IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE RICHARD SCOTTI, DISTRICT JUDGE

Respondents,

and

JENNIFER LYNN PLUMLEE,

Real Party In Interest.

CASE NO: 82236

D.C. NO: C-20-346852-A

PETITIONER'S APPENDIX
Volume 1

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 Petitioner

CRAIG MUELLER, ESQ.
Nevada Bar #004703
723 South Seventh Street
Las Vegas, Nevada 89101
(702) 382-1200

Counsel for Real Party in Interest

INDEX

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 21, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

CRAIG MUELLER, ESQ.
Counsel for Real Party In Interest

ALEXANDER CHEN
Chief Deputy District Attorney

I further certify that I served a copy of this document by electronic emailing a true and correct copy thereof to:

JUDGE RICHARD SCOTTI
Email: HowardM@clarkcountycourts.us

BY */s/ E. Davis*
Employee, District Attorney's Office

AC//ed

Electronically Filed
02/11/2020

CLERK OF THE COURT

APLC

DISTRICT COURT

CLARK COUNTY, NEVADA

C-20-346852-A
II
03-12-2020
In Chambers

STATE OF NEVADA,
Plaintiff,

-vs-

JENNIFER PLUMLEE
Defendant,

District Court Case #

Justice Court Case # 18CRH002333-0000

Department #

APPEAL FROM THE JUSTICE COURT, HENDERSON TOWNSHIP

CLARK COUNTY, NEVADA

Appellant	Respondent
CRAIG A. MUELLER, ESQ. 723 SOUTH SEVENTH STREET LAS VEGAS, NV 89101 Attorney for Defendant	District Attorney 200 Lewis Avenue Las Vegas, NV 89115 Attorney for Plaintiff

Justice Court, Henderson Township

CLARK COUNTY, NEVADA

2020 FEB 11 P 1:15

JENNIFER PLUMLEE,
Appellant,

-vs-

STATE OF NEVADA,
Respondent,

District Court Case #

Justice Court Case # 18CRH002333-0000

Department # 2

APPEAL FROM JUSTICE COURT, HENDERSON TOWNSHIP

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 _____ day of FEBRUARY, 2020

JUSTICE OF THE PEACE
HENDERSON TOWNSHIP

JUSTICE

2019 19 P 2:18

MUELLER & ASSOCIATES, INC.
CRAIG A.MUELLER, ESQ.
Nevada Bar No.4703
723 South Seventh Street
Las Vegas, Nevada 89101
(702) 382-1200
Attorney for Defendant
JENNIFER PLUMLEE

JUSTICE COURT, HENDERSON TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

JENNIFER PLUMLEE,

Defendant.

18MH0263X333

Case No. **18MH0263X**

Dept No. 2

NOTICE OF APPEAL

PURSUANT TO NRS 266.595, notice is hereby given that JENNIFER PLUMLEE, the Defendant above named, hereby appeals to the Eighth Judicial District Court of Las Vegas, Clark County, State of Nevada from the Final Judgment entered in this action on the 19TH day of November, 2019.

DATED this 19th day of November 2019.

MUELLER & ASSOCIATES, INC.

By Craig Mueller
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing NOTICE OF APPEAL is hereby acknowledged this 19th day of November 2019.

By: _____
DISTRICT ATTORNEY'S OFFICE

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

CASE # 18CRH002333-0000 18MH0263X STEPHEN L GEORGE - DEPT # 2

State **PLUMLEE, JENNIFER, aka GRAVES, JENNIFER LYNN** 1410679 (SCOPE)

Charge(s) FAIL TO PROPERLY MAINTAIN TRAVEL LANE OR IMPROPER LANE BENCH TRIAL: CONVICTION CHANGE

DUI ALCOHOL AND/OR CONT/PROHIBIT SUB, ABOVE THE LEGAL LIMIT, 2ND BENCH TRIAL: CONVICTION

LINKED CASES FOR: 18CRH002333-0000

CASE #	STATUS	EVENT DATE	EVENT DESCRIPTION
18PCH001696-0000	CRIMINAL COMPLAINT FIL	NO FUTURE EVENTS	72 HOUR HEARING (VIDEO) HND

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
February 11, 2020	APPEAL FROM JUSTICE COURT, HENDERSON TOWNSHIP SIGNED AND FILED	
February 10, 2020	APPEAL FROM JUSTICE COURT, HENDERSON TOWNSHIP FORWARDED TO CHAMBERS REPORTER'S TRANSCRIPT OF SENTENCING FILED REPORTER'S TRANSCRIPT OF PROCEEDINGS OF DUI BENCH TRIAL FILED	

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

CASE # 18CRH002333-0000 18MH0263X STEPHEN L GEORGE - DEPT # 2

State **PLUMLEE, JENNIFER, aka GRAVES, JENNIFER LYNN** 1410679 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
November 19, 2019 S.L. GEORGE, JP M. SCHEIBLE, DDA J. MAYNARD, ESQ. FOR C. MUELLER, ESQ. J. NESCI, CLK L. BRENSKE, CR	SENTENCING HEARING HELD The following event: SENTENCING HEARING HND scheduled for 11/19/2019 at 11:00 am has been resulted as follows: Result: SENTENCING HEARING HELD Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	STATUS CHECK HND Date: February 19, 2020 Time: 9:00 am Location: DEPARTMENT 2

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

CASE # 18CRH002333-0000 18MH0263X STEPHEN L GEORGE - DEPT # 2

State **PLUMLEE, JENNIFER, aka GRAVES, JENNIFER LYNN** 1410679 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
	SENTENCING HEARING: DEFENDANT PRESENT STATEMENT BY STATE. STATE REQUESTING THAT DEFENDANT BE ADJUDICATED GUILTY OF MISDEMEANOR "DUI 2ND OFFENSE" WITH THE FOLLOWING REQUIREMENTS: $1000 FINE OR 100 HOURS OF COMMUNITY SERVICE IN LIEU OF FINE SERVE 10 DAYS AT CLARK COUNTY JAIL INSTALL A BREATH IGNITION INTERLOCK DEVICE OR SCRAM DEVICE FOR A MINIMUM OF 6 MONTHS, OR PENDENCY OF CASE STAY OUT OF TROUBLE FOR A MINIMUM OF 6 MONTHS - ANY ALCOHOL CONSUMPTION WILL CONSTITUTE A STAY OUT OF TROUBLE VIOLATION CONTINUE WITH TREATMENT COMPLETE VICTIM IMPACT PANEL AND CORONERS PROGRAM STATEMENT MADE BY DEFENSE - DEFENDANT HAS COMPLETED MODERATE OFFENDERS PROGRAM ON OTHER CASE, AFTER NEW CHARGES WERE INITIATED. LETTER FROM DEFENDANT'S COUNSELOR PRESENTED TO COURT. DEFENDANT ATTENDING ALCOHOLICS ANONYMOUS MEETINGS 2 TIMES PER WEEK. DEFENSE'S REQUEST TO WAIVE FINE AND MANDATORY JAIL TIME, FOR DEFENDANT TO BE SENTENCED TO MODERATE OFFENDERS PROGRAM TO RUN CONCURRENT WITH OTHER CASE AND TO ACCEPT COMPLETION OF MODERATE OFFENDERS PROGRAM FROM PRIOR CASE AS COMPLETION OF REQUIREMENTS ON THIS CASE. COURT DOES NOT HAVE DESCRETION TO WAIVE FINE OR MANDATORY JAIL TIME WHICH ARE MINIMUM REQUIREMENTS SET BY STATUTE. BENCH CONFERENCE. HENDERSON MUNICIPAL COURT CONVICTION RECORDS PRESENTED TO COURT BY STATE. COURT FINDS DEFENDANT GUILTY OF MISDEMEANOR "DRIVING UNDER THE INFLUENCE - 2ND OFFENSE" AND MISDEMEANOR "FAIL TO MAINTAIN TRAVEL LANE" DEFENDANT SENTENCED TO THE FOLLOWING REQUIREMENTS: TO PAY $1,058 FINE INSTALL BREATH IGNITION INTERLOCK DEVICE FOR A MINIMUM OF 6 MONTHS	

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
	TO ABSTAIN FROM ALL ALCOHOL CONSUMPTION TO CONTINUE ATTENDING ALCOHOLICS ANONYMOUS MEETINGS 2 TIMES PER WEEK FOR A MINIMUM OF 6 MONTHS COMPLETE VICTIM IMPACT PANEL COMPLETE CORONERS PROGRAM STAY OUT OF TROUBLE FOR A MINIMUM OF 6 MONTHS 10 DAYS CLARK COUNTY JAIL WITH 6 DAYS CREDIT TIME SERVED - 4 DAYS REMAINING DEFENDANT TO SERVE ON WEEKENDS OR DAYS OFF - TO BE COMPLETED WITHIN THE NEXT 6 MONTHS 150 DAYS CLARK COUNTY JAIL - SUSPENDED ORDER FOR BREATH INGNITION INTERLOCK DEVICE SIGNED AND FILED IN OPEN COURT, COPY PROVIDED TO DEFENDANT AND COPY MAILED TO DMV CONTINUED FOR STATUS OF APPEAL AND COMPLETION OF REQUIREMENTS SURETY BOND EXONERATED --- SET FOR COURT APPEARANCE Event: STATUS CHECK HND Date: 02/19/2020 Time: 9:00 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2 --- NOTICE OF APPEAL FILED BY C. MUELLER, ESQ. - FORWARDED TO CHAMBERS	

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

CASE # 18CRH002333-0000 18MH0263X STEPHEN L GEORGE - DEPT # 2

State **PLUMLEE, JENNIFER, aka GRAVES, JENNIFER LYNN** 1410679 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
October 07, 2019 S.L. GEORGE, JP M. SCHIEBLE, DDA C. MUELLER, ESQ. J. NESCI, CLK D. TAVAGLIONE, CR	NON JURY TRIAL: DEFENDANT PRESENT DEFENSE'S RENEWED MOTION TO DISMISS. OBJECTION BY STATE. FURTHER ARGUMENT BY DEFENSE. STATE HAS COMPLIED WITH THE STATUTORY REQUIREMENTS. DEFENSE MOTION DENIED. STATE READY. DEFENSE READY. EXLUSIONARY RULE INVOKED. OPENING STATEMENT BY STATE. JOSEPH RISCO CALLED AS WITNESS BY STATE. SWORN IN BY CLERK. DIRECT. CROSS. NO REDIRECT OR RECROSS. WITNESS EXCUSED. TROOPER GREG LUNA CALLED AS WITNESS BY STATE. SWORN IN BY CLERK. DIRECT. WITNESS ID'D DEFENDANT. STATE'S EXHIBITS 1 AND 2 MARKED. DEFENSE MOTION FOR MISTRIAL. MOTION DENIED. STATE'S EXHIBIT 1 OFFERED. OBJECTION BY DEFENSE. EXHIBIT 1 ADMITTED. STATE'S EXHIBIT 2 OFFERED. OBJECTION BY DEFENSE. RULING WITHHELD. CROSS. NO REDIRECT OR RECROSS. WITNESS EXCUSED. MOTION BY DEFENSE TO SUPPRESS TROOPER LUNA'S TESTIMONY. OBJECTION BY STATE. FURTHER ARGUMENT BY DEFENSE AND STATE. MOTION DENIED. STATE'S RENEWED MOTION TO ADMIT EXHIBIT 2. RULING WITHHELD. DARBY LANZ CALLED AS WITNESS BY STATE. SWORK IN BY CLERK. DIRECT. STATE'S EXHIBITS 3 AND 4 MARKED. STATE'S RENEWED MOTION TO ADMIT EXHIBIT 2. RULING WITHHELD. CROSS. STATE'S RENEWED MOTION TO ADMIT EXHIBIT 2, AND TO ADMIT EXHIBITS 3 AND 4. OBJECTION BY DEFENSE AS TO ADMITTING EXHIBIT 2. BENCH CONFERENCE. STATE'S EXHIBITS 2-4 ADMITTED. REDIRECT. BENCH CONFERENCE. NO RECROSS. WITNESS EXCUSED AT THIS TIME. STATE RESTS. OPENING STATEMENT BY DEFENSE. DARBY LANZ RECALLED AS A WITNESS BY DEFENSE. WITNESS REMAINS UNDER OATH.	

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

CASE # 18CRH002333-0000 18MH0263X STEPHEN L GEORGE - DEPT # 2

State **PLUMLEE, JENNIFER, aka GRAVES, JENNIFER LYNN** 1410679 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
	DIRECT. NO CROSS. WITNESS EXCUSED. DEFENSE RESTS. SUMMARIZATION BY STATE. ARGUMENT BY DEFENSE. BENCH CONFERENCE. STATE NOT PROCEEDING ON "PER SE IMPAIRMENT" TO CLARIFY RECORD. STATE HAS MET ITS BURDEN OF PROOF. MATTER CONTINUED FOR FORMAL ADJUDICATION AND SENTENCING. DEFENDANT TO COMPLETE AN UPDATED ALCOHOL EVALUATION PRIOR TO SENTENCING. NO ALCOHOL CONSUMPTION ORDER REMAINS IN EFFECT. SURETY BOND CONTINUES --- SET FOR COURT APPEARANCE Event: SENTENCING HEARING HND Date: 11/19/2019 Time: 11:00 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	
October 03, 2019	MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FILED COPIES GIVEN TO RUNNER AT COUNTER	

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

CASE # 18CRH002333-0000 18MH0263X STEPHEN L GEORGE - DEPT # 2

State **PLUMLEE, JENNIFER, aka GRAVES, JENNIFER LYNN** 1410679 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
September 16, 2019 S.L. GEORGE, JP M SCHEIBLE, DDA C. MUELLER, ESQ J. NESCI, CLK S. MCINTOSH, CR	NON JURY TRIAL: DEFENDANT PRESENT MOTION BY DEFENSE TO INVOKE EXCLUSIONARY RULE, RENEWED MOTION TO DISMISS COMPLAINT AND REQUEST TO QUESTION TROOPER UNDER OATH PRIOR TO PROCEEDING WITH TRIAL. ARGUMENT BY STATE AND STATE'S MOTION TO DENY DEFENSE COUNSEL'S RENEWED MOTION TO DISMISS COMPLAINT. BENCH CONFERENCE. EVIDENTIARY HEARING TO PROCEED. EVIDENTIARY HEARING: TROOPER GREG LUNA CALLED BY DEFENSE. SWORN IN BY CLERK. DIRECT BY DEFENSE. CROSS BY STATE. STATE'S EXHIBITS 1 AND 2 MARKED AND OFFERED. OBJECTION BY DEFENSE COUNSEL AS TO ADMITTING STATE'S EXHIBIT #2. REQUEST BY STATE FOR ADDITIONAL TIME TO SUBPOENA ADDITIONAL WITNESSES. DEFENSE COUNSEL'S RENEWED MOTION TO DISMISS COMPLAINT. FURTHER ARGUMENT BY STATE AND DEFENSE. STATE'S EXHIBITS 1 AND 2 NOT ADMITTED. NO RE-DIRECT OR RE-CROSS. COURT UPHOLDS ITS PREVIOUS RULING REGARDING SERVICE. NON JURY TRIAL DATE RESET. TROOPER LUNA EXCUSED. BENCH CONFERENCE. PARTIES MAY PREPARE AND SUBMIT BRIEFS PRIOR TO TRIAL DATE. DEFENSE COUNSEL'S REQUEST FOR TRANSCRIPTS OF JULY 17TH PROCEEDINGS AND TRANSCRIPTS OF TODAY'S PROCEEDINGS. DEFENSE COUNSEL PROVIDED A COPY OF JULY 17TH TRANSCRIPTS FROM COURT'S FILE. NO OBJECTION BY STATE. COURT IMPOSES A CONDITION OF NO ALCOHOL CONSUMPTION BY DEFENDANT. SURETY BOND CONTINUES --- SET FOR COURT APPEARANCE Event: NONJURY TRIAL HND Date: 10/07/2019 Time: 9:30 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2 Result: CRIMINAL HEARING HELD	

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

CASE # 18CRH002333-0000 18MH0263X STEPHEN L GEORGE - DEPT # 2

State **PLUMLEE, JENNIFER, aka GRAVES, JENNIFER LYNN** 1410679 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
July 24, 2019	REPORTERS TRANSCRIPT OF PROCEEDINGS FILED	
July 17, 2019 S.L. GEORGE, JP B. SCHIFALACQUA, DDA C. MUELLER, ESQ. J. NESCI, CLK L. BRENSKE, CR	NON JURY TRIAL: DEFENDANT PRESENT MS. SCHIFALACQUA SWORN IN BY CLERK. ORAL BUSTOS MOTION TO CONTINUE NON JURY TRIAL. OBJECTION BY DEFENSE. FURTHER ARGUMENT BY STATE AND DEFENSE. COURT FINDS THAT THE STATE HAS MET ITS BURDEN OF PROOF. STATE'S MOTION TO CONTINUE GRANTED. NON JURY TRIAL DATE RESET DEFENSE REQUESTS TRANSCRIPTS OF TODAY'S PROCEEDINGS SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: NONJURY TRIAL HND Date: 09/16/2019 Time: 9:30 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2 Result: CRIMINAL HEARING HELD	
May 13, 2019 S.L. GEORGE, JP R. SCOW, DDA C. MUELLER, ESQ J. NESCI, CLK L. BRENSKE, CR	STATUS CHECK: DEFENDANT PRESENT NON JURY TRIAL DATE SET SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: NONJURY TRIAL HND Date: 07/17/2019 Time: 9:30 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	
April 25, 2019 S.L. GEORGE, JP B. SCHIFALACQUA, DDA S. REYES, ESQ FOR C. MUELLER, ESQ J. NESCI, CLK D. TAVAGLIONE, CR	DEMAND FOR EXPERT WITNESSES FILED COPIES GIVEN TO RUNNER AT FRONT COUNTER STATUS CHECK: DEFENDANT NOT PRESENT DEMAND FOR EXPERT WITNESS FILED CONTINUED FOR POSSIBLE NEGOTIATIONS SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 05/13/2019 Time: 9:00 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	

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

CASE # 18CRH002333-0000 18MH0263X STEPHEN L GEORGE - DEPT # 2

State **PLUMLEE, JENNIFER, aka GRAVES, JENNIFER LYNN** 1410679 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
April 10, 2019 S.L. GEORGE, JP B. SCHIFALACQUA, DDA D. FISCHER, ESQ FOR C. MUELLER, ESQ J. NESCI, CLK S. GRAHAM, CR	STATUS CHECK: DEFENDANT NOT PRESENT CONTINUED FOR COUNSEL TO BE PRESENT AND POSSIBLE NEGOTIATIONS SURETY BOND CONTINUES --- SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 04/25/2019 Time: 9:00 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	
March 26, 2019 S.L. GEORGE, JP B. SCHIFALACQUA, DDA C. HINDS, ESQ FOR C. MUELLER, ESQ J. NESCI, CLK L. BRENSKE, CR	NON JURY TRIAL: DEFENDANT NOT PRESENT AMENDED CRIMINAL COMPLAINT FILED IN OPEN COURT CONTINUED FOR POSSIBLE NEGOTIATIONS SURETY BOND CONTINUES --- SET FOR COURT APPEARANCE Event: COURT APPEARANCE HND Date: 04/10/2019 Time: 9:00 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2	
February 05, 2019 S.L. GEORGE, JP B. SCHIFALACQUA, DDA A. EDWARDS, CLC C. HINDS, ESQ FOR C. MUELLER, ESQ J. NESCI, CLK L. BRENSKE, CR	SET FOR COURT APPEARANCE Event: NONJURY TRIAL HND Date: 03/26/2019 Time: 9:30 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2 --- INITIAL ARRAIGNMENT DEFENDANT NOT PRESENT DEFENDANT ADVISED, WAIVED READING OF THE COMPLAINT DEFENDANT ADVISED OF HIS RIGHT TO SECURE OWN COUNSEL, WAIVED ENTERS PLEA OF NOT GUILTY NON JURY TRIAL DATE SET SURETY BOND CONTINUES	
December 12, 2018	SET FOR COURT APPEARANCE Event: ARRAIGNMENT SUMMONS Date: 02/05/2019 Time: 9:00 am Judge: GEORGE, STEPHEN L Location: DEPARTMENT 2 Result: ARRAIGNMENT HEARING HELD	
December 10, 2018	COMPLAINT FILED SUMMONS ISSUED FILED AND MAILED	

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

CASE # 18CRH002333-0000 18MH0263X STEPHEN L GEORGE - DEPT # 2

State **PLUMLEE, JENNIFER, aka GRAVES, JENNIFER LYNN** 1410679 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
September 13, 2018	BAIL POSTED Bond Type: SURETY BOND Bond Amount: $5,600 Bond/Pwr No.: FCS10-1909122 Bonding Co.: GOODFELLAS BAIL BONDS Charge #1: DUI ALCOHOL AND/OR CONT/PROHIBIT SUB, ABOVE THE LEGAL LIMIT, 2ND	
September 11, 2018	FIRST APPEARANCE HELD BAIL SET: $5,600 CASH OR SURETY The following event: 72 HOUR HEARING (VIDEO) HND scheduled for 09/11/2018 at 8:30 am has been resulted as follows: Result: FIRST APPEARANCE HELD Judge: BATEMAN, SAM Location: DEPARTMENT 1 PROBABLE CAUSE DETERMINATION	
September 10, 2018	SET FOR FIRST APPEARANCE Event: 72 HOUR HEARING (VIDEO) HND Date: 09/11/2018 Time: 8:30 am Judge: BATEMAN, SAM Location: DEPARTMENT 1 Result: FIRST APPEARANCE HELD	

ORIGINAL

HENDERSON JUSTICE COURT
FILED IN OPEN COURT
3/26/19

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JENNIFER LYNN PLUMLEE, aka,
Jennifer Lynn Graves #1410679,

Defendant.

CASE NO: 18MH0263X

DEPT NO:

AMENDED

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of DRIVING UNDER THE INFLUENCE (Misdemeanor - NRS 484C.110, 484C.400, 484C.105 - NOC 53902) and FAILURE TO MAINTAIN TRAVEL LANE (Misdemeanor - NRS 484B.223 - NOC 53788), in the manner following, to wit: That the said Defendant, on or about the 10th day of September, 2018, at and within the County of Clark, State of Nevada,

COUNT 1 - DRIVING UNDER THE INFLUENCE

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 at Clark County 215 and State Route 146, Henderson, Clark County, Nevada, Defendant being responsible in one or more of the following ways and/or under one or more of the following theories, to wit: 1) while under the influence of intoxicating liquor to any degree, however slight, which rendered her incapable of safely driving and/or exercising actual physical control of a vehicle, 2) while she had a concentration of alcohol of .08 or more in her breath, and/or 3) when she was found by measurement within two (2) hours after driving and/or being in actual physical control of a vehicle to have a concentration of alcohol of .08 or more in her breath, Defendant having previously been convicted of Driving Under The Influence within seven (7) years immediately preceding the date of the principal offense or after the principal offense charged herein, to wit:

///

///

Date of Offense: August 5, 2017
Conviction: January 18, 2018, Case No. 17CR009539,
Henderson Municipal Court, Henderson Township, Clark County, State of Nevada.

COUNT 2 - FAILURE TO MAINTAIN TRAVEL LANE

did then and there willfully and unlawfully fail to drive a motor vehicle as nearly as practicable entirely within a single lane while operating a motor vehicle at Clark County 215 and State Route 146, Henderson, Clark County, Nevada, a highway with two or more clearly marked lanes for traffic traveling in one direction.

All of which is 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. Said Complainant makes this declaration subject to the penalty of perjury.

Barbara Schifalacqua
03/25/19

18MH0263X/erg/L-5
NHP EV# 180900940
(TK)

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

HENDERSON JUSTICE COURT
2018 DEC 10 A 11:43

BURT#002333-000

THE STATE OF NEVADA,

Plaintiff,

-vs-

JENNIFER LYNN PLUMLEE, aka,
Jennifer Lynn Graves #1410679,

Defendant.

FILED

CASE NO: 18MH0263X

DEPT NO: II

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of DRIVING UNDER THE INFLUENCE (Misdemeanor - NRS 484C.110, 484C.400, 484C.105 - NOC 53900) and FAILURE TO MAINTAIN TRAVEL LANE (Misdemeanor - NRS 484B.223 - NOC 53788), in the manner following, to wit: That the said Defendant, on or about the 10th day of September, 2018, at and within the County of Clark, State of Nevada,

COUNT 1 - DRIVING UNDER THE INFLUENCE

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 at Clark County 215 and State Route 146, Henderson, Clark County, Nevada, Defendant being responsible in one or more of the following ways and/or under one or more of the following theories, to wit: 1) while under the influence of intoxicating liquor to any degree, however slight, which rendered her incapable of safely driving and/or exercising actual physical control of a vehicle, 2) while she had a concentration of alcohol of .08 or more in her breath, and/or 3) when she was found by measurement within two (2) hours after driving and/or being in actual physical control of a vehicle to have a concentration of alcohol of .08 or more in her breath.

COUNT 2 - FAILURE TO MAINTAIN TRAVEL LANE

did then and there willfully and unlawfully fail to drive a motor vehicle as nearly as practicable entirely within a single lane while operating a motor vehicle at Clark County 215 and State Route 146, Henderson, Clark County, Nevada, a highway with two or more clearly marked lanes for traffic traveling in one direction.

All of which is 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. Said Complainant makes this declaration subject to the penalty of perjury.

12/05/18

18MH0263X/vw
NHP EV# 180900940
(TK)

NOTICE OF WITNESSES

[NRS 174.234]

TO: Defendant or attorney of record:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that:

(1) If the offense date is prior to April 13, 2015 the STATE OF NEVADA intends to call the following witnesses:

FORENSIC ANALYST OF ALCOHOL
DARBY LANZ MP14274
DANA RUSSELL MP7503
LAS VEGAS METROPOLITAN POLICE
FORENSIC LABORATORY

(2) If the offense date is April 13, 2015 or after, the STATE OF NEVADA intends to call the following witnesses:

FORENSIC ANALYST OF ALCOHOL
DARBY LANZ MP14274
MARLISSA COLLINS MP 14973
LAS VEGAS METROPOLITAN POLICE
FORENSIC LABORATORY

These witnesses are in addition to those witnesses noted in the discovery or other documents provided.

DATED December 5, 2018.

ID#: 1410679

EVENT: 180900940

Nevada Highway Patrol

DECLARATION OF ARREST

TRUE NAME:	DATE OF ARREST:	TIME OF ARREST:
PLUMLEE, JENNIFER LYNN	09/10/2018	2319 Hours

OTHER CHARGES RECOMMENDED FOR CONSIDERATION:

DUI 3rd

THE UNDERSIGNED MAKES THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I am a peace officer with the Nevada Highway Patrol, being so employed since September 12th 2016

That I learned the following facts and circumstances, which lead me to believe that PLUMLEE, JENNIFER LYNN, committed (or was committing) the offense of (See T.C.R.) at the location of CC215 and SR146.

On 09/10/2018 at approximately 2250 hours, I was dispatched to a vehicle crash occurring on Green Valley Parkway and CC215 at the intersection. A witness advised a black sedan went off road and struck a pole then continued driving. Henderson Police located the vehicle, shortly after but did not witness the crash, and performed a traffic stop after observing the vehicle fail to maintain lane.

I arrived on scene with Henderson Police Department units, at approximately 2304 hours, and then took over the investigation. I observed a black Mercedes sedan bearing Nevada License plate #AMKM5. There was a small dent in the left front of the vehicle. Fresh dirt particles and small rocks were located on the tires.

While approaching the vehicle on the left side, I observed a single female occupant sitting in the driver's seat. I made contact with the driver and while speaking with her I smelled food emitting from inside the vehicle. There was a bag of Chinese food in the right passenger seat. The driver was later identified as PLUMLEE, JENNIFER LYNN by her Nevada driver's license #1502355281. I asked PLUMLEE if she hit anything, where she was going to and coming from. She states she didn't hit anything. She was heading home from work. She further stated she got on the CC215 from Decatur, heading eastbound, going home. She was stopped by Henderson Police Department, going westbound on CC215 east of State Route 146. She continued to state she was still going eastbound.

Abr 361

I asked PLUMLEE if she would consent to field sobriety testing, in which she agreed. I asked her to exit the vehicle. I asked her if she had anything to drink, she stated she had none tonight. I observed her to have a flushed face, glassy bloodshot eyes and I smelled the strong odor of an unknown intoxicating beverage emitting from her breath as we spoke. I asked her if she was under a doctors care, was injured, had any physical, mental or medical problems, used drugs or medications, wore corrective lenses, used insulin or was a diabetic. She replied no to all but wears glasses. I asked her to perform a series of field sobriety tests, in which she agreed. Each phase of the tests were explained and demonstrated prior to her attempts. She stated she understood the instructions for each test. The tests were administered in slippers on a relatively level concrete roadway. Walk and Turn and One Leg Stand were not performed due to the curve in the roadway, as well as the rocks and unstable cracks on the road affecting her while wearing the slippers.

Horizontal Gaze Nystagmus: PLUMLEE had equal pupil size and both eyes tracked equally. PLUMLEE showed a lack of smooth pursuit in both eyes, distinct and sustained nystagmus at maximum deviation in both eyes and onset prior to 45 degrees in both eyes, Vertical Gaze Nystagmus was observed. **During this test PLUMLEE showed 6/6 clues.**

I then administered a preliminary breath test to PLUMLEE to confirm the results of the standard field sobriety test. **Results of this test over 0.08.**

Due to PLUMLEE's reported driving characteristics, flush face, glassy bloodshot eyes and the results of the field sobriety test, I placed her under arrest for Driving Under the Influence of Alcohol. I placed her in handcuffs; checking the cuffs for proper fit, tightness and double locked the handcuffs. I conducted a search of PLUMLEE and secured her in the rear of my patrol car. I read PLUMLEE my NHP Issued Evidentiary Test Card, she stated she understood and chose a breath test.

QUALITY towing removed PLUMLEE's vehicle from the roadway for storage.

I transported PLUMLEE to Henderson City Detention Center. I began my observation period on PLUMLEE on 09/11/2018, at 0001 hours and at 0019 hours and 0022 hours tested two samples of her breath with the results of 0.161 and 0.155.

Furthermore, a records check through NHP Dispatch revealed PLUMLEE to have two prior DUI's. 1st DUI was on 04/18/2015 pled down to reckless driving. 2nd DUI was on 08/05/2017 conviction of guilty. PLUMLEE was then booked in on her charges.

Abn 366

ID#: 1410679

EVENT: 180900940

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 misdemeanor).

Declarant G. L. 366

Trooper G. Luna #366 NHP

18PCH001696-0000

NHP 18PCH001696-0000

Page 1 of 1 SCOPE# 3410679

HENDERSON POLICE DEPARTMENT
BOOKING/CUSTODY RECORD

Interpretor Needed? YES (NO)

Date/Time of Arrest 09/10/2018 MNI # DR/Event # 180900920 FH#

IS SUBJECT SUICIDAL? YES ☐ NO ☒ | IS SUBJECT COMBATIVE? YES ☐ NO ☒ | ASK SUBJECT IF THEY ARE INJURED: YES ☐ NO ☒ | INTAKE OFC INITIAL/P#:

INTAKE NAME (AKA, ALIAS, ETC.) Last	First	Middle	TRUE NAME Last	First	Middle
FLYNN	JENNIFER	LYNN			

ADDRESS Number & Street	PHONE #	Bldg/Apt #	City	State	Zip Code
97 ROCK LEDGE CT			HENDERSON	NV	89012

DATE OF BIRTH	RACE	SEX	HEIGHT	WEIGHT	HAIR	EYES	SOCIAL SECURITY #	PLACE OF BIRTH
03/20/1971	W	F	5'02"	135	BRO	GRN	570-99-3625	LONDON, CA

LOCATION OF CRIME (#-Street-City-State-Zip) 89012 | LOCATION OF ARREST SAME | PCN #

CC215/SR 11

CHARGE	STATUTE	WARRANT #	NOC CODE	DEGREE
DUI ALCOHOL	484C.110		53100	2ND
FAIL TO MAINTAIN LANE	484B.223		53788	

Complete Only For P&P Hits (DONS)

- Drinking Violation ☐ A
- Contact w/ Children ☐ B
- Contact w/ Victim ☐ C
- Driving Violation ☐ D
- In Gaming Establishment ☐ E
- Contact w/ Co-Offender ☐ F
- Contact w/ Gang Member ☐ G
- Interstate Compact Rel: - Other State ☐ H
- Other ☐ I

	PRINT NAME	EMPLOYEE/P#	UNIT
ARRESTING OFFICER'S SIGNATURE	G LUNA	214	NHP
TRANSPORTING OFFICER'S SIGNATURE	G LUNA	214	NHP
SUPERVISOR'S SIGNATURE	PRINT NAME	EMPLOYEE/P#	UNIT

PROBABLE CAUSE REVIEW

The undersigned Magistrate has reviewed the Affidavit and Declaration of Probable Cause for the arrest of the above-named defendant without warrant for the charge(s) shown.

FINDING ☒

I find there is sufficient probable cause, for the purpose of continued incarceration, to believe that charged crime(s) have been committed and that said defendant has committed such crime(s). THEREFORE, IT IS ORDERED that the defendant may be held in custody until bail is posted.

BAIL: Standard ☒ OTHER ☐ $

Office Use Only

☐ I find there is NOT sufficient probable cause shown to allow the defendant to be held in custody. THEREFORE, IT IS ORDERED that the defendant be immediately release from custody as to the charge(s). This order is without prejudice to the City or State to proceed with the charge(s) based upon additional evidence sufficient to establish probable cause.

DPCH ☐ OR RELEASE ☐ COR RELEASE ☐ IAD RELEASE ☐

COMMENT:

RETURN DATE: NORMAL SCHEDULE ☐ FIRST AVAILABLE ☒ OTHER DATE

Signature of Magistrate JUSTICE COURT ☒ MUNICIPAL COURT ☐ Date: 9-11-18 Time: 8:00a

1st COPY - ARRESTING OFC 3rd COPY - JAIL/FILE

PA000023

HENDERSON JUSTICE COURT
FILED IN OPEN COURT
11/19/19

HENDERSON TOWNSHIP, JUSTICE COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JENNIFER PLUMLEE,

Defendant,

CASE NO.: 18CRH002333-0000
18MH0263X
DEPT. NO.: 2

ORDER FOR BREATH IGNITION INTERLOCK DEVICE (BIID)

IT IS HEREBY ORDERED that as a condition of reinstating Defendant's Nevada driver's license, Defendant must provide proof to the Nevada Department of Motor Vehicles that a Breath Ignition Interlock Device (BIID) has been installed in any motor vehicle Defendant operates and shall pay the costs for installation, maintenance, and/or monthly charges.

IT IS FURTHER ORDERED that Defendant shall have the BIID installed for 6 MONTHS MINIMUM OR PENDENCY OF CASE, with 0 days/months credit for the time the BIID was installed prior to the entry of this Order.

DATED this 19th day of November, 2019

Stephen L. Cloge

JUSTICE OF THE PEACE

MUELLER & ASSOCIATES, INC.
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703
723 S. Seventh Street
Las Vegas, Nevada 89101
Attorney for Defendant
JENNIFER PLUMLEE

JUSTICE COURT, HENDERSON TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA Plaintiff, vs. JENNIFER PLUMLEE, Defendant.	18CRHD0333 Case No. 18MH0263X Dept No. 1 **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

COMES NOW, Defendant JENNIFER PLUMLEE, by and through her attorney CRAIG A. MUELLER, ESQ. and hereby moves to dismiss the complaint in the above captioned matter and requests a hearing on this matter.

This Motion to Dismiss and Request for Hearing is made based upon all the papers and pleadings on file, the attached Declaration of Counsel, Memorandum of Points and Authorities in support hereof, and oral argument at the time set for hearing this Motion.

DATED this 2nd day of October, 2019.

Craig Mueller

CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703 .
723 S. Seventh Street
Las Vegas, NV 89101
P: (702) 382-1200
Attorney for Defendant

10/7

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF CASE

Defendant is charged by way of Criminal Complaint with having committed the crimes of DRIVING UNDER THE INFLUENCE (Misdemeanor – NRS 484C.110, 484C.400, 484C.105 – NOC 53900).

The State requested a continuance at the hearing which occurred on July 17, 2019, due to the fact that the State's main witness, Trooper Luna of the Nevada Highway Patrol, failed to appear. The State, as reflected by the transcript of the July 17 hearing and a following hearing on this matter held September 16, 2019, failed to properly serve a subpoena on Trooper Luna, leaving him unaware he was supposed to appear at the July 17 hearing. Because the State failed to meet its duty to be prepared to present its case, and given its failure to properly subpoena Trooper Luna, because the State cannot show good cause for its inability to present a case at the July 17 hearing, the charge[s] against Defendant should be dismissed.

LAW AND ARGUMENT

Bustos v. Sheriff, 87 Nev. 622 (1971) established the principle that a "prosecutor should be prepared to present his case to the magistrate or show good cause for his inability to do so." In Clark v. Sheriff, 94 Nev 364 (1978) the Supreme Court of Nevada ordered the district court to issue a writ of habeas corpus where the magistrate had acted beyond his authority in granting a continuance in violation of the jurisdictional procedural requirements of Hill v. Sheriff, 85 Nev. 234 (1969) and Bustos.

As stated in Bustos, "[t]he business of processing criminal cases will be frustrated if continuances are granted without good cause." Failure to cause subpoenas to be properly issued and properly served upon witnesses does not demonstrate good cause. Hill v. Sheriff.

Peace Officer Acceptance of Delivery of a Subpoena Via Electronic Means Requires a Written Promise to Appear, NRS 174.315(4).

NRS 174.315(4) provides:

> **NRS 174.315 Issuance of subpoena by prosecuting attorney or attorney for defendant; promise to appear; informing witness of general nature of grand jury's inquiry; calendaring of certain subpoenas.**
> ... 4. A peace officer may accept delivery of a subpoena in lieu of service, via electronic means, by providing a written promise to appear that is transmitted electronically by any appropriate means, including, without limitation, by electronic mail transmitted through the official electronic mail system of the law enforcement agency which employs the peace officer....

Trooper Luna's testimony at the September 16, 2019 hearing, combined with the fact that he clearly did not provide a written promise to appear, makes clear that not only did the State fail to properly subpoena Trooper Luna, the State failed to notify him in any way of the July 17 hearing. The State's sending out a request to appear, not receiving a written promise back from Trooper Luna, and then not following up, simply fails to comply with the relevant statute. This failure by the State does not meet the standard of proper diligence or good cause.

Since in the current case the prosecution failed to properly issue and serve a subpoena, the prosecution is not in compliance with the standards of Bustos and Hill, and the charges against defendant should be dismissed.

CONCLUSION

Consequently, as the prosecution failed to comply with Bustos and Hill standards, all charges against defendant should be dismissed. Counsel for defendant hereby requests a hearing be scheduled for this matter.

DATED this 2nd day of October, 2019.

MUELLER & ASSOCIATES, INC.

By Craig Mueller
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703
723 South Seventh Street
Las Vegas, Nevada 89101
Attorney for Defendant

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** is hereby acknowledged this 3 day of Oct, 2019.

By
DISTRICT ATTORNEY'S OFFICE

ORIGINAL

MUELLER, HINDS & ASSOCIATES, CHTD.
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703
600 S. Eighth Street
Las Vegas, Nevada 89101
Attorney for Defendant
JENNIFER PLUMLEE

JUSTICE COURT, HENDERSON TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA

Plaintiff,

vs.

JENNIFER PLUMLEE,

Defendant.

19CRH002333-0000

Case No. 18MH0263X

Dept No. 1

DEMAND FOR EXPERT WITNESSES

COMES NOW Defendant JENNIFER PLUMLEE, by and through her attorney, CRAIG A. MUELLER, ESQ., of the law firm MUELLER, HINDS & ASSOCIATES, and provides notice to the State Of Nevada, pursuant to NRS 50.315(6) and NRS 50.320.

Defendant requests that the individuals listed as expert witnesses in the police report in the instant case be brought to court for live testimony, specifically TROOPER G. LUNA (NHP) DARBY LANZ (FORENSIC ANALYST).

Defendant contends that there is a substantial and bona fide dispute in this matter as to her state of intoxication at the time of her arrest. Defendant demands the right to confront the State's witnesses to determine the accuracy of the breath test taken with a CMI Inc. Intoxilyzer 8000 Unit, Serial Number 80-006041.

Defendant demands that the makers of the declarations be brought to court for cross-examination on the procedures used and the tests conducted. This is necessary to establish whether there could have possibly been an error following the checklist or administering the breath test.

DATED this 10TH day of April, 2019.

MUELLER, HINDS & ASSOCIATES, CHTD.

By _____
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703
723 South Seventh Street
Las Vegas, Nevada 89101
Attorney for Defendant

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing DEMAND FOR EXPERT WITNESSES is hereby acknowledged this 19 day of April, 2019.

By _____
DISTRICT ATTORNEY'S OFFICE

JUSTICE COURT, HENDERSON TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -v- JENNIFER PLUMLEE, #1410679 Defendant.	)	HENDERSON JUSTICE COURT 2018 DEC 12 12:56 CASE NO: 18CRH002333-0000 18MH0263X Dept No: 2 SUMMONS

THE STATE OF NEVADA TO:

JENNIFER PLUMLEE
972 ROCK LEDGE CT
HENDERSON, NV 89012

YOU ARE HEREBY SUMMONED to appear before me at JUSTICE COURT, HENDERSON TOWNSHIP,243 WATER ST, HENDERSON, NV 89015, Department 2 at 9:00 am on February 05, 2019, to answer to the following charge(s):

484C.400.1A	M	DUI ALCOHOL AND/OR CONT/PROHIBIT SUB, ABOVE THE LEGAL LIMIT, 1ST
484B.223.1	M	FAIL TO PROPERLY MAINTAIN TRAVEL LANE OR IMPROPER LANE CHANGE

DATED this 12th day of December, 2018.

Stephen L. Ledge

JUSTICE OF THE PEACE

CERTIFICATE OF MAILING

I hereby certify that service of the SUMMONS was made this 12th day of December, 2018 by depositing a copy in the U.S. Mail, postage prepaid, to the above referenced address.

BY _____

Prepared by: JN
NEVADA HIGHWAY PATROL EV# 180900940
Track# _ _____

☐ Courtesy Copy

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

Clerk's Initials

DATE: September 11, 2018 DEPT #: 1 JUDGE: SAM BATEMAN

CUSTODY STATUS

NAME: **PLUMLEE, JENNIFER** EVENT #: 180900940

CASE #: 18PCH001696-0000 DEFENDANT'S ID #:

Charge	Bail	Amended To
53902 DUI ALCOHOL AND/OR CONT/PROHIBIT SUB, ABOVE THE LEGAL LIMIT, 2ND	5,000.00	
53788 FAIL TO PROPERLY MAINTAIN TRAVEL LANE OR IMPROPER LANE CHANGE	600.00	

Other:

Remand on all Counts ☐ **Remand on Counts**

☐ **Remand (NLVDC/HDC Billing Purposes)**

☐ **SENTENCE TO CCDC** MONTHS DAYS ☐ Flat Time ☐ No House Arrest

☐ **Contempt of Court**
Days with Days CTS
☐ Concurrent ☐ Consecutive
To Case #

☐ Concurrent ☐ Consecutive Case #

☐ **Specific CTS** Days

☐ (1) **CTS**, this case, this lodging ☐ (2) **Total CTS**, this case, all lodgings

☐ (3) **Any CTS**, all cases, this lodging

☐ (4) **Maximum CTS**, this case – all lodgings; and all cases – this lodging

☐ If no complaint filed, defendant to be released on:

☐ **FUGITIVES** - Court orders Defendant to be released 30 days from this date (IF THERE ARE NO LOCAL CHARGES) **OR** released 30 days after all local charges have been resolved.

☐ House Arrest (if qualifies) ☐ House Arrest Days ☐ PreTrial to Interview

NEXT COURT DATE: 09/18/2018 TIME: 9:00 AM DEPT #: TBD

CHANGE OF CUSTODY STATUS

☐ CTS ☐ Dismissed ☐ Sentenced and/or Fine $ ☐ Found Not Guilty ☐ No Probable Cause Found ☐ PAD

☐ Court Ordered Release ☐ O/R ☐ O/R with Intensive Supervision ☐ Deft. Released from Intensive Supervision

☐ Deft. Released from House Arrest ☐ No Contact with Victim ☐ Released due to DA Delayed Filing

NEXT COURT DATE: TIME: DEPT #:

TRAN

CASE NO.

IN THE JUSTICE'S COURT OF HENDERSON TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JENNIFER PLUMLEE,

Defendant.

18CRH002333

CASE NO. 18MH0263X

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE STEPHEN L. GEORGE

JUSTICE OF THE PEACE

WEDNESDAY, JULY 17, 2019

APPEARANCES:

For the State: BARBARA SCHIFALACQUA
Chief Deputy District Attorney

For the Defendant: CRAIG MUELLER, ESQ.

Reported by: Lisa Brenske, CCR #186

HENDERSON, NEVADA, JULY 17, 2019

* * * * * * * * * * * * *

10:55AM THE COURT: Let's go ahead and call Jennifer Plumlee, 18MH0263X.

Good morning, Mr. Mueller.

MR. MUELLER: Craig Mueller on behalf of Miss Plumlee.

10:55AM MS. SCHIFALACQUA: Judge, I know I have witnesses but I need to know is Officer Luna here? Officer Luna? Judge, I'm going to need to be sworn.

THE COURT: Okay.

(Chief DA Schifalacqua sworn.)

10:56AM MS. SCHIFALACQUA: I'm Chief Deputy District Attorney Barbara Schifalacqua and I'm tasked with handling the matter of State of Nevada versus Jennifer Plumlee aka Jennifer Graves. This case was set for trial today July 17th to which I issued

10:56AM subpoenas on or about June 3rd of 2019 and I have handed to Mr. Mueller a copy of the subpoena return for Trooper Greg Luna that was issued that indicates that he's going to appear here to court today. I have called the courtroom. This matter was left on and he

10:57AM is not present. I'm surprised at that because

10:57AM obviously we were prepared to go forward and so I'm asking for a continuance and this is not done for purposes of delay. Thank you, Judge.

THE COURT: Thank you, Miss Schifalacqua.

10:57AM MR. MUELLER: I object, Judge. The motion to continue is improper form as a matter of law and secondarily we have an affidavit that has no affiant. There is not a signature on this indicating that there's actually been a personal service as required.

10:57AM May I approach?

THE COURT: Why don't you give that back to Miss Schifalacqua and see what she says.

MS. SCHIFALACQUA: And, Judge, it is done through their email services. They respond to us and

10:57AM it's printed as the same. They communicated that they were going to appear.

MR. MUELLER: An affiant is -- I just got chewed out in civil court because I'm not precise enough in civil court so I go over to criminal court

10:58AM and now an affiant is someone who testifies under penalty of perjury that I've done the following things. There is not a name. If my colleague can tell me who served the subpoena, I will withdraw my objection.

MS. SCHIFALACQUA: I'm not understanding

10:58AM when he's saying who served the subpoena. We send it

10:58AM 1 out. As we always do through our office, I issue the
2 subpoena, Judge. And you can see, I can approach,
3 Judge. This is what I get in return. Obviously this
4 is what we use with the troopers and I'll submit that
10:58AM 5 obviously this is proper, this is how we serve our
6 officers, it's returned to me. Thank you.
7 MR. MUELLER: How it is done is the
8 territory of the domain of the legislature. The
9 legislature is actually very clear that a service of
10:58AM 10 process has to be done and signed by an affiant.
11 That's why the box that doesn't have a name or
12 signature on it. It says affiant. There is not a good
13 faith basis to believe that Trooper Luna even knows
14 about the subpoena, let alone to rely on it as service
10:59AM 15 to relieve the duty of due diligence as a prosecutor.
16 Now, I'm simply asking for simple
17 compliance with black letter law. Nothing has changed
18 in the last 25 years on this subject since I've been
19 doing it.
10:59AM 20 MS. SCHIFALACQUA: And, Judge, maybe he's
21 confused about the OPAs. We get them routinely
22 electronically. We get them also electronically for
23 all of our officers including obviously who I said I
24 have on call, I have the forensic analyst also. I can
10:59AM 25 show you the same thing happens with them, Judge, and

10:59AM it's sent back the same way. My process servers obviously personally go out and serve lay witnesses. The returns are through here, we get this generated, printed to ourselves and if they don't, they send us what's called a uniform non-appearance form also generated, Judge. I have zero reason to doubt what obviously I have personally done in this case, or my diligence, Judge, which I take offense to it being questioned.

10:59AM MR. MUELLER: If she sent out the email is not the issue. I don't doubt for a moment anything she said is true, but the standard is not here's what we normally do. The standard is is there's been proper serve to reasonably expect this person to be here.

11:00AM MS. SCHIFALACQUA: What I --

MR. MUELLER: Counsel.

She's asking for you to grant the continuance to relieve her of the State of its obligation to be ready and not for purposes of delay based on the affidavit of someone who served the witness. There's no indication on this document that anybody served the witness. It looks like it was sent out email. I get 75 emails a day, sometimes a hundred. That's not service and it's not any reasonable belief to be here. Trooper Luna is a very diligent man. I

11:00AM can't imagine he knew about this court date and wasn't here. It's inconceivable to me.

MS. SCHIFALACQUA: Which is why I'm surprised, Judge.

11:00AM But if I can be clear, obviously he's mixing. What we send we do have proof that shows they're sent back to us. We oftentimes use electronic means to serve persons in law enforcement, Judge. This is every single case. In fact, I can show you the 11:00AM other officers that are here on my other case are served the exact same way, Judge. It's the process we use.

THE COURT: Okay. And I'm pretty familiar with that process and my understanding is that process 11:01AM is the process that has been determined by other courts to be valid all the way through. So I think the subpoena issues here are valid and unless that becomes challenged in a higher court, decides otherwise, I believe that the subpoena is valid in this case.

11:01AM So at this time I will go ahead and grant the State's request and we can reset this for a trial ordinary course but we'll make sure that we accommodate your schedule, Mr. Mueller. So we'll give you a date and if you need a different date, we'll make sure we 11:01AM accommodate what date works for you.

11:01AM MR. MUELLER: Thank you, Your Honor, and respectfully it's my obligation under the law at the moment to make a complete record here.

THE COURT: Absolutely.

11:01AM MR. MUELLER: Nothing that my colleague has said is sufficient as a matter of law to get a continuance. There has been no indication that anybody has been served, anything other than the email has been sent. There is no indication in this record that 11:02AM Trooper Luna knew about this court date and that there has been due diligence prepared for court. It's not in compliance with the standard. It appears that the government has decided to relieve itself of its burden under law and I object to a continuance and I believe 11:02AM the proper action here is the State is not ready to proceed without this witness and the case should in fact be dismissed.

THE COURT: Thank you, Mr. Mueller.

And, Miss Schifalacqua, it's your motion.

11:02AM MS. SCHIFALACQUA: Judge, I thought you had ruled, but again obviously I have served the subpoena, we issue them through our electronic means and they have persons that send us their uniform non-appearance form. I got the subpoena back in fact 11:02AM showing that it was served on 6/18/19 and in fact that

they received it and this is how we learn that Trooper Luna would be here today and I'm surprised that he's not.

MR. MUELLER: Judge, also may I reserve ruling at later date as to may I question Trooper Luna if in fact he actually knew about this date?

MS. SCHIFALACQUA: Judge, here's the problem that we're going to have. If he has misidentified when he's supposed to be here or not. It's not whether or not there's been a valid subpoena issued and I got a return and I'm surprised for it. Some sort of reasons for that in the future, Judge. Obviously you can take whatever you want under advisement, but Mr. Mueller knows very well the process and while I appreciate his continued efforts to make this seem as if something were improper when it's not, at some point, Judge, you've made a ruling. I would obviously submit that I properly served Trooper Luna and I am surprised, I can tell you, that he's not here. Considering I have a lay witness even here and that poor man had to sit around all morning, obviously I'm surprised that Trooper Luna is not here.

THE COURT: And I'll tell you what. I let you both make your records and I've listened to all the issues over and over again and I've heard the same

11:04AM issues presented a number of times here this morning on this matter and I do believe that the State has met its burden of proof. Therefore I will grant the State's motion and go ahead and reset this for a trial ordinary course on that and again, Mr. Mueller, we'll accommodate your schedule.

MR. MUELLER: Thank you, Judge. If we can go into the middle of September.

THE COURT: Yes. That would be fine.

11:04AM THE CLERK: September 16th, 9:30.

MR. MUELLER: Madam Court Reporter, may I get a transcript of today's session?

THE COURT: Yes.

11:04AM (The proceedings concluded.)

* * * * *

ATTEST: Full, true and accurate

11:04AM transcript of proceedings.

/S/Lisa Brenske

LISA BRENSKE, CSR No. 186

TRAN

CASE NO.

IN THE JUSTICE'S COURT OF HENDERSON TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,
Plaintiff,
vs.
JENNIFER PLUMLEE,
Defendant.

CASE NO. 18MH0263X

18CRH02333

REPORTER'S TRANSCRIPT OF PROCEEDINGS OF

DUI BENCH TRIAL

BEFORE THE HONORABLE STEPHEN L. GEORGE

JUSTICE OF THE PEACE

MONDAY, OCTOBER 7, 2019

APPEARANCES:

For the State: MELANIE SCHEIBLE, ESQ.
Deputy District Attorney

For the Defendant: CRAIG A. MUELLER, ESQ.

REPORTED BY: DANA TAVAGLIONE, RPR, CCR 841

2/6/2020

TRAN

CASE NO.

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

STATE OF NEVADA, Plaintiff,
vs. CASE NO. 18MH0263X
JENNIFER PLUNLEE, Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS OF
DUI BENCH TRIAL
BEFORE THE HONORABLE STEPHEN L. GEORGE
JUSTICE OF THE PEACE
MONDAY, OCTOBER 7, 2019

APPEARANCES:

For the State: MELANIE SCHEIBLE, ESQ.
Deputy District Attorney

For the Defendant: CRAIG A. MUELLER, ESQ.

REPORTED BY: DANA TAVAGLIONE, RPR, CCR 841

INDEX

EXHIBITS

HENDERSON, NEVADA, OCTOBER 7, 2019, 11:29 A.M

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THE COURT: Okay. Go ahead and call Jennifer Plumlee, Case No. 18MH0263X. And we had continued this trial from the last trial setting that we had for the motions to be made in writing.

And I did get, as the motion -- Mr. Mueller, if I recall, you were allowed to renew that motion, but we were not aware of the arguments that you were going to make on that day, and new information had been provided, in my opinion, that needed to be looked up and giving you guys an opportunity to brief.

I did see that I did receive a Memorandum of Law in Support of Motion to Dismiss. It was filed October 3rd, which was Thursday, at 4:31, which really pretty much didn't give the State any time at all to respond, didn't really give me a whole lot of time to look into it. But it's very short, and I was able to go through it on October the 3rd and again since then.

So let me just check with the State. I didn't see any Opposition filed by the State. My guess is the State didn't have enough time to review

it. Did the State receive it at the same time as I did?

MS. SCHEIBLE: Yes, Your Honor. I believe I received it on Friday morning, but my office received it on Thursday afternoon.

THE COURT: All right. I'm not sure of the State's position on this. Does the State still want to proceed, not having been given really any time to address it in writing, or is the State prepared and ready to go forward on the motion?

MS. SCHEIBLE: If you're comfortable with oral representation from the State, then I am happy to move forward today. Frankly, I would like to hear this case today.

THE COURT: Sure.

MS. SCHEIBLE: And have a final disposition since we have been back to court at least three, four times on this matter.

THE COURT: We have been very patient and diligent on this matter and looked into every single thing that we possibly could.

And, Mr. Mueller, I've listened to a lot of arguments on this issue, and I did receive this Memorandum in Law and Support of the Motion.

Did you have anything in addition that you

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wanted to add to what's already been said on this matter?

MR. MUELLER: Just two key points, Judge. Specifically, we referred to, or my colleague referred to Subsection 4 of 174.315 that allows a police officer to accept service of Subpoena via electronic means, and that's true.

However, in said sentence doesn't end in a period, it ends with a comma: And he accepts service by providing a written promise to appear, which is transmitted electronically by any appropriate means including, without limitation, by electronic mail through the official electronic system of law enforcement agency. It is actually abundantly clear.

Now, Trooper Luna wasn't here for the trial setting. I was surprised, and it didn't appear to me that he had been effectively served. He came back on the second setting and confirmed my suspicions that he had not been served. My colleague then generally invoked the Electronic Service Doctrine, which is fine. And then we look it up, and it says he has to provide written promise to appear. That document wasn't signed by him.

He didn't get service. That's not

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meaningfully in doubt. He didn't have effective service, not meaningfully in doubt; and anybody in the plain reading of the statute wouldn't expect him to be there because he has to sign the thing and transmit it back. Now, that's not an affidavit. That's not service. And I can pull the language out, and when I was a young prosecutor, Bill Koot beat these cases into our heads, "Bustos" and "Hill."

I read from the "Hill" decision: "The prophylactic effect of the doctrine of Hill is worthwhile. A prosecutor should be prepared to present his case to the magistrate at the time he scheduled or show good cause for his inability to do so. This is not an unfair burden. The business of prosecuting criminal cases will be frustrated if continuances are granted without good cause."

Now, this is blackletter law since I've been practicing law in Nevada. Bill Koot gave me this case in the first hour of the first day on the job, this one and "Bustos." I'm asking for a simple, straightforward, blackletter law, application of the law.

On the 17th of July, they were not ready to go. They hadn't talked to Officer, Trooper Luna. They didn't have an oral promise to appear supported

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by an Affidavit, and they did not have effective electronic service. No efforts were made to obtain his permission -- or there were no reasonable grounds to believe he was going to be present, and pursuant to the law and long established custom and practice in this jurisdiction, the case should be dismissed.

THE COURT: Thank you, Mr. Mueller.

Ms. Scheible.

MS. SCHEIBLE: In short, Your Honor, the time has passed for that kind of decision in this courtroom. The State made a motion to continue back in July, and that motion was granted. To dispute that ruling is an appellate issue. It's not an issue for this Court to hear. The fact is that the "Bustos" motion was already granted. We were already given the continuance, and we are now here for the second time with all of our witnesses prepared to go forward on the trial.

Moreover, I would like to note that there is a good policy reason for granting a "Bustos" motion in cases like what we have here, which is that -- and I'm going to -- I'm going to make some new representations, and I do have witnesses we can call to the stand to verify this, if you need. But

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basically when we arrived here on July 17th and Trooper Luna wasn't present, we knew that a number of things could have happened.

We might have issued the Subpoena, he received it, and he overslept; we might have issued the Subpoena, he received it, he got called out on an emergency and didn't come to court; he might have received Subpoena, he might have responded to the Subpoena, and that response might not have made it to my file in time, much like Mr. Mueller's motion didn't make it to my file in time for me to write a coherent response.

It also could have been Trooper Luna was served and that he gave his response to his supervisor or to NHP Arrest Services, and they simply never communicated to the District Attorneys Office. The point is that we knew that we had served Mr. Luna. We just didn't know where the breakdown in communication was because we have a very robust and very reliable communication system between our office and the Nevada Highway Patrol.

Over the last three weeks, when I could have been working on more important cases and subbing felony trials for their trial dates, when I could have been preparing other misdemeanor domestic

violence cases or DUI cases, instead, I was running around like a chicken with my head cut off, contacting the Nevada Highway Patrol to find out exactly what happened, which was one of the previous aforementioned possibilities.

As it turns out, Trooper Luna was in fact served with the Subpoena. He was out of town during the time of the hearing. So he did what he was supposed to do. He submitted a Uniform Nonappearance Sheet. That Uniform Nonappearance Sheet was sent by Nevada Highway Patrol to the Clark County District Attorneys Office. We received it the evening before the preliminary hearing.

Here is the thing: In Henderson Justice Court, we don't go to the office before we come to court. So whatever we have at 3:00, 4:00, or 5:00 p.m., whenever we leave the office on Monday is what we have when we come to court on Tuesday. That nonappearance form came to a prosecutor's inbox on Tuesday morning, when she was already here in the courtroom. So she had no idea that Trooper Luna had, in fact, followed all of the policies and procedures to a "T," submitting his nonappearance form. We simply didn't receive it in time.

And so we realized that, after the fact,

and now I'm here to represent to you that, in fact, we had proper service. There was a clerical error, which happens every single day, that prevented Officer Luna from being here on the 17th. We didn't know on the 17th what the reason was. We know what the reason is now. There's absolutely no reason that we shouldn't be able to go forward with this misdemeanor trial today.

THE COURT: Thank you, Ms. Scheible. Mr. Mueller.

MR. MUELLER: I am a little confused. Trooper Luna has testified under oath that -- I know that. He's actually been on the witness stand for 15, 20 minutes. He didn't say anything about being out of town. He said he didn't get served. That's the transcript from the 16th of September. Now, facts aren't a buffet. You don't get to pick them, put them back and pick up another one when you want it.

Now, the obligation was, if she found out he said he had -- which he hasn't testified to. In fact, he said he didn't know why he didn't get it. He said nothing about being out of town. And if in fact, he sent back a "Uniform notice of appearance," the law is actually even more clear. It should have

been in writing. That's a "Hill" motion. That's actually also grounds for a dismissal because they didn't properly and timely serve the "Hill" motion.

Now, every single day, the courts are here to protect citizens from the inconveniences caused to them by the government. They don't have to make a profit. They don't have to make payroll. They have to follow the law. She didn't follow the law, and in her effort to try to squeeze out of not following the law, she's actually confessed to something even more egregious, which is we had timely notice that he wasn't in town and we didn't follow the "Hill" decision, which requires a written notice.

There is no good cause here. The fact that they were sloppy, that they're busy, they didn't feel like going by the office on the way to court does not relieve them of the obligation. It does not. Somebody picked up the phone at 7:30 that morning and said, "Hey, we just find out our guy is out of town," probably 99 percent would have got professional courtesy from me or any other member of the defense Bar. But that's not what happened here.

Now, Ms. Schifalacqua said "We served him," don't know why he's not here. He got on there,

under oath says "I don't know why I wasn't here. I didn't get served." She says, "Oh, he did get served and we didn't get around to doing a 'Bustos' -- or 'Hill' motion." Now, they've made it impossible for you to allow this case to go forward. Either one of those three grounds is going to get the case dismissed. Now, the fact that they can't even tell you which one of those three scenarios is now true means for sure they haven't complied with the obligations required under law.

And I'll read this paragraph again: "The prophylactic effect of the Hill doctrine is worthwhile." This is right from Nevada Supreme Court case. "Prosecutor should be prepared to present its case with the magistrate at the time scheduled or show good cause for an inability to do so." Period. What's the good cause?

The first one didn't work. The second one didn't work. Now, I'm going to try a third theory on my third court date? Your Honor, respectfully, this is willful indifference to the rights of the defendant and its inconvenience that my colleague seems to have found herself, the reality is the rights belong to the defendant. This whole building, every one of these procedures is to make

sure the defendant is treated fairly, not conveniently. We move to dismiss.

THE COURT: Thank you, Mr. Mueller.

I appreciate both of your representations on this matter. And, Ms. Scheible, I appreciate your representations you presented.

Basically, I think what we were looking for as far as this, I know we've had this matter on calendar a number of times. This case has been prolonged over and over again. We've done that in a matter of trying to be thorough and looking into everything and making sure everything was covered properly and correctly, and we've given everybody some time to research that.

Just a clarification. I just wanted to make sure because my recollection may be incorrect. But in Mr. Mueller's motion, he stated that the State had requested a continuance the last time. I don't believe the State did make that request. I believe I was the one that said that let's continue this so that we can get it in writing, so that we can look into the technicalities of this particular matter.

So for clarification, is that proper? I don't believe the State did make that motion to

continue; is that correct?

MS. SCHEIBLE: No. As a matter of fact, Your Honor requested to go forward --

THE COURT: That's my recollection.

MS. SCHEIBLE: -- the last, yeah, the last court appearance regardless of the outcome of the motion.

THE COURT: Wonderful. Thank you.

And within that period of time, I did get the Memorandum of Law in Support of Motion to Dismiss by Mr. Mueller. As I stated, it was filed at 4:31, at the end --

Our windows close at 5:30; is that correct?

THE CLERK: 5:20.

THE COURT: 5:20. Thursday, this court is dark. There is nobody here on Friday. So that would, again, make it impossible for you to have submitted anything on a Friday, and we're here on Monday. I was able to take the advantage of having it served or filed late on Thursday. So I was able to review it and look into it, and I was able to look into a number of other matters.

But it almost appears that every time we come back here, there's additional. There's more, more, more, more. Today is the day to go forward,

and I think it is only fair that the State be given information on anything that's going to be presented to them as far as the defense. I'm hearing additional information.

Now, I understand that the trooper that testified the last time, that was a new issue to us. That was being made for the first time. That's why we went with the continuance because we wanted to look into it and make sure. I think he was somewhat surprised at the fact that he was going to be called to the stand to testify regarding the Subpoena at that time as well.

And since then, I've had an opportunity to look into the requirements on the Subpoena. And, Mr. Mueller, you've stated correctly on NRS 178.315, it does provide for those requirements. But I also found that, for law enforcement, NRS 289.027 also requires, provides additional requirements -- maybe not "additional," but it's titled "Law enforcement agencies required to adopt policies and procedures concerning service of certain subpoenas on peace officers."

In reviewing NRS 174.315 and the statutes contained in here, it appears to me abundantly clear that the State did comply with the requirements by

statute, and based on the testimony that was given here today on some of these conditions, I believe it's abundantly clear to me that all of the requirements have been complied with. Therefore, the Motion to Dismiss, at this time, is denied.

And at this time, let me check with both of you. Based my ruling on the motion, are we all ready to proceed with the trial? If so, I can call the case and then we can go forward.

MS. SCHEIBLE: Your Honor, the State is ready to proceed, with one preliminary matter.

THE COURT: Okay. Yeah, let's deal with all those preliminary matters, and then we'll call the case and see what we want to do.

MS. SCHEIBLE: It's essentially a question for you, Your Honor, of whether you will accept the affidavit for the blood alcohol level or whether you require me to bring in the present analyst of alcohol. She is available. I just have to give her a call so that she can come down here.

THE COURT: Right. And I know I've had this issue come up before with Mr. Mueller, I believe. I think that's where it came up the last time. But let me check with Mr. Mueller to see what his position is.

MR. MUELLER: I believe the expert should be here, Judge. I believe we filed a timely demand for the experts.

THE COURT: Okay. So we're going to go forward.

MS. SCHEIBLE: That's fine. If you'll just give me a moment to step into the hallway and give her a call.

THE COURT: Absolutely.

MS. SCHEIBLE: I think that's all.

THE COURT: Okay. Oh, and then when we come back -- I know we discussed this in the back last time regarding the way we're going to proceed, and I think I remember correctly, but on your opening remarks, we'll allow the State to make your opening remarks and present their case.

Once you're complete, then, Mr. Mueller, I believe that it was your position that you wanted to make your opening remarks when it was your case in chief.

MR. MUELLER: Yes, Judge. We'll see what she has to say.

THE COURT: Sure. Absolutely. That will be fine. Okay. Ms. Scheible, yes. You have your time.

MS. SCHEIBLE: Thank you. I'll literally be right back.

THE COURT: That's okay. Thank you.

(Pause in the proceedings.)

MS. SCHEIBLE: Your Honor, may I have Court's brief indulgence.

THE COURT: Yeah. Ten minutes? Five minutes? Let me tell you what, I've got a search warrant that they're waiting for me on.

MS. SCHEIBLE: Perfect.

THE COURT: I'm going to go look at that, and I'll be right back.

MS. SCHEIBLE: That will be the perfect amount of time. Thank you.

(Pause in the proceedings.)

THE COURT: Okay. This is the time, place set for trial in the matter of Jennifer Plumlee, Case No. 18MH0263X.

Just a question, preliminarily. I see this is being alleged as a DUI, second; is that correct?

MS. SCHEIBLE: Yes, Your Honor.

THE COURT: Okay. Let me just check --

MR. MUELLER: The defense would invoke the Exclusionary Rule before we --

THE COURT: That's what my question was

going to be. So, Mr. Mueller, let me just check with you: Is the defense prepared and ready to go forward at this time, Mr. Mueller?

MR. MUELLER: We are, Judge.

THE COURT: Thank you. And would the defense wish to invoke the Exclusionary Rule?

MR. MUELLER: Yes, we would, Your Honor.

THE COURT: Wonderful. Thank you.

And, Ms. Scheible, is the State prepared and ready and to go forward at this time?

MS. SCHEIBLE: Yes, Your Honor.

THE COURT: Thank you.

So at this time, the Exclusionary Rule is hereby invoked. I'm going to ask if there are any witnesses that are to testify on this matter today, that you please exit the courtroom. You're not to discuss your testimony amongst yourselves or with anybody else, and when it's your turn to testify, we'll have the marshals bring you back in.

And let's see. As we had discussed earlier, Ms. Scheible, you can make your opening remarks or call your first witness.

MS. SCHEIBLE: So, Your Honor, I just want, for the record, that I only have three witnesses in this case. There are some additional people here in

the gallery from the Nevada Highway Patrol who are not involved in this case.

THE COURT: Absolutely. That would be fine.

MS. SCHEIBLE: And would you like the certified copy of the prior conviction now?

THE COURT: Well, let's see what Mr. Mueller's preference.

MR. MUELLER: Statute says it's supposed to be presented at time of conviction, sentencing.

MS. SCHEIBLE: That's fine.

THE COURT: Okay. And I'm sorry. Mr. Mueller, I didn't hear what she was going to present, but I wanted to make sure you had time to look at it.

MR. MUELLER: The statute says that --

THE COURT: Yeah, let's even back-up. What was she going to present?

MR. MUELLER: She's going to present apparently a prior certified conviction of some sort. The statute says --

THE COURT: Oh, I see. I see.

MR. MUELLER: -- it gets presented at time of sentencing. If Ms. Plumlee gets convicted, we can't do sentencing today anyway. We have to deal with it another time.

THE COURT: Well, we'll look into that. But, yeah, we don't need that at this point.

MS. SCHEIBLE: I also don't understand why we couldn't go forward with sentencing today.

THE COURT: That's going to be my decision.

MS. SCHEIBLE: Okay.

THE COURT: And we'll see what Mr. Mueller says about that.

MS. SCHEIBLE: Okay. Your Honor, my opening statement is that I'm going to show you that this lady was driving drunk. So I will call my first witness, Mr. Joseph Risco.

THE DEPUTY: What was the last name, Counsel?

MS. SCHEIBLE: Risco.

THE COURT: For the record, we don't know if we're going to go through with sentencing today or not. It just will depend upon whether or not the State meets its burden of proof. So if it does, then we'll decide if we're going to do it today or in the future. See what Mr. Mueller has to say about that.

If the case is dismissed after going through the trial, there will not be -- it will not be necessary to go through the --

MS. SCHEIBLE: Excellent point, Your Honor.

(Witness sworn.)

THE WITNESS: Yes.

THE CLERK: Thank you. Can you state and spell your first and last name, please.

THE WITNESS: Joseph Risco. Joseph, J-O-S-E-P-H, Risco, R-I-S-C-O.

THE CLERK: Thank you. You can have a seat.

THE WITNESS: Thank you.

THE COURT: Thank you.

Ms. Scheible, you may proceed.

MS. SCHEIBLE: Thank you.

Thereupon --

JOSEPH RISCO,

having been first duly sworn to testify to the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SCHEIBLE:

Q. Mr. Risco, where do you live?

A. I live in North Las Vegas.

Q. And how long have you lived in the Las Vegas area?

A. About 15 years.

Q. Okay. And on September 10th of 2018, were you here in the Las Vegas area?

A. Yes, I was.

Q. And do you drive?

A. Yes.

Q. Were you driving on September 10th of last year?

A. Yes, I was.

Q. And did you have occasion to call 911?

A. Yes.

Q. And I want to direct your attention to that 911 call. Can you tell us why you called 911.

A. There was a car that passed a red light.

Q. Okay. Where were you when you saw this car?

A. Exiting the 215 at Green Valley Parkway.

Q. And what time of day was it?

A. It was during evening hours.

Q. Okay. What kind of car?

A. It was a black car.

Q. Okay. Was this car a sedan, like a four-door, or a larger SUV?

A. It was a sedan.

Q. Okay. And so you said that you saw this car go through a red light?

A. Yes.

Q. And is that when you called 911?

A. No.

Q. Okay. What happened after the car went through the red light?

A. It jumped the median, the center median.

Q. Okay. And then what?

A. And then it kept proceeding towards another area before the entrance of the freeway.

Q. Okay. So the car was over the median. Was it on the left side of the road then?

A. Yes.

Q. Driving against traffic?

A. Correct.

MR. MUELLER: Objection as to leading.

THE COURT: Any response, Ms. Scheible?

MS. SCHEIBLE: It doesn't suggest an answer. I was asking if she was on the left, if the car was on the left side of the road or not.

THE COURT: Okay. Any response?

MR. MUELLER: It suggests the answer.

THE COURT: Okay. Objection overruled.

MS. SCHEIBLE: Okay.

THE COURT: You may proceed.

BY MS. SCHEIBLE:

Q. So the car was traveling against traffic?

A. Correct.
Q. And then did the car ever come to a stop?
A. Yes, it did.
Q. How?
A. It hit a electric pole.
Q. From what angle? Did the car hit the pole straight on?
A. From the front side of the bumper.
Q. Okay. And did the car come to a complete stop at that time?
A. No.
Q. Okay. What happened?
A. Someone came out of the vehicle.
Q. Okay. Would you recognize that person if you saw them again?
A. No, no.
Q. Okay. Were you too far away to see the person clearly?
A. Yes. Correct.
Q. But you could tell that it was a human being exiting the car?
A. Correct.
Q. From which door?
A. On the driver's side door.
Q. Okay. And what did that person do when they

got out of the car?
A. Fell to the ground.
MR. MUELLER: Objection. Lack of foundation. How far away was he? What was the lighting conditions? Was it dark? Was it light out?
THE COURT: Okay. Well, you can ask those questions on cross-examination.
Overruled. Go ahead, Ms. Scheible.
BY MS. SCHEIBLE:
Q. So the person -- I'm sorry.
Let me ask this, could you tell whether it was a man or a woman?
A. It was a female.
Q. Okay. How could you tell?
A. A dress.
Q. Oh, the person was wearing a dress?
A. The person wearing a dress.
Q. Okay.
A. And the hair.
Q. Okay. Generally the size of a woman?
A. Correct.
Q. Okay. So when the woman got out of the car, what happened?
A. She walked around the car to see what she

was hitting.
Q. Okay. What about when she first got out of the car?
A. The car was still -- still on.
Q. Okay. And how did she appear to you when she exited her vehicle?
A. She was like -- she fell to the ground. She wasn't -- it looked like she didn't know what she was doing.
Q. Okay. So when you say that "she fell to the ground," can you describe, did her hands touch the ground? Her knees?
A. Her entire body just fell to the ground.
Q. But she managed to pick herself back up?
A. Correct. And she started stumbling.
Q. Okay. Around the car?
A. Around the car, yes.
Q. And did she eventually get back into the driver's seat?
A. Yes.
Q. And then what did she do?
A. She proceeded to hit her gas, and she was going against the electric pole.
Q. Okay. So the car had already crashed into the pole?

A. Correct.
Q. And the driver proceeded to press on the gas pedal?
A. That's correct.
MR. MUELLER: Objection. Asked and answered.
MS. SCHEIBLE: I'm just clarifying, Your Honor.
THE COURT: You may proceed. Objection overruled.
BY MS. SCHEIBLE:
Q. And how could you tell that she was pressing the gas?
A. The back tires.
Q. What about the back tires?
A. They were moving. A moving motion.
Q. Okay. And did she stay there with her car crashed into the pole?
A. Eventually, the car slid towards the right side, and she was able to go around the pole.
Q. And when you say "go around," you mean with the vehicle, she drove the vehicle around the pole?
A. That's correct. Yes.
Q. Okay. At what point did you call 911?
A. After she stopped in the center of the

freeway entrance.
Q. So was that before or after she hit the pole?
A. This is after she hit the pole.
Q. Okay. So we were just talking about her going around the pole. Had you called 911 yet at that point?
A. No.
Q. So she goes around the pole. What happens next?
A. She stays in the center of the freeway. That's -- she just stayed there.
Q. Okay. So the car was completely stopped?
A. Yes.
Q. And was it in an intersection or just on the road?
A. It was an intersection.
Q. Okay. And at that point, what did you do?
A. At that point, I decided to call 911.
Q. All right. And did you make that call?
A. Yes, I did.
Q. And did the cars remain in the intersection while you were on the phone with 911?
A. Yes, yes.
Q. Okay. And then what happened?

A. And then once -- I guess the vehicle started moving eventually.
Q. Okay. And where were you in relation to the vehicle in the intersection?
Was it in front of you? Behind you? Next to you?
A. It was in front of me.
Q. Okay. Were you the first car in line?
A. Yes, I was.
Q. So was there anybody between or anything between you and the stopped vehicle?
A. No.
Q. Okay. And you said the vehicle started to move again?
A. Correct.
Q. And which direction did it go?
A. Forward.
Q. All right. Towards the freeway? Towards you?
A. Away from the freeway.
Q. Okay. And you were still on the phone with 911 at this point?
A. Yes, I was.
Q. Okay. And did anybody respond, like a uniformed officer?

A. I flagged down a Henderson cruiser.
Q. And what did that officer do in the cruiser?
A. He proceeded to pull over the vehicle.
Q. And did you watch him pull over the vehicle?
A. Yes, I did.
Q. And where did that occur?
A. On the freeway.
Q. And were you on the freeway at that point?
A. No.
Q. But did you follow the car to the freeway?
A. Yes, I did.
Q. Why did you do that?
A. To just give my statement.
Q. Did you think that it was important to talk to law enforcement officers about what you had seen?
A. Yes.
Q. Why is that?
A. I was just concerned.
Q. Okay. Concerned for?
A. It's not a normal activity.
Q. Okay. Did you think this behavior was safe?
A. No.
MR. MUELLER: Objection.
THE COURT: Yes. Mr. Mueller.
MR. MUELLER: Calls for speculation, and

the witness isn't a safety expert.
THE COURT: Ms. Scheible.
MS. SCHEIBLE: I don't think he has to be an expert to testify to whether or not he thinks the situation is safe. It goes to what he did next and why.
THE COURT: Okay. From his own standpoint, but not as an expert testifying --
MS. SCHEIBLE: Absolutely.
THE COURT: -- what was his opinion.
You may proceed.
BY MS. SCHEIBLE:
Q. So were you worried about your safety?
A. Yes.
Q. The safety of others?
A. Yes.
Q. And so you followed -- am I understanding correctly, you followed the Henderson cruiser on the freeway where he was pulling over the black car?
A. Yes.
Q. Okay. And then did you also stop your car?
A. Yes.
Q. And did you speak with police officers on the scene?
A. Yes.

Q. Okay. Do you remember who you spoke with?
A. An NHP officer.
Q. Okay. An NHP officer. Did you speak with the Henderson officer as well?
A. No. At that moment, no.
Q. Okay. Did the Henderson officer leave the scene while you were still there?
A. I don't recall.
Q. Okay. Did an NHP officer arrive while you were still there?
A. Yes.
Q. Do you remember the NHP officer who you spoke to?
A. No.
Q. Do you think you'd recognize him if you saw him again?
A. Yes.
Q. Okay. Have you seen him since that time?
A. No.
Q. Okay. And what did you tell the NHP officer that day?
A. That I saw a vehicle jump over the median and just the strange activity.
Q. Okay. And it was the same vehicle that was on the side of the road at that point in time?

A. Yes.
Q. And then at some point, did you leave?
A. Yes.
Q. When did you leave?
A. After the trooper -- after I provided the trooper my statement.
Q. Okay. So you have given us a very good understanding of what happened.
MR. MUELLER: Objection. It's not a question.
MS. SCHEIBLE: There's a question here.
THE COURT: Go ahead.
BY MS. SCHEIBLE:
Q. We have gone step by step through what you observed, and I want to make sure that we didn't miss anything. So I'm going to ask you, from the time that you first noticed this car, to the time it was pulled over, can you just narrate for us what you observed the car doing.
MR. MUELLER: Objection. Narrative testimony. You can't have narrative testimony.
THE COURT: Any response?
MS. SCHEIBLE: Why not?
THE COURT: What's the response to the objection other than "Why not"?

MS. SCHEIBLE: I think that narrative testimony is fine in this instance.
MR. MUELLER: It's actually an objection. You can't have it.
MS. SCHEIBLE: It's not "narrative" as a term of art. I'm not going to ask him questions. "Narrative" in the sense that I want to quit interrupting him so that we can make sure that nothing got out of order.
THE COURT: I misunderstood, Mr. Mueller. Originally, I agreed with you. She cannot give a narrative of this. But my understanding is she's not going to give a narrative. The witness here is going to go through that.
MS. SCHEIBLE: Right.
MR. MUELLER: A distinction for that difference in testimony is you can't put a witness on the stand and say, "Hey, what do you want to tell me?" That's not proper. You've got to ask them questions.
THE COURT: Okay. And I believe the question was asked "From beginning to end, what occurred"?
MS. SCHEIBLE: Can you summarize for us.
THE COURT: That's pretty standard. So

objection overruled.
MR. MUELLER: For the record, I'd lodge a continuing objection to this testimony.
THE COURT: Thank you.
BY MS. SCHEIBLE:
Q. So you can go ahead and answer the question about a summary, from beginning to end, what you saw the car doing.
A. I was exiting the freeway, and I came to a complete stop. I had a red light. Then I saw a vehicle approach, proceeded to move forward, passing the red light, went over a median, going against incoming traffic, going over another set of -- I don't know if it's called a "median," but it was rocks -- finally hitting an electric pole. A female came out of the vehicle, stumbled, went around the car, went back in the car.
I left the scene. I flagged down a cruiser, and then I followed the cruiser onto the freeway. NHP arrived, wrote down a statement, and went to my next destination.
MS. SCHEIBLE: I have no further questions -- oh, I'm sorry. I do have one more question for this witness.
///

BY MS. SCHEIBLE:
Q. If you know, did this all happen in Clark County, Nevada?
A. **Yes, it did.**
MS. SCHEIBLE: I have no further questions.
THE COURT: Thank you, Ms. Scheible.
MR. Mueller.

CROSS-EXAMINATION

BY MR. MUELLER:
Q. Sir, you're a long way from home.
What were you doing down in Henderson from North Las Vegas?
MS. SCHEIBLE: Objection. Relevance.
THE COURT: Mr. Mueller.
MR. MUELLER: It's cross-examination. I'm entitled to find out where he's coming to and where he was going to, how he saw things.
THE COURT: Overruled.
BY MR. MUELLER:
Q. What were you doing down in Henderson, sir?
A. **Gambling.**
Q. Gambling. Had you had a couple drinks?
A. **No.**
Q. Did you have anything to drink at all while

you were gambling?
A. **While gambling?**
Q. Yes, sir.
A. **Yes, I did.**
Q. Okay. What did you have to drink?
A. **Alcohol.**
Q. Okay. Are you a beer drinker? Have shots? What do you drink?
A. **A beer.**
Q. A beer. What time did you -- and what casino did you go to, sir?
A. **Green Valley Ranch.**
Q. And what time did you get there about, approximately?
A. **It was evening hours.**
Q. Evening hours. What time did you leave?
A. **From my house?**
Q. No. The casino, to go. When you left Green Valley Ranch, were you going to head back up to North Las Vegas?
A. **It was dark outside.**
Q. Okay. 8:00 o'clock at night? 9:00 o'clock at night?
A. **10:00 p.m., estimate.**
Q. You estimate about 10:00 p.m.?

A. **10:00, 11:00 o'clock.**
Q. Now, when you saw the vehicle driving erratically, how far away from it were you?
A. **Are we talking feet?**
Q. Distance. Just a football field away? 10 feet away? How far away were you?
A. **I was from here to the second exit.**
Q. So I'm walking towards the back of the courtroom now. So you're about this far away or through the double doors away?
A. **The second door.**
Q. All right. So you agree about 60, maybe about 55, 60 feet?
A. **I'm not an expert on --**
Q. All right. And at no time did you get out of your car to assist the driver of the vehicle?
A. **I was worried about my safety.**
Q. Worried about your safety?
A. **Yes.**
Q. And how long did you observe this vehicle before you elected to call the police?
A. **Five, ten minutes.**
Q. Five to ten minutes. Five, ten minutes. So you looked at the car for a long time?
A. **If that's what you call a "long time," five**

minutes.
Q. All right. And where was your car parked for those five to ten minutes?
A. **I was at the red light.**
Q. Okay. Did you sit through a red light cycle, or did you pull off the side of the road?
A. **When she went over the median, I was at the red light, trying to make a right turn.**
Q. All right. So when the light turned, did you get on the highway?
A. **I was exiting the highway.**
Q. You were exiting the highway?
A. **Correct.**
Q. So you didn't -- you just sat there waiting for the light and then drove off?
A. **No. I made a U-turn to -- and went back towards the vehicle that passed the red light.**
Q. Now, the vehicle was able to get moving again all by itself; correct?
Nobody needed to push it?
A. **No.**
Q. Nobody needed to tow it?
A. **No.**
Q. Now, did you see what happened before the vehicle went over the median?

A. Can you repeat the question.
Q. Did you see what happened, if anything, before the vehicle went over the median?
A. I saw a car pass a red light.
Q. Okay. But did you -- was this in your rearview mirror? It would have been -- as you're sitting there, would the car be going past you?
A. It passed me on my side, on the driver's side.
Q. On the driver's side.
So it went through. You're sitting there at the light; vehicle went passed you on the left?
A. Correct.
Q. All right. Now, did it go over the median behind you or in front of you?
A. In front.
Q. How far out?
A. It was from here to where those -- those doors. I'm not sure what they're called.
MR. MUELLER: Okay.
THE COURT: And for the record, we have measured the doors. They're 25 feet away.
We have measured the door at the very back too, but it's torn off. I can't see.
MR. MUELLER: That's 25 feet.

THE COURT: 25 feet?
MR. MUELLER: I would have guessed a little longer. All right. Thanks, Judge.
I have nothing further.
THE COURT: Wonderful. Thank you, Mr. Mueller. Ms. Scheible.

REDIRECT EXAMINATION
BY MS. SCHEIBLE:
Q. Just to clarify, when you say that you saw a car pass you and run a red light, that was the same black car that ended up hitting the pole when you had pulled over; right?
A. Yes.
MS. SCHEIBLE: I have nothing further.
THE COURT: Mr. Mueller.
MR. MUELLER: Nothing further.
THE COURT: All right. Thank you, Mr. Risco. Appreciate your testimony. Thank you for your patience here today.
THE WITNESS: Thank you.
(Witness sworn.)
THE WITNESS: I do.
THE CLERK: Thank you. Can you state your first and last name, for the record, please.

THE WITNESS: My first name is Greg, G-R-E-G. Last name, Luna, L-U-N-A.
THE CLERK: Thank you. You can have a seat.
THE COURT: Thank you, Trooper.
Ms. Scheible, you can go ahead and proceed.
MR. SCHEIBLE: Thank you.

Thereupon --
GREG LUNA,
having been first duly sworn to testify to the truth, was examined and testified as follows:

DIRECT EXAMINATION
BY MS. SCHEIBLE:
Q. Officer Luna, how are you?
A. Good, ma'am.
Q. And where do you work?
A. I work for Nevada Highway Patrol.
Q. How long have you been with Nevada Highway Patrol?
A. Now, about over three years.
Q. And what do you do for the highway patrol?
A. I work traffic.
Q. Are you a uniformed officer?
A. Yes, ma'am.

Q. Are you a peace officer?
A. Yes, ma'am.
Q. And what do your job duties entail?
A. My job duties include enforcing traffic laws, solving crash investigations. Anything like that.
Q. Okay. And were you working on September 10th of 2018?
A. Yes, ma'am.
Q. And on September 10th of 2018, were you called out to a scene near the 215 and Green Valley Ranch?
A. Yes, ma'am.
Q. Do you remember going out to that scene?
A. Yes, ma'am.
Q. And to your knowledge, is that here in Clark County, Nevada?
A. Yes, ma'am.
Q. When you got there, did you see anybody who you see in the courtroom today?
A. Yes, ma'am.
Q. And can you point out that person, identify an article of clothing he or she is wearing.
A. It's the young miss with the white striped shirt, sitting next to him.

MS. SCHEIBLE: May the record reflect identification of the defendant.
THE COURT: Yes.
BY MS. SCHEIBLE:
Q. And when you made contact with the defendant, where was she?
A. She was seated in the driver's seat of vehicle.
Q. Okay. Do you remember what kind of vehicle it was?
A. I recall that it was a black sedan.
Q. And she was in the driver's seat?
A. Yes, ma'am.
Q. If you know, why were you called out to this scene?
MR. MUELLER: Objection. Hearsay.
MS. SCHEIBLE: It's not offered for the truth of the matter. It's offered for why he understood to be that he was going out there.
THE COURT: Overruled.
THE WITNESS: I was -- I apologize.
I was dispatched to the vehicle crash occurring at the intersection of Green Valley Parkway and the 215.
///

BY MS. SCHEIBLE:
Q. Okay. And when you got there, who also is present?
A. When I arrived around the scene, there was construction workers around, and then I believe there was Henderson police officers that was behind the black sedan.
Q. Okay. Were there any witnesses present?
A. That, I can't remember.
Q. Okay. When you first arrived on the scene, what's the first thing that you did?
A. When I arrived on scene, I spoke with the Henderson police officers. I asked them what was going on. They told me that they pulled --
MR. MUELLER: Objection. Hearsay.
BY MS. SCHEIBLE:
Q. You don't have to tell us what they said.
But you conversed with the Henderson police officers?
A. Yes, ma'am.
Q. And had they been called out -- if you know, had they been called out to the scene or just happened to be there?
A. I believe they just happened to be there, but I don't recall.

Q. Okay. So they weren't, for lack of a term, assigned to this call?
A. No, ma'am.
Q. But you were assigned to the call?
A. Yes, ma'am.
Q. And so when you're assigned to a call, what is your job on that scene?
A. If I'm assigned to, let's say it's a vehicle --
(Reporter request.)
THE WITNESS: My apologies.
If I'm assigned to a call, the call specified was a vehicle crash. So my goal is to find the car that was involved and see if anybody was injured or find out if there's any roadway marks or damaged parts or anything in the area.
BY MS. SCHEIBLE:
Q. And is that what you did in this case?
A. Yes, ma'am.
Q. And so what's the first thing you do to try to ascertain that information?
A. I would have to look at what were the details of the call. For instance, I recall it was a black sedan that struck a light pole. So I'm looking for a black sedan that may have front-end

damages.
Q. And is that what you saw when you responded to the 215 and Green Valley Ranch?
A. Yes, ma'am.
Q. And that's where the defendant was behind the wheel?
A. Yes, ma'am.
Q. So when did you approach the driver's side of the car?
A. After I parked behind Henderson police, I walked up to the left side of her car, and then that's when I started talking to her.
Q. Okay. Was there anybody else in the car?
A. No, ma'am.
Q. So what did you do next?
A. After that, I looked -- I wanted to make sure that was actually the vehicle. I looked to the front of the car. There was a dent on the left front. There was also dirt particles around the left front tire that was very, very recent as to like she went off road like several minutes before. Then from there, I talked to her, and I took over the investigation from Henderson.
Q. Okay. You said before that you didn't remember speaking to any witnesses.

Do you remember if you took any witness statements?

MR. MUELLER: Objection. Asked and answered. He just said he doesn't remember.

MS. SCHEIBLE: I'm asking if he took any statements, not if he remembers the witnesses that he talked to. I want to be clear here.

THE COURT: Overruled.

THE WITNESS: I don't remember taking a statement.

BY MS. SCHEIBLE:

Q. Okay. If I showed you a copy of a statement provided on the scene, might that help refresh your recollection?

MR. MUELLER: Objection. Facts not in evidence. There's been no evidence that a statement was taken at the scene.

THE COURT: Okay. And this is just to refresh his recollection?

MS. SCHEIBLE: Yeah.

THE COURT: Why don't you go ahead and show that to Mr. Mueller.

MS. SCHEIBLE: Oh, I'm sorry.

THE COURT: Other than that, objection overruled.

THE WITNESS: Yes, ma'am. I recognize this statement, but this was given to me after my investigation.

MR. MUELLER: I'm sorry. I didn't hear that, Trooper.

THE COURT: I didn't either.

THE WITNESS: I recognize this statement, but this was given to me after my investigation.

THE COURT: Oh.

BY MS. SCHEIBLE:

Q. So did you talk to the person who wrote that statement?

A. No, ma'am.

Q. Okay. Do you know who took that statement?

A. At the bottom, there's a signature. It was Trooper Pico. P-number 368.

Q. Okay. And then did you add it to your file?

A. Yes, ma'am.

Q. Okay. So on the scene, when you encountered the defendant behind the wheel, what's the next thing that you did?

A. From there, I would ask her how, like if she was involved in it. I remember asking her if she hit anything. She told me she didn't hit anything. From my first observations, when I try to usually smell from inside the vehicle, see if it's DUI related, the only thing that I smelled was like food. But there was a Chinese bag that was sitting there right in the right passenger seat. After that, I tried to get her story. I remember she told me she didn't hit anything. She was heading home, eastbound on the 215 towards Henderson.

MR. MUELLER: Objection. Has the witness been -- never mind. I'll withdraw that, and I'll wait for cross.

THE COURT: Okay. Thank you, Mr. Mueller. You may proceed.

THE WITNESS: Thank you.

She told me that she was heading eastbound on the 215, towards her home in Henderson, but where Henderson police pulled her over was going westbound. And from there, I asked her again. She was very adamant that she was still going eastbound.

BY MS. SCHEIBLE:

Q. Okay. And did she seem impaired to you at the time?

A. From -- she was sitting in the right -- since she was seated in the car, I could only smell the food. The only thing I could notice was that she had flesh eyes, glassy.

Q. So did you ask her to exit the vehicle?

A. Yes.

Q. And how did that go?

A. I told her exit out the vehicle. I brought her to the front of my patrol vehicle, where I managed to talk to her. When I was closer to her, that's when I was able to smell an unknown intoxicating beverage emitting on her breath, and then when I saw her eyes closer, they appeared to be glassy, bloodshot, and watery.

Q. And so at that point, did you conduct some field sobriety tests?

A. Yes, ma'am.

Q. How many field sobriety tests are you trained in?

A. There's only three tests.

Q. Okay. And did you perform --

What three tests are those?

A. It's the whole -- first test is horizontal-gaze nystagmus; the second is walk and turn, and the third is one leg stand.

Q. And did you have the defendant perform all three of those?

A. From what I recall, we only did horizontal-gaze nystagmus.

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Q. Okay. Would taking a look at your report help refresh your recollection?

MR. MUELLER: Objection. He testified that he doesn't recollect.

THE COURT: Objection. Overruled.

She's just seeing if this would refresh his recollection at this time.

MR. MUELLER: Counsel, may I see what you're showing the witness, please.

MS. SCHEIBLE: It's his report.

MR. MUELLER: I object to the witness being shown this report until and unless he's testified that he recorded some information that he no longer recollects and this report is necessary to refresh his recollection. Nothing has been said to lay the foundation, Your Honor.

THE COURT: Any response, Ms. Scheible?

MS. SCHEIBLE: I think he said that, as far as he recalls, he only did the one field sobriety test, which indicates to me that he could use refreshing of his recollection.

THE COURT: And this is only being used for the purpose of refreshing his recollection?

MS. SCHEIBLE: That is absolutely correct, Your Honor.

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MR. MUELLER: The purpose to show someone a report is to refresh recollection, not to get out testimony that the witness did not -- not to coach the witness what to say.

THE COURT: Thank you, Mr. Mueller.

Objection overruled.

BY MS. SCHEIBLE:

Q. Here. And look up when you're done.

A. (Witness complies.)

Q. Does that refresh your recollection?

A. Yes, ma'am.

Q. So how many field sobriety tests did you issue?

A. Only one, ma'am.

Q. I'm sorry?

A. Only one test.

Q. And that was the horizontal-gaze nystagmus test?

A. Yes, ma'am.

Q. And how did she perform on the test?

A. She showed six out of six clues.

Q. And do you know what those six clues are, off the top of your head?

A. Yes.

Q. What are they?

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A. She lacked -- she showed lack of smooth pursuit in both eyes. Onset prior, 45 degrees, both eyes and maximum deviation, which was then sustained for both eyes.

Q. So six out of six clues. What did you do next?

A. From there, after that, I asked if she would consent to preliminary breath test. She agreed.

Q. And how is the preliminary breath test conducted?

A. The preliminary breath test is conducted using our preliminary breath test machine which, at the time, I was issued a Draeger --

MR. MUELLER: Objection. As to the evidence of the PBT being admitted into evidence as inadmissible.

THE COURT: I understand. Any response?

MS. SCHEIBLE: I'm just asking him what he did. I'm not --

THE COURT: My understanding of the question was "How is that done?"

MS. SCHEIBLE: Right.

THE COURT: Overruled.

THE WITNESS: When I administered her

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preliminary breath test, the machine that I was issued is a Draeger device. I use a clean straw. I turn it on. I ask her --

MR. MUELLER: I object to the results of the preliminary breath test coming into evidence.

THE COURT: And I don't believe he's giving results. It sounds to me like he's telling us how it's done.

MS. SCHEIBLE: Correct.

THE COURT: Objection overruled.

THE WITNESS: I put a clean straw in the device. I turn the device on. I asked Ms. Plumlee to blow into the machine as though she was blowing a balloon. When she blows into it, the machine makes out a tone. Once it gets enough sample size, it stops and gives me the sample of her breath.

BY MS. SCHEIBLE:

Q. And what do you do with -- so it gives you the sample of her breath. Does it do any kind of analysis of it?

A. It shows me the results of her BAC, just preliminary.

Q. Okay. And so a preliminary breath test is distinct from a breath test; right?

A. Yes.

Q. Can you explain the difference.
A. The difference is when -- if I were to arrest her for DUI and she chose a breath test, if I would take her to a testing facility that has an evidentiary breath test machine, which is the Intoxilyzer, which I did at Henderson.
Q. Okay. So the preliminary breath test, is it, in your experience, reliable?
A. It's mostly just to determine whether there's drugs involved.
Q. Okay. And what did the preliminary breath test indicate in this instance?
MR. MUELLER: Objection. That's the third time she's asked for the results of the preliminary breath test. It's not admissible.
THE COURT: Now we're looking at the results.
MS. SCHEIBLE: Correct, Your Honor.
It's the first time I'm asking for the results of the test. I've laid adequate foundation that I'm not using it to show that the defendant was per se intoxicated but to understand what the officer did next and why.
MR. MUELLER: "Inadmissible" is not a word susceptible to ambiguity. It is inadmissible.

She's seeking, repeatedly seeking the admission of inadmissible evidence. It's blackletter law.
MS. SCHEIBLE: It is inadmissible for the purposes of showing per se intoxication, which is not why I'm admitting it. I'm asking for it to be admitted to show what the officer did next and why. Perfectly admissible.
THE COURT: For that purpose, limited purpose only. Overruled.
MR. MUELLER: I object and move for a mistrial, Judge.
THE COURT: Denied.
THE WITNESS: Are you asking for the results, Miss?
BY MS. SCHEIBLE:
Q. Yes, I am.
A. I do believe it was over .08.
Q. Okay. And at that point, what did you do?
A. After that point, I arrested her for driving under the influence of alcohol. I seated her in my patrol vehicle. I read her my NHP-issued evidentiary test card. She stated she understood and chose a breath test.
Q. And did you also read her "Miranda" at that point?

A. No.
Q. Okay. Did you read "Miranda" at any point?
A. No.
Q. Did somebody else read "Miranda"?
A. No.
Q. Okay. Is there a particular reason?
A. I wasn't charging her for anything other than DUI. I had no reason to read her "Miranda."
Q. Okay. And so when you arrested her -- you arrested her; right?
A. Yes.
Q. Did you place her in handcuffs?
A. Yes.
Q. Did you place her in your vehicle?
A. Yes.
Q. And you read her the evidentiary test card from your traffic; right?
A. Yes.
Q. And then are you the one who transported her to the Henderson Detention Center?
A. Yes, ma'am.
Q. Any conversation in the car?
A. Not that I can recall.
Q. Okay. And was there anybody else in the car?

A. No, ma'am.
Q. And when you got to the Henderson Detention Center, what did you do?
A. When I got to Henderson Detention Center, I got her stuff -- since she chose a breath test, I took her to the Intoxilyzer machine at Henderson jail, and that's when I began my observation period and followed a checklist for the device.
MS. SCHEIBLE: All right. Can I get some things premarked. Sorry. I should have done this so much earlier. Showing defense counsel what's been marked strictly for identification purposes as State's 1 and 2.
(Whereupon State's Exhibit 1 and 2 were marked for identification.)
MS. SCHEIBLE: May I approach the witness, Your Honor.
THE COURT: Yes.
BY MS. SCHEIBLE:
Q. Officer, showing you what's been marked for identification purposes as State's Exhibit 1, do you recognize that piece of paper?
A. Yes. I recognize this as the Intoxilyzer 8000 Checklist. I recognized this through my handwriting signature at the bottom with the subject

being Jennifer Plumlee.
Q. And is that a checklist that you filled out yourself?
A. **Yes, ma'am.**
Q. Does this look like the original or a copy?
A. **This looks like -- actually, it looks like the original.**
Q. Okay. And it appears exactly the same as you filled it out?
A. **Yes, ma'am.**
MS. SCHEIBLE: Move for admission of the Breathalyzer Checklist.
THE COURT: Any objections, Mr. Mueller?
MR. MUELLER: No objection to the checklist.
THE COURT: Thank you. So admitted.
And that's marked as State's Proposed exhibit what.
MS. SCHEIBLE: One, Your Honor.
(Whereupon State's Exhibit No. 1 was admitted into evidence.)
MS. SCHEIBLE: Are you ready?
THE COURT: Yes.
BY MS. SCHEIBLE:
Q. Can you explain for us what the checklist

is.
A. **The checklist is the means of how to operate the Intoxilyzer 8000. There's a period where I'm supposed to observe the subject for 15 minutes before continuing the test. During that, I'm observing her, whether she's regurgitating, swallowing anything, or if there's any foreign object in her mouth. From there, that's when I continue on with the test where the machine starts to power up, where I could obtain two samples of her breath.**
Q. And anything unusual in your 15-minute observation period?
A. **No, ma'am.**
Q. So you administered the test then?
A. **Yes, ma'am.**
Q. And I think you already said that you have to do two breath tests?
A. **Yes, ma'am.**
Q. And does she complete both breath tests?
A. **Yes, ma'am.**
Q. And did you receive some kind of indication of the results?
A. **At the end of the testing, the machine would print out the breath strip, which would show**

me the results or everything.
MS. SCHEIBLE: May I approach the witness.
THE COURT: Yes. Let's see what Mr. Mueller --
MR. MUELLER: I'm going to ask the Court not to receive the results of the test until it's been established the machine was properly calibrated and working.
THE COURT: And I want to make you see what she's going to hand him. I don't know what it is.
MR. MUELLER: She showed it to me, Judge.
MS. SCHEIBLE: It's Exhibit 2.
THE COURT: Oh, you did see it. Okay.
MS. SCHEIBLE: Yes.
THE COURT: You can approach the witness. I don't know from there. We'll make that objection when it's time.
BY MS. SCHEIBLE:
Q. And looking at State's Exhibit 2, is that the breath strip that you were just --
Excuse me?
MR. MUELLER: The Judge just invited me up to come take a look at it.
THE COURT: That's fine.
///

BY MS. SCHEIBLE:
Q. Is that the breath test you were just referring to?
A. **Yes. The breath "strip."**
Q. The breath "strip." Thank you.
And is it the original or a copy?
A. **This is a copy.**
Q. Does it look exactly the same as the original did?
A. **Yes, ma'am.**
Q. Fair and accurate depiction?
A. **Yes, ma'am.**
Q. And this is the one that was -- is it printed out by the machine itself?
A. **It is.**
Q. Kind of like a receipt at a cash register?
A. **Yes, ma'am.**
Q. Okay. And that was printed out from this Intoxilyzer, and then you physically took it?
A. **Yes.**
Q. And that's a printout of what you got?
A. **Yes.**
MS. SCHEIBLE: Okay. I will move for admission of State's Exhibit 2.
MR. MUELLER: I'd ask the Court to reserve

a ruling until it's established the machine was properly operating.

THE COURT: That's fine.

MR. MUELLER: And also so I have a chance to cross-examine the witness.

THE COURT: That's fine. We'll wait until after cross-examination. That's what I intended to do.

MS. SCHEIBLE: Well, Your Honor. I think that it can be admitted because it is the strip that was produced from the Intoxilyzer. Whether or not the Intoxilyzer was functioning properly is another question. But I don't think there's any question as to what results it produced at that time.

That's the strip that was printed by the machine, as Officer Luna saw it, read it, picked it up, held it in his hand. So it should be admitted into evidence.

THE COURT: I understand that. We'll wait until after cross-examination. I always do that.

BY MS. SCHEIBLE:

Q. Okay. And can you tell the Court what the results were of the breath test.

A. Yes, ma'am. For the results, the first test showed a BAC of .161. For the second test, it showed .155.

MR. MUELLER: Objection. Court just said "We're going to hold off admitting the results until after cross-examination," until he calibrated it. Yeah.

THE COURT: And we'll see if we're going to strike that or go forward with it. If we strike it, certainly it's something substantial, and I'll allow you to make your cross-examination and see how we can handle that since it's not been admitted.

MR. MUELLER: All right. Thank you, Judge.

BY MS. SCHEIBLE:

Q. And when you observed those results, what did you do?

A. After those results, I finished my Arrest Report for her.

Q. And was she taken into custody or remained in custody?

A. And she was taken by Henderson Detention Center.

MS. SCHEIBLE: Okay. Would you like these, Your Honor?

THE COURT: Not yet.

MS. SCHEIBLE: Okay. Brief indulgence.

THE COURT: Yes.

MS. SCHEIBLE: I have nothing further for this witness.

THE COURT: Wonderful. Thank you, Ms. Scheible. Mr. Mueller.

CROSS-EXAMINATION

BY MR. MUELLER:

Q. Trooper Luna, at no time in question did you see the black sedan move?

A. No, sir.

Q. And when you arrived, was the person in the black sedan free to leave?

A. She was pulled over by Henderson police for a traffic violation.

Q. That's not what I asked, Trooper.

A. No.

Q. She was not free to leave.

All right. So you were investigating a crime, a misdemeanor, which you did not witness; correct?

A. Correct.

Q. And she was not free to leave; correct?

A. Correct.

Q. So before you began talking to her, did you read her the "Miranda" decision?

A. No.

Q. No? Did you ask her questions based on what the other officers had told you?

A. No.

Q. You didn't ask her any questions?

A. I asked her questions but my questions. I didn't ask her questions relating to why Henderson pulled her over.

Q. All right. Well, the Henderson police officers were still present; correct?

A. Yes.

Q. What was their names?

A. I don't recall their names.

Q. How long had they been there?

A. For the whole scene of maybe about 15 minutes.

Q. 15 minutes. So they had been there 15 minutes prior to your arrival?

A. I don't recall how long that was.

Q. You don't recall.

Well, you've got your breath strip there on the witness stand, don't you?

A. I do.

Q. All right. If you don't know how long and you knew they were there at least 15 minutes, then

this breath sample is outside of two hours then, isn't it?

A. I don't -- I would have to look at my, the whole point of the call, sir. The time frame where it took from when I received the call, from when I arrived at the scene.

Q. All right. Trooper, you've been on the patrol now going on three years?

A. Correct.

Q. Did you do a field sobriety worksheet?

A. I do not know what that is.

Q. Where you check the boxes and interview the questions, all the questions you ask a suspected drunk driver?

A. I did not.

Q. Okay. So you didn't ask her if she had any medical conditions?

A. For field sobriety testing, before that, I ask that. But if you're asking me like if I follow a certain worksheet that shows what clues are. I don't do that. I make notes on it, on my notepad.

Q. All right. Do you have your notepad with you?

A. Not related to this case.

Q. Not related to this case.

So how many DUI arrests have you done now, Trooper?

A. I lost count.

Q. Dozens?

A. More than that.

Q. Hundreds?

A. Maybe a little more than that.

Q. Okay. Now, after about three years, I imagine after awhile, it's a job. Things start looking a lot like each other, don't they?

A. No, sir.

Q. You can't remember the details of every particular case, do you?

A. I would have to refresh my memory.

Q. So the answer is no, you don't remember the details?

A. I do remember the details of this though.

Q. Yes, sir. Did you take any photographs at the scene, sir?

A. I believe I did. I don't recall though.

MR. MUELLER: I have nothing further.

THE COURT: Wonderful. Thank you, Mr. Mueller. Ms. Scheible, anything on redirect?

MS. SCHEIBLE: Nothing, Your Honor.

THE COURT: Wonderful. Thank you.

Thank you, Trooper. Appreciate your patience and thank you for coming back.

MR. MUELLER: And before the Court -- my colleague calls her next witness, may I have a moment to make a motion.

THE COURT: Absolutely. Give me just a second. Okay. Mr. Mueller.

MR. MUELLER: Thank you, Your Honor.

I'm going to move to strike the trooper's testimony and the breath test. Specifically, he comes in contact with a witness, who's not free to leave, to investigate a misdemeanor that he did not see. You have custodial interrogation, and you have the investigation of a crime, which implicates "Miranda." There was no "Miranda" decision read.

In fact, my colleague starting fishing around on direct examination seeing if he knew of anybody that actually read her the "Miranda" decision, and the answer was no. So she gave him a second opportunity to talk about, "Did you read her the 'Miranda' decision?" No. "You didn't see her driving?" No. "So you're investigating a crime that did not occur in your presence, in a custodial interrogation"? Yes.

Now, blackletter law, which she's going to

recite to you, is that you don't need to read the "Miranda" decision if you are investigating a DUI, and that's correct. You don't, if you were the primary officer making the traffic stop. I see you driving, pulled over, I get out. I'm pretty sure you're drunk, but I'm going to do a field sobriety test anyway and ask a few questions. That's okay. That's black letter law. That's not what happened here.

This is I come up to someone who's not free to leave, in custody, and I start interrogating them about whether they've committed a crime. That requires a "Miranda" decision and, specifically, since it was a interagency pass-off. The trooper doesn't even testify as to the names of the Henderson police officers.

So respectfully, the "Miranda" decision is implicated here. It wasn't read. The conversation, the subsequent fruit of the poisonous tree, breath test is all illegal, and we move to suppress it and ask it be stricken from evidence.

THE COURT: Thank you, Mr. Mueller.

Ms. Scheible.

MS. SCHEIBLE: The "Miranda" decision addresses defendant's statements during a custodial

interrogation, and here we don't have any statements, and we don't even have custodial interrogation. The fact of the matter is that Trooper Luna was assigned to this call, and he was conducting a DUI investigation. The defendant was, in fact, not in custody, and she was not under interrogation. She was simply pulled over on the side of the road. That she had been stopped at a traffic violation, which then escalated to a DUI is actually rather common and doesn't implicate "Miranda" at all. There's law that indicates that doing a DUI investigation does not require reading "Miranda."

And so in this case, the officer who just testified was not relying on any kind of statements made by the defendant after she was arrested, after she was not free to leave that were coerced or that were otherwise procured when there should have been a "Miranda" warning. Because there was no point at which she needed a "Miranda" warning in order to make any statements or to cooperate with the field sobriety test.

And so I don't think that we have an issue of suppressible evidence or evidence that needs to be suppressed. We have an issue here where a

trooper responds to a crash scene and does a DUI investigation. He does not elicit any responses from the defendant. She is not under arrest. She's not being interrogated. He's simply performing the field sobriety test to determine whether or not she has been -- whether or not she is under the influence at the time that she got out of her car, which is completely standard practice, and I would oppose the motion to suppress his testimony.

MR. MUELLER: My colleague seems to have forgotten a few key points. He was investigating an automobile accident. There was testimony --

(The record was read.)

MR. MUELLER: An automobile accident.

THE REPORTER: Repeat please.

MR. MUELLER: Certainly.

My colleague seems to forget a couple of key points. The testimony from the trooper was he was there to investigate an automobile accident. He came up and inspected the fender first, saw the tires or saw the rocks in the tires, went to the window where he did not smell alcohol.

Now, she's sitting there, not free to leave. Highway patrol is there to back up the Henderson Police Department. She is not free to

leave. If she had driven off, they'd have given chase, and she'd have gone to jail for felony evasion. So she is not free to leave. Make no mistake about that. Now the State wants to have it both ways. That implicates the "Miranda" decision. That's it. In custody, custodial interrogation, investigating a crime. The only inkling he gets that it's a DUI case is after she's out of the car and then he thinks he smells alcohol. He gives her an HGN, and that's it.

So the answer is is, Your Honor, this is a "Miranda" case. It's blackletter law, and it should be suppressed. Breath sample gets suppressed and everything he learns after he arrests her gets suppressed.

THE COURT: Thank you, Mr. Mueller.

Any response, Ms. Scheible?

MS. SCHEIBLE: Yes, two things. First of all, I do want to note that while Trooper Luna was called out to investigate, the report said that it was a vehicle crash. That doesn't mean that he is limited to investigating a vehicle crash or that that is the only reason that he's there. This is clearly a DUI stop. By the time that Trooper Luna had removed the defendant from the car and started

doing the field sobriety test, this had clearly become a DUI stop.

The other thing I want to address is really the root of "Miranda" and the purpose of "Miranda," which is it's not like a switch that we flip and we say: Okay. Now we're in the clear -- oops, now we're not -- oh, now we are, now we're not. What the "Miranda" decision says is that you can't force somebody to give you information when they're in custody and you are interrogating them. It's about the coercive nature of the stop. It's about the kind of information that you are eliciting from the defendant.

It's not about whether or not an officer has said some magic words in order to complete his or her investigation. And in this case, there is no indication that the defendant incriminated herself by some kind of trickery on the part of Officer Luna or any other officer. Now, don't get me wrong, I think that officers should be reading "Miranda" every day of the week, and that's an incredibly important part of our criminal justice system.

But that does mean that every time that "Miranda" isn't read or is read later rather than sooner or is read too fast or too slow, that the

case automatically gets dismissed because there was no criminal conduct. What it means is that we have to carefully assess whether or not there was any misconduct and whether or not there was any information gleaned but directly related to the lack of a "Miranda" warning that brought the defendant in front of the car in the first place, and you just don't have that here.

There's no indication that if she had been read "Miranda," this would have gone in a different way or that if she had been read "Miranda," she would not have been intoxicated and behind the wheel. The facts of the case are the facts of the case, that she was intoxicated behind the wheel of this car and that Trooper Luna followed his procedures to remove her from the car, administer the field sobriety test, take her down to Henderson Detention Center, administer the breathalyzer test, and that's how we get here today in front of you, Your Honor, to discuss the criminal actions of the case.

THE COURT: Okay. Analyzing through this, as far as when Trooper Luna showed up, he's conducting his preliminary investigation. That's why everything is called "preliminary." The

"Miranda" is not triggered at that time when he's doing that. It shows, goes to show what he's going to do next as far as the investigation is concerned.

Now, here's the sticky part: Once he determines he's going to arrest her and then he takes her down to the department and performs the breath test, what is triggered? Yeah, I agree. Because in order if they don't consent, guess what happens now? The law has changed.

MR. MUELLER: Yes, sir.

THE COURT: It requires the issuance of a magistrate or a judge to take a look at the matter and make a determination on whether or not probable cause exists in order to administer the test. That's when it's triggered, right there, and that's what can be used.

Here, it's my understanding, correct me if I'm wrong, is that she consented -- that's my understanding of the testimony -- to the breath test and didn't resist or refuse to do either a breath or a blood test. At that point, had she done that and they did it anyway, 100 percent agree with you, the case would be dismissed if the "Miranda" Rights weren't done or if probable cause was not found through the efforts of reviewing the matter with a

magistrate or a judge and making a determination of whether or not probable cause existed.

But the fact that she had consented gets us into that factor that she was consenting to it. Because I do agree with you, Mr. Mueller, had she not consented and they had done that, we'd have a real big problem here based on the new standards of law that have recently come out.

When was that, about four years ago?

MR. MUELLER: The legislature, four or less. I think it was three.

THE COURT: Three years ago. Three years ago. So if that was the case, then I agree with Mr. Mueller. But my understanding is is that she consented; therefore, motion is denied at this time, unless I get additional information. If I do, I'll act upon it.

So we'll go ahead and move forward. So, Ms. Scheible, you can call your next witness.

MS. SCHEIBLE: I call Ms. Lanz to the stand. I'm not sure if she's arrived yet.

I'd like to renew my motion to have State's 1 and 2 admitted.

THE COURT: Before we go forward with that, Ms. Scheible has renewed her motion to have --

No. 1 has been admitted. But it's No. 2, I think, that has not been --

MS. SCHEIBLE: No. 2. Sorry. Your Honor.

MR. MUELLER: If we can have Ms. Lanz testify first.

THE COURT: Okay. That's fine.

MR. MUELLER: It might be a dead issue.

THE COURT: That would be fine.

(Witness sworn.)

THE WITNESS: I do.

THE CLERK: Thank you.

Can you state and spell your first and last name, please.

THE WITNESS: Sure. My name is Darby Lanz, D-A-R-B-Y, L-A-N-Z.

THE CLERK: Thank you.

MS. SCHEIBLE: I'm sorry, Your Honor.

THE COURT: You may proceed, Ms. Scheible.

MS. SCHEIBLE: If I could get these premarked. That would be three and four.

(Whereupon State's Exhibit Nos. 3 and 4 were marked for identification.)

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Thereupon --

DARBY LANZ,

having been first duly sworn to testify to the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SCHEIBLE:

Q. Ms. Lanz, where do you work?

A. I am a forensic scientist and forensic analyst of alcohol, with the Las Vegas Metropolitan Police Department's forensics laboratory.

Q. And what does your job entail?

A. I run the breath alcohol program for the southern half of Nevada, which means I manage 34 evidential instruments located throughout the four southernmost counties, as well as train officers on how to use them. I oversee their calibration and maintenance and then testify to any of the above.

Q. All right. And is that why you were called here today, if you know?

A. Yes.

MS. SCHEIBLE: And I'm showing defense counsel what's been marked as State's Exhibits 3 and 4, for the record.

BY MS. SCHEIBLE:

Q. Are you familiar with an evidentiary tool located in the Henderson Detention Center?

A. Yes. It's an Intoxilyzer 8000, evidential breath alcohol instrument, and its serial number is 80-006041.

Q. Fantastic. I am showing you what's been marked as State's Exhibit 1, which does that look like somebody used the Breathalyzer 8000 at Henderson Detention Center?

A. This is an Intoxilyzer Checklist that the officer is required to fill out when doing a breath test, and it does look like it is that instrument, yes.

Q. And does this look like -- I'm now showing you what's been marked as State's Exhibit 2, for the purpose of identification. Does that look like a printout from the Intoxilyzer 8000?

A. Yes, it is. And it is the same serial number on the instrument. And if I compare case numbers, it is from the same case.

Q. Okay. And do you know what date that Intoxilyzer was used or what date that test was done?

A. This test was performed on September 11th, 2018.

MS. SCHEIBLE: Are you done with those?

MR. MUELLER: Uh-huh.

BY MS. SCHEIBLE:

Q. And did I or someone from my office ask you to go back and pull the calibration records from this Intoxilyzer around that time?

A. Yes. I provided the calibration before and the calibration after.

Q. Okay. And I'm showing you what's --

If I may approach.

THE COURT: Yes. Did Mr. Mueller see it?

MR. MUELLER: Yes, I did, Your Honor.

THE COURT: Okay. Great.

BY MS. SCHEIBLE:

Q. I'm showing you what's been marked as State's Exhibit 3 and 4.

Can you tell the Court what those are.

A. Yes. State's Exhibit 3 is the Calibration Declaration from July 6th, 2018, for this instrument at Henderson Detention; and the second page of it is the Report of Gas Standard, which is the known concentration left with the instrument. So that is from July 6th, 2018.

And State's Exhibit 4 is for the same instrument, at the same location, on September 27th,

2018, and also accompanied by, again, the Report of Gas Standard for the standard, left with the instrument.

Q. Okay. And are you trained in reading those gas standards?

A. The gas standards, we purchase them from a certified manufacturer, but then we verify them at the laboratory and provide the Report of Gas Standard as a declaration to say, yes, this is the concentration and it is certified to be at .100.

Q. Okay. And is that what you did in this case?

A. Yes.

Q. So what does State's Exhibit 3 indicate about the gas standard?

A. Three and four are actually identical gas standards. It's the same lot number left both times. But what three and four both mention in the bottom paragraphs is, at the end of calibration, this gas standard was left with the instrument, and it's to show that it is operating properly.

Q. Okay. So fair to say the instrument was properly calibrated on July 6?

A. Yes.

Q. Properly calibrated on September 27th?

A. Yes.
Q. So in your opinion, was it properly calibrated on September 11th?
A. Yes. I don't have anything in my maintenance records to indicate any errors between the two calibration dates.
Q. Okay. So if the test was -- as the Intoxilyzer was properly calibrated, can you tell us what Exhibit 2 indicates to you?
A. Exhibit 2 is the printout from when the officer ran the test, and it does indicate a successfully completed test. I can go over everything that tells me that, if you want me to.
Q. I would like that very much.
A. Sure.
MS. SCHEIBLE: And I would also renew my motion to admit State's Exhibit 2.
THE COURT: Okay. We'll let Mr. Mueller make his cross-examination. Then I'll rule on the motion.
MS. SCHEIBLE: Okay. As long as you're okay with her testifying to the contents of it before it's been admitted.
THE COURT: That's fine.
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BY MS. SCHEIBLE:
Q. Okay. Then, please, go ahead.
A. The printout has all of the information for that test. It has the subject's data entry, which the officer enters either by scanning a driver's license or hand entering. It's got the location of the instrument, serial number of the instrument; who the operator was, which is the officer who ran the test. It indicates the start of the observation time, and when compared to the time of the first air blank, I need to see a minimum of 15 minutes. That is required by the checklist.
And then as that goes on, it does some diagnostics. It does air blanks before and after everything, and all of air blanks must have a zero alcohol reading. There are two tests that are required by the law. A pair of tests, two minutes apart, and they must agree within .020 or less, and these do. I can read the values, if you want me to, but I can refrain.
MS. SCHEIBLE: I would like to hear the values, Your Honor.
THE COURT: That's the finding?
MS. SCHEIBLE: Yes.
THE COURT: I'll tell you what, just to

make things simple, let's reserve on those because I've got a legitimate argument on the preliminary.
But let's let Mr. Mueller make his cross-examination, and then I'll let you do that on a brief cross. So let's hold off on that for right now.
THE WITNESS: That's fine.
And then it did also verify the standard test, which is the verification of the gas standard. It runs that before the subject's test. It must be a .100, plus or minus 10 percent. .100 is the certified value. The standard read at .101, well within that range. So between the pair, which is a valid test. At the bottom, it summarizes it and says it was a successfully completed test.
BY MS. SCHEIBLE:
Q. Okay. Can you tell us when that test was done.
A. The test was performed September 11th, 2018. The first air blank was at 0017 hours, and the test was completed by 0023 hours.
Q. Okay. And I just want -- sorry. I'm going to back-up just a little bit.
About your training and your experience, are you trained in running the diagnostics?

A. The diagnostics is automatic.
Q. Okay.
A. It automatically does that, but I do calibrate the instrument. We have a series of performance checks that we do after the calibration is complete. Plus I do maintenance on the instruments, if necessary, back at the laboratory.
Q. Okay. And what about the analysis of the actual alcohol content, is that something that you do as well?
A. The analysis is done by the instrument. So it's done when the officer runs the test.
Q. Okay. And would the same be true of a blood test as a breath test?
A. A blood test is performed by a scientist. So when collected in a DUI for blood, the blood is sent to the laboratory, and the scientist takes custody of it and performs the entire analysis.
Q. Okay.
A. Breath is different in the fact that I calibrate the instrument and then I leave it for the officers to run the test.
Q. Okay. And are you trained in running those tests of the blood samples as well?
A. Yes.

Q. Okay. And do you have some kind of knowledge and training in alcohol absorption?
A. Yes.
Q. And in alcohol impairment?
A. Yes.
Q. And do you know the legal limit for driving under the influence in Nevada?
A. We, per se, according to our law, is a .08. If it's in blood alcohol, it's grams per 100 milliliters of blood. If it's in breath, it is grams per 210 liters of breath.
Q. And in your training and experience, do you have some kind of, well, training on how you would expect somebody to act, perform, appear if they were at .08?
A. There is a list of guidelines. It does have crossover between. There's no set: At this level, they must act this way. But there's some suggestions or ideas of how people will act at different levels, yes.
Q. Okay. And do you have an idea of about what level somebody would completely incapacitated?
MR. MUELLER: Objection. Calls for speculation. She just said there's no strict guidelines.

THE COURT: Let's see "yes" or "no." Because I don't know. If it's a "no," then it would be speculation; but if it's a "yes," let's go from there.
THE WITNESS: It depends on the definition of "completely incapacitated." It's different between person, event, date, what they're drinking. It's really hard to put an exact number on "completely incapacitated."
THE COURT: Objection sustained.
BY MS. SCHEIBLE:
Q. Okay. Now, when somebody is ingesting alcohol, can you explain to the Court how their blood alcohol changes over time.
Does it go up? Does it go down? Does it do both?
A. As long as the person is consuming more alcohol than their body can metabolize and get rid of, their level will rise. How quickly that rises depends on quite a few different factors. Basic ones being full or empty stomach, what type of alcohol they're drinking and the rate at which they're drinking it.
It's really difficult to predict how quickly that will rise without knowing more

information. But as long as you're consuming more than you can metabolize, your level is going to rise. At your last drink, 30 minutes or so, you hit your peak, which is the highest you're going to be, and if you're no longer consuming, your level will then eliminate and drop.
Q. Okay. And about how long does it take to eliminate or drop?
A. There is some suggested standards out there. Studies have been shown that the average elimination rate is an .015 to an .018 per hour.
MS. SCHEIBLE: All right. I have no further questions.
THE COURT: Thank you, Ms. Scheible.
Mr. Mueller.

CROSS-EXAMINATION
BY MR. MUELLER:
Q. Ms. Lanz, nothing in this test here indicates that it was done with inside of two hours of someone driving or being in a car; correct?
A. As far as the breath test is concerned, that is not information that is on the printout.
Q. Now, two hours is the legal cutoff; correct?
A. It's one of the theories, yes. As long as

the result's within two hours.
Q. As long as within two hours.
Now, the reason we have two-hour limit is because people's alcohol level can change from the time they were first in contact with law enforcement and the levels go up or down depending; correct?
A. I'm not sure if that's the reason behind it. But yes, your statement about it going up or down since being detained is correct, yes.
Q. All right. So somebody's blood level printed out or breath level printed out doesn't necessarily reflect what the breath level was at the time they were driving if it's outside of two hours?
A. Correct. The printout says what it was at the time of the test.
Q. Right. Now, you are also a trainer for the police department and the highway patrol, do you not?
A. Every agency in the southern half of Nevada, yes.
Q. Okay. And so that's "yes," highway patrol and in the Henderson Police Department?
A. Yes. And many others.
Q. All right. So let me ask you a question, ma'am. If someone -- officer is supposed to do a 15-minute close visual observation; correct?

A. 15. Minimum 15 minutes, yes.
Q. 15 minutes. And that's actually on the checklist; right? I think it's State's 1?
A. Yes. On State 1, State's 1, the observation time period started at Step 3, and it says "Observed subject for minimum 15 minutes."
Q. And if someone weren't -- if a breath observation period weren't done in accordance with the checklist, what effect could that have on the printout of the breath strip?
A. The observation period is to help against, to safeguard against something called "mouth alcohol." Mouth alcohol is residual alcohol either from a recent drink or reintroduced to the subject's mouth if they are vomiting or something like that.
So the 15 minutes is to ensure that, for 15 minutes, nothing is put into the subject's mouth. They don't eat, drink, smoke, vomit, regurgitate, put any foreign objects in their mouth to allow for any alcohol in their mouth to completely dissipate. If an observation period is not completed, that mouth alcohol could, in fact, raise the limit, the value shown on the breath test.
Q. All right. And that means the breath test would not necessarily reflect the actual limit that

someone had or the actual amount of alcohol someone had in their system?
A. If it went undetected, it could falsely elevate it, yes.
Q. All right. Now, you also teach highway patrol officers and young officers to ask a series of questions, do you not?
A. It's not necessarily a series of questions. We tell them to check their mouth for foreign objects and to remove any removable dental work.
Q. All right. And do you also give them guidance on how to actually conduct investigations in the field?
A. As far as?
Q. Using the breath machine and the factors that would affect it?
A. Using the breath instrument, yes. We tell them to check their mouth, to remove any foreign objects or removable dental work; and then we instruct them to watch the subject for the minimum 15 minutes.
MR. MUELLER: All right. I have nothing further. Thank you, ma'am.
THE COURT: Thank you, Mr. Mueller.
Ms. Scheible.

MS. SCHEIBLE: I would, once again, like to renew my motion to admit State's 2, I think is still outstanding.
THE COURT: Two, three and four.
MS. SCHEIBLE: Two, three, and four, please.
MR. MUELLER: No objection to three and four. Four is irrelevant since it occurred after the date of the incident. But no objection. If she wants it, she can have it. Two --
(Reporter request.)
MR. MUELLER: Three and four are the calibration strips. Three is the one for 90-day period in question. Four is after the fact. So it's irrelevant. There's no need to admit it. But if she wants it, no objection.
No. 2, if we could have Ms. Lanz step down for a moment, I can address the Court on No. 2.
THE COURT: Sure. I'll tell you what. She can sit there, and we can go in the back. But let's make it clean so we're only focused on that.
MR. MUELLER: Sure.
THE COURT: So my understanding is three and four, no objections. You don't think it's relevant. But on top of that, no objections. Three

and four are hereby admitted. We'll step outside.
(Discussion off the record.)
(Whereupon State's Exhibit Nos. 3 and 4 were admitted into evidence.)
THE COURT: Back on record. Let's see, where were you?
MS. SCHEIBLE: Exhibit 2.
THE COURT: Exhibit 2.
MS. SCHEIBLE: Will he or won't he?
THE COURT: Mr. Mueller had an objection. You can go ahead and state that objection.
MR. MUELLER: My objection is, Judge, that it has not been established that the blood sample or breath sample here was taken within two hours, which is a definitional element of the crime charged.
THE COURT: Yes. Thank you.
And, Ms. Scheible.
MS. SCHEIBLE: The two-hour time limit is for per se intoxication. It doesn't matter whether or not it's taken within two hours, but that it is accurate and that is what the Intoxilyzer said at the time when it said it. That's all I'm trying to prove here is that this is the readout from the Intoxilyzer and that the Intoxilyzer was working properly at the time.

THE COURT: Okay. So at this time, Exhibit 2 is hereby admitted as well. So we've admitted Exhibits 1, 2, 3 and 4.

(Whereupon State's Exhibit Nos. 2 through 4 were admitted into evidence.)

MS. SCHEIBLE: Excellent.

THE COURT: So you can proceed.

MS. SCHEIBLE: Thank you.

REDIRECT EXAMINATION

BY MS. SCHEIBLE:

Q. I want to take a look at Exhibit No. 2.

So can you tell the Court what the readouts were on Exhibit No. 2?

A. Sure. There were two subject tests. The first one was a .161, and the second one was a .155.

Q. Okay. So tell us what that indicates to you.

A. There are two tests. The statute requires that they agree within .020 or less, which they do. We usually default to the lower of the two being the, quote-unquote, final answer. So that would be a .155. That it is a valid test, they were at least two minutes apart. I'm not sure what else --

Q. So at the time that this test was taken, the

subject who performed the test, participated in the test had a blood (sic) alcohol content of .155?

MR. MUELLER: "Breath" alcohol content.

MS. SCHEIBLE: I'm sorry. Thank you.

BY MS. SCHEIBLE:

Q. A breath alcohol content of .155?

A. Yes.

Q. Okay. And in your training and experience, if that had -- let's start with, within an hour. If the subject had had their last -- hold on.

I want to cut straight to the chase and ask you: If this test was done outside the two-hour window -- let's say it was three hours after the defendant had last been in control of a vehicle -- can you think of any scenario in which the defendant could have had a blood alcohol content below .08 three hours ago, not consumed anymore alcohol, and then end up with a .155 at time of the test?

MR. MUELLER: Objection. Calls for speculation. Also, this issue was litigated up in Nevada Supreme Court, "State of Nevada vs. Bobby Armstrong." Extrapolation has to be done by a toxicologist, not by Ms. Lanz, who I love to death, think the world of, but is not qualified to talk about back extrapolation.

THE COURT: Any response?

MS. SCHEIBLE: I think that's up to Your Honor whether you'll accept her testimony as to the extrapolation.

MR. MUELLER: Actually, a toxicologist is required. I've done a number of these. A toxicologist is what is required to go back to the back extrapolation. There's about seven or eight factors on the checklist that a toxicologist is supposed to review; and there's also a case called "Peptis," "State of Nevada vs. Peptis," which just came to my mind, also talks about back extrapolation. She's not qualified to go back, and my colleague is asking her to venture opinions far beyond her expertise at this moment. This is the --

THE COURT: Let's lay a foundation.

BY MS. SCHEIBLE:

Q. Are you trained in the science of breath alcohol content?

A. Yes, I am.

Q. Can you explain to us what kind of training you had.

A. I have been through numerous internal and external trainings. I started with Metro's forensics lab in 2010. I was first trained in blood

alcohol; and then following that training, I was trained in breath alcohol. I've been certified as a forensic scientist -- well, forensic scientist and forensic analyst of alcohol since January of 2011.

The forensic analyst of alcohol is required to recertify every two years, which I have done, to be still currently certified. Part of our training is back extrapolation, retrograde extrapolation, Widmark. All of that does fall under our training, and our laboratory certifies us as in being able to perform it. I can't speak to the law.

I don't know if what he's saying is correct or not. But our laboratory does say anyone who does the alcohol analysis and blood alcohol, and which carries over into breath, is trained on how to do the back extrapolation.

THE COURT: Thank you.

MS. SCHEIBLE: May I proceed?

THE COURT: Yes.

MR. MUELLER: Your Honor, respectfully, there's a case directly on point. "State of Nevada vs. Bobby Armstrong." Supreme Court upheld the refusing to allow one-point back extrapolation, which is exactly what my colleague is attempting to do here.

THE COURT: I understand that. We can go ahead and have another sidebar outside.
MS. SCHEIBLE: Okay.
THE COURT: Tell you what I'm going to do.
(Bench conference outside the courtroom.)
THE COURT: So, Ms. Scheible, we were with you. You can go ahead and proceed.
MR. MUELLER: And, for the record, just so there's an objection on the record.
THE COURT: Yes.
MR. MUELLER: Thank you.
BY MS. SCHEIBLE:
Q. I want to repeat my question which is, is there any way that somebody with three hours after consuming their last drink can have a blood alcohol content of .155 and not have had a blood alcohol content of over -- I'm sorry -- breath alcohol content of over .08 when they had their last drink?
A. The only way that would be possible is if they drank a large amount of alcohol and then were pulled over immediately thereafter. So the alcohol would still be in their stomach and not absorbed into their system yet. So they could still be below the legal per se, and then while in custody for whatever amount of time, since it takes 30 to

90 minutes for alcohol to be absorbed, if they hadn't absorbed it yet and then in custody absorbed to that quantity to get to the peak and then to start eliminating whatever time frame later, that would be the way. They would had to have been consuming it right before the stop or immediately preceding it.
Q. Okay. So if somebody was, let's just use easy timeframes, if someone was pulled over at midnight and their blood alcohol -- breath alcohol content was .07, then you're saying that if they had just finished a fifth, that their blood alcohol or their breath alcohol continued to rise after that time and then continued and then started falling after that time?
A. Absolutely. If they have alcohol that they just consumed. So it's still being held in their stomach. Alcohol is absorbed mainly through the upper intestine. That's where it's easiest and best absorbed. So if there is -- like I mentioned earlier, absorption varies based on food. If they had dinner and then drank, the alcohol would take longer to get into the system because there would be food in the way and absorbing something. So that's why it's hard to anticipate an absorption rate.

But if they had drank -- an entire fifth wouldn't be necessary, like you mentioned -- but a quantity of alcohol, while it was still in their stomach and then were pulled over, that's not affecting them yet. They would have it in their stomach and then if kept roadside say three hours or whatever the transport time was, three hours is plenty of time for all of that to be consumed or to be absorbed, and you'd hit your peak and start to eliminate since you're no longer consuming alcohol.
Q. Okay.
A. So a three-hour time frame, with that specific scenario, is possible.
Q. So you could end up with still .155 at the end of the three hours?
A. Absolutely. It all depends on how much we're talking and the height, the weight, the gender, a bunch of information like that because it's all based on -- the math I would use is based on studies and standards that are out there. It's all an estimate.
Q. Okay. What about after the first signs of intoxication or the first signs of impairment?
Is there science on that?
A. As far as?

Q. Whether alcohol, breath alcohol, is rising? Falling?
A. With the first signs of impairment, there's no way to know where they're at on the up or the down. The signs of impairment that officers are trained to look for just indicate impairment due to a depressant, which is alcohol in this situation. They can't tell if they're on the way up, on the way down, at what point in the event of drinking they're at. They're just looking for impairment signs.
Q. Okay. And at what level does a person normally become impaired?
Is there a science on it, or does it depend?
A. There's a -- Kurt Dubowski has this famous chart, but it's ranges. Between an .02 to .04, they might exhibit these symptoms, but then those are also exhibited by people in the .05 to .08 range, depending on how often you drink, what your personal tolerance of alcohol is. There's no exact number.
That's why a lot of studies have gone into play where most people pick the .08 as the per se level for legal purposes. But there isn't a hard and fast, that's it, you're impaired number.
MS. SCHEIBLE: Okay. I don't have any further questions.

THE COURT: Thank you, Ms. Scheible.
Mr. Mueller.
MR. MUELLER: No, Your Honor. I don't have further questions.
THE COURT: Thank you. Appreciate your testimony. Thank you for coming down.
THE WITNESS: Do you want me to stay, or am I free to go?
THE COURT: It's up to the State and/or Mr. Mueller. I don't know if Mr. Mueller is going to re-call or if the State --
MR. MUELLER: Is the State going to rest?
THE COURT: I don't know.
MS. SCHEIBLE: Yes.
THE COURT: Yes.
MS. SCHEIBLE: They are.
THE COURT: Yes.
THE WITNESS: I can stay. I just wanted to check.
MR. MUELLER: Oh, I just wasn't clear if she was done. Don't take it personally.
Yes, if you could stay.
THE WITNESS: Sure.
THE COURT: Wonderful. Thank you. I appreciate that. Thank you very much.

So my understanding, Ms. Scheible, is the State rests at this time.
MS. SCHEIBLE: That's correct, Your Honor.
THE COURT: Okay. And, Mr. Mueller, as we stated before, we were reserving opening arguments.
If you'd like to make those or if you'd like to just go ahead and call your witnesses, if you're calling any.
MR. MUELLER: May consider it. Just a moment. Did you want to take a recess and go read that "Bobby Armstrong" case?
THE COURT: Well, let's get through this, and then we'll get there.
MR. MUELLER: I'll make a very, very brief opening, Judge. Respectfully, Judge, this case is a not guilty finding. Specifically, the eyewitness who saw, allegedly saw, Ms. Plumlee driving can't identify her, doesn't recognize her in court. Says that she -- he had been drinking. He was markedly evasive.
Even for a criminal defense lawyer, he was evasive as to what time he arrived at the casino, how much he had to drink, what he had to drink, and what time anything happened. When I asked him what time this happened, he couldn't testify within even

an hour, 10:00, 11:00, 8:00, 9:00. He doesn't know, which means we have a two-hour violation, clean away.
We do not have an under-the-influence case, and what you're going to hear from my expert witness is that back extrapolation with one point is scientifically not plausible. With that, I'd like to call, re-call Ms. Lanz.
THE COURT: Yes.
(Pause in the proceedings.)
THE COURT: Thank you for coming back.
THE WITNESS: No problem.
THE COURT: And she has been sworn and under oath. Everybody's satisfied that that suffices at this point?
MR. MUELLER: Yes, Judge.
THE COURT: Understand that you're still under oath.
THE WITNESS: Okay.
THE COURT: Great. Thank you so much.

RECROSS-EXAMINATION

BY MR. MUELLER:

Q. Ms. Lanz, I'm familiar with your qualifications, but I want to ask you some questions

here. You're not a physician; correct?
A. Correct.
Q. You're not trained as a toxicologist physician?
A. Doctorate in toxicology, no.
Q. All right. You would agree there is a field such as that, someone who actually studies the effects of the intoxicants or, for that matter, poisonings on victims; correct?
A. Yes.
Q. And that's generally done by someone with a medical degree or higher level of education; correct?
A. People do have Master's in toxicology, but yes.
Q. Okay. Now, simple high school or eighth grade geometry, it takes two points to create a line; correct?
A. Correct.
Q. All right. Now, a few moments ago, my colleague was trying to get you to extrapolate or ask you about extrapolation. But you only have one reference point, which is a test of a .15 at some period of time; correct?
A. Correct.
Q. So with only one data point, you don't know

if the curve is going up or the curve going is down; correct?

A. Correct.

Q. And without anymore scientific information, it is scientifically impossible to go back in time with that only one data point?

A. It's not impossible, but there are a lot of qualifying remarks to go through, which I state my assumptions that I assume numerous things, and it could be done. But it's all based on assumptions and estimates, yes.

Q. And you would have to have that data ahead of time to actually do a workup?

A. It would be appreciated. I could do it here, but I would ask for a break with the information to do the math.

Q. All right. Now, let me ask you a couple questions, ma'am. One point determines a line. One point is a -- one data set is a point.

Two points are a line; correct?

A. Correct.

Q. Now, alcohol absorption can be going up or be going down if you have only one data point?

A. Correct.

MR. MUELLER: All right. I'd like the

Court's indulgence for just a moment.

THE COURT: Sure.

MR. MUELLER: I have nothing further.

THE COURT: Thank you. Ms. Scheible.

MS. SCHEIBLE: Nothing.

THE COURT: Thank you. Thank you for coming back. You are now free to go.

THE WITNESS: Thank you. Free to go officially or wait in the hallway?

MR. MUELLER: No.

THE COURT: I think everybody's done.

THE WITNESS: Okay. Thank you.

THE COURT: Thank you so much. Appreciate you coming down.

MR. MUELLER: Thank you, Your Honor.

Having consulted with Ms. Plumlee, I've re-admonished her, re-advised her that she has a right to testify, a right to remain silent. On advice of counsel, she's going to remain silent.

With that, defense rests.

THE COURT: Wonderful. Thank you, Mr. Mueller. Ms. Scheible, any redirect?

MS. SCHEIBLE: Oh. No.

THE COURT: Thank you. Any redirect?

MR. MUELLER: No, Your Honor.

THE COURT: Okay. Ms. Scheible.

MS. SCHEIBLE: Thank you.

The State's burden here is to prove that defendant failed to stay in her lane and drove under the influence, beyond a reasonable doubt. And I know that you have been in this courtroom the same length of time today that I have, listening to the testimony explaining all the various factors, all the various ways that we can try, try to determine somebody's state of mind, somebody's breath alcohol content at the time that they are behind the wheel.

But the most instructive thing we can have, that we can see, that we can find is actual evidence of impairment, and that's what Joseph Risco testified to at the very beginning of this case. He witnessed the defendant drive her car --

MR. MUELLER: Objection.

MS. SCHEIBLE: -- over a --

MR. MUELLER: Objection. That's not the testimony. He couldn't identify her. He never said that was her.

THE COURT: That is correct.

MS. SCHEIBLE: All right. I think that the State has proven, beyond a reasonable doubt, that the person in the car that drove over the median and

smashed into a light pole is the same car that was pulled over on the side of 215, by Henderson officers and then by responding NHP officers, and the person in that car was the defendant.

Our obligation here is to prove it beyond a reasonable doubt, and if there was any doubt about it, then there would have -- then we'd be in a different position. That's not the case here. I don't think and it's the State's position that Your Honor should not have any doubt as to whether or not the car that Mr. Risco observed and the car that the defendant was driving are one in the same because he had his eyes on it the whole time. He testified on cross-examination that he was coming home from the Green Valley Ranch Casino around 10:00 or 11:00 p.m., which is just about the time that the defendant was stopped.

He was very clear about what he saw while he was driving his car. He saw somebody driving erratically, who he was afraid of and who he thought was endangering his safety and the safety of others. Specifically, that person exhibited the signs of intoxication, namely: Driving over a median, stopping in the middle of an intersection, running into a light pole, running into the pole multiple

times, continuing to press the gas pedal, getting out of her car and falling to the ground and then leaving that scene.

That is all you need to be assured of conviction in this case, to know beyond a reasonable doubt that this individual was intoxicated and she was behind the wheel of a car. But, of course, we don't come in here with just the bare minimum. The State has met its obligation; and the troopers in this case, the police officers in this case, did a thorough investigation to ensure that they were making the right call.

That investigation included Trooper Luna responding to the scene, getting the defendant out of the car, having her do a field sobriety test; having her do a preliminary breath test, which indicated that her breath alcohol level was over .08.

MR. MUELLER: Objection.

MS. SCHEIBLE: It included taking her down to the Henderson Detention Center, where he had her do an Intoxilyzer exam, where she breathed into the larger machine here at the Henderson Detention Center and where her readout was, once again, over .08. She was blowing a .155 by the time she got to the Henderson Detention Center. When you couple

that with what the witnesses actually saw, a person crashing her own car into a light post, driving --

MR. MUELLER: Once again, objection. There's no testimony that that person in the car was this person. He never saw her, didn't identify her. She keeps forgetting that.

THE COURT: The first witness.

MR. MUELLER: Yes.

THE COURT: Okay. You can go ahead and proceed based on what Mr. Mueller said.

MS. SCHEIBLE: It's the State's position that that was the defendant and that is what the witness saw. He might not know her name. He might not know her face, but he certainly knows what he saw.

He was very honest with us about being several feet away -- 20, 30 feet away. He could tell that the person was a woman. She was wearing a dress. Her hair looked like woman's hair. But he couldn't see her face because (a), it was dark; and (b), he was just too far away, just like I can't see the face of somebody who is outside the doors right now because they're too far away, even if I could see through the window.

So we know that this is the same person and

that once she crashed her car, she thought that she was still going eastbound on the 215. She repeated twice to Officer Luna that she was going eastbound on the 215 when, in fact, she was headed westbound. She's simply impaired behind the wheel, and there is no reasonable doubt as to it.

The State is not trying to do any kind of mental gymnastics to make this Court believe that the breathalyzer test was done within two hours. It wasn't. It was most likely within three hours. We don't know exactly when it was per- -- we know exactly when it was performed. We don't know exactly when she stopped operating her vehicle because it doesn't matter.

Because when the margins are this wide, there's no question that the person who just ran into a pole, went westbound on the 215 convinced that she was going eastbound, and has a blood -- breath alcohol content of .115 at 17 minutes after midnight was definitely intoxicated just hours previously, just minutes previously when she was behind the wheel of that car, causing those accidents and endangering all of those people.

If the margins were smaller, then we would have a debate here. Then we would have some

argument. Then we would have some questions. But in this case, the margins are huge. She was not just intoxicated. She was very intoxicated at the time that she crashed her car, at the time that she was stopped, and she was still very intoxicated by the time that she got to the Henderson Detention Center.

I'll point out, also, that when we talked to Ms. Lanz on the stand about extrapolation, we spoke in generalities because nobody has taken the time in this case to extrapolate exactly what the defendant's blood alcohol content would have been at the time that she was stopped because it doesn't matter. The breath alcohol content is simply confirmation of what we already know, that she's drunk behind the wheel.

So you don't have to accept that the test was taken within two hours because it wasn't. You don't have to accept that the preliminary breath test is good because it's preliminary. You don't even have to accept that the Intoxilyzer was utilized that day. All you have to accept is that we have one, two, three, four, five different factors that indicate that she was drunk behind the wheel.

The actual signs of impairment, like crashing the car; the actual signs of impairment, like falling out of the car when it ultimately stopped; the preliminary breath test, the actual breath test; in addition to her believing that she was headed eastbound when she was actually headed westbound. Everything in this case points to an intoxicated person behind the wheel, and to suggest anything otherwise is not reasonable doubt. That is either unreasonable doubt or legal technicalities, legal technicalities that don't matter in this case.

It would be a completely different story if I were standing up here arguing to you that: She was per se drunk, per se driving under the influence of alcohol, convict her based solely on that breath test; but that's not what I'm arguing. I'm arguing that the breath test supports my position, not that it clenches it, not that it is the end-all, be-all of proving that this crime occurred, but that it supports my position that it indicates the suspicion that that witness had and that he might not have said on the stand that there was something wrong with this driver was accurate.

MR. MUELLER: Objection. Speculation as to what the witness thought. That's inappropriate

argument, Judge. Objection.

MS. SCHEIBLE: It's perfectly fine for argument. But I don't need to go on much longer, Your Honor, because I think I've been perfectly clear that the issue is whether or not she was driving under the influence and failing to maintain her lane, beyond a reasonable doubt, and the State's proven it beyond a reasonable doubt.

THE COURT: Wonderful. Thank you, Ms. Scheible. Appreciate your representations.

Mr. Mueller.

MR. MUELLER: Law, logic, and science are Old Testament studies. Lots of rules, no forgiveness. Now, here's what the State has to do here, and they failed on all three counts:

No. 1, they have to prove that she was too intoxicated to drive safely. The objective evidence that Trooper Luna has presented to you today was she was sitting behind the wheel and had food in the car and did not smell of liquor when he approached the window. He didn't see her driving, couldn't name a highway patrol officer or a trooper that had seen her driving. That's the evidence.

We have a gentleman, to a reasonable inference, probably had a good buzz going himself

from the sound of it. He was just --

MS. SCHEIBLE: Objection. It's argumentative. It's speculative, and it's not consistent with testimony.

MR. MUELLER: He was completely consistent. He admitted that he had been in the casino for a number of hours and had a couple of drinks.

Now, he didn't identify anybody at the scene. He didn't get out of his car to go to the scene. He didn't -- the person whoever was involved in this accident. Now, here's the fascinating -- I want to stay on point for a minute. So we don't have an under-the-influence case. We don't have field sobriety tests. We don't have a one-leg stand.

We don't have interviews. "How many did you have?" Like four Margaritas. Okay. That's a problem. We don't have "Where are you coming from?" We don't have that. We don't have "Where were you going?" We don't have how much you had to drink. We don't know any of this. The trooper didn't testify to any of that.

I specifically asked him, there's a standardized field sobriety form checklist that you're supposed to sit there with a clipboard and go

through that. He didn't do any of that. We've got a woman behind the wheel, pulled over for some unknown reason, by some unknown officer. Then we have another vignette where Mr. Risco thinks he sees the same car.

Well, the record doesn't even reflect the license plate is the same. In fact, if Mr. Risco were to tell you the truth, that car smashed into the light pole. The trooper doesn't even see enough damage to bother taking a picture of it. It raises a reasonable inference was it even the same car. Now, Your Honor, this is the evidence that's been produced.

THE COURT: I'm going stop you right there, and we're going to have a sidebar real quick.

(Bench conference.)

MR. MUELLER: Now, my colleague is asking and is leading the Court astray on a couple of very key point. Her argument is: Well, we had a .16 that we think at about three hours; therefore, she had to have been over the limit before that time. That's wrong. That issue has been litigated all the way up to the Nevada Supreme Court, "State of Nevada vs. Bobby Armstrong." I litigated it, drafted the brief, won the case.

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One-point extrapolation is not scientifically valid and cannot be done. If it were within two hours and two seconds, okay, maybe. But that's not what we have here. Ms. Lanz was asked: "What factors would you need to successfully go back for one-point extrapolation?" She gave a whole laundry list of things, none of which has actually been done.

Now, this case has not been made. Whether there was a case here that could be made is not even -- doesn't even suggest itself. I've got two vignettes, nobody tying them together. Where was Henderson police officers; who flagged her down; how do we know it's the same car? I'm puzzled. Actually, kind of dumbfounded because I don't know how this happens.

You hit a light pole and then you drive off. Then highway patrol trooper sees your car and doesn't even take pictures of the damage. I mean, if we had a license plate or even a make or model of the car. If you go back and put this record together, they haven't identified the car, the model, the make, or the year, let alone the license plate. No one asked her "Were you driving earlier?" No one asked -- I mean none of this. This record is

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completely barren.

Now, my colleague lacks -- or her enthusiasm is commendable, but it's going to mislead -- it's misleading because it overpromises the evidence. What do we have? Luna says: I arrived. I see a woman. I don't read her the "Miranda." She doesn't smell of liquor. I get her out of the car. I do smell liquor. I do an HGN, and I take her down. That's the case.

He doesn't tie the two instances together. He doesn't get a license plate number. He doesn't get any eyewitness statements. He can't even establish what time he got there. That's the state of the evidence. Without a two -- with no two hours, that goes away. The per se violation, you can't use it. Her enthusiasm together to say that leaves us standing alone.

And pardon the pun, but we're standing alone, and the State is asking you, without any admissions of drinking, without any independent eyewitnesses, they want you to convict her literally on an HGN. That is the objective piece of evidence that she's standing here on, and it's not enough. So I'd ask for a finding of not guilty across the board, Judge.

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THE COURT: Thank you, Mr. Mueller.

Now, let's have a discussion out here because I misunderstood something, but we'll see if it's necessary for me to go through that case. I'm not sure if it is, at this point, but let's see. Let's talk about it out here real quick.

(Bench conference outside the courtroom.)

THE COURT: Are we all ready? Let me just get a few things clarified on the record because I want to make sure this is absolutely clear.

In the confusion that we were trying to clear up at sidebar in the hall was, it's now clear to me that the State is not proceeding on the per se violation; is that correct?

MS. SCHEIBLE: That's correct, Your Honor.

THE COURT: Only on the impairment.

MS. SCHEIBLE: That's correct.

THE COURT: Okay. So based on that, that's going to be the limit of my consideration on this particular matter here today. So the per se is gone. So let me go back and review through my notes and see what we've got and see if that burden has been met with the communications that we had at sidebar.

MR. MUELLER: I'm going to accept the

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Court's invitation to step out for a minute.

THE COURT: Oh, absolutely. Absolutely.

(Pause in the proceedings.)

THE COURT: Let me just check. Ms. Scheible and Mr. Mueller, my recollection was that -- "Mr. Risco"; is that right?

MS. SCHEIBLE: Uh-huh.

THE COURT: That his testimony was that he saw her get out of the car and fail.

MR. MUELLER: No, sir. He saw somebody get out of the car.

THE COURT: Correct. "Somebody."

MR. MUELLER: He did not identify her.

THE COURT: Right. I was going to go back to the transcript and see if that was part of his testimony.

MS. SCHEIBLE: Sure. He's also still here if you'd like to ask him any questions.

THE COURT: And when he said "her," that could have been any female.

MS. SCHEIBLE: Right.

THE COURT: Because he couldn't identify her. We'll make sure that's clear. I do understand that. That is correct, Mr. Mueller.

If we all agree that that was part of his

testimony, then I don't need to look back at the record. If we don't, then I'm going to look back at the record and see what his testimony said. That was my recollection.

MS. SCHEIBLE: Oh, I understand now, your question. I agree that that was part of the testimony.

THE COURT: Okay. You ready?

I understand this case has been going on for a long time. We've taken quite a bit of time, a considerable amount of time looking into the issues here, and I'll be honest with you, I appreciate that. It doesn't matter to me how long it takes as long as we get it right, and we're trying to do that. Understanding we're not perfect, but we do everything we can to be as perfect as we can.

And, Mr. Mueller, I really appreciate your representations on your client. You represent your client very well, and you've done a great and outstanding job here.

Ms. Scheible, I appreciate your representation of your client as well. And as well, you've done an outstanding and great job here. I can tell you that, on an implied basis, we're not there. But on an impairment theory, I do believe

that the State has met its burden of proof.

And let me go through that so that you have that, that we had the Witness Risco, Mr. Risco, observe what was going on. The car went through a red light. The car jumped the median. He had testified that it appeared that the car was traveling against traffic and it hit a light pole.

He testified that the vehicle that he witnessed was a black sedan. He testified that the person who got out of the car had hair that resembled that of a woman's hair, was wearing a dress, resembling that it was a female driver. And a point of clarification, when he observed and witnessed the individual getting out of the car, he witnessed the individual falling down.

Now, we come with the other argument saying, well -- and we discussed this a little bit in the hall -- that people do hit poles that aren't under the influence, and I've had that happen a couple of times in my own neighborhood; and I can tell you, depending upon how hard you hit that, that both people in my neighborhood unfortunately were killed because the impact was so hard in hitting the pole.

Both poles actually fell on top of, one on

the vehicle -- it was a Toyota truck, I believe -- and it smashed the roof in and smashed the driver in the head, and it killed him. And the other one was a motorcycle, and the same thing. The pole fell on him and killed him. It was not really from the impact. But if you hit a pole and you're in an accident, you're going to get out, and you might stumble even though you're not in under the influence because you've got a head trauma, head injury. But that isn't the end of the story here.

We have the totality of the circumstances that are ongoing here, and that's the issue. I agree that Mr. Risco did not identify the defendant, Ms. Plumlee, directly. And he was here, and he said he couldn't point to her and identify her as the person that was in the car. However, we can't ignore the testimony that we did get, and that was that Mr. Risco observed what he observed, which we already stated on the record.

He dialed 911. Law enforcement was there within a very short period of time, it appears to me, and we have an ongoing chain of events, without any break in -- I guess we call it "custody of events on the totality of the circumstances." The officers testified and did point out here in court,

Ms. Plumlee was the person that they investigated.

They pointed out that it was a black sedan, and they pointed out that it was a female that was in that car. The chain of events were ongoing and continuous. I don't think there's any doubt who was in that car and who was driving that vehicle and what vehicle that was at that point. You can't ignore that. Then they had the subsequent test that continued from there. And Trooper Luna did testify that they did do the horizontal-gaze nystagmus test, and six out of six clues were discovered.

And based on that, I agree with you, Mr. Mueller, independent of one another, I don't think that we can jump to that conclusion. But with the totality of the circumstances, with the unbroken chain of events that occurred throughout this time, that there is enough evidence there, and the State has met its burden that Ms. Plumlee was impaired, operating a vehicle.

Now, in saying that, I've discussed with you my feelings on that situation, and I can tell you normally, I prefer to do a sentencing portion after the trial; and I know that, Ms. Scheible, you, kind of said, "Well, no, that" -- and I agree with you it's up to me to determine that. Normally I do

do it that way. However, based on what we've got here and what we're looking at --

And, Mr. Mueller, I know originally, you were saying, "Well, that might be a separate hearing." And to be honest with you, when you spoke, I'm sitting here thinking I'm really not sure because I don't know if we're going to even have one or not because if I find Ms. Plumlee not guilty, of course it's over with, it's done. So we might not need another one, but if we do, it might be today and it might be at a future time.

And so, Mr. Mueller -- and then I made the statement, "Well, I'll make that determination." But based on the findings and based on your representations that you made here, Mr. Mueller, guess what, I'll let you make that determination.

Would you like to continue this, at this point, for the sentencing portion? If so, I'll honor your request. If not --

MR. MUELLER: It's my understanding of the statute, Judge, that as a DUI, second offense, you have to order an alcohol evaluation before we go to a formal sentencing.

THE COURT: Okay.

MR. MUELLER: Having said that, these

conditions, this situation is a little bit different than most. She is actually due to graduate from a year-long minor offenders program down in Las Vegas Justice Court on the 15th of November. So maybe if we could -- I'll get it, see if I can find the evaluation for that incident and then bring it to the court. Save her a few dollars.

My client single mother of four. She's had a tough patch here. She's gone a year down at the program; and so you know, she's going to two group sessions a week. She's had one counseling session individually per week. She's going to AA two times per week. Every morning, she's got random U.A.s and breathalyzers for the car. And she has to report over in Las Vegas Justice Court, I believe it's Sciscento -- Judge Sciscento?

THE DEFENDANT: Sciscento, yeah.

MR. MUELLER: She's in 100 percent compliance. Never been called over to address anything with her, and I just delivered a status letter from Tom Stewart to the program coordinator on the supervising judge about a month ago on that. In fact, less than a month ago. A couple weeks ago.

So if we could just set sentencing over, I'll get an evaluation in accordance with the

statute, and we set sentencing over 15th or 16th of November?

THE DEFENDANT: I graduate the 15th.

MR. MUELLER: Yes, I know.

THE COURT: We'll go beyond that.

But let me let -- Ms. Scheible, you've been patient, and I didn't understand those things previously. But now that Mr. Mueller has given us that information, I do have a few more things to say. But let's let you have your representation.

MS. SCHEIBLE: Yeah, well, first, I think he indicated that he wanted to bring in the same evaluation from the previous event, to which I absolutely object. She needs a new alcohol evaluation for a new case, and for a conviction a year later, I think it's important that we have an up-to-date alcohol evaluation in this case.

Second of all, I appreciate that she's been working hard and doing well in her moderate offenders program, but I would not be surprised if a new DUI conviction would affect her ability to graduate in November.

THE COURT: Okay. So here's what we -- Mr. Mueller, I'm going to see what's going to happen on that.

MR. MUELLER: Okay.

THE COURT: So we're going to go outside that November date. The 15th was --

MR. MUELLER: She's scheduled to graduate the 15th of November.

THE CLERK: Our next day would be the 19th.

THE COURT: Yeah, let's go out a little --

You want a little bit more time than then, than that; right? You want to go out the first week of December, or do you want to go the last week of -- I don't want to get that far into Thanksgiving.

MR. MUELLER: 19th of November will work, Judge.

THE COURT: Okay. Let's do 19th of November. And in doing that, you know, now that I've gone through the trial, and now that I've made my ruling, our concern, Ms. Plumlee, is you and the safety of our community. And it's critically important that you comply with these counseling agencies. With what Mr. Mueller has said, I can tell you it helps me in making a determination on what I'm going to finally do at the end here.

In my opinion, there's a problem here. You've got to fix it for your own well being. There is no question you have to fix it. You cannot do it

on your own.

THE DEFENDANT: I've been in the program a year, and I've never had any failed U.A.s, no nothing wrong. I have complied with every single thing. I have not had a drink in over a year and two months. So I've only done what I can do until today. So going forward, I'm not drinking. I don't plan to drink. I'm a single mom that takes care of two kids in college and two teenagers in high school. We've had a bout of a rough patch. My daughter's boyfriend died on October 1st. So we've had a lot of things we were going through. But and I haven't even drank at all in over a year, so.

THE COURT: Okay. Well, and that's really important because some people can regulate, and some people can't. We're all different.

THE DEFENDANT: Correct.

THE COURT: It appears here that you're one that can't, and there's some things that I can do and can't do, myself personally. And those things that cause me trouble, I don't allow them in my home. Legally, even though they're legal things that I can have and do, I don't want them.

I don't want to overeat. You know what, one of my biggest weaknesses? I can tell you I

don't drink alcohol, but I love soda pop. And I could use this as an analogy because soda pop is not good for you. Soda pop creates health issues. But, for me, I can tell you, once I start drinking soda pop, I can't stop. I really like it. But guess what? Within a month on or two, I gain a lot of weight. And I feel very uncomfortable, and I don't feel good.

So guess what I do as a result? It's easy. I tell everybody, "There's no soda pop allowed in my house." So guess what's happened as a result? My two boys, they've said, "Hey, you know what, dad said that soda pop is not good." They're older now, much older. And at an early age, they said to themselves: Dad thinks that soda pop's not really good.

And to say I don't ever drink it, I do still. But if I go to the grocery store and I buy soda pop and I have it in my house, guess what? I'm going to drink it until it's gone. And I do the same thing with cashew peanuts. My mother buys them all the time. But guess what, I can't regulate myself. I can't do it. And I eat a five-pound thing of cashews one day because my wife thought "I'm going to be nice to him get him these for

Christmas." And I said "Don't do that, please."

I can't stay away from it. I can't. My mother buys them, and every time I go there, she knows how much I love them. I'll eat a handful at her house, and then she'll say, "Oh, just take the whole thing." I'm like "No, no." Because I know what's going to happen. If I take that home, the whole thing will be gone tomorrow. So much easier for me not to be around it and not have it around myself and not have it in my home. I don't.

So I don't buy soda pop. My kids, we'll go back to that, my two boys, it's about 15 years now, and neither of them have ever had a drink of soda pop of any kind. They don't -- they saw how big I got as a result of not being able to control it, and they heard about the health issues involved in soda pop. So they just don't drink it. So it's a good thing.

So it's not just for you too because that's in your best interest; it's for all of us too, and I can tell you thank goodness nobody was hurt, seriously. Thank goodness. That's not going to always be the case if we can't regulate that, and we see that every week. We see that every week. The odds aren't really good, and when somebody gets hurt

or dies as a result of it, we all lose.

We all lose forever because, one, you have to live with the thought of what's occurred, if you're the survivor; and the other side has to live with the thoughts of not having that loved one that they care about. Think about your own kids and not having them around for something that they didn't do wrong; or the reverse, you're gone.

THE DEFENDANT: I don't drink anymore, and I won't drink anymore.

THE COURT: You can't.

THE DEFENDANT: I won't.

THE COURT: You can't.

THE DEFENDANT: I won't.

THE COURT: You can't. Because there's too many risks involved. And in conclusion, just, you know, let's say -- the first example I gave you is you walk out okay, but somebody else is hurt, you've got to live with that. That's awful. But that family has to too. So second scenario is you don't walk away from it; you're not around anymore. You have two kids.

THE DEFENDANT: I have four.

THE COURT: Four kids. What do you think the impact is going to be on them?

THE DEFENDANT: I'm aware, which is why I'll never drink again.
THE COURT: Ever.
THE DEFENDANT: I agree.
THE COURT: Ever. Aside from the legality of the issues here, Mr. Mueller will advise you, you don't want anymore because the penalties from here on, in my opinion, are pretty severe. You don't want to have to face that. You want to do whatever you have to do to fix the problem. And I discussed that with Ms. Scheible and Mr. Mueller back here. We want to fix the problem. We don't want anybody hurt. You just got to fix it.
THE DEFENDANT: I've been working on it for a year, and so far, that's how long I've had, so.
MR. MUELLER: All right. Judge, we'll see that she gets the evaluation, Judge, and we'll see you the next time.
THE COURT: It's got to be a lifetime. It's got to be a lifetime, and it's a daily battle, but you've got to have that for a lifetime. It's important.
THE DEFENDANT: Yes, sir.
THE COURT: So I'll tell you what, we'll go ahead and do the sentencing.

And, Mr. Mueller, you can provide me with those records. But I'd love if you could give those to Ms. Scheible before we see what's going to happen because I know you're going to show me what's happened and what she's done. That's what I'm looking at as far as sentencing is concerned and where we're at.
It's a little bit of a different situation now after my findings.
MS. SCHEIBLE: Okay.
MR. MUELLER: Thank you, Your Honor.
MS. SCHEIBLE: Two quick questions, Your Honor. Are you adjudicating her today?
THE COURT: Yes. But I'm not sentencing.
MS. SCHEIBLE: And what time will the sentencing be on the 19th?
THE COURT: You know what, that's a good, real good question because I don't want you to have to come and sit around and everybody sitting here.
What day is that?
THE CLERK: That is a Tuesday.
THE COURT: That is a Tuesday. So it will probably be big calendar.
Do you want to do it at 11:00?
MR. MUELLER: That will be fine, Judge.

THE COURT: Does that work for you, Ms. Scheible?
MS. SCHEIBLE: I'm not sure I can be here on that day -- oh, it looks like I can. So, yes, that's fine.
THE COURT: Let's set that at a different time, yeah, at 11:00 o'clock. That way, I don't have everybody here, and I'll give you plenty of time because, on these, I want to be very thorough and look into everything and especially what, Mr. Mueller, I'm anticipating is going to present. I don't want to take it lightly.
MR. MUELLER: Thank you, Your Honor.
I'd ask you to hold off formal adjudication of guilt until the 19th. Otherwise, we're at cross-purposes with appellate rights.
THE COURT: I couldn't hear what you were saying.
MR. MUELLER: Otherwise, we would be at cross-purposes with her appellate rights. I don't want to file a notice of appeal ten days from today. If we could hold off formal adjudication appeal to sentencing.
MS. SCHEIBLE: I would like her adjudicated today, Your Honor. It's a misdemeanor. I think

that's pretty -- I think that's par for the course.
THE COURT: Yeah, help me understand what the problem with the appeal is.
MR. MUELLER: Because if I've got ten days from the date of the adjudication of guilt to file a Notice of Appeal, I don't want to sit down and talk to her about appealing anything. I want her to get the evaluation done and follow-up on it.
THE COURT: Oh, okay. Okay. Because I thought that was going to be a for sure. But it's not a for sure thing?
MR. MUELLER: No, sir.
THE COURT: Okay. All right. That's fine.
MR. MUELLER: Thank you.
THE COURT: Any problem with that?
MS. SCHEIBLE: Well, Your Honor --
THE COURT: I made my record. We've already had the trial.
MS. SCHEIBLE: I know. May we approach?
THE COURT: Yeah, sure. That's fine.
(Bench conference.)
THE COURT: We're on record one more time. I just want to make sure that the record is clear.
Ms. Plumlee, the condition of absolutely no alcohol of any kind is still there. Hopefully that

won't be an issue. I think that we should be okay with that after, you know, hearing from you here today.

But, Mr. Mueller, your request is granted, and we'll be back here on that November date.

MR. MUELLER: All right. Thank you, Your Honor.

THE COURT: You're welcome. Thank you.

(The proceedings concluded at 2:31 p.m.)

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REPORTER'S DECLARATION

STATE OF NEVADA)
)SS:
COUNTY OF CLARK)

I, Dana J. Tavaglione, a certified court reporter in and for the State of Nevada, hereby declare that pursuant to NRS 239(b).030, I have not included the Social Security number of any person within this document.

I further declare that I am not a relative or employee of any party involved in said action, nor a person financially interested in the action.

Dated at Henderson, Nevada, this 5th day of February 2020.

/s/Dana J. Tavaglione
Dana J. Tavaglione, RPR, CCR NO. 841

TRAN

CASE NO.

JUSTICE
2020 FEB 10 P 3:55

IN THE JUSTICE'S COURT OF HENDERSON TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

JENNIFER PLUMLEE,

Defendant.

18CRH002333-0002

CASE NO. 18MH0263X

REPORTER'S TRANSCRIPT

OF

SENTENCING

BEFORE THE HONORABLE STEPHEN L. GEORGE

JUSTICE OF THE PEACE

TUESDAY, NOVEMBER 19, 2019

APPEARANCES:

For the State: MELANIE SCHEIBLE
Deputy District Attorney

For the Defendant: JAY MAYNARD, ESQ.

Reported by: Lisa Brenske, CCR #186

HENDERSON, NEVADA, NOVEMBER 19, 2019

* * * * * * * * * * * * *

12:46PM THE COURT: Let's go ahead and call Jennifer Plumlee, Case Number 18MH0263X.

Good morning, Miss Scheible and Mr. Maynard. Nice to have you both here. We did have some discussions in the conference room on this matter, 12:46PM but, Miss Scheible, I will let the State take over and kind of give us an update on where we were, why we're here and what's going on.

MS. SCHEIBLE: Thank you, your Honor. You are very familiar with this case as am I. It's been 12:47PM open for over a year now since the defendant was arrested in September of 2018. She finally went to trial on October 23rd of 2019. You heard the case and found her guilty of driving under the influence. Her second offense. She's not yet been adjudicated and 12:47PM we're asking that she be adjudicated today guilty of DUI second. Her first offense she picked up just a few months before this offense which occurred on September 10th of 2018 and as a result of picking up this second DUI, even though she had not yet been 12:47PM convicted, she was transferred from the DUI -- she was

12:47PM transferred into the MOP program and I understand that she has since completed that program and she's done very well in that program and the State is pleased with her progress in maintaining her clean and sober
12:48PM lifestyle.

Unfortunately we are back here again on a sentencing on a DUI case and I don't want the Court to forget that even though a year and some months have passed, in that time the defendant did engage in some
12:48PM extremely dangerous conduct to herself, to her four children to which I understand she is the only parent and to the rest of the community. And the State frankly, your Honor, is disappointed to see that over the last year she's still not taken responsibility for
12:48PM this danger that she caused to the community. Despite being in the Moderate Offenders Program and despite getting clean and sober she has not acknowledged her role in the accident that occurred on September 10th of 2018. I hesitate to say luckily but I think we are
12:48PM lucky that she was the only person involved in that accident and that nobody else was injured. And as long as she stands here before this Court unwilling to take responsibility for what she did on September 10th of 2018, I think it is appropriate that additional
12:49PM sanctions be imposed on her beyond just what she's

12:49PM already endured as a result of her DUI first conviction.

So today I'm not trying to be unreasonable, your Honor. I'm trying to acknowledge 12:49PM that this was year ago and that as far as we know she's not had a drop of alcohol since that time. I think we all share in the goal of seeing the defendant live a productive and happy life that does not include anymore drinking, especially not drinking and then getting 12:49PM behind the wheel of a car.

And lest she forget the seriousness of this charge because time has passed and she has successfully completed the MOP program, we are going to ask you to do a few things today, your Honor. The 12:49PM first as I mentioned before to adjudicate her guilty of the DUI second which is still a misdemeanor. The State is asking for a thousand dollars as a fine or the equivalent in community service. We're also requesting that she complete 10 days in custody. This is the 12:50PM statutory minimum. The State is not being punitive. The State is not being vindictive. This is literally the minimum requirements for a DUI second. And I know that it might feel like it's coming a year after the fact, but the truth of the matter is that it is the 12:50PM defendant who delayed the prosecution of this case and

12:50PM delayed her conviction and adjudication to this day and now she has to answer for it. So I understand that she may have some credit already and we're asking that she complete her 10-day sentence.

12:50PM In addition the State is asking that the interlock device be placed on her car once again. There were some discussions in chambers about a SCRAM bracelet instead. It's my understanding that the defendant would prefer the interlock device and if that 12:50PM has changed since I last spoke to her counsel, then I will stand up again and address that. But otherwise I think I'm going to go forward with my request for interlock device for either six months or the pendency of this case, whichever is longer. I will be asking 12:51PM for a stay out of trouble order for the same length of time, either six months or the pendency of this case, whichever one is longer.

I'm asking that any use of alcohol be considered a violation of the stay out of trouble order 12:51PM whether it is detected with the interlock device or if she is arrested on completely unrelated charges and found to be intoxicated at the time, whether she is subject to a UA in court, whether she may or may not be intoxicated, whether it is proven by witnesses at an 12:51PM evidentiary hearing because somebody sees her ingesting

12:51PM alcohol and the State finds out, we are requesting that any consumption of alcohol be considered a stay out of trouble violation.

We're asking that she continue any 12:51PM treatment that she's already undergoing. I understand that she's completed the VIP and/or the coroner's program. If there's either of those that she's not done, we'd request that she do that now. Otherwise I would leave it to the defendant's discretion. To my 12:51PM knowledge she's not enrolled in AA and the State has no problem with her choosing an alternative course of treatment, but I would like to see some kind of documentation from a counselor, a treatment center, meetings, support group. I saw some similar 12:52PM documentation this morning of what she's done up to now and an evaluation as she leaves the MOP program, but I think it's important that she continue to see a therapist or go to meetings or do something to maintain her sobriety.

12:52PM Other than that, your Honor, I am asking for a six months suspended sentence and I think that it is fair in light of the charges, in light of the seriousness of the offense. And if she is really doing as well as she says that she is, which I hope -- beyond 12:52PM all hope I really want that to be true, that she has

12:52PM
been completely sober and she will continue to be sober, she will have no problems paying the fine or doing the community service, serving whatever remains of her 10 days and driving her car whenever and
12:52PM
wherever she wants because she has no problems with the interlock device, then the six months suspended sentence shouldn't be a problem.

THE COURT: Great. Wonderful. Thank you, Miss Scheible.

12:53PM
Mr. Maynard.

MR. MAYNARD: Thank you, Your Honor.

THE COURT: You're welcome.

MR. MAYNARD: Your Honor, we discussed in chambers and I think the appropriate question here is
12:53PM
what's our purpose here today, what's our objective, what's our goal? First and foremost our goal here has to be to insure the safety of the community including the safety of Miss Plumlee and absolutely understand that drinking and driving is a threat to that safety.
12:53PM
I think the best way and I think we all agree and I know that Miss Plumlee agrees the best way to insure the safety of the community, including herself, including her children, is that Miss Plumlee no longer drives. I know that she agrees with this. I know that
12:53PM
she understands this because she is already in full

compliance with that requirement.

Miss Plumlee did have a rough period here and she did have a prior DUI and while she was completing her requirements for that DUI she picked up this case. However, it was Ms. Plumlee through Mueller and Associates who went to the Court and went to the district attorney in that other case and it was us who requested the Moderate Offender Program to satisfy that violation of her probation for an informal probationary period. We were the ones who suggested the Moderate Offender Program, Miss Plumlee was the one who volunteered to go into the program. And not only did she go into the program but she has successfully completed it. I do have a certification here acknowledging her successful completion.

THE COURT: For clarification for me was that before the new charges came down or after?

MR. MAYNARD: It was after the new charges came down. I believe she was charged with this in September of 2018 and she entered the MOP in November 15th, 2018.

Worthy of note here is that she began her current period of sobriety on October 21st of 2018. So even before she entered the Moderate Offenders Program she started her period of sobriety that is

12:55PM present and ongoing and God willing day by day she will maintain that for the rest of her life. And that is her plan. Not only did she volunteer to go into the Moderate Offender Program, it is absolutely transparent 12:55PM that she took it incredibly seriously. I balked at the reference the State made. I chaff at the reference the State made to the idea that Miss Plumlee hasn't taken responsibility. I think what the State means, and I take her meaning, but I think what she means that she 12:56PM hasn't stopped fighting this case. She hasn't pled guilty. She hasn't thrown herself admitted everything that has happened and everything that she did on that day and confessed all of her sins before the Court. And that is a symptom not of Miss Plumlee not taking 12:56PM her sobriety and her recovery seriously. That is a symptom of the fact that what we're dealing with here today, and I think we're all informed adults here and we all understand what we're dealing with here today, we're addressing a public health crisis, addiction, 12:56PM with a criminal system and it's what we have and I am extraordinarily proud to work within this system. However, it is not without its flaws and this is one of them. And so criminal culpability is a different issue than the underlying cause of what led to these charges 12:57PM which is Ms. Plumlee's relationship, dysfunctional

12:57PM relationship with alcohol. And she has absolutely addressed that relationship and addressed that dysfunction, your Honor.

I would like to read from the letter 12:57PM provided to the Court and I have a copy for the Court if you would care for one, your Honor? I'd like to read from the letter that was just provided to the Court from Ms. Plumlee's counselor Jose Florido. This is on the second page of the letter. "I hope this 12:58PM information may be able to help you and Courts to make a decision. Miss Plumlee has been adhering perfectly to the requirements of the Court and program. She is in total compliance with everything that has been required and there is nothing else that we require from 12:58PM her. During the almost year" -- as a side note it has now been more than a year and she has graduated the program though this was written before that. "During the almost year she has been in the program she has never submitted a positive urine analysis test. That 12:58PM proves her seriousness and commitment to complete recovery. In spite of the difficulties that she has been going through and the financial stresses of life, she has remained in perfect compliance. She has never missed a class or a UA or an individual counseling 12:58PM session.

12:58PM "Her progress in the program has been outstanding and she is totally free from triggers or cravings leading to relapse in the old lifestyle. Her prognosis for a sober life is wonderful.

12:59PM "She possesses a great determination to remain alcohol free, due to internal motivations is not anymore because the Court may have a finger on her, but because she wants to be a responsible single mother helping her four children to succeed at school and in

12:59PM life. As her counselor I am proud of the entirely good job that she has been doing in the program."

To say that she hasn't taken responsibility for her actions and for her difficulties and again for her dysfunctional relationship with

12:59PM alcohol in the face of this, in the face of what she's accomplished? Perfect compliance, your Honor. I am sure you know and I'm sure I do not need to tell you but let me restate it regardless of its redundancy. Perfect compliance with any addiction treatment program

1:00PM imposed by the Court is incredibly difficult. It is incredibly difficult. One bad day, one late showing to a urinalysis, one missed text message. The number of ways that you can create a flaw -- you can provide a flaw to these programs is legion and yet she has

1:00PM avoided all of them. Honestly, your Honor, I don't

1:00PM know that I've ever known of another defendant who has had perfect compliance. Perfect. To say that she hasn't taken responsibility is frankly laughable, if it weren't quite so preposterous given the face of this. 1:00PM And again I mean no offense to my colleague. I understand the point she was trying to make, but clearly Miss Plumlee has taken responsibility for her actions.

Not only has she taken responsibility for 1:01PM her actions, she has corrected the underlying problems and insured that she will not repeat them. And insuring that is a day in and day out effort for her that she continues to make every day. She works as a real estate specialist at Wyndham and she has four 1:01PM children. They are all currently in school and they are all currently at home. Two of them are in college, two of them are in high school. They live at home and she provides for them. She works between the past year in the Moderate Offender Program between court dates 1:01PM and working in order to be able to pay all the fees and fines required of her. She on average is lucky to get about two days off a month because she has to take whatever overtime she can get, and quite frankly certainly mean no offense to her but she's lucky that 1:02PM she has a job that has allowed her to be able to take

1:02PM time off and go down and give a UA whenever it's required of her because there are many jobs that aren't nearly as understanding. But she has also given them as much time as they could possibly need from her and 1:02PM done as much work for them as she possibly could to maintain that good relationship and yet she hasn't taken responsibility?

To clarify a moment later on in the district attorney's presentation Ms. Plumlee is 1:02PM currently going to two Alcoholics Anonymous meetings a week as well as she had been attending three classes for the Moderate Offender Program. But now that those are freed up she's at least going to two AA meetings a week. She has maintained more than a year's worth of 1:03PM sobriety. Again her initial sobriety date October 21st, 2018.

I started this by asking what the purpose of this was, what our goal was. Our goal is to make sure that Miss Plumlee remain sober and remains a 1:03PM happy, healthy, non-dangerous part of our community. That goal, your Honor, has been achieved. That result is present before you. We see that here today with no questions and no doubts. This was mentioned earlier, but the evaluation of her program from again her 1:04PM counselor states that "According to DSM 5 criteria for

1:04PM
diagnosis Miss Plumlee is in sustained full remission. Sustained full remission means that none of the criteria for dependence or abuse have been met at any time during the past 12 months or longer. Miss Plumlee
1:04PM
has been an excellent client always in perfect compliance with Court and program rules and regulations. Urine tests always have been in total compliance with the expectations of the judge and the program. Attendance has always been perfect.
1:04PM
Participation in group and individual sessions outstanding. She has driven to maintain total abstinence and has clear determination to do it due to internal motivations like her children's education and welfare. Her prognosis towards an alcohol free life is
1:05PM
excellent."

The purpose of sentencing here has been achieved and for that reason we would be asking your Honor that the sentence in this case be that she participate in the Moderate Offender Program and that
1:05PM
that sentence be run concurrent with the prior case, Case Number 17CR009539. Our request is that her sentence be the Moderate Offender Program to run concurrent with the prior case and that this Court accept the completion of that case as the completion of
1:05PM
her requirements in this case. We understand that the

1:06PM Court may be hesitant to do that. In the alternative we would ask that Miss Plumlee be expected to continue her period of sobriety not imbibing any alcohol to be measured by a breath interlock device currently 1:06PM installed on her car and that she stay out of trouble for six months. We would ask that her underlying sentence be no more than 90 days.

And, your Honor, we have notably left out the 10 days in custody and the thousand dollar fine. 1:06PM That goes back to the very first question I asked which is what is the purpose here? Ms. Plumlee was in custody for six days when she was arrested on this case. First of all we would ask the Court to give her credit for time served on the 10 days in custody due to 1:06PM that time period in custody. However, what is that 10-day period going to serve? Is it going to serve the purpose of keeping her sober? Does it have anything to do with that purpose whatsoever? We would say, your Honor, no, it doesn't. She's been out of custody for 1:07PM more than a year and she's been sober for more than a year. She's clearly capable of staying sober without having a jail sentence imposed upon her. Furthermore, what is the thousand dollars going to do? What is a thousand dollar fine going to do to help her sobriety? 1:07PM She isn't not drinking because she doesn't have an

1:07PM
extra thousand dollars around. She's not drinking because of her own determination to provide a better life for herself and her children and to be a better part of this community. The thousand dollar fine would
1:07PM
have nothing to do with the purpose of this Court and this sentence. So we would ask that both of those be denied from the State's request.

Again first and foremost we are asking for her to be sentenced to the Moderate Offender Program
1:08PM
and this Court accept completion of that program as completion of her requirements here. In the alternative we'd ask for a breath interlock device and stay out of trouble for six months.

THE COURT: Wonderful. Appreciate that.
1:08PM
Thank you, Mr. Maynard.

I'm going to let you respond, Miss Scheible, but just a few questions. It's my understanding that on a DUI second I do not have any discretion on the 10 days?
1:08PM
MS. SCHEIBLE: That's my understanding, your Honor. That's the minimum.

THE COURT: And I don't have any discretion on the fine.

MS. SCHEIBLE: The fine, the minimum is
1:08PM
$750. We're asking for a thousand dollars.

1:08PM
THE COURT: Right. But --
MS. SCHEIBLE: You don't have discretion not to impose it.
THE COURT: Let me explain because I read
1:08PM the statute. That's correct, but when you tally up all the fees that are required by statute for me to impose on top of that I have got my number. It's $1058.
MS. SCHEIBLE: That's the minimum, your Honor. We're asking for an additional 250 on top of
1:09PM that.
THE COURT: So my understanding I don't have any discretion on that on the minimums.
MS. SCHEIBLE: Correct. That's my understanding as well, your Honor.
1:09PM THE COURT: With that, Miss Scheible.
MS. SCHEIBLE: I have nothing else, your Honor.
THE COURT: Can we have a side bar.
(At the bench discussion.)
1:32PM THE COURT: The case is still called. We're still there. At side bar we had some discussions regarding the mandatory minimums. One of those was the fine and just for the record including the AA fees the minimum that we do on a DUI second is $1058. On the
1:33PM jail time, and I think that was the issue that we were

1:33PM trying to figure out here, the minimum is 10 days, it looks like we've got six days credit for time served so we have an additional four days. So I'm trying to figure out what we can do within the scope of the law 1:33PM on those additional four days. I think that's kind of where we left it. And then we do need to get the information submitted on the record. I don't know, Miss Scheible, I think you have that regarding the --

MS. SCHEIBLE: I do, your Honor. So I 1:33PM think the information that you're looking for is I had brought in a certificate of conviction from her prior case file for the DUI first. It was not entered on the record at the time of the trial because she was not adjudicated at that time and the Court decided that it 1:34PM was an issue for sentencing rather than an issue for finding of fact of her guilt.

THE COURT: We discussed it in the back that Mr. Mueller asked we hold off on that.

MS. SCHEIBLE: That's correct, your Honor. 1:34PM That's my recollection.

THE COURT: I don't recollect, but that's good, I accept that.

MS. SCHEIBLE: So I brought it back with me today. I provided it to your Honor. I'm not sure 1:34PM if you want to enter it into the record as well. So I

1:34PM will hand it back to your marshal to hand back to you if that's okay. For the record the event number is 17-14649. The only case number I see on here because it's Municipal Court is 17CR009539. I don't know that 1:34PM it's adopted another case number in Muni Court at some point in time, but she was definitely convicted of DUI on that case.

THE COURT: I would like Mr. Maynard to have a chance to look at that and see if he has any 1:35PM response.

MS. SCHEIBLE: I'm sorry, your Honor. Here are a few more pages.

MR. MAYNARD: That's correct.

THE COURT: Any objections, Mr. Maynard? 1:35PM

MR. MAYNARD: No objections.

THE COURT: Let's get back to the other issue.

MS. SCHEIBLE: The State will just renew its request that she be sentenced to 10 days in the 1:36PM Clark County Detention Center and that she serve those days in the Clark County Detention Center. Frankly from a broader perspective I understand the defense's repeated request for mercy based on the defendant's success over the past year and those have not gone 1:36PM unnoticed by the State. That is why I'm up here

1:36PM literally asking for the minimum sentence and they're still fighting me on it. So I don't know what defendant wants less than the minimum sentence, but I don't think that she is deserving of treatment beyond 1:36PM what the law tells us is the minimum for a person who commits this crime. And so on that I will submit. Once again my request that she be sentenced to 10 days in the Clark County Detention Center to be served in the Clark County Detention Center.

1:36PM THE COURT: Wonderful. Thank you very much, Miss Scheible. Appreciate that.

Mr. Maynard.

MR. MAYNARD: After consulting with my client we would be asking for -- she has served six 1:36PM days on this as we understand it -- we would be asking for her to serve the remaining four days in custody at CCDC on the weekends as she can. To clarify, her weekends, quote, unquote, are Thursday and Friday. I assume it doesn't really matter which particular days 1:37PM she's in there but as long as she's in there for a matter of four days and she would have the full six months to get those four days served?

THE COURT: That is correct. What I don't want to do is jeopardize employment and make the 1:37PM situation worse.

1:37PM
MR. MAYNARD: That is her primary concern and the concern with the idea of the 30-day House Arrest is because the presence of the ankle monitor could possibly interfere with her capacity to
1:37PM
effectively do her job. So balancing all the concerns and considerations she has deemed that it would probably be best for her to do the four remaining days of the 10-day sentence in custody at CCDC over the six-month period.
1:38PM
THE COURT: That would be great. Appreciate that. Thank you, Mr. Maynard.

So at this time we did grant Mr. Mueller's request to hold off on the adjudication until this date and at this time we are going to go ahead and
1:38PM
adjudicate you Jennifer Plumlee guilty on the criminal complaint after going through the trial of the DUI second and based on the evidence and the testimony. I do want to make it absolutely clear that that was -- because in the criminal complaint it does provide a per
1:38PM
se and a presumption that the test was not done within the period of two hours. So it's not based on that, it's based on incapable of safely driving and/or exercising actual physical control of the vehicle as we discussed from the witnesses. I thought it was
1:39PM
abundantly clear from the testimony that was given that

1:39PM
we have an under the influence. My feeling is that we can't wear blinders and ignore what actually occurred and what actually happened on that day. It appears that since then things have gotten better. Miss
1:39PM
Plumlee has enrolled herself in the SOP program which is --

MR. MAYNARD: MOP program.

THE COURT: I'm sorry. MOP. Moderate Offender Program which is something that I believe that
1:40PM
she's done on her own in order to try and correct the problem. So it appears to me that she is trying and needs to continue to try. And as we had discussed it's not a let me try today, it's a daily thing that you need to continue to work on and wake up in the morning
1:40PM
and say I am going to be sober today and I'm not going to create a problem.

The good news is, and to be honest with you, I think it's just a matter of luck. I think we were just lucky. We're just lucky that nobody was
1:40PM
hurt. This was a pretty bad accident. It was pretty bad under out of control. The testimony that I received and heard sounded pretty bad. So I think we were lucky. And I'm not talking about anybody else, because I haven't even talked about you yourself. You
1:40PM
were lucky you weren't hurt. And we have seen evidence

1:40PM over and over and over again on almost a daily basis unfortunately of people that aren't lucky and somebody is hurt and the tragedy that that creates. Not just for the person who decided to take the wheel and drive
1:41PM while intoxicated but the tragedy for everybody involved. In that situation everybody loses. And in my opinion these are so very, very, very avoidable. With all the knowledge, with all the awareness that we have nowadays this should never happen but yet we get
1:41PM them over and over again and they seem to be increasing rather than decreasing with all the technology, with all the information we have about the results of what happens. I think we're fortunate in this situation that nobody was hurt. The vehicle can be replaced,
1:42PM they can be repaired. Lives cannot be. So I'm glad that you've taken some responsibility and done the -- am I going say it right -- the SOP?

MS. SCHEIBLE: The MOP.

THE COURT: The MOP, Moderate Offender
1:42PM Program. I think that's a great program and I commend you for doing that and that's a good thing to do.

I do agree with Miss Scheible on some of the conditions here and again some of these are minimum. I don't have a choice on these is my
1:42PM understanding. I don't have discretion on this. So

1:42PM here's what I'm going to do. Adjudicate you guilty based on the testimony and the abundantly clear evidence that I believe that was given and the testimony that was presented before me during the trial
1:42PM and therefore I'm going to go ahead and require Miss Plumlee to pay a fine of -- and just so we know with the AA fees it comes out to $1058. I know it's a weird number but with the AA fees that's how come it comes out. And just so you know, Mr. Maynard, you asked for
1:43PM the minimum and that is the minimum on that. Otherwise Miss Scheible asked for a thousand, it would have been substantially more. And then I'm going to go ahead and impose 10 days of jail time with six days credit for time served. The remaining four days can be served on
1:43PM her days off. How is that? That makes it clear. And it can be served in my opinion any day during the week. One day at a time, all four at a time, two days at a time. I don't want to jeopardize the employment is my biggest concern. So that can be done within the next
1:43PM six months and that's fine.

The interlock device be placed in the car for a period of a minimum six months or the pendency. And then we discussed no alcohol. She is to abstain from any alcohol of any kind. I know the holidays are
1:44PM coming up. Sometimes it's hard. Alcohol is your enemy

1:44PM and so you need to stay away from it a hundred percent. Hopefully forever but at least for the pendency of this action while this case is still ongoing.

One thing I forgot to tell you, Mr. Maynard, I think you told me she was doing this anyway, I really like the AA classes. I've been informed that that is very helpful. So I'd like her to continue with the AA classes. Sounds like she's doing two per week for the pendency of this action or six months, whichever is longer. Thousand dollar fine, 10 days jail time, interlock device, stay out of trouble for a period of six months or the pendency, no alcohol. Victim Impact Panel, did we discuss that? And the coroner's program. Those are two requirements that I think are really good.

And you know what, Mr. Maynard? I was talking to you and there's a very intense Coroner's Program, but now that I'm looking if she's attending the AA meetings, she can go through the standard coroner program. We'll accept the standard because she's doing the AA.

And then at the end of the day we're looking at imposing a 150-day sentence overall. However, we are going to suspend that. And so on the 10 days I don't have discretion. In my opinion on the

1:46PM
six months I do. I am going to impose that. However, I'm going to suspend the remaining time to make sure that she's compliant with all the terms of the negotiations.

1:46PM
MS. SCHEIBLE: The suspended sentence was 150 days or six months?

THE COURT: It's 150 days because I'm imposing 10 days. So it's 180 days minus 10 days but I think we requested 150. I'm good with that.

1:46PM
Here is my hope, and again, I'm trusting you that we are not going to have a problem. So that shouldn't be an issue. Just do what you're supposed to and tell me 10 years it won't make a difference because guess what? When you come back to see me again in six

1:46PM
months, it's all going to be done and I'm going to be happy. And we can close it out.

Let me just check with we'll start with Mr. Maynard. Did I miss anything? And, Miss Scheible, I'll come to you and see if I missed anything.

1:47PM
MR. MAYNARD: I don't think you missed anything as far as I caught. That's what I got on my notes.

THE COURT: Okay. Miss Scheible, did I get everything?

1:47PM
MS. SCHEIBLE: Got everything.

1:47PM

THE COURT: I can tell you I really appreciate both of your representation. I know you both worked really hard. Miss Scheible, you've worked so hard on this and I appreciate that. And, Mr. Maynard, I appreciate you being here and taking time to go through this because it's critically important to me and it really looks like it's very critically important to you and it's extremely important to Miss Plumlee that we go through this process. And I appreciate your patience in allowing us to get to this point. Thank you so much.

MR. MAYNARD: Your Honor, before we close out as I mentioned in the back we have a notice of appeal we will be filing immediately. We would ask that the requirements be suspended for the pendency of the appeals case and then reinstated if and when the appeal comes back down in affirmation or in the alternative we will deal with that when it happens.

THE COURT: Miss Scheible.

MS. SCHEIBLE: No. You don't get to suspend your sentence while you're pending appeal. The sentence is to be imposed when the sentence is handed down and then if there are some other -- if by some legal miracle this case is appealed, then there are other remedies at law for having served the sentences

1:48PM under that conviction. But the State is vehemently opposed to staying the adjudication, staying the sentences until the appeal has been finalized. That's not only ludicrous but flies in the face of defendant's 1:48PM passioned argument that she is prepared to take responsibility for what she's done and set down on the track of recovery.

THE COURT: And I'll tell you what. Let's do this. And this is how we normally do it on this. 1:49PM I'm going to set a status check for 90 days and see where we're at with it at that point.

MR. MAYNARD: Okay.

THE CLERK: February 19, 2020, 9:00 a.m.

MR. MAYNARD: Status check on the 1:49PM requirements and the appeal process?

THE COURT: Yes.

(The proceedings concluded.)

* * * * *

9:35AM ATTEST: Full, true and accurate transcript of proceedings.

/S/Lisa Brenske

LISA BRENSKE, CCR No. 186

NOH

DISTRICT COURT

CLARK COUNTY, NEVADA

JENNIFER PLUMLEE,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

Case No.: C-20-346852-A
Dept. No.: 2

Date: May 14, 2020
Time: 9:00 a.m.

ORDER SCHEDULING HEARING AND BRIEFING SCHEDULE

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that the undersigned will bring a hearing on appeal on the **14th day of May, 2020, at 9:00 a.m.** or as soon thereafter as counsel/parties can be heard, in Dept. II, Courtroom 3B, District Court.

Parties shall file briefs in accordance with the deadlines established in NRS 223B.130 as follows:

Petitioner's Opening Brief:	March 16, 2020
Respondent's Brief:	April 15, 2020
Petitioner's Reply:	April 30, 2020

Petitioner to provide courtesy copies of all pleadings to Department 2, 200 Lewis Avenue, 3rd Floor, no later than May 6, 2020.

The hearing scheduled for March 12, 2020 at 9:00 a.m. is hereby **VACATED**.

IT IS SO ORDERED.

Dated this 12th day of February, 2020.

RICHARD F. SCOTTI
DISTRICT COURT JUDGE

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey EFileNV system.

Craig Mueller, Esq.
Counsel for Appellant

Melanie Scheible, Esq.
Steven Wolfson, Esq.
District Attorney

/s/ *Melody Howard*

Melody Howard
Judicial Executive Assistant
C-20-346852-A

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

OET
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Attorney For Appellant

DISTRICT COURT
CLARK COUNTY, NEVADA

JENNIFER PLUMLEE, aka, Jennifer Lynn Graves #1410679, Appellant,	CASE NO:	C-20-346852-A
vs.	DEPT NO:	II
THE STATE OF NEVADA, Respondent.		

MOTION FOR ORDER EXTENDING TIME

COMES NOW, Appellant Jennifer Plumlee, by and through her attorney Craig A. Mueller, Esq., and hereby moves this Honorable Court for an Order Extending Time for the purpose of filing her Opening Brief. This Motion is based on Eighth Judicial District Court Rule 3.50, is supported by the attached Memorandum Of Points And Authorities, and is made in good faith and not for the purposes of delay.

DATED 13th day of March, 2020.

/s/Craig A. Mueller
Craig A. Mueller, Esq.
Attorney For Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

PROCEDURAL HISTORY OF THE CASE

On July 17, 2019, Appellant was scheduled for DUI trial in case number 18MH0263X. Respondent moved for a continuance pursuant to Bustos v. Sheriff, 491 P.2D 1279 (1971) due to Respondent's witness, Trooper Greg Luna, not being present. The court granted Respondent's motion to continue over Appellant's objections and motion to dismiss. The trial date was reset to September 16, 2019, at which time Trooper Luna was present for the trial. During cross-examination, Trooper Luna who admitted that he had never been served a subpoena for July 17, 2019. Appellant renewed her motion to dismiss the case due to an improper continuance. The court continued the trial to October 07, 2019. Appellant was convicted of DUI in Henderson Justice Court on October 07, 2019, after a bench trial. Appellant filed her Notice Of Appeal timely on February 11, 2020. Appellant timely ordered transcripts of the proceedings on July 17, 2019, September 16, 2019, and October 07, 2019. However, no transcript for September 16, 2019 was filed. The Court set dates for filing the Opening Brief, Responsive Brief, Reply Brief, and Argument. The deadline to file the Opening Brief is March 16, 2020, Responsive Brief April 15, 2020, and Reply Brief April 16, 2020. The matter is set for argument on May 14, 2020 at 9:00. Appellate counsel is requesting an extension until March 30, 2019, to file the Opening Brief.

ARGUMENT

Eighth Judicial District Court Rule 3.50 states in relevant part: Extending time.

(a) When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, with or without motion or notice, order the period enlarged if request

therefor is made before the expiration of the period originally prescribed or as extended by a previous order; but it may not extend the time for taking any action under Rule 3.40, except to the extent and under the conditions stated therein.

Cause exists to extend the time for Appellant to file her Opening Brief. Appellant needs the additional time to finish her Opening Brief, file it with the Court, and serve it upon Respondent. Appellant has significant colorable issues to appeal. Denial of this request for an extension of time to file the Opening Brief would be fatal to her appeal. Counsel's paralegal who is typically charged with drafting such documents has been dedicated to working on a Supreme Court Appeal from a two-week jury trial of a 23 count Indictment on charges of sex with a minor. Counsel was not aware until March 12, 2020 that the transcript of the proceedings of September 16, 2019 were never filed. Counsel requests this short continuance to finish the Opening Brief so as to serve the best interests of justice.

CONCLUSION

For the reasons stated above, Appellant Jennifer Plumlee respectfully requests that counsel be given until March 30, 2020 to file her Opening Brief.

Respectfully SUBMITTED this 13th day of March, 2020.

/s/Craig Mueller
Craig A. Mueller, Esq.
Attorney For Appellant

CERTIFICATE OF ELECTRONIC SERVICE

I certify that a copy of Appellant's Motion For Order Extending Time was served through the court clerk's Odyssey Efile/Eservice network on March 13, 2020, to:

MELANIE SCHEIBLE
Deputy District Attorney
Clark County District Attorney's Office

BY: */s/Rosa Ramos*
Legal Assistant to
Mueller & Associates

Electronically Filed
3/16/2020 10:46 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Jennifer Lynn Plumlee, Appellant(s) vs Nevada State of, Respondent(s)	Case No.: C-20-346852-A Department 2

NOTICE OF HEARING

Please be advised that the Appellant's Motion for Order Extending Time in the above-entitled matter is set for hearing as follows:

Date: March 26, 2020

Time: Chambers

Location: RJC Courtroom 03B
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Imelda Murrieta
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Imelda Murrieta
Deputy Clerk of the Court

CASE NO. C346852

DEPARTMENT NO. 2

IN THE JUSTICE COURT OF HENDERSON TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

* * * * *

THE STATE OF NEVADA, Plaintiff, vs. JENNIFER PLUMLEE, Defendant.	CASE NO. 18MH0263X

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE STEPHEN L. GEORGE
JUSTICE OF THE PEACE

MONDAY, SEPTEMBER 16, 2019
9:30 A.M.

APPEARANCES:

For the State: MELANIE SCHEIBLE, ESQ.
Deputy District Attorney

For the Defendant: CRAIG MUELLER, ESQ.
Attorney at Law

Reported by: Shawna J. McIntosh, CCR No. 770

SHAWNA J. MCINTOSH, CCR NO. 770
(702) 671-0691

I N D E X

STATE OF NEVADA v. JENNIFER PLUMLEE

CASE NO. 18MH0263X

* * * * *

HENDERSON, NEVADA, SEPTEMBER 16, 2019

* * * * *

THE COURT: Let me just call a case first before trial. Because, Mr. Mueller, my understanding is that you have a motion here. We will go ahead and hear that first. And then we'll see what we're going to do after that. If we go forward, then we'll re-call the case and start a trial. If we do not go forward, then we won't need to get there.

So let me go ahead and call the case of Jennifer Plumlee. Case No. 18MH0263X.

And, Mr. Mueller, you had mentioned that you had a motion that you wanted to submit prior to going forward with the trial; is that correct?

MR. MUELLER: That's correct, Judge. I'd ask to invoke the exclusionary rule. And, Your Honor, I want to formally request a hearing on the -- my renewed motion to dismiss. On the 17th of July, the State and I got into a fairly good-size donnybrook about --

THE COURT: I remember.

MR. MUELLER: -- continuing this, that I did not believe that they had reason to believe that the

trooper had been subpoenaed. And now that the trooper is here, I believe -- if memory serves -- I've done a lot of these, so I don't want to -- but in reading my notes and reading the court minutes, I've -- if recollection serves you, giving me the opportunity to renew my notion when the trooper was available. And I'd like to put him on the stand for just a moment or two, ask him a couple questions, and then be heard.

THE COURT: Okay.

Ms. Scheible, any response?

MS. SCHEIBLE: Well, my concern, Your Honor, is that the trooper is not the person at the Nevada Highway Patrol agency who is responsible for serving subpoenas. So I'm happy to have him on the stand and tell us what he knows or remembers about the service of the subpoena, but he would not be qualified to testify to whether or not a subpoena was received by his office and whether or not that subpoena was sent to him or really to give us an overview of how the Nevada Highway Patrol handles subpoenas. Personally, I don't know how they handle them either.

And so if -- if that's going to be the -- the motion, then I would request if -- if you want to hear -- if you want an evidentiary hearing on that kind of motion, I would request some additional

time to subpoena additional witnesses.

THE COURT: Okay.

MR. MUELLER: May I proceed.

THE COURT: Well, let's see what we're going to do.

MR. MUELLER: All right.

Defense would call to the stand Trooper Luna.

THE COURT: Well, just give me a second. I'm trying to figure out what we're going to do. The State has mentioned that if we're going to go forward with an evidentiary hearing, they would like to have some time to perhaps call additional witnesses based on this --

Let me ask Ms. Scheible, were you aware of this prior to today's date?

MS. SCHEIBLE: I have read the transcript from the previous --

THE COURT: Were you -- were you aware of Mr. Mueller's motion?

MS. SCHEIBLE: No.

MR. MUELLER: Maybe my colleague could refresh me. The transcript very clearly gives me permission to renew the motion, correct?

THE COURT: Correct. But she wasn't --

didn't get notice that you were going to renew it today.

MS. SCHEIBLE: That's correct, Your Honor.

MR. MUELLER: All right. Why don't we ask the trooper a few questions under oath and see what he has to say. Maybe it's moot.

MS. SCHEIBLE: I -- I would just request that you deny the motion without an evidentiary hearing.

MR. MUELLER: That's appropriate.

THE COURT: All right. Let's -- let's -- let's do this. Let's have a sidebar real quick.

(An off-the-record discussion was held at the bench)

THE COURT: All right. Are we going to go forward with the evidentiary hearing; is that right?

MR. MUELLER: That's defense's pleasure, Judge.

THE COURT: Okay. Let's go ahead.

Mr. Mueller, you can proceed.

MR. MUELLER: Thank you, Your Honor.

Trooper Luna. I thought it was Luna. How do you pronounce it, sir?

THE WITNESS: Luna, sir.

MR. MUELLER: Luna. I apologize, sir. I've got a client from China called Luna. Same four letters, different pronunciation.

THE COURT: Thank you.

Whereupon,

GREG LUNA,

having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE CLERK: Thank you. Can you state and spell your first and last name, please?

THE WITNESS: My name is Greg, G-r-e-g. Last name, Luna. L-u-n-a.

THE CLERK: Thank you. You can have a seat.

THE COURT: Thank you.

MR. MUELLER: May I proceed, Your Honor.

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. MUELLER:

Q. Trooper Luna, how long have you been with Nevada Highway Patrol?

A. I've been with Nevada Highway Patrol for three years.

Q. About three years. All right.

Now, did you -- have you been

subpoenaed before to court?
A. For this case?
Q. In general, sir. Do you know -- are you familiar with the procedures?
A. Yes, sir.
Q. All right. And you get handed a subpoena, and you sign for a subpoena?
A. I get e-mailed a subpoena.
Q. Okay. And how do you acknowledge that you have gotten the subpoena?
A. I don't acknowledge. I just get it. I print it out, then I follow the instructions on the sheet. For instance, if there is court, I will call the number and see if it's going.
Q. Sir, the 17th of July of this year, you were subpoenaed to court on this matter, correct?
A. I don't remember that.
Q. All right. Did you get a subpoena to be in court on the 17th of July?
A. I do not recall.
Q. Did you sign a document acknowledging -- from anybody in your chain of command -- you sign the subpoena return and hand it back to someone acknowledging that you would be in court?
A. I do not recall, sir.

Q. Did anybody from the District Attorney's office or from the Highway Patrol chain of command talk to you about why you were not here on the 17th of July?

A. No, sir.

Q. And from the 17th of July until this date, has the subject -- until you walked into court today -- has the subject of why you had not been present on the 17th of July ever come up?

A. No, sir.

Q. Sir, you would not intentionally avoid going to court with a subpoena when you've properly been subpoenaed, correct?

A. No, sir.

Q. All right. So you didn't intentionally not come, correct?

A. No, sir.

Q. All right. I mean, I -- I know you guys are busy and you get tired sometimes, but you didn't take out the subpoena and stuff it in your call box and say, The hell with it, I'll catch a nap instead?

A. No, sir.

Q. Okay. So to the best of your knowledge, you were never advised, subpoenaed, or had any reason to believe you needed to be here in court on the

17th of July?

A. Yes, sir.

Q. All right. Now, let me ask you a question, Troop, I know you guys are allowed to carry personal cell phones in your patrol cars?

A. You mean, just a personal phone in general --

Q. Yeah.

A. -- or a work phone?

Q. You're entitled to a work phone. You have a phone in the car, right?

A. Yes, sir.

Q. All right. And if someone called up and said, Hey. I need a witness here in court through dispatch. Dispatch would have called you and -- and talked to you over your cell phone, correct?

MS. SCHEIBLE: Objection, Your Honor. Calls for speculation.

MR. MUELLER: All right. Well, let me rephrase the question.

BY MR. MUELLER:

Q. Have you ever heard of dispatch calling people on their cell phone and telling them to be in court?

A. Dispatch, no. They would redirect me to somebody else.

Q. All right. But they would -- they would refer your phone call to -- you can receive calls while you're on duty, correct?

A. Yes, sir.

Q. All right. And what shift are you working these days?

A. Graveyard, sir.

Q. Graveyard. And what are the hours of graveyard? I know it varies a little bit.

A. 10 p.m. to 8 a.m.

Q. That's pretty rough. Are you -- you're the junior guy?

A. I just like graveyard.

Q. You like graveyard. Okay. Good for you. All right.

And so when do you normally sleep?

A. About eleven to five.

Q. About eleven in the afternoon until five in the afternoon?

A. Eleven in the morning until five.

Q. That's when you get your sleep.

And you don't have any recollection of why you weren't here on the 17th of July?

A. No, sir.

Q. All right.

MR. MUELLER: I have nothing further.

THE COURT: Ms. Scheible.

CROSS-EXAMINATION

BY MS. SCHEIBLE:

Q. Officer Luna, how do you get your work e-mail?

A. I go on to a work computer, I log on to bud lug tach (Phonetic). And then that's my e-mail.

Q. Do you get your e-mails on your phone?

A. No.

Q. Do you receive subpoenas by e-mail?

A. Yes.

Q. How frequently would you say?

A. Maybe two times a month.

Q. Okay. And what do you do when you get a subpoena by e-mail?

A. The e-mail has an attachment of the subpoena. I open it up. I print it out. I put it on, like, a desk. And then I put the date of the court on my -- like, my little calendar at home so I know when it's going to be on.

Q. Okay. Is that what you did in preparation for today's hearing?

A. Yes, ma'am.

Q. Do you have that subpoena with you?
A. Yes, ma'am. I gave it to you.
Q. You gave it to me?
What courtrooms do you get subpoenas to?
A. Las Vegas Justice and Las Vegas Municipal Court.
Q. What about Henderson?
A. Very rarely.
Q. Okay. That attachment on the e-mail, do you know what kind of document it is? Word? Pdf? Excel spreadsheet?
A. I think it's a pdf, but I'm not entirely sure.
Q. Okay.
MS. SCHEIBLE: May I approach your clerk to have this marked.
THE COURT: Yes.
MS. SCHEIBLE: Actually, let me get two.
(State's Proposed Exhibit Nos. 1 and 2 were marked for identification)
MS. SCHEIBLE: Showing defense what's been marked as State's Exhibits 1 and 2.
May I approach the witness, Your Honor.

THE COURT: Yes.

BY MS. SCHEIBLE:

Q. I'm showing you what's been marked as State's Exhibits 1 and 2. Do you recognize these documents?

A. Yes, ma'am. I recognize these documents.

Q. Can you tell the Court what they are?

A. These are subpoenas that I would receive from -- on the e-mail. And I would print it out and mark it.

Q. Okay. And what's the date on Exhibit No. 1, the court date?

A. Exhibit -- it's 5:32 p.m.

Q. What's the date?

A. The date is the 16th day of September, 2019.

Q. And what about Exhibit 2?

A. Exhibit 2 is the 17th day of July, 2019.

Q. And are these fair and accurate reflections of the type of subpoenas that you normally receive?

A. Yes, ma'am.

Q. Anything different about either one of them?

A. No, ma'am.

Q. Okay. And is there a little box at the bottom that has some additional information in it from NHP Services?

A. Yes, ma'am.
Q. And do you normally see that on your subpoena?
A. Yes, ma'am.
Q. So are these very standard subpoenas that you would receive via e-mail?
A. Yes, ma'am.
MS. SCHEIBLE: I move for admission of State's 1 and 2.
MR. MUELLER: Well, specifically, as examples of subpoenas, I don't have any objection. But he's never been -- it's never been established that he's ever seen the one from the 17th of July.
THE COURT: Go ahead and ask him.
BY MS. SCHEIBLE:
Q. Have you seen the one on the right -- have you seen Exhibit No. 2 before?
A. I've seen the same subpoena, but I've never seen the date. I -- I can't verify if I've seen it before or not.
MR. MUELLER: With that proviso, that they are generally generic samples of subpoenas in the subpoenaing process, I have no objection. But it's not for -- and the defense does object for the admission that he did receive the one on the 17th of

July which he's not testified to.

THE COURT: Well, I think that would be my determination, but Ms. Scheible?

MS. SCHEIBLE: Your Honor, in that case, I'm going to need additional time to subpoena additional witnesses.

MR. MUELLER: I have no further witness -- questions for the trooper. I -- and defense has no further questions for this -- for the hearing.

The law on this point is very clear. I -- we've already covered the grounds that would need to be --

THE COURT: Well, let's go ahead and cover it.

MR. MUELLER: All right. Thank you, Your Honor.

If the Court may recall -- or maybe I do have a few years on you -- I started the DUI team. The law is actually very clear. I still have burned in my brain serving subpoenas at one and two in the morning in front of the Clark County Courthouse, the old one.

The laws in Nevada is service of subpoena is effective under only -- only two, and only two conditions. One, somebody personally hands them

the subpoena, and they sign for it, which is the way we had to do it. And then about 10 years after that, maybe 15 years ago, they added a statute that says if you call someone -- if I call the trooper, Hey, Troop. We've got court tomorrow. Did you get your subpoena? Oh, yeah. You mailed it to me. I got it. I'll be there. Telephone service is also good.

Those are the two ways that are -- and that's the only two ways this case doesn't get dismissed, if the State can establish either one of those two services. Number one, he didn't sign for it. He said he didn't sign for it. No one in his chain of command gave him a subpoena. He did not get subpoenaed the old-fashioned, old-school way. So number two is, did someone talk to him on the phone or acknowledge that he got the subpoena? He still hasn't testified anything about that.

What we have is a document called NHP Services. Okay. That's wonderful. But law exists -- law in courts exist to prevent the citizens being taken advantage of by government and government convenience. It doesn't matter at this point what she adduces. That's one of two ways that service is effective. And she can't establish it. The trooper's already foreclosed both ways. So she can come in and

establish, Well, we normally do it this way. We normally do it that way. The law is the law.

I assure you I've spent many days arguing what the law should be, but that's not what my job is. My job is to enforce the law as it's written. And as it's written, it says one of two ways, neither of which has been established. It doesn't matter what else she says. It doesn't matter what -- how convenient the system is. It doesn't matter what its error rate is. It does not matter. He didn't get served one of two valid ways. And the State did not have reason to believe he was going to be here.

The Bustos granted by the Court over objection on the 17th of July isn't appropriate. I renew my motion to dismiss.

THE COURT: It appears to me that the State did satisfy it. But I'd like to have this briefed because this is a new issue that is going forward. And I've never heard this issue before. And it sounds like if it is one of two, I think one of the two prongs has been satisfied.

Go ahead, Ms. Scheible.

MS. SCHEIBLE: If I could just be heard briefly, Your Honor? The -- the legal requirement is that personal service be made. And in the modern era

of e-mail, we have e-mail accounts that can only be accessed by the person who has the password. And staff everywhere, NHP officers included, are instructed on who to share that password and who not to share that password with. The -- NHP has a system in place that provides for personal service via e-mail. Because our technology is advanced enough today that NHP has the capability to e-mail a subpoena personally to an officer and be ensured that that subpoena has gone to that officer, that officer alone, and directly to that officer. Once they do that, they communicate back to the DA's office that they have served that subpoena on that officer.

And that is the proof that I brought with me today in the subpoena return that shows that NHP did its part to inform Officer Luna of the hearing on the 17th of July. And they did their part to tell us that he was going to be here. That there was a breakdown somewhere in that communication, somewhere in the scheduling, that Mr. Luna failed to appear is not the point here. The point is that he was properly served, and he simply failed to get to the courthouse.

And I understand if you want additional briefing on the matter. I would be willing to do that, but I think that as far as the overarching

policy goals of the service statute and of the criminal statute, we have satisfied them here. The point isn't to keep -- the point is not to keep people from being prosecuted due to technical issues in an electronic subpoena system, the point is to make sure that the State is meeting its burden to inform officers when they have to be present and doing what is practical and what is ordinary practice in order to get those officers here, which is what we've done.

Again, I think that we will be able to show that personal service was effectuated on Officer Luna, given the time to further speak with him and to further speak with the appropriate administrative agents at NHP. And I would ask for that time to do that if you're not inclined to grant -- if you're not inclined to deny the motion at this time.

THE COURT: Mr. Mueller.

MR. MUELLER: My colleague actually makes no meaningful effort to avail herself of the law.

Now, just Sunday I had brunch with a guy who wants to run for the State Assembly. It's a wonderful job, a great occupation.

But that's not this case. What she wants the law to be is not what it is. What the law

is is there's two mechanisms, and only two, to effectuate service, personal service or acknowledgment via the phone. Neither was present. She can't explain why he wasn't served. He doesn't deny he wasn't served. He's got no recollection of being here.

The State did not exercise due diligence to be ready to go. This is willful right indifference to the rights of the defendant. The motion should be granted. This case should be dismissed.

Now, if she wants to run for State Assembly, I think she'd be a very fine State Assemblywoman.

THE COURT: Well -- and I appreciate that. I'll be honest with you. I think we went through a lot of this the last time. And the arguments that Ms. Scheible made, I think, were the arguments that I was looking at this from the standpoint of the requirements. And I believe that they have been satisfied. I think service is -- the issue of service has been addressed.

But if you would like additional time to brief it --

MR. MUELLER: Yes, Judge. I would accept

your offer.

THE COURT: But -- well, Ms. -- so this isn't Ms. -- this isn't -- this is your motion. And Ms. Scheible just learned about it today, as I did, understanding that I did say you could renew it, but I wasn't aware that you were going to renew it until just now.

MS. SCHEIBLE: I'm just a little bit confused by your ruling. Is it that we have met the burden and you will deny the motion?

THE COURT: I believe that service has been fine and I properly ruled at the last hearing. And the arguments that you made were what I considered to be good service on the subpoena. But if you would like time to have that briefed which, an issue like this, I think probably is maybe a good idea. But if you don't --

MS. SCHEIBLE: I'm not seeking to brief the issue, Your Honor.

THE COURT: Okay.

MR. MUELLER: I -- respectfully, Judge, I am -- and to my colleague, I am on rock-solid ground here. I take -- if -- if -- coming in now that I know he's verified the facts that I understood them on the previous occasion. And I can bring you in the law.

And I believe that will end up in a dismissal for Ms. Plumlee. That's what's appropriate here.

And if you would -- I'd like a day or two to put this transcript -- daily transcript together and make a motion to dismiss.

THE COURT: And -- I guess, you know, part of my concern is we've been trying to go forward with this proceeding. The difference is we're looking at a trial. And I'm trying to proceed on these matters. And it seems like we've been delayed for quite some time. I did mention that at sidebar. This case is over a year old at this point. And we've been trying and trying and trying to proceed on this. And it seems like we have some roadblocks.

You know what, let's do this. Let's do this. Let's go ahead and continue it for a period of two weeks. I'm going to continue the trial. I'm not going to continue to do an evidentiary hearing and then continue it for a trial because we've been taking way too much time on this already. I'll give you both an opportunity to submit your briefs that I can review.

If you would like to call any additional witnesses, Ms. Scheible, you are more than welcome to do that. I think that's only fair in these

proceedings, based on the fact that you just found out about it about -- what -- ten minutes ago? So did I.

MS. SCHEIBLE: That's fine, Your Honor. I'm just wondering -- procedurally, is there any reason that we couldn't go forward with the trial today? And then if she's convicted, asking that the trial -- Mr. Mueller could renew his motion for a dismissal on the same grounds, and it could be reviewed post-conviction.

MR. MUELLER: I'm satisfied with the Court's ruling.

THE COURT: Yeah. And we're -- we're going to proceed this way.

MS. SCHEIBLE: Okay.

THE COURT: And I'll explain that to you at sidebar.

MS. SCHEIBLE: Okay.

THE CLERK: October 1st at 9:30.

MR. MUELLER: Madam Clerk and Judge, if I can get just an additional week? I have taken -- agreed to take my kids back to the old country. I'm flying my two oldest kids back --

THE COURT: Yeah. I don't want to interfere with that.

MR. MUELLER: -- to Munich for the last

weekend of September for Oktoberfest.

THE COURT: That's fine.

THE CLERK: October 7th --

MR. MUELLER: That's fine. I'll get one of my lawyers to write a brief.

THE CLERK: -- at 9:30.

THE COURT: We just moved it from the 1st to the 2nd?

THE CLERK: The 7th.

THE COURT: Oh, 7th. Okay. Okay. I was going to say, I didn't know he can do that.

Trooper, thank you very, very, very much for being here. I apologize for the delay. Thank you.

And if I can have a sidebar?

MR. MUELLER: Certainly.

And, Madam Court Reporter, if it's not too much trouble, can I get a copy of the 17th of July's hearing and today's hearing?

THE COURT REPORTER: I'll let Lisa know about the July date. And then I'll call your office, and we can figure out an estimate.

THE COURT: And I thought you had that, Craig, because I've got it.

MR. MUELLER: Okay.

Maybe you can run off a copy then.
(An off-the-record discussion was held at the bench)
THE COURT: Let's go back on the minutes of Jennifer Plumlee. She is to abstain from any consumption of any alcoholic beverage of any kind.
MR. MUELLER: Not a problem, Judge. She's in the Moderate Offenders Program. She's been doing random UAs almost every day for a year. And she's great -- making great progress.
THE COURT: Thank you.
(Proceedings concluded)
--o0o--

Attest: Full, true, and accurate transcript of proceedings.

/s/ Shawna J. McIntosh_____
Shawna J. McIntosh, CCR No. 770

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DISTRICT COURT
CLARK COUNTY, NEVADA

Criminal Appeal | **COURT MINUTES** | **March 26, 2020**

C-20-346852-A Jennifer Lynn Plumlee, Appellant(s)
vs
Nevada State of, Respondent(s)

March 26, 2020 **3:00 AM** **Motion for Order Extending Time**

HEARD BY: Scotti, Richard F. **COURTROOM:** RJC Courtroom 03B

COURT CLERK: Elizabeth Vargas

PARTIES PRESENT: Minute Order- No parties present.

JOURNAL ENTRIES

- The Court GRANTS Appellant's Motion for Order Extending Time. Given the Court's continued efforts to combat and accommodate the issues presented by the COVID-19 pandemic, the February 14, 2020 Notice of Hearing is amended as follows; a new Notice of Hearing/Scheduling Order will NOT be issued:

Appellant s Opening Brief	Thursday, April 23, 2020
Respondent s Brief	Wednesday, May 13, 2020
Appellant s Reply	Wednesday, May 27, 2020
Appeal Hearing/Argument	Thursday, June 11, 2020

Appellant to prepare the Order.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Elizabeth Vargas, to the following: motions@clarkcountyda.com; Melanie.scheible@clarkcountyda.com; receptionist@craigmuellerlaw.com. //ev 4/3/20

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DISTRICT COURT
CLARK COUNTY, NEVADA

JENNIFER PLUMLEE, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	CASE NO: C-20-346852-A DEPT NO: II

APPELLANT'S OPENING BRIEF

Appellant JENNIFER PLUMLEE, by and through her attorney of record CRAIG A. MUELLER, ESQ., hereby submits the attached as and for her Opening Brief.

DATED this 23rd day of April, 2020.

/s/*Craig A. Mueller*
CRAIG A. MUELLER, ESQ.
Attorney For Appellant

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INDEX OF CASES AND AUTHORITIES

STATEMENT OF THE ISSUES

A. Did The Justice Court Commit Reversible Error When It Denied Defendant's Motion To Dismiss?

B. Did The Justice Court Commit Reversible Error When It Admitted The Intoxilyyzer 8000 Breath Strip?

PROCEDURAL HISTORY

On October 7, 2019, Appellant JENNIFER PLUMLEE was convicted of DRIVING UNDER THE INFLUENCE (Misdemeanor-NRS 484C.110, 484C.400, 484C.105) after a bench trial in Henderson Justice Court. She timely filed her Notice of Appeal. The

transcript of the trial was received by counsel on February 26, 2020.

STATEMENT OF FACTS

According to the testimony presented at trial, on a lay witness testified that on September 10, 2018, he was stopped for a traffic light exiting 215 onto Green Valley Parkway in Henderson, Nevada. A black sedan passed his vehicle, ran the red light, struck the center median, drove on the wrong side of the road and struck an electrical pole. TT pp. 23-25:1-8. The witness saw a woman exit from the driver's seat and fall to the ground. He was too far away to be able to identify the person. He believed the individual was a woman because she was wearing a dress. TT pp. 25-27:1-20. The individual got back in the car and continued driving, eventually coming to a stop on the on ramp to the 215. The witness called 911 and flagged down an HPD cruiser.

NHP Trooper Luna testified that he was dispatched to the scene. He made contact with Appellant. He testified that he could not smell alcohol, only prepared food that was bagged up in the car. TT 51:22-25. Later he did smell alcohol on her breath and that her eyes appeared glassy, bloodshot and watery. TT 52:4-10. She performed the horizontal gaze nystagmus test, failing with six of six clues. TT 55:1-6. Trooper Luna had Appellant perform a preliminary breath test. The State did not move to admit the results of the preliminary breath test. Trooper Luna placed Appellant under arrest. At the Henderson Detention Center, Trooper Luna used the Intoxilyzer 8000 to administer two breath tests to Appellant. The first test came back with a BAC of .161. The second test came back with a BAC .155. The State eventually conceded that the breath tests were not performed within two hours but closer to three hours after Appellant was driving. TT 115:7-10.

The State called Darby Lanz to testify about calibration of the particular Intoxilyzer 8000 machine used to test Appellant. Ms. Lanz is a forensic scientist and forensic analyst of alcohol

with the Las Vegas Metropolitan Police Department's forensics laboratory. She is in charge of managing and calibrating 34 evidential instruments in four counties in Nevada. TT 81:9-19. She is neither a toxicology physician nor does she have a Master's degree in toxicology. TT 108:3-14.

In addition to testimony regarding the calibration and maintenance of the Intoxilyzer 8000, the State elicited the following testimony over defense counsel's objection:

> Q: I want to repeat my question which is, is there any way that somebody with three hours after consuming their last drink can have a blood alcohol content of .155 and not have had a blood alcohol content of --I'm sorry-- breath alcohol content of over .08 when they had their last drink?
> A: The only way that would be possible is if they drank a large amount of alcohol and then were pulled over immediately thereafter. So the alcohol would still be in their stomach and not in their system yet. So they could still be below the legal per se, and then while in custody for whatever amount of time, since it takes 30 to 90 minutes for alcohol to be absorbed to that quantity to get to the peak and then to start eliminating whatever time frame later, that would be the way. They would had to have been consuming it right before the stop or immediately preceding it.
> Q: Okay. So if somebody was, let's just use easy timeframes, if someone was pulled over at midnight and their blood alcohol or their breath alcohol content was .07, then you're saying that if they had just finished a fifth, that their blood alcohol or their breath alcohol continued to rise after that time and then continued to rise after that time and then continued and then started falling after that time?
> A: Absolutely. If they have alcohol they had just consumed. So it's still being held in their stomach. Alcohol is absorbed mainly through the upper intestine. That's where it's easiest and best absorbed. So if there is –like I mentioned earlier, absorption varies depending on food. If they had dinner and then drank, the alcohol would take longer to get into the system because there would be food in the way and absorbing something. So that's why it's hard to anticipate an absorption rate.
> But if they had drank --an entire fifth wouldn't be necessary, like you mentioned --but a quantity of alcohol, while it was still in their stomach and then were pulled over, that's not affecting them yet. They would have had it in their stomach and then if kept roadside say three hours or whatever the transport time was, three hours is plenty of time for all that to be consumed, and you'd hit your peak and start to eliminate since you're no longer consuming alcohol.
> Q: Okay.
> A: So a three-hour time frame, with that specific scenario, is possible.
> Q: So could end up with still .155 at the end of three hours?
> A: Absolutely. It all depends on how much we're talking and the height, weight, the gender, a bunch of information like that because it's all based

on the math I would use is based on studies and standards that are out there. It's all an estimate.

TT 101:13-25, 102:1-25, 103:1-21.

STANDARD OF REVIEW

A reviewing court reviews a lower court's legal conclusions *de novo* and the lower court's factual findings for clear error. *Lamb v. State*, 127 Nev. Adv. Op. 3, 251 P.3d 700 (2011); *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

ARGUMENT

A. The Justice Court Committed Reversible Error When It Denied Defendant's Motion To Dismiss.

NRS 174.315 states in relevant part:

> Issuance of subpoena by prosecuting attorney or attorney for defendant; promise to appear; informing witness of general nature of grand jury's inquiry; calendaring of certain subpoenas.
>
> 1. A prosecuting attorney may issue subpoenas subscribed by the prosecuting attorney for witnesses within the State, in support of the prosecution or whom a grand jury may direct to appear before it, upon any investigation pending before the grand jury….
> 4. A peace officer may accept delivery of a subpoena in lieu of service, via electronic means, by providing a written promise to appear that is transmitted electronically by any appropriate means, including, without limitation, by electronic mail transmitted through the official electronic mail system of the law enforcement agency which employs the peace officer.

NRS 289.027 states:

> Law enforcement agency required to adopt policies and procedures concerning service of certain subpoenas on peace officers.
>
> 1. Each law enforcement agency shall adopt policies and procedures that provide for the orderly and safe acceptance of service of certain subpoenas served on a peace officer employed by the law enforcement agency.
> 2. A subpoena to be served upon a peace officer that is authorized to be served upon a law enforcement agency in accordance with the policies and procedures adopted pursuant to subsection 1 may be served in the manner provided by those policies and procedures.

Before the start of the trial on October 7, 2019, defense counsel renewed a motion to

dismiss he had made at other hearings. On July 17, 2019, the State requested a continuance of trial due to the fact that the State's main witness, Trooper Luna of the Nevada Highway Patrol, failed to appear. This motion was renewed on September 16, 2019, the State, as reflected by the transcript of the July 17 hearing and a following hearing on this matter held September 16, 2019, failed to properly serve a subpoena on Trooper Luna, leaving him unaware he was supposed to appear at the July 17 hearing. Because the State failed to meet its duty to be prepared to present its case, and given its failure to properly subpoena Trooper Luna, the State cannot show good cause for its inability to present a case at the July 17 hearing, the charge[s] against Defendant should be dismissed.

Bustos v. Sheriff, 87 Nev. 622, 491 P.2d 1279 (1971) established the principle that a "prosecutor should be prepared to present his case to the magistrate or show good cause for his inability to do so." In *Clark v. Sheriff*, 94 Nev 364, 580 P.2d 472 (1978) the Supreme Court of Nevada ordered the district court to issue a writ of habeas corpus where the magistrate had acted beyond his authority in granting a continuance in violation of the jurisdictional procedural requirements of *Hill* and *Bustos*. As stated in *Bustos*, "[t]he business of processing criminal cases will be frustrated if continuances are granted without good cause." *Bustos,* 87 Nev. at 624, 491 P.2d at 1280. Failure to cause subpoenas to be properly issued and properly served upon witnesses does not demonstrate good cause. *Hill,* 85 Nev. at 235, 452 P.2d at 918. Trooper Luna's testimony at the September 16, 2019 hearing, combined with the fact that he clearly did not provide a written promise to appear, makes clear that not only did the State fail to properly subpoena Trooper Luna, the State failed to notify him in any way of the July 17 hearing. The State's sending out a request to appear, not receiving a written promise back from Trooper Luna, and then not following up, simply fails to comply with the relevant statute. This failure by the

State does not meet the standard of proper diligence or good cause. Since in the current case the prosecution failed to properly issue and serve a subpoena, the prosecution is not in compliance with the standards of *Bustos* and *Hill*, and the charges against defendant should be dismissed.

B. The Justice Court Committed Reversible Error When It Admitted The Intoxilyzer 8000 Breath Strip.

NRS 484C.110 states in relevant part:

> Unlawful acts; affirmative defense; additional penalty for violation committed in work zone or pedestrian safety zone.
> 1. It is unlawful for any person who:
> (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; or
> (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, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access….

In *State v. Bobby Armstrong,* 127 Nev. Adv. Op. 84, 267 P.3d 777 (2011), a blood test taken more than two hours after the vehicle stop was excluded. There, as here, the State tried to introduce evidence of retrograde extrapolation to establish the defendant's BAC at the time of the stop. The District Court ruled the evidence inadmissible and the Supreme Court agreed. *Id.* In doing so, the Supreme noted that reliable retrograde extrapolation calculation requires consideration of a variety of factors.

> The following factors are relevant to achieving a sufficiently reliable retrograde extrapolation calculation: (1) gender, (2) weight, (3) age, (4) height, (5) mental state, (6) the type and amount of food in the stomach, (7) type and amount of alcohol consumed, (8) when the last alcoholic drink was consumed, (9) drinking pattern at the relevant time, (10) elapsed time between the first and last drink consumed, (11) time elapsed between the last drink consumed and the blood draw, (12) the number of samples taken, (13) the length of time between the offense and the blood draws, (14) the average alcohol absorption rate, and (15) the average elimination rate.

State v. Bobby Armstrong, 127 Nev. Adv. Op. at 12, 267 P.3d at 783.

LVMPD chemist Lanz identified these same factors, and acknowledged that she could not testify to these factors. TT 103:1-21. Thus, not only was her testimony as to Appellant's breath alcohol content outside her area of expertise, but it lacked sufficient foundation and was improperly admitted.

CONCLUSION

Based on the foregoing, Appellant Jennifer Plumlee's appeal must be granted, and her conviction vacated.

Respectfully SUBMITTED this 23rd day of April, 2020.

/s/Craig Mueller
CRAIG A. MUELLER, ESQ.
Attorney For Appellant

AFFIRMATION PURSUANT TO NRS 239B.030

I, Craig A. Mueller, Esq., do hereby affirm that the preceding APPELLANT'S OPENING BRIEF in Eighth Judicial District Court, case number C-20-346852-A, Dept. II, does not contain the social security number of any person.

DATED this 23rd day of April, 2020.

/s/Craig A. Mueller
CRAIG A. MUELLER , ESQ.

CERTIFICATE OF ELECTRONIC SERVICE

I certify that a copy of Appellant's Opening Brief was served through the court clerk's Odyssey Efile/Eservice network on April 23, 2020, to:

MELANIE SCHEIBLE, ESQ.
Deputy District Attorney
Clark County District Attorney's Office

BY: */s/Rosa Ramos*
Senior Criminal Paralegal
Mueller & Associates

RSPN
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JENNIFER PLUMLEE,
#1410679

Defendant.

CASE NO: C-20-346852-A

DEPT NO: II

STATE'S RESPONSE TO DEFENDANT'S OPENING BREIF

DATE OF HEARING: JUNE 11, 2020
TIME OF HEARING: 9:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through MELANIE SCHEIBLE, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Opening Breif.

This Response 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.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellant was arrested in the instant case on September 19, 2018 for Driving Under the Influence and Failure to Maintain Lane and released from custody shortly thereafter. The State filed a criminal complaint on or about December 15, 2018 and Appellant was arraigned on February 5, 2019. Appellant's non jury trial was first schedule March 26, 2019.

At the time of Appellant's arrest she had already been adjudicated guilty of Driving Under the Influence – 1st Offense in Henderson Municipal Court Case 17CR009539, and that case remained open. Prior to the non jury trial in the instant case, a Chief Deputy District Attorney discussed this case with her Appellant's attorney at the time, Christina Hinds, and the case was "called off" as the parties had reached a negotiation. A subsequent date was set for Appellant to enter her plea on April 10, 2019. On April 10, 2019, Appellant indicated she changed attorneys and another date was set for a status check on the confirmation of counsel for April 25, 2019.

On April 25, 2019 Susana Reyes appeared on behalf of Craig Mueller and yet another status check was set for May 13, 2019. On May 13, 2019, Appellant rejected the previous negotiations and a non jury trial was scheduled for July 17, 2019.

While the instant case was pending, on or about June 18, 2019, Appellant's sentence was modified in the Municipal Court Case, 17CR009539 to require that she complete the Moderate Offenders Program through Las Vegas Justice Court.

On July 17, 2019 the State moved for a continuance of the non jury trial in the instant case pursuant to Bustos v. Sheriff, Clark County, 87 Nev. 622, 623, 491 P.2d 1279, 1280 (1971). The motion was granted and the trial was re-set for September 16, 2019.

On September 16, 2019, Appellant moved to dismiss the case on the grounds that the previous motion to continue had been granted in error. The Court offered Appellant the opportunity to brief her argument in writing, and the non jury trial was re-set again to October 7, 2019.

On October 7, 2019, Appellant's motion to dismiss was denied and she proceeded to trial. Appellant was found guilty of Driving Under the Influence and Failure to Maintain Lane following the trial. A date was set for formal adjudication and sentencing of November 19, 2019. Appellant was adjudicated guilty of Driving While under the Influence – Second Offense, and Failure to Maintain Lane in the instant case on November 19, 2019. Appellant subsequently filed her Notice of Appeal Opening Brief. The State's Reply follows.

STATEMENT OF FACTS

On September 10, 2018, Jennifer Plumlee ("Appellant") was driving along Green Valley Parkway near the 215 in Henderson Nevada. 10/7/19 Non Jury Trial Transcript (NJTT) at 23. After running through a red light, she hit and jumped over the center median smashing into an electric pole, head on. Id at 24-25. Appellant opened the driver's side door, stumbled, and fell to the ground as she tried to exit her vehicle. Id at 26. Appellant eventually stood, surveyed her vehicle and got back in the driver's seat. Id at 27. She continued to press the gas pedal, causing her back wheels to turn, though the vehicle could not move because it has already collided with the pole. Id at 29. The car eventually slid backwards and Appellant maneuvered around the pole into the center of an intersection. Id at 30. Another concerned driver called 911 and flagged down a law enforcement officer who conducted a stop of the vehicle on the 215 heading westbound. Id at 32-35, 51. Shortly after, NHP Officer Greg Luna arrived and took over the investigation. Id at 44. Appellant had Chinese food in the passenger seat of her car, which Officer Luna immediately smelled upon approaching the vehicle. Id at 51. Upon inquiry, Appellant was adamant that she was heading home in the eastbound direction, despite being on the west bound freeway. Id at 51. Officer Luna observed her eyes to be glassy and smelled alcohol on her breath once was closer to her in physical proximity. Id at 52.

Officer Luna conducted a Horizontal Gaze Nystagmus test, on which Appellant exhibited six out of six clues of impairment. Id at 54-55. He then administered a preliminary breath test, which showed Appellant's Breath Alcohol Content to be above .08. Id at 58. Officer Luna then placed Appellant under arrest for Driving Under the Influence and

transported her to Henderson Detention Center. Id at 59-60. At Henderson Detention Center, Officer Luna administered a Breath Alcohol Content test using the Intoxilyzer 8000. Id at 60. The test – administered at 12:19 AM and 12:22 AM September 11, 2019 – showed her breath alcohol content to be .161 and .155, respectively.

ARGUMENT

I. The Court did not Err in Denying Appellant's Motion to Dismiss

In the instant case the trial court granted the State Motion to Continue (based on the Bustos decision) on July 72, 2019. Subsequently, the court allowed Defense to argue a "Motion to Dismiss" on September 16, 2019, and again on October 7, 2019, alleging the same arguments at the previous Motion to Continue. On October 7, 2019, the court denied the "Motion to Dismiss," essentially, affirming its own prior decision to grant the motion to continue. Therefore, the question here of whether the motion to dismiss was improperly denied and whether the motion to continue was improperly granted are one and the same. The Nevada Supreme Court has weighed in many times on the requirements for the State to show good cause for a continuance, and those standard apply in the instant case.

Good cause requires that the State "exercised reasonable diligence to secure [a witness's] attendance at trial [and]…. What constitutes reasonable efforts to procure a witness's attendance must be determined upon considering the totality of the circumstances." Hernandez v. State, 124 Nev. 639, 650, 188 P.3d 1126, 1134 (2008) citing Sheriff, Clark County v. Terpstra, 111 Nev. 860, 899 P.2d 548 (1995)

Therefore, it is relevant to note the particular facts and circumstances surrounding Appellant's case. Approximately four months after Appellant's arraignment, and almost six months after the incident in question, her case was set for a non jury trial for the second time. More than a month before that trial date, on June 3, 2019, the State caused a subpoena to be issued for NHP Trooper Greg Luna's appearance. And, sometime before July 17, 2019 NHP arrest services sent a return to the State indicating that the subpoena has been served on Officer Luna on June 18, 2019. Subsequently, when Officer Luna was not present in court on July 17,

2019, the State represented to the Court that it has made reasonable efforts to secure his appearance and requested a continuance for good cause.

Given these facts – of which the lower trial court had been fully apprised – the State acted reasonably. After numerous continuances – including a previous trial date – and nine months having passed since the incident occurred, and Appellant having been out of custody, enjoying the benefit of participating in Henderson Municipal Court's Moderate Offender Program, there was no prejudice to Appellant caused by the granting of the continuance. 10/7/19 NJTT at 130-135. In fact, when given the opportunity to proceed to trial on September 16, 2019, it was Appellant who requested the matter be delayed, over the State's objection. 9/16/19 Transcript at 24.

To offer context: in the seminal case in which the court found the State's actions to be *unreasonable* an out-of-state, lay witness, who had never been served a subpoena, failed to appear on the first day of a jury trial. Rather than seek to procure her attendance through a material witness warrant, the State sought (and was allowed) to introduce her testimony from preliminary hearing. Hernandez v. State, 124 Nev. 639, (2008)

Here, the witness has been served with the subpoena, the underlying charges were a misdemeanor, the defendant remained out of the custody, and the remedy sought was a continuance.

The State's actions simply do not meet the criteria for the kind of misconduct the Nevada Supreme Court has repeatedly stated it is trying to prevent.

> It has long been our aim that "criminal accusations should proceed or terminate on principles compatible with judicial economy, fair play and reason," and we have attempted to apply the above rules "firmly, consistently, but realistically."

Sheriff, Clark County v. Terpstra, 111 Nev. 860, 862, 899 P.2d 548, 549–50 (1995), quoting McNair v. Sheriff, 89 Nev. 434, 438, 514 P.2d 1175, 1177 (1973).

The conduct does not fall within the auspice of the scenarios described in Maes v. Sherriff as "willful failure of the prosecution to comply with important procedural rules;" nor within the realm of comparison to State v. Austin "where the prosecutor had exhibited a conscious indifference to rules of procedure affecting the defendant's rights". Bustos v. Sheriff, Clark County, 87 Nev. 622, 623, 491 P.2d 1279, 1280 (1971) (Citing Maes v. Sheriff, 86 Nev. 31m, 468 P.2d 332 (1970), State v. Austin, 87 Nev. 81, 482 P.2d 284 (1971).

In the instant case, the State later learned that Officer Luna was unavailable on July 17, 2019 because he was participating in mandatory training and Nevada Highway Patrol sent a "uniform non-appearance" form the Clark County District Attorney's office on July 16, 2019. 10/7/19 NJTT at 9-10 However, the prosecutor assigned to the case did not (and could not) receive the non-appearance form prior to her arrival in court on the morning of July 17, 2019. Id. Therefore, the Chief Deputy District Attorney prosecuting the case acted in good faith to request a continuance, for which there was good cause. If the notice of Officer Luna's training had been transmitted with more haste, the prosecutor on July 17, 2019 would have represented to the court that it is not the practice of our local law enforcement agencies to pull officers out of mandatory training to testify in non jury trials which have already been continued numerous times and can be continued again without prejudice to the defendant. Judicial economy, fair play and reason all point to allowing the continuance in this circumstance and upholding the subsequent conviction. Sheriff, Clark County v. Terpstra, 111 Nev. 860, 899 P.2d 548, (1995)

II. The Court did not Err in Admitting Evidence of Appellant's Intoxilyzer Results

It is well settled that a trial court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error. See e.g. Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002), Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978 (1995), Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983), Krause Inc. v. Little, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001)

Appellant's dependence on State v. Dist. Ct. (Armstrong), 127 Nev. 927, 936, (2011) is misplaced. That case addressed whether the results of a test of blood taken more than two hours after the defendant was involved in a vehicle accident would appeal to "the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence." State v. Dist. Ct. (Armstrong), 127 Nev. 927, 933, (citing Krause Inc. v. Little, 117 Nev. 929 at 935 (2001)) The concern that a jury would be so shocked by the defendant's astonishingly high blood alcohol content that its members would be unable to rationally consider the evidence does not apply in this case where the trier of fact was a judge and not a jury.

The State reiterates the argument put forth at trial. If Appellant's obvious signs of impairment, including hitting a lamp post, continuing to accelerate into that lamp post, being unable to stand up on two feet upon exiting her vehicle, and exhibiting numerous clues on the Field Sobriety Test left any doubt as to her impairment, looking to the results of a breath alcohol test could be useful. 10/7/2019 NJTT at 113-117. In this case, the test was taken outside the two hour mark, so if the breath alcohol concentration had been near .08, retrograde extrapolation may have been useful—though not necessary—to prove Appellant's intoxication beyond a reasonable doubt. Id. But, this case is not a "close call." By the time the test was administered, some two hours and seventeen minutes after Officer Luna reported to the scene, her breath alcohol content was still twice the legal limit: .161 and .155. NJTT at 97.

In Sheriff of Clark County v. Burcham, the Nevada Supreme Court held that no expert opinion is required to establish probable cause through retrograde extrapolation. 124 Nev. 1247, 1249–50, 198 P.3d 326, 327 (2008). In other words, a grand jury or jury can infer if a defendant's blood alcohol concentration was rising or falling. Id. In Burcham, police administered a retrograde extrapolation test on a DUI suspect within the statutory two-hour time window, which indicated a BAC of 0.07. Id. at 1251, 198 P.3d at 328; NRS 484C.110, 484C.200. A subsequent test was administered an hour and seven minutes later, which indicated a BAC of 0.04. Burcham, 124 Nev. at 1251. Both tests made clear that the suspect's intoxication level was decreasing rather than increasing. Id. The Court noted that the average

metabolic dissipation rate of alcohol—approximately 0.02 percent per hour—may be used to infer that a suspect was at or above the 0.08 BAC limit. Id. at 1254. Using this line of logic, the Court held that no expert witness was necessary at a probable cause hearing, and based on the two BAC levels, it could infer that the suspect's BAC was at or above 0.08 while operating the motor vehicle. Id.

In the instant case, the State was not burdened with proving that Appellant's BAC was at or above .08 while operating a vehicle beyond a reasonable doubt. The State offered, and the court accepted, evidence of a BAC between .160 and .155 as further corroboration of the the intoxication already proven by eyewitnesses at the time of trial. 10/7/19 NJTT at 115-116. Under Burcham it is acceptable for a finder of fact to use their basic cognitivie abilites to make inferences about metabolism of alchol by the human body and resulting impairment. The evidence was both relevant and admissible, leaving no reason for this Honorable Court to reverse the trial court's decision.

CONCLUSION

For the forgoing reasons, the State respectfully submits that Appellant's conviction ought to be AFFIRMED.

DATED this 13 day of May, 2020.

Respectfully submitted,

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

BY _____
MELANIE SCHEIBLE
Deputy District Attorney
Nevada Bar #14266

ROC or Certmail or Certfax

MS/ms/L-5

C-20-346852-A Jennifer Lynn Plumlee, Appellant(s)
vs
Nevada State of, Respondent(s)

June 11, 2020 09:00 AM Argument

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Vargas, Elizabeth

RECORDER: Amoroso, Brittany

REPORTER:

PARTIES PRESENT:

Craig A Mueller	**Attorney for Appellant**
Jennifer Lynn Plumlee	**Appellant**

JOURNAL ENTRIES

State not present. Mr. Mueller argued regarding the Appeal. COURT ORDERED, the District Attorney to listen to JAVS and provide or be prepared to provide an opposing argument at the next hearing, and Mr. Mueller's reply was reserved. COURT ORDERED, matter CONTINUED.

CONTINUED TO: 6/18/20 9:00 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Criminal Appeal	**COURT MINUTES**	**June 18, 2020**

C-20-346852-A Jennifer Lynn Plumlee, Appellant(s)
vs
Nevada State of, Respondent(s)

June 18, 2020 09:00 AM Argument

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Tucker, Michele

RECORDER: Amoroso, Brittany

REPORTER:

PARTIES PRESENT:

Craig A Mueller	**Attorney for Appellant**
Melanie L. Scheible	**Attorney for Respondent**

JOURNAL ENTRIES

Ms. Scheible appeared via BlueJeans.

Mr. Mueller advised the State has asked for a continuance. Ms. Scheible requested 7/9/20. COURT ORDERED, Matter CONTINUED.

CONTINUED TO: 7/09/21 9:00 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Criminal Appeal	**COURT MINUTES**	**July 09, 2020**

C-20-346852-A Jennifer Lynn Plumlee, Appellant(s)
vs
Nevada State of, Respondent(s)

July 09, 2020 09:00 AM Argument

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Garcia, Louisa

RECORDER: Amoroso, Brittany

REPORTER:

PARTIES PRESENT:

Craig A Mueller	**Attorney for Appellant**
Jennifer Lynn Plumlee	**Appellant**
Michael G Giles	**Attorney for Respondent**

JOURNAL ENTRIES

Mr. Miles appeared for Melanie Scheible on behalf of State. Court noted Mr. Mueller already argued and State was going to reply. Arguments by counsel whether or not the evidence that came in was admissible and if it influenced Judge George's decision. COURT ORDERED, matter taken UNDER ADVISEMENT; it will issue its decision from Chambers.

Electronically Filed
6/18/2020 11:31 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

JENNIFER LYNN PLUMLEE, Appellant, vs. THE STATE OF NEVADA, Respondent.	CASE NO.: C-20-346852-A DEPT. II

BEFORE THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE

THURSDAY, JUNE 11, 2020

RECORDER'S TRANSCRIPT OF HEARING RE: ARGUMENT

APPEARANCES:

For the Appellant: CRAIG A. MUELLER, ESQ.

For the Respondent: NO APPEARANCE

RECORDED BY: BRITTANY AMOROSO, COURT RECORDER

Las Vegas, Nevada; Thursday, June 11, 2020

[Hearing commenced at 9:32 a.m.]

THE COURT: Plumlee versus State of Nevada, C346852. Do we have somebody from the DA's office on this one? Anybody from the -- Mr. Nance are you still --

MR. MUELLER: This was done of -- up from the Henderson team, Judge. I know they're administratively broken up into different units.

THE COURT: Let's call one more time. Plumlee versus State of Nevada, C346852. Do we have anybody here on behalf of the State? This is the matter where Officer Luna apparently didn't show up at some prior hearing and there was a continuance. Anybody from the State call in anybody, or text, or email indicating that they wouldn't -- or needed a continuance on this one? All right. Let's move this one over.

If you want, I could hear -- since you have client here, I could hear argument now and then I would simply ask the State to listen to JAVS and then respond.

MR. MUELLER: Surely, Judge. I'm --

THE COURT: And then you could be back here for reply in the absence of your client.

MR. MUELLER: That'll be great.

THE COURT: Why don't you go ahead and present argument on this one then.

MR. MUELLER: Certainly. Jennifer, you want to go ahead

and sit down?

Your Honor, I applied for the District Attorney's Office out of civil practice in 1993. A friend of mine heard I gotten the interview and pulled me aside and took me to lunch before I went and met with Bill Koot and Rex Bell, and the first thing that that former District Attorney taught me was two motions, the *Hill* motion and the *Bustos* motion. Literally, the very first --

THE COURT: Yeah.

MR. MUELLER: -- idea that I was exposed to as a District Attorney, or would be District Attorney, was the idea that the State had to prepare. The State --

THE COURT: I studied, of course, both when I was handling the felonies.

MR. MUELLER: All right.

THE COURT: And so, I'm well familiar, but you may summarize it.

MR. MUELLER: All right. Well thank you, Your Honor. So, this is literally the blackest of black letter law. It is the first -- literally the first minute, and the first hour, the first day that I thought about being a District Attorney, this is the law I was exposed to. State has to prepare. If they don't prepare, the case gets dismissed. That's it. It's about that simple.

There are circumstances where if someone is unavailable because of training or they're in a car wreck, there is law that makes allowances on behalf of the State. Specifically, I subpoenaed the guy

and he's on vacation seeing his grandmother in Austria. Okay. We'll give him a pass on that one by law. If he does it in writing and it's done ahead of time.

Then there's a *Bustos* motion. *Bustos* is a bus stop. That's how I always remember it. *Bustos* is, I subpoenaed the guy, I expected him to be here. He wasn't here. Well, I know Trooper Luna. That's the one -- one of the upsides and downsides of practicing a small jurisdiction, is I kind of know people. So the District Attorney, Ms. Plumlee, and I are ready for trial. The District Attorney makes a *Bustos* motion for Trooper Luna.

THE COURT: Mm-hmm.

MR. MUELLER: I look at the motion. I don't believe it's served. It's a electronic service. Judge, I know Trooper Luna. He's a former Marine. I assure you if he knew about this, he'd be here. Okay? Because that's the kind of guy he is. I don't believe that he was served. I don't believe he's got actual notice.

I asked the District Attorney to prove who talked to Luna. She could not make affirmative representations. I move to dismiss. And the judge, probably in abundance of caution, held back, and if I were a judge, probably would have held back too to let the record get flushed out. Then I said, all right, Your Honor. If you're not going to dismiss it, then I'm going to ask that I'd be allowed to renew this motion before the trial date continues, which is -- was something I'd been taught to do over the years.

Trooper Luna shows up and I get him on the witness stand

before trial. Did you know about this date? No. Were you served electronically? No. Did you have any reason that you knew about and didn't appear at the prior date? No. That's it. That means I was correct on the trial date. There was no effort to find Trooper Luna. He did not appear and Ms. Plumlee's rights to a speedy trial are impeded. Nevada law is abundantly clear on this point.

THE COURT: Well of course, it's the good cause standard, and the judge made a determination implicitly that there was good cause. Isn't that a question of fact also?

MR. MUELLER: Well, perhaps I've gotten a little cantankerous that I've gotten a few older, but I used to stay at the office and call witnesses that I didn't have subpoenas for so I could stand up in Court and said -- and when I didn't have a subpoena, I tried calling them. All right? I never got a case dismissed on me. Now, that's the level of diligence that the State has -- has to by law due to be prepared --

THE COURT: Right.

MR. MUELLER: -- to go.

THE COURT: The question is could any reasonable judge have determined, based on the facts that you just presented, that there was not good cause?

MR. MUELLER: The answer is no. It's black --

THE COURT: Or that there was good cause so --

MR. MUELLER: It's -- this is law to fact.

THE COURT: Yeah. Okay.

MR. MUELLER: This is -- this isn't a finding of fact appeal. This is a finding de novo of law. I believe that she stood up and said, and candidly I don't believe she did this intentionally, but she stood up and made falsehoods to the Court. He was served. I expected him to be here. I look at the subpoena. I say, I wouldn't have expected him to be here. Who served it? Well, I don't know. This is electronic service. Okay. How do we know he got it?

THE COURT: Okay.

MR. MUELLER: So -- and then I confirmed my suspicion was correct. Trooper Luna hadn't gotten it. No one had made any effort.

[Colloquy between the Court and the Gallery]

MR. MUELLER: Trooper Luna had not gotten it. So, I renewed my motion to dismiss. Now, two trial dates, they weren't ready to go. Case should have been dismissed by every bit of law that I've ever known in Nevada.

THE COURT: Okay.

MR. MUELLER: They hadn't made an effort. If Trooper Luna had been on reserve duty, okay. If he'd been out of town, they'd have gotten it. They thought he had it. Nobody had made an effort to do it.

THE COURT: All right. So I've heard enough on that.

MR. MUELLER: Okay, next issue.

THE COURT: Well -- ten more -- well, okay.

MR. MUELLER: Okay.

THE COURT: Ten more -- can you give me your additional argument in a minute?

MR. MUELLER: They've -- they admit a breath test at three and a half hours -- three hours and fifteen minutes. And that's -- and it used as a base of conviction. That's actually errors of once again, an error of law. This -- I've got a young District Attorney who's gotten her teeth down there, and the judge is giving her a little more rope than she's entitled to, and now we're standing up here in District Court complaining on two egregious errors of law, that either one of which, warrants a summary dismissal with prejudice.

THE COURT: Very good. You have time reserved for a reply. We'll have the DA listen to JAVS and be back here in a week for any argument that they have. All right?

MR. MUELLER: All right. Thank you, Your Honor.

THE COURT: Thank you. That's technically continued then, until next --

THE COURT CLERK: Thursday?

THE COURT: -- for one week. Yep, Thursday.

THE COURT CLERK: June 18th.

MR. MUELLER: All right. Thank you. See you on the 18th.

THE COURT: Thank you.

[Hearing concluded at 9:39 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.

Brittany Amoroso
Court Recorder/Transcriber

C-20-346852-A Jennifer Lynn Plumlee, Appellant(s)
vs
Nevada State of, Respondent(s)

July 16, 2020 03:00 PM Minute Order

HEARD BY: Scotti, Richard F. COURTROOM: Chambers

COURT CLERK: Garcia, Louisa

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

The Court DENIES the Appeal, AFFIRMS the Conviction, and any bond is forfeited to the State.

The Court finds that the Justice of the Peace (Justice) did not commit error in finding "good cause" to grant the State s motion for continuance. The Justice could have found from the evidence that: the State prepared a subpoena for Officer Luna; the State provided the subpoena to the Nevada Highway Patrol (NHP); the NHP told the State that the subpoena had been served on Officer Luna; the State believed in good faith that Officer Luna would appear for Trial on July 17, 2019; and the State did not reasonably discover that Officer Luna would not appear until the day of Trial.

Appellant argues that strict compliance with the requirements for service of a subpoena, or, alternatively, a promise to appear by the witness, is a necessary condition to establish "good cause" under Bustos, 87 Nev. 622 (1971). This Court disagrees, noting that "good cause" must be examined under the totality of the circumstances.

As for the Intoxilyzer 8000 data, the Court accepts the representation of the Justice that he did not rely upon that evidence, so admission of such evidence, if in error, was harmless. The State to prepare and submit the Order, pursuant to the requirements of AO 20-17.

CLERK'S NOTE: A copy of this minute order was emailed to Melanie L. Scheible, melaniescheible@clarkcountyda.com, Michael Giles, michaelgiles@clarkcountyda.com and Craig Mueller, craig@muellerlaw.com. /lg 7-16-20

ORDR
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DISTRICT COURT
CLARK COUNTY, NEVADA

JENNIFER PLUMLEE, Appellant,	)	CASE NO: C-20-346852-A
vs.	)	DEPT NO: II
THE STATE OF NEVADA, Respondent.	)	

ORDER

Appellant JENNIFER PLUMLEE's oral motion to stay requirements pending this court's final decision on her appeal having come before the court July 9, 2020, by and through her attorney of record CRAIG A. MUELLER, ESQ., the STATE OF NEVADA represented by Deputy District Attorney MELANIE SCHEIBLE, and good cause appearing, it is hereby ORDERED that the sentence requirements imposed by the Henderson Justice Court in case number 18MH0263X are hereby STAYED until final decision in this appeal.

SO ORDERED this 17th day of July, 2020.

Dated this 17th day of July, 2020

DISTRICT COURT JUDGE BMT

B8B A11 0EC1 54A1
Richard F. Scotti
District Court Judge

Prepared And Submitted By:

___*/s/ Craig A. Mueller*_____

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Jennifer Lynn Plumlee, Appellant(s) vs Nevada State of, Respondent(s)	CASE NO: C-20-346852-A DEPT. NO. Department 2

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 7/17/2020

Craig Mueller	electronicservice@craigmuellerlaw.com
Rosa Ramos	rosa@craigmuellerlaw.com
District Attorney	motions@clarkcountyda.com

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DISTRICT COURT
CLARK COUNTY, NEVADA

JENNIFER PLUMLEE, Appellant,	)	CASE NO: C-20-346852-A
vs.	)	DEPT NO: II
THE STATE OF NEVADA, Respondent.	)	

APPELLANT'S MOTION TO RECONSIDER

COMES NOW, Appellant JENNIFER PLUMLEE, by and through her attorney Craig Mueller, Esq., and hereby moves for reconsideration of this Honorable Court's decision dated July 16, 2020, denying her appeal. This Motion is supported by the attached Memorandum Of Points And Authorities.

/s/ Craig A. Mueller

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Attorney For Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

Appellant Jennifer Plumlee respectfully requests that this Honorable Court reconsider its decision to deny her appeal on the following grounds:

A. Deputy District Attorney Scheibel's prosecution of this case violates the Separation of Powers Doctrine.

The Nevada Constitution states in relevant part:

ARTICLE. 3. - Distribution of Powers.

Section 1. Three separate departments; separation of powers; legislative review of administrative regulations.

1. The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Deputy District Attorney Scheibel serves on the Nevada State Legislature. She is also employed as a prosecutor by the Clark County District Attorney's Office. Her active involvement trying criminal cases would appear to clearly violate the express terms of Nev. Const. Art. 3 Sec. 1(1): "…no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others…."

B. The Justice of the Peace committed plain error.

Even applying the court's "totality of the circumstances" test for good cause, the State did not establish a good faith to move to continue Appellant's trial on July 17, 2019. The totality of the circumstances at the time the case was called for trial were:

1. Trooper Luna, the State's most essential witness, was not present.

2. The Deputy DA in the courtroom was unable to produce a signed subpoena return, or an electronic return/acknowledgement of service.

3. The Deputy DA in the courtroom was unable to produce a Uniform Nonappearance Sheet.

4. The Deputy DA did not prepare and file a timely written motion to continue as required by *Hill v. Sheriff*, 85 Nev. 234, 452 P.2d 918 (1969).

Based on the clear totality of the circumstances on July 17, 2019, as they existed at the time of trial (which is the only time relevant to this inquiry), the State did not have a good faith belief that Trooper Luna would appear for trial and did not have a basis to move for a continuance. Therefore, the Justice of the Peace committed clear error in granting the State's Motion To Continue on July 17, 2019.

Respectfully SUBMITTED this 21st day of July, 2020.

/s/ Craig A. Mueller
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703
MUELLER & ASSOCIATES, INC
723 S. Seventh St.
Las Vegas, NV 89101
Office (702) 388.0568
Fax (702) 940.1235
receptionist@craigmuellerlaw.com
Attorney For Appellant

CERTIFICATE OF ELECTRONIC SERVICE

I certify that a copy of Appellant's Motion To Reconsider was served through the court clerk's Odyssey Efile/Eservice network on July 21, 2020, to:

MELANIE SCHEIBLE, ESQ.
Deputy District Attorney
Clark County District Attorney's Office

BY: */s/Rosa Ramos*
Senior Criminal Paralegal
Mueller & Associates

Electronically Filed
7/23/2020 10:47 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Jennifer Lynn Plumlee, Appellant(s) vs Nevada State of, Respondent(s)	Case No.: C-20-346852-A Department 2

NOTICE OF HEARING

Please be advised that the Appellant's Motion to Reconsider in the above-entitled matter is set for hearing as follows:

Date: August 27, 2020

Time: Chambers

Location: RJC Courtroom 03B
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Marie Kramer
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Marie Kramer
Deputy Clerk of the Court

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MELANIE SCHEIBLE
Deputy District Attorney
Nevada Bar #14266
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-

JENNIFER PLUMLEE,
#1410679

Defendant.

CASE NO: C-20-346852-A

DEPT NO: II

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER

DATE OF HEARING: AUGUST 27, 2020
TIME OF HEARING: CHAMBER

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through MELANIE SCHEIBLE, Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To Reconsider.

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.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Appellant was arrested in the instant case on September 19, 2018 for Driving Under the Influence and Failure to Maintain Lane and released from custody shortly thereafter. The State filed a criminal complaint on or about December 15, 2018 and Appellant was arraigned on February 5, 2019. Appellant's non jury trial was first schedule March 26, 2019.

At the time of Appellant's arrest she had already been adjudicated guilty of Driving Under the Influence – 1st Offense in Henderson Municipal Court Case 17CR009539, and that case remained open. Prior to the non jury trial in the instant case, a Chief Deputy District Attorney discussed this case with her Appellant's attorney at the time, Christina Hinds, and the case was "called off" as the parties had reached a negotiation. A subsequent date was set for Appellant to enter her plea on April 10, 2019. On April 10, 2019, Appellant indicated she changed attorneys and another date was set for a status check on the confirmation of counsel for April 25, 2019.

On April 25, 2019 Susana Reyes appeared on behalf of Craig Mueller and yet another status check was set for May 13, 2019. On May 13, 2019, Appellant rejected the previous negotiations and a non jury trial was scheduled for July 17, 2019.

While the instant case was pending, on or about June 18, 2019, Appellant's sentence was modified in the Municipal Court Case, 17CR009539 to require that she complete the Moderate Offenders Program through Las Vegas Justice Court.

On July 17, 2019 the State moved for a continuance of the non jury trial in the instant case pursuant to Bustos v. Sheriff, Clark County, 87 Nev. 622, 623, 491 P.2d 1279, 1280 (1971). The motion was granted and the trial was re-set for September 16, 2019.

On September 16, 2019, Appellant moved to dismiss the case on the grounds that the previous motion to continue had been granted in error. The Court offered Appellant the opportunity to brief her argument in writing, and the non jury trial was re-set again to October 7, 2019.

On October 7, 2019, Appellant's motion to dismiss was denied and she proceeded to trial. Appellant was found guilty of Driving Under the Influence and Failure to Maintain Lane following the trial. A date was set for formal adjudication and sentencing of November 19, 2019. Appellant was adjudicated guilty of Driving While under the Influence – Second Offense, and Failure to Maintain Lane in the instant case on November 19, 2019.

Appellant subsequently filed a direct appeal on or about April 23, 2020. The State filed a response on or about May 13, 2020. Appellant's conviction was affirmed by this honorable court on July 17, 2020.

Appellant filed the instant motion on or about July 22, 2020. The State herein responds.

STATEMENT OF FACTS

On September 10, 2018, Jennifer Plumlee ("Appellant") was driving along Green Valley Parkway near the 215 in Henderson Nevada. 10/7/19 Non Jury Trial Transcript (NJTT) at 23. After running through a red light, she hit and jumped over the center median smashing into an electric pole, head on. Id at 24-25. Appellant opened the driver's side door, stumbled, and fell to the ground as she tried to exit her vehicle. Id at 26. Appellant eventually stood, surveyed her vehicle and got back in the driver's seat. Id at 27. She continued to press the gas pedal, causing her back wheels to turn, though the vehicle could not move because it has already collided with the pole. Id at 29. The car eventually slid backwards and Appellant maneuvered around the pole into the center of an intersection. Id at 30. Another concerned driver called 911 and flagged down a law enforcement officer who conducted a stop of the vehicle on the 215 heading westbound. Id at 32-35, 51. Shortly after, NHP Officer Greg Luna arrived and took over the investigation. Id at 44. Appellant had Chinese food in the passenger seat of her car, which Officer Luna immediately smelled upon approaching the vehicle. Id at 51. Upon inquiry, Appellant was adamant that she was heading home in the eastbound direction, despite being on the west bound freeway. Id at 51. Officer Luna observed her eyes to be glassy and smelled alcohol on her breath once was closer to her in physical proximity. Id at 52.

Officer Luna conducted a Horizontal Gaze Nystagmus test, on which Appellant exhibited six out of six clues of impairment. Id at 54-55. He then administered a preliminary breath test, which showed Appellant's Breath Alcohol Content to be above .08. Id at 58. Officer Luna then placed Appellant under arrest for Driving Under the Influence and transported her to Henderson Detention Center. Id at 59-60. At Henderson Detention Center, Officer Luna administered a Breath Alcohol Content test using the Intoxilyzer 8000. Id at 60. The test – administered at 12:19 AM and 12:22 AM September 11, 2019 – showed her breath alcohol content to be .161 and .155, respectively.

ARGUMENT

Appellant has no legal grounds for bringing a motion to reconsider and fails to cite any law that supports her right to move for reconsideration of the previous affirmation of her conviction. It is appellant's responsibility to present relevant authority and cogent argument, issues not so presented need not be addressed by this court. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987); NRAP 28(a)(9)(A)

Appellant's failure to cite any authority for her motion not withstanding, her claims both fail on the merits, too. Appellant's first claim was waived by not including it in the direct appeal from conviction. The Nevada Supreme Court has held that "[A]ll . . . claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)).

Second, to the extend Appellant's motion for reconsideration may be considered a motion for modification of sentence, it is similarly inappropriate. A district court has jurisdiction to modify a defendant's sentence "only if (1) the district court actually sentenced appellant based on a materially false assumption of fact that worked to appellant's extreme detriment, and (2) the particular mistake at issue was of the type that would rise to the level of a violation of due process." Passanisi v. State, 108 Nev. 318 (1992) at 322-23. Appellant does

not assert a mistake of fact about her criminal record and therefore is not entitled to a sentence modification.

CONCLUSION

For the forgoing reasons, the State respectfully requestst that Appellant's motion be DISMISSED.

DATED this _____ day of August, 2020.

Respectfully submitted,

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

BY _____
MELANIE SCHEIBLE
Deputy District Attorney
Nevada Bar #14266

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Opposition To Defendant's Motion To Reconsider, was made this 7th day of August, 2020, by Electronic Filing to:

CRAIG MUELLER
receptionist@craigmuellerlaw.com

_____
Secretary for the District Attorney's Office

MS/ms/L-5

DISTRICT COURT
CLARK COUNTY, NEVADA

Criminal Appeal	COURT MINUTES	August 24, 2020

C-20-346852-A Jennifer Lynn Plumlee, Appellant(s)
vs
Nevada State of, Respondent(s)

August 24, 2020 **Minute Order**

HEARD BY: Scotti, Richard F. **COURTROOM:** Chambers

COURT CLERK: Michele Tucker

JOURNAL ENTRIES

The Court notes that Appellant filed a Request for Hearing which the Court construes as a Request for Oral Argument on August 7, 2020. Accordingly, the Court MOVES Appellant s Motion for Reconsideration from chambers to the oral calendar on Thursday, August 27, 2020 at 9AM. However, in-person appearances are NOT permitted at this time. Parties are directed to call-in to, or login to, the Blue Jeans system via the below provided phone number and Session ID number, or link.

Access phone number: 408.419.1715
Session ID: 908 222 797
Meeting link: https://bluejeans.com/908222797

RESCHEDULED TO: 8/27/20 9:00 AM

CLERK'S NOTE: A copy of this minute order was distributed via the E-Service list and emailed to all parties. / mlt

DISTRICT COURT
CLARK COUNTY, NEVADA

Criminal Appeal	**COURT MINUTES**	**August 27, 2020**

C-20-346852-A Jennifer Lynn Plumlee, Appellant(s)
vs
Nevada State of, Respondent(s)

August 27, 2020 11:00 AM Motion to Reconsider

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Garcia, Louisa

RECORDER: Amoroso, Brittany

REPORTER:

PARTIES PRESENT:

Craig A Mueller	**Attorney for Appellant**
Melanie L. Scheible	**Attorney for Respondent**

JOURNAL ENTRIES

Following arguments by counsel regarding service and separation of powers, COURT ORDERED, matter CONTINUED and GRANTED State additional time to prepare supplemental briefing on the issue of whether Appellant waived his argument of separation of powers and subject matter jurisdiction; that the proceedings were illegal based upon the Const. Article 3 Sec.1(1). State's supplemental Points and Authorities DUE 9/14/20; Response DUE 9/21/20 and Argument SET thereafter.

CONTINUED TO 9/30/20 9:15 AM

OPPS
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #10539
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-

JENNIFER PLUMLEE,
#141067

Defendant.

CASE NO: C-20-346852-A

DEPT NO: II

STATE'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER

DATE OF HEARING: SEPTEMBER 30, 2020
TIME OF HEARING: 9:15 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to Suppress.

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.

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ARGUMENT

I. APPELLANT WAIVED HER RIGHT TO THE CLAIM BY NEVER MAKING AN OBJECTION

While Appellant's argument lacks any merits on the separation of powers grounds, this Court must first look to whether any objection to the deputy's involvement in the case has been waived. The longstanding rule is that failure to preserve an error is forfeited on appeal, even when the error that has been deemed structural. Jeremias v. State, 134 Nev., Adv. Op. 8, 412 P.3d 43, 48 (2018); See also, United States v. Olano, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right..."(internal quotation marks omitted)). Thus, failure to object at any point means that this objection is untimely and should be rejected.

Appellant is suddenly for the first time arguing in a Motion to Reconsider that the Deputy District Attorney should not have been allowed to handle this case. While Appellant never objected to this matter, it should and would have failed as a matter of law.

When a party wishes to disqualify a prosecutor, such impropriety must take the form of a conflict of interest. See NRPC 1.7, 1.9, 1.11; United States v. Kahre, 737 F.3d 554, 574 (2013) ("proof of a conflict [of interest] must be clear and convincing to justify removal of a prosecutor from a case."). Defendant has failed to demonstrate, or even address, the existence of a conflict of interest.

None of these issues were ever raised by Appellant, and it is certainly no secret that the Deputy District Attorney that prosecuted Appellant was a member of the Nevada Senate at the time this case was prosecuted. The fact that the objection is coming now is clearly a last-ditch effort to get this Court to entertain the issue after having already lost the direct appeal. The easy and correct solution here is to deny Appellant's motion as something that was never raised and thereby waived.

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II. HOLDING A POSITION ON THE LEGISLATURE AND BEING A DEPUTY DISTRICT ATTORNEY DOES NOT VIOLATE THE SEPARATION OF POWERS IN ARTICLE 3 § 1 OF THE NEVADA CONSTITUTION

Appellant claims that by holding a seat on the Legislature, a Deputy District Attorney is violating the separation of powers clause in the Nevada Constitution. This is false on numerous grounds. According to Article 3, § 1, sets out the three separate departments of government: the Legislative, the Executive, and the Judicial bodies. However, an acting Deputy District Attorney is a public employee rather than a person merely holding a public office, and thus the separation of powers does not apply. Article 4, § 6 grants in each House the authority to determine the qualifications of its own members. Clearly, the Senate in Nevada has not enacted any law or prohibition of a public employee also serving as a member of the Legislature.

The Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would prohibit legislators from holding positions of public employment with the local government. Further it is relevant to point out that a Deputy District Attorney is a mere "public employee" and not a "public officer" as used in the Nevada Constitution. *See State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 984 (1953). Public officers are created by law not simply created by mere administrative authority and discretion. Second, the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. *Univ. & Cmty. Coll. Sys. V. DR Partners*, 117 Nev. 195 200-06. Since a Deputy District Attorney is a "public employee," the separation of powers doctrine as listed in Article 3 §1 is not applicable.

Specifically, for district attorneys the Nevada Supreme Court has held that the separation of powers was not applicable to the exercise of certain powers by a county's District Attorney because he was not a state constitutional officer. *Lane v. Second Jud. Dist. Ct.* 104 Nev. 427, 437 (1988). In citing NRS 252.110, which sets forth the powers inured to the district attorney, the Court indicated that the district attorney is not an office created via the Nevada State Constitution, thus the separation of powers doctrine is inapplicable.

In 2004, then Secretary of State Dean Heller also broached this topic in two different ways. First, he sought an advisory opinion from the Nevada Attorney General on whether the separation of powers clause of the Nevada Constitution was applicable to local governments. 2004 Nev. Op. Atty. Gen. No. 03 (Nev.A.G.), 2004 WL 723329. Attorney General Brian Sandoval issued his opinion that local government employees could dually serve as members of the Nevada Legislature, and that such service did not violate Article 3, § 1 of the Nevada Constitution's separation of powers clause.

Attorney General Sandoval went on to explain Nevada's "long-standing practice of local government employees serving in the Nevada State Legislature." He pointed to examples such as Assemblywoman Ruth Averill, who was the second woman ever elected to the Nevada State Legislature. Assemblywoman Averill was a school teacher that went on to serve on the Assembly Committee on Judiciary as well as the Assembly Committee on Education.

In finding authority for the dual service of people like Assemblywoman Averill, Attorney General Sandoval relied on California laws that held the separation of powers doctrine does not apply to local government employees. *People ex rel. Attorney General v. Provines*, 34 Cal. 520 (1868). The California court distinguished that the constitution set up the State government but not local and county governments. This decision was reaffirmed in California and is adopted in a majority of other jurisdictions. *Mariposa County v. Merced Irrig. Dist.*, 196 P.2d 920, 926 (Cal. 1948). It should be noted that California was an appropriate state to draw from given that Nevada's Constitution was largely modeled after California's State Constitution. *See Aftercare of Clark County v. Justice Court of Clark County,* 120 Nev. 1, 82 P.3d 931 (2004). Attorney General Sandoval concluded his advisory opinion by stating the following: "Further, it is the opinion of this office that the constitutional requirement of separation of powers is not applicable to local governments. Accordingly, absent legal restrictions unrelated to the separation of powers doctrine, a local government employee may simultaneously serve as a member of the Nevada Legislature."

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The second way that Secretary of State Heller sought clarification on this issue followed the advisory opinion in a petition for writ of mandamus that he sought challenging state government employees who also serve on the Legislature. *Heller v. Legislature of the State of Nevada*, 120 Nev. 456 (2008). The Court in *Heller* echoed and affirmed the language in Article 4, § 6 that only the Legislature has the authority to judge its members' qualifications. *Id.*, at 468, 93 P.3d at 755.

In denying the petition for writ of mandamus, the Nevada Supreme Court further held that it would be in violation of the Separation of Powers Doctrine to judicially legislate who is eligible to serve in the Nevada Legislature, given that such a function lies with the Legislature itself.

The Legislature is given deference in determining who is qualified to be a member of the Legislature. As seen in *Heller*, the Supreme Court of Nevada refused to address this issue on the merits because to address the issue presented would in itself be a violation of the separation of powers. The Legislature was given the specific authority in the constitution to qualify their members, and the supreme court said that "by asking us to declare that dual service violates the separation of powers, the secretary urges our own violation of the separation of powers". *Heller* at 459.

If this Court were to prohibit a Deputy District Attorney from a righteous prosecution, thereby vacating a conviction and starting the case anew, it would result in this Court also violating the separation of powers doctrine. Since the Legislature was granted this power in the Nevada Constitution, this authority cannot be usurped by the Judicial branch of the government without violating the separation of powers article of the Constitution.

Finally, this Court should be aware that the Legislative Counsel Bureau (LCB Legal) issued a recent opinion regarding this exact same issue. (Attached as Exhibit "1"). While LCB Legal initially affirms and reiterates much of what has been discussed above, it went further to also examine other jurisdictions, as well as the history of Nevada, in concluding that public employment is not a bar to serving in the Legislature.

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CONCLUSION

Appellant's Motion to Reconsider should first and foremost be denied on the basis of something that was waived and not previously raised. However, even on the merits, Appellant's argument lacks merit because service of a public employee in the Legislature is not a violation of the Nevada Constitution's Separation of Powers clause. Based upon the foregoing argument, the State respectfully requests that Defendant's Motion to Reconsider be DENIED.

DATED this 14th day of September 2020.

Respectfully submitted,

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

BY /s/ Alexander Chen
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar # 10539

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 14th day of SEPTEMBER 2020, by Email to:

CRAIG MUELLER, ESQ.
receptionist@craigmuellerlaw.com

BY: /s/ J. Serpa
J. Serpa
Employee of the District Attorney's Office

AC/js

EXHIBIT 1

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU
LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747
Fax No.: (775) 684-6600

BRENDA J. ERDOES, *Director*
(775) 684-6800

LEGISLATIVE COMMISSION (775) 684-6800
NICOLE J. CANNIZZARO, *Senator, Chair*
Brenda J. Erdoes, *Director, Secretary*

INTERIM FINANCE COMMITTEE (775) 684-6821
MAGGIE CARLTON, *Assemblywoman, Chair*
Cindy Jones, *Fiscal Analyst*
Mark Krmpotic, *Fiscal Analyst*

LEGAL DIVISION (775) 684-6830
KEVIN C. POWERS, *General Counsel*
BRYAN J. FERNLEY, *Legislative Counsel*

August 8, 2020

Brenda J. Erdoes, Esq.
Director
Legislative Counsel Bureau
401 S. Carson St.
Carson City, NV 89701

Dear Director Erdoes:

Pursuant to NRS 218F.710(2), you have asked the General Counsel of the Legal Division of the Legislative Counsel Bureau (LCB Legal) to address a question of constitutional law relating to the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution.[1]

In particular, you have asked whether the separation-of-powers provision prohibits state legislators from holding positions of *public employment* with the Executive Department of the

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STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU
LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747
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LEGISLATIVE COMMISSION (775) 684-6800
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LEGAL DIVISION (775) 684-6830
KEVIN C. POWERS, *General Counsel*
BRYAN J. FERNLEY, *Legislative Counsel*

August 8, 2020

Brenda J. Erdoes, Esq.
Director
Legislative Counsel Bureau
401 S. Carson St.
Carson City, NV 89701

Dear Director Erdoes:

Pursuant to NRS 218F.710(2), you have asked the General Counsel of the Legal Division of the Legislative Counsel Bureau (LCB Legal) to address a question of constitutional law relating to the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution.[1]

In particular, you have asked whether the separation-of-powers provision prohibits state legislators from holding positions of *public employment* with the Executive Department of the Nevada State Government (hereafter "the state executive branch") or with local governments. In asking this question, you note that LCB Legal has addressed this question of constitutional law in: (1) prior legal opinions issued by LCB Legal in 2002 and 2003 which were disclosed to the public; and (2) prior legal arguments made by LCB Legal in 2004 before the Nevada Supreme Court in the case of Heller, Secretary of State v. Legislature of the State of Nevada, 120 Nev. 456 (2004).

In the Heller case, former Secretary of State Dean Heller brought a lawsuit against the Legislature claiming that the separation-of-powers provision in Article 3, Section 1 of the Nevada Constitution prohibits state legislators from holding positions of *public employment* with the state executive branch or with local governments. 120 Nev. at 458-60. As a remedy for the alleged separation-of-powers violations, the former Secretary of State asked the Nevada Supreme Court to oust or exclude state and local government employees from their seats in the Legislature. Id.

[1] NRS 218F.710(2), as amended by section 22 of Assembly Bill No. 2 (AB 2) of the 32nd Special Session of the Legislature, provides that upon the request of the Director, the General Counsel may give a legal opinion in writing upon any question of law.

In response to the lawsuit, LCB Legal, which represented the Legislature in the litigation, argued in line with our prior legal opinions that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus, at 42-75 (May 4, 2004). In particular, LCB Legal argued that the Framers of the Nevada Constitution did not intend the separation-of-powers provision to prohibit legislators from holding positions of *public employment* with the state executive branch because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch. Id. at 42-68. By contrast, LCB Legal argued that the Framers intended the separation-of-powers provision to prohibit legislators from holding only *public offices* in the state executive branch because persons who hold such *public offices* exercise sovereign functions appertaining to the state executive branch. Id. Finally, LCB Legal argued that the Framers did not intend the separation-of-powers provision to prohibit legislators from holding positions of *public employment* with local governments because the separation-of-powers provision applies only to the three departments of state government, and local governments and their officers and employees are not part of one of the three departments of state government. Id. at 68-76.

On July 14, 2004, the Nevada Supreme Court decided the Heller case in favor of the Legislature, but the court decided the case on different legal grounds from the separation-of-powers challenge raised by the former Secretary of State. Consequently, the Nevada Supreme Court did not decide the merits of the separation-of-powers challenge to legislators holding positions of *public employment* with the state executive branch or with local governments. Since the Heller case in 2004, neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed or decided the merits of such a separation-of-powers challenge in a reported case.

In the absence of any controlling Nevada case law directly on point, you have asked whether it remains the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. Given that there is no controlling Nevada case law directly on point to resolve this question of constitutional law, we again have carefully considered: (1) historical evidence of the practices in the Federal Government and Congress immediately following the ratification of the Federal Constitution; (2) historical evidence of the practices in the California Legislature under similar state constitutional provisions which served as the model for the Nevada Constitution; (3) historical evidence of the practices in the Nevada Legislature since statehood; (4) legal treatises and other authorities on constitutional law; (5) case law from other jurisdictions interpreting similar state constitutional provisions; (6) common-law rules governing public officers and employees; and (7) the intent of the Framers and their underlying public policies supporting the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body. Taking all these compelling historical factors, legal authorities and public policies into consideration—along with our prior legal opinions on this question of constitutional law—it remains the

opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments.

BACKGROUND

The Heller case is the primary Nevada case discussing the proper procedure for raising a separation-of-powers challenge to legislators holding positions of *public employment* with the state executive branch or with local governments. Therefore, in discussing this question of constitutional law, we must begin by analyzing the Heller case in some detail.

On April 2, 2004, former Secretary of State Dean Heller, who was represented in the litigation by former Attorney General Brian Sandoval, filed an original action in the Nevada Supreme Court in the form of a petition for writ of mandamus (mandamus petition) which asked the court to oust or exclude state and local government employees from their seats in the Legislature. 120 Nev. at 458-60. In the mandamus petition, the former Secretary of State argued that the separation-of-powers provision prohibits legislators from holding positions of *public employment* as state executive branch employees and also "question[ed] whether local government employees may serve as legislators without violating separation of powers." Id. With regard to state executive branch employees, the former Secretary of State asked the Nevada Supreme Court to "declare state executive branch employees unqualified to serve as legislators, and then direct the Legislature to comply with [that] declaration and either remove or exclude those employees from the Legislature." Id. at 460.

As part of the mandamus petition, the former Secretary of State attached as exhibits two legal opinions from LCB Legal—one issued to former Assemblyman Lynn Hettrick on January 11, 2002, and one issued to former Assemblyman Jason Geddes on January 23, 2003. Heller v. Legislature, Case No. 43079, Doc. No. 04-06157, Petition for Writ of Mandamus (Apr. 2, 2004) (Exhibits B-1 and B-2). In the two opinions, LCB Legal found that the separation-of-powers provision only prohibits legislators from holding *public offices* in the state executive branch because persons who hold such *public offices* exercise sovereign functions appertaining to the state executive branch. However, LCB Legal also found that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch. Based on our interpretation of the separation-of-powers provision, LCB Legal determined that certain positions of *public employment* with, respectively, the Nevada Department of Transportation and the University and Community College System of Nevada (now the Nevada System of Higher Education), were not *public offices* in the state executive branch because the positions did not involve the exercise of any sovereign functions appertaining to the state executive branch. Therefore, LCB Legal concluded that legislators could hold the respective positions of *public employment* without violating the separation-of-powers provision.

Also as part of the mandamus petition, the former Secretary of State attached as an exhibit a legal opinion issued by former Attorney General Sandoval—AGO 2004-03 (Mar. 1, 2004)—which disagreed with the two legal opinions issued by LCB Legal. Heller v. Legislature, Case No. 43079, Doc. No. 04-06157, Petition for Writ of Mandamus (Apr. 2, 2004) (Exhibit A). In AGO 2004-03, the former Attorney General concluded that the separation-of-powers provision prohibits legislators from holding both *public offices* and positions of *public employment* with the state executive branch, whether or not such positions exercise any sovereign functions appertaining to the state executive branch. AGO 2004-03, at 23-25. However, with regard to local government employees, the former Attorney General concluded that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with local governments because the separation-of-powers provision is not applicable to local governments. Id. at 26.

In the Legislature's answer to the mandamus petition, LCB Legal responded comprehensively and thoroughly in opposition to the legal conclusion in AGO 2004-03 that the separation-of-powers provision prohibits legislators from holding positions of *public employment* with the state executive branch. Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus, at 42-68 (May 4, 2004). Specifically, LCB Legal demonstrated through extensive citation to historical evidence and well-established legal authorities that the legal conclusion in AGO 2004-03 is not entitled to any persuasive weight for the following reasons: (1) it used incompletely researched and therefore inaccurate historical evidence; (2) it relied on inapt and inapplicable case law; (3) it failed to properly apply the rules of constitutional construction; and (4) it was not supported by relevant and persuasive legal authorities.[2]

For example, because the Nevada Constitution was modeled on the California Constitution of 1849, AGO 2004-03 attempts to use historical evidence and case law from California to support its legal conclusion that Nevada's legislators are prohibited from holding positions as state executive branch employees. AGO 2004-03, at 9-10. However, the historical evidence and case law from California actually proves the exact opposite. During California's first 67 years of statehood, it was a common and accepted practice for California Legislators to hold positions as state executive branch employees until 1916, when the California Constitution was amended to expressly prohibit legislators from being state executive branch employees. See Chenoweth v. Chambers, 164 P. 428, 430 (Cal. Dist. Ct. App. 1917) (explaining that the constitutional amendment "was intended to reach a practice in state administration of many

[2] We note that the legal opinions of the Attorney General and LCB Legal do not constitute binding legal authority or precedent. Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 203 (2001); Lorton v. Jones, 130 Nev. 51, 62 n.7 (2014). Instead, such legal opinions are entitled only to such persuasive weight as the courts think proper based on the legal reasoning and citation to relevant legal authorities that support the opinion. See Tahoe Reg'l Planning Agency v. McKay, 590 F. Supp. 1071, 1074 (D. Nev. 1984), *aff'd*, 769 F.2d 534 (9th Cir. 1985); Santa Clara Cnty. Local Transp. Auth. v. Guardino, 902 P.2d 225, 238 (Cal. 1995).

years' standing."). As more fully addressed in the legal discussion below, this is but one example of many historical and legal flaws that undermine the persuasive weight of AGO 2004-03.

However, in the Heller case, because the Nevada Supreme Court decided the case in favor of the Legislature on different legal grounds from the separation-of-powers challenge raised by the former Secretary of State, the court did not resolve the conflicting legal conclusions expressed in AGO 2004-03 and the two legal opinions issued by LCB Legal. 120 Nev. at 466-72. Nevertheless, the court's decision in the Heller case established some important legal principles governing separation-of-powers challenges and the exclusive constitutional power of each House of the Legislature to judge the qualifications of its members under Article 4, Section 6 of the Nevada Constitution. Id.

In the Heller case, as a remedy for the alleged separation-of-powers violations, the former Secretary of State asked the Nevada Supreme Court to oust or exclude state and local government employees from their seats in the Legislature. Id. at 458-60. However, in light of the requested remedy, the court declined to decide the merits of the separation-of-powers challenge because each House is invested with the exclusive constitutional power to judge the qualifications of its members under Article 4, Section 6, which provides in relevant part that "[e]ach House shall judge of the qualifications, elections and returns of its own members." Id. at 466. Based on the exclusive constitutional power in Article 4, Section 6, and guided by cases from other states interpreting similar constitutional provisions, the court found that Article 4, Section 6 "insulates a legislator's qualifications to hold office from judicial review," which means that "a legislative body's decision to admit or expel a member is almost unreviewable in the courts." Id. at 466-67.

As a result, the court determined that the judicial branch does not have the constitutional power to oust or exclude legislators from their *legislative seats* based on separation-of-powers challenges. Id. at 466-72. In other words, the court concluded that such separation-of-powers challenges to legislators' qualifications to hold their *legislative seats* are not "justiciable" in the courts. Id. at 472 ("[T]he Secretary asks this court to judge legislators' qualifications based on their executive branch employment. This request runs afoul of the separation of powers and is not justiciable."). As further explained by court:

> Ironically, the Secretary's attempt to have state executive branch employees ousted or excluded from the Legislature is barred by the same doctrine he relies on—separation of powers. The Nevada Constitution expressly reserves to the Senate and Assembly the authority to judge their members' qualifications. Nearly every state court to have confronted the issue of dual service in the legislature has found the issue unreachable because a constitutional reservation similar to Nevada's created an insurmountable separation-of-powers barrier. Thus, by asking us to declare that dual service violates separation of powers, the Secretary urges our own violation of separation of powers. We necessarily decline this invitation.

Id. at 458-59.

However, because neither the state executive branch nor local governments possess any constitutionally-based powers that are similar to the exclusive constitutional powers of the legislative branch under Article 4, Section 6, the Nevada Supreme Court determined that the judicial branch has the constitutional power to consider—in a properly brought lawsuit against a legislator—a separation-of-powers challenge to the legislator's qualifications to hold his or her position of *public employment* with the state executive branch or with a local government. Id. at 472-73. As explained by the court:

> [A]lthough a court may not review a state employee's qualifications to sit as a legislator, a court may review a legislator's employment in the executive branch. This dichotomy exists because no state constitutional provision gives the executive branch the exclusive authority to judge its employees' qualifications. Often then, cases discussing and resolving the dual service issue arise when a legislator seeks remuneration for working in the executive branch or when a party seeks to remove a legislator from executive branch employment.

Id. at 467-68.

With this background in mind, we turn now to a comprehensive and thorough legal discussion to address the question of constitutional law of whether the separation-of-powers provision prohibits legislators from holding positions of *public employment* with the state executive branch or with local governments. For the reasons set forth in the discussion below, it remains the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments.

DISCUSSION

I. Overview of state constitutional provisions.

Many state constitutions contain provisions that directly address the issue of a person holding more than one position in government. Scott M. Matheson, Eligibility of Public Officers and Employees to Serve in the State Legislature: An Essay on Separation of Powers, Politics and Constitutional Policy, 1988 Utah L. Rev. 295, 355-69 (1988). For example, the state constitution of Texas contains a broad provision that prohibits any public officer in any branch of government from accepting or occupying another public office. See, e.g., Powell v. State, 898 S.W.2d 821 (Tex. Crim. App. 1994); State ex rel. Hill v. Pirtle, 887 S.W.2d 921 (Tex. Crim. App. 1994). Some state constitutions contain more limited provisions that prohibit members of the state legislature from accepting or occupying another public office. See, e.g., Hudson v. Annear, 75 P.2d 587 (Colo. 1938); McCutcheon v. City of St. Paul, 216 N.W.2d 137 (Minn. 1974). Finally, some state constitutions contain provisions that prohibit members of the state legislature from accepting or occupying any position of employment in state government,

whether or not the position is considered to be a public office. See, e.g., Begich v. Jefferson, 441 P.2d 27 (Alaska 1968); Parker v. Riley, 113 P.2d 873 (Cal. 1941); Stolberg v. Caldwell, 402 A.2d 763 (Conn. 1978).

The Nevada Constitution does not contain any broad provisions with regard to incompatible public offices. See State ex rel. Davenport v. Laughton, 19 Nev. 202, 206 (1885) (holding that "[t]here is nothing in the constitution of this state prohibiting respondent from holding the office of lieutenant-governor and the office of state librarian."); Crosman v. Nightingill, 1 Nev. 323, 326 (1865) (holding that there is nothing in the constitution prohibiting a person from holding the offices of Lieutenant Governor and warden of the state prison at the same time). Rather, the Nevada Constitution contains only a few specific provisions concerning incompatible public offices. See Nev. Const. art. 4, §§ 8 and 9; art. 5, § 12; art. 6, § 11. However, for the purposes of this opinion, those specific provisions are not relevant to answering your question.

Thus, the Nevada Constitution does not contain any specific provisions concerning incompatible public offices that would prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. As a result, in the absence of any specific constitutional provisions that are applicable to this matter, any challenge to the constitutionality of legislators holding positions of *public employment* with the state executive branch or with local governments must be based on the general separation-of-powers provision in Article 3, Section 1. That provision provides in full:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons *charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others,* except in the cases expressly directed or permitted in this constitution.

Nev. Const. art. 3, § 1 (emphasis added).

As discussed previously, neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed or decided the merits of a separation-of-powers challenge to legislators holding positions of *public employment* with the state executive branch or with local governments. In one case, the Nevada Supreme Court considered the constitutionality of a statute that made the Secretary of State the ex officio Clerk of the Supreme Court, but the court declined to rule on the separation-of-powers issue. State ex rel. Josephs v. Douglass, 33 Nev. 82, 92 (1910), *overruled in part on other grounds*, State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 765-66 (2001). The petitioner in Douglass argued that the statute violated the separation-of-powers provision in the Nevada Constitution, and although the court found that the statute was unconstitutional, it based its decision on other constitutional grounds. 33 Nev. at 91-92. Specifically, the court stated:

> It has been urged that as these two offices appertain to separate and distinct coordinate departments of the state government, it would be in violation of article 3 of the constitution to combine them, but as this contention is not clearly manifest, both offices being mainly ministerial in character, and as the question can be determined upon another view of the case, we give this point no consideration further than to observe that it emphasizes the fact that the two offices are distinct, and that the duties of one do not pertain to the duties of the other.

Id. at 92.

In State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), former Attorney General W. T. Mathews raised a separation-of-powers challenge against former State Senator John H. Murray who, while a member of the Legislature, accepted the position of Director of the Drivers License Division of the Public Service Commission of Nevada. Id. at 119-20. However, as will discussed in greater detail below in the section dealing with the common-law differences between public officers and public employees, the Nevada Supreme Court decided the case on different legal grounds, and it did not address or decide the merits of the separation-of-powers challenge raised by the Attorney General. Id. at 120-24.

At least one state court in New Hampshire has held that the separation-of-powers provision in its state constitution does not apply to the issue of incompatible public offices because that issue is addressed in other, more specific provisions of the constitution. Attorney-General v. Meader, 116 A. 433, 434 (N.H. 1922). Considering that the issue of incompatible public offices is specifically addressed in the Nevada Constitution in Article 4, Sections 8 and 9, Article 5, Section 12, and Article 6, Section 11, it could be argued that the Framers intended those provisions to be the exclusive constitutional basis for determining whether a person is holding incompatible public offices. However, such an interpretation of the Nevada Constitution is unlikely given the numerous court decisions holding that the separation-of-powers doctrine applies to the issue of incompatible public offices.

Consequently, to address your question fully, we must determine whether Nevada's separation-of-powers provision prohibits legislators from holding positions of *public employment* with the state executive branch or with local governments. Under Nevada's separation-of-powers provision, because legislators hold elective offices that are expressly created by Article 4 of the Nevada Constitution governing the Legislative Department, legislators are "charged with the exercise of *powers* properly belonging to one of these departments"—the Legislative Department. Nev. Const. art. 3, § 1 (emphasis added). As a result, legislators are not allowed by the separation-of-powers provision to "exercise any *functions*, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Id. (emphasis added).

Thus, the critical issue under the separation-of-powers provision is whether legislators who hold positions of *public employment* with the state executive branch or with local governments "exercise any *functions*" appertaining to the state executive branch which cause

their public employment to be constitutionally incompatible with their service as legislators in the state legislative branch. In resolving this issue, because there is no controlling Nevada case law directly on point, we must consider historical evidence, legal treatises and other authorities on constitutional law, case law from other jurisdictions interpreting similar state constitutional provisions, common-law rules governing public officers and employees and, most importantly, the intent of the Framers and their underlying public policies supporting the concept of the "citizen-legislator" as the cornerstone of an effective, responsive and qualified part-time legislative body. We begin by examining historical evidence of the practices in the Federal Government and Congress immediately following the ratification of the Federal Constitution, historical evidence of the practices in the California Legislature under similar state constitutional provisions which served as the model for the Nevada Constitution, and historical evidence of the practices in the Nevada Legislature since statehood.

II. Historical evidence.

A. Federal Government and Congress.

In AGO 2004-03, the former Attorney General relies heavily on statements made by the Founders of the United States Constitution in the Federalist Papers. Specifically, AGO 2004-03 states that "[t]he the Federalist Papers are quite instructive in the instant analysis. The concerns raised by the founders with regard to the separation of powers are as relevant to the question presented in this opinion as they were 216 years ago." AGO 2004-03, at 8. However, upon a careful examination of the Federalist Papers, federal judicial precedent and long-accepted historical practices under the United States Constitution, it is clear the Founders did not believe that the doctrine of separation of powers absolutely prohibited an officer of one department from performing functions in another department.

On many occasions, the United States Supreme Court has discussed how the Founders adopted a pragmatic, flexible view of the separation of powers in the Federalist Papers. See, e.g., Mistretta v. United States, 488 U.S. 361, 380-82 (1989); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 441-43 (1977). Relying on the Federalist Papers, the Supreme Court has consistently adhered to "Madison's flexible approach to separation of powers." Mistretta, 488 U.S. at 380. In particular, Madison stated in the Federalist Papers that the separation of powers "'d[oes] not mean that these [three] departments ought to have no *partial agency* in, or no *controul* over the acts of each other.'" Id. at 380-81 (quoting The Federalist No. 47, pp. 325-326 (J. Cooke ed. 1961)).

In light of Madison's statements and other writings in the Federalist Papers, the Supreme Court has found that "the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." Mistretta, 488 U.S. at 380. Thus, as understood by the Framers in the Federalist Papers, the doctrine of separation of powers did not impose a hermetic, airtight seal around each department of government. See Loving v. United States, 517 U.S. 748, 756-57 (1996). Rather, the doctrine created a pragmatic, flexible template of overlapping functions and responsibilities so that three coordinate departments

could be fused into a workable government. See Mistretta, 488 U.S. at 380-81. Therefore, contrary to the inflexible and impractical interpretation of the doctrine of separation of powers advocated in AGO 2004-03, the Founders believed in a "pragmatic, flexible view of differentiated governmental power." Id. at 381.

Moreover, in the years immediately following the adoption of the United States Constitution, it was a common and accepted practice for judicial officers of the United States to serve simultaneously as executive officers of the United States. See Mistretta, 488 U.S. at 397-99. For example, the first Chief Justice, John Jay, served simultaneously as Chief Justice and Ambassador to England. Similarly, Oliver Ellsworth served simultaneously as Chief Justice and Minister to France. While he was Chief Justice, John Marshall served briefly as Secretary of State and was a member of the Sinking Fund Commission with responsibility for refunding the Revolutionary War debt. Id. at 398-99. Such long-accepted historical practices support the conclusion that the doctrine of separation of powers does not absolutely prohibit an officer of one department from performing functions in another department.

Finally, the Founders did not believe that, on its own, the doctrine of separation of powers would prohibit an executive officer from serving as a member of Congress. See 2 The Founders' Constitution 346-57 (Philip B. Kurland & Ralph Lerner eds., 1987). Therefore, the Founders added the Incompatibility Clause to the United States Constitution. Id. The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const. art. I, § 6, cl. 2. The history surrounding the Incompatibility Clause supports the conclusion that the doctrine of separation of powers does not prohibit a legislator from holding a position of *public employment* in the executive branch.

In 1806, Congressman J. Randolph introduced a resolution into the House of Representatives which provided that "a contractor under the Government of the United States is an officer within the purview and meaning of the [Incompatibility Clause of the] Constitution, and, as such, is incapable of holding a seat in this House." 2 The Founders' Constitution 357. Congressman Randolph introduced the resolution because the Postmaster General had entered into a contract of *employment* with a person to be a mail carrier and, at the time, the person was also a member of the Senate. Id. at 357-62.

In debating the resolution, many Congressmen indicated that the Incompatibility Clause was the only provision in the Constitution which prohibited dual officeholding and that, based on the long-accepted meaning of the term "office," a person who held a contract of *employment* with the executive branch was not an officer of the United States and was not prohibited from serving simultaneously as a member of Congress. Id. After the debate, the House soundly rejected the resolution because many members believed the resolution banning members of Congress from *employment* with the executive branch contained an interpretation of the Incompatibility Clause which expanded the meaning of the provision well beyond its plain terms. Id.

Shortly thereafter, in 1808, Congress passed a federal law which prohibited an executive officer of the United States from entering into a contract of *employment* with a member of Congress. Id. at 371. A version of that federal law remains in effect. 18 U.S.C. § 431; 2 Op. U.S. Att'y Gen. 38 (1826) (explaining that the federal law prohibited all contracts of *employment* between officers of the executive branch and members of Congress).

Based on this historical evidence, it is quite instructive that, a mere 19 years after the United States Constitution was drafted, many members of the House of Representatives expressed the opinion that the Federal Constitution did not prohibit a person who held a contract of *employment* with the executive branch from serving simultaneously as a member of Congress. At the very least, this historical evidence casts significant doubt on the legal conclusion in AGO 2004-03 that the doctrine of separation of powers prohibits an officer of one department from being employed in another department.

B. California Legislature.

In AGO 2004-03, the former Attorney General correctly notes that because the Framers of the Nevada Constitution modeled its provisions on the California Constitution of 1849, it is appropriate to consider historical evidence and case law from California when interpreting analogous provisions of the Nevada Constitution. AGO 2004-03, at 9-10; State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 763 (2001).

No California court has ever held that the separation-of-powers provision in the California Constitution prohibits a legislator from being a state executive branch employee. Nevertheless, AGO 2004-03 incorrectly claims that in Staude v. Bd. of Election Comm'rs, 61 Cal. 313 (1882), the California Supreme Court found that Senators and Assemblymen could not simultaneously serve in the executive and judicial departments as defined in Article V and Article VI of the California Constitution. AGO 2004-03, at 9. However, that specific issue was never raised before the court, and the court never decided such an issue. It is a fundamental rule of law that a case cannot be cited for authority on an issue that was never raised or decided. See Jackson v. Harris, 64 Nev. 339, 351 (1947); Steptoe Live Stock Co. v. Gulley, 53 Nev. 163, 172-73 (1931); Jensen v. Pradere, 39 Nev. 466, 471 (1916).

Moreover, when a court makes statements of a general nature in an opinion and those statements are unnecessary to the determination of the questions involved in the case, those statements are mere dictum and have no precedential value. See Stanley v. A. Levy & J. Zentner Co., 60 Nev. 432, 448 (1941); Dellamonica v. Lyon Cnty. Bank Mort. Corp., 58 Nev. 307, 316 (1938). Based on general statements or dictum used by the California Supreme Court in Staude, it appears that the court believed the separation-of-powers provision only prohibited a legislator from being an *officer* in the executive branch. The legal distinction between a state officer and a state employee was well established in the law when the California Supreme Court decided Staude. It is reasonable to assume that the court meant what it said:

> So of each *officer* of the Executive Department—he cannot belong to the Judicial or Legislative Department. That is to say, he can hold no judicial *office*, nor the *office* of Senator or member of the Assembly. And so of Senators and members of the Assembly—they can hold no judicial or executive *offices* comprised within the Executive and Judicial Departments, as defined in Articles V and VI.

Staude, 61 Cal. at 323 (quoting People ex rel. Att'y Gen. v. Provines, 34 Cal. 520, 534 (1868)) (emphasis added).

Thus, if the California case of Staude stands for anything on this issue, it is the principle that the separation-of-powers provision prohibits a legislator from being a state *officer* in the executive branch. Neither the facts nor dictum in the case support the proposition that the separation-of-powers provision prohibits a legislator from being a state *employee*.

Finally, AGO 2004-03 also incorrectly claims that in Elliott v. Van Delinder, 247 P. 523 (Cal. Dist. Ct. App. 1926), the court found that the separation-of-powers provision in the California Constitution means that no person shall hold positions under different departments of the government at the same time, and that a person cannot be an employee of the state department of engineering and a township justice of the peace at the same time. AGO 2004-03, at 9. However, in the Heller case, the Nevada Supreme Court rejected the former Attorney General's incorrect reading of Elliott v. Van Delinder because the California court never reached the merits of the separation-of-powers issue. 120 Nev. at 470.

In sum, the reliance in AGO 2004-03 on California case law is misplaced because the California cases cited by the former Attorney General do not support the legal reasoning or conclusions contained in AGO 2004-03, and because no California court has ever held that the separation-of-powers provision in the California Constitution prohibits a legislator from being a state executive branch employee.

Furthermore, the historical evidence from California establishes that during California's first 67 years of statehood, it was a common and accepted practice for California Legislators to hold positions as state executive branch employees until 1916, when the California Constitution was amended to expressly prohibit legislators from being state executive branch employees. See Chenoweth v. Chambers, 164 P. 428, 430 (Cal. Dist. Ct. App. 1917) (explaining that the constitutional amendment "was intended to reach a practice in state administration of many years' standing.").

At the general election held in California on November 7, 1916, one of the ballot questions was Amendment No. 6, which was an initiative measure to amend Cal. Const. art. 4, § 19, to read as follows:

> No senator or member of the assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this state;

> *provided*, that this provision shall not apply to any office filled by election by the people.

1916 Cal. Stat. 54 (As a result of subsequent constitutional amendments, the substance of the 1916 constitutional amendment is now found in Cal. Const. art. 4, § 13, which provides: "A member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office.").

In the weeks leading up to the 1916 general election, the proposed constitutional amendment was described in several California newspapers. In an article dated October 28, 1916, the San Francisco Chronicle reported that:

> Some thirty-five or forty legislators in the employ of the State in various capacities are anxiously awaiting the result of the November election, for if the electorate should adopt amendment six on the ballot, known as the ineligibility to office measure, State Controller John S. Chambers probably will refuse to draw warrants in favor of legislators then in the employ of the State.

Measure Alarms Legislators on 'Side' Payroll, S.F. Chron., Oct. 28, 1916, at 5, ***submitted as exhibit in*** Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 9).

In another article dated October 28, 1916, the Sacramento Bee reported that many California Legislators were employed at that time by executive branch agencies, including the State Lunacy Commission, State Motor Vehicles Department, State Labor Commissioner, State Pharmacy Commission, State Pharmacy Board, State Railroad Commission, Folsom State Prison and State Inheritance Tax Commission. Chambers Studies Amendment No. 6: Proposal to Make Legislature Members Ineligible to State Jobs is Perplexing, Sacramento Bee, Oct. 28, 1916, at 9, ***submitted as exhibit in*** Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 11).

On the ballot at the 1916 general election, the ballot arguments relating to the proposed constitutional amendment stated that "some of our most efficient officials have been men holding appointments under the state, [while] at the same time being members of the legislature." Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same to be Submitted to the Electors of the State of California at the General Election on Tuesday, November 7, 1916 (Cal. State Archives 1916), ***submitted as exhibit in*** Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 13). Those arguments also stated that:

> Here and there the state, by reason of such a law, will actually suffer, as it frequently happens that the most highly specialized man for work in connection

> with a certain department of state is a member of the legislature. There are instances of that sort today, where, by the enactment of such a law, the state will lose the services of especially qualified and conscientious officials.
>
> * * *
>
> Another argument advanced by the proponents of this measure is that members of the legislature who are appointed to state offices receive two salaries, but the records will show that leaves of absence are invariably obtained by such appointees during sessions of the legislature and the actual time of the legislative session is generally about eighty days every two years.

Id.

Shortly after the constitutional amendment was adopted, the California Court of Appeal was called upon to interpret whether the amendment applied to legislators whose terms began before the effective date of the amendment. Chenoweth v. Chambers, 164 P. 428 (Cal. Dist. Ct. App. 1917). The court held that the amendment was intended to apply to those legislators. Id. at 434. In reaching its holding, the court noted that the constitutional amendment "was intended to reach a practice in state administration of many years' standing and which the people believed should be presently eradicated." Id. at 430.

Taken together, these historical accounts establish that before the California Constitution was amended in 1916, California Legislators routinely held positions as state executive branch employees. This is notable because, at that time, the separation-of-powers provision in the California Constitution was nearly identical to the separation-of-powers provision in the Nevada Constitution. Thus, the historical evidence in California supports the conclusion that, in the absence of a specific constitutional amendment expressly banning legislators from public employment, the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee.

C. Nevada Legislature.

For many decades, state and local government employees have served simultaneously as members of the Nevada Legislature. Affidavit of Guy L. Rocha, Former Assistant Administrator for Archives and Records of the Division of State Library and Archives of the Department of Cultural Affairs of the State of Nevada (Apr. 29, 2004), *submitted as exhibit in* Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 1-3). Although there are no official records specifically detailing the occupations of legislators who served in the Legislature during the 1800s and early 1900s, the records that are available indicate that state and local government employees have been serving in the Legislature since at least 1903. Id. The earliest known examples of local government employees who served as members of the Legislature are Mark Richards Averill, who was a member of the Assembly in 1903, and Ruth Averill, who was a member of the Assembly in 1921. Id. The earliest known examples

of state executive branch employees who served as members of the Legislature are August C. Frohlich, who was a member of the Assembly in 1931, and Harry E. Hazard, who was a member of the Assembly in 1939. Id.

Based on research conducted by the Legislative Counsel Bureau covering the period from 1967 to 2019, state and local government employees have served as members of the Legislature during each regular session convened over the past 50-plus years. See Nevada Legislative Manual (LCB 1967-2019); Affidavit of Donald O. Williams, Former Research Director of the Research Division of the Legislative Counsel Bureau of the State of Nevada (Apr. 28, 2004), *submitted as exhibit in* Heller v. Legislature, Case No. 43079, Doc. No. 04-08124, Answer of Respondent Legislature in Opposition to Petition for Writ of Mandamus (May 4, 2004) (Appendix at 4-5).

Thus, the historical evidence from the Nevada Legislature supports the conclusion that the separation-of-powers provision does not prohibit a legislator from holding a position as a state executive branch employee or a local government employee. Under well-established rules of constitutional construction, this historical evidence represents a long-standing interpretation of the separation-of-powers provision by the Legislature which must be given great weight.

When interpreting a constitutional provision, the Nevada Supreme Court "looks to the Legislature's contemporaneous actions in interpreting constitutional language to carry out the intent of the framers of Nevada's Constitution." Halverson v. Miller, 124 Nev. 484, 488-89 (2008). Because the Legislature's interpretation of a constitutional provision is "likely reflective of the mindset of the framers," such a construction "is a safe guide to its proper interpretation and creates a strong presumption that the interpretation was proper." Id. (internal quotation marks omitted); Hendel v. Weaver, 77 Nev. 16, 20 (1961); State ex rel. Herr v. Laxalt, 84 Nev. 382, 387 (1968); Tam v. Colton, 94 Nev. 452, 458 (1978).

Furthermore, when the Legislature's construction is consistently followed over a considerable period of time, that construction is treated as a long-standing interpretation of the constitutional provision, and such an interpretation is given great weight and deference by the Nevada Supreme Court, especially when the constitutional provision involves legislative operations or procedures. State ex rel. Coffin v. Howell, 26 Nev. 93, 104-05 (1901); State ex rel. Torreyson v. Grey, 21 Nev. 378, 387-90 (1893) (Bigelow, J., concurring); State ex rel. Cardwell v. Glenn, 18 Nev. 34, 43-46 (1883). As a result, "[a] long continued and contemporaneous construction placed by the coordinate branch of government upon a matter of procedure in such coordinate branch of government should be given great weight." Howell, 26 Nev. at 104.

The weight given to the Legislature's construction of a constitutional provision involving legislative operations or procedures is of particular force when the meaning of the constitutional provision is subject to any uncertainty, ambiguity or doubt. See, e.g., Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 539-40 (2001). Under such circumstances, the Nevada Supreme Court has stated that "although the [interpretation] of the legislature is not final, its

decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail." Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 399-400 (1876).

The Nevada Supreme Court has also stated that when the meaning of a constitutional provision involving legislative operations or procedures is subject to any uncertainty, ambiguity or doubt, the Legislature may rely on an opinion of LCB Legal which interprets the constitutional provision, and "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n, 117 Nev. at 540. For example, when the meaning of the term "midnight Pacific standard time," as formerly used in the constitutional provision limiting legislative sessions to 120 days, was subject to uncertainty, ambiguity and doubt following the 2001 regular session, the Nevada Supreme Court explained that the Legislature's interpretation of the constitutional provision was entitled to deference because "[i]n choosing this interpretation, the Legislature acted on Legislative Counsel's opinion that this is a reasonable construction of the provision. We agree that it is, and the Legislature is entitled to deference in its counseled selection of this interpretation." Id.

With regard to state and local government employees serving as legislators, the Legislature has chosen to follow LCB Legal's long-standing interpretation of the separation-of-powers provision for decades, and it has acted on LCB Legal's opinion that this is a reasonable construction of the separation-of-powers provision. As a result, "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n, 117 Nev. at 540.

Therefore, under the rules of constitutional construction, the Legislature's long-standing interpretation of the separation-of-powers provision "should be given great weight." Howell, 26 Nev. at 104 ("A long continued and contemporaneous construction placed by the coordinate branch of government upon a matter of procedure in such coordinate branch of government should be given great weight."). Furthermore, to the extent there is any ambiguity, uncertainty or doubt concerning the interpretation of the separation-of-powers provision, the interpretation given to it by the Legislature "ought to prevail." Dayton Gold & Silver Mining, 11 Nev. at 400 ("[I]n case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature ought to prevail.").

III. Case law from other jurisdictions.

Several courts from other jurisdictions have decided cases involving the legal issue of whether a state constitutional separation-of-powers provision prohibits legislators from being state or local government employees. However, the cases from the other jurisdictions are in conflict on this issue. Because the cases are in conflict, we believe that it will be helpful to review those cases in some detail.

In State ex rel. Barney v. Hawkins, 257 P. 411, 412 (Mont. 1927), an action was brought to enjoin the state from paying Grant Reed his salary as an auditor for the state board of railroad commissioners while he served as a member of the state legislature. The complaint alleged that Reed was violating the separation-of-powers provision in the state constitution because he was occupying a position in the executive branch of state government at the same time that he was serving as a member of the state legislature. Id. at 412. At the time, the separation-of-powers provision in the Montana Constitution provided that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others." Id. at 413. The complaint also alleged that Reed was violating section 7 of article 5 of the state constitution, which provided that "[n]o senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the State." Id. The Montana Supreme Court framed the issue it was deciding as follows:

> The only question for us to decide is—is the position of auditor, held by Grant Reed, a civil office(?); for, if it be a civil office, he is holding it unlawfully; and, if it be not a civil office, he is not an officer, but only an employee, subject to the direction of others, and he has no power in connection with his position, and is not exercising any powers belonging to the executive or judicial department of the state government. In the latter event, Article IV of the Constitution [separation of powers] is not involved.

Id.

After considering voluminous case law concerning the definition of a "civil office," including cases from Nevada that we will discuss below, the Montana Supreme Court determined that Reed was not exercising any portion of the sovereign power of state government when he was acting as an auditor for the board of railroad commissioners and that, therefore, Reed did not occupy a civil office. Id. at 418. Rather, the court found that Reed was simply an employee "holding a position of employment, terminable at the pleasure of the employing power, the Board of Railroad Commissioners." Id. Thus, because Reed did not occupy a civil office, the court concluded that he had "no powers properly belonging to the judicial or executive department of the state government, for he is wholly subject to the power of the board, and, having no powers, he can exercise none; and, therefore, his appointment was not violative of Article IV of the Constitution [separation of powers]." Id.

The reasoning of the Montana Supreme Court was followed by the New Mexico Court of Appeals in State ex rel. Stratton v. Roswell Ind. Schools, 806 P.2d 1085, 1094-95 (N.M. Ct. App. 1991). In Stratton, the Attorney General argued that two members of the state legislature were violating the separation-of-powers provision in the state constitution because the legislators also occupied positions as a teacher and an administrator in local public school districts. Id. at 1088. At the time, the separation-of-powers provision in the New Mexico Constitution was identical to the separation-of-powers provision interpreted by the Montana Supreme Court in Hawkins: "no person or collection of persons charged with the exercise of

powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others[.]" Id. at 1094.

Like the Montana Supreme Court, the New Mexico Court of Appeals determined that a violation of the separation-of-powers provision could occur only if the members of the legislature were invested in their positions as school teacher and school administrator with sovereign power that properly belonged to another branch of government. Id. Because only public officers exercised sovereign power, the court determined that the separation-of-powers provision "applies [only] to public officers, not employees, in the different branches of government." Id. at 1095. After considering the nature of the public school positions, the court concluded that "[p]ublic school instructors and administrators are not 'public officials.' They do not establish policy for the local school districts or for the state department of education." Id. at 1094. Instead, "[a] school teacher employed by a common school district is [an] 'employee' not [an] 'officer', and the relationship between school teacher and school board is contractual only." Id. at 1095 (citing Brown v. Bowling, 240 P.2d 846, 849 (N.M. 1952)). Therefore, because the school teacher and school administrator were not public officers, but simply public employees, the court held that they were not barred by the separation-of-powers provision from being members of the legislature. Id.

The Colorado Supreme Court has also adopted this view. Hudson v. Annear, 75 P.2d 587, 588-89 (Colo. 1938) (holding that a position as chief field deputy for the state income tax department was not a civil office, but a position of public employment, and that therefore a legislator could occupy such a position without violating Colorado's separation-of-powers provision). See also Jenkins v. Bishop, 589 P.2d 770, 771-72 (Utah 1978) (Crockett, J., concurring in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would not prohibit a legislator from also being a public school teacher); State v. Osloond, 805 P.2d 263, 264-67 (Wash. Ct. App. 1991) (holding that a legislator who served as a judge pro tempore in a criminal case did not violate the principle of separation of powers as recognized in Washington, which does not have an express separation-of-powers provision in its constitution).

In stark contrast to the foregoing court decisions are several court decisions from Indiana, Oregon and Nebraska. The court decisions from Indiana and Oregon are especially notable because the language in the separation-of-powers provisions of those states more closely resembles the language in Nevada's separation-of-powers provision.

In State ex rel. Black v. Burch, 80 N.E.2d 294 (Ind. 1948), actions were brought to prevent the state from paying four members of the state legislature salaries that they had earned while occupying positions with various state commissions and boards in the executive branch of government. After reviewing the relevant statutes relating to these positions, the court held that the legislators' positions in the executive branch "are not public offices, nor do they in their respective positions, perform any official functions in carrying out their duties in these respective jobs; they were acting merely as employees of the respective commission or boards by whom they were hired." Id. at 299. In other words, "[i]n performing their respective jobs,

none of these [legislators] were vested with any functions pertaining to sovereignty." Id. Having determined that the legislators occupied positions of public employment, rather than public offices, the court's next task was to determine whether such public employment in another branch of state government violated Indiana's separation-of-powers provision, which provided at the time that "no person, charged with official duties under one of these departments[,] shall exercise any of the functions of another[.]" Id. The court framed the issue as follows: "[I]t now becomes necessary for this Court to determine what is the meaning of the phrase 'any of the functions of another,' as set out in the above quoted section of the Constitution." Id.

In interpreting the use of the term "functions," the court noted that the term "power" had been used instead of the term "functions" in the original draft of the separation-of-powers provision. Id. at 302. However, the term "functions" was inserted in the final version of the provision that was adopted by the drafters of the constitution. Id. The court then stated that "[i]t would seem to us that these two words are interchangeable but, if there is any distinction, the term 'functions' would denote a broader field of activities than the word 'power.'" Id. The court also quoted extensively from the decision in Saint v. Allen, 126 So. 548 (La. 1930), in which the Louisiana Supreme Court held that a member of the state legislature was prohibited from being employed by the executive department of state government pursuant to the separation-of-powers provision in the Louisiana Constitution, which provided at the time that "[no] person or collection of persons holding office in one of [the departments], shall exercise power properly belonging to either of the others[.]" Saint, 126 So. at 550. In particular, the Louisiana Supreme Court held that:

> It is not necessary, to constitute a violation of the article, that a person should hold office in two departments of government. It is sufficient if he is an officer in one department and at the same time is employed to perform duties, or exercise power, belonging to another department. The words "exercise power," speaking officially, mean perform duties or functions.

Id. at 555.

Based on the Saint case and other court decisions, the Indiana Supreme Court in Burch concluded that:

> In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an

> employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.

80 N.E.2d at 302.

The reasoning of the Indiana Supreme Court was followed by the Oregon Supreme Court in Monaghan v. School Dist. No. 1, 315 P.2d 797 (Or. 1957), *superseded by* Or. Const. art. XV, § 8. In that case, the court was asked "to determine whether or not [a state legislator, Mr. Monaghan,] is eligible for employment as a teacher in the public schools of this state while he holds a position as a member of the [state] House of Representatives." Id. at 799. At that time, the separation-of-powers provision in the Oregon Constitution provided that "no person charged with official duties under one of these departments, shall exercise any of the functions of another[.]" Id. at 800. Mr. Monaghan argued that the term "official duties" was synonymous with the term "functions," and that therefore the separation-of-powers provision applied only to a person holding a public office in more than one department of state government and not to a person merely occupying a position of public employment. Id. at 801. The court flatly rejected this argument:

> It is not difficult to define the word "official duties." As a general rule, and as we think the phrase is used in the section of the constitution, they are the duties or obligations imposed by law on a public officer. 67 C.J.S. Officers § 110, p. 396; 28 C.J.S. Duty, p. 597. There can be no doubt that Mr. Monaghan, as a legislator, is "charged with official duties." But the exercise of the "functions" of a department of government gives to the word "functions" a broader sweep and more comprehensive meaning than "official duties." It contemplates a wider range of the exercise of functions including and beyond those which may be comprehended in the "official duties" of any one officer.
>
> It may appear to some as a construction of extreme precaution, but we think that it expresses the considered judgment and deliberation of the Oregon Convention to give greater force to the concepts of separation by thus barring any official in one department of government of the opportunity to serve any other department, even as an employee. Thus, to use the language of O'Donoghue v. United States, supra [289 U.S. 516], in a sense, his role as a teacher subjugates the department of his employment to the possibility of being "controlled by, or subjected, *directly or indirectly*, to the coercive influence of" the other department wherein he has official duties and vice versa. (Emphasis supplied.) In the Burch case, supra [80 N.E.2d 294, 302], when considering the word "functions" in its similar setting in the Indiana Constitution, the court observed that the term "functions" denotes a broader field of activities than the word "power."
>
> * * *

> Our conclusion is that the word "functions" embodies a definite meaning with no contradiction of the phrase "official duties," that is, he who exercises the functions of another department of government may be either an official or an employee.

Id. at 802-04. Although acknowledging that a public school teacher was not a public officer, the court concluded, nevertheless, that a public school teacher was a public employee who was exercising one of the functions of the executive department of state government. Id. at 804-06. Therefore, the court held that Mr. Monaghan could not be employed as a public school teacher while he held a position as a member of the state legislature. Id.; see also Jenkins, 589 P.2d at 773-77 (Ellett, C.J., concurring and dissenting in a memorandum per curiam opinion and arguing that Utah's separation-of-powers provision would prohibit a legislator from also being a public school teacher).

After the decision in Monaghan, the Oregon Constitution was amended to permit legislators to be employed by the State Board of Higher Education or to be a member of any school board or an employee thereof. In re Sawyer, 594 P.2d 805, 808 & n.7 (Or. 1979). However, the amendment did not apply to other branches of state government. Id. In Sawyer, the Oregon Supreme Court was asked whether the state's separation-of-powers provision prohibited a judge from being regularly employed as a part-time professor at a state-funded college. The court answered in the affirmative, stating that:

> It is true that Judge Sawyer is not a full-time teacher. In our opinion, however, a part-time teacher regularly employed for compensation by a state-funded college to perform the duties of a teacher also performs "functions" of the executive department of government within the meaning of Article III, § 1, as construed by this court in Monaghan.

Id. at 809. The court noted, however, that "[w]e do not undertake to decide in this case whether the same result would necessarily follow in the event that a judge should occasionally, but not regularly, lecture at a state-funded college, but without other responsibilities as a teacher." Id. at 809 n.8.

Finally, in State ex rel. Spire v. Conway, 472 N.W.2d 403 (Neb. 1991), the Attorney General brought an action claiming that the separation-of-powers provision of the Nebraska Constitution prohibited a person from occupying a position as an assistant professor at a state-funded college while simultaneously serving as a member of the state legislature. At the time, Nebraska's separation-of-powers provision provided that "no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others." Id. at 404.

Unlike most other courts, the Nebraska Supreme Court determined that, under certain circumstances, an assistant professor at a public college could be considered to be holding a public office. Id. at 406-07. However, despite this determination, the court found that the

public officer-public employee distinction was not "determinative of the [separation-of-powers] issue now under consideration, for article II does not speak in terms of officers or employees; it speaks of persons 'being one of' the branches of government." Id. at 408. Rather, the court found that "[t]he unusual expression 'being one of these departments' is not clear; accordingly, construction is necessary. One thing that is clear, however, is that 'being one of these departments' is not intended to be synonymous with 'exercising any power of' a branch." Id. at 409.

After considering the text and history of the Nebraska Constitution, the court determined that the provision should be construed to read, "no person or collection of persons being [a member of] one of these departments." Id. at 412. Based on this construction, the court held that the separation-of-powers provision "prohibits one who exercises the power of one branch--that is, an officer in the broader sense of the word--from being a member--that is, either an officer or employee--of another branch." Id. The court then applied this construction to conclude that an assistant professor at a state college is a member of the executive branch and that a legislator, therefore, could not occupy such a position during his term in the legislature. Id. at 414-16. Specifically, the court held that:

> Although we have neither been directed to nor found any case explicitly stating that the state colleges are part of the executive branch, there are but three branches, and the state colleges clearly are not part of the judicial or legislative branches.
>
> * * *
>
> The Board of Regents of the University of Nebraska performs a function for the university which is identical to that of the Board of Trustees of the Nebraska State Colleges. While the Board of Regents is an "independent body charged with the power and responsibility to manage and operate the University," it is, nevertheless, an administrative or executive agency of the state. As the regents are part of the executive branch, so, too, are the trustees.
>
> Since the Board of Trustees, which governs the state colleges, is part of the executive branch, those who work for those colleges likewise are members of that branch. Respondent, as an assistant professor at the college, is thus a member of the executive branch within the meaning of article II.
>
> * * *
>
> Respondent is therefore a member of one branch of government, the executive, exercising the powers of another, the legislative, and, as a consequence, is in violation of article II of the state Constitution.

Id. at 414-15 (citations omitted).

If the Nevada Supreme Court were to follow the reasoning of the courts of Indiana, Oregon and Nebraska, rather than the reasoning of the courts of Montana, New Mexico and

Colorado, a state executive branch employee could not, pursuant to Nevada's separation-of-powers provision, serve as a member of the Legislature. Although we cannot determine with any reasonable degree of certainty whether the Nevada Supreme Court would adopt those holdings, we do believe that the decisions of those courts are not consistent with the text and structure of the Nevada Constitution. In particular, while we agree with the courts of Indiana and Oregon that the term "functions" is distinct in meaning from other terms such as "powers" or "duties," we do not believe that the meaning ascribed to the term "functions" in Burch and Monaghan is consistent with the structure and organization of Nevada's government.

Thus, despite the holdings of the courts of Indiana, Oregon and Nebraska, it is the opinion of LCB Legal that Nevada's separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch or with local governments. Obviously, we cannot say with any certainty whether the Nevada Supreme Court would agree with our opinion. However, as we explain next, we do believe that our opinion is supported by the text and structure of the Nevada Constitution and by the concept of the "citizen-legislator," which is a concept that is the cornerstone of an effective, responsive and qualified part-time legislative body.

IV. Interpretation of Nevada's separation-of-powers provision with regard to state executive branch employees.

It is a fundamental rule of constitutional construction that the Nevada Constitution must be interpreted in its entirety and that each part of the Constitution must be given effect. State ex rel. Herr v. Laxalt, 84 Nev. 382, 386 (1968). Therefore, the separation-of-powers provision in the Nevada Constitution cannot be read in isolation, but rather must be construed in accordance with the Nevada Constitution as a whole. Thus, the meaning of the phrases "no persons charged with the exercise of powers properly belonging to one of these departments" and "shall exercise any functions, appertaining to either of the others" cannot be based on a bare reading of the separation-of-powers provision alone. Rather, these phrases must be read in light of the other parts of the Nevada Constitution which specifically enumerate the persons who are to be charged with exercising the powers and functions of state government. As stated by the Nevada Supreme Court:

> [Article 3, Section 1] divides the state government into three great departments, and directs that "no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." As will be noticed, it is the state government as created by the constitution which is divided into departments. *These departments are each charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers.*

Sawyer v. Dooley, 21 Nev. 390, 396 (1893) (emphasis added).

According to the Nevada Supreme Court, the prohibition in Article 3, Section 1 applies only to persons who are charged by other parts of the Nevada Constitution with exercising powers or duties belonging to one of the three departments of state government. In other words, for the purposes of the separation-of-powers provision, the officers who are prohibited from exercising functions appertaining to another department of state government are limited to those officers in the legislative, executive and judicial departments who are expressly given powers and duties under the Nevada Constitution.

This construction of the separation-of-powers provision in the Nevada Constitution is consistent with the Utah Supreme Court's construction of an identical separation-of-powers provision in section 1 of article V the Utah Constitution. As to that provision, the Utah Supreme Court has held:

> [T]he prohibition of section 1, is directed to a "person" charged with the exercise of powers properly belonging to the "executive department." The Constitution further specifies in Article VII, Section 1, the persons of whom the Executive Department shall consist. Thus it is the "persons" specified in Article VII, Section 1, who are charged with the exercise of powers belonging to the Executive Department, who are prohibited from exercising any functions appertaining to the legislative and judicial departments.

State v. Gallion, 572 P.2d 683, 687 (Utah 1977); accord Robinson v. State, 20 P.3d 396, 399-400 (Utah 2001).

Consequently, a constitutional officer is an officer of the legislative, executive or judicial department who is "charged with the exercise of powers properly belonging to one of these departments." Nev. Const. art. 3, § 1; see also People v. Provines, 34 Cal. 520 (1868). No other person may exercise the powers given to a constitutional officer by the Nevada Constitution. As a result, when the Nevada Constitution grants powers to a particular constitutional officer, "their exercise and discharge by any other officer or department are forbidden by a necessary and unavoidable implication. Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department, or person." King v. Bd. of Regents, 65 Nev. 533, 556 (1948) (quoting State ex rel. Crawford v. Hastings, 10 Wis. 525, 531 (1860)). Thus, the constitutional powers of each department may be exercised only by the constitutional officers from that department to whom the powers have been assigned.

Even though it is only the constitutional officers of each department who may exercise the constitutional powers given to that department, the Framers realized that each department would also be charged with the exercise of certain nonconstitutional functions. Accordingly, the Framers provided for the creation by statute of nonconstitutional officers who could be charged by the Legislature with the exercise of nonconstitutional functions. See Nev. Const. art. 15, §§ 2, 3, 10 and 11. As observed by the Nevada Supreme Court:

> [T]he framers of the constitution decided for themselves that the officers named [in the constitution] were necessary and should be elected by the people; but they left it to the legislature to decide as to the necessity of additional ones, whether state, county, or township. . . . The duty of deciding as to the necessity of any office, other than those named in the constitution, is placed upon the legislature[.]

State ex rel. Perry v. Arrington, 18 Nev. 412, 417-18 (1884). As a result, the Nevada Constitution recognizes two distinct types of offices, "one which is created by the constitution itself, and the other which is created by statute." Douglass, 33 Nev. at 93 (quoting People v. Bollam, 54 N.E. 1032, 1033 (Ill. 1899)).

Like the framers of other state constitutions, the Framers of the Nevada Constitution could have simply stated that a constitutional officer shall not exercise any "powers" appertaining to another department of state government. However, the Framers of the Nevada Constitution provided that a constitutional officer shall not exercise any "functions" appertaining to another department of state government. We believe that the Framers used the term "functions" because they realized that, in each department of state government, the functions of the department would be performed by constitutional officers *and* by nonconstitutional officers. Thus, had the Framers used only the term "powers" in Article 3, Section 1, the separation-of-powers provision would have been too restrictive in its meaning, for it may have been construed simply to mean that a constitutional officer in one department could not exercise the powers entrusted to the constitutional officers in another department. To avoid this restrictive construction, we believe that the Framers used the term "functions" to ensure that a constitutional officer in one department could not perform the *sovereign functions* entrusted to both constitutional officers *and* nonconstitutional officers in another department.

Therefore, by using the term "functions," we believe that the Framers intended to prohibit a constitutional officer in one department from holding constitutional offices or nonconstitutional offices in another department, because persons holding constitutional or nonconstitutional offices in another department exercise the *sovereign functions* of state government. Because public employees do not exercise the sovereign functions of state government, we do not believe that the Framers intended to prohibit a constitutional officer from holding a position of *public employment* in another department of state government. Our conclusion is based on a well-established body of case law which holds that public officers are the only persons who exercise the sovereign functions of state government and that public employees do not exercise such sovereign functions.

In State ex rel. Kendall v. Cole, 38 Nev. 215 (1915), the Nevada Supreme Court discussed extensively the attributes of a public office, and the court also cited numerous cases that had been decided in other jurisdictions well before the Nevada Constitution was drafted in 1864. See Bradford v. Justices of Inferior Ct., 33 Ga. 332 (1862); Shelby v. Alcorn, 36 Miss. 273 (1858); see also Annotation, Offices Within Constitutional or Statutory Provisions Against Holding Two Offices, 1917A L.R.A. 231 (1917). From these cases, the Nevada Supreme Court concluded that the single most important characteristic of a public office is that the person who

holds such a position is "*clothed with some portion of the sovereign functions of government.*" Cole, 38 Nev. at 229 (quoting Attorney-General v. McCaughey, 43 A. 646 (R.I. 1899)). In later cases, the court expressed a similar view:

> The nature of a public office as distinguished from mere employment is the subject of a considerable body of authority, and many criteria of determination are suggested by the courts. Upon one point at least the authorities uniformly appear to concur. A public office is distinguishable from other forms of employment in that its holder has by the sovereign been invested with some portion of the sovereign functions of government.

State ex rel. Mathews v. Murray, 70 Nev. 116, 120-21 (1953) (citation omitted). Simply put, "the sovereign function of government is not delegated to a mere employee." Eads v. City of Boulder City, 94 Nev. 735, 737 (1978).

Thus, in each department of state government, only two types of persons are empowered to exercise the sovereign functions of that department, those who hold constitutional offices and those who hold nonconstitutional offices. We believe this is how the Framers of the Nevada Constitution understood the structure and organizational framework of each department of state government, and we believe that this is why the Framers used the word "functions" in Article 3, Section 1—to prohibit a constitutional officer in one department of state government from holding any other *public office* that was empowered, either by the constitution or statute, to exercise the sovereign functions of another department of state government. Because public employees do not exercise the sovereign functions of state government, a broader construction of the term "functions" to include public employees would not be consistent with the manner in which the sovereign functions of government are exercised in Nevada.

Moreover, a broader construction of the term "functions" to include public employees would run counter to "the constituency concept of our legislature in this state, which can accurately be described as a citizens' legislature." Stratton, 806 P.2d at 1093. Thus, we believe that the Framers of the Nevada Constitution realized that "[i]n a sparsely populated state . . . it would prove difficult, if not impossible, to have a conflict-free legislature." Id. In addition, we believe that any potential conflicts of interests experienced by a legislator who is also a public employee in another branch of state government are no greater than those conflicts experienced by other members of the Legislature. As stated by Justice Crockett of the Utah Supreme Court:

> In our democratic system, the legislature is intended to represent the people: that is, to be made up from the general public representing a wide spectrum of the citizenry. It is not to be doubted that legislators from the ranks of education are affected by the interests of that calling. But all other legislators also have interests. No one lives in a vacuum.

Jenkins, 589 P.2d at 771 (Crockett, J., concurring).

Finally, it is clear that the Framers intended the Nevada Legislature to be a part-time legislative body. In particular, the Framers provided for biennial legislative sessions in Article 4, Section 2 of the Nevada Constitution, and they originally limited those biennial sessions to 60 days in Article 4, Section 29. Although Article 4, Section 29 was repealed in 1958, the fact that the citizens of Nevada voted in 1998 to limit biennial sessions to 120 days is a clear indication that the citizens of Nevada, like the Framers, want the Nevada Legislature to be a part-time legislative body.

The economic reality of a part-time Legislature is that most legislators must continue to be employed in other occupations on a full-time or part-time basis during their terms of legislative service. This is as true today as it was when the Nevada Constitution was originally adopted. Given this economic reality, it is likely that the Framers fully expected that public employees, like other citizens, would be members of the Legislature, especially since some of the most qualified and dedicated citizens of the community often occupy positions of government employment. As stated by Chief Justice Hastings of the Nebraska Supreme Court in his dissent in Conway:

> A senatorial position in the Nebraska Legislature is a part-time position. Therefore, it is not uncommon for senators to have additional sources of income and careers. An uncompromising interpretation of the separation of powers would inhibit the ability of a part-time legislature to attract qualified members.

472 N.W.2d at 417 (Hastings, C.J., dissenting). Therefore, we believe that construing the term "functions" in Article 3, Section 1 to prohibit a member of the Nevada Legislature from occupying a position of *public employment* would not comport with the concept of the "citizen-legislator" that was undoubtedly envisioned by the Framers of the Nevada Constitution.

In sum, it is the opinion of LCB Legal that the separation-of-powers provision in the Nevada Constitution only prohibits a legislator from holding a *public office* in another department of state government, because a person who holds a *public office* exercises sovereign functions appertaining to another department of state government. However, it is also the opinion of LCB Legal that the separation-of-powers provision in the Nevada Constitution does not prohibit a legislator from occupying a position of *public employment* in another department of state government, because a person who occupies a position of *public employment* does not exercise any sovereign functions appertaining to another department of state government.

Based on this construction of the separation-of-powers provision, if a legislator holds another position in state government, the deciding issue under the Nevada Constitution is whether the other position is a *public office* or a position of *public employment*. If the other position is a *public office*, then the legislator would be prohibited by the separation-of-powers provision from holding the *public office*. However, if the other position is merely a position of *public employment*, then the legislator would not be prohibited by the separation-of-powers provision from holding the position of *public employment*.

As discussed previously, the Nevada Supreme Court has addressed the distinction between a public officer and a public employee on many occasions. See State ex rel. Kendall v. Cole, 38 Nev. 215 (1915); State ex rel. Mathews v. Murray, 70 Nev. 116 (1953); Mullen v. Clark Cnty., 89 Nev. 308 (1973); Eads v. City of Boulder City, 94 Nev. 735, 737 (1978). As recently as 2013, the court reaffirmed that "as is clear from our jurisprudence, officers are fundamentally different from employees." City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 361 (2013). In one of its more recent cases on the issue, the court restated the two fundamental principles that distinguish a public officer from a public employee. Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 200-06 (2001) (holding that, for the purposes of the Open Meeting Law, the position of community college president is not a public office).

The first fundamental principle is that a public officer must serve in a position created by law, not one created by mere administrative authority and discretion. Id. The second fundamental principle is that the duties of a public officer must be fixed by law and must involve an exercise of the sovereign functions of the state, such as formulating state policy. Id. Both fundamental principles must be satisfied before a person is deemed a public officer. See Mullen v. Clark Cnty., 89 Nev. 308, 311 (1973). Thus, if a position is created by mere administrative authority and discretion or if the person serving in the position is subordinate and responsible to higher-ranking policymakers, the person is not a public officer but is simply a public employee. We believe that these fundamental principles are best illustrated by the cases of State ex rel. Mathews v. Murray, 70 Nev. 116 (1953), and Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195 (2001).

In Mathews, the defendant accepted the position of Director of the Drivers License Division of the Public Service Commission of Nevada. 70 Nev. at 120. The Attorney General brought an original action in quo warranto in the Nevada Supreme Court to oust the defendant from that position because when the defendant accepted his position in the executive branch he was also serving as a State Senator. Id. The Attorney General argued that the defendant acted in violation of the separation-of-powers provision of the Nevada Constitution. Id. Before the court could determine the constitutional issue, the court needed to have jurisdiction over the original action in quo warranto. Id. Because an original action in quo warranto could lie only if the defendant's position in the executive branch was a public office, the issue before the court was whether the position of Director of the Drivers License Division was a public office or a position of public employment. Id. The court held that the Director's position was a position of public employment, not a public office, and thus the court dismissed the original action for lack of jurisdiction without reaching the constitutional issue. Id. at 124.

In concluding that the Director's position was a position of public employment, the court reviewed the statutes controlling the state department under which the Drivers License Division operated. Id. at 122. The court found that the position of Director of the Drivers License Division was created by administrative authority and discretion, not by statute, and that the position was wholly subordinate and responsible to the administrator of the department. Id. at 122-23. In this regard, the court stated:

> Nowhere in either act is any reference made to the "drivers license division" of the department or to a director thereof. Nowhere are duties imposed or authority granted save to the department and to its administrator. It appears clear that the position of director was created not by the act but by the administrator and may as easily by him be discontinued or destroyed. It appears clear that the duties of the position are fixed not by law but by the administrator and may as easily by him be modified from time to time. No tenure attaches to the position save as may be fixed from time to time by the administrator. The director, then, is wholly subordinate and responsible to the administrator. It cannot, then, be said that that position has been created by law; or that the duties which attach to it have been prescribed by law; or that, subject only to the provisions of law, the holder of such position is independent in his exercise of such duties. It cannot, then, be said that he has been invested with any portion of the sovereign functions of the government.

Id. at 122-23.

In DR Partners, the court was asked to determine whether the position of community college president was a public office for the purposes of the Open Meeting Law, which is codified in chapter 241 of NRS. Although the Open Meeting Law does not define the term "public office" or "public officer," the court found that the definition of "public officer" in chapter 281 of NRS was applicable because "[t]he Legislature's statutory definition of a 'public officer' incorporates the fundamental criteria we applied in Mathews and Kendall, and is in harmony with those cases, as we subsequently confirmed in Mullen v. Clark County." 117 Nev. at 201.

When the court applied the fundamental criteria from Mathews and Kendall and the statutory definition from chapter 281 of NRS to the position of community college president, the court concluded that the position of community college president was not a public office. DR Partners, 117 Nev. at 202-06. In reaching this conclusion, the court first found that the position of community college president is not created by the Nevada Constitution or statute, but is created by administrative authority and discretion of the Board of Regents. Id. Second, the court found that a community college president does not exercise any of the sovereign functions of the state. Id. Instead, a community college president is wholly subordinate to the Board of Regents and simply implements policies made by higher-ranking state officials. Id. As explained by the court:

> The community college president holds an important position, but the sovereign functions of higher education repose in the Board of Regents, and to a lesser degree in the chancellor, and not at all in the community college president.

* * *

> Because the president is wholly subordinate and responsible to the Board, and can only implement policies established by the Board, we conclude that the community college president does not meet the statutory requisites of a public officer set forth in NRS 281.005(1)(b).

Id. at 205-06.

Based on the foregoing discussion, it is the opinion of LCB Legal that state executive branch employees are not *public officers* because they do not exercise any sovereign functions appertaining to the executive branch of state government. As a result, it is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* as state executive branch employees because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch.

V. Interpretation of Nevada's separation-of-powers provision with regard to local government employees.

Nevada's separation-of-powers provision provides that "[t]he powers of the Government of the *State* of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial." Nev. Const. art. 3, § 1 (emphasis added). By using the term "State" in the separation-of-powers provision, the Framers of the Nevada Constitution expressed a clear intent to have the provision apply only to the three departments of state government. As explained by the Ohio Supreme Court:

> [I]n general at least, when the constitution speaks of the "State," the whole State, in her political capacity, *and not her subdivisions*, is intended. That such is the natural import of the language used, no one denies. That such must be its construction, to make the constitution consistent with itself, and sensible, is very apparent.

Cass v. Dillon, 2 Ohio St. 607, 616 (1853) (emphasis added).

The Nevada Supreme Court has recently stated that "the language of the separation-of-powers provision in the Constitution does not extend any protection to political subdivisions." City of Fernley v. State Dep't of Tax'n, 132 Nev. 32, 43 n.6 (2016). This determination is consistent with prior cases in which the court has recognized that political subdivisions are not part of one of the three departments of state government. See Univ. & Cmty. Coll. Sys. v. DR Partners, 117 Nev. 195, 203-04 (2001) ("Neither state-owned institutions, nor state departments, nor public corporations are synonymous with political subdivisions of the state."); Nunez v. City of N. Las Vegas, 116 Nev. 535, 540 (2000) ("Although municipal courts are created by the legislature pursuant to authority vested in that body by the Nevada Constitution, these courts are separate branches of their respective city governments. . . . .[T]hey are not state governmental entities."); City of Sparks v. Sparks Mun. Ct., 129 Nev. 348, 362 n.5 (2013)

("While municipal courts are included within the state constitutional judicial system, they are nonetheless primarily city entities, rather than an extension of the state.").

Because political subdivisions are not part of one of the three departments of state government, their local officers generally are not considered to be state officers who are subject to the separation-of-powers provision. See State ex rel. Mason v. Bd. of Cnty. Comm'rs, 7 Nev. 392, 396-97 (1872) (noting that the exercise of certain powers by a board of county commissioners was not limited by the doctrine of separation of powers); Lane v. Second Jud. Dist. Ct., 104 Nev. 427, 437 (1988) (noting that the doctrine of separation of powers was not applicable to the exercise of certain powers by a county's district attorney because he was not a state constitutional officer).

Furthermore, as discussed previously, the Nevada Constitution was modeled on the California Constitution of 1849. State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 761 (2001). Because the provisions of the Nevada Constitution were taken from the California Constitution of 1849, those provisions "may be lawfully presumed to have been taken with the judicial interpretation attached." Mason, 7 Nev. at 397.

In construing the separation-of-powers provision in the California Constitution of 1849, the California Supreme Court held that the separation-of-powers provision did not apply to local governments and their officers and employees. People ex rel. Att'y Gen. v. Provines, 34 Cal. 520, 523-40 (1868). In Provines, the court stated that "[w]e understand the Constitution to have been formed for the purpose of establishing a *State* Government; and we here use the term 'State Government' in contradistinction to local, or to county or municipal governments." Id. at 532. After examining the history and purpose of the separation-of-powers provision, the court concluded that "the Third Article of the Constitution means that the powers of the *State* Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments." Id. at 534. Thus, the court held that the separation-of-powers provision had no application to the functions performed by a person at the local governmental level. Id. at 523-40.

In later cases, the California Supreme Court reaffirmed that under California law, "it is settled that the separation of powers provision of the constitution, art. 3, § 1, does not apply to local governments as distinguished from departments of the state government." Mariposa County v. Merced Irrig. Dist., 196 P.2d 920, 926 (Cal. 1948). This interpretation of the separation-of-powers doctrine is followed by a majority of other jurisdictions. See, e.g., Poynter v. Walling, 177 A.2d 641, 645 (Del. Super. Ct. 1962); La Guardia v. Smith, 41 N.E.2d 153, 156 (N.Y. 1942); 16 C.J.S. Constitutional Law § 112, at 377 (1984).

Consequently, it is well settled that "a local government unit, though established under state law, funded by the state, and ultimately under state control, with jurisdiction over only a limited area, is not a 'State.'" United States ex rel. Norton Sound Health Corp. v. Bering Strait Sch. Dist., 138 F.3d 1281, 1284 (9th Cir. 1998). Furthermore, "a local government with authority over a limited area, is a different type of government unit than a state-wide agency

that is part of the organized government of the state itself." Wash. State Dep't of Transp. v. Wash. Natural Gas Co., 59 F.3d 793, 800 n.5 (9th Cir. 1995). Thus, "[w]hile local subdivisions and boards created by the state may have some connection with one of the departments of the state government as defined by the Constitution, they are not 'departments of state government' within the intent and meaning of the [law]." State v. Coulon, 3 So. 2d 241, 243 (La. 1941). In the face of these basic rules of law, courts have consistently found that cities, counties, school districts and other local governmental entities are not included within one of the three departments of state government. See, e.g., Dermott Special Sch. Dist. v. Johnson, 32 S.W.3d 477, 480-81 (Ark. 2000); Dunbar Elec. Supply, Inc. v. Sch. Bd., 690 So. 2d 1339, 1340 (Fla. Dist. Ct. App. 1997); Stokes v. Harrison, 115 So. 2d 373, 377-79 (La. 1959); Coulon, 3 So. 2d at 243.

Likewise, in the context of the Eleventh Amendment, federal courts interpreting Nevada law have consistently found that cities, counties, school districts and other local governmental entities in this state are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada's sovereign immunity in federal court. See, e.g., Lincoln County v. Luning, 133 U.S. 529, 530 (1890); Eason v. Clark Cnty. Sch. Dist., 303 F.3d 1137, 1144 (9th Cir. 2002); Herrera v. Russo, 106 F. Supp. 2d 1057, 1062 (D. Nev. 2000). These federal cases are important because when a federal court determines whether a political subdivision is part of state government for the purposes of the Eleventh Amendment, the federal court makes its determination based on *state* law. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977); Austin v. State Indus. Ins. Sys., 939 F.2d 676, 678-79 (9th Cir. 1991).

After examining state law in Nevada, federal courts have found that the Nevada Gaming Control Board, the Nevada Gaming Commission, the Nevada State Industrial Insurance System, the Nevada Supreme Court and the Nevada Commission on Judicial Discipline are state agencies included within one of the three departments of state government and that these state agencies are entitled to Nevada's sovereign immunity under the Eleventh Amendment. See Carey v. Nev. Gaming Control Bd., 279 F.3d 873, 877-78 (9th Cir. 2002); Romano v. Bible, 169 F.3d 1182, 1185 (9th Cir. 1999); Austin, 939 F.2d at 678-79; O'Connor v. State, 686 F.2d 749, 750 (9th Cir. 1982); Salman v. Nev. Comm'n on Jud. Discipline, 104 F. Supp. 2d 1262, 1267 (D. Nev. 2000). In contrast, after examining state law in Nevada, federal courts have found that cities, counties and school districts in Nevada are not included within one of the three departments of state government and that these local political subdivisions are not entitled to Nevada's sovereign immunity under the Eleventh Amendment. See Lincoln County, 133 U.S. at 530; Eason, 303 F.3d at 1144; Herrera, 106 F. Supp. 2d at 1062. Thus, as viewed by federal courts that have interpreted Nevada law, local political subdivisions in this state are not included within one of the three departments of state government.

Accordingly, because local political subdivisions in this state are not included within one of the three departments of state government, their officers and employees also are not part of one of the three departments of state government. Therefore, legislators who hold positions of *public employment* with local governments do not hold such positions within one of the three

departments of state government. Consequently, given that the separation-of-powers provision applies only to the three departments of state government, it is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with local governments because local governments are not part of one of the three departments of state government.

Furthermore, as discussed previously, it is the opinion of LCB Legal that the separation-of-powers provision prohibits legislators from holding only *public offices*, not positions of *public employment*. Thus, even assuming that the separation-of-powers provision applied to local governments, it is the opinion of LCB Legal that the separation-of-powers provision still would not prohibit legislators from holding positions of *public employment* with local governments because persons who hold such positions of *public employment* do not exercise any sovereign functions of state government.

CONCLUSION

It is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with the state executive branch because persons who hold such positions of *public employment* do not exercise any sovereign functions appertaining to the state executive branch. By contrast, it is the opinion of LCB Legal that the separation-of-powers provision prohibits legislators from holding only *public offices* in the state executive branch because persons who hold such *public offices* exercise sovereign functions appertaining to the state executive branch. Finally, it is the opinion of LCB Legal that the separation-of-powers provision does not prohibit legislators from holding positions of *public employment* with local governments because the separation-of-powers provision applies only to the three departments of state government, and local governments and their officers and employees are not part of one of the three departments of state government.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Sincerely,

Kevin C. Powers
General Counsel

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DISTRICT COURT
CLARK COUNTY, NEVADA

JENNIFER PLUMLEE, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	CASE NO: C-20-346852-A DEPT NO: II

APPELLANT'S REPLY TO RESPONDENT'S OPPOSITION TO MOTION TO RECONSIDER

COMES NOW, Appellant Jennifer Plumlee, by and through her attorney Craig Mueller, Esq., and hereby submits the following as and for her Reply to Respondent's Opposition to her Motion To Reconsider:

A. Deputy District Attorney Scheibel's Prosecution Of This Case Violates The Separation Of Powers Doctrine.

The Nevada Constitution states in relevant part:

ARTICLE. 3. - Distribution of Powers.

Section 1. Three separate departments; separation of powers; legislative review of administrative regulations.

1. The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers

> properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Deputy District Attorney Scheibel serves on the Nevada State Legislature. She is also employed as a prosecutor by the Clark County District Attorney's Office. Her active involvement trying criminal cases would appear to clearly violate the express terms of Nev. Const. Art. 3 Sec. 1(1): "…no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others…."

In *Heller v. Legislature of Nevada*, 120 Nev. 456, 93 P.3d 746 (2004), the Nevada Supreme Court ruled that the Secretary of State does not have standing to sue the Legislature to remove executive branch employees from serving on the Legislature because doing so violates the separation of powers doctrine. The Supreme Court held that Secretary Of State Dean Heller did not state an actionable "claim or controversy". *Id.* at 463. The Supreme Court further held that since there were no executive branch employees actually seated in the Legislature, the matter was not ripe for review. *Id.*

By contrast, Appellant was actually aggrieved by the fact that he was convicted after a bench trial that should never have happened. Deputy DA Scheible may not prosecute individuals for violating statutes she may have had input in writing or amending as that would clearly cross the separation-of-powers line. Because of that the trial was a nullity: the Unlike Secretary of State Heller, Appellant is not requesting a sweeping ruling altering the way the Legislature polices its members. *Id.* Appellant singles out a specific prosecutor who is also serves in the Assembly who violated the separation of powers doctrine when she prosecuted his case.

The language of the Nevada Constitution is clear and unambiguous: "…no persons charged with the exercise of powers properly belonging to one of these departments shall

exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution."

Respondent provides a copy of the Legislative Counsel Bureau's opinion letter dated August 8, 2020. The LCB's opinion is "…that the separation-of-powers provision of the Nevada Constitution only prohibits a legislator from holding a *public office* in another department of state government, because a person who holds a *public office* exercises sovereign functions appertaining to another department of state government." Respondent's Ex. 1, p. 27. The LCB opines "…that the separation-of-powers provision of the Nevada Constitution does not prohibit a legislator from occupying a position of *public employment* in another department of state government, because a person who occupies a position of *public employment* does not exercise any sovereign functions appertaining to another department of state government." *Id.* Put concretely, District Attorney Steve Wolfson is prohibited from serving as a legislator but Deputy District Attorney Melanie Scheibel is not.

This *opinion*, and its distinction between *public office* and *public employment,* may or may not eventually prove to be correct. As the LCB points out: "Since the *Heller* case in 2004, neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed or decided the merits of such a separation-of-powers challenge in a reported case." Respondent's Ex.1, p. 2. What is *fact* today is that the plain language of Nevada Constitution, Article 3, Section 1(1) does not make any distinction between *public office* and *public employment.* It does, however, prohibit an individual from working in the legislative and executive branches of government simultaneously.

B. The Call To Legislative Action.

The framers of the Nevada Constitution carved out an exception to what is a *prima facie*

prohibition on working as a member of the legislative and executive branches of state government simultaneously. That exception is found in the last phrase of Article 3, Section 1(1): "…*except in the cases expressly directed or permitted in this constitution."* The plain language of Article 3, Section 1(1) states that the legislature may permit an individual to work for two branches of government if it either: 1) amends the constitution, or 2) passes legislation enabling an individual to work for two branches of government simultaneously. This interpretation is harmonious with the Nevada Supreme Court's reasoning in *Heller* that Article 4, Section 6 of the Nevada Constitution "…expressly reserves to the Senate and Assembly the rights to extend, with and withdraw membership status." *Id.* at 466, 93 P.3d at 753. Until the Senate and Assembly authorize dual service, the practice is expressly prohibited by Article 3, Section 1(1). The irony here being that Assemblywoman Scheible could not introduce, sponsor or vote on such legislative action because doing so would not only violate the separation-of-powers doctrine, but would present an actual conflict of interest with Deputy District Attorney Scheible!

Respectfully SUBMITTED this 18th day of September, 2020.

/s/ Craig A. Mueller

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CERTIFICATE OF ELECTRONIC SERVICE

I certify that a copy of Appellant's Motion To Reconsider was served through the court clerk's Odyssey Efile/Eservice network on September 18, 2020, to:

ALEXANDER CHEN
Chief Deputy District Attorney
Clark County District Attorney's Office

BY: */s/Rosa Ramos*
Senior Criminal Paralegal
Mueller & Associates

DISTRICT COURT
CLARK COUNTY, NEVADA

Criminal Appeal	**COURT MINUTES**	**November 09, 2020**

C-20-346852-A Jennifer Lynn Plumlee, Appellant(s)
vs
Nevada State of, Respondent(s)

November 09, 2020 12:16 AM Minute Order

HEARD BY: Scotti, Richard F. **COURTROOM:** No Location

COURT CLERK: Kathryn Hansen-McDowell

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- The Court GRANTS Appellant s Motion to Reconsider, based on the violation of Appellant s Constitutional rights to procedural due process, as explained below.
Appellant Jennifer Plumlee was deprived of her Constitutional rights of procedural due process because her prosecutor, Deputy District Attorney Scheible, also served as a Legislator at the time of the trial, in violation of the Separation of Powers doctrine which doctrine exists as a fundamental feature of American government, and as a express clause in the Nevada Constitution. Nev. Const. Art. 3, Sec. 1. An individual may not serve simultaneously as the law-maker and the law-enforcer of the laws of the State of Nevada.
The plain and unambiguous language of the Nevada Constitution is that:
The powers of the Government of the State of Nevada shall be divided into three separate departments, - the Legislative, - the Executive and the Judiciary; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this Constitution.
Nev. Const. Art 3, sec. 1. This is commonly known as the Separation of Powers clause.
It is undisputed that Prosecutor Scheible was a person charged with the exercise of powers within the legislative branch of government at the time of the trial. Further, there is no reasonable dispute that, as prosecutor, she was charged with the exercise of powers within the executive branch. The

enforcement of the laws of the State of Nevada are powers that fall within the executive branch of the government of the State of Nevada. See Nev. Const. Art. 5, sec. 7. Prosecutor Scheible was enforcing the laws of the State of Nevada, and representing the State of Nevada, and thus was exercising the powers delegated to her within the executive branch. It is not mere coincidence that District Attorneys are frequently referred to as the State or the government.

Deputy District Attorney Scheible did not have the legal authority to prosecute Appellant, thus the trial was a nullity.

The Separation of Powers doctrine historically exists to protect one branch of government from encroaching upon the authority of another. But more than that, it exists to safeguard the people against tyranny the tyranny that arises where all authority is vested into one autocrat a person who writes the law, enforces the law, and punishes for violations of the law.

Our Founding Fathers understood that consolidated power was the genesis of despotism. A dispersion of power, they understood, was the best safeguard of liberty. As explained by James Madison, The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny. Federalist No. 47 (3rd para.).

One who serves in the legislative branch in making the law must not and cannot simultaneously serve in the executive branch as a prosecutor of the State laws. This Court finds that it is a violation of procedural due process of nearly the highest order for a person to be tried and convicted by a public official who in charge of both writing and enforcing the law.

The authorities cited by the State are very clearly wrong and distinguishable.

In 2004 Attorney General Brian Sandoval issued an opinion that local executive branch employees are not prohibited from serving in the legislature. But that opinion did not specifically consider that a Deputy District Attorney enforcing the laws of the State of Nevada, and representing the State of Nevada, is actually exercising powers belonging to the State executive branch.

In August 8, 2020 the Legislative Counsel Bureau issued an opinion that local governments and their officers and employees are not part of one of the three departments of state government. But, like the AG Opinion mentioned above, that opinion did not specifically consider that a Deputy District Attorney enforcing the laws of the State of Nevada, and representing the State of Nevada, is actually exercising powers belonging to the State executive branch.

The States reliance on Lane v. District Court, 760 P.2d 1245 (Nev. 1988) is misplaced. The issue in Lane was whether the Judiciary was improperly interfering with the functions of the Executive Branch. The Nevada Supreme Court did not squarely reach the issue whether the due process rights of a criminal defendant were violated when prosecuted by an Assistant District Attorney who also served in the Legislature. Here, this Court is not directing the Office of the District Attorney to do or not to do anything; rather, this Court is protecting the rights of the accused.

The State attempts to draw a distinction between a public officer and a mere public employee. As to the former, the State acknowledges that the Separation of Powers Doctrine does apply to a person holding an Office established by the Constitution. But the State invents out of thin air the notion that the Doctrine does not apply to an employee who carries out executive functions. The States purported authority, State ex rel. Mathews v. Murray, 70 Nev. 116 (1953) does not stand for its proposition. Mathews merely held that a petition for Writ of Quo Warranto could not be used to remove a public employee, only a public officer. While there might be a meaningful distinction

between a public employee and public officer in some situations, it is not evidence in the words of the Nevada Separation of Powers doctrine.
The State wrongly relies on Heller v. Legislature of the State of Nevada, 120 Nev. 456 (2008) which held that the judiciary could not determine whether a legislator must be removed for violating the Separation of Powers doctrine where the legislator also served in the Executive Branch. That case was based on lack of standing, rather than the merits. Further, this is not a case of the Judiciary determining the qualifications to be a member of the Legislature, or to work for the District Attorneys office. Rather this case involves the due process rights of an accused; and, in this case, those rights were violated.
The Appellant was deprived of her constitutional rights to procedural due process even if the Nevada Separation of Powers clause as written does not apply to any persons employed by local governments. The Separation of Powers doctrine is such a clear, vital, and well-recognized aspect of the American system of government, existing long before the adoption of the Nevada Constitution. This Court finds that it is fundamental to American jurisprudence that a criminal defendant shall not be prosecuted by a person who is simultaneously the law-maker and the law-enforcer of the laws of the State of Nevada.
The Court finds that Appellant did not waive her right on appeal to raise the issue of separation of powers. Raising it in the Motion for Reconsideration is the same as raising it in the original appeal brief as the initial appeal is still pending.
Accordingly, the Court GRANTS the Appeal, REVERSES the conviction, and ORDERS the Bond, if any, returned to Appellant.
Appellant shall prepare the Order, consistent herewith, correcting for any scrivener error, and adding appropriate context and authorities. Further, Appellant shall submit the Order, pursuant to the electronic submission provisions of AO 20-17.

CLERK'S NOTE: The above minute order has been distributed to: Craig Mueller: cmueller@muellerhinds.com, Alexander Chen: alexander.chen@clarkcountyda.com and Melanie Scheible: melanie.scheible@clarkcountyda.com

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JENNIFER LYNN PLUMLEE, aka,
Jennifer Lynn Graves, #1410679

Defendant.

CASE NO: C-20-346852-A

DEPT NO: II

STATE'S NOTICE OF MOTION AND MOTION FOR CLARIFICATION AND A STAY OF THE PROCEEDINGS FOLLOWING THE FILING OF THE ORDER

DATE OF HEARING: DECEMBER 3, 2020
TIME OF HEARING: 9:00 AM
HEARING REQUESTED

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and files this Notice Of Motion And Motion For Clarification And A Stay Of The Proceedings Following The Filing Of The Order.

This Motion 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.

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NOTICE OF HEARING

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion on for setting before the above entitled Court, in Department II thereof, on Thursday, the 3rd day of December, 2020, at the hour of 9:00 o'clock AM, or as soon thereafter as counsel may be heard.

DATED this 17 day of November, 2020.

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

BY _____
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

POINTS AND AUTHORITIES

A. THE STATE REQUESTS FURTHER CLARIFICATION

On November 9, 2020, this Court granted Appellant Jennifer Plumlee's Motion to Reconsider based upon her argument that the separation of powers clause of the Nevada Constitution was violated when the Deputy District Attorney also held a separate role as a part-time legislator. In the Minute Order, this Court granted the appeal, ordered that the convictions be reversed, and ordered the bond, if any, be returned to Appellant. This Court then directed Appellant to submit an Order consistent with the Minute Order.

In examining the Minute Order, there is no mention that this case be remanded for a future trial. Thus, the State respectfully asks this Court for clarification on whether it is the intent of this Court that the case be dismissed outright, or if its intention is to remand the case to Justice Court for further proceedings.

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