

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2165

2007 SENATE TRANSPORTATION

SB 2165

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2165

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: January 25, 2007

Recorder Job Number: 1917

Committee Clerk Signature

Jody Hauge

Minutes:

Chairman Gary Lee opened the hearing on SB 2165 relating to the chemical test of a driver in an accident. Five committee members were present and Senator Andrist was absent.

Senator Heitkamp introduced the bill and told why he was sponsoring it. An incident in his district prompted him to sponsor this bill that would require a blood test to determine the alcohol concentration or the presence of other drugs or substances

Larry Wayman, Ransom County, testified in support of SB 2165. He told the committee that in a two week time period his family had two accidents both involving the same person running into members of his family. The first accident involved his adult son who was traveling with a stock trailer and he was hit by a driver. In his observation the driver was "wired" but the Sheriff didn't do anything even after the driver commented he didn't have insurance. Two weeks later the same driver hit Mr. Wayman and his grandson. His thirteen year old grandson died in the accident. The State Trooper said that there would be a blood test on the driver. Two days later Mr. Wayman called the Sheriff to get the results of the blood test and was told by the Sheriff that a blood test was not taken. The deputy had walked around the driver and didn't smell anything so decided he did not need a blood test. The blood test was never ordered. Mr. Wayman believes his grandson would be alive today if a blood test would have been taken

at the first accident scene and if the driver at that time would have been asked about his insurance. He should not have even been driving. Mr. Wayman feels that SB 2165 would help save some lives and asked that the committee vote in favor of SB 2165.

Lynn Heinert, North Dakota Department of Transportation spoke in support of SB 2165.

Senator Potter asked how they would decide who should be tested.

Mr. Heinert said that they would like to see all drivers in accidents tested.

Senator Nething asked if the investigating officer makes the decision. And he asked about override and if this should be covered

Mr. Heinert said it should be covered the way it is written but the local officials have to follow it.

Senator Fiebiger said that federal rules already cover the testing of commercial drivers and railroad engineers.

Fred Wooten, law enforcement also signed the registration in support of SB 2165.

There was no opposition and no neutral testimony.

Senator Lee closed the hearing on SB 2165.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2165

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: January 25, 2007

Recorder Job Number 2316

Committee Clerk Signature

Jody Hauge

Minutes:

Senator Gary Lee called the committee to order to discuss SB 2165 on January 25, 2007, at 10:35AM.

Senator Nething commented that there had been no opposition testimony to SB 2165.

Senator Fiebiger thought that this bill would be a good start.

Senator Potter wondered if the words probable cause made the wording in the bill toothless and if should be stronger language. Discussion followed on the testimony and the wording.

Senator Fiebiger said the word probable cause was strong.

Senator Bakke moved a do pass of SB 2165 and refer it to appropriations.

Senator Fiebiger seconded the motion.

The clerk took the roll. 5-0-1 Senator Andrist was absent.

Senator Bakke will carry the bill.

FISCAL NOTE
Requested by Legislative Council
03/05/2007

Amendment to: SB 2165

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$7,300		\$7,665	
Appropriations			\$7,300		\$7,665	

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. Bill and fiscal impact summary: *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill requires law enforcement to obtain blood, breath, saliva or urine from the driver in a serious accident to determine the alcohol concentration or the presence of other drugs or substances.

B. Fiscal impact sections: *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Currently, law enforcement may, but is not required, to compel the driver in a serious accident to provide blood, breath, saliva or urine to test for alcohol, drugs or other substances.

This bill would result in additional samples to be tested by the Crime Lab of about 40 per biennium. In addition, temporary assistance would be needed to provide current staff with some help in working with the samples.

Without additional staff, passage of this bill will result in a 10% per year increase in the turnaround time for these samples, which will extend the period in which a death certificate can be issued to approximately 59 days. This would delay action to be taken as a result of the death.

As amended, the bill's fiscal effect does not change.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

N/A

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Expenditures include temporary assistance and laboratory supplies. As amended, the fiscal impact of this bill remains the same.

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The Executive Recommendation did not include any funding for this purpose.

As amended, the fiscal impact of this bill remains the same.

Name:	Kathy Roll	Agency:	Office of Attorney General
Phone Number:	328-3622	Date Prepared:	03/05/2007

FISCAL NOTE
Requested by Legislative Council
01/22/2007

Bill/Resolution No.: SB 2165

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$7,300		\$7,665	
Appropriations			\$7,300		\$7,665	

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill requires law enforcement to obtain blood, breath, saliva or urine from the driver in a serious accident to determine the alcohol concentration or the presence of other drugs or substances.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Currently, law enforcement may, but is not required, to compel the driver in a serious accident to provide blood, breath, saliva or urine to test for alcohol, drugs or other substances.

This bill would result in additional samples to be tested by the Crime Lab of about 40 per biennium. In addition, temporary assistance would be needed to provide current staff with some help in working with the samples.

Without additional staff, passage of this bill will result in a 10% per year increase in the turnaround time for these samples, which will extend the period in which a death certificate can be issued to approximately 59 days. This would delay action to be taken as a result of the death.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

N/A

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

Expenditures include temporary assistance and laboratory supplies.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The Executive Recommendation did not include any funding for this purpose.

Name:	Kathy Roll	Agency:	Office of Attorney General
Phone Number:	328-3622	Date Prepared:	01/24/2007

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number 2165

Action Taken do pass refer to Appropriations

Motion Made By Senator Bakke Seconded By Senator Fiebiger

Senators	Yes	No	Senators	Yes	No
Chairman Gary Lee	✓		Senator JoNell Bakke	✓	
V Ch John Andrist			Senator Tom Fiebiger	✓	
Senator Dave Nething	✓		Senator Tracy Potter	✓	

Total (Yes) 5 No 0

Absent 1

Floor Assignment Senator Bakke

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2165: Transportation Committee (Sen. G. Lee, Chairman) recommends DO PASS and BE REREFERRED to the Appropriations Committee (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2165 was rereferred to the Appropriations Committee.

2007 SENATE APPROPRIATIONS

SB 2165

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2165

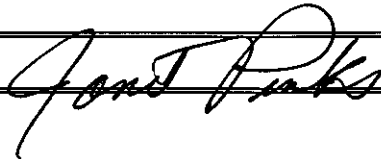
Senate Appropriations Committee

Check here for Conference Committee

Hearing Date: 01/31/07

Recorder Job Number: 2355

Committee Clerk Signature



Minutes:

Chairman Holmberg opened the hearing on SB 2165, welcoming the students representing Mohall, Lansford and Sherwood.

Senator Robert S. Eberle, District 28, Lehr, introduced SB 2165, indicating he had signed on to and supports the bill because of Senator Heitkamp's influence.

Senator Robinson indicated Senator Heitkamp had discussed SB 2165 and indicated events that led up to the introduction of the bill.

Senator Mathern indicated that perhaps this should be referred to the Attorney General's budget since it is a law enforcement issue. He also wondered if it had been heard by the policies committee. The response was it had been heard by transportation.

Chairman Holmberg indicated the bill was straight forward enough.

Senator Robinson moved a DO PASS on SB 2165, Senator Fischer seconded.

Senator Bowman stated that if this is mandatory and we are going to pay for it that if a party is found guilty, they should pay for the test. In response, another bill was discussed as an analogy. Additional discussion took place.

A roll call vote was taken resulting in 13 yes, 0 no, and 1 absent. The motion passed.

Senator Bakke will carry the bill.

Chairman Holmberg closed the hearing on SB 2165.

Date: 1/31/07
Roll Call Vote #:

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2165

Senate Appropriations Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Robinson Seconded By Fischer

Senators	Yes	No	Senators	Yes	No
Senator Ray Holmberg, Chrm	✓		Senator Aaron Krauter	✓	
Senator Bill Bowman, V Chrm	✓		Senator Elroy N. Lindaas	✓	
Senator Tony Grindberg, V Chrm	✓		Senator Tim Mathern	✓	
Senator Randel Christmann	✓		Senator Larry J. Robinson	✓	
Senator Tom Fischer	✓		Senator Tom Seymour	✓	
Senator Ralph L. Kilzer	✓		Senator Harvey Tallackson	✓	
Senator Karen K. Krebsbach	✓				
Senator Rich Wardner	✓				

Total (Yes) # 13 No 0

Absent B 21

Floor Assignment Bakke TRN

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
January 31, 2007 10:56 a.m.

Module No: SR-20-1615
Carrier: Bakke
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2165: Appropriations Committee (Sen. Holmberg, Chairman) recommends DO PASS
(13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2165 was placed on the
Eleventh order on the calendar.

2007 HOUSE TRANSPORTATION

SB 2165

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2165

House Transportation Committee

Check here for Conference Committee

Hearing Date: 02-23-2007

Recorder Job Number: 3736

Committee Clerk Signature

Lisa M Thomas

Minutes:

Chairman Weisz opened the hearing on SB 2165. SB 2165 relates to chemical test of a driver in an accident.

Senator Heitkamp introduced the bill.

Senator Heitkamp: This is a companion bill to the one that relates to proof of insurance.

This bill deals with what law enforcement does in terms of an accident with serious bodily injury or death. What this bill does is it says that they are going to test blood. There were some questions raised. I think it needs to be stated. After these bills were heard in the Senate, this has been a highly visible case in the Red River Valley. It needs to be pointed out that the highway patrol was right on this all along. It also needs to be pointed out that there were questions in regards to how the local sheriff might have handled this. It is legitimate, that sheriff is no longer in office. But there were questions on how he might have handled it and that is why the bill is here. As I said when Larry called me and said I want you to put this bill in, I assumed that any trooper would do that anyway. In this particular case, the county stepped in and it didn't happen. I think he has a legitimate concern and he certainly has the right after the story you heard yesterday and what you are going to hear today. I would think that for that piece of mind that's why this bill is a good bill. Most law enforcement will say that they would

do that anyways. In certain instances that didn't happen. Something else needs to be mentioned too. I got an email from a teacher in the Enderlin school district where these children knew this young man that Larry is about to talk about. These girls were in the vehicle with him and it has really changed their lives. I sent an email back to them saying that these bills are not about fault with those girls and that they need closure on the accident as well as do Larry. Hopefully this will do something positive in the future with something bad that has happened. That is why I sponsored the bill.

Rep. Weisz: As I read it, all we are really doing, because the police already have the ability to compel someone now, this just mandates it, right?

Sen. Heitkamp: Yes. I thought about that. We debated on the phone (he and Larry Wayman). He wanted this bill this way and I thought about it in terms of you and I getting in an accident this afternoon and a trooper pulls up and he knows that there is no problem with either one of us, do you then need to be in a position where one of us or both of us have to go get blood drawn? I thought that is a pretty small price to pay.

Rep. Weisz: I guess now days that is not such a big thing if you are in an accident.

Rep. Brandenburg spoke in support of the bill.

Rep. Brandenburg: I am also here to support SB 2165. I really look at it as this is about making the roads safer and taking people who are impaired drivers that have drank too much or are on drugs getting them off of the road, so when there is an accident they are not out there causing another accident. I support this bill.

Larry Wayman spoke in support of the bill.

Wayman: I still have to go back to April 24th that is when it all started in 2006. I got a call at 7:15 in the morning from my son and said that this kid comes flying at me and hit me and I don't know if he's injured so I called 911 for him and I went out there. When I got there, my

son's vehicle had been and the trailer that he was pulling. The kid that hit him was going so fast that it took almost half to three-quarters of a mile for him to even stop. When the deputy sheriff came up there the kid jumped out of the pickup and he started rambling on and he was wired. The deputy kept telling him to shut up. He said "I'm sorry I caused the accident, I blacked out, I fell asleep and I don't have any insurance." They told him to shut up and get into his vehicle. Then he got my son into the vehicle. A few months later my son comes back and I thought he took the kid over to Lisbon and tested him and I talked to my son and what the deputy did was he called the father and took the kid straight home. All he did was a couple of days later, he wrote the kid up for undue care. My son was kind of angry about that and like I said he called the state trooper and talked to them and in the mean time the kid was just driving around again just raising hell. Less than a couple of weeks later I went to Enderlin school to pick my son up (I call him my son, but he is my grandson) I have raised him. We started heading out on the country road toward Shelbing and that is when all of this happened. I found out later, after all of this, I questioned the State's Attorney about what was going on and I didn't find out too much until my family and I were sitting in the court room where he was charged with vehicular homicide and four counts of reckless endangerment and Judge Gross asked the State's Attorney right out what I had been trying to find out. What were the results of the blood test? All he could say was that the highway patrol ordered it and the Sheriff stopped it because he went by the kid and couldn't smell drugs or alcohol so he deemed it not necessary. I thought this is ridiculous. This kid was known to use drugs and drink and he did what they call "Get high and fly". He didn't go to school. He was out just raising hell on vehicles. Like I said that was a hard way to find out that twice that kid skated on us. He should have been tested and would have been stopped had the local law enforcement done their job. The reason I am doing this is because as I was laying there in that vehicle holding Joe and

watched him die in my arms, I said that this can't happen to anybody else. This is not right. We need to get these people off of the road and stop them before they kill and injure other innocent children. We need to prevent anybody else from going through the hell that I've had to of losing a son, it's hard. It should be mandatory. A lot of people skate on that. The judge cannot do anything because the blood test had been stopped. Without any of this his hands are tied.

Lynn Heinert, DOT, spoke in support of the bill.

Heinert: I am before you this morning to let you know that the department is in favor of this bill. With that, if you have any questions I will try to answer them.

There were no questions from the committee.

There was no further support for the bill and there was no opposition.

The hearing was closed.

Rep. Kelsch moved a DO PASS. Rep. Delmore seconded.

Rep. Gruchalla: The law isn't going to change that the officer at the scene has to have probable cause to believe that the driver is driving under the influence of alcohol. That won't change. It just changes the wording from "may" to "shall". So really, in a lot of cases the officer still has the discretion to discover with the odor of alcohol or a guy is under the influence of drugs. I think we are still going to have a problem with this section. Especially in the drug area. You can't always smell drugs and some you can't tell by looking at the. If it's a commercial driver it's different. In an ideal world this should be that if you are in a serious injury accident or fatality, then you go get a test. This is better probably than what we have but it's not the final answer.

Rep. Kelsch: You know I think that if law enforcement would have known that if we would have had this on the books and you had a young person involved in this accident that was

rambling and you know seemed as though they were out of control regardless of whether you smelled something or not, I think that the law enforcement probably would have erred on the side you know of I'm going to get them in for a blood test rather than just "may" I think when it says "shall" you know I think that law enforcement in cases like that are probably going to err on the side of being more aggressive than they currently are. I think that you know if you'd have had a kid and granted you know some of it is you know you are nervous or you know but the description that we heard, it really sounds more to me like you know there was really something going on with that kid. Law enforcement should have noticed that it wasn't just I had an accident and I'm upset, I don't know.

Rep. Gruchalla: That is true, but in this case and a lot of different cases, it's because of who the kid is. In this case it happened to be a friend of the Sheriff so it was kind of a cover up. I am just saying that in standard DUI time, it is still discretionary on the officer. It doesn't say that you have to be arrested here. Now you have to be under arrest before you can get a blood test or suspicion of DUI.

Rep. Weisz: If you eliminate the language starting on line that there is probable cause 390801 basically what it will say is that if there is someone involved in an accident resulting in death or serious bodily injury, then law enforcement officer investigating shall compel the driver. That is an option. Is there a down side to that? That would take the discretion of probable cause out.

Rep. Gruchalla: I think that might be a legal question, but that would be wonderful, but I think the Attorney General might have to visit with him on that.

Rep. Weisz: (To Lynn Heinert): Do you have, would that language affect you guys in any way?

Heinert: When this bill was first introduced and from the department's standpoint, we agree with what Rep. Gruchalla is saying. The department would like to see all drivers involved in

serious bodily injury and death tested. We looked at changing probable cause to reasonable suspicion but we end up with some due process questions regarding the driver's right.

There would have to be some legislation to protect the driver's due process right.

Rep. Weisz: We have two choices. We can hold this bill and get the A.G.'s opinion or we can pass it out as is.

Rep. Owens: I understand the concern about the A.G.'s opinion but the testimony just now was talking about changing probable cause to suspicion or what not, but based on what you said Mr. Chairman, taking that out, it seems like to me that the accident involving death or serious bodily injury, you know, is the probable cause in and of itself and taking that sentence out and since driving is a privilege, it's not a right, I don't see a problem with it at all personally.

Rep. Price: I would like to make it however loophole frees as we can. It happened to my son-in-law and they didn't test the other driver because she was in her thirties and he was in college and obviously they assumed he is in the wrong and he just about lost both legs.

Rep. Gruchalla: I could go back to other times where we have gotten to the scene of an accident and the driver is gone in the ambulance, so you don't get an opportunity to look at the driver and many times you try to call the hospital to see if they smell alcohol and try to get another officer there, but by the time he is in the emergency room and as soon as they hook a tube up to him, you loose your blood because he is contaminated so you can't get a test and they don't hold a guy until you can establish if he's been drinking, so it is a big issue. This situation happens all the time so if there is way that we could get this bill to that point where you could just do that, that would be the ultimate answer.

Rep. Weisz: The only other option would be if we pass it out amended and then put it in conference committee. That gives us time to get to the A.G.'s office.

Rep. Delmore: Are they aware of any other state that has taken all of this out of there?

Rep. Weisz: I am getting the nod yes from Lynn Heinert.

Heinert: I know there are other states.

Rep. Delmore: That would already be in place right now would it not?

Rep. Weisz: Correct.

Rep. Schmidt: This is urgent, why don't we put an emergency clause on it?

Rep. Gruchalla: I think we have the same issue with getting this into place and training and stuff. The sooner the better.

Rep. Schmidt: We've got the people here, can we ask them?

Rep. Weisz: If we make the amendment, I can ask that it go into conference committee, if there is an issue with that and the emergency clause. I have no problem with attaching an emergency clause or an earlier date. Right now we need to know what the committee's wishes are.

Rep. Thorpe: Did you have some ideas of an amendment Rep. Price?

Rep. Price: We had two suggestions, reasonable suspicion or just removing the language, but I guess maybe in thinking about it maybe we should hold it. I would hate to lose the bill on the floor because of questions. I want to do it right the first time.

Rep. Kelsch: I'll withdraw my motion. You know I have to say I agree. I think that there are people on the floor that will be very opposed to this that you know regardless of what kind of an accident it is you know you are going to have a blood test. So I think we need to. Right.

Rep. Weisz: Rep. Gruchalla, I am going to ask you get together with the A.G's office about our language.

Rep. Delmore withdrew her second.

The motion was withdrawn without a vote. No action was taken at this time. The hearing was closed.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2165

House Transportation Committee

Check here for Conference Committee

Hearing Date: 02-23-2007

Recorder Job Number: 3737

Committee Clerk Signature

Lisa M Thomas

Minutes:

Chairman Weisz allowed committee discussion on SB 2165. SB 2165 relates to chemical test of a driver in an accident.

Rep. Heitkamp was called back into the committee room.

Rep. Weisz: Do you have a problem with the amendments proposed today?

Sen. Heitkamp: He (Larry Wayman) wants something and to be able to walk away with something tragic and say "I did something about it". So what you do, I think some of these questions were raised on the Senate side and some of what Rep. Kelsch said was pretty accurate in terms of how you may and what you may find out. Do your homework and do what you can to get him something to remember his son. It really was his son, he raised him.

Rep. Weisz: To me it's not an issue because if we can do it for CDL it's hard to argue with a constitutional thing.

Sen. Heitkamp: It may have something to do with the federal mandate.

There was no further discussion and the committee did not take action at this time.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2165

House Transportation Committee

Check here for Conference Committee

Hearing Date: 03-02-2007

Recorder Job Number: 4276

Committee Clerk Signature

Lisa M Thomas

Minutes:

Chairman Weisz allowed committee discussion on SB 2165. SB 2165 relates to chemical test of a driver in an accident.

Rep. Weisz: For the committee's information, there was discussion with needing an A.G's opinion. I was in his office and asked him about it and he was familiar with it and as far as he was concerned there was no need for us to get an opinion if there was no issue. Obviously if we still want one, we can still request it. He said we are doing it now on CDL's and you can't have a constitutional conflict with those and it is either okay or it isn't. Since we are already doing it, it's not an issue as far as he is concerned, but again, if you are still uncomfortable we can get that opinion.

Rep. Kelsch: Are you talking about the probable cause part of it?

Rep. Weisz: Right.

Rep. Kelsch: Does it do anything for due process?

Rep. Weisz: He said there have been concerns about due process. Again as far as this being a policy issue, but not a legal issue. Obviously you can make a debate on a policy issue whether we are going beyond where we should be for due process.

Rep. Ruby: As I read this today and I missed testimony because I was testifying on another bill. When there is probable cause and it said they "may be compelled", and now they are going to say they "shall compel" the driver to submit. If there was probable cause, what is it really changing? If they have probable cause did they not request this?

Rep. Gruchalla: The change that is on here wouldn't change anything. What we have envisioned now is making it take out the probable cause part of it and just say "in a serious bodily injury or fatality accident the driver shall submit to a chemical test". We looked up the law in Illinois and it says that the driver who is involved and serious injured shall be enough to compel them to take a test. That has been through their court. We think this would get around it.

Rep. Vigesaa: (To Rep. Gruchalla): The term serious bodily injury is that something that is in code?

Rep. Weisz: It is defined in statute.

Rep. Ruby: I have a little problem with the seventy-three hundred dollar cost associated with it. For instance, if you have an elderly woman that is driving and she gets into an accident they are required no matter what her situation is, they are going to be required to pay the cost to test her when there is probably absolutely no indication that it would have to be done. That concerns me with requiring it in every situation when it takes away from the police officer the ability to look at the situation. If he has probable cause or any indication that he is going to do it, I'm sure they do.

Rep. Weisz: The grandma could be taking a combination of prescription drugs that cause an accident.

Rep. Kelsch: Well, Rep. Ruby was kind of going on you know this is something that I kind of talked about this weekend and trying to go through this because I know what we are trying to

get at here and I understand that we may not always be able to identify whether or not you may not be able to smell you know however, I typically think that if someone is on something they do act out of the ordinary. But here is the issue, is it Mr. Chairman and Rep. Price are in a serious accident today leaving the capital....leaving the capitol. Both of you have to be subjected to a blood test. You have nothing in your system other than caffeine. Here both of you now have to go in for a blood test regardless of how you are acting and THAT is the concern that I have and that is the only concern I have with this that is why I like the probable cause part of it and even with eighty-six year old you do think of those people that are you know at that age they probably are taking some sort of drugs and there possibly could be some sort of weird interaction that happens but I don't know I'm torn between a rock and a hard place because I do think about you two.

Rep. Weisz: Serious accident scenario that you just presented. Rep. Price was seriously injured and would they automatically get tested?

Rep. Gruchalla: No.

Rep. Delmore: There is another side to this too. If she was seriously enough hurt, she needs to go into immediate care. They are going to stop and say they need her blood first just to make sure?

Rep. Gruchalla: They do a tox test anyways because they need to know when they get her into the hospital that if she's not on something else before they give her medication.

Rep. Delmore: So someone who stated that wasn't done, was erroneous?

Rep. Gruchalla: It's done but law enforcement can't here that. It is confidential information.

Unless there are some extreme cases where you can get a subpoena but normally that tox screen is not available. In reality, the people that are getting off are when law enforcement gets to the scene and the driver is already gone in the ambulance or somebody covered it up for

him and that does happen. It's local volunteer group and it's one of their guys and all of the sudden, that guy disappears and the alcohol in the car is gone and scene is cleaned up. That does happen. Those are the kind of the cases and ten percent of the people that are in crashes are on some sort of medication, prescription or not or alcohol. A lot of those drugs, I taught DUI detection for twenty years and there are a lot of people that you cannot tell that they are on something and those are the ones that are getting away. You would never know and to do a complete accident investigation, and you look at the cause of the accident and the cause of the accident was because the driver was stoned on meth or something, but that is never admitted in the trial. Statistically the state toxicologist takes tox screens on everybody in a fatal accident and they know there are a lot of people who are never arrested. These are the types of cases where we thought that by trying to do this, we would get at the root cause of this. It is a big step.

Rep. Weisz: I am the one that suggested pulling that out, but my question would be based on some of the concerns, is there a way to tighten this up without picking on a little old granny.

Rep. Dosch: If one out of ten have some type of alcohol in their system that means that we are now going to test the all of them and subject the nine out of the ten who are not on drugs or drinking?

Rep. Weisz: Some types of employment, it doesn't matter who you are everybody is taking the test because of that.

Rep. Gruchalla: Commercial drivers, if they are in an accident, they have to go in for a post accident test. We aren't breaking any new ground there.

Rep. Price: Is there any other way to maybe hold law enforcement more accountable? They don't always check.

Rep. Weisz: It used to be our problem is drunks. It's pretty hard not to smell the booze, but today alcohol isn't the biggest. There are so many mixtures of drugs out there and maybe you wouldn't know if you hadn't seen a person in your life before you can't tell if they are or not. People are wired when they are in an accident. They are scared to death most likely.

Rep. Delmore: What you are saying is true but we also have drug ingestions and the officers really are trained.

Rep. Gruchalla: Even someone that is highly trained and it's windy and blizzarding, a lot of times you just don't get in contact with the individual. You would have to almost go over to the ambulance and try to smell something before they haul them away, so a lot of times, you can miss it. It happens a lot.

Rep. Weisz: Personally, if I was in an accident and somebody got killed I would be glad to have the test to make sure.

Rep. Schmidt: In the case of the man who testified, would this bill have prevented that?

Rep. Gruchalla: This bill was in place, he would have been tested and there wouldn't have been a cover up.

Rep. Schmidt: There must have been something in place because the people down there all got fired.

Rep. Gruchalla: The Sheriff didn't run for reelection. His son was shooting horses on the side.

Rep. Weisz: There was a reaction to the willful actions of law enforcement. They paid the price for that reaction but it didn't help from the standpoint of the person's grandson.

Rep. Ruby: One thing this doesn't prevent is somebody who is in an accident and flees the scene and isn't apprehended until they are sobered up. We have no idea of what level of intoxication they may have had. There are still ways around and cover ups.

Rep. Weisz: Law enforcement wouldn't be able to say that. If local law enforcement showed up on the scene and he was gone.

Rep. Vigesaa: At one time we had discussed changing the "probable cause" to "reasonable suspicion", what is the difference in those two terms? In conversation, that seems to open it up so there is more of a chance to test under that term, what would you say about that?

Rep. Gruchalla: Reasonable suspicion is a lesser legal issue. It could be that the cops just thought that he could be on something. Probable cause is more like eighty-percent and reasonable suspicion is less than fifty. We are teaching people for probable cause now for alcohol is to smell or see alcohol and even the smell of alcohol in Supreme Court cases isn't enough.

Rep. Weisz: The only thing and the point here was that no matter where you put the standards, and then there is an out. Anybody can say they didn't think there was reasonable suspicion to do the test and they walk.

The discussion was ended and the committee was adjourned.

No action was taken at this time.

Later that afternoon, Rep. Weisz opened committee discussion again.

Rep. Weisz: Does anybody have any suggestions?

Rep. Owens: In reference to that last sentence and I could be wrong about this but I'll just tell you how I'm reading it. The results of the test are admissible in an adjudicated proceeding, now that tells me that now literally what they have done is tied it to administrative hearings as well. This is not just about court.

Rep. Gruchalla: It's probably not going to pass with the amendments on it, so I will withdraw the amendments and just move on the bill the way it came in.

Rep. Weisz: The suggestion was made to change probable cause to reasonable suspicion and leave the bill as is.

Rep. Owens moved to adopt the amendment. Rep. Ruby seconded.

Voice Vote: Unanimous. Motion passed and the amendment was adopted.

Rep. Gruchalla moved a DO PASS AS AMENDED.

Rep. Price seconded.

Roll Call Vote: 12 yes. 0 no. 1 absent.

Carrier: Rep. Price.

Rep. Kelsch was absent and not voting.

Date: 2-23-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2165

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Withdrawn

Motion Made By Kelsch Seconded by Delmore Withdrawn

Representatives	Yes	No	Representatives	Yes	No
Chairman Welsz			Rep. Delmore		
Vice Chairman Ruby			Rep. Gruchalla		
Rep. Dosch			Rep. Myxter		
Rep. Kelsch			Rep. Schmidt		
Rep. Owens			Rep. Thorpe		
Rep. Price					
Rep. Sukut					
Rep. Vigesaa					

Total Yes _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:
Withdrawn Motion-

PROPOSED AMENDMENTS TO SENATE BILL NO. 2165

Page 1, line 7, overstrike "when the" and insert immediately thereafter "if a"

Page 1, line 9, overstrike "there is" and insert immediately thereafter "if a law enforcement officer investigating the accident has" and overstrike "is in violation of section"

Page 1, line 10, overstrike "39-08-01" and insert immediately thereafter "has violated the law or the driver's behavior contributed to the accident" and replace "a" with "the"

Page 1, line 12, after the period insert "The results of the test are admissible in an adjudicative proceeding."

Renumber accordingly

PROPOSED AMENDMENTS TO SENATE BILL NO. 2165

Page 1, line 9, overstrike "probable cause" and insert immediately thereafter "reasonable suspicion"

Renumber accordingly

Date: 3-2-1
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2165

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Amend Voice Vote

Motion Made By Owens Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Weisz	}	}	Rep. Delmore	}	
Vice Chairman Ruby			Rep. Gruchalla		
Rep. Dosch			Rep. Myxter		
Rep. Kelsch			Rep. Schmidt		
Rep. Owens			Rep. Thorpe		
Rep. Price					
Rep. Sukut					
Rep. Vigesaa					

Total Yes _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Probable Cause to Reasonable Suspicion

Date: 3-2-07
 Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 2165

House Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS As Amended

Motion Made By Gruchalla Seconded By Price

Representatives	Yes	No	Representatives	Yes	No
Chairman Weisz	✓		Rep. Delmore	✓	
Vice Chairman Ruby	✓		Rep. Gruchalla	✓	
Rep. Dosch			Rep. Myxter	✓	
Rep. Kelsch	Absent		Rep. Schmidt	✓	
Rep. Owens	✓		Rep. Thorpe	✓	
Rep. Price	✓				
Rep. Sukut	✓				
Rep. Vigasaa	✓				

Total Yes 12 No 0

Absent 1

Floor Assignment Price

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2165: Transportation Committee (Rep. Welsz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2165 was placed on the Sixth order on the calendar.

Page 1, line 9, overstrike "probable cause" and insert immediately thereafter "reasonable suspicion"

Renumber accordingly

2007 SENATE TRANSPORTATION

CONFERENCE COMMITTEE

SB 2165

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2165

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: April 3, 2007

Recorder Job Number: 5690

Committee Clerk Signature

Jody Hauge

Minutes:

Chairman Nething called the Conference Committee to order to discuss SB 2165 relating to the chemical test of a driver in an accident. All committee members were present. Chairman Nething summarized the changes that the House and Senate had not agreed on. The Senate had on page 1, line 9 the wording "probable cause" and the House amended it to overstrike "probable cause" and inserted "reasonable suspicion". He said the thrust of the law to start with was the driver may be compelled to a test by an officer. He said he didn't know what reasonable suspicion is but he always knew what the level of truth was for probable cause. He asked the House members to explain.

Rep. Owens said that the House had this discussion also. They also had the discussion on serious bodily injury. He said that serious bodily injury is defined in the century code. So understanding that serious bodily injury is defined in the century code, he turned to Rep. Gruchalla, a past enforcement officer, to describe the difference in the meaning of "probable cause" and "reasonable suspicion" to them while they are out investigating.

Rep. Gruchalla explained from a law enforcement stand point the difference between the two. He said "probable cause" is that there is an actual violation that has taken place. "Reasonable suspicion" would be, in regard to a traffic stop, that someone was weaving within its lane or

driving slower or something that isn't actually a violation of the law but that it is a reasonable suspicion to stop them. He said reasonable suspicion is a lesser standard. He said that is why they changed it from "probable cause" to "reasonable suspicion".

Senator Nothing said as he understands the difference: Probable cause is supported by some evidence that would lead a person to believe that it did occur, something fairly objective. Reasonable suspicion is more subjective and that is what makes it the milder of the two.

Senator Fiebiger presented some information from a couple of defense attorneys who do a lot of defense work and he shared their thoughts. They said: "Probable cause is a well established 4th amendment requirement for issuance of a warrant or for arrest. (The two primary requirements of the Fourth Amendment are probable cause and a warrant, issued by a neutral and detached magistrate). This statute would dispense with both of the Fourth Amendment's primary requirements. Virtually every other statutory chemical test requirement requires probable cause or the synonymous statutory term "reasonable cause." This is a warrant less search, without consent, and if statutorily authorized, should use the same standard as other chemical tests (and as required by the 4th amendment). After all, a magistrate is not being consulted. There often is very little meaningful distinction between reasonable suspicion and probable cause. Courts and lawyers often confuse the standards. This proposed amendment undermines well-settled 4th Amendment jurisprudence, and authorizes an invasive search (inside the body) without the minimal requirement of probable cause, and without the detached determination of a magistrate. Based on case like (specifically *Schmerber V. California*), I think dispensing with the warrant requirement (based on the "evanescent" nature of blood evidence) is constitutional. Dispensing with the minimal evidentiary requirement of probable cause, in my opinion, is on very shaky constitutional ground." (Bruce D Quick; Mark A Friese)

He said that he thinks the distinction that we are taking about is do we use "reasonable suspicion" and allow it to be a lesser standard and see what happens with it and see if it is held to be constitutional or do we use "probable cause" which he believes has a higher chance of being upheld in the courts.

Rep. Ruby said that when they initially read the bill the part where it talks about "probable cause" was left alone and the other language of "may be compelled" was changed to "shall be compelled". Under that situation they didn't think it changed anything as long as probable cause was left. It really didn't do what they thought Senator Heitkamp's intent of the bill was. They did have an amendment that was very direct that any accident with serious bodily injury or death would require both drivers to have testing. Through there discussions they choose not to go that far even though a CDL license are subject to this. As the House committee understood, Senator Heitkamp's intent was to put drivers on the level of a CDL license driver. Through their discussions they scaled it back but made it tougher than probable cause.

Senator Nething said that when they changed from may to shall they were making a more direct change. In the Senate Committee discussion this no longer left discretion to the law enforcement officer. The Senate Committee said, "You shall".

Rep. Gruchalla said that what led us to the House amendment was that Illinois requires that everyone involved in a fatality or serious bodily injury accident must take a blood test. We had testimony from DOT that they were not getting enough blood test and this could put Federal dollars at risk in the future. He said that they were looking at an amendment much like Illinois law but they ended up with a compromise with the wording "reasonable suspicion" because they didn't think they could get the automatic test through the full legislature.

Senator Nething said what bothered him was if we use "reasonable suspicion" and end up with a felony conviction, they could be on thin ice defending it in a due process challenge.

Senator Fiebiger said he shared that same concern. He asked if there has been any experience with the courts and how this has played out.

Rep. Gruchalla said there was a challenge to that but he doesn't have information. It went to the circuit and came back and they had to change one little thing but the challenge stood.

Senator Nething asked if they got the Attorney's General opinion.

Rep. Gruchalla said it was and they were told that there was no problem. They told Rep. Weisz that they were already doing it with CDL licenses.

Senator Nething said he didn't see any minutes on the hearing of discussion on reasonable suspicion, he asked if that was just committee discussion. So the Defense Attorneys were never a part of a hearing? The amendment hasn't had an open hearing on it.

Senator Andrist asked if you don't do the alcohol test is there a chance for conviction.

Rep. Gruchalla said if you don't get a blood and alcohol test you have to have evidence to make an arrest, that evidence could be walking a line or saying ABC,s or other combinations and you might get a conviction. Normally if you do the blood test you use that evidence. Without the blood test it would be a weaker case.

Senator Nething said the odor of the breath of a diabetic and the breath of someone drinking alcohol can smell the same. If you have a suspicion by breathe alone, that is one thing, but if you have probable cause you would probably have to couple that with something else.

Rep. Ruby said the courts have looked at "for the overall public good" and relaxed the standard seeing that this is a very serious problem.

Senator Nething asked if he recalled in the Illinois law if they use the reasonable suspicion language.

Rep. Gruchalla said he was not sure of that. He said he hadn't seen the actual copy of the law.

Senator Andrist said we should see what the Illinois law says.

Senator Nething still thinks that if we make these changes they deserve a public hearing.

Senator Fiebiger said his comfort level is higher with the language reasonable suspicion than it was before the discussion but he would like more information on the Illinois law.

The intern will get that information and also if the Illinois law has had any challenges.

Senator Nething closed the Conference Committee hearing.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2165

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: April 5, 2007

Recorder Job Number: 5764

Committee Clerk Signature

Jody Hauge

Minutes:

Chairman Nething called the Conference Committee to order to discuss SB 2165 relating to the chemical test of a driver in an accident. All committee members were present.

Senator Nething said that we have some additional information from Senator Fiebiger, Representative Gruchalla and from the Intern's research. He asked Senator Fiebiger to explain what he had found.

Senator Fiebiger thanked the intern for his information and explained what he had found. The written information is enclosed. He said in re-evaluating this his struggle is when it came to the Senate we were focused on what the testimony revealed and they wanted to be able to do something right away and not have local officials spirit people away or provide that the local person first on the scene can take some action. He thinks the probable cause piece is the better and safer way to go with respect to what ND law looks like. Either way it may be tested but his thoughts is that probable cause is the better language. The other issue is that there has not been a good hearing on the House changes and the fact that this committee has had so much discussion in a short amount of time on something so serious it tends to make him believe there is a need for the process of a hearing. In conclusion he said he would like to see

the language stay the same before the House amended it leaving "probable cause" and removing "reasonable suspicion".

Representative Gruchalla said the intent of the bill carrier was to circumvent a problem that happened. This thing will keep happening if there is no mandatory procedure. So in the House committee the discussion moved to the point where we wanted automatic testing but we knew this wouldn't fly so we migrated to "reasonable suspicion" to tighten it up. He questioned Senator Fiebiger's written information's that he presented. He said at the bottom of the page it says probable cause of a violation...which is a different situation. He had written information of what the law is doing in Idaho. The written information is enclosed.

Senator Nething again brought up the reasons the Senate committee changed the wording from "may" to "shall" and the fact that this strengthened the law. He said that they were improving the law with the Senate amendment whether we want to go another step is the question in front of us. He said we all understand the difference of "probable cause" in this case that the driver is in violation of Section.....or the other "reasonable suspicion" once you have the violation you can do anything you want.

Rep. Ruby said that he would be OK with leaving the probable cause in if we could add more language that would strengthen the position. When you do a search does that enhance your position legally?

Rep. Gruchalla said it would enhance your position but you would use that as a continuing progression.

Senator Nething added that than you develop factual evidence to support your probable cause. Senator Fiebiger said you would need the probable cause to go into the car which would be the violation.

Rep. Ruby said he wouldn't want to put forth a bill that is headed for challenges. The House committee's intent was to try to do what Senator Heitkamp wanted the bill to do.

Senator Andrist said he would rather a drunk driver be arrested even if he was able to challenge it at a later time. It would get them off the road.

Senator Fieber said if you see someone swerving you can pull them over...and if you are at an accident where there has been a serious injury or a death and see blood shot eyes or smell alcohol this would be probable cause. If there is a serious accident and there is nothing that suggests that there are any violations, do we need blood tests or should we be taking them?

Rep. Gruchalla said in most case we shouldn't have to but in some incidence there are individuals gone or cases that local police are friends with people involved.

Senator Fiebiger asked how "reasonable suspicion" will help this.

Rep. Gruchalla said that alcohol is easier to trace than drugs.

Rep. Owens said that we can't do it the same as CDL laws so maybe we will need to leave . probable cause in there and further amend.

Senator Nething closed the hearing

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2165

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: April 10, 2007

Recorder Job Number: 5859

Committee Clerk Signature

Jody Haug

Minutes:

Senator Nething called the Conference Committee to order on SB 2165 relating to the chemical test of a driver in an accident. All committee members were present. Senator Nething said the House amendment is not resolved on the changing of "probable cause" to "reasonable suspicion".

Rep. Owens asked about the e-mail he received and would like more time to digest it. In each case it is talking about probable cause but it has never been adjudicated as to reasonable suspicion.

Senator Nething said that is because we have never had reasonable suspicion in ND.

Senator Fiebiger said that this was the e-mail he brought to the last conference committee.

Rep. Owens said he does not understand the difference between the requirement for CDL and the requirement for anyone else driving on the road.

Senator Nething said the CDL is Federal Law. It is hard to compare it with the probable cause that ND has which is more lenient and a CDL is almost implied consent, is it not? He said to him, CDL law was the toughest. He said that you do kind of take away peoples rights when you do that, but that's the trade off for driving on the roads in that size vehicle.

Rep. Owens said applied consent has been applied to just a state drivers license for a vehicle. That is how we get administrative judication versus criminal judication.

Senator Nething said probable cause favors the driver a little more but a criminal prosecution could come out of this. The question is do we want to go to the step in between called reasonable suspicion for our drivers. For the law enforcement that is a little easier but we already made it easier with the Senate Amendment that changes "may compel" to "shall compel".

Senator Fiebiger said he thought changing "may" to "shall" was a significant change.

Senator Nething agreed that it was a good change.

Senator Andrist asked if we change it to "reasonable suspicion" and the courts challenges this and the court decides this is not constitutional what happens. What would be the status of the law?

Senator Nething said that he thought that they wouldn't revert back.

Senator Andrist said that if a judge would decide reasonable suspicion is not adequate and he sets aside the conviction, how does law enforcement respond? Do they respond by saying they need probable cause?

Rep. Gruchalla again explained his definition of probable cause and reasonable suspicion.

Rep. Ruby said that he still didn't think that changing "may" to "shall" was strong enough and he thought that by adding "reasonable suspicion" it strengthened it. He talked about the requirements for CDL drivers and he is comfortable with "reasonable suspicion" and having it hold up in the courts.

Senator Fiebiger said he disagreed and was not comfortable with reasonable suspicion. He said "shall" requires the test and there is no discretion. It is a significant difference. He

expressed his concern about violating the 4th amendment and he believes "probable cause" is the better of the language.

Senator Nething expressed his concern that we did not have testimony from the courts to hear their opinion on if "reasonable suspicion" could stand up in a court challenge. He said reasonable suspicion is whimsical. "It depends on your frame of mind." He said it is running into the 4th amendment.

Senator Andrist asked if the smell of alcohol is probable cause.

Senator Nething said yes.

Senator Fiebiger said yes, also. He added that to make changes to reasonable suspicion he felt that they should have had the testimony of state attorneys and defense attorneys and the people who work with it all the time.

Rep. Ruby summarized the testimony of the original hearing and they were asking for a mandate on testing. He does not think the way the bill is written now, that it will change anything.

Senator Fiebiger questioned him.

Rep. Gruchalla said they would have liked to mandate a test in any accident. They wanted to make the bill stronger and that is why they used the wording "reasonable suspicion". He also said the DOT needed more testing to keep federal funding.

Discussion continue for and against reasonable suspicion.

Senator Nething said that it sounded like the committee was locked and we should consider disbanding the present committee.

Rep. Owens said he would like to study the information and meet one more time.

The committee will meet again.

Senator Nething closed the hearing.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2165

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: April 11, 2007

Recorder Job Number: 5885

Committee Clerk Signature

Jody Hauge

Minutes:

Chairman Nething called the Conference Committee to order on SB 2165 relating to the chemical test of a driver in an accident. All committee members were present. He stated that the committee was here to try to resolve the problem with the change of wording that the House made in their amendment changing the wording "probable cause" to "reasonable suspicion".

Rep. Owens moved that the House recede from it's amendments as printed on page 730 of the Senate Journal and page 848 of the House Journal and that SB 2165 be amended as follow:

Page 1, line 10, overstrike section 39-08-01 and insert immediately thereafter, "a criminal or non criminal traffic offense in title 39, or equivalent ordinance, excluding chapter 39-21 or equivalent ordinance.

Rep. Ruby seconded the motion.

Senator Nething asked what the impact would be and the reason that they would like to make the change.

Rep. Owens said that what we did before, the probable cause was hinged on death and serious injuries. And he stated that serious injuries are defined in the century code. What it

does is it applies the rules that we've looked at that have been adhered to as far as the constitutionality of the challenges of similar laws in Illinois. It would not be restricted to the probable cause of a DUI or alcohol or drugs (under the influence). If there is an accident and there is a violation of running a red light or something...enforcement can provide an arrest through the operation of sighting the individuals in the accident. This is only in an accident where there is death or serious bodily injury. It does open it up beyond probable cause of under the influence to probable cause of a moving violation.

Senator Fiebiger said that this new amendment expands it dramatically. He said he ran this language by a couple of defense attorneys who work in this area and they were confounded by this expansion and thought that it would certainly be held unconstitutional. This expands it to a level where it allows someone to come in and take a blood test even where there is a probable cause for a non criminal offense and that expands it dramatically. In addition, he said that he keeps coming back to the fact that this committee has not had the proper dialogue and testimony on these complicated issues with people that do this for a living all the time. He is hesitant to move forward on an amendment like this without the proper dialogue with experts in the field.

Senator Nething asked specifically how this amendment would impact ND.

Rep. Owens said that currently the way the bill is written be it "probable cause" or "reasonable suspicion" the law enforcement officer investigating the accident shall compel the driver in the event of serious bodily injury or death only if there is suspicion or probable cause that one or both of the individuals have violated 08-01 which is under the influence. That is the only time! This amendment would change that because of the accident there is a violation, a moving violation.

Senator Nething said that it seemed to him that a moving violation would support probable cause. Why would you need more?

Rep. Owens said that based on the testimony heard in the House and Senate Transportation Committee this was not enough.

Senator Nething said that if you have someone run a stop light and an accident occurs and it is serious bodily injuries or death, under this law as the Senate sent it to you, you shall get a blood test.

Rep. Owens said, "No sir".

Rep. Gruchalle said not unless they have a probable cause for a DUI. This amendment will open it up to what Senate Nething just said. This amendment will allow for that.

Senator Nething said why you would want to take a blood test if there isn't a suspicion of violation of 39-08-01.

Rep. Gruchalle said that we want to move beyond the probable cause that the guy is intoxicated. We want to get more tests. There are a couple reasons for that. He said the amount of blood tests is dropping.

Senator Nething said if he was involved in an accident and he ran a red light ...running the red light could result in a non criminal situation. Now there was a serious injury but there is no evidence of any alcohol with it ...you are basing your probable cause on that he ran a red light?

Rep. Gruchalle said correct.

Senator Nething asked why he should subject himself to a blood test. Why would you want me to do that?

Rep. Gruchalle said that what they want to do when investigating an accident is to find out the cause of the accident. Many times running the red light caused it but in many cases it is drug impairment. He said that those people aren't being tested.

Senator Nething said to Rep. Gruchalle that he is asking him to give up a right. You are subjecting me to a test and I have not committed a criminal offense even. I don't know if you really want to do that. He said he didn't want to. He said that he felt it was a pretty strong demand of an individual's rights. Here is an example of not knowing what the impact is because we haven't heard the testimony.

Senator Fiebiger said that Rep. Gruchalle had talked about getting enough blood tests and he didn't think that getting enough tests is a reason why they should change this. Officers may have to reevaluate how they do this and this is a separate issue.

Rep. Owens said his concern is drugs and they are harder to detect.

Senator Nething said that he understands where they want to go to get after that individual under the influence of drugs but you are forcing a number of innocent people to have blood tests.

Rep. Ruby wished this kind of discussion and protection of rights would have been brought up for CDL drivers like himself who are subject to that same test even if there is not an injury. He said he should be filing for his 4th amendment rights under that situation.

Senator Nething said that he didn't think that they wanted to hold his mother-in-law up to the same standard of a CDL driver.

Senator Fiebiger said this is a huge difference.

Senator Andrist said that it looks like we have taken alcohol out of the equation.

Senator Nething said that drug and alcohol are under title 39.

Rep. Gruchalle gave an example of a person high on meth, driving fast, runs a light and kills Senator Nething's wife...there is no evidence of alcohol so he doesn't get a blood test and doesn't get arrested...that is the example that is pushing this movement.

Senator Nething asked if he would have been charged with homicide or negligence homicide or man slaughter.

Senator Fiebiger said that he would think that the investigation would lead to what his history was and that is all part of the equation.

Rep. Gruchalle said that the way it is now, in order to get a blood test you would have to arrest him or have probable cause that he is under the influence.

Senator Nething said that you don't need a blood test to convict someone of manslaughter.

The clerk took the roll on Rep. Owen's amendment 4-2-0.

Senator Nething said the amendment failed.

Senator Andrist moved the House recede from their amendments.

Senator Fiebiger seconded the motion.

The clerk called the roll 3-3-0

Senator Nething said that the conference committee was at a stand still.

Rep. Ruby moved to dissolve the conference committee.

Rep. Owens seconded the motion.

Senator Nething took a voice vote 6-0.

Chairman Adjourned the hearing.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2165

Senate Transportation Committee

Check here for Conference Committee

Hearing Date: April 19, 2007

Recorder Job Number: 6152 & 6166

Committee Clerk Signature

John Hauge

Minutes:

Chairman Nething opened the conference committee on SB 2165 relating to the chemical test of a driver in an accident. All committee members were present. He welcomed the new members of the newly formed conference committee and gave a short history of the bill. He said where we were focusing in the last conference committee was on the deletion of the "probable cause" and substituting "reasonable suspicion". He asked Rep. Ruby, the new chairman of the House, if he had thing to bring forward.

Rep. Ruby said that they were open to any options. The committee has heard their points on "reasonable suspicion" and why the House committee prefers this or with the amendment that they offered on April 6th which left probable cause in and on page 1, line 10, overstrike section "39-08-01" and insert immediately thereafter "a criminal or noncriminal traffic offense in title 39, or equivalent ordinance, excluding chapter 39-21 or equivalent ordinance". To defend that, for the benefit of anyone new, as he thought more about this, if a highway patrolman or any police officer sees any suspicious driving and they want to pull them over, they will pull them over under reasonable suspicion. He said that the 4th amendment rights have been discussed and he questioned why we can do check point or hunting check points and there is no call 4th amendment rights on search and seizure on that. Also as they talked about CDL license

requirements they just believe that they would like to have "reasonable suspicion" in law to see if would pass the mustard in the laws. We have talked extensively on CDL licenses and they have held up in court. Again, he stated they were open to look at alternatives. If nothing is furthered he didn't know if there would be a difference in outcome.

Senator Nething said that the Senate thought when they passed this bill over to the House that by stating "shall compel" the driver to submit to a test we were strengthening the law. He said if we do not have this bill the law will stay as it is "may be compelled" which is weaker than "shall compel". He said that is the only thing we have to offer.

Senator Fiebiger said he agreed with Chairman Nething. Another real difficult issue he had was the fact that when they had testimony the idea of changing the legal standard wasn't even on the table. He said that they did not hear testimony from any of the people who have expertise in this arena (prosecutors, defense attorneys). He said that without having that testimony he doesn't know how he can sign on to "reasonable suspicion" or the alternative version that was offered. He said he did think that the first change of changing "may compel" to "shall compel" helps solve the problem, it is not perfect but he said it was an improvement and he doesn't disagree with some of the points Rep. Ruby made but this discussion might be for a latter day when the new bill comes in with everyone having an opportunity to give testimony.

Rep. Ruby said that he understands that they didn't have the specific testimony in that area but as we did talk and listen to the testimony they didn't think changing "may" to "shall" made much of a difference. Gave an example from a discussion with Rep. Gruchalla how he would handle a situation. (7:54).

Senator Fiebiger again stated that he thinks changing "may" to "shall" is significant. He said that the present law if they determine probable cause to believe that the driver is in violation of

this section the driver may be compelled that means it is optional. He said the language of shall means that the law enforcement officer who is investigating the accident is required to do that. He no longer has that option. It strengthens it in some of these local concerns that were raised.

Senator Nething said he didn't think they were doing this for the Hiway patrol. He said that is a matter of training.

Rep. Owens said he understood exactly what they were saying and changing from "may" to "shall" is still an important aspect of this law. He said, "I do not deny that," but relating back to the scenario that brought this bill, he didn't think that still would have solved that problem.

Senator Lee questioned if he was involved in an accident and the other party was clearly at fault and they are killed in the accident and he is left standing, does that mean that under reasonable suspicion I could be required to submit to a blood test.

Rep. Ruby's respond to Senator Lee was that by virtue of him being in the accident, he would say no. He said they had talked about going that far in the bill. He referred again to CDL drivers. He referred back to their previous amendment that failed.

Senator Fiebiger said CDL's and what we are talking about here is different. It is like comparing apples and oranges whenever we bring CDL requirements into the equations.

Rep. Ruby said that the 4th amendment doesn't contain any exemptions.

Senator Fiebiger said that there are different standard depending on the nature of what the potential vehicle is or the potential threat is.

Rep. Ruby asked why pulling someone over for DUI isn't probable cause and why probable cause to pull people in on a road check isn't against the 4th amendment rights.

Senator Fiebiger said that he thought the Supreme Court held that those road checks, on random bases, are constitutional.

Senator Nething said that the committee needed to move off dead center. And they discussed how the reporting back could go.

Senator Fiebiger said that if we recede from the House and kill the bill they would loose the "shall compel". He offered that for the House's consideration.

Rep. Owens said he had one other alternative, taking amendment .0103 with Page 1, line9 crossed out and then on Page 1, line 10 take out "a criminal or".

Senator Nething said that makes it harder.

Senator Fiebiger said that makes it harder and even the "noncriminal" would be softer.

Senator Lee said if the House is not interested in the Senate version we can ask them to recede so we can salvage the "shall" but if the Senate recedes to their amendments than everything gets killed.

Rep. Owen asked if he had it backward and they should be taking out "noncriminal". He asked which one softens it.

Senator Fiebiger said that he would think taking out the noncriminal would be softer than taking out the "criminal".

Rep. Owens said it greatly reduces it if we take out noncriminal and made reference to the booklet.

Senator Nething asked Rep. Owens if he wants to present it as an amendment to get it ready and they would try to get the conference committee on the calendar as soon as possible.

Senator Nething adjourned the committee.

Conference Committee SB 2165 2:30 P.M. on April 19, 2007

Job number 6166

Senator Nething opened the conference committee on SB 2165 and all committee members were present. He asked Representative Owens if he had his proposed amendment.

Rep. Owens presented the amendment (.0104) and explained it. He also handed out a booklet of the century code.

Senator Nething asked what criminal traffic offenses are we talking about?

Rep. Owens said if you look in the booklet, anywhere that it says moving or non moving is not a criminal offense. Obviously a B misdemeanor, a C felony infraction is the way he has been told is a criminal offense. He said none of the speeding would be criminal. He said speeding in association with careless driving, the careless driving is criminal.

Senator Fiebiger said that he had visited with a defense attorney from Fargo and he said his concern is that there seems to be a whole litany of offenses that are criminal but are not necessarily related to accident or the driving conduct. He gave the example of required contacts for driving and what happens if you are not wearing them...that is a criminal offense. He gave more examples. He said that he thought it was too broad.

Rep. Owens said that those items are in there that Senator Fiebiger mentioned. He defended the example of using the tabs.

Rep. Ruby said that he could understand some of Senator Fiebiger's concern but he gave another example with motor homes and towing. (7:00)

Rep. Myxter asked if the DUI was still in. He said he didn't see the connection of some of these minor offenses.

Senator Nething said he was looking at Title 39 and it encompasses: registration, driver's license, accident, liquor, mobile home, height, weight, length; motor vehicle dealers, snowmobiles, off highway vehicles, etc. and these all have to do with title 39. He didn't realize it was quite so sweeping.

Rep. Owens did say that moving and non moving are not part of it.

Senator Nething said, right...all he did was recite where they had divisions that fall under title 3.

Senator Lee said this amendment moves us further from the bill's intention.

Senator Nething said it is interesting to see that exhibition driving is a moving vehicle offense and would be exempted. He said that on the other hand, if I went to a costume party dressed as a patrolman, and I got in an accident, the officers could take a blood test because I had a uniform on. He said that he thought it was a little tighter than we probably wanted.

Rep. Owens said if we leave it probable cause and change may to shall there is no difference in the way it is written before and the way it is written now. They can always say I didn't have probable cause.

Senator Lee moved that the House recede from their amendment.

Senator Fiebiger seconded the motion.

The clerk called the roll 3-3-0.

Motion failed.

Rep. Ruby said that he would just like to see if reasonable suspicion could stand the test.

Senator Nething said that part of the problem we mentioned before was that we didn't have impute in the committee. For example; DRES are drug recognition experts. There are dozens of officers trained as Drug Recognition officers. He said there are things in place for officers to establish probable cause through training of officers. We didn't have hearings on this and we don't have this information. He said he had talked to the sponsor of the bill and told him we were having our difficulties and he thought reasonable suspicion was pretty loose.

Rep. Owens went back to the original situation that brought this bill forward.

Senator Fiebiger stated that this bill can be improved with "shall".

The committee could not come to a compromise.

Senator Fiebiger moved to dissolve the committee.

Rep. Owens seconded the motion.

The clerk took the roll 6-0-0.

Senator Nething adjourned the committee.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2165

That the House recede from its amendments as printed on page 730 of the Senate Journal and page 848 of the House Journal and that Senate Bill No. 2165 be amended as follows:

Page 1, line 9, overstrike "probable cause" and insert immediately thereafter "reasonable suspicion" and overstrike "section"

Page 1, line 10, overstrike "^{Section}39-08-01" and insert immediately thereafter "a criminal or noncriminal traffic offense in title 39, or equivalent ordinance, excluding chapter 39-21 or equivalent ordinance"

Renumber accordingly

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2165

Senate Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number Amendment - Rep. Owens

Action Taken Do pass on amendment -

Motion Made By Rep. Owens Seconded By Rep. Ruby

	Senators	Yes	No	Representatives	Yes	No
no	Chairman Nething		✓	Rep. Owens	✓	
yes	Senator Andrist	✓		Rep. Ruby	✓	
no	Senator Fiebiger		✓	Rep. Gruchalla	✓	

Total (Yes) 4 No 2

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 4-11-07
 Roll Call Vote #: 1

**2007 SENATE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. SB 2165**

Senate Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number ~~None from amendment~~

Action Taken motion that the House Recede from their amend ment.

Motion Made By S. Andrist Seconded By S. Fiebiger

Senators	Yes	No	Representatives	Yes	No
Chairman Nething	✓		Rep. Owens		✓
Senator Andrist	✓		Rep. Ruby		✓
Senator Fiebiger	✓		Rep. Gruchalla		✓

Total (Yes) 3 No 3

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

4

**REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)**

Bill Number 2165 (, as (re)engrossed):

Date: 4-11-07

Your Conference Committee Transparatation

For the Senate:

For the House:

✓ Chairman <u>Neuding</u>	<u>Rep. Orlans</u>
✓ Senator <u>Gadiat</u>	<u>Rep. Ruby</u>
✓ Senator <u>Fiebiger</u>	<u>Rep. Werschaller</u>

recommends that the (SENATE/HOUSE) (ACCEDE to) (RECEDE from)

the (Senate/House) amendments on (SJ/HJ) page(s) _____ -- _____

_____ and place _____ on the Seventh order.

_____, adopt (further) amendments as follows, and place _____ on the Seventh order:

having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) _____ was placed on the Seventh order of business on the calendar.

DATE: _____

HOUSE CARRIER: _____

SENATE CARRIER: _____

LC NO. _____	of amendment _____
LC NO. _____	of engrossment _____
Emergency clause added or deleted _____	
Statement of purpose of amendment _____	

MOTION MADE BY: _____

SECONDED BY: _____

VOTE COUNT: ___ YES ___ NO ___ ABSENT

REPORT OF CONFERENCE COMMITTEE

SB 2165: Your conference committee (Sens. Nething, Andrist, Fiebiger and Reps. Owens, Ruby, Gruchalla), having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

SB 2165 was placed on the Seventh order of business on the calendar.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2165

That the House recede from its amendments as printed on page 730 of the Senate Journal and page 848 of the House Journal and that Senate Bill No. 2165 be amended as follows:

Page 1, line 9, overstrike "section"

Page 1, line 10, overstrike "39-08-01" and insert immediately thereafter "a criminal traffic offense in title 39, or equivalent ordinance, excluding chapter 39-21 or equivalent ordinance"

Renumber accordingly

Date: 4-19-07
Roll Call Vote #: 2

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2165

Senate Transportation Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Moved to dissolve the committee

Motion Made By Senator Fiebig Seconded By Rep. Owens

Senators	Yes	No	Representatives	Yes	No
Chairman Nething	✓		Rep. Ruby	✓	
Senator Lee	✓		Rep. Owens	✓	
Senator Fiebig	✓		Rep. Myxter	✓	

Total (Yes) 6 No 0

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

**REPORT OF CONFERENCE COMMITTEE
(ACCEDE/RECEDE)**

Bill Number 2165 (, as (re)engrossed):

Date: 4-19-07

10:30-AM

Your Conference Committee _____

2:30:PM

For the Senate:

For the House:

4-19-07

<input checked="" type="checkbox"/> Chairman <u>DeThain</u>	<input checked="" type="checkbox"/> Rep. <u>Rasky</u>
<input checked="" type="checkbox"/> Senator <u>Zu</u>	<input checked="" type="checkbox"/> Rep. <u>Owens</u>
<input checked="" type="checkbox"/> Senator <u>Ficbrone</u>	<input checked="" type="checkbox"/> Rep. <u>Mujica</u>

recommends that the (~~SENATE~~/HOUSE) (ACCEDE to) (~~RECEDE~~ from)

the (Senate/House) amendments on (SJ/HJ) page(s) _____ -- _____

_____ and place _____ on the Seventh order.

_____, adopt (further) amendments as follows, and place _____ on the Seventh order:

having been unable to agree, recommends that the committee be discharged and a new committee be appointed.

((Re)Engrossed) _____ was placed on the Seventh order of business on the calendar.

DATE: _____

HOUSE CARRIER: _____

SENATE CARRIER: _____

LC NO. _____	of amendment
LC NO. _____	of engrossment
Emergency clause added or deleted	
Statement of purpose of amendment	

MOTION MADE BY: _____

SECONDED BY: _____

VOTE COUNT: _____ YES _____ NO _____ ABSENT

REPORT OF CONFERENCE COMMITTEE

SB 2165: Your conference committee (Sens. Nething, G. Lee, Fiebiger and Reps. Ruby, Owens, Myxter), having been unable to agree, recommends that the committee be discharged.

SB 2165 was placed on the Seventh order of business on the calendar.

2007 TESTIMONY

SB 2165

Information Regarding Senate Bill 2165

King v. Ryan

1992 Illinois Supreme Court case holding that prior version of statute was unconstitutional

Statute authorizing chemical testing of driver without slightest indication that driver had been drinking if accident occurred which resulted in death or personal injury and there was probable cause to believe that driver was at least partially at fault for the accident violated Fourth Amendment; statute did not fall within category of special government needs outside normal need for law enforcement, since one of the stated purposes of the search was to gather evidence for criminal prosecution, and the goal of public safety was not sufficient to justify relaxing of constitutional requirements.

Statute at issue:

Any person who drives or is in actual control of a motor vehicle upon the public highways of this State shall be deemed to have given consent to a breath test using a portable device as approved by the Department of Public Health or to a chemical test or tests of blood, breath, or urine for the purpose of determining the alcohol or other drug content of such person's blood if there is probable cause to believe that such person was the driver at fault, in whole or in part, for a motor vehicle accident which resulted in the death or personal injury of any person. Ill.Rev.Stat.1989, ch. 95 1/2, par. 11-501.6(a).

Fink v. Ryan

1996 Illinois Supreme Court case holding that the amended version of statute did not violate the Constitution

Section of state Vehicle Code subjecting drivers involved in accidents resulting in death or serious injury to chemical testing absent individualized suspicion fell within "special needs" exception to warrant and ~~probable cause~~ requirements of Fourth Amendment, despite fact that results of chemical testing were admissible in criminal proceeding; changes made to statute by legislature narrowing spectrum of drivers subject to chemical testing and requiring that only drivers arrested by officer at scene could be tested reduced intrusiveness of chemical testing and allowed for testing only in those situations in which driver's expectation of privacy was diminished, and admission of test results in criminal proceeding was incidental to statute's purpose.

Statute at issue:

Any person who drives or is in actual control of a motor vehicle upon the public highways of this State and who has been involved in a personal injury or fatal motor vehicle accident, shall be deemed to have given consent to a breath test or to a chemical test or tests of blood, breath, or urine for the purpose of determining the alcohol or other drug content of such person's blood if arrested as evidenced by the issuance of a Uniform Traffic Ticket for any violation of the Illinois Vehicle Code or a similar provision of a local ordinance, with the exception of equipment violations contained in Chapter 12 of this Code, or similar provisions of local ordinances. 625 ILCS 5/11-501.6(a)

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 32422

STATE OF IDAHO,)
)
) **Boise, March 2007 Term**
) **Plaintiff-Respondent,**)
) **2007 Opinion No. 53**
) **v.**)
) **Filed: March 29, 2007**
) **BENITO A. DIAZ,**)
) **Stephen W. Kenyon, Clerk**
) **Defendant-Appellant.**)
)

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, for the County of Twin Falls. Hon. John C. Hohnhorst, District Judge.

The district court's order denying the motion to suppress is affirmed.

Molly J. Huskey, State Appellate Public Defender, Boise, for appellant.
Eric D. Fredericksen argued.

Honorable Lawrence G. Wasden, Attorney General, Boise, for respondent.
Jessica Lorello argued.

JONES, Justice

Appellant Benito Diaz entered a conditional guilty plea to a felony charge of driving under the influence (DUI). Diaz had moved to suppress the results of a blood alcohol content (BAC) test, claiming that a "forced" blood draw violated his constitutional rights. The district court denied his motion. We affirm.

I.

On April 9, 2005, Officer Scott Montgomery stopped a red Ford Mustang on Highway 30 in Buhl for erratic driving. The driver was later identified as Diaz. Montgomery noticed that Diaz's eyes were bloodshot and glassy and that his speech was slurred. After reviewing his license and registration he asked Diaz to leave his car and

perform field sobriety tests. Diaz tried to start his car instead. Montgomery arrested Diaz for obstructing and delaying and took him to the Twin Falls County Jail.

At the jail Montgomery conducted several standardized field sobriety tests, but Diaz refused to take the walk and turn test and the one leg stand. Montgomery advised Diaz of the consequences of refusing to undergo such testing, which Diaz said he understood. He then asked Diaz to take a breathalyzer test but he refused. Montgomery informed him that if he continued to refuse, he would be taken to a hospital and his blood would be drawn. After stating that he would submit to a breathalyzer test Diaz again refused to cooperate so Montgomery handcuffed him and took him to the Magic Valley Regional Medical Center where a hospital technician drew his blood. Diaz did not physically resist transportation to the hospital or the taking of his blood, but he continued to protest the blood draw. Diaz had prior DUI convictions in 2001 and 2003 so he was charged with felony DUI. I.C. §§ 18-8004, 18-8005(5). Diaz's BAC concentration was 0.26, more than three times the legal limit.

The district court denied Diaz's motion at trial to suppress the results of the BAC test under the Fourth Amendment and the Idaho Constitution. Diaz subsequently entered a conditional plea of guilty to felony DUI, reserving the right to appeal the district court's denial of his motion to suppress.

II.

In this opinion we address two issues: 1) whether an involuntary blood draw violates federal or state constitutional protections in cases where no death or serious bodily injury is involved, and 2) whether Idaho Code § 18-8002(6)(b) prohibits involuntary BAC testing in cases where no death or serious bodily injury is involved.

A.

In reviewing an order granting or denying a motion to suppress evidence, this Court will defer to the district court's factual findings unless clearly erroneous. *State v. Donato*, 135 Idaho 469, 470, 20 P.3d 5, 6 (2001). This court exercises free review over the district court's determination as to whether constitutional requirements have been satisfied in light of the facts found. *Id.*

B.

The administration of a blood alcohol test constitutes a seizure of a person and a search for evidence under both the Fourth Amendment and Article I, § 17 of the Idaho Constitution. *Halen v. State*, 136 Idaho 829, 833, 41 P.3d 257, 261 (2002) (citing *Schmerber v. California*, 384 U.S. 757, 767 (1966); *State v. Woolery*, 116 Idaho 368, 370, 775 P.2d 1210, 1212 (1989)). Searches and seizures performed without a warrant are presumptively unreasonable. *State v. LaMay*, 140 Idaho 835, 837-8, 103 P.3d 448, 450-1 (2004). To overcome the presumption, the State bears the burden of establishing two prerequisites. First, the State must prove that a “warrantless search fell within a well-recognized exception to the warrant requirement.” *LaMay*, 140 Idaho at 838, 103 P.3d at 451. Second, the State must show that even if the seizure is permissible under an exception to the warrant requirement, it “must still be reasonable in light of all of the other surrounding circumstances.” *Halen*, 136 Idaho at 833, 41 P.3d at 261.

Diaz argues that death or serious bodily injury is required to justify an involuntary blood draw under the exigency exception to the warrant requirement. Exigency, however, is not the lone applicable exception here; consent is also a well-recognized exception to the warrant requirement. *Halen*, 136 Idaho at 833, 41 P.3d at 261 (citing *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)). In Idaho “any person who drives or is in actual physical control” of a vehicle impliedly consents to evidentiary testing for alcohol at the request of a peace officer with reasonable grounds for suspicion of DUI. I.C. § 18-8002(1). Implied consent to evidentiary testing is not limited to a breathalyzer test, but may also include testing the suspect’s blood or urine. I.C. § 18-8002(9). The evidentiary test to be employed is of the officer’s choosing. *Halen*, 136 Idaho at 833, 41 P.3d at 261. Here, Montgomery had reasonable grounds to suspect that Diaz was driving under the influence – erratic driving, bloodshot and glassy eyes, and slurred speech. Because Diaz had already given his implied consent to evidentiary testing by driving on an Idaho road, he also gave his consent to a blood draw. Without addressing whether exigency also justified the blood draw, we hold that the seizure of Diaz’s blood fell within a well-recognized exception to the warrant requirement.

Regardless of how it qualifies as an exception to the warrant requirement, a blood draw must comport with Fourth Amendment standards of reasonableness. *Schmerber*,

384 U.S. at 768. To that end, the procedure must be done in a medically acceptable manner and without unreasonable force. *Id.* at 771-2. Fourth Amendment reasonableness standards are assessed objectively by examining the totality of the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989); accord *Rosenberger v. Kootenai County Sheriff's Dept.*, 140 Idaho 853, 857, 103 P.3d 466, 470 (2004). Here, Diaz was first offered a breathalyzer test, which he initially refused, then agreed to, and ultimately refused. After Diaz had declined this somewhat less intrusive alternative, Montgomery transported him to a nearby hospital where a qualified hospital technician drew his blood. Diaz was not manhandled while being transported to the hospital or during the procedure itself. Under the totality of the circumstances the police acted reasonably, using only handcuffs to transport Diaz to the hospital and having the blood test administered by a qualified hospital technician.

Diaz asserts that Art. I, § 17 of the Idaho Constitution provides greater protection than that afforded under the Fourth Amendment. However, Diaz failed to present any argument or authority in his opening brief to support this contention. "When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered." *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Therefore, we decline to address this claim.

C.

Diaz also argues that Idaho Code § 18-8002(6)(b) does not permit a police officer to order an involuntary blood draw absent suspicion of one of the enumerated offenses, which include aggravated DUI and vehicular manslaughter. We first addressed this question in *Halen*. 136 Idaho at 833-4, 41 P.3d at 261-2. There, we held that Idaho Code § 18-8002(6)(b) limits only when an officer can *order* medical personnel to administer a blood withdrawal but does not otherwise limit when an officer "may *request* that a defendant peacefully submit to a blood withdrawal." *Id.* at 834, 41 P.3d at 262 (emphasis added). Nothing in Idaho Code § 18-8002 limits the officer's authority to require a defendant to submit to a blood draw. *Id.* The Court of Appeals reconsidered this issue in *State v. Worthington*, 138 Idaho 470, 474-5, 65 P.3d 211, 215-6 (App. 2002). Diaz asserts that *Halen* and *Worthington* do not comport with the legislative intent behind Idaho Code § 18-8002(6)(b) and should be overruled. This argument is unavailing.

We look first to the literal words of a statute and give those words their plain, usual and ordinary meaning. *State v. Parker*, 141 Idaho 775, 777, 118 P.3d 107, 109 (2005). Idaho Code § 18-8002(6)(b) provides in relevant part that “a peace officer is empowered to order an individual authorized...to withdraw a blood sample for evidentiary testing when the peace officer has probable cause to believe that the suspect has committed any of the following offenses,” which include vehicular manslaughter and aggravated DUI. Thus, Idaho Code § 18-8002(6)(b) permits an officer to compel hospital personnel to withdraw blood upon probable cause of certain crimes. The statute does not prohibit an officer from asking hospital personnel to withdraw blood for evidentiary testing for DUI. In fact, Idaho Code § 18-8002(6) provides immunity to hospital personnel for “any act arising out of administering an evidentiary test for alcohol concentration...at the *request or order* of a peace officer.” (emphasis added); *see also* I.C. § 18-8002(6)(a) (“immunity extends to any person who assists any individual to withdraw a blood sample for evidentiary testing at the *request or order* of a peace officer”). A plain reading of Idaho Code § 18-8002(6) shows that an officer may always request hospital personnel to draw a suspect’s blood upon suspicion for DUI but may only compel a blood draw under certain circumstances.

The Legislature clearly intended to delineate when an officer could *compel* or *order* hospital personnel to draw blood rather than just *request* that they do so. In this case the technician at the Magic Valley Regional Medical Center chose to honor Montgomery’s request to draw Diaz’s blood, which is permissible under our statutory scheme. *Halen* and *Worthington* were ruled correctly, and we decline to overturn them here.

III.

We affirm the denial of Diaz’s motion to suppress and thus affirm his conviction.

Chief Justice SCHROEDER and Justices TROUT, EISMANN and BURDICK
CONCUR.

*Conference Committee***Fiebiger, Tom D.**

From: Mark A Friese [mfriese@vogellaw.com]
Sent: Wednesday, March 07, 2007 4:35 PM
To: Fiebiger, Tom D.; Bruce D Quick
Cc: Bruce D Quick
Subject: RE: SB 2165

Yes, I do have a problem. Probable cause is the well-established 4th Amendment requirement for issuance of a warrant or for arrest. (The two primary requirements of the Fourth Amendment are probable cause and a warrant, issued by a neutral and detached magistrate). This statute would dispense with both of the Fourth Amendment's primary requirements. Virtually every other statutory chemical test requirement requires probable cause or the synonymous statutory term "reasonable cause." This is a warrantless search, without consent, and if statutorily authorized, should use the same standard as other chemical tests (and as required by the 4th Amendment). After all, a magistrate is not being consulted.

There often is very little meaningful distinction between reasonable suspicion and probable cause. Courts and lawyers often confuse the standards. This proposed amendment undermines well-settled 4th Amendment jurisprudence, and authorizes an invasive search (inside the body) without the minimal requirement of probable cause, and without the detached determination of a magistrate.

Based on case like (specifically *Schmerber v. California*), I think dispensing with the warrant requirement (based on the "evanescent" nature of blood evidence) is constitutional. Dispensing with the minimal evidentiary requirement of probable cause, in my opinion, is on very shaky constitutional ground.

From: Fiebiger, Tom D. [mailto:tdfiebiger@nd.gov]
Sent: Wednesday, March 07, 2007 4:19 PM
To: Bruce D Quick; Mark A Friese
Subject: SB 2165

Gentlemen - This bill has just been amended by the House Transportation Committee to change the language from "probable cause" to reasonable suspicion" in the later part of the bill. Wondering if you have any problem with this change. Our Senate Transportation Committee needs to determine whether we are in agreement with the change. I'd appreciate your thoughts. Thanks.

Tom Fiebiger
Senator - District 45

4/4/2007

①

Fiebiger, Tom D.

From: Mark A Friese [mfriese@vogellaw.com]
Sent: Thursday, April 05, 2007 11:00 AM
To: Fiebiger, Tom D.
Cc: Bruce D Quick
Subject: SB2165

(Bruce--this is re: proposed amendments to 39-20-01.1--mandating a specimen collection, upon reasonable suspicion, in DUI cases involving death or serious bodily injury). Bruce--please pass your thoughts on to Sen. Fiebiger too (quickly, if possible--he has a hearing this afternoon).

Tom,

I'll try to call you too. The ND cases to look at are:

Wilhelmi v. Director of Dept. of Transp., 498 N.W.2d 150 (N.D. 1993) (holding probable cause to believe that incapacitated driver was under the influence of alcohol at time of accident is sufficient to warrant blood test), and

State v. Hansen, 444 N.W.2d 330 (N.D. 1989) (holding that motorist must be placed under arrest prior to obtaining sample of his blood even when he has been involved in accident resulting in death or serious bodily injury).

Wilhelmi basically affirms that the legislative changes following Hanson (permitting a warrantless search to obtain blood by statute) is constitutionally permissible. Importantly, in both cases, the court wrote extensively about the probable cause requirement. Again, as I noted earlier, the 4th Amendment requires: 1.) probable cause; AND 2.) a warrant. Dispensing with both is likely constitutionally infirm.

Hansen quotes Bruce's legislative testimony:

"Bruce Quick: The intent of this [bill] is to exempt implied consent law in vehicular homicide cases, basically. Implied consent law says that if you refuse to take a test, none shall be given. Other states have done this either through appellate court decisions or through legislation like this. It basically is word for word from the Uniform Vehicle Code. My interpretation of this, and what the ND Supreme Court has said, is an arrest would be required. If you want to make it clear, I would have no objection to amending the language where it says there's probable cause."

Hansen further says, "There is, however, a significant body of law which holds that the Fourth Amendment requires probable cause but not an actual arrest prior to obtaining a blood sample in alcohol-related felony offenses."

In Wilhelmi, the question was whether extraction of blood from an unconscious or semi-conscious person was constitutionally permissible. The court said:

"'Under these circumstances,' the Department argues that 'the law recognizes that a formal arrest would be an 'empty gesture,' and that only probable cause to believe the unconscious driver was under the influence of alcohol is necessary to administer a blood-alcohol test. We agree."

The primary cases which might support this legislation are New Jersey v. T.L.O (1985), New York v. Burger (1987), and Griffin v. Wisconsin (1987) (commonly referred to as the "special needs cases"). These cases have resulted in cases in which the justices have said, since recognizing special needs exceptions to the Fourth Amendment, "the clarity of Fourth Amendment doctrine has been badly distorted, as the Court has eclipsed the probable-cause requirement in a patch-work quilt of settings."

4/5/2007

This proposed amendment conflicts with every other ND statute related to DUI arrests and blood specimen collections (supplanting probable cause with reasonable suspicion). If adopted, not only would it invite constitutional challenge, it would also create a "patch-work quilt" of governing statutory law.

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4/5/2007

Gruchalla, Edmund A.

(2)

From: Aaron Birst [aaron.birst@ndaco.org]
Sent: Tuesday, April 03, 2007 4:04 PM
To: Gruchalla, Edmund A.
Subject: Blood Draws
Attachments: diaz.pdf

Representative Guchalla,

Idaho is the newest state to weigh in on this issue. Essentially they uphold a statute that only requires "reasonable grounds" to get a test. However as you can see they also seem to make a big deal that the officer only "requested" the hospital to take the test and not compelled the test. Additionally, they seem to look at the process of how the blood was taken namely whether or not the defendant was manhandled in order to have the test taken. I haven't had full time to digest this case but it is out there. I am not saying the ND Supremes or the US Supremes would rule the same way. This case is actually better to cite to support ND legislation than the Illinois case since that case requires Probable Cause of a violation. I will still get you that case also. Hope this helps and let me know what else I can do.
Aaron

4/3/2007