

Amendment No. 15

Senate Amendment to Senate Bill No. 35

(BDR 4-507)

Proposed by: Senate Committee on Judiciary**Amends:** Summary: No Title: No Preamble: No Joint Sponsorship: No Digest: No

ASSEMBLY ACTION			Initial and Date	SENATE ACTION			Initial and Date	
Adopted	☐	Lost	☐ _____		Adopted	☐	Lost	☐ _____
Concurred In	☐	Not	☐ _____		Concurred In	☐	Not	☐ _____
Receded	☐	Not	☐ _____		Receded	☐	Not	☐ _____

EXPLANATION: Matter in (1) ***blue bold italics*** is new language in the original bill; (2) ***green bold italic underlining*** is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) ***orange double underlining*** is deleted language in the original bill that is proposed to be retained in this amendment; and (6) ***green bold*** is newly added transitory language.

BFM/BAW



Date: 4/3/2007

S.B. No. 35—Revises certain provisions relating to the admissibility of certain affidavits and declarations in certain proceedings. (BDR 4-507)



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.

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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:

Before 2005, NRS 50.315 and 50.320 allowed affidavits and declarations of certain persons to be admitted as evidence during any criminal or administrative proceeding, including a trial, to prove certain facts relating to the testing of the blood, breath or urine of an accused to determine the presence or concentration of alcohol or certain other substances. During the 2005 Legislative Session, those provisions were amended so that such affidavits and declarations could only be used during a hearing before a grand jury or a preliminary hearing. (Chapter 443, Statutes of Nevada 2005, p. 2044) Those amendments were made in response to an opinion of the Nevada Supreme Court in 2004 which held that the affidavit of the nurse who withdrew the blood of a defendant accused of driving a vehicle while under the influence of alcohol was inadmissible at trial unless the defendant had an opportunity to cross-examine the person providing the testimony as required by the Sixth Amendment to the U.S. Constitution. (*City of Las Vegas v. Walsh*, 120 Nev. Adv. Op. 44, 91 P.3d 591, 596 (2004)) In December of 2005, the Nevada Supreme Court withdrew its opinion in *City of Las Vegas* and instead held that NRS 50.315 as it existed before its decision in *City of Las Vegas* was not unconstitutional and adequately preserved the rights of an accused under the constitution. (*City of Las Vegas v. Walsh*, 121 Nev. Adv. Op. 85, 124 P.3d 203, 209 (2005)) Although the Court agreed that the evidence is testimonial, the statute allowed for the court to order the witness to testify in court in certain circumstances. Accordingly, such evidence may be made admissible during other criminal and administrative proceedings if authorized by statute.

Sections 2 and 3 of this bill amend NRS 50.315 and 50.320 to return the language of those sections to that which existed before 2005. **Sections 2 and 3** provide that the affidavits and declarations referred to in those sections in certain circumstances may be admitted into evidence during any criminal proceeding, including a trial. **Section 4** of this bill provides the procedure for having such affidavits and declarations admitted into evidence at trial and the notice that must be provided to the defense in such circumstances. **Section 1** of this bill adds a

new provision allowing the affiant or declarant to testify by audiovisual transmission 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:

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

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

- 1. One or more cameras at a location other than the courtroom that depict the witness in real time so that the defendant, the defendant's counsel, the prosecutor, the court and the jury, if any, can see the witness in his entirety; and*
- 2. One or more cameras in the courtroom that depict the defendant, the defendant's counsel, the prosecutor, the court and the jury, if any, in real time on a screen visible to the witness who is at another location.*

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

50.315 1. ~~{The}~~ Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person is admissible in evidence in any ~~{grand jury hearing, preliminary hearing}~~ 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. ~~{The}~~ 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 ~~{grand jury hearing, preliminary hearing}~~ 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. ~~{The}~~ 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 ~~{grand jury hearing, preliminary hearing}~~ 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. ~~{The}~~ 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 ~~grand jury hearing, preliminary hearing~~ 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. ~~The~~ *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 ~~grand jury hearing, preliminary hearing~~ 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, 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

1 court shall not sustain any objection to the admission of such an affidavit or
2 declaration.

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

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

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

12 50.325 1. If a person is charged with an offense listed in subsection 4, and it
13 is necessary to prove:

14 (a) The existence of any alcohol;

15 (b) The quantity of a controlled substance; or

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

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

23 2. ~~The~~ *If the request is to have the affidavit or declaration admitted into*
24 *evidence at a preliminary hearing or hearing before a grand jury, the* affidavit or
25 declaration must be admitted into evidence upon submission. *If the request is to*
26 *have the affidavit or declaration admitted into evidence at trial, the request must*
27 *be:*

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

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

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

33 3. The provisions of this section do not prohibit either party from producing
34 any witness to offer testimony at ~~the preliminary hearing or hearing before a grand~~
35 ~~jury.~~ *trial.*

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

37 (a) An offense punishable pursuant to NRS 202.257, 455A.170, 455B.080,
38 493.130 or 639.283.

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

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

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

47 (1) The existence of any alcohol;

48 (2) The quantity of a controlled substance; or

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

51 **Sec. 5. This act becomes effective upon passage and approval.**