

2005

# Utah v. Oscar Ivan Cornejo : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

<b>STATE OF UTAH,</b> <i>Plaintiff/Appellant,</i> vs.  <b>OSCAR IVAN CORNEJO,</b> <i>Defendant/Appellee.</i>	<b>Case No. 20050060-CA</b>
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**BRIEF OF APPELLEE**

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*State's Appeal From a Pretrial Dismissal With Prejudice of an Information Charging Driving Under the Influence of Alcohol With Priors, a Third Degree Felony; Failing to Respond to an Officer's Signal, a Third Degree Felony; Driving on a Revoked License, a Class B Misdemeanor; and No Evidence of Security, a Class B Misdemeanor, in a Second Judicial District Court, Weber County, Utah, the Honorable Robert S. Dutson, Presiding.*

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UTAH APPELLATE COURTS  
OCT 28 2005

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**IN THE UTAH COURT OF APPEALS**

<b>STATE OF UTAH,</b> <i><b>Plaintiff/Appellant,</b></i> VS.  <b>OSCAR IVAN CORNEJO,</b> <i><b>Defendant/Appellee.</b></i>	<b>Case No. 20050060-CA</b>
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**IN THE UTAH COURT OF APPEALS**

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**BRIEF OF APPELLEE**

**SUMMARY OF ARGUMENT**

Several points of law, all sufficient by themselves, support the trial court's decision to dismiss this case with prejudice. First, the case was a question of mixed fact and law, which demanded that the State put on all of its evidence at trial. The State came unprepared to do so. Secondly, continuing the trial would have represented an unconstitutional delay, in that a poor strategic decision on the case of the prosecutor was the reason for dismissal, and the Defendant was there, ready to proceed on all evidence. Third, the prosecutor was offered and refused the opportunity to bifurcate the charges and try the Driving Under the Influence with Priors charge separately, and Defendant waived his right to claim double jeopardy. Her refusal was unreasonable, and justified a dismissal. And finally, the Prosecutor attempted to manipulate the judge into dismissing with prejudice, as she was warned repeatedly that was the result, so that she could appeal and hopefully get a new trial, complete with the witness she failed to subpoena.

Viewed in totality, the case was correctly dismissed with prejudice.

## ARGUMENT

**THE QUESTION BEFORE THE TRIAL COURT WAS A MIXED QUESTION OF FACT AND LAW WHICH SHOULD HAVE BEEN HEARD BEFORE THE JURY. THE TRIAL COURT DISMISSED WITH PREJUDICE ONLY AFTER ACCEPTING THE STATE'S ASSERTION THAT THE DEFENSE STRATEGY WAS ACTUALLY A "MOTION TO SUPPRESS." HAD THE PROSECUTOR ALLOWED THE CASE TO GO TO TRIAL WITHOUT INSISTING UPON A DISMISSAL, ALL OF STATE'S EVIDENCE WOULD HAVE COME IN AS A RESULT OF THE DEFENSE STRATEGY.**

The State, while at the trial court level and in this appeal, has mischaracterized the issues in order to portray the dismissal as one in which the judge errantly dismissed a case. This case was not dismissed because the Defendant failed to raise a suppression issue in compliance with Utah R. Crim. P. 12. The case was dismissed following an in-chambers hearing which resulted in the judge's adopting the prosecutorial position that the defense strategy was really just a "Motion to Suppress." According to the State, the only real question for the court to examine was purely a legal issue of admissibility, which was a waived defense because it had not been raised in pre-trial proceedings.

The court found that it was the state's burden to present evidence of admissibility, (Tr. 36:16 - 37:2), and since the State was characterizing the strategy as a "Motion to Suppress," the court would go ahead with a hearing on admissibility, prior to actually empaneling the jury. The court made this decision despite the fact the Defendant had failed to file an objection as to the admissibility of the evidence prior to the trial, as provided by Utah R. Crim. P. 12(c)(1)(B). The court was within its authority to make

such a ruling, pursuant to Utah R. Crim P. 12(f), which allows the court to grant relief from compliance to the rule for good cause.

The good cause in this case was the fact the Defendant intended to use, as his strategy, a showing to the jury that the arresting officer had engaged in several misdeeds which could lead to the jury's finding that police misconduct, not the Defendant's own behavior, was the animus for the arrest. The Defendant actually wanted the circumstances of the arrest and the blood draw to come in, and needed them to come in to illustrate his case. He then intended to object to them as part of his strategy, to lead the jury to the conclusion that the arresting officer was acting inappropriately at the time of the alleged drunken driving.

Defendant articulated this strategy, and repeatedly objected to the prosecutor's assertion that it was a question of admissibility which was purely a legal issue reserved for the court to decide. (Tr. 8: 17-22, 17: 6-13, 18:8-22, 29:14-16, 46:15 to 47:25)

In fact, the case, as counsel disclosed he intended to defend it, was a mixed question of fact and law. The facts should have been heard at the trial, and then decided upon by the judge as for admissibility. The Defendant's strategy was to ask, substantively, "Was this entire arrest motivated by the Defendant's behavior, or by inappropriate police behavior? (Tr. 10:19-11:14, 26:19- 27:5, 46:15 - 47:15, 52:7-13.) The judge adopted the position of the prosecution, reducing the question to one of law, "Are the toxicology reports properly admissible because they were properly obtained?"



(Tr. 11:16.)

The Utah Supreme Court indicated in *State of Utah v. Shayne M. Hansen*, 2002 UT 125, 63 P.3d 650, 659 (2005) that mixed questions of fact and law are examined giving some discretion to the district court's application of the law. The discretion afforded varies, however, according to the issue being reviewed. When a case involves consent to search, the appellate court will afford little discretion to the district court, because there must be state-wide standards that guide law enforcement and prosecutorial officials (citing *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993)).

The state-wide standards for a search and seizure are the benchmark from which the Defendant wanted to work, having the evidence of the stop come in, and letting the jury decide if the search was driven by improper motives. The court could still have decided that the search was unconstitutional, and stricken all of the evidence from the record. Without hearing all of the factual evidence, though, the court could not have applied the facts to the law and made an appropriate determination. *Hansen*, at 660, articulates that

To determine whether a traffic stop was reasonable, we consider two questions: “(1) Was the police officer’s action justified at its inception? And (2) Was the resulting detention reasonably related in scope to the circumstances that justified the interference in the first place?” (quoting *State v. Lopez*, 873 P. 2d 1127, 1131-32 (Utah 1994)).

Looking at this test, the prosecutor failed to subpoena the police officer who could lay the foundation for the search and seizure of the blood which led to the toxicology

reports. Without that testimony, part one of the reasonableness test could not be proven. Prosecutorial error prevented the judge from making any other decision when he decided to dismiss the case.

The Defendant has no disagreement with the state as to whether an impromptu suppression hearing should have been held, as it was unreasonable to demand that the prosecutor present her evidence in such a hearing.

The paramount issue is, though, that there was no need for a suppression hearing, as the Defendant did not want anything suppressed. The State argues, at page 22 of its brief, that a strategic decision should not be the basis for “cause” to excuse the latter challenge pursuant to Rule 12(f). This argument must also fail, because the Defendant made no strategic decision to challenge Rule 12(f). He wanted all of the evidence to come in. The prosecutor initially agreed with that position. The prosecutor conceded the strategic defense planned by the Defendant was appropriate, when the prosecutor stated

And I think if he’s going to suggest that there’s something improper, *which he may very well be able to do as a factual matter in front of a jury*, I ought to be able to defend it by saying this is exactly (unintelligible)– (emphasis added)(Tr. 8:12-16.)

The defense strategy required, as proof, all of the surrounding circumstances related to the blood draw to come into the trial. The objection as to the admissibility which the Defendant planned to make would have been a moot point—as the matter would have already been heard by the jury. The court could have immediately overruled any objection by the Defense, as at least two witnesses—the sergeant of the arresting officer,

and the state's toxicologist, would have already provided a foundation for the evidence, and would have been cross-examined by the Defense. Certainly at that point—and as was articulated by the defense counsel in chambers prior to trial—the Defendant would have waived any objection to the evidence being heard because counsel would not have objected to the witnesses.

In light of the Defendant's position, the trial court correctly insisted that the prosecution be responsible for providing an evidentiary foundation for any evidence which came in—regardless of whether or not there was an objection to such evidence. (Tr. 36:16 - 37:2.) Rule 12 of the Utah Rules of Criminal Procedure does not indicate that failure to object to evidence by the Defendant permits the State to ignore the Rules of Evidence. The Rules of Evidence exist to ensure the triers of fact and law receive a proper foundation for proper conclusions based upon the evidence.

The prosecutor incorrectly assessed the question before the court, after already conceding the Defendant had a right to defend his case as he planned. The prosecutor and the trial court wrongly determined the defense was actually a "Motion to Suppress." The judge believed the issue should go forward, with the State having the burden to produce evidence to prove its stop, search, and seizure were all proper and not motivated by inappropriate police behavior. As it were, as the prosecution was missing a link in its evidentiary chain, the judge had no choice but to dismiss with prejudice.

**THE TRIAL COURT'S FINDING OF UNCONSTITUTIONAL  
DELAY WAS CORRECT. REGARDLESS OF HOW PAST**

**CONTINUANCES ARE VIEWED, THE DEFENDANT WAS PREPARED TO GO TO TRIAL, HAD SUFFERED THE EMOTIONAL AND FINANCIAL IMPACT OF THE PREPARATION, AND THE PROSECUTOR WAS SIMPLY UNPREPARED TO PUT ON HER EVIDENCE.**

The State makes a well-delivered presentation of the reason that any further delay in the trial would not have been unconstitutional. However, its argument rests on the idea that any further delay would be the Defendant's fault, because the "...defendant failed to timely challenge the admission of his involuntary blood draw by September 1..." (Br. 17.)

This argument must fail because it is simply a fallacious representation of what occurred. At no point in the record is there any evidence that the Defendant wanted a suppression hearing. As explained above, the Defendant wanted the case to go forward, and have all of the police behavior be put before the jury. It was the prosecutor and the judge who termed the issue one of admissibility, and thus a suppression issue. (Tr. 5:13 - 7:21, 8:17.)

Defendant agrees that the question of whether an unconstitutional delay has occurred must be viewed by the totality of the circumstances. While Defendant does concede that there was no objection to delays in the pre-trial process, a reading of the marshalled record does indicate that the delays were domino-in-effect, because the Weber County Attorney's office failed to deliver the tape of the arrest in a timely matter. Whether Attorney Chad McKay had to continue hearings till he got past Scout Camp is not the point. The point is that the continuances were necessary because the schedule got

off in the first place when the tape was not delivered to the defendant, and the County Attorney's office did not immediately determine which charges it would file. Attorney McKay would have been prepared to go forward as scheduled had the County not started with the processing of fouling up the schedule.

Demanding that the Defendant would have objected to delays in the pre-trial, in order to demonstrate unconstitutional delay, necessarily demands that Defendant could have anticipated what would happen when he got to the court for his scheduled trial. The Supreme Court said, "We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right." ***Barker v. Wingo, Warden***, 407 U.S. 514 at 528 (1972). Defendant's actions were to cooperate with continuances needed because the County Attorney did not quickly decide which charges should be filed and did not deliver the arrest tape. The continuances should not be construed against the Defendant. They should be viewed as supportive of his belief that a speedy trial would be provided. Defendant had no reason to object to earlier delays, because he had no reason to suspect that the prosecutor would come to the trial unprepared.

The cases upon which the State relies for support of its position on its unreasonable delay/unavailable witness arguments can be largely distinguished. The State uses ***Barker v. Wingo, Warden***, 407 U.S. 514 (1972), to support its assertion that unavailability of a witness is not a reason for unconstitutional delay. What the State fails to mention is that the witness in ***Barker*** was planning to come, was subpoenaed, and

developed an unforeseen illness which prevented his coming. **Barker** at 518. In the case at bar, the witness was never subpoenaed to come to trial, because the prosecutor believed his presence was unnecessary. In fact, she had never even talked to the “unavailable” witness before that date. (Tr. at 33:19-23).

Similarly, in **State v. Trafny**, 799 P.2d 704 (Utah 1990), the situation again was that the unavailable witness was the victim, who had been subpoenaed to appear. Trafny consented to the continuance requested by the State because of the unavailable witness. There was no consent to a continuance in this case.<sup>1</sup>

The term “unavailable” is not interpreted so broadly as to say that it covers witnesses who were never ordered to show up. Interpretation as such would allow any prosecutor to fail to subpoena a witness and then move for a continuance—which would be taking advantage of a “strategic decision.” The state admits that a “strategic decision” should not be grounds for a dismissal, and should not as such be grounds for a continuance. (Br. at 22.)

This Court should apply URE 804 (Hearsay), as a guideline for when a witness is “unavailable,” and compare it to the circumstances surrounding the prosecutor’s unavailable witness. The unavailable witness exemptions which would apply should be

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<sup>1</sup>It is conceded however, that a second trial date was set, another witness was subpoenaed, and was unavailable. Trafny objected to a continuance, and the trial court did dismiss without prejudice. Other circumstances following the dismissal differ enough that this second delay is incomparable to the case in considering whether an unconstitutional delay was committed. **Trafny** at 705.

one of the following, as per rule 804:

The unavailable witness should be...

1. Exempted by a rule of the court on the ground of privilege from testifying.
2. Persists in refusing to testify, despite an order of the court to do so.
3. Testifies as to a lack of memory of the subject matter.
4. Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.

None of the four conditions above apply to the State's unavailable witness. Rule 804 also provides that the witness is "not unavailable" as a witness if the absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying.

In this case, the witness's lack of attendance was solely because of the failure of procurement of the proponent of the testimony—the prosecutor's. The state had no intention of having the witness testify. This error should be construed against the State, and not against the Defendant. The trial court was justified in dismissing the case with prejudice, as the State caused its own problems. The Defendant was there, prepared to go to trial with all of the evidence against him.

**THE DEFENDANT DOES NOT ARGUE WITH THE PROSECUTOR'S POSITION THAT ORDINARILY, BIFURCATION OF CRIMINAL CHARGES STEMMING FROM A SINGLE CRIMINAL EPISODE WOULD BE IMPLAUSIBLE AND CREATE DOUBLE JEOPARDY FOR THE DEFENDANT. IN THIS CASE, HOWEVER, DEFENDANT WAIVED HIS RIGHT TO CLAIM DOUBLE JEOPARDY BY NOT OBJECTING TO THE TRIAL JUDGE'S OFFER TO BIFURCATE THE ISSUES AND ALLOW TWO TRIALS.**

The transcript of the proceedings on the date of the trial indicate that the trial judge offered the prosecutor the opportunity to bifurcate the charges against the Defendant, and allow her to proceed later with the Driving Under the Influence with Priors charge. (Tr. 52:20 - 54:25) The Defendant agrees that normally this would constitute double jeopardy.

The transcript is also very clear that Attorney Chad McKay never objected to the court's offer of bifurcation. The failure to object constituted a waiver of the Defendant of the double jeopardy argument. Such a waiver is permitted under *Barker*, which defines waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Barker* at 525, citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Defense counsel's professional decision to not object represented a clear waiver of the double jeopardy argument.

Because the Defendant waived his double jeopardy right, the State could have proceeded with two trials. The State declined its right to do so, and as such, waived its right to appeal the dismissal with prejudice.

**THE PROSECUTOR ATTEMPTED TO STRONG-ARM THE JUDGE. SHE WAS GIVEN AMPLE OPPORTUNITIES TO RECONSIDER HER POSITION TO NOT GO FORWARD WITH HER CASE. SHE STIPULATED TO THE DISMISSAL WITH PREJUDICE.**

Several times throughout the pre-trial proceedings, Prosecutor Brenda Beaton was told that if she moved to dismiss the case, the case would be dismissed with prejudice. (Tr. at pages 39, 40, 42, 55, 56.) She essentially "dared" the judge to dismiss the case with prejudice, knowing

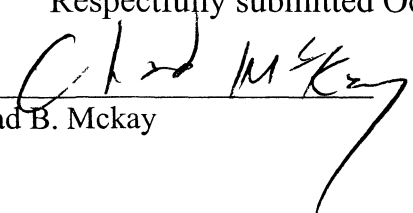


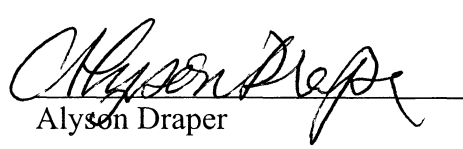
she could appeal the issue, as the State has done. Such was a strategic decision in error on her part, and should not now be a basis for remanding the case back for trial.

### CONCLUSION

Because she failed to subpoena her own witness, because she declined the opportunity to bifurcate the charges, and because she utterly failed to just go to trial with the witnesses and case she had prepared, which very easily could have led to convictions on all counts, this Court must view her actions as a stipulation to the judge's Dismissal with prejudice. This case should remain dismissed, and not be remanded for trial.

Respectfully submitted October 28, 2005

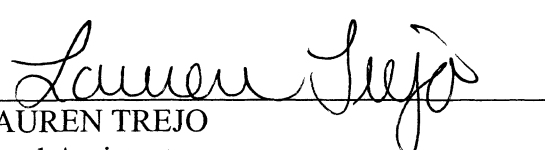
  
Chad B. McKay

  
Alyson Draper

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and accurate copies of the foregoing brief of Defendant/Appelle were delivered by hand delivering or mailing to CHRISTINE F. SOLTIS,, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, UT 84114-0854

DATED this 28<sup>th</sup> day of October, 20 05.

  
LAUREN TREJO  
Legal Assistant

# **TRANSCRIPT**

IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR WEBER COUNTY, STATE OF UTAH

\*\*\*\*\*

STATE OF UTAH,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	VIDEOTAPE TRANSCRIPT
	)	
OSCAR IVAN CORNEJO,	)	JURY TRIAL
	)	
DEFENDANT.	)	CASE NO. 041900798

\*\*\*\*\*

HONORABLE ROGER S. DUTSON  
DECEMBER 15, 2004

JAN. 27 2005

JAN 7 4 59 PM '05  
2ND DISTRICT COURT

APPEARANCES

FOR THE PLAINTIFF:	MS. BRENDA J. BEATON
FOR THE DEFENDANT:	MR. CHAD B. MCKAY

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UTAH APPELLATE COURTS  
MAY 31 2005

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1 of time and you can argue that that prejudices his case, but  
2 that's the way the statute reads, you know, so -- if you  
3 don't resolve it in some manner then I don't know how to tell  
4 this jury what they're doing. Otherwise, I tell them this is  
5 a felony DUI but we are asking you only to determine whether  
6 or not there's a basic violation of the DUI law in so --

7 **MR. MCKAY:** Yes. It's my understanding that we had  
8 agreed that -- and correct me if I'm wrong -- and that's why  
9 I didn't have any problems with these -- this verdict form is  
10 that I think you even sent over an instruction that if they  
11 find him guilty of the DUI, that we will send them back into  
12 the room to find the other elements and basically will be  
13 certified but it's (unintelligible) --

14 **THE COURT:** Well, it's a -- it's a legal question if  
15 you want make it such or I can send it back. You see,  
16 they -- if I take it from the jury, it has to be clearly  
17 agreed that I can do that part of it separate from the jury.  
18 Otherwise, I have to give it to the jury. I don't have any  
19 choice.

20 **MR. MCKAY:** Well, I don't think there's much  
21 question but --

22 **THE COURT:** Well, it's up to you.

23 **MR. MCKAY:** -- to prove that part of it so --

24 **THE COURT:** Chad, it's up to you to decide so --

25 **MR. MCKAY:** I have --

1           **MS. BEATON:** I think the other -- the other issue  
2 is, is there's a forced blood draw in this case, and the  
3 forced blood draw was done because the defendant had six  
4 priors within 10 years and he had just evaded the police and  
5 they felt like it was an emergency situation. So they did --

6           **THE COURT:** This is not a regular test?

7           **MS. BEATON:** No. This was an initial refusal and  
8 then they are telling him we're going to force the blood draw  
9 then, and then he -- I mean, he does stick out his arm and  
10 they don't have to hold him down or do anything, you know.

11           **MR. MCKAY:** I'm going to argue a bunch of stuff on  
12 that so --

13           **MS. BEATON:** But so I think if he's going to  
14 argue it --

15           **THE COURT:** Well, that a -- that's going to be  
16 argued as a legal issue?

17           **MR. MCKAY:** Yeah. I'm not -- at least -- nothing is  
18 perfect but I'm going to try not to bring up that  
19 information. I'm just going to go through the procedures and  
20 policies, whether they followed them, on cross. That's --

21           **MS. BEATON:** And I think the problem is if there's a  
22 suggestion by defense counsel that they improperly forced the  
23 blood draw --

24           **THE COURT:** Uh-huh.

25           **MS. BEATON:** Because this jury is going to think,

1 draw. You had another motion but it didn't affect that blood  
2 draw at all.

3 **MR. MCKAY:** Well, we brought it up in the prelim.  
4 You know, maybe I'm not understanding.

5 **THE COURT:** Well --

6 **MR. MCKAY:** Are you talking about the suppression  
7 hearing?

8 **THE COURT:** At the suppression hearing --

9 **MS. BEATON:** Wait. Do you --

10 **THE COURT:** -- it was never brought up.

11 **MR. MCKAY:** Right. We were just saving it for  
12 trial. That doesn't --

13 **THE COURT:** Well, but it's a legal question as to  
14 whether or not the blood draw is proper. You see, if he had  
15 had an opportunity to take a test, that legally can come in,  
16 if he refuses. There's a -- I think a very stat -- a clear  
17 statutory provision that you can just mention that he  
18 refused, basically. But if you're going to contest the  
19 validity of the blood draw, that is not a jury question.  
20 That is a judge question.

21 **MR. MCKAY:** Yeah. All I'm saying is that --

22 **THE COURT:** And so it would have to be heard outside  
23 the hearing of the jurors, and this is a heck of a time to be  
24 bringing it up.

25 **MS. BEATON:** And frankly, the state's in a position

1     instruct them that the blood draw is legal, basically, that  
2     you know, would be the ultimate conclusion, if I determine it  
3     is a legal blood draw.

4             **MR. MCKAY:** I guess it's just --

5             **THE COURT:** I don't know -- I haven't reviewed the  
6     case that authorizes it for a long, long time. I know there  
7     are some very limited circumstances where they can draw blood  
8     from a DUI suspect where he's in an emergency room as a  
9     result of an accident, for example, I think there are some  
10    cases that have held they can draw there for medical  
11    purposes, and then it can be used for a DUI process, but the  
12    exceptions are pretty limited, as I recall.

13            Brenda, what is your take on what the law allows in the  
14    way of a blood draw?

15            **MS. BEATON:** Bill has this issue right now and he  
16    and I have been talking about this issue. State versus  
17    Rodriguez is the case that defines whether or not a blood  
18    draw can be taken in an instance like this. Because what  
19    they did in Rodriguez was, they forced a blood draw of a  
20    woman who had refused all the field sobrieties and all the  
21    same sort of circumstances that we're dealing with here  
22    although they didn't have an evading that proceeded it and  
23    the Court then lists all these different factors. And I  
24    guess my problem is I --

25            **THE COURT:** But it was a forced blood draw on that

1       improperly taken and I can give three specific reasons why it  
2       was improperly taken, and then just let them be the judges  
3       and the trier of fact on the -- it's a very factually-based  
4       issue. I don't think it's a legal issue --

5               **THE COURT:** But that's giving the jury the right to  
6       make the legal decision on whether it's admissible. If you  
7       are willing to let that jury consider the results of a blood  
8       draw as part of your strategy in this case and then argue  
9       that, you know, they shouldn't give it any real weight  
10      because of all the circumstances, which is what you'd like to  
11      do, you're going to have to weigh that legal question as to  
12      the admissibility. Otherwise, I'm going to insist that it be  
13      resolved outside the hearing of the jury on a basis of a  
14      legal question. If you want to let it in --

15              **MR. MCKAY:** Well, you --

16              **THE COURT:** -- and then raise the problem, you lose  
17      the right to appeal the admissibility of that evidence and  
18      you can only argue to the jury then what weight do you want  
19      to give it. But admissibility is a legal question and if you  
20      want to give up your argument that it was illegally drawn so  
21      you can argue that, you know, the oppressive police conduct,  
22      the overzealous police work that was being done against your  
23      client to his detriment, or whatever your theory is, which I  
24      understand is basically that based on your previous -- you  
25      know, the previous motion that I denied, then, you know,



1 to --

2 **MR. MCKAY:** Whether they followed the procedures or  
3 not --

4 **THE COURT:** -- to get some evidence --

5 **MR. MCKAY:** It shows his intent --

6 **THE COURT:** Yeah. You might be able to get some  
7 evidence in on it. But as far as admissibility of a test,  
8 it's a legal question. The statute makes certain provisions  
9 on how the Court can admit the results of a test that is  
10 through the intoxalyzer or, you know, the blood alcohol  
11 testing equipment that is used.

12 **MR. MCKAY:** Maybe I don't understand. Are you  
13 saying that that's an option that they not? If I say that I  
14 waive that and they not present that evidence. How do they  
15 prove their case without that evidence? Maybe I'm just not  
16 understanding what you're saying.

17 **MS. BEATON:** The judge is suggesting that  
18 (unintelligible) --

19 **THE COURT:** Well, I am saying that it's not a jury  
20 question as to the admissibility of that test, and therefore,  
21 it has to be decided by a judge outside the hearing of the  
22 jury. If I allow it in, then all of the circumstances are  
23 probably going to be coming in. If I deny it, then if you  
24 raise the issue, you may open the door for them to get it in  
25 in certain ways --

1 came back. I've given him notice of expert, I've sent over  
2 CVs, I've done all sorts of things to indicate to him at  
3 least what my game plan was.

4 He and I have talked a few different times, and until  
5 today is the first time hearing that now all of a sudden  
6 we're going to talk about forced blood draw and we're going  
7 to, you know, make it seem like it's a big deal and all --

8 **THE COURT:** Well --

9 **MS. BEATON:** -- this kinda thing.

10 **THE COURT:** -- I'm not so concerned about the  
11 forcing of the blood draw and all of that if there is no  
12 objection to the test coming in. If there is an objection to  
13 the test coming in, that's a legal question I have to decide  
14 outside the presence of the jury, and the jury doesn't need  
15 to hear all the circumstances of it, then I would have to  
16 decide that. It doesn't sound like we're ready to go the  
17 jury on that issue for sure.

18 If you're going to object to the admissibility of the  
19 test, then I'm going to have to have a special hearing or I'm  
20 going to have to fully hear this and review the law because,  
21 you know, in our society in general you don't force people to  
22 give blood to incriminate them criminally, unless you're  
23 under one of the exceptions for a DNA draw or for some of the  
24 other purposes that are permitted. And a person can refuse  
25 to take the test and then I instruct them that there was a

1           **MR. MCKAY:** -- it's not like this is new.

2           **THE COURT:** We're only talking about --

3           **MR. MCKAY:** You knew this was coming --

4           **THE COURT:** We're only talking about the blood  
5 alcohol.

6           **MS. BEATON:** But the bottom line is we don't have a  
7 trial today if you're going to object to the illegal  
8 admissibility of the blood draw because that isn't something  
9 that we just parade out in front of a jury. That's something  
10 that we all get to write briefs on. That's something that if  
11 the Court rules against the state I think may be an  
12 appealable issue for me, it might be an appealable issue for  
13 you to go up on.

14           **THE COURT:** Yeah. I'm -- I'm not going to just go  
15 and give that whole thing to the jury and then try to  
16 instruct them what's admissible and what isn't.

17           **MR. MCKAY:** Yeah. And I guess I see it differently.

18           **MS. BEATON:** And maybe this whole conversation  
19 needs --

20           **THE COURT:** And that's what you apparently assumed I  
21 would do --

22           **MS. BEATON:** -- (unintelligible) is mute then  
23 because the defendant (unintelligible) show up.

24           **MR. MCKAY:** Yeah. I mean, my whole case is based  
25 on --

1           **THE CLERK:** I don't know --

2           **MS. BEATON:** And I don't know how that --

3           **THE COURT:** Mr. Cornejo isn't going anywhere. Hell,  
4 he's been around long enough to get seven DUIs, you say?

5           **MS. BEATON:** Yeah.

6           **THE COURT:** He's going to stick around.

7           **MS. BEATON:** It's the Christmas season, he'll  
8 probably be drunk and driving again. State wants a bench  
9 warrant if he doesn't show at the time of trial.

10          **THE COURT:** Well, I'll give Mr. McKay time to get  
11 him in for sure if he has to go pick him up.

12          **MS. BEATON:** Well, isn't today D-Day, though? I  
13 mean, he doesn't know that we've got --

14          **MR. MCKAY:** As far as I know --

15          **THE COURT:** I'll decide that issue if we decide --  
16 is he in there now -- I don't know.

17          **MR. MCKAY:** We got to change this screen.

18          **THE COURT:** But you know, I'm going to -- I'm going  
19 to give Mr. McKay a chance to get him in before I have him  
20 arrested. He's shown up for his other hearings.

21          **THE CLERK:** The defendant is here.

22          **THE COURT:** He is?

23          **THE CLERK:** He is.

24          **THE COURT:** So it's a nonissue there. But we're  
25 going to have to address this other issue. We got a couple

1 the presence of a jury given the fact that it may deny the  
2 evidence and then that leaves the state with one element that  
3 they would have to determine if they're going to try and  
4 prove, and that is if the defendant was impaired so that he  
5 could not safely operate a motor vehicle under the statute  
6 and get a conviction.

7 So the admissibility of the blood test is a critical  
8 element of the state's case. And the state has indicated  
9 they had previously given notice to Mr. McKay they intended  
10 to put that in and they have their -- what is it a doctor  
11 lined up --

12 **MS. BEATON:** Toxicologist.

13 **THE COURT:** -- or a technician, a toxicologist to  
14 come in and testify about, I suppose, the blood draw and the  
15 test itself.

16 **MS. BEATON:** And the result.

17 **THE COURT:** And the results and asserting that there  
18 is a blood alcohol level above the .08 grams, I suppose.

19 So that being the case, the state -- or the Court has a  
20 jury ready to go. Mr. McKay has indicated off the record,  
21 and I want to make it a part of the record now that he is  
22 ready to go to trial, his client is here and he wishes to go  
23 to trial today on the issue and the state has objected to  
24 going to trial today until the legal question of  
25 admissibility by them can be resolved. And I'd like to hear

1 prepared its entire case on the premise that that evidence  
2 would be included as testimony rather than we would have an  
3 issue in front of the jury as to its admissibility.

4 The state's position is, is that if we're going to argue  
5 this legal issue it's not something that can be readily done  
6 this morning and then reconvene the jury this afternoon; one,  
7 because research needs to be done by all three of the parties  
8 involved in this; two, because it requires an evidentiary  
9 hearing that requires the state to subpoena witnesses, some  
10 of which have already been subpoenaed for the trial but  
11 others of which the state would anticipate calling who are  
12 not under subpoena by the state and whether or not their  
13 availability is -- it is unknown at this point in time;  
14 three, I think the state's position is, is that this is an  
15 appealable issue, possibly by defense if the Court permits  
16 the admissibility of the forced blood draw in and the  
17 results; or two, that it would be situational possibly the  
18 state could appeal this issue because it is so critical for  
19 determining the DUI in this particular case.

20 The state also feels like this is a situation where the  
21 law does not permit defense counsel or the state to conduct a  
22 trial by ambush. And we have had a preliminary hearing,  
23 we've had a pretrial and we've had a suppression hearing, all  
24 of which none of those have indicated to the state that  
25 defense counsel was going to object to this blood draw until

1 filed, it was brought up at the preliminary hearing, it was  
2 not contested at the suppression hearing and not mentioned as  
3 any point of contention at any of the pretrials. And today  
4 the state was first informed by Mr. McKay that this was going  
5 to be an issue right as we were standing out in the hallway  
6 prior to the jury coming in.

7 **THE COURT:** All right. Mr. McKay, would you like to  
8 make a record and your -- regarding your position in this  
9 matter.

10 **MR. MCKAY:** Yes. Thank you, your Honor. Throughout  
11 this proceeding it's been fairly informal discovery. We've  
12 cooperated, passed things back and forth. We haven't had  
13 formal cut-off dates, we haven't had formal lists that have  
14 gone out, we haven't even supplied each other with witness  
15 lists. I mean, it's been very informal. Proper notice is  
16 not required in this case. Because for me to -- and as the  
17 Court knows, I'm not required to show all of my case to the  
18 prosecution, basically write out here, this is everything I'm  
19 going to do, you go ahead and prepare a response to every  
20 single thing, that's just not what the law requires.

21 The fact that in fact she sent the discovery to me that  
22 she brought up, particularly what she's referring to are the  
23 procedures for a forcible blood draw shows that it did come  
24 up in the preliminary hearing -- in fact, I don't think she  
25 was the one that did the prelim, I think it was Camille.

1 the legal issue that the Court will rule on, but did he  
2 follow the procedures, and I believe the trier of facts can  
3 follow those points, yes or no. And that's -- you know, we  
4 believe he did violate them on at least three particulars but  
5 it's up to the Court to rule whether that's --

6 One other thing, and maybe this is just a legend that  
7 passes around among the defense bar, but most defense  
8 attorneys -- my brother was a prosecutor and a judge and  
9 they, at least in Arizona, prosecutors will not try cases  
10 during December because they believe jurors for the will of  
11 the season or whatever it is are more lenient. And for that  
12 matter --

13 **MS. BEATON:** Now wait a minute.

14 **MR. MCKAY:** -- it would be prejudicial to my client  
15 not to have the trial in the month of December but to bump it  
16 off to when all the debts hit in February.

17 **THE COURT:** Well --

18 **MS. BEATON:** That's a bunch of crap.

19 **MR. MCKAY:** Whether it carries weight or not --

20 **THE COURT:** Just a minute. Just a minute.

21 **MR. MCKAY:** -- I'm just telling you that's an  
22 argument --

23 **THE COURT:** Yeah. That's -- that's --

24 **MR. MCKAY:** -- that it does tend to -- I mean,  
25 prosecutors don't think about it but --



1     their credit card debt it doesn't matter.

2             **MR. MCKAY:** Or that they need to be shopping instead  
3     of here listening to the case.

4             **THE COURT:** Yeah. And we're far enough before  
5     Christmas that it's -- it's totally a nonfactor.

6             However, I do think it's an important legal issue, that  
7     is my -- that's my concern on Ms. Beaton's side, it is an  
8     important legal issue. Strategically I understand where you  
9     were coming -- are coming from and it isn't your obligation  
10    totally to object in advance through motions in limine. The  
11    problem is as a judge in managing the trial, I have to make  
12    sure that it's done right and that the proper evidence gets  
13    before the jury and the improper evidence doesn't get before  
14    the jury. It's a question of law as to whether or not under  
15    certain facts a blood draw is permitted and then the evidence  
16    obtained therefrom can be used by the prosecution.

17            I have to also factor in how difficult it is for me to  
18    find trial dates for two days even, you know, to get cases  
19    tried because we're heavily calendared and we've set aside  
20    this date for the jury trial and I don't like to give up my  
21    trial dates. I have to use as many days for the trials as I  
22    can. I'm going to rule as follows:

23            We're going ahead with this trial today and I'm going to  
24    excuse the jury until 1:30, we're going to have a hearing on  
25    the legal and factual issues relating to this. It's now

1           **MS. BEATON:** When are we going to have the  
2 evidentiary hearing?

3           **THE COURT:** Right now.

4           **MR. MCKAY:** Do we need to go over the instructions?

5           **THE COURT:** Not now.

6           **MR. MCKAY:** Okay.

7           **THE COURT:** I'm going to excuse the jury for --  
8 until 1:30, have them come back and then we're going to go  
9 ahead and try this case.

10           (The following was held in open court.)

11           **THE COURT:** Ladies and Gentlemen of the Jury panel,  
12 you've been summoned in today to hear a case that is going to  
13 go for today and tomorrow, a criminal case. And we have  
14 determined -- or I have determined this morning that there  
15 are some issues that are purely legal that I need to resolve  
16 with the parties before we actually proceed with the trial.

17           Now, that being the case, I'm going to take the rest of  
18 this morning to resolve those legal questions that exist.  
19 And I'm going to have the jury panel come back at 1:30 and we  
20 will proceed with the trial. We still should be able to be  
21 done by tomorrow evening.

22           Now, the only question I'm going to ask any of you right  
23 now is are there any of you who have a -- an extremely dire  
24 emergency of some sort that would prevent you from being  
25 involved with the court for the next two days? Other issues

1 Honor, I think you've already heard what the state's position  
2 is. That's the problem that we're having here. The state  
3 feels like it's not prepared, this is an issue that the  
4 Court's already indicated it's not prepared for so I don't  
5 know why --

6 **THE COURT:** Well, I'm not going to reargue that  
7 issue. I just want to know how many witnesses you're going  
8 to need to call, who they are and let's see if we can help  
9 you to get them here as soon as possible.

10 **MS. BEATON:** Well, I need two witnesses right now,  
11 one witness who is not even under subpoena which is the  
12 sergeant who authorized this.

13 **THE COURT:** Well, that one perhaps I can allow in  
14 through a hearsay basis but let's -- the other witness, when  
15 were they due?

16 **MS. BEATON:** Well, the other witness obviously is  
17 going to be the trooper.

18 **THE COURT:** Okay.

19 **MS. BEATON:** So he's here. But problem is that the  
20 state has is I don't know what the -- I haven't even had a  
21 discussion with Brad Horne as to what the mental thoughts  
22 were that he was having when he instructed Trooper Jones to  
23 make sure that a forced blood draw takes place.

24 **THE COURT:** All right.

25 **MS. BEATON:** But troo -- but Sergeant Horne is the

1           **THE CLERK:** For the record we'll call State of Utah  
2 versus Oscar Ivan Cornejo, case number 041900798.

3           **THE COURT:** All right. The state may proceed.

4           **MS. BEATON:** Your Honor, if I may, the -- I have  
5 pulled the Utah Rules of Criminal Procedure.

6           **THE COURT:** Uh-huh.

7           **MS. BEATON:** Rule 12 under motions.

8           **THE COURT:** Uh-huh.

9           **MS. BEATON:** It indicates the following shall be  
10 raised at least five days prior to trial, this is subsection  
11 C, sub 1, sub B, which indicates that, A motion to suppress  
12 evidence shall be -- shall be brought before the court at  
13 least five days prior to trial. Subsection A indicates, An  
14 application to a court for an order shall be by motion,  
15 which, unless made during the trial or hearing, shall be in  
16 writing and in accordance with this rule. A motion shall  
17 state succinctly and with particularity the grounds upon  
18 which it is made and the relief sought. A motion need not be  
19 accompanied by a memorandum unless required by the Court.

20           The state's position is, is that this motion has -- is  
21 requesting a suppression of evidence of the admissibility of  
22 the blood draw and it should have been raised at least five  
23 days prior to trial and has not been raised five days to  
24 trial. The state is not prepared to go forward today and is  
25 not prepared on this legal issue.

1           **THE COURT:** It's your burden, not the defense's  
2 burden to be certain that the evidence is admissible.

3           **MS. BEATON:** Well, even if it's my burden, under  
4 this scenario, Rule 12 required me to file something in  
5 writing which I have not done, which I am prepared to do.

6           **THE COURT:** Well, that's not the way I read it so  
7 you can go ahead and --

8           **MS. BEATON:** Your Honor, at this time the state  
9 moves to dismiss.

10          **THE COURT:** Denied. This jury is here to try this  
11 case.

12          **MS. BEATON:** Your Honor, with all due respect --

13          **THE COURT:** If I dismiss -- let me say, I may  
14 admit -- I may allow that but it would be with prejudice.

15          **MS. BEATON:** Your Honor, I've also --

16          **THE COURT:** We're ready to go to trial.

17          **MS. BEATON:** -- looked at that. Rule 25 indicates  
18 the dismissal without trial, when that can be done and  
19 whether or not it can be done with prejudice. The only  
20 option that would apply is whether or not the Court believes  
21 that there is unconstitutional delay in bringing the  
22 defendant to trial. And I believe as we've indicated early I  
23 don't think that the Court can make a finding that the state  
24 is trying to delay this matter for no reason.

25          The state wants to be prepared on this legal issue

1 defense counsel did not bring that issue at the suppression  
2 hearing.

3 **THE COURT:** Nor did the state ever bring it before  
4 the Court.

5 **MS. BEATON:** I agree.

6 **THE COURT:** We're going to go to trial today, that's  
7 denied.

8 **MS. BEATON:** Your Honor --

9 **THE COURT:** If I dismiss it, it would have to be  
10 upon your agreement to dismiss with prejudice, I can do that.

11 **MS. BEATON:** I think the one thing that I get to do  
12 is I get to dismiss this case if I want to as part of the  
13 executive branch. The Court has the liberty then to  
14 determine if it's going to be a dismissal with prejudice but  
15 the state would ask for findings that it's being made based  
16 on unconstitutional delay.

17 **THE COURT:** It isn't. I'm just -- well, it could  
18 possibly be. But I -- what I'm saying is the parties are  
19 here, ready for trial, you should be prepared to go to trial  
20 today and you've had ample notice of this trial date. And I  
21 am -- the defense has mentioned in chambers they want the  
22 trial today, they're here ready to go, and so we'll either  
23 have the trial today or you can move to dismiss it without  
24 prejudice -- or with prejudice.

25 **MS. BEATON:** I -- with all due respect to the Court,

1 may present the evidence concerning this blood draw and I'll  
2 make a decision on whether it's admissible.

3 **MS. BEATON:** But I think what the Court -- what the  
4 state is saying, your Honor, is the state is not prepared to  
5 make this legal argument today. Because if the Court denies  
6 the admissibility of this evidence --

7 **THE COURT:** That's your problem, Ms. Beaton, not  
8 mine.

9 **MS. BEATON:** I --

10 **THE COURT:** I have to rule correctly on it no  
11 matter what.

12 **MS. BEATON:** I agree. And I think that you will  
13 rule correctly on it but I want -- I want the ability to at  
14 least file a written motion to indicate to you why I think  
15 that this evidence is admissible. I also have a difficulty  
16 because the sergeant who authorized this is on his way to  
17 Soda Springs, Idaho where he has business, where he --

18 **THE COURT:** I would be very liberal in you  
19 presenting any evidence concerning the circumstances of  
20 this --

21 **MS. BEATON:** I understand that, your Honor --

22 **THE COURT:** -- blood draw.

23 **MS. BEATON:** -- but I really feel like the state is  
24 not prepared to go forward.

25 **THE COURT:** And so what are you going to do? Do you

1 is this Court's dealing with the admissibility of the test  
2 that was blood drawn after the defendant refused to give a  
3 test, is that correct, Ms. Beaton? The defendant refused to  
4 give a test when -- after he had been stopped and arrested?

5 **MS. BEATON:** He did.

6 **THE COURT:** And the facts as I was told in  
7 chambers -- and by the way, I have never been asked to review  
8 the record of the preliminary hearing, because the only thing  
9 I was asked to review was the videotape of the officer when I  
10 denied your motion to suppress, so the record's clear on  
11 that.

12 **MR. MCKAY:** Thank you, your Honor.

13 **THE COURT:** And I had no indication until this  
14 morning that there was even an issue concerning the test, and  
15 at that time there was some discussion in a chambers about  
16 the nature of the test. But my understanding is from what  
17 was discussed in chambers is that the defendant was stopped  
18 for a traffic violation, and I think as I recall, he pulled  
19 out onto the road, made a wide turn and the officer followed  
20 him for some distance with his light on, got up by Adams and  
21 25th, was it, somewhere?

22 **MR. MCKAY:** Twenty-sixth (inaudible).

23 **THE COURT:** Somewhere around Adams. And that the  
24 stop then took place after the officer forced him off the  
25 road in a snow storm, so that's all I saw. And I denied your



1 taken or Mr. Cornejo was asked to lift his arm he lift his  
2 arm and they drew the blood. He wasn't physically struggling  
3 but he had objected to giving a test. Is that a correct  
4 summary of then what happened?

5 **MS. BEATON:** Yes, your Honor.

6 **MR. MCKAY:** Yes, your Honor.

7 **THE COURT:** All right. And also Ms. Beaton gave to  
8 the defense attorney the vitae of the blood technician  
9 showing that she considered his proper qualifications to draw  
10 blood and then to have it examined, and the testing  
11 procedures, she had already given information to the defense  
12 about what she was going to do in that regard, is that  
13 correct, Mr. McKay?

14 **MR. MCKAY:** You know, I don't recall receiving a  
15 curriculum vitae but she did send to me the procedures that  
16 they follow.

17 **THE COURT:** And you're not arguing that --

18 **MR. MCKAY:** That she wasn't qualified, no, your  
19 Honor.

20 **THE COURT:** -- that the technician wasn't qualified?

21 **MR. MCKAY:** No.

22 **THE COURT:** And Ms. Beaton, what other information  
23 was given to the defense so we make a good record here about  
24 your intent to try and show -- or to get the blood test in?  
25 What else did you do? You sent the curriculum vitae of the

1 the officers that were involved and you were attempting to  
2 attack the credibility of the officers because of the way  
3 they conducted themselves toward your client, is that a fair  
4 summary?

5 **MR. MCKAY:** That's correct, your Honor. As well as  
6 the violations of their own procedures.

7 **THE COURT:** So you were using it as a strategy to  
8 show that aspect as well as objecting to the admissibility?

9 **MR. MCKAY:** Correct, your Honor.

10 **THE COURT:** And the reason you did not file a motion  
11 to suppress this evidence was because it was part of your  
12 strategy --

13 **MR. MCKAY:** That's correct, your Honor.

14 **THE COURT:** -- in doing that?

15 **MR. MCKAY:** Right. Just do it during the trial.

16 **THE COURT:** State have anything further you want to  
17 say that you haven't said already?

18 **MS. BEATON:** I guess the state's position is then,  
19 defense counsel can have all sorts of strategies if they  
20 want, but if they want to actually have this Court suppress  
21 evidence, it is required by Rule 12 that I actually receive  
22 five days prior to trial written notice of that motion. That  
23 would have given all of us, if we would have had five days  
24 notice, an opportunity to have researched the issue and  
25 prepared to have even argued it this morning.

1 factual findings as to why the Court does not believe the  
2 Rule 12 would apply in this case because the word "shall" is  
3 used --

4 **THE COURT:** Well, it's a constitutional violation of  
5 the defendant's rights in a DUI case possibly, although I  
6 haven't fully researched it myself and would be prepared to  
7 rule on that within an hour or so, but it just comes to my  
8 mind that there's certainly a constitutional issue of due  
9 process and self-incrimination -- or involuntary  
10 incrimination when a defendant has a right to refuse to give  
11 a blood test in a DUI case and suffer certain consequences as  
12 a result of that because the procedures are established on  
13 how it is to be done. But again, that is what initially  
14 comes to my mind about this at least addressing the  
15 constitutional questions of a defendant's right to due  
16 process and the incrimination against his own desires similar  
17 to any other incrimination.

18 For example, I -- I read the law as being different in a  
19 DUI case than someone who is convicted of a crime who has to  
20 give a test for DNA samples because there are statutory  
21 provisions governing the one and the other as well. I think  
22 there are statutory provisions on voluntary testing in DUI  
23 cases, and the exception would have to be persuasive, you  
24 know, for any court I think to allow it in. And your  
25 argument is that you think that it's still admissible even

1 anybody that's been a prosecutor or a defense attorney runs  
2 into these kinds of things and so it's certainly not a fault  
3 issue.

4 It's a matter of I've got a jury here ready to try the  
5 case, we've got a defendant here ready to be tried, he's got  
6 a right to have a speedy, public trial and this date was the  
7 date set for a trial and both sides have to come prepared.  
8 And this is an issue that based on -- I can see where your  
9 assumption came from, it turned out to not be a correct  
10 assumption because of Mr. McKay's not raising it before --

11 **MS. BEATON:** Well, I mean he said --

12 **THE COURT:** -- and you assumed that he had the  
13 burden to raise it and I'm saying, no, he can object to it at  
14 trial. That's really where that problem arises.

15 **MS. BEATON:** But I think even when we were back in  
16 chambers talking about this we were having a difficult time  
17 trying to determine from Mr. McKay whether or not he was even  
18 objecting to the admissibility when he had to --

19 **THE COURT:** He could be silent about it even, you  
20 know. He doesn't have that burden. That's one of the things  
21 about the defense's position is they have many more options  
22 than I think the prosecution does, I really -- you know, and  
23 that sometimes may lead to some unfairness.

24 **MS. BEATON:** But there are limits as to what he can  
25 do.

1 charge, a third degree felony, that has nothing to do with  
 2 the DUI; there is no insurance charge, which has nothing to  
 3 do with the DUI; and there is a driving on a revoked license,  
 4 a Class B, which has nothing to do with the DUI. And I doubt  
 5 that you want to dismiss those knowing that they would be  
 6 dismissed with prejudice, because we could go ahead with  
 7 those issues before the jury.

8 **MS. BEATON:** Well, your Honor, with -- the state's  
 9 position is, is that the state has the ability as part of  
 10 executive branch to brings charges and to dismiss charges.  
 11 If this was a situation where it appeared to the Court that  
 12 the state was doing this just to violate the defendant's  
 13 speedy trial rights, then perhaps that would be a basis for  
 14 the Court to dismiss.

15 **THE COURT:** No, that's not -- that's not the issue.

16 **MS. BEATON:** So the state's position is, is that the  
 17 state has not asked for a continuance of this trial. The  
 18 state is prepared to go but the state now has an issue that  
 19 it does not feel like it's prepared to present at this point.

20 There is an alternative trial date that has already been  
 21 set because there was going to be a scheduling problem  
 22 already. This is the first time this case has actually been  
 23 set for trial and this defendant is not in custody, so we're  
 24 not dealing with speedy trial issues involving this defendant  
 25 or the state's desire to delay. Because as the Court has

1 because we could try that and I'm not certain that the DUI  
2 would necessarily be barred based on the fact that it's the  
3 Court that is telling --

4 **MS. BEATON:** It would violate double jeopardy if it  
5 came back.

6 **THE COURT:** -- you to go ahead to -- well, the  
7 jury -- no, the jury has not been empaneled yet.

8 **MS. BEATON:** But if we empanel the jury and I try  
9 the evading, the driving on suspension and the no insurance  
10 and we reserve the issue on the DUI and I move to dismiss the  
11 DUI and for some reason the Court of Appeals agrees and they  
12 return the DUI back to this Court, I would be precluded from  
13 trying the DUI.

14 **THE COURT:** Not necessarily. So what do you want to  
15 do?

16 **MS. BEATON:** State moves to dismiss.

*Prosecution got its own motion*

17 **THE COURT:** All of the charges?

18 **MS. BEATON:** Right. (Unintelligible.)

19 **THE COURT:** You understand that this case with all  
20 four counts, if I dismiss I feel I have to dismiss them with  
21 prejudice because the defense is ready to proceed on them and  
22 the reasons for the continuance are not justifiable.

23 **MS. BEATON:** By they have to amount to  
24 unconstitutional delay --

25 **THE COURT:** That's in essence what you're doing is

1 All right. Then these charges are dismissed with  
2 prejudice.

3 (The matter concluded.)  
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