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May 7, 2003

Nevada Assembly Judiciary, Room 3138

Re: SB 316

Testimony for Juanita Cox, representing—Citizens In Action, People Organized for the Next Generation.

Chairman and members of the Judiciary, I am Juanita Cox and today I am representing Citizens In Action and People Organized for the Next Generation.

“Misdemeanor” Search Warrant

I am here today because Nevada law is not clear about it's Search Warrants. I am asking what is the intent of this legislative body in regards to a “Misdemeanor” Search Warrant?

I had never heard of one before the year 2000 but at that time I saw two and with further research I found many. See my example attached. I sent three requests to the Washoe County District Attorney asking what was a MISDEMEANOR Search Warrant? I never received a reply. I asked the Honorable Supreme Court Justice Rose and he had never heard of one. My investigation found there were FELONY Search Warrants and ADMINISTRATIVE Search Warrants but never a MISDEMEANOR Search Warrant.

I found a Nevada Attorney General Opinion (No. 79-2) which stated that the *district court* has jurisdiction to issue warrants in other than criminal cases and such warrants must be directed to and executed by the sheriff. See AGO79-2 attached. But...these “MISDEMEANOR” search warrants were directed to non-peace officers as defined under who is and who is not a peace officer—NRS 169.125.

NRS 179.045, subsection 5(a), provides that a criminal search warrant must be directed to a peace officer. Therefore, warrants issued pursuant to NRS 179.015—179.115 in criminal proceedings must be directed to and executed by a peace officer and not the department or its inspectors as shown in my example. These “MISDEMEANOR” search warrants were used like an administrative search warrant but were issued from a Justice of the Peace and not from a District Court as directed.

Does this legislative body believe a misdemeanor is such an awful “CRIME” in Nevada that should have Search Warrant power equal to a FELONY? Or...should a misdemeanor “CRIME” believed to be a problem by inspectional agencies use the ADMINISTRATIVE process as directed by law?

The absence of legislation governing the procedure surrounding the issuance of these search warrants in other than criminal felony cases necessarily makes Nevada law and the courts that issue such warrants somewhat speculative as to who should appropriately execute them if “criminal” or “crime” is not defined.

ASSEMBLY JUDICIARY

DATE: 5-07-03 ROOM 3138 EXHIBIT E

SUBMITTED BY: Juanita Cox

E 1 of 15

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The issuance of search warrants is governed by the strictures of the Fourth Amendment and is also subject to whatever statutory control exists. **My suggested amendment to this bill is to define a crime in this section, as to those crimes defined as a felony.** Simply add the word *felony* to line 1-2, after A and before "search warrant." This will make clear to all, that Nevada will conform to the rest of the U.S.A.

Thank you for taking my recommendations. I would be happy to take any questions.

E-20815

Referred to Committee on Judiciary

SUMMARY—Revises provisions pertaining to issuance of search warrants. (BDR 14□1278)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

Green numbers along left margin indicate location on the printed bill (e.g., 5-15 indicates page 5, line 15).

AN ACT relating to search warrants; revising the provisions pertaining to the issuance of search warrants; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1-1 **Section 1.** NRS 179.045 is hereby amended to read as follows:

1-2 179.045 1. A *felony* search warrant may issue only on affidavit or

1-3 affidavits sworn to before the magistrate and establishing the

1-4 grounds for issuing the warrant or as provided in subsection 2. If the

1-5 magistrate is satisfied that grounds for the application exist or that

1-6 there is probable cause to believe that they exist, he shall issue a

1-7 warrant identifying the property and naming or describing the

1-8 person or place to be searched.

1-9 2. In lieu of the affidavit required by subsection 1, the

1-10 magistrate may take an oral statement given under oath, which must

1-11 be recorded in the presence of the magistrate or in his immediate

1-12 vicinity by a certified court reporter or by electronic means,

1-13 transcribed, certified by the reporter if he recorded it, and certified

1-14 by the magistrate. The statement must be filed with the clerk of the

1-15 court.

1-16 3. Upon a showing of good cause, the magistrate may order an

1-17 affidavit or a recording of an oral statement given pursuant to this

1-18 section to be sealed. Upon a showing of good cause, a court may

1-19 cause the affidavit or recording to be unsealed.

2-1 4. After a magistrate has issued a search warrant, whether [it]

2-2 the warrant is based on an affidavit or an oral statement given under

2-3 oath, he may orally authorize a peace officer to sign the name of the

2-4 magistrate on a duplicate original warrant. A duplicate original

2-5 search warrant shall be deemed to be a search warrant. [It] The

2-6 warrant must be returned to the magistrate who authorized the

2-7 signing of his name on [it.] the warrant. The magistrate shall

2-8 endorse his name and enter the date on the warrant when it is

2-9 returned to him. Any failure of the magistrate to make such an

2-10 endorsement and entry does not in itself invalidate the warrant.

E 30815

2-11 5. The warrant must be  
2-12 [(a) Be] directed to a peace officer in the county where the  
2-13 warrant is to be executed. It must:  
2-14 (a) State the grounds or probable cause for its issuance and the  
2-15 (b) Set forth:  
2-16 (1) The criminal offenses alleged to have been committed;  
2-17 (2) The names of the persons whose affidavits or oral  
2-18 statements have been taken in support thereof; [or  
2-19 (b) Incorporate by reference the affidavit or oral statement upon  
2-20 which it is based.  
2-21 The warrant must command]  
2-22 (3) The persons and places to be searched; and  
2-23 (4) The property to be seized.  
2-24 (c) Command the officer to search forthwith the person or place  
2-25 named for the property specified.  
2-26 [6. The warrant must direct that it]  
2-27 (d) Direct that the warrant be served between the hours of  
2-28 7 a.m. and 7 p.m., unless the magistrate, upon a showing of good  
2-29 cause therefor, inserts a direction that [it] the warrant be served at  
2-30 any time.  
2-31 [7. The warrant must designate]  
2-32 (e) Designate the magistrate to whom [it] the warrant is to be  
2-33 returned.  
2-34 6. An affidavit or recording of an oral statement:  
2-35 (a) Is not required to be attached to a warrant or left at any  
2-36 place searched.  
2-37 (b) Not later than 10 days after the execution of the warrant,  
2-38 must be filed with the issuing court, except upon good cause  
2-39 shown, and must be made available to any person searched or  
2-40 whose place was searched, unless the magistrate orders that the  
2-41 affidavit or recording of an oral statement be sealed pursuant to  
2-42 subsection 3.  
2-43 **Sec. 2.** This act becomes effective upon passage and approval.  
2-44 H

E 4 8/15

1 IN THE JUSTICE COURT OF Reno TOWNSHIP,  
2 IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA.

3 \* \* \*

4 IN THE MATTER OF THE APPLICATION  
5 FOR A SEARCH WARRANT.

6 \_\_\_\_\_  
7 S E A R C H W A R R A N T

8 THE STATE OF NEVADA, TO ANY PEACE OFFICER IN THE COUNTY OF  
9 WASHOE:

10 Proof by Affidavit having been made this date before me  
11 by Rebecca Tackett, of the WASHOE COUNTY CODE  
12 ENFORCEMENT, Washoe County, Nevada, that there is  
13 probable cause to believe that the crime(s) of OUTDOOR STORAGE/  
14 DISPLAY, OCCUPATION OF RECREATIONAL VEHICLE, INDUSTRIAL USE OF  
15 LAND IN VIOLATION OF ZONING STORAGE OF UNREGISTERED MOTOR VEHICLES, IMPROPER  
16 STORAGE OF SOLID WASTE  
17 violations of NRS 110.306.35, 110.310.35, 110.304.30(j), 052.1725(A)  
18 WCC 040.005  
19 has/have been committed by ROBERT L SONDEREN

18 and that evidence of the crime(s) photograph the land, open  
19 metal containers for determination of waste storage, look inside  
20 the R.V. trailers & unregistered cars for purpose of illegal occupancy.

21 \_\_\_\_\_  
22 \_\_\_\_\_  
23 is/are presently located, concealed and/or hidden on or within  
24 (✓) a residence and its surrounding premises and curtilage  
25 including sheds, outbuildings and areas appurtenant thereto,  
26 described as 2355 Piute Rd. Reno, NV.

Creek  
E 5815 [Signature] 1/25/0 2009

1 \_\_\_\_\_ in Washoe County, Nevada;

2 () a vehicle, described as \_\_\_\_\_

3 \_\_\_\_\_ which is presently located at

4 \_\_\_\_\_ in Washoe County, Nevada;

5 () a container, described as \_\_\_\_\_

6 \_\_\_\_\_

7 which is/are presently located at \_\_\_\_\_

8 \_\_\_\_\_ in Washoe County, Nevada.

9 YOU ARE THEREFORE DIRECTED to make a complete search within  
10 the exterior boundaries of the location and items described  
11 above, including any containers therein, whether locked or  
12 unlocked, which could reasonably contain the evidence to be  
13 searched for, and if the evidence is found, to seize it, make a  
14 written inventory of the same, and bring the inventory forthwith  
15 before me at the above Court.

16 () Serve this Warrant between the hours of 7:00 a.m.  
17 and 7:00 p.m.

18 () Good cause appearing, serve this Warrant at any  
19 time.

20 DATED this 20<sup>th</sup> day of April, 2000.

21 *A Mendel*

22 *DK Jensen*  
JUSTICE OF THE PEACE

23 *Handwritten signature*  
24 *4*  
25 *25/2000*



2. The present scheme and the history of NRS 7.125 indicate a clear legislative intent to compensate attorneys who represent indigent defendants charged with a public offense at the level of the criminal justice system. This would include magistrates before whom defendants appear charged solely by a criminal complaint.

3. The cost reimbursement provision of NRS 171.188, subsection 4 and the fee schedule of NRS 7.125 are not mutually exclusive payment systems for court-appointed attorneys who appear before justice, municipal, or police courts. The former covers costs incurred for appearances before those courts with a seventy-five (\$75) maximum. The latter sets up a fee schedule to compensate a court-appointed attorney for his time expended, in and out of court, on a particular case. This schedule assigns a three hundred dollar (\$300) limit for a misdemeanor case, subject to increase based upon "extraordinary circumstances."

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By ROBERT A. BORK, *Deputy Attorney General,*  
*Criminal Division*

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**OPINION NO. 79-2 Inspectional Search Warrants—(1) NRS 618.325, subsection 2 is unconstitutional to the extent it purports to authorize warrantless entries, without consent, of the nonpublic areas of the place of employment. (2) With certain recognized exceptions, a warrant is required to be issued on varying standards of probable cause, depending on the nature of the search intended. (3) The district court has jurisdiction to issue warrants in other than criminal cases and such warrants must be directed to and executed by the sheriff.**

CARSON CITY, February 6, 1979

The Nevada Industrial Commission, JOHN R. REISER, *Chairman*, Claude Evans and James S. Lorigan, *Commissioners*, 515 East Musser Street, Carson City, Nevada 89701

GENTLEMEN:

You have requested advice on a variety of matters, which may conveniently be addressed under two broad headings.

**QUESTION ONE**

Specifically, you ask concerning the effect of a recent decision, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), on the administrative search provisions of NRS 618.325, subsection 2.

**ANALYSIS—QUESTION ONE**

NRS 618.325, subsection 2 provides as follows:

Upon presenting appropriate credentials to any employer, the director or his representative may:

- (a) Enter without delay and at reasonable times any place of employment; and
- (b) Inspect and investigate during regular working hours or at other reasonable times and within reasonable limits, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and question privately any such employer or an employee.

4.

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In *Marshall v. Barlow's, Inc.*, supra, an OSHA inspector entered the customer service area of the company, an electrical and plumbing business, and advised Barlow, the president and general manager, that he wished to conduct a search of the working (nonpublic) area of the establishment. Barlow's, Inc. had simply turned up in OSHA's selection process and no complaint had been received. Barlow refused the inspector entry upon learning these facts and that the inspector had no search warrant. OSHA subsequently obtained a district court order compelling Barlow to admit the inspector, but Barlow again refused entry and sought injunctive relief. The district court order was issued based on section 8(a) of the federal OSHA legislation which is virtually identical to the authorization granted the Department of Occupational Safety and Health under NRS 618.325, subsection 2.

This issue before the court was whether a warrant must be obtained by the regulatory agency, upon the nonconsent of the employer, authorizing a "routine" inspectional search of the nonpublic areas of commercial premises.

The court held that " \* \* \* the act is unconstitutional insofar as it purports to authorize inspections without [search] warrant. \* \* \*" *Marshall v. Barlow's, Inc.*, 436 U.S. at 325. This holding applies to NRS 618.325, subsection 2 since, as mentioned earlier, the regulation or statute in question is virtually identical insofar as the authorization granted the regulatory agencies.

*Marshall v. Barlow's, Inc.*, supra, is one of the most recent progeny of two earlier landmark cases, *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967). *Marshall v. Barlow's, Inc.*, supra, is essentially an application of the *Camara-See* rationale to federal legislation purporting to authorize warrantless entries and searches upon the nonpublic portions of commercial establishments for the purpose of conducting "routine" area or periodic inspections for violations of occupational safety and health laws or regulations. The term "routine" is employed in the sense that the agency has no specific reason to believe that a violation actually exists on the business premises. The distinction between "routine" searches and those motivated by evidence of specific violations is critical in the context of the standard of probable cause which will be discussed in the analysis of your second question.

#### CONCLUSION--QUESTION ONE

It is the opinion of this office that NRS 618.325, subsection 2 is unconstitutional to the extent it purports to authorize "routine" inspections of the nonpublic portions of a place of employment without a search warrant. A warrant based on probable cause must be obtained for entry and inspection of such areas in the event of nonconsent by the employer or other appropriate person.

#### QUESTION TWO

More generally, you ask guidance regarding " \* \* \* the nature and requirements of affidavits in support of a search warrant; the court having jurisdiction of such matters; the proper party to serve the search warrant \* \* \*; the procedure for returns; and other matters properly related thereto."

#### ANALYSIS--QUESTION TWO

##### (A) The Probable Cause Requirement.

The question of what constitutes "probable cause" justifying the issuance of an inspectional warrant authorizing a routine entry is not altogether clear. However, the court has refused to apply the traditional probable cause standard to regulatory inspections and instead has adopted a relaxed standard. The *Camara* probable cause standard requires only that reasonable administrative or legislative standards for an area inspection be satisfied:

Such standards, which will vary with the municipal program being enforced, may be

based upon the passage of time, the nature of the building (e.g., a multi-family apartment house) or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

In *Marshall v. Barlow's, Inc.*, supra, the court stated:

A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights. 436 U.S. at 321.

Presumably, to show probable cause under these standards for area or periodic inspections the inspector would have to describe the agency's standards for inspection (for example, each establishment is to be inspected once a year), allege that these standards are reasonable and provide any other information available on the business, e.g., its nature, hazards, results of prior inspections, number of employees, known conditions on the premises, agency experience of violations in like establishments and the frequency of violations occurring at the particular establishment and in the industry.

On the other hand, the traditional standard of probable cause in the criminal sense applies in those instances where specific evidence of a violation on the business premises is brought to the department's attention which involves the imposition of criminal sanctions. (Imprisonment and fine, NRS 618.685 through 618.720, inclusive.)

When specific evidence of a violation involving the imposition of an administrative fine is brought to the department's attention, the standard of probable cause is as yet unarticulated. An argument may be made that the standard is less than probable cause in the criminal sense, requiring less verification of the facts. A phone call, suitably verified, would probably be sufficient; even an anonymous call or note might suffice if other evidence regarding the business premises were gathered. In view of the case-by-case basis the court has taken, all that may safely be said is that the standard of probable cause for administrative fine violations is not yet defined. All that may safely be done under the complaint procedure is to require the employee/informant to sign a written complaint detailing the violation and thereafter verifying the information to the extent possible with independent data on the business premises.

(B) The Warrant Requirement.

The court has not yet provided an adequate standard for determining when warrants are required. It is clear that nonconsent triggers the necessity of obtaining a warrant in all cases where the nonpublic portions of the business are to be inspected.

The provisions of NRS 179.015-179.115, inclusive, govern the issuance, grounds, contexts, execution and return of search warrants in criminal proceedings. These provisions will govern any warrant authorizing the seizure of property which is the product, instrumentality or means or evidence of crime pursuant to an investigation for violations of Chapter 618, NRS, for which criminal sanctions are imposed as contrasted with those violations calling for assessment of administrative fines.

A warrant is required only when the intended search includes nonpublic areas and in which, therefore, the employer enjoys a reasonable expectation of privacy. Under NRS 618.155 "place of employment" is defined as "\* \* \* any place \* \* \* where \* \* \* any industry, trade, work or business is carried on \* \* \* and where any person is employed by another \* \* \*." A work area in a given commercial establishment may well be a public area, i.e., one where customers may or are even expected to go. In other words, "nonpublic" and "place of employment" are not

necessarily functional equivalents. An employer may not lawfully refuse entry to a work area to which the public at large is given access, nor is a warrant required in these circumstances. In the event of refusal to permit entry into public work areas, an inspector may not employ force to gain entry, but instead must resort to the enforcement provisions of NRS 618.515. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

Some basis exceptions exist to the necessity of obtaining a search warrant which apply to the regulatory field.

A search which normally requires a warrant may be made without a warrant if consent is obtained. When valid consent is given, it operates as a waiver of the Fourth Amendment warrant requirements. What constitutes a valid consent and who may give consent are two questions not entirely settled.

There is no requirement that the employer be advised of his right to refuse entry, although knowledge of the right to refuse, or absent of such knowledge, is one factor among many considered by the courts in determining if the consent was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973). The Court in *Camara v. Municipal Court*, 387 U.S. 523 (1967), suggested but did not seem to require, that consent be first refused before a warrant is sought. An explicit consent is not necessary; even a casual consent ("Go ahead" or words of similar import) or silent acquiescence to the search have both been viewed as valid consent. *U.S. v. Thriftmart*, 429 F.2d 1006 (9th Cir. 1970); *U.S. v. Hammond Milling Co.*, 413 F.2d 608 (5th Cir. 1969).

Consent must be obtained from the person whose rights may otherwise be invaded or from someone with express authority to act for the affected person in his absence. Consent may be obtained from the employer, one sharing common authority, or such other person having a sufficient relationship to the premises. *U.S. v. Matlock*, 415 U.S. 164 (1974). NRS 618.095, subsection 4 sets forth a comprehensive definition of "employer" to include "[a]ny officer or management official having direction or custody of any employment or employee." It is certainly arguable that this definition, per se, vests in management or supervisory personnel the authority to consent to an inspectional search without a warrant. Presumably, though, management and supervisory personnel, such as general partners, general managers, corporate or other entity officers, have authority within the scope of their employment to consent to a search of their areas of responsibility.

A second exception deals with instances where there is probable cause to search but exigent circumstances exist making it impossible or impracticable to obtain a warrant in light of a need to act without delay. These situations may properly be characterized as "now or never" circumstances involving such considerations as destructibility or mobility of evidence, or the existence of an emergency. Thus, for example, the courts have recognized the legitimacy of warrantless entries in the regulatory field where there is a compelling need for prompt official action and under circumstances where there is not time or where it is impracticable to obtain a warrant in light of imminent and grave danger to life that immediate abatement of the hazard is required. *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967); and *Owens v. City of North Las Vegas*, 85 Nev. 105, 110-111 (1969).

NRS 618.425 requires the department to conduct a special investigation as soon as practicable in the event it finds there are reasonable grounds to believe that a safety or health violation exists that threatens physical harm, or that an imminent danger exists. The violation involved may or may not involve criminal sanctions, as opposed to the levy of administrative fines. The statutory scheme contemplates the necessity of immediate action, possibly without a warrant, in an emergency situation upon a finding of probable cause in the criminal sense if a crime is involved, or upon perhaps a somewhat more relaxed finding if administrative fines may be imposed (NRS 618.635 through 618.675, inclusive). Whether or not a warrant is required if a criminal sanction is involved depends on the gravity and immediacy of the hazard.

Lastly, under the "open fields" exception, an inspector may, without notice, consent or warrant, enter any portion of the employer's premises open to the public at large and from there

observe whatever the general public could see on or off the premises. Air Pollution Var. Bd. of Colo. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

(C) The Inspectional Warrant in Nevada.

No statutory provision exists governing the issuance of search warrants in other than criminal proceedings. However, the provisions of NRS 179.015-179.115, inclusive, are not exclusionary of grounds or circumstances other than criminal in nature which permit issuance of a search warrant. In *Owens v. City of North Las Vegas*, 85 Nev. 105, at 107-108 (1969), the court upheld the issuance of a search warrant for municipal building code violations and held:

The question is not whether the search was authorized by our state law. The question is, whether the search was reasonable under the Fourth Amendment to the United States Constitution. Just as a search authorized by state law may be an unreasonable one under the Fourth Amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. [Citations omitted.]

No common law right existed to the issuance of a search warrant and no provision of Chapter 618, NRS, in express terms empowers the department to seek a search warrant. A stated purpose of the Act, however, is to effectively enforce departmental health and safety regulations. NRS 618.015, subsection b. For that purpose, the department was created as the primary agency responsible for occupational safety and health within the State, NRS 618.185, subsection 1, with the duty to supervise and regulate all matters pertaining to the health and safety of employees, NRS 618.175. Authority is conferred to enforce the installation, use and maintenance of safety devices or other protective methods, NRS 618.315, subsection 3(b). NRS 618.325, subsection 1 provides that the director and his representatives “\* \* \* shall act with full power and authority to carry out and enforce the orders, standards and policies fixed by the department, \* \* \*.” Other enforcement provisions include the issuance of citations, NRS 618.465, and the imposition of administrative fines, NRS 618.625-618.675, inclusive.

The section which most closely confers express authorization on the department to seek a search warrant to carry out the purposes of the Act is NRS 618.285, subsection 4, which provides that the department shall “institute legal proceedings to compel compliance with this chapter or any rules, regulations, standards or orders adopted or issued under this chapter.” To this end, the department is empowered to prosecute, defend and maintain actions in its own name. NRS 618.525, subsection 1.

In *Marshall v. Barlow's, Inc.*, 436 U.S. at 320, the court touched upon authority of OSHA to seek a warrant:

Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed *ex parte* to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for “compulsory process.” (Footnote 15.)

The legislative intent evident in Chapter 618 of NRS is to confer broad enforcement powers on the department. From this intent alone it is not unreasonable to conclude that the department has by necessary implication the authority to seek a warrant in order to carry out its duties and the purposes of the Act. Additionally, the language of NRS 618.284, subsection 4 requiring the department to institute legal proceedings to compel employer compliance with the provisions of the Act is for all analytical purposes the legal equivalent of the regulatory authorization given OSHA inspectors to seek “compulsory process.”

The conclusion is that inspectional warrants in other than criminal cases are appropriately issued in Nevada. The director is authorized to request their issuance. However, the absence of legislation governing the procedure surrounding the issuance of search warrants in other than

criminal cases necessarily makes the answer to your remaining questions somewhat speculative. What court may issue such warrants and who appropriately executes them?

The issuance of search warrants is governed by the strictures of the Fourth Amendment and is also subject to whatever statutory control exists. Generally, the only constitutional requirement is that the issuing court be a disinterested magistrate. But in Nevada courts of the justice of the peace and municipal courts are of special and limited jurisdiction, having only those powers, duties and responsibilities fixed by law, and no presumption may be drawn or implied in favor of their jurisdiction. *Levy & Zenter Co. v. Justice Court*, 48 Nev. 425 (1925); Attorney General's Opinion No. 224 (1978); Attorney General's Opinion No. 64 (159); and 68 Am.Jur.2d Search and Seizures § 71. These courts are expressly authorized to issue search warrants in criminal proceedings, NRS 179.025 and NRS 169.095. However, neither the justice nor municipal court is expressly authorized by constitution or statute to issue search warrants in other than criminal proceedings and the conclusion must be reached that such authority does not exist in such proceedings under Chapter 618, NRS, not involving the potential of the imposition of criminal sanctions pursuant to the Act. See NRS 4.370; NRS 179.025; NRS 169.095 and Articles 6 and 8 of the Nevada Constitution (Justice Courts) and NRS 5.050-5.060; Article 6, section 9 of the Nevada Constitution (Municipal Courts). It is unnecessary here to decide the authority of either court to issue inspectional warrants in other than criminal proceedings for violations of county or municipal ordinances. See, *Owens v. City of North Las Vegas*, 85 Nev. 105 (1969) (authority of justice court presumed); NRS 5.050, subsection 1(a) and NRS 5.060 (municipal court power to issue process, writs and warrants).

Article 6, section 6 of the Nevada Constitution provides that the district courts shall have original jurisdiction in certain civil and criminal cases, but does not say that the district courts have jurisdiction to issue search warrants. Article 1, section 18 of the Nevada Constitution provides that no warrant shall issue but upon probable cause. This section thus recognizes that search warrants may be issued under certain stated limitations, but without regard to the civil or criminal nature of the search.

The district courts are expressly authorized to issue " \* \* \* all other writs proper and necessary to the complete exercise of their jurisdiction." Article 6, section 6 of the Nevada Constitution; NRS 3.190, subsection 3. An early Nevada case suggests that the enumeration of powers in Article 6, section 6 was not intended to exclude the delegation of other powers to the district courts by the Legislature. *Gay v. District Court*, 41 Nev. 330, 342 (1918). A more recent case, though, has expressed doubt as to the authority of the Legislature to enlarge the jurisdiction of a court beyond that granted constitutionally, at least if the additional duties are "foreign" to the court. *Laxalt v. Cannon*, 80 Nev. 588, 592 (1964).

A search warrant, essentially an *ex parte* order issued in the name of the state, falls within the statutory definition of "writ." NRS 10.010; NRS 28.010; NRS 64.020. Similar language as employed in Article 6, section 6 and NRS 3.190, subsection 3 appeared in a Minnesota statute and served as a basis for an opinion by that state's attorney general that district courts had the authority to issue inspectional warrants for housing and building code inspections despite there being no statute authorizing such warrants or the procedure governing their issuance. *Minn. O. Att'y. Gen. 59a-9* (1967). The duty of the district courts is to uphold and enforce valid state legislation, including the provisions of Chapter 618, NRS, empowering the director to enter and inspect commercial premises and to seek compulsory process in the courts to enforce that right. The duty of the district court in the matter is therefore entirely "natural" as opposed to one "foreign" to the judiciary.

It is accordingly the opinion of this office that only the district court is the appropriate court authorized to issue search warrants for inspection of commercial premises under Chapter 618, NRS, in other than criminal cases.

The last question deals with the persons authorized to execute the warrant. Again, there is little or no statutory guidance as to governing procedures in other than criminal cases. Inspectors

of the department are not defined as peace officers by NRS 169.125, NRS 179.045, subsection 2 provides that a criminal search warrant must be directed to a peace officer. Therefore, warrants issued pursuant to NRS 179.015-179.115 in criminal proceedings must be directed to and executed by a peace officer and not the department or its inspectors.

Nevada law contains no provision similar to Fed.R.Crim.P. 41(c) authorizing and requiring that search warrants be directed to and executed by any civil officer empowered to enforce or assist in enforcing any federal law. An argument may be made that NRS 618.325, subsection 1 authorizes an inspector to execute a warrant in other than criminal cases by the use of the phrase "The director and his representatives \* \* \* shall act with full power and authority to carry out and enforce the orders, standards and policies fixed by the department, \* \* \*" and, to that end, authorization is given to enter and inspect. It is doubtful that this quoted language can be or should be unequivocally construed to permit execution of the warrant by an inspector.

NRS 618.325 was added to the chapter in 1973 and amended by the Legislature in 1975. The Camara-See cases were decided in 1967. Neither case involved the regulatory field of occupational health and safety, although in hindsight, the See rationale could be considered a good indication of how the court would rule once the issue was squarely presented, as it was in 1978 in *Marshall v. Barlow's, Inc.*, supra. Until *Marshall* the federal courts were split on the issue of the warrant requirement under OSHA legislation. See, for example, *Brennan v. Buckeye Industries, Inc.*, 374 F.Supp. 1350 (S.D. Ga. 1974); *Brennan v. Gibson's Products, Inc.*, 407 F.Supp. 154 (E.D. Tex. 1976). Because of the uncertainty in the law, it is simply not evident that the Legislature even intended to address itself to the question of inspectional warrants or the authority of the inspectors to execute warrants.

In view of this, it is the opinion of this office that departmental inspectors do not have the authority to execute search warrants in other than criminal cases by virtue of the language used in NRS 618.325. Sound policy reasons support this conclusion in that an inspector enjoys none of the authority of a peace officer which the latter may employ in the execution of a warrant or other court process. See, for example, NRS 179.055 and NRS 248.200. The warrants should be directed to and executed by the sheriff acting pursuant to NRS 248.090; NRS 248.100; and NRS 248.120-130, or by a peace officer having similar authority to serve and execute process.

#### CONCLUSION--QUESTION TWO

(A) The traditional standard of probable cause in the criminal sense is not required in the case of area or periodic inspections. However, it is the appropriate test where specific evidence of violations of Chapter 618, NRS, imposing criminal sanctions are made known to the department. A more relaxed standard of probable cause should be employed where specific evidence of violations imposing administrative fines only are made known to the department.

(B) A warrant is required for area or periodic inspections upon non-consent to entry and inspection of the nonpublic areas of the place of employment. A warrant is likewise necessary where specific evidence of violations of chapter 618, NRS, imposing either administrative fines or criminal sanctions, is made known to the department. A warrant is not required: (1) if valid consent is given by the appropriate person; (2) where there is probable cause to search, but due to an emergency there is not time to seek a warrant; or, (3) when the case falls within the "open fields" exception.

(C) The director of the Department of Occupational Health and Safety has the authority to seek a search warrant to enforce the right of entry and inspection granted by NRS 618.325, subsection 2. The issuance of search warrants in other than criminal proceeding is appropriate in Nevada. The district court is the proper issuing court having jurisdiction of the matter. All warrants, whether civil or criminal in nature, must be directed to and executed by the sheriff, or other peace officer having like authority. A departmental inspector may accompany and assist in the service and execution of the warrant in the manner set forth in NRS 618.325.

Respectfully submitted,

RICHARD H. BRYAN, *Attorney General*

By EDWIN E. TAYLOR, JR., *Deputy Attorney General,*  
*Criminal Division*

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**OPINION NO. 79-3 Enactment Of Municipal Ordinances By Initiative Petition—A proposed municipal ordinance, which has been offered for consideration by initiative petition, but which would benefit a private corporation through the expenditure of public funds would be contrary to Article 1, Section 8 and Article 8, Section 10 of the Nevada Constitution. A city council may not enact, nor offer to the people for their enactment under NRS 295.215, a municipal ordinance which, if enacted, would be contrary to the constitution and laws of the State of Nevada or the city charter.**

CARSON CITY, February 13, 1979

THE HONORABLE GEORGE E. FRANKLIN, *City Attorney*, City of North Las Vegas, P.O. Box 4086,  
North Las Vegas, Nevada 89030

DEAR MR. FRANKLIN:

You have requested an opinion as to the legality of an ordinance contained in an initiative petition submitted to the North Las Vegas City Council concerning bonds issued under the Consolidated Local Improvements Law for facilities constructed in the Nellis Industrial Park.

#### FACTS

The City of North Las Vegas, pursuant to Chapter 271 of NRS, the Consolidated Local Improvements Law, has issued bonds and warrants to defray the costs of certain public improvements affecting the Nellis Industrial Park. Again in accordance with Chapter 271, an assessment district has been established for the purpose of assessing the landowners affected by these improvements for the funds to pay off the bonds and warrants. A large landowner, a private corporation, which is subject to assessments under this law has apparently refused to pay these assessments. The city, to avoid defaulting on the bonds and warrants, has been paying for them from public moneys diverted from the city's general funds and other public funds. You have informed us that some \$3 million has been paid in this way. The city has been in litigation with the landowner and has obtained a money judgment against the corporation for the unpaid assessments. This judgment has been affirmed in the Nevada Supreme Court.

The city council has now received an initiative petition proposing an ordinance to deal with this matter. The city does not question the sufficiency of the form of the petition. However, the city does question whether the ordinance may be legally enacted.

The proposed ordinance would require the city to enter into a settlement agreement, the terms of which are attached to the ordinance and apparently made a part thereto, which would require the city to dismiss with prejudice all its litigation against the private corporation involved in this matter. The city would further be required by the ordinance and the agreement to release or assign to the private corporation all unpaid assessments previously levied against the corporation. Finally, the city would be required by the ordinance and the agreement to issue new bonds or warrants worth \$2.7 million for improvements on property owned by the private corporation in the Nellis Industrial Park.

Once the market value of all the property in the Nellis Industrial Park, whether owned by the