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# State v. Turney Appellant's Reply Brief Dckt. 33154

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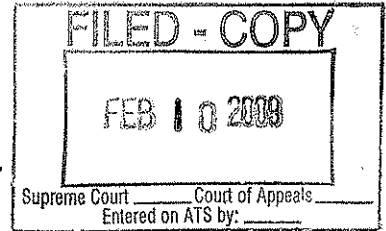
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,  
Plaintiff-Respondent,  
v.  
PHILIP ANDREW TURNEY,  
Defendant-Appellant.

NO. 33154

REPLY BRIEF



REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

HONORABLE CHERI C. COPSEY  
District Judge

MOLLY J. HUSKEY  
State Appellate Public Defender  
State of Idaho  
I.S.B. # 4843

KENNETH K. JORGENSEN  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

SARA B. THOMAS  
Chief, Appellate Unit  
I.S.B. # 5867

JUSTIN M. CURTIS  
Deputy State Appellate Public Defender  
I.S.B. # 6406  
3647 Lake Harbor Lane  
Boise, Idaho 83703  
(208) 334-2712

ATTORNEYS FOR  
DEFENDANT-APPELLANT

ATTORNEY FOR  
PLAINTIFF-RESPONDENT

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## STATEMENT OF THE CASE

### Nature of the Case

Philip Andrew Turney appeals from his judgment of conviction for two counts of felony DUI, with a persistent violator enhancement. Mr. Turney was convicted following a jury trial and the district court imposed concurrent unified sentences of life, with fifteen years fixed. Mr. Turney now appeals, asserting that: (a) when he was convicted of two counts of felony DUI, he was twice placed in jeopardy for the same crime; and (b) his life sentences are excessive.

### Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Turney's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUE

Was Mr. Turney twice put in jeopardy for the same offense when he was charged and convicted of two counts of aggravated DUI even though there was only one act of driving?

## ARGUMENT

### Mr. Turney Was Twice Put In Jeopardy For The Same Offense When He Was Convicted Of Two Separate Counts Of Aggravated DUI Even Though There Was Only One Act Of Driving

#### A. Introduction

Mr. Turney contends that, when he was charged with two separate counts of aggravated DUI, his double jeopardy rights under both the United States and Idaho Constitutions were violated. He submits that, given that there was clearly only one act of driving, he could have been charged with, and convicted of, only one count of aggravated DUI. Accordingly, he respectfully requests that this Court vacate one of his two convictions.

#### B. Mr. Turney Was Twice Put In Jeopardy For The Same Offense When He Was Convicted Of Two Separate Counts Of Aggravated DUI Even Though There Was Only One Act Of Driving

The State argues that the Idaho Supreme Court's decision in *State v. Lowe*, 120 Idaho 252, 815 P.2d 450 (1991), and *State v. Garner*, 121 Idaho 196, 824 P.2d 127 (1992), control the outcome of this case. The State is incorrect. As set forth in the Appellant's Brief, the defendant in *Lowe* was charged with two different crimes – aggravated DUI and vehicular manslaughter. *Lowe*, 120 Idaho at 255, 815 P.2d at 453. These are two completely different crimes with completely different elements, unlike a situation where two crimes with the same elements are charged. Mr. Turney did not suggest that a person could never be prosecuted for multiple crimes where there are multiple victims; he simply suggests that in this particular case, he could not be prosecuted for two DUI's.

Mr. Turney acknowledges that in *Garner*, the Idaho Supreme Court did permit multiple prosecutions for aggravated DUI based on multiple victims. *Garner*, 121 Idaho at 196, 824 P.2d at 127. In *Garner*, a four-paragraph *per curiam* opinion, the court, in conclusory fashion, determined that I.C. § 18-301 did not prevent multiple prosecutions under such facts. *Id.* As the State notes though, *Garner* did not involve a claim of constitutional double jeopardy and, in fact, the Opinion contains no double jeopardy analysis at all. Had a double jeopardy analysis been undertaken, the result likely would have been different.

The proper analysis for Mr. Turney's claim is set forth in *State v. Major*, 111 Idaho 410, 414, 725 P.2d 115, 119 (1986.) In that case, the Idaho Supreme Court held that if the conduct in question "constituted 'separate, distinct and independent crimes,'" the defendant should be charged with multiple crimes but, if not, then the defendant should only be charged with a single crime. *Major*, 111 Idaho at 414, 725 P.2d at 119 (quoting *State v. Hall*, 86 Idaho 63, 69, 383 P.2d 602, 606 (1963)).

In *Major*, the Idaho Supreme Court cited with approval the rule from California, which states that "a charge of multiple counts of violating a statute is appropriate only where the *actus reus* prohibited by the statute, the gravamen of the offense, has occurred more than once." *Major*, 111 Idaho at 415, 725 P.2d at 120 (citing *Wilkoff v. Superior Court*, 696 P.2d 134, 137 (Cal. 1985)). The Idaho Supreme Court also noted the one exception to this rule, "where a single act of violence is committed with an intent to harm more than one person with means likely to harm more than one person, and results in multiple victims, multiple punishments are warranted and permitted." *Id.*, at 415 n.1, 725 P.2d at 120 n.1 (citing *Wilkoff*, 696 P.2d at 138.)



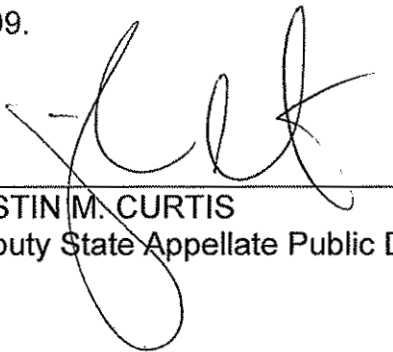
California, whose rule the Idaho Supreme Court adopted in *Major*, has a case directly on point. In *Wilkoff*, the very case cited by the Idaho Supreme Court, the California Supreme Court stated, “[t]he unlawful act denounced by the Vehicle Code is the ‘mere act of driving a vehicle upon a public highway while intoxicated’; the act is either a misdemeanor or a felony, depending on whether personal injuries result therefrom. The felony section simply ‘graduate[s] the punishment according to the [more serious] consequences of the forbidden act.’” *Wilkoff*, 696 P.2d at 138 (citations omitted.) The court concluded that “[t]he fact that there are several victims cannot transform the single act into multiple offenses.” *Id.* (citations omitted.) The *Wilkoff* Court also analyzed vehicular manslaughter by comparison, concluding, “[t]he actus reus of vehicular manslaughter is homicide—the unlawful killing of a human being. When a defendant commits several homicides in the course of a single driving incident, he or she has committed the act prohibited by the statute several times. Thus, the Courts of Appeal have consistently upheld multiple counts of vehicular manslaughter, while prohibiting multiple counts of felony drunk driving.” *Id.*

*Major*, not *Garner*, governs Mr. Turney’s claim of double jeopardy. *Major* specifically relies on a case that is directly on point, *Wilkoff*. This Court should apply the reasoning of *Major* and *Wilkoff* and conclude that Mr. Turney’s multiple convictions aggravated DUI violate double jeopardy principles.

CONCLUSION

Mr. Turney requests that this Court vacate one of his convictions for aggravated DUI due to the double jeopardy violation. Also, he requests that this Court reduce his remaining sentence as it deems appropriate, or remand his case for a new sentencing hearing. Alternatively, if this Court does not find a double jeopardy violation, he requests that this court reduce both his sentences as it deems appropriate, or remand his case for a new sentencing hearing.

DATED this 10<sup>th</sup> day of February, 2009.

  
\_\_\_\_\_  
JUSTIN M. CURTIS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10<sup>th</sup> day of February, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

PHILIP ANDREW TURNEY  
INMATE # 24289  
ISCI  
PO BOX 14  
BOISE ID 83707

CHERI C COPSEY  
DISTRICT COURT JUDGE  
E-MAILED COPY OF BRIEF

VERNON K SMITH  
ATTORNEY AT LAW  
E-MAILED COPY OF BRIEF

KENNETH K. JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
P.O. BOX 83720  
BOISE, ID 83720-0010  
Hand deliver to Attorney General's mailbox at Supreme Court

A handwritten signature in black ink, appearing to read 'EAS', with a horizontal line underneath it.

EVAN A. SMITH  
Administrative Assistant

JMC/eas