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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES**

(District – Courthouse)

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>v.<br><br>_____,<br><br>Defendant. | Case No.:_____<br><br>**DEFENDANT HAS THE FEDERAL CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE THAT THE BREATH ALCOHOL RESULT IS INACCURATE AND ERRONEOUSLY HIGH** |

**I.**

**THE FEDERAL CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE TRUMPS THE CALIFORNIA LEGISLATURE'S "FINDING" THAT BREATH MACHINES ARE ACCURATE WHEN THE SCIENCE DEMONSTRATES THEY ARE NOT.**

A defendant charged with crime has a federal guaranteed right to present evidence on his behalf. The state of California cannot impede the discovery of truth as to a defendant's true breath alcohol result. Unrebutted scientific evidence is that the breath machine is not capable of **accurately** reaching a breath alcohol result. The qualified scientists in the relevant filed have peer reviewed studies that show breath measurements overestimate the true breath alcohol result.

The California Supreme Court ruled in *People v. Vangelder* ____ Cal.___ (2013) that the defense cannot present evidence certain problems of a machine to accurately measure breath alcohol content because the machines have qualified on the Federal Products List and that the

California legislature has made a "finding" that breath testing is accurate on said machines. Such a legislative "finding" can not preclude defense evidence that the results are not accurate.

## II.

## BARRING DEFENSE EVIDENCE THAT THE BREATH TEST RESULT MAY BE INACCURATE VIOLATES CONSTITUTIONAL RIGHTS: THE RIGHT TO A FAIR TRIAL, DUE PROCESS, COMPULSORY PROCESS, AND RIGHT TO PRESENT EVIDENCE.

The California **legislature cannot limit the U.S. Constitution** and the defendant's right to state and federal Due Process of law, right to a fair trial, right to present evidence, and right to rebuttal evidence. Barring the defendant from introducing reliable evidence to rebut prosecution evidence would constitute a denial of the Constitutional rights of **cross-examination, equal protection, Due Process of law, and right to a fair trial.** The Constitutional rights of a criminal defendant cannot be abrogated by a state statute or a "finding" by the legislature.

Barring the defense from presenting qualified scientific testimony and peer reviewed studies that discredit the prosecution's evidence (the defendant's breath alcohol content) violates defendant's Federal and state **Constitutional Right to a fair trial** and the Right to **Due Process of law**. Excluding favorable defense evidence violates the Federal Constitutional Right to **present a defense** and that the trier of fact **consider** all **relevant evidence.** The prosecution should have no legitimate interest in presenting false and/or incomplete evidence relating to the charge of driving with .08% or higher, V.C. §23152(b).

The United States Supreme Court has held the application of **state evidentiary rules governing the admissibility of evidence** can be **inconsistent** with the **federal constitutional right** to **due process**, and to **compulsory process**. See *Rock v. Arkansas* (1987) 483 U.S. 44 [97 L.Ed.2d 37, 107 S.Ct. 2704]; *Green v. Georgia* (1979) 442 U.S. 95 [60 L.Ed.2d 738, 99 S.Ct. 2150] [hereafter Green]; *Chambers v. Mississippi* (1973) 410 U.S. 284 [35 L.Ed.2d 297, 93 S.Ct. 1038]; *Washington v. Texas* (1967) 388 U.S. 14 [18 L.Ed.2d 1019, 87 S.Ct. 1920].) A defendant charged with criminal violations has a **federal guaranteed right to present evidence** and **witnesses** in his behalf. (*Taylor v. Illinois* 484 U.S. 400, 408 (1988); *Chambers v. Mississippi*

410 U.S. 284, 302 (1973).)

**State evidentiary rules may so seriously impede the discovery of truth**, "as well as the doing of **Justice**," that they **preclude** the "**meaningful opportunity to present a complete defense" that is guaranteed by the Constitution**, *Crane v. Kentucky*, (1986) 476 U. S. 683, 690 (internal quotation marks omitted).

> "Whether rooted directly in the **Due Process Clause** of the Fourteenth Amendment, *Chambers v. Mississippi*,(1973) [410 U. S. 284], or in the **Compulsory Process or Confrontation clauses of the Sixth Amendment**, *Washington v. Texas*, (1967) 388 U. S. 14, 23; *Davis v. Alaska*, (1974) 415 U. S. 308 , the **Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense**.' *California v. Trombetta*, (1984) 467 U. S. [479, 485 ]; cf. *Strickland v. Washington*, (1984) 466 U. S. 668, 684-685. (`The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.') We break no new ground in observing that an essential component of procedural fairness is an **opportunity to be heard**. *In re Oliver*, (1948) 333 U. S. 257, 273; *Grannis v. Ordean,* (1914) 234 U. S. 385, 394. That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the **basic right** to have the prosecutor's case encounter and `survive the crucible of meaningful adversarial testing.' *United States v. Cronic*, (1984) 466 U. S. 648, 656 . See also *Washington v. Texas*, supra, at 22-23." *Crane v. Kentucky*, (1986) 476 U. S. 683, 690-691.

In *Chambers v. Mississippi*,(1973) 410 U. S. 284, 302, the U.S. Supreme Court held that "**where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule** may not be applied mechanistically to defeat the ends of Justice."

> "Few rights are more fundamental than that of an accused to **present witnesses** in his own defense. E.g., *Webb v. Texas*, (1972) 409 U. S. 95; *Washington v. Texas*, (1967) 388 U. S. 14, 19; *In re Oliver*, (1948) 333 U. S. 257. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The **testimony rejected by the trial court** here bore persuasive assurances of **trustworthiness** and thus was well within the basic rationale of the exception for declarations against interest.

> That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of Justice." *Chambers v. Mississippi*, (1973) 410 U. S. 284, 302.

Restricting the "defendant's **right to present relevant evidence**," must comply with the admonition in *Rock v. Arkansas*, (1987) 483 U. S. 44, 56, that they "may not be arbitrary or disproportionate to the purposes they are designed to serve." Applying that admonition to Arkansas' blanket rule prohibiting the admission of hypnotically refreshed testimony, the U.S. Supreme Court reasoned that a "**State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case**." Id., at 61.

A person accused of a crime has a firmly established **constitutional right to present a defense.** The **Sixth Amendment** provides that "the **accused** shall enjoy the right... to have **compulsory process** for obtaining **witnesses** in his favor."

> "**Few rights are more fundamental than that of an accused to present witnesses in his own defense**, see, e.g., *Chambers v. Mississippi*, (1973) 410 U. S. 284, 302. Indeed, this **right** is an essential **attribute of the adversary system** itself. ... The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The **right to offer testimony** is thus grounded in the **Sixth Amendment** ... ." *Taylor v. Illinois*, (1988) 484 U. S. 400, 408-409.

In *Washington v. Texas* (1967) 388 U. S. 14, the court held that **this right is applicable to the States** because it "is in plain terms the **right to present a defense**" and that it "is a **fundamental element of due process of law**."

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." Id., at 19.

Consistent with the history of the provision, the Court in *Washington v. Texas, Id.,* held that a **state rule of evidence that excluded "whole categories" of testimony** on the basis of a

presumption of unreliability was **unconstitutional**. The blanket rule of inadmissibility held invalid in **Washington v. Texas** involved the testimony of alleged accomplices. Both before and after that decision, the U.S. Supreme Court has recognized the **potential injustice produced by rules that exclude entire categories of relevant evidence that is potentially reliable**. At common law interested parties such as defendants [*Benson v. United States*, (1892) 146 U. S. 325, 335], their spouses [*Hawkins v. United States*, (1958) 358 U. S. 74, 75-76], and their co-conspirators (see *Washington v. Texas*, 388 U. S., at 20-21), were not competent witnesses. "Nor were those named the only grounds of exclusion from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors." *Benson v. United States, supra*, 146 U.S. 336. Under the regime established by *Frye v. United States*, scientific evidence was inadmissible unless it met a stringent "general acceptance" test. **Strict rules of exclusion have been replaced** by rules that broaden the **discretion of trial** judges to admit evidence and to allow properly instructed juries to evaluate its weight. The direction of the trend has been consistent and it has been manifested in constitutional holdings as well.

The U.S. Supreme Court in 1918 observed that in the "years which have elapsed since the decision of the Benson Case, the Disposition of courts to remove disabilities from witnesses has continued under dominance of the conviction of our time that the **truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts** involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain." *Rosen v. United States*, (1918) 245 U. S. 467, 471.

*Funk v. United States*, (1933) 290 U. S. 371, 377-378, involved the disqualification of spousal testimony, Justice Stewart stated: "Any rule that **impedes the discovery of truth in a court of law impedes as well the doing of Justice**." *Hawkins v. United States*, (1958) 358 U. S.

74, 81 (emphasis added). (Stewart, J., Concurring).

## III.

## CONCLUSION

According to the California Supreme Court in *People v. Vangelder* ____ Cal.___ (2013), the California legislature has made **findings** that a breath machine "that meets the Federal agency specifications and is listed as conforming is **reliable** and approved for evidential use in a California prosecution." Thus, the California Supreme Court held inadmissible various physiological factors that affect the results of breath machines. The Court reasoned that an **approved machine is considered reliable** is a matter that has "been determined as **policy by the legislature** - - and a defendant's expert witness may not invite a jury to nullify that determination ...".

Such a ruling prohibits the defendant from presenting the truth in a court of law and limits justice, and precludes the defendant from exercising his Constitutional Due Process Right to a fair trial. A defendant charged with criminal violations has a Federal guaranteed right to present evidence on his behalf. *Taylor v. Illinois*, *supra*, 484 US 400, 408 (1988), *Chambers v. Mississippi, supra*, 410 US 284, 302 (1973). This court must allow all scientific evidence relating to the inaccuracy of the prosecution's evidence of Breath Alcohol Content.

Dated: November 26, 2013

Respectfully submitted,

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