

**SECTION I: PUBLIC INFORMATION
(QUESTIONS 1 THROUGH 47)**

Personal Information

1. Full Name:

Alvin Richard Kacin, III

2. Have you ever used or been known by any other legal name?

No.

If so, state name and reason for the name change.

N/A

3. Work Address: Elko Justice and Municipal Court (Physical Address)
571 Idaho Street
Elko, NV 89801

Elko Justice and Municipal Court
PO Box 176
Elko, NV 89803

4. How long have you been a continuous resident of Nevada?

17 Years

5. Age:

43 Years Old

Employment History

6. Using the format provided in Attachment "A" please start with your current employment or most recent employment, self-employment, and periods of unemployment for the twenty years immediately preceding the filing of this Application.

See Attachment A.

Educational Background

7. List names and addresses of high schools, colleges and graduate schools (other than law school attended; dates of attendance; certificates or degrees awarded; reason for leaving.

High School: Franklin Regional High School
3200 School Road
Murrysville, PA 15668

HS Dates of Attendance: Junior Sep, 1984 – June, 1985
Senior Sep, 1985 – June, 1986

HS Certificates/Degrees: HS Diploma Awarded - June, 1986

HS Reason for Leaving: Graduated – Diploma Awarded

College: Carnegie Mellon University
5000 Forbes Avenue
Pittsburgh, PA 15213

College Dates of Attendance: Freshman August, 1986 – May, 1987
Sophomore August, 1987 – May, 1988
Junior August, 1988 – May, 1989
Senior August, 1989 – May, 1990

College Certificates/Degrees: BS Degree Awarded - May, 1990

College Reason for Leaving: Graduated – BS Degree Awarded

8. Describe significant high school and college activities including extracurricular activities, positions of leadership, special projects that contributed to the learning experience.

High School

Varsity Football Letter Awarded
Junior, Senior Year

I worked in my father's construction business from the time I was twelve years of age till I began law school in 1991. I consider this to be one of the most valuable experiences of my life.

College

I participated in Carnegie Mellon University's "Booth and Buggy" Competitions throughout my college years. These were charitable events.

I worked in my father's construction business from the time I was twelve years of age till I began law school in 1991. Again, I consider this experience to be one of the most valuable in my life.

9. **List names and addresses of law schools attended; degree and date awarded; your rank in your graduating class; if more than one law school attended, explain reason for change.**

Law School: Gonzaga University School of Law
721 N. Cincinnati Street
Spokane, WA 99220

Degree and Date Awarded: JD Degree (Cum Laude) - May, 1994

Class Rank:

On September 19, 2011, I asked my law school's registrar to tell my exact class rank. The answer is still pending. I know that I was in the top 25% of my graduating class.

10. **Indicate whether you were employed during law school, whether the employment was full-time or part-time, the nature of your employment, the name(s) of your employer(s), and dates of employment.**

Employer During Law School 1: Bruce E. Dice and Associates
787 Pine Valley, Suite E
Pittsburgh, PA 15239

May, 1992 – August, 1992

In this job, I primarily drafted pleadings, motions and intra-office correspondence. I also drafted resolutions for the Plum Borough Municipal Sewer Authority.

Employer During Law School 2: University Legal Assistance
Gonzaga University Law Clinic
721 N. Cincinnati Street
Spokane, WA 99220

Employed Part-Time as Legal Intern

May, 1993 – May, 1994

I practiced law under the supervision of practicing attorneys at University Legal Assistance. I litigated domestic relations, landlord-tenant, and criminal law cases for indigent clients. I also litigated administrative matters and tribal court cases for indigent clients.

11. Describe significant law school activities including offices held, other leadership positions, clinics participated in, extracurricular activities.

During law school, I worked at University Legal Assistance as noted above.

I also participated in my law school's annual Linden Cup Appellate Advocacy Competition for second year students, and was a member of the Phi Delta Phi Honors Fraternity.

Finally, I participated in the Gonzaga University School of Law's William O. Douglas Lectures during my second and third years of law school. This lecture series began in 1972, and features lectures by national figures who share a strong commitment to the freedoms of speech, religion and assembly.

12. State the year you were admitted to the Nevada Bar

1995

13. Name states (other than Nevada) where you are or were admitted to practice law and your year of admission.

In 1994, I was admitted to the Pennsylvania Bar.

14. Have you ever been suspended, disbarred, or voluntarily resigned from the practice of law in Nevada or any other state?

No.

15. Estimate what percentage of work over the last five years has involved litigation matters, distinguishing between trial and appellate courts. For judges, answer questions 16-20 for the five years directly preceding your appointment or election to the bench.

I have been a limited jurisdiction court judge for almost five years. I was elected Elko Township Justice of the Peace in 2006, and took the bench on January 2, 2007. I was also appointed to be the Elko Municipal Judge on January 2, 2007.

I estimate that 90% of my work as a limited jurisdiction judge involves litigation matters at the trial court level. The other 10% of that work involves the performance of my administrative responsibilities.

16. **Estimate percentage of time spent on (1) domestic/family and juvenile law matters, (2) civil litigation, (3) criminal matters, and (4) administrative litigation.**

For the five years before I took the bench, I was an Elko County Deputy District Attorney. I was assigned to prosecute felony, gross misdemeanor and misdemeanor criminal cases during that time.

I estimate that 98% of my time during those five years was spent prosecuting criminal cases at the trial and appellate court levels. Of course, many of those prosecutions involved domestic/family and juvenile issues, including prosecutions for Open Murder, Child Abuse, Sexual Assault on Minor, Lewdness on Minor, Sexual Exploitation of Minor, Battery Constituting Domestic Violence and Violation of Order for Protection Against Domestic Violence.

I estimate that perhaps 2% of my time during those five years was spent on civil and administrative litigation.

17. **In the past five years, what percentage of your litigation matters involved cases set for jury trials vs. non-jury trials?**

For the five years before I took the bench, I was an Elko County Deputy District Attorney. I was assigned to prosecute felony, gross misdemeanor and misdemeanor criminal cases during that time.

This is a very difficult question because the Elko County District Attorney's Office cannot assist me in giving an answer grounded in reliable statistics. Therefore, I will give an estimate.

Of my litigation matters set for trial during that time, I estimate that 50% of them were set for jury trials and 50% of them for non-jury trials.

18. **Give the approximate number of jury cases tried to a conclusion during the past five years with you as lead counsel. Give the approximate number of non-jury cases tried to a decision in the same period.**

For the five years before I took the bench, I was an Elko County Deputy District Attorney. I was assigned to prosecute felony, gross misdemeanor and misdemeanor criminal cases during that time.

This is also a very difficult question because the Elko County District Attorney's Office cannot assist me in giving an answer grounded in reliable statistics.

To the best of my recollection, I tried between fifteen and twenty jury trials to a "conclusion" during that time. During that time, I tried no cases with co-counsel.

For the purpose of answering this question, I consider "conclusion" to mean "verdict."

I estimate that I tried more than one hundred non-jury trials to a "decision" during that time. For the purpose of answering this question, I consider "decision" to mean a finding of "guilty" or "not guilty."

19. List courts and counties in any state where you have practiced in the past five years.

For the five years before I took the bench, I was an Elko County Deputy District Attorney. I was assigned to prosecute felony, gross misdemeanor and misdemeanor criminal cases during that time.

I practiced exclusively in Elko County during that time in the following courts: (a) Fourth Judicial District Court, Department 1; (b) Fourth Judicial District Court, Department 2; (c) Carlin Justice Court; (d) Elko Justice Court; (e) Wells Justice Court; (f) Jackpot Justice Court; and (g) East Line Justice Court.

20. List by case name and date the five cases of most significance to you (not including cases pending in which you have been involved), and list or describe:

- a. case name and date,
- b. court and presiding judge and all counsel,
- c. the importance of each case to you and the impact of each case on you,
- d. your role in the case.

These cases were all tried to a jury verdict. I am not listing these cases in any particular order of significance. I believe that they were all significant for my professional development, and gave me lessons that serve me well as a judge.

Case 1

- a. State v. Kelly Eugene Rhyne, Decision on Appeal Rendered 01/16/02
- b. Fourth Judicial District Court, Department 1
District Judge – J. Michael Memeo
Defense Counsel – Matthew J. Stermitz; Jeff Kump
- c. Importance and Impact of Case

This was the first open murder case that I prosecuted. It was the first and only capital murder case that I prosecuted. For those reasons alone, this case was important to me as a young prosecutor.

For this case, I learned how to effectively present and argue forensic evidence and testimony to a jury. I was responsible for presenting DNA, blood spatter and hair comparison analyst testimony. After this trial, I specialized in the litigation of forensic evidence cases. This experience serves me well as a judge when I am deciding objections and listening to the presentation of such evidence and testimony.

When I think of this case I am reminded that every criminal defendant is a human being and entitled to the careful consideration of his sentence by the sentencing authority.

I also argued this case on appeal to the Nevada Supreme Court, which affirmed the defendant's conviction and death sentence. Rhyne v. State, 118 Nev. 1 (2002).

d. My Role in Case – Prosecutor (Second Chair)

Case 2

- a. State v David James King, Jury Verdict Rendered 10/03/03
- b. Fourth Judicial District Court, Department 1
District Judge - J. Michael Memeo
Defense Counsel – Frederick B. Lee, Elko County Public Defender
- c. Importance and Impact of Case

This was the first murder case that I prosecuted as lead counsel. It was the first and only “shaken baby” murder case that I prosecuted. To this day, “shaken baby” cases remain extremely controversial. For these reasons, this case remains important to me.

For this case, I sharpened my ability to effectively present, cross-examine and argue inferences that can be drawn from technical expert testimony. I also learned how important it is for an advocate to study and comprehend complex, technical subjects that become important to a case. Again, this experience serves me well as a judge when I am deciding objections and listening to the presentation of complex, detail-laden evidence and testimony.

When I think of this case, I am also reminded that justice requires all participants in the jury trial system to abide by the rule of law.

A prosecutor's obligation to disclose exculpatory evidence and seek justice is one of his/her most important responsibilities. After the jury found the defendant guilty of first degree murder in this case, detectives disclosed to me the existence of some exculpatory evidence that arguably casts doubt on the verdict. I

disclosed this evidence to the defense, and I believe that post verdict litigation about its impact is ongoing.

d. My Role in Case – Lead Prosecutor (No Second Chair)

Case 3

- a. State v. Ryan Ensign and Steven Allen, Jury Verdict Rendered 07/08/04
- b. Fourth Judicial District Court, Department 2
District Judge – Andrew J. Puccinelli
Defense Counsel for Ensign – Roger Stewart
Defense Counsel for Allen – Robert Salyer
- c. Importance and Impact of Case

This may have been the first jury trial that I litigated in Judge Puccinelli's court. As I look back, I realize that I learned a lot from watching Judge Puccinelli run a jury trial.

First, Judge Puccinelli was a "trial lawyer's judge." In other words, he understood the importance of making a good record and speedy decisions on pretrial issues well in advance of opening statements. He understood the importance of letting the lawyers argue their cases, no matter how weak or incredible their evidence was. See Brooks v. State, 124 Nev 203 (2008).

Although I have not presided over a jury trial, I strive to make a good record and decide cases quickly, and I always welcome thorough argument.

Second, Judge Puccinelli worked very well with juries. He did a quick but thorough job of explaining the importance of their service. He always respected the venires and the petit juries that were in his court. He did that by requiring prosecutors and defense lawyers to be prepared and to temper their advocacy with civility. He did that by starting and ending the proceedings on time, and taking steps to minimize the need for side bars and arguments outside the presence of the jury. He required the lawyers to be diligent in the settling of jury instructions. Observing all of these things positively impacted me as a former litigator and current judge.

This case also taught me how much a charging mistake can influence the outcome of a jury trial. I made such a mistake in this case, which resulted in a verdict of guilty on a lesser included misdemeanor offense.

For me, this case stands for the proposition that all lawyers and judges should recognize and learn from their mistakes, fix them if they can, and do better the next time.

- d. My Role in Case -- Lead Prosecutor (No Second Chair)

Case 4

- a. State v. Dale Holcomb, Jury Verdict Rendered 04/12/05
- b. Fourth Judicial District Court, Department 1
District Judge - J. Michael Memeo
Defense Counsel -- Roger Stewart
- c. Importance and Impact of Case

This was the first felony domestic battery jury trial that I litigated. This case reminds me that justice sometimes must be sought in spite of an alleged victim's reluctance to seek it.

Domestic battery cases are some of the most difficult for a prosecutor to try. They are also often the most difficult for complaining witnesses. Often, complaining witnesses are in love with the person who battered them come trial day. These witnesses often abandon or contradict prior statements that they were battered by the defendant. In such cases, the prosecutor often attempts to impeach his/her own complaining witness, and relies on other testimony and photographic, documentary and physical evidence to prove the case beyond a reasonable doubt.

I litigated many such cases in justice courts, but I presented few to a jury. I found this case extremely difficult to try. It required more work than just about any other case that I tried.

This case reminds me that obtaining justice can be hard, but we must always strive and work within the rule of law and the jury system to seek it.

- d. My Role in Case -- Lead Prosecutor (No Second Chair)

Case 5

- a. State v. Shelli Rose Dewey, Jury Verdict Rendered 12/21/05
- b. Fourth Judicial District Court, Department 1
District Judge - J. Michael Memeo
Defense Counsel -- Marc Picker
- c. Importance and Impact of Case

This was the second murder case that I prosecuted as lead counsel. The defendant was found guilty of second-degree murder with the use of a deadly weapon.

This case involved a lot of motion practice and took a long time to try. The case is important to me because it was one of the last jury trials that I litigated. I felt that I tried this case as well any I ever did in spite of its many proof problems.

The case reminds me that obtaining professional competence is tremendously satisfying, but comes only with dedication and hard work.

The verdict in this case was affirmed on appeal in a reported decision. Dewey v. State, 123 Nev. 483 (2007).

d. My Role in Case -- Lead Prosecutor (No Second Chair)

- 21. Do you now serve or have you previously served as a mediator, an arbitrator, a part time or full-time judicial officer, or a quasi-judicial officer? To the extent possible, please explain each experience.**

I have been a limited jurisdiction court judge for almost five years. I was elected Elko Township Justice of the Peace in 2006, and took the bench on January 2, 2007. I was also appointed Elko Municipal Judge on January 2, 2007.

The experience has been rewarding and challenging.

I elaborate further on my experience as a judge in answers to Question 45 and Question 46.

See also Attachment B (Answer to Question 45) and Attachment C (Answer to Question 46).

- 22. Describe any pro bono or public interest work as an attorney.**

In 1997, I became a grader for the Nevada Board of Bar Examiners. I served as a grader until 2004, the year I was appointed to that board.

I have been on the Nevada Board of Bar Examiners since 2004.

As a grader and member of the Nevada Board of Bar Examiners, I have graded between 100 and 200 exam answers approximately seventeen times since 1997.

As a member of this board, I have drafted essay questions more than ten times since 2004. I have attended two full days of meetings in the spring and fall of every year that I have been a member of this board.

The primary purpose of these meetings is to review the administration and results of the bar examination immediately preceding the meeting, discuss and decide upon policy and rule changes dealing with the administration of the examination and vet essay questions for the next bar examination.

As a member of this board, I have also attended National Conference of Bar Examiners training sessions in Madison, Wisconsin, and Austin, Texas, and meetings with justices of the Nevada Supreme Court in Carson City.

I cannot reliably estimate the hundreds of hours that I have actually devoted to the Nevada Board of Bar Examiners. Although I was paid \$1.50 per answer graded when I was a grader, I have always considered my service to this board to be pro bono. Members of this board are not paid for their service.

At our last meeting this past week, other members and I estimated that we all spend between 100 and 120 hours on each administration of the Nevada Bar Examination.

23. **List all bar associations and professional societies of which you are or have been a member. Give titles and dates of offices held. List chairs or committees in such groups you believe to be of significance. Exclude information regarding your political affiliation.**

State Bar Membership

I have been a member of the Pennsylvania Bar since 1994.

I have been a member of the Nevada Bar since 1995.

Local Bar Association Membership

I have been a member of the Elko County Bar Association since 1995. I was president of that organization in 2004.

Judge's Associations Membership

I have been a member of the Nevada Judges of Limited Jurisdiction Association (NJLJ) since 2007. I have also been a member of that organization's Education Committee since 2007.

Nevada Supreme Court Commissions/Committees

Since 2008, I have been a member of the Nevada Supreme Court's Commission on Indigent Defense, Rural Subcommittee.

Since 2010, I have been a member of the Nevada Supreme Court's Video/Tele Conferencing Committee.

- 24. List all courses, seminars, or institutes you have attended relating to continuing legal education during the past five years. Are you in compliance with the continuing legal education requirements applicable to you as a lawyer or judge?**

In 2007, I attended a two-week training session for new advanced limited jurisdiction court judges at the National Judicial College (NJC) in Reno, NV. My attendance at this session was required by Nevada law. I also attended a two-day ethics seminar for new judges at the NJC in 2007.

In 2007, 2009, and 2011, I attended the NJLJ winter conference and training seminar sponsored by the Nevada Administrative Office of the Courts (AOC).

In 2009 and 2011, I attended the NJLJ summer conference and training seminar sponsored by the Nevada AOC.

I am in compliance with the continuing legal education requirements applicable to all me as a lawyer/judge.

Since 2004, I have actually earned a CLE waiver due to my service on Nevada's Board of Bar Examiners.

- 25. Do you have Professional Liability Insurance or do you work for a governmental agency?**

I do not have professional liability insurance. I am a judge.

Business and Occupational Experience

- 26. Have you ever been engaged in any occupation, business, or profession other than judicial officer or the practice of law?**

Yes.

- 27. List experience as an executor, trustee, or in any other fiduciary capacity. Give name, address, position title, nature of your duties, terms of service and, if any the percentage of your ownership.**

I have none.

- 28. Do you currently serve or have you in the past served as manager, officer, or director of any business enterprise, including a law practice? If so, please provide details as to:**

- a. the nature of the business,
- b. the nature of your duties,
- c. the extent of your involvement in the administration or management of the business,
- d. the terms of your service,
- e. the percentage of your ownership.

a. Nature of the Business

I worked for a single-family home building company named Delwood Homes, Incorporated, as a project manager. My father owns the company, and it is located in Murrysville, PA.

b. Nature of Duties

As a project manager, I managed the construction of single-family homes. My responsibilities included determining which markets to enter, soliciting and evaluating subcontractor bids, calculating and ordering materials needed for construction, deploying subcontractors and employees to jobs, negotiating real estate commissions, and selling finished homes to consumers for profit.

c. Involvement in Administration or Management

In addition to the duties above, I had some responsibility for administering the company's employee stock ownership plan.

d. Terms of Service

I was a project manager from 1988-1991.

e. Percentage of Ownership

None

Civic, Professional and Community Involvement

- 29. Have you ever held an elective or appointive public office in this or any other state? Have you been a candidate for such an office? If so, give details, including the offices involved, whether initially appointed or elected, and the length of service. Exclude political affiliation.**

I am the elected Elko Justice of the Peace. I have been so since January, 2007. I won election to this office in November, 2006.

I am the appointed Elko Municipal Judge. I have been so since January, 2007. The Elko City Council appointed me this office in January, 2007.

Please refer to my answer to Question 21, Question 45 and Question 46 for further details.

See also Attachment B (Answer to Question 45) and Attachment C (Answer to Question 46).

30. State significant activities in which you have taken part, giving dates and offices or leadership positions.

In 1997, I became a grader for the Nevada Board of Bar Examiners. I served as a grader until 2004, the year I was appointed to that board.

I have been on the Nevada Board of Bar Examiners since 2004.

Please refer to my answer to Question 22 for further details

31. Describe any courses taught at law schools or continuing education programs. Describe any lectures delivered at bar association conferences.

I have not taught courses at law schools or continuing education programs.

I have not delivered lectures at a bar association conference.

I delivered a lecture about writing judicial orders at the Nevada Judges of Limited Jurisdiction Summer Conference in June, 2011.

32. List education, military service, service to your country, charitable, fraternal and church activities you deem significant. Indicate leadership positions.

Please refer to my answer to Question 22 regarding my service to the Nevada Board of Bar Examiners, an educational activity that I deem significant.

Since 2006, I have been a member of the Elko High School Athletic Booster Club.

Since 2007, I have been a "500 Club" Member of the Elko Boys & Girls Club.

33. List honors, prizes, awards or other forms of recognition.

None.

34. Have you at anytime in the last 12 months belonged or do you currently belong to any club or organization that in practice or policy restricts (or

restricted during the time of your membership) its membership on the basis of race, religion, creed, national origin or sex?

No.

- 35. List books, articles, speeches and public statements published, or examples of opinions rendered, with citations and dates.**

I have issued many written orders that include opinions regarding Nevada and federal constitutional law. These are available at the Elko Justice and Municipal Court. One is attached as directed by Question 47 below.

- 36. During the past ten years, have you been registered to vote? Have you voted in the general elections held in those years?**

Yes, to both questions.

- 37. List avocational interests and hobbies.**

I especially enjoy spending time with my wife and children, and my sisters-in-law and their husbands and children.

I also enjoy riding bicycles (especially mountain bikes off road), fly fishing, whitewater rafting and exploring the Ruby and East Humboldt Mountains.

Conduct

- 38. Have you ever been convicted of or formally found to be in violation of federal, state or local law, ordinance or regulation? Provide details of circumstances, charges and dispositions.**

I was cited for violating a municipal ordinance prohibiting the possession of an alcoholic beverage by a minor when I was 16 or 17 years of age. If memory serves me correctly, I was cited in the Municipality of Murrysville, PA, and simply paid and forfeited cash bail on the citation.

I have been cited for speeding a few times in my life between 16 and 36 years of age. If memory serves me correctly, I have simply paid and forfeited cash bail on any speeding citation that I have ever received.

There is a lot of case law standing for the proposition that, for almost all purposes, the forfeiture of posted bail constitutes neither a "conviction" nor a "formal finding" that one is in violation of federal, state or local law, ordinance or regulation. I have made note of these citations and subsequent bail forfeitures in the interest of full disclosure.

My recent review of my complete Nevada driving record reveals the following speeding citation and conviction dates:

Cite Date	Conviction Date
07-07-1995	07-18-1995
09-07-1996	10-02-1996
05-28-2001	07-09-2001
12-12-2004	01-05-2005

Unfortunately, I do not have the information available to provide "details of circumstances, charges and dispositions" for any speeding citations that I received during the ten years that I held a Pennsylvania driver's license. I will try to find this information if the Commission requests that I do so.

39. **Have you ever been sanctioned, disciplined, reprimanded, found to have breached an ethics rule or to have acted unprofessionally by any judicial or bar association discipline commission, other professional organization or administrative body or military tribunal?**

No.

40. **Have you ever been dropped, suspended, disqualified, expelled, dismissed from, or placed on probation at any college, university, professional school or law school for any reason including scholastic, criminal, or moral?**

No.

41. **Have you ever been refused admission to or been released from any of the armed services for reasons other than honorable discharge?**

No.

42. **Has a lien ever been asserted against you or any property of yours that was not discharged within 30 days?**

No.

43. **Has any Bankruptcy Court in a case where you are or were the debtor, entered an order providing a creditor automatic relief from the bankruptcy stay (providing in rem relief) in any present or future bankruptcy case, related to property in which you have an interest?**

No.

Other

44. **If you have previously submitted a questionnaire or Application to this or any other judicial nominating commission, please provide the name of the commission, the approximate date(s) of submission, and the result.**

N/A

45. **In no more than three pages (double spaced) attached to this Application, provide a statement describing what you believe sets you apart from your peers, and explains what particular education, experience, personality or character traits you possess or have acquired that you feel qualify you as a good district court judge. In doing so, address both the civil (including family law matters) and criminal processes (including criminal sentencing).**

See attached statement (Attachment B).

46. **Detail any further information relative to your judicial candidacy that you desire to call to the attention of the members of the Commission on Judicial Selection.**

See attached statement (Attachment C).

47. **Attach a sample of no more than ten pages of your original writing in the form of a decision, "points and authorities," or appellate brief generated within the past five years, which demonstrates your ability to write in a logical, cohesive, concise, organized, and persuasive fashion.**

See attached "original writing" (Attachment D).

In the interest of full disclosure, please note that I have removed two paragraphs of dictum from this piece in order to meet the Commission's ten-page limit. The Order Granting Motion in Limine containing these two paragraphs is eleven pages long, and was entered on April 11, 2011, in Case No. CR-2010-2469 at the Elko Justice Court.

I have submitted this piece for the Commission's review because I think it best demonstrates my ability to write the kind of comprehensive pretrial orders that the Nevada Supreme Court prefers to see from district judges. See, e.g. Allstate Insurance Co. v. Fackett, 125 Nev. Adv. Op. 14, p.4, n.2 (2009).

If the Commission would like to have a copy of the Order Granting Motion in Limine that was actually entered, I will provide it upon request.

**INSERT PAGE BREAK HERE TO START SECTION II
(CONFIDENTIAL INFORMATION) ON NEW PAGE**

Attachment A Employment History

Please start with your current employment or most recent employment, self employment, and periods of unemployment for the last 20 years preceding the filing of this Application.

Current or Last Employer Elko Justice and Municipal Court

Phone Number: (775) 738-8403

Address: **Physical Address at Elko County Courthouse**

571 Idaho Street
Elko, NV 89801

Mailing Address

PO Box 176
Elko, NV 89803

Employed From: January, 2007

Employed To: Present

Supervisor's Name: None

Supervisor's Job Title: N/A

My Title: Elko Township Justice of the Peace
Elko Municipal Judge

Specific Duties:

As a Justice of the Peace, I am obligated to handle criminal and civil cases over which I have jurisdiction pursuant to NRS 4.370.

As a Municipal Judge, I am obligated to handle criminal and civil cases over which I have jurisdiction pursuant to NRS 5.050.

As a Justice of the Peace and a Municipal Judge I am obligated to perform administrative duties as required by the Nevada Code of Judicial Conduct.

Reason for Leaving: N/A

Previous Employer Elko County District Attorney's Office

Phone Number: (775) 738-3101

Address: 540 Court Street
Suite 201
Elko, NV 89801

Employed From: October, 1997

Employed To: December, 2006

Supervisor's Name: Gary D. Woodbury

Supervisor's Job Title: Elko County District Attorney

My Title: Elko County Deputy District Attorney

Specific Duties:

As an Elko County Deputy District Attorney, I was assigned to prosecute adult criminal cases.

I prosecuted charges ranging from the most serious felony offenses down to simple misdemeanor traffic offenses.

Reason for Leaving:

I was elected Elko Township Justice of the Peace in November, 2006. I took the bench on January 2, 2007.

On January 2, 2007, I was also appointed Elko Municipal Judge.

Previous Employer

Puccinelli & Puccinelli

Phone Number:

This law firm is no longer in existence.

Address:

This law firm is no longer in existence.

Employed From:

November, 1995

Employed To:

September, 1997

Supervisor's Name:

Leo and Andrew Puccinelli

Supervisor's Job Title:

Partners

My Title:

Associate

Specific Duties:

I primarily handled civil and criminal litigation when employed with Puccinelli & Puccinelli. I gained a lot of domestic/family and juvenile law experience during my employment with this firm.

While employed with Puccinelli & Puccinelli, I argued my first case on appeal. Golconda Fire Protection District v. County of Humboldt, 113 Nev. 104 (1997).

Reason for Leaving:

I left Puccinelli & Puccinelli because I was certain to have more jury trial experience as an Elko County Deputy District Attorney.

Previous Employer ----- Seventh Judicial District Court, State of Nevada -----

Phone Number: (775) 289-2341

Address: PG Box 151629
Ely, NV 89315

Employed From: September, 1994

Employed To: August, 1995

Supervisor's Name: The Honorable Dan Papez

Supervisor's Job Title: District Judge, Department 2

My Title: Law Clerk

Specific Duties:

As a law clerk for Judge Papez, I was primarily responsible for conducting legal research and drafting bench memoranda and orders. I was also responsible for maintaining the White Pine County Law Library and attending court proceedings with the judge.

Reason for Leaving:

I finished my clerkship at the end of August, 1995.

Period of Unemployment

I was unemployed during the months of September and October, 1995.

In October, 1995, I learned that I passed the July, 1995, Nevada Bar Examination. As previously noted, I then became an associate with Puccinelli & Puccinelli in Elko, NV, in November, 1995.

Previous Employer

University Legal Assistance
Gonzaga University School of Law

Phone Number: (509) 313-5791

Address: 721 N. Cincinnati Street
Spokane, WA 99220

Employed From: May, 1993

Employed To: May, 1994

Supervisor's Name: Mark Wilson, Esq.

Supervisor's Job Title: Clinic Director

My Title: Legal Intern

Specific Duties:

I practiced law under the supervision of practicing attorneys at University Legal Assistance. I litigated domestic relations, landlord-tenant, and criminal law cases for indigent clients. I also litigated administrative matters and tribal court cases for indigent clients.

Reason for Leaving:

In May, 1994, I graduated from law school and began preparing to take the July, 1994, Pennsylvania Bar Examination.

Period of Unemployment

I was unemployed during the months of June, July and August, 1994.

I graduated from law school in May, 1994, and promptly began studying for the Pennsylvania Bar Examination. After I took that bar examination, I went to Ely in August, 1994, to begin my clerkship in September, 1994.

Previous Employer Bruce E. Dice and Associates

Phone Number: (724) 733-3080

Address: 787 Pine Valley, Suite E
Pittsburgh, PA 15239

Employed From: May, 1992

Employed To: August, 1992

Supervisor's Name: Bruce E Dice, Esq.

Supervisor's Job Title: Partner

My Title: Legal Intern

Specific Duties:

In this job, I primarily drafted pleadings, motions and intra-office correspondence. I also drafted resolutions for the Plum Borough Municipal Sewer Authority.

Reason for Leaving:

In August, 1992, I departed for my second year of law school in Spokane, Washington.

Period of Unemployment

I was unemployed between September, 1992, and April, 1993, while I attended my second year of law school.

I was unemployed between September, 1991, and April, 1992, while I attended my first year of law school.

Attachment B
Answer to Question 45
Statement

I am honored to submit this application to become the next judge of the Fourth Judicial District Court, Department 2. If I am selected to fill this position, I will run the drug court and perform the other responsibilities of the job to the very best of my ability. My good friend and colleague who occupied this position, the late Andrew J. Puccinelli, and the people of Elko County would expect and deserve no less.

I do not believe that other judges are submitting an application for this position. Therefore, I believe that my judicial experience clearly sets me apart from my peers.

I have built a record as a hard-working jurist. For nearly five years, I have donned a black robe and taken the bench at the Elko Justice and Municipal Court. I have been available after regular court hours to consider applications for written and telephonic search warrants and orders for protection. I have had the joy and privilege of performing marriage ceremonies on the weekends for my fellow citizens.

I believe that my experience as a limited jurisdiction court judge would serve me well as a district judge deciding issues that arise in both civil and criminal cases. I already run a thirteen-employee court, and I know from experience how to timely discharge the adjudicative and administrative responsibilities of a judge. I also handle many cases involving unrepresented litigants. As more and more litigants represent themselves in Nevada's courts of general jurisdiction, this experience would be valuable for any district judge.

I have proven my ability to decide civil and criminal cases fairly and impartially under the rule of law. Making a good record for all of the cases that come before me has

become second nature. I have tried, practiced and improved techniques to ensure procedural fairness so that all litigants receive justice, *and* perceive that the judge really listened to and considered their side of the case. I have carefully studied areas of the law in which I lack experience in order become a more knowledgeable jurist. I would continue to do all of these things as a district judge. The public's confidence in the judicial system demands no less.

I am already comfortable with and practiced in the serious business of making decisions that affect the lives of my fellow citizens, including criminal sentencing.

As a judge, I draw on my personal experience in addition to my experience as a former prosecutor and defense attorney in fashioning criminal sentences. I have been an angry victim of crime who knows what it is like to desire retribution, deterrence and restitution from the sentencing judge. Because I have also had a couple of friends and acquaintances who have been sentenced in criminal courts, I know what it is like to urge a judge to consider the good in a person, and temper a sentence with mercy and an eye toward rehabilitation. I have learned through experience that the best sentences are given by an open-minded judge who considers all of the testimony and evidence relevant to sentencing. It is one of the things I love most about our justice system.

As a district judge I would also draw on my personal experience as a step-father and a child of divorce (in addition to my experience as a civil litigator) to timely and fairly decide contested divorce and child custody cases.

Finally, I have proven that I am a strong advocate for the judicial branch of government in Elko County. I have made improvements to the Elko Justice and Municipal Court that make it a better place to work for the employees, and an easier

place to do business and litigate for lawyers and unrepresented litigants. See Attachment C. I respectfully insist that county and city officials pay for these improvements with the administrative assessments and court facility funds to which the court is legally entitled.

I believe that I have had unique work and educational experiences that also may distinguish me from my peers.

I grew up in an affluent town, but my mother and father always taught me to earn my keep, and that all people have something important to offer and teach me. In my teenage years and the years before I attended law school, I worked in my father's construction business. Although I performed a lot of manual labor when working for my dad, I had considerable success as a project manager. This experience gave me a lot of confidence during my formative years, and taught me to respect people of various skill and income levels.

In my college years, I attended Carnegie Mellon University, an institution of inclusiveness where I learned to appreciate people of different races, religions and sexual orientations. That experience reminds me that all people are truly created equal and deserving of justice.

In my law school years, I was fortunate to represent indigent clients as a legal intern at a clinical program, University Legal Assistance. That experience also reminds me that the justice system must strive to ensure that people of limited means have legal representation if they desire it.

I look forward to my interview with the Commission on Judicial Selection to elaborate on the things I have written about here.

Attachment C
Answer to Question 46
Further Information

I ran against and prevailed over a longtime incumbent in the 2006 election for Elko Township Justice of the Peace. During that election, I knocked on a lot of doors and made many new friends and acquaintances. Everyday, I think about how honored and humbled I am that my fellow citizens selected me to be one of their judges.

A review of the Annual Report of the Judiciary for the last several fiscal years reveals that the Elko Justice and Municipal Court is the busiest one-judge court in Nevada. In order to deal with the large case load, I have made many changes to run the court efficiently and avoid the addition of another judge at great expense to the taxpayers of Elko Township. See NRS 4.020.

These changes include, among other things: (1) starting court sessions early every judicial day, and finishing them in the evening when necessary; (2) being available after hours to review applications for written and telephonic search warrants, as well as orders for protection; (3) developing and using new written forms to dispense with the need for certain hearings and make others less time-consuming; (4) establishing a simple civil case settlement program; (5) installing state-of-the-art audio visual equipment to facilitate the timely and less expensive presentation of cases; and (6) using the courtroom attached to the Elko County Jail to expedite short hearings involving incarcerated criminal defendants.

I have also made other sorely-needed improvements to the court. With the help of Elko County's Buildings and Grounds Department, I have organized and overseen the completion of a facility renovation and several court security improvements. When time

allows, I update the website that I developed for the court. The court has installed a modern digital recording and amplification system.

With the assistance of the PACE Coalition and Northern Nevada MADD, I established a new DUI Victim Impact Panel in Elko in 2009.

With the assistance of the Nevada Administrative Office of the Courts (AOC), the court's administrator and I oversaw the installation of the state-of-the-art "Court View" case management system in 2010. The system has improved case management and streamlined the time-consuming process of reporting case statistics to the AOC. In the near future, it is my hope that the system will allow the court to receive electronic citations from the Nevada Highway Patrol and other law enforcement agencies.

Like the other improvements that I have mentioned, the court funded and continues to fund the new case management system with assessments and fees collected from defendants in criminal and traffic cases. I am also happy to note that collections increased significantly after the court added a credit and debit card payment system in 2007.

ATTACHMENT D
WRITING SAMPLE

**In The Justice's/Municipal Court
of Elko Township, County of Elko
State of Nevada**

THE STATE OF NEVADA,
Plaintiff,

vs.

PAUL RICHARD ULRICH,
Defendant.

**ORDER IN LIMINE PERTAINING
TO ADMISSIBILITY OF
DECLARATIONS TO BE OFFERED
AT TRIAL PURSUANT TO
NRS 50.315 AND NRS 50.325**

In a Criminal Complaint filed February 16, 2011, Plaintiff State of Nevada (State) charged Defendant Paul Richard Ulrich (Ulrich) with Driving Under the Influence With One Prior Conviction (Second Offense DUI) in the City of Elko.

The State has alleged that on December 19, 2010, Ulrich drove or was in actual physical control of a motor vehicle on a highway or on premises to which the public has access while "having a concentration of alcohol of 0.08 or more in his/her blood or breath" or after he "was found to have, by measurement within two hours after driving or being in actual physical control of a vehicle" a concentration of alcohol of 0.08 or more in his blood or breath.

On March 3, 2011, the State filed a "Motion in Limine Regarding the Admissibility of the Unsworn Declarations of the Criminalist Maria Fassett Regarding the CMI Intoxilyzer 5000 Calibration and the Preparation of the Chemical Solution" (Motion in Limine). Ulrich opposed the Motion in Limine on March 18, 2011. The State replied to Ulrich's Opposition to Motion in Limine on March 24, 2011.

On April 5, 2011, this court held a hearing on the Motion in Limine. At issue in the Motion in Limine is the admissibility of two declarations by Maria Fassett (Fassett), a Criminalist employed by the Washoe County Sheriff's Office.

A copy of the first declaration is attached to the Motion in Limine as the first page of Exhibit 1. This court will refer to that declaration as the "calibration declaration." Fassett declares therein, among other things, that she: (a) is a Nevada-certified forensic analyst of alcohol; (b) calibrated a CMI Intoxilyzer 5000EN bearing serial number 68-012905, which is located at the Elko County Sheriff's Office, on November 20, 2010; and (c) determined that this Intoxilyzer was operating properly.

A copy of the second declaration is attached to the Motion in Limine as the second page of Exhibit 1. This court will refer to that declaration as the "solution declaration." Fassett declares

therein, among other things, that: (a) she is a Nevada-certified forensic analyst of alcohol; (b) in 2009 she prepared an aqueous solution of ethanol that corresponds to a concentration of alcohol in the breath of 0.103 gram per 210 liters; and (c) the solution was identified as N-0609, and has a chemical composition that is specified by Nevada's Committee on Testing for Intoxication as necessary for accurately calibrating the CMI Intoxilyzer 5000.

Admission of Fassett's declarations is sought pursuant to NRS 50.315 and NRS 50.325. At the hearing, Ulrich did not claim that the State failed to comply with these statutes in making its written request that these declarations be admitted at trial. However, Ulrich contends that the declarations should not be admitted because: (a) he has a "bona fide" dispute regarding the facts in the declarations that justifies an order requiring the State to produce Fassett as a trial witness; and (b) admission would violate his Sixth Amendment right to confront and cross examine Fassett. See Exhibit 1, Copy of Letter to Elko County District Attorney - April 4, 2011.

Having carefully considered these arguments, this court concludes that the admission of the calibration and solution declarations at trial would not violate Ulrich's Sixth Amendment right to confrontation. The court has also concluded that Ulrich has not established that there is a *substantial and bona fide* dispute regarding the facts in either declaration. Therefore, the court shall admit the declarations as long as the State meets the foundational requirements for admission.

1. Analysis – Confrontation Clause

Ulrich's initial objection to the admission of Fassett's declarations is stated in the first paragraph of a letter his counsel sent to the Elko County District Attorney, a copy of which is attached to the Motion in Limine as Exhibit 2. In that letter dated March 1, 2011, Ulrich's counsel wrote:

"Pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), NRS 50.315; and/or NRS 50.320, and/or NRS 50.325 and the Sixth Amendment to the United States Constitution, Defendant and Defense Counsel object to the use of affidavits in lieu of producing witnesses subject to cross-examination at the trial in the above referenced matter"

In the second paragraph of this letter, Ulrich's counsel disclaimed the ability to establish a "bona fide" dispute regarding the facts in Fassett's declarations.¹ Instead, Ulrich's counsel argued in the third and fourth paragraphs of the letter that NRS 50.315 is an unconstitutional burden-shifting statute with which he cannot and need not comply.

Ulrich fleshes out his objection to the admission of Fassett's declarations in his written opposition to the Motion in Limine. There, Ulrich primarily cites *City of Las Vegas v. Walsh*, 121 Nev. 899 (2005).

In that case, the Nevada Supreme Court held that that the admission of NRS 51.315 affidavits/declarations at a misdemeanor DUI trial violates the Confrontation Clause of the Sixth Amendment, assuming defense counsel does not waive the defendant's right to confrontation under the

¹ Such a showing is one of the prerequisites to securing the statutory right to cross-examine the authors of calibration and solution declarations. NRS 50.315(6).

statute. Id. at 906-907.

a. Confrontation, Crawford, Ohio v. Roberts, 448 U.S. 6 (1980), and Walsh

“The right to cross-examine witnesses is fundamental to a fair trial and applicable to the states through the Fourteenth Amendment.” Walsh, 121 Nev. at 904 (citing Pointer v. Texas, 380 U.S. 400, 401 (1965), and Drummond v. State, 86 Nev. 4, 6 (1970)).

Analysis of Ulrich’s argument about this fundamental right should begin with Crawford. Clearly, Crawford greatly changed Confrontation Clause jurisprudence and its effect on the application of statutes that govern the admission of calibration and solution declarations.

“In Crawford, the Court held that the Confrontation Clause bars the use of a testimonial statement made by a witness who does not appear at trial, unless the witness is unavailable to testify at trial, and the defendant had a prior opportunity to cross examine the witness regarding the statement.” Walsh, 121 Nev. at 905. “Thus, under Crawford, the admissibility of a hearsay statement under the Confrontation Clause now necessarily depends on whether the statement is testimonial in nature.” Id. “The Court expressly declined to define the term ‘testimonial,’ beyond stating that the term ‘applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.’” Id.

Prior to Crawford, the admissibility of Fassett’s NRS 50.315 declarations was governed by the previously well-settled rule of Roberts. Walsh, 121 Nev. at 904. “Under the Roberts test, the admission of a hearsay statement against a criminal defendant at trial did not violate the Confrontation Clause provided the statement bore adequate indicia of reliability by either (1) falling within a “firmly rooted hearsay exception,” or (2) bearing ‘particularized guarantees of trustworthiness.’” Id. (citing Roberts, 448 U.S. at 66).

Before Crawford, the Nevada Supreme Court decided that NRS 50.315 affidavits/declarations passed the Roberts test, making them admissible without confrontation. De Rosa v. District Court, 115 Nev. 225, 234 (1999).

That portion of the De Rosa holding was overruled in Walsh, a 2005 effort to navigate uncertain post-Crawford waters.² That result is not surprising. As one court noted shortly after the U.S. Supreme Court handed down Crawford: “If there is one theme that emerges from Crawford, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements.” United States v. Cromer, 389 F.3d 662, 679 (6th Cir. 2004).

b. NV Statutes Governing Admission of Calibration/Solution Declarations

NRS 50.315 and NRS 50.325 are basically qualified notice-and-demand statutes.

² Yet, under Walsh, a failure to properly raise a dispute of fact with regard to affidavits admitted under NRS 50.315 still “constitutes a waiver of the defendant’s opportunity to confront the witnesses against him.” Walsh, 121 Nev. at 907 (citing De Rosa, 115 Nev. at 234). That is because Walsh upheld the constitutionality of Nevada’s qualified notice-and-demand scheme for securing the right to confront and cross examine declarants like Fassett.

Subsection 2 of NRS 50.315 reads:

Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person who prepared a chemical solution or gas that has been used in calibrating a device for testing another's breath to determine the concentration of alcohol in his or her breath is admissible in evidence in any criminal or administrative proceeding to prove:

- (a) The occupation of the affiant or declarant; and
- (b) That the solution or gas has the chemical composition necessary for accurately calibrating it.

Subsection 3 of NRS 50.315 reads:

Except as otherwise provided in subsections 6 and 7, the affidavit or declaration of a person who calibrates a device for testing another's breath to determine the concentration of alcohol in his or her breath is admissible in evidence in any criminal or administrative proceeding to prove:

- (a) The occupation of the affiant or declarant;
- (b) That on a specified date the affiant or declarant calibrated the device at a named law enforcement agency by using the procedures and equipment prescribed in the regulations of the Committee on Testing for Intoxication;
- (c) That the calibration was performed within the period required by the Committee's regulations; and
- (d) Upon completing the calibration of the device, it was operating properly.

Subsection 6 of the NRS 50.315 reads:

If, at or before the time of trial, the defendant establishes that:

- (a) There is a substantial and bona fide dispute regarding the facts in the affidavit or declaration; and
- (b) It is in the best interests of justice that the witness who signed the affidavit or declaration be cross-examined,

the court may order the prosecution to produce the witness and may continue the trial for any time the court deems reasonably necessary to receive such testimony. The time within which a trial is required is extended by the time of the continuance.

Subsection 8 of NRS 50.315 reads:

The Committee on Testing for Intoxication shall adopt regulations prescribing the form of the affidavits and declarations described in this section.³

³ The form for a solution declaration is found in NAC 50.035. The form for a calibration declaration is found in NAC 50.045. A review of the Fassett declarations reveals that they were composed in compliance with NAC 50.035 and NAC 50.045.

Subsection 1 of NRS 50.325 reads:

If a person is charged with an offense listed in subsection 4, and it is necessary to prove:

- (a) The existence of any alcohol;
- (b) The quantity of a controlled substance; or
- (c) The existence or identity of a controlled substance, chemical, poison, organic solvent or another prohibited substance,

the prosecuting attorney may request that the affidavit or declaration of an expert or other person described in NRS 50.315 and 50.320 be admitted into evidence at the preliminary hearing, hearing before a grand jury or trial concerning the offense. Except as otherwise provided in NRS 50.315 and 50.320, the affidavit or declaration must be admitted into evidence at the trial.

Subsection 2 of NRS 50.325 reads:

If the request is to have the affidavit or declaration admitted into evidence at a preliminary hearing or hearing before a grand jury, the affidavit or declaration must be admitted into evidence upon submission. If the request is to have the affidavit or declaration admitted into evidence at trial, the request must be:

- (a) Made at least 10 days before the date set for the trial;
- (b) Sent to the defendant's counsel and to the defendant, by registered or certified mail, or personally served on the defendant's counsel or the defendant; and
- (c) Accompanied by a copy of the affidavit or declaration and the name, address and telephone number of the affiant or declarant.

Subsection 3 of NRS 50.325 reads:

The provisions of this section do not prohibit either party from producing any witness to offer testimony at trial.

Subsection 4 of NRS 50.325 reads:

The provisions of this section apply to any of the following offenses:

- (a) An offense punishable pursuant to NRS 202.257, 455A.170, 455B.080, 493.130 or 639.283.
- (b) An offense punishable pursuant to chapter 453, 484A to 484E, inclusive, or 488 of NRS.
- (c) A homicide resulting from driving, operating or being in actual physical

control of a vehicle or a vessel under power or sail while under the influence of intoxicating liquor or a controlled substance or resulting from any other conduct prohibited by NRS 484C.110, 484C.130, 484C.430, subsection 2 of NRS 488.400, NRS 488.410, 488.420 or 488.425.

- (d) Any other offense for which it is necessary to prove, as an element of the offense:
- (1) The existence of any alcohol;
 - (2) The quantity of a controlled substance; or
 - (3) The existence or identity of a controlled substance, chemical, poison, organic solvent or another prohibited substance.

Applicable Nevada Administrative Code provisions have been duly produced pursuant to NRS 50.315.

“Each evidential breath-testing device used by a law enforcement agency must be calibrated by a certified forensic analyst of alcohol at least once within the 90 days immediately preceding the date on which the device is used to test a person's breath.” NAC 484.660(1).

“Each law enforcement agency which uses an evidential breath-testing device shall keep in the ordinary course of its business a chronological record for each device.” NAC 484.680(1). This record must include entries pertaining to the calibration and maintenance/repair of the device. NAC 484.680(2)(b)&(c).

“Each forensic analyst of alcohol who calibrates or repairs evidential breath testing devices shall keep in the ordinary course of his business a chronological record for each device upon which he performs calibrations or repairs.” NAC 484.690(1).

Clearly, Nevada has a rigid system for calibrating evidential breath-testing devices and thoroughly recording the activities that forensic analysts of alcohol perform when doing so. This statutory and administrative framework prescribes routines that are performed often days, weeks or months before the investigation, arrest and prosecution of individual DUI defendants.⁴

c. Melendez-Diaz and Other Post-Crawford Case Law

In 2009, the United States Supreme Court decided Melendez-Diaz, the guiding light for the Confrontation Clause analysis in this order.

In that case, Melendez-Diaz was charged with and convicted of distributing cocaine and trafficking in cocaine. Melendez-Diaz, 129 S. Ct. at 2530-2531. During trial, the prosecution submitted three analyst certificates describing the results of the forensic analysis performed on the

⁴ In this case, the calibration declaration was apparently composed approximately one month before the date Ulrich is alleged to have committed the crime of DUI. The solution declaration at issue was apparently composed well over one year before that date.

substances at issue. Id. at 2531. In the certificates, analysts at the State Laboratory Institute of the Massachusetts Department of Public Health reported the weight of the seized bags, and that the bags contained cocaine. Id.

Citing Crawford, the Court held that “the analysts’ affidavits were testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.” Id. at 2532. The Court noted that “[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them,” Melendez-Diaz was entitled to “be confronted with” the analysts at trial. Id.

In the first footnote of the Melendez-Diaz opinion, however, the Court wrote:

“Contrary to the dissent’s suggestion, *post*, at ____ - ____, ____ 174 L. Ed. 2d, at 334-335, 337 (opinion of Kennedy, J.), we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case. While the dissent is correct that “[i]t is the obligation of the prosecution to establish the chain of custody,” *post*, at ____, 174 L. Ed. 2d, at 337, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent’s own quotation, *ibid.*, from United States v. Lott, 854 F.2d 244, 250 (CA7 1988), “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.” It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records. See *infra*, at ____ - ____, ____, 174 L. Ed. 2d, at 341-342.”

This court will take the Melendez-Diaz Court at its word. Admission of the Fassett declarations, which are “prepared in the regular course of equipment maintenance” - and which are apparently relevant to establish the accuracy of an Intoxilyzer used to test the alcohol concentration of Ulrich’s breath - would not violate the Confrontation Clause under the Melendez-Diaz holding. The calibration and solution declarations are, in a word, “nontestimonial.”

This conclusion is also supported by post-Crawford case law from appellate courts around the country. The State’s Motion in Limine cites a lot of these cases, some of which are from courts of states that border Nevada. See, e.g. United States v. Forstell, 656 F. Supp. 2d 578 (E.D. Virginia 2006); Ramirez v. State, 928 N.E. 2d 214 (Indiana App. 2010); Abyo v. State, 166 P.3d 55 (Alaska App. 2007); Bohsancurt v. Eisenberg, 129 P.3d 471 (Arizona App. 2006); State v. Norman, 125 P.3d 15 (Oregon App. 2005); Salt Lake City v. George, 189 P.3d 1284 (Utah App. 2008); State v. Carter, 114 P.3d 1001 (Montana 2005).

In reviewing these cases, this court discovered that many DUI defendants primarily contended that they are entitled to confront and cross-examine analysts who compose calibration and solution declarations because these declarants can reasonably anticipate that their declarations will be used in criminal trials. At first blush, this argument seems compelling. After all, the Crawford Court’s “core class of ‘testimonial’ statements” included “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” 541 U.S. at 51-52. Also, there can be no doubt that NRS 50.315 calibration and solution

declarations are created with an understanding that they may be used at a criminal trial to verify the working conditions of Intoxilyzers. Yet this court does not believe that NRS 50.315 calibration and solution declarations are testimonial.

“The Court in Crawford did not specifically emphasize *any* of its stated ‘formulations’ as determinative.” Bohsancurt, 129 P.3d at 479 (citing Crawford, 541 U.S. at 51-52). Further, the above formulation, as explained in Crawford, was directed at out-of-court statements aimed at a particular defendant or related to a specific case. Id. “This inference logically follows from the Court’s discussion of the historical evils the Confrontation Clause sought to address - testimony obtained by court officials acting in prosecutorial or investigative roles.” Id. (citing Crawford, 541 U.S. at 53).

At bottom, this court is persuaded that: “[W]hen a declarant intends to bear testimony against a specific person or is aware that the declarant’s statement could be used against a defendant in a particular case, then that intent or knowledge is a determinative factor in finding the declarant’s out-of-court statement testimonial.” Id. (citing Cromer, 389 F.3d at 675).

“That cannot be said, however, with respect to [forensic analysts of alcohol] who prepare [calibration and solution declarations].” Id. As noted above, these declarations are mandated by Nevada statute and the Nevada Administrative Code, and created regardless of whether the Intoxilyzer to which the declarations relate is ever used or whether a single defendant is arrested. Moreover, it is obvious that forensic analysts of alcohol do not intend to bear testimony against any specific defendant at the time they create mandatory calibration and solution declarations.

“[O]ther courts have dealt with calibration records that contain affidavits and have concluded, because the affidavit contains no testimony against any particular defendant, and indeed, no reference to any person at all, the affidavit does not render the calibration records testimonial.” Id. at 480 (citing Napier v. State, 820 N.E.2d 144,149 (Indiana App. 2005)).

“Further, although the Court in Crawford cited affidavits among its ‘various formulations’ of testimonial material, the Court apparently mentioned affidavits only in two specific contexts, neither of which is presented here.” See Bohsancurt, 129 P.3d at 480. “The first type of affidavit the Court considered testimonial was one that is the functional equivalent of ex parte, in-court testimony.” Id. (citing Crawford, 541 U.S. at 51). “The ex parte statements the Court cited as offensive to the Sixth Amendment included investigative statements by magistrates who acted prosecutorially or statements by Lord Cobham, Sir Walter Raleigh’s alleged accomplice.” Id. “Lord Cobham implicated Raleigh in an examination before an ex parte council and in a letter.” Id. (citing Crawford, 541 U.S. at 44). The Fasset declarations, however, do not resemble a sworn memorialization of statements elicited ex parte to inculcate a defendant.

The second context in which the Court referred to affidavits was “‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.’” Crawford, 541 U.S. at 51-52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992)). This court agrees with the Arizona Court of Appeals that “the Court was merely describing various modes of civil law practice that it had addressed and criticized earlier.” Bohsancurt, 129 P.3d at 480. Again, the Fasset declarations do not resemble those with which the Court expressed concern. “They are not created to formalize statements made at the behest of a party to document specific facts of the case.” Id. Rather, they are signed and completed in the ordinary course as required by Nevada statute and the Nevada Administrative Code, and solely in connection with the calibration of an Intoxilyzer

itself. These declarations have no relationship to any specific case or defendant when composed.

d. The Vitality of Walsh After Melendez-Diaz

This court accepts that the Nevada Supreme Court meant what it said and said what it meant when it concluded that *all* NRS 50.315 affidavits are testimonial, though one has to wonder why that determination was so broad. The only Confrontation Clause issue in Walsh was whether NRS 50.315(4) affidavits are testimonial, and that subsection deals with the affidavit of a person who withdraws a sample of blood from another for analysis by an expert.

Nothing in Crawford or Melendez-Diaz suggests that such “draw” affidavits and declarations will not continue to be considered testimonial. However, this court does not believe that the Nevada Supreme Court would stick to the conclusion that calibration and solution affidavits and declarations for evidential breath testing devices are testimonial, especially given Melendez-Diaz. It is hard to believe that *any* state or federal court would construe Melendez-Diaz to be doing precisely what the Court said it did not do.

2. Conclusion - Confrontation Clause Analysis

The admission of Fassett’s declarations at trial would not violate Ulrich’s Sixth Amendment right to confrontation.

3. Analysis: Has Ulrich Established Substantial & Bona Fide Dispute Regarding Declaration?

Despite his letter of March 1, 2011, to the Elko County District Attorney, Ulrich’s counsel claimed in the letter dated April 4, 2011, that he has “bona fide disputes” with the Fassett declarations.⁵

Ulrich characterizes the *absence* of the following in the calibration declaration as bona fide disputes with its actual contents: (a) an assertion regarding the identity of “the specific levels of alcohol which were tested within the range which corresponds to a concentration of alcohol in the breath from 0 to 0.4 grans [sic] per 210 liters;” and (b) an assertion about “the methodology used to verify the response and accuracy of the Intoxilyzer 5000N bearing serial number 68-012905; and (c) an assertion verifying “the proficiency of Criminalist Maria Fassett in verifying the response to the accuracy of Intoxilyzer 5000EN bearing serial number 68-012905 on November 20, 2010.”

Ulrich characterizes the *absence* of an assertion regarding “the methodology used in preparing the aqueous solution” in the solution declaration as a bona fide dispute with its contents. Ulrich also claims that he has a bona fide dispute with the contents of the solution declaration because: (a) it is signature stamped rather than personally signed by Fassett; and (b) it “refers to a chemical composition that is specified by the Committee on Testing for Intoxication as necessary for accurately calibrating the CMI Intoxilyzer 5000 whereas the [calibration declaration] refers to calibration of CMI Intoxilyzer 5000EN.”

Ulrich can style the absence of the above-noted assertions as *bona fide* disputes all he wants,

⁵ In the final paragraph of the April letter, Ulrich’s counsel claimed to “incorporate the previous Objection to Use of Affidavits in Lieu of Live Testimony.” Apparently, that paragraph is a reference to the March letter in which Ulrich’s counsel *disclaimed* the ability to establish a bona fide dispute regarding the contents of Fassett’s declarations. These inconsistent positions suggest that the any assertion of a bona fide dispute in this case is dubious at best.

but that does not make them so. There is absolutely no case law defining what a *substantial and bona fide* dispute is under NRS 50.315. However, this court easily concludes that the lack of these assertions in the Fassett declarations does not constitute disputes of fact with them, let alone NRS 50.315 *substantial and bona fide* disputes of fact. For that reason, together with the fact that the declarations facially comply with NAC 50.035 and NAC 50.045, Ulrich has not established a *substantial and bona fide* factual dispute with these declarations. Therefore, he is not entitled to an order to produce Fassett at trial.

In reaching this conclusion, this court has referred to NAC 484.680 and NAC 484.690. As noted above, these administrative provisions are part of a rigid system for calibrating evidential breath testing devices and thoroughly recording the activities that forensic analysts of alcohol perform when doing so. One can think of many good faith factual claims that a DUI defendant could make that might establish a *substantial and bona fide* dispute with the contents of a calibration or solution declaration and *also* compel a court to rule that cross-examination of the declarant is in *the best interests of justice*. The undersigned will not discuss the ones he has thought about here. It is sufficient to note that defense review of mandatory calibration records and interviews with the forensic analysts of alcohol who are required to produce them could yield information that forms the basis of such a *substantial and bona fide* dispute. Even then, the undersigned submits there would have to be an objective basis for the claimed dispute of fact before it could be fairly called a *substantial and bona fide* dispute. See Taylor v. State, 111 Nev. 1253, 1262 (1996) (in dissent, Justice Steffen noted that the key to Fourth Amendment jurisprudence is objective reasonableness); See In re Byrd, 357 F.3d 433, 437 (4th Cir. 2004) (in interpreting provision of United States Code, court in bankruptcy case noted that a *bona fide* dispute requires an objective basis for either a factual or legal dispute as to the validity of a debt).

4. Conclusion: Ulrich Hasn't Established Substantial & Bona Fide Dispute Regarding Declaration

Ulrich has not established a *substantial and bona fide* dispute regarding the facts in the Fassett declarations. For that reason, he is not entitled to an order requiring the State to produce her for cross examination pursuant to NRS 50.315.⁶

5. Order in Limine

The court shall admit the Fassett declarations as long as the State meets the foundational requirements for admission.⁷

DATED this ____ day of April, 2011.

Justice of the Peace

⁶ The court need not discuss whether it is in the best interests of justice that Fassett be cross examined.

⁷ One of the foundational requirements for the admission of NRS 50.315 declarations appears to be that the State offer *signed* copies of the declarations, not "signature stamped" copies. If this becomes an issue at trial, the court will deal with it then. At trial, the parties can also argue the impact of designating the breath-testing instrument as an "Intoxilyzer 5000" in the solution declaration rather than the "Intoxilyzer 5000EN" it was called in the calibration declaration.