

**In the Supreme Court of the State of California**

**ASHLEY JOURDAN COFFEY,**

**Appellant,**

**v.**

**GEORGE VALVERDE, as Director, etc.,**

**Respondent.**

Case No. S213545

SUPREME COURT  
**FILED**

OCT 11 2013

Frank A. McGuire Clerk

Deputy

Appellate District, Case No. G047562  
County Superior Court, Case No. 30-2012-00549559  
Robert J. Moss, Judge

**ANSWER TO PETITION FOR REVIEW**

KAMALA D. HARRIS  
Attorney General of California  
ALICIA M. B. FOWLER  
Senior Assistant Attorney General  
KENNETH C. JONES  
Supervising Deputy Attorney General  
State Bar No. 132740  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
Telephone: (213) 620-6089  
Fax: (213) 897-1071  
Email: [Kenneth.Jones@doj.ca.gov](mailto:Kenneth.Jones@doj.ca.gov)  
*Attorneys for Respondent Jean Shiimoto  
Acting Director of the Department of  
Motor Vehicles*

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**TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES:**

Respondent, Jean Shiimoto, Acting Director of the Department of Motor Vehicles, respectfully submits this Answer to the Petition for Review filed by Petitioner Ashley Jourdan Coffey seeking Review of the August 15, 2013, decision of Division Three of the Fourth Appellate District, affirming the ruling of the Orange County Superior Court.

**I. INTRODUCTION**

The Court of Appeal unanimously agreed with the trial court that there was substantial evidence to support the finding by the Department of Motor Vehicles (DMV) that Petitioner Ashley Coffey was driving a motor vehicle at the time her blood alcohol concentration (BAC) was 0.08% or higher. This decision, based upon the totality of the evidence, is completely consistent with controlling statutory and decisional authority. Review by this Court is not necessary to secure uniformity of decision or to settle an important question of law.

As discussed below, there is no conflict among the lower courts, and no important question of law is at issue in this case. The case does not meet any of the criteria for granting review as set forth in California Rules of Court 8.500 subdivision (b), and thus review should not be granted. The well-reasoned opinion of the Court of Appeal, which upheld the sound determination of the trial court, should stand.

## **II. THE PETITION FOR REVIEW SHOULD NOT BE GRANTED**

### **A. There Are No Grounds for Supreme Court Review.**

While this case is understandably important to the Petitioner, it is of little interest or importance to anyone else. The applicable law is well settled. The case presents no new issues of statewide importance or a conflict of decisional law. While the tragedy of drunk-driving is undeniably wide-spread and will undoubtedly continue, this Court's intervention into this fact-specific case will do nothing to reduce its recurrence and is not necessary.

#### **1. There is no Conflict Among Lower Court Decisions.**

There is no conflict between the challenged decision and the decisions from other appellate districts regarding the consideration of circumstantial evidence along with valid chemical test results to support findings regarding a driver's BAC at the time of driving. The Court of Appeal's Opinion carefully detailed how its conclusion was consistent with other relevant decisions and was based on controlling authority from this Court.

The cases Petitioner has cited do not show any decisional split or existing ambiguity of law. The Court of Appeal simply applied existing law to the unique factual circumstances in this case.

Petitioner's argument that the decision creates a new standard of review and changes the burden of proof in these cases is based on a contrived misinterpretation of the Opinion and is without merit.

The Court of Appeal aptly noted the relevant issue before it as follows:

"The issue boils down to whether non-chemical test circumstantial evidence can prove that Coffey's BAC at the time of driving was consistent with her BAC at the time of her chemical tests."

[Opinion, p. 11.]

In answering this question in the affirmative, the Court referred to this Court's three-decade old decision in *Burg v. Municipal Court* (1983) 35 Cal.3d 257 (*Burg*.) The specific passage from *Burg* the Court of Appeal relied on to support its conclusion is:

"Of course, both parties may also adduce other circumstantial evidence tending to establish that the defendant did or did not have a 0.10 percent blood-alcohol level while driving." (*Burg*, supra, 35 Cal.3d at p. 266, fn. 10.) [Opinion, p. 11.]

While the legal limit is now 0.08 percent, the reasoning from *Burg* still applies and there is nothing unusual about the Court of Appeal's conclusion. There is no new or novel test nor is there any lessening of the burden of proof.

This totality-of-the-evidence approach (considering valid chemical test results together with circumstantial evidence) is consistent with the controlling authority. As she did before the Court of Appeal, Petitioner suggests that other cases have held that circumstantial evidence can never be referenced to support findings of a specific BAC. The Court of Appeal addressed this argument in its Opinion and rejected it. It noted:

“Coffey contends circumstantial evidence can never prove a particular BAC because objective signs of intoxication can be present below a BAC of 0.08 percent. In support of her position, Coffey cites *Baker v. Gourley* (2002) 98 Cal.App.4th 1263 (*Baker*), *People v. Beltran* (2007) 157 Cal.App.4th 235, and *Brenner v. Department of Motor Vehicles* (2010) 189 Cal.App.4th 365 (*Brenner*). These cases are distinguishable, and *Baker* actually cuts against Coffey’s argument.” [Opinion, p. 12.]<sup>1</sup>

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<sup>1</sup> The other cases Petitioner cites in her Petition are also inapplicable or distinguishable. *People v. Bejasa* (2012) 205 Cal.App.4th 26 addressed whether an officer’s observations of a defendant including the defendant’s slurred speech are considered testimonial evidence subject to Fifth Amendment rights against self-incrimination or physical evidence. Both *Yordamlis v. Zolin* (1992) 11 Cal.App.4th 655 and *Santos v. Department of Motor Vehicles* (1992) 5 Cal.App.4th 537 addressed situations where there was no evidence as to the time the chemical tests were taken to implicate the three-hour presumption.

In fact, Petitioner cannot cite to a single case that is directly antagonistic to or rendered in conflict by the decision of the Court of Appeal. At most, she argues that there are cases that may “give rise to a different conclusion.” [Petition, p. 4.] Simply because the Court of Appeal disagreed with the Petitioner’s interpretation of the cases does not mean that the cases are in conflict.

**2. No Important Question of Law is Presented.**

Petitioner argues that review by this Court is required because the Court of Appeal decision “abrogates” the rising blood alcohol defense. [Petition, p. 4.] She grossly misinterprets and overstates the impact of the decision. Nowhere in the Opinion does the Court of Appeal reject, diminish or even question the continued validity of the defense.<sup>2</sup> The Court simply reinforces the need to consider all of the available evidence in determining the BAC at the time of driving.

Petitioner seizes on the use of the Court’s choice of the word “consistent” in its description of the issue presented in the case. By doing so, she reformulates the issue to one not intended by the Court.

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<sup>2</sup> Indeed, the Court of Appeal accepted the defense and specifically held: “Coffey’s expert testified based on breath and blood test results that Coffey’s BAC was in a state of rising and thus her BAC at the time of driving was below 0.08 percent. This substantial evidence rebutted the 3-hour presumption and required the DMV to adduce evidence to prove Coffey’s BAC was at least 0.08 percent at the time of driving ‘without regard to the presumption.’” [Opinion, p. 10.]

Again, the Court stated that the issue presented was “whether non-chemical test circumstantial evidence can prove that Coffey’s BAC at the time of driving was consistent with her BAC at the time of her chemical tests.” [Opinion, p. 11.] Petitioner takes the word “consistent” out of context to distort the issue and restate it in such a way as to create a new test that is found nowhere in the Opinion.

Petitioner variously argues that:

“The published decision in this case essentially holds that once the presumption is rebutted, the fact finder must merely decide if the evidence is ‘*consistent*’ with the previously presumed fact.”

[Petition, pp. 1 – 2.]

“The court of Appeal only looked for evidence ‘*consistent*’ with the factual findings and failed to apply the *de novo* standard.” [Petition, p. 2.]

“The Court of Appeal’s decision at issue has effectively changed the legal test in each of these cases, from what the weight of the evidence proves, to a determination of whether circumstantial evidence is *consistent* with a 0.08 percent inference, essentially abrogating the defense.” [Petition, p. 4.]

Premised on this flawed interpretation of the Court of Appeal’s decision, Petitioner argues that under the “new” test (as she interprets it), all that is required is circumstantial evidence that is “consistent” with a 0.08

BAC. Petitioner argues this new test is “contrary to established law.”

[Petition, pp. 14 – 16.] This is not the way the Court framed the issue and this is certainly not the test it used or supported.

The Court of Appeal simply allowed the DMV to use non-chemical test circumstantial evidence to prove that Petitioner’s “BAC at the time of driving was consistent with her BAC at the time of her chemical tests.”

Thus, the evaluation of “consistency” concerns the two BACs – the BAC at the time of driving and the BAC at the time of testing. It has always been the DMV’s burden to prove the driver’s BAC exceeded legal limits at the time of driving. Nothing has changed. In most cases the DMV can satisfy its burden based solely the three-hour presumption. However, if the presumption is rebutted, it may rely on other evidence, including circumstantial evidence.

The test is not whether this other evidence is “consistent” with the chemical test. The test is whether this other evidence proves that the BAC at the time of the chemical test is “consistent” with the BAC at the time of driving.

Petitioner is reframing the issue to support her argument that the Court of Appeal departed from established law and created a new test. This is not what the Court held. There is no important question of law presented to merit review by this Court.

### III. CONCLUSION

Petitioner Coffey vehemently argues not only that the Court of Appeal's decision was in error, but also that it is inconsistent with controlling law. She also argues that the Court announced a new standard of review that essentially abrogated the rising-blood-alcohol defense by changing the DMV's burden of proof. To support these arguments, Petitioner distorts the Court's Opinion and takes a key word out of context.

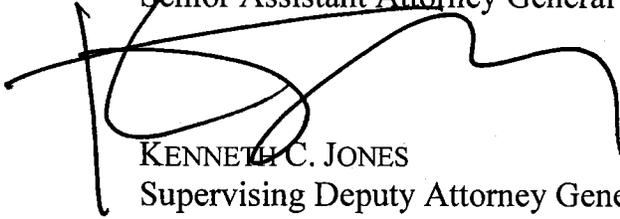
The simple fact remains that there is nothing new or out of the ordinary about the decision. It is based on established principles and is consistent with and supported by existing case law. It is not an aberration and there is no conflict between the appellate courts.

Since review is not necessary to secure the uniformity of law, or to decide an important question of law, the Petition for Review should be denied.

Dated: October 10, 2013

Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
ALICIA M. B. FOWLER  
Senior Assistant Attorney General



KENNETH C. JONES  
Supervising Deputy Attorney General  
*Attorneys for Respondent*  
*Jean Shiimoto Acting Director of the*  
*Department of Motor Vehicles*

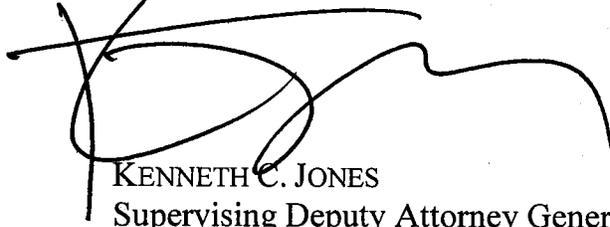
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**CERTIFICATE OF COMPLIANCE**

I certify that the attached ANSWER TO PETITION FOR REVIEW  
uses a 13 point Times New Roman font and contains 1857 words.

Dated: October 10, 2013

KAMALA D. HARRIS  
Attorney General of California

A handwritten signature in black ink, appearing to read 'K. Jones', is written over the printed name of Kenneth C. Jones.

KENNETH C. JONES  
Supervising Deputy Attorney General  
*Attorneys for Respondent Jean Shiimoto*  
*Acting Director of the Department of*  
*Motor Vehicles*

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **Ashley Jourdan Coffey v. George Valverde, as Director, etc.**  
No.: **S213545**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 10, 2013, I served the attached **ANSWER TO PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

**Chad R. Maddox, Esq.**  
**Law Offices of Chad R. Maddox**  
**5120 East La Palma, Suite 207**  
**Anaheim Hills, CA 92807**  
Attorney for Appellant

**Court of Appeal of the State of California**  
**Fourth Appellate District, Division Three**  
**601 W. Santa Ana Blvd.**  
**Santa Ana, CA 92701**

**Honorable Robert J. Moss, Judge**  
**Central Justice Center**  
**Orange County Superior Court**  
**700 Civic Center Drive West**  
**Santa Ana, CA 92701**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 10, 2013, at Los Angeles, California.

\_\_\_\_\_  
Letty Argumedo  
Declarant

\_\_\_\_\_  
*Letty Argumedo*  
Signature