

**BACKGROUND PAPER 95-10**

**NEVADA'S LAWS AGAINST  
DRIVING UNDER THE INFLUENCE**

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# NEVADA'S LAWS AGAINST DRIVING UNDER THE INFLUENCE

## INTRODUCTION

Nevada's first law concerning driving under the influence of intoxicating liquor (DUI) was enacted by the Nevada Legislature in 1923. Senate Bill 5<sup>1</sup> provided that it was unlawful "for any person, or persons, while either intoxicated or under the influence of intoxicating liquor, to drive or conduct any vehicle upon any street or highway in this state." The bill also stipulated that DUI resulting in the death or bodily injury to any person was a felony. Two years later, Assembly Bill 37 added "stimulating and stupefying drugs" to the statute.

In the 70 years since passage of the state's first DUI law, only the distinction between misdemeanor and felony DUI has remained relatively unchanged. The exact definition of the offenses and their respective penalties have been frequently revised. Occasionally, the penalties were reduced; more frequently, they have been increased. Nevada's lawmakers have also addressed public awareness of the seriousness of the offense, prevention programs, and rehabilitation of habitual DUI offenders.

This paper examines the development of certain concepts of DUI law in Nevada. When possible, the rationale for these developments, derived from either literature concerning national trends or testimony before legislative committees, is provided to enhance the discussion of the concepts. These suggested explanations are not intended to support or oppose any particular viewpoint or law.

## FIRST EFFORTS TO DEFINE THE OFFENSE: PRESUMPTIONS OF INTOXICATION

For over 30 years, no Nevada law defined, or otherwise provided direction concerning what constituted, intoxication or being "under the influence." Like their counterparts in other states, Nevada's peace officers relied upon observation, certain sobriety tests, and judgment to determine if drivers were intoxicated.

During the late 1930s and early 1940s, technology to measure the amount of alcohol in a person's blood (Blood Alcohol Content or BAC) became readily available. Further, evidence from the new tests indicated that, at higher BAC levels, drivers were more likely to be involved in accidents.

In an effort to make the evaluation of DUI more objective and, thus, the enforcement of DUI laws more effective, states began adopting "presumptive" DUI statutes. That is, a person was *presumed* to be intoxicated at a specified BAC, although the presumption was rebuttable in court. Indiana passed the first such law in 1939.

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<sup>1</sup> Appendix A to this paper, a chronicle of selected DUI legislation in Nevada, includes chapter citations of all bills referenced.

Similarly, Nevada, in 1957, enacted Assembly Bill 267, which established statutory presumptions associated with certain BAC levels. Like the presumptive statutes of most other states, A.B. 267 set what is now generally considered to be a very conservative standard for presumed intoxication--0.15.<sup>2</sup>

A person with a BAC of 0.05 or less was presumed *not* to be under the influence of intoxicating liquor; with a BAC of 0.15 or more, a person was presumed to be intoxicated. A BAC between 0.05 and 0.15 gave rise to no statutory presumption concerning whether the person was intoxicated, although the BAC might be considered with other evidence in making that determination.

Further, the bill specified that the presumptions were not to be "construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor." Thus, the presumption that a driver was intoxicated was rebuttable in court.

By 1967, national attention to the dangers of drunk driving had prompted the Federal Government to include among its standards for highway safety programs a presumptive BAC level of 0.10. Two years later, the Nevada Legislature considered a bill to lower the standard (Assembly Bill 266 of the 1969 Session), but the measure did not pass. Opponents referred to A.B. 266 as the "two-drink" bill, arguing that "just two drinks" could result in a BAC of 0.10.

Thus, it was not until 1971 that the Nevada Legislature lowered the presumptive level from a BAC of 0.15 to 0.10. According to testimony during legislative hearings, at that time 25 states had already done so.<sup>3</sup> The Nevada Safety Council, one advocate of lowering the standard for presumed intoxication, conducted an experiment to counter the "two-drink" argument of the previous session. The council's testimony included the results of that (admittedly non-scientific) experiment, in which it found "it takes a sufficient number of drinks before an average person's blood-alcohol content registers 0.10."

### ILLEGAL PER SE

Nationwide, the presumptive statutes of the 1950s were followed by "*per se*" statutes in the 1970s. Although a presumptive law allows a driver with a BAC over the presumed level of intoxication to rebut the presumption in court, a *per se* law stipulates that to drive with a BAC at or above a specified level constitutes an offense *in and of itself*. Proponents of the new legislation argued that police officers were not inclined to arrest drivers for DUI if they believed that the presumption of intoxication would be successfully rebutted. Further, they suggested that *per se* laws encouraged arrest and prosecution and, therefore, deterred drinking and driving.

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<sup>2</sup> Currently, all 50 states have either presumptive or *per se* statutes at a BAC no higher than 0.10.

<sup>3</sup> See the Legislative History of A.B. 24, available in the Research Library of the Legislative Counsel Bureau, for more information about lowering the presumptive BAC level.

Following passage of a significant piece of DUI legislation, Senate Bill 83 of the 1981 Session, the Nevada Legislature directed a study of the effectiveness of the state's drunk driving laws.<sup>4</sup> The interim subcommittee charged with conducting the study made several recommendations for legislation, most of which were enacted by the 1983 Legislature. Included among those recommendations was the adoption of an "illegal *per se*" law.

Testimony before the interim subcommittee indicated that *per se* legislation was expected not only to *deter* drivers from operating vehicles after drinking, but also to result in increased pleas and fewer requests for jury trials from those who nevertheless drove drunk and were subsequently arrested.

Thus, Nevada, following the example of other states, passed Assembly Bill 167 in 1983. Among other provisions, the bill provided that it was illegal *per se* to drive with a BAC of 0.10 or above. The existing prohibition against driving while under the influence remained, however, and the penalties for conviction under either provision--presumptive and *per se*--were the same.<sup>5</sup>

In 1992, the presumptive statute was found to be unconstitutional as applied, although the Court declined to address whether it was unconstitutional on its face.<sup>6</sup> Nevertheless, the 1993 Legislature, with the passage of Assembly Bill 490, repealed the section establishing presumptions. The same bill also addressed the use of the "last gulp defense," in which a person argues that a last drink consumed just prior to driving caused the BAC to rise to 0.10 at the time of *testing*, but at the time of *driving* the BAC was actually lower. Assembly Bill 490 provides that a person whose BAC measures 0.10 within 2 hours of driving is guilty of a misdemeanor.

Thus, Nevada's misdemeanor DUI law (*Nevada Revised Statutes* [NRS] 484.379) now has three separate components. It is unlawful for a person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access, if the person:

- Is under the influence of intoxicating liquor; **or**
- Has 0.10 percent or more by weight of alcohol in his blood; **or**
- Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have 0.10 percent or more by weight of alcohol in his blood.

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<sup>4</sup> See LCB *Bulletin* No. 83-7, *Driving While Intoxicated*, for a complete description of the subcommittee's findings and recommendations for legislation.

<sup>5</sup> According to the 1994 *Digest of State Alcohol-Highway Safety Related Legislation*, a publication of the National Highway Traffic Safety Administration, all but four states had adopted illegal *per se* laws by 1993. Like Nevada prior to the passage of A.B. 490, many states also retain presumptive statutes along with a *per se* law. An excerpt from the 1994 *Digest* that summarizes high-interest legislation for the 50 states, the District of Columbia, and Puerto Rico, is included as Appendix B to this paper.

<sup>6</sup> *McLean v. Moran*, 963 F.2d 1306 (9th Cir. 1992).

The penalty for a first misdemeanor DUI offense is: (1) 10 days to 6 months in jail or 48 hours of community work while dressed in "distinctive garb" identifying the person as a violator of the DUI law; (2) a fine of not less than \$200 nor more than \$1,000; and (3) completion of an educational course on substance abuse (NRS 484.3792). The sentence may be reduced to 1 day imprisonment or 24 hours of community work if, at any time prior to sentencing, the offender applies to the court to undergo a 1-year treatment program for substance abuse (NRS 484.3794).<sup>7</sup>

### **LOWERING THE *PER SE* LIMIT TO 0.08**

The 0.10 *per se* limit, at the time of its adoption in Nevada, was recommended by the National Highway Transportation Safety Administration (NHTSA) and the Presidential Commission on Drunk Driving. The NHTSA has since lowered its recommendation for the *per se* limit to 0.08. Some states have adopted the lower standard. The earliest states to do so include Oregon and Utah (1983) and Maine (1988). The states with more recent 0.08 levels are California, Florida, Kansas, New Hampshire, New Mexico, North Carolina, and Vermont. The *per se* limit in 36 states is 0.10.<sup>8</sup>

In 1991, three bills to revise the illegal *per se* standard from a BAC of 0.10 to 0.08 were introduced in the Nevada Legislature. The two Senate bills died in the Senate Committee on Transportation. The third measure, Assembly Bill 749, passed the Assembly Committee on Judiciary but died in Assembly Ways and Means. During the 1993 Session, legislators took up the issue again; once again, Assembly Bill 246 passed the Assembly Committee on Judiciary, but died in Ways and Means.

Proponents of lowering the limit argue that, for most drivers, serious impairment exists at a BAC of 0.08. They also argue that 0.08 laws have proven effective in reducing DUI incidents in those states with the lower limit. In addition, proponents stress that the legislation is intended to decrease not the consumption of alcohol, but rather the incidence of drunk driving. Further, to counter opposition to the cost of enforcing 0.08 legislation, proponents suggest that the cost of DUI-related death and injury (medical and legal costs as well as economic productivity losses) is also significantly high. Finally, Nevada may lose certain federal funds if it does not adopt the 0.08 standard.<sup>9</sup>

Opponents of 0.08 legislation argue that the cost (projected at \$1 million per biennium during testimony concerning A.B. 246) is prohibitive and that the money could be better spent on rehabilitation for substance abusers or on housing violent criminals. Further,

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<sup>7</sup> Nevada Revised Statutes 484.3794 requires that the offender be certified as an alcoholic or abuser of drugs and agree to pay the costs of the treatment.

<sup>8</sup> As of December 1994, Maryland, Massachusetts, South Carolina, and Tennessee had no *per se* law.

<sup>9</sup> Appendix C to this paper is a copy of a memorandum dated October 12, 1994, from Marlen Schultz, Highway Safety Coordinator with Nevada's Office of Traffic Safety, to Paula Winne of the Research Division of the Legislative Counsel Bureau, concerning the effect of the BAC level on Nevada's receipt of federal funds.



opponents suggest that lowering the limit will deter only social drinkers, not chronic abusers, and that it is the chronic abusers at 0.10 and above who are responsible for most DUI accidents. Finally, opponents argue that 0.08 legislation would be harmful to Nevada's tourist industry.

### **"SUBSEQUENT" OFFENSES DEFINED**

In 1967, Assembly Bill 71 provided the first time period--within 10 years--within which a DUI offense was punishable as a "subsequent" offense. Prior to 1967, a subsequent offense was not specifically defined, although it carried an additional penalty.

In the next 15 years, the definition of "subsequent" was revised periodically, from an offense occurring within 3 years (Assembly Bill 271 of the 1969 Session) to one occurring within 5 years (Senate Bill 83 of the 1981 Session) and, finally, to its present definition of within 7 years (Assembly Bill 167 of the 1983 Session).<sup>10</sup>

In addition, the 1983 Legislature eliminated a "loophole" in the provisions governing subsequent offenses. Prior to the passage of A.B. 167, a person had to be *convicted* of an offense before a later offense could be considered "subsequent," and the time period linking offenses ran from conviction to conviction. Thus, a person could commit a second or subsequent offense within the specified time period, but the date of conviction of the prior offense might be so late as to cause the later occurrence to be considered a lesser offense.

Testimony indicated that the "loophole" created a significant incentive to delay trials and also violated the intent of the law, which was to punish repeated offenses more severely. Assembly Bill 167 stipulated that an offense occurring within 7 years *preceding or after* the date of the "principal" offense constitutes a prior offense when evidenced by a conviction, *without regard to the sequence of the offenses and convictions*.<sup>11</sup>

Currently, the penalty for a second offense within 7 years is a fine of not less than \$500 nor more than \$1,000 and either residential confinement or imprisonment in jail from 10 days to 6 months (NRS 484.3792). The sentence may be reduced to 5 days if, at any time prior to sentencing, the offender applies to the court to undergo a 1-year treatment program for substance abuse (NRS 484.3794).

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<sup>10</sup> Subsection 8 of NRS 484.3792 provides that "offense" includes the violation of a law of any other jurisdiction which prohibits the same or similar conduct. Thus, a DUI conviction in another state constitutes a prior offense for purposes of enhancing the punishment for a DUI committed in Nevada.

<sup>11</sup> This language is found in Subsection 3 of NRS 484.3792.

## **FELONY DUI**

The state's first DUI law provided that a DUI offense resulting in death or bodily harm to any person constituted a felony. Over the years, that provision evolved to its current form, found in NRS 484.3795: a person driving while under the influence of intoxicating liquor or a controlled substance, to a degree which renders him incapable of safely driving, and "[whose] act or neglect of duty proximately causes the death of, or substantial bodily harm to, any person other than himself" is guilty of a felony.

In addition, the 1981 Legislature established that a third offense constitutes a felony (Senate Bill 83). Prior to that time, a third offense not involving death or substantial bodily harm would have been a misdemeanor, punishable as a subsequent offense.

Currently, the penalty for felony DUI causing death or substantial bodily harm is imprisonment from 1 to 20 years and a fine of not less than \$2,000 nor more than \$5,000. The penalty for felony DUI *not* involving death or substantial bodily harm (a third offense within 7 years) is imprisonment from 1 to 6 years and a fine of \$2,000 to \$5,000. Offenders incarcerated for felony DUI are, to the extent possible, placed in minimum security facilities and segregated from offenders whose crimes were violent.

## **TREATMENT, COUNSELING, AND THE "305" PROGRAM**

Over the past decade, Nevada's DUI laws, like those in most states, have become stricter and the penalties stiffer. Recognizing that harsher penalties may deter some but not all offenders, however, lawmakers have also stressed the importance of treatment for chronic abusers of alcohol.

### ***Senate Bill 83 of the 1981 Session***

The 1981 Legislature made several changes to the procedures related to treatment for DUI offenders. Senate Bill 83 stipulated that a first-time DUI offender could elect substance abuse treatment before sentencing, but after conviction. Prior to the bill's passage, a person could elect treatment *before* conviction; upon satisfactory completion of a treatment program, the charges were dropped. Following enactment of S.B. 83, a sentence might be reduced but the conviction would remain. In addition, the bill required that, to be eligible to elect treatment, a person be classified as an alcoholic or drug abuser.

Senate Bill 83 also provided that a person might elect treatment only once in a 5-year period. Previously, a person might elect treatment twice within a 2-year period. Finally, S.B. 83 stipulated that, as a condition of treatment, a person must serve a term of imprisonment (though significantly reduced from the term of imprisonment without treatment).

Finally, S.B. 83 added a provision requiring a DUI offender to attend an educational course on the abuse of alcohol and controlled substances.

### ***Assembly Bill 167 of the 1983 Session***

The legislative subcommittee formed during the 1981-1982 interim to review the state's DUI laws found that the treatment provisions, as amended by S.B. 83, attracted some opposition from prosecutors. In particular, opponents argued that the law did not permit a prosecutor to object to treatment if circumstances warranted objection; they also testified that defense lawyers were preventing the rehabilitative intent of treatment by advising clients to "save the election of treatment for when you are convicted of a third, or felony, offense."<sup>12</sup>

Thus, subcommittee members recommended that the treatment provisions be revised to preclude election of treatment for a third offense; to permit application for treatment on both first and second offenses; and to allow prosecutors to object to the application if an offender fails to complete or did not benefit from prior treatment. Assembly Bill 167 of the 1983 Session incorporated those recommendations.

### ***Assembly Bill 305 of the 1991 Session***

In 1991, an Executive-Legislative Blue Ribbon Commission was formed to conduct a study of prison overcrowding. Among the conclusions reached by the committee was that the state's lack of a substance abuse treatment program for prison inmates contributed to the high rate of re-arrest among DUI offenders.

To address that need, the Governor's committee recommended that the Department of Prisons create a treatment program for DUI offenders that would include intensive in-prison treatment (Phase I), followed by outpatient counseling in conjunction with work release or house arrest (Phase II). Accordingly, the 1991 Nevada Legislature enacted Assembly Bill 305.

During the 1993 Session, legislators concerned with the continuing problem of prison overcrowding suggested that an interim study be conducted to evaluate the efficacy of the "305" program and the possibility of its expansion. The Assembly Concurrent Resolution No. 71 Subcommittee determined that the program was effective,<sup>13</sup> but that certain changes would improve its operation. For example, the subcommittee recommended that inmates not eligible for residential confinement be allowed to complete Phase II of the program in prison, rather than while on parole.<sup>14</sup>

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<sup>12</sup> LCB Bulletin No. 83-7, *Driving While Intoxicated*, pages 15-16.

<sup>13</sup> For example, testimony from the Bureau of Alcohol and Drug Abuse indicated that, of the 204 offenders who had completed Phase II by the end of February 1994, only one had been returned to prison.

<sup>14</sup> See LCB Bulletin No. 95-9, *Drug and Alcohol Abuse Among Criminal Offenders*, for a complete description of the subcommittee's findings and recommendations.

## ***Assembly Bill 499 of the 1993 Session***

Lawmakers in the 1991 Session targeted for treatment not only felony DUI offenders (A.B. 305), but also those guilty of misdemeanor DUI (A.B. 491). Assembly Bill 491 was vetoed by Governor Bob Miller. The Governor objected to a provision of the bill that would have given a treatment facility, rather than a judge, the authority to confine an offender to the facility.

Assembly Bill 499 of the 1993 Session revised and expanded the bill vetoed 2 years earlier. The 1993 bill established an assessment procedure to determine whether a DUI offender is an abuser of alcohol or drugs. Its provisions apply to first-time offenders whose BAC was 0.18 percent or more and to persons guilty of a second DUI violation within 7 years. In those cases, the court is required to order an evaluation to determine if the offender is a substance abuser. The results of the evaluation and a recommendation for the length and type of any suggested treatment must be submitted to the court.

## **MISCELLANEOUS CONCEPTS OF NEVADA'S DUI LAW**

Appendix D to this paper is a copy of NRS 484.377 through 484.3947, inclusive, containing most of the statutes related to DUI (various other provisions concerning juvenile offenses and drivers' licenses, for example, are found in other chapters). Certain concepts contained in those statutes are discussed in more detail below.

### ***Implied Consent***

Nevada's Implied Consent Law originated with Assembly Bill 268 of the 1969 Legislative Session. The bill provided that a person operating a motor vehicle on the highways of the State was deemed to have consented to a test to determine the content of alcohol in the blood. Initially, refusal to submit to such a test was punishable by suspension of the driver's license for 6 months.

Currently, NRS 484.382 provides that a driver on a highway or on premises to which the public has access is deemed to have consented to a *preliminary test* of his breath if a police officer has an "articulable suspicion" that the person is under the influence of intoxicating liquor or a controlled substance. Failure to submit to the preliminary test results in the immediate revocation of the person's driver's license.

In addition, NRS 484.383 provides that a driver is deemed to have consented to an *evidentiary test* of his blood, urine, or breath, when such a test is administered at the direction of a police officer having reasonable grounds to believe that the person was operating a vehicle while under the influence of alcohol or a controlled substance. Failure to submit to the evidentiary test results in revocation of the driver's license. If a driver refuses to submit to a test, none may be given, *unless* the police officer has reasonable cause to believe that the person has caused the death or substantial bodily harm to another or has been previously convicted of a DUI offense within the past 7 years.

### ***Preliminary Breath Tests (PBTs)***

The 1981-1982 interim subcommittee formed to review the state's DUI laws recommended the authorization of Preliminary Breath Tests (PBTs). According to testimony before the subcommittee, the tests "enable an officer in the field to make a quick and simple determination whether a person is legally intoxicated and probable cause exists to arrest him \* \* \* \* [A PBT] can also show that a driver is not impaired, and can thus be released and not suffer the indignity and inconvenience of an arrest."<sup>15</sup> The tests were recommended by the Presidential Commission on Drunk Driving, and at the time of the study at least 19 states allowed their use.<sup>16</sup>

Accordingly, Assembly Bill 167 of the 1983 Session authorized the use of a PBT to determine whether there are "reasonable grounds" to make an arrest for DUI. The test is administered by a peace officer with an "articulable suspicion" that a driver to be tested is under the influence of intoxicating liquor. The results of the tests cannot be used in any criminal action, except to show that there were reasonable grounds to make an arrest for DUI.

The original Implied Consent Law, which applied only to evidentiary chemical tests, was modified by A.B. 167 to encompass the PBTs.

### ***Administrative "Per Se"***

Assembly Bill 167 also added an "administrative *per se*" provision to the state's DUI law. Similar to its criminal *per se* counterpart, the administrative law provided that to drive with a BAC of 0.10, as determined by either a PBT or a chemical test, was punishable "in and of itself" by revocation of the driver's license.

The administrative *per se* law was enacted in response to arguments that, to serve as a deterrent as well as punishment, a penalty for DUI must be "swift, sure, and certain." Prior to passage of the law, a license was revoked only upon conviction and at the discretion of the judge. In addition, testimony indicated that another purpose of the law was to eliminate a driver's incentive to delay a DUI trial and thus retain his license to drive as long as possible.

Currently, NRS 484.385 provides for immediate revocation of the driver's license of a person who fails to submit to a PBT or an evidentiary test, who has a BAC of 0.10 percent or more, or who has a detectable amount of a controlled substance in his blood. The statute also establishes a procedure for issuance of a temporary license and for administrative and judicial review of the order of revocation.

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<sup>15</sup> *Driving While Intoxicated*, page 9.

<sup>16</sup> See Appendix B for current information about states with PBTs.

## ***Driving While Drinking***

In 1971, the Legislature passed Assembly Bill 480, which made it unlawful for the driver of a vehicle to drink an alcoholic beverage while operating the vehicle. Twenty years later, lawmakers considered testimony that the law was impossible to enforce, since a driver might argue that a passenger was drinking the beverage. Thus, the 1991 Legislature enacted Senate Bill 120, which prohibits the possession of an open container of an alcoholic beverage within the passenger section of the car.

## ***Length of Imprisonment***

The punishment for DUI in Nevada has been frequently revised and, over the years, has included imprisonment, a fine, driver's license suspension or revocation, community service, enrollment in educational courses concerning substance abuse, and attendance at a victim impact panel. The punishment has often been specified as *either a fine or imprisonment or both*.

Appendix A to this paper, which chronicles the history of selected DUI laws in Nevada, illustrates that lawmakers (and, apparently, their constituencies) have not always agreed upon the appropriateness or length of imprisonment, particularly for misdemeanor DUI not involving death or bodily harm. For example, the 1937 Legislature provided that the sentence of imprisonment for a first offense (county jail for not less than 30 nor more than 90 days) could not be suspended. Two years later, lawmakers revised the penalty to *either imprisonment or loss of the driver's license*. Similarly, the period from 1969 to 1975 saw several changes to the imprisonment portion of the penalty for *subsequent* DUI offenses.

In 1981, Senate Bill 83 established a minimum jail term of 10 days for a subsequent (though still misdemeanor) offense. In addition, the bill prohibited probation or suspended sentences and limited plea-bargaining for DUI offenses. Senate Bill 83 also provided that a third or subsequent offense (not involving death or bodily harm) constituted a felony, punishable by a prison term of not less than 1 year nor more than 6 years. For a DUI offense resulting in death or substantial bodily harm, the penalty was increased to 1 to 6 years' imprisonment; previously, a fine alone might be imposed.

In 1983, Assembly Bill 167 increased the penalties for a *first* misdemeanor offense, including imprisonment of 2 days to 6 months. Alternatively, an offender might be sentenced to 48 hours of community service while dressed in "distinctive garb."

## CONCLUDING REMARKS

At the time of the 1981-1982 interim study of drunk driving laws, Nevada ranked first in the Nation for fatal traffic accidents, and alcohol was a factor in the majority of those accidents. In 1981, there were 151 alcohol-involved fatal traffic accidents in the state.<sup>17</sup>

In 1993, there were 91 alcohol-involved fatal accidents<sup>18</sup> in Nevada. Nevada's DUI law is now considered to be among the "toughest" in the United States. Increased public awareness of the seriousness of the offense, as well as more severe penalties, may have contributed to the significant decline (particularly when population increases are considered) in the number of drunk driving fatalities. In addition, preliminary results of the "305" program indicate that the last decade's emphasis on treatment also is effective in combatting drunk driving.

In the 70 years since passage of the first DUI law, the definition of and penalties for DUI have been revised many times. Nevertheless, lawmakers continue to wrestle with the issue; among the bill drafts requested for the 1995 Legislative Session are at least a dozen that relate to drunk driving.

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<sup>17</sup> *Driving While Intoxicated*, Appendix C.

<sup>18</sup> According to the Office of Traffic Safety of Nevada's Department of Motor Vehicles and Public Safety, "alcohol-involved" for 1993 was measured at 0.01 and above.





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## APPENDIX A

### History of Selected DUI Legislation in Nevada

Year	Bill or Resolution Number	Statutes of Nevada Chapter No.	Description of Bill / Comments
1923	S.B. 5	13	<p>The bill provides that it is unlawful "for any person, or persons, while either intoxicated or under the influence of intoxicating liquor, to drive or conduct any vehicle upon any street or highway in this state."</p> <p>The bill also stipulates that a driver who, while intoxicated or under the influence of alcohol, causes the death or bodily injury to any person is guilty of a felony.</p>
1925	A.B. 37	166	The bill includes "stimulating and stupefying drugs" in the statute prohibiting driving under the influence.
1937	A.B. 88	30	<p>The bill specifies penalties for misdemeanor DUI (not involving death or bodily injury). The penalty for a first offense is imprisonment in the county jail for not less than 30 nor more than 90 days. The sentence may not be suspended.</p> <p>A person convicted of a subsequent offense, in addition to being imprisoned, is deprived of his driver's license for a period of up to 1 year.</p>
1939	A.B. 177	161	<p>The bill revises the penalties for a first offense, to <b>either</b> imprisonment from 30 to 90 days <b>or</b> loss of the driver's license for 30 days to 1 year. The penalty for a subsequent offense remains imprisonment for 30 to 90 days <b>and</b> loss of the driver's license for up to 1 year.</p> <p>The prohibition against suspension of the sentence remains.</p>
1947	A.B. 159	110	The bill revises the penalties for a first misdemeanor offense, to <b>either</b> a fine of up to \$500 <b>or</b> imprisonment for up to 6 months, <b>and</b> loss of the driver's license for not less than 10 days nor more than 1 year. The penalties for a subsequent offense is unchanged.
1953	S.B. 149	247	The bill revises the penalties for a first misdemeanor offense, to <b>either</b> a fine of not less than \$100 nor more than \$500, <b>or</b> imprisonment of not less than 30 days nor more than 6 months, <b>or</b> both, <b>and</b> by suspension of the driver's license for not less than 30 days nor more than 1 year. The penalties for a subsequent offense are changed to those of a first offense, except that the period of suspension of the driver's license is mandated to be 2 years.

Year	Bill or Resolution Number	Statutes of Nevada Chapter No.	Description of Bill / Comments
1955	A.B. 113	106	The bill reduces the penalty for a first misdemeanor offense and increases it for a subsequent. For a first offense, the minimum fine is reduced to \$25; the 30-day minimum term of imprisonment is removed; and the license suspension is made optional. For a second offense, <b>both</b> imprisonment and a fine are mandatory, although the minimum term of imprisonment is reduced from 30 to 10 days.
1957	A.B. 267	304	<p>The omnibus traffic bill establishes "presumptions" associated with certain blood alcohol content (BAC) levels:</p> <p>(1) a person with a BAC of 0.05 or less is presumed to not be under the influence of intoxicating liquor;</p> <p>(2) a person with a BAC of more than 0.05 but less than 0.15 is presumed neither to be guilty nor innocent of driving while intoxicated, although the BAC may be considered along with other evidence in determining guilt or innocence; and</p> <p>(3) a person with a BAC of 0.15 is presumed to be under the influence of intoxicating liquor.</p> <p>The presumptions, however, "shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor."</p>
1967	A.B. 71	211	<p>The omnibus crime and punishment bill provides the first specified penalty for a felony DUI offense: <b>either</b> imprisonment for 1 to 10 years, <b>or</b> a fine of not more than \$5,000, or both.</p> <p>The specified penalty is, in fact, unchanged, since it is the same as the penalty for a felony prior to passage of A.B. 71. The bill reduced from 10 to 6 years the maximum term of imprisonment for a felony whose penalty was not otherwise specified, however; thus, the felony DUI penalty is now <b>more severe</b> relative to other, non-specified felony penalties. A.B. 71 also removes the specified penalties for misdemeanor DUI, other than for suspension of the driver's license.</p> <p>Finally, A.B. 71 provides a time period within which an offense is considered subsequent: within 10 years.</p>
1969	A.B. 268	341	The "Implied Consent Law," provides that a person operating a motor vehicle on the highways of the state is deemed to have consented to a test to determine the content of alcohol in the blood. Refusal to submit to such a test is punishable by suspension of the driver's license for 6 months.

Year	Bill or Resolution Number	Statutes of Nevada Chapter No.	Description of Bill / Comments
1969	A.B. 271	675	The bill revises certain penalties for driving under the influence. For a first misdemeanor offense, the person's driver's license may be suspended for 30 days to 1 year, in addition to any other penalties established by law for a misdemeanor. For a subsequent offense within 3 years, the bill mandates a fine of \$100-\$500 <b>or</b> imprisonment for 10 days to 6 months <b>or</b> both a fine and imprisonment. Previously, a subsequent offense was one occurring within 10 years. In addition, the previous punishment was fine <b>and</b> imprisonment.
1971	A.B. 24	10	The bill revises the level at which one is presumed to be intoxicated from 0.15 to 0.10.
1971	A.B. 480		The bill makes it unlawful for a driver to drink an alcoholic beverage while operating a vehicle.
1973	A.B. 35	412	The bill establishes a time period of more than 3 but less than 7 years within which a subsequent DUI offense carries a mandatory 1-year driver's license revocation. The bill does not alter the definition of subsequent conviction (within 3 years) for purposes of imposing a fine and imprisonment. The existing 2-year revocation period for a subsequent conviction within 3 years also remains unchanged.
1973	A.B. 43	686	The bill enhances the penalty for a subsequent conviction within 3 years. Previously, the punishment was a fine of \$100 to \$500 <b>or</b> imprisonment for 10 days to 6 months <b>or</b> both. The bill makes imprisonment mandatory (10 days to 6 months), although the fine is still optional.
1973	A.B. 595	733	The bill brings persons suspected of operating a vehicle while under the influence of a controlled substance within the scope of the Implied Consent Law.
1975	A.B. 151	493	The bill <i>removes</i> the mandatory prison sentence established by A.B. 43 of the 1973 Session; the penalties revert to <b>either</b> a fine <b>or</b> imprisonment <b>or</b> both.
1979	S.B. 9	655	The omnibus crime bill, which revises and specifies certain penalties, includes a section setting forth the penalty for felony DUI causing the death or substantial bodily harm of another person. The bill also stipulates a term of imprisonment 1 to 6 years <b>or</b> a fine of not more than \$5,000 <b>or</b> both fine and imprisonment.

Year	Bill or Resolution Number	Statutes of Nevada Chapter No.	Description of Bill / Comments
1980	A.C.R. 29	File 124	<p>The Interim Subcommittee to Study Motor Vehicle Insurance Rates and Rating Practices (A.C.R. 29) suggests legislation increasing the penalties for DUI. It also recommends, for a first offense, stipulating a mandatory fine of \$500 and authorizing imprisonment of up to 6 months. For a second offense, the subcommittee recommends that imprisonment and a \$500 fine be mandatory, although the minimum term to be imposed is lowered from 10 days to 2 (previously, however, either imprisonment or a fine might be imposed, rather than both).</p> <p>The subcommittee considers but does not approve a proposal to lower the BACs associated with presumptions regarding driving under the influence.</p>
1981	S.B. 83	755	<p>The bill: (1) for a first offense, establishes a mandatory minimum fine of \$100 and requires attendance at an educational course on substance abuse;</p> <p>(2) extends the period during which prior offenses are considered from within 3 years to within 5 years;</p> <p>(3) for a second offense within 5 years, establishes a mandatory minimum fine of \$500 and jail term of 10 days;</p> <p>(4) establishes that a third or subsequent offense within 5 years is a felony, with a minimum fine of \$2,000 and imprisonment for 1 year. (Previously, a third offense would have been a misdemeanor, punished as a "second or subsequent" offense.);</p> <p>(5) for negligent driving while intoxicated which results in death or substantial bodily harm, stipulates a minimum fine of \$2,000, up to \$5,000, <b>and</b> imprisonment of 1 year. (Previously, punishment was a fine <b>or</b> imprisonment <b>or</b> both.);</p> <p>(6) for driving with a suspended or revoked license resulting from either a DUI offense or a failure to submit to a test under the Implied Consent Law, establishes a minimum fine of \$500 and a jail term of 30 days;</p> <p>(7) for a first failure to submit to a test under Implied Consent Law, doubles the period of suspension to 1 year, and for a second failure adds a 3-year revocation period;</p> <p>(8) prohibits probation or suspended sentences and limits plea-bargaining for DUI-related offenses;</p> <p>(9) changes provisions governing deferred prosecution of DUI offenders under Chapter 458 of the NRS, which resulted in a dismissal of the charge upon completion of alcohol abuse treatment, to specify <i>post-conviction</i> treatment. Minimum jail sentences of 5 days for a second and 30 days for a third or subsequent offense are added as a condition of treatment; and</p> <p>(10) for civil actions related to personal injury caused by a DUI offender, authorizes a jury to award punitive and exemplary damages.</p>

Year	Bill or Resolution Number	Statutes of Nevada Chapter No.	Description of Bill / Comments
1982	S.B. 83	755	<p>The Legislative Commission creates an interim subcommittee to study the enforcement of S.B. 83. The subcommittee recommends legislation to:</p> <ul style="list-style-type: none"> <li>(1) authorize preliminary breath testing;</li> <li>(2) enact "illegal <i>per se</i>" legislation, providing that it is illegal <i>per se</i> to be driving with a BAC of 0.10. The suggested new offense would, in effect, create a new offense <i>separate</i> from "driving while under the influence of intoxicating liquor." The subcommittee considers that both the National Highway Traffic Safety Administration and the Presidential Commission on Drunk Driving recommend each state adopt 0.10 <i>per se</i> legislation, and, at the time of the study, 23 have done so;</li> <li>(3) impose upon DUI offenders administrative sanctions related to driver's licenses;</li> <li>(4) extend application of DUI law to "on or off the highways"; and</li> <li>(5) extend from 5 to 7 years the period during which prior offenses are considered.</li> </ul>
1983	A.B. 167	426	<p>Based upon the recommendations of the S.B. 83 oversight subcommittee, this bill:</p> <ul style="list-style-type: none"> <li>(1) creates a separate crime of driving with a BAC of 0.10 or over (illegal <i>per se</i>) and provides that penalties are the same as those for driving under the influence;</li> <li>(2) Increases the penalties for first DUI offenses. The bill requires imprisonment of 2 days to 6 months or performance of 48 hours of community service work while dressed in distinctive garb that identifies the offender as having violated the DUI laws. The first-time offender is also subject to a fine of not less than \$200 nor more than \$1,000; driver's license revocation for 90 days; and mandatory completion of an educational course on alcohol and drug abuse;</li> <li>(3) increases from 5 to 7 years the time period for consideration of prior offenses;</li> <li>(4) establishes a procedure for administering preliminary breath tests, the results of which may not be used in any criminal action, except to show that there were reasonable grounds to make an arrest for DUI;</li> <li>(5) provides for the summary revocation of the driver's license of a person who refuses to submit to a preliminary breath test or evidentiary test or who is found to have a BAC of 0.10 or more;</li> <li>(6) Increases the length of time for which drivers' licenses are suspended as a result of violating the DUI laws; and</li> <li>(7) provides that arrests for DUI violations may be made in parking lots and similar areas.</li> </ul>
1983	A.B. 49	14	<p>The bill eliminates a conflict between certain statutes governing the duration of the driver's license suspension for refusal to submit to chemical tests. By removing the conflict, the bill permits a 1-year license suspension for first-time offenders and 3 years for repeat offenders refusing the tests.</p>

Year	Bill or Resolution Number	Statutes of Nevada Chapter No.	Description of Bill / Comments
1983	S.B. 390	597	The bill provides for certification of devices used to determine the amount of alcohol in a person's blood in relation to DUI. A committee on testing for intoxication is created to adopt regulations concerning testing devices.
1983	A.C.R. 11	File No. 71	This resolution encourages local governments to educate the public on the dangers of driving while intoxicated.
1985	A.B. 381	273	The bill increases from 6 to 20 years the maximum penalty for DUI causing death or substantial bodily harm.
1985	A.B. 478	249	The bill eliminates the general use of urine tests to determine the alcoholic content of the blood of a person suspected of driving while intoxicated. The measure permits urine tests in the case of a person with hemophilia or a heart condition or when an officer has reason to suspect the presence of a controlled substance in the blood of the person in question.
1985	A.B. 480	430	The bill stipulates that breath tests may be used as evidence only if two consecutive samples of the person's breath are taken and the results of the two tests do not differ more than 0.02 percent. The bill provides that the results of a first breath test may be used if the person refuses to take a second test or for some other valid reason a second sample is not obtained.
1989	S.B. 456	527	The bill authorizes a court to suspend the sentence of a person convicted of DUI involving death or substantial bodily harm, <i>provided</i> the offender serves at least 1 year in prison and, upon completion of the term of imprisonment, is placed under probation for a period not to exceed 10 years.
1991	S.B. 120	324	The bill makes it unlawful to have an open container of an alcoholic beverage in the passenger area of a motor vehicle.
1991	A.B. 305	297	The bill requires a person convicted of felony DUI to be evaluated to determine if he is an abuser of alcohol or drugs. If it is determined that he can be treated successfully, the offender is placed in a treatment program that begins in prison and may be completed in residential confinement.
1992			McLean v. Moran: The Nevada Supreme Court finds the presumptive statute unconstitutional as applied. The Court declines to address the issue of whether the statute is unconstitutional on its face.
1993	A.B. 490	249	The bill repeals the presumptive statute. In addition, the bill clarifies that a BAC of 0.10 found by measurement <i>within 2 hours after driving</i> constitutes an offense. In the event alcohol was consumed after driving but before testing, the bill allows a person to offer this defense provided advance notification is given to the prosecuting attorney.



Year	Bill or Resolution Number	Statutes of Nevada Chapter No.	Description of Bill / Comments
1993	A.B. 499	668	The bill: (1) applies to first offenders whose BAC was 0.18 percent or more and to persons guilty of a second DUI offense within 7 years. In these cases, the court is required to order an evaluation to determine if the offender is an abuser of alcohol or drugs. The results of the evaluation, and the length and type of any treatment recommended, must be submitted to the court; and (2) provides that, if a person is found guilty of a second offense within 7 years, the court has the option of imposing a sentence of residential confinement or confinement in jail. In addition, the court may place the offender under the supervision of a treatment facility for not less than 30 days nor more than 6 months. The offender, to the extent of his financial resources, is required to pay for the treatment.
1993	A.B. 246		The bill proposes to revise the illegal <i>per se</i> limit from 0.10 to 0.08 and is passed out of the Assembly Committee on Judiciary. The bill's fiscal impact is estimated at \$1 million per biennium; it dies in Assembly Ways and Means.
1993	A.C.R. 71	File No. 177	This resolution directs an interim study of drug and alcohol abuse among criminal offenders. The subcommittee adopts several recommendations. For details, see LCB <i>Bulletin</i> 95-9.



## **APPENDIX B**

*Digest of State Alcohol-Highway Safety Related Legislation, Twelfth Edition*  
National Highway Traffic Safety Administration,  
January 1994





U.S. Department  
of Transportation  
**National Highway  
Traffic Safety  
Administration**

# **Digest of State Alcohol-Highway Safety Related Legislation**

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Current as of January 1, 1994

**Twelfth Edition**

## **INTRODUCTION**

### **PURPOSE**

This Digest is designed for use by anyone interested in State laws related to alcohol/drug use and highway safety. Except as indicated, it provides the reader with the status of such State laws as of January 1, 1994.

### **ORGANIZATION**

The Digest is divided into three main areas: (1) Introduction; (2) High Interest Legislation; and (3) State Law Summary. The Summary is organized by State and then by specific legal topics. The Summary includes code and, where needed, case law citations; these should help individuals conducting additional research in this area of the law. It should be noted that the Summary can be used to facilitate the comparison of State laws in the subject areas.

The Digest's Appendix, using the State Law Summary's format, gives the Uniform Vehicle Code's provisions on drunk driving, vehicle homicide and driving while license is either suspended or revoked.

### **EXPLANATIONS**

The following statements clarify the contents of and/or establish certain presumptions used in the Digest.

1. The term "DWI" is a general (non legal) term that refers to any criminal action of driving a motor vehicle either (1) while "illegal per se", (2) while either impaired or while under the influence or while intoxicated by either alcohol or other drugs.
2. The term "illegal per se" refers to State laws that make it a criminal offense to operate a motor vehicle at or above a specified alcohol or drug concentration level in either the blood, breath or urine.
3. An "administrative per se law" refers to a statute that allows a State's driver licensing agency to either suspend or revoke a driver's license based either on a specific alcohol or drug concentration level or on some other criteria related to alcohol or drug use and driving. Such action is completely independent of any licensing action related to a DWI criminal offense

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## INTRODUCTION (continued)

conviction.

4. Unless otherwise stated, for illegal per se and administrative per se States, the alcohol concentration levels in either the blood, breath or urine are based on the following ratio standards. For alcohol concentration in the blood, the ratio is the number of grams of alcohol per 100 milliliters of blood. For alcohol concentration in the breath, the ratio is number of grams of alcohol per 210 liters of breath. And, for alcohol concentration in urine, the ratio is the number of grams of alcohol per 67 milliliters of urine.

5. The sanctions listed for convictions of alcohol/drug related driving offenses (e.g., driving while impaired, driving while intoxicated, illegal per se, etc.) are those specified by statute. If a sanction is not specified by law (e.g., community service, et al.), it is not listed.

6. The term "mandatory sanction" means either a criminal sanction (e.g., jail, fine or community service) or an administrative licensing action (e.g., license suspension or revocation) which must be imposed by either a court or an administrative agency. That is, statutory law specifically requires that such sanction be given; this may be accomplished by denying either the court or the administrative agency the power to either suspend or otherwise prevent the imposition of such sanction.

7. Unless otherwise stated, the sanctions are the same for all alcohol and drug driving offenses (e.g., driving while under the influence of either alcohol or drugs, illegal per se, et al.).

8. Unless otherwise indicated, a "commercial motor vehicle" (CMV) is defined as one that either (1) has a gross vehicle weight of 26,001 or more pounds, (2) is designed to transport either 15/16 or more persons including the driver or (3) transports hazardous materials.

9. For each State in the Summary, in the section on "Driving After License has been Suspended or Revoked for an Alcohol Driving Offense," the general sanctions for operating a vehicle while a license is either in a suspended or revoked status are given in the absence of any specific sanctions dealing with the exact subject in the summary.

10. States without vehicle homicide laws treat deaths, which are caused by persons while operating motor vehicles, under their general criminal homicide laws such as manslaughter.

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## **INTRODUCTION (continued)**

11. A number of States have adopted the concept of a dram shop liability via case law. State courts making such decisions have used a multiplicity of legal theories in their opinions. Citations to the major decisions are given in this Digest. Note: Some States have dram shop liability via both statutory and case law.

12. A statute or regulation banning "Happy Hours" means one that prohibits the sale of alcoholic beverages below the price per quantity normally charged for such beverages.

13. The sanctions given in the Digest for criminal offenses are those that would normally apply to adult offenders. However, it should be noted, that for juvenile offenders (persons under 18 years old), the law may limit a court's ability to assign such punishment.

14. Unless otherwise noted, Table 2 lists the minimum mandatory sanctions for non-injury and non-death related driving while under the influence (alcohol/drugs) and illegal per se offenses.

15. The term "Preliminary Breath Test" (PBT) refers to a breath test given by a law enforcement officer to a suspected drunk driver prior to an arrest for a DWI offense. The results of this test are used along with other evidence by the officer to determine if there is probable cause to arrest the driver for DWI. The results of a PBT are usually non-evidentiary. That is, the test's results cannot be admitted into evidence at a DWI trial.

16. The term "Implied Consent Law" refers to a law that provides that a person impliedly consents to submit to a test for either an alcohol or drug content in their body if they are arrested or otherwise detained for a DWI offense. If the person refuses to submit to such a test, the law usually provides that their driving privileges will be either suspended or revoked. The results obtained from a test based upon the implied consent law are evidentiary. That is, the test's results can be admitted into evidence at a DWI trial.

## **LEGISLATIVE SUBJECT AREAS**

- o Basis for a DWI Charge (e.g., Blood Alcohol Concentration, Types of Drugs)
- o Chemical Breath Tests
  - o Preliminary
  - o Evidential (Implied Consent Law)

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## INTRODUCTION (continued)

- o Chemical Tests of Other Substances for Alcohol/Drugs Under the Implied Consent Law
- o Adjudication of Alcohol Driving Offenses
  - o Mandatory Adjudication
  - o Anti-Plea Bargaining Statutes
  - o Pre-Sentence Investigation
- o Sanctions for Refusal to Submit to a Chemical Test
- o Sanctions Following a Conviction for an Alcohol Driving Offense
  - o Criminal
  - o Administrative (Licensing Action)
  - o Rehabilitation
  - o Vehicle Impoundment
- o Homicide by Vehicle
- o Driving While License Suspended or Revoked Where the Basis was an Alcohol Driving Offense
- o Habitual Offender Laws
- o BAC Tests Required for Persons Killed as a Result of a Traffic Crash
- o Laws Establishing Minimum Ages Concerning the Use of Alcohol Beverages
- o Dram Shop Laws and Related Legal Actions
- o Laws Concerning Criminal/Administrative Actions Against Employees/Owners of Licensed Liquor Establishments who Sell Alcoholic Beverages to Persons who are under the Legal Drinking Age or who are Intoxicated
- o Laws Prohibiting "Happy Hours"
- o Laws Prohibiting the Possession of Open Containers of Alcoholic Beverages in the Passenger Compartment of a Motor Vehicle
- o Laws Prohibiting the Consumption of Alcoholic Beverages in Motor Vehicles

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## INTRODUCTION (continued)

### ABBREVIATIONS

BAC = blood alcohol concentration	mos = months
BrAC = breath alcohol concentration	N/A = not applicable
CDL = Commercial Drivers License	n.a. = not available
cl = class	off(s) = offense(s)
CMV = Commercial Motor Vehicle	pkg = package
cons = consecutive	rev = revocation
dy = day	susp = suspension
dys = days	UrAC = urine alcohol concentration
hr = hour	UVC = Uniform Vehicle Code
hrs = hours	veh = vehicle
mand = mandatory	w/n = within
misd = misdemeanor	yr = year
mo = month	yrs = years

### FEEDBACK

We intend, of course, to update this publication periodically. Accordingly, the NHTSA staff would appreciate receiving any comments that you might have concerning improving any future digest's readability or accuracy.

Any comments, corrections or new information should be sent to:

National Highway Traffic Safety Administration  
Office of Alcohol and State Programs - Code NTS-20  
400 7th Street, S.W.  
Washington, D.C. 20590  
Attention: Legislative Resource Center  
Telephone: (202) 366-2729

Finally, NHTSA staff hopes that this document will be useful to you. If you are interested in receiving updates to this Digest, please let us know via either telephone or letter.

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TABLE 1  
ANALYSIS BY STATES -- HIGH-INTEREST LEGISLATION

S T A T E	P B T <sup>1</sup>	Mand. Susp/Rev. Refusal		Admin. Per Se Law (BAC)	Mandatory Susp/Rev-Admin. Per Se			Illegal Per Se (BAC)	Presumptive Level (BAC)	Open Cont. Law <sup>11</sup>	Anti- Consump. Law	Dram Shop <sup>11</sup>
		1st	2nd		1st	2nd	3rd					
AL		S-90 dya	S-1 yr	No	--	--	--	0.10	0.10			S
AK	X	R-90 dya	R-1 yr	0.10	R-30 dya	R-1 yr	R-10 yrs	0.10	0.10	X	X <sup>14</sup>	S
AZ	X	S-12 moe	S-12 moe	0.10	S-30 dya	S-90 dya	S-90 dya	0.10	0.10		X	S
AR		S-6 moe	S-1 yr	No	--	--	--	0.10	--		X	No
CA	X	S-1 yr <sup>15</sup>	R-2 yrs	0.08 <sup>16</sup>	S-30 dya <sup>16</sup>	S-1 yr <sup>16</sup>	S-1 yr <sup>16</sup>	0.08	0.08	X	X	S <sup>16</sup>
CO	X	R-1 yr	R-1 yr	0.10	R-3 moe	R-1 yr	R-1 yr	0.10	.05, .10 <sup>17</sup>		X	S
CT		-- <sup>18</sup>	S-1 yr	0.10	-- <sup>18</sup>	S-1 yr	S-2 yrs	0.10	--			S <sup>18</sup>
DE	X	R-6 moe <sup>1</sup>	R-18 moe	(.10) <sup>1</sup>	R-3 moe	R-1 yr	R-18 moe	0.10	(0.10 <sup>2</sup> )		X	No
DC	X	S-12 moe	S-12 moe	(.10) <sup>1</sup>	--	--	--	0.10	(0.05 <sup>2</sup> )	X	X	C
FL		--	S-18 moe	0.08	--	S-1 yr	S-1 yr	0.08	(0.08 <sup>2b</sup> )	X		S <sup>11</sup>
GA		S-1 yr	S-1 yr	0.10	N/A	S-120 dya	S-2 yrs	0.10	0.08	X <sup>14</sup>		S
HI		R-1 yr	R-2 yrs	0.10	R-30 dya	R-1 yr	R-2 yrs	0.10	(0.10 <sup>1</sup> )	X	X	C
ID		S-180 dya	S-1 yr	0.10 <sup>11</sup>	S-30 dya <sup>11</sup>	S-1 yr <sup>11</sup>	S-1 yr <sup>11</sup>	0.10	--	X	X	S
IL	X	--	S-6 moe	0.10	--	S-90 dya	S-90 dya	0.10	0.10	X		S <sup>16</sup>
IN		S-1 yr	S-1 yr	0.10	S-180 dya <sup>1</sup>	S-180 dya <sup>1</sup>	S-180 dya <sup>1</sup>	0.10	0.10 <sup>11</sup>			S
IA	X	R-240 dya <sup>4</sup>	R-360 dya <sup>4</sup>	0.10	--	R-1 yr <sup>10</sup>	R-1 yr <sup>10</sup>	0.10	--	X	X	S
KS	X	S-1 yr	S-1 yr	0.08	S-30 dya	S-1 yr	S-1 yr	0.08	(0.08 <sup>2b</sup> )	X	X	No
KY	X	--	--	A <sup>1</sup>	--	--	--	0.10	--		X	S
LA		S-90 dya	S-345 dya	0.10	S-30 dya <sup>11</sup>	S-365 dya <sup>11</sup>	S-365 dya <sup>11</sup>	0.10	0.10			S <sup>11</sup>

TABLE 1 (continued)  
ANALYSIS BY STATES - HIGH-INTEREST LEGISLATION

S T A T E	P B T <sup>1</sup>	Mand. Susp/Rev-Refusal		Admin. Per Se Law (BAC)	Mandatory Susp/Rev-Admin. Per Se			Illegal Per Se (BAC)	Presumptive Level (BAC)	Open Cont. Law <sup>12</sup>	Anti- Consump. Law	Drum Shop <sup>13</sup>
		1st	2nd		1st	2nd	3rd					
ME		S-90 dya	S-1 yr	0.08	--	--	--	0.08	--		X <sup>14</sup>	S <sup>15</sup>
MD	X	S-120 dya	S-1 yr	0.10	--	S-90 dya	S-90 dya	--	(.07-.10 <sup>16</sup> )	X <sup>11</sup>	X <sup>14</sup>	No
MA		S-120 dya	S-120 dya	A <sup>1</sup>	--	--	--	--	0.10		X <sup>14</sup>	C
MI	X	--	S-1 yr	No	--	--	--	0.10	.07-.10 <sup>17</sup>	X	X	S
MN	X	R-15 dya	R-180 dya	0.10	R-15 dya	R-90 dya	R-90 dya	0.10	--	X	X	S
MS	X	S-90 dya <sup>1</sup>	S-90 dya <sup>8</sup>	0.10 <sup>9</sup>	--	--	--	0.10	--			S
MO	X	R-90 dya	R-1 yr	0.10	S-30 dya	R-1 yr	R-1 yr	0.10	--		X <sup>14</sup>	S <sup>16</sup>
MT		S-90 dya	R-1 yr	No	--	--	--	0.10	(0.10 <sup>18</sup> )	X	X	S
NE	X	R-1 yr <sup>14</sup>	R-1 yr <sup>14</sup>	0.10	R-30 dya	R-1 yr	R-1 yr	0.10	--		X	No
NV	X	R-1 yr	R-3 yrs	0.10	R-90 dya <sup>11</sup>	R-90 dya <sup>11</sup>	R-90 dya <sup>11</sup>	0.10	0.10	X	X <sup>14</sup>	No
NH	X	S-180 dya	S-2 yrs	0.08	S-6 moe	S-2 yrs	S-2 yrs	0.08	(0.08 <sup>20</sup> )	X	X	S
NJ		R-6 moe	R-2 yrs	No	--	--	--	0.10	--		X	S
NM		R-1 yr	R-1 yr	0.08	R-90 dya <sup>18</sup>	R-1 yr <sup>11</sup>	R-1 yr <sup>11</sup>	0.08	--	X	X	S
NY	X	R-6 moe	R-1 yr	A <sup>1</sup>	--	--	--	0.10	(.07-.10 <sup>14</sup> )		X	S
NC	X	R-6 moe	R-12 moe	0.08	R-10 dya	R-10 dya	R-10 dya	0.08	--	X <sup>11</sup>	X <sup>14,15</sup>	S <sup>16,17</sup>
ND	X	R-1 yr	R-2 yrs	0.10	S-30 dya	S-365 dya	S-2 yrs	0.10	--	X	X	S
OH		S-30 dya	S-90 dya	0.10 <sup>1</sup>	S-15 dya	S-30 dya <sup>16</sup>	S-180 dya <sup>17</sup>	0.10	--	X	X	S
OK		R-90 dya	R-1 yr	0.10	--	R-1 yr	R-18 moe	0.10	(.05-.10 <sup>15</sup> )	X	X	C
OR		S-90 dya	S-1 yr	0.08	S-30 dya	S-1 yr	S-1 yr	0.08	(0.08 <sup>19</sup> )	X	X	S

TABLE 1 (continued)  
ANALYSIS BY STATES -- HIGH-INTEREST LEGISLATION

S T A T E	P B T <sup>1</sup>	Mand. Susp/Rev/Refusal		Admin. Per Se Law (BAC)	Mandatory Susp/Rev-Admin. Per Se			Illegal Per Se (BAC)	Presumptive Level (BAC)	Open Cont. Law <sup>15</sup>	Anti- Consump Law	Drawn Ship <sup>13</sup>
		1st	2nd		1st	2nd	3rd					
PA	X	S-12 mos	S-12 mos	No	--	--	--	0.10	--		X <sup>14</sup>	S
PR	X	S-6 mos	S-1 yr	No	--	--	--	--	0.10 <sup>16</sup>			No
RI	X	S-3 mos	S-1 yr	No	--	--	--	0.10	--		X <sup>14</sup>	S
SC		S-90 dya	S-90 dya	No	--	--	--	--	0.10 <sup>14</sup>	X	X	C <sup>17</sup> 14
SD	X	--	--	No	--	--	--	0.10	0.10	X		C
TN		--	--	No	--	--	--	--	0.10			S
TX		--	--	0.10 <sup>15</sup>	--	S-90 dya <sup>13</sup>	S-90 dya <sup>11</sup>	0.10	--		X <sup>14</sup>	S <sup>12</sup>
UT		R-1 yr	R-1 yr	0.08	S-90 dya	S-120 dya	S-120 dya	0.08	--	X	X	S <sup>19</sup>
VT	X	S-6 mos	S-18 mos	0.08	S-90 dya	S-18 mos	S-2 yrs	0.08	0.08 <sup>14</sup>		X <sup>14</sup>	S
VA	X	S-6 mos	S-1 yr	No	--	--	--	0.10	0.10		X <sup>14</sup>	No
WA		R-1 yr	R-2 yrs	No	--	--	--	0.10	--	X	X	C <sup>10</sup>
WV	X	R-90 dya <sup>10</sup>	R-1 yr <sup>10</sup>	0.10 <sup>11</sup>	R-30 dya <sup>10</sup>	R-1 yr <sup>10</sup>	R-1 yr <sup>10</sup>	0.10	0.10 <sup>11</sup>		X	C
WI	X	R-30 dya	R-90 dya	0.10 <sup>12</sup>	--	--	--	0.10 <sup>13</sup>	(0.10 <sup>12</sup> )	X	X	S <sup>14</sup>
WY		S-6 mos	S-18 mos	0.10	--	S-90 dya	S-90 dya	0.10	--			S <sup>11</sup>
T O T A L S	29	S-25 R-19	S-27 R-21	36	S-13 R-10	S-19 R-13	S-19 R-13	0.10=37 0.08=10 No=5	0.08=2 0.10=16	27	40	S=36 C=8 No=8

S = Suspension, R = Revocation, A = Alternative, S = Statutory Law, C = Case (Common) Law

TABLE 1 (continued)  
ANALYSIS BY STATES -- HIGH INTEREST LEGISLATION

<sup>1</sup>Preliminary Breath Test (Pre-arrest/non-evidentiary breath test) Law

<sup>2</sup>Because of a conflict in the law, this period could be 90 days.

<sup>3</sup>Based on probable cause of DWI. This could be a BAC level of 0.10 or more.

<sup>4</sup>Based on sufficient evidence of DWI. This could be a BAC level of 0.10 or more.

<sup>5</sup>Suspension up to 180 days or until the DWI charges have been disposed of which ever occurs first.

<sup>6</sup>A restricted license may be issued for an implied consent law violation provided the defendant pleads guilty to a subsequent DWI charge.

<sup>7</sup>Alternative pre-DWI criminal adjudication licensing action by the courts.

<sup>8</sup>License suspension for one (1) year if the driver has a prior DWI offense conviction.

<sup>9</sup>Special provisions/procedures.

<sup>10</sup>Applies to persons 18 years old or above.

<sup>11</sup>Or under the influence of alcohol.

<sup>12</sup>Laws prohibiting the possession of an open container of an alcoholic beverage in the passenger compartment of a motor vehicle.

<sup>13</sup>Seven (7) States and Puerto Rico do not have dram shop liability.

<sup>14</sup>Applies only to drivers.

<sup>15</sup>The lower of the two numbers is evidence of driving while impaired; the higher is *prima facie* evidence of driving while under the influence.

<sup>16</sup>Applies only to the actions of intoxicated minors.

<sup>17</sup>The lower of the two numbers is driving while impaired; the higher is driving while under the influence.

<sup>18</sup>Competent evidence of DWI.

<sup>19</sup>This state has a statute that places a monetary limit on the amount of damages that can be awarded in dram shop liability actions.

<sup>20</sup>BAC level or levels which indicate *prima facie* evidence of a driving while under the influence offense.

<sup>21</sup>Not mandatory in all situations.

<sup>22</sup>Applies only to the actions of intoxicated minors or persons known to be habitually addicted to alcohol.

<sup>23</sup>The statute appears to have limited actions to those committed by minors.

<sup>24</sup>The lower of the two numbers is *prima facie* evidence of driving while under the influence. The higher number is *prima facie* evidence of driving while intoxicated.

<sup>25</sup>Limited application.

<sup>26</sup>Cause of action limited to licensees who have been convicted of the offense of selling alcoholic beverages either to minors or to intoxicated individuals.

<sup>27</sup>The statute applies specifically to the actions of intoxicated minors, but the law does not foreclose developing case law as to other types of dram shop actions.

<sup>28</sup>Not less than 0.08 constitutes being under the influence of intoxicating liquor.

<sup>29</sup>A person may receive a "special permit" based on a showing of "extreme hardship". Under proposed regulations dated 9/13/93, there would be a 30 day mand. susp.

<sup>30</sup>Applies only to the actions of (1) intoxicated minors and/or (2) adults who have lost their will to stop drinking.

<sup>31</sup>This state has both *prima facie* and presumptive evidence laws with BAC levels of 0.10.

<sup>32</sup>Statutory law has limited dram shop actions.

<sup>33</sup>Liability limited only to the actions of persons who are under 21 years old.

<sup>34</sup>90 days if the person pleads guilty to a DWI charge at the time of first arraignment with counsel.

<sup>35</sup>Provided there is also a 2nd or sub. DWI conviction.

<sup>36</sup>This BAC level is an inference of DWI.

<sup>37</sup>Possible case law.

<sup>38</sup>*Prima facie* evidence of impairment.

<sup>39</sup>Applies to actions of intoxicated minors.

<sup>40</sup>0.05 for persons who operate buses, trucks or other large motor vehicles.

<sup>41</sup>A DWI conviction following an admin. revocation cancels the admin. revocation action. Thereafter, the licensing sanctions for a DWI offense apply; this includes the right to obtain restricted driving privileges.

<sup>42</sup>Provided the person participates in the ignition interlock program.

<sup>43</sup>1st & 2nd off-0.10; 3rd or subsequent off-0.08.

<sup>44</sup>This revocation is based on administrative action.

<sup>45</sup>The Administrative Per Se Law was effective July 1, 1993.

<sup>46</sup>Applies only if there was a prior DWI offense conviction.

<sup>47</sup>Applies only if there were two prior DWI offense convictions.

<sup>48</sup>0.10 is *prima facie* evidence for 1st and 2nd offs. 0.08 is *prima facie* evidence for 3rd and sub. offs.

<sup>49</sup>A person may be issued a restricted license notwithstanding this revocation if certain conditions are satisfied.

<sup>50</sup>Applies only to persons 21 years old and above.

<sup>51</sup>Effective July 1, 1994.

<sup>52</sup>Effective January 1, 1995.

**TABLE 2**  
**ANALYSIS BY STATES -- HIGH INTEREST LEGISLATION**

S T A T E	Mandatory Fine (\$) -- DWI Conviction			Mandatory Imprisonment -- DWI Conviction			Community Service in Lieu of Mandatory Jail			Mandatory Licensing Action -- DWI Conviction		
	1st	2nd	3rd	1st	2nd	3rd	1st	2nd	3rd	1st	2nd	3rd
AL	..	..	..	..	48 CH	60 D	..	20 D	..	\$ 90 D	R 1 Y	R 1 Y
AK	250	500	1,000	72 CH	20 D	60 D	..	..	..	R 30 D	R 1 R	R 10 Y
AZ	250	500	..	..	30 CD <sup>15</sup>	6 M	..	..	..	\$ 90 D <sup>16</sup>	R 1 Y <sup>16</sup>	R 3 Y
AR	150	400	900	..	7 D	90 D	..	..	..	..	S 1 Y	S 2 Y
CA	390	375	390	..	48 H <sup>1,2</sup>	30 D <sup>1,2</sup>	..	10 D <sup>2</sup>	.. <sup>1</sup>	..	S 30 D	R 3 Y
CO <sup>4</sup>	..	..	..	5 D <sup>11</sup>	7 D	7 D	(48 H) <sup>18</sup>	(60 H) <sup>18</sup>	(60 H) <sup>18</sup>	..	R 1 Y	R 2 Y
CT <sup>6</sup>	..	..	..	48 CH	10 D	120 D	100 H	..	..	.. <sup>11</sup>	.. <sup>11</sup>	.. <sup>11</sup>
DE	..	..	..	..	.. <sup>14</sup>	.. <sup>14</sup>	..	..	..	.. <sup>11</sup>	.. <sup>11</sup>	.. <sup>11</sup>
DC <sup>2</sup>	..	..	..	..	..	..	..	..	..	R 6 M	R 1 Y	R 2 Y
FL	..	..	..	..	10 D	30 D	(50 H) <sup>18</sup>	..	..	..	R 12 M	R 24 M
GA	300	600	1,000	..	48 H	10 D	..	80 H	30 D	..	S 120 D	R 5 Y
HI	150 <sup>3</sup>	500	500	48 H <sup>1</sup>	48 CH	48 CH	72 H <sup>1</sup>	80 H	..	S 30 D	S 1 Y	R 1 Y
ID	..	..	..	..	10 D <sup>13</sup>	30 D	..	..	..	S 30 D	S 1 Y	S 1 Y
IL	..	..	..	..	48 CH	48 CH	..	100 H	30 D	..	..	..
IN	..	..	..	..	5 D <sup>4</sup>	5 D <sup>4</sup>	..	10 D	10 D	S 30 D	S 1 Y	S 1 Y
IA	500 <sup>8</sup>	750	750	..	7 D <sup>1</sup>	30 D	..	..	..	..	R 1 Y <sup>10</sup>	R 2 Y <sup>10</sup>
KS	..	500	..	48 CH	48 CH <sup>14</sup>	48 CH <sup>14</sup>	100 H	..	..	S 30 D	S 1 Y	S 1 Y
KY	200 <sup>1</sup>	..	..	48 H <sup>1</sup>	7 D	30 D	48 H <sup>1</sup>	..	..	S 30 D	R 12 M	R 24 M
LA	..	..	..	2 D <sup>1</sup>	15 D <sup>1</sup>	6 M <sup>1</sup>	4 D	30 D	..	..	S 12 M <sup>11</sup>	S 24 M <sup>11</sup>

TABLE 2 (continued)  
ANALYSIS BY STATES -- HIGH-INTEREST LEGISLATION

S T A T E	Mandatory Fine (\$) -- DWI Conviction			Mandatory Imprisonment -- DWI Conviction			Community Service in Lieu of Mandatory Jail			Mandatory Licensing Action -- DWI Conviction		
	1st	2nd	3rd	1st	2nd	3rd	1st	2nd	3rd	1st	2nd	3rd
ME	300	500	750	48 CH <sup>17</sup>	7 D	30 D	--	--	--	S-60 D <sup>14</sup>	S-1 Y <sup>14</sup>	S-2 Y <sup>14</sup>
MD <sup>7</sup>	--	--	--	--	48 CH	48 CH	--	80 H	80 H	--	--	--
MA	--	--	--	--	14 D <sup>13</sup>	60 D <sup>13</sup>	--	--	--	S-45 D	R-1 Y	R-2 Y
MI <sup>8</sup>	100 <sup>11</sup>	200 <sup>11</sup>	500 <sup>1</sup>	--	48 CH	1 Y <sup>1</sup>	--	10 D	--	--	R-1 Y	S-5 Y
MN	140	600	600	--	-- <sup>10</sup>	-- <sup>10</sup>	--	-- <sup>10</sup>	-- <sup>10</sup>	R-15 D	R-15 D	R-15 D
MS	200	400	500	--	--	--	--	--	--	S-30 D	S-1 Y	S-3 Y
MO	--	--	--	--	--	48 CH	--	--	--	S-30 D <sup>11</sup>	R-2 Y <sup>11</sup>	R-3 Y <sup>11</sup>
MT	--	--	--	24 CH <sup>9</sup>	3 D <sup>9,10</sup>	10 D <sup>9,10</sup>	--	--	--	--	R-3 M <sup>10</sup>	R-3 M <sup>10</sup>
NE	--	--	--	--	48 H <sup>10</sup>	7 D <sup>10</sup>	--	--	--	R-30 D <sup>10</sup>	R-6 M <sup>10</sup>	R-1 Y <sup>10</sup>
NV	200	500	2,000	2 D <sup>11</sup>	10 D <sup>11</sup>	1 Y <sup>11</sup>	48 H	--	--	R-45 D	R-1 Y	R-1.5 Y
NH	300	500	500	--	10 D <sup>14</sup>	10 D <sup>14</sup>	--	--	--	R-90 D	R-3 Y	R-3 Y
NJ	250	500	1,000	-- <sup>11</sup>	48 CH	90 D <sup>11</sup>	--	(30 D) <sup>10</sup>	(90 D) <sup>14</sup>	R-6 M <sup>11</sup>	R-2 Y <sup>11</sup>	R-10 Y <sup>11</sup>
NM	--	--	--	--	48 CH	48 CH	--	--	--	--	R-1 Y	R-5 Y
NY <sup>2</sup>	500	1,000	1,000	--	--	--	--	--	--	--	R-1 Y	R-1 Y
NC	--	--	--	--	7 D	7 D	--	--	--	--	R-2 Y	R-1 Y
ND	250	500	1,000	--	4 D <sup>8</sup>	60 D <sup>8</sup>	--	10 D	--	S-30 D	S-365 D	S-2 Y
OH	200	300	500	--	5 CD	15 CD	--	--	--	S-15 D	S-30 D	S-180 D
OK <sup>4</sup>	--	--	--	--	-- <sup>10</sup>	-- <sup>10</sup>	--	-- <sup>10</sup>	-- <sup>10</sup>	--	R-1 Y	R-18 M
OR	300	300	300	48 CH	48 CH	48 CH	80 H	80 H	80 H	--	S-90 D	S-1 Y



TABLE 2 (continued)  
ANALYSIS BY STATES -- HIGH-INTEREST LEGISLATION

S T A T E	Mandatory Fine (\$) -- DWI Conviction			Mandatory Imprisonment -- DWI Conviction			Community Service in Lieu of Mandatory Jail			Mandatory Licensing Action -- DWI Conviction		
	1st	2nd	3rd	1st	2nd	3rd	1st	2nd	3rd	1st	2nd	3rd
PA	300 <sup>1)</sup>	300 <sup>1)</sup>	300 <sup>1)</sup>	--	30 D	90 D	--	--	--	S-12 M	S-12 M	S-12 M <sup>1)</sup>
PR	--	--	--	--	24 CH	30 D	--	10 D	--	--	--	--
RI	100	400	400	--	10 D <sup>4)</sup>	6 M <sup>4)</sup>	--	--	--	S-3 M	S-1 Y	S-2 Y
SC	200	1,000	3,500	48 H <sup>1)</sup>	48 H <sup>1)</sup>	60 D <sup>1)</sup>	48 H <sup>1)</sup>	10 D <sup>1)</sup>	--	--	S-1 Y	S-2 Y
SD	--	--	--	--	--	--	--	--	--	--	R-1 Y	R-1 Y
TN	250	500	1,000	48 H	45 D	120 D	--	--	--	--	R-2 Y	R-3 Y
TX	--	--	--	--	72 H <sup>1)</sup>	10 D <sup>1)</sup>	--	--	--	--	--	--
UT	--	--	1,000	48 CH	240 CH	720 D	24 H	80 H	240 H	S-90 D	R-1 Y	R-1 Y
VT	--	--	--	--	48 CH	--	--	--	--	S-90 D	S-18 M	R-2 Y
VA	--	--	--	--	48 H	30 D	--	--	--	--	R-2 Y <sup>1)</sup>	R-5 Y
WA	250	500	500	24 CH	7 D <sup>4)</sup>	7 D <sup>4)</sup>	--	--	--	S-30 D	R-1 Y	R-2 Y
WV	100 <sup>1)</sup>	1,000 <sup>1)</sup>	3,000 <sup>1)</sup>	24 H <sup>1)</sup>	6 M <sup>1)</sup>	1 Y <sup>1)</sup>	--	--	--	R-30 D <sup>1)</sup>	R-1 Y <sup>1)</sup>	R-1 Y <sup>1)</sup>
WI	150	300	600	--	5 D	30 D	--	--	--	--	R-60 D	R-90 D
WY	--	--	--	--	7 D	7 D	--	--	--	--	S-1 Y	R-3 Y
T O T A L S	26	26	25	16	44	44	9	14	6	S-18 R-8	S-18 R-28	S-14 R-32

<sup>1)</sup>Mandatory sanctions for the offense of driving while under the influence and illegal per se.

<sup>2)</sup>Mandatory sanctions for the offense of driving while intoxicated.

<sup>3)</sup>Mandatory sanctions for the offense of driving while intoxicated and illegal per se.

C=Consecutive, H= Hour(s), D=Day(s), M=Month(s), Y=Year(s), S=Suspension, R=Revocation

TABLE 2 (continued)  
ANALYSIS BY STATES -- HIGH-INTEREST LEGISLATION

<sup>1</sup>The 48 hours (2nd off) and 30 days (3rd off) are not necessarily served consecutively. The sanctions listed are for non-injury offenses.

<sup>2</sup>48 consecutive hours of imprisonment or 10 days of community service became mandatory when the Dept. of Motor Vehicles certified that an application for 23 USC §408 grant funds has been submitted to the U.S. Dept. of Transportation.

<sup>3</sup>The court must sentence defendants to at least one of these sanctions but may sentence them to more than one such sanction.

<sup>4</sup>Must serve at least 48 consecutive hours.

<sup>5</sup>Could be 5 yrs under the habitual offender law.

<sup>6</sup>Not more than 200 hours of community service in lieu of the fine.

<sup>7</sup>This sentence may not be suspended; however, the statute is silent as to probation.

<sup>8</sup>Or 14 days in a treatment facility.

<sup>9</sup>This sanction only applies to driving while under the influence offenses.

<sup>10</sup>Must serve 48 consecutive hours.

<sup>11</sup>One day imprisonment or 24 hrs of community service if rehabilitation is taken.

<sup>12</sup>48 hours must be served consecutively. However, if the defendant agrees to participate in a 1 yr treatment program, the jail term is reduced to 1 dy or, as an alternative, the offender may perform 24 hrs of community service.

<sup>13</sup>48 con hrs if the defendant is eligible for the work release program.

<sup>14</sup>Three (3) consecutive 24 hour periods in a house of correction and seven (7) consecutive 24 hour periods in a DWI detention center.

<sup>15</sup>Mandatory treatment of not less than 12 nor more than 48 hours; this time is to be spent in an intoxicated driver resource center.

<sup>16</sup>As a part of community supervision.

<sup>17</sup>Provided the defendant either (1) had a BAC level of 0.15 or more, (2) was driving 30 MPH over the speed and had a BAC level of 0.08 or more, (3) was including a police officer and had a BAC level of 0.08 or more, (4) refused to submit to a chemical test or (5) was driving a vehicle with a passenger under 16 years old.

<sup>18</sup>Mandatory community service regardless of whether there is a mandatory imprisonment sanction.

<sup>19</sup>Applies to DWI offs that are not related to injury or death.

<sup>20</sup>May not apply to certain offenders who have been suspended pursuant to the administrative per se law.

<sup>21</sup>Applies only to driving while intoxicated offenses.

<sup>22</sup>The law states that the right to operate a motor vehicle is "forfeited."

<sup>23</sup>Home incarceration is possible.

<sup>24</sup>Temporary restricted license may be issued only for the purpose of attending either an alcohol education or treatment program.

<sup>25</sup>Work release is available for this period of time.

<sup>26</sup>For 2nd & subsequent offs, the court may sentence a person without regard to certain mandatory sanctions if mitigating circumstances exist or if the person is assigned to intensive probation.

<sup>27</sup>Not more than 90 dys as an alternative to imprisonment.

<sup>28</sup>If there is no imprisonment sanction, the defendant must serve either 48 con. hrs. of inpatient rehabilitation/treatment or 10 dys of community service.

<sup>29</sup>This revocation may not be mandatory if the defendant meets certain eligibility requirements for and does participate in a driver rehabilitation or improvement program.

<sup>30</sup>A person may be issued a restricted license notwithstanding this revocation if certain conditions are satisfied.

<sup>31</sup>Applies only to a 1st illegal per se conviction.

<sup>32</sup>Possible

<sup>33</sup>Followed by a period of "house arrest" with electronic monitoring.

<sup>34</sup>"House arrest" or the use of an "ignition" interlock" device may be ordered in lieu of a jail sentence.

<sup>35</sup>It appears that a court may order the use of an "ignition interlock" device in lieu of mandatory licensing action.

<sup>36</sup>Followed by work release for 3 dys for a 2nd off and 88 dys for a 3rd off.

<sup>37</sup>Plus the following mandatory surcharges: 1st off-\$50; 2nd off-\$100; and, 3rd off-\$200.

<sup>38</sup>The mandatory sanctions given are based upon a person receiving probation.

<sup>39</sup>30 dys imprisonment unless the court orders a probation rehabilitation program.

<sup>40</sup>Applies only to DWI offenses that are not related to injury or death and provided the person participates in the ignition interlock program.

<sup>41</sup>Not mandatory in all situations.

<sup>42</sup>License suspension is not mandatory in all situations. A "special permit" may be issued in cases of "significant hardship".

<sup>43</sup>Home detention may be used in lieu of this sanction.

<sup>44</sup>An amendment to the law in 1993 may have eliminated this mandatory revocation.

## **APPENDIX C**

Memorandum to Paula Winne of the Research Division  
of the Legislative Counsel Bureau, from  
Marlen Schultz, Highway Safety Coordinator with Nevada's Office of Traffic Safety,  
dated October 12, 1994





DEPARTMENT OF MOTOR VEHICLES AND PUBLIC SAFETY  
DIVISION OF SPECIAL SERVICES  
OFFICE OF TRAFFIC SAFETY  
555 Wright Way  
Carson City, Nevada 89711-0999  
(702) 687-5720 • Fax (702) 687-5328

October 12, 1994

MEMORANDUM

**TO:** Paula Winne, Res. Division, L.C.B.  
**FROM:** Marlen Schultz, Highway Safety Coordinator *MS*  
**SUBJECT:** Effect on Federal Funding if B.A.C. is Lowered

In response to your request to address the subject ramifications, I contacted the National Highway Traffic Safety Administration (NHTSA) and asked them to provide an official analysis of the impact to Title 23 U.S.C., Section 410 for Nevada. Attached is a copy of their memo to the Office of Traffic Safety.

As you know, our state receives both supplemental and basic grant funding as a result of strong legal provisions against the drunk and drugged driver. Congress enacted Section 410 to "reward" states for implementing aggressive laws, rather than "sanction" or punish states for failing to meet certain guidelines. (Although there have been recent instances where sanctioning has adversely affected states' highway construction funds. Most notably, Section 153 in the same title, penalizes states that don't implement motorcycle helmet and seat belt laws. Fortunately, we had acceptable provisions for both and therefore, NDOT's funding was not reduced by 2 1/2 percent.) To my knowledge, there is no such clause in Section 410, but please check with Ron Hill, NDOT's Deputy Director.

To date, our office has received \$654,905 in Section 410 Incentive Grant monies. We would be eligible for at least \$266,000 per year for FY96 and FY97, (we could receive as much as \$350,00 per year) if the State reduced the legal level of intoxication to .08 percent. Without such an enhancement, my office will cease to receive this money after FY95.

I hope this explanation and the summarized analysis provided by NHTSA answers your concerns. Don't hesitate to call me if you have additional questions.

Attachment

cc: James Hawke, Chief, SSD

MEMO:

October 13, 1994

Subj: 410 Grant and .08 BAC in Nevada

From: Paul Snodgrass, 410 Coordinator

*Paul S.*

To: Al Crancer, NHTSA Region 9  
Marlene Schultz, Nevada OTS

Nevada inquired how much more 410 money they might get if they enacted a .08 BAC Per Se law next year (meeting the 410 Rule Criteria, which applies to both Basic and Supplemental Grants.)

After checking with Marlene Markison in NRO, here's our best estimate:

Supplemental "5 per cent" Grant: Supplemental (additional, bonus "5%" grants) for .08 BAC Per Se laws are available only the first three years. All our States qualified at the end of FY92, but their "first year" is considered FY93, because law was re-enacted in FY92, starting 5-year "clock" in FY93. (FY92 was a "freebie" 410 grant for our States.)

So, the 5% Grant for a .08 BAC Per Se law is available to NV (and AZ, CA, HI) in FY93, FY94 and FY95. NV. could get this grant only in FY95, and only if law became effective before September 30, 1995.

The amount of the grant we can only estimate. The amount of 410 funds available in FY95 is the same as FY94: \$25 Million. But the number of States qualifying (26 in FY94) which divide up the \$25 Million "pie" could change in FY95.

At the FY95 level each 5% supplemental grant was theoretically worth up to \$43,225 for Nevada. However, at the 77% funding level (\$25 Million divided by 26 qualifying States) it was only \$33,283 for each Supplemental for Nevada. If more States qualify for 410 grants in FY95, it could be slightly less, perhaps around \$30,000.

**Basic Grant:**

A more important point to make about the fiscal impact on 410 funding, relating to enacting a .08 BAC Per Se law, is that it is one of the 6 Basic Criteria to receive any 410 funding. This would become effective in FY96. To receive 410 grants (estimated at the FY94 level of \$266,033) in FY96 and FY97,

Nevada would have to have a .08 BAC Illegal Per Se law in effect. They could, possibly, try to meet another Basic Criteria, which for them would have to be Self-Sustaining Community DUI Programs. But whether they could "switch" to this Criteria is uncertain (it hasn't been determined in writing yet by OCC) and whether they could meet this complex Criteria, which involves tracking all fines/fees from DUI's which support local DUI programs, is also uncertain.

Summary:

The best statement we can make on this complex question is that if Nevada enacted a .08 law which was effective by 9/30/95 they could receive another approx. \$30,000 in 410 funds in FY95. If they did not enact a .08 law which was effective by 9/30/96 it would place in jeopardy their total 410 grants (approx. \$266,000) in FY96 and FY97. (Their last two years of 410 grants.)

cc: J. Cindrich, RA





## **APPENDIX D**

DUI Statutes, NRS 484.377 through 484.3947, inclusive



RECKLESS DRIVING; DRIVING UNDER THE INFLUENCE OF  
INTOXICATING LIQUOR OR CONTROLLED SUBSTANCE

**484.377 Reckless driving; penalty for willful or wanton disregard for safety causing death or substantial bodily harm.**

1. It is unlawful for any person to:

(a) Drive a vehicle in willful or wanton disregard of the safety of persons or property.

(b) Drive a vehicle in an unauthorized speed contest on a public highway.

A violation of this subsection or subsection 1 of NRS 484.348 constitutes reckless driving.

2. Any person who does any act or neglects any duty imposed by law while driving or in actual physical control of any vehicle in willful or wanton disregard of the safety of persons or property, if the act or neglect of duty proximately causes the death of or substantial bodily harm to any person other than himself, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

(Added to NRS by 1969, 1486; A 1981, 866; 1983, 1015; 1993, 524)

**WEST PUBLISHING CO.**

Automobiles ⇐ 330.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles §§ 609 et seq.

**NEVADA CASES.**

**Particular manner of driving need not be alleged in indictment or information charging violation of section.** Under sec. 1, ch. 166, Stats. 1925 (cf. NRS 484.377), which makes it unlawful to drive in reckless manner, allegation in information is sufficient allegation of one of essential elements of offense if it charges that vehicle was operated in reckless and dangerous manner. Particular manner of driving which is charged as being reckless need not be stated in information or indictment. *State v. Mills*, 52 Nev. 10, 279 Pac. 759 (1929), cited, *Logan v. Warden*, 86 Nev. 511, at 514, 471 P.2d 249 (1970).

**Probable cause to believe section violated where driver crossed center line and collided with oncoming car.** In habeas corpus proceeding, where petitioner was charged with involuntary manslaughter as result of automobile collision in which his automobile crossed centerline in twilight of dawn and collided with another vehicle proceeding in its own lane, defendant had to be held to answer under preliminary examination statute, former NRS 171.455 (cf. NRS 171.206), if it appeared that public offense had been committed and there was sufficient cause to believe him guilty, and under former NRS 484.127 (cf. NRS 484.305), making it misdemeanor to drive vehicle outside of lane unless this can be done safely, and former NRS 484.060 (cf. NRS 484.377), making

it misdemeanor to operate recklessly, offense appeared without negation of possible justifying circumstances, because proof beyond reasonable doubt is not required at this stage, and examining magistrate is not required to distinguish degrees of negligence. In re Goldblatt, 74 Nev. 74, 322 P.2d 902 (1958), cited, In re Bennett, 77 Nev. 429, at 431, 366 P.2d 343 (1961), In re Beasley, 79 Nev. 78, at 81, 378 P.2d 524 (1963), *Shelby v. Sixth Judicial Dist. Court*, 82 Nev. 204, at 208, 414 P.2d 942 (1966), *Hanley v. State*, 85 Nev. 154, at 156, 451 P.2d 852 (1969), *Goldsmith v. Sheriff, Lyon County*, 85 Nev. 295, at 302, 454 P.2d 86 (1969).

**Investigation after stop of vehicle for violation of section reasonable.** Where automobile was stopped because of observable traffic offenses, including violation of NRS 482.275, relating to absence of license plates, former NRS 484.060 (cf. NRS 484.377), relating to careless driving, and former NRS 484.154 (cf. NRS 484.343), relating to changing lanes without signals, probable cause was established for such stopping, and where driver was found to be without license, in violation of NRS 483.230, and could show no registration or report of dealer, pursuant to former NRS 482.403 (cf. NRS 482.424 and 482.426), and where radio report from police headquarters advised of grand theft auto and burglary, investigation following stopping was reasonable and established probable cause for felony arrests without warrant. *Harper v. State*, 84 Nev. 233, 440 P.2d 893 (1968), cited, *Robertson v. State*, 84 Nev. 559, at 562, 445 P.2d 352 (1968), *Gebert v. State*, 85 Nev. 331, at 334, 454 P.2d

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897 (1969), *Sharkey v. State*, 85 Nev. 574, at 575, 459 P.2d 769 (1969), *Johnson v. State*, 86 Nev. 52, at 54, 464 P.2d 465 (1970), *Hughes v. State*, 86 Nev. 584, at 586, 471 P.2d 245 (1970), *Anderson v. State*, 86 Nev. 829, at 834, 477 P.2d 595 (1970), *Singleton v. State*, 87 Nev. 53, at 54, 482 P.2d 288 (1971), *Wright v. State*, 88 Nev. 460, at 464, 499 P.2d 1216 (1972), *Washington v. State*, 94 Nev. 181, at 184, 576 P.2d 1126 (1978)

**484.379 Driving under the influence of intoxicating liquor or controlled substance: Unlawful acts; affirmative defense.**

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor;

(b) Has 0.10 percent or more by weight of alcohol in his blood; or

(c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have 0.10 percent or more by weight of alcohol in his blood,

to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

2. It is unlawful for any person who is an habitual user of or under the influence of any controlled substance, or is under the combined influence of intoxicating liquor and a controlled substance, or any person who 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.

3. 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 was tested, to cause the alcohol in his blood to equal or exceed 0.10 percent. 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.

(Added to NRS by 1969, 1485; A 1971, 2030; 1973, 587, 1277, 1501; 1975, 788; 1981, 1924; 1983, 1068; 1993, 539)

**WEST PUBLISHING CO.**

Automobiles ⇐ 332.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles §§ 625 et seq.

**NEVADA CASES.**

**Factors to be considered in determining if there is interrogation.** Where defendant, after striking motorcycle with his truck, was beaten by husband of victim and hospitalized, and, without being advised of his right to remain silent, admitted to police officer sent to hospital to investigate battery that he had consumed some alcohol before accident, statements were not product of custodial interrogation and were admissible in trial of defendant for felony driving while intoxicated in violation of NRS

484.379. "Interrogation" consists of express questioning and other acts designed to elicit incriminating statements. Police officer was investigating battery on defendant, did not know defendant was suspect in other crime and therefore, could not have intended to elicit incriminating responses. *Pendleton v. State*, 103 Nev. 95, 734 P.2d 693 (1987)

**Jurisdiction over crimes committed on land owned by Federal Government.** Where incident for which defendant was accused of felony driving while intoxicated (see NRS 484.379), occurred on land owned by Federal Government, courts of this state had jurisdiction to try case because NRS 171.010 gives district court jurisdiction over crimes committed in

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county except where United States has exclusive jurisdiction, Nevada Admission Acts revealed no retention of jurisdiction by United States over land in question, there was no affirmative cessation of jurisdiction by Nevada and affirmative acceptance by United States and NRS 328.110 requires recording in office of county recorder to effectuate cessation of jurisdiction. *Pendleton v. State*, 103 Nev. 95, 734 P.2d 693 (1987)

**Person charged with misdemeanor driving under influence has no right to jury trial.** In consolidated appeals and petitions arising from denial of jury trials by municipal courts of cities of Las Vegas and North Las Vegas for persons charged with driving under influence of alcohol (see NRS 484.379), court held that right to trial by jury guaranteed by Nev. Art. 1, § 3 is coextensive with that guaranteed by U.S. Constitution and that U.S. 6th amendment right to trial by jury does not extend to every criminal proceeding. Court concluded that no constitutional right to trial by jury attaches to first time driving under influence offense where maximum penalty is misdemeanor (see NRS 484.3792). *Blanton v. North Las Vegas Mun. Court*, 103 Nev. 623, 748 P.2d 494 (1987), *aff'd*, *Blanton v. City of N. Las Vegas*, 109 S. Ct. 1289 (1989), cited, *State v. Ninth Judicial Dist. Court*, 104 Nev. 91, at 92, 752 P.2d 238 (1988), *Pettipas v. State*, 106 Nev. 377, at 379, 794 P.2d 705 (1990), see also *McLean v. Moran*, 963 F.2d 1306 (9th Cir. 1992)

**Person charged in justice's court with misdemeanor driving under influence has no right to jury trial.** When charged as misdemeanor, driving under influence of alcohol in violation of NRS 484.379 is petty offense for which trial by jury is not constitutionally mandated, regardless of whether defendant is charged in municipal court or justice's court. *State v. Ninth Judicial Dist. Court*, 104 Nev. 91, 752 P.2d 238 (1988)

**Implied consent statute and driving under influence statute are separate and distinct and should be enforced independently of one another.** Respondent was arrested for driving under influence of alcohol and because he refused to take evidentiary blood-alcohol test pursuant to implied consent law (see NRS 484.383), his driver's license was revoked for statutory 1-year period. Respondent argued that when he pleaded guilty to offense of driving under influence of intoxicating liquor, revocation of his license no longer served purpose. Court held that although implied consent statute is clearly intended to promote enforcement of statute relating to driving under influence, statutes are separate and distinct and, in absence of

any evidence of legislative intent to contrary, should be enforced independently of one another. *State, Dep't of Motor Vehicles & Public Safety v. Brown*, 104 Nev. 524, 762 P.2d 882 (1988)

**Court erred by refusing to give instruction of respondent's statutory duty to remain off highway while intoxicated while giving instruction relating to appellant's driving under influence.** On appeal from judgment against appellant in civil action arising out of collision of motorcycle with pedestrian, where evidence showed that respondent had been negligent as matter of law by virtue of being intoxicated pedestrian in traveled portion of highway, trial court erred in refusing to instruct jury on respondent's statutory duty as pedestrian to remain off highway while intoxicated (see NRS 484.331), while at same time giving comparable instruction on unlawfulness of appellant's driving while under influence (see former NRS 484.381; cf. NRS 484.379). Because evidence clearly showed that respondent's negligence contributed to collision, judgment of trial court was reversed. *Meyer v. Swain*, 104 Nev. 595, 763 P.2d 350 (1988)

**"Actual physical control" defined; facts to consider in making determination.** Person is in "actual physical control" of vehicle pursuant to NRS 484.379 when he has existing or present bodily restraint, directing influence, domination or regulation of vehicle. In deciding whether, at time of his apprehension, person had actual physical control of vehicle, court must consider: (1) where and in what position he was found in vehicle; (2) whether vehicle's engine was running; (3) whether he was awake or asleep; (4) if he was apprehended at night, whether vehicle's lights were on; (5) location of vehicle's keys; (6) whether he was trying to move or had moved vehicle; (7) whether vehicle was located on public or private property; and (8) whether he must, of necessity, have driven to location where apprehended. *Rogers v. State*, 105 Nev. 230, 773 P.2d 1226 (1989), cited, *Bullock v. State, Dep't of Motor Vehicles & Public Safety*, 105 Nev. 326, at 328, 775 P.2d 225 (1989), *Isom v. State*, 105 Nev. 391, at 393, 776 P.2d 543 (1989), *State, Dep't of Motor Vehicles & Public Safety v. Torres*, 105 Nev. 558, at 561, 779 P.2d 959 (1989)

**Defendant was in actual physical control of vehicle under circumstances.** Where defendant (1) was found asleep in driver's seat with engine running, (2) was on private property but had driven there on public highway and could have returned to highway at any time, and (3) when awakened by police officer, attempted to restart car and drive off, defendant was in actual

physical control of vehicle pursuant to NRS 484.379. *Isom v. State*, 105 Nev. 391, 776 P.2d 543 (1989), cited, *State, Dep't of Motor Vehicles & Public Safety v. Torres*, 105 Nev. 558, at 561, 779 P.2d 959 (1989).

**Defendant was not competent to testify regarding what he believed his blood-alcohol level was at time of accident.** Where defendant was charged with felony for third offense of driving under influence (see NRS 484.3792), trial court did not err in finding that he was not competent to testify regarding what he believed his blood-alcohol level was at time of accident (see former NRS 484.381; cf. NRS 484.379). *Slinkard v. State*, 106 Nev. 393, 793 P.2d 1330 (1990).

**Under unique facts of case, refusal of defendant to submit to evidentiary test of breath or blood until after examination by doctor constituted grounds for revocation of driver's license.** Defendant was arrested for driving under influence of alcohol (see NRS 484.379), transported to jail, allegedly bumped head while getting out of police car, began breath test but said it was making him dizzy and that he did not want to take test. Police officer asked defendant if he wanted to take blood test at jail before being examined at hospital and defendant said he wanted to wait until he was first examined by doctor. Approximately 5 hours after his arrest, defendant was examined by doctor who found no injury. Defendant's driver's license was revoked pursuant to NRS 484.385 for failure to submit to evidentiary test. Under unique facts of this case, supreme court held that failure by defendant to submit to test before examination by doctor constituted refusal to submit to required evidentiary test pursuant to subsection 3 of NRS 484.386, but stressed that holding does not apply to those situations where person is injured or ill and in need of medical attention. *State, Dep't of Motor Vehicles & Public Safety v. Brough*, 106 Nev. 492, 796 P.2d 1089 (1990).

#### FEDERAL AND OTHER CASES.

**Right to jury trial of person charged with driving while intoxicated.** Notwithstanding provisions of NRS 266.550 which prohibit trial by jury in municipal courts, person charged with driving while intoxicated in violation of NRS 484.379 has constitutional right to trial by jury because under Nevada law offense is serious in that (1) NRS 484.3792 provides that penalties upon conviction include mandatory term in jail, payment for and attendance at educational course on substance abuse and maximum fine of \$1,000, provides system for increasing minimum punishments for subsequent convictions,

and prohibits probation, suspension of sentence and plea bargaining and (2) collateral consequences include loss of driver's license (see NRS 484.384), and driving is nearly imperative to ability of many people to earn living. *Bronson v. Swinney*, 648 F. Supp. 1094 (D. Nev. 1986).

**No right to trial by jury for driving under influence.** Based on severity of maximum authorized penalty as major criterion, there is no constitutional right to trial by jury for person charged under Nevada law with driving under influence of alcohol (see NRS 484.379) since: (1) with maximum prison term being 6 months (see NRS 484.3792), presumption exists that Nevada legislature views it as "petty" offense for purposes of U.S. 6th amendment (cf. Nev. Art. 1, § 3 and NRS 266.550), and (2) defendant did not demonstrate that additional statutory penalties (see NRS 483.460, 484.3792 and 484.384) reflect legislative determination that offense in question is "serious" one. *Blanton v. City of N. Las Vegas*, 109 S. Ct. 1289 (1989), cited, *Westmoreland v. Demosthenes*, 737 F. Supp. 1127, at 1129 (D. Nev. 1990), *McLean v. Moran*, 963 F.2d 1306, at 1311 (9th Cir. 1992).

**Convictions of driving under influence, obtained without jury trial, may be used to enhance penalty for subsequent convictions.** Previous convictions for driving under influence pursuant to NRS 484.379, where defendant was not provided with jury trial, may be used to enhance penalty for subsequent convictions pursuant to NRS 484.3792. *Westmoreland v. Demosthenes*, 737 F. Supp. 1127 (D. Nev. 1990).

**Former presumption concerning alcohol content of defendant's blood was unconstitutional as applied.** Where judge, during bench trial of defendant charged with driving under influence of alcohol in violation of NRS 484.379, applied presumption created in former NRS 484.381 (amount of alcohol shown by chemical analysis of blood is presumed to be no less than amount present at time of alleged violation) as mandatory conclusive presumption, court of appeals ruled that former NRS 484.381 was unconstitutional as applied. Absent statutory presumption, evidence presented at trial may have failed to establish beyond reasonable doubt that defendant's blood-alcohol content at time of driving was at least 0.10 percent, and therefore, defendant's constitutional right of due process (see U.S. 14th amendment and Nev. Art. 1, § 8) to have state prove every element of crime beyond reasonable doubt was

violated by conclusive presumption applied by judge. Court declined to address facial constitutionality of statute. *McLean v. Moran*, 963 F.2d 1306 (9th Cir. 1992)

**484.3791 Driving under the influence of intoxicating liquor or controlled substance: Civil penalty.**

1. In addition to any other penalty provided by law, a person convicted of a violation of NRS 484.379 is liable to the state for a civil penalty of \$35, payable to the department.

2. The department shall not issue any license to drive a motor vehicle to a person convicted of a violation of NRS 484.379 until the civil penalty is paid.

3. Any money received by the department pursuant to subsection 1 must be deposited with the state treasurer for credit to the fund for the compensation of victims of crime.

(Added to NRS by 1987, 2273)

**REVISER'S NOTE.**

Ch. 814, Stats. 1987, contains the following provision not included in NRS:

"The provisions of [NRS 484.3791] do not apply with respect to any conviction obtained before July 1, 1987."

**WEST PUBLISHING CO.**

Automobiles ⇌ 359.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles §§ 596 et seq.

**484.3792 Driving under the influence of intoxicating liquor or controlled substance: Penalties; segregation of offender; probation, suspension of sentence and plea bargaining restricted; intermittent confinement; consecutive sentences.**

1. Any person who violates the provisions of NRS 484.379:

(a) For the first offense within 7 years, is guilty of a misdemeanor. Unless he is allowed to undergo treatment as provided in NRS 484.3794, the court shall:

(1) Except as otherwise provided in subsection 6, order him to pay tuition for an educational course on the abuse of alcohol and controlled substances approved by the department and complete the course within the time specified in the order, and the court shall notify the department if he fails to complete the course within the specified time;

(2) Unless the sentence is reduced pursuant to NRS 484.3794, sentence him to imprisonment for not less than 2 days nor more than 6 months in jail, or to perform 48 hours of work for the community while dressed in distinctive garb which identifies him as having violated the provisions of NRS 484.379; and

(3) Fine him not less than \$200 nor more than \$1,000.

(b) For a second offense within 7 years, is guilty of a misdemeanor. Unless the sentence is reduced pursuant to NRS 484.3794, the court:

(1) Shall sentence him to:

(I) Imprisonment for not less than 10 days nor more than 6 months in jail; or

(II) Residential confinement for not less than 10 days nor more than 6 months, in the manner provided in NRS 4.376 to 4.3768, inclusive, or 5.0755 to 5.079, inclusive;

(2) Shall fine him not less than \$500 nor more than \$1,000; and

(3) May order him to attend a program of treatment for the abuse of alcohol or drugs pursuant to the provisions of NRS 484.37945.

A person who willfully fails or refuses to complete successfully a term of residential confinement or a program of treatment ordered pursuant to this paragraph is guilty of a misdemeanor.

(c) For a third or subsequent offense within 7 years, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years and must be further punished by a fine of not less than \$2,000 nor more than \$5,000. An offender so imprisoned must, insofar as practicable, be segregated from offenders whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security.

2. Any offense which occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. 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.

3. No person convicted of violating the provisions of NRS 484.379 may be released on probation, and no sentence imposed for violating those provisions may be suspended except, as provided in NRS 4.373, 5.055 and 484.3794, that portion of the sentence imposed that exceeds the mandatory minimum. No prosecuting attorney may dismiss a charge of violating the provisions of NRS 484.379 in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial.

4. Any term of confinement imposed under the provisions of this section may be served intermittently at the discretion of the judge or justice of the peace, except that a person who is convicted of a second or subsequent offense within 7 years must be confined for at least one segment of not less than 48 consecutive hours. This discretion must be exercised after considering all the circumstances surrounding the offense, and the family and employment of the offender, but any sentence of 30 days or less must be served within 6 months after the date of conviction or, if the offender was sentenced pursuant to NRS 484.3794 and the suspension of his sentence was revoked, within 6 months after the date of revocation. Any time for which the offender is confined must consist of not less than 24 consecutive hours.

5. Jail sentences simultaneously imposed under this section and NRS 483.560 or 485.330 must run consecutively.

6. If the person who violated the provisions of NRS 484.379 possesses a driver's license issued by a state other than Nevada and does not reside in Nevada, in carrying out the provisions of subparagraph (1) of paragraph (a) or (b) of subsection 1, the court shall:

(a) Order the person to pay tuition for and submit evidence of completion of an educational course on the abuse of alcohol and controlled substances approved by a governmental agency of the state of his residence within the time specified in the order; or

(b) Order him to complete an educational course by correspondence on the abuse of alcohol and controlled substances approved by the department within the time specified in the order, and the court shall notify the department if the person fails to complete the assigned course within the specified time.

7. If the defendant was transporting a person who is less than 15 years of age in the motor vehicle at the time of the violation, the court shall consider that fact as an aggravating factor in determining the sentence of the defendant.



8. As used in this section, unless the context otherwise requires, "offense" means a violation of NRS 484.379 or 484.3795 or homicide resulting from the driving of a vehicle while under the influence of intoxicating liquor or a controlled substance, or the violation of a law of any other jurisdiction which prohibits the same or similar conduct.

(Added to NRS by 1983, 1070; A 1985, 1946; 1987, 907, 1136; 1989, 195, 2046; 1991, 218, 836; 1993, 2262, 2892)

#### WEST PUBLISHING CO.

Automobiles ⇐ 359.

Criminal Law ⇐ 982.4(1), 1208.6(1).

WESTLAW Topic Nos. 48A, 110.

C.J.S. Criminal Law §§ 1465, 1526, 1553.

C.J.S. Motor Vehicles §§ 596 et seq.

#### NEVADA CASES.

**Pretrial petition for habeas corpus not appropriate, in prosecution for third-offense violation, to challenge ruling of trial court concerning use of prior convictions.** In prosecution for driving under influence of intoxicating liquor where information alleged that this was defendant's third offense within 5 years and that offense was therefore felony under former provisions of NRS 484.379 (cf. NRS 484.3792), pretrial petition for habeas corpus was not appropriate means of challenging ruling of district court that prior convictions would be used as substantive proof of crime charged rather than solely for purposes of enhancement during sentencing, because even if defendant were to prevail in his argument as to how prior convictions were to be used at trial, he would not be entitled to immediate release from custody. Issue could be raised on direct appeal if defendant was convicted. *Hardin v. Griffin*, 98 Nev. 302, 646 P.2d 1216 (1982)

**Admissibility of prior convictions to be challenged by motion to suppress evidence, with review available only after trial.** In prosecution for driving under influence of intoxicating liquor where information alleged that this was defendant's third offense within 5 years and that offense was therefore felony under former provisions of NRS 484.379 (cf. NRS 484.3792), supreme court, on petition for mandamus or prohibition, declined to review district court's denial of pretrial petition for habeas corpus challenging probable cause where defendant's contention was that records of prior convictions were inadmissible at preliminary hearing because they did not show waiver of counsel or voluntariness of plea. Challenge to admissibility of evidence on constitutional grounds should have been made in motion to suppress evidence, with review available only after trial. *Hardin v. Griffin*, 98 Nev. 302, 646 P.2d 1216 (1982)

**Proper to enhance sentence based upon prior misdemeanor convictions.** In prosecution for driving motor vehicle while under influence of intoxicating liquor, where defendant had two or more prior convictions for same or similar offense in 5 years, it was proper for trial court to use defendant's prior convictions for misdemeanors as basis to enhance penalty under former provisions of NRS 484.379 (cf. NRS 484.3792) because, as used therein, prior conviction includes conviction for violation of subsection 1 or 2 of that statute as well as NRS 484.3795 or law which prohibits same conduct. *Koenig v. State*, 99 Nev. 780, 672 P.2d 37 (1983), cited, *State v. Smith*, 105 Nev. 293, at 298, 774 P.2d 1037 (1989)

**Prior convictions not element of offense, but basis for enhancement of sentence upon conviction.** In prosecution under former provisions of NRS 484.379 (cf. NRS 484.3792) for driving motor vehicle while under influence of intoxicating liquor, where defendant had two or more prior convictions for same or similar offense in 5 years, trial court correctly precluded jury from considering those convictions in determining verdict because statute does not establish prior convictions as separate elements of offense charged but is intended to provide for enhancement of penalty for subsequent convictions of same or similar offense which is question of law for court. *Koenig v. State*, 99 Nev. 780, 672 P.2d 37 (1983), cited, *Jones v. State*, 105 Nev. 124, at 127, 771 P.2d 154 (1989)

**Evidence of prior misdemeanor conviction, entered upon guilty plea, admissible if "spirit of constitutional principles" respected in taking of plea.** In prosecution for driving while under influence of intoxicating liquor, where defendant had two or more prior convictions for same or similar offense within 5 years, court records of defendant's convictions for misdemeanors based on guilty pleas were not constitutionally inadequate and convictions could be used as basis to enhance penalty under former provisions of NRS 484.379 (cf. NRS 484.3792), without full showing of requisites for use of such pleas when entered in district court. While records of felony conviction based on guilty plea are constitutionally adequate only if they show that (1) defendant was apprised of

his constitutional rights, (2) he understood and waived those rights, (3) there were no threats or promises that induced guilty plea, and (4) defendant understood consequences of plea and elements of offense, such records from misdemeanor conviction in justice's or municipal court are constitutionally adequate if they show that spirit of constitutional principles concerning tendering of guilty plea was respected. *Koenig v. State*, 99 Nev. 780, 672 P.2d 37 (1983), cited, *Jones v. State*, 105 Nev. 124, at 126, 771 P.2d 154 (1989), *State v. Smith*, 105 Nev. 293, at 298, 774 P.2d 1037 (1989), *Bonds v. State*, 105 Nev. 827, at 829, 784 P.2d 1 (1989), *Dressler v. State*, 107 Nev. 686, at 695, 819 P.2d 1288 (1991), *Polson v. State*, 108 Nev. 1044, at 1049, 843 P.2d 825 (1992), see also *Pettipas v. State*, 106 Nev. 377, 794 P.2d 705 (1990)

**Error for court to refer to prior convictions of defendant; error harmless where evidence of guilt overwhelming.** In prosecution for driving motor vehicle while under influence of intoxicating liquor, in violation of former provisions of NRS 484.379 (cf. NRS 484.3792), where defendant had previously been convicted of same or similar offenses, it was error for trial court to mention that defendant had two or more prior convictions but this reference did not constitute reversible error since evidence of guilt was overwhelming. *Koenig v. State*, 99 Nev. 780, 672 P.2d 37 (1983)

**Prior misdemeanor convictions in which right to counsel waived may be used to enhance penalty.** Where defendant had waived any right to counsel in prior misdemeanor proceedings, convictions could be used as basis to enhance penalty under former provisions of NRS 484.379 (cf. NRS 484.3792). *Koenig v. State*, 99 Nev. 780, 672 P.2d 37 (1983), cited, *Dixon v. State*, 103 Nev. 272, at 274, 737 P.2d 1162 (1987), *Pettipas v. State*, 106 Nev. 377, at 380, 794 P.2d 705 (1990)

**No statutory right to trial by jury in prosecution for driving under influence.** In prosecution under former provisions of NRS 484.379 (cf. NRS 484.3792) for driving motor vehicle while under influence of intoxicating liquor, district court erred in holding that subsection 2 of NRS 175.011 created statutory right to trial by jury upon demand in every case because statute does not express in plain, explicit language, legislative intention to grant substantive right to trial by jury, but is intended to establish only procedural requirements related thereto. *State v. Smith*, 99 Nev. 806, 672 P.2d 631 (1983)

**No constitutional right to jury trial in misdemeanor prosecution for driving under influence.** In prosecution under former provisions of NRS 484.379 (cf. NRS 484.3792) for driving motor vehicle while under influence of intoxicating liquor, defendant was not entitled to trial by jury under U.S. Constitution or Nev. Art. 1, § 3, because, as maximum possible penalty for offense charged was not more than 6 months imprisonment, offense was petty offense for which no constitutional right to trial by jury has been conferred. *State v. Smith*, 99 Nev. 806, 672 P.2d 631 (1983), cited, *Blanton v. North Las Vegas Mun. Court*, 103 Nev. 623, at 631, 748 P.2d 494 (1987), *State v. Ninth Judicial Dist. Court*, 104 Nev. 91, at 92, 752 P.2d 238 (1988), distinguished, *Bronson v. Swinney*, 648 F. Supp. 1094, at 1100 (D. Nev. 1986)

**Felony provision for third offense not ex post facto law where earlier convictions occurred before enactment.** Provision of NRS 484.3792 making third offense for driving under influence of intoxicating liquor or controlled substance felony is not ex post facto law simply because defendant's earlier convictions antedated its enactment. On day defendant committed third offense, reference to statute would have indicated precisely penalty he risked. *Dixon v. State*, 103 Nev. 272, 737 P.2d 1162 (1987)

**Prosecutor prohibited from engaging in plea bargaining.** Court consolidated appeals and petitions arising from denial of jury trials by municipal courts of cities of Las Vegas and North Las Vegas for persons charged with driving under influence of alcohol. In driving under influence of alcohol cases, prosecutor is prohibited by statute from engaging in plea bargaining. *Blanton v. North Las Vegas Mun. Ct.*, 103 Nev. 623, 748 P.2d 494 (1987)

**Person charged with misdemeanor driving under influence has no right to jury trial.** In consolidated appeals and petitions arising from denial of jury trials by municipal courts of cities of Las Vegas and North Las Vegas for persons charged with driving under influence of alcohol (see NRS 484.379), court held that right to trial by jury guaranteed by Nev. Art. 1, § 3 is coextensive with that guaranteed by U.S. Constitution and that U.S. 6th amendment right to trial by jury does not extend to every criminal proceeding. Court concluded that no constitutional right to trial by jury attaches to first time driving under influence offense where maximum penalty is misdemeanor (see NRS 484.3792). *Blanton v. North Las Vegas Mun. Court*, 103 Nev. 623, 748 P.2d 494 (1987), aff'd, *Blanton v. City of N. Las Vegas*, 109 S. Ct. 1289 (1989), cited, *State v. Ninth Judicial Dist.*

Court, 104 Nev. 91, at 92, 752 P.2d 238 (1988), *Pettipas v. State*, 106 Nev. 377, at 379, 794 P.2d 705 (1990), see also *McLean v. Moran*, 963 F.2d 1306 (9th Cir. 1992)

**Person charged in justice's court with misdemeanor driving under influence has no right to jury trial.** When charged as misdemeanor, driving under influence of alcohol in violation of NRS 484.379 is petty offense for which trial by jury is not constitutionally mandated, regardless of whether defendant is charged in municipal court or justice's court. *State v. Ninth Judicial Dist. Court*, 104 Nev. 91, 752 P.2d 238 (1988)

**Phrase "same conduct" refers to conduct of driving under influence, regardless of whether particulars are identical.** Phrase "same conduct" as used in subsection 7 of NRS 484.3792 refers to conduct of driving under influence of intoxicating liquor or controlled substance regardless of whether particulars are identical. *Jones v. State*, 105 Nev. 124, 771 P.2d 154 (1989)

**Evidence of plea of nolo contendere is admissible for purpose of enhancing penalty for driving under influence.** Where defendant entered plea of guilty to charge of driving under influence, it was proper for purpose of enhancing penalty pursuant to NRS 484.3792, notwithstanding provisions of NRS 48.125 or 51.295 to contrary, for trial court to admit evidence of his two prior California convictions entered upon pleas of nolo contendere. It is conviction itself that is relevant factor, and no distinction is drawn between conviction entered upon plea of guilty, plea of not guilty or plea of nolo contendere. *Jones v. State*, 105 Nev. 124, 771 P.2d 154 (1989)

**State precluded from using previous conviction that was reduced to first offense pursuant to plea bargain to enhance subsequent offense to felony status.** Where defendant, upon second arrest for driving under influence, entered into plea bargain and agreed to plead guilty in exchange for charge being reduced to first offense, state was precluded from using conviction to enhance subsequent offense to felony status (see NRS 484.3792). State is held to most meticulous standards of promise and performance concerning fulfillment of its part of plea bargain, and court will specifically enforce plea bargain when enforcement will carry out reasonable expectations of parties without binding trial judge to unsuitable disposition. *State v. Smith*, 105 Nev. 293, 774 P.2d 1037 (1989), cited, *Perry v. State*, 106 Nev. 436, at 437, 794 P.2d 723 (1990), *State v. Crist*, 108 Nev. 1058, at 1059, 843 P.2d 368 (1992)

**Evidence sufficient to establish prior violations.** In felony prosecution for third offense driving under influence (see NRS 484.3792), where state presented (1) for first offense, evidence that defendant had received citation and entered plea of nolo contendere, and (2) for second offense, complaint, defendant's guilty plea and sentence received, evidence was sufficient to establish that defendant had been convicted of two prior violations for driving under influence. *Isom v. State*, 105 Nev. 391, 776 P.2d 543 (1989), cited, *Polson v. State*, 108 Nev. 1044, at 1049, 843 P.2d 825 (1992)

**Evidence of prior conviction does not have to be formal, written judgment of conviction.** Subsection 2 of NRS 484.3792, which provides that certain offenses constitute prior offense for purpose of section if evidenced by conviction, does not require that prior conviction be evidenced by formal, written judgment of conviction. Where appellant's prior convictions were evidenced by certified copies of docket sheets and other court documents, such documents were sufficient to show that appellant was actually convicted of misdemeanor driving under influence in those proceedings. *Pettipas v. State*, 106 Nev. 377, 794 P.2d 705 (1990), cited, *Polson v. State*, 108 Nev. 1044, at 1049, 843 P.2d 825 (1992)

**Conviction where defendant was not represented by counsel could not be used as prior offense where documents supporting conviction did not contain formal waiver of counsel.** Where one of prior convictions relied on by prosecution pursuant to NRS 484.3792 was result of trial at which appellant was not represented by counsel, and documents supporting conviction did not contain formal waiver of counsel by appellant, district court erred when it used conviction to enhance appellant's present conviction of driving under influence to felony. *Pettipas v. State*, 106 Nev. 377, 794 P.2d 705 (1990)

**Post-conviction relief was not available to person convicted of misdemeanor driving under influence.** Where appellant was convicted of misdemeanor driving under influence (see NRS 484.3792), he could not challenge his conviction by filing petition for post-conviction relief pursuant to former NRS 177.315 because that section indicated clear legislative intent to make post-conviction relief available only to person who was convicted of felony offense and who was under sentence of death or imprisonment for that offense. *Ferreira v. City of Las Vegas*, 106 Nev. 386, 793 P.2d 1328 (1990)

**Defendant was not competent to testify regarding what he believed his blood-alcohol level was at time of accident.** Where defendant was charged with felony for third offense of driving under influence (see NRS 484.3792), trial court did not err in finding that he was not competent to testify regarding what he believed his blood-alcohol level was at time of accident (see former NRS 484.381; cf. NRS 484.379). *Slinkard v. State*, 106 Nev. 393, 793 P.2d 1330 (1990)

**Conviction of first offense pursuant to plea bargain must be treated as first offense for all purposes.** When person pleads guilty to first offense of driving under influence (see NRS 484.3792), conviction must be treated as first offense for all purposes, including sentencing for later convictions. *Perry v. State*, 106 Nev. 436, 794 P.2d 723 (1990), cited, *State v. Crist*, 108 Nev. 1058, at 1059, 843 P.2d 368 (1992)

**Date of offense, not date of conviction, determines whether prior offense may be used to enhance penalty.** Offense of driving under influence which occurred more than 7 years before current offense, but for which date of conviction was within 7 years of current offense, did not constitute prior offense for purposes of enhancing penalty of offender pursuant to NRS 484.3792 because unambiguous language of statute refers to occurrences rather than convictions. *Pfohlman v. State*, 107 Nev. 552, 816 P.2d 450 (1991)

**Error in description of prior conviction that does not prejudice defendant does not preclude use of that conviction to enhance punishment.** Where appellant was charged with third offense of driving under influence of alcohol and, in alleging county in which previous conviction had occurred, prosecution listed wrong county, error did not require reversal because although pursuant to NRS 484.3792 prosecution must in good faith include in information description of each prior conviction that is as complete and accurate as possible, error in description of prior conviction does not automatically preclude its use for purposes of enhancement of punishment. Unless criminal defendant can show that omission or inaccuracy in describing prior conviction has prejudiced him, prosecution is not precluded from using that prior conviction in seeking enhancement of defendant's punishment. *Dressler v. State*, 107 Nev. 686, 819 P.2d 1288 (1991), cited, *McAnulty v. State*, 108 Nev. 179, at 181, 826 P.2d 567 (1992)

#### FEDERAL AND OTHER CASES.

**Right to jury trial of person charged with driving while intoxicated.** Notwithstanding provisions of NRS 266.550 which prohibit trial by jury in municipal courts, person charged with driving while intoxicated in violation of NRS 484.379 has constitutional right to trial by jury because under Nevada law offense is serious in that (1) NRS 484.3792 provides that penalties upon conviction include mandatory term in jail, payment for and attendance at educational course on substance abuse and maximum fine of \$1,000, provides system for increasing minimum punishments for subsequent convictions, and prohibits probation, suspension of sentence and plea bargaining and (2) collateral consequences include loss of driver's license (see NRS 484.384), and driving is nearly imperative to ability of many people to earn living. *Bronson v. Swinney*, 648 F. Supp. 1094 (D. Nev. 1986)

**No right to trial by jury for driving under influence.** Based on severity of maximum authorized penalty as major criterion, there is no constitutional right to trial by jury for person charged under Nevada law with driving under influence of alcohol (see NRS 484.379) since: (1) with maximum prison term being 6 months (see NRS 484.3792), presumption exists that Nevada legislature views it as "petty" offense for purposes of U.S. 6th amendment (cf. Nev. Art. 1, § 3 and NRS 266.550), and (2) defendant did not demonstrate that additional statutory penalties (see NRS 483.460, 484.3792 and 484.384) reflect legislative determination that offense in question is "serious" one. *Blanton v. City of N. Las Vegas*, 109 S. Ct. 1289 (1989), cited, *Westmoreland v. Demosthenes*, 737 F. Supp. 1127, at 1129 (D. Nev. 1990), *McLean v. Moran*, 963 F.2d 1306, at 1311 (9th Cir. 1992)

**Convictions of driving under influence, obtained without jury trial, may be used to enhance penalty for subsequent convictions.** Previous convictions for driving under influence pursuant to NRS 484.379, where defendant was not provided with jury trial, may be used to enhance penalty for subsequent convictions pursuant to NRS 484.3792. *Westmoreland v. Demosthenes*, 737 F. Supp. 1127 (D. Nev. 1990)

#### ATTORNEY GENERAL'S OPINIONS.

**Punishment prescribed by section applies to both resident and nonresident drivers.** Punishment prescribed for drunken driving under ch. 166, Stats. 1925 (cf. NRS 484.3792), applies to both resident and nonresident drivers. AGO 324 (10-18-1941)

**Revocation of driver's license for conviction.** NCL §§ 4351 and 4442.32 (cf. NRS 484.3792 and 483.460) dealing with punishment for driving motor vehicle while under influence of intoxicating liquor, should be considered together so far as they are consistent. Thus, court has power to revoke driver's license under NCL § 4351 (cf. NRS 484.3792),

but license is automatically revoked by NCL § 4442.32 (cf. NRS 483.460). AGO 256 (12-26-1945)

**Convictions subject to enhanced punishment.** Under statute calling for more severe penalty for "subsequent conviction," date of last amendment thereto determines time after which first offense can take place, notwithstanding

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ing convictions prior to amendment. AGO 460 (5-28-1947)

**Amount of fine to be assessed.** When assessing fine under penal statutes, it is mandatory to assess not less than minimum nor more than maximum amount prescribed. AGO 262 (6-8-1953)

**Provision for enhancement of penalty not invalid ex post facto law.** Former provision of

NRS 484.379 (cf. NRS 484.3792) which imposed additional mandatory minimum 10-day jail sentence for second conviction within 3 years of driving under influence of intoxicating liquor, applied where first conviction occurred prior to enactment of provision, and was not ex post facto law because additional punishment being inflicted was for current offense. AGO 153 (12-4-1973)

**484.3793 Evaluation and treatment for alcohol or drug abuse: Definitions.** As used in NRS 484.3793 to 484.37947, inclusive:

1. "Evaluation center" means a facility which is approved by the bureau of alcohol and drug abuse of the rehabilitation division of the department of employment, training and rehabilitation to provide an evaluation of an offender to a court in order to determine if the offender is an abuser of alcohol or another drug. The term includes a facility operated by a court or other governmental agency.

2. "Treatment facility" means a facility for the treatment of abuse of alcohol or drugs, which is certified by the bureau of alcohol and drug abuse of the rehabilitation division of the department of employment, training and rehabilitation.

(Added to NRS by 1993, 2890)

**484.37935 Evaluation and treatment for alcohol or drug abuse: Standards for approval of evaluation center.** The bureau of alcohol and drug abuse of the rehabilitation division of the department of employment, training and rehabilitation shall adopt by regulation the standards to be used for approving the operation of a facility as an evaluation center for the purposes of NRS 484.3794, 484.37943 and 484.37945.

(Added to NRS by 1993, 2890)

**484.3794 Evaluation and treatment for alcohol or drug abuse: Application to undergo program of treatment; sentencing of offender and conditional suspension of sentence; notice to department.**

1. A person who is found guilty of a first or second violation of NRS 484.379 within 7 years may, at that time or any time until he is sentenced, apply to the court to undergo a program of treatment for alcoholism or drug abuse for at least 1 year if:

(a) He is classified as an alcoholic or abuser of drugs by a:

(1) Counselor certified to make that classification by the bureau of alcohol and drug abuse of the rehabilitation division of the department of employment, training and rehabilitation; or

(2) Physician certified to make that classification by the board of medical examiners;

(b) He agrees to pay the costs of the treatment; and

(c) He has served or will serve a term of imprisonment in jail of:

(1) One day, or has performed or will perform 24 hours of work for the community, if it is his first offense within 7 years; or

(2) Five days if it is his second offense within 7 years.

2. A prosecuting attorney may, within 10 days after receiving notice of an application for treatment pursuant to this section, request a hearing on the matter. The court shall order a hearing on the application if the prosecuting attorney requests it or may order a hearing on its own motion.

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3. At the hearing on the application for treatment the prosecuting attorney may present the court with any relevant evidence on the matter. If a hearing is not held, the court shall decide the matter upon affidavits and other information before it.

4. In granting an application for treatment the court shall:

(a) Immediately sentence the offender and enter judgment accordingly.

(b) Suspend the sentence for not more than 3 years upon the condition that the offender be accepted for treatment by a treatment facility, that he complete the treatment satisfactorily and that he comply with any other condition ordered by the court.

(c) Advise the offender that:

(1) If he is accepted for treatment by such a facility, he may be placed under the supervision of the facility for a period not to exceed 3 years and during treatment he may be confined in an institution or, at the discretion of the facility, released for treatment or supervised aftercare in the community.

(2) If he is not accepted for treatment by such a facility or fails to complete the treatment satisfactorily, he shall serve the sentence imposed by the court. Any sentence of imprisonment must be reduced by a time equal to that which he served before beginning treatment.

(3) If he completes the treatment satisfactorily, his sentence will be reduced to a term of imprisonment which is no longer than that provided for the offense in paragraph (c) of subsection 1 and a fine of not more than the minimum provided for the offense in NRS 484.3792, but the conviction remains on his record of criminal history.

5. The court shall administer the program of treatment pursuant to the procedures provided in NRS 458.320 and 458.330, except that the court:

(a) Shall not defer the sentence, set aside the conviction or impose conditions upon the election of treatment not provided in this section.

(b) May immediately revoke the suspension of sentence for a violation of any condition of the suspension.

6. The court shall notify the department, on a form approved by the department, upon granting the offender's application for treatment and his failure to be accepted for or complete treatment.

(Added to NRS by 1983, 1072; A 1987, 719, 964; 1989, 197; 1993, 1642, 2264, 2894)

WEST PUBLISHING CO.  
Automobiles ⇐ 359.  
Criminal Law ⇐ 982.5(1).

WESTLAW Topic Nos. 48A, 110.  
C.J.S. Criminal Law § 1556.  
C.J.S. Motor Vehicles §§ 596 et seq.

**484.37943 Evaluation and treatment for alcohol or drug abuse: Evaluation of certain offenders; assessment for support of evaluation center.**

1. If a person is found guilty of a first violation, if the weight of alcohol in the defendant's blood at the time of the offense was 0.18 percent or more, or any second violation of NRS 484.379 within 7 years, the court shall, before sentencing the offender:

(a) Require the evaluation of the offender by an evaluation center to determine if he is an abuser of alcohol or other drugs; and

(b) Order the offender to pay an assessment of not more than \$100 and render a judgment against him for the assessment.

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2. The evaluation of an offender pursuant to this section must be conducted at an evaluation center by:

(a) A counselor certified to make that classification by the bureau of alcohol and drug abuse of the rehabilitation division of the department of employment, training and rehabilitation;

(b) A physician certified to make that classification by the board of medical examiners; or

(c) A person who is approved to make that classification by the bureau of alcohol and drug abuse of the rehabilitation division of the department of employment, training and rehabilitation, who shall report to the court the results of the evaluation and make a recommendation to the court concerning the length and type of treatment required by the offender.

3. The money collected as an assessment pursuant to this section must:

(a) Not be deducted from any fine imposed;

(b) Be taxed against the offender in addition to the fine;

(c) Be stated separately on the court's docket; and

(d) Be expended to offset the cost of the evaluation required by this section, including, but not limited to, the cost of staffing the evaluation center, equipment used at the center and maintaining the center.

(Added to NRS by 1993, 2890)

#### REVISER'S NOTE.

Ch. 668, Stats. 1993, the source of this section, contains the following provision not included in NRS:

"1. The provisions of [NRS 484.37943] do not apply to:

(a) A district court or justices' court in a county; or

(b) A municipal court in a city, that does not have the personnel necessary to conduct the evaluations required by that section.

2. On or before July 1, 1995, each county and city shall provide any personnel necessary to conduct the evaluations required by [NRS 484.37943]."

#### WEST PUBLISHING CO.

Chemical Dependents ⇐ 14.

WESTLAW Topic No. 76A.

C.J.S. Drugs and Narcotics § 233.

#### **484.37945 Evaluation and treatment for alcohol or drug abuse: Placement of offender under clinical supervision of treatment facility; payment of charges for treatment; liability of facility limited.**

1. When a program of treatment is ordered pursuant to paragraph (b) of subsection 1 of NRS 484.3792, the court shall place the offender under the clinical supervision of a treatment facility for treatment for not less than 30 days nor more than 6 months, in accordance with the report submitted to the court pursuant to subsection 2 of NRS 484.37943. The court may, at its discretion:

(a) Order the offender confined in a treatment facility, then release the offender for supervised aftercare in the community; or

(b) Release the offender for treatment in the community, for the period of supervision ordered by the court.

2. The court shall:

(a) Require the treatment facility to submit monthly progress reports on the treatment of an offender pursuant to this section; and

(b) Order the offender, to the extent of his financial resources, to pay any charges for his treatment pursuant to this section. If the offender does not have the financial resources to pay all of those charges, the court shall, to the extent possible, arrange

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for the offender to obtain his treatment from a treatment facility that receives a sufficient amount of federal or state money to offset the remainder of the charges.

3. A treatment facility is not liable for any damages to person or property caused by a person who drives while under the influence of intoxicating liquor or a controlled substance after the treatment facility has certified to his successful completion of a program of treatment ordered pursuant to paragraph (b) of subsection 1 of NRS 484.3792.

(Added to NRS by 1993, 2891)

WEST PUBLISHING CO.  
Chemical Dependents ⇐ 14.

WESTLAW Topic No. 76A.  
C.J.S. Drugs and Narcotics § 233.

**484.37947 Evaluation and treatment for alcohol or drug abuse: Evaluation or treatment by private company authorized.** The provisions of NRS 484.37943 and 484.37945 do not prohibit a court from:

1. Requiring an evaluation pursuant to NRS 484.37943 to be conducted by an evaluation center that is administered by a private company if the company meets the standards of the bureau of alcohol and drug abuse of the rehabilitation division of the department of employment, training and rehabilitation pursuant to NRS 484.37935; or

2. Ordering the offender to attend a program of treatment that is administered by a private company.

(Added to NRS by 1993, 2892)

WEST PUBLISHING CO.  
Chemical Dependents ⇐ 14.

WESTLAW Topic No. 76A.  
C.J.S. Drugs and Narcotics § 233.

**484.3795 Driving under the influence of intoxicating liquor or controlled substance: Penalty if death or substantial bodily harm results; segregation of offender; plea bargaining prohibited; limitations on probation and suspension of sentence.**

1. Any person who, while under the influence of intoxicating liquor or with 0.10 percent or more by weight of alcohol in his blood, or while under the influence of a controlled substance, or under the combined influence of intoxicating liquor and a controlled substance, or any person who 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, 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, any person other than himself, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 20 years and must be further punished by a fine of not less than \$2,000 nor more than \$5,000. A person so imprisoned must, insofar as practicable, be segregated from offenders whose crimes were violent and, insofar as practicable, be assigned to an institution or facility of minimum security.

2. No prosecuting attorney may dismiss a charge of violating the provisions of subsection 1 in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial. Except as otherwise

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provided in subsection 3, a sentence imposed pursuant to subsection 1 may not be suspended nor may probation be granted.

3. A person convicted of violating any provision of this section may be sentenced to a specified term of imprisonment in accordance with the provisions of subsection 1. The court may order suspension of the sentence if, as a condition of the suspension, the defendant:

(a) Is imprisoned in the state prison, an institution of minimum security, a conservation camp, a restitution center or a similar facility for not less than 1 year; and

(b) Upon completion of the term of imprisonment, begins serving a period of probation not to exceed 10 years.

4. If the defendant was transporting a person who is less than 15 years of age in the motor vehicle at the time of the violation, the court shall consider that fact as an aggravating factor in determining the sentence of the defendant.

(Added to NRS by 1973, 447; A 1979, 1484; 1981, 1926; 1983, 1073; 1985, 818, 1015; 1989, 1111; 1991, 220, 489, 498, 837)

#### WEST PUBLISHING CO.

Automobiles ⇐ 359.

Criminal Law ⇐ 982.5(1).

WESTLAW Topic Nos. 48A, 110.

C.J.S. Criminal Law § 1556.

C.J.S. Motor Vehicles §§ 596 et seq.

#### NEVADA CASES.

**Owner of vehicle criminally and civilly liable for allowing intoxicated person to drive vehicle.** Where owner of automobile was riding in automobile when intoxicated friend backed into and killed woman, owner was criminally and civilly liable, because he permitted one who was intoxicated to operate automobile, under sec. 3, ch. 13, Stats. 1923 (cf. NRS 484.3795), providing that any person who drives vehicle while intoxicated or by reason of such intoxication does any act causing death of person shall be punished as for felony. *Ex parte Liotard*, 47 Nev. 169, 217 Pac. 960 (1923), cited, *State v. Lewis*, 59 Nev. 262, at 274, 91 P.2d 820 (1939)

**Section properly included in act to "regulate traffic."** Ch. 166, Stats. 1925 (cf. NRS 484.3795), which is entitled "An Act to regulate traffic on the highways of this state, to provide punishment for the violation thereof, and other matters properly connected therewith," properly includes as part of subject matter of act a provision making it felony to injure or kill any person as result of operating motor vehicle under influence of alcohol. *State v. Mills*, 52 Nev. 10, 279 Pac. 759 (1929)

**Elements of offense; information defective where duty imposed by law, and alleged to have been violated by defendant, not specified.** In prosecution for felony drunk driving, where defendant hit rear of another automobile as driver of that automobile was attempting to

turn left and collision caused injury to driver of other automobile, information which charged defendant with violation of former NRS 484.040 (cf. NRS 484.3795) without specifying act or duty imposed by law that defendant allegedly violated while driving under influence of intoxicating liquor and subsequent conviction of defendant based upon that charge were defective. In order to convict person of felony drunk driving, state must establish beyond reasonable doubt that defendant drove vehicle on public highway, that he was then and there under influence of intoxicating liquor, that he did some act forbidden by law or neglected duty imposed by law in driving such vehicle and that such act or neglect proximately caused bodily injury to person other than himself. Here information failed to allege and proof at trial failed to show what act forbidden by law defendant committed in addition to driving vehicle on public highway while under influence of intoxicating liquor. *Anderson v. State*, 85 Nev. 415, 456 P.2d 445 (1969), cited, *State v. Johnston*, 93 Nev. 279, at 281, 563 P.2d 1147 (1977), distinguished, *Logan v. Warden*, 86 Nev. 511, at 512, 471 P.2d 249 (1970)

**Sufficiency of information upheld where allegations of information, together with evidence adduced at preliminary hearing, sufficient to apprise defendant of crime charged.** Where sufficiency of information charging felony drunk driving in violation of former NRS 484.040 (cf. NRS 484.3795) was first challenged after conviction, information which charged defendant had driven vehicle in such negligent manner as to cause death, together with information contained in transcript of preliminary hearing relating to specific forbidden act committed, was sufficient to provide ade-

quate notice of crime charged to enable defendant to plead or defend. *Logan v. Warden*, 86 Nev. 511, 471 P.2d 249 (1970), cited, *Vincze v. State*, 86 Nev. 546, at 549, 472 P.2d 936 (1970), *Patrick v. Sheriff, Washoe County*, 86 Nev. 849, at 850, 477 P.2d 594 (1970), *Brimmage v. State*, 93 Nev. 434, at 440, 567 P.2d 54 (1977), *State v. Jones*, 96 Nev. 71, at 76, 605 P.2d 202 (1980), see also *Collura v. State*, 97 Nev. 451, 634 P.2d 455 (1981), distinguished, *Simpson v. Eighth Judicial Dist. Court*, 88 Nev. 654, at 661, 503 P.2d 1225 (1972), *State v. Johnston*, 93 Nev. 279, at 282, 563 P.2d 1147 (1977), *Barren v. State*, 99 Nev. 661, at 669, 669 P.2d 725 (1983)

**Indictment must allege specific act or neglect of duty causing injury.** Indictment predicated on violation of NRS 484.3795 which alleged only that defendant was driving under influence of intoxicating liquor was properly dismissed by trial court because it did not allege specific act or neglect of duty which was proximate cause of injuries. *State v. Johnston*, 93 Nev. 279, 563 P.2d 1147 (1977), cited, *Albitre v. State*, 103 Nev. 281, at 284, 738 P.2d 1307 (1987), dissenting opinion.

**Evidence sufficient to support finding of substantial bodily harm where victim's nose crushed, face lacerated and wrist broken.** In prosecution for causing substantial bodily harm to another while driving under influence of intoxicating liquor under NRS 484.3795 where victim's nose was crushed, face lacerated and wrist broken, evidence supported jury's finding that she suffered "substantial bodily harm" where that term was defined as (1) bodily injury which creates substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of function of any bodily member or organ, or (2) prolonged physical pain. *Gibson v. State*, 95 Nev. 99, 590 P.2d 158 (1979), cited, *Levi v. State*, 95 Nev. 746, at 748, 602 P.2d 189 (1979)

**Harm to multiple victims gives rise to multiple offenses.** On appeal from conviction of two felony counts of driving under influence of intoxicating liquor, causing death (see NRS 484.3795), defendant could not successfully contend that violation of drunk driving law results in only one offense, i.e., causing of injuries, regardless of number of victims. Appellate court ruled that state is concerned with minimizing both causing and receiving of injuries, and where defendant's course of conduct resulted in harm to multiple victims it gave rise to multiple charges of offense. *Galvan v. State*, 98 Nev. 550, 655 P.2d 155 (1982), cited, *LaMotte v. Slansky*, 661 F. Supp. 573, at 575 (D. Nev.

1987), *Albitre v. State*, 103 Nev. 281, at 284, 738 P.2d 1307 (1987)

**Fine for violation of section not to be converted to imprisonment automatically where defendant indigent.** State could impose mandatory fine for violation of NRS 484.3795 (causing death of another by driving motor vehicle while under influence of intoxicating liquor) but under equal protection clause of U.S. Constitution could not automatically convert fine into imprisonment (see NRS 176.065) solely because defendant was indigent and unable to pay fine in full. Before defendant may be imprisoned for nonpayment of fine, hearing must be held to determine his financial ability. If he is indigent, sentencing court must permit discharge of fine by alternative means (see NRS 176.085). To extent that NRS 176.085 permits imprisonment for nonpayment before hearing has been held, it is constitutionally insufficient. *Gilbert v. State*, 99 Nev. 702, 669 P.2d 699 (1983), cited, AGO 93-6 (4-9-1993)

**Expansion of punishment for conduct prohibited by section is for legislature; defendant not guilty of second degree murder for deaths caused by driving while intoxicated.** In criminal prosecution, where defendant, while driving under influence of intoxicating liquor, collided with another automobile and two of its passengers were killed, court would not extend liability for murder of second degree under NRS 200.030 to deaths resulting from driving while under influence of intoxicating liquor on ground that such driving was inherently dangerous and naturally tended to destroy human life, because expanding punishment established by legislature for killing or seriously injuring another while driving under influence of intoxicating liquor (see NRS 484.3795) would constitute impermissible judicial excursion into legislature's domain. *Sheriff, Douglas County v. LaMotte*, 100 Nev. 270, 680 P.2d 333 (1984), cited, *Johnston v. State*, 101 Nev. 94, at 95, 692 P.2d 1307 (1985)

**Absent showing of intent to kill, driver not properly convicted of murder with use of deadly weapon; section provides exclusive punishment.** In criminal prosecution, where defendant, while driving motor vehicle under influence of intoxicating liquor, drove vehicle into wooden electrical pole which fell and killed deliveryman, defendant was improperly charged and convicted of murder with use of deadly weapon under NRS 193.165, 200.010 and 200.030 because, absent showing of intent to kill, statutory punishment contained in NRS 484.3795 was exclusive punishment for homicide which occurred. *Johnston v. State*, 101 Nev. 94, 692 P.2d 1307 (1985)

**Prosecutorial misconduct.** On trial for driving under influence of intoxicants in violation of NRS 484.3795, prosecutor's announcement to jury "that we don't try people that we believe are innocent" and his demeaning of defendant's expert witness as "one who goes to highest bidder" constituted prosecutorial misconduct but it was not of magnitude warranting reversal. *Albitre v. State*, 103 Nev. 281, 738 P.2d 1307 (1987)

**Convictions of involuntary manslaughter and felony reckless driving redundant to conviction of causing death by driving under the influence.** Where defendant was convicted of two counts of causing death of another by driving vehicle while under influence of intoxicants in violation of NRS 484.3795, two counts of involuntary manslaughter and two counts of felony reckless driving, conviction of two counts of causing death of another by driving vehicle while under influence of intoxicants was proper, but remaining four felony convictions were redundant to legitimate counts and were reversed. Although charging to limit may be justified to cover developing nuances of proof, failure to instruct jury limiting number of alternatives of conviction was error. *Albitre v. State*, 103 Nev. 281, 738 P.2d 1307 (1987), cited, *Jenkins v. Fourth Judicial Dist. Court*, 109 Nev. 337, at 340, 849 P.2d 1055 (1993)

**Meaning of "under the influence."** Phrase "under the influence" in NRS 484.3795 applies to each harmful act or neglect of duty specified in NRS 484.3795, and its meaning embraces only person who ingests any substance mentioned in statute to degree that renders him "incapable of safely driving or exercising actual physical control of a vehicle." Whether driver has been so influenced by ingested substance will, except for "per se" violation of driving under influence of intoxicating liquor when person has over statutory prescribed percentage by weight of alcohol in his blood, always be question of fact to be considered in light of such variable circumstances as person's resistance to substance, amount ingested and type and time of ingestion. Giving of jury instruction containing erroneous meaning of qualifying phrase "under the influence" was reversible error. *Cotter v. State*, 103 Nev. 303, 738 P.2d 506 (1987), cited, *Bostic v. State*, 104 Nev. 367, at 369, 760 P.2d 1241 (1988), *Almond v. State*, 105 Nev. 904, at 908, 785 P.2d 217 (1989)

**Routine disposal of respondent's blood sample by state after 1 year did not violate his due process rights or unduly prejudice his case.** Respondent was charged with violating

NRS 484.3795 by causing substantial bodily injury while driving under influence of intoxicating liquor. Police chemist who conducted gas chromatograph blood-alcohol test of respondent's blood routinely disposed of blood sample after 1 year. Respondent's arguments that his due process rights were violated and his case unduly prejudiced by state's loss of blood sample were rejected because (1) state was not acting in bad faith when it disposed of blood sample, (2) gas chromatograph blood testing method is considered to be one of most reliable methods of blood-alcohol testing, (3) respondent failed to present any evidence to indicate that method of testing was faulty or likely to lead to inaccurate results, (4) other statutes exist which protect defendant from admission of inaccurate test results (see NRS 484.389 and 484.393), and (5) alternative means exist to impeach accuracy of test results in addition to retesting sample itself. *State v. Hall*, 105 Nev. 7, 768 P.2d 349 (1989), cited, *State, Dep't of Motor Vehicles & Public Safety v. Tilp*, 107 Nev. 288, at 292, 810 P.2d 771 (1991)

**Probable cause supported warrantless taking of blood sample and detaining of driver of vehicle.** Where passenger in truck driven by defendant fell from hood and was seriously injured when struck by truck, several hours elapsed before defendant sought medical assistance and reported incident, and facts clearly indicated that officer had justifiable basis for detaining defendant who was obviously intoxicated, probable cause existed at time blood sample was taken to believe defendant had violated NRS 484.3795, blood sample was lawfully taken pursuant to NRS 484.383 without warrant first being obtained, and placing defendant under civil protective custody was appropriate pursuant to NRS 458.270. *Almond v. State*, 105 Nev. 904, 785 P.2d 217 (1989)

**Sentence of 5 years in prison and fine of \$5,000 not abuse of discretion by trial court.** In prosecution for felony drunk driving under NRS 484.3795, imposition of sentence of 5 years in prison and fine of \$5,000 by trial court was not abuse of discretion despite fact that trial court disregarded sentencing recommendations of both department of parole and probation and department of prisons. Courts have wide discretion to impose sentences, and recommendations of either department of parole and probation (see NRS 176.145) or department of prisons are not binding on courts. Absent showing that court relied on impalpable or highly suspect evidence, sentence imposed was not abuse of discretion and was well within statutory limits of NRS 484.3795. *Etcheverry v. State*, 107 Nev. 782, 821 P.2d 350 (1991)

**Dismissal of lesser charges in exchange for plea of no contest to charge of involuntary manslaughter would have violated section and was not allowed.** Criminal defendant was charged with three alternative offenses within one count: (1) driving while intoxicated resulting in death of another person; (2) reckless driving causing death of another person; and (3) involuntary manslaughter. District attorney agreed to dismissal of remaining charges against defendant, as well as one charge against co-defendant, in return for defendant's plea of no contest to one count of involuntary manslaughter. Defendant entered plea of no contest to one count of involuntary manslaughter, but court refused to dismiss remaining charges against him. Ruling of trial court was upheld by supreme court because NRS 484.3795 prohibits state from plea bargaining with defendants charged with felony driving under influence and, despite district attorney's arguments to contrary, arrangement between district attorney and defendant was, at minimum, de facto plea bargain. *Jenkins v. Fourth Judicial Dist. Court*, 109 Nev. 337, 849 P.2d 1055 (1993)

#### **FEDERAL AND OTHER CASES.**

**No denial of due process based upon confinement at institution of medium security.** Defendant who was convicted of causing injury or death of another by driving motor vehicle while under influence of intoxicating liquor in

violation of NRS 484.3795 was not denied due process of law when he was confined in institution of medium security, because statute did not require that defendant be placed in institution of minimum security, but provided department of prisons with discretion to classify offenders. *Maison v. Sumner*, 636 F. Supp. 595 (D. Nev. 1986)

**Confinement of offender.** On application for writ of habeas corpus, where provision of NRS 484.3795 for segregation of intoxicated drivers from violent offenders gave department of prisons discretion in assigning convicted intoxicated drivers to facilities for confinement, offender convicted of intoxicated driving and voluntary manslaughter under NRS 200.070 and assigned to maximum or medium security had no constitutionally protected interest in liberty. Writ was denied. *Mattern v. Sumner*, 637 F. Supp. 527 (D. Nev. 1986)

**Multiple conviction and consecutive sentences not double jeopardy.** Multiple convictions and consecutive sentences for violations of NRS 484.3795 rising from single act do not violate double jeopardy clause of U.S. 5th amendment, because single act may form basis for prosecution of two distinct statutory offenses whenever conviction for each offense requires proof of fact that other does not. *LaMoite v. Slansky*, 661 F. Supp. 573 (D. Nev. 1987)

#### **484.3796 Driving under the influence of intoxicating liquor or controlled substance: Evaluation of certain offenders before sentencing.**

1. Before sentencing an offender pursuant to NRS 484.3795 or paragraph (c) of subsection 1 of NRS 484.3792, the court shall require that the offender be evaluated to determine whether he is an abuser of alcohol or drugs and whether he can be treated successfully for his condition.

2. The evaluation must be conducted by:

(a) A counselor certified to make such an evaluation by the bureau of alcohol and drug abuse of the rehabilitation division of the department of employment, training and rehabilitation;

(b) A physician certified to make such an evaluation by the board of medical examiners; or

(c) A psychologist certified to make such an evaluation by the board of psychological examiners.

3. The counselor, physician or psychologist who conducts the evaluation shall immediately forward the results of the evaluation to the director of the department of prisons.

(Added to NRS by 1991, 784; A 1993, 1643, 2016)

#### **WEST PUBLISHING CO.**

Automobiles ⇐ 359.

Criminal Law ⇐ 986.4(2), 986.4(3).

WESTLAW Topic Nos. 48A, 110.

C.J.S. Criminal Law §§ 1507, 1508, 1510.

C.J.S. Motor Vehicles §§ 596 et seq.

**484.3797 Driving under the influence of intoxicating liquor or controlled substance: Attendance of meeting of panel of victims of injuries caused by violations of NRS 484.379 or 484.3795.**

1. The judge or judges in each judicial district shall cause the preparation and maintenance of a list of the panels of persons who:

(a) Have been injured or had members of their families or close friends injured or killed by persons driving under the influence of an intoxicating liquor or a controlled substance; and

(b) Have, by contacting the judge or judges in the district, expressed their willingness to discuss collectively the personal effect of those crimes.

The list must include the name and telephone number of the person to be contacted regarding each such panel and a schedule of times and locations of the meetings of each such panel. The judge or judges shall establish, in cooperation with representatives of the members of the panels, a fee, if any, to be paid by defendants who are ordered to attend a meeting of the panel. The amount of the fee, if any, must be reasonable. The panel may not be operated for profit.

2. Except as otherwise provided in this subsection, if a defendant pleads or is found guilty of any violation of NRS 484.379 or 484.3795, the court shall, in addition to imposing any other penalties provided by law, order the defendant to:

(a) Attend, at the defendant's expense, a meeting of a panel of persons who have been injured or had members of their families or close friends injured or killed by persons driving under the influence of an intoxicating liquor or a controlled substance, in order to understand the effect such a crime has on other persons; and

(b) Pay the fee, if any, established by the court pursuant to subsection 1.

The court may, but is not required to, order the defendant to attend such a meeting if one is not available within 60 miles of the defendant's residence.

3. A person ordered to attend a meeting pursuant to subsection 2 shall, after attending the meeting, present evidence or other documentation satisfactory to the court that he attended the meeting and remained for its entirety.

(Added to NRS by 1993, 250)

**WEST PUBLISHING CO.**

Automobiles ⇐ 359.

**WESTLAW Topic No. 48A.**

C.J.S. Motor Vehicles §§ 596 et seq.

**484.3798 Driving under the influence of intoxicating liquor or controlled substance: Fee for chemical analysis.**

1. If a defendant pleads or is found guilty of any violation of NRS 484.379 or 484.3795 and a chemical analysis of his blood, urine, breath or other bodily substance was conducted, the court shall, in addition to any penalty provided by law, order the defendant to pay the sum of \$60 as a fee for the chemical analysis. Except as otherwise provided in this subsection, any money collected for the chemical analysis must not be deducted from, and is in addition to, any fine otherwise imposed by the court and must be:

(a) Collected from the defendant before or at the same time that the fine is collected.

(b) Stated separately in the judgment of the court or on the court's docket.

2. All money collected pursuant to subsection 1 must be paid by the clerk of the court to the county or city treasurer, as appropriate, on or before the fifth day of each month for the preceding month.

3. The treasurer shall deposit all money received by him pursuant to subsection 2 in the county or city treasury, as appropriate, for credit to the fund for forensic services created pursuant to NRS 453.575. The money must be accounted for separately within the fund.

4. Except as otherwise provided in subsection 5, each month the treasurer shall, from the money credited to the fund pursuant to subsection 3, pay any amount owed for forensic services and deposit any remaining money in the county or city general fund, as appropriate.

5. In counties that do not receive forensic services under a contract with the state, the money credited to the fund pursuant to subsection 3:

(a) Except as otherwise provided in paragraph (b), must be:

(1) Expended to pay for the chemical analyses performed within the county;  
 (2) Expended to purchase and maintain equipment to conduct such analyses;  
 (3) Expended for the training and continuing education of the employees who conduct such analyses; and

(4) Paid to law enforcement agencies which conduct such analyses to be used by those agencies in the manner provided in this subsection.

(b) May only be expended to cover the costs of chemical analyses conducted by, equipment used by, or training for employees of an analytical laboratory that is approved by the committee on testing for intoxication created in NRS 484.388.

(Added to NRS by 1991, 271; A 1993, 2463)

#### WEST PUBLISHING CO.

Fines = 1 1/2.

WESTLAW Topic No. 174.

C.J.S. Fines §§ 1 et seq.

**484.381 Driving under the influence of intoxicating liquor or controlled substance: Presumptions based on percentage of alcohol in blood and results of chemical analysis.** Repealed. (See chapter 249, Statutes of Nevada 1993, at page 540.)

#### WEST PUBLISHING CO.

Automobiles = 353.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles §§ 596 et seq.

#### NEVADA CASES.

**Where wantonness and recklessness at issue in wrongful death action, proper to instruct jury on definition and presumption of intoxication.** In wrongful death action growing out of automobile collision, where answer admitted intoxication but denied wantonness and recklessness, it was proper to instruct jury on legal definition of intoxication and on presumption of intoxication stated in former NRS 484.055 (cf. NRS 484.381), because such definition and presumption were relevant to issue of wanton and reckless misconduct, which required jury determination whether defendant's conduct constituted conscious disregard of danger and probable injury to others. *Porter v. Funkhouser*, 79 Nev. 273, 382 P.2d 216 (1963)

**Court erred by refusing to give instruction of respondent's statutory duty to remain off**

**highway while intoxicated while giving instruction relating to appellant's driving under influence.** On appeal from judgment against appellant in civil action arising out of collision of motorcycle with pedestrian, where evidence introduced that respondent had been negligent as matter of law by virtue of being intoxicated pedestrian in traveled portion of highway, trial court erred in refusing to instruct jury on respondent's statutory duty as pedestrian to remain off highway while intoxicated (see NRS 484.331), while at same time giving comparable instruction on unlawfulness of appellant's driving while under influence (see NRS 484.381). Because evidence clearly showed that respondent's negligence contributed to collision, judgment of trial court was reversed. *Meyer v. Swain*, 104 Nev. 595, 763 P.2d 350 (1988)

**Defendant was not competent to testify regarding what he believed his blood-alcohol level was at time of accident.** Where defendant was charged with felony for third offense of driving under influence (see NRS 484.3792),

trial court did not err in finding that he was not competent to testify regarding what he believed his blood-alcohol level was at time of accident (see NRS 484.381). *Slinkard v. State*, 106 Nev. 393, 793 P.2d 1330 (1990)

#### FEDERAL AND OTHER CASES.

**Section held to be unconstitutional as applied.** Where judge, during bench trial of defendant charged with driving under influence of alcohol in violation of NRS 484.379, applied presumption created in subsection 1 of NRS 484.381 (amount of alcohol shown by chemical analysis of blood is presumed to be no less than amount present at time of alleged violation) as

mandatory conclusive presumption, court of appeals ruled that NRS 484.381 was unconstitutional as applied. Absent statutory presumption, evidence presented at trial may have failed to establish beyond reasonable doubt that defendant's blood-alcohol content at time of driving was at least 0.10 percent, and therefore, defendant's constitutional right of due process (see U.S. 14th amendment and Nev. Art. 1, § 8) to have state prove every element of crime beyond reasonable doubt was violated by conclusive presumption applied by judge. Court declined to address facial constitutionality of statute. *McLean v. Moran*, 963 F.2d 1306 (9th Cir. 1992)

#### **484.382 Driving under the influence of intoxicating liquor or controlled substance: Implied consent to preliminary test; failure to submit to test; use of results of test.**

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 consent to a preliminary test of his breath for the purpose of determining the alcoholic content of his breath when the test is administered at the direction of a police officer at the scene of a vehicle accident or collision or where he stops a vehicle, if the officer has an articulable suspicion that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance.

2. The person under suspicion must be informed that his failure to submit to the preliminary test will result in the immediate revocation of his privilege to drive a vehicle.

3. If the person fails to submit to the test, the officer shall seize his license or permit to drive as provided in NRS 484.385, and if reasonable grounds otherwise exist, the officer shall arrest him and take him to a convenient place for the administration of a reasonably available evidentiary test under NRS 484.383.

4. 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.

(Added to NRS by 1983, 1066; A 1993, 2072)

#### NEVADA CASES.

**"Miranda" warnings are not necessary before administration of field sobriety tests.** District court erred in ruling that lack of "Miranda" warnings to driver suspected of driving under influence made statements to police officer inadmissible in proceeding for revocation of driver's license (see NRS 483.470) because (1) such proceeding is civil, not criminal, and (2) "Miranda" warnings are

not necessary before reasonable questioning and administration of field sobriety tests at normal traffic stop. (See NRS 484.382.) *State, Dep't of Motor Vehicles & Public Safety v. McLeod*, 106 Nev. 852, 801 P.2d 1390 (1990), cited, *State, Dep't of Motor Vehicles & Public Safety v. Tilp*, 107 Nev. 288, at 294, 810 P.2d 771 (1991), *Beavers v. State, Dep't of Motor Vehicles & Public Safety*, 109 Nev. 435, at 438, 851 P.2d 432 (1993)

#### **484.383 Driving under the influence of intoxicating liquor or controlled substance: Implied consent to evidentiary test; exemption from blood test; choice of test; restrictions on requiring urine test; failure to submit to test.**

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

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public has access shall be deemed to have given his consent to an evidentiary test of his blood, urine, breath or other bodily substance for the purpose of determining the alcoholic content of his blood or breath or the presence of a controlled substance when such a test is administered at the direction of a police officer having reasonable grounds to believe that the person to be tested was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance.

2. The person to be tested must be informed that his failure to submit to the test will result in the revocation of his privilege to drive a vehicle.

3. Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn his consent, and any such test may be administered whether or not the person is informed that his failure to submit to the test will result in the revocation of his privilege to drive a vehicle.

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 may be required to submit to a breath or urine test.

5. If the alcoholic content of the blood or breath of the person to be tested is in issue, he may refuse to submit to a blood test if means are reasonably available to perform a breath test. If the person requests a blood test and the means are reasonably available to perform a breath test, and he is subsequently convicted, he must pay for the cost of the substituted test, including the fees and expenses of witnesses in court.

6. If the presence of a controlled substance in the blood of the person is in issue, the officer may direct him to submit to a blood or urine test, or both, in addition to the breath test. The officer shall inform him that his failure to submit to either or both of the blood and urine tests, as required, will result in the revocation of his privilege to drive a vehicle. A failure to submit to either or both of these tests constitutes a failure to submit to one test under this section.

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

8. If a person to be tested fails to submit to a required test as directed by a police officer under this section, none may be given, except that if the officer has reasonable cause to believe that the person to be tested was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or a controlled substance and that the person:

(a) Thereby caused death or substantial bodily harm to another; or

(b) Has been convicted of an offense, as defined in subsection 8 of NRS 484.3792, within the previous 7 years,

the officer may direct that reasonable force be used to the extent necessary to obtain samples of blood from the person to be tested. Not more than three such samples may be taken during the 5-hour period immediately following the time of the initial arrest. In such a circumstance, the officer is not required to provide the person with a choice of tests for determining the alcoholic content or presence of a controlled substance in his blood.

(Added to NRS by 1969, 593; A 1973, 1502; 1975, 73; 1979, 1164; 1981, 1361; 1983, 18, 1074; 1985, 785; 1987, 1237; 1989, 2048; 1993, 117, 2073)

**WEST PUBLISHING CO.**

Automobiles  $\approx$  144.1(1.20), 414, 415, 418, 421.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles §§ 164.16, 633(4).

**NEVADA CASES.**

**Driver's request to take breath test need not be refused by police where presence of controlled substance is in issue and provisions of section are explained to driver.** Order suspending driver's license for failure to comply with implied consent law was properly affirmed where driver arrested for driving under influence of controlled substance took breath test but would not submit to blood or urine test even though police officers informed him that breath test alone would not satisfy requirements of NRS 484.383 because presence of controlled substance was in issue. Statute did not require officers to refuse driver's request to take breath test following their explanation. *Garvin v. State, Dep't of Motor Vehicles*, 96 Nev. 827, 619 P.2d 534 (1980), cited, *State, Dep't of Motor Vehicles v. Jenkins*, 99 Nev. 460, at 462, 663 P.2d 1186 (1983).

**Section to be liberally construed to promote purpose of legislature.** Implied consent statute (see NRS 484.383), which provides that person who drives vehicle upon highway in this state is deemed to have given his consent to blood-alcohol test, is to be construed liberally to promote legislative policy of removing intoxicated drivers from state's highways. *Galvan v. State*, 98 Nev. 550, 655 P.2d 155 (1982), cited, *Davis v. State*, 99 Nev. 25, at 27, 656 P.2d 855 (1983), *State, Dep't of Motor Vehicles & Public Safety v. Brown*, 104 Nev. 524, at 526, 762 P.2d 882 (1988), *State, Dep't of Motor Vehicles & Public Safety v. Brough*, 106 Nev. 492, at 496, 796 P.2d 1089 (1990), see also *Schroeder v. State, Dep't of Motor Vehicles & Public Safety*, 105 Nev. 179, 772 P.2d 1278 (1989), *State v. Smith*, 105 Nev. 293, 774 P.2d 1037 (1989), *State, Dep't of Motor Vehicles & Public Safety v. Kinkade*, 107 Nev. 257, 810 P.2d 1201 (1991), *Ebarb v. State, Dep't of Motor Vehicles & Public Safety*, 107 Nev. 985, 822 P.2d 1120 (1991).

**U.S. 4th amendment does not preclude taking of blood sample without warrant, though driver not under arrest, where driver unconscious and probable cause for arrest exists.** U.S. 4th amendment did not require formal arrest of driver before administration of blood-alcohol test pursuant to NRS 484.383 (implied consent statute) where there was probable cause for arrest but driver was unconscious and incapable of being arrested. Evidence of blood sample was admissible even though sam-

ple was taken without warrant, prior arrest or consent because under circumstances police officer could reasonably have believed that he was confronted with emergency and could not delay to obtain warrant or wait until driver regained consciousness. *Galvan v. State*, 98 Nev. 550, 655 P.2d 155 (1982), cited, *Almond v. State*, 105 Nev. 904, at 907, 785 P.2d 217 (1989).

**Section does not require arrest of driver for administration of test where driver unconscious.** Provisions of NRS 484.383 (implied consent statute) did not require arrest of driver before administration of blood-alcohol test where driver was unconscious and incapable of being arrested. This interpretation was applicable before, as well as after, clarifying amendment enacted in 1981. *Galvan v. State*, 98 Nev. 550, 655 P.2d 155 (1982).

**Results of test properly admitted, though driver not under arrest at time of test, where express consent to test given.** On appeal from conviction for driving under influence of intoxicating liquor when death results, where defendant contended it was error to admit results of blood-alcohol test because he was not under arrest at time blood sample was taken, appellate court found (1) that there was substantial evidence to support trial court's determination that defendant expressly and voluntarily consented to taking of sample, and (2) that since there was express consent, provisions of implied consent law, NRS 484.383, did not become operative. Nothing in implied consent law prevented conscious driver who was not under arrest from providing valid consent to blood-alcohol test. *Davis v. State*, 99 Nev. 25, 656 P.2d 855 (1983).

**Section does not preclude voluntary consent to blood-alcohol test.** Implied consent statute (see NRS 484.383) does not prevent conscious driver who is not under arrest from providing valid consent to blood-alcohol test, and if driver expressly and voluntarily consents to such test, results are admissible not because of implied consent law, but because of express consent of driver. Consent exempts search from probable cause and warrant requirements of U.S. 4th and 14th amendments, but consent is only valid if it is voluntarily given and not product of coercion, either express or implied. Voluntariness is question of fact to be determined from totality of surrounding circumstances. *Davis v. State*, 99 Nev. 25, 656 P.2d 855 (1983), cited, *State v. Smith*, 105 Nev. 293, at 297, 774 P.2d 1037 (1989).

**Failure to complete test is refusal; good faith effort to complete not sufficient.** Where

evidence established that driver arrested for driving under influence of intoxicating liquor refused to submit to blood and breath tests and was unable to complete urine test, it was error for district court to reverse decision of hearing officer suspending driver's license. (See NRS 233B.135.) Failure to complete chemical test amounts to refusal to submit to chemical test under implied consent law (see NRS 484.383); good faith attempt is not sufficient. *Department of Motor Vehicles v. Jenkins*, 99 Nev. 460, 663 P.2d 1186 (1983), cited, *State, Department of Motor Vehicles & Public Safety v. Kiffe*, 101 Nev. 729, at 733, 709 P.2d 1017 (1985), *State, Dep't of Motor Vehicles & Public Safety v. Brough*, 106 Nev. 492, at 497, 796 P.2d 1089 (1990), *State, Dep't of Motor Vehicles & Public Safety v. McLeod*, 106 Nev. 852, at 856, 801 P.2d 1390 (1990), *State, Dep't of Motor Vehicles & Public Safety v. Becksted*, 107 Nev. 456, at 458, 813 P.2d 995 (1991)

**Conditional consent to test, predicated upon being allowed to speak to attorney, is refusal.** Where defendant was arrested for driving motor vehicle while under influence of alcohol and requested to speak to attorney before submitting to chemical test pursuant to NRS 484.383 although he was repeatedly informed that he was not so entitled, defendant's conditional consent amounted to unlawful refusal to submit to chemical test for which his privilege to drive could be suspended pursuant to NRS 484.385. *McCharles v. State, Dep't of Motor Vehicles*, 99 Nev. 831, 673 P.2d 488 (1983), cited, *Schroeder v. State, Dep't of Motor Vehicles & Public Safety*, 105 Nev. 179, at 181, 772 P.2d 1278 (1989), *State, Dep't of Motor Vehicles & Public Safety v. Brough*, 106 Nev. 492, at 495, 796 P.2d 1089 (1990)

**Test is neither testimonial communication within meaning of U.S. 5th amendment privilege against self-incrimination nor critical stage of proceedings for purposes of U.S. 6th amendment right to counsel.** Where defendant was arrested for driving motor vehicle while under influence of alcohol and had his privilege to drive suspended for unlawfully refusing to submit to chemical test pursuant to NRS 484.383 by requesting to speak to attorney before submitting to test, defendant's rights under U.S. 5th and 6th amendments would not have been impaired had he been required to submit to test before consulting with attorney because test is not testimonial communication within meaning of U.S. 5th amendment or critical stage for purposes of U.S. 6th amendment as absence of counsel during test would not affect right to fair trial. *McCharles v. State, Dep't of Motor Vehicles*, 99 Nev. 831, 673

P.2d 488 (1983), cited, *State v. Smith*, 105 Nev. 293, at 296, 774 P.2d 1037 (1989)

**Revocation of driver's license based upon failure to submit to test improper where driver incapable of comprehending implied consent law or of giving intelligent response to request for sample.** Judgment sustaining administrative order revoking driver's license pursuant to NRS 484.384 for failure of driver to submit to chemical test under NRS 484.383, which provides that driver of motor vehicle in this state is deemed to have given his consent to test for alcoholic content of his blood, breath or urine, was reversed on appeal on ground that driver was incapable of refusing to submit to that test where (1) request to submit was made when driver was hospitalized and heavily sedated for injuries sustained when her vehicle struck pole, and (2) only medical testimony received indicated that driver would not have been in condition to comprehend laws concerning implied consent or to give intelligent response at that time. *Higgins v. State, Dep't of Motor Vehicles & Public Safety*, 101 Nev. 531, 706 P.2d 506 (1985)

**Admissibility of hearsay evidence.** At administrative hearing pursuant to NRS 484.387 to review order revoking driver's license pursuant to NRS 484.385 as result of driver's refusal to submit to evidentiary tests of alcoholic content of his blood (see NRS 484.383), where police officer testified that he was called to assist second officer who had stopped driver in parking lot and, upon his arrival there, saw driver standing close to his vehicle and was then informed that second officer had observed driver driving his vehicle in erratic manner, testimony was admissible under NRS 51.075 to show that driver was driving vehicle while under influence of intoxicating liquor, because circumstances under which second officer's statements were made offered assurances of accuracy not likely to be enhanced by calling him as witness. Furthermore, testimony was admissible under NRS 233B.123, which allows evidence to be admitted in administrative proceeding, except where precluded by statute, if it is of type commonly relied upon by reasonable and prudent men in conduct of their affairs. *State, Dep't of Motor Vehicles & Public Safety v. Kiffe*, 101 Nev. 729, 709 P.2d 1017 (1985), cited, *Nevada Employment Security Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, at 609, 729 P.2d 497 (1986)

**Conduct of administrative hearing in absence of counsel for department; hearing officer as prosecutor.** At administrative hearing conducted pursuant to NRS 484.387 to

review order revoking driver's license for failure of driver to submit to evidentiary test of alcoholic content of her blood as required by NRS 484.383, where department of motor vehicles and public safety was not represented by counsel, but hearing officer had in her possession at beginning of hearing documents supporting department's position which she produced, marked and offered as exhibits, and questioned department's witnesses to determine circumstances that led to revocation of license, hearing officer did not act improperly as prosecutor in violation of NRS 233B.122, because there was no indication of any inherent prosecutorial bias on part of hearing officer or of any inherent unfairness which violated defendant's rights. State, Dep't of Motor Vehicles & Public Safety v. Thompson, 102 Nev. 176, 717 P.2d 580 (1986)

**Driver's voluntary intoxication does not render driver incapable of refusing to take evidentiary test.** On appeal from order of district court reversing determination of department of motor vehicles and public safety revoking respondent's driving privileges, sole issue on appeal was whether respondent's voluntary intoxication constituted condition rendering him incapable of refusal such that he was deemed not to have withdrawn his consent (see NRS 484.383). Court held that as matter of law, driver's voluntary intoxication, by itself, may not render driver incapable of refusing to take evidentiary test. Accordingly, judgment of district court reversed and matter was remanded with instructions to reinstate decision revoking driving privileges of respondent. State, Dep't of Motor Vehicles & Public Safety v. Brown, 104 Nev. 524, 762 P.2d 882 (1988), cited, State, Dep't of Motor Vehicles & Public Safety v. Becksted, 107 Nev. 456, at 459, 813 P.2d 995 (1991)

**Implied consent statute and driving under influence statute are separate and distinct and should be enforced independently of one another.** Respondent was arrested for driving under influence of alcohol and because he refused to take evidentiary blood-alcohol test pursuant to implied consent law (see NRS 484.383), his driver's license was revoked for statutory 1-year period. Respondent argued that when he pleaded guilty to offense of driving under influence of intoxicating liquor, revocation of his license no longer served purpose. Court held that although implied consent statute is clearly intended to promote enforcement of statute relating to driving under influence, statutes are separate and distinct and, in absence of any evidence of legislative intent to contrary, should be enforced independently of one

another. State, Dep't of Motor Vehicles & Public Safety v. Brown, 104 Nev. 524, 762 P.2d 882 (1988)

**Initial refusal to take evidentiary test is final and is not vitiated by subsequent request to take test.** Initial refusal to take evidentiary test pursuant to NRS 484.383 is final and accused has no right to "cure" original refusal. Subsequent request to take test does not vitiate prior refusal because effectiveness and reliability of test declines with passage of time and accused should not be given chance to benefit from his delay. Schroeder v. State, Dep't of Motor Vehicles & Public Safety, 105 Nev. 179, 772 P.2d 1278 (1989), cited, State, Dep't of Motor Vehicles & Public Safety v. Brough, 106 Nev. 492, at 497, 796 P.2d 1089 (1990), State, Dep't of Motor Vehicles & Public Safety v. Becksted, 107 Nev. 456, at 459, 813 P.2d 995 (1991), see also State, Dep't of Motor Vehicles & Public Safety v. Kinkade, 107 Nev. 257, 810 P.2d 1201 (1991)

**Probable cause for arrest on charge of driving under influence not required before ordering evidentiary test.** It is not necessary under NRS 484.383 that police officer have probable cause to arrest driver on charge of driving under influence of intoxicating liquor before officer directs driver to submit to evidentiary test to determine alcoholic content of his blood. State, Dep't of Motor Vehicles & Public Safety v. Torres, 105 Nev. 558, 779 P.2d 959 (1989)

**Probable cause supported warrantless taking of blood sample and detaining of driver of vehicle.** Where passenger in truck driven by defendant fell from hood and was seriously injured when struck by truck, several hours elapsed before defendant sought medical assistance and reported incident, and facts clearly indicated that officer had justifiable basis for detaining defendant who was obviously intoxicated, probable cause existed at time blood sample was taken to believe defendant had violated NRS 484.3795, blood sample was lawfully taken pursuant to NRS 484.383 without warrant first being obtained, and placing defendant under civil protective custody was appropriate pursuant to NRS 458.270. Almond v. State, 105 Nev. 904, 785 P.2d 217 (1989)

**Qualified or conditional consent or refusal to submit to required evidentiary test is sufficient to constitute failure to submit to test.** Implied consent statute (see NRS 484.383) does not require express, unequivocal refusal to take blood or breath test before person's driver's license may be revoked. Whether person declines to take test by verbally saying "I

refuse," by remaining silent and not breathing or blowing into machine or by vocalizing some sort of qualified or conditional consent or refusal makes no difference. (See NRS 484.386.) *State, Dep't of Motor Vehicles & Public Safety v. Brough*, 106 Nev. 492, 796 P.2d 1089 (1990), cited, *State, Dep't of Motor Vehicles & Public Safety v. Kinkade*, 107 Nev. 257, at 259, 810 P.2d 1201 (1991)

**Police have no duty to renew offer of evidentiary test after it has been refused.** Police officer has no duty to renew offer of required evidentiary test (see NRS 484.383) after it has been refused by driver. *State, Dep't of Motor Vehicles & Public Safety v. Brough*, 106 Nev. 492, 796 P.2d 1089 (1990)

**Forced withdrawal of blood violated former provisions of statute but evidence was properly admitted at trial.** Where appellant was arrested for driving under influence of alcohol and police officer, upon learning that appellant had previous conviction in California for similar offense, directed that forced withdrawal of blood be taken from appellant's arm, action of police officer was in violation of former provisions of NRS 484.383 but evidence was properly admitted at trial because (1) no statute required exclusion of evidence taken in violation of former provisions of NRS 484.383, (2) there was no indication in record that police officer acted in bad faith or deliberately violated law when he directed forced withdrawal of blood, and (3) no public policy would be served by excluding evidence from trial. *Brockett v. State*, 107 Nev. 638, 817 P.2d 1183 (1991), cited, *Krahn v. State, Dep't of Motor Vehicles & Public Safety*, 108 Nev. 1015, at 1016, 842 P.2d 728 (1992)

**Driver who has two prior convictions within previous 7 years for driving under influence does not have right to refuse blood test and, therefore, arresting officer need not offer him choice between breath and blood test.** Appellant was arrested for driving under influence and record check through dispatch revealed that he had two prior convictions for driving under influence within previous 7 years. Arresting officer required appellant to take blood test without first giving him option of refusing, or offering him choice between blood test and breath test. (See NRS 484.383.) Revocation of appellant's driver's license based upon result of blood test was affirmed on appeal because once arresting officer has determined that suspect has two prior convictions for driving under influence within previous 7 years, suspect no longer has right to refuse blood test.

*Ebarb v. State, Dep't of Motor Vehicles & Public Safety*, 107 Nev. 985, 822 P.2d 1120 (1991)

**Decision of hearing officer that respondent understood her responsibilities and consequences of her actions in refusing to submit to evidentiary test under implied consent law was supported by substantial evidence.** Where police officer, after stopping respondent in her vehicle and administering field sobriety test which respondent failed, read to respondent implied consent law (see NRS 484.383) from form prepared for that purpose and, pursuant to provisions of NRS 484.383, informed respondent that her license would be revoked if she did not submit to evidentiary test, and where officer further testified that he believed respondent understood this warning, substantial evidence supported decision of hearing officer that respondent understood her responsibilities and consequences of her actions in refusing to submit to evidentiary test under implied consent law. Order of district court reversing hearing officer's decision to revoke respondent's driving privileges was therefore in error and reversed and remanded on appeal with instructions to enter order affirming hearing officer's order of revocation. *State, Dep't of Motor Vehicles & Public Safety v. Dunn*, 109 Nev. 572, 854 P.2d 858 (1993)

**Police officer is not required to explain possible durations of license revocation resulting from person's failure to submit to evidentiary test.** No statutory provision requires that police officer explain possible durations of license revocation resulting from failure to submit to evidentiary test. (See NRS 484.384.) Under provisions of NRS 484.383, police officer is only required to inform person to be tested that his failure to submit to test will result in revocation of his privilege to drive. *State, Dep't of Motor Vehicles & Public Safety v. Dunn*, 109 Nev. 572, 854 P.2d 858 (1993)

#### FEDERAL AND OTHER CASES.

**Mandatory blood test required by section is not violative of equal protection.** Provisions of NRS 484.383, which authorizes testing of blood of person without his consent if he has previously been convicted of driving under influence, does not violate constitutional rights of equal protection by creating improper classification of persons. *Westmoreland v. Demosthenes*, 737 F. Supp. 1127 (D. Nev. 1990)

#### ATTORNEY GENERAL'S OPINIONS.

**Section applicable to minor drivers.** NRS 484.383 et seq., which provide for implied consent of driver of motor vehicle to test for alcoholic content of his blood, breath or urine, and suspension of license by department of motor

vehicles (now department of motor vehicles and public safety) if test is refused, apply with equal force to drivers under age of majority. AGO 635 (1-9-1970)

**484.384 Driving under the influence of intoxicating liquor or controlled substance: Failure to consent to evidentiary or preliminary test; test showing 0.10 percent or more by weight of alcohol in blood; revocation of license, permit or privilege; periods of ineligibility.**

1. Except as otherwise provided in subsection 2, if a person fails to submit to an evidentiary test as directed by a police officer under NRS 484.383, his license, permit or privilege to drive must be revoked as provided in NRS 484.385 and he is not eligible for a license, permit or privilege to drive for a period of 1 year.

2. If the person who has failed to submit to such a test has had his license, permit or privilege to drive suspended or revoked for failing to submit to such a test within the immediately preceding 7 years, he is not eligible for a license, permit or privilege to drive for a period of 3 years.

3. If a person fails to submit to a preliminary test of his breath as directed by a police officer under NRS 484.382 or the result of a test given under NRS 484.382 or NRS 484.383 shows that he had 0.10 percent or more by weight of alcohol in his blood at the time of the test, his license, permit or privilege to drive must be revoked as provided in NRS 484.385 and he is not eligible for a license, permit or privilege for a period of 90 days.

4. If revocation of a person's license, permit or privilege to drive under NRS 483.460 follows a revocation under subsection 3 which was based on his having 0.10 percent or more by weight of alcohol in his blood, the department shall cancel the revocation under that subsection and give the person credit for any period during which he was not eligible for a license, permit or privilege.

5. Periods of ineligibility for a license, permit or privilege to drive which are imposed pursuant to this section must run consecutively.

(Added to NRS by 1983, 1066)

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C.J.S. Motor Vehicles  $\S$  164.16.

#### NEVADA CASES.

**Where driver incapable of refusing to submit to test.** Judgment sustaining administrative order revoking driver's license pursuant to NRS 484.384 for failure of driver to submit to chemical test under NRS 484.383, which provides that driver of motor vehicle in this state is deemed to have given his consent to test for alcoholic content of his blood, breath or urine, was reversed on appeal on ground that driver was incapable of refusing to submit to that test where (1) request to submit was made when driver was hospitalized and heavily sedated for injuries sustained when her vehicle struck pole, and (2) only medical testimony received indicated that driver would not have been in condition to comprehend laws concerning implied consent or to give intelligent response at that time. *Higgins v. State*, Dep't of Motor Vehicles

& Public Safety, 101 Nev. 531, 706 P.2d 506 (1985)

**Police officer is not required to explain possible durations of license revocation resulting from person's failure to submit to evidentiary test.** No statutory provision requires that police officer explain possible durations of license revocation resulting from failure to submit to evidentiary test. (See NRS 484.384.) Under provisions of NRS 484.383, police officer is only required to inform person to be tested that his failure to submit to test will result in revocation of his privilege to drive. *State, Dep't of Motor Vehicles & Public Safety v. Dunn*, 109 Nev. 572, 854 P.2d 858 (1993)

#### FEDERAL AND OTHER CASES.

**Right to jury trial of person charged with driving while intoxicated.** Notwithstanding provisions of NRS 266.550 which prohibit trial by jury in municipal courts, person charged with driving while intoxicated in violation of NRS 484.379 has constitutional right to trial by jury because under Nevada law offense is serious in that (1) NRS 484.3792 provides that pen-

alties upon conviction include mandatory term in jail, payment for and attendance at educational course on substance abuse and maximum fine of \$1,000, provides system for increasing minimum punishments for subsequent convictions, and prohibits probation, suspension of sentence and plea bargaining and (2) collateral consequences include loss of driver's license (see NRS 484.384), and driving is nearly imperative to ability of many people to earn living. *Bronson v. Swinney*, 648 F. Supp. 1094 (D. Nev. 1986)

**No right to trial by jury for driving under influence.** Based on severity of maximum authorized penalty as major criterion, there is no constitutional right to trial by jury for person

charged under Nevada law with driving under influence of alcohol (see NRS 484.379) since: (1) with maximum prison term being 6 months (see NRS 484.3792), presumption exists that Nevada legislature views it as "petty" offense for purposes of U.S. 6th amendment (cf. *Nev. Art. 1, § 3* and NRS 266.550), and (2) defendant did not demonstrate that additional statutory penalties (see NRS 483.460, 484.3792 and 484.384) reflect legislative determination that offense in question is "serious" one. *Blanton v. City of N. Las Vegas*, 109 S. Ct. 1289 (1989), cited, *Westmoreland v. Demosthenes*, 737 F. Supp. 1127, at 1129 (D. Nev. 1990), *McLean v. Moran*, 963 F.2d 1306, at 1311 (9th Cir. 1992)

**484.385 Driving under the influence of intoxicating liquor or controlled substance; Seizure of license; order of revocation; administrative and judicial review; temporary license; certificate of officer transmitted to department.**

1. As agent for the department, the officer who directed that a test be given pursuant to NRS 484.382 or 484.383 or who obtained the result of such a test shall immediately serve an order of revocation of the license, permit or privilege to drive on a person who fails to submit to the test, has 0.10 percent or more by weight of alcohol in his blood or has a detectable amount of a controlled substance in his system, if that person is present, and shall seize his license or permit to drive. The officer shall then advise him of his right to administrative and judicial review of the revocation and to have a temporary license, and shall issue him a temporary license on a form approved by the department if he requests one, which is effective for only 7 days including the date of issuance. The officer shall immediately transmit the person's license or permit to the department along with the written certificate required by subsection 2.

2. When a police officer has served an order of revocation of a driver's license, permit or privilege on a person pursuant to subsection 1, or later receives the result of an evidentiary test which indicates that a person, not then present, had 0.10 percent or more by weight of alcohol in his blood or had a detectable amount of a controlled substance in his system, the officer shall immediately prepare and transmit to the department, together with the seized license or permit and a copy of the result of the test, if any, a written certificate that he had:

(a) An articulable suspicion that the person had been driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance and that the person refused to submit to a required preliminary test;

(b) Reasonable grounds to believe that the person had been driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or a controlled substance and the person refused to submit to a required evidentiary test; or

(c) Reasonable grounds to believe that the person had been driving or in actual physical control of a vehicle with 0.10 percent or more by weight of alcohol in his blood or with a detectable amount of a controlled substance in his system, as determined by a chemical test.

The certificate must also indicate whether the officer served an order of revocation on the person and whether he issued the person a temporary license.

3. The department, upon receipt of such a certificate for which an order of revocation has not been served, after examining the certificate and copy of the result of the chemical test, if any, and finding that revocation is proper, shall issue an order revoking the person's license, permit or privilege to drive by mailing the order to the person at his last known address. The order must indicate the grounds for the revocation and the period during which the person is not eligible for a license, permit or privilege to drive and state that the person has a right to administrative and judicial review of the revocation and to have a temporary license. The order of revocation becomes effective 5 days after mailing.

4. Notice of an order of revocation and notice of the affirmation of a prior order of revocation or the cancellation of a temporary license provided in NRS 484.387 is sufficient if it is mailed to the person's last known address as shown by any application for a license. The date of mailing may be proved by the certificate of any officer or employee of the department, specifying the time of mailing the notice. The notice is presumed to have been received upon the expiration of 5 days after it is deposited, postage prepaid, in the United States mail.

5. As used in this section, "controlled substance" means any of the following substances for which a valid prescription has not been issued to the consumer:

- (a) Amphetamine;
- (b) Benzoyllecgonine;
- (c) Cocaine;
- (d) Heroin;
- (e) Lysergic acid diethylamide;
- (f) Mecloqualone;
- (g) Mescaline;
- (h) Methamphetamine;
- (i) Methaqualone;
- (j) Monoacetylmorphine;
- (k) Phencyclidine;
- (l) N-ethylamphetamine;
- (m) N, N-dimethylamphetamine;
- (n) 2, 5-dimethoxyamphetamine;
- (o) 3, 4-methylenedioxyamphetamine;
- (p) 3, 4, 5-trimethoxyamphetamine;
- (q) 4-bromo-2, 5-dimethoxyamphetamine;
- (r) 4-methoxyamphetamine;
- (s) 4-methyl-2, 5-dimethoxyamphetamine;
- (t) 5-dimethoxy-alpha-methylphenethylamine; or
- (u) 5-methoxy-3, 4-methylenedioxyamphetamine,

if the substance is classified in schedule I or II pursuant to NRS 453.166 or 453.176 at the time the substance is consumed.

(Added to NRS by 1969, 593; A 1973, 484, 1503; 1981, 1927; 1983, 1075; 1985, 1948; 1991, 1588)

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#### NEVADA CASES.

**Conditional consent to chemical test, predicated upon being allowed to speak to attorney, is refusal.** Where defendant was arrested for driving motor vehicle while under influence of alcohol and requested to speak to attorney before submitting to chemical test pursuant to



NRS 484.383 although he was repeatedly informed that he was not so entitled, defendant's conditional consent amounted to unlawful refusal to submit to chemical test for which his privilege to drive could be suspended pursuant to NRS 484.385. *McCharles v. State*, Dep't of Motor Vehicles, 99 Nev. 831, 673 P.2d 488 (1983), cited, *Schroeder v. State*, Dep't of Motor Vehicles & Public Safety, 105 Nev. 179, at 181, 772 P.2d 1278 (1989), *State*, Dep't of Motor Vehicles & Public Safety v. Brough, 106 Nev. 492, at 495, 796 P.2d 1089 (1990)

**Admissibility of hearsay at administrative hearing to review order of revocation.** At administrative hearing pursuant to NRS 484.387 to review order revoking driver's license pursuant to NRS 484.385 as result of driver's refusal to submit to evidentiary tests of alcoholic content of his blood (see NRS 484.383), where police officer testified that he was called to assist second officer who had stopped driver in parking lot and, upon his arrival there, saw driver standing close to his vehicle and was then informed that second officer had observed driver driving his vehicle in erratic manner, testimony was admissible under NRS 51.075 to show that driver was driving vehicle while under influence of intoxicating liquor, because circumstances under which second officer's statements were made offered assurances of accuracy not likely to be enhanced by calling him as witness. Furthermore, testimony was admissible under NRS 233B.123, which allows evidence to be admitted in administrative proceeding, except where precluded by statute, if it is of type commonly relied upon by reasonable and prudent men in conduct of their affairs. *State*, Dep't of Motor Vehicles & Public Safety v. Kiffe, 101 Nev. 729, 709 P.2d 1017 (1985), cited, *Nevada Employment Security Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, at 609, 729 P.2d 497 (1986)

**Order of revocation of license effective 8 days after mailing.** Violation of Nevada's driving under influence statutes results in mandatory revocation of person's driving privileges for specified time. In situations where order of revocation is issued by department of motor vehicles and public safety by mailing order to person at his last known address, subsection 3 of NRS 484.385 provides that order becomes effective 5 days after mailing. However, when subsection 3 of NRS 484.385 is read in conjunction with NRS 178.482, order of revocation actually becomes effective 8 days after mailing. *Zamarripa v. First Judicial Dist. Court*, 103 Nev. 638, 747 P.2d 1386 (1987)

**Mailing notice of order of revocation raises disputable presumption notice received.** Petitioner, who was arrested for driving under influence, gave his current address to arresting officer. Department of motor vehicles and public safety revoked petitioner's license and sent revocation order to his former address. Petitioner had moved four times since obtaining his driver's license but had not notified department as required by NRS 483.390. Subsequently petitioner was stopped and arrested for driving with revoked license. In finding petitioner received notice deemed sufficient under NRS 484.385, court held that subsection 4 of NRS 484.385 which provides that "... notice is presumed to have been received upon the expiration of 5 days after it is deposited, postage prepaid, in the United States mail" raises prima facie presumption that notice was received and recipient acquired knowledge of suspension or revocation 5 days after notice was mailed. Subsection 13 of NRS 47.250 makes it disputable presumption "(t)hat a letter duly directed and mailed was received in the regular course of the mail." Burden of proof shifts to defendant who must show that his failure to receive letter was result of something other than his own culpable or dilatory conduct. *Zamarripa v. First Judicial Dist. Court*, 103 Nev. 638, 747 P.2d 1386 (1987)

**Section requires at least constructive receipt of revocation notice.** Petitioner, who was arrested for driving under influence, gave his current address to arresting officer. Department of motor vehicles and public safety revoked petitioner's license and sent revocation order to his former address. Petitioner had moved four times since obtaining his driver's license but had not notified department as required by NRS 483.390. Subsequently petitioner was stopped and arrested for driving with revoked license. In finding petitioner received notice deemed sufficient under NRS 484.385, court held that NRS 484.385 requires at least constructive receipt of revocation notice. *Zamarripa v. First Judicial Dist. Court*, 103 Nev. 638, 747 P.2d 1386 (1987)

**Order of revocation of license not effective until 8 days after mailing.** Petitioner was arrested for driving while his license was revoked on May 7, 1986, 8th day after mailing of notice of revocation of his license. In vacating judgment of conviction, court held that subsection 3 of NRS 484.385, in conjunction with NRS 178.482, provides that if order revoking person's license, permit or privilege to drive is served by mail, revocation cannot become effective until 8 days after mailing. Because order was not effective until May 8, 1986, peti-

tioner's arrest on May 7, 1986, was premature. *Braham v. Fourth Judicial Dist. Court*, 103 Nev. 644, 747 P.2d 1390 (1987)

**Under unique facts of case, refusal of defendant to submit to evidentiary test of breath or blood until after examination by doctor constituted grounds for revocation of driver's license.** Defendant was arrested for driving under influence of alcohol (see NRS 484.379), transported to jail, allegedly bumped head while getting out of police car, began breath test but said it was making him dizzy and that he did not want to take test. Police officer asked defendant if he wanted to take blood test at jail before being examined at hospital and defendant said he wanted to wait until he was first examined by doctor. Approximately 5 hours after his arrest, defendant was examined by doctor who found no injury. Defendant's driver's license was revoked pursuant to NRS 484.385 for failure to submit to evidentiary test. Under unique facts of this case, supreme court held that failure by defendant to submit to test before examination by doctor constituted refusal to submit to required evidentiary test pursuant to subsection 3 of NRS 484.386, but stressed that holding does not apply to those situations where person is injured or ill and in need of medical attention. *State, Dep't of Motor Vehicles & Public Safety v. Brough*, 106 Nev. 492, 796 P.2d 1089 (1990)

**Placing order of revocation of driver's license in defendant's property bag does not satisfy requirement of personal service.** Respondent was arrested for driving under influence of alcohol and failed to submit to breath test. Pursuant to NRS 484.385, police officer prepared order of revocation of respondent's driver's license but, instead of personally serving order on respondent, placed order in respondent's property bag at jail. Thereafter, respondent made timely request for administrative hearing, at which hearing officer issued order upholding revocation of license. Although placing document in property bag did not amount to personal service as required by NRS 484.385, in this case no substantial rights of respondent were prejudiced thereby and revocation was upheld by court. *State, Dep't of Motor Vehicles & Public Safety v. Pida*, 106 Nev. 897, 803 P.2d 227 (1990), cited, *State, Dep't of Motor Vehicles & Public Safety v. Long*, 107 Nev. 77, at 79, 806 P.2d 1043 (1991), *State, Dep't of Motor Vehicles & Public Safety v. Dunn*, 109 Nev. 572, at 574, 854 P.2d 858 (1993)

**Failure of police officer to issue temporary license is not grounds to exclude evidence of driver's failure to submit to chemical test.** Evidence of driver's failure to submit to chemical test could not be excluded by court on grounds that police officer had failed to issue temporary license to driver (see NRS 484.385) where officer had substantially complied with other provisions of NRS 484.382 to 484.393, inclusive. (See NRS 484.389.) *State, Dep't of Motor Vehicles & Public Safety v. Kinkade*, 107 Nev. 257, 810 P.2d 1201 (1991), cited, *Brockett v. State*, 107 Nev. 638, at 641, 817 P.2d 1183 (1991), concurring opinion.

**Margin of error inherent in testing devices need not be considered before ordering revocation of person's license.** NRS 484.385 requires that person's license be revoked if he has 0.10 percent or more by weight of alcohol in his blood and does not mandate that margin or error be considered before license is revoked, which implies that legislature either accepts or is unconcerned about extent of margins of error inherent in approved breath-testing devices. *State, Dep't of Motor Vehicles & Public Safety v. Rowland*, 107 Nev. 475, 814 P.2d 80 (1991)

**Driver who failed to obtain Nevada driver's license within 45 days after becoming resident was not entitled to temporary license when his driving privileges were revoked pursuant to section.** Respondent, while driving pursuant to driver's license issued by State of Kansas, was arrested for driving under influence of intoxicating liquor. Arresting officer informed respondent that his driving privileges were revoked pursuant to NRS 484.385, but declined to issue temporary license to respondent as required by NRS 484.385. Respondent's argument that failure of officer to issue temporary license violated his constitutional rights to due process was rejected by court because, since respondent had, in violation of NRS 483.245, resided in this state for more than 45 days without obtaining Nevada driver's license, respondent did not have driving privileges in this state at time of his arrest and, therefore, was not entitled to temporary license. *State, Dep't of Motor Vehicles & Public Safety v. McGuire*, 108 Nev. 182, 827 P.2d 821 (1992)

**Placing of order of license revocation in respondent's property bag by police officer did not provide ground for reversal of license revocation where respondent could not demonstrate substantial prejudice to her rights.** Where respondent on appeal failed to demonstrate prejudice to her substantial rights but nonetheless contended that evidence of her

refusal to submit to evidentiary test had to be excluded because officer who administered test placed respondent's order of driver's license revocation in her property bag in violation of NRS 484.385, district court properly did not rely on this ground in reversing respondent's license revocation. *State, Dep't of Motor Vehicles & Public Safety v. Dunn*, 109 Nev. 572, 854 P.2d 858 (1993)

#### ATTORNEY GENERAL'S OPINIONS.

**Evidence of mailing of notice of revocation sufficient to sustain conviction for driving with suspended or revoked license.** Receipt of

notice of revocation of driver's license for driving while under influence of intoxicating liquor or controlled substance is not element of offense of driving with suspended or revoked license in violation of NRS 483.560 or 483.570, and evidence that notice of order of revocation was mailed to accused pursuant to NRS 484.385 is, therefore, sufficient to sustain conviction for driving with suspended or revoked license. AGO 85-7 (6-21-1985)

#### **484.386 Driving under the influence of intoxicating liquor: Requirements for evidentiary test of breath to determine percentage of alcohol in breath.**

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

(a) The difference between the percentage 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 percentage 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 484.383, 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 percentage 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 percentage.

3. A willful failure to provide a second or third consecutive sample or submit to a fourth evidentiary test is a failure to submit to a required evidentiary test.

(Added to NRS by 1985, 1226; A 1991, 957; 1993, 2074)

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WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles §§ 631 to 637.

#### NEVADA CASES.

**Under unique facts of case, refusal of defendant to submit to evidentiary test of breath or blood until after examination by doctor constituted grounds for revocation of driver's license.** Defendant was arrested for driving under influence of alcohol (see NRS 484.379), transported to jail, allegedly bumped head while getting out of police car, began breath test but said it was making him dizzy and that he did not want to take test. Police officer asked defendant if he wanted to take blood test

at jail before being examined at hospital and defendant said he wanted to wait until he was first examined by doctor. Approximately 5 hours after his arrest, defendant was examined by doctor who found no injury. Defendant's driver's license was revoked pursuant to NRS 484.385 for failure to submit to evidentiary test. Under unique facts of this case, supreme court held that failure by defendant to submit to test before examination by doctor constituted refusal to submit to required evidentiary test pursuant to subsection 3 of NRS 484.386, but stressed that holding does not apply to those situations where person is injured or ill and in need of medical attention. *State, Dep't of Motor Vehicles & Public Safety v. Brough*, 106 Nev. 492, 796 P.2d 1089 (1990)

**Qualified or conditional consent or refusal to submit to required evidentiary test is sufficient to constitute failure to submit to test.** Implied consent statute (see NRS 484.383) does not require express, unequivocal refusal to take blood or breath test before person's driver's license may be revoked. Whether person declines to take test by verbally saying "I refuse," by remaining silent and not breathing

or blowing into machine or by vocalizing some sort of qualified or conditional consent or refusal makes no difference. (See NRS 484.386.) State, Dep't of Motor Vehicles & Public Safety v. Brough, 106 Nev. 492, 796 P.2d 1089 (1990), cited, State, Dep't of Motor Vehicles & Public Safety v. Kinkade, 107 Nev. 257, at 259, 810 P.2d 1201 (1991)

**484.387 Driving under the influence of intoxicating liquor or controlled substance: Hearing by department; additional temporary license; judicial review; cancellation of temporary license.**

1. At any time while a person is not eligible for a license, permit or privilege to drive following an order of revocation issued pursuant to NRS 484.385, he may request in writing a hearing by the department to review the order of revocation, but he is only entitled to one hearing. The hearing must be conducted within 15 days after receipt of the request, or as soon thereafter as is practicable, in the county where the requester resides unless the parties agree otherwise. The director or his agent may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a re-examination of the requester. The department shall issue an additional temporary license for a period which is sufficient to complete the administrative review.

2. The scope of the hearing must be limited to the issues of whether the person failed to submit to a test or, at the time of the test, had 0.10 percent or more by weight of alcohol in his blood or a detectable amount of a controlled substance in his system. Upon an affirmative finding on any of these issues, the department shall affirm the order of revocation. Otherwise, the order of revocation must be rescinded.

3. If, after the hearing, the order of revocation is affirmed, the person whose license, privilege or permit has been revoked is entitled to a review of the same issues in district court in the same manner as provided by chapter 233B of NRS. The court shall notify the department upon the issuance of a stay and the department shall issue an additional temporary license for a period which is sufficient to complete the review.

4. If a hearing officer grants a continuance of a hearing at the request of the person whose license was revoked, or a court does so after issuing a stay of the revocation, the officer or court shall notify the department, and the department shall cancel the temporary license and notify the holder by mailing the order of cancellation to his last known address.

(Added to NRS by 1969, 594; A 1971, 83; 1973, 485, 1504; 1975, 1463; 1981, 85; 1983, 1077; 1985, 1949; 1987, 1456; 1989, 1655; 1991, 1590)

**ADMINISTRATIVE REGULATIONS.**

Practice Before the Department, NAC 481.140 et seq.

**WEST PUBLISHING CO.**

Automobiles ⇐ 144.2(1).

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles §§ 164.17, 164.2, 164.26 et seq.

**NEVADA CASES.**

**Admissibility of hearsay evidence.** At administrative hearing pursuant to NRS 484.387 to review order revoking driver's license pursuant to NRS 484.385 as result of driver's refusal to submit to evidentiary tests of alcoholic content of his blood (see NRS 484.383), where police officer testified that he was called to assist second officer who had stopped driver in parking lot and, upon his arrival there, saw driver standing close to his vehi-

cle and was then informed that second officer had observed driver driving his vehicle in erratic manner, testimony was admissible under NRS 51.075 to show that driver was driving vehicle while under influence of intoxicating liquor, because circumstances under which second officer's statements were made offered assurances of accuracy not likely to be enhanced by calling him as witness. Furthermore, testimony was admissible under NRS 233B.123, which allows evidence to be admitted in administrative proceeding, except where precluded by statute, if it is of type commonly relied upon by reasonable and prudent men in conduct of their affairs. *State, Dep't of Motor Vehicles & Public Safety v. Kiffe*, 101 Nev. 729, 709 P.2d 1017 (1985), cited, *Nevada Employment Security Dep't v. Hilton Hotels Corp.*, 102 Nev. 606, at 609, 729 P.2d 497 (1986)

**Conduct of administrative hearing in absence of counsel for department; hearing officer as prosecutor.** At administrative hearing conducted pursuant to NRS 484.387 to review order revoking driver's license for failure of driver to submit to evidentiary test of alcoholic content of her blood as required by NRS 484.383, where department of motor vehicles and public safety was not represented by counsel, but hearing officer had in her possession at beginning of hearing documents supporting department's position which she produced, marked and offered as exhibits, and questioned department's witnesses to determine circumstances that led to revocation of license, hearing officer did not act improperly as prosecutor in violation of NRS 233B.122, because there was no indication of any inherent prosecutorial bias on part of hearing officer or of any inherent unfairness which violated defendant's rights. *State, Dep't of Motor Vehicles & Public Safety v. Thompson*, 102 Nev. 176, 717 P.2d 580 (1986)

**Deference to agency's determinations.** In reviewing decision of administrative agency, district court is free to decide pure legal questions without deference to determination of agency, but agency's conclusions of law, which are necessarily closely related to agency's view of facts, are entitled to deference and will not be disturbed if they are supported by substantial evidence. (See NRS 233B.135, 484.387 and 612.530.) *Jones v. Rosner*, 102 Nev. 215, 719 P.2d 805 (1986), cited, *Garman v. State, Employment Security Dep't*, 102 Nev. 563, at 565, 729 P.2d 1335 (1986), *Fremont Hotel and Casino v. Esposito*, 104 Nev. 394, at 397, 760 P.2d 122 (1988), *State, Dep't of Motor Vehicles & Public Safety v. Torres*, 105 Nev. 558,

at 561, 779 P.2d 959 (1989), *Jessop v. State Indus. Ins. Sys.*, 107 Nev. 888, at 892, 822 P.2d 116 (1991), dissenting opinion, *Town of Eureka v. State Engineer*, 108 Nev. 163, at 165, 826 P.2d 948 (1992), *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, at 325, 849 P.2d 271 (1993), see also *Beavers v. State, Dep't of Motor Vehicles & Public Safety*, 109 Nev. 435, 851 P.2d 432 (1993)

**Department not required to provide original documents which another agency generates and maintains.** At administrative hearing to revoke driver's license of person charged with driving under influence of alcohol (see NRS 484.387), it was proper for hearing officer to admit into evidence authenticated copy of crime lab report pursuant to NRS 233B.123, because department of motor vehicles and public safety did not have possession of original document and department is not required to provide original documents which another agency generates and maintains. *State, Dep't of Motor Vehicles & Public Safety v. Clements*, 106 Nev. 516, 796 P.2d 588 (1990), cited, *State, Dep't of Motor Vehicles & Public Safety v. Kinkade*, 107 Nev. 257, at 260, 810 P.2d 1201 (1991), *State, Dep't of Motor Vehicles & Public Safety v. Tilp*, 107 Nev. 288, at 293, 810 P.2d 771 (1991), *State, Dep't of Motor Vehicles & Public Safety v. Rowland*, 107 Nev. 475, at 481, 814 P.2d 80 (1991)

**Abuse of discretion for court to review administrative decision where tape recording of hearing had been destroyed.** Appellant was arrested for driving under influence and, following administrative hearing, his driver's license was revoked. Appellant filed petition in district court for judicial review (see NRS 484.387). Although tape recording of administrative hearing, which constituted almost entire record of case, had been destroyed by respondent, district court upheld decision of administrative hearing officer. It was abuse of discretion for district court to review administrative decision in absence of record because it was impossible for court to determine if there was substantial evidence to support decision. *Pida v. State, Dep't of Motor Vehicles & Public Safety*, 106 Nev. 883, 803 P.2d 229 (1990)

**Department not required to provide original documents which it maintains in central location.** Where respondent sent letter to department of motor vehicles and public safety requesting to view original documents maintained by department but did not subpoena such documents, it was error for district court to reverse decision of hearing officer and reinstate respondent's driving privileges based upon fact that department failed to produce such docu-

ments at administrative hearing to revoke respondent's driver's license for driving under influence of alcohol (see NRS 484.387), because keeping original documents in central location protects them from being lost, altered or damaged and, unless subpoena duces tecum is issued, interest in protecting original documents from loss or destruction is sufficient reason to declare them not readily available (see NRS 233B.123) at administrative hearing. State, Dep't of Motor Vehicles & Public Safety v. Rowland, 107 Nev. 475, 814 P.2d 80 (1991)

**Question of whether investigatory traffic stop was lawful is irrelevant in hearing to review order of revocation of privilege to drive.** When hearing to review order of revocation of privilege to drive is conducted by department of motor vehicles and public safety (see NRS 484.387), question of whether investigatory traffic stop was lawful is irrelevant and outside statutory scope of hearing. Beavers v. State, Dep't of Motor Vehicles & Public Safety, 109 Nev. 435, 851 P.2d 432 (1993)

**484.388 Committee on testing for intoxication: Creation; appointment and qualifications of members; meetings; quorum; appeal from decision of committee.**

1. There is hereby created the committee on testing for intoxication, consisting of five members.

2. The director or his delegate is the chairman of the committee. The remaining members of the committee are appointed by the director and serve at his pleasure. At least three of the members appointed by the director must be technically qualified in fields related to testing for intoxication. Not more than three members of the committee may be from any one county.

3. The committee shall meet at the call of the director and as frequently as the committee deems necessary. Three members of the committee constitute a quorum. If a member is unable to attend a meeting, he may be represented by an alternate approved by the director.

4. Any person who is aggrieved by a decision of the committee may appeal in writing to a hearing officer of the department.

(Added to NRS by 1983, 1911; A 1985, 432, 1950)

**484.3882 Committee on testing for intoxication: Adoption of regulations listing approved breath-testing devices; presumption of accuracy and reliability of device; other evidence of amount of alcohol in breath not precluded.**

1. The committee on testing for intoxication shall adopt regulations consisting of a list of those devices, described by manufacturer and type, which it certifies as designed and manufactured to be accurate and reliable for the purpose of testing a person's breath to determine the percent by weight of alcohol in the person's breath. The committee may:

(a) Certify those devices of which it approves which are on the list of qualified products meeting the requirements for evidential breath-testing devices of the National Highway Traffic Safety Administration; or

(b) Establish its own standards and procedures for evaluating those devices and obtain evaluations of the devices from the director or his agent.

2. If such a device has been certified by the committee to be accurate and reliable pursuant to subsection 1, it is presumed that, as designed and manufactured, the device is accurate and reliable for the purpose of testing a person's breath to determine the percent by weight of alcohol in the person's breath.

3. This section does not preclude the admission of evidence of the amount of alcohol in a person's breath where the information is obtained through the use of a device other than one of a type certified by the committee.

(Added to NRS by 1983, 1912; A 1985, 1950; 1993, 2074)

**ADMINISTRATIVE REGULATIONS.**

Testing for Intoxication, NAC 484.590 et seq.

**WEST PUBLISHING CO.**

Automobiles  $\approx$  424.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles § 633(4).

**484.3884 Committee on testing for intoxication: Adoption of regulations to prescribe standards and procedures to calibrate breath-testing devices; issuance of certificates by director.**

1. The committee on testing for intoxication shall adopt regulations which:

(a) Prescribe standards and procedures for calibrating devices used for testing a person's breath to determine the percent by weight of alcohol in the person's breath. The regulations must specify the period within which a law enforcement agency that uses such a device must calibrate it or have it calibrated by the director or his agent.

(b) Establish methods for ascertaining the competence of persons to calibrate such devices and provide for the examination and certification of those persons by the department. A certificate issued by the department may not be made effective for longer than 3 years.

(c) Prescribe the form and contents of records respecting the calibration of such devices which must be kept by a law enforcement agency and any other records respecting the maintenance or operation of those devices which it finds should be kept by such an agency.

2. The director shall issue a certificate to any person who is found competent to calibrate such a device or examine others on their competence in that calibration.

(Added to NRS by 1983, 1912; A 1985, 1950; 1993, 2075)

**ADMINISTRATIVE REGULATIONS.**

Testing for Intoxication, NAC 484.590 et seq.

**484.3886 Committee on testing for intoxication: Adoption of regulations for certification of persons to operate device to test amount of alcohol in breath; judicial notice; presumption of proper operation; evidence of test performed by others not precluded.**

1. The committee on testing for intoxication shall adopt regulations which:

(a) Establish methods for ascertaining the competence of persons to:

(1) Operate devices for testing a person's breath to determine the percent by weight of alcohol in the person's breath.

(2) Examine prospective operators and determine their competence.

(b) Provide for certification of operators and examiners by the department. A certificate issued by the department may not be made effective for longer than 3 years.

A person who is certified as an examiner is presumed to be certified as an operator.

2. The director shall issue a certificate to any person who is found competent to operate such a device or examine others on their competence in that operation.

3. A court shall take judicial notice of the certification of a person to operate devices of one of the certified types. If a test to determine the amount of alcohol in a person's breath has been performed with a certified type of device by a person who is certified pursuant to this section, it is presumed that the person operated the device properly.

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.

(Added to NRS by 1983, 1913; A 1985, 1951; 1993, 2075)

#### ADMINISTRATIVE REGULATIONS.

Testing for Intoxication, NAC 484.590 et seq.

#### WEST PUBLISHING CO.

Automobiles ⇐ 423.  
WESTLAW Topic No. 48A.  
C.J.S. Motor Vehicles § 633(4).

**484.388 Committee on testing for intoxication: Adoption of regulations for calibration of devices to test blood or urine and certification of persons who calibrate or operate devices or who examine operators; adoption of regulations concerning operation of devices to test blood or urine.**

1. The committee on testing for intoxication may adopt regulations that require:
  - (a) The calibration of devices which are used to test a person's blood or urine to determine the amount of alcohol or the presence of a controlled substance in the person's blood or urine;
  - (b) The certification of persons who make those calibrations;
  - (c) The certification of persons who operate devices for testing a person's blood or urine to determine the amount of alcohol or presence of a controlled substance in the person's blood or urine; and
  - (d) The certification of persons who examine those operators.

2. The committee may adopt regulations that prescribe the essential procedures for the proper operation of the various types of devices used to test a person's blood or urine to determine the amount of alcohol or the presence of a controlled substance in the person's blood or urine.

(Added to NRS by 1993, 2072)

#### WEST PUBLISHING CO.

Automobiles ⇐ 411, 422 to 425.

#### WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles §§ 633(1) to 633(12).

**484.389 Driving under the influence of intoxicating liquor or controlled substance: Admissibility of evidence of refusal to submit to evidentiary test and results of test; availability of results of test.**

1. If a person refuses to submit to a required chemical test provided for in NRS 484.382 or 484.383, evidence of that refusal is admissible in any criminal or administrative action arising out of acts alleged to have been committed while he was driving a vehicle while under the influence of intoxicating liquor or a controlled substance.

2. Except as otherwise provided in subsection 4 of NRS 484.382, 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 484.382 to 484.393, inclusive.

3. If a person submits to such a test, full information concerning that test must be made available, upon his request, to him or his 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.

(Added to NRS by 1969, 594; A 1973, 1504; 1983, 1078, 1914; 1993, 2076)



**WEST PUBLISHING CO.**Automobiles  $\approx$  413.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles § 633(4).

**NEVADA CASES.**

**No need to preserve samples of breath.** In prosecution for driving motor vehicle while under influence of intoxicating liquor, where state, following standard procedures, failed to preserve samples of defendant's breath taken for test administered to determine alcoholic content of defendant's blood, and defendant did not demonstrate that he was prejudiced by loss of samples or that state was acting in bad faith, results of test were admissible at trial, NRS 484.389, because neither due process of law nor state law requires preservation of those samples. *City of Las Vegas v. O'Donnell*, 100 Nev. 491, 686 P.2d 228 (1984), cited, *State v. Hall*, 105 Nev. 7, at 9, 768 P.2d 349 (1989).

**Section protects defendant from admission of inaccurate test results.** Respondent was charged with violating NRS 484.3795 by causing substantial bodily injury while driving under influence of intoxicating liquor. Police chemist who conducted gas chromatograph blood-alcohol test of respondent's blood routinely disposed of blood sample after 1 year. Respondent's arguments that his due process rights were violated and his case unduly prejudiced by state's loss of blood sample were rejected because (1) state was not acting in bad faith when it disposed of blood sample, (2) gas chromatograph blood testing method is considered to be one of most reliable methods of blood-alcohol testing, (3) respondent failed to present any evidence to indicate that method of testing was faulty or likely to lead to inaccurate results, (4) other statutes exist which protect defendant from admission of inaccurate test results (see NRS 484.389 and 484.393), and (5) alternative means exist to impeach accuracy of test results in addition to retesting sample itself. *State v. Hall*, 105 Nev. 7, 768 P.2d 349 (1989), cited, *State, Dep't of Motor Vehicles & Public Safety v. Tilp*, 107 Nev. 288, at 292, 810 P.2d 771 (1991).

**Failure of police officer to issue temporary license is not grounds to exclude evidence of driver's failure to submit to chemical test.** Evidence of driver's failure to submit to chemical test could not be excluded by court on grounds that police officer had failed to issue temporary license to driver (see NRS 484.385) where officer had substantially complied with other provisions of NRS 484.382 to 484.393, inclusive. (See NRS 484.389.) *State, Dep't of Motor Vehicles & Public Safety v. Kinkade*, 107 Nev. 257, 810 P.2d 1201 (1991), cited,

*Brockett v. State*, 107 Nev. 638, at 641, 817 P.2d 1183 (1991), concurring opinion.

**In absence of regulations concerning calibration of testing device, evidence of test is admissible.** At administrative hearing to review revocation of respondent's driving privileges for driving under influence of alcohol, it was not error for hearing officer to consider results of test of respondent's blood for presence of alcohol even though there was no evidence presented that device used to analyze blood sample was properly calibrated before testing as required by NRS 484.389. Since committee on testing for intoxication had not adopted regulations for maintenance or calibration of equipment used to test alcohol content in sample of blood, department of motor vehicles and public safety could not be required to demonstrate compliance with nonexistent regulations. *State, Dep't of Motor Vehicles & Public Safety v. Tilp*, 107 Nev. 288, 810 P.2d 771 (1991).

**Department of motor vehicles and public safety is not required to provide information concerning blood test given by employee of metropolitan police department.** Respondent was suspected of driving under influence of alcohol and blood test was administered by employee of metropolitan police department. If respondent or his attorney wanted full information concerning test (see NRS 484.389), request should have been made to police department rather than department of motor vehicles and public safety, which was not required by NRS 484.389 to secure such information from police department on behalf of respondent. *State, Dep't of Motor Vehicles & Public Safety v. Tilp*, 107 Nev. 288, 810 P.2d 771 (1991), cited, *Beavers v. State, Dep't of Motor Vehicles & Public Safety*, 109 Nev. 435, at 440, 851 P.2d 432 (1993).

**Results of breath test were not inadmissible under circumstances.** On appeal from order of district court affirming revocation of appellant's driving privilege by department of motor vehicles and public safety after results of evidentiary breath test indicated that appellant had blood-alcohol concentration of 0.15 percent by weight, substantial evidence existed in record to support conclusion of hearing officer that police officer who administered breath test complied with regulations requiring calibration of breath machine with alcohol-free air before administering test. In particular, police officer testified at administrative hearing that he followed appropriate checklist for operation of breath testing device, and that testing device printed out results of test immediately following conclusion of test. Printout of breath machine also indicated that machine measured sample of

blank air before appellant was tested and that blank air sample contained 0.00 percent of alcohol. As appellant offered no evidence that ambient air was not alcohol-free, results of breath

test were not inadmissible under provisions of NRS 484.389. *Beavers v. State*, Dep't of Motor Vehicles & Public Safety, 109 Nev. 435, 851 P.2d 432 (1993)

**484.391 Driving under the influence of intoxicating liquor or controlled substance: Opportunity of arrested person to choose qualified person to administer test; substitution of test prohibited.**

1. A person arrested for driving a vehicle while under the influence of intoxicating liquor or a controlled substance shall be permitted, upon his request and at his expense, reasonable opportunity to have a qualified person of his own choosing administer a chemical test or tests for the purpose of determining the alcoholic content of his blood or the presence of a controlled substance in his blood.

2. The failure or inability to obtain such a test or tests by such person shall not preclude the admission of evidence relating to the refusal to submit to a test or relating to a test taken upon the request of a police officer.

3. A test obtained under the provisions of this section may not be substituted for or stand in lieu of the test required by NRS 484.383.

(Added to NRS by 1969, 594; A 1973, 1504)

**WEST PUBLISHING CO.**

Automobiles  $\approx$  415.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles § 633(4).

**NEVADA CASES.**

**Police must not hinder, but need not assist, person's attempt to obtain independent examination.** Police must not hinder per-

son's timely, reasonable attempts to obtain independent examination pursuant to NRS 484.391, but they need not assist him. Where police did not obstruct person's right to acquire independently administered chemical sobriety test, state did not deprive that person of his due process right to obtain evidence. *Schroeder v. State*, Dep't of Motor Vehicles & Public Safety, 105 Nev. 179, 772 P.2d 1278 (1989)

**484.393 Driving under the influence of intoxicating liquor or controlled substance: Admissibility of results of blood test; persons authorized to administer test; immunity from liability.**

1. The results of any blood test administered under the provisions of NRS 484.383 or 484.391 are not admissible in any hearing or criminal action arising out of the acts alleged to have been committed while a person was under the influence of intoxicating liquor or a controlled substance unless:

(a) The blood tested was withdrawn by a physician, physician's assistant, registered nurse, licensed practical nurse, emergency medical technician or a technician, technologist or assistant employed in a medical laboratory;

(b) The test was 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; and

(c) The person who withdrew the blood was authorized to do so by the appropriate medical licensing or certifying agency.

2. The limitation contained in paragraph (a) of subsection 1 does not apply to the taking of a chemical test of the urine, breath or other bodily substance.

3. No person listed in paragraph (a) of subsection 1 incurs any civil or criminal liability as a result of the administering of a blood test when requested by a police officer or the person to be tested to administer the test.

(Added to NRS by 1969, 595; A 1973, 1505; 1981, 1362; 1983, 1078, 1914; 1987, 1154)

**WEST PUBLISHING CO.**

Automobiles ¶ 411.

WESTLAW Topic No. 48A.

C.J.S. Motor Vehicles §§ 633(1) to 633(12).

**NEVADA CASES.**

**Objection to admissibility of affidavit of person drawing blood for test.** In administrative hearing to review revocation of driving privileges for driving while under influence of intoxicating liquor, driver could not, under NRS 50.325, object to use of affidavit of person who drew his blood for test to determine its alcoholic content (see NRS 50.315) because under NRS 50.325, only defendants in criminal proceedings may so object. In addition, admission of affidavit over objection made by driver did not violate his right to due process of law because (1) governmental interest in keeping its highways safe was substantial, (2) fiscal and administrative burdens would be substantial if each driver requesting hearing were entitled to have those persons whose affidavits are admissible pursuant to NRS 50.315 present at hearings, and (3) additional procedural safeguard of having those persons present at hearings would not significantly lessen any risk of error. (See also NRS 233B.123 and 484.393.) *State, Dep't of Motor Vehicles & Public Safety v. Vezaris*, 102 Nev. 232, 720 P.2d 1208 (1986), cited, *State, Dep't of Motor Vehicles & Public Safety v. Clements*, 106 Nev. 516, at 518, 796 P.2d 588 (1990).

**Persons authorized to withdraw blood sample; purpose of enumeration.** In prosecution for driving while under influence of intoxicating liquor, where sample of blood taken from defendant for evidentiary test of its alcoholic content was withdrawn by laboratory assistant employed by hospital, trial court erred in granting defendant's motion to suppress all evidence relating to that test on ground that laboratory assistant was not authorized to administer test pursuant to NRS 484.393 because legislature did not intend term "technician employed in a medical laboratory," as used in that statute, to be so narrowly construed. Intent of statute was to ensure that only competent, medically trained persons withdraw blood in acceptable manner. Therefore, case was remanded on appeal so that qualifications of laboratory assistant could be examined and trial court could determine whether she was competent to withdraw blood for testing. *State v. Webster*, 102 Nev. 450, 726 P.2d 831 (1986), cited, *State, Dep't of*

*Motor Vehicles & Public Safety v. Blair*, 108 Nev. 172, at 174, 825 P.2d 1232 (1992).

**Strict construction of section not required.**

In prosecution for driving while under influence of intoxicating liquor, strict construction of NRS 484.393, which authorizes certain persons to withdraw blood for evidentiary test of its alcoholic content, was not required because (1) statute did not define offense or prescribe penalty, and (2) potential for arbitrary enforcement of law did not exist. *State v. Webster*, 102 Nev. 450, 726 P.2d 831 (1986), cited, *State, Dep't of Motor Vehicles & Public Safety v. Blair*, 108 Nev. 172, at 174, 825 P.2d 1232 (1992).

**Section protects defendant from admission of inaccurate test results.** Respondent was charged with violating NRS 484.3795 by causing substantial bodily injury while driving under influence of intoxicating liquor. Police chemist who conducted gas chromatograph blood-alcohol test of respondent's blood routinely disposed of blood sample after 1 year. Respondent's arguments that his due process rights were violated and his case unduly prejudiced by state's loss of blood sample were rejected because (1) state was not acting in bad faith when it disposed of blood sample, (2) gas chromatograph blood testing method is considered to be one of most reliable methods of blood-alcohol testing, (3) respondent failed to present any evidence to indicate that method of testing was faulty or likely to lead to inaccurate results, (4) other statutes exist which protect defendant from admission of inaccurate test results (see NRS 484.389 and 484.393), and (5) alternative means exist to impeach accuracy of test results in addition to retesting sample itself. *State v. Hall*, 105 Nev. 7, 768 P.2d 349 (1989), cited, *State, Dep't of Motor Vehicles & Public Safety v. Tilp*, 107 Nev. 288, at 292, 810 P.2d 771 (1991).

**Statute does not apply retroactively.** At administrative hearing to revoke driver's license of person charged with driving under influence of alcohol, it was proper for hearing officer to admit into evidence affidavit of nurse who withdrew blood sample, even though there was no showing that she was authorized to withdraw blood pursuant to NRS 484.393, because arrest occurred before adoption of amendment of section and legislature expressed no intention that statute be applied retroactively. *State, Dep't of Motor Vehicles & Public Safety v. Clements*, 106 Nev. 516, 796 P.2d 588 (1990).

**484.3935 Driving under the influence of intoxicating liquor: Presumption that solution or gas used to calibrate device for testing breath is properly prepared. 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 percent by weight of alcohol in his breath; and

2. The technician makes an affidavit 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.

(Added to NRS by 1983, 1913; A 1987, 686; 1993, 2076)

**WEST PUBLISHING CO.**

Automobiles = 426.

**WESTLAW Topic No. 48A.**

C.J.S. Motor Vehicles §§ 631 to 637.

**484.394 Driving under the influence of intoxicating liquor or controlled substance: Analysis of blood for presence of alcohol of deceased victim of accident involving motor vehicle.**

1. Any coroner, or other public official performing like duties, shall in all cases in which a death has occurred as a result of an accident involving a motor vehicle, whether the person killed is a driver, passenger or pedestrian, cause to be drawn from each decedent, within 8 hours of the accident, a blood sample to be analyzed for the presence and amount of alcohol.

2. The findings of the examinations are a matter of public record and must be reported to the department by the coroner or other public official within 30 days of the death.

3. Blood-alcohol analyses are acceptable only if made by laboratories licensed to perform this function.

(Added to NRS by 1973, 893; A 1985, 1952)

**484.3941 Device to prevent intoxicated driver from starting vehicle: Definitions.** As used in NRS 484.3941 to 484.3947, inclusive, unless the context otherwise requires:

1. "Device" means a mechanism which:

(a) Tests a person's breath to determine the percent by weight of alcohol in his breath; and

(b) If the results of the test indicate that the person has 0.05 percent or more by weight of alcohol in his blood, prevents the motor vehicle in which it is installed from starting.

2. The phrase "0.05 percent or more by weight of alcohol in his blood" includes a concentration of alcohol in the blood or breath of a person of 0.05 gram or more by weight of alcohol:

(a) Per 100 milliliters of his blood; or

(b) Per 210 liters of his breath.

(Added to NRS by 1989, 1737; A 1993, 2076)

**484.3943 Device to prevent intoxicated driver from starting vehicle: Imposition by court order; installation and inspection; exceptions.**

1. Except as otherwise provided in subsection 5, a court may require any person convicted of driving under the influence of intoxicating liquor in violation of NRS 484.379 or 484.3795, who has served the term of confinement imposed upon him or

has had his sentence suspended pursuant to NRS 4.373 and 5.055 after serving the mandatory minimum sentence, to install at his own expense a device in any motor vehicle which he owns or operates:

- (a) As a condition of reinstatement of his driving privilege;
- (b) As a condition of the suspension of his sentence; or
- (c) As a condition of the suspension of his sentence and reinstatement of his driving privilege.

2. Upon imposing such a requirement, the court shall immediately prepare and transmit a copy of its order to the director. The order must include a statement that a device is required and the specific period for which it is required. The director shall cause this information to be incorporated into the records of the department and noted as a restriction on the person's driver's license.

3. If the court requires the use of a device, the person who is required to install the device shall provide proof of compliance to the department before the reinstatement.

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ment of his driving privilege. Each model of a device installed pursuant to this section must have been certified by the committee on testing for intoxication.

4. The person whose driving privilege is restricted pursuant to this section shall have the device inspected by the manufacturer of the device or his agent every 90 days to determine whether the device is operating properly. The manufacturer or its agent shall submit a report to the director indicating whether the device is operating properly and whether it has been tampered with. If the device has been tampered with, the director shall notify the court that ordered the installation of the device.

5. If a person is required to operate a motor vehicle in the course and scope of his employment and the motor vehicle is owned by his employer, the person may operate that vehicle without the installation of a device, if:

(a) The employee notifies his employer that the employee's driving privilege has been so restricted; and

(b) The employee has proof of that notification in his possession or the notice, or a facsimile copy thereof, is with the motor vehicle.

This exemption does not apply to a motor vehicle owned by a business which is all or partly owned or controlled by the person otherwise subject to this section.

(Added to NRS by 1989, 1737; A 1993, 2895)

**484.3945 Device to prevent intoxicated driver from starting vehicle: Penalties for tampering with or driving without device.** A person required to install a device pursuant to NRS 484.3943, who operates a motor vehicle without a device or tampers with the device must have his driving privilege revoked in the manner set forth in subsection 4 of NRS 483.460 and, if the installation of a device is a condition of the suspension of his sentence, the court upon notification shall order him to begin serving that portion of his original sentence which the court determines is appropriate under the circumstances.

(Added to NRS by 1989, 1738)

**484.3947 Device to prevent intoxicated driver from starting vehicle: Regulations.**

1. The committee on testing for intoxication shall on or before January 1, 1990, adopt regulations which:

(a) Provide for the certification of each model of those devices, described by manufacturer and model, which it approves as designed and manufactured to be accurate and reliable to test a person's breath to determine the percent by weight of alcohol in the person's blood and, if the results of the test indicate that the person has 0.05 percent or more by weight of alcohol in his blood, prevent the motor vehicle in which it is installed from starting.

(b) Prescribe the form and content of records respecting the calibration of devices, which must be kept by the director or his agent, and any other records respecting the maintenance and operation of the devices which it finds should be kept by the director or his agent.

2. The committee shall establish its own standards and procedures for evaluating the models of the devices and obtain evaluations of those models from the director or his agent.

3. If a model of a device has been certified by the committee to be accurate and reliable pursuant to subsection 1, it is presumed that, as designed and manufactured, any device of that model is accurate and reliable to test a person's breath to determine the percent by weight of alcohol in the person's blood and, if the results of

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the test indicate that the person has 0.05 percent or more by weight of alcohol in his blood, will prevent the motor vehicle in which it is installed from starting.

(Added to NRS by 1989, 1738)

**ADMINISTRATIVE REGULATIONS.**

Testing for Intoxication, NAC 484.590 et seq.