

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 REPLY 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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## I.

### INTRODUCTION

While the statewide importance of the decision of this Court in this case cannot be underestimated, this decision should also be a narrow one. Should this Court rule in favor of Appellant, the decision should not affect the future decision making process of criminal juries, civil juries, or judges presiding over bench trials. It will only set precedent for Administrative Per Se (APS) hearings, which have always been designed to effectuate limitations on the power of the Department of Motor Vehicles (DMV).

APS proceedings are unique in our body of civil administrative law in that it is a quasi-judicial process whereby an employee acts as the prosecutor, judge, and fact finder, without any formal legal or scientific training. Yet, the employee is empowered to snatch away the right to maintain a driver's license.<sup>1</sup> That right is afforded the protections of procedural due process under the Fourteenth Amendment, and has been noted by this Court to be "too important to the individual to relegate it to exclusive administrative extinction. [Citation]." Berlinghieri v. Dep't of Motor Vehicles, 33 Cal. 3d. 392, 395 (1983).

With this in mind, simply put, the question before this Court is:

Can the right to a driver's license be administratively extinguished using circumstantial evidence when there is not a scintilla of evidence in the record correlating any of the circumstantial evidence to an excessive BAC at the time of driving?

If the Court were to permit such an outcome how could the power of a lone DMV employee ever be constrained? On the other hand, finding in favor of Petitioner does not make it unreasonably difficult for the DMV to

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<sup>1</sup> The right to maintain a license is a vested right for purposes of due process analysis, despite the common belief that driving is a privilege and not a right. Berlinghieri v. Dep't of Motor Vehicles, 33 Cal. 3d. 392 (1983)

snatch a license from a driver under the APS laws. The vast majority of cases will continue as they always have. Where no evidence to rebut the three-hour presumption, the DMV will suspend. However, where a competent, qualified expert renders an opinion that a person's blood alcohol content (BAC) was rising, and below 0.08 percent or more at the time of driving, and states the materials he relied upon to draw that conclusion, the DMV would not administratively suspend the license.<sup>2</sup>

Such a holding does not render the DMV administrative process impotent. Nothing prevents the DMV from presenting affirmative evidence of a proscribed BAC level in rebuttal. This is how it should be. Without such an enforceable rule of law, the DMV employee will be free to issue boilerplate decisions finding an expert's testimony "too speculative" or "a subjective interpretation of the evidence" without pause. The DMV employee would be empowered to throw a blanket conclusion over the evidence, concluding somehow mysteriously that the "totality of the circumstances" supports the inference that the driver's BAC was 0.08 or more, without establishing a nexus between those specific circumstances and the deciding issue... all the while citing this Court's decision as authority to do so.

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<sup>2</sup> Although the DMV may later suspend without an administrative hearing, if the driver is convicted in the criminal case. See Vehicle Code section 13352.

## II.

### **MAINTAINING A DRIVER'S LICENSE IS A VESTED INTEREST WHICH SHOULD BE GUARDED AGAINST EXTINCTION SUPPORTED ONLY BY ASSUMPTIONS WITHOUT PROOF.**

#### **A. The Right to a Driver's License is Protected by the Principles of Procedural Due Process.**

“It is clear that the Due Process Clause applies to the deprivation of a driver's license by the State.” Dixon v. Love, 431 U.S. 105, 112 (1977). “Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.” Bell v. Burson, 402 U.S. 535, 539 (1971). The second factor in determining the specific dictates of due process is, “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.” Mathews v. Eldridge, 424 U.S. 319, 335 (1976). “Because a primary function of legal process is to minimize the risk of erroneous decisions, [Citations], the second stage of the Eldridge inquiry requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used.” Mackey v. Montrym, 443 U.S. 1, 13 (1979).

Given the lack of legal or scientific qualifications required to be a DMV hearing officer, the “likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used” are significant. On the other hand, by reversing the Court of Appeal, this Court will ensure the erroneous deprivation of a driver's license does not occur by requiring inferred facts (driver's BAC at the time of driving) to be *proven* to flow

from the proven facts (BAC level after driving, observations of driving, other observations of officers, and performance on field sobriety tests).

**B. DMV APS Hearings are Unique in Administrative Law.**

Respondent urges the Court to affirm the Court of Appeal because the rising blood alcohol argument is a “variety of Russian roulette” and “the driver should drive at his peril.” (Respondent’s Brief on the Merits (RB) 17-18.) However, affirming the Court of Appeal will subject drivers, whom have shown strong evidence establishing a rising blood alcohol defense,<sup>3</sup> to the peril of the whims of a lay person, under the guise of phrases like “totality of the circumstances.” Because of the unique nature of APS hearings, where the hearing officer acts as prosecutor, judge, and fact finder, due process demands that the rule of law does not permit the hearing officer to make inferences unconnected by the evidence; because where they lack an established connection, such inferences are unreasonable.

DMV APS hearings are conducted by hearing officers appointed from employees of the Department. Veh. Code § 14104.2(a). There are no statutes or regulations governing the education of a hearing officer. “Hearing officers are typically DMV employees who need not have any legal training whatever.” Brown v. Valverde, 183 Cal. App. 4th 1531, 1537 (2010). They are not required to have any scientific education or training; or, to even have attended college.<sup>4</sup>

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<sup>3</sup> The rising blood-alcohol defense is well recognized in criminal cases and APS hearings alike. People v. Beltran, 157 Cal. App. 4th 235 (2007); Helmandollar v. Dep’t of Motor Vehicles, 7 Cal. App. 4th 52, 55 (1992); see Taylor, Cal. Drunk Driving Defense (3d ed. 2001) Forensic Chemist: Blood-Alcohol, § 11.1.1, pp. 610–611.

<sup>4</sup> See DMV Driver Safety Hearing Officer open recruitment announcement, December 12, 2013, available at

Generally, the rules in the Administrative Procedures Act apply to DMV hearings. Veh. Code § 14112(a). However, Government Code section 11425.30 does not apply to APS hearings. Veh. Code §14112(b). That section prohibits a person from serving as the presiding officer at an adjudicative proceeding when the person has served as a prosecutor or advocate in the proceeding. “Thus, hearings conducted by such hearing officers are in contrast to other proceedings arising under the Administrative Procedure Act, where the agencies employ administrative law judges to preside over the proceedings. [Citations.] Such administrative law judges do have legal training: they must have been admitted to practice law in California for at least five years and have any additional qualifications prescribed by the State Personnel Board. [Citations.]” Brown, 183 Cal. App. 4th at 1537.

Permitting a hearing officer, who has just acted as prosecutor in the hearing, and who has no legal or scientific training or education, to reject the testimony of an uncontroverted expert witness; and to conclude that other circumstantial evidence establishes a driver’s specific BAC without requiring the hearing officer to prove a connection between that evidence and a particular BAC, eviscerates a driver’s due process right to a meaningful hearing.

“The essence of due process is the requirement that a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.” Mathews, 424 U.S. at 348. In the case of a DMV APS hearing, “Due process requires full and fair administrative hearings that provide drivers a “meaningful opportunity to present their case.’ [Citation.]” Petrus v. Dep’t of Motor Vehicles, 194 Cal. App. 4th 1240, 1244 (2011).

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[http://apps.dmv.ca.gov/dmv\\_careers/DRIVER\\_SAFETY\\_HEARING\\_OFFICER.pdf](http://apps.dmv.ca.gov/dmv_careers/DRIVER_SAFETY_HEARING_OFFICER.pdf)

There simply is no meaningful hearing if a DMV hearing officer is allowed to reject the driver's case without an explanation which connects the dots between alleged contrary evidence and his or her contrary findings.

**C. The Legislature did not Empower the DMV to Administratively Suspend a License Based on Evidence of Impairment.**

The APS laws came into effect on January 1, 1990. Veh. Code § 13353.2; See 1989 Cal. Stats. ch. 1460. Prior to its enactment, a driver's license was only suspended upon a *conviction* for driving under the influence of alcohol *or* driving with an excessive BAC. See 1989 Cal. Stats. ch. 1460. The stated purpose of the enactment was to, "authorize the Department of Motor Vehicles to suspend the person's privilege to operate a motor vehicle for six months on a first violation or one year on any subsequent violation within 7 years if the department finds that the person was driving a motor vehicle with an excessive concentration of alcohol in his or her blood"; and, "To provide safety for all persons using the highways of this state by quickly suspending the driving privilege of those persons who have shown themselves to be safety hazards by driving with an excessive concentration of alcohol in their bodies." Id.

When the APS laws were enacted, the Legislature could have mirrored the existing criminal statutes which allow suspension upon a conviction for either driving under the influence, or for an excessive BAC. It did not. The Legislature limited the ability of the DMV to suspend only for an excessive BAC level. Moreover, the specific statute controlling suspensions for excessive BAC has been amended nine times since its enactment. Veh. Code § 13353.2. The power of DMV to suspend a license for excessive BAC has never been expanded to allow it to suspend for being under the influence of alcohol, despite evidence that driving under the influence is

*subjective*, and can be sustained at BAC levels as low as 0.05 percent.<sup>5</sup> Driving with an excessive BAC is *objective*, and currently set at 0.08 percent.<sup>6</sup>

The history of the APS law demonstrates that the Legislature has never intended to give the power to the DMV to appoint an individual to suspend a driver's license by exercising their subjective judgment as to whether or not that driver was driving under the influence of alcohol. The Legislature wisely limited the power of the DMV to an objective standard.

If the Court of Appeal opinion is left to stand, the objective standard will effectively be replaced with the subjectivity of each hearing officer; each left to determine if the circumstantial evidence supports a finding of the proscribed BAC level without any proof that the circumstantial evidence correlates to any BAC at all. The objective standard would thereby be obliterated. The Legislature has declined to confer power to the DMV to administratively extinguish the right to maintain a license using a subjective standard; the judicial branch should not confer power to the DMV to do what the Legislative branch has declined to empower it to do.

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<sup>5</sup> It is presumed that a person is not under the influence of alcohol at BAC levels below 0.05 percent. Veh. Code § 23610(a)(1). If a person's BAC is 0.05 or more, but less than 0.08, "that fact shall not give rise to any presumption that the person was or was not under the influence of an alcoholic beverage, but the fact may be considered with other competent evidence in determining whether the person was under the influence of an alcoholic beverage at the time of the alleged offense." Veh. Code § 23610(a)(2). Person's with a BAC of 0.08 or more are presumed under the influence. Veh. Code § 23610(a)(3).

<sup>6</sup> The level was 0.10 percent at the time the APS laws were enacted. The term "driving under the influence" is subjective. See Burg v. Municipal Court, 35 Cal. 3d 257, 263 (1983).

#### **D. The Statewide Importance Cannot be Underestimated.**

While this case came to the Court under Ms. Coffey's set of facts, the case is about far more than vindicating the erroneous suspension she has been made to suffer as result of a DMV hearing officer's decision. This case potentially affects thousands of California drivers every year. In 2012 there were 164,274 APS actions initiated for persons allegedly driving with a BAC of 0.08 percent or more. (Calif. Dep't of Motor Veh., *California Administrative Per Se Facts* 3 (April 18, 2013), at [http://apps.dmv.ca.gov/about/profile/rd/2012\\_aps.pdf](http://apps.dmv.ca.gov/about/profile/rd/2012_aps.pdf).) DMV imposed suspensions in 148,687 of those actions.<sup>7</sup> *Id.* Presumably, the DMV relied on the three-hour presumption codified in subdivision (b), of Vehicle Code section 23152, in a majority of those of those cases because the DMV is statutorily prohibited from imposing an APS suspension unless a person's BAC is 0.08 percent or more.

Each time the DMV proposes to take action based upon the three-hour presumption, the potential of a rising blood-alcohol defense presents itself. While the potential of a rising blood alcohol defense is present, in truth it will only be presented in those cases where the facts not only give rise to it; but, also only in cases where it could have risen from below 0.08 to 0.08 or more;<sup>8</sup> and, only in those cases where a driver can afford the expense of a competent and qualified expert. As stated above, reversing the Court of

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<sup>7</sup> The average number of annual 0.08 percent or more BAC APS actions taken between 2001 and 2011 is 160,433, with a low of 146,291 in 2001 and a high of 182,152 in 2008. (Calif. Dep't of Motor Veh., *Annual Report of the California DUI Management Information System* 57 (January 2013), at [http://apps.dmv.ca.gov/about/profile/rd/r\\_d\\_report/Section\\_5/S5-243.pdf](http://apps.dmv.ca.gov/about/profile/rd/r_d_report/Section_5/S5-243.pdf).)

<sup>8</sup> For instance, while there may be case where a driver's BAC rises from 0.12 to 0.14 (or similar) it is of no matter as the BAC is still 0.08 or greater.

Appeal does not render the DMV impotent to enforce the APS laws. What it does is actually afford drivers' their due process rights to a meaningful hearing by ensuring that it actually have supporting evidence before depriving a driver of his or her license.

### III.

#### **APPELLANT DOES NOT ASSERT THAT CIRCUMSTANTIAL EVIDENCE CAN NEVER BE USED BY THE DMV.**

##### **A. Respondent Misconstrues Appellant's Argument too Broadly.**

Respondent misunderstands Appellant's argument when it asserts that Appellant wants her expert to benefit from the totality of the circumstances; yet, deny Respondent from using the very same evidence." (RB 8.) Appellant expects Respondent to rely on nothing more than the evidence that was before the hearing officer. What is glaringly absent from the "totality of the circumstances" as stated by the Court of Appeal, and the "totality of the circumstances" in the administrative record, are any facts or opinions in evidence correlating any of the observations of Appellant, or Appellant's performance on the field sobriety tests, to any BAC, or any range of BACs.

The totality of the evidence can be summarized as a first BAC test taken 56 minutes after driving with a result of 0.08 percent; objective BAC tests taken 56, 59, and 83 minutes after driving, each test being progressively higher than the previous; expert testimony that the BAC tests indicated a rising BAC; expert testimony that Appellant's BAC was *below* 0.08 percent at the time of driving; observations of Appellant that arguably indicated she was under the influence of alcohol; a lack of any documentary evidence, or testimony that any single observation, or combination of observations, are associated with any blood alcohol level; a lack of any documentary evidence, or testimony, explaining how Appellant's BAC could have been

dropping at the time of driving and then rose before testing; a lack of any documentary evidence, or testimony, that Appellant's BAC was 0.08 or more at the time of driving.

**B. Appellant Relies on the Totality of the Circumstances, Including Expert Testimony.**

Appellate asserts a qualified expert may rely on the circumstantial evidence to form his opinion. An expert is subject to cross-examination on his qualifications, scientific principles, and manner in which he applied the facts of the case to scientific principles. The cross-examination will reveal if the expert's conclusions are sound or unsupported.

**C. Respondent Asserts its Hearing Officer can make Conclusions Without any Supporting Foundation.**

Respondent is urging the Court to allow its hearing officers to use the same circumstantial evidence to draw the exact opposite conclusions of Appellant's expert. (RB 8-9.) It urges this without the necessity of laying a foundation for the hearing officer's expertise, and without the hearing office being subject to cross-examination.<sup>9</sup> Specifically, without the hearing officer having to establish his or her education, training, and/or experience which allows the hearing officer to determine the BAC levels at which the observed symptoms occur, which symptoms are more likely to occur at lower BACs, and which symptoms are likely to appear at BAC levels of 0.08 or more.

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<sup>9</sup> Rendering opinions on scientific evidence is easily distinguished from a set of facts where the hearing officer uses expertise to interpret a DMV record. See Vinson v. Snyder, 75 Cal. App. 4th 182, 184 (1999). [a hearing officer at an administrative per se hearing may rely on his or her own expertise in reading and analyzing a departmental record without first affirmatively establishing him or herself on the record as an expert in the interpretation of such documents.]

In addition, allowing the hearing officer to use circumstantial evidence to draw expert conclusions of BAC levels without being cross-examined on what material he or she used to draw his opinion, effectively results in a due process violation – especially where there is no other evidence in the record correlating any of the circumstantial evidence to a BAC at the time of driving. If there had been such evidence presented it would have provided the driver an opportunity to refute it. Here, the hearing officer’s opinion was essentially kept a secret until the hearing officer prepared and mailed out her findings. Even then, the findings failed to articulate what material the hearing officer relied upon, or how the hearing officer reached her conclusion.

**D. Respondent Should not be Permitted to rely on the Totality of the Circumstantial Evidence when that Evidence does not Correlate, in some way, to any Particular BAC Level.**

It is an improper application of the substantial evidence test to determine if the unknown BAC at the time of driving was consistent with a known BAC an hour later using circumstantial evidence **which has not been shown to correlate to any BAC level**. This is not the same thing as claiming the Respondent may never use circumstantial evidence. The Respondent may in fact do so where that evidence establishes the circumstantial evidence is relevant to BAC at the time of driving.

Such evidence is relevant when it tends to prove, or disprove, a particular BAC level at the time of driving. Without showing that the circumstantial evidence correlates, in some way, to a BAC level, it is not competent evidence to determine the issue before the fact finder. It may be common knowledge that the *consumption* of alcohol results in the observation of certain symptoms and behaviors. However, it is not common knowledge at what level each symptom occurs. While it may not always be

necessary to show a correlation to an *exact* BAC level for each symptom, Appellant submits that it must be shown to at least correlate to a BAC of 0.08 or more to have any tendency to prove the existence of the proscribed BAC level in question.

For example, to consider bloodshot/watery eyes as circumstantial evidence of a particular BAC, the evidence must show that bloodshot eyes occur at some alcohol level such as 0.04 or more. Without such a correlation, bloodshot/watery eyes are unreasonable to rely upon to conclude a person had at least a 0.04 BAC at the time of the bloodshot/watery eyes. The state of the evidence would merely demonstrate *some* alcohol, however minute, was consumed.

#### IV.

#### **IT IS UNREASONABLE TO INFER AN OBJECTIVE STANDARD OF EXCESSIVE BAC BASED ON SUBJECTIVE CIRCUMSTANTIAL EVIDENCE WITHOUT EVIDENCE TO BRIDGE THE GAP.**

Respondent acknowledges that circumstantial evidence which may be present at levels below 0.08 percent BAC is insufficient to support a finding that a person is 0.08 or more, without a valid chemical test, because it would “leave room for speculation.” (RB 15.) Appellant submits that in a case such as the one at bar, where the chemical test evidence strongly suggest, consistent with the expert’s opinion, that a driver’s BAC was rising and below 0.08 percent at the time of driving,<sup>10</sup> and the circumstantial evidence is not shown to correlate to a BAC level at or above 0.08 percent, there is still too much speculation required to draw a conclusion contrary to the uncontroverted expert testimony.

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<sup>10</sup> Where subsequent tests are each higher than the previous test it strongly suggest a rising BAC. And, where the first test was 0.08, in order to rise to that level the BAC must necessarily have been below 0.08 prior to testing.

**A. There was no Evidence that Appellant “Failed” the Field Sobriety Tests or that her Performance on the Tests Correlated to any BAC.**

Respondent characterized Appellant’s performance on the field sobriety tests (FSTs) as “poor” and that she failed the test. (RB 15, 17.) However, there was nothing in evidence that Appellant failed the FSTs.<sup>11</sup> While the officer recorded Appellant’s performance on the FSTs (AR 17), and indicated “poor performance on FST’s” (AR 7), the officer only formed the opinion that Appellant “was under the influence of an alcoholic beverage” based on “objective symptoms of intoxication and her poor performance on the field sobriety tests” (AR 18).

The officer only determined that Appellant’s performance on the FSTs was “poor” enough to conclude Appellant was impaired. There was no opinion proffered by the officer or other expert that the FSTs were so “poor” as to indicate the critical question of whether or not the performance was indicative of the proscribed BAC. The officer placed her under arrest for driving under the influence, not driving with a BAC of 0.08 or more. (AR 18.)

On the other hand, Appellant’s expert testified that he did consider the FSTs and that Appellant’s performance was not so “poor” to be indicative of a BAC of 0.08 or more. (AR 47.) Nobody testified to, nor was any evidence presented: (1) That the Walk and Turn test is a National Highway Traffic Safety Administration (NHTSA) validated test for determining BAC or that Appellant’s performance on the test was indicative of a BAC of 0.08 or more; (2) That the One Leg Stand test is a NHTSA validated test

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<sup>11</sup> It was the Court of Appeal that first characterized Appellant’s performance on the FSTs as failing. (Opinion 3.) The record does not indicate that the arresting officer ever characterized Appellant as having “failed” the FSTs.

for determining BAC or that Appellant's performance on the test was indicative of a BAC of 0.08 or more; or (3) That the Rhomberg Turn test is a NHTSA validated test for determining BAC or that Appellant's performance on the test was indicative of a BAC of 0.08 or more.

Respondent blanketly equates Appellant's performance on the FSTs with impairment of her motor skills and judgment, indicating clinical intoxication. (RB 17.) This is exactly the problem here. No evidence was introduced at the hearing, by any witness or document, which Appellant could have rebutted or cross-examined. Only now, at this late stage, does Respondent make these arguments that could have been addressed by Appellant at the hearing. Had these arguments been raised, or Appellant's counsel known these thoughts were in the hearing officer's mind, Appellant's expert could have provided more detail about Appellant's performance on the FSTs. Respondent's making these arguments at this point underscores the insufficiency of the evidence presented at the hearing.

**B. Field Sobriety Tests are a Poor Indicator of BAC at low Levels.**

Scientific studies do not support Respondent's argument that Appellant's "poor" performance on the FSTs are indicative of a BAC of 0.08 or more. In August of 1998, NHTSA published a report, used as a standard for FSTs by law enforcement agencies, entitled "Validation of the Standardized Field Sobriety Test [SFST's] Battery at BACs Below 0.10%." Michael P. Hlastala et al, Statistical Evaluation of Standardized Field Sobriety Tests, 50 J. Forensic Sci. No. 3, 1 (May 2005) (Hlastala). "SFSTs are usually used as tools by officers in the field to determine if an arrest followed by a breath test is justified. However, often breath test results are not available in court for a variety of reasons. Under these circumstances, the SFST's are frequently used as an indication of impairment and

sometimes as an indicator that the subject has a BAC greater than 0.08 g/dl.” Id.

The findings of the authors, “suggest that the SFST’s may be helpful in estimating blood alcohol concentration (BAC) or breath alcohol concentration (BrAC), but the results of the [NHTSA report] must be interpreted more conservatively than suggested by the author.” Id. The data showed that officers’ accuracy in estimating whether or not a driver’s BAC is over or under 0.08 percent, based on driver’s performance on SFST’s,<sup>12</sup> depended on measured blood alcohol content (MBAC). Id. at 2.

“If MBAC is lower than 0.04, the officer is generally 80% or more accurate at predicting a subject’s category (above or below 0.08% MBAC) in the sample studied. If the MBAC is greater than 0.09%, then the officer is about 90% or more accurate at predicting the subject’s category. However, if the MBAC is around 0.08%, specifically, between 0.06 and 0.08, the SFSTs are only about 30–60% accurate in correctly predicting whether a subject’s MBAC is  $\geq 0.08\%$  or  $< 0.08\%$ .” Id. at 2. The authors also opined on the utility of relying on the SFST’s in making classifications, rather than predicting exact BACs: “If our interest is not in quantitative prediction, but in classifying individuals, such as below vs. equal to or above a limit of 0.08%, the utility of the SFST depends very much on how intoxicated an individual is. Accuracy (and specificity) are low when individuals are close to 0.08% MBAC (Fig. 2 and Table 3), but if the individuals are quite intoxicated, such as above 0.12%, then accuracy is high (Fig. 2).” Id. at 7.

Thus, as explained by Hlastala, when a driver has a measured BAC of 0.08 percent, as Appellant does here, the performance on FSTs is a poor

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<sup>12</sup> The SFST’s are the walk and turn, one leg stand, and horizontal gaze nystagmus. “Rhomberg” is not an SFST. Hlastala at 1.

indicator of actual BAC, or even whether or not a driver is “below vs. equal to or above a limit of 0.08%.”

Of course, Hlastala was referring to the arresting officer’s ability to accurately predict the BAC. But that makes it even more problematic for a DMV hearing officer to make an inference of a BAC based on performance on FSTs. Presumably, not only will the officer have training and experience in administering and evaluating the tests, but the officer has the luxury of being present to observe subtle information that cannot be communicated in a report. How can a hearing officer who has nothing to go on other than an officer’s report, be reasonably said to have a greater ability to predict the BAC classification than the officer on the scene?

**C. Respondent Makes Unsupported Assertions in an Attempt to Discredit Appellant’s Expert Witness.**

Respondent argues that Appellant’s expert’s testimony does not rise to substantial evidence because he cannot claim Appellant’s BAC increased 0.01 percent in the three-minutes between the breath tests and then just 0.005 percent in the ensuing twenty-four minutes until the blood test. (RB 18.) However, Respondent offers no support for this theory which depends on the proposition that BAC levels rise in a linear fashion. Rather, it makes unsupported assertions contradicting the expert that helped write the Title 17 regulations. (AR 37.)

In People v. Vangelder, 58 Cal. 4th 1, 14 (2013), this Court recognized the ever-changing nature of BAC:

After ingestion and absorption through the stomach walls and the intestines, ethyl alcohol enters the blood and eventually travels via the carotid arteries to the brain, where it causes intoxication and resulting mental and physical impairment. (*McNeal, supra*, 46 Cal.4th at pp. 1190-1191; *State v. Chun* (N.J. 2008) 943 A.2d 114, 126 (*Chun*); see generally Mason & Dubowski, *Breath-Alcohol Analysis: Uses, Methods, and*

*Some Forensic Problems — Review and Opinion* (1976) 21 J. Forensic Sciences 9 (hereafter Mason and Dubowski, *Breath-Alcohol Analysis*.) At the same time that absorption of alcohol occurs, elimination also commences through excretion and metabolization. “When a person’s body is absorbing alcohol faster than he or she is eliminating it, the concentration of alcohol in the blood will continue to rise. . . . The concentration will reach its peak, and it will achieve a plateau, at the time when elimination and absorption are occurring at about the same rate. [¶] [Thereafter,] [w]hen the person . . . slows down ingestion to the point where the body is eliminating alcohol more quickly than absorbing it, the body enters what has generally been referred to as the post-absorptive phase. During this period of time, the concentration of alcohol in the blood decreases.” (*Chun, supra*, at p. 127.)

The Vangelder decision reaffirms principles first recognized by this Court over thirty years ago in Burg v. Municipal Court, 35 Cal. 3d 257 (1983). As a preface to its constitutional discussion, the Court discussed the legislative response to the effect of alcohol on drivers. Id. at 261-62. In doing so, the Court referenced scientific studies examining the effects of alcohol, Id. at 262-63:

A more satisfactory means of defining the problem of drinking and driving emerged in the middle decades of this century, with the development of scientific measurement of blood-alcohol levels. (Ross, *Deterring the Drinking Driver* (1982) p. 2; Cameron, *The Impact of Drinking-Driving Countermeasures: A Review and Evaluation* 1979 *Contemp. Drug Prob.* 495, 497-498.) Research on alcohol's effect on both motor skills and judgment revealed that **impairment occurred at alcohol concentrations as low as 0.05 percent** (Hurst, *Estimating the Effectiveness of Blood Alcohol Limits* (1970) 1 *Behav. Research Highway Safety* 87), considerably below the point at which typical clinical symptoms of intoxication appear in most persons. (Ross, *Deterring the Drinking Driver* (1982) p. 2; Jones & Joscelyn, *Alcohol and Highway Safety* 1978, *op. cit. supra*, at pp. 35-50.)

The same concepts have been acknowledged by the United States Supreme Court in Missouri v. McNeely, 133 S. Ct. 1552, 1560 (2013):

It is true that as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated. See *Skinner*, 489 U. S., at 623, 109 S. Ct. 1402, 103 L. Ed. 2d 639; *Schmerber*, 384 U. S., at 770-771, 86 S. Ct. 1826, 16 L. Ed. 2d 908. Testimony before the trial court in this case indicated that the percentage of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed. App. 47. More precise calculations of the rate at which alcohol dissipates depend on various individual characteristics (such as weight, gender, and alcohol tolerance) and the circumstances in which the alcohol was consumed. See Stripp, *Forensic and Clinical Issues in Alcohol Analysis*, in *Forensic Chemistry Handbook* 437-441 (L. Kobilinsky ed. 2012)

Both this Court and the United States Supreme Court have recognized that alcohol levels rise faster after initial consumption, and although continuing to rise as the person consumes, rise at a slower rate as the person reaches peak absorption. Thus, Respondent's unsupported argument flies in the face of established principles.

It is frustrating that the DMV now attempts to insert scientific evidence such as studies during briefing, but did not attempt to offer it at the APS hearing. If the DMV hearing officer was able to draw her conclusions legitimately without the evidence being offered at the hearing, why can't the DMV defend its conclusions without the need for such evidence now?

V.

**RESPONDENT'S MARGIN OF ERROR ARGUMENT MISAPPLIES  
THE LAW AND EVIDENCE.**

Respondent claims Appellant's rising blood alcohol theory is flawed for two reasons. (RB 18.) First, it offers the statement, "The same BAC in the subject could result in different test results in breath and blood." (RB 18.) Respondent makes this statement as if it is a conclusive scientific and legal fact; yet, it offers no support for its statement. This is at least consistent with the way its hearing officers sometimes reach their conclusions, without supporting evidence. Furthermore, Respondent certainly did not mean to state that breath tests are flawed and not a true representation of a driver's BAC?

Second, Respondent argues the rising blood alcohol theory is flawed because, "Appellant's expert concedes, the margin of error on a chemical test could be as high as 0.02 percent. Such margin of error is especially apparent when two breath tests conducted within three minutes vary by 0.01 percent." (RB 18.) In Borger v. Department of Motor Vehicles, 192 Cal. App. 4th 1118, 1121-22 (2011), the court conclusively dismissed any argument that a margin of error in breath testing devices could be used to defeat the test results. Borger explained that such a conclusion would in effect abrogate Title 17 and require every breath test to be at least 0.10 to impose a suspension for driving with a BAC of 0.08 or more. Id. at 1122; (See also, Vangelder, 58 Cal. 4th at 35 fn. 28 [Regarding Title 17 regulations, "Our conclusion is consistent with observations made by the appellate court in Borger v. Department of Motor Vehicles."] )

Moreover, the entire inherent margin of error argument is not relevant to Appellant's expert's rising blood alcohol theory and conclusion Appellant's BAC was below 0.08 at the time of driving. As stated by the Court of

Appeal, “[Appellant’s] expert opined that [Appellant’s] BAC was below 0.08 percent at the time of driving based on two **independent** theories.” (Emphasis added) (Opinion 4.)

On the other hand, if Respondent is now abandoning the very argument it made in Borger, and conceding that there is an inherent margin of error in breath testing devices, the Appellant is willing to accept that conclusion. The result of course is that the test she completed closest to her time of driving, the breath test at 2:28 a.m. would change from 0.08 to 0.06 percent; and, the breath test she completed at 2:31 a.m. would change from 0.09 to 0.07 percent. In this case, the evidence would also be that Appellant was below 0.08 percent at the time of driving.

## VI.

### **THE RESPONDENT’S LITANY OF CASES ARE INAPPOSITE TO FACTS BEFORE THE COURT.**

Respondent cites to a line of cases to bolster its argument that an inference of a BAC level of 0.08 or more can be drawn from circumstantial evidence, even without any evidence to create a nexus between the circumstantial evidence and any specific BAC, or range of BACs. Respondent is incorrect. The place to begin is with the decision of this in Court in Burg, for not only does Respondent begin here (RB 9), but the Court of Appeal based its opinion on Burg. Of course, it is a fundamental doctrine that a decision is not authority for what is said in the opinion but only for the points actually involved and actually decided. Norris v. Moody, 84 Cal. 143, 149 (1890); Hart v. Burnett, 15 Cal. 530, 598 (1860). Therefore, both Respondent and the Court of Appeal were mistaken in relying on Burg.

**A. *Burg* Stood for the Proposition that the Three-Hour Presumption is Constitutional.**

In *Burg*, the Court was reviewing the denial of a writ of prohibition prohibiting the prosecution of Burg for subdivision (b), of Vehicle Code section 23152, for whether or not the statute failed to give constitutionally adequate notice of the conduct it prohibits. 35 Cal. 3d at 260. Before addressing the issue, the Court gave six pages of background information. *Id.* at 260-66. During that background, the court stated that under subdivision (b), guilt must still be proven beyond a reasonable doubt. *Id.* at 265.

In footnote 10, the Court stated, *Id.* at 266:

Section 23152, subdivision (b), prohibits driving a vehicle with a blood-alcohol level of 0.10 percent or higher; it does not prohibit driving a vehicle when a subsequent test shows a level of 0.10 percent or more. Circumstantial evidence will generally be necessary to establish the requisite blood-alcohol level called for by the statute. A test for the proportion of alcohol in the blood will, obviously, be the usual type of circumstantial evidence, but of course the test is not conclusive: the defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom. ( *People v. Lewis* (1983) 148 Cal.App.3d 614, 620 [196 Cal.Rptr. 161]; accord, *Fuenning v. Superior Court* (Ariz. 1983) 680 P.2d 121, 127 (Dec. 15, 1983, No. 17049-SA) [rejecting argument that analogous statute represents "substitution of a machine test result for a jury verdict" because defendant is given an opportunity to challenge accuracy of test result, and state must prove beyond a reasonable doubt that defendant's blood-alcohol level was 0.10 percent at the time he was driving]; *Cooley v. Municipality Anchorage* (Alaska App. 1982) 649 P.2d 251, 254-255.) 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. (See, e.g., *Fuenning*, *supra*, at p. 130.)

Nowhere else does Burg discuss circumstantial evidence.

Not only did Burg not stand for the proposition now before the Court, but it was decided in the context of what a criminal jury must decide, and it gave no hint as to what circumstantial evidence may or may not be sufficient for making a reasonable inference. Burg is not controlling.

***B. Fuenning is not Controlling and is not on Point.***

Respondent grasps onto the Court's citation to Fuenning v. Superior Court, 680 P.2d 121 (Ariz. 1983), to further make the argument that a BAC of 0.08 or more can be made from circumstantial evidence. (RB 10-11.) Obviously, even if Fuenning, stood for that proposition, it is not controlling on this California court. Moreover, Fuenning, just like Burg, was concerned with the constitutionality of a statute, not issues of circumstantial evidence.

The issues before the court were the "Constitutionality of the statute," Id. at 125; "Admissibility of evidence of defendant's conduct and behavior," which the court specifically stated, "We need not decide," Id. at 130; and, "Foundation for admission of test results" Id. at 131. Thus, because it was not even decided, Fuenning does not stand for the proposition that the meager observations noted by Appellant's arresting officer are "substantial evidence" that Appellant's BAC was 0.08 percent or more at the time of driving.

Even assuming, arguendo, that Fuenning did address the circumstantial evidence issues presented here, it is inapposite to the facts here. The Court of Appeal quoted from Fuenning, Id. at 130:

Evidence that at that time the person charged smelled strongly of alcohol, was unable to stand without help, suffered from nausea, dizziness or any other 'symptoms' of intoxication would justify an inference that a test administered some time after arrest probably produced lower readings than that which

would have been produced had the test been administered at the moment of arrest.

However the Court of Appeal “paraphrased” by omitting the immediately preceding sentence from Fuenning, “Defendant attacked the results, presenting evidence regarding margin of error, time lapse and other factors. Such evidence might raise **considerable doubt** whether the test result of .11% indicated .10% or greater BAC at the time defendant was arrested” [Emphasis added.]; as well as the sentence immediately following, Id.:

The converse is also true. Evidence that at the time of arrest defendant was in perfect control, displayed none of the symptoms of intoxication and had not driven in an erratic manner, is relevant to show that a reading of .11% from a test given some time later does not prove beyond a reasonable doubt that the defendant was driving with a .10% or greater BAC at the time of his arrest.

Similar to the instant matter, in Fuenning, there was expert testimony that, Id. at 124-25:

The speed at which the body absorbs alcohol is affected by the presence or absence of food in the stomach. When the stomach is empty of food, alcohol is absorbed much more quickly. **The test can only measure the amount of alcohol in the blood at the time of the test, not at the time of the event.** If a person has had several drinks during dinner, is arrested while driving soon afterward, and given an intoxilyzer test an hour or two later, the test is likely to show a considerably greater BAC than that which existed at the time of arrest. [Emphasis added.]

The statutory BAC at issue was 0.10 percent. Id. at 130. Fuenning’s BAC was 0.11 percent. Id. at 124. The Fuenning court noted that “Reaching the chemical level of .10% requires consumption of a number of drinks (as much as a pint of whiskey, one to two six packs of beer, or a quart of wine) in a period of two or three hours.” Id.

In addition, the evidence was not that the arresting officer merely detected “the smell of alcohol and gave field sobriety tests,” *Id.* at 124, but also included a videotape showing Fuenning’s behavior at the time of booking and testimony from the arresting officer that Fuenning was “‘Drunk,’ ‘intoxicated,’ and ‘under the influence.’” *Id.* at 130. But significantly noteworthy, the court specifically stated that “the probative value of terms like “drunk,” “intoxicated,” and “under the influence” in a “per se case would be slight” and cautioned trial courts from admitting this type of evidence in determining per se cases. *Id.* at 131. Most importantly, Fuenning never concluded that the observations of the arresting officer were sufficient evidence to establish that Fuenning was driving with a BAC of 0.10 percent. In fact, it was not even the issue before the court.

***C. McKinney and Jackson do not Support Concluding a BAC of 0.08 Percent or More on Circumstantial Evidence.***

Respondent states that McKinney v. Department of Motor Vehicles, 5 Cal. App. 4th 519, 524 (1992), “concluded that circumstantial evidence, **unencumbered by any contrary showing**, provided independent support for the suspension, beyond reliance upon chemical test.” (Emphasis added.) (RB 12.) Assuming for the moment that this statement is true, it does not help Respondent as the facts here are not “unencumbered by any contrary showing” as they were in McKinney. A tenured expert provided testimony which was a contrary showing. In addition, in Baker v. Gourley, 98 Cal. App. 4th 1263, 1264 (2002), the same Court of Appeal that rendered the decision, explained that McKinney did not stand for the proposition, which DMV now asserts is an established maxim.

Similarly, Respondent also relies on Jackson v. Department of Motor Vehicles, 22 Cal. App. 4th 730 (1994), for the proposition that Appellant’s BAC can be established based on circumstantial evidence other than a

chemical test. (RB 13.) This proposition was similarly explained away by the Baker court.

In Baker, 98 Cal. App. 4th at 1264, the court was addressing the APS suspension of driver's license, "not a criminal prosecution for drunk driving." The Court held, Id.:

[B]efore 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. The Legislature, however, has not authorized administrative suspension without substantial evidence the motorist was driving with at least that amount of alcohol in his or her blood.

At Baker's APS hearing he presented "uncontroverted expert testimony" that the chemical testing method employed could have resulted in a false high result because official regulations had not been complied with; DMV did not present any evidence that the test was otherwise unreliable. Id. at 1265. Baker sought relief in the trial court where, "The petition was denied by the trial judge, based on circumstantial evidence other than the suspect blood test." Id.

The Baker court stated that because the presumption the chemical test was reliable was rebutted, the burden had shifted to DMV to establish the test was still reliable. Id. Because DMV did not carry the burden of establishing the reliability of the test, the Court stated the issue in the case was: "Can a given amount of blood-alcohol level be established without a valid chemical test by evidence of behavior or indicia typically associated with intoxication?" Id.

Here, just as it did in Baker, DMV claims that McKinney and Jackson provided “an affirmative answer to the question.” Id. at 1266. In response to the DMV, the Court stated, Id.:

No. They don't. There is language in both cases which can be read for the proposition that circumstantial evidence apart from a chemical test might establish a given blood-alcohol level, but that language is not only dicta, but unsupported dicta. In the Jackson case, in fact, one of the authorities cited by the court would require the opposite conclusion.

The Baker court then provided a detailed analysis of McKinney, including cases cited by McKinney, and cautioned that, “The language in McKinney which might be read for the idea that non-chemical test evidence alone will suffice is an example of the tendency of ideas to become distorted when they are paraphrased from one court to another.” Id. at 1270. The Court also detailed three conclusions from its analysis of McKinney:(1) “[T]he McKinney court never actually held that circumstantial evidence absent a chemical test of some sort was sufficient to establish a given blood-alcohol level”; and, (2) “anything that the McKinney court said or implied about the establishment of blood-alcohol level in the absence of a chemical test was unnecessary to the result, i.e., dicta”; and, (3) “any dicta in McKinney concerning the establishment of blood-alcohol level in the absence of a chemical test (e.g., that a chemical test “is not the only means of establishing that a driver's BAL was .08 or more”) was unsupported by the authorities it cited.” Id. at 1269.

The Baker court then addressed Jackson, “which also contained a statement which might be read for the idea that circumstantial evidence sans chemical test could suffice to establish a proscribed blood-alcohol level,” Id. at 1270. After significant analysis of Jackson, and the cases cited by it, the court stated “The same conclusions emerge from our

analysis of Jackson that emerged from our analysis of McKinney.” Id. at 1272. Specifically, the Baker court came to several conclusions regarding the statement in Jackson that “circumstantial evidence other than chemical test results may properly be admitted to establish a driver had the proscribed level of blood-alcohol at the time of the offense.” Id. First, the statement “was not as tightly written as the court might have wanted.” Id. Second, “to the degree that the statement is construed to mean that nonchemical test evidence can alone support a blood-alcohol concentration, it was dicta.” Id. Third, “to the degree that the statement is construed to mean that non-chemical test evidence can alone support a blood-alcohol concentration, it was unsupported dicta.” Id.

Finally, in reversing the trial court, the Baker court held, Id. at 1273:

Because the Admin Per Se law is wholly pegged to a given blood-alcohol level, it follows that **circumstantial evidence without a valid chemical test is insufficient to suspend a license**. After all, the usual symptoms of substantive intoxication--slurred speech, bloodshot eyes, etcetera--can manifest themselves at a blood-alcohol level below .08. [Citation.] We are aware of no body of scientific evidence to the effect that such symptoms as slurred speech, bloodshot eyes, or even port wine stains, automatically correlate with .08 or greater blood alcohol. In fact, as contact lens wearers know, bloodshot eyes may have nothing to do with drinking. Thus to allow such symptoms to establish a blood-alcohol level without a valid chemical test is to add to the Admin Per Se statute what isn't there. [Citation.] (Emphasis added.)

Baker is nearly identical to the present matter. In Baker, the presumption that Baker’s BAC was 0.08 percent was rebutted by uncontroverted expert testimony that the chemical test gave a false high; here, the presumption was rebutted by uncontroverted expert testimony that Appellant’s BAC was rising and that her BAC was below 0.08 percent at the time of driving. In both Baker and here, after the presumption was

rebutted, DMV did not present any additional evidence of a BAC of 0.08 more at the time of driving.

The only difference between Baker and this matter is the presence of a valid chemical test. However, the valid chemical test 56 minutes does not provide any clue to Appellant's BAC at the time of driving in isolation. There are only three inferences that can be made about Appellant's BAC at the time of driving from her 0.08 breath test 56 minutes after driving. Appellant's BAC was either the same, lower, or higher.

There is no evidence directly on point with the breath test other than the expert's opinion Appellant's BAC was rising; thus, it necessarily had to be lower than 0.08 at the time of driving. There is no evidence it was the same or rising. Therefore, in accord with Baker, when circumstantial evidence other than a chemical test cannot establish a BAC standing alone, how can other circumstantial evidence support a BAC of 0.08 or more by the addition of evidence of a 0.08 percent chemical test 56 minutes later when the evidence is that the Appellant's BAC was rising and below 0.08 percent. It simply is not a reasonable inferential leap.

***D. People v. Randolph is Questionable Authority.***

Respondent quotes a portion of McKinney that quotes People v. Randolph, 213 Cal. App. 3d Supp. 1, 7 (1989). (RB 12.) Randolph is questionable authority for the circumstantial evidence proposition because it cites to Burg and Fuenning as its authority. It is also distinguishable on the critical issue here. Most notably, in Randolph, there was testimony by an expert witness that established a correlation between the circumstantial evidence of driving, of the officer's observations of the smell of the "odor of an alcoholic beverage on his breath, and noted appellant's eyes were bloodshot and glassy," and, Randolph's performance on FSTs, to a particular BAC level. Id. at 8-10.

As Appellant has stated at nauseam, there is no such correlating evidence in the record here. Furthermore, the defendant in Randolph had a chance to cross-examine such witnesses and rebut evidence. Id. at 10.

**E. Komizu did not Involve a Rebutted Presumption.**

In attempting to distinguish Baker, Respondent cites to and discusses Komizu v. Gourley, 103 Cal. App. 4th 1001 (2002), in a footnote. (RB 14.) There was no expert testimony regarding rising blood alcohol or that Komizu's BAC was below 0.08 at the time of driving. These are the facts that are in dispute here; therefore, Komizu is inapposite.

**F. Respondent Twist the Constitutional Meaning of Criminal Jury Instructions in Regards to Rebuttable Presumptions.**

Respondent goes so far as to quote California Criminal Jury Instruction 12.61.1 for the proposition that a hearing officer "*may but is not required to*" still find Appellant's BAC was 0.08 or more even when the three hour presumption is rebutted. (RB 16.) Respondent's assertion torments the purpose of "may, but are not required to," in the jury instruction.

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. [Citation.] Jury instructions relieving States of this burden violate a defendant's due process rights. [Citations.] Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." Carella v. California, 491 U.S. 263, 265 (1989). Thus, the purpose of "may, but are not required to," in the jury instruction for subdivision (b), of Vehicle Code section 23152 is not the granting of permission to the jury to make **unreasonable** inferential leaps. Quite the opposite is true. The language ensures that the jury knows it is not required to find a driver's BAC was 0.08 or more at the time of

driving just because a chemical test was completed within three hours of driving. If such a finding would be unreasonable, the permissible inference does not require it. In fact, the law would prohibit it, if it be unreasonable.

## VII.

### **WHEN THE CORRECT STANDARD OF REVIEW OF INDEPENDENT JUDGMENT IS APPLIED, THE ONLY REASONABLE CONCLUSION IS THAT THE THREE-HOUR PRESUMPTION WAS REBUTTED.**

#### **A. Whether or not the Three-Hour Presumption was Rebutted is a Question of Law Calling for this Court's Independent Judgment.**

Questions of law are reviewed de novo. Borger, 192 Cal. App. 4th at 1121. In Manriquez v. Gourley, 105 Cal.App.4th 1227, 1233-34 (2003), the court was reviewing the trial court's determination that a presumption had been rebutted at a DMV APS hearing. In explaining the court's standard of review on the question of whether the presumption had been rebutted, the court stated, "On appeal, this court ordinarily reviews the record to determine whether the trial court's findings are supported by substantial evidence. [Citation.] But where, as here, the determinative question is one of statutory or regulatory interpretation, an issue of law, we may exercise our independent judgment." Id. at 1233. Thus, regardless of the correct standard of review in this the Court of Appeal and this Court in regards to the three-hour presumption is independent review.

The Court of Appeal found substantial evidence rebutted the presumption. (Opinion 8-10.) For the reasons stated in Appellant's Opening Brief on the Merits, and for the reasons stated below, the Court should not disturb this determinations.

**B. *Engstrom* does not Permit Rejecting Uncontroverted  
Expert Testimony in Regards to Presumptions.**

Respondent cites to People v. Engstrom, 201 Cal. App. 4th 174, 187 (2012), for the proposition that the DMV hearing officer was free to reject Appellant’s expert witness’ testimony. (RB 30.)

In Engstrom, the issue was whether where “the jurors do not rely on extraneous materials or evidence, or conduct an improper experiment, is it misconduct for them to reject and correct what appeared to the jurors to be an expert's formulaic miscalculation of the anticipated yield of an indoor marijuana garden?” Id. at 177. In other words, the case had nothing to do with the question of law as to whether or not a presumption had been rebutted. Moreover, the jury did not arbitrarily reject the expert’s opinion; but, “some jurors disagreed with the expert's quantification of one factor in his formula for calculating marijuana yield, applied a commonsense interpretation of available evidence to requantify the same factor, and discussed it with fellow jurors.” Id. at 187.

In a footnote, the court stated “the jury had reason to doubt the defense expert” because of his strong ties to the medical marijuana industry, little evidence establishing his expertise, and no specialized education or certification. Id. at 188 fn. 11. These facts are inapposite to the facts regarding the expert here. Here, the expert’s specialized education and certification was firmly established, there was no evidence of bias, and the hearing officer did not make a recalculation based upon the expert’s testimony but simply rejected it arbitrarily.

**CONCLUSION**

For the reasons set out in her Opening Brief on the Merits and above, 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, firmly establishing a rule of law that once the three-hour presumption is rebutted the inferred fact must be established by affirmative, independent evidence, not established by a mere test of "consistency."

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M Maddox', written over a horizontal line.

CHAD R. MADDOX  
Attorney for Petitioner  
ASHLEY JOURDAN COFFEY

Dated: January 22, 2014

**CERTIFICATE OF WORD COUNT**

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

The text of the memorandum consists of 9,447 (nine-thousand, four-hundred forty-seven) words as counted by the Microsoft Word version 2007 processing program used to generate the brief.

Dated: January 22, 2014



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 January 22, 2014, I served the attached document described as Appellant's Reply 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:

Office of the Attorney General  
Kevin K. Hosn, D.A.G.  
300 S. Spring St. - #1702  
Los Angeles, CA 90013

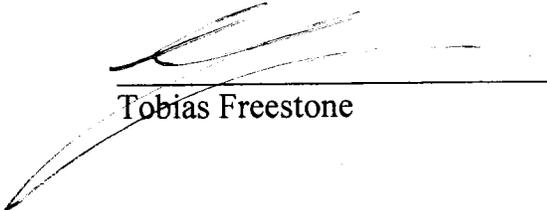
Judge Robert J. Moss, Orange County Superior Court, Department 23  
700 Civic Center West  
Santa Ana, CA 92701

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

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

Executed on January 22, 2014, at Anaheim Hills, California.



Tobias Freestone