

# Felony DUI Cases at a Glance<sup>1</sup>

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<sup>1</sup> This article was drafted by panel attorney Conness A. Thompson as a resource for the CCAP website. CCAP wishes to thank Ms. Thompson for her extensive research on this foundation overview article. As always, counsel is encouraged to conduct their own independent research for current and applicable cases and/or statutory updates in an ever-changing body of law.

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## Overview

The simple statement that a person has been convicted of felony drunk driving belies the complexity of this area of law. There is not one “felony drunk driving” code section, but rather many different routes to a felony drunk driving conviction. As a starting point, if one is charged with drunk driving, that charge is typically either Vehicle Code section 23152 (driving under the influence) or 23153 (causing bodily injury to another while driving under the influence), neither of which is necessarily a felony.

In California, a simple driving under the influence (DUI) (Veh. Code, § 23152), without more, is charged as a misdemeanor for the first, second, and third occurrence. (Veh. Code, §§ 23536, 23540, 23546.) However, simple driving under the influence may be charged as a felony where:

1. A person has three or more prior convictions, in any combination, of Vehicle Code section 23152, 23153, or 23103, as specified in Veh. Code, § 23103.5 (a plea to Veh. Code, § 23103 instead of being charged with Veh. Code, § 23152; aka “wet reckless”), where the violations occurred within the ten years of the current violation. (Veh. Code, § 23550.)
2. A person has a prior felony DUI conviction, which occurred within ten years of date of the current drunk driving violation. (Veh. Code, § 23550.5.) Qualifying prior convictions are: Vehicle Code sections 23152, 23153, and Penal Code section 192, subdivision (1)(c) (vehicular manslaughter).

Where a defendant is charged with felony Vehicle Code section 23152, the DUI charge will be heard first, then the matter of the priors will be heard. The priors may be heard either as part of the trial for the presently charged DUI(s) or in a bifurcated trial (jury or court). (See *People v. Calderon* (1994) 9 Cal.4th 69, 77–78.)

The “other” drunk driving offense, causing bodily injury to another while driving under the influence (Veh. Code, § 23153), is a wobbler and thus may be charged as either a misdemeanor or felony upon the first and second violation. (Veh. Code, § 23554.) Upon the third violation, Vehicle Code section 23153 is charged only as a felony. (Veh. Code, § 23566.) To qualify, the current offense must have occurred within 10 years of two or

more separate violations, in any combination, of Vehicle Code section 23103 (as specified in sections 23103.5, 23152, or 23153, and those prior violations resulted in conviction. (Veh. Code, § 23566.)

Similarly, a violation of Vehicle Code section 23153, may be charged as a felony, where the driver has a prior felony conviction for any of Vehicle Code section 23152, 23153, or Penal Code section 192, subdivision (1)(c) (vehicular manslaughter), where the violation occurred within ten years of date of the current violation. (Veh. Code, § 23550.5.)

Both Vehicle Code section 23152 and 23153 have a subdivision (a) and (b), which cover subtly different characterizations of a person's intoxication. For both code sections, subdivision (a) requires only that a person has driven "under the influence." This is satisfied by a showing of impairment while operating a vehicle. (*People v. Haeussler* (1953) 41 Cal.2d 252, 261.) The prosecution is not required to establish a particular blood alcohol content. Subdivision (b) requires a finding that a person's blood alcohol content was 0.08% or more. No showing of impairment is required. (See *Hamilton v. Gourley* (2002) 103 Cal.App.4th 351, 360–361.)

For both Vehicle Code sections 23152 and 23153, subdivision (a) and (b) are separate offenses. (*Hamilton v. Gourley, supra*, 103 Cal.App.4th 351, 361.) "Subdivision (b) . . . does not provide a mere alternative definition of 'driving under the influence,' and it does not constitute a lesser included offense of that proscribed in subdivision (a)." (*People v. Duarte* (1984) 161 Cal.App.3d 438, 446.) Accordingly, a person may be charged and convicted in count 1 with section 23152, subdivision (a), and in count 2 with section 23152, subdivision (b). (*Ibid.*)

In sum, regardless of how a person comes to be charged with a felony DUI, the starting point typically is either Vehicle Code section 23152 or 23153. (Note: These two code sections address persons 21 years or older. Vehicle Code section 23140 addresses those under 21 years of age, and is not discussed in this article.)

## **Elements of the Offense**

### **Vehicle Code section 23152**

Where a person is charged with violating Vehicle Code section 23152 (driving under the influence), he or she typically will be charged with both subdivision (a) and subdivision (b).

#### **Subdivision (a)**

Vehicle Code section 23152, subdivision (a), provides in part: "It is unlawful for

any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.”

To establish a violation of Vehicle Code section 23152, subdivision (a), the prosecution must prove beyond a reasonable doubt that (1) the defendant was under the influence while (2) driving a vehicle. (*People v. Martinez* (2007) 156 Cal.App.4th 851, 855.)

### **Under the Influence**

To sustain a conviction for Vehicle Code section 23152, subdivision (a), the prosecution does not have to prove actual intoxication or drunkenness to establish that the defendant was under the influence. (*People v. Haeussler* (1953) 41 Cal.2d 252, 262.) Rather, the prosecution is required to prove that, as a result of the use of alcohol or drugs, the defendant’s ability “to operate the vehicle in a manner like that of an ordinarily prudent and cautious person in the full possession of his faculties, using reasonable care and under like conditions” was impaired. (*Id.* at p. 261 [under the influence of alcohol]; *People v. Torres* (2009) 173 Cal.App.4th 977, 983 [under the influence of drugs].)

Proof of the defendant being under the influence of alcohol or drugs may be established by circumstantial evidence. (See *People v. Dingle* (1922) 56 Cal.App. 447, 449 [car zigzagged and crossed in front of another; defendant staggered, talked loudly and thickly, smelled of alcohol].)

Note that although Vehicle Code section 23152, subdivision (b), is a distinct offense that focuses on a threshold blood alcohol level of 0.08 percent, evidence of being under the influence based on an intoxication test is permissible. “By statute, if a chemical test within three hours of driving measures a driver’s blood alcohol at 0.08 percent or more, the driver is presumed to have been driving “under the influence” of alcohol. ([Veh. Code,] § 23610, subd. (a)(3).)” (*People v. McNeal* (2009) 46 Cal.4th 1183, 1188.) In other words, if a defendant is found guilty of Vehicle Code section 23152, subdivision (b), the trier of fact may, but is not required to, use this fact to find that the defendant was under the influence for purposes of subdivision (a).

### **Driving**

The driving element of driving under the influence “requires proof of volitional movement of a vehicle.” (*Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 768.) Under this definition, the engine does not have to be running – it is sufficient for the vehicle to be in motion while being steered by a person under the influence. (*People v. Jordan* (1977) 75 Cal.App.3d Supp. 1, 10.) Nor does the defendant have to be actively driving in the everyday sense of the word, so long as there was movement of the vehicle. (See *Henslee v. Department of Motor Vehicles* (1985) 168 Cal.App.3d 445, 451

[defendant “drove” where she was found asleep at the wheel of her parked, but running car, which she subsequently shifted into drive, causing the car to move several inches].)

If the arresting officer does not see the defendant driving the vehicle, “driving” may be proven by circumstantial evidence. For example, “a suspect’s proximity to a vehicle thought to have been driven by a person under the influence of alcohol is evidence from which a reasonable inference can be drawn that the suspect was the driver.” (*People v. Moreno* (1987) 188 Cal.App.3d 1179, 1190; see also *People v. Martinez* (2007) 156 Cal.App.4th 851, 855 [driving under the influence was established by evidence that the car was parked facing the wrong way with its engine running and headlights on, and that there were only two people in the area - one was buckled into the passenger seat, the other, the defendant, was intoxicated].)

### **A Vehicle**

Although the vehicles typically associated with a drunk driving conviction are cars or trucks, the Vehicle Code defines a vehicle broadly: “A ‘vehicle’ is a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.” (Veh. Code, § 670.) Additionally, “[a] ‘motor vehicle’ is a vehicle that is self-propelled.” (Veh. Code, § 415.)

In a drunk driving case involving a moped, where the reviewing court ultimately concluded that a moped was a vehicle under the Vehicle Code, the court first discussed what constituted a vehicle or motor vehicle, noting: “The term ‘motor vehicle’ includes a motor truck (Veh. Code, § 410), a truck tractor (Veh. Code, § 655), a snow mobile (Veh. Code, § 557), a motorcycle (Veh. Code, § 400; *Harrison v. Cal. State Auto. Assn. Inter Ins. Bureau* (1976) 56 Cal.App.3d 657, 663), a mobile crane or mobile truck crane (*Colby v. Liberty Mutual Ins. Co.* (1966) 220 Cal.App.2d 38, 44–45; *Donahue Cons. Co. v. Trans Indemnity Co.* (1970) 7 Cal.App.3d 291, 300), a motorized forklift (*Travelers Indem. Co. v. Colonial Ins. Co.* (1966) 242 Cal.App.2d 227, 236–238) and a bulldozer (*Lambert v. Southern Counties Gas Co.* (1959) 52 Cal.2d 347, 351.)” (*People v. Jordan* (1977) 75 Cal.App.3d Supp. 1, 6, 7.) In a recent case, a pocket bike - a two-wheeled motorized device - was determined to be a vehicle under the drunk driving statutes. (*People v. Varela* (2011) 193 Cal.App.4th 1216, 1219.)

### **Subdivision (b)**

Vehicle Code section 23152, subdivision (b), provides in part: “It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.”

To establish a violation of Vehicle Code section 23152, subdivision (b), the

prosecution must prove beyond a reasonable doubt that (1) the defendant drove a vehicle, and, (2) that when the defendant drove, the defendant's blood-alcohol level was .08 percent or more by weight.

### **Driving**

See discussion above.

### **A Vehicle**

See discussion above.

### **Blood Alcohol Level 0.08 Percent or More by Weight**

In California, pursuant to the implied consent law, a driver who is arrested for driving under the influence must consent to a blood, breath, or urine blood-alcohol test. (*Zink v. Gourley* (2000) 77 Cal.App.4th 774, 778, fn. 2; Veh. Code, § 23612.) If such a test reveals that the driver had a blood alcohol level of 0.08 percent or more at the time the blood alcohol test was given, and that test was given within three hours of being arrested for driving under the influence, there is a rebuttable presumption that the driver had a blood alcohol level of 0.08 percent or more at the time of driving. (Veh. Code, § 23152, subd. (b).)

One of the tools available to an officer investigating whether a person was driving under the influence is the preliminary alcohol screening (PAS) test. (Veh. Code, § 23612, subd. (h).) "The preliminary alcohol screening test is not determinative of blood alcohol content, but is a field sobriety test which may be used as a further investigative tool in order to establish reasonable cause to believe a person was driving a vehicle while under the influence of alcohol." (*Kodani v. Snyder* (1999) 75 Cal.App.4th 471, 473, fn. 2.) If an officer conducts a PAS test, he or she must tell the person being investigated that submitting to the PAS test does not relieve that person of his or her implied consent to take a blood, breath, or urine test. (Veh. Code, § 23612, subd. (i).) That person must also be informed that he or she has the right to refuse taking the PAS test. (Veh. Code, § 23612, subd. (i).)

### **Vehicle Code section 23153**

This code section differs from Vehicle Code section 23152 in that, in addition to driving under the influence, there was injury to another. Like section 23152, this code section has a subdivision (a) and subdivision (b), where (a) requires proof that the driver was "under the influence," and (b) requires proof that the driver had a blood alcohol content of 0.08 percent or greater.

Unlike Vehicle Code section 23152, section 23153 may be charged as either a misdemeanor or a felony on the first offense without needing to prove priors to charge a felony. (Veh. Code, § 23554.) Also, a person convicted of violating this code section within 10 years of a separate violation of section 23103, as specified in section 23103.5, 23152, or 23153, may be charged with either a misdemeanor or a felony. (Veh. Code, § 23560.) However, if a person is convicted of this code section within 10 years of two or more separate violations of section 23103, as specified in sections 23103.5, 23152, or 23153, then the current violation is charged only as a felony. (Veh. Code, § 23566.)

### **Subdivision (a)**

Vehicle Code section 23153, subdivision (a), provides in part: “It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.”

To establish a violation of Vehicle Code section 23153, subdivision (a), the prosecution must prove beyond a reasonable doubt that the defendant was (1) under the influence while (2) driving a vehicle, and (3) did a forbidden act or neglected a duty (4) resulting in injury to another.

### **Under the Influence**

See discussion above.

### **Driving**

See discussion above.

### **A Vehicle**

See discussion above.

### **Forbidden Act or Neglected Duty**

“To satisfy [this] element, the evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence.” (*People v. Minor* (1994) 28 Cal.App.4th 431, 438, emphasis in original.) “[A] wide variety of acts or omissions [may] satisfy the requirement the defendant commit an unlawful act when driving. These acts include the failure to yield the right of way to a pedestrian, (*People v. Walker* (1968) 266 Cal.App.2d 562, 568–569); violating the basic speed law, (*People v. Lares* (1968) 261 Cal.App.2d

657, 665); knowingly operating a car with defective brakes, (*People v. Campbell* (1958) 162 Cal.App.2d 776, 782); driving a vehicle when the windshield was so dirty as to cause poor visibility, (*People v. Graybehl* (1944) 67 Cal.App.2d 210, 214); and recklessly driving by zigzagging from side to side, (*People v. Dawes* (1940) 37 Cal.App.2d 44, 49).” (*People v. Capetillo* (1990) 220 Cal.App.3d 211, 216–217.)

In proving the defendant neglected a duty imposed by law while driving, it is not necessary to prove that any specific section of the Vehicle Code was violated. (*People v. Oyaas* (1985) 173 Cal.App.3d 663, 669.) “[T]he unlawful act or neglect of duty element of Vehicle Code section 23153 is satisfied by evidence which establishes that the defendant’s conduct amounts to no more than ordinary negligence.” (*Ibid.*; italics omitted.)

The required act or neglect does not have to have proximately caused the accident or to have been related to the careless driving, but merely must have proximately caused bodily injury to a person other than the driver. (*People v. Weems* (1997) 54 Cal.App.4th 854, 859–860.) “[T]he only required link between the driving under the influence and the ‘act or neglect’ is that the two occur ‘concurrently.’” (*Id.* at p. 859 [violation of mandatory seat belt law that caused injury to passenger satisfied neglect of duty element of statute].)

### **Injury to Another**

“Bodily injury means just what it says - harm or hurt to the body.” (*People v. Lares* (1968) 261 Cal.App.2d 657, 662.) It is more than a shaking up, fright, or minor headache following an accident. (*Ibid.*) But “bodily injury” does not require substantial or great injury to satisfy this element. (*People v. Thoma* (2007) 150 Cal.App.4th 1096, 1100.) The words “bodily injury” are not too indefinite or uncertain to provide the basis for a criminal conviction. (*People v. Lares, supra*, 261 Cal.App.2d 657, 662.)

### **Subdivision (b)**

Vehicle Code section 23153, subdivision (b), provides in part: “It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.”

To establish a Vehicle Code section 23153, subdivision (b), violation, the prosecution must prove beyond a reasonable doubt that the defendant (1) had a blood alcohol level of 0.08 percent or greater while (2) driving a vehicle, and (3) did a forbidden act or neglected a duty (4) resulting in injury to another.

## **0.08 Blood Alcohol Level**

See discussion above.

## **Driving**

See discussion above.

## **A Vehicle**

See discussion above.

## **Forbidden Act or Neglected Duty**

See discussion above.

## **Injury to Another**

See discussion above.

## **Vehicle Code section 23550**

Vehicle Code section 23550 is a repeat offender sentencing enhancement that applies to Vehicle Code section 23152, driving under the influence. (*People v. Coronado* (1995) 12 Cal.4th 145, 152, fn. 5 [discussing Vehicle Code section 23550 predecessor code section 23175; noting that this code section is not a substantive offense, but rather a sentence-enhancing statute that results in increased punishment for a current conviction under Vehicle Code section 23152].)

In a nutshell, Vehicle Code section 23550 factors any prior drunk driving conviction(s) into a defendant's current driving under the influence charge(s) (Veh. Code, § 23152). Vehicle Code section 23550 states, in part, that this code section may be charged where a person, "is convicted of a violation of section 23152 and the offense occurred within 10 years of three or more separate violations of section 23103, as specified in section 23103.5 [reckless driving as a result of a plea of guilty or nolo contendere in place of an original charge of driving under the influence], or section 23152 [driving under the influence] or 23153 [causing bodily injury while driving under the influence], or any combination thereof." Note that drunk driving priors adjudicated while the defendant was a juvenile may not be used under Vehicle Code section 23550. (*People v. Bernard* (1988) 204 Cal.App.3d Supp. 16, 18.)

Qualifying out-of-state priors may be used as part of a Vehicle Code section

23550 enhancement. “Out-of-state” includes “any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Dominion of Canada.” (Veh. Code, § 23626.) The out-of-state prior qualifies as a prior conviction of Vehicle Code section 23152 (driving under the influence) or 23153 (bodily injury while driving under the influence), or Penal Code section 191.5 (vehicular manslaughter) or section 192.5, subdivision (a) (vehicular homicide), if the out-of-state prior would have been a conviction of any of those statutes if committed in California. (Veh. Code, § 23626.)

A defendant’s prior conviction in another jurisdiction subjects the defendant to the same punishment as if he or she were convicted in California of an offense involving the same conduct. (*People v. Crane* (2006) 142 Cal.App.4th 425, 433.) Enhancement based on a conviction from another jurisdiction is permissible only where the conduct underlying the out-of-state conviction satisfies all of the elements of the California offense. (*Ibid.*) If the statutory definition of the out-of-state offense contains all of the elements of the California offense, the inquiry is complete. (*Ibid.*) Alternatively, if the statutory definition of the out-of-state offense does not contain all of the elements of the California offense, the California court may take into account evidence found in the record for the out-of-state conviction to determine whether the conduct underlying the out-of-state conviction would constitute a qualifying offense if committed in California. (*Ibid.*) Restricting the trier of fact to the record for the out-of-state conviction prevents the relitigation of the out-of-state prior. (*Ibid.*)

### **Vehicle Code section 23550.5**

Similar to Vehicle Code section 23550, Vehicle Code section 23550.5 is a repeat offender sentencing enhancement statute, which may elevate the presently charged offense to a felony. Unlike section 23550, section 23550.5 applies to current violations of both Vehicle Code section 23152 and 23153.

Vehicle Code section 23550.5 may be charged where a “person is convicted of a violation of section 23152 or 23153, and the offense occurred within 10 years of any of the following: (1) A prior violation of section 23152 that was punished as a felony under section 23550 or this section, or both, or under former section 23175 or former section 23175.5, or both[;] (2) A prior violation of section 23153 that was punished as a felony[;] (3) A prior violation of paragraph (1) of subdivision (c) of section 192 of the Penal Code [vehicular manslaughter] that was punished as a felony.” In addition, “[e]ach person who, having previously been convicted of a violation of subdivision (a) of section 191.5 of the Penal Code [gross vehicular manslaughter while intoxicated], a felony violation of subdivision (b) of section 191.5 [vehicular manslaughter while intoxicated], or a violation of subdivision (a) of section 192.5 of the Penal Code [vehicular manslaughter committed during the operation of a vessel], [and who] is subsequently convicted of a violation of section 23152 or 23153” may be charged with a felony. (Veh. Code, § 23550.5, subd.

(b.)

A prior qualifying felony drunk driving conviction that triggers Vehicle Code section 23550.5, where that prior conviction resulted in a prison term, “may be used both to elevate a violation of Vehicle Code section 23152 to a felony under Vehicle Code section [23550.5] and to enhance the sentence therefor under section 667.5(b) without violating [Penal Code] section 654’s bar against multiple punishment of an act or omission.” (*People v. Coronado* (1995) 12 Cal.4th 145, 159.) Additionally, the use of a prior conviction to both elevate a current drunk driving offense to a felony and to enhance the resulting sentence does not invoke the sentencing prohibition against the dual use of facts. (*Id.* at p. 159, fn. 10.)

### **Lesser Included Offenses**

In a jury trial, the court must instruct on lesser included offenses of the crime charged. Lesser included offenses do not come up often in felony drunk driving cases, but there are a couple to keep an eye out for:

Misdemeanor offenses of driving under the influence (Veh. Code, § 23152, subd. (a)) and driving with an unlawful blood alcohol level (Veh. Code, § 23152, subd. (b)) are lesser included offenses of felony driving under the influence causing injury (Veh. Code, § 23153, subd. (a)) and driving with an unlawful blood alcohol level causing injury (Veh. Code, § 23153, subd. (b)). (*People v. Powell* (2010) 181 Cal.App.4th 304, 307, 314; see also *People v. Capetillo* (1990) 220 Cal.App.3d 211, 221 [where prosecution was unable to prove Vehicle Code section 23153, defendant might still be guilty of lesser included offense of Vehicle Code section 23152].)

Felony driving under the influence causing injury in violation of Vehicle Code section 23153, subdivision (a), is a lesser included offense of gross vehicular manslaughter while intoxicated in violation of Penal Code section 191.5, subdivision (a). (*People v. Miranda* (1994) 21 Cal.App.4th 1464, 1466-1467, 1468-1469.)

Note: Subdivision (b) (driving with a blood alcohol level of 0.08 percent or greater) of both Vehicle Code section 23152 and 23153 is not lesser included offense of subdivision (a) (driving under the influence) of those code sections. (*People v. Duarte* (1984) 161 Cal.App.3d 438, 446.)

### **Jury Instructions**

CALCRIM jury instructions for driving under the influence offenses are found in instructions 2100 to 2131. The instructions are grouped into four categories: causing injury, without injury, prior conviction, and refusal (relating to implied consent). The CALCRIM instructions associated with Vehicle Code sections 23152, 23153, 23550,

23550.5, and 23566 are provided below.

## **CALCRIM 2110**

### *Driving Under the Influence (Veh. Code, § 23152(a))*

To prove that the defendant is guilty of this crime, the People must prove that:

1) The defendant drove a vehicle;

AND

2) When (he/she) drove, the defendant was under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug].

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. (An *alcoholic beverage* includes <insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer>.)]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the

regulations of the California Department of Health Services.]

[It is not a defense that the defendant was legally entitled to use the drug.]

### **CALCRIM 2111**

*Driving With 0.08 Percent Blood Alcohol (Veh. Code, § 23152(b))*

The defendant is charged [in Count ] with driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23152(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1) The defendant drove a vehicle;

AND

2) When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

### **CALCRIM 2100**

*Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury (Veh. Code, § 23153(a))*

The defendant is charged [in Count] with causing injury to another person while (driving a vehicle/operating a vessel) under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] [in violation of Vehicle Code section 23153(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

- 1) The defendant (drove a vehicle/operated a vessel);
- 2) When (he/she) (drove a vehicle/operated a vessel), the defendant was under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug].
- 3) While (driving a vehicle/operating a vessel) under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);

AND

- 4) The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to (drive a vehicle/operate a vessel) with the caution of a sober person, using ordinary care, under similar circumstances.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes <insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer>.]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to (drive a vehicle/operate a vessel) as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would (drive a vehicle/operate a vessel) under similar circumstances.] (See Veh. Code, § 312 [definition of drug].)

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[The People allege that the defendant committed the following illegal act[s]: <list name[s] of offense[s]>.

To decide whether the defendant committed <list name[s] of offense[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while (driving the vehicle/operating the vessel): (the duty to exercise ordinary care at all times and to maintain proper control of the (vehicle/vessel)/ <insert other duty or duties alleged>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to (drive a vehicle/operate a vessel).]

## **CALCRIM 2101**

### *Driving With 0.08 Percent Blood Alcohol Causing Injury (Veh. Code, § 23153(b))*

The defendant is charged [in Count ] with causing injury to another person while driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23153(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

- 1) The defendant drove a vehicle;
- 2) When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight;
- 3) When the defendant was driving with that blood alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);

AND

- 4) The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services.]

[The People allege that the defendant committed the following illegal act[s]: *<list name[s] of offense[s]>*].

To decide whether the defendant committed *<list name[s] of offense[s]>*, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/ *<insert other duty or duties alleged>*).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

## **CALCRIM 2125**

*Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*  
(*Veh. Code*, §§ 23550, 23550.5 & 23566)

If you find the defendant guilty of ([causing injury while] driving under the influence/ [or] [causing injury while] driving with a blood alcohol level of 0.08 percent or more), [or the lesser offense of driving under the influence [or driving with a blood alcohol level of 0.08 percent or more]], you must then determine whether the People have proved the additional allegation that the defendant has been convicted of (another/other) driving under the influence offense[s] before. It has already been determined that the defendant is the person named in exhibits <*insert numbers or descriptions of exhibits*>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The court has a *sua sponte* duty to instruct on proof of the alleged prior convictions. Give this instruction if the defendant does not admit the prior conviction and the court has not granted a bifurcated trial on the prior conviction.

The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the court grants a bifurcated trial, give CALCRIM No. 2126, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial.

## **CALCRIM 2126**

*Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—  
Bifurcated Trial (Veh. Code, §§ 23550, 23550.5 & 23566)*

The People have alleged that the defendant was previously convicted of (another/other) driving under the influence offense[s]. It has already been determined that the defendant is the person named in exhibits *<insert numbers or descriptions of exhibits>*. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of *<insert Veh. Code section violated>*, on *<insert date of conviction>*, in the *<insert name of court>*, in Case Number *<insert docket or case number>*(;/.)  
[AND *<Repeat for each prior conviction alleged>*.]

[In deciding whether the People have proved the allegation[s], consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]

You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding.

### **Sentencing/Punishment**

The sentence imposed by the court should always be compared to the statute in effect at the time the offense was committed (to make sure there are no ex post facto problems) and the time of sentencing (to determine whether the defendant should receive the ameliorative effect of a beneficial change in the law).

### **Imprisonment**

Imprisonment associated with drunk driving convictions charged as felonies falls into one of several categories:

#### County Jail

- Term of 16 months, or two or three years
- Veh. Code, § 23550 (3 or more prior DUIs within 10 years).

#### State Prison

- Term of 16 months, or two or three years

- Veh. Code, § 23550.5 (prior felony DUI within 10 years)
- Veh. Code, § 23554 (first conviction of 23153)
- Veh. Code, § 23560 (conviction of 23153 with prior DUI within 10 years).
- Term of two, three, or four years
  - Veh. Code, § 23566 (conviction of 23153 with 2 or more prior DUIs within 10 years).

A prior felony drunk driving conviction that resulted in a prison sentence may be used both (1) to elevate a current drunk driving conviction to felony and (2) to impose a one-year prison term enhancement (Pen. Code, § 667.5, subdivision (b)) without violating Penal Code section 654 ban on multiple punishment of act or omission. (See *People v. Coronado* (1995) 12 Cal.4th 145, 159.)

When reviewing the record, check that any evidence used to prove a prior has been included in the record. Pursuant to California Rules of Court, rule 8.320(b)(13)(C), “[t]he clerk’s transcript must contain . . . [a]ny document admitted in evidence to prove a prior . . . criminal conviction, or prison term.” If such documentary evidence is missing from the record, submit a California Rules of Court, rule 8.340(b) letter to the superior court where the conviction was sustained requesting the missing information.

A defendant convicted of a felony violation of Vehicle Code section 23153, Penal Code section 191.5, subdivision (a), or Penal Code section 192.5, subdivision (a), where injury was caused to more than one victim, shall receive a one-year prison enhancement for each additional victim. (Veh. Code, § 23558.) For this enhancement to be imposed, “the fact of the bodily injury to each additional victim [must be] charged in the accusatory pleading and [must be] admitted or found to be true by the trier of fact.” (Veh. Code, § 23558.) Note, however, that the trial court has the discretion to strike the one-year enhancement(s) if it finds circumstances in mitigation to imposing the enhancements. (Veh. Code, § 23558.) The trial court must state on the record its reasons for striking the enhancements. (Veh. Code, § 23558.)

## **Fines and Fees**

The following list is comprised of those fines and fees for Vehicle Code sections related to drunk driving that are or may be charged as felonies. All are mandatory.

### **Veh. Code, § 23550**

- Applies to: Conviction of Vehicle Code section 23152 within 10 years of 3 or more separate convictions of Vehicle Code section 23103 (as specified in section 23103.5), 23152, 23153, or any combination thereof.
- Amount: \$390 to \$1,000
- Ability to Pay Dispositive: No

**Veh. Code, § 23550.5**

- Applies to: Conviction of Vehicle Code section 23152 or 23153 within 10 years of any conviction of Vehicle Code sections 23152, 23153, or Penal Code section 192, subdivision (c)(1) that was punished as a felony; Penal Code section 191.5, subdivisions (a) or (b) (if felony), or 192.5, subdivision (a).
- Amount: \$390 to \$1,000
- Ability to Pay Dispositive: No

**Veh. Code, § 23554**

- Applies to: First conviction of Vehicle Code section 23153.
- Amount: \$390 to \$1,000
- Ability to Pay Dispositive: No

**Veh. Code, § 23560**

- Applies to: Second conviction of Vehicle Code section 23153 that occurs within 10 years of a separate violation of Vehicle Code section 23103 (as specified in Vehicle Code section 23103.5), 23152, or 23153.
- Amount: \$390 to \$5,000
- Ability to Pay Dispositive: No

**Veh. Code, § 23566(a)**

- Applies to: Conviction of Vehicle Code section 23153 that occurs within 10 years of 2 or more separate violations of Vehicle Code section 23103 (as specified in Vehicle Code section 23103.5), 23152, 23153, or some combination thereof.
- Amount: \$1,015 to \$5,000
- Ability to Pay Dispositive: No

**Veh. Code, § 23566(b)**

- Applies to: Conviction of Vehicle Code section 23153, where the act or neglect proximately caused great bodily injury (pursuant to Penal Code section 12022.7) to someone other than the driver, that occurs within 10 years of 2 or more separate violations of Vehicle Code section 23103 (as specified in Vehicle Code section 23103.5), 23152, 23153, or some combination thereof.
- Amount: \$1,015 to \$5,000
- Ability to Pay Dispositive: No

### **Veh. Code, § 23568**

- Applies to: Grant of probation following conviction of Vehicle Code section 23566.
- Amount: \$390 to \$5,000 + restitution pursuant to Penal Code section 1203.1.
- Ability to Pay Dispositive: No

### **Mandatory Penalty Assessments**

The following is a list of mandatory penalty assessments that are imposed on top of enumerated fines and fees. Both assessments are mandatory.

### **Veh. Code, § 23645**

- Applies to: Convictions of either Vehicle Code section 23152 or 23153.
- Details of Assessment: Supports county alcohol abuse education and prevention.
- Amount: Up to \$50
- Ability to Pay Dispositive: Yes

### **Veh. Code, § 23649**

- Applies to: Convictions of either Vehicle Code section 23152 or 23153.
- Details of Assessment: Imposed upon every fine, penalty, or forfeiture imposed and collected by the courts for a violation of section 23152 or 23153 in any judicial district that participates in a county alcohol and drug problem assessment program.<sup>2</sup>
- Amount: Up to \$100
- Ability to Pay Dispositive: Yes

### **Other Punishment**

In addition to incarceration and fines/assessments, a person convicted of drunk driving is subject to other punishment. This includes the suspension/revocation of a person's privilege to operate a motor vehicle for anywhere from six months to five years,

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<sup>2</sup> This assessment can only be levied upon a fine, penalty or forfeiture that was imposed and collected by the court. (Veh. Code, § 23649.) When the court imposes a fine against the defendant, but subsumes the fine into the defendant's presentence credit award, the fine was never collected and the Vehicle Code section 23649 assessment should not be imposed. (*People v. Benner* (2010) 185 Cal.App.4th 791, 797.)

the surrender to the court of one's driver's license, and the designation as a habitual traffic offender for a period of three years following conviction. (Veh. Code, §§ 23536, 23540, 23546, 23550, 23550.5, 23554, 23560, 23566.)

## **Issue Spotting on Appeal**

Because felony drunk driving convictions often involve priors, this is an area to investigate when looking for issues to raise on appeal. Two key areas related to priors are the validity of an out-of-state prior drunk driving conviction, and whether all the alleged priors occurred within 10 years of the current violation. Other areas to investigate, if the facts support it, are whether the defendant was actually driving at the time of his or her arrest for driving while intoxicated, and whether there was evidence to support a charge that the defendant was under the influence while driving.

### **Foreign Priors**

If a defendant's drunk driving conviction is enhanced based on an out-of-state (foreign) prior drunk driving conviction, check that the out-of-state conviction qualifies for purposes of sentence enhancement. "Enhancement is only permissible when the conduct underlying the foreign conviction would meet all of the elements of the California offense." (*People v. Crane* (2006) 142 Cal.App.4th 425, 433 [holding that Colorado conviction for driving while ability impaired would not have been a conviction under Veh. Code, § 23152, subs. (a) or (b) and thus did not qualify as a prior]; see also *People v. Self* (2012) 204 Cal.App.4th 1054 [prior Arizona conviction was not equivalent to California conviction and therefore could not elevate a Veh. Code, § 23152 offense to a felony].)

### **Standard of Review**

A challenge on appeal of whether a prior foreign conviction qualifies as a conviction under California law involves an assessment of the sufficiency of the evidence. (*People v. Crane* (2006) 142 Cal.App.4th 425, 429.) Hence, the standard of review is substantial evidence.

### **Standard of Prejudice**

Not applicable.

### **Timing of Priors**

Vehicle Code sections 23550, 23550.5, and 23566 all enhance the sentencing of a current drunk driving conviction based on drunk driving priors occurring within 10 years of the current conviction. The 10-year look-back period in these Vehicle Code sections is

based on the date the violation(s) occurred, not the conviction dates. (*People v. Munoz* (2002) 102 Cal.App.4th 12, 17.) Check that any priors used to enhance the current sentence in fact occurred within the 10-year window. Also be aware that it is possible for a drunk driving conviction to occur out of order relative to other drunk driving violation dates. The ensuing confusion may result in error. (See *People v. Munoz* (2002) 102 Cal.App.4th 12 [finding error where requirement that all priors occur within the 7-year window<sup>3</sup> was not met due to one of the three prior drunk driving convictions occurring before the current (4th) charge, and two occurring after, with all three occurring within 7 years of current charge, but not of each other].)

### **Standard of Review**

A challenge to a finding that a defendant suffered the requisite number of drunk driving priors during the 10-year look-back period involves a review of the sufficiency of the evidence. (*People v. Munoz* (2002) 102 Cal.App.4th 12, 16.) Thus, the correct standard of review is substantial evidence.

### **Standard of Prejudice**

Not applicable.

### **Driving**

Cases where a defendant is found in a parked car beside a roadway, and the investigating officer believes that the defendant is under the influence of alcohol or drugs, should be examined to ensure that there was sufficient evidence to establish the driving element of drunk driving statutes. Driving requires “proof of volitional movement of a vehicle.” (*Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [where defendant was legally parked in a residential neighborhood and officer did not see car move, intoxication alone was not sufficient to arrest defendant for drunk driving].) Note, however, that depending on the circumstances, an officer does not need to have seen the defendant actually drive the vehicle; driving may be established through circumstantial evidence. (*People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9.)

### **Standard of Review**

A challenge to a conviction for drunk driving (either while under the influence or with a blood alcohol level of 0.08% or greater) that focuses on whether the defendant was, in fact, driving raises a question of the sufficiency of the evidence. Accordingly, the standard of review is substantial evidence. (*People v. Wilson* (1985) 176 Cal.App.3d

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<sup>3</sup> Predecessor statute to current Vehicle Code section stipulated a 7-year window instead of 10.

Supp. 1, 7-8.)

### **Standard of Prejudice**

Not applicable.

### **Under the Influence**

To prove that a defendant was driving under the influence (Veh. Code, § 23152, subd. (a)), the prosecution only has to prove that, as a result of the use of alcohol or drugs, the defendant's ability "to operate the vehicle in a manner like that of an ordinarily prudent and cautious person in the full possession of his faculties, using reasonable care and under like conditions" was impaired. (*People v. Haeussler* (1953) 41 Cal.2d 252, 261 [under the influence of alcohol]; *People v. Torres* (2009) 173 Cal.App.4th 977, 983 [under the influence of drugs].) In reviewing the record, check that the facts support that the defendant was, in fact, driving in an impaired manner.

### **Standard of Review**

A challenge to a conviction for driving under the influence that raises the question of whether there was sufficient evidence to support a finding that the defendant was driving in an impaired manner is reviewed under the substantial evidence standard. (*People v. Torres* (2009) 173 Cal.App.4th 977, 979.)

### **Standard of Prejudice**

Not applicable.

### **Pending/Recent California/United States Supreme Court Issues**

When reviewing an appellate record for issues, always check the recent and pending issues in both the California and United States Supreme Courts. CCAP maintains a directory of such cases at: [http://www.capcentral.org/high\\_court/index.asp](http://www.capcentral.org/high_court/index.asp).

In addition to CCAP's inventory, an attorney should perform his or her own research to determine whether there are issues pending with respect to the matters at issue in a given appellant's case. The California Supreme Court maintains a list of pending issues, which can be found at: <http://www.courts.ca.gov/13648.htm>. For information on cases pending in the United States Supreme Court, that website directs viewers to the American Bar Association's webpage for its publications "Preview," which is subtitled "Comprehensive Coverage of the U.S. Supreme Court." The direct link is: [http://www.americanbar.org/publications/preview\\_home/alphabetical.html](http://www.americanbar.org/publications/preview_home/alphabetical.html). Unfortunately, this site is organized by case, not issue, but there is a wealth of

information if one drills down, including questions presented, merit briefs, and amicus briefs. Each case also includes a “source” link, which directs the viewer to the U.S. Supreme Court’s docket for that case.

### **California Supreme Court – Pending**

- **Breath Tests:** Did the trial court prejudicially err in refusing to allow expert testimony about the accuracy of the breath-testing devices used in this case? (*People v. Vangelder* (2011) 197 Cal.App.4th 1, review granted 10/19/11 (S195423/ D059012).)  
[http://www.capcentral.org/high\\_court/casedetails.aspx?id=406](http://www.capcentral.org/high_court/casedetails.aspx?id=406).
  - ⇒ **Update as of this writing:** On April 17, 2013, the court directed the parties to file supplemental briefs addressing the effect, if any, of: (1) Health & Safety Code sections 100700 and 100701; (2) California Code of Regulations, title 17, sections 1221.2 [concerning performance standards for breath-alcohol analysis machines] and 1221.3 [concerning a "Conforming Products list" for approved breath-alcohol analysis machines]; and (3) 58 Federal Register 48705, 48707-48708 (Sept. 17, 1993) [“Model Specifications for Evidential Breath Testing Devices” - providing that no machine can meet federal standards unless it “measure[s] the alcohol content of deep lung breath with sufficient accuracy for evidential purposes”]; 72 Federal Register 71480, 71481-71483 (Dec. 17, 2007) [“Conforming Products List of Evidential Breath Measurement Devices” at time of trial]; 77 Federal Register 35747, 35748-35751 (June 14, 2012) [current “Conforming Products List of Evidential Breath Measurement Devices”].
- **Blood Tests:** (1) Can circumstantial evidence other than the results of chemical tests be used to prove that a driver's blood-alcohol content at the time of driving was the same as, or greater than, the results of a blood-alcohol test taken approximately an hour after driving? (2) Is the decision of the Court of Appeal consistent with the requirements of Evidence Code section 604 for proof of an initially presumed fact after the presumption has been rebutted? (*Coffey v. Shiimoto* (2013) 218 Cal.App.4th 1288, review granted 10/30/13 (S213545/G047562).)  
[http://www.capcentral.org/high\\_court/casedetails.aspx?id=520](http://www.capcentral.org/high_court/casedetails.aspx?id=520)

### **U.S. Supreme Court – Recent/Decided**

- **Warrantless Blood Sample:** May a law enforcement officer obtain a

nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream? (*Missouri v. McNeely* (2012) 358 S.W.3d 65, cert. granted 9/25/12 (11-1425).)  
[http://www.capcentral.org/high\\_court/casedetails.aspx?id=460](http://www.capcentral.org/high_court/casedetails.aspx?id=460)

⇒ Decided 4-17-13: The Court affirmed the state court finding that where a defendant was stopped as part of a routine DWI investigation, where no factors other than the natural dissipation of blood alcohol suggested that there was an emergency, the nonconsensual warrantless blood test violated defendant's right to be free from unreasonable searches of his person.  
[http://www.supremecourt.gov/opinions/12pdf/11-1425\\_cb8e.pdf](http://www.supremecourt.gov/opinions/12pdf/11-1425_cb8e.pdf)