Filed 10/22/07

**CERTIFIED FOR PUBLICATION**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>TIMMIE LANCE MCNEAL,<br><br>Defendant and Appellant. | E041226<br><br>(Super.Ct.No. CRA4177)<br><br>**ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING**<br>[NO CHANGE IN JUDGMENT] |

The petition for rehearing is denied. The opinion filed in this matter on September 21, 2007, is modified as follows:

1. On page 19, add new footnote 9 at the end of the first paragraph as follows:

"'This section shall not be construed as limiting the introduction of any other component evidence bearing upon the question of whether the

person ingested any alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense.'[1]"

2. On page 22, add footnote 10 at the end of the first full paragraph as follows:

"Because evidence is admissible to challenge the ultimate fact of intoxication under the generic DUI statute, and personal partition ratio evidence is relevant to that fact, we hold that a defendant may introduce otherwise admissible evidence of his personal partition ratio in defense of a generic DUI charge.[2]"

3. The last sentence of the first full paragraph on page 24 of the opinion is modified to add the words "for this purpose," and footnote 11 is added at the end of that paragraph, so that the sentence reads as follows:

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[1] The People argue that the word "other," as a modifier of the phrase "competent evidence," was intended to exclude personal partition ratio evidence. The assertion is unsupported. Read in the context of the entire statute, "other competent evidence" refers to competent evidence other than evidence of the statutory partition ratio set forth in subdivision (b) of section 23610. Because a defendant's personal partition ratio is evidence "other" than the statutory partition ratio, it is admissible under the plain language of subdivision (c).

[2] Because it is defendant in this case who sought to introduce partition ratio evidence to prove his innocence, our holding is stated in this context. We do not suggest, as the People contend, that our holding would permit the defendant, but not the People, to introduce a defendant's personal partition ratio into evidence. Because the question is not before us, we express no view as to whether the People can introduce a defendant's personal partition ratio as evidence of guilt.

"General partition ratio evidence does not, we conclude, have any bearing upon whether the defendant in a particular case was under the influence. It is therefore irrelevant and inadmissible for this purpose.[3]"

Except for these modifications, the opinion remains unchanged. These modifications do not effect a change in the judgment.

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/s/ King
J.

I concur:

/s/ Ramirez
P.J.

[3] As the People point out, evidence of a defendant's personal partition ratio may, as a practical matter, require foundational testimony concerning the general nature of partition ratios. We do not hold, as the People suggest, that testimony regarding general partition ratios cannot be presented for such purposes. (See, e.g., Evid. Code, § 801, subd. (b) [expert testimony can be based on matter "whether or not admissible"].) Rather, we hold merely that general partition ratio evidence is not relevant or admissible on the issue of whether the defendant was or was not intoxicated. Whether general partition ratio evidence may be admissible for other purposes is not before us.