

1 LAW OFFICES OF NAME  
2 NAME OF ATTORNEY, SBN  
3 ADDRESS  
4 (T): (925) XXXXXXXX  
5 (F): (925) XXXXXXXX

6 Attorney for Petitioner

7 **CALIFORNIA SUPERIOR COURT**  
8 **COUNTY OF NAME**

9 XXXX, 10 11 Petitioner, 12 vs. 13 JEAN SHIOMOTO, DIRECTOR FOR THE 14 DEPARTMENT OF MOTOR VEHICLES FOR 15 THE STATE OF CALIFORNIA, 16 Respondent.	Case No. XXX  <b>AMENDED</b> VERIFIED PETITION FOR WRIT OF MANDATE/REVIEW-RECORD OF PROCEEDINGS HAVING NOW BEEN PROVIDED
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17 TO JEAN SHIOMOTO, DIRECTOR OF THE DEPARTMENT OF MOTOR  
18 VEHICLES AND THE ABOVE ENTITLED COURT:

19 COMES NOW the Petitioner, CLIENT'S NAME, by and through undersigned counsel,  
20 petitions this Court for a Writ of Mandate under C.C.P. § 1085 and California Vehicle Code  
21 §13559, directed to Respondent, Jean Shiomoto, Director of the Department of Motor Vehicles,  
22 and by this Verified Petition alleges as follows:

- 23 1. Petitioner, was arrested for an alleged violation of Vehicle Code § 23152 subd. (a) & (b)  
24 by Officer XXXX Badge No. 1042, of the NAME OF AGENCY on DATE.
- 25 2. Petitioner is an individual and at all times prior to his arrest, Petitioner was the holder of a  
26 valid California Driver's License Number XXXX, issued by the Respondent, Department  
27 of Motor Vehicles.
- 28 4. Petitioner, at all times relevant to this action, is and has been a resident of NAME OF  
County, California.

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5. Respondent is the Director of an agency of the State of California, empowered by California Vehicle Code § 1650 to administer and enforce the provisions of the Vehicle Code. See also Government Code § 11150.
  6. Petitioner was served with a notice advising him of his right to contest the suspension of his license. Petitioner made a timely request for a hearing.
  7. On xxxxxx, the Department of Motor Vehicles conducted the first of two APS hearings. The Department introduced three exhibits:
    - a. Exhibit 1: DS-367 Form
    - b. Exhibit 2: The Temporary Driver's License Issued
    - c. Exhibit 3: DMV Record Printout for xxxxxx
  8. Furthermore, on the xxxxxx hearing, the arresting officer, xxxxxx testified.
  9. The subsequent, and final hearing, occurred on xxxxxxxx. During the two hearings, Petitioner introduced the following exhibits:
    - a. Exhibit A: Public Safety Report
    - b. Exhibit B: Picture taken on Date of Arrest
    - c. Exhibit C: Picture taken on Date of Arrest
    - d. Exhibit D: Picture taken of Position of Petitioner's Car
    - e. Exhibit E: PAS calibration logs, Evidential Breath Test Logs, Evidential Breath Test Calibration Logs, Evidential Breath Test Maintenance Logs
  10. During the xxxxxx hearing, xxxxxx testified followed by Toxicologist xxxxxx of xxxxx.
  11. The issues at the Administrative Per Se hearing, as specified by statute, were:
    - a. Did the peace officer have reasonable cause to believe that the person had been driving a motor vehicle in violation of Section 23140, 23152, or 23153?
    - b. Was the person placed under lawful arrest?
    - c. Was the person driving a motor vehicle with .08 percent or more, by weight, of alcohol in his blood?California Vehicle Code § 13557(2), et. seq.

1 12. A Notification of Findings and Decision was Signed by xxxxxxx of the Driver Safety  
2 Office on xxxxxx.

3 13. The Notice of Decision contains many errors and improper conclusions that are not  
4 supported by the evidence in the testimony and exhibits at the hearings, moreover  
5 consideration of the record makes clear the decision by the hearing officer is arbitrary and  
6 capricious.

7 14. Regarding the first prong, whether the peace officer had a reasonable cause to believe that  
8 the person had been driving a motor vehicle in violation of Section 23140, 23152, 23153,  
9 there was no evidence presented that the officer had actually seen xxxxxx driving in a  
10 manner from which it could be ascertained that he was operating his vehicle in violation of  
11 CVC 23152 or CVC 23153 (CVC 23140 does not apply). There is nothing from the  
12 parking, on the shoulder of the road, which would illustrate that the vehicle was driving in  
13 violation of Section 23152, or 23153 of the vehicle code. According to the Findings and  
14 Decision the hearing officer relied on CVC 40300.5 as a basis for determining xxxxxx was  
15 lawfully arrested. No competent evidence was introduced at the hearing that supported  
16 application of CVC 40300.5 in that despite the fact the shoulder area where xxxxxxx was  
17 did not allow for his entire vehicle to be off the roadway, and according to the officer the  
18 vehicle protruded onto the roadway; there was no evidence that xxxxx actually obstructed  
19 the roadway. As such the officer's action was not justified and he caused xxxxxx to be  
20 unlawfully subjected to a prolonged detention, in that very simply if the officer had some  
21 concern regarding some potential future obstruction, he should have simply asked xxxxx  
22 to move the vehicle as opposed to engaging in a criminal investigation.

23 15. Thereafter, when xxxxx drove his vehicle to a nearby location at the direction of the  
24 officer, the evidence is undisputed the vehicle was operated safely per the testimony of the  
25 officer.

26 16. Regarding the hearing officer's findings regarding probable cause, the hearing officer cites  
27 the officer's determination of driving, the officer's belief that the Petitioner was  
28 intoxicated because of the so called objective symptoms of intoxication, and "additional

1 reported factors that the officer used to form the belief of intoxication. There was no  
2 evidence or testimony that Petitioner was driving unlawfully or in an unsafe manner.  
3 Furthermore, regarding the “objective” symptoms, the hearing officer relied on the DS-367  
4 and the Arrest Report as evidentiary proof. The officer’s testimony at the hearing does  
5 not support a finding of probable cause even when considered along with the DS-367  
6 sworn document. Vehicle Code § 13380. The DS-367 form only cites red and watery eyes  
7 and a smell of an alcoholic beverage coming from the car, not from Petitioner. However,  
8 whereas general signs of alcohol consumption such as odor of alcohol, red/watery eyes,  
9 unsteady gait, slurred speech, and poor driving is insufficient evidence for proving a 0.08  
10 or higher BAC, and there must be direct and competent evidence of the driver’s BAC.  
11 *Baker v. Gourley* (2002) 98.Cal.App.4<sup>th</sup> 1263; in this specific case, the officer did not  
12 observe an unsteady gait and slurred speech nor poor driving. Based on the rendition of the  
13 officer’s testimony regarding the field sobriety tests performance, in conjunction with the  
14 presence of red/watery eyes and odor of alcohol, still fall well short of the standard for  
15 probable cause.

16 17. In the Notification of Findings and Decision the hearing officer did not articulate the basis  
17 for finding probable cause but rather made reference to xxxxxx testimony “confirming the  
18 events” and reference to the DS-367 and arrest report. As such the hearing officer fails to  
19 give notice of the basis for suspension in violation of CVC 13380. In addition to the  
20 inadequate facts related to mere consumption of alcohol and “unsatisfactory field sobriety  
21 tests”; the mere presence of alcohol indicated by the PAS device adds nothing to the  
22 articulation, particularly in light of the fact that licensee had admitted recent consumption  
23 of alcohol.

24 18. Regarding the third prong, was the person driving a vehicle with a blood alcohol level of  
25 0.08 or higher, the DMV again erred in finding that Petitioner was driving with a BAC of  
26 0.08 or higher. First, there was no evidence tying a particular blood alcohol level to a point  
27 in time when the vehicle was being operated. Second, the testing was not subject to lawful  
28 arrest, therefore it should not have been considered. Cal. Veh. Code § 23612 subd. (c).

1 Furthermore, the hearing officer stated in his Notice of Decision that the results of the  
2 Breath Alcohol test were .10 and .10 BAC, tests taken at xxxxxx. and xxxxxx respectively.  
3 (approximately 2 hours after first contact) Although the hearing officer relied on an initial  
4 presumption of accuracy, Petitioner, through counsel, presented evidence through exhibit  
5 E and through the testimony of toxicologist xxxxxx and that of Petitioner that (1) the breath  
6 alcohol testing apparatus was improperly producing false high results at the time this  
7 breath alcohol test was taken (2) the results of the calibration of the breath alcohol  
8 machine were not in compliance with Department of Health Title 17 regulations and (3)  
9 that Petitioner’s blood alcohol level was rising and that (Even if the test results were  
10 treated as accurate – despite the obvious inaccuracy demonstrated by the DOJ’s own  
11 records) no reasonable conclusion could be made that the blood alcohol level was .08 or  
12 higher at the time of driving. Once such evidence was presented, the burden was shifted  
13 back to the hearing officer to show efficacy of the breath alcohol testing apparatus, a  
14 burden the Department could not and did not meet. Instead, the hearing officer arbitrarily  
15 concluded that the testimony of xxxxxx was too speculative, and the testimony of  
16 petitioner was selective, without addressing the merits of the testimony or the other  
17 problems with the breath testing apparatus.

18 19. It is apparent from the decision that the hearing officer was not competent to address the  
19 scientific and regulatory aspects of the evidence and just fell back to a default position  
20 calling the testimony “speculative and selective”.

21 20. At all times mentioned in this petition, Respondent has been the agency charged with  
22 administrative per se suspension of driver’s licenses for persons in violation of CVC  
23 23152 (a)/(b).

24 21. Petitioner is a party beneficially interested in the issuance of a writ and he has a clear,  
25 present, and substantial right to the performance of the respondent’s duty in compliance  
26 with California Vehicle Code section 13559 and California Vehicle Code section 13353 et.  
27 seq., and that respondent not exceed its constitutional authority nor make erroneous or  
28 arbitrary decisions.

- 1 22. The Petitioner was denied due process of law when the Department arbitrarily and  
2 capriciously entered an Order suspending his license to drive without lawful authority to  
3 do so, as more fully argued in the points and authorities contemporaneously filed herewith,  
4 along with the administrative record now received and filed herewith.
- 5 23. Petitioner's license is suspended solely on the basis of the action taken by the Department  
6 of Motor Vehicles complained of herein.
- 7 24. Petitioner made a demand at the Administrative Per Se hearing that the required  
8 ministerial duties of the Department be performed, to which they refused.
- 9 25. On xxxxx the Department of Motor Vehicles issued a Notice of Findings and Decision  
10 following the final hearing on xxxxxx , holding that the suspension of Petitioner's Drivers  
11 License was proper and ordered that the suspension take effect. In the Notice of Findings  
12 and Decision the Department made an erroneous determination that Petitioner had a .08%  
13 or more BAC while driving a motor vehicle.
- 14 26. The transcript of the proceedings is attached hereto and incorporated by reference.
- 15 27. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law other  
16 than the relief sought in this petition.
- 17 28. The weight of the evidence does not support the suspension of the petitioner's license in  
18 the instant case because:
- 19 a. The department's evidence was insufficient to make a finding against the licensee;
  - 20 b. The licensee came forth with affirmative evidence rebutting the department's  
21 documentation;
  - 22 c. The licensee came forth with affirmative evidence that the breath alcohol testing  
23 apparatus was in violation of Title 17 of the California Code of Regulations and was  
24 providing a false high result as demonstrated by Exhibit E of the Petitioner's evidence;
  - 25 d. The licensee's affirmative evidence more than rebutted the evidence of the department,  
26 thereby shifting the burden back to the department to come forth with evidence  
27 rebutting the licensee's evidence; which they failed to do;
- 28

- 1 e. The Department arbitrarily rejected evidence by the licensee without any evidentiary  
2 basis for doing so;
- 3 f. The Department arbitrarily avoided the shortcomings in their own evidence as if they  
4 did not exist;
- 5 g. The Department failed to provide any information indicating the hearing officer was  
6 competent to understand the evidence produced and in fact as will be demonstrated by  
7 the record and apparent from the substance of his notice of decision either arbitrarily  
8 ignored evidence favorable to the licensee due to his bias or was so incompetent that  
9 he could not understand the evidence and therefore ignored favorable evidence to the  
10 licensee;
- 11 h. The witness for the licensee who explained the breath testing evidence obtained from  
12 the Department of Justice has over twenty-one years of experience in the field, was  
13 found to be an expert in the subject matter of his testimony, provided un-rebutted  
14 testimony undermining the credibility of the department's evidence and specifically  
15 and reasonably articulated why it could not be concluded the licensee's blood alcohol  
16 level was .08 or higher at the time of driving.
- 17 i. The decision in this case was arbitrary and capricious and not rationally based; If it is  
18 construed the department met its initial burden of coming forward with sufficient  
19 evidence and thereby shifting the burden to the licensee, the licensee came forward  
20 with substantial affirmative evidence undermining the credibility of the breath test  
21 result and the department then failed to carry out its burden to rebut the licensee's  
22 evidence.
- 23 j. The Petitioner was denied due process;

24 29. This application is made on the ground that Respondent's decision to suspend Petitioner's  
25 license is invalid under California Code of Civil Procedure §1094.5. Respondent's  
26 findings are not supported by the weight of evidence, thus constituting a prejudicial abuse  
27 of discretion. At the Administrative Per Se Hearing, Petitioner objected to the admission of  
28 the department's evidence and Petitioner's objections were either rejected outright by

1 Respondent without a legal basis or rationale. Nor was any legal basis provided as to why  
2 the objections were rejected and evidence found credible; and objections have still not  
3 been ruled upon as they were not presented in the Notification of findings.

4 30. Petitioner is the xxxxxxxx of xxxxx company. The primary activity of Company xxxx is  
5 xxxxxx. Petitioner is heavily and intricately involved in four projects that require him to  
6 be able to readily drive between xxxxx, xxxxxx, and xxxxx at unscheduled times  
7 throughout the day and through the evening. The projects xxxx (generally state nature of  
8 hardship if license suspension were to occur)

9 31. Without his driver's license, Petitioner will be substantially hindered from performing the  
10 duties of his employment. Unless the Order of the Department is stayed, Petitioner will  
11 suffer irreparable damage and injury. *See Mackey v. Montrym* (1979) 443 U.S. 1, 10-11  
12 (“[The driver’s interest in] continued possession and use of his license pending the  
13 outcome of the hearing due him ... is a substantial one, for the Commonwealth will not be  
14 able to make a driver whole for any personal inconvenience and economic hardship  
15 suffered by reason of any delay in redressing an erroneous suspension...”); *Dixon v. Love*  
16 (1977) 431 U.S. 105, 113 (“a licensee is not made entirely whole if his suspension or  
17 revocation is later vacated”); *Berlinghieri v. Department of Motor Vehicles* (1983) 33  
18 Cal.3d 392, 397 (“We ... emphasize that we view the “right to drive” herein as important,  
19 indeed “fundamental” for purposes of selecting the standard of judicial review of the  
20 administrative decision to suspend the driver’s license”).

21 32. As the result of Respondent’s action, Petitioner was required to employ attorneys to  
22 prosecute this Petition and is personally obligated to pay attorney’s fees and costs incurred  
23 herein. Respondent’s action was without legal authority, lacked any basis in law or fact,  
24 was not supported by the evidence, and was arbitrary and capricious as more fully argued  
25 in the Points and Authorities contemporaneously filed herewith. The action was, therefore,  
26 both arbitrary and capricious under the provisions of Government Code § 800, and  
27 Petitioner requests this Court to award attorneys fees for the cost of prosecuting this  
28 Petition.

1 33. Counsel for Petitioner has experience appealing Administrative Findings with the Superior  
2 Court, and anticipates that the total time expended for fees in the preparation and  
3 prosecution of the instant Petition will be approximately 20 hours.

4 34. A true and correct copy of the administrative record is attached to the declaration of  
5 counsel filed herewith.

6 WHEREFORE, Petitioner prays that:

- 7 1. This Court review the Order of the Department of Motor Vehicles, set aside the  
8 suspension arbitrarily entered against him, and order Petitioner's Driver's License  
9 reinstated;
- 10 2. This Court order Respondent to pay attorney's fees pursuant to Government Code §800  
11 and costs pursuant to Code of Civil Procedure §1095.5(a); and
- 12 3. For such other and further relief as this Honorable Court may deem just and proper.
- 13

14 Dated:

15 Respectfully submitted

16 \_\_\_\_\_  
Name of Attorney for Petitioner

17

18 **VERIFICATION**

19 I, the undersigned, declare under penalty of perjury, under the laws of the State of  
20 California that the foregoing is true and correct to the best of my personal knowledge based on  
21 my representation of Petitioner throughout the referenced proceedings.

22 Executed on xxxxx

23

24 \_\_\_\_\_  
Attorney for Petitioner

25

26 **MEMORANDUM OF POINTS AND AUTHORITIES**  
27 **IN SUPPORT OF PETITION FOR WRIT OF MANDATE/REVIEW**

28 **1. SUMMARY OF FACTS**

1 On xxxxx 2014 Officer xxxx of the Law Enforcement agency contacted Petitioner. The  
2 Officer's DS-367 form states that he contacted Petitioner in a X CAR on SR-99 near MM 352.5.  
3 **(CT 4:21-5:22)**The officer testified that the reason for detaining Mr.xxxx was that his vehicle  
4 was "partially blocking" the northbound lane. **(CT 6:2-3)** However, the records established  
5 clearly that while Mr.xxxxx's vehicle did protrude slightly onto the roadway, there was no  
6 competent evidence that xxxxxx did in fact obstruct the roadway as provided by CVC  
7 40300.5(b). **(CT 8:21-9:5; 17:4-20:8; 24:1-3; 41:7-9)** It should be noted that the record reflects  
8 the hearing officer did not understand the basis for the application of CVC 40300.5 but rather  
9 just accepted the officer's contention that it provided a lawful basis for arrest. **(CT 21:1-18)** The  
10 Officer further testified that he passed Mr. xxxxx's vehicle in the opposite direction, and then  
11 made a U-turn, came upon the vehicle from the rear and turned on his take down lights,  
12 effectuating a detention of Mr. xxxx's vehicle, despite Mr. xxxx not engaging in illegal activity.  
13 **(CT 6:3-7; 24:10-14)** The officer claims he then approached the vehicle, an open air convertible  
14 and claims to have smelled a faint odor of alcohol, which he claims became more concentrated  
15 as he stood next to the vehicle. **(CT 6:7-11; 24:20-25:4)** This testimony was accepted by the  
16 hearing officer without question despite the obvious nonsensical nature of the testimony in light  
17 of the natural dissipation of gaseous molecules in an open environment. The officer then, rather  
18 than asking Mr. xxxx to merely move his vehicle decided to conduct a criminal investigation.  
19 The officer asked Mr. xxxxx to drive his vehicle up and off the roadway to a nearby location  
20 belying his so-called suspicion that Mr. xxxx was too intoxicated to operate a motor vehicle.  
21 **(CT:6:14-20)** Moreover, the officer admits in his testimony that his observation of Mr. xxxxx  
22 operation of the vehicle was done safely, which fact should have been adequate to dispel any  
23 suspicion the officer may have harbored that Mr. xxxx was too intoxicated to operate a motor  
24 vehicle. The DS-367 form lists that the officer saw red and watery eyes and could smell an odor  
25 of an alcoholic beverage coming from inside of the car. **(CT 40:6-21)**The Officer testified  
26 Petitioner performed field sobriety tests on a gravel, sloped turnout, **(CT 25:15-26:3; 27:3 –**  
27 **35:15)** and was subsequently arrested by the officer. **(CT 7:**The DS-367 form states that at 1950  
28 hours, the officer obtained a breath sample resulting in a PEBT yield of .10 % BAC and a second

1 result of .11 % BAC. (It should be noted the Department of Motor Vehicles did not attempt to  
2 lay a foundation for, nor did not consider the PEBT numerical results but rather considered them  
3 for the mere presence of alcohol. If in fact it is construed otherwise the foundation in fact was  
4 not laid.

5 The Petitioner timely requested a DMV APS hearing, and the first hearing occurred on  
6 xxxxx . At this hearing the Department marked its three exhibits, the DS-367 form, Petitioner's  
7 DMV printout, and the APS Order and Temporary Driver's license. Furthermore the officer  
8 testified at this hearing.

9 The second hearing occurred on xxxxx. Between the hearing, the Petitioner presented  
10 exhibits A through E, including the Public Safety Report, a Picture taken on Date of Arrest,  
11 another Picture taken on Date of Arrest, a Picture taken of Position of Car, and PAS calibration  
12 logs, Evidential Breath Test Logs, Evidential Breath Test Calibration Logs, Evidential Breath  
13 Test Maintenance Logs. At the xxx hearing Petitioner testified along with expert xxxx , a  
14 toxicologist with over 21 years of experience in the field of toxicology. **(CT 87:12-89:18)** Mr.  
15 xxxx, after hearing the testimony of Petitioner, testified that Petitioner's blood was more likely  
16 than not rising at the time of the evidentiary breath test, and therefore the actual BAC at the time  
17 of driving was more likely than not lower than the breath test results later obtained. Petitioner  
18 further provided evidence, through exhibits A through E, that the breath alcohol testing machine  
19 was falsely testing high to a point that it was not compliant with title 17 of Department of Health  
20 regulations for breath alcohol testing. Under normal circumstances the non-compliance with the  
21 administrative regulation related to evidentiary breath tests should have been sufficient to  
22 warrant a set-aside. **(92:6 -97:20)** However in this case, this conclusion was further supported  
23 by the credible testimony of xxxxx. Mr. xxxx first identified the failure of compliance and  
24 concerns related to whether the breath-testing device was operating correctly, and then the fact  
25 the machine was actually faulty and had to be taken out of service. **(CT 110:20-111:20)**

26 Mr. xxxx testified that accepting the officer's report as true and accurate regarding the  
27 filed sobriety tests that Mr. xxxx's performance was consistent with a BAC below .08. **(CT**  
28 **98:13-102:2)**

1 Mr. xxxx testified that accepting the officer's report as true and accurate regarding the so-  
2 called objective symptoms further supported a conclusion that licensee was below a .08 BAC.

3 **(CT 104:4-24)**

4 Mr. xxxx then testified that even if the department were to consider that the obvious  
5 problems related to the current operation deficiencies of the breath machine were set-aside and  
6 the evidentiary numerical values obtained by the both the PEBT and Breath Testing device were  
7 considered true and accurate that it could not possibly be concluded from the evidence that Mr.  
8 xxxx blood alcohol level was more likely than not .08 or higher at the time of driving. In order  
9 to reach this conclusion, Mr. xxxx merely had to rely on the profile of distribution and  
10 elimination of alcohol demonstrated by the department's evidence and not on any statements  
11 made by Mr. xxxx . **(CT 104:25-109:13; 115:12-116:2; 120:19-123:5)** The hearing officer  
12 either did not understand this fact or arbitrarily ignored it demonstrated by the Notice and  
13 Findings reference to the credibility of Mr. xxxx and the speculation and selectiveness of Mr.  
14 xxxx related to reliance on xxxxx testimony. "Since Respondents testimony is not credible, the  
15 presentation of Mr. xxxx is given little weight". Mr. xxxx testified that the basis of his  
16 conclusion was the departmental evidence not Mr. xxxx testimony. The reference to xxx  
17 testimony was that the drinking pattern presented by xxxx was consistent with the conclusions  
18 otherwise reached by xxxxx and not that the conclusions were reliant on the truth of that  
19 testimony. **(113:14-116:2)** This point the hearing officer either missed altogether or  
20 intentionally ignored or misconstrued.

21 On March xxxx , the hearing officer, issued a Notice of Decision and Finding which  
22 suspended Petitioner's driver's license as of xxxxx. The decision was improper because licensee  
23 was subjected to a unlawful and prolonged detention; the arrest was not supported by probable  
24 cause; the breath test machine was not in compliance with Title 17 of the California Code of  
25 Regulations; and the hearing office's summary dismissal of the un-refuted, un-rebutted and  
26 reasonable testimony of Mr. xxxxx was not warranted.

27 **2. ARGUMENT**

1           **A. STANDARD OF REVIEW**

2           When a person petitions for a writ of administrative mandate following an order  
3 suspending his or her driver's license, the superior court is required to determine, based on the  
4 exercise of its independent judgment, whether the weight of the evidence supports the  
5 administrative decision. *Lake v. Reed* (1997) 16 Cal.4th 448, 456; Code Civ. Proc., § 1094.5,  
6 subd. (c); *Santos v. DMV* (1992) 5 Cal.App.4th 537, 545. Here the DMV circumvented clearly  
7 established rules of evidence pursuant to the California Evidence Code, ignored Title 17 of the  
8 California Code of regulations, and ignored clearly established case law. Based on the  
9 aforementioned errors by the DMV and in light of the evidence presented at the hearing, the  
10 weight of the evidence in this case supports a conclusion that Petitioner was below a .08% at the  
11 time of driving and therefore the suspension should have been set aside.

12                   **B. THE DMV DID NOT MEET ITS PRIME FACIE CASE, BY PROVING BY**  
13                   **A PREPONDERANCE OF THE EVIDENCE, THAT THE OFFICER HAD**  
14                   **REASONABLE CAUSE TO BELIEVE PETITIONER HAD BEEN DRIVING,**  
15                   **WAS LAWFULLY ARRESTED, OR HAD BEEN DRIVING WITH A 0.08**  
16                   **PERCENT BAC OR HIGHER.**

17           At the hearing, the DMV had the burden of proving by a preponderance of the evidence  
18 that (1) the officer had reasonable cause to believe Petitioner had been driving; (2) Petitioner was  
19 lawfully arrested; and (3) Petitioner was driving with a .08 percent blood alcohol concentration  
20 or higher. Vehicle Codes §§ 13557, subd. (b)(2), 23152, subd. (b); *Lake v. Reed* (1997) 16  
21 Cal.4th 448, 456.

22                   **i. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING**  
23                   **THAT THE OFFICER HAD REASONABLE CAUSE TO BELIEVE**  
24                   **PETITIONER WAS DRIVING A MOTOR VEHICLE IN VIOLATION OF**  
25                   **SECTION 23136, 23140, 23152, 23153, or 23154 OF THE VEHICLE CODE**

26           The first issue at a DMV Administrative Per Se Hearing, pursuant to California Vehicle  
27 Code § 13557 subd. (b)(2)(A), is whether: “The peace officer had reasonable cause to believe  
28 that the person had been driving a motor vehicle in violation of Section .... 23152, 23153.” In  
this case, the officer detained licensee despite not having committed a violation of the vehicle  
code. The officer then subjected licensee to an unjustified and prolonged detention. While the  
licensee was not driving the vehicle upon first observation by the officer, the licensee did direct

1 licensee to drive the vehicle to another location for the purpose of carrying out the criminal  
2 investigation. In order for the officer to conduct a criminal investigation, the basis for the  
3 prolonged detention would have had to been that the officer was suspicious that Mr. xxxx was so  
4 impaired as to be unable to operate his motor vehicle consistent with the caution and care of a  
5 reasonably sober person. If in fact the officer genuinely harbored this suspicion, any such  
6 suspicion should have been dispelled by the officer observing the actual safe operation of the  
7 vehicle at the direction of the officer. The officer ignored this fact and pressed on in his criminal  
8 investigation, despite only minimal and un-conclusive evidence to support continued detention  
9 and ultimately arrest.

10  
11 **C. THE DEPARTMENT DID NOT PROVE, BY A PREPONDERANCE OF THE**  
12 **EVIDENCE, THAT THERE WAS A LAWFUL ARREST**

13 Regarding probable cause the hearing officer cites the officer's determination of driving,  
14 the officer's belief that the Petitioner was intoxicated because of the objective symptoms of  
15 intoxication, and "additional reported factors that the officer used to form the belief of  
16 intoxication. There was no evidence or testimony that Petitioner was driving poorly. The so-  
17 called "objective" symptoms could only be consisted with recent consumption and not  
18 intoxication. According to the officer's report and testimony the field sobriety tests did little if  
19 anything to support the justification of a decision to arrest Mr. xxxx.

20 While the hearing officer found that application of CVC 40300.5 was supported by the  
21 fact to supplant the need to observe actual operation of the vehicle, no competent evidence was  
22 actually introduced regarding actual obstruction. The fact of the matter is Mr. xxxx had simply  
23 pulled off the road in order to enjoy the view and did not impede or obstruct traffic and simply  
24 should have been told to move, if the officer had concerns about possible future obstruction.

25 Based on the paucity of evidence supporting the lawfulness of the arrest the only  
26 reasonable conclusion is that the police officer relied on the numerical value of the PEBT (a field  
27 sobriety test) to make the arrest decision. However, the correctness of the numerical value of the  
28 PEBT being introduced for evidentiary purpose was not supported by the record, and the

1 Department made not effort to lay any foundation for consideration of the numerical value of the  
2 PEBT, and in fact did not do so. As such, there was insufficient evidence to support the decision  
3 to arrest.

4 **D. ONCE THE PETITIONER REBUTTED THE CHEMICAL TEST**  
5 **PRESUMPTION, THE BURDEN SHIFTED BACK TO DMV TO PRESENT**  
6 **EVIDENCE THAT PETITIONER’S BAC WAS ABOVE 0.08.**

7 If the Court were to construe that licensee is incorrect and in fact the Department met its  
8 initial burden to establish a lawful arrest the next question is whether the department introduced  
9 evidence sufficient to support a finding that licensee operated a motor vehicle with a BAC at the  
10 time of driving of .08 or higher. The department introduced evidence of a breath test taken on a  
11 Drager 7510 device 2 full hours after driving. The device being maintained on behalf of the law  
12 enforcement agency by the Department of Justice criminalistics bureau. After the Department  
13 met it initial burden of producing admissible evidence under Evidence Code section 1280 to  
14 support its holding, the burden shifted to the Petitioner to produce affirmative evidence to rebut  
15 the Department’s evidence. *Roze v. DMV* (2006) 141 Cal.App.4th 1176. The DMV, in its  
16 decision, stated that there were two chemical tests at 7:50 and 7:52 with BACs of .10 and .10  
17 respectively, and used these two test results to substantiate that Petitioner had a BAC of 0.08 or  
18 higher 2 hours prior.

19 The court in *Manriquez v. Gourley* addressed the burdens of proof at a DMV  
20 administrative hearing. *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1232. At such a  
21 hearing, “the DMV bears the burden of proving by a preponderance of the evidence certain facts,  
22 including that the driver was operating a vehicle with a blood-alcohol level of 0.08 percent or  
23 higher. *Id.* “The DMV may satisfy its burden via the presumption of Evidence Code section 664.  
24 *Id.* “Procedurally, it is a fairly simple matter for the DMV to introduce the necessary  
25 foundational evidence.” *Id.* “Evidence Code section 664 creates a rebuttable presumption that  
26 blood-alcohol test results recorded on official forms were obtained by following the regulations  
27 and guidelines of title 17.” *Id.* “The recorded test results are presumptively valid and the DMV is  
28 not required to present additional foundational evidence.” *Id.* “With this presumption, the

1 officer's sworn statement that the breath-testing device recorded a certain blood-alcohol level is  
2 sufficient to establish the foundation, even without testimony at the hearing establishing the  
3 reliability of the test. *Id.* at 1233.

4 “Once the DMV establishes its prima facie case by presenting documents contemplated  
5 in the statutory scheme, the driver must produce affirmative evidence of the nonexistence of the  
6 presumed facts sufficient to shift the burden of proof back to the DMV.” *Id.* Then the “licensee  
7 must show, ‘through cross-examination of the officer or by the introduction of affirmative  
8 evidence, that official standards were in any respect not observed.” *Id.* “Once such showing has  
9 been made, the burden shifts to the DMV to prove that the test was reliable despite the  
10 violation.” *Id.*

11 Furthermore, when a person petitions for a writ of administrative mandate following an  
12 order suspending his or her driver's license, the superior court is required to determine, based on  
13 the exercise of its independent judgment, whether the weight of the evidence supports the  
14 administrative decision. *Lake v. Reed* (1997) 16 Cal.4th 448, 456; Code Civ. Proc., § 1094.5,  
15 subd. (c). In reviewing the administrative record, the court acts as a trier of fact; it has the power  
16 and responsibility to weigh the evidence and make its own determination about the credibility of  
17 the witnesses. *Roze v. DMV* (2006), 141 Cal.App.4th 1176, 1184 (citing *Barber v. Long Beach*  
18 *Civil Service Com.* (1996) 45 Cal.App.4th 652, 658–659.) “While the court must afford a strong  
19 presumption of correctness concerning the administrative findings, ultimately it is free to  
20 reweigh the evidence and substitute its own findings.” *Roze, supra*, at 1184 (citing *Fukuda v.*  
21 *City of Angels* (1999) 20 Cal.4th 805, 816–819); *State Farm Mutual Automobile Ins. Co. v.*  
22 *Quackenbush* (1999) 77 Cal.App.4th 65, 71).

23 Once the Department presented its evidence under Evidence Code §§ 664 and 1280 it  
24 was incumbent on the Petitioner to produce affirmative evidence that his BAC was below a .08  
25 at the time of driving. In order to provide the initial foundation for application of the  
26 presumption the arresting officer is under a duty to ensure that statutory provisions are followed:

27  
28 The chemical test for blood-alcohol level "shall be . . . administered at the  
direction of a peace officer" having reasonable cause to believe the arrested driver

1 is under the influence of alcohol. ( Veh. Code, § 23612, subd. (a)(1)(C).) This  
2 statutory language "imposes on an officer a duty 'to administer the test or have it  
3 administered by another.'" ( *Yordamlis v. Zolin* (1992) 11 Cal. App. 4th 655, 661,  
4 quoting *Davenport, supra*, 6 Cal. App. 4th at p. 142, fn. 4, "In most cases it will  
5 be the arresting officer who will . . . either give the test or take the suspect to a  
6 facility where a test can be administered. " ( *Skinner v. Sillas* (1976) 58 Cal. App.  
3d 591, 599.) If the test is administered by another, the officer is still under a duty  
7 to make certain that the testing procedures satisfy statutory and regulatory  
8 requirements.

9 The peace officer "shall immediately forward" a copy of the license suspension  
10 order along with "the report required by Section 13380" to the DMV...  
11 "Accordingly, faced with a report of chemical test results, the burden would be on  
12 the licensee to demonstrate that the test was not properly performed."  
13 (*Imachi, supra*, 2 Cal. App. 4th at p. 817.) *Petricka v. Dep't of Motor Vehicles*  
14 (2001) 89 Cal. App. 4th 1341.

15 In this case, the Petitioner produced affirmative evidence of violations of Title 17 the  
16 California Code of Regulations, section 1219 et. seq.; evidence the machine was in a current  
17 state of disrepair at the time of the incident, as well as expert testimony that Petitioner's blood  
18 alcohol level was clearly rising at the time of the chemical test, and more likely than not below a  
19 .08 BAC at the time of driving. Petitioner presented evidence through exhibit E and through the  
20 testimony of toxicologist xxxxx that (1) the breath alcohol testing apparatus was improperly  
21 producing false high results at the time this breath alcohol test was taken (2) the results of the  
22 calibration of the breath alcohol machine were not in compliance with Title 17 of the California  
23 Code of Regulations; shortly after this incident the machine had to be taken out of service and  
24 the fuel cell (the device which determines the amount of alcohol present in the breath specimen  
25 had to be replaced) and (3) that Petitioner's blood alcohol level was not only rising but more than  
26 likely below a .08 at the time of driving.

27 Regarding the breath alcohol apparatus testing "high", this analysis is made based on  
28 Petitioner's Exhibit E, pg. 5 of 6. The date of incident in this case is xxxx . The "accuracy test"  
on xxxxx shows a result of .108 when testing for an expected value of .100. On xxx the test  
result is .110 when testing for an expected value of .100. Shortly thereafter, on 11/12 there are  
subsequent test results for .111 and .112 for an expected value of .100. On page 6 of 6 of exhibit  
E, on maintenance for 11/13/2014 the breath alcohol instrument used in this case was taken for

1 service with the following note “11/12/14 Instrument Brought in By K. Scanlon With Reported  
2 High Accuracy Checks.” Hence, the instrument had high accuracy checks with artificially  
3 inflated test results compared to known samples. Furthermore, Title 17 of the California Code of  
4 Regulations § 1221.4, entitled Standard of Procedures states that accuracy checks for breath  
5 alcohol instruments, “determination of accuracy shall consist, at a minimum, of a periodic  
6 analysis of a reference sample of known alcohol concentrations within accuracy and precision  
7 limits of plus or minus **0.01 grams % of the true value.**” Hence, for purposes of Title 17  
8 analysis, the machine was well out of tolerance by testing .011 and .012 grams % above the  
9 known value beginning on 10/29/14 (the accuracy check immediately following the breath test in  
10 this case) and continued to showing increasing failures until shortly thereafter when it was taken  
11 out of operation entirely and the fuel cell was replaced.

12           Furthermore, based on the timing of the breath alcohol test relative to the time of the  
13 initial stop, expert xxxx testified that there was rising blood alcohol, and that Mr.xxxx’s  
14 blood alcohol level was lower at the time of driving. In order to reach this conclusion Mr. xxxx  
15 relied on the accuracy of the breath test results both one hour and two hours after the initial  
16 contact with the officer. Essentially, the conclusion was that if the breath tests are true and  
17 accurate measurements and the first was a .10 one hour after driving and the second was .10 two  
18 hours after driving, the only conclusion that can be drawn is that the person’s blood alcohol level  
19 was rising during the hour preceding the first test. As such, there would have had to be over one  
20 drink in Mr. xxxx ’s system not yet metabolized and therefore not contributing to his BAC.  
21 Thereafter with the passage of time the alcohol from that drink was absorbed and took his blood  
22 alcohol level from below to above a .08 in light of the fact that contribution of a single drink was  
23 .02 for Mr. xxxxx based on his height and weight, the total contribution would be in excess of  
24 .02 based on the amount of time having gone by and the number which would have initially been  
25 below .08 thereafter rising to the approximate .10 level registered on the breath machine one  
26 hour after contact with the police. This scenario was played out without any consideration for  
27 the current disrepair of the equipment and without any consideration for a margin of error  
28 associated with breath alcohol testing in general. As such, the opinion was further solidified if

1 the fact the machine was testing approximately .01 or higher on accuracy checks were taken into  
2 consideration. In light of this evidence and testimony, the licensee did in fact meet his burden  
3 and present affirmative evidence that should have shifted the burden back to the department.

4 The burden was then shifted to the Department to rebut the evidence as the court in  
5 *Marquez/Roze* clearly articulated. The Department did not provide evidence rebutting that of the  
6 licensee. Rather than address the licensee's evidence the hearing officer chose to just fall back on  
7 a common and arbitrary position by the Department that the evidence was based on  
8 "speculation" or the witness was "selective". The reality is the department was the "selective"  
9 entity here. Because the Department did not meet the burden that was placed on them through  
10 the introduction of affirmative evidence the action of the Department is erroneous and has no  
11 evidentiary support.

12 **E. THE HEARING OFFICERS' RULING WAS ARBITRARY AND**  
13 **CAPRICIOUS**

14 This record demonstrates there is nothing that the Petitioner could have done to overcome  
15 the confirmatory bias and pre-disposition of the hearing officer. *"The phrase "arbitrary or*  
16 *capricious" encompasses conduct not supported by a fair or substantial reason, a stubborn*  
17 *insistence on following unauthorized conduct, or a bad faith legal dispute."* *American President*  
18 *Lines, Ltd. v. Zolin* (1995) 38 Cal. App. 4th 910, 933 (emphasis added). The decision in this case  
19 is not merely erroneous or just an error. The statement of decision demonstrates that the conduct  
20 of the hearing officer is arbitrary and not supported by a fair or substantial reason. *Id.*

21 **F. CONCLUSION**

22 The licensee hereby respectfully requests the Court set aside the administrative  
23 suspension issued by the Department in this case.

24  
25 Dated:

\_\_\_\_\_  
26 Attorney Name  
27 Attorney for Petitioner  
28

October 7, 2011

Department of Motor Vehicles  
Driver's Safety  
Administrative Review Request  
7677 Oakport St., Suite 220  
Oakland, CA 94621

*Re: xxxxx*

Dear Mssrs:

This is a request for administrative review of the Notification of Findings and Decision issued by hearing officer Pressley at the Oakland Office of Driver's Safety on 9/24/11 regarding xxxxx. The Findings and Decision is erroneous for at least the following reasons:

1. No time of driving was established by any competent evidence in the record;
2. No competent evidence was introduced from which a reasonable inference could be made that A) the licensee was operating the motor vehicle; B) at a time within 3 hours of law enforcement attaining a chemical sample;
3. Incompetent multiple hearsay evidence was introduced to establish probable cause and time of driving;
4. CVC 40300.5 does not apply in this case and no driving was observed by a law enforcement officer nor other competent witness;
5. The testimony interpretation by the hearing officer is not accurate; the witness testified to an admission of being intoxicated by saying he was "f'd up" not an admission to any wrong doing;
6. The hearing officers interpretation of the witness' testimony is bias and does not support the inferences drawn therefrom;
7. Evidence sufficient to rebut the presumption of the department regarding licensee operation of the subject vehicle was introduced and either misconstrued or wrongfully rejected by the hearing officer;
8. The hearing officer claims and exigency to establish a lawful arrest but no such exigency exists from the record;

9. The hearing officer admittedly only introduced the “statements of the citizen to prove the reasonableness of the officer’s belief, not the truth of the matter stated” As such the citizen statements cannot be relied upon to establish probable cause – which is what occurred in this matter;
10. The hearing officer “cherry-picked” portions of the witnesses’ testimony that conveniently suited his theory of the case but then arbitrarily rejected those portions that established deficiencies in his case.

This does not exhaust the reasons the decision is in error. The licensee hereby renews all the objections made at the time of the hearing.

The decision is erroneous and should be set-aside.

A check for the administrative review fee is enclosed herewith.

Thank you,

Peter Johnson  
Attorney at Law

REQUEST FOR ADMINISTRATIVE REVIEW

RE:  
CDL

---

This is a request for administrative review based on the erroneous decision to sustain the suspension of xxxxx license.

The evidence adduced at the hearing was that the officer was unable to take xxxx to the first police department for a breath test. Then at the station where the test ultimately was taken a disruptive arrestee caused a stir during the time the arresting officer in xxxx case was required to conduct a 15 min continuous observation period. The arresting officer was then distracted assisting in his attendance of the disruptive arrestee thereby interrupting the continuous observation period. As such the continuous 15 min observation period required by Title 17 did not occur.

**Roze v. DMV** (2006) 141 Cal.App.4th 1176, 1184 provides that in the first instance it is a simple matter for the department to make out its prima facie case regarding admissibility of the breath test. However, the court further provides that if the licensee can show that there is a violation of Title 17 of the California Code of Regulations with regard to the 15 minute observation period that the non-compliance is sufficient to support a set-aside.

This matter should be set aside.

The licensee reiterates the arguments made at the time of the hearing.

Please consider these points and those made at the time of the hearing. The hearing officer's decision in this matter is erroneous and should be overturned.

Respectfully Submitted,

Peter Johnson  
Attorney at Law



CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

CONTRA COSTA COUNTY BAR ASSOCIATION  
SPONSORED SEMINARS

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Speakers: Peter Johnson , Panagiotis Prountzos  
Date of Activity: 7/10/2020  
Time of Activity: 12:00 PM - 01:30 PM  
Location: VIRTUAL PROGRAM  
Your Location  
Hometown, CA 00000

CLE Format: Participatory  
Total Eligible California MCLE Credit Hours: 1

To Be Completed by the Attorney after Participation in the Above-Named Activity

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Title of Activity Up Your DUI Practice at DMV Hearings (Webinar)

Date of Offering: 7/10/2020 12:00 PM - 01:30 PM

Venue: VIRTUAL PROGRAM

**Name of Participant (Optional):** \_\_\_\_\_

First

Last

**Please indicate your evaluation of this course by completing the table below**

Question	Yes	No	Comments
Did this program meet your educational objectives?	<input type="checkbox"/>	<input type="checkbox"/>	
Were you provided with substantive written materials?	<input type="checkbox"/>	<input type="checkbox"/>	
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Did the activity contain significant professional content?	<input type="checkbox"/>	<input type="checkbox"/>	
Was the environment suitable for learning (e.g., temperature, noise, lighting, etc.)?	<input type="checkbox"/>	<input type="checkbox"/>	

**Please rate the instructor(s) of the course below**
**On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below**

<b>Instructor's Name and Subject Taught</b>	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	<b>Rate 1 - 5</b>
---	--	-----------------------

Overall Teaching Effectiveness

\_\_\_\_\_

Knowledge of Subject Matter

\_\_\_\_\_

<b>Instructor's Name and Subject Taught</b>	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	<b>Rate 1 - 5</b>
---	--	-----------------------

Overall Teaching Effectiveness

\_\_\_\_\_

Knowledge of Subject Matter

\_\_\_\_\_

<b>Instructor's Name and Subject Taught</b>	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	<b>Rate 1 - 5</b>
---	--	-----------------------

Overall Teaching Effectiveness

\_\_\_\_\_

Knowledge of Subject Matter

\_\_\_\_\_

1 PANAGIOTIS PROUNTZOS (SBN 282451)  
2 333 WEST PORTAL AVE, SUITE A  
3 SAN FRANCISCO, CA 94127  
4 415-661-8334 (OFFICE)  
5 415-731-6687 (FAX)  
6 PANAGIOTIS@PROUNTZOSLAW.COM

7 DEPARTMENT OF MOTOR VEHICLES

8 STATE OF CALIFORNIA

9 IN THE MATTER OF THE  
10 ADMINISTRATIVE PER SE HEARING  
11 CONCERNING THE DRIVING PRIVILEGE  
12 OF CLIENT,

13 CDL A1111111

14 AT THE DEPARTMENT OF MOTOR  
15 VEHICLES IN SAN FRANCISCO  
16 CALIFORNIA ON JULY 1, 2019

17 HEARING BRIEF

18 Please accept this brief as a noncomprehensive summary and assertion of issues I will be  
19 raising at the hearing, as well as timely objections to the Department's evidence as appropriate.

20 **LICENCEE WAS NEVER ADMONISHED THAT HER DRIVING PRIVILEGE WOULD**  
21 **BE SUSPENDED OR REVOKED IF SHE REFUSED**

22 VC23612(a) sets forth the advice and admonition that law enforcement "shall" give to the  
23 arrestee. There cannot be an informed refusal where the admonition is not given. CVC  
24 §23612(a)(1)(D) speaks in mandatory, not discretionary, terms of the requirement that a licensee  
25 be informed of his or her duty to take a test and the consequences for failing to take a test. It thus  
26 follows that if a person is not informed of his/her rights and duties that no suspension can stand.  
27 "Proper warning of the consequences of refusal of a motorist arrested for drunk driving to take  
28 one of the three tests required by CVC §13353, is one of the elements essential to suspension of

1 license under the implied consent law.” *Giomi v. Department of Motor Vehicles*, 15 Cal. App. 3d  
2 905 at 906 (1971).

3 Here, when Officer recites to licensee the DS-367 chemical test admonition, he fails  
4 entirely to admonish her that her driving privilege **will** be administratively suspended for one  
5 year or administratively revoked for two or three years by the department of motor vehicles as  
6 required by CVC 23612. Specifically, CVC 23612 states “The person **shall** also be told that his  
7 or her failure to submit to, or the failure to complete, the required breath, blood, or urine tests  
8 **will result** in (i) the administrative suspension by the department of the person’s privilege to  
9 operate a motor vehicle for a period of one year...” Licensee was never admonished that her  
10 license would be suspended for one year if she were to refuse. The following is a transcript of the  
11 DS-367 admonition given to licensee by Officer at the Mill Valley Police Department (enclosed  
12 as exhibit A - DVD recording of officer’s bodycam).

13  
14  
15 **Transcript of admonition given by officer**

16  
17 Officer– “You are required by state, by the state to, you are required by state law to  
18 submit to and complete a chemical test to determine the alcohol and or drug content of your  
19 blood because I believe you are under the influence of alcohol, or a combination of alcohol and  
20 drugs, you have the choice of taking a breath or blood test if you are driving under the influence,  
21 or on dui probation, you are required to submit to a preliminary alcohol screening test. So, since,  
22 let’s see here, when applicable since the breath and blood tests are unavailable you are incapable  
23 of completing a breath or blood test or you are afflicted with hemophilia or are using  
24 anticoagulant medication you are deemed to have given your consent to a chemical test of your  
25 urine. Or, when applicable, since you need medical treatment, your choice is limited to blood,  
26 breath, or urine to test, the only test available at blank. If you refuse to submit to a test, or fail to  
27  
28

1 complete a chemical test, refusal or failure to complete the test may be used against you in court.  
2 Refusal or failure to complete the breath testing will result in a fine and mandatory imprisonment  
3 if you are convicted of a violation of 23152 or 23153. You do not have the right to talk to an  
4 attorney or have an attorney present before stating whether you will submit to a test, before  
5 deciding which test to take, or during the test. If you cannot, or state you cannot, complete the  
6 test you choose, you must submit to complete a remaining test. So I'm going to ask you, would  
7 you, will you take a preliminary alcohol screening test?"  
8

9 Licensee – inaudible

10 Officer – “These are yes or no questions.”

11 Licensee – “We just decided we are going to”

12 Officer – “right but”

13 Licensee – “refuse”

14 Officer – “I need to read you this just for law, no. Ok. Will you take a breath test?”

15 Licensee – “No”

16 Officer – “Will you take a blood test?”

17 Licensee – “No”

18  
19  
20 Officer failed to admonish licensee that her driving privilege would be administratively  
21 suspended for one year or administratively revoked for two or three years by the department of  
22 motor vehicles by refusing as required by the statute.  
23

24 Prior to the improper admonishment of the DS-367, Officer stated to licensee “if you do  
25 refuse, then you **may** be subject to a driver’s license suspension for at least one year.” This is a  
26 far deviation from the statute’s mandatory provisions that officer must instruct licensee that a  
27 refusal “**will** result in (i) the administrative suspension by the department of the person’s  
28

1 privilege to operate a motor vehicle for a period of one year (CVC23612).” Confused, yet  
2 completely willing to submit to a chemical test, licensee asked for clarity on the warrant issue  
3 and test requirements to which Officer reiterated, “just so you know if I contact a judge because  
4 of your refusal, then you’re **subject** to losing your license for up to a year.” (Exhibit A) This  
5 statement to licensee again is contrary to the requirements of the statute that her refusal **will**  
6 result in suspension, rather that she may be subject to suspension as communicated by Officer .  
7

8         There is no ambiguity that CVC §23612 requires that an officer **shall** clearly instruct  
9 licensee of the consequences of refusal. Licensee never made an informed refusal as required by  
10 the statute given that she was never informed of the consequences of said refusal. At no point  
11 was licensee ever unwilling to submit to a chemical test, and only requested that a warrant be  
12 obtained prior to her blood being drawn due to erroneous statement by the Officer that her  
13 license **may** be suspended if a warrant was obtained.  
14

15         Licensee’s refusal was a direct result of the improper admonition given and confusion  
16 caused directly by Officer.  
17

18         **THE OFFICER’S STATEMENT/DS 367 AND ARREST/INCIDENT REPORT**  
19         **DOES NOT SATISFY TRUSTWORTHINESS UNDER 1280(C) AND THUS DOES NOT**  
20         **QUALIFY AS A HEARSAY EXCEPTION**

21         Under the “official records” hearsay exception, the evidence being admitted is done so,  
22 despite it being hearsay because there exists some indicia of trustworthiness. Evidence Code  
23 1280 (c) states “The sources of information and method and time of preparation were such as to  
24 indicate its trustworthiness.” Here, trustworthiness of this subsection cannot be met as to qualify  
25 as a hearsay exception  
26

27         Officer incorrectly admonished Licensee of her rights as protected and governed under  
28

1 CVC §23612. As a result, Officer cannot be relied as a source of information to indicate  
2 trustworthiness given his lack of a fundamental grasp on the matter. There is no ambiguity that  
3 CVC §23612 requires that an officer **shall** clearly instruct licensee of the consequences of  
4 refusal. Yet despite this failure to properly adhere to CVC §23612 he represents in his DS 367  
5 form that he fully admonished licensee under penalty of perjury. Further, in the Mill Valley  
6 Police Department Incident Report he explicitly states, “I advised CLIENT of the Chemical Test  
7 Admonition on page two of the DMV 367 Form.” However based on his bodycam footage, he  
8 did not fully advise her as represented. Rather, he failed almost entirely to read section 4 of the  
9 test admonition that he references on page 2 of the DMV 367 form.  
10  
11

12 For the reasons stated, licensee respectfully makes appropriate objections to offered  
13 evidence and requests that the suspension be set aside.  
14  
15  
16

17 \_\_\_\_\_  
18 PANAGIOTIS PROUNTZOS, ESQ.  
19  
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21  
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24  
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27  
28

REQUEST FOR ADMINISTRATIVE REVIEW

RE: XXXXX

XXXXXXX

This is a request for an administrative review in the above-entitled matter. A Notification of Findings and Decision was issued on 12/27/18.

The decision of the hearing officer demonstrates a bias not supported by an objective resolution of the evidence in the case. The hearing officer is arbitrarily ignoring the audio recording contained in the MVARs and the audio recording during the blood draw (blood was attained) wherein it is clear the licensee was told his license would be suspended for one year if he refused.

The decision of the hearing officer further demonstrates bias not supported by an objective resolution of the evidence by accepting testimony by the officer that is clearly unreliable and in conflict with the recorded evidence.

The finding and decision demonstrates the hearing officer exercising a double standard when assessing the credibility of a police officer's testimony vs. a witness for the licensee. In this case the police officer not only had clear memory deficiencies related to facts specific and necessary to the issues to be decided but also provided testimony that conflicted with the audio recordings. Under either of those circumstances it is without question the hearing officer would find a licensee witness not credible however in this case the hearing officer not only excuses the deficiencies but moreover ignores the plain information in the recordings that is contrary. The hearing officer is therefore arbitrary and capricious in this particularly case.

The CHP officer claims he read the admonition on the DMV 367 however the information he recorded on the back of the DMV 367 form is consistent with the recording heard when the officer gives the wrong admonition. The information on the back of the DMV367 does not comport with the officer's conflicting and vaguely recalled testimony regarding what occurred when he supposedly read the admonition.

The CHP officer could not recall whether he read the admonition to the licensee at the Oakland CHP office or the Contra Costa CHP Office.

The CHP officer testified as to both the Oakland CHP office and the Contra Costa CHP office that he doesn't know if asked any questions or received any responses from the licensee.

The CHP officer doesn't know where he filled out the DS367

On the one hand we have two recordings wherein there is clearly an admonition given that states the suspension is only one year, though this is not a complete admonition.

The Officer testifies there was more as he claims to have read the DMV 367 however cannot provide any details except that the licensee has his eyes closed and that either he was sleeping was pretending to be sleeping. The officer concludes that in his opinion licensee was not “so asleep” (whatever that means) that he could not understand.

Yet the officer very plainly testified additionally as follows:

He did not ask the licensee if he understood the admonition;  
He did not ask the licensee if he could hear the admonition;  
He did not ask the licensee if he needed the officer to repeat the admonition;

When asked to describe why he felt the licensee was just pretending to be asleep he testified his bases was he wasn't snoring; and that if he was asleep he could not be upright sitting on the bench.

The officer qualified his testimony and stated the licensee was not “so asleep”.

The conclusion that he would not be upright while sitting on the bench entirely ignores the fact the licensee was sitting on a bench, handcuffed to a bar in the back of the bench and leaning against the wall.

The suspension of a driver's license even for six months may have profound and obvious effects on one's life situation constituting a severe economic and personal hardship. Thus, a driver's license is a fundamental right requiring the exercise by the court of its independent judgment in reviewing the administrative proceedings leading to a suspension. *Berlinghieri v. Department of Motor Vehicles*, (1983) 33 Cal.3d 392, 398

Proper warning of the consequence of refusal is an element essential to the suspension of a driver's license. *Janusch v. Department of Motor Vehicles* (1969) 276 CA2d 193,196.

A one year admonition cannot support a two-year suspension and therefore any suspension in this case should be limited to one year. *Daly v. Dep't of Motor Vehicles*, 187 CA3d 257.

Per CVC 23612(a)(5):

“A person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the non-completion of, the test or tests will result in the suspension or revocation of his or her privilege to operate a motor vehicle. A person who is dead is deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer.”

In this case the officer's is permitted to speculate as to the condition of XXXX at the time the admonition was allegedly given. The officer stated he was asleep or pretending to be asleep. That in his opinion he was pretending because he did not fall over despite leaning against a wall and handcuffed to a bench, and was not snoring. The officer further equivocated the condition of the licensee by stating he was not “so asleep”. The hearing officer ignored the deficiencies in the officer's testimony and despite no effort whatsoever on the part of the officer to determine whether or not the licensee was actually asleep, concluded him not being “so asleep”; was a sufficient state to withdraw consent.

Based on the foregoing the finding of refusal should be set-aside entirely in the first instance and if the decision is sustained, which would remain error in light of the foregoing, such suspension cannot be for more than one year as that is the only credible admonition proven in this case.

Respectfully submitted,

Peter Johnson  
Attorney at Law

**DUI SENTENCING AND IID LAWS**  
**BEGINNING ON JANUARY 1, 2019 THROUGH JANUARY 1, 2026**

OFFENSE/SECTION	DMV	COURT
<p>1ST OFFENSE WITH NO INJURY AND NO REFUSAL  CVC 23152(a) Under Influence  CVC 23152(b) .08 or higher  CVC 23152(e) Passenger for Hire  BAC .04  CVC 23152(g) Drugs &amp; Alcohol</p>	<p>FOUR (4) MONTHS SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:  1. PROOF OF IID  2. PROOF OF DUI PROGRAM  3. PROOF OF SR-22  4. PAY \$125 REISSUE FEE  CVC 13353.2./13353.3</p> <p style="text-align: center;">OR</p> <p>FOUR (4) MONTHS SUSPENSION - ONE CAN APPLY FOR RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:  1. SERVE A THIRTY (30) DAY HARD SUSPENSION (NO DRIVING FOR ANY REASON)-5 MONTHS RESTRICTED  2. PROOF OF DUI PROGRAM  3. PROOF OF SR-22  4. PAY \$125 REISSUE FEE</p> <p>CVC 13353.7 (if APS hearing requested)  *Note: APS Suspensions are terminated upon conviction and resulting mandatory suspension  Restrictions without IID are limited as follows:  "The restriction of the driving privilege shall be limited to the hours necessary for driving to and from the person's place of employment, driving during the course of employment, and driving to and from activities required in the driving-under-the-influence program."  CVC 13352.4  If IID installed only restriction is the IID, driving is not otherwise limited</p>	<p>SIX (6-BAC .19 OR BELOW) / TEN (10-BAC.20 OR ABOVE) MONTHS SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:  1. PROOF OF IID  2. PROOF OF DUI PROGRAM  3. PROOF OF SR-22  4. PAY \$125 REISSUE FEE  CVC 13352/13352.1</p> <p style="text-align: center;">OR</p> <p>TWELVE (12) MONTHS SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:  1. PROOF OF DUI PROGRAM  2. PROOF OF SR-22  3. PAY \$125 REISSUE FEE  <b>*NOTE PENDING SB545</b></p> <p>CVC 13352.4</p> <p>CVC 23538 with probation (CVC 23600)  Probation terms 3-5 years  County Jail 0-6 mos.  Driving BAC less than 0.01  No Criminal Offense  If arrested no refusal chemical test  Fine \$390-\$1000</p> <p>CVC 23536 without probation (CVC 23600)  Same conditions as above with exception for minimum custody time  County Jail 96 hours at least 48 continuous up to 6 mos.;  If under 18 Suspension is under either 13352.3 (one year) or 13352(a) whichever is longer</p>
<p>1ST OFFENSE WITH INJURY  CVC 23153 misd.  (Wobblers)</p>	<p>FOUR (4) MONTHS SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:  1. PROOF OF IID  2. PROOF OF DUI PROGRAM  3. PROOF OF SR-22  4. PAY \$125 REISSUE FEE</p> <p style="text-align: center;">OR</p> <p>FOUR (4) MONTHS SUSPENSION – RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:  1. SERVE A THIRTY (30) DAY HARD SUSPENSION (NO DRIVING FOR ANY REASON)-5 MONTHS RESTRICTED  2. PROOF OF DUI PROGRAM  3. PROOF OF SR-22  4. PAY \$125 REISSUE FEE</p> <p>*Note: APS Suspensions are terminated upon conviction and resulting mandatory suspension</p>	<p>ONE (1) YEAR SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:  1. PROOF OF IID  2. PROOF OF DUI PROGRAM  3. PROOF OF SR-22  4. PAY \$125 REISSUE FEE  ***IID MANDATORY ONE YEAR***  CVC23575.3(h)(2)  CVC 13352(a)(2)(A)  <b>Misdemeanor</b>  Without probation CVC 23554  90 days to one year county jail  Fine \$390 -\$1000  <b>With probation</b> CVC 23556  Standard Terms per CVC 23600  County Jail 5 days to one year  <b>Felony</b>  Imprisonment in State Prison  CVC 23558 Multiple Victim Enhancement applies to felony convictions (GBI One year State prison enhancement per victim)</p>

OFFENSE/SECTION	DMV	COURT
<p>1<sup>ST</sup> OFFENSE – DRUG ONLY WITH NO INJURY CVC 23152 (c) or (f)</p>	<p>DRUG-ONLY OFFENDERS ARE NOT SUBJECT TO AN ADMINISTRATIVE LICENSE SUSPENSION TAKEN BY THE DMV UPON ARREST UNDER ADMINISTRATIVE PER SE LAWS.</p>	<p>SIX (6) MONTH HARD SUSPENSION AND DRIVING PRIVILEGES REINSTATED WITH THE FOLLOWING:            1. PROOF OF COMPLETION OF DUI PROGRAM            2. PROOF OF SR-22            3. PAY \$125 REISSUE FEE            Same terms as CVC 23152 (a) (b) (e) per CVC 23536             *A RESTRICTED LICENSE MAY BE AVAILABLE PER CVC 13352.4</p>
<p>1<sup>ST</sup> OFFENSE – DRUG ONLY WITH INJURY CVC 23153 (c) (f)</p>	<p>DRUG-ONLY OFFENDERS ARE NOT SUBJECT TO AN ADMINISTRATIVE LICENSE SUSPENSION TAKEN BY THE DMV UPON ARREST UNDER ADMINISTRATIVE PER SE LAWS.</p>	<p>ONE (1) YEAR HARD SUSPENSION AND DRIVING PRIVILEGES REINSTATED WITH THE FOLLOWING:            1. PROOF OF COMPLETION OF DUI PROGRAM            2. PROOF OF SR-22            3. PAY \$125 REISSUE FEE            Same terms as CVC 23153 (a)(b)(d)(e) CVC 23554  <b>Misdemeanor</b>            Without Probation            90 days to one year county jail            Fine \$390-\$1000  <b>With probation</b> CVC 23556            Standard Terms per CC 23600            County Jail 5 days to one year  <b>Felony</b>            Imprisonment in State Prison            CVC 23558 Multiple Victim Enhancement applies to felony convictions (GBI One year State prison enhancement per victim)            *A RESTRICTED LICENSE MAY BE AVAILABLE PER CVC 13352.4</p>
<p>2<sup>ND</sup> OFFENSE WITH NO INJURY AND NO REFUSAL – CVC 23152 (a)(b)(d)(e)(g)</p>	<p>TWELVE (12) MONTHS SUSPENSION RESTRICTION ELIGIBLE WITH THE FOLLOWING:            1. PROOF OF IID            2. PROOF OF DUI PROGRAM            3. PROOF OF SR-22            4. PAY \$125 REISSUE FEE            CVC 13353.3(2)(A)            *Note: APS Suspensions are terminated upon conviction and resulting mandatory suspension</p>	<p>TWO (2) YEARS SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:            1. PROOF OF IID-MANDATORY FOR 1 YEAR            2. PROOF OF DUI PROGRAM            3. PROOF OF SR-22            4. PAY \$125 REISSUE FEE            CVC 13352(a)(3)  <b>Without probation</b> per CVC 23540            90 days to one year county jail            Fine \$390 - \$1000  <b>With probation</b> per CVC 23542            Standard terms per CVC 23600            Either 10 days to one year; or            96 hours up to one year – if 96 hours to be served in two 48 hour increments (can do 10 days of community service in lieu of 48 continuous hours CVC 23580)</p>

OFFENSE/SECTION	DMV	COURT
<p>2<sup>ND</sup> OFFENSE WITH INJURY CVC 23153 (a)(b)(d)(e)(g) Misd. (wobbler)</p>	<p>TWELVE (12) MONTHS SUSPENSION RESTRICTION ELIGIBLE WITH THE FOLLOWING: 1. CONVICTION 2. PROOF OF IID 3. PROOF OF DUI PROGRAM 4. PROOF OF SR-22 5. PAY \$125 REISSUE FEE CVC 13353.3(2)(A) *Note: APS Suspensions are terminated upon conviction and resulting mandatory suspension</p>	<p>THREE (3) YEARS REVOCATION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING: 1. PROOF OF IID-MANDATORY FOR TWO (2) YEARS 2. PROOF OF DUI PROGRAM 3. PROOF OF SR-22 4. PAY \$125 REISSUE FEE CVC 13352(a)(4) <b>Misdemeanor</b> Without Probation per CVC 23560 120 days to one year county jail <b>With probation</b> per CVC 23562 Standard terms per CVC 23600 Either 120 days minimum up to year Fine \$390-\$5000; or 30 days minimum up to year county jail Fine \$390-\$1000 18 mos. or 30 mos. program <b>Felony</b> Imprisonment in State Prison CVC 23558 Multiple Victim Enhancement applies to felony convictions (GBI One year State prison enhancement per victim)</p>
<p>2<sup>ND</sup> OFFENSE – VOP  **NOTE**UNDER THE NEW DMV LAWS, WITH A VOP, ONE IS TREATED THE SAME AS THE OFFENSE AND IS IMMEDIATELY ELIGIBLE FOR A LICENSE FOLLOWING THE PROCEDURE HERE.</p>	<p>TWELVE (12) MONTHS SUSPENSION RESTRICTED ELIGIBLE WITH THE FOLLOWING: 1. PROOF OF IID 2. PROOF OF DUI PROGRAM 3. PROOF OF SR-22 4. PAY \$125 REISSUE FEE CVC 13353.75 *Note: APS Suspensions are terminated upon conviction and resulting mandatory suspension</p>	<p>TWO (2) YEAR SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING: 1. PROOF OF IID- MANDATORY ONE YEAR 2. PROOF OF DUI PROGRAM 3. PROOF OF SR-22 4. PAY \$125 REISSUE FEE CVC 13352(a)(3)</p>
<p>2<sup>ND</sup> OFFENSE WITH DRUGS ONLY – CVC 23152(c)(g) w/ prior</p>	<p>DRUG-ONLY OFFENDERS ARE NOT SUBJECT TO AN ADMINISTRATIVE LICENSE SUSPENSION TAKEN BY THE DMV UPON ARREST UNDER ADMINISTRATIVE PER SE LAWS.</p>	<p>TWO (2) YEAR SUSPENSION; TWELVE (12) MONTH HARD SUSPENSION AND THEN ELIGIBLE FOR A RESTRICTED LICENSE WITH THE FOLLOWING: 1. PROOF OF DUI PROGRAM 2. PROOF OF SR-22 3. PAY \$125 REISSUE FEE CVC 13352(a)(3)(A)(i) <b>Without probation</b> per CVC 23540 90 days to one year county jail Fine \$390 - \$1000 <b>With probation</b> per CVC 23542 Standard terms per CVC 23600 Either 10 days to one year; or 96 hours up to one year – if 96 hours to be served in two 48 hour increments</p>

OFFENSE/SECTION	DMV	COURT
<p>2<sup>ND</sup> OFFENSE WITH DRUGS ONLY AND INJURY CVC 23153(c)(g)</p>	<p>DRUG-ONLY OFFENDERS ARE NOT SUBJECT TO AN ADMINISTRATIVE LICENSE SUSPENSION TAKEN BY THE DMV UPON ARREST UNDER ADMINISTRATIVE PER SE LAWS.</p>	<p>THREE (3) YEAR SUSPENSION; TWELVE (12) MONTH HARD SUSPENSION AND THEN ELIGIBLE FOR A RESTRICTED LICENSE WITH THE FOLLOWING:</p> <ol style="list-style-type: none"> <li>1. PROOF OF DUI PROGRAM</li> <li>2. PROOF OF SR-22</li> <li>3. PAY \$125 REISSUE FEE</li> </ol> <p>CVC 13352(a)(4)(A)(i)  <b>Misdemeanor</b>  Without Probation per CVC 23560  120 days to one year county jail  <b>With probation</b> per CVC 23562  Standard terms per CVC 23600  Either 120 days minimum up to year  Fine \$390-\$5000; or  30 days minimum up to year county jail  Fine \$390-\$1000  18 mos. or 30 mos. program  <b>Felony</b>  Imprisonment in State Prison  CVC 23558 Multiple Victim Enhancement applies to felony convictions (GBI One year State prison enhancement per victim)</p>
<p>3<sup>RD</sup> OFFENSE WITH NO INJURY AND NO REFUSALCVC 23152 (a)(b)(d)(e)(g) w/ two priors</p>	<p>ONE (1) YEAR SUSPENSION RESTRICTION ELIGIBLE WITH THE FOLLOWING:</p> <ol style="list-style-type: none"> <li>1. CONVICTION</li> <li>2. PROOF OF IID</li> <li>3. PROOF OF DUI PROGRAM</li> <li>4. PROOF OF SR-22</li> <li>5. PAY \$125 REISSUE FEE</li> </ol> <p>CVC 13353.3(2)(A)  *Note: APS Suspensions are terminated upon conviction and resulting mandatory suspension</p>	<p>THREE (3) YEAR SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:</p> <ol style="list-style-type: none"> <li>1. PROOF OF IID –MANDATORY 2 YEARS</li> <li>2. PROOF OF DUI PROGRAM</li> <li>3. PROOF OF SR-22</li> <li>4. PAY \$125 REISSUE FEE</li> </ol> <p>CVC 13352(a)(5)  <u>COURT HAS AUTHORITY TO SUSPEND UP TO 10 YEAR UNDER CVC 23597</u>  <b>Without probation</b> CVC 23546  120 day minimum up to one year county jail  Fine \$390 to \$1000  Designation as habitual traffic offender  <b>With probation</b> CVC 23548  Standard terms per CVC 23600  120 days minimum up to one year  Fine \$390 to \$1000  Or Court may require 30 mos. program – 30 days minimum up to one year county jail</p>
<p>3<sup>RD</sup> OFFENSE WITH INJURYCVC 23153(a)(b)(d)(e)(g) w/two priors</p>	<p>ONE (1) YEAR SUSPENSION RESTRICTION ELIGIBLE WITH THE FOLLOWING:</p> <ol style="list-style-type: none"> <li>1. CONVICTION</li> <li>2. PROOF OF IID</li> <li>3. PROOF OF DUI PROGRAM</li> <li>4. PROOF OF SR-22</li> <li>5. PAY \$125 REISSUE FEE</li> </ol> <p>CVC 13353.3(2)(A)  *Note: APS Suspensions are terminated upon conviction and resulting mandatory suspension</p>	<p>FIVE (5) YEAR SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:</p> <ol style="list-style-type: none"> <li>1. PROOF OF IID-MANDATORY 3 YEARS</li> <li>2. PROOF OF DUI PROGRAM</li> <li>3. PROOF OF SR-22</li> <li>4. PAY \$125 REISSUE FEE</li> </ol> <p>13352(a)(6)  <u>COURT HAS AUTHORITY TO SUSPEND UP TO 10 YEARS UNDER CVC 23697</u>  <b>Misdemeanor</b>  Without probation CVC 23566  2, 3 or 4 years State Prison  Fine \$1015 - \$5000  If GBI same sentence  Designated Habitual Traffic Offender  Attendance in Alcohol or Drug Program in Prison  <b>With probation</b> CVC 23568  Standard terms per CVC 23600  Minimum one year county jail  Fine \$390-\$5000;  Restitution per PC 1203.1; or  18 mos. program or 30 mos. where available  30 days minimum up to one year  <b>Felony</b>  Imprisonment in State Prison  CVC 23558 Multiple Victim Enhancement applies to felony convictions (GBI One year State prison enhancement per victim)</p>

OFFENSE/SECTION	DMV	COURT
3 <sup>RD</sup> OFFENSE WITH DRUGS ONLY AND NO INJURY	DRUG-ONLY OFFENDERS ARE NOT SUBJECT TO AN ADMINISTRATIVE LICENSE SUSPENSION TAKEN BY THE DMV UPON ARREST UNDER ADMINISTRATIVE PER SE LAWS.	<p>THREE (3) YEAR SUSPENSION; TWELVE (12) MONTH HARD SUSPENSION AND THEN ELIGIBLE FOR A RESTRICTED LICENSE WITH THE FOLLOWING:</p> <ol style="list-style-type: none"> <li>1. PROOF OF DUI PROGRAM</li> <li>2. PROOF OF SR-22</li> <li>3. PAY \$125 REISSUE FEE</li> </ol> <p><u>COURT HAS AUTHORITY TO SUSPEND UP TO 10 YEARS UNDER CVC 23597</u></p> <p><b>Without probation</b> CVC 23546 120 day minimum up to one year county jail Fine \$390 to \$1000 Designation as habitual traffic offender</p> <p><b>With probation</b> CVC 23548 Standard terms per CVC 23600 120 days minimum up to one year Fine \$390 to \$1000 Or Court may require 30 mos. program – 30 days minimum up to one year county jail</p>
3 <sup>RD</sup> OFFENSE WITH DRUGS ONLY AND INJURY CVC 23153(c)(f) w/ two prior	DRUG-ONLY OFFENDERS ARE NOT SUBJECT TO AN ADMINISTRATIVE LICENSE SUSPENSION TAKEN BY THE DMV UPON ARREST UNDER ADMINISTRATIVE PER SE LAWS.	<p>FIVE (5) YEAR SUSPENSION; TWELVE (12) MONTH HARD SUSPENSION AND THEN ELIGIBLE FOR A RESTRICTED LICENSE (DRIVING TO/FROM YOUR PLACE OF EMPLOYMENT, DURING THE COURSE OF EMPLOYMENT AND DRIVING TO/FROM ACTIVITIES REQUIRED IN THE DUI PROGRAM) WITH THE FOLLOWING:</p> <ol style="list-style-type: none"> <li>1. PROOF OF DUI PROGRAM</li> <li>2. PROOF OF SR-22</li> <li>3. PAY \$125 REISSUE FEE</li> </ol> <p><u>COURT HAS AUTHORITY TO SUSPEND UP TO 10 YEARS UNDER CVC 23597</u></p> <p><b>Misdemeanor</b> Without probation CVC 23566 2, 3 or 4 years State Prison Fine \$1015 - \$5000 If GBI same sentence Designated Habitual Traffic Offender Attendance in Alcohol or Drug Program in Prison</p> <p><b>With probation</b> CVC 23568 Standard terms per CVC 23600 Minimum one year county jail Fine \$390-\$5000; Restitution per PC 1203.1; or 18 mos. program or 30 mos. where available 30 days minimum up to one year</p> <p><b>Felony</b> Imprisonment in State Prison CVC 23558 Multiple Victim Enhancement applies to felony convictions (GBI One year State prison enhancement per victim)</p>
4 <sup>TH</sup> OFFENSE WITH NO INJURY AND NO REFUSAL CVC 23152 (a)(b)(d)(e)(g) w/three priors	<p>ONE (1) YEAR SUSPENSION RESTRICTION ELIGIBLE WITH THE FOLLOWING:</p> <ol style="list-style-type: none"> <li>1. CONVICTION</li> <li>2. PROOF OF IID</li> <li>3. PROOF OF DUI PROGRAM</li> <li>4. PROOF OF SR-22</li> <li>5. PAY \$125 REISSUE FEE</li> </ol> <p>CVC 13353.3(2)(A) *Note: APS Suspensions are terminated upon conviction and resulting mandatory suspension</p>	<p>FOUR (4) YEARS SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:</p> <ol style="list-style-type: none"> <li>1. PROOF OF IID-MANDATORY FOR 3 YEARS</li> <li>2. PROOF OF DUI PROGRAM</li> <li>3. PROOF OF SR-22</li> <li>4. PAY \$125 REISSUE FEE</li> </ol> <p>CVC 13352(a)(7) <u>COURT HAS AUTHORITY TO SUSPEND UP TO 10 YEARS UNDER CVC 23597</u></p> <p><b>Without probation</b> per CVC 23550 County Jail minimum 180 days up to one year (misd.) Felony County Jail Imprisonment per 1170(h) Designated as habitual traffic offender</p> <p><b>With probation</b> per CVC 23552 Standard Terms per CVC 23600 180 days minimum up to one year county jail Fine \$390 - \$1000 Court may order 30 mos. program and 30 days minimum or 18 mos. program if no prior 12-18 mos. Program</p>

OFFENSE/SECTION	DMV	COURT
<p>4<sup>TH</sup> OFFENSE WITH INJURY CVC 23153(a)(b)(d)(e)(g) w/ three prior</p>	<p>ONE (1) YEAR SUSPENSION RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:  1. PROOF OF IID  2. PROOF OF DUI PROGRAM  3. PROOF OF SR-22  4. PAY \$125 REISSUE FEE</p> <p>*Note: APS Suspensions are terminated upon conviction and resulting mandatory suspension</p>	<p>FIVE (5) YEAR SUSPENSION AND RESTRICTED DRIVING PRIVILEGES WITH THE FOLLOWING:  1. PROOF OF IID – MANDATORY 3 YEARS (4 IF PREVIOUS FELONY)  2. PROOF OF DUI PROGRAM  3. PROOF OF SR-22  4. PAY \$125 REISSUE FEE</p> <p>CVC 13352(a)(8)  <u>COURT HAS AUTHORITY TO SUSPEND UP TO 10 YEARS UNDER CVC 23597</u>  <b>Without probation</b> CVC 23566  2, 3 or 4 years State Prison  Fine \$1015 - \$5000  If GBI same sentence  Designated Habitual Traffic Offender  Attendance in Alcohol or Drug Program in Prison  <b>With probation</b> CVC 23568  Standard terms per CVC 23600  Minimum one year county jail  Fine \$390-\$5000;  Restitution per PC 1203.1; or  18 mos. program or 30 mos. where available  30 days minimum up to one year</p> <p>CVC 23558 Multiple Victim Enhancement applies to felony convictions (GBI One year State prison enhancement per victim)</p>
<p>4<sup>TH</sup> OFFENSE WITH DRUGS ONLY AND NO INJURY CVC 23152(c)(f) w/ three priors</p>	<p>DRUG-ONLY OFFENDERS ARE NOT SUBJECT TO AN ADMINISTRATIVE LICENSE SUSPENSION TAKEN BY THE DMV UPON ARREST UNDER ADMINISTRATIVE PER SE LAWS.</p>	<p>FOUR (4) YEAR SUSPENSION; TWELVE (12) MONTHS HARD SUSPENSION AND THEN ELIGIBLE FOR A RESTRICTED LICENSE WITH THE FOLLOWING:  1. PROOF OF DUI PROGRAM  2. PROOF OF SR-22  3. PAY \$125 REISSUE FEE</p> <p>CVC 13352(a)(7)  <u>COURT HAS AUTHORITY TO SUSPEND UP TO 10 YEARS UNDER CVC 23597</u>  <b>Without probation</b> per CVC 23550  County Jail minimum 180 days up to one year (misd.)  Felony County Jail Imprisonment per 1170(h)  Designated as habitual traffic offender  <b>With probation</b> per CVC 23552  Standard Terms per CVC 23600  180 days minimum up to one year county jail  Fine \$390 - \$1000  Court may order 30 mos. program and 30 days minimum or 18 mos. program if no prior  12-18 mos. Program</p>
<p>4<sup>TH</sup> OFFENSE WITH DRUGS ONLY AND INJURY CVC 23153(c)(f) w/ three priors</p>	<p>DRUG-ONLY OFFENDERS ARE NOT SUBJECT TO AN ADMINISTRATIVE LICENSE SUSPENSION TAKEN BY THE DMV UPON ARREST UNDER ADMINISTRATIVE PER SE LAWS.</p>	<p>FOUR (4) YEAR SUSPENSION; TWELVE (12) MONTHS HARD SUSPENSION ELIGIBLE FOR A RESTRICTED LICENSE WITH THE FOLLOWING:  1. PROOF OF DUI PROGRAM  2. PROOF OF SR-22  3. PAY \$125 REISSUE FEE 4</p> <p>CVC 13352(a)(8)  <u>COURT MAY SUSPEND UP TO 10 YEARS UNDER CVC 23597</u>  <b>Without probation</b> CVC 23566  2, 3 or 4 years State Prison  Fine \$1015 - \$5000  If GBI same sentence  Designated Habitual Traffic Offender  Attendance in Alcohol or Drug Program in Prison  <b>With probation</b> CVC 23568  Standard terms per CVC 23600  Minimum one year county jail  Fine \$390-\$5000;  Restitution per PC 1203.1; or  18 mos. program or 30 mos. where available  30 days minimum up to one year</p> <p>CVC 23558 Multiple Victim Enhancement applies to felony convictions (GBI One year State prison enhancement per victim)</p>

OFFENSE/SECTION	DMV	COURT
<p>CVC 23140 age 18-21 (a) 0.05 BAC or greater (b) may be proved without a chemical test</p>	<p>1 YEAR HARD SUSPENSION (NO DRIVING FOR ANY REASON) - *MAY APPLY FOR CRITICAL NEEDS LICENSE AFTER 30 DAYS HARD SUSPENSION</p> <p>CVC 13353.8 (CVC 12513)</p>	<p>*ONE YEAR HAD SUSPENSION (MAY APPLY FOR CRITICAL NEED) CVC 13352.6</p> <p>REQUIRED DRUG OR ALCOHOL PROGRAM CVC 23520</p>
<p>REFUSAL CVC 23577 ENHANCEMENT CVC13353 ADMINISTRATIVE CVC 13353.1 UNDER 21 CVC 13353.1 PROBATION</p>	<p>1ST OFFENSE - 1 YEAR HARD SUSPENSION 2ND OFFENSE - 2 YEAR HARD SUSPENSION 3RD OFFENSE - 3 YEAR HARD SUSPENSION</p> <p>***NO CHANCE FOR A RESTRICTED LICENSE IF YOU LOSE ADMINISTRATIVE HEARING ON THIS AND NO WAY TO UNWIND THROUGH COURT, NOT EVEN WITH A NOT GUILTY VERDICT ON THE REFUSAL AT TRIAL.</p>	<p>23577 was amended effective January 1, 2019 to address the holding in BIRCHFIELD V. NORTH DAKOTA, 136 S. Ct. 2160. The provision no longer applies to blood test. Counsel should consider challenging the refusal enhancement in breath and urine tests as well.</p> <p>1st offense 23152 imposition of probation terms under CVC 23538 1st offense 23153 48 continuous hours – cannot be stayed 2nd offense 23152 or 23153 96 continuous hours – cannot be stayed 3d offense 23152 10 days cannot be stayed 4th offense 23152 18 days cannot be stayed</p>
<p>COMMERCIAL LICENSE Commercial Vehicle CVC 15210</p>	<p>13352(h)(1)(2) 13353.6(e)(1) 13353.6(e)(2) / 13353.7(d); 13353.75 ELIGIBLE FOR CLASS C non-commercial or CLASS M - SUBJECT TO SAME RESTRICTION AS STANDARD DUI</p> <p>NO ELGIBILITY FOR RESTRICTION ON COMMERCIAL LICENSE</p>	<p>ONE YEAR DISQUALIFCATION FOR FIRST OFFENSE CVC 15300 CONVICTION WITH PRIOR – LIFETIME DISQUALIFICATION CVC 15302</p> <p>THREE YEARS DISQUALIFICATION CVC 15300(10)(B) IF OCCURRED WHILE TRANSPORTING HAZARDOUS MATERIALS</p>
<p>CVC 23550.5 (wobbler) Prior Felony Conviction</p>		<p>One Year Maximum County Jail; or State Prison Sentence Designation as Habitual Offender</p>
<p>CVC 23572 (minor passenger) under age 14)</p>		<p>If Sentenced under: (Cannot be Stayed) CVC 23136 – 48 continuous hours in county jail CVC 23540 – 10 days county jail CVC 23546 – 30 days county jail CVC 23550 – 90 days county jail Does not apply if conviction under 273a occurs</p>
<p>CVC 23582 SPEED ENHANCEMENT 30 or more on freeway 20 or more street or highway also requires proof of driving per CVC 23103</p>		<p>60 days consecutive county jail Court has discretion to not impose additional term</p>
<p>CVC 23576 Employer Vehicle Exemption</p>	<p>Must have proof of notice to employer regarding restriction</p>	
<p>CVC 23578 BAC .15 or higher can be considered for enhancement</p>		<p>No specific nor mandatory enhancement term</p>

OFFENSE/SECTION	DMV	COURT
Penal Code section 191.5 Vehicular Manslaughter while intoxicated	APS terms apply as above	191.5 (a) (Gross Vehicular Manslaughter) Felony – State Prison 4, 6, 10  191.5(b) Wobbler (1170(h) eligible); up to one year county jail as misdemeanor  191.5(d) Life in Prison w/ priors under the following: 23152/23540; 23153; 191.5; 192(c)(1); 192.5 (a); 192.5(b)
MISC. CODE SECTIONS	CVC 13352 MANDATORY SUSPENSIONS CVC 13352.3 JUVENILE MANDATORY SUSPENSIONS CVC 13352.5 RESTRICTED LICENSE PROVISIONS (COURT) CVC 13353.3 PERIOD OF ADMINISTRATIVE SUSPENSION CVC 13353.5 RESIDENCY OUT OF STATE (ALSO 13552) CVC 13353.6(d) ADMIN. IID CREDIT AGAINST MANDATORY CVC 13353.8 CRITICAL NEED TO DRIVE CVC 13363 OUT OF STATE CONVICTIONS CVC 13366 START DATE OF MANDATORY ACTION CVC 13366.5 START DATE COMMERCIAL MANDATORY CVC 13553 UNLICENSED - SAME PENALTIES CVC 15000 DRIVER LICENSE COMPACT CVC 23575.3 IID PROVISIONS CVC 23576 IID EMPLOYER VEHICLE EXEMPTION CVC 23521 OUT OF STATE JUVENILE OFFENSES CVC 23592 VEHICLE IMPOUNDMENT CVC 23620-26 PRIOR AND SEPARATE OFFENSES CVC 23665 POSTPONEMENT OF SUSPENSION PC 2900.5 CUSTODY CREDITS	