PART ONE CRIME AND PUNISHMENT

CHAPTER 1. THE OVERVIEW OF THE OFFENSE AND DEFENSES

Orr.	ENOR WID DELFINORO
§ 1:1	Introduction
§ 1:2	Common misdemeanor DUI CVC 23152
§ 1:3	Felony Offense When an Injury Is Alleged—CVC 23153
§ 1:4	Felony offense CVC 23152 w/three or more priors within 10 years
§ 1:5	Drunk driving with "prior" related felony
§ 1:6	Drivers under 21 with 0.05% blood-alcohol
§ 1:7	CVC 23154 New offense occurring while on probation
§ 1:8	Vehicular manslaughter
§ 1:9	Murder: Watson
§ 1:10	Attempted drunk driving
§ 1:11	The corpus
§ 1:12	"Driving"
§ 1:13	"Vehicle"
§ 1:14	Under the influence of alcohol (VC § 23152(a))
§ 1:15	"Under the influence" defined
§ 1:16	Blood-alcohol presumption of intoxication
§ 1:17	Under the influence of drugs
§ 1:18	Driving while addicted: vehicle code § 23152(c)
§ 1:19	Driving with 0.08% blood-alcohol concentration (VC § 23152(b))
§ 1:20	Legal defenses
§ 1:21	Double jeopardy
§ 1:22	Mistake of fact
§ 1:23	Necessity and duress
§ 1:24	Entrapment
§ 1:25	Insanity

CHAPTER 2. DUI SENTENCING AND CONSEQUENCES

§ 2:1 Misdemeanor driving under the influence

§ 1:26 Accomplice liability

California Driving Under the Influence Defense

§ 2:3	CVC 23153 DUI with injury misdemeanor or felony
§ 2:4	Drunk driving with three priors ("Four strikes")
§ 2:5	Drunk driving with a prior DUI-related felony
§ 2:6	Manslaughter and murder
§ 2:7	Multiple victims
§ 2:8	DUI specific sentencing enhancements
§ 2:9	"Prior" or "separate" convictions
§ 2:10	Refusal to submit to chemical testing
§ 2:11	Speeding and Reckless
§ 2:12	Child endangerment
§ 2:13	Blood-alcohol over 0.15%
§ 2:14	Blood-alcohol over 0.20%
§ 2:15	Sentencing issues
§ 2:16	Multiple punishment
§ 2:17	Punishment for exercising the right to trial
§ 2:18	Work furlough, community service, and roadwork
§ 2:19	Residential treatment programs
§ 2:20	Electronic home detention
§ 2:21	Drinking and driving education programs
§ 2:22	Ignition interlock devices (IIDs)
§ 2:23	Vehicle impound/forfeiture
§ 2:24	Immigration consequences
§ 2:25	Emergency response costs
§ 2:26	Effects of charges and conviction on professional licenses
§ 2:27	Probation and punishments for violating probation
§ 2:28	Restrictions on foreign travel
§ 2:29	Diversion due to military service for misdemeanor DUI
§ 2:30	Diversion due to mental health condition for
-	misdemeanor and/or felony DUI
§ 2:31	Court diversion for misdemeanor offenses
	Appendix

PART TWO ADMINISTRATIVE LICENSE SUSPENSIONS

CHAPTER 3. THE ADMINISTRATIVE PER SE SUSPENSION

§ 3:1	The administrative suspension and the DMV
3:2	The out-of-state driver
§ 3:3	The California driver convicted or suspended in
	another state
\$ 3:4	Drugs and DUI

§ 3:5	Effect of criminal proceedings on APS suspension
§ 3:6	The "0.08%" suspension
§ 3:7	Drivers under 21 ("zero tolerance"): 0.01%
§ 3:8	The "refusal" suspension
§ 3:9	What constitutes a "refusal"
§ 3:10	Change of mind ("cure")
§ 3:11	Refusal to submit to PAS test (under 21)

CHAPTER 4. THE ADMINISTRATIVE PER SE HEARING

§ 4:1	Representation before the DMV: an overview
§ 4:2	Objecting to the hearing
§ 4:3	Telephonic versus in-person hearings
§ 4:4	Discovery
§ 4:5	The DMV subpoena: initial examination of the
	arresting officer
§ 4:6	Testimony by affidavit
§ 4:7	The hearing brief
§ 4:8	Hearing procedures
§ 4:9	Challenging the hearing officer for bias
§ 4:10	Continuances
§ 4:11	Rules of evidence
§ 4:12	Unsworn documents
§ 4:13	The hearsay rule in DMV hearings
§ 4:14	The "official records" exception
§ 4:15	The "official duty" presumption
§ 4:16	Electronic transmissions and the best evidence rule
§ 4:17	The licensee's case
§ 4:18	The 15 most common grounds for setting aside a
	suspension
§ 4:19	Administrative Review
§ 4:20	Judicial Review—Writ of Mandamus
§ 4:21	Admin per se Hearing checklist

PART THREE PRETRIAL

CHAPTER 5. INTERVIEW, ARRAIGNMENT, AND PLEA BARGAINING

§ 5:1	The client interview
§ 5:2	The midnight phone call
§ 5:3	Educating the client
§ 5:4	The retainer agreement

Appendix

- § 5:5 Advising the client on "emergency response" costs
- § 5:6 The arraignment
- § 5:7 Pretrial release
- § 5:8 Evaluating the case
- § 5:9 Plea bargaining considerations Appendix

CHAPTER 6. PRIOR CONVICTIONS

- § 6:1 Striking "priors"
- § 6:2 Factual proof
- § 6:3 Constitutional challenge to priors
- § 6:4 Uncharged priors
- § 6:5 The uncounseled prior
- § 6:6 Incompetence of prior counsel
- § 6:7 The juvenile "prior"
- § 6:8 Out-of-state priors
- § 6:9 Procedures for striking a prior conviction
- § 6:10 The record
- § 6:11 Alleging prejudice
- § 6:12 Bifurcation of trial
- § 6:13 Prosecutorial refusal to accept admission of prior
- § 6:14 Sample points and authorities for challenging out-ofstate prior convictions Appendix

CHAPTER 7. DISCOVERY

- § 7:1 Discovery in the DUI case
- § 7:2 California law enforcement transparency provisions
- § 7:3 Field evidence
- § 7:4 Law enforcement avoiding recording events or destroying recordings
- § 7:5 Cross-examination of the arresting officer at DMV administrative per se hearings
- § 7:6 Blood-alcohol evidence
- § 7:7 Chemical test discovery
- § 7:8 Blood/breath test discovery requests
- § 7:9 Miscellaneous breath and blood discovery issues
- § 7:10 Sample breath discovery request
- § 7:11 Preservation and production of sample: Trombetta
- § 7:12 Getting court-ordered analysis and/or expert testimony
- § 7:13 Prosecutorial resistance to discovery
- § 7:14 Meet and confer
- § 7:15 Remedies for failure to provide discovery
- § 7:16 What the defense is required to disclose in discovery

§ 7:17 Defendant not required to disclose impeachment material Appendix

CHAPTER 8. SUPPRESSION OF EVIDENCE

§	8:1	Pretrial suppression in the DUI case
§	8:2	Procedures for filing a motion to suppress
§	8:3	Reasonable suspicion/probable cause: detention and arrest
§	8:4	Vehicle code infractions as probable cause for stop
§	8:5	Prolonged detention
§	8:6	Pre-textual stops and police stake-outs
§	8:7	Driving not occurring in officer's presence
§	8:8	Exceptions to presence requirement
§	8:9	Establishing <i>corpus delicti</i> independent of defendant's statements
§	8:10	Blood alcohol test admissibility dependent on lawful arrest
§	8:11	Arrest having actually occurred
§	8:12	Probable cause based on anonymous tip
§	8:13	The implied consent advisement
§	8:14	Taking of blood by warrant
§	8:15	Taking blood by actual consent
§	8:16	Blood draw pursuant to acceptable medical practices
§	8:17	Forceful seizure of blood: Schmerber-Rochin
_	8:18	Sobriety checkpoints
§	8:19	Evasion of sobriety checkpoints
§	8:20	"Electronic checkpoints"
	8:21	Incriminating statements: Miranda-Berkemer
§	8:22	Self-incrimination and the refusal: Neville
§	8:23	Refusal to take field sobriety tests or PAS tests
§	8:24	Admissibility of field sobriety tests: $\mathit{Kelly-Frye-Sargon}$
§	8:25	"Standardized" field sobriety tests
§	8:26	Mental acuity tests: Muniz
§	8:27	Horizontal gaze nystagmus (HGN)
_	8:28	Preliminary alcohol screening (PAS) devices
	8:29	Pupil reaction
	8:30	Police obstruction of witnesses
§	8:31	Blood alcohol evidence
§	8:32	Admissibility of chemical test results under the public employee business records exception
_	8:33	Denial of choice if breath is requested: Nelson
§	8:34	Denial of choice if blood is requested
§	8:35	Denial of access to counsel
8	8:36	Hospital blood-alcohol evidence

§ 8:37 Denial of independent sample
§ 8:38 Chain of custody
§ 8:39 Lack of foundation: Title 17
§ 8:40 Failure to provide discovery
§ 8:41 Recordings and photographs
§ 8:42 Warrantless seizure of crash data records Appendix

PART FOUR CHALLENGING THE SCIENTIFIC EVIDENCE

CHAPTER 9. CHALLENGING THE PROSECUTION'S EVIDENCE OF BAC

	SECUTION SEVIED OF BILL
§ 9:1	Analysis of blood alcohol concentration in the DU
	case, an overview
§ 9:2	Physiology: alcohol absorption and elimination
§ 9:3	Estimating blood-alcohol levels
§ 9:4	The Widmark factors
§ 9:5	Individual tolerance
§ 9:6	The "rising blood-alcohol" defense
§ 9:7	General physiological sources of error
§ 9:8	The fallacy of the "average person"

- § 9:9 Women and alcohol
- § 9:10 Racial differences in alcohol metabolism
- § 9:11 Hematocrit
- § 9:12 The effects of body fat
- § 9:13 Circadian rhythm
- § 9:14 Food, cigarettes, and alcohol metabolism
- § 9:15 Zinc deficiency
- § 9:16 Internally-produced alcohol
- § 9:17 Discovery
- § 9:18 Retesting
- § 9:19 Cross-examination techniques Appendix

CHAPTER 10. CHALLENGING BREATH ALCOHOL TESTS

§ 10:1	Breath analysis overview
§ 10:2	Theory and reality: the "new paradigm"

- § 10:3 Important considerations in presenting a breath alcohol defense
- $\S~10:4$ The blood-breath partition ratio: Bransford to McNeal
- § 10:5 Problems with nonspecific analysis in breath testing

3 10:6	Problems with breath testing during the absorptive phase
§ 10:'	±
3 10:8	Presenting the G.E.R.D. and acid-reflux defense
3 10:9	The effects of breathing pattern on breath test reliability
3 10:	
3 10:	Physiological effects of stress can affect the reliability of breath testing
3 10:	12 Unreliability of breath testing in a diabetic client
3 10:	Effects of high-protein diets on breath testing reliability
3 10:	14 Breath specimen contamination with ambient air
3 10:	Incomplete purging and the "air blank" may effect the reliability of a breath test result
3 10:	16 Simulator calibration can affect the accuracy of breath testing
3 10:	17 The unscientific single point calibration
3 10:	18 Inherent error in breath testing
3 10:	A summary of variables affecting the precision and accuracy of breath testing
3 10:2	How radio frequency interference (RFI) can affect the reliability of breath testing
3 10:2	21 Breath machines used in California
3 10:2	22 Intoxilyzer 5000
3 10:2	23 DataMaster
3 10:2	24 Intoximeter EC/IR & EC/IR II
3 10:2	25 Drager Alcotest 7110 MK III
3 10:2	26 Drager Alcotest 7410
3 10:2	27 Drager Alcotest 7510
3 10:2	28 Drager Alcotest 9510
3 10:2	
3 10:5	The preliminary alcohol screening (PAS) device overview
3 10:5	Strategies for dealing with PAS evidence
3 10:5	
3 10:5	33 The Alco-Sensor IV
10:5	34 LifeLoc FC20
10:5	B5 Draeger Alcotest 7410 and 7510
	Appendix

CHAPTER 11. CHALLENGING THE ANALYSIS OF BLOOD ALCOHOL AND URINE ALCOHOL

§ 11:1 Blood analysis overview

§ 11:2	Challenging the analysis of blood samples
§ 11:3	Collection of the blood specimen and its effects on identity and integrity
§ 11:4	Hemolysis will affect the integrity of a blood specimen
§ 11:5	Fermentation can affect the integrity of a blood specimen
§ 11:6	Chain of custody issues affecting the identity and integrity of a blood specimen
§ 11:7	Attacking the blood analysis
§ 11:8	Gas chromatography a non-technical overview
§ 11:9	Challenging headspace gas chromatography using a flame ionization detector as a presumptive method affecting the integrity of the analysis
§ 11:10	Challenging analytical error by interpreting chromatograms
§ 11:11	Chromatography software affects the integrity of reporting analytical results
§ 11:12	Variations in calibration and the effects on the integrity of test results
§ 11:13	The unscientific single point calibration
§ 11:14	Inaccuracy due to measuring serum/plasma vs. whol blood
§ 11:15	Accuracy can be affected due to arterial vs. venous blood draws
§ 11:16	Sterilization effects on integrity of blood specimens
§ 11:17	Challenging hospital blood analysis
§ 11:18	Traceability error
§ 11:19	Finding errors in the analysis of blood for alcohol
§ 11:20	Urinalysis

CHAPTER 12. METROLOGY IN DUI DEFENSE

- § 12:1 Metrology in DUI defense
- § 12:2 Metrology in California courts
- § 12:3 Uncertainty of measurement (UOM)—An overview
- § 12:4 Estimating uncertainty of measurement

CHAPTER 13. DRIVING UNDER THE INFLUENCE OF DRUGS

- § 13:1 Overview of the drug impairment dilemma
- § 13:2 Important pharmacological terms
- § 13:3 Definitions of blood levels
- § 13:4 Cognitive functioning impairment

§ 13:5	Drug classifications and effects
§ 13:6	Addressing law enforcement DDUI training
§ 13:7	Law enforcement DDUI training
§ 13:8	A.R.I.D.E. (Advanced roadside impaired driving enforcement)
§ 13:9	D.R.E.—Drug recognition "expert"
§ 13:10	Limiting or excluding DRE testimony
§ 13:11	Other case law to consider related to DUI Drug defense
§ 13:12	Medical conditions that can mimic impairment

CHAPTER 14. DUI DRUG ANALYSIS

- § 14:1 DUI drug analysis overview
- § 14:2 Presumptive testing for drugs
- § 14:3 Gas chromatography mass spectrometry non-technical overview
- § 14:4 Drug confirmation limitations by GC/MS
- § 14:5 Sample preparation
- § 14:6 Anatomy of gas chromatograph mass spectrometer (GC/MS)
- § 14:7 How a gas chromatograph mass spectrometer works
- § 14:8 Problem areas for GC/MS drug analysis

PART FIVE TRIAL

CHAPTER 15. JURY SELECTION AND OPENING STATEMENT

- § 15:1 Jury Selection Overview
- § 15:2 Jury selection—Legal considerations
- § 15:3 Discovery of prosecution records on jurors
- § 15:4 Attorney voir dire
- § 15:5 Opening statement

officer

§ 15:6 Illustrative opening statement

CHAPTER 16. THE ARRESTING OFFICER: FIELD EVIDENCE

§ 16:1 Importance of cross-examination of the arresting officer regarding field evidence
 § 16:2 The officer as an intoxication expert
 § 16:3 Preparing for cross-examining the arresting officer
 § 16:4 Developing a strategy for cross-examination of the arresting officer
 § 16:5 Executing the plan for cross-examining the arresting

CALIFORNIA DRIVING UNDER THE INFLUENCE DEFENSE

§ 16:6	Exposing lack of independent recollection
§ 16:7	Addressing the arresting officer's qualifications, training and experience
§ 16:8	Exposing Confirmatory Bias—Predisposition
§ 16:9	Suggesting reasonable alternatives and humanizing the event
§ 16:10	Emphasizing observations tending to support sobriety
§ 16:11	Attacking the officer's investigation: observations, interrogation and testing procedures
§ 16:12	Phase one—Vehicle in motion (VIM)
§ 16:13	Phase two—Initial contact (IC)
§ 16:14	Phase three—Field sobriety tests
§ 16:15	Alternative explanations related to field sobriety tests performance
§ 16:16	Tactics for cross-examination on field sobriety tests
§ 16:17	Preliminary Alcohol Screening (PAS) devices
§ 16:18	Cross-examination techniques
CHA	PTER 17. THE DEFENSE WITNESS
§ 17:1	The sobriety witness
§ 17:2	Lay opinion of intoxication
§ 17:3	Illustrative direct examination of sobriety witness
§ 17:4	Preparing the sobriety witness for cross-examination
§ 17:5	The police expert
§ 17:6	The defense blood alcohol expert
§ 17:7	Illustrative direct examination of defense blood alcohol expert
§ 17:8	Preparing the defense expert for cross-examination
§ 17:9	The defendant
§ 17:10	Defendant's testimony as to his own blood alcohol level
§ 17:11	Illustrative direct examination of defendant
§ 17:12	Preparing the defendant for cross-examination
	PTER 18. JURY INSTRUCTIONS AND
ARG	UMENT
§ 18:1	Importance of jury instructions
§ 18:2	CalCrim jury instructions
§ 18:3	CalCrim vs. Caljic instructions
§ 18:4	Selected special (pinpoint) instructions
§ 18:5	The closing argument Appendix
	Appenuix

CHAPTER 19. DEFENDING DUI CASES IN FEDERAL COURT

- § 19:1 Introduction
- § 19:2 How does a case get into federal court?
- § 19:3 The first appearance and discovery
- § 19:4 Trial
- § 19:5 The plea agreement

APPENDICES

- Appendix A. Additional Forms
- Appendix B. Drager Alcotest 7110 Pamphlet
- Appendix C. Drager Mark IIA Simulator Pamphlet
- Appendix D. Intoxilyzer 5000 Brochure
- Appendix E. Intoxilyzer Pamphlet
- Appendix F. Usage and Callibration Logs
- Appendix G. Notices of Appeal
- Appendix H. Bibliography
- Appendix I. Sample Federal Information and Violation
 - Notice
- Appendix J. Addendums

Table of Laws and Rules

Table of Cases

Index