

CHAPTER 4

DRIVING UNDER THE INFLUENCE POLICY AND PROCEDURES

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CHAPTER 4

DRIVING UNDER THE INFLUENCE POLICY AND PROCEDURES

1. GENERAL. This chapter contains policies and procedures for the enforcement of driving under the influence (DUI) related statutes.
2. POLICY.
 - a. A continuous and vigilant enforcement effort shall be directed toward the detection and apprehension of persons who may be DUI.
 - b. Officers shall investigate all incidents involving suspected DUI drivers and shall physically arrest all persons in violation of Sections 23152/23153 of the California Vehicle Code (CVC), and all applicable subsections, as prescribed by law and in accordance with this manual.
 - c. Officers shall complete a CHP 202, Driving Under the Influence Arrest – Investigation Report, in accordance with this manual; General Order (GO) 100.39, CHP 202, Driving Under the Influence Arrest – Investigation Report, and CHP 216, Arrest – Investigation Report; and GO 100.91, Search and Seizure Policy.
 - d. The Misdemeanor Incarceration section of the CHP 202 shall be completed by the arresting officer whenever a physical arrest is made for a misdemeanor (Section 853.6 of the Penal Code [PC]).
 - e. Officers shall complete all uniform crime reporting requirements, in accordance with GO 100.100, Uniform Crime Reporting Program, for each incident/arrest involving DUI.
 - f. In the event of an incident qualifying for DUI cost recovery, follow the procedures located in Highway Patrol Manual (HPM) 11.1, Administrative Procedures Manual, Chapter 20, Driving Under the Influence Cost Recovery Program.
3. APPLICATION OF DRIVING UNDER THE INFLUENCE STATUTES. The public offenses outlined in Sections 23100 through 23249.50 CVC, Division 11, Chapter 12, apply to vehicles upon the highways and elsewhere throughout the state (e.g., fire roads, state parks, rest areas, public property, private property), unless expressly provided otherwise.

4. APPLICATION OF ADMINISTRATIVE PER SE PROVISIONS.

a. General. California's Administrative Per Se (APS) law allows for the prompt administrative suspension or revocation of a person's driving privilege based upon a specific blood alcohol concentration (BAC) (0.08 percent or more for persons age 21 or older, 0.04 percent for persons driving a vehicle requiring a commercial driver's license, 0.01 percent for persons under 21 ["zero tolerance"] or on probation for DUI, and upon an arrestee's refusal to submit to a chemical test).

b. Department of Motor Vehicles DS 367, Age 21 and Older Officer's Statement, and DS 367M, Under Age 21 Officer's Statement. The forms documenting incidents which bring people under APS provisions, and which the Department of Motor Vehicles (DMV) uses to seek administrative suspensions/revocations, are the DS 367 or DS 367M. The DS 367, for drivers age 21 or older, and the DS 367M, for drivers under age 21, consist of the Officer Statement (including the Probable Cause Narrative), APS Suspension/Revocation Order, and Temporary Driver License portions.

(1) The first page of the DS 367 and DS 367M is the Officer's Statement. The back side of the Officer's Statement contains the Chemical Test Refusal and Drug Admonition Supplement sections. The second page of the DS 367 contains the officer's Probable Cause Narrative. On the DS 367M, the back side also contains the Under Age 21 Preliminary Alcohol Screening (PAS) Test Refusal section.

(2) The remaining pages of the DS 367 and DS 367M are the DMV (white), law enforcement agency (yellow), and driver (pink) copies of the APS Suspension/Revocation Order, Temporary Driver License, and Restricted Driver License Options.

c. California Vehicle Code Section 13380. Regardless of whether an APS action is applicable based upon an arrestee's specific BAC or refusal, Section 13380 CVC requires an officer to submit a sworn report to DMV for **every** DUI arrest. This includes instances where a person age 21 or older is arrested for DUI and their BAC is below 0.08 percent; instances where a person is arrested for DUI of drugs only; and instances where a person age 21 or older is arrested for DUI of a combination of drugs and alcohol and their BAC is below 0.08 percent.

(1) Procedures. A DS 367 or DS 367M shall be completed for every subject arrested for DUI (Section 23152/23153 CVC), regardless of their BAC.

(2) Drug and/or Alcohol Driving Under the Influence Arrests Below a Specific Blood Alcohol Content. When a subject is arrested for alcohol-and/or drug-related DUI and an APS action is not applicable (e.g., the arrestee's BAC is below 0.08 percent if they are age 21 or older and/or the arrestee submits to a

chemical test), only the Officer's Statement (first page of the DS 367 or DS 367M and the second page, the Probable Cause Narrative) should be forwarded to DMV with the relevant report. The subject's license shall not be confiscated nor shall the pink copy of the DS 367 or DS 367M (e.g., the driver's copy of the APS Suspension/Revocation Order and Temporary Driver License) be served.

5. MISDEMEANOR DRIVING UNDER THE INFLUENCE.

a. Section 23152 of the California Vehicle Code.

(1) Section 23152(a) CVC makes it unlawful to drive while under the influence of any alcoholic beverage (regardless of the BAC).

(2) Section 23152(b) CVC makes it unlawful to drive with a BAC of 0.08 percent or greater. This applies only to arrests with chemical tests resulting 0.08 percent or greater.

(3) Section 23152(c) CVC makes it unlawful for a drug addict to drive a vehicle.

(a) An addict is defined as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his addiction."¹

(b) "This is not a 'driving under the influence' offense. Because a drug addict is subject to the physical infirmities caused by withdrawal, he is always a potential danger on the highway and it is proper to forbid him to drive. (O'Neil [1965] 62 Cal.2d. 748.) It is not necessary to show that his driving was impaired at the time of driving. (Diaz [1965] 234

Cal.App.2d 818.) Nor is it necessary to show he was in a state of withdrawal. (O'Neil [1965] 62 Cal.2d 748.) 'Addicts' covered by Section 23152(c) CVC, does not include drug users who do not use a drug producing a physical dependence so as to suffer withdrawal symptoms if deprived of their dosage. (O'Neil [1965] 62 Cal.2d 748.)"²

(4) Section 23152(d) CVC makes it a misdemeanor to drive a commercial motor vehicle, as defined in Section 15210 CVC, with a BAC of 0.04 percent or greater.

¹ Black's Law Dictionary, Sixth Edition.

² California Peace Officers Legal Sourcebook

(5) Section 23152(e) CVC makes it a misdemeanor to drive a vehicle with a BAC of 0.04 percent or greater when a passenger for hire is a passenger in the vehicle at the time of the offense (e.g., ride share driver with a passenger.)

(6) Section 23152(f) CVC makes it unlawful to drive while under the influence of any drug.

(7) Section 23152(g) CVC makes it unlawful to drive under the combined influence of any alcoholic beverage and drug.

b. Driving Not Committed in Officer's Presence—Arrest Without a Warrant (Section 40300.5 of the California Vehicle Code).

(1) Pursuant to Section 40300.5 CVC, a peace officer may, without a warrant, arrest a person when the officer has reasonable cause to believe that the person had been driving while under the influence and any of the following exist:

(a) The person is involved in a traffic crash (Section 40300.5[a] CVC).

1 “Crash” means an unintended event that produces damage or injury, involving a motor vehicle in-transport. (Refer to HPM 110.5, Crash Investigation Manual, Chapter 2, “Definitions and Classifications of Crashes”.)

2 Section 40300.5 CVC applies to private property crashes, as well as those occurring on a highway. “Traffic, as used in this section, refers to the type of accident not the location.” (*People v. Ashley* [1971] 95 Cal.Rptr. 509.)

3 Section 40300.5 CVC also applies to a solo noninjury crash in which no significant property damage occurred. (*Cowman* [1978] 86 Cal.App.3d 851 [e.g., car went over embankment and became stuck in sand]).

(b) The person is observed in or about a vehicle which is obstructing a roadway (Section 40300.5[b] CVC).

(c) The person will not be apprehended unless immediately arrested (Section 40300.5[c] CVC).

(d) The person may cause injury to themselves or damage property unless immediately arrested (Section 40300.5[d] CVC).

(e) The person may destroy or conceal evidence of the crime unless immediately arrested (Section 40300.5[e] CVC).

NOTE: Section 40300.5 CVC can be applied to the “destruction of evidence” caused by natural metabolization of blood alcohol if you have probable cause to believe the driver had consumed alcohol. (*Thompson* [2006] 38 Cal.4th 811.)

(2) When establishing and articulating the elements to support a DUI arrest pursuant to Sections 40300.5(c), (d), and (e) CVC, officers must clearly articulate and document the facts regarding the likelihood that the arrested person was the driver and that another person was not, or could not have been, the driver. (*Thompson* [2006] 38 Cal.4th 811 and *Noia* [1973] 34 Cal.App.3d 691).

(3) Officers must clearly establish the elements of the appropriate subsections within the arrest report and the Probable Cause Statement contained on the DS 367 or DS 367M. In other words, establish and articulate that the arrestee will not be apprehended unless immediately arrested (subsection [c]); may cause injury to themselves or damage property unless immediately arrested (subsection [d]); or may destroy or conceal evidence of the crime unless immediately arrested (subsection [e]).

c. Minor Passengers: Penalty Enhancements.

(1) Section 23572(a) CVC provides for increased penalties when any person is convicted of a violation of Section 23152 CVC and a minor under 14 years of age was a passenger in the vehicle at the time of the offense. If a minor under 14 years of age is a passenger in the vehicle of a person arrested for Section 23152 CVC, officers shall request in the Recommendations section of the CHP 202 that the enhanced penalty provided by Section 23572(a) CVC be imposed on the arrested person upon a conviction of Section 23152 CVC. Officers are to include sufficient information on the CHP 202 to support the imposition of this penalty enhancement.

(2) Section 273a(b) PC makes it a misdemeanor for any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to be placed in such a situation that their person or health may be endangered. As defined in Section 11165 PC, a child is any person under 18 years of age. Officers may include a charge of Section 273a(b) PC whenever a person is arrested for a violation of Section 23152 CVC and a person under 18 years of age is a passenger in the vehicle.

(3) Section 273a(a) PC makes it a felony for any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to be placed in such a situation that their person or health is endangered. Officers may include a charge of Section 273a(a) PC when the circumstances support the elements of this crime (e.g., child passenger

in DUI driver's vehicle is injured as a result of a traffic crash; child passenger in DUI driver's vehicle during a high-speed pursuit involving reckless driving).

d. Other Enhancements.

(1) Speed Enhancement. Section 23582 CVC provides that any person who drives a vehicle 30 or more miles per hour (MPH) over the maximum, prima facie or posted speed limit on a freeway, or 20 MPH or more over the speed limit on any other street or highway shall receive a 60-day penalty enhancement if the speeding occurred during the commission of a violation of Section 23152 or 23153 CVC and the driving was reckless (i.e., "in a manner prohibited by Section 23103 CVC during the commission of a Section 23152 or 23153 CVC violation").

(2) Multiple Victims Enhancement. Pursuant to Section 23558 CVC, any person who proximately causes bodily injury or death to more than one victim in any one instance of driving in violation of Section 23153 CVC or Section 191.5 or 192 PC shall (upon a felony conviction) receive an enhancement of one year for each additional victim (up to a maximum of three years).

(3) Filing Procedures. These penalties are imposed only if the aforementioned facts are charged in the accusatory pleading and admitted or found to be true by the trier of fact (judge or jury). Accordingly, Areas should coordinate filing procedures with their local district/city attorney's office to determine whether the enhancement should be noted on the CHP 215, Notice to Appear, or in the narrative of the CHP 202, as well as the circumstances sufficient to support the enhancement.

6. RELEASE OF HOSPITALIZED ARRESTEE FROM CUSTODY.

a. Area commanders shall coordinate with their local court(s), district/city attorney(s), and booking facility(ies) to determine which procedure(s) outlined in the following paragraphs will be utilized for release of a hospitalized arrestee from custody. Areas shall also establish applicable standard operating procedures (SOP) which address local procedures and guidelines for release of a hospitalized arrestee from custody.

b. An officer who makes a warrantless arrest must deliver the arrestee to the magistrate in the county in which the offense is triable (Section 849[a] PC). In lieu of delivering the arrestee to the magistrate, officers may release the arrestee to the law enforcement agency which is authorized to accept custody of prisoners (e.g., sheriff's department, police department).

c. Occasionally, DUI arrestees are hospitalized due to an injury or illness. If it appears that the arrestee will be required to stay in the hospital for an extended period of time, the officer shall ensure all evidence is lawfully obtained for later prosecution (e.g., chemical test and statements) and shall utilize one of the following procedures:

(1) Misdemeanor Driving Under the Influence Arrests.

(a) Upon the concurrence of a supervisor, post an officer or officers at the hospital for the purpose of guarding and subsequently booking the arrestee upon their release; or

(b) Book the arrestee into a hospital jail ward controlled/operated by the law enforcement agency which is authorized to accept custody of prisoners (e.g., sheriff's department, police department). This does not include sworn/nonsworn hospital security staff; or

(c) Release the arrestee to the custody of a deputy/officer of the law enforcement agency which is authorized to accept custody of prisoners (e.g., sheriff's department, police department). This does not include sworn/nonsworn hospital security staff. Arrange for an absentee booking of the arrestee at the appropriate booking facility; or

(d) Cite and release the arrestee by having them sign a CHP 215. Cite and release procedures shall only apply in Areas that have a Cite and Release Program as described in paragraph 8. of this chapter; or

(e) Releasing an individual pursuant to Section 849(b)(4) PC does not require the issuance of a CHP 103, Certificate of Release from Custody. After arresting an individual for driving under the influence of alcohol or drugs and the person is delivered to a hospital for medical treatment that prohibits immediate delivery before a magistrate, the officer shall, after arrest and release, complete an arrest report detailing the arrest and release and request a complaint to be filed through the local district/city attorney.

(f) Upon the concurrence of a supervisor, release the arrestee pursuant to Section 849(b)(5) PC and issue a CHP 103, when the person was arrested and subsequently delivered to a hospital or other urgent care facility including, but not limited to, a facility for the treatment of co-occurring substance use disorders, for mental health evaluation and treatment, and no further proceedings are desirable.

(2) Felony Driving Under the Influence Arrests.

- (a) Upon the concurrence of a supervisor, post an officer or officers at the hospital for the purpose of guarding and subsequently booking the arrestee upon their release; or
- (b) Book the arrestee into a hospital jail ward controlled/operated by the law enforcement agency which is authorized to accept custody of prisoners (e.g., sheriff's department, police department). This does not include sworn/nonsworn hospital security staff; or
- (c) Release the arrestee to the custody of a deputy/officer of the law enforcement agency which is authorized to accept custody of prisoners (e.g., sheriff's department, police department). This does not include sworn/nonsworn hospital security staff. Arrange for an absentee booking of the arrestee at the appropriate booking facility; or
- (d) Upon concurrence of a supervisor, contact the on-call magistrate and request the arrestee be released on their own recognizance. In some Areas, protocol requires contacting the on-call district/city attorney who will then contact the on-duty magistrate; or
- (e) Upon the concurrence of a supervisor, release the arrestee pursuant to Section 849(b)(4) PC and issue a CHP 103. The officer shall provide the arrestee with a copy of the CHP 103 and file the original with the CHP 202. After arrest and release, the officer shall complete an arrest report detailing the arrest and release and request a complaint to be filed through the local district/city attorney. Releasing an individual pursuant to Section 849(b)(4) PC does not preclude the later filing of a criminal complaint nor does it prevent officers from subsequently arresting the individual when they are released from the hospital.

7. WARRANTLESS DRIVING UNDER THE INFLUENCE ARRESTS IN A RESIDENCE.

- a. In cases in which a subject evades arrest without committing a felony and flees into a residence, officers shall not make warrantless entry into the residence unless the totality of the circumstances shows an emergency such as:
 - (1) An imminent harm to others.
 - (2) A threat to the officers themselves.
 - (3) The destruction of evidence.
 - (4) Escape from the home.

NOTE: Hot pursuit of a misdemeanor suspect alone is not grounds for warrantless entry of a residence (*Lange v. California* [2021] 20-18).

b. In order to make a lawful warrantless entry for a misdemeanor or felony DUI arrest in a residence, an officer must have probable cause to believe all the following conditions exist:

- (1) The driver is home.
- (2) Driving under the influence is an element of the crime being investigated.
- (3) The driver is under the influence.
- (4) The time between the crime and arrest is brief enough that evidence of the blood alcohol level is still present.

c. In these cases, the court requires “knock and notice” and consideration of method of entry or use of force to be commensurate with severity of the crime committed.

8. CITING AND RELEASING MISDEMEANOR DRIVING UNDER THE INFLUENCE ARRESTEES.

a. Authority. The California Attorney General issued formal opinion No. 87-802, on March 1, 1988, regarding citing and releasing misdemeanor DUI arrestees. The entire text is contained in Annex A. The Attorney General’s conclusion is summarized as follows:

- (1) Section 853.6 PC gives a peace officer the authority to release a person arrested under one or more of the circumstances listed in Sections 40302 and 40303 CVC. This allows peace officers to release a person arrested for DUI by issuing the person a CHP 215 and accepting their promise to appear in court.
- (2) Where a person is arrested for DUI and released upon a written promise to appear in court, the arresting officer would not, without additional facts being established, be liable for injury caused by the release.

b. Policy.

- (1) Area commanders may adopt a Cite and Release Program for misdemeanor DUI arrestees. The objective of this program is to increase available patrol hours for detection and apprehension of DUI violators, as well as other emergency services to the public. A list of Areas currently participating

in the Cite and Release Program are contained in Annex B. Implementation of such a program shall be contingent upon the following conditions:

- (a) Operational needs of the command that cannot otherwise be resolved.
- (b) Endorsement of the Cite and Release Program from the sheriff's department, district/city attorney's office and local courts.
- (c) Review and approval of the Cite and Release Program, through channels, by the Office of Assistant Commissioner, Field (ACF).

(2) Approved Cite and Release Programs shall incorporate the following provisions:

- (a) Officers may cite and release physically arrested misdemeanor DUI offenders.
- (b) Officers shall not normally cite and release a misdemeanor DUI arrestee from the scene of the arrest until after gathering the necessary evidence to support the arrest, and after ensuring the arrestee will not continue to drive (e.g., someone is able to accept responsibility of the arrestee and meets the criteria listed in paragraph 8.d.[1][b] of this chapter).

c. Responsibilities.

(1) Area. Area commanders are responsible for:

(a) Determining if the needs of the Area dictate requesting a Cite and Release Program for misdemeanor DUI arrestees. Some examples of when a Cite and Release Program would be beneficial are:

- 1 Areas with extended travel time to jail facilities.
- 2 Areas with isolated geographical locations, such as resident posts.
- 3 Areas with limited personnel resources.
- 4 Areas where DUI arrestees cannot be booked due to booking facility refusal and/or court order.
- 5 Circumstances which prevent timely booking of the arrestee, such as hospitalization.

(b) Establishing written guidelines and procedures for instituting a misdemeanor DUI Cite and Release Program.

(c) Coordinating with the local district/city attorney(s) and court(s) to determine proper procedures and guidelines for processing cite and release arrestees within their jurisdiction. Furthermore, the district/city attorney(s) and court(s) shall be consulted regarding criteria for individuals not eligible for release, such as the following:

- 1 Prior DUI convictions.
- 2 Being under the influence of drugs.
- 3 Violent or aggressive behavior.
- 4 Being a danger to themselves or others.

(d) Submitting a request for participation and proposed written guidelines and procedures for instituting a misdemeanor DUI Cite and Release Program to Division for review and transmittal to ACF.

(e) Monitoring the general effectiveness of the program and reporting quarterly on the program, by memorandum, to their respective field Division during the first year of operation.

(f) Areas should periodically review their Cite and Release Program to ensure it conforms to current law and policy, and continues to serve the needs of the command.

(2) Division. Field Division commanders are responsible for:

(a) Reviewing written guidelines submitted by Area commanders. Field Division commanders shall include their comments and forward the Division approved documents to ACF for approval. The ACF will submit the documents to the Impaired Driving Section who will review and recommend implementation of the program. Once ACF advises the Area and Division of approval, the Area may begin the program once all personnel are trained in the procedures to be utilized.

(b) Monitoring ongoing Cite and Release Programs within their Division.

(c) Maintaining a file for the quarterly reports submitted by Areas.

(d) Notifying ACF of any operational problems that arise.

d. Procedures. The following procedural guidelines shall be followed when a Cite and Release Program is instituted:

(1) The arresting officer shall obtain a chemical test or transport the arrestee to the appropriate facility for chemical testing and processing. After obtaining a chemical test, the arresting officer shall determine if the arrestee is to be booked or cited and released. The following factors should be considered when an officer is determining if an arrestee is eligible for release:

(a) Likelihood the arrestee will appear in court at a later date.

(b) A person is available to assume responsibility for the subsequent behavior of the arrestee. This requirement may be waived whenever the arrestee is expected to stay in a hospital for an extended period of time due to injury or illness. The following criteria may be utilized to determine whether a person is qualified to accept responsibility of an arrestee:

1 The responsible person is not under the influence of alcohol and/or drugs.

2 The responsible person must be available within a reasonable time to respond, or reside nearby, to assume responsibility of the arrestee.

3 The responsible person shall be an adult.

4 The responsible person shall have proper identification.

(2) A photograph and/or thumbprint should be taken of the arrestee to avoid identity problems in court. This may be accomplished in concert with local agencies, or through departmental resources.

(3) All arrestees shall be checked for warrants through the California Law Enforcement Telecommunications System (CLETS) and the National Crime Information Center.

(4) The arresting officer shall issue a CHP 215 and have the arrestee sign the citation.

(a) The responsible person's name and driver's license number shall be entered in the violation section of the citation by the arresting officer. The arrestee shall be given a copy of the citation which indicates a date to appear in court.

(b) The "Booking Required" box on the CHP 215 should be checked for a subject who is physically arrested or cited and released for a violation of Section 23152 CVC. A violation of Section 23152 CVC is a recordable offense, and a JUS 8715, Adult Disposition of Arrest and Court Action, is required pursuant to Section 11115 PC. In addition, a CHP 194,

Fingerprint Notification/Verification, is required pursuant to Section 853.6 PC. Refer to GO 100.28, Criminal Fingerprinting; JUS 8715, Adult Disposition of Arrest and Court Action; and JUS 8716, Juvenile Detention Disposition Report, for policy and procedures for both forms.

(5) The arresting officer shall admonish the arrestee and the responsible person of the following information:

- (a) The arrestee has been arrested for DUI.
- (b) The arrestee is not to drive a motor vehicle until they are no longer under the influence, or they may again be subject to arrest.
- (c) The arrestee is responsible for their own actions.
- (d) The arrestee is being released to the responsible person.

(6) The responsible person shall be requested to sign a CHP 202F, Driving Under the Influence Cite and Release Admonishment. If the responsible person refuses to sign the form, write "refused" in the signature box. The form shall be retained and attached to the DUI report.

(7) The arrested person should be booked whenever a responsible person is not willing to sign the admonishment form.

(8) The arresting officer shall include the following in the Additional section of the arrest report:

- (a) The arrestee was cited and released.
- (b) The name of the responsible person to whom the arrestee was released.
- (c) The location where the arrestee was released (e.g., Area office, jail facility, police department, residence, friend's house).

9. ARRESTS OF COMMERCIAL VEHICLE DRIVERS FOR 0.04 PERCENT BLOOD ALCOHOL CONTENT AND OUT-OF-SERVICE ORDERS.

a. Authority. Sections 23152(d) and 23153(d) CVC make it unlawful for any person to drive a commercial motor vehicle, as defined in Section 15210 CVC, with a BAC of 0.04 percent or greater.

(1) A commercial motor vehicle is defined as any vehicle or combination of vehicles which requires a Class A or Class B license, or a Class C license with an endorsement issued pursuant to Section 15278 CVC. A commercial vehicle does not include:

(a) A recreational vehicle as defined in Section 18010 of the Health and Safety Code (HSC).

(b) Military equipment operated by active-duty members, when operating a motor vehicle for military purposes, which is owned or operated by the United States Department of Defense, including the National Guard pursuant to Section 15250(g) CVC.

(c) An implement of husbandry operated by a person who is not required to obtain a driver's license under the CVC.

(d) Vehicles operated by persons exempted pursuant to Section 25163 HSC or a vehicle operated in an emergency situation at the direction of a peace officer pursuant to Section 2800 CVC.

(2) Section 1213.1(c) of Title 13, California Code of Regulations (CCR), adopted per Sections 34501 and 34501.15 CVC, requires officers to place the operator of a commercial vehicle, as defined in Section 15210 CVC, out-of-service for a period of 24 hours when the driver is found to have a BAC of 0.01 percent or greater.

(3) The Implied Consent laws (Sections 13353 and 23612 CVC) apply to violations of Sections 23152(d) and 23153(d) CVC. Officers shall invoke the provisions of the Implied Consent laws incidental to a lawful arrest for Section 23152 or 23153 CVC when the officer believes the arrestee's BAC is 0.04 percent or greater.

NOTE: Implied Consent does not apply to a driver being placed out-of-service solely for a violation of Section 1213.1(c) CCR.

(4) Pursuant to Sections 13353, 13353.2, 13382, and 23612 CVC, the APS laws apply to drivers arrested for Section 23152(d) or 23153(d) CVC when a chemical test indicates a BAC of 0.04 percent or greater or when the officer

reasonably believes the chemical test results (blood or urine) will indicate a BAC of 0.04 percent or greater, or when the offender refuses to submit to chemical testing.

b. Policy. When an officer comes into contact with the driver of a commercial motor vehicle, as defined in Section 15210 CVC, who the officer believes has consumed an alcoholic beverage and may be in violation of Section 23152(d), 23153(d), or 1213.1(c) CCR, the following procedures shall apply.

(1) A thorough investigation shall be conducted.

(2) As a last field sobriety test (FST), when reasonably available, officers should request the driver to submit to a PAS test. Officers shall ensure correct PAS procedures are followed. (Refer to Chapter 7, Preliminary Alcohol Screening Device, of this manual for PAS operating instructions.)

(3) Where an investigation fails to establish probable cause for an arrest for Section 23152(d) or 23153(d) CVC, the following shall apply concerning the provisions of Section 1213.1(c) CCR:

(a) Officers shall consider all the relevant evidence, including the results of the PAS test, in determining whether to place a driver out-of-service. The PAS readings shall not be rounded off to the nearest hundredth. For example, a reading of 0.009 percent shall not be interpreted as 0.01 percent.

(b) When the driver is found to have a BAC of 0.01 percent but less than 0.04 percent, the officer shall issue a CHP 215 for a violation of Section 34506.3 CVC, failure to comply with California Highway Patrol (CHP) regulations, BAC of 0.01 percent or greater, placing the driver out-of-service for 24 hours. The driver shall be advised of the 24-hour out-of-service order, and a notation shall be made on the driver's record of duty status (RODS) (if applicable) stating the time and place that such order was given (Section 1213.1[e] CCR).

(c) A driver shall be ordered out-of-service for 24 hours if the driver is found to have 0.01 percent or more, by weight, of alcohol in their blood. This can be determined by:

1 An evidentiary chemical test; or

2 Circumstantial evidence, including the results of a PAS test (if available), admission by the driver of how much they had to drink and at what time, an odor of an alcoholic beverage emitting from their breath, bloodshot eyes, FSTs, etc.

3 Officers shall submit a report on a CHP 202 articulating the circumstances of the violation. The report shall include specific admissions made by the driver, results of the PAS test, and other circumstantial evidence supporting elements of the violation. The questions and responses contained on the CHP 202 will help establish the probable cause for arrest.

(4) An investigation shall result in an arrest for Section 23152(d) or 23153(d) CVC when the officer has reasonable cause to believe the driver's BAC is 0.04 percent or greater.

(5) Drivers arrested for Section 23152(d) or 23153(d) CVC shall be processed in the same manner as any other DUI arrest (APS applies when the driver has a BAC of 0.04 percent or more). Section 23152(d) or 23153(d) CVC shall always be used when the driver has a BAC of 0.04 percent or greater (this includes BACs of 0.08 percent or greater). The officer shall first place the driver out-of-service for 24 hours, advise the driver of the out-of-service order, and note on the driver's RODS the time and place that such order was given, then proceed to the chemical testing facility and/or jail.

(6) If, after the arrest and chemical test, the driver's BAC is determined to be under 0.04 percent, the following shall apply.

(a) The driver should be examined for drug impairment; and, where evidence supports this offense, the driver shall be charged with Section 23152(f) or 23153(f) CVC, and the appropriate Health and Safety Code section, if applicable.

(b) The driver should be examined for impairment resulting from a combination of alcohol and drugs. When evidence supports impairment as a result of this offense, the driver shall be charged with Section 23152(g) or 23153(g), and the appropriate Health and Safety Code section, if applicable.

(c) Absent evidence of drug impairment, the driver should be released from custody, and a CHP 202 shall be completed describing the circumstances.

(d) If the chemical test results indicate a BAC at or above 0.01 percent and below 0.04 percent and the driver is released from custody, the officer should follow the procedures under paragraph 9.b.(3).

c. If the driver is placed out-of-service, it does not make the vehicle unavailable for 24 hours. Vehicle disposition subsequent to an out-of-service order or arrest for Section 23152 or 23153 CVC, shall be consistent with the Area's SOP and HPM 81.2, Vehicle Procedures Manual. In the case of a driver being placed out-of-

service or arrested, the vehicle may be parked at the scene (this would not apply to freeways, or surface streets that could not accommodate large vehicles) or released to a company representative or responsible party. The vehicle may be released to a passenger if the passenger has not consumed any alcoholic beverages, is properly licensed, and the owner/carrier has been prenotified and approves. The officer shall always consider the vehicle's load (e.g., perishable foods, hazardous materials, combustible materials) when determining the appropriate vehicle disposition.

d. When a driver has been ordered out-of-service and is stopped again within the 24-hour out-of-service time frame, the following shall apply:

(1) A citation should be issued to the driver for a violation of Section 2800 CVC, failure to obey a lawful order from a peace officer.

(2) The driver shall be directed to comply with the out-of-service order.

(3) If the driver indicates a refusal to comply with the out-of-service order, the driver should be placed under arrest for Section 2800 CVC pursuant to Section 40303(b)(7) CVC.

e. Officers shall contact the local dispatch center and ensure the entry in the CHP 144, Incarcerated–Injured–Vehicle Report, system for logging out-of-service drivers and/or vehicles is completed.

f. Areas participating in the Nonconsensual Chemical Testing (NCT) program and/or the DUI Cite and Release Program shall follow departmental and Area policies and procedures when arresting commercial drivers pursuant to Section 23152(d) or 23153(d) CVC.

10. ARRESTS OF DRIVERS FOR SECTION 23154 OF THE CALIFORNIA VEHICLE CODE, VIOLATION OF PROBATION, OR SECTION 23136 OF THE CALIFORNIA VEHICLE CODE, DRIVERS UNDER THE AGE OF 21 WITH BLOOD ALCOHOL CONCENTRATION 0.01 PERCENT OR GREATER, OR SECTION 23140 OF THE CALIFORNIA VEHICLE CODE FOR DRIVING UNDER THE INFLUENCE.

a. Authority.

(1) Section 23136 of the California Vehicle Code. Section 23136 CVC makes it unlawful for a person under the age of 21 who has a BAC of 0.01 percent or greater, as measured by a PAS test or other chemical test, to drive a vehicle. Per Section 13388(a) CVC, if an officer has reasonable cause to believe a person is in violation of Section 23136 CVC, the officer shall request the person take a PAS test to determine the presence of alcohol, if a PAS device is

“immediately available.”³ If a PAS device⁴ is not immediately available, the officer may request the person submit to a chemical test of their blood, breath, or urine, conducted pursuant to Section 23612 CVC.

(2) Section 23140 of the California Vehicle Code. Section 23140 CVC makes it unlawful for a person under the age of 21 who has a BAC of 0.05 percent or greater to drive a vehicle. This includes driving under the influence of a combination of alcohol and drugs when the driver’s BAC is 0.05 percent or greater.

(3) Section 23154 of the California Vehicle Code. Section 23154 CVC makes it unlawful for a person on probation for DUI who has a BAC of 0.01 percent or greater, as measured by a PAS test or other chemical test, to drive a vehicle.

b. Scope. Sections 23154, 23136, and 23140 CVC are punishable as infractions pursuant to Section 40000.1 CVC. As such, these violations must occur in an officer’s presence. Furthermore, unlike Sections 23152 and 23153 CVC, Section 40300.5 CVC is not applicable to Sections 23136, 23140, and 23154 CVC.

c. Policy. When an officer comes into contact with a driver who is on probation for DUI or under the age of 21, whom the officer suspects has consumed an alcoholic beverage, a thorough investigation shall be conducted.

(1) After evaluating the totality of the circumstances, including the driver’s performance on the FSTs, the driver shall be advised of the requirement to submit to a PAS device test, if one is immediately available.

(2) Sections 23136, 23140, and 23154 CVC shall be enforced only when the violations are corroborated by a chemical test or PAS test.

d. Implied Consent.

(1) Pursuant to Section 23136(c)(1) CVC, any person under the age of 21 years who drives a motor vehicle is deemed to have given their consent to a PAS test or other chemical test for the purpose of determining the presence of alcohol.

³ “Immediately available” means in the officer’s general vicinity or within a reasonable distance. The intent of this legislation was to not unreasonably detain either the driver or the officer. Each situation will determine the definition of “immediately available.” Officers shall use sound professional judgment when determining “immediately available” and “reasonable distance.” “Immediately available” may be an evidentiary breath machine located at a sobriety checkpoint at the point where the stop was made. “Immediately available” would not be a police or sheriff’s station several miles away from the traffic stop.

⁴ As described in Section 13388(c) CVC, a PAS device is an instrument designed and used to measure the presence of alcohol of a person based on a breath sample. An evidentiary breath machine may be used for enforcement of this section if “immediately available.”

(2) Pursuant to Section 23612 CVC, a person who drives a motor vehicle is deemed to have given consent to chemical testing for purposes of determining alcoholic content if lawfully arrested for Section 23140, 23152, or 23153 CVC.

(3) Pursuant to Section 23154(c)(1) CVC, any person on probation for DUI who drives a motor vehicle is deemed to have given their consent to a PAS test or other chemical test for the purpose of determining the presence of alcohol.

(4) Area commanders shall establish an applicable SOP which addresses local procedures and guidelines for when officers may invoke the provisions of Implied Consent and transport a violator to a chemical testing facility for the purposes of enforcing violations of Sections 23136, 23140, and 23154 CVC. In establishing the SOP, commanders should consider/address factors such as:

(a) Extended travel time to testing facilities.

(b) Limited personnel resources.

(c) Requirements of the local prosecutor(s) and the court(s) for prosecution, including the need for a CHP 202 for violations of Section 23136, 23140, or 23154 CVC alone.

(d) Testing persons in violation of Section 23140 CVC who are involved in traffic crashes resulting in death, or injury likely to produce permanent disability or eventual death.

NOTE: Pursuant to Section 191.5 PC, gross vehicular manslaughter while intoxicated includes a violation of Section 23140 CVC.

(e) Handling and/or releasing juveniles/minors.

e. Procedures. When an officer comes into contact with a driver under the age of 21, who the officer believes is in violation of Section 23136, 23140, 23152, or 23153 CVC, or a driver in violation of Section 23154 CVC, the following procedures shall apply:

(1) Preliminary Alcohol Screening Device Immediately Available. At the conclusion of the FSTs, the driver shall be admonished that they are required to submit to a PAS test. If the driver submits to a PAS test and the results show 0.01 percent BAC or greater, or if the driver refuses to take the PAS test, a one to three year suspension of their driving privilege will occur.

(2) Section 23140 of the California Vehicle Code. If the PAS reading is 0.05 percent or greater, and the officer determines the driver is not in violation of

Section 23152 or 23153 CVC, the officer should issue a CHP 215 for a violation of Section 23140 CVC.

Section 23136 of the California Vehicle Code. If the PAS reading is between 0.01 and 0.04 percent, the officer should issue a CHP 215 for a violation of Section 23136 CVC.

(3) Section 23154 of the California Vehicle Code. If the PAS reading is 0.01 percent or greater, and the officer determines the driver is not in violation of Section 23152 or 23153 CVC, the officer should issue a CHP 215 for a violation of Section 23154 CVC. Section 23154 CVC shall be enforced only when the driver's probation status is verified through CLETS via dispatch or using the mobile digital computer.

NOTE: Officers shall not cite a subject for violations of both Sections 23136 and 23140 CVC.

(4) The officer shall take possession of the driver's California driver's license, complete a DS 367 or DS 367M, and issue the pink copy (driver's copy) of the APS Suspension/Revocation Order and Temporary Driver License to the driver. At the conclusion of the enforcement contact, the driver (if not arrested) shall be ordered not to drive again until there is no alcohol in their system.

(a) The officer shall use sound professional judgment in determining the appropriate release disposition for the driver. Depending upon the location and time of the enforcement contact, the driver and vehicle may be released to a licensed passenger (if under the age of 21 and has not consumed any alcohol, or if over the age of 21 and is not under the influence), released to a parent or guardian, removed from the scene and taken to a safe place, or the driver may be allowed to call for a ride, etc.

(b) If the driver has been ordered not to drive and is stopped again and still has a measurable amount of alcohol in their system, as measured by a PAS device test or other chemical test if a PAS device is not immediately available, a citation may be issued to the driver for Section 2800 CVC, failure to obey a lawful order from a peace officer.

(c) Section 22651(h)(2) CVC provides authority for storing vehicles of drivers who have been served a notice of suspension or revocation pursuant to Section 13388 or 13389 CVC. Officers are to follow local SOP and HPM 81.2 when using this storage authority.

(5) Preliminary Alcohol Screening Device Not Immediately Available. When a PAS device is not available, it is imperative that officers exercise sound judgment in order to ensure the reasonableness of the detention.

(a) If the officer does not have a PAS device in their possession, the officer should request a PAS device from an adjoining beat partner or their supervisor. If a PAS device is still not available, the officer shall follow their Area's SOP regarding invoking the provisions of Implied Consent and transporting a violator to a chemical testing facility.

(b) If a PAS device is not immediately available, and the driver is lawfully arrested for DUI (Section 23152 or 23153 CVC), any chemical test obtained pursuant to Section 23612 CVC (Implied Consent) may be used to substantiate a zero alcohol tolerance violation.

(6) Refusals. At the conclusion of the FSTs, the driver shall be admonished that they are required to submit to a PAS test. If the driver refuses to take, or fails to complete the PAS test, the admonishment, located on the back of the first page (Officer's Statement) of the DS 367 or DS 367M, shall be read verbatim. If, after the admonishment is read, the driver still refuses to take the PAS test, the officer shall take possession of the driver's California driver's license, complete a DS 367 or DS 367M, and issue the pink copy to the driver. For Areas participating in the enhanced NCT Program, violations of Section 23140 CVC shall be handled in accordance with policy contained in Chapter 5, Chemical Tests–Implied Consent Law, of this manual. The provisions of the enhanced NCT Program do **not** include violations of Section 23136 or 23154 CVC.

(7) Documentation. In all situations where an officer encounters a driver who is in violation of Section 23136, 23140, 23154, 23152, or 23153 CVC, the following forms shall be completed:

(a) For violation of Sections 23136, 23140, 23154, and/or 23152/23153 CVC, the officer shall take possession of the driver's California driver's license, complete a DS 367 or DS 367M, issue the pink copy of the DS 367 or DS 367M to the driver, submit these documents for processing to the DMV, and complete the applicable departmental reports.

(b) If a driver refuses or fails to complete a PAS test, the officer shall take possession of the driver's California driver's license, complete a DS 367 or DS 367M, and issue the pink copy to the driver.

(c) The pink copy of the DS 367/DS 367M shall be given to the driver in all instances, even if the driver does not have a valid California driver's license. This form does not give an unlicensed driver an endorsement to drive; it simply ensures the driver has received the necessary information regarding their right to a hearing. The temporary license only allows the driver to operate a vehicle within the same class and restrictions afforded by the original license.

(d) If the driver has a suspended or revoked license, the officer shall take possession of the license, complete a DMV DL 310, Verbal Notice by Peace Officer, and submit these documents separately to the DMV.

(8) Section 23152 or 23153 of the California Vehicle Code. If the driver is determined to be DUI, they shall be arrested for either Section 23152 or 23153 CVC, as appropriate, and admonished regarding the provisions of Section 23612 CVC, Implied Consent law. The driver shall be requested to submit to a chemical test to determine their BAC.

(a) If under 18 years of age, the arrested juvenile shall be taken without unnecessary delay to a juvenile detention facility or should be handled in accordance with local juvenile in-custody policies.

(b) The procedures set forth in HPM 100.69, General Law Enforcement Policy Manual, Chapter 1, Arrest Policies, for handling juveniles which are brought to an adult detention facility for chemical testing or investigative interrogation shall be followed.

(c) Upon receipt of chemical test results indicating a person on probation for DUI or a driver under the age of 21 has a BAC of 0.01 percent or greater, the person may, depending on the local district/city attorney's charging policy, also be charged with a violation of Section 23136, 23140, or 23154 CVC. This additional charge will be indicated on the CHP 215, CHP 202, and required booking documents, as appropriate.

(d) If a person is determined not to be under the influence of alcohol and/or drugs after the chemical testing, the arresting officer shall notify their supervisor of the situation. With the supervisor's approval, the person may be released. Upon release, if no further enforcement is to be taken, a CHP 103 shall be issued as provided in HPM 100.69, Chapter 1.

1 If the chemical test of a person on probation for DUI indicates a BAC of 0.01 percent or more, a citation may be issued prior to their release, or a petition filed, for a violation of Section 23154 CVC.

2 If a driver under the age of 21 has a chemical test which indicates a BAC of 0.05 percent or more, a citation may be issued prior to their release, or a petition filed, for a violation of Section 23140 CVC.

3 If the driver under the age of 21 has a chemical test which indicates a BAC of 0.01 percent to 0.04 percent, officers are to take enforcement action for a violation of Section 23136 CVC. The results of the chemical test can be used in lieu of a PAS test to suspend the

driving privilege of a driver under the age of 21 pursuant to Section 13353.2(a) CVC.

4 In authorizing any release of a juvenile (under 18 years of age) after an arrest for DUI, the supervisor should consider taking one or more of the following actions when feasible:

a Release the juvenile to a parent, guardian, or other responsible adult.

b Provide transportation for the juvenile to their residence or other suitable place of safety.

c Take reasonable steps to ensure the juvenile will not drive.

f. Section 25658.2 of the Business and Professions Code. A parent or legal guardian who knowingly permits their child, or a person in the company of the child, or both, who are under the age of 18 years, to consume an alcoholic beverage or use a controlled substance at the home of the parent or legal guardian is guilty of a misdemeanor if all of the following occur:

(1) As a result of the consumption of an alcoholic beverage or use of a controlled substance at the home of the parent or legal guardian, the child or other underage person has a BAC of 0.05 percent or greater, as measured by a chemical test, or is under the influence of a controlled substance.

(2) The parent knowingly permits the child or other underage person, after leaving the parent's or legal guardian's home, to drive a vehicle.

(3) The child or underage person is found to have caused a traffic crash while driving the vehicle.

11. DRIVING UNDER THE INFLUENCE WITH THREE PRIORS—FELONY: SECTION 23550 OF THE CALIFORNIA VEHICLE CODE.

a. Authority. Section 23550 CVC makes a conviction for Section 23152 CVC punishable as a felony if the offense occurs within ten years of three or more DUI-related convictions.

b. Policy.

(1) When an officer arrests a subject for DUI and the officer has reasonable cause to believe that the subject has three or more convictions within the last ten years for DUI or reckless driving as defined in Section 23103.5 CVC, the

officer shall arrest for Section 23152 (a), (b), (c), (d), (e), (f), or (g) CVC as a felony. Officers shall follow the procedures set forth in this section or as directed by their respective district/city attorney.

(2) Area commanders shall coordinate with their respective district/city attorney(s) to determine proper local procedures for processing Section 23550 CVC violations.

c. Procedures.

(1) Arrest and Booking. Officers shall run a driver's license status check via CLETS on all DUI offenders before booking. If the inquiry indicates three or more prior DUI convictions (or DUI reduced to reckless driving) within ten years of the current arrest, officers shall arrest and book the subject for Section 23152 CVC as a felony (pursuant to Section 23550 CVC) based upon probable cause that a felony has been committed. If the driver's license system is offline, officers should arrest and book these individuals as misdemeanor DUI offenders. A complaint should then be filed with the district/city attorney for felony DUI after obtaining the DUI conviction record (depending on local procedures for processing Section 23550 CVC violators).

(a) A code "R" in the disposition column under the "conviction section" of the Driver History Inquiry from the DMV will indicate a prior DUI conviction which was reduced to reckless driving (Section 23103 CVC pursuant to Section 23103.5 CVC). These are commonly referred to as "wet reckless" priors.

(b) When certified copies of the arrestee's driving record are required for prosecution, an INF 252, Law Enforcement Request for Driver License/Identification Record, should be submitted by mail to the Department of Motor Vehicles.

(2) Completion of a CHP 215, Notice to Appear. The following entry shall be recorded on the CHP 215 when documenting violations of Section 23550 CVC: "Section 23152(a), (b), (c), (d), (e), (f) or (g)/23550 CVC, felony DUI with priors." This method of documentation clarifies that the subject has been arrested for a violation of Section 23152 CVC with the felony enhancement authorized by Section 23550 CVC.

(3) Traffic Crash Coding (CHP 555, Traffic Crash Report). The primary crash factor (PCF) shall be the applicable alcohol or drug section (e.g., Section 23152 CVC). Do not use Section 23550 CVC as the PCF since this section does not describe the proximate cause of the crash. Refer to HPM 110.5, Crash Investigation Manual, regarding specific guidelines for coding DUI crashes.

(4) Chemical Tests. A DUI arrestee who refuses to submit to a chemical test may be physically compelled to take a test if the arrestee meets the criteria outlined in Chapter 5 of this manual regarding NCT.

(5) Completion of JUS 8715/8716, Adult Disposition of Arrest and Court Action/Juvenile Detention Disposition Report, and FD 249, FBI Fingerprint Card, Forms. Officers completing a JUS 8715 or JUS 8716, shall enter "Section 23152(a), (b), (c), (d), (e), (f) or (g)/23550 CVC" in the charge box and check the felony box. Refer to GO 100.28 for complete instructions regarding the remainder of the JUS 8715. When required to complete a FD 249, officers shall enter "Section 23152(a), (b), (c), (d), (e), (f) or (g)/23550 CVC felony DUI with priors" in the violation box.

(6) Management Information System Data Entry. The Area office CHP 215 clerk shall enter Section "23550 CVC" into the Management Information System (MIS) when the felony violation is listed on the CHP 215.

(7) Assignment of Case Numbers. Felony case numbers shall be assigned to arrests involving violations of Section 23550 CVC. However, in cases where the subject is arrested for misdemeanor Section 23152 CVC and a complaint is to be filed with the prosecuting attorney for felony DUI, the report should be handled as a misdemeanor with no felony case number assigned. Refer to GO 100.38, Assignment of Case Numbers, for specific guidelines regarding case numbers.

12. DRIVING UNDER THE INFLUENCE WITH A PRIOR FELONY WITHIN TEN YEARS: SECTION 23550.5 OF THE CALIFORNIA VEHICLE CODE.

a. Authority. Section 23550.5 CVC provides that a DUI conviction (Section 23152 or 23153 CVC) occurring within ten years of a prior felony DUI conviction or any time after a specified vehicular manslaughter conviction is punishable as a felony.

(1) When coupled with a current violation of Section 23152 or 23153 CVC, a prior conviction of the following offenses warrant a charge of Section 23550.5 CVC.

(a) A prior conviction of Section 23152 CVC within ten years that was punished as a felony pursuant to Section 23550 or 23550.5 CVC.

(b) A prior conviction of Section 23153 CVC within ten years that was punished as a felony.

(c) A prior conviction of Section 192(c)(1) PC (vehicular manslaughter) within ten years that was punished as a felony.

(d) A prior conviction of Section 191.5 PC (gross vehicular manslaughter while intoxicated).

(e) A prior conviction of Section 192(c)(3) PC (vehicular manslaughter while intoxicated) that was punished as a felony.

(2) Notably, the prior offense must have actually been punished as a felony. Officers should be aware that Sections 23152/23550 and 23153 CVC and Sections 192(c)(1) and 192(c)(3) PC are “wobblers” (e.g., punishable as either a felony or misdemeanor).

b. Policy.

(1) Upon an arrest for Section 23152 or 23153 CVC, if the officer has reasonable cause to believe that the arrestee has a prior felony DUI conviction within the previous ten years, or a specified prior manslaughter conviction, the officer shall charge the arrest as a felony per Section 23550.5 CVC.

(2) Although usually charged as felonies, many DUI and manslaughter offenses may be punished as misdemeanors (e.g., Sections 23152/23550 and 23153 CVC and Sections 192[c][1] and 192[c][3] PC). Accordingly, it is imperative for officers to use sound professional judgment in accurately determining if a prior offense is applicable.

(3) Area commands shall develop local procedures to ensure accurate filing of Section 23550.5 CVC violations. Additionally, Area commands shall coordinate with their respective district/city attorney’s office to determine proper local procedures for processing Section 23550.5 CVC violations (e.g., if certified copies of documents are required).

c. Procedures.

(1) In accordance with Area procedures and prior to booking a DUI offender, officers should attempt to determine if the arrestee has a prior qualifying felony conviction. Upon reasonable belief that the arrestee has a qualifying conviction, the officer should arrest and book the subject for either Section 23152/23550.5 or 23153/23550.5 CVC.

(2) If prior conviction information is unavailable at the time of booking, officers should arrest and book the arrestee under the primary charge only (Section 23152 or 23153 CVC). In accordance with Area procedures, officers should later ascertain the necessary information, and when applicable, file a complaint with the district/city attorney for felony DUI pursuant to Section 23550.5 CVC.

d. Information Resources. Any reliable source of information (e.g., CLETS) may be utilized to develop the necessary probable cause for a Section 23550.5 CVC arrest. In accordance with Area procedures, officers may access CLETS either directly or via the appropriate CHP Communications Center.

(1) An arrestee's driver's license history may indicate a prior felony DUI/manslaughter conviction.

(a) Indications of a felony conviction are:

1 A code "K" in the disposition ("Disp") column of the driver history inquiry indicates a felony conviction. Where multiple violations which received felony punishment appear, further investigation may be necessary.

2 A "1" as the third digit under the "Court" column usually is indicative of adjudication in Superior Court. Nevertheless, the violation may not have been punished as a felony. Thus, further investigation may be necessary. If the court identifier is unfamiliar, court status may be obtained via the "Court/DMV Roster." Copies of this publication are available from DMV. To obtain a copy of the Court/DMV Roster, send an e-mail request, using a departmental e-mail, to jaglaw@dmv.ca.gov. Provide the Area's requestor or an inquiry code and request a Court Roster from DMV (Areas can obtain their requestor or inquiry code by contacting DMV's Account Processing Unit at [916] 657-5564). A copy will be provided via e-mail. Contact DMV at (916) 657-7732 or (916) 657-7590 for additional information.

(b) When certified copies are required for prosecution, a request should be submitted to DMV by mail (using an INF 252).

(2) In accordance with Area policy, officers may access the Criminal History System for information regarding the disposition of an arrestee's prior convictions.

(3) Officers shall strictly adhere to all policies and procedures set forth in HPM 40.4, Information Security and Administration Manual; Department of Justice (DOJ)/CLETS Operating Manual Policies, Practices and Procedures; as well as all applicable state and federal statutes pertaining to the use of information systems.

e. Completion of a CHP 215, Notice to Appear. The following entries shall be recorded on the CHP 215 when documenting violations of Section 23550.5 CVC: "Section 23152(a), (b), (c), (d), (e), (f), or (g)/23550.5 CVC, felony DUI with prior

felony” or “Section 23153(a), (b), (d), (e), (f), or (g)/23550.5 CVC, felony DUI with prior felony.” This method of documentation clarifies that the subject has been arrested for a violation of Section 23152 or 23153 CVC, with the felony enhancement authorized by Section 23550.5 CVC.

f. Traffic Crash Coding (CHP 555, Traffic Crash Report). The PCF shall be the applicable alcohol or drug section (e.g., Section 23152 CVC). Since Section 23550.5 CVC does not describe the proximate cause of the crash, do not use this section as the PCF. Refer to HPM 110.5 regarding specific guidelines for coding DUI crashes.

g. Chemical Tests. If the criteria outlined in Chapter 5 of this manual regarding NCT is satisfied, a DUI arrestee who refuses to submit to a chemical test may be physically compelled to take a test.

h. Completion of JUS 8715/8716, Adult Disposition of Arrest and Court Action/Juvenile Detention Disposition Report, and FD 249, FBI Fingerprint Card, Forms. Officers completing a JUS 8715 or a JUS 8716 enter “Section 23152(a), (b), (c), (d), (e), (f), or (g)/23550.5 CVC” or “Section 23153(a), (b), (c), (d), (e), (f), or (g)/23550.5 CVC” in the charge box and check the felony box. Refer to GO 100.28 for complete instructions regarding the remainder of the JUS 8715. When required to complete a FD 249, officers shall enter “Section 23152(a), (b), (c), (d), (e), (f), or (g)/23550.5 CVC felony DUI with prior felony” or “Section 23153(a), (b), (d), (e), (f), or (g)/23550.5 CVC felony DUI with prior felony” in the violation box.

i. Management Information System Data Entry. The Area office CHP 215 clerk shall enter Section “23550.5 CVC” into the MIS when the felony violation is listed on the CHP 215.

j. Assignment of Case Numbers. Felony case numbers shall be assigned to arrests involving violations of Section 23550.5 CVC. However, when the subject is arrested for misdemeanor Section 23152 CVC and a felony complaint is filed later with the prosecuting attorney, the report should be handled as a misdemeanor with no felony case number assigned.

13. BICYCLES, MOTORIZED SCOOTERS, AND MOTORIZED BOARDS—DRIVING UNDER THE INFLUENCE.

a. Authority.

(1) Section 21200 CVC provides the basis for enforcement concerning bicyclists. Bicycles are not included within the definition of a motor vehicle (Section 415 CVC); therefore, Section 13353 CVC, Refusal of Chemical Tests,

is not applicable. However, the provisions of Section 40300.5 CVC, DUI involved in a crash, do apply.

(2) Section 21200.5 CVC makes it a misdemeanor for anyone to ride a bicycle upon a highway while under the influence of alcohol and/or drugs.

(3) Section 21221 CVC provides the basis for enforcement concerning motorized scooters. A motorized scooter is defined as a “device” in Section 407.5 CVC. Motorized scooters are specifically excluded from requirements in Sections 1803 CVC, Report of Court Action, and 12804.9 CVC, Examination and Classifications; because of this, Section 13353 CVC is not applicable. However, the provisions of Section 40300.5 CVC, do apply.

(4) Section 21221.5 CVC makes it a misdemeanor for anyone to operate a motorized scooter upon a highway while under the influence of alcohol and/or drugs.

(5) Section 21296 CVC makes it a misdemeanor for anyone to operate an electrically motorized board upon a highway while under the influence of alcohol and/or drugs. An electrically motorized board is defined as a “device” in Section 313.5 CVC and is not included within the definition of a motor vehicle (Section 415 CVC). Therefore, Section 13353 CVC is not applicable. The provisions of Section 40300.5 CVC do not apply.

b. Policy. Persons arrested for Section 21200.5 CVC, DUI—Bicycle; Section 21221.5 CVC, DUI—Motorized Scooters; or Section 21296 CVC, DUI—Electrically Motorized Boards, shall be handled according to the provisions contained in paragraphs 13.a.(1) through 13.a.(5).

c. Procedures.

(1) Officers shall advise arrestees that they are entitled to (but are not required to) take a chemical test of their blood or breath, if they so desire. The arrestee may also choose a urine test pursuant to Section 23612 CVC (the urine test is based upon the “unavailability” of both the blood and breath tests). Refer to Chapter 5 of this manual for procedures. This advisement shall be noted in the arrest report.

(2) If the arrestee requests a chemical test, the officer shall afford them the opportunity to take a test. If the arrestee fails to complete the test, or changes their mind about taking the test, these facts should be noted in the arrest report.

(a) This test shall be administered under the same conditions as any chemical test pursuant to Sections 13353 and 23612 CVC.

(b) This test shall be paid for by the prosecuting jurisdiction (Sections 29601 and 29602 of the Government Code.)

(c) Although the recognized presumptive blood alcohol limit of 0.08 percent does not apply to Sections 21200.5, 21221.5, or 21296 CVC, it can be used as a guide, along with observed riding patterns, to determine the arrestee's ability to safely operate a bicycle, motorized scooter, or electrically motorized board.

(d) Some persons arrested for Section 21200.5, 21221.5, or 21296 CVC will not request or submit to a chemical test. In those instances, it is essential that officers accurately document the specific objective symptoms of intoxication which led to the arrest of the subject, including any FSTs given. Emphasis should be placed on evidence of the violator's inability to safely operate a bicycle, motorized scooter, or electrically motorized board on a highway.

(3) Officers shall ensure the security of the arrestee's bicycle, motorized scooter, and electrically motorized board when they are taken into custody. This may involve taking (not storing) the arrestee's bicycle, motorized scooter, or electrically motorized board to a tow yard or the Area office for safekeeping, releasing it to a responsible party, or placing it in some other secure location where it may be retrieved by the arrestee when they are released.

(4) Officers shall return arrestees to their bicycles, motorized scooters, or electrically motorized board whenever they are released pursuant to Section 849(b)(1) PC. If the location of the arrestee's bicycle, motorized scooter, or electrically motorized board is a substantial distance from the arrest scene, officers should return the arrestee and their property to the location of the original arrest.

14. CHP 215, NOTICE TO APPEAR, FOR IN-CUSTODY DRIVING UNDER THE INFLUENCE ARRESTS—OPTIONAL.

a. General. Since the CHP 215 and CHP 202 contain redundant information, Areas may wish to eliminate the use of the CHP 215. The CHP 215 is used for its alphanumeric number to track a subject through DOJ databases and as a source document for MIS data entries.

b. Procedures. In order to ensure uniformity, the following procedures shall be implemented prior to the elimination of the CHP 215 for DUI arrests:

(1) Areas should coordinate with local district/city attorneys and courts to ensure the CHP 215 is not an essential part of the arrest package. With their approval, the CHP 215 may be eliminated.

(2) Areas will be required to develop a unique local six-digit number for tracking reports. The number is important for locating a report, for future reference (and DOJ audits), and for the purpose of entering information into the MIS data input screen. The six-digit number will replace the citation number which goes into the "215 #" position on the MIS screen.

(a) Officers are to record the six-digit number in the "citation number" section of page one of the CHP 202.

(b) The numbering system explained below is only an example. Areas may wish to use a different numbering system that will best suit their specific needs. For example:

1 The characters shall only be numeric and shall have exactly six characters. The numeric need not include the year or the Area number because these identifying numbers are contained in other parts of the MIS data input screen. For misdemeanor arrests, the first number may be a "1" to identify the violation as a misdemeanor (e.g., 100001, 100002, 100003). For felony arrests, the first number may be a "2" to identify the violation as a felony (e.g., 200001, 200002, 200003). These numbers may be repeated each calendar year.

2 Areas shall incorporate the assigned numbers into their arrest logs for additional tracking. To ensure uniformity of the numbering system, the Area may wish to have only one person assign the number to each arrest (or prenumber the arrest logs).

15. EXAMINATION BY A DOCTOR. Refer to Highway Patrol Manual 100.69, General Law Enforcement Manual, Chapter 1, Arrest Policies, for additional information.

16. NOTIFICATION TO THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL.

a. General.

(1) During the course of a DUI investigation, violators often identify the location where they acquired and/or consumed alcohol. For example, one of the investigation interview questions located on the back of the CHP 202 specifically asks about the location where the violator was drinking. Information obtained from the questioning or during the investigation may

establish that alcohol was illegally provided to the violator. This is especially true in cases involving a person under the age of 21.

(2) Anytime an incident is caused by an impaired driver whose condition can be attributed to alcohol that was illegally consumed or obtained, it is of great concern to the Department. Additionally, it is important that those who provide alcohol illegally to individuals are held accountable for their actions.

(3) The Department of Alcoholic Beverage Control (ABC) is responsible for licensing and regulating establishments that sell alcoholic beverages, in addition to enforcing laws related to alcoholic beverages within the state. Routine inspections are conducted by ABC of establishments and/or businesses that illegally sell or furnish alcohol to individuals, with actions against offenders taken accordingly.

b. Notification to the Department of Alcoholic Beverage Control. It is in the interests of both the CHP and ABC that, in certain cases, information generated from a DUI investigation be provided to ABC, thus enabling them to conduct follow-up investigations and take appropriate action within their jurisdiction.

(1) It is not necessary to provide information to ABC for all DUI arrests. However, there are some situations which warrant notification to ABC so that they can conduct a follow-up investigation.

(2) The following are examples in which notification to ABC would be appropriate:

(a) Anytime a person under the age of 21 is arrested for an alcohol-related offense. An extreme concern for ABC is the unlawful purchase and consumption of alcohol by underage individuals.

(b) Anytime officers detect a pattern of individuals involved in alcohol-related traffic crashes who identify the same establishment as the locations where they were served alcohol. In these situations, ABC can conduct follow-up investigations to determine if the establishment has been illegally serving alcohol to obviously intoxicated patrons and if corrective action against the premises is warranted.

(c) Anytime an impaired driver in a fatal (or other high profile) traffic crash identifies the specific drinking establishment where they were served alcohol. Although it will vary by county, ABC has indicated that there may be situations which warrant investigation into an establishment which serves alcohol to the responsible party in a fatal (or other high-profile) traffic crash.

c. Procedures. For situations where it is determined that contact with ABC is warranted, notification can generally be provided to the local ABC field office by telephone. However, there may be slight variations in preferred methods of communication and notification criteria among the different ABC field offices.

(1) Commanders' Responsibility. Commanders should ensure contact is initiated with their local ABC field office to determine appropriate contacts and preferred methods of communication. These methods should be included in the Area's SOP. Additionally, situations where the commander determines that ABC is to be notified should also be included in the Area's SOP.

(2) A detailed listing of ABC field offices, addresses, and telephone numbers can be accessed on the ABC website at www.abc.ca.gov.

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ANNEX A

ATTORNEY GENERAL'S OPINION—NO. 87-802

TO BE PUBLISHED IN THE OFFICIAL REPORTS
OFFICE OF THE ATTORNEY GENERAL
State of California
JOHN K. VAN DE KAMP
Attorney General

OPINION :

Of :

JOHN K. VAN DE KAMP : No. 87-802

Attorney General :

MARCH 1, 1988

RODNEY O. LILYQUIST :

Deputy Attorney General :

THE HONORABLE J. E. SMITH, COMMISSIONER, DEPARTMENT OF THE CALIFORNIA HIGHWAY PATROL, has requested an opinion on the following questions:

1. Does a peace officer have the authority to release a person arrested for driving under the influence of an alcoholic beverage by issuing to the person a notice to appear in court and accepting the person's written promise to appear?
2. Where a person is arrested for driving under the influence of an alcoholic beverage and released upon a written promise to appear in court, would the arresting officer be liable for injury caused by the person after the release?

CONCLUSIONS

1. A peace officer has the authority to release a person arrested for driving under the influence of an alcoholic beverage by issuing to the person a notice to appear in court and accepting the person's written promise to appear.
2. Where a person is arrested for driving under the influence of an alcoholic beverage and released upon a written promise to appear in court, the arresting officer would not, without additional facts being established, be liable for injury caused by the person after the release.

ANALYSIS

Section 23152 of the Vehicle Code¹ states in part:

“(a) It is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcohol beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle.

“(b) It is unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.”

¹ All references hereafter to the Vehicle Code are by section number only.

ANNEX A

ATTORNEY GENERAL'S OPINION—NO. 87-802 (*continued*)

The two questions presented for analysis concern the arrest of a person for “driving under the influence,” a misdemeanor violation of section 23152. May the arresting officer release the person without taking him or her to a magistrate, and would the officer be liable for an injury caused by the person after the request?

1. Authority to Release

For the vast majority of Vehicle Code violations, the person arrested is not taken to jail or to court. Rather, the officer prepares a written notice to appear (i.e., a citation of “ticket”) and releases the violator after the latter has given a written promise to appear in court. (§§ 40300-40604; see *People v. Superior Court* (1972) 7 Cal.3d 186, 199-200; *People v. Yniguez* (1971) 15 Cal.App.3d 669, 671-672; *People v. Mercurio* (1970) 10 Cal.App.3d 426, 430.)

Certain serious misdemeanor offenses, however, require that the person arrested be brought “before a magistrate,” a judge of one of the courts (Pen. Code § 808). Section 40302 provides:

“Whenever any person is arrested for any violation of this code, not declared to be a felony, the arrested person shall be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the arrest is made in any of the following cases:

“(a) When the person arrested fails to present his driver’s license or other satisfactory evidence of his identity for examination.

“(b) When the person arrested refuses to give his written promise to appear in court.

“(c) When the person arrested demands an immediate appearance before a magistrate.

“(d) When the person arrested is charged with violating Section 23152.” (Emphases added.)

Section 40302 mandates the taking of the person to a magistrate under the specified circumstances, including when the person is arrested for driving under the influence. (*People v. Superior Court, supra*, 7 Cal.3d 186, 199-201, 208-210; *People v. Pringle* (1984) 151 Cal.App.3d 854, 858; *People v. Yniguez, supra*, 15 Cal.App.3d 559, 673; *People v. Superior Court* (1971) 14 Cal.App.3d 935, 945; *People v. Mercurio, supra*, 10 Cal.App.3d 426, 430; *People v. Salinas* (1980) 111 Cal.App.3d Supp. 27, 31.) If the magistrate is unavailable, the officer is required to take the person either to the magistrate’s clerk or to [t]he officer in charge of the most accessible county or city jail ...” (§ 40307.) The person is not to be “booked”² by the officer (*People v. Superior Court, supra*, 7 Cal.3d 186, 208-210; *Agar v. Superior Court* (1971) 21 Cal.App.3d 24, 27-28; *Carpio v. Superior Court, supra*, 19 Cal.App.3d 790, 793-794; *People v. Mercurio, supra*, 10 Cal.App.3d 426, 431; rather, he or she is entitled to an immediate release from the magistrate, clerk, or jailer either upon his or her own recognizance upon a written promise to appear or upon the posting of bail. (§§ 40306, 40307.) The only exception to an immediate release is “in cases in which a temporary detention is necessary to permit a motorist to recover from alcoholic or narcotic intoxication sufficiently to be released with safety to himself and to the public.” (*People*

² “To ‘book’ signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the personal arrested, or any of these acts following an arrest.” (Pen. Code, § 7, subd. 21; see *People v. Superior Court, supra*, 7 Cal.3d 186, 208; *Carpio v. Superior Court* (1971) 19 Cal.App.3d 790, 793.)

ANNEX A

ATTORNEY GENERAL’S OPINION—NO. 87-802 (continued)

v. Superior Court, supra, 7 Cal.3d 186, 209, fn. 17; see *People v. Yniguez, supra*, 15 Cal.App.3d 669, 673; *Evans v. Municipal Court* (1962) 207 Cal.App.2d 633, 636.)³

The mandatory nature of section 40302 is to be contrasted with section 40303 and other statutes involving less serious offenses that give the officer the option of taking the person to a magistrate or releasing the arrestee upon a written promise to appear. Section 40303, for example, provides in part:

“Whenever any person is arrested for any of the following offenses and the arresting officer is not required to take the person without unnecessary delay before a magistrate, the arrested person shall, in the judgment of the arresting officer, either be given a 10 days’ notice to appear as provided in this section or be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the arrest is made:

“(a) Section 10852 or 10853, relating to injuring or tampering with a vehicle.

“

“(o) Section 21200.5, relating to riding a bicycle while under the influence of an alcoholic beverage or any drug.”

If the provisions of the Vehicle Code were the only statutes at issue, we would have no difficulty in answering the question. The arresting officer would be prohibited from issuing a notice to appear when the person is charged with violating section 23152. A different result, however, is compelled by the language of Penal Code section 853.6.

The general provisions of Penal Code section 853.6 apply where the person is arrested for a misdemeanor. In relevant part, the statute provides:

“(a) IN any case in which a person is arrested for an offense declared to be a misdemeanor, including violation of any city or county ordinance, and does not demand to be taken before a magistrate, be released according to the procedures set forth by this chapter. If the person is released, the officer or superior shall prepare in duplicate a written notice to appear in court, containing the name and address of the person, the offense charged, and the time and place where and when the person shall appear in court. If pursuant to subdivision (i), the person is not released prior to being booked and the officer in charge of the booking or his or her superior determines that the person should be released, the officer or superior shall prepare a written notice to appear in court.

“

“(d) The officer shall deliver one copy of the notice to appear to the arrested person, and the arrested person, in order to secure release, shall give his or her written promise so to appear in court by signing the duplicate notice when shall be retained by the officer. Thereupon the arresting officer shall immediately release the person arrested from custody.

³ A motorist may also be detained for up to two hours in order to verify his or her identity pursuant to section 40307.

ANNEX A

ATTORNEY GENERAL’S OPINION—NO. 87-802 (continued)

“

(g) The officer may either book the arrested person, as defined in subdivision 21 of Section 7, prior to release or indicate on the citation that the arrested person shall be booked. In the event it is indicated on the citation that the arrested person is to be booked, the magistrate shall, before the proceedings are finally concluded, order the defendant to be booked by the arresting agency.

“

“(i) Whenever any person is arrested by a peace officer for a misdemeanor, that person shall be released according to the procedures set forth by this chapter unless one of the following is a reason for nonrelease, *in which case the arresting officer may release the person*, or the arresting officer shall indicate, on a form to be established by his or her employing law enforcement agency, which of the following was a reason for the nonrelease:

- (1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.
- (2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.
- (3) *The person was arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.*

“” (Emphases added.)

Not only does Penal Code section 853.6 allow for the booking of the arrested person, it authorizes the officer to release a “person arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.” The language “in which case the arresting officer may release the person” was added to section 853.6 in 1984. (Stats. 1984, ch. 952, § 1, p. 3306.) Such language was not part of the legislative bill as originally introduced but was contained in the author’s amendment of May 15, 1984. The committee report of the Assembly Committee on Criminal Law and Public Safety described the purpose of the author’s amendment as follows:

“Peace Officer Flexibility Preserved. As amended May 15, 1984, the flexibility of a peace officer to release a person even when one of the technical nonrelease provisions set forth in paragraphs 1 through 9, on pages 4 and 5 applies, is preserved. As peace officer representatives have pointed out, numerous circumstances may arise when, though a person is not technically eligible for release, it would be desirable to release them (no satisfactory evidence of ID but the officers recognize the individual, an outstanding warrant exists for a very minor offense, the person is intoxicated but someone is willing to care for them, etc.)”

The committee report of the Senate Committee on Judiciary similarly provided:

“Peace officer flexibility preserved. AB 2858 would preserve the discretion of a peace officer to release a person even when one of the technical non-release provisions listed in Comment 4 did not apply. As peace officer representatives have pointed out, numerous circumstances may arise when though a person is not technically eligible for release, it would be desirable to release him – e.g., (no satisfactory evidence of ID but the officers recognize the individual, an outstanding warrant exists for a very minor offense, the person is intoxicated but someone is willing to care for them, etc.)”

ANNEX A

ATTORNEY GENERAL'S OPINION—NO. 87-802 (*continued*)

It is clear, therefore, from the legislative history of the amendment of section 853.6 in 1984 that the Legislature intended to authorize an arresting officer to release a person arrested for driving under the influence of an alcoholic beverage by issuing to the person a notice to appear in court and accepting the person's written promise to appear.

As interpreted by the courts, section 40302 gives the arresting officer no option when the charge is a violation of section 23152. He or she must take the arrested person to a magistrate and is prohibited from issuing a notice to appear. On the other hand, Penal Code section 853.6 expressly authorizes the officer to release the arrested person under the circumstances described in section 40302.

We find "no rational basis for harmonizing the two potentially conflicting statutes." *Dew v. Appleberry* (1979) 23 Cal.3d 630, 636.) While it is true that "when a special and a general statute are in conflict, the former controls" (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420), section 40302 cannot be said to be more specific than Penal Code section 853.6 since the latter expressly refers to the former.

What is significant is that the mandatory language of section 40302 was part of the statute when it was enacted in 1959 (Stats. 1959, ch. 3, pp. 1774-1775), while the express discretionary language of Penal Code section 853.6 concerning section 40302 was added by the Legislature in 1984. It is well-recognized that "when two laws upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail." (*Canteen Corp. v. State Bd. of Equalization* (1985) 174 Cal.App.3d 952, 960; see *In re Thierry S.* (1977) 19 Cal.3d 727, 744; *Woodward v. Southern Cal. Permanente Medical Group* (1985) 171 Cal.App.3d 656, 664.) "[T]he arresting officer may release the person ...arrested under ...the circumstances listed in Sections 40302 ..." constitutes the latest expression of the will of the Legislature, and as such controls our conclusion.⁴

In answer to the first question, therefore, we conclude that a peace officer has the authority to release a person arrested for driving under the influence of an alcoholic beverage by issuing to the person a notice to appear in court and accepting the person's written promise to appear.

2. Liability for Injury

In determining whether a peace officer or law enforcement agency would be liable for an injury caused by a person released after being arrested for driving under the influence, the threshold issue to be resolved is whether any duty of care is owed to the injured party. (See *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 201-202; *Harris v. Smith* (1984) 157 Cal.App.3d 100, 104; *Whitcombe v. City of Yolo* (1977) 73 Cal.App.3d 698, 706; 68 Ops.Cal.Atty.Gen. 250, 255 (1985).)

With respect to this issue, however, it has been stated that "[a]s a general rule, one owes no duty to control the conduct of another nor to warn those endangered by such conduct." (*Bonds v. State of California ex rel. Cal. Highway Patrol* (1982) 138 Cal.App.3d 314, 318; see *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750-758; 68 Ops.Cal.Atty.Gen. 250, 255 (1985).)

⁴ We understand that the basis for the question is the recent lack of detoxification, detention, jail, and court facilities necessary to accommodate the temporary custody of all persons arrested for driving under the influence.

ANNEX A

ATTORNEY GENERAL'S OPINION—NO. 87-802 (*continued*)

In *Jackson v. Clements* (1983) 146 Cal.App.3d 983, police officers investigated a party where alcoholic beverages were being served; they detained a person named Clements for about one-half hour during the investigation. They knew that Clements was too intoxicated to drive but did not prevent him from leaving the party in his automobile. Clements thereafter killed three people while driving under the influence.⁵ The court concluded that the officers had no duty of care in these circumstances:

“Plaintiffs cite no authority, nor has any been found, to support their claim that a police officer’s observation of a citizen’s conduct which might foreseeably create a risk of harm to others, or the officer’s temporary detention of the citizen, creates a special relationship which imposes on the officer a duty to control the citizen’s subsequent behavior. The case law is to the contrary.” (*Id.*, at p. 987.)

In *Harris v. Smith, supra*, 157 Cal.App.3d 100, the officer stopped a motorist for speeding. He detected the odor of alcohol on the driver’s breath, but the driver passed three field sobriety tests and was released. About one-half hour later the driver was in an accident in which two persons were killed. His blood alcohol level was .17. Under these facts the court concluded that the officer owed no duty of care to the persons killed:

“Officer Kreps did not create the peril to plaintiff; he took no affirmative action which contributed to, increased or changed the risk that otherwise existed; he did not voluntarily assume any responsibility to protect plaintiff; and he made no statement or promise to induce plaintiff’s reliance. Assuming, arguendo, plaintiff or any other member of the motoring public was a reasonably foreseeable victim, that fact alone is not enough to establish a special relationship with Officer Kreps imposing on him a duty to use due care.” (*Id.*, at p. 105.)

With respect to whether the failure to stop a person from acting dangerously constituted an affirmative act increasing the risk of harm to others, the court observed:

“However, the facts of *Davidson* demonstrate that a police officer does not act affirmatively to increase the risk of harm simply by failing to stop a citizen from acting dangerously. There, police had solid information that a suspect in a laundromat was dangerous. They failed to intercede or to warn another citizen in the laundromat, whom the suspect later stabbed. The Supreme Court found no special relationship, no duty of care toward the victim, and no negligence. (*Davidson, supra*, 32 Cal.3d at p. 209.) The court said, “[The officers’] conduct did not change the risk which would have existed in their absence. There is simply no reason to speculate that anyone – Yolanda or Blackmun, victim or assailant – would have acted differently had the officers not placed the laundromat under surveillance.” (*Id.*, at p. 208.) Similarly, in the instant case the conduct of Officer Kreps did not alter any risk which already was present.” (*Id.*, at p. 107.)

In *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, the Supreme Court ruled that police officers had no duty to control a person arrested and released even though they knew of the person’s potential for violence against a specific victim. (*Id.*, at p. 444; see also *Davidson v. City of Westminster, supra*, 32 Cal.3d 197, 205; *Thompson v. County of Alameda, supra*, 27 Cal.3d 741, 752, 756.)

⁵ These were the allegations of the complaint accepted as true on the appeal from the dismissal of the complaint.

ANNEX A

ATTORNEY GENERAL'S OPINION—NO. 87-802 (*continued*)

A finding of a duty of care would require the showing of a “special relationship” described in *Jackson v. Clements*, *supra*, 146 Cal.App.3d 983, 988, as:

“... (1) where there was a voluntary assumption by the public official of a duty toward the injured party [citation], (2) where the police had induced the victim’s reliance on a promise, express or implied, that they would protect him [citation], or (3) where the victim was dependent upon the police or other public official for protection because the official either created the peril [citation] or increased or changed the risk which would have otherwise existed, ‘as by lulling the injured parties into a false sense of security and perhaps preventing other assistance from being sought.’ [Citations.]”

While these various special circumstances give rise to a duty of care (see *Williams v. State of California*, (1983) 34 Cal.3d 18, 23-25; *Davidson v. City of Westminster*, *supra*, 32 Cal.3d 197, 203; *Duffy v. City of Oceanside* (1986) 179 Cal.App.3d 666, 671-672; *Harris v. Smith*, *supra*, 157 Cal.App.3d 100, 105; *Bonds v. State of California ex rel. Cal. Highway Patrol*, *supra*, 138 Cal.App.3d 314, 318; 68 Ops.Cal.Atty.Gen. 250, 255 (1985)), the injured party must necessarily also prove in order to recover damages: (1) a breach of such duty, (2) a proximate causal connection between the conduct and injury, and (3) an actual loss or damage (*Harris v. Smith*, *supra*, 157 Cal.App.3d 100, 104). Moreover, the police officer and law enforcement agency may have an immunity from liability even assuming all elements of a cause of action are established by the injured party.

In some states “police officers and governmental entities which employ them may be held liable if an officer who has initially stopped an intoxicated driver negligently allows him to continue driving.” (*Hucko v. City of San Diego* (1986) 179 Cal.App.3d 520, 523; see *Irwin v. Town of Ware* (1984) 392 Mass. 745 [467 N.E.2d 1292, 1303-1304]; *Huhn v. Dixie Ins. Co.* (Fla.App.1984) 453 So.2d 70.) Such, however, is not the case in California. While peace officers may have a duty to enforce the provisions of the Vehicle Code, they do not act as “an insurer of safety on the highway.” (*Bonds v. State of California ex rel. Cal. Highway Patrol*, *supra*, 138 Cal.App.3d 314, 320; see *Williams v. State of California*, *supra*, 34 Cal.3d 18, 24.) The Legislature has provided public entities and public officials with numerous immunities, including an immunity for the “failure to enforce any law” (Gov. Code, § 818.2), for the “exercise of the discretion vested in him, whether or not such discretion be abused” (Gov. Code § 8202.2), for the “failure to enforce an enactment” (Gov. Code, § 821), and for “determining whether to parole or release a prisoner” (§ 845.8). With specific regard to the release of arrested persons, Government Code section 846 provides:

“Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody.”

Government Code section 846 would give the arresting officer immunity from liability for injury caused by a person arrested for drunk driving and released upon a written promise to appear in court. (See *Hucko v. City of San Diego*, *supra*, 179 Cal.App.3d 520, 521-524; *Truong v. James* (1985) 168 Cal.App.3d 833, 835; see also *Bonds v. State of California ex. rel. Cal. Highway Patrol*, *supra*, 138 Cal.App.3d 314, 322.)

In answer to the second question, therefore, we conclude that where a person is arrested for driving under the influence of an alcoholic beverage and released upon a written promise to appear in court, the arresting officer would not, without additional facts being established, be liable for injury caused by the person after the release.

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ANNEX B

AREAS PARTICIPATING IN THE DEPARTMENT'S DRIVING UNDER THE INFLUENCE CITE AND RELEASE PROGRAM

125	HUMBOLDT (WILLOW CREEK RESIDENT POST ONLY)
135	REDDING (BURNEY RESIDENT POST ONLY)
140	SUSANVILLE
145	YREKA
146	MOUNT SHASTA
160	WILLOWS
165	QUINCY
170	ALTURAS
175	TRINITY RIVER
241	CHICO
246	SOUTH LAKE TAHOE
252	SOUTH SACRAMENTO
260	EAST SACRAMENTO
265	STOCKTON
266	TRACY
320	CONTRA COSTA
330	REDWOOD CITY
335	SAN FRANCISCO
365	SOLANO
370	OAKLAND
390	DUBLIN
420	BAKERSFIELD
426	BUTTONWILLOW
430	FORT TEJON
435	FRESNO
455	MARIPOSA
456	OAKHURST
460	MERCED
461	LOS BANOS
465	MODESTO
480	VISALIA
481	PORTERVILLE
495	COALINGA
525	BALDWIN PARK
530	SOUTH LOS ANGELES
535	EAST LOS ANGELES
540	NEWHALL
545	ANTELOPE VALLEY
550	SANTA FE SPRINGS

ANNEX B

**AREAS PARTICIPATING IN THE DEPARTMENT'S
DRIVING UNDER THE INFLUENCE CITE AND RELEASE PROGRAM *(continued)***

565	WEST LOS ANGELES
575	ALTADENA
580	WEST VALLEY
590	CENTRAL LOS ANGELES
620	WINTERHAVEN
625	EL CENTRO
630	INDIO
645	SAN DIEGO
650	OCEANSIDE
655	SAN GORGONIO PASS
660	BLYTHE
670	WESTMINSTER
675	SANTA ANA
680	EL CAJON
685	TEMECULA
690	CAPISTRANO
720	SANTA CRUZ
725	HOLLISTER-GILROY
730	MONTEREY
735	KING CITY
740	TEMPLETON
750	SANTA MARIA
755	BUELLTON
765	VENTURA
820	BRIDGEPORT
825	BISHOP
830	MOJAVE
834	NEEDLES
855	RANCHO CUCAMONGA
860	SAN BERNARDINO
865	ARROWHEAD