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7 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
8 **COUNTY OF SANTA CRUZ**

9 PETITIONER ) No.  
10 )  
11 Plaintiff, ) DMV File  
12 )  
13 v. )  
14 FOR ) PETITION  
15 ) WRIT OF MANDATE  
16 JOAN BORUCKI, Interim Director of the )  
17 Department of Motor Vehicles; T. Young, )  
18 Hearing Officer of the Department of Motor ) IMMEDIATE STAY  
19 Vehicles, and DEPARTMENT OF MOTOR ) REQUESTED  
20 VEHICLES, an agency of the State of California, )  
21 Respondents. )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

19 Petitioner hereby respectfully petitions this Court to issue  
20 its Writ of Mandate directed to Joan Borucki, Interim Director of  
21 the Department of Motor Vehicles, to Hearing Officer of the  
22 Department of Motor Vehicles, and to the DEPARTMENT OF MOTOR  
23 VEHICLES, an agency of the State of California, commanding them  
24 to set aside and revoke the hearing officer's Notification of  
25 Findings and Decision issued, suspending the petitioner's driving  
26 privilege for the period commencing, and terminating, or, in the  
27 alternative, to show cause before this Court at a time and place  
28 hereafter to be specified by the Court why they have not done so

1 and why a peremptory writ should not issue.

2 By this verified petition, the following facts and causes  
3 are set forth for issuance of the writ:

4 1. The petitioner was, at all times mentioned herein, a  
5 resident of the County of Santa Cruz, California.

6 2. Respondent Joan Borucki is the Interim Director and Chief  
7 Executive Officer of the Department of Motor Vehicles [DMV].  
8 Respondent is a Hearing Officer employed by the DMV. The DMV is  
9 an agency of the State of California.

10 3. At all times herein mentioned, the petitioner was the  
11 holder of a valid California driver's license number, issued by  
12 the DMV.

13 4. The factual basis for the administrative action was  
14 contained in an Age 21 and Older Officer's Statement on DMV form  
15 DS-367 [herinafter DS-367], and in additional arrest reports.  
16 The DS-367 is a sworn statement. Appended to the sworn statement  
17 were an unsworn arrest report and an unsworn supplemental  
18 narrative report of California Highway Patrol Officer M. . (A  
19 true and correct copy of the DS-367 sworn report is attached as  
20 Exhibit A and incorporated herein by reference. A true and  
21 correct copy of the unsworn arrest report is attached as Exhibit  
22 B and incorporated herein by reference. A true and correct copy  
23 of the unsworn supplemental narrative report is attached as  
24 Exhibit C and incorporated herein by reference.) According to  
25 the reports, on June 5, 2006, at 12:05 AM, Officer was driving  
26 southbound on US-101 in the number one lane at 65 mph and came up  
27 behind the petitioner's vehicle in the same lane. A second  
28 patrol car, which Officer estimated was traveling at 70 mph,

1 passed the petitioner's vehicle on the right. The petitioner's  
2 vehicle allegedly swerved to the left over the solid yellow  
3 roadway edge line, then came back into the number one lane where  
4 it allegedly weaved within the lane before moving right to the  
5 number two lane. Officer and his partner Officer then initiated  
6 a traffic stop.

7 5. Officer approached the petitioner's vehicle on the right  
8 front passenger side where he found a passenger seated. The  
9 officer states that he smelled a "moderate strong odor" of  
10 alcohol in the vehicle. The passenger later stated that he had  
11 drunk Coors Light earlier. The officer noticed that both the  
12 passenger and the driver had red, watery eyes; the petitioner  
13 later explained that she had been surfing all day. The officer  
14 approached the driver's side door and stated that he smelled "an  
15 odor of an alcoholic beverage" on the petitioner's breath.  
16 Officer then checked the petitioner's eyes for nystagmus, despite  
17 the fact that she was still seated in her vehicle rather than  
18 standing as is required for a meaningful nystagmus test. The  
19 petitioner, at Officer's request, exited her vehicle and  
20 performed other field sobriety tests. She explained that she was  
21 very tired and had been hit in the eye by her surfboard earlier  
22 that day; she was wearing "thong sandals" or barefoot while  
23 taking the field sobriety tests. Officer "advised Petitioner of  
24 the P.A.S. admonition" at 12:22 AM and Petitioner refused that  
25 test.

26 6. After Officer arrested the petitioner at 12:23 AM for a  
27 violation of Vehicle Code Section 23152(a), he placed her in the  
28 left rear seat of his patrol car "where she was advised of her

1 implied consent." Officer does not specify who made this  
2 advisement and what language was used. At 12:50 AM, Officer  
3 read "the back of the DMV form DS 367 verbatim" to the  
4 petitioner. Officer reports that the petitioner responded to  
5 these admonishments only by stating, "I would like to see my  
6 attorney."

7 7. The petitioner has performed all conditions precedent to  
8 the filing of this petition by exhausting all administrative  
9 remedies available in that she requested and was granted an  
10 administrative per se hearing on July 27, 2006, before Hearing  
11 Officer Young. At the hearing, no witnesses testified. The  
12 Department relied entirely on the DS-367, arrest report, and  
13 supplemental arrest report. The petitioner objected to the  
14 admission of these documents into evidence on the grounds that  
15 the officers lacked reasonable cause to stop the petitioner and  
16 the unsworn reports are inadmissible hearsay. The petitioner  
17 also argued that the circumstances of the admonishment by the  
18 officers confused her and that she believed she had a right to  
19 have an attorney present during a chemical test. The petitioner  
20 argued that her requests for her attorney did not constitute a  
21 refusal of the chemical test under the circumstances.

22 8. Notification of Findings and Decision was issued on  
23 December 12, 2006. (A true and correct copy is attached as  
24 Exhibit D and incorporated by reference.)

25 9. By service of this petition for Writ of Mandate, the  
26 petitioner is requesting the DMV to prepare the administrative  
27 record pursuant to Government Code section 11523.<sup>1</sup>

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28 <sup>1</sup> The petitioner reserves his right to amend the Petition for Writ of

1       10. The respondents have a clear and present ministerial duty  
2 to reinstate the petitioner's privilege to operate a motor  
3 vehicle. The respondents have a clear and present ministerial  
4 duty to administer the law in conformity with due process and  
5 fair hearing rights under the federal and state constitutions,  
6 the laws of the State of California, and the DMV's own  
7 regulations.

8       11. The petitioner has a clear, present and substantial right  
9 to the performance of the respondents' duty in that the  
10 respondents' action in suspending the petitioner's driving  
11 privilege violates the due process requirement of a fair hearing.

12       12. The petitioner is a party beneficially interested in this  
13 action in that petitioner is directly affected by the action of  
14 the respondents in the suspending of his privilege to operate a  
15 motor vehicle and he has been denied due process of the law in  
16 that said DMV suspended his driving privilege without sufficient  
17 evidence.

18       13. The petitioner has no speedy and adequate remedy at law  
19 since there is no appeal from the order suspending his privilege  
20 to operate a motor vehicle and petitioner's only method of review  
21 of that order is by a mandamus action in this Court.

22       14. The respondents have, at all times, been able to set  
23 aside the order of suspension but refuse to perform this duty.

24       15. No other petition for extraordinary relief has been filed  
25 by or on behalf of the petitioner in this action.

26       16. The petitioner's privilege to operate a motor vehicle is

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27  
28       Mandate once the Administrative Record has been prepared and provided to him.

1 not suspended or revoked for any reason other than that stated  
2 herein.

3 WHEREFORE, the petitioner respectfully prays that:

4 1. This Court issue its peremptory Writ of Mandate  
5 commanding respondent Joan Borucki, Interim Director of the DMV,  
6 respondent T. Young, Hearing Officer of the DMV, and the DMV, an  
7 agency of the State of California, to set aside and revoke the  
8 order of suspension issued, suspending the petitioner's driving  
9 privilege commencing, through, or, in the alternative, issue its  
10 alternative Writ of Mandate and an order to show cause before  
11 this Court why they have not done so and why a peremptory writ  
12 should not issue;

13 2. On the return of the alternative Writ of Mandate and  
14 hearing on this petition, if issued, the Court issue a peremptory  
15 Writ of Mandate commanding respondent Joan Borucki, Interim  
16 Director of the DMV, respondent, Hearing Officer of the DMV, and  
17 the DMV, an agency of the State of California, to set aside and  
18 revoke the order of suspension issued on, suspending the  
19 petitioner's driving privilege commencing, through;

20 3. Pending the hearing and judgment of this Court in this  
21 matter, the respondents be ordered to stay the operation of the  
22 order suspending the petitioner's privilege to operate a motor  
23 vehicle;

24 4. For an award of attorney's fees pursuant to Government  
25 Code section 800; and

26 5. For such other and further relief as the Court may deem  
27 just and proper.

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