DUI PROSECUTORS MANUAL

By

BRUCE W. NELSON
Chief Deputy District Attorney
Traffic Safety Resource Prosecutor
Clark County District Attorney's Office
2013
Updated 2017

DUI PROSECUTORS MANUAL

This manual is dedicated to the police officers and prosecutors who make our State safer by prosecuting those persons who stupidly and criminally drive while impaired. I would like to thank all of my colleagues who proof read the manual and offered many excellent suggestions. I would especially like to thank Jennifer Georges who put up with my many revisions and was kind enough to prepare and format this manual.

The purpose of this manual is to provide a summary of the law in Nevada as it relates to DUI prosecutions. Manuals like this can become obsolete as soon as they are published because the law changes. Therefore, users of this manual should always check the continuing validity of the cases cited herein.

There are several things not included in this manual. These include a discussion of DMV issues, trial tactics, and appellate issues.

This manual is broken down into two sections. The first deals with the DUI statutes and the second deals with the law relating to various DUI issues.

TABLE OF CONTENTS

PART ONE: THE DUI STATUTES

PART TWO: THE DUI STOP AND ARREST

PART 1: THE DUI STATUTES

There are basically two DUI statutes. One criminalizes DUI with alcohol and the other criminalizes DUI with drugs. The two statutes are further broken down into misdemeanor and felony DUI offenses.

I. MISDEMEANOR DUIs

Subsection 1 of NRS 484C.110 provides that:

1. It is unlawful for any person who:
   (a) Is under the influence of intoxicating liquor;
   (b) Has a concentration of alcohol of 0.08 or more in his blood or breath; or
   (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his blood or breath, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

Subsection 2 of NRS 484C.110 addresses drugs:

2. It is unlawful for any person who:
   (a) Is under the influence of a controlled substance;
   (b) Is under the combined influence of intoxicating liquor and a controlled substance; or
   (c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

   The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.

Subsection 3 of NRS 484C.110 creates a per se drug offense for certain drugs:

3. It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his blood or urine that is equal to or greater than:

Prohibited substance	Urine	Blood
	Nanograms per milliliter	Nanograms per milliliter
(a) Amphetamine	500	100
(b) Cocaine	150	50
(c) Cocaine metabolite	150	50

(d) Heroin	2,000	50
(e) Heroin metabolite:		
(1) Morphine	2,000	50
(2) 6-monoacetyl morphine	10	10
(f) Lysergic acid diethylamide	25	10
(g) Marijuana	NA	2
(h) Marijuana metabolite (11OH	NA	5
(i) Methamphetamine	500	100
(j) Phencyclidine	25	10

(Note that that marijuana and its metabolite is only a prohibited substance if a blood result is obtained)

Subsection 4 of NRS 484C.110 creates an affirmative defense to a charge of having a BAC of 0.08 or more within two hours of driving for a driver who claims to have consumed alcohol after driving:

> 4. If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.08 or more in his blood or breath. A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

A. INTRODUCTION TO NRS 484C.110

For ease of discussion, NRS 484C.110 can be broken down into two primary areas: alcohol and drugs. Some of the sections of NRS 484C.110 are unique to alcohol and some to drugs. Certain portions of NRS 484C.110 are identical to alcohol and drugs.

B. IDENTICAL PORTIONS OF NRS 484C.110

The identical portions of NRS 484C.110 may be found in how and where a defendant can violate NRS 484C.110. A person violates NRS 484C.110 when he[1] drives or is in actual physical control (APC) of a vehicle on a highway or on premises to which the public has access. The following factors are common to DUI alcohol and DUI drugs cases:

1. Driving,
2. Being in APC,
3. Of a vehicle,

[1] For the sake of comprehension and clarity the text will not use both the male and female forms; the personal nouns and pronouns used in this text therefore also apply in their female form.

4. On a highway, or
5. On premises to which the public has access.

Also, the defendant's intent to drive is the same for an alcohol or drugs case. Those common factors must be present in both a DUI alcohol and DUI drugs case. They are explained as follows:

1. Driving

Driving is fairly easy to understand: when a person is causing a vehicle to go in one direction or stand still. Although no Nevada case or statute has defined driving, several other states have addressed driving in the context of a coasting car or an inoperable car. Specifically, Comm. v. McPherson, 533 A.2d 1060 (Pa.Super. 1987) and State v. Cole, 591 N.E.2d 1378 (Ohio Muni. 1992) hold coasting is driving. Likewise, State v. Osgood, 605 A.2d 1071 (N.H. 1992) holds an inoperable car can be driven, and William v. State, 884 P.2d 167 (Alaska App. 1994) holds steering a towed vehicle constitutes driving.

2. Actual Physical Control (APC)

In addition to driving, an impaired driver may not be in APC of a vehicle. Unfortunately, the law relating to APC is a mess in the State of Nevada.[2] The reason for this is NRS 484C.110 fails to define APC and several decisions from the Nevada Supreme Court have left APC law almost incomprehensible.

The first case in Nevada dealing specifically with APC was Rogers v. State, 105 Nev. 230, 773 P.2d 1226 (1989). Rogers was asleep behind the wheel of his vehicle. The motor was on and Rogers stated he had stopped to sleep. Rogers contended because he was asleep while behind the wheel, he could not have been in physical control. The Supreme Court rejected Rogers's claim and found he was in physical control.

In Rogers, the Court defined "physical control" as follows:

> [W]e conclude that a person is in actual physical control when the person has existing or present bodily restraint, directing influence, domination or regulation of the vehicle. In deciding whether someone has existing or present restraint, directing influence, domination or regulation of a vehicle, the trier of fact must weigh a number of considerations, including where, and in what position, the person is found in the vehicle; whether the vehicle's engine is running or not; whether the occupant is awake or asleep; whether, if the person is apprehended at night, the vehicle's lights are on; the location of the vehicle's keys; whether the person was trying to move the vehicle or moved the vehicle;

[2] See Nelson, Bruce. "As Clear as Mud: Actual Physical Control in a DUI Case." Nevada Lawyer Magazine (1995): 23-25.

> whether the property on which the vehicle is located is public or private; and whether the person must, of necessity, have driven to the location where apprehended.

Id., 105 Nev. at 234.

The next decision dealing with physical control was Bullock v. State, Dep't Motor Vehicles, 105 Nev. 326, 775 P.2d 225 (1989). Bullock was found behind the wheel of his running vehicle at a bar parking lot. Bullock testified he had been drinking at the bar and returned to his car to await his friends. He had started the car to run the heater. While in his car, Bullock had fallen asleep. Based upon this evidence, the court concluded Bullock was not in physical control. The primary focus of Bullock seems to be that Bullock drove to the bar sober and was merely sleeping in his car, waiting for a ride home without any intent to drive the car while impaired.

In Isom v. State, 105 Nev. 391, 776 P.2d 543 (1989), the defendant had parked her vehicle near a telephone booth at a closed gas station. Isom was asleep but the car was running. Isom attempted to drive the car after the officer contacted her. The court concluded Isom was in physical control even though she had stopped driving her vehicle:

> Applying those standards, we hold that Isom was in actual physical control of her car. In particular, we note that the deputy found Isom asleep and in the driver's seat with the engine running. Although Isom managed to leave the highway and reached private property, she had driven there on a public highway. Furthermore, she could have returned to the highway at any moment.

Id., 105 Nev. at 393.

In State, Dep't Motor Vehicles v. Torres, 105 Nev. 558, 779 P.2d 959 (1989), the Court concluded that Torres was in physical control. In Torres, the police found Torres passed out at the wheel of a vehicle in a drive thru lane of a restaurant. The vehicle was not running but the keys were in the ignition in the "on" position. In upholding the decision of the DMV to revoke Torres's license because he was in physical control, the Supreme Court found that the arresting officer had reasonable grounds to believe Torres was in physical control. The problem with the above cases is, while Rogers sets forth various factors to consider, the Court does not explain how these factors are to be considered. Which factors favor the defendant? Should the factors be all weighed equally and a defendant be released if the "defendant factors" outweigh the "State factors"?

The Nevada Supreme Court did address some of the factors in detail in Barnier v. State, 119 Nev. 129, 67 P.3d 320, 323 (2003). In Barnier, the police received a tip about a

female drunk driver. Barnier, a male, was found behind the wheel, parked along the roadway. The trial court gave a jury instruction that did not include all of the Rogers factors and the Supreme Court reversed Barnier's conviction. The court addressed several of the Rogers factors, as follows: the engine being off favors the defendant, not attempting to drive the vehicle favors the defendant, and the fact that Barnier did not drive the car to the location where he was found favors him. "In Rogers, we stated that a spectrum of cases may arise from those where no actual physical control was present because it was clear that the defendant did not drive his vehicle, to those where the defendant must have driven to the location where apprehended and so must have been in actual physical control." Id., 67 P.3d at 323.

Based upon the above cases, it is possible to draw some conclusions about APC law in Nevada:

1. A person who is found behind the wheel in traffic is most likely to be found to be in APC.

2. The key issue in an APC case is whether the defendant drove the vehicle while drunk to the location where it is found by the police. If the defendant drove to the location sober and was merely sitting in his car to sober up before driving, then Bullock applies and a defendant would not be in APC. If it is likely that the defendant drove to the location while drunk then Isom/Barnier should apply and the defendant will be found to be in APC.

3. Until the legislature or the courts further define APC, the law in this area will remain a mess.

a. OPERABILITY OF THE VEHICLE

Occasionally a defendant will argue that his vehicle is inoperable so that he cannot be in APC. Operability of the vehicle is not one of the factors listed in Rogers. Most states either do not consider operability of the vehicle as a defense or they exclude vehicles that have been rendered inoperable by the acts of the defendant. State v. Starfield, 481 N.W.2d 834 (Minn. 1992); State v. Larriva, 870 P.2d 1160 (Ariz. App. 1994); State v. Smelter, 674 P.2d 690 (Wash. App. 1984); City v. Quezoda, 893 P.2d 659 (Wash. 1995) (finding APC exists if defendant made car inoperable); State v. Ghylin, 250 N.W.2d 252 (N.D. 1977).

4. In 2015, the Legislature amended NRS to provided that a person is not in APC if all of the following conditions are met: 1. The person is asleep inside the vehicle; 2. The person is not in the driver's seat of the vehicle; 3. The engine of the vehicle is not running; 4. The vehicle is lawfully parked; and 5. Under the facts presented, it is evident that the person could not have driven the vehicle to the location while under the influence of intoxicating liquor, a controlled substance or a prohibited substance. NRS 484C.109

Under this statue Bullock would be in APC because he was in the driver's seat and the engine was running.
This statute should be used to argue that the legislature intended to retreat from Rogers and its progeny. In particular if a person is awake, behind the wheel, with the engine running, stopped in traffic or parked at the side of the road and there is no evidence that anyone but the arrestee drove the car to its present location, then such a person should be found to be in APC regardless of Rogers. Further court action will be needed to determine if this statute has overruled or otherwise effected Rogers.

3. A Vehicle

A vehicle is defined in NRS 484A.320, as follows:

> "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway except:
>
> 1. Devices moved by human power or used exclusively upon stationary rails; and
> 2. Electric personal assistive mobility devices as defined in NRS 482.029 [a Segway].

Although bicycles, trains, and wheelchairs are not considered "vehicles" for purposes of the DUI laws, Segways are if they can travel over 15 mph. Further, mopeds and any device operated in whole or in part by a motor would be included in the definition of a vehicle.

a. COMMERCIAL VEHICLE

NRS 484C.120 relates to DUIs committed by drivers of commercial vehicles. The defendant must be driving a commercial vehicle; having a commercial driver's license is insufficient. A commercial vehicle is defined in NRS 484A.055 as "every vehicle designed, maintained or used primarily for the transportation of property in furtherance of commercial enterprise." The only difference between a commercial vehicle DUI and a non-commercial vehicle DUI is that the per se violation for a commercial vehicle is 0.04 not 0.08, i.e. it is unlawful for drivers of a commercial vehicle to have a 0.04 alcohol level at the time of driving or to have a 0.04 alcohol level within two hours of driving.

4. On a Highway

A highway is defined in NRS 484A.095 as "the entire width between the boundary lines of every way dedicated to a public authority when any part of the way is open to the use of the public for purposes of vehicular traffic, whether or not the public authority is maintaining the way." A sidewalk is a part of the highway per NRS 484A.240. "'Sidewalk' means that portion of a highway between the curb lines or the lateral lines of a highway and the adjacent property lines intended for the use of pedestrians."

5. Premises to Which the Public Has Access

A driver can commit a misdemeanor DUI or felony DUI (when the felony is based on prior DUI convictions) if he is on a highway or on premises to which the public has access. "Premises to which the public has access" is defined in NRS 484A.185, as follows:

1. "Premises to which the public has access" means property in private or public ownership onto which members of the public regularly enter, are reasonably likely to enter, or are invited or permitted to enter as invitees or licensees, whether or not access to the property by some members of the public is restricted or controlled by a person or a device.

2. The term includes, but is not limited to:
   (a) A parking deck, parking garage or other parking structure.
   (b) A paved or unpaved parking lot or other paved or unpaved area where vehicles are parked or are reasonably likely to be parked.
   (c) A way that provides access to or is appurtenant to:
      (1) A place of business;
      (2) A governmental building;
      (3) An apartment building;
      (4) A mobile home park;
      (5) A residential area or residential community which is gated or enclosed or the access to which is restricted or controlled by a person or a device; or
      (6) Any other similar area, community, building or structure.
3. The term does not include:
   (a) A private way on a farm; or
   (b) The driveway of an individual dwelling.

6. Intent to Drive Drunk

NRS 484C.110 does not set forth what intent the drunk driver must have. Must a driver intend to drive drunk or must he simply have the intent to drive or is DUI a strict liability offense? Virtually every state recognizes that DUI is a strict liability offense. English v. State, 603 N.E.2d 161 (Ind.1992); State v. Grimsley, 444 N.E.2d 1071 (Ohio App. 1982) (finding DUI is strict liability offense and multiple personality disorder is not a defense to DUI). Nevada seemly follows the majority rule. In McDaniel v. Sierra Health and Life Ins. Co., 118 Nev. 596, 53 P.3d 904 (2002), the court found NRS 484.379 (now NRS 484C.110) is a strict liability crime. ("By statute, felonious drunk driving, in both California and Nevada, does not require criminal intent, but merely driving while intoxicated resulting in serious bodily harm to another." 118 Nev. at 600, 53 P.3d at 907).

In Whistler v. State, 121 Nev. 401, 116 P.3d 59 (2005), the court found involuntary intoxication is not a defense to the crime of DUI. However, in Hoagland v. State, 126 Nev. —, 240 P.3d 1043 (2010), the court found it had not yet decided whether DUI is a strict liability offense. The Hoagland court did not discuss McDaniel v. Sierra Health and Life Ins. Co.

It is not a defense to the charge of DUI for a defendant to argue he was not aware that he was intoxicated or above the 0.08 per se amount. In Whistler v. State, 121 Nev. 401, 116 P.3d 59 (2005), the court found that lack of knowledge of the intoxicating power of a drug is not a defense to a DUI charge. In Slinkard v. State, 106 Nev. 393, 793 P.2d 1330 (1990), the court held that lack of knowledge of a person's precise alcohol level, i.e. 0.08 or above, is not a defense to DUI. The court reasoned "a person who consumes a substantial amount of liquor and then drives is on notice that he may be in violation of the DUI statutes." 106 Nev. at 395, 793 P.2d at 1331.

7. Work Zone

NRS 484B.130 provides for enhanced penalties if a defendant commits a crime in a work zone. "Work zone" is defined in NRS 484B.130. Basically, the maximum possible penalty against the defendant is doubled so that a drunk driver could face up to one year in jail if he commits his DUI in a work zone. NRS 484C.110 provides that committing a DUI in a work zone is subject to the enhancement set forth in NRS 484B.130. (The work zone enhancement only applies to misdemeanor DUIs). The enhancement cannot exceed six months in jail, a $1,000 fine, or 120 hours of community service.

Prosecutors should be cautious in utilizing this statute because of an unintended consequence. Currently, if the State is seeking more than six months in jail, a defendant has a right to a jury trial. Duncan v. Louisiana, 391 U.S. 145, 159, 88 S. Ct. 1444, 1453, 20 L.Ed.2d 491 (1968). Per NRS 484B.130, the work zone enhancement is not a separate offense but is a sentencing enhancement. Therefore, if the prosecutor seeks more than six months in jail, the defendant would be entitled to a jury trial on his misdemeanor case. The prosecutor could still utilize the work zone enhancement if he announced that he would not seek more than six months in jail (could still seek the increased fines and community service). See Donahue v. City of Sparks, 111 Nev. 1281, 903 P.2d 225 (1995) (defendant not entitled to jury trial even though aggregate sentences could exceed six months in jail when judge agreed not to impose more than six months in jail).

8. DUI and Other Traffic Violations

Usually a defendant will commit a traffic offense in addition to the DUI. For example, a defendant who is stopped for speeding and later arrested for DUI has committed two crimes: speeding and DUI. The defendant may be charged with both the underlying traffic offense and the DUI. State v. Dist. Ct., 116 Nev. 127, 994 P.2d 692 (2000) (double jeopardy clause not violated when defendant charged with traffic offense and DUI).

C. UNIQUE ELEMENTS

The above requirements are common to both alcohol and drug misdemeanors DUIs. However, there are some factors unique to an alcohol DUI and to a drug DUI. Those factors deal with how a person can commit an alcohol DUI versus a drug DUI.

1. Alcohol Offenses

There are three ways to violate the alcohol sections of NRS 484C.110:

1. By driving or being in APC while under the influence of intoxicating liquor;
2. By having an alcohol concentration of 0.08 or more at the time of driving or being in APC; or
3. By having a 0.08 or more alcohol level within two hours after driving or being in APC of a vehicle.

The three ways of violating NRS 484C.110 are alternative means of violating NRS 484C.110. Long v. State, 109 Nev. 523, 853 P.2d 112 (1993). Acquittal of one way does not mandate acquittal of an alternative means. Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002). A defendant convicted of two or more means of violating NRS 484C.110 cannot receive multiple punishments. Ibid.

A jury need not agree upon the means by which a defendant violates NRS 484C.110. Gordon v. State, 121 Nev. 504, 117 P.3d 214 (2005); Tarbush v. State, 119 Nev. 293, 313, 72 P.3d 584, 597 (2003). Thus, a verdict form in a jury trial should set forth all of the alternate ways of violating NRS 484C.110 that have been shown by the evidence. Even if one of the ways is later found to be unsupported by the evidence, the conviction will stand so long as sufficient evidence supports one of the ways of violating NRS 484C.110. Gordon, supra.

Each of the ways of violating NRS 484C.110 has different elements. Those elements break down as follows:

a. UNDER THE INFLUENCE

A person violates NRS 484C.110(a) if he drives "under the influence of intoxicating liquor." NRS 484C.105 defines Under the Influence (UTI) as follows "impaired to a degree that renders a person incapable of safely driving or exercising actual physical control of a vehicle." This definition mirrors case law but some problems remain. For example: "To find a defendant was 'under the influence,' the fact-finder must determine that the alcohol affected the defendant 'to a degree that renders them incapable of safely driving or exercising actual physical control of the vehicle.'" Sheriff, Clark County v. Burcham, 124 Nev. 1247, 1256, 198 P.3d 326, 332 (2008). Thus, a person is UTI if the alcohol "renders them incapable of safely driving . . . ."

The Burcham decision does not clear up the definition of UTI because the court did not define "incapable of safely driving." In an unpublished decision, the Court did expand upon the meaning of incapable of safely driving: "'Incapable of safely driving' does not, of course, mean that one is incapable of reaching her destination in safety, but that her mental or physiological functions are diminished so that the risk of an accident is unreasonably increased." City v. Rhymer, No. 30730 (June 23, 1998).

One question remains from the Burcham decision. What level of incapacity must a defendant be under to be UTI? In other words, how impaired must a defendant be? Virtually every state provides that the slightest impairment of the ability to drive safely is sufficient. State v. Myers, 536 P.2d 280, 283 (N.M., 1975) ("The term 'under the influence' has been interpreted to mean that to the slightest degree."); State v. Schmitt, 554 A.2d 666, 669 (Vt. 1988); Weston v. State, 65 P.2d 652, 654 (Ariz. 1937).

In sum, a person is driving UTI if his ability to operate the vehicle is impaired to the slightest extent. In a misdemeanor DUI case, the prosecution will prove impairment by the manner of driving, physical symptoms, or field sobriety tests. In a felony case (see below), there may be additional hurdles because of a need to prove specific bad driving.

b. 0.08 AT TIME OF DRIVING

The first of the per se violations set forth in NRS 484C.110 is driving while having a 0.08 blood/breath alcohol level. The essence of a per se violation is it is not necessary to show the defendant is under the influence; the crime is complete if the defendant drives while having a 0.08 or more blood alcohol level, regardless of impairment. Cotter v. State, 103 Nev. 303, 738 P.2d 506 (1987) (footnote 2); Bostic v. State, 104 Nev. 367, 760 P.2d 1241 (1988).

Obviously it is impossible to show a person's precise alcohol level at the time of driving. Some time will always lapse between the time of the driving and the time of the test. However, a defendant's alcohol level at the time of driving can be approximated using a process of extrapolating his present alcohol level back to the time he was driving. Ransford v. District of Columbia, 583 A.2d 186, 187-88 (D.C. 1990). This process is known as Retrograde Extrapolation (RE).

RE is well recognized as a process to determine a person's alcohol level at the time of driving. State v. Jensen, 482 N.W.2d 238 (Minn., 1992); State v. Vliet, 19 P.3d 42 (Haw. 2001). As a person consumes alcohol, his alcohol level will rise eventually reaching a peak. When the person stops drinking, his alcohol level will begin to decline until it reaches zero. Various factors, such as a person's "height, weight, gender, amount of

alcohol consumed, duration of alcohol consumption, time of blood test, and the subject's food consumption," Kennedy v. State, 264 S.W.3d 372, 377 (Tex. App.—Houston [1 Dist.], 2008), may affect the rate of absorption or dissipation of alcohol.

Many of the factors listed in the Kennedy, supra, decision will be unknown to the police because, unless the defendant talks to the police, it will be impossible to known when he last ate, etc. Obviously, the more factors the police can gather the more likely it is that a court will admit evidence of RE. Unfortunately, the Nevada Supreme Court has apparently set a very high bar for the admission of RE evidence.

In State v. Dist. Ct. (Armstrong) 127 Nev. —, 267 P.3d 777 (2011), the court addressed the question of RE. Armstrong had been involved in a collision and his blood was drawn for testing. The State attempted to use his blood test and various factors about him to have an expert witness perform an RE calculation. The district court refused to allow RE evidence and the Nevada Supreme Court affirmed. The court concluded because only one blood sample had been gathered and because various personal factors about Armstrong were not known, RE evidence would be more prejudicial than probative. The court set forth some of the RE factors:

1. Gender
2. Weight
3. Age
4. Height
5. Mental state
6. Type and amount of food in the stomach
7. Type and amount of alcohol consumed
8. When the last alcoholic drink was consumed
9. Drinking pattern at the relevant time
10. Elapsed time between the first and last drink consumed
11. Time elapsed between the last drink consumed and the blood draw
12. Number of samples taken
13. Length of time between the offense and the blood draws
14. Average alcohol absorption rate
15. Average elimination rate

Finally, the Armstrong court concluded the admissibility of RE evidence will be determined on a case-by-case basis.

The full effect of the Armstrong decision will not be clear until the Supreme Court readdresses the issue of RE. For example, the primary argument by the State in Armstrong was a full RE was not necessary because so much time had elapsed between Armstrong's last drink and his driving (four hours). Because so much time had elapsed,

Armstrong's alcohol level had to be declining at the time he drove so that his test result must be lower than his alcohol level at the time he drove. The Armstrong majority did not address this issue. Also unaddressed is whether the State must do RE in every case. As set forth below, many states do not require RE if an alcohol test result is well above a 0.08.

For the present, police officers should attempt to obtain as many of the Armstrong RE factors as possible. Most importantly, when the first alcohol test is beyond two hours, the police should always perform a second test one hour later. The Armstrong court's primary objection to the admission of RE evidence was that only one blood test was done. RE evidence is much more likely to be found admissible if two tests are done because then the rate of alcohol dissipation can readily be determined.

Prosecutors should always remind the court they are not attempting to establish the defendant's exact alcohol level but are only attempting to show that the defendant was 0.08 or more at time of driving. Moreover, prosecutors should always tailor their RE arguments to the facts of their case. For example, the rate at which a defendant absorbs alcohol is not relevant if so much time has elapsed between the last drink and the driving that all of the alcohol must have been absorbed.

One RE issue not addressed in Armstrong is whether RE is necessary in all cases. Many courts hold that, if a defendant's alcohol level is well over the per se amount and the blood draw is done within a reasonable time after driving, then extrapolation is unnecessary. Martin v. Department of Public Safety, 964 S.W.2d 772 (Tex. App.—Austin 1998, no pet.); State v. Banoub, 700 So.2d 44 (Fla. 2nd DCA 1997). One could argue Armstrong rejects the view RE is not always necessary, but the Nevada Supreme Court did not specifically so hold.

In sum, RE can be done if the police can gather sufficient information about a defendant to allow an expert to perform RE. However, the admissibility of RE evidence for the foreseeable future will be done on a case-by-case basis. Prosecutors should always encourage the police to do multiple alcohol tests one hour apart in all felony cases and in cases where the first test is beyond two hours.

c. 0.08 WITHIN TWO HOURS OF DRIVING

In order to avoid many of the problems associated with RE, the Nevada legislature has set forth another method for convicting a defendant of DUI. The third method of convicting a defendant of DUI is to prove he had a 0.08 or higher blood alcohol level within two hours of driving. Sereika v. State, 114 Nev. 142, 955 P.2d 175 (1990). NRS 484C.110(1)(c) eliminates the need for RE but has its own unique issues.

In order to charge a person with a violation of NRS 484C.110(1)(c), the defendant's blood must be drawn for testing within two hours of his driving or being in actual physical control. ("[I]s found by measurement within 2 hours after driving or being in actual physical control," NRS 484C.110(1)(c)). If the blood draw occurs outside of the two hour limit, the defendant cannot be charged with a violation of NRS 484C.110(1)(c). When determining the two hour limit, prosecutors and police officers should take care in determining when driving or being in APC ended. For example, suppose an officer arrives at the scene of a collision and finds the defendant behind the wheel. Assuming the defendant makes no admissions about when he drove, the officer may not be able to determine when the crash occurred. However, if the defendant is still behind the wheel, he may still be in APC so that the blood draw can occur within two hours of the defendant being in APC of his vehicle.

As an aside, at least one court has found a defendant can be compelled to take a blood test if doing a breath test would put the test beyond the two hour time limit. People v. Sukram, 539 N.Y.S.2d 275, 277 (N.Y.Dist.Ct. 1989)("In the instant case, the two-hour testing limit would have expired by the time the trooper could have retrieved a breathalyzer kit thereby requiring that a different chemical test be given, in this case a blood test.").

i. Drinking After Driving

A defendant who drinks after he has finished driving has an affirmative defense to a violation of NRS 484C.110(1)(c). Once the State proves, by a preponderance of the evidence, the defendant had a 0.08 or more BAC within two hours of driving or being in APC, it is an affirmative defense that he drank after he drove. It is not enough the defendant shows he drank some alcohol afterwards; he must show he "consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.08 or more." NRS 484C.110(4). In other words the defendant must show, but for his post-driving drinking, his alcohol level would have been below 0.08.

A defendant who intends to offer this defense at a trial or preliminary hearing must, not less than 14 days before the trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent. This written notice is similar to an alibi notice.

Police officers can eliminate this defense at the outset by always asking a defendant if he drank after he stopped driving.

2. DUI Drug Offenses

NRS 484C.110(2) concerns driving under the influence of drugs. As noted above, many of the elements of driving or being in APC of a vehicle on a highway or premises to

which the public has access are identical for alcohol and drugs, but there are some laws unique solely to DUI drugs cases.

NRS 484C.110(2) provides that is unlawful to:

a) drive under the influence of a controlled substance;
b) drive under the influence of a controlled substance and alcohol; or
c) use any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle.

NRS 484C.110(3) provides it is unlawful to drive with certain drugs at certain levels in the blood. (See subsection c below relating to prohibited substances).

a. DRIVING UNDER THE INFLUENCE

It is unlawful to drive under the influence of virtually any substance if that substance impairs a person's ability to drive. The discussion above relating to what constitutes "under the influence" for DUI alcohol is the same for DUI drugs and will not be repeated here.

While there is a great amount of research concerning what blood alcohol level constitutes "impairment," such research is lacking for DUI drugs. Particularly helpful to the prosecutor in this area is the drug recognition expert (see below) as well as the National Highway Traffic Safety Administration and the National Institute of Drug Abuse. A prosecutor must always be prepared to establish that a particular type of impairment is caused by a particular drug or class of drugs. For example, HGN (described in HGN section of field sobriety testing) may not be present with every drug. Therefore, a defendant passing the HGN test may be consistent with impairment by certain drugs.

Although no Nevada case has discussed the quantum of proof necessary to prove a person was impaired by drugs, several other states have done so. In the following cases, the court found sufficient evidence existed for the finder of fact to convict the defendant without any FSTs: State v. Tamburro, 346 A.2d 401 (N.J. 1975) (bad driving, pupils, drowsy); People v. Smith, 61 Cal. Rptr. 557 (Cal. App. 1967) (bad driving coupled with reaction when arrested); Joseph v. Klinger, 378 F.2d 308 (9th Cir. 1967) ("abundant evidence" when defendant was speeding and unsteady on feet; no test given).

b. TWO HOUR RULE

NRS 484C.110(1)(c) provides that a person is guilty of DUI if he has a 0.08 or more BAC within two hours of driving. There is no two hour rule for a DUI drugs or prohibited substance case so the defendant's blood need not be collected within two hours of his driving in such case. Naturally the sooner the blood sample is collected after driving, the more accurate the test result will be.

c. PROHIBITED SUBSTANCES

NRS 484C.110(3) sets forth Nevada's prohibited substance law. This section of NRS 484C.110 creates a per se law for drugs. The statute makes it unlawful to drive with certain levels of certain drugs in the blood or urine. The statute does not require proof of impairment; like the 0.08 alcohol law, it only requires that a person drive while having a certain level of the drug in the blood. Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002). The prohibited substance law has been upheld against various constitutional challenges. Ibid. However, some issues may remain.

i. Medical Marijuana

Nevada has enacted a statute permitting various persons to possess and use so called medical marijuana. This statute has no effect on Nevada's DUI laws including the prohibited substance statute. NRS 453A.200 provides that a person possessing a medical marijuana card is immune from prosecution for certain drug offenses. However NRS 453A.300 provides that the medical marijuana exception does not apply to a charge of: "(a) Driving, operating or being in actual physical control of a vehicle . . . while under the influence of marijuana; or (b) Engaging in any other conduct prohibited by NRS 484C.110 [i.e. the prohibited substance section of NRS 484C.110]."

ii. Marijuana Metabolites

NRS 484C.080 defines a prohibited substance as:

> [A]ny of the following substances if the person who uses the substance has not been issued a valid prescription to use the substance and the substance is classified in schedule I or II pursuant to NRS 453.166 or 453.176 when it is used.
>
> 1. Amphetamine;
> 2. Cocaine or cocaine metabolite;
> 3. Heroin or heroin metabolite (morphine or 6-monoacetyl morphine);
> 4. Lysergic acid diethylamide;
> 5. Marijuana or marijuana metabolite;
> 6. Methamphetamine;
> 7. Phencyclidine.

Marijuana metabolites are not listed in schedule I or II of NRS 453.166. However, they are specifically listed as a prohibited substance. "5. Marijuana or marijuana metabolite." In State v. Williams, 120 Nev. 473, 93 P.3d 1258 (2004), the court concluded marijuana

metabolites are prohibited substances because, although they are not listed in the drug schedules, they are plainly listed as prohibited substances.

In 2017 the legislature limited "marijuana metabolites" to 11-OH tetrahydrocannabinol.

iii. Morphine

With one exception, morphine is not a prohibited substance. That one exception occurs when the morphine is a metabolite of heroin. NRS 484C.080 includes as prohibited substances: "3. Heroin or heroin metabolite (morphine or 6-monoacetyl morphine)." A blood test result for morphine will generally not be able to distinguish morphine as a metabolite of heroin from morphine in general. Thus, unless additional evidence is found to show that the defendant used heroin, prosecuting a prohibited substance morphine case is problematic.

iv. Prohibited Substance Levels

The prohibited substance levels set in NRS 484C.110 do not relate to impairment. A person is not UTI when he is at the level set forth in NRS 484C.110. Most of the levels set by statute relate to the cutoff amounts used by labs in determining whether a blood sample has tested positive for that particular drug. For example, most labs will report a negative result for marijuana if the blood test result is below two nanograms.

d. DRE

Because there are many different drugs with a variety of symptoms, police officers in Los Angeles developed the drug recognition program which trains officers to make determinations of possible drug impairment. A DRE (drug recognition expert) officer has been trained to utilize a 12 step process to determine of what category of drug a defendant may be under the influence.

The Nevada Supreme Court has not yet addressed the DRE program but many other states have held the program is valid, either because it is a matter that a layperson could testify to (State v. Klawitter, 518 N.W.2d 577 (Minn. 1994)) or because it is based on well recognized scientific principle. (State v. Baity, 991 P.2d 1151 (Wash. 2000); State v. Sampson, 6 P.3d 543 (Or. 2000)). Prosecutors should argue the DRE program is non-scientific since DREs merely testify to what laypersons can observe, but they should also be prepared to establish the scientific basis of the DRE program (since laypersons probably aren't competent to testify that a particular symptom is consistent with a particular drug classification).

It is possible the Nevada Supreme Court may conclude that the DRE program is scientific in nature. Some courts have found the DRE protocol to be scientific. State v. Baity, 991 P.2d 1151 (Wash. 2000) (holding DRE has scientific aspect but is admissible; there is a good discussion of the groups that have found the DRE program to be valid); State v.

Sampson, 6 P.3d 543 (Or., 2000); U.S. v. Everett, 972 F. Supp. 1313 (D. Nev. 1997)(analyzes DRE under Daubert standard and finds it to be admissible).

Prosecutors need to be aware that a DRE may not be able testify that a person was under the influence of a particular drug, only that the symptoms were consistent with a particular drug class. Prosecutors who are familiar with the DRE matrix can use it in their drug cases even if a DRE did not do the examination. For example, a lack of HGN is consistent with marijuana use; knowing this will allow a prosecutor to better evaluate a DUI marijuana case.

e. PRESCRIPTION NOT A DEFENSE

NRS 484C.110(2)(c) provides having a prescription to use a drug is not a defense to a charge of driving under the influence of that drug. Sometimes a defendant will attempt to argue that his blood test result shows he was at a therapeutic level for that drug, i.e. he was using the drug as directed by his doctor. Prosecutors should be familiar with the therapeutic range for various drugs (these levels are available from many sources such as the FDA or Winek's Drug & Chemical Blood-Level Data[3]). Prosecutors should counter the therapeutic argument by pointing out what effects the drug can have on a person even at a therapeutic range. For example, Xanax (Alprazolam) has, as a side effect, sleepiness; if the defendant is at a therapeutic amount, he could feel drowsy or sleepy.

f. REACTION TO MEDICATION

As a general rule, a defendant who has a bad reaction to his medication cannot use that reaction as an excuse to drive while impaired. Many of these cases involve people who misuse a prescription drug. See, for example, People v. Mathson, 210 Cal.App.4th 1297, 149 Cal.Rptr.3d 167 (Cal. 2012)(voluntary use of a drug resulting in sleep driving is not involuntary intoxication: "If intoxication is the result of defendant's own fault or defendant knows or has reason to anticipate the intoxicating effects, the intoxication is voluntary." 149 Cal.Rptr.3d at 180; Myers v. State, 691 S.E.2d 650 (Ga. App. 2010) (overdose).

3. Combined Influence: Drugs and Alcohol

Almost every drug provides that it should not be mixed with alcohol. The definition for being under the influence is the same for drugs and alcohol, as it is for drugs or alcohol separately. Again, a prosecutor must be prepared to do extra research to determine what effect alcohol can have when mixed with a particular drug. Prosecutors and police officers are particularly encouraged to seize or photograph the warnings on the pill bottles that a defendant has in his possession.

[3] Winek C.L., Wahba W.W., Winek Jr. C.L., Balzer T.W. "Drug and Chemical Blood-Level Data 2001." *Forensic Science International* (2001): 107-123. Print.

D. PENALTIES FOR MISDEMEANOR DUI

A DUI first or second offense (see below) is a misdemeanor punishable by up to six months in jail or a $1,000 fine. NRS 484C.400.

1. First Offense

There are certain mandatory minimum penalties for a first offense, as follows:

1. A minimum fine of $400;
2. 48 hours in jail or 48 to 96 hours of community service;
3. Attendance at a course on the abuse of alcohol or drugs (said course must be approved by the DPS);
4. Attendance at a victim impact panel.

If the convicted defendant had a blood alcohol level of 0.18 or more, then the defendant must have an alcohol evaluation done pursuant to NRS 484C.360 to determine if he would benefit from additional alcohol counseling. 484C.400. A defendant under the age of 21 must also have an alcohol evaluation done regardless of his blood alcohol level. NRS 484C.350(2).

a. TREATMENT PROGRAM

A defendant may apply to attend an alcohol or drug abuse treatment program in lieu of the above sentence. This program is not open to defendants whose blood alcohol level was 0.18 or more. The program must last from six months to three years. To be accepted the defendant must be diagnosed as an alcoholic or abuser of drugs by a licensed alcohol and drug abuse counselor or a physician. The defendant must pay the cost of his treatment if possible.

Once the defendant applies to do the program, the prosecution may request a hearing to challenge the defendant's eligibility to do the program. The court would then determine whether or not to put the defendant into the program.

If accepted into the program, the defendant's sentence is suspended until he either succeeds or fails the program. If he succeeds, his punishment is reduced to one day in jail or 24 hours of community service.

A first offender who is also a veteran may attend veteran's court NRS 176A.280 et. seq.

2. Second Offense

There are certain mandatory minimum penalties for a DUI second offense, as follows:

1. A minimum fine of $750;
2. 10 days in jail or 10 days of house arrest;
3. Attendance at a victim impact panel;

4. An alcohol evaluation and possible additional counseling (Note that for a second offense an evaluation is mandatory regardless of the defendant's alcohol level. NRS 484C.400);
5. Suspension of the defendant's vehicle registration for five days. NRS 484C.520.

a. TREATMENT PROGRAM

A defendant may apply to attend an alcohol or drug abuse treatment program in lieu of the above sentence. The program must last from one to three years. To be accepted the defendant must be diagnosed as an alcoholic or abuser of drugs by a licensed alcohol and drug abuse counselor or a physician. The defendant must pay the cost of his treatment, if possible, and the defendant must serve five days in jail. Once the defendant applies to do the program, the prosecution may request a hearing to challenge the defendant's eligibility to do the program. The court would then determine whether or not to put the defendant into the program.

If accepted into the program, the defendant's sentence is suspended until he either succeeds or fails the program. If he succeeds, punishment is reduced to five days in jail.

II. FELONY DUIs

There are two ways a person can commit a felony DUI:

1. Have a certain number or type of prior conviction(s); or
2. Kill or seriously injury someone.

A. DUI WITH PRIOR CONVICTIONS

NRS 484C.400 sets forth two types of offenses based on prior convictions. NRS 484C.400(1)(c) provides a third offense within seven years of the first offense constitutes a felony DUI, punishable by one to six years in prison and a $2,000 to $5,000 fine. NRS 484C.400(2) provides a DUI conviction following a felony DUI conviction is punishable by two to fifteen years in prison and a $2,000 to $5,000 fine. Both of these violations have certain unique elements.

1. Third Offense Within Seven Years

NRS 484C.400(1)(c) provides a third conviction for DUI within a seven year period is a felony. The two prior misdemeanor offenses must have occurred within seven years of the third offense; the date of conviction is irrelevant, only the date of offense matters. Speer v. State, 116 Nev. 677, 5 P.3d 1063 (2000).

The prior DUI convictions can be from Nevada or from some other state if the prior punishes the same or similar conduct. (See below "Out of State Priors").

2. Prior Felony Conviction

NRS 484C.400(2) provides a conviction for DUI is a felony if the defendant has previously been convicted of a felony DUI. Unlike a third offense DUI, the prior felony need not have occurred within seven years of the present offense; any felony DUI conviction constitutes a prior felony conviction. The prior felony DUI conviction can be from Nevada or from some other state if the prior punishes the same or similar conduct.

3. Offense vs. Conviction

NRS 484C.400 does speak of prior offenses, not prior convictions. Theoretically, a person charged with a DUI second offense who has not yet been convicted of his 1st offense could be convicted of a second offense if the prosecution proves the existence of both the first offense and the present offense. However, as a practical matter, it would be extremely difficult to prove both offenses beyond a reasonable doubt. So, while the statute does speak to prior "offenses," prosecutors should limit themselves to prior "convictions."

B. PROVING THE PRIORS

Various issues of proof may arise from utilizing a prior conviction in a DUI case. These issues include what types of priors can be used and how they are introduced.

1. General Considerations

The first issue which can arise is in what format the prior must be. In Pettipas v. State, 106 Nev. 377, 794 P.2d 705 (1990), the Supreme Court has held that a formal judgment of conviction is not necessary. (Many municipal courts do not create a formal judgment of conviction). A prior is valid even though a non-lawyer justice of the peace took the plea. Goodson v. State, 115 Nev. 443, 991 P.2d 472 (1999): A felony DUI conviction may be used to enhance another DUI to a third offense. Speer v. State, 116 Nev. 677, 5 P.3d 1063 (2000) (today a felony DUI prior stands on its own as a felony prior). The sentence imposed for a prior is irrelevant for purposes of determining the validity of the prior. Paschall v. State, 116 Nev. 911, 8 P.3d 851 (2000). A juvenile conviction is not a prior conviction for purposes of the DUI statute. State, Dep't of Motor Vehicles v. Hafen, 108 Nev. 1011, 842 P.2d 725 (1992). The fact that the defendant pled nolo contendre does not affect the validity of the prior. Jones v. State, 105 Nev. 124, 771 P.2d 154 (1989). The proper statute of limitations for a DUI felony when the felony is based on prior convictions is the felony statute of limitations not the misdemeanor statue. Chapman v. State, 118 Nev. 178, 42 P.3d 264 (2002).

2. Constitutional Considerations

Many priors may come from municipal courts which do not have formal plea canvasses similar to those done for felony convictions in a district court. Further complications may arise if the municipal court is not a court of record so that a transcript is unavailable. For these reasons a prosecutor in those courts should take steps to ensure that a complete record is made of the entry of plea or finding of guilt. With regard to the constitutional issues which may arise from using a prior conviction, the Supreme Court focuses primarily on whether the defendant had an attorney when he pled guilty.

a. VALIDITY OF PLEA

The U.S. Supreme Court has held a defendant cannot challenge the validity of his priors unless they were obtained without an attorney. Custis v. U.S., 511 U.S. 485, 114 S. Ct. 1732, 128 L.Ed.2d 517 (1994). The Nevada Supreme Court has rejected this rule and has adopted a two tiered system for determining the validity of a prior conviction. In Davenport v. State, 112 Nev. 475, 915 P.2d 878 (1996), the court found that if a defendant was represented by counsel, the prior conviction is presumed valid; if unrepresented by an attorney then the State must establish validity of the prior. In Davenport, the defendant had signed his out-of-state waiver of rights form the day after he pled guilty but the court found his prior conviction to be valid because the defendant was represented by an attorney. A prior must show either that the defendant waived counsel or was represented by an attorney; confusion with this issue can invalidate the prior. Bonds v. State, 105 Nev. 827, 784 P.2d 1 (1989).

For purposes of a prior conviction, it is irrelevant that the defendant pled guilty, no contest, or was convicted after trial; all are prior convictions. Jones v. State, 105 Nev. 124, 771 P. 2d 154 (1989).

b. FARETTA ISSUES

The U.S. Supreme Court has held a defendant who pleads guilty to a misdemeanor offense need not receive a Faretta canvas prior to pleading guilty. Iowa v. Tovar, 541 U.S. 77, 81, 124 S. Ct. 1379, 158 L.Ed.2d 209 (2004). Further, priors obtained without an attorney can be used to enhance a future case. Nichols v. United States, 511 U.S. 738, 114 S. Ct. 1921, 128 L.Ed.2d 745 (1994). (Note that some states do not follow Nichols on state law grounds).

c. EX POST FACTO LAWS

Frequently the prior conviction being used to enhancement the present case to a felony will predate the enactment of NRS 484C.400(2). However, using this prior to enhance the defendant's present case does not violate the ex post facto clause of the U.S. or Nevada constitutions. Dixon v. State, 103 Nev. 272, 737 P.2d 1162 (1987) (even though prior convictions did not state that future cases could be enhanced, enhancement permissible because at time of third offense statute provided for enhancement); Gryger v. Burke, 334 U.S. 728, 732, 68 S. Ct. 1256, 1258, 92 L. Ed. 1683 (1948):

> Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

3. Plea Bargained Priors

What if a prior conviction arose as a result of a plea bargain? The use of that conviction as a valid prior depends upon the nature of the plea bargain. If the defendant's prior was charged as a DUI second offense and that second offense was reduced to a first offense, then his next DUI (i.e. his present case the State is seeking to enhance to a third offense based on his two priors) will be a second offense. In State v. Smith, 105 Nev. 293, 774 P.2d 1037 (1989) and Nevada v. Crist, 108 Nev. 1058, 843 P.2d 368 (1992), the court concluded part of the bargain received by the defendant when his case was reduced to a first offense from a second offense was that his next DUI would be treated as a second offense. (Prosecutors can avoid this result by having the defendant pled guilty to a first offense for sentencing and a second offense for enhancement).

Should the defendant's priors consist of two first offenses (usually this occurs because the prosecution is unaware of the defendant's prior conviction when they charge him the second time with a first offense), then his next offense is a felony. In Grover v. State, 109 Nev. 1019, 862 P.2d 421 (1993) and Perry v. State, 106 Nev. 436, 794 P.2d 723 (1990), the court found when a defendant pleads guilty to two first offenses, his next offense is properly treated as a third offense. The court concluded because there was no plea bargain reducing either of his first offenses, the defendant was on notice that his next offense would be a third offense.

4. Out of State Priors

NRS 484C.400(7) defines a "prior" as a violation of Nevada's DUI laws and "(c) A violation of a law of any other jurisdiction that prohibits the same or similar conduct as . . . the Nevada DUI statutes." The Supreme Court has been fairly liberal in determining what constitutes "the same or similar conduct" for purposes of a prior conviction. In Jones v. State, 105 Nev. 124, 771 P.2d 154 (1989), the court held an out of state prior need not be identical to a Nevada DUI charge to be a valid prior. Thus, the fact that a DUI in Nevada is limited to highways and premises to which the public has access does not preclude using a California DUI conviction as a prior in Nevada even though a DUI in California is not limited to a highway or to premises to which the public has access. Because the out of state prior need not be identical to a Nevada DUI, the Nevada Supreme Court has permitted several out of state convictions to be used to enhance a Nevada case even though the out of state DUI has different elements than a Nevada DUI. For example, in Blume v. State, 112 Nev. 472, 915 P.2d 282 (1996), a prior conviction from California prohibiting driving with a 0.08 alcohol level was found to be the same or similar conduct even though, at that time, Nevada's per se level was 0.10. In Marcinaiak v. State, 112 Nev. 242, 911 P.2d 1197 (1996), a Michigan statute prohibiting "driving while impaired" could be used as a prior conviction in Nevada even though "driving while visibly impaired" was a lesser included of DUI in Michigan. Presumably this holding would allow a "wet reckless" to be used as a prior in Nevada. People v. Claire, 229 Cal.App.3d 647, 650, 280 Cal. Rptr. 269 (Cal.Ct.App. 1991)("wet reckless" is treated as a prior DUI for California DUI offenses). In Sindelar v. State, - Nev. -, 382 P.3d 904 (2016), a Utah felony DUI conviction was held to be the same or similar to a NV felony conviction even though NV requires 3 DUIs in a seven year period and Utah law says that the three priors can be within ten years.

5. Mechanics of Proving a Prior Conviction

NRS 484C.400(2) sets forth the manner by which a defendant is advised of his priors.

> The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged

to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

Great care must be taken by the prosecution not to advise the jury of the existence of the prior conviction(s). The manner of proving the existence and validity of a prior conviction varies between a trial and a preliminary hearing/grand jury presentment.

a. PRELIMINARY HEARING AND GRAND JURY

At the conclusion of a preliminary hearing/grand jury presentment, the State must introduce evidence that the defendant has a prior conviction. This evidence need only show the defendant has a prior conviction; it need not show the conviction was constitutionally valid. Parsons v. State, 116 Nev. 928, 10 P.3d 836 (2000) (justice court lacks jurisdiction to consider constitutional validity of prior conviction). While a prosecutor is not required to do so, the better practice is to allow a defense attorney to show the prosecution any errors in the prior conviction at the preliminary hearing. Binding a case up for trial without valid prior convictions wastes time and resources.

b. TRIAL

NRS 484C.400 provides: "The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury." The Indictment or Information must allege the prior conviction. Phipps v. State, 111 Nev. 1276, 903 P.2d 820 (1995). If the case is going to jury trial, it is probably best to provide the court with an Indictment or Information to be read to the jury which has the priors redacted. This way, the jury will not accidentally be advised of the priors.

At or before the conclusion of the case, "[T]he State is required to satisfy its burden of production by presenting a record of the existence of the prior conviction that provides prima facie evidence of the prior conviction." Hudson v. Warden, 117 Nev. 387, 395, 22 P.3d 1154, 1159 (2001) (allegations of priors in pre-sentencing report do not meet State's burden of proving the priors).

c. PAPERWORK FOR PRIORS

It is not necessary to have an actual judgment of conviction to have a valid prior. Pettipas v. State, 106 Nev. 377, 794 P.2d 705 (1990). The copies of the priors must be certified. State v. Madrigal, 110 Nev. 1005, 879 P.2d 746 (1994). Some error in the description of the prior does not invalidate that prior unless the defendant is misled to his prejudice. Dressler v. State, 107 Nev. 686, 819 P.2d 1288 (1991).

d. TIMING OF PRESENTING THE PRIOR

A defendant may stipulate to his prior convictions. Krauss v. State, 116 Nev. 307, 998 P.2d 163 (2000). However a defendant cannot stipulate to fictitious priors as part of a plea bargain; the priors must actually exist. Hodges v. State, 119 Nev. 479, 78 P.3d 67 (2003). If the defendant does not stipulate to the priors then the evidence of the prior convictions must be presented at or before the time of sentencing. Robertson v. State, 109 Nev. 1086, 863 P.2d 1040 (1993) (record of priors cannot be supplemented after sentencing); Hudson v. Warden, 117 Nev. 387, 395, 22 P.3d 1154, 1159 (2001); Ronning v. State, 116 Nev. 32, 992 P.2d 260 (2000) (proof of priors may be presented before sentencing).

e. SUFFICIENT PROOF OF THE VALIDITY OF THE PRIOR

In Koenig v. State, 99 Nev. 780, 672 P.2d 37 (1983), the Supreme Court held a guilty plea in a municipal court need not have the same formality as a felony plea in the district court. So long as the "spirit of Constitutional principles" is respected, a guilty plea in a municipal court is valid and usable as a prior. (Koenig also sets forth a waiver of rights form that was found to be valid). A mass advisement of the rights the defendant is waiving does not invalidate a prior conviction so long as there is some individual discussion between the judge and the defendant. ("Mr. Defendant, do you have any questions about the rights you were advised of?"). Picetti v. State, 124 Nev. 782, 192 P.3d 704 (2008). If a prior is challenged, the judge who took the plea on the prior may file an affidavit as to his practices in taking a plea. State v. Moga, 989 P.2d 856 (Mont. 1999).

C. DUI FELONY: DEATH AND/OR SUBSTANTIAL BODILY HARM (SBH)

A defendant who drives while impaired and causes death or substantial bodily harm to another person is guilty of a felony DUI. While many of the elements of a misdemeanor and felony DUI are identical, there are some important distinctions. The felony DUI statute is found in 484C.430, which provides:

> 1. Unless a greater penalty is provided pursuant to NRS 484C.130 and 484C.440, a person who:
>
> (A) Is under the influence of intoxicating liquor;
>
> (b) Has a concentration of alcohol of 0.08 or more in his blood or breath;
>
> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his blood or breath;
>
> (d) Is under the influence of a controlled substance or is under the combined influence of intoxicating liquor and a controlled substance;
>
> (e) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle; or

(f) Has a prohibited substance in his blood or urine in an amount that is equal to or greater than the amount set forth in NRS 484C.130 and 484C.440,

and does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle on or off the highways of this State, if the act or neglect of duty proximately causes the death of, or substantial bodily harm to, a person other than himself, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 20 years and must be further punished by a fine of not less than $2,000 nor more than $5000.

The following elements comprise the crime of felony DUI Causing Death and/or SBH.

1. Highway

A misdemeanor DUI and a felony DUI based on priors can only be committed on a highway or on premises to which the public has access. A felony DUI involving death or substantial bodily harm can be committed anywhere in the State of Nevada. Hudson v. Warden, 117 Nev. 387, 22 P.3d 1154 (2001). This can include land owned by the United States unless the United States has asserted exclusive jurisdiction over the land. Pendleton v. State, 103 Nev. 95, 734 P.2d 693 (1987).

2. Driving or Being in Actual Physical Control

Driving or being in actual physical control is defined the same in a felony case as in a misdemeanor case.

3. Under the Influence; 0.08 or More at Time of Driving; 0.08 within Two Hours of Driving; Controlled and Prohibited Substances

All of these definitions are the same for a felony case as they are for a misdemeanor case.

4. Do an Act or Neglect a Duty

Unlike a misdemeanor case, a felony DUI causing death or SBH has as an element that the defendant "do an act or neglect a duty" while driving impaired or while driving with a per se amount. Typically, this means the impaired driver will violate some traffic law and cause a collision. As set forth below in the "proximate cause" section, the impaired driver need not be the only person committing a traffic violation; negligence by the victim does not excuse the impaired driver.

a. MUST THE ALCOHOL/DRUGS CAUSE THE TRAFFIC VIOLATION?

Sometimes the defense will argue the State did not prove that the traffic violation committed by their impaired client was caused by the alcohol or drugs the client had taken. The defense will cite Cotter v. State, 103 Nev. 303, 738 P.2d 506 (1987) as mandating proof that a person's impairment caused him to drive poorly. Specifically, the

Cotter court addressed the question of whether the State must prove that the impaired driver was under the influence "to a degree." In holding that proof of impairment "to a degree" was necessary, the court found that holding otherwise could criminalize driving under the influence when a person's ability to drive safely was not impaired: "It would make felons of drivers on lawfully prescribed medications irrespective of whether the medication had any causal relationship to the event leading to the death or injury of another." Cotter, 103 Nev. at 305-306, 738 P.2d at 508. The defense will focus on the phrase "causal relationship" to argue that the State must prove that the impairment caused the traffic violation. However, Cotter addressed the question of the meaning of "under the influence" and found a person had to be under the influence "to a degree . . . ." Neither Cotter nor any other Nevada case holds the State must prove the impaired person caused the traffic violation. Such a holding is also contrary to the vast majority of other state's laws. People v. Schaefer, 703 N.W.2d 774 (Mich. 2005). While the State must prove the defendant was impaired at the time of the traffic violation, the State need not prove that impairment caused him to commit a traffic violation. State v. Benoit, 650 A.2d 1230, 1233 (R.I. 1994); Miller v. State, 513 S.E.2d 27 (Ga., 1999)(footnote 4: "The majority of courts in other states which have been presented with the question have held that their vehicular homicide statutes require proof of a causal connection only between the defendant's act of driving and the victim's death rather than between the defendant's intoxication and the death."); State v. Rivas, 896 P.2d 57 (Wash. 1995); State v. Hubbard, 751 So.2d 552 (Fla. 1999).

b. ARE ANY SPECIFIC TRAFFIC VIOLATIONS ATTRIBUTABLE TO DUI?

While there is no moving violation that can exclusively be committed by an impaired driver, some studies have found certain traffic violations are more commonly committed by a drunken driver. See National Highway Traffic Safety Administration (NHTSA) report, "The Visual Detection of DUI Motorists." DOT HS 808 677 (2010). Being able to cite this or a similar study to a jury will inform the jury that there are studies backing up what the officer is telling them.

5. Proximate Cause

The act or neglect of duty by the impaired driver must proximately cause death or SBH to the victim. (Note that there must be a victim; the impaired driver is not guilty of a felony DUI if he only injuries himself).

Proximate cause is easy if the defendant is the sole cause of the collision and injury/death to the victim. Thus, there is no proximate cause issue in a case where the drunken driver crosses the median and drives the wrong way on the highway. Likewise, when the victim is the sole cause of the collision, such as a victim who rear-ends the drunk driver sitting at a stop light, then the drunk driver is only guilty of a misdemeanor. Issues may arise in the following circumstances:

1. Both the drunken driver and the victim commit traffic violations;
2. The victim fails to use safety equipment (such as a seat belt); or
3. Some third party or event contributes to the collision.

a. BOTH THE DRUNK DRIVER AND THE VICTIM ARE AT FAULT

Frequently, both the defendant and the victim may contribute to the traffic collision. For example, suppose the victim turns left in front of the defendant, who is speeding. In this situation, the defendant is a proximate cause of the collision but not the sole proximate cause. However, the victim's negligence does not exonerate the defendant.

In Etcheverry v. State, 107 Nev. 782, 821 P.2d 350 (1991), Trent v. Clark County, 88 Nev. 573, 502 P.2d 385 (1972), and Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002), the court addressed proximate cause in the context of a criminal case.

In Etcheverry, the defendant alleged his collision was caused by a mechanical defect. The Etcheverry court approved of a jury instruction which: "[I]n essence, stated that the jury could only exonerate Etcheverry if it determined that the alleged failure in the steering mechanism presumably resulting from the negligence of an unknown mechanic was the '*sole cause*' of the injuries sustained by Costa . . . ." Etcheverry, 107 Nev. at 784. (Italicized language by the court). Etcheverry's definition of proximate cause was based on the earlier decision in Trent. In Trent, the defendant struck and killed a pedestrian who was walking on the highway at night. In rejecting Trent's argument that the juvenile referee failed to consider the pedestrian's negligence, the Supreme Court found the pedestrian was not the sole cause of his death. The court then concluded Trent could lawfully be charged with the pedestrian's death even though the pedestrian may have been contributorily negligent. The court quoted from R. Anderson, Wharton's Criminal Law and Procedure § 986 (1957), as follows:

> . . . [T]he fact that the deceased was guilty of negligence directly contributing to his death does not exonerate the accused, unless deceased's negligence was the sole cause of death. In the latter case, the defendant is exculpated not because of the contributory negligence of the victim but because the defendant was not the proximate cause of the homicide . . . .

88 Nev. at 577 (footnote omitted).

In Williams v. State, the defendant wanted to introduce evidence that her victims were negligent because they were working in the highway median when they were killed by her. The State had sought a motion in limine to prevent Williams from arguing that her victims were negligent because they were in the highway median. The trial court granted the State's motion in limine. The Supreme Court reaffirmed the validity of Etcheverry and Trent's holding that a defendant is only exonerated when the victim is the sole cause of the collision. The court also found the State's motion in limine was properly granted.

b. VICTIM'S FAILURE TO USE SAFETY EQUIPMENT

Sometimes a defendant will argue he should be exonerated because his victim did not properly use safety equipment. Usually, this argument will be made when the victim's injuries were exacerbated by his failure to wear a seat belt. Every court which has considered this issue has universally held evidence that a victim failed to wear his seat belt is inadmissible and irrelevant.

State v. Nester, 336 S.E.2d 187, 189 (W.Va. 1985)("To say otherwise [that the failure to wear a seat belt is a defense] could absolve a murderer if it could be shown the victim was not wearing a bulletproof vest."); State v. Turk, 453 N.W.2d 163 (Wis., 1990); Warner v. State, 577 N.E.2d 267 (Ind., 1991); State v. Lund, 474 N.W.2d 169 (Minn. App. 1991); State v. Radziwil, 563 A.2d 856 (N.J., 1989); Union v. State, 642 S.2d 91 (Fla. 1st DCA 1994); People v. Wattier, 59 Cal.Rptr.2d 483 (1997)(motion in limine regarding seat belt use was properly granted; this case has some excellent language as to why seat belt evidence should not be admitted).

c. THIRD PARTY NEGLIGENCE

Sometimes a defendant will seek to argue that he should be excused because a third party's negligence caused or contributed to the collision. Courts have usually rejected these claims on the basis that the third party's negligence was a preexisting condition and did not independently cause the collision. For example, in Bostic v. State, 104 Nev. 367, 760 P.2d 1241 (1988), the court found an obstructed stop sign did not independently cause the death of the victim and so Bostic was not entitled to a jury instruction on superseding and intervening causes. In Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002), the court found the lower court properly granted the State's motion in limine precluding Williams from arguing the highway department's failure to put out warning signs and/or road blocks was a cause of the death of six children when Williams drove into the center median and struck them.

6. Death or Substantial Bodily Harm (SBH)

Death is self explanatory but SBH is not. What constitutes SBH is defined in NRS 0.060, as follows:

> Unless the context otherwise requires, "substantial bodily harm" means:
> 1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
> 2. Prolonged physical pain.

a. BODILY INJURY

"Bodily injury" as defined in subsection 1 of NRS 0.060 can include broken bones. Hardaway v. State, 112 Nev. 1208, 926 P.2d 288 (1996) (SBH was shown when victim suffered "bruises, scratches, a black eye, and a broken arm."). The loss of the function of the bodily member need not be serious. Gibson v. State, 95 Nev. 99, 590 P.2d 158 (1979) (victim who had crushed nose, lacerated face, and broken wrist suffered bodily injury or prolonged physical pain). It can also include cosmetic injury. Levi v. State, 95 Nev. 746, 602 P.2d 189 (1979):

> Although it is true that the burns to the boy's stomach and hand did not create a substantial risk of death, protracted loss or impairment of a bodily member or organ, or prolonged physical pain, there was sufficient evidence offered to enable the jury to find a serious permanent disfigurement. Indeed, a doctor testified that the disfigurement was permanent and could be cosmetically serious, if not functionally so. In our view, the phrase, "serous permanent disfigurement," includes cosmetic disfigurement as well as an injury that is functionally disabling.

95 Nev. at 748, 602 P.2d at 190.

b. PROLONGED PHYSICAL PAIN (PPP)

What constitutes PPP is a question for the jury and is a question of degree. Gibson v. State, 95 Nev. 99, 590 P.2d 158 (1979); Brooks v. Sheriff, 89 Nev. 260, 510 P.2d 1371 (1973). The PPP statute is not vague or ambiguous. Collins v. State, 125 Nev. 60, 65, 203 P.3d 90, 93 (2009)("phrase 'prolonged physical pain' has a well-settled and ordinarily understandable meaning — i.e., there must be at least some physical suffering that lasts longer than the pain immediately resulting from the wrongful act."). PPP can exist when a victim has headaches several weeks after the collision. Collins, supra.

c. PROVING SBH

Obviously, the doctor who treated the victim or the coroner who examined the body can testify as to injury or death. These witnesses will be necessary at trial but it may be administratively prohibitive to bring them in at a preliminary hearing. Besides a medical professional, lay witnesses are generally competent to testify as to death or SBH. NRS 50.265 allows lay witnesses to give their opinion about things that are: "1. Rationally based on the perception of the witness; and 2. Helpful to a clear understanding of his testimony or the determination of a fact in issue." Thus, a lay witness can testify as to: the sanity of a defendant, Ford v. State, 102 Nev. 126, 717 P.2d 27 (1986); the use or effect of narcotics on a person, Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968); the cause of an accident, Paul v. Imp. Palace, 111 Nev. 1544, 908 P.2d 226 (1995); and the speed of a vehicle, Patton v. Henrikson, 79 Nev. 197, 200, 380 P.2d 916 (1963). A lay witness may also testify as to his own injuries provided he is not simply repeating what

his doctor told him. Leiper v. Margolis, 111 Nev. 1012, 899 P.2d 574 (1995); El Cortez v. Coburn, 87 Nev. 209, 212, 484 P.2d 1089 (1971). See also Gibson v. Traver, 44 N.W.2d 834 (Mich. 1950) (witness can testify to pain, suffering, and broken bones).

d. MULTIPLE VICTIMS

Suppose a drunk driver kills or injures multiple persons. In that scenario each death or SBH is a separate offense. Galvan v. State, 98 Nev. 550, 655 P.2d 155 (1982).

III. VEHICULAR HOMICIDE

One type of DUI combines both DUI with priors and DUI causing death. If a defendant is convicted of DUI causing death and he has three prior DUI convictions, he violates NRS 484C.130 and commits the crime of vehicular homicide (VH).

The three prior convictions should be listed in the complaint like priors for a DUI third offense or a DUI with a prior felony conviction offense. (See above). However, unlike a third offense DUI where the two priors must have occurred within seven years of the third offense, the three priors used to comprise a VH do not have to have occurred within seven years.

The penalty for VH is set forth in NRS 484C.440. A person who commits VH is guilty of a Category A Felony, punishable by life imprisonment with the possibility of parole after 10 years has been served or by a definite term of 10 to 25 years in prison.

A defendant probably could not be charged with murder as a result of driving drunk unless the defendant intentionally killed the victim. Sheriff v. LaMotte, 100 Nev. 270, 680 P.2d 333 (1984) (second degree murder statute will not be extended to cover drunk driving); Johnston v. State, 101 Nev. 94, 692 P.2d 1307 (1985).

PART 2: THE DUI STOP AND ARREST

I. INITIAL STOP

Every DUI begins when the police contact a person. Typically, the contact will begin when the police observe a moving violation but the circumstances of the initial contact are many and varied. "In determining the reasonableness of a stop, the court should consider the totality of the circumstances and should remember that trained law enforcement officers are permitted to make reasonable inferences and deductions that might elude an untrained person." DMV v. Long, 107 Nev. 77, 79, 806 P.2d 1043, 1044 (1991), citing United States v. Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L.Ed.2d 621 (1981).

A. STOPPING A MOVING VEHICLE

1. Traffic Violation

Usually, the initial contact between the police and a DUI suspect occurs when the police observe the suspect commit a moving violation. A police officer may stop a vehicle when the officer has reasonable suspicion that the driver will commit, is committing, or has committed a crime. NRS 171.123; U.S. v. Arvizu, 534 U.S. 266, 122 S. Ct. 744 (2002); Dixon v. State, 103 Nev. 272, 737 P.2d 1162 (1987).

An officer may observe a vehicle that appears to be driven unsafely but said unsafe driving is not specifically illegal. Nonetheless, the officer may stop the vehicle for the unsafe driving even though that driving is not specifically illegal. Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997) (police had cause to stop reported drunk driver when officer observed vehicle weaving within its own lane). However, in State v. Rincon, 122 Nev. 1170, 147 P.3d 233 (2006), the court held driving too slowly is not necessary illegal so that the stop of a car driving too slowly was improper (although the stop may be valid under the community caretaker exception, see below).

An officer may use the composite knowledge of all officers in determining whether reasonable suspicion exists. Doleman v. State, 107 Nev. 409, 812 P.2d 1287 (1991) (reasonable suspicion need not be based on knowledge of a specific police officer, but may be based on the collective knowledge of all officers involved).

2. Paperwork Violation

Sometimes an officer may stop a vehicle based on an equipment or paperwork violation. Some unique laws may apply to such stops. For example, an officer may presume that the owner of a car is the driver of the car when the officer knows that the owner's license is suspended or revoked. State v. Pike, 551 N.W.2d 919, 922 (Minn. 1996). Likewise, an officer may stop a vehicle to verify a temporary registration is valid but, upon determining the registration is valid, the reason for the stop is over unless the officer has

observed further reasons to detain the driver. U.S. v. Dexter, 165 F.3d 1120 (7th Cir. 1998). An officer may also randomly run license plates to see if the registration to the vehicle is valid. State v. Donis, 723 A.2d 35 (N.J. 1998); State v. Loyd, 338 S.W.3d 863 (Mo. 2011).

3. Calls to Police

Sometimes a vehicle may be stopped based on a call to the police. These stops are generally valid. Particularly when a private citizen calls the police, provides his identity, and relays information about the bad driving, a stop based on the phone call is valid. Chambers v. Maroney, 399 U.S. 42, 90 S. Ct. 1975, 26 L.Ed.2d 419 (1970) (officer had cause to stop vehicle based on information supplied by eye witnesses); Lucas v. State, 96 Nev. 428, 610 P.2d 727 (1980).

Sometimes the caller may be anonymous in which case a more stringent standard will apply. An anonymous tip can serve as the basis for the stop of a vehicle if the tip is sufficiently corroborated. State v. Sonnenfeld, 114 Nev. 631, 958 P.2d 1215 (1998). In Sonnenfeld, a person identified as a "bartender" called the police to report that a drunk driver had just left a bar. Based solely on this information, the police stopped Sonnenfeld. The Nevada Supreme Court upheld the validity of the stop based solely on the anonymous call because the deputy was able to corroborate some of the information supplied by the anonymous caller (the color and license plate number of the vehicle, the fact that the car had a roof rack, and the direction in which the car traveled away from the bar). In Navarette v. California, - U.S. -, 134 S. Ct. 1683, 188 l. Ed. 2d 680 (2014), the Court upheld the stop of a drunk driver based on a call the court treated as anonymous. The caller stated that she had been run off the road at a certain location by a silver truck. The police found the silver truck in the general area where the caller said it would be. The court found that the tip was sufficiently corroborated. On the other hand, a court will not permit a stop based on an anonymous call when it is unclear as to the basis of the caller's information. Fla. v. JL, 529 U.S. 266, 146 L.Ed.2d 254, 120 S. Ct. 1375 (2000) (anonymous call that a certain black man had a gun was not a basis for police to contact the black man when basis of informant's information was unclear).

4. Checkpoints

The initial contact with the defendant may occur as a result of a DUI checkpoint. In Michigan v. Sitz, 496 U.S. 444, 110 S. Ct. 2481 (1990), the Supreme Court found that DUI checkpoints were constitutionally valid as against a Fourth Amendment challenge: "In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment." Id., 496 at 455, 110 S. Ct. at 2488. Nevada has chosen to codify Sitz in NRS 484B.570. NRS

484B.570 sets forth various requirements that a checkpoint must meet in order to warn approaching motorists:

> 2. To warn and protect the traveling public, administrative roadblocks established by police officers must meet the following requirements:
>
> (a) The administrative roadblock must be established at a point on the highway clearly visible to approaching traffic at a distance of not less than 100 yards in either direction.
>
> (b) At the point of the administrative roadblock, a sign must be placed near the centerline of the highway displaying the word "Stop" in letters of sufficient size and luminosity to be readable at a distance of not less than 50 yards in the direction affected by the roadblock, either in daytime or darkness.
>
> (c) At the same point of the administrative roadblock, at least one red flashing or intermittent light, on and burning, must be placed at the side of the highway, clearly visible to the oncoming traffic at a distance of not less than 100 yards.
>
> (d) At a distance of not less than one-quarter of a mile from the point of the administrative roadblock, warning signs must be placed at the side of the highway, containing any wording of sufficient size and luminosity to warn the oncoming traffic that a "police stop" lies ahead. A burning beam light, flare or lantern must be placed near the signs to attract the attention of the traffic to the sign.

Sometimes a defendant will argue the checkpoint did not meet the statutory requirements. Prosecutors should respond that the purpose of the statute is to protect drivers in the area by letting them know that the checkpoint is up ahead; it is not to protect drunk drivers. Thus, unless the drunk driver crashed because of the improperly set up checkpoint, he has no standing to attack the checkpoint.

Although not required, prior notice of the checkpoint in the media is a factor that favors the checkpoint. It is not necessary to stop every car that enters the checkpoint so long as the criteria used to determine which car is stopped are nondiscriminatory (example: stopping every third car). Likewise, the checkpoint should not set up randomly but should be done according to established criteria. (Once a month, road with high accident rates, etc.).

B. CONTACTING THE DRIVER OF A CAR ALREADY STOPPED

Sometimes an officer will encounter a car that is already stopped. Usually this will occur when there has been a collision or when the driver is passed out or sleeping behind the wheel. Such contacts are analyzed differently under the Fourth Amendment than the stop of a moving vehicle.

As a general rule, the police do not violate the Fourth Amendment when they approach a person and speak to him. Florida v. Royer, 460 U.S. 491, 497-498, 103 S. Ct. 1319, 1324 (1983) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."). Because the vehicle is already stopped before the police contact, the police do not need reasonable suspicion to approach a stopped car.

C. COMMUNITY CARETAKER

In addition to investigating criminal activity, the police may stop or approach a vehicle to check on the welfare of the occupants. Usually this occurs when a person appears to be unconsciousness behind the wheel but it can arise in other situations.

As a general rule the police may check on the occupants of a vehicle to determine if they are in need of medical assistance. Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct. 2523 (1973); State v. Rincon, 122 Nev. 1170, 147 P.3d 233 (2006)("An objectively reasonable belief that emergency assistance is needed may arise if a police officer observes circumstances indicative of a medical emergency or automotive malfunction."). An officer may open a car door to check on a nonresponsive driver; the act of opening the door does not constitute a seizure of the person. Overvig v. Comm., 730 N.W.2d 789 (Minn. 2007).

D. SEIZURE OF A DRIVER IN THE DRIVER'S HOME

Sometimes the police will not contact the driver of a car until the driver has entered his home. This can occur as a result of a police chase or as a result of a follow up investigation. The analysis is slightly different for each fact pattern.

If the police are chasing a driver who runs into his home, the police may pursue the driver into his home. United States v. Santana, 427 U.S. 38, 96 S. Ct. 2406, 49 L.Ed.2d 300 (1976) (a defendant could not thwart an otherwise valid arrest by retreating from the doorway of her home into the vestibule of her house). In order to rely upon Santana, the police must be in hot i.e. direct pursuit of the suspect. The situation is somewhat different when the police are not in hot pursuit of a suspect but are investigating a DUI. In Welsh v. Wis., 466 U.S. 740, 80 L.Ed.2d 732, 104 S. Ct. 2091 (1983), the Supreme Court found the police may not enter a home without a warrant to cite someone for the civil infraction of DUI. Welsh involved an arrest for a civil infraction. Post-Welsh courts have distinguished Welsh on the grounds that their DUI laws treat DUI as a serious misdemeanor rather than a civil infraction and that there is a need to preserve evidence. People v. Hampton, 209 Cal. Rptr. 905 (1985); State v. Lamont, 631 N.W.2d 603, 611 (S.D. 2001); State v. Paul, 548 N.W.2d 260, 267 (Minn. 1996); Beachwood v. Sims, 647

N.E.2d 821 (Ohio 1994)(police justified in arresting defendant in home based on informant's tip that defendant was driving drunk and officer's observation of defendant's intoxicated condition).

The Supreme Court may have also retreated from Welsh. In Illinois v. McArthur, 531 U.S. 326, 335-36, 121 S. Ct. 946, 952 (2001), the police detained the defendant outside of his residence until they could obtain a warrant. The Supreme Court distinguished Welsh, in part, because McArthur's crime was one punishable by jail time:

> Finally, McArthur points to a case (and we believe it is the only case) that he believes offers direct support, namely, Welsh v. Wisconsin, supra. In Welsh, this Court held that police could not enter a home without a warrant in order to prevent the loss of evidence (namely, the defendant's blood alcohol level) of the "nonjailable traffic offense" of driving while intoxicated. 466 U.S., at 742, 754, 104 S. Ct. 2091. McArthur notes that his two convictions are for misdemeanors, which, he says, are as minor, and he adds that the restraint, keeping him out of his home, was nearly as serious.
>
> We nonetheless find significant distinctions. The evidence at issue here was of crimes that were "jailable," not "nonjailable." In Welsh, we noted that, "[g]iven that the classification of state crimes differs widely among the States, the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." 466 U.S., at 754, n. 14, 104 S. Ct. 2091. The same reasoning applies here, where class C misdemeanors include such widely diverse offenses as drag racing, drinking alcohol in a railroad car or on a railroad platform, bribery by a candidate for public office, and assault.
>
> . . .
>
> We have explained above why we believe that the need to preserve evidence of a "jailable" offense was sufficiently urgent or pressing to justify the restriction upon entry that the police imposed. We need not decide whether the circumstances before us would have justified a greater restriction for this type of offense or the same restriction were only a "nonjailable" offense at issue.

McArthur, 531 U.S. at 335-36, 121 S. Ct. at 952 – 953.

E. GARAGE OR CURTILAGE

Generally, the curtilage or garage of a home is not subject to the same Fourth Amendment protection as the inside of a home. Thus, a police officer may enter an open garage or the driveway, porch, etc. of a home to arrest a drunk driver without a warrant because the driver has no reasonable expectation of privacy in those areas. Harbin v. City

of Alexandria, 712 F. Supp. 67 (E.D. Va. 1989) (front porch); State v. Brocuglio, 779 A.2d 793 (Conn. 2001) (front yard); Tracht v. Comm., 592 N.W.2d 863 (Minn. 1999) (garage). This result arises from the fact that a defendant may be seen in an open garage.

F. JURISDICTION OF POLICE

Usually there is no question that the police are within their jurisdiction when they stop a defendant, but there may be cases where a limited jurisdiction officer makes an arrest outside of his jurisdiction. In Clark County, the most common example occurs whenever a UNLV police officer makes a stop off of UNLV property.

Resolving the issue of whether the limited jurisdiction officer has made a proper arrest involves a two step process: 1. Is the officer within his jurisdiction; and 2. What is the effect of him being outside of his jurisdiction?

A prosecutor must carefully check the statutes and any agreements between the local and special police organizations to see if the limited jurisdiction officer is still within his jurisdiction. For example, UNLV police are subject to NRS 289.350, which grants a UNLV officer jurisdiction: (a) upon UNLV campus, "including that area to the center line of public streets adjacent to a campus; (b) When in hot pursuit of a violator leaving such a campus or area. . ." or in accordance with agreements with other police agencies providing the agreement is limited to a public street adjacent to the campus or for mutual assistance.

The LVMPD and UNLV police departments have a standing agreement allowing UNLV police to act in cases of emergency regardless of where the emergency occurs. Prosecutors should argue that stopping a car committing a moving traffic violation is always an emergency.

What is the effect of an officer making an arrest outside of his jurisdiction? Should an officer be outside his jurisdiction, this does not mean he cannot arrest persons. The general rule is an arrest made by an officer outside of his jurisdiction is valid if a private citizen could have made the arrest. State v. Harris, 382 S.E.2d 925 (S.C. 1989); U.S. v. Ible, 630 F.2d 389 (5th Cir. 1980); People v. Meyer, 379 N.W.2d 59 (Mich. 1985). The officer may be legally treated as a private citizen but the arrest is still valid.

G. FEDERAL PROPERTY

What if a defendant is arrested on federal property, such as an air force base, and turned over to State authorities? Unless the federal government has taken exclusive jurisdiction over the federal property, a State maintains concurrent jurisdiction to try violations of state law committed on federal property. Pendelton v. State, 103 Nev. 95, 734 P.2d 693

(1987). See also NRS 171.010 and State v. Williams, 932 P.2d 665 (Wash. 1997) (implied consent law applicable to military base).

II. CONTACTING THE DRIVER

Once the officer has stopped the vehicle, he will contact the driver. The driver may not refuse to roll down his window. Rinaldo v. State, 787 So.2d 208 (Fla. 2001):

> Every encounter with a stopped vehicle included a request for documentation and some preliminary questioning and observation for signs of alcohol impairment. . . . Motorists are neither expected nor privileged to refuse to obey these minimal necessary and legitimate demands at a valid roadblock.

The officer may compel the driver and/or the passengers to exit the vehicle. Pa. v. Mims, 434 U.S. 106, 98 S. Ct. 330 (1977) (driver), and Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882 (1997) / Cortes v. State, 127 Nev. 505, 260 P.3d 184 (2011) (passenger).

III. OBSERVATIONS OF THE DEFENDANT

When an officer initially contacts a driver, the officer will have a preliminary conversation with the driver. The officer will also usually observe that the driver exhibits signs of impairment. As a general rule, the driver need not be Mirandized before this conservation occurs and the officer is free to testify about how the defendant appeared.

A. INITIAL CONVERSATION

Upon contacting the driver, the officer will ask certain questions relating to the driver's identification and what has happened. Generally, these questions are not considered a custodial interrogation and are not subject to Miranda requirements.

Specifically, in Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984), the Supreme Court found routine questioning during a traffic stop did not arise to the level of a custodial interrogation. In Berkemer, a police officer stopped a vehicle he saw weaving in the roadway. Berkemer exhibited signs of intoxication and failed a field sobriety test. Berkemer was then asked if he had been using intoxicants. Berkemer admitted to drinking alcohol and smoking marijuana. Berkemer was arrested and given a chemical test. Berkemer argued that his questioning should be suppressed because he was not given his Miranda warnings. In rejecting Berkemer's claim, the Supreme Court found the questioning of Berkemer did not rise to the level of a custodial interrogation. In the absence of a custodial interrogation, no Miranda warnings are necessary.

The Berkemer court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 468 U.S. at 428. The Court concluded questioning as part of a traffic stop does not constitute custodial interrogation. Nevada has adopted the Berkemer rational. Dixon v. State, 103 Nev. 272, 737 P.2d 1162 (1987).

B. PLACING DEFENDANT IN A PATROL CAR AND/OR IN HANDCUFFS

During this portion of the investigation, the officer may place the defendant in a patrol car for safety reasons (accident scene, bad weather) or because the defendant is uncooperative. Placing the defendant into a police car does not automatically convert the questioning into a custodial interrogation but it is a factor the court will consider. In re: Joseph R, 76 Cal.Rptr.2d 887 (1998)(Joseph not subject to custodial interrogation even though he was placed in handcuffs and seated in a police car for five minutes because he was then released from the handcuffs, removed from the car, and questioned); State v. Warrell, 534 N.E.2d 1237 (Ohio 1987)(defendant was not subject to a custodial interrogation even though he was questioned about accident while seated in a patrol car); State v. Warrell, 534 N.E.2d 1237 (Ohio 1987)(defendant was not subject to a custodial interrogation even though he was questioned about accident while seated in a patrol car); Lamb v. State, 127 Nev. --, 251 P.3d 700, 706 (2011)(footnote 4: "Lamb concedes that no deceit or trickery was practiced on him and cites no authority for the proposition that a statement made to officers while in handcuffs is per se coerced (and ignores abundant contrary precedent).").

IV. SIGNS OF IMPAIRMENT

While the officer is conversing with the driver, the officer will typically observe signs or symptoms of impairment. These observations are not subject to Miranda because they do not involve testimonial acts, i.e. they do not involve a conversation between the officer and the driver. Pa. v. Muniz, 496 U.S. 582 (1990). An officer (and for that matter, a layperson) is competent to testify as to the fact that a driver appeared intoxicated. Crowe v. State, 84 Nev. 358, 362, 441 P.2d 90, 92 (1968)("Lay witnesses ... who are sufficiently trained and experienced, may testify at the discretion of the trial court relative to the use and influence of narcotics.") modified on other grounds by Tellis v. State, 84 Nev. 587, 590, 445 P.2d 938, 940 (1968); People v. Bowman, 827 N.E.2d 1062, 1073 (Ill. 2005); and Commonwealth v. Ragan, 652 A.2d 925, 928 (Pa. 1995).

Typically an officer will observe some of the following symptoms. Not all of these symptoms will be present in every case.

1. **Odor of alcohol or some other drug (usually marijuana)**: As set forth below, the odor of alcohol or a drug may be, by itself, enough to arrest the defendant for DUI. Naturally, an officer should not stop looking for symptoms simply because an odor is present. The defense may argue to the court that alcohol itself has no odor. This is technically true but the other mixes, etc., in alcohol do have a distinctive odor. Otherwise why could someone sniff a glass of wine before drinking it?

2. **Bloodshot watery eyes**: This clue may vary with the type of drug found.

3. **Poor balance**: Of course it is well known that alcohol affects a person's balance (falling down drunk). Balance can also include an inability to exit the vehicle.

4. **Slurred speech**: Again, a classic symptom of intoxication.

5. **Pupil size**: Certain drugs will have an affect on the user's pupils. Marijuana will cause dilated pupils as will hallucinogenic and central nervous system stimulants. Narcotic Analgesics will cause constricted pupils. (See DRE section below).

V. QUESTIONING THE DEFENDANT

After noting the driver has symptoms of impairment, an officer will typically question the driver about driving and/or intoxication issues. These questions are both a part of the pre-FST questioning and a part of a normal DUI investigation. Several legal issues can arise from these questions.

A. MIRANDA

As a general rule, questioning at the roadside is not a custodial interrogation so long as the questioning is of a general nature. In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), the Supreme Court found a suspect must be given his Miranda warnings before he is subject to a custodial interrogation. The rule in Miranda bars statements made by a defendant to government agents as a result of custodial interrogation. If the defendant is not in custody, or is not interrogated, there is no bar. Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711 (1977); Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931 (1987). Since the Miranda decision, the Supreme Court has determined when a "custodial interrogation" occurs. Specifically, in Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138 (1984), the Supreme Court found that routine questioning during a traffic stop did not arise to the level of a custodial interrogation. See also, Dixon v. State, 103 Nev. 272, 274, 737 P. 2d 1162, 1164 (1987) (citing Berkemer, "Dixon challenges the trial court's failure to suppress evidence obtained without Miranda warnings. No such warning is necessary before reasonable questioning and administration of field sobriety tests at a normal roadside traffic stop."); State v. Taylor, 114 Nev. 1071, 968 P.2d 315, 323 (1998)("An individual is not in custody for purposes of Miranda where police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process or where the individual questioned is merely the focus of a criminal investigation.").

B. MUST THE DEFENDANT ANSWER THE OFFICER'S QUESTIONS?

A defendant has a right not to incriminate himself and his refusal to answer an officer's questions may not be used against him in court. A person lawfully stopped by the police must identify himself but need not provide any further information. Hiibel v. Nevada, 542 U.S. 177, 124 S. Ct. 2451 (2004). See NRS 171.123(3) ("Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace

officer"). However, a defendant's refusal to take FSTs may be admissible against him. (See below).

C. QUESTIONING AT THE HOSPITAL

Sometimes, the officer will question the defendant at the hospital because the defendant has been injured in a collision. Questioning at the hospital where the defendant cannot leave is not a custodial interrogation simply because the defendant cannot leave the hospital. State v. Cooper, 809 P.2d 515 (Idaho 1991); People v. Milhollin, 751 P.2d 43 (Colo. 1988); Comm. v. Ellis, 549 A.2d 1323 (Pa. 1988); Wofford v. State, 952 S.W.2d 646, 656-57 (Ark. 1997) ("We agree with the Supreme Court of Delaware that there is no per se 'hospital rule' in a custody inquiry because each case must be decided on its own facts. In the absence of other indicia of custody, we cannot say that Ms. Wofford's health-related confinement alone produced a custodial situation because her confinement was not the result of police compulsion.").

D. ADMISSIBILITY OF A DEFENDANT'S CONFESSION: CORPUS DELICTI

Frequently a defendant will make admissions about his intoxication and/or his driving. These statements are admissible as party admissions. NRS 51.035(3) (a). Sometimes, the defense will argue the defendant's admissions are inadmissible because they violate the corpus delicti rule (CDR). The State should respond either the CDR does not apply at all or the CDR has been satisfied by other evidence.

The CDR or "body of the crime" rule is concerned with the elements of the crime, i.e. what must be shown to establish an offense occurred. Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996). The purpose of the corpus delicti rule is to preclude conviction of a defendant based solely on his confession; there must be some evidence, independent of the confession that a crime occurred. Domingues, supra. The necessary evidence may be direct, circumstantial, or a combination of both. Sheriff v. Larsgard, 96 Nev. 486, 611 P.2d 625 (1980); Harrison v. State, 96 Nev. 347, 608 P. 2d 1107 (1980). The evidence need not show the corpus delicti beyond a reasonable doubt; slight or prima facie evidence is sufficient. Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996) (overruled on other grounds in Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)). Put another way, the corpus delicti may be shown by evidence which creates an inference of a criminal agency even though that same evidence may have a non-criminal inference. Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996); Myatt v. State, 101 Nev. 761, 763, 710 P.2d 70 (1985).

In the context of a DUI case, the State need not present evidence independent of the defendant's admission that he was driving, to prove that he was, in fact, driving. This is because the identity of the driver is not an element of the CDR. However, even if the

CDR was applicable, the State can usually present sufficient evidence, independent of the defendant's admission, to meet the CDR and permit the admission of the defendant's statement that he was driving.

If the defendant argues the State has no independent evidence that he was driving aside from his admission, the prosecution should contend no such evidence is necessary. Although no Nevada case has considered the corpus delicti of a DUI, Nevada law does provide the identity of the perpetrator is not an element of the corpus delicti of a crime. In Sefton v. State, 72 Nev. 106, 295 P.2d 385 (1956), the defendant confessed to murdering someone. At trial, the defendant argued that his confession was inadmissible because the corpus delicti of the crime of murder included the identity of the murderer. The Supreme Court rejected the defendant's claim:

> We reject the contention of appellant made in reliance on State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948), that proof of the corpus delicti must include not only the element of the death of the deceased and that it was by a criminal agency, but a third element, namely, the identification of the defendant as the criminal agency. Nor need the proof of the corpus delicti 'be as full and conclusive as would be essential if there was not confession to corroborate it. . . .
> 'The corroborating evidence need not be such as to connect accused with the crime'. Hundreds of cases in support of this rule are cited in the note, . . . Not only was the corpus delicti proved aliunde the confession, but the same received ample corroboration in the defendant's leading the officers to the scene of the crime, the correspondence of the wounds in the body with those described in the confession, ..."

Id., 72 Nev. at 110. (Teeter was overruled in part on other grounds by Application of Wheeler, 81 Nev. 495, 406 P.2d 713 (1965)).

Sefton stands for the general proposition that the identity of the criminal is not a part of the CDR of murder. In the context of a DUI case, several other states have held the identity of the driver is not an element of the crime of DUI. See Folk v. State, 797 S.W.2d 141 (Tex. 1990):

> The corpus delicti of driving while intoxicated is that someone drove or operated a motor vehicle in a public place while intoxicated. Appellant argues that the corpus delicti was not proved in this cause because there is no evidence other than his extrajudicial statements tending to prove that he was driving the car. This argument confuses the evidence necessary to prove the guilt of a defendant with that necessary to prove the corpus delicti. Provided there is

other evidence that a crime was committed, the identity of the defendant as the perpetrator may rest alone upon his confession.

Id., 797 S.W.2d at 144, citations omitted. See also City v. Portman, 490 S.E.2d 613 (S.C. 1997); State v. Stimmel, 800 S.W.2d 156 (Mo. 1990); State v. Knoefler, 563 P.2d 175 (Utah 1977); State v. Superior Court, 933 P.2d 1215 (Ariz. 1996); State v. Girdley, 957 S.W.2d 520 (Mo. 1997).

If the court should conclude the identity of the driver is an element of the CDR, then the prosecution should point out that evidence, in addition to the defendant's admissions, shows he was the driver. This evidence can include the following:

1. Defendant Is Owner of the Car

If the defendant is the registered owner of the car involved in the accident, the corpus delicti has been sufficiently shown to admit his statement. In Privette v. Faulkner, 92 Nev. 353, 550 P.2d 404 (1976), a dispute arose as to who was driving a car at the time of an accident. The court held the registered owner of the car was presumed to be the driver. If the owner/driver presumption is sufficient for a jury to find a defendant was the driver of the car, then it must be sufficient to show the CDR. See also State v. Sjogren, 862 P.2d 612 (Wash. 1993). Indeed, some courts have held the corpus was shown when the vehicle involved in the accident was registered to a roommate of the defendant. People v. Komatsu, 261 Cal. Rptr 681 (1989); Folk v. State, 797 S.W.2d 141 (Tex. 1990); People v. Booden, 69 N.Y.S.2d 185, 505 N.E.2d 598 (N.Y. 1987) (corpus shown when car registered to defendant's father).

2. At Scene of Accident

When a defendant admits to being the driver and is present at the accident scene, the defendant's presence at the accident scene is sufficient to establish the corpus delicti. Reagan v. State, 590 N.E.2d 640 (Ind. 1992); State v. Gridley, 957 S.W.2d 520 (Mo. 1997); Comm. v. Hogan, 584 A.2d 347 (Pa. 1990); Claxton v. City, 421 S.E.2d 891 (Va. 1992); People v. Garcia, 197 Cal. Rptr. 277 (1983).

3. Injuries to Defendant

Where the police officer observed visible injuries to the defendant and the defendant's statements about the damage to the vehicle or his injuries are consistent with those injuries, the defendant's injuries are sufficient corroboration of his statement that he was driving the vehicle involved in the accident. Comm. v. Jones, 364 A.2d 368 (Pa. 1976); People v. Chavez, 674 N.E.2d 156 (Ill. 1996); Bremerton v. Corbett, 723 P.2d 1135 (Wash. 1996); Henson v. State, 422 S.E.2d 265 (Ga. 1992).

4. Description of Damage to Car

Where the defendant describes the damage to the vehicle involved in the collision and the damage on the vehicle matches the defendant's description of the accident, the "matching" damage to the car is sufficient to corroborate the defendant's admission that he was driving. In Sefton, supra, the Nevada Supreme Court held the corpus was shown in a murder case, in part, because the defendant described the injuries to the victim. The injuries on the victim were consistent with those described by the defendant. In a DUI case, if the damage to the car involved in the collision is consistent with the defendant's explanation of how the collision occurred, the CDR has been met. See also State v. Garrett, 829 S.W.2d 622 (Mo. 1992) (corpus shown when defendant's description of accident matched position of car at scene).

5. Defendant Had Keys

The defendant either had the keys to the vehicle in his possession or took those keys from the Officer. Accepting or maintaining dominion or control over the keys is evidence the defendant drove the car. Henson, supra; People v. Komatsu, 261 Cal. Rptr. 681 (1995); Clark v. State, 512 N.E.2d 223 (Ind. 1987) (corpus shown when defendant had keys even though defendant was found one mile from accident); State v. Litterell, 800 S.W.2d 7 (Mo. 1990) (corpus shown when defendant removing personal items from car).

VI. FIELD SOBRIETY TESTS

After questioning the driver and observing possible signs of impairment, an officer may ask a defendant to take FSTs. Neither the Fourth nor Fifth Amendments is violated by such a request. Pa. v. Muniz, 496 U.S. 582, 110 S. Ct. 2638, 110 L.Ed.2d 528 (1990) (most portions of FSTs are not subject to the Fifth Amendment because they are nontestimonial); "We therefore hold that where an officer's reasonable suspicion that a driver is intoxicated justifies making a traffic stop, field sobriety tests may be administered". Dixon v. State, 103 Nev. 272, 273, 737 P.2d 1162, 1164 (1987), State v. Ferreira, 988 P.2d 700, (Idaho App. 1999) (officer may give defendant FSTs if officer has reasonable suspicion that defendant is DUI); Arthur v. State, 216 S.W.3d 50 (Tex. 2007) (Fourth Amendment not violated by having defendant do FST because police had reasonable suspicion that defendant was DUI); Blasi v. State, 893 A.2d 1152 (Md.App. 2006). A defendant also has no right to counsel during field sobriety tests. Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979) (superseded by statute on another issue); State v. Erickson, 802 P.2d 111, 115 (Utah App. 1990).

A. BRIEF HISTORY OF FSTs

FSTs have been a part of DUI investigations for a long time. In 1975, the National Highway Traffic Safety Administration (NHTSA) began a lengthy series of studies to determine which FSTs were the most accurate. These studies concluded the horizontal gaze nystagmus test (HGN), the walk and turn test (WAT), and the one leg stand test (OLS) were the most accurate tests in determining impairment. Initially, the testing was done using a 0.10 blood alcohol level but the tests were later validated with a 0.08 blood

alcohol level. See Development of a Standard Field Sobriety Test at ww.nhtsa.gov/people/injury/alcohol/SFST/introduction.htm. See also, Appendix One: Redfairn and Nelson "THE ABCs OF FSTS. A brief summary of field sobriety tests in DUI cases.

The detailed instructions for each test are listed on the FST worksheet used by the police. In a nutshell, the HGN test is administered by having the defendant follow a pen with his eyes without turning his head. The WAT is performed by walking down a line heel to toe. The OLS is done by standing on one foot and counting out loud.

B. WHEN MAY THE POLICE ADMINISTER FSTs?

Nevada and other courts have fairly universally found the police may ask a defendant to take FSTs if the police have reasonable suspicion the defendant is impaired. See Dixon v. State, 103 Nev. 272, 273, 737 P.2d 1162, 1164 (1987) "We therefore hold that where an officer's reasonable suspicion that a driver is intoxicated justifies making a traffic stop, field sobriety tests may be administered." See also State v. Ferreira, 988 P.2d 700, 706-707 (Idaho App. 1999), where the court concluded the police may give a person FSTs if the police have a reasonable suspicion the person is driving under the influence:

> To determine whether a search conducted within an investigatory detention is reasonable and, therefore, constitutionally permissible, the Court must balance the state's interest in conducting the search against the level of intrusion into an individual's privacy that the search entails. As we have stated above, the state's interest in stopping drunk driving is compelling, and the protection of its citizens from life-threatening danger is of paramount concern. An individual's privacy is certainly intruded upon by the administration of field sobriety tests. However, the state's interest is overwhelming and outweighs the intrusion into a driver's privacy and, thus, we hold that field sobriety tests are reasonable methods of conducting an investigation, based on specific and articulable facts that a driver is operating his or her vehicle contrary to I.C. § 18-8004.
>
> Moreover, this Court has previously held that the Fourth Amendment requires only reasonable suspicion that a driver is driving while under the influence before an officer may request a driver to perform field sobriety tests. Therefore, we hold again today, based on established precedent and thorough analysis, that the Fourth Amendment to the United States Constitution requires only that an officer possess reasonable suspicion that a driver is operating a vehicle contrary to I.C. § 18-8004 before field sobriety tests may be administered.

See also Arthur v. State, 216 S.W.3d 50 (Tex. 2007) (Fourth Amendment not violated by having defendant do FST because police had reasonable suspicion defendant was DUI); Blasi v. State, 893 A.2d 1152, 1165-66 (Md. 2006) and the cases cited therein.

C. ADMISSIBILITY OF FST EVIDENCE

FST evidence has been held to be admissible in the overwhelming majority of states. Some states admit FST evidence as circumstantial proof of intoxication (i.e. falling down drunk). Horn v. U.S., 185 F.Supp.2d 530 (D. Md. 2002)(Horn is a decision with which all prosecutors should be familiar; although, as set forth below, the court came to the wrong conclusion, the court did extensively summarize various State decisions regarding FSTs); State v. Ferrer, 23 P.3d 744, 760-62 (Haw. 2001)("The tests involving coordination (including the walk-and-turn and the one-leg-stand) are probative of the ability to drive, as they examine control over the subject's own movements."). There is some split as to whether FSTs are admissible as scientific evidence of impairment. Horn, supra, holds FSTs are admissible as evidence of impairment but the officer should not be permitted to testify in scientific terms such as "standardized tests", "errors", or "the defendant failed the test". Other courts hold that such terms are permissible. McRae v. State, 152 S.W.3d 739 (Tex. 2004). (For a discussion of Horn and its errors see Appendix Two). Until the Nevada Supreme Court rules on this issue, prosecutors should admit evidence of FSTs as proof of impairment and have the officer testify as to what clues he is looking for and whether the defendant failed the FSTs.

1. Arresting Without Giving FSTs

Sometimes an officer will be unable or unwilling to gather proof of impairment beyond symptoms of impairment. As a general rule, an officer is not required to have a defendant perform field sobriety tests. Further, probable cause to arrest can be shown simply from the defendant's bad driving and objective symptoms of impairment. See Breithaupt v. Abram, 352 U.S. 432, 433, 77 S. Ct. 408, 409 (1957) (traffic collision combined with odor of alcohol and whiskey bottle in car provided probable cause to arrest defendant for DUI); Schmerber v. California, 384 U.S. 757, 759, 86 S. Ct. 1826, 1830 (1966) ("Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while 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.'"); State v. Torres, 105 Nev. 558, 779 P.2d 959 (1989)(poor balance, an odor of alcohol, and bloodshot eyes were sufficient cause to arrest defendant without giving FSTs); State, Dept. of Motor Vehicles and Public Safety v. McLeod, 106 Nev. 852, 801 P.2d 1390 (1990)(officer had sufficient cause to give person chemical DUI test when officer noted person had bloodshot eyes and an odor of alcohol about his person); Wright v. State, Dept. of Motor Vehicles, 121 Nev. 122, 110 P.3d 1066 (2005)(bloodshot eyes and odor of alcohol are not the only factors police may consider in determining a person is intoxicated).

2. Arresting Even If Defendant Passes Some or All of the FSTs

Sometimes a defendant will take FSTs but will pass some or all of them. If the officer has evidence of impairment, he may arrest the defendant even if the defendant passes some or all of the FSTs. State v. Webster, 754 A.2d 976, 978 (Me. 2000)("While performance on field sobriety tests is relevant to determinations of both probable cause and ultimate guilt or innocence, such performance of the field sobriety tests does not control either issue."); Craze v. Comm., 533 A.2d 519 (Pa. 1987); Richie v. Dir., 987 S.W.2d 331 (Mo. 1999); U.S. v. Coleman, 750 F. Supp. 191 (W. Va. 1990); State v. Grier, 791 P.2d 627 (Alaska 1990)(defendant properly arrested for DUI even though he passed all FSTs except for HGN test as HGN test is most accurate FST); Comm. v. Arizini, 419 A.2d 643 (Pa. 1980)(police had grounds to arrest even though defendant passed all FSTs); State v. Groboski, 390 N.W.2d 348 (Minn. 1986); State v. DeWhitt, 727 P.2d 151 (Or. 1986); City v. Elmourabit, 373 N.W.2d 290 (Minn. 1985).

3. FSTs Are Not Done Precisely as Listed in the FST Manual

Sometimes the officer may vary from the FST manual when giving the FSTs. For example, an officer will frequently have a defendant use an imaginary line for the WAT. As a general rule, the failure to precisely follow the FST instructions goes to the weight to be assigned to the test and not its admissibility. Hawkins v. State, 476 S.E.2d 803 (Ga. 1996) (error in giving HGN test goes to weight not admissibility); State v. Thomas, 420 NW 2d 747 (N.D. 1988). NHTSA has also recognized that errors in the FSTs go to the weight to be afforded the tests and not their admissibility. "Officers always should fully comply with NHTSA's guidelines when administering the SFSTs. However, if deviations occur, officers and the courts should understand that any deviation from established procedures relates to the weight of the evidence, not its admissibility." Jack Stuster, PhD, CPE. *Development of a Standardized Field Sobriety Test*. Department of Transportation, National Highway Transportation Safety Administration. [Nov 2001] <http://www.nhtsa.gov/people/injury/alcohol/SFST/index.htm. In the most recent SFST manual (2013), the following language appears with regard to errors in the test:

> The instructor manual provides, in the preface: The procedures outlined in this manual describe how the Standardized Field Sobriety Tests (SFSTs) are to be administered under ideal conditions. We recognize that the SFSTs will not always be administered under ideal conditions in the field, because such conditions will not always exist. Even when administered under less than ideal conditions, they will generally serve as valid and useful indicators of impairment. Slight variations from the ideal, i.e., the inability to find a perfectly smooth surface at roadside, may have some effect on the evidentiary weight given to the results. However, this does not necessarily make the SFSTs invalid.

One court has found the failure to strictly follow the NHTSA manual requires suppression of the FSTs. State v. Homan, 732 N.E.2d 952 (Ohio 2000). The Homan decision is rejected by most courts. State v. DePompei, 773 N.E.2d 626 (Ohio 2002), and has been superseded by the Ohio legislature, which found errors in FSTs go to the weight to be given the FSTs and not their admissibility. See State v. Bish, 947 N.E.2d 257 (Ohio 2010) and Ohio Revised Statute 4511.19.

4. Defendant Refuses to Take FSTs

Sometimes a defendant will refuse to take FSTs. There is no practical way to force a defendant to take FSTs but the refusal to take the tests may be considered by the officer and a jury as consciousness of guilt. In Pa. v. Muniz, 496 US 582, 110 L.Ed.2d 528 (1990), the U.S. Supreme Court determined the vast majority of FSTs are non-testimonial in nature. The Court based its decision on the fact that FSTs primarily test a person's coordination and balance and coordination and balance are non-testimonial. Virtually every court that has addressed this issue post-Muniz has held that a refusal to take FSTs is admissible as evidence of guilt. State v. Hoenscheid, 374 N.W.2d 128 (S.D. 1984), State v. Sup Ct., 742 P.2d 286 (Ariz. 1995), State v. Wright, 867 P.2d 1214 (N.M. 1994) and State v. Washington, 498 S.2d 136 (La. 1986).

5. Admission of the NHTSA Manual to Impeach the Officer

A defense attorney might seek to admit the NHTSA FST manual into evidence to impeach the officer. In U.S. v. Van Griffith, 874 F.2d 634 (9th Cir. 1989), the court determined the NHTSA manual was admissible as a party admission. However, the NHTSA manual was produced by the United States government who is not a party to a case brought by the State of Nevada. If the officer was trained on a manual other than the NHTSA manual, that manual should be admissible but the NHTSA manual is not. Prosecutors should be sure they have a copy of their police department's manual and go over the same with the officer prior to trial.

Frequently, defense attorneys will bring in an old manual and try to impeach the officer with it. Prosecutors should be sure they have the most up to date manual which will probably be different than the older manual. For example, older manuals said that the WAT should be done on a straight line. The 2013 manual states: "Whenever possible" test should be conducted on a reasonable dry, hard, level, non-slippery surface. Removed from the manual – "Requires a designated straight line" Still says: "Recent field validation studies have indicated that varying environmental conditions have not affected a subject's ability to perform this test."

Student Manual Session 8, pg. 4.

6. Non-standard FSTs

Sometimes a police officer may give FSTs other than the three standardized tests. Usually this is done because the defendant is unable to perform the standardized tests. Although no Nevada case has addressed the issue, other states have held non-

standardized tests are admissible. Com. v. Drake, 681 A.2d 1357 (Pa., 1996); State v. Walker, 777 N.E.2d 279 (Ohio 2002).

7. Using FSTs to Establish an Alcohol Level

Studies of FSTs, particularly the HGN test, have found performance on the FSTs can be used to estimate a certain blood alcohol level. Courts will usually not allow an officer to testify as to a defendant's blood alcohol level based on his performance on the FSTs. "[M]ost of the states that have ruled that HGN evidence is admissible have not allowed it to be used to prove specific BAC but instead only as circumstantial proof of intoxication or impairment." U.S. v. Horn, 185 F.Supp.2d 530, 551 (D. Md. 2002).

8. Preliminary Breath Test

As a part of the FSTs, an officer may chose to give the defendant a preliminary breath test (PBT). The Committee on Testing for Intoxication may create a list of approved PBTs. NRS 484C.610. The PBTs must be calibrated at least once a year. NAC 484C.070. The use of PBTs is governed by NRS 484C.150, which provides:

> 1. Any person who drives or is in actual physical 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 a preliminary test of his or her breath to determine the concentration of alcohol in his or her breath when the test is administered at the direction of a police officer at the scene of a vehicle accident or collision or where the police officer stops a vehicle, if the officer has reasonable grounds to believe that the person to be tested was:
>
> (a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance; or
>
> (b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430.
>
> 2. If the person fails to submit to the test, the officer shall seize the license or permit of the person to drive as provided in NRS 484C.220 and arrest the person and take him or her to a convenient place for the administration of a reasonably available evidentiary test under NRS 484C.160.
>
> 3. The result of the preliminary test must not be used in any criminal action, except to show there were reasonable grounds to make an arrest.

The PBT is only admissible to show cause to arrest the defendant. Because the validity of an arrest is not a matter for a jury, a clever defendant will probably be able to exclude the PBT result at trial. However, this also means a prosecutor can preclude a defendant from introducing the PBT result at trial.

A refusal to take a PBT is admissible at trial as evidence of guilt. NRS 484C.240. Failing a PBT results in a 90 day license suspension. NRS 484C.210 but, oddly, there is no DMV penalty for refusing a PBT test.

9. Arrest

At the conclusion of the FSTs, the officer will arrest the defendant. Normally, an officer can only arrest for a misdemeanor if the misdemeanor occurs in the officer's presence. NRS 171.124. However, an officer may arrest for DUI or traffic offenses even though those crimes did not occur in the officer's presence so long as the officer has probable cause to arrest. NRS 484A.710.

Sometimes a defense may seek to suppress evidence by arguing the officer had to immediately arrest a defendant when the officer had probable cause to do so. This argument is based on NRS 171.1231, which provides in pertinent part: "At any time after the onset of the detention pursuant to NRS 171.123, the person so detained shall be arrested if probable cause for an arrest appears." However, there is no constitutional right to be arrested. Hoffa v. U.S., 385 U.S. 293, 87 S. Ct. 408, 17 L.Ed.2d 374 (1966). See also Graves v. State, 112 Nev. 118, 129912 P.2d 234 (1996)("Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, . . ." [Citing Hoffa]; State v. Autry, 103 Nev. 552, 746 P.2d 637 (1987).

VII. IMPLIED CONSENT

Once an officer has completed the FSTs, he will arrest the defendant for DUI. At this point the implied consent law comes into play (although arrest need not precede the implied consent warning). The implied consent law is set forth in NRS 484C.160, (Appendix 4) which provides that everyone who drives or is in APC has consented to a test of their blood, breath or urine to determine their alcohol or drug content if the officer has reasonable grounds to believing that the person was driving or in actual physical control while under the influence of alcohol, drugs or both. (Note that if marijuana is suspected, the officer may request a blood test: see below) NRS 484C.160 (1). If a person refuses to take a test, they must be told that their license will be revoked. NRS 484C.160(2). If a person is unconscious the officer may have the blood drawn. NRS 484C.160(3). (However this should never be done without obtaining a warrant: see below). A person who is afflicted with hemophilia or "with a heart condition requiring the use of an anticoagulant" is exempt from a blood test but must take a breath or urine test. NRS 484C.160(4). If the arrestee is charged with a first alcohol offense, he has a choice or a blood or breath test. However, if he chooses to take a blood test instead of a breath test, and the chemist who performs the blood test testifies at trial or DMV, then the defendant must pay fees to have the chemist attend court (a minimum of $150). NRS 484C.160(5). If a person is suspected of being under the influence of a controlled or

prohibited substance, he has a choice of a blood or urine test. NRS 484C.160(6). If a person refuses to consent to a test, the police can obtain a warrant to compel a blood draw. NRS 484C.160(8). See section below relating to refusal to take a test for more details. No more than three blood samples may be taken during the 5-hour period immediately following the time of the initial arrest. NRS 484C.160(5). If an arrestee is less than 18 years of age the officer shall make a "reasonable attempt to notify the parent, if known." NRS 484C.160(8).

Several issues can arise in an implied consent context.

A. MUST THE OFFICER ADVISE THE ARRESTEE OF THE IMPLIED CONSENT LAW?

There is no constitutional requirement that a defendant be advised of the implied consent law. Nelson v. City of Irvine, 143 F.3d 1196, 1203 (9th Cir. 1998): "[T]he implied consent law does not create any constitutional rights to have performed or even be informed of, any of the three testing options." An officer may ask for express consent without invoking the implied consent law. If the defendant agrees to take a requested test, the implied consent law does not apply. Davis v. State, 99 Nev. 25, 656 P. 2d 855 (1983).

If the implied consent advisement is done, the defendant must be told that the failure to consent to a test results in a loss of license. NRS 484C.160(2).

An officer may ask an arrestee to submit to a test and if the arrestee refuses, the officer should then advise the arrestee that the failure to submit to a test may result in the loss of the privilege to drive for a minimum of one year. This loss of license is consecutive to any loss of license for having a blood alcohol level above .08 or having controlled or prohibited substances in the blood.

B. WHAT IF AN ARRESTEE WANTS HIS OWN TEST?

An arrestee has a right to have his own test performed after the State's test is complete. However, the police have no obligation to inform a defendant that he has a right to an independent test. Robertson v. State, 109 Nev. 1086, 863 P.2d 1040 (1993), overruled on other grounds by Krauss v. State, 116 Nev. 307, 998 P.2d 163 (2000).

C. WHAT IF ARRESTEE WANTS BREATH BUT MACHINE IS UNAVAILABLE?

The implied consent law provides a person may choose to take a breath test but if the breath test is not "reasonably available," the person must take a blood test. "Reasonably available" is not defined in NRS 484C.160 but several other courts have addressed this issue. In Herring. Comm., 507 S.E.2d 638 (Va. 1994), the court held the police do not need to take the arrestee to another jail if the breath machine at the first jail was not working. In Mason v. Comm., 425 S.E.2d 544 (Va. 1993) and Talley v. Comm, 431

S.E.2d 65 (Va. 1993), the courts held a defendant must take a blood test if no breath operator is available and that so long as the State did not act in bad faith, the State is not required to have a breath operator available.

D. HEART CONDITIONS AND ANTICOAGULANTS

Sometimes a defendant will argue after the blood draw that he was wrongly compelled to take a blood test because he was afflicted with a heart condition or he was taking an anticoagulant. NRS 484C.160(3) provides, "Any person who is afflicted with hemophilia or with a heart condition requiring the use of an anticoagulant as determined by a physician is exempt from any blood test which may be required pursuant to this section but must, when appropriate pursuant to the provisions of this section, be required to submit to a breath or urine test."

In order to invoke NRS 484C.160, the defendant must tell the officer prior to the test that he is a hemophilia or taking an anticoagulant. Typically, an officer will ask a defendant if he is taking medication and the defendant will list several substances. An officer is not required to memorize all anticoagulant prescription medications so unless the defendant specifically states that his drug is an anticoagulant for a heart condition, the officer need not inquire further.

E. WHEN DOES THE DEFENDANT HAVE A CHOICE OF TESTS?

If a defendant is charged with a DUI alcohol offense he has the ability to select a blood or breath test if alcohol is suspected (however a defendant who selects blood must pay the fees of the chemist who testifies at his trial [minimum of $150], NRS 484C.160(5)(b)). If a defendant is suspected of DUI drugs (except marijuana), he may select a blood or urine test. If a defendant is suspected of being under the influence of marijuana, the officer can ask for a blood test: urine testing results are inadmissible in a prohibited substance/marijuana case so an officer should always demand a blood test if marijuana is suspected and obtain a warrant if the defendant refuses).

F. ATTORNEYS AND MIRANDA IN IMPLIED CONSENT CASES

A defendant has no right to consult with an attorney before selecting a chemical test or being forced to submit to a chemical test. McCharles v. DMV, 99 Nev. 831, 673 P.2d 488 (1983). Likewise a defendant is not entitled to receive Miranda warning before he selects a test. S.D. v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983), State v. Smith, 105 Nev. 293, 774 P.2d 1037 (1989).

G. REFUSAL TO TAKE A TEST

Pursuant to Nevada law, a defendant may not refuse to take a chemical test. NRS 484C.160(1). An initial refusal to take a chemical sobriety test is final; the suspect cannot "cure" this refusal by making a subsequent request to take a test. Schroeder v. State, Dep't of Motor Vehicles, 105 Nev. 179, 182, 772 P.2d 1278, 1280 (1989).

A refusal can arise from the defendant's statement or from the defendant's actions. It is irrelevant S.D. v. Neville if the defendant's inability to take a test is intentional or based on physical factors. Garvin v. State, 96 Nev. 827, 619 P.2d 534 (1980) (inability to urinate constitutes a refusal to do test).

If a defendant refuses to take a test his refusal to do so is admissible against him. NRS 484C.240 and South Dakota v. Neville, 459 U.S. 553 (1983).

On April 17, 2013, the U.S. Supreme Court decided Missouri v. McNeely, - U.S. -, 133 S. Ct. 1552 (2013). McNeely was a case in which the State of Missouri argued that a DUI blood draw was always subject to the exigent circumstances exception to the warrant requirement of the Fourth Amendment because the body is always metabolizing alcohol. The U.S. Supreme Court held that every DUI case is not automatically subject to the exigent circumstances exception to the warrant requirement. The Court held that exigent circumstances may permit a warrantless blood draw but those circumstances must be based on something more than the fact that body is metabolizing alcohol.

The McNeely decision did not specifically deal with implied consent laws but the Nevada Supreme Court found that, based on McNeely that a portion of Nevada's old implied consent law was unconstitutional. In Byars v. State, 130 Nev. Adv. Op. 85, 336 P.3d 939 (2014), the court determined that NRS 484C.160(7) which permitted the police to force a blood draw without a warrant if a defendant refused to take a test was unconstitutional. (NRS 484C.110(7) was amended in 2015). The court concluded that, because McNeely found that the dissipation of alcohol did not create a per se warrant exception, the implied consent law could not constitutionally allow a warrantless blood draw if a defendant refused. The court did find that, if a person refused to take a test, the police could obtain a warrant to allow a blood draw. The court also concluded that, because the NHP trooper acted in good faith in drawing Byar's blood without a warrant, Byar's test result would not be suppressed.

Finally, in 2016, the US Supreme Court decided Birchfield v. North Dakota, - U.S. -, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). Birchfield addressed the validity of criminalizing a refusal to take a chemical test. The Court found that a breath test was much less intrusive than a blood test so that the refusal to take a breath test when asked to do so could be prosecuted as a criminal offense. However, because a blood test was far more intrusive, the failure to submit to a blood test could not be criminalized. The Court did uphold administrative penalties for a refusal i.e. a license revocation. Nevada does not impose a criminal penalty for a refusal so Birchfield should have a minimal effect on our cases.

McNeely/Byars have left many questions unanswered. For example, how can a defendant submit to a test if he is too drunk to give voluntary consent? Also, does an exigency exist if obtaining a warrant will take longer than two hours? These questions will eventually have to be answered by Nevada courts.
In response to McNeely/Byars, Nevada's implied consent law was amended in 2015. The new implied consent law relating to refusals provides as follows:
1. The police may obtain a warrant if a person refuses to take a test, 2. If a person refuses to take a test they will lose their license one year; (or three years, if their license had been revoked within the last seven years for failure to submit to a test). This revocation is in addition to any revocation for having a .08 or more in their blood or for having controlled or prohibited substances in their blood. Thus a driver who refuses a test and has a .08 or more will lose their license for a minimum of 15 months. 3. If a person refuses to take a test under the implied consent law, the police must tell the person that their license will be revoked. It is probably best for the police to tell the person that their license will be revoked for at least one year. (In my opinion, these changes do not prevent an officer from first requesting a test. If the person refuses then the implied consent law comes into play and the person would have to be advised that they will lose their license if they continue to refuse). 4. A person will have their license revoked if they have a detectable amount of a controlled or prohibited substance in their blood unless they have a prescription for the controlled substance or a medical marijuana card. Note that the medical marijuana card must be from the State of Nevada. Note also that this exception does not apply to a refusal. A person who refuses a test will lose their license for one year even if they have a prescription or a MMJ card, 5. The police may draw blood up to three times in a 5 hour period.

Based on the new implied consent law, prosecutors should advise their police departments as follows: 1. Ask a defendant to submit to a blood or breath test, 2. If the defendant refuses, advise the defendant of the consequences of a refusal, 3. Do not tell a defendant that a warrant will automatically issue: instead tell the defendant that a warrant may be applied for, 4. If the defendant continues to refuse obtain a warrant.

A refusal can consist of affirmatively stating "I refuse" or it can take the form of conduct. Department of Motor Vehicles v. Jenkins, 99 Nev. 460, 663 P.2d 1186 (1983) (Failure to complete test, even if done in good faith, constitutes a refusal to do the test). Once a defendant refuses they cannot "cure' their refusal. Schroeder v. Department of Motor Vehicles & Pub. Safety, 105 Nev. 179, 772 P.2d 1278, 1989 (1989) Police officers should be encouraged to do the test if the defendant quickly "cures" his refusal even though they are not mandated to do so).

H. INTERPRETER FOR IMPLIED CONSENT

Most officers will eventually encounter a situation where the defendant either claims not to speak English or legitimately does not do so. With regard to the implied consent law,

the police are not required to provide the defendant with an interpreter. Comm. v. Mordan, 615 A.2d 102 (Pa. 1992); State v. Bishop, 957 P.2d 369 (Kan. 1998); State v. Hurban, 261 N.E.2d 290 (Ohio 1970); Yohoyama v. Comm., 356 N.W.2d 830 (Minn. 1984).

I. WHAT IF THE DEFENDANT IS UNCONSCIOUS?

Sometimes an officer may be confronted with a defendant who is unconscious. Obviously, reading any implied consent information to an unconscious person is pointless. While NRS 484C.160(3) does allow the blood on an unconscious person to be drawn the Birchfield decision makes it clear that a warrant should be obtained unless exigent circumstances apply.

J. COERCION AND THE IMPLIED CONSENT LAW

A defendant may argue that he was coerced into taking a test because he was told that he was required to take chemical test. To date no published opinion has held that it is coercive to tell a defendant that he must take a test and that the police can obtain a warrant if he refuses to do so. See People v. Harris, 234 Cal. App. 4th 671, 689, 184 Cal. Rptr. 3d 198, 212-213 (Cal. 2015): "We agree with Brooks and Moore that a motorist's submission to a chemical test, if freely and voluntarily given, is actual consent under the Fourth Amendment. That the motorist is forced to choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist's submission to be coerced or otherwise invalid for purposes of the Fourth Amendment." See also State v. Brooks, 838 N.W.2d 563, 570, 572-73 (Minn. 2013) [Brooks and Harris were cited with approval in Byars] and State v. Moore, 318 P.3d 1133, 1138 (Or. 2013): "Moreover, it is difficult to see why the disclosure of accurate information about a particular penalty that may be imposed—if it is permissible for the state to impose that penalty—could be unconstitutionally coercive. Rather, advising a defendant of the lawful consequences that may flow from his or her decision to engage in a certain behavior ensures that that defendant makes an informed choice whether to engage in that behavior or not. . . . Of course, accurately advising a defendant of a lawful penalty that could be imposed may well play a role in the defendant's decision to engage in the particular behavior, but that does not mean that the defendant's decision was "involuntary."

The Nevada Supreme Court has held that a defendant is not coerced even if he is misadvised of the implied consent law. The question is was the consent voluntary not whether the officer's recitation of the implied consent law was letter perfect:

> The district court found that based on the totality of the circumstances, Hernandez gave voluntary consent to search. Under the facts of this case, this conclusion was not clearly erroneous. While Hernandez was told that the law required him to consent to a blood test, he was also correctly

> informed that if he refused to consent the requesting officer could apply for a court order to authorize the blood draw through the use of force. The district court noted that: the record was devoid of any evidence of intimidation or harassment, Hernandez presented no evidence that he was incapable of understanding the issue of consent, and Hernandez willingly complied with hospital protocol for the blood draw.
>
> Hernandez v. State, No. 71087 Unpublished Op., page3 (2017)

K. WHAT IF AN IMPLIED CONSENT VIOLATION OCCURS?

If an officer violates the implied consent statue, what remedy does a defendant have? The defendant will seek to suppress his test result but this request should rarely, if ever, be granted.

NRS. 484C.240 provides:

> 2. Except as otherwise provided in subsection 3 of NRS 484C.150, 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 484C.150 to 484C.250, inclusive, and 484C.600 to 484C.640, inclusive.
> 3. If a person submits to a chemical test provided for in NRS 484C.150 or 484C.160, full information concerning that test must be made available, upon request of the person, to the person or his or her 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 breath-testing device and otherwise maintained it as required by the regulations of the Committee on Testing for Intoxication.

In Brockett v. State, 107 Nev. 638, 640, 817 P.2d 1183 (1991), the Nevada Supreme Court concluded a violation of the implied consent law should not result in suppression of evidence. Likewise, unless a defendant can demonstrate prejudice from the implied consent error, he is not entitled to have his test result suppressed. DMV v. Long, 107 Nev. 77, 806 P. 2d 1043 (1991)(defendant denied relief when officer failed to advise defendant of implied consent law but defendant could not show any prejudice).

A prosecutor faced with an implied consent violation should contend the defendant's remedy for the violation is his license is not revoked under the implied consent law. The implied consent law provides the circumstances under which a defendant loses his driver's license in a DUI case. This result is independent of the defendant's criminal trial.

DMV v. Brown, 104 Nev. 524, 762 P.2d 882 (1988); DMV v. Frangal, 110 Nev. 46, 867 P.2d. 397 (1994):

> Implied consent statutes provide for administrative, civil proceedings entirely separate and distinct from criminal statutes prohibiting drunk driving. A person who refuses to submit to a blood alcohol test risks license revocation under such a statute regardless of whether he is acquitted or convicted, and even when he is never charged with an offense or charges are later dismissed. We hold that Frangal's criminal arrest and prosecution existed wholly independently of the DMV revocation process.

Frangal, 110 Nev. at 49.

VIII. THE CHEMICAL TEST

Once the defendant has been advised of the implied consent law and agreed to take a test, he will typically choose a blood or breath test (urine tests are few and far between). Different issues can arise from each test.

A. BREATH TEST

A defendant may choose to take a breath test in lieu of a blood test if the present case is his first DUI. The officer will follow a DUI checklist in performing the breath test. The officer will first run a simulator solution and then the defendant will provide two breath samples. When the defendant does so, several issues can arise. Most of these issues are resolved by either the Nevada Administrative Code (NAC) or case law.

1. The Defendant Only Provides One Breath Sample

NRS 484C.200 provides two breath samples must be taken to allow the breath test to be used to establish an alcohol level. There is one exception to this rule and that is when the defendant fails to provide a second sample. In that situation, the first test result is admissible and the officer may force a defendant to take a blood test.

2. The Defendant Is Unable or Unwilling to Take the Test

A defendant will frequently try to thwart the test intentionally or by claiming he is unable to perform the test (can't blow hard enough, etc.). Whether the defendant is intentionally or unintentionally refusing to take the test, the result is the same. When a defendant fails to perform the breath test, this failure amounts to a refusal and the officer may use reasonable force to obtain a blood sample. DMV v. Jenkins, 99 Nev. 460, 663 P.2d 1186 (1983) and DMV v. Root, 113 Nev. 942, 948, 944 P.2d 784, 787-8888 (1997) ("Moreover, a good faith but unsuccessful effort to complete such a test is insufficient and thus constitutes a 'refusal to submit' under the 'implied consent' statutes.").

3. Errors in the Test Itself

Most litigation with regard to the breath test involves a claim that the officer erred in some way in giving the test. Obviously, this litigation can be avoided if the officer strictly follows the breath test checklist, but in the real world, this may not happen. As a general rule, an error in the breath test does not automatically cause suppression of the test result. State v. Rowland, 107 Nev. 475, 814 P.2d 80 (1991) (failure to fill out checklist is not grounds to suppress test result); State v. Palmaka, 597 S.E.2d 630 (Ga. 2004) (any error in not following breath test manual goes to weight not admissibility of test result). The following are some common errors.

a. FAILURE TO WAIT 15 MINUTES BEFORE GIVING BREATH TEST

Prior to giving the breath test, the officer is instructed to observe the defendant for 15 minutes. The breath machine checklist speaks of "close visual" observation. The purpose of the observation period is to ensure all mouth alcohol has been eliminated so the breath test will not be compromised. A defendant may argue the officer did not closely observe him. While the phrase "close visual" observation is not defined in the checklist, other states have held the officer need not literally stare into the defendant's face for 15 minutes. State v. Remsberg, 882 P.2d 993 (Idaho 1994) and Manriquez v. Gourley, 130 Cal. Rptr. 2nd 209 (2003).

If during the 15 minute waiting period the defendant burps, vomits, or puts anything in his mouth, the 15 minute period must begin again. The reason for this is because burping, etc. can reintroduce mouth alcohol into the mouth. However, speculation that the defendant burped, etc. should not be admissible unless there is evidence the defendant actually did burp. State v. Nelson, 399 N.W.2d 629 (Minn. 1987) (defendant must show he actually burped to exclude evidence of test where officer didn't check for burping).

If a defendant does have mouth alcohol, an additional safeguard is built into the breath machine. The breath machine expert should be able to testify as to the "slope detector," which is built into the breath machine. A defendant who has mouth alcohol will have a large breath alcohol result as he begins to breathe into the breath machine. As he continues to breathe, his mouth alcohol level will decline rapidly. Should this occur, the machine's slope detector will activate and invalidate the test.

Another problem can occur if the officer acts too quickly in activating the machine after the 15 minute waiting period. The breath machine checklist states the officer should wait the 15 minutes and then activate the machine. The "warm up" of the machine will take a minute or two so that the breath printout should read that the 15 minute waiting period took a little longer than exactly 15 minutes (15 minute wait plus 1-2 minutes for machine to warm up).

b. INABILITY TO GIVE THE BREATH TEST WITHIN TWO HOURS OF DRIVING BECAUSE OF THE 15 MINUTE WAITING PERIOD

Sometimes waiting 15 minutes and then giving the breath test will mean the officer exceeds the two hour limit of NRS 484C.110(c). Although not addressed by any Nevada court, at least one state has held the inability to do a breath test within two hours of driving permits an officer to mandate a blood test. People v. Sukram, 539 N.Y.S.2d 275, 277 (N.Y. 1989)(the two-hour testing limit would have expired by the time the trooper could have retrieved a breathalyzer kit thereby requiring a different chemical test be given, in this case a blood test).

c. FOREIGN OBJECTS, ETC. IN MOUTH

The checklist states an officer should remove all foreign objects from a defendant's mouth before doing a breath test. These foreign objects include false teeth and studs. (If the stud is permanent, then a defendant should not be given a breath test). If the officer fails to have the defendant remove false teeth, etc., then the breath test is compromised. However, a defendant who lies about objects in his mouth and/or fails to remove them is precluded from arguing that his test is invalid. Knoll v. N.D., 644 N.W.2d 191, 196 (N.D. 2002)("We hold, if a person intentionally or unintentionally provides false information to an operator attempting to follow the State Toxicologist's approved methods, the person cannot thereafter challenge the foundation for admissibility of the test results on the ground that the false information resulted in the approved methods not being followed."). See also Harding, P.M., et al., "The effects of dentures and denture adhesives on mouth alcohol retention", J. Forensic Sci., 37(4): 999-1007, 1992 (waiting twenty minutes eliminates any danger from dentures without removing dentures).

d. PARTITION RATIO

The partition ratio refers to the mathematical formula used to convert a breath test result into a blood test result. The breath machine is set to a 1/2100 partition ratio. The defendant may try to argue that his client has a different ratio but this fact is irrelevant in Nevada. NRS 484C.110 makes it unlawful to drive with a 0.08 breath alcohol level. NRS 484C.020 defines "0.08" as a concentration of alcohol "per 210 liters of his or her breath." Thus, regardless of the defendant's actual partition ratio, he is guilty if he has a 0.08 or more as a result of a test done by a machine calibrated at 1/2100.

e. GERD DEFENSE

GERD is acid reflux disease. The defense will argue a defendant afflicted with GERD may involuntarily burp during the breath test process and this will affect the test result. However, GERD should be irrelevant if the officer follows the proper steps in giving a breath test. Particularly, if the officer observes the defendant for 15 minutes and the slope detector is working properly, GERD should be irrelevant. Moreover, requiring two breath samples should eliminate GERD. See "Reliability of Breath Alcohol Analysis in Individuals with GERD." Kechagias, Stergios, J. Forensic Sci. 1999; 44(4): 814-818. (GERD unlikely to affect test. 90 minutes after stopping drinking stomach and lungs have the same alcohol level. 15 minute waiting period is very important to eliminate GERD).

f. SOURCE CODE

The source issue revolves around the internal working of the breath machine. The source code refers to the system used by the machine to set forth the test result. The source code does not affect how the machine determines the test result. The defense will argue that they are entitled to review the source code specifications and the machine manufacturer will argue that the source code is a trade secret. A good discussion of the source code issue can be found in People v. Cialino, 831 N.Y.S.2d 680 (N.Y. 2007) and U.S. v. French, 2010 WL 1141350 (D. Nev. March 22, 2010) (unpublished decision). Cialino held the source code was not discoverable because the State did not possess it. See also, State v. Underdahl, 767 N.W.2d 677 (Minn. 2009).

g. ATTACKS ON THE BREATH MACHINE ITSELF

On rare occasions, the defense attacks the breath machine in some way. Defense witnesses may argue the machine discriminates against women or it does not validly test a breath sample. While the defendant is free to attack his particular test result, he should be prohibited from attacking the breath machine in general. The reason for this is NRS 484C.610 gives the Committee on Testing for Intoxication the authority to select breath machines that are to be used to establish a breath alcohol level. A defendant whose breath alcohol level is tested on an approved machine violates NRS 484C.110 if the breath test result is 0.08 or more. NRS 484C.610(3) creates a presumption that the approved breath machine is "accurate and reliable." Thus, while a defendant can attack his particular result, he cannot attack the breath machine in general.

h. NON-CERTIFIED BREATH MACHINE OPERATOR

Suppose the officer giving the breath test is not certified to operate the breath machine either because his certification lapsed or because he was never certified to begin with. In such a case, NRS 484C.630 applies. NRS 484C.630(4) provides: "4. This section does not preclude the admission of evidence of a test of a person's breath where the test has been performed by a person other than one who is certified pursuant to this section." If the operator is certified to run the certified machine, then it is presumed the breath machine was properly operated. An operator is competent to testify as to his certification without having his certificate with him. NRS 484C.630(3) provides a court "shall" take judicial notice of the certification of a person to operate certified devices.

i. TESTS ARE MORE THAN 0.02 APART

NRS 484C.200 requires a person doing a breath test provide two breath samples and the two samples must be within 0.02 of each other:

> 1. Except as otherwise provided in subsection 2, an evidentiary test of breath to determine the concentration of alcohol in a person's breath may be used to establish that concentration only if two consecutive samples of the person's breath are taken and:

(a) The difference between the concentration of alcohol in the person's breath indicated by the two samples is less than or equal to 0.02;

(b) If the provisions of paragraph (a) do not apply, a third evidentiary test of breath is administered and the difference between the concentration of alcohol in the person's breath indicated by the third sample and one of the first two samples is less than or equal to 0.02; or

(c) If the provisions of paragraphs (a) and (b) do not apply, a fourth evidentiary test is administered. Except as otherwise provided in NRS 484C.160, the fourth evidentiary test must be a blood test.

2. If the person fails to provide the second or third consecutive sample, or to submit to the fourth evidentiary test, the results of the first test may be used alone as evidence of the concentration of alcohol in the person's breath. If for some other reason a second, third or fourth sample is not obtained, the results of the first test may be used with all other evidence presented to establish the concentration.

3. If a person refuses or otherwise fails to provide a second or third consecutive sample or submit to a fourth evidentiary test, a police officer may direct that reasonable force be used to obtain a sample or conduct a test pursuant to NRS 484C.160.

Prosecutors should be sure to instruct their police officers that, because the breath test only reads two digits it is possible that a test 0.02 apart may be greater than 0.02. For example, a result of 0.12 and 0.14 could be more than 0.02 apart because the third digit is not read (0.121 and 0.149).

If the defendant's results are more than 0.02 apart, the defendant must take a third test and two of the three must be within 0.02. If not a fourth test can be done and tow of the four results must be within 0.02. If the defendant fails or refuses to take additional tests then the results of the first test are admissible and the defendant can be compelled to do a blood test.

j. SOLUTION USED TO CALIBRATE BREATH MACHINE

A crime lab should be encouraged to prepare its own simulator/calibration solution. If the solution is purchased from an outside source then NRS 484C.190 creates a presumption that the solution is properly prepared. NRS 484C.190 provides:

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 to determine the concentration of alcohol in his or her breath; and

2. The technician makes an affidavit or declaration that the solution or gas has the chemical composition that is necessary for calibrating the device, it is

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

Note that the affidavit/declaration of the lab tech may be from the police lab or from an outside lab.

If the breath machine is not properly calibrated or the simulator solution is not properly prepared, then the results of the breath test are inadmissible. NRS 484C.240(4). However, NRS 484C.240(2) provides: "Except as otherwise provided in subsection 3 of NRS 484C.150, 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 484C.150 to 484C.250, inclusive, and 484C.600 to 484C.640, inclusive." Naturally, prosecutors should urge their crime labs to fully comply with all regulations relating to the calibration of the breath machine and the preparation of the simulator solution.

k. Asthma: A defendant may claim that his asthma inhaler artificially inflated his breath test. Several studies have shown that, so long as the officer observes the 15 minute waiting period, the asthma inhaler will not affect the validity of the breath test. State v. Ybarra, 237 P.3d 117, 122 (N.M., 2010). (Asthma inhaler will not adversely affect breath test). See also Garcia, Jose et. al. A Comparison of Standard Inhalers for Asthma with and without Alcohol as the Propellant on the Measurement of Alcohol in Breath. (Journal of Aerosol Medicine, 2005) (Any effect of inhaler on test gone after 5 minutes) and Logan, Barry et. al. Evaluation of the Effect of Asthma Inhalers and Nasal Decongestant Sprays on a Breath Alcohol Test. (Washington State Tox. Lab, 1997) (15 minute waiting period eliminates any possibility of contamination from Inhaler or Sprays).

B. BLOOD TEST

Not many issues arise with regard to the blood test itself. The officer obtains a blood kit, watches the blood being drawn, secures the blood tubes in the kit, and impounds the kit into evidence.

Most of the issues which arise occur after the blood draw.

1. Qualifications to Perform a Blood Draw

Pursuant to NRS 484C.250(1)(a)(1), the persons who can perform a blood draw are as follows:

- a physician
- a physician's assistant licensed pursuant to chapter 630 or 633 of NRS
- a registered nurse

- a licensed practical nurse
- an emergency medical technician
- a phlebotomist
- a technician, technologist or assistant employed in a medical laboratory

A "catch-all" provision allows anyone to draw blood who has special knowledge, skill, experience, training, and education in withdrawing blood in a medically acceptable manner such as a person who has been qualified in court as an expert or a person who has completed a course of instruction described in subsection 2 of NRS 652.127. NRS 484C.250(1)(a)(2). The arresting officer, even if he fits within one of the above categories, cannot draw the blood. If the blood is drawn by someone other than the above, it is inadmissible. NRS 484C.250.

Occasionally, the defense will claim the blood drawer's (hereinafter collectively referred to as the "nurse") license by the appropriate Nevada agency cannot be found or is not up to date. Prosecutors should be prepared to obtain copies of the license or certification of the nurse. If the license has lapsed, then the prosecutor can use the catch all provision to show the nurse is qualified. (The nurse could not have obtained a license initially without completing a "course of instruction.") See also State v. Webster, 102 Nev. 450, 726 P.2d 831 (1986) (statute relating to who may draw blood is to be liberally construed).

2. Swabbing the Arm

The defense may attempt to argue the swab used to clean the skin contained alcohol. The nurse should be able to testify he did not use alcohol to swab the arm. If the nurse's affidavit is used, then it should contain language that no alcohol was used to swab the skin.

3. Whole Blood

Prosecutors should always ask their blood tester if he tested "whole blood." NRS 484C.250(b) requires the blood test be 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. Whole blood refers to blood that has not separated into its component parts. The reason whole blood is tested is blood serum can yield a higher blood alcohol level than whole blood. If clotted blood is tested, prosecutors must be prepared to have an expert testify about the partition ratio for whole blood and blood serum.

4. Chain of Custody

Most arguments about blood draws relate to the chain of custody. In larger cities, the officer will put the blood kit in a refrigerator and it will be picked up by the lab. The kit then will be opened at the lab and tested. In rural areas, the blood kit may be kept by the officer in his car for a period of time. Most chain of custody arguments relate to the fact

that the person who picks up the blood from storage and takes it to the lab does not testify.

In order to meet the chain of custody, the State must make a: "(1) reasonable showing that substitution, alteration or tampering of the evidence did not occur; and (2) the offered evidence is the same or reasonably similar to the substance seized." Burns v. Sheriff, 92 Nev. 533, 554 P.2d 257 (1976); Eisentrager v. State, 79 Nev. 38, 378 P.2d 526 (1963). The chain of custody should be satisfied if the chemist testifies that the blood kit he received was sealed when he opened it. Obviously, the blood could not have been tampered with through the sealed kit. Schram v. Comm., 359 N.W.2d 632 (Minn. 1984) (chain of custody met even though State did not call person who transported blood to lab; blood was sealed by officer and opened at lab so chain of custody met). Moreover, the prosecutor should note, if the defendant thought the kit was tampered with, he could have the blood retested.

5. Retesting Blood Sample

Sometimes, the police will retest a blood sample at a later date after the initial test. This is done to check for further drugs or possibly for DNA purposes. Once the police have lawfully seized the defendant's blood, they may retest it as often as they like for any purpose. Patterson v. State, 742 N.E.2d 4, 5 (Ind. 2000)(defendant's DNA collected and retested in a subsequent rape investigation): "There is no evidence in the record showing that Patterson exhibited an actual expectation of privacy in the blood sample taken by police on December 6, 1997. Likewise, we find that based upon the specific facts of this case society is not prepared to recognize as reasonable Patterson's continued expectation of privacy in blood samples lawfully collected by police."; Gaines v. State, 116 Nev. 359, 998 P.2d 166 (2000)(police could obtain genetic markers from a convict "to solve future crimes."); Smith v. State, 744 N.E.2d 437 (Ind. 2001)(retesting of DNA sample was not a search within the meaning of the Fourth Amendment); People v. King, 663 N.Y.S.2d 610, 614 (N.Y. 1997):

> It is beyond cavil that an individual has a legitimate privacy expectation with respect to the blood flowing though his or her own veins. . . . It is also clear that once a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person. In this regard we note that the defendant could not plausibly assert any expectation of privacy with respect to the scientific analysis of a lawfully seized item of tangible property, such as a gun or a controlled substance. Although human blood, with its unique genetic properties, may initially be quantitatively different from such evidence, once

constitutional concerns have been satisfied, a blood sample is not unlike other tangible property which can be subject to a battery of scientific tests.

6. Blood Sample Damaged or Destroyed

The defense may argue the blood sample has been compromised because it was exposed to the weather while it was in the officer's possession. The defense also may claim the blood kit has been destroyed by the State so the evidence was lost. Neither claim should prevail.

a. DAMAGED

The defense may attempt to claim the blood sample has been "damaged" because the officer left in the trunk of his car for a period of time and the heat damaged the sample. This claim should fail because the kit is still sealed so no tampering could occur, the blood is still whole blood so there is no proof of "damage," and the only effect rising heat would have on the sample is to lower the blood alcohol level. "Effects of Heat on Blood Samples Containing Alcohol." Glover, Paul (only effect of heat was to lower blood alcohol level).

b. LOST OR DESTROYED

Sometimes, after a blood test, the blood kit may have been lost or destroyed. So long as the kit was not intentionally destroyed, the loss of the kit should not affect the admissibility of the test result.

The seminal Nevada case on destruction of evidence is State v. Hall, 105 Nev. 7, 768 P.2d 249 (1989). In Hall, the defendant had given a blood sample in a DUI case. After one year passed, the crime lab routinely destroyed Hall's blood sample. Hall then argued the destruction of his blood sample mandated dismissal of his case. The Supreme Court disagreed: "In order to establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must demonstrate either (1) that the state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed exculpatory value that was apparent before the evidence was destroyed." 105 Nev. at 9. See also Keeney v. State, 109 Nev. 220, 850 P.2d 311 (1993); Leonard v. State, 117 Nev. 53, 17 P.3d 397 (2001) ("The State's loss or destruction of evidence constitutes a due process violation only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.").

i. Bad Faith

"Bad faith" was negatively defined in Hall, supra: "The chemist who disposed of the sample had saved it for a reasonable period of time and then disposed of it in accordance with his routine practice and for a legitimate purpose. Accordingly, we conclude that the state was not acting in bad faith when it disposed of the sample." 105 Nev. at 9. Ordinarily, the nurse who draws the blood or the chemist who analyzes it will have no

direct connection with the defendant or any interest in the outcome of his case. Because of this, it will be almost impossible for the defendant to show bad faith. "In the present case there is absolutely no indication that the medical technician, who had sole possession of the vials for approximately two minutes, substituted, altered, changed or tampered with their contents, nor is there the remotest suggestion that he may have been interested in doing so." Eisentrager v. State, 79 Nev. 38, 45, 378 P.2d 526, 531 (1963). Moreover, the exculpatory nature to the blood sample, if any, will not be known by the chemist or nurse unless the test result is close to or under 0.08 and the nurse or chemist knew this before disposing of the blood.

ii. Prejudice

A defendant can rarely establish prejudice from the loss of his blood sample. The burden to show prejudice is on the defendant. State v. Boggs, 95 Nev. 911, 604 P.2d 107 (1979). The defendant must show specific prejudice from the loss of the evidence; merely believing that the evidence might be exculpatory is not sufficient.

Sheriff v. Warner, 112 Nev. 1234, 926 P. 2d 775 (1996):

> We must therefore determine whether the loss of the evidence was prejudicial to Warner. The burden of demonstrating prejudice lies with Warner and "requires some showing that it could be reasonably anticipated that the evidence sought would be exculpatory and material to appellant's defense. It is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence nor is it sufficient for the defendant to show only that examination of the evidence.

112 Nev. at 1242; see also Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002) (failure to preserve blood sample in DUI case did not amount to bad faith or prejudice).

7. Who Can Testify as to Test Results?

Obviously, the person who performed the test can testify as to its results. However, each person who performs one of the test functions need not be called as a witness; the supervisor in charge of the test may testify as to what was done and the test result. "Appellant contends it was error to allow the medical doctor to testify as to the result of his blood analysis without calling the toxicologist who actually performed the test under the doctor's control and supervision. He contends there is no proof of a proper chain of custody nor of the qualifications of the individual conducting the specific test. We disagree." Anderson v. State, 85 Nev. 415, 418, 456 P.2d 445, 446-47 (1969). See also State v. Salter, 162 N.W.2d 427, 430 (Iowa 1968)("As to the hearsay portion of the objection to the doctor's testimony, we believe the law to be well established that an expert need not personally conduct all tests nor be personally familiar with all procedures before being qualified to testify concerning the results."); State v. Sweat, 433 P.2d 229

(Mont. 1967); State v. Bailey, 339 P.2d 45 (Kan. 1959)(overruled on other grounds in State v. Budden, 595 P.2d 1138 (Kan. 1979); Bryan v. State, 252 S.W.2d 184 (Tex. 1952).

In response to the above cases, the defendant will argue Bullcoming v. New Mexico, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), precludes one expert from testifying as to the results obtained by another expert. However, Bullcomming dealt with a case in which the analyst testified as to a missing analyst's test result and did not "sign the certification or personally perform or observe the performance of the test reported in the certification." The testifying analyst also did no independent examination of the blood test result but merely parroted what the non-testifying analyst found. See Bullcomming, supra, Sotamayor concurring "Second, this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue . . . It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results." 131 S. Ct. at 2722. Pursuant to Bullcoming, one expert cannot testify as to what another expert found but he can testify as to his own independent analysis. See also Williams v. Illinois, 132 S. Ct. 2221, 2228, 183 L. Ed. 2d 89, 99 (2012), which held that "Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Applying this rule to the present case, we conclude that the expert's testimony did not violate the Sixth Amendment." (Williams also held that a DNA profile was not testimonial).

8. Hospital Blood Draws

Frequently, a hospital will draw the blood of the defendant for testing. The results of those tests are admissible in the defendant's DUI prosecution. NRS 629.065 provides a health care provider "shall" make the results of a blood breath or urine test available to the police if the patient/defendant is suspected of DUI. Only the test results are required to be shown to the police.

Sometimes the hospital may obtain their blood sample within two hours. In any event, the hospital sample, which is usually earlier than the police sample, is useful for retrograde extrapolation. Prosecutors should encourage the police to obtain the hospital sample. When doing so the police should obtain the name of the person who drew the patient/defendant's blood and the lab person who tested that blood.

Although NRS 629.065 only mentions the results of the blood test, prosecutors should also consider having the police seize that sample, once the hospital is done with it. The police lab can then test the hospital's blood.

NRS 629.065(4) exempts a health car provider or any of her employees from liability for providing the records to the police.

9. Multiple Blood Draws

NRS 484C.160(7) authorizes multiple blood draws in cases where the defendant refuses to take a test. A clever defendant may argue multiple blood draws are therefore not permitted in cases where the defendant agrees to take a test. Prosecutors should respond that the Supreme Court recognized the necessity blood draws in State v. Dist. Ct. (Armstrong) – Nev. -, 267 P.3d 777 (2011). Prosecutors should also argue that permitting multiple blood draws protects both the public from a drunk driver and an accused who may have a rising alcohol defense, i.e. the second blood result is higher than the first result. Finally, other States recognize the validity of multiple tests. In State v. Faust, 682 N.W.2d 371 (Wis. 2004), the police obtained a valid breath sample from Faust. The police later conducted a blood test on Faust. Faust argued the police were prohibited from obtaining the blood sample after they had a valid breath sample. The court disagreed, noting that exigent circumstances permitted a second blood draw. The court also noted, "We have found no authority that stands for the proposition that the police are limited to obtaining only a single piece of evidence under the exigent circumstances doctrine." 682 N.W.2d at 379.

MISC

A. AFFIDAVIT OF NURSE, CHEMIST, AND OTHERS

This manual does not address trial tactics or evidence issues unless they are unique to DUI cases. One type of evidence which is unique to DUI cases relates to the admissibility of the affidavits or declarations of various persons involved in the DUI arrest.

A defendant has the right to confront the witnesses against him. However, several Nevada statutes allow the State to use the affidavit/declaration (hereinafter collectively referred to as the "declaration") of certain witnesses. Whether the declaration is admissible depends on who prepared the declaration and in what type of hearing it is being used.

1. The Statutes

NRS 50.315 provides the affidavits of certain witnesses are admissible if certain conditions are met. Specifically, NRS 50.315 provides the following declarations are admissible to show certain facts:

> 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 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 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 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 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, 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 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, not later than 10 days before the date set for trial or such shorter time before the date set for trial as authorized by the court, the defendant objects in writing to admitting into evidence the affidavit or declaration, the court shall not admit the affidavit or declaration into evidence and 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 (hereinafter declaration) described in this section.

The key components of NRS 50.315 are as follows:

1. The declaration of several witnesses is admissible at trial unless the defendant objects to their admission provided the defense is properly told that the declaration will be used.
2. The defendant must object in writing to the admission of the declaration at least 10 days prior to trial (unless the court sets a shorter time for the objection).
3. If the objection is properly made, the declaration must not be admitted.

NRS 50.320 governs the admissibility of the affidavit of the chemist who analyzed the blood. It provides:

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, 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 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.

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.

The key components of NRS 50.320 are:

1. The declaration of the person who analyzed the blood or urine of a defendant to determine its alcohol/drugs content is admissible into evidence,

2. If the defendant objects to the admission of the declaration at trial it shall not be admitted.

3. The declaration is admissible at a preliminary hearing or grand jury presentment over the defendant's objections.

NRS 50.325 sets forth the manner in which the declaration may be used and the manner of objecting to it. NRS 50.325 provides:

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, 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, 484A to 484E, inclusive, 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 484C.110, 484C.130, 484C.430, 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.

The key components of NRS 50.325 are as follows:

1. The declaration is admissible at a preliminary hearing or grand jury presentment upon submission and without notice to the defendant,

2. The declaration may be admissible at trial if the State serves the defendant or his attorney in person or by registered mail with a request to do so,
3. If the defendant objects in writing to the admission of the affidavit at least ten days before trial (unless the court sets a shorter time) then the affidavit is inadmissible and the nurse or chemist must appear: the defendant need not set forth a reason for his objections.

Several issues can arise from these statutes. Naturally, the defense will seek to always compel the State to bring in the witnesses by arguing that the declaration is inadmissible for some reason. These reasons include:

A. THE DECLARATION CONTAINS FACTS OTHER THAN THOSE SET FORTH IN THE STATUTE

Frequently, the declaration will contain facts other than those listed in the statute. For example, it is not uncommon for the nurse's declaration to state the nurse did not use any alcohol swabs in withdrawing the defendant's blood. In City of Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005) (overruled on other grounds in City of Reno v. Howard, - Nev. -, 318 P.3d 1063 (2014) the court found the declaration is admissible even though it contained information not set forth in the statute. The court reasoned to hold otherwise would undermine the purpose of the statute.

B. CONFRONTATION CLAUSE

i. Preliminary Hearing or Grand Jury

NRS 50.315-50.325 make the declaration admissible in a preliminary hearing or grand jury presentment without notice to the defendant. The statutes further provide the court shall not sustain an objection to the declarations. The defendant will object to the admission of the declarations at his preliminary hearing on confrontation grounds. However, a defendant has no right to confront witnesses at a preliminary hearing or at a grand jury presentment (indeed, the defendant cannot even be present at a grand jury proceeding). Sheriff v. Witzenburg, 122 Nev. 1056, 145 P.3d 1002 (2006); U.S. v. Andrus, 775 F.2d 825 (7th Cir. 1985); Montez v. Sup. Ct., 285 Cal. Rptr. 279 (1991) (Footnote 8 discusses the fact that no Federal circuit court has found that right of confrontation applies to a preliminary hearing). However, in Valenti v. State DMV, 131 Nev. Adv. Rep. 87 (Nev. 2015), the court found that, at a DMV hearing the affidavit could not be used unless the expert chemist had qualified as an expert in a Nevada court of record. Arguable this ruling would also apply to an affidavit used in a preliminary hearing or a grand jury presentation.

ii. Trial

A defendant has the right to confront the witnesses against him at trial. In City of Reno v. Howard, 318 P.3d 1063 (2014), the Supreme Court concluded that the declaration by the nurse was testimonial. The Court then concluded that, requiring a defendant to show that a substantial and bona fide dispute exists with regard to the declaration before the State was required to have the nurse testify at trial, violated the confrontation clause. In response to the City's argument that the nurse was merely a conduit in the chain of custody, the Court found that, because the declaration was admitted at trial a confrontation clause violation had occurred. The Court left open the possibility of arguing that the nurse was not a necessary witness in the chain of custody.

Howard makes it clear that the nurse's declaration will not be admitted into evidence unless the nurse testifies. Prosecutors who cannot produce the nurse may want to consider proceeding without the nurse's declaration. This could be done by having the officer testify as to the blood draw and then having a custodian of records testify that the blood drawer is licensed by the appropriate Nevada agency.
(The State must show that the blood drawer is licensed by the appropriate Nevada agency. See NRS 484C.250(1)(a)(1))

D.NOTICE TO DEFENDANT AND OBJECTIONS TO NOTICE
The State is required to give the defendant at least ten days notice that the State will be using the declarations at trial. This notice can be sent by certified mail or personally served on the defendant. Prosecutors should make a practice of including the notice as part of discovery which the defendant or his attorney normally receives at arraignment. In that way, the cost of mailing can be avoided, there is proof of service, and, unless the trial is set in less than ten days, the prosecutor has complied with the statute.

E. FORM OF THE NOTICE: AFFIDAVIT VERSUS DECLARATION
NRS 53.045 provides that an unsworn (i.e. un-notarized) declaration may be used in lieu of an affidavit if the declaration is signed as follows:

> 1. If executed in this State: "I declare under penalty of perjury that the foregoing is true and correct." . . .
> 2. Except as otherwise provided in NRS 53.250 to 53.390, inclusive, if executed outside this State: "I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct."

When preparing the declaration be sure to include the above language just above the signature line. The declaration also should be dated immediately after the signature.

B. SPECIAL DEFENSES TO DUI

Generally, the defendant will argue there is insufficient evidence to convict him of DUI. However, sometimes the defendant may argue his drunk driving should be excused for some reason. These reasons can include:

1. Necessity Defense

The defense of necessity or the 'choice of evils' defense arises when a defendant seeks to excuse his violation of the law by arguing he was preventing a greater harm. Usually, the defendant will argue he was fleeing from a fight or trying to take someone to the hospital. Necessity is an affirmative defense which the defendant must prove. Jorgensen v. State, 100 Nev. 541, 545, 688 P.2d 308, 310 (1984).

Nevada has addressed the defense of necessity in the context of a DUI case. In Hoagland v. State, - Nev. -, 240 P.3d 1043, 1045 (2010), the defendant's attempt to invoke the necessity defense was rejected by the Supreme Court. Hoagland had illegally parked his truck in a prohibited parking spot. Hoagland was then ordered to move his vehicle by a security guard, which he did. Hoagland was then arrested for DUI.

The Hoagland court found one of the elements of the necessity defense is that the defendant not create the harm he was seeking to avoid. The court found that Hoagland's decision to illegally park created the necessity of his subsequent drunk driving so that the necessity defense was unavailable to him.

Other States have also uniformly rejected the necessity defense in a DUI case. See Reeve v. State, 764 P.2d 324 (Alaska 1988); Smith v. State, 552 S.E.2d 499 (Ga. App. 2001) (defendant cannot invoke necessity defense in response to attack on him when he was drunk before attack). In State v. Fee, 489 A.2d 606, 608 (N.H. 1985), the defendant argued that he had to drive drunk because the police had told him that the burglar alarm in his pharmacy was activated. Fee argued he had to drive to his pharmacy to make sure no drugs were stolen. The court rejected Fee's claims because he had alternatives to his drunken driving:

> Assuming arguendo that the defendant reasonably perceived an imminent danger, he had available to him courses of conduct that did not require him to drive while intoxicated. The defense of competing harms is not available to justify unlawful conduct when lawful alternatives exist which will cause less, if any, harm.

See also People v. Pena, 197 Cal. Rptr. 264 (1983) for a good discussion of the necessity defense in the context of a DUI case.

2. Medical Episode

Sometimes a defendant may argue a medical condition caused him to crash rather than his impairment. As a general rule, a person who is rendered unconscious through no fault of his own is not liable for things he does while unconscious. However, an important

exception exists if the defendant is aware he has a medical or other condition that could cause him to have a seizure.

In People v. Eckert, 157 N.Y.S.2d 551, 557 (N.Y. 1956), the court found a person who drove, knowing he was subject to epileptic seizures, could be convicted of voluntary manslaughter. See also Gov't., Virgin Islands v. Smith, 278 F.2d 169 (3rd Cir. 1960) and Smith v. Commonwealth, 268 S.W.2d 937 (Ky. 1954).

APPENDIX ONE

THE ABCs OF FSTs
A brief summary of field sobriety tests in DUI cases.

By *Detective William Redfairn, Las Vegas Metropolitan Police Department, and Bruce Nelson, Deputy District Attorney, Clark County District Attorney's Office.*

Virtually every DUI stop will involve an officer asking a defendant to take a field sobriety test (FST) of some sort. While most attorneys have heard of FSTs, they may not know how the FSTs are done and how courts have ruled on some of the legal aspects of FSTs. This article will briefly summarize how the most common FSTs should be done and some of the case law relating to FSTs.

Introduction

Just 20 years ago, police departments around the country used many different field sobriety tests to enforce drunken driving laws. These tests had little consistency or standardization in how they were administered or interpreted. Concern over this lack of consistency as well as the alarming rise in fatal car crashes involving drunk drivers prompted the National Highway Traffic Safety Administration (NHTSA) to initiate an effort to identify the best field sobriety tests for enforcement use. In 1977, NHTSA sponsored a study in which researchers were asked to identify the tests being used by law enforcement and recommend the best test battery for further development. Out of the many tests being used, researchers identified three tests – the walk and turn (WAT), one leg stand (OLS), and horizontal gaze nystagmus (HGN) – as the most reliable and practical tests for law enforcement use. This led to further research conducted in 1981 where a standard set of administration and scoring criteria was developed for the three tests identified previously. In an effort to promote consistency in the implementation of these tests, NHTSA developed a standardized training program and began instructing police officers around the country.

The test battery developed by the NHTSA research is being used in all 50 states and has been adopted by many foreign countries as the best tool for developing probable cause in impaired driving investigations. The standardized field sobriety tests (SFSTs) have withstood the test of time and are widely accepted by courts as a reliable indicator of impairment.

The training protocol developed by NHTSA requires officers to follow a standard set of administration and interpretation criteria to determine if a person's blood alcohol content (BAC) is above 0.08. If an officer fails to follow the "standard," the validity of the tests can be compromised. NHTSA is constantly reevaluating the protocol and conducting new research to give officers the best possible tools to combat impaired driving.

Impaired Driving Detection

The FST protocol begins with an officer stopping a vehicle for some reason. Once the vehicle has been stopped, the officer contacts the driver. Typically, the driver will exhibit signs of intoxication: bloodshot eyes, alcohol on the breath, admissions regarding drinking, and poor balance. At this point the officer will request that the defendant perform FSTs.

Refusal to take FSTs

One issue which can arise at this point is what happens if the defendant refuses to take the FSTs. While there is no practical way to compel a person to perform a FST, most courts have held a refusal to take a FST is admissible against the defendant as an admission of guilt. This holding is based on the fact that a defendant has no Fifth Amendment right to refuse to take FSTs.

In Pa. v. Muniz , 496 U.S. 582, 110 L.Ed.2d 528 (1990), Muniz had been arrested for DUI and was transported to the police station. While at the station, Muniz was given a FST without being Mirandized first. Muniz argued that his Fifth Amendment rights were violated because he should have been Mirandized before he was given the FSTs. The Supreme Court disagreed and found most portions of the FST are not subject to the Fifth Amendment because they are non-testimonial in nature. The Court reasoned that, just as a person has no right to refuse to be photographed or fingerprinted, he has no right to refuse to take FSTs. Based upon Muniz, several state courts have held the defendant's refusal to take FSTs is admissible because he has no right to refuse to take them. For example, in City of Seattle v. Stalsbroten, 978 P.2d 1059, 1065 (Wash. 1999), the court held:

> We conclude that admitting evidence of a drunk driving suspect's refusal to perform FSTs does not violate the suspect's privilege against self-incrimination. Not only is such evidence nontestimonial, but it is not compelled by the State. For these reasons, Fifth Amendment protections do not apply to evidence of a defendant's refusal to take FSTs.

See also State v. Hoenscheid, 374 N.W.2d 128 (S.D. 1984).

A somewhat related issue can arise when an officer refuses/fails to give a defendant FSTs. In State v. Torres, 105 Nev. 558, 779 P.2d 959 (1989), the Nevada Supreme Court held an officer may have probable cause to arrest without giving FSTs and FSTs are not a prerequisite to arrest. Thus, while an officer typically will give FSTs, they are not required to do so.

Assuming the defendant has agreed to take the FST, the officer will now proceed to administer the FSTs to the defendant.

Divided-Attention Tests

Many of the most reliable FST psychophysical tests employ the concept of divided attention, requiring the subject to concentrate on two things at once. Even when impaired, many people can handle a single, focused-attention task. However, most people when impaired cannot sufficiently divide their attention to handle multiple tasks at once. Driving requires divided attention and this inability to perform divided attention tasks is why drunk driving is so dangerous.

Two of the standardized field sobriety tests, the walk-and-turn and one-leg stand, employ the concept of divided attention and simulate the mental and physical capabilities a driver needs to drive safely:

- Information processing
- Short-term memory
- Judgment and decision making
- Balance
- Steady, sure reactions
- Clear vision
- Small muscle control
- Coordination of limbs

Simplicity is a key factor in divided attention field sobriety testing. Selecting a test that just divides the driver's attention is not enough. It must be one that is reasonably simple for the average person to perform when sober.

Walk-and-Turn Test

The walk-and-turn test has been validated through extensive research, and consists of two stages:

- Instruction stage
- Walking stage

In the instruction stage, the suspect stands with his feet in a heel-to-toe position keeping his arms down at his side and listens to instructions given by the officer. The instruction stage divides the suspect's attention between a balancing task (standing while maintaining the heel-to-toe position) and an information task (listening to and remembering instructions).

In the walking stage, the suspect takes nine heel-to-toe steps, turns in a prescribed manner, and takes nine heel-to-toe steps back. He must do this while counting his steps out loud and watching his feet. During the turn, the suspect must keep his front foot on the line, turn in a prescribed manner, and use the other foot to take several small steps to complete the turn. The walking stage divides the suspect's attention among a balancing task (walking heel-to-toe and turning), a small muscle control task (counting out loud), and a short-term memory task (recalling the number of steps and the turning instructions).

As the suspect performs the walk-and-turn test, the officer looks for eight standardized clues of impairment:

- Can't balance during instructions
- Starts too soon
- Stops while walking
- Doesn't touch heel to toe
- Steps off line
- Uses arms to balance
- Loses balance on turn or turns incorrectly
- Takes the wrong number of steps

A suspect's inability to complete the walk-and-turn test occurs when:

- The suspect steps off the line three or more times
- The suspect is in danger of falling
- The suspect cannot do the test

The original research showed if a suspect exhibits two or more of the clues, or cannot complete the test, the suspect's BAC is likely above 0.10.

<u>One-Leg Stand</u>
The one-leg stand test also has been validated through NHTSA's research as a valid divided-attention test. This test also consists of two stages:

- Instruction stage
- Balance and counting stage

In the instruction stage, the suspect must stand with also feet together, keep also arms at also side, and listen to instructions given by the officer. This divides the suspect's attention between a balancing task (maintaining the stance) and an information processing task (listening to and remembering the instructions).

In the balance and counting stage, the suspect must raise one leg (either leg) with the foot approximately six inches off the ground and keep the raised foot parallel to the ground. Then, while looking at the raised foot, the suspect must count out loud in the following manner: "one thousand one, one thousand two, one thousand three," etc., until told to stop. This divides the suspect's attention between balancing (standing on one foot) and small muscle control (counting out loud).

While the suspect performs the test, the officer must time the test for thirty seconds. The original research showed many impaired suspects were able to stand on one leg for up to 25 seconds, but few could do so for 30 seconds.

NOTE: Depending on when the officer was trained, he may tell the suspect to count from "one thousand one" to "one thousand thirty." Since the original research, NHTSA has changed to the current timing of the test for 30 seconds in the mid to late 1990s. This was done to account for those suspects that may be impaired on drugs.

The one-leg stand test is administered and interpreted in a standardized manner with the officer looking for four specific clues of impairment:

- Sways while balancing
- Uses arms to balance
- Hops
- Puts foot down

An inability to complete the one-leg stand test occurs when the suspect:

- Puts their foot down three or more times, during the 30-second period
- Cannot do the test

The original research showed when the suspect produced two or more clues or was unable to complete the test, it was likely his BAC was above 0.10.

Horizontal Gaze Nystagmus Test

Horizontal Gaze Nystagmus (HGN) refers to an involuntary jerking as the eyes gaze toward the side. In addition to being involuntary, the person experiencing the nystagmus is unaware the jerking is happening.

This involuntary jerking of the suspect's eyes becomes readily noticeable when the suspect is impaired. As the suspect's blood alcohol concentration increases, the eyes will begin to jerk sooner as they move to the side.

The Horizontal Gaze Nystagmus is the most reliable field sobriety test especially when used in combination with the above divided-attention tests.

When administering the HGN test, the officer has the suspect follow the motion of a small stimulus with his eyes only. The stimulus may be the tip of a pen or penlight, an eraser on a pencil, or the officer's finger tip. The main concern with stimulus selection is it should contrast with the background the suspect will be looking at.

When the HGN test is administered, the officer always begins with the suspect's left eye. Each eye is examined independently for three specific clues.

As the eye moves from side-to-side, the officer looks to see if the eye moves smoothly or if it jerks noticeably. (As people become impaired by alcohol and certain types of drugs, their eyes exhibit a lack of smooth pursuit as they move from side-to-side.)

Next, the officer will observe whether the eye jerks distinctly when it moves as far to the side as possible and is kept at that position for several seconds.

Lastly, the officer will guide the eye toward the side and see if it starts to jerk prior to a 45 degree angle.

The maximum number of clues that may appear in one eye is three, resulting in a total of six for any suspect. The original research showed if four or more clues were evident, it was likely the suspect's blood alcohol concentration was above 0.10.

The last check the officer will make when looking at the suspect's eyes is vertical gaze nystagmus. This is an up-and-down jerking of the eyes when they gaze upward at maximum elevation. This type of nystagmus was not addressed in the original research, but field experience has shown the presence of vertical gaze nystagmus (VGN) has proven to be a reliable indicator of high doses of alcohol or certain other drugs for that individual.

For standardization purposes, the officer should administer the three field sobriety tests in the following order: Horizontal Gaze Nystagmus, Walk-and-Turn, and One-Leg Stand.

Legal aspects of the FSTs

The two largest areas of litigation for FSTs are:

1. Are the tests a valid indicator of intoxication; and
2. What effect does the failure to give the tests in the manner prescribed by NHTSA have on the validity/admissibility of the tests?

Most courts have held FSTs are reliable indicators of intoxication. These rulings are based on the principle that it is well known that an intoxicated person will have poor balance and/or coordination. "[T]he trial court ruled that the tests are designed to examine behavior that 'is widely accepted as indicative of impairment or intoxication.'" Volk v. U.S., 57 F.Supp.2d 888, 895 (N.D.Cal. 1999). Likewise, a police officer or even a lay witness can testify that a defendant exhibited poor coordination and appeared intoxicated based on his inability to perform FSTs. "A child six years old may answer whether a man (whom it has seen) was drunk or sober." People v. Eastwood, 14 N.Y. 562, 566 (N.Y. 1856); State v. Powers, 685 N.W.2d 869 (Wis. 2004); Singletary v. Secretary of Health, Ed. and Welfare, 623 F.2d 217, 219 (2nd Cir. 1980). The admissibility of the HGN test and how the FSTs can be admitted into evidence are somewhat trickier.

Courts have taken differing views on the extent to which FSTs are admissible. These differences are well summarized in U.S. v. Horn, 185 F.Supp.2d 530 (D. Md. 2002). In Horn, the court, using a Daubert analysis, concluded FSTs were not admissible as direct evidence of intoxication but were admissible as circumstantial evidence of intoxication. Daubert v. Merrill Dow Pharmaceuticals Inc., 509 U.S. 579, 125 L.Ed.2d 469, 113 S. Ct. 2786 (1993). The Horn court noted the overwhelming majority of jurisdictions do admit FST results as direct evidence of intoxication. The Horn court also concluded no court admits FSTs to prove a particular alcohol level.

Of all the FSTs, the HGN test is by far the most litigated. See "HGN test: use in impaired driving prosecution", 60 ALR 4th 1129 (1988). While various courts have come to various results, the general consensus is the HGN, like the other FSTs, is admissible to show impairment but not to show a specific alcohol level. Gordon v. State, - Nev. -, 117 P.3d 214 (2005) (evidence sufficient to convict defendant when, among other things, defendant failed HGN test); Manley v. State, 424 S.E.2d 818 (Ga. 1992) (HGN test inadmissible to show blood alcohol level).

Finally, what happens if the officer makes an error in performing the FST? For example, suppose the officer uses an imaginary straight line for the walk-and-turn test as opposed to an actual line. Courts have come to two different conclusions when an error occurs: 1. the error goes to the weight to be assigned to the FST and not its admissibility; or 2. the FST evidence is excluded.

The overwhelming majority of courts have held errors in administering the FST should go to the weight to be assigned the FST and not its admissibility. Hawkins v. State, 476 S.E.2d 803 (Ga. 1996); State v. Thomas, 420 N.W.2d 747 (N.D. 1988). The minority rule is set forth in State v. Homan, 732 N.E.2d 952 (Ohio 2000). In Homan, the Ohio Supreme Court concluded the FSTs must strictly comply with the NHTSA FST manual or they are inadmissible.

Homan has been severely criticized and no other court has adopted its reasoning. Interestingly, the Ohio Legislature "overruled" Homan when it enacted a statute which provides errors in the FST go to the weight to be given the test rather than its admissibility. Ohio Statute 4511.19. Likewise, NHTSA now states: "Officers always should fully comply with NHTSA's guidelines when administering the SFSTs. However, if deviations occur, officers and the courts should understand that any deviation from established procedures relates to the weight of the evidence, not its admissibility." U.S. Dept of Transportation, NHTSA "Development of a Standardized Filed Sobriety Test", footnote 4 which can be found at www.nhtsa.dot.gov.

It is unlikely any other courts will adopt the reasoning of Homan. It is impossible outside of (or even inside of) a laboratory to "strictly comply" with the NHTSA manual. For example, the manual states the balance tests are to be done on a level surface. Absent complex measuring equipment, it is impossible for an officer to determine that the surface area was completely level.

Homan also errs because it fails to determine whether the failure to follow the manual affected the test results adversely to the defendant. One of the things the Homan court found the officer did wrong was the officer allowed Homan to turn to the right or left during the WAT test whereas the manual states the subject should turn to the left only. Allowing the test subject to pick which way to turn only benefits the defendant, yet the Homan court found this benefit invalidated the test.

Conclusion

This article has briefly summarized how FSTs should be done and the law relating to FSTs. Obviously, the summary nature of this article prevents a complete discussion of all aspects of the FSTs. FSTs are a valuable tool in detecting drunk drivers, and having a full understanding of how they should be done can benefit both the prosecution and defense sides of a DUI case.

APPENDIX TWO

Discussion of Horn v. U.S., 185 F.Supp.2d 530 (D. Md. 2002).

1. Horn was a case which extensively discussed and analyzed the FST in the context of admitting scientific evidence under Federal law.

2. Four experts testified for the defense as to the unreliability of FSTs.

3. The federal court found several things:

a) FSTs are inadmissible to show a particular alcohol level.

b) FSTs are admissible as probable cause to arrest.

c) FSTs can be admitted as circumstantial evidence that the defendant was driving under the influence but officer may not testify that defendant "failed the test" or the defendant had a certain number of "clues," i.e. testimony may not be couched in scientific terms.

d) The prosecution may ask the court to take judicial notice that HGN can indicate alcohol impairment and defense can ask the court take notice that other things can also cause HGN.

4. Court based its holding on the fact FSTs are not scientific tests because:

a) Tests show the reliability of FSTs to be 77% whereas scientific community demands 80-90% reliability.

b) One test had officers watch a video of people taking tests; 46% of officers said they would have arrested persons; all persons on tape were sober.

c) NHTSA tests were not subject to peer review, i.e. not reviewed by a scientist in the field, before being published.

5. Flaws in Horn:

a) Court found no state admits FSTs to show alcohol level yet court criticized FSTs because they cannot be used to show alcohol level.

b) When taken together, FST tests show a reliability rate of 81% to 91%, not 77%. Thus, tests are in the range of accuracy for scientific evidence.

c) The FST test where officers watched video is not valid because FSTs specify they are only one part of decision to arrest, i.e. officer should talk to defendant, see if odor of alcohol is present, etc. FSTs do not stand alone. No competent officer would testify that his decision to arrest would be based solely on a video tape.

d) Even if initial report of FSTs were not subject to peer review, they certainly have been widely discussed and criticized afterwards.

e) The original NHTSA study of FSTs was based on everyone below a 0.10 as being non-impaired but we know today people are impaired at a much lower level than 0.10. Hence an officer's decision to arrest in the original study may have been

correct even though the defendant was below 0.10. Moreover, the Horn court erroneously equates 0.08 per se level with proof of impairment. 0.08 is simply a per se level; it does not show proof of impairment; it only shows a defendant had a particular alcohol level. Most people are impaired far below 0.08. See "Alcohol Alert" National Institute on Alcohol Abuse and Alcoholism No. 25 PH 351 July 1994.

f) Most "errors" which occurred in FST testing came about when the officer chose not to arrest defendant after giving FSTs even though defendant was above 0.10, i.e. the officer's error favored the defendant.

g) Horn is largely based on the standards set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). Nevada does not follow Daubert. Yamaha v. Arnoult, 114 Nev. 233, 955 P.2d 661 (1998). Post-Horn decisions have largely rejected Horn's analysis. See McRae v. State, 152 S.W.3d 739 (Tex. 2004)("We conclude that, under the circumstances demonstrated here, the words 'clues,' 'test,' and 'divided attention' merely refer to observations by the peace officer, based on common knowledge observations of the one-leg stand, and do not convert the lay witness testimony into expert testimony."). 152 S.W.3d at 746-47. State v. Waldrop, 93 So.3d 780 (La. 2012); State v. Shadden, 235 P.3d 436 (Kan. 2010).

> Although there may be situations when language imbues unscientific evidence with scientific significance, using testing language to describe field sobriety tests is not one of them. Words like "tests," "results," "pass," "fail," and "points" are commonly used by the average person to describe unscientific topics. In this context, the language is nothing more than descriptive and does not automatically imply that the topic is scientific in nature. We therefore hold that the state is not required to lay a scientific foundation before it or its witnesses use testing language to describe field sobriety tests.

State v. Kelley, 896 A.2d 129, 135 (Conn. 2006).

In conclusion, Horn does an admirable job of summarizing various states' decisions concerning FST evidence. However, the Horn court came to a conclusion that is unsupported by law or facts.

APPENDIX THREE

BREATH TESTING

QUESTIONS FOR THE OFFICER WHO GAVE THE BREATH TEST

1. Did the defendant agree to take a breath test?
(Defendant has a choice of tests if this is his first DUI offense. If officer reasonably believes defendant has a prior conviction, or if a felony DUI, then defendant must take a blood test)

2. Where was the breath test given?
(At jail)

3. Who gave the defendant the breath test?
(I did)

4. Are you trained and certified to give a breath test?

5. When were you certified?
(Officer must be recertified every three years)

6. Is there a checklist that you follow to give a breath test?
(Yes)

7. Did you follow the checklist in this case?
(Yes)

8. Did you bring that checklist with you today?
(Yes)

9. How do you know this checklist pertains to this defendant?
(Officer fills out checklist and writes defendant's name on same)

10. Judge, we would move to admit the checklist into evidence.
(Defense may object. If court sustains objection, you don't need checklist admitted to win case)

11. Prior to giving the breath test did you observe the defendant for at least 15 minutes?

12. During this observation period did the defendant burp, vomit, or otherwise put alcohol in his mouth?
(The purpose of the 15 minute wait is to eliminate mouth alcohol)

13. Did the defendant have any food, liquids, or dentures in his mouth?
(Officer is supposed to ask defendant and/or check mouth)

14. Did you start the machine and enter information concerning the defendant into the machine?

15. What did you test the machine with to ensure it was accurate?
(Ran simulator solution)

16. Did you use the simulator solution in the manner you have been trained?
(Ran it though machine and then machine purged solution before test)

17. What did you have the defendant breath into?
(A plastic mouthpiece)

18. Where did you get the mouth piece from?
(A box where it is sealed in plastic)

19. Was the mouth piece sealed?
(Yes)

20. How many times did you test the defendant's breath?
(At least two times)

21. Did you use a new mouthpiece for each test?

22. Did the machine produce a result of the breath test?
(Yes, as a computer printout)

23. What did you do with that paper once the machine produced it?
(Impound it into evidence)

24. Were you subpoenaed to bring that paper with you today?

25. How do you know this paper pertains to this defendant?
(Officer signs bottom of paper and fills it out)

26. Is that test result in substantially the same condition as when you saw it come out of the machine?

27. Have paper marked and admitted.
(Defense may object on grounds that you have not shown that machine was calibrated or that simulator solution was prepared properly. You can either conditionally admit result or move to admit it after testimony about calibration and simulator solution by Forensic Analyst of Alcohol).

QUESTIONS FOR THE CHEMIST WHO CLAIBRATED THE BREATH MACHINE AND PREPARED THE SIMULATOR SOLUTION

1. State your name.

2. By who are you employed?

3. How long have you been so employed?

4. What are your duties?
(I calibrate, repair, and maintain evidential breath testing instruments for testing the breath alcohol content of subjects. I also train and certify police officers in the operation of evidential breath instruments)

5. What is your education and training that qualifies you to calibrate evidential breath instruments?
(FAA states education and training)

6. Is there any type of certification that is required for a person to calibrate breath instruments?
(To calibrate evidential breath instruments in Nevada, a person has to be certified as a Forensic Analyst of Alcohol)

7. Are you currently certified as a Forensic Analyst of Alcohol and were you on (state date of calibration in question or date of subject's breath test)?
(Yes)

CALIBRATION

8. Do you calibrate and maintain (state instrument serial # for case)?
(Yes)

9. Is this instrument type included on the State of Nevada's list of approved evidential breath testing devices?
(Yes)

10. Where is that breath instrument located?
(At the ____ jail)

11. Prior to (state date of subject's breath test), did you calibrate this instrument and on what date?
(Yes, on _____ date)

12. What did you do to ensure the accuracy of your calibration?
(Test machine several times with simulator solutions [multiple solutions with multiple values])

13. Was the instrument operating properly on that date?
(Yes)

14. Does anything in your records indicate that the instrument was not operating properly on (state date of subject's breath test)?
(No)

SIMULATOR AND SIMULATOR SOLUTION

15. Please briefly explain what a breath alcohol simulator is and how it is used in breath testing.
(A breath alcohol simulator is a device used to simulate a breath alcohol sample. The device contains a simulator solution of known alcohol concentration. The simulator maintains the simulator solution at a constant temperature and is hooked up to the instrument at all times. Immediately prior to the subject blowing into the breath instrument, the simulator introduces an ethanol/water vapor sample to be analyzed by the instrument. The instrument must read the ethanol concentration of the solution within $\pm$ 10 % of the certified value of that solution. If the instrument cannot analyze the solution within this specific range, the test will be aborted and the subject will not be allowed to blow into the instrument. By using a breath alcohol simulator, we can be assured that the instrument is operating properly and can accurately read a known ethanol concentration.)

16. Please explain how a simulator solution is prepared and certified to be used.
(The simulator solution is prepared and analyzed in the forensic laboratory. A large batch of simulator solution is prepared by quantitatively mixing ethanol w/ water. The batch is then assigned a Lot # and is analyzed using Head-space Gas Chromatography. A certified value for the lot is determined from the analysis results. The solution is then bottled for use in evidential breath alcohol instruments)

17. Are you familiar with simulator solution # ____?

18. How are you familiar with it?
(I prepared it)

19. Why did you prepare it?
(To test accuracy of breath machine)

20. What steps did you take to ensure the accuracy of simulator solution #____ when you made it?
(Checked it in machine and checked it against known values)

21. Is the # on simulator solution # unique to that simulator solution?
(Simulator solution number is written on breath checklist)

22. After you made simulator solution # S-___, what did you do with it?
(Issue it for use with breath machines)

SUBJECT'S BREATH TEST

23. Showing you (*show the FAA the subject's breath test card*), can you tell me what this is?
(This is a breath test card from a breath test performed on (*instrument serial #*), on (*date of test*), from (*subject's name*)

24. Based on your knowledge and experience looking at these breath test cards, can you briefly explain what information is contained on the breath card and what its significance is in respect to determining the validity of the results?
(FAA will go through the important parts of the breath test card, i.e. waiting period, air blanks, duplicate tests, simulator result, etc.

25. Based on the test card in front of you, in your opinion, does this appear to be a valid breath test?
(Based on the test card only, all the important information is present and this appears to be a valid breath test)

BLOOD TESTING

QUESTIONS FOR OFFICER WHO HAD BLOOD TEST DONE

1. Was the defendant given a blood test in this case?

2. Where was the test draw done?
(Jail or hospital)

3. Who did the blood draw?
(Nurse) (Note: this may lead to a hearsay objection so have officer tell why he thought she was a nurse)

4. Did you observe the blood draw occur?
(Yes)

5. What did the nurse do to withdraw the blood?
(Needle in arm)

6. What did the nurse place the withdrawn blood into?
(Glass vials)

7. What did you do with the vials after the nurse gave them to you?
(Put vial into cardboard kit and sealed kit)

8. Before being given to you, were the vials ever out of your sight?
(No)

9. What did you do with the blood kit after you got it from the nurse?
(Kept it until it is placed in a locked refrigerator at jail)

10. This locked refrigerator, does the public have access to it?
(No, it is secured at the jail)

11. Did you bring that blood kit with you?
(Officer is subpoenaed to bring in blood kit)

12. Please hand the blood kit to the Court Clerk to be marked (or have blood marked before court).

13. How do you know that this blood kit pertains to this defendant?
(Officer writes name and initials on box and on vials; also defendant's name is on kit)

14. Officer I see there is an event number on the outside of this box. Is that event number unique to this defendant?

15. Is this kit in substantially the same condition as when you saw it last?
(Other than being opened and resealed by lab)

16. Officer, please open the kit.
(Ask defense if they want kit opened; sometimes they will waive this)

17. What is inside the kit?
(The vials with the defendant's blood)

18. How do you know this blood vial pertains to this defendant?
(Officer initials vial before putting it into kit)

19. Are these vials in substantially the same condition as when they were placed into the kit by you?
(Yes except one vial has been opened and resealed by lab for testing)

20. Move to admit kit and vials.
(Defense may object. If court sustains, move to readmit blood kit and vials after chemist has testified [see question #28 below])

QUESTIONS FOR NURSE WHO DREW BLOOD

1. Please state your name.

2. By who are you employed?

3. How long have you been so employed?

4. What are your duties?

5. By who are you licensed or certified to perform these duties?
(Nevada State Board of Nursing or other appropriate Nevada agency)

6. Is part of your duties the drawing of blood from a person for later testing?

7. On _____, did you draw the blood of _____?
(Note: if nurse doesn't remember blood draw [very likely as nurse does thousands of draws] have him ID his declaration and admit as past recollection recorded)

8. When you drew ____'s blood, did you do so in a medically acceptable manner?
(Yes)

9. Did you use any alcohol solutions or swabs when you drew _____'s blood?
(No, the swabbing solution we use contains no alcohol)

10. What did you do with the blood when you withdrew it from the defendant's arm?
(Put it into a vial) (Note: nurse draws two vials of blood).

11. After placing the blood into the vial, what did you do with the vial?
(Gave it to the police officer)

12. Did you mark the vials or the box in any way for identification?
(Nurse sometimes marks vials)

13. Did anything happen to the vials or box between the time you drew the blood and gave them to the officer?
(No, matter of seconds)

14. Can you identify the State's Exhibit____? How do you know this vial and box go to this defendant?
(If nurse wrote on vials she can ID them. If she did not, do not ask this question)

QUESTIONS FOR CHEMIST WHO ANALYZED DEFENDANT'S BLOOD

1. Please state your name.

2. By who are you employed?
(Quest labs or Metro Crime Lab)

3. How long have you been so employed?

4. What are your duties?

5. Have you ever qualified in a court of record as an expert in the testing of blood to determine its alcohol or drug content? If so, when did you so qualify?
(If witness is qualified in a court of record, you don't need to go into qualifications as an expert [but you may want to anyway]. If not qualified, see next question)

6. What specialized education/training/experience have you received that qualifies you to analyze blood to determine its alcohol content?

7. As part of your duties with the crime lab (or other lab), do you analyze blood to determine its alcohol content?

8. What test do you use to analyze the blood?
(Gas Chromatograph)

9. What type of blood do you analyze?
(Whole blood, i.e. blood has not broken down into component parts)

10. What safeguards to you follow to ensure the accuracy of your tests?
(Two tests done, machine calibrated after each test)

11. Do these safeguards ensure that your test result is accurate?

12. How many times do you test the blood?
(Two)

13. Showing you what has been marked as State's Exhibit ___, can you identify this box?
(Yes, I tested this blood sample)

15. Was the box sealed when you first saw it?
(This is most important question for chain of custody. Normally, you won't have the courier testify so you must show that blood was sealed when it went from refrigerator to lab. Note: if defendant argues blood may not have been refrigerated, chemist will testify that heated blood will only lower BA level).

16. Did you open the box and vial to test the blood?

17. Did you test the blood in this vial?

18. How do you know that you tested the blood in this vial?
(My initials are on box)

19. Whose blood is in this vial?
(Defendant's name on box [put there by officer] and box sealed)

20. Does this box have a unique event number on it?

21. Are these numbers unique to each case?

22. Did you reseal the box after you were done testing the blood?

23. What did you do with the resealed box after you were done with it?
(Back into refrigerator at lab where officer/trooper picks it up or it is put in sealed storage cabinet)

24. How did you record the results of your test?
(In a declaration)

25. Is this the declaration you prepared in this case?
(Yes)

26. Judge, we would move to admit the declaration.
(If defense successfully objects to admission of declaration, then go to next question. Even if declaration is admitted, ask next question)

27. What result did you obtain when you tested the defendant's blood?

28. Judge we would move to admit the blood kit and blood vials into evidence.
(If defense has successfully objected to the admission of the blood kit and vials earlier, you will need to ask this question to have them readmitted)

APPENDIX FOUR
NRS 484C.160: THE IMPLIED CONSENT STATUTE

1. Except as otherwise provided in subsections 4 and 5, any person who drives or is in actual physical 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 or to determine whether a controlled substance, chemical, poison, organic solvent or another prohibited substance is present, if such a test is administered at the request of a police officer having reasonable grounds to believe that the person to be tested was:

(a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance or with a prohibited substance in his or her blood or urine; or

(b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430.

2. A police officer who requests that a person submit to a test pursuant to subsection 1 shall inform the person that his or her license, permit or privilege to drive will be revoked if he or she fails to submit to the test.

3. If the person to be tested pursuant to subsection 1 is dead or unconscious, the officer shall direct that samples of blood from the person to be tested.

4. Any person who is afflicted with hemophilia or with a heart condition requiring the use of an anticoagulant as determined by a physician is exempt from any blood test which may be required pursuant to this section but must, when appropriate pursuant to the provisions of this section, be required to submit to a breath or urine test.

5. If the concentration of alcohol in the blood or breath of the person to be tested is in issue:

(a) Except as otherwise provided in this section, the person may refuse to submit to a blood test if means are reasonably available to perform a breath test.

(b) The person may request a blood test, but if means are reasonably available to perform a breath test when the blood test is requested, and the person is subsequently convicted, the person must pay for the cost of the blood test, including the fees and expenses of witnesses whose testimony in court or an administrative hearing is necessary because of the use of the

blood test. The expenses of such a witness may be assessed at an hourly rate of not less than:
(1) Fifty dollars for travel to and from the place of the proceeding; and
(2) One hundred dollars for giving or waiting to give testimony.

(c) Except as otherwise provided in NRS 484C.200, not more than three samples of the person's blood or breath may be taken during the 5-hour period immediately following the time of the initial arrest.

6. If the presence of a controlled substance, chemical, poison, organic solvent or another prohibited substance in the blood or urine of the person is in issue, the officer may request that the person submit to a blood or urine test, or both.

7. Except as otherwise provided in subsections 4 and 6, a police officer shall not request that a person submit to a urine test.

8. If a person to be tested fails to submit to a required test as requested by a police officer pursuant to this section and the officer has reasonable grounds to believe that the person to be tested was:

(a) Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance or with a prohibited substance in his or her blood or urine; or

(b) Engaging in any other conduct prohibited by NRS 484C.110, 484C.120, 484C.130 or 484C.430,

the officer may apply for a warrant or court order directing that reasonable force be used to the extent necessary to obtain samples of blood from the person to be tested.

9. If a person who is less than 18 years of age is requested to submit to an evidentiary test pursuant to this section, the officer shall, before testing the person, make a reasonable attempt to notify the parent, guardian or custodian of the person, if known.

APPENDIX FIVE: EXIGENT CIRCUMSTANCES.

When an officer asks a defendant to submit to a chemical test and the defendant is unwilling or unable to agree, the officer should obtain a warrant to perform a blood draw. A warrant is not necessary if the police have exigent circumstances. Courts are reluctant to find exigent circumstances because in most DUI cases, there is time to obtain a warrant. The only situation where exigent circumstances have been generally found is when the defendant is at the hospital and is going to receive medical for serious injuries. When the defendant is going to be administered drugs and/or going to be in surgery or other serious treatment for an unknown period of time, courts have found that exigent circumstances exist.

In People v. Ackerman, 346 P.3d 61, 67 (Colo. 2015), the court found that it was not known how long Ackerman would be treated before his blood could be drawn so exigent circumstances existed allowing a warrantless blood draw:

> Nevertheless, the police had not completed writing the affidavit by the time Officer Tower was informed that Ackerman was headed for a CAT scan and surgery. At the time he ordered the first blood draw, it was unclear how long surgery would last. Because the "percentage of alcohol in the blood begins to diminish shortly after drinking stops," Schmerber, 384 U.S. at 770, a lengthy surgery could have resulted in a delay that significantly diminished the sample's blood-alcohol content. The impending medical procedures also might have altered the alcohol content in Ackerman's blood and adversely affected the accuracy of the results.

In State v. Stavish, 868 N.W.2d 670, 677-678 (Minn. 2015), the need for medical treatment and a two hour rule combined to create an exigency:

> We conclude that the State established under the totality-of-the-circumstances approach that exigent circumstances justified the warrantless blood draw. The relevant circumstances are that law enforcement had reason to believe that Stavish, who allegedly admitted to being the driver, had consumed alcohol, and that alcohol contributed to the accident. Thus, it was important to draw Stavish's blood within 2 hours of the accident to ensure the reliability and admissibility of the alcohol concentration evidence. Minn. Stat. § 169A.20, subd. 1(5) (defining impairment as an

alcohol concentration of 0.08 or greater, as measured within 2 hours of the time of driving). Additionally, Stavish sustained serious injuries that necessitated emergency medical treatment at a hospital and potentially required that he be transported by helicopter to another hospital. Stavish's medical condition and need for treatment rendered his future availability for a blood draw uncertain. Sergeant Martens did not know how long Stavish was likely to remain at the same hospital or whether further medical care would preclude obtaining a sample even if Stavish stayed at the same hospital. Consequently, it was objectively reasonable for Sergeant Martens to conclude that he was faced with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence. See Schmerber, 384 U.S. at 770.

DA PROSECUTORS MANUAL INDEX

A

B

C

D

E.

F.

G

H

T

U

V

W

X

Y

Z