

COPY

CASE NO. S213545

**IN THE SUPREME COURT OF CALIFORNIA**

**ASHLEY JOURDAN COFFEY,**  
Petitioner and Appellant,

v.

**GEORGE VALVERDE, DIRECTOR, CALIFORNIA  
DEPARTMENT OF MOTOR VEHICLES**  
Respondent.

**APPELLANT'S OPENING BRIEF ON THE MERITS**

After a Decision by the Court of Appeal Fourth Appellate District, District Three  
Case No. G047562

On Appeal from the Superior Court of California, County of Orange,  
The Honorable Robert J. Moss, Judge.  
Case No. 30-2012-00549559

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SUPREME COURT  
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Deputy

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## I.

### STATEMENT OF THE ISSUES PRESENTED

This Court granted review on the following issues:

- (1) Whether the Court of Appeal committed error by creating a new standard of review rather than applying its “independent judgment” to a question of law?
- (2) Can circumstantial evidence tending to prove alcohol *impairment* and a chemical test of 0.08 percent blood alcohol content (BAC) fifty-six minutes after driving establish, by a preponderance standard, that a driver had a BAC of 0.08 percent at the time of driving, where the three-hour presumption in Vehicle Code section 23152, subdivision (b), had been rebutted by substantial evidence?<sup>1</sup>

## II.

### INTRODUCTION

This case arises from the Department of Motor Vehicles’ (DMV) suspension of Petitioner/Appellant’s, Ashely Jourdan Coffey, driver’s license.

The DMV held an Administrative Per Se (APS) hearing, to determine if it should suspend Coffey’s license. At that hearing, the DMV hearing officer admitted into evidence a police report describing circumstantial evidence relevant to possible impairment, to wit: swerving while driving, bloodshot/watery eyes, the odor of an alcoholic beverage, and performance on field sobriety tests (FSTs). The police report indicated the arresting

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<sup>1</sup> “[I]t is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.” Veh. Code § 23152(b).

officer formed the opinion “Coffey was under the influence of an alcoholic beverage,” and that the officer arrested her for allegedly driving in violation of subdivision (a), of Vehicle Code section 23152. The officer did not correlate any of his observations to a particular BAC. He did not opine, nor did he arrest Coffey, for allegedly driving in violation of subdivision (b), of Vehicle Code section 23152, driving with a BAC of 0.08 or more.

The DMV relied on the rebuttable presumption in Vehicle Code section 23152 and rested its case in chief.

Coffey then called an expert to testify regarding her BAC at the time of driving. Among other things, he relied on the chemical tests recorded and entered into evidence which revealed Coffey’s BAC was 0.08 percent fifty-six minutes after she was stopped by the California Highway Patrol, 0.09 percent three-minutes later, and 0.095/0.096 percent another twenty-four minutes later. The expert testified that based on all the chemical test evidence Coffey’s BAC was rising and below 0.08 at the time of driving. The expert also opined that the totality of the circumstantial evidence was consistent with a rising BAC and that Coffey’s BAC was less than 0.08 at the time of driving.

The DMV did not produce any evidence in rebuttal. The DMV dismissed the expert’s testimony as “too speculative” and a “subjective interpretation of the evidence.” The DMV then issued an order suspending Coffey’s driver’s license.

Coffey filed a petition for writ of mandate seeking review. The trial court denied Coffey’s writ of mandate. The trial court stated it understood what Coffey’s expert was saying; but, that the DMV “wasn’t buying it,” that the DMV did not have to accept the expert’s opinion, and even assuming the three-hour presumption had been rebutted, “there was sufficient evidence based on the alcohol tests and other circumstantial

evidence to... support the DMV hearing officer's decision under the weight of the evidence."

Coffey appealed. The Court of Appeal disagreed with the trial court in part, holding there *was* substantial evidence that Coffey's BAC was rising and below 0.08 at the time of driving; thus, the three-hour presumption was rebutted.

However, the Court of Appeal affirmed the trial court's denial of Coffey's writ of mandate. The Court of Appeal stated that its review was "limited to determining whether the trial court's judgment [was] supported by substantial evidence." The Court of Appeal then held that the circumstantial evidence constituted substantial evidence sufficient to sustain the trial court's finding that "Coffey had a BAC equal or greater than 0.08 percent at the time of driving."

However, the Court of Appeal failed to apply the substantial evidence standard properly. In its opinion, the Court of Appeal stated a different test: "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." It is not a proper application of the substantial evidence test to determine if the unknown BAC at time of driving is consistent with a known BAC an hour later using circumstantial evidence which has not been shown to correlate to any BAC level.

The Court of Appeal should have determined the inherent question of law before it: Is it reasonable to infer, as the trial court impliedly did, that the driver's BAC at the time of driving, was the same as, or greater than, the 0.08 test results completed approximately an hour after driving? Using the evidence in the record that was not a reasonable inference. It is well settled that BAC levels do not remain stagnant. They are constantly

changing. It is not reasonable to infer that Coffey's BAC was 0.08 or more at the time of driving from circumstantial facts which do not tend to prove: a) a particular BAC level; b) that Coffey's BAC level was falling from the time of driving to the time of chemical testing; or c) that Coffey's BAC level remained constant from the time of driving to the time of chemical testing.

While there was circumstantial evidence that would support a reasonable inference that Coffey was impaired, there was no evidence correlating that circumstantial evidence to any particular BAC level.

The rule of law must require at least some scintilla of evidence in the record demonstrating a nexus between the circumstantial evidence and a BAC before the trier of fact can infer from circumstantial evidence that a person's BAC level was of a certain concentration at the time of driving.

Such a rule does not create an unworkable standard for the DMV. In those cases where the three-hour presumption has been rebutted, if it can do so, the DMV need only present additional evidence correlating observed signs of impairment to a BAC of 0.08 or more. If, through additional evidence, the DMV can establish that nexus, then the weight of the evidence may tip the scales.

In light of the above, Coffey respectfully requests the Court reverse the Court of Appeal's holding that the circumstantial evidence presented in this particular case constituted substantial evidence sufficient to sustain the trial court's finding; and rule, as a matter of law, that because there was no nexus between the circumstantial evidence and BAC levels, it was insufficient to prove, by the weight of the evidence, her BAC was 0.08 or more at the time of driving.

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### III.

#### FACTUAL AND PROCEDURAL HISTORY

##### A. The Arrest of Coffey.

On November 13, 2011, at approximately 0132 hours, Coffey vehicle was observed swerving in the area of southbound State Route 55 near Baker Street by Sergeant C. Martin, of the California Highway Patrol (CHP). (AR 16.)<sup>2</sup> When Sergeant Martin initially contacted Coffey he smelled the “strong odor of an alcoholic beverage” and noticed her “eyes were red.” (AR 16.) Sergeant Martin checked Coffey’s eyes and noted her eyes could not smoothly track his finger, “had an early onset and had distinct horizontal gaze nystagmus prior to the extremes.” (AR 16.) CHP Officer White then arrived to assist Sergeant Martin. (AR 16.)

Officer White also, “detected the odor of an alcoholic beverage” coming from Coffey and observed that she had, “red/watery eyes.” (AR 18.) Officer White then administered a series of FSTs. (AR 17.) At 0200 hours, “Based upon the driving observed by Sergeant Martin, the fact that Coffey displayed objective symptoms of intoxication and her poor performance on the field sobriety tests, [Officer White] formed the opinion that Coffey was under the influence of an alcoholic beverage and was unable to safely operate a motor vehicle upon a highway. Coffey was placed under arrest for 23152 (a) V.C.”<sup>3</sup> (AR 18.)

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<sup>2</sup> “AR” references are to the Administrative Record.

<sup>3</sup> Subdivision (a), of Vehicle Code section 23152, only proscribes driving while impaired and does not require any specific BAC: “It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.”

At 0228 hours, 56 minutes after she was driving, Coffey completed an evidentiary breath test with a BAC result of 0.08; at 0231 hours, she completed an evidentiary breath test with a BAC result of 0.09. (AR 13.) At 0255 hours, Coffey completed an evidentiary blood test with BAC results of 0.095 and 0.096. (AR 21-22.) Subsequently, Officer White issued Coffey an Age 21 and Older Administrative Per Se Suspension/Revocation Order and Temporary Driver License. (AR 11.)

### **B. Coffey's APS Hearing**

Coffey's APS hearing took place on February 14, 2012. (AR 3, 35.) The DMV's evidence consisted of the arrest report (AR 14-19), the breath test results (AR 13), the blood test results (AR 21-22), and the Age 21 and Older Officer's Statement (DS367) (AR 7-9). Neither Sergeant Martin, nor Officer Martin, testified at the hearing.

After the DMV's presentation of its evidence, Coffey's expert witness, Jay Williams, testified. (AR 36.) Williams described his expert qualifications, which included: (1) Being a forensic toxicologist for over 50 years; (2) Former Chief Toxicologist for Santa Barbara County from 1967 to 1972; (3) Head of the Ventura County Crime Lab from 1972 to 1980; (3) Owner of a nationwide private laboratory system testing practice; (4) Assisted in writing the Title 17 regulations; (5) Current expert on the Los Angeles County Superior Court indigent panel; and, (6) Testifying as an expert witness in "at least 4500 cases in federal and state courts, and over 1000 THE DMV hearings" in California. (AR 37.) The DMV then stipulated to Williams' expert qualifications. (AR 37.)

Williams testified he was familiar with breath testing and "alcohol distribution to the body, such as rising, plateauing, and eliminating." (AR 38.) He also testified that while Title 17 allows for 0.02 difference between

the first breath sample and the second breath sample, the devices had an accuracy of plus or minus 0.01 percent. (AR 43.)

Williams went on to testify that leading experts in the world, including A.W. Jones, Dr. Kurt Dubowski, and several others have published that the proper way to apply the margin of error is to “apply the margin of error to the benefit of the subject tested and not add it to the detriment of the person tested.” (AR 41.) Williams repeated, “The way it’s done is to subtract your margin of error from the individual’s result to get them the fair value of what the result may be so that you do not overcharge or overestimate a person’s alcohol level.” (AR 42-43.) Williams then applied the principal to the first breath reading in this case by stating, “I would subtract your margin for error. The 08 would go to 07 and possibly 06 given physiological factors.” (AR 44.)

Williams then discussed absorptive, plateau, and elimination rates of alcohol consumption and stated there is no one rate for all individuals. (AR 46.) Williams agreed with the statement that, “[Alcohol] takes time to get into your system. And it has time to take effect and then affects your brain.” (AR 44.)

Williams noted that Coffey completed two breath tests; and that two tests were conducted on her blood sample, each increasing over the one before it; 0.08 to 0.09 and then 0.095 and 0.096 approximately 20 to 30 minutes later. (AR 47.) Williams was asked, “[Coffey] was cooperative. Was a moderate odor of alcohol. Speech was normal. No issues. And then you have an 08/09. And you take a look at the field sobriety tests, not that bad. I mean there’s impairment, but it’s nothing outrageous. Is this consistent with what you perceive and have seen as a scientist with someone’s alcohol rising?” (AR 47.) He replied, “Yes, it - - it - - as the time goes by your performance on those tests gets a little poorer... You’ll

be an 08 before you're an 09." (AR 47.) Williams stated that if all the results were plotted on a graph it "would be totally consistent with the alcohol rising, or recent consumption of alcohol." (AR 48.)

Williams also testified that the circumstantial evidence was consistent with Coffey's BAC being less than 0.08 at the time of driving. (AR 48-49.)

On cross examination, Williams discounted the possibility that given the margin of error for the breath machine Coffey's true BAC was 0.09 at the time of the first breath test and 0.08 at the time of the second breath test. The DMV asked, "So maybe, in reverse, it could have been an 09 and an - - and an 08. Could that have been a true statement taking into - -" (AR 51.) Williams replied, "Well, it wouldn't go down and then go back up again." (AR 51.)

To the question, "Now you've added in the fact, the separate and additional fact, that your - - your blood that's taken 20, 30 minutes later is higher than the breath, that confirms that she's rising, does it not?" Williams replied, "It does." (AR 58-59.)

Finally, Williams testified that there were two bases that independently supported the conclusion that Coffey's BAC was rising during the testing times and therefore below 0.08 at the time of driving. First, the principle that one should deduct the margin of error from the breath results. Second, and independent of the margin of error, that the blood test results, taken 20-30 minutes after the breath results, was higher than the breath results. (AR 58.)

The DMV did not present any evidence after Williams testimony.

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### **C. The DMV's APS Decision**

On February 14, 2012 the DMV issued its APS Notification of Findings and Decision suspending Coffey's driver license. (AR 3-5.) The DMV dismissed Williams testimony that Coffey's BAC was rising and below 0.08 percent claiming, "No reliable evidence was presented in support of the contention"; Williams' testimony was "too speculative to support the contention"; and, "the contention is based on a subjective interpretation of the evidence." (AR 4.) The DMV made no findings connecting any of the circumstantial evidence to BAC levels.

### **D. The Trial Court Decision**

On February 29, 2012 Coffey filed a petition for peremptory writ of mandate in the Orange County Superior Court, the Honorable Judge Robert J. Moss. (CT 9-12.)<sup>4</sup> On October 19, 2012 the trial court issued an order denying Coffey's petition stating in part, "The DMV hearing officer was entitled to reject the uncontradicted testimony of petitioner's expert witness, and the hearing officer set forth reasons for doing so in this case." (CT 58.)

The trial court stated, "The hearing officer does not have to accept an expert's opinion... I understand what your expert said, the hearing officer wasn't buying it." (RT 2.)<sup>5</sup>

In addition, the trial court concluded that even if Coffey's expert had rebutted the presumption that her BAC was 0.08 percent or more, "there was sufficient evidence based in the blood-alcohol tests and the other circumstantial evidence based on the assessment, observations and tests by

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<sup>4</sup> "CT" references are to the Clerk's Transcript.

<sup>5</sup> "RT" references are to the Reporter's Transcript page number.

the arresting officers at the scene to support the DMV hearing officer's decision under the weight of the evidence." (AR 58.)

Approximately seven months after Coffey filed her Notice of Appeal, the trial court dismissed her petition for writ of mandate with prejudice. (Op. 5.)<sup>6</sup>

#### **E. The Court of Appeal Proceedings**

On October 24, 2012 Coffey filed her Notice of Appeal in Division 3 of the Fourth District Court of Appeal. (CT 66.) On November 9, 2012 Coffey filed a Petition for Writ of Supersedeas or Other Appropriate Stay Order, in the Court of Appeal, requesting an immediate stay of the suspension of her driver's license. On November 13, 2012 the court issued an order staying the suspension of Coffey's license pending further order of the court.

#### **F. The Court of Appeal Opinion**

On August 15, 2013 the Court of Appeal issued its published opinion affirming the trial court's denial of the writ of mandate. (Op. 2.) The Court of Appeal ruled that the trial court's dismissal of the case after the appeal was filed, was void, and the appeal was not moot. (Op. 6.)

The Court of Appeal disagreed with the holding of the trial court on a question of law; whether the three-hour presumption had been rebutted. (Op. 7.) The court stated, (Op. 10):

Applying the foregoing here, [Petitioner's] expert testified based on breath and blood test results that [Petitioner'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 three-hour presumption and required the DMV to

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<sup>6</sup> "Op." references are to the page number of the slip opinion. The opinion has been subsequently published at Coffey v. Shiimoto, 218 Cal. App. 4th 1288 (2013), and depublished by this grant of review.

adduce evidence to prove [Petitioner's] BAC was at least 0.08 percent at the time of driving "without regard to the presumption." (Evid. Code, § 604.)

The Court of Appeal then went on to state, "The issue boils down to whether nonchemical 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. Based on *Burg*, supra, 35 Cal.3d at page 266, footnote 10, we hold it can." (Op. 11.)

The Court of Appeal found, "The evidence of Coffey's erratic driving, failed field sobriety tests (FST's), and objective indications of intoxication are substantial evidence that Coffey had a BAC equal to or greater than 0.08 percent at the time of driving." (Op. 2.)

The court concluded its opinion with the following statement, which reads as a caution, (Op. 15):

In reaching the conclusion that the circumstantial evidence here was sufficiently substantial to support the trial court's ruling, we hasten to add that nothing about our opinion compels a fact finder to accept any particular combination of signs of intoxication as proving a particular BAC at the time of driving. Trial courts must independently weigh the evidence and reach their own conclusions. Our holding is limited to the proposition that such evidence constitutes substantial evidence sufficient to sustain such a finding in the presence of a valid BAC test taken a reasonable time after driving.

On August 30, 2013 Petitioner filed a Petition for Rehearing in the Court of Appeal. On September 9, 2013 the Court of Appeal denied the petition.

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## ARGUMENT

### IV.

#### THE GENERAL LEGAL FRAMEWORK AT ISSUE.

Vehicle Code section 13353.2, subdivision (a)(1), mandates that the DMV suspend the driver's license when, "The person was driving a motor vehicle when the person had 0.08 percent or more, by weight, of alcohol in his or her blood." There is no provision for the DMV to administratively suspend the driver's license of a person who is under the influence, but whose BAC is below 0.08 percent.<sup>7</sup>

Subdivision (b), of Vehicle Code section 23152 provides a rebuttable presumption that if a person chemical test with a result of 0.08 percent or more within three-hours of driving, that the person's BAC was 0.08 percent or more at the time of driving.

Upon the driver's timely request for a hearing, the DMV must hold an administrative hearing (APS hearing). Veh. Code § 13558. At the APS hearing, "The sole issues are whether: (A) . . . the peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of Section . . . 23152[] or 23153. [¶] (B) . . . the person was placed under arrest . . . [and] [¶] (C) . . . the person was driving . . . [¶] [w]hen the person had 0.08 percent or more, by weight, of alcohol in his or her blood." Lake v. Reed, 16 Cal. 4th 448, 456 (1997).

At the APS hearing, the DMV bears the burden of proof to establish the validity of the suspension:

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<sup>7</sup> Vehicle Code section 13352 requires the DMV to suspend a driver's license as result of a criminal conviction for driving while under the influence of alcohol or drugs; but, there is no equivalent code requiring or permitting an *administrative* suspension for driving while under the influence of alcohol or drugs.

[Section 13558] says nothing about the driver starting the hearing with such a burden. Quite the contrary, one of the stated legislative purposes of the enactment was to protect against erroneous deprivation of one's driving privilege is by providing an opportunity for a "full hearing". (Stats. 1989, Ch. 1460, Section 1). Moreover, the Supreme Court has established in somewhat analogous THE DMV proceedings that, although mere reports presented without proof of reliability sufficed to support an initial summary finding of license suspension, once "the Petitioner requests a hearing, the ... report is itself insufficient to establish a prima facie showing of the facts supporting the suspension of a driver's license." (quoting, Daniels vs. Department of Motor Vehicles, 33 Cal. 3rd 532, 541 (1983).)

Coombs v. Pierce, 1 Cal. App. 4th 568, 580-81 (1991). The DMV's determination is then subject to judicial review. Veh. Code § 13559.

V.

**THE STANDARDS OF REVIEW WERE NOT PROPERLY FOLLOWED BY THE TRIAL COURT OR COURT OF APPEAL**

Code of Civil Procedure section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 514-15 (1974). The pertinent issues under section 1094.5 are (1) whether the agency proceeded without jurisdiction, (2) whether there was a fair hearing, and (3) whether there was a prejudicial abuse of discretion. Code Civ. Proc. § 1094.5(b). An abuse of discretion is established if the agency did not proceed in the manner required by law, the decision was not supported by the findings, or the findings were not supported by the evidence. Code Civ. Proc. § 1094.5(c).

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### **A. Trial Court Standard of Review.**

“In ruling on an application for a writ of mandate following an order of suspension or revocation, a trial court is required to determine, based on its independent judgment, whether the weight of the evidence supported the administrative decision.” Lake, 16 Cal. 4th at 456; Berlinghieri v. Dep’t of Motor Vehicles, 33 Cal. 3d. 392, 395 (1983).

### **B. The Trial Court Failed to Exercise its Independent Judgment.**

When conducting an independent review of an administrative hearing, the trial court “does not defer to the fact finder below and accept its findings whenever substantial evidence supports them. Instead, it must weigh all the evidence for itself and make its own decision about which party's position is supported by a preponderance.” Alberda v. Board of Retirement of Fresno County Employees' Retirement Assn., 214 Cal. App. 4th 426, 435 (2013).

Statements such as, “substantial evidence supports the hearing officer's decision or findings” by the trial court do *not* indicate a trial court used its independent judgment. Id. at 435. Courts cannot infer that the trial court used the independent judgment standard and simply misspoke when its opinion reflects deference to the decision of an administrative hearing officer. Id.

Here, statements of the trial court are demonstrative of the trial court applying the substantial evidence standard, rather than independently weighing the evidence:

“I understand what your expert said, the hearing officer wasn’t buying it” (RT 2.); “The hearing officer does not have to accept an expert’s opinion” (RT 2.); “The DMV hearing officer was entitled to reject” the expert opinion (CT 58.); and “there was sufficient evidence... to support

the DMV hearing officer's decision under the weight of the evidence." (CT 58.)

### C. Standard of Review on Appeal.

Questions of law, and questions of fact (or mixed questions) were presented to the Court of Appeal. On the question of whether the three-hour presumption was rebutted, the review was a question of law requiring independent judgment. Borger v. Dep't of Motor Vehicles, 192 Cal. App. 4th 1118, 1121 (2011); Manriquez v. Gourley, 105 Cal. App. 4th 1227, 1233-34 (2003).

On appeal, Coffey raised the issue that the trial court did not apply the proper independent judgment standard. (COA OB, 11.)<sup>8</sup> If the trial court did not use its independent judgment, the Court of Appeal should have remanded the matter. Alberda, 214 Cal. App. 4th at 436. The Court of Appeal decision was silent on this issue. Assuming the Court of Appeal determined that the trial court exercised its independent judgment, the Court of Appeal was required to use the substantial evidence test to review the trial court's judgment as stated in Lake, 16 Cal. 4th at 457:

On appeal, we "need only review the record to determine whether the trial court's findings are supported by substantial evidence." [Citation.] " 'We must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.] Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's. [Citation.] We may overturn the trial court's factual findings only if the evidence before the trial court is **insufficient as a matter of law** to sustain those findings. [Citation.]' " Emphasis added.

Therefore, even using the substantial evidence standard, the Court of Appeal was required to determine if the circumstantial evidence was

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<sup>8</sup> "COA OB" references are to Appellant's Opening Brief in the Court of Appeal, page number.

sufficient, as a **matter of law**, to sustain a finding that Coffey had a BAC of 0.08 or more at the time of driving. Because that is a **question of law**, it should have been decided using the independent judgment standard. Assuming the Court of Appeal found the circumstantial evidence was sufficient, as a matter of law, to sustain a finding that Coffey had a BAC of 0.08 or more at the time of driving, this Court should reverse the Court of Appeal because the finding lacks evidentiary support making it unreasonable.

## VI.

### **THE COURT OF APPEAL'S HOLDING THAT THE THREE-HOUR PRESUMPTION WAS REBUTTED SHOULD NOT BE DISTURBED ON REVIEW.**

The trial court concluded the uncontroverted testimony of Williams did not rebut the three-hour presumption. However, the Court of Appeal disagreed with the trial court, holding, (Op. 10):

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 three-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." (Evid. Code, § 604.)

The Court of Appeal correctly held the presumption had been rebutted; therefore, this Court should affirm that portion of the Court of Appeal's opinion.

#### **A. The Three-Hour Presumption is a Rebuttable Presumption Affecting the Burden of Producing Evidence.**

"A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence." Evid. Code § 600(a). Both

mandatory and permissive presumptions are rebuttable. People v. McCall, 32 Cal. 4th 175, 183 (2004). The three-hour presumption affects the burden of producing evidence (Evid. Code § 604), not the burden of proof (Evid. Code § 605). Section 604 of the Evidence Code states:

The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and **until evidence is introduced which would support a finding of its nonexistence**, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. [Emphasis added]

When evidence contradictory to a presumption is presented a “presumption disappears.” Craig v. Brown & Root, 84 Cal. App. 4th 416, 421 (2000). “Section 23152, subdivision (b), does not create a conclusive presumption of intoxication.” Burg v. Municipal Court, 35 Cal. 3d 257, 265 (1983).

The court in In re Heather B., 9 Cal. App. 4th 535, 561 (1992), stated:

A presumption affecting the burden of producing evidence requires the ultimate fact to be found from proof of the predicate facts in the absence of other evidence. **If contrary evidence is introduced then the presumption has no further effect and the matter must be determined on the evidence presented.** [Emphasis added.]

#### **B. A Presumption may be Rebutted by Expert Testimony Alone.**

An expert opinion may rebut the three hour presumption, but only where it rises to the level of “substantial evidence.” In Borger, 192 Cal. App. 4th at 1122, the court stated:

Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations.] In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. [Citation.]

### **C. William's Expert Testimony was Reliable Evidence.**

Evidence Code section 801, subdivision (b), states that a court must determine whether the matter that the expert relies on is of a type that an expert reasonably can rely on in forming an opinion upon the subject to which his testimony relates. Smith v. ACandS, Inc., 31 Cal. App. 4th 77, 93 (1994) (disapproved on another point in Camargo v. Tjaarda Dairy, 25 Cal. 4th 1235, 1245 (2001)).

The matter relied on must provide a reasonable basis for the particular opinion offered, and an expert opinion based on speculation or conjecture is inadmissible. Id. A three part test related to the matters upon which an expert may make an opinion was stated in County Sanitation Dist. v. Watson Land Co., 17 Cal. App. 4th 1268, 1277 (1993):

Under [Evidence Code section 801,] subdivision (b), the matter upon which an expert's opinion is based must meet each of three separate but related tests. First, the matter must be perceived by or personally known to the witness or must be made known to him at or before the hearing at which the opinion is expressed... Second, and without regard to the means by which an expert familiarizes himself with the matter upon which his opinion is based, the matter relied upon by the expert in forming his opinion must be of a type that reasonably may be relied upon by experts in forming an opinion upon the subject to which his testimony relates... Third, an expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law of this State to be an improper basis for an opinion. [Citation]

Whether an opinion should be held inadmissible in a particular case depends upon the extent to which the improper considerations have influenced the opinion. [Citation.] Such questions are addressed to the sound discretion of the trial court. [Citations.]

Williams' testimony met the County Sanitation Dist. test. First, he thoroughly described the "matters" that were known to him, or made known to him, before or at the hearing; to wit, the contents of the arrest report, and chemical test results, and his own training and experience. Second, the expert testified that he was part of the team that wrote the Title 17 regulations, along with other experts, that regulate chemical testing; and, that the matter he relied upon was the type of matter relied upon by other experts in the field. Third, there is no constitutional, statutory, or decisional law concluding that the matters were an improper basis for using in an opinion.

"The chief value of an expert's testimony... rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion. [Citations.]" Borger, 192 Cal. App. 4th at 1122.

Williams thoroughly explained "the material from which his opinion [was] fashioned and the reasoning by which he progresse[d] from his material to his conclusion." The DMV gave no explanation for rejecting Williams' rising blood alcohol theory; rather, the DMV rejected theory that Coffey's BAC was below 0.08 based upon a theory of inherent margin of error in breath testing machines. The DMV's conclusion has no weight when applied to the rising blood alcohol theory because Williams specifically stated his conclusion was independent of any inherent margin of error in the breath machine.

#### **D. Williams' Testimony Amounted To Substantial Evidence.**

The five elements to properly review expert testimony are stated by BAJI 2.40, "In determining what weight to give any opinion expressed by an expert witness, you should consider the qualifications and believability

of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion.”

1. Williams’ Qualifications.

Williams described his extensive qualifications, which included assisting in writing the State regulations for chemical testing (Title 17). The DMV subsequently stipulated to his expertise.

2. Williams’ Believability.

“[D]ecisions of our Supreme Court and most courts of appeal hold that the trial court has the power and responsibility to weigh the evidence at the administrative hearing and to make its own determination of the credibility of witnesses.” Guymon v. Bd. Of Accountancy, 55 Cal. App. 3d 1010, 1016 (1976). In weighing the credibility of the expert, the Court uses the independent review standard. San Diego Unified School Dist. v. Commission on Professional Competence, 194 Cal. App. 4th 1454, 1461 (2011). The "demeanor, manner, [and] attitude" of the expert should be considered. Govt. Code §11425.50(b).

Here, although Williams has testified “in at least 4500 cases in federal and state court, and over 1000 DMV hearings,” he was not impeached with prior inconsistent testimony, nor did the DMV make any findings regarding Williams’ demeanor or attitude. Williams’ testimony does not reveal that he was uneasy, nervous, or that he displayed any demeanor which suggested a dishonest answer, or an answer which was uncertain. His attitude was impartial; he answered both parties' questions directly, in a narrative when called for, and with a single word response when appropriate.

Arguably, the DMV findings include an implied finding Williams’ “manner” of testifying indicated it was not believable. But such an inference is not supported by the weight of the evidence. He did not flip-

flop when testifying. He did not testify to any fact, or scientific principle, differently at one time than another.

3. Facts and Materials Relied Upon by Williams.

“An expert may generally base his opinion on any ‘matter’ known to him, including hearsay not otherwise admissible, which may reasonably . . . be relied upon for that purpose.” People v. Carpenter, 15 Cal.4th 312, 403 (1997).

Here, Williams relied on the facts contained in the police report and chemical tests; specifically, the results and timing of the breath tests and the blood test. The timing and results of the tests are not in dispute. Likewise, although Williams testified to many things, he did not rely on them all when forming his opinion. For example, Williams testified to the margin of error in breath tests (AR 40), testing protocols (AR40), Title 17 of the California Code of Regulations (AR 40), a published paper by A.W. Jones (AR 40-41), published papers by other scientists (AR 41), the technique of calculating the fair value of a breath result (AR 42-43), the physiology of the consumption of alcohol (AR 44), and that increase in BAC adversely effects performance on field sobriety tests (AR 47).

4. Reasons for Each of Williams’ Opinions.

Williams reasons were simple, and supported by the many facts and materials relied upon. He opined Coffey’s BAC was rising at the time of driving and testing. The reasoning was that Coffey’s BAC increased over time and it would not go down and then back up again. He opined Coffey’s BAC at the time of driving was under 0.08. The reasoning for that opinion was simply that it was rising at the time of driving and the time of the testing, with the first test being 0.08, so logically Coffey’s BAC was less than 0.08 when driving 56 minutes before her first test because her BAC would not go down and back up again.

**E. There was no Basis to Detract from the Expert's Credibility.**

When the evidence is based on the testimony of a witness, subdivision (b), of Government Code section 11425.50 states:

If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement **shall** identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it. [Emphasis added].

In the findings of the APS hearing, the DMV failed to identify any evidence of Williams' demeanor, manner, or attitude. The DMV's entire basis for rejecting Williams' testimony focused solely on Williams' testimony about the margin of error in breath testing equipment. This is noteworthy, given the fact that Williams was the same expert that testified about a breath machine's margin of error in Borger. In that case, there was only breath tests. The Borger court determined that an inherent margin of error did not, by itself, rebut the three-hour presumption. This is distinguishable where, as here, there is also a blood test after the breath tests; and, where there was an explanation, independent of a breath test margin of error theory, explaining why Coffey's BAC was under 0.08 at the time of driving.

The DMV did not address any aspect of Williams' testimony in regard to Coffey's rising blood alcohol, despite Williams' testimony that his opinion that Coffey's BAC was below 0.08 was wholly independent of any margin of error in the breath testing device.

Williams' opinion was based on facts found in evidence and by applying those facts to accepted scientific principles. Therefore, Williams'

opinion rose to the level of substantial evidence and rebutted the three-hour presumption. The presumption therefore disappeared.

**F. An Expert's Opinion may not be Arbitrarily or Unreasonably Rejected.**

An expert's opinion may not arbitrarily or unreasonably be disregarded, but must be given the weight the opinion deserves. In Howard v. Owens Corning, 72 Cal. App. 4th 621, 633 (1999), the court stated, "Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion. Instead, it must give to each opinion the weight which it finds that opinion deserves." Here, the DMV unreasonably rejected Williams' opinion.

Williams' opinion was that Coffey's BAC was rising. Given that the first chemical test reading was 0.08, her rising BAC necessarily meant her BAC was below 0.08 at the time of driving 56 minutes earlier. To reject that conclusion is unreasonable. There was simply no evidence in the record to support a conclusion that Coffey's BAC remained constant, or was falling, for the 56 minutes between the time of driving and time of testing.

The DMV's decision merely cut and pasted language from case law in an attempt to justify its conclusions. Statements in the DMV's findings were self-serving and unsupported by the record:

- That Williams' opinion was based "upon matters which are not reasonably relied upon by other experts." (AR 4.)

There were no "matters" testified to by Williams' which are not relied upon by other experts. He relied on the technique of calculating the fair value of a breath result (AR 42-43), the physiology of the consumption of alcohol (AR 44), and that increase in BAC adversely affects performance on FSTs (AR 47). These are all matters other experts rely upon. (AR 40-41.)

- That Williams' opinion was based "upon factors which are speculative, remote or conjectural."

There were no such "factors" testified to by Williams' or identified by the DMV. The BAC readings were not speculative. The time of the tests were not speculative. The fact that .08 is less than .09 is not speculative. Therefore, rejection of Williams' opinion that Coffey's BAC was below 0.08 at the time of driving is likewise arbitrary and unreasonable.

## VII.

### **THE COURT OF APPEAL OPINION IS INCONSISTENT WITH EVIDENCE CODE 604.**

The effect of a presumption affecting the burden of producing evidence is prescribed by Evidence Code section 604. In Slater v. Kehoe, 38 Cal. App. 3d 819, 833 (1974), the court explained the statute:

An additional explanation of the purpose and effect of section 604 is found in McDonough, *The California Evidence Code: A Precis* (1966) 18 Hastings L. J. 89. The author, then a member of the California Law Revision Commission, explains that there are two primary views concerning presumptions: 1) the Morgan view that a presumption always shifts the burden of proof; and 2) the Thayer view that a presumption disappears from the case entirely once the person against whom it operates has introduced sufficient evidence to support a finding against the presumption, without regard to whether that evidence will be believed by the trier of fact. "The Evidence Code takes the position, in effect, that the Thayer view is correct as to some presumptions, which the Evidence Code defines in section 603 as presumptions affecting the burden of producing evidence, and that the Morgan view is correct as to other presumptions, which the Evidence Code defines in section 605 as presumptions affecting the burden of proof" ( *id.* at p. 99).

Here, the rule created by the Court of Appeal is in contradiction to the Thayer view. The opinion fails to remove the three-hour presumption from the case entirely.

To demonstrate how the Court of Appeal failed to remove it completely, consider the effect the presumption had prior to it being rebutted. It shifted the burden of proof to Coffey, which initially rested on the DMV. Daniels vs. Dep't of Motor Vehicles, 33 Cal. 3rd 532 (1983). Coffey would have to produce evidence which would disprove the presumption, or at least support a different conclusion.

Once rebutted, if the presumption disappears completely, the state of the case should be returned, in full, to what it was before the presumption was given effect. Coffey would have no burden of producing evidence. The DMV would be left to make its case. It is not ordinarily sufficient for the DMV to merely demonstrate that the facts are consistent with a BAC of 0.08 or more at the time of driving. The DMV would be required to prove that the facts affirmatively establish, by the weight of the evidence, Coffey's BAC was 0.08 or more at the time of driving.

Here, after the presumption had been rebutted, the Court of Appeal apparently viewed the state of the case as one where the burden of producing evidence remained on the driver. Specifically, it viewed the driver as having the burden to prove that the presumed fact (BAC of 0.08 or more at driving), was *inconsistent* with the known fact (BAC at the time of testing). This is apparent from the Court of Appeal opinion which articulated that as long as the circumstantial evidence was *consistent* with the presumed fact, it would be obligated to affirm the trial court. Viewing the state of the case that way, once the presumption was rebutted, places an improper burden on the driver, as it fails to eliminate the effect of the presumption completely.

The Court of Appeal should have been looking at the sufficiency of the evidence to prove BAC at time of driving without regard to the (rebutted) presumed fact that it was 0.08. Upon review by the Court of Appeal, it isn't enough, legally, that the evidence does not affirmatively **disprove** the theory that Coffey's BAC was 0.08 at the time of driving. To be considered "substantial evidence" which supports the trial court's finding, it must affirmatively make the inference reasonable. **That is, it should tend to prove the material fact, not merely fail to disprove it.** If a party's "proof operated to rebut the presumption upon which the plaintiff, or if it left an essential fact... in doubt or uncertainty, the party who made the allegation should suffer, and not her adversary." Patterson v. San Francisco & S. M. E. R. Co., 147 Cal. 178, 185 (1905).

The Court of Appeal holding requires a finding, in every case, that the driver's BAC was 0.08 or more at the time of driving where there is a valid chemical test of 0.08 or more, unless the non-chemical circumstantial evidence affirmatively proves the BAC at time of driving is *inconsistent* with a BAC of 0.08 or more. The correct test *is not* a test of consistency with a rebutted presumed fact. It is whether the weight of the evidence affirmatively proves the driver's BAC was 0.08 or more at the time of driving.

## VIII.

### THE FINDINGS WERE A RESULT OF UNREASONABLE INFERENCES

While it is true that a trier of fact is not prevented from "the drawing of any inference that may be appropriate" after a presumption is rebutted (Evid. Code § 604), he may only make *reasonable* inferences.

**A. It is Unreasonable to Infer that Coffey's true BAC at the time of her Breath Tests was First 0.09 Percent and then 0.08 BAC Merely Because the Device has a Margin of Error of 0.02.**

The Court of Appeal relied on the fact that all the chemical tests in this case were within 0.02 of each other – the same as the margin of error for breath tests. This makes it mathematically possible for the breath reading of 0.08 to result from a true BAC of 0.09, and the breath reading of 0.09 to result from a true BAC of 0.08. Therefore, if one failed to consider any other evidence, there is a possibility that Coffey's BAC was falling from 0.09 to 0.08 at the time of the two breath tests. However, an inference of a fact is not made reasonable, merely because the fact is possibly true. California Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal. App. 3d 1, 45 (1985)("[A]n inference 'cannot be based upon mere possibility'.")

Moreover, this possibility is not reasonable because it was explained that it would be impossible for her BAC to have fallen from 0.09 to 0.08 at the time of the breath tests, and then rise again at the time of her blood draw (unless the officers and her consumed alcohol after she was stopped – an absurd notion).

**B. It is Unreasonable to Infer that Coffey's true BAC at the time of all of her Chemical Tests was 0.09 Percent Because it is well Established that BAC Levels Change Rapidly.**

Another inference which would validate the trial court's decision, and the Court of Appeal opinion, is the inference that Coffey's true BAC at the time of all her chemical tests was 0.09, and therefore (somehow) it was 0.08 or more at the time of driving. This too appears to be a mere possibility, without being reasonable.

It is well settled that BAC levels change rapidly. People v. Vangelder, No. S195423 (Cal. Nov. 21, 2013). There is no explanation for concluding the first breath test of 0.08 was inaccurate. There is no evidence in the

record that indicates Coffey's BAC remained constant for nearly an hour and a half; from the time of the first breath test to the time of the blood draw. Even if this is possible, and reasonable under some circumstances, there is no evidence in the record tending to prove that the phenomenon occurred in this case.

**C. It is Unreasonable to Infer that Coffey's BAC was the Same or Higher at the time of Driving as it was at the time of her Chemical Tests.**

It appears that the Court of Appeal would have every fact finder begin with the assumption that the subject has reached the "post-absorptive" phase mentioned in People v. Vangelder, No. S195423 (Cal. Nov. 21, 2013), or, what was referred to as the point at which the person is "fully absorbed" in Missouri v. McNeely, 133 S. Ct. 1552, 1560 (2013).

It is indisputable that BAC is not a constant and continues to rise when a person is absorbing faster than eliminating alcohol. This period of absorption can last from 30 to 90 minutes or longer: "[Alcohol] takes 30 to 90 minutes to reach maximum concentration... The speed with which alcohol arrives in the brain is strongly affected by how much food is in the stomach." Attorneys' Textbook of Medicine § 59.A.11 (Roscoe N. Gray & Louise J. Gordy eds., 3d ed. 2005) ("Gray").

The Court of Appeal opinion relied on Fuenning v. Super. Ct. In & For Cty. Of Maricopa, 680 P.2d 121 (Ariz. 1983), which recognized, **under the facts of that case**, that the driver in that case likely had a higher BAC at the time of driving than at the time of his chemical tests. The Court of Appeal opinion quoted Fuenning for that inference to be true in this case as well. (Op 12.) However, the Court of Appeal failed to appreciate the great disparity between the facts of Fuenning and the facts here.

In Fuenning, the driver's chemical test was performed "several hours" after arrest. Id., at 130.<sup>9</sup> Here, the first test was less than an hour after driving. Also, the non-chemical circumstantial evidence in Fuenning was arguably so extreme as to make it reasonable to infer extreme levels of intoxication: an inability to stand without help, nausea, and dizziness. Here, the evidence affirmatively showed that Coffey did not have an unsteady gait, nor did she have slurred speech. Therefore, the circumstances which the Court in Fuenning relied upon are diametrically opposed to those here. It is not reasonable under the facts of this case to assume Coffey's BAC was falling after driving to the time of the first breath test which was 56 minutes after driving. Likewise, there is nothing in the Fuenning opinion to suggest that court considered several chemical tests over a period of time as we have in this case.

#### IX.

#### **CIRCUMSTANTIAL EVIDENCE, OTHER THAN THE RESULTS OF A CHEMICAL TEST, MAY NOT BE USED TO ESTABLISH A BAC AT THE TIME OF DRIVING WAS THE SAME AS, OR GREATER THAN, A CHEMICAL TEST TAKEN APPROXIMATELY AN HOUR LATER**

Generally, relevant evidence is admissible. Evidence is relevant when it has "any tendency in reason to prove or disprove any disputed fact that is of consequence." Evid. Code § 210. Therefore, the question becomes: does the non-chemical circumstantial evidence, at issue here, tend to prove a disputed fact?

The disputed fact here is that Coffey's BAC was stagnant or falling. The DMV failed to demonstrate how any of the non-chemical test evidence

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<sup>9</sup> The Court of Appeal quoted Fuenning, from page 130 of the Fuenning decision, and inexplicably left out this very fact (replacing it with "..."), which was contained with the portion quoted.

tended to prove Coffey's BAC was the same (0.08), or higher, than the measured results nearly an hour later. It is this missing link which causes the trial court's ruling to fail the substantial evidence test. The lack of a nexus between the known facts, and the disputed fact, makes it unreasonable to infer the disputed fact.

In Medicolegal Aspects of Alcohol 320-21 (James C. Garriot ed., 1996) ("Garriot"), it is stated that it is, "Apparent to us" upon review of numerous studies "that impairment begins at levels below BAC 0.05"; and, "Impairment of driving-related visual skills may occur in BAC as low as 0.03%" (Id. at 43). Garriot also stated, "The threshold blood alcohol level for pharmacologic impairment may be as low as 0.02 g/dL. According to some researchers neuromuscular responses are impaired at 0.04-0.05 g/dL; vision at levels below 0.10 g/dL; simple and complex tracking at levels between 0.05-0.10 g/dL; and attention at levels as low as 0.03 g/dL." Id. at 280.

"Intoxication is easily noted by the appearance of certain recognizable signs. These include flushing about the face, dysarthria (slurred speech caused by loss of muscular control), nystagmus (rapid, involuntary movement of the eyeballs) and ataxia (loss of muscular coordination)." Gray at § 59.A.22(1). "[D]riving ability is affected by a blood alcohol concentration (BAC) as low as .02 g/dL" (Gray at § 135.00); and, "[D]ivided attention performance was the most sensitive to alcohol impairment, with effects noted at doses as low as 0.02 percent" (Gray at § 135.13(2)).

Add to the above, the fact that individuals react differently to alcohol: "Despite the fact that statutes which prohibit driving with a blood alcohol concentration over a certain level assume that everyone is impaired in the same manner at the same BAC, manifestations of alcoholic influence are

not uniform.” Scientific Evidence In Civil And Criminal Cases 18 (Andre A, Moenssens et. al., eds. 1995). The authors also pointed out that there are “difficulties in providing a nexus between the BAC at testing and the BAC while driving.” Id. at 200. The proposition that non-chemical circumstantial evidence has any probative value to determine a particular BAC becomes questionable. The probative value is certainly less for determining a BAC at an earlier point in time; the time of driving.

“While measurement of the blood alcohol concentration (BAC) by either direct blood analysis or breath testing is analytically accurate methods of determining the alcohol level, the measured BAC may not be an accurate measure of the outward manifestations of intoxication, and vice versa.” Kalen N. Olson et. al., Relationship Between Blood Alcohol Concentration and Observable Symptoms of Intoxication in Patients Presenting to an Emergency Department, Alcohol and Alcoholism, 1 (2013). Estimates of BAC levels based on observed symptoms of intoxication<sup>10</sup> shows a **poor correlation** when applied by **trained medical personnel**. Id. at 2-4. [Emphasis added.] “**In conclusion, outward physical signs of intoxication do not correlate well with BACs as measured by alcohol testing.**” Id. at 4. [Emphasis added.]

## X.

### **IT IS WELL SETTLED THAT CIRCUMSTANTIAL EVIDENCE ALONE IS NOT SUFFICIENT EVIDENCE OF BAC AT THE TIME OF DRIVING**

People v. Bejasa, 205 Cal. App. 4th 26, 43 (2012) [Observations of an officer such as loss of balance or slurred speech “reflects only an officer's

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<sup>10</sup> “Odor of alcohol on breath, impaired fine motor control, impaired gross motor control, slurred speech, change in speech volume, decreased alertness, sweating, slow or shallow respiration, sleepiness, pace of speech and red eyes.”

observation of the physical manifestation of the subject's intoxication (i.e., a lack of muscular coordination).”]; Baker v. Gourley, 98 Cal. App. 4th 1263, 1264-66 (2002) [“But before the DMV can summarily suspend a license without court proceedings it must have the definite evidence of a valid chemical test showing blood alcohol while driving of at least .08 percent. As the DMV itself is well aware, some symptoms of intoxication can occur below the .08 percent blood-alcohol threshold.” Slurred speech, bloodshot eyes, unsteady gait without a valid chemical test cannot establish specific BAC.].

## XI.

### **THE ADDITION OF A VALID CHEMICAL TEST DOES NOT PROVE COFFEY’S BAC WAS 0.08 PERCENT OR MORE AT THE TIME OF DRIVING**

A blood alcohol test is only “circumstantial evidence of some level of concentration at the time of driving.” People v. Warlick, 162 Cal. App. 4th Supp. 1, 7 (2008). Therefore, the chemical test here merely tends to prove Coffey had “some level of concentration.” This is a far cry from establishing “substantial evidence” that she was 0.08% at the time of driving.

Next, consider what probative value impressions of the officers have on BAC levels. In Brenner v. Dep’t of Motor Vehicles, 189 Cal. App. 365, 373 (2010), the Court stated “While the impressions of the officer may have a bearing on plaintiff’s level of impairment, they have **no bearing** on the precise level of his BAC.” [Emphasis added.] So, if the chemical test merely establishes “some level” and then you add to that evidence which has “no bearing” on the BAC level, you are left with evidence which is far below the “substantial evidence” required to sustain the trial courts finding.

**A. If the Circumstantial Evidence Equally Supports a Finding that Coffey's BAC was Under 0.08 at the time of Driving, the Decision must be Reversed.**

If the evidence equally supports the inference that Coffey's BAC was 0.08 or more, as it does the inference that Coffey's BAC was under 0.08 at the time of driving, the trial court's finding was not supported by "substantial evidence."

[W]here proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other., before he is entitled to recover.

Showalter v. Western P. R. Co., 16 Cal. 2d 460, 476 (1940) (See also, Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 340 (1933) ["When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong."].)

It is **not** conceded that the circumstantial evidence equally sustains an inference that Coffey was 0.08 or more at the time of driving. However, it is noteworthy that the trial court's finding could only be legally affirmed if it tends to sustain the proposition that Coffey was 0.08 or more, more than it tends to sustain the proposition that Coffey was under 0.08. In light of the expert testimony putting it all in context, and in the absence of evidence correlating the non-chemical circumstantial evidence to levels at, or above 0.08, it cannot be said that it does.

**B. The Case Law Distinguished by the Court of Appeal.**

The Court of Appeal analyzed three cases cited by Coffey, distinguishing each of them; Baker v. Gourley, 98 Cal. App. 4th 1263, 1270

(2002); People v. Beltran, 157 Cal. App. 4th 235 (2007); and Brenner v. Dep't of Motor Vehicles, 189 Cal. App. 365, 373 (2010).

The Court of Appeal determined Baker was not inconsistent with its opinion, because the driver in Baker was able to invalidate the chemical test. The Court of Appeal determined Beltran was not inconsistent because witnesses on both sides concluded Beltran could have been under 0.08 at the time of driving, and statements in the opinion that the circumstantial evidence was not tied to any BAC level was merely an “offhanded” observation about the state of the evidence. The Court of Appeal finally determined Brenner was not inconsistent because the driver in Brenner challenged the accuracy of 0.08 reading, stating that “in Brenner there was no valid, undisputed BAC test at 0.08 percent or above...”

Thus, the Court of Appeal’s decision rests heavily on the notion that unlike any other case, this case presented a new set of circumstances wherein there was a *valid* chemical test and circumstantial evidence (without a presumption).

However, the analysis is flawed because the chemical test evidence in Brenner was not invalid to the extent that it was still admissible. While it was shown in Brenner that the device was reading 0.002 high, this did not render the readings inadmissible. The fact merely detracted from the weight given to the .08 reading. In fact, the trial court, and the Court of Appeal, were left to determine the issues with a chemical test of 0.08, records demonstrating the device was reading .002% high, “a mere two in 10 chance that plaintiff’s BAC was under the legal limit,” “PAS results, Officer Gilliam’s observation of plaintiff’s impaired driving, the field sobriety tests, and other indicia of intoxication.” Brenner, 189 Cal. App. at 372. The only difference here is that there was no attack on the precise

reading of the chemical tests in this case. There was still a valid chemical test admitted in Brenner.

Perhaps the Court of Appeal overlooked Yordamlis v. Zolin, 11 Cal. App. 4th 655, 660 (1992) and Santos v. Dep't of Motor Vehicles, 5 Cal. App. 4th 537, 542, 549-50 (1992). In both cases, there was circumstantial evidence proving impairment and **valid** chemical tests. The trial court ruled in favor of the driver, finding the weight of the evidence did not prove a BAC of 0.08 at the time of driving.

Coffey appreciates that the procedural posture is different here, where the driver **lost** at the trial court, while Yordamlis and Santos both won at the trial court. However, the existence of these cases highlight the problems created by this Court of Appeal opinion. The substantial evidence test has been reduced to a mere "consistency" test, where the Court of Appeal looks only for the presence of circumstantial evidence which was "consistent" with a BAC of 0.08. Stated another way, the Court of Appeal merely confirms that not **all** the circumstantial evidence affirmatively contradicts such a conclusion. Only if it found a complete absence of evidence which was "consistent" with a BAC of 0.08 would it reverse the trial court.

**Why should drivers be put in the position of affirmatively proving the circumstances are inconsistent with a BAC of 0.08 to keep their license, while the administrative agency merely must prove there is some evidence "consistent" with a BAC of 0.08 to take it away?** Moreover, why would any court allow an administrative agency to take that fundamental vested right away without requiring a correlation between that evidence and a particular BAC level? Such a rule cannot be reconciled with Showalter and Pennsylvania R. Co..

**C. The Evidence of Coffey's BAC at the time of Driving.**

Here, the non-chemical test evidence was reviewed by an uncontroverted expert that concluded it was consistent with a BAC below 0.08. He considered the additional fact of a valid chemical test and held the same opinion.

There was no expert testimony, or any evidence, put into the record to contradict the expert's conclusion.

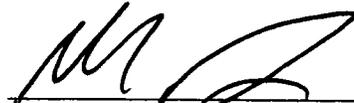
Because Coffey's expert was deemed sufficient to rebut the three-hour presumption, his opinion should not be ignored thereafter, allowing a contrary conclusion to be drawn without evidentiary support that the circumstantial evidence in fact tends to prove a BAC at, or above, 0.08.

**CONCLUSION**

The Court should affirm the holding of the Court of Appeal that the three-hour presumption was rebutted. In addition, the Court should reverse the remainder of the Court of Appeal's opinion applying a test for "consistency" with the rebutted presumption. The Court should firmly establish a rule of law that once the three-hour presumption is rebutted, the necessary facts must be established without regard to the presumption; and that circumstantial evidence of impairment may not sustain the DMV's burden without evidence which correlates it to a particular BAC level, or that otherwise establishes that an inference the driver's BAC was 0.08 or more, is more likely than a contrary inference.

Respectfully submitted,

Dated: November 27, 2013



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**CERTIFICATE OF WORD COUNT**

**(California Rules of Court, Rule 8.204(c)(1).)**

The text of the memorandum consists of 10,569 (ten-thousand, five-hundred sixty-nine) words as counted by the Microsoft Word version 2007 processing program used to generate the brief.

Dated: November 27, 2013

  
CHAD R. MADDOX

**PROOF OF SERVICE**

Supreme Court Case No.: S213545

Appellate Court Case No.: G047562

Trial Court Case No.: 30-2012-00549559

Ashley Jourdan Coffey v. George Valverde, Director, California DMV.

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the County of Orange and my business address is 5120 E. La Palma, #207, Anaheim Hills, CA 92807.

On November 27, 2013, I served the attached document described as Appellant's Opening Brief on the Merits on the party in the above named case. I did this by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon, I then placed the envelopes in a U.S. Postal Service mailbox in Anaheim Hills, California, addressed as follows:

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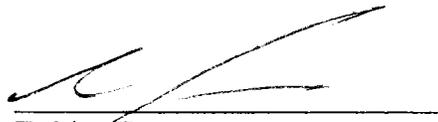
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I, Tobias Freestone, declare under penalty of perjury that the foregoing is true and correct.

Executed on November 27, 2013, at Anaheim Hills, California.



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Tobias Freestone