3 THE COURT: You may.

4 MS. LAVELL: For the record, your Honor,

12:01PM 5 the parties have stipulated to the doctor's expertise

6 but I will be asking just a couple of questions for the

7 record.

8 MR. BOLEY: We are going to stipulate that

9 he's an internist and qualified as such.

12:01PM 10 MS. LAVELL: That's correct.

11 THE COURT: Okay. That's the full extent

12 of the stipulation?

13 MS. LAVELL: I will lay a foundation.

14 THE COURT: Right.

12:01PM 15

16 **HAMID HAIDER,**

17 having been first duly sworn, did testify as follows:

18 DIRECT EXAMINATION

19 BY MS. LAVELL:

12:01PM 20 Q. Doctor, where are you currently employed?

21 A. I'm employed at VA right now, but I am

22 also going to hospital as an independent hospitalist.

23 Q. Is one of the hospitals that you have

24 privileges at St. Rose Dominican Hospital on the Siena

12:01PM 25 campus?

12:01PM 1 A. Yes.

2 Q. And as an internist do you have the

3 responsibility of kind of overseeing various other

4 doctors that have specialties?

12:01PM 5 A. Right. Not overseeing, but I depend on

6 their expertise.

7 Q. Ultimately at the end of the day who makes

8 the decision to determine a patient is ready for

9 discharge?

12:02PM 10 A. For ready for discharge it will be my

11 decision, but based on the recommendation of other

12 specialties, if there's another specialty involved.

13 Q. As part of your job, and that doesn't mean

14 in every case, but do you have occasion to review

12:02PM 15 medical reports that were generated by other doctors in

16 regards to patients?

17 A. Yes.

18 Q. And in fact is that part of your

19 responsibility as an internist to at least review

12:02PM 20 medical reports that other doctors have generated?

21 A. Of course.

22 Q. Did I ask you to review the medical

23 reports associated with Maxine Lubner who was admitted

24 to St. Rose Dominion Hospital Siena campus on

12:03PM 25 September 1st, 2016?

12:03PM 1 A. Yes. I reviewed it today.

2 Q. And in regards to this particular

3 individual Maxine Luber did you have any direct

4 responsibility in her treatment or just -- I don't want

12:03PM 5 to say supervising or overseeing, but just determining

6 whether all necessary treatment was done?

7 A. Yes. Because I'm the -- if the case is

8 assigned to me, I'm the attending physician for that

9 particular case.

12:03PM 10 Q. And now this is quite sometime ago and I'm

11 assuming you've seen numerous patients since that; is

12 that fair to say?

13 A. I see 25, 30 patients a day so I don't

14 remember.

12:03PM 15 Q. After reviewing the medical records do you

16 recall what brought her into the hospital?

17 A. Based on the medical record, but, yeah, I

18 do not remember anything.

19 Q. Based on the medical records after your

12:03PM 20 review what brought her to the hospital?

21 A. Correct.

22 Q. Do you know what brought her to the

23 hospital?

24 A. Yeah. According to the record there was a

12:04PM 25 multi vehicle accident.

12:04PM 1 Q. And as a result of the motor vehicle
2 accident was it determined that she suffered various
3 injuries?

4 A. Based on the medical records it says
12:04PM 5 patient had a multi vehicle accident and certain injury
6 happened. But I can't say whether it was related or
7 not. I can't say that for sure.

8 Q. So you can't say whether the injuries were
9 related to the motor vehicle accident?

12:04PM 10 A. Most likely it is, but not a hundred
11 percent for sure.

12 Q. You didn't actually see her injured?

13 A. No.

14 Q. Do you recall the various injuries that
12:04PM 15 she sustained?

16 A. Based on the medical record, yes.

17 Q. And everything I'm asking you based on
18 your prior testimony is just based on your review of
19 the medical records, Doctor, and thank you for being so
12:04PM 20 clear. But we've made that record. What were the
21 injuries that were suffered by Miss Luber?

22 A. Sternum and rib fractures.

23 Q. Where is the sternum on the body?

24 A. The sternum is in the ribcage right here.

12:05PM 25 Q. And you're pointing to the middle of your

12:05PM 1 chest?

2 A. Correct.

3 Q. And do you recall how many fractures the

4 sternum suffered?

12:05PM 5 MR. BOLEY: Judge, I am going to object to

6 this line of questioning in general because I think the

7 doctor has testified that actually the diagnosis and

8 the work and the direct contact with the patient was

9 done by another doctor. So this review of medical

12:05PM 10 records wouldn't meet the Fry standard.

11 MS. LAVELL: Judge, doctors every day in

12 this state and most other states, I assume, can testify

13 in regards to medical records which are deemed to be

14 business records created by another doctor. I don't

12:05PM 15 know of a case where the State brought in very specific

16 doctors that dealt with trauma patients because you

17 have the ER doctor, you have surgeons. You have

18 various other doctors not necessarily connected to this

19 case but connected to cases in general. And the State

12:06PM 20 calls in one doctor that is able to testify to the

21 injuries and treatment based on the medical records.

22 So that would be the State's response. I don't know

23 that it is a legitimate objection. Well, it's a

24 legitimate objection, but I don't believe it's a

12:06PM 25 correct objection.

12:06PM 1 MR. BOLEY: If I may respond.

2 THE COURT: You may.

3 MR. BOLEY: I think what the State is

4 getting at here is there's trying to prove that there

12:06PM 5 was substantial bodily harm of course and this doctor

6 has been very clear that he testified what he remembers

7 from the medical records and I believe to rise to that

8 level beyond a reasonable doubt, which we don't have to

9 do today, but we need to get towards discoverable

12:06PM 10 evidence in a criminal case, we would need the actual

11 trauma surgeon, the diagnoser or somebody that had

12 personal contact with this patient.

13 MS. LAVELL: I guess my response to that

14 argument would be what would the State's position be if

12:06PM 15 the individual that actually treated -- let's just say

16 the emergency room doctor -- doesn't remember this

17 individual but for reviewing the medical reports. And

18 I think its reasonable that in most cases doctors do

19 not remember a specific individual. If I said hey,

12:07PM 20 Doctor, you treated Maxine Luber back in 2012, tell me

21 how she presented, they are going to have to review the

22 medical records. That's why there are medical records.

23 The same thing with the trauma surgeon. It's unlikely

24 that if I had the trauma surgeon involved here, the

12:07PM 25 trauma surgeon would be able to remember what happened

12:07PM 1 without reviewing the records.

2 So there's absolutely nothing in the

3 statute or case law that the State is aware of that

4 says that a doctor cannot testify based on a review of

12:07PM 5 the records. And the doctor did testify that in this

6 particular case he was the primary physician which

7 means he reviewed all of the documents in this case.

8 So would counsel have me bring in the emergency room

9 doctor and the trauma doctor and if she had surgery the

12:08PM 10 surgeon? We're not required to do that. This doctor

11 is in a position to testify he was connected with this

12 case and I think that his testimony as to her injuries

13 after reviewing the report is completely allowable.

14 MR. BOLEY: Judge, my objection is

12:08PM 15 essentially a hearsay objection. If you look at a

16 medical record that you created, of course you can

17 refresh your recollection. But if it's not a medical

18 record that you created, that's hearsay. Pure and

19 simple. This is the statement of another person

12:08PM 20 intended to prove the matter asserted. Thank you.

21 THE COURT: I believe there is the issue

22 here as to a person giving some expert testimony plus

23 they're testifying off of a business record that they

24 are associated with. So at the moment the objection is

12:08PM 25 overruled. Proceed.

12:08PM 1 MS. LAVELL: Thank you.

2 BY MS. LAVELL:

3 Q. Doctor, I believe my question, and I'm

4 very long winded so I may have forgotten it, but I

12:08PM 5 believe my question was how many injuries or fractures

6 did she have to the sternum?

7 A. So first I have to explain what the

8 sternum is. The sternum is kind of like in the middle

9 of the ribcage. So both sides of it is -- the ribs are

12:09PM 10 attached to the sternum and there's like at the top

11 portion of the sternum is called the manubrium and

12 there is -- if I remember correctly based on the

13 records there's a fracture on the manubrium under the

14 sternum and there was like two fracture or three

12:09PM 15 fracture on the right side and there was seven or eight

16 on the left side. Something like that.

17 Q. Now, are we moving from the sternum to the

18 ribs when you're talking about the seven or eight?

19 A. Yes.

12:09PM 20 Q. So in addition to the fractures on the

21 sternum there were multiple fractures to this

22 individual's ribcage?

23 A. On the rib right and left.

24 Q. Was there any to your knowledge medical

12:10PM 25 intervention associated with the fractures?

12:10PM 1 A. No. Because in that kind of fracture you
2 cannot do anything, you cannot -- you don't do
3 anything. It's just leave it like that. But it's
4 going to cause a lot of pain when you breathe in and
12:10PM 5 all these things because you cannot take deep breath
6 and as soon as you take a deep breath it is going to
7 cause more pain. So they just keep it to like heal by
8 itself with pain medication.

9 Q. And was she prescribed pain medication?

12:10PM 10 A. Yes.

11 Q. And what pain medication?

12 A. I'm not sure.

13 Q. Do you want to look at the medical
14 records? Would that help you?

12:10PM 15 A. Yeah.

16 MS. LAVELL: May I approach?

17 THE COURT: You may.

18 THE WITNESS: Yes.

19 BY MS. LAVELL:

12:11PM 20 Q. So in looking at the medical records did
21 that refresh your recollection as to whether or not she
22 was prescribed any pain medication upon release?

23 A. Upon release I know medication was given
24 when she was in the hospital.

12:11PM 25 Q. Well, I am going to tell you, you don't

12:12PM 1 need to find that specifically. Would it make sense
2 that someone -- did you find it?

3 A. No. This is the one that was in the
4 hospital. I'm pretty sure we -- usually I send patient
12:12PM 5 with a pain medication.

6 Q. But she certainly was given pain
7 medication while in the hospital?

8 A. Yes.

9 Q. How long was she in the hospital?

12:12PM 10 MR. BOLEY: Objection. Asked and
11 answered. He said he doesn't remember whether she was
12 given pain medication. He can't remember.

13 MS. LAVELL: In the hospital. I had
14 indicated in the hospital.

12:12PM 15 THE COURT: I think we're talking two
16 different things and he did say that there's evidence
17 in the record of medication and his usual practice of
18 prescribing medication with the person who is being
19 discharged, if I misunderstood that. I don't believe
12:12PM 20 he testified differently than that.

21 MR. BOLEY: Then I would just ask to
22 clarify.

23 MS. LAVELL: I will ask it again.

24 BY MS. LAVELL:

12:12PM 25 Q. So, Doctor, first of all how long was she

12:12PM 1 in the hospital?

2 A. From December 1st to December 3rd,
3 2016.

4 Q. Is it your testimony that while she was in
12:12PM 5 the hospital she was given pain medication?

6 A. Yes.

7 Q. And if given time would you be able to
8 determine whether or not she received medication to
9 take home? In other words, if we waited while you
12:13PM 10 looked through all the medical records? As you sit
11 here today can you say certainly she was or certainly
12 she wasn't or you just can't say one way or another?

13 A. If I say it with this kind of a patient, I
14 usually send it with pain medication.

12:13PM 15 Q. Now, Doctor, based on the injuries that
16 we've discussed in this particular hearing, the sternum
17 fractures as well as the multiple rib fractures, would
18 that be consistent with a traumatic injury as a result
19 of a motor vehicle accident?

12:13PM 20 A. Yes.

21 MS. LAVELL: I'll pass the witness.

22 THE COURT: Cross.

23 MR. BOLEY: Briefly.

24

25

CROSS-EXAMINATION

BY MR. BOLEY:

Q. Doctor, did you ever have personal contact with either Maxine Lubner or her husband in this matter?

A. I was the attending physician so I'm pretty sure yes, I did. Because without that I wouldn't write anything.

Q. You don't remember specifically, though?

A. No, I don't remember specifically. I don't remember. If I see them -- even if I see her here I wouldn't know which one the patient was. Because that was two years ago and I see so many patients.

Q. And you testified a little bit about the treatment of a fractured sternum and ribs. You don't have to set that, do you?

A. I don't understand.

Q. So like a broken arm you would have to set?

A. Yes. That's why they usually -- if something happened like that, that's why we depend on the expertise of a consultant which in this case was a trauma surgeon and cardiovascular surgeon. Trauma surgeon for the rib fracture and the sternum fracture. For the vascular surgeon is consulted and pretty sure

12:14PM 1 regarding if there is any issue with cardiovascular
2 system.

3 MR. BOLEY: No further questions.

4 MS. LAVELL: No redirect.

12:15PM 5 THE COURT: Doctor, you're excused. Thank
6 you for your testimony.

7 Is there any further need for this witness
8 by either side?

9 MS. LAVELL: Not the State.

12:15PM 10 MR. BOLEY: No.

11 THE COURT: You're excused, sir.

12 MS. LAVELL: The State calls Martin Luber.

13 THE CLERK: Raise your right hand.

14 Do you solemnly swear that the testimony
12:15PM 15 that you are about to give will be the truth, the whole
16 truth and nothing but the truth, so help you God?

17 THE WITNESS: Yes.

18 THE CLERK: Please be seated.

19 Please state your first and last name and
12:15PM 20 spell each for the record.

21 THE WITNESS: Martin Luber.

22 MS. LAVELL: Mr. Luber has a little bit of
23 a hearing problem. Do we have the head phones?

24 THE CLERK: Yes.

12:16PM 25

12:16PM 1 **MARTIN LUBER,**
2 having been first duly sworn, did testify as follows:

3 DIRECT EXAMINATION

4 BY MS. LAVELL:

12:17PM 5 Q. How is that, Mr. Luber?

6 A. Very good.

7 Q. Can you spell your last name?

8 A. L-U-B-E-R.

9 MS. LAVELL: May I proceed, your Honor?

12:17PM 10 THE COURT: You may.

11 BY MS. LAVELL:

12 Q. Mr. Luber, do you know a young lady by the
13 name of Maxine Luber?

14 A. Yes, I do.

12:17PM 15 Q. How do you know her?

16 A. She's my wife.

17 Q. For how long?

18 A. Sixty-six years.

19 Q. And what is your date of birth, sir?

12:17PM 20 A. February 29, 1932.

21 Q. How many years young are you?

22 A. Eighty-six.

23 Q. Do you own a 2009 Nissan Cube with Nevada
24 license plate 710WCW?

12:17PM 25 A. I did.

12:17PM 1 Q. And we'll get to why it's past tense in
2 just a couple minutes. I want to draw your attention
3 to December 1st of 2016. On that date did you own
4 that vehicle?

12:17PM 5 A. Yes.

6 Q. Can you tell the Court what you were doing
7 on the evening of December 1st, 2016.

8 A. My wife and I were going to dinner.

9 Q. And where were you coming from?

12:18PM 10 A. From our home.

11 Q. I do not want you to give your address,
12 but did something happen as you were going towards
13 dinner?

14 A. Yes.

12:18PM 15 Q. And how far away from your home were you
16 when this took place?

17 A. Possibly a mile.

18 Q. Were you driving?

19 A. Yes.

12:18PM 20 Q. Where were you taking your bride to
21 dinner?

22 A. If I recall it might have been Winchell's
23 or Village Pub. I'm not sure.

24 Q. Winchell's the restaurant, not the
12:18PM 25 doughnut place?

12:18PM 1 A. It's the bar and restaurant.

2 Q. And so did something happen while you were

3 traveling from your home to the restaurant?

4 A. Yes.

12:18PM 5 Q. What happened?

6 A. I got hit by a car.

7 Q. So let's talk about that a little bit.

8 What street were you driving on?

9 A. Anthem Parkway.

12:19PM 10 Q. Which direction were you going?

11 A. North.

12 Q. What was the cross street nearest you?

13 A. Atchley Drive.

14 Q. That's A-T-C-H-L-E-Y?

12:19PM 15 A. Yes.

16 Q. And where was your vehicle on Anthem

17 Parkway in relationship to the intersection at Atchley

18 Drive when you were in the vehicle accident?

19 A. I was on Anthem Parkway. I would be

12:19PM 20 starting to cross.

21 Q. So is it fair to say that you were at the

22 intersection in the number one position?

23 A. Yes.

24 Q. At some point before the accident were you

12:19PM 25 stopped at a red light?

12:19PM 1 A. No.

2 Q. So as you drove down Anthem Parkway you

3 had a green?

4 A. Yes.

12:20PM 5 Q. Did something happen when you began to go

6 through the intersection?

7 A. Yes.

8 Q. What happened?

9 A. I got hit by a car.

12:20PM 10 Q. So describe that. What side of your

11 vehicle was that other car on?

12 A. The left-hand side.

13 Q. So you in your position were going to

14 continue straight through the intersection?

12:20PM 15 A. That's correct.

16 Q. Now, the vehicle on the left-hand side,

17 was that also a lane where you continue straight or was

18 it a left-hand turn lane?

19 A. It was a left-hand turn.

12:20PM 20 Q. So when you realized you got struck on the

21 left-hand side, was it from a car that would have been

22 in the left-hand turn lane to your knowledge?

23 A. To my knowledge yes.

24 Q. And did you see how the vehicle came to

12:20PM 25 strike you?

12:20PM 1 A. No, I did not.

2 Q. When did you first realize where the
3 second vehicle was positioned after it struck your
4 vehicle?

12:21PM 5 A. Well, I didn't see the second car.

6 Q. So explain to the Court what happened upon
7 impact.

8 A. As I was passing through the intersection
9 I got struck and the air bags deployed in my car and
12:21PM 10 the one in the passenger side exploded and threw so
11 much smoke and chemicals, whatever is in the air bag,
12 that you couldn't see. And I finally got out of the
13 car because the door was bent and I had a little
14 problem getting out of my car. And my wife was telling
12:21PM 15 me that she was hurt. And I got out and there was no
16 car there. I said where is the other car? It
17 disappeared. And I had to go around the other side
18 because somebody thought the car was on fire because of
19 the smoke in the cabin.

12:22PM 20 Q. But it was not on fire, it was just the
21 air bags?

22 A. Yes, that's correct.

23 Q. Did anybody help you get your wife out of
24 the car?

12:22PM 25 A. Yes, there was I believe a young lady that

12:22PM 1 helped me try to pull the door, it was kind of stuck,
2 and to get her out. I don't know who she was.

3 Q. Were you able to get your wife out of the
4 car?

12:22PM 5 A. Yes, we got her out.

6 Q. And where did you and your wife take
7 yourselves once out of the vehicle?

8 A. We stayed right there.

9 Q. Next to the vehicle?

12:22PM 10 A. Well, we had to get away from the vehicle
11 because we still didn't know whether it was on fire or
12 not.

13 Q. So did you get out of the intersection and
14 go to a sidewalk?

12:22PM 15 A. To the sidewalk.

16 Q. Do you know who called the police?

17 A. Somebody with a telephone, cell phone
18 dialed 911.

19 Q. You and your wife didn't call the police?

12:22PM 20 A. No.

21 Q. Now, did medical respond?

22 A. Yes.

23 Q. Did medical respond before the police
24 responded?

12:23PM 25 A. Well, I think the medical responded

12:23PM 1 because the fire station was right across the street,
2 same intersection, so they could get there before the
3 police.

4 Q. Did you and your wife both get transported
12:23PM 5 by ambulance to St. Rose Dominican Hospital Siena
6 campus?

7 A. Yes.

8 Q. And, sir, were you treated for injuries?

9 A. Well, they checked me over. They took
12:23PM 10 x-rays and everything because I was bruised across the
11 whole front of my chest.

12 Q. And bruised possibly by the air bag?

13 A. Seat belt or the air bag, I'm not sure.

14 Q. You had your seat belt on?

12:23PM 15 A. Yes.

16 Q. Did your wife have her seat belt on?

17 A. Oh, yes.

18 Q. Oh, good. But you were treated and
19 released?

12:23PM 20 A. Yes.

21 Q. Did they give you any pain killers for
22 your discomfort?

23 A. No.

24 Q. Now, let's talk about your bride. Was she
12:24PM 25 treated and released the same day as you were?

12:24PM 1 A. No.

2 Q. How long was she in the hospital?

3 A. Three days.

4 Q. At some point did she become released from

12:24PM 5 the hospital?

6 A. Yes.

7 Q. And without saying what the injuries were

8 were you made aware that she had various injuries as a

9 result of the car accident?

12:24PM 10 A. Yes.

11 Q. And as a result of the injuries did you

12 have to be her caretaker for a period of time?

13 A. Yes.

14 Q. Approximately how long were you and

12:24PM 15 anybody else in your family helping out caretaking your

16 wife?

17 A. About six months.

18 Q. Can you tell the judge what sort of things

19 that you had to do to accommodate your wife after the

12:24PM 20 injuries.

21 A. Yes. I had to do all the cooking pretty

22 much. I had to help her get dressed. I had to be in

23 the bathroom when she was showering to make sure she

24 didn't fall and to help her in bed.

12:25PM 25 Q. Did you have to help her standing and

12:25PM 1 sitting?

2 A. Yes.

3 Q. Did she appear to be in a lot of pain

4 during those six months?

12:25PM 5 A. Terrible pain.

6 Q. To the point where she cried out at times?

7 A. Yes.

8 Q. Have you ever seen the gentleman sitting

9 to my right and sitting to the first individual to my

12:25PM 10 right's right?

11 A. No.

12 Q. So you didn't see him anywhere near the

13 accident scene once you were able to get out of your

14 vehicle?

12:25PM 15 A. No, I did not.

16 Q. Is this the first time you're seeing him?

17 A. Yes.

18 MS. LAVELL: I'll pass this witness, your

19 Honor.

12:25PM 20 THE COURT: Cross.

21 MR. BOLEY: Briefly.

22

23 CROSS-EXAMINATION

24 BY MR. BOLEY:

12:25PM 25 Q. Mr. Luber, I just want to ask to just

12:26PM 1 shore up some of the facts surrounding the car
2 accident. It seems like you like to go to dinner at
3 Winchell's and Village Pub, right?
4 A. Occasionally, yes.
12:26PM 5 Q. So where are those two places located?
6 A. On Eastern.
7 Q. So you'd have to go north from your home
8 on Anthem Parkway, right?
9 A. Well, I have to get from my home to Anthem
12:26PM 10 Parkway to down to Eastern.
11 Q. Are there any other paths that you might
12 take to those restaurants?
13 A. No.
14 Q. Always Anthem Parkway?
12:26PM 15 A. Yeah.
16 MR. BOLEY: I'll pass the witness.
17 MS. LAVELL: Nothing further.
18 THE COURT: All right. Any further need
19 for this witness?
12:26PM 20 MS. LAVELL: No need from the State.
21 MR. BOLEY: Doubtful. We're done.
22 MS. LAVELL: With Court's permission the
23 State would call Maxine Luber.
24 THE CLERK: Raise your right hand.
12:27PM 25 Do you solemnly swear that the testimony

12:27PM 1 that you are about to give will be the truth, the whole
2 truth and nothing but the truth, so help you God?

3 THE WITNESS: Yes, I do.

4 THE CLERK: Please be seated.

12:27PM 5 Please state your first and last name and
6 spell each for the record.

7 THE WITNESS: Maxine Luber. M-A-X-I-N-E.
8 L-U-B-E-R.

12:28PM 10 **MAXINE LUBER,**
11 having been first duly sworn, did testify as follows:

12 DIRECT EXAMINATION

13 BY MS. LAVELL:

14 Q. May I call you Maxine?

12:28PM 15 A. Sure.

16 Q. How is your hearing? Better than your
17 husband's?

18 A. Yes.

19 Q. You don't need the headphones?

12:28PM 20 A. No.

21 Q. Is that no?

22 A. That's a no.

23 Q. Ma'am, what is your date of birth?

24 A. May 8th, 1932.

12:28PM 25 Q. How old are you?

12:28PM 1 A. Eighty-six.

2 Q. I want to draw your attention to

3 December 1st, 2016. Now, that young man that just

4 exited the courtroom, that's your husband Martin,

12:28PM 5 correct?

6 A. Yes.

7 Q. So I want to just ask on December 1st,

8 2016 you and Martin were going to dinner?

9 A. Yes.

12:29PM 10 Q. And Martin was driving your vehicle?

11 A. Yes.

12 Q. Did something happen as Martin was driving

13 on Anthem Parkway going north and just crossing the

14 intersection or entering into the intersection at

12:29PM 15 Atchley Drive?

16 A. Did something happen?

17 Q. Yes.

18 A. Yes. We were hit by a car.

19 Q. Did you see the vehicle before it struck

12:29PM 20 you?

21 A. I did not.

22 Q. After the vehicle struck you what

23 physically happened to you inside the car if you know?

24 A. I was in terrible pain. Should I go on?

12:29PM 25 Q. Yes.

12:29PM 1 A. Because then the car filled with smoke.

2 Q. How come that happened?

3 A. Well, at the time I didn't know, but I was

4 told that probably the air bag, it was the air bag. I

12:29PM 5 didn't know. All I know is the car was filled with

6 smoke.

7 Q. So at the time that the crash occurred you

8 were not aware that the air bag had deployed?

9 A. I didn't know that.

12:30PM 10 Q. But you indicated you were in terrible

11 pain?

12 A. Oh, yes.

13 Q. At some point were you able to get out of

14 the car with assistance?

12:30PM 15 A. With assistance. The car seemed to

16 lock -- we couldn't get out -- I couldn't get out of

17 the car. They had to -- people came and got me out.

18 Q. At some point were you and your husband

19 transported by ambulance to the hospital?

12:30PM 20 A. Yes.

21 Q. Do you remember how many days you had to

22 stay in the hospital?

23 A. Well, I think it was three. I was told it

24 was three.

12:30PM 25 Q. Can you explain to the Court what injuries

12:30PM 1 you had as a result of the accident?

2 A. Well, I had 10 broken ribs -- two

3 fractures in my sternum. Oh, and I didn't know it

4 until I got into the bed but there was a lot of blood

12:30PM 5 and I didn't know where it was coming from, but

6 apparently it was from the air bag and it was on my

7 leg.

8 Q. So the air bag cut your leg?

9 A. Yes.

12:30PM 10 Q. And did you have any injury to your

11 abdomen or your chest?

12 A. My chest, yes.

13 Q. Beyond the fractures did you have any

14 visible injury on your chest that you recall?

12:31PM 15 A. Well, I was black and blue.

16 Q. Now, as a result of the fractures that

17 you've mentioned did you suffer any pain beyond the

18 actual accident itself? In other words, after the

19 accident happened did you have pain after the accident?

12:31PM 20 A. Sure.

21 Q. The next hour, the next day?

22 A. Oh, my goodness, yes.

23 Q. How long did you suffer pain?

24 A. I can't even remember. A very long time.

12:31PM 25 I know it was almost a year before I was really mobile.

12:31PM 1 Q. During the time that you were recovering
2 from the rib fractures and the sternum fracture did you
3 need assistance in your every day activities?

4 A. Absolutely.

12:31PM 5 Q. How come?

6 A. I was in pain and it was difficult to move
7 around to be mobile.

8 Q. Before the accident -- and I know some of
9 these questions seem odd to you because I can see from
12:32PM 10 your face why is she asking me this, but it's just
11 about making a record.

12 A. Sure.

13 Q. This is going to really throw you. Before
14 the accident did you have broken ribs or a broken
12:32PM 15 sternum?

16 A. No, I did not.

17 Q. When you left the hospital were you
18 prescribed pain medication?

19 A. Yes.

12:32PM 20 Q. And how many times did you have to get
21 that refilled, if any?

22 A. Well, I changed it after awhile. I don't
23 know because I asked them to change -- I said I
24 couldn't take what they gave me because it didn't agree
12:32PM 25 with me, all this pain medication. So the doctor gave

12:32PM 1 me something else and I really don't know. After
2 awhile I just resorted to taking over-the-counter
3 things.

4 Q. Like Ibuprofin?

12:33PM 5 A. That's one of them, yeah.

6 Q. As you sit here today you're fully
7 recovered?

8 A. I would say yes.

9 MS. LAVELL: Pass the witness.

12:33PM 10 THE COURT: Cross?

11 MR. BOLEY: No questions.

12 THE COURT: Miss Luber, you're excused.

13 You may leave now. Thank you for your testimony.

14 THE WITNESS: Thank you.

12:33PM 15 THE COURT: Any further need for this
16 witness?

17 MS. LAVELL: No, Your Honor. Thank you.

18 MR. BOLEY: No, Your Honor.

19 MS. LAVELL: Your Honor, with Court's
12:33PM 20 permission the State would like to call Gregory Larson.

21 THE CLERK: Raise your right hand.

22 Do you solemnly swear that the testimony
23 that you are about to give will be the truth, the whole
24 truth and nothing but the truth, so help you God?

10:29AM 25 THE WITNESS: I do.

10:29AM 1 THE CLERK: Please be seated.
2 Please state your first and last name and
3 spell each for the record.
4 THE WITNESS: Gregory Larson.
12:34PM 5 G-R-E-G-O-R-Y. L-A-R-S-O-N.
6 MS. LAVELL: May I proceed, your Honor?
7 THE COURT: You may.
8
9 **GREGORY LARSON,**
12:34PM 10 having been first duly sworn, did testify as follows:
11 DIRECT EXAMINATION
12 BY MS. LAVELL:
13 Q. Do you go by Greg or Gregory?
14 A. Either is fine.
12:34PM 15 Q. May I call you Greg?
16 A. Sure.
17 Q. Greg, how are you employed?
18 A. I work for the City of Henderson as a fire
19 engineer.
12:34PM 20 Q. And is a fire engineer a firefighter but
21 you drive the big trucks?
22 A. That's correct. I'm a firefighter and I
23 operate the apparatus.
24 Q. Were you an engineer on December 1st,
12:35PM 25 2016 or did you hold a different position with the fire

12:35PM 1 department?

2 A. No. I was an engineer then.

3 Q. Continuing to draw your attention to
4 December 1st, 2016 in the evening were you in the

12:35PM 5 area of Anthem Parkway and Atchley Drive?

6 A. Yes, I was. I was just leaving the fire
7 station 99 which sits on the corner.

8 Q. So were you leaving in an official
9 capacity or were you leaving work?

12:35PM 10 A. I was off duty. I had visited the fire
11 station off duty to drop off some stuff for the crew
12 and I was leaving the station headed home.

13 Q. So you were in your personal vehicle in
14 plain clothes?

12:35PM 15 A. Yes, I was.

16 Q. Approximately what time was that if you
17 remember?

18 A. 5:30 or so, 5:45, somewhere in that range.
19 Early evening.

12:35PM 20 Q. Did something catch your attention as you
21 were leaving the fire station?

22 A. Yes. I was sitting basically eastbound at
23 Atchley waiting to turn left to go north on Anthem
24 Parkway to head home. There was heavy traffic so I was

12:36PM 25 sitting there for awhile waiting to have my chance to

12:36PM 1 turn left and I noticed an auto collision in front of
2 me.

3 Q. Can you tell the Court which street and
4 direction had the right of way while you were waiting?

12:36PM 5 A. So Anthem Parkway would have the right of
6 way.

7 Q. Going north or south?

8 A. North or south, yeah. I needed to cross
9 Anthem Parkway to make a left to go north. So

12:36PM 10 obviously the traffic going north and south had the
11 right of way.

12 Q. So you indicated that you saw an accident.
13 Do you recall the vehicles involved, at least the
14 makes?

12:36PM 15 A. There was a Cube, I'm not sure who makes
16 it, but the Cube looking car.

17 Q. So if I said Nissan Cube, would you have
18 any reason to doubt that?

19 A. No. I'd have no reason to doubt that.

12:37PM 20 The other was a dark colored Mercedes.

21 Q. Which one had the right of way, the Nissan
22 or the Mercedes?

23 A. The Nissan.

24 Q. Did you see the actual collision?

12:37PM 25 A. Yes.

12:37PM 1 Q. Can you explain to the Court how it
2 happened.

3 A. The Mercedes was in the turn lane to turn
4 left on Atchley to head eastbound. The Cube was headed
12:37PM 5 northbound on Anthem Parkway. The Mercedes basically
6 just turned into them, into the Cube.

7 Q. And --

8 A. It made a left-hand turn in front of them.

9 Q. It made a left-hand turn in front of them
12:37PM 10 or right-hand turn?

11 A. A left-hand turn.

12 Q. Okay. So let me just understand that
13 again. The Cube --

14 A. I might be mistaken.

12:37PM 15 Q. I might be too. So I want to make sure
16 we're all on the same page. The Cube was going north.
17 Was the Mercedes to the left or the right of the Cube?

18 A. The left.

19 Q. Okay. So he was to the left of the Cube
12:38PM 20 preparing to make a left-hand turn?

21 A. Yes.

22 Q. But he made a right turn into the Cube?

23 A. Yes. Yes. I'm trying to vision the
24 intersection but yes.

12:38PM 25 Q. So he would have had to make a right turn

12:38PM 1 to hit the vehicle to his right, correct? Shall we
2 draw it? Do you want to draw it?

3 A. If you want to draw it, yeah.

4 Q. I don't know the streets there, I'm not
12:38PM 5 very familiar with that area so why don't you just draw
6 the intersection for me. And it doesn't have to be --
7 this is just for demonstrative purposes so it doesn't
8 have to be perfect and we'll let the judge see it too.

9 A. So the Cube is headed this way.

12:39PM 10 Q. So that's going to be north?

11 A. I was sitting here. The impact was here.

12 Q. Oh, I see. Okay. Go ahead and make an
13 arrow and just write Cube on that line. All right.
14 And so I see now you said you were in the left-hand
12:39PM 15 turn lane but not on the same side as the Cube but on
16 the other street?

17 A. I saw the impact here.

18 Q. Do you know where the Mercedes was coming
19 from?

12:39PM 20 A. It was my recollection that he was trying
21 to go this way.

22 Q. So he was going south on --

23 A. He was here, yes. So he turned into them
24 there and then after the collision continued --

12:39PM 25 Q. I see.

12:39PM 1 A. -- this direction.

2 Q. Thank you for clarifying that.

3 Do you want this marked into evidence or

4 just for demonstrative purposes?

12:40PM 5 MR. BOLEY: Just for demonstrative

6 purposes.

7 THE WITNESS: So he continued down Atchley

8 this direction after the collision.

9 MS. LAVELL: Do you want to see it?

12:40PM 10 THE COURT: If it's not in evidence.

11 MS. LAVELL: Well, just for demonstrative

12 purposes if you wanted to see it. Okay.

13 BY MS. LAVELL:

14 Q. So the Cube was heading north?

12:40PM 15 A. Yes.

16 Q. And the Mercedes had been heading south on

17 Anthem Parkway but was making a left-hand turn?

18 A. Yes.

19 Q. Okay. I am completely with you now. And

12:40PM 20 the Mercedes hit the Cube in the intersection?

21 A. Yes.

22 Q. Did the Cube to your knowledge still have

23 the green light or did the Mercedes have the turn?

24 A. There is no light there. There is no

12:40PM 25 signal.

12:40PM 1 Q. So there's no signal. So then the Cube
2 would have been going straight and had the right of
3 way?

4 A. Absolutely.

12:41PM 5 Q. What did you do when you saw the accident?

6 A. First thing I did is I grabbed my cell
7 phone and called the fire station to tell those guys --
8 I knew they were there, I had just left -- to let them
9 know there was a collision in front of the fire

12:41PM 10 station. And I no sooner got on the phone with them,
11 gave them the information and I noticed that the
12 Mercedes was proceeding to leave.

13 I noticed another vehicle started to
14 follow that Mercedes and then about that point in time
12:41PM 15 traffic was clearing. The north and southbound travel
16 lanes of Anthem Parkway had cleared. There was a break
17 in traffic. The other cars that were waiting that were
18 headed southbound waiting to make that left onto
19 Atchley, they had stopped. People had got out of their
12:41PM 20 cars to go over to the accident.

21 I noticed the driver of the Cube had got
22 out of the car so I let the station know -- I was on
23 the phone, I let them know that the driver is out of
24 the car. That alerts them to what potentially other
12:42PM 25 resources they may need. You know, obviously if the

12:42PM 1 guy is pinned in the car, they may need other
2 resources. So I did not stop and I followed after the
3 two vehicles that -- I followed after the Mercedes and
4 the vehicle that was following it.

12:42PM 5 Q. When you initially started to follow in
6 the direction that the Mercedes had gone in, did you
7 actually have a sightline on that vehicle or did you
8 get there some other way?

9 A. I followed them. I could see them going,
12:42PM 10 but Atchley makes a little bit of a curve so as they
11 went around the curve I just followed the trail of
12 fluids. Because Idaho Falls is like two streets down
13 so I'm wondering do I -- whether I go down Atchley or
14 Idaho Falls, you can just see the trail of fluids and
12:42PM 15 some debris left from the Mercedes that had fallen in
16 the street. And so I basically saw that they got to
17 Idaho Falls and they had made a right-hand turn on
18 Idaho Falls and stopped right there. They may have
19 proceeded a hundred feet down Idaho Falls before they
12:43PM 20 stopped, both cars.

21 Q. So the Mercedes that we've been talking
22 about plus the witness that is following the Mercedes
23 and then you in line?

24 A. Yes.

12:43PM 25 Q. Did you ultimately turn onto that same

12:43PM 1 street and stop?

2 A. Yes, I did. And I stopped adjacent to the

3 other witness. So basically right behind the Mercedes.

4 Q. How far away would you say where the

12:43PM 5 Mercedes ultimately stopped and the accident occurred

6 was?

7 A. We could Google it, but maybe a quarter

8 mile. I don't know. I mean, it's not that far. I

9 don't know.

12:43PM 10 Q. If the Mercedes chose to leave the

11 intersection, were there other areas before that

12 right-hand turn that the Mercedes could have pulled

13 over into?

14 A. It could have stopped on Atchley. It

12:43PM 15 could have stopped on Atchley. There was another side

16 street before Idaho Falls that it could have turned

17 onto. But Atchley is a wide open street.

18 Q. Was there anything that you saw in the

19 intersection that would cause you to believe that the

12:44PM 20 Mercedes for the safety of the driver needed to move

21 his car out of the intersection?

22 A. No. Traffic had stopped.

23 Q. When you pulled behind the second car did

24 you get out and make contact with the individual at the

12:44PM 25 Mercedes?

12:44PM 1 A. I did, yes. I pulled up adjacent to the
2 second car and I did get out. The driver of the
3 Mercedes was still in his car.

4 Q. When you stopped and got out?

12:44PM 5 A. Yes.

6 Q. Do you see that individual that you saw as
7 the driver of the Mercedes present in the courtroom?

8 A. Yes.

9 Q. Would you point and describe something
12:44PM 10 he's wearing.

11 A. It's the gentleman in the dark suit with
12 the white shirt.

13 MS. LAVELL: Your Honor, may the record
14 reflect that the witness has identified the defendant?

12:44PM 15 THE COURT: Yes.

16 BY MS. LAVELL:

17 Q. So did you approach the defendant's
18 vehicle at that point?

19 A. I did.

12:45PM 20 Q. And did the defendant remain in the
21 vehicle upon your approach or exit?

22 A. He remained in the vehicle as I approached
23 him.

24 Q. Was there some sort of conversation at
12:45PM 25 that point between you and the defendant?

12:45PM 1 A. There was.

2 Q. And what was that?

3 A. I approached him and I asked him if he was

4 okay. He said he was. He said yes. And I noticed at

12:45PM 5 that point in time he was fumbling with his phone. And

6 I thought -- I respond to traffic accidents so I see

7 these kind of things. But I thought it was

8 entertaining that he seemed disoriented, impaired, he

9 was trying to figure out what he was doing and he was

12:45PM 10 trying to -- I thought he was trying to make a phone

11 call, but he was messing with his phone and it was

12 actually his car talking to him asking him if he was

13 okay, you were involved in an accident, that type of

14 thing.

12:45PM 15 Q. So was it one of those cars if you get in

16 an accident someone --

17 A. Like On Star or something like that.

18 Q. So what you were observing was him trying

19 to figure out --

12:46PM 20 A. Who was communicating with him. So it

21 took me a second to get his attention and I got his

22 attention, asked him if he was okay. He said he was

23 okay. And I just made a funny comment to him.

24 Q. What was the comment?

12:46PM 25 A. I had just told him, I said sir, you've

12:46PM 1 been involved in a hit and run accident and I think
2 you're the runner and he stated to me oh, I didn't mean
3 to leave.

4 Q. So that was his response?

12:46PM 5 A. That was his response to me.

6 MR. BOLEY: Objection to that based on
7 hearsay and move to strike the statement of the
8 defendant.

9 MS. LAVELL: Judge, a defendant's
12:46PM 10 statement is not hearsay. It is an admission by a
11 party opponent. It's absolutely allowable evidence
12 what the defendant says.

13 THE COURT: Objection's overruled.
14 Proceed.

12:46PM 15 BY MS. LAVELL:

16 Q. So after he indicated oh, I didn't mean to
17 leave, was there further conversation?

18 A. I let him know to just sit tight in his
19 car. I said hey, just sit tight in your car.

12:47PM 20 At that point in time I had my phone with
21 me, I called the police, I called dispatch to let them
22 know. And as I was on the phone with them I asked him
23 to sit in his car and wait and --

24 Q. Did you advise him that you were calling
12:47PM 25 the police?

12:47PM 1 A. I did, yeah.

2 Q. Did he remain seated in his vehicle at

3 that point?

4 A. He did.

12:47PM 5 Q. At some point did he exit his vehicle?

6 A. Yes. I didn't stay by his side for that

7 entire second. I went back to check on my daughter who

8 was in my car parked behind him. So I was standing

9 outside of my vehicle. I noticed him kind of fumbling

12:47PM 10 around in his vehicle which kind of made me a little

11 bit nervous because I had my daughter with me. I

12 followed him out of instinct but then I started second

13 guessing this guy could have a weapon or other things.

14 So I was very cautious and kept my eye on him.

12:47PM 15 He got out of his car and he seemed very

16 anxious. He was wandering around checking the damage

17 of his car. Kind of looked like he was just looking

18 around the area or what-not. So I just kind of watched

19 him from a distance. And dispatch knew where we were

12:48PM 20 at, they had officers on the way so I just let him know

21 that. I reminded him again kind of for my own safety

22 that hey, the police are coming.

23 He got back in his car and so then I was

24 kind of watching him. And I heard the car start, I

12:48PM 25 went back up to him and told him sir, can you turn the

12:48PM 1 car off, you just need to stay here and hang out. I
2 wasn't really sure the car would go anywhere anyway but
3 I just told him you need to stay. And he told me --

4 Q. Let me stop you for a quick second. So
12:48PM 5 after he had stopped and he got out of the car, he got
6 back into the car and he turned the ignition on again?

7 A. Yes. He started the car back up.

8 Q. Okay.

9 A. And at that point I told him hey, can you
12:48PM 10 shut it off, just hang out. The cops are coming. I
11 kind of reminded him again. And he told me well, I
12 need to move my car. I wasn't going to argue with him
13 or anything so I just kind of stepped back towards my
14 vehicle which was parked behind his and he proceeded to
12:49PM 15 drive his car around the corner which I was surprised
16 it actually steered and moved that well with the damage
17 that was done in the front of it.

18 Q. And what street did he end up on?

19 A. I believe it was Sandstone. That section
12:49PM 20 of Idaho Falls where we stopped was maybe 200 feet
21 long. It's just an entrance into the neighborhood and
22 Sandstone is the first residential street. So he made
23 that corner so I got back in my vehicle and I followed,
24 moved up and so did the other witness, we both followed
12:49PM 25 up and as soon as we turned the corner on Sandstone I

12:49PM 1 noticed that he had only made it maybe five, six houses
2 down the street. So I stopped right there basically.

3 Q. I am going to stop you. You said he only
4 made it. Was he still in the car?

12:49PM 5 A. Yeah, he was still in his car, but I'm
6 guessing that's as far as the car would make it. It
7 wasn't steering very well. Watching him steer the car
8 it was kind of all over the road and it was leaking
9 fluids and dragging pieces, parts. So he basically
12:50PM 10 stopped five or six houses down.

11 Q. All right. And did you observe him do
12 anything else after he stopped?

13 A. He was in the car for a moment and he sat
14 there. I got back on the phone, I called to let police
12:50PM 15 know where our new location was and right after I got
16 off the phone with them I noticed he got out of his
17 car. I went to the witnesses that had also followed, I
18 let them know hey, just stay in your car, I don't know
19 what this guy's gonna do. I asked police to expedite
12:50PM 20 because it seemed like he was getting unpredictable.

21 And next thing you know he took off
22 running on foot. It was dark. I didn't see exactly
23 where he went. And shortly after that within a minute
24 or two of him leaving on foot the battalion chief from
12:50PM 25 our department as well as a police officer rounded the

12:50PM 1 corner. I told them, I said he just went that way on
2 foot. I said but he can't be very far. I said I would
3 check the bushes or anything around these houses close
4 by because we're talking a minute, 30 seconds of time
12:51PM 5 lapsed between when he left. And so they had officers
6 start looking for him.

7 Q. And at that point or at some point after
8 that did you see the defendant again in police custody?

9 A. I did, yeah. They brought him back up to
12:51PM 10 the scene.

11 Q. Is the individual that they brought up to
12 the scene the same individual that you saw leave?

13 A. Same individual.

14 MS. LAVELL: I pass the witness.

12:51PM 15 THE COURT: Cross.

16 MR. BOLEY: Briefly.

17

18 CROSS-EXAMINATION

19 BY MR. BOLEY:

12:51PM 20 Q. So this intersection we're talking about
21 earlier, Atchley and Anthem Parkway, how is that
22 intersection governed? You said there wasn't a
23 stoplight. How is it governed?

24 A. As far as a traffic control?

12:51PM 25 Q. Exactly.

12:51PM 1 A. There is no stop sign, there is no
2 stoplight. So anyone making a turn would yield to
3 oncoming traffic. I'm not a law enforcement officer so
4 I can't give you the law on traffic control, but as a
12:52PM 5 driver, I've been driving a vehicle for a couple years,
6 and I drive firetrucks for a living, I can tell you,
7 you know at Anthem Parkway north and southbound you
8 have the right of way and if you want to cross traffic
9 or either make a left or a right, what direction you're
12:52PM 10 traveling --

11 Q. Is there a left-hand turn lane on Anthem
12 Parkway turning I guess it would be east onto Atchley?

13 A. There is.

14 Q. So your testimony is that's where the
12:52PM 15 Mercedes was?

16 A. Yes.

17 Q. Okay. So if I were hypothetically in the
18 same scenario, how would I know to turn left -- excuse
19 me. Let me be more specific. If I was going
12:52PM 20 southbound on Anthem Parkway and I wanted to turn left
21 onto Atchley, how would I know when it was safe for me
22 to proceed?

23 A. When there's no traffic. I mean, if
24 traffic is cleared, there's no oncoming traffic, then
12:53PM 25 you'd be safe to turn.

12:53PM 1 Q. Do you remember filling out a witness
2 statement with Henderson Police Department?
3 A. I do.
4 MR. BOLEY: May I approach the witness?
12:53PM 5 THE COURT: Yes.
6 BY MR. BOLEY:
7 Q. I am just going to draw your attention to
8 that page right there. Do you recognize that document?
9 A. Okay.
12:53PM 10 Q. Is that the statement you gave to the
11 Henderson Police Department?
12 A. It is.
13 Q. Could you read the first sentence.
14 A. "I was sitting at the intersection of
12:53PM 15 Atchley and Anthem Parkway and saw a two car motor
16 vehicle accident and it just occurred."
17 Q. You said in that statement -- and those
18 are your words, right?
19 A. Yeah, I wrote this.
12:54PM 20 Q. You said that it just occurred. That
21 seems like in the past tense. Why did you write it
22 that way?
23 A. Well, I wrote this statement probably an
24 hour after it occurred.
12:54PM 25 Q. Okay.

12:54PM 1 A. So I might have used past tense for that
2 reason.

3 Q. Your testimony today is that you actually
4 saw it?

12:54PM 5 A. Yes. I was sitting in the intersection
6 when the collision happened.

7 Q. We'll move on beyond that.

8 A. I guess if I would have come upon
9 something I would have written I came upon an accident.

12:54PM 10 As opposed to it just occurred.

11 Q. Let me ask you this then: If you
12 witnessed an accident, wouldn't you normally write the
13 facts of the accident?

14 A. The fact of like --

12:55PM 15 Q. This car --

16 A. Turned into this car or that car?

17 Q. Yes.

18 A. I guess if I was witnessing -- if I was
19 trying to describe the accident, yes, I would. I felt
12:55PM 20 my witness statement -- when I filled this out I think
21 I felt it was more to what occurred after. I followed
22 here, I did this, I waited for that. I didn't think it
23 was -- I felt that the accident didn't need any
24 justification. It happened. Everybody saw it happen.

12:55PM 25 Q. Everybody who?

12:55PM 1 A. There was a line of traffic and when I
2 drove through, there were multiple people that got out
3 of their vehicles that came over and were coming to the
4 aid of the people in the other car.

12:55PM 5 MR. BOLEY: No further questions.

6 MS. LAVELL: No redirect, your Honor.
7 Thank you.

8 THE COURT: You're excused. Thanks for
9 your testimony.

12:55PM 10 Is there any further need for this
11 witness?

12 MS. LAVELL: No, Your Honor. Thank you.

13 MR. BOLEY: No.

14 MS. LAVELL: The State calls Officer

12:56PM 15 Vargason.

16 THE CLERK: Raise your right hand.

17 Do you solemnly swear that the testimony
18 that you are about to give will be the truth, the whole
19 truth and nothing but the truth, so help you God?

12:56PM 20 THE WITNESS: I do.

21 THE CLERK: Please be seated.

22 Please state your first and last name and
23 spell each for the record.

24 THE WITNESS: Jordan Vargason.

12:56PM 25 J-O-R-D-A-N. V-A-R-G-A-S-O-N.

12:56PM 1 MS. LAVELL: May I proceed, your Honor?

2 THE COURT: You may.

3

4

JORDAN VARGASON,
having been first duly sworn, did testify as follows:

12:56PM 5

6

DIRECT EXAMINATION

7

BY MS. LAVELL:

8

Q. Sir, how are you employed?

9

A. I am a police officer with the City of

12:57PM 10

Henderson.

11

MR. BOLEY: Judge, I'll stipulate that

12

he's a police officer and qualified as such.

13

MS. LAVELL: Thank you.

14

BY MS. LAVELL:

12:57PM 15

Q. Officer, I want to draw your attention

16

back to December 1st, 2016. Were you working on that

17

day?

18

A. Yes, ma'am.

19

Q. In what capacity?

12:57PM 20

A. I was working patrol.

21

Q. Did you get dispatched or were you made

22

aware of an accident in the area of Anthem Parkway and

23

Atchley Drive?

24

A. Yes, ma'am. I was dispatched there.

12:57PM 25

Q. And is that in Henderson, Clark County,

12:57PM 1 Nevada?

2 A. Yes, ma'am, it is.

3 Q. In what capacity were you dispatched?

4 A. Not sure I understand the question.

12:57PM 5 Q. Were you primary, the first one to get the

6 call, were you attempting to locate, what was your

7 responsibility upon your initial dispatch?

8 A. I was assigned as the primary officer to

9 the call along with multiple other officers that were

12:57PM 10 dispatched at the same time.

11 Q. So in other words, I don't know if you

12 call it a call sign or P-number, but they advised you

13 of the accident and then other units jump in to assist?

14 A. Yes, ma'am.

12:58PM 15 Q. So ultimately you were responsible for the

16 report and putting together the investigation as far as

17 patrol handles that?

18 A. That's correct.

19 Q. Where did you first arrive at?

12:58PM 20 A. The first location I arrived at was the

21 actual intersection Anthem and Atchley which was where

22 I confirmed that an accident had taken place.

23 Q. Now, were you made aware that this was a

24 two car collision when you were dispatched?

12:58PM 25 A. Yes, ma'am.

12:58PM 1 Q. When you arrived how many vehicles were
2 actually at that location that had been involved in the
3 accident?

4 A. Just one.

12:58PM 5 Q. At some point later did you learn where
6 the second vehicle ended up?

7 A. Yes. When I arrived on scene I was
8 directed to the area of the Idaho Falls and Sandstone
9 Cliffs intersection, just east of that location.

12:59PM 10 Q. Did you respond there?

11 A. Yes, I did.

12 Q. And did you see a vehicle that you later
13 learned had been involved in the accident at the first
14 location?

12:59PM 15 A. Yes, ma'am. A black Mercedes E350.

16 Q. Did you determine who it was registered
17 to?

18 A. Yes. Mr. Jack Banka.

19 Q. Did you yourself ever come in contact with
12:59PM 20 Mr. Banka, the driver of that vehicle?

21 A. I did.

22 Q. Do you see him present in the courtroom?

23 A. I do.

24 Q. Would you point at him and describe what
12:59PM 25 he's wearing.

12:59PM 1 A. He's right there wearing a black suit coat
2 and white button-up shirt.

3 Q. At some point did you perform what is
4 known as an FST or field sobriety test on the
12:59PM 5 defendant?

6 A. Yes, ma'am.

7 Q. How many different tests did you perform?

8 A. There are three standardized field
9 sobriety tests. I performed all three of them.

1:00PM 10 Q. For the record would you provide the name
11 of the three field sobriety tests.

12 A. There's the first horizontal gaze
13 nystagmus test, second is the walk and turn test and
14 the third is the one legged stand test.

1:00PM 15 Q. Are you trained and certified in
16 performing the HGN or the horizontal gaze nystagmus
17 test?

18 A. Yes, ma'am.

19 Q. And are you trained in the remaining two
1:00PM 20 tests?

21 A. Yes, ma'am.

22 Q. Did the defendant pass or fail the
23 horizontal gaze nystagmus?

24 A. He performed it unsatisfactorily.

1:00PM 25 Q. Unsatisfactorily or satisfactory?

1:00PM 1 A. Unsatisfactorily.

2 Q. Did you he pass or fail the walk and turn?

3 A. Also unsatisfactory.

4 Q. Did he pass or fail the one legged stand?

1:00PM 5 A. It was also unsatisfactory.

6 Q. Did you also perform a preliminary breath

7 test?

8 A. Officer Carick performed the breath test

9 in my presence.

1:01PM 10 Q. So you observed it?

11 A. Yes, ma'am.

12 Q. Did you observe the results of that test?

13 A. I did.

14 Q. And what were the results of that?

1:01PM 15 MR. BOLEY: Judge, objection. It's

16 inadmissible. It's not met the Fry standard.

17 THE COURT: You have to give me more than

18 that, counsel.

19 MR. BOLEY: It's been held that the

1:01PM 20 preliminary breath test does not meet the Fry standard.

21 That it occurred is admissible but the results of it

22 are not.

23 MS. LAVELL: I will withdraw that

24 question.

1:01PM 25 THE COURT: Okay.

1:01PM 1 BY MR. BOLEY:

2 Q. In addition to his performance on the

3 three tests as well as whatever the result was of the

4 breath test did you observe any other signs or behavior

1:01PM 5 on the part of the defendant that caused you to believe

6 that he had been driving impaired?

7 A. Yes, ma'am.

8 Q. Could you explain to the Court what those

9 signs or behaviors were.

1:02PM 10 A. Once of the first was his appearance, his

11 eyes were very glassy or watery. His speech was very

12 low and slower than I would expect in conversing with

13 him. His gait was very stiff as well when he walked.

14 In addition to that physical evidence, I

1:02PM 15 also observed later inside the black Mercedes that

16 there was a cup with liquid and ice in it which had

17 been spilled all over the car that had the odor of an

18 unknown alcoholic beverage on it which I confirmed

19 later with the PBT that it had the presence of alcohol

1:02PM 20 in the odor.

21 MR. BOLEY: Judge, I am going to object to

22 that line of evidence and move to strike that because

23 the PBT, there again it's not even admissible for its

24 purpose, but it's definitely not admissible for

1:03PM 25 determining a spilled beverage contains alcohol at all.

1:03PM 1 MS. LAVELL: Well, Judge, I am going to
2 have to just respond to that objection. Obviously the
3 officer is testifying that the test is able to
4 determine the presence of alcohol in liquid. He's just
1:03PM 5 testified that that in fact happened. But the State
6 will stipulate that these are simply presumptive tests
7 and they are not admissible to prove that the defendant
8 was under the influence. But they're being offered to
9 go to the officer's probable cause for arresting the
1:03PM 10 defendant. So I'm not aware of any case law that says
11 that the officer can't testify that he performed the
12 test on a spilled beverage and it tested for alcohol.

13 MR. BOLEY: Clearly he can testify that he
14 performed the test. Just like because he can testify
1:03PM 15 that he performed the test as intended so he had some
16 person blow into a Breathalyzer, but he can't testify
17 to the results. He can testify that, yeah, I waved
18 this thing around a spilled beverage, but he can't
19 testify yes or no or that it contained alcohol.

1:04PM 20 MS. LAVELL: I will withdraw the question
21 and follow up.

22 BY MS. LAVELL:

23 Q. Did you take into consideration the
24 results of the test that you performed on the spilled
1:04PM 25 liquid when making your determination that the

1:04PM 1 defendant was under the influence?

2 MR. BOLEY: Objection. That's assuming

3 the answer to the question that I just objected to.

4 THE COURT: You know, the officer can

1:04PM 5 testify to what he did. He's testified that he did X,

6 Y and Z. Based on the fact that he did it without

7 revealing the results. He moved onto the next move

8 that he chose to do. I will admit it to that purpose

9 only.

1:04PM 10 MR. BOLEY: Yes, sir.

11 MS. LAVELL: Thank you.

12 BY MS. LAVELL:

13 Q. So is it fair to say that there were

14 numerous indicators based on the things that you

1:05PM 15 personally observed, the tests that you performed --

16 did you also talk to witnesses?

17 A. I did.

18 Q. And did you factor what the witnesses said

19 into whether or not you believed him to be intoxicated?

1:05PM 20 A. Intoxicated and in control of the vehicle

21 at the time of the accident as well, yes.

22 Q. And based on the totality of the

23 circumstances you determined that the defendant for

24 this question was under the influence of alcohol and

1:05PM 25 was going to be placed under arrest?

1:05PM 1 A. At that point, yes.

2 Q. Now, did you make a similar determination

3 that this particular vehicle and the defendant were

4 involved in the accident in the intersection that we

1:05PM 5 first mentioned at Anthem Parkway and Atchley?

6 A. Yes, ma'am.

7 Q. Did you speak to the defendant in regard

8 to that accident?

9 A. Yes, I did.

1:05PM 10 Q. Did the defendant admit to you that he was

11 in fact driving the Mercedes?

12 A. He did.

13 Q. Did he admit to you that he did in fact

14 leave the scene of the accident?

1:06PM 15 A. He first claimed that he had never been in

16 an accident and then when I followed up on questioning,

17 he admitted that yes, he had been in an accident.

18 Q. Now, based on the defendant's statements

19 and the evidence that you collected from various

1:06PM 20 witnesses, in addition to being arrested for driving

21 under the influence did you arrest him for leaving the

22 scene of an accident?

23 A. Yes, I did.

24 Q. Now, at the time of the arrest were you

1:06PM 25 aware that one of the individuals that had been in the

1:06PM 1 car, a young lady by the name of Maxine Lubber, had
2 suffered substantial bodily injury?
3 A. Yes. I became aware -- at some point
4 while I was speaking with Jack I was informed by other
1:06PM 5 officers that she had injuries, yes.
6 Q. So prior to booking him did you already
7 have enough information that he would be charged with
8 DUI with substantial bodily harm or was it upgraded
9 later after her medical results?
1:07PM 10 A. I knew at the scene that she'd been
11 diagnosed with broken ribs and a sternum and so at that
12 point I decided to use the charge of DUI with
13 substantial bodily harm.
14 Q. Now, when you are dealing with an
1:07PM 15 individual thought to be intoxicated, beyond the
16 presumptive tests that you do at the field, whether
17 they're Breathalyzers or FSTs, HGNS, do you have blood
18 drawn or breath taken?
19 A. Yes. I advised Jack --
1:07PM 20 Q. And when you say Jack, you're referring
21 to?
22 A. Mr. Banka.
23 Q. The defendant?
24 A. Yes, ma'am. I advised him of Implied
1:08PM 25 Consent. He consented to a blood test. I transported

1:08PM 1 him to Henderson Detention Center where a nurse drew
2 the blood from his arm and it was later tested.

3 Q. Did you observe her draw the blood?
4 A. Yes, ma'am.

1:08PM 5 MS. LAVELL: Your Honor, I would like to
6 move -- or it's actually admitted by stipulation and I
7 just want to provide it to the Court after I approach
8 the witness with your permission with State's Exhibit
9 2.

1:08PM 10 BY MS. LAVELL:

11 Q. Are you familiar with the blood draw
12 declaration that the nurses fill out?
13 A. Yes, ma'am.

14 Q. Do you have to witness it?
1:08PM 15 A. Yes. I am there when they fill it out.

16 Q. Would you take a look at State's Exhibit 2
17 and tell me if this is in fact the blood draw connected
18 to this particular case?
19 A. Yes.

1:08PM 20 Q. Do you see the defendant's name on there?
21 A. I do.

22 Q. And is your signature at the bottom?
23 A. Yes, ma'am.

24 Q. On the left or the right?
1:09PM 25 A. It is on the left.

1:09PM 1 Q. And that is just an affidavit indicating
2 that blood was drawn from the defendant on what's the
3 date?
4 A. December 1st, 2016.

1:09PM 5 Q. And that is the same date as the accident?
6 A. Yes, ma'am.

7 MS. LAVELL: Your Honor, it's actually
8 been admitted by stipulation but I need your Honor to
9 admit it, please.

1:09PM 10 MR. BOLEY: There is no objection.
11 THE COURT: State's Exhibit 2 will be
12 admitted.
13 (State's Exhibit 2 was admitted.)
14 BY MS. LAVELL:

1:09PM 15 Q. What is it that you do with the vial or
16 vials of blood that are drawn from an individual?
17 A. Immediately after the nurse draws the
18 blood she provides them to me. I put them back in the
19 kit and I seal it. That kit is then immediately taken
20 to a refrigerated vault at our main station. From
21 there it's provided to our forensic lab for testing.

22 Q. So you kind of talked in generalizations.
23 Is that what you did this in this particular case?
24 A. Oh, yes, ma'am.

1:10PM 25 Q. Did you request that there be a forensic

1:10PM 1 exam conducted on the blood?

2 A. Yes.

3 Q. For the purposes of determining whether or

4 not the defendant was under the influence of alcohol?

1:10PM 5 A. Yes, ma'am.

6 MS. LAVELL: Your Honor, I would move to

7 admit State's Exhibit 3 by stipulation.

8 MR. BOLEY: I am not going to object. So

9 stipulated so no objection.

1:10PM 10 THE COURT: It will be admitted.

11 (State's Exhibit 3 was admitted.)

12 MS. LAVELL: May I approach the witness?

13 THE COURT: You may.

14 BY MS. LAVELL:

1:10PM 15 Q. I am showing you what's titled Forensic

16 Laboratory Report of Examination, State's Exhibit 3.

17 Are you familiar with this form?

18 A. Yes, ma'am.

19 Q. Is this a form that is produced after a

1:10PM 20 forensic analysis is done on various items?

21 A. Yes, ma'am.

22 Q. Specifically in this case what was the

23 exam conducted on?

24 A. A vial of whole blood.

1:10PM 25 Q. Is this also associated with Jack Banka

1:10PM 1 the defendant?

2 A. Yes, ma'am.

3 Q. Is his name on the form?

4 A. Yes, it is.

1:10PM 5 Q. What was the outcome of the examination in

6 regards to the blood alcohol content?

7 A. It indicated that he had a blood alcohol

8 content at the time of withdrawal of .193.

9 Q. What is the legal limit to drive?

1:11PM 10 A. .08.

11 Q. So is that over two times the legal limit?

12 A. Yes, ma'am.

13 MS. LAVELL: I'll pass the witness.

14 THE COURT: Cross.

1:11PM 15 MR. BOLEY: Briefly.

16

17 CROSS-EXAMINATION

18 BY MR. BOLEY:

19 Q. Officer, you testified that you arrived at

1:11PM 20 the scene and there was still a car there, right?

21 A. At Anthem and Atchley?

22 Q. Yes.

23 A. Yes, sir.

24 Q. What car was that?

1:11PM 25 A. It was an orange Nissan Cube.

1:11PM 1 Q. How was that car positioned in the
2 intersection?

3 A. I honestly don't recall.

4 Q. Now, I heard, and this is just me not
1:12PM 5 hearing, you testified that you did field sobriety
6 tests on Mr. Banka?

7 A. Yes, sir.

8 Q. Did you testify that you were not
9 certified in the three field sobriety tests?

1:12PM 10 A. No. I was certified.

11 Q. Never mind. That was just me not hearing.
12 Did you talk to a Gregory Larson at that
13 scene?

14 A. I talked to Gregory I think his last name
1:12PM 15 was Larson. I'm sorry. I can't confirm it off the top
16 of my head.

17 Q. Did he tell you that he saw the motor
18 vehicle accident?

19 MS. LAVELL: Objection. Hearsay.

1:12PM 20 THE COURT: Sustained.

21 MR. BOLEY: No further questions.

22 MS. LAVELL: I have nothing further for
23 this witness.

24 THE COURT: Thank you, officer. You're
1:12PM 25 excused.

1:13PM 1 MS. LAVELL: The State has no further
2 witnesses, your Honor, and with the admission of
3 State's Exhibits 1, 2 and 3 the State rests.
4 THE COURT: What's Exhibit 3?
1:13PM 5 MR. BOLEY: I believe they admitted the
6 affidavit and blood draw results separately and the CAD
7 log was one that was admitted by stipulation but not
8 used for the purposes of the prelim.
9 THE COURT: Formally I'll admit Exhibit 1.
1:13PM 10 I don't think there was actually a motion to admit --
11 MS. LAVELL: Well, we --
12 THE COURT: I understand there was a
13 stipulation, but you never brought it forward on any
14 particular witness.
1:13PM 15 MS. LAVELL: Correct.
16 THE COURT: And it remained in front of
17 the clerk on the bar.
18 MR. BOLEY: There is no objection to
19 admitting it.
1:14PM 20 THE COURT: So it will be admitted.
21 (State's Exhibit 1 was admitted.)
22 MS. LAVELL: With that State rests.
23 THE COURT: Defense.
24 MR. BOLEY: I have advised Mr. Banka of
1:14PM 25 his rights to testify and he will remain silent and we

1:14PM 1 also rest.

2 THE COURT: Any argument?

3 MS. LAVELL: We reserve for rebuttal.

4 MR. BOLEY: If I may?

1:14PM 5 THE COURT: You may.

6 MR. BOLEY: You've heard from several

7 witnesses today. There are a couple problems with this

8 case. First of all you heard from a doctor that he can

9 only testify from reviewing other records that the

1:14PM 10 State's trying to get at substantial bodily harm

11 through that doctor. I don't believe that meets the

12 slight or marginal evidence standard that we're trying

13 to address today because clearly he has no personal

14 knowledge of any of the facts that he testified to,

1:14PM 15 just simply that they're written in -- medical records

16 prepared by somebody else.

17 The other thing is I would contend that

18 there was some -- when the officer was testifying about

19 the preliminary breath test he testified that he used

1:15PM 20 it for a purpose other than the intended purpose of the

21 preliminary breath test which we all know is for

22 somebody to blow on to test for alcohol. I think that

23 calls his entire testimony into question if he was

24 doing that. That being said I would just ask the Court

1:15PM 25 to dismiss these matters.

1:15PM 1 MS. LAVELL: First of all, your Honor,
2 expert witnesses do not have to have direct knowledge.
3 They're able to utilize various sources which they do
4 all the time to draw conclusions. But this particular
1:15PM 5 doctor did in fact have firsthand knowledge. He
6 testified that to the best of his recollection he
7 actually met with the victim in this particular case
8 and reviewed all of the documents and ultimately is the
9 one that decided when it was time to release her. And
1:16PM 10 I kind of gathered from his testimony that when she was
11 released if medication was in fact prescribed he would
12 have been the one to prescribe it.

13 Having said that even without the doctor's
14 testimony you heard from the victim who testified that
1:16PM 15 she had multiple broken ribs and multiple fractures and
16 the sternum, that she was in pain for she thought she
17 was maybe out of pain within a year. Her husband
18 believed the pain was at least for six months and we
19 know during that time the pain was significant enough
1:16PM 20 that she needed to be taken care of by various members
21 of her family, specifically her husband who had to help
22 her in and out of bed, in the bathroom, help her do the
23 things she'd normally be able to do. And so certainly
24 we have proven substantial bodily harm.

1:16PM 25 As to driving under the influence and

1:16PM 1 having physical control, well, we know the defendant
2 had physical control because you heard testimony from
3 one of the witnesses who followed the defendant, saw
4 the defendant behind the wheel while the vehicle was
1:17PM 5 still running when he first approached him and
6 identified the individual in court today Mr. Banka as
7 the individual that had physical control of that
8 vehicle. We know that he got out of that vehicle at
9 one point and got back into that vehicle, turned it on
1:17PM 10 and drove further away and then ultimately the
11 defendant ran from the scene and was located by law
12 enforcement. So we know that he had physical control
13 of the vehicle. We know it was the same facts that he
14 left the scene of the accident because as I stated he
1:17PM 15 had to be followed by this witness that testified to
16 locate him and then beyond leaving the scene of the
17 accident he left the scene of his own vehicle by
18 running on foot.

19 In addition to that you heard testimony
1:17PM 20 from the officer that just testified that when he
21 responded to the accident scene, which was a two car
22 collision, there was only one car there. So he clearly
23 left the scene of the accident.

24 Finally, we know that this all occurred
1:18PM 25 while he was under the influence of alcohol over two

1:18PM 1 times the legal limit as evidenced by the forensic exam
2 that is State's Exhibit 3. So for all those reasons,
3 your Honor, respectfully the State would ask that you
4 bind him over to answer both Count 1 and Count 2.

1:18PM 5 THE COURT: Last argument? Anything?

6 MR. BOLEY: I don't believe I have the
7 right to.

8 THE COURT: Okay. It appears to me based
9 upon the evidence presented at this preliminary hearing
1:18PM 10 that the alleged crimes have been committed and that
11 the defendant named in the complaint has committed
12 those crimes. I hereby order that said defendant be
13 held to answer to said charges in the Eighth Judicial
14 District Court, State of Nevada, County of Clark.

1:18PM 15 THE CLERK: July 10, 10:00 a.m.

16

17 (The proceedings concluded.)

18

19 * * * * *

1:19PM 20

21 ATTEST: Full, true and accurate
22 transcript of proceedings.

23

24 /S/Lisa Brenske

1:19PM 25 LISA BRENSKE, CSR No. 186

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUL 10 2018

BY Kristen Brown
KRISTEN BROWN DEPUTY

INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

I.A. 7/10/18
10:00 A.M.
T. BOLEY, ESQ.

THE STATE OF NEVADA,
Plaintiff,

CASE NO: C-18-333254-1

-vs-

DEPT NO: V

JACK PAUL BANKA,
#8353273

Defendant.

AMENDED
INFORMATION

STATE OF NEVADA }
COUNTY OF CLARK } ss.

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JACK PAUL BANKA, the Defendant(s) above named, having committed the crimes of **DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430 - NOC 53906)** and **LEAVING THE SCENE OF AN ACCIDENT (Category B Felony - NRS 484E.010 - NOC 53743)**, on or about the 1st day of December, 2016, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

///

C-18-333254-1
AINF
Amended Information
4762373

W:\2016\2016\FH2036\16FH2036-INFM-(BANKA_JACK)-001.DOCX



RA 000098

1 COUNT 1 - DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A
2 MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN
3 INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL
4 BODILY HARM

5 did then and there willfully and unlawfully drive and/or be in actual physical control
6 of a motor vehicle on a highway or on premises to which the public has access, to wit:
7 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada, Defendant being responsible
8 under one or more of the following theories of criminal liability, to wit: 1) while under the
9 influence of intoxicating liquor to any degree, however slight, which rendered him incapable
10 of safely driving and/or exercising actual physical control of a motor vehicle, 2) while he had
11 a concentration of alcohol of .08 or more in his blood, and/or 3) when Defendant was found to
12 have a concentration of alcohol of .08 or more in his blood sample which was taken within
13 two (2) hours after driving and/or being in actual physical control of a vehicle, defendant
14 failing to pay full time and attention to his driving, and/or failing to exercise due care, and/or
15 failing to drive in a careful and prudent manner, which acts, or neglect of duties, proximately
16 caused the vehicle being driven by defendant to strike and collide with a vehicle being
17 driven by MAXINE LUBER, said collision proximately causing substantial bodily harm to
18 MAXINE LUBER and/or MARTIN LUBER.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

COUNT 2 - LEAVING THE SCENE OF AN ACCIDENT

did then and there willfully, unlawfully, and feloniously, while driving a motor vehicle on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada and after being involved in an accident resulting in bodily injury or death to MAXINE LUBER and/or MARTIN LUBER, fail to immediately stop his vehicle at the scene of the accident, or as close thereto as possible.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY


MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120

These witnesses are in addition to those witnesses endorsed on the Information or Indictment and any other witness for which a separate Notice of Witnesses and/or Expert Witnesses has been filed.

NAME

ADDRESS

BERKOW, KATHLEEN	2149 Silent Echoes Dr., Henderson, NV
CUSTODIAN OF RECORDS	Henderson Detention Center Communications
CUSTODIAN OF RECORDS	Henderson Detention Center Records
CUSTODIAN OF RECORDS	HPD COMMUNICATIONS
CUSTODIAN OF RECORDS	HPD RECORDS
FASSETTE, T.	HPD P# 1618
HAIDEZ, HAMID	C/O St. Rose Dominican Hospital 300 St. Rose Pkwy., Henderson, NV
KAROVIC, E.	HPD P# 1704
KROOK, M.	HPD P# 2231
LARSON, GREGORY	1337 Cadence St., Henderson, NV
LASRY, JASON	UNKNOWN ADDRESS
LILLEGARD, C.	HPD P# 2244

1	LUBER, MARTIN	2217 Savannah River St., Henderson, NV
2	LUBER, MAXINE	2217 Savannah River St., Henderson, NV
3	MAYER, N.	C/O CORIZON, Henderson Detention Center
4		243 Water St. Henderson, NV
5	VARGASON, J.	HPD P# 1623
6	VILLENA, V.	HPD P# 2141
7	WATTS, J.	C/O CCDA'S OFFICE
8	YADKO, EDITH	2094 Gunnison Pl., Henderson, NV

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27 16FH2036X/erg/L-5

HPD EV#1621674

28 (TK)

Felony/Gross Misdemeanor

COURT MINUTES

April 08, 2019

C-18-333254-1 State of Nevada
 vs
 Jack Banka

April 08, 2019 09:00 AM Calendar Call

HEARD BY: Ellsworth, Carolyn COURTROOM: RJC Courtroom 16D

COURT CLERK: Natali, Andrea

RECORDER: Corcoran, Lara

REPORTER:

PARTIES PRESENT:

Jack Paul Banka Defendant

Thomas D Boley Attorney for Defendant

JOURNAL ENTRIES

Deft. present at liberty on Bond. Mr. Boley stated he had tried to file a motion to continue the trial. Ms. Lavell stated she had no opposition to the continuance. Colloquy regarding the motion not getting filed due to the order show cause being dropped off late on Thursday. Ms. Lavell conveyed the offer made to the Deft., that would have to be accepted within the next two weeks, otherwise there will be no other offers. Mr. Boley acknowledged that was his understanding of the offer conveyed. COURT ORDERED, defense motion to continue GRANTED; jury trial VACATED and RESET.

BOND

6/17/19 - 9:00 AM - CALENDAR CALL

6/24/19 - 1:30 PM - JURY TRIAL

Felony/Gross Misdemeanor

COURT MINUTES

June 17, 2019

C-18-333254-1 State of Nevada
 vs
 Jack Banka

June 17, 2019 09:00 AM Calendar Call

HEARD BY: Ellsworth, Carolyn COURTROOM: RJC Courtroom 16D

COURT CLERK: Natali, Andrea; Velazquez, Jeanette

RECORDER: Fedra, Rubina

REPORTER:

PARTIES PRESENT:

Jack Paul Banka	Defendant
State of Nevada	Plaintiff
Taleen R Pandukht	Attorney for Plaintiff
Thomas D Boley	Attorney for Defendant

JOURNAL ENTRIES

Deft. present at liberty on bond. Mr. Boley stated the matter had been negotiated and summarized the negotiations. Ms. Pandukht stated she would agree to dismiss any additional charges. Upon Court's canvass of the Deft. regarding the circumstances related to the crime, counsel requested a CONFERENCE AT THE BENCH. Matter TRAILED for Mr. Boley to discuss the plea further with the Deft.

Matter RECALLED. Same parties present as before. At the request of Mr. Boley COURT ORDERED, matter CONTINUED to Wednesday. Guilty plea agreement RETURNED to Mr. Boley.

BOND

CONTINUED TO: 6/19/19 - 9:00 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

June 19, 2019

C-18-333254-1 State of Nevada
 vs
 Jack Banka

June 19, 2019 09:00 AM Calendar Call

HEARD BY: Ellsworth, Carolyn COURTROOM: RJC Courtroom 16D

COURT CLERK: Natali, Andrea; Velazquez, Jeanette

RECORDER: Corcoran, Lara

REPORTER:

PARTIES PRESENT:

State of Nevada

Plaintiff

Taleen R Pandukht

Attorney for Plaintiff

JOURNAL ENTRIES

APPEARANCES CONTINUED: Deft. not present. John Watkins, Esq. and Michael Pariente, Esq. present.

Upon Court's inquiry, Mr. Watkins stated the Deft. was on his way. Further, Mr. Watkins stated he was not ready for trial and requested the trial be reset in the ordinary course. Ms. Pandukht stated an Alford plea agreement had been prepared. COURT ADVISED, the trial was not getting continued, as the rule indicated it shall not allow a substitution of counsel, if it resulted in a trial continuance. Mr. Watkins argued the Deft. was entitled to have the attorney of his choice and noted a conflict had arisen. COURT FURTHER ADVISED, it was not continuing the trial. Mr. Watkins stated there was no way he could be ready for trial. Mr. Boley stated this was the first he had heard about the substitution of counsel; additionally, advised he would do whatever the Court directed him to do. Deft. now present at liberty on Bond. Ms. Pandukht stated she and Ms. Lavell were not aware of the substitution, there wasn't an agreement to continue the trial and the State objected to a trial continuance, and if the Deft. does not enter a plea, she had been advised to withdraw the offer; further, announced ready for trial. Matter TRAILED for the other calendar call matters to be called.

Matter RECALLED. Same parties present as before. Upon Court's inquiry, Deft. stated he did not want to enter into the plea agreement. Upon Court's further inquiry regarding whether counsel was ready for trial, Mr. Boley stated he had the same information as the State when he came in for today's hearing. Further, Mr. Boley stated there was a conflict that had arisen with respect to a difference of view on the case. Upon Court's further inquiry regarding whether Mr. Boley had not prepared for trial, Mr. Boley stated if the Court orders him to go to trial he will; however, advised he believed it would prejudice the Deft. COURT ADVISED, counsel could associate in to help Mr. Boley with the trial; however, it was not continuing the trial. Ms. Pandukht stated as the Deft. rejected the plea she was revoking the offer. Counsel anticipated one week for trial. Matter TRAILED for the other calendar call matter to be called.

Matter RECALLED. Same parties present as before, with the exception of Mr. Giles who is now present on behalf of the State. COURT ADVISED, there were no other trials going forward except this case; therefore, ORDERED, jury trial SET to begin at 1:00 PM on Monday. Further statement by Mr. Boley regarding the difference in trial strategies; therefore, advised

he should hire an expert and requested the trial be CONTINUED. COURT ADVISED, the time to hire an expert was before today's date. Trial date STANDS. Mr. Boley stated he would be ready if the court orders him to be. Mr. Giles announced ready.

BOND

6/24/19 - 1:00 PM - JURY TRIAL

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUN 24 2019

BY Andrea Natali
ANDREA NATALI, DEPUTY

C-18-333254-1
AINF
Amended Information
4844604



INFM
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MARIA E. LAVELL
Chief Deputy District Attorney
Nevada Bar #010120
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

I.A. 7/10/18
10:00 A.M.
T. BOLEY, ESQ.

THE STATE OF NEVADA,
Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273

Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

SECOND AMENDED
INFORMATION

STATE OF NEVADA }
COUNTY OF CLARK } ss.

STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

That JACK PAUL BANKA, the Defendant(s) above named, having committed the crimes of **DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM** (Category B Felony - NRS 484C.110, 484C.430 - NOC 53906) and ~~LEAVING THE SCENE OF AN ACCIDENT~~ (Category B Felony - NRS 484E.010 - NOC 53743), on or about the 1st day of December, 2016, within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada,

///

1 COUNT 1 - DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A
2 MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN
3 INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL
4 BODILY HARM

5 did then and there willfully and unlawfully drive and/or be in actual physical control
6 of a motor vehicle on a highway or on premises to which the public has access, to wit:
7 2338 Sandstone Cliffs Drive, Henderson, Clark County, Nevada, Defendant being responsible
8 under one or more of the following theories of criminal liability, to wit: 1) while under the
9 influence of intoxicating liquor to any degree, however slight, which rendered him incapable
10 of safely driving and/or exercising actual physical control of a motor vehicle, 2) while he had
11 a concentration of alcohol of .08 or more in his blood, and/or 3) when Defendant was found to
12 have a concentration of alcohol of .08 or more in his blood sample which was taken within
13 two (2) hours after driving and/or being in actual physical control of a vehicle, defendant
14 failing to pay full time and attention to his driving, and/or failing to exercise due care, and/or
15 failing to drive in a careful and prudent manner, which acts, or neglect of duties, proximately
16 caused the vehicle being driven by defendant to strike and collide with a vehicle being
17 driven by MARTIN LUBER, said collision proximately causing substantial bodily harm to
18 MAXINE LUBER.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

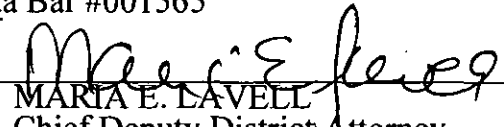
28 ///

1 COUNT 2 - LEAVING THE SCENE OF AN ACCIDENT

2 did then and there willfully, unlawfully, and feloniously, while driving a motor vehicle
3 on a highway or on premises to which the public has access at 2338 Sandstone Cliffs Drive,
4 Henderson, Clark County, Nevada and after being involved in an accident resulting in bodily
5 injury or death to MAXINE LUBER and/or MARTIN LUBER, fail to immediately stop his
6 vehicle at the scene of the accident, or as close thereto as possible.

7 STEVEN B. WOLFSON
8 Clark County District Attorney
9 Nevada Bar #001565

10 BY


11 MARIA E. LAVELL
12 Chief Deputy District Attorney
13 Nevada Bar #010120
14
15
16
17
18
19
20
21
22
23
24
25
26

27 16FH2036X/erg/L-5
28 HPD EV#1621674
(TK)

Felony/Gross Misdemeanor

COURT MINUTES

August 14, 2019

C-18-333254-1 State of Nevada
 vs
 Jack Banka

August 14, 2019 09:00 AM Defendant's Motion for Substitution of Attorney

HEARD BY: Ellsworth, Carolyn COURTROOM: RJC Courtroom 16D

COURT CLERK: Natali, Andrea

RECORDER: Corcoran, Lara

REPORTER:

PARTIES PRESENT:

Jack Paul Banka	Defendant
John G. Watkins	Attorney for Defendant
Michael D. Pariente	Attorney for Defendant
State of Nevada	Plaintiff
Taleen R Pandukht	Attorney for Plaintiff

JOURNAL ENTRIES

Deft. present at liberty on Bond. Upon Court's inquiry regarding whether the substitution would result in the sentencing date being continued or the plea being withdrawn, Mr. Pariente stated it would not. Mr. Watkins stated that was not his intention at the present time. COURT ORDERED, motion GRANTED. Mr. Watkins stated the substitution of counsel had already been filed.

BOND

10/23/19 - 9:00 AM - SENTENCING

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****October 23, 2019**

C-18-333254-1 State of Nevada
vs
Jack Banka

October 23, 2019 9:00 AM Sentencing

HEARD BY: Ellsworth, Carolyn**COURTROOM:** RJC Courtroom 16D**COURT CLERK:** Andrea Natali**RECORDER:** Lara Corcoran**REPORTER:****PARTIES**

PRESENT:	Banka, Jack Paul	Defendant
	Pariante, Michael D.	Attorney
	State of Nevada	Plaintiff
	Villani, Jacob J.	Attorney
	Watkins, John G.	Attorney

JOURNAL ENTRIES

- Deft. present at liberty on Bond. Mr. Watkins orally argued that the information did not charge a crime. Mr. Villani argued in opposition to the oral motion; noting there was a stipulated sentence. Further, Mr. Watkins requested to file a motion to arrest judgment in open court. COURT ADVISED it would not allow the document to be filed in open court, as he could not ambush the state by filing the motion; however, advised counsel he could e-file something if he wanted to withdraw the plea. Mr. Watkins further argued regarding comingling a gross misdemeanor with a felony, that there was no offense charged, and the Court had no jurisdiction to adjudicate the Deft. Mr. Villani orally moved to remand the Deft. into custody, or in the alternative order breath interlock monitoring; further, argued in opposition to the motion being filed, due to its untimeliness. Mr. Watkins argued that the Deft. should remain out of custody, as he was not a flight risk and had appeared to all of the hearings. Further arguments regarding whether the motion was a delay tactic. COURT ADVISED, there was not a good reason to remand the Deft. into custody, and as to the additional monitoring, nothing had changed with the Deft.; ADDITIONALLY, the state had the right to file a response to the

PRINT DATE: 11/13/2019

Page 1 of 2

Minutes Date: October 23, 2019

RA 000110

motion; therefore, ORDERED, sentencing CONTINUED and motion SET for hearing; briefing schedule IMPOSED as follows:

Deft.'s motion DUE BY today 10/23/19,

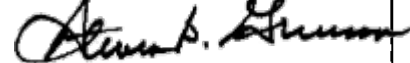
State's response DUE BY 11/6/19,

Deft.'s reply DUE BY 11/13/19.

BOND

11/18/19 - 9:00 AM - SENTENCING ... MOTION TO ARREST JUDGMENT

CLERK'S NOTE: The foregoing minutes were updated to correct two grammatical errors (11/13/19 amn).



OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MICHAEL G. GILES
Deputy District Attorney
Nevada Bar #10051
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JACK PAUL BANKA,
#8353273,

Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

**STATE'S OPPOSITION TO DEFENDANT'S MOTION IN ARREST OF
JUDGMENT PURSUANT TO NRS 176.525**

DATE OF HEARING: 11/18/2019
TIME OF HEARING: 0900 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through MICHAEL G. GILES, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion In Arrest Of Judgment Pursuant To NRS 176.525.

This Opposition is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

///

///

///

///

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On December 1, 2016, at approximately 5:50 p.m. Jack Paul Banka (hereinafter
4 Defendant), was the at fault driver in a motor vehicle crash at the intersection of Atchley Drive
5 and Anthem Parkway in Henderson, Nevada.¹ The vehicle Defendant struck was occupied by
6 two individuals; the driver, Martin Luber was 83 years old at the time of the crash; the
7 passenger (his wife), Maxine Luber was also 83 years old at the time of the crash. After the
8 Defendant struck the victim's vehicle he stopped briefly before pushing the victim's vehicle
9 with his own before driving away from the scene. Witnesses at the scene, including an off-
10 duty Henderson Firefighter, observed the crash and Defendant's flight from the scene.

11 Witness Gregory Larson followed the Defendant as he drove away from the scene and
12 called 9-1-1 to report the crash. He reported the vehicle as a Mercedes sedan with Nevada
13 License 071SWZ. The vehicle was later determined to be registered to Defendant. Mr. Larson
14 followed Defendant into a neighborhood at the corner of Idaho Falls and Sandstone Cliffs.
15 Defendant stopped the severely damaged vehicle half way down the street and Mr. Larson
16 approached the Mercedes to check on him. After a brief conversation Defendant again tried to
17 drive away but was unable to. At that point Defendant left his vehicle and fled the area on foot.

18 Defendant was located by HPD Officer Kook approximately 1500 feet from his vehicle
19 and was brought back to the location where he had previously abandoned the car. Defendant
20 exhibited signs of impairment but denied drinking alcohol. He failed standardized field
21 sobriety tests. Witnesses at the scene identified Defendant as the driver of the Mercedes
22 involved in the crash. Upon searching Defendant's vehicle a spilled cup of liquid with an odor
23 of alcohol was splattered inside. A PBT unit in passive mode detected the presence of alcohol
24 in the liquid.

25 Medical units responded to the crash scene where Maxine Luber complained of pain in
26 her sternum. It was later determined she suffered two fractures of her sternum. Martin Luber
27 also suffered injury to his chest and arm in the crash.

28

¹ Unless otherwise noted all facts of the incident are derived from Henderson Police Department event 16-21674.

1 Defendant was arrested for DUI Resulting in Substantial Bodily Harm and Duty to Stop
2 at the Scene of a Crash Resulting in Injury.

3 On December 5, 2016, Defendant made his first appearance in Henderson Justice Court
4 Department 1. Bail was set at \$153,000. Defendant posted the bond and was released on
5 December 6, 2016.

6 On January 11, 2017, a criminal complaint was filed, and a summons sent to Defendant.

7 On February 21, 2017, Thomas Boley appeared at arraignment for Defendant in
8 Henderson Justice Court Department 3. He waived the reading of the Complaint, as well as a
9 speedy preliminary hearing. Preliminary Hearing was set on March 23, 2017.

10 On March 23, 2017, Defendant was not present with Mr. Boley. The PH was called off
11 for discovery issues and a status check on discovery was set for June 28, 2017.

12 On June 28, 2017, the case was again continued for possible negotiations. A status
13 Check was set for August 1, 2017.

14 On August 1, 2017, Defendant was not present, and Mr. Boley requested a preliminary
15 hearing date be set. The preliminary hearing was set for September 13, 2017.

16 On September 13, 2017, Defendant was not present when Mr. Ron Colquitt appeared
17 for Mr. Boley and moved to continue the Preliminary Hearing, which was granted with a new
18 date set of October 16, 2017.

19 On October 16, 2017, the case was again continued for possible negotiations. A status
20 check was set for November 21, 2017.

21 On November 21, 2017, Defendant was present with Mr. Boley and the matter was
22 again continued for possible negotiations with a status check set for December 7, 2017.

23 On December 7, 2017, Defendant was not present, and Mr. Foley again requested to
24 continue for possible negotiations. A new date of January 11, 2018 was set.

25 On January 11, 2018, Defendant was present. The case was not resolved and a
26 preliminary hearing date of March 8, 2018.

27 On January 24, 2018, the State filed an amended Criminal Complaint which was
28 granted. The Preliminary Hearing date of March 8, 2018 remained.

1 On March 8, 2018, Defendant was not present when Mr. Boley requested to continue
2 the case for possible negotiations. A status check for negotiations was set for May 22, 2018.

3 On May 22, 2018, Defendant was not present and a firm preliminary hearing date of
4 June 28, 2018.

5 On June 28, 2018, Defendant was present with Mr. Boley. The preliminary hearing was
6 held, and Defendant was bound over on Counts of Driving Under the Influence Resulting in
7 Substantial Bodily Harm and Duty to Stop at the Scene of Crash with injury.

8 On July 10, 2018, Defendant appearing in Master Calendar and was arraigned on the
9 charges. He pled not guilty and waived his speedy trial rights. Trial was set for April 15, 2019.

10 On April 8, 2019, at calendar call Defendant announced not ready and moved to
11 continue the trial. The State had no opposition. Trial was reset for June 24, 2019.

12 On June 17, 2019, defendant appeared with Mr. Boley at calendar call and advised the
13 Court the matter was resolved. Defendant however did not wasn't to admit liability for the
14 crash and asked if the plea could be accomplished pursuant to *Alford*. Calendar call was
15 continued to June 19, 2019 for the original deputy, Maria Lavell, to make the accommodation,
16 which she agreed to do.

17 On June 19, 2019, John G. Watkins and Michael Pariente attempted to substitute into
18 the case and continue the trial. After considerable discussion this Court ruled that they could
19 substitute in only if they were prepared to proceed to trial the following Monday, otherwise
20 their Motion to Substitute in was denied. Alternatively the Court advised them they could
21 affiliate into the case with Mr. Boley who consistently advised the Court he was prepared to
22 go forward. Mr. Watkins and Mr. Pariente advised the Court they could not do either option.
23 This Court then set the matter for trial to begin on Monday.

24 On June 19, 2019 at 12:40 p.m. Mr. Pariente electronically filed a Notice of Substitution
25 of Counsel with the clerk's office.

26 On June 20, 2019, Mr. Pariente filed an emergency Writ of Mandamus and Emergency
27 Motion to Stay Trial with the Nevada Supreme Court.

1 On June 21, 2019, the State filed its opposition to the Writ of Mandamus. The
2 Defendant then file a Reply with the Court requesting certified minutes and the JAVS of the
3 hearings at question. The Court then Denied the Writ and Motion.

4 On June 24, 2019, Defendant appeared with Mr. Boley and entered a guilty plea
5 pursuant to *Alford* to one count of Driving Under the Influence Resulting in Substantial Bodily
6 Harm. Defendant was canvassed and Mr. Boley waived defects in the pleading. The parties
7 agreed to stipulate to a sentence of 48-120 months in the NDOC. Defendant's plea was
8 accepted by the Court. Defendant was allowed to remain free on bond pending sentencing
9 which was set for October 23, 2019.

10 On July 25, 2019, Michael Pariente again filed a Motion to Substitute into the case. A
11 hearing date was set for August 14, 2019.

12 On August 14, 2019, Michael Pariente and John G. Watkins were allowed to substitute
13 into the case after advising the Court that it would not result in a continued sentencing date or
14 an effort to withdraw the plea.

15 On October 23, 2019, at the time set for sentencing, Mr. Pariente and Mr. Watkins
16 asked to file the present motion to arrest judgment in open Court. There had been no notice of
17 the motion to the State and Chief Deputy District Attorney Villani opposed any continuance
18 as there was a stipulated sentence. The sentencing date was continued to provide time to
19 Defendant to file the motion electronically and for the State to oppose it.

20 The State's Opposition now follows.

21 ARGUMENT

22 Defendant now asks this Court to arrest the judgment by claiming the Information fails
23 to charge a crime. He demonstrates a fundamental lack of understanding of NRS 484C.110
24 which establishes all DUI behavior and NRS 484C.430 which establishes a penalty for certain
25 specific behavior, namely causing substantial bodily harm or death while driving while
26 impaired. More importantly he fails to address the fact that he pled guilty to the charge and his
27 counsel waived the defects in the pleading to accomplish that act.

28 ///

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

3
4
5
6
7
8
9
0

- 1
- 2
- 3
- 4
- 5
- 6
- 7

8
9
0
1
2

3
4

5

6
7
8

guilt or within such further time as the court may fix during the 7-day period.

Setting aside the fact that the court has yet to make a determination of guilt (Defendant has pled pursuant to a GPA but has yet to be adjudicated guilty), Defendant cannot prevail on either the lack of a charge not jurisdictional grounds portion of the statute.

As shown below, regardless of Defendant's claims that the State conflated elements of the charge, the State properly charged Driving Under the Influence Resulting in Substantial Bodily Harm by asserting the statutory basis for the charge, the proscribed behavior Defendant was alleged to have committed, the locus of the crime being within Clark County, Nevada, and the injury to the victim. Likewise, by asserting the crime occurred in Clark County Nevada in the pleading the State has properly established this Court has jurisdiction over the matter.

II. THE INFORMATION CORRECTLY CITED THE NRS APPLICABLE TO THE CHARGE AND DEFENDANT WAS ALWAYS AWARE OF THE BEHAVIOR ALEGED AND AS SUCH WAS NOT PREJUDICED BY THE INCLUSION OF HIGHWAY OR ON PREMESIS TO WHICH THE PUBLIC HAS ACCESS IN PLACE OF ON OR OFF THE HIGHWAY

Defendant was charged by way of Criminal Complaint in the Justice Court. Following a preliminary hearing wherein witnesses identified him as 1) driving his vehicle on a highway in Henderson, Nevada, 2) while under the influence 3) crashing into the victim's vehicle before fleeing the scene, and 4) that the victim's suffered injuries, he was bound over to District Court to face the charges of Driving under The Influence Resulting in Substantial Bodily Harm and Leaving the Scene of an Accident. The Information filed followed the language of the Criminal Complaint and, as to the DUI, alleged that:

That JACK PAUL BANKA, the Defendant(s) above named, having committed the crimes of **DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 484C.110, 484C.430 - NOC 53906)** and **LEAVING THE**

1 **SCENE OF AN ACCIDENT (Category B Felony - NRS**
2 **484E.010 - NOC 53743)**, on or about the 1st day of December,
3 2016, within the County of Clark, State of Nevada, contrary to the
4 form, force and effect of statutes in such cases made and provided,
5 and against the peace and dignity of the State of Nevada,
6 COUNT 1 - DRIVING AND/OR BEING IN ACTUAL
7 PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE
8 UNDER THE INFLUENCE OF AN INTOXICATING
9 LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL
10 BODILY HARM

11 did then and there willfully and unlawfully drive and/or be in
12 actual physical control of a motor vehicle on a highway or on
13 premises to which the public has access, to wit: 2338 Sandstone
14 Cliffs Drive, Henderson, Clark County, Nevada, Defendant being
15 responsible under one or more of the following theories of
16 criminal liability, to wit: 1) while under the influence of
17 intoxicating liquor to any degree, however slight, which rendered
18 him incapable of safely driving and/or exercising actual physical
19 control of a motor vehicle, 2) while he had a concentration of
20 alcohol of .08 or more in his blood, and/or 3) when Defendant was
21 found to have a concentration of alcohol of .08 or more in his
22 blood sample which was taken within two (2) hours after driving
23 and/or being in actual physical control of a vehicle, defendant
24 failing to pay full time and attention to his driving, and/or failing
25 to exercise due care, and/or failing to drive in a careful and prudent
26 manner, which acts, or neglect of duties, proximately caused the
27 vehicle being driven by defendant to strike and collide with a
28 vehicle being driven by MARTIN LUBER, said collision
proximately causing substantial bodily harm to MAXINE
LUBER.

21 Citation to the full statute is not required and only the facts of the charge must be
22 included, and reference to the NRS version of the laws was sufficient to put Defendant on
23 notice of the offenses charged. See Sanders v. Sheriff, 85 Nev. 179, 181-82 (1969).

24 Nevada is a notice pleading State. Sheriff v. Levinson, 95 Nev. 436 (1979). In that
25 case, the defendant was charged with two counts of involuntary manslaughter, the result of a
26 motor vehicle crash. The charging document clearly stated the behavior alleged (driving over
27 100 mph on I-15 within Clark County Nevada) without citation to a statute. At the conclusion
28 of the preliminary hearing the case was bound over to the District Court. The District Court

then granted the defendant's Pre-Trial Writ of Habeas Corpus alleging the information contained was insufficient to charge a crime. In reversing the District Court's Order, the Nevada Supreme Court held:

In reviewing the sufficiency of the information before us, we are mindful of established principles regarding the function and requisites of the information. The information is the first pleading by the state in a criminal action (See NRS 173.015) and must contain “a plain, concise and definite written statement of the essential facts constituting the offense charged.” NRS 173.075(1). In the information, the prosecution is required to make a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case. In accord with these principles, we have held that an information which alleges the commission of the offense solely in the conclusory language of the statute is insufficient. In the instant case, both counts of the information are identical in all pertinent respects. **Each count provides a definite date and location for the commission of the offense, states that the offense occurred while respondent was engaged in a lawful act (driving a car), and alleges that the offense occurred because respondent was driving in an unlawful manner (in excess of 100 miles per hour). We are not concerned with whether the information could have been more artfully drafted, but only whether as a practical matter, the information provides adequate notice to the accused.** (emphasis added)(internal citations omitted)

Id at 437-8.

The Amended Information in the case at bar clearly states the charges, citing to the pertinent NRS and giving sufficient information for Defendant to be on notice of the allegations and what he would need to defend against. The correct NRS is referenced in the charge and a description of the exact behavior giving this Court jurisdiction over the case is alleged. For that reason alone Defendant's motion should be denied.

///

///

///

III. EVEN CITATION TO THE INCORRECT STATUTE, SO LONG AS THE DEFENDANT HAD ADEQUATE NOTICE OF THE CHARGES, DOES NOT NECESSITATE DISMISSAL OR REVERSAL

Pursuant to NRS 173.075:

1. The indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged. It must be signed by the Attorney General acting pursuant to a specific statute or the district attorney. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to the statement.
2. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.
3. The indictment or information must state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. **Error in the citation or its omission is not a ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.**

NRS 173.075 (emphasis added).

Not only does NRS 175.075(3) establish that an error in citation is not fatal to a case so long as it does not act to the defendant's prejudice, NRS 175.075(2) allows pleading in the disjunctive or even that the means are unknown. Where "a single offense may be committed by one or more specified means, and those means are charged alternatively, the state need only prove one of the alternative means in order to sustain a conviction." State v. Kirkpatrick, 94 Nev. 628, 630 (1978). As both NRS 484C.110 and 484C.430 list driving upon a highway as a theory the State could have proven at trial Defendant committed the alleged crime, regardless of the disjunctive portions of the statutes. The error in citation therefore could not have been to his detriment.

1 NRS 178.598 further provides that "Any error, defect, irregularity or variance which
2 does not affect substantial rights shall be disregarded."

3 In State v. Jones, 96 Nev. 71, 605 P.2d 202 (1980), the indictment erroneously charged
4 the defendant with a sale of narcotics to Officer Jolley when in fact the sale was made to the
5 informant Scheri. The Nevada Supreme Court held that the evidence presented by the State
6 at trial was not so at variance with the allegations in the indictment as to warrant granting of
7 defendant's motion to vacate the verdict.

8 The United States Supreme Court has held that reversible
9 error exists only where the variance between the charge and proof
10 was such as to affect the substantial rights of the accused. Berger
11 v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 79 L.Ed. 1314
12 (1935). The reason for this is that (1) the accused must be
13 definitely informed as to the charges against him so that he can
14 prepare for trial and will not be surprised by evidence produced,
15 and (2) the accused must be protected against double jeopardy
16 another charge for the same offense. See also Russell v. United
17 States, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).
18 This court is in agreement with this standard and has added that
19 the indictment should be sufficiently definite to prevent the
20 prosecutor from changing the theory of the case. Adler v. Sheriff,
21 92 Nev. 436, 440, 552 P.2d 334, 336 (1976); Simpson v. District
22 Court, 88 Nev. 654, 660-61, 503 P.2d 1225, 1230 (1972).

23 Also, we have looked to determine whether the challenge
24 to the indictment was brought before trial or after trial and have
25 said **that reduced standards apply to the sufficiency of**
26 **indictments challenged after trial in contrast to pre-trial**
27 **challenges.** Compare Brimmage v. State, 93 Nev. 434, 567 P.2d
28 54 (1977); Warden v. Shuff, 91 Nev. 719, 541 P.2d 1105 (1975);
Vincze v. State, 86 Nev. 546, 472 P.2d 936 (1970); and Logan v.
Warden, 86 Nev. 511, 471 P.2d 249 (1970) with State v. Johnston,
93 Nev. 279, 563 P.2d 1147 (1977) and Simpson v. District Court,
88 Nev. 654, 503 P.2d 1225 (1972).

25 State v. Jones, 96 Nev. 71, 74, 605 P.2d 202 (emphasis added).

26 The Nevada Supreme Court concluded:

27 The sufficiency of the indictment was challenged only after all the
28 evidence was presented at trial. Additionally, a state statute
provides: "Any error, defect, irregularity or variance which does

not affect substantial rights shall be disregarded.” NRS 178.598. These factors indicate the application of a reduced standard toward the sufficiency of the indictment and, as such, we find that the variance between the crime charged and the proof adduced was immaterial. It did not affect the substantial rights of the respondent because it did not impair his ability to prepare his case and defend himself against the charge.

State v. Jones, 96 Nev. 71, 76, 605 P.2d 202.

In this instance, Defendant pled guilty to one count of Driving Under the Influence Resulting in Substantial Bodily Harm via the *Alford* decision. As noted in State v. Jones this results in a reduced standard for determining the sufficiency of the Amended Information. It is also important to note that defense counsel waived defects in the pleading at the time of the plea canvas. (See, Recorder's Transcript of Hearing: Entry of Plea 3:21).

As the Ninth Circuit Court of Appeals stated in United States v. Gordon, 641 F.2d 1281 (9th Cir. 1981): “While correct citation to the relevant statute is always desirable, both the Federal Rules and the cases interpreting them make it clear that an error or omission is not necessarily fatal.” The Gordon case referenced Federal Rules of Criminal Procedure Rule 7(c)(3), which also provides that “error in the citation or its omission shall not be ground for dismissal of the indictment ... or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.” United States v. Gordon, 641 F.2d 1281, 1284. The Ninth Circuit Court of Appeals held that they do not find that the Government's failure to cite s[ection] 197.010 could have prejudiced appellants as they were fully informed of the charges they faced. United States v. Gordon, 641 F.2d 1281, 1285.

In United States v. Clark, 416 F.2d 63 (9th Cir. 1969), a Ninth Circuit decision relying on Rule 7(c)(3), this Court upheld the district court's refusal to dismiss an indictment where appellant, who was accused of submitting a false travel voucher to the federal government, had been charged under 18 U.S.C. s 287 instead of 18 U.S.C. s 1001. In so doing, the Court stated:

The statutory citation is not, however, regarded as part of the indictment.... We read Rule 7(c) to permit the citation of a statute on an indictment to be amended where, as here, the facts alleged will support such a change.

1 Id. at 64. See also Steinert v. United States District Court for District of Nevada, 543
2 F.2d 69, 70 (9th Cir. 1976) (A contempt case in which the Government incorrectly cited 18
3 U.S.C. s 402 instead of 18 U.S.C. s 401. Referring to Rule 7(c)(3), the court found that
4 defendant was always aware of the charge against him and that he was not prejudiced by the
5 miscitation); United States v. Wuco, 535 F.2d 1200 (9th Cir. 1976), cert. denied, 429 U.S. 978,
6 97 S.Ct. 488, 50 L.Ed.2d 586 (1979) (Noting the absence of prejudice, the court upheld a
7 superseding indictment which erroneously classified the organic THC found in defendants'
8 possession under 21 U.S.C. s 812(c) Schedule I(c), which applies only to synthetic THC);
9 United States v. Shipstead, 433 F.2d 368 (9th Cir. 1970) (A drug manufacturing case in which
10 the indictment miscited 21 C.F.R. 320.3(b), the federal regulation designating the drug
11 involved).

12 Courts in other jurisdictions have similarly held as the Nevada Supreme Court and the
13 Ninth Circuit Court of Appeals.

14 In New York, there is no statutory requirement that the indictment refer to the specific
15 statute alleged to have been violated, and many courts have held that such reference is
16 unnecessary. Assuming that the allegations of an indictment are otherwise sufficient to meet
17 the statutory requirements and adequately apprise the defendant of the charges against him or
18 her, the basic essential function of an indictment has been fulfilled. In such an instance,
19 reference to the statute itself is not necessary. The inclusion of the incorrect statutory citation,
20 therefore, is surplusage and not necessary to meet the statutory requirements. People v.
21 Guccione, 837 N.Y.S.2d 552, 554-555 (N.Y.Sup. 2007) (citations omitted).

22 An indictment will not be dismissed, nor a conviction reversed, even when the state has
23 intentionally refused or unintentionally failed to amend the indictment to correct such an error
24 in citation. State v Donato, 414 A.2d 797, 802 (R.I. 1980). The trial justice's correction by
25 amendment of the error in statutory citation worked no prejudice on defendant, who had been
26 adequately apprised of the charge against him. Id at 804.

27 Amendment of the indictment by deleting the reference to the statute proscribing
28 assault with intent to commit robbery and replacing it with the reference to the statute

1 proscribing robbery did not charge an additional or different offense and did not prejudice the
2 substantial rights of the defendant, since inclusion of the reference to the assault statute was
3 merely an unintentional drafting error and, from the beginning of the lawsuit, the parties
4 treated the charge in the indictment as one of armed robbery, rather than felonious assault.
5 State v Beal, 614 S.W.2d 77, 80 (Tenn.Cr.App. 1981).

6 More importantly, Defendant's Counsel is aware of the notice vs. correct statutory
7 citation as he previously made a similar argument while defending another DUI Felony case,
8 that one a DUI under the Once a Felon Statute. See Chrisman v. State, 437 P.3d 1055 (table)
9 (Nev. Unpub. 2019). In that case the State inadvertently charged the defendant with violating
10 NRS 484C.410(1)(a) when the correct citation should have been to NRS 484C.410(1)(c). Id
11 at 4. The District Court held that the error dd not prejudice Defendant as he was on notice the
12 State intended to use his prior felony DUI conviction as an enhancement. In considering the
13 issue the Nevada Supreme Court also agreed that the mere error in citation did not prejudice
14 Chrisman because at all states of the process he had been placed on notice of the States
15 intention to use the prior to enhance his new charge to a felony and denied his appeal on that
16 issue. Id.

17 As above, the Amended information in this case clearly states the actions for which
18 Defendant was charged. It correctly cites to the general DUI Statute, NRS 484C.110 AND the
19 penalty statute NRS 484C.430. In doing so the body of the charge incorrectly used the
20 language from NRS 484C.110 of "highway or on a premises to which the has access" in place
21 of the "on or off a highway" language of NRS 484C.430. As will be discussed below, NRS
22 484C.430 does not establish a different crime from NRS 484C.110, it merely broadens the
23 locations where the crime can occur in the event of substantial bodily harm or death to another
24 resulting from the crime of driving while under the influence. For these reasons Defendant's
25 Motion should be denied.

26 ///

27 ///

28 ///

1 **IV. DEFENDANT'S ASSERTION THAT NRS 484C.110 IS A**
2 **MISDEMEANOR OFFENSE IS INCORRECT AND TAINTS THE**
3 **REMAINDER OF HIS ARGUMENT.**

4 The Defendant asserts throughout his motion that the State conflated a "misdemeanor"
5 statute with a "felony" statute. He is incorrect. His misunderstanding is at the heart of his claim
6 and must fail.

7 **A. NRS 484C.110 Establishes the Elements of Driving Under The Influence without**
8 **respect to severity of the offense.**

9 NRS 484C.110 states in relevant part:

10 1. It is unlawful for any person who:

11 (a) Is under the influence of intoxicating liquor;

12 (b) Has a concentration of alcohol of 0.08 or more in his or her
13 blood or breath; or

14 (c) Is found by measurement within 2 hours after driving or
15 being in actual physical control of a vehicle to have a
16 concentration of alcohol of 0.08 or more in his or her blood or
17 breath,

18 to drive or be in actual physical control of a vehicle on a highway
19 or on premises to which the public has access...

20 5. If consumption is proven by a preponderance of the evidence,
21 it is an affirmative defense under paragraph (c) of subsection 1
22 that the defendant consumed a sufficient quantity of alcohol after
23 driving or being in actual physical control of the vehicle, and
24 before his or her blood or breath was tested, to cause the
25 defendant to have a concentration of alcohol of 0.08 or more in
26 his or her blood or breath. A defendant who intends to offer this
27 defense at a trial or preliminary hearing must, not less than 14
28 days before the trial or hearing or at such other time as the court
 may direct, file and serve on the prosecuting attorney a written
 notice of that intent.

 6. A person who violates any provision of this section may be
 subject to any additional penalty set forth in NRS 484B.130 or
 484B.135.

 At no point does NRS 484C.110 establish if the crime described is in fact a
 misdemeanor or felony. It does require driving behavior on a highway or premises to which
 the public has access.

 In order to determine if a DUI offense described under NRS 484C.110 is a
 misdemeanor or a felony one must read NRS 484C.400 which states in relevant part:

1 1. Unless a greater penalty is provided pursuant to NRS
2 484C.430 or 484C.440, and except as otherwise provided in NRS
3 484C.410, a person who violates the provisions of NRS
4 484C.110 or 484C.120:

5 (a) For the first offense within 7 years, is guilty of a
6 misdemeanor...

7 (b) For a second offense within 7 years, is guilty of a
8 misdemeanor...

9 (c) Except as otherwise provided in NRS 484C.340 and unless
10 the person is assigned to a program pursuant to section 16 of this
11 act, for a third offense within 7 years, is guilty of a category B
12 felony...

13 7. As used in this section, unless the context otherwise requires,
14 "offense" means:

15 (a) A violation of NRS 484C.110, 484C.120 or 484C.430;

16 (b) A homicide resulting from driving or being in actual physical
17 control of a vehicle while under the influence of intoxicating
18 liquor or a controlled substance or resulting from any other
19 conduct prohibited by NRS 484C.110, 484C.130 or 484C.430;

20 As is clearly demonstrated, the exact same behavior in NRS 484C.110 might be a
21 simple misdemeanor or a felony depending on the number of prior offenses or, as is states in
22 484C.110(1) "Unless a greater penalty is provided pursuant to NRS 484C.430..." the penalty
23 may be even more severe.

24 Additionally, NSRS 484C.400(7) the word offense encapsulates both section .110 and
25 .430.

26 Contrary to Defendant's argument, the distinguishing feature between the two sections
27 is not the difference between the words of "on a highway or premises to which the public has
28 access" and "on or off the highway" but the fact that NRS 484C.430 provides a specific penalty
for a person who injures another while driving impaired.

29 B. NRS 484C.430 is a Penalty Enhancement Statute, Not a Separate 30 Standard for DUI Prosecution

31 NRS 484C.430 states in relevant part:

32 1. Unless a greater penalty is provided pursuant to NRS
33 484C.440, a person who:

34 (a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.08 or more in his or her blood or breath;
(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his or her blood or breath;
(d) Is under the influence of a controlled substance or is under the combined influence of intoxicating liquor and a controlled substance;
(e) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders the person incapable of safely driving or exercising actual physical control of a vehicle; or
(f) Has a prohibited substance in his or her blood or urine, as applicable, in an amount that is equal to or greater than the amount set forth in subsection 3 or 4 of NRS 484C.110, and does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this State, 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...

C. NRS 484C.430 Prohibits More Expansive Behavior Than NRS 484C.110, Not Different Behavior

NRS 484C.110 prohibits driving or being in actual physical control of a vehicle on the highway or a premises to which the public has access while impaired which narrows the reach of the statute.

1. Highway Defined

A highway is defined in NRS 484A.095 as "...the entire width between the boundary lines of every way dedicated to a public authority when any part of the way is open to the use of the public for purposes of vehicular traffic, whether or not the public authority is maintaining the way." There is no dispute in this case that the Defendant was driving on a "highway" at the time of this crash.

2. Premises to which the public has access

NRS 484A.185 defines premises to which the public has access as property in private or public ownership onto which members of the public regularly enter, are reasonably likely to enter, or are

1 Hudson pled guilty to two counts and was sentenced to a term of imprisonment for 60 to 150
2 months per count to run consecutively. *Id* at 392. Hudson appealed the ambiguity of “on or
3 off the highway” under NRS 484.3795 (later superseded by NRS 484C.430) claiming it failed
4 to vest the Court with jurisdiction. *Id* at 395. The Court found that the term was clear and
5 unambiguous given the finding at preliminary hearing that he had been driving a vehicle “off
6 the highway of this **state**, and thus the district court has jurisdiction.” *Id* at 396. (emphasis
7 added)

8 In the same fashion, there is no question that the Defendant drove upon a highway of
9 the state of Nevada. Highway is delineated in both NRS 484C.110 and NRS 484C.430.
10 Neither is the defining characteristic of jurisdiction and as pled Defendant had notice of the
11 charges to which he was pleading. For that reason his argument is not valid and should be
12 denied.

13 D. Defendant’s assertion that NRS 484C.110 and 484C.430 proscribe
14 different elements under Blockburger is in error and must be
15 rejected.

16 Defendant asks this Court to find that the difference between “highway or on a premises
17 to which the public has access” and “on or off a highway” are entirely different elements and
18 as such the State has failed to charge a valid crime. He is wrong.

19 As noted above, the use of the language of the Statute, while desirable, is not even
20 required so long as the defendant is able to determine the acts for which he is being charged
21 and thus prepare an adequate defense. More importantly, these two elements do not establish
22 jurisdiction or a crime. They are merely locations the State would need to prove at trial. The
23 real Blockburger evaluation of the two statutes reveals why both NRS 484C.110 and 484C.430
24 (the felony enhancement portion of the statute) are referenced in the charging document.

25 In comparing these two statutes it is clear that both criminalize and punish a driver who
26 does “any act or neglects any duty imposed by law while driving or in actual physical control
27 of any vehicle” while (a) Is under the influence of intoxicating liquor; (b) Has a concentration
28 of alcohol of 0.08 or more in his or her blood or breath; (c) Is found by measurement within 2

1 hours after driving or being in actual physical control of a vehicle to have a concentration of
2 alcohol of 0.08 or more in his or her blood or breath;

3 NRS 484C.110 limits prosecution for these actions to behavior committed on a highway
4 or to premises which the public has access to. This is a public policy argument prevent to
5 overreach of the state onto private property where the only person involved is the impaired
6 driver.

7 NRS 484C.430 in contrast expands the State's ability to prosecute the charge of Driving
8 Under the Influence "on or off the highway," essentially anyplace in the state if "the act or
9 neglect of duty proximately causes the death of, or substantial bodily harm to, another person."
10 Both DUI charges include highways as a location. The real difference between a DUI
11 committed on a highway under NRS 484C.110 and one committed on a highway pursuant to
12 NRS 484C.430 is the substantial bodily harm to another. It is important to note that even on a
13 highway, premises to which the public has access, or off the highway a DUI resulting in
14 substantial bodily harm to the defendant alone would only be a misdemeanor. This the real
15 difference between the statutes.

16 CONCLUSION

17 As demonstrated above, the State properly charged Defendant with DUI resulting in
18 Substantial Bodily Harm. The Amended Information alleged the specific behavior, location
19 and injuries to place Defendant on notice of the charges. The error in citing the highway or
20 premises to which the public has access vs. on or off a highway does not alter the charge
21 sufficiently to render it invalid. If anything it simply narrowed the location for which the State
22 could have prevailed at trial rather than failing to allege a crime as Defendant asserts.

23 Numerous Courts, including the Nevada Supreme Court, have held consistently that a
24 failure in citation or language of a charging document does not render it invalid unless it is so
25 defective as to not reasonably place a defendant on notice of the charges against him. No
26 reasonable reading of the Amended information in this case could be construed as not having
27 placed the defendant on notice of the charges and what the State planned to prove at trial.

28 Additionally, as Defendant never raised this issue before he pled guilty and waived
effects to the pleadings, this Court should use the standard set forth in State v. Jones and use

1 a reduced standard for determining the sufficiency of the Amended Information. Under the
2 reduced standard there is no reading of the Amended Information in which Defendant can
3 assert a crime was not alleged, the Court lacked jurisdiction and he was not placed on sufficient
4 notice of the charges against him.


5 Because there was a sufficiently precise charge brought against Defendant to which he
6 pled guilty with the assistance of Counsel this Court should DENY his Motion in Arrest
7 Judgment and proceed to sentencing in this matter. For all of the foregoing the State
8 respectfully asks this Court to DENY the Motion in Arrest of Judgment.

9 DATED this 6th day of November, 2019.

10 Respectfully submitted,

11 STEVEN B. WOLFSON
12 Clark County District Attorney
Nevada Bar #001565

13 BY



14 MICHAEL G. GILES
15 Deputy District Attorney
Nevada Bar #10051

16
17 CERTIFICATE OF FACSIMILE TRANSMISSION

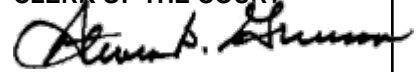
18 I hereby certify that service of State's Opposition to Defendant's Motion In Arrest
19 Of Judgment Pursuant To NRS 176.525, was made this 6th day of November, 2019, by
20 facsimile transmission to:

21 MICHAEL PARIENTE, ESQ.
22 FAX #702-953-7055

23 BY:


24 Theresa Dodson
25 Secretary for the District Attorney's Office
26
27
28

MGG/mg/VCU



MOT
THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorneys for Defendant

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JACK BANKA,

Defendant

Case No: C-18-333254-1
Dept No: 5

**REPLY TO THE STATE'S OPOSITION OF DEFENDANT'S MOTION IN
ARREST OF JUDGMENT PURSUANT TO NRS 176.525**

COMES NOW Defendant, JACK BANKA, through his attorney, MICHAEL D.
PARIENTE, ESQUIRE., with JOHN G. WATKINS, ESQUIRE., Of Counsel, and
replies to the State's Opposition.

DATED this ____ day of _____, 2019.

MICHAEL D. PARIENTE, ESQ.
Nevada Bar No.: 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169

I.

**THE STATE’S ADMISSION THAT JACK BANKA WAS IMPROPERLY
CHARGED WITH THE ELEMENTS “HIGHWAY OR PREMISES TO WHICH
THE PUBLIC HAS ACCESS” REQUIRES THAT HIS MOTION IN ARREST OF
JUDGMENT BE GRANTED**

To legally charge an offense, the formal accusation (indictment, information or complaint) must set forth each and every element of the statutory offense to be charged.¹ The substitution of elements from separate statutory offenses does not charge an offense and fails to confer subject matter jurisdiction on the Court. It is uncontroverted that the State commingled elements from NRS 484C.110 with elements of NRS 484C.430 in the Amended Information filed against Banka.

The State admits that its substitution of the NRS 484C.110 element “highway or premises to which the public has access” for the felony element “on or off the highways” in NRS 484C.430 was improper.

The State admits that Mr. Banka was improperly charged. The State says,

It [the Amended Information] correctly cites the general DUI statute, NRS 484C.110 AND the penalty statute NRS 484C.430. **In doing so the body of the charge incorrectly used the language from NRS 484C.110 of “highway or on a premises to which the public has access” in place of the “on or off a highway” language of NRS 484C.430.**

State’s Opposition (S.O.), p. 14, ls. 18-22. (emphasis added.)

The State’s admission requires this Court to grant Banka’s Motion In Arrest Of

1. Banka has provided a plethora of legal authority for what is required to charge an offense in his Motion in Arrest of Judgment and will not repeat it here for reasons of judicial economy. However, it must be noted again, there is no statute criminalizing the “charge” made against Mr. Banka in Count 1 of the Amended Information. *See again*, NRS 193.050(1).

Judgment.²

II.

ADDRESSING THE STATE'S SPECIFIC OBJECTIONS

1. The State's "Statement of the Case" is irrelevant here:

A crime is made by the State alleging each and every element of the offense in the indictment, information or complaint. *See, Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) ("An indictment **must** set forth each element of the crime that it charges." (emphasis added.); *United States v. Cook*, 17 Wall. 168, 174 (1872) (" . . . it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.") *See also, Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v. United States*, 369 U.S. 749, 763 (1962). The Court in *State v. Hancock*, 114 Nev. 161, 164, 955 P.2d 183 (1998) recognized, "[a]n indictment, **standing alone, must contain: (1) each and every element of the crime charged . . .**"³ (emphasis added.) The determination of whether the Banka Amended Information charged a DUI offense is to be made solely from the elements listed in the Amended Information itself. Consideration of information outside the Amended Information is improper and prohibited. The Court in *Ex Parte Alexander*⁴ held, " . . . **the failure [to allege that the crime was**

2. Jack Banka could not be found to have knowingly and intelligently entered a plea to a NRS 484C.430 offense when the Amended Information alleged misdemeanor elements which were substituted for the felony element. Jack was never made aware of the elements of NRS 484C.430 offense!

3. This requirement prohibits the State from alleging or relying on only part of an element.

4. 80 Nev. 354, 358, 393 P.2d 615 (1964).

1 committed in the State of Nevada] being fatal to the sufficiency of the
2 information could not be cured by evidence tending to show where the crime
3 was committed.” *Id.*, 80 Nev. at 358. (emphasis added.) Therefore, the State’s
4 “Statement of the Case” is not only irrelevant but also improperly prejudicial and must
5 be ignored by this Court.
6

7 **2. State’s alleged waiver claim:**

8 The State’s assertion that Attorney Boley waived defects of Count 1 during
9 the plea is disingenuous. Attorney Boley’s waiver of defects went to the Court’s
10 striking Court 2, leaving the scene. *See*, Plea Transcript dated June 24, 2019, ps.
11 3-4, ls. 15-25; 1-6. There was no waiver as to Count 1. Even if there had been, a
12 waiver of jurisdiction by the parties can’t be done. *See, fn 7, infra.*
13

14 **3. Paragraph I of the State’s Opposition:**⁵

15 The State’s argument that this Court has subject matter jurisdiction because “. . .
16 A CRIME IS PROPERLY CHARGED PURSUANT TO NRS 484C.110 AND
17 484C.430” lacks merit. S.O., p.6, l.1. (emphasis added.) The State’s admission that
18 Jack Banka was improperly charged by using elements from NRS 484C.110 defeats its
19 jurisdictional argument. The commingling of two (2) separate and distinct criminal
20 statutes does not charge an offense and fails to confer subject matter jurisdiction on
21
22
23
24
25
26

27 5. The State’s assertion that this Court has not adjudicated Jack Banka is incorrect. This Court found
28 Mr. Banka guilty on October 23, 2019.

the Court.⁶ *See again, Ex Parte Alexander.*⁷

The indictment in *Ex Parte Alexander* failed to allege that the murder occurred in Nevada. Absent this allegation, the indictment failed to charge an offense. The State admits that the failure to allege where the offense occurred “. . . **would result in the court lacking jurisdiction.**” S.O., p.6, l. 13. (emphasis added.) The State’s acquiesces that jurisdiction was lacking in *Ex Parte Alexander* supports Banka.

The Court in *Williams v. Municipal Court*⁸ held that the complaint did not charge an offense thereby failing to confer subject matter jurisdiction on the court because the law requires the complainant to swear before the magistrate, not a notary public. Any argument that the situation in *Williams* is more egregious than prosecuting a person on improper elements of the offense must fall on deaf ears. *Williams* supports Banka, not the State.

The State’s assertion that because Banka’s Amended Information alleges that the offense occurred in Clark County, Nevada “. . . the State has properly established this Court has jurisdiction over the matter.” S.O., p.7, l. 11. The State’s assertion lacks merit. It falsely assumes that the Amended Information charges an offense, which it

6. A court cannot act without subject matter jurisdiction and, if it does, all its acts are void. *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1938); *State Indus. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273 (1984). Jurisdiction cannot be waived or created when none exist. *Vaile v. Dist. Ct.*, 118 Nev. 262, 276, 44 P.3d 506 (2002). Jurisdiction cannot be conferred upon the court by actions of the parties and principles of estoppel and waiver do not apply. *Richardson v. United States*, 943 F.2d 1107, 1113 (9th Cir.) (1991); *State of Nevada v. Justice Court*, 112 Nev. 803, 806, 918 P.2d 401 (1996).

7. 80 Nev. 354, 393 P.2d 615 (1964).

8. 85 Nev. 425, 429, 456 P.3d 440 (1969).

1 does not. The State has improperly substituted NRS 484C.110 elements of “highway or
2 premises to which the public has access” for the felony element of “on or off the
3 highways” in NRS 484C.430. Again, the State admitted that the substitution did occur
4 and was improper.

7 **4. Paragraph II and III of the State’s Opposition:**

8 The State’s reliance on its claim of lack of prejudice is misplaced. Prejudice is not
9 a factor to be considered when determining whether Banka’s Amended Information
10 charges an offense. A formal accusation which fails to charge an offense will always fail
11 to charge an offense until amended. The absence of prejudice does not magically or
12 legally turn a formal accusation which fails to charge an offense into one which does.
13 Whether or not Jack Banka is prejudiced by the State’s Amended Information which
14 fails to charge an offense is irrelevant.⁹

17 The State’s attempt to make Banka’s Motion in Arrest of Judgment a “notice”
18 issue lacks merit. Jack Banka is not challenging the sufficiency of the Amended
19 Information for lack of “notice.” He admits that the Amended Information put him on
20 notice that the elements of “highway or premises to which the public has access” were
21 being used to prosecute him. Jack’s claim is that the Amended Information fails to
22 charge an offense and fails to confer subject matter jurisdiction on this Court.

24 The State’s Opposition regarding the citation to the statute being charged lacks
25

26 9. However, Mr. Banka is prejudiced by the State’s improper Amended Information. An
27 acquittal of the DUI would be null and void, thus denying him constitutional protection
28 against double jeopardy. *See, Ex Parte Alexander*, 80 Nev. at 359. (“An acquittal . . . by
a court having no jurisdiction is void”)

1 merit. It's the State's inappropriate commingling of the elements which is dispositive,
2 not the cite or the lack thereof to a statute.

3 The State's reference to alternative pleading is misplaced. The issue in Banka is
4 the failure of the Amended Information to charge an offense. The State's argument
5 that 484C.110 and NRS 484C.430 have the same "highway" element under both
6 statutes is false. "On or off the highways" is far more expansive than "highway." The
7 State's argument also ignores that Banka's Amended Information subjects him to the
8 element "on premises to which the public has access."
9

10 The State's cite to *State v. Jones*¹⁰ and trial variance is inapposite. The indictment
11 in *Jones*, unlike the Amended Information in Banka, charged an offense. The failure of
12 Banka's Amended Information to charge an offense is not subject to a reduced
13 standard. Whether or not a formal accusation fails to charge an offense is determined
14 solely from the language set forth in that document. *See again, Ex Parte Alexander,*
15 *supra; Williams v. Municipal Judge, supra.*
16

17 The 9th Circuit cases cited by the State are irrelevant. All are cases where the
18 charging document DID charge an offense. Additionally, the cite to the New York
19 jurisdiction for the proposition that the indictment need not refer to a specific statute is
20 not the law in Nevada. *See, NRS 173.075(3)* which states in pertinent part, "[t]he
21 indictment or information must state for each count the official or customary citation of
22 the statute. . . which the defendant is alleged therein to have violated."
23
24
25
26
27
28

10. 96 Nev. 71, 605 P.2d 202 (1980).

5. Paragraph IV of the State's Opposition:

The State admits that NRS 484C.110, “. . . does require driving behavior on a highway or premises to which the public has access.” S.O., p.15, ls. 25-26. This is another admission that Banka's Motion in Arrest of Judgment is meritorious.

The reference to NRS 484C.430 in NRS 484C.400 is to provide notice that a violation of NRS 484C.430 can be used for enhancement of a NRS 484C.110 violation and nothing more.

The State's assertion that NRS 484C.430 is not a substantive offense but rather a penalty enhancement statute has absolutely no support in law. There is no Nevada case holding that NRS 484C.430 is an enhancement only statute. A reading of NRS 484C.430 shows that is a substantive offense with penalties for its violation. The statute lists the substantive elements of the offense as well as the penalties for its violation. NRS 484C.110 has absolutely nothing to do with NRS 484C.430 except to incorporate the levels of the prohibitive substances which are contained in NRS 484C.110. The State admits that NRS 484C.110 and NRS 484C.430 are separate and distinct, citing *Hudson v. Warden*.¹¹

The State attacks Banka's reference to *Blockburger*¹² showing that NRS 484C.110 and NRS 484C.430 are separate and distinct statutes. The State previously admitted that the two statutes are different. Now the State argues they are the same! This is an obvious contradiction.

Contrary to the State's assertion, NRS 484C.110 does not require “any act or

11. 117 Nev. 387, 22 P.3d 1154 (2001).

12. *Blockburger v. United States*, 284 U.S. 299 (1932).

neglects any duty imposed by law.” This element is limited to NRS 484C.430.

The State makes clear that “highway or premises to which the public has access” covers conduct different than “on or off the highways.” **This is exactly the basis for Banka’s Motion in Arrest of Judgment.** The misdemeanor elements under NRS 484C.110 are materially different than “on or off the highways” set forth in NRS 484C.430. A person may be found guilty under NRS 484C.430 yet be acquitted under NRS 484C.110. What better example of showing that “highway or premises to which the public has access” is not the same as “on or off the highways.”

CONCLUSION

The State substituted the misdemeanor “elements” of “highway or premises to which the public has access” for the felony “element” of “on or off the highways”. The State’s commingling of the two (2) separate and distinct criminal statutes does not charge an offense and fails to confer subject matter jurisdiction on this Court.

Therefore, Jack’s Motion in Arrest of Judgment must be granted.

DATED this ____ day of _____, 2019.

Respectfully submitted,

MICHAEL D. PARIENTE, ESQ.
Nevada Bar No.: 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615

CERTIFICATE OF SERVICE

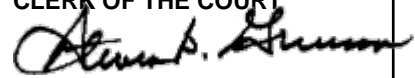
I HEREBY CERTIFY that on the ____ day of _____ 2019, that I electronically filed the foregoing Reply with the Clerk of the Court by using the electronic filing system.

The following participants in this case are registered electronic filing system users and will be served electronically:

Maria Lavell – District Attorney
Maria.Lavell@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101

And

Michael Giles – District Attorney
Michael.Giles@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101



MOT
THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorneys for Defendant

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JACK BANKA,

Defendant

Case No: **C-18-333254-1**
Dept No: **5**

MOTION TO WITHDRAW PREVIOUSLY ENTERED PLEA OF GUILTY

COMES NOW Defendant, JACK BANKA, through his attorney, MICHAEL D. PARIENTE, ESQUIRE., with JOHN G. WATKINS, ESQUIRE., Of Counsel, and moves this Honorable Court for an Order allowing Jack Banka to withdraw his previously entered plea of guilty (*Alford*) pursuant to NRS 176.165 on the grounds that the plea was not “knowingly” and “intelligently” entered, to wit: Jack Banka did not know or understand the elements of NRS 484C.430.¹

DATED this 15th day of November, 2019.



MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ., OF COUNSEL

1. The Amended Information to which Jack Banka pled improperly alleged “highway or premises to which the public has access” which is not an element of NRS 484C.430.

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff

TO: DISTRICT ATTORNEY, Attorney for Plaintiff

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion on for hearing before the Court at the Courtroom of the above-entitled Court on the ____ day of _____, 2019, at ____ m. of said day, in Department ____ of said Court.



MICHAEL D. PARIENTE, ESQ.

Nevada Bar No.: 9469

JOHN G. WATKINS, ESQ., OF COUNSEL

3960 Howard Hughes Parkway, Suite 615

Las Vegas, Nevada 89169

(702) 966-5310

Attorneys for Defendant

JURISDICTION

All motions to withdraw a previously entered plea of guilty pursuant to NRS 176.165 must be first filed in District Court. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 721 (1986).

RELEVANT FACTS

Jack Banka pled to the Amended Information which contained incorrect elements for a violation of NRS 484C.430. "Highway or premises to which the public has access" is not an element of NRS 484C.430. A defendant who is unaware of the elements of the

offense charged cannot be said or held to have entered his guilty plea “knowingly” and “intelligently”.

I

LAW AND ARGUMENT

A.

JACK BANKA’S GUILTY PLEA TO DUI WAS NOT KNOWINGLY AND INTELLIGENTLY MADE BECAUSE MR. BANKA DID NOT UNDERSTAND THE TRUE AND CORRECT ELEMENTS OF THE NRS 484C.430 OFFENSE

a. The State admitted that it improperly substituted the elements from NRS 484C.110 for the element in NRS 484C.430.

The United States Constitution is implicated when a state court accepts a defendant’s plea of guilty or *nolo contendere*.² *Boykin v. Alabama*.³ The Court in *Higby v. Sheriff*⁴ held that “[t]he defendant [must] understand[] the nature of the charge itself, i.e. the ‘elements’ of the crime to which he is pleading guilty.”⁵ *Id.*, 86 Nev, at 781. (emphasis added.)

2. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (An *Alford* plea is treated as one of *nolo contendere*.)

3. 395 U.S. 238 (1969).

4. 86 Nev. 774, 476 P.2d 959 (1970).

5. In order to charge a public offense, an indictment, information or complaint **must** allege every element of the offense. *See, Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (“An indictment **must** set forth each element of the crime that it charges.” (emphasis added.); *United States v. Cook*, 17 Wall. 168, 174 (1872) (“ . . . it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.”)⁵ *See also, Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v. United States*, 369 U.S. 749, 763 (1962). The Court in *State v. Hancock*, 114 Nev. 161, 164, 955 P.2d 183 (1998) recognized, “[a]n indictment, standing alone, **must contain**: (1) each and every element of the crime charged” (emphasis added.)

The Amended Information does not set forth the correct elements of a NRS 484C.430 violation. The State has improperly substituted the elements of “highway or premises to which the public has access” from NRS 484C.110 for the element “on or off the highways” in NRS 484C.430. The State’s commingling of the two separate and distinct statutes not only fails to charge an offense,⁶ but also fails to inform Jack Banka of the true and correct elements of NRS 484C.430.

The prosecutor, defense attorney or this Court never mentioned, addressed or discussed the inclusion of the wrong elements of NRS 484C.430 set forth in the Amended Information. The Court has the duty “to ensure that [it] has sufficient information to conclude that a defendant understands the consequences of a plea **as well as the nature of the offense**”. *Freeze*, 116 Nev. at 1105.⁷ (emphasis added.) This Court never discussed during the plea the substance of the elements alleged in the Amended Information.

Jack Banka cannot be said or held to have understood the “charge” i.e. elements of the offense filed against him when the elements alleged are not the elements of NRS 484C.430.

6. *See*, NRS 193.050(1). There is no statute criminalizing the DUI “charge” filed against Jack! Under the circumstances in Banka, this Court never acquired subject matter jurisdiction to adjudicate the case- period.

7. *State v. Freeze*, 116 Nev. 1097, 13 P.3d 443 (2000).

CONCLUSION

Since the Amended Information alleged the wrong elements, Jack Banka could not be held to understand the “charge” filed against him. Therefore, his plea of guilty was not “knowingly” and “intelligently” made and must be allowed to be withdrawn.

DATED this 15th day of November, 2019.

Respectfully submitted,



MICHAEL D. PARIENTE, ESQ.

Nevada Bar No.: 9469

JOHN G. WATKINS, ESQ., OF COUNSEL

3960 Howard Hughes Parkway, Suite 615

Las Vegas, Nevada 89169

(702) 966-5310

Attorneys for Defendant

8. Additionally, Jack Banka did not fully understand the consequences of his plea. Jack was never told that this Court had to impose a minimum fine of \$2,000 dollars. He was led to believe that the fine could be any amount up to \$5,000 dollars. *See, Plea Transcript* (June 24, 2019), ps.4-5, ls. 19-25; ls. 1-6. This is contrary to the law. Therefore, Jack Banka did not understand the consequences of his plea. This is an additional reason why this Court should allow Jack Banka to withdraw his previous entered plea of guilty.

Equally dispositive here is the fact that not one defense Motion was filed on behalf of Jack Banka. This is a factor which must be considered regarding Jack’s Motion to Withdraw his plea. *See Stevenson v. State*, 131 Nev. 598, 503-504, 354 P.3d 1277, 1281 (2015).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November 2019, that I electronically filed the foregoing Motion with the Clerk of the Court by using the electronic filing system.

The following participants in this case are registered electronic filing system users and will be served electronically:

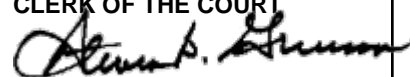
Maria Lavell – District Attorney
maria.lavell@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101

And

Michael Giles – District Attorney
michael.giles@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101



Chris Barden, an employee
of Pariente Law Firm, P.C.



MOT
THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorneys for Defendant

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JACK BANKA,

Defendant

Case No: **C-18-333254-1**
Dept No: **5**

AMENDED MOTION TO WITHDRAW PREVIOUSLY ENTERED PLEA OF GUILTY

COMES NOW Defendant, JACK BANKA, through his attorney, MICHAEL D. PARIENTE, ESQUIRE., with JOHN G. WATKINS, ESQUIRE., Of Counsel, and moves this Honorable Court for an Order allowing Jack Banka to withdraw his previously entered plea of guilty (*Alford*) pursuant to NRS 176.165 on the grounds that Jack did not understand the nature of the charge i.e. the elements of the offense, the consequences of the plea, the lack of Motions filed by his previous defense counsel and his valid defenses to the DUI charge.

DATED this 19th day of November, 2019.



MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ., OF COUNSEL

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff

TO: DISTRICT ATTORNEY, Attorney for Plaintiff

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion on for hearing before the Court at the Courtroom of the above-entitled Court on the 4th day of December, 2019, at 9:00 a.m. of said day, in Department 5 of said Court.



MICHAEL D. PARIENTE, ESQ.

Nevada Bar No.: 9469

JOHN G. WATKINS, ESQ., OF COUNSEL

3960 Howard Hughes Parkway, Suite 615

Las Vegas, Nevada 89169

(702) 966-5310

Attorneys for Defendant

JURISDICTION

All motions to withdraw a previously entered plea of guilty pursuant to NRS 176.165 must be first filed in District Court. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 721 (1986).

I

LAW AND ARGUMENT

A.

A TRIAL JUDGE HAS VAST DESCRETION TO WITHDRAW A GUILTY PLEA FOR ANY REASON WHICH IS FAIR AND JUST EVEN WHEN THE PLEA WAS KNOWINGLY AND VOLUNTARILY MADE

a. Jack Banka should be allowed to have a trial.

This Court has “vast discretion” under NRS 176.165 to grant Jack’s timely request to withdraw his previously entered guilty plea to NRS 484C.430. *See State v. Lewis*¹.

A district court has vast discretion with respect to determining the merits of a presentence motion to withdraw a guilty plea and, in fact, **may grant such motion for any reason that is fair and just**. Moreover, when the district court grants a presentence motion to withdraw a guilty plea, the State generally suffers no substantial prejudice. The State may proceed to trial on the original charges or enter into a new plea bargain with the defendant.

Id., 124 Nev. at 137. (footnotes omitted) (emphasis added)

A timely motion to withdraw a guilty plea must be judged by a relaxed standard. *See Molina v. State*² (“Accordingly, Nevada trial and appellate courts must apply a more relaxed standard to presentence motions to withdraw guilty pleas than post-sentencing motions.”) *Id.*, 120 Nev. at 191.

The Court in *State v. District Court*³ addressed NRS 176.165,

Was the lower court in error in allowing Robert to withdraw his guilty plea also? We think not. NRS 176.165 provides that:

“Except as provided in NRS 176.225, a motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.”

1. 124 Nev. 132, 178 P.3d 146 (2008).

2. 120 Nev. 185, 87 P.3d 533 (2004).

3. 85 Nev. 381, 455 P.2d 923 (1969).

Id., 381 Nev. at 384.

The above statute was taken from and is substantially the same as Rule 32 (d), Fed. Rules Crim. Proc. The action of the lower court is discretionary and will not be reversed unless there has been a clear abuse of that discretion. *Gearhart v. United States*, 272 F.2d 499 (D.C. Cir. 1959); *Bergen v. United States*, 145 F.2d 181 (8th Cir. 1944). The granting of the motion to withdraw one’s plea before sentencing is proper where for any substantial reason the granting of the privilege seems “fair and just.” *Gearhart v. United States*, *supra*. It is even held in *Woodring v. United States*, 248 F.2d 166 (8th Cir. 1957): “The question of a *defendant’s guilt or innocence is not an issue* on a motion under Rule 32 (d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., for leave to withdraw a plea of guilty. . . .” (Emphasis added.) See also *United States v. Paglia*, 190 F.2d 445 (2d Cir. 1951).

85 Nev. at 385. (emphasis original.)

This Court has full authority to grant Jack’s motion to withdraw his plea even assuming *arguendo* (which is not the case here) it was entered knowingly and voluntarily. The Court in *Riley v. State*⁴ stated,

Riley contends that the chief judge erred in allowing him to withdraw his plea of guilty to the rape charge. The authorities he cites pertain solely to the *entry* of a plea of guilty, i.e., whether such plea was voluntarily and knowingly made. **No similar determination is required prior to allowing the withdrawal of a guilty plea.**

Id., 91 Nev. at 198. (footnote omitted) (emphasis added)

Jack’s request to withdraw his previously entered plea of guilty is timely under NRS 176.165, is “fair and just” and should be granted.

Jack did not understand the elements of the offense:

The United States Constitution is implicated when a court accepts a defendant’s

⁴ 91 Nev. 196, 533 P.2d 456 (1975).

plea of guilty or nolo contendere. *Boykin v. Alabama*⁵. *Boykin* explained, “[w]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of what courts are capable in canvassing this matter with the accused to make sure he has a **full understanding** of what the plea connotes and of its consequences.” 395 U.S. at 234-244. (emphasis added.) *See also, State v. Freese*⁶, (“A colloquy is a constitutional mandate to ensure that a court has sufficient information to conclude that a defendant understands the consequences of a plea as well as the nature of the offenses.”) 116 Nev. at 1105. The Court in *Love v. State*⁷ stated, “[T]he record must reveal, *inter alia*, that the accused entered his or her plea with an understanding of the charge and the **elements of the offense**.” (emphasis added.) A plea cannot be voluntary and knowing “. . . unless the defendant possesses an understanding of the law in relation to the facts.” *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

The Court in *Higby v. Sheriff*⁸ held that “[t]he defendant [must] understand[] the nature of the charge itself, **i.e. the ‘elements’ of the crime to which he is pleading guilty.**” *Id.*, 86 Nev. at 781. (emphasis added.) The Amended Information does not set forth the correct elements of a NRS 484C.430 violation. The State **admits** it has improperly substituted the elements of “highway or premises to which the public has access” from NRS 484C.110 for the element “on or off the highways” in NRS

5. 395 U.S. 238 (1969)

6. 116 Nev. 1097, 13 P.3d 442 (2000)

7. 99 Nev. 147, 147, 659 P.2d 876, 877 (1983)

8. 86 Nev. 774, 476 P.2d 959 (1970).

1 484C.430. The prosecutor, defense attorney or this Court never mentioned, addressed
2 or discussed the inclusion of the wrong elements of NRS 484C.430 set forth in the
3 Amended Information. The State’s commingling of the two separate and distinct
4 statutes not only fails to charge an offense,⁹ but also fails to inform Jack Banka of the
5 true and correct elements of NRS 484C.430. Jack Banka cannot be said or held to have
6 understood the “charge” i.e. elements of the offense filed against him when the
7 elements alleged are not the elements of NRS 484C.430.

8
9 The Court has the duty “to ensure that [it] has sufficient information to conclude
10 that a defendant understands the consequences of a plea **as well as the nature of**
11 **the offense**”. *Freeze*, 116 Nev. at 1105.¹⁰ (emphasis added.) This Court never discussed
12 during the plea the substance any of the elements alleged in the Amended Information.
13 Therefore, the Court could not possibly know that Jack understood each element of the
14 DUI offense at the time he entered his plea.

15
16 Additionally, the “however slight” language in the Amended Information is not
17 the law and has never been. *See*, this Court’s Order addressing this issue in *Vitale*
18 marked as Exhibit A. Also, the language “failing to pay full time attention to his
19 driving, and/or failing to exercise due care and/or failing to drive in a careful and
20 prudent manner” are conclusory pleadings in violation of the Sixth Amendment
21 “notice” requirement in the United States Constitution. This Court in *Vitale* stated
22 that the “due care” allegation was unconstitutionally conclusory. It cannot lawfully be
23 said that Jack Banka understood the nature of the charge brought against him.

24
25
26
27 _____
28 9. *See*, NRS 193.050(1). There is no statute criminalizing the DUI “charge” filed against Jack!

10. *State v. Freeze*, 116 Nev. 1097, 13 P.3d 443 (2000).

Jack did not understand the consequences of his plea:

Jack was never told that this Court had to impose at least minimum fine of \$2,000 dollars. Jack was lead to believe that the fine could be any amount up to \$5,000 dollars. *See, Plea Transcript* (June 24, 2019), ps. 4-5, ls. 19-25; ls. 1-6. The Court's representation was contrary to law. A fine is an important part of the DUI penalty. Therefore, Jack Banka did not understand the consequences of his plea.

Jack's previous defense attorney should have filed the following Motions:

1. A motion *in limine* pursuant to *State v. Dist. Ct.* (Armstrong, 127 Nev. 927, 267 P.3d 777 (2011)).
2. A motion challenging the Preliminary Breath Test (PBT) pursuant to *State v. Sample*, 134 Nev., Adv Opin. No. 23 (April 5, 2018).
3. A motion challenging the conclusory pleadings pursuant to *Earlywine v. Sheriff*, 94 Nev. 100, 575 P.2d 599 (1998).
4. A motion challenging the "however slight" language in the Amended Information pursuant to *Cotter v. State*, 103 Nev. 303, 305, 738 P.2d 506 (1987) and *Sheriff v. Burcham*, 124 Nev. 1247, 198 P.3d 326 (2008).

None of these motions were filed on behalf of Jack Banka.

B.

JACK BANKA HAS VALID DEFENSES TO THE STATE'S DUI CHARGE AND SHOULD BE ALLOWED TO PROCEED TO TRIAL¹¹

As to the impairment and *per se* theories, there is insufficient information to allow the State to do a scientifically reliable retrograde extrapolation. *See, Armstrong, supra*. There is only one blood draw which was obtained over one (1) hour after the accident. It is imperative for a valid retrograde extrapolation calculation to know how much alcohol was consumed and when the first and last drink occurred. The police did not ask these questions!

There is evidence that Jack could have consumed alcohol immediately after the accident. There was an alcoholic beverage which partially spilled in Jack's vehicle .

The Officer's observations of Jack do not prove beyond a reasonable doubt that Jack was impaired. Clearly, Jack has valid defenses to the impairment and *per se* theories.

The "two-hour" theory is equally defensible. First, a Motion to Suppress the evidentiary BAC reading is appropriate because the Officer did not give Jack the choice of submitting to a breath test in lieu of blood. *See, NRS 484C.160(5)(a)* (" . . . the person

11. Jack still maintains that the Amended Information does not charge an offense and fails to confer jurisdiction on this Court. In order to charge a public offense, an indictment, information or complaint **must** allege every element of the offense. *See, Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) ("An indictment **must** set forth each element of the crime that it charges." (emphasis added.); *United States v. Cook*, 17 Wall. 168, 174 (1872) (" . . . it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.")¹¹ *See also, Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v. United States*, 369 U.S. 749, 763 (1962). The Court in *State v. Hancock*, 114 Nev. 161, 164, 955 P.2d 183 (1998) recognized, "[a]n indictment, standing alone, **must contain**: (1) each and every element of the crime charged" (emphasis added.)

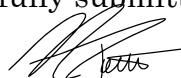
may refuse to submit to a blood test if means are reasonable available to perform a breath test.”); NRS 484C.240(2) (Unless the Officer substantially complies with the implied consent law, which he did not do in Banka, the evidentiary test reading is inadmissible.) Second, a review of the testing of Jack’s blood is imperative. *See*, NRS 484C.240(3) (“If a person submits to a chemical test provided for in NRS 484C.150 or 484C.160, full information concerning that test must be made available, upon request of the person, to the person or his or her attorney.”) This request was never made in Jack’s case. It is common to find material errors in the Lab’s blood alcohol testing.

CONCLUSION

The charge filed against Jack Banka is serious requiring a mandatory prison sentence. As evidence of the seriousness, this Court has indicated that it would sentence Jack to four (4) years in the Nevada State Prison. Jack should be entitled to defend against the serious charge before a jury. A plea of guilty is not designed to foreclose a defendant’s right to have a trial. This Court has vast discretion to withdraw a plea of guilty and should exercise that discretion in Jack’s case. Therefore, Jack Banka’s Motion to Withdraw the plea should be granted on the grounds that Jack did not understand the nature of the charge i.e. the elements of the offense, the consequence of the plea, the lack of Motions filed by his previous defense counsel and his valid defenses to the DUI charge.

DATED this 19th day of November, 2019.

Respectfully submitted,



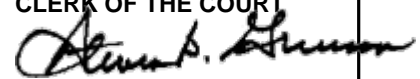
MICHAEL D. PARIENTE, ESQ.

Nevada Bar No.: 9469

JOHN G. WATKINS, ESQ., OF COUNSEL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit A



1 **ORDR**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4 THE STATE OF NEVADA,

5 Plaintiff,

6 -vs-

7 JESSICA LYNN VITALE,
8 #3074317

9 Defendant.

CASE NO: C-17-322753-1

DEPT NO: V

10 **ORDER GRANTING DEFENDANT'S MOTION TO STRIKE THE LANGUAGE OF**
11 **"HOWEVER SLIGHT" IN THE INFORMATION BECAUSE IT IS NOT (AND**
12 **NEVER WAS) THE DEFINITION OF "UNDER THE INFLUENCE" IN NEVADA**

13 DATE OF HEARING: August 9, 2017
14 TIME OF HEARING: 9:00 A.M.

15 THIS MATTER having come on for hearing before the above entitled Court on the 9th
16 day of August, 2017, the Defendant being represented by JOHN GLENN WATKINS, ESQ.,
17 the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through
18 THOMAS J. MOSKAL, Deputy District Attorney, and the Court having heard the arguments
19 of counsel, based on the pleadings, and good cause appearing therefore,

20 IT IS HEREBY ORDERED that the Defendant's Motion to Strike the Language of
21 "However Slight" in the Information because it is not (and never was) the Definition of
22 "Under the Influence" in Nevada is GRANTED as unopposed.

23 DATED this 1st day of December, 2017.

24 
25 DISTRICT JUDGE

Certificate of Service

The undersigned hereby certifies that on the 4th of December 2017 she served the foregoing ORDER GRANTING DEFENDANT'S MOTION TO STRIKE THE LANGUAGE OF "HOWEVER SLIGHT" IN THE INFORMATION BECAUSE IT IS NOT (AND NEVER WAS) THE DEFINITION OF "UNDER THE INFLUENCE" IN NEVADA by faxing, mailing, or electronically serving a copy to counsel as listed below:

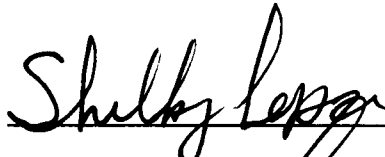
STEVEN B. WOLFSON

Thomas Moskal, Deputy District Attorney.

Clark County District Attorney

John G. Watkins, Esq.

Attorney for Defendant



Shelby Lopaze, Judicial Executive Assistant

CERTIFICATE OF SERVICE

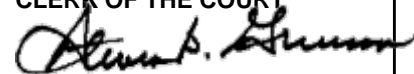
I HEREBY CERTIFY that on the 19th day of November 2019, that I electronically filed the foregoing Motion with the Clerk of the Court by using the electronic filing system.

The following participants in this case are registered electronic filing system users and will be served electronically:

Michael Giles – District Attorney
michael.giles@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101



Chris Barden, an employee
of Pariente Law Firm, P.C.



1 **OPPS**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MICHAEL G. GILES
6 Deputy District Attorney
7 Nevada Bar #10051
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,
10
11 Plaintiff,

11 -vs-

12 JACK PAUL BANKA,
13 #8353273,

14 Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

15 **STATE'S OPPOSITION TO DEFENDANT'S AMENDED MOTION TO**
16 **WITHDRAW PREVIOUSLY ENTERED PLEA OF GUILTY**

17 DATE OF HEARING: 12/4/19
18 TIME OF HEARING: 0900 AM

18 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
19 District Attorney, through MICHAEL G. GILES, Deputy District Attorney, and hereby
20 submits the attached Points and Authorities in Opposition to Defendant's Amended Motion
21 To Withdraw Previously Entered Plea Of Guilty.

22 This Opposition is made and based upon all the papers and pleadings on file herein,
23 the attached points and authorities in support hereof, and oral argument at the time of hearing,
24 if deemed necessary by this Honorable Court.

25 ///

26 ///

27 ///

28 ///

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On December 1, 2016, at approximately 5:50 p.m. Jack Paul Banka (hereinafter
4 Defendant), was the at fault driver in a motor vehicle crash at the intersection of Atchley Drive
5 and Anthem Parkway in Henderson, Nevada.¹ The vehicle Defendant struck was occupied by
6 two individuals; the driver, Martin Luber was 83 years old at the time of the crash; the
7 passenger (his wife), Maxine Luber was also 83 years old at the time of the crash. After the
8 Defendant struck the victim's vehicle he stopped briefly before pushing the victim's vehicle
9 with his own before driving away from the scene. Witnesses at the scene, including an off-
10 duty Henderson Firefighter, observed the crash and Defendant's flight from the scene.

11 Witness Gregory Larson followed the Defendant as he drove away from the scene and
12 called 9-1-1 to report the crash. He reported the vehicle as a Mercedes sedan with Nevada
13 License 071SWZ. The vehicle was later determined to be registered to Defendant. Mr. Larson
14 followed Defendant into a neighborhood at the corner of Idaho Falls and Sandstone Cliffs.
15 Defendant stopped the severely damaged vehicle half way down the street and Mr. Larson
16 approached the Mercedes to check on him. After a brief conversation Defendant again tried to
17 drive away but was unable to. At that point Defendant left his vehicle and fled the area on foot.

18 HPD Officer Kook located Defendant approximately 1500 feet from his vehicle and s
19 brought him back to his abandoned car. Defendant exhibited signs of impairment but denied
20 drinking alcohol. He failed standardized field sobriety tests. Witnesses at the scene identified
21 Defendant as the driver of the Mercedes involved in the crash. Upon searching Defendant's
22 vehicle a spilled cup of liquid with an odor of alcohol was splattered inside. A PBT unit in
23 passive mode detected the presence of alcohol in the liquid.

24 Medical units responded to the crash scene where Maxine Luber complained of pain in
25 her sternum. It was later determined she suffered two fractures of her sternum. Martin Luber
26 also suffered injury to his chest and arm in the crash.

27
28

¹ Unless otherwise noted all facts of the incident are derived from Henderson Police Department event 16-21674, a copy of which is attached as Exhibit 1.

1 Defendant was arrested for DUI Resulting in Substantial Bodily Harm and Duty to Stop
2 at the Scene of a Crash Resulting in Injury.

3 On December 5, 2016, Defendant made his first appearance in Henderson Justice Court
4 Department 1. Bail was set at \$153,000. Defendant posted the bond and was released on
5 December 6, 2016.

6 On January 11, 2017, a criminal complaint was filed, and a summons sent to Defendant.

7 Between February 21, 2017, the initial arraignment, and June 28, 2018, when the
8 preliminary hearing was conducted, the case was continued 10 times for Defendant to prepare
9 and consider offers of resolution.

10 On June 28, 2018, following the preliminary hearing Defendant was bound over on
11 Counts of Driving Under the Influence Resulting in Substantial Bodily Harm and Duty to Stop
12 at the Scene of Crash with injury.

13 On July 10, 2018, Defendant appeared in Master Calendar and was arraigned on the
14 charges. He pled not guilty and waived his speedy trial rights. Trial was set for April 15, 2019.

15 On April 8, 2019, at calendar call Defendant announced not ready and moved to
16 continue the trial. The State had no opposition. Trial was reset for June 24, 2019, with calendar
17 call June 17, 2019.

18 On June 17, 2019, defendant appeared with Mr. Boley at calendar call and advised the
19 Court the matter was resolved. Defendant however did not want to admit liability for the crash
20 and asked if the plea could be accomplished pursuant to *Alford*. Calendar call was continued
21 to June 19, 2019, for the original deputy, Maria Lavell, to make the accommodation, which
22 she agreed to do.

23 On June 19, 2019, John G. Watkins and Michael Pariente attempted to substitute into
24 the case and continue the trial. After considerable discussion this Court ruled that they could
25 substitute in only if they were prepared to proceed to trial the following Monday, otherwise
26 their Motion to Substitute in was denied. Alternatively the Court advised them they could
27 affiliate into the case with Mr. Boley, who consistently advised the Court he was prepared to
28

go forward. Mr. Watkins and Mr. Pariente advised the Court they could not do either option. This Court then set the matter for trial to begin on Monday.

On June 19, 2019 at 12:40 p.m. Mr. Pariente electronically filed a Notice of Substitution of Counsel with the clerk's office.

On June 20, 2019, Mr. Pariente filed an emergency Writ of Mandamus and Emergency Motion to Stay Trial with the Nevada Supreme Court.

On June 21, 2019, the State filed its opposition to the Writ of Mandamus. The Defendant then filed a Reply, with the Supreme Court requesting certified minutes and the JAVS of the hearings at question. The Supreme Court then Denied the Writ and Motion.

On June 24, 2019, Defendant appeared with Mr. Boley and entered a guilty plea pursuant to *Alford* to one count of Driving Under the Influence Resulting in Substantial Bodily Harm. Defendant was canvassed and Mr. Boley waived “any” defects in the pleading. The parties agreed to stipulate to a sentence of 48-120 months in the NDOC. Defendant’s plea was accepted by the Court. Defendant was allowed to remain free on bond pending sentencing which was set for October 23, 2019.

On July 25, 2019, Michael Pariente again filed a Motion to Substitute into the case. A hearing date was set for August 14, 2019.

On August 14, 2019, Michael Pariente and John G. Watkins were allowed to substitute into the case after advising the Court that it would not result in a continued sentencing date, or an effort to withdraw the plea.

On October 23, 2019, at the time set for sentencing, Mr. Pariente and Mr. Watkins asked to file a motion to arrest judgment in open Court. There had been no notice of the motion to the State and Chief Deputy District Attorney Villani opposed any continuance as there was a stipulated sentence. The sentencing date was continued to provide time to Defendant to file the motion electronically and for the State to oppose it.

On November 6, 2019, the State filed its Opposition.

On November 12, 2019, Defendant filed his reply to the State's Opposition.

1 On November 15, 2019, Defendant filed a subsequent Motion to Withdraw Plea.²

2 On November 18, 2019, the parties argued the Motion to Arrest Judgment. This Court
3 ruled that the notice provided in the charging document, which included the correct statutory
4 citation and sufficient facts of what the State intended to prove at trial to put Defendant on
5 notice, despite the “inartful” pleading, did not render the Information invalid, and denied
6 Defendant’s Motion. At the conclusion of the argument the State noted the recently filed
7 Motion to Withdraw Plea, noting that the argument within it was essentially the same
8 argument the Court had just ruled against, and asked if the Court had any inclination to address
9 it without the State having responded in writing. Mr. Watkins immediately advised the Court
10 that in fact there was much more to the Motion to Withdraw including the failure of prior
11 counsel to file motions, the canvass of the defendant by the Court and Defendant’s general
12 understanding of the plea canvass and negotiation, and that the State’s representation of the
13 motion was inaccurate. The Court declined to consider the Motion and a date was set for
14 December 4, 2019, at the State’s request.

15 On November 19, 2019, Defendant filed an eleven page Amended Motion to Withdraw
16 Previously Entered Plea of Guilty, now based on four articulated grounds and with a
17 supporting exhibit for one of the newly articulated grounds.

18 The State’s Opposition now follows.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28

² A copy of the original 6 page Motion to Withdraw Plea, filed on November 15, 2019, and based on a single articulated
issue, is attached hereto as Exhibit 2

ARGUMENT

I. DEFENDANT'S PLEA WAS FREELY AND VOLUNTARILY ENTERED

On August 13, 2015, the Supreme Court of the State of Nevada released a new opinion regarding withdraw of a pre-sentence guilty plea. In Stevenson v. State, 131 Nev. Adv. Op. 61 (2015), the Court abandoned the requirement set forth in Crawford v. State, 117 Nev. 718, 30 P.3d 1123 (2001), that “the only relevant question when determining whether a defendant presented a fair and just reason sufficient to permit withdrawal of his plea is whether the plea was knowingly, voluntarily, and intelligently entered.” Stevenson, 131 Nev. Adv. Op. 61, p. 1 (citing, Crawford, 117 Nev. at 721-22, 30 P.3d at 1125-26). The Court concluded that such a limitation was not required by NRS 176.165 nor supported by the federal rule upon which NRS 176.165 was based. Stevenson holds that “[w]e therefor disavow Crawford’s exclusive focus on the validity of the plea and affirm that the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just.” Stevenson, 131 Nev. Adv. Op. 61, p. 8.

Applying the new standard established in Stevenson, the issue is not whether the plea was entered knowingly, which the State believes is clearly established, but whether or not it would be fair and just to allow the withdraw of a plea. The heart of Defendant’s argument as to why he should be allowed to set aside his plea is that it was not entered knowingly because neither his attorney, the State nor the Court noted that the Information contained the language from NRS 484C.110 rather than the language from NRS 484C.430 despite both sections of the statute being cited and as such his plea was valid. Regardless of whether or not the plea was knowingly entered, this court must determine if it would be fair and just to allow the withdraw of the plea per Stevenson.

A guilty plea is knowing and voluntary if the defendant “has a full understanding of both the nature of the charges and the *direct consequences* arising from a plea of guilty.” Rubio v. State, 194 P.3d 1224, 1228 (Nev. 2008). To determine the validity of the guilty plea, the Nevada Supreme Court requires the district court to look beyond the plea canvass to the

entire record and the totality of the circumstances. Id. “A defendant may generally not repudiate [his] assertions, made in open court, that the plea is voluntary.” Id.

Here, by signing his GPA, Defendant represented that he was aware of the consequences of his plea GPA, p. 1. Defendant was also made aware of the possible underlying sentences for the single count to which he pleaded guilty:

I understand that as a consequence of my plea of guilty by way of the Alford decision the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than two (2) year and a maximum term of not more than twenty (20) years. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$5,000.00.

GPA, p. 2.

Of important note, in the original GPA the possible fine amount was incorrectly noted as being permissive by the use of the word may. During the canvass the Court noted the discrepancy and asked if the fine was in fact mandatory which the State confirmed. (See Recorder's Transcript of Hearing: Entry of Plea 4:19-24.) Defendant acknowledged he was aware the fine was mandatory and the Court further noted the fine could be less than \$5,000 but had to be imposed, in addition to any restitution requested, which Defendant acknowledged he understood. Id at 5:1-9

Defendant also acknowledged that he did not enter his plea pursuant to any promises made to him:

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute.

I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the recommendation.

GPA, p. 3. Defendant also acknowledged that he was waiving various rights pursuant to the agreement he entered into with the State. (See the section entitled “Waiver of Rights” on page 4 and 5 of Defendant’s GPA). Moreover, in the section entitled “Voluntariness of Plea,” Defendant acknowledged that the following statements are true:

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

1 I understand that the State would have to prove each element of the charge(s)
2 against me at trial.

3 I have discussed with my attorney any possible defenses, defense strategies and
4 circumstances which might be in my favor.

5 All of the foregoing elements, consequences, rights, and waiver of rights have
6 been thoroughly explained to me by my attorney.

7 I believe that pleading guilty and accepting this plea bargain is in my best
8 interest, and that a trial would be contrary to my best interest.

9 I am signing this agreement voluntarily, after consultation with my attorney, and
10 I am not acting under duress or coercion or by virtue of any promises of leniency,
11 except for those set forth in this agreement.

12 I am not now under the influence of any intoxicating liquor, a controlled
13 substance or other drug which would in any manner impair my ability to
14 comprehend or understand this agreement or the proceedings surrounding my
15 entry of this plea.

16 My attorney has answered all my questions regarding this guilty plea agreement
17 and its consequences to my satisfaction and I am satisfied with the services
18 provided by my attorney.

19 GPA, p. 5-6. Finally, Defendant's attorney executed a "Certificate of Counsel" as an officer
20 of the Court affirming the following:

- 21 1. I have fully explained to the Defendant the allegations contained in the
22 charge(s) to which guilty pleas are being entered.
- 23 2. I have advised the Defendant of the penalties for each charge and the
24 restitution that the Defendant may be ordered to pay.
- 25 3. I have inquired of Defendant facts concerning Defendant's immigration
26 status and explained to Defendant that if Defendant is not a United States
27 citizen any criminal conviction will most likely result in serious negative
28 immigration consequences including but not limited to:
 - a. The removal from the United States through deportation;
 - b. An inability to reenter the United States;
 - c. The inability to gain United States citizenship or legal residency;
 - d. An inability to renew and/or retain any legal residency status; and/or
 - e. An indeterminate term of confinement, by with United States Federal
Government based on the conviction and immigration status.

Moreover, I have explained that regardless of what Defendant may have
been told by any attorney, no one can promise Defendant that this
conviction will not result in negative immigration consequences and/or

impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.

5. To the best of my knowledge and belief, the Defendant:

a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement,

b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily, and

c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

GPA, p. 7. In addition to making the above representations by signing his GPA, Defendant was thoroughly canvassed by the court when he entered his plea. No transcripts of the actual plea canvass in this case were provided by Defendant in his motion, so there has been no evidence presented that the court's plea canvass was somehow deficient. Pursuant to Bryant, *supra*, this burden remains squarely on Defendant. However, as it is highly relevant to Defendant's current Motion and the representations of his current counsel it is important to note that during the canvass this Court specifically addressed the situation that led up to his plea which occurred on the day trial was to start.

The Court, as is standard practice in this department, specifically addressed the voluntariness of Defendant's plea.

THE COURT: Okay. Now , has anyone forced or coerced you into entering your plea?

THE DEFENDANT: No.

THE COURT: Has—am I ever going to hear from you that somehow because of all—everything that occurred before this plea was entered, that you now really didn't want to enter the plea and you're being forced and you want to go to trial?

THE DEFENDANT: No.

THE COURT: Are you sure because I don't want to see that later in some kind of petition that I forced you into this because obviously you can go to trial this afternoon?

1 THE DEFENDANT: I made a mistake on—on Wednesday and I just—it feels like
2 every time I open my mouth I get worse and worse, so I just—I don't—I—

3 THE COURT: So you don't—you feel like you are being forced today?

4 THE DEFENDANT: No

5 Recorder's Transcript of Hearing: Entry of Plea 7:25, 8:1-15.

6 At no point in the plea canvass did Defendant claim he was coerced into accepting the
7 negotiation. At no point did he assert his counsel was not present for him during the preceding
8 two and a half years. In fact by signing his Guilty Plea Agreement Defendant admits
9 affirmatively that counsel was available to him, had answered all of his questions and had
10 discussed possible issues and defenses available to him should the matter proceed to trial.

11 While this is sufficient to sustain the voluntary and knowing standard in the average
12 plea canvass, and thus denial of the Motion to Withdraw Plea, it has even more meaning in
13 this case as Defendant himself is a law school graduate. According to the PSI prepared in this
14 case Defendant obtained his Juris Doctorate from the Thomas M. Cooley Law School in 2005.
15 (See PSI, p.3 Education; Trinity Term 2005 Volume XXVII Number 2: Benchmark The
16 Thomas M. Cooley Law School Magazine p.18 listing Jack Paul Banka as receiving a Juris
17 Doctor Degree, a copy of which is attached as Exhibit 3).

18 Far from being an individual with little to no understanding of the plea process
19 Defendant has the educational basis to critically evaluate the matter to which he was pleading
20 and understand to a better than average degree his options. His failure to raise any of these
21 issues during the plea canvass, especially in light of the Court's offer to allow the trial to begin
22 later that same day (a possibility the State was prepared for with witnesses waiting) shows that
23 he intentionally accepted the negotiation.

24 **II. DEFENDANT'S SUPPORTING REASONS FOR WITHDRAWING HIS**
25 **PLEA ARE NOT A VALID BASIS TO DO SO**

26 Defendant next argues five basis to support the contention that despite the facts of his
27 plea canvass he did not understand the consequences of his plea. None are persuasive and
28 should all be denied.

1 A. Defendant's claim that he did not understand the elements of the crime because the
2 elements of NRS 484C.430 were incorrectly cited in the information is not
3 supported and should be rejected.

4 As this was the basis of Defendant's already denied Motion in Arrest of Judgment (and
5 was the sole basis for the original Motion to Withdraw Plea) the State will only briefly address
6 this claim.

7 Citation to the full statute is not required and only the facts of the charge must be
8 included, and reference to the NRS version of the laws was sufficient to put Defendant on
9 notice of the offenses charged. See Sanders v. Sheriff, 85 Nev. 179, 181-82 (1969).

10 Nevada is a notice pleading State. Sheriff v. Levinson, 95 Nev. 436
11 (1979). Pursuant to NRS 173.075(3):

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

16 (emphasis added).

17 Defendant was on notice that he drove a motor vehicle on a highway while intoxicated,
18 caused a motor vehicle collision which injured two people and then fled the scene. He heard
19 the State make those representations and agreed with them by proclaiming that he was
20 accepting the negotiation to avoid the potentially more serious multiple convictions and
21 possible terms of incarceration.

22 His claim that the incorrect language in the Information denied him to understand what
23 was charged should be denied.

24 B. Defendant's claim that he was not advised of a mandatory minimum fine of
25 \$2000, and so did not understand the consequences of his plea, should be denied.

26 Defendant asks this Court to conclude that despite the Defendant expressly accepting
27 the fact that a fine in this matter was mandatory and potentially as high as \$5,000 dollars, the
28 fact that the minimum amount was not articulated denied him the ability to understand the

1 consequences of his plea. Defendant also acknowledged he was agreeing to recommend a
2 sentence of four (4) to ten (10) years in prison based upon his plea. He also acknowledged that
3 restitution would be ordered if requested to which he acknowledge his understanding.
4 Defendant clearly understood his plea held significant consequences as to his time and
5 monetary resources and agreed that he still wanted to plead guilty to avoid potentially worse
6 consequences after trial. For that reason this claim should be denied.

7 C. Defendant's claim that his prior counsel should have filed certain motions on his
8 behalf is belied by his plea and the standards of representation and should be
9 denied for two (2) reasons.

10 1. Defendant signed a Guilty Plea Agreement and was canvassed.

11 An essential aspect of the GPA is to insure the Defendant is ultimately aware of certain
12 rights and establish a record that those rights were protected. By signing the GPA Defendant
13 is representing certain essential facts to the Court, including that he and his attorney had
14 discussed the facts of the case, the elements of the charge, possible defenses, defense strategies
15 and circumstances in his favor and he believed based on those interactions that his best option
16 to avoid an even lengthier prison term was to accept the State's offer and plead guilty pursuant
17 to *Alford*. Part of trial preparation and strategy is to discuss possible motions in association
18 with defenses. By agreeing that this conversation had occurred Defendant acknowledges that
19 the fact no motions were filed was a conscious decision.

20 2. Defense counsel is not required to file motions he does not believe are advisable,
21 valid or available simply because some other attorney might file them.

22 Of all his claims, the fact that four (4) specific motions were not filed on his behalf is
23 perhaps the most baffling because two of the motions would have had no impact on the case,
24 one is not supported by the facts, and one is already controlled by statute.

25 a. Defendant's assertion as to a Motion in Limine under Armstrong

26 Defendant's assertion that a Mention in Limine pursuant State v. Dist. Ct., (Armstrong)
27 127 Nev. 927 (2011) should have been filed on his behalf is confusing. The essential premise
28 of Armstrong is that with a single blood draw outside of two (2) hours a number of factors

need to be known to conduct a valid retrograde analysis. In this case the crash occurred at 6:10 pm and Defendant's blood was drawn at 7:17 pm, well inside the two-hour timeframe established by NRS 484C.430(c). Retrograde extrapolation would not have been an element of this case and as such a Motion in Limine under Armstrong would have been a frivolous exercise.

b. Defendant's assertion as to challenging the Preliminary Breath Test under State v. Sample, 134 Nev. 169 (2018) is also unfounded.

The only similarity between the facts of Sample and this case is that a PBT was administered in both cases. As a preliminary matter, Nevada law permits the use of a consensual PBT. 484C.150(1). In Sample, despite initially asserting that he received consent from Sample to obtain the PBT, the officer later testified he had simply directed Sample, who was under arrest and in custody at the time, to blow into the tester without obtaining consent. Id. at 171. This was deemed an unconstitutional search by the court. Id. In this case the officer obtained consent from Defendant before administering a PBT. Again it is unclear what Defendant would have gained by filing this motion as the PBT is not admissible in Court except to repudiate the claim that there was not a reasonable grounds for an arrest. 484C.150(3).

c. Defendant's assertion that a challenge to "conclusory pleadings" pursuant to Earlywine v. Sheriff was essential is in error.

Defendant could have filed a motion to challenge the “conclusory” language of the Information to wit: failing to pay full time and attention to his driving, failing to exercise due care, and/or failing to drive in a careful and prudent manner pursuant to Earlywine v. Sheriff, 94 Nev. 100 (1998), something his current counsel routinely does in other cases. The end result of such a motion, should it be granted, is the State filing an Amended Information with a more definite statement. It does not dispose of the case or substantially change it in any way, other than putting before a jury an even more specific description of the Defendant’s criminal behavior. Many defense attorneys do not file such a motion for that very reason and as a strategic decision. The fact that current counsel does file this motion does not indicate failing

1 to file it somehow rendered the representation of Defendant deficient by previous counsel and
2 as such this argument has no basis as to the Motion to Withdraw Plea.

3 d. Defendant's suggestion that challenging the language of "however slight"
4 by motion was essential is wrong.

5 Here Defendant's counsel again proposes that such a motion is essential to a defense,
6 mainly because he always files it. And, to his credit, the District Attorney's office routinely
7 does not oppose such a motion because, without agreeing the language is improper, it is agreed
8 that it is unnecessary. As in this case, prosecution for an alcohol related DUI under NRS
9 484C.110 or NRS 484C.430, always proceeds when the evidentiary testing shows a BAC of
10 more than .080 as a baseline, and behavior specified within one of the three (3) theories of
11 prosecution permitted. The words "however slight" make little difference and are not
12 contained within any of the enumerated theories. It is unclear how failing to file a motion the
13 State would have no opposition to, and which would not change a single structural issue in the
14 case has to do with prior counsel failing to adequately prepare for trial and a defense under
15 these facts.

16 None of the four (4) motions noted by Defendant as needing to be filed (simply because
17 current counsel routinely files them) are actually required. Defense counsel and defendant
18 spent two and a half years preparing for trial. Defendant already admitted to the Court that he
19 discussed possible defense strategies with his attorney (which would include available
20 motions) and did not file these motions. The fact new counsel would have is not a basis to
21 withdraw his plea at this time and Defendant's request on this basis should be denied.

22 D. The fact there may have been possible defenses to a charge does not invalidate
23 Defendant's plea as he was free to proceed to trial and present those defenses to
24 the jury

25 This argument is perhaps the most confusing of all the broad reasons to withdraw his
26 plea Defendant has put forward. The fact that there are potentially valid affirmative defenses
27 to a charge is not unique. It would be a rare case where there were not at least a few possible
28 defenses. That fact alone does not invalidate a plea.

1 As noted above, Defendant signed a GPA asserting he had discussed the possible
2 defenses in his case with his counsel and taking all of that into consideration decided to plead
3 guilty rather than face the potentially longer sentence upon conviction. As will be shown the
4 defenses argued in his motion are belied by the record.

5 1. Defendant's assertion of a lack of support to perform a retrograde extrapolation

6 Of the four (4) identifiable claims in this section this is the most confusing. Defendant's
7 argument is that the State, due to only taking a single blood draw, cannot do a retrograde
8 extrapolation and, as such, presumably cannot convict Defendant under an impairment or *per*
9 *se* theory. As shown above, Defendant's blood was drawn within two (2) hours of driving. The
10 State need not prove all three (3) theories of liability, and as such retrograde extrapolation
11 would not be needed to convict Defendant in this case. His claim as to this basis must fail for
12 that reason alone.

13 2. Defendant's claim that he "could have" consumed alcohol is belied by the record.

14 As an initial matter, the assertion of having consumed alcohol after driving is an
15 available affirmative defense in Nevada but would have required Defendant to take the stand
16 and testify, exposing himself to cross examination. It is uncontested that an unknown liquid
17 with the odor of alcohol, and which tested on a PBT to contain some alcohol, was found in
18 Defendant's vehicle. (See Exhibit 1, Henderson Police Department Declaration of Arrest, p2
19 of 3; paragraph 6) It is also uncontested that (as documented in paragraph 3 of the same page)
20 when asked at the scene if he had ingested any alcohol that day, on the drive home or since
21 walking away from his car Defendant answered no.

22 The fact Defendant could have ingested alcohol after the crash would have been
23 contrasted by the cross examination of him on the stand and while a defense, it again would
24 have been a defense he could have discussed prior to pleading guilty and determined not to
25 pursue. This claim should also be denied as a basis to withdraw his plea.

26 ///

27 ///

28 ///

1 3. The argument that Defendant should have filed a motion to suppress the blood in
2 this case because he was not given the option of a breath test but instead consented
3 to a blood test is in error

4 This is another motion commonly filed by current defense counsel. His argument is
5 always that pursuant to NRS 484C.160(5)(a) for implied consent to be valid Defendant must
6 be given the option of a breath test if it is reasonably available. This is an oversimplification
7 of the standard as it only applies to first and second offenses and not felonies, a fact defense
8 counsel should be aware of as he represented the appellant in the controlling case on point,
9 Ebarb v. State, 107 Nev. 985 (1991).

10 In Ebarb v State, defendant was arrested for DUI under the previous statute, NRS
11 484.383 (now NRS 484C) and the officer learned during the course of his investigation the
12 defendant had prior convictions rendering the new arrest a felony charge. Under then
13 484.383(5) (now 484C.160(5)(a)) the officer advised the defendant he needed to submit a
14 blood sample to which the defendant complied. Counsel then moved at the to suppress the
15 results at the DMV License revocation proceeding. The motion was denied, and an appeal was
16 taken on the issue. Id at 986. The issue present to the court then is as now, pursuant to the law
17 a defendant has the right to choose breath or blood and a failure to provide that option renders
18 the results inadmissible per NRS484C.240(2). The Court in Ebarb held:

19 Appellant's reading of NRS 484.383(8) is erroneous. Statutes
20 should be construed "with a view to promoting, rather than
21 defeating the legislative policy behind them." State, Dep't of Mtr.
22 Vehicles v. Brown, 104 Nev. 524, 526, 762 P.2d 882, 883 (1988).
23 The clear intent of NRS 484.383(8) is to obtain a blood test if there
24 is reasonable cause to believe a DUI suspect has committed a
25 felony. Further, this court has consistently held that "the implied
26 consent statute should be liberally construed so as to keep drunk
27 drivers off the streets." State, Dep't of Mtr. Vehicles v. Kinkade,
28 107 Nev. 257, 259, 810 P.2d 1201, 1202 (1991). See also Davis v.
 State, 99 Nev. 25, 27, 656 P.2d 855, 856 (1983). It would frustrate
 the purpose of the statute to require an officer to inform a suspect
 of the consequences of refusing a test when the suspect may not
 refuse a test, or to offer the suspect a choice between a blood test
 and a breath test when the suspect has no choice.

Id at 987-88.

1 Under NRS 484C.160 the section of the previous law establishing testing specifically
2 for felonies and people previously convicted was removed but the rationale of the court has
3 never been abrogated in that the implied consent statutes are to be construed liberally with an
4 eye to keeping "drunk drivers off the streets." State, Dep't of Mtr. Vehicles v. Kinkade, 107
5 Nev. 257, 259, 810 P.2d 1201, 1202 (1991).

6 4. Obtaining a confirmatory test of the State's Testing is permissible
7 but not required.

8 Defendant concludes by challenging the fact that prior counsel did not obtain the testing
9 information relied upon by the State (commonly called the lab case file) and retain an expert
10 to review and challenge it. He then states "it is common to find material errors in the Lab's
11 blood alcohol testing" without any support for that statement.

12 Regardless, the fact is that a Stipulation and Order³ was prepared by prior counsel in
13 Justice Court to obtain Defendant's blood sample to be independently tested which shows the
14 deliberative investigation process employed and presumably part of the "defenses and
15 strategies" Defendant admitted to pursuing with prior counsel by signing his GPA.

16 CONCLUSION

17 Defendant has failed to present any information showing that he was not aware of the
18 facts of his case or that he unknowingly entered into his plea negotiation to avoid a more
19 substantial penalty in the event of conviction. He affirmed by signing his GPA that he had in
20 fact discussed his case with prior counsel and, presumably as the holder of a JD from an
21 accredited law school, he had the ability to comprehend the documents and arguments as well
22 as charges and potential defenses. The fact that his new counsel might have suggested other
23 pretrial attacks on the evidence does not negate the fact that he stood before this court and on
24 more than one occasion stated he did not want to go to trial on the charges and had in fact
25 made a mistake by trying to substitute new counsel in at the continued calendar call. Not only
26 was his plea knowingly and voluntarily entered, there is no fair and sufficient reason presented
27 showing that permitting his withdraw is supported by the totality of the facts before this Court.

28

³ See Stipulation and Order filed in lower court a copy of which is attached as Exhibit 4


1 For all of the foregoing reasons his Amended Motion to Withdraw Previously Entered
2 Plea of Guilty should be Denied.

3 DATED this 25th day of November, 2019.

4 Respectfully submitted,

5 STEVEN B. WOLFSON
6 Clark County District Attorney
7 Nevada Bar #001565

8 BY



9 MICHAEL G. GILES
10 Deputy District Attorney
11 Nevada Bar #10051

12 CERTIFICATE OF FACSIMILE TRANSMISSION

13 I hereby certify that service of State's Opposition to Defendant's Amended Motion To
14 Withdraw Previously Entered Plea Of Guilty, was made this 25th day of November, 2019, by
15 facsimile transmission to:

16 JOHN WATKINS, ESQ.
17 FAX #702-953-7055

18 BY:


19 Theresa Dodson
20 Secretary for the District Attorney's Office
21
22
23
24
25
26
27

28 MGG/mg/VCU

EXHIBIT 1

Henderson Police Department

223 Lead St. Henderson, NV 89015

Declaration of Arrest

Page 1 of 3

DR# 1621674

FH# 18

Arrestee's Name Banka, Jack Paul

Date of Arrest 12/01/2016

Time of Arrest 1045

Charge	Degree	NRS/HMC
FAIL YIELD ROW W/LEFT TURN IN I-SECT	Misdemeanor	484B.258
DUTY TO STOP AT SCENE OF ACNT/DOPI	Felony	484E.010
DUI, ABOVE LEGAL LIMIT, R/BBH	Felony	484C.430

THE UNDERSIGNED MAKE THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS That I, Jordan Vargason am a peace officer with the Henderson PD, Clark County, Nevada, being so employed since 03/03/2008. That I learned the following facts and circumstances which led me to believe that the above named subject committed (or was committing) the above offense/offenses at the location of Anthem Parkway Henderson Nevada 89052, and that the offense occurred at approximately 1746 hours on 12/01/2016

Details of Probable Cause

On 12/01/16 at approximately 1750 hours I, Officer Vargason #1623, was dispatched to the intersection of Atchley Drive and Anthem Parkway reference a hit-and-run accident that just occurred. While en route, HPD Dispatch advised that the suspect vehicle left the scene traveling eastbound, and was followed by witnesses. The suspect vehicle was described as a black Mercedes sedan bearing Nevada plate 071SWZ

The witnesses followed the vehicle a short distance, as it turned right onto Idaho Falls Drive, then turned right again onto Sandstone Cliffs Drive, and stopped. The male got out of his vehicle and remained by it. Witnesses described him as a white male, wearing a blue polo shirt and khaki pants. One of the witnesses remained with the male, and tried to keep him from leaving. However, the male got into his vehicle, and tried to drive it again, but the vehicle stopped working, and came to rest in front of 2338 Sandstone Cliffs Drive. It was leaking fluids heavily. The male got out of the vehicle again and started running from the location.

Officers began arriving on scene at this time. I located the Mercedes E350 still parked on Sandstone Cliffs Drive. A check of the registration indicated that the owner was Jack Banka (DOB 03/13/78). Officer Krook #2231 located the described male near the intersection of Red Valley Avenue and Clearwater Lake Drive, 1500 feet away from the vehicle. Officer Krook contacted the male, who identified himself by Nevada driver license as Jack Banka. Officer Krook asked Jack if he would like a courtesy transport back to his vehicle. Jack agreed. Officer Krook transported him to my location.

Jack appeared slightly off balance when he walked, his speech was short and quiet, and his eyes were watery. There was a moderate odor of an unknown alcoholic beverage emanating from his person.

Jack advised that he is not sick or injured, nor is he diabetic or epileptic. He does not take insulin, and he is not under the care of a doctor or dentist. He does take medications for his blood pressure and cholesterol. He does not have any physical defects, and he advised me he was driving his vehicle, the black Mercedes. Jack stated he has not eaten anything in two days, and his last meal was a protein shake. He claimed he had nothing to drink. He thought there might be a mechanical problem with his car, as there was a "service engine" light glowing on his control panel. He is supposed to wear contact lenses for his vision, but was not wearing them at this time.

He explained at first that he did not think he was even in an accident at the intersection, then advised me that he immediately pulled over after being involved in an accident. He had just left his friends house near "Country Club", and

Jordan Vargason

Declarant's Name

RA 000181

Henderson Police Department

223 Lead St. Henderson, NV 89015

Page 2 of 3

Declaration of Arrest Continuation Page

DR# 1621674

FH# 19

Arrestee's Name Banka, Jack Paul

Details of Probable Cause (Continued)

was returning to his residence in Madeira Canyon. I asked him if he knew his current location. Jack advised that he believed the next cross street West of our location to be Anthem Parkway (The actual intersection was Twin Falls Drive and Sandstone Cliffs Drive)

Jack consented to perform Standardized Field Sobriety Tests (SFSTs) Jack failed to satisfactorily perform any of the SFSTs He agreed to a preliminary breath test as well. Officer Karovic administered the breath test, which indicated Jack had a BAC of .146. The serial number of the PBT was 90604970-C2

I asked Jack again if he had anything to drink today, as both the SFSTs and the breath test indicated he had. Jack was adamant that he had not been drinking tonight. I asked if he had been drinking at the golf course earlier today, if he had anything to drink while driving home, or if he had anything to drink since he walked away from his vehicle. To each question, Jack answered no

Witnesses confirmed that Jack was the male they saw driving from the scene of the accident

Officer Lillegard responded to the scene of the accident and made contact with the occupants of the other vehicle. His investigation indicated that Jack was traveling southbound on Anthem Parkway, and made a left turn onto Atchley Drive, failing to yield to oncoming traffic, at which point he struck their vehicle. Please see Officer Lillegard's report for further information regarding the accident. The driver, Martin Luber (DOB 02/29/32), suffered from general chest pains. The passenger, Maxine Luber (DOB 05/08/32) was later found to have suffered from a sternum snapped in two locations. Both were transported to SRD Siena Hospital by HFD paramedics, unit R99

Inside of Jack's vehicle, there was a spilled cup of ice and a liquid that had an odor of an alcoholic beverage splattered on the interior. Officer Karovic performed a passive test with the PBT, which indicated the presence of alcohol around the liquid

Due to the fact that witnesses observed Jack driving the Mercedes, that Officer Krook located Jack near the area, that Jack advised he was driving the vehicle during the time of the accident, that he had an odor of an unknown alcoholic beverage on his person, that he was unable to satisfactorily perform SFSTs, that a preliminary breath test indicated his BAC to be .146, well over the legal limit, that he had an alcoholic beverage in his car with ice still present, That Jack advised he had not had anything to drink since leaving his vehicle, and that at this time at least one of the occupants of the vehicle he struck suffered from broken bones, leading her to be currently incapacitated in a hospital bed, I determined there was probable cause to arrest Jack for driving under the influence with accident causing substantial bodily harm (NRS 484C.430).

Due to the fact that witnesses observed Jack in the Mercedes, that they observed him leaving the scene of the accident immediately after it occurred, and that in causing the accident he injured two occupants of the other involved vehicle, One of whom suffered broken bones, I determined there was probable cause to arrest Jack for failing to stop at the scene of an accident with injury (NRS 484E.010).

Due to the fact that Jack was traveling northbound on Anthem Parkway, and made a left turn onto Atchley drive in front of oncoming traffic, causing a collision, I determined there is probable cause to arrest him for failing to yield on a left turn at an intersection (NRS 484B 253)

Jordan Vargason

Declarant's Name

RA 000182

Henderson Police Department

223 Lead St. Henderson, NV 89015

Page 3 of 3

Declaration of Arrest Continuation Page

DR# 1621874

FH# 16

Arrestee's Name Banka, Jack Paul

Details of Probable Cause (Continued)

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor)

Jordan Vargason

Declarant's Name

RA 000183

EXHIBIT 2



MOT
THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorneys for Defendant

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JACK BANKA,

Defendant

Case No: C-18-333254-1
Dept No: 5

MOTION TO WITHDRAW PREVIOUSLY ENTERED PLEA OF GUILTY

COMES NOW Defendant, JACK BANKA, through his attorney, MICHAEL D. PARIENTE, ESQUIRE., with JOHN G. WATKINS, ESQUIRE., Of Counsel, and moves this Honorable Court for an Order allowing Jack Banka to withdraw his previously entered plea of guilty (*Alford*) pursuant to NRS 176.165 on the grounds that the plea was not "knowingly" and "intelligently" entered, to wit: Jack Banka did not know or understand the elements of NRS 484C.430.¹

DATED this 15th day of November, 2019.



MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ., OF COUNSEL

1. The Amended Information to which Jack Banka pled improperly alleged "highway or premises to which the public has access" which is not an element of NRS 484C.430.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION

TO: STATE OF NEVADA, Plaintiff

TO: DISTRICT ATTORNEY, Attorney for Plaintiff

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion on for hearing before the Court at the Courtroom of the above-entitled Court on the ____ day of _____, 2019, at ____m. of said day, in Department ____ of said Court.



MICHAEL D. PARIENTE, ESQ.

Nevada Bar No.: 9469

JOHN G. WATKINS, ESQ., OF COUNSEL

3960 Howard Hughes Parkway, Suite 615

Las Vegas, Nevada 89169

(702) 966-5310

Attorneys for Defendant

JURISDICTION

All motions to withdraw a previously entered plea of guilty pursuant to NRS 176.165 must be first filed in District Court. *Bryant v. State*, 102 Nev. 268, 272, 721 P.2d 721 (1986).

RELEVANT FACTS

Jack Banka pled to the Amended Information which contained incorrect elements for a violation of NRS 484C.430. "Highway or premises to which the public has access" is not an element of NRS 484C.430. A defendant who is unaware of the elements of the

offense charged cannot be said or held to have entered his guilty plea “knowingly” and “intelligently”.

I

LAW AND ARGUMENT

A.

JACK BANKA’S GUILTY PLEA TO DUI WAS NOT KNOWINGLY AND INTELLIGENTLY MADE BECAUSE MR. BANKA DID NOT UNDERSTAND THE TRUE AND CORRECT ELEMENTS OF THE NRS 484C.430 OFFENSE

a. The State admitted that it improperly substituted the elements from NRS 484C.110 for the element in NRS 484C.430.

The United States Constitution is implicated when a state court accepts a defendant’s plea of guilty or *nolo contendere*.² *Boykin v. Alabama*.³ The Court in *Higby v. Sheriff*⁴ held that “[t]he defendant [must] understand[] the nature of the charge itself, i.e. the ‘elements’ of the crime to which he is pleading guilty.”⁵ *Id.*, 86 Nev. at 781. (emphasis added.)

2. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (An *Alford* plea is treated as one of *nolo contendere*.)

3. 395 U.S. 238 (1969).

4. 86 Nev. 774, 476 P.2d 959 (1970).

5. In order to charge a public offense, an indictment, information or complaint **must** allege every element of the offense. *See, Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (“An indictment **must** set forth each element of the crime that it charges.” (emphasis added.); *United States v. Cook*, 17 Wall. 168, 174 (1872) (“ . . . it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed.”)⁵ *See also, Hamling v. United States*, 418 U.S. 87, 117 (1974); *Russell v. United States*, 369 U.S. 749, 763 (1962). The Court in *State v. Hancock*, 114 Nev. 161, 164, 955 P.2d 183 (1998) recognized, “[a]n indictment, standing alone, **must contain**: (1) each and every element of the crime charged” (emphasis added.)

The Amended Information does not set forth the correct elements of a NRS 484C.430 violation. The State has improperly substituted the elements of “highway or premises to which the public has access” from NRS 484C.110 for the element “on or off the highways” in NRS 484C.430. The State’s commingling of the two separate and distinct statutes not only fails to charge an offense,⁶ but also fails to inform Jack Banka of the true and correct elements of NRS 484C.430.

The prosecutor, defense attorney or this Court never mentioned, addressed or discussed the inclusion of the wrong elements of NRS 484C.430 set forth in the Amended Information. The Court has the duty “to ensure that [it] has sufficient information to conclude that a defendant understands the consequences of a plea as well as the nature of the offense”. *Freeze*, 116 Nev. at 1105.⁷ (emphasis added.) This Court never discussed during the plea the substance of the elements alleged in the Amended Information.

Jack Banka cannot be said or held to have understood the “charge” i.e. elements of the offense filed against him when the elements alleged are not the elements of NRS 484C.430.

6. *See*, NRS 193.050(1). There is no statute criminalizing the DUI “charge” filed against Jack! Under the circumstances in Banka, this Court never acquired subject matter jurisdiction to adjudicate the case- period.

7. *State v. Freeze*, 116 Nev. 1097, 13 P.3d 443 (2000).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

CONCLUSION

2 Since the Amended Information alleged the wrong elements, Jack Banka could
3 not be held to understand the "charge" filed against him. Therefore, his plea of guilty
4 was not "knowingly" and "intelligently" made and must be allowed to be withdrawn.8

DATED this 15th day of November, 2019.

Respectfully submitted,



MICHAEL D. PARIENTE, ESQ.
Nevada Bar No.: 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorneys for Defendant

24 8. Additionally, Jack Banka did not fully understand the consequences of his plea. Jack was never
25 told that this Court had to impose a minimum fine of \$2,000 dollars. He was led to believe that the
26 fine could be any amount up to \$5,000 dollars. *See, Plea Transcript* (June 24, 2019), ps.4-5, ls. 19-
27 25; ls. 1-6. This is contrary to the law. Therefore, Jack Banka did not understand the consequences
of his plea. This is an additional reason why this Court should allow Jack Banka to withdraw his
previous entered plea of guilty.

28 Equally dispositive here is the fact that not one defense Motion was filed on behalf of Jack
Banka. This is a factor which must be considered regarding Jack's Motion to Withdraw his plea. *See*
Stevenson v. State, 131 Nev. 598, 503-504, 354 P.3d 1277, 1281 (2015).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November 2019, that I electronically filed the foregoing Motion with the Clerk of the Court by using the electronic filing system.

The following participants in this case are registered electronic filing system users and will be served electronically:

Maria Lavell – District Attorney
maria.lavell@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101

And

Michael Giles – District Attorney
michael.giles@clarkcountyda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101



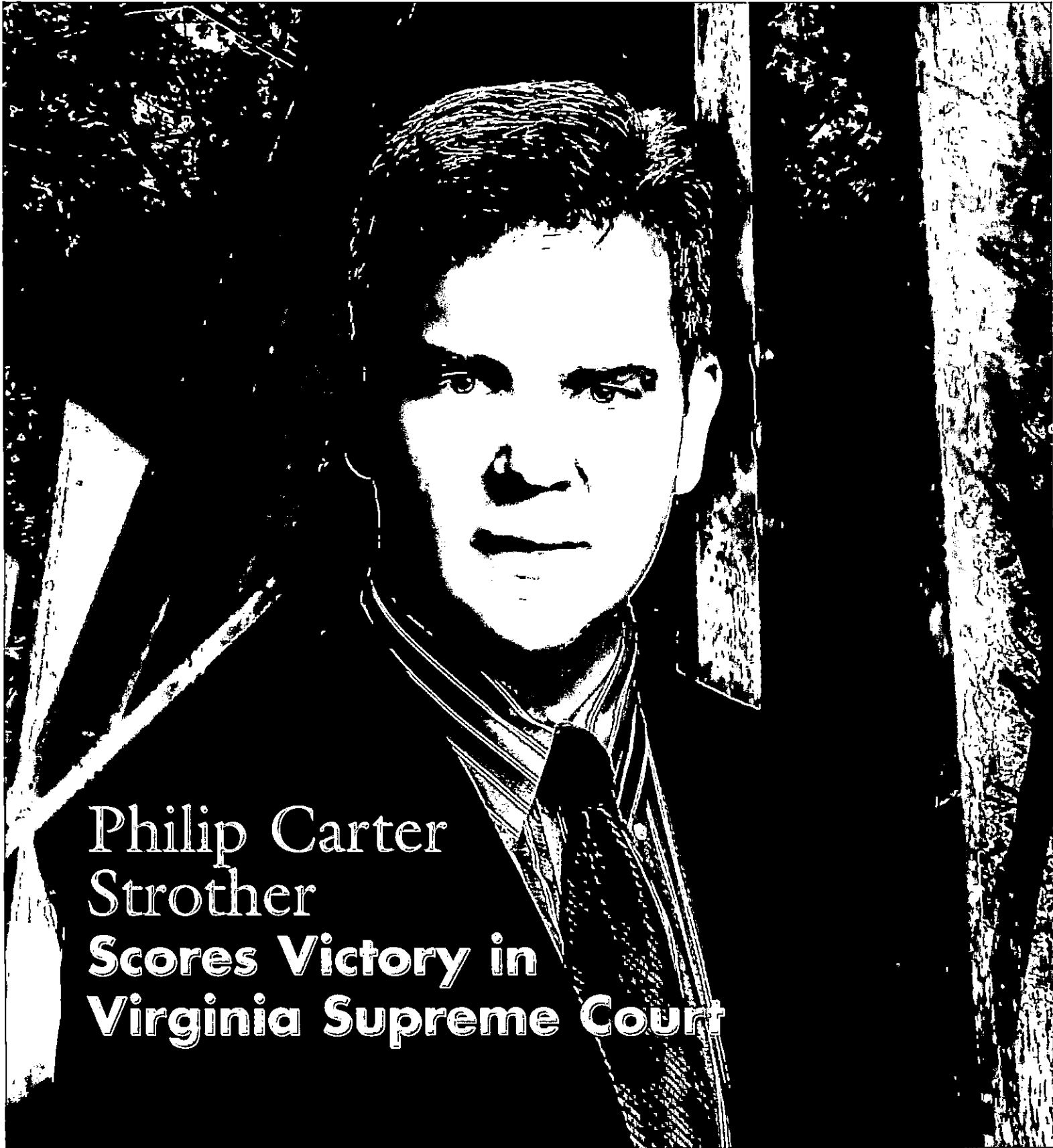
Chris Barden, an employee
of Pariente Law Firm, P.C.

EXHIBIT 3

TRINITY TERM 2005 VOLUME XXVII NUMBER 2

BENCHMARK

THE THOMAS M. COOLEY LAW SCHOOL MAGAZINE



Philip Carter
Strother
**Scores Victory in
Virginia Supreme Court**

BENCHMARK

Editor

Terry Carella

Co-Editor/Writer

Sharon Matchette

Contributing Writers

Darryl Parsell

James Robb

Design

Image Creative Group

Photography

Dementi Studios

Portrait

Kim Kauffman

Background Images

Photo Collage

Dave Matchette

Call for Submissions

The *Benchmark* is seeking submissions and story ideas from graduates. We are looking for stories on a variety of subjects including, but not limited to, graduate achievements, international law, cultural diversity, legal information helpful to practitioners, unique law practices, advice to prospective law students, and special events. If you would like to author an article, reprint an article you have authored for another publication, or share a story idea, please write, call, or e-mail:

Communications Office

Thomas M. Cooley Law School

P.O. Box 13038

Lansing, MI 48901

Phone: (517) 371-5140 ext. 2916

Fax: (517) 334-5780

E-mail: communications@cooley.edu

Postmark: *Benchmark* is published three times each year by the administrative offices of the Thomas M. Cooley Law School, P.O. Box 13038, Lansing, MI 48901

alumni database

The user name will always remain the word alumni. The password changes each term and will be disclosed in the *Benchmark* on the inside front cover. Please call the Alumni Relations Office at (800) 243-ALUM, or in the Lansing area call 371-5140, ext. 2038, or e-mail alumni@cooley.edu if you have any problems.

Letter from Cooley



You can find a member of Cooley's alumni body, now numbering 12,177, in every state. Were you to visit all Cooley graduates abroad, you could take a wonderful trip around the world, from Canada and Mexico down to Guatemala and Belize, then across to England, Ireland, France, Germany, Spain, Switzerland, the Netherlands, Italy, Saudi Arabia, and Tanzania. You would return home via Thailand, Japan, Taiwan, Australia, and New Zealand. On the way, you would stop in American Samoa, Guam, Hawaii, the Virgin Islands and Puerto Rico for good measure.

Staying in touch with our alumni is a challenge. One solution is the new Thomas M. Cooley Alumni Association. Our alumni leaders worked for more than two years to identify association needs, establish goals, and plan how to meet those goals. What resulted was a complete overhaul of the association, culminating in a new charter, followed by, on the evening of October 15, 2005, the election of a new board of directors and slate of officers.

Gone are the days when relatively few alumni, all based in Lansing, did the work of the association. Now, the association is operated through one of six primary working committees: Special Events (plans member alumni events), Student Recruitment (helps Cooley attract students), Fundraising (helps obtain financial support for the association and Cooley), Membership and Outreach (develops membership and member benefits), Student Services (helps students and graduates find jobs and mentorships), and Constituent Alumni Club (connects the Association with state and regional clubs). Because the committee work is done via teleconference and e-mail, you can serve on a committee no matter where you may live. Thus, where only two years ago a mere ten alumni did everything for the association, we now have 100 committee members, some who live very far from Michigan, working actively for you.

The new Thomas M. Cooley Alumni Association is here to involve you in the continuing life of our great law school. It offers you networking and mentoring opportunities, business referrals, alumni database information, regional and local events, special discounts, and a continuing connection to Cooley.

But to be a member of the association, you must join. At last year's meeting, the alumni body authorized the association to become a dues-paying organization, and we have done that. You should receive our beautiful membership enrollment packet soon. It describes in detail the benefits of membership, benefits that will grow as we continue to build our new association. (You can also see detailed enrollment information on page 14 of this *Benchmark* issue.) We think, however, that the primary benefits of membership are the improved connection you will have with Cooley and your fellow alumni and the satisfaction of helping to support students and improve the law school.

So become part of the exciting new Cooley Alumni Association by returning the enrollment form with your check for \$35 payable to "Thomas M. Cooley Law School." For more information, e-mail us at alumni@cooley.edu or call us at 1-800-243-ALUM. Join today.

James D. Robb

Associate Dean for Development and Alumni Relations

Contents

THOMAS M. COOLEY LAW SCHOOL Trinity 2005

Features

Strother Scores Victory in Virginia Supreme Court	2
Alumni Profile: Julia and Steve Callaghan	5
2005 Alumni Golf Outing	8
Race For Education	10
Scribes Comes to Cooley	12
Damages Book Goes Online	16

School News

Making a Difference	17
D.S.A. Award	18
Graduation: Boyles Class	19
Graduation Highlights	20
Faculty Briefs	21

Alumni Matters

Alumni News	24
Letter from the Alumni President	30
Class Notes	31



Strother Scores
Victory in Virginia
Supreme Court

2



Alumni Profile: Julia and
Steve Callaghan

5



2005 Alumni
Golf Outing

8

BENCHMARK

RA 000194

Graduates

Boyles Class, May 21, 2005

Bette S. Darby
Kristine Marie Dax,
MAGNA CUM LAUDE

Cristina Raquel Delgado

Joseph Angelo Dessoye

Michael L. DeYoung

Bianca Ali Dickerson

Nathan A. Dodson,
CUM LAUDE

Brian Nicholas Donley

Patrick James Downs

Benjamin Drake

Matt Dubois, *CUM LAUDE*

Naa Dei Dzani

Travis J. Earley

James O. Edokpolo

Allison Marissa Edwards

Danielle Jeanne Eliot,
CUM LAUDE

Erin Brett Ellis, *CUM LAUDE*

Rhonda R. Fasching,
CUM LAUDE

Brian Fenech

Lawrence Ray Filiberto,
CUM LAUDE

Stacey A. Ford, *CUM LAUDE*

Mary Theresa Foster,
CUM LAUDE

Mark Owen Galliver

Larkaya Donyiell Gant

Melba Lisa Garcia

Robert Edward Gebhard

Michael J. Giardine

Thomas J. Gibbons

Benjamin Jeffrey Gielow,
CUM LAUDE

Tamar Noam Glazer

Leah Catherine Good,
MAGNA CUM LAUDE

Kim Marie Gourrier

Denise J. Grass

Camille Anthea Gray,
CUM LAUDE

Bryant David Greene

Jonathan Martin Gregory,
CUM LAUDE

Garrett Grieser,
MAGNA CUM LAUDE

Glenda Michele Griffin

Ian Matthew Guy, *CUM LAUDE*

John Thor Haarala,
MAGNA CUM LAUDE

Annette Marie Haas,
CUM LAUDE

Alicia Marie Hall

Rasheedah Denise Hamidullah

Evan Kent Hammond

Richard Kirk Hanna, Jr.

Sandra Dawn Hanshaw

Stacey Elizabeth Harris,
CUM LAUDE

Leola Danielle Hearing,
CUM LAUDE

Keeley D. Heath, *CUM LAUDE*

Jason Henry, *CUM LAUDE*

Jose Antonio Hernandez

Derek William Hilst

Michael Barry Hoenig

Crystal Hopkins

David Hunter, *CUM LAUDE*

Martyrson C. Imbert

Andrew William Janetzke,
CUM LAUDE

Michelle D. Johns

Brant Alan Johnson

Karen Lynn Hill Johnson

Lisa Marie Johnson

Joseph Karl Jones

Francis Edward Judd,
CUM LAUDE

Joseph E. Keeney

Laurel Ann Kendall

Kevin Kenneth Kilby,
CUM LAUDE

Daniel Andrew Klemptner

Stephen N. Knights, Jr.,
LEADERSHIP
ACHIEVEMENT AWARD

Melinda Allyson Knowles

Erica Garner Kopec,
CUM LAUDE

Craig Alfred Kreger,
CUM LAUDE

Julie Elizabeth Kretschmer,
MAGNA CUM LAUDE

Aaron Alec Kurilik

Andrew Charles LaPres

Andrew Charles Lawson

Monique Latrese Lee,
CUM LAUDE

Rose Le-Lewis

Andrew Duane Lendrum, Jr.,
MAGNA CUM LAUDE

Adam James Licari

Kirk David Lightner

Adrian Durand Lindsey

Dan Henning Andreas
Lundstedt

Mary Frances Lundstedt,
MAGNA CUM LAUDE

Weston Jon MacIntosh

Okwuoma Chukwudi Maduforo
Jennifer Mahoney

Lorna Elise Maloney,
LEADERSHIP
ACHIEVEMENT AWARD

Gabriella Manolache

Sven Herman Mascarenhas,
CUM LAUDE

Bruce A. Mayrand, Jr.

John Lawrence McDonough

John Kenneth McIntyre

Daniel David Mead,
CUM LAUDE

Dorothy Nena Meath,
MAGNA CUM LAUDE

Patrick John Melnik, Jr.,
CUM LAUDE

Kasio K. Mida, Jr.

Christopher Michael Migliaccio

Cynthia Ann Milia

Adam D. Mittman

Michael Oliver Mondy

Chad Alan Montgomery,
CUM LAUDE

Mark Lawrence Nawrocki

Dipti Nayyar

Rico D. Neal

Tricia Ann Nelson

Michael S. Newell,
MAGNA CUM LAUDE

Alfreda Lynette Newton

Chad Niven

Nenen Mata Obrador

Grace Ann Onderlinde,
MAGNA CUM LAUDE

Obioma S. Osimiri

Mary Ellen O'Sullivan

Larissa Ann Overley

Orin Paliwoda

Natalia Pashkovsky

Nihar Manhar Patel

Sima Girish Patel, *CUM LAUDE*

Judith B. Paul

Kevin Scott Peterson,
CUM LAUDE

Bethany Anne Pierpont

Christine Pierre-Louis

Tina Marie Pinkston

Jeffrey David Pinter, *SUMMA*
CUM LAUDE; PRESIDENT'S
ACHIEVEMENT AWARD

Michael John Plowman

Michael Clark Quimby

Brian D. Rabal

Mysti Nicolle Ramsey,
CUM LAUDE

Marietta Espiritu Raqueno,
CUM LAUDE

Karyn Marie Reid, *CUM LAUDE*

Satara Charlene Rembert

Chris Renna

Cassandra Elizabeth Rhodes

T'sah Kamila Rodriguez

Aithyni Keir-Heleyne Rucker,
CUM LAUDE

Karen Schantz

Jason Schick, *CUM LAUDE*

James Derek Schlesinger

Corrie Sue Schmidt,
CUM LAUDE

Marius Segal-Gebski

Abbi Jo Sexton

Sauda Shakoor-Ahmad

Steven Edward Shelton,
MAGNA CUM LAUDE

Matthew Benjamin Shepherd

Adil Siddiki

Shawndrica Nicole Simmons

Mwanaisha Atieno Sims

Tracey Marie Sims,
CUM LAUDE

Christopher Pascal Sirounian

Jennifer Lynn Slatten

Neal Kennedy Smith

Anthony Michael Snyder

En-Tie Soon

Camilo Antonio Soto,
CUM LAUDE

Imad Soubra

Channa Jackson Stacey,
CUM LAUDE

James Rocco Stellabotte

Natalie Shawn Stevens

Marcella Jo Stewart,
CUM LAUDE

Matthew James Stropes

Thomas Matthew Tarsia

Deidra Denise Thompson

Damian Tofte

Timothy Nicholas Tomasic

George Sam Tornik

A. Beatrice Travis

Ryan Matthew Tutera

Frank Russell Van Cleef,
CUM LAUDE

John Paul Vella

Michael D. Wagstaff

Chih-Chin Wang

Melissa Anne Warrington

Jennifer Orena Watts

Jason M. Weinandy

Mark L. Wilkins

Nathan Thomas Williams,
CUM LAUDE

Rebekah Lynn Williams

Jessica Elizabeth Williams-
Bronner

James Randall Witham

Elizabeth Janni Wu

Dionnie Suzette Wynter,
LEADERSHIP
ACHIEVEMENT AWARD

Lec Cassie Yates

Alfred (Wai-Lung) Yeung

EXHIBIT 4

1 **STIP**

2 **BOLEY & ALDABBAGH, LTD.**

3 **THOMAS D. BOLEY, ESQ.**

4 Nevada Bar No. 11061

5 1900 E. Bonanza Rd.

6 Las Vegas, NV 89101

7 T: (702) 435-3333

8 F: (702) 475-6567

9 *Attorney for Defendant*

10 **JUSTICE COURT - HENDERSON TOWNSHIP**

11 **CLARK COUNTY, NEVADA**

12 **STATE OF NEVADA,**

13 **Plaintiff,**

14 **vs.**

15 **JACK PAUL BANKA #8353273,**

16 **Defendant.**

17 **CASE NO: 16FH2036X**

18 **DEPT NO: 3**

19 **STIPULATION AND ORDER**

20 IT IS HEREBY STIPULATED AND AGREED by and between the above-captioned
21 parties, through their undersigned counsel of record, that the blood samples of the above-named
22 Defendant, currently in the possession of the Henderson Police Department ("HPD") Forensic
23 Laboratory, located at 5605 W. Badura Avenue, Suite 120-B, Las Vegas, Nevada 89118,
24 regarding LVMPD Incident No. 16-21674, may be released to the Defendant's attorney or his
25 Agent, Daniel Berkabile, for the purpose of having said blood samples retested to determine its
26 alcohol content under the following terms and conditions:

- 27 1. The Defendant's attorney or his agent shall be responsible for picking up the
28 blood kit/samples from the HPD evidence vault;
2. The Defendant's attorney or his agent shall record and preserve the chain of
custody for the blood kit/samples;
3. The laboratory utilized by the Defendant for the retesting of the blood sample
shall record and maintain the chain of custody of the blood kit/samples, and shall

HENDERSON
JUSTICE COURT

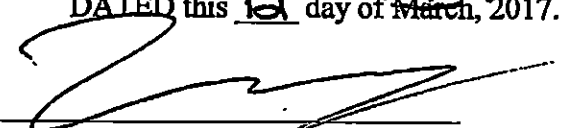
2017 APR 13 P 5:44


FILED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- preserve the integrity of the blood kit/samples during the retesting procedure;
4. The Defendant's attorney or his agent shall promptly return the blood kit/samples to the HPD evidence vault in substantially the same condition as it was received (with the exception of accessing the blood kit/samples for the purposes of the retesting process);
5. The Defendant waives any claims relating to chain of custody for said blood sample arising from his retesting of the blood; and
6. The Defendant stipulates to the admission of the blood test results from HPD's testing at his bench trial in the event that the blood samples are lost.

DATED this 12 day of ~~March~~^{April}, 2017.


THOMAS D. BOLEY, ESQ.
Nevada Bar No. 11061
BOLEY & ALDABBAGH, LTD
1900 E. Bonanza Rd.
Las Vegas, Nevada 89101

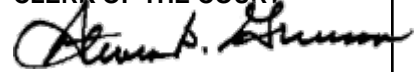

MARIA LAVELL, ESQ.
Nevada Bar No. 10120
DEPUTY DISTRICT ATTORNEY
200 Lewis Avenue
Las Vegas, Nevada 89101

ORDER

The parties having entered into the above stipulation, the same is HEREBY ORDERED.

DATED this 13 day of ~~March~~^{April}, 2017.


JUSTICE COURT JUDGE



MOT
THE PARIENTE LAW FIRM, P.C.
MICHAEL D. PARIENTE, ESQ.
Nevada Bar No. 9469
JOHN G. WATKINS, ESQ., OF COUNSEL
3960 Howard Hughes Parkway, Suite 615
Las Vegas, Nevada 89169
(702) 966-5310
Attorneys for Defendant

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

STATE OF NEVADA,
Plaintiff,

vs.

JACK BANKA,
Defendant

Case No: **C-18-333254-1**
Dept No: **5**

**REPLY TO STATE'S OPPOSITION TO DEFENDANT'S AMENDED MOTION
TO WITHDRAW PREVIOUSLY ENTERED PLEA OF GUILTY**

COMES NOW Defendant, JACK BANKA, through his attorney, MICHAEL D.
PARIENTE, ESQUIRE., with JOHN G. WATKINS, ESQUIRE., Of Counsel, and
Replies to the State's Opposition.

DATED this 2nd day of December, 2019.



MICHAEL D. PARIENTE, ESQ.
JOHN G. WATKINS, ESQ., OF COUNSEL

I

LAW AND ARGUMENT

A.

JACK BANKA’S MOTION TO WITHDRAW THE PLEA SHOULD BE GRANTED ON THE GROUNDS THAT JACK DID NOT UNDERSTAND THE NATURE OF THE CHARGE i.e. THE ELEMENTS OF THE OFFENSE AND THE CONSEQUENCES OF THE PLEA, THE LACK OF MOTIONS BY JACK’S PREVIOUS COUNSEL AND JACK’S VALID DEFENSES TO THE DUI CHARGE

a. This Court has vast discretion to withdraw a plea of guilty.¹

ADDRESSING THE STATE’S OPPOSITION:

1. The State’s “Statement of the Case” is disingenuous.

A Statement of the Case is limited to a description of the course of the court proceedings. But, the State did more than this. Under the disguise of the “Statement of the Case,” the State added a statement of facts telling this Court that Jack is guilty of the DUI. The State knows full well (or should) that guilt or innocence plays no role in determining whether to allow the withdrawal of a plea. *See again, State v. District Court.*² (“The question of a defendant’s guilt or innocence is not *an issue* on a motion . . . for leave to withdraw a plea of guilty”) *Id.*, 85 Nev. at 385. (italics original.) (cites omitted.) This Court should strike the State’s improper inclusion of irrelevant facts.

2. The State’s assertion that Attorney Boley waived “any” defect regarding the DUI allegation is flat-out false.

1. Jack has provided case law for this Court’s “vast discretion” in its Amended Motion.

2. 85 Nev. 381, 455 P.2d 923 (1969).

Attorney Boley's waiver of "any" defects went solely to this Court's striking Court 2, Leaving the Scene. The Plea Transcript (June 24, 2019) exposes the State's false statement.³

MS. LAVELL: And, Judge, the State amended the amended information by interlineation.

THE COURT: Okay. The leaving the scene?

MS. LAVELL: Yes, Your Honor.

MR. BOLEY: And that's struck by interlineation?

MS. LAVELL: Yes.

MR. BOLEY: **We'll waive any defects assuming the plea goes through today.**

THE COURT: Okay. All right. Thank you.

MS. LAVELL: Thank you.

THE COURT: And so do you want me to conform the H.T., p.3, ls. 14-25. (emphasis added.)

attachment Exhibit 1 by striking—

MS. LAVELL: Yes, please.

THE COURT: -- the language—

MS. LAVELL: If you would.

THE COURT: -- on the first page, line 24 of the amended?

Or actually it starts on line 23.

H.T., p.4, ls. 1-6.

3. A copy of the entire *Plea Transcript* is provided herein marked as *Exhibit A*.

There was no waiver as to Count 1!

3. Footnote 2 of the State’s “Statement of the Case” is false:

Footnote 2 reads, “[a] copy of the original six page Motion to Withdraw Plea, filed on November 15, 2019, **and based on a single articulated issue**, is attached hereto as Exhibit 2.” (emphasis added.) Jack’s original Motion was not limited to a “single articulated issue.” *See, fn. 8* of Jack’s original Motion. Jack raised this Court’s failure to advise him that he must be fined \$2,000 and the ineffective assistance of Jack’s prior attorney.

4. Jack did not know the elements of NRS 484C.430:⁴

A plea entered knowingly, intelligently and voluntarily is not a bar to a motion to withdraw a plea. *See, Stevenson v. State*.⁵ However, a plea entered without knowledge of all the elements of the offense requires that the plea be allowed to be withdrawn. *See again, Boykin v. Alabama*⁶ ; *McCarthy v. United States*⁷ ; *State v. Freeze*⁸ ; *Love v. State*⁹ and *Higby v. State*¹⁰, each of these cases were provided in Jack’s “Amended Motion to Withdraw Previously Entered Plea of Guilty”. Jack had no knowledge that “on or off the highways” was an element of NRS 484C.430 violation.

4. The State had no legal basis to use NRS 484C.110 to charge Jack with a NRS 484C.430 violation.

5. 131 Nev. 598, 603, 354 P.3d 1277 (2015).

6. 395 U.S. 238 (1969).

7. 394 U.S. 459, 466 (1969).

8. 116 Nev. 1097, 13 P.3d 442 (2000).

9. 99 Nev. 147, 147, 659 P.2d 876 (1983).

10. 86 Nev. 774, 476 P.2d 959 (1970).

1 The State's assertion and unfounded reliance that Jack's plea was "freely and
2 voluntarily" entered is a non-issue. The relevant issue before this Court is whether
3 Jack knew at the time he entered his plea that "on or off the highways" was an element
4 of NRS 484C.430. The answer is a resounding, No. Jack was never told, informed or
5 explained that the correct element of a NRS 484C.430 violation was "on or off the
6 highways" and not "highway or premises to which the public has access." The State
7 admitted that Jack was improperly charged! The two elements came from different
8 statutes and have different meanings. This was also admitted by the State.

10 The State's reliance on the GPA lacks merit. There is nothing in the GPA which
11 informs Jack that "on or off the highways" is the element which he must defend.
12 Exhibit A of the GPA, the Amended Information, alleges "highway or premises to
13 which the public has access" the element of NRS 484C.110 (misdemeanor enhancement
14 statute). Jack was also required to execute an Admonishment of Rights at the time he
15 entered his plea. See a copy attached hereto marked as Exhibit B. The Admonishment
16 indicates that Jack was being charged with a violation of NRS 484.379 [now NRS
17 484C.110]. There is absolutely no mention of NRS 484C.430! The Admonishment states
18 that the felony of NRS 484.379 requires one to six years incarceration. The
19 Admonishment is totally confusing.

21 The State's reliance that Jack graduated from Cooley Law School is misguided.
22 How is Jack to know the correct elements of NRS 484C.430 when this Court, Justice
23 Court, two prosecutors and a defense attorney DID NOT KNOW! Again, the State had
24 no legal basis to use or rely upon NRS 484C.110 to charge Jack.
25
26
27
28

Since Jack did not know that “on or off the highways” and not “highway or premises to which the public has access” was the element of NRS 484C.430 filed against him, Jack’s Motion to withdraw the plea should be granted.

The State’s reliance on “notice-pleading” that it need not include the elements of the offense in the Amended Information but rather “. . . **only the facts of the charge must be included, in reference to the NRS version of the laws was sufficient**” is flat-out wrong and contrary to the law.¹¹ State’s Opposition (S.O.), p. 11, ls.6-7. (emphasis added.) The Court in *State v. Hancock*¹² stated, “[a]n indictment, **standing alone, must contain: (1) each and every element of the crime charged** and (2) the facts showing how the defendant allegedly committed each element of the crime charged,” citing *United States v. Hooker*.¹³ *Id.*, 114 Nev. at 164 (emphasis added.) *Hancock* and *Hooker* has been cited most recently with approval that the charging document must contain “each and every element of the crime charged.” See, *State v. Salgado*.¹⁴

11. The State’s so called “notice-pleading” argument violates not only basic notions of Due Process, it also violates NRS 173.075(1). “Notice-pleading” is generally recognized as a civil standard and has no application in Nevada’s criminal cases. See, *Simpson v. District Court*, 88 Nev. 554, 503 P.3d 1225 (1972)(The Court noted that NRS 173.075(1) replaced “notice-pleading.”) 88 Nev. at 656-657. NRS 173.075(1) requires a “plain, concise and *definite*” written statement of the charge[s] against the accused. (italics added.) However, whether this Court continues to adopt the State’s misplaced “notice-pleading” argument is not a reason or factor to deny Jack’s request to withdraw his plea. See again, *Stevenson v. State, supra*. (“We therefore disavow *Crawford’s* exclusive focus on the validity of the plea”) 131 Nev. at 603.

12. 114 Nev. 161, 955 P.2d 183 (1998).

13. 841 F.2d 1225, 1230 (4th Cir. 1988).

14. 2019 WL 989863 (C.O.A. No. 75287/75288)(Feb. 26 2019.)

The State's cite to *Sanders v. Sheriff*¹⁵ supports Jack. *Sanders* stated, "... the complaint is intended solely to put the defendant on formal written notice of the charge he must defend ... and may simply be drawn in the words of the statute **so long as the essential elements of the crime are stated.**" *Id.*, 85 Nev. at 181-182. (emphasis added.) The State's claim that the Amended Information need not set forth the elements of the offense being charged lacks merit.

The State's reliance that it only needs to cite the statute of the crime being charged lacks merit.¹⁶ The Court in *Hooker*, cited in *Hancock*, held,

Wong-Tai contains no language which would impart validity to an indictment which omits an allegation of an element of a crime charged nor does it suggest at any time in the opinion that a mere citation of the statute under which the indictment issues will satisfy the requirement that the indictment contain a clear statement of the elements of the offense charged.

Id., 841 F.2d at 1229-1230.

It should be quite apparent that without knowledge of the elements of the offense, the State's factual allegations are meaningless.

5. Jack did not understand the consequences of the plea.

A conviction of NRS 484C.430 requires "a fine of not less than \$2,000 nor more than \$5,000." The Banka GPA indicated that the Court **may** but is not required to impose a fine. This Court in correcting the language of the GPA led Jack to believe that he could receive much less than \$2,000.

15. 85 Nev. 179, 451 P.2d 718 (1969).

16. Here, two statutes were cited. Which one controlled?

THE COURT: -- the sentence that I impose? And also I have to fine you. It's a requirement. I have to fine you up to -- actually, it says may here. I thought it was mandatory.

MR. GILES: It's mandatory, Your Honor. It is—

THE COURT: A mandatory fine of up to five thousand?

MR. GILES: Yes.

THE COURT: Okay. So—and it says I may also be fined,

H.T., p. 4, ls. 19-25.

but you understand that it's a mandatory fine?

THE DEFENDANT: Yes.

THE COURT: I could – because of the language of up to five thousand, **I could do something much less than that obviously**, but I have to fine him – impose a fine. Okay.

H.T. p. 5, ls. 1-5. (emphasis added.)

The Court's information was contrary to law. Jack was never told that he must be fined at least \$2,000! Therefore, Jack did not understand the consequences of his plea.

It is constitutionally required that a plea of guilty be knowingly, intelligently and voluntarily entered. *See again, Boykin v. Alabama*. A guilty plea is knowing and voluntary only if the defendant “has a full understanding of both the nature of the charges and the *direct consequences* arising from the plea.” *Rubio v. State*¹⁷, 124 Nev. at 1038. (italics original.) The Court in *Hudson v. Warden*¹⁸ noted, “[a] court has an

17. 124 Nev. 1032, 194 P.3d 1224 (2008).

18. 117 Nev. 387, 22 P.3d 1154 (2001).

obligation to determine that a defendant understands the nature of the offense and the consequences at the time of the entry of the plea.” *Id.*, 117 Nev. at 400.

6. Jack has listed at least four (4) Motions which should have been filed.¹⁹

a. *Armstrong*.

An *Armstrong* motion is applicable to the impairment and *per se* theories and should have been filed by Jack’s previous counsel.

b. PBT.

Jack denies that he gave consent for the PBT. Jack was told by the police officer that if he refuses to submit to the PBT, then his drivers license would be revoked for one (1) year. Jack’s submittal to the PBT is not consent but rather was coerced. Eliminating the PBT creates a legitimate challenge to the officer’s probable cause.

c. Challenging conclusory pleadings.

The State’s Opposition lacks merit. The State does not dispute the merits of such a motion, only that it results in the State amending the Information. What the State ignores is that a non-conclusory pleading provides the defendant with a statement of facts so the defendant can defend against these elements as well as preventing the State from changing its prosecution theories at trial. In *Vitale* this Court held that the due care allegation was conclusory!

d. “However slight” language.

19. This Court and the prosecutor know that Jack was not satisfied with the representation of his prior counsel. Jack believed that some motions should be filed but were not. This is one of the reasons Jack wanted new counsel.

The “however slight” language is misleading and not the law. A jury can be “fooled” or misled to believe that only slight impairment is needed to convict. Jack was also misled by the “however slight” language.

Jack’s prior counsel should have filed at a minimum the Motions listed by Jack. Therefore, it is “fair” and “just” to allow Jack to withdraw his plea, file the appropriate Motions and have a jury decide his case.

The State argues that valid defenses does not invalidate Jack’s plea. This misses the point. The issue here is not invalidating the plea but rather presenting reasons why Jack’s withdrawal Motion should be granted under the standard of “fair and just.”

The State admits that Jack could have consumed alcohol after the accident which would allow him to pursue the affirmative defense under 484C.430(3). However, his prior counsel never filed a motion of intent on this issue.

7. Jack has an extremely viable defense to the State’s two-hour prosecution theory.

The prosecution under NRS 484C.430(c) requires that there be a breath or blood test. A suppression of the breath or blood test eliminates the two-hour prosecution. Jack’s blood test should have been suppressed.

The implied consent law in effect at the time of Jack’s arrest allowed a choice of breath or blood testing. NRS 484C.160(5)(a) states in pertinent part, “[i]f the concentration of alcohol in the blood or breath is an issue: (a) Except as otherwise provided in this section, **the person may refuse to submit to a blood test if the means are reasonably available to perform a breath test.**”²⁰ (emphasis added.)

20. None of the exceptions listed in NRS 484C.160 apply in Jack’s case.

The police report indicates that Jack was not offered a breath test. This is a classic example of a lack of SUBSTANTIAL COMPLIANCE! Suppression is the remedy. *See*, NRS 484C.240(2).

The State's cite to *Ebarb v. State, Dep't of Mtr. Vehicles*²¹ is not only inapposite but inappropriate. *Ebarb*'s holding is no longer controlling in light of the implied consent law which was amended in 2015 and the legal authority of *Missouri v. McNeely*²² and *Byars v. State*²³.

The State's assertion that the choice that breath or blood testing "only applies" to first and second offenses and not felonies" is FLAT-OUT WRONG! *See*, NRS 484C.160(1)(b) which specifically refers to NRS 484C.430. The officer's failure to allow Jack to submit to breath testing requires suppression of the reported blood alcohol reading. *See* again, NRS 484C.240(2).

Merely retesting the blood falls way short of requesting "full information" of the testing as allowed by NRS 484C.240(3). This Court is aware of the "full information" request made in the *Vitale* case.

CONCLUSION

The charge filed against Jack Banka is serious requiring a mandatory prison sentence.²⁴ As evidence of the seriousness, this Court has indicated that it would

21. 107 Nev. 985, 822 P.2d 1120 (1991).

22. 569 U.S. 141 (2013).

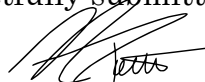
23. 130 Nev. 848, 336 P.3d 939 (2014).

24. Jack was charged with violating three prosecution theories: (1) impairment, (2) per se and (3) the two-hour rule. However, at the P.H. when this Court inquired what the prosecution would prove at trial, the State relied solely on the two-hour theory. Therefore, it was error for this Court to find Jack

1 sentence Jack to four (4) years in the Nevada State Prison. Jack should be entitled to
2 defend against the serious charge before a jury. A plea of guilty is not designed to
3 foreclose a defendant's right to have a trial. This Court has vast discretion to withdraw
4 a plea of guilty and should exercise that discretion in Jack's case. Therefore, Jack
5 Banka's Motion to Withdraw the plea should be granted on the grounds that Jack did
6 not understand the nature of the charge i.e. the elements of the offense, the
7 consequence of the plea, the lack of Motions filed by his previous defense counsel and
8 his valid defenses to the DUI charge.

10 DATED this 2nd day of December, 2019.

12 Respectfully submitted,



14 MICHAEL D. PARIENTE, ESQ.

15 Nevada Bar No.: 9469

16 JOHN G. WATKINS, ESQ., OF COUNSEL

17 **JACK BANKA'S DECLARATION IN SUPPORT HIS MOTION TO WITHDRAW HIS**
18 **PLEA OF GUILTY**

19 I, Jack Banka, the defendant/declarant herein, states as follows:

- 20 1. I am A Certified Public Accountant and own my accounting firm.
- 21 2. I graduated from Cooley Law School in 2005 but have never practiced law. I am not
22 a licensed attorney and have never been so.
- 23 3. I do not know Nevada DUI law and relied solely on my prior counsel, Thomas Boley
24 to represent me. As time passed I believe that Mr. Boley was not effectively
25 representing me and I intended to change counsel. I wanted John Watkins, Esquire
26 (having heard that Mr. Watkins was highly skilled in DUI cases) and Michael
27

28 _____
guilty of impairment and the *per se* theories.

Pariente, Esquire to represent me.

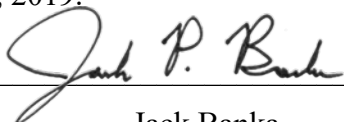
4. That prior to entering my plea, I believe that the Court “may” but was not required to impose a fine based on the language set forth in the GPA. However, at the plea hearing, the Judge said a fine was mandatory. I was led to believe that the fine could be a minimal amount up to \$5,000. I was never told that the fine had to be at least \$2,000, a large amount. The fact that I was led to believe that the fine could be minimal was a factor in entering my plea.
5. I never knew or was told by anyone that the allegation of “highway or premises to which the public has access” in the Amended Information was not the correct element for an NRS 484C.430 offense. I had no knowledge that the correct element was “on or off the highways.”
6. I was required to execute what was labeled “DUI ADMONISHMENT OF RIGHTS”. The document totally confused me. It stated that I was being charged with the violation of NRS 484.379. I had no idea what that referred to. There was no mention of NRS 484C.430. I could not understand why I was being charged with having committed prior DUI’s when in fact there were none. I was afraid to say anything because every time I spoke, things got worse for me.
7. I believe the Amended Informations reference to “however slight” meant that any degree of alcohol influence established guilt. My understanding of the “however slight” language was a factor in my entering the plea.
8. That after a conversation with Mr. Pariente and Mr. Watkins, I realized that a number of legal Motions should have been filed on my behalf by Attorney Boley. Some of these Motions have been listed in my Motion to Withdraw the Plea and the Reply herein.

- 1 9. If I had known that I had to be fined at least \$2,000, that “however slight” was not
2 the law and that the Amended Information did not set forth the correct element, I
3 would not have pled guilty.
4
5 10. That I still maintain that I did not cause the accident. I was traveling straight and had
6 the right-of-way when the other vehicle proceeded to cross the roadway that I was
7 proceeding on. I told this Court initially this fact whereon the Court would not accept
8 my initial plea. Only after the State agreed to an Alford plea did this Court accept my
9 plea.

10 YOUR DECLARANT SAYETH NOTHING FURTHER

11 I declare under the penalty of perjury that the foregoing is true and correct.

12 Executed on this 2nd Day of December, 2019.

13 
14 Jack Banka

PARIENTE LAW FIRM. P.C.

3960 Howard Hughes Pkwy., Suite 615

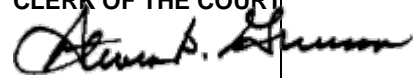
Las Vegas, NV 89169

PHONE: (702) 966-5310 | FAX: (702) 953-7055

WWW.PARIENTELAW.COM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit A



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	CASE NO. C-18-333254-1
Plaintiff,)	DEPT. NO. V
vs.)	
JACK BANKA,)	
Defendant.)	

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

MONDAY, JUNE 24, 2019

RECORDER'S TRANSCRIPT OF HEARING:

ENTRY OF PLEA

APPEARANCES:

For the State:	MARIA LAVELL, ESQ., Chief Deputy District Attorney MICHAEL G. GILES, ESQ., Deputy District Attorney
----------------	--

For the Defendant:	THOMAS D. BOLEY, ESQ.,
--------------------	------------------------

RECORDED BY: LARA CORCORAN, COURT RECORDER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Las Vegas, Nevada; Monday, June 24, 2019
[Hearing commenced at 9:05 a.m.]

THE COURT: And that is C333254, State of Nevada versus Jack Banka. Good morning.

MR. BOLEY: Good morning.
MS. LAVELL: Good morning, Your Honor.
MR. BOLEY: Good morning, Judge.

[Colloquy between counsel]

MS. LAVELL: Your Honor, may I approach to file the amended information?

THE COURT: Sure.
MS. LAVELL: The second amended.

THE COURT: So I have in my hand a guilty plea agreement. Before we get to that, there were -- there was -- after I -- after court last Wednesday a substitution was filed improperly. A substitution of counsel that's ordered struck from the docket 'cause I denied that motion. And, of course, then I'm quite aware of everything that happened while I was at my conference. Okay.

MR. BOLEY: Yes, ma'am. And we apologize for any convenience -- inconvenience that that caused.

THE COURT: It didn't. It didn't cause me any inconvenience. I guess my staff was scrambling around for a little bit, but that's fine. They're used to that.

All right. So tell me what the negotiations are?

1 MR. BOLEY: Yes, Your Honor. This is going to be a guilty
2 plea by way of the *Alford* decision --

3 THE COURT: Okay.

4 MR. BOLEY: -- to Count 1, DUI with substantial bodily harm.
5 Dismiss remaining counts. We're going to stipulate to a sentence of four
6 to ten years in the Department of Corrections.

7 MS. LAVELL: That's correct, Your Honor.

8 THE COURT: All right. And is that your understanding of the
9 negotiations, Mr. Banka?

10 THE DEFENDANT: Yes.

11 THE COURT: Okay. Now, this guilty plea agreement does in
12 fact say that, but let me address first this -- this idea of both parties
13 stipulating to the sentence, so obviously --

14 [Colloquy between the Court and the Clerk]

15 MS. LAVELL: And, Judge, the State amended the amended
16 information by interlineation. Count 2 wasn't struck from that.

17 THE COURT: Okay. The leaving the scene?

18 MS. LAVELL: Yes, Your Honor.

19 MR. BOLEY: And that's struck by interlineation?

20 MS. LAVELL: Yes.

21 MR. BOLEY: We'll waive any defects assuming the plea goes
22 through today.

23 THE COURT: Okay. All right. Thank you.

24 MS. LAVELL: Thank you.

25 THE COURT: And so do you want me to conform the

1 attachment Exhibit 1 by striking --

2 MS. LAVELL: Yes, please.

3 THE COURT: -- the language --

4 MS. LAVELL: If you would.

5 THE COURT: -- on the first page, line 24 of the amended?

6 Or actually it starts on line 23.

7 All right. So this -- the stipulated sentence, so you understand
8 that this -- this guilty plea agreement is a contract between you and the
9 State of Nevada and I'm not a party to the contract?

10 THE DEFENDANT: Yes.

11 THE COURT: And so I just have to sentence you within the
12 legal sentencing perimeters that's set by the legislature for this particular
13 crime; you understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: And that -- that range is a minimum of two
16 years and a maximum of twenty years, the minimum may not exceed 40
17 percent of the maximum --

18 THE DEFENDANT: Yes.

19 THE COURT: -- the sentence that I impose? And also I have
20 to fine you, it's a requirement. I have to fine you up to -- actually, it says
21 may here. I thought it was a mandatory.

22 MR. GILES: It's mandatory, Your Honor. It is --

23 THE COURT: A mandatory fine of up to five thousand?

24 MR. GILES: Yes.

25 THE COURT: Okay. So -- and it says I may also be fined,

1 but you understand that it's a mandatory fine?

2 THE DEFENDANT: Yes.

3 THE COURT: I could -- because of the language of up to five
4 thousand, I could do something much less than that obviously, but I
5 have to fine him -- impose a fine. Okay.

6 And you also understand that -- you understand that I have to
7 impose restitution obviously if there are damages that are outstanding in
8 order to make the victim whole and this --

9 THE DEFENDANT: Yes.

10 THE COURT: -- is required by statute and now a
11 constitutional amendment; you understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you also understand you're not eligible for
14 probation on this particular charge --

15 THE DEFENDANT: Yes.

16 THE COURT: -- for which you're entering the plea? All right.

17 So, attached as Exhibit 1 is the second amended information
18 charging you in fact with driving and/or being in actual physical control of
19 a motor vehicle while under the influence of an intoxicating liquor or
20 alcohol resulting in substantial bodily harm, category B felony; did you
21 read Exhibit 1?

22 THE DEFENDANT: Yes.

23 THE COURT: And to that charge, how do you plead?

24 THE DEFENDANT: Guilty.

25 THE COURT: By way of the *Alford* decision?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Okay. So let's review what that means and
3 see that you're understanding that it is the same as mine and the law,
4 okay. And so basically that means that you're agreeing to plead guilty to
5 this charge, but you're not admitting your guilt and you're doing that
6 pursuant to this, you know, a case that is the *Alford* decision, *Alford*
7 *versus North Carolina*. And the reason for that is you don't want to put
8 yourself at risk for being convicted on the original charges and facing a
9 harsher penalty that might be required or given than you would by
10 entering this plea; is that your understanding as well?

11 THE DEFENDANT: Yes, it is.

12 THE COURT: Okay. If the State went to trial, what would it
13 prove?

14 MR. GILES: Your Honor, if we had gone to trial, the State
15 would have proven that on December 1st, 2016, the Defendant was
16 driving a Mercedes Benz on Anthem Parkway at Atchley Drive and he
17 turned left in front of oncoming traffic failing to surrender the roadway to
18 those with the right of way causing a two-car crash involving an elderly
19 couple, Maxine and Martin Luber.

20 In the crash, Ms. -- Ms. Luber suffered ten broken ribs, a
21 fractured sternum and several other injuries including a large laceration,
22 abrasion to her leg which required substantial medical care and recovery
23 time. Mr. Luber suffered injuries that were not substantial, but were
24 fairly graded in and of themselves. The Defendant then drove away
25 from the scene. He was later caught.

1 And the State would further prove that within two hours of the
2 driving behavior, his blood was drawn and when it was tested, it came
3 back at .193 BAC approximately two and half times the legal limit.

4 THE COURT: Okay. All right. So before I can accept your
5 plea, I have to know that it's freely and voluntarily made and that you
6 understand the nature and consequences. We've already talked about
7 the nature and consequences of the plea and you understand that
8 sentencing is strictly up to the Court, no other person; correct?

9 THE DEFENDANT: Yes.

10 THE COURT: And, of course, I will make my sentencing
11 decision based upon a pre-sentence investigation report that will be
12 prepared by the Division of Parole and Probation. Also I'll consider any
13 materials, anything that you and through your lawyer wish to submit for
14 the Court's consideration as well as anything that you wish to say at time
15 of sentencing and I'll likewise hear arguments from your lawyer; do you
16 understand that?

17 THE DEFENDANT: Yes.

18 THE COURT: I mean that's obviously within the perimeters of
19 what you agreed to in the stipulation and that is a sentence of four to ten
20 years; correct?

21 THE DEFENDANT: Yes.

22 THE COURT: Okay. Now, has anyone forced or coerced you
23 into entering your plea?

24 THE DEFENDANT: No.

25 THE COURT: Has -- am I ever going to hear from you that

1 somehow because of all -- everything that occurred before this plea was
2 entered, that now you really didn't want to enter the plea and you're
3 being forced and you want to go to trial?

4 THE DEFENDANT: No.

5 THE COURT: Are you sure because I don't want to see that
6 later in some kind of petition that I forced you into this because obviously
7 you can go to trial this afternoon?

8 THE DEFENDANT: I made a mistake on -- on Wednesday
9 and I just -- it feels like every time I open my mouth I get worse and
10 worse, so I just -- I don't -- I --

11 THE COURT: So you don't -- so you feel like you're being
12 forced today?

13 THE DEFENDANT: No.

14 THE COURT: I don't want to coerce you into anything.

15 THE DEFENDANT: No.

16 THE COURT: How about promises; has anyone made you
17 any promise in order to induce you to plead guilty today, something I
18 don't know anything about, it's not in this guilty plea agreement?

19 THE DEFENDANT: No.

20 THE COURT: You understand that you're waiving very
21 valuable constitutional rights by entering into this guilty plea agreement?

22 THE DEFENDANT: Yes.

23 THE COURT: You understand you're waiving your right to a
24 jury trial?

25 THE DEFENDANT: Yes.

1 THE COURT: And you understand you're waiving your right
2 to confront the witnesses against you and have your lawyer cross
3 examine those witnesses at trial?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you understand you're giving up your
6 opportunity to present any evidence you might wish to at such a trial,
7 although of course you don't have to prove anything, the State bears the
8 burden of proof, they have to prove their doubt -- that you're guilty
9 beyond a reasonable doubt as each and every element of the crime and
10 you don't have to call a single witness or present any evidence, but of
11 course if you wanted to, you most certainly could, but because you're
12 not going to have a trial, you give up that opportunity to do so; do you
13 understand everything I just told you?

14 THE DEFENDANT: Yes.

15 THE COURT: Do you understand also you're giving up your
16 opportunity to testify at such at a trial, although again, you don't have to
17 testify, you in fact are guaranteed by the United States constitution as
18 well as the Nevada's constitution the right not to testify at a trial against
19 you and if you decided to invoke that right and not waive it, then I would
20 not permit the State to use that against you in any way; do you
21 understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: Now in the normal course of a trial, if you were
24 to go forward to -- to a trial, what would happen would be just after the
25 State rested you'd have the opportunity to talk with your lawyer and

1 weigh the pros and cons of whether or not you wanted to testify or not
2 and then make that informed decision on the advice of counsel and if
3 you decided to waive your right and take the stand, you would. Or you
4 could invoke your right and I would -- if your lawyer requested an
5 instruction, I would instruct the jury that they couldn't use that against
6 you in any way or discuss it in their deliberations; do you understand
7 that?

8 THE DEFENDANT: Yes.

9 THE COURT: Do you understand that you are waiving your
10 right to a direct appeal in this matter?

11 THE DEFENDANT: Yes.

12 THE COURT: And has your lawyer explained to you what that
13 means?

14 THE DEFENDANT: Yes.

15 THE COURT: All right. Are you under the influence of any
16 alcohol or illicit drugs?

17 THE DEFENDANT: No.

18 THE COURT: How about any medications? Are you taking
19 any medications?

20 THE DEFENDANT: Just for cholesterol and blood pressure.

21 THE COURT: Okay. And those medications help you feel
22 better?

23 THE DEFENDANT: I hope.

24 THE COURT: So you feel okay today?

25 THE DEFENDANT: Yes.

1 THE COURT: How about did you get enough sleep last night
2 so you know what you're doing today?

3 THE DEFENDANT: Yes.

4 THE COURT: I'm sure you may have been a bit nervous.

5 THE DEFENDANT: I tossed and turned a little bit.

6 THE COURT: Okay. Yeah. I toss and turn as well, but I still
7 know what's going on this morning and you likewise?

8 THE DEFENDANT: Yes.

9 THE COURT: Okay. Very good. Any other questions you
10 have of the Court at all in this matter?

11 THE DEFENDANT: No.

12 THE COURT: It appearing that he does understand the
13 nature and consequences of his plea that's freely and voluntarily made,
14 I'll accept his plea of guilty in this matter. Refer it to the Division of
15 Parole and Probation for the pre-sentence investigation report. Set it
16 down for sentencing. We'll vacate the trial that was set to commence
17 this afternoon.

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE CLERK: October 23rd, 9 am.


THE COURT: Thank you.

MR. BOLEY: Thank you, Judge.

[Hearing concluded at 9:18 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Michelle Ramsey
Court Recorder/Transcriber

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit B

District Court

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-VS-

JACK PAUL BANKA,
#8353273

Defendant.

CASE NO: C-18-333254-1

DEPT NO: V

DUI ADMONISHMENT OF RIGHTS

I am the Defendant in this case. At this time, I am charged with willfully and unlawfully driving and/or being in actual physical control of a motor vehicle on a highway or on premises to which the public has access in the County of Clark, State of Nevada, while under the influence of intoxicating liquor; AND/OR a controlled substance; AND/OR a prohibited substance; AND/OR while having a concentration of alcohol of 0.08 or more in my blood or breath; AND/OR while having a concentration of alcohol of 0.08 or more in my blood or breath within two hours after driving or being in actual physical control of a motor vehicle, in violation of NRS 484.379.

I AM AWARE THAT I HAVE EACH OF THE FOLLOWING RIGHTS AND THAT I WILL BE WAIVING THESE RIGHTS IF I PLEAD GUILTY OR NOLO CONTENDERE:

1. The right to a speedy trial;
2. The right to require the State to prove the charge(s) against me beyond a reasonable doubt;
3. The right to confront and question all witnesses against me;
4. The right to subpoena witnesses on my behalf and compel their attendance;
5. The right to remain silent and not be compelled to testify if there were a trial; and
6. The right to appeal my conviction except on constitutional or jurisdictional grounds.

I AM ALSO AWARE THAT BY PLEADING GUILTY OR NOLO CONTENDERE I AM ADMITTING THE STATE COULD FACTUALLY PROVE THE CHARGE[S] AGAINST ME. I AM ALSO AWARE THAT MY PLEA OF GUILTY OR NOLO CONTENDERE MAY HAVE THE FOLLOWING CONSEQUENCES:

1. I understand the State will use this conviction, and any other conviction from this or any other State which prohibits the same or similar conduct to enhance the penalty for any subsequent offense;
2. I understand that, as a consequence of my plea of guilty or nolo contendere, if I am not a citizen of the United States, I may, in addition to other consequences provided by law, be removed, deported or excluded from entry into the United States or denied naturalization;
3. I understand that sentencing is entirely up to the court and the following range of penalties for committing the offense described above will apply:

FIRST OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 2 days, but not more than 6 months in the Clark County Detention Center or at least 48 hours, but not more than 96 hours of community service; a fine of not less than \$400 nor more than \$1,000 in addition to certain fees and assessments that are required by statute; required attendance at DUI school with tuition required to be paid by me; required attendance at the Victim Impact Panel. If I was found to have a concentration of alcohol of 0.18 or more in my blood or breath or if I was under 21 years of age when I committed this violation, the Court must, before sentencing, require an alcohol/drug dependency evaluation, and I will be assessed a \$100 fee. The Court may order a Breath Interlock Device installed on any vehicle I own or operate for not less than 3 months nor more than 6 months at my own expense, if I was found to have had a concentration of alcohol of less than 0.18 in my blood or breath; the Court may order me, for a period determined by the Court, to install at my own expense Breath Interlock Device in any motor vehicle which I own or operate as a condition of reinstatement of my driving privilege; and, if I was found to have had a concentration of alcohol of 0.18 or more in my blood or breath, the Court must order a Breath Interlock Device installed on any vehicle that I own or operate for a period of not less than 12 months nor more than 36 months. Further, the Department of Motor Vehicles will revoke or suspend my driver's license for at least 90 days and impose a \$35 civil penalty. Also, if I was found to have a concentration of alcohol of 0.18 or more in my blood or breath, I will be required to attend a program of treatment for the abuse of alcohol or drugs.

SECOND OFFENSE WITHIN 7 YEARS (MISDEMEANOR):

At least 10 days, but not more than 6 months in the Clark County Detention Center or in residential confinement; a fine of not less than \$750 nor more than \$1000, in addition to certain fees and assessments that are required by statute, or an equivalent number of hours of community service; and required attendance at the Victim Impact Panel. In addition, the Court must, before sentencing, require an alcohol/drug dependency evaluation, and I will be assessed a \$100 fee. Further, the Department of Motor Vehicles will revoke or suspend my driver's license for at least 1 year, impose a \$35 civil penalty, and suspend my registration for at least five days. Additionally, if I was found to have had a concentration of alcohol of less than 0.18 in my blood or breath, the Court may order me, for a period of not less than 3 months nor more than 6 months, to install at my own expense a Breath Interlock Device in any motor vehicle which I own or operate as a condition of reinstatement of my driving privilege; if I was found to have had a concentration of alcohol of 0.18 or more in my blood or breath, the Court must order me to install, for a period of not less than 12 months nor 36 months, a Breath Interlock Device in any motor vehicle which I own or operate as a condition to obtaining a restricted license or as a condition of reinstatement of my driving privilege.

Also, the Court must order me to attend a program of treatment for the abuse of alcohol or drugs.

EXHIBIT RA-000227

THIRD OFFENSE OR ANY SUBSEQUENT OFFENSE WITHIN 7 YEARS (FELONY):

Incarceration in the Nevada Department of Corrections for a non-probationable sentence of at least 1 year, but not more than 6 years; a fine of not less than \$2,000 nor more than \$5,000, in addition to certain fees and assessments that are required by statute; and required attendance at the Victim Impact Panel. The Court must order a breath interlock device installed on any vehicle I own or operate for not less than 12 months nor more than 36 months upon my release from prison at my expense. Further, the Department of Motor Vehicles will revoke or suspend my driver's license for at least 3 years, impose a \$35 civil penalty, and suspend my registration for at least five days. Before sentencing, the Court must also require me to be evaluated to determine whether I am an abuser of alcohol or drugs and whether I can be treated successfully for that condition.

SPECIAL WARNING


A person who has previously been convicted of: (a) A violation of NRS 484.379 that is punishable as a felony pursuant to paragraph (c) of subsection 1; (b) A violation of NRS 484.3795; (c) A homicide resulting from driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or controlled substance or resulting from any other conduct prohibited by NRS 484.379 or 484.3795; or (d) A violation of a law or any other jurisdiction that prohibits the same or similar conduct as set forth in paragraph (a), (b) Nevada State Prison for a non-probationable sentence of at least 2 years, but not more than 15 years, and shall be further punished by a fine of not less than \$200 nor more than \$5000 in addition to certain fees and assessments that are required by statute, along with required attendance at the Victim Impact Panel. The Court must order a Breath Interlock Device installed on any vehicle that the person owns or operates for not less than 12 months nor more than 36 months upon release from prison at the person's own expense. Further, the Department of Motor Vehicles will revoke or suspend that person's license for at least 3 years, impose a \$35 civil penalty, and if the person is convicted of a second or subsequent violation of NRS 484.39 or 484.3795 within 7 years, the Court must issue an order directing the Department of Motor Vehicles to suspend the registration of that person for at least 5 days. Before sentencing the offender, the Court must also require the person to be evaluation to determine whether he is an abuser of alcohol or drugs and whether he can be treated successfully for his condition.

VEHICULAR HOMICIDE


A person who commits vehicular homicide after three prior DUI offenses is guilty of a category A felony and shall be punished by imprisonment in the state prison: (a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or (b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served. The person may also be subjected to certain fees and assessments that are required by statute. In addition, the person is required to attend the Victim Impact Panel. The Court must also order a Breath Interlock Device on any vehicle that the person owns or operates for not less than 12 months nor more than 36 months upon the person's release from prison, at the person's own expense. Further, the Department of Motor Vehicles will revoke or suspend that person's driver's license for at least 3 years, the Department of Motor Vehicles may impose a \$35.00 civil penalty, and the person's registration will be suspended for at least 5 days. Before sentencing whether he can be treated successfully for his condition.

ALL DEFENDANTS MUST INITIAL EITHER #1 OR #2 BELOW--DO NOT INITIAL BOTH

- JPB
1. I am represented by an attorney in this case. My attorney has fully discussed these matters with me and advised me about my legal rights. My attorney is Thomas Boley.
 2. I have declined to have an attorney represent me and I have chosen to represent myself. I have made this decision even though there are dangers and disadvantages in self-representation in a criminal case, including but not limited to, the following:
 - a. Self-representation is often unwise, and a defendant may conduct a defense to his or her own detriment;
 - b. a defendant who represents himself is responsible for knowing and complying with the same procedural rules as lawyers, and cannot expect help from the Judge in complying with those procedural rules;
 - c. a defendant representing himself will not be allowed to complain on appeal about the competency or effectiveness of his or her representation;
 - d. the state is represented by experienced professional attorneys who have the advantage of skill, training and ability;
 - e. a defendant unfamiliar with legal procedures may allow the prosecutor an advantage, may not make effective use of legal rights, and may make tactical decisions that produce unintended consequences; and
 - f. the effectiveness of the defense may well be diminished by a defendant's dual role as attorney and accused.

 DEFENDANTS SIGNATURE	<u>3/13/88</u> DATE OF BIRTH	<u>6/29/19</u> DATE
---	---------------------------------	------------------------

I HAVE REVIEWED THIS ADMONISHMENT WITH MY CLIENT AND HE/SHE UNDERSTANDS THE RIGHTS HE/SHE IS WAIVING AND THE CONSEQUENCES OF HIS/HER PLEA OF GUILTY/NOLO CONTENDERE TO THIS DUI CHARGE.


 DEFENDANTS ATTORNEY (if applicable)

11061
 BAR NUMBER

CERTIFICATE OF SERVICE

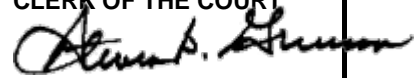
I HEREBY CERTIFY that on the 2nd day of December, 2019, that I electronically filed the foregoing Motion with the Clerk of the Court by using the electronic filing system.

The following participants in this case are registered electronic filing system users and will be served electronically:

Michael Giles – District Attorney
michael.giles@clarkcountynvda.com
200 Lewis Avenue
Third Floor
Las Vegas, Nevada 89101



Chris Barden, an employee
of Pariente Law Firm, P.C.



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

THE STATE OF NEVADA,

Plaintiff,

vs.

JACK PAUL BANKA,

Defendant.

CASE NO. C-18-333254-1
DEPT NO. V

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE CAROLYN ELLSWORTH, DISTRICT COURT JUDGE

MONDAY, FEBRUARY 24, 2020

**RE: DEFENDANT'S MOTION FOR BAIL PENDING APPEAL
PURSUANT TO NRS 178.488 AND NEVADA CASE LAW**

APPEARANCES:

FOR THE STATE:

MICHAEL G. GILES, ESQ.
Deputy District Attorney

FOR THE DEFENDANT:

JOHN G. WATKINS, ESQ.
MICHAEL D. PARIENTE, ESQ.

RECORDED BY: LARA CORCORAN, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

1 **LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 24, 2020, 9:34 A.M.**

2 * * * * *

3 THE COURT: Case Number C333254 State of Nevada
4 versus Jack Banka.

5 MR. WATKINS: Good morning, Your Honor. May it
6 please, Your Honorable Court, John Watkins. Mr. Pariente's
7 here, Michael has the flu. So with your permission I'll be
8 arguing.

9 THE COURT: Okay. So, Mr. Watkins, I've got only 10
10 minutes I think with you this morning because I have trial --

11 MR. WATKINS: Okay.

12 THE COURT: -- and so -- and it's a huge calendar --

13 MR. WATKINS: Okay.

14 THE COURT: -- so I'm just -- if you need more time
15 than that then we can reset for a different time. I just
16 wanted you to know because you do usually take some time and
17 that's fine. I'm just telling you I don't have a lot of time
18 this morning so if you need more than 10 minutes, let's go talk
19 about it.

20 MR. WATKINS: I think we should pass it a couple of
21 days?

22 THE COURT: Couple of days, no.

23 MR. WATKINS: No, when can we argue?

24 THE COURT: When we're out of our trial.

25 Staff?

1 THE CLERK: We're looking at either --

2 MR. WATKINS: I'll just do it this morning.

3 THE COURT: Okay. It's with -- I'm in the middle of
4 a trial.

5 MR. WATKINS: I appreciate that you're giving me the
6 opportunity, Your Honor.

7 THE COURT: Sure.

8 MR. WATKINS: But Jack's in custody here and he's got
9 his family.

10 Where's the family?

11 UNIDENTIFIED SPEAKER: In the back row over there.

12 THE COURT: Sure. All right. So I have read all of
13 the pleadings. So there are many, but there's the motion for
14 bail pending appeal is -- I've read that. I've read the
15 State's opposition. I've read the reply to the opposition. I
16 have read the supplemental points and authorities regarding the
17 motion for bail pending appeal.

18 I've also read the State's opposition to the
19 supplemental points and authorities. I have also read the
20 amended reply to the State's opposition. I read the reply and
21 then I read the amended reply, but the amended took the place
22 in -- of the reply. So I've read all of that.

23 MR. WATKINS: Okay. With that, Your Honor, I'd like
24 to, you know, just potentially just summarize, but right now I
25 need to point something that's important to the Court. On our

1 amended we made a heading here, preliminary remarks. If you
2 remember, the prosecution indicated that not only was the older
3 lady injured in the case, but the male who was 86 had five
4 broken ribs.

5 I spoke with Jack, and he asked me to check into that
6 scenario. I in fact did check into that scenario and that is
7 incorrect. That gentlemen did not suffer any broken ribs at
8 all, okay, and he went to the hospital, was just checked out
9 and released immediately and -- but there was no pain killers
10 or anything given to him. I made copies of the pertinent
11 section of the grand jury transcript where he testified if
12 you'd like to see that?

13 THE COURT: I've already looked at that and I -- so
14 I'm aware. My understanding was it was the female that was in
15 the other car who suffered the more serious injuries.

16 MR. WATKINS: Yes. The gentleman didn't suffer any
17 injuries, but -- but the State represented to you in our
18 argument and obviously that has an impact I believe, you know,
19 versus, you know, he really wasn't injured or five broken ribs.
20 Also so I wanted to make sure that you understood that, you
21 know.

22 And also you must have been given some erroneous
23 information at the time of the plea because you were of the
24 impression that Jack was again facing two counts of felony DUI
25 substantial bodily injury. He had at no time ever faced two

1 counts; he only faced the one count. And apparently when you
2 accepted the plea you were of the impression that he had two,
3 and he was getting a real break here because he was only going
4 to be pleading to one. And I want you to know that that's
5 incorrect and I -- somehow you got erroneous information; I
6 don't know how you got that, but I do have --

7 THE COURT: At the time of the entry of the plea?

8 MR. WATKINS: Yes, Your Honor, and I actually have --
9 and it's on page 14. And what it said -- and I believe, Judge,
10 strike that it was on the motion to withdraw the plea is where
11 you indicated, if I may briefly, But we had a discussion and he
12 acknowledged that he understood. He understood, excuse me,
13 what the Alford decision was and that that was that. In fact,
14 he was going to not admit to his guilt, but he still wanted me
15 to accept his plea of guilty because he didn't want to run the
16 risk of being convicted of the original and more serious
17 charges, which of course included two counts of driving under
18 the influence with substantial bodily harm, so.

19 THE COURT: Okay. So what was the -- I can't
20 remember what the original charge was.

21 MR. GILES: And my memory, Your Honor, is that it was
22 there were two victims named in the one count, but it's two
23 counts total one --

24 THE RECORDER: Mr. Giles, can you move the mic,
25 please.

1 THE COURT: All right. One was leaving the scene of
2 the accident --

3 MR. GILES: One leaving the scene and one DUI
4 substantial, both of which have a 2 to 20 requirement.

5 MR. WATKINS: Well, I'll finish on what I was
6 reading, and it says, as well as a felony, you know, fleeing
7 the scene, failure to stop which you know there was a lot of
8 evidence about that.

9 So, you know, Your Honor, Jack did not injure this
10 other gentleman, okay. And -- and there was not two DUIs, and
11 I think that's very important that you understand that because
12 it appears based on what you said you were under the
13 impression. So I'm going to leave that with you.

14 Now, just briefly here there's really four issues to
15 be decided, okay. One is our appeal, okay, frivolous or are
16 they for purpose of delay, is Jack a flight risk, or is he a
17 danger to the community; those are the four issues that I
18 believe are before the Court based upon the case law and the
19 statutory language, okay.

20 And I -- I can't see for the life of me how you would
21 say that our appeals are frivolous, okay. We have, you know,
22 our motion arrest of judgment which we believe there wasn't a
23 crime charged by the State. There's no statute that's
24 prohibiting that kind of conduct.

25 Also, Your Honor, in addition to -- in addition to

1 that there's no delay. Mr. Pariente and I have been very
2 diligent with Jack in representing this case, and you know
3 that. So there's no purpose of delay.

4 So also, Jack is not a flight risk, and he's not a
5 danger to the community. He was released since December
6 the 1st of 2016, on bail, and there was no conditions that --
7 the State didn't have any check in, you know, for anything.

8 So, Judge, we're asking that you grant bail pending
9 appeal. Jack has never had any problems at all. This is the
10 only incident that he had.

11 Now, I did point out to you that's why you asked to
12 do the supplement, and the State admits the police reports are
13 incorrect about the accident, okay, the direction, and I
14 presented to you that it's important the arresting officer know
15 who was -- who caused the accident.

16 The State's argument was that it was conjecture or
17 scrivener error. Well, conjecture has absolutely no place
18 here, and both reports were done by the police officer so
19 there's no error. Bottom line there was a question as to who
20 was doing what, and I pointed that out.

21 The other issues that I pointed out for the Court
22 that you wanted to know dealing with the -- the field
23 sobrieties and some other inconsistencies. Basically the State
24 said, well, the inconsistencies there was no room on the police
25 report for the officer to go ahead and put down really what

1 happened so he put down what was on the form. Well, I point
2 out then he's not giving, you know, correct information.

3 Just to summarize, Your Honor, again this is not a
4 frivolous appeal that we have. And it's the two issues that,
5 you know, one is the withdrawal in the plea and the other one
6 is, you know, the motion arrest of judgment, and he's not a
7 flight risk, and he's clearly not a danger to the community
8 based upon the action by the Court. And this Court actually,
9 you know, made it clear to the State you never asked for any of
10 this before, okay. So we're asking the Court to at a minimum
11 grant bail pending appeal for Jack.

12 We also, you pointed out when I went through and I
13 made my argument that apparently weren't things, you know,
14 there was some additional information that you wanted to be put
15 in writing, and I put all that information in writing to you.
16 I won't go through it because of the time constraints. You've
17 read it all; you know what's there. And it's -- and you said
18 that, you know, you potentially could, you know, consider this
19 I guess in regards to some kind of reconsideration for him to
20 allow to withdraw the plea --

21 THE COURT: Okay. On Honeycutt I could even though
22 it was on appeal I could certify to the Supreme Court --

23 MR. WATKINS: Yeah.

24 THE COURT: -- if I so implied that I wanted to
25 change my mind --

1 MR. WATKINS: Yes.

2 THE COURT: -- on a previous ruling and send such a
3 notice to the Supreme Court so that they could remand it back,
4 but, you know, that's what I was talking about --

5 MR. WATKINS: I understand that --

6 THE COURT: -- in other words --

7 MR. WATKINS: -- and the State said you can't do it.
8 Well, we know that you can and that was the reason -- that was
9 the reason for the amended that I did because I've done my
10 research on that, and I wanted to point out the Dingwall
11 [phonetic] case, and you were aware of all of those I know.

12 So again, Your Honor, Jack has had absolutely no
13 problems with this legal system at all except for this
14 incident, and we're asking that at a minimum you grant bail
15 pending appeal. We're going to ask that you reconsider and let
16 him allow -- let him to withdraw the plea in this case.

17 THE COURT: Okay. State.

18 MR. GILES: And, Your Honor, to start from the top
19 Martin Luber [phonetic] told me himself in pretrials, we were
20 getting ready for trial that he had broken ribs. What was said
21 at the prelim several years previously clearly is at odds; I
22 will accept Mr. Watkins's representation. It doesn't matter
23 because Maxine had a crushed sternum, and she was named as a
24 victim in the SBH count and/or Martin Luber and then they're
25 both named in the fleeing the scene count where the substantial

1 nature of the injuries isn't required, just injury.

2 And again, we've already dealt with the two counts
3 versus two victims. I think that was just a language
4 transposition there that happened.

5 Just to remind everybody, basically what happened
6 last time we were here on the motion for bail. At the very end
7 of it after I believe the Court had begun to make a ruling on
8 the issue, Mr. Watkins began talking about all the missing
9 evidence that was never dealt with, and the Court gave him an
10 opportunity to supplement the record.

11 Well, the essence of the supplementation is that the
12 police officer wrote a report where he properly noted the
13 directions of travel in the narrative section and then down in
14 the conclusory section transposed one of the directions of
15 travel.

16 That does not change what the firefighter said in his
17 sworn testimony and what he would say at trial as to the
18 direction of travel and who was at fault for the accident. It
19 doesn't change what the physical evidence shows, which is that
20 the defendant was at fault for the accident, and he left the
21 scene, and he was chased down, and he appeared impaired.

22 And Mr. Watkins discussing the report and the fact
23 that the language on the checkmarked boxes is different than
24 the language used in the written narrative, that's a choice
25 Henderson PD made to use a form where they give officers a

1 quick option to checkmark boxes. It doesn't change the fact
2 that all the things noted showed signs of impairment, that they
3 went through their investigation before taking the defendant
4 down to test him evidentiary for alcohol in his system, and it
5 came back substantially above the legal limit within two hours.

6 And so the essence of the motion -- and I will
7 apologize about whether the Court had the ability to reconsider
8 the prior motion on appeal. I talked to our appellate
9 division. I've never done appellate work, and they all advised
10 me that, no, they felt that once it was up there that that
11 issue had moved up. I understand the Court has the ability to
12 send something up to the Supreme Court saying I got it wrong
13 please send it back.

14 I don't think that that's necessary because in
15 essence what we're here today on is the question of
16 dangerousness. I'm not going to weigh in; I didn't weigh in
17 before on the frivolous and for purposes of delay even if I
18 have an opinion, I believe the case law is pretty solid on that
19 issue.

20 But this case is about a DUI where an individual
21 drove, crashed into a car and then fled the scene. DUIs are
22 not like other crimes. We can't look at history and say well,
23 you've got all these little predicate crimes leading up to this
24 one big crime. It's about one moment in time where a person
25 who has very likely done the same behavior again and again and

1 again gets into that crash.

2 MR. WATKINS: I'm going to have to object, Your
3 Honor. There's absolutely no evidence that Jack has had any
4 similar problem and drives while drinking. That's
5 inappropriate that just like five broken ribs --

6 THE COURT: Well, he's not -- he didn't say that the
7 defendant. He's just saying in general it's the type of crime
8 that people don't generally get, you know, their first DUI
9 isn't as a nature, you know, substantial bodily harm or death,
10 but it does happen. I've seen it many times --

11 MR. WATKINS: Sure you have.

12 THE COURT: -- it is their only time that they were
13 arrested whether or not they weren't arrested before, you know,
14 we never know about those things. It's just like any other
15 case people come in and say to me, well, my client has been
16 crime free.

17 Well, I don't know that. I know he hasn't been
18 arrested. I don't know if he's actually been crime free. I
19 can only go with has he been -- does he -- been arrested for
20 any new cases I can give you that. What he's done in the
21 meantime otherwise I don't know. And so that's all I think
22 he's saying, but there's --

23 MR. WATKINS: Well, you shouldn't consider that, you
24 know.

25 THE COURT: I'm not. I'm not considering that.

1 MR. WATKINS: Okay.

2 MR. GILES: And it's being said simply for the fact,
3 Your Honor, that we now have an individual who isn't cloaked
4 with the belief of being not guilty; the innocence is gone
5 here. Mr. Banka has driven drunk in the past and has caused
6 substantially bodily harm, and all the promises in the world
7 doesn't change that fact that he won't do it again, and the
8 dangerousness to the community.

9 This isn't a targeted individual, this isn't a
10 specific victim class that would be potentially impacted by
11 Mr. Banka. It's society as a whole if he was released.

12 And other than that unless the Court has any
13 questions about our opposition I will submit to the Court that
14 bail at this time is inappropriate. It should be denied and
15 Mr. Banka's appeal should be allowed to go forward.

16 MR. WATKINS: If I could just briefly respond, Your
17 Honor.

18 First off, the State obviously is not saying that our
19 appeal is for delay or it's frivolous. There's no flight risk.
20 The only thing they're saying is now he's a threat to the
21 public, okay. And again there has been absolutely nothing in
22 Jack's life before or after this horrible incident on December
23 1st of 2016.

24 The prosecutor comes in now as trying to paint a
25 picture here oh, he's a real risk to you, he's this to the

1 community, et cetera, et cetera, when in fact their previous
2 conduct showed that they didn't believe that. This is just
3 argument to keep this gentleman sitting in prison when we are
4 trying to fight his case legally and have a --

5 THE COURT: Okay. Tamp it down.

6 MR. WATKINS: -- basis to do so.

7 THE COURT: Just like exclamation marks in your
8 papers don't move me neither does shouting in court.

9 MR. WATKINS: I'm going to stop doing that because
10 Jack Howard said that exclamation marks is not good.

11 THE COURT: Yeah.

12 MR. WATKINS: So I'm not going to do that and I'm not
13 going to do as much underlying of and I try to, you know, kind
14 of keep my voice --

15 THE COURT: There you go.

16 MR. WATKINS: -- you know, but, Judge --

17 THE COURT: Okay. I understand what you're saying,
18 and I, you know, I've read everything. So I'm saying it again.
19 You've already said it in the papers --

20 MR. WATKINS: Okay.

21 THE COURT: -- and you've said now in oral argument.
22 It doesn't do it any good to say it a third time. I understand
23 what you're saying.

24 MR. WATKINS: And I'm not trying to repeat; I'm
25 trying to respond to them saying that, you know, he is a danger

1 to the community when none of that took place before, but now
2 because we are now trying to get Jack on bail because you
3 realize that if we're successful on appeal, and he's in custody
4 he has appeared victory. He's being punished.

5 Our position is why punish him at this point. Let us
6 do our appeal. You can make -- for example, Jack will
7 surrender his driver's license to this Honorable Court. He
8 won't drive during the interim.

9 THE COURT: All right. So as far as that goes, I
10 mean, yes, okay, every single person who is sentenced to
11 incarceration and has an appeal right, they -- they're in that
12 same boat or you can say, okay, well, every single person
13 should be given appeal, you know, bond on appeal pending
14 appeal, and that's why the Supreme Court has said, well, there
15 are things that we look at, right. And it's not just are they
16 a threat or is the appeal frivolous or -- our Supreme Court has
17 pretty much said you can look at anything. Here I'm looking at
18 some discrete things.

19 So whether or not your client is a threat to the
20 community I really don't know, you know. I mean, he -- he
21 hasn't while he was at liberty. He wasn't arrested for DUI
22 again. I don't know whether he would be inclined to drink and
23 drive again if he were released I don't know.

24 That -- you know that -- are people that drink and
25 drive a threat to the community? Yes. And we've had people

1 that have gone through the felony DUI program for three years
2 and still then later drink and drive again, and that's
3 horrifying, and you'd like to think that they wouldn't, you
4 know. They've got a lot to lose, et cetera if they do that.

5 But so I don't know. I mean, I don't see that he's a
6 threat in the same way that the Supreme Court was discussing a
7 murderer, you know, that, no, he's, you know, he, yeah,
8 intentionally drove drunk, and he as a result got into an
9 accident. I think that the evidence for that is overwhelming,
10 frankly, in this case, and someone was gravely injured, and he
11 fled the scene. And there's not really any dispute about that
12 that he fled first in his car, that then when the car became
13 inoperable he tried to also flee on foot, but --

14 MR. WATKINS: Judge, just so I could --

15 THE COURT: -- let me just say this that I think that
16 the additional facts that you presented to me at my invitation
17 regarding your arguments about the case itself, which I wanted
18 to know because that would obviously impact whether I thought I
19 had made a mistake about permitting him to withdraw his plea,
20 would it, you know, result in a manifest injustice on the
21 totality of the circumstances. I really don't think that
22 anything that you put in the papers does rise to that level.

23 I agree with what the State has said. I mean, there
24 were -- there was an eyewitness, a reliable eyewitness who saw
25 the accident happen, testified about the directions of the

1 vehicles, followed the defendant and kept him from eventually
2 fleeing on foot so.

3 And, you know, there was field sobriety and
4 eventually a blood draw with -- he was, you know, blood alcohol
5 in violation of the limits.

6 So nothing that's been presented by the defense makes
7 me think that under a totality of the circumstances I should
8 have granted the motion to withdraw the plea. So I'm not
9 granting on sending anything up to the Supreme Court under
10 Honeycutt saying that I want to change that.

11 Now, based on the complete procedural posture of this
12 case, particularly that the defendant had the option of
13 proceeding to trial on the date that was set either with his
14 original counsel or with his current counsel and instead he
15 chose to plead guilty pursuant to Alford where he acknowledged
16 that he did not want to run the risk of the conviction at
17 trial.

18 And then the offer of proof was made by the State,
19 that offer of proof indicated substantial if not overwhelming
20 evidence to the Court.

21 Based upon that I find that this motion as well as
22 all of the procedure that has gone on with this -- like I say,
23 he could have gone to trial. Instead we have all of this
24 machinations to delay that. I believe that this current motion
25 is also for the purpose of delay in this matter, and so I'm not

1 going to grant it.

2 Do I think that your appeal is frivolous? I don't
3 like to say that an appeal is frivolous. When it goes on
4 appeal, the Supreme Court is going to decide whether it's
5 frivolous or not. In certain instances maybe the trial Court
6 can say an appeal is frivolous because it's not grounded in any
7 law, that there's not any potential argument. I don't -- I
8 don't find your arguments persuasive which because if I had, I
9 would have granted your motions. But so I --

10 MR. WATKINS: That doesn't mean that it's not.

11 THE COURT: Exactly.

12 MR. WATKINS: Thank you.

13 THE COURT: That's why I'm saying that I don't think
14 it's frivolous. I think for something to be frivolous,
15 frankly, for a Court, a trial Court to make a finding of a
16 frivolous appeal that it's a further finding or it certainly
17 insinuates that counsel really doesn't have a true belief that
18 there is any merit to the appeal; I don't think that. I think
19 that you do believe there's merit.

20 MR. WATKINS: I strongly believe in it.

21 THE COURT: Right. And you've indicated that to me
22 every which and every time. So I'm not making a finding of
23 frivolousness.

24 I'm making a finding that I think it's for the
25 purpose of delay, and therefore it's denied. Obviously you can

1 reapply for bail and appeal to the Supreme Court.

2 MR. WATKINS: And, Your Honor, just one thing and
3 then I'll be out of here. Is that you're making it sound that
4 Jack had Michael Pariente and myself of counsel to represent
5 him you would not let us substitute in, and you were going to
6 require us to be ready for trial --

7 THE COURT: I let -- that's right.

8 MR. WATKINS: -- and we could not be ready for trial
9 and represent this gentleman with a five-day window so he
10 didn't have us. And then he was scared to death because you
11 wouldn't let us come in, and then they increased it from two
12 years to four years because we as attorneys, okay --

13 THE COURT: Okay. Let's --

14 MR. WATKINS: -- wanted to represent Jack.

15 THE COURT: Mr. Watkins, it's now been 20 minutes
16 even though I said 10. So thank you.

17 MR. WATKINS: Judge, thanks. By the way, is the
18 husband doing, okay?

19 THE COURT: Of course. Thank you.

20 MR. WATKINS: Okay. Thank you.

21 MR. GILES: Thank you, Your Honor.

22 MR. WATKINS: Your Honor -- nevermind. I assume
23 you'll do the order.

24 THE COURT: The State will prepare the order, and I
25 will review it and make any changes necessary.

1 MR. WATKINS: Are we going to get a chance to see it
2 before it goes to you or?

3 THE COURT: Well, if you can get it done in the time
4 frame, it's supposed to be done in 10 days so.

5 MR. WATKINS: Would you send it to me?

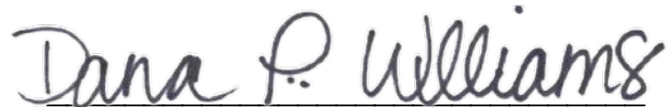
6 MR. GILES: I will cc them, Your Honor.

7 THE COURT: Okay.

8 (Proceedings adjourned 10:01 a.m.)

9 -oOo-

10 ATTEST: I do hereby certify that I have truly and correctly
11 transcribed the audio/video proceedings in the above-entitled
12 case.

13 
14

15 Dana L. Williams
16 Transcriber
17
18
19
20
21
22
23
24
25

	15/22 15/23 16/2	aware [2] 4/14 9/11	16/12 16/12	couple [2] 2/20 2/22
MR. GILES: [6] 5/21 6/3 9/18 13/2 19/21 20/6	agree [1] 16/23	B	CAROLYN [1] 1/12	course [2] 5/17 19/19
MR. WATKINS: [39]	ahead [1] 7/25	back [4] 3/11 9/3 11/5 11/13	case [16] 1/7 1/14 2/3 4/3 6/18 7/2 9/11 9/16 11/18 11/20 12/15 14/4 16/10 16/17 17/12 20/12	court [31]
THE CLERK: [1] 3/1	alcohol [2] 11/4 17/4	bail [11] 1/14 3/14 3/17 7/6 7/8 8/11 9/14 10/6 13/14 15/2 19/1	cases [1] 12/20	crash [1] 12/1
THE COURT: [39]	Alford [2] 5/13 17/15	BANKA [4] 1/9 2/4 13/5 13/11	caused [2] 7/15 13/5	crashed [1] 11/21
THE RECORDER: [1] 5/24	all [19] 3/12 3/12 3/22 4/8 6/1 7/9 8/15 8/17 9/11 9/13 10/8 11/2 11/9 11/23 12/21 13/6 15/9 17/22 17/23	based [5] 6/12 6/18 8/8 17/11 17/21	cc [1] 20/6	crime [5] 6/23 11/24 12/7 12/16 12/18
UNIDENTIFIED	allow [2] 8/20 9/16	Banka's [1] 13/15	certain [1] 18/5	crimes [2] 11/22 11/23
SPEAKER: [1] 3/11	allowed [1] 13/15	basically [2] 7/23 10/5	certainly [1] 18/16	crushed [1] 9/23
-	already [3] 4/13 10/2 14/19	basis [1] 14/6	certify [2] 8/22 20/10	current [2] 17/14 17/24
-oOo [1] 20/9	also [9] 3/18 3/19 4/20 4/22 6/25 7/4 8/12 16/13 17/25	be [14] 2/7 5/4 6/15 8/14 13/10 13/14 13/15 15/13 15/22 18/14 19/3 19/6 19/8 20/4	cetera [3] 14/1 14/1 16/4	custody [2] 3/8 15/3
1	amended [5] 3/20 3/21 3/21 4/1 9/9	became [1] 16/12	chance [1] 20/1	D
10 [4] 2/9 2/18 19/16 20/4	any [15] 4/7 4/16 7/7 7/9 8/9 12/3 12/14 12/20 13/12 14/22 16/11 18/6 18/7 18/18 19/25	because [18] 2/10 2/16 4/23 5/3 5/15 6/11 8/16 9/9 9/23 11/14 14/9 15/2 15/2 16/18 18/6 18/8 19/10 19/12	change [6] 8/25 10/16 10/19 11/1 13/7 17/10	Dana [1] 20/15
10:01 [1] 20/8	anything [5] 4/10 7/7 15/17 16/22 17/9	been [10] 4/22 7/1 12/15 12/17 12/18 12/19 12/19 13/21 17/6 19/15	changes [1] 19/25	danger [4] 6/17 7/5 8/7 14/25
14 [1] 5/9	apologize [1] 11/7	before [9] 1/12 6/18 8/10 11/3 11/17 12/13 13/22 15/1 20/2	charge [1] 5/20	dangerousness [2] 11/16 13/8
178.488 [1] 1/14	appeal [26]	began [1] 10/8	charged [1] 6/23	date [1] 17/13
1st [2] 7/6 13/23	appeals [1] 6/21	being [4] 5/16 13/2 13/4 15/4	charges [1] 5/17	day [1] 19/9
2	APPEARANCES [1] 1/16	belief [2] 13/4 18/17	chased [1] 10/21	days [3] 2/21 2/22 20/4
20 [2] 6/4 19/15	appeared [2] 10/21 15/4	believe [10] 4/18 5/9 6/18 6/22 10/7 11/18 14/2 17/24 18/19 18/20	check [3] 4/5 4/6 7/7	dealing [1] 7/22
2016 [2] 7/6 13/23	appears [1] 6/12	big [1] 11/24	checked [1] 4/8	dealt [2] 10/2 10/9
2020 [2] 1/13 2/1	appellate [2] 11/8 11/9	blood [2] 17/4 17/4	checkmark [1] 11/1	death [2] 12/9 19/10
24 [2] 1/13 2/1	appreciate [1] 3/5	boat [1] 15/12	checkmarked [1] 10/23	December [2] 7/5 13/22
8	are [13] 3/13 6/15 6/17 6/18 6/21 7/12 11/21 14/3 15/2 15/15 15/15 15/24 20/1	bodily [4] 4/25 5/18 12/9 13/6	choice [1] 10/24	decide [1] 18/4
86 [1] 4/3	argue [1] 2/23	bond [1] 15/13	chose [1] 17/15	decided [1] 6/15
9	arguing [1] 2/8	both [3] 6/4 7/18 9/25	circumstances [2] 16/21 17/7	decision [1] 5/13
9:34 [1] 2/1	argument [6] 4/18 7/16 8/13 14/3 14/21 18/7	Bottom [1] 7/19	CLARK [2] 1/2 2/1	defendant [7] 1/10 1/20 10/20 11/3 12/7 17/1 17/12
A	arguments [2] 16/17 18/8	break [1] 5/3	class [1] 13/10	DEFENDANT'S [1] 1/14
a.m [2] 2/1 20/8	arrest [2] 6/22 8/6	briefly [3] 5/11 6/14 13/16	clear [1] 8/9	defense [1] 17/6
ability [2] 11/7 11/11	arrested [5] 12/13 12/13 12/18 12/19 15/21	broken [5] 4/4 4/7 4/19 9/20 12/5	clearly [2] 8/7 9/21	delay [8] 6/16 7/1 7/3 11/17 13/19 17/24 17/25 18/25
about [14] 2/19 6/8 7/13 9/4 10/8 11/7 11/20 11/24 12/14 13/13 16/11 16/17 16/19 16/25	ask [1] 9/15	but [21]	client [2] 12/15 15/19	denied [2] 13/14 18/25
above [2] 11/5 20/11	asking [3] 7/8 8/10 9/14	C	cloaked [1] 13/3	DEPT [1] 1/7
above-entitled [1] 20/11	assume [1] 19/22	C-18-333254-1 [1] 1/7	come [2] 12/15 19/11	Deputy [1] 1/18
absolutely [4] 7/17 9/12 12/3 13/21	at [25]	C333254 [1] 2/3	comes [1] 13/24	did [6] 4/6 4/7 6/9 7/11 9/9 17/16
accept [2] 5/15 9/22	ATTEST [1] 20/10	calendar [1] 2/12	community [8] 6/17 7/5 8/7 13/8 14/1 15/1 15/20 15/25	didn't [7] 4/16 5/15 7/7 11/16 12/6 14/2 19/10
accepted [1] 5/2	Attorney [1] 1/18	can [12] 2/15 2/23 5/24 9/8 12/19 12/20 15/6 15/12 15/17 18/6 18/25 20/3	conduct [2] 6/24 14/2	different [2] 2/15 10/23
accident [7] 6/2 7/13 7/15 10/18 10/20 16/9 16/25	audio [1] 20/11	can't [4] 5/19 6/20 9/7 11/22	conjecture [2] 7/16 7/17	diligent [1] 7/2
acknowledged [2] 5/12 17/15	audio/video [1] 20/11	car [4] 4/15 11/21	consider [2] 8/18 12/23	Dingwall [1] 9/10
action [1] 8/8	authorities [2] 3/16 3/19		considering [1] 12/25	direction [2] 7/13 10/18
actually [3] 5/8 8/8 12/18			constraints [1] 8/16	directions [3] 10/13 10/14 16/25
addition [2] 6/25 6/25			convicted [1] 5/16	discrete [1] 15/18
additional [2] 8/14 16/16			conviction [1] 17/16	discussing [2] 10/22 16/6
adjourned [1] 20/8			copies [1] 4/10	discussion [1] 5/11
admit [1] 5/14			CORCORAN [1] 1/23	dispute [1] 16/11
admits [1] 7/12			correct [1] 8/2	DISTRICT [3] 1/2 1/12 1/18
advised [1] 11/9			correctly [1] 20/10	division [1] 11/9
after [2] 10/7 13/22			could [8] 8/18 8/21 8/22 9/3 13/16 16/14 17/23 19/8	do [16] 2/16 3/2 5/6 7/12 9/7 13/7 14/6 14/12 14/13 14/22 15/6 16/4 18/2 18/19 19/23 20/10
again [13] 4/24 8/3 9/12 10/2 11/25 11/25 12/1 13/7 13/21 14/18			counsel [4] 17/14 17/14 18/17 19/4	does [5] 10/16 12/10 12/19 14/8 16/22

<p>D</p> <p>doesn't... [1] 18/17</p> <p>doing [3] 7/20 14/9 19/18</p> <p>don't [19] 2/17 5/6 11/14 12/8 12/17 12/18 12/21 14/8 15/20 15/22 15/23 16/5 16/5 16/21 18/2 18/7 18/8 18/13 18/18</p> <p>done [7] 7/18 9/9 11/9 11/25 12/20 20/3 20/4</p> <p>down [6] 7/25 8/1 10/13 10/21 11/4 14/5</p> <p>draw [1] 17/4</p> <p>drink [3] 15/22 15/24 16/2</p> <p>drinking [1] 12/4</p> <p>drive [4] 15/8 15/23 15/25 16/2</p> <p>driven [1] 13/5</p> <p>driver's [1] 15/7</p> <p>drives [1] 12/4</p> <p>driving [1] 5/17</p> <p>drove [2] 11/21 16/8</p> <p>drunk [2] 13/5 16/8</p> <p>DUI [6] 4/24 6/3 11/20 12/8 15/21 16/1</p> <p>DUIs [2] 6/10 11/21</p> <p>during [1] 15/8</p>	<p>facts [1] 16/16</p> <p>failure [1] 6/7</p> <p>family [2] 3/9 3/10</p> <p>far [1] 15/9</p> <p>fault [2] 10/18 10/20</p> <p>FEBRUARY [2] 1/13 2/1</p> <p>felony [3] 4/24 6/6 16/1</p> <p>felt [1] 11/10</p> <p>female [1] 4/14</p> <p>field [2] 7/22 17/3</p> <p>fight [1] 14/4</p> <p>find [2] 17/21 18/8</p> <p>finding [4] 18/15 18/16 18/22 18/24</p> <p>fine [1] 2/17</p> <p>finish [1] 6/5</p> <p>firefighter [1] 10/16</p> <p>first [3] 12/8 13/18 16/12</p> <p>five [4] 4/3 4/19 12/5 19/9</p> <p>five-day [1] 19/9</p> <p>fled [3] 11/21 16/11 16/12</p> <p>flee [1] 16/13</p> <p>fleeing [3] 6/6 9/25 17/2</p> <p>flight [4] 6/16 7/4 8/7 13/19</p> <p>flu [1] 2/7</p> <p>followed [1] 17/1</p> <p>foot [2] 16/13 17/2</p> <p>form [2] 8/1 10/25</p> <p>forward [1] 13/15</p> <p>four [3] 6/14 6/17 19/12</p> <p>frame [1] 20/4</p> <p>frankly [2] 16/10 18/15</p> <p>free [2] 12/16 12/18</p> <p>frivolous [13] 6/15 6/21 8/4 11/17 13/19 15/16 18/2 18/3 18/5 18/6 18/14 18/14 18/16</p> <p>frivolousness [1] 18/23</p> <p>further [1] 18/16</p>	<p>14/9 14/12 14/13 18/1 18/4 19/5 20/1</p> <p>gone [4] 13/4 16/1 17/22 17/23</p> <p>good [3] 2/5 14/10 14/22</p> <p>got [8] 2/9 3/8 5/5 5/6 11/12 11/23 16/4 16/8</p> <p>grand [1] 4/11</p> <p>grant [4] 7/8 8/11 9/14 18/1</p> <p>granted [2] 17/8 18/9</p> <p>granting [1] 17/9</p> <p>gravely [1] 16/10</p> <p>grounded [1] 18/6</p> <p>guess [1] 8/19</p> <p>guilt [1] 5/14</p> <p>guilty [3] 5/15 13/4 17/15</p> <p>H</p> <p>had [18] 4/3 4/25 5/2 5/11 7/9 7/10 9/12 9/20 9/23 10/7 11/7 11/11 12/3 15/25 16/19 17/12 18/8 19/4</p> <p>happen [2] 12/10 16/25</p> <p>happened [3] 8/1 10/4 10/5</p> <p>harm [3] 5/18 12/9 13/6</p> <p>has [20] 2/7 4/18 7/9 7/17 9/12 11/11 11/25 12/3 12/15 12/19 13/5 13/5 13/12 13/21 15/4 15/11 15/14 15/16 16/23 17/22</p> <p>hasn't [2] 12/17 15/21</p> <p>have [26]</p> <p>he [52]</p> <p>he's [17] 3/8 7/4 8/2 8/6 8/7 12/6 12/7 12/18 12/20 12/22 13/20 13/25 13/25 15/3 15/4 16/5 16/7</p> <p>heading [1] 4/1</p> <p>Henderson [1] 10/25</p> <p>here [12] 2/7 3/8 4/1 5/3 6/14 7/18 10/6 11/15 13/5 13/25 15/17 19/3</p> <p>hereby [1] 20/10</p> <p>him [10] 4/10 8/19 9/16 9/16 10/9 11/4 15/5 16/19 17/1 19/5</p> <p>himself [1] 9/19</p> <p>his [11] 3/9 5/14 5/15 10/16 11/4 14/4 15/7 16/12 16/19 17/13 17/14</p> <p>history [1] 11/22</p> <p>Honeycutt [2] 8/21 17/10</p> <p>Honor [17] 2/5 3/6 3/23 5/8 5/21 6/9 6/25 8/3 9/12 9/18 12/3 13/3 13/17 19/2 19/21 19/22 20/6</p> <p>HONORABLE [3] 1/12 2/6 15/7</p>	<p>horrible [1] 13/22</p> <p>horrifying [1] 16/3</p> <p>hospital [1] 4/8</p> <p>hours [1] 11/5</p> <p>how [2] 5/6 6/20</p> <p>Howard [1] 14/10</p> <p>huge [1] 2/12</p> <p>husband [1] 19/18</p> <p>I</p> <p>I'd [1] 3/23</p> <p>I'll [4] 2/7 3/2 6/5 19/3</p> <p>I'm [21]</p> <p>I've [11] 2/9 3/14 3/14 3/15 3/18 3/22 4/13 9/9 11/9 12/10 14/18</p> <p>if [16] 2/14 2/18 4/1 4/11 5/11 8/24 11/17 12/18 13/11 13/16 15/3 15/23 16/4 17/19 18/8 20/3</p> <p>immediately [1] 4/9</p> <p>impact [2] 4/18 16/18</p> <p>impacted [1] 13/10</p> <p>impaired [1] 10/21</p> <p>impairment [1] 11/2</p> <p>implied [1] 8/24</p> <p>important [3] 3/25 6/11 7/14</p> <p>impression [3] 4/24 5/2 6/13</p> <p>in [62]</p> <p>inappropriate [2] 12/5 13/14</p> <p>INC [1] 1/24</p> <p>incarceration [1] 15/11</p> <p>incident [3] 7/10 9/14 13/22</p> <p>inclined [1] 15/22</p> <p>included [1] 5/17</p> <p>inconsistencies [2] 7/23 7/24</p> <p>incorrect [3] 4/7 5/5 7/13</p> <p>increased [1] 19/11</p> <p>indicated [4] 4/2 5/11 17/19 18/21</p> <p>individual [3] 11/20 13/3 13/9</p> <p>influence [1] 5/18</p> <p>information [5] 4/23 5/5 8/2 8/14 8/15</p> <p>injure [1] 6/9</p> <p>injured [3] 4/3 4/19 16/10</p> <p>injuries [3] 4/15 4/17 10/1</p> <p>injury [2] 4/25 10/1</p> <p>injustice [1] 16/20</p> <p>innocence [1] 13/4</p> <p>inoperable [1] 16/13</p> <p>insinuates [1] 18/17</p> <p>instances [1] 18/5</p> <p>instead [2] 17/14 17/23</p> <p>intentionally [1] 16/8</p> <p>interim [1] 15/8</p> <p>into [5] 4/5 4/6 11/21 12/1 16/8</p> <p>investigation [1] 11/3</p>	<p>invitation [1] 16/16</p> <p>is [41]</p> <p>isn't [5] 10/1 12/9 13/3 13/9 13/9</p> <p>issue [3] 10/8 11/11 11/19</p> <p>issues [4] 6/14 6/17 7/21 8/4</p> <p>it [48]</p> <p>it's [23]</p> <p>itself [1] 16/17</p> <p>J</p> <p>JACK [17] 1/9 2/4 4/5 4/24 6/9 6/16 7/2 7/4 7/9 8/11 9/12 12/3 14/10 15/2 15/6 19/4 19/14</p> <p>Jack's [2] 3/8 13/22</p> <p>JD [1] 1/24</p> <p>JOHN [2] 1/20 2/6</p> <p>JUDGE [6] 1/12 5/9 7/8 14/16 16/14 19/17</p> <p>judgment [2] 6/22 8/6</p> <p>jury [1] 4/11</p> <p>just [22]</p> <p>K</p> <p>keep [2] 14/3 14/14</p> <p>kept [1] 17/1</p> <p>killers [1] 4/9</p> <p>kind [3] 6/24 8/19 14/13</p> <p>know [53]</p> <p>L</p> <p>lady [1] 4/3</p> <p>language [4] 6/19 10/3 10/23 10/24</p> <p>LARA [1] 1/23</p> <p>LAS [1] 1/25</p> <p>last [1] 10/6</p> <p>later [1] 16/2</p> <p>law [4] 1/14 6/18 11/18 18/7</p> <p>leading [1] 11/23</p> <p>leave [1] 6/13</p> <p>leaving [2] 6/1 6/3</p> <p>left [1] 10/20</p> <p>legal [2] 9/13 11/5</p> <p>legally [1] 14/4</p> <p>let [7] 9/15 9/16 15/5 16/15 19/5 19/7 19/11</p> <p>let's [2] 2/18 19/13</p> <p>level [1] 16/22</p> <p>liberty [1] 15/21</p> <p>license [1] 15/7</p> <p>life [2] 6/20 13/22</p> <p>like [9] 3/23 4/12 11/22 12/5 12/14 14/7 16/3 17/22 18/3</p> <p>likely [1] 11/25</p> <p>limit [1] 11/5</p> <p>limits [1] 17/5</p> <p>line [1] 7/19</p> <p>little [1] 11/23</p> <p>look [3] 11/22 15/15 15/17</p> <p>looked [1] 4/13</p>
--	--	---	---	--

<p>L</p> <p>looking [2] 3/1 15/17</p> <p>lose [1] 16/4</p> <p>lot [3] 2/17 6/7 16/4</p> <p>Luber [2] 9/19 9/24</p> <hr/> <p>M</p> <p>machinations [1] 17/24</p> <p>made [7] 4/1 4/10 8/9 8/13 10/25 16/19 17/18</p> <p>make [5] 4/20 10/7 15/6 18/15 19/25</p> <p>makes [1] 17/6</p> <p>making [3] 18/22 18/24 19/3</p> <p>male [1] 4/3</p> <p>manifest [1] 16/20</p> <p>many [2] 3/13 12/10</p> <p>marks [2] 14/7 14/10</p> <p>Martin [2] 9/19 9/24</p> <p>matter [2] 9/22 17/25</p> <p>Maxine [1] 9/23</p> <p>may [2] 2/5 5/11</p> <p>maybe [1] 18/5</p> <p>me [14] 3/5 4/5 5/12 5/14 6/20 9/19 11/10 12/15 14/8 16/15 16/16 17/7 18/21 20/5</p> <p>mean [5] 15/10 15/20 16/5 16/23 18/10</p> <p>meantime [1] 12/21</p> <p>memory [1] 5/21</p> <p>merit [2] 18/18 18/19</p> <p>mic [1] 5/24</p> <p>MICHAEL [4] 1/17 1/21 2/7 19/4</p> <p>middle [1] 3/3</p> <p>mind [1] 8/25</p> <p>minimum [2] 8/10 9/14</p> <p>minutes [3] 2/10 2/18 19/15</p> <p>missing [1] 10/8</p> <p>mistake [1] 16/19</p> <p>moment [1] 11/24</p> <p>MONDAY [1] 1/13</p> <p>more [4] 2/14 2/18 4/15 5/16</p> <p>morning [4] 2/5 2/10 2/18 3/2</p> <p>motion [12] 1/14 3/13 3/17 5/10 6/22 8/6 10/6 11/6 11/8 17/8 17/21 17/24</p> <p>motions [1] 18/9</p> <p>move [2] 5/24 14/8</p> <p>moved [1] 11/11</p> <p>Mr. [11] 2/6 2/9 5/24 7/1 9/22 10/8 10/22 13/5 13/11 13/15 19/15</p> <p>Mr. Banka [2] 13/5 13/11</p> <p>Mr. Banka's [1] 13/15</p> <p>Mr. Giles [1] 5/24</p> <p>Mr. Pariente [1] 7/1</p> <p>Mr. Pariente's [1] 2/6</p> <p>Mr. Watkins [4] 2/9 10/8 10/22 19/15</p>	<p>Mr. Watkins's [1] 9/22</p> <p>much [2] 14/13 15/17</p> <p>murderer [1] 16/7</p> <p>must [1] 4/22</p> <p>my [8] 4/14 5/21 8/13 8/25 9/9 12/15 14/14 16/16</p> <p>myself [1] 19/4</p> <hr/> <p>N</p> <p>named [3] 5/22 9/23 9/25</p> <p>narrative [2] 10/13 10/24</p> <p>nature [2] 10/1 12/9</p> <p>necessary [2] 11/14 19/25</p> <p>need [3] 2/14 2/18 3/25</p> <p>neither [1] 14/8</p> <p>NEVADA [5] 1/2 1/6 1/14 2/1 2/3</p> <p>never [5] 7/9 8/9 10/9 11/9 12/14</p> <p>nevermind [1] 19/22</p> <p>new [1] 12/20</p> <p>no [18] 1/7 1/7 2/22 2/23 4/9 4/25 6/23 7/1 7/3 7/6 7/17 7/19 7/24 9/12 11/10 12/3 13/19 16/7</p> <p>none [1] 15/1</p> <p>not [38]</p> <p>noted [2] 10/12 11/2</p> <p>nothing [2] 13/21 17/6</p> <p>notice [1] 9/3</p> <p>now [11] 3/24 6/14 7/11 13/3 13/20 13/24 14/21 15/1 15/2 17/11 19/15</p> <p>NRS [1] 1/14</p> <p>Number [1] 2/3</p> <hr/> <p>O</p> <p>object [1] 12/2</p> <p>obviously [4] 4/18 13/18 16/18 18/25</p> <p>odds [1] 9/21</p> <p>off [1] 13/18</p> <p>offer [2] 17/18 17/19</p> <p>officer [4] 7/14 7/18 7/25 10/12</p> <p>officers [1] 10/25</p> <p>oh [1] 13/25</p> <p>okay [28]</p> <p>older [1] 4/2</p> <p>on [31]</p> <p>once [1] 11/10</p> <p>one [14] 5/1 5/4 5/22 5/23 6/1 6/3 6/3 6/15 8/5 8/5 10/14 11/24 11/24 19/2</p> <p>only [8] 2/9 4/2 5/1 5/3 7/10 12/12 12/19 13/20</p> <p>oOo [1] 20/9</p> <p>opinion [1] 11/18</p> <p>opportunity [2] 3/6 10/10</p> <p>opposition [5] 3/15 3/15 3/18 3/20 13/13</p>	<p>option [2] 11/1 17/12</p> <p>or [18] 4/10 4/19 6/15 6/16 7/16 9/24 12/9 12/13 13/19 13/22 15/12 15/16 15/16 15/19 17/14 18/5 18/16 20/2</p> <p>oral [1] 14/21</p> <p>order [2] 19/23 19/24</p> <p>original [3] 5/16 5/20 17/14</p> <p>other [9] 4/15 6/10 7/21 7/23 8/5 9/6 11/22 12/14 13/12</p> <p>otherwise [1] 12/21</p> <p>our [12] 2/24 3/25 4/17 6/15 6/21 6/22 11/8 13/13 13/18 15/5 15/6 15/16</p> <p>out [9] 2/24 4/8 7/11 7/20 7/21 8/2 8/12 9/10 19/3</p> <p>over [1] 3/11</p> <p>overwhelming [2] 16/9 17/19</p> <hr/> <p>P</p> <p>page [1] 5/9</p> <p>pain [1] 4/9</p> <p>paint [1] 13/24</p> <p>papers [3] 14/8 14/19 16/22</p> <p>PARIENTE [3] 1/21 7/1 19/4</p> <p>Pariente's [1] 2/6</p> <p>particularly [1] 17/12</p> <p>pass [1] 2/20</p> <p>past [1] 13/5</p> <p>PAUL [1] 1/9</p> <p>PD [1] 10/25</p> <p>pending [7] 1/14 3/14 3/17 7/8 8/11 9/15 15/13</p> <p>people [4] 12/8 12/15 15/24 15/25</p> <p>permission [1] 2/7</p> <p>permitting [1] 16/19</p> <p>person [3] 11/24 15/10 15/12</p> <p>persuasive [1] 18/8</p> <p>pertinent [1] 4/10</p> <p>phonetic [2] 9/11 9/19</p> <p>physical [1] 10/19</p> <p>picture [1] 13/25</p> <p>place [3] 3/21 7/17 15/1</p> <p>Plaintiff [1] 1/7</p> <p>plea [10] 4/23 5/2 5/7 5/10 5/15 8/5 8/20 9/16 16/19 17/8</p> <p>plead [1] 17/15</p> <p>pleading [1] 5/4</p> <p>pleadings [1] 3/13</p> <p>please [3] 2/6 5/25 11/13</p> <p>point [5] 3/25 7/11 8/1 9/10 15/5</p> <p>pointed [3] 7/20 7/21 8/12</p>	<p>points [2] 3/16 3/19</p> <p>police [4] 7/12 7/18 7/24 10/12</p> <p>position [1] 15/5</p> <p>posture [1] 17/11</p> <p>potential [1] 18/7</p> <p>potentially [3] 3/24 8/18 13/10</p> <p>predicate [1] 11/23</p> <p>prelim [1] 9/21</p> <p>preliminary [1] 4/1</p> <p>prepare [1] 19/24</p> <p>presented [3] 7/14 16/16 17/6</p> <p>pretrials [1] 9/19</p> <p>pretty [2] 11/18 15/17</p> <p>previous [2] 9/2 14/1</p> <p>previously [1] 9/21</p> <p>prior [1] 11/8</p> <p>prison [1] 14/3</p> <p>problem [1] 12/4</p> <p>problems [2] 7/9 9/13</p> <p>procedural [1] 17/11</p> <p>procedure [1] 17/22</p> <p>proceeding [1] 17/13</p> <p>proceedings [3] 1/9 20/8 20/11</p> <p>program [1] 16/1</p> <p>prohibiting [1] 6/24</p> <p>promises [1] 13/6</p> <p>proof [2] 17/18 17/19</p> <p>properly [1] 10/12</p> <p>prosecution [1] 4/2</p> <p>prosecutor [1] 13/24</p> <p>public [1] 13/21</p> <p>punish [1] 15/5</p> <p>punished [1] 15/4</p> <p>purpose [4] 6/16 7/3 17/25 18/25</p> <p>purposes [1] 11/17</p> <p>pursuant [2] 1/14 17/15</p> <p>put [5] 7/25 8/1 8/14 8/15 16/22</p> <hr/> <p>Q</p> <p>question [2] 7/19 11/15</p> <p>questions [1] 13/13</p> <p>quick [1] 11/1</p> <hr/> <p>R</p> <p>RE [1] 1/14</p> <p>read [12] 3/12 3/14 3/14 3/15 3/16 3/18 3/19 3/20 3/21 3/22 8/17 14/18</p> <p>reading [1] 6/6</p> <p>ready [3] 9/20 19/6 19/8</p> <p>real [2] 5/3 13/25</p> <p>realize [1] 15/3</p> <p>really [7] 4/19 6/14 7/25 15/20 16/11 16/21 18/17</p> <p>reapply [1] 19/1</p> <p>reason [2] 9/8 9/9</p> <p>reconsider [2] 9/15 11/7</p>	<p>reconsideration [1] 8/19</p> <p>record [1] 10/10</p> <p>RECORDED [1] 1/23</p> <p>RECORDER [1] 1/23</p> <p>regarding [2] 3/16 16/17</p> <p>regards [1] 8/19</p> <p>released [4] 4/9 7/5 13/11 15/23</p> <p>reliable [1] 16/24</p> <p>remand [1] 9/3</p> <p>remarks [1] 4/1</p> <p>remember [2] 4/2 5/20</p> <p>remind [1] 10/5</p> <p>repeat [1] 14/24</p> <p>reply [5] 3/15 3/20 3/20 3/21 3/22</p> <p>report [3] 7/25 10/12 10/22</p> <p>REPORTING [1] 1/24</p> <p>reports [2] 7/12 7/18</p> <p>represent [3] 19/4 19/9 19/14</p> <p>representation [1] 9/22</p> <p>represented [1] 4/17</p> <p>representing [1] 7/2</p> <p>require [1] 19/6</p> <p>required [1] 10/1</p> <p>requirement [1] 6/4</p> <p>research [1] 9/10</p> <p>reset [1] 2/15</p> <p>respond [2] 13/16 14/25</p> <p>result [2] 16/8 16/20</p> <p>review [1] 19/25</p> <p>ribs [5] 4/4 4/7 4/19 9/20 12/5</p> <p>right [8] 3/12 3/24 6/1 15/9 15/11 15/15 18/21 19/7</p> <p>rise [1] 16/22</p> <p>risk [7] 5/16 6/16 7/4 8/7 13/19 13/25 17/16</p> <p>room [1] 7/24</p> <p>row [1] 3/11</p> <p>ruining [2] 9/2 10/7</p> <p>run [2] 5/15 17/16</p> <hr/> <p>S</p> <p>said [15] 5/9 6/12 7/24 8/17 9/7 9/20 10/16 13/2 14/10 14/19 14/21 15/14 15/17 16/23 19/16</p> <p>same [3] 11/25 15/12 16/6</p> <p>saw [1] 16/24</p> <p>say [11] 6/21 10/17 11/22 12/6 12/15 14/22 15/12 16/15 17/22 18/3 18/6</p> <p>saying [11] 11/12 12/7 12/22 13/18 13/20 14/17 14/18 14/23 14/25 17/10 18/13</p> <p>says [1] 6/6</p> <p>SBH [1] 9/24</p>
---	--	---	--	--

<p>S</p> <p>scared [1] 19/10</p> <p>scenario [2] 4/6 4/6</p> <p>scene [7] 6/1 6/3 6/7 9/25 10/21 11/21 16/11</p> <p>scrivener [1] 7/17</p> <p>section [3] 4/11 10/13 10/14</p> <p>see [4] 4/12 6/20 16/5 20/1</p> <p>seen [1] 12/10</p> <p>send [4] 9/2 11/12 11/13 20/5</p> <p>sending [1] 17/9</p> <p>sentenced [1] 15/10</p> <p>serious [2] 4/15 5/16</p> <p>set [1] 17/13</p> <p>several [1] 9/21</p> <p>she [1] 9/23</p> <p>should [5] 2/20 13/14 13/15 15/13 17/7</p> <p>shouldn't [1] 12/23</p> <p>shouting [1] 14/8</p> <p>showed [2] 11/2 14/2</p> <p>shows [1] 10/19</p> <p>signs [1] 11/2</p> <p>similar [1] 12/4</p> <p>simply [1] 13/2</p> <p>since [1] 7/5</p> <p>single [2] 15/10 15/12</p> <p>sitting [1] 14/3</p> <p>so [41]</p> <p>sobrieties [1] 7/23</p> <p>sobriety [1] 17/3</p> <p>society [1] 13/11</p> <p>solid [1] 11/18</p> <p>some [6] 2/16 4/22 7/23 8/14 8/19 15/18</p> <p>somehow [1] 5/5</p> <p>someone [1] 16/10</p> <p>something [3] 3/25 11/12 18/14</p> <p>sound [1] 19/3</p> <p>specific [1] 13/10</p> <p>spoke [1] 4/5</p> <p>Staff [1] 2/25</p> <p>start [1] 9/18</p> <p>STATE [15] 1/6 1/17 2/3 4/17 6/23 7/7 7/12 7/23 8/9 9/7 9/17 13/18 16/23 17/18 19/24</p> <p>State's [4] 3/15 3/18 3/20 7/16</p> <p>statute [1] 6/23</p> <p>statutory [1] 6/19</p> <p>sternum [1] 9/23</p> <p>still [2] 5/14 16/2</p> <p>stop [2] 6/7 14/9</p> <p>strike [1] 5/10</p> <p>strongly [1] 18/20</p> <p>submit [1] 13/13</p> <p>substantial [6] 4/25 5/18 6/4 9/25 12/9 17/19</p> <p>substantially [2] 11/5 13/6</p> <p>substitute [1] 19/5</p> <p>successful [1] 15/3</p>	<p>such [1] 9/2</p> <p>suffer [2] 4/7 4/16</p> <p>suffered [1] 4/15</p> <p>summarize [2] 3/24 8/3</p> <p>supplement [2] 7/12 10/10</p> <p>supplemental [2] 3/16 3/19</p> <p>supplementation [1] 10/11</p> <p>supposed [1] 20/4</p> <p>Supreme [9] 8/22 9/3 11/12 15/14 15/16 16/6 17/9 18/4 19/1</p> <p>sure [4] 3/7 3/12 4/20 12/11</p> <p>surrender [1] 15/7</p> <p>sworn [1] 10/17</p> <p>system [2] 9/13 11/4</p> <p>T</p> <p>take [1] 2/16</p> <p>taking [1] 11/3</p> <p>talk [1] 2/18</p> <p>talked [1] 11/8</p> <p>talking [2] 9/4 10/8</p> <p>Tamp [1] 14/5</p> <p>targeted [1] 13/9</p> <p>telling [1] 2/17</p> <p>test [1] 11/4</p> <p>testified [2] 4/11 16/25</p> <p>testimony [1] 10/17</p> <p>than [4] 2/15 2/18 10/23 13/12</p> <p>thank [5] 18/12 19/16 19/19 19/20 19/21</p> <p>thanks [1] 19/17</p> <p>that [152]</p> <p>that's [16] 2/17 3/25 5/4 6/11 6/23 7/11 9/4 10/24 11/14 12/4 12/21 15/14 16/2 17/6 18/13 19/7</p> <p>their [4] 11/3 12/8 12/12 14/1</p> <p>them [2] 14/25 20/6</p> <p>then [12] 2/15 3/21 8/2 9/24 10/13 11/21 16/2 16/12 17/18 19/3 19/10 19/11</p> <p>there [21]</p> <p>there's [12] 3/13 6/14 6/23 7/1 7/3 7/19 12/3 12/22 13/19 16/11 18/7 18/19</p> <p>therefore [1] 18/25</p> <p>these [1] 11/23</p> <p>they [14] 6/16 9/3 10/25 11/2 11/9 11/10 12/12 12/13 14/2 15/11 15/15 16/3 16/4 19/11</p> <p>they're [3] 9/24 13/20 15/11</p> <p>They've [1] 16/4</p> <p>thing [2] 13/20 19/2</p> <p>things [5] 8/13 11/2 12/14 15/15 15/18</p> <p>think [17] 2/10 2/20 6/11 10/3 11/14 12/21</p>	<p>16/3 16/9 16/15 16/21 17/7 18/2 18/13 18/14 18/18 18/18 18/24</p> <p>third [1] 14/22</p> <p>this [33]</p> <p>those [3] 6/17 9/11 12/14</p> <p>though [2] 8/21 19/16</p> <p>thought [1] 16/18</p> <p>threat [5] 13/20 15/16 15/19 15/25 16/6</p> <p>three [1] 16/1</p> <p>through [4] 8/12 8/16 11/3 16/1</p> <p>time [15] 2/14 2/15 2/16 2/17 4/23 4/25 5/7 8/16 10/6 11/24 12/12 13/14 14/22 18/22 20/3</p> <p>times [1] 12/10</p> <p>today [1] 11/15</p> <p>told [1] 9/19</p> <p>took [2] 3/21 15/1</p> <p>top [1] 9/18</p> <p>total [1] 5/23</p> <p>totality [2] 16/21 17/7</p> <p>TRAN [1] 1/1</p> <p>transcribed [2] 1/24 20/11</p> <p>Transcriber [1] 20/15</p> <p>transcript [2] 1/9 4/11</p> <p>transposed [1] 10/14</p> <p>transposition [1] 10/4</p> <p>travel [3] 10/13 10/15 10/18</p> <p>trial [12] 2/10 2/24 3/4 9/20 10/17 17/13 17/17 17/23 18/5 18/15 19/6 19/8</p> <p>tried [1] 16/13</p> <p>true [1] 18/17</p> <p>truly [1] 20/10</p> <p>try [1] 14/13</p> <p>trying [5] 13/24 14/4 14/24 14/25 15/2</p> <p>two [12] 4/24 4/25 5/2 5/17 5/22 5/22 6/10 8/4 10/2 10/3 11/5 19/11</p> <p>type [1] 12/7</p> <p>U</p> <p>under [4] 5/17 6/12 17/7 17/9</p> <p>underlying [1] 14/13</p> <p>understand [5] 6/11 9/5 11/11 14/17 14/22</p> <p>understanding [1] 4/14</p> <p>understood [3] 4/20 5/12 5/12</p> <p>unless [1] 13/12</p> <p>up [5] 11/10 11/11 11/12 11/23 17/9</p> <p>upon [3] 6/18 8/8 17/21</p> <p>us [5] 15/5 19/5 19/6 19/10 19/11</p> <p>use [1] 10/25</p> <p>used [1] 10/24</p> <p>usually [1] 2/16</p>	<p>V</p> <p>VEGAS [1] 2/1</p> <p>vehicles [1] 17/1</p> <p>versus [3] 2/4 4/19 10/3</p> <p>very [4] 6/11 7/1 10/6 11/25</p> <p>victim [2] 9/24 13/10</p> <p>victims [2] 5/22 10/3</p> <p>victory [1] 15/4</p> <p>video [1] 20/11</p> <p>violation [1] 17/5</p> <p>voice [1] 14/14</p> <p>W</p> <p>want [4] 5/4 5/15 17/10 17/16</p> <p>wanted [9] 2/16 4/20 5/14 7/22 8/14 8/24 9/10 16/17 19/14</p> <p>was [53]</p> <p>wasn't [3] 4/19 6/22 15/21</p> <p>WATKINS [6] 1/20 2/6 2/9 10/8 10/22 19/15</p> <p>Watkins's [1] 9/22</p> <p>way [2] 16/6 19/17</p> <p>we [22]</p> <p>we're [8] 2/24 3/1 7/8 8/10 9/14 9/15 11/15 15/3</p> <p>we've [2] 10/2 15/25</p> <p>weigh [2] 11/16 11/16</p> <p>well [16] 6/5 6/6 7/17 7/24 8/1 9/8 10/11 11/22 12/6 12/15 12/17 12/23 15/12 15/14 17/21 20/3</p> <p>went [3] 4/8 8/12 11/3</p> <p>were [12] 4/23 5/2 5/22 6/12 7/18 9/11 9/19 10/6 12/12 15/23 16/24 19/5</p> <p>weren't [2] 8/13 12/13</p> <p>what [20] 5/9 5/13 5/19 5/20 6/5 6/12 7/20 7/25 8/1 9/4 9/20 10/5 10/16 10/17 10/19 11/15 12/20 14/17 14/23 16/23</p> <p>what's [1] 8/17</p> <p>when [9] 2/23 2/24 5/1 8/12 14/1 14/3 15/1 16/12 18/3</p> <p>where [8] 4/11 5/10 9/25 10/12 10/25 11/20 11/24 17/15</p> <p>Where's [1] 3/10</p> <p>whether [6] 11/7 12/13 15/19 15/22 16/18 18/4</p> <p>which [8] 5/17 6/4 6/7 6/22 10/19 16/17 18/8 18/22</p> <p>while [2] 12/4 15/21</p> <p>who [10] 4/3 4/15 7/15 7/15 7/19 10/18 11/25 13/3 15/10 16/24</p> <p>whole [1] 13/11</p>	<p>why [4] 7/11 15/5 15/14 18/13</p> <p>will [7] 9/22 11/6 13/13 15/6 19/24 19/25 20/6</p> <p>Williams [1] 20/15</p> <p>window [1] 19/9</p> <p>withdraw [5] 5/10 8/20 9/16 16/19 17/8</p> <p>withdrawal [1] 8/5</p> <p>within [1] 11/5</p> <p>won't [3] 8/16 13/7 15/8</p> <p>words [1] 9/6</p> <p>work [1] 11/9</p> <p>world [1] 13/6</p> <p>would [9] 6/20 10/17 13/10 15/22 16/18 16/20 18/9 19/5 20/5</p> <p>wouldn't [2] 16/3 19/11</p> <p>writing [2] 8/15 8/15</p> <p>written [1] 10/24</p> <p>wrong [1] 11/12</p> <p>wrote [1] 10/12</p> <p>Y</p> <p>yeah [3] 8/23 14/11 16/7</p> <p>years [4] 9/21 16/1 19/12 19/12</p> <p>yes [5] 4/16 5/8 9/1 15/10 15/25</p> <p>you [99]</p> <p>you'd [2] 4/12 16/3</p> <p>you'll [1] 19/23</p> <p>you're [4] 3/5 14/17 14/23 19/3</p> <p>you've [5] 8/16 11/23 14/19 14/21 18/21</p> <p>your [25]</p>
---	--	--	---	---