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**IN THE SUPREME COURT OF
THE STATE OF NEVADA**

VALENTI, VINCENT

Appellant,

vs.

STATE OF NEVADA,
DEPT OF MOTOR VEHICLES,

Respondent.

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S.Ct. No. 63987

District Ct. No. A-13-677093-J

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	i - v
TABLE OF CASES AND AUTHORITIES	ii - iv
STATUTES	iv & v
MISCELLANEOUS	v
PRELIMINARY COMMENTS	1
LAW AND ARGUMENT	1 - 7
A. THE ACT OF LEGISLATIVELY DEFINING A NON-CHEMIST TO BE A "CHEMIST" DOES NOT INSURE THAT THE PERSON HAS THE NECESSARY EXPERTISE TO PRODUCE ACCURATE SCIENTIFIC BLOOD ALCOHOL RESULTS.....	1 & 2
B. NRS 50.320 REQUIRES 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 & 4
C. THE FOURTH AMENDMENT APPLIES AT THE DMV DRIVER'S LICENSE FORFEITURE PROCEEDINGS	4 - 7
CONCLUSION	7 & 8
VERIFICATION	8 & 9
CERTIFICATE OF COMPLIANCE	9 & 10
CERTIFICATE OF MAILING	10

TABLE OF CASES AND AUTHORITIES

<i>Brooks v. Minnesota</i> , ___ N.W. 2d ___ (All – 1042, decided October 23, 2013) or 2014 WL 5731811 (Minn.)	6
<i>Bullcoming v. New Mexico</i> , ___ U.S. ___, 131 S.Ct. 2705 (2011)	1
<i>Cramer v. State</i> , 126 Nev. Adv. Op, 38, 240 P.3d 8 (2010)	2, 3 & 7
<i>Minnesota v. Netland</i> , 742 N.W. 2d 207 (Minn. Ct. App. 2007)	6
<i>Missouri v. McNeely</i> , Slip opinion No. 11-1425 (April 17, 2013)	fn1 page & pg 4
<i>Oregon v. Newton</i> , 291 Or. 788, 636 P.2d 393 (1981)	3 & 4
<i>State v. Butler</i> , 302 P.3d 609 (Ariz. 2013)	6 & 7

STATUTE

Assembly Bill 250	4
Assembly Bill 643	5
NRS 50.315	3
NRS 50.320	2 - 4, 7 & 8
NRS 50.320 (5)	2
NRS 484C.160	5
Senate Bill 157	3

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PRELIMINARY COMMENTS

Respondent spends an inordinate amount of time presenting and addressing irrelevant matters. For example, only one of Valenti's six objections raised at the DMV administrative hearing is now before this Court¹, the inadmissibility of the toxicology report. The other five are irrelevant. The facts supporting the officer's decision to arrest are irrelevant. Valenti has not raised a lack of "reasonable grounds" to arrest. Appellant Valenti's issues on appeal are legal not factual. The irrelevant material should be ignored.

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 PRODUCE ACCURATE SCIENTIFIC BLOOD ALCOHOL RESULTS

Gas chromatography is a widely used scientific method for testing blood alcohol samples. Nevada uses this method. The Court in *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S.Ct. 2705 (2011) recognized the human error which

¹ Valenti did not raise the Fourth Amendment lack of warrant issue at the hearing because the administrative law judges repeated by opine that they are without legal authority to address any constitutional issue. This is why Valenti raised the *McNeely, Missouri v. McNeely*, Slip opinion No. 11-1425 (April 17, 2013) issue in district court which was answered by Respondent.

1 can and often occur in blood alcohol testing. *Id.* at *fn.* 1. Expertise in the opera-
2 tion of blood alcohol testing is crucial to achieve accurate results. A statutorily
3 defined “chemist” does not make the person competent and qualified to perform
4 blood alcohol analysis. The inadmissible declarations in *Cramer*² and *Joseph*
5 would now be admissible without any showing of expertise. Boot-strapping non
6 chemists to “chemists” proves nothing about expertise to do scientific blood
7 alcohol testing. *Cramer*’s quote holds true here. “Allowing an affidavit from a
8 proposed expert, which lacks the reliability and trustworthiness of an affidavit
9 from one who has been qualified to testify as an expert, would violate NRS
10 50.320’s plain meaning and lead to absurd results, including the revocation of
11 driver’s licenses based on a layperson’s affidavit.” *Id.* at 9.
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17 The definition of “chemist” in NRS 50.320 (5) standing alone is insuffi-
18 cient foundation for admissibility of an NRS 50.320 affidavit/declaration.
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27 ² *Cramer v. State*, 126 Nev. Adv. Op, 38, 240 P.3d 8 (2010)
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B.

**NRS 50.320 REQUIRES 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

A person's academic or employment title does not establish expertise to test blood for alcohol. It must be determined that the person is indeed an expert. This duty falls on the courts. *Cramer* stated, "This Court has consistently stated that in performing its gatekeeping duties, 'the district court must first determine that the witness is indeed a qualified expert.'" *Id.*, P.3d at 12. The legislative history of NRS 50.320 (formerly NRS 50.315) requires a one time court qualification for all.

Respondent fails to address two important matters: (1) the 1995 Nevada Legislature's reliance on the Florida statute to create NRS 50.320 and (2) Chief Deputy District Attorney, L.J. O'Neale's statement to the 2009 Legislature.

Senate Bill (SB) 157 in 1995 produced NRS 50.320. The Senate Committee on Judiciary relied upon a Florida statute for NRS 50.320. *See* SB 157, February 21, 1995, p.5. The Florida statute read in material part,

A chemical analysis of a person's blood to determine
alcoholic content . . . in order to be considered valid

³ The issue of whether a true (one if fact) chemist is required to be once qualified as an expert witness is not before this Court. However, that issue is purely legal and the record here is sufficient for this Court to decide it.

1 under this section, must have performed substantially
2 in accordance with methods approved by the Depart-
3 ment of Law Enforcement **and by an individual pos-**
4 **sessing a valid permit issued by the department for**
5 **this purpose.**

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

7 Every Florida blood alcohol analyst had to be qualified as evidenced by "posses-
8 sing a valid permit."

9 The 2009 Amendment of NRS 50.320 (Assembly Bill 250) makes clear
10 that expert qualification by a court applies to a chemist as well as all other per-
11 sons who test blood for alcohol content. L. J. O'Neal stated, "The bill provides
12 that a person **who has qualified as an expert in a court of record** can testify as
13 an expert regarding certain evidence." See Senate Committee on Judiciary, April
14 14, 2009, p. 24, *see again* Appx. 174. (emphasis added.) All persons including a
15 true chemist must be once qualified as an expert witness before his/her affidavit
16 is admissible under NRS 50.320.
17
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20 C.

21 **THE FOURTH AMENDMENT APPLIES** 22 **AT THE DMV DRIVER'S LICENSE FORFEITURE PROCEEDINGS** 23

24 Respondent attempts to defeat Valenti's *McNeely, supra*, issue by two
25 arguments: (1) a person's implied consent by operation of law is consent remov-
26 ing Fourth Amendment protection and (2) the exclusionary rule should not apply
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1 to the State's forfeiture of Valenti's driver's license. Neither have merit.

2
3 All states except Nevada have true implied consent laws. In those other 49
4 states, the driver can withdraw his consent to submit to an alcohol test. This eli-
5 minates any Fourth Amendment challenge because the person need not take the
6 test. This contrasts with Nevada, which specifically eliminated the driver's abil-
7 ity to refuse in 1995. Hearing on A.B. 643 before the Senate Commission on
8 Transportation, 68th Legislature (June 15, 1995) (the DUI suspect "will no longer
9 have the ability to refuse to take a test, as long as the officer has probable cause
10 for the arrest" and the statute would "remove the right of refusal on a DUI first
11 offense"); Hearing on A.B. 643 before the Assembly Judiciary Commission, 68th
12 Legislature (June 5, 1995) ("The current legislation [the antecedent of 484C.160]
13 would eliminate implied consent for first time DUI"). The legislature explicitly
14 eliminated any possibility of a freely and voluntarily given consent.
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20 "Implied consent" is not constitutional consent:

21 **Oregon v. Newton:**⁴

22 The warrant requirement may be excused if there is consent.
23 By this, we mean actual consent. **Defendant's statutorily im-**
24 **plied consent cannot excuse an otherwise unconstitutional**
25 **seizure.** If defendant's submission may be regarded as a con-
26 sent to seize, it was an informed consent in that defendant
knew that he had the option of refusal, cf. *State v. Flores*,
280 Or. 273, 570 P.2d 965 (1977). The controlling principle
is that effective consent must be voluntary. That is the con-
senting person's will may not be overborne. *Schneckloth v.*

27 ⁴ 291 Or. 788, 636 P.2d 393 (1981).
28

1 *Bustamonte*, 412 U.S. 218, 225 – 226, 93 S.Ct. 2041, 2046 –
2 2047, 36 L.Ed.2d 854 (1973). Where a person’s consent to
3 a seizure is solicited, and the person consents only after be-
4 ing warned that he will suffer a substantial penalty if he re-
5 fuses, the resulting consent cannot be regarded as a free ex-
6 ercise of will. We therefore hold that defendant’s submis-
7 sion to the breath test was not voluntary consent to seizure
8 because it was coerced.”

9 *Id.* at 403. (emphasis added) (footnote omitted)

10 **Minnesota v. Netland:**⁵

11 An individual’s consent to be searched is a well-settled ex-
12 ception to the warrant requirement. *Id.* To be valid, such
13 consent must be “freely and voluntarily” given. *State v.*
14 *George*, 557 N.W. 2d 575, 579 (Minn. 1997). Although
15 “an officer has a right to ask to search [.] . . . an individual
16 has a right to say no.” *Id.* **Because an individual does not**
17 **have the right to say no to a chemical test and, indeed, is**
18 **subject to criminal penalties for doing so, the “consent”**
19 **implied by law is insufficiently voluntary for Fourth**
20 **Amendment purposes.** Cf. *State v. Mellett*, 642 N.W. 2d
21 779, 785 (Minn. App. 2002) (acknowledging that crimin-
22 alizing refusal is a “means of coercion”), *review denied*
23 (Minn. July 16, 2002).“

24 *Id.* at 214. (emphasis added)

25 **Brooks v. Minnesota:**⁶

26 “Even more importantly, however, we do not hold that Brooks
27 consented because Minnesota law provides that anybody who
28 drives in Minnesota “consents . . . to a chemical test.” *See* Minn .
Stat. § 169A.51, subd. 1 (a). Rather, we hold that Brooks con-
sented based on our analysis of the totality of the circumstances
of this case.”

Id. at 18.

State v. Butler:⁷

“We hold now that independent of § 28 – 1321 [implied
consent statute], the Fourth Amendment requires an arres-

⁵ 742 N.W. 2d 207 (Minn. Ct. App. 2007).

⁶ ____ N.W. 2d ____ (All – 1042, decided October 23, 2013) or 2013 WL 5731811
(Minn.)

⁷ 302 P.3d 609 (Ariz. 2013).

tee's consent to be voluntary to justify a warrantless blood draw."

Id. at 613.

Any argument by the Respondent that "implied consent" by operation of law exempts a Government search from Fourth Amendment protection lacks merit.

Respondent's argument that the exclusionary rule does not apply at the DMV's driver's license forfeiture proceeding lacks merit. The DMV's forfeiture action was based on the police search and seizure of Valenti's blood. The taking of blood triggered the Fourth Amendment. Valenti's blood was taken without a warrant when a warrant could have easily been obtained. This triggers the exclusionary rule.

Respondent's arguments amount to creating a "good faith" exception to the warrant requirement. No such exception exists. The "good faith" exception to the exclusionary rule cannot be used because the police knew that a warrant was required. Valenti's alleged blood alcohol readings must be suppressed.

CONCLUSION

Cramer addressed the "any other person" language of NRS 50.320 and held that the plain meaning of the statute required persons who are forensic scientists must be once court qualified as an expert witness. *Cramer* left two unrelated issues for a later time. Valenti's appeal is the sequel to *Cramer*.

1 Assuming *arguendo* that under NRS 50.320 a true chemist need not ever
2 be court qualified as an expert witness, did the legislature intend to eliminate ex-
3 pert qualification by merely defining non-chemists (“any other person”) such as
4 forensic scientists in *Cramer* to be “chemists.” Valenti, relying on the legislative
5 history before and after the enactment of NRS 50.320 says “No.” Common sense
6 also dictates that the legislature never intended such a result. Defining a non-
7 chemist to be a “chemist” does not insure that the person has the necessary exper-
8 tise to produce accurate scientific blood alcohol results. Since Ms. Maloney is
9 not a chemist and lacks expert qualification by a court, her affidavit was inadmis-
10 sible.
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15 The Fourth Amendment guarantees apply at DMV driver’s license forfeit-
16 ure proceedings. Alcohol readings obtained from blood taken without a warrant
17 in violation of the Fourth Amendment cannot be used as evidence.
18

19 Valenti’s appeal should be granted.

20 DATED this 10th day of March, 2014.
21

22 
23 John G. Watkins, Esquire
24

25 **VERIFICATION**

26 Under penalties of perjury, the undersigned declares that he is VINCENT
27 VALENTI’S counsel and knows the contents of the APPELLANT’S REPLY
28

1 BRIEF and the contents thereof is true. Be it also known that Appellant,
2
3 VINCENT VALENTI, personally authorized his counsel, JOHN G. WATKINS,
4 ESQUIRE to commence this action.

5
6 DATED this 10th day of March, 2014.

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9 John G. Watkins, Esquire

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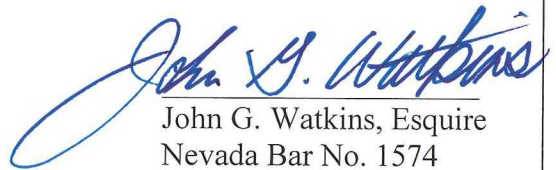
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3 quires every assertion in the brief regarding matters in the record to be supported
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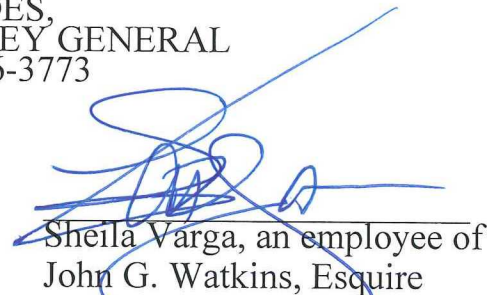
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17 **CERTIFICATE OF FACSIMILE TRANSMISSION**

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Re: **VALENTI, VINCENT-NV SUP CT CASE # 63987**

APPELLANT'S REPLY BRIEF

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