

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Electronically Filed
Feb 07 2022 09:30 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

MYRTIS TYRONE JAMES,
A.K.A.

JAMES TYRONE MYRTIS)
Appellant,)

V.)

Case No. 83439

THE STATE OF NEVADA,)
Respondent.)

Appeal from the Seventh Judicial District Court

RESPONDENT'S APPENDIX VOLUME 1 PAGE 1-53

James S. Beecher
White Pine County District Attorney
Nevada Bar Number 12555
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Ely, NV 89301
(775) 293-6565

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1 CASE NO.: CR-1903028

2 DEPT. NO.: 2

FILED

2021 MAY 12 AM 10:05

WENDY HALLAM
WHITE PINE COUNTY CLERK
BY DA
DEPUTY

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6 IN THE SEVENTH JUDICIAL DISTRICT COURT
7 COUNTY OF WHITE PINE, STATE OF NEVADA

8 * * * * *

9 THE STATE OF NEVADA,
10 PLAINTIFF,

11 vs.

12 MYRTIS TYRONE JAMES, A.K.A.,
13 JAMES TYRONE MYRTIS

14 DEFENDANT.

AMENDED
CRIMINAL INFORMATION
FOR DRIVING OR BEING IN ACTUAL
PHYSICAL CONTROL OF A VEHICLE
WHILE BEING UNDER THE INFLUENCE
OF INTOXICATING LIQUOR, FELONY
OFFENSE

15
16 STATE OF NEVADA }
17 COUNTY OF WHITE PINE } ss.

18 In the Seventh Judicial District Court of the the State of Nevada, against MYRTIS
19 TYRONE JAMES, a.k.a., JAMES TYRONE MYRTIS, Defendant, MCKINZIE M. HILTON,
20 ESQ., White Pine County Chief Deputy District Attorney, within and for the County of
21 White Pine, State of Nevada, in the name and by the authority of the State of Nevada,
22 informs the Court that on the date hereinafter set forth in the County of White Pine, State of
23 Nevada, said Defendant did commit the following *to-wit*:

24 COUNT I: On or about December 18, 2018, the Defendant committed the criminal
25 offense of DRIVING OR BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE
26 WHILE BEING UNDER THE INFLUENCE OF INTOXICATING LIQUOR, FELONY

Respondent's Appendix 1

1 OFFENSE, by the Defendant being in actual and/or physical control of a motor vehicle in the
2 parking lot of Family Dollar, a premises to the which the public has access, located at 1550
3 Great Basin Boulevard in Ely, County of White Pine, State of Nevada, while being under the
4 influence of an intoxicating liquor; and/or being found by measurement within 2 hours after
5 driving or being in actual physical control of a motor vehicle to have a concentration of
6 alcohol of 0.08 or more in his blood, while having a prior conviction for Driving Under the
7 Influence of alcohol and/or drugs (with priors), a Felony Offense, judgment dated on or about
8 May 7, 2015, in the Fifth Judicial District Court, County of Washington, State of Utah, case
9 number 141501828, all of which is a Felony in violation of NRS 484C.110, NRS 484C.020, NRS
10 484C.400 and NRS 484C.410; and all of the foregoing is contrary to the form, force and effect
11 of the statute in such cases, made and provided and against the peace and dignity of the
12 State of Nevada.

13 DATED this 12 day of May, 2021.

14 JAMES S. BEECHER, ESQ.
15 WHITE PINE COUNTY DISTRICT ATTORNEY

16 
17 MCKINZIE M. HILTON, ESQ., #14447
18 White Pine County Chief Deputy District Attorney

19 The undersigned hereby affirms pursuant to NRS 239B.030 that this Information does not
20 contain the social security number of any person.

21 DATED this 12 day of May, 2021.

22 JAMES S. BEECHER, ESQ.
23 WHITE PINE COUNTY DISTRICT ATTORNEY

24 
25 MCKINZIE M. HILTON, ESQ., #14447
26 White Pine County Chief Deputy District Attorney

1 The witnesses known to the State at the time of the filing of this Information are as
2 follows:

3 Sergeant Luke Shady, White Pine County Sheriff's Office, Ely, Nevada

4 Deputy Steve Saunders, White Pine County Sheriff's Office, Ely, Nevada

5 Brandi Sumrall R.N., William Bee Ririe Hospital, 1500 Avenue H Ely, Nevada

6 Felicia Mason, Washoe County Crime Lab, 911 Parr Blvd., Reno, Nevada
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FILED

Case No. CR- 1903028

2021 MAY 19 PM 4:02

Dept No. 2

MICHELLE BALEWIN
WHITE PINE COUNTY CLERK
BY JA
DEPUTY

THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

THE STATE OF NEVADA,

Plaintiff,

vs.

VERDICT

MYRTIS TYRONE JAMES, A.K.A.,
JAMES TYRONE MYRTIS,

Defendant.

WE, the Jury in the above-entitled case, unanimously find the Defendant,
MYRTIS TYRONE JAMES, A.K.A., JAMES TYRONE MYRTIS, as follows:

COUNT I - DRIVING OR BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE
UNDER THE INFLUENCE OF INTOXICATING LIQUOR.

(You may select one or both of these theories of guilt in Count I by
checking the appropriate box or boxes or you may find the Defendant not guilty by
checking that box.)

☒ Guilty of Being in Actual and/or Physical Control Of A Motor Vehicle While
Under The Influence Of Intoxicating Liquor; and/or

1 ☒ Guilty of Being Found By Measurement Within Two (2) Hours After Driving
2 Or Being In Actual Physical Control Of A Vehicle To Have A Concentration Of
3 alcohol of 0.08 Or More In His Blood.

4 ☐ Not Guilty.

5 DATED this 19th day of May, 2021.

6 
7 FOREPERSON

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25 Respondent's Appendix 5
26

1 Case No.: CR-1903028

2 Dept. No.: 2

FILED

2021 DEC -1 PM 2:29

WHITE PINE COUNTY CLERK
BY DA
DEPUTY

SEVENTH JUDICIAL DISTRICT COURT
COUNTY OF WHITE PINE, STATE OF NEVADA

8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

11 MYRTIS TYRONE JAMES AKA

12 JAMES TYRONE MYRTIS,

13 Defendant.

CORRECTED JUDGMENT AND
SENTENCE

14 WHEREAS, there is a clerical error contained in the Judgment and Sentence filed on
15 August 18, 2021, and a corrected order is permitted pursuant to NRS 176.565. The error in
16 the Judgment and Sentence was leaving out the AKA name and designating the offense as a
17 Category B Felony. Therefore, the Judgment and Sentence is hereby corrected to the
18 following to correct clerical errors pursuant to NRS 176.565.

19 WHEREAS, On the 19th day of May, 2021, the above-named Defendant, JAMES TYRONE
20 MYRTIS, further described as: Date of Birth: February 28, 1975; Place of Birth: Keams
21 Canyon, Arizona; was found guilty at jury trial of the crimes described below and as more
22 fully set forth in the Amended Criminal Information filed herein, and the Court entered
23 judgment. Legal counsel present at the Defendant's jury trial were RICHARD W. SEARS
24 ESQ., White Pine County Public Defender, representing Defendant, and MCKINZIE M.
25 HILTON ESQ., White Pine County Chief Deputy District Attorney, representing the State,
26 and the Nevada Division of Parole and Probation was also present.

DESCRIPTION OF CONVICTION

**COUNT I: DRIVING OR BEING IN ACTUAL PHYSICAL CONTROL OF
A VEHICLE WHILE BEING UNDER THE INFLUENCE OF INTOXICATING LIQUOR,
A CATEGORY B FELONY OFFENSE.**

On the 16th day of August, 2021, the above-named defendant appeared before this Court for the purpose of sentencing and entry of a final judgment of conviction in this matter. This Court, the State and the Defense Counsel previously received a Pre-Sentence Report prepared by the Division of Parole and Probation. The State previously filed a certified copy of the Defendant's prior felony DUI conviction, judgment filed the 7th day of May, 2015.

The above-named Defendant was personally present at the sentencing. Legal counsel present at the Defendant's sentencing were RICHARD W. SEARS ESQ., White Pine County Public Defender, representing Defendant, and MCKINZIE M. HILTON ESQ., White Pine County Chief Deputy District Attorney, representing the State, and the Nevada Division of Parole and Probation was also present.

The Court found that the appropriate judgment in this case is as follows:

IT IS HEREBY ADJUDGED that for COUNT I, Defendant is sentenced to serve a maximum term of 84 months in the Nevada Department of Corrections, with parole eligibility after a minimum term of 32 months. Defendant is given credit for 5 days previously served.

IT IS HEREBY ORDERED that the Clerk of this court enter this Judgment of Conviction as part of the record in the above-entitled matter.

IT IS HEREBY FURTHER ORDERED that the Defendant shall pay a \$25.00 Administrative Assessment fee.

IT IS HEREBY FURTHER ORDERED that the Defendant shall pay a \$3.00 Genetic Marker Analysis Administrative Assessment fee.

1 **IT IS HEREBY FURTHER ORDERED** that the Defendant submit to DNA
2 Analysis Testing to determine genetic markers and pay a \$150.00 fee for such testing.

3 **IT IS HEREBY FURTHER ORDERED** that the Defendant shall pay a \$60.00
4 Chemical Analysis fee.

5 **IT IS HEREBY FURTHER ORDERED** that the Defendant shall pay a \$300.00
6 toward the cost of public defender services.

7 **IT IS HEREBY FURTHER ORDERED** that the Defendant shall reimburse White
8 Pine County the sum of \$350.00 towards the cost of the Pre-Sentence Investigation Report
9 fee.

10 **IT IS HEREBY FURTHER ORDERED** that the Defendant shall pay a fine in the
11 amount of \$2,000.

12 **IT IS HEREBY FURTHER ORDERED** that the fees assessed shall be paid to the
13 White Pine County Clerk's Office, 801 Clark Street, Suite 4, Ely, Nevada 89301.

14 **IT IS HEREBY FURTHER ORDERED** that the Defendant shall install an ignition
15 interlock device for 24 months in any vehicle he drives, once he is eligible to drive again.

16 **IT IS HEREBY FURTHER ORDERED** that any Bond in this matter shall be
17 exonerated.

18 **IT IS HEREBY FURTHER ORDERED AND THE COURT ADVISES**
19 **DEFENDANT** that pursuant to NRS 176.063, all administrative assessment fees, all other
20 fees, and all fines constitute a lien pursuant to NRS 176.275; and should the Defendant fail to
21 satisfy said lien(s), collection efforts may be undertaken against the Defendant pursuant to
22 the laws of this State.

23 DATED this 30th day of November, 2021.

24
25 
26 DISTRICT COURT JUDGE

1 lets - lets go ahead and recess and then does that work for
2 counsel or is this -

3 MS. HILTON: That works for me Your Honor.

4 MR. SEARS: I would like to address an issue.

5 THE COURT: You - you may.

6 MR. SEARS: So in the course of my research I looked
7 at a jury instruction out of California, it's called Cal
8 (unintelligible word) I think it's two forty-four.

9 THE COURT: Okay. And it is an instruction that is
10 relevant when the government is relying on circumstantial
11 evidence to prove a fact in controversy. And here's what I'm
12 researching. I don't know that we have a Cal - a Nevada law
13 similar although I do know that we have on occasions used
14 California jury instructions as modified. This instruction
15 essentially says if circumstantial evidence is an important
16 part of the State's case, and you have inferences that arise
17 from circumstantial evidence, okay, and one inference - one
18 reset of reasoning says he's guilty, another set of reasoning
19 from the same facts say he's not guilty, and they're both
20 reasonable inferences, you must find him not guilty. We talk
21 about that a little bit in our opening instructions but it
22 doesn't get to the point of what happens when you have two
23 interpretations and I think that's the word California uses,
24 you have two interpretations of substantial evidence, both

1 could be true given the facts of the case, you must acquit
2 because they didn't prove that element beyond a reasonable
3 doubt. My - my thinking, and I know this is premature, my
4 thinking is with respect to the Rogers factors which the Court
5 - I reviewed the Rogers factors and the jury instructions
6 already. Those are obviously important given the state of the
7 evidence. I'm wondering and I'm questioning whether or not
8 that reasoning applies to the Rogers factors and here's why.
9 My argument traditionally has been and I've used it against
10 Miss Hilton, that the Rogers factors that the Court - that
11 the jury relies on must be proven beyond a reasonable doubt,
12 okay. And the State disagreed, said no they don't need to be
13 proven beyond a reasonable doubt, and then my question is,
14 okay, that's fine, what standard do we use? Do they need to
15 be proven by clear and convincing evidence preponderance of
16 the evidence? And I have not found a good answer to that
17 question yet, but if he cannot be convicted absent proof
18 beyond a reasonable doubt, and the State's right and those
19 Rogers factors don't have to be proven, I need to know what
20 standard do they need to be proven by? A Judge Lehman who I
21 argued this in front of, a trained lawyer from Elko County,
22 we both did the case together. I think it was Lehman, yeah.
23 He disagreed. He said no, no. The state's right. These don't
24 have to be proven beyond a reasonable doubt. That's fine. He

1 made his call, but I find that she's guilty anyway because
2 she was driving impaired, okay, on this particular case.
3 Doesn't matter, but it raised the question with me, okay,
4 what's the standard? And we don't address the standard in
5 the jury instruction somewhere. My recollection that in
6 Rogers and Isom and the following cases don't provide much
7 clarity, so that's going to be my issue, okay. And that's
8 the reason I went to Cal Jig was to see what's the standard
9 on circumstantial evidence because most of that is going to
10 be inferential. I mean the only hard proof that we have I
11 think is the keys were in the ignition and the engine was
12 running. So that's sort of the reason I'm exploring that and
13 that's my concern with the jury instructions Your Honor.

14 THE COURT: Thank you.

15 MR. SEARS: Thank you.

16 THE COURT: Any response -

17 MS. HILTON: Yes.

18 THE COURT: - on this at this time?

19 MS. HILTON: Thank you Your Honor. And Your Honor the
20 State obviously has not seen the California jury instruction
21 but would object to using a California jury instruction.
22 Regarding the circumstantial evidence Your Honor, that is
23 already contained in the jury instructions that the Court has
24 provided and the State is required to prove each element of

1 this offense beyond a reasonable doubt. The Rogers factors
2 go towards one of that - one of those elements. The Rogers
3 factors is as clear, and I think it is a clear issue Your
4 Honor from the keyslot are to be waived by the jury, and that
5 is an issue for the trier of fact. I think the instruction
6 that Your Honor has about the Rogers factors and the fact
7 that the jury is to weigh them is appropriate. I did want to
8 look at some of the additional ones that I had prepared but
9 as far as adding an additional instruction about
10 circumstantial evidence, I think that's already fully
11 encompassed and adding one that says it - it's already been
12 covered. It's covered in the reasonable doubt standard. It's
13 covered in the circumstantial evidence standard. It's obvious
14 from the instructions Your Honor already has that if there's
15 multiple alternatives and they're all equally likely that it
16 hasn't been proven beyond a reasonable doubt, I don't
17 understand why we would need to have a separate jury
18 instruction delineating that and potentially confusing the
19 jury about the mult - a potential multitude of other options.

20 THE COURT: Thank you. Anything else on that at this
21 point?

22 MR. SEARS: It's on the internet, it was on the web.
23 Jessica has a copy of it too so like I said Two Forty-four.

24 THE COURT: Okay. Do you have a copy of that proposed

1 copy -

2 MR. SEARS: I have it at -

3 THE COURT: - of the instruction?

4 MR. SEARS: - at my home and I will email it to -

5 THE COURT: Why don't you go ahead and do it? The
6 Court will take it under consideration.

7 MR. SEARS: Okay.

8 THE COURT: Your argument. Well, first of all, the
9 Court is not adverse to giving a jury instruction from any
10 other state if it's going to be the correct law of this state
11 so the fact that it's coming from Cal Jig or you know, the
12 State of Utah, or wherever, that's - that's not a - a
13 deciding factor if - if it's appropriate to be given in
14 Nevada given - given the state of our law versus the
15 instruction. You know, with that, let me consider Mr. Sears'
16 argument, the State's opposition. Clearly the burden of proof
17 is to prove that a person was in actual physical control and
18 in looking at Rogers those are some of the factors the Court
19 would - could consider, wouldn't rule out other factors. I
20 mean there could be some other factors that weren't in
21 Rogers. I don't think that's an exclusive list of potential
22 factors but those are the factors that have been identified
23 in that and I mean there are a number of other cases that
24 came after Rogers too that - that address those factors as -

1 as appropriate, but clearly the standard is - is whether or
2 not the circumstances of the individual support actual
3 physical control, and it is true that the jury is supposed to
4 weigh those factors, whatever evidence is before the Court
5 and to weight those factors and then determine has that
6 element been proved beyond a reasonable doubt based upon the
7 evidence before the jury. I mean that's - you know, that's
8 what it goes. I - I - I - I respect your argument Mr. Sears
9 but I'm just wondering how do they weigh it.

10 MR. SEARS: That's -

11 THE COURT: Well - well, you know this here - you're -
12 you're asking that there needs to be a level of proof that
13 they must - okay, so. That - that's what you're saying, now
14 how they weight it but what - what level has there to be for
15 them to be satisfied. I understand your argument. Okay. All
16 right. Any - anything else then this afternoon?

17 MS. HILTON: Ah, no Your Honor. So did you want to
18 come back in a a -

19 THE COURT: I can if you want to take a look at the
20 instructions that I have now, or if not we can certainly do
21 it tomorrow.

22 MR. SEARS: I'd rather do it tomorrow.

23 THE COURT: That's - that's fine.

24 MR. SEARS: I need to look at it over night.

1 THE COURT: Then - then the - if there's nothing else
2 then, at this time then the Court stay in a recess until
3 tomorrow morning at nine thirty. Should something come up
4 with counsel that they believe that any type of hearing the
5 matters need to be heard before the Court before nine thirty,
6 try to contact us by five today or I - I of course will be in
7 early in the morning so I'll be in way before nine thirty,
8 so, you can get me then.

9 MR. SEARS: Thank you Your Honor.

10 THE COURT: All right.

11 MS. HILTON: Thank you Your Honor.

12 THE COURT: Court's in recess.

13 BAILIFF: All rise.

14 BAILIFF: All rise. The Seventh Judicial District
15 Court of the State of Nevada in and for the County of White
16 Pine is now in session, the Honorable Gary D. Fairman
17 presiding.

18 THE COURT: Court's in session, please be seated
19 everyone. Good morning. Let the record reflect that we're in
20 the second day of our trial. We have the presence of the
21 Defendant, Mr. James, his counsel Mr. Richard Sears, State's
22 counsel Miss McKinzie Hilton, White Pine County Deputy
23 District Attorney. We have the presence of our jurors in the
24 jury box and we are in the State's case and Miss Hilton you

1 Please be seated everyone. At ths time of course we'll go
2 ahead and settle on the balance of the instructions. If
3 you'd like to take - if you need some additional time to look
4 at the instructions or the proposed instructions, you can -
5 we can certainly do that. What do you think about half an
6 hour?

7 MR. SEARS: That works for me Your Honor.

8 THE COURT: Then we'll go forward and I'll consider -
9 the Court has already crafted some instructions. If there are
10 additional instructions and I know the State has - has
11 submitted proposed jury instructions, some of which as the
12 Court indicated yesterday were similar to the Court's. Some
13 the Court did not include in the Court's package and so any
14 of those that the State wants to offer in addition to what
15 the Court has already, you certainly may do so. The Defense
16 counsel has submitted a proposed jury instruction that he
17 eluded to yesterday afternoon, we discussed briefly in Court.
18 The Court's had an opportunity to look at that instruction
19 this morning and I believe State's counsel has a copy of that
20 as well so we can - if there are any other instruction, get
21 them to me.

22 MR. SEARS: Okay.

23 THE COURT: Okay? If you have them, if you can just
24 bring them over to the Court in Chambers and provide one

1 another copies of those instructions so that we can fully
2 discuss them when we come back. So why don't we take a break
3 until about eleven forty-five you know about thirty-five
4 minutes or so and then we'll go forward and discuss the
5 instructions.

6 MR. SEARS: Thank you Your Honor.

7 THE COURT: Court's in recess.

8 BAILIFF: All rise.

9 BAILIFF: All rise. Court's in session, please be
10 seated. Let the record reflect that we're in the continuation
11 of our trial. Let the record further reflect that the
12 Defendant is not present. Mr. Sears contacted the Court in
13 Chambers during the break, indicated that his client wanted
14 to spend some time outside of the courthouse pending this
15 hearing and waived his presence in the Court, concurs that
16 it's appropriate. His presence can be waived for the
17 settling of jury instructions. Mr. Sears is appearing on the
18 Defendant's behalf and - and Miss McKenzie Hilton appearing
19 for the State. Let the record further reflect that we're in
20 the noon recess for the jury so the jury is not present in
21 the courtroom and this is we've set aside this time to settle
22 the jury instructions. The Court has previously provided to
23 both counsel a set of stock instructions that the Court had
24 prepared with respect to this case and concerning the stock

1 instructions, I'm going to go from one counsel to the other.
2 I'll start with the State's counsel. Are there any objections
3 to the specific stock instructions that the Court has
4 provided Miss Hilton?

5 MS. HILTON: Your - Your Honor, not an objection, I do
6 have a request for change regarding the expert witness jury
7 instruction, looks like it's towards the end of the packet.

8 THE COURT: Okay. Let me - let me turn to that. Yes.
9 I - I have that instruction and the change that you want to
10 discuss Miss Hilton?

11 MS. HILTON: Your Honor, I believe we have to refer to
12 any what used to be known as an expert witness to as what an
13 non-expert witness we can't in the instructions use the words
14 so I was -

15 THE COURT: Yes.

16 MS. HILTON: - hoping to have it read the following -
17 a person is qualified to testify to - as to her professional
18 opinion rather than an expert, and then on the second line
19 where it says as an expert, I'd like it to say to do so. And
20 then on line five -

21 THE COURT: Hold one just one moment.

22 MS. HILTON: Okay.

23 THE COURT: And after the first change, what was the
24 second proposed change?

1 MS. HILTON: On line three -
2 THE COURT: Yes.
3 MS. HILTON: - where it says as an expert -
4 THE COURT: Uh huh.
5 MS. HILTON: - I'd ask to change that to to do so, so
6 it reads sufficient - sufficient to qualify him slash her to
7 do so rather than as an expert.
8 THE COURT: All right. Go ahead.
9 MS. HILTON: On lines five instead of the word expert,
10 I'd like it to read duly qualified witnesses rendering a
11 professional opinion.
12 THE COURT: Go ahead.
13 MS. HILTON: Between line seven and eight Your Honor
14 where it says expert, I would just like to strike expert and
15 just put witness, and the same thing on the next line.
16 THE COURT: Okay. Thank you.
17 MS. HILTON: And then -
18 MR. SEARS: You got one more.
19 MS. HILTON: - one more Your Honor on line ten if it
20 could read you are not bound to accept a professional opinion
21 rather than an expert opinion.
22 THE COURT: Thank you Mr. Sears, on that - on those
23 proposed changes?
24 MR. SEARS: I think it's dumb.

1 THE COURT: Oh. The Court shares the same but I
2 understand where the State's coming from in view of the
3 cases.

4 MS. HILTON: And the State also would prefer it say
5 expert but given the case law, I - I don't want it to say
6 that.

7 MR. SEARS: I think the case law is wrong and I think
8 its dumb, and if I appeal this case, that's not going to be
9 my issue.

10 THE COURT: Okay. All right. Then the Court will make
11 the changes.

12 MS. HILTON: Thank you. And then Your Honor, the only
13 other change I have to the stock instructions is on the
14 verdict form.

15 MR. SEARS: Yeah. That was a little awkward.

16 THE COURT: Leo, in my desk do you want to get
17 (unintelligible words - other people talking) stick note tags
18 - tabs - want to bring me a pack of those, it's sitting on my
19 desk. I don't know if they're green or blue or something,
20 whatever color. Go ahead then.

21 MS. HILTON: Thank you Your Honor.

22 THE COURT: Which instruction?

23 MS. HILTON: It's the verdict form on the second page
24 of the verdict form and what I would like Your Honor, as it

1 stands right now, it says point zero eight percent or more by
2 weight of alcohol. I would like to strike the percent since
3 that's not an element charged in the Information. It's not
4 in the statutory language. There is not a percentage in
5 either of those. I feel it would confuse the jury. And then I
6 would like to strike by weight of alcohol for the same reason
7 and then just have it read in his blood. So in total it would
8 read for the second option, guilty of being found by
9 measurement within two hours after driving or being in actual
10 physical control of a vehicle to have point zero eight - and
11 maybe lets do zero point zero eight or more in his blood - to
12 have a concentration of alcohol of point zero eight or more
13 in his blood just to reflect the statutory language.

14 THE COURT: Zero point zero eight or more - go ahead.

15 MR. SEARS: You want to say nanograms per known liter
16 or more?

17 MS. HILTON: No. I want it to read exactly like it
18 does in the statute.

19 THE COURT: There we go. Let me turn to the statute.
20 So you want it to say after vehicle, to have a concentration
21 of alcohol of zero point zero eight or more in his blood?

22 MS. HILTON: Yes.

23 THE COURT: Okay. Mr. Sears?

24 MR. SEARS: Yeah, that's fine, it's accurate.

1 THE COURT: Okay. And just one moment. The Court has
2 made that change.

3 MS. HILTON: Thank you Your Honor, and Your Honor the
4 other items I have are not so much changes but just an
5 addition so we can come back (unintelligible words - papers
6 shuffling in microphone).

7 THE COURT: And I will. Mr. Sears, turning to the
8 stocks that the Court has provided in addition to the changes
9 with respect to the verdict and the proposes expert
10 instruction, any -

11 MR. SEARS: Any others?

12 THE COURT: - others on the stocks, okay?

13 MR. SEARS: No issues with those.

14 THE COURT: All right.

15 MR. SEARS: And no complaints to the changes that were
16 suggested.

17 THE COURT: Then the Court will incorporate those
18 changes and those will be the instructions that are provided
19 at this point subject to any other additions that we have.
20 Then with respect to the proposed instructions that have been
21 submitted by the State, do you want to -

22 MR. SEARS: Before we go there, can we do one more
23 stock?

24 THE COURT: Yes. Oh yes.

1 MR. SEARS: On your Rogers factors, as I read Rogers,
2 those factors are not exclusive. Okay. In fact the Rogers
3 court when it is doing its own analysis - re-analysis of
4 Rogers it adds one factor that it didn't have on the list and
5 that was whether or not the person was going to have to drive
6 away from his location while under the influence of alcohol
7 and yet that's not a factor, okay. Their factor was whether
8 or not he tried to move the vehicle, and yet in their
9 analysis, they said yeah, well he was going to have to drive
10 away from there to get to wherever he was going when he was
11 drunk. And so that list is not an exclusive list I guess is
12 the way I would put it, including among other factors I
13 think. So on the third line it says you must weigh a number
14 of considerations among those would probably be accurate but
15 not exclusively, and I don't know how to get them out
16 exclusive in there because it's not exclusive. If the jury
17 thinks something else is relevant to a factor of, you know,
18 directing influence, domination or regulation, they get to
19 talk about it. Or if you said something like after before
20 your last sentence other factors the jury finds important or
21 - yeah, important for the - for the determination.

22 THE COURT: Okay. Miss Hilton?

23 MS. HILTON: Your Honor, I don't really have any
24 objection to that other than I mean if that's what the

1 Defendant would want. I - I just think in the case law I
2 think the standard is just to have the factors by the Court
3 wanted to put language in that - I - I would prefer something
4 like these factors are not exclusive. I feel like that's
5 kind of covered because it says including.

6 THE COURT: Yeah. That -

7 MS. HILTON: (Unintelligible words - Judge speaking).

8 THE COURT: That - that's sort of what - that's sort
9 of what Mr. Sears is saying and - and the language is not
10 meant to be limiting when the Supreme Court addresses those
11 because the Supreme Court indicates that there can be a
12 number of considerations including.

13 MS. HILTON: Right.

14 THE COURT: So by the language that the Court used and
15 in - and in the subsequent cases as well. It wasn't meant to
16 just be finite to those specific factors. Those were just
17 factors that have been presented to the Court, you know,
18 through the case, there have been more afterward so I think
19 it is - it is a reasonable request. I think both of you share
20 that. We can just wordsmith that for a moment and have the
21 appropriate language in there that would indicate that - to
22 the jury that this is not the limited number of factors that
23 they would - you know, would have to take into consideration.

24 MS. HILTON: Yes Your Honor.

1 THE COURT: All right. I'm just going to take a look
2 at it for a moment then we'll certainly entertain any
3 suggestions. Let me just take a moment and look at the
4 instruction. How about if it were just to say on this on
5 line four? You could say a number of considerations
6 including comma but not limited to comma?

7 MR. SEARS: I was going to say including without
8 limitations is contract language.

9 THE COURT: Yeah. Yeah.

10 MR. SEARS: But anything like that I think -

11 THE COURT: Okay.

12 MR. SEARS: - does it. I just didn't want to get an
13 objection if I came up with another factor that was relevant
14 obviously to the case.

15 THE COURT: I'm going to put including but not limited
16 to.

17 MR. SEARS: Okay.

18 THE COURT: So it would be including comma but not
19 limited to comma and that will be the - that will be the
20 change and then that doesn't bind the jury to, you know, have
21 the pigeon hold those factors for their - their deliberation.

22 MR. SEARS: My next whining will be with respect to
23 the instruction, the Court instructs a jury that in every
24 crime or public offense there must be a union of joined

1 operations of act and intention, okay. Every crime requires
2 an act and an intention. We don't have a willful and
3 felonious instruction, so I'm sort of wondering about that.

4 THE COURT: You're - you're saying to - to delete that
5 instruction?

6 MR. SEARS: No. I'm saying we need the instruction
7 about intention. I didn't see an intention instruction.

8 THE COURT: Well it says intention is manifested by
9 the circumstances connected with the perpetration of the
10 offense in the sound mind and discretion of the person
11 accused.

12 MR. SEARS: I agree, but what's the intention? Does it
13 have to be felonious intention, willfulness?

14 THE COURT: Okay.

15 MR. SEARS: So that's why I'm looking for a
16 willfulness instruction. We usually have those in felony
17 cases. So that's my other one?

18 THE COURT: Ah, go ahead Miss Hilton.

19 MS. HILTON: Thank you Your Honor. And Your Honor the
20 offense, of course, and the State agreed with the instruction
21 that you had provided about the manifestation of intention,
22 the driving under the influence offense crime is not a
23 specific intent crime. It's essentially willfulness of -
24 it's a general intent crime and so if the Court is inclined

1 to adopt that, the State would ask that it reflect that it's
2 a general intent crime. Furthermore, I don't think the
3 felonious word should be used in the jury instructions and
4 there is certainly no intent that he had an intention to
5 commit a felony.

6 THE COURT: Mr. Sears?

7 MR. SEARS: Yeah, I don't disagree. I mean, I don't
8 care that much about the felonious part but it's got no - I
9 mean we're saying intention. What's the intention and that's
10 where I'm - I'm sort of stumbling on this instruction. Evil
11 intention, right? Intention to break the law, or intention
12 to commit the act. The intent to drive while under the
13 influence of alcohol is manifested by the circumstances
14 connected with the perpetration of the offense and the sound
15 mind and discretion of the person accused. Why doesn't that
16 do it?

17 THE COURT: Say that again.

18 MR. SEARS: The intention to drive while under the
19 influence of alcohol or to be in actual or physical control
20 of a motor vehicle while under the influence of alcohol is
21 manifested by the circumstances connected. I think that says
22 willful, doesn't it? That means willful, because that
23 indicates he's - he's willing to drive and control while he's
24 under the influence.

1 THE COURT: The Court's going to take a look at its
2 willfulness instruction and see if we want to change this.

3 MR. SEARS: Okay.

4 THE COURT: All right. Anything else?

5 MR. SEARS: Ah, affirmative defense.

6 THE COURT: Okay.

7 MR. SEARS: I gave him notice of the affirmative
8 defense and you've got an affirmative defense of driving - of
9 drinking after driving in your stocks but I didn't see it in
10 this set.

11 THE COURT: Yeah. And - and I do and I have it here.

12 MR. SEARS: Okay.

13 THE COURT: I'll provide copies of it to counsel.

14 MR. SEARS: You're way ahead of me.

15 THE COURT: Leo, give one of these to each counsel.

16 MR. SEARS: Thank you.

17 MS. HILTON: Thank you.

18 THE COURT: Lets take a moment to look at that and
19 that's the stock for this particular defense.

20 MR. SEARS: So you're going to put that you were
21 instructed, does that go in front of the Rogers factors?
22 Yeah, I think both of those are correct.

23 THE COURT: Which - which are you looking at now?
24 Which instruction did I give you?

1 MR. SEARS: You gave me the defense and then you gave
2 me you are instructed but the objective in requiring the
3 arrest of those who are not driving but who are in actual
4 physical control of a - is to prevent and discourage persons
5 from placing themselves in control of a vehicle.

6 THE COURT: Ah, that - that shouldn't have been -

7 MR. SEARS: In there?

8 THE COURT: -ah - ah - provided to you guys. I want to
9 talk about that in a moment -

10 MR. SEARS: Okay.

11 THE COURT: - whether or not this Court wants to give
12 that instruction, okay.

13 MR. SEARS: Okay.

14 THE COURT: That was there. I - I did prepare that.
15 It was attached to what you have but lets - lets deal with
16 just the - the defense of drinking after.

17 MR. SEARS: That looks like the law to me, lets put it
18 that way.

19 THE COURT: I -

20 MR. SEARS: The ah - affirmative defense.

21 THE COURT: Okay. Anything on the affirmative defense
22 instruction?

23 MS. HILTON: Your Honor, the State agrees. The State
24 is wondering if we could have an addition to just make it

1 more clear that this affirmative defense is only to be
2 considered if they that the Defendant has proven it with the
3 preponderance of the - by a preponderance of the evidence.
4 So in my proposed jury instruction eleven, Your Honor, I had
5 suggested one that said the affirmative defense post driving
6 intoxication can only be considered if you find that more
7 likely than not that the Defendant consumed alcohol after
8 being in actual physical control of a motor vehicle.

9 MR. SEARS: I think he's got it in the starting on
10 line seven and a half. That says it. The Defendant has the
11 burden of proving by a preponderance of the evidence - the -
12 of the evidence all the facts necessary to establish, and
13 then he's got used to that.

14 THE COURT: I think line one takes care of it, doesn't
15 it? Take a look at that again. Ah, or paragraph one on line
16 ten. It says what he has to prove.

17 MR. SEARS: Yeah.

18 MS. HILTON: My concern there Your Honor was just that
19 the jury would be considering this defense without them
20 finding that he proved it.

21 THE COURT: So you want to add the language somewhere
22 that this - the defense of post driving intoxication can only
23 be considered?

24 MS. HILTON: Yes.

1 THE COURT: All right. The Court is willing to add
2 that potentially on line nineteen as an addition - additional
3 sentence on that same instruction. I don't find that it
4 clouds the instruction or changes the instruction.

5 MR. SEARS: And when the time is right, I'm going to
6 object to the addition Your Honor.

7 THE COURT: Okay. Very well. I - I think the - the
8 word would be would he say more likely than not, you're
9 saying preponderance of the evidence.

10 MS. HILTON: Right.

11 THE COURT: And then it - it should be couched in the
12 preponderance of the evidence language, not more likely than
13 not to keep it consistent because more likely than not is not
14 explained anywhere.

15 MS. HILTON: Right.

16 THE COURT: And preponderance of the evidence is the
17 standard. We call it in different terms. But the Court is
18 willing to use preponderance of the evidence, and then you
19 can still raise your objection Mr. Sears.

20 MR. SEARS: Okay.

21 THE COURT: And with respect to specials then, other -
22 other offered instructions by the State.

23 MS. HILTON: Your Honor, the State is wondering if you
24 have a instruction about the theory of ignorance is no

1 excuse? That was brought up on the direct examination of the
2 Defendant when he was being asked whether he knew and whether
3 it was unlawful to do what he was doing. The State would ask
4 that we pull one of your stock instructions for that theory.
5 I did not think of that to be honest until we were already in
6 here so I have not prepared a physical document.

7 THE COURT: Mr. Sears on that offer?

8 MR. SEARS: Yeah, she's right.

9 THE COURT: Okay. All right. We'll take a look at that
10 and see what we have in our stocks.

11 MS. HILTON: Thank you Your Honor.

12 MR. SEARS: Okay.

13 THE COURT: Any other specials?

14 MS. HILTON: Your Honor, the State - the only other
15 one was the affirmative defense and you've already covered
16 that. Ah, I would when you're ready Your Honor like to talk
17 about the additional instruction.

18 THE COURT: Yes. That's what I meant, those - those
19 other ones that you proposed.

20 MS. HILTON: Yes.

21 THE COURT: Okay. Which ones do you want to address?

22 MS. HILTON: The one that you had provided to us with
23 the affirmative defense instruction.

24 THE COURT: Yeah, that you are instructed?

1 MS. HILTON: Yes.

2 THE COURT: Okay.

3 MS. HILTON: I - that is the one that the State would
4 like to add. The other ones I feel like with the Court's
5 stock instructions in combination you have addressed those
6 but the State would like to add the you are instructed that
7 the objective in requiring that one.

8 THE COURT: Mr. Sears?

9 MR. SEARS: It's almost a policy statement Your Honor.
10 I think that's why I would be opposed to it. We're trying to
11 guess what the legislatures' intention was and that's what
12 works for us in here. I - I'd looked at this statute for
13 years, I looked at the history behind the statute, I looked
14 at the testimony over this statute when they changed it.
15 This - this whole statute came about because the cops were
16 concerned that guys were sleeping in the casino parking lots.
17 They were afraid they were going to wake up and drive away,
18 or they were in an accident in a casino parking lot and that
19 was the reason they wanted accesses - access to the - or
20 premises to each public as an access. That's how this stuff
21 came about, but that's sort of what's going on in the mind of
22 the legislature. I'm not sure it's the law. It's certainly
23 a policy.

24 THE COURT: Miss Hilton?

1 MS. HILTON: Thank you Your Honor. And Your Honor,
2 this language comes directly from case law. In looking -

3 THE COURT: It's on two thirty-three, I have it in
4 front of me.

5 MS. HILTON: Yes. Um -

6 THE COURT: On page two thirty-three of Rogers.

7 MS. HILTON: Yes. It comes directly from the case
8 law. It was - in the State's proposed, it was a direct
9 quote -

10 THE COURT: All right.

11 MS. HILTON: - and that's why the State's asking.

12 THE COURT: Well it is a direct quote but it's not the
13 case law. Okay, and - and I had drafted it and you guys got
14 it by mistake, it was just attached to what I gave you. I -
15 I - I'd intended to pull that after doing some more looking
16 at - at and reading it. I - I think it's - well A, it's true,
17 B, it could be argued, okay. I agree with Mr. Sears, it's
18 policy, you know, it makes good sense, but it's not - it's
19 not - it's not a law. I don't think - I haven't - Court
20 shepherdized it and you now it = it's simply not the law of
21 the State of Nevada. I think the Supreme Court was making
22 some observations in you know rendering their decision that
23 and then I think what they're saying is accurate but I don't
24 think its law so I'm not going to give it in the instruction.

1 MS. HILTON: Thank you Your Honor.

2 THE COURT: Okay. Any others then on your list?

3 MS. HILTON: Other? No Your Honor.

4 THE COURT: Okay. Mr. Sears, the one instruction that
5 you proposed?

6 MR. SEARS: And that was what I pulled out of that
7 nineteen twenty-six case and the language is a little
8 awkward, granted.

9 THE COURT: A little?

10 MR. SEARS: Cause those guys didn't know what they
11 were talking about, but now we don't talk about evidence in
12 the same - except for we talk about circumstantial evidence
13 in the same way, but we don't talk about - they talked about
14 positive evidence and we talk about direct evidence. I think
15 that the meaning is essentially the same but it's awkward
16 language, but I - seems to me that's the law in the State of
17 Nevada. It's very similar to but broader than the California
18 instruction that I gave. The California instruction only
19 addressed the issue and I think that's the threshold in this
20 case, is that - that instruction only goes in a case where an
21 element is at issue and you have circumstantial evidence for
22 the element, and so the element that I think which is the
23 primary issue here is being in actual physical control, so
24 that's the element. And they're supposed to go through those

1 Rogers factors and anything else that they think is relevant
2 and that was always my bitch about that but at any rate
3 without any weighing, that says I think what I tried to say
4 yesterday and I think that's the importance of the California
5 instruction. So, is the circumstantial evidence for Rogers
6 factor significant enough to deserve that instruction? I
7 think that's the first issue.

8 THE COURT: All right. Miss Hilton, response?

9 MS. HILTON: Thank you Your Honor, and Your Honor, the
10 State looked at not only the California jury instruction but
11 also the case - the State v. Boyle case referenced by Mr.
12 Sears. The State agrees that the language is very awkward.
13 The State also feels that it is confusing and that the
14 statements in this jury instruction has already been
15 encompassed in the Court's stock instructions regarding
16 circumstantial and direct evidence. Furthermore Your Honor,
17 this California jury instruction, it has the similar language
18 in the Boyle case. In the Boyle case, the posture of it Your
19 Honor, and the State's understanding was that this jury
20 instruction listed in the case had been presented to the
21 jury. I believe the State objected to that and that was an
22 appeal issue and the Court found that it was not error to
23 give that instruction, and just because it wasn't error Your
24 Honor, that doesn't mean that the Court is required or should

1 give that instruction. Having said that Your Honor, if the
2 Court is inclined to give this instruction, the State would
3 ask that the full instruction be given. I'm looking at the
4 two twenty-four, the last line of that says, however, when
5 considering circumstantial evidence, you must accept only
6 reasonable conclusions and reject any that are unreasonable.
7 I don't think that it's necessary to give this instruction
8 but if the Court feels it does, I would ask that that last
9 line be included as well. Thank you Your Honor.

10 THE COURT: Thank you. Mr. Sears?

11 MR. SEARS: Well let me start at the beginning. First
12 we have some direct evidence of the Rogers factors, okay.
13 We've got the key's in the ignition. We know that because
14 the engine's running. The officer testified the engine was
15 running and you can see it in the video. You can actually see
16 exhaust. So we have direct evidence that the engine's
17 running and therefore there's an inference that the key must
18 be in it. We have no evidence that it was a key fob, so and
19 what's the difference if it's a fob or if the key's in the
20 ignition. For all practical purposes, we know the engine's
21 running and the key's in the ignition, okay. We don't have
22 any direct evidence that the lights are on, okay, and the
23 jury can tell that from looking at the video. The lights
24 aren't on on the car. That's another Rogers factor. We know

1 that it's in private - parked in private. We've got direct
2 evidence of that one, okay. We know that he drove to the
3 location because he testified to that today, so we have
4 direct evidence of that. And we know his position in the
5 vehicle was in the driver's seat. There is direct evidence of
6 that. The cop testified he was asleep and I was careful to
7 make sure that he honestly thought he was asleep so we have
8 direct evidence of the fact that he was asleep behind the
9 wheel. So I think we have direct evidence on almost every
10 factor with the exception of was he going to drive away which
11 was a factor in the Rogers case that they discussed but it
12 was not a factor in their list. In Rogers they talked about
13 well, you know, was the guy going to drive away or not.
14 Yeah, he was going to drive away and he would have been drunk
15 when he drove away. We don't have anything on that. We've
16 got no evidence on that except Myrtis' statement he would
17 just walk up to the bus stop, so I think that's only one
18 factor out of the group, all right, so I'm not sure it's that
19 big of a deal to go through all this fuss over it frankly. I
20 think it's an accurate statement of the law. I don't think
21 it's in your instructions anyplace else. You talk about
22 circumstantial evidence in the beginning but you don't talk
23 anything about interpretation or a hypot - Boyle used the
24 word hypothesis. We don't have any hypothesis. We don't use

1 that word anywhere, but the point being if you've got
2 inferences that go both ways, one towards guilt and one
3 towards innocence, they have to go towards innocence, but I'm
4 not sure we've got that unless we take the Rogers factors as
5 a whole. And I may want to argue that with respect to the
6 Rogers factors as a whole. So if the State's position is
7 that point is already contained, and I can argue it without
8 objection, fine, I'll just argue it.

9 THE COURT: All right. This is the Court's ruling.
10 With respect to the proposed instruction and we found it -
11 actually you had Cal Crim Two Forty-four. It's Cal Jig Two
12 point Zero One is where it comes from.

13 MR. SEARS: Okay.

14 THE COURT: On that, and - and I looked at what you
15 had submitted to the Court and it was from California
16 Criminal Two Twenty-four, but it's similar, but the - the use
17 of that instruction when it is used in - in the State of
18 California was basically when the State's case rested
19 substantially or entirely on circumstantial evidence, all
20 right, and that the - and - and again in California it's not
21 binding on Nevada but it makes sense that the instruction
22 that they found was unnecessary where the prosecution case
23 does not substantially rely on circumstantial evidence. And
24 we've identified here a number of - of - of areas where there

1 is direct evidence and maybe one area where there is
2 circumstantial. This - this instruction was additionally
3 addressed in some subsequent cases in Nevada too. Scott
4 versus State, it's Seventy-two Nevada Eighty-nine, Bincze -
5 B - I - N - C - Z - E vee State at Eighty-six Nevada Five
6 Forty-six and basically, you know the - the - the substance
7 of the case particularly Bincze was you know that if you - if
8 you had direct and circumstantial evidence, you didn't have
9 to give it, okay, so the - the Court finds that - well, in
10 addition, it's - it's not that we couldn't wordsmith it down,
11 but it is very wordy, it's confusing, it would amount to a
12 dissertation for the jury to look at it and it is covered by
13 other instructions that the Court has given so the Court
14 rejects the instruction on - on that basis.

15 MR. SEARS: Then that raises the question, can I argue
16 it?

17 THE COURT: Can you argue what?

18 MR. SEARS: The point on circumstantial evidence. If
19 there's two inferences or a reasoning from circumstantial
20 evidence in this case and there is some circumstantial
21 evidence with respect to actual physical control, if of the
22 two possible inferences, one leads to innocence, the other
23 one leads to guilt, you must find him not guilty. That's the
24 argument.

1 THE COURT: The - the Court rejects that argument,
2 okay? But you're not going to be allowed to make that
3 argument. You've made a record on that, okay, with respect
4 to the case. You know, the Court has defined you know the
5 consideration that the jury must entertain concerning direct
6 and circumstantial evidence in the instruction then in fact
7 that it's already given and that is instruction number five.
8 All right, and - and basically with respect to circumstantial
9 evidence, it - it indicates that the law makes no distinction
10 between circumstantial evidence and direct evidence as to the
11 degree of proof required for conviction but respects each
12 person to convincing forces it may carry and accepts each as
13 a reasonable method of proof. Either will support a verdict
14 of guilty or not guilty if it carries convincing quality
15 required by laws stated in these instructions. So they have
16 to consider all of the evidence as a whole potentially if
17 there was some bit of circumstantial evidence that the jury
18 considered against everything else that they found was so
19 significant then they're going to - they're going to consider
20 that together with the direct evidence. You can argue the
21 weight to be given to that circumstantial evidence because
22 that instruction makes it clear that you know both of which
23 if adequately convincing the - the juries can use to
24 determine whether a defendant is guilty or not guilty.

1 MR. SEARS: Okay. I'll argue that.

2 THE COURT: Any other instructions, for the Defense?

3 MR. SEARS: No Your Honor.

4 THE COURT: All right. Then what the Court's going to
5 do is to take a brief recess, we'll make the changes that a
6 Court has agreed to change on the instructions with the input
7 of counsel, and then the Court will also review the stock
8 instructions with respect to ignorance of the law and I'm - I
9 will also take a look at - at willfulness if I determine that
10 something isn't appropriate to - to give -

11 MR. SEARS: Okay.

12 THE COURT: - then I'll review that, so we'll just
13 stand by, we'll - we'll make the changes on these
14 instructions and I'll take a few moments to - to review the
15 other status of instructions in the Court stocks, okay.
16 We'll be in recess.

17 BAILIFF: All rise.

18 BAILIFF: All rise.

19 THE COURT: Court's in session, please be seated. Let
20 the record reflect that we're present in Court in the
21 continuation of our jury trial. Only the attorneys, Mr.
22 Sears and Miss Hilton are present in Court to settle jury
23 instructions at this time. During the break, the Court has
24 recrafted some of the instructions with changes that were

1 proposed including changes that there was objection to by
2 Defense counsel as the instructions in this case including
3 the drafting of the mistake or ignorance of the law is no
4 defense in a criminal action. That came from Whiterock versus
5 State One Twelve Nevada Seven Seventy-five, a nineteen
6 ninety-six case and there was some before it but it's - there
7 is such an instruction and that was the instruction in that
8 case, so, it's not one that we commonly get, but it's
9 appropriate for this case so the Court is giving that. With
10 respect to the request for a willfulness instruction that was
11 proposed by the Def - Defense, the Court rejects the
12 willfulness instruction in this case. When you look at the
13 statute, the statute isn't couched in willfulness or any
14 specific intent to commit the crime, and as far as the joint
15 - the operation of act of intent, basically the act is
16 drinking and - and - and - and the intent is being - being in
17 your car. I mean, that's basically it but the Court rejects
18 any other proposed willfulness instruction.

19 MR. SEARS: Thank you.

20 THE COURT: Okay. All right. Any - any additional
21 objections other than have been stated on the record with
22 respect to the current packet of instructions then and I'll
23 go through them and we can number them?

24 MR. SEARS: I had one concern with the affirmative

1 Defense.

2 THE COURT: Okay. Lets - lets go to that Mr. Sears.

3 MR. SEARS: The paragraph that we added, the
4 affirmative defense of post driving intoxication can only be
5 considered if you find by a preponderance of the evidence
6 that the Defendant consumed alcohol after being in actual
7 physical control of a motor vehicle. Okay. The verdict form
8 provided for driving. The can convict him for driving and
9 being caught within two hours of driving, right?

10 THE COURT: Yes.

11 MR. SEARS: Okay. And so this only refers to actual
12 physical control. If the jury decides that when he drove from
13 Ridley's to the Dollar Store he was driving and he was under
14 the influence of alcohol because he said he took two shots,
15 and we've got no evidence of how much time passed or anything
16 except maybe fifteen or twenty minutes I guess based on his
17 time line, that means they can't consider it if they find
18 that he drove drunk between Ridley's and the Dollar Store. I
19 mean that's - I'm concerned at what we've limited it to -

20 THE COURT: Yeah.

21 MR. SEARS: - is not back. In other words, so if they
22 find well hell he drove between those two, but this is -

23 THE COURT: Well this is an - yes, I'm sorry to step
24 on your -

1 MR. SEARS: No. It's all right. This - this only
2 applies if we find he was in actual physical control. What if
3 we find he was actually driving? I could see us getting a
4 question about that.

5 THE COURT: Counsel?

6 MS. HILTON: Your Honor, what if we phrased it as on
7 Line between twenty-one and twenty-two consumed alcohol after
8 driving or being in actual physical control of a motor
9 vehicle?

10 THE COURT: Okay.

11 MS. HILTON: The State wouldn't have any objection to
12 that.

13 THE COURT: Okay. All right.

14 MR. SEARS: I think that solves it Judge. I still
15 don't like it but I think that solves it.

16 THE COURT: Do you want to have Miss Lopez go ahead
17 and do that and then we'll just have her bring the original
18 plus three?

19 MS. HILTON: Your Honor, did you also change the
20 verdict form?

21 THE COURT: Ah, you - you didn't receive the new
22 verdict form?

23 MS. HILTON: Ah, I don't believe so.

24 THE COURT: Okay. Then we will make that - we did.

1 MS. HILTON: Okay.

2 THE COURT: Okay. We did change that, I'll provide it
3 to you in just a moment. And what - what the - what the
4 change was was on the second guilty of being found by measure
5 within two hours after driving or being in actual physical
6 control of a vehicle to have a concentration of alcohol of
7 zero point zero eight or more in his blood.

8 MS. HILTON: Yes.

9 THE COURT: I think I probably - well, let me see
10 here. I might have dragged them with me, just a moment. I
11 thought Wendy did give me the verdict forms but lets make
12 three copies of the verdict form. I thought I already had
13 them, I may have left then somewhere in my office.

14 THE COURT: Lets go on the record. Let the record
15 reflect that we're - we are back on the record in State
16 versus James. Let the record reflect that Mr. James is not
17 present in Court, his appearance has been waived by counsel,
18 approved by the Court. Mr. Richard Sears, his counsel, is
19 present. The State's counsel, Miss McKinzie Hilton is
20 likewise present. The purpose of this hearing is to settle
21 the jury instructions. The Court has already given
22 instructions one through seven to the jury so the Court would
23 propose that the next instruction, Instruction Number Eight,
24 be it now becomes my duty as Judge. Instruction Nine,

1 you're instructed that if in these instructions. Instruction
2 Ten, you're instruction - you're instructed that the
3 Defendant in this case is presumed innocent. Instruction
4 Eleven, in every criminal action the burden. Instruction
5 Number Twelve, reasonable doubt is one based on reason.
6 Instruction Thir - Instruction Thirteen. The Amended
7 Criminal Information is a mere accusation. Instruction
8 Fourteen, this is a prosecution by the State of Nevada
9 against the Defendant. Instruction Fifteen, you're instructed
10 the Defendant is charged in Count One of the Amended Criminal
11 Information. Instruction Sixteen. The Court instructs the
12 jury that in every crime or public defense, there must be a
13 union. The next instruction in order would be you're
14 instructed that a person is in actual physical control and
15 that next in order would be Instruction Number Seventeen.
16 Instruction Eighteen you're instructed that in deciding
17 whether someone has existing or present bodily restraint.
18 Instruction Nineteen, the premises to which the public has
19 access. Instruction Twenty, it is a defense to the crime of
20 drunk driving. It says driving a motor vehicle, excuse me.
21 Instruction Twenty-one, you are instructed that mistake or
22 ignorance of the law. Instruction Twenty-two, a statement
23 made by the - by a Defendant other than at this trial.
24 Instruction Twenty-Three, a person is qualified to testify as

1 to his, her professional opinion. Instruction twenty-four,
2 both the State and the Defendant are entitled to the
3 individual opinion of each juror. Instruction twenty-five, I
4 have not intended by anything I have said or done.
5 Instruction Twenty-six, upon retiring for deliberation the
6 jury may take with them. Instruction Twenty-seven, once you
7 commence your deliberations. Instruction Twenty-eight, in
8 arriving at a verdict in this case. Instruction Twenty-nine,
9 you entered upon your duties as jurors in this case. Then we
10 have the verdict form, please review the verdict form and
11 concur that that is the form that we're going to give with
12 respect to the change that was made on page two.

13 MS. HILTON: That looks good to the State Your Honor.

14 THE COURT: Okay. And with respect to instructions one
15 through twenty-nine in total, recognizing the - for the
16 record, the offers by the Defense or instructions and the
17 objections to the instructions as have been discussed on the
18 record, does the Defense agree that these are going to be the
19 instructions that are going to be provided in this case?

20 MR. SEARS: Ah, yes, Your Honor.

21 THE COURT: And for the State, subject to the
22 objections that the State has made to instructions and
23 offered instructions that were rejected by the Court, does
24 the State also agree that these are the instructions that are

1 going to be provided to the jury in this case?

2 MS. HILTON: Yes Your Honor.

3 THE COURT: Is there a request that the instruction
4 the jury be instructed prior to argument, that the
5 instructions be - that these instructions be read to the jury
6 prior to closing arguments?

7 MR. SEARS: Yes Your Honor.

8 MR. HILTON: Yes Your Honor.

9 THE COURT: Okay. Both counsel have indicated. So are
10 there any other matters that need to be addressed at this
11 time before we take a recess to have them copied?

12 MS. HILTON: No Your Honor.

13 THE COURT: Okay. Then the Court will have thirteen
14 copies made. I will not make additional copies for yourselves
15 or the Court but we'll take a recess. As soon as we have the
16 thirteen copies, we'll let Mr. Ringueberg know and we'll
17 bring the jury back and we'll - we'll go forward. It will
18 probably take about ten or fifteen minutes. All right.
19 Court's in recess.

20 BAILIFF: All rise.

21 BAILIFF: All rise.

22 THE COURT: Court's in session please be seated. Let
23 the record reflect that we're in the continuation of our jury
24 trial. We have the presence of the Defendant and his counsel

1 and the State and the State's counsel, the presence of all of
2 the jurors in the jury box. Ladies and gentlemen, you have
3 been provided with copies of the jury instructions in this
4 case, and at this time the Court is going to read the jury
5 instructions that I did not previously read to you. You can
6 follow along if you'd like and read them or you don't have
7 to. Well, of course, you can take them with you during
8 deliberations. It now becomes my duty as Judge to instruct
9 you in the law that applies to this case and it is your duty
10 as jurors to follow the laws as I shall state it to you. On
11 the other hand, it is your exclusive province to determine
12 the facts in this case and to consider and weigh the evidence
13 for that purpose. The authority thus vested in you is not an
14 arbitrary power but must be exercised with sincere judgment,
15 sound discretion and in accordance with the rules of law
16 stated to you. You are instructed that if in these
17 instructions any rule, direction or idea be stated in varying
18 ways, no emphasis thereon is intended by me and none must be
19 inferred by you. For that reason you are not to single out
20 any certain sentence or any individual point of instruction.
21 You are to consider the instructions as a whole and to regard
22 each in the light of all the others. The order in which the
23 instructions are given has no significance as to their
24 relative importance. You are instructed that the Defendant

1 in this case is presumed innocent. This is a presumption of
2 law wit which the Defendant is clothed and it abides with him
3 throughout the entire trial of the case until it is overcome
4 by competent evidence sufficient in your minds to establish
5 the guilt of the offense charged beyond a reasonable doubt,
6 and in case of a reasonable doubt he is entitled to be
7 acquitted. In every criminal action, the burden of proof is
8 upon the State to prove the guilt of the Defendant beyond a
9 reasonable doubt. The State must prove each and every
10 necessary element of the crime with which the Defendant is
11 charged and the proof of each such element must be to your
12 satisfaction beyond a reasonable doubt. The failure to prove
13 any element of a crime beyond a reasonable doubt must result
14 in a verdict of not guilty of that crime. A reasonable doubt
15 is one based on reason. It is not mere possible doubt but is
16 such a doubt as would govern or control a person in the more
17 weighty affairs of life. If the minds of the jurors after
18 the entire comparison and consideration of all evidence are
19 in such a condition that they can say they feel an abiding
20 conviction of the truth of the charge, there is not a
21 reasonable doubt. Doubt to be reasonable must be actual, not
22 mere possibility or speculation. The Amended Criminal
23 Information is a mere accusation or charge against the
24 Defendant and is not of itself any evidence of guilt and no

1 juror in this case should permit himself or herself to be any
2 extent influenced against the Defendant because of or on
3 account of the Amended Information. This is a prosecution by
4 the State of Nevada against the Defendant, Myrtis Tyrone
5 James, A K A James Tyrone Myrtis, charging the Defendant with
6 the crime of Count One, driving or being in actual physical
7 control of a vehicle while being under the influence of
8 intoxicating liquor in the following manner, to-wit, in that
9 said Defendant on or about December eighteenth twenty
10 eighteen, committed the criminal offense of driving or being
11 in actual physical control of a vehicle while being under the
12 influence of intoxicating liquor, by the Defendant being in
13 actual and or physical control of a motor vehicle in a
14 parking lot of Family Dollar, a premises to which the public
15 had access, located at Fifteen Fifty Great Basin Boulevard,
16 Ely, County of White Pine, State of Nevada, while being under
17 the influence of an intoxicating liquor and or being found by
18 measurement within two hours after driving or being in actual
19 physical control of a motor vehicle to have a concentration
20 of alcohol of zero point zero eight or more in his blood, all
21 of which is contrary to the form, force and effect of the
22 statute in such cases made and provided and against the peace
23 of dignity of the State of Nevada. To this Amended Criminal
24 Information, the Defendant has entered a plea of not guilty.

1 Upon the issues thus joined, the burden is on the State of
2 Nevada to prove the Defendant guilty of the crime charged
3 beyond a reasonable doubt. You are instructed that the
4 Defendant is charged in Count One of the Amended Criminal
5 Information with the alternative charge of driving or being
6 in actual physical control of a vehicle while being under the
7 influence of intoxicating liquor. In order to convict the
8 Defendant of this alternative charge, the State must prove
9 each of the following elements beyond a reasonable doubt.
10 One, that at the time and place indicated in the Amended
11 Criminal Information the Defendant, two, drove or was in
12 actual physical control of a motor vehicle, three, in the
13 parking lot of Family Dollar, a premises to which the public
14 has access, four, while he was under the influence of
15 intoxicating liquor, or five, is found by measurement within
16 two hours after driving or being in actual physical control
17 of a vehicle to have a concentration of alcohol of zero point
18 zero eight or more in his blood. To find the Defendant guilty
19 of driving under the influence, you must find the Defendant
20 guilty of one of these alternatives. If either of the two
21 alternatives is proven beyond a reasonable doubt, it is
22 unnecessary for the State to prove the other. The Court
23 instructs the jury that in every crime of public offense,
24 there must be a union or joint operation of act and

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of February, 2022. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD – NEVADA ATTORNEY GENERAL

RICHARD SEARS- COUNSEL FOR APPELLANT

JAMES S. BEECHER – WHITE PINE COUNTY DISTRICT ATTORNEY

I further certify that this document was personally served to Appellant's counsel, by placing a copy in his box at the White Pine County District Attorney's Office, with his consent.

DATED this 7th day of February, 2022.

SIGNED: /s/ McKinzie Hilton
White Pine County Chief Deputy District Attorney