

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

MATTHEW HANEY MOLEN,

Real Party In Interest.

Electronically Filed
Jan 14 2021 08:27 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 82249

D.C. NO: C-20-348754-A

PETITIONER'S APPENDIX

STEVEN B. WOLFSON
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Counsel for Petitioner

Counsel for Real Party in Interest

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 14, 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

Alanna J. Smith
CLERK OF THE COURT

1 APLC

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**
5

6 **STATE OF NEVADA,**
7 **Plaintiff,**

8 **-vs-**

9 **MATTHEW HANEY MOLEN**
10 **Defendant,**

District Court Case #

Justice Court Case # 19CRH000443-0000

Department # **C-20-348754-A**
II
07-09-2020
In Chambers

11
12 **APPEAL FROM THE JUSTICE COURT, HENDERSON TOWNSHIP**

13 **CLARK COUNTY, NEVADA**
14

15
16 **Appellant**

Respondent

17 **MATTHEW HANEY MOLEN**
18 **2600 PONDEROSA PINE AVE**
19 **HENDERSON, NV 89074**
Attorney for Defendant

District Attorney
200 Lewis Avenue
Las Vegas, NV 89115
Attorney for Plaintiff

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Department # 1

5-21

1 MUELLER & ASSOCIATES, INC.
2 CRAIG A. MUELLER, ESQ.
3 Nevada Bar No. 4703
4 723 South Seventh Street
5 Las Vegas, Nevada 89101
6 (702) 382-1200
7 Attorney for Defendant
8 MATTHEW MOLEN

HENDERSON JUSTICE COURT

5/21/2020
FILED IN OPEN COURT

9 JUSTICE COURT, HENDERSON TOWNSHIP

10 CLARK COUNTY, NEVADA

11 THE STATE OF NEVADA,

12 Plaintiff,

13 vs.

14 MATTHEW MOLEN,

15 Defendant.

19CRH 000443-0000
Case No. 19FH0521X

Dept No. 3

NOTICE OF APPEAL

16 PURSUANT TO NRS 266.595, notice is hereby given that MATTHEW MOLEN, the
17 Defendant above named, hereby appeals to the Eighth Judicial District Court of Las Vegas, Clark
18 County, State of Nevada from the Final Judgment entered in this action on the 18TH day of May,
19 2020.

20 DATED this 19th day of May 2020.

21 MUELLER & ASSOCIATES, INC.

22 By Craig Mueller
23 CRAIG A. MUELLER, ESQ.
24 Nevada Bar No. 4703
25
26
27
28

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing NOTICE OF APPEAL is hereby acknowledged

this ____ day of May 2020.

By: 

DISTRICT ATTORNEY'S OFFICE

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

CASE # 19CRH000443-0000 19FH0521X **SAM BATEMAN - DEPT # 1**
State MOLEN, MATTHEW HANEY **8014510 (SCOPE)**
Charge(s) DUI ALCOHOL AND/OR CONT/PROHIBIT SUB, ABOVE THE LEGAL LIMIT, 1ST **GUILTY PLEA W/SENT BEFORE TRIAL**
CHILD ABUSE OR NEGLECT, 1ST **BOUND OVER**

Chrg#	Docket Dt	Docket Description	Amt Owed	Amt Paid	Amt Dism	Amt Due
2	05/18/2020	\$800 AND HIGHER FINE	\$625.00	\$0.00	\$0.00	\$625.00
2	05/18/2020	ALCOHOL ANALYSIS FEE HND	\$80.00	\$0.00	\$0.00	\$80.00
						\$585.00
						\$585.00

LINKED CASES FOR: 19CRH000443-0000

CASE #	STATUS	EVENT DATE	EVENT DESCRIPTION
19PCH000485-0000	CRIMINAL COMPLAINT FIL	NO FUTURE EVENTS	FELONY ARRAIGNMENT HND

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

**PROCEEDINGS
APPEARANCES - HEARING**

EVENTS

May 21, 2020	NOTICE OF APPEAL FILED	STATUS CHECK HND Date: July 09, 2020 Time: 9:00 am Location: DEPARTMENT 1
May 18, 2020 S. BATEMAN, JP B. SCHIFALACQUA, DDA C. MUELLER, ESQ. K. ZICHA, CLK L. BRENSKE, CR	<p>DEFENDANT NOT PRESENT DEFENSE COUNSEL SUBMITS ALCOHOL EVALUATION STATE REQUESTS DEFENDANT BE PRESENT FOR SENTENCING COURT WAIVES DEFENDANTS PRESENCE DEFENDANT TO PAY \$585 FINE OR DO 50 HOURS COMMUNITY SERVICE ATTEND VICTIM IMPACT PANEL STAY OUT OF TROUBLE MINIMUM OF 1 YEAR - STATE TO RUN NCIC AS DEFENDANT RESIDES IN MONTANA DEFENDANT SENTENCED TO 6 MONTHS CLARK COUNTY JAIL - SUSPENDED. COURT WILL INQUIRE WITH LRS REGARDING ON-LINE LONG TERM ALCOHOL COUNSELING IN LIEU OF DUI SCHOOL CONTINUED FOR REQUIREMENTS AND ON-LINE COUNSELING NO BAIL POSTED</p> <hr/> <p>SET FOR COURT APPEARANCE Event: STATUS CHECK HND Date: 07/09/2020 Time: 9:00 am Judge: BATEMAN, SAM Location: DEPARTMENT 1</p>	

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

CASE # 19CRH000443-0000 19FH0521X **SAM BATEMAN - DEPT # 1**
State MOLEN, MATTHEW HANEY **8014510 (SCOPE)**

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
April 23, 2020	REPORTER'S TRANSCRIPT OF SENTENCING FILED	
March 17, 2020 S. BATEMAN, JP E. ISCAN, DDA C. MUELLER, ESQ. K. ZICHA, CLK L. BRENSKE, CR	<p>DECISION: DEFENDANT PRESENT IN COURT COUNT 2: COURT FINDS DEFENDANT GUILTY BEYOND A REASONABLE DOUBT DEFENDANT TO OBTAIN ALCOHOL EVALUATION DEFENSE STATES HE WILL HAVE DEFENDANT SIGN UP FOR DUI SCHOOL AND VICTIM IMPACT PANEL COURT INSTRUCTS DEFENSE COUNSEL TO SEND EVALUATION TO COURT PRIOR TO NEXT COURT DATE CONTINUED FOR SENTENCING NO BAIL POSTED</p> <hr/> <p>SET FOR COURT APPEARANCE Event: SENTENCING HEARING HND Date: 05/18/2020 Time: 9:00 am Judge: BATEMAN, SAM Location: DEPARTMENT 1</p> <hr/> <p>Result: CRIMINAL HEARING HELD</p> <hr/> <p>SET FOR COURT APPEARANCE Event: STATUS CHECK HND Date: 05/18/2020 Time: 9:00 am Judge: BATEMAN, SAM Location: DEPARTMENT 1</p>	
March 18, 2020 S. BATEMAN, JP M. SCHEIBLE, DDA J. MAYNARD, ESQ FOR C. MUELLER, ESQ K. ZICHA, CLK L. BRENSKE, CR	<p>SET FOR COURT APPEARANCE Event: STATUS CHECK HND Date: 03/17/2020 Time: 9:00 am Judge: BATEMAN, SAM Location: DEPARTMENT 1</p> <hr/> <p>Result: CRIMINAL HEARING HELD</p> <hr/> <p>STATUS CHECK: DEFENDANT NOT PRESENT CONTINUED FOR STATUS CHECK - DECISION ON TRIAL NO BAIL POSTED</p>	
March 04, 2020 S. BATEMAN, JP V. VILLEGAS, DDA J. MAYNARD, ESQ FOR C. MUELLER, ESQ K. ZICHA, CLK L. BRENSKE, CR	<p>SET FOR COURT APPEARANCE Event: STATUS CHECK HND Date: 03/16/2020 Time: 9:00 am Judge: BATEMAN, SAM Location: DEPARTMENT 1</p> <hr/> <p>STATUS CHECK: DEFENDANT NOT PRESENT CONTINUED FOR DECISION ON TRIAL NO BAIL POSTED</p>	

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

CASE # 19CRH000443-0000 19FH0521X **SAM BATEMAN - DEPT # 1**
State MOLEN, MATTHEW HANEY **8014510 (SCOPE)**

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
January 29, 2020	SET FOR COURT APPEARANCE Event: STATUS CHECK HND Date: 03/04/2020 Time: 9:00 am Judge: BATEMAN, SAM Location: DEPARTMENT 1 Result: CRIMINAL HEARING HELD HEARING VACATED The following event: STATUS CHECK HND scheduled for 01/30/2020 at 9:00 am has been resulted as follows: Result: HEARING VACATED Judge: BATEMAN, SAM Location: DEPARTMENT 1	-
January 15, 2020	REPORTER'S TRANSCRIPT OF TRIAL FILED	
January 06, 2020	STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF ON CONSIDERATION OF A SINGLE BREATH TEST TAKEN OUTSIDE OF THE TWO HOUR LIMIT- FILED	
December 17, 2019	SUPPLEMENTAL BRIEF ON CONSIDERATION OF A SINGLE BREATH TEST TAKEN OUTSIDE OF THE TWO HOUR LIMIT FILED BY CRAIG A. MUELLER, ESQ	

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

CASE # 19CRH000443-0000 19FH0521X **SAM BATEMAN - DEPT # 1**
State MOLEN, MATTHEW HANEY 8014510 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
December 05, 2019 S. BATEMAN, JP M. SCHEIBLE, DDA C. MUELLER, ESQ. K. ZICHA, CLK L. BRENSKE, CR	NON JURY TRIAL DEFENDANT PRESENT DEFENSE MOTION TO EXCLUDE WITNESSES - GRANTED STATE WAIVES OPENING STATEMENT DEFENSE MAKES OPENING STATEMENT STATE'S WITNESSES TODD SMITH OFFICER AUSTIN GROLL OFFICER AUSTIN GROLL DARBY LANZ STATE'S EXHIBIT'S #1-#7 PHOTOGRAPHS - MARKED, OFFERED, ADMITTED #8 INTOXILYZER 8000 CHECKLIST- MARKED, OFFERED, ADMITTED #9 INTOXILYZER RESULTS - MARKED, OFFERED, OBJECTION, ADMITTED #10 HENDERSON POLICE DEPARTMENT DUI SUMMARY - MARKED, OFFERED, OBJECTION, NOT ADMITTED DEFENSE EXHIBIT'S #A PHOTOGRAPH'S - MARKED, OFFERED, ADMITTED #B TRAFFIC ACCIDENT STATEMENT- MARKED FOR IDENTIFICATION PURPOSE ONLY #C COMPACT DISK - MARKED, OFFERED, ADMITTED #D ARREST REPORT - MARKED FOR IDENTIFICATION PURPOSE ONLY STATE RESTS DEFENDANT ADVISED OF RIGHT TO MAKE A STATEMENT DEFENSE CALLS DEFENDANT TO TESTIFY DEFENSE RESTS STATE WAIVES AND RESERVES DEFENSE REQUESTS TO SUBMIT POINTS AND AUTHORITIES DEFENSE CLOSING ARGUMENT STATE CLOSING ARGUMENT DEFENSE TO SUBMIT BRIEF BY DECEMBER 19, 2019 STATES RESPONSE DUE BY JANUARY 6, 2019 CONTINUED FOR STATUS CHECK POINTS AND AUTHORITIES NO BAIL POSTED	

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

CASE # 19CRH000443-0000 19FH0521X **SAM BATEMAN - DEPT# 1**
State MOLEN, MATTHEW HANEY 8014510 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
	SET FOR COURT APPEARANCE Event: STATUS CHECK HND Date: 01/30/2020 Time: 9:00 am Judge: BATEMAN, SAM Location: DEPARTMENT 1	
November 18, 2019 S. BATEMAN, JP S. KERN, DDA C. MUELLER, ESQ. K. ZICHA, CLK L. BRENSKE, CR	NONJURY TRIAL COUNT 2 DEFENDANT PRESENT DEFENSE MOTION TO CONTINUE - RECEIVED ADDITIONAL DISCOVERY THIS MORNING STATE OBJECTS MOTION GRANTED NON JURY TRIAL RESET NO BAIL POSTED TRIAL CONTINUED - DEFENSE ESQ REQUEST The following event: NONJURY TRIAL HND scheduled for 11/18/2019 at 9:30 am has been resulted as follows: Result: TRIAL CONTINUED - DEFENSE ESQ REQUEST Judge: BATEMAN, SAM Location: DEPARTMENT 1 SET FOR COURT APPEARANCE Event: NONJURY TRIAL HND Date: 12/05/2019 Time: 9:30 am Judge: BATEMAN, SAM Location: DEPARTMENT 1	
August 28, 2019	SET FOR COURT APPEARANCE Event: NONJURY TRIAL HND Date: 12/05/2019 Time: 9:30 am Judge: BATEMAN, SAM Location: DEPARTMENT 1	

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

CASE # 19CRH000443-0000 19FH0521X **SAM BATEMAN - DEPT # 1**
State MOLEN, MATTHEW HANEY **8014510 (SCOPE)**

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
<p>August 27, 2019 S. BATEMAN, JP M. SCHEIBLE, DDA C. MUELLER, ESQ. K. ZICHA, CLK L. BRENSKE, CR</p>	<p>PRELIMINARY HEARING DEFENDANT PRESENT EXCLUSIONARY RULE INVOKED PARTIES STIPULATE TO BIFURCATE COUNTS AND PROCEED ON COUNT 1 TODAY STATE WITNESS OFFICER AUSTIN GROLL STATE'S EXHIBITS #1 DUI SUMMARY #2 INTOXILYZER 8000 CHECKLIST #3 DMV FORM - OFFICER'S CERTIFICATION OF CAUSE AND NOTICE OF REVOCATION AND/OR SUSPENSION #4 HENDERSON DETENTION CENTER INTOXILYZER - ALCOHOL ANALYZER EXHIBITS #1-#4 OFFERED, OBJECTION, ARGUMENT, ADMITTED STATE RESTS DEFENDANT WAIVES RIGHT TO MAKE STATEMENT DEFENSE EXHIBITS #A - HENDERSON POLICE DEPARTMENT INCIDENT REPORT #19-05593 #B - HENDERSON POLICE DEPARTMENT DUI SUMMARY #19-05593 DEFENSE EXHIBITS MARKED FOR IDENTIFICATION PURPOSE ONLY, NOT OFFERED DEFENSE RESTS STATE WAIVES AND RESERVES DEFENSE MOTION TO DISMISS AND ARGUMENT IN FAVOR OF SAID MOTION STATE'S ARGUMENT AGAINST MOTION MOTION DENIED THEREUPON Thereupon Court ORDERED defendant held to answer to said charge in the Eighth Judicial District Court. SURETY BOND CONTINUES COUNT 2 - SET FOR NON-JURY TRIAL SET FOR COURT APPEARANCE Event: DISTRICT COURT ARRAIGNMENT HND Date: 09/06/2019 Time: 10:00 am Judge: Location: DISTRICT COURT ARRAIGNMENT SET FOR COURT APPEARANCE Event: NONJURY TRIAL HND Date: 11/18/2019 Time: 9:30 am Judge: BATEMAN, SAM Location: DEPARTMENT 1</p>	

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

CASE # 19CRH000443-0000 19FH0521X **SAM BATEMAN - DEPT # 1**
State MOLEN, MATTHEW HANEY 8014510 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
July 03, 2019 S. BATEMAN, JP V. VILLEGAS, DDA T. JONES, ESQ FOR C. MUELLER, ESQ K. ZICHA, CLK D. TAVAGLIONE, CR	HEARING VACATED The following event: PRELIMINARY HEARING HND scheduled for 07/10/2019 at 9:30 am has been resulted as follows: Result: HEARING VACATED Judge: BATEMAN, SAM Location: DEPARTMENT 1 MOTION: DEFENDANT NOT PRESENT MOTION BY DEFENSE TO RESCHEDULE PRELIMINARY HEARING. MOTION GRANTED. PRELIMINARY HEARING DATE 07/10/2019 VACATED AND RESET SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 08/27/2019 Time: 9:30 am Judge: BATEMAN, SAM Location: DEPARTMENT 1	
July 01, 2019	MOTION TO RESCHEDULE PRELIMINARY HEARING DATE FILED BY C. MUELLER, ESQ. FILED SET FOR COURT APPEARANCE Event: MOTIONS HND Date: 07/03/2019 Time: 9:00 am Judge: BATEMAN, SAM Location: DEPARTMENT 1 Result: MOTION GRANTED	
June 12, 2019	DEMAND FOR EXPERT WITNESSES FILED	
June 03, 2019 S. BATEMAN, JP V. VILLEGAS, DDA A. DEMARTINO, ESQ FOR: C. MUELLER, ESQ D. LOPEZ CLK L. BRENSKE, CR	PRELIMINARY HEARING: DEFENDANT NOT PRESENT MATTER CALLED OFF PRELIMINARY HEARING DATE RESET SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 07/10/2019 Time: 9:30 am Judge: BATEMAN, SAM Location: DEPARTMENT 1	

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

CASE # 19CRH000443-0000 19FH0521X **SAM BATEMAN - DEPT # 1**
State MOLEN, MATTHEW HANEY 8014510 (SCOPE)

DATE, JUDGE, OFFICERS OF COURT PRESENT	PROCEEDINGS APPEARANCES - HEARING	EVENTS
April 02, 2019 D.S. GIBSON, SR., JP FOR S. BATEMAN, JP S. WATERS, DDA C. HINDS, ESQ FOR C. MUELLER, ESQ E. VANOSTRAND, CLK L. BRENSKE, CR	INITIAL ARRAIGNMENT: DEFENDANT NOT PRESENT DEFENSE COUNSEL ACKNOWLEDGES, WAIVED READING OF THE COMPLAINT BY AND THROUGH HIS ATTORNEY, DEFENDANT ASKED FOR DATE CERTAIN FOR HEARING WAIVED 15 DAY RULE PRELIMINARY HEARING DATE SET SURETY BOND CONTINUES SET FOR COURT APPEARANCE Event: PRELIMINARY HEARING HND Date: 08/03/2019 Time: 9:30 am Judge: BATEMAN, SAM Location: DEPARTMENT 1	
March 14, 2019	\$5,000 SURETY BOND POSTED ON 03-13-19 AT HDC Charge #1: DUI ALCOHOL AND/OR CONT/PROHIBIT SUB. ABOVE THE LEGAL LIMIT, 1ST COMPLAINT FILED SET FOR COURT APPEARANCE Event: FELONY ARRAIGNMENT HND Date: 04/02/2019 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3 Result: ARRAIGNMENT HEARING HELD	
March 13, 2019	SET FOR COURT APPEARANCE Event: FELONY ARRAIGNMENT HND Date: 03/18/2019 Time: 9:00 am Judge: GIBSON SR, DAVID S Location: DEPARTMENT 3 Result: HEARING VACATED PROBABLE CAUSE DETERMINATION BAIL SET \$5,000 TOTAL CASH OR SURETY	

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA
COURT

THE STATE OF NEVADA,

Plaintiff,

-vs-

MATTHEW HANEY MOLEN #8014510,

Defendant.

2019 MAR 14 A 8:55

KZ 19CRH000443-0000
CASE NO: 19FH0521X

DEPT NO: 3

CRIMINAL COMPLAINT

The Defendant above named having committed the crimes of CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B Felony - NRS 200.508.1 - NOC 55226) and DRIVING UNDER THE INFLUENCE (Misdemeanor - NRS 484C.110, 484C.400, 484C.105 - NOC 53900), in the manner following, to wit: That the said Defendant, on or about the 12th day of March, 2019, at and within the County of Clark, State of Nevada,

COUNT 1 - CHILD ABUSE, NEGLECT, OR ENDANGERMENT

did willfully, unlawfully, and feloniously cause a child under the age of 18 years, to wit: E.M., being approximately 13 year(s) of age, to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect, to wit: negligent treatment or maltreatment of a child, and/or cause E.M. to be placed in a situation where he or she might have suffered unjustifiable physical pain or mental suffering as a result of abuse or neglect, to wit: negligent treatment or maltreatment of a child, by operating a vehicle occupied by E.M., while under the influence of alcohol.

COUNT 2 - 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 Pecos Road and Robindale Road, 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 him incapable of safely driving and/or exercising actual physical control of a vehicle, 2) while

1 he had a concentration of alcohol of .08 or more in his breath, and/or 3) when he was found
2 by measurement within two (2) hours after driving and/or being in actual physical control of
3 a vehicle to have a concentration of alcohol of .08 or more in his breath.

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

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9 03/13/19

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28 HPD EV# 1905593
(TK)

1 **NOTICE OF WITNESSES**

2 **[NRS 174.234]**

3 **TO: Defendant or attorney of record:**

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

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

7 **FORENSIC ANALYST OF ALCOHOL**
8 **DARBY LANZ MP14274**
9 **DANA RUSSELL MP7503**
LAS VEGAS METROPOLITAN POLICE
FORENSIC LABORATORY

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

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

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

17 **DATED March 13, 2019.**

Henderson Police Department

223 Lead St. Henderson, NV 89015

Declaration of Arrest

Page 1 of 2

DR# 1105923

FW 19

Arrestee's Name: Molen, Matthew Haney

Date of Arrest: 03/12/2019

Time of Arrest: 1623

Charge	Degree	NRS/NVC
DUI, ABOVE LEGAL LIMIT, (1ST)	Misdemeanor	484C.110
CHILD ABUSE OR NEGLECT, (1ST)	Felony	200.001.1

THE UNDERSIGNED MAKE THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND
SAYS: That I, Austin Groll am a peace officer with the Henderson PD, Clark County, Nevada, being so employed since
08/25/2018. That I learned the following facts and circumstances which led me to believe that the above named subject
committed (or was committing) the above offense/offenses at the location of North Pecos Road Henderson Nevada
89074, and that the offense occurred at approximately hours on .

Details of Probable Cause

On 03/13/2019 at approximately 1620 hours Field Training Officer A. Nelson #2195 and I, Officer A. Groll #2486, were
dispatched to the intersection of Pecos Road and Robindale Road (Henderson, Nevada) reference a traffic accident.

Please refer to report number 19-05592 for further details about the traffic accident.

Upon arrival I made contact with a male, Matthew Molen (05/20/1981), who stated he had just gotten into a vehicle
accident. Matthew stated he was driving his 2018 Hyundai Sonata bearing Montana license plate 248378B. I asked
Matthew where he was driving to and he stated he had just picked up his son, Easton Molen (09/21/08), from Thurman
White Middle School.

While Matthew was explaining the traffic accident to me, I detected a strong odor of an unknown alcoholic beverage
emanating from his breathe and person. I also noticed that Matthew's eyes were bloodshot and watery.

Officer K. Skinner #2233 arrived on scene to assist.

Due to the above observations, I asked Matthew if he would submit to Standardized Field Sobriety Testing to determine if
he was able to operate a motor vehicle safely, and he agreed. I asked Matthew a series of questions that are detailed on
the HP-95 form which is attached to this report. It should be noted, Matthew admitted to drinking three beers at his
estimated time of 0200 hours and he confessed to driving the vehicle.

I then moved Matthew to a smooth area that had a hard, flat surface.

I administered Matthew the Horizontal Gaze Nystagmus test and he showed 6 out of 8 clues which is an unsatisfactory
performance of that test.

I administered Matthew the Walk and Turn test and he showed 3 out of 8 clues which is an unsatisfactory performance of
that test.

I administered Matthew the One Leg Stand test and he showed 3 out of 4 clues which is an unsatisfactory performance of
that test.

All of the above testing and observations indicated that Matthew was too impaired to operate a motor vehicle safely. See

Austin Groll

Declarant's Name

SCANNED

AA000016

Henderson Police Department

223 Lead St. Henderson, NV 89015

Page 2 of 2

Declaration of Arrest Continuation Page

DR# 1995593

F# 19

Arrestee's Name: Molen, Matthew Harvey

Details of Probable Cause (Continued)

the attached Standardized Field Sobriety Checklist (HP-95-form) for complete details of the SFSTs.

Due to the fact that Matthew confessed to drinking alcohol, the fact that Matthew confessed to driving the vehicle, and the above facts from the Standardized Field Sobriety Test, I advised Matthew that he was being placed in custody for violating NRS 484C.4001 - DUI, ABOVE LEGAL LIMIT, (1ST).

I then searched Matthew and placed him in my patrol vehicle. I read Implied Consent at 1628 (witnessed by Field Training Officer Nelson) and asked Matthew if he would voluntarily submit to evidentiary breath testing at the Henderson Detention Center, and he said he would.

I read Matthew his Miranda Warning at about 1628 hours (witnessed by Field Training Officer Nelson).

Officer Eldner later did an inventory search of Matthew's vehicle and inside was the following: HP Chrome Laptop (White/Silver), Black Backpack, Capital One credit card (...4738), Misc Trash, Emergency roadside kit.

Matthew's car was then towed by Snap Towing.

I transported Matthew to the Henderson Detention Center without incident. After Matthew was booked into the jail at 1701 hours, I warmed up the Intoxilyzer 8000 (SN 80-006041). At this point in time, I checked Matthew's mouth to ensure he did not have any foreign objects in his mouth. At approximately 1711 hours, I began the observation period on Matthew for the next fifteen minutes to ensure that he did not contaminate his breath and jeopardize the integrity of the test. After the fifteen minute observation period, Matthew gave two breath samples. The results were .172 & .184 at 1737 hours and 1741 hours respectively.

Due to the fact Matthew was driving his vehicle on a public roadway, the fact it was determined he was over the legal limit of alcohol, the fact his son who is thirteen years of age was riding in the vehicle with him, the fact Matthew placed his son in a situation where he may have suffered physical pain while operating the vehicle while intoxicated, I charged Matthew with a felony violation of NRS 200.508.1 - CHILD ABUSE OR NEGLECT, (1ST).

This incident was recorded on the Henderson Police Department's Dash and Body Worn Cameras.

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor).

Austin Groll

Declarant's Name

AA000017

Henderson Police Department

223 Lead St. Henderson, NV 89015

Booking Custody Record

1702

DR NUMBER 180383	PH NUMBER 19	MINI NUMBER	SUBJECT NAME Molan, Matthew Henry		ARREST DATE 08/12/2019	ARREST TIME 1828
LOCATION OF CRIME North Pease Road Henderson Nevada 89074				INTERSECTION Robindale Road	<input checked="" type="checkbox"/> AT LOCATION	
LOCATION OF ARREST 355 North Pease Road Henderson Nevada 89074				INTERSECTION	<input checked="" type="checkbox"/> AT LOCATION	
<input type="checkbox"/> INTERPRETOR NEEDED		<input type="checkbox"/> SUBJECT COMBATIVE	<input type="checkbox"/> SUBJECT SUICIDAL		<input type="checkbox"/> ASK SUBJECT IF INJURED	
<input checked="" type="checkbox"/> MIRANDA GIVEN		<input type="checkbox"/> MIRANDA WAIVED		<input checked="" type="checkbox"/> MIRANDA INVOKED		INTAKE OFC INITIALS
MIRANDA	DATE 08/12/2019	TIME 1828	GIVEN BY A. Groll #2486			
PERSON 1	PERSON NAME (LAST, FIRST, MID., SUFFIX) Molan, Matthew Henry			SSN 604-08-1880	D.O.B. 08/20/1981	AGE 37
PERSON ADDRESS 2600 Ponderosa Pine AVE Henderson Nevada 89074				HGT 5'7"	WGT 170	HAIR Brown
				EYES Green	RACE White	GENDER Male
HOME PHONE	CELL PHONE	BUSINESS PHONE	OTHER PHONE	PLACE OF BIRTH Stockton, California		
ALIAS	ALIAS (LAST NAME/INITIALS, FIRST, MIDDLE)					
VIOLATION 1	STATUTE 484C.110	CLASS Misdemeanor	NOC CODE 63800	COUNTS 1		
DESCRIPTION DUI, ABOVE LEGAL LIMIT, (1ST) (ALCOHOL) JC						
PCN NUMBER	WARRANT NUMBER					
VIOLATION 2	STATUTE 200.008.1	CLASS Felony	NOC CODE 55220	COUNTS 1		
DESCRIPTION CHILD ABUSE OR NEGLECT, (1ST)						
PCN NUMBER	WARRANT NUMBER					
P AND P	<input type="checkbox"/> DRINKING VIOLATION	<input type="checkbox"/> CONTACT WITH VICTIM	<input type="checkbox"/> IN GAMING ESTABLISHMENT	<input type="checkbox"/> CONTACT WITH GANG MEMBER		
	<input type="checkbox"/> CONTACT WITH CHILDREN	<input type="checkbox"/> DRIVING VIOLATION	<input type="checkbox"/> CONTACT WITH CO-OFFENDER			


ARRESTING OFFICER Groll, Austin	P NUMBER HP2486	TRANSPORTING OFFICER Groll, Austin	P NUMBER HP2486
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Henderson Police Department

228 Lead St. Henderson, NV 89015

Booking Custody Record

19PCH000467-0000

OR NUMBER 1905581	FH NUMBER 19	MNI NUMBER	SUBJECT NAME Molan, Matthew Henry	ARREST DATE 03/12/2019	ARREST TIME 1823
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.					
TIME STAMP AT BOOKING	Finding				
	<input checked="" type="checkbox"/> 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 <input checked="" type="checkbox"/> OTHER <input type="checkbox"/> \$ _____				
	<input type="checkbox"/> 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 <input type="checkbox"/> OR RELEASE <input type="checkbox"/> COR RELEASE <input type="checkbox"/> IAD RELEASE <input type="checkbox"/>					
COMMENT:					
RETURN DATE: NORMAL SCHEDULE <input type="checkbox"/> FIRST AVAILABLE <input type="checkbox"/> OTHER DATE _____					
Signature of Magistrate: 			JUSTICE COURT <input checked="" type="checkbox"/> Date: 3-13-19 Time: 9:00a		
			MUNICIPAL COURT <input type="checkbox"/>		

ARRESTING OFFICER
Groll, Austin

P NUMBER
HP2486

TRANSPORTING OFFICER
Groll, Austin

P NUMBER
HP2486

**Enlightening Minds for
Ever Lasting Recovery
600 Central Avenue, Suite 408
Great Falls, Montana 59401
(406) 315-2227**

May 15, 2020

**Craig Mueller, Attorney at Law
723 South Seventh Street**

Dear Mr. ,

RE: Matthew H. Molen

DOB: 5/20/1981

This letter is to inform you that Mr. Molen performed an Addiction Assessment with this counselor on May 14, 2020. He met the DSM-5 Criteria for an Alcohol Use Disorder. He also met the American Society of Addiction Medicines Patient Placement Criteria 2013 for Level I Care (outpatient). Thus, it is recommended he enter and complete this level of care to increase his knowledge about the disease of addiction along with the coping skills to assist him in maintaining long-term abstinence.

If you have any questions a message can be left at the office at (406) 315-2227. Messages are checked weekly.

Sincerely,

**Lynda (Lynn) Reiman
Bachelors of Science In Human Services
Licensed Addiction Counselor**

AA000020

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TRAN

JUSTICE
COURT

CASE NO.

2020 JUN -1 A 8:48

FILED

IN THE JUSTICE'S COURT OF HENDERSON TOWNSHIP

COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

ORIGINAL

Plaintiff,
vs.

19CRH000443-0000
CASE NO. 19FH0521X

MATTHEW HANEY MOLEN,

Defendant.

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE SAMUEL G. BATEMAN

JUSTICE OF THE PEACE

MONDAY, MAY 18, 2020

APPEARANCES:

For the State: BARBARA SCHIFALACQUA
Deputy District Attorney

For the Defendant: CRAIG MUELLER, ESQ

Reported by: Lisa Brenske, CCR #186

1 HENDERSON, NEVADA, MAY 18, 2020

2
3 * * * * *

4
9:42AM 5 THE COURT: Matthew Molen, 19FH0521.

6 Mr. Mueller, I think we were waiting first
7 on an evaluation. How are we looking on that?

8 MR. MUELLER: Well, after a great bit of
9 effort and many phone calls I found a qualified -- may
9:42AM 10 I approach?

11 THE COURT: Just nobody doing them right
12 now, is that the problem?

13 MR. MUELLER: No. It's in Great Falls.
14 It's not that they're not getting it done. It's
9:42AM 15 getting it done up in Big Sky Country.

16 THE COURT: They're part of the United
17 States, aren't they?

18 MR. MUELLER: It's been rumored, but I
19 wasn't able to find any definitive proof. Anyway, your
9:42AM 20 Honor, we did get an evaluation done and I spoke with
21 Mr. Molen at length this morning.

22 THE COURT: Looks like they're
23 recommending some sort of an out-patient type program.

24 MR. MUELLER: What I would suggest, sir,
9:42AM 25 Mr. Molen has not been able to find employment as a

9:42AM 1 result of his pending case up in Big Sky. He's living
2 with his folks. I'd recommend and ask as a sentence of
3 DUI school, Victim Impact Panel, the minimum fine by
4 law, and then as a result of the alcohol evaluation if
9:43AM 5 we could have him just do one or two AA meetings a week
6 for a couple months. I've done a lot of these and I
7 saw the evidence. Obviously I have a disagreement with
8 its conclusion but I saw the evidence.

9 THE COURT: Well, I think the reason that
9:43AM 10 they probably in part might have recommended -- I don't
11 know what evidence was provided to this particular
12 group, but I think he had been, if I remember
13 correctly, arrested a number of times for DUI before.
14 Is that correct in scope if I remember? I looked at it
9:43AM 15 before sentencing last time I believe.

16 MS. SCHIFALACQUA: Right. And, Judge, my
17 only concern --

18 THE COURT: Not that he's been convicted.
19 Just that he was arrested for DUI.

9:43AM 20 MR. MUELLER: Yes, Judge. I also had the
21 local -- there was an older alcohol evaluation that I
22 had done earlier with Frank over at --

23 THE COURT: Do you have that with you?

24 MR. MUELLER: No, sir, I don't. Frank
9:44AM 25 refused to update it over the phone which is why we had

9:44AM 1 to get a second one.

2 THE COURT: Who is Frank?

3 MR. MUELLER: Frank is over at LRS.

4 THE COURT: He lives in Montana. It's my
9:44AM 5 understanding he's pretty much living there.

6 MS. SCHIFALACQUA: My concern is we can't
7 do a sentencing without him present, Judge. So I don't
8 know if he wants to arrange for Blue Jeans to be set up
9 for his client, but you can't order Mr. Mueller to tell
9:44AM 10 him. I mean, obviously this has a tortured history,
11 but I would ask then that he at least do it by video,
12 phone, something. Otherwise if you are going to
13 adjudicate him and give him a specific sentence.

14 MR. MUELLER: Judge, we've already had
9:44AM 15 this, and I know Miss Schifalacqua wasn't there, but we
16 had a discussion and we agreed to do it this way, and
17 remember this is the only part --

18 THE COURT: Well, I found him guilty last
19 time. I had asked for the evaluation to possibly help
9:44AM 20 decide the situation. What's the status of the
21 District Court case?

22 MR. MUELLER: Status check is on the
23 16th of June with no disposition.

24 MS. SCHIFALACQUA: Right. They are going
9:44AM 25 to set the trial on that date. So that's what my

9:45AM 1 concern is. I don't have any agreement by Miss
2 Scheible. My only concern legally obviously if you are
3 going to give him a sentence --

4 THE COURT: I think we can -- he's been
9:45AM 5 here -- I think we can waive his presence for
6 sentencing on the DUI. My bigger question is do you
7 have any recommendations -- my understanding he's
8 currently living in Montana; is that correct?

9 MR. MUELLER: Yes, Judge.

9:45AM 10 THE COURT: Is there any intent that he
11 returns here or is he staying up there?

12 MR. MUELLER: As you may know over the
13 years sometimes people move to Las Vegas, realize that
14 there are things available to them here that may not
9:45AM 15 necessarily agree with them long term, and he has
16 returned as far as I know permanently to his family in
17 Big Sky.

18 THE COURT: One of the exacerbating or
19 aggravating circumstances of the case was the driving
9:46AM 20 with the child in the car. What is the status of his
21 situation with his son and presumably the mother of the
22 child?

23 MR. MUELLER: The son and the child are
24 down here as far as I know, Judge. I have a healthy
9:46AM 25 disdain for Family Court to the point where I don't

9:46AM 1 even ask.

2 THE COURT: What's your position,
3 Miss Schifalacqua? Obviously you made your record
4 whether he needs to be here or not, but what's your
9:46AM 5 position on the sentence in this particular case?

6 MS. SCHIFALACQUA: And, Judge, obviously
7 you went through it. I went through and looked at it.
8 The biggest concern is the long time or term it looks
9 like of alcohol abuse, right? So of course we think
9:46AM 10 that he has to do more extended treatment than a
11 traditional DUI sentence. I do think out-patient
12 treatment is appropriate. I think that obviously I
13 want a full six months suspended, Judge. I think a
14 SCRAM device, if it hasn't already been done, is
9:46AM 15 appropriate, and then I would submit on any other
16 standard conditions.

17 THE COURT: Do you remember, Mr. Mueller,
18 the LRS, what did they recommend? Do you remember?

19 MR. MUELLER: If I could.

9:47AM 20 THE COURT: Yes. Go ahead. Obviously we
21 couldn't sentence him today if I wanted to give him
22 jail time.

23 MS. SCHIFALACQUA: Correct. Which I
24 believe would have been the recommendation from the
9:47AM 25 other deputy.

9:47AM 1 MR. MUELLER: I don't have it, Judge.

2 THE COURT: Where would he do the DUI
3 counseling if it's difficult to find?

4 MR. MUELLER: I was hoping your Honor --
9:48AM 5 and my colleague may not be aware that this is Great
6 Falls, Montana. There is not a pallet of available
7 counseling up there. What I was going to ask the Court
8 to fashion it something that we could address the
9 State's concerns and still actually get it done which
9:48AM 10 is why -- I mean --

11 THE COURT: I don't know if he qualifies
12 for the -- I assume he can do Victim Impact Panel
13 online because he probably meets the definition of
14 being outside of the hundred miles.

9:48AM 15 MR. MUELLER: The statute says 60.

16 THE COURT: You're setting the trial on --

17 MS. SCHIFALACQUA: In June they'll set it
18 because right now the earliest they can even
19 contemplate is mid July with regard to juries and then
9:48AM 20 it's going to go priority of in custody invoked.

21 THE COURT: I was going to say he could do
22 stuff online with LRS, but I don't have them here to
23 educate me. I don't know when they are going to be
24 sending folks here.

9:50AM 25 Do you come down and see me anytime in

9:50AM 1 June, Mr. Mueller, on any of your cases? If you could
2 check your calendar.

3 What I'm inclined to do is this: I'm
4 going to sentence him to six months. I'm going to
9:50AM 5 suspend that sentence. I'm going to sentence him to
6 staying out of trouble for a minimum of one year.
7 You're going to probably have to run an NCIC to give me
8 an update on what's happening up in Montana. I'm going
9 to have him pay a 688 fine.

9:50AM 10 MR. MUELLER: He is not working. Every
11 time he goes for a job they see the child abuse
12 complaint.

13 THE COURT: I understand. He has a year.
14 He is going to have whatever -- this is going to be a
9:50AM 15 work in progress because of the District Court case. I
16 knocked it down to a 585 fine. I think he can do the
17 Victim Impact Panel online because of where he's
18 located according to the statute.

19 I'm going to continue this. Did you find
9:51AM 20 a good date for June, Mr. Mueller?

21 MR. MUELLER: The 18th I've got depos set.
22 Could we do it the week after that?

23 THE COURT: Sure. I'd rather have you
24 here than one of your associates just because you know
9:51AM 25 the case.

9:51AM 1 THE CLERK: July 9th.

2 THE COURT: Let's see if we can get that
3 done. I'm going to reach out to LRS. I'm inclined
4 to -- because I think he does have a bit of an issue.

9:51AM 5 They have more like a medium level alcohol and drug
6 counseling service through LRS. The question is
7 whether he can do it online or not. I'm going to reach
8 out to LRS and find out.

9 MR. MUELLER: LRS over the years has been
9:52AM 10 my go to agency. They're close to my office.

11 THE COURT: So I will get back to you. Do
12 you have a problem with me --

13 MR. MUELLER: Well, I was going to say,
14 Judge, they are my go to agency. I tried getting
9:52AM 15 everything done through LRS this time and they were
16 remarkably unhelpful. Surprisingly unhelpful on this
17 occasion.

18 THE COURT: Okay. I'm going to reach out
19 to them. So between now and the next date he can start
9:52AM 20 working on the 585 fine. If he wants I'll convert it
21 to community service if he wants to do that up there,
22 although that doesn't help us. I want him to do the
23 Victim Impact Panel. I want him to stay out of
24 trouble. We'll find out what's going on with his
9:52AM 25 District Court case. I'm going to reach out to LRS

9:52AM 1 about the medium level alcohol and drug counseling at
2 this point and we'll come back around on --

3 THE CLERK: July 9th.

4 THE COURT: -- and see if we can take it
9:53AM 5 back up and see what's available at that point. Does
6 that work for you, Mr. Mueller?

7 MR. MUELLER: That'll be fine, Judge.

8 THE COURT: All right. We'll see you back
9 on that next date.

9:53AM 10 THE CLERK: July 9th, nine a.m.

11

12 (The proceedings concluded.)

13

14 * * * * *

9:35AM 15

16 ATTEST: Full, true and accurate
17 transcript of proceedings.

18

19 /S/Lisa Brenske

9:35AM 20 LISA BRENSKE, CCR No. 186

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TRAN

CASE NO.

2020 APR 23 P 1:32
FILED

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

ORIGINAL

STATE OF NEVADA,
Plaintiff,
vs.

MATTHEW HANEY MOLEN,
Defendant.

19CRH 000443-0000
CASE NO. 19FH0521X

REPORTER'S TRANSCRIPT
OF
SENTENCING
BEFORE THE HONORABLE SAMUEL G. BATEMAN
JUSTICE OF THE PEACE
TUESDAY, MARCH 17, 2020

APPEARANCES:

For the State: ERCAN ISCAN
Chief Deputy District Attorney

For the Defendant: CRAIG MUELLER, ESQ.

Reported by: Lisa Brenske, CCR #186

HENDERSON, NEVADA, MARCH 17, 2020

* * * * *

10:05AM

THE COURT: State versus Molen, 19FH0521X.

This is the continuation for decision on the trial in this particular case.

10:05AM

MR. ISCAN: Before we get started, Judge, this is Miss Schieble's case. I'm not sure what it's on for today.

10:05AM

THE COURT: I know. So a few weeks ago, I don't know when was the last date -- I think Mr. Maynard showed up yesterday, Mr. Mueller, and I think he showed up March 16th for you.

10:05AM

MR. MUELLER: Yes, Judge.

THE COURT: So on March 16th I was prepared to rule at that point. I guess there was maybe some confusion about what I was going to do that particular date.

10:06AM

MR. MUELLER: When I spoke with you last week at the bench you asked to have Mr. Molen present.

THE COURT: Well, you spoke with me after this March 16th date. No, I'm sorry. It was the March 4th date.

MR. MUELLER: Right.

10:06AM

1 THE COURT: So we had a decision on
2 everything on March 4th. I think Mr. Maynard came
3 and said there was some confusion. So I continued it
4 to the 16th. In between that you and I just discussed
10:06AM 5 about scheduling. And so I had suggested that you get
6 to your client to schedule a date that's convenient for
7 everyone because I know that he was coming down.

10:06AM

8 And then yesterday Mr. Maynard showed up
9 and said that Mr. Molen was on a flight at four. So
10 Miss Scheible was here yesterday in front of me and
11 said what do you want to do? And so at that point my
12 next date would have been Thursday. But because I
13 don't know that Miss Scheible could have made Thursday
14 any better than today, she said she could make herself
10:06AM 15 available today but asked that your office contact her
16 to confirm that he was getting here. And so I got an
17 email late last night, and I think it was from Miss
18 Scheible to me, and you also were on it, and I think it
19 was J. Maynard, he was on the email that said I have
10:07AM 20 not heard from Mr. Mueller's office, therefore I'm not
21 coming today.

10:07AM

22 So that's where we find ourselves today.
23 The question is do you want me to make a decision today
24 or do you want me to continue it to Thursday to see if
25 Miss Scheible can be here?

10:07AM

1 MR. MUELLER: Mr. Molen lives in a small
2 town up in Big Sky Country. He is unemployable until
3 this matter is resolved.

4 THE COURT: Okay.

10:07AM

5 MR. MUELLER: He flew down with great
6 expense and personal inconvenience to be here today.

7 THE COURT: Well, but I had informed you
8 that I would work with Mr. Molen and yourself because
9 he was out of custody and he wasn't living here.

10:07AM

10 MR. ISCAN: Just for everyone's knowledge
11 Miss Scheible intends to be here this morning. I just
12 text her to get a status update on where she's at.

13 THE COURT: So she is coming?

14 MR. ISCAN: That was my understanding is

10:07AM

15 she is coming today.

16 MR. MUELLER: Your Honor, I'm litigating a
17 one or two man bicycle shop against the largest law
18 firm in the state and they have 175 eminently qualified
19 lawyers.

10:07AM

20 THE COURT: Well, I'm going to make a
21 decision today at least as to the finality of the
22 decision as to the trial.

23 So I've reviewed the video, I reviewed the
24 filings of the parties and the transcript. And so if
25 this were a case that was just based on impaired

10:08AM

10:08AM 1 driving apart from the per se portion of the statute, I
2 would say that there probably was insufficient evidence
3 of impairment. The initial accident was testified to
4 by the witness that Mr. Molen was driving possibly
10:08AM 5 erratically and ultimately brake checked him.
6 Mr. Molen says he didn't do that. I didn't have any
7 other witnesses one way or the other on that. They
8 pulled over into the parking lot at which time the
9 officers ultimately arrived and had their dash cams on.

10:09AM 10 And I also reviewed the video. I didn't
11 see all of the field sobriety tests clearly on the
12 video, but I think ultimately there probably was
13 insufficient evidence of impairment outside of the per
14 se rule.

10:09AM 15 So the next question is ultimately were
16 the blood draws taken within the two-hour rule or the
17 two-hour portion of the statute. So the body cams that
18 I did receive were from -- let's see, we had some still
19 photographs, and I think probably the defense would
10:09AM 20 concede that at least if we were operating from the
21 still photographs, Mr. Molen was sitting in his car
22 after he pulled it over and the first blood draw was
23 within the two hours by about two minutes if I remember
24 correctly. About an hour and 58 minutes.

10:10AM 25 So the question I then had for Mr. Mueller

10:10AM

1 was the blood draws themselves. Mr. Mueller made the
2 point effectively that there was some issue as to the
3 amount of time that the officers were observing

4 Mr. Molen and for how long. However, Mr. Molen took
10:10AM 5 the stand and said he didn't remember anything unusual
6 about any sort of regurgitation or anything like that
7 that would have necessarily caused a failure of the
8 test. So the test itself I don't think at the end of
9 the day was problematic.

10:10AM

10 The next question I had was the first test
11 was within the two hours, the second test was outside
12 of the two hours. So my question for the briefing was
13 does both tests have to be within the two hours. I
14 think ultimately the second test per the statute is

10:11AM

15 really only there to confirm the viability of the first
16 test, that being that it has to be within a certain
17 range of the first test which in this case it was. So
18 at the end of the day while it was close in time,
19 Mr. Molen did receive the breath test within the two
10:11AM 20 hours and therefore it's a per se violation of the
21 statute.

10:11AM

22 So I do find at this point based on the
23 per se theory that Mr. Molen is guilty beyond a
24 reasonable doubt of DUI and that's the record I'm going
10:11AM 25 to make as to the decision on guilty or not guilty. So

10:11AM

1 I do find him guilty beyond a reasonable doubt based
2 upon that.

10:11AM

3 Mr. Mueller, since Miss Scheible isn't
4 here, here's what I was inclined to do as far as
5 sentencing. I think what I would prefer to do at this
6 point is I would like Mr. Molen, based on what I've
7 heard in this case and the familiarity with his file,
8 to get an evaluation and then make a determination as
9 to what I'm going to have him do at that point. I'm

10:12AM

10 not inclined to give him jail time today or anything
11 like that. Or any additional jail time outside of the
12 suspended sentence unless Miss Scheible jumps up and
13 down. I don't know that she will. He can be sentenced
14 in absentia once I get the report and I get a sense of
15 what he's doing in Montana, what he has access to and
16 those types of things. What's your position on that?

10:12AM

17 MR. MUELLER: Thank you, Judge. I will
18 have him get an alcohol evaluation. I will get him
19 started on the DUI school and the Victim Impact Panel
20 and we can come back in 60 days, or I can come back in
21 his stead, for formal sentencing at that point.

10:12AM

22 THE COURT: Okay. Mr. Iscan, do you have
23 any additional information as to when Miss Scheible
24 might be here?

10:12AM

25 MR. ISCAN: Well, she said she could have

10:12AM 1 been here in about 15, 20 minutes, but I said you're in
2 the middle of ruling so I told her not to.

3 THE COURT: All right.

4 MR. ISCAN: But I can call her back down
10:13AM 5 if you'd like.

6 THE COURT: No, that's all right.

7 Mr. Mueller, I'm thinking given everything
8 that's going on with the Court shutdown that 60 days
9 would be a good time to have the evaluation done. I'll
10:13AM 10 waive his presence for now to come back down on that
11 particular date, but I just need you to get me the
12 evaluation ahead of time and then we can argue about it
13 at that time.

14 MR. MUELLER: Thank you, Judge.

10:13AM 15 THE COURT: Is that fair?

16 MR. MUELLER: That'll be fine. And in the
17 meantime I'll get him doing the DUI school and the
18 Victim Impact Panel.

19 THE COURT: All right. Good luck. Thank
10:13AM 20 you for coming down.

21 THE CLERK: May 18, 9:00 a.m.

22 MR. ISCAN: And that's for sentencing?

23 THE COURT: Yes. For totality of
24 sentencing. But I want to see based upon the history
10:13AM 25 of Mr. Molen and everything that's going on what that

10:13AM

1 evaluation would suggest.

2

MR. MUELLER: Thank you, Your Honor.

3

4

THE COURT: I'm not inclined to give him
any immediate jail time, okay?

10:13AM

5

MR. MUELLER: Thank you, Your Honor.

6

THE COURT: All right. Thank you.

7

8

(The proceedings concluded.)

9

10:13AM

10

* * * * *

11

12

13

ATTEST: Full, true and accurate
transcript of proceedings.

14

10:13AM

15

/S/Lisa Brenske

16

LISA BRENSKE, CSR No. 186

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AA000040

AA000041

AA000042

AA000043

AA000044

AA000045

AA000046

STATE OF NEVADA
DEPARTMENT OF PUBLIC SAFETY
INTOXILYZER 8000 CHECKLIST

INSTRUMENT SERIAL # 80-006041

AGENCY: HPD

CASE #: 19-05543

SUBJECT: MOLLEN, MATTHEW

DATE: 03/12/2019

OPERATOR: A. Groll #2406

CERTIFICATION #: 505576

If the instrument displays - "STANDBY MODE" - (green power light is on) press the green START TEST button.
(Note: instrument displays a Ready Mode count down and goes through diagnostics before it is ready to begin.)

1. If subject has removable dental work, (dentures, partials), have subject remove dental work.
2. Check subject's mouth for foreign objects (i.e., chewing tobacco, breath mints, candy, gum, coins, tongue studs)
If any are found, have subject remove object
3. TIME OBSERVATION PERIOD STARTED: 1711 HOURS. Observe subject minimum 15 minutes with close visual contact. If the subject is observed to eat, drink, smoke, burp, regurgitate, vomit, or put any foreign object in his/her mouth, you must wait an additional 15 minutes.
4. Observation period was completed satisfactorily. Comments.
5. Ensure adequate paper is in internal feeder or external printer.
6. In display window, observe "READY MODE" message and push (green start test) button to start.
7. When display requests "SWIPE/SCAN OPERATOR ID OR PRESS ENTER", place barcode of the Operator Card under red LED scanner. If accepted, press ENTER to review scanned information.
8. If barcode is not accepted or not available, Press ENTER and answer subsequent questions, followed by ENTER.
9. When display requests "PLEASE SWIPE/SCAN DL OR PRESS ENTER", place barcode of subject's driver's license under red LED scanner or swipe the mag stripe using the reader on the top of the instrument. If accepted, press ENTER to review scanned subject information. Then answer additional test data entry questions, followed by ENTER.
10. If barcode is not accepted, Press ENTER and answer subsequent test data entry questions, followed by ENTER.
11. Display will request, "OBSERVATION TIME?" Enter the time that observation began (time listed on Step #3) followed by ENTER.
12. The instrument will automatically run an air blank, diagnostic test, air blank and a standard test. If standard test is out of range, the instrument will not allow the completion of the subject's breath test.
13. When display requests "PLEASE BLOW UNTIL TONE STOPS / R", attach a clean mouthpiece and request subject blow with a long, continuous breath into the breath tube until the tone stops. If subject is not willing to provide a sample, press the "R" key. The instrument will only accept this command when "PLEASE BLOW UNTIL TONE STOPS / R" is on the display. Display will show, "PLEASE WAIT" as it counts down the two minute wait period before the second subject test sample.
14. When display requests "PLEASE BLOW UNTIL TONE STOPS / R" attach a clean mouthpiece and request subject blow with a long, continuous breath into the breath tube until the tone stops. If subject is not willing to provide a sample, press the "R" key. The instrument will only accept this command when "PLEASE BLOW UNTIL TONE STOPS / R" is on the display.
15. If the two samples do not agree within 0.020, the instrument will automatically request a third sample be given after a two minute wait period. When requested, have subject deliver a third sample.
16. Instrument will automatically print out the test results. REMOVE TEST PRINTOUT and SIGN/DATE. CORRECT ANY MISINFORMATION ON EVIDENCE TEST PRINTOUT IF NECESSARY and INITIAL THE CHANGES. RECORD the necessary information below and in the D.U.I. LOGBOOK. For multiple copies, press F3

RESULTS: STANDARD TEST (g/210L) 0.098

SUBJECT TEST (g/210L) TEST #1 0.172 TEST #2 0.164 TEST #3 ---

ATTACH TEST RECORD

I HAVE FOLLOWED THE PROCEDURES OUTLINED ABOVE


OPERATOR'S SIGNATURE

2486

79-05593

HENDERSON DETENTION
Intoxilyzer - Alcohol Analyzer
MJ Model 8800
SN 80-085843
03/12/2019

Obsr. Start = 15:11
Sub Name = MOLEN, MATTHEW HANEY
Sub DOB = 05/20/1981
Sex = Male
Drive Lic = 0589919814128
State = ND
Officer = A. GROLL #2486
Agency = MPD
Cit = ND
Loc = PECOS/ROBINDALE
Oper = GROLL
Cert = 505576
Standard Lot No = 2851710001
Standard Value = 0.100

---BREATH ANALYSTS---

Air Blank	.000	17:35
Diagnostics	Pass	17:35
Air Blank	.000	17:35
Standard Test	.098	17:36
Air Blank	.000	17:36
Subject Test	.172	17:37
Air Blank	.000	17:37
Air Blank	.000	17:39
Subject Test	.164	17:41
Air Blank	.000	17:42

---SUMMARY---

Standard Test: .098
Subject Test #1: .172
Subject Test #2: .164

Successfully
Completed Test

All results in grams of
alcohol/210 liters of breath

Operator A. Groll ²⁴⁸⁶

Date 03/12/2019

STATE'S
EXHIBIT

AA000048



HENDERSON POLICE DEPARTMENT
DUI SUMMARY

HPD 0095

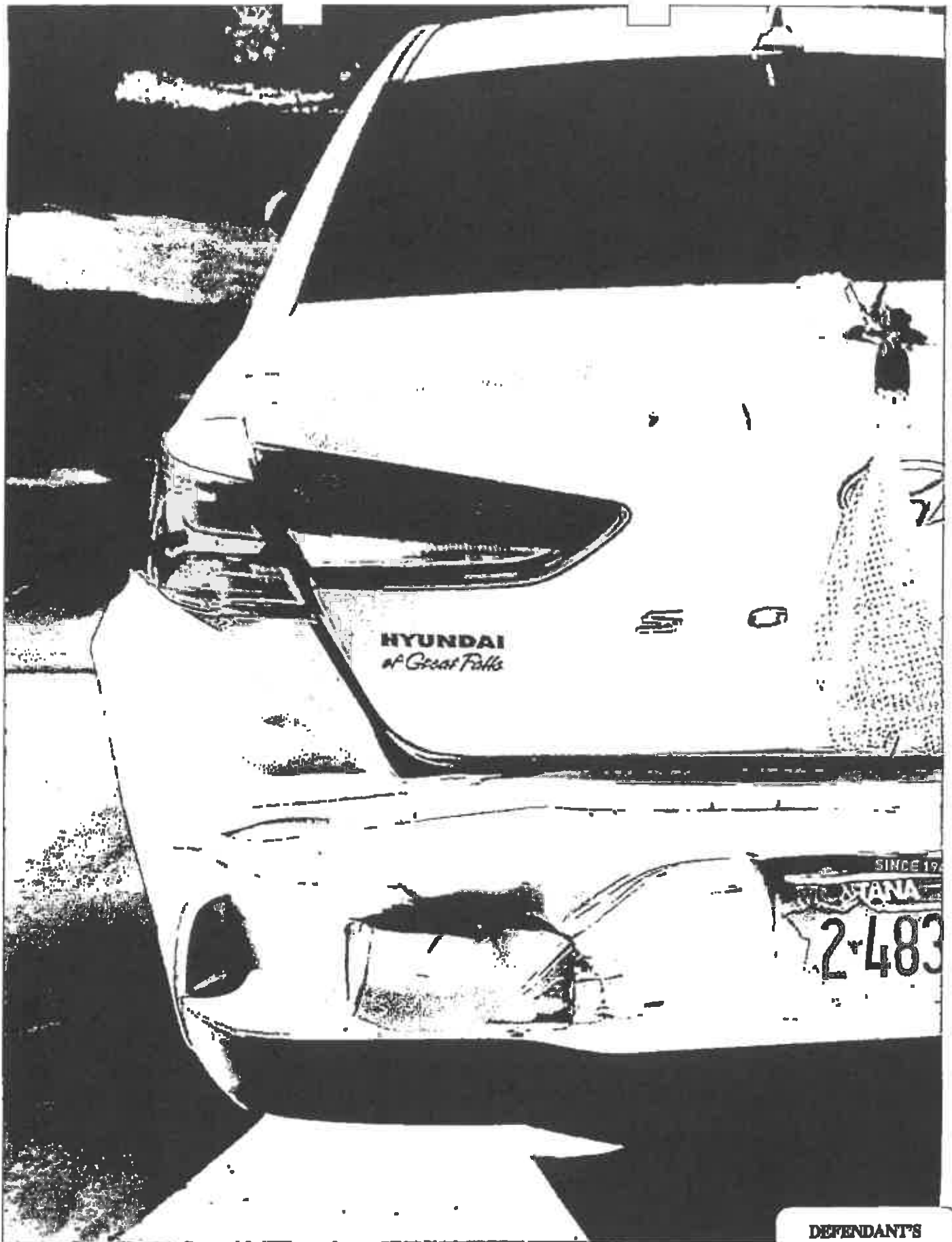
PAGE 2 OF 3

DR# 19-05593

Standardized Field Sobriety Checklist					
Horizontal Gaze Nystagmus			Instructions understood: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Observations:		Test:			Additional Information
Prescription Lenses	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Lack of Smooth Pursuit:	<input checked="" type="checkbox"/> Left <input checked="" type="checkbox"/> Right		
Contact Lenses	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Distinct and Sustained Nystagmus at Maximum Deviation	<input checked="" type="checkbox"/> Left <input checked="" type="checkbox"/> Right		
Resting Nystagmus	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Onset of Nystagmus Prior to 45 Degrees	<input checked="" type="checkbox"/> Left <input checked="" type="checkbox"/> Right		
Equal Pupil Size	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Total Cues: (Maximum 6)	6		
Equal Tracking	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Vertical Nystagmus	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Walk and Turn <input type="checkbox"/> Satisfactory <input checked="" type="checkbox"/> Unsatisfactory			Instructions Understood? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Instruction Stages:			Additional Information:		
Cannot keep balance					
Start too soon					
Walking Stages:					
Stops While Walking					
Messes Touch Heel/Toe (1/2")					
Steps Off Line					
Raises Arms (2" Allowed)					
Actual Number of Steps					
Improper Turn					
Total (Maximum 8)			8		
			Describe Turns:		
			Unable to Perform Test (explain)		
One Leg Stand <input type="checkbox"/> Satisfactory <input checked="" type="checkbox"/> Unsatisfactory			Instructions Understood? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		
Sways while Balancing			Additional Information:		
Uses Arms for Balance (2" Allowed)					
Hopping					
Puls Foot Down					
TOTAL (Maximum 4) 3			Unable to Perform Test (explain)		
Field Sobriety Test:			PBT		
<input type="checkbox"/> Refused			<input type="checkbox"/> Yes %		
<input type="checkbox"/> Not Given (List Reason)			<input checked="" type="checkbox"/> No		
			<input type="checkbox"/> Refused		
			Given by: P#		
			PBT Serial #		
			Witnessed by: P#		
Evidentiary Test					
Suspected Alcohol Impairment					
I am requesting that you submit to an evidentiary test to detect the presence of alcohol and/or drugs. I am required to inform you that your license, permit or privilege to drive will be revoked if you fail to submit to the test.					
Will you voluntarily submit to a breath test? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No					
If NO, will you voluntarily submit to a blood test? <input type="checkbox"/> Yes <input type="checkbox"/> No					

STATE'S
EXHIBIT

10





HENDERSON POLICE DEPARTMENT
TRAFFIC ACCIDENT STATEMENT

HPD 0016

PAGE 1 OF 1

DR# 19-05592

To Be submitted to Police Records by the Investigating Officer(s)		Date: 3-12-15
Name: TODD SMITH	Date of Birth: 1-29-65	
Address: 2541 MESA VERDE TERRACE		
Phone Numbers	(Home) 702-434-8360 (Work)	(Cell) 702-225-8885
Vehicle Year, Make, Model: 2001 FORD ESSO VAN	License Plate/State: NV 954UEC	
Insurance Name: ALLSTATE	Insurance Phone #: 702-897-1000	
Insurance Policy #: 929 140 246	Coverage Dates: 1-25-14 TO 7-25-15	
Where was witness in relation to accident (exact location): INTERSECTION OF RIVINGTON + PECOS SOUTHBOUND INSIDE LANE OF ARCS		
DESCRIBE WHAT HAPPENED, GIVING DATE AND TIME, LOCATION, AND PEOPLE INVOLVED BY NAME "PLEASE DO NOT WRITE ON REVERSE SIDE, ASK OFFICER FOR ADDITIONAL STATEMENT FORM"		
ON 3-12-14 I WAS STOPPED AT LIGHT SOUTHBOUND INSIDE LANE BEFORE RIVINGTON, LIGHT TURN GREEN TRAFFIC STARTED TO GO THE CAR IN FRONT DID NOT GO I HONKED WE BOTH GO THEN HE SUMMERED ON BRAKES I COULDN'T STOP IN TIME AND HIT HIS CAR.		
I, TODD SMITH WAS THE ONLY PERSON IN MY CAR		
ANOTHER WITNESS NOT INVOLVED LEFT ME HIS NAME AND PHONE KEITH BOWERS PHONE HE FILLED OUT A STATEMENT WITH POLICE		
*NRS 404.233, False Reports: Any person who gives information in oral or written reports as required in NRS Chapter 404, knowing or having reason to believe that such information is false, is guilty of a gross misdemeanor.		
Witnessing Officer: [Signature] P2426		Witness Signature: [Signature]

HPD 0016

DEFENDANT'S
EXHIBIT

B

City of Henderson, NV

Revised: 03/06/2014

AA000051

Henderson Police Department

223 Lead St. Henderson, NV 89015

Declaration of Arrest

DRF 1505583

PH 18

Arrestee's Name: Molen, Matthew Haney

Date of Arrest: 03/12/2019

Time of Arrest: 1623

Charge	Degree	NRSMHC
DUI, ABOVE LEGAL LIMIT, (1ST)	Misdemeanor	484C.118
CHILD ABUSE OR NEGLECT, (1ST)	Felony	200.508.1

THE UNDERSIGNED MAKE THE FOLLOWING DECLARATIONS SUBJECT TO THE PENALTY FOR PERJURY AND SAYS: That I, Austin Groll am a peace officer with the Henderson PD, Clark County, Nevada, being so employed since 08/26/2018. That I learned the following facts and circumstances which led me to believe that the above named subject committed (or was committing) the above offense/offenses at the location of North Pecos Road Henderson Nevada 89074, and that the offense occurred at approximately hours on .

Details of Probable Cause

On 03/13/2019 at approximately 1520 hours Field Training Officer A. Nelson #2195 and I, Officer A. Groll #2486, were dispatched to the intersection of Pecos Road and Robindale Road (Henderson, Nevada) reference a traffic accident.

Please refer to report number 18-05582 for further details about the traffic accident.

Upon arrival I made contact with a male, Matthew Molen (05/20/1981), who stated he had just gotten into a vehicle accident. Matthew stated he was driving his 2018 Hyundai Sonata bearing Montana license plate 248378B. I asked Matthew where he was driving to and he stated he had just picked up his son, Easton Molen (09/21/06), from Thurman White Middle School.

While Matthew was explaining the traffic accident to me, I detected a strong odor of an unknown alcoholic beverage emanating from his breathe and person. I also noticed that Matthew's eyes were bloodshot and watery.

Officer K. Skinner #2233 arrived on scene to assist.

Due to the above observations, I asked Matthew if he would submit to Standardized Field Sobriety Testing to determine if he was able to operate a motor vehicle safely, and he agreed. I asked Matthew a series of questions that are detailed on the HP-95 form which is attached to this report. It should be noted, Matthew admitted to drinking three beers at his estimated time of 0200-hours and he confessed to driving the vehicle.

I then moved Matthew to a smooth area that had a hard, flat surface.

I administered Matthew the Horizontal Gaze Nystagmus test and he showed 6 out of 6 clues which is an unsatisfactory performance of that test.

I administered Matthew the Walk and Turn test and he showed 3 out of 5 clues which is an unsatisfactory performance of that test.

I administered Matthew the One-Leg Stand test and he showed 3 out of 4 clues which is an unsatisfactory performance of that test.

All of the above testing and observations indicated that Matthew was too impaired to operate a motor vehicle safely. See

Austin Groll

Declarant's Name

DEFENDANT'S
EXHIBIT

AA000052

Henderson Police Department

223 Lead St. Henderson, NV 89016

Page 2 of 2

Declaration of Arrest Continuation Page

CR# 1005503

PM 18

Arrestee's Name: Miles, Matthew Honey

Details of Probable Cause (Continued)

the attached Standardized Field Sobriety Checklist (HP-95 form) for complete details of the SFSTs.

Due to the fact that Matthew confessed to drinking alcohol, the fact that Matthew confessed to driving the vehicle, and the above facts from the Standardized Field Sobriety Test, I advised Matthew that he was being placed in custody for violating NRS 484C.4001 - DUI, ABOVE LEGAL LIMIT, (1ST).

I then searched Matthew and placed him in my patrol vehicle. I read Implied Consent at 1626 (witnessed by Field Training Officer Nelson) and asked Matthew if he would voluntarily submit to evidentiary breath testing at the Henderson Detention Center, and he said he would.

I read Matthew his Miranda Warning at about 1626 hours (witnessed by Field Training Officer Nelson).

Officer Skinner later did an inventory search of Matthew's vehicle and inside was the following: HP Chrome Laptop (White/Silver), Black Backpack, Capital One credit card (...4738), Misc Trash, Emergency roadside kit.

Matthew's car was then towed by Snap Towing.

I transported Matthew to the Henderson Detention Center without incident. After Matthew was booked into the jail at 1701 hours, I warmed up the Intoxilyzer 8000 (SN 80-006041). At this point in time, I checked Matthew's mouth to ensure he did not have any foreign objects in his mouth. At approximately 1711 hours, I began the observation period on Matthew for the next fifteen minutes to ensure that he did not contaminate his breath and jeopardize the integrity of the test. After the fifteen minute observation period, Matthew gave two breath samples. The results were .172 & .164 at 1737 hours and 1741 hours respectively.

Due to the fact Matthew was driving his vehicle on a public roadway, the fact it was determined he was over the legal limit of alcohol, the fact his son who is thirteen years of age was riding in the vehicle with him, the fact Matthew placed his son in a situation where he may have suffered physical pain while operating the vehicle while intoxicated, I charged Matthew with a felony violation of NRS 200.508.1 - CHILD ABUSE OR NEGLECT, (1ST).

This incident was recorded on the Henderson Police Department's Dash and Body Worn Cameras.

Wherefore, Declarant prays that a finding be made by a magistrate that probable cause exists to hold said person for preliminary hearing (if charges are a felony or gross misdemeanor) or for trial (if charges are a misdemeanor).

Austin Groll

Declarant's Name

AA000053

12:00AM 1 TRAN
2 CASE NO.
3
4 IN THE JUSTICE'S COURT OF HENDERSON TOWNSHIP
5 COUNTY OF CLARK, STATE OF NEVADA
6
7 STATE OF NEVADA,
8 Plaintiff,
9 vs. CASE NO. 19FH0521X
10 MATTHEW HANRY MOLEN,
11 Defendant.
12
13
14 REPORTER'S TRANSCRIPT
15 OF
16 TRIAL
17 BEFORE THE HONORABLE SAMUEL G. BATEMAN
18 JUSTICE OF THE PEACE
19 THURSDAY, DECEMBER 5, 2019
20 APPEARANCES:
21 For the State: MELANIE SCHEIBLE
22 Chief Deputy District Attorney
23 For the Defendant: CRAIG MUELLER, ESQ.
24
25 Reported by: Lisa Brenske, CCR #186

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12:00AM 1 WITNESSES
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FILED
2020 JAN 15 P 1:17
HENDERSON JUSTICE COURT

12:00AM 1 HENDERSON, NEVADA, DECEMBER 5, 2019
2
3 *****
4
5
6 THE COURT: Matthew Molen, 19FH0521X.
7 Today is the time for the midday
8 trial. Preliminarily, since we have had witness
9 testimony in this case for the probable cause hearing,
10 I'm not going to preclude you from calling those
11 witnesses again but I don't think we need to start from
12 scratch with them as though they haven't testified. So
13 I understand that if we are going to call any of those
14 witnesses, if there's additional questions you want to
15 ask because it's a different standard of proof, I'm
16 totally fine with that. If there's different
17 cross-examination based on different discovery,
18 Mr. Mueller, I'm totally fine with that. I just don't
19 think we need to start as though we haven't heard
20 anything about this case before. Does that make sense?
21 I mean, there is no reason to start -- I don't need to
22 hear the exact same thing again with any of those
23 witnesses. Does that make sense?
24 MS. SCHEIBLE: Yes.
25 MR. MUELLER: Yes, Judge.
26 MS. SCHEIBLE: Your Honor, that being the
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9:40AM 1 case then if you'll just let me know if I'm becoming
2 repetitive or not being thorough enough.
3 THE COURT: Well, I don't know if I can
4 tell you whether you're thorough enough.
5 MR. MUELLER: I'll volunteer.
6 THE COURT: All I'm saying is, let's not
7 go, hey, did you come upon this. So let's just cover
8 stuff if we haven't covered it already. I don't know
9 what the evidence is. Same thing, Mr. Mueller, with
10 cross-examination, I'm more than happy to let you
11 cross-examine; but I don't want to have the same
12 cross-examination that we've already heard one time.
13 The other thing is have you talked to your
14 client about testifying? Mr. Molen, you have a right
15 to testify. If you choose not to testify, I can't hold
16 that against you in any way. I won't hold it against
17 you if you don't testify. I can't by law. If you do
18 testify, the State gets to cross-examine you. I don't
19 know if you have any felony convictions. They can ask
20 about those. I don't know anything about it.
21 Number two, I don't know if you've talked
22 to your client about whether any testimony at this
23 particular case would or potentially be able to be used
24 in this trial on his felony. I'll let that be handled
25 up in District Court. I would imagine they would let

9:41AM 1 it, and if they didn't, at a minimum if there was any
2 inconsistency in the two testimonies, they probably
3 would at a minimum allow the State to ask about that in
4 the jury trial on the felony. So I want to make sure
5 that he has been advised of those rights and the
6 potential consequences of testifying.
7 MR. MUELLER: Thank you, Your Honor. He's
8 been advised of his right to testify. Absent the
9 tremendous and surprising evidence he will most
10 certainly not be testifying.
11 THE COURT: Okay. Anything else?
12 MR. MUELLER: No, Your Honor. Defense
13 does ask to invoke the exclusionary rule, and we'd like
14 to go to the unusual step of making a brief opening
15 statement. I want to let the Court know.
16 THE COURT: That's fine. As long as it's
17 brief.
18 Do you waive your opening statement, Miss
19 Scheible?
20 MS. SCHEIBLE: Yes, your Honor.
21 THE COURT: Are these both your witnesses?
22 MR. MUELLER: That's Mitt's mother.
23 THE COURT: Sir, can I have you step
24 outside, but I will call you first as soon as we're
25 ready. Okay? Thank you.

9:42AM 1 Go ahead, Mr. Mueller.
2 MR. MUELLER: Thank you, your Honor. At
3 the end of the evidence we would ask for a finding of
4 not guilty. As the Court is well aware there are two
5 theories of criminal liability that the State has in
6 play. One is the per se violation in -- one of which
7 is the under the influence violation.
8 Mr. Molen -- the evidence is going to show
9 that Mr. Molen was rear ended by another vehicle. He
10 got out of the car. He, Mr. Molen, called the police
11 at the hour of 3:20, 13:20 hours. The police officers
12 show up. The evidence is going to show that a young
13 officer by the name Officer Groll is in his field
14 training which is why this case is actually here.
15 You are going to find out that the under
16 the influence -- or the per se violation is not
17 available to the State. The chemical test at issue is
18 at two hours and 17 minutes and two hours and 21
19 minutes after the fact.
20 Additionally, you are going to find out
21 that Mr. Molen did the field sobriety tests that are on
22 the videotape at approximately 16:28 and on Officer
23 Groll's video you will see Mr. Molen's performance on
24 the walk and turn. Specifically on a parking white
25 line where he doesn't even step off the line. There's

9:43AM 1 not an under the influence case. And this case was
2 summed up and is found at the whole question and why we
3 were here at 17:27 where Officer Groll asks his
4 training officer what to do, and this ends up being
5 used as a training experience for Officer Groll. This
6 is not a case and Mr. Molen is entitled to a not guilty
7 finding.
8 THE COURT: Let's call your first witness,
9 State.
10 MS. SCHEIBLE: State calls Todd Smith.
11 THE COURT: Todd Smith, please. Sir, come
12 on up to the witness stand. Jump on up here and remain
13 standing and raise your right hand for me.
14 THE CLERK:
15 Do you solemnly swear that the testimony
16 that you are about to give will be the truth, the whole
17 truth and nothing but the truth, so help you God?
18 THE WITNESS: Yes.
19 THE CLERK: Please be seated.
20 Please state your first and last name and
21 spell each for the record.
22 THE WITNESS: Todd Smith. T-O-D-D.
23 S-M-I-T-H.
24
25

9:44AM 1 SCOTT SMITH
having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MS. SCHEIBLE:

9:44AM 2 Q. Thank you, Mr. Smith. Can you tell the
Court where you live. What city?

3 A. Henderson.

4 Q. And is that here in Clark County, Nevada?

5 A. Yes.

9:45AM 6 Q. And were you in Henderson on March 12th
of this year?

7 A. Yes.

8 Q. Were you driving on that date?

9 A. Yes.

9:45AM 10 Q. What kind of vehicle were you driving?

11 A. It's a 2001 Ford E-350 van.

12 Q. And what color is it?

13 A. White.

9:45AM 14 Q. Where were you driving on the 12th of
March?

15 A. I was -- I came from -- I was coming from
work heading home. So I came from the strip area,
heading to my house which is off of Pecos and
Robindale.

9:45AM 16 Q. And about what time was that?

9:45AM 1 A. It was three. It was the afternoon.

2 Q. Sometime before or after 3:00 p.m.? Or
right around 3:00 p.m.?

3 A. It was right around two or three.

9:45AM 4 Q. Fair to say it was before it got dark?

5 A. Oh, yeah.

6 Q. And so probably before 6:00 p.m.?

7 A. Yes.

8 Q. Before 5:00 p.m.?

9:45AM 9 A. Yes.

10 Q. And at some point during your drive home
were you involved in a vehicle accident?

11 A. Yes.

12 Q. Can you describe for the Court what
happened.

13 A. I was -- I turned off of Warm Springs onto
Pecos heading south. I was coming up to the
intersection of Robindale. I was in the right lane
heading south on Pecos and coming up on that light. It
was red. The cars in the right lane were lined up.

9:45AM 14 There was quite a few more cars in the left lane so I
changed lanes, come up to the red light, stopped and --

15 Q. When you stopped at the red light were you
behind other cars?

9:45AM 16 A. Yes.

11

9:46AM 1 Q. Okay. Continue.

2 A. And I stopped behind him and I noticed
that he was probably at least three car lengths --

9:46AM 3 MR. MUELLER: Objection. There is no
question.

4 THE COURT: Why don't you follow up. Just
a little bit of a narrative and he's also said him who
hasn't been identified. So let's have you follow up
with a question.

9:47AM 5 BY MS. SCHEIBLE:

6 Q. Sure. Like the Court just mentioned, you
did point to somebody in this room and say that you
stopped behind him. So I'm going to ask you how you
found that out later, but can you just point to that
person and describe an article of clothing he or she is
wearing?

7 A. Right there with the suit, dark suit.
Gray.

9:47AM 8 MS. SCHEIBLE: May the record reflect
identification of the defendant?

9 THE COURT: It'll so reflect.

10 BY MS. SCHEIBLE:

11 Q. And so I imagine when you pulled up behind
the car you couldn't see the driver clearly?

9:47AM 12 A. No.

12

9:47AM 1 MR. MUELLER: Objection. Leading.

2 THE COURT: I will sustain it. Rephrase
it.

3 BY MS. SCHEIBLE:

4 Q. How did you ultimately learn that the
defendant was the driver of the car in front of you?

5 A. We were in a car crash.

6 Q. Okay.

7 A. And once he got out of the car, that's
when I noticed him.

9:47AM 8 Q. And so do you recognize him today based on
his facial features, his height?

9 A. Yes. I recognize him from his face.

10 Q. And on that day before you knew who the
driver was you said that you were stopped at a red
light?

11 A. Stopped at a red light.

12 Q. Behind a car that you later learned the
defendant was driving?

9:48AM 13 A. Yes.

14 Q. Do you remember what kind of car it was?

15 A. It was a silver Hyundai, I think it was.

16 Q. And you're about to tell the Court
something that you noticed about the car?

9:48AM 17 A. Yes. So I pulled up behind -- he was

9:40PM 1 already -- all these cars were already stopped. I was
2 coming up to him and I noticed that he was at least
3 three car lengths behind the car in front of him and
4 his -- he was over in -- he was in the left lane, his
5 tires were in the right lane over the line. So I said
6 something is going on here, this guy is drugs, drunk.

7 Q. When you say I said that, you mean to
8 yourself?

9 A. To myself. Yes. Because it was unusual.
10 It wasn't like he was trying to move into the lane
11 because he was going straight. It wasn't -- you know
12 how some people try and move into the next lane and
13 they're pointed? Anyway, he was three car lengths
14 behind, he was over the line, pulled up right behind
15 him. I think he must have noticed where I was and
16 where he was because he pulled over and up to get into
17 his lane, into our lane straight and because he pulled
18 up, you know, quite a bit -- there was a big -- big
19 distance between his car and my car. I didn't move up
20 with him. I just stayed where I was. So --

21 MR. MUELLER: Objection. There is no
22 question.

23 THE COURT: Ask your next question, Miss
24 Scheible.
25

9:49AM 1 BY MS. SCHEIBLE:

2 Q. About how far away were you from his car,
3 from the car in front of you?

4 A. We were probably between -- once he pulled
5 up into his lane, got centered up into it, there was at
6 least one car length, maybe more, that I was behind
7 him. The light turned -- you want me to continue what
8 happened?

9 Q. I was just going to ask you what color was
10 the light at that point?

11 A. The light was red still and eventually the
12 light turned green. All the cars started to go. I
13 started rolling forward because I had a big distance
14 anticipating he was going to go. Start rolling forward
15 getting closer and closer, I stop because he hadn't
16 gone yet. I honked the horn and that's when he started
17 going. I followed with him and then he immediately
18 slammed on his brakes, come to a complete stop, and
19 that's where I ran into the back of his car.

20 Q. Okay. And when you honked your horn was
21 the light still green?

22 A. Yes.

23 Q. And was the car in front of you completely
24 stopped?

25 A. When I honked the horn, yes. He hadn't

9:50AM 1 started moving yet.

2 Q. And I just want to make sure that I
3 understood your testimony correctly. Once you honked
4 your horn the car in front of you did start to move?

5 A. Yes.

6 Q. And you started to move behind that car?

7 A. Yes.

8 Q. Can you estimate, and it's okay if the
9 answer is no, can you estimate how fast the car in
10 front of you was moving and how fast you were moving at
11 that point?

12 A. It was immediate so we couldn't have been
13 over 5 miles an hour, maybe 10 at the most. Probably
14 not even that.

15 Q. So you guys had not accelerated very much?

16 A. No. We were just starting accelerating,
17 yes.

18 Q. And I believe you testified that the car
19 in front of you stopped abruptly?

20 A. Yes.

21 Q. And could you see brake lights?

22 A. Yes.

23 Q. And did you try to stop?

24 A. Yes.

25 Q. And what happened?

9:51AM 1 A. I -- that's when I smashed into the back
2 of his car.

3 Q. Once you had that collision, where were
4 the cars at this point?

5 A. We were in the left lane near the left
6 turn lane that goes up -- turns onto Robindale. So we
7 were at the Robindale/Pecos intersection.

8 Q. But you guys were still on Pecos or you
9 guys were in the intersection at this point.

10 A. No. We weren't -- we were -- I could just
11 barely turn into the lane -- into the turn lane, so we
12 were probably three, four car lengths before the
13 intersection.

14 Q. And once the cars collided, what did you
15 do?

16 A. I started looking for a non-emergency
17 phone number for the police, and that's when he got out
18 of the car and he was yelling about his car being
19 crashed and his neck, you know, he had his hand up on
20 his neck. And I didn't get out of the van. I was
21 trying to get a phone number. Trying to look up a
22 phone number. And he was looking at his car. I had
23 said -- I don't remember the exact words I said but I
24 said -- I had mentioned brake checking is illegal,
25 slamming on your brakes when you're in front. I said

9:52AM 1 broke checking is illegal. I was just listening to him
2 talk about his neck and his car and he wasn't out there
3 that long.

4 Q. So both cars are stopped in this left-hand
9:53AM 5 turn lane on Pecos?

6 A. We were in the driving lane. We weren't
7 in the left turn lane.

8 Q. The driving lane. You were still in your
9 car, the defendant got out of his car and came to your
9:53AM 10 car?

11 A. He didn't -- he never came past the back
12 of his car.

13 Q. Okay. At some point he did get back into
14 his car?

9:53AM 15 A. Yes.

16 Q. And --

17 A. I'm assuming he was looking for a phone
18 number too because I never got ahold of anybody but the
19 police did show up. So I never called anybody.

9:53AM 20 Q. Okay.

21 A. And I -- so then I decided to pull into
22 the left turn lane so I wasn't blocking traffic and
23 that's when we talked about moving over to a parking
24 lot.

9:53AM 25 Q. So the two of you did have some

9:53AM 1 conversation?

2 A. I was talking through my window. And
3 he -- even then I was just leaning out the window. He
4 says -- I think he said I'm going to pull into the --

9:53AM 5 MR. MUELLER: Objection as to the
6 narrative of the testimony. It's false.

7 THE COURT: All right. Ask your next
8 question.

9 BY MS. SCHEIBLE:

9:54AM 10 Q. So you two had some kind of conversation
11 while still in your car?

12 A. Yes.

13 Q. And he was out of his car at this point?

14 A. Yes.

9:54AM 15 Q. And in that conversation, without telling
16 us the contents of the conversation, what did you two
17 collectively decide to do?

18 A. He said -- I don't remember the exact
19 words but he was going to a parking lot. He pulled
9:54AM 20 into the parking lot. I'm assuming I said yes, good
21 idea, and I followed him.

22 Q. So did you guys ultimately move to that
23 parking lot?

24 A. We moved in the parking lot and I was, you
9:54AM 25 know --

9:54AM 1 Q. And this might sound silly, but did the
2 defendant get in the driver's seat of his car?

3 A. Yes.

4 Q. And did he drive to that parking lot?

9:54AM 5 A. Yes.

6 Q. And did you do the same?

7 A. Yes.

8 Q. And did you guys park in that parking lot?

9 A. Yes.

9:54AM 10 Q. And did police arrive?

11 A. Yes.

12 Q. About how long did it take for the police
13 to arrive?

14 A. It wasn't that long. Oh, there was --
9:54AM 15 actually before we moved into the --

16 MR. MUELLER: Objection. There is no
17 question.

18 THE COURT: He's kind of responding. The
19 question was how long did it take you to move into the
9:55AM 20 parking lot, right?

21 THE WITNESS: Probably -- it was pretty
22 close. Fifteen, 20 minutes maybe. We decided to move
23 into the parking lot. It wasn't that long. Police
24 showed up, maybe half hour. I don't know even know if
9:55AM 25 it was long. Maybe another 15.

9:55AM 1 BY MS. SCHEIBLE:

2 Q. From the time you got to the parking lot,
3 how long were you waiting for police?

4 A. No more than 30 minutes, I would say.

9:55AM 5 Q. And when the police ultimately showed up,
6 did you give them a statement?

7 A. Yes. Actually they were -- no, they
8 didn't really talk to me. They were talking to him.
9 mostly. I was at the back of my van and he was at the
9:55AM 10 back of his car. Talking to him. They were asking
11 him --

12 Q. I'm not worried about what they're asking
13 him. I'm want to know if you gave them a statement?

14 A. I did eventually, yes. Not at that time.

9:55AM 15 Q. And --

16 A. There was a witness too that I talked to.
17 MR. MUELLER: Objection. There is no
18 question.

19 THE COURT: That's all right. I'm going
9:56AM 20 to sustain it. Did you have a follow-up question?

21 MS. SCHEIBLE: Yes, I did.

22 THE COURT: Okay.

23 BY MS. SCHEIBLE:

24 Q. At any point do you remember checking the
9:56AM 25 time?

9:56AM 1 A. Just while I was on my phone looking
2 for -- I'm sure I looked at what time it was.
3 Q. Do you happen to remember today what time
4 it was?
5 A. Just -- no, not exact. No.
6 Q. But we already established this happened
7 sometime after 3:00 p.m., before 3:00 p.m.?
8 MR. MUELLER: Objection. She's
9 testifying. Is there a question before this witness?
10 THE COURT: Well, I think the question was
11 did we establish that? Right? Overruled.
12 THE WITNESS: I would say it was 3:00. I
13 would say it's between 2:30 and 3:30, I would say.
14 BY MS. SCHEIBLE:
15 Q. By the time you left the parking lot about
16 what time was it?
17 A. 4:30 probably. At least.
18 MS. SCHEIBLE: I have no further questions
19 for this witness, your Honor.
20 THE COURT: Do you need those marked?
21 MS. SCHEIBLE: Yes.
22
23 CROSS-EXAMINATION
24 BY MR. MUELLER:
25 Q. Mr. Smith, you admit that you were

9:57AM 1 driving?
2 A. Yes.
3 Q. You admit that you were behind Mr. Molen's
4 car, correct?
5 A. Yes.
6 Q. You admit that there was at least a couple
7 car lengths' distance between you and him at the
8 beginning of the stoplight, correct?
9 A. Yes.
10 Q. You admit that you hit him from behind,
11 correct?
12 A. Yes.
13 Q. Now, your recollection here on the witness
14 stand is that you were going about 5 miles an hour.
15 A. I would say yes. No more than 10.
16 Q. Showing you what's been marked as Defense
17 A for identification, do you recognize the car, sir?
18 A. Yes.
19 Q. All right. Is that in fact Mr. Molen's
20 car?
21 A. Yes.
22 Q. And is that in fact the damage you caused
23 by tapping him at 5 miles an hour?
24 A. Yes.
25 Q. And your recollection now that this is the

9:58AM 1 damage consistent with the 5-mile-an-hour bumper tap?
2 A. Yes.
3 MR. MUELLER: Move to admit Defense A for
4 identification.
5 THE COURT: Any objection?
6 MS. SCHEIBLE: No, Your Honor.
7 THE COURT: It will be admitted.
8 (Defendant's Exhibit A was admitted.)
9 BY MR. MUELLER:
10 Q. Now, sir, you did a witness statement for
11 the officers when they eventually arrived, correct?
12 A. Yes.
13 MR. MUELLER: Counsel, this is from your
14 discovery.
15 BY MR. MUELLER:
16 Q. Showing you what's been marked as B for
17 identification is that statement your statement?
18 A. That is my statement, yes.
19 Q. And that's not the original, it's a
20 photocopy, correct?
21 A. Right.
22 Q. Does that photocopy fairly and accurately
23 represent the original?
24 A. It's my writing so, yes.
25 Q. All right. Show me on there where you

9:59AM 1 noted what time the accident occurred.
2 A. I do not see it.
3 Q. Was there anyone else in the car with you,
4 sir?
5 A. No.
6 MR. MUELLER: I have nothing further from
7 this witness.
8 THE COURT: Any redirect?
9 MS. SCHEIBLE: No, nothing further.
10 THE COURT: Is this witness free to go?
11 MS. SCHEIBLE: I do not anticipate
12 recalling him.
13 THE COURT: I appreciate that. He's been
14 here a couple times.
15 MR. MUELLER: Thank you for your time,
16 Mr. Smith.
17 THE COURT: You're free to go.
18 Call your next witness.
19 MS. SCHEIBLE: Officer Grill.
20 THE COURT: Officer, come on up. I'll
21 have you jump up on the witness stand, remain standing
22 and raise your right for me.
23 THE CLERK: Do you solemnly swear that the
24 testimony that you are about to give will be the truth,
25 the whole truth and nothing but the truth, so help you

10:00AM 1 God?

2 THE WITNESS: Yes, ma'am.

3 THE CLERK: Please be seated.

4 Please state your first and last name and

10:00AM 5 spell each for the record.

6 THE WITNESS: Austin Groll. G-R-O-L-L.

7 THE COURT: Go ahead, State.

8

9 AUSTIN GROLL,

10:00AM 10 having been first duly sworn, did testify as follows:

11 DIRECT EXAMINATION

12 BY MS. SCHEIBLE:

13 Q. Officer Groll, how are you employed?

14 A. I'm a police officer with the City of

10:01AM 15 Henderson.

16 Q. And is that here in Clark County, Nevada?

17 A. Yes, ma'am.

18 Q. And have you been here to testify on this

19 case before?

10:01AM 20 A. Yes, ma'am.

21 Q. In this courtroom? In front of this

22 judge?

23 A. Yes, ma'am.

24 THE COURT: His hair is different.

25

10:01AM 1 BY MS. SCHEIBLE:

2 Q. Have you changed your hair since then?

3 A. I believe I have.

4 Q. Oh my goodness. Have you had a chance to

10:01AM 5 review your earlier testimony before coming in today?

6 A. No, ma'am.

7 Q. Oh, I thought you had. Well, do you

8 remember giving testimony?

9 A. The day prior -- I believe the second time

10:01AM 10 we came into here I reviewed it, but not today.

11 Q. But you have reviewed it before?

12 A. Yes, ma'am.

13 Q. And we're here to talk again about the

14 events that occurred on March 12th of this year. Did

10:01AM 15 you respond to a vehicle collision on March 12th?

16 A. Yes, ma'am.

17 Q. And where did you respond, geographically?

18 A. It was Pecos and Robindale, I believe.

19 Q. All right. And what kind of call was it?

10:02AM 20 A. It was a traffic accident.

21 Q. And what time did the call come out?

22 A. I don't know what time the call came out.

23 I know that we arrived there -- it was 13:3 -- or I'm

24 sorry. 15:39.

10:02AM 25 Q. Did you write a report in this case?

10:02AM 1 A. Yes, ma'am.

2 Q. And would looking at a copy of that report

3 help refresh your recollection as to when the call came

4 out?

10:02AM 5 A. Yes, ma'am.

6 MS. SCHEIBLE: May I approach the witness,

7 your Honor?

8 THE COURT: Yes.

9 MR. MUELLER: Counsel, may I see what

10:02AM 10 you're showing.

11 MS. SCHEIBLE: Sorry. It's the

12 Declaration of Arrest.

13 MR. MUELLER: Thank you, counsel. Also my

14 colleague just handed me a series of photographs. To

10:02AM 15 my training and experience they appear to be still

16 captures from the officer's dash cam video. I've seen

17 the videos. I'm prepared to review them and address

18 these. If she will represent as an officer of the

19 Court that these are in fact still captures, I will not

10:02AM 20 object to their admission.

21 THE COURT: Are you asking this witness to

22 lay the foundation for those photographs?

23 MS. SCHEIBLE: That was my plan.

24 THE COURT: If he testifies that they're

10:03AM 25 still photographs of his -- I mean, photographs -- is

10:03AM 1 this what you saw on this particular day at this

2 particular time, then the foundation is laid. I don't

3 know that it has to be established that it came from a

4 particular dash cam, but I'll let you ask whatever

10:03AM 5 questions you're going to ask, Miss Scheible, and we'll

6 go from there.

7 MS. SCHEIBLE: Thank you, Your Honor.

8 MR. MUELLER: Thank you, counsel.

9 THE WITNESS: 15:20.

10:03AM 10 BY MS. SCHEIBLE:

11 Q. So have you reviewed the arrest report?

12 A. Yes.

13 Q. And does that refresh your recollection,

14 Officer Groll?

10:03AM 15 A. Yes, ma'am.

16 Q. And now that it's been refreshed, what

17 time did the call come out?

18 A. 15:20.

19 Q. But you arrived sometime after 15:20?

10:03AM 20 A. Yes, ma'am.

21 Q. And you previously testified, I believe,

22 that you arrived at 15:39?

23 A. Yes, ma'am.

24 Q. How do you know that?

10:03AM 25 A. On the body camera footage that was just

10:04AM 1 mentioned it has a timestamp -- on that timestamp.
 2 Q. So let's back up a little bit. Did you
 3 also review your body cam in anticipation of this
 4 trial?
 10:04AM 5 A. Yes, ma'am.
 6 Q. And did you review it carefully?
 7 A. Yes, ma'am.
 8 Q. Were you looking at the timestamps when
 9 you reviewed it?
 10:04AM 10 A. Yes, ma'am.
 11 Q. In reviewing it did you see that your
 12 arrival was timestamped at 15:39?
 13 A. Yes, ma'am.
 14 Q. Now, I'm going to show you what's been
 10:04AM 15 marked as State's Proposed 1 through 7. Is this the
 16 body cam footage that we were just talking about?
 17 A. It's not the body cam footage but it is
 18 the vehicle footage.
 19 Q. Excellent catch. Did you also review your
 10:04AM 20 dash cam footage?
 21 A. Yes, ma'am.
 22 Q. And where was your car parked during the
 23 stop?
 24 A. It was in a parking lot.
 10:05AM 25 Q. And were you conducting business in front

10:05AM 1 of the car, behind the car?
 2 A. It was in front of the car.
 3 Q. And did you review the dash cam footage in
 4 anticipation of this trial?
 10:05AM 5 A. Yes, ma'am.
 6 Q. And do those pictures fairly and
 7 accurately depict the dash cam as it looked when you
 8 reviewed it?
 9 A. Yes, ma'am.
 10:05AM 10 Q. And can you flip through all seven of them
 11 for me, please, to make sure.
 12 A. Yes, ma'am.
 13 Q. So those fairly and accurately depict dash
 14 cam footage as you reviewed it on your computer?
 10:05AM 15 A. Yes, ma'am.
 16 MS. SCHEIBLE: I will move for admission
 17 of State's Proposed 1 through 7.
 18 THE COURT: Any objection, defense?
 19 MR. MUELLER: Those are the dash cam
 10:05AM 20 captures?
 21 THE COURT: That's what he just testified
 22 to.
 23 MR. MUELLER: No objection. I said I
 24 wouldn't object.
 10:05AM 25 THE COURT: They will be admitted.

10:05AM 1 (State's Exhibits 1 - 7 were admitted.)
 2 BY MS. SCHEIBLE:
 3 Q. Just for clarification purposes, did you
 10:05AM 4 print these out for me or did I print them out for you?
 5 A. You printed them out for me.
 6 Q. But your body cam -- or your system it
 7 looks exactly the same on your computer as it does on
 8 my computer?
 9 A. Correct.
 10:06AM 10 Q. And on State's Exhibit 1 can you identify
 11 for the Court what we're looking at in that screen
 12 shot?
 13 A. So this is when I first arrived and exited
 10:06AM 14 my vehicle and there was --
 15 THE COURT: What exhibit number was that?
 16 MS. SCHEIBLE: Exhibit 1. May I approach
 17 the witness again?
 18 THE COURT: Yes.
 10:06AM 19 MS. SCHEIBLE: I just want to make sure I
 20 do this right.
 21 BY MS. SCHEIBLE:
 22 Q. So that's when you exit your vehicle?
 23 A. Yes. I had just exited my vehicle. This
 10:06AM 24 is a still shot of probably five seconds after I exited

10:06AM 1 my vehicle.
 2 Q. And who else is visible in the screen
 3 shot?
 4 THE COURT: You want to come up here,
 10:06AM 5 Craig?
 6 MR. MUELLER: Sure.
 7 THE COURT: Can you hold it so that I can
 8 see it.
 9 THE WITNESS: Yes, sir.
 10:07AM 10 BY MS. SCHEIBLE:
 11 Q. Who else can we see in the screen shot?
 12 A. The driver of the second vehicle.
 13 Q. And the second vehicle is which one?
 14 A. The van.
 10:07AM 15 Q. And what about the driver of the sedan?
 16 A. No, you cannot see him.
 17 Q. Why not?
 18 A. Because he's in his vehicle.
 19 Q. How do you know that?
 10:07AM 20 A. Because I remember it from the incident,
 21 and I've re-watched the video surveillance.
 22 Q. And on State's Exhibit 2 is the driver
 23 still in the vehicle?
 24 A. Yes, ma'am.
 10:07AM 25 Q. What time was that taken?

10:07AM 1 A. This is at 15:39 or 3:39 p.m.
 2 Q. And how many seconds?
 3 A. And 44 seconds.
 4 Q. And what about in State's Exhibit 37
 10:08AM 5 A. Just exiting the vehicle there.
 6 Q. The driver is just exiting the vehicle?
 7 A. Correct.
 8 Q. And what time is that?
 9 A. 15:39:45 seconds.
 10:09AM 10 Q. And was that clock accurate at that time?
 11 A. Yes, ma'am.
 12 Q. So would you say that you're confident
 13 that he exited his vehicle at 15:39:45 seconds?
 14 A. Yes, ma'am.
 10:09AM 15 Q. And what happened next?
 16 A. So, it was initially at a traffic
 17 accident. So that -- I began the process of
 18 determining who was at fault, getting IDs, insurance,
 19 et cetera, and then during that process I smelled a
 10:09AM 20 strong alcoholic beverage emanating from his person; so
 21 at that point it became something more, and
 22 investigated that and so forth.
 23 Q. And I want to talk about smelling the
 24 alcohol on his breath.
 10:09AM 25 MR. MUELLER: Objection. He said nothing

10:09AM 1 about smelling alcohol on his breath.
 2 THE COURT: It's just what he said. He
 3 said it was emanating. Are you objecting that breath
 4 is different than emanating from him?
 10:09AM 5 MR. MUELLER: You put a very fine point on
 6 that, Judge. I'll withdraw the objection.
 7 BY MS. SCHEIBLE:
 8 Q. When you smelled the alcohol, it was on
 9 the driver of the vehicle and is he here in court
 10:09AM 10 today?
 11 A. Yes, ma'am.
 12 Q. Can you identify him?
 13 A. Gray suit jacket.
 14 MS. SCHEIBLE: Record will reflect
 10:09AM 15 identification of the defendant?
 16 THE COURT: It will.
 17 BY MS. SCHEIBLE:
 18 Q. Same defendant as the last time you
 19 testified?
 10:09AM 20 A. Yes, ma'am.
 21 Q. When you said that you detected alcohol on
 22 his person, are you trained to detect alcohol?
 23 A. Yes, ma'am.
 24 Q. And what is that training like?
 10:10AM 25 A. It's in the academy. It's about a week

10:10AM 1 long and then additionally just training experience I
 2 have with drunk people on a regular basis.
 3 Q. And on that date were you out there by
 4 yourself or with somebody else?
 10:10AM 5 A. I was with my field training officer.
 6 Q. What is your field training officer's
 7 name?
 8 A. Alex Nelson.
 9 Q. And can you describe for the Court when
 10:10AM 10 you're operating as a Henderson police officer with the
 11 field training officer, are you guys partners on that
 12 scene or is it something else?
 13 A. No. So he's just there to supervise. I'm
 14 treated as I'm the only officer out there.
 10:10AM 15 Q. And are you allowed to or supposed to
 16 check in with your field training officer if you have
 17 questions or concerns?
 18 A. Yes, ma'am.
 19 Q. And is that something that you do or did
 10:10AM 20 on a regular basis when you were in field training?
 21 A. Yes, ma'am.
 22 Q. Did you do that on this date?
 23 A. Yes, ma'am.
 24 Q. When was the first time you checked in
 10:10AM 25 with your field training officer about your procedure?

10:10AM 1 A. So as soon as I could smell an alcoholic
 2 beverage emanating from his person, that's when I asked
 3 my field training officer hey, did you smell alcohol.
 4 Q. And did your field training officer --
 10:11AM 5 without telling me what he said, how did he respond?
 6 A. That's hard to do without saying what he
 7 said.
 8 Q. I will move on. So what did you do next?
 9 A. At that point we went and spoke to the
 10:11AM 10 defendant again and at that point both of us determined
 11 that we could smell alcohol.
 12 Q. So when you say we, you mean you and your
 13 field training officer?
 14 A. Yes, ma'am.
 15 Q. And did you and your field training
 16 officer have a side conversation about it?
 17 A. Yes, ma'am.
 18 Q. And determined that you did detect the
 19 presence of alcohol?
 10:11AM 20 A. Yes, ma'am.
 21 Q. And then how did you proceed?
 22 A. And then we proceeded to field sobriety
 23 test him.
 24 Q. And did you conduct the field sobriety
 10:12AM 25 tests?

10:12AM 1 A. I did.
2 Q. And was your field training officer
3 present?
4 A. He was.
10:12AM 5 Q. Where was he in relation to you?
6 A. He was right next to me. He was watching
7 the whole time.
8 Q. Did he stop you at any point?
9 A. No, ma'am.
10:12AM 10 Q. Is he supposed to stop you if you do
11 something wrong?
12 A. Yes, ma'am.
13 Q. And did you stop yourself at any point?
14 A. No, ma'am.
10:12AM 15 Q. Did you ask your field training officer
16 any questions?
17 A. I didn't ask him any questions. He
18 just -- after each field sobriety test he reviewed what
19 I had done and then it just proceeded as normal.
10:12AM 20 Q. And you previously testified in front of
21 this Court about the process of the field sobriety
22 tests that you administered?
23 A. Yes, ma'am.
24 Q. And can you just briefly --
10:12AM 25 THE COURT: Did we admit anything with

10:12AM 1 regard to those the last time? We don't have the
2 exhibits that were sent to District Court, if I
3 recollect.
4 MS. SCHEIBLE: That's what I'm just
10:13AM 5 realizing, your Honor.
6 THE COURT: I don't think we need to go
7 back through the testimony on how he did it and what he
8 did. I think we covered that.
9 MR. MUELLER: I didn't have the video.
10:13AM 10 THE COURT: If you want to cover it in
11 relation to the new evidence, I'm happy to allow you to
12 do that. I just don't think we need to have the
13 standard stuff we had the last time. Go ahead, if
14 that's clear.
15 MS. SCHEIBLE: If you'll allow me, your
16 Honor, just to ask Officer Groll to summarize the tests
17 that he administered and how the defendant performed on
18 them?
19 THE COURT: That's fine.
10:13AM 20 BY MS. SCHEIBLE:
21 Q. Do you remember off the top of your head
22 the tests you performed and how the defendant performed
23 on them?
24 A. I remember how many clues he missed on
10:13AM 25 each one. I don't remember the specific clues for each

10:13AM 1 test.
2 Q. That's fine. If you can tell the Court
3 what the tests were,
4 A. So the horizontal gaze nystagmus which is
10:13AM 5 the first test he performed unsatisfactorily with six
6 out of six clues. The walk and turn test he performed
7 unsatisfactorily with three out of eight clues, and on
8 the one leg stand he performed unsatisfactorily with
9 three out of four clues.
10:14AM 10 Q. Thank you. And given his less than
11 stellar performance on the --
12 MR. MUELLER: Objection. Editorializing.
13 THE COURT: The objection would be
14 argumentative. I will sustain it.
10:14AM 15 BY MS. SCHEIBLE:
16 Q. Given his performance on the field
17 sobriety tests, did you take him into custody
18 immediately?
19 A. No. We --
10:14AM 20 Q. Okay. I'm going to ask you why not?
21 A. We offered him to do a portable breath
22 test and at that point he did not want to.
23 Q. And you're saying no. Is that you?
24 A. Sorry. He and Officer Nelson. My field
10:14AM 25 training officer.

10:14AM 1 Q. And so but even when you say no, do you
2 mean that you and Officer Nelson are talking to him
3 together, Officer Nelson --
4 A. Yes, ma'am.
10:15AM 5 Q. So Officer Nelson is involved at this
6 point?
7 A. Yes, ma'am.
8 Q. And together you offer him the breath test
9 which he refuses?
10:15AM 10 A. Yes. More or less refused. We told him
11 that he had an option, he said I don't have an option
12 at this point and we told him that he did. And it was
13 just kind of back and forth so at that point we just
14 did not.
15 Q. So what did you do next?
16 A. Placed him into custody.
17 Q. And when you placed him into custody, does
18 that mean handcuffs?
19 A. Yes, ma'am.
10:15AM 20 Q. Who placed the handcuffs?
21 A. I did.
22 Q. Was there anybody else present at that
23 point?
24 A. Yes, ma'am. Officer Skinner and Officer
10:15AM 25 Nelson.

10:15AM 1 Q. And who is Officer Skinner?
2 A. She was my backup officer.
3 Q. And when did she arrive?
4 A. I don't recall.
10:15AM 5 Q. If you don't recall the time, do you
6 recall when in the process she arrived?
7 A. Before field sobriety testing.
8 MS. SCHEIBLE: Brief indulgence?
9 THE COURT: Yes.
10:16AM 10 MS. SCHEIBLE: May I approach your clerk,
11 your Honor?
12 THE COURT: Yes.
13 MR. MUELLER: I'm going to ask the Court
14 to pay very close -- I'm going to ask -- I object to
10:16AM 15 the testimony regarding the breath test. It is clearly
16 outside of the two hours and I don't think it's
17 appropriate to enter it into evidence.
18 THE COURT: Are you talking about the
19 breath test? Not that he -- the testimony that he
10:16AM 20 refused the preliminary breath test?
21 MR. MUELLER: No. The actual evidence of
22 the breath test is well outside of two hours.
23 THE COURT: Well, I think we had covered
24 this previously at the preliminary hearing where I
10:17AM 25 asked if you were aware of any case law that said if

10:17AM 1 indeed there is insufficient foundation that it was
2 done within two hours, is it essentially precluded from
3 my review or does it simply become relevant evidence at
4 that point and he's not subject to the two-hour rule
10:17AM 5 and the presumption, if you will, that he's impaired.
6 I seem to remember you made that objection, I noted it.
7 I seem to remember that at that time nothing was
8 presented to me that it can't be considered as relevant
9 evidence. Obviously if it's outside the two hours, it
10:17AM 10 isn't effectively strict liability in a sense.
11 So do you have anything else, Mr. Mueller?
12 MR. MUELLER: Respectfully, Judge, the
13 element of the crime is that it is within two hours.
14 THE COURT: Well, that's one of the --
10:17AM 15 MR. MUELLER: Theories.
16 THE COURT: -- theories.
17 MR. MUELLER: That theory becomes a dead
18 letter if you then ascertain or if we as a group of
19 lawyers entertain a breath test outside of two hours
10:18AM 20 for evidence of intoxication. That basically made the
21 legislature's rule on this point a dead letter because
22 then it comes in at anytime, anyplace, rather than its
23 intoxication, which it is not. And remember the
24 background is Mr. Nolan didn't cause this accident and
10:18AM 25 didn't step off the line during the walk and turn test.

10:18AM 1 Well, that's all coming later.
2 THE COURT: My position is if it's outside
3 the two hours, and I haven't got that information yet,
4 then it's merely relevant information of his current
10:18AM 5 BAC within however many minutes and hours it was from
6 the crash and they're not operating therefore under the
7 theory of under two hours and they would still have to
8 prove that he was impaired and that would be just some
9 additional evidence of his impairment.
10:18AM 10 MR. MUELLER: It is not evidence of
11 impairment, Judge.
12 THE COURT: Well, I'm going to rule that
13 it is relevant evidence that I can consider but if it
14 turns out to be outside of two hours, I'm sure you'll
10:19AM 15 bring that to my attention, Mr. Mueller, and then we
16 will go from there as it relates to that particular
17 theory. Okay?
18 MR. MUELLER: Thank you, Judge. I will
19 sit down after one last statement. That's plain error.
10:19AM 20 That's plain error.
21 THE COURT: Okay. That's fine. I don't
22 have anything in front of me. I think you knew that
23 this was a particular issue going into this because we
24 had had the preliminary hearing and I had brought up
10:19AM 25 the last time do you have any particular law on the

10:19AM 1 issue and I'm happy to take a look at it. If at the
2 end of the close of evidence that you wish to continue
3 it for some briefing on it, I'm happy to let you do
4 that as well and take a look at whatever you want to
10:19AM 5 provide me. I'll hear it and if it turns out that I
6 was wrong and it was plain error and it shouldn't be
7 admitted, then I will exclude it in my brain, if you
8 can provide me that. All right?
9 MR. MUELLER: Thank you, Judge.
10:19AM 10 THE COURT: Go ahead, Miss Scheible.
11 MS. SCHEIBLE: I'm showing defense counsel
12 what's been marked as State's 8 and 9.
13 BY MS. SCHEIBLE:
14 Q. I think we left off with taking the
10:20AM 15 defendant into custody; is that correct?
16 A. Yes, hm'm.
17 Q. And where did you go?
18 A. To the Henderson Detention Center.
19 Q. And when you got there, what did you do?
10:20AM 20 You don't have to describe everything. What was the
21 main event?
22 A. The Intoxilyzer test which started with a
23 15 minute observation period.
24 Q. When you do in the Intoxilyzer test, do
10:20AM 25 you fill out some type of checklist for it?

10:20AM 1 A. Yes, ma'am.
 2 Q. Did you do that in this case?
 3 A. Yes, ma'am.
 4 MS. SCHEIBLE: May I approach, your Honor?
 10:20AM 5 THE COURT: Yes.
 6 BY MS. SCHEIBLE:
 7 Q. I'm showing you what's been marked as
 8 State's Exhibit 8.
 9 THE COURT: Have you seen these,
 10 Mr. Mueller?
 11 MR. MUELLER: Yes.
 12 BY MS. SCHEIBLE:
 13 Q. Is that the checklist?
 14 A. Yes, ma'am.
 10:20AM 15 Q. Is that the one you filled out?
 16 A. Yes, ma'am.
 17 Q. Or a photocopy of it?
 18 A. Yes, ma'am.
 19 Q. Is it a fair and accurate depiction of
 10:20AM 20 your Intoxilyzer checklist from this case?
 21 A. Yes, ma'am.
 22 MS. SCHEIBLE: I move admission of State's
 23 Exhibit 8.
 24 MR. MUELLER: Checklist?
 10:20AM 25 MS. SCHEIBLE: Yes.

10:20AM 1 MR. MUELLER: No objection to the
 2 checklist.
 3 THE COURT: All right. It will be
 4 admitted.
 5 (State's Exhibit 8 was admitted.)
 10:20AM 6 MS. SCHEIBLE: May I stand up here for a
 7 few more minutes?
 8 THE COURT: Yes.
 9 BY MS. SCHEIBLE:
 10:21AM 10 Q. Once you go through the checklist and
 11 administer the Intoxilyzer, does the Intoxilyzer
 12 produce results?
 13 A. Yes, ma'am.
 14 Q. Are those results printed?
 10:21AM 15 A. Yes, ma'am.
 16 Q. Do you have to sign the printed results?
 17 A. Yes, ma'am.
 18 Q. And I'm showing you what's been marked as
 10:21AM 19 State's Exhibit 9. Is that a copy of the results that
 20 you had to sign?
 21 A. Yes, ma'am.
 22 Q. And is it a fair and accurate
 23 representation of the results that you signed?
 24 A. Yes, ma'am.
 10:21AM 25 MS. SCHEIBLE: I move for admission of

10:21AM 1 State's Exhibit 9.
 2 MR. MUELLER: Defense objects.
 3 THE COURT: What was nine again?
 4 MS. SCHEIBLE: It's the printout from the
 10:21AM 5 Intoxilyzer.
 6 THE COURT: Is your objection the previous
 7 objection that you've made?
 8 MR. MUELLER: No, your Honor.
 9 THE COURT: Is it a different objection?
 10:21AM 10 Go ahead.
 11 MR. MUELLER: 50.315 sub 6 and 50.320.
 12 THE COURT: Hang on. You're going too
 13 fast. Give me one second. Mrs 50 what?
 14 MR. MUELLER: 315 sub 6.
 10:22AM 15 THE COURT: 50.3 --
 16 MR. MUELLER: 50.315.
 17 THE COURT: I'm sorry. 50.135.
 18 MR. MUELLER: I filed a demand for the
 19 expert. There has been no establishment that the
 10:22AM 20 breath machine was properly calibrated as is
 21 statutorily 10 days prior to trial to be notified. Did
 22 demand the expert, we did so back in July or June of
 23 this year.
 24 THE COURT: Do you have the expert here?
 10:22AM 25 MS. SCHEIBLE: I do, your Honor.

10:22AM 1 THE COURT: You're going to call the
 2 expert?
 3 MS. SCHEIBLE: Of course.
 4 THE COURT: I'll stay the decision on the
 10:22AM 5 admission of that particular document until you provide
 6 that particular testimony and he's had an opportunity
 7 to cross-examine. Okay.
 8 MS. SCHEIBLE: Okay.
 9 THE COURT: All right. I'm not overruling
 10:22AM 10 your objection. Just staying it at this point in time,
 11 Mr. Mueller.
 12 MR. MUELLER: I understand, Judge.
 13 MS. SCHEIBLE: I will hold onto this
 14 Exhibit 9 because it's not in evidence.
 10:23AM 15 THE COURT: All right. Just leave it with
 16 my clerk.
 17 MS. SCHEIBLE: Well, I'm probably going to
 18 use it to refresh recollection momentarily.
 19 THE COURT: Go ahead. Take your time.
 10:23AM 20 BY MS. SCHEIBLE:
 21 Q. Do you remember when you got to Henderson
 22 what time you started the observation period?
 23 A. No, ma'am.
 24 Q. Would looking at a copy --
 10:23AM 25 THE COURT: It's not admitted. He can

10:23AM 1 look at whatever document you want to provide.
 2 BY MS. SCHEIBLE:
 3 Q. I think looking at State's Exhibit 8 --
 4 A. Yes, ma'am.
 10:23AM 5 Q. What time does the observation period
 6 begin?
 7 A. 17:11 hours.
 8 Q. What time did the -- sorry, just very
 9 briefly the Intoxilyzer -- I want to ask how does it
 10 work, not like scientifically but how do you administer
 11 an Intoxilyzer test?
 12 A. The subject blows into a test tube.
 13 Q. Perfect. And when was the first time he
 14 blew into the test tube?
 10:23AM 15 A. I don't know.
 16 Q. Would looking at a copy of the printout
 17 help refresh your recollection?
 18 A. Yes, ma'am.
 19 Q. Do you remember now?
 10:24AM 20 A. Yes, ma'am.
 21 Q. What time did he first blow into the test
 22 tube?
 23 A. 17:37 hours.
 24 Q. What time did he blow into it a second
 10:24AM 25 time?

10:24AM 1 A. 17:41 hours.
 2 Q. And do you remember the time that he got
 3 out of his car?
 4 A. Yes, ma'am. It was 15:39 hours.
 10:24AM 5 Q. So how far apart was the time that he got
 6 out of the car and the time that he first blew into the
 7 test tube?
 8 A. Approximately an hour and 58 minutes,
 9 ma'am.
 10:24AM 10 MS. SCHEIBLE: I have nothing further,
 11 your Honor.
 12
 13 CROSS-EXAMINATION
 14 BY MR. MUELLER:
 10:24AM 15 Q. Officer, you haven't gone back and watched
 16 all the videos, have you?
 17 A. I'm sorry, sir?
 18 Q. You haven't looked at your body cam video?
 19 A. Yes, ma'am.
 10:25AM 20 Q. Did you look at timestamps on those body
 21 camera video?
 22 A. No, sir.
 23 Q. You know at 17:27 you have Mr. Molen out
 24 and you're asking your field training officer for
 10:25AM 25 advice, did you know that?

10:25AM 1 A. No, sir.
 2 MR. MUELLER: Madam Clerk, can I get the
 3 video set up, please.
 4 THE COURT: Which exhibit, Mr. Mueller?
 10:25AM 5 MR. MUELLER: I handed the videotape that
 6 the State has given me of Officer Groll --
 7 THE COURT: We're marking it as C.
 8 BY MR. MUELLER:
 9 Q. Now, let's go through and let's test your
 10 memory, officer. Was he in the car or out of the car
 11 when you arrived?
 12 A. In the car.
 13 Q. In the car?
 14 A. Yes, sir.
 10:25AM 15 Q. And you're sure of that now?
 16 A. Yes, sir.
 17 Q. Let me ask you a question. Were the
 18 lights on?
 19 A. I don't recall.
 10:25AM 20 Q. Was the engine running?
 21 A. I do not recall.
 22 Q. Was the doors open?
 23 A. No, sir.
 24 Q. All right. Now, let me ask you a couple
 10:25AM 25 questions, sir. Are you certain, and my colleague

10:25AM 1 asked you several times, that this was on the 12th of
 2 March? Do you remember?
 3 A. Yes, sir.
 4 THE COURT: I'm sorry, I didn't understand
 10:26AM 5 the question. It was on March 12th?
 6 MR. MUELLER: Yes.
 7 THE COURT: Okay.
 8 MR. MUELLER: Madam Clerk, may I have this
 9 marked as Defense D for identification.
 10:26AM 10 BY MR. MUELLER:
 11 Q. Sir, showing you Defense D for
 12 identification do you recognize that document?
 13 A. Yes, sir.
 14 Q. And can you identify it, please.
 15 A. It's the Declaration of Arrest.
 16 Q. Can you read the first paragraph there,
 17 the first opening line.
 18 A. On March 13th --
 19 Q. March 13th?
 10:26AM 20 A. Yes, sir.
 21 Q. A moment ago you just said you were
 22 certain and testified under oath it was on
 23 March 12th?
 24 A. Yes, sir.
 10:26AM 25 Q. So you don't have the date correct on this

10:26AM 1 report.
 2 A. Yes, sir, that's correct.
 3 Q. How many Declarations of Arrest have you
 4 written by the time you wrote this one?
 10:27AM 5 A. I don't recall a specific number, sir.
 6 Q. You don't recall. Now, a moment ago you
 7 said that the call came out at 15:20; is that correct?
 8 A. Yes, sir.
 9 Q. Showing you your report, is that
 10:27AM 10 documented 15:20?
 11 A. Yes, sir.
 12 Q. All right. Now, at no time did you see
 13 Mr. Holen drive the car?
 14 A. I did not, sir.
 10:27AM 15 Q. All right. You saw neither of the
 16 vehicles drive, correct?
 17 A. Correct.
 18 MR. MUELLER: Madam Clerk, may I have
 19 Mr. Smith's statement.
 10:27AM 20 THE COURT: Which exhibit is that?
 21 MR. MUELLER: That would have been B.
 22 THE COURT: The statement or the picture?
 23 MR. MUELLER: Both actually. I'm looking
 24 for the statement.
 25

10:27AM 1 BY MR. MUELLER:
 2 Q. Did you get a statement from Mr. Smith?
 3 MS. SCHEIBLE: I don't think the statement
 4 was admitted into evidence.
 10:27AM 5 THE COURT: Nothing was admitted. I think
 6 you marked some, Mr. Mueller. You might have taken it
 7 back with you which eventually we'll need if it's
 8 marked.
 9 MR. MUELLER: May I approach?
 10:28AM 10 THE COURT: Yes.
 11 BY MR. MUELLER:
 12 Q. Sir, you would agree that times are
 13 important on these cases, correct?
 14 A. Yes, sir.
 10:28AM 15 Q. And it's very clear you sat down with my
 16 colleague and talked about times in your preparation
 17 for your testimony here today; correct?
 18 A. Yes, sir.
 19 Q. Now, showing you what's been marked as
 10:28AM 20 Defense B for identification, when you were out there
 21 in the field training, did you take that statement from
 22 Mr. Smith?
 23 A. Yes, sir.
 24 Q. All right. Show me on there, sir, where
 10:28AM 25 you documented what time Mr. Smith rear ended

10:28AM 1 Mr. Holen.
 2 A. I'm sorry, sir?
 3 Q. Show me what you documented or what time
 4 did you write down when Mr. Smith rear ended Mr. Holen?
 10:28AM 5 THE COURT: I'm a little confused. This
 6 was Mr. Smith's statement?
 7 BY MR. MUELLER:
 8 Q. This is Mr. Smith's statement you took,
 9 correct?
 10:28AM 10 A. Mr. Smith fills this out and I just sign
 11 it.
 12 Q. And no where on there did you write down
 13 what time or document what time, correct?
 14 A. That is not common procedure, sir.
 10:29AM 15 Q. So there is no time on that statement?
 16 A. Not to the best of my knowledge.
 17 Q. Let me ask you a question, sir. Mr. Smith
 18 was the one who rear ended Mr. Holen, correct?
 19 A. Yes, sir.
 10:29AM 20 Q. All right. Now, isn't the duty of the
 21 driver -- driver have a duty to pay attention to where
 22 he's going?
 23 A. Yes, sir.
 24 Q. All right. Now, you got there and you
 10:29AM 25 spent a significant part of your time working up an

10:29AM 1 accident report, did you not?
 2 A. I did not do the accident report, sir.
 3 Q. All right. Did you watch your body camera
 4 video in preparation for your testimony today?
 10:29AM 5 A. Yes, sir.
 6 Q. Now, do you remember actually going back
 7 to the car, having Mr. Holen and Mr. Smith stand there
 8 while you start taking down information?
 9 A. Yes, sir.
 10:29AM 10 MR. MUELLER: Madam Clerk, is it
 11 possible --
 12 I.T. DERRICK: Sure.
 13 MR. MUELLER: I'm sorry, your name is?
 14 I.T. DERRICK: Derrick.
 10:29AM 15 MR. MUELLER: Derrick. Thank you,
 16 Derrick. Is it possible we could start the video?
 17 THE COURT: I.T. Derrick.
 18 MR. MUELLER: I.T. Derrick. Thank you.
 19 I.T. DERRICK: There's three videos on
 10:30AM 20 your disk. Do you know which one you'd like to play?
 21 MR. MUELLER: There's one -- the lead
 22 is -- there's one from the back seat of the car which
 23 I'm not interested in. It's the one from the body
 24 camera.
 10:30AM 25 THE COURT: Let's start from the top,

10:30AM 1 Mr. Mueller, and if it's not what you want, we'll go to
2 the next one.
3 BY MR. MUELLER:
4 Q. Officer, you reviewed the body camera
10:30AM 5 video?
6 A. Yes, sir.
7 THE COURT: Hang on a second. Do we want
8 to play it or do you want to stop it, Mr. Mueller?
9 MR. MUELLER: I've got three points that I
10:31AM 10 want to bring here.
11 THE COURT: Let's pause it for a second.
12 BY MR. MUELLER:
13 Q. Sir, this is the body cam video that you
14 reviewed, correct?
10:31AM 15 A. Yes, sir.
16 Q. And did you check the timestamps on this?
17 This is what you're referring to?
18 A. I'm referring to my vehicle timestamp,
19 sir.
10:31AM 20 Q. Now, how come your vehicle timestamp is
21 different from your body camera timestamp?
22 A. I'm not sure, sir.
23 Q. Let me ask you a question. When you do an
24 accident investigation, aren't you supposed to get
10:31AM 25 registration, driver's license and proof of insurance?

10:31AM 1 A. Yes, sir.
2 Q. Did you tell Mr. Molen to get into the car
3 and get the driver's license, registration and proof of
4 insurance?
10:31AM 5 A. He was in his vehicle when I arrived and
6 at that point I asked him for his license, registration
7 and proof of insurance, sir.
8 Q. All right. So when you walked up
9 Mr. Molen should be sitting in the car?
10:31AM 10 A. Yes, sir.
11 Q. Why isn't he?
12 I.T. Derrick?
13 THE COURT: Do you want to play it, Mr.
14 Mueller?
10:31AM 15 MR. MUELLER: Yes, please.
16 THE COURT: Can I stop you for one second.
17 Was that at the very start, Derrick?
18 I.T. DERRICK: Yes.
19 THE COURT: Can you start it at the very,
20 very beginning.
21 BY MR. MUELLER:
22 Q. Now, officer, does this body camera fairly
23 and accurately represent the video that you were there
24 in the field with? This is the events, correct?
10:32AM 25 A. Yes, sir.

10:32AM 1 Q. And this is the camera that's quite
2 literally sitting on your shoulder?
3 A. Right here, sir.
4 MR. MUELLER: For the record he is tapping
10:32AM 5 his sternum.
6 THE COURT: All right.
7 BY MR. MUELLER:
8 Q. All right. Let it roll forward, I.T.
9 Derrick, for just a moment.
10:32AM 10 THE COURT: Is there no volume? Hang on
11 for a second.
12 MR. MUELLER: If we could just stop it
13 right there for a second.
14 THE COURT: All right.
10:32AM 15 BY MR. MUELLER:
16 Q. Now, officer, at this time -- if we could
17 stop it right there -- he's handing you his driver's
18 license?
19 A. Yes, sir.
10:32AM 20 Q. Now, his car is not running, correct?
21 A. I don't recall.
22 Q. Now, did Mr. Smith tell you how fast he
23 was going when he hit Mr. Molen from behind?
24 MS. SCHEIBLE: Objection, your Honor.
10:32AM 25 Hearsay.

10:33AM 1 BY MR. MUELLER:
2 Q. Did you investigate?
3 THE COURT: Well, is this likely to be
4 inconsistent?
10:33AM 5 MR. MUELLER: Yes.
6 THE COURT: I'll let him answer it. Go
7 ahead.
8 BY MR. MUELLER:
9 Q. Sir, did Mr. Smith tell you how fast he
10:33AM 10 was going when they collided?
11 A. I do not recall, sir.
12 MR. MUELLER: Mr. Derrick, what's the
13 timestamp on this?
14 THE COURT: Hang on. I don't want my
15 staff identifying. Can we read that? I can't quite
16 see.
17 MS. SCHEIBLE: I can see it, your Honor.
18 THE COURT: Does someone want to make a
19 representation as to what the timestamp says and right
20 now on this particular video --
21 MR. MUELLER: We are at --
22 THE COURT: Hang on a second, Mr. Mueller.
23 -- it appears that the officer is being
24 handed the driver's license. So can you give me a
10:33AM 25 timestamp on that.

10:24AM 1 MR. MUELLER: 031219. 15:40 and nineteen
2 seconds. Timestamp is 3:40 p.m. and 19 seconds. If
3 you could let it roll forward.

4 THE COURT: Can I stop you one second? Do
5 we know why there's no audio, Derrick?

6 I.T. DERRICK: There wasn't any. I don't
7 know if there audio in the beginning. I don't know.

8 MR. MUELLER: It might cut out as well for
9 a second or two.

10 THE COURT: Did it? Okay. That's fine.

11 BY MR. MUELLER:

12 Q. If we could stop it at this moment. Thank
13 you.

14 Now, Officer Groll, you're in the process
15 of investigating a traffic accident this moment,
16 correct?

17 A. Correct.

18 Q. Mr. Molen's out of the car, he's providing
19 you with the essential information, correct?

20 A. Correct.

21 Q. Mr. Smith is outside of the car as well?

22 A. Correct.

23 Q. You saw neither one of these gentlemen
24 drive the cars?

25 A. Correct.

10:35AM 1 Q. Now, do you suspect that Mr. Molen is
2 intoxicated at this time?

3 A. Yes. I smelled the alcohol.

4 Q. Did you have meaningful doubts about
5 whether you smelled it or not?

6 A. I was not sure at that point. I could
7 smell alcohol. I didn't know where it was coming from
8 at that point.

9 MR. MUELLER: And, Derrick, if we could
10 roll it forward to about 15:38.

11 THE COURT: I'm sorry?

12 MR. MUELLER: No, just let it play
13 forward, please.

14 THE COURT: Give me a second. You said
15 15:38 or 40, Mr. Mueller?

16 MR. MUELLER: 15:38.

17 THE COURT: We already started it at
18 15:40, I thought.

19 MS. SCHEIBLE: For clarification, your
20 Honor, I think he means the bar bottom because it's
21 about an hour long video.

22 THE COURT: I got you.

23 I.T. DERRICK: Do you want me to fast
24 forward to 15:38?

25 MR. MUELLER: If you could just go back to

10:36AM 1 where we were and just let it play for a minute or two.

2 MS. SCHEIBLE: Then I would like the
3 record to accurately reflect that the timestamp of the
4 actual time is still about 15:42.

5 THE COURT: Well, hang on a second. Let's
6 just let it roll for a little bit so we can watch it.

7 MS. SCHEIBLE: I'm sorry, your Honor. I
8 think we previously had audio for this portion.

9 MR. MUELLER: We did.

10 MS. SCHEIBLE: And we don't have it now.

11 THE COURT: Let's stop it for a second.

12 MS. SCHEIBLE: I'm sorry.

13 MR. MUELLER: My colleague is correct.
14 There is audio on that part of it.

15 THE COURT: All right. As of right now I
16 just started it, we're at 13 seconds in not on the
17 timestamp but on the video media player. I've got no
18 volume for the record. Mr. Mueller, is this your
19 understanding -- when does the volume kick in?

20 MR. MUELLER: Momentarily.

21 THE COURT: All right.

22 I.T. DERRICK: Your Honor, it should start
23 in a minute. There's a minute start to it.

24 MR. MUELLER: Your Honor, if I could have
25 you pull it forward to 15:38 on the chronology screen

10:44AM 1 and I'd like to show that to the officer.

2 THE COURT: All right.

3 BY MR. MUELLER:

4 Q. Let's stop it right there. Officer, your
5 field training officer says he didn't smell alcohol and
6 you said maybe, I don't know. So you already talked to
7 Mr. Molen, you've been sitting there pulling his
8 paperwork for about 15 minutes, and 15 minutes in both
9 you and your field training officer are still uncertain
10 whether he smells of liquor, correct?

11 A. To sort of work as an answer, sir. So
12 I --

13 Q. I wasn't there, sir. You were.

14 A. Okay. My main concern at that point was I
15 didn't want to -- I guess I didn't want to say
16 something and then go against my field training
17 officer. I was kind of seeing where he thought at that
18 point and I didn't want to say yes, this is the way it
19 is and go against him in that way.

20 Q. All right. So you weren't really,
21 actually in charge, the field training officer was?

22 A. No, sir. I was.

23 Q. So at 15 minutes in the two of you guys
24 still couldn't form a consensus even if you smelled
25 liquor?

10:45AM 1 A. He said that he could not. I said I
2 could. But since he couldn't, I said maybe there
3 isn't, that is correct.
4 Q. You've been a police officer for how long
10:46AM 5 now?
6 A. A year and a half, sir.
7 Q. All right. I'm going to go on a limb
8 here, I suspect you have had to deal with a few
9 intoxicated people in the last year and a half?
10:46AM 10 A. Yes, sir.
11 Q. Was Mr. Molen falling down drunk? I mean,
12 you've walked into bar fights, haven't you, officer?
13 A. I don't know if I have walked into a bar
14 fight, sir. But he wasn't -- he wasn't falling down
10:46AM 15 when we were -- when he was walking. During the tests
16 there were some steps that he --
17 Q. Sir, you talked to the guy for 15 to 30
18 minutes. You're 15 minutes into a conversation with
19 him and -- how many years experience does your training
10:46AM 20 officer have?
21 A. I believe five years, and the whole 15
22 minutes on the conversation I was not with Mr. Molen.
23 Q. So the answer is even 15 minutes in you
24 guys aren't sure? You're not sure you smelled liquor?
10:46AM 25 A. Correct, sir.

10:46AM 1 Q. Now, if you were convinced or suspected
2 that he was intoxicated, how come you had to do the BGN
3 test twice?
4 A. So the first time I did it was to check to
10:47AM 5 see if there were signs of it, and then I didn't ask
6 him the questions that are needed during the FSTs. So
7 I did that without asking the questions and then I
8 determined that he was showing signs, so then I
9 restarted from the beginning so that I could get
10:47AM 10 everything correctly.
11 Q. But you actually didn't continue, you
12 actually walked back and talked to your field training
13 officer again, didn't you?
14 A. I don't recall, but I'm sure I did.
10:47AM 15 Q. Now, let me ask you a question, sir. You
16 did the walk and turn test, correct?
17 A. Yes, sir.
18 Q. And you actually did it on a visible
19 straight line, a parking line, correct?
10:47AM 20 A. I don't recall.
21 Q. Let me ask you a question, sir. How many
22 times did Mr. Molen step off the line?
23 A. I don't recall.
24 Q. You don't recall?
10:47AM 25 A. No, sir.

10:47AM 1 MR. MUELLER: Your Honor, if I could ask
2 the Court to pull it forward to 16:12.
3 THE COURT: Well, right now we're at
4 15:39. You want it at 16:12?
10:48AM 5 MR. MUELLER: Yes, sir.
6 THE COURT: All right. Just go there.
7 MR. MUELLER: If I could stop right there,
8 Judge. Since the laptop is buffering a little bit
9 let's get to the point here. If we could go to 16:12
10:49AM 10 and then I'll ask the officer a few questions.
11 THE COURT: Do you want to go back to
12 16:12?
13 MR. MUELLER: I'm sorry. 16:17.
14 THE COURT: We're going backwards. We're
10:49AM 15 at 16:37. So you want to go back to 16:17?
16 MR. MUELLER: No. If you just let it roll
17 forward for just a second.
18 BY MR. MUELLER:
19 Q. Sir, as part of your training in field
10:50AM 20 sobriety testing -- if you would just let that play
21 until it gets to the walk and turn.
22 THE COURT: Do you want me to let it go?
23 MR. MUELLER: Yes, please.
24 THE COURT: Do you have the timestamp
10:50AM 25 there on the walk and turn?

10:50AM 1 MR. MUELLER: I wrote all the times down
2 and for whatever reason they're not matching so just --
3 we'll need to let it roll. It's not far.
4 BY MR. MUELLER:
5 Q. Sir, did you have the field sobriety check
6 sheet that you did or did not conduct in the field?
7 A. I have a pocket guide that I carry with
8 me.
9 Q. All right. Did you write down the clues
10:50AM 10 as you observed them?
11 A. Yes, sir.
12 Q. Do you have that observations with you?
13 A. I don't have them with me, sir.
14 Q. Did you write it down and transfix it onto
10:51AM 15 a permanent report or permanent record?
16 A. Yes, sir.
17 Q. Do you have that report with you?
18 A. I do not have that with me, sir.
19 MR. MUELLER: If we could stop it right
10:51AM 20 there.
21 BY MR. MUELLER:
22 Q. We're at 17:27 on this timestamp and you
23 are now asking your field training officer on how to
24 do -- advice on how to follow up with the call,
10:51AM 25 correct? The question you asked your officer at

10:51AM 1 17:27 is, is it bad to do this?

2 A. So I was asking him, I guess, how to --

3 because there's specific ways you can ask a question.

4 I was wondering how to ask it -- honestly to try to get

10:52AM 5 an admission of him drinking.

6 Q. Okay.

7 A. So he was kind of telling me on how to

8 word that.

9 MR. MUELLER: All right. And, Judge, if

10 we could move it forward to 18:10.

11 BY MR. MUELLER:

12 Q. Sir, I just want -- are you supposed to

13 have the contacts in or out?

14 A. You're supposed to ask them if they have

10:52AM 15 contacts.

16 THE COURT: And just for the record we're

17 about 18:15 into the video. That's not the timestamp

18 on the camera. That's on the video that's been

19 recorded and it appears -- I'm assuming you don't have

20 a problem putting on the record it appears he's

21 doing -- what do you call this test, Mr. Mueller?

22 MR. MUELLER: Horizontal gaze nystagmus

23 test.

24 THE COURT: Thank you.

25

10:52AM 1 BY MR. MUELLER:

2 Q. Sir, you asked him if he had contacts but

3 you didn't have him remove the contacts, did you?

4 A. Not that I recall, sir.

10:53AM 5 Q. Sir, I'm going to ask you again, how many

6 times did Mr. Nolan step off the line for the walk and

7 turn test?

8 A. I don't recall, sir.

9 Q. Did you write it down in your report?

10 A. Yes, sir.

11 Q. Do you have your report with you?

12 A. As far as the narrative of my report, I'm

13 not sure if I wrote it down.

14 Q. Now, officer, are you intentionally

10:54AM 15 covering up your body camera and video?

16 A. No, sir. When I key up like this --

17 THE COURT: For the record he's touching

18 his -- what do you call it, your mic, your radio?

19 THE WITNESS: Yes, sir.

20 THE COURT: I'm sorry, what did you say?

21 THE WITNESS: Your Honor, I'm asking for a

22 backup officer at that point.

23 THE COURT: All right. How long do you

24 want this to roll?

10:54AM 25 MR. MUELLER: I want to get to the walk

10:56AM 1 and turn test.

2 THE COURT: Do you know when that is?

3 MR. MUELLER: No. Just a short distance.

4 THE COURT: How much longer until the walk

10:56AM 5 and turn?

6 THE WITNESS: I believe another five

7 minutes, sir. About that time period.

8 MR. MUELLER: For the record we're at

9 31:32 on the chronology.

10 BY MR. MUELLER:

11 Q. Officer, as you sit here on the witness

12 stand you cannot tell me how many times he stepped off

13 the line, this heel to toe, correct?

14 A. I do not recall, sir.

11:01AM 15 Q. You cannot tell me how many times he

16 misused touching heel to toe, correct?

17 A. Correct, sir.

18 Q. You don't know why you gave a failing

19 score on a walk and turn test, correct?

20 A. I don't recall as to why, sir.

21 Q. You gave him a failing score on the one

22 leg stand, correct, sir?

23 A. Correct.

24 Q. But once again, you can't tell me why you

11:01AM 25 scored him a failure on the walk and turn -- on the one

11:01AM 1 leg stand, correct?

2 A. I don't remember the specific.

3 Q. Do you recall if he even put his foot down

4 during the walk and turn or the one leg stand?

11:02AM 5 A. I do not recall, sir.

6 Q. Sir, you have some experience with law

7 enforcement now. After an automobile accident what is

8 the duties imposed on a driver of a car in an accident

9 by law?

10 A. That they need to stay and render aid if

11 there's any injuries and to give their insurance

12 information.

13 Q. All right. So if there's an accident,

14 you're required by law to remain at the scene, correct?

11:02AM 15 A. Correct.

16 Q. And when you arrived Mr. Nolan was waiting

17 at the scene?

18 A. Correct.

19 Q. He provided you, promptly and courteously,

20 with his driver's license, correct?

21 A. Yes, sir.

22 Q. His proof of insurance, correct?

23 A. I just remember the driver's license. I

24 don't recall any issues, so yes.

11:02AM 25 Q. And registration?

11:02PM 1 A. I believe so. I don't recall
2 specifically.
3 Q. And you were 15 minutes into your
4 interaction with Mr. Hulan and the two of you officers
5 couldn't even agree whether you skulled liquor,
6 correct?
7 A. Correct, sir.
8 MR. MUELLER: Thank you, your Honor.
9 Defense's presentation of this case was -- had been
10 built around the videotape of the walk and turn test
11 which I understood as the Court is aware we're having
12 some technical difficulties.
13 THE COURT: Let me ask you this. Do I
14 need to see it right now or do you have some specific
15 questions that this witness would -- is it disputed
16 facts?
17 MR. MUELLER: No. The state of the
18 evidence as I believe it is, is the officer gave him a
19 summary of failure. I've done a number of these cases,
20 I looked at the video, I contest that conclusion.
21 THE COURT: All right. We need to get to
22 the video.
23 MR. MUELLER: On the other hand I can move
24 on. We can use our time productively.
25 THE COURT: Let's keep going and we'll go

11:03AM 1 back around, if and when we get this working.
2 BY MR. MUELLER:
3 Q. Sir, do you have your training card for
4 the Intoxilyzer 8000 on you?
5 11:04AM 6 A. No, sir. It's just a checklist at the
7 jail.
8 Q. Have you been trained on the Intoxilyzer
9 8000?
10 A. Yes, sir.
11 Q. Do you have your certification card?
12 A. Yes, sir.
13 Q. May I see it, please. For the record the
14 officer appears to have handed me a credit card sized
15 document.
16 11:04AM 17 THE COURT: Are we making it an exhibit,
18 Mr. Mueller?
19 MR. MUELLER: No, Your Honor. Just
20 examining it.
21 BY MR. MUELLER:
22 Q. All right. And you took your studies from
23 Miss Lanz, correct?
24 A. Correct, sir.
25 Q. So Miss Lanz instructed you how to
properly execute and use the Intoxilyzer 8000, correct?
11:05AM 26 A. Correct, sir.

11:06AM 1 Q. Now, sir, let me ask you a question. You
2 filled out step three of the checklist?
3 THE COURT: Hang on one second.
4 While he's working on that, go ahead,
5 11:06AM 6 Mr. Mueller.
7 BY MR. MUELLER:
8 Q. Sir, Miss Lanz taught you to do a close
9 visual observation, correct?
10 A. Correct.
11 Q. And here in State's Exhibit 8, you
12 documented the breath observation period beginning at
13 17:11, correct?
14 A. Correct, sir.
15 Q. And non-military time that's 5:11 p.m.,
16 11:06AM 17 correct?
18 A. Yes, sir.
19 Q. Now, what does a close visual observation
20 period consist of?
21 A. Fifteen minutes.
22 Q. All right. And what is the danger and why
23 is the breath observation period an essential part of
24 doing a proper breath test?
25 A. Because if the subject puts anything in
their mouth or I guess maybe takes something out, I
don't know, could sway it. Just making sure that their

11:06AM 1 mouth is empty so there's nothing in there.
2 Q. All right. Breath observation period
3 consists of what, sir? What have you been trained to
4 do?
5 11:06AM 6 A. So when you get there before the 15-minute
7 observation period you have to have them open their
8 mouth to make sure that there's nothing in there, and
9 then at that point you watch him for 15 minutes to make
10 sure that they don't put anything in their mouth.
11 Don't drink water.
12 Q. Sir, the close visual contact, does that
13 consist of keeping the subject at arms length to make
14 sure they don't burp, belch or regurgitate alcohol into
15 their mouth?
16 11:07AM 17 A. Yes, sir.
18 Q. All right. Now, I would imagine sitting
19 there and staring at someone or keeping them in close
20 visual contact for 15 minutes gets a little unpleasant,
21 correct?
22 A. Yes, sir.
23 Q. All right. You don't know this guy and
24 staring at someone for 15 minutes doesn't -- not a lot
25 of fun to do, correct?
11:07AM 26 A. Yes, sir.
Q. So if you started the breath observation

11:07AM 1 period at 17:11, what's 15 minutes later?
 2 A. I'm bad at math.
 3 Q. What's 11 plus 15, officer?
 4 A. 17:26.
 11:07AM 5 Q. All right. And what time did you actually
 6 do the breath observation period? First one?
 7 A. 17:27, I believe.
 8 Q. How about 17:39 you answered the question
 9 under direct examination?
 11:07AM 10 THE COURT: I believe he testified 17:37.
 11 BY MR. MUELLER:
 12 Q. Why the extra 12 minutes?
 13 A. I don't recall.
 14 Q. All right. Were you actually in the room
 11:08AM 15 staring at him intently at arms length for an extra 12
 16 minutes?
 17 A. I don't recall, but I would say no.
 18 Q. Am I making you uncomfortable?
 19 A. Yes, sir.
 11:08AM 20 THE COURT: You're making me
 21 uncomfortable.
 22 BY MR. MUELLER:
 23 Q. So you did this for an extra 12 minutes
 24 and you don't know why you did it?
 11:08AM 25 A. Correct.

11:08AM 1 Q. Were you in the same room as Mr. Molen?
 2 A. Yes, sir.
 3 Q. Throughout the observation period or were
 4 you doing your paperwork?
 11:08AM 5 A. I was in the same room, sir.
 6 Q. Were you doing your paperwork, officer?
 7 A. I don't recall.
 8 Q. What paperwork is needed to be done for a
 9 DUI arrest?
 11:08AM 10 A. There's a lot of paperwork, sir.
 11 Q. All right. Well, you have an extra 12
 12 minutes unaccounted for so we agree that sitting there
 13 staring at someone for close visual contact is not
 14 comfortable, I don't think anybody disagrees with that,
 11:08AM 15 but yet you apparently did it for 12 extra minutes.
 16 I'm going to ask you again, do you know what you were
 17 doing for those extra 12 minutes? You weren't staring
 18 at him for an extra 12 minutes, were you?
 19 A. I'm sorry, sir?
 11:08AM 20 Q. You weren't staring at him for an extra 12
 21 minutes, were you?
 22 A. Not that I recall, sir.
 23 Q. All right. So you were not — you weren't
 24 paying attention, were you?
 11:09AM 25 A. I was paying attention, sir.

11:09AM 1 Q. Really? Then why can't you tell me why
 2 you were there for almost twice as much time as was
 3 required?
 4 A. I don't recall what I was doing.
 11:09AM 5 Q. Do you fill out a document called the DMV
 6 45?
 7 A. Is that the DMV revocation form?
 8 Q. Yes, sir.
 9 A. Yes, sir.
 11:09AM 10 Q. Did you fill out a temporary custody
 11 record, correct?
 12 A. Yes, sir.
 13 Q. And did you fill out a Declaration of
 14 Arrest, correct?
 11:09AM 15 A. Correct, sir.
 16 Q. And were you doing all those documents
 17 while —
 18 A. No, sir.
 19 Q. -- Mr. Molen was sitting there?
 11:09AM 20 THE COURT: Hang on. Let him answer the
 21 question.
 22 Finish the question, Mr. Mueller.
 23 BY MR. MUELLER:
 24 Q. Were you filling out any or all those
 11:09AM 25 documents while you were sitting there with Mr. Molen?

11:09AM 1 THE COURT: Go ahead.
 2 THE WITNESS: For sure not the DOA and not
 3 the SCR. I don't recall as to the DMV revocation form.
 4 BY MR. MUELLER:
 11:10AM 5 Q. Sir, did Miss Lanz tell you that if a
 6 subject burps or belches or regurgitates in the mouth
 7 alcohol that it will create an artificially high
 8 reading?
 9 A. Yes, sir.
 11:10AM 10 Q. Miss Lanz told you that following this
 11 checklist is absolutely essential for a proper test?
 12 A. Sorry?
 13 Q. Following this checklist is absolutely
 14 essential?
 11:10AM 15 A. Yes, sir.
 16 MR. MUELLER: I have nothing further.
 17 THE COURT: Give me the time again,
 18 Mr. Mueller, where you think the walk and turn is.
 19 MR. MUELLER: Using the timestamp that
 11:10AM 20 just came off the old laptop at 31:44 into the timing
 21 of the video.
 22 THE COURT: Come on up here, Miss
 23 Scheible. 34, I'm sorry?
 24 MR. MUELLER: 31:34 seconds in.
 11:11AM 25 THE COURT: All right. Let's try starting

11:11AM 1 It at 31:32 and hope that it works.
 2 MR. MUELLER: And for the record, the
 3 Court has retrieved the much more modern laptop that
 4 appears to have a much higher buffering speed.
 5 11:12AM 5 BY MR. MUELLER:
 6 Q. Sir, from just a moment here, this is the
 7 second time you've done the BGV test?
 8 A. Yes, sir.
 9 Q. And you agree that if I read the police
 10 11:12AM 10 report, I wouldn't have known that you've done it
 11 twice? You don't make any mention of the fact that it
 12 was actually conducted twice in your report, do you?
 13 A. Not that I recall.
 14 Q. Now, if you're so confident he failed it
 15 11:12AM 15 the first time, why are we administering it the second
 16 time?
 17 A. Again, sir, because I didn't ask him the
 18 questions that are standard with the SFSTs.
 19 Q. Sir, you would agree and concede that you
 20 11:16AM 20 didn't have a great angle at that, but the reality is
 21 that he didn't step off the line, correct? We just
 22 watched the video. He didn't step off the line, did
 23 he?
 24 A. I don't remember what I put in the report,
 25 11:16AM 25 and as you mentioned there's not a good angle. I can't

12:16AM 1 recall this video.
 2 Q. He didn't miss touching heel to toe, did
 3 he?
 4 A. I believe in my report that I did put that
 5 he did.
 6 Q. We just watched the video. Okay. The
 7 video is the video, correct?
 8 A. Correct.
 9 Q. Now, let me ask you a question.
 10 12:16AM 10 THE COURT: Hang on. The video is the
 11 video is correct, he says correct.
 12 Go ahead, Mr. Mueller.
 13 BY MR. MUELLER:
 14 Q. Sir, now, we have only your memory to rely
 15 11:16AM 15 on that he failed the walk and turn test, correct? We
 16 don't have your check sheet, we have the video,
 17 correct?
 18 A. Yes, sir.
 19 Q. How many clues are there possibly to fail
 20 11:17AM 20 the walk and turn test?
 21 A. Eight.
 22 Q. Can you list them for me, please, from
 23 memory?
 24 A. I can try. Steps off the line, uses arms
 25 11:17AM 25 to balance, misses heel to toe, starts too soon,

11:17AM 1 improper turn, counting number of steps.
 2 MR. MUELLER: I have nothing further, your
 3 Honor.
 4 THE COURT: Any redirect, State?
 5 11:17AM 5 MS. SCHEIBLE: Yes, your Honor.
 6
 7 REDIRECT EXAMINATION
 8 BY MS. SCHEIBLE:
 9 Q. Let's dive right into the walk and turn
 10 11:17AM 10 test. So from the body camera video it looks like you
 11 have a little card that you're putting into your shirt
 12 pocket, is that correct?
 13 A. Yes, ma'am.
 14 Q. And I think we've talked about it before,
 15 11:18AM 15 that's the field sobriety test card?
 16 A. Correct.
 17 Q. And what happened to that?
 18 A. I had it with me the whole time.
 19 Q. Perfect. So where is it now?
 20 11:18AM 20 A. So it -- you transfer that over onto
 21 another sheet that has the same test, it's just more
 22 informal. So I had that at the jail. The paperwork
 23 that Mr. Mueller was talking about, he transferred that
 24 onto another hard copy.
 25 11:18AM 25 Q. And is that -- did you transfer it onto

11:18AM 1 what's now marked as one of the State's exhibits or is
 2 that a different report?
 3 A. I'm not sure.
 4 MS. SCHEIBLE: May he look, your Honor, at
 5 11:18AM 5 the exhibits already admitted?
 6 THE COURT: Yes. Go ahead.
 7 THE WITNESS: These are all the body cam
 8 footage.
 9 THE COURT: What are we looking for?
 10 11:18AM 10 MS. SCHEIBLE: I thought, your Honor, that
 11 I handed him the test checklist at some point in time.
 12 I believe it would be State's 8. Do you have State's 8
 13 up there?
 14 THE COURT: I don't have anything. Let me
 15 11:19AM 15 see what you have, sir.
 16 MS. SCHEIBLE: I found State's 8, your
 17 Honor, but indeed that's not the document I was looking
 18 for.
 19 THE COURT: Take your time.
 20 11:20AM 20 MS. SCHEIBLE: Before I get it marked, may
 21 I approach the witness?
 22 THE COURT: Are we going to move to admit
 23 it? Is it just to refresh recollection?
 24 MS. SCHEIBLE: It depends on his answer
 25 11:20AM 25 honestly, your Honor.

11:20AM 1 THE COURT: All right. Well, why don't
2 you just go up and approach and see what your questions
3 are and what his answer is and then we'll go from
4 there.

11:20AM 5 BY MS. SCHEIBLE:

6 Q. Is that a copy of the document that you
7 transfer all the information to?

8 A. Yes.

11:20AM 9 Q. Is this a fair and accurate representation
10 of the document as you filled it out?

11 A. Yes, ma'am.

12 Q. On March 12th?

13 A. Yes, ma'am.

14 Q. And does it appear the same way?

11:20AM 15 A. Yes, ma'am.

16 MS. SCHEIBLE: I'd like to move for
17 admission.

18 MR. MUELLER: I'm going to object. As
19 hard as this is to believe, Judge, this wasn't in
20 discovery.

21 THE COURT: I don't even know what this
22 is. So let's mark it since we are going to have a
23 dispute about it. It will be next line. And then why
24 don't you take a look at it, Mr. Mueller.

11:21AM 25 MS. SCHEIBLE: Your Honor, the reason it's

11:21AM 1 not in Mr. Mueller's discovery is that he admitted it
2 into evidence during the preliminary hearing last time.

3 MR. MUELLER: Well, that would explain it.

4 THE COURT: There you go. Well, if it's
11:21AM 5 already been admitted into evidence, I'm assuming that
6 you're not objecting, correct, Mr. Mueller?

7 MR. MUELLER: I wouldn't go that far. I
8 remember this now. Thank you.

9 THE COURT: Where are we at? Are we going
11:21AM 10 to move to admit this?

11 MS. SCHEIBLE: Yes, your Honor.

12 THE COURT: We already have it in the
13 preliminary hearing transcript but those documents are
14 in District Court, so I'm assuming there's no
11:21AM 15 objection, correct, Mr. Mueller?

16 MR. MUELLER: No, your Honor. I will
17 accept my colleague's representation.

18 THE COURT: If there's some future dispute
19 about whether that's it or isn't it, we'll take it back
20 up. But otherwise what number is it?

11:22AM 21 MS. SCHEIBLE: Ten.

22 THE COURT: What is that document?

23 THE WITNESS: That's the FST checklist.

24 THE COURT: All right. It will be
11:22AM 25 admitted.

11:22AM 1 MR. MUELLER: It should be used to
2 refresh. She can refresh his recollection. It's his
3 summary. It's not to be admitted.

4 THE COURT: I thought you admitted it.

11:22AM 5 Are you saying you just marked it or did you admit at
6 the preliminary hearing?

7 MR. MUELLER: I impeached him with it and
8 left it with the record the last time because of the
9 performance. The documentation now that my colleague
11:22AM 10 refreshed my recollection with --

11 THE COURT: Well, I don't know that
12 answered my question. Was it admitted at the
13 preliminary hearing or did you simply mark it as a
14 defense exhibit?

11:22AM 15 MR. MUELLER: I believe I marked it as a
16 defense exhibit.

17 THE COURT: Do you remember, Ms. Scheible?

18 MS. SCHEIBLE: I don't. Your Honor, it
19 looks like it was not admitted into evidence. It was
20 simply marked as a defense exhibit.

21 THE COURT: All right. My guess is we
22 were using it -- personally I don't think you need to
23 mark exhibits if you're just going to use them as a
24 document to refresh recollection or to include as some
11:23AM 25 sort of impeachment necessarily. So I don't care, but

11:23AM 1 it requires me to keep -- once it's marked as a
2 potential document I have to keep it, whether it's
3 admitted or not. So do you want it marked or do you
4 just want to simply show it to him and see if he
11:23AM 5 refreshes his recollection, Miss Scheible?

6 MS. SCHEIBLE: Your Honor, at this point I
7 move for admission of State's 10 based not on anything
8 that happened at the last preliminary hearing but based
9 on his testimony now that this is the document that he
11:23AM 10 filled out, it's a fair and accurate representation of
11 it and that it reflects his --

12 THE COURT: Is it the result of the FST,
13 is that what it is?

14 MS. SCHEIBLE: Exactly, your Honor.

11:23AM 15 THE COURT: Do you have an objection, Mr.
16 Mueller?

17 MR. MUELLER: I do object to its
18 admission. It's hearsay and cumulative. The officer's
19 had his recollection refreshed and --

20 THE COURT: I don't think we need to admit
21 it, but I think he's allowed to use it to refresh his
22 recollection. You could even call it a recorded, what
23 is it, recollection --

24 MS. SCHEIBLE: Past recollection recorded.

11:24AM 25 THE COURT: Correct. So I think it

11:24AM 1 probably would more likely qualify under that since it
2 was done close in time. But I'm going to deny
3 admitting it. Why don't you ask questions off of it,
4 though, Miss Scheible. Go ahead.

11:24AM 5 BY MS. SCHEIBLE:

6 Q. All right. So you filled out that form
7 that's in front of you, correct?

8 A. Yes, ma'am.

9 Q. And that's the day of the event shortly
10 afterwards?

11 A. Yes.

12 Q. And you're copying from your card to the
13 form?

14 A. Correct. This is just a blown up card
15 basically.

16 Q. And then what do you do with the physical
17 card?

18 A. At that point, once it gets transferred, I
19 believe we just throw it away.

11:24AM 20 Q. And that's standard practice?

21 A. Yes, ma'am.

22 Q. Any reason to believe that you had any
23 inaccuracies in transferring your card to this
24 document?

11:25AM 25 A. No, ma'am.

11:25AM 1 Q. Is it something that you do on a regular
2 basis?

3 A. Every DUI arrest.

4 Q. And in addition to filling it out on that
11:25AM 5 sheet of paper, did you -- how do I phrase this -- what
6 else have you done to review this case?

7 A. Like watching video?

8 Q. Right.

9 A. Yes.

10 Q. And the last time that you testified in
11 here was August 27th, is that correct?

12 A. I don't recall. I'm sorry.

13 Q. How about this? The last time you
14 testified in here was your memory better or worse than
11:25AM 15 it is now or the same?

16 A. About the same. I would say better.

17 Q. So at that time you testified as to what
18 exactly the clues were that he exhibited during the
19 walk and turn test; do you remember that?

11:26AM 20 A. I don't recall.

21 Q. If I showed you a copy of your testimony,
22 would that refresh your recollection?

23 A. Yes, ma'am.

24 Q. And start at line 15. Having read that
11:27AM 25 portion of the transcript do you now remember what

11:27AM 1 exactly the clues were that the defendant exhibited on
2 the walk and turn test?

3 A. Yes, ma'am.

4 Q. What were they?

11:27AM 5 A. Started too soon and can't keep balance.

6 Q. And when we were just reviewing the video,
7 did you observe those same clues?

8 A. Yes.

9 Q. And both of those are also clues that you
10 mention on cross-examination; is that correct? When
11 Mr. Mueller asked you to name the eight clues?

12 A. Yes.

13 Q. And I want to talk a little bit about the
14 observation period at the Henderson Detention Center.

11:27AM 15 A. Okay.

16 Q. But first, more generally, you testified,
17 correct me if I'm wrong, but you testified that during
18 the 15-minute observation period you're checking to see
19 if anybody puts anything in their mouth?

11:28AM 20 A. Correct.

21 Q. Are you also checking to make sure that
22 they don't vomit or regurgitate alcohol?

23 A. Correct.

24 Q. If one of those things happens, what are
11:28AM 25 you supposed to?

11:28AM 1 A. Restart the test.

2 Q. Do you recall that happening with the
3 defendant here?

4 A. No, ma'am.

11:28AM 5 Q. Are you sure that it did not happen with
6 the defendant here?

7 A. Yes, ma'am.

8 Q. And during the observation period, is that
9 happening right in front of the Intoxilyzer, in a room
10 adjacent?

11 A. It kind of depends on each time and the
12 corrections officers.

13 Q. In this case?

14 A. I don't recall. I remember sitting at him
11:28AM 15 with the Intoxilyzer. I don't recall if that was
16 during the observation period or not.

17 Q. And if he had regurgitated any alcohol,
18 vomited, you would have recorded that?

19 A. Yes, ma'am.

11:29AM 20 Q. Is there any part of your training or
21 policy that says that the observation period should not
22 be longer than 15 minutes?

23 A. No, ma'am.

24 MS. SCHEIBLE: Brief Indulgence?

11:29AM 25 THE COURT: Yes.

11:2904 1 BY MS. SCHEIBLE:
2 Q. Officer Groll, are you aware of the quote
3 two hour rule?
4 A. Yes.
11:2904 5 Q. What is your understanding of the two hour
6 rule?
7 MR. MUELLER: Objection. Withdrawn.
8 THE COURT: I will let him answer. Go
9 ahead.
11:2904 10 THE WITNESS: My understanding is that you
11 have two hours from when you get to the scene and see
12 them in actual physical control of the vehicle, that
13 you have two hours to do -- perform an evidentiary
14 breath test which is the Intoxilyzer.
11:3004 15 BY MS. SCHEIBLE:
16 Q. And do you keep track on a clock and watch
17 your watch to make sure that you're within the two
18 hours?
19 A. Yes.
11:3004 20 Q. And what happens if you go outside of the
21 two hours?
22 A. Then you just have to do an extra test or
23 you can do blood.
24 Q. And in this case did you draw blood?
11:3004 25 A. No, ma'am.

11:3004 1 MS. SCHEIBLE: I have nothing further for
2 this witness, your Honor.
3 THE COURT: Any re-cross, Mr. Mueller?
4 MR. MUELLER: Just one question.
11:3004 5
6 ACROSS EXAMINATION
7 BY MS. SCHEIBLE:
8 Q. Officer, while you were sitting there my
9 colleague was asking you questions. Do you recollect
10 why you did a 24-minute breath observation period
11 instead of 15 minutes?
12 A. No, sir.
13 THE COURT: Anything else, Mr. Mueller?
14 MR. MUELLER: No.
15 THE COURT: All right. Is this witness
16 free to go? I think so. He's been here awhile.
17 MS. SCHEIBLE: I don't anticipate
18 recalling him.
19 THE COURT: Thank you. Appreciate your
11:3104 20 testimony.
21 Next witness, State.
22 MS. SCHEIBLE: Officer Nelson.
23 THE COURT: Come on up to the witness
24 stand, remain standing and raise your right hand for
11:3204 25 me.

11:3204 1 THE CLERK: Raise your right hand.
2 Do you solemnly swear that the testimony
3 that you are about to give will be the truth, the whole
4 truth and nothing but the truth, so help you God?
11:3204 5 THE WITNESS: Yes, ma'am.
6 THE CLERK: Please be seated.
7 Please state your first and last name and
8 spell each for the record.
9 THE WITNESS: Alex Nelson. A-L-E-X
11:3404 10 N-E-L-S-O-N.
11 THE COURT: All right. Let's not cover
12 exactly the same material. Go ahead, Miss Scheible.
13 MS. SCHEIBLE: I will try to be brief.
14 THE COURT: Hit the points that we need to
11:3404 15 shoot for.
16
17 ALEX NELSON
18 having been first duly sworn, did testify as follows:
19
20 DIRECT EXAMINATION
11:3404 21 BY MS. SCHEIBLE:
22 Q. Officer Nelson, how are you employed?
23 A. I'm currently a patrol officer at the
24 Henderson Police Department.
11:3404 25 Q. How long have you been so employed?
A. Since July 28th of 2015. So four -- 3

11:3404 1 little over four years.
2 Q. And were you working as a patrol officer
3 on March 12th of this year?
4 A. Yes, ma'am, I was.
11:3504 5 Q. At that time were you also a field
6 training officer?
7 A. Yes, ma'am, I was.
8 Q. Did you have a trainee with you on
9 March 12th?
11:3504 10 A. I did.
11 Q. Was it Officer Groll?
12 A. It was.
13 Q. And is that the same Officer Groll who we
14 just saw coming out of the courtroom here?
11:3504 15 A. Yes, ma'am.
16 Q. And on March 12th were you guys called
17 out to a traffic collision?
18 A. Yes, ma'am.
19 Q. And when you got to the collision call, do
11:3604 20 you recall what time it was?
21 A. I do not recall.
22 Q. Were you in charge or was Officer Groll in
23 charge?
24 A. Officer Groll was in charge.
11:3604 25 Q. And what generally was Officer Groll in

11:35AM 1 charge of doing at the scene?
 2 A. Conducting the investigation of the
 3 initial call which was the traffic accident and from
 4 that point on a DUI investigation.
 11:35AM 5 Q. And so the investigation turned from
 6 traffic to DUI?
 7 A. Yes, ma'am.
 8 Q. And was there anybody there who you now
 9 see in court today?
 11:36AM 10 A. Yes, ma'am.
 11 Q. Can you point out that person and identify
 12 an article of clothing that he's wearing?
 13 A. He's wearing a gray suit.
 14 MS. SCHEIBLE: May the record reflect
 15 identification of the defendant?
 16 THE COURT: It will so reflect.
 17 BY MS. SCHEIBLE:
 18 Q. And what was the defendant doing there, if
 19 you know?
 11:36AM 20 A. Specifically? He was involved in a
 21 traffic accident.
 22 Q. So he was one of the drivers?
 23 A. He was one of the drivers. Yes.
 24 Q. And how did this change from a traffic
 11:36AM 25 collision to a DUI investigation?

11:36AM 1 A. As Officer Groll was conducting his
 2 investigation on the traffic accident he detected an
 3 odor of alcohol coming from Mr. Matthew.
 4 Q. And did you detect that alcohol as well?
 11:36AM 5 A. Initially no.
 6 Q. You said initially. Did you detect it
 7 later?
 8 A. I did once we -- once Officer Groll
 9 informed me that he detected the odor, I went back and
 10 spoke to Matthew and at that point I did.
 11 Q. Is it common for field training officers
 12 and trainees to have conversations like that during the
 13 course of an investigation?
 14 A. It is.
 15 Q. Is it in fact encouraged?
 16 A. It is.
 17 Q. And was there anything about Officer
 18 Groll's conduct that concerned you?
 19 A. During -- no, ma'am.
 11:37AM 20 Q. Did he do everything by the book,
 21 essentially?
 22 A. Yes, ma'am.
 23 Q. So starting from that moment when he
 24 thought he detected alcohol?
 11:37AM 25 A. Uh-huh.

11:37AM 1 Q. After he thought he detected alcohol, what
 2 did he or the two of you do next?
 3 A. We discussed what he detected and then we
 4 moved on with the investigation.
 11:37AM 5 Q. And what was the next step of the
 6 investigation?
 7 A. The field sobriety tests.
 8 Q. And who conducted the field sobriety
 9 tests?
 10 A. Officer Groll did.
 11 Q. And did you observe him as he conducted
 12 the field sobriety tests?
 13 A. Yes.
 14 Q. And did you observe anything in the field
 15 sobriety test that was not done properly?
 16 A. No, ma'am.
 17 Q. If you had, would you have stopped Officer
 18 Groll?
 19 A. Yes, ma'am.
 11:37AM 20 Q. Did Officer Groll stop himself at any
 21 point during the field sobriety tests?
 22 A. No. No, ma'am.
 23 Q. Did he come over to ask you any questions?
 24 A. I don't recall specifically if he had a
 11:38AM 25 question about it or not.

11:38AM 1 Q. Do you recall whether you asked him any
 2 questions during the field sobriety test?
 3 MR. MUELLER: I'm going to object. Unless
 4 this witness's testimony is other than vouching for
 11:38AM 5 Officer Groll, did he have any independent --
 6 THE COURT: I think he was there
 7 witnessing the whole thing, so I think his whole
 8 testimony -- I mean, it might be the same as the other
 9 officer. I'm not quite sure I know what your objection
 10 is.
 11 MR. MUELLER: The objection is vouching.
 12 He's vouching for Officer Groll as opposed to actually
 13 offering any insights.
 14 THE COURT: All right. What was the
 15 question again?
 16 MS. SCHEIBLE: Whether Officer Nelson
 17 asked Officer Groll any questions during the field
 18 sobriety tests.
 19 THE COURT: I'm going to overrule on that.
 11:38AM 20 I understand what you're saying, Mr. Mueller. Bring it
 21 back up if you think that there's some vouching.
 22 Go ahead.
 23 BY MS. SCHEIBLE:
 24 Q. Did you ask Officer Groll any questions?
 11:38AM 25 A. I don't recall asking any questions.

11:30AM 1 Q. And did you observe Officer Groll filling
2 out his FST card?
3 A. I did.
4 Q. Did you observe it closely enough to see
11:30AM 5 what he was writing down?
6 A. I did.
7 Q. And was everything he was writing down
8 accurate?
9 A. Yes, ma'am.
10 Q. And when I say accurate, I mean did what
11 he write -- is what he wrote down consistent with what
12 you saw with your own two eyes?
13 A. Yes, ma'am.
14 Q. Do you remember what it was he was writing
11:30AM 15 down?
16 A. He was writing down the specific clues he
17 observed during the test.
18 Q. So all the clues that he observed you
19 observed as well?
11:30AM 20 A. For the walk and turn and the one leg
21 stand, yes, ma'am.
22 Q. Do you remember what those clues were?
23 A. I do not.
24 Q. Would looking at a copy of the formalized
11:30AM 25 FST report help refresh your recollection?

11:30AM 1 A. Yes.
2 MR. MUELLER: Defense would object to
3 this, Judge. The way this case is laid out, it was
4 Officer Groll's work. Officer Kelsoe also was standing
11:30AM 5 there but did not participate at all.
6 THE COURT: Let's lay a little foundation
7 whether it in fact would refresh his recollection,
8 maybe go a little bit more into what he was observing
9 with regard to the three FSTs and we'll go from there.
10 Okay.
11 BY MS. SCHEIBLE:
12 Q. You were observing the FSTs?
13 A. Yes. The walk and turn and the one leg
14 stand I did.
15 Q. You observed them at the same time as
16 Officer Groll?
17 A. Yes.
18 Q. But you didn't both write down separate
19 reports, did you?
11:40AM 20 A. No, ma'am.
21 Q. Officer Groll wrote down a report?
22 A. Yes, ma'am.
23 Q. But you reviewed that report?
24 A. Yes, ma'am.
11:40AM 25 Q. In the courtroom, at the time?

11:40AM 1 A. Yes, ma'am.
2 Q. And it's your testimony now that you can't
3 remember independently which clues you observed?
4 A. That is correct.
5 Q. But would looking at a copy of that report
11:40AM 6 help you to remember?
7 A. Yes, ma'am.
8 THE COURT: I'm going to let him testify
9 to it if it refreshes his recollection. It's kind of
10 cumulative. The other officer already testified to it.
11 Is that your objection, Mr. Mueller?
12 MR. MUELLER: I agree, Judge. Number one,
13 it's cumulative. Number two, it's hearsay. The
14 officer could not or reasonably should not be expected
11:40AM 15 to have recollected a field sobriety test another
16 officer did a year and a half ago -- six, seven months
17 ago. Number three, he is not going to get his
18 recollection refreshed by reviewing Officer Groll's
19 report. He is going to literally read it back into the
11:41AM 20 record. I do not -- I object on all three counts.
21 THE COURT: I think his testimony was, if
22 I'm wrong, is that he observed the clues. He doesn't
23 recollect exactly what those clues were.
24 MR. MUELLER: True, but you've seen the
11:41AM 25 video more recently than he has. You saw the clues. I

11:41AM 1 mean, I can't put you on the witness stand how to
2 testify what you saw. It's the same thing. If he'd
3 written the report --
4 THE COURT: He can testify as to what he
11:41AM 5 saw. If that particular document refreshes his
6 recollection as to what he saw, not what was written
7 down on the report, if the refreshing of the
8 recollection if I saw these clues, this refreshes my
9 recollection as to what I saw then I'll let him do it.
10 I'm not going to let him reread it into the record if
11 he doesn't have that independent recollection after
12 reviewing the report. So that's my ruling. If you
13 want to show it to him, have him read it, see if it
14 refreshes his recollection as to what he observed at
15 that particular time. If it does, I'll let him testify
16 to it. If it just refreshes his recollection as to
17 what was written down and he doesn't have any actual
18 recollection of what he himself saw, then I'm not going
19 to let him. Make sense?
20 MS. SCHEIBLE: Perfect. I believe your
11:42AM 21 clerk has the document which is marked as 10.
22 Q. I'm showing you what's been marked as
23 State's Exhibit 10 for identification purposes only.
24 Give it a read and look up at me when you're done
11:42AM 25 reviewing it. Now that you've seen this, do you

11:42AM 1 remember more clearly watching Officer Groll administer
2 the FSTs?

3 A. Yes, ma'am.

11:42AM 4 Q. Do you remember more clearly watching how
5 the defendant performed on them?

6 A. Yes, ma'am.

7 Q. How did he perform on the walk and turn
8 test?

11:43AM 9 A. The walk and turn he performed
10 unsatisfactorily during that test.

11 Q. What about his performance was
12 unsatisfactory?

13 A. I remember specifically he was starting
14 too soon and that's the only one I personally recall.

11:43AM 15 Q. And what about the one leg stand test?

16 A. Yes. He completed that unsatisfactorily
17 as well. He was raising his arms more than 6 inches
18 and also he was slightly hopping while trying to
19 maintain his balance.

11:43AM 20 Q. And all this is your own recollection of
21 how you saw it at the time?

22 A. Yes, ma'am.

23 Q. And from there is it fair to say that he
24 failed the field sobriety tests?

11:43AM 25 A. Yes, ma'am.

11:43AM 1 Q. Was he transported to Henderson Detention
2 Center?

3 A. He was.

4 Q. Did you transport him?

11:43AM 5 A. I was in the vehicle with Officer Groll
6 who was driving, yes.

7 Q. When you guys got to the Henderson
8 Detention Center what did you do?

11:43AM 9 A. We -- we booked him in and then Officer
10 Groll began the observation period and conducted the
11 breathalyzer.

12 Q. And where were you during the observation
13 period?

14 A. I was with Officer Groll.

11:44AM 15 Q. Were you guys next to the Intoxilyzer, in
16 a different room?

17 A. We were in the room where the Intoxilyzer
18 is.

11:44AM 19 Q. And were both of you observing the
20 defendant?

21 A. Yes.

22 Q. And how long did the observation period
23 have to be?

24 A. Fifteen minutes.

11:44AM 25 Q. And can it be longer than that?

11:44AM 1 A. Yes.

2 Q. In this case do you remember how long the
3 observation period was?

4 A. I do not.

11:44AM 5 Q. Do you remember during the observation
6 period -- sorry, let me back up -- what are you looking
7 for during the observation period?

11:44AM 8 A. We're just making sure that the suspect or
9 the person we are going to perform the test on is not
10 putting any objects in his mouth or to, I guess, tamper
11 with the breath test.

12 Q. Are there other things that could happen
13 that would affect the breath test during the course of
14 the observation period?

11:44AM 15 A. Besides consuming something? Not that I
16 know of.

17 Q. Would vomiting or belching or something
18 like that possibly affect it?

19 A. Yes.

11:45AM 20 Q. And if you observe any of those things,
21 what do you do?

22 A. You restart the observation period.

23 Q. Do you recall any of those things
24 happening with the defendant?

11:45AM 25 A. I do not recall.

11:45AM 1 Q. So it's possible that he did belch and you
2 started the test over and you just don't remember?

3 A. It's possible. As I say, I don't recall
4 so I'm -- I'm not sure.

11:45AM 5 Q. Did he put anything in his mouth during
6 the observation period?

7 A. No.

8 Q. You and Officer Groll were both there the
9 entire time?

10 A. Uh-huh.

11 THE COURT: Is that yes?

12 THE WITNESS: Yes. Sorry, yes.

13 BY MS. SCHEIBLE:

11:45AM 14 Q. And is there a maximum length of time that
15 the observation period can last?

16 A. I'm not sure. I don't know.

17 Q. Does the observation period ever exceed 15
18 minutes?

19 A. Sometimes. Yes.

11:45AM 20 Q. Why might it exceed 15 minutes?

21 A. If we get busy with something else or
22 we're waiting for the Intoxilyzer to start up or
23 process it. If there's an error or something.

11:45AM 24 Q. And do you remember in this case whether
25 the period had exceeded the 15 minutes?

11:46AM 1 A. I do not recall.
 2 Q. So you don't remember anything happening
 3 that would have caused the --
 4 MR. MUELLER: Objection. Asked and
 11:46AM 5 answered. About three times.
 6 THE COURT: I think that's true.
 7 MS. SCHEIBLE: That's fine.
 8 BY MS. SCHEIBLE:
 9 Q. Did you also observe the Intoxilyzer test?
 11:46AM 10 A. I did.
 11 Q. Did you see the printout from the
 12 Intoxilyzer?
 13 A. I did.
 14 Q. I'd like to show him what's been marked as
 11:46AM 15 State's Exhibit 8. It's not in evidence yet. Maybe I
 16 mean seven. Okay. Thank you. Showing you --
 17 MR. MUELLER: Counsel, can you show me
 18 what you have?
 19 BY MS. SCHEIBLE:
 11:47AM 20 Q. Showing you what's been marked as 9 for
 21 identification purposes only. Is that the printout
 22 from the Intoxilyzer?
 23 A. It is.
 24 Q. Is that a fair and accurate depiction of
 11:47AM 25 the printout?

11:47AM 1 A. It is.
 2 MS. SCHEIBLE: That's all. Nothing
 3 further, your Honor.
 4 THE COURT: Anything, Mr. Mueller, on
 11:47AM 5 cross-examination?
 6
 7 CROSS-EXAMINATION
 8 BY MR. MUELLER:
 9 Q. How many breath tests have you conducted
 11:47AM 10 in the last five years?
 11 A. I don't recall.
 12 Q. You don't recall?
 13 A. No, sir.
 14 Q. How many would you think?
 11:47AM 15 A. Four or five.
 16 Q. Four or five tests. You've done four or
 17 five over the years?
 18 A. Yes.
 19 Q. Now, you used two phrases that caught my
 11:47AM 20 ears. You said -- my colleague asked why would there
 21 be a longer observation period than 15 minutes. Do you
 22 remember what your answer was?
 23 A. I do not.
 24 Q. The phrase you used was if we get busy.
 11:47AM 25 Now, what do you mean by if we get busy during the

11:47AM 1 breath observation period?
 2 A. No, if we -- if we're still performing --
 3 well, my intentions was to say if we get waiting for
 4 the Intoxilyzer. But we're always with the defendant
 11:48AM 5 or the suspect at that point.
 6 Q. Do you do paperwork?
 7 A. We do.
 8 Q. And can you get busy doing paperwork and
 9 not paying attention to the breath observation period?
 11:48AM 10 A. You can, yes. It's possible.
 11 Q. All right. Now, the breath observation
 12 period here, sir, was 24 minutes, not 15.
 13 A. Okay.
 14 Q. Are you aware of that?
 11:48AM 15 A. No, sir.
 16 Q. Did you have any independent recollection
 17 of that until I told you just a moment ago?
 18 A. No, sir.
 19 Q. Now, did you guys get busy during this
 11:48AM 20 breath observation period?
 21 A. Possibly.
 22 Q. Now, let me ask you a question. If
 23 someone burps or belches or regurgitates in their mouth
 24 alcohol, will that potentially make the breath test
 11:48AM 25 artificially higher?

11:48AM 1 A. I'm assuming. I'm not a hundred percent
 2 sure.
 3 Q. Do you have your breath -- do you have
 4 your certification card with you?
 11:48AM 5 A. I do not.
 6 Q. Are you currently certified?
 7 A. I'm not.
 8 Q. Were you certified at the time?
 9 A. Yes.
 11:48AM 10 Q. You let your certification lapse?
 11 A. Yes, sir.
 12 Q. Now, sir, you've done a number of traffic
 13 investigations, correct?
 14 A. What type of investigations?
 11:48AM 15 Q. You get called to the scene of a
 16 fender-bender, correct?
 17 A. Yes, sir.
 18 Q. All right. One car strikes another one
 19 from behind, whose fault is that?
 11:48AM 20 A. It depends on the circumstances.
 21 Q. The person -- the driver from behind the
 22 car is usually responsible for that accident, correct?
 23 A. Usually.
 24 Q. All right. Now, you went to the scene,
 11:48AM 25 did you not?

11:49AM 1 A. Yes, I was at the scene.
 2 Q. Damage to Mr. Molen's vehicle was in the
 3 front or the back?
 4 A. It was in the back.
 11:49AM 5 Q. All right. Damage on the front of the
 6 other vehicle, was it in the front or the back?
 7 A. The front.
 8 Q. All right. So the other vehicle struck
 9 Mr. Molen, correct, from behind?
 11:50AM 10 A. Yes.
 11 MR. MUELLER: May I approach?
 12 THE COURT: Yes.
 13 Q. Showing you Defense A for identification
 14 where it will tell you that was the damage to
 11:50AM 15 Mr. Molen's vehicle at the scene. Would you agree or
 16 disagree with that?
 17 A. I'm not sure I remember it specifically
 18 being at the bottom left.
 19 Q. That's about -- do you recollect having
 11:50AM 20 been there that that's about what the damage was?
 21 A. (No oral response.)
 22 THE COURT: I need you to speak out loud.
 23 THE WITNESS: Yes, sir.
 24 MR. MUELLER: I believe that's admitted
 11:50AM 25 already. I have no further questions.

11:50AM 1 THE COURT: Any redirect?
 2 MS. SCHEIBLE: No, your Honor.
 3 THE COURT: All right. Thank you for your
 4 testimony. I appreciate it.
 11:50AM 5 Call your last witness, please.
 6 MS. SCHEIBLE: State calls Miss Lanz.
 7 THE COURT: I will have you stand on the
 8 witness stand and raise your right hand.
 9 THE CLERK: Do you solemnly swear that the
 11:52AM 10 testimony that you are about to give will be the truth,
 11 the whole truth and nothing but the truth, so help you
 12 God?
 13 THE WITNESS: Yes.
 14 THE CLERK: Please be seated.
 15 Please state your first and last name and
 16 spell each for the record.
 17 THE WITNESS: My name is Darby Lanz.
 18 D-A-R-B-Y L-A-N-Z.
 19
 11:52AM 20 DANNY LANZ,
 21 having been first duly sworn, did testify as follows:
 22
 23 DIRECT EXAMINATION
 24 BY MS. SCHEIBLE:
 25 Q. Mr. Lanz, how are you employed?
 A. I am a forensic scientist and forensic

11:52AM 1 analyst of alcohol with the Las Vegas Metropolitan
 2 Police Department's forensics laboratory.
 3 Q. And how long have you been doing that?
 4 A. Nine and a half years.
 11:52AM 5 Q. And what does your -- what --
 6 MR. MUELLER: Your Honor, I have married a
 7 woman that I've spent less time with than Miss Lanz.
 8 Her qualifications are not in doubt and --
 9 THE COURT: All right. We'll figure her
 11:53AM 10 as an expert in this particular area and if you want to
 11 get right to the heart of how she dealt with the --
 12 MR. MUELLER: I will stipulate that she is
 13 an expert in the testing on forensic breath testing for
 14 alcohol. She's got requisite academic credentials and
 11:53AM 15 experience.
 16 THE WITNESS: Thank you.
 17 THE COURT: Let's get right to it.
 18 MS. SCHEIBLE: Your Honor, I'm approaching
 19 the witness, if I may, with Exhibit 9.
 11:53AM 20 BY MS. SCHEIBLE:
 21 Q. Do you recognize this document?
 22 A. This is a printout of a breath test
 23 performed on March 12th, 2019.
 24 Q. And can you tell us where the breath test
 11:54AM 25 was performed?

11:54AM 1 A. This one was done at Henderson Detention
 2 Center.
 3 Q. On what kind of machine?
 4 A. The Intoxilyzer 8000.
 11:54AM 5 Q. Does it have a specific serial number?
 6 A. Yes. The serial number is 80-006041.
 7 Q. And is this a machine that you are
 8 familiar with?
 9 A. Yes. I calibrate this instrument every 90
 11:54AM 10 days or less. It is actually a dual cal instrument
 11 which means Melissa Collins and myself both perform
 12 calibrations on it in that time period.
 13 Q. And was it calibrated properly on
 14 March 12, 2019?
 11:54AM 15 A. Yes. I was there February 15th, 2019.
 16 Q. And are these -- so this printout is
 17 accurate from the Intoxilyzer 8000?
 18 A. Yes. It is correct from the Intoxilyzer
 19 8000, the one at Henderson Detention Center and it was
 11:54AM 20 calibrated prior to this.
 21 MS. SCHEIBLE: I will move for admission
 22 of State's Exhibit 9.
 23 MR. MUELLER: Ask the Court to reserve
 24 ruling until I cross-examine the witness.
 11:54AM 25 THE COURT: I will. That's fine. Do you

11:54PM 1 have any other questions about this?
 2 MS. SCHEIBLE: Yes, I do.
 3 THE COURT: Okay.
 4 BY MS. SCHEIBLE:
 11:55AM 5 Q. As we're looking at this document in the
 6 middle are the numbers; is that accurate?
 7 A. Yes, the breath analysis portion is in the
 8 middle.
 9 Q. And on the far -- the furthest --
 11:55AM 10 THE COURT: Let's do this correctly
 11 because you have additional questions about it and
 12 ultimately if it's admitted you want to get into that.
 13 What I'm going to allow you to do is we'll call it in
 14 reverse, Mr. Mueller. Why don't you let him do that as
 11:55AM 15 it relates to your motion to admit the evidence.
 16
 17 BY MR. MUELLER: VOIR DIRE EXAMINATION
 18 Q. Miss Lenz, do you train officers on how to
 19 properly use the Intoxilyzer 8000?
 11:55AM 20 A. I do.
 21 Q. And I suspect now we can fairly say that
 22 you've trained the last generation of officers both
 23 here in Henderson and throughout the valley?
 24 A. Southern Nevada since 2011.
 11:55AM 25 Q. And how many officers would you say you've

11:55AM 1 trained?
 2 A. Thousands. I don't have an exact number.
 3 Q. Thousands?
 4 A. Yes.
 11:55AM 5 Q. So you've trained a lot of them?
 6 A. Probably the majority.
 7 Q. All right. Now, have you in fact trained
 8 and do you train the officers that they must follow the
 9 breath checklist?
 11:55AM 10 A. I train them that way and it's mandated by
 11 the NAC, I believe.
 12 Q. Nevada Administrative Code would that be?
 13 A. Yes.
 14 Q. So it has a force and effect of law,
 11:56AM 15 correct?
 16 A. I'm not familiar with that term, but it is
 17 the Nevada Administrative Code that they fill out the
 18 checklist.
 19 Q. Now, my colleague has brought the
 11:56AM 20 checklist to your attention. Do you have it up there
 21 on the witness stand or is it over here?
 22 A. I have only seen State's Exhibit 9 which
 23 is the breath test printout.
 24 THE COURT: Mr. Mueller, I'm going to
 11:56AM 25 allow you to ask questions about whether that

11:56AM 1 particular document should be admitted.
 2 MR. MUELLER: I'm coming right to a
 3 succinct point.
 4 THE COURT: Okay.
 11:56AM 5 BY MR. MUELLER:
 6 Q. Ma'am, drawing your attention to the
 7 breath checklist three. Is that an essential
 8 requirement to determine if the breath machine is
 9 accurately done?
 11:56AM 10 A. State's Exhibit 8 is a copy of an
 11 Intoxilyzer checklist and yes, the officers are
 12 instructed to fill that out at the time of the test.
 13 Q. All right. And that is required by law.
 14 Required by administrative code?
 11:56AM 15 A. Yes.
 16 Q. Now, why is it a 15-minute breath
 17 observation period essential?
 18 A. The observation period is to protect -- to
 19 safeguard against mouth alcohol.
 11:57AM 20 Q. All right. And will mouth alcohol
 21 potentially interfere with the scientific value of the
 22 test that the machine produces?
 23 A. Mouth alcohol can falsely elevate the
 24 reading of the breath test, if it is present.
 11:57AM 25 Q. All right. And part of this check sheet

11:57AM 1 is to do close visual contact, is it not?
 2 A. Yes.
 3 Q. All right. And what do you teach the
 4 thousands of officers that you have taught that close
 11:57AM 5 visual contact is?
 6 A. I specifically do not give them an exact
 7 definition because every test location is different.
 8 But I tell them to be close enough to see, smell, hear,
 9 if the subject burps, vomits or regurgitates or puts
 11:57AM 10 any foreign object in their mouth.
 11 Q. So basically arms length or kind of not --
 12 sort of the distance between me and you and for the
 13 record about six feet, five feet?
 14 A. Yes. That's fine. I tell them to stay in
 11:57AM 15 front of the subject, they can sit beside, in front of
 16 you, stand, sit. Doesn't matter as long as they can
 17 watch the subject.
 18 Q. And if the officers get busy and are
 19 paying attention to something else other than the test
 11:58AM 20 subject, is that proper breath observation?
 21 A. I tell them they need to pay attention to
 22 the subject for that 15-minute interval.
 23 Q. All right. Now, on this particular test
 24 the breath observation period isn't a 15-minute, it's
 11:58AM 25 24 minutes?

11:56AM 1 A. Correct.
2 Q. All right. Now, if a proper observation
3 period is being conducted for 24 minutes, that's still
4 scientifically valid, correct?

11:56AM 5 A. Yes. The requirement is a minimum of 15
6 minutes.

7 Q. But if somebody was actually doing
8 paperwork, and can't recall why there was 24 minutes,
9 wouldn't that imply that the proper observation period
10 was not done?

11 MS. SCHEIBLE: Objection, your Honor.
12 Calls for speculation.

13 BY MR. MUELLER:
14 Q. If you put someone in a chair and walk
15 away from them to go do your Declaration of Arrest and
16 paperwork, is that a proper breath observation period?

17 A. If you have walked away from them prior
18 than like we were talking five or six feet, if you
19 leave the room, that is not a correct observation
20 period.

21 MR. MUELLER: Thank you.

22 THE COURT: Are you continuing to make an
23 objection based upon the testimony?

24 MR. MUELLER: Yes. I object to the
25 admission of this breath strip. I have two officers,

11:56AM 1 one of which was in training, one of which should have
2 been paying very close attention, wasn't paying
3 attention. He cannot explain why he took 24 minutes to
4 make the point and to illustrate the point. I walked
5 up and I got pretty close to him, and I said I'm making
6 you pretty uncomfortable, aren't I? Yes, sir. You
7 said, Judge, you said you're making me uncomfortable.

8 Now, doing a breath proper observation
9 period is not a particularly pleasant thing. You have
10 to sit and keep very close contact with a stranger.
11 Not something you do an extra 10 minutes for just for
12 fun. Now, I asked the officer, why did you do it for
13 24 minutes? I don't recall. What were you doing? I
14 don't recall. Did you do the paperwork? What's the
15 paper that needs to be done? Go through the whole
16 laundry test.

17 So my colleague then calls a backup
18 officer. He doesn't remember the 24-minute breath
19 observation period and despite the fact that he's done
20 four or five, he can assure us that it was done
21 properly. Nonetheless, we have something that's
22 unpleasant to do, that is not properly documented, that
23 doesn't look like it was done the right way, and
24 despite the fact that the kid's on the job for six or
25 nine months, and this is his first or second arrest, he

12:00PM 1 has no recollection.

2 Now, I submit to the Court that the
3 requisite breath strip -- the check that Miss Lanz has
4 just testified as required by law, has not been
5 complied with and that there can be no scientific
6 validity to those results because the check sheet
7 wasn't properly performed. I object to the admission
8 of the breath strip. The fact that the machine can
9 print out numbers is not the issue. The machine can
10 also print a number. The question is whether we have
11 any confidence in that number.

12 THE COURT: You're not stating that it
13 wasn't -- this witness didn't properly calibrate it
14 according to --

12:01PM 15 MR. MUELLER: No, Miss Lanz -- she's --
16 the documentation is -- I have occasionally had
17 occasion to question whether the machine's been
18 properly calibrated but not since Miss Lanz has run the
19 machine.

20 THE COURT: All right. State.

21 MS. SCHEIBLE: So I think there are two
22 separate issues here. The first one is whether or not
23 the breath strip should be admitted based on its
24 accuracy. I don't think there's a question as to
25 accuracy.

12:01PM 1 The second question is whether or not the
2 breath strip should be admitted for the -- you know,
3 for its contents based on the 24-minute observation
4 period and we have received no evidence that there was
5 any kind of error during the observation period. It
6 was simply longer than required by law. There is
7 nothing to indicate that the officers walked away, that
8 the officers lost attention or that anything happened
9 that the defendant put anything in his mouth, that the
10 defendant vomited, anything like that.

11 So absent any evidence and only testimony
12 that they followed the checklist, and I think that it's
13 completely normal not to remember everything that
14 occurs in a 24-minute span. We also heard from Officer
15 Nelson sometimes they have to wait for the Intoxilyzer
16 to warm up. There's no reason to believe that the
17 checklist wasn't followed perfectly and that the
18 results are inaccurate, and so I renew my motion for
19 admission of what I believe is marked as State's 10,
20 but it could be a different number.

21 THE COURT: It has to be authenticated and
22 I believe that that's been appropriately done in this
23 particular case. And the next question is whether it's
24 relevant information. It is relevant information so
25 I'm going to admit it. The arguments that Mr. Mueller

12:02PM 1 make go to weight, not admissibility, in my opinion at
2 this particular point based upon the testimony of this
3 particular expert witness. So I'm going to admit it
4 and I'll let Mr. Mueller make the same point as to why
12:03PM 5 it should not proceed the way that I'm sure Miss
6 Scheible thinks it should. Okay. So it's admitted.

7 (State's Exhibit 9 was admitted.)

8 THE COURT: Any other questions, Miss
9 Scheible?

12:03PM 10 MS. SCHEIBLE: Yes. About the document.

11 THE COURT: Okay.

12 DIRECT EXAMINATION (Resumed)

14 BY MS. SCHEIBLE:

12:03PM 15 Q. So in the middle, underneath the line that
16 says breath analysis, can you explain for us what each
17 of the three columns indicates.

18 A. Yes. The middle portion which says breath
19 analysis is everything that's going on during the
12:03PM 20 breath test. The left-hand column states what is
21 occurring. The middle column states the results of
22 that and the right-hand column is the time that that
23 occurred.

24 Q. And how is that time calculated or
12:03PM 25 inputted into the Breathalyzer?

12:03PM 1 A. The time is on the Intoxilyzer. It is
2 verified every time I go to the instrument that it is
3 correct. Sometimes it's off by a minute or two. It's
4 adjusted. That would be in my maintenance records if
12:03PM 5 it would be adjusted. But it's not usually off by more
6 than a couple minutes and it comes from the instrument
7 itself. The officer has no way to control that.

8 Q. And that time is set to Pacific standard
9 time?

12:03PM 10 A. Yes.

11 Q. Were there any adjustments to the time
12 before -- within the time range of March 12th shortly
13 before or afterwards?

14 A. No.

12:04PM 15 MS. SCHEIBLE: I have nothing further,
16 your Honor.

17 THE COURT: Are you going to ask questions
18 about this, Mr. Mueller?

19 MR. MUELLER: No, Your Honor.

12:04PM 20 THE COURT: Any additional questions?

21 MS. SCHEIBLE: No, Your Honor.

22 THE COURT: All right. Cross-examination.
23 Mr. Mueller, anything in addition to what you have
24 already kind of done?

12:04PM 25

1 CROSS-EXAMINATION

2 BY MR. MUELLER:

3 Q. Miss Lanz, additive value. If someone
4 has -- a subject has mouth alcohol, how would that
12:04PM 5 potentially create a higher value.

6 THE COURT: Did you say additive?

7 BY MR. MUELLER:

8 Q. How would it create the mathematically
9 additive value to the test? A-D-B-I-T-I-V-E.

10 A. Additive. Make it higher. Add to. If
11 mouth alcohol is present and if it is -- mouth alcohol
12 is usually from a recent drink or vomit, burping,
13 regurgitation, somehow that alcohol is reintroduced to
14 the subject's mouth. If that is a higher concentration
12:05PM 15 than what is in their bloodstream or their breath, then
16 it would actually reflect higher than the rest of the
17 breath would be.

18 Q. That's what the purpose of doing a proper
19 breath observation period, is to try to prevent this
12:05PM 20 happening?

21 A. Yes. It's to allow any mouth alcohol to
22 completely evaporate.

23 MR. MUELLER: Nothing further.

12:05PM 25

1 REDIRECT EXAMINATION

2 BY MS. SCHEIBLE:

3 Q. Do you know how much mouth alcohol can
4 increase -- how big the difference can be between blood
12:05PM 5 alcohol and breath alcohol?

6 A. It honestly depends on the type of mouth
7 alcohol. If you take a drink of beer. Beer is
8 4 percent which is much higher than anyone is going to
9 have on their breath in their bloodstream. So that
10 would reflect a much higher concentration. A fresh
11 drink of beer would absolutely be caught by the
12 instrument. It would either be too high for it to read
13 or definitely show the mouth alcohol error.

14 More common in situations of the type of
15 mouth alcohol I believe Mr. Mueller is referring to is
16 reintroduced through burping, vomiting or regurgitation
17 because I highly doubt police would be handing alcohol
18 to any subject in custody. So it would not be a fresh
19 drink. It would be re-introduced. So it would be
12:06PM 20 stomach contents. So it would be reflective of
21 whatever was in their stomach. So that could be --
22 could be a 4 percent beer if that's what they were
23 drinking, it could be a higher concentration, depending
24 on if it was shots of liquor. I can't speak for what
12:06PM 25 anyone may or may not have been drinking. But it's

12:06PM 1 reflective of whatever is re-introduced or introduced
2 to the mouth. So it could be incredibly high.
3 Q. But it is based on stomach contents?
4 A. It's based on wherever the alcohol came
5 from to be in that mouth again.
6 MS. SCHEIBLE: I have nothing further.
7 THE COURT: Anything?
8 MR. MUELLER: No, Your Honor.
9 THE COURT: All right. Thank you for your
10 testimony. I appreciate it.
11 THE WITNESS: Stick around?
12 THE COURT: No, you're good to go.
13 THE WITNESS: Appreciate it.
14 THE COURT: I am assuming you're resting?
15 MS. SCHEIBLE: Yes, your Honor.
16 THE COURT: Do you have any exhibits that
17 we've moved that haven't been admitted? I don't think
18 there are.
19 MS. SCHEIBLE: I don't have any in my
20 possession.
21 THE COURT: Do you think that last exhibit
22 was the one that remains? So I think otherwise we have
23 your exhibits.
24 MS. SCHEIBLE: You have two that were not
25 admitted.

12:07PM 1 THE COURT: They were marked.
2 MS. SCHEIBLE: Right. But you have them.
3 THE CLERK: Which ones were that? I have
4 10 at the moment, marked.
5 THE COURT: FST check sheet was done, that
6 was not admitted. That was that one. I think that Mr.
7 Mueller may have had a couple.
8 Mr. Mueller, I just wanted to confirm the
9 CD that we were playing, was that your exhibit or was
10 that the State's Exhibit?
11 MR. MUELLER: That's my exhibit.
12 THE COURT: Did we move to admit that?
13 I'm assuming we did.
14 MR. MUELLER: We've seen it. We have to
15 admit it.
16 THE COURT: If you didn't do it on the
17 record, it'll be admitted.
18 MR. MUELLER: Formally admit Defense C.
19 I've got Defense B and D for identification, Rob Bary,
20 Judge Bary, has made it abundantly clear that he wants
21 it referenced on the record, he wants it made part of
22 the package. I actually agree with you. I learned the
23 way you did in law school, but we've been told to make
24 sure anything is referenced on the record.
25 THE COURT: If that's what he wants.

12:08PM 1 Okay. State's rested, Mr. Mueller.
2 MR. MUELLER: Your Honor, I previously
3 indicated Mr. Molen might testify. I'm still open to
4 that discussion so may I take a moment or two.
5 THE COURT: I'm just going to take a
6 moment. I'll be back in two minutes. You talk to your
7 client.
8 (Off the record.)
9 THE COURT: Back on. Matthew Molen.
10 19FH0521X.
11 Mr. Mueller, do you intend to present any
12 evidence in your case?
13 MR. MUELLER: Yes, your Honor, I hope to
14 and I believe it's in Mr. Molen's best interest that he
15 testify today because several things that the officers
16 have said is simply not correct, in part. The
17 practical problem I have and now I am constrained
18 because I cannot put him on the witness stand with a
19 felony charge pending. Now, the felony charge has put
20 him up to defend himself here and the oddity is if I
21 get the misdemeanor dismissed here, the felony up there
22 will also fail because he would have been not guilty.
23 THE COURT: Well, let me work through
24 this. Legally.
25 MR. MUELLER: The State's theory of

12:17PM 1 liability was that he was intoxicated here therefore
2 the fact that he picked up his son at school is a count
3 of child abuse. I believe that I can prove that he's
4 not intoxicated here, but I can't put him on the stand
5 for fear if you disagree, now I've confessed to a
6 felony.
7 THE COURT: I'd have to look into whether
8 the standard for the child abuse charge under a
9 negligent treatment theory means that your impairment
10 is to the level that it's illegal to drive under the
11 DUI statute. I'd have to look it up. It could be less
12 than that, I don't know. I can't tell you I know for
13 sure what the law is on that so I couldn't — I
14 understand the theorizing you're doing but I don't know
15 if —
16 MR. MUELLER: We used to follow the one
17 event number rule, you got charged with a felony, they
18 plied it down. This bifurcation of felonies and
19 misdemeanors is a relatively new phenomenon.
20 THE COURT: Before Miss Scheible's time
21 that was a legislative direction that they didn't like
22 the fact that we might have the felony here and the
23 misdemeanor went to Municipal Court. And so what the
24 legislature has done, and before Miss Scheible's time,
25 is they forced them together. And this has happened

12:19PM 1 for forever where you're not incorporated in Clark
2 County, Las Vegas Justice Court where everyone has to
3 decide how to handle a case when you have a felony and
4 misdemeanor. So I don't know of anything that
12:19PM 5 specifically states or addresses the circumstances that
6 you face.

7 I'm sympathetic to it and I understand it,
8 I don't know of anything that addresses it which is
9 kind of why I'm surprised we're still going forward
12:19PM 10 with this misdemeanor charge which you requested --
11 your side is the one that after the preliminary hearing
12 requested a speedy setting of the misdemeanor trial. I
13 don't know that Miss Scheible would have cared, quite
14 frankly, whether you dealt with your felony case before
12:19PM 15 the misdemeanor or not. I have no idea what your
16 discussion has been, but after the preliminary hearing
17 you're the one that asked for this trial, and if you
18 had asked to continue this trial until after the felony
19 trial had been resolved, unless Miss Scheible had a
12:19PM 20 objection to it and we worked our way through the law
21 and what's required, I probably would have been fine to
22 continue it. So in some sense you guys have made a
23 strategic decision and, you know, you're facing that
24 situation. That's kind of up to you at this point.

12:20PM 25 MR. MUELLER: Mr. Nolen is going to

12:20PM 1 testify.

2 THE COURT: Come on up.
3 Regardless of what happens today because
4 you provided me with a disk of an hour's worth of
12:20PM 5 footage, I think I'm obligated to watch the whole
6 thing. So I'm probably not going to make decision
7 today.

8 MR. MUELLER: I solicited only very
9 limited segments.

10 THE COURT: Well, I mean, I have the whole
11 disk and it goes from the start to finish. I think I
12 have an obligation as the trier of fact to watch the
13 video. If we were going to send this back to the jury,
14 the whole video, they could sit back there and
12:20PM 15 deliberate and watch the whole video.

16 MR. MUELLER: No. What we would have done
17 is edited the video.

18 THE COURT: Well, you didn't do that. Are
19 you making a motion that I'm only watching certain
12:20PM 20 portions of the video?

21 MR. MUELLER: Yes. I called the things to
22 the Court's attention.

23 THE COURT: How do I go back and watch the
24 video and know --

12:20PM 25 MR. MUELLER: Your Honor, if you want to

12:20PM 1 watch the video, you can watch the video. As you can
2 tell I'm very unimpressed with the police work, your
3 Honor. As a trier of fact you should be too.

4 THE COURT: Well, my position is the
12:21PM 5 entire video has been presented to me. I have to watch
6 the whole video. You didn't splice it up, you didn't
7 say for only -- admitting this portion because this
8 other portion is inadmissible. I have to watch the
9 whole video, I think, and it may inure to his benefit,
10 it may not inure to his benefit. I have no idea. But
11 I'm just telling you that it's my intention that I'm
12 not going to make a ruling today because I have an
13 hour's worth of video to watch.

14 You've also brought up some -- I'm
12:21PM 15 assuming your position is going to be that -- I don't
16 know if you are going to take the position that there's
17 some probable cause issues with regard to the stop and
18 the PSTs and therefore everything should be suppressed
19 thereafter. I don't know if that's your position. If
12:21PM 20 it is, I've got to look at it.

21 I don't know if you want to brief some
22 issues with the fact that if it is outside the two-hour
23 rule, can I consider that evidence? So we've got a
24 number of things we want to work through. I just
12:21PM 25 wanted to throw that out to you ahead of time before

12:21PM 1 your client ultimately decides to testify.

2 And you're welcome, too, if you want, to
3 bring up the issue as to what the dilemma defendant is
4 in when he has a felony up in District Court and a
12:22PM 5 misdemeanor here. I'm happy to take a look at all of
6 that. I don't want you to think I'm just winging it
7 off my head. So I tend to like to be able to look it
8 up and make sure that we get it right. Make sure I get
9 it as close to right as possible, and if there has to
10 be an appeal, then I have a sufficient enough record
11 with all of those issues addressed or the Honorable
12 Judge here to opine as well. So I'm just throwing that
13 all out at you.

14 Do you want to start with your client?

15 MR. MUELLER: Thank you.

16 THE COURT: Go ahead. Let's have you
17 raise your right hand, Mr. Nolen.

18 ~~MATTHEW MOORE~~
19 having been first duly sworn, did testify as follows:

12:22PM 20 DIRECT EXAMINATION

21 BY MR. MUELLER:

22 Q. Mr. Nolen, you've sat and watched the
23 evidence, correct?

12:22PM 24 A. Correct.

12:22PM 1 Q. Do you remember seeing -- do you remember
2 being transported by the Henderson Police Department
3 officers down to the jail?

4 A. I do.

12:22PM 5 Q. When you arrived down at the jail, in your
6 own words, sir, will you tell the judge what happened.

7 A. Well, they booked me in. They brought me
8 in and they actually had me handcuffed still and they
9 put me on this back corner seat. They've got like rows
10 of kind of bench seating or something, they put me in
11 that seat.

12 Q. And when you say they, are we talking
13 about Officer Groll or Officer Nelson?

14 A. Officer Groll.

12:23PM 15 Q. And what happened then, sir? Did Officer
16 Groll sit with you and do a close visual contact?

17 A. No, he did not.

18 Q. All right. What happened, sir?

19 A. They left. I didn't know where they went.

12:23PM 20 Q. When you say they left, Officer Groll and
21 Officer Nelson?

22 A. They left the room.

23 Q. So you were there by yourself in the
24 Henderson jail?

12:23PM 25 A. Correct. There wasn't actually anybody

12:23PM 1 around me for maybe three or four rows ahead of me.

2 Q. All right. And what happened then, sir?

3 A. Just sitting there. I just waited. I
4 couldn't tell you how long I waited. And then actually
5 a female officer actually took off my handcuffs because
6 my shoulders were killing me and she said well, they
7 should have given you double handcuffs because I got
8 pretty wide shoulders. And so she took the handcuffs
9 off, I sat there for awhile longer and then that's when
10 they came up and --

11 Q. When you say they, is that Officer
12 Groll --

13 A. Officer Groll.

14 THE COURT: Hang on. I need you guys not
15 to speak over each other. So, when you say they, who
16 are you referring to?

17 THE WITNESS: Officer Groll. And is it
18 Nelson?

19 BY MR. MUELLER:

12:24PM 20 Q. He came back in and made contact with you
21 again?

22 A. Yeah, they did. They came back.

23 Q. All right. And what did they do then,
24 sir?

12:24PM 25 A. So then they took me down the back

12:24PM 1 hallway. Like you go to the side behind, I don't know
2 if there are offices or whatever, but it goes down away
3 from everybody and there's like this little cubby area
4 that they have the Breathalyzer in and, you know, they
5 proceeded to try to take the Breathalyzer test. He did
6 it a couple times trying --

7 Q. When you say did it, he ran the machine a
8 couple times?

9 A. Yeah.

12:24PM 10 THE COURT: Who is he?

11 THE WITNESS: Groll. Groll was the one
12 that was taking care of everything. But he had a
13 problem with the mouthpiece. He had to redo it again.
14 I think ultimately we did it probably, I don't know,
15 three or four times.

12:24PM 16 BY MR. MUELLER:

17 Q. Did Officer Olson or Officer Groll -- or
18 Officer Nelson, sorry -- or Officer Groll ever stay
19 within arms length distance of you for 15 minutes and
20 do close visual contact?

21 A. Absolutely not.

22 Q. All right. And the majority of the time
23 you were there you were sitting by yourself in the
24 Henderson jail?

12:25PM 25 A. 100 percent. Yes.

12:25PM 1 Q. Sir, did you feel intoxicated at the time
2 that Mr. Smith rear-ended you?

3 A. No.

4 Q. And had you been up the night before?

5 A. I had.

12:25PM 6 Q. And were you tired?

7 A. I was.

8 Q. All right. And despite being tired and
9 short of sleep, did you pick up -- go pick up your son?

12:25PM 10 A. I did, yes.

11 MR. MUELLER: I have nothing further.

12 THE COURT: State, go ahead with
13 cross-examination.

14 CROSS-EXAMINATION

15 BY MS. SCHEIDLE:

16 Q. Do you know what time you got to the
17 Henderson Detention Center?

18 A. No clue.

12:25PM 19 Q. Do you wear a watch?

20 A. I do not.

21 Q. Are there clocks in the Henderson
22 Detention Center?

23 A. What was that?

12:25PM 24 Q. Are there clocks in the Henderson

12:26PM 1 Detention Center?

2 A. I'm sure there are.

3 Q. But you didn't see anything?

4 A. No, not that I was paying attention to.

12:26PM 5 Q. And what did you eat while you were

6 sitting at the Henderson Detention Center?

7 A. I didn't eat anything.

8 Q. What did you drink while you were sitting

9 at the Henderson Detention Center?

10 A. I didn't drink anything or eat anything.

11 THE COURT: I've got to have you speak up

12 a little bit and into that microphone.

13 THE WITNESS: I didn't drink anything or

14 eat anything.

12:26PM 15 BY MS. SCHEIBLE:

16 Q. At what point did you vomit at the

17 Henderson Detention Center?

18 A. I didn't vomit.

19 Q. Did you regurgitate into your mouth?

12:26PM 20 A. I don't recall.

21 Q. Oh, okay. So did you -- you didn't drink

22 anything, right?

23 A. Correct.

24 Q. You didn't eat anything, right?

12:26PM 25 A. Correct.

12:26PM 1 Q. And you didn't throw up at the Henderson

2 Detention Center, right?

3 A. That's correct.

4 Q. And your testimony now that you don't

12:26PM 5 remember if you regurgitated?

6 A. What is regurgitated?

7 MR. MUELLER: My concern is Mr. Holan

8 doesn't appear to know what the word regurgitated

9 means.

10 THE WITNESS: Yeah.

11 BY MS. SCHEIBLE:

12 Q. Do you know what the term regurgitated

13 means?

14 A. Are you asking me if I burped?

12:27PM 15 Q. Or if you kind of spit up a little bit in

16 your mouth?

17 A. Like I said, I don't keep track of burping

18 or spitting up.

19 Q. Is that something that happens to you

12:27PM 20 often?

21 A. I do. I have major reflux.

22 Q. Is that because of your alcohol abuse?

23 MR. MUELLER: Objection.

24 THE COURT: Overruled.

12:27PM 25 THE WITNESS: It's a family thing. What

12:27PM 1 are you talking about? Are you saying that one thing

2 leads to the other? I'm sure that could be symptoms.

3 But I couldn't link that to that.

4 BY MS. SCHEIBLE:

12:27PM 5 Q. So have you always had this problem with

6 regurgitating --

7 A. Yes.

8 Q. -- into the back of your mouth?

9 A. Yes. Well, I have esophageal spasms.

12:27PM 10 Q. Even before you started drinking?

11 A. Yeah, I've had it all my life.

12 Q. And does it get worse when you drink?

13 A. Couldn't say one way or another, but sure,

14 maybe.

12:27PM 15 Q. And were you drinking on March 11th?

16 A. Yes, I was.

17 Q. How much did you have to drink on

18 March 11th?

19 A. Couldn't recall.

12:28PM 20 Q. Is it because it was so much?

21 A. I said -- like I said I couldn't recall.

22 Q. Did you drink so much that you blacked out

23 and now you don't know how much you drank?

24 A. No, that's not it. I had some drinks. I

12:28PM 25 was up late. I work, sometimes, over at the pub that

12:28PM 1 was near my house, so I went down there, had some food,

2 had some drinks and was doing my computer work there

3 and then went home. Went to sleep before I went and

4 picked up my son.

12:28PM 5 Q. How many drinks is a lot for you?

6 A. I don't know.

7 Q. Is three a lot?

8 A. No, probably not.

9 Q. Is five a lot?

12:28PM 10 A. Just depends on what are you considering a

11 drink?

12 Q. What do you consider a drink?

13 A. I mean a beer?

14 Q. Yes.

12:28PM 15 A. Yeah, five beers is a lot of beer.

16 Q. So if you had five beers in one night,

17 you'd remember that?

18 A. Yeah.

19 Q. And when did you stop drinking on

12:28PM 20 March 11th?

21 A. Sometime late that morning.

22 Q. Did you feel drunk when you stopped?

23 A. When I stopped?

24 Q. Yes.

12:28PM 25 A. I was probably buzzed, yes.

12:29PM 1 Q. What did you do?
 2 A. I went home.
 3 Q. How did you get home?
 4 A. Took an Uber.
 12:29PM 5 Q. And then how did you get your car?
 6 A. Because I took an Uber there.
 7 Q. Uber where?
 8 A. To the pub.
 9 Q. At what time?
 12:29PM 10 A. Probably woke up around two in the
 11 morning.
 12 Q. So you took an Uber from your house to the
 13 pub at two in the morning to get your car?
 14 A. No. Took an Uber to the pub, where I did
 12:30PM 15 my work, had some drinks knowing that I'd have to go
 16 back home. It's literally like two blocks from my
 17 house so it's easier to just Uber both ways.
 18 Q. It's easier to Uber than to drive?
 19 A. Correct.
 12:30PM 20 Q. And why is that?
 21 A. Because I didn't want to drink and drive.
 22 Q. And is that how you normally get to work?
 23 A. Well, it's not -- I don't always work
 24 there. I don't -- what are you referencing? I'm not
 12:30PM 25 sure quite -- so my work is remote. I'm out of town a

12:30PM 1 lot. I literally do everything on the run. So it just
 2 so happened I couldn't sleep, and so I was working late
 3 at night and I pulled out my computer and was doing
 4 reports.
 12:30PM 5 Q. So what time did you go to the pub?
 6 A. Like I said, probably around two in the
 7 morning.
 8 Q. I thought that you previously testified
 9 that you were drinking around 11:00 p.m. on
 12:30PM 10 March 11th?
 11 A. That's not correct.
 12 Q. So walk me through the day on March 11th.
 13 A. Can you remind me where I said that? I
 14 don't remember saying that.
 15 THE COURT: She's moved on.
 16 BY MS. SCHRIBER:
 17 Q. So on March 11th, in the afternoon, when
 18 do you first go to the pub?
 19 A. On March 11th?
 12:30PM 20 Q. Correct.
 21 A. I just told you. Two in the morning.
 22 Q. You started drinking on the 11th?
 23 A. Well, two in the morning would be the
 24 11th.
 12:30PM 25 Q. So you were drinking at two o'clock in the

12:30PM 1 morning on March 11?
 2 A. No, I'm sorry, you're right. It would
 3 have been the 12th at two in the morning.
 4 Q. But you said you were drinking on the
 12:30PM 5 11th?
 6 A. I was referring to the 12th.
 7 Q. Okay. So on the 12th you got to the pub
 8 at two o'clock in the morning?
 9 A. Correct.
 12:31PM 10 Q. To start doing your work?
 11 A. Uh-huh.
 12 Q. And having a few beers?
 13 A. Yes.
 14 Q. And you had more than two but less than
 12:31PM 15 five?
 16 A. Like I said, I couldn't recall how many.
 17 Q. You don't recall how many, and then you
 18 took an Uber home around what time?
 19 A. Somewhere in the morning. Eight, 8:30.
 12:31PM 20 Q. And what did you do when you got home?
 21 A. Went right to sleep.
 22 Q. What time did you wake up?
 23 A. Right before I had to get my kid. I was
 24 actually late. He gets out of school about 2:05.
 12:31PM 25 Q. How often do you pick the kid up?

12:31PM 1 A. When I have him. I have him every other
 2 week.
 3 Q. You've previously testified that you were
 4 buzzed when you came home, so when you woke up how did
 12:31PM 5 you feel?
 6 A. Like I said, I felt fine. I was tired
 7 because I hadn't slept very well.
 8 Q. And if you had still been drunk, would you
 9 have gone to pick your kid up?
 10 A. No. Absolutely not.
 11 Q. What about if you had been more tired,
 12 would you still have gone to pick him up?
 13 A. Well, yeah. I mean, I have to get him so
 14 it's either that or I call his mom.
 12:32PM 15 Q. And how often do you call his mom to pick
 16 him up?
 17 A. His mom now or mom picks him up with work
 18 situations and stuff. Quite a bit actually. It could
 19 be a couple times a week.
 12:32PM 20 Q. How long after you stopped drinking will
 21 you wait until you drive?
 22 A. Like I said, I wasn't feeling anything so,
 23 I don't know, usually go home and sleep, and then when
 24 I wake up if I, you know, if I feel okay, I feel okay.
 12:33PM 25 Q. So then why would you have been blowing a

12:33PM 1 blood alcohol of .16?

2 A. Couldn't tell you that. I'm not an expert

3 on the machine and I'm definitely not an expert on the

4 checklist they took either.

12:33PM 5 Q. Where do you pick your kid up at school?

6 Like is it a roundabout, is it a parking lot?

7 A. A rec center.

8 Q. A rec center.

9 A. In front of the swimming area.

12:33PM 10 Q. And does he get in the front seat or back

11 seat?

12 A. Front seat.

13 Q. And did he say anything to you that day

14 when he got in the car?

12:33PM 15 A. No.

16 Q. Do you guys normally talk in the car?

17 A. Sure.

18 Q. What do you talk about?

19 A. School. About what's going on. We listen

12:34PM 20 to music.

21 Q. And on this day you guys got into a car

22 accident, right?

23 A. That's correct.

24 Q. How did that car accident happen?

12:34PM 25 A. Well, coming down the road, I was actually

12:34PM 1 driving, we come back and go down Pecos. So we go down

2 Russell and down Pecos. I was driving back and this

3 van was tailing us for blocks, and I actually made

4 mention to my son like this guy keeps tailing me. And

12:34PM 5 so I finally actually rolled down my window and put my

6 hand out the window like, you know, what's going on.

7 Like the guy was right on top of me. So I was coming

8 into the intersection, and as the previous guy

9 explained the right lane was actually deep, but I was

10 coming in so there was only one car in front of me, and

11 so, you know, because I was looking in the rearview

12 mirror back at him, as soon as I was coming to the

13 intersection I pushed on my brakes because it was a red

14 light, and that's when he ran into the back of me.

12:35PM 15 MS. SCHEIBLE: Can I have brief

16 indulgence, your Honor?

17 THE COURT: Yes.

18 BY MS. SCHEIBLE:

19 Q. Did your son say anything to you that day

12:35PM 20 about smelling alcohol?

21 A. No.

22 Q. Has he ever said anything before or since

23 then?

24 A. Well, he has in the past, yeah.

12:35PM 25 Q. So he's talked to you about drinking?

12:35PM 1 A. Well, he's talked to me about he can smell

2 it on my breath at home.

3 Q. And --

4 MR. MUELLER: Objection. This is far

12:36PM 5 beyond the scope of direct examination.

6 THE COURT: What's the relevance? You're

7 objecting as to scope. Are you also -- just scope?

8 MR. MUELLER: Scope and relevance.

9 THE COURT: Where are we going with this,

12:36PM 10 Miss Scheible? I presume it was something with regard

11 to whether Mr. Molen has a drinking problem which would

12 be relevant to this particular day, but I don't know.

13 MS. SCHEIBLE: Yes, your Honor, and I'm

14 trying to walk the line so to speak of not getting

12:36PM 15 outside of --

16 THE COURT: He's already said that his son

17 has asked him or has said something about alcohol on

18 his breath, so I think let's move on from there. Go

19 ahead.

12:36PM 20 BY MS. SCHEIBLE:

21 Q. Has your son ever asked you not to drive

22 him because you were drinking?

23 A. No.

24 Q. If he asked you not to drive him because

12:36PM 25 you were drinking, how would you respond?

12:36PM 1 MR. MUELLER: Objection. Calls for

2 speculation. It's far beyond the scope of cross and

3 it's not relevant, and it's also speculation.

4 THE COURT: If he had asked. I think he

12:37PM 5 said that he had not asked.

6 MS. SCHEIBLE: But if he had -- if he did

7 that, how would he respond?

8 THE COURT: I'm going to sustain the

9 objection.

12:37PM 10 BY MS. SCHEIBLE:

11 Q. How often do you drink?

12 A. Actually, I don't drink anymore.

13 Q. Why is that?

14 A. Because of this whole thing.

12:37PM 15 Q. Back in March of this year, how often were

16 you drinking?

17 A. I traveled a lot. You know, I was

18 drinking quite a bit.

19 Q. Every day?

12:37PM 20 A. Definitely two or three days a week.

21 Q. Two or three days a week. Would you get

22 drunk?

23 MR. MUELLER: Objection. Speculation and

24 more foundation.

12:37PM 25 THE COURT: I will overrule it.

12:37PM 1 THE WITNESS: Excuse me?
 2 BY MS. SCHEIBLE:
 3 Q. Would you get drunk those two or three
 4 days a week that you drank?
 12:37PM 5 A. No. I mean, there was times I'm sure it
 6 happened, but most of the time I stayed levelheaded.
 7 Q. And so did you normally drive to get
 8 places?
 9 A. Like I said, when I can take an Uber and
 12:38PM 10 things like that, if I knew I was drinking, I was
 11 pretty smart about that. I have always stayed within
 12 the area of my house. Just that I could take an Uber
 13 for cheap.
 14 Q. And -- I just -- have you ever been in a
 12:38PM 15 Breathalyzer before?
 16 A. Have I?
 17 Q. Yes.
 18 A. No.
 19 Q. And in the past has it read --
 12:38PM 20 MR. MUELLER: Objection. Speculation.
 21 Beyond the scope of direct.
 22 THE COURT: I think he said something
 23 about not being an expert in the machine or something.
 24 So I think asking about the machine and whether he had
 12:38PM 25 the machine before I think is arguably relevant if he's

12:38PM 1 claiming that it wasn't working and things like that.
 2 So I will allow you to ask the question.
 3 BY MS. SCHEIBLE:
 4 Q. So when you've blown into a Breathalyzer
 12:39PM 5 before has it produced what you thought was an
 6 erroneous result?
 7 A. Like I said, I don't know what results
 8 read. Like I said, I don't know how completely they
 9 work perfectly. You know, I know how they're applied.
 12:39PM 10 I don't know how the functions work.
 11 Q. So let me ask it this way. Have you blown
 12 into a Breathalyzer before when you didn't feel drunk?
 13 A. Yeah.
 14 MR. MUELLER: Objection. Speculation and
 12:39PM 15 beyond the scope of direct examination.
 16 THE COURT: Well, it's not speculation. I
 17 will allow the question. I think the question was have
 18 you ever blown into an Intoxilyzer when you're not
 19 drunk.
 12:40PM 20 BY MS. SCHEIBLE:
 21 Q. When you didn't feel drunk?
 22 A. Yeah.
 23 Q. Other than this time?
 24 A. Yeah.
 12:40PM 25 Q. And on those occasions was the results --

12:40PM 1 what was the result?
 2 A. I wasn't drunk.
 3 Q. And have you ever blown into a
 4 Breathalyzer when you have felt drunk?
 12:40PM 5 A. Yeah.
 6 Q. And what were the results?
 7 A. I couldn't recall.
 8 MS. SCHEIBLE: I have nothing further,
 9 your Honor.
 12:40PM 10 THE COURT: Any redirect, Mr. Mueller?
 11
 12 REDIRECT EXAMINATION
 13 BY MR. MUELLER:
 14 Q. Sir, did you feel the effects of alcohol
 12:40PM 15 when you were driving?
 16 A. I did not.
 17 Q. And Mr. Smith had hit you from behind,
 18 correct?
 19 A. That's correct.
 12:40PM 20 Q. And were you in fact waiting for the
 21 officers as required by law when they arrived?
 22 A. That's correct.
 23 MR. MUELLER: Nothing further.
 24 THE COURT: Are we done?
 12:40PM 25 MS. SCHEIBLE: Yes, your Honor.

12:40PM 1 THE COURT: Have a seat, sir. Thank you.
 2 Any additional witnesses, Mr. Mueller?
 3 MR. MUELLER: No, Your Honor. Defense
 4 rests.
 12:40PM 5 THE COURT: Any rebuttal witnesses, State?
 6 MS. SCHEIBLE: No, Your Honor.
 7 THE COURT: Okay. Do I have all pieces of
 8 evidence that you want -- I should have asked you
 9 before you rested, Mr. Mueller. Do we have anything
 12:40PM 10 that you'd move to admit that hasn't been admitted or
 11 that you want move to admit that has not been?
 12 MR. MUELLER: No, Your Honor. The clerk
 13 has all the documents I have referenced on the record
 14 and those admitted and not admitted.
 12:41PM 15 THE COURT: Okay. State, do you want to
 16 wait or reserve at this time?
 17 MS. SCHEIBLE: Yes, please, your Honor.
 18 THE COURT: Mr. Mueller, in light of
 19 everything I said before your client took the stand,
 12:41PM 20 what would you like to do? Would you like to argue,
 21 what would you like? Your pleasure, sir.
 22 MR. MUELLER: I'm going to accept the
 23 Court's invitation to give points and authorities on
 24 the admissibility of the breath test outside of the
 12:41PM 25 two-hour line. I believe it's an important issue. And

12:41PM 1 unfortunately it's -- I'd like to give points and
2 authorities. Respectfully, I'd also like to make a few
3 points in closing.

4 THE COURT: Go ahead.

12:41PM 5 MR. MUELLER: And submit additional points
6 and authorities.

7 Specifically, Judge, this is
8 extraordinary. You don't know this because you only
9 see them in criminal court. I do a fair number of car
10 wrecks as well, and candidly, nothing makes me
11 happier --

12 THE COURT: I do see car wrecks as well.
13 I do small claims and civil, Mr. Mueller. I'm not like
14 these J.P.'s downtown. We do it all here in Henderson
15 so go ahead.

16 MR. MUELLER: All right. Thank you,
17 Judge. So you know exactly what it means when somebody
18 comes into your office and says I got hit from behind.
19 That means it's done with liability. Person runs into
20 you from behind is responsible for the accident. We
21 have the exact same accident that generally insurance
22 companies just ask how much you want and they write a
23 check for it,

24 In this case Mr. Molen is a victim. He
25 gets rear ended by a guy who is following too close to

12:42PM 1 him. He says, and Mr. Smith is minimizing because we
2 know he says, well, it was a 5-mile an hour accident.
3 Yeah, not so much. You can look at the bumper and you
4 can see the damage on the car. That is clearly more
5 than a 5-mile an hour bumper tap.

6 MS. SCHEIBLE: Objection, your Honor. We
7 had no testimony on this fact. It is pure speculation.

8 MR. MUELLER: Pictures speaks for itself.

9 MS. SCHEIBLE: They do not.

10 THE COURT: I think the argument is, I can
11 take a look at the picture, it goes to weight as to how
12 significant I thought that accident was in relationship
13 to -- I think Mr. Smith testified he initially said
14 five and said no more than 10. I will allow you to
15 make the argument. It's true there is no expert
16 testimony on accident reconstruction here what a bumper
17 should look like after that type of accident. But I'll
18 let you make the argument. Go ahead, Mr. Mueller.

19 MR. MUELLER: Thank you, Your Honor. Then
20 the officers get called to the scene by Mr. Molen,
21 15:20. So we have the two hour and some odd minute
22 time test that the breath test is at two hours.

23 THE COURT: I don't mean to interrupt you,
24 Mr Mueller, Was there testimony that your client
25 called 911?

12:43PM 1 MS. SCHEIBLE: There wasn't, your Honor.

2 THE COURT: I don't recollect that.

3 MR. MUELLER: Well, Mr. Smith didn't call
4 them so --

12:43PM 5 THE COURT: There was no testimony.

6 MR. MUELLER: No, it's not in the record
7 directly.

8 THE COURT: There is no testimony as to
9 how it is that the call went out, on either side of
10 this point, but go ahead. I just want to make sure
11 that I'm right in my recollection.

12 MR. MUELLER: All right. Now, the
13 officer's report says the call comes to them at 15:20.
14 We can infer that the report is made after the
15 accident.

16 MS. SCHEIBLE: Your Honor, I'm sorry to
17 cut off defense counsel.

18 THE COURT: This is just closing argument.

19 MS. SCHEIBLE: But --

12:44PM 20 THE COURT: I will let you do rebuttal.
21 Go ahead, Mr. Mueller.

22 MR. MUELLER: I actually showed him his
23 report and had him read it so I know that's in the
24 record. He said he got the call -- the call came in
25 15:20, they got there 15:38. Now, here's the practical

12:44PM 1 problem. You have two hours from the time of the
2 accident to the time of the breath test. That doesn't
3 happen here. We got two hours and --

4 MS. SCHEIBLE: I'm sorry.

12:44PM 5 MR. MUELLER: Counsel --

6 THE COURT: Hang on. I will let you
7 clarify whatever you think he said to me that's
8 incorrect.

9 MS. SCHEIBLE: It's not about the defense
10 counsel's argument, it's a procedural question.

11 THE COURT: Which is?

12 MS. SCHEIBLE: Are we adjudicating today?

13 THE COURT: No. I'm just letting you guys
14 argue and if you want to brief the issue later on we
15 can -- I have to read -- I have to watch an hour's
16 worth of video. All right, Ms. Scheible, what is your
17 question?

18 MS. SCHEIBLE: Is it arguments, briefing,
19 more arguments or arguments, briefing, decision?

12:45PM 20 THE COURT: I'm not going to reargue all
21 the facts of the case. I think Mr. Mueller wanted to
22 brief whether I can admit -- I offered up the
23 opportunity to brief whether I can admit the test
24 results if it's after two hours. I'm not saying that
25 I've made a decision as to whether it is after two

12:45PM 1 hours. Mr. Mueller is saying it is after two hours.
2 My presumption is you're going to say that they were
3 within the two hours based on the 3:20 call out and the
4 first breath test being at 17:37, correct?

12:45PM 5 MS. SCHEIBLE: Correct, your Honor.

6 THE COURT: So if it's outside of two
7 hours, I think Mr. Mueller wants to be able to provide me
8 some points and authorities on that. So the way I'm
9 treating this is this is our closing argument here. I
10 still need to watch the video. If Mr. Mueller wants to
11 present something on that, I will certainly let you,
12 Miss Scheible, respond to it, and we will argue that
13 particular point. We're not going to reargue the whole
14 facts at a later date.

12:46PM 15 MS. SCHEIBLE: Okay. And I'm sorry for
16 interrupting.

17 THE COURT: That's all right. It's a
18 little unusual. Go ahead, Mr. Mueller.

19 MR. MUELLER: All right. Thank you. So
20 my colleague -- so we know from the time of the call
21 out and the time the officers arrived and the time of
22 the breath test it's outside of two hours, and my
23 colleague obviously has a slightly different take.

24 Then there's -- she advances or appears to
25 in going to events the argument well, Mr. Molen might

12:46PM 1 have been sitting in his car while waiting for the
2 police officers, therefore it's arguably not it's
3 outside of two hours. Practical problem is that it's a
4 duty imposed by law. If you have to sit and wait for a
5 officer as required by law, you can't then turn around
6 and use that duty required by law as the basis for a
7 crime. Specifically, you've got to sit and wait for
8 the cops. If you're sitting and waiting for the cops,
9 now you're committing a crime. There's a circularly
10 reasoning there that needs to be addressed by my
11 colleague.

12 Now, let's go through the field sobriety
13 test. What is the average every day common sense? I
14 go over to the pub across the street and come back
15 after court, how would all of us determine whether I'd
16 had too much to drink? Well, it would be my demeanor.
17 Well, let's look at what the officer saw when they saw
18 it, in contemporaneously. Fifteen minutes they're
19 talking to Molen. They don't say a word. Nobody says
20 a word. They don't even think about it. Fifteen
21 minutes they're talking to him, taking pictures of
22 this, looking at that, asking for witnesses. They
23 don't say a word about -- and don't begin an
24 investigation. Then the younger officer goes and talks
25 to the slightly young -- less young officer and says I

12:47PM 1 think I smell liquor. I didn't smell it. Well, maybe.
2 That's maybe. So that's where we're at and we're
3 already now at half hour and 20 something minutes in
4 the discussion.

5 So what does the officer do? He comes out
6 and conducts a field sobriety test. He comes out and
7 actually just does one RUK test. Did you ask him if he
8 had contacts? Yes. Did you have him remove the
9 contacts? No. Okay, what did you do then? Well, then
10 I patted him down, and I had him do a series of field
11 sobriety tests. Walk and turn test. Doesn't step off
12 a line, Judge. Doesn't miss touching heel to toe. The
13 officer can't remember any of the clues but he knows he
14 fails. So then I ask him, officer, what are the eight
15 clues? If you're going to go from memory, live by your
16 memory, die by your memory. What are the eight clues?
17 He got six. He couldn't even remember the eight clues
18 sitting on the witness stand after presumably my
19 colleague has actually prepped him for testimony. He
20 still can't remember them. Now that's the test.

21 Now, the other thing that came through,
22 and my colleague didn't -- I didn't say a word about
23 this, but I want you to recall it. Officer Nelson
24 didn't say -- or didn't say he put his foot down during
25 the walk of the one leg stand. Okay. So we literally

12:49PM 1 have a don't step off the line, don't miss touching
2 heel to toe, don't put your foot down case and with
3 that objective information our officers arrest him.
4 Okay. Standard for arrest is relatively low. At this
5 point we're functioning on a RUK test and a thought
6 they had smelled liquor.

7 So then we go down to the breath machine.
8 Miss Lanz very learned in the subject, even I as a
9 learned opponent will concede that she's very good at
10 what she does. She tells the Court the following place
11 of information. The Nevada Administrative Code
12 requires the breath sheet.

13 THE COURT: I'm sorry?

14 MR. MUELLER: The check sheet is required
15 by law, has force and effect of law. Nevada
16 Administrative Code that the breath observation period
17 is supposed to be close visual contact. Got to keep
18 your eye on them. All right. So that's the background
19 against it. So then we talk to our officers and what
20 have they done? Well, at 17:11 I conducted a breath
21 observation period. You agree, officer, it's not a
22 really pleasant thing to do sitting there and staring
23 at strangers, right? Well, yeah, you're right. So why
24 did you do it for an extra 12 minutes? I don't
25 remember why I did that. Where were you? I don't

12:50PM 1 remember. Well, could you have been doing some
2 paperwork? Well, what paperwork needs to be done? He
3 came up with a whole laundry list of paperwork that
4 needs to be done: Declaration of Arrest, a report, DMV
5 45, the booking sheet. All the stuff that he needs to
6 do.

7 So we called the field training officer
8 in. He can't recall why there's a 24-minute breath
9 observation period either and he's only done four or
10 five of them. He doesn't recall this at all. And then
11 he gives us the magic words, and that's what -- the
12 thing about cross-examination. Well, why would you do
13 more than 15 minutes observation period? And his
14 phrase was, if we were busy. That's the word he came
15 up with on the cross-examination, if we were busy.
16 What do you mean by busy? Well, were you doing some
17 paperwork? Then he starts getting a little
18 uncomfortable on the witness stand. Yeah, yeah, we
19 could have been doing some paperwork.

20 Now, Mr. Molen testifies why do we have
21 this big gap of memory and this big block of
22 unaccounted period of time? Mr. Molen told you exactly
23 what happened. He got sat in the back row, a female
24 officer came over and took the handcuffs off, they
25 didn't do a breath observation period at all. They --

12:51PM 1 officers, and, I know they mean well, and it's hard to
2 have to say bad things about kids who are doing their
3 best, but the reality is zero credibility. Zero
4 credibility. You can't account for me staring at
5 someone for 15 more minutes than I need to, and the
6 best recollection they got is maybe we were busy. It
7 didn't happen. They didn't do a breath observation
8 period.

9 What does Miss Lanz say about that? She
10 says that no breath observation period and you don't
11 have a scientifically valid test.

12 So here is what we've got. State's got
13 two of theories of criminal liability. Bad driving.
14 Well, we have no bad driving. We got under the
15 influence. Well, what do you have? We don't have
16 weaving, we don't have a running a red light, we don't
17 have speeding, we don't have running over a curb, we
18 don't have speeding up or slowing down. We have a guy
19 sitting at the light getting rear ended. We have no
20 reason to believe he can't drive safely. Then we get a
21 series of field sobriety tests.

22 Two officers said did you smell liquor?
23 Well, I don't know, to which he answered a passed walk
24 and turn, a passed one leg stand and get arrested
25 anyway. Now, you get down to jail and the guys botch

12:53PM 1 the test up. It's just about that simple.

2 Your Honor, there is literally no reason
3 to convict Mr. Molen of this offense. I'm going to ask
4 the Court for a finding not guilty. With that I will
5 accept the Court's invitation to submit supplemental
6 points and authorities on whether you can consider an
7 out of two hours test as evidence of intoxication.

8 THE COURT: Miss Scheible.

9 MS. SCHREIBER: I think this case is pretty
10 cut and dry. We have not just a police officer from
11 Henderson, we have an officer in training who has his
12 field officer -- field training officer with him
13 looking over his shoulder making sure that he does
14 everything by the book, and we have an individual here
15 who has been so irresponsible as to get behind the
16 wheel after having too much to drink and pick up his
17 son from school. He's then unfortunate enough to get
18 into a car accident. It doesn't matter who is at
19 fault. It doesn't matter how the police come into
20 contact with him. It doesn't matter how they discover
21 that he's under the influence. The point is that they
22 discover it. And it's Officer Groll who first smells
23 the alcohol on the defendant's breath. He does a
24 check-in with his field training officer just like we
25 would want any training officer to do. Now, I think I

12:54PM 1 smell alcohol, am I right? We have honest testimony
2 from both of them that says that initially Officer
3 Nelson didn't also smell alcohol so he went back to the
4 defendant, had a closer conversation, determined that
5 actually Officer Groll might be onto something and they
6 decide to investigate further. This then becomes a DUI
7 investigation. That is exactly how this process is
8 supposed to work. When police officers come into
9 contact with the person who has been driving a vehicle
10 and they think that person may be under the influence
11 of alcohol, they are supposed to investigate it in
12 order to keep all of us safe, and that's what they did.

13 They go through the field sobriety tests
14 and the defendant fails them. He does the horizontal
15 gaze nystagmus test first, with his contacts in, and
16 there is no testimony that he's supposed to take his
17 contacts out, but there's testimony that he failed that
18 test. That is one of the first indicators to Officer
19 Groll that this person might be under the influence.
20 The fact that he does the test twice is not a problem,
21 it's in fact a strength of the case because often we
22 see officers move directly to field sobriety testing,
23 especially when they're more experienced and they're
24 more agile with their investigation, but here we have a
25 younger officer, a newer officer, who wants to make

12:56PM 1 sure that he's doing everything right. So he doesn't
2 just smell alcohol, he does an initial HSG -- HSG,
3 horizontal gaze nystagmus, HGN, an initial HGN, and
4 discovers that there are some indications of
5 intoxication here. So then he starts the process of
6 the full-fledged FST. Full-fledged field sobriety test
7 and he does the HGN again, he does the walk and turn,
8 and he does the one leg stand.

12:56PM 9 In this particular case we happen to have
10 multiple officers who observe the tests because this
11 officer is in training and because of the backup
12 officer. Of course we didn't hear testimony from the
13 backup officers so I'm not going to get into that. I'm
14 just saying that we have three officers present where
15 sometimes we would only have one or two. And in this
16 case we heard from two of those officers that they have
17 the same observations, that they view this person who
18 is failing the walk and turn test, who is failing the
19 one legged stand test. One officer, Officer Groll,
20 testified that he remembers the defendant putting his
21 leg down during the one legged stand test. Officer
22 Nelson remembers him reaching his arms up and failing
23 to maintain his balance. I believe we do not have the
24 checklist in evidence but none of those things are
25 inconsistent with failing the field sobriety test. It

12:57PM 1 indicates you have two different people watching the
2 same person undergo field sobriety testing and failing
3 that testing.

12:57PM 4 Then he gets taken down to the Henderson
5 Detention Center where he is administered a
6 Breathalyzer. I'm going to skip forward a little bit
7 and then go back to the validity of the Breathalyzer
8 test. I just want to point out that he comes in at
9 .172 and .164 when he does his Breathalyzer test. This
10 is more than twice the legal limit. This is an
11 individual who was incredibly intoxicated, who has a
12 history of drinking and doesn't appear as drunk as you
13 or I or somebody else might appear with a blood alcohol
14 level of .172 because he drinks so often.

12:57PM 15 And so at this point in time we have to
16 wonder whether or not the test is accurate, and the
17 only thing, the only thing that defense counsel
18 suggests might be wrong is that the officers had an
19 observation period too long. The issue is that there
20 is no evidence that anything went wrong during the
21 observation period. We heard testimony so many times
22 from both officers and from Miss Lane that the point of
23 the observation period is to make sure that nobody
24 consumes anything or regurgitates any alcohol. There
25 is no evidence whatsoever that any of these things

12:58PM 1 happened. The closest thing we get is on my
2 cross-examination where I'm talking to the defendant
3 about him maybe burping or regurgitating some alcohol
4 which is apparently a problem that he's had in the
5 past, and even if we accept that that's the reason for
6 these extremely high intoxication levels, then that has
7 to mean that there was still alcohol in his stomach
8 that was coming back up through his esophagus in order
9 to blow a .172 and a .164. However, in order to accept
10 that you also have to believe that the officers are
11 lying to you and defendant is telling the truth. That
12 is what defense counsel is asking you to believe, that
13 two officers got on the stand --

12:59PM 14 MR. MUELLER: I'm going to object. I
15 never used the word lying once in my closing. I never
16 accused anybody of lying.

12:59PM 17 THE COURT: They were mistaken, that's
18 what your argument was. Mr. Mueller is saying they
19 were mistaken.

12:59PM 20 MS. SCHUBLE: Yes. Mr. Mueller is saying
21 that these two officers got on the stand and told you
22 they did an observation period when they didn't.
23 Rather, I would suggest to you that they did a very
24 unremarkable observation period. It went on a little
25 bit longer than 15 minutes because there were two

12:59PM 1 officers there, and when you have two officers present
2 one of them can watch the defendant while the other one
3 turns around and does some paperwork, and then they can
4 switch while the other one answers the phone call or
5 their radio or blows their nose or coughs. And when
6 you have two of them present, you might extend the
7 period of time past the 15 minutes.

1:00PM 8 Moreover, the close personal observation
9 nobody testified has to be standing over somebody's
10 shoulder or standing over somebody's face and
11 intimidating in an uncomfortable manner. It just means
12 sitting with them. Sitting with them for a full 15
13 minutes. Close enough that you can hear, see and
14 observe them. And there's no legitimate reason to
15 doubt that that actually happened in this case. That
16 officers were present for the full 24 minutes and the
17 reason that they can't tell you why they extended the
18 observation period beyond 15 minutes is because nothing
19 remarkable happened. The defendant didn't throw up.
20 The defendant didn't have anything to drink. The
21 defendant didn't belch. There wasn't any kind of major
22 distraction at the station. They were simply observing
23 him for some period of time before they started the
24 Intoxilyzer.

1:01PM 25 The defendant himself testified that they

1:01PM 1 had to try it a few times. It seems likely that what
2 happened is they went to the Intoxilyzer at minute 16
3 or 17 and when Officer Groll had to restart it when
4 Officer Groll had to retest it to make sure that he was
1:02PM 5 getting an accurate reading, that took us to the
6 24-minute mark that we have so clearly discussed. And
7 at that 24-minute mark the defendant blows into the
8 Intoxilyzer and his breath alcohol level is .172. This
9 happens one hour and 35 minutes after he first got out
1:03PM 10 of the car.

11 State's Exhibits 1, 2, and 3 I believe will
12 show the screen shot moments from the time that the
13 defendant went from sitting in his car to standing
14 outside of his car. State's Exhibit 9 or 11 which is
1:04PM 15 the printout of the breath strip will show you that the
16 first test occurred at 17:37. 17:37 to 15:39 is less
17 than two hours and the law says that if you have a test
18 corroborated with the second test and that test is
19 taken within two hours that it is per se intoxication
1:05PM 20 for the purposes of the DUI statute. And it does not
21 specify that both tests have to be within two hours.
22 It specifies that one has to be within two hours and
23 that they both have to be within .02 points of each
24 other in order to be accurate and that's what we have
1:06PM 25 here. We have a test that's within .02 points of each

1:07PM 1 other in order to be accurate.

2 There is no doubt, there is no doubt here
3 that the defendant was behind the wheel. There is no
4 doubt here that the defendant drove the car from the
1:08PM 5 intersection where he got into an accident over to the
6 parking lot. There is no doubt that he made it down to
7 the Henderson Detention Center within two hours. And
8 most importantly, I know that we still have to litigate
9 this issue which is why I interrupted opposing counsel
1:09PM 10 so many times, is that there is no way that if he is
11 blowing a .172 at 17:37 hours that at 17:35 or 17:30 or
12 17:25 or 17:20 he's blowing a .08. It's simply
13 impossible that his breath alcohol level doubled during
14 the time that he was sitting in the Henderson Detention
1:10PM 15 Center regardless of who saw him, unless he was in
16 there taking shots. But he already testified to you
17 that he didn't have anything to drink at the Henderson
18 Detention Center. So there is no explanation for these
19 breath alcohol levels except that the defendant started
1:11PM 20 drinking before he got behind the wheel, stopped
21 drinking at some point before he made contact with the
22 officers, and still two hours after he was involved in
23 this accident with his son in the back seat he blew a
24 .172 and a .164. And there is no reasonable doubt as
1:12PM 25 to his intoxication at the time that he was driving the

1:04PM 1 car.

2 THE COURT: All right. Thank you very
3 much. When is Mr. Moles -- I know he's out of town a
4 lot.

1:04PM 5 MR. MUELLER: He comes -- he's up in Big
6 Sky these days.

7 THE COURT: Is there a time in which Mr.
8 Moles is going to be back in town?

9 THE DEFENDANT: I'm back indefinitely.
1:04PM 10 This is the fifth time I've had to come back. I'm
11 broke.

12 THE COURT: Well, you're going to keep
13 coming back I'm assuming because of the case in
14 District Court as well, right? You guys are going to
1:04PM 15 have to decide what you want to do with all this. So
16 how about you give us, why don't we shoot somewhere
17 around 30 days.

18 MR. MUELLER: That will be fine, Judge.
19 Give us a week to get my points and authorities in.

1:05PM 20 THE COURT: That's fine. Let's maybe do
21 45.

22 THE CLERK: January 30th.

23 THE COURT: Sure. And if that becomes a
24 difficult date, I'm more than happy to move it.

1:05PM 25 MS. SCHEIBLE: I just want to clarify

1:06PM 1 that's for the ruling?

2 THE COURT: I will rule at that time and,
3 Mr. Mueller, if you can get me anything and then
4 obviously submit it, serve it on Miss Scheible, and I
1:06PM 5 know we're coming up on the holidays here, sometime
6 before Christmas and that will still give her most of
7 January.

8 MR. MUELLER: All right. Thank you.

9 THE COURT: Just don't hit her with it a
1:06PM 10 day before the 30th, all right?

11 MS. SCHEIBLE: Your Honor, can we get a
12 deadline?

13 MR. MUELLER: The 15th will be fine.

14 THE COURT: 19th of December.

1:06PM 15 MS. SCHEIBLE: Your Honor, when would you
16 like my response?

17 THE COURT: How about a week into January?

18 THE CLERK: January 6th.

1:06PM 19 THE COURT: If you guys need more time,
20 work it out between yourselves.

21 MR. MUELLER: Thank you.

22 MS. SCHEIBLE: Thank you.

23
24 (The proceedings concluded.)
1:06PM 25

1:06PM

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ATTEST: Full, true and accurate
transcript of proceedings.

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1:06PM

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/s/Lisa Brunske

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LISA BRUNSKA, CSD NO. 706

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<p>ATTEST: [1] 176/24 BY MR. MUELLER: [43] 21/23 23/8 23/14 50/13 51/7 52/9 53/24 54/10 55/6 57/2 57/11 58/20 59/6 59/14 59/25 60/7 61/10 64/2 67/17 68/3 68/20 69/10 69/24 71/9 74/1 74/18 75/5 77/10 77/21 79/22 80/3 81/4 82/12 110/7 117/16 119/4 121/12 127/1 127/6 136/21 138/18 139/15 155/12 BY MS. SCHEIBLE: [54] 9/3 11/9 11/21 12/3 13/24 18/8 19/25 20/22 21/13 25/11 25/24 28/9 31/2 31/21 32/9 34/6 34/16 38/19 39/14 44/12 45/5 45/11 46/8 48/19 49/1 83/7 85/4 89/4 92/25 93/14 94/6 95/19 97/16 100/22 102/10 108/12 109/7 109/18 114/22 115/19 117/3 125/13 128/1 140/15 141/14 142/10 143/3 146/15 150/17 151/19 152/9 153/1 154/2 154/19 I.T. DERRICK: [7] 56/11 56/13 56/18 58/17 61/5 62/22 63/21 MR. MUELLER: [152] MS. SCHEIBLE: [100] THE CLERK: [11] 8/13 8/18 24/22 25/2 94/25 95/5 114/8 114/13 130/2 175/21 176/17 THE COURT: [249] THE DEFENDANT: [1] 175/8 THE WITNESS: [28] 8/17 8/21 19/20 21/11 25/1 25/5 28/8 70/18 70/20 71/5 80/1 84/6 86/22 93/9 95/4 95/8 108/11 113/22 114/12 114/16 129/10 129/12 138/16 139/10 141/12 142/9 142/24 152/25</p>	<p>146/19 146/22 146/24 147/5 12 [10] 77/12 77/15 77/23 78/11 78/15 78/17 78/18 78/20 116/14 164/24 12th [16] 9/10 9/19 26/14 26/15 52/1 52/5 52/23 85/12 96/3 96/9 96/16 115/23 126/12 147/3 147/6 147/7 13 [1] 63/16 13:3 [1] 26/23 13th [2] 52/18 52/19 18 [31] 19/25 44/23 64/8 64/8 64/23 65/17 65/18 65/21 65/23 73/3 76/8 76/18 76/22 77/1 77/3 90/24 92/22 94/11 108/17 108/20 108/25 110/21 111/12 121/5 139/19 165/13 166/5 171/25 172/7 172/12 172/18 15-minute [8] 76/5 91/18 119/16 120/22 120/24 15:20 [9] 7/11 28/9 28/18 28/19 53/7 53/10 158/21 159/13 159/25 15:38 [5] 62/10 62/15 62/16 62/24 159/25 15:38 on [1] 63/25 15:39 [4] 26/24 28/22 29/12 67/4 15:39 hours [1] 50/4 15:39 is [1] 173/16 15:39 or [1] 33/1 15:39:45 [2] 33/9 33/13 15:40 [2] 61/1 62/18 15:42 [1] 63/4 15th [2] 116/15 176/13 16 [1] 173/2 16:12 [4] 67/2 67/4 67/9 67/12 16:17 [2] 67/13 67/15 16:20 [1] 7/22 16:37 [1] 67/15 17 [2] 7/18 173/3 17:11 [3] 49/7 75/12 77/1 17:11 I [1] 164/20 17:20 [1] 174/12 17:25 or [1] 174/12 17:26 [1] 77/4 17:27 [2] 8/3 77/7 17:27 is [1] 69/1 17:27 on [1] 68/22 17:27 you [1] 50/23 17:30 or [1] 174/11 17:35 or [1] 174/11 17:37 [3] 77/10 161/4 173/16 17:37 hours [2] 49/23 174/11 17:37 to [1] 173/16 17:39 [1] 77/8 17:41 hours [1] 50/1 186 [2] 1/25 177/7 18:10 [1] 69/10 18:15 into [1] 69/17 19 [1] 61/2 19FH0521X [3] 1/9 4/5 131/10 19th [1] 176/14</p>	<p>2001 [1] 9/16 2011 [1] 117/24 2015 [1] 95/25 2019 [5] 1/18 4/1 115/23 116/14 116/15 20th [1] 95/25 21 [1] 7/18 23 [1] 3/4 24 [7] 111/12 120/25 121/3 121/8 122/3 122/13 172/16 24-minute [7] 94/10 122/18 124/3 124/14 165/8 173/6 173/7 27th [1] 90/11 2:05 [1] 147/24 2:30 and [1] 21/13</p>
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CLERK OF DISTRICT COURT

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FILED

JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-VS-

MATTHEW HANEY MOLEN,
#8014510

Defendant.

CASE NO: 19CRH060443-0000

DEPT NO: 1

STATE'S RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF
ON CONSIDERATION OF A SINGLE BREATH TEST TAKEN
OUTSIDE OF THE TWO HOUR LIMIT

DATE OF HEARING: JANUARY 30, 2020
TIME OF HEARING: 9 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 Supplemental Brief on
Consideration of a Single Breath Test Taken Outside of the Two Hour Limit.

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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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 Matthew Molen ("Defendant") was charged by way of Criminal Complaint on or about
4 March 13, 2019 with CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B
5 Felony - NRS 200.508.1 - NOC 55226) and DRIVING UNDER THE INFLUENCE
6 (Misdemeanor - NRS 484C.110, 484C.400, 484C.105 - NOC 53900).

7 On August 27, 2019, a Preliminary Hearing was held on Count 1 CHILD ABUSE,
8 NEGLECT, OR ENDANGERMENT (Category B Felony - NRS 200.508.1 - NOC 55226),
9 for which this Honorable Court found probable cause. On December 5, 2019, a non-jury trial
10 was held before this Honorable Court on Count 2 DRIVING UNDER THE INFLUENCE
11 (Misdemeanor - NRS 484C.110, 484C.400, 484C.105 - NOC 53900). Both parties rested on
12 December 5, 2019, but this Honorable Court granted Defendant leave to file a Supplemental
13 Briefing before making a final adjudication. Defendant filed the instant Brief on
14 December 16, 2019 and the State herein responds.

15 **STATEMENT OF THE FACTS**

16 Officers from the Henderson Police Department responded to a vehicle collision near
17 the intersection of Pecos and Robindale on March 12, 2019. Preliminary Hearing Transcript
18 8/27/2019 ("PHT") 7-9. Officer Groll was dispatched at approximately 1520 hours, and
19 arrived at 1538 hours. PHT 38¹. After Officer Groll arrived, he saw Defendant exit his
20 Hyundai, which was parked in a parking lot near the intersection. PHT 9. When Officer Groll
21 approached Defendant, Officer Groll detected alcohol on Defendant's breath. PHT 10. Officer
22 Groll administered a series of Field Sobriety Tests, including a horizontal gaze nystagmus,
23 walk and turn, and one leg stand test. PHT 14-15. On the horizontal gaze nystagmus test,
24 Defendant exhibited six out of six possible clues of impairment. PHT 14. On the walk and turn
25 test, Defendant exhibited three out of eight possible clues of impairment. PHT 16. On the
26 one-leg stand test, Defendant exhibited three of four possible clues of impairment. PHT 18.

27 ///

28 ¹ Footage from Officer Groll's body camera was admitted as evidence during the non-jury trial on December 5, 2019 with accurate time stamps, which shows Officer Groll arriving at 1538 hours.

1 Based on the indicators of impairment, Officer Groll placed Defendant under arrest at
2 that time. PHT 22. Officer Groll transported Defendant to the Henderson Detention Center
3 where Officer Groll administered a breath test to Defendant. PHT 26. In accordance with
4 policy, Officer Groll first observed Defendant for at least fifteen minutes prior to giving the
5 sample for the breath test. PHT 26-27. During this time, Officer Groll did not observe
6 Defendant place anything in his mouth, remove anything from his mouth, or anything else that
7 might affect the results of a breath test. PHT 26-28.

8 At 1737 hours on March 12, 2019 Defendant provided a breath sample which had a
9 .172 breath alcohol concentration. PHT 33. Four minutes later, at 1741 hours, Defendant
10 provided a breath sample which had a breath alcohol concentration of .164. Id.

11 ARGUMENT

12 **L. Defendant Provides No Justification For Considering The Two Breath Tests 13 A Single Test**

14 The case law Defendant cites to support his assertion that the two tests administered at
15 1737 hours and 1741 hour, respectively, should be considered a single test are not cases on
16 point. Defendant's Brief at 3. In Burcham, the Defendant's blood alcohol level was measured
17 at .07 about an hour after he was driving, and .04 another hour after the first test. Sheriff
18 Clark County v. Burcham, 124 Nev. 1247, (2008) The Court ruled "expert testimony regarding
19 retrograde extrapolation or an explanation by the State is not required in Grand Jury
20 proceedings under these circumstances." Id at 328.

21 Moreover, the Court found that "Burcham erroneously relies on a Texas Court of
22 Criminal Appeals case, *Mata v. **334 State*, to support his argument that the State may not
23 rely on retrograde extrapolation unless it presents an expert to testify on the technique."
24 Sheriff Clark County v. Burcham, 124 Nev. 1247 at 1259 (internal citations omitted.)

25 In Burcham, the Nevada Supreme Court addressed when a Grand Jury or jury could
26 make an inference as to whether a Defendant's blood alcohol concentration was rising or
27 falling. Id. For that, it implied, two tests taken minutes apart would not be instructive. Id. Two
28 tests would be needed with enough time in between to determine the direction of a trend.

1 The instant case is entirely different. NRS 484C.200 requires consecutive tests of the
2 breath in order to control for possible errors. The legislature instructs us that when two
3 consecutive tests differ by more than .02, the accuracy is questionable. This makes sense. If
4 a Defendant's breath alcohol were measured to be .01 and a few minutes later .11, a reasonable
5 person would worry that one of the results was erroneous. Rather than require lawyers to
6 bicker about just how big the difference must be to trigger said "worry," the legislature has
7 proscribed a number and it is .02. In the instant case, the two tests are different by .008, so
8 the Court may rest assured that both of those numbers are accurate.

9 The next question for the Court, is whether there is a test before it that was taken within
10 two hours of Defendant being in actual control of the vehicle.² There is. The first test was
11 taken 1 hour and 59 minutes after Officer Groll observed Defendant exit his car.

12 **II. A Breath Test Was Conducted Within The Two Hour Time Limit As Required By**
13 **Nevada Revised State 484C.110 And 484C.200**

14 1737 is an hour and 59 minutes after 1538. Even if this Court accepted Defendant's
15 puzzling assertion that the tests were performed so close in time as to be considered one test,
16 he provides no reason to conclude that "the test" was performed more than two hours after he
17 was driving. It is the State's position that two tests were conducted, and the first was within
18 two hours of Defendant being in physical operation of his vehicle.

19 **III. Defendant Has Become Unnecessarily Fixated On The Science Of**
20 **Retrograde Extrapolation**

21 Defendant fundamentally misunderstands or misconstrues the State's argument by
22 arguing that the evidence is insufficient to determine whether Defendant's breath alcohol level
23 was rising or falling at the time the breath test was administered. The State does not rely on
24 the difference between the two tests to argue that Defendant's alcohol level was trending in
25 either direction. To the State, it is irrelevant whether the second test was higher or lower than
26 the first test, as long as the difference between the two was less than .02. It is only Defendant
27

28 ² The State is perplexed by Defendant's assertion that "there is no dispute that the breath test is outside the 2-hour limit of the accident." Defendant's Brief at 2. Deputy District Attorney Melanie Scheible clearly stated during the Preliminary Hearing on the felony charge associated with this case that "we will argue it was within the two-hour time limit." PHT at 68.

who is concerned that science is unable to tell us whether his breath alcohol content was rising or falling at the time he was arrested. Yet, he fails to explain the relevance to the Court. If his breath alcohol content was actually rising, does that mean it was not measured at .172 within two hours of being in control of his vehicle? If it was actually falling, does that mean it was not measured at .172 within two hours of driving?

Defendant fails to provide any way to interpret the results of his breath alcohol tests that would cast reasonable doubt upon his intoxication at the time he was driving his car. He now cites to McLean v. Moran, 963 F.2d 1306, 1311 (9th Cir. 1992) to suggest that considering the results of the breath tests administered in this case would be error. However, the Court was clear in McLean that the error was treating the results of a blood test as an irrebuttable presumption of intoxication, under a statute that had no time parameters on alcohol detection tests. Id. The instant case, where the statute provides a clear time limit on the use of tests to presume intoxication, and the test falls within that time limit, is not analogous. The results of Defendant's breath alcohol tests are competent, relevant evidence that it would be error for this Court not to consider.

Likewise, Defendant's dependence on State v. Dist. Ct. (Armstrong), 127 Nev. 927, 936, (2011) is misplaced. This 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.

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III

1 In addition, Defendant cites to Phillips v. State, 128 Nev. 925, (2012) for the
2 proposition that the evidence of his breath alcohol tests is inadmissible without expert
3 testimony to correlate his breath alcohol content (BAC) with impairment. The Phillips
4 decision concerns a case where the Defendant was charged only under an impairment theory,
5 but the Court nonetheless instructed a jury on per se intoxication. Phillips v. State, 128 Nev.
6 925. In the instant case, Defendant is charged under all three theories of liability.

7 **IV. No Retrograde Extrapolation Was Done Or Required In This Case**

8 The State does not dispute that the test was barely conducted within the two-hour
9 parameters set by statute to establish per se intoxication under Nevada law. The State argued
10 at trial that any concerns regarding the time elapsed between Defendant's control of his vehicle
11 and the breath test is allayed by the results of the tests: a breath alcohol concentration more
12 than twice the legal limit.

13 The State reiterates the argument put forth at trial. If the breath alcohol concentration
14 had been near .08, retrograde extrapolation may have been useful—though not necessary—to
15 prove Defendant's intoxication beyond a reasonable doubt. But, this case is not a "close call."
16 A test was conducted within two hours. Defendant's breath alcohol was above the legal limit.
17 Defendant was per se intoxicated at the time he was in control of his vehicle.

18 The State is not asking this Honorable Court to make a determination that requires
19 scientific expertise. The law provides the presumption that a person who has a breath alcohol
20 concentration of .08 120 minutes after operation a vehicle was under the influence of alcohol
21 while operating the vehicle. Therefore, the Court should—and must—also presume that
22 someone with a breath alcohol concentration of .172 119 minutes after operation of a vehicle
23 was under the influence of alcohol while operating the vehicle.

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25 ///

26 ///

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28 ///

1 To take this a step further, assuming *arguendo*, the Court is concerned that the
2 corroborative test was not taken until 123 minutes after Defendant was in operation of his
3 vehicle, the State suggests there is no logical way Defendant could have had a breath alcohol
4 concentration of .164 123 minutes after being in operation of vehicle and not also been under
5 the influence of alcohol while he was in operation of the vehicle. Defendant provided no
6 reason to believe that if the timeline of the testing had been moved up by 4 minutes, the results
7 would have been different by .09. There is no need to conduct retrograde extrapolation where
8 there is no reasonable doubt as to Defendant's intoxication at the time he was driving.

9 Other factors that should alleviate any doubt regarding Defendant's intoxication
10 include the clues of intoxication exhibited on all three of the Field Sobriety Tests, the smell of
11 alcohol detected on Defendant's breath, and the fact that he was involved in a car collision.

12 DATED this 6th day of January, 2020.

13 Respectfully submitted,

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

17 BY

18 
19 MELANIE SCHEIBLE
20 Deputy District Attorney
21 Nevada Bar #014266

22 **CERTIFICATE OF FACSIMILE TRANSMISSION**

23 I hereby certify that service of the above and foregoing was made this 6th day of
24 January, 2020, by facsimile transmission to:

25 CRAIG MUELLER, ESQ.
26 (702) 940-1235

27 BY /s/ E. Goddard

28 E. Goddard
Secretary for the District Attorney's Office

19FH0521X/erg/L-5

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Fax Phone Number: 702-940-1235

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10 **MATTHEW MOLEN**

11 **JUSTICE COURT, HENDERSON TOWNSHIP**

12 **CLARK COUNTY, NEVADA**

13 **THE STATE OF NEVADA,**

14 **Plaintiff,**

15 **vs.**

16 **MATTHEW HANEY MOLEN,**

17 **Defendant,**

18 Case No. 19FH0521X

19 Dept. No. 3 / 1

20 **DATE:**

21 **TIME:**

22 **SUPPLEMENTAL BRIEF ON CONSIDERATION OF**
23 **A SINGLE BREATH TEST TAKEN OUTSIDE OF THE TWO HOUR LIMIT**

24 COMES NOW, Defendant, MATTHEW HANEY MOLEN, by and through his
25 attorneys, CRAIG MUELLER & ASSOCIATES, and provides the following Supplemental Brief
26 on Consideration of a Single Breath Test Taken Outside of the Two Hour Limit as requested by
27 the Court.
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HENDERSON JUSTICE
COURT

2019 DEC 17 A 8:40

FILED

1 This supplement is based upon the pleadings on file herein, the attached Memorandum of
2 Points and Authorities, any pleadings or papers of which the Court takes judicial notice, and any
3 argument the Court may allow.

4 Dated this 3rd day of December, 2019.

5 CRAIG MUELLER & ASSOCIATES

6
7 *Craig Mueller*
8 By: CRAIG A. MUELLER, ESQ. #4703
9 723 South 7th Street
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10 I.
11 **MEMORANDUM OF POINTS AND AUTHORITIES**
12 **INTRODUCTION**

13 This case involved a two car accident that was called in at 15:20. Officers arrived at 15:39,
14 and there was a witness to the accident that remained on scene. The breath test in this case was
15 administered at 17:37 and 17:41, and the results were .172 and .164, respectively. There is no
16 dispute that the breath test is outside of the 2 hour limit of the accident. The single breath test
17 was not followed by a subsequent breath test for the purpose of retrograde extrapolation, and
18 therefore is not admissible for the purposes of a DUI.

19 **QUESTION PRESENTED:** The question presented was whether a single breath test
20 outside the two hours be admissible for any other reason to establish DUI.

21 **SHORT RESPONSE:** No. The Nevada Supreme Court has concluded that evidence of the
22 actual alcohol level, without any evidence correlating that alcohol level with impairment in
23 driving, is unfairly prejudicial.

24
25 I. **NRS 484C.200(1)(a) REQUIRES TWO CONSECUTIVE SAMPLES TO**
26 **ESTABLISH CONCENTRATION WITHIN AN INDIVIDUAL'S BREATH.**

27 **NRS 484C.200 Requirements for evidentiary test of breath to determine**
28 **concentration of alcohol in breath; refusal or failure to submit to test.**

1. Except as otherwise provided in subsection 2, an evidentiary test of breath to determine the concentration of alcohol in a person's breath may be used to establish that concentration only if two consecutive samples of the person's breath are taken and:

(a) The difference between the concentration of alcohol in the person's breath indicated by the two samples is less than or equal to 0.02;

Thus, the set of the two consecutive tests can establish the concentration of alcohol in a person's breath if the difference is within or equal to .02; In this case, the tests were .172 and .164, and act as a single test for that point in time which is outside the two hour limit.

II. THE TWO BREATH TESTS COUNT AS A SINGLE TEST

The two breath tests were administered minutes apart but both were over two hours after the driving incident. The two tests were so close in time they serve as a single test pursuant to discussions held in case law. The Nevada Supreme Court previously addressed the closeness of time between tests, and reasonable time frame between tests for the purposes of retrograde extrapolation. The time between tests was discussed in *Sheriff v. Burcham*, 198 P.3d 326, 124 Nev. 1247 (Nev. 2008). In *Sheriff*, there was about an hour difference between the two tests. The issue in *Sheriff* was whether there needed to be expert testimony on retrograde extrapolation at a grand jury, but the Sheriff Court also visited and discussed the differentiation between two tests taken close in time. That Court discussed *Mata*, a Texas case, where it involved tests that were so close in time, the tests only served as a single test for determining whether he was still absorbing alcohol, meaning his BAC was rising, or was eliminating alcohol, meaning his BAC was dropping.

For the purposes in this case, the administration of the two breath tests, so close in time and only minutes apart as required under NRS 484C.200, count as a single test to determine the alcohol in a person's breath at a given time.

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1 **III. ADMISSION OF A BREATH TEST WITHOUT A SECOND SET OF**
2 **TESTING FIGURES RAISES AN OVERBREADTH CHALLENGE, AS**
3 **ALCOHOL AT THE TIME OF TESTING IS NOT INDICATIVE OF**
4 **ALCOHOL AT THE TIME OF TESTING**

5 Previously, the statutes created a presumption that the blood alcohol at the time of testing
6 was the same level at the time of driving. Not only is this inaccurate as the BAC may be rising
7 from the body still absorbing alcohol, or dropping from the body eliminating alcohol, but was
8 subject to an overbreadth challenge. In *McLean*, the Ninth Circuit addressed just such an
9 overbreadth challenge to NRS 484.379(1) ² and NRS 484.381(1) ³ as they were formulated at
10 that time. NRS 484.379(1)(c) was not then in effect; however, NRS 484.381(1) created a
11 presumption that the defendant's blood alcohol level at the time of driving was the same as at the
12 time of testing. The *McLean* court found that the district court treated the presumption as
13 mandatory and conclusive, and that it was, therefore, unconstitutional as applied. The court
14 concluded that "McLean's constitutional right to have the State prove every element of the crime
15 beyond a reasonable doubt was violated by the conclusive presumption applied by the judge."
16 *McLean v. Moran*, 963 F.2d 1306 (9th Cir.1992).

17 By this Court considering the results of a test taken outside of the time frame without a
18 second test and an expert able to testify to retrograde extrapolation and correlation to determine
19 alleged alcohol level at the time of driving raises the same overbreadth challenge. This would be
20 tantamount to this Court taking a step back in time to when it was believed the alcohol level at
21 the time of the test was the same as the time of driving. This approach disregards current law
22 and the procedural safeguards that are in place by the statutes and case law.

23
24 **IV. A SINGLE TEST OUTSIDE THE LIMIT ENCOURAGES A CONVICTION**
25 **BASED ON AN IMPROPER BASIS WHEN THE CALCULATION IS NOT**
26 **SUFFICIENTLY RELIABLE**

27 To have the State push for admission of a test outside of the allotted time only indicates their
28 encouragement to want the trier of fact, in this case, the Justice Court Judge, to assume the role

1 of an expert in retrograde extrapolation and make their own calculation or finding based on the
2 breath test and time. This would mean the judicial officer would disregard the fact there is no
3 second test to anchor a calculated alcohol level. The judicial officer would then attempt to use
4 simple math in their head and guesstimate, in their own opinion as to if Mr. Molen was under the
5 influence based on the test. This places the judicial officer in an expert witness position rather
6 than evaluating the evidence of expert witness testimony evaluating the test which is submitted
7 to the judicial officer. Further, doing this disregards the factors and variables that an expert
8 would employ, and the judicial officer may likely not possess or lack in proper skill and
9 trainings, such as individual absorption and elimination rates, including (1) the type and amount
10 of food in the stomach, (2) gender, (3) weight, (4) age, (5) mental state, (6) drinking pattern at
11 the relevant time, (7) type and amount of beverage consumed, and (8) elapsed time between the
12 first and last drink taken. Any analysis without a second test and assuming This is what
13 encourages a conviction on an improper basis.
14

15 The Nevada Supreme Court previously upheld a pretrial motion to exclude a single test
16 which facts are almost identical to this case (other than it involved a single blood test while this
17 involves a single breath test). The *State v. Eighth Judicial Dist. Court of Nevada*, 127 Nev. Adv.
18 Op. 84, 267 P.3d 777 (Nev. 2011) involved a collision where a single blood sample was taken
19 more than two hours after the collision. That blood sample had an alcohol level of .18.
20

21 Armstrong filed a pretrial motion to exclude the blood alcohol test result. Armstrong argued that
22 his blood was drawn outside the statutory two-hour window provided in NRS 484C.430(1)(c)
23 and that the test was inadmissible because only one blood sample was obtained. He further
24 argued that the retrograde extrapolation that the State would have to use to determine his blood
25 alcohol level at the time he was driving was unreliable and therefore irrelevant and unfairly
26 prejudicial. The State opposed the motion, arguing that retrograde extrapolation was not required
27
28

1 to determine Armstrong's blood alcohol level at the time of the collision because his alcohol
2 level was sufficiently high that a jury could determine that it was above .08 while he was driving,
3 but even if the State were required to do so, any variables in the retrograde extrapolation go to
4 the weight of that evidence rather than its admissibility. The State also argued that the blood
5 alcohol test was admissible to show that Armstrong was driving under the influence of
6 intoxicating liquor.

7
8 The Court denied the petition that attempted to permit the lower Court to use a single test,
9 and did so by saying the prosecution was not precluded from convictions by going on to state:

10 "We are not unmindful of the State's concerns about prosecuting offenders for driving under
11 the influence, but the State's accusations that the district court's order "precludes the state
12 from ever convicting a drunk driver of having a .08 or more at [the] time of driving" and
13 "legalizes driving under the influence of alcohol so long as a chemical test is not done within
14 two hours of driving" go a step too far. The State may present evidence that is relevant and
15 not unfairly prejudicial. NRS 48.025(1); NRS 48.035(1). Although retrograde extrapolation
16 has its place in proving that a defendant was driving under the influence, it also has the
17 potential to encourage a conviction based on an improper basis when the calculation is not
18 sufficiently reliable in a given case. There may be circumstances consistent with this opinion
19 in which a calculation based on the results of a single blood sample is reliable and whose
20 relevance is not substantially outweighed by the danger of unfair prejudice; that is up to the
21 district court to determine on a case-by-case basis. But even when retrograde extrapolation
22 evidence is not admissible, other evidence may establish that a defendant was driving under
23 the influence as prohibited by NRS 484C.430(1)(a). *See Sheriff v. Burcham*, 124 Nev. 1247
24 1258, 198 P.3d 326, 333 (2008) (concluding that State presented sufficient evidence to
25 establish probable cause to believe defendant was driving under the influence based on
26 testimony about defendant's driving and circumstances of accident, defendant's smell and
27 physical appearance after accident, and defendant's admissions about drinking)."

21 The Court in *State v. Eighth Judicial Dist. Court of Nevada*, 127 Nev. Adv. Op. 84, 267 P.3d
22 777 (Nev. 2011) also addressed factors in calculation that would also be ignored by this court
23 (should the judicial officer choose use the single test taken outside of the two hour time limit)
24 and use a single test for impairment of another time period using or calculating their own alcohol
25 level¹. What the court said was:

26
27 ¹ Doing so is tantamount to the judicial officer acting as an expert in the case on retrograde extrapolation to
28 determine if Mr. Moien was under the influence when he was driving.

1 " We agree that achieving a reliable retrograde extrapolation calculation requires
2 consideration of a variety of factors. The following factors are relevant to achieving a
3 sufficiently reliable retrograde extrapolation calculation: (1) gender, (2) weight, (3) age, (4)
4 height, (5) mental state, (6) the type and amount of food in the stomach, (7) type and amount
5 of alcohol consumed, (8) when the last alcoholic drink was consumed, (9) drinking pattern at
6 the relevant time, (10) elapsed time between the first and last drink consumed, (11) time
7 elapsed between the last drink consumed and the blood draw, (12) the number of samples
8 taken, (13) the length of time between the offense and the blood draws, (14) the average
9 alcohol absorption rate, and (15) the average elimination rate. We observe, as the *Mata* court
10 did, that not every personal fact about the defendant must be known to construct a reliable
11 extrapolation, 46 S.W.3d at 916-17, but rather those factors must be balanced."

12 If the judicial officer considers and acts on the test outside of the two hour window to
13 determine impairment without the proper skill and training to the factors listed above², they
14 would also likely not possess or lack in proper skill and trainings to properly assess the
15 additional 15 factors above. Doing so only encourages a conviction on an improper basis and
16 makes it ripe for appeal with not only being overturned but even consideration for bias towards
17 defendants and exceeding judicial authority. This is why the State is to present expert testimony
18 on the correlation of tests to impairment, and the judicial officer consider such testimony of
19 validly admitted tests. Unfortunately, a test taken outside the two hour window is not admissible
20 absent a second test upon which an alcohol level can be anchored by testimony of an expert in
21 the field of retrograde extrapolation. The single test cannot and should not be considered by this
22 court and request is hereby made to exclude such test from admission and/or consideration.

23 **V. THE NEVADA SUPREME COURT HAS AGREED THAT THE PROBATIVE**
24 **VALUE OF A TEST IS OUTWEIGHED BY THE DANGER OF UNFAIR**
25 **PREJUDICE.**

26 The Court echoed this idea in other cases, including an unpublished opinion which the
27 Supreme Court now permits citation thereof where previously it could not be cited as authority
28

² (1) the type and amount of food in the stomach, (2) gender, (3) weight, (4) age, (5) mental state, (6) drinking pattern at the relevant time, (7) type and amount of beverage consumed, and (8) elapsed time between the first and last drink taken.

1 but could be cited as a reference or rather as a guide to where the Court is otherwise leaning or
2 may rule if it was presented with a similar case and similar circumstances.

3 In *Maldonado-Mejia*, the forensic scientist (generally the type of expert used for
4 retrograde extrapolation) testified they could not form an opinion based on blood tests taken after
5 the accident³. In that case, when asked on direct examination if she could form an opinion about
6 Maldonado-Mejia's blood alcohol level at the time of the accident based on the test results, the
7 forensic scientist testified that she could not form an opinion because there were too many
8 variables. In light of this testimony, we agree with Maldonado-Mejia that the probative value of
9 this evidence may have been outweighed by the danger of unfair prejudice. See *State v. Eighth*
10 *Judicial Dist. Court (Armstrong)*, 127 Nev. ___, 267 P.3d 777, 781-82 (2011), as cited in
11 *Maldonado-Mejia v. State* (Nev. 2013).

12 One case right on point is *Phillips*, as that is what the State hopes the judicial officer will
13 do in this case: admit a test without producing a witness to correlating it to impairment. In
14 *Phillips*, she contended that her blood alcohol level, which was admitted in the form of a
15 laboratory report, was not relevant under the charged theory of DUI and was more prejudicial
16 than probative because the State did not produce a witness to correlate the blood alcohol level
17 with some degree of actual impairment. The Court agreed.

18 Similarly identical to the same facts as above is the *Phillips* case where that court said:

19 "While the presence of alcohol in Phillips's system was relevant to proving the offense of
20 driving under the influence, we conclude that evidence of the actual blood alcohol level,
21 without any evidence correlating that blood alcohol level with impairment in driving, was
22 unfairly prejudicial. Therefore, we conclude that the district court erred in admitting
23 evidence of Phillips's blood alcohol level. See *Libby v. State*, 115 Nev. 45, 52, 975 P.2d
24 833, 837 (1999), as cited in *Phillips v. State*, 381 P.3d 650(Table) (Nev. 2012)

25
26
27 ³ The case involved a watercraft accident, however the same Driving Under the Influence and alternate theories of
28 impairment apply.

1 This case at hand involves that identical issue: a test with no one expert to correlate it to
2 any type of impaired driving. It can't be used for the within two hour theory, and there was no
3 second test to be used for extrapolation or impairment theory. As in Phillips, this case involves a
4 single test and no second test and too many factors upon which a forensic scientist or expert
5 could reasonable extrapolate Molen's blood alcohol at the time of driving. This court should not
6 consider or permit the single test to be admitted, as the probative value to show Molen's alcohol
7 level at a time outside of the two hour time limit is outweighed by the danger of unfair prejudice
8 to him if the test is in any way used to attempt or determine any level of alcohol or intoxication
9 at the time of driving. No expert is able to testify using a single test, and here the State does not
10 even have an expert willing to do so, nor should a judge substitute their opinion and become that
11 expert. Doing so also raises the issue of bias, and goes to shows the judicial officer is no longer
12 impartial and then becomes a witness for the prosecution rather than a trier of fact. A test with
13 nothing to correlate it to driving is just that: a test than cannot be correlated to driving.
14
15

16 CONCLUSION


17 For this court to admit and use the test in any way to show Mr. Molen was under the
18 influence for either charge identified in the petition, without a proper second test, would
19 encourage a conviction based on improper basis, and probative value of a single test is
20 outweighed by the danger of unfair prejudice. Not only can a forensic scientist extrapolate the
21 alcohol level from a single test based on the variable factors and an individual's characteristics,
22 the judicial officer should not be tempted or permitted to do the same or substitute their opinion
23 as to the blood alcohol at the time of driving. Defendant has a right to have the State prove each
24 and every element beyond a reasonable doubt and in this case, they cannot do so. The State is
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26
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28

CRAIG MUELLER & ASSOCIATES, INC.
723 S. 7th Street, Las Vegas, Nevada 89101
Telephone: (702) 382-1200 Facsimile: (702) 940-1235

1 relying a last minute "Hail Mary Pass"⁴ and hoping the court will extrapolate on their own and
2 find intoxication on behalf of Mr. Molen. This is what causes the unfair prejudice and should
3 not be allowed by the court. The breath test should not be admitted, nor should the State be
4 permitted to persuade the trier of fact for a conviction based on the test result. Doing so
5 disregards the procedural safeguards put in place by the statutes and case law for such cases, and
6 infringes on a defendant's constitutional rights. There are other ways for the State to establish
7 that a defendant was driving under the influence, but using a breath test under these
8 circumstances based on it being both a single test and the timing being outside of the two hour
9 limit is not one of them.

10
11 Dated this 15th day of December, 2019.

12 CRAIG MUELLER & ASSOCIATES

13
14 By: 
15 CRAIG A. MUELLER, ESQ. #4703
16 723 South 7th Street
17 Las Vegas, Nevada 89101

18 **RECEIPT OF COPY**

19 RECEIPT OF COPY of the foregoing SUPPLEMENTAL BRIEF ON
20 CONSIDERATION OF A SINGLE BREATH TEST TAKEN OUTSIDE OF THE TWO
21 HOUR LIMIT, is hereby acknowledged this 16 day of Dec 2019.

22
23 By 
24 DISTRICT ATTORNEY'S OFFICE

25
26 ⁴ A Hail Mary pass, also known as a shot play, is a very long forward pass in American football, typically made in
27 desperation, with only a small chance of success.... Originally meaning any sort of desperation play, a "Hail Mary"
28 gradually came to denote a long, low-probability pass, typically of the "alley-oop" variety, attempted at the end of a
half when a team is too far from the end zone to execute a more conventional play, implying that it would take
divine intervention for the play to succeed. [Wikipedia.com](https://en.wikipedia.org/wiki/Hail_Mary_pass)

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723 S. 7th Street, Las Vegas, Nevada 89101
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ORIGINAL

HENDERSON JUSTICE
COURT

2019 JUL -21 A 9:18

MUELLER & ASSOCIATES, CHTD.
CRAIG A. MUELLER, ESQ.
Nevada Bar No. 4703
723 South Seventh
Las Vegas, NV 89101
(702) 382-1200
Attorney for Defendant
MATTHEW MOLEN

JUSTICE COURT, HENDERSON TOWNSHIP

CLARK COUNTY, NEVADA

19FH000443-0000

THE STATE OF NEVADA,

Case No. 19FH0521X

Plaintiff,

Dept No. 1

vs.

**MOTION TO RESCHEDULE
PRELIMINARY HEARING DATE**

MATTHEW MOLEN,

Defendant.

COMES NOW, Defendant MATTHEW MOLEN, by and through his attorney, CRAIG A. MUELLER, ESQ., of the law firm MUELLER & ASSOCIATES, CHTD., and moves this Honorable Court to place this matter on calendar to reschedule preliminary hearing date as the defendant will be out of jurisdiction due to business matter.

DATED the 27th day of June, 2019.

MUELLER, HINDS & ASSOCIATES, CHTD.

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

SCANNED

AA000140

1 **NOTICE OF MOTION**

2 TO: THE STATE OF NEVADA, Plaintiff; and,

3 TO: ITS COUNSEL OF RECORD, District Attorney:

4 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring
5 the foregoing Motion on for hearing before this court, on the 3rd day of July, 2019,
6 at the hour of 1:00 p.m., or as soon thereafter as counsel may be heard.

7
8 MUELLER, HINDS & ASSOCIATES, CHTD.

9 By Craig Mueller
10 CRAIG A. MUELLER, ESQ.
11 Nevada Bar No. 4703
12
13

14 **RECEIPT OF COPY**

15 RECEIPT OF A COPY of the foregoing MOTION TO RESCHEDULE PRELIMINARY
16 HEARING DATE is hereby acknowledged this 28 day of June, 2019.

17
18
19 BY: [Signature]
20 DISTRICT ATTORNEY'S OFFICE
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ORIGINAL

HENDERSON JUSTICE
COURT

2019 JUN 12 A 8 07

FILED

1 MUELLER, HINDS & ASSOCIATES, CHTD.
2 CRAIG A. MUELLER, ESQ.
3 Nevada Bar No. 4703
4 600 S. Eighth Street
5 Las Vegas, Nevada 89101
6 Attorney for Defendant
7 MATTHEW MOLEN

8 JUSTICE COURT, HENDERSON TOWNSHIP
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA

11 Plaintiff,

12 vs.

13 MATTHEW MOLEN,

14 Defendant.

19081000443-0000
Case No. 19FH0521X

Dept No. 3

DEMAND FOR EXPERT WITNESSES

15 COMES NOW Defendant MATTHEW MOLEN, by and through his attorney, CRAIG A.
16 MUELLER, ESQ., of the law firm MUELLER, HINDS & ASSOCIATES, and provides notice to the
17 State Of Nevada, pursuant to NRS 50.315(6) and NRS 50.320.

18 Defendant requests that the individuals listed as expert witnesses in the police report in the
19 instant case be brought to court for live testimony, specifically AUSTIN GROLL (HPD) DARBY
20 LANZ (FORENSIC ANALYST).

21 Defendant contends that there is a substantial and bona fide dispute in this matter as to her
22 state of intoxication at the time of her arrest. Defendant demands the right to confront the State's
23 witnesses to determine the accuracy of the breath test taken with a CMI Inc. Intoxilyzer 8000 Unit,
24 Serial Number 80-006041.
25
26
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28

1 Defendant demands that the makers of the declarations be brought to court for cross-examination on
2 the procedures used and the tests conducted. This is necessary to establish whether there could have
3 possibly been an error following the checklist or administering the breath test.
4

5 DATED this 24TH day of May, 2019.
6

7 MUELLER, HINDS & ASSOCIATES, CHTD.
8

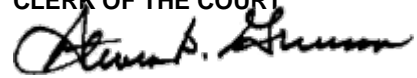
9 By Craig Mueller
10 CRAIG A. MUELLER, ESQ.
11 Nevada Bar No. 4703
12 723 South Seventh Street
13 Las Vegas, Nevada 89101
14 Attorney for Defendant
15

16 **RECEIPT OF COPY**

17 RECEIPT OF COPY of the foregoing DEMAND FOR EXPERT WITNESSES is hereby
18 acknowledged this 11 day of May, 2019.
19

20
21 By Williams
22 DISTRICT ATTORNEY'S OFFICE
23
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28

SCANNED



District Court

Clark County, Nevada

Matthew Haney Molen, Appellant(s)
vs
Nevada State of, Respondent(s)

Case No.: C-20-348754-A
Department 2
Justice Court Case: 19FH0521X /
19CRH000443-0000

To: Appellant's Attorney: Craig A Mueller
To: Respondent's Attorney: Steven B Wolfson

COUNTS

Appealing Final Judgment Entered in this
Action on May 18th, 2020.

RECEIPT FOR DOCUMENTS AND NOTICE OF HEARING

You are hereby notified that the Clerk of District Court has filed the following:

Notice of Appeal
Original Justice Court File

Filed June 11, 2020

PLEASE TAKE NOTICE that the above referenced action has been set for
hearing in Department 2, on July 9th, 2020, In Chambers.

STEVEN D. GRIERSON, CEO/CLERK OF COURT

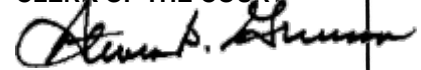
/s/ Salevao Asifoa
S.L. Asifoa, Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 11th day of June, 2020

☒ The foregoing Receipt for Documents and Notice of Hearing was electronically
served to all registered parties for case number C-20-348754-A.

/s/ Salevao Asifoa
S.L. Asifoa, Deputy Clerk of the Court



1 NOH

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA
5

6 MATTHEW MOLEN,
7 Appellant,
8 vs.
9 STATE OF NEVADA,
10 Respondent.
11

Case No.: C-20-348754-A
Dept. No.: 2

Date: September 17, 2020
Time: 9:00 a.m.

**ORDER SCHEDULING HEARING
AND BRIEFING SCHEDULE**

12 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

13 PLEASE TAKE NOTICE that the undersigned will bring a hearing on appeal on the
14 **21st day of September, 2020, at 9:00 a.m.** or as soon thereafter as counsel/parties can be
15 heard, in Dept. II, Courtroom 3B, District Court.

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

18 Petitioner's Opening Brief: July 20, 2020
19 Respondent's Brief: August 19, 2020
20 Petitioner's Reply: September 3, 2020

21 **Petitioner** to provide courtesy copies of all pleadings to Department 2, 200 Lewis
22 Avenue, 3rd Floor, no later than September 11, 2020.

23 Pursuant to Administrative Order 20-17, all in-person appearances are discouraged
24 until further notice. The Blue Jeans information is below. Parties may contact our Court
25 Recorder, Brittany Amoroso, by email amorosob@clarkcountycourts.us or phone at 702-671-
26 0663 if you have any questions or need assistance with Blue Jeans set-up.

27 . . .

28 . . .

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

Date of Hearing	Phone Number	Meeting ID	Meeting URL
09/17/20	408.419.1715	373 293 863	https://bluejeans.com/373293863

The Chambers hearing scheduled for July 9, 2020 is hereby **VACATED**.

IT IS SO ORDERED.

Dated this 17th day of June, 2020.

RICHARD F. SCOTTI
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

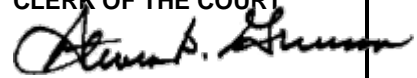
I hereby certify that on or about the date signed, a copy of this Order was electronically served in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey EFileNV system.

Craig Mueller, Esq.
receptionist@craigmuellerlaw.com
Counsel for Appellant

Steven Wolfson, Esq.
motions@clarkcountyda.com
District Attorney

/s/ Melody Howard

Melody Howard
Judicial Executive Assistant
C-20-348754-A



1 NOH

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA
5

6 MATTHEW MOLEN,
7 Appellant,
8 vs.
9 STATE OF NEVADA,
10 Respondent.
11

Case No.: C-20-348754-A
Dept. No.: 2

Date: September 17, 2020
Time: 9:00 a.m.

**AMENDED ORDER SCHEDULING
HEARING AND BRIEFING
SCHEDULE**

12 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

13 PLEASE TAKE NOTICE that the undersigned will bring a hearing on appeal on the
14 **17th day of September, 2020, at 9:00 a.m.** or as soon thereafter as counsel/parties can be
15 heard, in Dept. II, Courtroom 3B, District Court.

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

18 Petitioner's Opening Brief: July 20, 2020

19 Respondent's Brief: August 19, 2020

20 Petitioner's Reply: September 3, 2020

21 **Petitioner** to provide courtesy copies of all pleadings to Department 2, 200 Lewis
22 Avenue, 3rd Floor, no later than September 11, 2020.

23 **IT IS SO ORDERED.**

24 Dated this 25th day of June, 2020.

25
26 
27 RICHARD F. SCOTTI
DISTRICT COURT JUDGE
28

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

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CERTIFICATE OF SERVICE

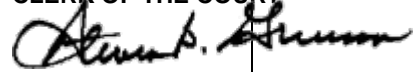
I hereby certify that on or about the date signed, a copy of this Order was electronically served in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey EFileNV system.

Craig Mueller, Esq.
Counsel for Appellant

Steven Wolfson, Esq.
motions@clarkcountyda.com
District Attorney

/s/ Melody Howard

Melody Howard
Judicial Executive Assistant
C-20-348754-A



BREF
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
Attorney For Appellant

DISTRICT COURT
CLARK COUNTY, NEVADA

MATTHEW HANEY MOLEN,)	
)	
Appellant,)	CASE NO: C-20-348754-A
)	
vs.)	DEPT NO: II
)	
THE STATE OF NEVADA,)	
)	
Respondent.)	

APPELLANT'S OPENING BRIEF

Appellant MATTHEW HANEY MOLEN, by and through her attorney of record
CRAIG A. MUELLER, ESQ., hereby submits the attached as and for his Opening Brief.
DATED this 30th day of July, 2020.

/s/Craig A. Mueller
CRAIG A. MUELLER, ESQ.
Attorney For Appellant

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STATEMENT OF THE ISSUES

A. Does Deputy District Attorney Scheibel’s prosecution of this case violates the Separation of Powers Doctrine?

B. Did The Justice Court Commit Reversible Error When It Admitted The Intoxilyzer 8000 Results?

PROCEDURAL HISTORY

On December 5, 2019, Appellant MATTHEW HANEY MOLEN was convicted of DRIVING UNDER THE INFLUENCE (Misdemeanor-NRS 484C.110, 484C.400, 484C.105) after a bench trial in Henderson Justice Court. He timely filed his Notice of Appeal.

STATEMENT OF FACTS

According to the testimony presented at trial, Todd Smith was driving home on March 12, 2019, at approximately 3:00 p.m. He was heading south on Pecos coming up on the intersection with Robindale. He stopped at the intersection for a red light. His vehicle was directly behind Appellant’s. When the light turned green, both vehicles began to proceed slowly. Appellant had to stop and Mr. Smith’s vehicle struck his from behind. Appellant called the police, and the two waited at the scene.

Henderson police officer Austin Groll arrived at the scene with his field training officer Alex Nelson. The call from dispatch came in at 3:20 p.m., and that they arrived at the scene at 3:39 p.m. Trial Transcript (“TT”) 28:9-23. On cross examination Officer Groll admitted that after about 15 minutes of interacting with Appellant, Officer Nelson still wasn’t sure that he smelled alcohol on Appellant’s breath, which in turn, made Officer Groll unsure that he could

1 smell alcohol. TT 64:4-25; 65:1-3. Officer Groll testified that he had to administer the HGN test
2 twice because he didn't ask the necessary questions. TT 66:1-10; 81:6-18. Officer Groll
3 testified that he had Appellant do the walk and turn test on a visible, painted white line, but
4 couldn't recall how many times Appellant allegedly stepped off the line, nor did he bring his
5 notes to the trial recording his observations. TT 66:21-25; 68:9-18. Officer Groll had no
6 explanation as to why at the Henderson Detention Center the observation period for Appellant
7 was 24 minutes instead of the prescribed 15 minutes. TT 94:8-12.

9
10 LVMPD Officer Darby Lanz is a forensic scientist and forensic analyst of alcohol. She
11 calibrates the Intoxilyzer 8000 and trains police officers on the proper way to operate it. She
12 testified that walking away from the subject during the observation period is improper, as they
13 are to pay attention for the entire 15-minute observation period. TT 120:18-22. The purpose of
14 the observation period is to make sure that any mouth alcohol has dissipated, and that the subject
15 has not burped or regurgitated, which would bring stomach alcohol up to the mouth and cause an
16 artificially high breath test. TT 127: 3-22.

18 Appellant Matthew Molen testified that at the Henderson Detention Center, Officer Groll
19 had to perform the breathalyzer three or four times because he couldn't operate the machine
20 properly, such as having problems inserting the mouthpiece. TT 139:5-15. Appellant testified
21 that Officer Groll left him alone prior to doing the breath test and never observed him as
22 required. TT 139:17-25. Appellant testified that while he didn't remember regurgitating at the
23 Henderson Detention Center, he does suffer from major reflux and esophageal spasms, a
24 condition that runs in his family and which he was born with. TT 142:19-25; 143:1-11.

26 **STANDARD OF REVIEW**

27
28 A reviewing court reviews a lower court's legal conclusions *de novo* and the lower

1 court's factual findings for clear error. *Lamb v. State*, 127 Nev. Adv. Op. 3, 251 P.3d 700
2 (2011); *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

3
4 The Supreme Court reviews questions of statutory interpretation *de novo*, and “when a
5 statute is clear on its face, a court cannot go beyond the statute in determining legislative intent.”
6 *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). “We [typically] review a district
7 court’s decision to admit or exclude evidence for an abuse of discretion,” but “failure to object
8 precludes appellate review of the matter unless it rises to the level of plain error.” *McLellan v.*
9 *State*, 24 Nev. 263, 267, 182 P.3d 106, 109 (2008) (internal quotations omitted). Reversal for
10 plain error is only warranted if the appellant demonstrates that the error was prejudicial to his
11 substantive rights. *Pantano v. State*, 122 Nev. 782, 795, 138 P.3d 477, 485-86 (2006).

12 The standard for appellate review of the sufficiency of the evidence and the credibility of
13 witnesses in Nevada is summed up in *Gonzales v. State*, 131 Nev. Adv. Op. 49, 21 (2015):

14 The test for sufficiency of the evidence in a criminal case is ‘whether, after viewing the evidence
15 in the light most favorable to the prosecution, any rational trier of fact could have found the
16 essential elements of the crime beyond a reasonable doubt.’ *McNair v. State*, 108 Nev. 53, 56,
17 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). ‘[I]t is the
18 jury's function. . . to assess the weight of the evidence and . . . credibility of witnesses.’ *Id.*

19 **ARGUMENT**

20 **A. Deputy District Attorney Scheibel’s Prosecution Of This Case** 21 **Violates The Separation of Powers Doctrine.**

22 The Nevada Constitution states in relevant part:

23 ARTICLE. 3. - Distribution of Powers.

24 Section 1. Three separate departments; separation of powers; legislative review of
25 administrative regulations.

26 1. The powers of the Government of the State of Nevada shall be divided into
27 three separate departments, the Legislative, the Executive and the Judicial; and no
28 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

1 involvement trying criminal cases would appear to clearly violate the express terms of Nev.
2 Const. Art. 3 Sec. 1(1): "...no persons charged with the exercise of powers properly belonging to
3 one of these departments shall exercise any functions, appertaining to either of the others...." A
4 legislator may not also enforce the law; enforcement is the responsibility of the executive branch.
5 Therefore, Deputy District Attorney Scheibel did not have the legal authority to prosecute
6 Appellant, and his conviction must be vacated.
7

8
9 **B. The Justice Court Committed Reversible Error When It**
10 **Admitted The Intoxilyzer 8000 Results.**

11 NRS 484C.110 states in relevant part:

12 Unlawful acts; affirmative defense; additional penalty for violation committed
13 in work zone or pedestrian safety zone.

14 1. It is unlawful for any person who:

- 15 (a) Is under the influence of intoxicating liquor;
16 (b) Has a concentration of alcohol of 0.08 or more in his or her blood or breath; or
17 (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....

18 NRS 484C.200 Requirements for evidentiary test of breath to determine concentration of
19 alcohol in breath; refusal or failure to submit to test.

20 1. Except as otherwise provided in subsection 2, an evidentiary test of breath to
determine the concentration of alcohol in a person's breath may be used to establish that
concentration only if two consecutive samples of the person's breath are taken and:

- 21 (a) The difference between the concentration of alcohol in the person's breath indicated
22 by the two samples is less than or equal to 0.02;

23 The set of the two consecutive tests can establish the concentration of alcohol in a person's
24 breath if the difference is within or equal to .02. In this case, the tests were .172 and .164, and
25 act as a single test for that point in time which is outside the two-hour limit.
26
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1 The two breath tests in this case were administered minutes apart and both were over two
2 hours after the driving incident. The two tests were so close in time they serve as a single test
3 pursuant to Nevada case law. The Nevada Supreme Court previously addressed the closeness of
4 time between tests, and reasonable time frame between tests for the purposes of retrograde
5 extrapolation. The time between tests was discussed in *Sheriff v. Burcham*, 124 Nev. 1247, 198
6 P.3d 326 (2008). In *Burcham*, there was about an hour difference between the two tests. The
7 issue in *Burcham* was whether there needed to be expert testimony on retrograde extrapolation at
8 a grand jury, but the Sheriff Court also visited and discussed the differentiation between two tests
9 taken close in time. The *Burcham* court discussed a Texas case that involved tests that were so
10 close in time, the tests only served as a single test for determining whether he was still absorbing
11 alcohol, meaning his BAC was rising, or was eliminating alcohol, meaning his BAC was
12 dropping.

13
14
15 For the purposes in this case, the administration of the two breath tests, so close in time and
16 only minutes apart as required under NRS 484C.200, count as a single test to determine the
17 alcohol in a person's breath at a given time. Previously, the statutes created a presumption that
18 the blood alcohol at the time of testing was the same level at the time of driving. Not only is this
19 inaccurate as the BAC may be rising from the body still absorbing alcohol, or dropping from the
20 body eliminating alcohol, but was subject to an overbreadth challenge. The Ninth Circuit
21 addressed just such an overbreadth challenge to NRS 484.379(1) and NRS 484.381(1) as they
22 were formulated at that time. NRS 484.379(1)(c) was not then in effect; however, NRS
23 484.381(1) created a presumption that the defendant's blood alcohol level at the time of driving
24 was the same as at the time of testing. The Ninth Circuit found that the district court treated the
25 presumption as mandatory and conclusive, and that it was, therefore, unconstitutional as applied.
26
27
28

1 The court concluded that "McLean's constitutional right to have the State prove every element of
2 the crime beyond a reasonable doubt was violated by the conclusive presumption applied by the
3 judge." *McLean v. Moran*, 963 F.2d 1306 (9th Cir. 1992).

4
5 By this Court considering the results of a test taken outside of the time frame without a
6 second test and an expert able to testify to retrograde extrapolation and correlation to determine
7 alleged alcohol level at the time of driving raises the same overbreadth challenge. This would be
8 tantamount to this Court taking a step back in time to when it was believed the alcohol level at
9 the time of the test was the same as the time of driving. This approach disregards current law
10 and the procedural safeguards that are in place by the statutes and case law.

11
12 To have the State push for admission of a test outside of the allotted time only indicates their
13 encouragement to want the trier of fact, in this case, the Justice Court Judge, to assume the role
14 of an expert in retrograde extrapolation and make their own calculation or finding based on the
15 breath test and time. This would mean the judicial officer would disregard the fact there is no
16 second test to anchor a calculated alcohol level. The judicial officer would then attempt to use
17 simple math in their head and guesstimate in their own opinion as to if Mr. Molen was under the
18 influence based on the test. This places the judicial officer in an expert witness position rather
19 than evaluating the evidence of expert witness testimony evaluating the test which is submitted
20 to the judicial officer. Further, doing this disregards the factors and variables that an expert
21 would employ, and the judicial officer may likely not possess or lack in proper skill and
22 trainings, such as individual absorption and elimination rates, including (1) the type and amount
23 of food in the stomach, (2) gender, (3) weight, (4) age, (5) mental state, (6) drinking pattern at
24 the relevant time, (7) type and amount of beverage consumed, and (8) elapsed time between the
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1 first and last drink taken. Any analysis without a second test and assuming This is what
2 encourages a conviction on an improper basis.

3 The Nevada Supreme Court previously upheld a pretrial motion to exclude a single test
4 which facts are almost identical to this case (other than it involved a single blood test while this
5 involves a single breath test). *State v. Bobby Armstrong*, 127 Nev. Adv. Op. 84, 267 P.3d 777
6 (2011) involved a collision where a single blood sample was taken more than two hours after the
7 collision. That blood sample had an alcohol level of .18. Armstrong filed a pretrial motion to
8 exclude the blood alcohol test result. Armstrong argued that his blood was drawn outside the
9 statutory two-hour window provided in NRS 484C.430(1)(c) and that the test was inadmissible
10 because only one blood sample was obtained. He further argued that the retrograde extrapolation
11 that the State would have to use to determine his blood alcohol level at the time he was driving
12 was unreliable and therefore irrelevant and unfairly prejudicial. The State opposed the motion,
13 arguing that retrograde extrapolation was not required to determine Armstrong's blood alcohol
14 level at the time of the collision because his alcohol level was sufficiently high that a jury could
15 determine that it was above .08 while he was driving, but even if the State were required to do
16 so, any variables in the retrograde extrapolation go to the weight of that evidence rather than its
17 admissibility. The State also argued that the blood alcohol test was admissible to show that
18 Armstrong was driving under the influence of intoxicating liquor.

19 The Court denied the petition that attempted to permit the lower Court to use a single test,
20 and did so by saying the prosecution was not precluded from convictions by going on to state:

21 “We are not unmindful of the State's concerns about prosecuting offenders for driving under
22 the influence, but the State's accusations that the district court's order “precludes the state
23 from ever convicting a drunk driver of having a .08 or more at [the] time of driving” and
24 “legalizes driving under the influence of alcohol so long as a chemical test is not done within
25 two hours of driving” go a step too far. The State may present evidence that is relevant and
26 not unfairly prejudicial. NRS 48.025(1); NRS 48.035(1). Although retrograde extrapolation

1 has its place in proving that a defendant was driving under the influence, it also has the
2 potential to encourage a conviction based on an improper basis when the calculation is not
3 sufficiently reliable in a given case. There may be circumstances consistent with this opinion
4 in which a calculation based on the results of a single blood sample is reliable and whose
5 relevance is not substantially outweighed by the danger of unfair prejudice; that is up to the
6 district court to determine on a case-by-case basis. But even when retrograde extrapolation
7 evidence is not admissible, other evidence may establish that a defendant was driving under
8 the influence as prohibited by NRS 484C.430(1)(a). *See, Sheriff v. Burcham*, 124 Nev. 1247,
1258, 198 P.3d 326, 333 (2008) (concluding that State presented sufficient evidence to
establish probable cause to believe defendant was driving under the influence based on
testimony about defendant's driving and circumstances of accident, defendant's smell and
physical appearance after accident, and defendant's admissions about drinking)."

9 The Nevada Supreme Court also addressed factors in calculation that were also be ignored by
10 Justice Court (should the judicial officer choose use the single test taken outside of the two hour
11 time limit) and use a single test for impairment of another time period using or calculating their
12 own alcohol level. What the court said was:

13
14 "We agree that achieving a reliable retrograde extrapolation calculation requires
15 consideration of a variety of factors. The following factors are relevant to achieving a
16 sufficiently reliable retrograde extrapolation calculation: (1) gender, (2) weight, (3) age, (4)
17 height, (5) mental state, (6) the type and amount of food in the stomach, (7) type and amount
18 of alcohol consumed, (8) when the last alcoholic drink was consumed, (9) drinking pattern at
19 the relevant time, (10) elapsed time between the first and last drink consumed, (11) time
20 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. We observe, as the *Mata* court
did, that not every personal fact about the defendant must be known to construct a reliable
extrapolation, 46 S.W.3d at 916–17, but rather those factors must be balanced."

21 *Id.* at 12, 267 P.3d at 783.

22 If the judicial officer considers and acts on the test outside of the two-hour window to
23 determine impairment without the proper skill and training to the factors listed above¹, they
24 would also likely not possess or lack in proper skill and trainings to properly assess the
25 additional 15 factors above. Doing so only encourages a conviction on an improper basis and
26 makes it ripe for appeal with not only being overturned but even consideration for bias towards
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1 defendants and exceeding judicial authority. This is why the State is to present expert testimony
2 on the correlation of tests to impairment, and the judicial officer consider such testimony of
3 validly admitted tests. A test taken outside the two-hour window is not admissible absent a
4 second test upon which an alcohol level can be anchored by testimony of an expert in the field of
5 retrograde extrapolation. The single test cannot and should not be considered by this court and
6 request is hereby made to exclude such test from admission and/or consideration.
7

8 In *Phillips*, the defendant contended that her blood alcohol level, which was admitted in
9 the form of a laboratory report, was not relevant under the charged theory of DUI and was more
10 prejudicial than probative because the State did not produce a witness to correlate the blood
11 alcohol level with some degree of actual impairment. The Court agreed stating:
12

13 While the presence of alcohol in Phillips's system was relevant to proving the offense of driving
14 under the influence, we conclude that evidence of the actual blood alcohol level, without any
15 evidence correlating that blood alcohol level with impairment in driving, was unfairly
16 prejudicial. Therefore, we conclude that the district court erred in admitting evidence of Phillips's
17 blood alcohol level.

18 *Phillips v. State*, 381 P.3d 650 (Nev. 2012), citing *Libby v. State*, 115 Nev. 45, 52, 975 P.2d 833,
19 837 (1999).

20 The present case involves that identical issue: a test with no one expert to correlate it to
21 any type of impaired driving. It can't be used for the within two-hour theory, and there was no
22 second test to be used for extrapolation or impairment theory. As in *Phillips*, this case involves a
23 single test and no second test and too many factors upon which a forensic scientist or expert
24 could reasonable extrapolate Molen's blood alcohol at the time of driving. This court should not
25 consider or permit the single test to be admitted, as the probative value to show Molen's alcohol
26 level at a time outside of the two hour time limit is outweighed by the danger of unfair prejudice
27 to him if the test is in any way used to attempt or determine any level of alcohol or intoxication
28

1 at the time of driving. No expert is able to testify using a single test, and here the State does not
2 even have an expert willing to do so, nor should a judge substitute their opinion and become that
3 expert. Doing so also raises the issue of bias and goes to shows the judicial officer is no longer
4 impartial and then becomes a witness for the prosecution rather than a trier of fact. A test with
5 nothing to correlate it to driving is just that: a test than cannot be correlated to driving.
6

7 8 **CONCLUSION**

9 Based on the foregoing, Appellant MATTHEW HANEY MOLEN's appeal must be
10 granted, and his conviction reversed.

11 Respectfully SUBMITTED this 30th day of July, 2020.

12
13 /s/Craig Mueller
14 CRAIG A. MUELLER, ESQ.
15 Attorney For Appellant
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21 **AFFIRMATION PURSUANT TO NRS 239B.030**

22 I, Craig A. Mueller, Esq., do hereby affirm that the preceding APPELLANT'S OPENING
23 BRIEF in Eighth Judicial District Court, case number C-20-346852-A, Dept. II, does not contain
24 the social security number of any person.

25 DATED this 30th day of July, 2020.

26
27 /s/Craig A. Mueller
28 CRAIG A. MUELLER , ESQ.

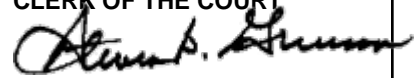
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CERTIFICATE OF ELECTRONIC SERVICE

I certify that a copy of Appellant's Opening Brief was served through the court clerk's
Odyssey Efile/Eservice network on July 30, 2020, to:

MELANIE SCHEIBLE, ESQ.
Deputy District Attorney
Clark County District Attorney's Office

BY: /s/Rosa Ramos
Legal Assistant to
Mueller & Associates



RSPN
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-

MATTHEW MOLEN,
#8014510

Defendant.

CASE NO: C-20-348754-A

DEPT NO: II

STATE'S RESPONSE TO APPELLANT'S OPENING BRIEF

DATE OF HEARING: SEPTMEBER 17, 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 Appellant's Opening Brief.

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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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 Matthew Molen (“Appellant”) was charged by way of criminal complaint on or about
4 March 13, 2019 with CHILD ABUSE, NEGLECT, OR ENDANGERMENT (Category B
5 Felony – NRS 200.508.1 – NOC 55226) and DRIVING UNDER THE INFLUENCE
6 (Misdemeanor – NRS 484C.110, 484C.400, 484C.105 – NOC 53900).

7 On August 27, 2019, a preliminary hearing was held on Count 1 CHILD ABUSE,
8 NEGLECT, OR ENDANGERMENT (Category B Felony – NRS 200.508.1 – NOC 55226),
9 for which this honorable court found probable cause. On December 5, 2019, a non-jury trial
10 was held before this honorable court on Count 2 DRIVING UNDER THE INFLUENCE
11 (Misdemeanor – NRS 484C.110, 484C.400, 484C.105 – NOC 53900). Both parties rested on
12 December 5, 2019. However, the honorable Justice Court of the Henderson Township granted
13 Appellant leave to file supplemental briefing before making a final adjudication. Appellant
14 was adjudicated guilty on March 17, 2020. Appellant underwent a substance abuse evaluation
15 and was subsequently sentenced on May 18, 2020.

16 Appellant filed his notice of appeal on May 21, 2020. The Justice Court of the
17 Henderson Township filed the record of the case with this Honorable Court on June 11, 2020.
18 This honorable court issued a briefing schedule on June 18, 2020 ordering Appellant to file
19 his opening brief by July 20, 2020, and for the State to file its response by August 19, 2020.
20 Appellant’s opening brief was subsequently filed on July 30, 2020. The State herein responds.

21 **STATEMENT OF THE FACTS**

22 Officers from the Henderson Police Department responded to a vehicle collision
23 near the intersection of Pecos and Robindale on March 12, 2019. Non-Jury Trial Transcript
24 12/5/2019 (“NJT”) at 26. Officer Groll was dispatched at approximately 1520 hours, and
25 arrived at 1538 hours. NJT 26-28. After Officer Groll arrived, he saw Defendant exit his
26 Hyundai, which was parked in a parking lot near the intersection. NJT 30. When Officer Groll
27 approached Defendant, Officer Groll detected alcohol on Defendant’s breath. Id. Officer Groll
28 administered a series of Field Sobriety Tests, including a horizontal gaze nystagmus, walk and

1 turn, and one leg stand test. NJT 38-39. On the horizontal gaze nystagmus test, Defendant
2 exhibited six out of six possible clues of impairment. NJT 39. On the walk and turn test,
3 Defendant exhibited three out of eight possible clues of impairment. Id. On the one leg stand
4 test, Defendant exhibited three of four possible clues of impairment. Id.

5 Based on the indicators of impairment, Officer Groll placed Defendant under arrest at
6 that time. NJT 40-41. Officer Groll transported Defendant to Henderson Detention Center
7 where Officer Groll administered a breath test to Defendant. NJT 44-46. In accordance with
8 policy, Officer Groll first observed Defendant for at least fifteen minutes prior to giving the
9 sample for the breath test. NJT 48-50. During this time, Officer Groll did not observe
10 Defendant place anything in his mouth, remove anything from his mouth, or anything else that
11 might affect the results of a breath test. NJT 48-50, 141-142.

12 At 1737 hours on March 12, 2019 Defendant provided a breath sample which had a
13 .172 breath alcohol concentration. NJT at 125, State's Exhibit 9. Four minutes later, at 1741
14 hours, Defendant provided a breath sample which had a breath alcohol concentration of .164.
15 Id.

16 **ARGUMENT**

17 **A. The Appeal Ought to be Denied for Appellant's Failure to Prosecute.**

18 The Justice Court of the Township of Henderson transmitted a complete record of this
19 case to this honorable court on June 11, 2020. This honorable court issued its Notice of
20 Hearing and Briefing schedule on June 18, 2020 which specified that Appellant's brief was
21 due on July 20, 2020. This honorable court issued a subsequent, amended order, changing the
22 date of the hearing but reiterating Appellant's deadline to file an opening brief of July 20,
23 2020.

24 Appellant did not file his brief, nor a motion requesting additional time on or before
25 July 20, 2020. And, he has yet to show any good cause for the delay.

26 Appellant inexplicably filed a "Notice of Transcripts" on July 22, 2020, which included
27 the transcripts of the Non-Jury Trial on December 5, 2019 and further proceedings on March
28 17, 2020, both of which were already included in the record provided by the Justice Court on

1 June 11, 2020. Finally, on July 30, ten days after the due date for his opening brief, Appellant
2 filed this brief.

3 The Nevada Rules of Appellate Procedure (NRAP) provide:

4 “A motion for extension of time for filing a brief may be made no
5 later than the due date for the brief and must comply with the
6 provisions of this Rule and Rule 27.”
NRAP 31(b)(3)

and

7 “[i]f an appellant fails to file an opening brief or appendix within
8 the time provided by this Rule, or within the time extended, a
9 respondent may move for dismissal of the appeal or the court may
10 dismiss the appeal on its own motion. If an appellant has not filed
a reply brief, oral argument will be limited as provided by Rule
34(c)”
NRAP 31(d)1

11 The Nevada Supreme Court has affirmed the District Court’s authority to dismiss an appeal
12 for failure to comply with the Court’s orders, as well as the Court’s authority to order
13 briefing schedules.
14

15 Such authority derives from the court's inherent authority, which
16 includes those powers “which ‘are necessary to the exercise of all
17 others.’ A court exercising its appellate jurisdiction must be able to
18 require the orderly and timely processing of appeals with rules and
19 sanctions for the failure to follow those rules. And while not
20 specifically addressing the appellate jurisdiction of the court, this
21 court has recognized the district court's inherent “power to dismiss
22 a case for failure to prosecute or to comply with its orders ... within
the bounds of sound judicial discretion, independent of any
authority granted under statutes or court rules.” We conclude that
the inherent authority of the district court acting in its appellate
jurisdiction permits the court to dismiss an appeal for failure to
prosecute or comply with the court's orders. . .

23
24 Sparks v. Bare, 132 Nev. 426, 432–33, 373 P.3d 864, 868 (2016), citing Roadway Express,
25 Inc. v. Piper, 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (quoting United
26 States v. Hudson, 11 U.S. 32, 34, 7 Cranch 32, 3 L.Ed. 259 (1812)), citing
27 Moore v. Cherry, 90 Nev. 390, 393, 528 P.2d 1018, 1020 (1974)
28

1 It is well within this honorable Court's discretion to dismiss Appellant's appeal for
2 failure to comply with the Court's order. If, however, this Court sees fit to reach Appellant's
3 claims on their merits, he still is not entitled to relief.

4
5 **B. Deputy District Attorney Scheible's Prosecution of this Case Does Not Violate The**
6 **Separation of Powers Doctrine.**

7 It is appellant's responsibility to present relevant authority and cogent argument, issues
8 not so presented need not be addressed by this court. Maresca v. State, 103 Nev. 669, 673,
9 748 P.2d 3, 6 (1987); NRAP 28(a)(9)(A). Appellant fails to support his interpretation of the
10 Nevada Constitution with any legal authority. To the contrary, In Heller v. Legislature of
11 Nev., 120 Nev. 456 (2004), the Nevada Supreme Court was asked to declare that dual service
12 violates the separation of powers doctrine. The Court refused to do so. Id. At 459.

13 Further, Appellant fails to articulate the relevance of this particular claim to his case
14 and why vacating his conviction would be an appropriate remedy.

15
16 **C. The Justice Court Did Not Commit Reversible Error When It Admitted The**
17 **Intoxilyzer 8000 Results.**

18 It is well settled that a trial court's determination to admit or exclude evidence is to be
19 given great deference and will not be reversed absent manifest error. See e.g. Braunstein v.
20 State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002), Bletcher v. State, 111 Nev. 1477, 1480, 907
21 P.2d 978 (1995), Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983), Krause Inc. v.
22 Little, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001).

23 *1. The Two Tests Met the Statutory Requirements of NRS 484C.200*

24 The law does not support Appellant's assertion that the two tests administered at 1737
25 hours and 1741 hour, respectively, should be considered a single test. Neither case to which
26 he cites is on point. In Burcham, the defendant's blood alcohol level was measured at .07
27 about an hour after he was driving, and .04 another hour after the first test. Sheriff, Clark
28 County v. Burcham, 124 Nev. 1247, (2008) The Court ruled "expert testimony regarding

1 retrograde extrapolation or an explanation by the State is not required in grand jury
2 proceedings under these circumstances.” Id at 328.

3 The instant case is entirely different. NRS 484C.200 requires consecutive tests of the
4 breath in order to control for possible errors. This makes sense. If a defendant’s breath alcohol
5 were measured to be .01 and a few minutes later .11, a reasonable person would worry that
6 one of the results was erroneous. In the instant case, the two tests are different by .008, so the
7 Court may rest assured that both of those numbers are accurate. And, this conclusion is
8 supported by NRS 484C.200(1)(a) which requires that the two tests be within .02 of one
9 another.

10 The next question for the court, is whether there is a test before it that was taken within
11 two hours of Defendant being in actual control of the vehicle. There is. The first test was taken
12 one hour and fifty eight minutes after Officer Groll observed Defendant exit his car.

13 Appellant’s dependence on State v. Dist. Ct. (Armstrong), 127 Nev. 927, 936, (2011)
14 is similarly misplaced. That case addressed whether the results of a test of blood taken more
15 than two hours after the defendant was involved in a vehicle accident would appeal to “the
16 emotional and sympathetic tendencies of a jury, rather than the jury’s intellectual ability to
17 evaluate evidence.” State v. Dist. Ct. (Armstrong), 127 Nev. 927, 933, (citing Krause Inc. v.
18 Little, 117 Nev. 929 at 935 (2001)) The concern that a jury would be so shocked by the
19 defendant’s astonishingly high blood alcohol content that its members would be unable to
20 rationally consider the evidence does not apply in this case where the trier of fact was a judge
21 and not a jury.

22 2. *No Retrograde Extrapolation Was Utilized or Required*

23 In this case, the test was taken within the two-hour mark, so retrograde extrapolation is
24 not necessary to prove Appellant’s intoxication beyond a reasonable doubt. See Transcript
25 3/17/2020 at 6. Moreover, any doubt as to Appellant’s intoxication at the time of the vehicle
26 collision, would be allayed by the results of the breath alcohol test. By the time the test was
27 administered, one hour and fifty-eight minutes after Appellant was no longer in actual physical
28

1 control of his vehicle, his breath alcohol content was still twice the legal limit: .172 and .164.
2 NJT State's Exhibit 9.

3 NRS 484C.11C states that it is unlawful for a person who "is found by measurement
4 within 2 hours after driving *or being in actual physical control of a vehicle* to have a
5 concentration of alcohol of 0.08 or more in his or her blood or breath" to drive or be in actual
6 physical control of a vehicle." (Emphasis added.) Officer Groll testified that he arrived at
7 15:38 hours. NJT 26-28. Officer Groll further testified that Appellant got out of his car at
8 approximately 15:39 hours. Id at 50, line 4. Until this point, Appellant was in possession of
9 his keys, was positioned in the vehicle behind the wheel, was physically capable of operating
10 the vehicle, and the vehicle was operable. Therefore, 15:39 hours is the point when Appellant
11 was no longer in actual physical control of his vehicle. Barnier v. State, 119 Nev. 129, 134, 67
12 P.3d 320, 323 (2003) (holding that active or constructive possession of the keys, Appellant's
13 position in the vehicle behind the wheel, whether Appellant was physically capable of
14 operating the vehicle, and whether the vehicle was operable are reasonable factors to
15 determine actual physical control).

16 Appellant blew into the tube of the Intoxilyzer at 17:37 hours. NJT at 49, line 23.
17 Therefore, an hour and fifty-eight minutes elapsed between when Appellant stopped "being in
18 actual physical control of [the] vehicle" and when he took the Intoxilyzer test. Id at 50, line 8.
19 Therefore, the test occurred within the two-hour statutory window required by NRS 484C.110.
20 The result of that test—a breath alcohol concentration of .172—was corroborated by a second
21 test which detected a breath alcohol concentration of .164. The difference between the two
22 results is .008, which is less than .02 as required by NRS 484C.200.

23 As for any arguments regarding the validity of the second sample—such as that the
24 samples were not spaced far enough apart or that the second sample might be construed to
25 have fallen outside of the two-hour window—those arguments are defeated by State v. Taylor-
26 Caldwell, 126 Nev. 132 (2010), which holds that the "second test is "merely an evidentiary
27 requirement to validate the test" and a single breath sample is "sufficient to prove
28 [Appellant's] breath was above the legal limit." Id. at 135. (Taylor-Caldwell refers to NRS

1 484.384 and NRS 484.386 where the statutes used the singular forms of “rest” and “test,” and
2 this reasoning also applies to NRS 848C.200 where the statute uses the singular form of “test.”)

3 Appellant failed to present any evidence in support of the conflicting conclusions he
4 appears to draw: that an error occurred during the breath observation period; or, that no breath
5 observation period occurred. Appellant did not consume alcohol or regurgitate alcohol into
6 his mouth during the observation period. He did not eat anything or drink anything. He did not
7 put anything else in his mouth.

8 Additionally, Appellant’s argument that the Judge sat as an expert is belied by the
9 record because the court did not rely on retrograde extrapolation to come to its decision. See
10 Transcript 3/17/2019 at 6. Likewise, Appellant needlessly weighs the prejudicial versus
11 probative value of the evidence, as it is both relevant and admissible. There is no evidence of
12 judicial bias in the instant case. The only sense in which the evidence of Appellant’s breath
13 alcohol concentration is “prejudicial” is that it demonstrates Appellant’s guilt.

14 **CONCLUSION**

15 For the forgoing reasons, the State respectfully requests that Appellant’s appeal be DENIED.

16
17
18 DATED this _____ day of August, 2020.

19 Respectfully submitted,

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

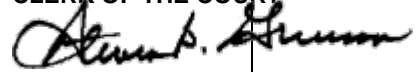
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24 MELANIE SCHEIBLE
25 Deputy District Attorney
26 Nevada Bar #14266

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Attorney For Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)	
)	
Plaintiff,)	
)	CASE NO. C-20-348754-A
VS.)	
)	DEPT. NO. II
MATTHEW MOLEN,)	
#8014510)	
)	
Respondent.)	

APPELLANT'S REPLY BRIEF

DATE OF HEARING: SEPTEMBER 17, 2020
TIME OF HEARING: 9:00 a.m.

COMES NOW, Appellant Matthew Molen, by and through his attorney Craig A. Mueller, Esq., and hereby submits the attached Memorandum of Points and Authorities replying to Respondent's Answering Brief. This Reply Brief 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.

DATED This 3rd Day Of September, 2020.

/s/ Craig A. Mueller
CRAIG A. MUELLER, ESQ.
Attorney For Appellant

1
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 A.

4 **DEPUTY DISTRICT ATTORNEY SCHEIBLE’S PROSECUTION OF THIS CASE**
5 **DOES VIOLATE THE SEPARATION OF POWERS DOCTRINE.**

6 In *Heller v. Legislature of Nevada*, 120 Nev. 456, 93 P.3d 746 (2004), the Nevada
7 Supreme Court ruled that the Secretary of State does not have standing to sue the Legislature to
8 remove executive branch employees from serving on the Legislature because doing so violates
9 the separation of powers doctrine. The Supreme Court held that Secretary Of State Dean Heller
10 did not state an actionable “claim or controversy”. *Id.* at 463. The Supreme Court further held
11 that since there were no executive branch employees actually seated in the Legislature, the matter
12 was not ripe for review. *Id.*

13
14 By contrast, Appellant was actually aggrieved by the fact that he was convicted after a
15 bench trial that should never have happened. Deputy DA Scheible may not prosecute individuals
16 for violating statutes she may have had input in writing or amending as that would clearly cross
17 the separation-of-powers line. Because of that the trial was a nullity: the Unlike Secretary of
18 State Heller, Appellant is not requesting a sweeping ruling altering the way the Legislature
19 polices its members. *Id.* Appellant singles out a specific prosecutor who is also serves in the
20 Assembly who violated the separation of powers doctrine when she prosecuted his case.
21
22

23 The Nevada Constitution states in relevant part:

24 ARTICLE. 3. - Distribution of Powers.

25 Section 1. Three separate departments; separation of powers; legislative review of
26 administrative regulations.

27 1. The powers of the Government of the State of Nevada shall be divided into
28 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.

1 The language of the Nevada Constitution is clear and unambiguous: "...no persons charged with
2 the exercise of powers properly belonging to one of these departments shall exercise any
3 functions, appertaining to either of the others, except in the cases expressly directed or permitted
4 in this constitution."

6 **B.**

7 **THE JUSTICE COURT COMMITTED REVERSIBLE ERROR**
8 **WHEN IT ADMITTED THE INTOXILYZER 8000 RESULTS.**

9 Respondent cites *State v. Taylor-Caldwell*, 126 Nev. 132, 229 P.3d 471 (2010) to bolster
10 the validity of the second breath sample by stating that "the second test is 'merely an evidentiary
11 requirement to validate the test' and a single breath sample is 'sufficient to prove [Appellant's]
12 breath was above the legal limit'." State's Response, p. 7, lines 23-28, quoting *Id.* at 135.

13 *Taylor-Caldwell* involved appellate review of an administrative law decision: the revocation of a
14 driver's license by DMV. A DMV driver's license revocation hearing is a civil proceeding, not a
15 criminal one. NRS 484.220. The standard of proof at a DMV revocation hearing is a
16 preponderance of the evidence. The standard of proof at a criminal trial is beyond a reasonable
17 doubt. The evidence presented by the City of Henderson in this case did not meet this standard
18 of proof. The conviction must be vacated.

21 **CONCLUSION**

22 Based on the foregoing, Appellant respectfully submits that his appeal must be granted and
23 his conviction for DUI must be reversed.

24 Respectfully SUBMITTED This 3rd Day Of September, 2020.

26 /s/CRAIG A. MUELLER
27 CRAIG A. MUELLER, ESQ.
28 Attorney For Appellant

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MELANIE SCHEIBLE, ESQ.
Deputy District Attorney
Clark County District Attorney's Office

AA000175

Criminal Appeal

COURT MINUTES

September 17, 2020

C-20-348754-A Matthew Haney Molen, Appellant(s)
vs
Nevada State of, Respondent(s)

September 17, 2020 09:00 AM Argument

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Ortega, Natalie

RECORDER: Amoroso, Brittany

REPORTER:

PARTIES PRESENT:

Craig A Mueller Attorney for Appellant

Melanie L. Scheible Attorney for Respondent

JOURNAL ENTRIES

Also present, Chief Deputy District Attorney Alex Chen.

Mr. Mueller requested to waive the presence of Mr. Molen noting he resided out of state. COURT ORDERED, Mr. Molen's presence WAIVED. Mr. Schieble noted Chief Deputy District Attorney Alex Chen was also present as head of their appellant division. Upon Court's inquiry, Ms. Scheible advised the procedural issue would need to be resolved before the merits. Mr. Chen argued the appeal was untimely. Arguments by Ms. Scheible regarding the procedural issue. Upon Court's inquiry as to if the State was prejudiced, Ms. Schieble argued the Appellant failed to prosecute the appeal in a timely fashion and should be dismissed. Further, the State should not have to wait after a deadline had passed and then respond to a brief. The Appellant should not be rewarded noting she was never served personally with the brief. She discovered the brief because she followed through. There was no adequate time to research or respond properly. COURT ORDERED, State's request to dismiss for untimely brief DENIED. COURT FINDS any purported failure to prosecute, the delay was minimal and inconsequential in this particular case. Further, there was no prejudice given the State ultimately found out about this matter and prepared a brief in response on August 19th. The State had an adequate opportunity. Based on tort delay, zero prejudice, there was no indication of bad faith, the Court would hear the merits on the two issues. Mr. Mueller indicated he would allow the State more time to respond noting this was a pro-bono case. Mr. Chen advised he appreciated Mr. Mueller's offer and would take his offer so they may present the Court with a better position. COURT ORDERED, matter CONTINUED to October 15, 2020 at 10:00 a.m. COURT FURTHER ORDERED, State's Supplemental Opposition, October 1, 2020; Appellant's Reply deadline October 8, 2020.

CONTINUED TO: 10/15/20 10:00 AM

Criminal Appeal

COURT MINUTES

October 15, 2020

C-20-348754-A Matthew Haney Molen, Appellant(s)
vs
Nevada State of, Respondent(s)

October 15, 2020 10:00 AM Argument

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Snow, Grecia

RECORDER: Slattery, Patti

REPORTER:

PARTIES PRESENT:

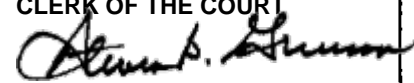
Alexander G. Chen Attorney for Respondent

Craig A Mueller Attorney for Appellant

Melanie L. Scheible Attorney for Respondent

JOURNAL ENTRIES

Court noted it reviewed the supplemental briefs by both parties. Argument by Mr. Mueller regarding Deputy District Attorney Scheibel's prosecution of the case violated the separation of powers doctrine and did not receive a fair hearing due to this. Mr. Chen argued there was nothing to support claim of impropriety; further argued Attorney General's opinions were reliable. Further arguments by Mr. Mueller. Court advised this was an important issue of constitutional significance and would need to review the Lane case carefully. COURT ORDERED, matter taken UNDER ADVISEMENT.



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-

MATTHEW HANEY MOLEN,
#8014510
Defendant.

CASE NO: C-20-348754-A

DEPT NO: II

**RESPONDENT'S SUPPLEMENTAL RESPONSE TO APPELLANT'S OPENING
BRIEF REGARDING SEPARATION OF POWERS ISSUES**

DATE OF HEARING: OCTOBER 15, 2020
TIME OF HEARING: 10:00 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 Supplemental Response.

This Supplement 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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AA000178

1 **ARGUMENT**

2 **I. APPELLANT WAIVED HIS RIGHT TO ANY SEPARATION OF**
3 **POWERS CLAIM BY NEVER MAKING AN OBJECTION**

4 While Appellant's argument lacks any merits on the separation of powers grounds, this
5 Court must first look to whether any objection to the deputy's involvement in the case has
6 been waived. The longstanding rule is that failure to preserve an error is forfeited on appeal,
7 even when the error that has been deemed structural. Jeremias v. State, 134 Nev., Adv. Op. 8,
8 412 P.3d 43, 48 (2018); See also, United States v. Olano, 507 U.S. 725, 731, 113 S.Ct. 1770,
9 123 L.Ed.2d 508 (1993) ("No procedural principle is more familiar to this Court than that a
10 constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil
11 cases by the failure to make timely assertion of the right..."(internal quotation marks
12 omitted)). Thus, failure to object at any point means that this objection is untimely and should
13 be rejected.

14 Appellant is suddenly for the first time arguing in an appeal that the Deputy District
15 Attorney should not have been allowed to handle this case. While Appellant never objected
16 to this matter, it should and would have failed as a matter of law.

17 When a party wishes to disqualify a prosecutor, such impropriety must take the form
18 of a conflict of interest. See NRPC 1.7, 1.9, 1.11; United States v. Kahre, 737 F.3d 554, 574
19 (2013) ("proof of a conflict [of interest] must be clear and convincing to justify removal of a
20 prosecutor from a case."). Defendant has failed to demonstrate, or even address, the existence
21 of a conflict of interest.

22 None of these issues were ever raised by Appellant, and it is certainly no secret that the
23 Deputy District Attorney that prosecuted Appellant was a member of the Nevada Senate at the
24 time this case was prosecuted. The easy and correct solution here is to deny Appellant's
25 motion as something that was never raised and thereby waived.

26 **II. HOLDING A POSITION ON THE LEGISLATURE AND BEING A DEPUTY**
27 **DISTRICT ATTORNEY DOES NOT VIOLATE THE SEPARATION OF**
28 **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

1 numerous grounds. According to Article 3, § 1, sets out the three separate departments of
2 government: the Legislative, the Executive, and the Judicial bodies. However, an acting
3 Deputy District Attorney is a public employee rather than a person merely holding a public
4 office, and thus the separation of powers does not apply. Article 4, § 6 grants in each House
5 the authority to determine the qualifications of its own members. Clearly, the Senate in
6 Nevada has not enacted any law or prohibition of a public employee also serving as a member
7 of the Legislature.

8 The Nevada Constitution does not contain any specific provisions concerning
9 incompatible public offices that would prohibit legislators from holding positions of public
10 employment with the local government. Further it is relevant to point out that a Deputy
11 District Attorney is a mere “public employee” and not a “public officer” as used in the Nevada
12 Constitution. *See State ex rel. Mathews v. Murray*, 70 Nev. 116, 120-21, 258 P.2d 982, 984
13 (1953). Public officers are created by law not simply created by mere administrative authority
14 and discretion. Second, the duties of a public officer must be fixed by law and must involve
15 an exercise of the sovereign functions of the state, such as formulating state policy. *Univ. &*
16 *Cnty. Coll. Sys. V. DR Partners*, 117 Nev. 195 200-06. Since a Deputy District Attorney is a
17 “public employee,” the separation of powers doctrine as listed in Article 3 §1 is not applicable.

18 Specifically, for district attorneys the Nevada Supreme Court has held that the
19 separation of powers was not applicable to the exercise of certain powers by a county’s District
20 Attorney because he was not a state constitutional officer. *Lane v. Second Jud. Dist. Ct.* 104
21 Nev. 427, 437 (1988). In citing NRS 252.110, which sets forth the powers inured to the district
22 attorney, the Court indicated that the district attorney is not an office created via the Nevada
23 State Constitution, thus the separation of powers doctrine is inapplicable.

24 In 2004, then Secretary of State Dean Heller also broached this topic in two different
25 ways. First, he sought an advisory opinion from the Nevada Attorney General on whether the
26 separation of powers clause of the Nevada Constitution was applicable to local governments.
27 2004 Nev. Op. Atty. Gen. No. 03 (Nev.A.G.), 2004 WL 723329. Attorney General Brian
28 Sandoval issued his opinion that local government employees could dually serve as members

1 of the Nevada Legislature, and that such service did not violate Article 3, § 1 of the Nevada
2 Constitution's separation of powers clause.

3 Attorney General Sandoval went on to explain Nevada's "long-standing practice of
4 local government employees serving in the Nevada State Legislature." He pointed to
5 examples such as Assemblywoman Ruth Averill, who was the second woman ever elected to
6 the Nevada State Legislature. Assemblywoman Averill was a school teacher that went on to
7 serve on the Assembly Committee on Judiciary as well as the Assembly Committee on
8 Education.

9 In finding authority for the dual service of people like Assemblywoman Averill,
10 Attorney General Sandoval relied on California laws that held the separation of powers
11 doctrine does not apply to local government employees. *People ex rel. Attorney General v.*
12 *Provines*, 34 Cal. 520 (1868). The California court distinguished that the constitution set up
13 the State government but not local and county governments. This decision was reaffirmed in
14 California and is adopted in a majority of other jurisdictions. *Mariposa County v. Merced*
15 *Irrig. Dist.*, 196 P.2d 920, 926 (Cal. 1948). It should be noted that California was an
16 appropriate state to draw from given that Nevada's Constitution was largely modeled after
17 California's State Constitution. *See Aftercare of Clark County v. Justice Court of Clark*
18 *County*, 120 Nev. 1, 82 P.3d 931 (2004). Attorney General Sandoval concluded his advisory
19 opinion by stating the following: "Further, it is the opinion of this office that the constitutional
20 requirement of separation of powers is not applicable to local governments. Accordingly,
21 absent legal restrictions unrelated to the separation of powers doctrine, a local government
22 employee may simultaneously serve as a member of the Nevada Legislature."

23 The second way that Secretary of State Heller sought clarification on this issue followed
24 the advisory opinion in a petition for writ of mandamus that he sought challenging state
25 government employees who also serve on the Legislature. *Heller v. Legislature of the State*
26 *of Nevada*, 120 Nev. 456 (2008). The Court in *Heller* echoed and affirmed the language in
27 Article 4, § 6 that only the Legislature has the authority to judge its members' qualifications.
28 *Id.*, at 468, 93 P.3d at 755.

1 In denying the petition for writ of mandamus, the Nevada Supreme Court further held
2 that it would be in violation of the Separation of Powers Doctrine to judicially legislate who
3 is eligible to serve in the Nevada Legislature, given that such a function lies with the
4 Legislature itself.

5 The Legislature is given deference in determining who is qualified to be a member of
6 the Legislature. As seen in *Heller*, the Supreme Court of Nevada refused to address this issue
7 on the merits because to address the issue presented would in itself be a violation of the
8 separation of powers. The Legislature was given the specific authority in the constitution to
9 qualify their members, and the supreme court said that “by asking us to declare that dual
10 service violates the separation of powers, the secretary urges our own violation of the
11 separation of powers”. *Heller* at 459.

12 If this Court were to prohibit a Deputy District Attorney from a righteous prosecution,
13 thereby vacating a conviction and starting the case anew, it would result in this Court also
14 violating the separation of powers doctrine. Since the Legislature was granted this power in
15 the Nevada Constitution, this authority cannot be usurped by the Judicial branch of the
16 government without violating the separation of powers article of the Constitution.

17 Finally, this Court should be aware that the Legislative Counsel Bureau (LCB Legal)
18 issued a recent opinion regarding this exact same issue. (Attached as Exhibit “1”). While LCB
19 Legal initially affirms and reiterates much of what has been discussed above, it went further
20 to also examine other jurisdictions, as well as the history of Nevada, in concluding that public
21 employment is not a bar to serving in the Legislature.

22 CONCLUSION

23 Appellant’s argument should first and foremost be denied on the basis of something
24 that was waived and not previously raised. However, even on the merits, Appellant’s
25 argument lacks merit because service of a public employee in the Legislature is not a violation

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1 of the Nevada Constitution's Separation of Powers clause. Based upon the foregoing
2 argument, the State respectfully requests that Appellant's appeal be denied on any grounds
3 regarding his separation of powers argument.

4 DATED this 17th day of.

5 Respectfully submitted,

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

9 BY /s/ALEXANDER CHEN
10 ALEXANDER CHEN
11 Chief Deputy District Attorney
12 Nevada Bar # 10539

13 CERTIFICATE OF ELECTRONIC FILING

14 I hereby certify that service of Respondent's Supplemental Response to Appellant's
15 Opening Brief Regarding Separation of Powers Issues, was made this 17th day of September,
16 2020, by Electronic Filing to:

17 CRAIG MUELLER
18 receptionist@craigmuellerlaw.com

19 /s/Maria Bateson
20 Secretary for the District Attorney's Office
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STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU

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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 be 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 Staudé 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 Staudé, 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 Staudé. 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.

Staudé, 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 Staudé 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. Anneaf, 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,

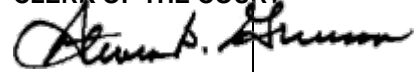


Kevin C. Powers
General Counsel

KCP:dtm

Ref No. 200807100628

File No. OP_Erdoes200807221145



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Attorney For Appellant

DISTRICT COURT
CLARK COUNTY, NEVADA

MATTHEW HANEY MOLEN,)	
)	
Appellant,)	CASE NO: C-20-348754-A
)	
vs.)	DEPT NO: II
)	
THE STATE OF NEVADA,)	
)	
Respondent.)	

**APPELLANT'S REPLY TO RESPONDENT'S SUPPLEMENTAL RESPONSE TO
APPELLANT'S OPENING BRIEF REGARDING SEPARATION OF POWERS ISSUES**

COMES NOW, Appellant Matthew Haney Molen, by and through his attorney Craig Mueller, Esq., and hereby submits the following as and for his Reply to Respondent's Supplemental Response To Appellant's Opening Brief Regarding Separation Of Powers Issues:

**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

1 properly belonging to one of these departments shall exercise any functions,
2 appertaining to either of the others, except in the cases expressly directed
3 or permitted in this constitution.

4 Deputy District Attorney Scheibel serves on the Nevada State Legislature. She is also employed
5 as a prosecutor by the Clark County District Attorney's Office. Her active involvement trying
6 criminal cases would appear to clearly violate the express terms of Nev. Const. Art. 3 Sec. 1(1):
7 "...no persons charged with the exercise of powers properly belonging to one of these
8 departments shall exercise any functions, appertaining to either of the others...."

9
10 In *Heller v. Legislature of Nevada*, 120 Nev. 456, 93 P.3d 746 (2004), the Nevada
11 Supreme Court ruled that the Secretary of State does not have standing to sue the Legislature to
12 remove executive branch employees from serving on the Legislature because doing so violates
13 the separation of powers doctrine. The Supreme Court held that Secretary Of State Dean Heller
14 did not state an actionable "claim or controversy". *Id.* at 463. The Supreme Court further held
15 that since there were no executive branch employees actually seated in the Legislature, the matter
16 was not ripe for review. *Id.*

17
18 By contrast, Appellant was actually aggrieved by the fact that he was convicted after a
19 bench trial that should never have happened. Deputy DA Scheible may not prosecute individuals
20 for violating statutes she may have had input in writing or amending as that would clearly cross
21 the separation-of-powers line. Because of that the trial was a nullity. Unlike Secretary of
22 State Heller, Appellant is not requesting a sweeping ruling altering the way the Legislature
23 polices its members. *Id.* Appellant singles out a specific prosecutor who also serves in the
24 Assembly who violated the separation of powers doctrine when she prosecuted his case.

25
26 The language of the Nevada Constitution is clear and unambiguous: "...no persons
27 charged with the exercise of powers properly belonging to one of these departments shall
28

1 exercise any functions, appertaining to either of the others, except in the cases expressly directed
2 or permitted in this constitution.”

3 Respondent provides a copy of the Legislative Counsel Bureau’s opinion letter dated
4 August 8, 2020. The LCB’s opinion is “...that the separation-of-powers provision of the Nevada
5 Constitution only prohibits a legislator from holding a *public office* in another department of
6 state government, because a person who holds a *public office* exercises sovereign functions
7 appertaining to another department of state government.” Respondent’s Ex. 1, p. 27. The LCB
8 opines “...that the separation-of-powers provision of the Nevada Constitution does not prohibit a
9 legislator from occupying a position of *public employment* in another department of state
10 government, because a person who occupies a position of *public employment* does not exercise
11 any sovereign functions appertaining to another department of state government.” *Id.* Put
12 succinctly, Clark County District Attorney Steve Wolfson, as an elected official, is prohibited
13 from serving as a legislator but Deputy District Attorney Melanie Scheibel, as an employee of
14 the Clark County District Attorney’s Office, is not.

15 This *opinion*, and its distinction between *public office* and *public employment*, may or
16 may not eventually prove to be correct. As the LCB points out: “Since the *Heller* case in 2004,
17 neither the Nevada Supreme Court nor the Nevada Court of Appeals has addressed or decided
18 the merits of such a separation-of-powers challenge in a reported case.” Respondent’s Ex.1, p. 2.
19 What is the current state of the law is that the plain language of Nevada Constitution, Article 3,
20 Section 1(1) does not make any distinction between *public office* and *public employment*. It
21 does, however, prohibit an individual from working in the legislative and executive branches of
22 government simultaneously.

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Respectfully SUBMITTED this 25th day of September, 2020.

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4 **CERTIFICATE OF ELECTRONIC SERVICE**

5 I certify that a copy of Appellant's Reply To Respondent's Supplemental Response
6 To Appellant's Opening Brief Regarding Separation Of Powers Issues was served through the
7 court clerk's Odyssey Efile/Eservice network on September 25, 2020, to:

8 ALEXANDER CHEN
9 Chief Deputy District Attorney
10 Clark County District Attorney's Office

11 BY: /s/Rosa Ramos
12 Office Manager
13 Craig A. Mueller & Associates
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Criminal Appeal

COURT MINUTES

November 09, 2020

C-20-348754-A Matthew Haney Molen, Appellant(s)
vs
Nevada State of, Respondent(s)

November 09, 2020 12:16 PM 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 Matthew Molen was deprived of his Constitutional rights of procedural due process because his 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.

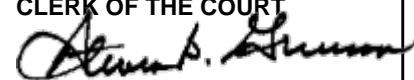
The Appellant was deprived of his constitutional rights to procedural due process even if the Nevada Separation of Powers clause as written does not apply to any persons employed by local governments. The Separation of Powers doctrine is such a clear, vital, and well-recognized aspect of the American 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 his 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, Esq.: cmueller@muellerhinds.com, Alexander Chen, Esq.: alexander.chen@clarkcountyda.com and Melanie Scheible, Esq.: melanie.scheible@clarkcountyda.com. 11/10km



MOT
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
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-

MATTHEW HANEY MOLEN,
#8014510

Defendant.

CASE NO: C-20-348754-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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1 **NOTICE OF HEARING**

2 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned
3 will bring the foregoing motion on for setting before the above entitled Court, in Department
4 II thereof, on Thursday, the 3rd day of December, 2020, at the hour of 9:00 o'clock AM, or as
5 soon thereafter as counsel may be heard.

6 DATED this 17 day of November, 2020.

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

10 BY 

11 ALEXANDER CHEN
12 Chief Deputy District Attorney
13 Nevada Bar #010539

14 **POINTS AND AUTHORITIES**

15 **A. THE STATE REQUESTS FURTHER CLARIFICATION**

16 On November 9, 2020, this Court granted Appellant Matthew Haney Molen's Motion
17 to Reconsider based upon her argument that the separation of powers clause of the Nevada
18 Constitution was violated when the Deputy District Attorney also held a separate role as a
19 part-time legislator. In the Minute Order, this Court granted the appeal, ordered that the
20 convictions be reversed, and ordered the bond, if any, be returned to Appellant. This Court
21 then directed Appellant to submit an Order consistent with the Minute Order.

22 In examining the Minute Order, there is no mention that this case be remanded for a
23 future trial. Thus, the State respectfully asks this Court for clarification on whether it is the
24 intent of this Court that the case be dismissed outright, or if its intention is to remand the case
25 to Justice Court for further proceedings.

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1 Based upon this newly discovered information, and because the issue came up during
2 oral argument, an assurance from this Court that it fairly and impartially ruled on the matter
3 and has avoided the appearance of impropriety based on the timing and amount of counsel's
4 contribution seems appropriate. Alternatively, if upon reconsideration this Court feels that the
5 campaign contribution might have affected the canons to avoid the appearance of impropriety,
6 then it should refrain from issuing an order and seek to have the matter re-assigned prior to
7 the filing of the final order.

8 **C. FOLLOWING THE FILING OF THE ORDER, THE STATE REQUESTS**
9 **THAT THIS MATTER BE STAYED TO SEEK A WRIT FROM THE NEVADA**
10 **SUPREME COURT**


11 The State disagrees with this Court's ultimate decision to reverse the conviction based
12 upon the Deputy District Attorney's prosecution of this case. Given that this is a novel issue,
13 but one of widespread importance, the State wishes to seek clarification via the Nevada
14 Supreme Court. Pursuant to Rule 8 of the Nevada Rules of Appellate Procedure, a party must
15 ordinarily seek a stay with the district court prior to seeking extraordinary relief. In order for
16 the appellate court to have jurisdiction, a written order must first be filed. Rust v. Clark Cty.
17 Sch. Dist., 103 Nev. 686 (1987).

18 Given that this Court's ruling may have an impact on other cases being handled by the
19 Deputy District Attorney, the State feels seeking extraordinary relief or clarification is
20 appropriate. Thus, pursuant to Rule 8(a)(1)(C), the State respectfully asks that the order be
21 filed and then that the order be stayed so that the State may seek a writ from the appellate
22 court.

23 DATED this 17 day of November, 2020.

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

27 BY

28 
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

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CRAIG MUELLER, ESQ.
Email: receptionist@craigmuellerlaw.com

BY: CP Bush
Secretary for the District Attorney's Office

19FH0521X/AC/ckb/L4

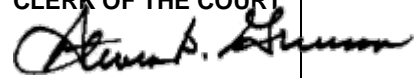
Contributions Search Results

Contributor	Date	Amount	Type	Recipient	Report
Craig Mueller & Associates	9/14/2020	\$1,500.00	Monetary Contribution	Richard Frank Scotti	2020 CE Report 3
Craig Mueller & Associates Inc	8/28/2020	\$500.00	Monetary Contribution	Crystal Lyn Eller	2020 CE Report 3
Craig Mueller	3/4/2020	\$500.00	Monetary Contribution	Jim Sweetin	2020 CE Report 1 (Amended)
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Craig A. Mueller, Attorney at Law	3/4/2020	\$500.00	Monetary Contribution	Tegan Christine Machnich	2020 CE Report 1
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Craig A. Mueller	5/24/2019	\$300.00	Monetary Contribution	Andrew Thomas Matthews	2020 Annual CE Filing
Craig A Mueller	5/2/2018	\$10,000.00	Monetary Contribution	Craig A Mueller	2018 CE Report 1
Craig A Mueller	5/7/2018	\$20,000.00	Monetary Contribution	Craig A Mueller	2018 CE Report 1
Craig A Mueller	5/11/2018	\$6,000.00	Monetary Contribution	Craig A Mueller	2018 CE Report 1
Craig A Mueller	5/14/2018	\$14,000.00	Monetary Contribution	Craig A Mueller	2018 CE Report 1
Craig Mueller	11/1/2017	\$100,000.00	Monetary Contribution	Craig A Mueller	2018 Annual CE Filing
Craig Mueller	5/22/2016	\$350.00	Monetary Contribution	Bita Yeager	2016 CE Report 2
Craig Mueller	3/31/2016	\$500.00	Monetary Contribution	Steven M Goldstein	2016 CE Report 1 (Amended)
Craig A. Mueller Attorney At Law	1/30/2015	\$500.00	Monetary Contribution	Martin D Hastings	2015 CE Report 1
Craig Mueller	11/3/2014	\$350.00	Monetary Contribution	William Horne	2014 CE Report 5
Craig Mueller	8/15/2014	\$500.00	Monetary Contribution	Joseph Anthony Scalia	2014 CE Report 3
Craig Mueller	5/23/2014	\$350.00	Monetary Contribution	Steven B Wolfson	2014 CE Report 2
Craig Mueller	2/10/2013	\$1,000.00	Monetary Contribution	Terry Jones Zach	2013 Municipal CE Report 1
Craig Mueller	9/10/2012	\$1,000.00	Monetary Contribution	Kalani Hoo	2012 CE Report 3
Craig Mueller	7/19/2012	\$250.00	Monetary Contribution	Amy P. Chelini	2012 CE Report 3
Craig Mueller	6/4/2012	\$500.00	Monetary Contribution	William D Jansen	2012 CE Report 2
Craig Mueller	2/23/2012	\$250.00	Monetary Contribution	Amy P. Chelini	2012 CE Report 1

EXHIBIT "I"

DISTRICT COURT
CLARK COUNTY, NEVADA

Electronically Filed
11/17/2020 11:50 AM
Steven D. Grierson
CLERK OF THE COURT



Matthew Haney Molen, Appellant(s)
vs
Nevada State of, Respondent(s)

Case No.: C-20-348754-A
Department 2

NOTICE OF HEARING

Please be advised that the State's Motion for Clarification and a Stay of the Proceedings Following the Filing of the Order in the above-entitled matter is set for hearing as follows:

Date: December 03, 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

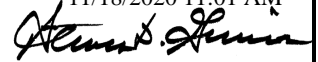
By: /s/ Imelda Murrieta
Deputy Clerk of the Court

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

AA000231


CLERK OF THE COURT

1 **ORDR**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 MATTHEW HANEY MOLEN,

6 Appellant(s),

7 vs.

8 STATE OF NEVADA,

9 Respondent(s).

Case No.: C-20-348754-A

Dept. No.: II

Henderson JC Case No.: 19FH0521X
19CRH000443-0000

Hearing Date: October 15, 2020

Hearing Time: 10:00 a.m.

10 **ORDER:**

11 **GRANTING THE APPEAL, REVERSING CONVICTION, AND REMANDING TO**
12 **LOWER COURT**

13 PROCEDURAL HISTORY

14 This matter came before the Court on a Criminal Appeal from Henderson Justice
15 Court. On June 11, 2020, Appellant filed his Notice of Appeal. A hearing was held on
16 September 17, 2020. Appellant argued that Deputy District Attorney Melanie Scheible serves
17 on the Nevada State Legislature, in violation of the Separation of Powers Doctrine, and, thus,
18 the conviction was a nullity¹. Given the gravity of Appellant's assertions—and its potential
19 widespread effects on others, like Scheible, who arguably hold dual governmental positions—
20 the Court continued the hearing and allowed the parties an opportunity to provide
21 supplemental briefing on the issue.

22 After reviewing all of the submitted papers and pleadings, and considering all of the
23 arguments and authority presented, the Court GRANTS Appellant's Appeal, based on the
24 violation of Appellant's Constitutional rights to procedural due process, as explained below.

25
26
27 ¹ This argument was also made by Appellant Plumlee, in case C-20-346852-A (Plumlee v. State), who is
28 represented by the same counsel as Mr. Molen; with Deputy District Attorney Scheible similarly representing the
State. Accordingly, the Court *quasi*-consolidated the cases, solely for the purpose of arguing the Separation of
Powers issue.

1 DISCUSSION

2 Appellant Matthew Molen was deprived of his Constitutional rights of procedural due
3 process because his prosecutor, Deputy District Attorney Scheible, also served as a Legislator
4 at the time of the trial, in violation of the “Separation of Powers” doctrine – which doctrine
5 exists as a fundamental feature of American government, and as an express clause in the
6 Nevada Constitution. Nev. Const. Art III, §1. An individual may not serve simultaneously as
7 the lawmaker and the law-enforcer of the laws of the State of Nevada.

8 The plain and unambiguous language of the Nevada Constitution is that:

9 The powers of the Government of the State of Nevada shall be divided
10 into three separate departments, - the Legislative, - the Executive and the Judicial;
11 and no persons charged with the exercise of powers properly belonging to one of
12 these departments shall exercise any functions, appertaining to either of the
others, except in the cases expressly directed or permitted in this Constitution.

13 Nev. Const. Art III, §1. This is commonly known as the “Separation of Powers”
14 clause.

15 It is undisputed that Prosecutor Scheible was a person charged with the exercise of
16 powers within the legislative branch of government at the time of the trial. Further, there is no
17 reasonable dispute that, as prosecutor, she was charged with the exercise of powers within the
18 executive branch. The enforcement of the laws of the State of Nevada are powers that fall
19 within the executive branch of the government of the State of Nevada. See Nev. Const. Art. V,
20 §7. Prosecutor Scheible was enforcing the laws of the State of Nevada, and representing the
21 State of Nevada, and thus was exercising the powers delegated to her within the executive
22 branch.

23 Deputy District Attorney Scheible did not have the legal authority to prosecute
24 Appellant, thus the trial was a nullity.

25 The Separation of Powers doctrine historically exists to protect one branch of
26 government from encroaching upon the authority of another. However, more than that, it
27 exists to safeguard the people against tyranny – the tyranny that arises where all authority is
28

1 vested into one autocrat – a person who writes the law, enforces the law, and punishes for
2 violations of the law.

3 Our Founding Fathers understood that consolidated power was the genesis of
4 despotism. A dispersion of power, they understood, was the best safeguard of liberty. As
5 explained by James Madison, “The accumulation of all powers, legislative, executive and
6 judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-
7 appointed or elective, may justly be pronounced the very definition of tyranny.” Federalist
8 No. 47, ¶3.

9 One who serves in the legislative branch in making the law must not and cannot
10 simultaneously serve in the executive branch as a prosecutor of the State laws. This Court
11 finds that it is a violation of procedural due process of nearly the highest order for a person to
12 be tried and convicted by a public official who in charge of both writing and enforcing the
13 law.

14 The authorities cited by the State are very clearly wrong and distinguishable.

15 In 2004, Attorney General (AG) Brian Sandoval issued an opinion that local executive
16 branch employees are not prohibited from serving in the legislature. However, that opinion
17 did not specifically consider that a Deputy District Attorney enforcing the laws of the State of
18 Nevada, and representing the State of Nevada, is actually exercising powers belonging to the
19 State executive branch.

20 In August 8, 2020, the Legislative Counsel Bureau issued an opinion that “local
21 governments and their officers and employees are not part of one of the three departments of
22 state government.” However, similar to the AG Opinion mentioned above, that opinion did
23 not specifically consider that a Deputy District Attorney enforcing the laws of the State of
24 Nevada, and representing the State of Nevada, is actually exercising powers belonging to the
25 State executive branch.

26 The State’s reliance on Lane v. District Court, 760 P.2d 1245 (Nev. 1988) is
27 misplaced. The issue in Lane was whether the Judiciary was improperly interfering with the
28 functions of the executive branch. The Nevada Supreme Court did not squarely reach the issue

1 whether the due process rights of a criminal defendant were violated when prosecuted by an
2 Assistant District Attorney who also served in the Legislature. Here, this Court is not directing
3 the Office of the District Attorney to do or not to do anything. Rather, this Court is protecting
4 the rights of the accused.

5 The State attempts to draw a distinction between a “public officer” and a “mere public
6 employee.” As to the former, the State acknowledges that the Separation of Powers Doctrine
7 does apply to a person holding an Office established by the Constitution. However, the State
8 invents out of thin air the notion that the Doctrine does not apply to an employee who carries
9 out executive functions. The State’s purported authority, State ex rel. Mathews v. Murray, 70
10 Nev. 116 (1953) does not stand for its proposition. Mathews merely held that a petition for
11 Writ of *Quo Warranto* could not be used to remove a “public employee,” – only a “public
12 officer.” While there might be a meaningful distinction between a public employee and public
13 officer in some situations, it is not evidence in the words of the Nevada Separation of Powers
14 doctrine.

15 The State wrongly relies on Heller v. Legislature of the State of Nevada, 120 Nev. 456
16 (2008) which held that the judiciary could not determine whether a legislator must be
17 removed for violating the “Separation of Powers” doctrine where the legislator also served in
18 the executive Branch. That case was based on lack of standing, rather than the merits. Further,
19 this is not a case of the Judiciary determining the qualifications to be a member of the
20 Legislature, or to work for the District Attorneys’ office. Rather this case involves the due
21 process rights of an accused; and, in this case, those rights were violated.

22 The Appellant was deprived of his constitutional rights to procedural due process even
23 if the Nevada Separation of Powers clause as written does not apply to any persons employed
24 by local governments. The “Separation of Powers” doctrine is such a clear, vital, and well-
25 recognized aspect of the American system of government, existing long before the adoption of
26 the Nevada Constitution.

1 CONCLUSION

2 This Court finds that it is fundamental to American jurisprudence that a person who is
3 simultaneously the lawmaker and the law-enforcer of the laws of the State of Nevada shall not
4 prosecute a criminal defendant.

5 Accordingly, the Court hereby **ORDERS, ADJUDGES, AND DECREES** that
6 Appellant's Appeal is **GRANTED**, the lower court's conviction is **REVERSED**, and the
7 bond, if any, released to Appellant.

8 The Court **FURTHER ORDERS** that this matter be **REMANDED** to the lower court
9 for further proceedings consistent with this Order.

10 **IT IS SO ORDERED.**

Dated this 18th day of November, 2020

11 Dated this ____ day of November, 2020.



12
13 RICHARD F. SCOTTI
14 DISTRICT COURT JUDGE
15 Richard F. Scotti
16 District Court Judge
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Craig A. Mueller, Esq.
Attorney(s) for Appellant(s)

/s/ Melody Howard

Melody Howard
Judicial Executive Assistant
C-20-348754-A

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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5
6 Matthew Haney Molen,
Appellant(s)

CASE NO: C-20-348754-A

7
8 vs

DEPT. NO. Department 2

9 Nevada State of, Respondent(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 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:

14 Service Date: 11/18/2020

15 District Attorney motions@clarkcountyda.com

16 Criag Mueller receptionist@craigmuellerlaw.com

17 Craig Mueller electronicservice@craigmuellerlaw.com

18 Department II Dept02LC@clarkcountycourts.us

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AA000238

DISTRICT COURT
CLARK COUNTY, NEVADA

Criminal Appeal

COURT MINUTES

December 03, 2020

C-20-348754-A Matthew Haney Molen, Appellant(s)
vs
Nevada State of, Respondent(s)

December 03, 2020 03:00 AM State's Motion for Clarification and a Stay of the Proceedings
Following the Filing of the Order

HEARD BY: Scotti, Richard F. COURTROOM: Chambers

COURT CLERK: Garcia, Louisa

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

The Court will issue a Minute Order resolving this matter.

1 **DAO**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**
5

6
7 Matthew Haney Molen,

8 Appellant.

9 v.

10 State of Nevada,

11 Respondent.
12
13

CASE NO. C-20-348754-A

DEPT NO. 2

14
15 **ORDER**

16 This MATTER having come before Judge Richard Scotti was originally set for hearing on
17 December 3, 2020. However, Judge Richard Scotti took the matter under advisement and issued a
18 minute order with his decision on December 15, 2020. Thereafter, the Respondent, the State of
19 Nevada, appealed Judge Richard Scotti's decision to the Nevada Supreme Court. Subsequently,
20 the Nevada Supreme Court issued an Order on December 31, 2020 directing Respondent to obtain
21 from the District Court Judge a written order memorializing its ruling on the motion for
22 clarification. This written order follows. On December 15, 2020 Judge Richard Scotti made the
23 following findings:
24

25 Judge Scotti DENIES the State's Motion For Clarification And Stay of the Proceedings as
26 his decision was rendered in complete compliance with the Nevada Code of Judicial Conduct, and
27 without any improper bias or prejudice. The State suggests that the Judge was influenced by a
28

1 campaign contribution from attorney Craig Mueller. The State is clearly wrong for several
2 reasons. First, the amount of the Mueller contribution represents merely one-half of one percent
3 of the total campaign contributions and loans to the Re-elect Judge Scotti campaign. Second,
4 Judge Scotti had actually made two very significant rulings against other clients of Mr. Mueller
5 even after the receipt of the campaign contribution - thus confirming that Judge Scotti renders
6 decision on the merits, rather than external or improper factors. Third, Judge Scotti's decision is
7 legally correct and properly based on the Nevada Constitution and the principle of Separation of
8 Powers. Fourth, Judge Scotti confirms that he acted with impartiality, in strict compliance with
9 the Nevada Code of Judicial Conduct, and without any bias or prejudice.
10

11 The Nevada Code of Judicial Conduct and the Nevada Supreme Court permit sitting
12 Judges and Judicial candidates to accept campaign contributions from attorneys that have or may
13 have clients with matters pending in their Department - provided it does not lead to actual bias. In
14 fact it is an established practice and commonplace in the Eighth Judicial District Court for Judges
15 and Judicial-candidates to solicit and accept contributions from attorneys that have or might in the
16 future have cases before them. This Court has carefully considered each of the factors set forth in
17 *Ivey v. Eighth Judicial District Court*, 129 Nev. 154, 159 (2013) in exercising its obligation to
18 remain on this case.
19
20

21 Further, the Court DENIES the State's request for a stay pursuant to NRAP 8(a). The State
22 is not prejudiced by the denial of a stay, and the denial of a stay will not defeat the object of any
23 appeal.
24

Dated this 8th day of January, 2021



D8B ED7 1384 7E99

Linda Marie Bell
District Court Judge

Decision made by Judge Richard
Scotti who is no longer with the
District Court

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Matthew Haney Molen,
Appellant(s)

CASE NO: C-20-348754-A

7
8 vs

DEPT. NO. Department 2

9 Nevada State of, Respondent(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Decision and 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:

14 Service Date: 1/8/2021

15 District Attorney motions@clarkcountynyda.com

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18 Department II Dept02LC@clarkcountycourts.us

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