

1986

Lynno Matt Harry v. Fred C. Schwendiman : Brief of Respondent

Utah Court of Appeals

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BRIEF

.A10

DOCKET NO. 860338

IN THE SUPREME COURT OF THE STATE OF UTAH

LYNNO MATT HARRY,

Appellant,

VS.

FRED C. SCHWENDIMAN, Director
of Driver License, State of
Utah,

Respondent.

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Case No. 860338-CA
19745

BRIEF OF RESPONDENT

AN APPEAL FROM A JUDGMENT OF THE SEVENTH JUDICIAL
DISTRICT COURT OF UINTAH COUNTY, STATE OF UTAH
HONORABLE BOYD BUNNELL, PRESIDING

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

LYNNO MATT HARRY,)	
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Appellant,)	Case No. 19745
)	
vs.)	
)	
FRED C. SCHWENDIMAN, Director)	
of Driver License, State of)	
Utah,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

NATURE OF THE CASE

Respondent seeks to have Utah Code Ann. § 41-2-19.6 (1953) as amended, and effective August 1, 1983, declared as constitutional on its face and as applied in this case as a civil public safety statute of the State of Utah, and as held by the trial court below.

DISPOSITION IN LOWER COURT

The district court denied appellant's petition and upheld the Department of Public Safety, Driver License Service's decision subsequent to hearing as not being arbitrary or capricious, holding the civil public safety statute to constitutional and violative of due process.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the trial court logic and decision upheld.

STATEMENT OF FACTS

The Department and the arresting officer followed the procedures exactly as set forth in the civil statute, Utah Code Ann. § 41-2-19.6 (effective August 1, 1983). See addendum for all relevant statutory citations. At the time of arrest, the petitioner was "personally served" with a Uniform DUI Citation on which was contained the words "NOTICE OF INTENT TO SUSPEND." The citation specifically warned the individual that 31 days from the date of "this notice" the privilege to operate a motor vehicle in the State of Utah would be suspended pursuant to the cited section. "You have the right to request a hearing on this suspension." The Department will not contact you further regarding a hearing unless you request a hearing in writing. YOUR WRITTEN REQUEST must be sent WITHIN TEN (10) DAYS of the date of arrest to the office of Driver License Services . . . "Upon your written request for a hearing you will be notified of a time and place to appear. If you fail to appear or request a hearing your driver license suspension will be automatic. The administrative hearing is civil in nature and does not satisfy the requirement for your to appear in court as indicated above."

The written notice was given on an official numbered departmental form as required by statute. The driver obviously received it as Mr. Harry requested an opportunity for a hearing and was granted a hearing by agreement of the parties on. The hearing examiner gave Mr. Harry an opportunity to testify and challenge the two statutory issues that he would determine. His testimony on actual physical control of the vehicle was corroborated by the information contained on the Uniform DUI Summons information, and the official notarized and sworn to report by the police officer. Mr. Harry did not contest the breathalyzer test results of .10% BAC nor the officer's sworn statement that he was (1) sitting in the "driver's seat", (2) with the keys "in the ignition", and (3) in the "on position." R. 12, DUI Report Form. The driver, in fact, admitted that he was sitting in the vehicle, R. 12, and admitted "yes, it could have been moved." T. 27.

The hearing examiner considered his testimony and its believability as well as the reports and other facts and circumstances to make his decision. T. 27, 28. Based upon the evidence and testimony received at this hearing, he found that the officer had sufficient reason to believe the driver was in violation of U.C.A. § 41-6-44 and that the driver did have a .08% or greater BAC test results. The only thing that Mr. Harry choose to challenge at the hearing was whether or not he was in

actual physical control. T. 17. However, after his opportunity for hearing, the prior served "Notice of Intention to Suspend" and letter of 90 day suspension effective on the 31st day from the arrest and subsequent to the hearing, was sustained by the hearing examiner. T. 9.

At the trial the Court considered two issues. (1) The constitutionality of the statute and the due process that was rendered; and (2) whether or not the hearing examiner or the Department of Public Safety was arbitrary or capricious. T. 32, 36, 38. Appellant offered exhibits of a two-month prior letter requesting 200+ blank subpoenas. It was dated more than two months prior to the date of the hearing before the Department. The exhibits were denied admission by the Court, as well as was respondent's offer to submit the departmental policy to allow subpoenas to individuals for officers and the subpoena forms prepared by the Department for use by drivers in specific hearings. T. 41 (See addendum for offered forms).

The verdict of the criminal trial was not before the hearing examiner, and not admitted by the district court. (T. 24)

INTRODUCTION

The destruction of life and property caused by drunk drivers has long been recognized as a major national problem. Alcohol is responsible for an estimated annual economic loss of \$21 to \$24 billion, and at least 50 percent of all highway

deaths. Presidential Commission on Drunk Driving, Final Report (Nov., 1983) p. 1. Exhibit A.

Utah's problem is equally severe. In 1980, 150 people lost their lives in alcohol related accidents. Recommendations of the Governor's Commission on Drinking and Driving (Nov. 5, 1982) p.6. Exhibit B. With property damage, injury and death caused by alcohol the economic and social loss to Utah alone is staggering -- in Utah the estimated economic damage is \$20,385,000 lost because of alcohol caused deaths alone in just 1981. Id. Add the 263 deaths for 1982 and 283 for 1983 and the Utah death toll alone for three years staggers to an economic loss of around \$94,095,000. The majority (73.2%) of the driver's contributing to alcohol related fatal accidents had a blood alcohol content much greater than the .08% Utah standard. The average blood alcohol content of drivers killed was .14%. (Statistics for 1983.) Utah Traffic Accident 1983 Summary (July 1, 1984) p. 27. Exhibit C.

In an effort to curb the problem of drunk driving and thus lessen economic losses and save pain suffering and lives, Utah and many other states have enacted laws which deal with alcohol impaired drivers swiftly and efficiently through a civil administrative driver license suspension process rather than through the slower criminal process.

POINT I

THE STATUTE IS CONSTITUTIONAL ON ITS FACE AND SHOULD
BE PRESUMED TO BE CONSTITUTIONAL BY THIS COURT

Petitioner merely alleges the unconstitutionality of the new statute, however, the Utah Supreme Court grants a strong presumption that legislative enactments are constitutional. See Zamora v. Draper, 635 P.2d 78 (Utah 1981). The cases also suggest that the petitioner will have to make a clear showing that the statute is unconstitutional on its face or that it cannot be constitutionally implemented.

Under this presumption, the Utah Supreme Court in Utah Farm Bureau v. Utah Insurance Guarantee Assoc., 564 P.2d 751, in challenging the constitutionality of the Insurance Guarantee Association Act, quoting Pride Club v. State, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) said that, "this court makes every reasonable presumption in favor of constitutionality and will not nullify a legislative enactment unless it is clearly and expressly prohibited by the constitution." Utah Farm Bureau, supra at 753.

The Utah court further said in the case of Sims v. Smith, 571 P.2d 586, challenging a criminal penalty statute quoting from the case of Pride Club v. State, 25 Utah 2d 333, 481 P.2d 669 (1971), that ". . . a statute should be held valid unless there is a clear, complete and unmistakeable violation of some specific provision of the constitution." The court also in

quotes said that this principle of a presumption of constitutionality was so basic that it "must be observed in deciding the matter." (Emphasis added.) The court obviously meant what it said, as in Pride Club, it struck an obviously unconstitutional phrase to cure a constitutionally infirmed statute. See also In Re Boyer, 636 P.2d 1084 (Utah 1981), where the court said, "It is the duty of this court to construe a statute to avoid constitutional infirmities whenever possible. Cf. Munsee v. Munsee, 12 Utah 2d 83, 363 P.2d 71 (1961)." The Utah court also quoted the same language from the United States v. Delaware and Hudson Company, 213 U.S. 366, 407, 29 S.Ct. 527, 535, 53 L.Ed. 836 (1909).

Further we submit that the statute is constitutional on its face as it complied with the constitutional requirements in that it provides the individual with reasonable notice and an adequate opportunity for hearing prior to any action being taken, in a civil matter, with a civil privilege to drive. See Greaves v. State, 528 P.2d 805 (Utah 1974), Mackey v. Montrym, 443 U.S. at 13, 99 S.Ct. at 2618, stating that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." Quoting Dixon v. Love, 431 U.S. 105, 113, 97 S.Ct. 1723, 1727, 52 L.Ed.2d 172 (1977). The Supreme Court also seemed to uphold a system and reach down into the appellate level of Illinois and reversed an appellate court decision excluding a

police officer's affidavit that did not specify the grounds which led him to believe that the respondent was driving while under the influence of alcohol. Such seems to be the thrust of this petitioner's argument. In Illinois v. Batchelder, id., the Court said, "Indeed it is the affect of the appellate court's opinion on the Illinois effort to halt this carnage that has prompted our summary action in this case. . . . Clearly then, the fact that 11-501.1(d) provides for a predeprivation hearing abundantly weighs this second part of the Eldridge analysis in favor of the constitutionality of the Illinois implied consent scheme."

(Emphasis the Court). The Illinois system allowed the admission of the affidavit of the police officer in a criminal case and this was upheld by the U.S. Supreme Court.

POINT II

UTAH'S DUI LAWS SATISFY DUE PROCESS GUARANTEES

In the tradition of according the "states great leeway in adopting summary procedures to protect public health and safety," the United States Supreme Court has sanctioned the prompt civil laws requiring revocation of driving privileges. Mackey v. Montrym, 443 U.S. 1 99 S.Ct. 2612, (1979). In Mackey v. Montrym, the Court upheld Massachusetts' implied consent system under which the petitioner's driver license was revoked for refusing to take a breath test. In analyzing the constitutional sufficiency of the Massachusetts' system, the

Court, following the balancing tests in Mathews v. Eldridge, 424 U.S. 319 (1976), considered three factors in holding that the prehearing revocation and the due process question. It considered (1) the nature and weight of the private interest at stake -- the driving privilege; (2) the risk of erroneous deprivation, and value of alternative procedural safeguards; and (3) the governmental function, state interest, and administrative or fiscal burdens at stake.

A. Private Interest is Minimal and
State's Interest is Great

In considering the first and third of these three factors, the Court recognized that drivers do have an interest in their licenses. Mackey, id. at 12. It also recognized the substantial governmental interest, as discussed above, in promptly removing impaired and dangerous drivers from the road, and keeping them off through an efficient administrative process. Id. at 17-19.

The Utah Operator and Chauffeur's License Act, Utah Code Ann. § 41-2-1(n) and (o) (1983), as amended, defines a driver's "license" as a privilege, and evidence of a privilege to drive in the State of Utah. It is a privilege that is constitutionally protected in the State of Utah, Ballard v. State, 559 P.2d 1302 (Utah 1979), however, a driver "does not have a constitutional right to drive an automobile upon the public highways (particularly so, when he has been drinking

alcoholic beverages.) The right to drive upon the highways is a privilege conferred subject to conditions; and it may be revoked if those conditions are violated." Smith v. Cox (Utah 1980), 609 P.2d 1332, 1333. Hence we see this Court has held, as have virtually all courts in the Nation, that the privilege to drive is not as fundamental as life or liberty, and that the privilege's nature, and weightiness is not so fundamental as to require an "error free" determination. See Greenholtz v. Nebraska Penal Inmates, 442 U.S. at 7, 99 S.Ct. at 2103, not requiring the full penalty of process, and Mackey v. Montrym, (U.S. S.Ct.) infra.

In Hedding v. Dirkswater, 366 N.W.2d 54 (Minn. 1983), the Supreme Court of Minnesota in holding that the statutory section mandating suspension of a driver license before failure of a chemical test by registering an alcohol content of .10 BAC or more was not violative due process, set the example for other states, by comparing its Minnesota system with the Massachusetts system using the comparison in Mackey v. Montrym. That Court held on page 60 that "the private interest effected here is the same as in Montrym," and considered the (1) duration of the revocation, (2) the availability of hardship relief and (3) the availability of prompt post-revocation review.

In Illinois v. Batchelder, 103 S.Ct. 3513 (1983), another implied consent case, the court weighed the extent of the

private privilege. As in Utah, under the suspension system at issue in Batchelder, a driver could request a hearing, and, as in Utah, the driver license would not be suspended until after an adverse hearing decision. In Mackey, the suspension occurred prior to the hearing. Thus, the Batchelder court explained that "in Mackey, our concern centered on '[t]he duration of any potentially wrongful deprivation of the property interest.'" Id. at 3516. However, because under the Illinois system, unlike the Massachusetts system, a driver could not lose his license until after the requested hearing, the court concluded that the "respondent can seek no solace in the first step of the Eldridge analysis." Id. The court concluded that the driver in Batchelder had little or no interest at stake because he retained his license, unaffected prior to the hearing.

As in Batchelder, a driver license is not suspended under Utah Code Ann. § 41-2-19.6 until after the requested hearing. Because of this, the duration of the wrongful suspension that concerned the Mackey Court is non-existent and the driver's interest minimal.

The third prong of the Montrym/Eldridge balancing test, the governmental interest has partially been discussed above. The governmental interest includes the devastating economic loss and loss of life for which alcohol-impaired drivers are responsible and the corresponding interest in remedying the problem.

The governmental interest also encompasses the method of the remedy. That is, the state has a great interest in, for example, keeping its officers on the roads instead of in court or at hearings. It also has an interest in the "fiscal and administrative burden" that would be imposed using other remedies. Mackey, supra, at 18. Thus, the Mackey Court recognized that states have a substantial interest in promptly removing impaired and dangerous drivers from the road and keeping them off through an efficient administrative procedure. Id. at 17-19.

B. The Utah System Minimizes the
Chance of Erroneous Deprivation.

Analyzing the second leg of the Eldridge balancing test, the risk of erroneous deprivation, the Montrym court found that the flexible due process clause does not require a perfect error-free standard. The Court stated:

The Due Process Clause simply does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations. Greenholtz v. Nebraska Penal Inmates, supra at 7. Thus, even though our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error, the "ordinary principle" established by our prior decisions is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." Dixon v. Love, supra, at 113. And, when prompt post deprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used by designed to provide a

reasonable reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be. See, e.g. Barry v. Barchi, post, at 65-66; Mathews v. Eldridge, 424 U.S. at 334.

Id. at 13. Thus, in considering the second prong of the Eldridge test, the nature of the administrative suspension system should be examined, as should the nature of relief from or judicial review of an adverse agency decision. Both must be weighed and balanced against the governmental interest in health, safety, and welfare and administrative and financial burdens.

As the U.S. Montrym decision stated, the Due Process Clause standard does not require an "error-free" agency decision. So long as prompt judicial review of the suspension decision is available, it does not require an evidentiary hearing prior to the suspension of an individual's driver license. Dixon v. Love id.

In Utah, prompt judicial relief from suspension decision is available. Under Section 41-2-19.6(5), Utah Code Ann. (1953) as amended, (see addendum) drivers may file a petition to the reviewing court within 30 days after the suspension. Not only is relief prompt, but the chance that the license of a driver, operating a vehicle, with a BAC of less than .08% will be suspended is almost non-existent. The risk is minimized by: (1) the police department check; (2) it is an organized official form that must be sworn to and mailed in

promptly; (3) public safety reviews of the record; (4) an opportunity to testify at a hearing, (5) prompt review by any "court of record" in the driver's "county" of residence, and (6) appeal to the Utah Supreme Court.

Utah's administrative license suspension system even further protects drivers against the risk of erroneous deprivation. Unlike the system at issue in Montrym, in Utah a driver license is not suspended until after the driver has been afforded an opportunity for a hearing. Although the Constitution does not require an evidentiary hearing prior to adverse administrative action, Montrym, id. at 13, at the hearing in issue competent evidence was taken. Documentary evidence was examined, and, importantly, the driver testified supporting parts of that sworn document.

The documentary evidence taken into account at the hearing consisted primarily of the DUI Uniform Citation and the DUI Report Form. These reports are required by the statute, on forms only approved by the Department of Public Safety and sworn to and must be returned promptly (5 days), and become part of their official records. T. 26 and Utah Code Ann. § 41-2-19.6(3) and (4). These documents are trained officer's reports which are obtained by the Department of Public Safety through the ordinary and regular and only business channels. The documents contain information regarding the cause for the arrest, the arrest and

the officer's contact with the driver after the arrest. The DUI report form must be sworn to by the arresting officer, notarized and checked again requiring another "authorized endorsing signature."

Administrative reliance on documents similar to these trained officer's reports was upheld by the Montrym Court without the requirement of correlative officer testimony. (See also Batchelder, id.) Characterizing the information contained in such reports as "objective" and obtained by a "trained observer and investigator", id. at 13 and 14, the Montrym Court found it easy to uphold the Massachusetts system which predicated license revocation on documentary evidence alone. The Court explained that the officer's report was sufficient evidence on which to base the license revocation because:

The District Court, in holding that the Due Process Clause mandates that an opportunity for a further hearing before the Registrar precede a driver's suspension, overstated the risk of error inherent in the statute's initial reliance on the corroborated affidavit of a law enforcement officer. The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts. The specific dictates of due process must be shaped by "the risk of error inherent in the truth finding process as applied to the generality of cases" rather than the "rare exceptions." Mathews v.

Eldridge, . . . And, the risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seems insubstantial. (Emphasis added.) Id. at 14.

Thus, because of the obvious reliability of the officer's sworn report in the "general" cases, the Supreme Court upheld the Massachusetts' implied consent system which prefaced license revocation solely on the officer's report.

Bolstering their position, the Court noted that Montrym, like most drivers, "did not dispute the facts" contained within the officer's report. Id. 2612. Similarly, most drivers in Utah who request a hearing pursuant to U.C.A. § 41-2-19.6 do not dispute the factual accuracy of the officer's report, nor make preparations to have him present in advance. Rather, as in Montrym, they choose to challenge the constitutionality of the statute under which their licenses may be suspended, complaining of technical jury-type evidence considerations. The Montrym Court used this fact to illustrate the accuracy and reliability of the officer's report and the need for its use in the general majority of these cases.

In this case, the petitioner attempted to show at the hearing, that he was not in "actual physical control" of the vehicle. However, the challenge was, apparently, directed at the legal meaning of "actual physical control" and not the underlying factual situation. (Apparent ability to strike was present. See

Garcia v. Schwendiman, 645 P.2d 651, 654 (1982). This driver never contended that the keys were not in the ignition. The officer's report states, nor did the driver specifically say, that the car was not moving, as the report states. He, in fact, admitted to the hearing examiner that the car "could have been moved." T. at 17, 26-27.

As in Montrym, on appeal, the petitioner seems to challenge only the constitutionality of the law and quibble with the evidence taking process. He does not challenge even the meaning of "actual physical control" that was at issue at the administrative level. The lack of challenge on factually related issues, as is true of most cases in which a suspension under Utah Code Ann. § 41-2-19.6 is challenged, supports the Montrym court's conclusion, and the conclusion that should be reached here, that the officer's report is a factually reliable account of a trained observer and may be used in support of an administrative civil public safety suspension decision.

Mr. Harry had an opportunity to testify. The officer's report and other documentary evidence was not the only evidence relied on by the department in this case. The department also used testimonial evidence; the unbelieved testimony of Mr. Harry, in support of its suspension decision. T. 28. As previously mentioned, much of the testimony supports the officer's report. Thus, as does the documentary evidence, the testimony actually

taken in this case also helps to minimize the risk of erroneous deprivation.

Any risk of erroneous deprivation is also minimized through requiring the agency to address only relatively simple issues. U.C.A. § 41-2-19.6(5) simply requires the department to determine (1) whether the arresting officer had reasonable cause to believe that the driver was operating a vehicle under the influence, and (2) whether the driver's BAC test results, if any, indicated a .08% BAC or greater. The DUI Report Form and any other documentary evidence along especially with the driver's testimony permit ready determination of these two simple issues.

Because the State of Utah requires the officer's reports to be sworn, checked and authorized by the chief of police or his designate, on contemporaneous sworn official departmental forms which are checked by the Department of Public Safety, and grants the driver an opportunity for an actual hearing prior to any effective suspension of the driving privileges, the risk of erroneous deprivation under Utah's new DUI laws is slight. This minimal risk, combined with the added safeguard of post deprivation judicial review and appeal make Utah's DUI suspension system constitutionally sound.

C. Post Deprivation Relief is Significant
and Constitutionally Sufficient.

Although the Montrym Court emphasized the significance of post-deprivation relief, the source of relief in Montrym was

administrative (because of the summary prehearing revocation) and not judicial. Thus, standards of judicial review were not directly discussed in Montrym. However, even without specific guidelines from Montrym, due process in driver license cases is described as a "flexible standard", and it is evident that the Utah standard of administrative hearing before any suspension and judicial review of license suspension decisions is more than sufficient.

Section 41-2-20, Utah Code Ann. (1953), as amended, requires the reviewing court to determine whether or not the Department's suspension decision was arbitrary and capricious within 30 days. Therefore, review is prompt and meaningful.

The Utah Supreme Court has approved the arbitrary and capricious standard. Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Ut. 1983). The Administrative Services court discussed two standards of review which it denoted "arbitrary and capricious." Under the first standard discussed, the agency is afforded great deference. Under this standard the agency should not be reversed if "there is evidence of any substance whatever which can reasonably be regarded as supporting the determination made." (Citation omitted.) Administrative Services, id. at 609.

This standard was held to provide a constitutionally sufficient level of review by at least three other Utah district

courts. None have held it to be unconstitutional. See, e.g., Williams v. Schwendiman, Third Judicial District Memorandum Decision, Judge Russon, Civil No. C84-2196, June 12, 1984, S.Ct. Case No. 20128. And it has frequently been applied by other district judges in examining, and even occasionally reversing as arbitrary, departmental suspension decisions. The fact that the courts have used this standard in reversing departmental decisions logically demonstrates that it is meaningful.

Other western states, pursuant to their implied consent laws, afford agency revocation and suspension decision similar judicial deference. For example, both Idaho and Colorado limit judicial review to a review to the agency record, and apply the "clearly erroneous" or "arbitrary and capricious" standard of review. See, e.g. Davis v. Colorado Department of Revenue, 623 P.2d 874 (Colo. 1981), Mason v. State, 653 P.2d 803 (Idaho App. 1982).

Although this "arbitrary and capricious" standard of review sufficiently protects the petitioner's due process guarantee, the Utah Administrative Services court articulated another "arbitrary and capricious" standard which could also be employed by a court in reviewing license suspension decisions with mixed questions of law and fact.

Under the second and stricter standard set forth in Administrative Service, a court will not uphold an agency

decision if there is only "evidence of any substance whatever" supporting the determination. Rather, the reviewing court must determine whether or not the agency decision "falls within the limits of reasonableness or rationality." Administrative Services, supra at 610. This standard of reasonableness and rationalness, which the Administrative Services court denotes as a standard of arbitrary and capricious review applies to agency decisions involving mixed fact and law questions. Id. at 609-610.

As a practical matter this higher standard is used by most reviewing courts even in these simple cases. That is, "was the administrative decision reasonable or rational." Thus, if the reviewing court finds, for example, that the issue of whether or not the arresting officer had reasonable cause to believe that the driver was driving while under the influence is a mixed question, the court likely will apply the higher "arbitrary and capricious" standard, substitute its judgment for the fact finder and review and check the administrative driver license hearing examiner for reasonableness and rationalness.

Testing the reasonableness and rationality, or the substance of the departmental suspension decision based on the agency record is a significant and sufficient form of review. So significant is this form of review that the New Mexico implied consent scheme even employs it for the review of the one year

license revocations for refusal. State, Department of Motor Vehicles v. Gober, 513 P.2d 391 (N.W. 1973), New Mexico Stat. Section 66-8-112(F) (1978). Where one year revocations are concerned, Utah, on the other hand, graciously grants a de novo review of the revocation decision. A form of review affording the agency fact finder no deference. Utah Code Ann. § 41-6-44.10.

Therefore this Court in Administrative Services grants drivers two meaningful standards of review as required under the statutory "arbitrary and capricious" review requirement. The first standard, allowing greater agency deference is as other states have found, constitutionally sufficient. Even if, this standard was lacking, Administrative Services makes available a higher standard of review under which the reasonableness and rationality of the agency decision is tested. Both standards provide drivers, like the plaintiff, whose licenses have been temporarily administratively suspended, with meaningful judicial review of the suspension decision.

Taken as a whole, Sections 41-2-19.6 and 41-2-20 more than protect the due process rights of drivers, like the petitioner. Every driver tested must know he is being granted a conditional privilege -- conditioned on "safety first." The risk of erroneous deprivation is slight. The documentary evidence which precipitates any suspension action is promptly completed by

trained and sworn persons, sworn to, and checked and double checked in a reliable, objective fashion. The driver has an opportunity to obtain a pre-deprivation hearing at which evidence from every available source may be presented. Under 41-2-19.6 the driver, through the department, may also subpoena the officer if he believes that the officer's report may be inaccurate in any aspect. The combined available testimony and the reliable documentary evidence are considered only regarding two relatively simple issues, and, therefore assure accurate agency decisions. Then the risk of erroneous deprivation is even further minimized through post-deprivation relief in the form of judicial review and appeal.

When weighed against the individual's interest in his driving "privileges" and the state's urgent interest in removing hazardous drivers from the highways, the pre-hearing administrative suspension process more than adequately protects drivers' due process rights.

POINT III

THE ADMINISTRATIVE SUSPENSION DECISION
WAS BASED ON RELIABLE AND COMPETENT LEGAL
EVIDENCE, THEREFORE NOT REQUIRING THE
PEACE OFFICER'S PRESENCE

The lack of the arresting officer's corroborative testimony at the administrative hearing serves as the basis of the appellant's major claims. The petitioner contends that the

arresting officer's presence at the hearing was mandatory because it fulfills two functions. First, that the officer's presence would satisfy the requirements of the "residuum rule." Second, that his presence would satisfy the petitioner's interest in cross-examination.

First, although the applicability of the residuum rule to driving privilege suspension cases is unsettled, in any event the rule's requirements have been met in this case. The residuum rule requires an agency decision to be supported by some "competent" evidence. Sandy State Bank v. Brimhall, 636 P.2d 481 (Utah 1981), Ogden Ironworks v. Industrial Commission, 102 Utah 492, 132 P.2d 376 (1942). In this case, the hearing officer did rely on "competent" testimonial and hearsay evidence in making the suspension decision, as was allowed in Zions Cooperative Merchantile Assoc. v. Industrial Commission of Utah, (Utah 1927), 262 P.2d 99.

If the evidence is an exception to the hearsay rule under the Utah Rules of Evidence, the officer's sworn report, corroborated or not by testimony, should be competent evidence upon which a decision could be based. This Court would have allowed that evidence under its own rules if it was a proper exception to the hearsay rule, part of the res gestae, even in the original case spawning apparently the residuum rule of evidence. Garfield Smelting Company v. Industrial Commission, 53

Utah 133, 178 P.2d 57 (1918). Of course, this Court has recently reaffirmed in Sandy State Bank v. Brimhall, supra at p. 486, "that the technical rules of evidence need not be applied" in hearings before administrative agencies and that "hearsay evidence is admissible in proceedings before the Industrial Commission and the Public Service Commission." The Court in stating that the findings of fact cannot be based solely upon hearsay evidence, but must be supported by a residuum of "legal evidence competent in a court of law", must have meant that any hearsay evidence under the trustworthiness and reliability exceptions to the hearsay rule, corroborated or not, would be acceptable. If that is not the rule, we submit that there appears here, in the interest of public safety, a "sound reason why the minority residuum rule should" not be applied. Sandy State Bank, id.

The officer's report is an exception to the hearsay exclusionary rule because this is a civil matter (Ballard v. Cox, 595 P.2d 1302, 1304 (1979)), and the source of the information and the circumstances of its preparation indicate trustworthiness. See Barney v. Cox, 588 P.2d 696 (Utah 1978), allowing hearsay driver license computerized records as "competent" evidence. Additionally, a specific exception for these reports is made under Rule 803(1), because they contain a first-hand immediate record of the event which is being perceived.

They are also admissible under Rule 803(6) as being a business entry exception or a record of a regularly conducted activity made at or near the time in the course of business of a regularly conducted business or institution, (see also Barney v. Cox, supra). They would be "competent" and self-authenticating under Rule 803(8) as a record and report setting forth an activity that the declarant has a "statutory duty to report." Utah Code Ann. § 41-2-19.6.

The Utah Supreme Court said in Barney v. Cox, supra, a driver license records case, "it is the type of evidence which will be excepted from the hearsay rule, not the type of organization (i.e. private or public) that is important." In that case Justice Hall cited the business entries exception of Utah Rules of Evidence (Rule 63), and also stated in a footnote that, "other subsections of Rule 63 may also apply as exceptions including (15) reports and findings of public officials and (17) contents of official record." Barney is cited by the framers of the Utah Rules of Evidence as being in support of subsection 6 of Rule 803 and subsection 8 on public records and reports. Like the reports in Barney, the reports in the civil proceedings here are ordinarily and regularly obtained by the Department from an individual trained to observe and gather the urgently needed information in an objective and reliable manner. Mackey v. Montrym, supra.

The Utah Supreme Court has upheld the admissibility of official records and sworn reports for substantive proof not only in Barney v. Cox, supra but also allowed a sworn official toxology report in Yacht Club v. Liquor Control Commission 681 P.2d 1224, 1227, supra. Also in Murray City v. Hall, 663 P.2d 1314 (Utah 1983), a criminal case, this Court held that even though the results of the breathalyzer test were erroneously admitted, as a rule the test results (and the machine testing technician's affidavit) are admissible if the judge (or hearing examiner) finds them to be trustworthy under U.C.A. § 41-6-44.3. In that decision Justice Durham logically reasons that:

It is well recognized that the accused right of confrontation is not absolute. See e.g. State v. Maestes, Utah, 564 P.2d 1386 (1977). In certain instances it must yield to legitimate governmental interest. See e.g. State v. Walker, supra, 53 Ohio St.2d at 199, 374 N.E.2d at 136-37. The enactment of § 41-6-44.3 manifest an intent by the legislature to relieve the State of Utah and other governmental entities of the financial burden and inconvenience of calling as witnesses in every DUI case the accuracy of the breathalyzer machine. (Cite omitted.) Such a concern is a legitimate governmental interest. Section 41-6-44.3, devised to further that interest, constitutes a very limited intrusion upon the accused right of confrontation. (Emphasis added.) Id. at 1321.

The Murray City Court went on to point out that if the accused feels that the machine was not functioning properly "he/she can subpoena the public officer responsible for testing the accuracy of the breathalyzer and the ampoules." See Utah Code Anno. § 77-35-14 . See also Stroupe v. Commonwealth, supra. [215 Va. 243, 207 S.E.2d 894 (1974)] The court said:

Thus, given (1) the legitimate governmental interest in not having to produce in every DUI case the public officer responsible for testing the accuracy of the breathalyzer and the ampoules, and (2) the alternative means available to an accused to cross-examine and confront such a witness, we hold that § 41-6-44.3 does not violate the appellant's constitutional right of confrontation when all of its requirements are met. See State v. Walker, supra. [53 Ohio St. 2d 192, 374 N.E.2d 132 (1978)] See also People v. Tenorio, 197 Colo. 137, 590 P.2d 952 (1979) (stating that there is no violation of an accused's right of confrontation where the evidence is shown to be trustworthy and reliable). However, as previously discussed, the mandate of § 41-6-44.3 was not met in the present case. Therefore, the results of the breathalyzer test were erroneously admitted. Id., at 1322.

Justice Hall, concurring in that decision, wrote that the affidavit submitted in this case was admissible and did meet the foundational requirements of the statute. Id., at 1322-1323. This same fiscal need and urgent public right applies to the test results as well as to the officer's sworn report in this civil case.

The criminal case of State v. Bertul, 664 P.2d 1184 (Utah 1983), also proposes that a civil business record may be admitted irrespective of the type of organization from which it emanates. There, Justice Stewart pointed out that police records (Booking Reports) are admissible depending on the "nature of the record" and "the purpose for which they are offered." Even under this criminal case these sworn police officer reports, required by the civil statute, meet the business entries "and the like"

exception to the hearsay rule. This Court again, in that case cites Barney v. Cox, supra, for the statement that "it is the type of evidence which will be excluded by the hearsay rule, not the type of organization, i.e. public or private, that is important." Id. at 1183. Bertul was a criminal case and involved a conviction and a possible jail sentence and should not apply in these public safety cases being "civil cases" involving no possible fine or jail purposes. See Ballard v. Cox, 595 P.2d 1302 (1979).

We submit that the officer's sworn report is competent sworn documentary evidence in a court under the trustworthy hearsay exceptions and logic of the Utah Rules of Evidence and the reasoning and holdings of the Utah Supreme Court and other courts including federal ones. For example, as the United States Supreme Court said in Mackey v. Montrym, id. at p. 13 and 14 and p. 2619:

[He] is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts . . . The risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seems insubstantial. Moreover, as this case illustrates, there will rarely be any genuine dispute as to the historical facts providing cause for a suspension.

Not only were the requirements of the residuum rule met through the competent documentary evidence, but they were also met by the direct testimonial evidence of the driver, relied upon by the department, believable or not.

Importantly, the driver/petitioner testified. T. at 28. Although the driver did not fully agree with the officer's report, in that he contended he was not in "actual physical control" of the vehicle, T. at 17 (an issue which has not been pursued by the petitioner) he did confirm that he was behind the wheel and that the car "could have been" moving, T. at 17-19 and 26-27, thus corroborating the officer's admissible sworn report with "competent", direct testimonial evidence.

In this case, the appellant's testimony at the administrative hearing, like the reliable documentary evidence, served to satisfy the requirements of the residuum of evidence rule and since he could have subpoenaed him and had him present, due process was granted.

A. The Presence of the Peace Officer
Was Not Otherwise Required

In support of his second proposition, that the officer's presence is otherwise necessary to satisfy the petitioner's interest in cross-examination, the petitioner cites I.C.C. v. Louisville & Nashville R.R. Co., 277 U.S. 88 (1913). The Louisville & Nashville language, quoted by the petitioner, seems to require a full-blown trial even though the proceeding is administrative. But much more limited proceedings are constitutionally permissible, and the Louisville & Nashville language should not be used to guide the driving privilege suspension cases.

Two factors immediately distinguish Louisville & Nashville from the case at hand. First, agencies have been accorded much greater freedom over the last 70 years since Louisville & Nashville was decided. Their expertise and convenience made them a valuable, modern necessity. Their desirable qualities would be lost, however, if every agency action required a full-blown trial.

Secondly, Louisville & Nashville involved complex, nationwide rate making. The extent of the hearing required was, accordingly, more elaborate than that where only two relatively simple public safety facts and issues are addressed as in license suspension cases.

Additionally, Louisville & Nashville has been narrowed to its facts by the United States Supreme Court. In 1973 the Court, in United States v. Florida East Coast R. Co., 410 U.S. 224 (1973), a case factually similar to Louisville & Nashville, held that some railroad rate making could be accomplished without the evidentiary hearing it required in Louisville & Nashville, even though the statute at issue required a "hearing." The court distinguished Florida East Coast from Louisville & Nashville saying that one involved "rulemaking" while the other involved "adjudication." However, the principle law difference between these cases, as Davis On Administrative Law points out, is that in Louisville & Nashville nationwide rate making was the issue.

While in Florida East Coast only the "specified rates" of a single railroad were at issue. K. Davis, Administrative Law Treatise, §§ 12:4, 14:10 (2d ed. 1976). See also K. Davis, Administrative Law Treatise, § 15.2 (1953).

Strangely, today, Louisville & Nashville is largely known for its inception of the rule, now accepted nationwide and in Utah, that the exclusionary rules of evidence do not apply to administrative agencies. See Opp Cotton Willis v. Administrator, 312 U.S. 126, 155 (1941), and Davis, (2d ed.) supra, at § 16:4. Sandy State Bank v. Brimhall, 636 P.2d 481, 486 (1981) affirmed that the "technical rule of evidence need not be applied " in administration proceedings.

The history of Louisville & Nashville illustrates the trend toward liberalizing administrative proceedings and accepting agencies as experts in their fields. Administrative officers, like the hearing officer which presided in this case, are experienced in Implied Consent cases, breath testing machines, and regulations and trained to weigh the evidence before them and determine the trustworthiness of that evidence.

The trustworthiness of the officer's sworn report is substantial. The report was sworn to by the officer and also double checked and endorsed with the authorized endorsing signature as required by the statute. It was received in the ordinary and regular course of business through regular, routine

departmental channels, on the department's own statutorily required forms. It appears on its face to be properly sworn to, verified and notarized. In other words, the source of the information and the circumstances of its preparation indicate its trustworthiness, acceptability and admissibility upon which the hearing officer could reasonably and naturally rely. Ballard v. Cox, supra, Barney v. Cox, 588 P.2d 696 (Utah 1978).

There is no absolute right to cross-examination, particularly in the administrative setting. The driver could have had the officer there. The Department had forms ready for that purpose. Murray City v. Hall, supra and infra. The trustworthiness of the report nullifies the need for the officer's presence particularly when the driver has an opportunity to testify himself. Thus, in Burkhart v. Department of Motor Vehicles, 124 Cal.App.3d 99, 177 Cal.Rptr.. 175 (1981), the California Court of Appeals held that the California statutory scheme for suspension clauses and that the officer's hearsay sworn statement could support a finding even against conflicting evidence. The Court pointed out that the officer's hearsay report was an official record of the Department and was made specifically admissible by the statute. The Court then pointed out that the petitioner could have called the arresting officer himself. The Court's reasoning is persuasive:

The physical presence of the officer at the hearing would not substantially enhance the

reliability of the hearing process. The officer and the licensee would engage in a swearing match and cross-examination of the officer would seldom reveal any weaknesses in his testimony, simply because the issues are neither complex nor subtle.

Finally, in reference to the governmental interest and the fiscal and administrative burdens involved if additional or substitute procedures are mandated, we note that governmental agencies at the state and local level are in a period of fiscal restraint. Police manpower resources are finite. It does not require the presence of the arresting officer at every hearing. The licensee has an absolute right to compel his attendance if he requests a subpoena, has it served and pays the statutory fee (§ 14104.5; Gov.Code, § 68097.2). In the event the licensee deems the officer's presence critical to his defense, the burden is properly placed on him to insure the officer's attendance. Many licensees may prefer that the officer not appear, so as to take his chances on his powers of persuasion working in the absence of conflicting live testimony. (Emphasis added.) Id. at 181.

The Utah Supreme Court has also specifically held that even in a criminal trial the individual's interest in cross-examination gives say to a trustworthy report balanced against the economic and administrative burden. Murray City v. Hall, 663 P.2d 1314 at p. 1321 (Utah 1983).

The circumstances of this case indicate that the DUI report was trustworthy. The appellant does not indicate otherwise. Because of this the appellant's due process rights and interest in cross-examination have been satisfied, especially since the appellant did not make efforts to have the officer there..

POINT IV

THE PETITIONER'S CLAIM THAT HE WAS DENIED THE OPPORTUNITY TO SUBPOENA WITNESSES LACKS MERIT

The petitioner did not attempt to subpoena witnesses or obtain subpoenas regarding his administrative suspension hearing. T. at 31. Because he made no request for subpoenas (blank or specific) he lacks standing to claim that departmental policy makes subpoenas unavailable to aggrieved drivers. However, even if the petitioner had standing, this claim must fall, for the department provides reasonable procedures under which relevant witnesses may be subpoenaed. (See addendum subpoena form.)

Section 41-2-19.6, Utah Code Ann. (1953), as amended, provides that "[i]n connection with a [license suspension] hearing the department or its duly authorized agents . . . may issue subpoenas for the attendance of witnesses and the production of relevant books and papers." It does not permit the issuance of innumerable blank subpoenas upon the request of the driver or his attorney. However, the statutory authority to subpoena witnesses and evidence are practical and reasonable, and prevent neither the acquisition of witnesses or evidentiary material.

An agency's subpoena power is limited to reasonably relevant, legal inquiry. See, e.g., State v. D.R. Johnson Lumber Co., 617 P.2d 603 (Or. 1980), State v. Latta, 601 P.2d 520 (Wash.

1979). The subpoenas the department may issue in anticipation of a suspension hearing must be relevant to the fact situation and issues involved, such as the officer's reason to believe that the plaintiff was driving under the influence, and, for example, the plaintiff's driving pattern, the accident, or his performance of the field sobriety test.

The issues and facts are few and uncomplicated. The only witness' testimony that will usually be pertinent to these issues is that of the driver and the arresting officer. Testimony on, perhaps, the driver's normal state of sobriety, or the arresting officer's character is irrelevant, and due to the testimony's irrelevancy, issuance of subpoenas for the purpose of obtaining this sort of information would be beyond the bounds of the department's authority. The issuance of blank subpoenas could potentially draw the department outside of its jurisdiction and possibly into the criminal area. Thus, the department, with its reasonably limited subpoena power, should not issue blank subpoenas.

Because the Administrative Procedure Act (APA) has not been adopted in Utah, its provisions are not dispositive. They are, however, illustrative. Section 6(c) of the APA provides:

Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement on showing of general relevance and reasonable scope of the evidence sought.
(Emphasis added.)

As Davis points out, this section was added by Congress to put private parties on the same footing as the government with respect to the acquisition of unprivileged information. K. Davis, Treatise on Administrative Law, (1953) 8.15. However, the availability of information to private parties is limited.

The words "authorized by law" [in Section 6(c), APA] prevent the provision from granting power to agencies not otherwise empowered to issue subpoenas. The provision returns the previous system of permitting an agency to exercise discretion concerning the grant of subpoenas on behalf of pro-rate parties, but only to the extent of "a statement or showing of general relevance and reasonable scope." (Footnote omitted). Id.

Under the APA an agency may and should issue subpoenas, but only those relevant to the issues before the agency. A request for blank subpoenas does not meet the showing of relevancy requirement. The same holds true for the issuance of subpoenas under Section 41-2-19.6. The statute requires that the information sought through testimony be relevant. The department is, therefore, not reasonably authorized to issue blank subpoenas.

The appropriate procedure would be for the driver or his attorney to request the department to subpoena, for example, the arresting officer. See Appellant's Brief, p. 19. But neither specific nor even blank subpoenas were requested in this case. T. at 31. In any case had the plaintiff requested that particular individual, whose testimony would be relevant, be

subpoenaed, and had the department refused to subpoena the requested witnesses, the issue would be different. As it is, the plaintiff's contention that he should have been issued blank subpoenas, lacks merit.

CONCLUSION

Statutes are accorded a presumption of validity and therefore are assumed valid unless they are clearly unconstitutional. The petitioner has not demonstrated that Sections 41-2-19.6 and 41-2-20, Utah Code Ann., 1953 (as amended), are clearly unconstitutional. Therefore, Utah's new civil license suspension system should be presumed valid and upheld.

To test the constitutional validity under the due process granted, the individual's interest and state's interest must be weighed against the suspension system itself. The individual does have an interest in a continued privilege, but it is a limited interest, subject to reasonable regulation. The license is retained prior to the administrative hearing, only suspended and only for 90 days, all deprivation subject to judicial review and appeal.

The State and traveling public have a tremendous interest. The effects of DUI have been great, both in terms of the economy and in terms of human life, pain and suffering. Therefore, there is a crying need in remedying this problem and

in remedying it in an efficient way (both fiscally and administratively) that will guarantee swift and sure results.

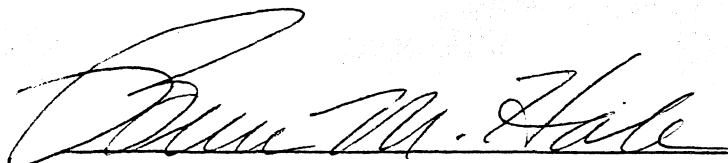
The risk of erroneous deprivation is invalid because:

- 1) The trained officer's uniform report is sworn to and based on reasonable grounds;
- 2) The reported information is checked before and after mailing to the Department for inaccuracies and deficiencies;
- 3) The driver has an opportunity for a hearing prior to any 90 day suspension;
- 4) The driver has an opportunity to subpoena witnesses;
- 5) An impartial public official has discretion to take into account a wide range of evidence, on two basic simple issues;
- 6) The documentary evidence -- Officer's Sworn DUI Report Form -- is reliable competent and trustworthy;
- 7) The privilege is only suspended for a short three month period; and
- 8) An opportunity for prompt post-suspension meaningful judicial review is available.

Therefore, this statute and system is constitutionally sufficient especially when considering the state's great interest in keeping its highways safe. The Trial Court nor the hearing

examiner were arbitrary or irrational and, therefore, the court should be affirmed.

DATED this 19 day of November, 1984.

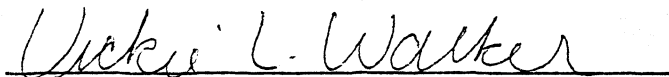
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BRUCE M. HALE
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify I mailed a true and exact copy of the foregoing Brief of Respondent, first-class, postage prepaid to JoAnn B. Stringham, McRae & DeLand, 209 East 100 North, Vernal, UT 84078.

DATED this 19 day of November, 1984.

A handwritten signature in dark ink, appearing to read "Vickie L. Walker", written over a horizontal line.

Upon the conclusion of such examination the department shall take such action as may be appropriate and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restriction as permitted under section 41-2-9. Refusal or neglect of the licensee to submit to such examination shall be ground for suspension or revocation of his license.

(h) No report authorized by section 41-2-12.1 shall contain any evidence of a conviction for speeding on an interstate system located in this state if the conviction was for a speed of less than 71 miles per hour and did not result in an accident unless authorized in writing by the individual whose report is being requested.

(i) The department may suspend the license of a person when the department has been notified by a juvenile court that the person has outstanding against him or her an unpaid fine or uncomplied-with restitution requirement levied by order of a juvenile court, and the suspension shall remain in effect until the department is notified by the juvenile court that the order has been satisfied. No report authorized by section 41-2-12.1 shall contain any evidence of such suspension.

(j) The department may immediately suspend the license of a person if it has reason to believe that the person is the owner of a motor vehicle with respect to which a security is required under Chapter 41 of Title 31, and has operated the vehicle or permitted it to be operated within this state without the security being in effect. The provisions of sections 41-12-17.5 and 41-12-29 with respect to the surrender of license plates and registration of motor vehicles and the requirement of proof of financial responsibility apply to persons whose driving privilege is suspended under this subsection. If the department exercises the right of immediate suspension granted under this subsection (i), the notice and hearing provisions of subsection (b) apply. A person whose license suspension has been sustained or whose license has been revoked by the department under this subsection may file a petition within 30 days after the sustaining of the suspension or the revocation for a hearing in the matter which, if held, shall be governed by the provisions of section 41-2-20.

History: C. 1953, 41-2-19, enacted by L. 1983, ch. 183, § 22; 1983, ch. 187, § 3; 1983, ch. 1978 (2nd S.S.), ch. 9, § 2; L. 1983, ch. 99, § 4; 192, § 1.

41-2-19.5. Purpose of revocation or suspension for driving under the influence. The legislature finds and declares that a primary purpose of the provisions in this code that relate to suspension or revocation of a person's license or privilege to operate a motor vehicle for driving with a blood alcohol content above a certain level or while under the influence of alcohol or any drug, or combination of alcohol and any drug, or for refusing to take a chemical test provided for in section 41-6-44.10, is safely protecting persons on roads and highways by quickly removing from those roads and highways persons who have shown they are safety hazards by driving with a blood alcohol content above a certain level or while under the influence of alcohol or any drug or combination of alcohol and any drug or by refusing to take a chemical test that complies with the requirements of section 41-6-44.10.

History: C. 1953, 41-2-19.5, enacted by L. 1983, ch. 99, § 5.

Title of Act.

An act relating to driving while intoxicated; establishing standards relating to, penalties for, and procedures to deal with, driving while intoxicated; repealing the section which formerly set the absolute minimum blood-alcohol content required to con-

vict for driving while intoxicated; and providing an effective date.

This act amends sections 41-2-2, 41-2-20, and 41-2-28, Utah Code Annotated 1953, section 41-2-13, Utah Code Annotated 1953, as last amended by chapter 129, Laws of Utah 1981, section 41-2-18, Utah Code Annotated 1953, as last amended by chapter 152, Laws of Utah 1979, section 41-2-19, Utah Code Annotated 1953, as enacted by chapter 9, Laws of Utah 1978, Second Special Session,

sections 41-2-29 and 41-2-30, Utah Code Annotated 1953, as last amended by chapter 83, Laws of Utah 1967, section 41-6-43.10, Utah Code Annotated 1953, as last amended by chapter 78, Laws of Utah 1957, section 41-6-44, Utah Code Annotated 1953, as last amended by chapter 46, Laws of Utah 1982, sections 41-6-44.3 and 41-6-44.5, Utah Code Annotated 1953, as enacted by chapter 243, Laws of Utah 1979, section 41-6-44.10, Utah Code Annotated 1953, as enacted by chapter 126, Laws of Utah 1981, section 41-22-14, Utah Code Annotated 1953, as enacted by chapter 107, Laws of Utah 1971, section 63-43-10, Utah Code Annotated 1953, as last

amended by chapter 2, Laws of Utah 1980, section 73-18-12, Utah Code Annotated 1953, as last amended by chapter 183, Laws of Utah 1977, and section 76-5-207, Utah Code Annotated 1953, as last amended by chapter 63, Laws of Utah 1981; enacts sections 41-2-19.5 and 41-2-19.6, Utah Code Annotated 1953; repeals and reenacts section 41-6-43, Utah Code Annotated 1953, as enacted by chapter 242, Laws of Utah 1979; and repeals section 41-6-44.2, Utah Code Annotated 1953, as last amended by chapter 4, Laws of Utah 1982, Second Special Session. — Laws 1983, ch. 99.

41-2-19.6. Chemical test — Grounds and procedure for officer's request — Taking license — Report to department — Procedure by department — Suspension. (1) When a peace officer has reasonable grounds to believe that a person may be violating or has violated section 41-6-44 the peace officer may, in connection with his arrest of the person, request the person to submit to a chemical test to be administered in compliance with the standards set forth in section 41-6-44.10.

(2) The peace officer shall advise a person prior to the person's submission to a chemical test that results indicating .08% or more by weight of alcohol in the blood shall, and the existence of a blood alcohol content sufficient to render the person incapable of safely driving a vehicle can, result in suspension or revocation of the person's license or privilege to operate a motor vehicle.

(3) If the person submits to that chemical test and the results indicate a blood alcohol content of .08% or more, or if the officer makes a determination, based on reasonable grounds to believe that the determination is correct, that the person is otherwise in violation of section 41-6-44, the officer directing administration of the test or making the determination shall serve on the person, on behalf of the department, immediate notice of the department's intention to suspend the person's privilege or license to drive. If the officer serves that immediate notice on behalf of the department he shall take the Utah driver license or certificate or permit, if any, of the driver, issue a temporary license effective for only 30 days, and supply to the driver, on a form to be approved by the department, basic information regarding how to obtain a prompt hearing before the department. A citation issued by the officer may, if approved as to form by the department, serve also as the temporary license.

(4) The peace officer serving the notice shall send to the department within five days after the date of arrest and service of the notice the person's license along with a copy of the citation issued regarding the offense, and a sworn report indicating the chemical test results, if any, and any other basis for the officer's determination that the person has violated section 41-6-44, and the officer's belief regarding the person's violation of section 41-6-44. Each such report shall be on a form approved by the department and shall be endorsed by the police chief or his equivalent or by a person authorized by him, other than the officer serving the notice.

(5) Upon written request of a person who has been issued a 30-day license, the department shall grant to the person an opportunity to be heard within 30 days after the date of arrest and issuance of the 30-day license, but the request must be made within 10 days of the date of the arrest and issuance of the 30-day license. A hearing, if held, shall be before the department in the county in which the arrest occurred, unless the department and the person agree that the hearing may be held in some other county. The hearing shall be documented and its scope shall cover the issues of whether a peace officer had reasonable grounds to believe the person

to have been person refu with a hear and may is relevant bo the hearing bers of the membership either that be suspended section, sha of the arre for a period department subsection 4 privilege is called if the that the sub by the depa the suspens the provision

History: C. 1983, ch. 99, §

41-2-20. — Scope of celed, suspen revocation is occurred pur thirty days t wherein such and it shall to the depar of the case t subject to ca this act. The whether or n

History: L. § 2; C. 1943, 57-

41-2-21. P revoked unde until the exp or longer as revoked may provided in s provisions of an investigati to indicate w highways.

(2) Any re ate a motor vi

to have been operating a motor vehicle in violation of section 41-6-44, whether the person refused to submit to the test, and the test results, if any. In connection with a hearing the department or its duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers. One or more members of the department may conduct the hearing, and any decision made after a hearing before any number of the members of the department shall be as valid as if made after a hearing before the full membership of the department. After the hearing, the department shall order, either that the person's license or privilege to drive be suspended or that it not be suspended. A first suspension, whether ordered or not challenged under this subsection, shall be for a period of 90 days, beginning on the 31st day after the date of the arrest. A second or subsequent suspension under this subsection shall be for a period of 120 days, beginning on the 31st day after the date of arrest. The department shall assess against a person, in addition to any fee imposed under subsection 41-2-8(7), a fee of \$25, which must be paid before the person's driving privilege is reinstated, to cover administrative costs, and which fee shall be cancelled if the person obtains an unappealed department-hearing or court decision that the suspension was not proper. A person whose license has been suspended by the department under this subsection may file a petition within 30 days after the suspension for a hearing in the matter which, if held, shall be governed by the provisions of section 41-2-20.

History: C. 1953, 41-2-19.6, enacted by L. 1983, ch. 99, § 6.

41-2-20. Judicial review of license cancellation, revocation or suspension — Scope of review. Any person denied a license or whose license has been canceled, suspended or revoked by the department except where such cancellation or revocation is mandatory under the provisions of this act unless the suspension occurred pursuant to section 41-2-19.6 shall have the right to file a petition within thirty days thereafter for a hearing in the matter in a court of record in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon ten days' written notice to the department; and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to cancellation, suspension or revocation of license under the provisions of this act. The court's jurisdiction is limited to a review of the record to determine whether or not the department's decision was arbitrary or capricious.

History: L. 1933, ch. 45, § 20; 1935, ch. 47, § 2; C. 1943, 57-4-23; L. 1983, ch. 99, § 7.

41-2-21. New license after revocation. (1) Any person whose license has been revoked under this act shall not be entitled to apply for or receive any new license until the expiration of one year from the date such former license was revoked or longer as provided in sections 41-2-18 and 41-2-19. Licenses which have been revoked may not be renewed, but application for a new license must be filed as provided in section 41-2-8, and a license so issued shall be subject to all of the provisions of an original license. The department shall not grant the license until an investigation of the character, abilities and habits of the driver has been made to indicate whether it will be safe to again grant him the privilege of using the highways.

(2) Any resident or nonresident whose operator's ~~or chauffeur's~~ license to operate a motor vehicle in this state has been suspended or revoked as provided in this

- 41-6-44.2. Repealed.
- 41-6-44.3. Standards for chemical breath analysis — Evidence.
- 41-6-44.5. Admissibility of chemical test results in actions for driving under the influence or with a prohibited blood alcohol content — Weight.
- 41-6-44.8. Municipal attorneys authorized to prosecute for driving while license suspended or revoked.
- 41-6-44.10. Implied consent to chemical tests for alcohol or drug — Refusal to allow — Warning, report, revocation of license — Court action on revocation — Person incapable of refusal — Results of test available — Who may give test — Evidence.
- 41-6-44.30. Seizure and impoundment of vehicles by category I peace officers.

41-6-43. Local ordinances to be consistent with code. (1) An ordinance adopted by a local authority that governs a person's driving or being in actual physical control of a motor vehicle while having alcohol in the blood or while under the influence of alcohol or any drug or the combined influence of alcohol and any drug, or that governs, in relation to any of those matters, the use of a chemical test or chemical tests, or evidentiary presumptions, or penalties or that governs any combination of those matters, shall be consistent with the provisions in this code which govern those matters.

(2) An ordinance adopted by a local authority that governs reckless driving, or driving a vehicle in willful or wanton disregard for the safety of persons or property shall be consistent with the provisions of this code which govern those matters.

History: C. 1953, 41-6-43, enacted by L. Compiler's Notes.
1983, ch. 99, § 11.

Laws 1983, ch. 99, § 11 repealed old section 41-6-43 (L. 1979, ch. 242, § 12), relating to powers of local authorities, and enacted new section 41-6-43.

41-6-43.10. Negligent homicide — Death occurring within one year — Penalty — Revocation of license or privilege to drive. ~~(a)~~ (1) When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide.

~~(b)~~ (2) Any person convicted of negligent homicide shall be punished by imprisonment in the county jail for not more than one year or by fine of not less than \$100 nor more than \$1,000, or by both such fine and imprisonment.

~~(c)~~ (3) The department shall revoke the license or permit to drive and any non-resident operating privilege of any person convicted of negligent homicide.

History: C. 1953, 41-6-43.10, enacted by L.
1955, ch. 71, § 1; L. 1957, ch. 78, § 2; 1983, ch.
99, § 12.

41-6-44. Driving under the influence of alcohol or drug or with high blood alcohol content — Criminal punishment — Arrest without warrant — Suspension or revocation of license. ~~(a)~~ (1) It is unlawful and punishable as provided in subsection ~~(d)~~ of this section for any person with a blood alcohol content of .08% or greater by weight, or who is under the influence of alcohol; or ~~who is under the influence of~~ any drug or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely driving a vehicle, to drive or be in actual physical control of ~~any~~ a vehicle within this state. The fact that ~~any~~ a person charged with violating this section is or has been legally entitled to use alcohol or a drug ~~shall~~ does not constitute a defense against any charge of violating this section.

(b) In any criminal prosecution for a violation of subsection (a) of this section relating to driving a vehicle while under the influence of alcohol, or in any civil suit or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's blood, breath, or other bodily substance shall give rise to the following presumptions:

(1) If there was at that time 0.05 per cent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of alcohol;

(2) If there was at that time in excess of 0.05 per cent but less than 0.08 per cent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of alcohol, but such fact may be considered with other competent evidence in determining whether the person was under the influence of alcohol;

(3) If there was at the time 0.08 per cent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of alcohol;

(4) The foregoing provisions of this subsection shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the person was under the influence of alcohol.

(c) (2) Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred cubic centimeters of blood.

(d) (3) Every person who is convicted the first time of a violation of subsection (1) of this section shall be punished by imprisonment for not less than 60 days nor more than six months, or by a fine of \$299, or by both such fine and imprisonment; provided except that in if the event such person shall have has inflicted a bodily injury upon another as a proximate result of having operated said the vehicle in a negligent manner, he shall be punished by imprisonment in the county jail for not more than one year, and, in the discretion of the court, by a fine of not more than \$1,000. For the purposes of this section, the standard of negligence shall be is that of simple negligence, the failure to exercise that degree of care which ordinarily reasonable and prudent persons exercise under like or similar circumstances.

(e) (4) In addition to the penalties provided herein for in subsection (3), the court shall, upon a first conviction, impose a mandatory jail sentence of not less than ~~two~~ 48 consecutive hours nor more than 10 days with emphasis on serving in the drunk tank of the jail, or require the person to work in an alcohol rehabilitation facility a community-service work program for not less than two nor more than 10 days ~~or~~ and, in addition to the jail sentence or the work in the community-service work program, order the person to obtain treatment at an participate in an assessment and educational series at a licensed alcohol rehabilitation facility.

(f) (5) Upon a second conviction within five years after a first conviction under this section or under a local ordinance similar to this section adopted in compliance with subsection 41-6-43 (1), the court shall, in addition to the penalties provided for in subsection (e) (3), impose a mandatory jail sentence of not less than ~~two~~ 48 consecutive hours nor more than 10 days with emphasis on serving in the drunk tank of the jail, or require the person to work in an alcohol rehabilitation facility a community-service work program for not less than 10 nor more than 30 days ~~or~~ and, in addition to the jail sentence or the work in the community-service work program, order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility and the court may, in its discretion, order the person to obtain treatment at an alcohol rehabilitation facility. Upon a subsequent conviction within five years after a second conviction under this section

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or under a local ordinance similar to this section adopted in compliance with subsection 41-6-43 (1), the court shall, in addition to the penalties provided for in subsection (e) (3), impose a mandatory jail sentence of not less than 30 nor more than 90 days with emphasis on serving in the drunk tank of the jail, or require the person to work in an alcohol rehabilitation facility, a community-service work project for not less than 30 nor more than 90 days plus and, in addition to the jail sentence or work in the community-service work program, order the person to obtain treatment at an alcohol rehabilitation facility. No portion of any sentence imposed pursuant to under subsection (e) (3) shall be suspended ~~nor shall~~ and the convicted person shall not be eligible for parole or probation until such time as the any sentence provided for in this subsection imposed under this section has been served. Probation or parole resulting from a conviction for a violation of this section or a local ordinance similar to this section adopted in compliance with subsection 41-6-43 (1) shall not be terminated and the department shall not reinstate any license suspended or revoked as a result of such conviction, if it is a second or subsequent such conviction within five years, until and unless the convicted person has furnished evidence satisfactory to the department that all fines and fees, including fees for restitution, and rehabilitation costs, assessed against the person, have been paid.

(6) The provisions in subsections (4) and (5) that require a sentencing court to order a convicted person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility, obtain, in the discretion of the court, treatment at an alcohol rehabilitation facility, or obtain, mandatorily, treatment at an alcohol rehabilitation facility, or do any combination of those things, apply to a conviction for a violation of section 41-6-45 that qualifies as a prior offense under subsection (7), so as to require the court to render the same order regarding education or treatment at an alcohol rehabilitation facility, or both, in connection with a first, second, or subsequent conviction under section 41-6-45 that qualifies as a prior offense under subsection (7), as he would render in connection with applying respectively, the first, second, or subsequent conviction requirements of subsections 41-6-44(4) and (5). For purposes of determining whether a conviction under section 41-6-45 which qualified as a prior conviction under subsection (7), is a first, second, or subsequent conviction under this subsection, a previous conviction under either section 41-6-44 or 41-6-45 is deemed a prior conviction. Any alcohol rehabilitation program and any community-based or other education program provided for in this section must be approved by the department of social services.

(g) (7) (a) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of section 41-6-45 or of an ordinance enacted pursuant to subsection 41-6-43(b) in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense. The statement shall be an offer of proof of the facts which show whether or not there was consumption of alcohol or drugs, or a combination of both, by the defendant, in connection with the offense.

(b) The court shall advise the defendant prior to the acceptance of before accepting the plea offered pursuant to under this subsection of the consequences of a violation of section 41-6-45 as follows: If the court accepts the defendant's plea of guilty or no contest to a charge of violating section 41-6-45, and the prosecutor states for the record that there was consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense, the resulting conviction shall be a prior offense for the purposes of paragraph (f) subsection (5) of this section.

(c) The court shall notify the department of motor vehicles of each conviction of section 41-6-45, which shall be a prior offense for the purposes of paragraph (f) subsection (5) of this section.

(+) (8) A peace officer may, without a warrant, arrest a person for a violation of this section when ~~such~~ the violation is coupled with an accident or collision in which ~~such~~ the person is involved and when ~~such~~ the violation has, in fact, been committed, although not in his presence, if the officer has reasonable cause to believe that the violation was committed by ~~such~~ the person.

(+) (9) The department of public safety shall ~~revoke~~ suspend for a period of 90 days the operator's ~~or chauffeur's~~ license of any person convicted for the first time under subsection (1) of this section, and shall revoke for one year the license of any person otherwise convicted under this section, except that the department may subtract from any suspension period the number of days for which a license was previously suspended under section 41-2-19.6 if the previous suspension was based on the same occurrence which the record of conviction is based upon.

History: L. 1941, ch. 52, § 34; C. 1943, 57-7-111; L. 1949, ch. 65, § 1; 1957, ch. 75, § 1; 1967, ch. 88, § 2; 1969, ch. 107, § 2; 1977, ch. 268, § 3; 1979, ch. 243, § 1; 1981, ch. 63, § 2; 1982, ch. 46, § 1; 1983, ch. 99, § 13; 1983, ch. 103, § 1; 1983, ch. 183, § 33.

Compiler's Notes.

Laws 1983, ch. 183, discontinuing separate classification for chauffeur's license, is effective January 1, 1984.

The 1982 amendment increased the minimum term in subsec. (d) from 30 to 60 days; deleted "not less than \$100 nor more than" before "\$299" in subsec. (d); inserted subsec. (e); redesignated former subsec. (e) as (f); increased the period of work from not less than two nor more than 10 days to not less

than 10 nor more than 30 days in the first sentence of subsec. (f); added "or to obtain treatment at an alcohol rehabilitation facility" to the first sentence of subsec. (f); increased the periods in the second sentence of subsec. (f) from not less than 10 nor more than 30 days to not less than 30 nor more than 90 days; added "plus obtain treatment at an alcohol rehabilitation facility" to the second sentence of subsec. (f); inserted subsec. (g); redesignated former subsecs. (f) and (g) as (h) and (i).

Effective Date.

Section 2 of Laws 1982, ch. 46 provided that the act should take effect upon approval. Approved February 19, 1982.

41-6-44.2. Repealed.

Repeal.

Section 41-6-44.2 (L. 1973, ch. 80, § 2; 1982 (2nd S.S.), ch. 4, § 2), relating to driving with

blood alcohol content of .10% or higher, was repealed by Laws 1983, ch. 99, § 21.

41-6-44.3. Standards for chemical breath analysis — Evidence. (1) The commissioner of public safety shall establish standards for the administration and interpretation of chemical analysis of a person's breath including standards of training.

(2) In any action or proceeding in which it is material to prove that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or driving with a blood alcohol content of ~~.10% or greater~~ statutorily prohibited, documents offered as memoranda or records of acts, conditions or events to prove that the analysis was made and accuracy of the instrument were made pursuant to used was accurate, according to standards established in subsection (1) shall be admissible if:

(a) The judge finds that they were made in the regular course of the investigation at or about the time of the act, condition or event; and

(b) The source of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness.

(3) If the judge finds that the standards established under subsection (1) and the ~~provisions~~ conditions of subsection (2) have been met, there ~~shall be~~ is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

History: C. 1953, 41-6-44.3, enacted by L. 1979, ch. 243, § 2; L. 1983, ch. 99, § 14.

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41-6-44.5. Admissibility of chemical test results in actions for driving under the influence or with a prohibited blood alcohol content — Weight. (1) In any action or proceeding in which it is material to prove that a person was driving or in actual physical control of a vehicle while under the influence of alcohol or with a blood alcohol content of ~~10% or greater~~ statutorily prohibited, the results of a chemical test or tests as authorized in section 41-6-44.10 shall be admissible as evidence.

(2) If the chemical test was taken within two hours of the alleged driving or actual physical control, the blood alcohol level of the person at the time of the alleged driving or actual physical control shall be presumed to be not less than the level of the alcohol determined to be in the blood by the chemical test.

(3) If the chemical test was taken more than two hours after the alleged driving or actual physical control, the test result shall be admissible as evidence of the person's blood alcohol level at the time of the alleged driving or actual physical control, but the trier of fact shall determine what weight shall be given to the result of the test.

(4) The foregoing provisions of this section shall not be construed as limiting the consideration or application by the trier of fact of the presumptions set forth in section ~~41-6-44~~, nor shall they prevent a court from receiving otherwise admissible evidence as to a defendant's blood alcohol level at the time of the alleged driving or actual physical control.

History: C. 1953, 41-6-44.5, enacted by L. 1979, ch. 243, § 3; L. 1983, ch. 99, § 15.

41-6-44.8. Municipal attorneys authorized to prosecute for driving while license suspended or revoked. Alleged violations of section 41-2-28, which consist of the person driving while his operator's or chauffeur's license is suspended or revoked for a violation of section 41-6-44, a local ordinance which complies with the requirements of section 41-6-43, section 41-6-44.10, section 76-5-207, or a criminal prohibition that the person was charged with violating as a result of a plea bargain after having been originally charged with violating one of more of those sections or ordinances, may be prosecuted by attorneys of cities and towns as well as by prosecutors who are empowered elsewhere in this code to prosecute those alleged violations.

History: C. 1953, 41-6-44.8, enacted by L. 1983, ch. 102, § 1.

attorneys of cities and towns to prosecute those alleged violations.

This act enacts section 41-6-44.8, Utah Code Annotated 1953. — Laws 1983, ch. 102.

Title of Act.

An act relating to prosecution of alleged violations of section 41-2-28; empowering city

41-6-44.10. Implied consent to chemical tests for alcohol or drug — Refusal to allow — Warning, report, revocation of license — Court action on revocation — Person incapable of refusal — Results of test available — Who may give test — Evidence. ~~(a)~~ (1) Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug as detailed in section 41-6-44, provided that such so long as the test is or tests are administered at the direction of a peace officer having grounds to believe such that person to have been driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and

any drug as detailed in section 41-6-44. A peace officer shall determine which of the aforesaid tests shall be administered.

No person; who has been requested pursuant to under this section to submit to a chemical test or tests of his breath, blood, or urine, shall have the right to select the test or tests to be administered. The failure or inability of a peace officer to arrange for any specific test shall is not be a defense with regard to taking a test requested by a peace officer ~~nor~~ and it shall not be a defense in any criminal, civil or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(b) (2) If ~~such~~ the person has been placed under arrest and has thereafter been requested by a peace officer to submit to any one or more of the chemical tests provided for in subsection (a) (1) of this section and refuses to submit to ~~such~~ the chemical test or tests, ~~such~~ the person shall be warned by a peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of his license to operate a motor vehicle. Following this warning, unless ~~such~~ the person immediately requests the chemical test or tests as offered by a peace officer be administered, no test shall be given and a peace officer shall submit a sworn report, within five days after the date of the arrest, that he had grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited or while under the influence of alcohol, or any drug or combination of alcohol and any drug as detailed in section 41-6-44 and that the person had refused to submit to a chemical test or tests as set forth in subsection (a) (1) of this section. Within 20 days after receiving a sworn report from a peace officer to the effect that ~~such~~ the person has refused a chemical test or tests the department shall notify ~~such~~ the person of a hearing before the department. If at ~~said~~ that hearing the department determines that the person was granted the right to submit to a chemical test or tests and refused to submit to ~~such~~ the test or tests, or if ~~such~~ the person fails to appear before the department as required in the notice, the department shall revoke for one year his license or permit to drive. The department shall also assess against the person, in addition to any fee imposed under subsection 41-2-8 (7), a fee of \$25, which must be paid before the person's driving privilege is reinstated, to cover administrative costs, and which fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this subsection that the revocation was not proper. Any person whose license has been revoked by the department under the provisions of this section shall have the right to file a petition within 30 days thereafter for a hearing in the matter in the district court in the county in which ~~such~~ the person shall reside resides. ~~Such~~ The court is hereby vested with jurisdiction, and it shall be its duty to set the matter for trial de novo upon 10-days' written notice to the department and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner's license is subject to revocation under the provisions of this act chapter.

(c) (3) Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any such chemical test or tests shall be deemed not to have withdrawn the consent provided for in subsection (a) (1) of this section, and the test or tests may be administered whether such person has been arrested or not.

(d) (4) Upon the request of the person who was tested, the results of such test or tests shall be made available to him.

(e) (5) Only a physician, registered nurse, practical nurse or person authorized under subsection 26-1-30 (19), acting at the request of a peace officer can withdraw blood for the purpose of determining the alcoholic or drug content therein. This limitation shall not apply to the taking of a urine or breath specimen. Any physician, registered nurse, practical nurse or person authorized under subsection 26-1-30 (19) who, at the direction of a peace officer, draws a sample of blood from

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any person whom a peace officer has reason to believe is driving in violation of this chapter, or hospital or medical facility at which such sample is drawn, shall be immune from any civil or criminal liability arising therefrom, provided such test is administered according to standard medical practice.

(f) (6) The person to be tested may, at his own expense, have a physician of his own choosing administer a chemical test in addition to the test or tests administered at the direction of a peace officer. The failure or inability to obtain such additional test shall not affect admissibility of the results of the test or tests taken at the direction of a peace officer, nor preclude nor delay the test or tests to be taken at the direction of a peace officer. Such additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(g) (7) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested shall not have the right to consult an attorney nor shall such a person be permitted to have an attorney, physician or other person present as a condition for the taking of any test.

(h) (8) If a person under arrest refuses to submit to a chemical test or tests under the provisions of this section, evidence of refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of alcohol or any drug or combination of alcohol and any drug.

History: C. 1953, 41-6-44.10, enacted by L. 1981, ch. 126, § 43; L. 1983, ch. 99, § 16.

Actual physical control.

To establish actual physical control of a vehicle for purposes of this section, it is unnecessary to show actual intent to control the vehicle; intent to control a vehicle may be inferred from the performance of those acts which constitute actual physical control. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

There was an adequate showing that motorist was in actual physical control of a motor vehicle where motorist occupied the driver's position behind the steering wheel of a motor vehicle with possession of the ignition key and with apparent ability to start and move the vehicle; fact that vehicle was blocked by a fence and another vehicle and could be moved only a few feet did not preclude a finding of actual physical control. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

The "actual physical control" language of this section should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive

occupants. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

Proceeding to revoke license for failure to submit to test.

Driver's license revocation proceeding for failure to submit to a requested chemical test requires proof only by a preponderance of the evidence. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

At a proceeding to revoke a driver's license for failure to submit to a requested chemical test, department of public safety has the burden to show arrested person was driving or in actual physical control of a motor vehicle in addition to showing that the arresting officer had grounds to believe that the arrested person was under the influence; the same evidentiary burden must be met in a trial de novo in the district court. *Garcia v. Schwendiman* (1982) 645 P 2d 651.

Law Reviews.

Hansen v. Owens — Expansion of the Privilege against Self-Incrimination to Unknown Limits, 1981 Utah L. Rev. 447.

41-6-44.30. Seizure and impoundment of vehicles by category I peace officers. The legislature finds that it is contrary to the safety of the public to leave vehicles unattended on public roads.

(1) If a category I peace officer arrests or cites the driver of a vehicle for violating sections 41-6-43, 41-6-44, 41-6-44.2, or 41-6-44.10, the officer shall seize and impound the vehicle.

(2) Any such officer who impounds a vehicle under this section shall remove, or cause the vehicle to be removed, to the nearest accessible state impound yard that meets the standards set by rule by the state department of motor vehicles,

STATE OF UTAH
BEFORE THE DEPARTMENT OF PUBLIC SAFETY
OFFICE OF DRIVER LICENSE SERVICES

SUBPOENA

In the Matter of the
Driving Privileges of:

Defendant

)
)
) File No. _____
)

) All expenses incurred by the
) service of this subpoena will
) be paid by the defendant.

THE STATE OF UTAH Sends Greetings to _____
at _____.

IN THE ABOVE MATTER AND BY AUTHORITY OF UTAH CODE ANNOTATED,
Title 41, as amended, WE COMMAND YOU, That all singular business and
excuses being laid aside, you appear and attend before a Hearing Officer
as assigned by the Department of Public Safety of the State of Utah,
at the following location: _____,
on _____ the _____ day of _____, A.D. 19____, at _____
o'clock _____ .M. then and there to testify in the above-entitled matter now
pending before the Department, on behalf of _____
for the following reason _____
and that you bring with you and then and there produce the following des-
cribed documents, reports, books, and records, to-wit: _____
_____. Disobedience and failure
to attend may be punished as a contempt upon request to the Courts.

WITNESS: THE DEPARTMENT OF PUBLIC SAFETY, In and for the
STATE OF UTAH this _____ day of _____, A.D. 19____.

Authorized Signature _____

DRIVER LICENSE SERVICES