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of ineligibility for a license, permit or privilege to drive for an additional year.

Suspensions and revocations under this section must run consecutively.

Sec. 26. NRS 50.315 is hereby amended to read as follows:

50.315 *1.* Whenever any person has qualified in the district court of any county as an expert witness for the purpose of testifying regarding the presence in the blood or urine of a person of alcohol [or] , a controlled substance [the] *whose* use or possession [of which] is regulated by chapter 453 of NRS, *or a chemical, poison or organic solvent,* or the identity of a controlled substance alleged to have been in the possession of a person, [the affidavit of such person] *the expert's affidavit* is admissible in evidence in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district [for the purpose of proving] *to prove the identity of* the person from whom the affiant received the blood or urine or purported controlled substance for analysis and the presence or absence of alcohol or *a* controlled substance, *chemical, poison or organic solvent,* as the case may be.

2. Whenever a person withdraws a sample of blood from another for the purpose of analysis by an expert as mentioned in subsection 1, the affidavit of the person who withdraws the sample is admissible in any court in any criminal proceeding to prove the occupation of the affiant, the identity of the person from whom the affiant withdrew the sample, the fact that the affiant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another and the person to whom the affiant delivered it.

3. Whenever a person receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent, the affidavit of the person who receives the sample or other evidence may be admitted in any court in any criminal proceeding to prove the occupation of the affiant, the facts that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another, and the identity of the person to whom the affiant delivered it.

Sec. 27. NRS 50.325 is hereby amended to read as follows:

50.325 1. Whenever a person is charged with an offense punishable under chapters 453 or 484 of NRS *or homicide resulting from driving a vehicle while under the influence of intoxicating liquor or a controlled substance as defined in chapter 453 of NRS, or a chemical, poison or organic solvent,* and it is necessary to prove the existence of any alcohol or the existence or identity of a controlled substance [as defined in chapter 453 of NRS,] , *chemical, poison or organic solvent,* the district attorney or city attorney may request that the affidavit of [a person qualified as provided] *an expert or other person described* in NRS 50.315 be admitted in evidence at the trial of or preliminary examination into the offense.

2. The request must be made at least 10 days prior to the date set for [such] *the* trial *or* examination and must be sent to the defendant's counsel and to the defendant, by registered or certified mail , by the prosecuting attorney.

3. If [such] *the* defendant [,] or his counsel [,] notifies the district attorney or city attorney by registered or certified mail at least 96 hours prior to the date set for [such] *the* trial *or* examination that the presence of [such person] *the expert or other person* is demanded, the affidavit must not be admitted. *A defendant who demands the presence of the expert or other person and is convicted of violating NRS 484.379 shall pay the fees and expenses of that witness in court.*

4. If at the trial or preliminary examination the affidavit of an expert *or other person* has been admitted in evidence, and it appears to be in the interest of justice that [such] *the* expert *or other person* be examined or cross-examined in person, the [district] judge or justice of the peace may adjourn the trial or preliminary examination for a period of not to exceed 3 judicial days for the purpose of receiving such testimony. The time within which a preliminary examination or trial is required is extended by the time of [such] *the* adjournment.

Sec. 28. NRS 50.335 is hereby amended to read as follows:

50.335 The affidavit *of an expert* referred to in *subsection 1 of* NRS 50.315 and *in NRS* 50.325 [shall] *must* be substantially in one of the following forms:

1. If the sample contained a controlled substance as defined in chapter 453 of NRS [:] *or a chemical, poison or organic solvent:*

STATE OF NEVADA }
COUNTY OF..... } ss.

....., being first duly sworn, deposes and says: That I am ..... (occupation); that on ..... (date) I qualified before a district judge [of the district court] of this district as a witness qualified to detect the presence and identity in the blood or urine of a person of a controlled substance the use or possession of which is regulated by chapter 453 of NRS [,] *or a chemical, poison or organic solvent,* or the identity of a controlled substance alleged to have been in the possession of a person; that on ..... (date) I obtained certain evidence from ..... bearing Identification No. ..... and consisting of ..... for the purpose of performing a chemical analysis upon the contents thereof; that on ..... (date) I analyzed [such] *the* substance or sample and determined it to be or contain ..... (substance); and that on ..... (date) I replaced the contents in the [above-mentioned evidence] container, sealed [that evidence] *the* container with [an evidence seal(s)] *a seal* bearing my initials .....; [and returned such evidence to .....;] that [such] *the* evidence was in my sole [care and custody from the time it was obtained by me until it was returned to ..... and was] *custody or*

control and remained in substantially the same condition as when it was first obtained by me [.] *until on* ..... *(date) I returned the evidence to* ..... *(name) or that I still have the evidence in my possession.*

.....
Affiant

.....
Title

Subscribed and sworn to before me

this ..... day of ....., 19.....

.....
Notary Public

2. If the sample contained alcohol:

STATE OF NEVADA
} ss.
COUNTY OF.....

....., being first duly sworn, deposes and says: That I am ..... (occupation); that on ..... (date) I qualified before a district judge [of the district court] of this district as a witness qualified to detect the presence of alcohol in the blood or urine of a person; that on ..... (date) I received a *sample of* blood or urine [sample] *bearing Identification No.* ..... from ..... (name); that on ..... (date) I analyzed [such] *the* sample and determined that the blood or urine of the person from whom the sample was taken contained ..... (percent) by weight of alcohol; that *the sample was in my sole custody or control and remained in substantially the same condition as when it was first obtained by me until* on ..... (date) I returned [such] *the* sample to ..... (name) or that I still have [such] *the* sample in my possession.

.....
Affiant

.....
Title

Subscribed and sworn to before me

this ..... day of ....., 19.....

.....
Notary Public

Sec. 29. Chapter 50 of NRS is hereby amended by adding thereto the provisions set forth as sections 30 and 31 of this act.

Sec. 30. *The affidavit which is referred to in subsection 2 of NRS 50.315 and in NRS 50.325 must be substantially in the following form:*

State of Nevada

County of } *ss.*

....., *being first duly sworn, deposes and says: That I am* ..... *(occupation); that on* ..... *(date) I withdrew a sample of blood from a person known to me as* ..... *(name) and affixed to the sample a seal or tag bearing Identification No.* .....; *that the sample was in my sole custody or control and remained in substantially the same condition as when it was first obtained by me until on* ..... *(date) I delivered the sample to* ..... *(name).*

.....
Affiant

.....
Title

Subscribed and sworn to before me

this ..... *day of* ....., *19*.....

.....
Notary Public

Sec. 31. *The affidavit which is referred to in subsection 3 of NRS 50.315 and in NRS 50.325 must be substantially in the following form:*

State of Nevada

County of } *ss.*

....., *being first duly sworn, deposes and says: That I am* ..... *(occupation); that on* ..... *(date) I received certain evidence bearing Identification No.* ..... *from* ..... *(name); that the evidence was in my sole custody or control and remained in substantially the same condition as when it was first obtained by me until on* ..... *(date) I delivered the evidence to* ..... *(name).*

.....
Affiant

.....
Title

Subscribed and sworn to before me

this ..... day of ....., 19.....

.....

Notary Public

Sec. 32. NRS 179.245 is hereby amended to read as follows:

179.245 1. A person who has been convicted of [any] :

(a) Any felony may, after 15 years from the date of his conviction or, if he is imprisoned, from the date of his release from actual custody [, a person who has been convicted of a] ;

(b) Any gross misdemeanor may, after 10 years from the date of his conviction or release from custody [, and a person who has been convicted of a] ;

(c) A violation of NRS 484.379 other than a felony may, after 7 years from the date of his conviction or release from custody; or

(d) Any other misdemeanor may, after 5 years from the date of his conviction or release from custody,

petition the court in which the conviction was obtained for the sealing of all records relating to [such] *the* conviction.

2. The court shall notify the district attorney of the county in which the conviction was obtained, and the district attorney and any person having relevant evidence may testify and present evidence at the hearing on the petition.

3. If after hearing the court finds that, in the [15 years preceding the filing of the petition if the conviction was for a felony, in the 10 years preceding the filing of the petition if the conviction was for a gross misdemeanor, or in the 5 years preceding the filing of the petition, if the conviction was for a misdemeanor,] *period prescribed in subsection 1,* the petitioner has not been arrested, except for minor moving or standing traffic violations, the court may order sealed all records of [such] *the* conviction which are in the custody of the court, of another court in the State of Nevada or of a public or private agency, company or official in the State of Nevada, and may also order all such criminal identification records of the petitioner returned to the file of the court where the proceeding was commenced from, but not limited to, the Federal Bureau of Investigation, the California identification and investigation bureau, sheriffs' offices and all other law enforcement agencies reasonably known by either the petitioner or the court to have possession of such records.

Sec. 33. NRS 458.260 is hereby amended to read as follows:

458.260 1. Except as provided in subsection 2, the use of alcohol, the status of drunkard and the fact of being found in an intoxicated condition are not:

(a) Public offenses and shall not be so treated in any ordinance or resolution of a county, city or town.

(b) Elements of an offense giving rise to a criminal penalty or civil sanction.

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Sec. 7. NRS 484.389 is hereby amended to read as follows:

484.389 1. If a person refuses to submit to a required chemical test provided for in NRS 484.383 or section 2 of Assembly Bill No. 167 of this session, evidence of that refusal is admissible in any criminal or administrative action arising out of acts alleged to have been committed while he was driving a vehicle while under the influence of intoxicating liquor or a controlled substance.

2. Except as provided in subsection 4 of section 2 of Assembly Bill No. 167 of this session, a court or hearing officer may not exclude evidence of a required test or failure to submit to such a test if the police officer or other person substantially complied with the provisions of NRS 484.383 to 484.393, inclusive, and section 2 of Assembly Bill No. 167 of this session.

3. If a person submits to such a test, full information concerning that test must be made available, upon his request, to him or his attorney.

4. Evidence of a required test is not admissible in a criminal or administrative proceeding unless it is shown by documentary or other evidence that the law enforcement agency calibrated the testing device and otherwise maintained it as required by the regulations of the committee on testing for intoxication.

Sec. 7.5. Section 17.5 of Assembly Bill No. 167 of the 62nd session of the Nevada legislature is hereby amended to read as follows:

484.393 1. The results of any blood test administered under the provisions of NRS 484.383 or 484.391 are not admissible in any hearing or criminal action arising out of the acts alleged to have been committed while a person was under the influence of intoxicating liquor or a controlled substance unless:

(a) The blood tested was withdrawn by a physician, registered nurse, licensed practical nurse, advanced emergency medical technician-ambulance or a technician employed in a medical laboratory; and

(b) The test was performed on whole blood [.] *, except if the sample was clotted when it was received by the laboratory, the test may be performed on blood serum or plasma.*

2. The limitation contained in paragraph (a) of subsection 1 does not apply to the taking of a chemical test of the urine, breath or other bodily substance.

3. No physician, registered nurse, licensed practical nurse, advanced emergency medical technician-ambulance or technician incurs any civil or criminal liability as a result of the administering of a blood test when requested by a police officer or the person to be tested to administer such test.

Sec. 8. NRS 50.315 is hereby amended to read as follows:

50.315 *1.* Whenever any person has qualified in the district court

of any county as an expert witness for the purpose of testifying regarding the presence in the blood or urine of a person of alcohol, a controlled substance whose use or possession is regulated by chapter 453 of NRS, or a chemical, poison or organic solvent, or the identity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove the identity of the person from whom the affiant received the blood or urine or purported controlled substance for analysis and the *amount of alcohol or the* presence or absence of [alcohol or] a controlled substance, chemical, poison or organic solvent, as the case may be.

2. [Whenever a person withdraws a sample of blood from another for the purpose of analysis by an expert as mentioned in subsection 1, the affidavit of the person who withdraws the sample is admissible in any court in any criminal proceeding to prove the occupation of the affiant, the identity of the person from whom the affiant withdrew the sample, the fact that the affiant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another and the person to whom the affiant delivered it.

3. Whenever a person receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent, the affidavit of the person who receives the sample or other evidence may be admitted in any court in any criminal proceeding to prove the occupation of the affiant, the facts that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another, and the identity of the person to whom the affiant delivered it.] *A person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:*

(a) That he has been certified by the director of the department of motor vehicles as being competent to operate devices of a type which have been certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath, blood or urine to determine the amount by weight of alcohol in his blood;

(b) The identity of a person from whom the affiant obtained a sample of breath, blood or urine;

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly; and

(d) The amount of alcohol that he found in the person's blood.

3. The affidavit of a person who prepared a chemical solution or gas which has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That he prepared a solution or gas having the chemical composition which is specified by the manufacturer of the device as necessary for accurately calibrating it; and

(c) The name of the law enforcement agency or laboratory to which he delivered the solution or gas.

4. The affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated such a device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

5. The affidavit of a person who withdraws a sample of blood from another for the purpose of analysis by an expert as mentioned in subsection 1 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The identity of the person from whom the affiant withdrew the sample;

(c) The fact that the affiant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The person to whom the affiant delivered it.

6. The affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

7. The committee on testing for intoxication shall adopt regulations which prescribe the form of the affidavits described in this section.

Sec. 9. NRS 50.325 is hereby amended to read as follows:

50.325 1. Whenever a person is charged with an offense punishable under chapters 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor or a controlled substance as defined in chapter 453 of NRS, or a chemical,

poison or organic solvent, and it is necessary to prove the existence of any alcohol or the existence or identity of a controlled substance, chemical, poison or organic solvent, the [district attorney or city] *prosecuting* attorney may request that the affidavit of an expert or other person described in NRS 50.315 be admitted in evidence at the trial [of or preliminary examination into] *or hearing concerning* the offense.

2. The request must be made at least 10 days [prior to] *before* the date set for the trial or [examination] *hearing* and must be sent to the defendant's counsel and to the defendant, by registered or certified mail, by the prosecuting attorney.

3. If the defendant or his counsel notifies the [district attorney or city] *prosecuting* attorney by registered or certified mail at least 96 hours [prior to] *before* the date set for the trial or [examination] *hearing* that the presence of the expert or other person is demanded, the affidavit must not be admitted. A defendant who demands the presence of the expert or other person and is convicted of violating NRS 484.379 *or a provision of chapter 484 of NRS for which a driver's license may be revoked* shall pay the fees and expenses of that witness [in court.] *at the trial or hearing.*

4. If at the trial or [preliminary examination] *hearing* the affidavit of an expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge [or] , justice of the peace *or hearing officer* may adjourn the trial or [preliminary examination] *hearing* for a period of not to exceed 3 judicial days for the purpose of receiving such testimony. The time within which a preliminary examination or trial is required is extended by the time of the adjournment.

Sec. 10. NRS 172.135 is hereby amended to read as follows:

172.135 1. In the investigation of a charge, for the purpose of either presentment or indictment, the grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them [,] or furnished by legal documentary evidence [,] or *by* the deposition of witnesses taken as provided in this Title, except that the grand jury may receive an affidavit [in the form prescribed in NRS 50.335] from an expert witness [qualified pursuant to] *or other person described in* NRS 50.315 in lieu of his personal testimony or deposition.

2. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Sec. 11. NRS 50.335 and sections 29 to 31, inclusive, of Assembly Bill No. 167 of the 62nd session of the Nevada legislature are hereby repealed.

Sec. 12. 1. This section and the provisions of sections 2 to 5, inclusive, and section 8 of this act respecting the adoption of regulations and the certification of devices, persons who operate or calibrate

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Office Department] *United States Postal Service* stating that the defendant refused to accept delivery or could not be located, or that the address was insufficient, and the plaintiff's affidavit of compliance therewith are attached to the original process and returned and filed in the action in which it was issued. Personal service of notice and a copy of the process upon the defendant, wherever found outside of this state, by any person qualified to serve like process in the State of Nevada is the equivalent of mailing, and may be proved by the affidavit of the person making [such] *the* personal service appended to the original process and returned and filed in the action in which it was issued.

3. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

4. The fee of $5 paid by the plaintiff to the director of the department of motor vehicles *and public safety* at the time of the service must be taxed in his costs if he prevails in the suit. The director of the department of motor vehicles *and public safety* shall keep a record of all service of process, *including* the day and hour of service.

5. The foregoing provisions of this section with reference to the service of process upon an operator defendant are not exclusive, [but] *except* if the operator defendant is found within the State of Nevada , he must be served with process in the State of Nevada.

6. The provisions of this section apply to nonresident motorists and to resident motorists who have left the state or cannot be found within the state following an accident which is the subject of an action for which process is served pursuant to this section.

Sec. 110. NRS 50.315 is hereby amended to read as follows:

50.315 1. Whenever any person has qualified in the district court of any county as an expert witness for the purpose of testifying regarding the presence in the blood or urine of a person of alcohol, a controlled substance whose use or possession is regulated by chapter 453 of NRS, or a chemical, poison or organic solvent, or the identity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove the identity of the person from whom the affiant received the blood or urine or purported controlled substance for analysis and the amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles *and public safety* as being competent to operate devices of a type which have been certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath, blood or urine to determine the amount by weight of alcohol in his blood;

(b) The identity of a person from whom the affiant obtained a sample of breath, blood or urine;

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly; and

(d) The amount of alcohol that he found in the person's blood.

3. The affidavit of a person who prepared a chemical solution or gas which has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That he prepared a solution or gas having the chemical composition which is specified by the manufacturer of the device as necessary for accurately calibrating it; and

(c) The name of the law enforcement agency or laboratory to which he delivered the solution or gas.

4. The affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated such a device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

5. The affidavit of a person who withdraws a sample of blood from another for [the purpose of] analysis by an expert as mentioned in subsection 1 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The identity of the person from whom the affiant withdrew the sample;

(c) The fact that the affiant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The person to whom the affiant delivered it.

6. The affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

7. The committee on testing for intoxication shall adopt regulations which prescribe the form of the affidavits described in this section.

Sec. 111. NRS 62.221 is hereby amended to read as follows:

62.221 Whenever any child is found to have violated a traffic law or ordinance, the judge, or his duly authorized representative, shall forward to the department of motor vehicles [,] *and public safety,* in the form required by NRS 483.450, a record of [such] *the* violation, other than violation of a law or ordinance governing standing or parking, and may [, in his discretion, do one, some] *do any* or all of the following:

1. Impose a fine.
2. Recommend to the department of motor vehicles *and public safety* the suspension of the child's driver's license.
3. Require that the child attend and complete a traffic survival course.
4. Order that the child or his parents pay the reasonable cost of the child's attending the traffic survival course.
5. Order the child to be placed on a work detail [in order] to repay any fine imposed.
6. Order the child placed on probation.

Sec. 112. NRS 62.360 is hereby amended to read as follows:

62.360 1. The court shall make and keep records of all cases brought before it.

2. The records may be opened to inspection only by order of the court to persons having a legitimate interest therein except that a release without a court order may be made of any:

(a) Records of traffic violations which are being forwarded to the department of motor vehicles [;] *and public safety;* and

(b) Records which have not been sealed and are required by the department of parole and probation for preparation of presentence reports pursuant to NRS 176.135.

3. The clerk of the court shall prepare and cause to be printed forms for social and legal records and other papers as may be required.

4. Whenever the conduct of a juvenile with respect to whom the jurisdiction of the juvenile court has been invoked may be the basis of a civil action, any party to the civil action may petition the court for release of the child's name, and upon satisfactory showing to the court that the purpose in obtaining the information is for use in a civil action brought or to be brought in good faith, the court shall order the release of the child's name and authorize its use in the civil action.

Sec. 113. NRS 108.310 is hereby amended to read as follows:

108.310 Subject to the provisions of NRS 108.315, the lien created in NRS 108.270 to 108.360, inclusive, may be satisfied as follows:

1. The lien claimant shall give written notice to the person on whose account the storing, maintaining, keeping, repairing, labor, fuel, supplies, facilities, services or accessories were made, done or given, and to any other person known to have or to claim an interest in the

motor vehicle, aircraft, motorcycle, motor or aircraft equipment, aircraft parts or trailer, upon which the lien is asserted, and to the:

(a) Manufactured housing division of the department of commerce with regard to mobile homes and commercial coaches as defined in chapter 489 of NRS; or

(b) [Motor vehicle registration] *Registration* division of the department of motor vehicles *and public safety* with regard to all other items included in this section.

2. In accordance with the terms of a notice so given, a sale by auction may be had to satisfy any valid claim which has become a lien on the motor vehicle, aircraft, motorcycle, motor or aircraft equipment, aircraft parts or trailer. The sale must be had in the place where the lien was acquired, or, if that place is manifestly unsuitable for the purpose, at the nearest suitable place.

3. After the time for the payment of the claim specified in the notice has elapsed, an advertisement of the sale, describing the motor vehicle, aircraft, motorcycle, motor or aircraft equipment, aircraft parts or trailer to be sold, and stating the name of the owner or person on whose account it is held, and the time and place of the sale, must be published once a week for 2 consecutive weeks, being 3 successive weekly issues, in a newspaper published in the place where the sale is to be held, but if no newspaper is published in that place then in some newspaper published in this state and having a general circulation in that place. The sale must not be held less than 15 days [from] *after* the time of the first publication.

4. From the proceeds of the sale the lien claimant who furnished the services, labor, fuel, accessories, facilities or supplies shall satisfy his lien, including the reasonable charges of notice, advertisement and sale. The balance, if any, of the proceeds must be delivered, on demand, to the person to whom he would have been bound to deliver, or justified in delivering, the motor vehicle, aircraft, motorcycle, motor or aircraft equipment, aircraft parts or trailer.

Sec. 114. NRS 108.315 is hereby amended to read as follows:

108.315 1. Any keeper of a trailer park who desires to enforce a lien for unpaid rent or rent and utilities under the provisions of NRS 108.270 to 108.360, inclusive, shall, within 15 days after the rent is 30 days past due, make a demand in writing upon the registered owner of the trailer, for the amount due, stating that a lien is claimed on the trailer. A copy of the demand must be sent to every holder of a security interest in the trailer by registered or certified mail.

2. For the purpose of obtaining the name and address of a holder of a security interest in the trailer, the trailer park keeper shall request that information before making the demand for payment from the:

(a) Manufactured housing division of the department of commerce with regard to mobile homes and commercial coaches as defined in chapter 489 of NRS.

(b) Department of motor vehicles *and public safety* with regard to all other vehicles.

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Sec. 2. **NRS 3.095** is hereby amended to read as follows:

3.095 1. If a district judge at the time of his death had retired and was then receiving a pension under the provisions of NRS 3.090, or if at the time of his death the judge had not retired but had performed sufficient service for retirement under the provisions of NRS 3.090, the surviving spouse, if the spouse has attained the age of 60 years, is entitled, until his death or remarriage, to receive payments of $750 per month.

2. *If a surviving spouse of a judge is not eligible to receive benefits pursuant to subsection 1, he is entitled, until his death or remarriage or until he becomes eligible to receive such benefits, to receive payments equal in amount to the payment provided in subsection 1 of NRS 286.674 for the spouse of a deceased member of the public employees' retirement system.*

3. To obtain these benefits, the surviving spouse must make application to the board, commission or authority entrusted with the administration of the judges' pensions and furnish such information as may be required pursuant to reasonable regulations adopted for the purpose of carrying out the intent of this section.

[3.] *4.* It is the intent of this section that no special fund be created for the purpose of paying these benefits, and all payments made under the provisions of this section are to be made out of and charged to any fund created for the purpose of paying pension benefits to district judges.

Sec. 3. The surviving spouse of a justice of the supreme court or district judge who died before July 1, 1987, is entitled to receive the benefits provided in this act, beginning July 1, 1987.

Assembly Bill No. 609--Committee on Judiciary

CHAPTER 352

AN ACT relating to witnesses; limiting the matters provable by the affidavits of certain experts as to the presence of alcohol or a controlled substance; and providing other matters properly relating thereto.

[Approved June 8, 1987]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. **NRS 50.315** is hereby amended to read as follows:

50.315 1. Whenever any person has qualified in the district court of any county as an expert witness for the purpose of testifying regarding the presence in the blood or urine of a person of alcohol, a controlled substance whose use or possession is regulated by chapter 453 of NRS, or a chemical, poison or organic solvent, or the identity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence *in an administrative proceeding or* in a criminal trial in the

district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove the identity of the person from whom the affiant received the blood or urine or purported controlled substance for analysis and the amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type which have been certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath, blood or urine to determine the amount by weight of alcohol in his blood;

(b) The identity of a person from whom the affiant obtained a sample of breath, blood or urine;

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly; and

(d) The amount of alcohol that he found in the person's blood.

3. The affidavit of a person who prepared a chemical solution or gas which has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; *and*

(b) That he prepared a solution or gas having the chemical composition which is specified by the manufacturer of the device as necessary for accurately calibrating it . [; and

(c) The name of the law enforcement agency or laboratory to which he delivered the solution or gas.]

4. The affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated such a device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

5. The affidavit of a person who withdraws a sample of blood from another for analysis by an expert as mentioned in subsection 1 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The identity of the person from whom the affiant withdrew the sample;

(c) The fact that the affiant kept the sample in his sole custody or control

and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The person to whom the affiant delivered it.

6. The affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

7. The committee on testing for intoxication shall adopt regulations which prescribe the form of the affidavits described in this section.

Senate Bill No. 253--Committee on Commerce and Labor

CHAPTER 353

AN ACT relating to pharmacy; requiring persons who dispense drugs to comply with the regulations of the state board of pharmacy; requiring practitioners to obtain authorization from the board to dispense controlled substances or dangerous drugs; and providing other matters properly relating thereto.

[Approved June 9, 1987]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 630.306 is hereby amended to read as follows:

630.306 The following acts, among others, constitute grounds for initiating disciplinary action or denying licensure:

1. Inability to practice medicine with reasonable skill and safety because of illness, a mental or physical condition or the use of alcohol, drugs, narcotics or any other substance.

2. Engaging in any conduct:

(a) Which is intended to deceive; [or]

(b) Which the board has determined is a violation of the standards of practice established by regulation of the board [.] *; or*

(c) Which is in violation of a regulation adopted by the state board of pharmacy.

3. Administering, dispensing or prescribing any controlled substance as defined in chapter 453 of NRS, or any dangerous drug as defined in chapter 454 of NRS, to or for himself or to others except as authorized by law.

4. Performing, assisting or advising the injection of any substance

containing liquid silicone into the human body, except for the use of silicone oil to repair a retinal detachment.

5. Practicing or offering to practice beyond the scope permitted by law, or performing services which the licensee knows or has reason to know that he is not competent to perform.

6. Performing, without first obtaining the informed consent of the patient or his family, any procedure or prescribing any therapy which by the current standards of the practice of medicine are experimental.

7. Continual failure to exercise the skill or diligence or use the methods ordinarily exercised under the same circumstances by physicians in good standing practicing in the same specialty or field.

8. Making or filing a report which the licensee or applicant knows to be false or failing to file a record or report as required by law or regulation.

9. Failing to comply with the requirements of NRS 630.254.

10. Habitual intoxication from alcohol or dependency on controlled substances.

11. Failure by a licensee or applicant to report, within 30 days, the revocation, suspension or surrender of his license to practice medicine in another jurisdiction.

12. Failure to be found competent to practice medicine as a result of an examination to determine medical competency pursuant to NRS 630.318.

Sec. 2. NRS 631.3485 is hereby amended to read as follows:

631.3485 The following acts, among others, constitute unprofessional conduct:

1. Willful or repeated violations of the provisions of this chapter;

2. Willful or repeated violations of the regulations of the board of health *, the state board of pharmacy* or [the regulations of] the board of dental examiners; or

3. Failure to pay the fees for a license.

Sec. 3. NRS 633.131 is hereby amended to read as follows:

633.131 1. "Unprofessional conduct" includes:

(a) Willfully making a false or fraudulent statement or submitting a forged or false document in applying for a license to practice osteopathic medicine.

(b) Failure of a licensee to designate his school of practice in the professional use of his name by the term D.O., osteopathic physician or doctor of osteopathy, or by a similar term.

(c) Directly or indirectly giving to or receiving from any person, corporation or other business organization any fee, commission, rebate or other form of compensation for sending, referring or otherwise inducing a person to communicate with an osteopathic physician in his professional capacity or for any professional services not actually and personally rendered, except as provided in subsection 2.

(d) Employing, directly or indirectly, any suspended or unlicensed person in the practice of osteopathic medicine, or the aiding or abetting of any unlicensed person to practice osteopathic medicine.

(e) Advertising the practice of osteopathic medicine in a manner which

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(1) The administrator of the aging services division;

(2) The administrator of the division for review of health resources and osts;

(3) The administrator of the health division;

(4) The administrator of the rehabilitation division;

(5) The state welfare administrator; and

(6) The administrator of the youth services division.

(b) Shall administer, through the divisions of the department, the ovisions of chapters 210, 422 to 427A, inclusive, [431] *432* to 436, clusive, 439 to 443, inclusive, 446, 447, 449, 450, 458 and 615 of NRS, RS 444.003 to 444.430, inclusive, 445.015 to 445.038, inclusive, and all her provisions of law relating to the functions of the divisions of the partment, but is not responsible for the clinical activities of the health vision or the professional line activities of the other divisions.

(c) Has such other powers and duties as are provided by law.

2. The governor shall appoint the administrator of the mental hygiene d mental retardation division.

Sec. 2. NRS 431.103, 431.105, 431.107 are hereby repealed.

Senate Bill No. 480--Committee on Judiciary

CHAPTER 658

AN ACT relating to statutory interpretation; providing a definition of the term "controlled substance" applicable to Nevada Revised Statutes as a whole; and providing other matters properly relating thereto.

[Approved June 18, 1987]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The preliminary chapter of NRS is hereby amended by ding thereto a new section to read as follows:

Except as otherwise expressly provided in a particular statute or required the context, "controlled substance" means a drug, immediate precursor other substance which is listed in schedule I, II, III, IV or V for control the state board of pharmacy pursuant to NRS 453.146.

Sec. 2. NRS 50.315 is hereby amended to read as follows:

50.315 1. Whenever any person has qualified in the district court of y county as an expert witness [for the purpose of testifying] *to testify* garding the presence in the blood or urine of a person of alcohol, a ntrolled substance , [whose use or possession is regulated by chapter 453 NRS,] or a chemical, poison or organic solvent, or the identity of a ntrolled substance alleged to have been in the possession of a person, the

expert's affidavit is admissible in evidence in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove the identity of the person from whom the affiant received the blood or urine or purported controlled substance for analysis and the amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type which have been certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath, blood or urine to determine the amount by weight of alcohol in his blood;

(b) The identity of a person from whom the affiant obtained a sample of breath, blood or urine;

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly; and

(d) The amount of alcohol that he found in the person's blood.

3. The affidavit of a person who prepared a chemical solution or gas which has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That he prepared a solution or gas having the chemical composition which is specified by the manufacturer of the device as necessary for accurately calibrating it; and

(c) The name of the law enforcement agency or laboratory to which he delivered the solution or gas.

4. The affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated such a device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

5. The affidavit of a person who withdraws a sample of blood from another for analysis by an expert as mentioned in subsection 1 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The identity of the person from whom the affiant withdrew the sample;

(c) The fact that the affiant kept the sample in his sole custody or control nd in substantially the same condition as when he first obtained it until elivering it to another; and

(d) The person to whom the affiant delivered it.

6. The affidavit of a person who receives from another a sample of blood r urine or other tangible evidence that is alleged to contain alcohol or a ontrolled substance, chemical, poison or organic solvent may be admitted in ny criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from nother person and kept it in his sole custody or control in substantially the ame condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

7. The committee on testing for intoxication shall adopt regulations hich prescribe the form of the affidavits described in this section.

Sec. 3. NRS 50.325 is hereby amended to read as follows:

50.325 1. Whenever a person is charged with an offense punishable nder chapters] *pursuant to chapter* 453 or 484 of NRS or homicide sulting from driving a vehicle while under the influence of intoxicating quor , [or] a controlled substance [as defined in chapter 453 of NRS,] or a emical, poison or organic solvent, and it is necessary to prove the istence of any alcohol or the existence or identity of a controlled bstance, chemical, poison or organic solvent, the prosecuting attorney may quest that the affidavit of an expert or other person described in NRS).315 be admitted in evidence at the trial or preliminary hearing concerning e offense.

2. The request must be made at least 10 days before the date set for the al or preliminary hearing and must be sent to the defendant's counsel and the defendant, by registered or certified mail by the prosecuting attorney.

3. If the defendant or his counsel notifies the prosecuting attorney by gistered or certified mail at least 96 hours before the date set for the trial preliminary hearing that the presence of the expert or other person is manded, the affidavit must not be admitted. A defendant who demands the esence of the expert or other person and is convicted of violating NRS 4.379 or a provision of chapter 484 of NRS for which a driver's license ay be revoked shall pay the fees and expenses of that witness at the trial or eliminary hearing.

4. If at the trial or preliminary hearing the affidavit of an expert or other rson has been admitted in evidence, and it appears to be in the interest of stice that the expert or other person be examined or cross-examined in rson, the judge or justice of the peace may adjourn the trial or hearing for period of not to exceed 3 judicial days [for the purpose of receiving such] *receive the* testimony. The time within which a preliminary hearing or al is required is extended by the time of the adjournment.

Sec. 4. NRS 52.395 is hereby amended to read as follows:

52.395 1. When any substance alleged to be a controlled substance [as defined in chapter 453 of NRS] is seized from a defendant by a peace officer, the law enforcement agency of which [such] *the* officer is a member may, with the prior approval of the prosecuting attorney, petition the district court in the county in which the defendant is charged to secure permission to destroy a part of [such] *the* substance.

2. Upon receipt of a petition filed pursuant to subsection 1, the district court shall order the substance to be accurately weighed and the weight thereof accurately recorded. [Both the] *The* prosecuting attorney or his representative and the defendant or his representative [shall] *must* be allowed to inspect and weigh the substance.

3. If after completion of the weighing process the defendant does not knowingly and voluntarily stipulate to the weight of the substance, the district court shall hold a hearing to make a judicial determination of the weight of such substance. The defendant, his attorney and any other witness the defendant may designate may be present and testify at such hearing.

4. After a determination has been made as to the weight of the substance, the district court may order all of the substance destroyed except that amount which is reasonably necessary to enable each interested party to analyze the substance to determine the composition of [such] *the* substance. The district court shall order the remaining sample to be sealed and maintained for analysis [prior to] *before* trial.

5. If the substance is finally determined not to be a controlled substance, the owner may file a claim against the county to recover the reasonable value of the property destroyed pursuant to this section.

6. The district court's finding as to the weight of a substance destroyed pursuant to this section is admissible in any subsequent proceeding arising out of the same transaction.

Sec. 5. NRS 129.050 is hereby amended to read as follows:

129.050 1. Any minor who is under the influence of, or suspected of being under the influence of, a controlled substance [as defined by chapter 453 of NRS, or a dangerous or hallucinogenic drug:]

(a) May give express consent; or

(b) If unable to give express consent, shall be deemed to consent,

to the furnishing of hospital, medical, surgical or other care for the treatment of abuse of drugs or related illnesses by any public or private hospital, medical facility, facility for the dependent or any licensed physician, and the consent of the minor is not subject to disaffirmance because of minority.

2. Immunity from civil or criminal liability extends to any physician or other person rendering care or treatment pursuant to subsection 1, in the absence of negligent diagnosis, care or treatment.

3. The consent of the parent or the legal guardian of the minor is not necessary to authorize such care, but any physician who treats a minor pursuant to this section shall make every reasonable effort to report the fact of treatment to the parent or parents or legal guardian within a reasonable time after treatment.

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Sec. 67. Section 1 of Assembly Bill No. 609 of this session is hereby amended to read as follows:

Section 1. NRS 50.315 is hereby amended to read as follows:

50.315 1. Whenever any person has qualified in the district court of any county as an expert witness to testify regarding the presence in the blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence *in an administrative proceeding or* in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove the identity of the person from whom the affiant received the blood or urine or purported controlled substance for analysis and the amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type which have been certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath, blood or urine to determine the amount by weight of alcohol in his blood;

(b) The identity of a person from whom the affiant obtained a sample of breath, blood or urine;

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly; and

(d) The amount of alcohol that he found in the person's blood.

3. The affidavit of a person who prepared a chemical solution or gas which has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; *and*

(b) That he prepared a solution or gas having the chemical composition which is specified by the manufacturer of the device as necessary for accurately calibrating it . [; and

(c) The name of the law enforcement agency or laboratory to which he delivered the solution or gas.]

4. The affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated such a device at a named law enforcement agency by using the procedures and equipment

prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

5. The affidavit of a person who withdraws a sample of blood from another for analysis by an expert as mentioned in subsection 1 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The identity of the person from whom the affiant withdrew the sample;

(c) The fact that the affiant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The person to whom the affiant delivered it.

6. The affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

7. The committee on testing for intoxication shall adopt regulations which prescribe the form of the affidavits described in this section.

Sec. 68. **NRS 453.041, 484.376 and 639.0055** are hereby repealed.

Sec. 69. This act shall become effective upon passage and approval.

Assembly Bill No. 859--Committee on Government Affairs

CHAPTER 659

AN ACT relating to administrative regulations; temporarily revising the procedure for adoption of administrative regulations; ratifying the adoption of the administrative regulations in the Nevada Administrative Code; and providing other matters properly relating thereto.

[Approved June 18, 1987]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. **Chapter 233B of NRS** is hereby amended by adding thereto a new section to read as follows:

The Nevada Administrative Code as most recently revised or supplemented before May 15, 1987, and the text of those regulations which have been prepared by the legislative counsel for inclusion in the Nevada Administrative Code on or before May 15, 1987, but have not been included, are hereby ratified.

Sec. 2. NRS 233B.066 is hereby amended to read as follows:

233B.066 Each adopted regulation which is [to be submitted to the legislative commission for review] *filed with the secretary of state* must be accompanied by a statement concerning the regulation which contains the following information:

1. A description of how public comment was solicited, a summary of public response, and an explanation how other interested persons may obtain a copy of the summary.

2. A description of how comment was solicited from affected businesses, a summary of their response, and an explanation how other interested persons may obtain a copy of the summary.

3. The estimated economic effect of the regulation on the business which it is to regulate and on the public. These must be stated separately, and in each case must include:

(a) Both adverse and beneficial effects; and

(b) Both immediate and long-term effects.

4. The estimated cost to the agency for enforcement of the proposed regulation.

5. A description of any regulations of other state or government agencies which the proposed regulation overlaps or duplicates and a statement explaining why the duplication or overlapping is necessary.

Sec. 3. NRS 233B.067 is hereby amended to read as follows:

233B.067 1. After adopting a regulation, the agency shall submit an original and four copies of each regulation adopted, except an emergency regulation or a temporary regulation, to the director of the legislative counsel bureau for review by the legislative commission, which may refer it to a joint interim committee, to determine whether the regulation conforms to the statutory authority under which it was adopted and whether the regulation carries out the intent of the legislature in granting that authority. The director shall have endorsed on the original and duplicate copies of each adopted regulation the date of their receipt and shall maintain one copy of the regulation in a file and available for public inspection for 2 years.

2. The legislative commission or the joint interim committee if the commission has referred it to such a committee, shall review the regulation at its next regularly scheduled meeting if the regulation is received more than 3 working days before the meeting and a regular meeting is held within 35 days after receipt of the regulation. The commission may appoint a committee composed of three or more members of the commission or any joint interim committee to examine proposed regulations received more than 35 days before a regular meeting is scheduled to be held. [If the commission or committee does not object to a regulation within 35 days after its receipt,

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Senate Bill No. 68—Committee on Judiciary

CHAPTER 44

AN ACT relating to witnesses; permitting the affidavit of an expert to be used in lieu of his testimony in certain proceedings for the purpose of establishing the quantity of a controlled substance; and providing other matters properly relating thereto.

[Approved March 29, 1989]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 50.315 is hereby amended to read as follows:

50.315 1. [Whenever any] *If a* person has qualified in the district court of any county as an expert witness to testify regarding the presence in the blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity *or quantity* of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence in an administrative proceeding or in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove [the] *:*

(a) The identity of the person from whom the affiant received the blood or urine or purported controlled substance for analysis *;*

(b) The quantity of the purported controlled substance; and [the]

(c) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type [which have been] certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath, blood or urine to determine the amount by weight of alcohol in his blood;

(b) The identity of a person from whom the affiant obtained a sample of breath, blood or urine;

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly; and

(d) The amount of alcohol that he found in the person's blood.

3. The affidavit of a person who prepared a chemical solution or gas [which] *that* has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; and

(b) That he prepared a solution or gas having the chemical composition [which is] specified by the manufacturer of the device as necessary for accurately calibrating it.

4. The affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated such a device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

5. The affidavit of a person who withdraws a sample of blood from another for analysis by an expert as mentioned in subsection 1 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The identity of the person from whom the affiant withdrew the sample;

(c) The fact that the affiant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The person to whom the affiant delivered it.

6. The affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

7. The committee on testing for intoxication shall adopt regulations [which prescribe] *prescribing* the form of the affidavits described in this section.

Sec. 2. NRS 50.325 is hereby amended to read as follows:

50.325 1. [Whenever] *If* a person is charged with an offense punishable pursuant to chapter 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor, a controlled substance or a chemical, poison or organic solvent, and it is necessary to prove [the] :

(a) The existence of any alcohol [or the] ;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison or organic solvent,

the prosecuting attorney may request that the affidavit of an expert or other person described in NRS 50.315 be admitted in evidence at the trial or preliminary hearing concerning the offense.

2. The request must be made at least 10 days before the date set for the trial or preliminary hearing and must be sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney.

3. If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for the trial or preliminary hearing that the presence of the expert or other person is demanded, the affidavit must not be admitted. A defendant who demands the

presence of the expert or other person and is convicted of violating NRS 484.379 or a provision of chapter 484 of NRS for which a driver's license may be revoked shall pay the fees and expenses of that witness at the trial or preliminary hearing.

4. If at the trial or preliminary hearing the affidavit of an expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge or justice of the peace may adjourn the trial or hearing for a period of not to exceed 3 judicial days to receive the testimony. Should 3 judicial days not be sufficient in a county whose population is less than 25,000 to provide the presence of the expert or other person to be examined or cross-examined, the judge, justice of the peace or hearing officer may extend the period of adjournment for a period not exceeding 10 days. The time within which a preliminary hearing or trial is required is extended by the time of the adjournment.

Assembly Bill No. 28—Assemblymen Thompson, Bergevin, Spinello, McGaughey, DuBois, Fay, Regan, Diamond, Callister, Adler, Chowning, Jeffrey, Carpenter, Sheerin, Dini, Schofield, Wendell Williams, Porter, Sedway, Bogaert, Kerns, Price, Sader, Lambert, Garner and Kissam

CHAPTER 45

AN ACT relating to trade practices; prohibiting certain methods of solicitation by telephone; providing a penalty; and providing other matters properly relating thereto.

[Approved March 29, 1989]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 598 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided in subsection 2, a person shall not use an automatic system to select and dial telephone numbers to play automatically a recorded message to:

(a) Solicit a person to purchase goods or services; or

(b) Request information for a survey if that information is to be used directly to solicit a person to purchase goods or services.

2. This section does not prohibit the use of an automatic system to dial the number of and play a recorded message to a person with whom the system's owner has a preexisting business relationship.

3. A person who violates this section is guilty of a misdemeanor.

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Assembly Bill No. 85—Committee on Judiciary

CHAPTER 52

AN ACT relating to witnesses; allowing a declaration made under the penalty of perjury by a person who withdraws a sample of blood from another for analysis to be admitted in a criminal or administrative proceeding to prove certain facts; and providing other matters properly relating thereto.

[Approved April 14, 1993]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 50.315 is hereby amended to read as follows:

50.315 1. If a person has qualified in the district court of any county as an expert witness to testify regarding the presence in the blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence in an administrative proceeding or in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove:

(a) The identity of the person from whom the affiant received the blood or urine or purported controlled substance for analysis;

(b) The quantity of the purported controlled substance; and

(c) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath, blood or urine to determine the amount by weight of alcohol in his blood;

(b) The identity of a person from whom the affiant obtained a sample of breath, blood or urine;

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly; and

(d) The amount of alcohol that he found in the person's blood.

3. The affidavit of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; and

(b) That he prepared a solution or gas having the chemical composition specified by the manufacturer of the device as necessary for accurately calibrating it.

4. The affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his blood is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated such a device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

5. The affidavit *or declaration made under the penalty of perjury* of a person who withdraws a sample of blood from another for analysis by an expert as mentioned in subsection 1 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant [;] *or declarant;*

(b) The identity of the person from whom the affiant *or declarant* withdrew the sample;

(c) The fact that the affiant *or declarant* kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The *identity of the* person to whom the affiant *or declarant* delivered it.

6. The affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

7. The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits *and declarations* described in this section.

Sec. 2. NRS 50.325 is hereby amended to read as follows:

50.325 1. If a person is charged with an offense punishable pursuant to chapter 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor, a controlled substance or a chemical, poison or organic solvent, and it is necessary to prove:

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison or organic solvent,

the prosecuting attorney may request that the affidavit *or declaration* of an expert or other person described in NRS 50.315 be admitted in evidence at the trial or preliminary hearing concerning the offense.

2. The request must be made at least 10 days before the date set for the trial or preliminary hearing and must be sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney.

3. If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for the trial or preliminary hearing that the presence of the expert or other person is demanded, the affidavit *or declaration* must not be admitted. A defendant who demands the presence of the expert or other person and is convicted of

violating NRS 484.379 or a provision of chapter 484 of NRS for which a driver's license may be revoked shall pay the fees and expenses of that witness at the trial or preliminary hearing.

4. If at the trial or preliminary hearing the affidavit *or declaration* of an expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge or justice of the peace may adjourn the trial or hearing for a period [of] not to exceed 3 judicial days to receive the testimony. [Should] *If* 3 judicial days *are* not [be] sufficient in a county whose population is less than 35,000 to provide the presence of the expert or other person to be examined or cross-examined, the judge, justice of the peace or hearing officer may extend the period of adjournment for a period not exceeding 10 days. The time within which a preliminary hearing or trial is required is extended by the time of the adjournment.

Sec. 3. NRS 172.135 is hereby amended to read as follows:

172.135 1. In the investigation of a charge, for the purpose of either presentment or indictment, the grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them or furnished by legal documentary evidence or by the deposition of witnesses taken as provided in this Title, except that the grand jury may receive an affidavit *or declaration* from an expert witness or other person described in NRS 50.315 in lieu of his personal testimony or deposition.

2. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Assembly Bill No. 101—Committee on Taxation

CHAPTER 53

AN ACT relating to taxation; authorizing the department of taxation to reduce or waive the payment of interest owed for the nonpayment of certain taxes; authorizing the department to reduce the amount of a penalty it imposed for the nonpayment of certain taxes; and providing other matters properly relating thereto.

[Approved April 14, 1993]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 360.419 is hereby amended to read as follows:

360.419 1. The department may, for good cause shown, waive *or reduce* the payment of [a] *the interest or* penalty *, or both,* on any tax which is owed to the state or to a county by any person. *The department shall, upon the request of any person, disclose the:*

(a) Name of the person whose interest or penalty was waived or reduced; and

(b) Amount so waived or the amount of the reduction.

2. This section applies to all taxes imposed under this Title except for those imposed pursuant to chapter 364, 366, 371 or 375 of NRS.

Sec. 2. This act becomes effective upon passage and approval.

Assembly Bill No. 133—Committee on Government Affairs

CHAPTER 54

AN ACT relating to cities; authorizing the annexation of a portion of an unincorporated town by a city under certain circumstances if the annexation is approved by the governing body of the unincorporated town; and providing other matters properly relating thereto.

[Approved April 14, 1993]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 268.580 is hereby amended to read as follows:

268.580 *1.* The governing body of any city may extend the corporate limits of [such] *the* city to include any territory which meets the general standards of subsection [1] *2* and every part of which meets the requirements of [either subsection 2, 3, 4 or 5.

1.] *subsection 3, 4, 5 or 6.*

2. The total area proposed to be annexed must meet the following standards:

(a) It must be contiguous to the annexing city's boundaries at the time the annexation proceedings are instituted.

(b) Not less than one-eighth of the aggregate external boundaries must be contiguous to the boundaries of the annexing city.

(c) No part of the territory proposed to be annexed may be included within the boundaries of another incorporated city [or] *as those boundaries exist on July 1, 1983.*

(d) No part of the territory proposed to be annexed may be included within the boundaries of any unincorporated town as those boundaries exist on July 1, 1983 [.

2.] *, without the prior approval of the governing body of the unincorporated town in which the territory is located.*

3. All of the territory proposed to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

(a) Has a total resident population density of two or more persons per acre of land included within its boundaries;

(b) Has a total resident population density of one or more persons per acre of land included within its boundaries, and is subdivided or parceled, through separate ownerships, into lots or parcels such that at least 60 percent of the total acreage consists of lots and parcels 5 acres or less in size and such that at least 60 percent of the total number of lots and parcels are 1 acre or less in size; or

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breath to determine the percent by weight of alcohol in the person's [blood.] *breath.*

5. A court shall take judicial notice of the certification by the director of the department of motor vehicles and public safety of a person to operate testing devices of one of the certified types. If a test to determine the amount of alcohol in a person's [blood] *breath* has been performed with a certified type of device by a person who is certified pursuant to NRS 484.3886 [,] *or section 1 of this act,* it is presumed that the person operated the device properly.

6. This section does not preclude the admission of evidence of a test of a person's breath [, blood or urine] where the:

(a) Information is obtained through the use of a device other than one of a type certified by the committee on testing for intoxication.

(b) Test has been performed by a person other than one who is certified by the director of the department of motor vehicles and public safety.

Sec. 15. NRS 488.213 is hereby amended to read as follows:

488.213 If:

1. A manufacturer or technician in a laboratory prepares a chemical solution or gas to be used in calibrating a device for testing a person's breath [, blood or urine] to determine the percent by weight of alcohol in his [blood;] *breath;* and

2. The [manufacturer certifies or the] technician makes an affidavit that the solution or gas has the chemical composition that is [specified by the manufacturer of such a device as] necessary for calibrating the device,

it is presumed that the solution or gas has been properly prepared and is suitable for calibrating the device.

Sec. 16. NRS 50.315 is hereby amended to read as follows:

50.315 1. If a person has qualified in the district court of any county as an expert witness to testify regarding the presence in the *breath,* blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence in an administrative proceeding or in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove:

(a) [The identity of the person from whom the affiant received the blood or urine or purported controlled substance for analysis;

(b)] The quantity of the purported controlled substance; and

[(c)] *(b)* The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath [, blood or urine] to determine the amount by weight of alcohol in his [blood;] *breath;*

(b) The identity of a person from whom the affiant obtained a sample of breath ; [, blood or urine;]

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly; and

(d) The amount of alcohol that he found in the person's [blood.] *breath.*

3. The affidavit of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his [blood] *breath* is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; and

(b) That he prepared a solution or gas having the chemical composition [specified by the manufacturer of the device as] necessary for accurately calibrating it.

4. The affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his [blood] *breath* is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated [such a] *the* device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

5. The affidavit or declaration made under the penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as [mentioned] *set forth* in subsection 1 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The identity of the person from whom the affiant or declarant withdrew the sample;

(c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The identity of the person to whom the affiant or declarant delivered it.

6. The affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

7. The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

Sec. 17. Sections 4, 13 and 16 of this act become effective at 12:01 a.m. on October 1, 1993.

Assembly Bill No. 314—Committee on Government Affairs

CHAPTER 506

AN ACT relating to water; increasing the limit on the assessment for water distribution expenses incurred by the state engineer; making various changes to the hearing process for a permit for the appropriation of public waters; increasing certain fees collected by the state engineer; requiring a quarterly report on the performance of the state engineer's office; and providing other matters properly relating thereto.

[Approved July 9, 1993]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 533.280 is hereby amended to read as follows:

533.280 1. The state engineer shall, between the first Monday of October and the first Monday of December of each year, prepare a budget of the amount of money estimated to be necessary to pay the expenses of the stream system or each water district for the then current year.

2. The budget must show the following detail:

(a) The aggregate amount estimated to be necessary to pay the expenses of the stream system or water district.

(b) The aggregate water rights in the stream system or water district as determined by the state engineer or the court.

(c) The unit charge necessary to provide the money required.

(d) The charge against each water user, which must be based upon the proportion which his water right bears to the aggregate water rights in the stream system, but the minimum charge is $1.

3. When the stream system lies in more than one county, a separate budget must be prepared for each county showing only the claimants and charges assessable within the county.

4. When the stream system irrigates more than 200,000 acres of land, the assessment for water distribution expenses must not exceed [21] *25* cents per acre-foot of water decreed.

Sec. 2. NRS 533.365 is hereby amended to read as follows:

533.365 1. Any person interested may, within 30 days from the date of last publication of the notice of application, file with the state engineer a written protest against the granting of the application, setting forth with reasonable certainty the grounds of such protest, which shall be verified by the affidavit of the protestant, his agent or attorney.

2. On receipt of a protest, the state engineer shall advise the applicant whose application has been protested of the fact that the protest has been filed with him, which advice shall be sent by [registered or] certified mail.

3. The state engineer shall [duly] consider the protest, and may, in his discretion, hold hearings and require the filing of such evidence as he may deem necessary to a full understanding of the rights involved . [; but no hearing thereon shall be had except after due notice by registered or] *The state engineer shall give notice of the hearing by* certified mail to both the applicant and the protestant. The notice [shall give] *must state* the time and place at which the hearing is to be held and [shall] *must* be mailed at least 15 days [prior to] *before* the date set for the hearing.

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2. The state board of education shall adopt regulations to carry out the program. The regulations must prescribe the procedure by which a school district may obtain a waiver from the requirements of the program.

Senate Bill No. 157—Committee on Judiciary

CHAPTER 708

AN ACT relating to expert witnesses; revising the provisions governing the use of an affidavit or declaration in lieu of the testimony of an expert witness as to the existence of alcohol or a controlled substance; and providing other matters properly relating thereto.

[Approved July 7, 1995]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 50 of NRS is hereby amended by adding thereto a new section to read as follows:

1. The affidavit of a chemist and any other person who has qualified in the district court of any county to testify as an expert witness regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, which is submitted to prove:

(a) The quantity of the purported controlled substance; or

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be,

is admissible in the manner provided in this section.

2. An affidavit which is submitted to prove any fact set forth in subsection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a grand jury. The court shall not sustain any objection to the admission of such an affidavit.

3. The defendant may object in writing to admitting into evidence an affidavit submitted to prove any fact set forth in subsection 1 during his trial. If the defendant makes such an objection, the court shall not admit the affidavit into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit.

Sec. 2. NRS 50.315 is hereby amended to read as follows:

50.315 1. [If a person has qualified in the district court of any county as an expert witness to testify regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence in an administrative proceeding or in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove:

(a) The quantity of the purported controlled substance; and

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A] *Except as otherwise provided in subsections 6 and 7, a* person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath to determine the amount by weight of alcohol in his breath;

(b) The identity of a person from whom the affiant obtained a sample of breath; *and*

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly . [; and

(d) The amount of alcohol that he found in the person's breath.

3. The]

2. Except as otherwise provided in subsections 6 and 7, the affidavit of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; and

(b) That he prepared a solution or gas having the chemical composition necessary for accurately calibrating it.

[4. The]

3. Except as otherwise provided in subsections 6 and 7, the affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated the device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

[5. The]

4. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration made under the penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as set forth in [subsection] *section* 1 *of this act* is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The identity of the person from whom the affiant or declarant withdrew the sample;

(c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The identity of the person to whom the affiant or declarant delivered it.

[6. The]

5. Except as otherwise provided in subsections 6 and 7, the affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

6. If, at or before the time of the trial, the defendant establishes that:

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,

the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

7. During any trial in which the defendant has been accused of committing a felony, the defendant may object in writing to admitting into evidence an affidavit or declaration described in this section. If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit or declaration.

[7.] *8.* The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

Sec. 3. NRS 50.325 is hereby amended to read as follows:

50.325 1. If a person is charged with an offense punishable pursuant to chapter 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor, a controlled substance or a chemical, poison or organic solvent, and it is necessary to prove:

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison or organic solvent,

the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 *and section 1 of this act* be admitted [in] *into* evidence at the trial or preliminary hearing concerning the offense. *Except as otherwise provided in NRS 50.315 and section 1 of this act, the affidavit or declaration must be admitted into evidence.*

2. [The] *If the request is to have the affidavit or declaration admitted into evidence at a preliminary hearing or hearing before a grand jury, the affidavit or declaration must be admitted into evidence upon submission. If the request is to have the affidavit or declaration admitted into evidence at trial, the* request must be [made] *:*

(a) Made at least 10 days before the date set for the trial [or preliminary hearing and must be sent] *;*

(b) Sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney [.] *; and*

(c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the affiant or declarant.

3. [If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for the trial or preliminary hearing that the presence of the expert or other person is demanded, the affidavit or declaration must not be admitted. A defendant who demands the presence of the expert or other person and is convicted of violating NRS 484.379 or a provision of chapter 484 of NRS for which a driver's license may be revoked shall pay the fees and expenses of that witness at the trial or preliminary hearing.

4. If at the trial or preliminary hearing the affidavit or declaration of an expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge or justice of the peace may adjourn the trial or hearing for a period not to exceed 3 judicial days to receive the testimony. If 3 judicial days are not sufficient in a county whose population is less than 35,000 to provide the presence of the expert or other person to be examined or cross-examined, the judge, justice of the peace or hearing officer may extend the period of adjournment for a period not exceeding 10 days. The time within which a preliminary hearing or trial is required is extended by the time of the adjournment.] *The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.*

Senate Bill No. 171—Senator Rhoads

CHAPTER 709

AN ACT relating to the cost of litigation; authorizing courts to award as costs to the prevailing party the costs of certain computerized services; and providing other matters properly relating thereto.

[Approved July 7, 1995]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 18.005 is hereby amended to read as follows:

18.005 For the purposes of NRS 18.010 to 18.150, inclusive, the term "costs" means:

1. Clerks' fees.

2. Reporters' fees for depositions, including a reporter's fee for one copy of each deposition.

3. Jurors' fees and expenses, together with reasonable compensation of an officer appointed to act in accordance with NRS 16.120.

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The affidavit *or declaration* must contain the evidentiary foundation upon which the results of the test are based, including the description of the test, the personnel involved and the controls employed in conducting the test.

2. As used in this section:

(a) "Laboratory director" has the meaning ascribed to it in NRS 652.050.

(b) "Medical laboratory" has the meaning ascribed to it in NRS 652.060.

Sec. 2. **NRS 50.315** is hereby amended to read as follows:

50.315 1. Except as otherwise provided in subsections 6 and 7, [a person's] *the* affidavit *or declaration of a person* is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That [he] *the affiant or declarant* has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath to determine the amount by weight of alcohol in his breath;

(b) The identity of a person from whom the affiant *or declarant* obtained a sample of breath; and

(c) That the affiant *or declarant* tested the sample using a device of a type so certified and that the device was functioning properly.

2. Except as otherwise provided in subsections 6 and 7, the affidavit *or declaration* of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The [affiant's occupation;] *occupation of the affiant or declarant;* and

(b) That [he prepared a] *the* solution or gas [having] *has* the chemical composition necessary for accurately calibrating it.

3. Except as otherwise provided in subsections 6 and 7, the affidavit *or declaration* of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The [affiant's occupation;] *occupation of the affiant or declarant;*

(b) That on a specified date [he] *the affiant or declarant* calibrated the device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

4. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration made under the penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as set forth in NRS 50.320 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The identity of the person from whom the affiant or declarant withdrew the sample;

(c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The identity of the person to whom the affiant or declarant delivered it.

5. Except as otherwise provided in subsections 6 and 7, the affidavit *or declaration* of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal , *civil* or administrative proceeding to prove:

(a) The occupation of the affiant [;] *or declarant;*

(b) The fact that the affiant *or declarant* received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant *or declarant* delivered it.

6. If, at or before the time of the trial, the defendant establishes that:

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,

the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

7. During any trial in which the defendant has been accused of committing a felony, the defendant may object in writing to admitting into evidence an affidavit or declaration described in this section. If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit or declaration.

8. The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

Sec. 3. **NRS 50.320** is hereby amended to read as follows:

50.320 1. The affidavit *or declaration* of a chemist and any other person who has qualified in the district court of any county to testify as an expert witness regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, which is submitted to prove:

(a) The quantity of the purported controlled substance; or

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be,

is admissible in the manner provided in this section.

2. An affidavit *or declaration* which is submitted to prove any fact set forth in subsection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a

grand jury. The court shall not sustain any objection to the admission of such an affidavit [.] *or declaration.*

3. The defendant may object in writing to admitting into evidence an affidavit *or declaration* submitted to prove any fact set forth in subsection 1 during his trial. If the defendant makes such an objection, the court shall not admit the affidavit *or declaration* into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit [.] *or declaration.*

Sec. 4. **NRS 616C.230** is hereby amended to read as follows:

616C.230 1. Compensation is not payable pursuant to the provisions of chapters 616A to 616D, inclusive, of NRS for an injury:

(a) Caused by the employee's willful intention to injure himself.

(b) Caused by the employee's willful intention to injure another.

(c) Proximately caused by the employee's intoxication. If the employee was intoxicated at the time of his injury, intoxication must be presumed to be a proximate cause unless rebutted by evidence to the contrary.

(d) Proximately caused by the employee's use of a controlled substance. If the employee had any amount of a controlled substance in his system at the time of his injury for which the employee did not have a current and lawful prescription issued in his name, the controlled substance must be presumed to be a proximate cause unless rebutted by evidence to the contrary.

For the purposes of paragraphs (c) and (d), the affidavit *or declaration* of an expert or other person described in NRS 50.315 is admissible to prove the existence of any alcohol or the existence, quantity or identity of a controlled substance in an employee's system. If the affidavit *or declaration* is to be so used, it must be submitted in the manner prescribed in NRS 616C.355.

2. No compensation is payable for the death, disability or treatment of an employee if his death is caused by, or insofar as his disability is aggravated, caused or continued by, an unreasonable refusal or neglect to submit to or to follow any competent and reasonable surgical treatment or medical aid.

3. If any employee persists in an unsanitary or injurious practice that imperils or retards his recovery, or refuses to submit to such medical or surgical treatment as is necessary to promote his recovery, his compensation may be reduced or suspended.

4. An injured employee's compensation, other than accident benefits, must be suspended if:

(a) A physician or chiropractor determines that the employee is unable to undergo treatment, testing or examination for the industrial injury solely because of a condition or injury that did not arise out of and in the course of his employment; and

(b) It is within the ability of the employee to correct the nonindustrial condition or injury.

The compensation must be suspended until the injured employee is able to resume treatment, testing or examination for the industrial injury. The insurer may elect to pay for the treatment of the nonindustrial condition or injury.

ASSEMBLY BILL NO. 250–ASSEMBLYMAN MANENDO
(BY REQUEST)

MARCH 5, 2009

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to certain affidavits or declarations of experts. (BDR 4-1018)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

~

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to evidence; revising certain provisions governing the admissibility of certain affidavits or declarations; authorizing personal service of a request to have such affidavits or declarations admitted into evidence at certain trials; defining certain terms; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides that if a person is qualified as an expert in a district court in this State, the person's affidavit or declaration regarding the presence in breath, blood or urine of alcohol or certain other substances or regarding the identity or quantity of a controlled substance may be admissible in certain proceedings. **Section 1** of this bill provides that for purposes of determining the admissibility of such affidavits or declarations, the person may be qualified in any court of record in this State, rather than only in a district court in this State. **Section 1** also provides a definition of the term chemist for purposes of the provisions governing the admissibility of such affidavits and declarations. (NRS 50.320)

Section 2 of this bill authorizes a request to have such an affidavit or declaration admitted into evidence at trial for certain offenses to be personally served on the defendant's counsel or the defendant, rather than only sent by registered or certified mail. (NRS 50.325)

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 50.320 is hereby amended to read as follows:

50.320 1. The affidavit or declaration of a chemist and any other person who has qualified in ~~[the district court of any county]~~ ***a court of record in this State*** to testify as an expert witness regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison, organic solvent or another prohibited substance, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, which is submitted to prove:

(a) The quantity of the purported controlled substance; or

(b) The concentration of alcohol or the presence or absence of a controlled substance, chemical, poison, organic solvent or another prohibited substance, as the case may be,

↪ is admissible in the manner provided in this section.

2. An affidavit or declaration which is submitted to prove any fact set forth in subsection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a grand jury. The court shall not sustain any objection to the admission of such an affidavit or declaration.

3. The defendant may object in writing to admitting into evidence an affidavit or declaration submitted to prove any fact set forth in subsection 1 during his trial. If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecuting attorney may cause the person to testify to any information contained in the affidavit or declaration.

4. The Committee on Testing for Intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

5. As used in this section, "chemist" means any person employed in a medical laboratory, pathology laboratory, toxicology laboratory or forensic laboratory whose duties include, without limitation:

(a) The analysis of the breath, blood or urine of a person to determine the presence or quantification of alcohol or a controlled substance, chemical, poison, organic solvent or another prohibited substance; or

(b) Determining the identity or quantity of any controlled substance.

Sec. 2. NRS 50.325 is hereby amended to read as follows:

50.325 1. If a person is charged with an offense listed in subsection 4, and it is necessary to prove:

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison, organic solvent or another prohibited substance,

➥ the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 and 50.320 be admitted into evidence at the preliminary hearing, hearing before a grand jury or trial concerning the offense. Except as otherwise provided in NRS 50.315 and 50.320, the affidavit or declaration must be admitted into evidence at the trial.

2. If the request is to have the affidavit or declaration admitted into evidence at a preliminary hearing or hearing before a grand jury, the affidavit or declaration must be admitted into evidence upon submission. If the request is to have the affidavit or declaration admitted into evidence at trial, the request must be:

(a) Made at least 10 days before the date set for the trial;

(b) Sent to the defendant's counsel and to the defendant, by registered or certified mail ~~[by the prosecuting attorney;]~~ ***, or personally served on the defendant's counsel or the defendant;*** and

(c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the affiant or declarant.

3. The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.

4. The provisions of this section apply to any of the following offenses:

(a) An offense punishable pursuant to NRS 202.257, 455A.170, 455B.080, 493.130 or 639.283.

(b) An offense punishable pursuant to chapter 453, 484 or 488 of NRS.

(c) A homicide resulting from driving, operating or being in actual physical control of a vehicle or a vessel under power or sail while under the influence of intoxicating liquor or a controlled substance or resulting from any other conduct prohibited by NRS 484.379, 484.3795, 484.37955, subsection 2 of NRS 488.400, NRS 488.410, 488.420 or 488.425.

(d) Any other offense for which it is necessary to prove, as an element of the offense:

(1) The existence of any alcohol;

(2) The quantity of a controlled substance; or

(3) The existence or identity of a controlled substance, chemical, poison, organic solvent or another prohibited substance.

AB250

Introduced in the Assembly on Mar 05, 2009.

By: (**Bolded** name indicates primary sponsorship)
Manendo

Revises provisions relating to certain affidavits or declarations of experts. (BDR 4-1018)

Fiscal Notes
Effect on Local Government: No.
Effect on State: No.

Most Recent History Action: Approved by the Governor. Chapter 16.
(See full list below)

Upcoming Hearings

Past Hearings

Assembly Judiciary	Mar. 16, 2009	08:00 AM	**Minutes**	Do pass
Senate Judiciary	Apr. 14, 2009	08:30 AM	**Minutes**	Do pass
Senate Judiciary	Apr. 15, 2009	08:30 AM	**Minutes**	After Passage Discussion

Final Passage Votes

Assembly Final Passage	**(As Introduced)**	Mar. 18	Yea 42,	Nay 0,	Excused 0,	Not Voting 0,	Absent 0
Senate Final Passage	**(As Introduced)**	Apr. 16	Yea 21,	Nay 0,	Excused 0,	Not Voting 0,	Absent 0

Bill Text **As Introduced** **As Enrolled**

Bill History

Mar 05, 2009
- Read first time. Referred to Committee on Judiciary. To printer.

Mar 06, 2009
- From printer. To committee.

Mar 16, 2009
- From committee: Do pass.

Mar 17, 2009
- Read second time.

Mar 18, 2009
- Read third time. Passed. Title approved. **(Yeas: 42, Nays: None.)** To Senate.

Mar 19, 2009
- In Senate.
- Read first time. Referred to Committee on Judiciary. To committee.

000248

Apr 14, 2009
- From committee: Do pass.

Apr 15, 2009
- Read second time.

Apr 16, 2009
- Read third time. Passed. Title approved. **(Yeas: 21, Nays: None.)** To Assembly.

Apr 17, 2009
- In Assembly. To enrollment.

Apr 21, 2009
- Enrolled and delivered to Governor.

Apr 22, 2009
- Approved by the Governor. Chapter 16.
- **Effective October 1, 2009.**

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
March 16, 2009

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:08 a.m. on Monday, March 16, 2009, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman Tick Segerblom, Vice Chair
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman William C. Horne
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Richard McArthur
Assemblyman Harry Mortenson
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Nick Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Sean McDonald, Committee Secretary
Steven Sisneros, Committee Assistant

OTHERS PRESENT:

L.J. O'Neale, Deputy District Attorney, Clark County District Attorney's Office, Las Vegas, Nevada
Bruce Nelson, Deputy District Attorney, Clark County District Attorney's Office, Las Vegas, Nevada
Jason Frierson, Clark County Public Defender's Office, Las Vegas, Nevada
P.K. O'Neill, Chief, Records and Technology Division, Department of Public Safety
Frank Adams, Executive Director, Nevada Sheriffs' and Chiefs' Association, Mesquite, Nevada
Sam Bateman, representing the Nevada District Attorneys Association, Las Vegas, Nevada
Tony Almaraz, Deputy Chief, Nevada Highway Patrol, Department of Public Safety
Ronald Dreher, Government Affairs Director, Peace Officers Research Association of Nevada, Reno, Nevada
Brett Kandt, representing the Office of the Attorney General and the Advisory Council for Prosecuting Attorneys, Carson City, Nevada

Chairman Anderson:
[Roll called. Opening remarks on protocol on testifying before the Committee.]

Assembly Bill 244: Provides for the public auctioning of certain confiscated and forfeited firearms under certain circumstances. (BDR 15-762)

Mr. Hambrick, do you want to make a disclosure relative to Assembly Bill 244?

Assemblyman Hambrick:
It is my intent to withdraw the bill and hopefully resubmit it at some later date should I return at another session.

Chairman Anderson:
It is Mr. Hambrick's bill, but it now belongs to the Committee since it has been submitted to the floor and referred to this Committee. It is the pleasure of the Committee. If there is no one objecting, we will put it back on the board, or do you want it indefinitely postponed, Mr. Hambrick?

Assemblyman Hambrick:
Mr. Chairman, if it is the pleasure of the Chair, I would prefer that it be indefinitely postponed.

Chairman Anderson:
Okay. So that we can close it, so we will not use it as a vehicle for another piece of legislation, the Chair will entertain a motion to indefinitely postpone A.B. 244, at the request of Mr. Hambrick.

> ASSEMBLYMAN HAMBRICK MOVED TO INDEFINITELY POSTPONE ASSEMBLY BILL 244.

All those in favor please indicate by saying aye. All those in opposition.

> THE MOTION PASSED UNANIMOUSLY.

Mr. Secretary, please record it as unanimous, with Mr. Mortenson now being in attendance, an indefinite postponement of A.B. 244.

[The motion to indefinitely postpone set out above, which action was in doubt by the Committee, was taken up again on March 18, 2009, and the motion to indefinitely postpone was subsequently made, seconded, and passed at that meeting.]

Let me open the hearing on Assembly Bill 250.

Assembly Bill 250: Revises provisions relating to certain affidavits or declarations of experts. (BDR 4-1018)

Assemblyman Mark A. Manendo, Clark County Assembly District No. 18:
I bring forth Assembly Bill 250 on behalf of the Nevada District Attorneys Association. In Las Vegas, we have Mr. O'Neale and Mr. Nelson, who are the

experts in this particular area. I would like them to testify since I am proposing the bill for them.

L.J. O'Neale, Deputy District Attorney, Clark County District Attorney's Office, Las Vegas, Nevada:

I am the chief of our vehicular crimes unit. Among our responsibilities is the prosecution of misdemeanor driving while under the influence (DUI) offenses. We have asked for your consideration of this bill because it is a procedural bill. It does not affect anyone's substantive rights. However, it does make things a little bit easier and a lot less expensive.

The first portion of the bill amends *Nevada Revised Statutes* (NRS) 50.320 regarding the admissibility of an affidavit to change the qualification requirement from a person who is qualified "in the district court of any county" to "a court of record." When the statute was first introduced in 1971, the district court was the only court of record. In 1979, justice courts and designated municipal courts became courts of record, but the language in the statute was never changed to accommodate this new reality. This is significant because, with the crowding of the courts, especially the district court, we have people who have been working and are qualified as experts who have never actually had the chance to testify in a district court trial just because of the competition to get court time for various cases. This does not affect us so much as it does proceedings such as the Department of Motor Vehicles' administrative hearings, which accept affidavits from people who are qualified. We have people who have been working in the Las Vegas Metropolitan Police Department's (Metro) crime lab for four or five years who are not qualified under the present statute because they never qualified as an expert in the district court. Because the justice courts are courts of record, anything said there can of course be examined and their qualifications, or a lack thereof, can certainly be ascertained easily. This is just more of an administrative change but one that I think is significant with the evolution of the courts.

The section of the bill that defines the term "chemist" is becoming significant because, as persons go to greater and greater extremes in the defense of cases, we have seen a couple of instances where defense counsel say, well, your chemist is not really a chemist because his or her job title is not chemist. In fact, none of the people who do this work have a job title of chemist. Metro forensic lab people are forensic scientists. They used to be called criminalists, and this was changed a couple of years ago. The people who do the analysis for Quest Laboratories, which does the Highway Patrol cases, are termed forensic technicians. So their job titles do not say chemist. Chemist is perhaps on the lowest level as a term of art because people say, "Do you have your chemist available? Is your chemist ready to go?" So these people are always

referred to as chemists even though their job titles are not chemist. This is just a clarification that, for these people that everybody calls chemists, the law will call them chemists as well.

The language of the bill that would provide the most savings in time and money for us is the ability to give a notice of intent to use an affidavit by personally serving it on the attorney or the defendant. This would typically be done in court when the attorney receives the discovery for the case. Because DUIs have jail time attached to them, attorneys are always appointed for the indigent. It is very rare for a person to waive counsel, and that happens only because someone is in jail and has the prospect of immediate release if they settle the case right away. Even in these cases, our judges will ask the public defender, although not appointed to represent the person, to act as a friend of the court and give legal advice to the person as to his or her rights.

A DUI defendant, if a case is ever set for trial, will have an attorney. We can hand the notice to the attorney, they get it much sooner, and it does not affect any of their rights as far as their ability to object or deal with it appropriately. It saves us the time of our secretaries: it takes about five minutes to set up these two letters because you have to send one to the defendant and one to the attorney. About a quarter of the ones that are sent to the defendants are returned because they have moved or the address is bad. Five minutes is not much, but when you have 8,000 to 10,000 cases per year, five minutes adds up. The cost for sending a certified letter is about $5 with a return receipt. That is $10 per case. If we send it registered mail, as the statute permits, registered mail starts at $10, so that would be about $20 a case. Merely handing the attorney the notice gives him the notice sooner and as effectively, does not compromise any of the defense rights, and saves a lot of time and trouble. Again, this goes back several years, perhaps at a time when certified mail was the most reliable way to get things to someone. Now, at least in our courts, since people are given the discovery and they sign for it at the first arraignment, it would be a more direct and efficient way to accomplish the process without affecting substantive rights.

Chairman Anderson:
Mr. Nelson, any additional testimony that you need to put on the record?

Bruce Nelson, Deputy District Attorney, Clark County District Attorney's Office, Las Vegas, Nevada:
No, I will just echo everything Mr. O'Neale said unless the Committee has any questions.

Assemblyman Carpenter:
For either witness, will they sign for this information when you give it to them, or what kind of a situation will exist to acknowledge receipt?

L.J. O'Neale:
Typically, it would be part of the discovery package, and, in fact, they do sign a receipt for the discovery because we have a per-page charge for copying and a charge for duplicating photo discs and other things. They do sign and acknowledge that they have received discovery.

Assemblyman Horne:
It was just a clarification that I wanted. These are going to be given to counsel at the time of discovery—I can see the ease of this for public defenders, you could serve the public defender's office, but private attorneys often withdraw before discovery. I would hate to see a situation where an attorney who has withdrawn receives this notice and not the actual attorney. A person may be without an attorney for a period of time. Discovery is not always immediately given upon receiving a case.

L.J. O'Neale:
The problems we have are probably greater with the present system. When we have a new attorney substitute in for a defendant, we do routinely renotice them by certified mail. Generally, as far as an attorney withdrawing before arraignment, that is fairly rare in our cases. We usually do not give the discovery until the arraignment when the attorney actually confirms as counsel. Certainly, we do renotice new attorneys. Sometimes, we do not know there is a new attorney until the day set for trial. Someone will typically have a public defender, and then they or their family will hire private counsel. As it stands now, the last time I ran the numbers, about 23 percent of our DUI misdemeanor cases were public defenders, and the rest were private counsel. It is a preponderance of private counsel in our cases. We do renotice them with certified mail. It just doubles that particular cost, but we would routinely reserve them. We want to make sure people have discovery because we do not want to have all our witnesses show up for a trial date and the attorney says he never got discovery.

Chairman Anderson:
Mr. Horne, are you concerned with the language at page 3, subsection 2(b)? You feel that there is a need for greater clarification that notice be served other than by registered or certified mail? Do you want it clarified that each of the attorneys be served? Are you going to make a suggestion that we broaden this in some way?

Assemblyman Horne:
No, I am comfortable the way it is.

Assemblywoman Parnell:
What concerns me is you are deleting who performs the service with the deletion of "by the prosecuting attorney." There is no other reference as to who is actually doing it. If you could clarify that for me, I would appreciate it.

L.J. O'Neale:
Actually, that seems to be how the bill emerged from drafting. We do not mind taking on that responsibility. We think it is ours anyway. We did not ask for that language to be removed. Grammatically, the language should probably appear at the end of the sentence. We are happy with adding the language back in since we are the ones who do it anyway.

Bruce Nelson:
The way discovery is typically served is that our district attorney (DA) clerk will hand it to the defendant. Technically, they are being served by the clerk and not by the prosecutor, so I think that is why that language was eliminated. It really does not matter. The main point is they are getting it in court from someone from our office.

Assemblywoman Parnell:
I think the word "by" needs to be there somewhere in that section because it should show who is going to be doing it.

L.J. O'Neale:
I would just say "by the prosecution."

Chairman Anderson:
I think the Legislative Counsel Bureau (LCB) will solve it.

Jason Frierson, Clark County Public Defender's Office, Las Vegas, Nevada:
As a practical matter, I do not think this changes very much at all. The defense attorney, if a person is represented, can request that they be served in lieu of the defendant. There is still a process to make sure that the defendant has an opportunity to object in writing whether this is served via certified mail or by personal service.

Chairman Anderson:
I will close the hearing on Assembly Bill 250.

Ms. Parnell, we will ask Legal to look at the need to remove the language from the bill. Ms. Chisel, did you have something?

Jennifer M. Chisel, Committee Policy Analyst:
Our Committee Counsel is watching the hearing, and he indicated to me that deleting "by the prosecuting attorney" is because the language is not necessary. In other words, the defendant will know who is serving him. It is usually served by the clerk or someone in that office, so that is why the language was deleted.

Chairman Anderson:
The bill drafter is of the opinion that the language is apparently no longer needed.

Assemblywoman Parnell:
It concerns me because it does not state who is responsible for it.

Chairman Anderson:
I am sure the bill drafter would be happy to return the language if you insist.

Assemblywoman Parnell:
If Legal is comfortable, I am fine with that.

Chairman Anderson:
The hearing is closed on A.B. 250. The Chair will entertain a motion.

> ASSEMBLYMAN CARPENTER MOVED TO DO PASS ASSEMBLY BILL 250.
>
> ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.
>
> THE MOTION PASSED (ASSEMBLYMAN GUSTAVSON WAS ABSENT FOR THE VOTE.)

Let us open the hearing on Assembly Bill 253.

Assembly Bill 253: Revises the crime of resisting, delaying or obstructing a public officer in the discharge of his duties. (BDR 15-892)

Assemblyman Ty Cobb, Washoe County Assembly District No. 26:
[Read from prepared remarks (Exhibit C).]

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
April 14, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:38 a.m. on Tuesday, April 14, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

GUEST LEGISLATORS PRESENT:

Assemblywoman Barbara E. Buckley, Assembly District No. 8
Assemblyman Mark A. Manendo, Assembly District No. 18

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

Hank Pirowski, Project Director, Veterans Treatment Court, Buffalo, New York
T. Arthur Ritchie, Jr., District Judge, Family Division, Department H, Eighth Judicial District
Peter I. Breen, Senior District Judge

Ramu Komanduri, M.D., Chief of Staff, Veterans Health Administration, Southern Nevada Healthcare System
Tim Tetz, Executive Director, Office of Veterans' Services
Orrin Johnson, Deputy Public Defender, Washoe County Public Defender's Office
Diane R. Crow, State Public Defender
Claudia Stieber, Lieutenant, Division of Parole and Probation, Department of Public Safety
Kevin Quint, Executive Director, Join Together Northern Nevada
Gregory Hunter, Veteran, United States Army
Lee Rowland, Northern Coordinator, American Civil Liberties Union of Nevada
Dee McLellan, Deputy Administrator, Division of Mental Health and Developmental Services, Department of Health and Human Services
L. J. O'Neale, Chief Deputy District Attorney, Vehicular Crimes Unit, Office of the District Attorney, Clark County
Samuel Bateman, Nevada District Attorneys Association

CHAIR CARE:
I will open the hearing on Assembly Bill (A.B.) 187.

ASSEMBLY BILL 187: Authorizes the establishment by district courts of a program for the treatment of certain offenders who are veterans or members of the military. (BDR 14-955)

ASSEMBLYWOMAN BARBARA E. BUCKLEY (Assembly District No. 8):
I am the sponsor of A.B. 187. Operation Enduring Freedom and Operation Iraqi Freedom are ongoing. The pace of development in these wars has been unprecedented in the history of our all-volunteer force. More of today's armed forces are directly exposed to combat. The service members returning home bear the scars of these experiences. Those with physical wounds are easily identified and treated, but the scars of battle are not always physical. Increasingly, military leaders and policy makers admit that exposure to combat can damage the mental, emotional and cognitive faculties of service members, even as their bodies remain intact.

At least 12 independent studies have provided evidence of the prevalence of depression, post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI) among today's deployed troops. Post-traumatic stress disorder is the most prevalent mental health disorder among deployed service members. It affects

DEE MCLELLAN (Deputy Administrator, Division of Mental Health and Developmental Services, Department of Health and Human Services):
I work with Dr. Harold Cook, and while we are neutral on this bill, we are concerned about the funding that may be needed in the future for the clients who do not fit into the category that would be accepted into this specialty court. Some veterans may not meet the criteria for services. Those veterans would be coming to other providers.

We do not have the infrastructure needed for this. We do not have the funding. Most of us do not have the training it would take to provide this service for veterans who have had bombs going off and people dying next to them. We do not have that understanding. We may have the understanding and expertise with addictions because many of us have family members with these problems, or we have an acquaintance with it. We are able to work with people with these addictions. However, we do not have the experience that comes with being in a war. We would require special training that is expensive and time-consuming. We would have to have funding to provide the needed care.

CHAIR CARE:
There is no fiscal note on this bill, but there was testimony indicating there may be a funding issue. This will go on a work session, so if you have supplemental material you want us to see, please provide us with it.

SENATOR MCGINNESS:
Will you ask for a fiscal note?

MS. MCLELLAN:
No.

CHAIR CARE:
There being nothing further, I will close the hearing on A.B. 187 and open the hearing on A.B. 250.

ASSEMBLY BILL 250: Revises provisions relating to certain affidavits or declarations of experts. (BDR 4-1018)

ASSEMBLYMAN MARK A. MANENDO (Assembly District No. 18):
Assembly Bill 250 provides that a person may qualify to test as an expert witness in any court of record in the State, rather than only in the district court,

regarding the presence of alcohol in the breath, blood or urine of a person or the identity or quantity of a controlled substance or other chemical in a person's possession. The measure defines who qualifies as a chemist for purpose of such expert witness testimony and authorizes a request to have the affidavit or declaration admitted as evidence at a trial to be personally served on the defendant or his counsel.

L. J. O'NEALE (Chief Deputy District Attorney, Vehicular Crimes Unit, Office of the District Attorney, Clark County):
This bill clarifies and eases the procedure. It does not affect the substantive rights of anyone accused of a crime. The bill provides that a person who has qualified as an expert in a court of record can testify as an expert regarding certain evidence. It is becoming increasingly difficult to get time in the district courts with so many cases being heard. It is rare for an expert to have the opportunity to testify in a trial.

The district court was the only court of record in Nevada. In 1979, justice courts and some municipal courts became courts of record. Therefore, testimony of experts can be preserved and scrutinized.

Chemist is a term generally used to refer to anyone who tests blood or urine for alcohol or drugs. The problem is, although many of these people have degrees in chemistry, none of them have the job title of chemist. This bill explains who a chemist is.

Statute requires us to send the notice of intent to use affidavit by certified mail. This takes about five minutes per letter. If we do ten a day, we are up to about an hour of our time. Additionally, we have to send it to the defense attorney and the defendant. This adds to our cost. We give them actual notice when we hand them the notice in court. They still have all their rights to object. This makes it easier and cheaper for us.

HAIR CARE:
What is the current case law on only the use of an affidavit or declaration and the confrontation clause? This is not the issue in front of us, but it kicks in when we say a court of record in this State as opposed to district court.

MR. O'NEALE:
There are two separate issues. One is the affidavit of someone who draws the blood. The state of the law is the Nevada Supreme Court opinion in *City of Las Vegas v. Walsh,* 121 Nev. 899, 124 P.3d 203 (2005), where the Nevada Supreme Court said the present procedure with the provision to object and bring the objections before the court does not violate the right of confrontation or due process. The other issue is bringing in the chemist. The law requires us to bring in the chemist if there is an objection to bringing in the chemist, even for a misdemeanor trial. We can bring in the affidavit of the person who drew the blood if the objection is not sufficient under the law. There is no sufficiency requirement for an objection to the chemist. All they have to do is say they object, and then we have to bring in the chemist. This affects us only in our misdemeanor cases. In a jury trial, as a routine, we always bring in the chemist and the nurse or person who draws the blood because we want the jury to see them. In a felony, we do not want any possible objections on appeal. Under Nevada law, there is no due process or confrontation problem with the affidavit of the person who drew the blood because the statutory right to object is preserved.

SAMUEL BATEMAN (Nevada District Attorneys Association):
I am here as a backup.

CHAIR CARE:
This bill passed out of the Assembly by a vote of 42 to 0.

SENATOR WIENER MOVED TO DO PASS A.B. 250.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
April 15, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:38 a.m. on Wednesday, April 15, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

GUEST LEGISLATORS PRESENT:

Assemblyman Joseph M. Hogan, Assembly District No. 10
Assemblyman William Horne, Assembly District No. 34
Assemblyman John Oceguera, Assembly District No. 16

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Janet Sherwood, Committee Secretary

OTHERS PRESENT:

Kristin Erickson, Chief Deputy District Attorney, Washoe County District Attorney
David W. Clifton, Chief Deputy District Attorney, Criminal Division, Washoe County District Attorney

CHAIR CARE:
It was A.B. No. 521 of the 74th Session which was voted out of each House unanimously but died in conference committee.

SENATOR PARKS:
There have been three reprints on A.B. No. 521 of the 74th Session. Was the version of the bill you requested from the third reprint? I see it went through several conference committees and then ran out of time.

ASSEMBLYMAN HOGAN:
My understanding is it is from the third reprint. The idea was to take advantage of the fact that it had successfully navigated both Houses. I was not involved with it in the prior Session, but that is my recollection.

CHAIR CARE:
My recollection is two versions of the retail crime theft ring bill. One of them was actually not a conspiracy, but for some reason, a theft ring was comprised of three or more persons as opposed to two or more. It had quite a checkered history. Assembly Bill 322 passed out this Session 41 to 0 with one excused. We will take another look at it and get it to a work session soon. We want to reconstruct what happened last Session. We will close the hearing on A.B. 322.

The two bills we entertained yesterday, A.B. 250 and A.B. 187, were passed unanimously out of the Assembly.

ASSEMBLY BILL 250: Revises provisions relating to certain affidavits or declarations of experts. (BDR 4-1018)

ASSEMBLY BILL 187: Authorizes the establishment by district courts of a program for the treatment of certain offenders who are veterans or members of the military. (BDR 14-955)

We held onto the Speaker's bill. There was the one amendment proposed. Assemblyman Mark A. Manendo's bill came out yesterday. Of the three we heard today, A.B. 164 passed 42 to 0. Assembly Bill 182 and A.B. 322 passed 41 in favor, none opposed and one excused in both cases.

Frances Doherty, Deputy Attorney General, asked to reinforce the request to delete 'as appropriate' from line 7 of the bill, "as it really changes the mandate under that line." She added that she is the individual working on the state plan to access federal funds under the Violence Against Women Act. She told the committee she is likely to be back at a later time to request their assistance in accessing those funds. There was no further testimony. The chairman called for a motion.

SENATOR ADLER MOVED TO AMEND AND DO PASS SENATE BILL 228.

SENATOR TITUS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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The committee moved into a work session to discuss and take action on two bills.

SENATE BILL 157: Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance.

Ben Graham, Chief Deputy District Attorney, Clark County, Representative, Nevada State District Attorneys Association, provided the committee with an amendment to S.B. 157 (Exhibit E). The chairman noted the amendment "tightened up the notice provisions on the use of the affidavit" along with the addition of language which clarifies the provision does not prohibit either party from bringing the witness at trial.

Mr. Graham, seeking to further clarify the intent of the bill, noted that language was also added which states the party who seeks to use the affidavit will provide the other party with copies of the affidavit which will include the name, address, and phone number of the 'expert.' This way, the party could easily contact the witness. The chairman called for a motion.

SENATOR LEE MOVED TO AMEND AND DO PASS SENATE BILL 157.

SENATOR ADLER SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR WASHINGTON AND SENATOR PORTER WERE ABSENT FOR THE VOTE.)

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1995 REGULAR SESSION (68th)

ASSEMBLY ACTION		SENATE ACTION		
Adopted	☐	Adopted	☐	Senate Amendment to Senate Bill No. 157 BDR 4-475 Proposed by Committee on Judiciary
Lost	☐	Lost	☐	
Date: Initial:		Date: Initial:		
Concurred in	☐	Concurred in	☐	
Not Concurred in	☐	Not Concurred in	☐	
Date: Initial:		Date: Initial:		

Amendment No. 36

Amend section 1, page 1, by deleting lines 16 through 19 and inserting:

"*50.315 be admitted in evidence.* The request must be [made] *:*

(a) Made at least 10 days before the date set for the trial . [or preliminary hearing and must be sent]

(b) Sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney.

(c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the expert or other person described in NRS 50.315.".

Amend section 1, page 2, line 14, by deleting "*affidavit;*" and inserting:

"*affidavit or declaration;*".

Amend section 1, page 2, line 16, after "*affidavit*" by inserting "*or declaration*".

Drafted by: JKN:mrw Date: 2/23/95

S.B. No. 157--Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance.

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EXHIBIT E

Amend section 1, page 2, after line 20 by inserting:

"*4. The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.*".

Assembly Bill No. 193.

Senator Rawson moved that the bill be referred to the Committee on Finance.

Motion carried.

SECOND READING AND AMENDMENT

Senate Bill No. 157.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 36.

Amend section 1, page 1, by deleting lines 16 through 19 and inserting: "*50.315 be admitted in evidence.* The request must be [made] :

(a) Made at least 10 days before the date set for the trial . [or preliminary hearing and must be sent]

(b) Sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney.

(c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the expert or other person described in NRS 50.315.".

Amend section 1, page 2, line 14, by deleting "*affidavit;*" and inserting: "*affidavit or declaration;*".

Amend section 1, page 2, line 16, after "*affidavit*" by inserting "*or declaration*".

Amend section 1, page 2, after line 20 by inserting:

"*4. The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.*".

Senator Adler moved the adoption of the amendment.

Remarks by Senator Adler.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

GUESTS EXTENDED PRIVILEGE OF SENATE FLOOR

On request of Senator Jacobsen, the privilege of the floor of the Senate Chamber for this day was extended to Penny Frost.

On request of Senator McGinness, the privilege of the floor of the Senate Chamber for this day was extended to Dee McGinness.

Senator Raggio moved that the Senate adjourn until Monday, March 6, 1995 at 10:30 a.m.

Motion carried.

Senate adjourned at 11:33 a.m.

Approved:

LAWRENCE E. JACOBSEN
President pro Tempore of the Senate

Attest: JANICE L. THOMAS
Secretary of the Senate

(REPRINTED WITH ADOPTED AMENDMENTS)
FIRST REPRINT S.B. 157

SENATE BILL NO. 157—COMMITTEE ON JUDICIARY

JANUARY 31, 1995

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance. (BDR 4-475)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to expert witnesses; revising the provisions governing the use of an affidavit or declaration in lieu of the testimony of an expert witness as to the existence of alcohol or a controlled substance; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 50.325 is hereby amended to read as follows:

50.325 1. If a person is charged with an offense punishable pursuant to chapter 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor, a controlled substance or a chemical, poison or organic solvent, and it is necessary to prove:

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison or organic solvent,

[the prosecuting attorney may request that] the affidavit or declaration of an expert or other person described in NRS 50.315 *must, upon submission,* be admitted in evidence at the [trial or] preliminary hearing concerning the offense.

2. *At the trial concerning the offense, the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 be admitted in evidence.* The request must be [made] :

(a) Made at least 10 days before the date set for the trial . [or preliminary hearing and must be sent]

(b) Sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney.

(c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the expert or other person described in NRS 50.315.

3. [If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for the trial or

preliminary hearing that the presence of the expert or other person is demanded, the affidavit or declaration must not be admitted. A defendant who demands the presence of the expert or other person and is convicted of violating NRS 484.379 or a provision of chapter 484 of NRS for which a driver's license may be revoked shall pay the fees and expenses of that witness at the trial or preliminary hearing.

4. If at the trial or preliminary hearing the affidavit or declaration of an expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge or justice of the peace may adjourn the trial or hearing for a period not to exceed 3 judicial days to receive the testimony. If 3 judicial days are not sufficient in a county whose population is less than 35,000 to provide the presence of the expert or other person to be examined or cross-examined, the judge, justice of the peace or hearing officer may extend the period of adjournment for a period not exceeding 10 days.] *If, at or before the time of the trial, the defendant establishes that:*

(a) There is a substantial and bona fide dispute as to the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,

the judge may order the district attorney to produce the witness and may continue the trial for any time the judge deems reasonably necessary in order to receive such testimony. The time within which a [preliminary hearing or] trial is required is extended by the time of the [adjournment.] *continuance.*

4. The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.

signaled by the members of the Senate. Our colleagues, in the Assembly are prepared to add imprimatur on this measure. It is most fitting that this man who was considered a lawyer's lawyer, a judge's judge and a unique individual in the history of this state should be recognized. I urge your support for this resolution.

Roll call on Senate Joint Resolution No. 13:

YEAS—21.

NAYS—None.

Senate Joint Resolution No. 13 having received a constitutional majority, Mr. President pro Tempore declared it passed.

Senator Raggio moved that all rules be suspended and that Senate Joint Resolution No. 13 be immediately transmitted to the Assembly.

Motion carried unanimously.

Senate Bill No. 42.

Bill read third time.

Remarks by Senators Adler, Rhoads and Rawson.

Senator Rawson moved that Senate Bill No. 42 be taken from the General File and placed on the Secretary's desk.

Remarks by Senator Rawson.

Motion carried.

Senate Bill No. 157.

Bill read third time.

Remarks by Senator Adler.

Roll call on Senate Bill No. 157:

YEAS—21.

NAYS—None.

Senate Bill No. 157 having received a constitutional majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 166.

Bill read third time.

Remarks by Senator James.

Roll call on Senate Bill No. 166:

YEAS—20.

NAYS—Neal.

Senate Bill No. 166 having received a constitutional majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 167.

Bill read third time.

Remarks by Senator James.

Roll call on Senate Bill No. 167:

YEAS—21.

NAYS—None.

Senate Bill No. 167 having received a constitutional majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-eighth Session
June 1, 1995

The Committee on Judiciary was called to order at 8:10 a.m., on Thursday, June 1, 1995, Chairman Anderson presiding in Room 332 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. David E. Humke, Chairman
Ms. Barbara E. Buckley, Vice Chairman
Mr. Brian Sandoval, Vice Chairman
Mr. John C. Carpenter
Mr. David Goldwater
Mr. Mark Manendo
Mrs. Jan Monaghan
Ms. Genie Ohrenschall
Mr. Richard Perkins
Mr. Michael A. (Mike) Schneider
Ms. Dianne Steel
Ms. Jeannine Stroth

COMMITTEE MEMBERS EXCUSED:

Mr. Thomas Batten

STAFF MEMBERS PRESENT:

Dennis Neilander, Senior Research Analyst
Joi Davis, Committee Secretary

OTHERS PRESENT:

Scott Doyle, Douglas County District Attorney's Office
Christine Thiel, Division of Water Resources
Judge Michael Gibbons, District Court, Minden
Judy Jacoboni, MADD

Bill Cavagnaro, Las Vegas Metropolitan Police Department
Noel Waters, Carson City District Attorney
Nancy Saitta, Senior Deputy Attorney General
Ben Graham, Clark County District Attorney's Office
Lieutenant Phil Galeoto, Reno Police Department
Jim Nadeau, Washoe County Sheriff's Office

Chairman Anderson began the hearing by calling upon Co-chairman David Humke.

Mr. Humke submitted written, follow-up material, from Lt. Governor Lonnie Hammargren regarding his testimony of Monday, May 29, 1995 for entry into the record for the hearing of Wednesday, May 31, 1995 (See minutes of May 31, 1995.)

Chairman Anderson requested the Minnesota study, "Medical Malpractice Report", submitted by the Nevada Trial Lawyers Association, be entered into the record of May 31, 1995 (See minutes of May 31, 1995.)

Chairman Anderson opened the hearing on Assembly Bill 598.

ASSEMBLY BILL 598 - Limits exclusion of persons from criminal proceedings.

Judge Michael Gibbons, District Judge, Department 2, Ninth Judicial District Court, Douglas County, explained he had drafted this bill when he was in the District Attorney's Office [Douglas County] but the bill addresses a problem which is more unique to the judiciary than to prosecution. He reviewed the content of the bill and discussed the reason for the changes. One was to allow the victim who has the most interest in the case, other than the defendant, to be in the courtroom; the victim is often excluded from the proceedings. The bill strikes a compromise by allowing the victim to be in the court room after testifying. The 1982 Presidential Task Force on Victims of Crime recommended judges should allow victims to remain in the court room at all times as the victims felt disenfranchised because they could not watch the proceedings. A second change is to allow the investigating officer to view the proceedings. He described in many states the investigating officer remains part of the case and the officer's presence in the court room is to assist the prosecutor to make evidence available and to provide other information. Judge Gibbons testified the officer should not be excluded from the court room as a possible witness in the case.

Chairman Anderson closed the hearing on Assembly Bill 560 and Assembly Bill 598. He opened the hearing on Senate Bill 157.

SENATE BILL 157 - Revises provisions governing use of affidavit of declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance.

Mr. Ben Graham, Nevada District Attorney's Association, acknowledged Mr. Noel Waters, Carson City District Attorney, and Mr. Scott Doyle, Douglas County District Attorney was accompanying him. Mr. Graham began by providing background for the bill. He explained a preliminary hearing is a statutory requirement where the state must offer sufficient evidence to prove probable cause. The trial is where the defendant has a right of confrontation and proof beyond a reasonable doubt must be presented by the state. The bill eliminates a loophole in the existing law which allows good DUI cases to be lost. Under the DUI law, breath testing devices must be calibrated. The person calibrating the device signs an affidavit to that effect. The affidavit can be presented in lieu of the calibrator's presence unless the defendant demands the calibrator be brought in. This can require a calibrator to be called to any jurisdiction in the state. There are few calibrators in the state so the cases are delayed or even dismissed (no matter how solid a DUI case it is.) In the matter of a blood test, the blood drawer also signs an affidavit of properly drawing and handling the blood. Again, the affidavit can be used unless the defendant demands the technician's presence. When these witnesses are called the chances of them testifying is "about zip." Calling them is used as a tactic by the defense; the person does not show and the case is reduced or dismissed. This bill is to allow the affidavit at the preliminary hearing. Notice would be served on, and copies provided, to the defense and they could subpoena the affiant if they wished. He added the state must have the affiant present if the defendant shows good cause or reason to question the validity of the affidavit or calibration. He noted the defense will say they have a right to cross-examine a witness but there is no constitutional right to cross-examine at a preliminary hearing. Mr. Graham continued by asking the bill to be amended. A recent Ninth Circuit Court case has brought question as to whether the chemist should be summarily at the trial. He requested the bill be amended to delete chemist from trial but allowing a ten-day demand letter. He added the chemist's conclusion is very different from the person's who draws the blood.

Chairman Anderson asked where the amendment should be placed.

Mr. Graham stated he had worked with Mr. [Dennis] Neilander to develop amending language; some work is still needed.

Mr. Dennis Neilander, Senior Research Analyst, stated something which tries to differentiate between persons who perform an objective function, like calibrating the machine, and persons who do subjective evaluations, such as the chemist needs to be prepared. He could not determine a way to do that in terms of language. If a motion is taken it will be necessary to rely on the bill drafter to help.

Mr. Carpenter asked Mr. Graham to explain what the chemist was being taken out of.

Mr. Graham explained the affidavit of the laboratory person analyzing the blood is issued automatically, the same as the technicians, but there is some question this [the chemist's] is different type of evidence [from the technician drawing the blood] since it is the ultimate conclusion and therefore they are asking it [affidavit] not be automatically admitted into court.

Mr. Carpenter asked if he means the chemist would have to be at the preliminary and the trial.

Mr. Graham answered not at the preliminary since there is a lower burden of proof; just probable cause. He reminded the Committee 90-95% of the cases are negotiated once they pass the preliminary hearing.

Ms. Buckley commented under the present system the prosecuting attorney may request the affidavits of these individuals be admitted into evidence and the defense attorney may send, within 96 hours, a demand the affidavit not be admitted. If they demand it and the defendant is convicted they have to pay the costs. She asked him to explain how it works in "real life."

Mr. Graham responded in "real life" the [prosecution] sends a letter stating they are going to use the affidavit. Routinely the defense responds they want the person and so they are called in. He could not think of a case where they have billed or charged the defense bar under that statute.

Ms. Buckley asked for the percentage of cases where the defense demands the experts be there. She wondered, since it is the state's burden to show probable cause the person is guilty of the crime; the alcohol was at a certain level, the

equipment was tested properly, if mandatory use of affidavits violates the state's obligation to produce the evidence.

Mr. Graham answered at the preliminary hearing the chemist's affidavit would be submitted unless the defense showed good cause why it should not be used; then the chemist would be brought in. He added the defense could subpoena the witness at any time. The ability for someone to call a witness is not being precluded.

Ms. Steel asked if a line saying "this in no wise has anything to do with the chemist in a drug case."

Mr. Graham stated they would still like the option of the ten-day demand letter for the chemist.

Ms. Ohrenschall thinks the bill is fine since the standard of proof is not being changed for the preliminary hearing.

Mr. Carpenter asked if the affidavits were hearsay.

Mr. Graham responded at a trial it could be termed a hearsay document. He continued with short discussion of hearsay. Under this provision they would not be excluded under the hearsay rule.

Mr. Carpenter asked if Line 12 regarding a "bona fide dispute" applies to the preliminary hearing or just the district court trial.

Mr. Graham stated the referenced section applies at the trial: district or justice court.

Mr. Carpenter again asked about the preliminary hearing.

Mr. Dennis Neilander, Senior Research Analyst, clarified he believed the changes on Page 2 are only applicable to the trial not the preliminary hearing. There is a different statute, not contained in this bill, which addresses the preliminary hearing.

Mr. Carpenter inquired if after the preliminary hearing could the defense counsel bring the chemist in.

Mr. Graham stressed defense counsel may bring witnesses at any proceeding, any time. He explained what is trying to be accomplished is the state is not required to do it [bring in a witness] unless there is a good reason. Now, since it is required of the state, if the witness does not appear the judge will frequently dismiss the case or reduce the charge.

Chairman Anderson understood the burden shifts; the defense would have to challenge the affidavit in some way in order for the state to request the witness to appear.

Mr. Graham affirmed his understanding.

Ms. Ohrenschall wanted to clarify the burden is being shifted for going forward with the evidence not changing the burden of proof required at the preliminary hearing.

Mr. Graham replied they are not actually shifting any burden; just changing the quality of the presentation from personal testimony to the personal affidavit. The burden of proof still remains.

Mr. Noel Waters, Carson City District Attorney, wished to speak in support of the bill and wanted to emphasize the burden of proof was not changing. He stated it was virtually unheard of to successfully challenge a probable cause finding based on the information from the affiant. He discussed the reliability of the affidavits based on the knowledge of the affiant. Mr. Waters reiterated there were not many of these individuals in the state and they were being subpoenaed only to see if they would appear and not to testify.

Captain Jim Nadeau, Washoe County Sheriffs Office; Lt. William Cavagnaro, Las Vegas Metropolitan Police Department; and Lt. Phil Galeoto, Reno Police Department came forward together to testify.

Capt. Jim Nadeau wished to speak in support of the bill. He described he works at [Washoe County's] Lake Tahoe substation. The small hospital in the area refused to conduct blood tests for DUI/drug cases because of the expense and inconvenience created for their nursing staff. He continued the Washoe County Sheriff's Office certifies the breath [testing] machines for Northern Nevada and Susan Hansen, who certifies the machines, is constantly waiting in court rooms and seldom testifies.

Lt. Bill Cavagnaro testified in support of the bill. He stated they feel it is a manpower issue. When people are taken away from their jobs, for no particular reason, we have to staff with more people to cover for them.

Lt. Phil Galeoto stated he agreed with the aforementioned reasons and added this bill would streamline the process and allow fewer unnecessary continuances in a process which takes the most time due to their numbers--preliminary hearings.

Ms. Judy Jacoboni, Lyon County Chapter President, M.A.D.D., testified her chapter and M.A.D.D. supports this bill. She explained they are in a rural county and many times she has been at a preliminary hearing on a DUI case where the witnesses are called by the defenses in hopes to find a technical reason to have the evidence thrown out. It is a burden on the rural counties to bring the experts in; the counties must pay their travel expenses. She added the limited resources could be put to better use.

Mr. James Jackson, Nevada State Public Defender, stated he understands the concerns brought by the prosecutors and he does not know if his office has employed such tactics and is aware of judges being more than willing to continue a preliminary hearing or trial when the calibrators are not available. He wished to state his office does not challenge those [affidavits] unless there is a true problem with the test. The bill addresses a problem created by the Supreme Court regarding whether or not the notice given to the defendant was adequate and if it was fair to shift the burden onto the defendant. He noted the Court's decision did not address fairness but what was effective notice. He thought this bill addresses that area as it makes it "OK" to use the affidavits in all cases unless there is a specific demand. He did not have any particular problem with that situation in misdemeanor trials and at preliminary hearings; his concern is with felony trials. Mr. Jackson could not imagine trying a case by affidavit or hearsay unless the result is not in dispute.

Mr. Ben Graham interjected this was in line with some of the caution being taken with the issue of the chemist. Felony trials would not only include the chemist but the persons who calibrated the machines or drew blood, as appropriate. The ten-day demand letter would be preserved.

Mr. Carpenter asked Mr. Jackson if the bill passes and he thought a mistake had been made could he call any of these people referred into the preliminary hearing.

Mr. Jackson responded yes, it could be achieved two ways; he could subpoena them or send a notice to the district attorney with reason for the person to appear.

Unknown Committee member, "That's not in here."

Mr. Jackson followed with, "I misunderstood the bill." He continued he could make the demand by way of a motion to court.

Mr. Carpenter agreed things should be made quick, simple, and efficient but he does not want to cut off the right of anyone to challenge evidence.

Mr. Jackson responded he did not think that was the intent of the bill. The intent is to close a loophole which was never intended to be there; a case being dismissed, which should not otherwise be dismissed, when a person is not available for a legitimate reason.

Chairman Anderson asked Mr. Carpenter if he was comfortable with the response.

Mr. Carpenter acknowledged he thought it was "OK."

Chairman Anderson closed the hearing on S.B. 157. He announced a quorum was present and the Committee was ready to entertain a motion.

MR. CARPENTER MOVED TO AMEND AND DO PASS SENATE BILL 157 WITH AMENDMENTS TO CLARIFY THE LANGUAGE RELATIVE TO THE CHEMIST AND FELONY TRIALS; THE CONCEPTS AS OUTLINED BY MR. BEN GRAHAM.

THE MOTION WAS SECONDED BY MS. OHRENSCHALL.

Chairman Anderson asked for any discussion. None was given.

THE MOTION CARRIED. ASSEMBLYMEN BATTEN, HUMKE, MANENDO, MONAGHAN, AND PERKINS NOT PRESENT.

Chairman Anderson opened the hearing on Assembly Bill 557.

ASSEMBLY BILL 577 - **Requires disclosure by seller of status of water rights**

"2. *In determining whether corrective action is required by the presence of excessive petroleum in the soil, the division shall consider, unless waived by the administrator of the division:*

(a) Factors peculiar to the site and to the contaminant; and

(b) The use of methods developed by the American Society for Testing and Materials to assess health and environmental risks, or equivalent procedures, to establish the need for corrective action and the required level of corrective action.".

Amend the bill as a whole by deleting sec. 2.

Amend the title of the bill by deleting the second line and inserting: "leum needs to be cleaned up; and".

Assemblyman Carpenter moved the adoption of the amendment.

Remarks by Assemblyman Carpenter.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Assembly Bill No. 722.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 1193.

Amend section 1, page 1, by deleting lines 4 through 14 and inserting:

"(a) For being available to report civil and criminal testimony and proceedings when the court is sitting [, $120] *during traditional business hours on any day except Sunday, $140* per day, to be paid by the county as provided in subsection 3.

(b) For *being available to report civil and criminal testimony and proceedings when the court is sitting beyond traditional business hours or on Sunday:*

(1) If the reporter has been available to report for at least 4 hours, $30 per hour for each hour of availability; or

(2) If the reporter has been available to report for fewer than 4 hours, a pro rata amount based on the daily rate set forth in paragraph (a), to be paid by the county as provided in subsection 3.

(c) For transcription [, $2.25] *:*

(1) Except as otherwise provided in subparagraph (2), $3.25 per page for the original draft [,] *and one copy,* and 50 cents per page for each additional copy to the party ordering the original draft.

(2) For civil litigants who are ordering the original draft and are represented by a nonprofit legal corporation or a program for pro bono legal assistance, $2.50 per page and 50 cents per page for each additional copy.

(3) For [transcription for] any party other than the party ordering the original draft, 50 cents per page.".

Assemblyman Humke moved the adoption of the amendment.

Remarks by Assemblyman Humke.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 157.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:
Amendment No. 1172.

Amend the bill as a whole by deleting section 1 and adding new sections designated sections 1 through 3, following the enacting clause, to read as follows:

"Section 1. Chapter 50 of NRS is hereby amended by adding thereto a new section to read as follows:

1. The affidavit of a chemist and any other person who has qualified in the district court of any county to testify as an expert witness regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, which is submitted to prove:

(a) The quantity of the purported controlled substance; or

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be,

is admissible in the manner provided in this section.

2. An affidavit which is submitted to prove any fact set forth in subsection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a grand jury. The court shall not sustain any objection to the admission of such an affidavit.

3. The defendant may object in writing to admitting into evidence an affidavit submitted to prove any fact set forth in subsection 1 during his trial. If the defendant makes such an objection, the court shall not admit the affidavit into evidence and the prosecution may cause the person to testify in person concerning any information contained in the affidavit.

Sec. 2. NRS 50.315 is hereby amended to read as follows:

[If a person has qualified in the district court of any county as an expert witness to testify regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in an administrative proceeding or in a criminal trial in the district court of any county in the district or a preliminary examination or proceeding in a justice's or municipal court in any county in the district to prove:

(a) The quantity of the purported controlled substance; and

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

Except as otherwise provided in subsection 6, a person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath to determine the amount by weight of alcohol in his breath;

(b) The identity of a person from whom the affiant obtained a sample of breath; *and*

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly . [; and

(d) The amount of alcohol that he found in the person's breath.

3. The]

2. Except as otherwise provided in subsection 6, the affidavit of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; and

(b) That he prepared a solution or gas having the chemical composition necessary for accurately calibrating it.

[4. The]

3. Except as otherwise provided in subsection 6, the affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated the device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

[5. The]

4. Except as otherwise provided in subsection 6, the affidavit or declaration made under the penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as set forth in [subsection] *section* 1 *of this act* is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The identity of the person from whom the affiant or declarant withdrew the sample;

(c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The identity of the person to whom the affiant or declarant delivered it.

[6. The]

5. Except as otherwise provided in subsection 6, the affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

6. During any trial in which the defendant has been accused of committing a felony, the defendant may object in writing to admitting into evidence an affidavit described in this section. If the defendant makes such an objection, the court shall not admit the affidavit into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit.

7. The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

Sec. 3. NRS 50.325 is hereby amended to read as follows:

50.325 1. If a person is charged with an offense punishable pursuant to chapter 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor, a controlled substance or a chemical, poison or organic solvent, and it is necessary to prove:

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison or organic solvent,

the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 *and section 1 of this act* be admitted [in] *into* evidence at the trial or preliminary hearing concerning the offense. *Except as otherwise provided in NRS 50.315 and section 1 of this act, the affidavit must be admitted into evidence.*

2. [The] *If the request is to have the affidavit admitted into evidence at a preliminary hearing or hearing before a grand jury, the affidavit must be admitted into evidence upon submission. If the request is to have the affidavit admitted into evidence at trial, the* request must be [made] :

(a) Made at least 10 days before the date set for the trial [or preliminary hearing and must be sent] ;

(b) Sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney [.] *; and*

(c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the affiant or declarant.

3. [If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for the trial or preliminary hearing that the presence of the expert or other person is demanded, the affidavit or declaration must not be admitted. A defendant who demands the presence of the expert or other person and is convicted of violating NRS 484.379 or a provision of chapter 484 of NRS for which a driver's license may be revoked shall pay the fees and expenses of that witness at the trial or preliminary hearing.

4. If at the trial or preliminary hearing the affidavit or declaration of an

expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge or justice of the peace may adjourn the trial or hearing for a period not to exceed 3 judicial days to receive the testimony. If 3 judicial days are not sufficient in a county whose population is less than 35,000 to provide the presence of the expert or other person to be examined or cross-examined, the judge, justice of the peace or hearing officer may extend the period of adjournment for a period not exceeding 10 days. The time within which a preliminary hearing or trial is required is extended by the time of the adjournment.] *The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.*".

Assemblyman Humke moved the adoption of the amendment.

Remarks by Assemblyman Humke.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 161.

Bill read second time.

The following amendment was proposed by the Committee on Government Affairs:

Amendment No. 1006.

Amend the bill as a whole by deleting sec. 4 and renumbering sections 5 through 7 as sections 4 through 6.

Amend the bill as a whole by deleting sec. 8.

Amend the title of the bill by deleting the fourth and fifth lines and inserting: "ance of his duties; and providing other matters properly relating thereto.".

Assemblyman Lambert moved the adoption of the amendment.

Remarks by Assemblyman Lambert.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 255.

Bill read second time and ordered to third reading.

Senate Bill No. 366.

Bill read second time and ordered to third reading.

Senate Bill No. 422.

Bill read second time.

The following amendment was proposed by the Committee on Commerce:

Amendment No. 1041.

Amend section 1, page 1, line 2, by deleting: "2, 3 and 4" and inserting: "2 to 4.5, inclusive,".

Amend the bill as a whole by adding a new section designated sec. 4.5, following sec. 4, to read as follows:

"Sec. 4.5. *All advertising by or business cards of a certificate holder must include the number of his certificate.*".

Amend sec. 16, page 5, line 8, by deleting "*$300.00*" and inserting "*$200.00*".

(REPRINTED WITH ADOPTED AMENDMENTS)
SECOND REPRINT S.B. 157

SENATE BILL NO. 157—COMMITTEE ON JUDICIARY

JANUARY 31, 1995

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance. (BDR 4-475)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to expert witnesses; revising the provisions governing the use of an affidavit or declaration in lieu of the testimony of an expert witness as to the existence of alcohol or a controlled substance; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 50 of NRS is hereby amended by adding thereto a new section to read as follows:

1. The affidavit of a chemist and any other person who has qualified in the district court of any county to testify as an expert witness regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, which is submitted to prove:

(a) The quantity of the purported controlled substance; or

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be,

is admissible in the manner provided in this section.

2. An affidavit which is submitted to prove any fact set forth in subsection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a grand jury. The court shall not sustain any objection to the admission of such an affidavit.

3. The defendant may object in writing to admitting into evidence an affidavit submitted to prove any fact set forth in subsection 1 during his trial. If the defendant makes such an objection, the court shall not admit the affidavit into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit.

Sec. 2. NRS 50.315 is hereby amended to read as follows:

50.315 1. [If a person has qualified in the district court of any county as an expert witness to testify regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or

organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence in an administrative proceeding or in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove:

(a) The quantity of the purported controlled substance; and

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A] *Except as otherwise provided in subsection 6, a* person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath to determine the amount by weight of alcohol in his breath;

(b) The identity of a person from whom the affiant obtained a sample of breath; *and*

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly . [; and

(d) The amount of alcohol that he found in the person's breath.

3. The]

2. Except as otherwise provided in subsection 6, the affidavit of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; and

(b) That he prepared a solution or gas having the chemical composition necessary for accurately calibrating it.

[4. The]

3. Except as otherwise provided in subsection 6, the affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated the device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

[5. The]

4. Except as otherwise provided in subsection 6, the affidavit or declaration made under the penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as set forth in [subsection] *section* 1 *of this act* is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The identity of the person from whom the affiant or declarant withdrew the sample;

(c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The identity of the person to whom the affiant or declarant delivered it.

[6. The]

5. Except as otherwise provided in subsection 6, the affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

6. During any trial in which the defendant has been accused of committing a felony, the defendant may object in writing to admitting into evidence an affidavit described in this section. If the defendant makes such an objection, the court shall not admit the affidavit into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit.

7. The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

Sec. 3. NRS 50.325 is hereby amended to read as follows:

50.325 1. If a person is charged with an offense punishable pursuant to chapter 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor, a controlled substance or a chemical, poison or organic solvent, and it is necessary to prove:

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison or organic solvent,

the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 *and section 1 of this act* be admitted [in] *into* evidence at the trial or preliminary hearing concerning the offense. *Except as otherwise provided in NRS 50.315 and section 1 of this act, the affidavit must be admitted into evidence.*

2. [The] *If the request is to have the affidavit admitted into evidence at a preliminary hearing or hearing before a grand jury, the affidavit must be admitted into evidence upon submission. If the request is to have the affidavit admitted into evidence at trial, the* request must be [made] *:*

(a) Made at least 10 days before the date set for the trial [or preliminary hearing and must be sent] *;*

(b) Sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney [.] *; and*

(c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the affiant or declarant.

3. [If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for the trial or preliminary hearing that the presence of the expert or other person is demanded, the affidavit or declaration must not be admitted. A defendant who demands the presence of the expert or other person and is convicted of violating NRS 484.379 or a provision of chapter 484 of NRS for which a driver's license may be revoked shall pay the fees and expenses of that witness at the trial or preliminary hearing.

4. If at the trial or preliminary hearing the affidavit or declaration of an expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge or justice of the peace may adjourn the trial or hearing for a period not to exceed 3 judicial days to receive the testimony. If 3 judicial days are not sufficient in a county whose population is less than 35,000 to provide the presence of the expert or other person to be examined or cross-examined, the judge, justice of the peace or hearing officer may extend the period of adjournment for a period not exceeding 10 days. The time within which a preliminary hearing or trial is required is extended by the time of the adjournment.] *The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.*

(30)

Mr. Speaker:

Your Committee on Taxation, to which were referred Senate Bills Nos. 308, 518, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

BOB PRICE, *Chairman*

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Perkins moved that Assembly Bills Nos. 363, 632, 651; Senate Bills Nos. 190, 308, 314, 458, 473, 503, 504, 518, 545, 553 be placed on the Second Reading File.

Motion carried.

INTRODUCTION, FIRST READING AND REFERENCE

By the Committee on Elections and Procedures:

Assembly Bill No. 729—An Act relating to the legislature; repealing prospectively certain interim legislative committees; and providing other matters properly relating thereto.

Assemblyman Close moved that the bill be referred to the Committee on Elections and Procedures.

Motion carried.

GENERAL FILE AND THIRD READING

Senate Bill No. 157.

Bill read third time.

Remarks by Assemblyman Goldwater.

Roll call on Senate Bill No. 157:

YEAS—39.

NAYS—None.

Absent—Arberry, Sandoval, Williams—3.

Senate Bill No. 157 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 161.

Bill read third time.

Remarks by Assemblyman Neighbors.

Roll call on Senate Bill No. 161:

YEAS—39.

NAYS—None.

Absent—Arberry, Sandoval, Williams—3.

Senate Bill No. 161 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Senate Bill No. 193.

Bill read third time.

Remarks by Assemblyman Brower.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Sixty-eighth Session
June 26, 1995

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 8:25 a.m., on Monday, June 26, 1995, in Room 224 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Jon C. Porter, Vice Chairman
Senator Maurice Washington
Senator Mike McGinness
Senator Ernest E. Adler
Senator Dina Titus
Senator O. C. Lee

STAFF MEMBERS PRESENT:

Allison Combs, Senior Research Analyst
Marilyn Hofmann, Committee Secretary

OTHERS PRESENT:

Dennis J. Healy, Lobbyist, Nevada Highway Patrol Association
Sergeant Gary Wolff, Lobbyist, Nevada Highway Patrol Association
Valerie J. Cooney, Lobbyist, Nevada Trial Lawyers Association
Dana K. Bilyeu, Operations Officer, Public Employees' Retirement System
Muriel R. Skelly, Attorney
Robert W. Teuton, Chief Deputy District Attorney, Clark County District Attorney's Office
Ben Graham, Lobbyist, Nevada District Attorneys Association
Mary E. Bell, Nevada Court Reporters' Association
Morgan R. Baumgartner, Attorney at Law

Senator James appointed a subcommittee consisting of Senator Lee, Senator McGinness and himself, and opened the hearing on Assembly Bill (A.B.) 292.

Senator Adler pointed out that is the current statement of the law, and no concurrence may be necessary.

SENATOR ADLER MOVED TO RESCIND THE CONCURRENCE WITH S.B. 335.

SENATOR LEE SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR PORTER WAS ABSENT FOR THE VOTE.)

* * * * *

SENATOR ADLER MOVED NOT TO CONCUR IN ASSEMBLY AMENDMENTS NOS. 802 AND 1170 TO S.B. 335.

SENATOR LEE SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR PORTER WAS ABSENT FOR THE VOTE.)

* * * * *

Senator Adler noted under the statutes the gun would technically be subject to forfeiture, which is not the intention of legislators. Senator James asked him to address that in a conference committee.

Senator James reminded the committee they had heard S.B. 157 while in Las Vegas.

SENATE BILL 157: Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance.

He said the testimony on S.B. 157 referred to accepting affidavits from experts. He called the amendment from the Assembly "a total rewrite." He said the amendment will amend the bill as a whole by deleting section 1. He remembered the first reprint was approved in the Senate and it contained only one section, which is now being deleted.

Mr. Graham stated those who previously voiced concern about S.B. 157 should have less concern now. He explained the bill has taken the chemist, the blood-drawer and the calibrator completely out of the affidavit process except for what already exists today at felony trials, so there will be no automatic admission of an affidavit from a chemist at any proceeding. He said misdemeanor trials will not allow a chemist except for the present standard. He indicated the notification process will be retained just as in the original bill. He asserted the bill, as amended by the Assembly, has stricter provisions regarding what will be admissible.

According to Mr. Graham, a case from the Ninth Circuit Court of Appeals conflicted with the Seventh Circuit Court of Appeals. He declared a majority of the district attorneys feel the bill is still constitutional, but in the interest of being conservative he agreed with the Assembly to remove the chemist from the list of experts. He urged the committee to concur.

Senator Adler asked how the bill will work procedurally. Mr. Graham responded in a case of driving under the influence of a controlled substance (DUI), the district attorney sends the attorney a notice that the affidavit of an expert, such as the person who calibrated the breath machine, is to be used in court, along with a copy of the affidavit. If the attorney can establish a bonafide reason why the affidavit should not be used, the state will be required to bring in the expert witness.

Mr. Graham explained in the case of the chemist, the district attorney will send a letter stating a desire to use the affidavit of the chemist, but the defending attorney can reject it without a bonafide reason, and the chemist will have to appear in person. He said the state will pay the fee for the chemist. He noted this differs from present law in that the calibrator does not have to appear, but the chemist does, which is the result of the Ninth Circuit Court case.

Senator James recalled many people had testified S.B. 157 will make a tremendous change. He asked if they approve of a law which mandates that the evidence must be admitted at any time except for the trial, and no objection will be allowed. Mr. Graham pointed out there is an opportunity for objection, which is contained in S.B. 157.
He declared:

> I spent hours not only with bill-draft people, but with our district attorneys, emphasizing that if there's a bonafide dispute, that it is a

savings clause. I was assured over and over again by the bill-draft people that that was still in there.

Mr. Graham acknowledged he found the amendment to be confusing, so he asked Noel Waters, Carson City District Attorney, to review it, and he agreed that the provision covering a bonafide dispute is still in the bill. Mr. Graham asserted if that is not in the bill, the bill was not amended as intended. He suggested the measure be held until he can obtain assurances from the bill drafters that the bonafide dispute provision is still contained in the bill.

Senator James insisted the bonafide dispute language was deleted, which means that notice of the affidavit will not be required, and the judge will not be able to sustain an objection. He stated, "It says right here that the court shall not sustain any objection to the admission of such an affidavit." Mr. Graham reiterated his request to examine the matter further.

Senator Adler pointed out the prohibition against sustaining an objection applies to pretrial matters as set forth in section 1, subsection 1 of the bill, whereas subsection 2 allows for an objection to evidence to go before the trial.

Senator James announced the bill will be held for the next work session. He asked the committee to consider S.B. 496, the revisers bill.

SENATE BILL 496: Makes various technical amendments to provisions of Nevada Revised Statutes.

He called attention to section 2, page 2, line 17, which was amended by the Assembly to resolve a conflict. He said the figure was changed to $125,000 because the homestead provision was raised. Also he noted an effective date change in section 75.

SENATOR TITUS MOVED TO CONCUR IN THE ASSEMBLY AMENDMENT NO. 1048 TO S.B. 496.

SENATOR LEE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Sixty-eighth Session
June 27, 1995

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 8:30 a.m., on Tuesday, June 27, 1995, in Room 224 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Maurice Washington
Senator Mike McGinness
Senator Ernest E. Adler
Senator Dina Titus
Senator O. C. Lee

COMMITTEE MEMBERS ABSENT:

Senator Jon C. Porter, Vice Chairman (Excused)

GUEST LEGISLATORS PRESENT:

Assemblywoman Barbara E. Buckley

STAFF MEMBERS PRESENT:

Allison Combs, Senior Research Analyst
Lori M. Story, Committee Secretary
Brenda Erdoes, Legislative Counsel, Legislative Counsel Bureau

OTHERS PRESENT:

George L. Cotton, Affirmative Action Manager, Clark County
Paul Gowins, Representative, Disabled Community
Carol A. Jackson, Director, Department of Employment, Training and Rehabilitation
I.R. "Renny" Ashleman, Lobbyist, Southern Nevada Home Builders Association
Elizabeth B. Kolkoski, Chief, Aging Services Division, Department of Human Resources
Myla C. Florence, Director, Welfare Division, Department of Human Resources

3278 77c

Recalling S.B. 573, the bill drafter's trailer bill, the chairman took a motion.

SENATOR ADLER MOVED TO DO PASS S.B. 573.

SENATOR LEE SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR PORTER WAS ABSENT FOR THE VOTE.)

*****

SENATE BILL 157: Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance.

The next bill, S.B. 157 is the affidavit bill. The committee received the amendments to the bill. It appeared the bona fide dispute escape clause was removed by the Assembly. This was apparently done in error, the chairman explained. He called for a motion to not concur in the amendment to allow a repair of the bill in a conference committee.

SENATOR WASHINGTON MOVED TO NOT CONCUR IN THE ASSEMBLY AMENDMENT TO S.B. 157.

SENATOR ADLER SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR PORTER WAS ABSENT FOR THE VOTE.)

*****

ASSEMBLY BILL 623: Authorizes juvenile division of district court to bind over for trial child certified as adult after formal adversarial hearing.

The next bill, A.B. 623, is opposed by the Nevada Association of Juvenile Probation Officers, Senator James reported. He asked who had requested this piece of legislation. Ben Graham, Chief Deputy, Clark County, Lobbyist, Nevada District Attorneys Association, came forward to address the concerns raised by the juvenile authorities, noting this same concern was raised by the Clark County District Attorney's Office when it first came forward.

Remarks by Senator O'Connell.
Motion carried.
Bill ordered transmitted to the Assembly.

APPOINTMENT OF CONFERENCE COMMITTEES

Mr. President appointed Senators O'Donnell, Porter and Shaffer as a first Committee on Conference to meet with a like committee of the Assembly for the further consideration of Assembly Bill No. 47.

REPORTS OF CONFERENCE COMMITTEES

Mr. President:

The first Committee on Conference concerning Senate Bill No. 157, consisting of the undersigned members, has met, and reports that:

It has agreed to recommend that the amendment of the Assembly be concurred in.

It has agreed to recommend that the bill be further amended as set forth in Conference Amendment No. 23, which is attached to and hereby made a part of this report.

Conference Amendment.

Amend sec. 2, page 2, line 9, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 2, line 22, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 2, line 31, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 2, line 44, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 3, line 9, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 3, line 19, after "*6.*" by inserting: "*If, at or before the time of the trial, the defendant establishes that:*

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,

the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

7.".

Amend sec. 2, page 3, line 21, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 2, page 3, line 22, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 2, page 3, by deleting line 24 and inserting: "*affidavit or declaration.*".

Amend sec. 2, page 3, line 25, by deleting "7." and inserting "[7.] *8.*".

Amend sec. 3, page 3, line 40, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 3, page 3, line 41, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 3, page 3, line 42, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 3, page 3, line 43, after "*affidavit*" by inserting "*or declaration*".

JON C. PORTER
MAURICE E. WASHINGTON
O. C. LEE
Senate Committee on Conference

JAN F. MONAGHAN
MARK A. MANENDO
MICHAEL A. SCHNEIDER
Assembly Committee on Conference

Senator Porter moved that the Senate adopt the report of the first Committee on Conference concerning Senate Bill No. 157.

Remarks by Senator Porter.
Motion carried.

MESSAGES FROM THE SENATE

SENATE CHAMBER, Carson City, July 1, 1995

To the Honorable the Assembly:

I have the honor to inform your honorable body that the Senate on this day passed Assembly Bills Nos. 80, 116, 225, 328, 386, 467, 487, 506, 676, 691, 738, 740.

Also, I have the honor to inform your honorable body that the Senate amended, and on this day passed, as amended, Assembly Bills Nos. 210, 288, 498, 532, 585, and respectfully requests your honorable body to concur in said amendments.

Also, I have the honor to inform your honorable body that the Senate on this day adopted the report of the first Committee on Conference concerning Assembly Bill No. 279.

Also, I have the honor to inform your honorable body that the Senate on this day passed Senate Bill No. 582.

Also, I have the honor to inform your honorable body that the Senate on this day passed, as amended, Senate Bill No. 581.

Also, I have the honor to inform your honorable body that the Senate on this day concurred in the Assembly amendments to Senate Bills Nos. 133, 395, 491, 501.

Also, I have the honor to inform your honorable body that the Senate on this day respectfully refused to concur in the Assembly amendment to Senate Bill No. 579.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Lowden, Coffin and Augustine as a first Committee on Conference concerning Senate Bill No. 85.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Porter, Washington and Lee as a first Committee on Conference concerning Senate Bill No. 171.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Augustine, Shaffer and Lowden as a first Committee on Conference concerning Senate Bill No. 344.

Also, I have the honor to inform your honorable body that the Senate on this day appointed Senators Rawson, Jacobsen and Mathews as a first Committee on Conference concerning Senate Bill No. 526.

Also, I have the honor to inform your honorable body that the Senate on this day adopted the report of the first Committee on Conference concerning Senate Bill No. 335.

Also, I have the honor to inform your honorable body that the Senate on this day adopted the report of the first Committee on Conference concerning Senate Bill No. 458.

Also, I have the honor to inform your honorable body that the Senate on this day adopted the report of the second Committee on Conference concerning Senate Bill No. 87.

MARY JO MONGELLI
Assistant Secretary of the Senate

UNFINISHED BUSINESS

REPORTS OF CONFERENCE COMMITTEES

Mr. Speaker:

The first Committee on Conference concerning Senate Bill No. 157, consisting of the undersigned members, has met, and reports that:

It has agreed to recommend that the amendment of the Assembly be concurred in.

It has agreed to recommend that the bill be further amended as set forth in Conference Amendment No. C24, which is attached to and hereby made a part of this report.

JAN F. MONAGHAN
MARK A. MANENDO
MICHAEL A. SCHNEIDER
Assembly Committee on Conference

JON C. PORTER
MAURICE E. WASHINGTON
O. C. LEE
Senate Committee on Conference

Conference Amendment No. 24.

Amend sec. 2, page 2, line 9, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 2, line 22, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 2, line 31, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 2, line 44, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 3, line 9, by deleting "*subsection 6,*" and inserting: "*subsections 6 and 7,*".

Amend sec. 2, page 3, line 19, after "*6.*" by inserting: "*If, at or before the time of the trial, the defendant establishes that:*

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,

the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

7.".

Amend sec. 2, page 3, line 21, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 2, page 3, line 22, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 2, page 3, by deleting line 24 and inserting: "*affidavit or declaration.*".

Amend sec. 2, page 3, line 25, by deleting "7." and inserting "[7.] *8.*".

Amend sec. 3, page 3, line 40, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 3, page 3, line 41, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 3, page 3, line 42, after "*affidavit*" by inserting "*or declaration*".

Amend sec. 3, page 3, line 43, after "*affidavit*" by inserting "*or declaration*".

Assemblyman Monaghan moved that the Assembly adopt the report of the first Committee on Conference concerning Senate Bill No. 157.

Remarks by Assemblyman Monaghan.

Motion carried.

Mr. Speaker:

The first Committee on Conference concerning Senate Bill No. 526, consisting of the undersigned members, has met, and reports that:

It has agreed to recommend that the amendment of the Assembly be concurred in.

DIANNE STEEL	RAYMOND D. RAWSON
MAUREEN E. BROWER	LAWRENCE E. JACOBSEN
MICHAEL A. SCHNEIDER	BERNICE MATHEWS
Assembly Committee on Conference	*Senate Committee on Conference*

(REPRINTED WITH ADOPTED AMENDMENTS)
THIRD REPRINT S.B. 157

SENATE BILL NO. 157—COMMITTEE ON JUDICIARY

JANUARY 31, 1995

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance. (BDR 4-475)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to expert witnesses; revising the provisions governing the use of an affidavit or declaration in lieu of the testimony of an expert witness as to the existence of alcohol or a controlled substance; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 50 of NRS is hereby amended by adding thereto a new section to read as follows:

1. The affidavit of a chemist and any other person who has qualified in the district court of any county to testify as an expert witness regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, which is submitted to prove:

(a) The quantity of the purported controlled substance; or

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be,

is admissible in the manner provided in this section.

2. An affidavit which is submitted to prove any fact set forth in subsection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a grand jury. The court shall not sustain any objection to the admission of such an affidavit.

3. The defendant may object in writing to admitting into evidence an affidavit submitted to prove any fact set forth in subsection 1 during his trial. If the defendant makes such an objection, the court shall not admit the affidavit into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit.

Sec. 2. NRS 50.315 is hereby amended to read as follows:

50.315 1. [If a person has qualified in the district court of any county as an expert witness to testify regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or

organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence in an administrative proceeding or in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove:

(a) The quantity of the purported controlled substance; and

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A] *Except as otherwise provided in subsections 6 and 7, a* person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath to determine the amount by weight of alcohol in his breath;

(b) The identity of a person from whom the affiant obtained a sample of breath; *and*

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly . [; and

(d) The amount of alcohol that he found in the person's breath.

3. The]

2. Except as otherwise provided in subsections 6 and 7, the affidavit of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; and

(b) That he prepared a solution or gas having the chemical composition necessary for accurately calibrating it.

[4. The]

3. Except as otherwise provided in subsections 6 and 7, the affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated the device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

[5. The]

4. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration made under the penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as set forth in

[subsection] *section 1 of this act* is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The identity of the person from whom the affiant or declarant withdrew the sample;

(c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The identity of the person to whom the affiant or declarant delivered it.

[6. The]

5. Except as otherwise provided in subsections 6 and 7, the affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

6. If, at or before the time of the trial, the defendant establishes that:

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,

the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

7. During any trial in which the defendant has been accused of committing a felony, the defendant may object in writing to admitting into evidence an affidavit or declaration described in this section. If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit or declaration.

[7.] *8.* The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

Sec. 3. NRS 50.325 is hereby amended to read as follows:

50.325 1. If a person is charged with an offense punishable pursuant to chapter 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor, a controlled substance or a chemical, poison or organic solvent, and it is necessary to prove:

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison or organic solvent,

the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 *and section 1 of this act* be admitted [in] *into* evidence at the trial or preliminary hearing concerning the offense. *Except as otherwise provided in NRS 50.315 and section 1 of this act, the affidavit or declaration must be admitted into evidence.*

2. [The] *If the request is to have the affidavit or declaration admitted into evidence at a preliminary hearing or hearing before a grand jury, the affidavit or declaration must be admitted into evidence upon submission. If the request is to have the affidavit or declaration admitted into evidence at trial, the* request must be [made] *:*

(a) Made at least 10 days before the date set for the trial [or preliminary hearing and must be sent] *;*

(b) Sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney [.] *; and*

(c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the affiant or declarant.

3. [If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for the trial or preliminary hearing that the presence of the expert or other person is demanded, the affidavit or declaration must not be admitted. A defendant who demands the presence of the expert or other person and is convicted of violating NRS 484.379 or a provision of chapter 484 of NRS for which a driver's license may be revoked shall pay the fees and expenses of that witness at the trial or preliminary hearing.

4. If at the trial or preliminary hearing the affidavit or declaration of an expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge or justice of the peace may adjourn the trial or hearing for a period not to exceed 3 judicial days to receive the testimony. If 3 judicial days are not sufficient in a county whose population is less than 35,000 to provide the presence of the expert or other person to be examined or cross-examined, the judge, justice of the peace or hearing officer may extend the period of adjournment for a period not exceeding 10 days. The time within which a preliminary hearing or trial is required is extended by the time of the adjournment.] *The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.*

2. The state board of education shall adopt regulations to carry out the program. The regulations must prescribe the procedure by which a school district may obtain a waiver from the requirements of the program.

Senate Bill No. 157—Committee on Judiciary

CHAPTER 708

AN ACT relating to expert witnesses; revising the provisions governing the use of an affidavit or declaration in lieu of the testimony of an expert witness as to the existence of alcohol or a controlled substance; and providing other matters properly relating thereto.

[Approved July 7, 1995]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 50 of NRS is hereby amended by adding thereto a new section to read as follows:

1. The affidavit of a chemist and any other person who has qualified in the district court of any county to testify as an expert witness regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, which is submitted to prove:

(a) The quantity of the purported controlled substance; or

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be,

is admissible in the manner provided in this section.

2. An affidavit which is submitted to prove any fact set forth in subsection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a grand jury. The court shall not sustain any objection to the admission of such an affidavit.

3. The defendant may object in writing to admitting into evidence an affidavit submitted to prove any fact set forth in subsection 1 during his trial. If the defendant makes such an objection, the court shall not admit the affidavit into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit.

Sec. 2. NRS 50.315 is hereby amended to read as follows:

50.315 1. [If a person has qualified in the district court of any county as an expert witness to testify regarding the presence in the breath, blood or urine of a person of alcohol, a controlled substance, or a chemical, poison or organic solvent, or the identity or quantity of a controlled substance alleged to have been in the possession of a person, the expert's affidavit is admissible in evidence in an administrative proceeding or in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's or municipal court in any county in the district to prove:

(a) The quantity of the purported controlled substance; and

(b) The amount of alcohol or the presence or absence of a controlled substance, chemical, poison or organic solvent, as the case may be.

2. A] *Except as otherwise provided in subsections 6 and 7, a* person's affidavit is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That he has been certified by the director of the department of motor vehicles and public safety as being competent to operate devices of a type certified by the committee on testing for intoxication as accurate and reliable for testing a person's breath to determine the amount by weight of alcohol in his breath;

(b) The identity of a person from whom the affiant obtained a sample of breath; *and*

(c) That the affiant tested the sample using a device of a type so certified and that the device was functioning properly . [; and

(d) The amount of alcohol that he found in the person's breath.

3. The]

2. Except as otherwise provided in subsections 6 and 7, the affidavit of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation; and

(b) That he prepared a solution or gas having the chemical composition necessary for accurately calibrating it.

[4. The]

3. Except as otherwise provided in subsections 6 and 7, the affidavit of a person who calibrates a device for testing another's breath to determine the amount of alcohol in his breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The affiant's occupation;

(b) That on a specified date he calibrated the device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the committee on testing for intoxication;

(c) That the calibration was performed within the period required by the committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

[5. The]

4. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration made under the penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as set forth in [subsection] *section 1 of this act* is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The identity of the person from whom the affiant or declarant withdrew the sample;

(c) The fact that the affiant or declarant kept the sample in his sole custody or control and in substantially the same condition as when he first obtained it until delivering it to another; and

(d) The identity of the person to whom the affiant or declarant delivered it.

[6. The]

5. Except as otherwise provided in subsections 6 and 7, the affidavit of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

6. If, at or before the time of the trial, the defendant establishes that:

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,

the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

7. During any trial in which the defendant has been accused of committing a felony, the defendant may object in writing to admitting into evidence an affidavit or declaration described in this section. If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit or declaration.

[7.] *8.* The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

Sec. 3. NRS 50.325 is hereby amended to read as follows:

50.325 1. If a person is charged with an offense punishable pursuant to chapter 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor, a controlled substance or a chemical, poison or organic solvent, and it is necessary to prove:

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison or organic solvent,

the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 *and section 1 of this act* be admitted [in] *into* evidence at the trial or preliminary hearing concerning the offense. *Except as otherwise provided in NRS 50.315 and section 1 of this act, the affidavit or declaration must be admitted into evidence.*

2. [The] *If the request is to have the affidavit or declaration admitted into evidence at a preliminary hearing or hearing before a grand jury, the affidavit or declaration must be admitted into evidence upon submission. If the request is to have the affidavit or declaration admitted into evidence at trial, the* request must be [made] *:*

(a) Made at least 10 days before the date set for the trial [or preliminary hearing and must be sent] ;

(b) Sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney [.] ; *and*

(c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the affiant or declarant.

3. [If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for the trial or preliminary hearing that the presence of the expert or other person is demanded, the affidavit or declaration must not be admitted. A defendant who demands the presence of the expert or other person and is convicted of violating NRS 484.379 or a provision of chapter 484 of NRS for which a driver's license may be revoked shall pay the fees and expenses of that witness at the trial or preliminary hearing.

4. If at the trial or preliminary hearing the affidavit or declaration of an expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge or justice of the peace may adjourn the trial or hearing for a period not to exceed 3 judicial days to receive the testimony. If 3 judicial days are not sufficient in a county whose population is less than 35,000 to provide the presence of the expert or other person to be examined or cross-examined, the judge, justice of the peace or hearing officer may extend the period of adjournment for a period not exceeding 10 days. The time within which a preliminary hearing or trial is required is extended by the time of the adjournment.] *The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.*

Senate Bill No. 171—Senator Rhoads

CHAPTER 709

AN ACT relating to the cost of litigation; authorizing courts to award as costs to the prevailing party the costs of certain computerized services; and providing other matters properly relating thereto.

[Approved July 7, 1995]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 18.005 is hereby amended to read as follows:

18.005 For the purposes of NRS 18.010 to 18.150, inclusive, the term "costs" means:

1. Clerks' fees.

2. Reporters' fees for depositions, including a reporter's fee for one copy of each deposition.

3. Jurors' fees and expenses, together with reasonable compensation of an officer appointed to act in accordance with NRS 16.120.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
April 14, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:38 a.m. on Tuesday, April 14, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

GUEST LEGISLATORS PRESENT:

Assemblywoman Barbara E. Buckley, Assembly District No. 8
Assemblyman Mark A. Manendo, Assembly District No. 18

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

Hank Pirowski, Project Director, Veterans Treatment Court, Buffalo, New York
T. Arthur Ritchie, Jr., District Judge, Family Division, Department H, Eighth Judicial District
Peter I. Breen, Senior District Judge

ASSEMBLY BILL 250: Revises provisions relating to certain affidavits or declarations of experts. (BDR 4-1018)

ASSEMBLYMAN MARK A. MANENDO (Assembly District No. 18):
Assembly Bill 250 provides that a person may qualify to test as an expert witness in any court of record in the State, rather than only in the district court, regarding the presence of alcohol in the breath, blood or urine of a person or the identity or quantity of a controlled substance or other chemical in a person's possession. The measure defines who qualifies as a chemist for purpose of such expert witness testimony and authorizes a request to have the affidavit or declaration admitted as evidence at a trial to be personally served on the defendant or his counsel.

L. J. O'NEALE (Chief Deputy District Attorney, Vehicular Crimes Unit, Office of the District Attorney, Clark County):
This bill clarifies and eases the procedure. It does not affect the substantive rights of anyone accused of a crime. The bill provides that a person who has qualified as an expert in a court of record can testify as an expert regarding certain evidence. It is becoming increasingly difficult to get time in the district courts with so many cases being heard. It is rare for an expert to have the opportunity to testify in a trial.

The district court was the only court of record in Nevada. In 1979, justice courts and some municipal courts became courts of record. Therefore, testimony of experts can be preserved and scrutinized.

Chemist is a term generally used to refer to anyone who tests blood or urine for alcohol or drugs. The problem is, although many of these people have degrees in chemistry, none of them have the job title of chemist. This bill explains who a chemist is.

Statute requires us to send the notice of intent to use affidavit by certified mail. This takes about five minutes per letter. If we do ten a day, we are up to about an hour of our time. Additionally, we have to send it to the defense attorney and the defendant. This adds to our cost. We give them actual notice when we hand them the notice in court. They still have all their rights to object. This makes it easier and cheaper for us.

CHAIR CARE:
What is the current case law on only the use of an affidavit or declaration and the confrontation clause? This is not the issue in front of us, but it kicks in when we say a court of record in this State as opposed to district court.

MR. O'NEALE:
There are two separate issues. One is the affidavit of someone who draws the blood. The state of the law is the Nevada Supreme Court opinion in *City of Las Vegas v. Walsh,* 121 Nev. 899, 124 P.3d 203 (2005), where the Nevada Supreme Court said the present procedure with the provision to object and bring the objections before the court does not violate the right of confrontation or due process. The other issue is bringing in the chemist. The law requires us to bring in the chemist if there is an objection to bringing in the chemist, even for a misdemeanor trial. We can bring in the affidavit of the person who drew the blood if the objection is not sufficient under the law. There is no sufficiency requirement for an objection to the chemist. All they have to do is say they object, and then we have to bring in the chemist. This affects us only in our misdemeanor cases. In a jury trial, as a routine, we always bring in the chemist and the nurse or person who draws the blood because we want the jury to see them. In a felony, we do not want any possible objections on appeal. Under Nevada law, there is no due process or confrontation problem with the affidavit of the person who drew the blood because the statutory right to object is preserved.

SAMUEL BATEMAN (Nevada District Attorneys Association):
I am here as a backup.

CHAIR CARE:
This bill passed out of the Assembly by a vote of 42 to 0.

SENATOR WIENER MOVED TO DO PASS A.B. 250.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

STATE OF NEVADA
DEPARTMENT OF MOTOR VEHICLES
(702) 486-4940
NOTICE OF ADMINISTRATIVE HEARING
January 8, 2013

VALENTI, VINCENT S.
3687 E HACIENDA AVE
LAS VEGAS NV 89120

CASE #: IP120918B

DL NO.: 1701100444

IN THE MATTER OF: DRIVER'S LICENSE REVOCATION UNDER NRS 484.385/484C.220

You are scheduled for a hearing as follows:

DATE: FEBRUARY 11TH, 2013

TIME: 1:00:00 PM

LOCATION: Department of Motor Vehicles
East Entrance marked "Office of Administrative Hearings"
2701 East Sahara Ave /TB
Las Vegas, NV 89104

PURPOSE The purpose of this hearing is to determine whether the chemical test to which you submitted showed an alcohol concentration of 0.08 or more and/or whether the chemical test to which you submitted showed a detectable amount of prohibited substance(s) in your system pursuant to NRS 484.379/484C.110. You may expect affidavits/declarations to be used to establish your blood/breath alcohol and/or prohibited substance content. (NRS 50.315, NRS 50.320, NRS 233B.123, and NAC 481.330)

AUTHORITY NRS 484.387/484C.230, NRS 233B Nevada Administrative Procedures Act

Please see Information Sheet attached hereto.

If you are under the age of 18, you must be accompanied by a parent, legal guardian, or guardian ad litem.

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the hearing. If special arrangements for the hearing are necessary, please notify the Hearing Office at (702) 486-4940 no later than five (5) working days prior to the meeting. Failure to pick up your temporary driver's license may result in cancellation of your hearing by the Administrative Hearings Office.

cc: J. WATKINS/LM

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NRS 50.315 Admissibility of affidavit or declaration offered to prove certain facts concerning use of certain devices or withdrawal or holding of evidence related to determining presence of alcohol, controlled substance, chemical, poison, organic solvent or another prohibited substance.

1. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person is admissible in evidence in any criminal or administrative proceeding to prove:

(a) That the affiant or declarant has been certified by the Director of the Department of Public Safety as being competent to operate devices of a type certified by the Committee on Testing for Intoxication as accurate and reliable for testing a person's breath to determine the concentration of alcohol in his or her breath;

(b) The identity of a person from whom the affiant or declarant obtained a sample of breath; and

(c) That the affiant or declarant tested the sample using a device of a type so certified and that the device was functioning properly.

2. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the concentration of alcohol in his or her breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant; and

(b) That the solution or gas has the chemical composition necessary for accurately calibrating it.

3. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person who calibrates a device for testing another's breath to determine the concentration of alcohol in his or her breath is admissible in evidence in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) That on a specified date the affiant or declarant calibrated the device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the Committee on Testing for Intoxication;

(c) That the calibration was performed within the period required by the Committee's regulations; and

(d) Upon completing the calibration of the device, it was operating properly.

4. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration made under the penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as set forth in NRS 50.320 is admissible in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The identity of the person from whom the affiant or declarant withdrew the sample;

(c) The fact that the affiant or declarant kept the sample in his or her sole custody or control and in substantially the same condition as when he or she first obtained it until delivering it to another; and

(d) The identity of the person to whom the affiant or declarant delivered it.

5. Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person who receives from another a sample of blood or urine or other tangible evidence that is alleged to contain alcohol or a controlled substance, chemical, poison, organic solvent or another prohibited substance may be admitted in any criminal or civil or administrative proceeding to prove:

(a) The occupation of the affiant or declarant;

(b) The fact that the affiant or declarant received a sample or other evidence from another person and kept it in his or her sole custody or control in substantially the same condition as when he or she first received it until delivering it to another; and

(c) The identity of the person to whom the affiant or declarant delivered it.

6. If, at or before the time of trial, the defendant establishes that:

(a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and

(b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,

➥ the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

7. During any trial in which the defendant has been accused of committing a felony, the defendant may object in writing to admitting into evidence an affidavit or declaration described in this section. If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecution may cause the person to testify to any information contained in the affidavit or declaration.

8. The Committee on Testing for Intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

(Added to NRS by 1971, 929, 2048; A 1973, 891; 1975, 647; 1983, 1084, 1914; 1985, 1972; 1987, 798, 1544, 1579; 1989, 77; 1993, 84, 2079; 1995, 2712; 1997, 1419; 1999, 2468, 3400; 2001, 172, 2555; 2005, 2044; 2007, 396)

1971 PAGE 929

Assembly Bill No. 637—Messrs. Frank Young, Lowman, Prince and Dreyer

CHAPTER 477

AN ACT relating to witnesses in criminal matters; permitting certain experts to testify by affidavit as to presence of intoxicating liquor or a drug in a person's blood or urine at a trial or preliminary examination; preserving the right of cross-examination; and providing other matters properly relating thereto.

[Approved April 23, 1971]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 53 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 4, inclusive, of this act.

SEC. 2. *Whenever any person has qualified in the district court of a county as an expert witness for the purpose of testifying regarding the presence in the blood or urine of a person of intoxicating liquor, a narcotic drug, as defined in NRS 453.020, a dangerous drug, as defined in NRS 454.220, or a drug the use or possession of which is regulated by NRS 454.460 and 454.465, the affidavit of such person is admissible in evidence in a criminal trial in the district court in such county or a preliminary examination or trial in a justice's court in such county for the purpose of proving the person from whom the affiant received the blood or urine for analysis and the presence or absence of intoxicating liquor or drug, as the case may be.*

SEC. 3. *1. Whenever a person is charged with an offense punishable under chapters 453 or 484 of NRS or NRS 454.180 to 454.465, inclusive, and it is necessary to prove the existence of any intoxicating liquor or drug, the district attorney may request that the affidavit of a person qualified as provided in section 2 of this act be admitted in evidence at the trial of or preliminary examination into the offense.*

2. Such request shall be made at least 10 days prior to the date set for such trial examination and shall be sent to the defendant's counsel and to the defendant, by registered or certified mail.

3. If such defendant, or his counsel, notifies the district attorney within 72 hours after receipt of such request that the presence of such person is demanded, the affidavit shall not be admitted.

4. If at the trial or preliminary examination the affidavit of an expert has been admitted in evidence, and it appears to be in the interest of justice that such expert be examined or cross-examined in person, the district court judge or justice of the peace may adjourn the trial or preliminary examination for a period of not to exceed 3 judicial days for the purpose of receiving such testimony. The time within which a preliminary examination or trial is required is extended by the time of such adjournment.

SEC. 4. *The affidavit referred to in sections 2 and 3 of this act shall be substantially in the following form:*

STATE OF NEVADA
COUNTY OF..... } *ss.*

....., being first duly sworn, deposes and says: That I am ..... (occupation); that on ..... (date)

I qualified before a district judge of the district court of this county as a witness qualified to detect the presence in the blood or urine of a person of intoxicating liquor or a narcotic drug, as defined in NRS 453.020, a dangerous drug as defined in NRS 454.220, or a drug the use or possession of which is regulated by NRS 454.460 and 454.465; that on ..... (date) I received a substance from ..... (name); that on ..... (date) I analyzed such substance and determined it to be ..... (substance); that on ..... (date) I returned such drug to ..... (name) or that I still have such substance in my possession.

.....
AFFIANT

Subscribed and sworn to before me this ..... day of ....., 19.....

.....
NOTARY PUBLIC

Assembly Bill No. 688—Messrs. Hafen, Smith, Swallow, Frank Young, Mrs. White, Messrs. Ronzone and Wilson

CHAPTER 478

AN ACT relating to junk and secondhand dealers; requiring due diligence in the purchase of anything ordinarily belonging to a public utility; providing a penalty; and providing other matters properly relating thereto.

[Approved April 23, 1971]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 647 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

SEC. 2. *1. Any junk dealer or any agent, employee or representative of a junk dealer who buys or receives any junk which he knows or should reasonably know is ordinarily used by and belongs to a telephone, telegraph, gas, water, electric or transportation company or county, city or other political subdivision of this state engaged in furnishing utility service, and who fails to use ordinary care in determining whether the person selling or delivering such junk has a legal right to do so, is guilty of criminally receiving such property.*

2. Any person convicted of criminally receiving junk shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years or in a county jail for not more than 1 year, or by a fine of not more than $1,000, or by both fine and imprisonment.

SEC. 3. *1. Any secondhand dealer or any agent, employee or representative of a secondhand dealer who buys or receives any junk which he knows or should reasonably know is ordinarily used by and belongs to a telephone, telegraph, gas, water, electric or transportation company or county, city or other political subdivision of this state engaged in furnishing utility service, and who fails to use ordinary care in determining*

whether the person selling or delivering such junk has a legal right to do so, is guilty of criminally receiving such property.

2. Any person convicted of criminally receiving junk shall be punished by imprisonment in the state prison for not less than 1 year nor more than 5 years or in a county jail for not more than 1 year, or by a fine of not more than $250, or by both fine and imprisonment.

SEC. 4. NRS 647.010 is hereby amended to read as follows:

647.010 As used in NRS 647.010 to 647.090, inclusive [:] *, and section 2 of this act:*

1. "Junk" includes old iron, copper, brass, lead, zinc, tin, steel and other metals, metallic cables, wires, ropes, cordage, bottles, bagging, rags, rubber, paper, and all other secondhand, used or castoff articles or material of any kind.

2. "Junk dealer" means every person, firm or corporation engaged in the business of purchasing or selling hides or junk.

SEC. 5. NRS 647.030 is hereby amended to read as follows:

647.030 1. Every junk dealer shall keep a book in which shall be written in ink at the time of purchase a full and accurate description of each article purchased, together with the full name, residence, *driver's license number, vehicle license number, license number of the vehicle delivering the material* and general description of the person or persons selling the same. No entry in the book shall be erased, mutilated or changed.

2. The book shall be open at all times to inspection by the sheriff of the county or any of his deputies, any member of the police force in the city or town, and any constable or other county or municipal official in the county in which the junk dealer does business.

SEC. 6. NRS 647.080 is hereby amended to read as follows:

647.080 NRS 647.010 to 647.090, inclusive, *and section 2 of this act,* shall not be construed as impairing the power of cities or incorporated towns in this state to license, tax and regulate any person, firm or corporation now engaged in or hereafter engaged in the buying and selling of junk.

SEC. 7. NRS 647.100 is hereby amended to read as follows:

647.100 As used in NRS 647.100 to 647.150, inclusive, *and section 3 of this act,* every person engaged in whole or in part in the business of buying and selling secondhand personal property, metal junk or melted metals shall be deemed to be a secondhand dealer.

SEC. 8. NRS 647.110 is hereby amended to read as follows:

647.110 1. Every secondhand dealer doing business in any incorporated city or unincorporated town in this state shall maintain in his place of business a book or other permanent record in which shall be legibly written in the English language, at the time of each purchase or sale, a record thereof containing:

(a) The date of the transaction.

(b) The name of the person or employee conducting the transaction.

(c) The name, age, *driver's license number, vehicle license number,* street and house number, and a general description of the dress, complexion, color of hair, and facial appearance of the person with whom the transaction is had.

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Assembly Bill No. 111—Committee on Judiciary

CHAPTER 555

AN ACT to permit an expert in the identification of controlled substances, who has qualified as such an expert in a district court of this state, to appear at trials and preliminary examinations of a district or justice court of such district by affidavit; providing a proper form of affidavit; and providing other matters properly relating thereto.

[Approved April 25, 1973]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 50.315 is hereby amended to read as follows:

50.315 [1. Until January 1, 1972, whenever any person has qualified in the district court of a county as an expert witness for the purpose of testifying regarding the presence in the blood or urine of a person of intoxicating liquor, a narcotic drug, as defined in NRS 453.020, a dangerous drug, as defined in NRS 454.220, or a drug the use or possession of which is regulated by NRS 454.460 and 454.465, the affidavit of such person is admissible in evidence in a criminal trial in the district court in such county or a preliminary examination or trial in a justice's court in such county for the purpose of proving the person from whom the affiant received the blood or urine for analysis and the presence or absence of intoxicating liquor or drug, as the case may be.

2. After January 1, 1972, whenever] *Whenever* any person has qualified in the district court of [a] *any* county as an expert witness for the purpose of testifying regarding the presence in the blood or urine of a person of [intoxicating liquor,] *alcohol* or a controlled substance the use or possession of which is regulated by chapter 453 of NRS, the affidavit of such person is admissible in evidence in a criminal trial in the district court [in such county] *in any county in the district* or a preliminary examination or trial in [a] *any* justice's court [in such county] *in any county in the district* for the purpose of proving the person from whom the affiant received the blood or urine for analysis and the presence or absence of [intoxicating liquor] *alcohol* or controlled substance, as the case may be.

SEC. 2. NRS 50.325 is hereby amended to read as follows:

50.325 1. Whenever a person is charged with an offense punishable under chapters 453 or 484 of NRS [or NRS 454.180 to 454.465, inclusive,] and it is necessary to prove the existence of any [intoxicating liquor or drug,] *alcohol or the existence or identity of a controlled substance as defined in chapter 453 of NRS*, the district attorney may request that the affidavit of a person qualified as provided in NRS 50.315 be admitted in evidence at the trial of or preliminary examination into the offense.

2. Such request shall be made at least 10 days prior to the date set for such trial examination and shall be sent to the defendant's counsel and to the defendant, by registered or certified mail.

3. If such defendant, or his counsel, notifies the district attorney within 72 hours after receipt of such request that the presence of such person is demanded, the affidavit shall not be admitted.

4. If at the trial or preliminary examination the affidavit of an expert

has been admitted in evidence, and it appears to be in the interest of justice that such expert be examined or cross-examined in person, the district court judge or justice of the peace may adjourn the trial or preliminary examination for a period of not to exceed 3 judicial days for the purpose of receiving such testimony. The time within which a preliminary examination or trial is required is extended by the time of such adjournment.

SEC. 3. NRS 50.335 is hereby amended to read as follows:

50.335 [1. Until January 1, 1972, the affidavit referred to in NRS 50.315 and 50.325 shall be substantially in the following form:

State of Nevada
County of ..... } ss.

....., being first duly sworn, deposes and says: That I am .....(occupation); that on ..... (date) I qualified before a district judge of the district court of this county as a witness qualified to detect the presence in the blood or urine of a person of intoxicating liquor or a narcotic drug, as defined in NRS 453.020, a dangerous drug as defined in NRS 454.220, or a drug the use or possession of which is regulated by NRS 454.460 and 454.465; that on .....(date) I received a substance from .....(name); that on ..... (date) I analyzed such substance and determined it to be ..... (substance); that on .....(date) I returned such drug to .....(name) or that I still have such substance in my possession.

.....
Affiant

Subscribed and sworn to before me
this ..... day of ....., 19.....

.....
Notary Public

2. After January 1, 1972, the affidavit] *The affidavit* referred to in NRS 50.315 and 50.325 shall be substantially in [the following form:] *one of the following forms:*

1. If the sample contained a controlled substance as defined in chapter 453 of NRS:

State of Nevada
County of ..... } ss.

....., being first duly sworn, deposes and says: That I am .....(occupation); that on .....(date) I qualified before a district judge of the district court of this [county] *district* as a witness qualified to detect the presence *and identity* in the blood or urine of a person of [intoxicating liquor or] a controlled substance the use or possession of which is regulated by chapter 453 of NRS; that on ....(date) I received a substance *or* .....

(blood or urine sample) from .....(name); that on .....(date) I analyzed such substance *or sample* and determined it to be *or contain* ..... (substance); that on .....(date) I returned such substance *or sample* to .....(name) or that I still have such substance *or sample* in my possession.

.....
Affiant

Subscribed and sworn to before me
this ..... day of ....., 19.....

.....
Notary Public

2. *If the sample contained alcohol:*

State of Nevada }
County of..... } *ss.*

....., *being first duly sworn, deposes and says: That I am* .....*(occupation); that on* .....*(date) I qualified before a district judge of the district court of this district as a witness qualified to detect the presence of alcohol in the blood or urine of a person; that on* .....*(date) I received a blood or urine sample from* .....*(name); that on* .....*(date) I analyzed such sample and determined that the blood or urine of the person from whom the sample was taken contained* .....*(percent) by weight of alcohol; that on* .....*(date) I returned such sample to* ..... *(name) or that I still have such sample in my possession.*

.....
Affiant

Subscribed and sworn to before me
this ..... day of ....., 19.....

.....
Notary Public

Assembly Bill No. 42—Committee on Transportation

CHAPTER 556

AN ACT relating to motor vehicles; requiring a blood test of any person killed as a result of an accident involving a motor vehicle; and providing other matters properly relating thereto.

[Approved April 25, 1973]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter 484 of NRS is hereby amended by adding thereto a new section which shall read as follows:

1975 PAGE 647

13. No person may operate or give permission for the operation of a vessel which is not equipped as required by this section.

14. Notwithstanding the provisions of subsection 2, no motorboat of class A need exhibit the lights required by this section during a period of 1 hour after sunset and during a period of 1 hour before sunrise, except when operated on navigable waters of the United States.

SEC. 8. NRS 488.235 is hereby amended to read as follows:

488.235 1. No person may operate a vessel on any [congested] waters of this state for towing a person or persons on water skis or a surfboard or similar device unless there is in such vessel a person, in addition to the operator, in a position to observe the progress of the person or persons being towed. [If such waters are not congested, such vessel shall be equipped with a suitable rearview mirror by which the operator of such boat may observe the person being towed. The commission shall determine and arrange to give notice to the public what waters are congested under the provisions of this section.]

2. No person may operate a vessel on any waters of this state towing a person or persons on water skis, a surfboard or similar device, nor may any person engage in water skiing, surfboarding or similar activity at any time between the hours from 1 hour after sunset to 1 hour before sunrise.

3. The provisions of subsections 1 and 2 of this section do not apply to a performer engaged in a professional exhibition or a person or persons engaged in an activity authorized under NRS 488.305.

SEC. 9. This act shall become effective on January 1, 1976.

Assembly Bill No. 585—Committee on Judiciary

CHAPTER 431

AN ACT relating to expert witnesses; permitting expert witnesses to submit affidavits identifying controlled substances alleged to have been in possession of any person; providing for the admissibility in municipal courts and the reception by grand juries of certain affidavits from expert witnesses; and providing other matters properly relating thereto.

[Approved May 13, 1975]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 50.315 is hereby amended to read as follows:

50.315 Whenever any person has qualified in the district court of any county as an expert witness for the purpose of testifying regarding the presence in the blood or urine of a person of alcohol or a controlled substance the use or possession of which is regulated by chapter 453 of NRS, *or the identity of a controlled substance alleged to have been in the possession of a person,* the affidavit of such person is admissible in evidence

in a criminal trial in the district court in any county in the district or a preliminary examination or trial in any justice's *or municipal* court in any county in the district for the purpose of proving the person from whom the affiant received the blood or urine *or purported controlled substance* for analysis and the presence or absence of alcohol or controlled substance, as the case may be.

SEC. 2. NRS 50.325 is hereby amended to read as follows:

50.325 1. Whenever a person is charged with an offense punishable under chapters 453 or 484 of NRS and it is necessary to prove the existence of any alcohol or the existence or identity of a controlled substance as defined in chapter 453 of NRS, the district attorney *or city attorney* may request that the affidavit of a person qualified as provided in NRS 50.315 be admitted in evidence at the trial of or preliminary examination into the offense.

2. Such request shall be made at least 10 days prior to the date set for such trial examination and shall be sent to the defendant's counsel and to the defendant, by registered or certified mail [.] *by the prosecuting attorney.*

3. If such defendant, or his counsel, notifies the district attorney [within 72 hours after receipt of such request] *or city attorney by registered or certified mail at least 96 hours prior to the date set for such trial examination* that the presence of such person is demanded, the affidavit shall not be admitted.

4. If at the trial or preliminary examination the affidavit of an expert has been admitted in evidence, and it appears to be in the interest of justice that such expert be examined or cross-examined in person, the district court judge or justice of the peace may adjourn the trial or preliminary examination for a period of not to exceed 3 judicial days for the purpose of receiving such testimony. The time within which a preliminary examination or trial is required is extended by the time of such adjournment.

SEC. 3. NRS 50.335 is hereby amended to read as follows:

50.335 The affidavit referred to in NRS 50.315 and 50.325 shall be substantially in one of the following forms:

1. If the sample contained a controlled substance as defined in chapter 453 of NRS:

STATE OF NEVADA
} ss.
COUNTY OF.....

....., being first duly sworn, deposes and says: That I am ..... (occupation); that on ..... (date) I qualified before a district judge of the district court of this district as a witness qualified to detect the presence and identity in the blood or urine of a person of a controlled substance the use or possession of which is regulated by chapter 453 of NRS [;] *, or the identity of a controlled substance alleged to have been in the possession of a person;* that on ..... (date) I [received a substance or ..... (blood or urine sample) from ..... (name);] *obtained certain evidence from ..... bearing Identification No. ..... and consisting of ..... for*

the purpose of performing a chemical analysis upon the contents thereof; that on .....(date) I analyzed such substance or sample and determined it to be or contain .....(substance); *and* that on .....(date) I [returned such substance or sample to .....(name) or that I still have such substance or sample in my possession.] *replaced the contents in the above-mentioned evidence container, sealed that evidence container with an evidence seal(s) bearing my initials ..... and returned such evidence to .....; that such evidence was in my sole care and custody from the time it was obtained by me until it was returned to ..... and was in substantially the same condition as when it was first obtained by me.*

.....
Affiant

.....
Title

Subscribed and sworn to before me
this ..... day of ....., 19.....

.....
Notary Public

2. If the sample contained alcohol:

State of Nevada }
} ss.
County of.....}

....., being first duly sworn, deposes and says: That I am .....(occupation); that on .....(date) I qualified before a district judge of the district court of this district as a witness qualified to detect the presence of alcohol in the blood or urine of a person; that on .....(date) I received a blood or urine sample from .....(name); that on .....(date) I analyzed such sample and determined that the blood or urine of the person from whom the sample was taken contained .....(percent) by weight of alcohol; that on .....(date) I returned such sample to ..... (name) or that I still have such sample in my possession.

.....
Affiant

.....
Title

Subscribed and sworn to before me
this ..... day of ....., 19.....

.....
Notary Public

SEC. 4. NRS 172.135 is hereby amended to read as follows:

172.135 1. In the investigation of a charge, for the purpose of either presentment or indictment, the grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of witnesses

taken as provided in this Title [.] , *except that the grand jury may receive an affidavit in the form prescribed in NRS 50.335 from an expert witness qualified pursuant to NRS 50.315 in lieu of his personal testimony or deposition.*

2. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

Assembly Bill No. 428—Committee on Labor and Management

CHAPTER 432

AN ACT relating to workmen's compensation; revising the definition of average monthly wage and extending use of other definitions.

[Approved May 13, 1975]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 616.027 is hereby amended to read as follows:

616.027 "Average monthly wage" means the lesser of:

1. The monthly wage actually received *or deemed to have been received* by the employee on the date of the accident or injury to the employee [; or] *excluding remuneration from:*

(a) Employment not subject to the Nevada Industrial Insurance Act or the Nevada Occupational Diseases Act;

(b) Employment specified in NRS 616.255 or 617.180; and

(c) Employment for which coverage is elective, but has not been elected; or

2. [The] *One hundred fifty percent of the* state average weekly wage as most recently computed by the employment security department during the fiscal year preceding the date of the injury or accident, multiplied by 4.33.

SEC. 2. NRS 617.020 is hereby amended to read as follows:

617.020 1. Unless a different meaning is clearly indicated by the context, *the* definitions hereinafter set forth *and the definitions set forth in chapter 616 of NRS for additional terms and phrases* shall govern the construction and meaning of the terms and phrases used in this chapter.

2. Unless the context otherwise requires, a word used in this chapter in the singular number shall also include the plural. The masculine gender shall also include the feminine and neuter.

Assembly Bill No. 536—Committee on Commerce

CHAPTER 433

AN ACT relating to execution sales of real property; requiring additional notice to the judgment debtor.

[Approved May 13, 1975]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 21.130 is hereby amended to read as follows:

21.130 Before the sale of property on execution, notice thereof shall be given as follows:

1. Perishable property. In cases of perishable property, by posting written notice of the time and place of sale in 3 public places at the township or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property.

2. Other personal property. In case of other personal property, by posting a similar notice in 3 public places of the township or city where the sale is to take place, not less than 5 nor more than 10 days before sale, and, in case of sale on execution issuing out of a district court, by the publication of a copy of the notice in a newspaper, if there be one in the county, at least twice, the first publication being not less than 10 days before date of sale.

3. Real property. In case of real property, *by personal service upon each judgment debtor or by registered mail to the last-known address of each judgment debtor and* by posting a similar notice particularly describing the property, for 20 days successively, in 3 public places of the township or city where the property is situated and also where the property is to be sold; and also by publishing a copy of the notice three times, once a week, for 3 successive weeks, in a newspaper, if there be one in the county. The cost of publication shall in no case exceed the rate for legal advertising as provided in NRS 238.070. In any case where the paper authorized by this section to publish such notice of sale [shall neglect or refuse] *neglects or refuses* from any cause to make such publication, then the posting of notices as provided in this section shall be deemed sufficient notice. Notices of the sale of property on execution upon a judgment for any sum less than $500, exclusive of costs, shall be given only by posting in 3 public places in the county, 1 of which shall be posted at the courthouse.

E.O. 320

ow84t

DETAIL LISTING
FROM FIRST TO LAST STEP

TODAY'S DATE: Dec. 27, 1996
TIME : 3:38 pm
LEG. DAY IS: 116
PAGE : 1 OF 1

N E L I S

1995

SB 157 By Judiciary WITNESSES

Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance. (BDR 4-475)

Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: No.

01/31	12	Read first time. Referred to Committee on Judiciary. To printer.
02/01	13	From printer. To committee.
02/01	13	Dates discussed in Committee: 2/13, 2/21, 2/28, 6/26, 6/27 (A&DP)
03/01	23	From committee: Amend, and do pass as amended.
03/01	23	(Amendment number 36.)
03/03	25	Read second time. Amended. To printer.
03/06	26	From printer. To engrossment.
03/06	26	Engrossed. First reprint.
03/08	28	Read third time. Passed, as amended. Title approved. (21 Yeas, 0 Nays, 0 Absent, 0 Excused, 0 Not Voting.) To Assembly.
03/09	29	In Assembly.
03/09	29	Read first time. Referred to Committee on Judiciary. To committee.
03/09	29	Dates discussed in committee: 6/1 (A&DP)
06/22	105	From committee: Amend, and do pass as amended.
06/22	105	(Amendment number 1172.)
06/22	105	Placed on Second Reading File.
06/22	105	Read second time. Amended. To printer.
06/23	106	From printer. To re-engrossment.
06/23	106	Re-engrossed. Second reprint.
06/23	106	Placed on General File.
06/23	106	Read third time. Passed, as amended. Title approved. (39 Yeas, 0 Nays, 3 Absent, 0 Excused, 0 Not Voting.) To Senate.
06/24	107	In Senate.
06/28	111	Assembly amendment not concurred in. To Assembly.
06/28	111	In Assembly.
06/29	112	Assembly amendment not receded from. Conference requested. First Committee on Conference appointed by Assembly. To Senate.
06/29	112	The Speaker appoints Assemblymen Monaghan, Manendo, and Schneider as a first Committee on Conference.
06/29	112	In Senate.
06/30	113	First Committee on Conference appointed by Senate. To committee.
06/30	113	The President appoints Senators Porter, Washington, and Lee as a First Committee on Conference.
07/01	114	From committee: Concur in Assembly amendment and further

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amend.
07/01 114 First Conference report adopted by Senate.
07/01 114 First Conference report adopted by Assembly.
07/02 115 To printer.
07/06 0 From printer. To re-engrossment.
07/06 0 Re-engrossed. Third reprint.
07/06 0 To enrollment.
07/06 0 Enrolled and delivered to Governor.
07/07 0 Approved by the Governor. Chapter 708.
Effective October 1, 1995.
(* = instrument from prior session)

S.B. 157 of the 68th Session

1995

AFFIDAVITS OR DECLARATIONS IN LIEU OF TESTIMONY
REGARDING EXISTENCE OF ALCOHOL OR CONTROLLED SUBSTANCE

000077

NEVADA LEGISLATURE

SIXTY-EIGHTH SESSION

1995

SUMMARY OF LEGISLATION

PREPARED BY

RESEARCH DIVISION

LEGISLATIVE COUNSEL BUREAU

S.B. 157 (Chapter 708)

Senate Bill 157 revises the provisions governing the use at trial of affidavits or declarations in lieu of testimony. This measure provides that the affidavits or declarations of experts as to the existence of alcohol or controlled substances must be admitted into evidence if submitted at a preliminary hearing or grand jury proceeding concerning the offense charged.

The measure authorizes the prosecuting attorney to request, at the trial, that the affidavit or declaration of the chemist or other person who interprets the test results be admitted into evidence. If the defendant, at or before trial, establishes that there is a substantial and bona fide dispute regarding the facts in the affidavit or declaration and that it is in the best interests of justice that the person who signed the document be cross-examined, the court may order the production of the witness and a continuation of the trial, if necessary. If the defendant objects to the use of the chemist's affidavit at trial, the judge must order the district attorney to produce the witness at trial and not allow the affidavit to be admitted as evidence.

Senate Bill 157 does not prohibit either the prosecution or the defense from producing any witness to offer testimony at trial.

SENATE BILL NO. 157—COMMITTEE ON JUDICIARY

JANUARY 31, 1995

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance. (BDR 4-475)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to expert witnesses; revising the provisions governing the use of an affidavit or declaration in lieu of the testimony of an expert witness as to the existence of alcohol or a controlled substance; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 50.325 is hereby amended to read as follows:

50.325 1. If a person is charged with an offense punishable pursuant to chapter 453 or 484 of NRS or homicide resulting from driving a vehicle while under the influence of intoxicating liquor, a controlled substance or a chemical, poison or organic solvent, and it is necessary to prove:

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

(c) The existence or identity of a controlled substance, chemical, poison or organic solvent,

[the prosecuting attorney may request that] the affidavit or declaration of an expert or other person described in NRS 50.315 *must, upon submission,* be admitted in evidence at the [trial or] preliminary hearing concerning the offense.

2. *At the trial concerning the offense, the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 be admitted in evidence.* The request must be made at least 10 days before the date set for the trial [or preliminary hearing] and must be sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney.

3. [If the defendant or his counsel notifies the prosecuting attorney by registered or certified mail at least 96 hours before the date set for the trial or preliminary hearing that the presence of the expert or other person is demanded, the affidavit or declaration must not be admitted. A defendant who demands the presence of the expert or other person and is convicted of violating NRS 484.379 or a provision of chapter 484 of NRS for which a

driver's license may be revoked shall pay the fees and expenses of that witness at the trial or preliminary hearing.

4. If at the trial or preliminary hearing the affidavit or declaration of an expert or other person has been admitted in evidence, and it appears to be in the interest of justice that the expert or other person be examined or cross-examined in person, the judge or justice of the peace may adjourn the trial or hearing for a period not to exceed 3 judicial days to receive the testimony. If 3 judicial days are not sufficient in a county whose population is less than 35,000 to provide the presence of the expert or other person to be examined or cross-examined, the judge, justice of the peace or hearing officer may extend the period of adjournment for a period not exceeding 10 days.] *If, at or before the time of the trial, the defendant establishes that:*

(a) There is a substantial and bona fide dispute as to the facts in the affidavit; and

(b) It is in the best interests of justice that the witness who signed the affidavit be cross-examined,

the judge may order the district attorney to produce the witness and may continue the trial for any time the judge deems reasonably necessary in order to receive such testimony. The time within which a [preliminary hearing or] trial is required is extended by the time of the [adjournment.] *continuance.*

Senator Porter, after reminding the audience that during the hearings in Las Vegas no action could be taken on any bills being discussed, asked if there were further questions for the witnesses. There were none and the senator excused them.

SENATE BILL 157: Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance.

The vice chairman opened the hearing on S.B. 157. He called on Ben Graham, Chief Deputy District Attorney, Clark County, Nevada. Mr. Graham addressed the committee explaining the process of prosecuting driving under the influence (DUI) cases along with the tests and professionals/technicians involved in determining the blood alcohol level of the DUI suspect. He pointed out the steps taken to ensure the accuracy of the breath and blood tests including multiple breath tests taken of one individual, the regular calibration of the breath machines, and the careful control of the solutions used in the tests. Mr. Graham explained that a suspect can elect to take a blood test. The blood is drawn from the individual by a registered nurse, he explained, and forwarded in a sealed container to a certified laboratory where it is tested for blood alcohol level. The results of this test are reported to the district attorney, along with an affidavit from the nurse, lab technician or chemist, forensic specialist, and breath machine calibrator attesting to his or her qualifications and experience, along with the condition of the evidence when delivered and the most recent time the machines were calibrated (Exhibit C).

The question before the committee, Mr. Graham noted, deals with the need to have the experts who signed the above mentioned affidavits present in person in the courtroom at the preliminary hearing. He explained that many of these experts are frequently demanded to be present by the defense, in the hopes that they will have some time conflict and be unable to attend, thus forfeiting the prosecution of the DUI. Mr. Graham stated that this bill, if passed, would have a much greater impact upon the prosecution of DUI cases than any proposed lowering of the blood alcohol level standard. He asked the Legislature to authorize the use of the affidavits to prove the blood draw, and the alcohol level of the blood, as examined by the experts. He asked that these affidavits be sufficient evidence for the prosecution, while still allowing the defense to subpoena the experts if they wish, in order to ask any questions they might have. He told the committee the burden of proof is still with the state, this is not being shifted, but the defense would have to call the witnesses if questions arose in regard to the affidavits. He asked for questions.

Senator Adler asked whether Mr. Graham felt there is a constitutional problem with the bill. Mr. Graham denied this, stating there is no limit being set to the right to cross-examine the witness. He pointed out such laws had been upheld in other states as a "rebuttable presumption." Senator Porter asked why there is only one person in the state certified to calibrate the breath machines. Mr. Graham replied there was actually one calibration expert for the north and one for the south, and that he does not understand why there is such a limited number of them. Senator McGinness asked if affidavits of this type are used in any other court proceedings. Mr. Graham said that there are affidavits frequently used in numerous other proceedings, unless the defendant demands the expert's presence. He further noted there would be amendments proposed to the bill, apologizing that they were not yet available.

Senator Lee summarized the current state of the requirement that the state bring the expert witnesses if the defense demands, and the taxpayers pay the expert fees. He asked if the defense had to bring the witnesses, who would pay the fees. Mr. Graham answered it would be the defense who would pay the "standard witness fees." Senator Adler noted that the reason for the current setup is the prosecution's burden of proof and the experts are essentially the prosecution's witnesses. Mr. Graham argued that the affidavits are proof enough. He asked the senator if, in his personal courtroom experience, he had ever seen any of the witnesses called by the defense actually examined by counsel. Senator Adler pressed further, pointing out there are instances of serious crime that might fall under this legislation, such as murder or DUI with substantial bodily harm. Mr. Graham insisted they are only addressing DUIs in this case and if the defense feels there is a "hole in the case" they will go and interview the expert witnesses and call them to testify, if needed.

The vice chairman next called David Sarnowski, Chief Criminal Deputy, Office of the Attorney General, to testify in favor of the bill. He explained that, while generally the attorney general's office is not involved in such cases, there are instances where they might become involved. He emphasized the burgeoning costs imposed upon the state by being required to produce these expert witnesses in order to prove the case. He stated the attorney general's office feels these affidavits are sufficient and should be allowed as such. Mr. Sarnowski offered a personal experience which pointed up the truth of Mr. Graham's testimony of "game-playing" by defense attorneys. He also wished to clarify that in the case of indigence of the defendant, the state would pay the cost of any experts called as witnesses.

Mr. Graham asked to clear up the number of personnel qualified to calibrate the breath machines in the state. He stated he is informed there are actually two persons in the south and two in the north who can calibrate the machines, and who are frequently called to testify in any of the many courts in the state. The number of courts that hear such cases is the real problem for the experts, Mr. Graham explained. Senator Porter asked Mr. Graham whether the experts must appear in court under the current legislation. Mr. Graham responded that the affidavits could be used if the defense counsel agreed to it. However, they do not agree to it, "as a matter of routine." Mr. Graham further noted that he had personal experience as a defense attorney and he had frequently won cases in the very same manner, by demanding the presence of experts. Senator Porter asked if this is a loophole that defense attorneys use. Mr. Graham agreed that is the case.

Eric Cooper, Representative, Nevada Sheriffs and Chiefs Association, addressed the committee. He mentioned that he spoke in the absence of Clark County Sheriff Jerry Keller, who was originally going to appear. He stated he had previous experience as the administrator for the metropolitan police department, and in that capacity found the work load on the chemists is heavily impacted by the requirement to testify constantly. He told of frequent requests by the crime lab's director for additional staff to cover those who were out of the lab to testify. Mr. Cooper testified that the bill under consideration is much more acceptable to the sheriffs and police chiefs in the state. He explained that there were annual requests for additional chemists to keep up with the work load because so many were absent to testify in court. He urged the committee's favorable consideration of the bill.

John Glenn Watkins and John "Jack" Howard, Defense Attorneys, next appeared as witnesses in opposition to the bill. Mr. Watkins spoke first offering some personal background. He stated his opposition to the bill and offered several handouts to the committee. Mr. Howard introduced himself and also offered his personal background to the committee. Mr. Watkins resumed his testimony agreeing with Mr. Graham's remarks about being friends and adversaries. He stated while Mr. Graham supported this bill, he is in error. Mr. Watkins expressed his view that this legislation would streamline the process at the expense of the United States Constitution. He noted that Mr. Graham's explanation of the breath test process was erroneous in that only two tests are usually taken. A third is required, he stated, if the first two tests do not agree within .02 percent of alcohol. If this test does not agree, the defendant is required to take a blood test or lose their driver's license for 1 year, Mr. Watkins continued.

Mr. Watkins referred to Exhibit D which is a copy of the 6th Amendment to the United States Constitution. He pointed out this amendment says an "individual is to be confronted with the witnesses against him" without calling these witnesses himself and expending money in the process. Mr. Watkins agreed that no one in the room wanted drunk drivers on the highways, but, in his opinion, the state is trying to treat DUIs differently than any other crime. Mr. Watkins referred to Exhibit E, an excerpt from a brief he had filed which points out the importance of cross-examination in the practice of law. Next, Mr. Watkins spoke of an article in *Reasonable Doubt* (Exhibit F) that deals with the right to cross-examination and its importance in society.

Moving on, Mr. Watkins took exception to the statement made by Mr. Graham, when the experts are called the defendant pleads guilty. He stated this was untrue because he and Mr. Howard would always cross-examine the witness to ascertain the truth. He offered examples of some things that might come to light if the experts were examined (e.g., the condition of blood draw kits). Mr. Watkins showed the committee copies of affidavits (Exhibit G) which he exclaimed to be "a fraud upon the citizens of the State of Nevada." He pointed out wording in the affidavits that should be the subject of further examination, which would reveal that the witness was not actually qualified as an expert witness in the area of law being tried. He further offered examples of information brought out in trial through the process of examining the expert witness (e.g., out-of-date solutions used in calibrating breath machines) (Exhibit G, pages 9-14). Mr. Watkins emphasized the problems with breath machine calibration and solutions which do not become apparent through the use of affidavits, but only through the cross-examination of witnesses. Mr. Watkins stated that he disagrees with Mr. Graham's representation that most defense attorneys require the presence of the experts. He stated there are only "a few attorneys that actually object" to the use of the affidavits, but he felt it is malpractice not to "have the state bring their witnesses in."

Senator James took the chair at this point, and excused himself from the first part of the hearing. He asked exactly how the bill's supporters dealt with the "confrontation issue." Mr. Watkins stated that Mr. Graham felt it did not apply. Senator James further noted that existing law allows the use of affidavits under some limited circumstances. Mr. Watkins stated that under NRS 50.315 the prosecution is required to give the defense 10 days notice that they intend to use the affidavits. If the defense decides they want the witnesses present, they must give the prosecution 96 hours notice, he continued. In other words, the senator noted, the prosecution must have the agreement of the defense to use affidavits.

Mr. Howard addressed the committee concurring with Mr. Watkins and adding he feels the prosecution wants all to believe the affidavits "are self-proving documents, that why would one of their experts lie or fabricate, or under what circumstances could an error be committed." He suggested there are "countless" instances of error in the machine. This error, he noted, could be inherent in the machine, or it could be human error. Mr. Howard next turned to the cost of bringing the expert witnesses in every instance. He stated that in many instances, in the face of a breath machine blood alcohol finding, the attorney simply suggests the defendant plead guilty in hopes of a "good deal." However, Mr. Howard offered the committee personal experiences where calling and cross-examining the experts resulted in dismissal of the charges due to inaccuracies and falsehoods in the affidavits.

Senator Adler had a question he addressed to the witnesses and to Mr. Graham. He stated he was troubled by wording in the bill which tends to shift the burden of proof to the defendant. Mr. Graham responded that one of the proposed amendments to the bill removed that language. Senator Adler continued his query wondering whether the defense had to make its whole case before having any opportunity to subpoena the witnesses. Mr. Watkins responded he felt the senator was reading the bill correctly, and he added that it applies not only to misdemeanors but to any DUI trial or to a homicide resulting from DUI. Stating the best tool of the defense attorney is legislative change, he said this bill gives the defense attorney an "absolute 105 shell" and sends the case to federal court.

Mr. Howard noted that the defense typically does not have full information concerning the test. He stated that it is a practical impossibility to lay a foundation of doubt without being able to first examine the expert witness. Senator Adler reiterated his concern about the ability to cross-examine a witness and the possibility of a precedent being set that would overturn hundreds of DUI convictions. Mr. Watkins spoke of the Patricia McLean case that went to the federal court which did, indeed, result in a need to change the law.

The chairman called for further testimony on S.B. 157. Stewart L. Bell, District Attorney, Clark County, Nevada, moved to the witness table. He stated his desire to make the bill simpler, cleaner, fairer, and cheaper. He offered Option 3 (Exhibit H) as a subsection to NRS 50.315, which eliminates NRS 50.325 altogether. Mr. Bell reviewed for the committee the current process. He then summerized the proposal as eliminating the 10 day letter notice to defense by prosecution and the 96 hour notice to prosecution by defense. He stated, if the defense wants the witness, let him pay and bring the witness, because as it now stands the district attorney's office has one secretary who spends half of her time doing nothing but

10-day letters and in cases where these deadlines are missed, a substantive case is lost due to procedural failings. He explained the bill would allow the affidavits as evidence unless the defense does not want them.

Addressing the "confrontation clause," issue, Mr. Bell suggested that the person who calibrated the breath machine is not the accuser in the case and is, therefore, not necessarily a witness subject to confrontation by the accused. Further, he noted there are lots of exceptions to the "hearsay rule" including medical records, because they are "inherently reliable."

Mr. Bell pointed out the biggest prosecution problems arise in the rural areas. He stated, in his experience as a defense attorney in an outlying area, he always called the expert, hoping they would not show up. There was no issue involved when he called these witnesses, he noted, and there usually is not an issue. He reiterated that this change would not preclude either the defense or the prosecution from bringing witnesses and, further, it would clean up the process and make it much more equitable.

Senator James asked Mr. Bell specifically about the proposed change (Exhibit H), whether he would replace the whole bill with the suggested section 8. Mr. Bell replied in the affirmative, stating that this addition to the first section of NRS 50.315 would simply eliminate the 10-day letter process, allowing either side to subpoena witnesses they felt were necessary to the case without being disadvantaged by some procedural technicality. He assured the chairman that if a witness, who has been subpoenaed, becomes unavailable the hearing can be continued. Mr. Bell further explained his proposal as inserting Option 3, number 8 (Exhibit H) at the end of section 1 of NRS 50.315 and completely doing away with NRS 50.325.

The chairman was concerned that a conviction could be obtained by using an affidavit that was not necessarily faulty on its face, but would be shown faulty under cross-examination of the witness. Mr. Graham pointed out that Mr. Watkins' testimony regarding the faulty affidavits is irrelevant because a defense attorney would simply have to point out the fault on the face of the affidavit once it was introduced as evidence. Such a fault would be sufficient to have the affidavit removed as proof, Mr. Bell noted. Mr. Bell continued that in 99 percent of the cases the introduction of such affidavits or evidence is "perfunctory" and it is only in the cases where the expert is not readily available, as in the outlying areas, that their presence becomes "necessary."

Senator Adler stated that his concern with the proposed amendment is that it states the defense is to be provided with the reports from the experts although it is his understanding that the statutes do not require this. Mr. Bell stated it is a matter of law to provide experts' reports to the defense. Mr. Graham offered his assurances that if the instant bill is passed, future bills dealing with discovery would require production of these reports to defense as early as possible.

Senator Porter asked what percent of DUI cases are won or lost due to "no shows" by expert witnesses. Mr. Bell explained that while cases are not usually completely dismissed because of a "no show," they did frequently result in a reduced charge plea negotiation. Mr. Bell guessed that the percent is "more than 10 and less than 33." Senator Porter then inquired how many of the guilty parties ended up "on the street" because of a technicality. Mr. Bell responded that it is not really an issue of "on the street" because these are frequently misdemeanor cases that would not result in jail time, but more an issue of guilt supported by evidence that cannot be introduced due to technicalities. He emphasized the purpose of the bill is to "promote justice," to "prevent injustice," and "to save money, somewhere in the neighborhood of tens of thousands of dollars."

The chairman called for further testimony. Mr. Watkins asked to comment on the proposed amendment (Exhibit H) stating it is worse than the original bill. He referred the committee to the legislative history of NRS 50.315, which is concerned with the "confrontation clause." Senator James entered into the record a letter from Mothers Against Drunk Drivers (MADD) in support of the bill (Exhibit I). He noted the bill would be addressed again in a work session. The hearing was closed.

SENATE BILL 120: Limits civil liability of county school districts, local law enforcement agencies and certain other persons with regard to volunteer crossing guards for schools.

Chairman James opened the hearing on S.B. 120. He introduced the bill himself, along with Senator Porter. Senator James explained the bill originated from town meetings where concerns were expressed about the availability of paid crossing guards at elementary schools in the area. Senator James told of parents at the town meetings asking why they, as parents and members of the Parent Teacher Association (PTA), could not go out to the crosswalk near their homes and act as crossing guards during the morning and afternoon hours. He noted that a concern regarding liability was raised, as to who would be liable if there was a problem. The senator said he offered to introduce a bill to the legislature that would insulate such parents and other parties (the police department or the school district) from

AFFIDAVIT OF WITHDRAWAL OF BLOOD SAMPLE

STATE OF NEVADA)

) ss

COUNTY OF CLARK)

EVENT #: 94025-0072

re RAMOS-CHAVEZ, HUGO

STEVEN R. STEWART, says:

THAT I AM A
- [x] Registered Nurse
- [ ] Licensed Practical Nurse
- [ ] Laboratory Technician / Assistant
- [ ] Emergency Medical Technician
- [ ] Physician Assistant
- [ ] Nurse Practitioner
- [ ] Medical Doctor
- [ ] Other (specify) _____

employed by E.M.S.I. CORRECTIONAL CARE

That a regular part of my duties is the withdrawing of blood samples from persons and I am authorized to do so by

NEVADA STATE BOARD OF NURSING

(THE APPROPRIATE LICENSING OR CERTIFYING AGENCY);

That on 25 OCTOBER, 19 94 at 0227 AM / PM, I withdrew a sample of blood in a medically accepted manner from a person known to me as: RAMOS-CHAVEZ, HUGO

and

That I withdrew the sample using no alcohol solutions or alcohol-based swabs; and;

That I kept the sample of blood in my sole custody or control and it remained in substantially the same condition as when I first obtained it until on 25 OCTOBER, 19 94 at 0227 AM/PM

I delivered the sample to Officer D. LAYTON P #: 4321 of the L.V.M.P.D. (agency)

I STEVEN R. STEWART (PRINT DECLARANT'S NAME) DO HEREBY DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Dissemination is restricted to Criminal Justice Agencies ONLY. Secondary dissemination to non-Criminal Justice Agencies is prohibited. LVMPD

D-A 1-95

Las Vegas Metropolitan Police Department

Declarant's Signature

RN 10-25-94

Title Date

D. Layton

Witness Signature

10-25-94

Date

9405403C45B

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

FORENSIC LABORATORY REPORT OF EXAMINATION

NOV [illegible] 05 AM '94

CASE #: 941025-0072 OCT [illegible] '94

NAME : RAMOS-CHAVEZ, HUGO

AGENCY: LVMPD

BOOKED BY: LAYTON
REQUESTED BY: TRAFFIC

INCIDENT: DUI

I, MINORU AOKI, do hereby declare:

That I am a Criminalist employed by the Las Vegas Metropolitan Police Department;

That on September 3, 1980, I first qualified in the Eighth Judicial District Court of Clark County, Nevada,
as an expert witness, to testify regarding the presence and amount of alcohol in a biological fluid;

That I received a sealed blood alcohol kit bearing the above name from a refrigerator in the Clark County Detention Center, containing a sample of whole blood;

That on October 28, 1994, I completed an analysis on the above sample and determined that the [redacted] 0.28 percent by weight of alcohol;

That I sealed the sample and transferred it to the LVMPD evidence vault or submitting agency;

That the evidence was in my custody from the time I first obtained it until I resealed the sample, at which time it was in substantially the same condition as when I first obtained it.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 10-29-94

Minoru Aoki #1592 ✓

Minoru Aoki P# 1592
Criminalist II

Linda T. Bricketto, Dir

Witness

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13

AFFIDAVIT

(Blood Alcohol/Drug)

INCIDENT DATE: 12-01-94

OFFICER: Honea

LAB NO: 94-113832

AGENCY: DMV

STATE OF NEVADA vs. ODETTE, ROBERT M.

I, Dorinda D. Land, do hereby affirm under penalty of perjury that the assertions of this affidavit are true.

That I am a Forensic Specialist, employed by Associated Pathologists Laboratories of Las Vegas.

That on May 18, 1994, I first qualified in the Eighth Judicial District Court of Clark County, Nevada as an expert witness to testify regarding the analysis of alcohol and drugs in body fluids (blood and urine).

That I am familiar by training and experience with the analytical principles underlying immunoassay, gas chromatography and gas chromatography/mass spectrometry.

That I received the sealed whole blood sample bearing the above name from the secure specimen storage room located in the Associated Pathologists Laboratories.

That on 12-02-94 at 10:39 and 12-06-94 at 12:00, I analyzed the sample and determined that the blood sample of the person from whom the sample was taken cont[redacted]anol and **no other drugs.**

That I sealed the sample with the evidence seal bearing my initials (DL), and delivered it back to the secure specimen storage room of Associated Pathologists Laboratories who maintained care, custody, and control of said sealed sample.

That the evidence was in my sole care, custody, and control from the time I first obtained the sample until I resealed the sample, at which time it was in substantially the same condition as when I first obtained it.

Dorinda D. Land

Dorinda D. Land, MT(ASCP)

Forensic Specialist

Associated Pathologists Laboratories

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE WITH THE DEPARTMENT OF MOTOR VEHICLES/ PUBLIC SAFETY - STATE OF NEVADA

BY S.C. Cahill DATE 12-13-94

SUPERVISOR RECORD SECTION

REGION I

Subscribed and sworn to before me

this 8 day of Dec, 19 94.

Loretta J. Arguello

NOTARY PUBLIC

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
LORETTA J. ARGUELLO
My Appointment Expires Dec. 16, 1997

STATE OF NEVADA vs ODETTE, ROBERT M.

SIMULATOR SOLUTION

STATE OF NEVADA)
)ss
COUNTY OF CLARK)

I, TRACY H. BIRCH, do hereby affirm, under penalty of perjury, that t assertions of this affidavit are true;

That I am a Criminalist, employed by the Las Vegas Metropolitan Poli Department, Las Vegas, Nevada;

That I was certified as a Forensic Analyst of Alcohol on October 1, 199 by the Director of the Department of Motor Vehicles and Public Safety, competent to calibrate and maintain evidential breath testing devices;

That on March 14, 1994, an aqueous solution of ethyl alcohol was prepare

That I determined this solution contained the equivalent of 0.12 perce by weight of alcohol contained in a person's breath, and was assigr solution lot number S-138;

That this solution is specified by the Committee on Testing f Intoxication as necessary for accurately calibrating breath alcohol testi devices.

TRACY H. BIRCH
Forensic Analyst of Alcohol, FSC

Oath administered and sworn to before me this 17 day of March, 1994, that the assertions of this affidavit are true

NOTARY PUBLIC

LINDA T. ERRIGHETTO
Notary Public - Nevada
Clark County
My appt. exp. Mar. 27, 1998

This is to certify that this document is a true and accurate copy of a business record on file with the Las Vegas Metropolitan Police Department Forensic Laboratory.

Signature 3-17-94 Date

000093 16

CALIBRATION

STATE OF NEVADA)
)ss
COUNTY OF CLARK)

I, TRACY H. BIRCH, do hereby affirm, under penalty of perjury, that the assertions in this affidavit are true.

That I am a Criminalist, employed by the Las Vegas Metropolitan Police Department, Las Vegas, Nevada;

That I was certified as a Forensic Analyst of Alcohol on October 1, 1993, by the Director of the Department of Motor Vehicles and Public Safety, as competent to calibrate and maintain evidential breath testing devices;

That on January 13, 1994, I calibrated a CMI, Inc. Intoxilyzer 5000, serial number 66-002820, located at the University of Nevada Las Vegas Police Department, 4505 S. Maryland Parkway, Las Vegas, Clark County, Nevada;

That this instrument is certified by the Committee on Testing for Intoxication to be accurate and reliable in testing a person's breath to determine the percentage, by weight, of alcohol contained in that person's breath;

That the calibration was performed verifying the response and accuracy of the device, as prescribed in the regulations of the Committee on Testing for Intoxication, by examing three aqueous alcohol solutions ranging from 0.00 to 0.40 percent by weight of alcohol in the breath;

That the calibration was performed within the ninety day period and that the device was otherwise maintained as required by the regulations of the Committee on Testing for Intoxication;

That upon completion of the calibration, the breath instrument was operating properly.

This is to certify that this document is a true and accurate copy of a [illegible] made with the Las Vegas Metropolitan Police Department Forensic Laboratory.

Signature 1-14-94 Date

TRACY H. BIRCH
Forensic Analyst of Alcohol, FS007

Oath administered and sworn to before me this 14 day of January, 1994 that the assertions of this affidavit are true

NOTARY PUBLIC

LINDA F. ERRICHETTO
Notary Public - Nevada
Clark County
My appt. exp. Mar. 27, 1998

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AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

Court of the Unite
common law.

Excessive bail sha
nor cruel and unusu

The enumeration
be construed to de

The powers not
tution, nor prohibi
respectively, or to t

The Judicial pow
to extend to any s
against one of the
Citizens or Subject

The Electors sh
ballot for Presider
shall not be an inh
shall name in thei
in distinct ballots t
shall make distinc
of all persons vote

> "It is well settled that the suspension or revocation of a driver's license implicates a protectable property interest under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Bell v. Burson*, 402 U.S. 535 (1971)."
>
> Id. at 236.

Procedural "due process" requires that the confrontation clause of the Sixth Amendment be satisfied.

For two centuries, judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony. Cross-examination is the most reliable and effective way known to test the credibility and accuracy of statements. The right of confrontation is an essential element of due process. *Alford v. United States*, 282 U.S. 687 (1931); *Smith v. Illinois*, 390 U.S. 129 (1968); *Douglas v. Page*, 390 U.S. 719 (1968); and, *California v. Green*, 399 U.S. 149 (1970). In *Alford*, supra, the Court said,

> "Cross-examination of a witness is a mater of right. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot appraise them."
>
> U.S. at 691.

The right of cross-examination applies with equal force in administrative proceedings.

In *Goldberg v. Kelly*, supra, the Court, citing precedent, stated,

> "We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny."
>
> U.S. at 270.

John G. Watkins
Attorney at Law

John G. Watkins, Esq.
Tom Conner, Esq.
804 S. 6th St.
Las Vegas, NV 89101
(702) 383-1006
Fax (702) 383-8118

000096

EXHIBIT E

19

REASONABLE DOUBT

VOL. V, Nº 2, February, 1995

Newsletter of Nevada Attorneys for Criminal Justice

NEVADA ATTORNEYS FOR CRIMINAL JUSTICE

EDITOR

Thomas F. Pitaro
815 South Third Street
Las Vegas, Nevada 89101
(702) 382-9221

IN THIS ISSUE:

000097

20

EXHIBIT F

ONE MORE FOR THE ROAD

by John Glenn Watkins, Esq.

THE "CATCH-ALL" HEARSAY EXCEPTION AS USED IN *DMV v. KIFFE* VIOLATES THE UNITED STATES CONSTITUTION.

a. Unless an out of court statement is inherently trustworthy, the "catch-all" hearsay exception violates an individual's right to confront and cross-examine opposing witnesses.

Any defense attorney handling DUI cases, whether criminally or DMV license revocations, must be aware and on guard against the State using the "catch-all" hearsay exception to make or prove its case. *State, Dept. of Motor Vehicles and Public Safety v. Kiffe*, 101 Nev. 729, 709 P.2d 1017 (1985). In *Kiffe*, the arresting officer never observed Kiffe driving his vehicle but rather relied solely on another officer who arrived on the scene first and saw the driving. The District Court reversed the administrative license revocation on the ground of inadmissible hearsay. The Nevada Supreme Court reversed, holding that the hearsay statements were admissible under NRS 51.075(1) ("catch-all" hearsay exception) for the purpose of showing that Kiffe was driving while under the influence of intoxicating liquor. This article will answer the question, "Can the State use the 'catch-all' hearsay exception as was done in *Kiffe*, supra?" The answer is applicable to both criminal and administrative proceedings.

There is no question that the right to confront witnesses applies to criminal cases. Sixth Amendment of United States Constitution; *Alford v. United States*, 282 U.S. 687 (1931); *Smith v. Illinois*, 390 U.S. 129 (1968); *Douglas v. Page*, 390 U.S. 719 (1968); and *California v. Green*, 399 U.S. 149 (1970). In Alford, the Court said,

> Cross-examination of a witness is a matter of right. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, ...
>
> Alford, p. 691.

The right of cross-examination applies with equal force in civil administrative proceedings. In *Goldbery v. Kelly*, 397 U.S. 254 (1970), the Supreme Court, citing precedent stated,

> We have formalized these protections in the requirement of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * * this Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases * * * but also

> in all types of cases where administrative * * * actions were under scrutiny. (emphasis added)
>
> Alford, p. 270.

See also NRS 233B.123(4) which mandates,

> Each party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though such matter was not covered in direct examination, impeach any witness regardless of which party first called him to testify, and rebut evidence against him.
> (emphasis added).

Reliance on the "catch-all" hearsay exception violates the Sixth Amendment right of confrontation; it is not a "firmly rooted" exception.

The Nevada Supreme Court in *Franco v. State*, 109 Nev. 1, ___ P.2d ___ 1993, had occasion to address the Fifth Amendment confrontation clause in light of recent United States Supreme Court decisions.

> The Confrontation Clause limits the state's ability to use hearsay as evidence in criminal trials when the hearsay declarant does not testify. The Clause requires the hearsay offered against an accused be sufficiently reliable to substitute for in-court scrutiny through cross-examination. Hearsay statements are sufficiently reliable when they fall within a "firmly rooted" hearsay exception. See *Wright v. Idaho*, 497 U.S. 805, 815 (1989); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). If they do not fall within such an exception, they must be supported by a showing of "particularized guarantees of trustworthiness."[1]
>
> *Franco*, p. 6(footnote omitted).

The Nevada court continued and stated,

> In addition general hearsay exception are not "firmly rooted" for the purposes of Confrontation Clause analysis. *Wright*, 497 U.S. at 817. Therefore, hearsay statement of non-testifying declarant, even when properly admitted under the general exception, will violate the Confrontation Clause unless they also possess particularized guarantees of trustworthiness such that "adversarial testing would add

1 The cite should be **Idaho v. Wright**, 497 U.S. 805, 110 S.Ct. 3139 (1990).

little to their reliability." *Id.* at 821.
Franco, p. 7.

A statement offered under the "catch-all" hearsay exception must of itself be trustworthy without reference to other corroborating evidence to be admissible. In *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139 (1990), the Supreme Court noted and held,

> As our discussion above suggests, we are unpersuaded by the State's contention that evidence corroborating the truth of hearsay statement may properly support a finding that the statement bears "particularized guarantees of trustworthiness." To be admissible under the Confrontation Clause, hearsay evidence sued to convict a defendant must possess indica of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. *Id.* at 3150. (emphasis added)

Most all of the out-of-court statements are nothing more than "old fashioned" hearsay and do not possess particularized guarantees of trustworthiness such that "adversarial testing would add little to their reliability". *Idaho v. Wright*, supra. In conclusion, the *Kiffe*, supra case was incorrectly decided and is effectively over-ruled by the Supreme Law of the Land.

Happy Valentine's Day!

DIST
DT

Nov 28 9 28 AM '90

I [illegible] hereby certify that this is a full, [illegible] on file and of record in the original [illegible] Las Vegas Metropolitan [illegible]

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

FORENSIC LABORATORY REPORT OF EXAMINATION

STATE OF NEVADA)
)ss
COUNTY OF CLARK)

DR: 90-22455

NAME : STETSON, Charles

AGENCY: LVMPD

INCIDENT: DUI/ACC

BOOKED BY: McDonald

I, TERRY L. COOK, do hereby affirm, under penalty of perjury, that the assertions of this affidavit are true.

That I am a Criminalist, employed by the Las Vegas Metropolitan Police Department;

That on March 13, 1984, I first qualified in the Eighth Judicial District Court of Clark County, Nevada, as an expert witness;

That on November 26, 1990, I received a sealed blood alcohol kit bearing the above name from a refrigerator in the nursing station of the Las Vegas Metropolitan Police Department, City Facility, containing a sample of whole blood;

That on November 26, 1990, I analyzed the sample and determined that the blood of the person from whom the sample was taken contained 0.24 percent by weight of alcohol;

That I sealed the kit with an evidence seal bearing my initials -TLC- and delivered it to the LVMPD evidence vault/refrigerator or submitting agency;

That the evidence was in my sole custody or control from the time I first obtained it until I resealed the kit, at which time it was in substantially the same condition as when I first obtained it.

Terry L Cook #2545
TERRY L. COOK, #2545
Criminalist

Oath administered and sworn to before me this 28 day of November 1990, that the assertions of this affidavit are true

Carla M. Noziglia
NOTARY PUBLIC

CARLA M. NOZIGLIA
Notary Public-Nevada
Clark County
My appointment expires Aug. 25, 1992

00101

D

24

EXHIBIT G

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

FORENSIC LABORATORY REPORT OF EXAMINATION

STATE OF NEVADA)
)ss
COUNTY OF CLARK)

CASE #: 910719-1558

NAME : FITCH, Robert Durial AGENCY: LVMPD

INCIDENT: DUI/ACC BOOKED BY: Chavez

I, ALAN C. GALLASPY, do hereby affirm, under penalty of perjury, that the assertions of this affidavit are true.

That I am a Criminalist, employed by the Las Vegas Metropolitan Police Department;

That on March 25, 1991, I first qualified in the Eighth Judicial District Court of Clark County, Nevada, as an expert witness;

That on July 22, 1991, I received a sealed blood alcohol kit bearing the above name from a refrigerator in the nursing station of the Las Vegas Metropolitan Police Department, containing a sample of whole blood;

That on July 23, 1991, I analyzed the sample and determined that the blood of the person from whom the sample was taken contained 0.30 percent by weight of alcohol;

That I sealed the kit with an evidence seal bearing my initials, and delivered it to the LVMPD evidence vault/refrigerator or submitting agency;

That the evidence was in my sole custody or control from the time I first obtained it until I resealed the kit, at which time it was in substantially the same condition as when I first obtained it.

Alan Gallaspy 4026
ALAN C. GALLASPY, #4026
Criminalist

Oath administered and sworn to before me this 24 day of July, 1991, that the assertions of this affidavit are true

Carla M. Koziolia
NOTARY PUBLIC

CARLA M. KOZIOLIA
My appointment expires Aug. 25, 1992

LAS VEGAS METROPOLITAN POLICE DEPARTMENT

FORENSIC LABORATORY REPORT OF EXAMINATION

STATE OF NEVADA)
)ss
COUNTY OF CLARK)

CASE #: 911020-0121

NAME : GALLAGHER, Jeffrey AGENCY: LVMPD

INCIDENT: DUI BOOKED BY: LONG

I, ALAN C. GALLASPY, do hereby affirm, under penalty of perjury, that the assertions of this affidavit are true.

That I am a Criminalist, employed by the Las Vegas Metropolitan Police Department;

That on March 25, 1991, I first qualified in the Eighth Judicial District Court of Clark County, Nevada, as an expert witness to testify regarding the identity or quantity of a controlled substance alleged to have been in the possession of a person;

That on October 21, 1991, I received a sealed blood alcohol kit bearing the above name from a refrigerator in the nursing station of the Las Vegas Metropolitan Police Department, City Facility, containing a sample of whole blood;

That on October 22, 1991, I analyzed the sample and determined that the blood of the person from whom the sample was taken contained 0.17 percent by weight of alcohol;

That I sealed the kit with an evidence seal bearing my initials, and delivered it to the LVMPD evidence vault/refrigerator or submitting agency;

That the evidence was in my sole custody or control from the time I first obtained it until I resealed the kit, at which time it was in substantially the same condition as when I first obtained it.

ALAN C. GALLASPY, #4026
Criminalist

Oath administered and sworn to before me this 23rd day of October, 1991, that the assertions of this affidavit are true.

NOTARY PUBLIC

My appointment expires May 10 19[illegible]

I HEREBY CERTIFY that this is a full, true and correct copy of the original FORENSIC LAB RPT on file with the Las Vegas Metropolitan Police Department.

RECORDS SUPERVISOR

000103

26

(2)

September 9, 1991

01225243 WINN, GLORIA D

05727, OPIATE,UR, R
08/29, 00:00, R , UR, TOI
0000869107 0000869107

TX-91
29913

01225248 WARDEN, JENNIFER J

05728, AMPHET, R
08/28, 00:00, R , UR, TOI
0000869114 0000869114

TX-91
29914

01225252 URIOSTE, ROBERT A

05731, COCAINE OPIATE,UR, R,R
08/29, 00:00, R , UR, TOI
0000869118 0000869118

TX-91
29916

01225253 STONEBERGER, ERNEST

05733, AMPHET, R
09/03, 17:00, R , UR, TOI
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TX-91
29917

01225254 GRIFFIN, TRACEY L

05734, COCAINE, R
08/21, 00:00, R , UR, TOI
0000869121 0000869121

TX-91
29918

01225259 KUTCHER, TODD W

19582, ALC-L, R
09/07, 12:40, R , GRY, LEG
0000869123 0000869123

TX-91
29919

01225262 BROWN, LESTER C

19583, ALC-L, R
09/07, 23:30, R , GRY, LEG
0000869125 0000869125

TX-91
29920

01225263 SUMMERS, JAMES E

19584, ALC-L, R
09/07, 00:53, R , GRY, LEG
0000869130 0000869130

TX-91
29921

01225266 DUKE, EDWARD 0000869131*0000869131

Returned to DMV
1-16-92

01225266*
DUKE, EDWARD 0000869131 M 3BY R 09-09-91 14:4

TX-91
29922

ALC-L TOXI

01225271 PORTELA, JOSE R 0000869134*0000869134

01225271*
PORTELA, JOSE R 0000869134 M 34Y R 09-09-91 1

TX-91
29923

ALC-L TOXI

01225274 GROVER, SION G

4

19587, ALC-L, R
09/08, 03:40, R , GRY, LEG
0000869137 0000869137

000104

TX-91
29924

27

CHEMISTRY DEPARTMENT

REAGENT Alcohol Standards

DATE REC'D	LOT NUMBER	NUMBER REC'D	EXP. DATE	DATE CHECKED	CONTROLS OK YES	CONTROLS OK NO	TECH INIT
6-19-91	9242	20 2 cases	8-30-91	8/30/92	✓		
6-19-91	0335	20 2 cases	12-1-92	12/2/92	✓		

APL TOXICOLOGY QUALITY CONTROL

Sept, 1991

	DATE	ETHANOL CONTROL: 100 ± 10%	TECH I.D.
1.			
2.	9/2/91	105	BG
3.	9/3/91	109	BG
4.	9/4/91	104	BG
5.	9/5/91	102	BG
6.			
7.	9/7/91	103	BG
8.	9/8/91	~~104~~	
9.	9/9/91	104	BG
10.	9/10/91	100	BG
11.	9/11/91	104	BG
12.	9/12/91	106	BG
13.	9/13/91	101	BG
14.	9/14/91	105	BG
15.	9/15/91	110	BG
16.	9/16/91	99	BG
17.	9/17/91	99	BG
18.	9/18/91	95	BG
19.	9/19/91	98	BG
20.	9/20/91	92	KH
21.	9/21/91	96	BG
22.	9/22/91	98	BG
23.	9/23/91	95	BG
24.	9/24/91	100	BG
25.	9/25/91	97	KH
26.	9/26/91	94	KH
27.	9/27/91	91	KH
28.	9/28/91	102	BG
29.	9/29/91	101	DWH
30.	9/30/91	96	BG
31.			

STATE'S
EXHIBIT
#3
NANCY C. DESTERLE

Stephens Scientific

SETPOINT ETH™

Certificate of Analysis

Setpoint ETH™ aqueous ethanol standards are prepared volumetrically using USP ethanol, 200 proof, and deionized water with less than 1 ppm residual solids filtered to 0.2 um.

The actual concentration of the individual standard is determined by analyzing it as an unknown versus a NIST SRM 1828 reference standard using gas chromatography.

Instrumentation

Shimadzu GC-9A
Detector: FID
Column: 0.25mm x 30 m FSOT
Phase: RSL 150
Integrator: Chromatopac CR-3A

Operating Parameters

Column: 150 °C
Injector Temp: 175 °C
Carrier Gas: Nitrogen
Sample Size: 0.6 uL
Statistical Method: Corrected Area Normalization

Replicate determinations are performed to obtain a statistically valid mean assay value. The mean assay value must fall within ± 1% of the stated concentration.

The assay results for this lot of Setpoint ETH™ are:

Catalog Number: 4462-10
Lot Number: 0335
Expiration Date: 12/1/92
Mean Assay Value: 1.0098 mg/mL

If you have any additional questions, please write or call Stephens Scientific at the address or number listed below.

Laboratory Supervisor

000107

Division of Cornwell Corporation 107 Riverdale Road Riverdale, New Jersey 07457-1710
Tel. 201-831-9800 Fax 201-831-8009

AFL 16:05:04 24 MAR 1992
S_INQ1DISPLAY INQUIRY LUCY HORTON

DEPT OF MOTOR VEHICLES 4133 01225259 KUTCHER, TODD W
:0000869123 SS#: DOB: AGE:29Y SEX:M
DATE:09/09/91 14:44 ACCINIT:NW48 REPORTED:09/11/91 07:56

COLLECTED: COUNTY DETENTION CENTER
OFFICER: STEVE ALDRIDGE #339
530-62-9765

ETHANOL, LEGAL GM%

RESULTS: ETHANOL = 0.310 GM%
TIME 8:20
ANALYST: KARL HAMMER

Reference range: None Detected
Legal Intoxication: 0.100 gm%
Toxic Level: >0.400 gm%

.....Collected.....	.....Arrived.....	.....Resulted.....
09/07/91 12:40	09/09/91 15:11 NW48	09/10/91 23:45 MR82
.....Collected.....	.....Arrived.....	.....Resulted.....
09/07/91 12:40	09/09/91 15:11 NW48	09/09/91 17:26 NW48

THORNE J. BUTLER, M.D.
TOXICOLOGIST

ASSOCIATED PATHOLOGISTS LABORATORIES
TOXICOLOGY DEPARTMENT 09 SEP 91 15:44 5373-129 Clos:

CO

Patient Name: KUTCHER TODD W
RECEIVED: 09 SEP 91 02:44PM
Collected: 07 SEP 91 12:40PM
Client: DEPT OF MOTOR VEHICLES
Worksheet ID#: 46438

MRN#: 000086912
Patient ID: 0000E
Accession #: 0122525
Audit #: 91-029919

TX 91 29919

Reporting Tech: KH

Report Date: 9/10/91

TESTS REQUESTED: ALC - LEG

SPECIMEN TYPE(S): RED___ GRAY___ URINE___ GASTRIC___ BILE___ VITREOUS___

ENZYME ASSAYS

1. Amphet. ______
2. Barbs. ______
3. Benzos. ______
4. Cocaine ______
5. Opiate ______
6. PCP ______
7. METH. ______
8. Propoxy. ______
9. THC ______
10. ETOH ______
11. AMP TDX ______
12. THC TDX ______

ALC	0.310				
SAL					
PLAC					
AN					
ALK					

COMMENTS

314 - 8:20
311

FINAL REPORT CERTIFIED BY: [signature] 9/11/91

Extracted by: Derivatized by: Setup by:

Screen results reviewed by: ______

GC/MS Batch #s:

TLC RECORD

ØØ BLD	SI BLD	ØØ UR	SI UR	ALK

INTERNAL CUSTODY RECORD

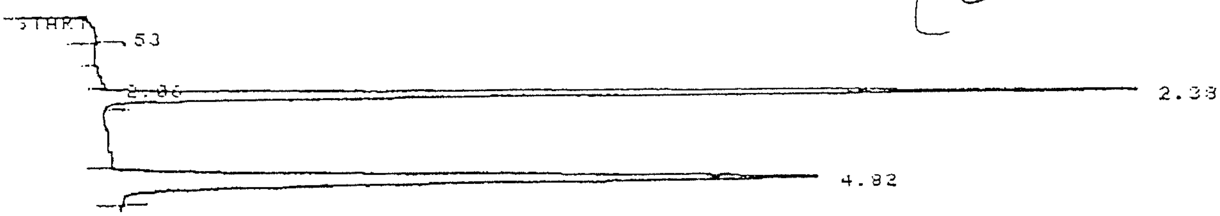
DATE	TIME	PURPOSE	INTL
9/9	1815	Recv	[initials]
9/10	800	Alig Bld Alc.	KH
		000109	

9

32

9/10/91

CC150 KH



1.0

RUN # 4726 SEP/10/91 07:51:00
ID 0

TO RT	AREA	TYPE	CAL#	AMOUNT
0.53	591	BB		0.000
2.06	753	PV		0.000
2.38	39586	VB	1	150.020
4.82	46748	BB	2&	100.000

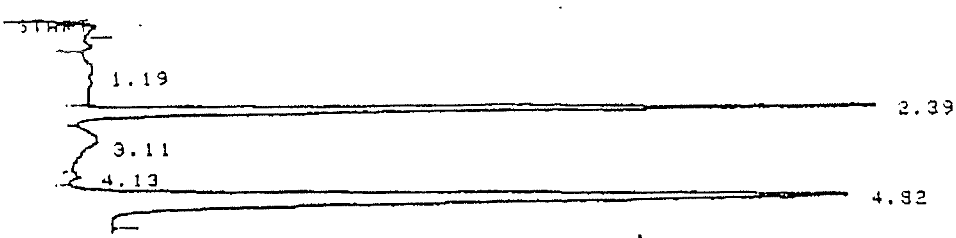
TOTAL AREA= 87678
ISTD AMT= 1.0000E+02
MUL FACTOR= 1.0000E+00

100 mg/dl

RCALB - @
ISTD CALIB RUNS 1
REF % RTW: -0.20 % RTW: 2.00

CAL#	RT	AMT	AMT/AREA
1	2.37	1.5000E+02	3.7892E-03
2&	4.81	1.0000E+02	2.1391E-03

CC100



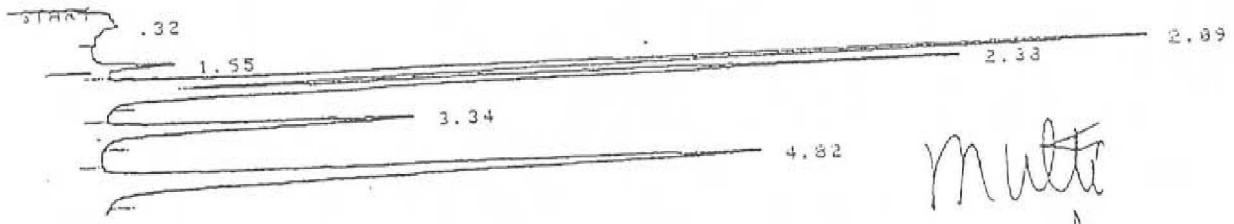
000110

33

N = 4727 SEP/10/91 07:58:25

TO RT	AREA	TYPE	CAL#	AMOUNT
1.19	3407	PV		0.000
2.39	29222	VV	1	100.330
3.11	3243	VV		0.000
4.13	474	VP		0.000
4.82	51566	PB	2%	100.000

TOTAL AREA= 87911
ISTO AMT= 1.0000E+02
MUL FACTOR= 1.0000E+00



Mulla KH

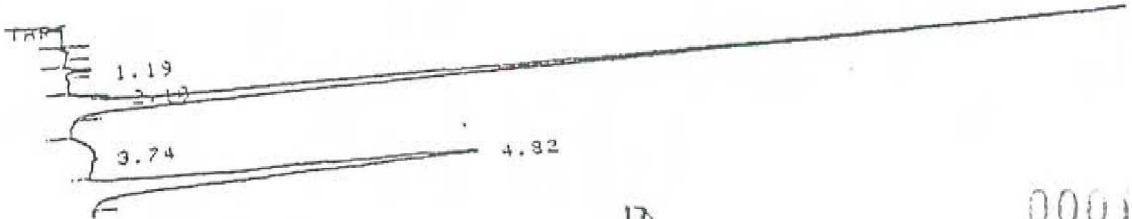
RUN # 4728 SEP/10/91 08:10:20
ID 8

ISTO RT	AREA	TYPE	CAL#	AMOUNT
0.32	1770	BP		0.000
1.55	1473	PB		0.000
2.09	15021	BV		0.000
2.38	31431	VB	1	124.620
3.34	15174	BB		0.000
4.82	44677	BB	2%	100.000

Acet = 0.82
Isop = 0.34

TOTAL AREA= 131150
ISTO AMT= 1.0000E-02
MUL FACTOR= 1.0000E+00

29919 KH



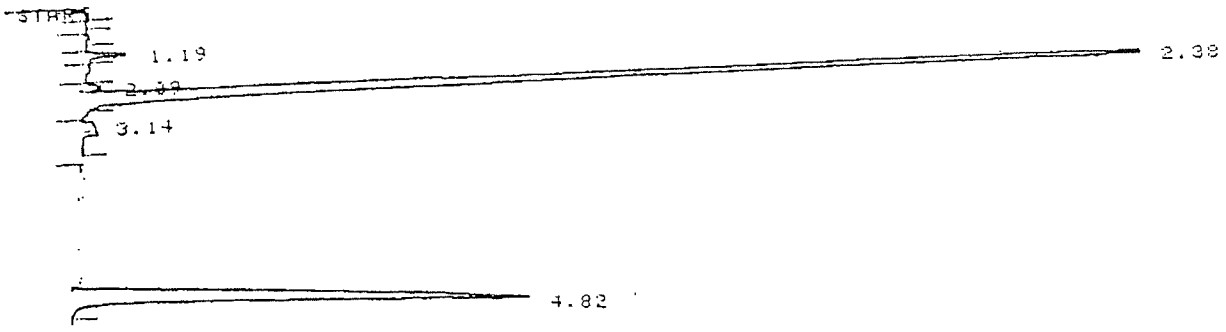
II

ID 0

ISTD RT	AREA	TYPE	CAL#	AMOUNT
1.19	646	PB		0.000
2.10	1117	PV		0.000
2.38	47887	VB	1	314.540
3.74	3092	PV		0.000
4.82	26923	VB	3&	100.000

TOTAL AREA= 79585
ISTD AMT= 1.0000E+02
MUL FACTOR= 1.0000E+00

29919 KH

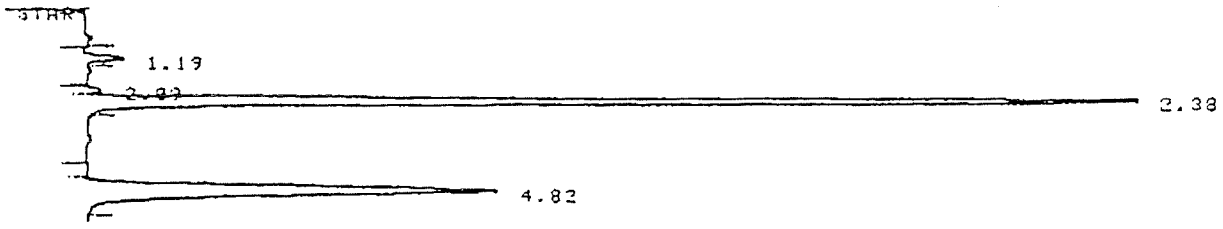


RUN # 4730 SEP/10/91 08:27:14
ID 0

ISTD RT	AREA	TYPE	CAL#	AMOUNT
1.19	976	BB		0.000
2.09	388	PV		0.000
2.38	53491	VB	1	311.670
3.14	415	PV		0.000
4.82	30460	PB	2&	100.000

TOTAL AREA= 85730
ISTD AMT= 1.0000E+02
MUL FACTOR= 1.0000E+00

29920 KH

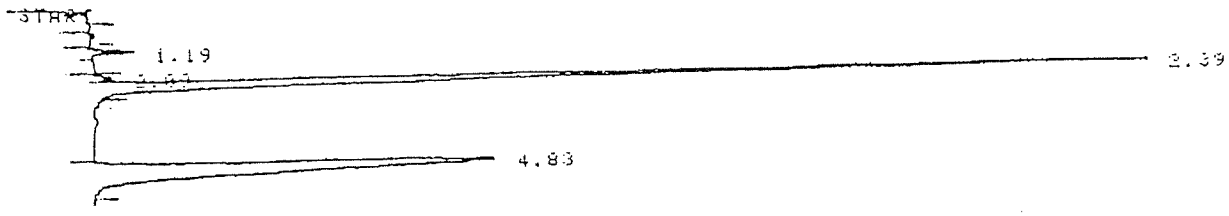


ISTD

RT	AREA	TYPE	CAL#	AMOUNT
1.19	922	PB		0.000
2.09	453	PV		0.000
2.38	48553	VB	1	311.740
4.82	27589	PB	2&	100.000

TOTAL AREA= 77517
ISTO AMT= 1.0000E+02
MUL FACTOR= 1.0000E+00

29920 KLT



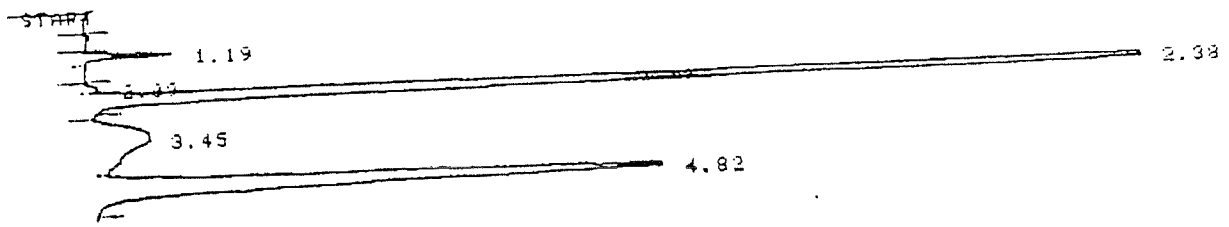
RUN # 4732 SEP/10/91 08:44:20
ID 0

ISTD

RT	AREA	TYPE	CAL#	AMOUNT
1.19	1167	PP		0.000
2.09	541	PV		0.000
2.39	48634	VB	1	320.640
4.83	26868	BB	2&	100.000

TOTAL AREA= 77210
ISTO AMT= 1.0000E+02
MUL FACTOR= 1.0000E+00

29921 KLT



RUN # 4733 SEP/10/91 08:54:06
ID 0

ISTD

RT	AREA	TYPE	CAL#	AMOUNT
1.19	2261	PP		0.000
2.09	358	PV		0.000
[illegible]	[illegible]	[illegible]	[illegible]	100.000

AFFIDAVIT

(Blood Alcohol)

INCIDENT DATE: 9-07-91

OFFICER: Steve Aldridge

LAB NO: 91-029919

STATE OF NEVADA vs. KUTCHER, TODD W.

I Karl Hammer and Toxicologist I at Associated Pathologists Laboratories hereby swear under penalty of perjury, being a Chemist and fully trained to detect the presence of alcohol in the blood of a person, having been experienced in this procedure since the year 1988, hereby depose and say that on 9-09-91 I received a whole blood sample from the locked refrigerator at the Clark County Detention Center, bearing the name Todd W. Kutcher.

That on 9-10-91 at 8:20 I analyzed such sample and determined that the blood of the person from whom the sample was taken contained 0.310 gm% and that I still have such sample in my possession.

Karl Hammer

Karl Hammer, BS

Toxicologist

Associated Pathologists Laboratories

Subscribed and sworn to before me

this 20th day of September, 1991.

Concetta M. Rusch

NOTARY PUBLIC

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
CONCETTA M. RUSCHER
My Appointment Expires Aug. 17 1993

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controlled substance, chemical, poison or organic solvent may be admitted in any criminal or administrative proceeding to prove:

(a) The occupation of the affiant;

(b) The fact that the affiant received a sample or other evidence from another person and kept it in his sole custody or control in substantially the same condition as when he first received it until delivering it to another; and

(c) The identity of the person to whom the affiant delivered it.

7. The committee on testing for intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.

OPTION 1

8. Nothing in this section precludes any party to the proceedings from calling an affiant or a declarant as a witness through the appropriate subpoena process.

OPTION 2

8. The affidavits and the declarations described in this section are not excluded by the hearsay rule. Nothing in this section precludes any party to the proceedings from calling an affiant or a declarant as a witness through the appropriate subpoena process.

OPTION 3

8. The affidavits and the declarations described in this section are not excluded by the hearsay rule, and upon admission into evidence will be prima facie evidence of the matters attested to or declared therein. Nothing in this section precludes any party to the proceedings from calling an affiant or a declarant as a witness through the appropriate subpoena process.

Mothers Against Drunk Driving

P.O. Box 1354 • Dayton, Nevada 89403 • (702) 246-7522 • FAX (702) 246-3687 • TAX ID #: EIN-94-270-7273
Lyon County Chapter

February 13, 1995

Senator James, Chairman
Senate Judiciary Committee
Las Vegas, Nevada

Re: Senate Bill 157 - MADD supports

Dear Senator:

I am writing today in support of Senate Bill 157, which would allow a prosecuting attorney to request that affidavit of an expert as to existence of alcohol or controlled substances be admitted in evidence at the preliminary hearing. The defendant still has an opportunity to ask the judge to order the witnesses' appearance at the trial, if he has a bona fide dispute.

MADD, Lyon County Chapter supports this bill, as we feel the resulting use upon request of affidavit or declaration would still provide the "expertise", about the existence of alcohol, etc. At the same time this provision would prevent misdemeanor cases of Driving Under the Influence from being dismissed because expert witnesses weren't able to attend. Also, this provision could spare the county justice courts and city municipal courts the burdensome costs associated with bringing an expert in to attend proceedings where there was no dispute about matters within the area of their expertise. Especially in the rural counties, experts may typically have to travel some distance to attend proceedings.

MADD, Lyon County Chapter urges a "YES" vote on Senate Bill 157.

Yours truly,

Judy Jacobsoni, President
MADD, Lyon County Chapter

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EXHIBIT I

* * * * *

SENATE BILL 111: Revises provisions governing notice of hearings for attorney's fees requested for administration of estate of decedent.

SENATOR ADLER MOVED TO DO PASS S.B. 111.

SENATOR TITUS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

SENATE BILL 112: Authorizes enforcement of liability of surety for executor or administrator of estate of deceased person without independent action.

SENATOR ADLER MOVED TO DO PASS S.B. 112.

SENATOR TITUS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

SENATE BILL 157: Revises provisions governing use of affidavit or declaration in lieu of testimony of expert witness as to existence of alcohol or controlled substance.

Senator James indicated an amendment to the bill had been prepared, but that the defense attorneys opposed to the legislation "...thought the amendment was worse than the bill." Senator Adler stated he believed there were sections of the bill regarding the ability to cross-examine, which courts may rule unconstitutional. Senator Washington said testimony on the bill had indicated that would be the case.

The first to speak to the committee was Ben Graham, Nevada District Attorneys

Association and Office of the Clark County District Attorney. Mr. Graham indicated the bill was ":..nothing more than we are already doing...with affidavits in 80 percent of the cases." He added it was the "other 10 to 15 percent where they are utilized strictly as a loophole to deliberately frustrate the intent of the Legislature" that was the problem. Mr. Graham provided to the committee a copy of the nearly identical statute in effect since 1992 in the state of Florida. A copy of the statute is attached hereto as Exhibit E. He said a court case in Florida has upheld the constitutionality of that statute and added Senator Adler was correct in stating it would be challenged in Nevada. However, Mr. Graham added, "It will not interfere with the successful prosecution of many cases...and it will do more for effective prosecution of driving under the influence (DUI) cases than anything else you could do." He urged the committee to study Exhibit E. Mr. Graham stated the testimony presented by the defense attorneys involved affidavits "which were faulty and should not have been used in the first place." He said they would request that "good affidavits" with all the relevant information to show they are trustworthy and reliable should be admitted.

Mr. Graham further said this legislation would not be a violation of the "confrontation clause," and added they were "using affidavits every day." Senator Adler stated he had seen bills leave the committee "...with people swearing up and down they were constitutional," and added he had seen people "grievously injured" because the court said the statute which resulted was "clearly unconstitutional." He continued: "We are not doing anyone a favor if we run a bill through here that invalidates a DUI based on this...then a third-time DUI comes up and the guy can't go to prison because his earlier DUI was invalidated...." Senator Adler concluded, "Just because it is quick and easy for the district attorney's office doesn't mean we are going to pass it." Mr. Graham responded, "I wouldn't be here asking...if I did not think there was a sound constitutional basis...."

Senator Porter referenced the bill at page 2, line 13 and asked Mr. Graham the meaning of "substantial bona fide dispute." Mr. Graham referred to a memorandum provided to the committee in Las Vegas which would substantially change the bill draft and eliminate the provision referred to by Senator Porter. He also said "if there is a real dispute, we can bring the witness in."

Senator James asked Mr. Graham if he wished to "establish a prima facie case

through the declarations," while carrying the burden "beyond a reasonable doubt." Mr. Graham answered, "If there is no other evidence that comes in to rebut it...that is the evidence." Senator James affirmed if the prosecution could not "make the prima facie case" the whole case would be thrown out. Mr. Graham agreed.

Senator James stated he was a strong supporter of prosecuting DUI offenders but added, "I have a real problem with getting away from the notion that a 'live body' has to come into court and accuse you...and give testimony against you." He indicated he shared some of Senator Adler's concerns regarding criminal cases which could be made and sustained against someone by virtue of a piece of paper. Mr. Graham reiterated affidavits were admissible now, "If the defendant does not demand the presence of the witness." He said what they were asking was that affidavits be admissible under all circumstances, "unless the defendant raises a valid issue as to why they aren't admissible." Mr. Graham stated he felt this was vitally important legislation.

Senator James asked: "What happens if a declaration comes in as prima facie evidence in the state's case, then the person can't be there pursuant to a subpoena by the defense counsel for cross-examination." Mr. Graham answered the case would be continued on a defense motion.

Mr. Graham indicated his willingness to work with Senator Adler or other members of the committee to see if legislation could be developed which would be satisfactory. Senator Porter indicated he believed there was some merit to the proposal and welcomed the opportunity to work with Mr. Graham on the bill.

The next person to testify on S.B. 157 was Mariah Sugden, Senior Deputy Attorney General, State of Nevada, Office of the Attorney General. Ms. Sugden spoke on behalf of the Department of Motor Vehicles & Public Safety (DMV & PS), and stated it was her understanding that the DMV & PS hearing's officer was able to admit affidavits into evidence under the current law. She added the defendant could ask for witness testimony in person. Ms. Sugden stated the DMV & PS would support the legislation as it would expedite DUI criminal prosecutions.

Next to speak to the committee was David F. Sarnowski, Chief Criminal Deputy Attorney General, State of Nevada, Office of the Attorney General. Mr. Sarnowski stated he had been unable to complete any research above and beyond that which was presented at the hearing in Las Vegas. Senator Adler indicated to Mr.

Sarnowski, "If we screw this up...you could have literally hundreds of third-time DUI felonies thrown out." Mr. Sarnowski agreed with Senator Adler and stated his concern was that his office, district attorneys and public defenders are not litigating matters "which could have disastrous results" in the future.

Senator James stated S.B. 157 would not be acted upon at this time.

SENATE JOINT RESOLUTION 25 OF THE SIXTY-SEVENTH SESSION: Proposes to amend Nevada constitution to create intermediate appellate court.

Senator James introduced the Honorable Justice Cliff Young, Nevada Supreme Court (hereafter "Court"). Justice Young stated all the members of the Court favored passage of S.J.R. 25 of the 67th Session. He added three justices also favored expansion of the Court, which he described as a "more realistic view." Justice Young stated: "The Court is not riding on a crest of a wave of popularity at the present time...I am not sure I would want to bet that the proposal for amending the Constitution to add an appellate court will be successful ...." He emphasized the Court was "hard working" and they badly need help because of the large caseload. Justice Young suggested if the Court were to be enlarged by two members and the voters approved an intermediate appellate court, two justices could be transferred to that appellate court.

Senator James agreed with Justice Young's comments, and added in the western United States only Montana, Wyoming and Nevada were without intermediate appellate courts. He said in Montana and Wyoming the ratio of justices to cases was far lower than in Nevada. Senator James reflected upon Justice Young's comment regarding the Court not being held in high esteem and stated, "I think you do a tremendous amount in the Court which is not noticed by the public." He said the trouble with this type of proposal was that "...there is no type of apparatus or political campaign which is funded to carry the message to the voters...all we can hope is somehow the voters...realize they can be substantially affected if we don't do something like this."

Senator James thanked Justice Young for appearing before the committee and called for a vote on S.J.R. 25 of the 67th Session.

SB 157.

THE FLORIDA STATUTE

In 1992, the Florida legislature enacted legislation which allows blood or breath analysis to be presented at trial by affidavit. As with the legislation we are seeking to have adopted, the Florida statute specifically excepted the affidavit from the hearsay rule and set forth the requirements for authentication. The Florida law reads as follows:

> An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content, as authorized by § 316.1932[1] or § 316.1933,[2]

---

[1]This section authorizes the administration of a blood or breath test to any person lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle while under the influence. Fla. Stat. Ann. § 316.1932(1)(a) (West Supp. 1995).

> is admissible in evidence under the exception to the hearsay rule in § 90.803(8) for public records and reports. Such affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath if the affidavit discloses:
>
> (a) The type of test administered and the procedures followed;
> (b) The time of the collection of the blood or breath sample analyzed;
> (c) The numerical results of the test indicating the alcohol content of the blood or breath;
> (d) The type and status of any permit issued by the Department of Law Enforcement that was held by the person who performed the test; and
> (e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument.
>
> The Department of Law Enforcement shall provide a form for the affidavit. Admissibility of the affidavit does not abrogate the right of the person tested to subpoena the person who administered the test for examination as an adverse witness at a civil or criminal trial or other proceeding.

Fla. Stat. Ann. § 316.1934(5) (West Supp. 1995). This section has been found not to violate the Confrontation Clause of the United States Constitution. *Gehrman v. State*, No. 94-3023, 1995 WL 47632 (Fla. Dist. Ct. App. Jan. 18, 1995).[3] Nor does the statute impermissibly shift the burden of proof to the defendant. *Id.* This in itself is likely sufficient support for the proposed revision of NRS 50.325 in SB 157. I have, however, been in contact with the Office of the Florida Attorney General and am attempting to make arrangements to have the legislative history of this section forwarded to this office. In addition, what follows is an admittedly somewhat superficial analysis of the constitutional arguments for and against the revision.

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[2]This section allows for a blood or breath analysis when a law enforcement officer has probable cause to believe that a motor vehicle driven by a person under the influence has caused the death or serious bodily injury of a human being. Fla. Stat. Ann. § 316.1933(1) (West Supp. 1995).

[3]It is noted that as of February 14, 1995, this opinion had not been released for publication in the permanent law reports. Until its release, it is subject to revision or withdrawal.

II

THE CASE FOR THE CONSTITUTIONALITY OF THE PROPOSED LEGISLATION

There are two approaches in arguing for the constitutional validity of SB 157 containing this office's amendment. The first is that there is no Confrontation Clause issue raised because the proposed legislation allows a defendant to call the affiant to the stand and question him as to his sworn statement. The second is that the affidavit is not violative of the Confrontation Clause because the information contained in the sworn writing would be an exception to the hearsay rule as a business record.

A. THERE IS NO CONSTITUTIONAL ISSUE BECAUSE THE PROPOSED STATUTE ALLOWS THE DEFENDANT TO CALL THE AFFIANT

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The proposed revision of NRS 50.325 is arguably not violative of the Confrontation Clause because it *does* allow criminal defendants to confront witnesses against them. A defendant would be allowed to call the affiant during his case and question the affiant as to the matters contained in the sworn statement. As such, the proposed legislation would not be violative of the Sixth Amendment.

B. THE PROPOSED LEGISLATION IS NOT VIOLATIVE OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT BECAUSE THE AFFIDAVIT IS ARGUABLY A BUSINESS RECORD

The United States Supreme Court has determined that the Confrontation Clause does not

require in every case that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence. *White v. Illinois*, — U.S. —, 112 S. Ct. 736, 741 (1992). Where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied. *Id.* at 743. Indeed, the business records exception is one "firmly rooted" to the rule against hearsay.

The affidavit contemplated in Fla. Stat. Ann. § 316.1934(5) is arguably nothing more than a business record. For example, when a technician comes to court to testify as to the results of a breath test, he is not giving his opinion as to the amount of alcohol present in the defendant's blood, but is, rather, giving the numeric result of the test performed by the machine. There is no expertise required in presenting this result at trial.

This is the apparent approach used in Florida. Fla. Stat. Ann. § 90.803(8) specifically includes the 316.1934(5) affidavit as a business record exception to the hearsay rule.

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fied operator with proper equipment and expert testifies concerning meaning of test. Robertson v. State, 604 So.2d 783 (1992).

Once state shows that person conducting blood alcohol test was licensed by the Department of Health and Rehabilitative Services and substantially complied with applicable regulations, presumption is created that blood alcohol evidence is admissible. Robertson v. State, 604 So.2d 783 (1992).

When blood alcohol test results and related testimony are produced by unlicensed expert, and it is sought to introduce such evidence, presumptions created by implied consent law do not apply, and state will bear burden of establishing that expert was genuinely qualified to conduct and interpret test; if state does not shoulder that burden or if defense rebuts state's evidence in that regard, test results are then inadmissible; moreover, defense is entitled to challenge reliability once such evidence is admitted, including attempting to impeach expert for being unlicensed. Robertson v. State, 604 So.2d 783 (1992).

2. Rules

Rules promulgated by Department of Health and Rehabilitative Services (HRS) for implementing statute authorizing collection and analysis of blood for alcohol testing are adequate. State v. McRoberts, App. 2 Dist., 621 So.2d 528 (1993).

316.1934. Presumption of impairment; testing methods

(1) It is unlawful and punishable as provided in chapter 322 and in s. 316.193 for any person who is under the influence of alcoholic beverages or controlled substances, when affected to the extent that his normal faculties are impaired, to drive or be in actual physical control of any motor vehicle within this state. Such normal faculties include, but are not limited to, the ability to see, hear, walk, talk, judge distances, drive an automobile, make judgments, act in emergencies, and, in general, normally perform the many mental and physical acts of daily life.

Amended by Laws 1991, c. 91-255, § 4, eff. July 1, 1991.

(2) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving, or in actual physical control of, a vehicle while under the influence of alcoholic beverages or controlled substances, when affected to the extent that his normal faculties were impaired or to the extent that he was deprived of full possession of his normal faculties, the results of any test administered in accordance with s. 316.1932 or s. 316.1933 and this section shall be admissible into evidence when otherwise admissible, and the amount of alcohol in the person's blood or breath at the time alleged, as shown by chemical analysis of the person's blood, or by chemical or physical test of the person's breath, shall give rise to the following presumptions:

(a) If there was at that time 0.05 percent or less by weight of alcohol in the person's blood or breath, it shall be presumed that the person was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired.

(b) If there was at that time in excess of 0.05 percent but less than 0.08 percent by weight of alcohol in the person's blood or breath, such fact shall not give rise to any presumption that the person was or was not under the influence of alcoholic beverages to the extent that his normal faculties were impaired, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired.

(c) If there was at that time 0.08 percent or more by weight of alcohol in the person's blood or breath, that fact shall be prima facie evidence that the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired. Moreover, such person who has a blood or breath alcohol level of 0.08 percent or above is guilty of driving, or being in actual physical control of, a motor vehicle, with an unlawful blood or breath alcohol level.

The presumptions provided in the foregoing provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was under the influence of alcoholic beverages to the extent that his normal faculties were impaired.

Amended by Laws 1991, c. 91-255, § 4, eff. July 1, 1991; Laws 1993, c. 93-124, §§ 2, 4, eff. Jan. 1, 1994.

(3) A chemical analysis of a person's blood to determine alcoholic content or a chemical or physical test of a person's breath, in order to be considered valid under this section, must have been performed substantially in accordance with methods approved by the Department

of Law Enforcement and by an individual possessing a valid permit issued by the department for this purpose. Any insubstantial differences between approved techniques and actual testing procedures or any insubstantial defects concerning the permit issued by the department, in any individual case do not render the test or test results invalid. The Department of Law Enforcement may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses, and issue permits that are subject to termination or revocation in accordance with rules adopted by the department.

Amended by Laws 1992, c. 92-58, § 22, eff. July 1, 1992; Laws 1993, c. 93-124, § 4, eff. Jan. 1, 1994.

[See main volume for (4)]

(5) An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content, as authorized by s. 316.1932 or s. 316.1933, is admissible in evidence under the exception to the hearsay rule in s. 90.803(8) for public records and reports. Such affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath if the affidavit discloses:

(a) The type of test administered and the procedures followed;

(b) The time of the collection of the blood or breath sample analyzed;

(c) The numerical results of the test indicating the alcohol content of the blood or breath;

(d) The type and status of any permit issued by the Department of Law Enforcement that was held by the person who performed the test; and

(e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument.

The Department of Law Enforcement shall provide a form for the affidavit. Admissibility of the affidavit does not abrogate the right of the person tested to subpoena the person who administered the test for examination as an adverse witness at a civil or criminal trial or other proceeding.

Added by Laws 1991, c. 91-255, § 4, eff. July 1, 1991. Amended by Laws 1992, c. 92-58, § 22, eff. July 1, 1992.

(6) Nothing in this section prohibits the prosecution of a person under s. 322.62. The provisions of subsection (2) do not apply to such prosecution and the presumptions made pursuant to that subsection may not be introduced into evidence during such prosecution.

Amended by Laws 1991, c. 91-255, § 4, eff. July 1, 1991.

Historical and Statutory Notes

Laws 1991, c. 91-255, § 4, eff. July 1, 1991, in subsec. (1), added the last sentence; in subsec. (2) inserted "or breath" following "blood" throughout, and substituted "The presumptions provided in" for "The percent by weight of alcohol in the blood shall be based upon grams of alcohol per 100 milliliters of blood." at the beginning of the concluding paragraph; inserted subsec. (5); and renumbered former subsec. (5) as subsec. (6).

Laws 1992, c. 92-58, § 22, eff. July 1, 1992, in subsecs. (3) and (5), substituted references to the Department of Law Enforcement for references to the Department of Health and Rehabilitative Services; and made grammatical changes.

Laws 1993, c. 93-124, § 2, eff. Jan. 1, 1994, in subsec. (2), substituted "0.08 percent" for "0.10 percent" in three places.

Laws 1993, c. 93-124, § 4, eff. Jan. 1, 1994, in subsec. (2), substituted "0.08 percent" for "0.10 percent" in three places; and, in subsec. (3), in the second sentence, inserted "or any insubstantial defects concerning the permit issued by the department".

Law Review Commentaries

Practical guide to the introduction of blood alcohol tests in civil trials. Robert H. Oxendine, 65 Fla.B.J. 47 (Feb. 1991).

Notes of Decisions

1. Validity

Busch v. State, App. 4 Dist., 547 So.2d 245 (1989) [main volume] review denied 560 So.2d 232.

Subsection (2)(c) of this section providing that fact of .10 percent or more by weight of alcohol in person's blood "shall be prima facie evidence" of

impairment creates permiss
constitutional presumption, c
State v. Rolle, 560 So.2d
denied 111 S.Ct. 181, 498 U
144.

2. Test administration ru

State failed to show, in a
ing to suspend driving privi
pliance with Department of
tive Services (HRS) rule re
licensee for 20 minutes p
breath alcohol test, even
observed licensee for 17 m
unidentified third party wa
three minutes preceding the
al, and state presented no t
officer or unidentified thir
dence, as to what occurred
utes. Department of Highw
Vehicles v. Farley, App. 1
(1994).

Blood alcohol test results
implied consent law's exclus
not drawn by person expre
plied consent statute. Ro
So.2d 783 (1992).

Exclusionary rule of im
quires that blood alcohol e
when unauthorized persons
improperly maintained equi
testing; such practices co
test subjects. Robertson v
(1992).

Test conducted by Depar
ment employee with bache
matics, masters degree in
doctorate in physical chemis
test within meaning of stat
alcohol testing in drunk dri
death or serious injury whe
himself possess Departmen
bilitative Services permit,
work was supervised by p
quire that person conductin
and substantially comply w
ment regulations. Roberts
783 (1992).

Procedure utilized by Dep
Rehabilitation Services (HR
blood alcohol testing compli
and statute governing prese
statute required that chemi
blood be performed subst
with methods approved by
sessing valid permit issued
pose and that was the proc
v. Mehl, App. 5 Dist., 602
proved, remanded 632 So.2

3. Admissibility of evider

Admission of testimony
Law Enforcement employee
alcohol testing and of that e
test results was justified, w
was drawn by nurse, who

Citation Rank(R) Database Mode
Slip Copy R 1 OF 2 FL-CS Page
20 Fla. L. Weekly D210
(Cite as: 1995 WL 15550 (Fla.App. 4 Dist.))

Keith GEHRMANN, Petitioner,
v.
STATE of Florida, Appellee.
No. 94-3023.
District Court of Appeal of Florida,
Fourth District.
Jan. 18, 1995.

PER CURIAM.

*1 This Petition for Writ of Certiorari is directed to the circuit court sitting in appellate capacity, which affirmed petitioner's conviction and sentence in the county court for driving under the influence of alcohol. The circuit court held that section **316.1934(5)**, Florida Statutes (1991) does not violate the confrontation clauses of the federal and Florida constitutions, nor does it impermissibly shift the burden of proof to the defense.

We deny certiorari, as the circuit court applied the correct law in reaching its decision.

GUNTHER, STONE and POLEN, JJ., concur.

END OF DOCUMENT

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Note 8

nosis or treatment exception. Duncan v. State, App. 4 Dist., 583 So.2d 439 (1991).

9. Criminal proceedings

Admission into evidence in trial on charges of armed burglary, armed sexual battery and armed robbery of hearsay testimony of police dispatch report which originated with unidentified person, not alleged victim, that man chasing female down street "supposedly had some type of gun or rifle" was improper, even though state claimed purpose for evidence was to explain motive of officer in investigating defendant, where state used evidence to prove truth of matter asserted. Cooley v. State, 620 So.2d 180 (1993).

Hearsay statement by wife to daughter concerning alleged rape of wife by man subsequently shot by defendant was prohibited by statute from being used to prove rape; statement did not fall within any known exception to hearsay rule, and information was never communicated to defendant by wife or daughter and, thus, hearsay statement was not admissible in guilt phase of capital murder trial for deaths of wife and alleged rapist. Cannady v. State, 620 So.2d 165 (1993).

Hearsay statement by wife to daughter concerning alleged rape of wife by man subsequently shot by defendant was prohibited by statute from being used to prove rape; statement did not fall within any known exception to hearsay rule, and information was never communicated to defendant by wife or daughter and, thus, hearsay statement was not admissible in penalty phase of capital murder trial for deaths of wife and alleged rapist, despite relaxed rules of evidence in penalty phase. Cannady v. State, 620 So.2d 165 (1993).

90.803. Hearsay exceptions; availability of declarant immaterial

The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

[See main volume for (1) to (7)]

(8) Public records and reports.—Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934(5).

Amended by Laws 1991, c. 91-255, § 12, eff. July 1, 1991.

[See main volume for (9) and (10)]

(11) Records of religious organizations.—Statements of births, marriages, divorces, deaths, parentage, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

Amended by Laws 1990, c. 90-139, § 2, eff. Oct. 1, 1990.

[See main volume for (12) to (18)]

(19) Reputation concerning personal or family history.—Evidence of reputation:

(a) Among members of his family by blood, adoption, or marriage;

(b) Among his associates; or

(c) In the community,

concerning a person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

Amended by Laws 1990, c. 90-139, § 2, eff. Oct. 1, 1990.

[See main volume for (20) to (22)]

(23) Hearsay exception; statement of child victim.—

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

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MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Sixty-eighth Session
February 28, 1995

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 9:00 a.m., on Tuesday, February 28, 1995, in Room 224 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Jon C. Porter, Vice Chairman
Senator Maurice Washington
Senator Mike McGinness
Senator Ernest E. Adler
Senator Dina Titus
Senator O. C. Lee

STAFF MEMBERS PRESENT:

Allison Combs, Senior Research Analyst
Lori M. Story, Committee Secretary
Maddie Fischer, Primary Secretary

OTHERS PRESENT:

Dale A.R. Erquiaga, Chief Deputy, Office of the Secretary of State
Donald J. Reis, Deputy, Office of the Secretary of State
Robert Barengo, Lobbyist, Former Representative, Securities Industry Association
Donald J. Mello, Director, Court Administration, Judicial Council of the State of Nevada
Joni A. Kaiser, Executive Director, Committee to Aid Abused Women (CAAW)
Susan Meuschke, Executive Director, Nevada Network Against Domestic Violence
Frances Doherty, Deputy Attorney General
Ben Graham, Chief Deputy District Attorney, Clark County, Representative, Nevada State District Attorneys Association

SENATE BILL (S.B.) 154: Makes various changes to provisions governing securities.

IN THE SUPREME COURT OF
THE STATE OF NEVADA

VALENTI, VINCENT,

Appellant,

vs.

THE STATE OF NEVADA,
DEPT OF MOTOR VEHICLES,

Respondent.

S.Ct. No. **63987**

District Ct. No. **A-13-677093-J**

APPENDIX[1]

[1] The preceding zeros to the Appendix numbers have been omitted for clarity and convenience.

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

****

Vincent Valenti,

Petitioner,

vs.

State of Nevada, Department of Motor Vehicles,

Respondent.

CASE NO.: A-13-677093-P

DEPT. NO. 32

DECISION AND ORDER

Petitioner Vincent Valenti challenges the Decision of the Administrative Law Judge affirming the revocation of his driver's license by Respondent State of Nevada, Department of Motor Vehicles. Valenti now petitions this Court for judicial review of the Administrative Law Judge's decision.

Factual Background and Procedural Background

Valenti was stopped by a Nevada Highway Patrol (NHP) Trooper on July 1, 2012, for making two unsafe lane changes without signaling. The Trooper smelled alcohol, observed signs of intoxication, and administered a preliminary breath test for a reading of blood-alcohol content. After Valenti failed the preliminary test, the Trooper transported

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Valenti to the Clark County Detention Center (CCDC). During the transport, the Trooper read Valenti the standard implied consent form and informed Valenti that he would have to decide whether to proceed with another breath test or a blood test at CCDC. Upon arriving at CCDC, Valenti's blood was drawn and then sent to NHP's Southern Command location for testing. Forensic scientist Christine Maloney performed the analysis and determined Valenti's blood alcohol content to be .159. With this evidence, Respondent revoked Valenti's driver's license, and Valenti contested the revocation. The challenge to the revocation was heard on February 11, 2013, and the Administrative Law Judge affirmed the revocation on February 12, 2013.

Valenti timely brings this petition for judicial review, arguing that the Administrative Law Judge's decision was not supported by substantial evidence. The record on appeal was submitted on March 12, 2013. Valenti filed his Opening Brief on April 12, 2013. Valenti filed a Supplement to Petitioner's Opening Brief on May 6, 2013. Respondent filed an Answering Brief on June 7, 2013. On June 27, 2013, Valenti filed a Reply Brief and a Request for Oral Argument. This matter came on for hearing on the 15th day of August, 2013 at the hour of 9:00 a.m. before Department XXXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with Judge Rob Bare presiding; Petitioner Vincent Valenti appeared by and through his attorney, John G. Watkins, Esq.; Respondent State of Nevada appeared by and through its attorneys, Kimberly A. Buchanan, Esq., and Denise S. McKay, of the Office of the Attorney General. The Court, having reviewed the briefs and the record makes the following findings:

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Conclusions of Law

When reviewing a record on appeal, NRS 233B.135 provides that the District Court is limited to the record on appeal and may not "reweigh the evidence, reassess the witnesses' credibility, or substitute the administrative law judge's judgment with [its] own." Nellis Motors v. State, Dep't of Motor Vehicles, 197 P.3d 1061, 1066 (Nev. 2008). The burden of proof is on the Petitioner to show that the administrative determination was not supported by the law, was clearly erroneous in view of the substantial evidence, or was an abuse of discretion. NRS 233B.135(2), (3)(d)-(f).

Nevada Revised Statute 484C.210 (1) states:

> "1. If the result of a test given under NRS 484C.150 or 484C.160 shows that a person had a concentration of alcohol of 0.08 or more in his or her blood or breath at the time of the test, the license, permit or privilege of the person to drive must be revoked as provided in NRS 484C.220 and the person is not eligible for a license, permit or privilege for a period of 90 days."

Driving within the State of Nevada is a privilege "extended only to those who are qualified to operate a motor vehicle safety." McCharles v. State, Dept. of Motor Vehicles, 99 Nev. 831, 833, 673 P.2d 488, 489 (1983). "[T]he privilege of operating a vehicle in Nevada is conditioned upon driver's consent to submit to a chemical sobriety test" pursuant to NRS 484C.160. Id. Nevada's implied consent statute requires that "[a]ny person who drives or is in actual control of a vehicle on a highway or on premises to which the public has access shall be deemed to have given his or her consent to an evidentiary test of his or her blood, urine, breath or other bodily substance to determine the concentration of alcohol in his or her blood or breath." NRS 484C.160. Consent from the driver is absolute. McCharles, 99 Nev. at 833. If a driver refuses a blood test,

"reasonable force [may] be used to the extent necessary to obtain samples of blood from the person to be tested." NRS 484C.160(7). Thus, by voluntarily choosing to operate a motor vehicle on the public roads of Nevada, Petitioner consented to an evidentiary test to determine his blood-alcohol content, as it is undisputed that the NHP Trooper had reasonable grounds to believe Valenti was under the influence of alcohol.

Upon the withdraw of Valenti's blood, forensic scientist Christine Maloney tested the sample for blood-alcohol content. Maloney is a chemist as defined in NRS 50.320, and, thus, her affidavit regarding the sample testing is admissible proof of the concentration of alcohol in the blood draw.

Because this Court finds that Valenti consented to have his blood drawn under NRS 484C.160 and the testing of that blood by a chemist under NRS 50.320 showed that Valenti's blood alcohol content was above .08 in violation of NRS 484C.210, this Court finds the Administrative Law Judge's decision was supported by substantial evidence, and was proper as a matter of law. Therefore, the decision of the Administrative Law Judge is AFFIRMED.

Dated this 27th day of August, 2013.

Rob Bare
Judge, District Court, Department 32

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I placed a copy of this Order in the attorney's folder in the Clerk's Office, or mailed or faxed a copy to:

John G. Watkins, Esq.
804 South Sixth Street
Las Vegas, NV 89101
Attorney for Petitioner

Catherine Cortez Masto
Attorney General
Denise S. McKay
Deputy Attorney General
Public Safety Division
555 East Washington Avenue, #3900
Las Vegas, NV 89101
Attorneys for Respondent

Tara Duenas
Judicial Executive Assistant, Dept. 32

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CLERK OF THE COURT

ROA

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555 East Washington Avenue, #3900
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Fax: (702) 486-3773
ahoney@ag.nv.gov
Attorneys for State of Nevada, Department of Motor Vehicles

DISTRICT COURT
CLARK COUNTY, NEVADA

VALENTI, VINCENT

Petitioner,

vs.

STATE OF NEVADA, DEPT. OF MOTOR VEHICLES,

Respondent

CASE NO.: A-13-677093-J
DEPT. NO.: XXXII

RECORD ON APPEAL BEFORE THE

DEPARTMENT OF MOTOR VEHICLES

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

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PRESENT AT HEARING FEBRUARY 11, 2013

TONI BOOONE	ADMINISTRATIVE LAW JUDGE
LAWRENCE MOORE, ESQ.	ATTORNEY FOR PETITIONER
TROOPER SCOTT REINMUTH	DEPARTMENT WITNESS

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TRANSCRIPT OF ADMINISTRATIVE HEARING ON FEBRUARY 11, 2013

JUDGE BOONE: This is the time and date of the hearing in the matter of the driving privileges of VINCENT SAMUEL VALENTI. Date of birth for the Petitioner is August 6th, 1968 and the DMV case number to this case is IP120918B. Today's date is February the 11th, 2013 and the time is approximately 1:00 p.m. This hearing is being conducted at the Department of Motor Vehicles Office of Administrative Hearings at 2701 East Sahara Avenue, Las Vegas, Nevada. My name is Toni Boone and I'm the Administrative Law Judge assigned to hear this case. Pursuant to Chapter 484C of the Nevada Revised Statutes, this hearing was scheduled at the request of the Petitioner after he was notified by the Department of Motor Vehicles of the Department's intention to revoke his driving privileges. The revocation was based on a Certification of Cause received from TROOPER SCOTT REINMUTH of the Nevada Highway Patrol. In the Certification of Cause filed by TROOPER REINMUTH he stated he had reasonable grounds to believe the Petitioner had been driving or in actual physical control of a motor vehicle while under the influence of intoxicants on July 1st, 2012. The Certification of Cause also indicated that the Petitioner submitted to an evidentiary test of his blood and that the blood test revealed an alcohol concentration of .08 or greater and/or the presence of a prohibited substance. The Certification of Cause is part of the file prepared for my consideration and it has been marked as Department's Exhibit 1. There are only two other documents offered by the Department, both of which were marked as Exhibits. Department's Exhibit 2 is a Declaration regarding

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Withdrawal of a Whole Blood Sample and Department's Exhibit 3 is Forensic Laboratory Analysis of the sample. Prior to the hearing, counsel for the petitioner, LAWRENCE MOORE, who is appearing here today for JOHN WATKINS offered three documents for to mark as exhibits on behalf of the petitioner. Petitioner's Exhibit A is the DMV Notice of Administrative Hearing. Petitioner's Exhibit B is an uncaptioned motion to suppress on Fourth Amendment grounds. And Petitioner's Exhibit C is a copy of a response to motion to suppress from Justice Court of Las Vegas Township, uh, in the matter of Matthew K. Ashworth. The Rules of Evidence applicable to this Administrative Hearing are those found in Nevada Revised Statutes 233B, commonly known as the Administrative Procedures Act. Let the record show that present for the hearing are the witness for the Department, uh, TROOPER REINMUTH, Petitioner, VINCENT SAMUEL VALENTI, and counsel for the Petitioner, the aforementioned LAWRENCE MOORE. MR. MOORE, do you have any motions or preliminary matters to address?

ATTORNEY MOORE: Yes, Your Honor. I would note under Nevada Administrative Code 481.330 subsection 3 it allows for affidavits to come into evidence but not declarations. I would note Government's Exhibits 2 and 3 are declarations. Under NRS 233B.121.(2c) the Notice of Hearing is to include a section of statutes and regulations to be used in hearing. You'll note that in the Notice of Hearing which I filed NRS 53.045 is not listed. Uh, it's my position that the only way declarations may come into evidence is to meet all the requirements of NRS 53.045. To support that position I would cite the Nevada Supreme Court Case

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of Buckwalter at 126 Nevada Advanced Supreme page 21 where our Nevada Supreme Court did allow declarations to come in as evidence but only because all the requirements of NRS 53.045 had been met. That statute not being listed in the Notice of Hearing, I would ask that you rule in my client's favor and do not allow the evidence in the test to come in. My next objection goes strictly to Exhibit 3, the Declaration by CHRISTINE MALONEY. I know that nowhere in this declaration does CHRISTINE MALONEY indicate that she has ever been declared an expert in a court of record. I would... (pause) Excuse me. I would cite the case of Kramer v. the Department of Motor Vehicles at 126 Nevada Advanced Opinion page 38. I'm gonna read just a couple of lines from page 2:

> We, (meaning the Nevada Supreme Court) conclude that NRS 50.320 limits the use of an expert witness affidavit to persons previously qualified by District Court to testify as an expert witness. Therefore, an administrative hearing officer lacks discretion to admit expert witness testimony by affidavit when the affiant has not been qualified by District Court or the affidavit fails to state the District Court in which the affiant has been permitted to testify.

Subsequently, this decision, the statute was modified to indicate that it must be an expert witness in a court of record. Again, in Exhibit 3, there is nothing in this document indicates she has ever been declared an expert witness. I realize it says that she is a chemist in this declaration, but I would argue that alone should not be sufficient to meet the requirements of the NRS and I would ask you to strike the evidence. Next argument goes to the constitutionality of NRS 484C160. Clearly the taking of blood triggers Fourth Amendment protection. In the brief we've cited Schmerber v. California. Evidence must be

based on probable cause, uh, and briefly cited Henry v. The United States. Evidence seized in violation of the Fourth Amendment is not admissible. In the brief we've cited Wong Sun v. the United States. Federal Courts will strike down state law which may also provide the constitutional protection which is required by the Federal government. In the brief we've cited Ybarra v. Illinois. Essentially, under NRS 484C160 an officer with reasonable grounds may require a blood or a breath test. If the person refuses to take the test, then blood may be for-forced on a first offense. In Torres v. the Department of Motor Vehicles, our Nevada Supreme Court ruled that reasonable grounds was less than probable cause. I argue therefore the statute is unconstitutional, ask you to rule in my client's favor. That concludes the preliminary arguments. Thank you.

JUDGE BOONE: Alright, thank you, MR. MOORE. I will take those under advisement and I will address them in my written decision. TROOPER REINMUTH, would you raise your right hand please? Do you hereby swear or affirm that the testimony you are about to give will be the truth the whole truth and nothing but the truth?

TROOPER REINMUTH: I do.

JUDGE BOONE: Thank you. Please state your name for the record.

TROOPER REINMUTH: SCOTT PAUL REINMUTH.

JUDGE BOONE: Where are you employed?

TROOPER REINMUTH: Uh, Nevada Highway Patrol Department of Public Safety.

JUDGE BOONE: How long have you been a trooper with NHP?

TROOPER REINMUTH: Just under 5 years.

JUDGE BOONE: Were you so employed and were you on duty on July 1st, 2012?

TROOPER REINMUTH: I was.

JUDGE BOONE: And on that date did you come into contact with MR. VALENTI?

TROOPER REINMUTH: I did.

JUDGE BOONE: Then give me a detailed account of your contact with him beginning with time of contact and tell me why you thought he was operating under the influence.

TROOPER REINMUTH: About 6:25 in the morning I was going southbound on I-15 approaching the southern 215 or the southern beltway. I observed a black BMW in front of my patrol car make two unsafe lane changes without signaling from the number three to the number four and the number four to the number five travel lane. I also noticed the, uh, driver as well wasn't wearing a seatbelt. As we exited on one of the access roads there, I initiated a traffic stop using overhead lights and sirens. Stopped on the right shoulder just north of Las Vegas Bouldevard. Where there's an exit there. It's an access road onto Las Vegas Boulevard. We stopped appropriately on the paved shoulder. I exited the vehicle and made contact. Motorist said he was the sole occupant of the vehicle. I asked him for his driver's license. Upon first contact I smelled a strong odor of alcohol about the interior, an unknown alcoholic substance about the interior of the vehicle. I noticed his eyes were bloodshot and watery, his pupils were a little bit constricted and when he started talking he had uh moderately slurred speech. Had to ask

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him several questions multiple times to, uh, understand what he was trying to tell me. Said he was coming from… excuse me, if I could refer to my report…. (pause) Ogden Towers. He said he left about an hour before I stopped him, he stopped, uh, had some, some breakfast I guess with some friends at the El Cortez and then he said he was driving home. He gave me his driver's license. He didn't have any problem presenting that to me. Asked him if he had anything to drink he stated he had consumed alcohol 10-ish, 9 or 10 o'clock the night before. Twelve ounces of vodka and soda. I'd asked him to exit the vehicle due to all the signs of intoxication. Then he stood in front of my patrol car. As I was basically doing a field interview on him I noticed that he was leaning against, uh, the push bumper of the car with his legs, looked like he was using it for support cause be appeared a little bit unsteady on his feet when he was standing outside the vehicle. Due to the admission of consuming alcohol and outward signs of intoxication, the odor of alcohol about his person while outside the vehicle, and bloodshot, watery eyes, I requested that he submit to an evident… -er, uh, field sobriety testing in which he, uh, complied, he agreed. Did the horizontal gaze nystagmus. During the test I had to, uh, ask him several times to keep his head still. Cause his head moved a little bit during the test it was going back and forth. I noticed six clues and a vertical HGN. Uh, we moved along to the nine step walk-and-turn. Which was, I'll give a little synopsis of what happened. During my explanation the test while I was demonstrating how to do it he failed to stay in the starting position. We started the test three times before being told to

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start. He wasn't able to keep his balance while in the starting position when just, just standing when I was explained the test to him, once he started the test rather than follow the directions he was given which was to take nine steps forward and nine steps back he took three steps forward, made an improper turn and then took three steps back. During those first six steps, three forward and three back he uh, I'll have to refer at my report here to double check which one… uh… he lost his balance, stepped off line, failed to step heel to toe and made an improper turn. He then took three more steps after turning around failing the same clues, failing to touch heel to toe, stepping off line, using his arms for balance, made another improper turn and took an additional three steps forward after concluding the test I observed that he had….

ATTORNEY MOORE: Would you try to just testify rather than... It's almost as if he's continually referring to his notes. I realize it's appropriate for him but he can just ask each time he needs to. Thank you.

JUDGE BOONE: TROOPER REINMUTH, um, with respect to the details that you're checking on, if MR. MOORE wants to have your testimony in that great a detail, he can ask you the questions during cross-examination.

TROOPER REINMUTH: Okay.

JUDGE BOONE: Okay?

TROOPER REINMUTH: Alright. He had, uh, seven clues during the nine step walk-and-turn.

JUDGE BOONE: Okay.

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TROOPER REINMUTH: After the walk-and-turn we did the one leg stand. During one leg stand he showed two additional clues. Failing all Field Sobriety Tests. I asked him to submit to a preliminary breath test.

ATTORNEY MOORE: May I voir dire the officer briefly, the trooper on that?

JUDGE BOONE: With regard to the PBT?

ATTORNEY MOORE: Yes.

JUDGE BOONE: Yes.

ATTORNEY MOORE: Do you actually calibrate the PBT yourself?

TROOPER REINMUTH: No.

ATTORNEY MOORE: And do you have any records of this calibration with you today, sir?

TROOPER REINMUTH: No.

ATTORNEY MOORE: I would ask that he not be allowed to testify to that because that doesn't meet the foundational requirements of Nevada Administrative Code 484.621 and NAC 484.624.

JUDGE BOONE: Um, I'll take your objection under advisement. I'll address it in my written decision. I'm going to allow the testimony for now but I may not give it any evidentiary weight after I've considered your argument. TROOPER REINMUTH?

TROOPER REINMUTH: So I asked him to submit to the field, er- to the uh, the PBT, the Preliminary Breath Test. I explained how to do the test, how to exhale through the straw. Uh, I advised him that it's pretty easy to tell if someone is deceiving the test. On his first attempt, he did try to deceive the test by puffing up his cheeks and not blowing through the straw-

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ATTORNEY MOORE: Objection, argumentative. And a conclusion.

JUDGE BOONE: Um,…

ATTORNEY MOORE: Also, irrelevant.

JUDGE BOONE: Well, I'm not sure….

ATTORNEY MOORE: Okay.

JUDGE BOONE: With respect to the conclusion… Well, I believe at this point it, it is possible that it's relevant, MR. MOORE.

ATTORNEY MOORE: Okay.

JUDGE BOONE: But, uh, with respect to the foundation, I'll take that objection under advisement and I'll address it in my decision. Continue testimony, trooper.

TROOPER REINMUTH: I already explained that PBT to him again, asked him to uh… I gave him one more opportunity to take the preliminary breath test, he did comply on the second attempt and blew a .154 on the PBT. After that I placed him in custody and hand restraints that I checked for tightness and double-locked. I, uh, searched his person, placed him inside the rear seat of the patrol vehicle and put a seat belt on him. I read him his Miranda rights and the Nevada implied consent and told him that he had to uh make up him mind by the time we got to the jail which test that he wanted to do either a blood test or a breath test. I ran a records check on him through the Nevada Highway Patrol dispatch center for warrants, license status and prior DUIs. He was clear and valid. He didn't have any prior DUIs. Drove him down to the Clark County Detention Center and once we got to the Clark County Detention Center, I asked him what his decision was. He asked for my recommendation. I told him I could not give him one. He had to make the decision. He chose to have

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a blood draw. Once we got inside I observed and I'll have to see the name of the uh the phlebotomist… uh… observed ADAM WAGNER an EMT down at CCDC, withdraw two vials of blood from the uh right arm at 0745 hours using a sealed blood kit that I opened. After I observed him withdraw the blood I took custody of the vials, sealed them with evidence tape and then sealed them inside the blood kit. After completing my report and clearing the jail I drove the blood down to the Southern Command and booked it into evidence.

JUDGE BOONE: This is Department's Exhibit 2. Could you identify it for me please?

TROOPER REINMUTH: That's the Nevada Highway Patrol Declaration for the Withdrawal of whole blood.

JUDGE BOONE: Do you recognize that particular declaration as one you've seen before?

TROOPER REINMUTH: Yes.

JUDGE BOONE: How?

TROOPER REINMUTH: It was filled out by the, uh, phlebotomist ADAM WAGNER, the day he did the blood draw and it's got the same event number and it's bearing my signature on the bottom.

JUDGE BOONE: This is Department's Exhibit 3, can you identify it please?

TROOPER REINMUTH: This is the uh, Las Vegas Metropolitan Police Department's Forens- Forensic Laboratory Examination Report for his blood content which showed .159.

JUDGE BOONE: Thank you. This is Department's Exhibit 1. Could you identify it?

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TROOPER REINMUTH: This is the DL-45 that I filled out the day that I arrested MR. VALENTI. Am I pronouncing that correctly? And it's bearing my signature on the bottom the day I received the blood results.

JUDGE BOONE: Alright, thank you. MR. MOORE, do you have questions for the witness?

ATTORNEY MOORE: My client was cooperative during this, was he not?

TROOPER REINMUTH: Yes. I don't recall him being uncooperative.

ATTORNEY MOORE: You recorded and you checked cooperative, did you not?

TROOPER REINMUTH: I- I'd have to verify, but I, I vaguely remember this. This incident. I do believe he was cooperative during the duration of the encounter.

ATTORNEY MOORE: Did you have anything to do with getting the blood to the crime lab yourself or once you dropped off that was the end of your handling of the blood?

TROOPER REINMUTH: After I booked it into evidence, I no longer had custody of the blood draw.

ATTORNEY MOORE: I have no additional questions for trooper.

JUDGE BOONE: Okay, I will of course take and review your previous objections and your preliminary motions and I'm now ready for any additional closing arguments.

ATTORNEY MOORE: Looking at Exhibit 3 by CHRISTINE MALONEY, there's nothing in this document which indicates what day she received the blood, how the blood got to her, whether it was transported or sent by UPS, no indication as to how the blood was stored from the time it was taken to the time it got to her,

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it talks about how, once it got to the forensic laboratory they put it in a refrigerator. I would argue that there's not sufficient evidence and to a degree to show a proper chain of custody and I would ask that you exclude the evidence. Lastly, in- I'd note Exhibit 3, of, uh, C I'm sorry by me, the order to Matthew Ashworth matter, I don't believe I commented on it earlier in that case…

JUDGE BOONE: You did not.

ATTORNEY MOORE: The uh, JP ERIC GOODMAN uh did hold the statute unconstitutional and I'd like to just read just a couple lines from page 13. I will ask you consider it in its entirety.

JUDGE BOONE: Yes.

ATTORNEY MOORE: I'm starting on line 14:

> This Court finds that, as a matter of law, requiring the Defendant to waive his Fourth Amendment rights as a condition of driving renders his "consent" to the blood draw coercive, and therefore invalid. As the Statute allows warrantless blood draws on less than probable cause, in violation of federal law, and the warrantless search does not fall within either the "special needs" exception or the "consent" exception, this Court holds [the statute] unconstitutional.

I would ask you to rule in my client's favor. Thank you.

JUDGE BOONE: Thank you, Mr. MOORE. Department's Exhibits 1, 2, & 3 and Petitioner's Exhibits A, B and C are admitted as evidence. This Hearing is now concluded.

End of Recording

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STATE OF NEVADA)
COUNTY OF CLARK)

I, Amanda Senif, an employee for the STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES, do hereby certify:

That I transcribed the foregoing from a digital recording made of the testimony taken at an administrative hearing held on February 12, 2013.

That the foregoing transcript consisting of pages numbered one (1) through thirteen (13), inclusive, is a full, true and correct transcription of the digital recording taken in the above-entitled matter, to the best of my knowledge, skill and ability.

I further testify that I am a disinterested person in the outcome of said action.

IN WITNESS THEREOF, I have hereunto set my hand this 7th day of MARCH, 2013.

AMANDA SENIF

SUBSCRIBED AND SWORN TO
before me this 7th day
of March, 2013 by AMANDA SENIF.

ELIZABETH DRASER
Notary Public State of Nevada
No. 02-75643-1
My appt. exp. June 2, 2014

NOTARY PUBLIC in and for said
County and State of Nevada

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Department's Exhibits

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DMV
Nevada Department of Motor Vehicles

OFFICER'S CERTIFICATION OF CAUSE AND NOTICE OF REVOCATION OR SUSPENSION

(NRS Chapters 483 & 484)

Central Services & Records
555 Wright Way
Carson City, NV 89711
www.dmvnv.com

RIVER'S INFORMATION (PLEASE PRINT)

Valenti (Last) Vincent (First) Samuel (Middle)

Date Officer Completed This Form: 07-01-12

ess: 3687 E Hacienda Ave

Enf. Agency & City: NHP/Las Vegas

Las Vegas (City) NV (State) 89120 (Zip)

Ticket/Case No.: 170700150

08-05-68 ☐ UNDER 18 ☐ UNDER 21

Court: Justice Court

(M/F) Height 5'11" Weight 175 Eyes Haz Hair Brn Class C Endorsements none Restrictions none

Type: ☐ Non-Commercial ☐ Commercial ☐ CMV-Hazmat Driver's Lic. No./ID Card No. 1701100444 State NV

eived on the above date by (person's signature):

FFICER'S CERTIFICATION OF CAUSE AND EVIDENTIARY TESTING / IMPLIED CONSENT WARNING

n Officer of the law enforcement agency listed above. On 07.01, 20 12, I confronted the above-identified person (hereinafter n"), and at that time I had reasonable grounds to believe that such person had been driving or in actual physical control of a vehicle while under the ce of intoxicating liquor or a controlled and/or prohibited substance, as determined by a chemical or breath test. (See Section 3.)

I read such person the implied consent warning (pursuant to NRS 484.383–484.386), which described the person's rights and obligations pertaining to for intoxicating liquor or a controlled and/or prohibited substance, including, but not limited to, the person's rights to select a breath or blood test, depending circumstances. I explained that such person DID NOT HAVE THE RIGHT TO SPEAK TO AN ATTORNEY BEFORE TESTING.
h person was UNDER 18 on the date of the evidentiary testing, such person's parent, guardian or custodian was notified (per NRS 484.383).

he parent, guardian or custodian was NOT notified because DEPARTMENT'S EXHIBIT # 1A

VIDENTIARY TEST RESULTS (COPY ATTACHED)

EVIDENTIARY TEST(S) SHOWED THAT AT THE TIME OF THE TEST(S) THE PERSON HAD A CONCENTRATION OF ...

☐ ... ALCOHOL of 0.02 but less than 0.08 in his/her BLOOD as determined by an evidentiary CHEMICAL test. (APPLIES TO PERSONS UNDER 21 YEARS OF AGE)

☐ ... ALCOHOL of 0.02 but less than 0.08 in his/her system as determined by an evidentiary BREATH test.* (APPLIES TO PERSONS UNDER 21 YEARS OF AGE)

☐ ... ALCOHOL of 0.08 or more (0.04 or greater if operating a commercial motor vehicle) in his/her BLOOD or with a detectable amount of a prohibited substance in his/her system as determined by an evidentiary CHEMICAL test. (APPLIES TO PERSONS ANY AGE)

Type of evidentiary test(s) administered:
- ☑ Blood Test
- ☐ Urine Test (for prohibited substance)
- ☐ Urine Test for Alcohol (to be used ONLY if person is afflicted with hemophilia or a heart condition requiring use of an anticoagulant as noted in NRS 484.383)

☐ ... ALCOHOL of 0.08 or more (0.04 or greater if operating a commercial motor vehicle) in his/her system as determined by an evidentiary BREATH test.* (APPLIES TO PERSONS ANY AGE)

*The evidentiary BREATH test results were:

Test 1 / Test 2 / Test 3

I hereby certify that this document is a true and correct copy of the original on file at the Department of Motor Vehicles

any pertinent witness or officer: Phone ( ) –

any pertinent witness or officer: Date: 10/3/12 By: DOK Phone ( ) –

RVICE AND NOTICE OF REVOCATION OR SUSPENSION ORDER (Separate from court action)

I DID NOT SERVE a Notice of Revocation or Suspension Order or issue a temporary license on the above-named person. I request the Department of Motor Vehicles to issue the appropriate Revocation or Suspension Order.

I SERVED the following Notice of Revocation or Suspension Order based on the evidentiary test results as shown above:

THIS IS YOUR OFFICIAL NOTICE OF THE REVOCATION OR SUSPENSION ORDER.

You are hereby notified that your driver's license has been revoked or suspended for a period of 90 days. If you disagree with the revocation or suspension of your driving privileges, YOU MAY REQUEST AN ADMINISTRATIVE HEARING. See Note 4 on the reverse side of this form.

I SEIZED the NEVADA driver's license (if it was available) and attached it to the Department's copy of this form (pursuant to NRS 484.385 or 483.462).

MPORARY LICENSE/PERMIT Cannot exceed 7 days. (Officer: See Note 5 on reverse side of this form for effective dates.)

NTIRE notice must be carried in order to be valid as a Temporary License/Permit. Do not tear off any portion of this form.

D ON _____ at _____ a.m./p.m.

TIVE DATE _____ at _____ a.m./p.m. EXPIRATION DATE _____

o temporary license/permit was issued because: Results Pending

W ENFORCEMENT OFFICER I attest the above information is true and correct.

Full Name S. Reinmuth Badge No. 351 Work Phone (702) 485 - 4100

r's Signature 351 Date Signed 09-07-12

(17)

(Revised 09/2011) ORIGINAL (White)—DMV DUPLICATE (Blue)—Law Enforcement Agency TRIPLICATE (Pink)—Driver

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GENERAL INFORMATION

If your license is revoked or suspended, you may not drive again in Nevada under any condition, including using a driver's license from another jurisdiction, until you have complied with Nevada requirements and the Department of Motor Vehicles has reinstated your driving privilege. **This is an administrative revocation or suspension. It will not be affected by the outcome of the DUI citation processed through the criminal court proceedings.**

EVIDENTIARY TESTING / IMPLIED CONSENT WARNING

- You are required to submit to evidentiary testing of your blood or breath to determine alcohol content. If this is your first offense, you may refuse to submit to a blood test if breath testing is available. If you choose breath, you must give two or more consecutive samples.
- If this is other than a first offense, or reasonable grounds exist to believe you have caused death or substantial bodily harm to another person, you must submit to a blood test if requested.
- If the presence of a controlled and/or prohibited substance is in issue, you are required to submit to a blood or urine test, or both, in addition to the breath test.
- If you fail to submit to required testing, the law allows me (the officer) to direct that reasonable force be used to the extent necessary to obtain up to three blood samples from you.
- You are further advised that any warning relating to having an attorney present before answering any questions does not bear on the issue of submitting to evidentiary testing. **YOU DO NOT HAVE THE RIGHT TO SPEAK TO AN ATTORNEY BEFORE TESTING.**

NOTES (as they apply to the section numbers on the front side of this notice):

DEPARTMENT'S EXHIBIT # 18

I. SERVICE AND NOTICE OF REVOCATION OR SUSPENSION ORDER

Request for Hearing—Procedures and Information

If you disagree with the revocation or suspension of your driving privileges, you may request an Administrative Hearing. You have the right to an Administrative Hearing before the Department of Motor Vehicles, Administrative Law Judge. Requests may be made by calling one of the following offices: Carson City [(775) 684-4574], Las Vegas [(702) 486-4940], or Elko [(775) 753-1239]. Written requests may be made to: Department of Motor Vehicles, Office of Administrative Hearings, 555 Wright Way, Carson City, NV 89711-0400.

Your hearing will be scheduled within 15 days of receipt of the request, when possible. If you have a valid license, you will be given a Temporary License or Permit to cover the Administrative Hearing period. You will be given the opportunity to present evidence and cross-examine witnesses. If you wish, you may be represented by an attorney; however, **this would be at your own expense.**

If you were under 21 years of age on the date you were confronted by the officer, the hearing will cover the following issues:

a) Whether you were driving or in actual physical control of a vehicle;
b) Whether you were less than 21 years of age at the time of the test; and
c) Whether you had a concentration of alcohol of 0.02 percent but less than 0.08 as determined by an evidentiary test of breath or blood;
d) Whether you had a concentration of alcohol of 0.08 percent or more (0.04 or greater if operating a commercial motor vehicle) as determined by an evidentiary breath test;
e) Whether you had a concentration of alcohol of 0.08 percent or more (0.04 or greater if operating a commercial motor vehicle) as determined by an evidentiary test of blood or urine; or
f) Whether you had a detectable amount of a prohibited substance as determined by a chemical test and as defined in Nevada Revised Statutes and Nevada Administrative Code.

If you were 21 years of age or older on the date you were confronted by the officer, the hearing will cover the following issues:

a) Whether you had a concentration of alcohol of 0.08 percent or more (0.04 or greater if operating a commercial motor vehicle) as determined by an evidentiary breath test;
b) Whether you had a concentration of alcohol of 0.08 percent or more (0.04 or greater if operating a commercial motor vehicle) as determined by an evidentiary test of blood or urine; or
c) Whether you had a detectable amount of a prohibited substance as determined by a chemical test and as defined in Nevada Revised Statutes and Nevada Administrative Code.

Following this hearing, the Administrative Law Judge will render a written decision that affirms or rescinds the revocation or suspension action. If you disagree with the Administrative Law Judge's decision, you have the right to judicial review by appealing the decision to district court.

I hereby certify that this document is a true and correct copy of the original on file with the Department of Motor Vehicles

License Reinstatement: Prior to reinstating your driver's license following a revocation, you must send or bring proof of financial responsibility to DMV's Central Services & Records. The most common method is to request your insurance company's home office forward an SR22 form to the Department of Motor Vehicles, Central Services & Records, 555 Wright Way, Carson City, NV 89711-0400. The SR22 will certify that you have a liability insurance policy in effect on certain motor vehicles you own or wish to operate. This insurance must be maintained for a 3-year period from the date of reinstatement.

VALIDATED SEP 14 2012 DEPARTMENT OF MOTOR VEHICLES

You may NOT drive in Nevada until: Date 10/3/12 By: SOK Custodian of Records

a) Your revocation or suspension expires,
b) You have made application for and received a new license; and
c) You have successfully completed all applicable tests and paid reinstatement fees.

Restricted Hardship License Information: If this is your first DUI offense/conviction, you may be eligible for a restricted hardship license after serving one-half of your revocation or suspension period. For additional information, call the Reno office [(775) 684-3506] or the Las Vegas office [(702) 486-1319].

TEMPORARY LICENSE/PERMIT

If you were driving with a temporary license, you are NOT entitled to an additional temporary license (NRS 484.385). **If you held a valid commercial driver's license (CDL) or permit**, this temporary license/permit becomes effective 24 hours after receipt and expires 168 hours (7 days) after it becomes effective (NAC 483.8485). **If you are 21 years of age or older** and held a valid non-commercial driver's license (NCDL) or permit, the temporary license/permit is effective for only 7 DAYS including the date of issuance (NRS 484.385). **If you are UNDER 21**, the temporary license becomes effective 1 hours after receipt and expires 120 hours (5 DAYS) after it becomes effective (NRS 483.462). **If you request an Administrative Hearing** and if you are eligible to request a temporary license or permit, you may go to any Nevada DMV office to apply for a temporary license or permit that will be effective until a hearing decision is rendered. **Out-of-state drivers are NOT eligible to receive a NEVADA temporary driver's license/permit.**

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NEVADA HIGHWAY PATROL
DECLARATION FOR THE WITHDRAWAL OF WHOLE BLOOD SAMPLE

EVENT # 12C00150

STATE OF NEVADA)

) Valenti, Vincent Samuel
(Name of person blood drawn from)

COUNTY OF CLARK)

Adam Wagner being first duly sworn, deposes
(Print name of declarant drawing blood)

and says THAT I AM A
- ____ Registered Nurse
- ____ Licensed Practical Nurse
- ____ Laboratory Technician / Assistant
- X Emergency Medical Technician
- ____ Physician Assistant
- ____ Nurse Practitioner
- ____ Medical Doctor
- ____ Other (Specify) _____

employed by Nephcare

DEPARTMENT'S EXHIBIT # 2

That a regular part of my duties is the withdrawing of blood samples from persons and I am authorized to do so by

- ____ Nevada State Board of Nursing
- X Nevada Department of Human Resources / Health Division / Bureau of Licensure & *Certification*
- ____ Nevada Board of Medical Examiners (Doctor's Only)

That on 7-1-12 (Date Drawn), at 0754 (AM) PM (Time Drawn), I withdrew a sample of blood in a medically accepted manner from a person known to me as : Valenti, Vincent Samuel
(Print name of Person blood drawn from)

and

That I withdrew the sample using no alcohol solutions or alcohol-based swabs ; and ; when I first obtained it until on 7-1-12, at 0754 (AM) / PM, I delivered the sample to Officer S. Reinmuth ID # 351 of the Nevada Highway Patrol.

I Adam Wagner do hereby declare under penalty of perjury
(Print Declarant Name)

that the foregoing is true and correct.

A Wagner
Declarant Signature

EMT
Declarant Title

S. R. 351
Witness Signature

07-01-12
Date

(19)

I hereby certify that this document is a true copy of the original on file at the Department of Motor Vehicles

Date: 10/3/13 By: DOK
Custodian of Records

Revised 03-06

AUG 13 2012

Las Vegas Metropolitan Police Department Forensic Laboratory Report of Examination Toxicology Unit	Distribution Date: AUG 6 2012

Subject(s): VALENTI, VINCENT	**Case:**	NHP120700150
	Agency:	NHP
	Booked By:	Reinmuth
	Requester:	Reinmuth/NHP
Incident: DUI		

I, Christine Maloney, do hereby declare:

That I am a Forensic Scientist employed by the Las Vegas Metropolitan Police Department;

That I am a "chemist", as defined in Nevada Revised Statue 50.320, and my duties include the analysis of the blood of a person to determine the presence or quantification of alcohol;

That I received sealed evidence in the above case from a secure refrigerator in the LVMPD Forensic Laboratory, containing a sample of whole blood;

That I completed an analysis on the sample and determined that the blood contained a concentration of alcohol of 0.159 gram per 100 milliliters of blood;

That I sealed the evidence and placed it in a secure refrigerator in the LVMPD Forensic Laboratory;

That the evidence was in my custody from the time I first obtained it until I resealed it, at which time it was in substantially the same condition as when I first obtained it.

I declare under penalty of perjury that the foregoing is true and correct.

DEPARTMENT'S EXHIBIT # 3

Christine Maloney 7/24/12 M. Salega Mgr

Christine Maloney, #9459 Report Date Reviewer

Forensic Scientist

I hereby certify that this document is a true copy of the original on file at the Department of Motor Vehicles

Dated: 8/13/12 By: DDK

Custodian of Records

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Petitioner's Exhibits

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STATE OF NEVADA
DEPARTMENT OF MOTOR VEHICLES
(702) 486-4940
NOTICE OF ADMINISTRATIVE HEARING
January 8, 2013

VALENTI, VINCENT S.
3687 E HACIENDA AVE
LAS VEGAS NV 89120

CASE #: IP120918B

DL NO.: 1701100444

IN THE MATTER OF: DRIVER'S LICENSE REVOCATION UNDER NRS 484.385/484C.220

You are scheduled for a hearing as follows:

PETITIONER'S EXHIBIT # A

DATE: FEBRUARY 11TH, 2013

TIME: 1:00:00 PM

LOCATION: Department of Motor Vehicles
East Entrance marked "Office of Administrative Hearings"
2701 East Sahara Ave /TB
Las Vegas, NV 89104

PURPOSE The purpose of this hearing is to determine whether the chemical test to which you submitted showed an alcohol concentration of 0.08 or more and/or whether the chemical test to which you submitted showed a detectable amount of prohibited substance(s) in your system pursuant to NRS 484.379/484C.110. You may expect affidavits/declarations to be used to establish your blood/breath alcohol and/or prohibited substance content. (NRS 50.315, NRS 50.320, NRS 233B.123, and NAC 481.330)

AUTHORITY NRS 484.387/484C.230, NRS 233B Nevada Administrative Procedures Act

Please see Information Sheet attached hereto.

If you are under the age of 18, you must be accompanied by a parent, legal guardian, or guardian ad litem.

We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the hearing. If special arrangements for the hearing are necessary, please notify the Hearing Office at (702) 486-4940 no later than five (5) working days prior to the meeting. Failure to pick up your temporary driver's license may result in cancellation of your hearing by the Administrative Hearings Office.

cc: J. WATKINS/LM

DOK

000028

(21)

John G. Watkins, Esquire
Nevada Bar No. 1574
804 South Sixth Street
Las Vegas, Nevada 89101
johngwatkins@hotmail.com
(702) 383-1006

PETITIONER'S
EXHIBIT # B

LAS VEGAS MUNICIPAL COURT

CLARK COUNTY, NEVADA

CITY OF LAS VEGAS, Plaintiff, vs. Defendant.	Case No.: Dept. No.: Hearing date: Hearing time:

MOTION TO SUPPRESS
THE BLOOD TEST RESULT ON THE GROUND THAT
THE NEVADA IMPLIED CONSENT LAW VIOLATES
THE FOURTH AMENDMENT OF THE
UNITED STATES CONSTITUTION

Comes Now _____, by and through his counsel, JOHN G. WATKINS, ESQUIRE and moves this Court for an Order suppressing _____ blood test result on the ground that it was obtained in violation of the Fourth Amendment of the United States Constitution.

DATED this _____ day of _____, 2011.

_____
John G. Watkins, Esquire

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SUMMARY OF ARGUMENT

A search for evidence under the Fourth Amendment of the United States Constitution must be based on probable cause. *See Bolin v. State*, *infra* ("... acquiring blood samples constituted searches within the ambit of the Fourth Amendment and were thus subject to its stringent probable cause requirements." *Id.* at 523. (emphasis added). NRS 484C.160 (formerly NRS 484.383) demands a blood draw on less than probable cause. *See Torres*, *infra*. ("It is not necessary under this statute [NRS 484.383 (1)] that probable cause for an arrest on a charge of driving while under the influence of alcohol be demonstrated.") *Id.* 105 Nev. at 560, *fn.* 1. Since NRS 484C.160 compels a search on a standard less than probable cause, the statute is unconstitutional.

I

LAW AND ARGUMENT

A.

THE TAKING AND TESTING OF DEFENDANT'S BLOOD PURSUANT TO THE NEVADA IMPLIED CONSENT LAW VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

a. The United States Constitution requires probable cause to force a defendant to submit to a search and the States shall not allow a lower standard.

A person has a Fourth Amendment right to be free from unreasonable "searches" and "seizures" by the Government. The Fourth Amendment protects people, not places. *Katz v. United States*, 389 U.S. 347, 351, (1967). The overriding purpose of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusions. *Schmerber v. California*, 384 U.S. 757, 767 (1966). A Fourth Amendment search for evidence must be based on probable cause. *Henry v. United States*, 361 U.S. 98 (1959): Bolin *v. State*, *supra* at

(23)

523. Evidence and the "fruits" thereof obtained in violation of the Fourth Amendment are inadmissible. *Wong Sun v. United States*, 371 U.S. 471 (1963). The Fourth Amendment is controlling on the States through the Fourteenth Amendment of the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961).

It is axiomatic that a state may provide a citizen more protection than the federal constitution provides but not less. *Osburn v. State*, 118 Nev. 323, 44 P.3d 523 (2002) ("Although the Nevada Constitution and the United States Constitution contain similar search and seizure clauses, the United States Supreme Court has noted that states are free to interpret their own constitutional provisions as providing greater protections than analogous federal provisions." *Id.* at 325 – 326. (footnote omitted.) *See also, California v. Ramos*, 463 U.S. 992, 1013 – 14 (1983). Federal courts will not hesitate to strike-down a state law which provides less constitutional protection than the federal constitution demands. *See Ybarra v. Illinois*, 444 U.S. 85 (1979). *See also, Hannoy v. Indiana*, 789 N.E.2d 977 (Ct. of App. 2003) ("The legislature cannot, however, abrogate a person's Fourth Amendment right to be free from unreasonable searches and seizures, as defined by the Supreme Court", citing *Ybarra v. Illinois*.)

b. The drawing and testing of defendant's blood is a search and seizure within the definition of the Fourth Amendment.

The taking of blood from an individual for evidence in a criminal prosecution triggers Fourth Amendment protections. The Court in *Schmerber v. California* stated,

> The values protected by the Fourth Amendment thus substantially overlap those of the Fifth Amendment helps protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime. But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under

(24)

> the Fourth Amendment. The Amendment expressly provides that "[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated***." (Emphasis added). It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of "persons," and depend antecedently upon seizures of "persons," with the meaning of that Amendment.

Id. at 467.

The Court in *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998) said,

> In Schmerber v. California, 384 U.S. 757, 766 – 768 (1966), the United States Supreme Court recognized that intrusive procedures into the human body for the purpose of acquiring blood samples constituted searches within the ambit of the Fourth Amendment and were thus subject to its stringent probable cause requirements.

Id. at 523.

c. Nevada's Implied Consent Statute allows a forced blood draw with less than probable cause.

NRS 484C.160 compels a search of a person's breath and/or blood of any driver "... if such a test is administered at the direction of a police officer having reasonable grounds to believe that the person to be tested was: ..." in violation of Nevada's DUI laws. (emphasis added). The person to be tested CANNOT refuse! Any attempt to refuse will be met with a forced blood draw.[1]

The constitutionality of NRS 484C.160 depends upon the definition of "reasonable grounds" as it appears in the statute. If the term means a standard less than probable cause, the statute

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[1] NRS 484C.160 is not an implied consent law and it is incorrect to refer to it as such. Implied consent laws are not compulsory. The person has a choice to submit to the test or suffer the loss of his driver's license for a designated length of time. A true implied consent statute does not run afoul of the Fourth Amendment because the search is not mandatory. *See Hannoy, supra* ("Because Chapter Seven [implied consent law] does not require a search or seizure, it does not violate the right to be free from unreasonable searches and seizures and is therefore not unconstitutional.") *Id.* at 987. The person is allowed to refuse to submit to a breath or blood test.

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violates the Fourth amendment's prohibition against unreasonable searches.

The Nevada Supreme Court in *State of Nevada, Department of Motor Vehicles and Public Safety v. Torres*, 105 Nev. 558, 779 P.2d 959 (1989) defined "reasonable grounds" in NRS 484.383 (1) (now NRS 484C.160) as a standard less than probable cause. The Court stated,

> We note that the District Court applied an incorrect standard in reaching its conclusions. NRS 484.383 (1) provides that a police officer may direct the administration of a chemical test to determine the percentage of alcohol in the blood of the person to be tested if the officer has reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or controlled substance. It is not necessary under this statute that probable cause for an arrest on a charge of driving while under the influence of alcohol be demonstrated.

Torres, 105 Nev. at 560 n. 1 (emphasis added)

See also, Headnote 1 in *Torres*.

> 1. AUTOMOBILES.
> Probable cause for arrest on charge of driving under influence of intoxicating liquor does not have to be demonstrated prior to police officer directing administration of chemical test to determine percentage of alcohol in blood of driver; officer only has to have reasonable grounds to believe that person to be tested was driving and in actual physical control of vehicle while under influence of intoxicating liquor or controlled substance. NRS 484.383, subd. 1.

Based on *Torres*, NRS 484C.160 authorizes a search on less than probable cause and is therefore unconstitutional.[2] *Again see, Ybarra, supra* and *Hannoy, supra*.

CONCLUSION

Based on the above, _____ motion to suppress must be granted.

(26)

[2] It is important to note that if the legislature did not agree with the state supreme court's definition of reasonable grounds in *Torres*, the lawmakers would have surely changed that definition by subsequent legislation. This was not done and is evidence that the legislature agreed with *Torres*.

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

MATTHEW K. ASHWORTH,

Defendant.

CASE NO.: 18M09805X

DEPT. NO.: 11

ORDER

The Court having reviewed Defendant Matthew K. Ashworth's Motion To Suppress The Blood Result On The Ground That The Nevada Implied Consent Law Violates The Fourth Amendment Of The United States Constitution, the State of Nevada's Opposition To Motion To Suppress, the oral arguments before the Court, and all papers and pleadings filed herein and good cause appearing therefore,

IT IS HEREBY ORDERED that:

Defendant's Motion to Declare NRS 484C.160 Unconstitutional is GRANTED.

Defendant's Motion to Suppress is DENIED WITHOUT PREJUDICE.

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PETITIONER'S EXHIBIT # C

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BACKGROUND

The following facts are alleged as the basis for the misdemeanor charge of Driving Under the Influence, First Offense. On or about November 27, 2010, Defendant Matthew K. Ashworth was involved in an accident. During the course of the investigation officers came to suspect that the Defendant was under the influence of intoxicating liquor. Defendant failed an on-scene preliminary breath test. The officers were notified by dispatch that the Defendant had a prior conviction for driving under the influence. The Defendant was read his rights under Nevada's Implied Consent Statute. Defendant was told he had to take a blood test because of the prior conviction. Defendant was arrested and taken to the Clark County Detention Center where the blood test was performed.

Defendant now seeks to suppress the results of the blood test on the ground that the Nevada Implied Consent Statute is unconstitutional.[1] The Defendant argues that the Statute violates the rights guaranteed to him under the Fourth Amendment of the United States Constitution that it allows warrantless blood draws where the police have less than probable cause to believe that the crime of driving under the influence was committed.

ANALYSIS

A statute may be unconstitutional either on its face or as applied in a particular case. An applied challenge alleges that a constitutionally valid statute was applied in an unconstitutional manner under the specific facts of the case. Tobe v. City of Santa Ana, 892 P.2d 1145, 1152 (Cal. 1995). In a facial challenge, the particular facts of the case do not matter, the challenger must show that the statute unconstitutionally impacts a "large fraction" of the cases to which the statute applies. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 895, 112 S.Ct. 2791, 2829-230 (1992). To have standing to challenge a statute or policy, a party must submit to

[1] Defendant's counsel, John G. Watkins, Esq., has filed the same motion in multiple cases. For the convenience of the Court and the parties, the Court chose this case as the lead case.

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the challenged policy. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-67, 92 S.Ct. 1965, 1968. (1972) (Appellee lacked standing to challenge membership policy of Moose Lodge; appellee did not suffer injury as he never applied for membership).

Defendant makes a facial challenge to the Implied Consent Statute. At issue are privacy rights guaranteed by the Fourth Amendment of the United States Constitution. The Court finds the Defendant has standing to make the challenge as he was compelled to submit to a blood draw, thus submitting to the challenged statute.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." (U.S. Const. amend. IV.) The purpose of the Fourth Amendment is to protect the "privacy, dignity and security of persons against certain arbitrary and invasive acts by officers of the Government, or those acting at their direction." Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 613-14, 109 S.Ct. 1402, 1411 (1989). The Fourth Amendment does not proscribe all searches and seizures, only those that are unreasonable. Skinner, 489 U.S. at 619, 109 S.Ct. at 1414. Whether a particular search is reasonable is judged by balancing the intrusion into the individual's privacy interest against the needs of the government to promote legitimate interests. Id. In criminal cases this balance is generally struck in favor of requiring a search warrant.

In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966) the United States Supreme Court carved out an exception to the warrant requirement for compulsory blood tests from individuals arrested for the crime of driving under the influence. The Court weighed the privacy interests of the accused in the integrity of, and intrusion into, the human body versus the need of the state to secure evidence of the crime. Given the effervescent nature of alcohol within a defendant's system, and the very real risk of dissipation of that evidence while a warrant is

secured from a neutral magistrate, the Court held that a warrantless search was reasonable when weighed against the minimal intrusion into the human body occasioned by a blood draw.

That Schmerber allows warrantless blood draws does not end this Court's inquiry. The Supreme Court did not authorize warrantless blood draws in all cases; the exception only applies in those cases where the police officer has probable cause for the initial arrest. This probable cause requirement is central to the Supreme Court's analysis:

> Here there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile under the influence of intoxicating liquor. The police officer who arrived at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were "bloodshot, watery, sort of a glassy appearance."
>
> * * *
>
> While early cases suggest that there is an unrestricted right on the part of the government . . . to search the person of the accused when legally arrested . . . the mere fact of a lawful arrest does not end our inquiry.
>
> * * *
>
> Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test.

Schmerber, 384 U.S. at 768-70, 86 S.Ct. at 1834-35. Thus, under the Fourth Amendment of the United States Constitution, before a warrantless search may be conducted of a defendant's blood, the police officer must have probable cause to believe that the defendant committed the crime of driving under the influence.

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The probable cause standard for the warrant exception is the federal constitutional standard. As has oft been noted, the federal constitutional standard is a floor, not a ceiling. The individual states are free to grant their citizens greater protection than that offered by the United States Constitution. Wilson v. State, 123 Nev. 587, 595 (2007) (noting the Court's "past practice of affording more citizen protection under the Nevada Constitution than are afforded under the federal Constitution.")

The Nevada Implied Consent Statute (N.R.S. 484C.160) (the "Statute") states that as a condition of driving on the public highways and roads of the State, that the driver is "deemed to have given his or her consent to an evidentiary test of his or her blood . . . to determine the concentration of alcohol in his or her blood . . . or to determine whether a controlled substance . . . is present." N.R.S. 484C.160(1). The standard for a blood test is whether a police officer has "reasonable grounds" to believe the accused was driving or in actual physical control of the vehicle while under the influence of alcohol or a controlled substance. If an individual refuses to comply, the statute authorizes a police officer to use "reasonable force" to collect the blood sample. NRS 484C.160(7)(b).

In State, Department of Motor Vehicles v. Torres, 105 Nev. 558 (1989) the Nevada Supreme Court interpreted "reasonable grounds" as being a standard less than probable cause:

> We note that the district court applied an incorrect standard in reaching its conclusions. [484C.160] provides that a police officer may direct the administration of a chemical test to determine the percentage of alcohol in the blood of the person to be tested if the officer has "reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance." It is not necessary under this statute that probable cause for an arrest on a charge of DUI be demonstrated.

Torres, 105 Nev. at 560, n.1. This Court is bound to follow the Nevada Supreme Court's interpretation of "reasonable grounds" in determining the constitutionality of the Statute.[2] Minnesota v. Probate Court of Ramsey County, 309 U.S. 270, 273, 60 S.Ct. 523, 525 (1940) ("[W]e must take the statute as though it read precisely as the highest court of the State has interpreted it.")

On its face, as interpreted by the Nevada Supreme Court, the Statute is unconstitutional as it allows a warrantless blood draw by a police officer where there is less than probable cause to believe the accused committed the crime of driving under the influence. This finding, though, is not necessarily fatal as the Statute must be examined in light of two other exceptions to the warrant requirement: 1) the "special needs" exception; and 2) the "consent" exception.

The "special needs" exception to the warrant requirement dispenses with both the need for a warrant and for probable cause where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." New Jersey v. T.L.O., 469 U.S. 325, 351, 105 S.Ct 733, 748 (1985) (Blackmun, J. concurring in judgment.) Although the courts generally require some measure of individualized suspicion:

> a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interest implicated by the search are minimal, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

Skinner, 489 U.S. at 624, 109 S.Ct. at 1417.

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[2] This Court respectfully, but strongly, disagrees with the result reached in Torres. Since at least 1845 "probable cause" and "reasonable grounds" have been synonymous. Travis v. Smith, 1 Pa. 234 (1845) ("[P]robable cause, or in other words, reasonable grounds for belief of guilt."); Brinegar v. U.S., 338 U.S. 160, 175, 69 S.Ct. 1302, 1310 (1949) ("The substance of all the definitions of probable cause is a reasonable ground for belief of guilt."); Lerner v. Sheriff of Nevada v. Marin, 83 Nev. 75, 78 (1967) ("[P]robable cause (or reasonable grounds for detention)."). If "reasonable grounds" means "probable cause," the Statute is constitutional.

In Skinner, the petitioners challenged the constitutionality of a Federal Railroad Administration regulation which required certain railroad employees to submit to blood, breath and/or urine tests for the presence of drugs or alcohol. Under the regulation, testing is mandatory for any employee involved in a major train accident. In the case of a reportable accident, employees are tested unless a supervisor can immediately determine that the employee was not involved in the accident. The Supreme Court held that the regulation is constitutional because railroad employees have a diminished expectation of privacy and because the regulation furthered government's legitimate interest in promoting railroad safety.[3]

Central to the Court's holding is the fact that the regulation's stated and primary purpose is to prevent accidents; it is not a pretext for the collection of evidence for use in the criminal prosecution of employees. The Court left for another day the issue of whether the routine use of the chemical tests in criminal prosecutions would render the regulation unconstitutional. Skinner, 489 U.S. at 621 n.5, 109 S.Ct. at 1415 n.5.

That issue was addressed by the Court in Ferguson v. City of Charleston, 532 U.S. 67, 121 S.Ct. 1281 (2001). The Court in Ferguson addressed the constitutionality of a hospital policy that drug tested pregnant women for the presence of cocaine in their urine. The policy was developed with the help of law enforcement, and the results were forwarded to law enforcement. The hospital argued that the warrantless urine tests fell within the "special needs" exception, as its purpose was to protect the health of the mother and child. The Court rejected this argument stating:

> While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches

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[3] While driving is also heavily regulated by the State, an individual does not lose his reasonable expectation of privacy by simply entering his vehicle. Delaware v. Prouse, 440 U.S. 648, 662-63, 99 S.Ct. 1391 1400-01 (1979) ("Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.")

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was to generate evidence for law enforcement purposes in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of MUSC's policy was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment.

Ferguson, 532 U.S. at 82-4, 121 S.Ct. at 1289-90. Here, the ultimate goal of the Statute may be to remove drunk drivers from the roadways through the Nevada Department of Motor Vehicles license revocation proceeding. However, its immediate goal is to generate evidence for the criminal prosecution of individuals accused of driving under the influence. A review of legislative record from the enactment of, and the 1995 amendment to, the Statute makes this clear.

The Statute began life as Assembly Bill 268, proposed before the Fifty Fifth Session of the Nevada Legislature (1968-69). On April 3, 1969, the Bill was read for the third time. During that hearing the following remarks were made part of the record:

> Senator Titlow: Some time before this session, I was having a discussion with a member of the Highway Patrol. He informed me that it was not necessary to have this law, and if they wanted to take a blood test, they would take it, period.
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> * * *
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> Senator Monroe: [B]ut if you're going to drive a car in such a manner that an officer will suspect that you are intoxicated, I say you ought to be arrested and say that you ought to

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be taken off the highways, and I say that you ought to be convicted of driving while intoxicated. That's the only way you can stop the drunken driving problem.

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Senator Young: You might say this is an anti-lawyer bill because I think it will save lawyer's fees. . . . It has been my experience that when a . . . blood alcohol test, is taken, the ball game is pretty well over, one way or the other. If it turns out to be less than 15 percent, the prosecution is dropped, if it turns out to be more than 15 percent the defendant generally, and probably wisely, pleads guilty instead of going to trial and paying for the expense of an attorney. . . .

Journal of the Senate, Fifty-Fifth Session, p. 621.

In 1995 the Clark County District Attorney's Office sponsored an amendment to the Statute (Assembly Bill 643). Minutes of the Assembly Committee on Judiciary, Sixty-Eighth Session, June 5, 1995. The amendment made two major changes to the Statute: 1) it effectively denied first time offenders the right to choose between a breath test and a blood test; and 2) it authorized the use of "reasonable force" by police officers if the accused refused to consent to a blood draw. On June 5, 1995, the Judicial Committee heard testimony on the proposed amendment. Id. The following individuals appeared in support of the amendment: Ben Graham, Clark County District Attorney's Office; Richard Gammick, Washoe County District Attorney; Roger Whomes, deputy district attorney, Washoe County; and William Gardner, Chief Prosecutor, Reno City Attorney's Office. Id. During that hearing District Attorney Gammick made the following representation:

When the DUI laws first came out they were not very popular. However, presently there is a large move to enforce these laws and create better laws to get drunk drivers off of our roads. This push has added the "implied consent" provisions in the current DUI laws.

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> Currently if there is substantial bodily harm or death, or if there is proof that it is the second or third DUI, then a sample of blood can be drawn without implied consent. The only time implied consent is involved is for a first time DUI. [The amendment] would simply bring the first time DUI in line with other cases.
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> [I]mplied consent is no longer given because of the involvement in the laws by the legislature over the past six years. The current legislation would eliminate implied consent for the first time DUI.

Id. Chief Prosecutor Gardner added that passage of the amendment would "remove the guesswork associated with DUI trials." Id. These quotes are consistent with how the Statute actually functions during the course of an investigation into, and criminal prosecution of, the crime of driving under the influence.

From the moment an individual is pulled over to the moment he is booked into the Clark County Detention Center ("C.C.D.C.") the officer(s) involved in the arrest is looking for evidence to support the charge of, and conviction in court for, the crime of driving under the influence. To that end the Las Vegas Metropolitan Police Department ("Metro") provides its officers with a standard D.U.I. form to be filled out by the investigating officer. Included in that multi-page form are areas for the officer to note everything from the defendant's physical characteristics (blood shot eyes, the smell of alcohol or marijuana, stumbling, etc...) to the conditions of the road where a field sobriety test is conducted. Also contained in that document is language taken from the Statute and a checkbox to note whether the officer advised the accused of their "rights" under the Statute.

When the accused is transported to C.C.D.C. it is in handcuffs in the back of a police vehicle. The blood draw occurs at C.C.D.C. It is done by a licensed nurse at the direction of, and

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is witnessed by, the officer. The officer provides the sealed blood draw kit. After the blood is drawn, evidence tape is placed on both the blood vials and on the outside of the kit. The officer and the nurse initial the evidence tape and the officer places the event number on the kit. An affidavit is filled out by the nurse and is witnessed by the officer. The officer then takes the kit and places it into Metro's locked evidence safe. The kit remains in the safe until such time as it is transported to the diagnostic lab for testing. The diagnostic lab tests the blood following standard and scientifically valid protocol. After the blood is tested, the technician seals the vials and kit with new evidence tape, which is then initialed. The kit is transported back to Metro's evidence locker. In general, the kit remains in Metro's possession until such time as it is brought by the arresting officer to the courthouse, where it introduced by the State as evidence against the accused in a criminal case.

Each step taken above is done according to standard practices and procedures developed by law enforcement and prosecutors. This is to ensure that the results of the blood draw are admissible at a criminal trial; that the evidence survives any possible objection to chain of custody or tampering that might be raised by the defendant's attorney.

The Statute facilitates this process by advising the accused that he has no right to refuse a blood test, and that failure to comply will result in the use of physical force. Thus the immediate goal of the Statute is to secure evidence for use in a criminal prosecution. That the same evidence may be used in a license revocation hearing is clearly nothing more than a secondary benefit to the State. It is the arrest which triggers the license revocation proceeding, not vice versa. The Court therefore finds that the Statute does not fall within the "special needs" exception. Ferguson, 532 U.S. at 82-4, 121 S.Ct. at 1289-90.

The State argues that the above analysis is unnecessary; by virtue of their status as drivers on Nevada's roadways individuals give their "consent" to the blood draw. Further, that consent

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takes the blood draw outside of the Fourth Amendment. State v. Ruscetta, 123 Nev. 299, 302 (1007) ("[C]onsent, freely and intelligently given, converts a search and seizure which would otherwise be unlawful into a lawful search and seizure.").

From 1969 to 1995 drivers in Nevada had the choice to either comply with, or to refuse, a police officer's request for a blood draw. The State determined that this choice interfered with its ability to prosecute DUI offenses. The 1995 amendment negated any real choice, a fact the District Attorney's office openly admitted during committee hearings. At oral argument in this case, the State took the following position: "if you don't like it, don't drive."

This Court is not persuaded by the argument that citizens should merely submit to the supremacy of the State. There are very few harbors left in modern life that are free from the reach of the regulatory powers of the federal, state, county and municipal governments. Each year brings more regulation, not less. The courts must be vigilant that the Constitution does not suffer the death of a thousand regulatory cuts.

Further, the position taken by the State makes clear the problem underlying it's reliance on the theory of "consent" for consent to be valid it must not be the product of coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973) In Schneckloth the Supreme Court stressed the importance of the rule that consent be freely given:

> But the Fourth and Fourteenth Amendments require that consent not be coerced, by explicit or implicit means, by implied threat or covert force. For no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion . . . .
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> It may be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by

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silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Schneckloth, 412 U.S. at 228–29, 93 S.Ct. at 2048. (citing Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535 (1886)); Gantity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967) (New Jersey statute that required police officers to waive Fifth Amendment rights or face loss of job and pension held unconstitutional); People v. Youmans, 327 Mich. 410 (1950) (State could not condition grant of hunting, fishing or trapping license on waiver of Fourth Amendment right to be free from unreasonable searches.) This Court finds that, as a matter of law, requiring the Defendant to waive his Fourth Amendment rights as a condition of driving renders his "consent" to the blood draw coercive, and therefore invalid.

As the Statute allows warrantless blood draws on less than probable cause, in violation of federal law, and the warrantless search does not fall within either the "special needs" exception or the "consent" exception, this Court holds that NRS 484.160C is unconstitutional.

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However, the Court will deny without prejudice Defendant's motion to the extent it seeks to suppress the results of the blood draw. The State may still proceed on the theory that the police officer had probable cause to arrest the Defendant. If probable cause is shown, the blood draw would comply with the standard set forth in Schmerber. That issue cannot be decided without sworn testimony from the investigating officer(s). The Court will rule on that issue after an evidentiary hearing on the matter.

Dated this 7 day of October, 2011.

ERIC A. GOODMAN

JUDGE ERIC A. GOODMAN

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Findings of Fact, Conclusions of Law and Decision

CASE NO: IP120918B

STATE OF NEVADA

DEPARTMENT OF MOTOR VEHICLES

IN THE MATTER OF THE DRIVING PRIVILEGE OF:

VINCENT SAMUEL VALENTI,

Petitioner.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

Jurisdiction

This case was adjudicated pursuant to Chapters 233B, 481 and 484C of the Nevada Revised Statutes (NRS) and Chapters 481 and 484C of the Nevada Administrative Code (NAC).

Statement of Case

The Department of Motor Vehicles (Department) revoked the driving privilege of Petitioner Vincent Samuel Valenti after it received an Officer's Certification of Cause (form DP45) in which Trooper Scott Reinmuth of the Nevada Highway Patrol claimed to have reasonable grounds to believe the Petitioner was driving or in actual physical control of a vehicle while under the influence of alcohol and/or prohibited substance(s). The Certification of Cause also asserted that at the time of the evidentiary test the Petitioner had an alcohol concentration of 0.08 or more in his blood or breath and/or amounts of prohibited substance(s) in his blood or urine. The Petitioner requested a hearing to contest the revocation of his driving privileges by the Department of Motor Vehicles.

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The hearing was held at 1:00p.m. on February 11th, 2013, at the Hearings Office for the Department of Motor Vehicles at 2701 E. Sahara Avenue in Las Vegas. Administrative Law Judge Toni Boone conducted the hearing. The Petitioner was present for the hearing and was represented by Lawrence Moore, Esquire, who was appearing for John Watkins, Esquire.

Trooper Scott Reinmuth of the Nevada Highway Patrol offered sworn testimony on behalf of the Department of Motor Vehicles. The Petitioner did not testify.

Department Exhibits One (1) through Three (3) and Petitioner's Exhibits A through C were admitted into evidence and made a part of the record.

List of Exhibits

Department Exhibit One (1): Form DP45, Officer's Certification of Cause

Department Exhibit Two (2): Declaration for the Withdrawal of the Whole Blood Sample

Department Exhibit Three (3): Forensic Chemist's Report of Blood Analysis

Petitioner's Exhibit A: DMV Notice of Administrative Hearing

Petitioner's Exhibit B: Uncaptioned Motion to Suppress

Petitioner's Exhibit C: *State v. Ashworth* from Justice Court of Las Vegas Township

Issues

Pursuant to NRS 484C.230.2, the scope of the hearing is limited to whether the officer had reasonable grounds to believe the Petitioner was driving or in actual physical control of a vehicle while under the influence of alcohol and/or a prohibited substance(s) and whether, at the time of the evidentiary test, the Petitioner had an alcohol concentration of 0.08 or more in his blood or breath or a detectable amount of a prohibited substance in his blood or urine.

Motions, Objections, Arguments, Discussion, Analysis and Rationale

Motion 1: Counsel for the Petitioner argued that Department Exhibits 2 and 3 were inadmissible because they were not affidavits. Department Exhibits 2 and 3 are declarations sworn under penalty of perjury. Counsel asserted NRS 53.045 may allow for the admission of declarations made under penalty of perjury, but that admission of such declarations under NRS 53.045 was prohibited in this particular hearing because NRS 53.045 was not cited in the Notice of Hearing (Petitioner's Exhibit A). Counsel argued that NRS 233B.121 requires the Notice of Hearing include all statutes which may be relied upon by the administrative law judge in rendering a decision and since the Notice of Hearing did not cite NRS 53.045, it could not be relied upon for admission of a declaration sworn under penalty of perjury. Counsel contended that while *Buckwalter v. The 8th Judicial District Court*, 234 P.3d 920, 126 Nev. Advance Opinion 21 (2010) allowed admission of declarations, it did so citing NRS 53.045, which cannot support admission of the declarations for this hearing because it was not cited in the hearing notice.

Ruling: This motion is denied for a number of reasons.

Statutory Requirements Pursuant to NRS 233B.121

NRS 233B.121.2(c) requires that the hearing notice include "a reference to the particular sections of the statutes and regulations involved." NRS 53.045 is intentionally omitted from the hearing notice because it is not applicable to an administrative driver's license revocation proceeding. The statutes authorizing admission of declarations in this hearing are NRS 50.315 and NRS 50.320. Both NRS 50.315 and 50.320 are specifically cited in the hearing notice.

Counsel's assertion that only affidavits and declarations made under the authority of NRS 53.045 are admissible is based upon a flawed premise: that the rules of evidence apply during a contested administrative driver's license revocation hearing. They do not. The traditional rules

of evidence are found in title 4 of the Nevada Revised Statutes, NRS 47.020 to NRS 56.020. NRS 47.020.1 sets forth the "Scope of title 4 of NRS" by stating: "This title governs proceedings in the courts of this State and before magistrates. . . ." This administrative tribunal is not a court.[1] This administrative law judge is not a magistrate. In fact, The Nevada Supreme Court has consistently defined administrative driver's license revocation hearings as "quasi-judicial"[2] rather than judicial in nature.

Instead, the rules of evidence for a contested administrative hearing are found in NRS 233B.123: "...when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form." NRS 233B.123 doesn't require written evidence to be submitted in any particular form; presumably an affidavit or a declaration, or even an unsworn statement, would be admissible under the statute.

In addition to the statutory and regulatory authority for admission of declarations provided by NRS 233B.123, the declarations to which Petitioner objected have authority for admission under NRS 50.315 and NRS 50.320, which are the only sections of the rules of evidence applicable to administrative hearings. Those two statutes are applicable to administrative hearings only because those statutes specify that they apply to administrative hearings.

Alleged Insufficiency of Notice of Hearing

Counsel for Petitioner argued that NRS 53.045 cannot be the basis for the admission of Department Exhibits 2 and 3 because that statute was not cited in the hearing notice. An

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[1] Article 6, Section 1 of the Nevada Constitution states: "The Judicial power of this State shall be vested in a Supreme Court, District Courts, and in Justices of the Peace. The Legislature may also establish Courts for municipal purposes only in incorporated cities and towns." The Department of Motor Vehicle hearings are not judicial proceedings under Article 6, Section 1 of the Nevada Constitution. Such hearings are administrative proceedings governed by NRS 233B. Such proceedings are quasi-judicial. Quasi-judicial proceedings are proceedings which have a judicial character that are preformed by an administrative agency. See, *Nevada Industrial Comm'n v. Reese*, 93 Nev. 115 (1977).

[2] See, for example, *State, Department of Motor Vehicles v. Root*, 113 Nev. 942 at 947, 944 P.2d 784 at 787 (1997).

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omission or deficiency in a hearing notice warrants exclusion of evidence only when that omission/deficiency prejudices the Petitioner or damages Petitioner's ability to present the case.

Counsel for the Petitioner was aware that declarations would be used to establish the Petitioner's alcohol concentration because the hearing notice informed him of same and indicated the correct statutory authority for the admission of the declarations. Counsel for the Petitioner, by presenting this very motion and by presenting Petitioner's Exhibit A in support of the motion, demonstrated that he was fully apprised that declarations would be used. Thus, the omission of NRS 53.045 from the hearing notice in no way prejudiced the Petitioner or damaged his ability to present his case.

Applicability of Buckwalter and/or NRS 53.045

It is true that *Buckwalter* relies upon NRS 53.045 for the admission of a declaration sworn under penalty of perjury, but *Buckwalter* is inapplicable to this case for two reasons: (1) *Buckwalter* is a medical malpractice action which requires a much higher level of procedural due process than does a quasi-judicial administrative hearing regarding a brief, temporary loss of driving privileges; and (2) The statute pertaining to medical malpractice specifically required an affidavit, which meant that there was no supporting authority for admission of the document other than NRS 53.045, while the statutes pertaining to the admission of Department Exhibits 2 and 3 (NRS 50.315 and 50.320) explicitly state that a declaration made under penalty of perjury is admissible, thereby providing a basis for admission independent of NRS 53.045.

These specific arguments that Counsel for the Petitioner raised, whether declarations sworn under penalty of perjury are admissible in an administrative driver's license proceeding, were raised before the Nevada Supreme Court by John Watkins, in 1997, in *State, Department of Motor Vehicles v. Bremer* and *State, Department of Motor Vehicles v. Sanders*, combined at 113 Nev. 805, 942 P.2d 145 (1997). The Nevada Supreme Court held that declarations regarding

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evidentiary chemical testing were admissible. The court stated several reasons for their decision to admit declarations that were not dependent upon NRS 53.045. While they made reference to NRS 53.045 because appellant Sanders raised a question regarding the statute, the court never relied upon that statute as the reason for admission of the declarations, nor did the court state that NRS 53.045 or any other rule of evidence was applicable to an administrative driver's license revocation proceeding.

In 1993, NRS 50.315 was amended to require admission of *affidavits* related to evidentiary chemical test results in administrative hearings. NRS 53.045 was also enacted in 1993. In 1995, the same language requiring admission of affidavits related to evidentiary chemical test results was incorporated into NRS 50.320. Thus, in 1997, when *Bremer* and *Sanders* were tried, NRS 50.315 and NRS 50.320 stated that an affidavit and *only* an affidavit was admissible in an administrative driver's license hearing. Both statutes specifically omitted declarations.

In *Bremer*, the appellant argued that the declaration of the chemist qualified as an expert was inadmissible in Bremer's administrative driver's license revocation hearing because it was merely a declaration and not an affidavit. While NRS 50.315 and NRS 484.3935 both authorized the admission of affidavits, Bremer argued the declaration wasn't admissible because the "DMV chose not to take advantage of NRS 484.3935" by providing an actual affidavit. The district court relied upon *Santillanes v. State*, 104 Nev. 699, 765 P.2d 1147 (1988) in its decision holding that the chemist's declaration was inadmissible because it was merely a declaration rather than an affidavit.

Bremer held that declarations were indeed admissible, with no reference whatsoever to NRS 53.045 as the basis for admission. *Bremer* referred to declarations as affidavits, thus equating the two. *Bremer* at 809, with emphasis included[3] by the *Bremer* court:

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[3] The court provided the emphasis in *Bremer;* the emphasis was not in the original *Vezeris* decision.

> "The DMV argues that the district court's reading of *Santillanes* is clearly erroneous because the burdens of proof and rules of admissibility of evidence differ between the criminal and civil arenas, particularly in the context of administrative hearings. As support for this proposition, the DMV notes that NRS 233B.123 relaxes the evidentiary rules in administrative hearings and that findings of fact are sustainable via substantial evidence only. Thus, the DMV maintains that the district court's reliance on *Santillanes* is inapposite. This court has carved out a unique posture toward administrative driver's license revocation proceedings. "It is well established that administrative hearings concerning the revocation of driver's licenses are civil in nature, not criminal," *State, Dep't Mtr. Vehicles v. Vezeris*, 102 Nev. 232, 235, 720 P.2d 1208, 1211 (1986). In *Vezeris*, we concluded that "only defendants in criminal proceedings may object to the use of affidavits of persons drawing blood samples; *parties seeking administrative review of driver's license revocation may not object to the use of affidavits*." *Id.* at 236, 720 P.2d at 1211. Although the affidavits at issue in *Vezeris* involved persons drawing rather than those testing blood samples, the same reasoning applies because of the long established reliability of blood-alcohol testing. *Id.* at 236, 720 P.2d at 1211 and 1212."

Thus, the *Bremer* court did not rely upon NRS 53.045 for the admission of declarations. Instead, the court noted that "NRS 233B.123 relaxes the evidentiary rules in administrative hearings" and that "[t]his court has carved out a unique posture toward administrative driver's license revocation proceedings." (emphasis added)

In *Sanders*, the appellant argued that NRS 50.315 (which states that an affidavit regarding chemical testing is admissible) was the controlling statute—not NRS 53.045 which provided for the admission of declarations sworn under penalty of perjury. *Sanders* held at 813:

> "[W]e hold that the distinction between an affidavit and declaration made under penalty of perjury is not such as to affect the substantial rights of parties to civil license revocation proceedings. [citation omitted] In so ruling, we find no irreconcilable repugnancies between NRS 50.315 and NRS 53.045. See *City of Las Vegas v. Int'l Assoc. Firefights*, 91 Nev. 806, 543 P.2d 1345 (1975). In this limited context, there is no logical reason for requiring the formalistic protocol of a sworn affidavit. Further, the administration of an oath or affirmation no longer has religious significance. Thus, for the purposes of administrative hearings of the type involved in this matter, the distinction between a sworn declaration and an affidavit is a distinction without a legal difference. Accordingly, for the reasons discussed above, we reverse the district court and hold that the administrative law judge did not err in admitting the declarations in lieu of affidavits."

Sanders, at Footnote 9, stated that the above ruling "does not affect affidavit requirements set forth in other contexts such as NRS 53.045(2), NRCP 56, the Nevada Probate Code, criminal

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DUI trials, NRS 31.260(2), NRS 6.130(2) and NRS 1.235", thus continuing to grant an explicit exception to affidavit requirements in an administrative driver's license revocation proceeding.

While the court made reference to NRS 53.045 in *Sanders*, because the appellant raised the applicability of NRS 53.045, the court merely said "we find no irreconcilable repugnancies between NRS 50.315 and NRS 53.045." Neither *Bremer* nor *Sanders* held that NRS 53.045 or any other traditional rule of evidence found in Title 4 was applicable to or binding upon an administrative driver's license revocation proceeding. Counsel for Petitioner provided neither statute nor case requiring the application of NRS 53.045 or any other traditional rule of evidence to an administrative driver's license proceeding. To the contrary, *Bremer* says "NRS 233B.123 relaxes the evidentiary rules in administrative hearings" and that the Nevada Supreme "court has carved out a unique posture toward administrative driver's license revocation proceedings."

Counsel argues that the ruling regarding NRS 53.045 in *Buckwalter* is applicable to this proceeding, but there is an element present in *Buckwalter* that is lacking in this proceeding which renders *Buckwalter* inapplicable. NRS 41A.071 provides, with emphasis added:

> "If an action for medical malpractice or dental malpractice is filed in district court, the district court **shall dismiss the action,** without prejudice, **if the action is filed without an affidavit**, supporting the allegations contained in the action, submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice."

Thus, there was a statute specific to a medical malpractice action that required the district court to dismiss the action if the action was filed without an affidavit from a medical expert. NRS 53.045 *had* to provide the basis for the admission of a declaration in *Buckwalter* because the statute specific to medical malpractice required an affidavit. There is no similar statute requiring that the documents to which the Petitioner objected be in the form of affidavits. In fact, both

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NRS 50.315 and 50.320 were both amended to include admission of declarations. *To wit*, NRS 50.320 provides, in pertinent part with emphasis added:

> "1. The affidavit or declaration of a chemist and any other person who has qualified in a court of record in this state to testify as an expert witness regarding the presence in the breath blood, or urine of a person of alcohol...which is submitted to prove...the concentration of alcohol...is admissible in the manner provided in this section.
> 2. An affidavit or declaration which is submitted to prove any fact set forth in subjection 1 must be admitted into evidence when submitted during any administrative proceeding, preliminary hearing or hearing before a grand jury. The court shall not sustain any objection to the admission of such an affidavit or declaration.
> 3. The defendant may object in writing to admitting into evidence an affidavit or declaration submitted to prove any fact set forth in subjection 1 during the defendant's trial. If the defendant makes such an objection, the court shall not admit the affidavit or declaration into evidence and the prosecuting attorney may cause the person to testify to any information contained in the affidavit or declaration."

NRS 50.315(4) provides, in pertinent part, with emphasis added:

> "Except as otherwise provided in subsections 6 and 7, the affidavit or declaration made under penalty of perjury of a person who withdraws a sample of blood from another for analysis by an expert as set forth in NRS 50.320 is admissible in any criminal or administrative hearing to prove..."

Buckwalter held that NRS 53.045 provided the basis for admission of the physician's declaration because the pertinent statute specifically required an affidavit. Neither NRS 53.045 nor *Buckwalter* apply to the admission of declarations in this hearing because there is express statutory for the admission of declarations in NRS 50.315 and 50.320, eliminating the need for reliance upon NRS 53.045 or any other rule of evidence. NRS 50.315 and 50.320 call for the admission of declarations from phlebotomists and the chemists. If *Buckwalter* is the only source of law that Counsel for the Petitioner can find to support his contention that NRS 53.045 applies to this hearing, his contention is utterly baseless.

Since the very inception of administrative hearings, there have been objections to the admission of hearsay documents, such as the Department Exhibits 2 and 3, on the ground that admission violates confrontation clause rights. For example, in *Richardson v. Perales*, 402 U.S.

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389, 91 S.Ct. 1420 (1971), a claimant who was denied Social Security benefits argued that he had a right to cross-examine a physician who submitted a medical report which ultimately resulted in the denial of disability benefits. The U.S. Supreme Court held that despite the hearsay nature of the medical report, the presence of opposing medical evidence and the absence of cross-examination, the medical report was admissible and could be given evidentiary weight. The court recognized the reliability and probative worth of written reports and, while acknowledging their hearsay character, pointed out the numerous hearsay exceptions under which written reports may be admitted in formal trials. But the court noted another reason for the admission of written reports. *Richardson, supra,* 402 U.S., at 406:

> "There is an additional and pragmatic fact which, although not controlling, deserves mention. This is what Chief Judge Brown has described as '(t)he sheer magnitude of that administrative burden,' and the resulting necessity for written reports without 'elaboration through the tradition facility of oral testimony.' "

Thus, there has always been a different level of procedural due process for civil, administrative hearings due to the sheer magnitude of the burden of providing the same level of due process that is provided in a criminal context. The current law controlling the level of procedural due process is *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976).[4] *Mathews* held that due process is flexible and does not have a fixed content that is applicable to every legal proceeding. *Mathews, supra,* 424 U.S., at 335:

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

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[4] *Mathews v. Eldridge* has been cited by the Nevada Supreme Court on 24 occasions, most recently in *J.D. Const., Inc. v. IBEX Intern Group, LLC*, 240 P.3d 1043, 125 Nev. Adv. Op. 36 (October 7, 2010). The court most recently applied the *Mathews* balancing test to an administrative driver's license revocation proceeding in *Weaver v. State, Department of Motor Vehicles*, 121 Nev. 494, 117 P.3d 193 (2005) and first applied it in that context in *Vezeris v. State*, 102 Nev. 232, 720 P.2d 1208 (1986).

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The U.S. Supreme Court first applied the *Mathews* balancing test to an administrative driver's license revocation proceeding in *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. 2612 (1979). *Mackey*, supra, 443 U.S., at 13: "something less than an evidentiary hearing is sufficient prior to adverse administrative action."

The court later applied the *Mathews* balancing test to administrative driver's license revocation hearings for driving under the influence in *Illinois v. Batchelder*, 463 U.S. 1112, 103 S.Ct. 3513 (1983). *Batchelder* held that an informal, less than trial-like proceeding meets due process requirements because:

a) although a defendant has a strong interest in maintaining driving privileges, there is no risk it will be deprived without an opportunity for a hearing;
b) a pre-deprivation hearing is an adequate safeguard against an erroneous agency decision depriving a defendant of driving privileges; and
c) the state has a strong interest in keeping drunk drivers off public roads.

There was a concern expressed, in *Richardson v. Perales*, that undue judicialization of the administrative hearing process might frustrate the effective administration in the interest of those intended as the law's beneficiaries. This was true because of the nature of the cases involved and the number of them. *Richardson v. Perales*, supra, 402 U.S., at 399: "Such a system must be fair—and it must work." This is no less true today. To impose trial-like procedures on administrative driver's license revocation proceedings would, due to the number of hearings involved, impede the administrative process. But it is not for this reason alone that neither the strict rules of evidence nor the exclusionary rules of the 4th, 5th and 6th are applicable in an administrative tribunal. It is unlikely that the heightened evidentiary standard that the Petitioner proposes would reduce the risk of the erroneous deprivation of driving privileges. If the phlebotomist signed Department Exhibit 2 before a notary public instead of signing it under penalty of perjury before a police officer, would that decrease the likelihood of erroneous deprivation of the Petitioner's driving privileges? If the forensic chemist signed Department Exhibit 3 before a notary public instead of signing it under penalty of perjury and having the

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declaration reviewed by the laboratory manager, would that decrease the likelihood of erroneous deprivation of the Petitioner's driving privileges? The answer to both questions is "no." Thus, requiring the higher level or procedural due process (affidavits rather than declarations) would not benefit petitioners and is therefore not required under *Mathews v. Eldridge* and its progeny.

The identification of both documents by Trooper Reinmuth provided foundation for the admission of both exhibits; thus, Department Exhibits 2 and 3 are admitted as evidence.

Motion 2: Counsel for the Petitioner argued that Department Exhibit 3 (blood analysis) should be suppressed or excluded because: (1) There was no indication on the document that the declarant had been qualified as an expert by a Nevada Court of Record; and (2) The *Cramer* case stands for the proposition that even chemists must be properly qualified in a court of record.

Ruling: The motion is denied.

Counsel for the Petitioner argues that Department Exhibit 3 cannot be admitted into evidence because the declarant has not been qualified as an expert witness. NRS 50.320 provides that the affidavit or declaration of two distinct classes of persons must be admitted in an Administrative Hearing—one class is a "chemist" and the other is "any other person" qualified as an expert by a Nevada court of record.[5] The Nevada Supreme Court also acknowledged, in *Cramer v. State, Department of Motor Vehicles*, 126 Nev., Advance Opinion 38 (October 7th, 2010), that the affidavit or declaration of two distinct classes of persons must be admitted in an Administrative Hearing—again, one class is a "chemist" and the other is "any other person" qualified as an expert by a Nevada court of record. *Cramer* states that if the declarant of the document is not a "chemist" but is merely "any other person," the person must be qualified as an

[5] The clear distinction between "any other person" and a "chemist" was made in footnote 3 of *Cramer v. State, Department of Motor Vehicles*, 126 Nev. Advance Opinion 38 (October 7, 2010)

expert by a Nevada court of record for the declaration to be admitted. Apparently, based on *Cramer*, a "chemist" does not to have the same expert qualification.

A chemist is defined in NRS 50.320.5 as "any person employed in a medical laboratory, pathology laboratory, toxicology laboratory or forensic laboratory whose duties include, without limitation, (a) the analysis of the breath, blood or urine of a person to determine the presence or quantification of alcohol or a controlled substance, chemical, poison, organic solvent or another prohibited substance." Department Exhibit 3 states that the declarant of that document, Christine Maloney, is employed as a Forensic Scientist for the Las Vegas Metropolitan Police Department and that her duties "include the analysis of the blood of a person to determine the presence or quantification of alcohol." I conclude that Christine Maloney is a chemist as defined by NRS 50.320. Consequently, she does not have to be qualified in a court of record in this State for her declaration to be admissible in this hearing.

NAC 481.330.3 provides: "The affidavit of any person may be admitted into evidence. All parties have the right to present evidence to rebut the contents of any affidavit." If Petitioner has evidence to rebut the findings of intoxicant concentrations as stated in such an affidavit, Petitioner certainly could have presented such evidence. Petitioner presented no such evidence.

Even though they are not binding in an administrative hearing, the normal rules of evidence dealing with hearsay likewise would support the admission of an affidavit of blood analysis for the presence of alcohol or a prohibited substance. NRS 51.075(1) states that, "[a] statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available." The blood analysis for intoxicants "is considered to be one of the most reliable methods of blood-alcohol testing." *State v. Hall*, 105 Nev. 7, 9, 768 P.2d 349,350 (1989). An affidavit for blood analysis possesses particularized guarantees of trustworthiness such that cross examination would add little to its reliability. The affiants are

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trained professionals who have no motive to lie or fabricate the results. *DeRosa v. Dist. Ct.*, 115 Nev. 225, 985 P.2d 157 (1999).

In addition to the discussions above it should be noted that Petitioner has no right to even object to the admission of Department Exhibit 3. In *State, Dep't Mtr. Veh. v. Bremer*, 113 Nev. 805, 809, 942 P.2d 145, 148 (1997) the Nevada Supreme Court cited *State, Dep't Mtr. Vehicles v. Vezeris*, 102 Nev. 232, 236, 720 P.2d 1208, 1211 (1986) and stated: "This court has carved out a unique posture towards administrative driver's license revocation proceedings . . . . In *Vezeris*, we concluded that 'only defendants in criminal proceeding may object to the use of affidavits of persons drawing blood samples; *parties seeking administrative review of driver's license revocations may not object to the use of affidavits.*' . . . Although the affidavits at issue in *Vezeris* involved persons drawing rather than those testing blood samples, the same reasoning applies because of the long established reliability of blood-alcohol testing." (emphasis in original) In *Bremer* the court noted that the affiant had been qualified in a district court and gave that as one reason the affidavit was admissible. The court then gave two other separate reasons the affidavit was admissible. One of those separate reasons was that, ". . . the DMV's blood-testing procedures are inherently reliable, particularly in light of our rulings in *Tilp* and *Hall*." The court noted the third separate reason the affidavit was admissible by stating: "Moreover, *Vezeris* instructs, by analogy, that [Petitioner] may not object to the use of [a blood analyst's] affidavit in an administrative proceeding."

The Nevada Supreme Court has stated, "If defense counsel has no bona fide dispute regarding the facts in an affidavit and credibility of . . .declarant, then cross examination is meaningless." *City of Las Vegas v. Walsh*, 121 Nev. 899, 907, 124 P.3d 203, 208 (2005). Without the presentation of proper evidence disputing the facts in the affidavit or the credibility of the affiant, such affidavits should be admitted into evidence.

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Motion 3: Counsel for the Petitioner offered a motion to suppress admission of the analysis of the Petitioner's blood sample on the grounds set forth in Petitioner's Exhibit B, as follows: A search for evidence under the 4th Amendment of the U.S. Constitution must be based on "probable cause." *Henry v. United States*, 361 U.S. 98 (1959) and *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998). The taking of blood from an individual triggers 4th Amendment protection. *Schmerber v. State of California*, 86 S.Ct. 1826, 384 U.S. 757 (1966). *State, Department of Motor Vehicles v. Torres*, 105 Nev. 448, 779 P.2d 959 (1989) defines "reasonable grounds" as a standard less than "probable cause." NRS 484C.160 demands a search on less than "probable cause," thus violating the 4th Amendment and rendering NRS 484C.160 unconstitutional. *Wong Sun v. United States*, 83 S.Ct. 407, 371 U.S. 471 (1963) held that the fruits of an unlawful search are inadmissible. If a person refuses to take an evidentiary test, they can be forced to submit to a blood test, which constitutes an unlawful search as long as the standard on which the search is predicated is "reasonable grounds" rather than "probable cause." Evidence of the analysis of the blood sample should be suppressed as the blood was withdrawn in violation of the tenets regarding illegal searches and seizures of the 4th Amendment. Counsel for the Petitioner provided *State v. Ashworth* in support of his contention that the taking of blood on the basis of "reasonable grounds" is a 4th Amendment violation.

Ruling: Motion to suppress is denied.

Petitioner's concern for the constitutionality of NRS 484C.160 is preserved for the record but the administrative hearings office is not an appellate court but a quasi-judicial administrative tribunal which has no authority to rule on the issue of constitutionality of a state statute. Further, the Nevada Supreme Court issued a ruling on this very issue in *State, Department of Motor Vehicles v. Evans*, 114 Nev. 41, 952 P.2d 958 (1998). *Evans* held, at Footnote 7:

> "Evans asserts that NRS 484.383(1) is unconstitutional if "reasonable grounds" is interpreted to mean anything less than "probable cause." The validity of Evans' arrest is not an issue in an administrative license revocation proceeding, however, and it is not an issue in this appeal. *See Beavers*, 109 Nev. at 438-39, 851 P.2d at 434, NRS 484.387(2)."

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Petitioner provided *State v. Ashworth* which declared the taking of blood on less than probable cause a 4th Amendment violation. But *Ashworth* decision can have no bearing on this case for three reasons.

First, *Ashworth* is a criminal case. Defendant Ashworth could have lost his liberty had he been convicted on the charge before the Justice Court. This is a civil, administrative hearing where the maximum sanction that can be imposed is a limited, temporary loss of driving privileges—a 90-day license revocation. Thus, as was previously explained, there must be a far higher level of substantive due process for the criminal charge than for the administrative hearing. The rules of evidence in a criminal proceeding are also far more stringent than those in an administrative proceeding. Consequently, *Ashworth* is inapplicable to this proceeding.

Second, a limited jurisdiction court has no more authority to declare a law unconstitutional than does an administrative tribunal. When faced with a question regarding the suppression of evidence as a result of the constitutionality of a statute or the lack thereof, a limited jurisdiction court can only determine whether the evidence which has been offered in the case before the court is admissible on constitutional grounds. Constitutionality of a statute must be determined by an appellate court which has a broader jurisdiction and thus has binding authority over lower courts and administrative tribunals, *i.e.* the Nevada Supreme Court.

Third, the decision from an inferior court, such as a limited jurisdiction court, cannot establish a precedent because there cannot be presumptive validity to the inferior court's judgment unless the record in a given case demonstrates that that court has jurisdiction in that case. Jurisdiction does not attach until it has been demonstrated on the record. In contrast, the jurisdiction of an appellate tribunal is broader and in Nevada's case, is statewide.

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A decision does not establish a precedent where other courts are not required to follow the decision. The decision of one limited jurisdiction judge is not binding on other limited jurisdiction judges. The decision of one general jurisdiction judge is not binding on other general jurisdiction judges. There could be, and probably is, at least one decision from a Nevada limited or general jurisdiction court on this specific issue that is inapposite to *Ashworth*. In fact, for an attorney to provide the decision of a limited jurisdiction or general jurisdiction court as if that decision could or should serve as a precedent is a somewhat mendacious.

Petitioner's motion, however, is denied on other grounds.

First, pursuant to the ruling of the Nevada Supreme Court in *Weaver v. State, Department of Motor Vehicles*, 121 Nev. 494, 503, 117 P.3d 193 (2005) and *Sereika v. State*, 114 Nev. 142, 955 P.2d 175 (1998) Petitioner has no standing to argue that the evidence in the present case should be excluded. Even if the applicable standard for this hearing was "probable cause" rather than "reasonable grounds" the evidence in the record would support a finding that the higher standard of "probable cause" was met in this case. *Sereika* held, at 150-151, in pertinent part:

> "Sereika provides no evidence that NRS 484.379(1)(c) has ever been enforced in the manner he suggests, or that it is likely to be so enforced in the future. This court has declared that statutory interpretation should avoid absurd or unreasonable results.... Given the general presumption that statutes will be interpreted in compliance with the Constitution, we decline to strike down an otherwise valid statute based on the unsubstantiated possibility of unconstitutional enforcement. ....Sereika lacks standing to bring the issue before this court. "A person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the [c]ourt." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973)."

Because the statute Sereika alleged was unconstitutional was not applied against him in the manner he hypothesized in the case before the court, the court held he lacked standing to raise the issue. Petitioner also lacks standing to raise the issue of constitutionality in the instant case.

The U.S. Supreme Court has stated that probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably

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trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed..." *Brinegar v. United States*, 338 U.S. 160, 175-176, 1609 S.Ct. 1302 (1949). In the present case, the facts and circumstances within the knowledge of Trooper Mendoza were more than adequate to support the belief than an offense had been or was being committed before he requested that the Petitioner submit to an evidentiary chemical test for intoxication.

Second, the cases which Counsel cites as authority for his argument to exclude the analysis of the blood sample on 4th Amendment grounds are all criminal cases (*Henry v. United States*, 361 U.S. 98 (1959); *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998); *Schmerber v. State of California*, 86 S.Ct. 1826, 384 U.S. 757 (1966); and *Wong Sun v. United States*, 83 S.Ct. 407, 371 U.S. 471 (1963)). These cases only stand for the proposition that illegally seized evidence should be excluded from criminal proceedings. This administrative hearing is neither criminal nor quasi-criminal; it is wholly civil in nature. *State, Department of Motor Vehicles v. Frangul*, 110 Nev. 46, 867 P.2d 397 (1994).

Third, and perhaps most important, no state or federal appellate court has ever held that the 4th Amendment exclusion for illegal searches and seizures applies to administrative driver's license revocation hearings. In fact, appellate courts have unanimously held, following the balance test provided by the U.S. Supreme Court in *United States v. Janis*, 428 U.S. 433 (1976), that the social costs of excluding the illegally seized evidence from an administrative driver's license revocation proceeding far outweighed any deterrent effect that the exclusion of the evidence might have. *Nevers v. State, Department of Administration, Division of Motor Vehicles*, 123 P.3d 958 (Alaska, 2005); *Tornabene v. Bonine, Arizona Highway Department and Motor Vehicle Division*, 203 Ariz. 326, 54 P.3d 355 (Ariz. App. 2002); *Fishbein v. Kozlowski, Commissioner of Motor Vehicles*, 252 Conn. 38, 743 A.2d 1110 (1999); *Martin v. Kansas Department of Revenue*, 285 Kan. 625, 176 P.3d 938 (2008); *Powell v. Secretary of State*, 614

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A.2d 1303 (Maine, 1992); *Motor Vehicle Administration v. Shea*, 415 Md. 1, 997 A.2d 768 (Md. App. 2010); *Ascher v. Commissioner of Public Safety*, 527 N.W.2d 122 (Minn. App. 1995); *Murphy v. Director of Revenue*, 170 S.W.3d 507 (Missouri App. 2005); *Chase v. Neth, Department of Motor* Vehicles, 269 Neb. 882, 697 N.W.2d 675 (2005); and *Glynn v. State, Taxation and Revenue Department, Motor Vehicle Division*, --- P.3. ---, 2011 WL 1565448 (New Mexico App., 2011). Petitioner's motion is denied. Department Exhibit 3 is admissible.

Objection: Counsel for the Petitioner objected to the admission of Trooper Reinmuth's testimony regarding the outcome of the portable preliminary breath test (PBT) administered to the Petitioner on the ground that the testimony lacked foundation because the evidence in the record is insufficient to establish that the PBT administered to the Petitioner was properly calibrated in accordance with NAC 484.621 and NAC 484.624.

Ruling: This objection is overruled.

The Nevada Supreme Court's response to similar arguments has been reliably consistent.

In *State, Dept. of Motor Vehicles v. Tilp*, 107 Nev. 288, 810 P.2d 771, the Nevada Supreme Court held that the Department of Motor Vehicles is not required to secure information from a police agency regarding equipment used for chemical testing on behalf of a petitioner. In *Tilp*, the court held that if the Petitioner or his attorney desired "full information" regarding testing, the information should have been acquired from the police agency with a subpoena *duces tecum* prior to the administrative hearing.

In *State, Dept. of Motor Vehicles v. Rowland*, 107 Nev. 475, 814 P.2d 80 (1991), the court held, citing, *State v. Hall*, 105 Nev. 7, 768 P.2d 349 (1989), that the burden is on the Petitioner to establish that any machine used for breath tests is not properly maintained. *Rowland* also noted that if a petitioner makes no effort to inspect a machine or obtain "full information" prior to the hearing, he cannot move to have the test results suppressed.

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State, Dept. of Motor Vehicles v. Bremer, 113 Nev. 805, 942 P.2d 145 (1997), held that the statutes, regulations and rules of evidence did not bar the admission of the results of evidentiary chemical testing in cases where the Department did not present evidence of calibration.

In *Beavers v. State, Department of Motor Vehicles*, 109 Nev. 435, 851 P.2d 432 (1993), the appellant contended the evidentiary analysis of her breath, administered using a CMI Intoxilyzer, was inadmissible in the administrative hearing because the state did not demonstrate that the testing device was maintained as required by the regulations of the Committee on Testing for Intoxication. The appellant argued that the administrative hearing process did not "clearly resolve all the crucial issues presented" such as maintenance of the intoxilyzer and the manner in which the officer administered the test. In *Beavers*, the court held:

> "in a license revocation proceeding, the state is not required to introduce evidence that a breath-testing device is properly maintained; and that the appellant bore the burden of establishing at the hearing that the machine was improperly maintained. Appellant failed to meet her burden because she offered no evidence at the hearing to prove that the machine was not properly maintained. Further appellant made no showing that she unsuccessfully tried to inspect or obtain information about the machine...The crucial issues relevant to a DMV revocation hearing are: (1) whether a person refused to submit to an evidentiary tests or had 0.10% by weight of alcohol in her blood at the time of the test, and, if challenged, (2) whether the officer had reasonable grounds to direct the person to submit to an evidentiary test."

Beavers also held that the maintenance of the breath-testing device is "not [a] crucial issue in a DMV license revocation hearing" and that the appellant bore the burden of establishing that the machine was improperly maintained.

As the Nevada Supreme Court has consistently held that proof of calibration is not necessary prior to admission of the results of an *evidentiary* chemical test, the results of the preliminary breath test, which is given no more weight than any other test that might be conducted in the field, would likewise be admissible without proof of calibration.

As *Beavers* held that the maintenance of the intoxilyzer was outside the scope of the hearing and the burden was on the appellant to prove that the machine had not been properly

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maintained even though the results of the intoxilyzer are crucial to any given case, then certainly the maintenance of the PBT, the results of which have far less weight, would also be outside the scope of the administrative hearing and the burden would be on the Petitioner to establish that the PBT had not been calibrated or properly administered. As Counsel for the Petitioner offered no evidence indicating that the PBT was not calibrated properly or that the officer did not administer the test properly, the objection to the admission of the results of the PBT is overruled. However, it should also be noted that if the PBT results were suppressed, the remaining evidence in the record would be more than sufficient to support a reasonable belief that the Petitioner had been driving under the influence of intoxicants.

In *U.S. v. Cortez*, 449 U.S. 411, 418 (1981), the U.S. Supreme Court held police officers are permitted to make reasonable inferences that may elude an untrained person and courts, in determining "reasonableness," should consider the totality of the circumstances. In *State, Department of Motor Vehicles v. Long*, 107 Nev. 77, 806 P.2d 1043 (1991) the Nevada Supreme Court agreed, citing *Cortez*. Thus, the totality of the circumstances Trooper Reinmuth encountered must be considered rather than focusing only on the preliminary breath test.

In *State, Department of Motor Vehicles v. Torres*, 105 Nev. 558, 779 P.2d 959 (1989), the court held that a police officer is not required to prove that a person was driving under the influence of intoxicants in order to justify requiring that person to submit to an evidentiary chemical test for intoxication. *Torres* held that the officer may direct the administration of a chemical test if the officer merely has "reasonable grounds to believe" that the person to be tested was driving under the influence. In *Torres*, the court ruled the police officer could direct the defendant to submit to a chemical intoxication test without first conducting any field sobriety tests. It follows that an officer could also require a defendant to submit to a chemical intoxication test without first requiring a portable, preliminary breath test. In the instant case, the

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trooper administered both standardized field sobriety tests and a portable preliminary breath test and the Petitioner failed them all.

In both *State, Department of Motor Vehicles v. Kinkade*, 107 Nev. 257, 810 P.2d 1201 (1991) and *State, Department of Motor Vehicles v. Clements*, 106 Nev. 516, 796 P.2d 588 (1990), the court held that it is permissible for a police officer to consider a driver's admission as to his use of alcohol prior to driving in determining whether it is reasonable to believe the person was driving under the influence of intoxicants.

In *State, Department of Motor Vehicles v. McLeod*, 106 Nev. 852, 801 P.2d 1390 (1990), the court held that the mere odor of alcohol on the driver's breath combined with bloodshot eyes were, by themselves, sufficient reasonable grounds for an arresting officer to believe a driver was operating a vehicle under the influence and to require chemical testing. In *Wright v. State, Department of Motor Vehicles*, 110 P.3d 1066, 121 Nev. 122 (2005), the court clarified the *McLeod* decision stating that the two indications of intoxication discussed in *McLeod* served only as examples of the factors that may establish reasonable grounds to require evidentiary testing. *Wright* held that an officer may require evidentiary chemical testing with as few as two indicia of intoxication even when the indicia observed do not include an odor of alcohol or bloodshot eyes. In the instant case, the Petitioner made two unsafe lane changes without signaling, he was not wearing a seatbelt, he had slurred speech, he had watery, bloodshot eyes and constricted pupils, he was unsteady on his feet and leaned against a vehicle for support while standing, there was a strong odor of alcoholic beverages emanating from his vehicle and his body, he admitted he consumed alcoholic beverages prior to driving, he failed all standardized field sobriety tests administered to him achieving the maximum number of clues of intoxication on the horizontal gaze nystagmus test, he exhibited vertical gaze nystagmus and he failed the portable, preliminary breath test administered to him.

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Objection: Counsel for the Petitioner objected to Trooper Reinmuth's conclusion that the Petitioner was initially trying to "deceive" the PBT by puffing up his checks without actually blowing into the machine. Counsel asserted that this conclusion was irrelevant.

Ruling: This objection is sustained. The statement was ignored.

Argument: Counsel for the Petitioner objected to the admission of Department Exhibit 3 (the analysis of the Petitioner's blood sample) on the ground that the document contained no information regarding the date the blood sample was received, how it was stored or transported prior to arriving at the lab or the identity of the person who transported the sample.

Ruling: Counsel's argument, that Department Exhibit 3 should be excluded without more evidence regarding the handling of the blood sample, is without merit.

In *State, Dept. of Motor Vehicles v. Rowland*, 107 Nev. 475, 814 P.2d 80 (1991), the Nevada Supreme Court held, citing, *State v. Hall*, 105 Nev. 7, 768 P.2d 349 (1989), that the burden is on the Petitioner to establish that the custody chain was not properly maintained. There was no evidence presented that the custody chain was not properly maintained.

In *Carter v. State*, 84 Nev. 592, 593 (1968), the court held: (1) It is not necessary that an object be positively identified to be received into evidence; it is sufficient if it is recognized that the object is similar or bears a sufficient resemblance to remove the elements of mere speculation and surmise; (2) It is not necessary, in laying foundation for admission of an exhibit, to negate the possibility of an opportunity for tampering with an exhibit nor to trace its custody; and (3) A statement that the exhibit is the identical object or reasonably resembles it and that it is in the same condition as the time the offense occurred makes the exhibit admissible.

The forensic blood analyst's declaration states that the blood was stored in a secure refrigerator prior to analysis, that the blood sample examined and analyzed was properly sealed and labeled when it was received, and that it was in substantially the same condition after

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analysis as when it was first obtained. These statements and the identifying information found in Department Exhibits 2 and 3, which are corroborative of one another, are sufficient to "remove the elements of mere speculation and surmise" as required by *Carter*.

Eisentrager v. State, 79 Nev. 38, 378 P.2d 526 (1963), held that unless there is indication that the medical technician substituted, altered, changed or tampered with blood or may have been interested in doing so, the analysis of the blood sample is admissible. *Vezeris* also held:

> "It is well-established that administrative hearings concerning the revocation of driver's licenses are civil in nature, not criminal. See *Ballard v. State, Motor Vehicle Division*, 595 P.2d 1302 (Utah 1979) and *McDonnell v. Dept. of Motor Vehicles*, 119 Cal.Rptr. 804 (Cal. App. 1975)...We conclude that only defendants in criminal proceedings may object to the use of affidavits of persons drawing blood samples; parties seeking administrative review of driver's license revocations may not object to the use of such affidavits...We conclude that NRS 50.325 does not give participants in administrative hearings before DMV the right to object to use of affidavits authorized by NRS 50.315. We are convinced that this decision will result in no violation of respondents' procedural due process rights."

In *City of Las Vegas v. Walsh*, 124 P.3d 203 (2005) the Nevada Supreme Court held that unless the Petitioner establishes a substantial and bona fide dispute regarding the facts in the declaration or raises questions regarding the credibility of the declarant, the analysis of the blood sample is admissible. The basis on which Petitioner objected to Department Exhibit 3 did not question the facts contained in the document or the credibility of the declarant.

FINDINGS OF FACT

After consideration of the foregoing motions, objections, argument, testimony and documentary evidence, I find that the following facts are supported by substantial evidence:

The Petitioner's vehicle was observed changing lanes unsafely while traveling on a public roadway on July 1st, 2012, in the County of Clark, in the State of Nevada.

The Petitioner was observed driving the vehicle and was seated in the driver's seat when the vehicle was stopped by police.

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There was a strong odor of alcoholic beverages emanating from the Petitioner and his vehicle, he had slurred speech, he was unsteady on his feet and leaned against a vehicle for support while standing, and he had watery, bloodshot eyes with constricted pupils.

The Petitioner admitted he consumed alcoholic beverages prior to driving the vehicle.

The Petitioner failed the standardized field sobriety test(s) administered to him.

The Petitioner failed the portable, preliminary breath test administered to him.

The Nevada implied consent admonition was provided to the Petitioner.

The Petitioner submitted to an evidentiary chemical analysis of his blood.

The blood samples were taken and the samples were analyzed in accordance with the standards and rules established to insure the accuracy of the chemical analyses.

The chemical analysis of the Petitioner's blood revealed an alcohol concentration of 0.200 grams of alcohol per 100 milliliters of blood.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, I conclude, as a matter of law, that the officer had reasonable grounds to believe the Petitioner was driving or in actual physical control of a vehicle while under the influence of alcohol and that the Petitioner, at the time of the evidentiary blood test, had a concentration of alcohol of 0.08 or greater in his blood, specifically 0.159.

DECISION

I find that all elements of proof necessary to sustain a revocation for driving under the influence of intoxicants under Chapter 484C of the Nevada Revised Statutes are supported by substantial evidence.

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THEREFORE, it is the decision of the Administrative Law Judge that the Order of Revocation withdrawing the driving privileges of Vincent Samuel Valenti, Petitioner, is affirmed.

An adverse decision may be appealed to District Court under NRS 484C.230 within thirty (30) days of the date of this decision.

Dated this 12 **day of** February, **2013**
DEPARTMENT OF MOTOR VEHICLES

Toni Boone

Toni Boone, Administrative Law Judge

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