

SENATE BILL NO. 35—COMMITTEE ON JUDICIARY

(ON BEHALF OF THE ATTORNEY GENERAL)

PREFILED JANUARY 26, 2007

Referred to Committee on Judiciary

SUMMARY—Revises certain provisions relating to the admissibility of certain affidavits and declarations in certain proceedings. (BDR 4-507)

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

~

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

AN ACT relating to crimes; providing that certain witnesses may testify by simultaneous audiovisual transmission in certain circumstances; providing that certain affidavits and declarations are admissible in certain criminal proceedings; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

1 Before 2005, NRS 50.315 and 50.320 allowed affidavits and declarations of
2 certain persons to be admitted as evidence during any criminal or administrative
3 proceeding, including a trial, to prove certain facts relating to the testing of the
4 blood, breath or urine of an accused to determine the presence or concentration of
5 alcohol or certain other substances. During the 2005 Legislative Session, those
6 provisions were amended so that such affidavits and declarations could only be
7 used during a hearing before a grand jury or a preliminary hearing. (Chapter 443,
8 Statutes of Nevada 2005, p. 2044) Those amendments were made in response to an
9 opinion of the Nevada Supreme Court in 2004 which held that the affidavit of the
10 nurse who withdrew the blood of a defendant accused of driving a vehicle while
11 under the influence of alcohol was inadmissible at trial unless the defendant had an
12 opportunity to cross-examine the person providing the testimony as required by the
13 Sixth Amendment to the U.S. Constitution. (*City of Las Vegas v. Walsh*, 120 Nev.
14 Adv. Op. 44, 91 P.3d 591, 596 (2004)) In December of 2005, the Nevada Supreme
15 Court withdrew its opinion in *City of Las Vegas* and instead held that NRS 50.315
16 as it existed before its decision in *City of Las Vegas* was not unconstitutional and
17 adequately preserved the rights of an accused under the constitution. (*City of*



* S B 3 5 *

18 *Las Vegas v. Walsh*, 121 Nev. Adv. Op. 85, 124 P.3d 203, 209 (2005)) Although
19 the Court agreed that the evidence is testimonial, the statute allowed for the court to
20 order the witness to testify in court in certain circumstances. Accordingly, such
21 evidence may be made admissible during other criminal and administrative
22 proceedings if authorized by statute.

23 **Sections 2 and 3** of this bill amend NRS 50.315 and 50.320 to return the
24 language of those sections to that which existed before 2005. **Sections 2 and 3**
25 provide that the affidavits and declarations referred to in those sections in certain
26 circumstances may be admitted into evidence during any criminal proceeding,
27 including a trial. **Section 4** of this bill provides the procedure for having such
28 affidavits and declarations admitted into evidence at trial and the notice that must
29 be provided to the defense in such circumstances. **Section 1** of this bill adds a new
30 provision allowing the affiant or declarant to testify by audiovisual transmission
31 when testimony is required to admit the affidavit or declaration.

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

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

3 *Any testimony given pursuant to NRS 50.315 or 50.320 may be*
4 *given by means of simultaneous audiovisual transmission*
5 *accomplished through the use of:*

6 *1. One or more cameras at a location other than the*
7 *courtroom that depict the witness in real time so that the*
8 *defendant, the defendant's counsel, the prosecutor, the court and*
9 *the jury can see the witness in his entirety; and*

10 *2. One or more cameras in the courtroom that depict the*
11 *defendant, the defendant's counsel, the prosecutor, the court and*
12 *the jury in real time on a screen visible to the witness who is at*
13 *another location.*

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

15 50.315 1. ~~{The}~~ *Except as otherwise provided in subsections*
16 *6 and 7, the* affidavit or declaration of a person is admissible in
17 evidence in any ~~{grand jury hearing, preliminary hearing}~~ *criminal*
18 *or administrative proceeding to prove:*

19 (a) That the affiant or declarant has been certified by the
20 Director of the Department of Public Safety as being competent to
21 operate devices of a type certified by the Committee on Testing for
22 Intoxication as accurate and reliable for testing a person's breath to
23 determine the concentration of alcohol in his breath;

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

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

28 2. ~~{The}~~ *Except as otherwise provided in subsections 6 and 7,*
29 *the* affidavit or declaration of a person who prepared a chemical



* S B 3 5 *

1 solution or gas that has been used in calibrating a device for testing
2 another's breath to determine the concentration of alcohol in his
3 breath is admissible in evidence in any ~~{grand jury hearing,~~
4 ~~preliminary hearing}~~ **criminal** or administrative proceeding to
5 prove:

6 (a) The occupation of the affiant or declarant; and

7 (b) That the solution or gas has the chemical composition
8 necessary for accurately calibrating it.

9 3. ~~{The}~~ **Except as otherwise provided in subsections 6 and 7,**
10 **the** affidavit or declaration of a person who calibrates a device for
11 testing another's breath to determine the concentration of alcohol in
12 his breath is admissible in evidence in any ~~{grand jury hearing,~~
13 ~~preliminary hearing}~~ **criminal** or administrative proceeding to
14 prove:

15 (a) The occupation of the affiant or declarant;

16 (b) That on a specified date the affiant or declarant calibrated the
17 device at a named law enforcement agency by using the procedures
18 and equipment prescribed in the regulations of the Committee on
19 Testing for Intoxication;

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

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

24 4. ~~{The}~~ **Except as otherwise provided in subsections 6 and 7,**
25 **the** affidavit or declaration made under the penalty of perjury of a
26 person who withdraws a sample of blood from another for analysis
27 by an expert as set forth in NRS 50.320 is admissible in any ~~{grand~~
28 ~~jury hearing, preliminary hearing}~~ **criminal** or administrative
29 proceeding to prove:

30 (a) The occupation of the affiant or declarant;

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

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

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

38 5. ~~{The}~~ **Except as otherwise provided in subsections 6 and 7,**
39 **the** affidavit or declaration of a person who receives from another a
40 sample of blood or urine or other tangible evidence that is alleged to
41 contain alcohol or a controlled substance, chemical, poison, organic
42 solvent or another prohibited substance may be admitted in any
43 ~~{grand jury hearing, preliminary hearing}~~ **criminal** or civil or
44 administrative proceeding to prove:

45 (a) The occupation of the affiant or declarant;



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

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

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

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

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

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

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

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

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

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

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

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

↳ is admissible in the manner provided in this section.

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



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

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

Sec. 4. NRS 50.325 is hereby amended to read as follows:

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

(a) The existence of any alcohol;

(b) The quantity of a controlled substance; or

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

the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 and 50.320 be admitted into evidence at the preliminary hearing, ~~for~~ 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. ~~The~~ *If the request is to have the affidavit or declaration admitted into evidence at a preliminary hearing or hearing before a grand jury, the affidavit or declaration must be admitted into evidence upon submission. If the request is to have the affidavit or declaration admitted into evidence at trial, the request must be:*

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

(b) *Sent to the defendant's counsel and to the defendant, by registered or certified mail by the prosecuting attorney; 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 ~~a preliminary hearing or hearing before a grand jury.~~ *trial.*

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

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

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

(c) A homicide resulting from driving, operating or being in actual physical control of a vehicle or a vessel under power or sail



- 1 while under the influence of intoxicating liquor or a controlled
2 substance or resulting from any other conduct prohibited by NRS
3 484.379, 484.3795, 484.37955, subsection 2 of NRS 488.400, NRS
4 488.410, 488.420 or 488.425.
- 5 (d) Any other offense for which it is necessary to prove, as an
6 element of the offense:
- 7 (1) The existence of any alcohol;
8 (2) The quantity of a controlled substance; or
9 (3) The existence or identity of a controlled substance,
10 chemical, poison, organic solvent or another prohibited substance.

