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## Summary of State v. Dist. Ct., 127 Nev. Adv. Op. 84

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## CRIMINAL LAW AND PROCEDURE – EXCLUSION OF EVIDENCE

### **Summary**

The Court considered the State’s petition for a writ of mandamus challenging the district court’s exclusion of blood alcohol test results obtained by retrograde extrapolation from the prosecution of defendant for driving under the influence.

### **Disposition/Outcome**

The Court denied the State’s petition for a writ of mandamus because the district court did not “demonstrate[] manifest abuse or arbitrary or capricious exercise of discretion” when it excluded retrograde extrapolation evidence as unfairly prejudicial.<sup>2</sup>

### **Factual and Procedural History**

The State charged Bobby Armstrong (“Armstrong”), real party in interest, with driving under the influence and crashing into another vehicle, thereby causing substantial bodily harm to the other driver. The accident occurred at 1:30 A.M. Professionals did not administer Armstrong’s blood test until 3:51 A.M., drawing a single blood sample that revealed an alcohol level of .18. Armstrong filed a motion to prevent the introduction of the blood test results as evidence against him in his prosecution. The State replied, arguing to introduce the results. The State argued that any variables affecting the retrograde extrapolation “go to the weight of that evidence rather than its admissibility.”<sup>3</sup>

The district court granted Armstrong’s motion in part. The district court did not allow the State to introduce the specific results of the retrograde extrapolation but did allow the State to present general evidence that Armstrong’s blood tested positively for alcohol. The State filed a writ of mandamus in response to the district court’s decision.

### **Discussion**

Justice Douglas wrote for the Court majority, hearing the case en banc. The Court has the discretion to grant an extraordinary writ. However, if the petitioner can find relief through the ordinary course of law, he must do so. In the current case, the State challenged the discretion of the district court and had no remedy after Armstrong’s prosecution reached a final judgment.<sup>4</sup> Therefore, the Court entertained the State’s petition because it was an area of law that needed clarification.<sup>5</sup>

The Court examined the district court’s evidentiary ruling excluding retrograde extrapolation to see if it constituted an abuse of discretion. Such abuse includes discretion

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<sup>1</sup> By Michelle Newman.

<sup>2</sup> *State v. Dist. Ct.*, 127 Nev. Adv. Op. 84 at 15 (December 29, 2011).

<sup>3</sup> *Id.* at 3.

<sup>4</sup> See NEV. REV. STAT. § 177.015(3).

<sup>5</sup> *State v. Dist. Ct.*, 127 Nev. Adv. Op. 84 at 4 (December 29, 2011); see *Diaz. v. Dist. Ct.*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000).

“founded on prejudice or preference rather than reason”<sup>6</sup> and a “clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.”<sup>7</sup>

*First Question: Is retrograde extrapolation relevant to the case at hand?*

The district court initially determined that the retrograde extrapolation was relevant to the State’s theories of liability. For the first time, the Court recognized the relevance of retrograde extrapolation evidence. Retrograde extrapolation was relevant in the current case because it tended to make the existence of a consequential fact – the level of alcohol in the defendant’s blood at a certain point in time – more probable than it would be without the evidence.<sup>8</sup>

*Second question: Is the evidence of retrograde extrapolation admissible due to the danger of unfair prejudice?*

NRS 48.035(1) limits the admissibility of evidence that causes “unfair” prejudice.<sup>9</sup> “Unfair prejudice” in NRS 48.035 is defined as a plea to “the emotional and sympathetic tendencies of a jury, rather than the jury’s intellectual ability to evaluate evidence.”<sup>10</sup> The danger of unfair prejudice lies in the variables that are part of the retrograde. Even though the evidence of the retrograde extrapolation is not highly probative, the jury may still find the defendant guilty based on the blood alcohol test results and the substantial bodily harm caused by defendant.

Various jurisdictions have approached the admissibility of retrograde extrapolation differently. For instance, the Texas court has not established an “exact blueprint” to evaluate retrograde extrapolation, but acknowledged that an extrapolation can be reliable even when some characteristics are unknown.<sup>11</sup> The Texas court noted that the time between tests and amount of tests can also enhance reliability despite the lack of knowledge of personal characteristics. The opposite is also true – an extrapolation can be reliable based on only one sample of blood if many personal characteristics are known. For the extrapolation to be reliable, the focus of the calculation must be on individual absorption and elimination rates, rather than average rates. As other jurisdictions have, the Court “agree[d] that achieving a reliable retrograde extrapolation calculation requires consideration of a variety of factors.”<sup>12</sup> The factors determined to be relevant to a “sufficiently reliable retrograde calculation” include:<sup>13</sup>

- (1) gender, (2) weight, (3) age, (4) height, (5) mental state, (6) the type and amount of food in the stomach, (7) type and amount of alcohol consumed, (8) when the last alcoholic drink was consumed, (9) drinking pattern at the relevant time, (10) elapsed time between the first and last drink consumed, (11) time elapsed between the last drink consumed and the blood draw, (12) the number of

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<sup>6</sup> BLACK’S LAW DICTIONARY 119 (9<sup>th</sup> ed. 2009) (defining “arbitrary”).

<sup>7</sup> *Id.* at 239 (defining “capricious”).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 8; see NEV. REV. STAT. § 48.035(1).

<sup>10</sup> *Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001).

<sup>11</sup> *Mata v. State*, 46 S.W.3d 902, 916 (Tex. Crim. App. 2001), *overruled by* *Bagheri v. State*, 87 S.W.3d 657, 660-61 (Tex. App. 2002).

<sup>12</sup> *State v. Dist. Ct.*, 127 Nev. Adv. Op. 84 at 12 (December 29, 2011).

<sup>13</sup> *Id.*

samples taken, (13) the length of time between offense and the blood draws, (14) the average alcohol absorption rate, and (15) the average elimination rate.<sup>14</sup>

The Court concluded that “not every personal fact about the defendant must be known to construct a reliable extrapolation . . . but rather those factors must be balanced.”<sup>15</sup>

In the present case, the State and Armstrong relied on average characteristics for the retrograde extrapolation rather than the personal characteristics of Armstrong. The known factors included Armstrong’s weight and the number of beers he reportedly drank, but the unknown factors included his height, age, drinking habits, emotional state, and food intake. Additionally, Armstrong provided a single blood sample, increasing the importance of Armstrong’s personal factors. Lack of the retrograde extrapolation’s reliability “potentially invite[d] the jury to determine Armstrong’s guilt based on emotion or an improper ground . . . rather than a meaningful evaluation of evidence.”<sup>16</sup> Therefore, the danger of unfair prejudice outweighed the probative value of the retrograde extrapolation. The district court did not “manifestly abuse[] or arbitrarily or capriciously exercise[] its discretion” in excluding the retrograde extrapolation.<sup>17</sup> Future cases involving retrograde extrapolation should be evaluated case-by-case.

### **Conclusion**

Retrograde extrapolation evidence is subject to the same evidentiary rules governing the admissibility of evidence that might be unfairly prejudicial.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.* at 14.