

1
2 **IN THE SUPREME COURT OF**
3 **THE STATE OF NEVADA**

4 **VALENTI, VINCENT,**
5 **Appellant,**

6 vs.
7

8 **THE STATE OF NEVADA,**
9 **DEPT OF MOTOR VEHICLES,**
10 **Respondent.**

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11 **APPELLANT'S OPENING BRIEF¹**
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¹ The preceding zeros to the Appendix numbers have been omitted for clarity and convenience.

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8	Senate Bill (SB) 157 in 1995	10
9	“Summary of Legislation” Counsel Bureau	10
10	<i>See</i> Senate Committee on Judiciary, April 14, 2009, p. 24	7 & 11

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A district court's review of an administrative agency's decision is confined to the record presented to the agency. NRS 233B.135 (1)(b). The agency's facts and decision must be supported by substantial evidence. *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). See also NRS 233B.125 ("Findings of fact and decisions must be based upon substantial evidence."); NRS 233B.121 (8) ("Finds of fact must be based exclusively on substantial evidence and on matters officially noticed.") "A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal." *Tighe*, at 634. Substantial evidence is evidence which "a reasonable mind might accept as adequate to support a conclusion." *Construction Indus. v. Chalue*, 119 Nev. 348, 352, 74 P.3d 595 (2003). See also *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Edison Co. v. Labor Board*, 305 U.S. 197, 229 (1938)).

3. The court shall not substitute its judgment for that of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or nullify the decision if the substantial rights of the appellant have been prejudiced

1 because the administrative findings, inferences, conclusions
2 or decisions are:

- 3 (a) In violation of the constitutional
4 or statutory provisions;
- 5 (b) In excess of the statutory authority
6 of the agency;
- 7 (c) Made upon unlawful procedure;
- 8 (d) Affected by other error of law;
- 9 (e) Clearly erroneous in view of the
10 reliable, probative and substantial
11 evidence on the whole record; or
- 12 (f) Arbitrary or capricious or charact-
13 erized by abuse or discretion or
14 clearly unwarranted exercise of
15 discretion.

16 **CONSTRUCTION OF A STATUTE REQUIRES**
17 **INDEPENDENT APPELLATE REVIEW**

18 Statutory construction is a legal question requiring de novo appellate review. *Maxwell*
19 *v. SIIS*.² NRS 233B.135 (3) empowers this Court with authority to set aside the agency's decis-
20 ion when in violation of statutory provisions or in excess of the statutory authority. Appellant
21 Valenti believes that the administrative Law Judge's (ALJ's) admission of Ms. Maloney's
22 affidavit (Department Exhibit 3) violated NRS 50.320. A legislatively defined person as a
23 chemist standing along fails to establish expertise in blood alcohol testing.

24 **STATEMENT OF RELEVANT FACTS**

25 Appellant Valenti was notified by the Department of Motor Vehicles that his driver's
26 license was being revoked because his blood alcohol level was reported to be a 0.08 or more.
27 Appellant requested an administrative hearing to challenge the DMV's revocation action.

28 At the hearing, Appellant's counsel objected to the admission of Christine Maloney's

² 109 Nev. 327, 329, 849 P.2d 267, 269 (1993).

declaration (Department's Exhibit 3)³ on the grounds that forensic scientist Maloney had never been qualified as an expert in any Nevada court. The objection was overruled by the Administrative Law Judge (ALJ) stating,

Apparently, based on *Cramer*, a “chemist” does not have the same expert qualification. * * * 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.

Appx. 61, ll. 1 - 12.

The ALJ's word "apparently" is less than convincing and fails to rise to the required standard of substantial evidence. Furthermore, *Cramer* did not address the "chemist" issue!

ISSUES

1. The act of defining a non-chemist to be a “chemist” fails to insure that the person possesses the necessary expertise to perform accurate scientific blood alcohol testing.
2. NRS 50.320 requires that all persons doing blood alcohol testing must be once qualified as an expert witness by a Nevada court before his/her affidavit is admissible.
3. The Fourth Amendment exclusionary rule applies at DMV driver’s license forfeiture proceedings.

I

LAW AND ARGUMENT

A.

**THE ACT OF LEGISLATIVELY DEFINING A NON-CHEMIST
TO BE A “CHEMIST” DOES NOT INSURE THAT THE
PERSON HAS THE NECESSARY EXPERTISE TO
PERFORM ACCURATE SCIENTIFIC BLOOD ALCOHOL TESTING**

³ See Department's Exhibit 3 at Appx. 26. Nowhere on Ms. Maloney's declaration is there any evidence that she has the scientific expertise to accurately perform blood alcohol testing.

1 **a. The 2009 Amendment to NRS 50.320 defining all persons doing**
2 **blood alcohol testing as “chemists” was not intended to eliminate**
3 **expert qualification by the court.**

4 A person submitting an affidavit under NRS 50.315 does not appear before the hearing
5 examiner; therefore, there is generally no opportunity to examine the witness regarding his/her
6 qualifications. *See State, Dep’t Mtr. Veh. v. Evans*,⁴ citing NRS 233B.123 (4) (stating that a
7 defendant in an administrative proceeding is entitled to confront and cross-examine the witness
8 against him.) *Cramer*⁵ held, “Allowing an affidavit from a proposed expert, which lacks the
9 reliability and trustworthiness of an affidavit from one who has been qualified to testify as an
10 expert, would violate NRS 50.320’s plain meaning and lead to absurd results, including the
11 revocation of driver’s licenses based on a layperson’s affidavit.” *Id.* p. 9.

12 This case involves the interpretation of NRS 50.320 as it relates to the admissibility of
13 an affidavit or declaration from a non-chemist who has been statutorily defined a “chemist”
14 under NRS 50.320 (5).⁶ Specifically, this appeal challenges the admissibility of Christine
15 Maloney’s hearsay declaration reporting Appellant Valenti’s alleged blood alcohol level.⁷ Ms.
16 Maloney had never qualified as an expert in a Nevada court. *See again* Appx. 26.

17 *Cramer* held that the DMV could not introduce affidavits of LVMPD forensic scientists
18 who have not been qualified as experts in a Nevada district court.⁸ Two issues remain unans-

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23 ⁴ 114 Nev. 41, 45, 952 P.2d 958, 961 (1998).

24 ⁵ 126 Nev. Adv. Op. 38, 240 P.3d 8 (2010).

25 ⁶ The Legislature in 2009 defined all persons testing blood (regardless of expertise and job title) as “chemists.” *See*
26 2009 Nev. Stat., Ch. 16, § 1, at 32.

27 ⁷ The blood analyst here, Ms. Maloney, is a forensic scientist (not chemist), the same job title as the person who
28 tested blood in *Cramer* and needed to be court qualified.

⁸ As part of the 2009 Amendment to NRS 50.320, the Legislature changed “district court” to “court of record,”
making court qualification much easier. *See again*, 2009 Nev. Stat., Ch. 16, § 1, at 32.

1 wered in *Cramer*: (1) Whether a chemist ever needs to be court qualified as an expert, and (2)
2 The legal impact of defining all persons who do blood alcohol testing as “chemists.” See
3 *Cramer, fn. 3*. This case is the sequel to *Cramer* and addresses the legal impact of defining non-
4 chemists to be “chemists.”⁹

5
6 The Administrative Law Judge (ALJ) opined that since all persons doing blood alcohol
7 testing (including forensic scientists as in *Cramer*) are now legislatively defined as “chemists,”
8 Ms. Maloney need not be court qualified. The ALJ’s argument is as follows:

- 9
10 I. The statutory requirement of being court qualified as an expert
11 does not apply to a chemist **because a chemist is always an
expert in blood alcohol testing.**
- 12 II. Anyone who does blood alcohol testing is deemed a chemist
13 by operation of law.
- 14 III. Christine Maloney (forensic scientist) tests blood for alcohol.
- 15 IV. Therefore, Christine Maloney is a chemist and does not need
16 to be court qualified as an expert witness under NRS. 50.320.

17 Premise I is false, making conclusion IV false as well. Merely having the title of chemist by
18 operation of law does not insure that the person is an expert in the field of blood alcohol testing.
19 The title of chemist by definition tells us nothing about the person’s expertise regarding blood
20 alcohol testing.

21
22 NRS 50.315 (now NRS 50.320) has always required the person doing blood alcohol
23 testing to be once court qualified as an expert witness before that person’s affidavit is admissible
24 in lieu of live testimony. See Appx. 178 - 244. The 2009 Amendment of NRS 50.320
25 (Assembly Bill “AB” 250) defining all blood alcohol analyst as “chemists” was not intended to
26

27 ⁹ Since *Cramer*’s “does a chemist need be court qualified” issue involves a purely legal question, the record herein
28 is sufficient to resolve it as well. See paragraph B, *infra*. The Legislature has always required the blood analyst
to be once court qualified as an expert. See Appx. 75 –177.

1 eliminate expert court qualification. Chief Deputy District Attorney, L.J. O'Neal, a strong sup-
2 porter of AB 250, stated, "The bill provides that a person **who has qualified as an expert in a**
3 **court of record** can testify as an expert regarding certain evidence." See Senate Committee on
4 Judiciary, April 14, 2009, p. 24, at Appx. 174. (emphasis added.)

5
6 Since Ms. Maloney's declaration as a forensic scientist is inadmissible under *Cramer*,
7 Respondent wants this Court to hold that forensic scientist Maloney's hearsay declaration is now
8 admissible under NRS 50.320 merely because she has been legislatively labeled a "chemist"
9 **with no additional qualifications than Ms. Maloney possessed as a forensic scientist.** A
10 statutorily defined "chemist" does not make the person a chemist. It's like saying that a person
11 is a violinist once he is given a violin.
12

13 The definition of "chemist" in NRS 50.320 (5) is circular and "begs the question" of
14 expertise to test blood for alcohol.¹⁰ The definition provides no proof of expertise. Additionally,
15 the "chemist" definition makes a nullity of the "and any other person" language of NRS 50.320,
16 a violation of statutory construction. All such persons would be deemed a "chemist" and accord-
17 ing to the ALJ need not be court qualified as an expert witness. Boot-strapping non-chemists to
18 "chemists" proves nothing about expertise to do scientific blood alcohol testing. The inadmis-
19
20

21
22 ¹⁰ Expert qualification is controlled by NRS 50.275 not the Legislator's definition making non-chemists "chemists."
NRS 50.275 states,

23 If scientific, technical or other specialized knowledge will assist the trier
24 of fact to understand the evidence or to determine a fact in issue, a witness
25 qualified as expert by special knowledge, skill, experience, training or ed-
26 ucation may testify to matters within the scope of such knowledge.

27 (emphasis added)

28 See also *Mulder v. State*, 116 Nev. 1, 13, 992, P.2d 845, 852 (2000) ("the district court must first determine that the
witness is indeed a qualified expert."; *Hallmark v. Eldridge*, 124 Nev. 492, 499, 189 P.3d 646, 650 (2008); *Higgs v.*
State, 126 Nev. ___, 222 P.3d 648 (2010).

1 sible declarations in *Cramer* and *Joseph* would now be admissible without any showing of
2 expertise. A “chemist” by operation of law must be once qualified as an expert by a court of
3 record before that person’s hearsay declaration is admissible under NRS 50.320. Otherwise, it
4 “. . . would violate NRS 50.320’s plain meaning, and lead to absurd results, including the revoc-
5 ation of driver’s license bases on a layperson’s affidavit.” *Cramer*, 126 Nev. Adv. Opn. 38
6 (2010), p. 9.

7
8 The definition of “chemist” in NRS 50.320 (5) standing alone is insufficient foundation
9 for admissibility of an NRS 50.320 affidavit/declaration.¹¹ Therefore, Ms. Maloney’s declaration
10 was inadmissible.

11
12 Appellant Valenti’s appeal must be granted.

13
14 B.

15 **NRS 50.320 REQUIRES THAT ALL PERSONS DOING**
16 **BLOOD ALCOHOL TESTING MUST BE ONCE QUALIFIED**
17 **AS AN EXPERT WITNESS**
18 **BY A NEVADA COURT BEFORE HIS/HER AFFIDAVIT IS ADMISSIBLE**¹²

19 a. Christine Maloney was not court qualified.

20 NRS 50.320 requires that both a chemist and any other person doing blood alcohol
21 testing to be court qualified as expert witnesses. The language of NRS 50.320, the legislative
22 history and *Cramer* compel this interpretation. The ALJ’s “apparent” finding to the contrary is
23 flat-out wrong.

24
25 ¹¹ This Court in *Cramer* (*Joseph*) held that reliance on a stipulation of expertise in an unrelated case was insuffic-
26 ient for admissibility of an affidavit under NRS 50.320. Defining persons to be “chemists” fares no better.
Neither shows expertise!

27 ¹² NRS 50.320 affidavits/declarations are legislative hearsay exceptions which apply equally to criminal prelim-
28 inary hearings, grand jury proceedings and administrative proceedings. See *DeRosa v. Dist. Ct.*, 115 Nev.
225, 985 P.2d 157 (1999) (“NRS 50.315, 50.320, and 50.325 provide relatively new statutory exceptions to
the hearsay rule.”) *Id.* at 229 (emphasis added)

1 **Statutory construction of NRS 50.320**¹³

2 Statutory construction requires reading "each sentence, phrase, and word" of the statute
3 "to render it meaningful within the context of the purpose of the legislation."¹⁴ *Berkson v.*
4 *LePome*.¹⁵ When this is done, the plain meaning of NRS 50.320 requires all blood alcohol anal-
5 ysts to be court qualified as expert witnesses. The use of the conjunction "and" not "or" between
6 "chemist" and "any other person" makes the modifier "who has qualified . . ." apply to both the
7 "chemist" and "any other person." The use of the word "other" in "any other person" refers to
8 the preceding reference to chemist. Blacks Law Dictionary, Sixth Edition, p. 1101 states,
9

10
11 Following an enumeration of particular classes "other" must
12 be read as "other such like" *and includes only others of like*
13 *kind and character.*

14 (emphasis added)

15 Both the chemist and any person defined as a "chemist" must be "qualified in a court"

16 There is no evidence that Christine Maloney was qualified by any court (Nevada or otherwise) as
17 an expert witness or possess the expertise to do blood alcohol testing.

18 **Legislative History**

19 The legislative history of NRS 50.320 (formerly NRS 50.315) requires all persons who
20 test blood for alcohol content to be court qualified as an expert witness before their affidavit is
21 admissible.
22

23 NRS 50.315 (1) first dealt with blood alcohol analysts and submission of their affidavits.

24
25 ¹³ NRS 50.320 is clear and unambiguous and a reviewing court may not go beyond the language of the statute.
Thompson v. District Court, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984); *Robert E. v. Justice Court*, 99 Nev.
26 443, 445 (1983).

27 ¹⁴ The purpose of NRS 50.320 is to insure that experts are doing the blood alcohol testing since the analyst's
28 qualifications will not be subject to challenge by cross examination.

¹⁵ 126 Nev Adv. Op. No 46, P.3 (December 16, 2010).

1 Under that statute, all persons doing blood alcohol testing had to be qualified as an expert wit-
2 ness in a district court. A Ph.D. chemist had to be qualified as an expert! The Court in *State*,
3 *Dep't Mtr. Veh. v. Bremer* ¹⁶ stated,
4

5 Because Dr. Marcovich had been previously qualified as an
6 expert in the field of chemistry in district court, his affidavit
was admissible before the hearing officer.

7 (emphasis added)

8 *Bremer* again explained why the chemist's affidavit was admissible at the DMV driver's license
9 license revocation proceeding:
10

11 First, pursuant to NRS 50.315, Dr. Marcovich was qualified
12 as an expert in the district court and could, therefore, proffer
an affidavit to prove Bremer's blood alcohol level.

13 *Bremer* at 809. (emphasis added)

14 *Bremer* also noted in footnote 2. Effective October 1, 1995, the language of former NRS
15 50.315 was incorporated into NRS 50.320 (1). **The instant case involves NRS 50.320.**
16

17 Senate Bill (SB) 157 in 1995 produced NRS 50.320.¹⁷ The Senate Committee on Judi-
18 ciary relied upon a Florida statute for NRS 50.320. *See* SB 157, February 21, 1995, p. 5. The
19 Florida statute read in material part,
20

21 A chemical analysis of a person's blood to determine alcoholic
22 content . . . in order to be considered valid under this section,
23 must have performed substantially in accordance with methods
24 approved by the Department of Law Enforcement **and by an**
individual possessing a valid permit issued by the depart-
ment for this purpose.

25 See p. 48, "Summary of Legislation" Counsel Bureau. (emphasis added)

26
27 ¹⁶ 113 Nev. 805, 808, 942 P.2d 145 (1997).

28 ¹⁷ A copy of the history of SB 157 is attached in Appx. 75 -177.

1 Every Florida blood alcohol analyst had to be qualified as evidenced by "possessing a valid per-
2 mit."

3
4 The 2009 Amendment of NRS 50.320 (Assembly Bill 250) makes clear that expert quali-
5 fication by a court applies to a chemist as well as all other persons who test blood for alcohol
6 content. Chief Deputy District Attorney, L. J. O'Neale stated, "The bill provides that a person
7 **who has qualified as an expert in a court of record** can testify as an expert regarding certain
8 evidence." See Senate Committee on Judiciary, April 14, 2009, p. 24, *see again* Appx. 174.
9 (emphasis added.)
10

11 Since Christine Maloney was not **court qualified** as an expert witness, her purported
12 declaration is inadmissible.

13 **Cramer**

14 Blood alcohol testing like all scientific testing is subject to human error. "Garbage in,
15 garbage out." *Cramer* recognized this fact.
16

17 While we have previously states that "the DMV's blood-testing
18 procedures are inherently reliable, "*State, Dep't Mtr. Veh. v.*
19 *Bremer*, 113 Nev. 805, 809, 942 P.2d 145, 148 (1997), **we have**
20 **never concluded nor implied, that blood-alcohol tests con-**
21 **ducted by a person who is not qualified to testify as an ex-**
22 **pert regarding the presence of alcohol in a person's blood**
23 **are equally reliable.**

24 126 Nev., Advance Opinion 38, p. 9. (emphasis added)

25 The Court in *Bullcoming v. New Mexico*, Slip Opn. No. 09-10876 (Decided June 23, 2011) noted
26 and explained the human error factors in blood alcohol testing. Expertise in the operation of
27 blood alcohol testing machines is crucial for accurate results. *Bullcoming* stated,
28

SLD analysts use gas chromatograph machines to determine

1 BAC levels. Operation of the machines requires specialized
2 knowledge and training. Several steps are involved in the gas
3 chromatograph process, and human error can occur at each step.¹

4 ¹ Gas chromatography is a widely used scientific method of quantitatively
5 analyzing the constituents of a mixture. See generally H. McNair & J.
6 Miller, *Basic Gas Chromatography* (2d ed. 2009) (hereinafter McNair).
7 Under SLD's standard testing protocol, the analyst extracts two blood
8 samples and inserts them into vials containing an "internal standard" —
9 a chemical additive. App. 53, See McNair 141-142. The analyst then
10 "cap[s] the [two] samples[s]," "crimp[s] them with an aluminum top,"
11 and places the vials into the gas chromatograph machine. App. 53-54.
12 Within a few hours, this device produces a printed graph — a chroma-
13 togram — along with calculations representing a software-generated in-
14 terpretation of the data. See Brief for State of New Mexico Dept. of
15 Health, SLD as *Amicus Curiae* 16-17. Although the State presented
16 testimony that obtaining an accurate BAC measurement merely entails
17 "look[ing] at the [gas chromatograph] machine and record[ing] the re-
18 sults," App. 54, authoritative sources reveal that the matter is not so
19 simple or certain. "In order to perform quantitative analyses satisfact-
20 orily and . . . support the results under rigorous examination in court,
21 the analyst must be aware of, and adhere to, good analytical practices and
22 understand what is being done and why." Stafford, *Chromatography*, in
23 *Principles of Forensic Toxicology* 92, 114 (B. Levine 2d 3d. 2006). See
24 also McNair 137 ("Errors that occur in any step can invalidate the best
25 chromatographic analysis, so attention must be paid to all steps."); D.
26 Bartell, M. McMurray, & A. ImObersteg, *Attacking and Defending*
27 *Drunk Driving Tests* § 16:80 (2d revision 2010) (stating that 93% of
28 errors in laboratory tests for BAC levels are human errors that occur
either before or after machines analyze samples.) Even after the mac-
hine has produced its printed result, a review of the chromatogram may
indicate that the test was not valid. See McNair 207-214. Nor is the
risk of human error so remote as to be negligible. *Amici* inform us, for
example, that in neighboring Colorado, a single forensic laboratory pro-
duced as least 206 flawed blood-alcohol readings over a three-year span,
prompting the dismissal of several criminal prosecutions. See Brief for
National Association of Criminal Defense Lawyers et al. as *Amici Curiae*
32-33. An analyst had used improper amounts of the internal standard,
causing the chromatograph machine systematically to inflate BAC mea-
surements. The analyst's error, a supervisor said, was "fairly complex."
Ensslin, *Final Tally on Flawed DUI: 206 Errors, 9 Tossed or Reduced*,
Colorado Springs Gazette, Apr. 19, 2010, p. 1 (internal quotation marks
omitted), available at [http://www.gazette.com/articles/report-97354-police-](http://www.gazette.com/articles/report-97354-police-discuss.html)
[discuss.html](http://www.gazette.com/articles/report-97354-police-discuss.html). (All Internet materials as visited June 21, 2011, and included

1 in Clerk of Court's case file).

2 *Bullcoming* Slip Opin. ps 4-5.

3 Expert qualification and human error are corollaries; less qualified more human error and vice
4 versa. *Cramer* found the plain meaning of NRS 50.320 to require a showing that the blood
5 analyst possessed the expertise to obtain accurate and reliable blood alcohol results.

6
7 Allowing an affidavit from a **proposed expert**, which lacks the
8 reliability and trustworthiness of an affidavit from one who
9 has been qualified to testify as an expert, would violate NRS
10 50.320's plain meaning and lead to absurd results, including
11 the revocation of driver's licenses based on a layperson's
12 affidavit.

13 126 Nev., Adv. Opin, 38, p. 9. (cite omitted) (emphasis added)

14 A person's academic or employment title does not establish that person's expertise to test
15 blood for alcohol.¹⁸ *Cramer* held that expert qualification of a witness must be determined by
16 the court as gatekeeper. "This Court has consistently stated that in performing its gatekeeping
17 duties, ' the district court must first determine that the witness is indeed a qualified expert.'" *Id.*,
18 P.3d at 12. (Citation omitted and emphasis in original) Christine Maloney was not qualified by
19 a court and therefore is nothing more than a layperson in the eyes of the law.

20 Appellant Valenti's appeal must be granted.

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26 ¹⁸ The blood analysts in both *Cramer* and the consolidated case of *Joseph* had the title of "forensic scientist" as
27 Christine Maloney here. A forensic scientist performs duties in many areas other than blood alcohol testing.
28 The same applies to a chemist. Merely having the title of chemist tells us nothing about possessing expertise to
do blood alcohol testing. Under *Cramer*, a chemist who has never been court qualified as an expert witness is
nothing more than a "proposed expert" whose affidavit leads to absurd results. *Again see* 126 Nev. Adv. Opn.
38, p. 9.

C.

**POLICE RELIANCE ON NRS 484C.160
TO OBTAIN APPELLANT'S BLOOD RATHER THAN
OBTAINING A WARRANT VIOLATES THE FOURTH AND FOURTEENTH
AMENDMENTS OF THE UNITED STATES CONSTITUTION**

a. *Missouri v. McNeely* held that there is no *per se* exigency
in DUI alcohol cases.

The taking of blood in DUI cases is a search and seizure under the Fourth Amendment.

*Schmerber v. California*¹⁹ held,

But if compulsory administration of a blood test does not im-
plicate the Fifth Amendment, it plainly involves the broadly
conceived reach of a search and seizure under the Fourth
Amendment.

Id. at 767. (emphasis added)

The Fourth Amendment applies to the states. *Mapp v. Ohio*.²⁰

Police initiated blood draws go to the core of the Fourth Amendment. *Schmerber* stated,

The overriding function of the Fourth Amendment to protect
personal privacy and dignity against unwarranted intrusion by
the State. In *Wolf* we recognized “[t]he security of one’s pri-
vacy against arbitrary intrusion by the police” as being “at the
core of the Fourth Amendment” and “basic to a free society.”
338 U.S., at 27, 69 S. Ct. at 1361.

Id. at 767. (emphasis added)

The warrant requirement plays a critical role in protecting personal privacy. *Johnson v. United
States*,²¹ classic statement rings more true today.

¹⁹ 384 U.S. 757 (1966).

²⁰ 367 U.S. 643 (1961).

²¹ 333 U.S. 10, 13 – 14 (1948).

1 The point of the Fourth Amendment, which is often not
2 grasped by zealous officers, is not that it denies law en-
3 forcement the support of the usual inferences which re-
4asonable men draw from evidence. Its protection con-
5 sists in requiring that those inferences be drawn by a
6 neutral and detached magistrate instead of being judged
7 by the officer engaged in the often competitive enterprise
8 of ferreting out crime.

9 *See also Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971).

10 Bodily intrusions lie at the core of Fourth Amendment protections. As the Court stated in
11 *Schmerber*, 384 U.S. at 770, “Search warrants are ordinarily required for searches of dwellings,
12 and absent an emergency, no less could be required where intrusions into the human body are
13 concerned.” *See also Winston v. Lee*.²² (intrusions into the human body implicate the “most
14 personal and deeply rooted expectations of privacy”.) *Id.* at 760.

15 A Fourth Amendment search conducted without a warrant issued upon probable cause is
16 “*per se* unreasonable . . . subject only to a few specifically established and well-delineated
17 exceptions.” *Katz v. United States*.²³ An emergency is one of the narrow exceptions to the war-
18 rant requirement. Exigency means that there is no time to secure a judicial warrant. The United
19 States Supreme Court in *Missouri v. McNeely*,²⁴ *supra* held there is no *per se* exigency in DUI
20 alcohol cases. Warrants are mandatory unless exigency exist based on the totality of the circum-
21 stances.²⁵

22 In the instance case, the police never made any attempt to obtain a warrant for Appellant

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24 ²² 470 U.S. 753 (1985).

25 ²³ 389 U.S. 347, 354 (1967).

26 ²⁴ Slip opinion No. 11-1425 (April 17, 2013). *See also United States v. Brown*, 2013 WL 5604589 (U.S. Dist. Ct.,
27 D. Maryland, Oct. 11, 2013 for a through analysis of *McNeely*; *Arizona v. Butler*, __ P.3d __, 2013 WL 2352802
(Ariz., May 30, 2013).

28 ²⁵ *See again*, footnote 2, *supra*.

1 Valenti's blood draw. The police obtained Appellant Valenti's blood pursuant to NRS 484C.160
2 under threat of force for non compliance. NRS 484C.160 abrogates the Fourth Amendment
3 warrant requirement making the statute unconstitutional under *Missouri v. McNeely*.
4

5 **b. The "exclusionary rule" applies herein.**

6 The Fourth Amendment applies to all governmental action, not just actions in criminal in-
7 vestigations. See *Marshall v. Barlow's Inc.*²⁶ (federal inspection under interstate commerce
8 power of health and safety of work place); See *v. Seattle*²⁷ (inspection of warehouse for muni-
9 cipal fire code violations); and *Camara v. Municipal Court*²⁸ (inspection of residence for munici-
10 pal fire code violations.) There is no United States Supreme Court case specifically addressing
11 Fourth Amendment law as applied to a state administrative driver's license forfeiture based on a
12 DUI blood draw. However, the exclusionary rule applies to state administrative forfeiture pro-
13 ceedings.
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16 The Court in *One 1958 Plymouth Sedan v. Pennsylvania*²⁹ had occasion to address
17 whether or not the Fourth Amendment exclusionary rule applied to a civil forfeiture action. The
18 police had stopped the driver/owner of the 1958 Plymouth and "found 31 cases of liquor not
19 bearing Pennsylvania tax seals." *Id.* at 694. The car and liquor were seized and the driver/owner
20 arrested. Subsequently, the courts determine that the stop and seizure were unlawful under the
21 Fourth Amendment. At the civil forfeiture proceeding to take the car, the owner invoked the
22 exclusionary rule preventing the illegal liquor evidence from being considered. Pennsylvania
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25 ²⁶ 436 U.S. 307 (1978).

26 ²⁷ 387 U.S. 541 (1967).

27 ²⁸ 387 U.S. 523 (1967).

28 ²⁹ 380 U.S. 693 (1965).

1 argued that the Fourth Amendment exclusionary rule did not apply to civil proceedings. The
2 United States Supreme Court disagreed.

3 . . . we hold that the constitutional exclusionary rule does apply
4 to such forfeiture proceedings and consequently reverse the
5 judgment of the Pennsylvania Supreme Court.

6 *Id.* at 696.

7 The rational and holding in *One 1958 Plymouth Sedan* should apply to the State's forfeiture of
8 Valenti's driver's license.

9 Nevada's taking of Appellant Valenti's driver's license is a forfeiture action. It is well
10 established law that an individual has a constitutionally protected property interest in his state
11 issued driver's license and a state forfeiture of that license triggers constitutional protections.
12 *Bell v. Burson*³⁰; *State v. Vezeris*.³¹ The State's forfeiture of Valenti's driver's license relies in
13 the identical evidence used in the criminal prosecution. The statute is the same. The blood
14 draw is the same. And, the alleged blood results are the same. The license forfeiture action is
15 intertwined with the criminal case. It is contradictory to suppress this evidence in the criminal
16 case yet allow it to take away a constitutionally protected driver's license.

17 Other states have held that the Fourth Amendment exclusionary rule applies to DUI related
18 state forfeiture proceedings of a person's driver's license. *See State v. Lussier*³²; *People v. Kru-*

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26 ³⁰ 402 U.S. 535 (1971).

27 ³¹ 102 Nev. 232, 720 P.2d 1208 (1986).

28 ³² 171 Vt. 19, 23, 757 A.2d 1017, 1020 (2000).

1 eger³³; *Pooler v. MVD*³⁴ and *Olsen v. Com'r of Public Safety*.³⁵ There are also state cases hold-
2 ing that the exclusionary rule does not apply at a civil proceeding. See *Chase v. Nebraska*.³⁶

3
4 *McNeely* does apply to Nevada's driver's license forfeiture proceeding. Appellant Valen-
5 ti's appeal must be granted.

6 **CONCLUSION**

7 Based on the above reasons, Valenti's appeal must be granted.

8 **VERIFICATION**

9
10 Under penalties of perjury, the undersigned JOHN G. WATKINS, ESQUIRE for VINCENT
11 VALENTI declares that he is Appellant's counsel and knows the contents thereof; that the plead-
12 ing is true of his own knowledge, except as to those matters stated on information and belief, and
13 that as to such matters he believes them to be true.

14 EXECUTED this 10th day of December, 2013.

15
16
17 
18 John G. Watkins, Esquire
Counsel for Appellant

19 **CERTIFICATE OF COMPLIANCE**

20
21 I, John G. Watkins, Esquire, hereby certify that this Opening Brief complies with the
22 formatting requires of NRAP 32 (a)(4), the typeface requirements of NRAP 32 (a)(5) and the
23 type style requirements of NRAP 32 (a)(6) because:
24

25 ³³ 208 Ill. App. 3d 897, 567 N.E. 2d 717, 153 Ill. Dec. 759 (1991).

26 ³⁴ 306 Or. 47, 755 P.2d 701 (1988).

27 ³⁵ 371 N.W. 2d 552 (Minn. 1985).

28 ³⁶ 697 N.W. 2d 684 (Nev. 2005) (*Chase* lists those cases in opposition.)

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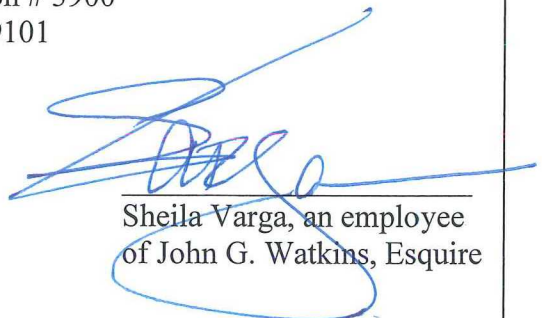
13 **CERTIFICATE OF SERVICE**

14 I hereby certify that a true and correct copy of:

15 **APPELLANT'S OPENING BRIEF**

16 was deposited into the United States mail in a prepaid postage envelope on this 11th day of
17 December, 2013 and the Appendix was mailed in a prepaid postage envelope on the 10th day
18 of December, 2013 and addressed to the following:

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