

Douglas County Court
Douglas County Justice Center
4000 Justice Way
Suite 2009
Castle Rock, Colorado 80109
Telephone: (303) 663-7200

Plaintiff: THE PEOPLE OF THE STATE OF COLORADO

v.

Defendant: [REDACTED]

Attorney or Party Without Attorney: (Name & Address)

[REDACTED]
Attorney at Law*

Phone Number: [REDACTED]

FAX Number: [REDACTED]

E-mail: [REDACTED]

Atty. Reg. #: [REDACTED]

* Admitted to Practice in Colorado and California

Attorney appearing herein *in propria persona*

▲ COURT USE ONLY ▲

Case Number:

[REDACTED]

Div.: [REDACTED] Ctrm: [REDACTED]

**MOTION OF DEFENDANT [REDACTED] FOR DISMISSAL
OF ALL CHARGES WITH PREJUDICE ON THE BASIS THAT
THE DEFENDANT WAS NOT "DRIVING" AND WAS NOT
A "DRIVER" OR "IN CONTROL OF A VEHICLE" WITHIN
COLORADO'S APPLICABLE DUI STATUTES**

Defendant, [REDACTED] appearing herein [REDACTED], hereby moves the Court for an Order dismissing this action in its entirety with prejudice.

This Motion is based on the Statement of Facts as set forth in Section I hereinbelow; the Declaration of [REDACTED] submitted concurrently herewith; the Declaration of [REDACTED] submitted concurrently herewith; and the other pleadings, records, exhibits, and files herein.

Respectfully submitted,

*Original Signature on File in the Law Offices
of [REDACTED] Attorney at Law*

Dated: [REDACTED], 2005

[REDACTED]
[REDACTED]
[REDACTED]
Attorney at Law*

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Telephone: [REDACTED]

Telefax: [REDACTED]

E-Mail: [REDACTED]

* Admitted to Practice in Colorado and California

Attorney [REDACTED]
[REDACTED]

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**SECTION 1
STATEMENT OF FACTS**

A. The Vehicle Runs Out of Gas, the Battery Goes Dead, the Keys Get Stuck in the Ignition by Their Own Security System, and in General the Night Deteriorates at a Remarkably Rapid Pace.

On the evening of [REDACTED] [REDACTED] 2005, while headed Northbound on Interstate-25, Defendant's vehicle simply ran out of gas. He had earlier picked it up from [REDACTED] Chevrolet in Colorado Springs, where following repairs it had in the past been customary for the dealer to refill the fuel tank of the 2003 Hummer H2 before returning it to its owner. For whatever reason, in this instance this did not happen.

The gas tank on the vehicle, unnoticed by the Defendant driver, was "running on proverbial fumes," and came to a permanent halt on I-25 at approximately Mile Marker 183, i.e., around three miles from the Douglas County Justice Center. According to the police report, this occurred sometime between 8:45 and 9:00 o'clock P.M.¹ The vehicle was equipped with the "On Star®" system, which allowed the driver to call for roadside assistance. OnStar® assured the driver that a truck bearing gasoline would arrive within approximately forty-five minutes to one hour.

Not being especially mechanically inclined, Defendant made his next dumb move of the evening by turning on the vehicle's emergency electrical flasher system, in the hope of alerting other passing drivers to his automobile's presence.² Unfortunately for Defendant, the Hummer H2 model vehicle is equipped with an extraordinary array of exterior lights, all of which activate

¹ Actually, the events themselves occurred some time earlier; [REDACTED] Chevrolet and Hummer closed its service department, from which Defendant picked up his vehicle, at approximately 6:30 o'clock P.M. that evening. *See* the concurrently-filed Declaration of [REDACTED]. It took Defendant less than one-half hour to run out of gas on I-25. *See* likewise the concurrently-filed Declaration of [REDACTED]. So by definition, the notations of Officer [REDACTED] in the arrest-related documents are off by at least two hours. One inference from this fact could be that Defendant's blood alcohol "bell curve" was still on the "downside" from the two glasses of chardonnay he had at lunch; the far more scientific, and likely, interpretation is that Defendant imbibed alcoholic beverages after his vehicle became disabled, and that by the time Officer [REDACTED] conducted the Intoxilyzer 5000 test some time later, Defendant was beginning to feel the effects of his actions – i.e., was then on the "upside" of the well-recognized bell curve of alcohol consumption.

² Approximately eight feet from the right edge of the I-25 highway; the Court indicated at Defendant's bond hearing that she herself had observed the position of the Defendant's vehicle at the side of the road while in transit on her way to work that morning.

in tandem with the flasher system. It looks just like the Disneyland electrical parade, all by itself.

- Potential added safety for the benefit of other motorists? Yes. The sight would be hard for them to miss.
- How long does it take to run the battery of the vehicle down to completely “ZERO” with all of these electrical systems designed for safety operating simultaneously? About forty minutes, as it turns out.³ By then, not a single electrical device on the vehicle was in working condition, not even the small lamp-reading light on the overhead console.

As if Defendant’s situation could worsen, he made yet another discovery about which he had previously been unaware: As the Declaration of [REDACTED] submitted concurrently herewith demonstrates, Mr. [REDACTED] is an expert on virtually all aspects of the Hummer H2 automobile, and is in charge of the service department of the Hummer H2 division of Colorado Springs’ largest Hummer H2 dealership.⁴ It turns out that the Hummer H2 is factory-equipped with a system that “kills” the ignition – and the ability to remove the ignition key – whenever the vehicle’s battery has been removed or otherwise loses all power. Specifically, when the vehicle loses all electrical power – i.e., when the battery “dies,” as it did here – one of the side effects of the vehicle’s inherent design architecture is that if the key is in the ignition (as it was in the action at bar⁵), *it is impossible to remove it from the ignition until such time as all battery and electrical power are restored.* Defendant found out this unhappy fact by twisting, yanking, pulling, and in general doing everything he could except gnawing with his own teeth to remove the key from the ignition switch. No luck.

B. What Happened to the Defendant as the Events of the Evening Continued to Unfold.

Nothing good.

Officer [REDACTED] of the Colorado State Patrol⁶, subsequent to Defendant’s having sat in the driver’s seat of his vehicle (i) nearly freezing half to death – or at least feeling that way --

³ See the Declaration of [REDACTED] Esq., submitted concurrently herewith.

⁴ [REDACTED] Chevrolet and Hummer in Colorado Springs.

⁵ See the Declaration of [REDACTED] submitted concurrently herewith; *see also*, the Declaration of [REDACTED] submitted concurrently herewith.

⁶ Who should be commended for his courtesy and helpfulness during the course of this entire series of events; Defendant has never encountered a more gentlemanly individual in the law

because the lack of engine heat stemming from the lack of fuel; (ii) in the dark, due to the lack of electrical power; and (iii) spending his spare time pulling, yanking, etc. as previously described on the irremovable ignition key, arrived on the scene literally about three minutes prior to the arrival of the OnStar® tow truck. The Defendant alighted from his vehicle and explained “what was going on,” in response to Officer ██████’s questions. Officer ██████ asked the Defendant if he had been drinking at all that day, and Defendant replied that he had consumed two glasses of Chardonnay at lunchtime.⁷

Officer ██████ requested Defendant to participate in a series of voluntary field sobriety tests, to which Defendant acquiesced. Given that Defendant was half-frozen by the time the tests were administered, not to mention that the wind speed coupled with the ambient air temperature was probably in the neighborhood of 20° Fahrenheit once the wind chill factor was considered while the tests were being administered, it is a wonder that even the Officer could remain standing, let alone Defendant (who was dressed in light sweat pants and a T-shirt). The Officer then placed Defendant under arrest and transported him to a police substation. The Officer requested that the Defendant agreed to take the “Intoxilyzer” breath test, to which Defendant also acquiesced. The results, after first going to a different substation and finding the Intoxilyzer unit there broken and non-functional, of the test reflected a blood alcohol level of 0.08, i.e., exactly the legal limit.

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II
THE NUMEROUS FACTORS CITED IN COLORADO’S LEADING APPELLATE CASES ALL POINT TO A COMPLETE INABILITY OF THE STATE TO DEMONSTRATE A *PRIMA FACIE* SHOWING TO SUPPORT THE CONVICTION OF THE DEFENDANT ON A

enforcement community during over twenty-nine years of having contact, as a member of the Bars of two states as well as seven ancillary federal Courts, with members of that group.

⁷ Taking the time Defendant ate lunch and comparing it with the time of Officer ██████’s question, the gap in time would have been approximately eight-to-nine hours. The blood alcohol level of 0.08 ultimately demonstrated by the Intoxilyzer 5000’s application to Defendant’s breath sample would be inconsistently low (see analysis presented in Exhibit “A” attached hereto) applied to such an interval but *would* be quite consistent with Defendant’s explanation presented in his concurrently-filed Declaration that he imbibed a quantity of alcoholic beverage substance during the forty-five minutes to one hour while he and his vehicle awaited the arrival of the OnStar® tow truck bearing gasoline and jumper cables. So long as Defendant was not “driving,” the best that could be said of this offense would be that perhaps Defendant was in violation of the “open container” statute, which is far different than “driving under the influence.” The table contained in Exhibit “A” stops at 240 pounds; Defendant weighs 281 pounds as of this writing.

SINGLE CHARGE OF VIOLATING COLORADO'S DUI LAWS

A. Fundamental Question Presented: Was the Defendant a “Driver” Who Was “Driving” or “in actual physical control of a vehicle” at the Time of his Arrest as Those Terms are Used in Colorado’s Statutory Scheme?

It is axiomatic that one cannot be convicted of “drunk driving” unless the Defendant in question is both (i) drunk, and (ii) driving. It is the latter of these two questions which takes on special significance in the action at bar. This is just plain common sense interpretation of the English language.

The relevant statutory reference is C.R.S. §42-1-102(27), which provides the Legislature’s definition of “driver.”⁸ As distinguished from some other States, Colorado has no statute of which Defendant is aware at the moment which defines “driving” as distinguished what is already implied or embodied in the definition of “driver” contained in C.R.S. §42-1-102(27), *supra*.

Whether Defendant was a “driver” who was “in actual physical control” at the time of his arrest by Officer [REDACTED] necessarily comprises the crux of this entire case.

B. An Analysis of Colorado’s Statutory Law, as Applied by Relevant Appellate Cases, Leads Inescapably to the Conclusion That Defendant at the Time of His Arrest Was Neither a “Driver” Nor Someone Who Was “Driving” Nor Someone Who Was in “Actual Physical Control” of a Motor Vehicle.

There are five leading appellate cases in Colorado which serve to define the parameters of what does and does not constitute a “driver,” and whether that person is impermissibly “in actual physical control” while intoxicated. The cases are:

- *People v. Swain*, 959 P.2d 426 (Colo. 1998)
- *Caple v. Department of Revenue*, 804 P.2d 873 (Colo. App. 1990)⁹

⁸ “(27) ‘Driver’ means every person, including a minor driver under the age of twenty-one years, who drives or is in actual physical control of a vehicle.”

⁹ *Caple, supra*, involved a driver passed out in his own car in a bar parking lot, wearing his seat belt. The engine was not running but the keys were in the ignition, turned to the on position, the

- *Motor Vehicle Division v. Warman*, 763 P.2d 558 (Colo. 1988)¹⁰
- *Colorado Division of Revenue v. Lounsbury*, 743 P.2d 23 (Colo. 1987)¹¹; and
- *Brewer v. Motor Vehicle Division*, 720 P.2d 564 (Colo. 1986)¹².

(1) The Analysis of the Court in *People v. Swain, Supra*, is the Most Persuasive When Applied to the Action at Bar; Most Other Precedent Available Within This Jurisdiction is Mere *Dicta* or Ancillary to the Questions Presented Here.

The leading case on the issue of what constitutes “driving” under the DUI statute in Colorado is *Swain, supra*. In *Swain*, the Colorado Supreme Court noted that the term “drove” had been previously defined, in the context of a DMV proceeding, to mean being in actual physical control. The Court held that this definition applies to the term in the context of the DUI statute as well.¹³ The Court went on to set forth a non-exclusive list of factors to consider, in determining from the totality of the circumstances, whether there was actual physical control: where the vehicle was found; where in the vehicle the person was found; whether or not the keys were in the ignition; whether or not the vehicle was running; and any other factor which tends to

dash lights were illuminated, and the radio was on. The Court found that the Defendant was “driving.” The facts in *Caple, supra*, could hardly be more disparate than those presented in the instant action.

¹⁰ *Warman, supra*, presented the Court with the question of whether driving while intoxicated on private property, as opposed to a public highway, would constitute a violation of Colorado’s DUI statutes. A convenience store parking lot was involved in this factual scenario. The Court upheld that there should be no distinction between the public-versus-private land question, and upheld the Defendant’s conviction. No issue germane to *Warman, supra*, is of applicability to the action at bar.

¹¹ *Lounsbury, supra*, involved an intoxicated driver with the engine running, the vehicle in gear, in the process of attempting to extricate himself from a snow bank. He was found to be “driving.” Duh...

¹² If not *Lounsbury, supra*, *Brewer, supra*, probably presented the least intellectual challenge for the Court that decided it, involving as it did a defendant’s car parked in the middle of a cul-de-sac with the lights on, the engine running, and the defendant slumped behind the wheel. The Court concluded that this met the test for “driving.” The disparity of the facts of the action at bar versus factual scenarios such as both *Lounsbury, supra*, as well as *Brewer, supra*, represent such an obviously huge chasm that no more need be said.

¹³ *People v. Swain*, 959 P.2d 426 (Colo. 1998).

indicate that the person exercised bodily influence or direction over a motor vehicle based on everyday experience.

The trial Court, sitting without a jury, may determine as a matter of law whether the Defendant's actions constituted "driving" as that term is used in C.R.S. §42-4-1301. *Colorado DUI Benchbook* [2nd Edition], Colorado County Judges Association (2004), Section 3.4.4. It is accordingly entirely within the province of this Honorable Court to dispose of the issues presented by the instant Motion by ruling on a pre-trial basis.

Applying the *Swain, supra* analysis, the following factors, according to the Court, are worthy of note:

- **Was there actual physical control of the vehicle by the Defendant?** Obviously not, since the vehicle had run out of fuel; had no electrical power left from its battery; and had its keys stuck in the ignition as a result of the vehicle's own security system.
- **Where the vehicle was found:** It was found approximately eight feet on I-25's right-hand meridian, where it clearly represented no threat to other traffic (as substantiated by Officer ██████'s decision to leave it by the roadside throughout the night as opposed to having it towed away, which he would have had every right to do). In fact, Officer ██████ was even courteous enough to permit the OnStar® tow truck to refuel the vehicle, charge its battery, and later return to make certain that the vehicle had been secured by being properly locked. (See the Declaration of ██████ submitted concurrently herewith.)
- **Where in the vehicle the person was found:** As previously noted in Section I, *supra*, "The Defendant alighted from his vehicle and explained 'what was going on,' in response to Officer ██████'s questions." What had been going on, as also previously noted, was that Defendant was freezing half to death in the driver's seat of his fuel-bereft, electrically-powerless car for nearly an hour. But lest the Court be inclined to infer anything negative from the mere fact that Defendant was sitting behind the driver's seat when Officer ██████ arrived on the scene, it should be noted that numerous appellate decisions have addressed this exact question, *without* drawing any adverse inference that the Defendant's mere occupancy of the driver's seat in a disabled vehicle, absent other factors, should be viewed with any kind of suspicion.¹⁴ The question has been put repeatedly as to whether the vehicle was being used as a "vehicle" or as a "shelter." It is difficult to see how a totally inoperable vehicle with no fuel and no electrical power on a cold night, as was the case in the action at bar, could be judicially viewed as anything other than a "shelter."

¹⁴ See, e.g., *State v. Williams*, 20 Ohio Misc. 51, 49 Ohio Ops.2d 97, 251 N.E.2d 714 (1969); *Commonwealth v. Fox, supra*.

- **Whether or not the keys were in the ignition:** This has already been the subject of much discussion. It would have taken a torch to remove the keys from the subject vehicle’s system architecture, and even that approach would have by no means represented a sure thing.
- **Whether or not the vehicle was running:** It had no gas and no battery power. It was definitely not running, nor could it have.
- **“...any other factor which tends to indicate that the person exercised bodily influence or direction over a motor vehicle based on everyday experience:”** *Swain, supra*, 959 P.2d at 430. Applied to the action at bar, this is a simple one: How a person could exercise “bodily influence or direction” over a motor vehicle that had neither fuel nor electrical power, and whose ignition keys were virtually welded into the ignition switch,¹⁵ is a concept difficult to fathom. As far back as 1932, it was held by a Pennsylvania Court that even when every other system in the vehicle was operational, the fact that the drive shaft turned out to be broken effectively precluded the driver from going anywhere, and he was acquitted of the ensuing DUI charges. *Commonwealth v. Fox*, 17 Pa. D & C 491, 43 Lane L. Rev. 246 (1932), 93 A.L.R. 3d 7, §7.

(2) **A Review of the Analyses Performed by the Courts of Other Jurisdictions Which Have Come to the Same Legal Conclusion Given Factual Circumstances Similar to Those of the Action at Bar.**

(A) **Alabama’s Very Succinct Analysis of the Issue.**

Swain, supra, while certainly the leading authority in Colorado – and authored by its highest Court – is by no means in a “minority view” or the only precedent for the propositions advanced therein regarding what does and does not constitute “driving” or being a “driver.”

Most succinctly to the point is probably the opinion in the Alabama case of *Key v. Town of Kinsey*, 424 So.2d (Ala. Crim. App. 1982). That Court identified three simple factors as prerequisites to a conviction under that State’s DUI laws:

- Active or constructive possession of the vehicle’s ignition key by the person charged or, in the alternative, proof that such key is not required for the vehicle’s operation. **Argument:** As has been explained, and as set forth in the Declaration of [REDACTED] filed concurrently herewith, once Defendant’s Hummer H2 lost electrical power, he lost any ability he may have had before to control, or make any other use, of the key.

¹⁵ The vehicle’s gross curb weight exceeds 8,000 pounds, which would make trying to push or otherwise manually manipulate it rather difficult, too.

- The person charged should be positioned in the driver’s seat, behind the steering wheel, and in such condition that, except for the intoxication, he or she is physically capable of starting the engine and causing the vehicle to move. **Argument:** While it is true that Defendant was in the driver’s seat when Officer ██████ pulled up, he promptly alighted and explained the situation to the officer. Besides, driving a car with no gas and no battery power obviously restrained any ability the Defendant might otherwise have had to “cause the vehicle to move.” See also, Footnote No. 14, *supra*, and the text to which it relates.
- A vehicle that is operable to some extent. **Argument:** For the reasons discussed at length hereinabove, there was no way for Defendant, or anyone else, to operate the vehicle. Even the next morning after being “jump-started” by the OnStar® tow truck the evening before, the battery was once again dead and had to be jump-started yet a second time after being left overnight.¹⁶

B. Arizona’s Common Sense Approach to the Question.

Earlier case law in Arizona established a “bright line” test to the effect that if a driver pulled off the road and turned off the engine, he or she was no longer considered to be control of the vehicle. The idea was to further the policy of encouraging impaired drivers to remove themselves from the highway. See, e.g., *State v. Zavala*, 136 Ariz. 356, 666 P.2d 456 (1983); and *State v. Webb*, 78 Ariz. 8, 274 P.2d 338 (1954). In 1995, that State’s Supreme Court rejected a ‘rigid mechanistic analysis’ in determining actual physical control of a vehicle and held that a jury should consider the totality of the circumstances (a view much akin to Colorado’s *Swain, supra*). *State v. Love*, 182 Ariz. 324, 897 P.2d 626 (1995).

Along the same lines as *Swain, supra*, the Court in *Love, supra*, recognized the multiplicity of factors involved in the question of whether a “driver” was really “driving”:

“Instructing a jury that actual physical control means that a person has the ‘apparent ability to start and move a vehicle’ may not be helpful to a jury. The legislature did not include the language in the DUI statutes. The jury should not be instructed that actual physical control means that a person has the ‘apparent ability to start and move a vehicle’. ***They should be instructed that a person is in actual physical control if, based on the totality of the circumstances, his potential use of the vehicle presented a real danger to himself or others.***” [Emphasis added]

¹⁶ See the concurrently-filed Declaration of ██████

Defendant's inability to do any harm to others given that his vehicle was completely immobilized by at least three separate mechanisms is obvious.

The *Love, supra* Court, once again paralleling the Colorado decision in *Swain, supra*, went on to enumerate virtually the same factors that should be considered in determining whether an alleged "driver" is "driving," or in "actual physical control," at the time of his arrest:

"The court rejected the rigid mechanistic rule that a person is presumed to be in actual physical control unless the person's vehicle is completely off the road and has the ignition off. Instead, the court held that whether the engine is running is not dispositive and that several factors must be considered by the court, including the following: whether the vehicle was running or the ignition was on; location of the key; position of the driver in the vehicle and whether they were awake or asleep; headlights on or off; was the vehicle legally parked or on the road; time of day and weather conditions; if the heater or air conditioner was on; whether the windows were up or down; and any explanation of the circumstances advanced by the defendant. *All are circumstances to be considered to determine if the defendant was 'simply using the vehicle as a stationary shelter' or was in actual physical control.*" [Emphasis added]

Love, supra, as partially synopsisized by 1 *Drinking/Driving Litigation: Criminal and Civil* Second Edition, Flem Whited, III, Donald H. Nichols, at § 2:5 (Database updated November 2004).

C. Maryland Also Agrees With *Swain, Supra's* Analysis.

This same analytical approach was used by the Maryland Supreme Court. The Court said the primary focus of what constitutes actual physical control is whether the defendant is merely using the vehicle as a stationary shelter. The conviction was reversed where the only evidence was that the defendant climbed into the driver's seat, put the keys in the ignition and fell asleep. See *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019 (1993).

D. Pennsylvania Also Follows the *Swain, Supra* Doctrine, And to An Even More Extreme Extent.

In a widely-quoted Pennsylvania case the court said showing that an intoxicated person started a parked car, without more, is not enough to prove actual physical control. The "more" appears to be evidence the defendant drove the vehicle to its final position. The court said the prosecution cannot simply focus mechanically on whether the motor was running, but must show some additional facts to illustrate the defendant was a danger to public safety. Pennsylvania continues to require more than simply being in a vehicle with the engine running to show actual

physical control. See, in particular, *Com. by Byers*, 437 Pa. Super. 502, 650 A.2d 468 (1994); *Com. v. Trial*, 438 Pa. Super. 209, 652 A.2d, 338 (1994); and *Com. v. Sanders*, 456 Pa. Super. 741, 691 A.3d 946 (1997).

E. New Hampshire's Courts Also Concur.

The New Hampshire Supreme Court has held a totally passive person cannot be in actual physical control. See *State v. Willard*, 139 N.H. 568, 660 A.2d 1086 (1995); cf. *State v. Winstead*, 150 N.H. 244, 836 A.2d 775 (2003).

In *Willard, supra*, the Court said that if the person has not in any way attempted to actively control the vehicle, and there is no reason to believe that the inebriated person is imminently going to control the vehicle in his or her condition, they should not be held to be in actual physical control. The court said that the primary focus is whether the vehicle is being used as a stationary shelter or whether it is reasonable to assume the person will, while under the influence, jeopardize the public by exercising control over the vehicle. In this case the defendant was asleep in a parking lot with the engine running. **Argument:** Compared to the defendant in *Willard, supra* – and, indeed, to the vast majority in all of the reported DUI cases which deal with this issue -- the Defendant in this case was totally helpless. He had no gas; no electrical power; and an ignition system frozen by his vehicle's security system. He had no more capability to “drive” or become a “driver” or “exercise control” than Zeus.

F. Nevada, the Statutory Scheme of Which is Very Similar to That of Colorado, Also Concur That What Defendant is Alleged to Have Done in This Case Would Not Have Been A Crime in That State.

Nevada's leading case addressing what this Court is *now* addressing is *Rogers v. State*, 105 Nev. 230, 773 P.2d 1226 (1989), to which could be added *Bullock v. State Dept. of Motor Vehicles*, 105 Nev. 326, 775 P.2d 225 (1989). In the latter case, no DUI was found where the defendant was found asleep in a reclined position, with his hands in his pockets in a private parking lot.

Rogers, supra, quoted with approval in *Barnier v. State*, 67 P.3d 320 (Nev. 2003), once again found the factors enunciated in Colorado's *Swain, supra*, persuasive: As quoted by *Barnier, supra*:

“These factors were: ‘(1) Where and in what position the person is found in the vehicle; (2) Whether the vehicle's engine is running or not; (3) Whether the occupant is awake or asleep; (4) Whether, if the person is apprehended at night, the vehicle's lights are on; (5) The location of the vehicle's keys; (6) Whether the

person was trying to move the vehicle or moved the vehicle; (7) Whether the property on which the vehicle is located is public or private; and (8) Whether the person must, of necessity, have driven to the location where apprehended." The court denied his requested instruction and gave one which gave the following factors: '(1) Active or constructive possession of the ignition keys: (2) the position of the person charged in the driver's seat, behind the steering wheel, and in such a condition that, except for the intoxication, he or she is physically capable of starting the engine and causing the vehicle to move; and (3) a vehicle that is operable to some extent. Actual movement of the vehicle is not required as long as it is reasonably capable of being rendered operable.' The jury found him guilty and he was sentenced to sixty months. The court used a harmless error standard in review. Because the proposed instruction was based on his theory of the case, correctly stated the law and was not covered by the other instructions, and because there was evidence in the record, which supported the omitted Rogers factors, the court concluded that any error was not harmless. *The court looked to the evidence and found that the officer clearly testified that the engine was not running which would have weighed in Barnier's favor. Secondly, the evidence showed that Barnier was not trying to move the vehicle and had not done so. Finally, his female companion testified that she had driven there as the tipster had indicated and had intended to continue driving after she relieved herself. These factors also would have weighed in Barnier's favor. In response to the state's argument that Rogers did not indicate how the factors were to be weighed or whether they were absolute, the court stated that they had 'reaffirmed the Rogers factors in every subsequent opinion in which we have considered the subject of actual physical control.'* The proper balancing of those factors should be left to the trier of fact. The court concluded that even though the jury could have convicted him with all the Rogers factors, the omission of the three 'unduly restricted Barnier's defense and was tantamount to directing a verdict in favor of the State.' **Reversed and remanded for new trial.** [Emphasis added]

G. Massachusetts' View.

The Courts of Massachusetts have concluded that the State must prove the defendant intentionally did an act or made use of any mechanical or electrical agency which would set the power of the vehicle in motion. *Com. v. Plowman*, 28 Mass. App. Ct. 230, 548 N.E.2d 1278 (1990). That would have been a neat trick here, to say the least, in a vehicle with an empty tank

of gas, a dead battery, and a security system that had locked the entire ignition system down for the duration pending the restoration of electrical power.

H. A View From the Indiana Courts.

In *Heigel v. State*, 538 N.E.2d 265 (Ind. Ct. App. 3d Dist. 1989), the Court listed four factors to use in determining whether a person was in actual physical control: (1) whether the person was asleep or awake; (2) whether the motor was running; (3) the location of the vehicle and how it got there; and (4) the intent of the person. Applying these factors, the court found that he was asleep, the motor was only running to keep him warm in the cold whether, he parked his car then got drunk intending to remain parked until his girlfriend picked him up. Finally, when he applied the brake to keep from rolling, he did not intend to operate the car. The court concluded that based on these stipulated facts, a reasonable trier of fact could not have found him guilty beyond a reasonable doubt. The conviction was reversed. **Argument:** The facts of the action at bar are far less egregious than were those involved in *Heigel, supra*. Defendant may as well as have been sitting in a storage container without wheels as in a car when Officer [REDACTED] happened on the scene. The only thing these two defendants had in common were the fact that they drank alcoholic beverages *after* their vehicles were safely stopped and removed as a hazard from the public road system. This feature of many DUIs is addressed more expansively *infra*.

I. Tennessee's View.

In *Line v. State*, 191 Tenn. 380, 234 S.W.2d 818 (1950), the defendant was charged with "operating and driving" a motor vehicle on the highway while under the influence of intoxicants. The Court held that a defendant who was merely sitting in the front seat of his car, which had stopped on the highway and was waiting to be pushed by another car, was neither driving nor operating his car within the meaning of the statute, "operating" in such case meaning a putting into activity or a continuing in activity.

J. California's View.

The Supreme Court of California takes the even more liberal view that there must be vehicular movement in the arresting officer's presence to lawfully arrest a driver for driving under the influence of alcohol without a warrant. See *Mercer v. Department of Motor Vehicles*, 53 Cal. 3d 753, 809 P.2d 404, 280 Cal. Rptr. 745 (1991). *Mercer, supra*, is consistent with the holding of one of the same State's Court of Appeals in *Music v. Department of Motor Vehicles*, 221 Cal. App. 3d 841, 270 Cal. Rptr. 692 (1st Dist. 1990). wherein a motorist's act of grasping the gearshift lever, while seated in his truck with the engine running, was held not to amount to "operating" the vehicle because the truck did not move.

K. It Should Be Apparent to the Court by Now That This Defendant, Stranded in a Totally Inoperative Vehicle But

**Having Taken All Possible Safety Precautions, Cannot be
Convicted Under Colorado’s DUI Statute.**

The foregoing citations from other jurisdictions, all of which support the Colorado Supreme Court’s holding in *Swain, supra*, all lead to the same conclusion. The overview presented above is by no means exhaustive; the Court is respectfully referred to 93 A.L.R.3d, *Operating Motor Vehicle While Intoxicated*, 93 A.L.R. at p. 7, and in particular to §11(d) thereof, for an even more thorough dissertation on when a person is considered a “driver” who is actively “driving” in comparison of the opposite of this proposition.

V

**IT IS THE BURDEN OF PROOF OF THE PEOPLE TO ESTABLISH
THAT THE DEFENDANT WAS BOTH LEGALLY INTOXICATED
AS WELL AS DRIVING AT THE SAME TIME; AS THE
CONCURRENTLY SUBMITTED DECLARATION OF ██████████
██████████ ESTABLISHES, THIS SIMPLY WAS NOT THE CASE**

The Courts have been confronted with many instances wherein a perfectly sober driver, for whatever reason, stopped his vehicle (thereby ceasing to be a “driver” who was no longer deemed to be “driving”), and proceeded thereafter to become inebriated prior to being contacted by law enforcement agents. That is precisely what happened here.

The Declaration of ██████████ demonstrates that Defendant, shortly before his encounter with Officer ██████████ purchased a quantity of liquor (airplane-style “miniatures”) that he had planned to consume later that evening with his wife at a hotel they had booked for the evening in Denver. Rather than the romantic evening planned for the Denver hotel, Defendant’s spouse ended up sleeping alone and Defendant ended up in jail – about as alone as you can get -- with his wife driving 120+ miles the next morning to make it back to work on time by 8:00 o’clock A.M.

None of this would have happened had Defendant simply refrained from opening even one of the airplane-style “miniatures” bottles of liquor and making himself a group of crude but nonetheless effective cocktails as he awaited the OnStar® tow truck. Defendant’s blood alcohol level of 0.08 reflects not the two glasses of wine that he mentioned to Officer ██████████ he had imbibed with lunch several hours beforehand; under generally understood medical principles a man weighing what Defendant weighs (approximately 281 pounds) would have dissipated that amount of alcohol in a matter of a couple of hours at most. Rather, Defendant’s 0.08 Intoxilyzer 5000 reading is indicative of what he imbibed during the forty-five minutes to one hour between the time his vehicle became inoperative and the time that he was contacted by Officer ██████████ Exhibit “A” attached hereto illustrates the general principle involved; the accompanying Declaration of ██████████ reflects what happened and approximately what he

had to drink in his vehicle immediately after it ran out of gas but immediately prior to his contact with Officer [REDACTED]¹⁷

VI CONCLUSION

A. Closing Argument.

The proposition is really a simple one. Driving occurs in steps, and it terminates in steps.

Surely no one would argue that a person leaving his home to go to work, closing the front door of his house, was yet either a “driver” or engaged in “driving.” But when he opens his car door, inserts his ignition key, starts the engine, and backs out the driveway, nearly anyone would agree that, at that point, he’s a “driver” and he’s actively “driving.”

At some point this process will come to an end. Our hypothetical “driver” will stop “driving” by turning off his vehicle’s ignition key, thereby shutting down the engine, and decamping from his vehicle. Nobody would attempt to credibly argue, at that point, that he was still a “driver” who was “driving.”

Somewhere in between the time that a person enters his or her vehicle and later leaves that same vehicle, “driving” both starts, and then stops. Leaving the vehicle, in fact, according to the Court in *Swain, supra*, is not even a necessary circumstance.

As Colorado’s leading authority in *Swain, supra*, was careful to note, there are numerous factors in determining whether someone is or is not a “driver” who is “driving.” As noted in Section II(B)(1) hereinabove, the *Swain* tests set out five specific criteria and one general common sense, “catchall” provision. As also established hereinabove together with the supporting three Declarations submitted herewith, ***Defendant meets all of the Swain, supra tests which dictate as a matter of law that the instant Motion should be granted, and all charges on file herein dismissed with prejudice.*** The numerous authorities cited *supra* from jurisdictions ranging from Alabama to Arizona to Maryland to Pennsylvania to New Hampshire to Nevada to Massachusetts to Indiana to Tennessee to, finally, California, all further uphold the

¹⁷ It would be a legitimate question for the Court to ask, “Then why did you tell Officer [REDACTED] only about the two glasses of lunchtime Chardonnay, and not about the “miniatures”?” All that Defendant can say in response to this inquiry is that (i) the Officer never asked about any consumption beyond the lunchtime Chardonnay; and (ii) most citizens would be reluctant to volunteer, unless asked, “Oh, yes, and by the way, I have eight unopened “miniatures” of hard liquor in the back seat of my car.” The Officer did not search the subject vehicle to determine if other liquor was present and, in fact, was courteous enough to return to the automobile after Defendant’s booking to make certain that it was properly locked and secured; hence but one of the reasons for Footnote No. 5, *supra*.

reasonableness of the proposition that if an alleged “driver” is not “driving” a vehicle because the vehicle is inherently inoperable, it is incongruous for that person to somehow be a “drunk driver” under the DUI laws.

B. Closing Analogy.

Perhaps the following analogy will assist in furthering the Court’s analysis of the law in this area: Were the law to be interpreted as the People will undoubtedly attempt to present it should this case move toward trial, it would be entirely possible for a derelict “wino” whose only home is a junkyard full of old, inoperative cars, some crushed, some piled atop one another, some crowded in so close together that moving them would be physically impossible, to be convicted of a DUI for every single day (or, for that matter, hour) that he brings home to his car of choice the usual bottle of Muscatel®. After all, the car is certainly inoperable. The law is supposed to abhor absurdities.¹⁸ In this case, the very idea that the Defendant was capable of driving what was a triply-disabled motor vehicle, and thereby violating the applicable DUI laws, bears very little difference to the man-in-the-junkyard analogy.

C. Prayer for Relief.

Defendant accordingly respectfully prays that the relief sought in the within Motion be granted, and that the charge alleged in the Summons & Complaint issued on [REDACTED] 2005 by Officer [REDACTED] be dismissed with prejudice.

Dated: June 7, 2005

Respectfully submitted,

*Original Signature on File in the Law Offices
of [REDACTED] Attorney at Law*

[REDACTED]

¹⁸ Indeed, the United States Supreme Court has invoked the absurdity doctrine at least five times in recent years to depart from a plain reading of statutory text. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 429, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *Burns v. United States*, 501 U.S. 129, 135-37, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 454-55, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989); and *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-11, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989).

