

**Unofficial Draft Copy**

As of: June 28, 2010 (1:43pm)

LC1j04

\*\*\*\* Bill No. \*\*\*\*

Introduced By \*\*\*\*\*

By Request of the Law and Justice Interim Committee

A Bill for an Act entitled: "An Act revising the laws relating to alcohol or drug related driving offenses; providing that a peace officer may request a search warrant to obtain a blood sample for chemical testing if an arrested person refuses to submit to testing; providing for the appointment of standing masters in the 1st judicial district to handle search warrant applications during days and hours that courts are not in session; amending sections 46-5-220, 46-5-224, 61-8-402, 61-8-404, and 61-8-405, MCA; and providing an immediate effective date and an applicability date."

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

NEW SECTION. **Section 1. Nonjudicial hours -- search warrants -- appointment of standing master.** (1) The judges of the district court of the 1st judicial district shall appoint one or more standing masters to receive applications for search warrants on legal holidays, on nonjudicial days, and during hours that courts are not in session. The authority of a standing master appointed under this section to issue search warrants extends to all parts of the state.

(2) An application for a search warrant may be made to a standing master appointed under this section during the time

**Unofficial Draft Copy**

As of: June 28, 2010 (1:43pm)

LC1j04

periods provided in subsection (1).

(2) The application for and issuance of search warrants under this section shall comply with the provisions of Title 46, chapter 5, part 2.

(3) A standing master appointed under this section must meet the qualifications of a justice of the peace under 3-10-202 and be a resident of the 1st judicial district.

(4) All proceedings before a special master under this section must be conducted in a suitable room in the courthouse, subject to the provisions of Title 46 relating to the use of two-way electronic audio-visual communication. All records of a standing master appointed under this section must be kept in accordance with the rules governing the district court and 46-5-222, as applicable.

(5) The expenses of a standing master appointed under this section shall be paid AS PROVIDED IN 3-5-601.

**Section 2.** Section 46-5-220, MCA, is amended to read:

**"46-5-220. Authority to issue search warrant.** (1) A peace officer, the city or county attorney, or the attorney general may apply for a search warrant.

(2) A search warrant may be issued by:

(a) a city or municipal court judge or justice of the peace within the judge's geographical jurisdiction; or

(b) a district court judge or a standing master appointed under [section 1] within this state."

{Internal References to 46-5-220: None.}

# Unofficial Draft Copy

As of: June 28, 2010 (1:43pm)

LC1j04

**Section 3.** Section 46-5-224, MCA, is amended to read:

**"46-5-224. What may be seized with search warrant.** A warrant may be issued under this section to search for and seize any:

(1) evidence, including blood samples that may yield evidence of any measured amount or detected presence of alcohol or drugs in a person's body when subjected to a chemical test as contemplated in 61-8-402 or 61-8-404;

(2) contraband; or

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

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

NEW SECTION. **Section 4. Refusal to submit to test --**

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

**Unofficial Draft Copy**

As of: June 28, 2010 (1:43pm)

LC1j04

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

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

(4) A PERSON'S RIGHT TO REFUSE TO SUBMIT TO A TEST UNDER 61-8-402(4) DOES NOT APPLY TO THIS SECTION. THE PROVISIONS OF THIS SECTION DO NOT PREVENT LAW ENFORCEMENT FROM OBTAINING TESTS WITHOUT A WARRANT AS OTHERWISE AUTHORIZED BY LAW.

(5) A SUBSEQUENT CONSENT TO A TEST THAT WAS INITIALLY REFUSED DOES NOT PREVENT THE ISSUANCE OF A SEARCH WARRANT UNDER THIS SECTION.

**Section 5.** Section 61-8-402, MCA, is amended to read:

**"61-8-402. Blood Implied consent -- blood or breath tests for alcohol, drugs, or both -- refusal to submit to test --**

**administrative license suspension.** (1) A person who operates or is in actual physical control of a vehicle upon ways of this state open to the public is considered to have given consent to a test or tests of the person's blood or breath for the purpose of determining any measured amount or detected presence of alcohol or drugs in the person's body.

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

(i) the officer has reasonable grounds to believe that the person has been driving or has been in actual physical control of

**Unofficial Draft Copy**

As of: June 28, 2010 (1:43pm)

LC1j04

a vehicle upon ways of this state open to the public while under the influence of alcohol, drugs, or a combination of the two and the person has been placed under arrest for a violation of 61-8-401;

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

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

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

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

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

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

(4) If an arrested person refuses to submit to one or more tests requested and designated by the officer as provided in subsection (2), the refused test or tests may not be given, ~~but~~ the except as provided in 61-8-405(6) or pursuant to a search warrant. Upon refusal, the officer shall, on behalf of the department, immediately seize the person's driver's license. The peace officer shall immediately forward the license to the department, along with a report certified under penalty of law

**Unofficial Draft Copy**

As of: June 28, 2010 (1:43pm)

LC1j04

stating which of the conditions set forth in subsection (2) (a) provides the basis for the testing request and confirming that the person refused to submit to one or more tests requested and designated by the peace officer. Upon receipt of the report, the department shall suspend the license for the period provided in subsection (6).

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

(6) (a) Except as provided in subsection (6) (b), the following suspension periods are applicable upon refusal to submit to one or more tests:

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

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

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

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

# Unofficial Draft Copy

As of: June 28, 2010 (1:43pm)

LC1j04

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

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

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

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

(10) This section does not apply to blood and breath tests, samples, and analyses used for purposes of medical treatment or

**Unofficial Draft Copy**

As of: June 28, 2010 (1:43pm)

LC1j04

care of an injured motorist or, related to a lawful seizure for a suspected violation of an offense not in this part, or performed pursuant to a search warrant."

{Internal References to 61-8-402:

ok 61-2-107	ok 61-5-212	ok 61-5-212	ok 61-5-218
ok 61-8-101*	ok 61-8-409	ok 61-8-409	ok 61-8-409
ok 61-8-409	o 61-8-409	ok 61-8-733}	

**Section 6.** Section 61-8-404, MCA, is amended to read:

**"61-8-404. Evidence admissible -- conditions of admissibility.** (1) Upon the trial of a criminal action or other proceeding arising out of acts alleged to have been committed by a person in violation of 61-8-401, 61-8-406, 61-8-410, or 61-8-805:

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

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



# Unofficial Draft Copy

As of: June 28, 2010 (1:43pm)

LC1j04

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

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

(c) a report of the facts and results of a physical, psychomotor, or physiological assessment of a person is admissible in evidence if it was made by a person trained by the department or by a person who has received training recognized by the department.

(2) If the person under arrest refused to submit to one or more tests ~~as provided in this section~~ under 61-8-402, whether or not a sample was collected pursuant to 61-8-405(6) or a search warrant, proof of refusal is admissible in any 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 vehicle upon the ways of this state open to the public, while under the influence of alcohol, drugs, or a combination of alcohol and drugs. The trier of fact may infer from the refusal that the person was under the influence. The inference is rebuttable.

(3) The provisions of this part do not limit the introduction of any other competent evidence bearing on the question of whether the person was under the influence of

# Unofficial Draft Copy

As of: June 28, 2010 (1:43pm)

LC1j04

alcohol, drugs, or a combination of alcohol and drugs."

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

**Section 7.** Section 61-8-405, MCA, is amended to read:

**"61-8-405. Administration of tests.** (1) Only a physician or registered nurse, or other qualified person acting under the supervision and direction of a physician or registered nurse, may, at the request of a peace officer, withdraw blood for the purpose of determining any measured amount or detected presence of alcohol, drugs, or any combination of alcohol and drugs in the person. This limitation does not apply to the sampling of breath.

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

(3) Upon the request of the person tested, full information

# Unofficial Draft Copy

As of: June 28, 2010 (1:43pm)

LC1j04

concerning any test given at the direction of the peace officer must be made available to the person or the person's attorney.

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

(5) The department in cooperation with any appropriate agency shall adopt uniform rules for the giving of tests and may require certification of training to administer the tests as considered necessary.

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

{*Internal References to 61-8-405:*

*ok 23-2-535*

*ok 61-8-101*

*ok 61-8-404*

*ok 61-8-409*

*ok 61-8-807*

*ok 67-1-211*}

## NEW SECTION. **Section 8. {standard} Codification**

**instruction.** (1) [Section 1] is intended to be codified as an integral part of Title 3, chapter 5, part 1, and the provisions of Title 3, chapter 5, part 1, apply to [section 1].

(2) [Section 4] is intended to be codified as an integral part of Title 61, chapter 8, part 4, and the provisions of Title

# Unofficial Draft Copy

As of: June 28, 2010 (1:43pm)

LC1j04

61, chapter 8, part 4, apply to [section 4].

NEW SECTION. **Section 9. {standard} Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 10. {standard} Applicability.** [This act] applies to violations of Title 61, chapter 8, part 4, that occur and to applications for search warrants that are made on or after [the effective date of this act].

- END -

{Name : Valencia Lane  
Title : Staff Attorney  
Agency : LSD  
Phone : 444-4025}