IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY D. HIBEL,

Petitioner,

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

SUPPLEMENT TO ANSWER TO WRIT OF CERTIORARI

On February 6, 2002 and February 21, 2002 petitioner filed a motion and an errata requesting that he be allowed to supplement his writ of certiorari with a recent decision by the Ninth Circuit Court of Appeals. The state did not oppose the motion to supplement because it wanted to file a supplemental answer if the court granted the motion. On February 25, 2002 this court entered an order granting petitioner's motion to supplement the writ of certiorari. Therefore the state submits this supplement for the court's consideration as a result of the Ninth Circuit Court of Appeals opinion in Carey v. Nevada Gaming Control Board filed February 4, 2002.

02-03746

LEGAL ARGUMENT

A. THE NINTH CIRCUIT COURT OF APPEALS' DECISION IN CAREY FAILS TO PROPERLY BALANCE THE INTEREST OF GOVERNMENT AND THE RIGHT TO BE FREE FROM ARBITRARY INTERFERENCE.

The Nevada Supreme Court is not obligated to follow the legal reasoning of the Ninth Circuit Court of Appeals. In Blanton v. North Las Vegas Municipal Court, 103 Nev. 623, 748 P.2d 494 (1987) this court noted that decisions of federal circuit courts and panels are not binding on the court. The Nevada State Constitution binds the courts of this state to the United States Constitution as interpreted by the United States Supreme Court. The state urges this court not to adopt the rationale in Carey v. Nevada Gaming Control Board, ___ F.3d ___ (Ninth Circuit Court of Appeals Filed February 4, 2002) and to recognize that the opinion creates an unwarranted expansion of Fourth and Fifth Amendment rights that the United States Supreme Court has declined to acknowledge and that other federal circuit courts have rejected. Albright v. Rodriguez, 51 F.3d 1531 (10th Cir. 1995).

The state argues in its answer to petitioner's writ of certiorari that this court should apply a balancing test when deciding if NRS 171.123(3) is unconstitutional. The state cited opinions from the United State Supreme Court in support of this position. In Carey the Ninth Circuit Court of Appeals applied a balancing test but failed to adequately explain how requiring individuals to identify themselves violates the Fourth and/or Fifth Amendments. The only explanation given by the court is a reference to Lawson v. Kolender, 658 F.2d 1362 (9th Cir. 1981) where the court stated "as a result of the demand for identification, the statutes bootstrap the authority to arrest on less than probable cause, and because the serious intrusion on personal security outweighs the mere possibility that identification might provide a link leading to arrest."

The state finds it difficult to conceive how asking for identification is a "serious intrusion on personal security." The answer to such a request does not give law enforcement "substantive information" of a crime. The request to provide identification does not require the person to explain his whereabouts at a particular time or his conduct prior to being detained by an officer. This information can only be described as neutral and non-substantive in nature. Therefore, the state believes that the Ninth Circuit Court's depiction of the serious nature of asking for identification is skewed and fails to take into consideration the complexities of law enforcement.

It is interesting to note that in the opinion the court describes Carey's name as "not relevant to determining whether Carey had cheated." Id at 1725 The state agrees with this assertion. The information itself is not relevant to the crime charged. However, it becomes very relevant for law enforcement purposes. When an officer has reasonable suspicion to detain a person he should be permitted, at a minimum, to know the name of the person he is confronting. So often routine stops turn into situations where an officer's life is threatened. If the officer can obtain the person's identity to determine their criminal history or outstanding warrants, it would cause the officer to act more prudent and alleviate the potential risk of harm to the officer and/or person being detained. Furthermore, since the Ninth Circuit deems this information as "not relevant" it can hardly be deemed compelled testimony under the Fifth Amendment or a threat to personal security under the Fourth Amendment.

In light of the Carey opinion it is clear the Ninth Circuit Court of Appeals believes an individual cannot be compelled to identify himself when detained on reasonable suspicion. With this opinion the court created an unwarranted dilemma for officers in the

State of Nevada. Applying the court's rationale it would appear that individuals stopped for committing a traffic violation are no longer required to produce identification when requested by the officer. A routine traffic stop is similar to a *Terry* stop that is based on reasonable suspicion. Berkemer v. McCarty, 468 U.S. 420 (1984); *See* Dixon v. State, 103 Nev. 272, 737 P.2d 1162 (1987) If a person is not required to produce identification while being detained on reasonable suspicion then they certainly cannot be compelled to produce identification during a routine traffic stop. This essentially will prevent officers from obtaining the needed information to complete the traffic citation and result in the arrest of the driver. Perhaps this is the quid pro quo the Ninth Circuit had in mind when it deemed that requiring a person to produce identification is a "threat to personal security."

The state fails to see any distinctions between this scenario and when a person is detained on reasonable suspicion. Each encounter involves a police presence. Each encounter requires the officer to do some investigation and gather information before making a decision. By creating a broad prophylactic rule in an attempt to protect individual rights, the Ninth Circuit Court of Appeals has now placed law enforcement officers and citizens at greater risk. The state submits that this has tipped the scales in a direction that is unacceptable and should be rejected by this court.

CONCLUSION

The Ninth Circuit Court of Appeal's opinion falls short in properly balancing the interests of law enforcement with the constitutional rights of individuals. Requiring a person to provide identification while being detained on reasonable suspicion allows an officer to adequately perform his lawful duties while the act of providing identification constitutes a minimal intrusion into a person's life. The information itself is non-testimonial

in nature and does not provided substantive information about a particular crime. When weighing these competing interests it seems reasonable that a person can be arrested for failing to provide identification to an officer when that officer is lawfully engaged in performing his duties. The state urges this court to reject the "bootstrap" analysis propounded by the Ninth Circuit Court of Appeals and adopt the position of the Tenth Circuit Court of Appeals as set forth in the Oliver and Albright opinions. These opinions are more reasonable in light of the complexities that law enforcement officers face each day.

Dated This 27 Day of February 2002.

Conrad Hafen
Chief Deputy District Attorney

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b) I certify that I, am an employee of the Humboldt County District Attorney's Office and that on this 27th day of February, 2002 I deposited by a copy of to the following:

Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701-4717

Supreme Court Clerk
201 South Carson Street, #201
Carson City, Nevada 89701

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HUMBOLDT COUNTY DISTRICT ATTORNEY

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February 27, 2002

Supreme Court Clerk
201 South Carson Street, Ste. 201
Carson City, Nevada 89701

RE: Hibel v. Sixth Judicial District Court - 38876

Dear Clerk:

Enclosed please find original and three copies of Supplement to Answer to Writ of Certiorari regarding the above-entitled matter. Please file-stamp and return file-stamped copy to this office.

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

Sincerely,

Paige Brown
Legal Secretary

:pb
encl.