IN THE SUPREME COURT OF THE STATE OF NEVADA

Myrtis Tyrone James, aka James Tyrone Myrtis,
Appellant,
vs.
The State of Nevada,
Respondent

Case No.: 83439

APPELLANT'S OPENING BRIEF

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Routing Statement: This case should be routed to the Nevada Supreme Court Based upon NRAP 17(b)(3).

NRAP Rule 26.1 Disclosure
The undersigned counsel of record certifies that the following are persons and entities as described in NRAP Rue 26.1: NO ONE. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

STATEMENT OF ISSUES

ISSUE 1: WHETHER THE DISTRICT COURT ERRED IN DISMISSING DEFENSE'S MOTION TO SUPPRESS EVIDENCE FOR AN UNLAWFUL STOP AND SEARCH?

ISSUE 2: WHETHER CURRENT ACTUAL PHYSICAL CONTROL LAWS SHOULD BE INTERPRETED TO CREATE REASONABLE SUSPICION TO SEIZE ALL PERSONS ASLEEP IN VEHICLES IN ANY PUBLIC PLACE FOR FIELD TESTING PURPOSES?

ISSUE 3: ISSUE 3: WHETHER THE DISTRICT COURT IMPROPERLY REFUSED TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE IN AN ACTUAL PHYSICAL CONTROL OF AN AUTOMOBILE CASE?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF FACTS

Myrtis James worked as a licensed electrician at the Robinson Mine in Ely, Nevada. AA, 1:205. He resided in St. George, Utah with his wife and children while working at Robinson Mine. *Id* at 204. Myrtis is a Native American. *Id*., at 205.

On December 18, 2018, he was asleep in his car at the Dollar Store parking lot in Ely, Nevada. *Id*. at 208. It was almost midnight, and he had to go to work the next morning at the Mine. *Id*. He was parked near the location where he could walk to get on the bus to the mine. *Id*. at 206-207. Private automobiles are not allowed on the mine site. *Id*.

Myrtis was living in his car to save money. *Id*. at 207. The Dollar Store is just across the street from the Ridley's grocery, where Myrtis bought his dinner, drove across the four lane street, and went to sleep. Myrtis drank quite a bit with his dinner. *Id*. 207-208, 210, 182.

Sheriff Sergeant Luke Shady drove by and saw Myrtis's parked car. *Id*. at 182. Sgt. Shady pulled into the parking lot behind Myrtis, stopped his Sheriff's vehicle, and knocked on the rear passenger window to awaken Myrtis, who was reclined, asleep in the driver's seat. *Id*. at 183. Myrtis eventually woke up. *Id*. He was sleeping with the door open, engine

running: due to the cold December temperatures, he had turned on the heater in the car. *Id* at 184.

Shady asked Myrtis if he was ok; Myrtis responded, “yes”. Myrtis was alone in the car. Shady noticed Myrtis was a Native American by his distinct features. *Id*. at 208.

Shady then began to interview Myrtis and asked for his driver’s license. *Id*. at 184. Myrtis had pulled his wallet out of his pocket upon being awakened. *Id*. Myrtis then popped the rear trunk lid on his car, and began rummaging around in two coolers in the trunk looking for his license. Id.

Shady asked if his license was in his wallet, and Myrtis said, “Yes”. Id. Shady then reminded him that the wallet was in the driver’s area of the car. Id. Shady smelled an odor of alcohol, noted slurred speech, and continued his investigation for driving under the influence of a controlled substance. *Id*.

Shady allowed Myrtis to reenter the automobile on the driver’s side, and upon obtaining his license, ran a wants and warrants check. *Id*. Myrtis believed he was going to be arrested and drank the rest of the bottle of vodka in his car. *Id*. at 208. When Shady returned after running the

warrants check he told Myrtis to shut off the car and he did so. *Id*. at 185. Shady then put Myrtis through the field sobriety testing routine, and Myrtis said, "I'm drunk, we are all drunk, just take me to jail." *Id*. at 209, 187. Shady did. *Id*. at 187. Shady noted it was cold outside and he and he was wearing his jacket. *Id*.

Myrtis submitted to a blood draw: his blood alcohol was over the legal limit. *Id*. at 188, 203. After pre-trial litigation - including a Motion to Suppress - the case went to trial on the issue of whether Myrtis was in actual physical control of an automobile, or not.

ARGUMENT

ISSUE 1: WHETHER THE DISTRICT COURT ERRED IN DENYING THE DEFENSE'S MOTION TO SUPPRESS EVIDENCE FOR AN UNLAWFUL STOP AND SEARCH?

Myrtis moved the District Court to suppress all ill-gotten evidence, including his blood. A hearing was conducted, and the District Court determined that the seizure of Myrtis, his vehicle, and his blood was performed in conformance with Nevada law and U.S. Constitutional law. AA, Vol 1: 140.

The District Court found three factors supported its decision: 1) the officer had reasonable suspicion of criminal activity, perhaps a burglary; 2) there was no stop of the vehicle or seizure of the person or vehicle; 3) the community caretaking exception permitted the encounter. Id., *passim*.

Shady testified four times under oath in this case: at the preliminary hearing, the Jackson-Denno Hearing, the Motion to Suppress Hearing, and at Trial. He also prepared a written report that was submitted to the Court for its review.

At his first testimonial opportunity, Shady never mentioned the words burglary or suspicion of criminal activity. AA, 1: 8, *passim*. He said he stopped to "check on it." Id., at 5, *passim*. He testified that he walked up to the vehicle, saw a person reclined, asleep in the driver's seat, and woke him up. *Id*., 5-6

At his second testimonial opportunity, Shady said he stopped to "check on it." Id, at 66. He testified he walked up to the vehicle, saw a person reclined, asleep in the driver's seat, and woke him up. *Id*., 66-67. Upon cross examination when asked, "Why did you approach the vehicle if there was no traffic violation?", he mentioned potential burglary, or what it

might be. *Id.*, at 68. When pressed, Shady admitted that he had no calls regarding a burglary in the Ely area, had no information from other officers about a potential burglary, and had no reason to be looking out for that particular vehicle. *Id.* at 68-69. Shady admitted that Myrtis never asked for help, and responded that he was okay upon inquiry. *Id.* Shady saw no bottles of alcohol, burglary tools, disturbed store door or window, or anything else in plain view upon approach to the driver's side doorway indicating that the driver was in distress. *Id.* If a sleeping, or just awakened person reclined behind the wheel is not in distress, why does he need caretaking? That's because this stop was not at all about caretaking, according to the officer.

On redirect, Shady stated his reason for the stop was to "check on why it was there, what it was doing, where the owner was, who the owner was, investigative stop". *Id.*, at 69.

Shady was therefore straightforward about his reason for the stop, it was a criminal investigative stop without reasonable suspicion of criminal activity. Why do I say criminal investigative stop? Because those are the only things police officers investigate: crimes. They do not make civil

investigative stops to see if everything is ok. Police need probable cause or reasonable suspicion of criminal activity to investigate. For a moving vehicle, they need a violation of the traffic laws or codes. None of that existed here.

This raises a simple sub-issue in this argument. Do people have the right under either the Nevada Constitution or the U.S. Constitution to be left alone? Are the police allowed to approach someone on the street and ask to see their identification? At the suppression hearing, the State argued YES, absolutely. The State then relied on *Hiibel v. 6th Judicial District Court, et. al.,* for that proposition. But *Hiibel* says something very different:

> In contrast, the Nevada Supreme Court has interpreted NRS § 171.123(3) to require only that a suspect disclose his name. *See* 118 Nev., at ____, 59 P. 3d, at 1206 (opinion of Young, C. J.) (The suspect is not required to provide private details about his background, but merely to state his name to an officer when reasonable suspicion exists). As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means a choice, we assume, that the suspect may make the statute is satisfied and no violation occurs. See *id*., at ____, 59 P. 3d, at 1206-1207.

Hiibel. V. 6th Judicial District Court, et.al, 542 U. S. 177, 185 (2004).

The statute at issue in Hiibel, and it is plain:

> "1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> . . . . .
>
> "3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer."

Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 181-82 (2004).

It is certainly possible that the U.S. Supreme Court misunderstood Nevada's interpretation of its own statutes when it upheld Nevada law. However, State - and now Federal - interpretation of our stop and identify statute seems to differ from the White Pine County's interpretation of the law in this case.

In *Hiibel*, there was a lot of reasonable suspicion: a call about violence, description of the truck, the roadway, the people. And upon arrival, there were unusual skid marks, indicating a sudden stop. A man was outside a car, a female was inside a car. All matched the call and provided a suspicion of violence.

The *Hiibel* court constantly referred to the person being questioned as a "suspect". Nothing in the facts of this case point out a suspect when law enforcement pulled up behind and woke a sleeping man in his car.

No suspicious facts exist here. We only have a man sleeping in a car on a cold night with the heater running and the door open presumably to balance the temperature to a comfortable level for sleeping. Myrtis argues that once he told the officer he was okay, the officer should have left.

But Shady did not leave: he was conducting a criminal investigation, and wanted answers to his questions. And he decided he was going to do a criminal investigation before he ever exited his patrol car.

If Shady and the prosecution and the 7th Judicial District Court are correct on the law, then people sleeping in their cars on a dark night in a parking lot are all suspects. All can be awakened, seized, and then checked by field testing to see if they have been drinking or using drugs.

Failure of field sobriety tests then mean all sleepers then be arrested, tested, booked, jailed, and prosecuted.

ISSUE 2: WHETHER NEVADA LAW DENIES THE DEFENSE THE ABILITY TO DEFEND AGAINST ACTUAL PHYSICAL CONTROL CLAIMS DUE TO THE ABSENCE OF DIRECTION TO A JURY ON HOW TO USE THE ROGERS, ET AL, FACTORS IN AN DRIVING UNDER THE INFLUENCE CASE?

The actual physical control laws currently in existence in Nevada and as interpreted by the Nevada Supreme Court probably make the proposition correct that all sleepers found in cars can be arrested and convicted if they have been drinking prior to sleeping.

Definition of Actual Physical Control:

> We conclude that a person is in actual physical control when the person has existing or present bodily restraint, directing influence, domination, or regulation of the vehicle. In deciding whether someone has existing or present bodily restraint, directing influence, domination, or regulation of a vehicle, the trier of fact must weigh a number of considerations, including where, and in what position, the person is found in the vehicle; whether the vehicle's engine is running or not; whether the occupant is awake or asleep; whether, if the person is apprehended at night, the vehicle's lights are on; the location of the vehicle's keys; whether the person was trying to move the vehicle or moved the vehicle; whether the property on which the vehicle is located is public or private; and whether the person must, of necessity, have driven to the location where apprehended.

Rogers v. State, 105 Nev. 230, 773 P.2d 1226 (1989), as quoted in *Bullock, infra*.

In the Nevada Supreme Court cases of *Bullock*[1] and *Isom*, the Court wrestled with two competing policies: 1) arrest and prosecute drunk drivers

[1] *Bullock* was a civil driver's license revocation administrative proceeding allowing a lower burden of proof to establish actual physical control; on facts on all fours with these facts, the Supreme Court reversed the district court and administrative court and order Bullock's driver's license reinstated: because Bullock was asleep and was a passive occupant of the vehicle.

who are in actual physical control of a motor vehicle regardless of the circumstances of the driver; and, 2) drivers should be encouraged to pull over and sleep rather than drive drunk.

The facts in this case are nearly identical to *Bullock*, except this case was not dismissed by a Court because the driver was simply a passive occupant of the automobile. In *Isom*, this Court determined that the fact she attempted to drive away when awakened by police resulted in the affirmation of a third offense driving conviction.

The considerations set out in *Bullock* and *Isom* hint at the future dangerousness of the situation rather than strictly whether the person had the present ability to exercise control over the car. *Bullock* seems to deny future dangerousness because the driver was asleep and apparently never attempted to drive away. In *Isom*, the driver attempted to move the vehicle demonstrating an intent to resume operation of the vehicle. Obviously, anyone in a motor vehicle has some ability to exercise control over the vehicle when they wake up inside the vehicle. Even if not in the passenger seat, they can reach over and push the button and start the car, they can turn the heater on and off, they can turn the vehicle lights on and off when

they do not do so automatically. In partially self driving vehicles, they do not even need to do those things to exercise control, they may simply command the car to "go to a pre-programmed location".[2]

Here, Myrtis went to sleep in a parking lot after eating his dinner and drinking. Myrtis did not attempt to leave; in fact, the officer asserted that Myrtis never tried to leave in his car or move his car. Myrtis testified he got to his mine job in the morning by bus, he could not drive his vehicle onto the mine site. He could walk to the bus from where he was parked. So Myrtis was a passive occupant of a vehicle, sleeping reclined, lawfully parked in a parking lot, just like *Bullock*.

Justice Rose wrote the majority opinion in *Bullock* and dissented in *Isom*. In part he was concerned about the policy message being sent by *Isom*. Apparently, Justice's Rose's concern was not shared by law enforcement. The message to law enforcement is *not* that passive

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[2] The obvious answer is we will wait for that to happen some Level 5 self driving vehicles are now ready for testing, and some are now being tested on America's roadways. *See emerj.com*: HOW SELF-DRIVING CARS WORK – A SIMPLE OVERVIEW: IN March 2019, Las Vegas was an active test location for self driving vehicles.

occupants of vehicles will be left alone if sleeping, the message law enforcement clearly understands is arrest them and let the Courts sort it out.[3]

Rogers, et al, direct the trier of fact to weigh of the "considerations"[4] for triers of fact from *Rogers* and *Isom*. Unfortunately, the factors do little to direct triers of fact; they may only reinforce the prejudices held by the triers of fact with regard to alcohol consumption and driving. If juries support the proposition: you can drink or drive, but not both at the same time, arguably they will always convict under the current law.

A review of the factors and how they affect a jury is instructive.

INITIAL SET OF FACTORS: driving to the location, lawfully stopping, drinking, sleeping.

A review the factors chronologically normally starts with whether the accused drove to the arrest location, lawfully stopped, had been drinking, slept. Do those facts matter? How should that testimony be weighed by the jury? *Bullock* indicates those facts matter. But how does the jury learn this

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[3] As a side note, defense counsel has tried four passive occupant actual physical control cases within a year and lost each: three in Justice Court and one in District Court.

[4] For clarity, counsel will use the term "factors" or "factor" in this brief to refer to those facts called guides or considerations in a decision about actual physical control of an automobile.

information? Some from the arresting officer, some from the defense - if there is any evidence at all from that source.

First, someone must testify to the facts. If no testimony is given about some guides, the jury may likely presume the accused drove to the location drunk or no presumption is made, but the factor provides no guidance on the decision when there is no evidence presented. This raises the obvious question: Does the absence of evidence of a factor point to actual physical control? Circumstantial evidence normally leads to the conclusion that the intoxicated person drove the car to wherever it was located when the driver was discovered asleep in it, otherwise how did they get there? Next, were they drunk when they arrived at the sleep site or drink after arriving? Normally no officer can know that unless the driver states the fact during investigation. This evidence is often circumstantial.

The presence of open containers of alcohol in the vehicle do not provide much detail for deciding if these factors exist, since the person may either have been drinking in the car while driving, or drinking in the car after driving but before sleeping. In addition, the possession of an open

container requires a defendant to confess to a crime on the stand, not something that people like to do.

With the first factor set leaving the trier of fact without any real direction absent direct testimony, those triers of fact opposed to drinking and driving will presume the defendant was drunk prior to stopping their vehicle and sleeping - in the absence of direct evidence. Presuming there is testimony on this factor, the next problem is will the jury give testimony of a drunk any credit?

Why or Why Not? Nevada jurisprudence tells the judge and trier of fact nothing about how to use the first set of factors, or any, factor. Does the government have a burden of proof on those initial factors? One cannot tell. Consequently, instructions on the burden of proof of any factor is non-existent. The jury deliberates and decides whether the facts relevant to the first set of factors were true, or not, without even an instruction that they should believe a factor exists if substantial evidence is presented. Then the jury must decide what the first factors mean to an ultimate finding of actual physical control, whether true or not.

Some may say the truth can be determined by the law of circumstantial evidence, since often the only direct evidence on some facts will likely be the location of the car, attitude of the seat, and condition of the driver (whether asleep and a passive occupant, or not). Again, how does the trier of fact determine who proves this? Does anyone have a burden to prove this? Clearly the government has a burden to prove the charge beyond a reasonable doubt to convict. But the law is silent on how the factors play into this burden. The Supreme Court has stated, in essence, the factors are just that: guides. But the defense asks: what burden exists with respect to the factors? Is there a burden of production to an established burden of proof? Is the burden preponderance of the evidence? Probable cause to believe? Clear and Convincing evidence? These may well be guides, but who bears the burden of producing credible facts *about* the guides? Clearly, the government must bear the burden of producing facts relevant to each factor: it is their case to prove, the defendant does not want to be there, he appears or is arrested.

When, as here, the government has no burden, the absence of evidence on several of the guides may lead a jury to decide guilt anyway,

because the burden shifts to the defense to deny the existence of the guides if there is an absence of direct evidence. Arguably, the government has no burden to produce any evidence on the guides: they can ignore them and allow the jury to presume the importance of their absence or existence based on the circumstances. Arguably, a high blood alcohol level will result in automatic conviction, this is because the drunk should never been in control of an automobile.

In fact, circumstances may well resolve a case in a conviction in short order even in the absence of much evidence at all. For example, when the driver is drunk asleep in a vehicle in the roadway blocking traffic, he will be determined to be in actual physical control. The condition of the lights, seat, awake or asleep, keys, or engine will not matter. Arguably, even if he is sleeping in the back seat, it would not matter. This is because the first and last factors, absent any direct evidence, will direct a jury to conclude that he must have driven there, and he must be intending to drive away. Most likely, the driver passed out in the middle of the roadway due to excessive consumption.

Other than in the prior obvious situation, what happens when no direct evidence one way or the other is produced on a particular factor?

The defense argues that in the absence of production by the State of any credible evidence to support a factor, the jury should presume the factor points toward innocence. The government failed to prove any factors that point to actual physical control so the defense should win.

SECOND AND THIRD FACTORS: key in ignition, engine running, light status at night.

What happens when we have an electric car, or self-driving car, that requires no key to start, simply a key fob that must be present in the vehicle for the vehicle to start a motor? No one recalls whether the lights are on or off on the vehicle. How do those two facts direct a trier of fact to determine guilt or innocence in the absence of direct evidence that the driver is asleep and reclined in the vehicle? Should they point toward innocence or guilt? How does the jury know the driver was asleep? No testing of the driver is done to check to see if they are sleeping or simply faking. The officer's truthful testimony can only be "the driver appeared to be asleep".

No key was in the ignition, should point toward innocence. But the lights, no evidence on the lights, does that point toward innocence or guilt?

In most modern vehicles, the lights illuminate automatically in the dark when the motor is running at night. Does that mean innocence, since the driver does not have to turn them on, or guilt because he does not have to turn them on and they start automatically, so the driver is exercising control over the vehicle because the key is on. Finally, in the absence of any evidence one way or the other, does that support either guilt or innocence? When evidence of the factor is neutral, does it help either side, or does it simply mean the remaining guides become more important? If the jury engaged in a bean count: 4 guides were positive and proved (drove there, engine running, lights on, sleeping in seat), 1 factor was perhaps innocence pointing, it is still 3 to 1 for conviction.

FINAL FACTOR SET: Did the person attempt to drive away?

In this case, the answer was no. Myrtis made no attempt to drive away, and he had lawfully parked where he could walk onto the bus to ride to work, so he had no need to drive the next day at all.

These guides should have pointed toward innocence of being in actual physical control if the jury believed the testimony. The evidence on these factors clearly had an insufficient effect on the jury to result in acquittal.

Similarly, with the lawfully parked vehicle, no evidence of lights being on or off, the engine was running because it was a cold night, and Myrtis was asleep. Yet all this evidence of no actual physical control was either discounted partially or completely. In a bean count, it is still 3 to 2 for conviction. When there is no guidance for a jury on what they should do in balancing the evidence, the jury is left to use or ignore facts in whatever way they wish.

Ultimately, the prosecution argued that Myrtis could have awakened at any time and driven or attempted to drive the car. *Id*. at 216. And while that is true, whether the "driving away" factor proves too much is the issue. A person who is asleep can always awaken and shut off the heater, stop the engine or do any number of things that evidence present ability to exercise control over a motor vehicle. While it is true that in this case, Myrtis had no need to drive to get to work, he could have always awakened and driven, if he wanted to. Because the factors in *Rogers, et al*, allow the jury to come up with factors that are relevant to the issue, counsel did not object to that specific argument when made by the prosecution. Defense argues that the stated guides, the absence of any burden of proof, and the vague notion that

other factors might persuade a jury, are simply too imprecise to permit the defense to make a case that someone asleep behind the wheel who is legally parked is not in existing control over an automobile after drinking.

Finally, the defense is left to wonder: what theory did the jury use to determine that sleeping Myrtis had the present ability to exercise control over the vehicle? It could well be the case than when Officer Shady told Myrtis his identification was in his wallet on the dashboard, Myrtis' reentry into the vehicle and subsequent shut off of the engine demonstrated actual physical control; or, the fact that he opened the trunk demonstrated actual physica control, and all of those facts were in front of the jury. The missing element not required under Nevada law is that once he was awakened by the police officer's investigation, he was no longer a sleeping human, he was a human acting on police directions physically controlling the vehicle.

Because it is unclear from the jurisprudence, or the court's instructions --- which followed the law --- whether acts undertaken after a suspect is awakened by police matter. If they are relevant, which the *Isom* case indicates post sleep actions are relevant, then drunks sleeping in their vehicles will always be found guilty.

The government or courts may argue that Myrtis should complain to the legislature. Arguably, someone did. The law was altered recently to provide some guidance:

> NRS 484C.109. Persons deemed not to be in actual physical control of vehicle in certain circumstances.
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> For the purposes of this chapter, a person shall be deemed not to be in actual physical control of a vehicle if:
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> **1.** The person is asleep inside the vehicle;
>
> **2.** The person is not in the driver's seat of the vehicle;
>
> **3.** The engine of the vehicle is not running;
>
> **4.** The vehicle is lawfully parked; and
>
> **5.** Under the facts presented, it is evident that the person could not have driven the vehicle to the location while under the influence of intoxicating liquor, a controlled substance or a prohibited substance.

Whether or not this statute provides a safe haven for sleeping drunks is an open question. First, the statute is unclear about what the words: "under the facts presented" means. Does this require production by the prosecution of substantial evidence? Since the prosecution has the burden or proof in a criminal trial, the defense asserts the statute must require that level of proof. The plain words of the statute make it clear that each fact in the statute must be met for any "deeming" to occur.

The good news for drinkers is the statute seems to provide a "safe harbor" when someone proves each element in the statute by substantial evidence. The use of semi-colons and the "and" prior to the last factor indicates that each factor must be proven by the defendant.

Unfortunately, the term "substantial evidence" has come under scrutiny and the vagaries are illustrated in the following discussion:

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88, 71 S. Ct. 456, 464-65 (1951)

While the Supreme Court of the United States' discussion of a federal statute is certainly not conclusive in a Nevada criminal jury matter, it seems that a finding that "substantial evidence" of a fact exists in a case requires a consideration of the whole record, not just the facts presented by one side or the other. Nevada law requires proof by "substantial evidence" in many

contexts, some of which - including grand jury proceedings and preliminary hearings - do not require paying attention to facts that are contrary to a prosecution presentation.

Presumably, in a criminal jury trial, contrary facts must be considered before a reviewing court accepts a fact as a thing supported by substantial evidence.

Therefore, if the jury concludes by substantial evidence that each fact of NRS 484C.109 has been met, the trier of fact is permitted to deem the person to not be in actual physical control.[5]

If that is the case, one can argue by analogy that each *Rogers* factor must be proven by substantial evidence. Proof must be by the prosecution. We are then back to the question: how does the failure of proof of a factor affect the trier of fact? The facile answer is that the unproven factor does not affect the outcome of the decision. The remaining guides which have been proven by substantial evidence alone are considered. Therefore, in the bean count scenario, all drunk drivers will be found guilty. This is because

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[5] Whether this law has any effect on the *Rogers factors, et. al.* is not at issue here, since the trial court failed to address the issue and the defense did not raise it at the Myrtis James trial

of the simplicity of the factors: driving to location, engine running, lights on, keys in ignition, asleep in driver's seat, etc. The unproven facts do not count and are not part of the determination; therefore, it is always 3 to 0 or 4 to 0, or 5 to or maybe 1 - and conviction results. The statute provides little help, it also requires that all 5 of the factors to be met, or else the person is in actual physical control. At this point, the Court and the legislature apparently believe that all people who sleep in the driver's seat of their automobile are in actual physical control.

It is now arguable that after the legislature's action, *Bullock* is no longer good law, unless the Legislature is "deemed" to not have overruled the *Rogers, et. al.* factors.

However, the 2015 statutory changes either clarify that an actual physical control defense case only relates to the 5 legislative factors and *Rogers, et. al.* are overruled, or both co-exist and the absence of clarity in the application of the *Rogers, et. al.* factors will continue.

ISSUE 3: WHETHER THE DISTRICT COURT IMPROPERLY REFUSED TO INSTRUCT THE JURY ON CIRCUMSTANTIAL EVIDENCE IN AN ACTUAL PHYSICAL CONTROL OF AN AUTOMOBILE CASE?

The defense sought a jury instruction from the Court that would permit the jury to conclude the non-existence of a factor in the absence of direct evidence point toward innocence of an element of the crime: actual physical control. The proposed instruction arose from *State v. Boyle*, a 1926 instruction. AA, Vol 1, 165-166, that instruction setting forth the law on direct and circumstantial evidence and then states in relevant part:

> But if on the other hand, the whole evidence in the case, as you view it, is just as consistent with the hypothesis of his innocence as with the hypothesis of his guilt, or, if you do not feel an abiding conviction of the truth of the charge, or entertain a reasonable doubt, resting upon the unsatisfactory character of the evidence or for any other reason growing out of the evidence in the case to establish his guilt, your duty is just as imperative to acquit.

State v. Boyle, 49 Nev, 386, 398-400 (1926).

The Court refused to permit argument consistent with that instruction, and the defense did not argue the "hypothesis of his innocence" during argument. AA,___. The defense sought this instruction because there was no direct evidence on some of the factors: driving drunk to location, lights on, driving away from location, or post driving drinking.

In an actual physical control case, the prosecution will argue that the driver "had to have driven there drunk" and "could always reach up and

turn off the engine, or drive away upon awakening". Those arguments sway the majority of the factors toward guilt even in the face of no evidence on a factor either way. Because of the absence of direction from the courts on the burden of proof of the factors, a jury is allowed to guess what happened based upon no evidence, circumstantial or otherwise.

Unless a defender is allowed to point out that a hypothesis of innocence is consistent with "there was no proof of the existence of factor 'awakened driving', and that failure of proof is evidence of not being in actual physical control", the defense is defenseless. Otherwise, a jury may conjecture that "awakened driving" is not proof that when Myrtis was asleep, he would not wake up and drive the car. In fact, that was the government's precise argument. Therefore, the failure of proof by circumstantial evidence of factor "awakened driving" does not mean factor "awakened driving" does not matter, it means factor "awakened driving" is consistent with Myrtis not being in actual physical control. Therefore, if Myrtis was not in actual physical control, the hypothesis of innocence is supported because innocence is presumed until substantial evidence rebuts it. Similarly, the government can always argue, and does, we don't know if

the lights were on but it does not matter: he could turn on the lights if he woke up. The same problem exists with each factors set out in *Rogers, et al.*

CONCLUSION

Drunk driving cases frequently result in mandatory prison terms consistent with the actual infliction of deadly violence on victims. Both involuntary and voluntary manslaughter convictions result in lower sentences than felony drunk driving. Despite this disparity, the jury instructions and law in manslaughter cases are much clearer than the jurisprudence surrounding actual physical control cases, and these cases resulting in longer sentences for sleeping in one's car than for killing a human being.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Appellant's Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. The brief complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7). This brief is typeset using font Georgia, 14 point, and contains 6266 words.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

_____**ss**_____

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