

1
2 IN THE SUPREME COURT OF THE STATE OF NEVADA
3
4

5 LARRY D. HIBEL,

6 Petitioner,

No. 38876

7 vs

8 THE SIXTH JUDICIAL DISTRICT
9 COURT OF THE STATE OF NEVADA,
10 IN AND FOR THE COUNTY OF,
11 HUMBOLDT, AND THE HONORABLE
12 RICHARD A. WAGNER

Respondent,

13 and

14 THE STATE OF NEVADA,
15 Real Party in Interest

FILED

MAR - 4 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

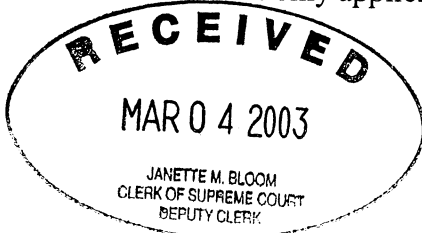
16 **ANSWER TO PETITION FOR REHEARING**

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

21 **LEGAL ARGUMENT**

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

25 The Fifth Amendment of the United States Constitution protects a person from being
26 "compelled in any criminal case to be a witness against himself." The word "witness" in the
27 constitutional text only applies to the category of compelling incriminating communications
28



03-03583

1 to those that are “testimonial” in nature. The history and policies underlying the self-
2 incrimination clause support the proposition that this privilege may only be asserted to resist
3 compelled explicit or implicit disclosures of incriminating information. This privilege was
4 created to prevent the type of inquisitorial methods used by ecclesiastical courts and the Star
5 Chamber wherein an individual would be compelled under oath to answer questions
6 designed to uncover uncharged offenses without evidence from another source. *See*
7 Andresen v. Maryland, 427 U.S. 463, 470-471 (1976); 8 Wigmore sec. 2250; *See Also Doe*
8 v. United States, 487 U.S. 201, 212 (1988)
9

10
11 Based on this historical backdrop the state submits to this court that compelling an
12 individual to produce identification after an officer establishes reasonable suspicion does not
13 constitute a violation of the Fifth Amendment. The state contends that Hibel’s name does
14 not have “testimonial” significance. In United States v. Wade, 388 U. S. 218 (1967)
15 defendant was indicted for robbery. Without notice to his attorney, defendant was placed in
16 a lineup and made to wear strips of tape on his face as the robber allegedly had done.
17 Further, defendant was required to repeat the words used by the robber. Defendant was
18 subsequently convicted of robbery and filed a writ of certiorari with the United States
19 Supreme Court. The United States Supreme Court granted certiorari and determined that
20 defendant’s Fifth Amendment privilege against self-incrimination was not violated when he
21 was required to speak the same words the robber spoke during the robbery. The court stated
22 that these spoken words did not have any “testimonial significance” because he was not
23 being asked to disclose any knowledge he had about the robbery itself. *Id* at 222-223
24
25

26 Applying the United States Supreme Court’s interpretation of the Fifth Amendment
27 privilege against self-incrimination to the case at bar it seems clear that stating one’s name
28

1 carries with it no “testimonial significance.” When comparing both cases there are some
2 very important distinctions that this court should consider. First, unlike Wade, Hibel was
3 never formally charged with a crime prior to being asked for identification. Deputy Dove
4 made this request while conducting a temporary detention to investigate a possible
5 battery/domestic battery. The state submits that once a person has been charged and is
6 considered to be the only person who committed the crime, the protections provided by the
7 privilege against self-incrimination become much more important. There is a greater
8 interest in making sure the government does not use compulsive means to extract a
9 confession or information that can be used to assist the prosecution in proving each element
10 beyond a reasonable doubt at time of trial.
11

12
13 Second, unlike Wade, requiring Hibel to provide identification did not give the
14 prosecution any material information about the crime itself. Compelling Wade to speak the
15 same words as the robber while eye witnesses listen is a greater infringement on the
16 privilege against self-incrimination because it gave the prosecution an important piece of
17 evidence that placed Wade at the scene of the crime. If the witnesses harbored any doubts
18 as to the identity of the perpetrator, hearing the same words and comparing the voices erased
19 these doubts. Again, Wade was compelled to produce this evidence after he was formally
20 charged.
21

22 In light of United States v. Wade, 388 U.S. 218 (1967), if this court finds that
23 requiring a person who is detained based on reasonable suspicion to provide identification is
24 a violation of the Fifth Amendment privilege against self-incrimination, the court would be
25 engaging in what Justice Holmes stated to be “an extravagant extension of the Fifth
26 Amendment.” See Holt v. United States, 218 U.S. 245 (1910)(compelling a defendant to put
27
28

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

15
16
17
18 In United Sates v. Dionisio, 410 U.S. 1 (1973) a grand jury was investigating
19 crimes relating to illegal gambling. The grand jury had a tape recording of voices but could
20 not determine the identity of the voices. As a result, the grand jury subpoenaed twenty
21 individuals to compel them to provide voice exemplars. Defendant objected and refused to
22 abide by his subpoena claiming that the voice exemplar violated his Fifth Amendment
23 privilege against self-incrimination. The United States Supreme Court rejected this argument
24 and held that the voice exemplars were used for identification purposes and did not rise to
25 the level of being testimonial in nature.
26
27
28

1 The facts and opinion in Dionisio bolster the state's position in this case. The grand
2 jury was engaged in an investigation of criminal activity. It is undisputed that Deputy Dove
3 had reasonable suspicion and was also investigating the crime of domestic battery. The
4 grand jury was investigating potential suspects and based on the evidence presented to them
5 needed to identify the individuals from the tape recording. The only way they could
6 accomplish that goal was to have these suspects utter words so a comparison could be made
7 to the voices on the tape recording.
8

9 Deputy Dove was placed in a similar position. He had received information from
10 dispatch that a person witnessed a man hit a woman while they were driving down the road
11 in a truck. When Deputy Dove came upon the scene to start his investigation he saw Hibel
12 outside the truck. **Deputy Dove did not know Hibel's name. In order for Dove to**
13 **adequately complete his investigation of domestic battery he needed Hibel's name.**
14 **NRS 171.137(2) states that before an officer can arrest for domestic violence he must**
15 **consider several factors. One of those factors is whether the suspect has a prior history**
16 **of domestic violence. See NRS 171.137(2)(a) Before a criminal history could be**
17 **obtained from dispatch Deputy Dove needed to provide some identification**
18 **information. If this court finds that requiring identification violates the Fifth**
19 **Amendment privilege against self-incrimination, how would Deputy Dove comply with**
20 **this requirement?** . This is just one of several statutory examples that would create a
21 tremendous conflict for law enforcement officers in this state as they attempt to carry out
22 their duties and responsibilities while investigating crime.
23
24
25

26 Petitioner relies primarily on Byers v. California, 402 U.S. 424 (1971) to support his
27 argument that requiring a person to identify themselves is a violation of the Fifth
28

1 Amendment privilege against self-incrimination. However, a closer review of Byers reveals
2 that the United States Supreme Court opinion substantiates the state's position. When
3 addressing the issue of whether compelling an individual to disclose their name and address
4 at an accident is a violation of the Fifth Amendment, the court held that this was "an
5 essentially neutral act." Furthermore, the court found that compelling a person to stop and
6 provide a name and address did not require that person to provide the state with "evidence of
7 a testimonial or communicative nature." Schmerber v. California, supra, at 761
8

9
10 Petitioner's attempt to elevate Byers beyond its reasonable application to the Fifth
11 Amendment amounts to what Justice Holmes reiterated in United States v. Sullivan, 274
12 U.S. 259 (1927) as "an extreme if not extravagant application of the Fifth Amendment."
13 The state urges this court to apply a balancing test. Weigh the importance of Nevada law
14 enforcement officers need to have a suspect's name to further their investigation and obtain
15 information as to what type of suspect they are dealing with against whether a name is
16 testimonial in nature and provides any substantive information that could later be used at
17 trial. When considering the type of information/evidence the United States Supreme Court
18 has held can be obtained from a person through compulsive means, requiring suspects to
19 identify themselves once reasonable suspicion is established is De minimis and does not
20 outweigh law enforcement's need to obtain this information.
21

22 In Michigan v. DeFillippo, 443 U.S. 31 (1979) the court was asked to determine if
23 defendant had been lawfully arrested for failing to provide identification. A Michigan
24 Appellate Court found the ordinance to be unconstitutionally vague and reversed
25 defendant's conviction. However, the appellate court did not find that the ordinance
26 violated defendant's Fifth Amendment privilege against self-incrimination. On appeal the
27
28

1 United States Supreme Court held that if a person is arrested under a presumptively valid
2 ordinance the arrest is deemed valid. Notably, the court did not take the opportunity to strike
3 down the ordinance as a violation of the defendant's Fifth Amendment privilege against
4 self-incrimination. This failure speaks volumes as to the court's position on this issue. By
5 not addressing the privilege against self-incrimination issue the United States Supreme
6 Court implicitly placed its stamp of approval on this type of ordinance.
7

8 Perhaps the most compelling state court decision is State v. Flynn, 285 N.W. 2d 710
9 (1979). In Flynn an officer was investigating a crime and developed reasonable suspicion to
10 detain the defendant. During the detention the officer asked defendant for identification.
11 Defendant refused to provide his identification so the officer took it from him. On appeal
12 the Wisconsin Supreme Court upheld the officer's conduct. The court stated that unless an
13 officer is entitled to at least ascertain the identity of the suspect the right to stop serves no
14 useful purpose at all. The court determined that to allow a suspect to refuse to provide
15 identification would reduce the officers authority granted in Adams v. Williams, 407 U.S.
16 143 (1972) to a mere fiction.
17

18 A Florida Appellate Court was asked to decide a similar issue. The court ruled that
19 one of the basic reasons for and necessarily one of the primary functions of an investigative
20 stop is to ascertain the identity of the suspect. Citing to State v Flynn, 285 N.W. 2d 710
21 (1979), the court upheld the officer's decision to take the defendant's identification which
22 ultimately led to the discovery of other evidence. See Harper v. State, 532 So. 2d 1091 (Fla.
23 App. 3 Dist. 1988); See Also W. LaFave 9.4(g)
24
25

26 Several state courts have also been asked to address the validity of an identification
27 law. In Jones v. Commonwealth of Virginia, 334 S.E.2d 536 (1985) the Virginia Supreme
28

1 Court, citing DeFillippo, upheld an identification ordinance because a person could only be
2 required to produce identification if an officer had reasonable suspicion to detain the person.
3 An Illinois Appellate court ruled that refusal to provide identification can be part of
4 establishing reasonable suspicion to detain a person's luggage. People v. Evans, 689 N.E.
5 2d 142 (1997) The State of Ohio has a specific criminal statute requiring a person to provide
6 identification. The Ohio Appellate Court approved of this statute and rejected defendant's
7 argument that it was unconstitutional. State of Ohio v. Pugh, 998 Ohio App. Lexis 2882
8 (Court of Appeals of Ohio, First Appellate District, Hamilton County)
9

10
11 The state finds it difficult to understand how the giving of one's name results in "self-
12 incrimination." The request does not require the suspect to "speak to his guilt" and the
13 answer to such a request does not give law enforcement "substantive information." United
14 States v. Wade, 388 U.S. 221 (1967) The request to provide identification did not require
15 Hibel to explain his whereabouts at a particular time or his conduct prior to being detained
16 by Deputy Dove. This information can only be described as neutral and non-substantive in
17 nature. Therefore, the state believes petitioner's argument that requiring persons to identify
18 themselves after being detained on reasonable suspicion is a violation of the Fifth
19 Amendment is skewed and fails to take into consideration the complexities of law
20 enforcement.
21

22 Finally, the state is disturbed by petitioner's use of an editorial from the Review Journal.
23 The state submits that attaching the editorial, as an exhibit to the petition for rehearing, is
24 inappropriate. Petitioner appears to be asking this court to step out of its role as a neutral
25 and detached judicial body and decide this issue based on a newspaper's opinion. The state
26 could have attached hundreds of letters by law enforcement officers praising the majority's
27
28

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

7
8 However, this court’s role is to decide legal issues as an independent body. Therefore,
9 the state will not adopt petitioner’s posture and attempt to influence this court by use of
10 public opinion that strongly favors the majority’s position. The state will rely upon the
11 numerous cases cited in this answer that have held the Fifth Amendment privilege against
12 self-incrimination does not protect the giving of identification because a person’s name has
13 no “testimonial significance” and is essentially a “neutral” communication.
14

15 The state notes after reading the editorial that the Review Journal’s interpretation of the
16 majority’s opinion is completely misguided and ill informed. Apparently, the editor forgot
17 to read NRS 171.123 that requires an officer to first establish reasonable suspicion before
18 asking for identification. If this threshold is not met then the Fourth and Fifth Amendment
19 protections apply and this court, as the United States Supreme Court did in Brown v. Texas,
20 443 U.S. 47 (1979), can reverse the conviction. It is this requirement that prevents us from
21 being a police state.
22

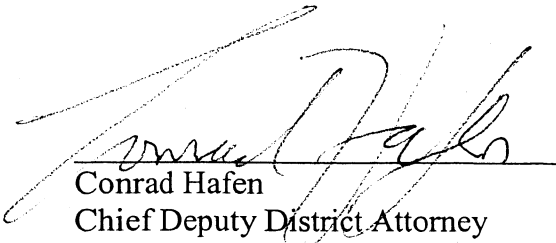
23 The majority’s opinion did not, as the dissent claims, “allowed the first layer of our civil
24 liberties to be whittled away.” Rather, the majority’s opinion reflects a sound, well-
25 reasoned legal analysis of a complex constitutional issue that properly balances an officer’s
26 need to have a suspect’s name against a suspect’s right not to give neutral, non-incriminating
27
28

1 information. The majority engaged in common sense and made good law. Peak v. United
2 States, 353 U.S. 43 (1957) The state asks this court to again engage in common sense and
3 deny petitioner's petition for rehearing. The state asks this court to find that a person's
4 name, like a voice exemplar, finger prints, handwriting sample, blood sample, being
5 compelled to wear clothing and being compelled to give your name and address at an
6 accident scene is non-testimonial and therefore the Fifth Amendment privilege against self-
7 incrimination does not apply.
8

9 CONCLUSION

10 The state submits that a person's name is essentially neutral information and
11 requiring a person to give their name to an officer after being detained on reasonable
12 suspicion does not rise to the level of compelled testimony. Requiring Hibel to give his
13 name to Deputy Dove during the investigative stop did not require Hibel to "speak to his
14 guilt." Hibel's name does not reveal any substantive information relating to what may have
15 occurred in the truck. Hibel's name simply reveals his identity like a finger print,
16 handwriting sample or voice exemplar. Further, it would have assisted Deputy Dove in his
17 investigation just like leaving a name and address at an accident scene. Based on the legal
18 analysis presented in this answer, the state urges this court to deny petitioner's petition for
19 rehearing.
20
21

22 Dated This 3 Day of March 2003
23
24

25 
26 Conrad Hafen
27 Chief Deputy District Attorney
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

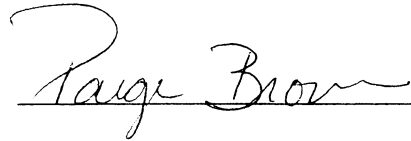
Pursuant to NRCP 5(b), I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 3rd day of March, 2003, at Winnemucca, Nevada, I delivered a true copy of the ANSWER TO PETITION FOR RECONSIDERATION, by the following means, to:

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



HUMBOLDT COUNTY DISTRICT ATTORNEY

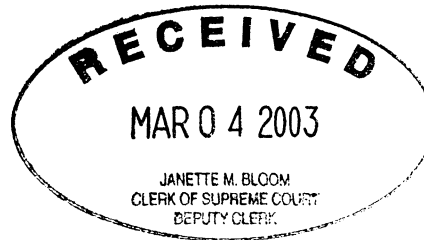
DAVID ALLISON
DISTRICT ATTORNEY



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,

A handwritten signature in cursive script that reads "Paige Brown".

Paige Brown
Legal Secretary

pb:
encl.