Opinion No. 56-6564

December 31, 1956

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Patrick F. Hanagan, District Attorney, Fifth Judicial District, Roswell, New Mexico

Your letter of March 1, 1956, and several subsequent communications concerning the matter of a D.W.I. charge, and the consequent problem of jury trial rights, have been turned over to me.

This office is conscious of the gravity of the situation as raised by you -- we agree that the matter is one of importance -- but we wish to point out that the specific case involves a first offense D.W.I., whereas your question covers an entire field of the law that would take months of research to develop. Also, an opinion from this office in this field would have to be based largely on two cases in this State from which we might construe a line of thinking of our Supreme Court, but which, in extending the same to other misdemeanors or minor offenses, would involve hazards of prediction which might likely do more harm than good.

In passing, we would like to indicate the scope of the problem even in the area of D.W.I. It would certainly appear that our high court considers a first time D.W.I. a petty offense. Whether the second time, the third time, etc., with its increased penalty, is equally "petty" is a matter on which "an opinion" would necessarily be only a "guess." On top of this lies the fact that the legislative meeting, only a couple of weeks hence, seems likely to make changes in this specific matter that would out-date any opinion of this office. When the same situation is multiplied by the hundreds of offenses that must be considered in any answer to your questions, the "opinion" becomes a life work.

This by no means exhausts the reasons why a comprehensive brief seems impracticable -- I am told that Mr. Standley spoke to you on the telephone a day or so ago and further elucidated.

Hence, the limitation of this opinion to this instant matter.

1. We are of the opinion that a first offense D.W.I. defendant is not entitled as a right to a jury trial in the district court, for the reason that a first offense D.W.I. charge has been held to be a "petty" offense, in New Mexico, as well as the majority of other jurisdictions.

2. We are of the opinion that until "Gutierrez vs. Gober, 43 N.M. 146, 87 P. 2d 437" is overruled or differentiated, it may be accepted as the prevailing rule in New Mexico.

3. We are of the opinion that "Tucumcari vs. Briscoe, 58 N.M. 721, 275 P. 2d 958" holds a first offense, D.W.I. under the then prevailing penalty, to be a "petty" offense.

We hope the above will be of some small assistance in this large and contradictory problem.

By: Howard M. Rosenthal

Assistant Attorney General