CALIFORNIA JUDGES BENCHGUIDES

Benchguide 81

DUI PROCEEDINGS

[REVISED 2016]

JUDICIAL COUNCIL
OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR JUDICIAL EDUCATION AND RESEARCH

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Editorial comments and inquiries: Steven G. Warner, Attorney 415-865-7745

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DUI PROCEEDINGS

I. [§81.1] SCOPE OF BENCHGUIDE

This benchguide covers procedures for handling misdemeanor and felony DUI cases under Veh C §§23152 and 23153, and DUI cases involving drivers under 21 years of age under Veh C §§23136 and 23140. It covers the elements of each of these offenses, arrest procedures, pretrial procedures specific to DUI cases, evidentiary considerations (particularly with respect to chemical tests), jury instructions, and sentencing (including probation).

Discussion of vehicular manslaughter is beyond the scope of this benchguide. In addition, discussion of DMV administrative per se procedures is beyond the scope of this benchguide, although cases involving judicial review of administrative per se hearings are cited in the benchguide. It should be noted that the administrative hearings are civil in nature and are subject to relaxed rules of evidence, and judges may face argument from counsel that the holdings in cases involving review of these hearings should not apply to a criminal proceeding.

II. PROCEDURAL CHECKLISTS

A. [§81.2] Violation of Veh C §23152

(1) *Review the accusatory pleading and confirm that it complies with all legal requirements*. See §81.23.

(2) *Obtain a copy of the defendant's driving record from the DMV to determine if the defendant has any prior DUI convictions.* In each case involving a violation of Veh C §23152, the court must obtain and review a copy of the defendant's driving record before imposing sentence. See Veh C §23622(b); discussion in §81.24.

(3) *Hear any suppression motion to exclude*:

- *Evidence obtained subsequent to the detention and arrest of the defendant.* The requirements of a lawful detention and arrest are discussed in §§81.15–81.20.
- *Results of any blood, breath, or urine test*. For discussion of chemical tests, see §§81.35–81.56, 81.60.
- *Evidence obtained subsequent to the detention and arrest of the defendant at a sobriety checkpoint*. For discussion of sobriety checkpoint guidelines, see §81.21.
- *Any extrajudicial admissions of the defendant based on the ground that the prosecution has failed to make a prima facie showing of the corpus delicti,* i.e., *the elements of the offense*. For a discussion of the statutory elements of Veh C §23152, see §81.4. For discussion of circumstantial evidence that the defendant was under the influence and that the defendant was driving, see §§81.33–81.34.

(4) *Hear any motion by defendant to strike a separate conviction*. See §81.30.

(5) *Hear any motion to bifurcate a separate conviction*. See §81.31.

(6) *Determine whether to approve any plea bargain.* The defendant may enter into a plea bargain with the prosecution to instead plead guilty or no contest to a charge under Veh C §23103 of reckless driving without causing bodily injury. See Veh C §23103.5; discussion in §81.26.

(7) *On dismissing an allegation of a violation of Veh C §23152, substituting a lesser offense for the allegation, or dismissing or striking an allegation of a separate conviction, specify on the record the reasons for the order.* See §81.28.

(8) *Upon conviction, consider ordering presentence investigation to determine whether defendant would benefit from education or treatment program in addition to other penalties*. See §81.63.

(9) *At sentencing hearing, determine whether to grant or deny probation.*

(10) *If probation is denied*:

- *Render judgment of county jail term and fine*. (*Note*: If defendant is convicted of a felony violation of Veh C §23152 (see §81.6), defendant must be sentenced to state prison for 16 months or 2 or 3 years, or in certain cases to county jail for 16 months or 2 or 3 years).
- *Advise defendant that the DMV will suspend or revoke his or her driving privileges for the designated period*.

- *Ask defendant to surrender his or her license*. The arresting officer in most cases will have already taken the defendant's driver's license at the time of the arrest, issued a temporary license which is valid for 30 days, and notified the defendant of the suspension of his or her license from the date of the arrest. See Veh C §§13353.2, 13382. If this has occurred, the defendant will have only the temporary license to surrender. See §81.100.

(11) *If probation is granted*:

- *Impose judgment and suspend its execution.*
- *Specify term of probation.* For discussion, see §81.65.
- *Specify conditions of probation*. For discussion of mandatory conditions, see §81.65. Additional conditions will apply depending on the nature of the offense. See §§81.70–81.73, 81.77.
- *Ask defendant whether he or she understands the conditions of probation and accepts probation on those conditions*. If defendant rejects probation, impose sentence (Step 10, above).

(12) *In all cases*:

- *Advise the defendant that his or her driving privileges will not be restored until the defendant provides the DMV with proof of successful completion of a DUI program.* This advisement should be given even if the court does not order the defendant to attend such a program. See Veh C §§13352(a)(1), (3), (5), (7), 13352.1(b), 23538(b)(3), 23542(c), 23548(d), 23552(d).
- (If first or second violation and defendant eligible for restricted license) *If the court determines that the defendant would present a traffic or public safety risk if authorized to operate a motor vehicle during the suspension period, the court may prohibit the DMV from issuing a restricted driver's license under Veh C §13352.4.* Veh C §§13352.4(h), 13352.5(g), 23536(d), 23538(a)(3), 23540(b), 23542(d). See §§81.70–81.71.
- Impose a restitution fine of not less than $150 and not more than $1000.

Note: If probation is granted, impose an additional probation revocation restitution fine in the same amount and order that it be suspended unless probation is revoked. Pen C §1202.44.

- *Order defendant to pay restitution to any victim(s) for any economic losses incurred*. Pen C §1202.4(f).

☛ JUDICIAL TIP: On November 4, 2008, California voters adopted Proposition 9 (Victims' Bill of Rights Act of 2008, also known as

Marsy's Law), which removed language from Cal Const art I, §28(b) allowing the waiver of all or a portion of victim restitution for compelling and extraordinary reasons. Proposition 9 effectively *negates* various provisions (including Pen C §1202.4(f) and (g)) that authorize reductions for compelling and extraordinary reasons. See generally California Judges Benchguide 83: *Restitution* (Cal CJER).

- (If applicable) *Order defendant to participate in a county alcohol and drug problem assessment program*. (Veh C §23646(a), (b)). See §81.88.
- *Impose penalty assessments, fees, and state surcharge.* See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs, and, if applicable, an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.
- *Advise the defendant that if he or she continues to drive under the influence of alcohol and/or drugs, and someone is killed as a result, the defendant can be charged with murder*. Veh C §23593.
- *Advise the defendant of his or her appeal rights if the conviction occurred after a trial.* See Cal Rules of Ct 4.305 (felony), 4.306 (misdemeanor). A defendant convicted of a misdemeanor must file a notice of appeal within 30 days after the judgment. Cal Rules of Ct 8.853(a). A defendant convicted of a felony has 60 days after the judgment to file a notice of appeal. Cal Rules of Ct 8.308(a). A defendant who wants to appeal after a guilty or nolo contendere plea may be required to obtain a certificate of probable cause from the trial court. See Pen C §1237.5; Cal Rules of Ct 8.304.
- (Optional) *Order defendant to install ignition interlock device on any vehicle he or she owns or operates*. See §81.89.
- (Optional) *Order vehicle used in the commission of the offense impounded.* Impoundment is mandatory if defendant has any prior DUI convictions. See §81.101.
- (Optional) *If the defendant has two or more prior DUI convictions, declare as a nuisance the vehicle used in commission of the offense and order it to be sold*. See §81.101.

B. [§81.3] Violation of Veh C §23153

(1) *Review the accusatory pleading and confirm that it complies with all legal requirements*. See §81.23.

(2) *Obtain a copy of the defendant's driving record from the DMV to determine if the defendant has any prior DUI convictions*. In each case involving a violation of Veh C §23153, the court must obtain and review a copy of the defendant's driving record before imposing sentence. See Veh C §23622(b); discussion in §81.24.

(3) *Before releasing a defendant charged with a felony violation of Veh C §23153(a) on his or her own recognizance (OR), review OR investigative report*. See §81.25.

(4) *Hear any suppression motion to exclude*:

- *Evidence obtained subsequent to the detention and arrest of the defendant.* The requirements of a lawful detention and arrest are discussed in §§81.15–81.20.
- *Results of any blood, breath, or urine test*. For discussion of chemical tests see §§81.35–81.56, 81.60.
- *Evidence obtained subsequent to the detention and arrest of the defendant at a sobriety checkpoint*. For discussion of sobriety checkpoint guidelines, see §81.21.
- *Any extrajudicial admissions of the defendant based on the ground that the prosecution has failed to make a prima facie showing of the corpus delicti,* i.e., *the elements of the offense*. For a discussion of the statutory elements of Veh C §23153, see §§81.7–81.9. For discussion of circumstantial evidence that the defendant was under the influence and that the defendant was driving, see §§81.33–81.34.

(5) *Hear any motion by defendant to strike a separate conviction*. See §81.30.

(6) *Hear any motion to bifurcate a separate conviction*. See §81.31.

(7) *Determine whether to approve any plea bargain.* Before approving a plea bargain in a felony DUI case in which an indictment or information has been filed, the court must find (1) there is insufficient evidence to prove the People's case, (2) testimony of a material witness cannot be obtained, or (3) a reduction or dismissal would not result in a substantial change in sentence. Pen C §1192.7(a)(2). See §81.27.

(8) *On dismissing or striking an allegation of a separate conviction, specify on the record the reasons for the order.* See §81.28.

(9) *On conviction, consider ordering presentence investigation to determine whether defendant would benefit from education or treatment program in addition to other penalties*. See §81.63.

(10) *At sentencing hearing, determine whether to grant or deny probation.*

(11) *If probation is denied*:

- *Render judgment of state prison term and fine*. (*Note*: If defendant is convicted of a misdemeanor violation of Veh C §23153 (see §81.10), defendant must be sentenced to county jail from the required minimum term (dependent on number of separate convictions and whether probation is granted) up to a maximum term of 1 year.)
- *Advise defendant that the DMV will suspend or revoke his or her driving privileges for the designated period*.
- *Ask defendant to surrender his or her license*. The arresting officer in most cases will have already taken the defendant's driver's license at the time of the arrest, issued a temporary license which is valid for 30 days, and notified the defendant of the suspension of his or her license from the date of the arrest. See Veh C §§13353.2, 13382. If this has occurred, the defendant will have only the temporary license to surrender. See §81.100.

(12) *If probation is granted*:

- *Impose judgment and suspend its execution.*
- *Specify term of probation.* For discussion, see §81.65.
- *Specify conditions of probation*. For discussion of mandatory conditions, see §81.65. Additional conditions will apply depending on the nature of the offense. See §§81.74–81.77.
- *Ask defendant whether he or she understands the conditions of probation and accepts probation on those conditions*. If defendant rejects probation, impose sentence (Step 11, above).

(13) *In all cases:*

- *Advise the defendant that his or her driving privileges will not be restored until the defendant provides the DMV with proof of successful completion of a DUI program.* This advisement should be given even if the court does not order the defendant to attend such a program. See Veh C §§13352(a)(2), (4), (6), 23556(d), 23562(c), 23568(c).
- Impose a restitution fine of $150 to $1000 for misdemeanor conviction, or $300 to $10,000 for felony conviction.

Note: In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted. Pen C §1202.4(b)(2).

- *If probation is granted, impose an additional probation revocation restitution fine in the same amount as the restitution fine imposed under Pen C §1202.4(b) and order it suspended unless and until probation is revoked.* Pen C §1202.44.
- *If the defendant is committed to state prison, impose an additional postrelease community supervision revocation restitution fine in the same amount as the restitution fine imposed under Pen C §1202.4(b) and order it suspended unless and until the postrelease community supervision is revoked.* Pen C §1202.45(b), (c).
- *Order defendant to pay restitution to any victim(s) for any economic losses incurred*. Pen C §1202.4(f). See also Judicial Tip in §81.2.
- (If applicable) *Order defendant to participate in a county alcohol and drug problem assessment program*. Veh C §23646(a), (b). See §81.88.
- *Impose penalty assessments, fees, and state surcharge.* See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs, and, if applicable, an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.
- *Advise the defendant that if he or she continues to drive under the influence of alcohol and/or drugs, and someone is killed as a result, the defendant can be charged with murder*. Veh C §23593.
- *Advise the defendant of his or her appeal rights if the conviction occurred after a trial.* See Cal Rules of Ct 4.305 (felony), 4.306 (misdemeanor). A defendant convicted of a misdemeanor must file a notice of appeal within 30 days after the judgment. Cal Rules of Ct 8.853(a). A defendant convicted of a felony has 60 days after the judgment to file a notice of appeal. Cal Rules of Ct 8.308(a). A defendant who wants to appeal after a guilty or nolo contendere plea may be required to obtain a certificate of probable cause from the trial court. See Pen C §1237.5; Cal Rules of Ct 8.304.
- (Optional) *Order defendant to install ignition interlock device on any vehicle he or she owns or operates*. See §81.89.
- (Optional) *Order vehicle used in the commission of the offense impounded.* Impoundment is mandatory if defendant has any prior DUI convictions. See §81.101.
- (Optional) *If the defendant has any prior DUI convictions, declare as a nuisance the vehicle used in commission of the offense and order it to be sold*. See §81.101.

III. APPLICABLE LAW

A. DUI Offenses

1. Misdemeanor DUI (Veh C §23152)

a. [§81.4] Statutory Elements of Offense

It is a misdemeanor to drive a vehicle under the following circumstances:

- While under the influence of any alcoholic beverage or any drug or under their combined influence. Veh C §23152(a), (e), (f).
  - — *DUI involving alcohol.* It is not necessary to prove any specific degree of intoxication, but only that the defendant was under the influence. *McDonald v Dep't of Motor Vehicles* (2000) 77 CA4th 677, 687, 91 CR2d 826. See §81.57 (rebuttable presumptions of intoxication based on blood-alcohol level).
  - — *DUI involving drugs.* When a defendant is charged with driving under the influence of a drug, a showing of a specific measurable amount of the drug in the defendant's blood is not required. The showing that must be made is that the defendant was under the influence. *People v Bui* (2001) 86 CA4th 1187, 1194, 103 CR2d 908.
- While having 0.08 percent or more, by weight, of alcohol in one's blood. Veh C §23152(b). For this offense it is not necessary to prove the defendant was, in fact, under the influence; it is sufficient to prove the defendant's blood-alcohol level was 0.08 percent or more. *Burg v Municipal Court* (1983) 35 C3d 257, 262–263, 198 CR 145. See §81.58. For this reason, this statute is sometimes referred to as the "per se" DUI statute. See *People v Bransford* (1994) 8 C4th 885, 892–893, 35 CR2d 613 (Legislature intended to criminalize driving with this specified excessive breath or blood-alcohol level). There 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 3 hours after driving. Veh C §23152(b). The percent by weight is based on grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. Veh C §23152(b).
- While addicted to the use of any drug, unless participating in an approved narcotic treatment program. Veh C §23152(c). See *People v O'Neil* (1965) 62 C2d 748, 755–757, 44 CR 320 (what

constitutes "addiction"); see also CALCRIM 2112; CALJIC 16.831.1.

- While having 0.04 percent or more, by weight, of alcohol in one's blood while driving a commercial vehicle. Veh C §23152(d). There is a rebuttable presumption that the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within 3 hours after driving. Veh C §23152(d).

Note: Effective July 1, 2018, it will be unlawful for a person to drive a motor vehicle with a passenger for hire in the vehicle if the driver has 0.04 percent or more, by weight, of alcohol in his or her blood. Stats 2016, ch 765.

b. [§81.5] Definitions

Alcoholic Beverage. The term "alcoholic beverage" includes any liquid or solid material intended to be ingested by a person that contains ethanol, also known as ethyl alcohol, drinking alcohol, or alcohol, including malt beverage, beer, wine, spirits, liqueur, whiskey, rum, vodka, cordials, gin, and brandy, and any mixture containing one or more alcoholic beverages ingested separately or as a mixture and that contains one-half of 1 percent or more of alcohol. Bus & P C §23004; Veh C §109. See CALCRIM 2110; CALJIC 12.63; *Bobus v Dep't of Motor Vehicles* (2004) 125 CA4th 680, 684–686, 23 CR3d 168 (cough syrup containing alcohol is an alcoholic beverage under Veh C §109).

Drug. The term "drug" is defined by Veh C §312 as any substance or combination of substances, other than alcohol, that could affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his or her ability to drive a vehicle in a prudent and reasonable manner. It does not have to be an illegal substance. It is no defense to a charge of driving under the influence of any drug or the combined influence of alcohol and any drug in violation of Veh C §23152 or §23153 that the defendant is or has been entitled to use the drug under state law. Veh C §23630; see *People v Keith* (1960) 184 CA2d Supp 884, 885–886, 7 CR 613 (conviction for driving under combined influence of alcohol and insulin). The critical issue is whether the defendant was under the influence. *People v Benner* (2010) 185 CA4th 791, 795–796, 111 CR3d 98 (defendant's driving ability appreciably impaired by methamphetamine use based on failed sobriety tests and anxious, agitated, and paranoid mental state); compare *People v Torres* (2009) 173 CA4th 977, 983–984, 93 CR3d 303 (no evidence that defendant's methamphetamine use actually impaired his driving ability). Actual notice

of each drug that constitutes a basis for prosecution under Veh C §23152(e) is not required if a person is reasonably made aware of the proscribed conduct, *i.e.,* impaired driving ability resulting from the ingestion of some substance. *People v Olive* (2001) 92 CA4th Supp 21, 24–27, 112 CR2d 687 (error to dismiss charge against defendant based on his consumption of kava; no showing that Veh C §23152 was unconstitutional as applied to this defendant); *Byrd v Municipal Court* (1981) 125 CA3d 1054, 1058–1059, 178 CR 480 (complaint need not specify particular drug).

Driving. The word "drive," as used in Veh C §23152, is not unconstitutionally vague. *People v Wilson* (1985) 176 CA3d Supp 1, 5, 222 CR 540. It encompasses any act or action necessary to operate the mechanism and controls and directs the course of a motor vehicle. 176 CA3d Supp at 6. See *People v Lively* (1992) 10 CA4th 1364, 1368, 13 CR2d 368 ("driving" means any volitional movement of the vehicle). The movement of the vehicle need not be extensive; moving the vehicle a few inches constitutes driving. *Music v Dep't of Motor Vehicles* (1990) 221 CA3d 841, 850, 270 CR 692.

A person is "driving" a motor vehicle if he or she seizes the steering wheel from the passenger seat, taking control of the vehicle and causing it to change direction and crash. *In re F.H.* (2011) 192 CA4th 1465, 1469–1472, 122 CR3d 43.

See also CALCRIM 2241; CALJIC 1.28. On proving that the defendant was the driver by circumstantial evidence, see §81.34.

Driving under the influence. A person is under the influence when, as a result of using alcohol or drugs, his or her physical or mental abilities are impaired to such a degree that he or she no longer has the ability to drive the vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances. *People v Bui* (2001) 86 CA4th 1187, 1194, 103 CR2d 908. See CALCRIM 2110; CALJIC 16.831 and 16.832.

☛ JUDICIAL TIP: To prove that a defendant was guilty of driving under the influence, the prosecution does not have to prove a knowledge element but does have to prove that (1) the defendant drove a vehicle, and (2) the defendant was under the influence of an alcoholic beverage or a drug or under their combined influence when driving. Driving under the influence is a general intent crime and voluntary intoxication is not a defense. *People v Mathson* (2012) 210 CA4th 1297, 1324–1326, 149 CA3d 167 (the defendant alleged that he was "sleep driving" after taking Ambien, the main ingredient of which is the drug zolpidem).

c. [§81.6] Charging Violation of Veh C §23152 as Felony

The prosecutor has the discretion to charge a violation of Veh C §23152 as a felony when the defendant has:

- Three or more separate DUI convictions within 10 years of the current offense. Veh C §23550. See §81.73.
- A prior felony DUI conviction or prior felony gross vehicular manslaughter violation within the past 10 years of the current offense. Veh C §23550.5(a). See §81.77.
- A prior conviction for gross vehicular manslaughter while intoxicated (Pen C §191.5(a)), felonious vehicular manslaughter while intoxicated but without gross negligence (Pen C §191.5(b)), or gross vehicular manslaughter while intoxicated and when committed during the operation of a vessel (Pen C §192.5(a)). Veh C §23550.5(b). See §81.77.

2. Felony DUI Causing Injury to Another (Veh C §23153)

a. [§81.7] Statutory Elements of Offense

It is a felony, in addition to driving under the influence of alcohol or drugs, or both, to drive a vehicle and

- Concurrently do any act forbidden by law or neglect any duty imposed by law in driving a vehicle that proximately causes bodily injury to any person other than the driver. Veh C §23153(a) (alcohol), (e) (drugs), (f) (combined influence).
- While having 0.08 percent or more, by weight, of alcohol in one's blood to concurrently do any act forbidden by law or neglect any duty imposed by law in driving a vehicle that proximately causes bodily injury to any person other than the driver. Veh C §23135(b). There 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 3 hours after driving. Veh C §23153(b).
- While having 0.04 percent or more, by weight, of alcohol in one's blood to drive a commercial vehicle and concurrently do any act forbidden by law or neglect any duty imposed by law in driving the vehicle that proximately causes bodily injury to any person other than the driver. Veh C §23153(d).

Note: Effective July 1, 2018, it will be unlawful for a person to drive a motor vehicle with a passenger for hire in the vehicle, if the driver has

0.04 percent or more, by weight, of alcohol in his or her blood. Stats 2016, ch 765.

b. [§81.8] Act Forbidden by Law

In proving that the defendant did an act forbidden by law or neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of the Vehicle Code was violated. Veh C §23153(c). This element of the offense is satisfied by evidence establishing ordinary negligence. *People v Oyaas* (1985) 173 CA3d 663, 669, 219 CR 243 (erratic driving). But if the prosecution has alleged specific code violations in the accusatory pleading to establish the unlawful act and relies on these allegations at trial, the court must give the jury definitional instructions for those violations. See *People v Minor* (1994) 28 CA4th 431, 438–439, 33 CR2d 641; CALCRIM 2100, 2101; CALJIC 12.60.01, 12.60.02, 12.60.03, and 12.60.1.

The unlawful act or omission must occur while the defendant is driving. *People v Capetillo* (1990) 220 CA3d 211, 217, 269 CR 250 (driving vehicle without owner's permission—"joy-riding"—was insufficient unlawful act). However, it need not cause the accident; it must only proximately cause injury to someone other than the driver. See Veh C §23153; *People v Weems* (1997) 54 CA4th 854, 861–863, 62 CR2d 903 (violation of mandatory seatbelt law that causes injury to passenger satisfies neglect of duty element).

Typical examples of unlawful acts that satisfy this element of the offense of felony DUI are

- Speeding. See *People v Ellis* (1999) 69 CA4th 1334, 1338–1339, 82 CR2d 409 (when act is speeding in area where there was no posted speed limit, court must instruct jury sua sponte on Veh C §22350 definition of speeding).
- Making an unsafe lane change. See Veh C §21658(a); *People v Thurston* (1963) 212 CA2d 713, 716–717, 28 CR 254.
- Turning or moving to the right or the left when it is unsafe to do so. See Veh C §22107; 212 CA2d at 716–717.
- Attempting to pass without sufficient clearance. See *People v Schoonover* (1970) 5 CA3d 101, 105, 85 CR 69.
- Driving on the wrong side of the road. See *People v Walzmuth* (1955) 130 CA2d 91, 92, 278 P2d 527.
- Failing to stop at a stop sign. See *People v Sussman* (1953) 121 CA2d 717, 718–719, 263 P2d 909.

Because a Veh C §23152 DUI offense is always included in any felony violation of Veh C §23153, the Veh C §23152 offense cannot be

used as the "act forbidden by law." *People v Thurston, supra,* 212 CA2d at 714–715. Similarly, the court must explicitly instruct the jury that it must find that the defendant committed an illegal act other than driving under the influence to convict the defendant of a violation of Veh C §23153. *People v Minor, supra,* 28 CA4th at 436–439.

A defendant may be charged with and convicted of both felony DUI under Veh C §23153 and gross vehicular manslaughter while intoxicated under Pen C §191.5(a) as a result of an unlawful act. See *People v McFarland* (1989) 47 C3d 798, 804, 254 CR 331. However, if the jury acquits the defendant on the manslaughter charge with a specific finding that the defendant did not commit an unlawful act, the defendant may not be found guilty of felony DUI. See *People v Ferrara* (1988) 202 CA3d 201, 205, 248 CR 311 (reversing felony DUI conviction because jury specifically found defendant did not run red light when it acquitted him of gross vehicular manslaughter, and record did not indicate defendant had committed any other unlawful act).

c. [§81.9] Bodily Injury

Vehicle Code §23153 only requires proof of "bodily injury," not proof of "substantial bodily injury" or "great bodily injury." *People v Guzman* (2000) 77 CA4th 761, 765, 91 CR2d 885; *People v Dakin* (1988) 200 CA3d 1026, 1035, 248 CR 206 (statute only requires proof of "harm or hurt to the body"). Minor injuries will satisfy the statutory requirement (see, *e.g., People v Guzman, supra* (abrasions, lacerations, and back and neck pain were sufficient injuries); *People v Dakin, supra,* 200 CA3d at 1036 (cuts, headache, and stiff neck were sufficient injuries)). However, there must be some *physical* injury; merely being shaken up or frightened is insufficient. *People v Lares* (1968) 261 CA2d 657, 662, 68 CR 144.

When the defendant causes "great bodily injury," the court has authority to increase the punishment by imposing a sentence enhancement under Pen C §12022.7. *People v Guzman, supra,* 77 CA4th at 764–765. When the defendant causes "great bodily injury" and has four or more separate DUI convictions within 10 years of the current conviction, the court must impose a sentence enhancement under Veh C §23566(b), (c). Alternatively, the court may impose a sentence enhancement under Pen C §12022.7. See *People v Sainz* (1999) 74 CA4th 565, 569–576, 88 CR2d 203; discussion in §81.76.

The bodily injury must be sustained by someone other than the defendant (Veh C §23153(a), (b)), *e.g.,* the defendant may be convicted of a violation of Veh C §23153 based on injuries sustained by a passenger in the defendant's vehicle. *People v Guzman, supra,* 77 CA4th at 764.

d. [§81.10] Charging Violation of Veh C §23153 as Misdemeanor

The prosecutor has the discretion to charge a violation of Veh C §23153 as a misdemeanor when the defendant has:

- No separate DUI convictions within 10 years of the current offense. Veh C §23554. See §81.74.
- One separate DUI conviction within 10 years of the current offense. Veh C §23560. See §81.75.
- A prior felony DUI conviction or prior felony gross vehicular manslaughter violation within the past 10 years of the current offense. Veh C §23550.5(a). See §81.77.
- A prior conviction for gross vehicular manslaughter while intoxicated (Pen C §191.5(a)), felonious vehicular manslaughter while intoxicated but without gross negligence (Pen C §191.5(b)), or gross vehicular manslaughter while intoxicated and when committed during the operation of a vessel (Pen C §192.5(a)). Veh C §23550.5(b). See §81.77.

3. Driving While Under the Influence of Alcohol—Person Under 21 Years of Age

a. [§81.11] Driving With 0.05 Percent Blood-Alcohol Level (Veh C §23140)

It is unlawful for a person under 21 years of age who has 0.05 percent or more, by weight, of alcohol in his or her blood to drive a vehicle. Veh C §23140(a). See *People v Goslar* (1999) 70 CA4th 270, 276, 82 CR2d 558 (statute does not deny persons under 21 equal protection of law even though it bases violation on blood-alcohol level of 0.05 percent or more rather than 0.08 percent level applicable to adults because young people who drink and drive pose greater accident risk than older drivers).

A person may be found in violation of Veh C §23140(a) if the person was, at the time of driving, under 21 years of age and under the influence of, or affected by, an alcoholic beverage regardless of whether a chemical test was made to determine his or her blood-alcohol concentration, and if the trier of fact finds that the person had consumed an alcoholic beverage and was driving a vehicle while having a concentration of 0.05 percent or more, by weight, of alcohol in his or her blood. Veh C §23140(b).

This offense is punishable as an infraction. See §81.93. On conviction, the clerk of the court must prepare and immediately forward to the DMV an abstract of the record of the court. Veh C §23140(c).

b. [§81.12] Driving With 0.01 Percent Blood-Alcohol Level (Veh C §23136)

It is unlawful for a person under 21 years of age to drive with a blood-alcohol concentration of 0.01 percent or more, as measured by a preliminary alcohol screening (PAS) test or other chemical test. Veh C §23136(a). See §81.53. A violation may be found if the person consumed an alcoholic beverage and was driving with the requisite blood-alcohol level. Veh C §23136(b). See *Foster v Snyder* (1999) 76 CA4th 264, 271, 90 CR2d 207 (statute does not have intent requirement). This offense, sometimes referred to as "the zero tolerance law," is punishable as an infraction. See §81.94.

This statute does not bar prosecution under Veh C §23152 or §23153, or any other provision of law. Veh C §23136(a).

4. [§81.13] Driving Under the Influence of Alcohol—Person on Probation for DUI Violation (Veh C §23154)

It is unlawful for a person who is on probation for a violation of Veh C §23152 or §23153 to drive a vehicle with a blood-alcohol concentration of 0.01 percent or more, as measured by a preliminary alcohol screening (PAS) test or other chemical test. Veh C §23154(a). This offense is punishable as an infraction. See §81.99.

5. [§81.14] Attempted DUI

Attempted DUI constitutes a crime under Pen C §664 and Veh C §23152(a). *People v Garcia* (1989) 214 CA3d Supp 1, 4–5, 262 CR 915 (defendant was sole occupant of vehicle parked in the fast lane with flashers on and had blood-alcohol level of 0.13 percent).

B. Stop, Detention, and Arrest

1. [§81.15] Stop and Detention

A peace officer may stop a vehicle and detain the driver if, based on the totality of circumstances known to the officer, he or she has reasonable cause to suspect that some activity relating to crime has taken place or is occurring or is about to occur, and the person the officer intends to stop or detain is involved in that activity. *In re Tony C.* (1978) 21 C3d 888, 893, 148 CR 366; *People v Conway* (1994) 25 CA4th 385, 388, 30 CR2d 533.

An officer may have reasonable cause to stop a vehicle on suspicion of driving under the influence even if the conduct of the driver does not constitute a specific Vehicle Code violation. See *Arburn v Dep't of Motor Vehicles* (2007) 151 CA4th 1480, 1484–1486, 61 CR3d 15 (vehicle weaved within lane for one block, narrowly missing the curb); *People v Bracken* (2000) 83 CA4th Supp 1, 3–4, 99 CR2d 481 (vehicle weaving

within its own lane for one-half mile); *People v Perez* (1985) 175 CA3d Supp 8, 10–11, 221 CR 776 ("pronounced weaving" within lane for three-quarters of a mile); *People v Faddler* (1982) 132 CA3d 607, 609, 183 CR 328 (driving "erratically").

An anonymous and uncorroborated phone-in tip regarding a possibly intoxicated driver who is weaving all over the roadway may provide an officer reasonable suspicion to make an investigatory stop of the vehicle matching the description in the tip, even if the officer sees nothing to indicate the driver was intoxicated. *People v Wells* (2006) 38 C4th 1078, 1083–1088, 45 CR3d 8; see also *People v Brown* (2015) 61 C4th 968, 981–987, 190 CR3d 583 (anonymous phone call reporting fight in alley where person claimed to have loaded gun gave police reasonable suspicion to stop man whom officer saw driving away from empty alley 3 minutes after call); *Navarette v California* (2014) ___ US ___; 134 S Ct 1683, 1687, 188 L Ed 2d 680 (a 911 caller's report that a vehicle had run her off the road created reasonable suspicion that the other driver was intoxicated).

Unlawful stops and preexisting warrants. The Fourth Amendment is not violated if an officer unlawfully detains a person, learns that the person has a valid, preexisting arrest warrant, and then finds evidence during a search incident to arrest. *Utah v Strieff* (2016) ___ US ___, 136 S Ct 2056, 2063–2064, ___ L Ed 2d ___ (methamphetamine was admissible despite closeness in time between the illegal stop and the arrest, "because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant").

2. Arrest Without Warrant for Misdemeanor DUI

a. [§81.16] Offense Committed in Officer's Presence

As a general rule, a peace officer may make a lawful arrest without a warrant for a misdemeanor offense only if he or she has probable cause to believe that such an offense is being committed in his or her presence. Pen C §836(a)(1); *Music v Dep't of Motor Vehicles* (1990) 221 CA3d 841, 847, 270 CR 692; *People v Wilson* (1985) 176 CA3d Supp 1, 8, 222 CR 540. With respect to a DUI offense, the "in the presence" requirement necessitates that the officer see the vehicle move. *Mercer v Dep't of Motor Vehicles* (1991) 53 C3d 753, 769, 280 CR 745; *Padilla v Meese* (1986) 184 CA3d 1022, 1029, 229 CR 310 (offense did not occur in officer's presence when vehicle, although running, was not moved).

When one officer has reasonable suspicion, based on personal observation, that a motorist may be driving while intoxicated, the arrest may be made by another officer who did not see the motorist commit the alleged DUI, but who is summoned by the first officer. Because both officers participate in the arrest, the arrest complies with Pen C

§836(a)(1). *People v Freeman* (1969) 70 C2d 235, 236–239, 74 CR 259; *Dyer v Dep't of Motor Vehicles* (2008) 163 CA4th 161, 172–174, 77 CR3d 138.

b. [§81.17] Offense Committed Outside Officer's Presence

DUI cases provide an exception to the general rule that a misdemeanor must be committed in the officer's presence for a lawful arrest without a warrant. Vehicle Code §40300.5 authorizes the arrest of a person without a warrant for misdemeanor DUI under Veh C §23152 committed outside of the officer's presence if the officer has reasonable cause to believe that the person has been driving under the influence *and* the person (Veh C §40300.5)

- Is involved in a traffic accident. See *Corrigan v Zolin* (1996) 47 CA4th 230, 54 CR2d 634 (accident need not involve other vehicles); *Cowman v Dep't of Motor Vehicles* (1978) 86 CA3d 851, 853–854, 150 CR 559 (accident need not cause personal injuries or property damage); *Shaffer v Dep't of Motor Vehicles* (1977) 75 CA3d 698, 700, 142 CR 569 (defendant need not be arrested at accident scene; officer had reasonable cause to arrest defendant at his home a short time after accident was reported to officer by witnesses; officer observed defendant's intoxication and damage to defendant's vehicle); *Schmerber v California* (1966) 384 US 757, 768–769, 86 S Ct 1826, 16 L Ed 2d 908 (officer who arrived at scene shortly after accident had probable cause to arrest defendant for DUI when officer smelled alcohol on defendant's breath and observed that defendant's eyes were bloodshot as well as similar symptoms of intoxication);
- Is observed in or about a vehicle that is obstructing a roadway. See *Villalobos v Zolin* (1995) 35 CA4th 556, 562, 41 CR2d 207 (defendant was asleep behind wheel of vehicle stopped on freeway, with engine running);
- Will not be apprehended unless immediately arrested;
- May cause injury to himself or herself, or damage property, unless immediately arrested; or
- May destroy or conceal evidence of the crime unless immediately arrested. See *People v Thompson* (2006) 38 C4th 811, 818–828, 43 CR3d 750 (officers entered defendant's home to apprehend defendant after a witness reported that she had observed that the defendant was under the influence and was driving; officers had good reason to believe defendant would attempt to flee or otherwise act to conceal intoxication; dissipation of blood-alcohol evidence constituted exigent circumstance to justify warrantless

entry to effect DUI arrest); *People v Schofield* (2001) 90 CA4th 968, 972–975, 109 CR2d 429, disapproved on another ground in 38 C4th 811, 828 n3 (metabolic destruction of alcohol or drugs in body by simple passage of time constitutes destruction of evidence).

This statute must be liberally interpreted to further safe roads and the control of driving while under the influence in order to permit arrests to be made within a reasonable time and distance from the scene of a traffic accident. Veh C §40300.6. What constitutes "a reasonable time and distance" depends on the particular factual circumstances of the case. See, *e.g.,* 90 CA4th at 975–976 (warrantless arrest of defendant at defendant's home within short time after accident was lawful arrest); *Corrigan v Zolin, supra,* 47 CA4th at 235 (defendant's arrest 2 hours after accident, at her home that was in neighborhood where accident occurred, was reasonable). The authorization by Vehicle Code §40300.5 of warrantless arrests for a misdemeanor occurring outside of an officer's presence does not violate the Fourth Amendment. *People v Burton* (2013) 219 CA4th Supp 9, 11 162 CR3d 510.

If none of the circumstances set forth in Veh C §40300.5 has occurred and the officer has not observed the defendant driving, then a valid arrest may only be made with a warrant. See *Music v Dep't of Motor Vehicles* (1990) 221 CA3d 841, 850–851, 270 CR 692. Nevertheless, one court has held that a warrantless DUI arrest of a person who was not driving, but whom the officer found intoxicated behind the wheel of the vehicle, was lawful because the person could have been arrested under Pen C §647(f) for being intoxicated in public. See *People v Lively* (1992) 10 CA4th 1364, 1368–1373, 13 CR2d 368.

3. [§81.18] Arrest for Felony DUI

Arrests for felonies in violation of the Vehicle Code (*e.g.*, for felony DUI under Veh C §23153) are treated in the same manner as arrests for the commission of any other felony. Veh C §40301; *People v Superior Court* (Simon) (1972) 7 C3d 186, 199, 101 CR 837.

4. [§81.19] Citizen's Arrest

A citizen's arrest for DUI is proper when based on the citizen's observation that the defendant was driving under the influence; in so doing, the citizen may delegate to a peace officer the act of taking the defendant into physical custody. See Pen C §837(1) (citizen may make arrest for misdemeanor committed in his or her presence); *Johanson v Dep't of Motor Vehicles* (1995) 36 CA4th 1209, 1216–1218, 43 CR2d 42 (parking lot attendant who, observing defendant trying to exit parking facility by driving wrong way and into facility's entrance gate, summoned

officer and reported his observations to officer who made arrest); *Padilla v Meese* (1986) 184 CA3d 1022, 1030–1031, 229 CR 310 (inspector of Department of Food and Agriculture who stopped defendant's vehicle at inspection station observed defendant was intoxicated and reported observations to highway patrol officer, who arrested defendant).

5. [§81.20] Effect of Unlawful Arrest

Evidence obtained as a result of an unlawful arrest is admissible in subsequent court proceedings unless this evidence is subject to exclusion under the federal exclusionary rules. *People v Donaldson* (1995) 36 CA4th 532, 539, 42 CR2d 314. Although Pen C §836(a)(1) provides rules with respect to the lawfulness of a misdemeanor arrest, a court may admit the evidence obtained incident to an arrest made in violation of that section, unless the exclusion is mandated by federal constitutional standards. 36 CA4th at 537–539. This result is compelled by Cal Const, art I, §28(d) (Proposition 8), which abrogated the judicially created exclusionary rule mandating that evidence obtained incident to an unlawful arrest be excluded. 36 CA4th at 534. The Legislature did not revive this exclusionary rule as a remedy for an illegal arrest when it amended Pen C §836 after the passage of Proposition 8. 36 CA4th at 534, 539. Admission of the evidence does not violate federal constitutional standards as long as the arresting officer had probable cause to make the arrest. *People v Trapane* (1991) 1 CA4th Supp 10, 13–14, 3 CR2d 423.

The DMV may not suspend or revoke a person's driving privilege, however, for refusing to submit to a chemical test when the person was not lawfully arrested. *Mercer v Dep't of Motor Vehicles* (1991) 53 C3d 753, 760, 280 CR 745; *Johanson v Dep't of Motor Vehicles* (1995) 36 CA4th 1209, 1216, 43 CR2d 42; *Padilla v Meese* (1986) 184 CA3d 1022, 1026, 229 CR 310.

C. [§81.21] Sobriety Checkpoints

The United States Supreme Court has upheld the use of sobriety checkpoints, stressing the states' strong interest in eradicating the serious problem of drunken driving, the slight intrusion on motorists subject to a brief stop at a highway checkpoint, and the fact that it is for politically accountable officials to decide which reasonable law enforcement techniques should be used and that checkpoints are a reasonable technique. *Michigan Dep't of State Police v Sitz* (1990) 496 US 444, 450–453, 110 S Ct 2481, 110 L Ed 2d 412.

The California Supreme Court has held that sobriety checkpoints are lawful under the state and federal constitutions if they are conducted within certain limitations. *Ingersoll v Palmer* (1987) 43 C3d 1321, 1329, 1338, 1341, 241 CR 42. The Court set forth the following guidelines for

evaluating the intrusiveness of a sobriety checkpoint stop (43 C3d at 1341–1346):

- Decisions to establish checkpoints and regarding site selection and procedures should be made by supervisors, not officers in the field.
- Decisions about which motorists to stop should be made by applying a neutral formula and should not be at the officer's discretion.
- Primary consideration must be given to the safety of motorists and officers.
- The checkpoint must be at the most effective location to achieve the governmental interest, that is, on roads with high rates of alcohol-related accidents or arrests.
- Officials must exercise good judgment as to the time and duration of the checkpoints, considering effectiveness and safety.
- The checkpoint must appear to be duly authorized, with high visibility, warning signs, police vehicles, and uniformed officers.
- The length of time each motorist is detained must be minimal. If the motorist does not display signs of impairment, he or she must be permitted to drive on without further delay. If the officer observes signs of intoxication, the motorist may be directed to a separate area for field sobriety tests, at which point further investigation must be based on probable cause.

Ingersoll also required that there be advance publicity of the checkpoint, but the Court subsequently found that this requirement, when it is the sole infirmity, places too onerous a burden on law enforcement officials. *People v Banks* (1993) 6 C4th 926, 931, 934 n3, 25 CR2d 524. When other problems are found, however, this factor may tip the scales in favor of granting a motion to suppress. *People v Alvarado* (2011) 193 CA4th Supp 13, 20, 123 CR3d 222.

The burden of proving that the *Ingersoll* requirements have not been met is on the accused driver. See *Roelfsema v Dep't of Motor Vehicles* (1995) 41 CA4th 871, 880, 48 CR2d 817. If all vehicles passing through a checkpoint are stopped, a neutral mathematical formula of 100 percent is applied. The burden of proof never shifts back to the DMV if the accused driver does not overcome the Evid C §664 presumption as to the checkpoint's compliance with the *Ingersoll* factors. *Arthur v Dep't of Motor Vehicles* (2010) 184 CA4th 1199, 1207–1209, 109 CR3d 384.

Drug interdiction. The United States Supreme Court, in *City of Indianapolis v Edmond* (2000) 531 US 32, 121 S Ct 447, 148 L Ed 2d 333, held that vehicle checkpoints for the purpose of interdicting unlawful drugs violated the Fourth Amendment, because the primary purpose of the

checkpoints was indistinguishable from the general interest in crime control. The Court noted that it has upheld brief, suspicionless seizures at a sobriety checkpoint aimed at removing drunk drivers from the road (see *Sitz*, above), and in other limited instances, but that it has never approved a checkpoint program whose *primary* purpose was to detect evidence of ordinary criminal wrongdoing. The fact that it may have a *secondary* purpose of keeping impaired motorists off the road does not make such a checkpoint constitutional. This holding does not alter the constitutional status of the checkpoints approved in *Sitz*.

D. Pretrial Procedures

1. [§81.22] Presence of Defendant

Generally, a defendant charged with a misdemeanor need not personally appear in court but may appear through counsel. See Pen C §§977(a)(1), 1429. However, the court may, in an appropriate case, order a defendant charged with a misdemeanor violation of Pen C §191.5(b), Veh C §23103 as specified in Veh C §23103.5, Veh C §23152, or Veh C §23153 to be present at arraignment, at the time of plea, or at sentencing. Pen C §977(a)(3).

2. [§81.23] Accusatory Pleading

An accusatory pleading charging DUI may be in the words of the statute. See Pen C §952. For example, the following language is sufficient to charge a defendant with misdemeanor DUI (Veh C §23152(a), (e), (f)):

> _____ did willfully and unlawfully drive a vehicle while [*under the influence of an alcoholic beverage/under the influence of a drug/under the combined influence of an alcoholic beverage and a drug*].

Although it is usually sufficient to charge a DUI in language permitted by Pen C §952, when the DUI involves a violation of more than one statute, the accusatory pleading must refer to the specific code sections that the defendant allegedly violated. See *People v Clenney* (1958) 165 CA2d 241, 253, 331 P2d 696. See also *Byrd v Municipal Court* (1981) 125 CA3d 1054, 1056, 178 CR 480 (compliance with Pen C §952 may be insufficient to withstand demurrer when statutory language fails to give defendant constitutionally adequate notice of the offense).

One instance of driving under the influence that causes injury to several persons is chargeable only as one count of DUI. *Wilkoff v Superior Court* (1985) 38 C3d 345, 348–353, 211 CR 742. Multiple convictions are permissible, however, if there are multiple acts of driving. *People v Esparza* (1986) 185 CA3d 458, 469–470, 229 CR 739 (defendant was properly sentenced to one term for DUI and causing injury to a bicyclist

and to a consecutive term for vehicular manslaughter as to another cyclist when, after defendant struck and injured first victim, he continued to drive and struck and killed second victim).

3. [§81.24] Obtaining Copy of Defendant's Driving Record

In any case charging a violation of Veh C §23152 or §23153, the court must obtain a copy of the defendant's driving record from the DMV and may obtain records from the Department of Justice or any other source to determine if the defendant has been convicted of any separate violations of Veh C §23152, §23153, or §23103 (guilty plea to reckless driving in place of charge under Veh C §23152) within 10 years of the charged offense. Veh C §23622(b). See *People v Dunlap* (1993) 18 CA4th 1468, 1477–1481, 23 CR2d 204 (admissibility of CLETS rap sheet to prove priors). See also §§81.71–81.73, 81.75–81.76 (sentencing enhancements on conviction of subsequent offense within 10 years of prior offense). The DMV is required to furnish the court with a copy of this record. Veh C §13209.

If any separate convictions of violations of Veh C §23152 or §23153 are reported to have occurred within 10 years of the charged offense, the court must notify each court where any of the separate convictions occurred for the purpose of enforcing terms and conditions of probation under Veh C §23602. Veh C §23622(c).

4. [§81.25] OR Investigative Report

If the court employs an investigative staff to recommend whether a defendant should be released on his or her own recognizance, that staff must prepare a report when the defendant is charged with a felony violation of Veh C §23153(a). Pen C §1318.1(b). The report must contain a recommendation for or against OR release and written verification of (1) any outstanding warrants against the defendant, (2) any prior incidents where the defendant has failed to make a court appearance, (3) the defendant's criminal record, and (4) the defendant's residence during the past year. Pen C §1318.1(b).

5. Plea Bargaining

a. [§81.26] Misdemeanor DUI Charges

A person who is charged with misdemeanor DUI under Veh C §23152 may enter into a plea bargain with the prosecution to instead plead guilty or no contest to a charge under Veh C §23103 of reckless driving without causing bodily injury. Veh C §23103.5(a). The prosecution must state for the record a factual basis for the satisfaction or substitution, including facts showing whether the defendant had consumed any alcoholic beverage or ingested or administered any drug, or both, in

connection with the case. Veh C §23103.5(a). If the statement indicates that the defendant did so consume, ingest, or administer, the guilty or no-contest plea will be treated as a prior offense in future DUI prosecutions of the defendant, and the court must advise the defendant of that fact before accepting the defendant's plea. Veh C §23103.5(b), (c). If the prosecution does not make such a statement at the time of the defendant's plea and the defendant does not object to the omission and is expressly advised that the guilty plea may be used as a prior offense in a subsequent prosecution to enhance the sentence, the reckless driving conviction may be so used despite the omission. *People v Claire* (1991) 229 CA3d 647, 649–655, 280 CR 269.

b. [§81.27] Felony DUI Charges

Plea bargaining in any felony case in which the indictment or information charges a driving offense while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination of them, is prohibited unless (Pen C §1192.7(a)(2)):

- There is insufficient evidence to prove the People's case;
- Testimony of a material witness cannot be obtained; or
- A reduction or dismissal would not result in a substantial change in sentence. The court may impose a bargained-for sentence following a felony DUI conviction without violating the Victim's Bill of Rights (Proposition 8), as long as the court notes that the sentence is the one it would have imposed without a negotiated sentence. *People v Arauz* (1992) 5 CA4th 663, 669–671, 7 CR2d 145.

6. Dismissal

a. [§81.28] DUI Allegation or Allegation of Separate Conviction

When the court dismisses an allegation of a violation of Veh C §23152, substitutes a lesser offense for such an allegation, or dismisses or strikes an allegation of a separate conviction, the court must specify on the record the reasons for the order. Veh C §23635. The court must also specify on the record whether the dismissal, substitution, or striking was requested by the prosecution, or whether the prosecution concurred in or opposed this action. Veh C §23635.

When the prosecution makes a motion for dismissal or substitution or for the striking of a separate conviction, it must submit a written statement giving the reasons for the motion, which must include, but need not be limited to, problems of proof, the interests of justice, why another offense is more properly charged, and any other pertinent reasons. If the reasons

include the "interests of justice," the statement must specify all of the factors that contributed to this conclusion. Veh C §23635. This statement becomes part of the court record. Veh C §23635.

b. [§81.29] Defendant in Custody on Another Case

Violations of Veh C §23152 or §23153 are specifically exempt from the requirement that a case be dismissed if the defendant is in custody on another case, as specified. Veh C §41500(f).

7. [§81.30] Motion To Strike Separate Conviction

The defendant may challenge the constitutionality of a separate conviction entered in a separate proceeding that has not been challenged previously and upheld. Veh C §§23624, 41403 (determination that prior conviction was unconstitutional is res judicata in all subsequent cases). Even if a separate conviction has been challenged and previously upheld, the defendant may challenge it again if an appellate court decision announced after the prior challenge has created a new basis on which to challenge the constitutionality of the separate conviction. Veh C §23624.

The defendant must move to strike the separate conviction by filing with the clerk of the court a written statement specifying the deprivation of constitutional rights. Veh C §41403(a). A copy of the statement must be served on the court that rendered the separate conviction and on the prosecutor in the current proceeding, at least 5 court days before the hearing on the defendant's motion. Veh C §41403(a). A hearing must be held before the trial of the action to determine the constitutional validity of the charged separate conviction. Veh C §41403(b).

At the hearing, the prosecution has the initial burden of producing evidence of the separate conviction sufficient to justify a finding that the defendant has a separate conviction. Veh C §41403(b)(1). The defendant then has the burden of proving by a preponderance of the evidence that his or her constitutional rights were infringed in the separate proceeding. Veh C §41403(b)(2) (if separate conviction was based on guilty or no contest plea, defendant must provide court with specified evidence of prior plea); *People v Zavala* (1983) 147 CA3d 429, 441, 195 CR 527 (defendant has burden of producing evidence from reporter's transcript or other source that prior conviction was unconstitutional). If the defendant meets this burden, the prosecution has a right to produce rebuttal evidence. Veh C §41403(b)(3). The court must make a finding based on the evidence, and must strike the separate conviction from the accusatory pleading if the court finds that the separate conviction is constitutionally invalid. Veh C §41403(b)(4). See *Garcia v Superior Court* (1997) 14 C4th 953, 966, 59 CR2d 858 (defendant has no right under federal or state constitutions to collaterally challenge prior conviction on grounds of ineffective assistance

of counsel in course of current prosecution for noncapital offense); *People v Superior Court* (Almaraz) (2001) 89 CA4th 1353, 1356–1361, 107 CR2d 903 (prior conviction is not constitutionally invalid based on use of noncertified interpreter in that proceeding); *People v Green* (2000) 81 CA4th 463, 466–469, 96 CR2d 811 (defendant may not collaterally attack out-of-state prior conviction on ground of lack of waivers of right to jury trial, right to confront witnesses, and privilege against self-incrimination, unless there is evidence that these procedural requirements operated in that jurisdiction at time of plea).

If the defendant does not comply with the 5-day notice requirement or does not produce the evidence required by Veh C §41403(b)(2), the court may hear the motion at the time of sentencing instead of continuing the trial, except that, if good cause is shown for the failure to provide notice or produce the required evidence, the court must grant a continuance of the trial for a reasonable period. Veh C §41403(c). The procedure, burden of proof, and burden of producing evidence are the same regardless of when the court hears the motion. Veh C §41403(c).

The prosecution may appeal, before judgment, an order striking a separate conviction. *People v Kirk* (1992) 7 CA4th 855, 858–860, 9 CR2d 270.

8. [§81.31] Bifurcation of Separate Conviction

If a separate conviction is not stricken before the trial and the issue of its truth goes to trial, the defendant is entitled to request that the issue be bifurcated from the issue of guilt on the substantive DUI offense. *People v Weathington* (1991) 231 CA3d 69, 90, 282 CR 170. Bifurcation of prior convictions is discretionary but should be granted when the defendant will be unduly prejudiced if bifurcation is not granted. *People v Calderon* (1994) 9 C4th 69, 77–78, 36 CR2d 333.

The main situation in which denial of bifurcation would not result in prejudice is when the jury will learn of the prior conviction anyway. 9 C4th at 78. Factors that affect the potential for prejudice include the degree to which the prior offense is similar to the charged offense, how recently the prior conviction occurred, and the relative seriousness or inflammatory nature of the prior conviction as compared with the charged offense. 9 C4th at 79. If it appears likely that admission of evidence of the prior conviction would unduly prejudice the defendant, the court should consider whether this potential for prejudice will be lessened for some reason, such as because evidence that the defendant has committed one or more uncharged criminal offenses will be admitted for purposes other than sentence enhancement. 9 C4th at 79.

The risk of undue prejudice posed by the admission of evidence of a prior conviction, considered against the minimal inconvenience generally caused by bifurcating the trial, frequently will militate in favor of granting

the defendant's timely request for bifurcation. 9 C4th at 79. The court may conditionally grant the defendant's bifurcation motion and reconsider this ruling at the close of the prosecution's case in chief and again at the close of the defense case, in light of subsequent developments in the proceedings. 9 C4th at 79.

☛ JUDICIAL TIP: When the issue of a prior conviction has been bifurcated and the jury returns a conviction on the substantive offense, many defendants then admit the prior. If that happens, the court should obtain an informed waiver of the defendant's privilege against self-incrimination, right to a jury trial, and right to confront one's accusers. *In re Yurko* (1974) 10 C3d 857, 863 n6, 112 CR 513; see also *People v Cross* (2015) 61 C4th 164, 168, 187 CR3d 139 (defendant's unwarned stipulation to a prior conviction was invalid under *Yurko* because it subjected him to a longer prison term).

E. Trial

1. [§81.32] Voir Dire

The following are questions that the court may want to incorporate into its voir dire of a jury in a DUI case:

- Does anyone choose not to drive a motor vehicle? If not, why? Are any of you not licensed to drive?
- Is there anyone who abstains from drinking alcoholic beverages? If so, do you have any bias against those who choose to drink alcoholic beverages?
- Have any of you been injured or suffered any monetary loss because of a drunk driver? Have any of you had a friend, family member, or other loved one injured or killed by a drunk driver?
- Is there anyone who is employed by or has any association with any business or organization connected in any way with the distribution or sale of alcoholic beverages?
- Do any of you belong to or contribute, financially or otherwise, to MADD (Mothers Against Drunk Driving) or similar organization that takes a definite position on the use and consumption of alcoholic beverages?
- Have any of you ever seen a field sobriety test being administered? Have any of you ever seen a test administered to determine the amount of alcohol in a person's blood? Does anyone have any training or special experience in the principles of testing blood, breath, or urine for alcohol content?

- Do any of you feel that it is illegal to drink and drive regardless of the amount of alcohol consumed or the effect it has on the driver? Does anyone believe that a person is automatically impaired in his or ability to drive after having one or two drinks?
- Do any of you have any personal views about the subject of drinking alcoholic beverages that may make it difficult or impossible for you to be unbiased and fair to both sides in this case?

2. Evidentiary Issues

a. Circumstantial Evidence

(1) [§81.33] Proof That Defendant Was Under the Influence

Proof that the defendant was under the influence may be established by circumstantial evidence other than the results of a breath, blood, or urine test, *e.g.*, slurred speech or unsteady gait. *Burg v Municipal Court* (1983) 35 C3d 257, 266 n10, 198 CR 145. But proof that a defendant charged with a "per se" DUI violation had an 0.08 percent blood-alcohol level cannot be established by circumstantial evidence apart from a valid chemical test. *Baker v Gourley* (2002) 98 CA4th 1263, 1273, 120 CR2d 348 (usual symptoms of intoxication can manifest themselves at a blood-alcohol level below 0.08 percent). But see *People v Warlick* (2008) 162 CA4th Supp 1, 5–8, 77 CR3d 564 (*Baker* limited to "admin per se" laws; expert testimony relying on retrograde extrapolation evidence is admissible in a Veh C §23152(b) prosecution; statute does not preclude prosecutions lacking a chemical test showing blood-alcohol level of 0.08 percent or greater).

A defendant's refusal to take a required chemical test is admissible to prove the defendant's consciousness of guilt, and the jury may be so instructed. See §81.36.

(2) [§81.34] Proof That Defendant Was Driving

A "slight movement" of the vehicle in the arresting officer's presence constitutes direct evidence that the vehicle was being driven. *People v Wilson* (1985) 176 CA3d Supp 1, 8, 222 CR 540. Moving the vehicle even a few inches constitutes driving. *Music v Dep't of Motor Vehicles* (1990) 221 CA3d 841, 850, 270 CR 692. On the definition of driving, see §81.5.

If the arresting officer does not see the defendant driving the vehicle, proof that the defendant was driving may be established by circumstantial evidence (*Mercer v Dep't of Motor Vehicles* (1991) 53 C3d 753, 762, 280 CR 745), for example:

- *Elimination of other possible drivers.* Once other possible drivers have been eliminated from consideration, the defendant's proximity to the vehicle is evidence from which a reasonable inference can be drawn that the defendant was the driver. For example, the defendant who was found standing alone next to the vehicle after the accident and whose injuries were consistent with having sat in the driver's seat was properly found to be the driver. See *People v Gapelu* (1989) 216 CA3d 1006, 1009, 265 CR 94. But see *People v Moreno* (1987) 188 CA3d 1179, 1186, 1190, 233 CR 863 (corpus delicti was not established when there was no evidence that defendant was driver and there were other people at scene who may have driven); *People v Nelson* (1983) 140 CA3d Supp 1, 3, 189 CR 845 (corpus delicti was not established because it was possible other individuals may have been driving). The corpus delicti for a DUI offense was also established in a case in which the officers found the vehicle parked on the side of the highway with a flat tire, the defendant was sitting in the passenger seat of the vehicle while her companion was changing the tire, they were the only individuals in the vicinity of the vehicle, and both were under the influence of alcohol. The prosecution was not required to establish who was driving as a condition precedent for the admissibility of the defendant's statement that she was the driver. Once the prosecution established that a reasonable inference to be drawn from the evidence was that a person under the influence of alcohol drove the vehicle on the highway, it was entitled to use the defendant's statement to establish that she was the driver. It was not required to eliminate all other inferences to establish the elements of the crime of DUI. *People v McNorton* (2001) 91 CA4th Supp 1, 5–6, 110 CR2d 930. See also *People v Martinez* (2007) 156 CA4th 851, 855–856, 67 CR3d 670 (corpus delicti established by evidence that an automobile was parked facing the wrong way with its engine running and its headlights on, and evidence that there were only two people in the vicinity, one of whom was in the passenger seat with her seatbelt buckled, and one of whom was intoxicated).
- *Parked vehicle.* The corpus delicti for a DUI offense was established when the officers found the vehicle parked with its front tire missing and raised on a hand jack, and the defendant had the keys to the vehicle and lug nuts in his pocket. See *People v Scott* (1999) 76 CA4th 411, 417–418, 90 CR2d 435. See also *People v Komatsu* (1989) 212 CA3d Supp 1, 5, 261 CR 681 (corpus delicti was established when officers discovered that vehicle was blocking roadway, parking lights of vehicle were on, defendant was only person in vicinity of vehicle and was

intoxicated, and defendant was sleeping in front passenger's seat holding car keys). But see *Music v Dep't of Motor Vehicles, supra,* 221 CA3d at 850 (warrantless arrest of defendant was illegal because defendant did not move vehicle in officer's presence; arrest occurred when officer observed defendant sitting in driver's seat of his vehicle, which was parked in parking stall with engine running).

b. Breath, Blood, or Urine Tests

(1) [§81.35] Implied Consent Law

Alcohol content of blood. Any person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her breath or blood, for the purpose of determining the alcohol content of his or her blood, when the person has been lawfully arrested for a violation of Veh C §23140, §23152, or §23153. Veh C §23612(a)(1)(A). Police do not need a search warrant to administer a breath test incident to a drunk driving arrest. *Birchfield v North Dakota* (2016) ___ US ___, 136 S Ct 2160, 2184, ___ L Ed 2d ___. See §81.56.

Drug content of blood. Similarly, consent is deemed given for chemical testing of a person's blood for the purpose of determining the drug content of the blood if the person is so arrested. If a blood test is unavailable, consent is deemed given for chemical testing of a person's urine. Veh C §23612(a)(1)(B).

Miranda warning not required. A *Miranda* warning is not required to be given to the driver before administering a blood, breath, or urine test to determine whether he or she is under the influence, because these tests do not elicit evidence of a testimonial or communicative nature. *Pennsylvania v Muniz* (1990) 496 US 582, 600–605, 110 S Ct 2638, 110 L Ed 2d 528 (statements that driver makes in response to test are admissible without *Miranda* warning because questioning attendant to legitimate police procedures is not "interrogation" within meaning of *Miranda*). But see *Hoberman-Kelly v Valverde* (2013) 213 CA4th 626, 633, 152 CR3d 661 ("[T]he officer is obligated to attempt to clarify an arrested person's confusion over when the right to counsel arises.").

Unlawful arrest. An essential prerequisite for the application of the implied consent law is a *lawful* arrest for driving under the influence. *Music v Dep't of Motor Vehicles* (1990) 221 CA3d 841, 847, 270 CR 692. When the defendant's arrest is not lawful, the implied consent law and any penalties for not complying with that law, *e.g.,* a defendant's refusal to submit to a blood-alcohol test, may not be applied to the defendant. 221 CA3d at 851.

(2) Refusal To Take Test

(a) [§81.36] Consequences of Refusal

Sentencing and license suspension. The arrested person must be told that his or her refusal to submit to or complete a required test will result in a fine and mandatory imprisonment if the person is convicted of DUI, and suspension or revocation of his or her driver's license. Veh C §23612(a)(1)(D), (e)–(g). License suspension or revocation is mandatory when the person refuses to submit to or complete a required test, even if he or she is later acquitted or the DUI charge is dismissed. See Veh C §13353(a); *Anderson v Cozens* (1976) 60 CA3d 130, 144 n12, 131 CR 256. Unlike Veh C §13353.2, which requires the DMV to reinstate the license of a person who is acquitted of driving with a blood-alcohol concentration of 0.08 percent or more, Veh C §13353 does not have a similar provision for defendants charged with refusing to take a chemical test, even when they are found factually innocent of this charge. *Burnstine v Dep't of Motor Vehicles* (1996) 51 CA4th 1428, 1430–1432, 60 CR2d 89.

Sentencing enhancements. On conviction of a violation of Veh C §23152 or §23153, the defendant is subject to the sentencing enhancements set forth in Veh C §23577(a). Before these enhancements may be imposed, the defendant's willful refusal or failure to complete the required test must be pleaded and proved. Veh C §23577(b). See §81.64.

Use in court. The person should be advised that his or her refusal to submit to a test may be used against him or her in court. Veh C §23612(a)(4). "Although providing the admonition about the consequences of withdrawing consent would be considered in the totality of the circumstances surrounding the consent, the admonition is not required in order to find voluntary consent." *People v Agnew* (2015) 242 CA4th Supp 1, 10–11, 195 CR3d 486 (declining to make admonition constitutional requirement). See *South Dakota v Neville* (1983) 459 US 553, 564–566, 103 S Ct 916, 74 L Ed 2d 748 (refusal to take blood-alcohol test after lawful request is not act coerced by officer and is not protected by privilege against self-incrimination). See also *Quintana v Municipal Court* (1987) 192 CA3d 361, 366, 237 CR 397 (statute prohibiting defendant from refusing to submit to chemical test does not violate privilege against self-incrimination). However, an officer's failure to give this advisement goes to the weight, not the admissibility, of the evidence. *South Dakota v Neville, supra,* 459 US at 565–566; *People v Municipal Court* (Gonzales) (1982) 137 CA3d 114, 117–119, 186 CR 716.

Resisting arrest. An arrested person's simple, peaceable refusal to submit to a chemical test is constitutionally protected, and it alone does not support a conviction of resisting, obstructing, or delaying a peace officer under Pen C §148(a). *People v Valencia* (2015) 240 CA4th Supp

11, 20–22, 193 CR3d 272 ("[T]he manner of refusal or the defendant's associated conduct may very well support a lawful conviction under" Pen C §148.).

(b) [§81.37] What Constitutes Refusal

The person's refusal to submit to a test unless it is administered by his or her own physician constitutes a refusal under the statute (*Payne v Dep't of Motor Vehicles* (1991) 235 CA3d 1514, 1518–1519, 1 CR2d 528), as does a refusal to submit to a test unless the person's attorney is present (*Ent v Dep't of Motor Vehicles* (1968) 265 CA2d 936, 938, 71 CR 726) or until the person has had an opportunity to communicate with his or her attorney (*Payne v Dep't of Motor Vehicles, supra,* 235 CA3d at 1518). See *Webb v Miller* (1986) 187 CA3d 619, 625, 232 CR 50 (defendant's demand to look at officer's card containing information on accuracy of various tests before submitting to test was a refusal). Because the test must be administered without delay, when a person refuses to submit to a test and then changes his or her mind, the person is deemed to have refused to comply with the testing requirement. See *Covington v Dep't of Motor Vehicles* (1980) 102 CA3d 54, 57–59, 162 CR 150 (defendant's refusal to submit to test, followed by consent to breath test 90 minutes later, was a refusal).

A defendant's silence and refusal to choose a test is a sufficient refusal to submit to a chemical test, as is an ineffectual attempt to blow once during a breath test. A delayed submission to a chemical test does not allow an arrestee to avoid the consequences of an initial refusal. *Garcia v Dep't of Motor Vehicles* (2010) 185 CA4th 73, 82–84, 89, 109 CR3d 906. A refusal also occurs when a person elects a blood test, cooperates in taking the test, but efforts to administer the test fail, and the person then refuses to take a breath test. *White v Dep't of Motor Vehicles* (2011) 196 CA4th 794, 798–800, 126 CR3d 774.

(c) [§81.38] Lack of Capacity To Refuse Test

A person who is unconscious or otherwise in a condition rendering the person incapable of refusing to take a chemical test is deemed not to have withdrawn consent, and a test may be administered whether or not the person is told that failure to submit to or complete the test will result in the suspension or revocation of his or her license. Veh C §23612(a)(5). The issue of whether a warrantless blood draw from an unconscious person violates the Fourth Amendment is pending before the California Supreme Court. *People v Arredondo* (S233582). A person who is dead is deemed not to have withdrawn consent, and a test may be administered at the officer's direction. Veh C §23612(a)(5).

(3) Choice of Test

(a) [§81.39] Driving Under Influence of Alcohol

The officer must advise a person arrested for driving under the influence of alcohol that he or she has a choice of a blood or breath test. If the person is incapable of completing the chosen test, he or she must submit to the remaining test. Veh C §23612(a)(2)(A). If neither a blood or breath test is available, the arrested person is deemed to have consented to and must submit to a urine test. Veh C §23612(a)(1)(A), (2)(A), (d)(2). See *People v Superior Court* (Maria) (1992) 11 CA4th 134, 140–144, 13 CR2d 741 (when test person chose was not available, person is not entitled to dismissal of DUI charge as a sanction, except on showing of bad faith by police). A breath sample taken with a malfunctioning device is not considered a completed test, and the person must either take another breath test on a properly functioning device, or must take another type of test. *Gobin v Alexis* (1984) 153 CA3d 641, 648–650, 200 CR 397. When the defendant requests a breath test but fails to follow the officer's instructions for completing the test so that the testing device is unable to record a reliable blood-alcohol content reading, the defendant may be compelled to take a blood test. *People v Sugarman* (2002) 96 CA4th 210, 214–216, 116 CR2d 689.

(b) [§81.40] Driving Under Influence of Drugs

The officer must advise a person arrested for driving under the influence of drugs, or the combined influence of drugs and alcohol, that he or she has a choice of a blood or breath test. Veh C §23612(a)(2)(B). A person who chooses a breath test may also be required to submit to a blood test if the officer has a clear indication that the additional test will reveal evidence of the person being under the influence of drugs. Veh C §23612(a)(2)(C) (officer must state facts underlying this conclusion in his or her report). If the person arrested is incapable of completing a blood test, he or she must submit to and complete a urine test. Veh C §23612(a)(2)(C).

(c) [§81.41] Person Required To Be Transported to Medical Facility

If the arrested person is required to be transported to a medical facility for treatment before a chemical test is administered, and it is not feasible at that facility to administer a blood or breath test, the person has a right to choose among the tests that are available at the facility, including a urine test, and must be so advised. Veh C §23612(a)(3).

(d) [§81.42] Failure To Give Required Advisements Regarding Choice of Tests

The failure to advise a defendant of the right to a choice of tests does not require the exclusion of the results of a properly conducted test. *People v Bloom* (1983) 142 CA3d 310, 317–318, 190 CR 857. However, if the defendant chose to take a urine test and provided a urine sample, he or she may not be forced to submit to a blood test in addition; the results of the blood test in such a case are inadmissible at trial. *People v Fiscalini* (1991) 228 CA3d 1639, 1644–1646, 279 CR 682. See *Nelson v City of Irvine* (9th Cir 1998) 143 F3d 1196, 1203–1205 (when suspected drunk driver requests breath or urine test and such test is available, but is instead coerced into taking blood test, his or her Fourth Amendment rights are violated, and he or she has a cause of action under 42 USC §1983).

(e) [§81.43] No Right to Attorney Before or During Test

The arrested person must be advised that he or she does not have the right to have an attorney present before stating whether he or she will submit to chemical testing, before deciding which test to take, or during the administration of the test. Veh C §23612(a)(4). See *Schmerber v California* (1966) 384 US 757, 765–766, 86 S Ct 1826, 16 L Ed 2d 908 (because blood-alcohol test is not testimonial in nature, *Miranda* rule concerning right to consult with attorney before questioning is inapplicable).

(f) [§81.44] Retention of Test Samples

A person who selects a breath test must be informed, before or after the test, that the equipment used does not retain a sample, and that no breath sample will be available for analysis after the test. Veh C §23614(a); *In re Cheryl S.* (1987) 189 CA3d 1240, 1242–1243, 235 CR 42 (fundamental fairness does not require advisement before, rather than after, person submits to breath test). The person must then be advised that he or she may provide a blood or urine sample to be retained, at no cost, for subsequent testing. Veh C §23614(b). The person must also be informed that the blood or urine sample may be tested by either party in a criminal prosecution, and that the failure to perform a test places no duty on the opposing party to perform it and does not affect the admissibility of other evidence regarding the arrested person's blood-alcohol content. Veh C §23614(c). The failure to give any of these advisements does not affect the admissibility of evidence of the arrested person's blood-alcohol content. Veh C §23614(d).

(4) [§81.45] Exemptions From Blood Test

Hemophiliacs and persons with heart conditions who are using an anticoagulant under a physician's direction are exempt from the requirement of submitting to a blood test, but must submit to and complete a urine test. Veh C §23612(b), (c).

(5) [§81.46] Arrested Individual's Right To Request Test

An arrested person has a right to request a blood or breath test to determine the alcohol content of his or her blood. If so requested, the arresting officer must have the test performed. Veh C §23612(d)(1). See *In re Newbern* (1961) 55 C2d 508, 513, 11 CR 551 (right to test in order to obtain negative results that may exonerate arrestee when arresting officer does not initiate test). On the defendant's right to request an additional test, see §81.50.

(6) Administration of Test

(a) [§81.47] Breath Test

A breath sample may be collected only after the arrested person has been under continuous observation for at least 15 minutes before its collection, and during that time, the person must not have ingested food or drink, smoked, regurgitated, or vomited. 17 Cal Code Regs §1219.3. The arresting officer need not have direct and unbroken eye contact with the defendant for this period, as long as the officer is able to use all of his or her senses to ensure compliance with the continuous observation requirement. *Manriquez v Gourley* (2003) 105 CA4th 1227, 1234–1238, 130 CR2d 209 (requirement satisfied when officer observed defendant who was seated in backseat of patrol car through rear view mirror and engaged in conversation with defendant as he was driving to jail). See also *Taxara v Gutierrez* (2003) 114 CA4th 945, 950–951, 8 CR3d 172 (observation can be conducted by more than one officer as long as the observation is continuous). Two samples must be collected that do not differ from each other by more than 0.02 percent. 17 Cal Code Regs §1221.4(a)(1). If the first two samples are not within 0.02 percent of each other, the person must continue to give samples until the difference between any two of them is within this range. *People v French* (1978) 77 CA3d 511, 521–522, 143 CR 782. The person's refusal to give a subsequent sample when required is considered a refusal or failure to complete the breath test. *Hasiwar v Sillas* (1981) 118 CA3d 295, 298–299, 173 CR 358.

The breath test may be conducted by use of a breathalyzer, which may preserve a test sample for retesting (see *People v Hitch* (1974) 12 C3d 641, 644–645, 117 CR 9, overruled on another ground in 47 C3d

1194, 1234), or an intoximeter (see *Intoximeters, Inc. v Younger* (1975) 53 CA3d 262, 267–270, 125 CR 864), which takes an instantaneous reading but does not preserve any samples. The test must be conducted by a properly trained person, using a machine that has been tested for accuracy every 10 days or after 150 tests, whichever comes first. 17 Cal Code Regs §1221.4(a)(2), (6) (records must be kept of testing of each machine).

A defense expert's bald conclusion that there is a margin of error of "plus or minus 0.02 percent" inherent in a blood-alcohol level (BAC) measured with an "Intoxilyzer 5000," an approved DMV breath testing device (17 Cal Code Regs §1221.3), does not rebut the presumptively valid BAC results. *Borger v Dep't of Motor Vehicles* (2011) 192 CA4th 1118, 1121–1122, 121 CR3d 816. Similarly, a defense expert's testimony that breath tests are inherently inaccurate and scientifically unreliable would be improper because the Legislature has made the policy decision that federally approved, properly calibrated and used breath-testing machines are reliable. *People v Vangelder* (2013) 58 Cal.4th 1, 7–13, 38–39, 164 CR3d 522.

(b) [§81.48] Blood Test

The blood test must be administered at the direction of a peace officer (Veh C §23612(a)(1)(C)), but only licensed physicians and surgeons, registered nurses, licensed vocational nurses, licensed clinical laboratory scientists or bioanalysts, certified phlebotomy technicians, unlicensed laboratory personnel regulated by Bus & P C §§1242, 1242.5, and 1246, and certified paramedics acting at the officer's request may withdraw blood. Veh C §23158(a) (this limitation does not apply to taking of breath specimens). Blood should be taken as soon as possible after the alleged offense, and enough should be taken to permit duplicate determinations. 17 Cal Code Regs §1219.1(a), (b). Any blood remaining after testing must be retained for 1 year after the date of collection and be made available to the defendant at his or her request for additional testing. 17 Cal Code Regs §1219.1(g).

Withdrawing the defendant's blood in jail rather than at a hospital is not a violation of the Fourth Amendment, absent evidence that the jail location was unsafe or unsanitary, or that personnel present would fail to properly respond in the event of a medical problem. *People v Ford* (1992) 4 CA4th 32, 37–38, 5 CR2d 189.

(c) [§81.49] Urine Test

A person given a urine test must be afforded privacy that will ensure the accuracy of the specimen while maintaining the person's dignity. Veh C §23158(i). However, to obtain an approved urine sample, the person must initially void his or her bladder in the administering officer's

presence. 17 Cal Code Regs §1219.2(a). This first sample is not the approved sample and need not be retained. 17 Cal Code Regs §1219.2(a). At least 20 minutes after the first sample is given, the person must give a second sample, which is the approved sample. 17 Cal Code Regs §1219.2(a). Failure to give a second sample is considered a failure to complete the test. *Miles v Alexis* (1981) 118 CA3d 555, 560, 173 CR 473. The sample must be kept in a container with a preservative, and whatever remains after the test must be retained for 1 year after the date of collection and made available to the defendant at his or her request for additional testing. 17 Cal Code Regs §1219.2(b), (c).

(d) [§81.50] Defendant's Right to Test Results and To Obtain Own Test

On request, full information concerning the test must be made available to the person or the person's attorney. Veh C §23158(c). The person may, at his or her own expense, obtain an additional test conducted by someone of the person's choosing; however, the failure or inability to obtain an additional test does not preclude the admissibility in evidence of the test taken at the officer's direction. Veh C §23158(b).

As discussed in §81.47, breath samples are not required to be retained. See *California v Trombetta* (1984) 467 US 479, 488–490, 104 S Ct 2528, 81 L Ed 2d 413 (no duty to preserve test results that are unlikely to have exculpatory value because of established accuracy of breath test). Blood and urine samples must be retained at no cost to the defendant. Veh C §23614(a), (b). Any retained samples must be made available to the defendant on request. See *Brady v Maryland* (1963) 373 US 83, 86–88, 83 S Ct 1194, 10 L Ed 2d 215.

Police failure to preserve a blood or urine sample, constituting "borderline" evidence that is only possibly exculpatory does not violate due process, unless it was done in bad faith. See *Arizona v Youngblood* (1988) 488 US 51, 55–59, 109 S Ct 333, 102 L Ed 2d 281. For bad faith to exist, the exculpatory value of the evidence must be apparent to the police before it is destroyed, the evidence must be expected to play a significant role in the defense, and the defendant must be unable to obtain comparable evidence by other reasonably available means. *California v Trombetta, supra,* 467 US at 488–489 (absent this showing, test results are admissible).

(7) [§81.51] Preliminary Alcohol Screening (PAS) Test

As a further investigative tool, the officer may use a preliminary alcohol screening (PAS) test, which indicates the presence or concentration of alcohol based on a breath sample, in order to establish reasonable cause that the person is violating Veh C §23140, §23152, or

§23153. Veh C §23612(h). The officer must advise the person that he or she is being requested to take the test to assist the officer in determining if the person is under the influence of alcohol and/or drugs. Veh C §23612(i). The officer must also advise the person that the obligation to submit to a blood, breath, or urine test is not satisfied by submitting to a PAS test, and that the person has a right to refuse to take a PAS test. Veh C §23612(i).

In addition to establishing reasonable cause to arrest, the results of a PAS test may be admitted as substantive evidence of intoxication either on a showing of compliance with the forensic alcohol training and testing regulations contained in 17 Cal Code Regs §§1221 et seq, *or,* alternatively, on proof of three foundational prerequisites: (1) the device was working properly, (2) the test was properly administered, and (3) the operator was competent and qualified. *People v Williams* (2002) 28 C4th 408, 414–418, 121 CR2d 854 (court upheld admission of alco-sensor test results that met the alternative foundational requirement although there was evidence of noncompliance with certain Title 17 regulations; noncompliance affects the weight of the evidence, not its admissibility); *People v Adams* (1976) 59 CA3d 559, 561, 131 CR 190.

The admissibility of PAS evidence is subject to the court's discretion under Evid C §352. *People v Bury, supra,* 41 CA4th at 1207.

Evidence of a person's refusal to take a PAS test is not admissible at trial. *People v Jackson* (2010) 189 CA4th 1461, 1467, 1469, 117 CR3d 775.

(8) [§81.52] Horizontal Gaze Nystagmus (HGN) Test

One of the field sobriety tests that the officer may administer is the horizontal gaze nystagmus (HGN) test. The test involves having the suspect follow a moving object with his or her eyes, them measuring the angle at which an involuntary jerking of the eyes begin. Depending on the observations of the officer at the angle of onset, the prosecution may argue that the failure of the defendant to follow the object or a jerking of the eyes indicates the presence of alcohol and/or drugs. The officer's observations may be admitted as evidence of the presence of alcohol, as will the officer's opinion, based on the HGN test in combination with other tests, that the defendant was under the influence. The officer's testimony, however, should not draw a correlation between the HGN test and any specific blood-alcohol level. *People v Joehnk* (1995) 35 CA4th 1488, 1493–1508, 42 CR2d 6 (HGN evidence, when viewed with other relevant indications, meets *Kelly-Frye* standard for general acceptance in the scientific community for purposes of deciding whether a person is under the influence).

(9) [§81.53] Testing of Driver Under 21 Years of Age

A person under 21 years of age who drives a motor vehicle is deemed to have consented to a preliminary alcohol screening (PAS) test or other chemical test for determining the presence of alcohol in the person if lawfully detained for an alleged violation of Veh C §23136(a) (driving with blood-alcohol level of 0.01 percent or more) (see §81.12). Veh C §23136(c)(1). See *Taylor v Dep't of Motor Vehicles* (1995) 36 CA4th 812, 814–816, 42 CR2d 758 (detention must be lawful under general criminal laws; lesser standard is not applicable merely because person is a minor). The testing must be incidental to a lawful detention and administered at the direction of a peace officer having reasonable cause to believe the person was driving a vehicle while having a 0.01 percent blood-alcohol concentration. Veh C §23136(c)(2). The person must be told that his or her failure to submit to or complete a PAS test or other chemical test as requested will result in the suspension or revocation of his or her license for 1 to 3 years. Veh C §§13353.1, 23136(c)(3). The person is subject to automatic license suspension or revocation if a PAS test measures his or her blood-alcohol level to be above 0.01 percent. See Veh C §13353.2(a)(2).

If the PAS test measures the person's blood-alcohol level to be 0.05 percent or greater (a violation of Veh C §23140), the officer may require the person to submit to a breath, blood, or urine test, as provided in §§81.35–81.50. See also §81.51 (use of PAS test to establish reasonable cause person is violating Veh C §23140). Similarly, if the PAS test measures the person's blood-alcohol level to be 0.08 percent or greater (a violation of Veh C §23152(b) or §23153(b)), the person may be required to submit to further chemical testing. The person may also be required to submit to a blood, breath, or urine test in the first instance if lawfully arrested for a violation of Veh C §23140, §23152, or §23153. Note that these sections require that the person be "lawfully arrested" before his or her consent to chemical testing may be implied, while Veh C §23136 only requires that the person be "lawfully detained" in order for his or her consent to a PAS test to be implied.

(10) [§81.54] Testing of Driver on Probation for DUI Violation

A person who is on probation for a violation of Veh C §23152(b) or §23153(b) who drives a motor vehicle is deemed to have consented to a preliminary alcohol screening (PAS) test or other chemical test for determining the presence of alcohol in the person if lawfully detained for an alleged violation of Veh C §23154(a) (driving with blood-alcohol level of 0.01 percent or more) (see §81.13). Veh C §23154(c)(1). The testing must be incidental to a lawful detention and administered at the direction

of a peace officer having reasonable cause to believe the person was driving a vehicle while having a 0.01 percent blood-alcohol concentration. Veh C §23154(c)(2). The person must be told that his or her failure to submit to or complete a PAS test or other chemical test as requested will result in the suspension or revocation of his or her license for 1 to 3 years. Veh C §§13353.1, 23154(c)(3). The person is subject to automatic license suspension or revocation if a PAS test measures his or her blood-alcohol level to be above 0.01 percent. See Veh C §13353.2(a)(4).

(11) [§81.55] Partition Ratios

Urine test. Because Veh C §23152(b) makes it a crime to drive with a certain blood-alcohol level or breath-alcohol level, but not with a certain urine-alcohol level, when the defendant elects to take a urine test, the results of that test must be converted under 17 Cal Code Regs §1220.4(e) to a corresponding blood-alcohol reading. *People v Acevedo* (2001) 93 CA4th 757, 765–766, 113 CR2d 437. The partition ratio between a urine test and a blood test for alcohol level may vary from time to time and from individual to individual, and it is appropriate to allow a jury to consider this fact, *i.e.,* the defendant is entitled to cross-examine the prosecution's expert witness on the issue of variability and to present his or her own expert testimony on the issue. 93 CA4th 762–766.

Breath test. A defendant charged with a generic DUI offense (see Veh C §23152(a)) may present competent evidence about partition ratio variability to rebut the presumption of intoxication. *People v McNeal* (2009) 46 C4th 1183, 1200, 96 CR3d 261.

A defendant charged with a per se DUI offense (see Veh C §23152(b)) may not, however, present evidence that his or her particular partition ratio is different from the state standard (or that partition ratios may vary from person to person) when the defendant has elected to take a breath test because the statute defines the crime in terms of specific grams of alcohol per liter of breath. *People v Bransford* (1994) 8 C4th 885, 889–893, 35 CR2d 613; *People v Acevedo, supra,* 93 CA4th at 765–766; *People v Ireland* (1995) 33 CA4th 680, 692–696, 39 CR2d 870 (preventing defendant from introducing evidence of variability between breath- and blood-alcohol tests does not violate due process or equal protection).

(12) [§81.56] Admissibility of Test Results

Test incident to lawful arrest. "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment requires that they do so." *Missouri v McNeely* (2013) ___ US ___, 133 S Ct 1552, 1561, 185 L Ed 2d 696.

Whether the natural metabolization of alcohol in the bloodstream presents an exigency justifying an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing "must be determined case by case based on the totality of the circumstances." *McNeely, supra,* 133 S Ct at 1556, 1568 (declining to discuss "all the relevant factors that can be taken into account in determining reasonableness of acting without a warrant."). However, police do not need to obtain a search warrant to administer a breath test incident to a drunk driving arrest. *Birchfield v North Dakota* (2016) ___ US ___, 136 S Ct 2160, 2184, ___ L Ed 2d ___.

McNeely does not apply retroactively to defendants arrested before the case was decided. *People v Jones* (2014) 231 CA4th 1257, 1263, 180 CR3d 407. See also *People v Jimenez* (2015) 242 CA4th 1337, 1364–1365, 197 CR3d 1 (officer's reasonable reliance on pre-*McNeely* precedent authorizing warrantless blood draws brings pre-*McNeely* evidence within good-faith exception to exclusionary rule). And one court has "concluded that *McNeely* did not hold that warrantless blood draws may only be justified under the Fourth Amendment by establishing exigent circumstances under the totality of the circumstances," holding "that free and voluntary submission to a blood test, after receiving an advisement under the implied consent law, constitutes actual consent to a blood draw under the Fourth Amendment." *People v Harris* (2015) 234 CA4th 671, 685, 184 CR3d 198.

Exigent circumstances justified a nonconsensual warrantless blood draw when a person driving a moving truck the wrong way on a highway crashed into a car, injuring its occupants, then stopped 2000 feet away after blowing a tire; person was combative, had to be physically restrained, and yelled profanities at officers instead of giving information including what time he had stopped drinking. *People v Toure* (2015) 232 CA4th 1096, 1104–1105, 181 CR3d 857 (taking judicial notice that closing of branch courts in county impacts time required to get warrant).

Test incident to unlawful arrest. The results of a blood-alcohol test taken incident to an *unlawful* arrest are admissible unless this evidence is subject to exclusion under the federal exclusionary rules. See *People v Donaldson* (1995) 36 CA4th 532, 537–539, 42 CR2d 314. See also §81.16.

Constitutionally impermissible seizure. The results of an otherwise permissible test are inadmissible if the test, as conducted, exceeded constitutional bounds so as to render the seizure constitutionally impermissible. See *Schmerber v California* (1966) 384 US 757, 771–772, 86 S Ct 1826, 16 L Ed 2d 908 (test must be performed in reasonable manner); see also *People v Cuevas* (2013) 218 CA4th 1278, 1285, 160 CR3d 773 (testimony of police officer witnessing blood draw may be considered to determine if blood draw conducted in constitutionally reasonable manner). Police may use force to obtain a blood sample from a

defendant who refuses to submit to chemical testing, but excessive force is unconstitutional. *Mercer v Dep't of Motor Vehicles* (1991) 53 C3d 753, 760, 280 CR 745. See *People v Rossetti* (2014) 230 CA4th 1070, 1078, 179 CR3d 148 (reasonable force to handcuff arrestee who was "kicking around" and force him down on the floor so phlebotomist could draw blood). The defendant's blood may be drawn by someone other than a doctor, but the person drawing the defendant's blood may not expose the defendant to an unreasonable risk of infection or pain. *People v Sugarman*, 96 CA4th 210, 216, 116 CR2d 689 (test administered by nurse was not unreasonable); but see *People v Harris* (2015) 234 CA4th 671, 694–697, 184 CR3d 198 (reasonable for phlebotomist to draw blood at police station instead of hospital). See *People v Ford* (1992) 4 CA4th 32, 37–39, 5 CR2d 189 (fact that technologist who administered blood test was not statutorily authorized to perform test without medical authorization did not make test constitutionally impermissible).

Test not in compliance with regulations. The regulations set forth in Cal Code Regs, title 17, for forensic alcohol analysis, are an expressed standard for the competency of the results of blood-alcohol tests administered in compliance with the standards. Test results may be excluded in a case in which there were numerous and serious violations of the standards for conducting the particular test. See *In re Garinger* (1987) 188 CA3d 1149, 1154–1155, 233 CR 853 (when defendant shows deliberate and systematic policy of violating regulations, court may order suppression or, as last resort, dismissal). Evidence obtained in violation of the regulations is not inadmissible per se, unless there is a constitutional dimension to the violation. *People v French* (1978) 77 CA3d 511, 522, 143 CR 782. Noncompliance goes only to the weight, not the admissibility, of the evidence. 77 CA3d at 522; *People v Adams* (1976) 59 CA3d 559, 567, 131 CR 190.

Failure to give statutory advisements. Test results are not excludable solely on the ground that the officer failed to give the defendant the advisements required under Veh C §§23612 and 23614 concerning the defendant's choice among breath, blood, and urine tests (see §§81.39–81.44). These advisements are statutory rights only and are not constitutionally required; exclusion of evidence obtained in violation of those rights is prohibited by Proposition 8. *In re Garinger, supra,* 188 CA3d at 1154–1156.

3. Presumptions

a. Of Intoxication

(1) [§81.57] Prosecution Under Veh C §23152(a) or §23153(a)

In a prosecution under Veh C §23152(a) or §23153(a), the amount of alcohol in the defendant's blood gives rise to the following rebuttable presumptions concerning whether the defendant was intoxicated at the time of the alleged offense:

- If the blood-alcohol level was less than 0.05 percent, it is presumed that the defendant was not under the influence of alcohol. Veh C §23610(a)(1). See *People v Gallardo* (1994) 22 CA4th 489, 496, 27 CR2d 502 (presumption was sufficiently rebutted by evidence of defendant's conduct, even though test showed blood-alcohol level of 0.03 percent).
- If the blood-alcohol level was 0.05 or more, but less than 0.08 percent, there is no presumption either way, but this fact may be considered with other competent evidence in determining whether the defendant was under the influence. Veh C §23610(a)(2).
- A blood-alcohol level of 0.08 percent or more gives rise to a rebuttable presumption of intoxication. Veh C §23610(a)(3).

The percent, by weight, of alcohol in the defendant's blood must be based on grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath. Veh C §23610(b).

These rebuttable presumptions do not limit the introduction of any other competent evidence bearing on the question of whether the defendant consumed any alcoholic beverage or was under the influence at the time of the alleged offense. Veh C §23610(c). Non-chemical test circumstantial evidence is relevant to rebut defense expert testimony that defendant's blood-alcohol content (BAC) was lower than 0.08 percent while she was driving and only later increased to the higher levels shown by her chemical tests. *Coffey v Shiomoto* (2015) 60 C4th 1198, 1217, 185 CR3d 538 (evidence included defendant's "general appearance, erratic driving, poor performance on field sobriety tests, and the strong odor of alcohol she projected").

If the defendant presents evidence that the instrument used to measure his or her blood-alcohol content produced results that were higher than the accurate values, the burden shifts back to the DMV to prove by a preponderance of evidence that the test results were reliable. *Brenner v Dep't of Motor Vehicles* (2010) 189 CA4th 365, 371–372, 116 CR3d 716, disapproved on other grounds in 60 C4th 1198, 1217. See also *Najera v Shiomoto* (2015) 241 CA4th 173, 181, 193 CR3d 596 (defense expert's

testimony that blood draw results were based on data collected from only one column of dual-column gas chromatograph was substantial evidence rebutting presumed reliability of blood test results).

(2) [§81.58] Prosecution Under Veh C §23152(b) or §23153(b)

A driver with a blood-alcohol level of 0.08 percent or more violates Veh C §23152(b), even if he or she retains the ability to drive the vehicle with the caution that is characteristic of a sober person of ordinary prudence under the same or similar circumstances. *Burg v Municipal Court* (1983) 35 C3d 257, 265–266, 198 CR 145. This section does not create an improper conclusive presumption of intoxication, is not void for vagueness, and is a valid exercise of police power. 35 C3d at 265–273. A defendant may not present evidence that he or she was not under the influence, despite having a blood-alcohol level of 0.08 percent or more. *Wallace v Municipal Court* (1983) 140 CA3d 100, 108, 189 CR 886.

There is a rebuttable presumption that the person had a blood-alcohol level of 0.08 percent or more at the time of driving if the person had such a level at the time of chemical testing performed within 3 hours after driving. Veh C §§23152(b), 23153(b).

(3) [§81.59] Prosecution Under Veh C §23152(d) or §23153(d)

There is a rebuttable presumption that the driver of a commercial motor vehicle had a blood-alcohol level of 0.04 percent or more at the time of driving if the person had such a level at the time of chemical testing performed within 3 hours after driving. Veh C §§23152(d), 23153(d).

b. [§81.60] That Chemical Test Was Properly Performed

There is a rebuttable presumption that the chemical testing procedures were properly performed. See Evid C §664 (presumption that official duty was properly performed). The defendant has the burden of showing that the procedure was not properly performed. *Petricka v Dep't of Motor Vehicles* (2001) 89 CA4th 1341, 1348–1351, 107 CR2d 909.

4. Jury Instructions

a. [§81.61] CALCRIM and CALJIC

The following CALCRIM and CALJIC instructions specifically relate to DUI trials:

Elements of offense

- Violation of Veh C §23140(a). CALCRIM 2113.
- Violation of Veh C §23152(a). CALCRIM 2110; CALJIC 16.830.01
- Violation of Veh C §23152(a) with prior conviction(s). CALCRIM 2110, 2125; CALJIC 12.65.
- Violation of Veh C §23152(b). CALCRIM 2111; CALJIC 16.830.1.
- Violation of Veh C §23152(b) with prior conviction(s). CALCRIM 2111, 2125; CALJIC 12.66.
- Violation of Veh C §23152(c). CALCRIM 2112; CALJIC 16.830.04.
- Violation of Veh C §23152(c) with prior convictions(s). CALCRIM 2112, 2125; CALJIC 12.65.
- Violation of Veh C §23152(e). CALCRIM 2110; CALJIC 16.830.02.
- Violation of Veh C §23152(e) with prior convictions(s). CALCRIM 2110, 2125; CALJIC 12.65.
- Violation of Veh C §23152(f). CALCRIM 2110; CALJIC 16.830.03.
- Violation of Veh C §23152(f) with prior convictions(s). CALCRIM 2110, 2125; CALJIC 12.65.
- Violation of Veh C §23153(a). CALCRIM 2100; CALJIC 12.60.01
- Violation of Veh C §23153(a) with prior convictions(s). CALCRIM 2100, 2125; CALJIC 12.67.
- Violation of Veh C §23153(b). CALCRIM 2101; CALJIC 12.60.1.
- Violation of Veh C §23153(b) with prior conviction(s). CALCRIM 2101, 2125; CALJIC 12.68.
- Violation of Veh C §23153(e). CALCRIM 2100; CALJIC 12.60.02.
- Violation of Veh C §23153(e) with prior convictions(s). CALCRIM 2100, 2125; CALJIC 12.67.
- Violation of Veh C §23153(f). CALCRIM 2100; CALJIC 12.60.03.
- Violation of Veh C §23153(f) with prior convictions(s). CALCRIM 2100, 2125; CALJIC 12.67.

Inferences

- Driving under the influence—inference of intoxication. CALCRIM 2100, 2110; CALJIC 12.61.
- Driving with 0.08 percent or more. CALCRIM 2101, 2111; CALJIC 12.61.1.

Chemical tests

- Refusal to take test as consciousness of guilt. CALCRIM 2130; CALJIC 16.835.
- Willful refusal to take or complete test. CALCRIM 2131; CALJIC 17.28.2.
- Implied consent—choice of tests. CALCRIM 2131; CALJIC 17.29.

Lawful arrest by peace officer. CALJIC 9.24.1.

Bifurcation of separate conviction. CALCRIM 2126.

Relation of manner of vehicle operation to drunk driving. CALCRIM 2110; CALJIC 16.832.

Definitions

- Addiction. CALCRIM 2112; CALJIC 16.831.1.
- Alcoholic beverage. CALCRIM 2100, 2110; CALJIC 12.63.
- Driver and driving. CALCRIM 2241; CALJIC 1.28.
- Drug. CALCRIM 2100, 2110, 2112; CALJIC 12.65, 12.67.
- Under the influence. CALCRIM 2100, 2110; CALJIC 12.60.01, 12.60.02, 12.60.03, 12.65, 12.67, 16.831.

☛ JUDICIAL TIP: The court in *People v Mathson* (2012) 210 CA4th 1297, 1328 n32, 149 CA3d 167 recommended that the Judicial Council adopt the following instruction for voluntary intoxication to be used in cases when the defense involves a claim of unconsciousness resulting from the unexpected effect of prescription drugs: "Voluntary intoxication is not a defense to driving under the influence of drugs. If you conclude the defendant's intoxication was voluntary, then the defendant's unconsciousness resulting from that intoxication is not a defense to the crime. [¶] A person is voluntarily intoxicated if: (1) the person willingly and knowingly ingested a drug; (2) the drug was capable of producing an intoxicating effect and (3) the person knew or reasonably should have known that the drug could produce an intoxicating effect." See Bench Notes to CALCRIM 3426.

b. [§81.62] Unlawful Acts

When the prosecution has alleged specific code violations in the accusatory pleading to establish the unlawful act required for a violation of Veh C §23153 and relies on these allegations at trial, the court must give the jury definitional instructions for those violations. See *People v Minor* (1994) 28 CA4th 431, 438–439, 33 CR2d 641; CALJIC 12.60.01, 12.60.02, 12.60.03, and 12.60.1. When the unlawful act is speeding, the court must define "speeding." *People v Ellis* (1999) 69 CA4th 1334, 1338–1339, 82 CR2d 409. See Veh C §22350 (statutory definition of speeding). The court is not required, however, to instruct the jurors, sua sponte, that they must reach a unanimous verdict on the specific act or neglect of duty. *People v Mitchell* (1986) 188 CA3d 216, 220–222, 232 CR 438.

F. [§81.63] Presentence Investigation to Determine Suitability for Education, Training, or Treatment

After conviction of a violation of Veh C §23152 or §23153, the court may order a presentence investigation to determine whether the defendant would benefit from one or more education, training, or treatment programs and, in addition to any other penalties, may order suitable education, training, or treatment. Veh C §23655(a). In determining whether to require, as a condition of probation, that the defendant participate in such a program, the court may consider any relevant information about the defendant that is made available by the presentence investigation or other screening procedure. Veh C §23655(b). In addition, the court must obtain from the DMV a copy of the defendant's driving record to determine whether the defendant is eligible to participate in an approved program. Veh C §23655(b). See §81.24.

Before the conclusion of the trial, the court may not suspend or stay proceedings to allow the defendant to participate in such programs, nor may the court dismiss the proceedings because of the defendant's participation in such programs. Veh C §23640(a).

G. Sentencing Under Veh C §23152 or §23153

1. General Considerations—All Cases

a. [§81.64] Pronouncing Sentence

When a defendant is convicted of violating Veh C §23152 or §23153, the court may not stay or suspend the pronouncement of sentence but instead must pronounce sentence in conjunction with the conviction in a reasonable time, including time for receipt of any presentence investigation report ordered under Veh C §23655 (see §81.63). Veh C §23600(a). Once sentence is pronounced, the court has the discretion to

suspend execution of the sentence and place the defendant on probation. See Veh C §§23538, 23542, 23548, 23552. When pronouncing sentence for a first DUI offense, the court is not required to advise the defendant of the increased penalties for a second offense. See *Hartman v Municipal Court* (1973) 35 CA3d 891, 893, 111 CR 126. For a subsequent DUI offense, the court may consider the defendant's prior DUI conviction(s) in sentencing the defendant to the upper term of imprisonment. See *People v Bowen* (1992) 11 CA4th 102, 105–106, 14 CR2d 40. The court may impose a bargained-for sentence following a felony DUI conviction without violating the Victim's Bill of Rights (Proposition 8), as long as the court notes that the sentence is the one it would have imposed without a negotiated sentence. *People v Arauz* (1992) 5 CA4th 663, 669–671, 7 CR2d 145. See §81.26.

When sentencing a defendant to 1 year in the county jail or to more than 1 year in state prison, the court may postpone the revocation or suspension of the defendant's driving privilege until the term of imprisonment is served. Veh C §23665.

Advisory statement of dangers of driving under the influence. When a defendant is convicted of violating Veh C §23152 or §23153, the court must give the following advisement (Veh C §23593(a)):

You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder.

This advisement may be included in a plea form, or the fact that the advisement was given may be specified on the record. Veh C §23593(b). See *People v Watson* (1981) 30 C3d 290, 179 CR 43.

b. Probation

(1) [§81.65] Mandatory Terms

The terms and conditions must include:

- A term of probation not less than 3 years nor more than 5 years or a period equal to the maximum permissible sentence (Veh C §23600(b)(1));
- A requirement that the person not drive a vehicle with any measurable amount of alcohol in his or her blood (Veh C §23600(b)(2));
- A requirement that the person not refuse a chemical test for the purpose of determining blood-alcohol content on arrest for a violation of Veh C §23152 or §23153 (Veh C §23600(b)(3)); and

- A requirement that the person not commit a criminal offense (Veh C §23600(b)(4)).

Additional terms of probation apply depending on the nature of the offense. These additional terms are discussed in §§81.70–81.76.

(2) [§81.66] Violation of Terms

If the court finds that the defendant has violated a required term or condition of probation, the court must revoke probation and proceed under Pen C §1203.2(c). If a defendant violates Veh C §23600(b)(2) or (3), and has a blood-alcohol concentration of over 0.04 percent as determined by a chemical test, the court must revoke probation regardless of any other proceeding and may only grant a new term of probation of not more than 5 years on the added condition that the defendant be confined in the county jail for not less than 48 hours for each violation of probation, except in an unusual case in which the interests of justice would best be served if this additional condition were not imposed. Veh C §23600(d).

(3) [§81.67] Order To Pay Fine, Restitution, or Assessment

An order to pay any fine, restitution, or assessment imposed as a condition of probation or as part of a judgment of conditional sentence may be enforced in the same manner provided for the enforcement of money judgments. Veh C §23601(a). However, if an order to pay a fine as a condition of probation is stayed, a writ of execution may not be issued, and any failure to pay the fine is not willful, until the stay is removed. Veh C §23601(c). A willful failure to pay any fine, restitution, or assessment during probation constitutes a violation of the terms and conditions of probation. Veh C §23601(b).

(4) [§81.68] Denial of Probation Based on Prior Conviction

The court has the discretion to deny probation to a defendant convicted under Veh C §23152 or §23153 solely because the defendant has a prior conviction. *People v Bowen* (1992) 11 CA4th 102, 105–106, 14 CR2d 40.

(5) [§81.69] Alternative Live-in Rehabilitation Program

In place of any drug or alcohol education program required under Veh C §23538, §23542, §23548, §23552, §23556, §23562, or §23568 (see §§81.70–81.76), the court may require that the defendant complete a live-in substance abuse rehabilitation program, as defined in Pen C §8001, for

a minimum of 2 years if the defendant consents and is accepted into the program. Veh C §23598.

2. [§81.70] First Violation of Veh C §23152

- *Imprisonment and fine.* Conviction of a first violation is punishable by imprisonment in the county jail for not less than 96 hours (at least 48 hours of which must be continuous) nor more than 6 months, and by a fine of $390 to $1000. Veh C §23536(a). The court must order that any imprisonment be served on days other than those of the defendant's regular employment. If the court determines that 48 hours of continuous imprisonment would interfere with the defendant's work schedule, the court must allow the defendant to serve the imprisonment when normally scheduled for time off from work. This determination may be based on a representation from the defendant's attorney or on the defendant's affidavit or testimony. Veh C §23536(b).
- *Probation.* When granting probation to a defendant punished under Veh C §23536, the terms and conditions must include, in addition to the requirements of Veh C §23600 (see §81.65), a fine of $390 to $1000. The court *may* also impose a county jail term for at least 48 hours, but not more than 6 months. Veh C §23538(a)(1). The DMV must suspend the defendant's driver's license for 6 months under Veh C §13352(a)(1). Veh C §23538(a)(2). If the defendant is ordered to participate in a 9-month DUI program, the defendant's driving privilege must be suspended for 10 months under Veh C §13352.1. Veh C §23538(a)(2). If the county has an approved DUI program, the court must also impose as a condition of probation that the defendant participate in the program for at least 3 months (or 9 months if blood-alcohol content of .20 percent or higher or refusal to take chemical test). Veh C §23538(b). The court must revoke the probation if the defendant fails to enroll in, participate in, or complete the required program, unless good cause is shown. Veh C §23538(c)(1).
- *License suspension.* The DMV must suspend the defendant's driver's license for 6 months. Veh C §§13352(a)(1), 23536(c). If the defendant is ordered to participate in a 9-month DUI program, the defendant's driving privilege must be suspended for 10 months under Veh C §13352.1(a). Veh C §§13352(a)(1), 23536(c). The DMV may not reinstate the license until the defendant gives proof of financial responsibility and proof of successful completion of a DUI program as described in Veh C §23538(b). Veh C §§13352(a)(1), 13352.1(b).

- *Disallowance of restricted license.* When the court, considering the circumstances taken as a whole, determines that the defendant would present a traffic or public safety risk if authorized to operate a motor vehicle during the 6-month (or 10-month) suspension period, the court may prohibit the DMV from issuing a restricted driver's license under Veh C §13352.4. Veh C §§13352.4(h), 23536(d), 23538(a)(3). To do so, the court must report the conviction to the DMV using disposition code "M" in addition to all other applicable disposition codes.

☛ JUDICIAL TIP: The Vehicle Code does not define a traffic or public safety risk. However, the court may want to consider the circumstances of the offense, such as the defendant's blood-alcohol level, defendant's refusal to take a chemical test, the presence of children in the vehicle, and defendant's flight from an accident scene.

- *Surrender of license*. See §81.100.
- *Vehicle impound*. See §81.101.
- *Ignition interlock device*. The court may require that the defendant install an ignition interlock device on any vehicle he or she owns or operates. See §81.89.
- *Restitution fines*. The court must impose a restitution fine of no less than $150 and not more than $1000 (and if probation granted, an additional probation revocation restitution fine in the same amount), unless the court finds compelling and extraordinary reasons for not doing so. Pen C §§1202.4(b)(1), (c), 1202.44.
- *Victim restitution*. The court must order full restitution to any victim of the defendant's crime for any economic losses incurred. Pen C §1202.4(f). See also Judicial Tip in §81.2.
- *Participation in county alcohol and drug problem assessment program*. The court must order the defendant to attend a county alcohol and drug problem assessment program if he or she has previously been convicted of a violation Veh C §23152 or §23153 that occurred more than 10 years ago, or has previously been convicted of a violation of Pen C §647(f) (public intoxication). Veh C §23646(b)(3). See §81.88.
- *Penalty assessments, fees, and state surcharge*. Impose penalty assessments, fees, and state surcharge. See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs, and, if

applicable (see §81.88), an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.

3. [§81.71] Violation of Veh C §23152 With One Separate Conviction of Related Offense

- *Imprisonment and fine.* Conviction of a violation of Veh C §23152 when the offense occurred within 10 years of a separate violation of Veh C §23152, §23153, or §23103 (guilty plea to reckless driving in place of charge under Veh C §23152) that resulted in a conviction, is punishable by imprisonment in the county jail for 90 days to 1 year, and by a fine of $390 to $1000. Veh C §23540(a).

☛ JUDICIAL TIP: The period after which priors expire, *e.g.*, 10 years, is sometimes called the "washout period."

- *Probation.* When granting probation to a defendant punished under Veh C §23540, the terms and conditions must include, in addition to the requirements of Veh C §23600 (see §81.65), (1) confinement in the county jail for 10 days to 1 year or 96 hours to 1 year, (2) a fine of $390 to $1000, and (3) successful completion of an 18-month or 30-month DUI program. Veh C §23542(a)(1), (b). The DMV must suspend the defendant's driver's license for 2 years under Veh C §13352(a)(3). Veh C §23540(a). The court must revoke the probation if the defendant fails at any time to participate successfully in the treatment program. Veh C §23544. The court may revoke the probation if the defendant fails to comply with any other term or condition. Veh C §23544. In such event, the court must do one of the following: (1) revoke suspension of sentence and proceed as provided in Pen C §1203.2(c) and order the DMV to suspend the defendant's driver's license under Veh C §13352(a)(3) from the date of the order revoking probation; or (2) grant a new term of probation on the condition that the defendant be confined in the county jail for at least 30 days and order the DMV to suspend the defendant's driver's license under Veh C §13352(a)(3) from the date of the new grant of probation. Veh C §23544.
- *License suspension.* The DMV must suspend the defendant's driver's license for 2 years. Veh C §§13352(a)(3), 23540(a). The DMV may not reinstate the license until the defendant gives proof of financial responsibility and proof of successful completion of a DUI program as described in Veh C §23542. Veh C §§13352(a)(3).
- *Disallowance of restricted license.* When the court, considering the circumstances taken as a whole, determines that the defendant

would present a traffic or public safety risk if authorized to operate a motor vehicle during the 2-year suspension period, the court may prohibit the DMV from issuing a restricted driver's license under Veh C §13352.5. Veh C §§13352.5(g), 23540(b), 23542(d). To do so, the court must report the conviction to the DMV using disposition code "M" in addition to all other applicable disposition codes.

☛ JUDICIAL TIP: The Vehicle Code does not define a traffic or public safety risk. However, the court may want to consider the circumstances of the offense, such as the defendant's blood-alcohol level, defendant's refusal to take a chemical test, the presence of children in the vehicle, and defendant's flight from an accident scene.

- *Surrender of license*. See §81.100.
- *Vehicle impound*. See §81.101.
- *Ignition interlock device*. The court may require that the defendant install an ignition interlock device on any vehicle he or she owns or operates. See §81.89.
- *Restitution fines*. The court must impose a restitution fine of no less than $150 and not more than $1000 (and if probation granted, an additional probation revocation restitution fine in the same amount), unless the court finds compelling and extraordinary reasons for not doing so. Pen C §§1202.4(b)(1), (c), 1202.44.
- *Victim restitution*. The court must order full restitution to any victim of the defendant's crime for any economic losses incurred. Pen C §1202.4(f). See also Judicial Tip in §81.2.
- *Participation in county alcohol and drug problem assessment program*. See §81.88.
- *Penalty assessments, fees, and state surcharge*. Impose penalty assessments, fees, and state surcharge. See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs, and an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.

4. [§81.72] Violation of Veh C §23152 With Two Separate Convictions of Related Offenses

- *Imprisonment and fine.* Conviction of a violation of Veh C §23152 when the offense occurred within 10 years of two separate

violations of Veh C §23152, §23153, or §23103 (guilty plea to reckless driving in place of charge under Veh C §23152), or any combination of these offenses, which resulted in convictions, is punishable by imprisonment in the county jail for 120 days to 1 year, and by a fine of $390 to $1000. Veh C §23546(a).

- *Probation.* When granting probation to a defendant punished under Veh C §23546, the terms and conditions must include, in addition to the requirements of Veh C §23600 (see §81.65), confinement in the county jail for 120 days to 1 year, a fine of $390 to $1000, and revocation of the defendant's driver's license under Veh C §13352(a)(5). Veh C §23548(a). See *People v Municipal Court* (Hinton) (1983) 149 CA3d 951, 953–954, 197 CR 204 (jail term is mandatory; placement in alcohol rehabilitation facility is not sufficient). As an additional condition of probation, the court may require the defendant to satisfactorily participate for at least 18 months in a DUI program if the defendant has not previously completed a program successfully. Veh C §23548(c) (person who has previously completed 12-month or 18-month program is ineligible for referral under this provision unless 30-month program is not available in person's county of residence or employment). Alternatively, on a showing of good cause and regardless of whether the defendant has previously completed a program, the court may require satisfactory participation for at least 30 months subsequent to the underlying conviction, in which case the term of imprisonment is 30 days to 1 year. Veh C §23548(b). In either case, the additional condition cannot be used to reduce any other probation requirement or to avoid the mandatory license revocation. Veh C §23548(b), (c).
- *Designation as habitual traffic offender.* The defendant must be designated as a habitual traffic offender for 3 years subsequent to conviction. Veh C §23546(b). The court must require the defendant to sign an affidavit acknowledging this designation. Veh C §13350(b).
- *License revocation.* The DMV must revoke the defendant's driver's license for 3 years. Veh C §§13352(a)(5), 23546(a). The DMV may not reinstate the license until the defendant gives proof of financial responsibility and proof of successful completion, subsequent to the current violation, of a DUI program. Veh C §13352(a)(5).
- *Ten-year license revocation*. Notwithstanding the license revocation provisions of Veh C §13352(a)(5) (see above), the court may order a 10-year revocation of the defendant's driver's license after considering specific factors. Veh C §23597(a).

- *Surrender of license*. See §81.100.
- *Vehicle impound and forfeiture*. See §81.101.
- *Ignition interlock device*. The court may require that the defendant install an ignition interlock device on any vehicle he or she owns or operates. See §81.89.
- *Restitution fines*. The court must impose a restitution fine of no less than $150 and not more than $1000 (and if probation granted, an additional probation revocation restitution fine in the same amount), unless the court finds compelling and extraordinary reasons for not doing so. Pen C §§1202.4(b)(1), (c), 1202.44.
- *Victim restitution*. The court must order full restitution to any victim of the defendant's crime for any economic losses incurred. Pen C §1202.4(f). See also Judicial Tip in §81.2.
- *Participation in county alcohol and drug problem assessment program*. See §81.88.
- *Penalty assessments, fees, and state surcharge.* Impose penalty assessments, fees, and state surcharge. See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs and an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.

5. [§81.73] Violation of Veh C §23152 With Three or More Separate Convictions of Related Offenses

- *Imprisonment and fine.* Conviction of a violation of Veh C §23152 when the offense occurred within 10 years of 3 or more separate violations of Veh C §23152, §23153, or §23103 (guilty plea to reckless driving in place of charge under Veh C §23152), or any combination of these offenses, which resulted in convictions, is punishable by imprisonment in the county jail for 180 days to 1 year, or imprisonment in county jail under Pen C §1170(h) for 16 months or 2 or 3 years, and by a fine of $390 to $1000. Veh C §23550(a). Use of prior convictions to elevate a fourth DUI offense from a misdemeanor to a felony, and to enhance the resulting sentence, does not violate the proscription against multiple punishment under Pen C §654.
- *Proving separate convictions.* Pleading and proof of the three separate DUI convictions at the *preliminary hearing* is a constitutional and statutory condition precedent to prosecution and punishment of a fourth DUI violation as a felony. *People v*

Casillas (2001) 92 CA4th 171, 174, 184, 111 CR2d 651. The complaint must be dismissed if the evidence fails to show three separate violations that resulted in convictions; it is not sufficient to show that one or more of the separate violations *might* result in a conviction, *e.g.,* on another pending DUI complaint. 92 CA4th at 178, 180. If the defendant receives three separate convictions after the filing of the misdemeanor DUI complaint, the complaint may be amended to charge a felony. 92 CA4th at 184–185. See §81.81 (order in which offenses were committed and convictions obtained is immaterial).

- *Probation.* When granting probation to a defendant punished under Veh C §23550, the terms and conditions must include, in addition to the requirements of Veh C §23600 (see §81.65), confinement in the county jail for 180 days to 1 year, a fine of $390 to $1000, and revocation of the defendant's driver's license under Veh C §13352(a)(7). Veh C §23552(a)(1). As an additional condition of probation, the court may require the defendant to satisfactorily participate for at least 18 months in a DUI program if the defendant has not previously completed a program successfully. Veh C §23552(c) (person who has previously completed 12-month or 18-month program is ineligible for referral under this provision unless 30-month program is not available in person's county of residence or employment). Alternatively, on a showing of good cause and regardless of whether the defendant has previously completed a program, the court may require satisfactory participation for at least 30 months subsequent to the underlying conviction, in which case the term of imprisonment is 30 days to 1 year. Veh C §23552(b). In either case, the additional condition cannot be used to reduce any other probation requirement or to avoid the mandatory license revocation. Veh C §23552(b), (c).
- *Designation as habitual traffic offender.* The defendant must be designated as a habitual traffic offender for 3 years subsequent to conviction. Veh C §23550(b). The court must require the defendant to sign an affidavit acknowledging this designation. Veh C §13350(b).
- *License revocation.* The DMV must revoke the defendant's driver's license for 4 years. Veh C §§13352(a)(7), 23550(a). The DMV may not reinstate the license until the defendant presents satisfactory evidence establishing that no grounds exist that would authorize refusal to issue a license, and gives proof of financial responsibility and proof of successful completion, subsequent to the current violation, of a DUI program. Veh C §13352(a)(7).

- *Ten-year license revocation*. Notwithstanding the license revocation provisions of Veh C §13352(a)(7) (see above), the court may order a 10-year revocation of the defendant's driver's license after considering specific factors. Veh C §23597(a).
- *Surrender of license*. See §81.100.
- *Vehicle impound and forfeiture*. See §81.101.
- *Ignition interlock device*. The court may require that the defendant install an ignition interlock device on any vehicle he or she owns or operates. See §81.89.
- *Restitution fines*. The court must impose a restitution fine of $150 to $1000 for misdemeanor conviction or $300 to $10,000 for felony conviction (and if applicable, probation, parole, or mandatory supervision revocation restitution fines in same amount), unless the court finds compelling and extraordinary reasons for not doing so. Pen C §§1202.4(b)(1), (c), 1202.44, 1202.45. In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted. Pen C §1202.4(b)(2).
- *Victim restitution*. The court must order full restitution to any victim of the defendant's crime for any economic losses incurred. Pen C §1202.4(f). See also Judicial Tip in §81.2.
- *Participation in county alcohol and drug problem assessment program*. See §81.88.
- *Penalty assessments, fees, and state surcharge.* Impose penalty assessments, fees, and state surcharge. See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs and an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.
- *Impeachment.* An additional consequence is that the defendant may be impeached with prior DUI convictions because felony DUI with three prior convictions is a crime involving moral turpitude. See *People v Forster* (1994) 29 CA4th 1746, 1757, 35 CR2d 705.

6. [§81.74] First Violation of Veh C §23153

- *Imprisonment and fine.* Conviction of a first violation of Veh C §23153 is punishable by imprisonment in the county jail for 90

days to 1 year, or in the state prison for 16 months or 2 or 3 years, and by a fine of $390 to $1000. Veh C §23554.

- *Probation.* When granting probation to a defendant punished under Veh C §23554, the terms and conditions must include, in addition to the requirements of Veh C §23600 (see §81.65), confinement in the county jail for 5 days to 1 year, a fine of $390 to $1000, and suspension of driving privileges under Veh C §13352(a)(2). Veh C §23556(a). If the county has an approved DUI program, the court must also impose as a condition of probation that the defendant participate in the program for at least 3 months (or 9 months if blood-alcohol content of .20 percent or higher). Veh C §23556(b). The court must revoke probation for the defendant's failure to enroll in, participate in, or complete the required program. Veh C §23556(c)(1).
- *License suspension.* The DMV must suspend the defendant's driver's license for 1 year. Veh C §§13352(a)(2), 23554. The DMV may not reinstate the license until the defendant gives proof of financial responsibility and of successful completion of a DUI program. Veh C §13352(a)(2).
- *Surrender of license*. See §81.100.
- *Vehicle impound*. See §81.101.
- *Ignition interlock device*. The court may require that the defendant install an ignition interlock device on any vehicle he or she owns or operates. See §81.89.
- *Restitution fines*. The court must impose a restitution fine of $150 to $1000 for misdemeanor conviction, or $300 to $10,000 for felony conviction (and if applicable, probation, parole, or postrelease community supervision revocation restitution fines in the same amount), unless the court finds compelling and extraordinary reasons for not doing so. Pen C §§1202.4(b)(1), (c), 1202.44, 1202.45. In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted. Pen C §1202.4(b)(2).
- *Victim restitution*. The court must order full restitution to any victim of the defendant's crime for any economic losses incurred. Pen C §1202.4(f*)*. See also Judicial Tip in §81.2.
- *Participation in county alcohol and drug problem assessment program*. The court must order the defendant to attend a county alcohol and drug problem assessment program if he or she has

previously been convicted of a violation Veh C §23152 or §23153 that occurred more than 10 years ago, or has previously been convicted of a violation of Pen C §647(f) (public intoxication). Veh C §23646(b)(3). See §81.88.

- *Penalty assessments, fees, and state surcharge*. Impose penalty assessments, fees, and state surcharge. See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs, and, if applicable (see §81.88), an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.

7. [§81.75] Violation of Veh C §23153 With One Separate Conviction of Related Offense

- *Imprisonment and fine.* Conviction of a violation of Veh C §23153 when the offense occurred within 10 years of a separate violation of Veh C §23152, §23153, or §23103 (guilty plea to reckless driving in place of charge under Veh C §23152), which resulted in a conviction, is punishable by imprisonment in the county jail for 120 days to 1 year, or in the state prison for 16 months or 2 or 3 years, and by a fine of $390 to $5000. Veh C §23560.
- *Probation.* When granting probation to a defendant punished under Veh C §23560, the terms and conditions must include, in addition to the requirements of Veh C §23600 (see §81.65), one of the following: (1) confinement in the county jail for at least 120 days, a fine of $390 to $5000, and revocation of the defendant's driver's license under Veh C §13352(a)(4) (Veh C §23562(a)); or (2) confinement in the county jail for 30 days to 1 year, a fine of $390 to $1000, revocation of the defendant's driver's license under Veh C §13352(a)(4), and enrollment and satisfactory participation for at least 18 or 30 months in a DUI program if available in the county of the defendant's residence or employment (Veh C §23562(b)). The entire program must be completed after current violation, and no credit may be given for program activities completed before that violation. Veh C §23562(b)(4). If the defendant fails to participate in a required DUI program, the court must either (1) revoke or terminate probation and order the DMV to revoke the defendant's driver's license for 3 years under Veh C §13352(a)(4) from the date of the order revoking or terminating probation, or (2) grant a new term of probation requiring that the defendant serve 90 days in county jail and order the DMV to suspend the defendant's driver's license for 3 years under Veh C §13352(a)(4) from the date of the new grant of probation. Veh C §23564.

- *License revocation.* The DMV must revoke the defendant's driver's license for 3 years. Veh C §§13352(a)(4), 23560. The DMV may not reinstate the license until the defendant presents satisfactory evidence establishing that no ground exists that would authorize a refusal to issue a license, and gives proof of financial responsibility and proof of successful completion, subsequent to the current violation, of a DUI program. Veh C §13352(a)(4).
- *Surrender of license*. See §81.100.
- *Vehicle impound and forfeiture*. See §81.101.
- *Ignition interlock device*. The court may require that the defendant install an ignition interlock device on any vehicle he or she owns or operates. See §81.89.
- *Restitution fines*. The court must impose a restitution fine of $150 to $1000 for misdemeanor conviction or $300 to $10,000 for felony conviction (and if applicable, probation, parole, or postrelease community supervision revocation restitution fines in the same amount), unless the court finds compelling and extraordinary reasons for not doing so. Pen C §§1202.4(b)(1), (c), 1202.44, 1202.45. In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted. Pen C §1202.4(b)(2).
- *Victim restitution*. The court must order full restitution to any victim of the defendant's crime for any economic losses incurred. Pen C §1202.4(f). See also Judicial Tip in §81.2.
- *Participation in county alcohol and drug problem assessment program*. See §81.88.
- *Penalty assessments, fees, and state surcharge.* Impose penalty assessments, fees, and state surcharge. See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs, and an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.

8. [§81.76] Violation of Veh C §23153 With Two Separate Convictions of Related Offenses

- *Imprisonment and fine.* Conviction of a violation of Veh C §23153 when the offense occurred within 10 years of two separate violations of Veh C §23152, §23153, or §23103 (guilty plea to

reckless driving in place of charge under Veh C §23152), or any combination of these offenses, which resulted in convictions, is punishable by imprisonment in state prison for 2, 3, or 4 years, and by a fine of $1015 to $5000. Veh C §23566(a).

- *Probation*. When granting probation to a defendant punished under Veh C §23566, the terms and conditions must include, in addition to the requirements of Veh C §23600 (see §81.65), confinement in the county jail for at least 1 year, a fine of $390 to $5000, restitution or reparation under Pen C §1203.1, and revocation of the defendant's driver's license under Veh C §13352(a)(6). Veh C §23568(a). The court must also require the defendant to complete an 18-month DUI program or, if available in the county of the defendant's residence or employment, a 30-month program. In either case, the minimum terms of imprisonment is 30 days. Veh C §23568(b). The entire program must be completed subsequent to the current violation, and no credit may be given for program activities completed before this violation. This additional condition is not a basis for reducing any other probation requirement or for avoiding mandatory license revocation. Veh C §23568(b).
- *Designation as habitual traffic offender.* The defendant must be designated as a habitual traffic offender for 3 years subsequent to conviction. Veh C §23566(d). The court must require the defendant to sign an affidavit acknowledging this designation. Veh C §13350(b).
- *Participation in education program.* The defendant must be ordered to participate in an alcohol or drug education program during state prison confinement if one is available. Veh C §23566(e).
- *Enhancement for offense resulting in great bodily injury.* If the act or neglect constituting the violation of Veh C §23153 proximately causes great bodily injury to any person other than the defendant, and the offense occurred within 10 years of four or more separate convictions of Veh C §23152, §23153, or §23103, or any combination of these offenses, the punishment must be enhanced by an additional and consecutive term of imprisonment in state prison for 3 years. Veh C §23566(b), (c). See *People v Sainz* (1999) 74 CA4th 565, 569–576, 88 CR2d 203 (not error to impose great bodily injury sentencing enhancement under Pen C §12022.7, even though Veh C §23566 is arguably more specific; legislative intent controls this conflict). See also §81.9.
- *License revocation.* The DMV must revoke the defendant's driver's license for 5 years. Veh C §§13352(a)(6), 23566(a). The

DMV may not reinstate the license until the defendant presents evidence establishing that no ground exists that would authorize refusal to give a license, and gives proof of financial responsibility and proof of successful completion of a DUI program. Veh C §13352(a)(6).

- *Ten-year license revocation*. Notwithstanding the license revocation provisions of Veh C §13352(a)(6) (see above), the court may order a 10-year revocation of the defendant's driver's license after considering specific factors. Veh C §23597(a).
- *Surrender of license*. See §81.100.
- *Vehicle impoundment and forfeiture*. See §81.101.
- *Ignition interlock device*. The court may require that the defendant install an ignition interlock device on any vehicle he or she owns or operates. See §81.89.
- *Restitution fines*. The court must impose a restitution fine of $300 to $10,000 (and if applicable, probation, parole, or postrelease community supervision revocation restitution fines in the same amount), unless the court finds compelling and extraordinary reasons for not doing so. Pen C §§1202.4(b)(1), (c), 1202.44, 1202.45. In setting the restitution fine, the court may determine the amount of the fine as the product of the minimum fine multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted. Pen C §1202.4(b)(2).
- *Victim restitution*. The court must order full restitution to any victim of the defendant's crime for any economic losses incurred. Pen C §1202.4(f). See also Judicial Tip in §81.2.
- *Participation in county alcohol and drug problem assessment program*. See §81.88.
- *Penalty assessments, fees, and state surcharge*. Impose penalty assessments, fees, and state surcharge. See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs and an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.

9. [§81.77] Violation of Veh C §23152 or §23153 With Separate Felony Conviction of Related Offense

A conviction under Veh C §23152 or §23153 may be punished as a misdemeanor or as a felony if the offense occurred *within 10 years* of any

of the following: (1) a prior violation of Veh C §23152 that was punished as a felony under Veh C §§23550 and/or 23550.5, or under former Veh C §§23175 and/or 23175.5; (2) a prior violation of Veh C §23153 that was punished as a felony; or (3) a prior violation of Pen C §192(c)(1) (gross vehicular manslaughter that was punished as a felony). Veh C §23350.5(a). See *People v Camarillo* (2000) 84 CA4th 1386, 101 CR2d 618 (prior "wobbler" DUI conviction that was converted to misdemeanor after sentencing under Pen C §17(b)(3) is treated as a misdemeanor for all purposes thereafter and is not "punished as a felony" for purposes of these Vehicle Code provisions).

However, a juvenile conviction under Veh C §23153 is not a prior violation punished as a felony that elevates a later adult misdemeanor driving under the influence charge to a felony under Veh C §23550.5. *People v Lopes* (2015) 238 CA4th 983, 985, 189 CR3d 860.

A conviction under Veh C §23152 or §23153 may also be punished as a misdemeanor or as a felony if the defendant was previously convicted of a violation of Pen C §191.5(a) (gross vehicular manslaughter while intoxicated), a felony violation of Pen C §191.5(b) (vehicular manslaughter while driving in violation of Veh C §23140, §23152, or §23153, but without gross negligence), or a violation of Pen C §192.5(a) (vessel manslaughter while intoxicated). Veh C §23550.5(b).

Punishment for a conviction under Veh C §23152 or §23153 with a qualifying prior felony includes:

- *Imprisonment and fine.* Imprisonment in the county jail for up to 1 year, or in the state prison for 16 months or 2 or 3 years, and by a fine of $390 to $1000. Veh C §23550.5(a), (b).
- *Designation as habitual traffic offender.* A person convicted of Veh C §23152 that is punishable under Veh C §23550.5 must be designated as a habitual traffic offender for 3 years subsequent to conviction. Veh C §23550.5(d). The court must advise the defendant of this designation and must require the defendant to sign an affidavit acknowledging this designation. Veh C §§23550.5(d), 13350(b).
- *License revocation.* The DMV must revoke the defendant's driver's license for 4 years, unless the defendant has suffered his or her third Veh C §23153 conviction within 10 years, in which case the period is 5 years. Veh C §§23550.5(c), 13352(a)(6), (7). The DMV may not reinstate the license until the defendant presents evidence establishing that no ground exists that would authorize refusal to give a license, and gives proof of financial responsibility and proof of successful completion of a DUI program. Veh C §13352(a)(6), (7).

- *Ten-year license revocation*. Notwithstanding the license revocation provisions of Veh C §13352(a)(6), (7) (see above), the court may order a 10-year revocation of the defendant's driver's license if the defendant has been convicted of a third or subsequent violation of Veh C §13152 or Veh C §13153. Veh C §23597(a).
- *Surrender of license*. See §81.100.
- *Vehicle impound and forfeiture*. See §81.101.
- *Ignition interlock device*. The court may require that the defendant install an ignition interlock device on any vehicle he or she owns or operates. See §81.89.
- *Restitution fines*. The court must impose a restitution fine of $150 to $1000 for misdemeanor conviction, or $300 to $10,000 for felony conviction (and if applicable, probation, parole, or postrelease community supervision revocation restitution fines in the same amount), unless the court finds compelling and extraordinary reasons for not doing so. Pen C §§1202.4(b)(1), (c), 1202.44, 1202.45. In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted. Pen C §1202.4(b)(2).
- *Victim restitution*. The court must order full restitution to any victim of the defendant's crime for any economic losses incurred. Pen C §1202.4(f). See also Judicial Tip in §81.2.
- *Participation in county alcohol and drug problem assessment program*. See §81.88.
- *Penalty assessments, fees, and state surcharge*. Impose penalty assessments, fees, and state surcharge. See Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7. Also impose an assessment of $50 for alcohol abuse education and prevention programs and an assessment of $100 for county alcohol and drug problem assessment programs. Veh C §§23645, 23649.

10. Circumstances Enhancing Punishment

a. [§81.78] Excessive Speed

A person who is convicted of violating Veh C §23152 or §23153 while driving a vehicle 30 or more miles per hour above the speed limit on a freeway or 20 or more miles per hour over the speed limit on any other street or highway in violation of Veh C §23103 (reckless driving) must be punished by an additional consecutive term of 60 days in the county jail.

Veh C §23582(a). If the court grants probation or suspends the execution of sentence, the court must require, as a condition of probation or suspension, that the defendant serve 60 days in the county jail, in addition and consecutive to any other sentence prescribed by Division 11.5, Chapter 2 of the Vehicle Code (Veh C §§23530–23598). Veh C §23582(b). The court must order a first offender to participate in an education and counseling program related to alcohol, drugs, or both. Veh C §23582(c).

The court may not impose the additional term unless the facts of the reckless driving (and requisite driving over the speed limit) are charged in the accusatory pleading and are either admitted or found to be true by the trier of fact. Veh C §23582(d). The finding must be based on facts in addition to the fact that the defendant was driving while under the influence of alcohol and/or drugs, or with a specified percentage of alcohol in the blood. Veh C §23582(d).

The court may not strike this enhancement except in unusual cases in which the interests of justice would be served. If the court decides not to impose the additional and consecutive term, the court must specify its reasons on the record. Veh C §23582(c).

b. [§81.79] 0.15 Percent Blood-Alcohol Level

If a person convicted of violating Veh C §23152 or §23153 had a blood-alcohol level of 0.15 percent or more, the court must consider this blood-alcohol level as a special factor justifying the enhancement of penalties, denying probation, or imposing additional or enhanced terms or conditions of probation. Veh C §23578.

c. [§81.80] Willful Refusal To Take Test

If, at the time of arrest for a first violation of Veh C §23152, the defendant willfully refused to submit to or complete a chemical test (see §§81.36–81.37), the terms and conditions of his or her probation must include the conditions outlined in Veh C §23538(a)(1). Veh C §23577(a)(1). See §81.70.

If the defendant's refusal occurred at the time of arrest for a violation of Veh C §23153 or at the time of arrest for a second or subsequent violation of Veh C §23152, his or her punishment must be enhanced by confinement in county jail from a minimum of 48 continuous hours to a maximum of 18 days, depending on the defendant's number of prior DUI convictions, whether or not probation is granted. Veh C §23577(a)(2)–(5). No part of the jail term may be stayed, unless the defendant has been sentenced to and incarcerated in state prison and execution of that sentence is not stayed. Veh C §23577(a)(2)–(5).

In addition, the court must consider a defendant's refusal to take a chemical test as a special factor justifying enhancement of penalties, denying probation, or imposing enhanced terms or conditions of probation. Veh C §23578.

d. [§81.81] Passenger Under 14 Years of Age

When a defendant is convicted of a violation of Veh C §23152 and a minor under age 14 was a passenger in the vehicle at the time of the offense, the court must enhance the punishment from a minimum of 48 continuous hours to a maximum of 90 days in county jail, depending on the defendant's number of prior convictions, whether or not probation is granted. No part of the jail term may be stayed. Veh C §23572(a). The driving of the vehicle in which the minor was a passenger must be pleaded and proved. Veh C §23572(b). No enhancement may be imposed if the defendant is also convicted of a violation of Pen C §273a (willful cruelty to child) arising out of the same facts and incident. Veh C §23572(c).

e. [§81.82] Bodily Injury or Death to Multiple Victims

A defendant who proximately causes bodily injury or death to more than one victim while violating Veh C §23153 must, on conviction, be given an enhancement of 1 year in state prison for each additional victim, up to a maximum of three enhancements. Veh C §23558 (statute does not preempt great bodily injury enhancement under Pen C §12022.7). The court may strike the enhancements if it determines that there are circumstances in mitigation and states its reasons on the record. Veh C §23558. The court may not impose an enhanced sentence unless the fact of bodily injury to each additional victim is charged in the accusatory pleading and admitted or found true by the trier of fact. Veh C §23558.

11. [§81.83] Minimum Confinement or Fine

The court may not absolve a defendant convicted under Veh C §23152 or §23153 from the obligation of spending the minimum time, if any, in confinement, or of paying the minimum fine. Veh C §23600(c). The DUI statutes that require jail are mandatory; time must be served in county jail, not in an alcohol rehabilitation facility. *People v Municipal Court* (Hinton) (1983) 149 CA3d 951, 954–957, 197 CR 204.

12. [§81.84] Time of Separate Convictions

The Legislature has declared that the timing of court proceedings should not permit a defendant convicted of a violation of Veh C §23152 or §23153 to avoid enhanced mandatory minimum penalties for multiple separate offenses occurring within a 10-year period. Veh C §23217. It has expressed its intent that a defendant should be subject to these enhanced

penalties regardless of whether the convictions were obtained in the same order in which the offenses were committed. Veh C §23217. See *People v Snook* (1997) 16 C4th 1210, 1213, 69 CR2d 615 (applying statute and finding it constitutional).

The current offense and the separate violations resulting in convictions must all occur within a 10-year period. See *People v Munoz* (2002) 102 CA4th 12, 16–20, 125 CR2d 182 (defendant wrongfully charged with a violation of Veh C §23152 punishable under Veh C §23550 (then requiring priors within 7-year period) that occurred in 1996, despite convictions for violations that occurred in 1990, 1997, and 1998; although all three separate violations occurred within 7 years of the current offense, the three violations were themselves more than 7 years apart).

13. [§81.85] Striking Separate Convictions

When a violation of Veh C §23152 or §23153 is charged and the defendant has one or more separate convictions that form the basis for the imposition of increased penalties, the court may not strike any of those convictions in order to avoid either (1) the imposition, as part of the sentence or term of probation, of the minimum imprisonment or fine or (2) the revocation, suspension, or restriction of the defendant's driving privileges. Veh C §23622(a).

14. [§81.86] Out-of-State Convictions

A conviction of an out-of-state offense that would have been a violation of Veh C §23152 or §23153 if committed in California constitutes a conviction of those sections for purposes of the Vehicle Code, including its sentencing provisions. Veh C §23626. See *People v Crane* (2006) 142 CA4th 425, 48 CR3d 334 (Colorado conviction for driving while impaired, which requires only that the defendant be affected to the slightest degree, cannot serve as a prior conviction for purposes of enhancing DUI sentence; California violations require an appreciable degree of impairment).

If the statutory definition of an out-of-state offense does not contain the necessary elements of the California offense, the court may consider evidence found within the record of the foreign conviction to determine whether the underlying conduct would have constituted a qualifying offense if committed in California. The record of conviction includes the charging documents, the change of plea form, and the abstract of judgment. *People v Self* (2012) 204 CA4th 1054, 1059, 1061, 139 CR3d 496 (no evidence in the record of conviction to support a finding that defendant's Arizona offense would have constituted a violation of Veh C §23152).

In administrative driver's license suspension proceedings, it is sufficient if the out-of-state offense is "substantially similar" to the California DUI statutes. See *McDonald v Dep't of Motor Vehicles* (2000) 77 CA4th 677, 681–689, 91 CR2d 826 (comparing California and Colorado DUI statutes and finding sufficient similarity even though Colorado statute presumes intoxication at blood-alcohol level of 0.05 percent or more, while Veh C §§23152 and 23153 only presume intoxication at blood-alcohol level of 0.08 percent or more). See also Veh C §13363(b) (out-of-state conviction must be "substantially the same" in substance, interpretation, and enforcement as the California law pertaining to that conviction in order to be given reciprocal treatment by DMV under Driver's License Compact (Veh C §§15000 et seq)).

15. [§81.87] Separate Sentences

The offenses described in Veh C §23152(a) and (b) are separate offenses, and dual convictions are proper; however, Pen C §654 prohibits dual punishments arising from a single act or an indivisible course of conduct. *People v Duarte* (1984) 161 CA3d 438, 446, 207 CR 615. Thus, the court must stay execution of the sentence on one of the convictions. 161 CA3d at 447. The court should also order that the use of this conviction as a prior conviction for penal and administrative purposes be stayed pending the finality of the judgment, with the stay to become permanent when service of the sentence is completed. 161 CA3d at 447–448.

When a defendant is charged with DUI and violating Veh C §§12500 (license requirements) or 14601 (suspended or revoked licenses; ignition interlock devices) arising out of the same conduct, those violations merge under Pen C §654 because both charges arise from a single physical act. See *People v Johnson* (2012) 54 C4th 350, 360, 142 CR3d 561 (explicitly overruling *In re Hayes* (1969) 70 C2d 604, 605, 75 CR 790, which upheld separate sentences for DUI and driving on a suspended license).

A DUI violation and a violation of Health & S C §11550 (being under influence of controlled substance) are separate offenses, and the court may impose a separate sentence for each. *People v Davalos* (1987) 192 CA3d Supp 10, 14, 238 CR 50. A defendant charged with DUI and a Health & S C §11550 violation is ineligible for diversion (see *People v Duncan* (1990) 216 CA3d 1621, 1627, 265 CR 612), and is also disqualified from receiving probation and drug treatment, in place of incarceration, under Proposition 36 (see Pen C §§1210, 1210.1(b)(2) (defendant is ineligible for this treatment when convicted of misdemeanor not related to use of drugs or of any felony in same proceeding in which defendant is convicted of drug possession offense)). See also *Gardner v Schwarzenegger* (2009) 178 CA4th 1366, 101 CR3d 229 (amendments by

SB 1177 (Stats 2006, ch 63) to initiative statutes mandating drug treatment and probation for nonviolent drug offenders are held unconstitutional).

16. [§81.88] Participation in Alcohol and Drug Problem Assessment Program

The court must order a person convicted of a violation of Veh C §23152 or §23153 to participate in an alcohol and drug problem assessment program under Veh C §§23646–23649 when (Veh C §23646(a), (b)):

- The conviction occurred within 10 years of a separate violation of Veh C §23152 or §23153;
- The person has a prior conviction for a violation of Veh C §23152 or §23153 that occurred more than 10 years ago; or
- The person has a prior conviction for a violation of Pen C §647(f) (public intoxication).

The court *may* order any other defendants convicted of a violation of Veh C §23152 or §23153 to attend such a program. Veh C §23646(b)(2).

If a program assessment recommends additional treatment to a defendant convicted of a violation of Veh C §23152 with no prior DUI convictions within 10 years, the court may order the defendant to complete an 18-month or 30-month DUI program described in Veh C §23542(b)(4) in lieu of the program described in Veh C §23538(b). Veh C §§13352(a)(1), 23646(b)(3).

If a program assessment recommends additional treatment to a defendant convicted of a violation of Veh C §23153 with no prior DUI convictions within 10 years, the court may order the defendant to complete an 18-month or 30-month DUI program described in Veh C §23542(b)(4) in lieu of the program described in Veh C §23556(b). Veh C §§13352(a)(2), 23646(b)(3).

17. [§81.89] Installation of Ignition Interlock Device

Ignition interlock device pilot program. In the counties of Alameda, Los Angeles, Sacramento, and Tulare, the DMV must mandate the installation of a certified ignition interlock device in all motor vehicles owned and operated by defendants who are convicted of a violation of Veh C §23152 or §23153. Veh C §23700. This pilot program has been extended until Jan. 1, 2019. Stats 2016, ch 783. Effective Jan. 1, 2019, defendants in all California counties who are either repeat offenders or first-time offenders who caused injuries will be required to install ignition interlock devices in their vehicles. Stats 2016, ch 783.

Installation within court's discretion on conviction of first offense. The court may require a defendant convicted of a first-offense violation of

Veh C §23152 or §23153 to install a certified ignition interlock device on any vehicle he or she owns or operates and may prohibit the defendant from operating a motor vehicle unless it is equipped with a functioning, certified ignition interlock device. Veh C §23575(a)(1). The court must give heightened consideration to imposing this sanction on a defendant with 0.15 percent or more by weight of alcohol in his or her blood at arrest, with two or more prior moving traffic violations, or who refused the chemical tests at arrest. Veh C §23575(a)(1). If the court orders an ignition interlock device restriction, the court must determine the period of the restriction, which may not exceed 3 years from the date of conviction. Veh C §23575(a)(1). The court must notify the DMV of the terms of the restriction, which must be placed on the defendant's DMV records. Veh C §23575(a)(1).

Mandatory installation on conviction of driving on suspended or revoked license (Veh C §14601.2). The court must require a defendant convicted of a violation of Veh C §14601.2 (driving while license is suspended or revoked because of conviction under Veh C §23152 or §23153) to install an ignition interlock device on any vehicle the defendant owns or operates and must prohibit the defendant from operating a motor vehicle unless it is equipped with a functioning, certified ignition interlock device. Veh C §23575(a)(2). The court must determine the period of the restriction, which may not exceed 3 years from the date of conviction. Veh C §23575(a)(2). The court must notify the DMV of the terms of the restriction, which must be placed on the defendant's DMV records. Veh C §23575(a)(2).

Mandatory installation when designated offenses substituted for Veh C §14601.2 charge. If the court agrees to a plea of guilty or no contest to a charge of Veh C §14601, §14601.1, §14601.4 or §14601.5 (driving while license is suspended or revoked) in satisfaction of, or as substitute for, an original charge of a violation of Veh C §14601.2, it must order the installation of an ignition interlock device for a period not to exceed 3 years, unless the court determines that installation of the ignition interlock device is not in the interest of justice and states the reasons for the finding on the record. Veh C §14601(e), §14601.1(d), §14601.4(c), §14601.5(g); Cal Rules of Ct 4.325.

The DMV is responsible for mandating the installation of an ignition interlock device when a person has been convicted of Veh C §14601.2, §14601.4, or §14601.5 subsequent to a prior conviction of a violation of any of those same offenses or Veh C §23103.5, §23152, or §23153. The DMV will require the installation of an ignition interlock device for 1, 2, or 3 years, depending on the number of prior convictions. Veh C §23573.

Other cases. In other cases, the court may require installation of an ignition interlock device and may prohibit the defendant from operating a motor vehicle without such a device. Veh C §23575(*l*). The period of the

restriction may not exceed 3 years from the date of conviction. Veh C §23575(*l*).

Exemption for operation of employer-owned vehicle. If the defendant is required to operate a vehicle owned by the defendant's employer as part of his or her employment, the defendant may operate the vehicle without the installation of an ignition interlock device, as long as the defendant has notified the employer that his or her driving privilege has been restricted under Veh C §§23575 and 23700 and has proof of that notification in his or her possession or with the vehicle. Veh C §23576(a). This exemption does not apply with respect to a vehicle that is owned by a business entity, which is entirely or partly owned or controlled by the defendant. Veh C §23576(b).

Other actions required of court. The court must include on the abstract of conviction or violation submitted to the DMV the requirement and term for the use of an ignition interlock device. Veh C §23575(b). The court must also advise the defendant that installation of the device does not permit the defendant to drive without a valid driver's license. Veh C §23575(c), (h). The court must monitor the installation and maintenance of an ignition interlock device restriction the court has ordered, and must give notice to the DMV under Veh C §40509.1 of a defendant's failure to comply with the restriction. Veh C §23575(e).

Unlawful acts to circumvent restrictions. Vehicle Code §23247 describes various acts to circumvent ignition interlock restrictions that are unlawful. A violation of that section is punishable by imprisonment in the county jail for up to 6 months and/or by a fine not exceeding $5000. Veh C §23247(f).

H. Punishment of Drivers of Commercial Vehicles

1. [§81.90] One-Year or Lifetime Ban on Driving a Commercial Vehicle

In addition to any other penalties, if a driver of a commercial motor vehicle (defined in Veh C §15210) violates Veh C §23152(a), (b), (c), or (d) or §23153(a), (b) or (d) while driving *any* vehicle, and the court notifies the DMV of this fact, the DMV must disqualify that driver from driving a commercial motor vehicle for 1 year. Veh C §§15300(a)(1)–(4), 15320. If the driver is convicted of a second DUI violation, the DMV will impose a lifetime ban on that driver's right to drive a commercial motor vehicle. Veh C §15302(a)–(d).

2. [§81.91] One-Year or Lifetime Ban When Driver Refuses Chemical Test

In addition to any other penalties, if a driver of a commercial motor vehicle willfully refuses to submit to, or fails to complete, a chemical test

to determine his or her blood-alcohol content in connection to the driving of *any* vehicle, the DMV must disqualify that driver from driving a commercial motor vehicle for 1 year. Veh C §15300(a)(9). A driver's second refusal will result in a lifetime ban on his or her right to drive a commercial motor vehicle. Veh C §§15302(i), 13353(b).

3. [§81.92] Three-Year or Lifetime Ban for Transporting Hazardous Material

In addition to any other penalties, if a driver of a commercial vehicle is convicted of a violation of any offense listed in Veh C §§15300(a), 13350(a)(2), 13352, or 13357 that occurred while transporting a hazardous material, the DMV must disqualify that driver from driving a commercial motor vehicle for 3 years. Veh C §15300(b). A commercial driver's second violation of any offense listed in Veh C §§15302(a)–(j), 13350(a)(2), 13352, or 13357 that occurred while transporting a hazardous material will result in a lifetime ban on his or her right to drive a commercial motor vehicle. Veh C §15302(k).

I. Sentencing of Person Under 21 Years of Age

1. [§81.93] Violation of Veh C §23140

A violation of Veh C §23140 is punished as an infraction under Veh C §§40000.1 and 42001.25, *i.e.,* by imposition of a $100 fine for a first infraction, a $200 fine for a second infraction within 1 year, or a $300 fine for a third infraction within 1 year, and by license suspension for 1 year under Veh C §13202.5(a). If the defendant does not yet have a driver's license, the court may order the DMV to delay issuing a license for 1 year after the defendant becomes eligible to drive. Veh C §13202.5(a).

In addition to any penalties, the court must order a defendant, who is between the ages of 18 and 21 and who is convicted of a first violation of Veh C §23140, to attend a licensed DUI program. Veh C §23502(a). If the defendant has not been convicted of a DUI-related offense within 10 years of the current violation of Veh C §23140, the defendant must complete, at minimum, the education component of the DUI program. Veh C §23502(b)(1). If, however, the defendant has a DUI-related conviction within 10 years, the defendant must complete the entire program. Veh C §23502(b)(2). The DMV must suspend the defendant's driver's license under Veh C §13352.6, and the court must require the defendant to surrender his or her license to the court in accordance with Veh C §13550. Veh C §23502(c). The court must advise the defendant at the time of sentencing that his or her driving privilege will not be restored until he or she has provided the DMV with proof of successful completion of the required DUI program. Veh C §23502(d).

The court may require the installation of a certified ignition interlock device. Veh C §13202.8.

2. [§81.94] Violation of Veh C §23136

A violation of Veh C §23136 is punished as an infraction under Veh C §§40000.1 and 42001(a), *i.e.,* by imposition of a $100 fine for a first infraction, a $200 fine for a second infraction within 1 year, or a $250 fine for a third infraction within 1 year.

3. [§81.95] First Violation of Veh C §23152 or §23153

In a county that has one or more alcohol or drug education programs certified by the county alcohol program administrator and approved by the board of supervisors, the juvenile court judge, referee, or juvenile hearing officer must order a defendant who is convicted of a first violation of Veh C §23152 or §23153, and who was under 21 years of age at the time of the offense, to participate in and successfully complete an alcohol and/or drug education program, as designated by the court. Veh C §§23500, 23520. The expense of the defendant's attendance in the program must be paid by the defendant's parents or guardian if the defendant is under 18 years of age; a defendant 18 years of age or older must pay the expense. Veh C §23520(a). The fee may be waived on a showing of indigency, or paid in installments on a showing of inability to pay the full fee at the commencement of the program. Veh C §23520(a).

The court must suspend for 1 year the driver's license of a defendant who is convicted of a violation of Veh C §23152 or §23153, and who was under 21 years of age at the time of the offense. If the defendant does not yet have a driver's license, the court may order the DMV to delay issuing a license for 1 year after the defendant becomes eligible to drive. Veh C §13202.5(a).

4. [§81.96] Participation in Youthful Drunk Driver Visitation Program

When a defendant under 21 years of age is found to be in violation of Veh C §23140 or §23152 and is granted probation, the court may order the defendant, with his or her consent, to participate in a Youthful Drunk Driver Visitation Program, as a condition of probation. Veh C §23514(a). The court must require that the defendant not drink any alcoholic beverage at all before reaching 21 years of age and not use illegal drugs. Veh C §23514(c). The types of supervised visitations that may be ordered and provisions for conducting the visitation are described in Veh C §23517. The program may include a personal conference after the visitation between the sentencing judge (or judicial officer or person responsible for coordinating the program for the court) and the defendant, his or her

attorney, and his or her parents, to discuss the experiences of the visitation and how those experiences may impact the defendant's future conduct. Veh C §23518(a). If a personal conference is not practicable because of the defendant's absence from the jurisdiction, conflicting time schedules, or other reasons, the program should provide for a written report or letter by the defendant to the court discussing the experiences and their impact on the defendant. Veh C §23518(b).

5. [§81.97] Informal Supervision of Minor

When a minor has been charged with a violation of Veh C §23140 or §23152, the probation officer may, in lieu of requesting that the minor be declared a ward of the court, outline a program of supervision for the minor. Welf & I C §654.1(a). The probation officer must cause the citation for the violation to be heard and disposed of by the judge, referee, or juvenile hearing officer as a condition of any program of supervision. Welf & I C §654.1(a). A minor who is placed on informal supervision must participate in and successfully complete an alcohol or drug education program from a county mental health agency or other appropriate community program. Welf & I C §654.4.

6. [§81.98] Out-of-State Convictions

Any finding of an out-of-state juvenile court judge, referee, or juvenile hearing officer of a commission of an offense which, if committed in this state, would have been a violation of Veh C §23152 if committed in California, constitutes a conviction under that section for purposes of license suspension or revocation under Veh C §§13352, 13352.3, and 13352.5. If the offense would have been a violation of Veh C §23153 if committed in California, it constitutes a conviction under that section for purposes of license suspension or revocation under Veh C §§13352 and 13352.3. Veh C §23521. See §81.86.

J. [§81.99] Sentencing of Person on Probation for DUI Violation

A violation of Veh C §23154 is punished as an infraction under Veh C §§40000.1 and 42001(a), *i.e.,* by imposition of a $100 fine for a first infraction, a $200 fine for a second infraction within 1 year, or a $250 fine for a third infraction within 1 year.

K. [§81.100] Surrender of License

If a person's driver's license is required or ordered to be suspended or revoked by the DMV under any section of the Vehicle Code on conviction of a DUI offense, the person must surrender the license to the court on conviction. Veh C §§13350, 23660 (if defendant has more than one license, all must be surrendered). The court must transmit to the DMV all

licenses required to be suspended or revoked. Veh C §23660. The person is not entitled to have the post-conviction license suspension reduced by the number of days spent driving on a restricted license during the post-arrest administrative license suspension. *Piper v Dep't of Motor Vehicles* (2014) 232 CA4th 1310, 1318, 182 CR3d 200.

L. [§81.101] Impoundment or Sale of Vehicle

The court may order that a vehicle that was used in the commission of an offense under Veh C §23152 or §23153, and was registered to the convicted defendant, be impounded at the defendant's expense for 1 to 30 days if the defendant has not had a prior conviction within the last 5 years. Veh C §23594(a). If the defendant *has* had a prior conviction within the last 5 years, the court *must* order impoundment of the vehicle at the defendant's expense for 1 to 30 days, except in an unusual case. Veh C §23594(a). If the defendant has had two or more prior convictions within the last 5 years, the court must order impoundment of the vehicle at the defendant's expense for 1 to 90 days. Veh C §23594(a).

If the defendant is convicted of Veh C §23152 and has two or more separate convictions within 7 years, or is convicted of Veh C §23153 and has any separate convictions within the same period, the court may declare the vehicle a nuisance and order it to be sold, as long as the defendant is the registered owner. Veh C §23596.

The court may not order impoundment or sale if the defendant's spouse has a community property interest in the vehicle, the vehicle requires only a class C or a class M license, and the vehicle is the sole vehicle available to the defendant's family. Veh C §§23594(b), 23596(g)(2).

M. [§81.102] Proposition 36 Not Applicable to DUI Offenders

A defendant convicted of both a nonviolent drug possession offense and a misdemeanor driving under the influence offense is not eligible to receive probation and drug treatment, in place of incarceration, under Proposition 36 (Substance Abuse and Crime Prevention Act of 2000), Pen C §§1210, 1210.1, 3063.1. The driving under the influence offense is a disqualifying "misdemeanor not related to the use of drugs" within the meaning of Pen C §§1210.1(b)(2) and 1210(d). *People v Canty* (2004) 32 C4th 1266, 14 CR3d 1.

A defendant convicted of a nonviolent drug possession offense may be denied probation and drug treatment under Proposition 36 if he or she has a prior misdemeanor driving under the influence conviction. *People v Eribarne* (2004) 124 CA4th 1463, 1465–1468, 22 CR3d 417 (court found that DUI offense committed within 5-year washout period involved the

"threat of physical injury to another person" within meaning of Pen C §1210.1(b)(1)).

IV. SCRIPTS

A. [§81.103] Plea of Guilty or No Contest to Misdemeanor DUI

(1) *Call the case:*

In the matter of the People of the State of California v _____, case number _____. Counsel, please state your appearances.

Are you [*Mr./Ms.*] [*name of defendant*]? What is your full true name and the date of your birth?

[*Mr./Ms.*] [*name of defendant*], if at any time during these proceedings there is anything that you do not understand or which confuses you, please stop me so that either the court or your attorney can clarify it or explain it to you.

You are accused of having violated Vehicle Code Section [*23152(a)/23152(b)/23152(d)/23152(e)/23152(f)*], a misdemeanor, on or about [*date*].

Note: Each offense in Veh C *§§23152* and 23153 *should be separately and distinctly alleged.*

[*Mr./Ms.*] [*name of defense attorney*], do you waive further reading of the complaint? Is the defendant ready to plead at this time?

[*Mr./Ms.*] [*name of defendant*], your attorney has indicated that you wish to enter a plea of [*guilty/no contest*] [*to Count* ____]. Is that what you want to do?

(2) *Advisement of the nature of the charge(s):*

Do you understand the crime(s) charged against you? Do you have any questions about the charge(s)?

(3) *Advisement and waiver of rights:*

[*Mr./Ms.*] [*name of defendant*], before I take your plea and sentence you, you must also understand and give up certain constitutional and statutory rights.

a. You have the right to a speedy and public trial within 30 days if you are in custody and 45 days if you are not in custody.

b. You have the right to a trial by jury, or if both you and the prosecutor waive that right, you have the right to be tried by a judge.

c. At your trial, you have a right to see and hear the witnesses against you testify under oath and, through your attorney, to question those witnesses.

d. You have the right to remain silent and not incriminate yourself.

e. You have the right to present a defense, that is, to testify in your own behalf, to present evidence and witnesses, and to use the court's subpoena power to bring evidence and witnesses before the court for your defense.

By pleading [*guilty/no contest*] to these charges, you are giving up all these rights. In fact, you are incriminating yourself by pleading [*guilty/no contest*] to these charges. Do you understand that?

[*Mr./Ms.*] [*name of defendant*], have you discussed all these rights, including your right to a trial by jury, your right to confront and cross-examine witnesses, and your right against self-incrimination, with your attorney? Have you discussed your case and defense of your case with your attorney?

[*Mr./Ms.*] [*name of defendant*], do you understand each of these rights that I have explained to you? Do you have any questions?

With full knowledge and understanding of each of these rights, do you freely and voluntarily waive and give up all these rights?

Counsel, do you join in those waivers? Do the People join?

(4) *Consequences of plea:*

[*Mr./Ms.*] [*name of defendant*], before I take your plea, you must understand the potential consequences.

a. *Potential county jail term and fine:*

Do you understand that if you plead guilty to the charge(s), the maximum punishment is _____ [*days/months*] in county jail and a fine of up to $_____? [See *Veh C §§23536–23568*.]

[*If applicable:*]

And do you understand that your county jail term may be enhanced by ___ days if you [*refused to submit to a chemical test/were driving at an excessive speed/had a child under 14 years of age in your vehicle*]? [See *Veh C §§23572, 23577, 23582*.]

If your blood-alcohol level was 0.15 percent or higher, the Court may consider this in determining whether to enhance the penalties, grant

probation, or impose additional terms of probation. Do you understand that? [See *Veh C §23578*.]

b. *Penalty assessments, fees, and state surcharge:*

In addition, should a fine be imposed, you will be required to pay penalty assessments, fees, and a state surcharge that will significantly increase the amount you must pay. [See *Pen C §§1464, 1465.7, 1465.8; Govt C §§70372, 70373, 70375, 76000, 76000.5, 76000.10, 76104.6, 76104.7*; *Veh C §§23645, 23649*.]

c. Restitution fine and victim restitution:

You will be ordered to pay a restitution fine of not less than $150 nor more than $1000. If you are granted probation, the sentencing judge will also impose an additional probation revocation restitution fine in the same amount, but this fine will be suspended unless your probation is revoked. If probation is revoked, the fine will be reinstated against you. [See *Pen C §§1202.4*, *1202.44*.]

[*Add if crime with a victim:*]

You will also be ordered to pay restitution directly to the victim(s) of your offense(s) in an amount determined by the court to fully reimburse the victim(s) for economic losses. [See *Pen C §1202.4*.]

d. *Revocation or suspension of driving privileges* (*Veh C §§13200–13202.7, 13210, 13350–13352.6, 13357, 13361*)*:*

As a result of your conviction, your driving privileges may be suspended or revoked by the Department of Motor Vehicles, and you will be asked to surrender your license to the Court. This is in addition to any suspension that the Department of Motor Vehicles may impose under a procedure that is separate from this criminal action. Do you understand that?

In order to have your driving privileges reinstated, you will have to provide the Department of Motor Vehicles with proof of successful completion of an alcohol/drug treatment program, even if you are not ordered to attend such a program by the Court. Do you understand that? [See *Veh C §§13352(a)(1), (3), (5), (7), 13352.1(b), 23538(b)(3), 23542(c), 23548(d), 23552(d)*.]

If the court determines that you would present a traffic or public safety risk if authorized to drive during the license suspension period, you will be unable to obtain a restricted driver's license from the Department of Motor Vehicles, which would allow you to drive to and from work, and to and from an alcohol or drug treatment program. Do you understand

that? [See *Veh C §§13352.4(h), 13352.5(g), 23536(d), 23538(a)(3), 23540(b), 23542(d)*.]

[*Defendant under age 21 at time of arrest. Add as appropriate*:]

If you were under the age of 21 at the time of your arrest, your driver's license will be suspended for 1 year, and you must surrender your license to the Court. If you do not have a valid driver's license, the Court will order the Department of Motor Vehicles to delay issuing you a license for 1 year after you become eligible to drive. [See *Veh C §13202.5*.]

[*Defendant with commercial driver's license. Add as appropriate*:]

The Department of Motor Vehicles will prohibit you from operating a commercial motor vehicle for 1 year. If you have a prior conviction of Vehicle Code Section 23152 or 23153 involving any vehicle, you will lose your right to drive a commercial motor vehicle for life. [See *Veh C §§15300, 15302*.]

e. *Ignition interlock device (Veh C §23575):*

The Court may order that you install an ignition interlock device on any vehicle you own or operate for a period of up to 3 years. This device prevents the vehicle from starting if you have alcohol in your body. Do you understand that?

f. *Vehicle impoundment (Veh C §23594). Add as appropriate:*

If you are the registered owner of the vehicle involved in the offense, as a result of your plea, the vehicle may be impounded at your expense for up to [*30/90*] days. Do you understand that?

g. *Vehicle forfeiture (Veh C §23596). Add as appropriate:*

If you are the registered owner of the vehicle involved in the offense, as a result of your plea, the vehicle may be declared a nuisance and ordered forfeited. Do you understand that?

h. *Immigration consequences (Pen C §1016.5(a)):*

If you are not a citizen of the United States, you should assume that your plea of [*guilty/no contest*] will result in your deportation from the United States, exclusion from admission to the United States, or denial of naturalization as a United States citizen. Do you understand that?

☛ JUDICIAL TIP: The court should give the Pen C §1016.5 advisement to all defendants because the court may not inquire into a defendant's legal status. See Pen C §1016.5(d); *People v Aguilera* (1984) 162 CA3d 128, 133, 208 CR 418.

i. *Advisory statement of dangers of driving under the influence (Veh C §23593):*

You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder. [See *People v Watson* (1981) 30 C3d 290, 179 CR 43.]

(5) *Factual basis*:

☛ JUDICIAL TIP: The court is not required to inquire as to whether there is a factual basis for a misdemeanor plea (*In re Gross* (1983) 33 C3d 561, 567–568, 189 CR 848), but it is recommended that the court do so. By satisfying itself that there is a factual basis, the court ensures the voluntariness of the plea, protects against the entry of a plea by an innocent defendant, and makes a record against appellate or collateral attacks on the plea. *People v Hoffard* (1995) 10 C4th 1170, 1183–1184, 43 CR2d 827 (approving of practice followed by many courts of determining factual basis for all pleas, but declining to impose a duty on courts). See also *People v Holmes* (2004) 32 C4th 432, 9 CR3d 678 (court provides guidelines on how to comply with Pen C §1192.5 and what constitutes a sufficient factual basis for a plea) and *People v Willard* (2007) 154 CA4th 1329, 1333–1335, 65 CR3d 488 (counsel's bare stipulation that there is a factual basis, without reference to any documents in record containing factual allegations, is insufficient).

[*Mr./Ms.*] [*name of prosecutor*], please state the factual basis for the plea.

[*Mr./Ms.*] [*name of defense counsel*], do you accept the factual basis as stated?

(6) *Voluntariness of plea:*

Are you entering your plea of [*guilty/no contest*] freely and voluntarily? Has anyone threatened you in any way in order to get you to plead guilty?

Are you under any medications, or have you recently consumed any drugs or alcohol?

[*If straight plea:*]

Has anyone made any promises or representations to you of a lesser sentence, probation, or any other advantage of any kind to get you to plead [*guilty/no contest*]?

[*If negotiated plea:*]

The prosecutor has indicated that if you plead [*guilty/no contest*] [*to Count* _____], [*he/she*] will [*describe terms of negotiated plea*], and your attorney has concurred in the terms of the plea.

Other than what has been stated here in open court, has anyone made any other promises or representations to you of a lesser sentence, probation, or any other advantage of any kind to get you to plead [*guilty/no contest*]?

Before entering your plea, do you have any questions about what you are doing today?

Have you talked about this case with your attorney? Do you believe that you have had enough time to talk with [*him/her*] about your case?

[*Mr./Ms.*] [*name of defense attorney*], do you believe that you have had sufficient time to discuss this case with your client? Have you discussed with your client [*his/her*] rights, defenses, and the possible consequences of a plea of [*guilty/no contest*]? Are you satisfied that your client understands [*his/her*] rights?

(7) *Taking the plea:*

[*Mr./Ms.*] [*name of defendant*], you are charged in the complaint [*in Count* _____] with a misdemeanor violation of section [*23152(a)/23152(b)/23152(d)/23152(e)/23152(f)*] of the Vehicle Code. To that charge, what is your plea?

[*If no-contest plea (Pen C §1016(3)):*]

For these purposes, a plea of no contest is the same as a plea of guilty. If you plead no contest, I will find you guilty on the basis of your plea and you will be sentenced as if you pleaded guilty. Do you still wish to plead no contest?

(8) *Findings and acceptance of plea:*

The court finds that the defendant has expressly, knowingly, understandingly, and intelligently waived [*his/her*] statutory and constitutional rights. The court further finds that the plea was freely and voluntarily made with an understanding of the nature of the charges pending as well as the consequences of the plea. The court finds there is

a factual basis for the plea. The court accepts the plea and finds the defendant guilty.

B. [§81.104] Short Plea Script

Note: The script below is to be used in conjunction with a written plea form. Comprehensive DUI advisement, waiver, and plea forms are available from the Los Angeles Superior Court Planning and Research Unit, and can be accessed via the Los Angeles Superior Court Digital Library website (www.jibbsnet.org).

(1) *Call the case:*

In the matter of the People of the State of California v _____, case number _____. Counsel, please state your appearances.

Are you [*Mr./Ms.*] [*name of defendant*]? What is your full true name and the date of your birth?

[*Mr./Ms.*] [*name of defendant*], if at any time during these proceedings there is anything that you do not understand or which confuses you, please stop me so that either the court or your attorney can clarify it or explain it to you.

You are accused of having violated Vehicle Code Section [*23152(a)/23152(b)/23152(d)/23152(e)/23152(f)*], a misdemeanor, on or about [*date*].

Note: Each offense in Veh C §§23152 and 23153 *should be separately and distinctly alleged.*

(2) Review written plea form with defendant:

[*Mr./Ms.*] [*name of defendant*], I have been handed a written DUI Advisement of Rights, Waiver, and Plea form with your name on it.

I am showing that form to you at this time. Do you recognize this form?

Are these your initials in the boxes to the right of pages ___? Is this your signature on the last page of the form?

Did you read this form before you initialed and signed it?

Did you understand your constitutional and statutory rights as they were explained to you on this form?

Do you understand that by signing this form you are waiving these rights?

Did you understand the consequences of a plea of guilty or no contest as they were explained to you on this form?

[*If not represented by counsel:*]

Would you like me to explain any of your rights or any of the consequences of a guilty or no-contest plea before I proceed?

[*If represented by counsel:*]

Did [*Mr./Ms.*] [*name of defense counsel*] explain to you your constitutional and statutory rights?

Did [*he/she*] explain to you the consequences of a plea of guilty or no contest?

(3) Factual basis:

[*Mr./Ms.*] [*name of defense counsel*], do you stipulate to a factual basis for the plea based on the information contained in the police report?

[*Mr./Ms.*] [*name of prosecutor*], do you also stipulate that there is a factual basis for the plea?

(4) *Voluntariness of plea:*

Are you entering your plea of [*guilty/no contest*] freely and voluntarily?

Has anyone threatened you in any way in order to get you to plead guilty?

Has anyone made any promises or representations to you of a lesser sentence, probation, or any other advantage of any kind to get you to plead [*guilty/no contest*]?

Before entering your plea, do you have any questions about what you are doing today?

(5) *Taking the plea:*

[*Mr./Ms.*] [*name of defendant*], to a misdemeanor charge of violating Vehicle Code section [*23152(a)/23152(b)/23152(d)/23152(e)/23152(f)*], what is your plea?

[*If no-contest plea (Pen C §1016(3)):*]

For these purposes, a plea of no contest is the same as a plea of guilty. If you plead no contest, I will find you guilty on the basis of your plea, and you will be sentenced as if you pleaded guilty. Do you still wish to plead no contest?

(6) *Findings and acceptance of plea:*

The court finds that the defendant has expressly, knowingly, understandingly, and intelligently waived [*his/her*] statutory and constitutional rights. The court further finds that the plea was freely and voluntarily made with an understanding of the nature of the charges pending as well as the consequences of the plea. The court finds there is a factual basis for the plea. The court accepts the plea and finds the defendant guilty.

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