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As of: August 23, 2010 (12:13pm)

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**** Bill No. ****

Introduced By *****

By Request of the Law and Justice Interim Committee

A Bill for an Act entitled: "An Act revising the laws relating to alcohol or drug related driving offenses; clarifying that search warrants may be issued for blood samples; revising the implied consent law; providing that a peace officer may request a search warrant to obtain a blood sample for chemical testing if an arrested person refuses to submit to testing; amending sections 46-5-224, 61-8-402, 61-8-404, and 61-8-405, MCA; and providing an immediate effective date and an applicability date."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 46-5-224, MCA, is amended to read:

"46-5-224. What may be seized with search warrant. A

warrant may be issued under this section to search for and seize any:

(1) evidence, including blood samples that may yield evidence of any measured amount or detected presence of alcohol or drugs in a person's body when subjected to testing;

(2) contraband; or

(3) person for whose arrest there is probable cause, for whom there has been a warrant of arrest issued, or who is unlawfully restrained."

{Internal References to 46-5-224: None.}

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NEW SECTION. **Section 2. Refusal to submit to test --**

search warrant. (1) If a person refuses to submit to one or more tests requested and designated by a peace officer as provided in 61-8-402 and the officer has probable cause to believe that the person has been driving or has been in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person has been placed under arrest for a violation of 61-8-401, 61-8-406, 61-8-410, or 61-8-805, a test or tests may be administered without the consent of the person provided that the officer first obtains a search warrant authorizing administration of the test or tests.

(2) The test or tests shall be administered in accordance with 61-8-405 and the provisions of 61-8-405 apply to the administration of the test.

(3) The results of a test performed pursuant to a search warrant are admissible as competent evidence in any civil or criminal prosecution, subject to applicable rules of evidence.

(4) A person's right to refuse to submit to a test under 61-8-402(4) does not apply to this section.

(5) The provisions of this section do not prevent law enforcement from obtaining tests without a warrant as otherwise authorized by law.

(6) A subsequent consent to a test that was initially refused does not prevent the issuance of a search warrant under this section.

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Section 3. Section 61-8-402, MCA, is amended to read:

"61-8-402. Blood Implied consent -- blood or breath tests for alcohol, drugs, or both -- refusal to submit to test -- administrative license suspension. (1) A person who operates or

is in actual physical control of a vehicle upon ways of this state open to the public is considered to have given consent to a test or tests of the person's blood or breath for the purpose of determining any measured amount or detected presence of alcohol or drugs in the person's body.

(2) (a) The test or tests must be administered at the direction of a peace officer when:

(i) the officer has reasonable grounds to believe that the person has been driving or has been in actual physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person has been placed under arrest for a violation of 61-8-401;

(ii) the person is under the age of 21 and has been placed under arrest for a violation of 61-8-410; or

(iii) the officer has probable cause to believe that the person was driving or in actual physical control of a vehicle:

(A) in violation of 61-8-401 and the person has been involved in a motor vehicle accident or collision resulting in property damage; or

(B) involved in a motor vehicle accident or collision resulting in serious bodily injury, as defined in 45-2-101, or

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1 death.

2 (b) The arresting or investigating officer may designate
3 which test or tests are administered.

4 (3) A person who is unconscious or who is otherwise in a
5 condition rendering the person incapable of refusal is considered
6 not to have withdrawn the consent provided by subsection (1).

7 (4) If an arrested person refuses to submit to one or more
8 tests requested and designated by the officer as provided in
9 subsection (2), the refused test or tests may not be given, ~~but~~
10 the at the request of the officer, unless authorized by a search
11 warrant. Upon refusal, the officer shall, on behalf of the
12 department, immediately seize the person's driver's license. The
13 peace officer shall immediately forward the license to the
14 department, along with a report certified under penalty of law
15 stating which of the conditions set forth in subsection (2) (a)
16 provides the basis for the testing request and confirming that
17 the person refused to submit to one or more tests requested and
18 designated by the peace officer. Upon receipt of the report, the
19 department shall suspend the license for the period provided in
20 subsection (6).

21 (5) Upon seizure of a driver's license, the peace officer
22 shall issue, on behalf of the department, a temporary driving
23 permit, which is effective 12 hours after issuance and is valid
24 for 5 days following the date of issuance, and shall provide the
25 driver with written notice of the license suspension and the
26 right to a hearing provided in 61-8-403.

27 (6) (a) Except as provided in subsection (6) (b), the

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1 following suspension periods are applicable upon refusal to
2 submit to one or more tests:

3 (i) upon a first refusal, a suspension of 6 months with no
4 provision for a restricted probationary license;

5 (ii) upon a second or subsequent refusal within 5 years of a
6 previous refusal, as determined from the records of the
7 department, a suspension of 1 year with no provision for a
8 restricted probationary license.

9 (b) If a person who refuses to submit to one or more tests
10 under this section is the holder of a commercial driver's
11 license, in addition to any action taken against the driver's
12 noncommercial driving privileges, the department shall:

13 (i) upon a first refusal, suspend the person's commercial
14 driver's license for a 1-year period; and

15 (ii) upon a second or subsequent refusal, suspend the
16 person's commercial driver's license for life, subject to
17 department rules adopted to implement federal rules allowing for
18 license reinstatement, if the person is otherwise eligible, upon
19 completion of a minimum suspension period of 10 years. If the
20 person has a prior conviction of a major offense listed in
21 61-8-802(2) arising from a separate incident, the conviction has
22 the same effect as a previous testing refusal for purposes of
23 this subsection (6) (b).

24 (7) A nonresident driver's license seized under this
25 section must be sent by the department to the licensing authority
26 of the nonresident's home state with a report of the
27 nonresident's refusal to submit to one or more tests.

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1 (8) The department may recognize the seizure of a license
 2 of a tribal member by a peace officer acting under the authority
 3 of a tribal government or an order issued by a tribal court
 4 suspending, revoking, or reinstating a license or adjudicating a
 5 license seizure if the actions are conducted pursuant to tribal
 6 law or regulation requiring alcohol or drug testing of motor
 7 vehicle operators and the conduct giving rise to the actions
 8 occurred within the exterior boundaries of a federally recognized
 9 Indian reservation in this state. Action by the department under
 10 this subsection is not reviewable under 61-8-403.

11 (9) A suspension under this section is subject to review as
 12 provided in this part.

13 (10) This section does not apply to blood and breath tests,
 14 samples, and analyses used for purposes of medical treatment or
 15 care of an injured motorist ~~or~~, related to a lawful seizure for a
 16 suspected violation of an offense not in this part, or performed
 17 pursuant to a search warrant.

18 (11) This section does not prohibit the release of
 19 information obtained from blood and breath tests, samples, and
 20 analyses for law enforcement purposes as provided in 46-4-301 and
 21 61-8-405(6)."

22 {Internal References to 61-8-402:
 23 ok 61-2-107 ok 61-5-212 ok 61-5-212 ok 61-5-218
 24 ok 61-8-101* all ok 61-8-409 61-8-409 61-8-409
 25 61-8-409 61-8-409 ok 61-8-733}

26
 27 **Section 4.** Section 61-8-404, MCA, is amended to read:
 28 **"61-8-404. Evidence admissible -- conditions of**

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1 **admissibility.** (1) Upon the trial of a criminal action or other
2 proceeding arising out of acts alleged to have been committed by
3 a person in violation of 61-8-401, 61-8-406, 61-8-410, or
4 61-8-805:

5 (a) evidence of any measured amount or detected presence of
6 alcohol, drugs, or a combination of alcohol and drugs in the
7 person at the time of a test, as shown by an analysis of the
8 person's blood or breath, is admissible. A positive test result
9 does not, in itself, prove that the person was under the
10 influence of a drug or drugs at the time the person was in
11 control of a motor vehicle. A person may not be convicted of a
12 violation of 61-8-401 based upon the presence of a drug or drugs
13 in the person unless some other competent evidence exists that
14 tends to establish that the person was under the influence of a
15 drug or drugs while driving or in actual physical control of a
16 motor vehicle within this state.

17 (b) a report of the facts and results of one or more tests
18 of a person's blood or breath is admissible in evidence if:

19 (i) a breath test or preliminary alcohol screening test was
20 performed by a person certified by the forensic sciences division
21 of the department to administer the test;

22 (ii) a blood sample was analyzed in a laboratory operated or
23 certified by the department or in a laboratory exempt from
24 certification under the rules of the department and the blood was
25 withdrawn from the person by a person competent to do so under
26 61-8-405(1);

27 (c) a report of the facts and results of a physical,

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1 psychomotor, or physiological assessment of a person is
2 admissible in evidence if it was made by a person trained by the
3 department or by a person who has received training recognized by
4 the department.

5 (2) If the person under arrest refused to submit to one or
6 more tests ~~as provided in this section~~ under 61-8-402, whether or
7 not a sample was subsequently collected for any purpose, proof of
8 refusal is admissible in any criminal action or proceeding
9 arising out of acts alleged to have been committed while the
10 person was driving or in actual physical control of a vehicle
11 upon the ways of this state open to the public, while under the
12 influence of alcohol, drugs, or a combination of alcohol and
13 drugs. The trier of fact may infer from the refusal that the
14 person was under the influence. The inference is rebuttable.

15 (3) The provisions of this part do not limit the
16 introduction of any other competent evidence bearing on the
17 question of whether the person was under the influence of
18 alcohol, drugs, or a combination of alcohol and drugs."

19 {Internal References to 61-8-404:
20 ok 61-8-101*}

21
22 **Section 5.** Section 61-8-405, MCA, is amended to read:

23 **"61-8-405. Administration of tests.** (1) Only a physician or
24 registered nurse, or other qualified person acting under the
25 supervision and direction of a physician or registered nurse,
26 may, at the request of a peace officer, withdraw blood for the
27 purpose of determining any measured amount or detected presence

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1 of alcohol, drugs, or any combination of alcohol and drugs in the
2 person. This limitation does not apply to the sampling of breath.

3 (2) In addition to any test administered at the direction
4 of a peace officer, a person may request that an independent
5 blood sample be drawn by a physician or registered nurse for the
6 purpose of determining any measured amount or detected presence
7 of alcohol, drugs, or any combination of alcohol and drugs in the
8 person. The peace officer may not unreasonably impede the
9 person's right to obtain an independent blood test. The officer
10 may but has no duty to transport the person to a medical facility
11 or otherwise assist the person in obtaining the test. The cost of
12 an independent blood test is the sole responsibility of the
13 person requesting the test. The failure or inability to obtain an
14 independent test by a person does not preclude the admissibility
15 in evidence of any test given at the direction of a peace
16 officer.

17 (3) Upon the request of the person tested, full information
18 concerning any test given at the direction of the peace officer
19 must be made available to the person or the person's attorney.

20 (4) A physician or registered nurse, or other qualified
21 person acting under the supervision and direction of a physician
22 or registered nurse, does not incur any civil or criminal
23 liability as a result of the proper administering of a blood test
24 when requested in writing by a peace officer to administer a
25 test.

26 (5) The department in cooperation with any appropriate
27 agency shall adopt uniform rules for the giving of tests and may

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1 require certification of training to administer the tests as
2 considered necessary.

3 (6) If a peace officer has probable cause to believe that a
4 person has violated 61-8-401, 61-8-406, 61-8-410, or 61-8-805 and
5 a sample of blood, breath, urine, or other bodily substance is
6 taken from that person for any reason, a portion of that sample
7 sufficient for analysis shall be provided to a peace officer if
8 requested for law enforcement purposes and upon issuance of a
9 subpoena as provided in 46-4-301."

10 {Internal References to 61-8-405:
11 ok 23-2-535 ok 61-8-101 ok 61-8-404 ok 61-8-409
12 ok 61-8-807 ok 67-1-211}

13
14 NEW SECTION. Section 6. {standard} Codification

15 **instruction.** [Section 2] is intended to be codified as an
16 integral part of Title 61, chapter 8, part 4, and the provisions
17 of Title 61, chapter 8, part 4, apply to [section 2].

18
19 NEW SECTION. Section 7. {standard} Effective date. [This
20 act] is effective on passage and approval.

21
22 NEW SECTION. Section 8. {standard} Applicability. [This
23 act] applies to violations of Title 61, chapter 8, part 4, that
24 occur on or after [the effective date of this act].

25 - END -

26 {Name : Valencia Lane
27 Title : Staff Attorney
28 Agency : LSD
29 Phone : 444-4025}