IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY D. HIBEL,

Petioner,

No. 38876

vs

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF, HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER

Respondent,

and

THE STATE OF NEVADA,
Real Party in Interest

ANSWER TO PETITION FOR REHEARING

Comes Now the State of Nevada, Real Party in Interest, and pursuant to NRAP 40(d) and this court's order issued on February 20, 2003 submits this answer to Petitioner's Petition for Rehearing. This answer is made and based upon all the pleading and papers file herein, the record on appeal, as well as the points and authorities submitted herewith.

LEGAL ARGUMENT

A. THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION DOES NOT APPLY TO DETENTIONS BASED ON REASONABLE SUSPICION.

The Fifth Amendment of the United States Constitution protects a person from being "compelled in any criminal case to be a witness against himself." The word "witness' in the constitutional text only applies to the category of compelling incriminating communications

to those that are "testimonial" in nature. The history and policies underlying the self-incrimination clause support the proposition that this privilege may only be asserted to resist compelled explicit or implicit disclosures of incriminating information. This privilege was created to prevent the type of inquisitorial methods used by ecclesiastical courts and the Star Chamber wherein an individual would be compelled under oath to answer questions designed to uncover uncharged offenses without evidence from another source. *See* Andresen v. Maryland, 427 U.S. 463, 470-471 (1976); 8 Wigmore sec. 2250; *See Also* Doe v. United States, 487 U.S. 201, 212 (1988)

Based on this historical backdrop the state submits to this court that compelling an individual to produce identification after an officer establishes reasonable suspicion does not constitute a violation of the Fifth Amendment. The state contends that Hibel's name does not have "testimonial" significance. In United States v. Wade, 388 U. S. 218 (1967) defendant was indicted for robbery. Without notice to his attorney, defendant was placed in a lineup and made to wear strips of tape on his face as the robber allegedly had done. Further, defendant was required to repeat the words used by the robber. Defendant was subsequently convicted of robbery and filed a writ of certiorari with the United States Supreme Court. The United States Supreme Court granted certiorari and determined that defendant's Fifth Amendment privilege against self-incrimination was not violated when he was required to speak the same words the robber spoke during the robbery. The court stated that these spoken words did not have any "testimonial significance" because he was not being asked to disclose any knowledge he had about the robbery itself. Id at 222-223

Applying the United States Supreme Court's interpretation of the Fifth Amendment privilege against self-incrimination to the case at bar it seems clear that stating one's name

carries with it no "testimonial significance." When comparing both cases there are some very important distinctions that this court should consider. First, unlike Wade, Hibel was never formally charged with a crime prior to being asked for identification. Deputy Dove made this request while conducting a temporary detention to investigate a possible battery/domestic battery. The state submits that once a person has been charged and is considered to be the only person who committed the crime, the protections provided by the privilege against self-incrimination become much more important. There is a greater interest in making sure the government does not use compulsive means to extract a confession or information that can be used to assist the prosecution in proving each element beyond a reasonable doubt at time of trial.

Second, unlike Wade, requiring Hibel to provide identification did not give the prosecution any material information about the crime itself. Compelling Wade to speak the same words as the robber while eye witnesses listen is a greater infringement on the privilege against self-incrimination because it gave the prosecution an important piece of evidence that placed Wade at the scene of the crime. If the witnesses harbored any doubts as to the identity of the perpetrator, hearing the same words and comparing the voices erased these doubts. Again, Wade was compelled to produce this evidence after he was formally charged.

In light of United States v. Wade, 388 U.S. 218 (1967), if this court finds that requiring a person who is detained based on reasonable suspicion to provide identification is a violation of the Fifth Amendment privilege against self-incrimination, the court would be engaging in what Justice Holmes stated to be "an extravagant extension of the Fifth Amendment." *See* Holt v. United States, 218 U.S. 245 (1910)(compelling a defendant to put

on a blouse did not violate the privilege against self-incrimination) It is unreasonable to give a person's name "testimonial" characteristics when the United States Supreme Court has held that other more incriminating evidence does not merit that distinction. The court has ruled that compelling a person to provide a blood sample does not violated the Fifth Amendment. *See* Schmerber v. California, 384 U.S. 757 (1966) The court has affirmed the compulsion of a handwriting exemplar, recording of a voice or putting on a shirt. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 91967); Holt v. United States, 218 U.S. 245 (1910) All more intrusive than simply requiring a person's name while being detained for investigative purposes. In addition, these other compulsive means provide information that has far more evidentiary value at time of trial than the defendant's name. Yet the court continues to apply the standard that unless the compulsion brings about a communication that relates either express or implied assertions of fact or belief the Fifth Amendment privilege against self-incrimination will not apply. *See* Pennsylvania v. Muniz, 496 U.S. 582 (1990)

In United Sates v. Dionisio, 410 U.S. 1 (1973) a grand jury was investigating crimes relating to illegal gambling. The grand jury had a tape recording of voices but could not determine the identity of the voices. As a result, the grand jury subpoenaed twenty individuals to compel them to provide voice exemplars. Defendant objected and refused to abide by his subpoena claiming that the voice exemplar violated his Fifth Amendment privilege against self-incrimination. The United States Supreme Court rejected this argument and held that the voice exemplars were used for identification purposes and did not rise to the level of being testimonial in nature.

The facts and opinion in Dionisio bolster the state's position in this case. The grand jury was engaged in an investigation of criminal activity. It is undisputed that Deputy Dove had reasonable suspicion and was also investigating the crime of domestic battery. The grand jury was investigating potential suspects and based on the evidence presented to them needed to identify the individuals from the tape recording. The only way they could accomplish that goal was to have these suspects utter words so a comparison could be made to the voices on the tape recording.

Deputy Dove was placed in a similar position. He had received information from dispatch that a person witnessed a man hit a woman while they were driving down the road in a truck. When Deputy Dove came upon the scene to start his investigation he saw Hibel outside the truck. **Deputy Dove did not know Hibel's name. In order for Dove to adequately complete his investigation of domestic battery he needed Hibel's name. NRS 171.137(2) states that before an officer can arrest for domestic violence he must consider several factors. One of those factors is whether the suspect has a prior history of domestic violence.** ***See*** **NRS 171.137(2)(a) Before a criminal history could be obtained from dispatch Deputy Dove needed to provide some identification information. If this court finds that requiring identification violates the Fifth Amendment privilege against self-incrimination, how would Deputy Dove comply with this requirement?** . This is just one of several statutory examples that would create a tremendous conflict for law enforcement officers in this state as they attempt to carry out their duties and responsibilities while investigating crime.

Petitioner relies primarily on Byers v. California, 402 U.S. 424 (1971) to support his argument that requiring a person to identify themselves is a violation of the Fifth

Amendment privilege against self-incrimination. However, a closer review of Byers reveals that the United States Supreme Court opinion substantiates the state's position. When addressing the issue of whether compelling an individual to disclose their name and address at an accident is a violation of the Fifth Amendment, the court held that this was "an essentially neutral act." Furthermore, the court found that compelling a person to stop and provide a name and address did not require that person to provide the state with "evidence of a testimonial or communicative nature." Schmerber v. California, supra, at 761

Petitioner's attempt to elevate Byers beyond its reasonable application to the Fifth Amendment amounts to what Justice Holmes reiterated in United States v. Sullivan, 274 U.S. 259 (1927) as "an extreme if not extravagant application of the Fifth Amendment." The state urges this court to apply a balancing test. Weigh the importance of Nevada law enforcement officers need to have a suspect's name to further their investigation and obtain information as to what type of suspect they are dealing with against whether a name is testimonial in nature and provides any substantive information that could later be used at trial. When considering the type of information/evidence the United States Supreme Court has held can be obtained from a person through compulsive means, requiring suspects to identify themselves once reasonable suspicion is established is De minimis and does not outweigh law enforcement's need to obtain this information.

In Michigan v. DeFillippo, 443 U.S. 31 (1979) the court was asked to determine if defendant had been lawfully arrested for failing to provide identification. A Michigan Appellate Court found the ordinance to be unconstitutionally vague and reversed defendant's conviction. However, the appellate court did not find that the ordinance violated defendant's Fifth Amendment privilege against self-incrimination. On appeal the

United States Supreme Court held that if a person is arrested under a presumptively valid ordinance the arrest is deemed valid. Notably, the court did not take the opportunity to strike down the ordinance as a violation of the defendant's Fifth Amendment privilege against self-incrimination. This failure speaks volumes as to the court's position on this issue. By not addressing the privilege against self-incrimination issue the United States Supreme Court implicitly placed its stamp of approval on this type of ordinance.

Perhaps the most compelling state court decision is State v. Flynn, 285 N.W. 2d 710 (1979). In Flynn an officer was investigating a crime and developed reasonable suspicion to detain the defendant. During the detention the officer asked defendant for identification. Defendant refused to provide his identification so the officer took it from him. On appeal the Wisconsin Supreme Court upheld the officer's conduct. The court stated that unless an officer is entitled to at least ascertain the identity of the suspect the right to stop serves no useful purpose at all. The court determined that to allow a suspect to refuse to provide identification would reduce the officers authority granted in Adams v. Williams, 407 U.S. 143 (1972) to a mere fiction.

A Florida Appellate Court was asked to decide a similar issue. The court ruled that one of the basic reasons for and necessarily one of the primary functions of an investigative stop is to ascertain the identity of the suspect. Citing to State v Flynn, 285 N.W. 2d 710 (1979), the court upheld the officer's decision to take the defendant's identification which ultimately led to the discovery of other evidence. *See* Harper v. State, 532 So. 2d 1091 (Fla. App. 3 Dist. 1988); *See Also* W. LaFave 9.4(g)

Several state courts have also been asked to address the validity of an identification law. In Jones v. Commonwealth of Virginia, 334 S.E.2d 536 (1985) the Virginia Supreme

Court, citing DeFillippo, upheld an identification ordinance because a person could only be required to produce identification if an officer had reasonable suspicion to detain the person. An Illinois Appellate court ruled that refusal to provide identification can be part of establishing reasonable suspicion to detain a person's luggage. People v. Evans, 689 N.E. 2d 142 (1997) The State of Ohio has a specific criminal statute requiring a person to provide identification. The Ohio Appellate Court approved of this statute and rejected defendant's argument that it was unconstitutional. State of Ohio v. Pugh, 998 Ohio App. Lexis 2882 (Court of Appeals of Ohio, First Appellate District, Hamilton County)

The state finds it difficult to understand how the giving of one's name results in "self-incrimination." The request does not require the suspect to "speak to his guilt" and the answer to such a request does not give law enforcement "substantive information." United States v. Wade, 388 U.S. 221 (1967) The request to provide identification did not require Hibel to explain his whereabouts at a particular time or his conduct prior to being detained by Deputy Dove. This information can only be described as neutral and non-substantive in nature. Therefore, the state believes petitioner's argument that requiring persons to identify themselves after being detained on reasonable suspicion is a violation of the Fifth Amendment is skewed and fails to take into consideration the complexities of law enforcement.

Finally, the state is disturbed by petitioner's use of an editorial from the Review Journal. The state submits that attaching the editorial, as an exhibit to the petition for rehearing, is inappropriate. Petitioner appears to be asking this court to step out of its role as a neutral and detached judicial body and decide this issue based on a newspaper's opinion. The state could have attached hundreds of letters by law enforcement officers praising the majority's

decision in this case. The state could have informed this court that law enforcement officers throughout the State of Nevada considered this case to be an "officer safety" issue and applauded Justice Maupin's concurring opinion that "... our decision today is truly related to the ability of police to properly and safely deal with persons reasonably suspected of criminal misconduct, here, domestic violence and driving while under the influence of alcohol..."

However, this court's role is to decide legal issues as an independent body. Therefore, the state will not adopt petitioner's posture and attempt to influence this court by use of public opinion that strongly favors the majority's position. The state will rely upon the numerous cases cited in this answer that have held the Fifth Amendment privilege against self-incrimination does not protect the giving of identification because a person's name has no "testimonial significance" and is essentially a "neutral" communication.

The state notes after reading the editorial that the Review Journal's interpretation of the majority's opinion is completely misguided and ill informed. Apparently, the editor forgot to read NRS 171.123 that requires an officer to first establish reasonable suspicion before asking for identification. If this threshold is not met then the Fourth and Fifth Amendment protections apply and this court, as the United States Supreme Court did in Brown v. Texas, 443 U.S. 47 (1979), can reverse the conviction. It is this requirement that prevents us from being a police state.

The majority's opinion did not, as the dissent claims, "allowed the first layer of our civil liberties to be whittled away." Rather, the majority's opinion reflects a sound, well-reasoned legal analysis of a complex constitutional issue that properly balances an officer's need to have a suspect's name against a suspect's right not to give neutral, non-incriminating

information. The majority engaged in common sense and made good law. Peak v. United States, 353 U.S. 43 (1957) The state asks this court to again engage in common sense and deny petitioner's petition for rehearing. The state asks this court to find that a person's name, like a voice exemplar, finger prints, handwriting sample, blood sample, being compelled to wear clothing and being compelled to give your name and address at an accident scene is non-testimonial and therefore the Fifth Amendment privilege against self-incrimination does not apply.

CONCLUSION

The state submits that a person's name is essentially neutral information and requiring a person to give their name to an officer after being detained on reasonable suspicion does not rise to the level of compelled testimony. Requiring Hibel to give his name to Deputy Dove during the investigative stop did not require Hibel to "speak to his guilt." Hibel's name does not reveal any substantive information relating to what may have occurred in the truck. Hibel's name simply reveals his identity like a finger print, handwriting sample or voice exemplar. Further, it would have assisted Deputy Dove in his investigation just like leaving a name and address at an accident scene. Based on the legal analysis presented in this answer, the state urges this court to deny petitioner's petition for rehearing.

Dated This 3 Day of March 2003

Conrad Hafen
Chief Deputy District Attorney

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 3rd day of March, 2003, at Winnemucca, Nevada, I delivered a true copy of the ANSWER TO PETITION FOR RECONSIDERATION, by the following means, to:

Supreme Court Clerk's Office
Supreme Court Building
201 South Carson Street, Suite 250
Carson City, Nevada 89701-4702

Public Defender
511 East Robinson Street
Carson City, Nevada 89701
Attn: Gary Logan

Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701

( ) Certified Mail
(✓) U.S. Mail
( ) Hand-delivered
( ) Placed in box at Justice Court
( ) Via Facsimile

Paige Brown

HUMBOLDT COUNTY DISTRICT ATTORNEY

DAVID ALLISON
DISTRICT ATTORNEY

POST OFFICE BOX 909
WINNEMUCCA, NEVADA 89446

March 3, 2003

Supreme Court Clerk's Office
201 South Carson Street
Carson City, Nevada 89701-4702

RE: Hiibel v. Sixth Judicial District Court et al.

Dear Court Clerk:

Enclosed please find Answer to Petition for Rehearing regarding the above-entitled matter. Please file-stamp and return file-stamped copy to our office.

If you have any questions, please do not hesitate to contact our office.

Sincerely,

Paige Brown

Paige Brown
Legal Secretary

pb:
encl.