

**The Federal Rule Against Attendance of Traffic Violator School  
Instruction by Commercial Driver License Holders and its  
Unconstitutionality**

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**The Anti-Masking Statute**

On September 30, 2005, Congress enacted the “anti-masking statute” into law<sup>1</sup>, thus prohibiting the “masking” of a Commercial Driver License holder’s (CDL holder) simple moving violation conviction.<sup>2</sup> As a result, the statute currently prohibits any CDL holder from attending Traffic School if that driver receives a non-correctable traffic citation resulting in a movable conviction.

The statute was made effective and part of the Department of Transportation on January 1, 2000, pursuant to the Motor Carrier Safety Improvement Act of 1999.<sup>3</sup>

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This article is contrived as a result of research sought and heard through various venues such as through (but not limited to) Court opinions, Court argument audio as well as Collegiate level textbook materials.

<sup>1</sup> 49 §CFR § 384.226 provides that “[t]he State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (other than parking, vehicle weight, or vehicle defect violations) from appearing on the CDLIS driver record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State.”

<sup>2</sup> ““CDL holders” are not specifically defined in the federal regulations, “commercial driver's license (CDL)” is defined as: “A license issued by a State or other jurisdiction, in accordance with the standards contained in 49 CFR part 383, to an individual, which authorizes the individual to operate a class of a commercial motor vehicle.”” (Kline, 2001-2013)

<sup>3</sup> 49 U.S.C. § 113

The Congress passed and enacted the measure into law in an effort to address what was said to be an issue concerning Commercial Motor Vehicle Operators receiving movable traffic citations, which result in “infractions”.

As an example, typically in California (prior to enactment of § 384.226), a motorist (be it a Commercial Motor Vehicle operator, or a motorist operating any other vehicle) who received a movable traffic citation resulting in a “guilty” or “no contest” plea could use the option of attending traffic school and have such conviction removed from his or her Department of Motor Vehicles (DMV) report.<sup>4</sup>

### **Organizational Analysis of Anti-Masking**

The National District Attorneys Association (NDAA)<sup>5</sup> published an article on the basics of dealing with prosecution of CDL holders and engaged in a *post hoc*<sup>6</sup> analysis on why depriving CDL holders of the ability to attend Traffic Violator School is important if they receive infractions, which would otherwise result in a conviction.

The NDAA article gives an in-depth analysis on the basics of the Federal Motor Carrier Safety Regulations and its legislative history as well as a brief discussion on the historic guideposts of large trucks and its accident history (Commercial Drivers’ Licenses’).

Emphasis is placed on the notions and ideas that generally, trucks are dangerous (Background Check) on the highways of America, and therefore, deference must be given for purposes of increased focus on the prosecution of CDL holders if they receive traffic citations or may be involved in a collision that results in a finding of fault where prosecution is minimally appropriate, however; there are no indications of the general causation rates within large truck accident fact reports from government sources within the NDAA article.

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<sup>4</sup> California CVC § 41501. (a) “After a deposit of bail and bail forfeiture, a plea of guilty or no contest, or a conviction, the court may order a continuance of a proceeding against a person, who receives a notice to appear in court for a violation of a statute relating to the safe operation of a vehicle, in consideration for successful completion of a course of instruction at a licensed school for traffic ( )1 violators and pursuant to Section 1803.5 or 42005, the court may order that the conviction be held confidential by the department ( )2 in accordance with Section 1808.7. The court shall notify a person that only one conviction within 18 months will be held confidential.”

<sup>5</sup> “National District Attorneys Association” (2013)

<sup>6</sup> See *SEC v. Chenery Corp*, 318 U.S. 80 (1943)

The NDAA article admonishes Law Enforcement Officers, Prosecutors, and Court Judges for allowing CDL holders to plea bargain their charges<sup>7</sup> and instructs them to make it their priority to charge, prosecute, and adjudicate infractions and crimes involving charges against CDL holders for the original complaint without allowing the CDL holder to enter into any type of courtroom plea colloquy. The instructions attempt to provide that disallowing CDL holders to enter into such plea negotiations should pass due process scrutiny.

The NDAA uses minimal case law, which has virtually nothing to do with the issue concerning simple infractions received by CDL holders. The cited cases are *Peretto v. Department of Motor Vehicles*<sup>8</sup> ("Leagle", 2013), and *Lockett v. Commonwealth of Virginia*<sup>9</sup> ("Leagle", 2013).

The *Peretto* case involves an appellate petitioner convicted of operating a non-commercial motor vehicle while under the influence of an alcoholic beverage over the legal intoxicating limit. An administrative suspension of Peretto's driver license was imposed prior to a hearing and judgment, and Peretto brought an appellate challenge of the suspension based on a due process and equal protection argument (Leagle, 2013).

Although the *Peretto* Court correctly concluded that the drunk driver suspension statute "is rationally related to a legitimate legislative purpose and does not violate the equal protection clauses of the state or federal Constitutions or the prohibition against special legislation set forth in the California Constitution[]" (Strankman, J.)<sup>10</sup>, the NDAA article incorrectly cites *Peretto* as prime authority to rationalize their basis in believing that prohibiting CDL holders from attending traffic school for mere infractions is an important safeguard in preventing even more serious infractions or a DUI offense.

The Appellate Court in *Peretto* also notes "that a state's suspension of a driver's license for statutorily defined cause must comport with constitutional due process requirements, to protect against an

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<sup>7</sup> See Fed. Rule Crim. Proc. 11(a)(1)

<sup>8</sup> 235 Cal. App. 3d 449 (1991)

<sup>9</sup> 438 S.E.2d 497 (Va. App. Ct. 1993)

<sup>10</sup> See *Peretto* at 459

erroneous deprivation of the driver's property interest in that license.” (Strankman, J.).<sup>11</sup>

With this and other holdings similar involving DUI related offenses and convictions, it is irrefutable that requirements under the due process language of the Constitution to furnish petitioner with a hearing after the suspension should pass constitutional scrutiny.

The next cited NDAA case of interest is *Lockett v. Commonwealth of Virginia* involving “a police officer [who] arrested Lockett on a charge of operating a motor vehicle on a public highway while having a blood alcohol concentration of .10 percent or more by weight by volume.” (BENTON, Judge).

The *Lockett* court explains that the reasoning for their decision is simply to hold as a matter of law that CDL holders who drink and drive whether on or off the job are an increased danger to society if they begin to operate a Commercial Motor Vehicle while under the influence of an intoxicating beverage. (Leagle, 2013).

The court also notes that “as an expression of its concern for the impact of the use of alcohol on [] public safety[,] the legislature has imposed more severe sanctions on operators of commercial motor vehicles who drive after drinking than those governing other drivers.”<sup>12</sup> (BENTON, Judge).

Both the *Lockett* and *Peretto* Courts conclude their holdings with no finding that strict judicial scrutiny is an issue in the context of these mounted appeals by petitioners. (Leagle, 2013).<sup>13</sup>

To give the NDAA another argument that they would more than likely consider working in their favor but presumably overlooked, is

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<sup>11</sup> *Id.* (citing *Mackey v. Montrym*, supra, 443 U.S. at p. 10 and fn. 7 [61 L.Ed.2d at p. 329]; *Bell v. Burson* (1971) 402 U.S. 535, 539 [29 L.Ed.2d 90, 94, 91 S.Ct. 1586].

<sup>12</sup> Citing “[c]ompare Code §§ 46.2-341.24 to 46.2-341.31 with Code § 18.2-270”.

<sup>13</sup> “Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. To pass strict scrutiny, the legislature must have passed the law to further a “compelling governmental interest,” and must have narrowly tailored the law to achieve that interest. A famous quip asserts that strict scrutiny is “strict in name, but fatal in practice.”

For a court to apply strict scrutiny, the legislature must either have significantly abridged a fundamental right with the law's enactment or have passed a law that involves a suspect classification.” (Cornell LII, 2013)

another case involving a California CDL holder who was issued a citation for driving at a speed of 80 MPH in her personal vehicle.<sup>14</sup>

The petitioner in *People v. Meyer*<sup>15</sup> did not challenge the Constitutionality of section § 384.226, nor the state statute concerning the attendance of traffic violator school. (Leagle, 2013). Petitioner Meyer challenged her inability to attend traffic violator school on the basis that she forfeited her CDL after initial Judgment.

The California Court of Appeals affirmed the judgment against the defendant for speeding, and rejected petitioner's request to be allowed to attend traffic school on the basis that she immediately surrendered her CDL to make it appear as if she were a non-commercial driver. (Leagle, 2013).

Although Meyer had a CDL, she had not operated a commercial motor vehicle in four years, and elected not to take a physical examination pursuant to the FMCSR requirement in which drivers must have a physical examination every two years.<sup>16</sup>

After receiving her citation, Meyer later realized that she would not be eligible for traffic school pursuant to § 384.226<sup>17</sup>, so she surrendered her CDL, and placed a request before the Superior Court, asking for her ability to attend traffic school on the basis that she is no longer a commercial driver.

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<sup>14</sup> It is not indicated by the NDAA whether their article had been published prior to or after the following *People v. Meyer* case notes, however, the last cited date within the NDAA article is March, 2010, quoting a federal statute and the "*Federal Motor Carrier Safety Administration, Large Truck and Bus Crash Facts, 2008*". Additionally, the PDF "document properties" (Mozilla Firefox, version 23.0.1) indicate that the article was created in April, 2011, which makes it that much more apparent that the article was created after the *People v. Meyer* case was published.

<sup>15</sup> 186 Cal. App. 4th 1279 (2010)

<sup>16</sup> 49 C.F.R. § 391.41(a)(1)(i) "Physical qualifications for drivers" provides in part: "A person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so, and, except as provided in paragraph (a)(2) of this section, when on-duty has on his or her person the original, or a copy, of a current medical examiner's certificate that he or she is physically qualified to drive a commercial motor vehicle."

<sup>17</sup> CA Rule 4.104 (b) Authority of a court clerk to grant a request to attend traffic violator school

(2) Ineligible offenses:

A court clerk is not authorized to grant a request to attend traffic violator school for a misdemeanor or any of the following infractions:

(H) A violation that occurs in a commercial vehicle as defined in Vehicle Code section 15210(b). (Post AB 1888) (See *n.* 22).

The California Appellate Division Court system in *Meyer* affirmed the denial of the defendant's motion to attend traffic school, holding that while it may be unlikely for a person to circumvent the anti-masking statute by surrendering one's CDL, the violation was still committed while in possession of a valid CDL. (BLEASE, Acting P. J.).

*Meyer* did not challenge either the federal statute, nor the state statute concerning the prohibition on attending traffic violator school on the basis of a Fourteenth Amendment<sup>18</sup> equal protection or due process analysis, she challenged it based on her reasoning that she was no longer a CDL holder, which at the time, might have been a good effort to make a case, but did not work in that context.

The Court in *Meyer* may have erred in their holding because petitioner did not have a valid medical examination certificate, nor did she have one on file, therefore she would not have been qualified to operate a commercial motor vehicle because her CDL was invalid at the time her citation was issued.<sup>19</sup>

Moreover, the *Meyer* Court stated that “[t]he purpose [of the anti-masking statute] is to identify the "worst of the worst" commercial drivers and prevent them from operating the large commercial vehicles that present a safety risk on the nation's highways.” (BLEASE, Acting P. J.).

In another case that the NDAA conveniently overlooked, *People v. Schindler*<sup>20</sup> was a case in which the California Court of Appeals for the Second District held that “although [a] court may not arbitrarily refuse to entertain a request for traffic school merely because a defendant elects to plead not guilty<sup>21</sup> the court otherwise has discretion to grant

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<sup>18</sup> The Fourteenth Amendment provides:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

U.S. Const. amend. XIV § 1

<sup>19</sup> The *Meyer* Court does not indicate whether or not the CDLIS profile will confirm validity of a CDL holder's Commercial License status if a medical certification pursuant to 49 C.F.R. § 391.41 is invalid for an extended period of time.

<sup>20</sup> 20 Cal. App. 4th 431 [26 Cal. Rptr. 2d 255] (1993)

<sup>21</sup> Citing *People v. Wozniak* (1987) 197 Cal. App. 3d Supp. 43 [243 Cal.Rptr. 686]; *People v. Enochs* (1976) 62 Cal. App. 3d Supp. 42 [133 Cal.Rptr. 363]

or not grant traffic school for a traffic violation."<sup>22</sup> (Vogel, 2014). The *Schindler* Court holding may be binding on a court concerning a request from any motorist who is licensed asking the court to grant a request to attend traffic violator school.

This and other holdings similar beg the question: Does a speeding conviction against a CDL holder while even operating their personal vehicle identify such drivers as “the worst of the worst” (DISCUSSION)? If the answer is yes, government and courts must identify why it is proper to compare a speeding conviction to a DUI related offense or a major collision resulting in serious injury or death, and perhaps, even bring the fine schedules closer in terms of being similar before arbitrarily declaring that speeding and other simple infractions received by CDL holders should identify them as being “the worst of the worst.”

It seems implied in almost every publication addressing the statute that the purpose of section § 384.226 is to filter out “the worst of the worst,” which should be identifiable to those at a minimum, convicted of reckless driving or DUI related offenses, not simple movable traffic infractions less serious.

The NDAA’s contrary argument that infractions by CDL holders operating any vehicle are a precursor to more serious traffic violations and subsequent convictions, which might result in death or serious injury, is flawed. With this thinking, the NDAA attempts to convey a mindset providing that rules imposing a prohibition on the ability to attend traffic violator school will save lives and prevent certain destruction. Such a notion is without a doubt, one that must soundly and promptly be rejected by a court where relevant subject matter jurisdiction is appropriate.

The NDAA article further ignores one rather serious issue related to CDL holders under Law Enforcement investigation for DUI related offenses, and found to be in violation of the statute(s) determining a CDL holder’s (or non-CDL holder’s) legal blood alcohol content as being at or above the statutory level.

That nearly all reputable trucking industry carriers would immediately terminate an employee, or contractor operating

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<sup>22</sup> Citing *People v. Levinson* (1984) 155 Cal. App. 3d Supp. 13, 21 [203 Cal.Rptr. 426].) *fn.* 2

agreement, or refuse to hire an applicant driver as an employee or contractor for at least seven to ten years after having been stopped and arrested for a DUI related offense or major conviction/accident, is a flagrant and unmistakable omission in the NDAA article.

This and other types of industry self-policing policy measures are practices, which should alternatively be given recognition and praise by government as well as organizational entities (such as the NDAA), but they cannot seem to bring themselves to such a level of recognition for reasons that cannot be explained here today.

The several court cases correctly affirming the constitutionality of license suspensions for CDL holders for purposes of depriving them of the ability to operate CMVs after having been arrested and charged with operating *any vehicle* while under the influence of an intoxicating beverage is rendered almost completely moot by Trucking Industry Carriers' sound and rational policy decisions, making it so that a CDL holder's application for employment will not survive the filter of drivers' license safety screening conducted by a Trucking Industry carrier's human resources department.

Further, it is an obvious and well-known standard among the Trucking Industry community that such standards, which exist industry wide are practices surpassing statutory standards as set forth in state and federal regulations, yet these policies goes disappointingly unnoticed in the NDAA article as if the standard of practice is virtually non-existent.

Moreover, the *Lockett* Court notes that "Lockett's supervisor at the lumber company where Lockett was employed testified that Lockett had a good employment record but would lose his job if his commercial driver's license was suspended and he could not drive a truck"<sup>23</sup> (BENTON, Judge).

Before 2000, Trucking Industry Carriers rarely continued employment relationships of drivers arrested and charged with a DUI related offense. Similarly, in a scenario of today's standard of practice among Trucking Industry Carriers, testimony should add that a driver will find no other job in the Trucking Industry for at least seven to ten years if even stopped by Law Enforcement, resulting in suspension of driving privileges for any length of time, and that case had better be

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<sup>23</sup> See *Lockett* Para. 3

pleaded to a Peace Officer whose decision it is in making an arrest for a DUI related driving offense committed while operating *any vehicle*.

Additionally, it is virtually impossible in this day of intense scrutiny on the American Trucking Industry to find a teary eyed representative of a Trucking Industry Carrier inside a courtroom witness box pleading to a Judge or Jury to “go easy” on a DUI related offender “because the worker was such a good worker,” otherwise that company representative will have to seek other employee resources.

The immediate suspension of a CDL holder’s license for driving under the influence of an intoxicating beverage should be likened to an emergency restraining order protecting an at-risk spouse/domestic partner who is in danger of repeated assault and battery.

In both situations, there is a compelling governmental interest in preventing the continued relevant activity because life and limb is in danger if individuals are otherwise free to roam about society causing injury and destruction by using their licensed privilege to drive under the influence of an intoxicating beverage, or enter the space of a domestic partner or spouse as a restrained party, and commit an assault and battery or grave injury on their intended victim.

The question posed here concerns whether or not it is constitutionally permissible for a rule prohibiting any person who is a CDL holder to attend a diversion program, will conditionally conceal conviction of a simple infraction.

What must be considered for purposes of this question is that the fundamental right to attend educational activities by those who have committed far less offenses than the act of operating a motor vehicle while under the influence of an intoxicating beverage or substance are not being protected when it should, thus, the prohibition on CDL holders being allowed to attend Traffic Violator School in states such as California, violates due process and equal protection muster because it discriminates against an entire class of Citizens and legal residents.

### **Subsequent State Legislative Activities Reacting to the Anti-Masking Statute**

In California, the issue of CDL holders prohibited from attending traffic violator school has been presented to more than several

lawmakers, and Judges adjudicating violations for CDL holders who received traffic citations while operating their personal motor vehicles. Under § 384.226, CDL holders who receive movable traffic infractions are not allowed to attend traffic school regardless of the type of vehicle they are operating.

At least one Lawmaker in California (State Assembly Member Mike Gatto<sup>24</sup>) introduced legislation<sup>25</sup> that would enable CDL holders operating under Class C driving privileges, to attend Traffic Violator School if they receive a movable traffic infraction. The legislation passed.

Prior to AB 1888, yet after the enactment of § 384.226, state court judges made it more of a practice of reducing a violator's conviction code to a statute that would not carry a movable infraction report on that violator's DMV License report. This practice may be commonly known as plea bargaining.<sup>26</sup>

At least one State Attorney General<sup>27</sup> has addressed the very question concerning the prohibition against CDL holders attending traffic violator school, and has indicated that the ability to attend traffic violator school is a form of plea negotiation in the Courts.

The Attorney General of Kansas<sup>28</sup> published a legal opinion holding that "plea negotiations could be considered a form of masking" but it was his opinion that § 384.226 does not clearly require states to prohibit plea negotiations (Kline, 2013).

Attorney General Kline notes further that "[a] grant of diversion for driving under the influence would prevent the driver's conviction for

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<sup>24</sup> Member, State Assembly, 43<sup>rd</sup> District of California.

<sup>25</sup> A.B. 1888.

<sup>26</sup> "Subdivision (e)(1) [of Rule 11, Federal Rules of Criminal Procedure] is intended to make clear that there are four possible concessions that may be made in a plea agreement. First, the charge may be reduced to a lesser or related offense". (Notes of Advisory Committee on Rules—1974 Amendment, 2013). Additionally, California Penal Code § 1192.7 (b): "[P]lea bargaining" means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

<sup>27</sup> Phill Kline, Attorney General of Kansas

<sup>28</sup> Attorney General Opinion No. 2003-32

driving under the influence from appearing on his driving record.” (Kline, 2013).

Again, it is clear that the Kansas Attorney General seems focused on the idea that this statute intends to target those who are arrested, charged and convicted of the various states’ statutes on driving under the influence of an intoxicating beverage or drug (Diversions).

### **The Ambiguity of Anti-Masking**

In the context of these questions, ambiguity may be an issue in the statute because clarification and testimony may need to be sought on whether or not to determine that a CDL holder who is operating a non-commercial vehicle is exempt from the provisions of § 384.226. It is mentioned here that in California, this question was addressed by enacting legislation providing that a CDL holder is allowed to attend traffic school if (*at the time* of the violation) the defendant was operating a non-commercial motor vehicle.

“Ambiguity can be intentional or unintentional; it can derive from misunderstandings about language, from simple mistakes, from a failure to plan ahead, or from the impossibility of seeing very far ahead” (Levmore, 2009). Courts should “begin, as always, with the language of the statute,” in an attempt to define the intent of Congress (Cornell Legal Information Institute, 2013)<sup>29</sup>

There should be no escaping the Statute’s ambiguity because for one thing, the term “masking” was never defined for purposes of enforcement of the statute, and it was approximately 10 years later that the NDAA hardly addressed the interpretation of the term “masking”.

### **Masking as a Plea Option and the Plea Negotiation Standard**

To address concerns related to courts making decisions on whether or not it is right or wrong to allow a defendant to engage in plea negotiations, the Dual Court system has at its disposal to make such

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<sup>29</sup> *Duncan v. Walker*, 533 U.S. 167, 172 (2001); *see also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

decisions during the courtroom plea colloquy<sup>30</sup> process so long as all parties to the criminal case agree on such disposition.

If Courts cannot be allowed under statutory authority to allow criminal and non-criminal defendants to engage in that plea colloquy process, ours will become a system that pre-dates the plea negotiation standards of our nation, and persons who receive movable traffic citations will by default, elect to plead “Not Guilty,”<sup>31</sup> thus, clogging the Traffic Court system (as is likely happening today as a result of § 384.226).

Although the ability for criminal defendants to engage in plea negotiations in a criminal proceeding is not necessarily considered a “constitutional right,”<sup>32</sup> the importance of plea negotiations and bargaining has been long established in our nation’s jurisprudence because of the ever-increasing problem concerning the over-burdening of the Dual Court system as well as the prison system in criminal proceedings, and the United States Supreme Court has had to address such concerns numerous times since its inception.

“In modern times, plea bargaining has become the primary procedure through which we dispose of the vast proportion of cases of serious crime. How then could common law procedure function for so many centuries without a practice that is today so prevalent and seemingly so indispensable?”<sup>33</sup>

“Supporters of plea bargaining often argue that it is necessary for handling the enormous criminal caseload because it allows prosecutors to allocate limited resources efficiently, and that without plea bargaining, the legal system would cease to function.<sup>34</sup> Thus, if it came down to evaluating plea bargaining under strict scrutiny, it is highly

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<sup>30</sup> “Fed. Rules of Crim. Proc. 11 (c) Plea Agreement Procedure. (1) In General. An attorney for the government and the defendant’s attorney, or the defendant when proceeding *pro se*, may discuss and reach a plea agreement. The court must not participate in these discussions.” (Rule 11. Pleas).

<sup>31</sup> E.g., See FRAP Rule 11(a)(1) (Entering a Plea).

<sup>32</sup> See *Missouri v. Frye*, 566 U. S. \_\_\_\_ (2012), Slip Op. at 12, *Lafler v. Cooper*, 566 U.S. \_\_\_\_ (2012), Slip Op. at 9; *Id.* at 7, Scalia, J., Dissenting (Citing *Weatherford v. Bursey*, 429 U. S. 545, 561 (1977)).

<sup>33</sup> Langbein, John H., “Understanding the Short History of Plea Bargaining” (1979)

<sup>34</sup> (Wan, 2007, p. 35) Citing “Halberstam, *supra* note 4, at 35; Mazzone, *supra* note 14, at 837–38; McCoy & Mirra, *supra* note 10, at 905 n.92; Schulhofer, *Inevitable*, *supra* note 17, at 1039–40; Douglas D. Guidorizzi, Comment, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 765 (1998); Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 512–13 (1999).”

likely that the Supreme Court would find the continued function and efficiency of the legal system to be a compelling state interest.”<sup>35</sup>

One quite recent Supreme Court case involving the question concerning the need for plea negotiations and its efficiency was *Missouri v. Frye*<sup>36</sup>, which provided that “the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.”<sup>37</sup>

The *Frye* case involved a defendant’s counsel who was sent a letter by a prosecutor offering a choice of two plea bargains, and the counsel never notified the defendant (his client, Frye) of the offer, which resulted in Frye receiving the maximum sentence. The Supreme Court in *Frye* reversed the sentence, holding that “defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”<sup>38</sup>

The Court, in *Frye* noted that the prior holding in *Padilla v. Kentucky* “made clear that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.””<sup>39</sup>

It is very much unlikely that any government official who is familiar with our nation’s system of criminal law would come out to state that such form(s) of plea negotiations during the courtroom plea colloquy process is a form of masking that should be prohibited by the Congress of the United States.

As an example, if such a rule were to pass Congress prohibiting certain sex offenders charged in State Court from entering into plea negotiations because of the severity of their crimes, it would more than likely be struck by Courts below, or in appellate divisions of State Court via criminal cases.

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<sup>35</sup> *Id.*

<sup>36</sup> 566 U. S. \_\_\_\_ (2012)

<sup>37</sup> See *Frye*, Slip Op. at 8

<sup>38</sup> *Id.* at 9

<sup>39</sup> See *Frye* at slip op. P. 4-5

## The History of Plea Bargaining

Plea bargaining has a short history<sup>40</sup> in our nation, and carries with it a good reason the plea negotiation is an ever-increasing component in our nation's jurisprudence.

"[I]nto the late 17th century, guilty pleas were frowned upon by courts. Even in the mid-18th century, a court's acceptance of a guilty plea was considered "backwards" and a court would generally advise a prisoner to "retract it".<sup>41</sup>

Prior to the American Revolution, cases tried were often (or always) without Counsel, and conducted within one day, and *voir dire* proceedings were unheard of at that time as well.

When a criminal case was heard by the courts of The Old Bailey, and the accused was ever found guilty, there was ever rarely an appeal by the convicted or a guilty plea<sup>42</sup>. A finding of guilt was never a result of a non-trial criminal procedure because there were no "non-trial" criminal procedures in that history, nor was there ever any pressure prior to 1730 in developing any such standard in that court system.<sup>43</sup>

It was in the 1920s and 1930s that plea negotiations became more of a topic of study, even though there was still a strong bias against the practice (Savitsky, 2009) (Citing "Alschuler 1968").

Part of the plea negotiation standard also comes with it, terms of probation as opposed to jail or short-term prison sentences, and that standard became prevalent in 1903 when the "[California] Legislature enacted a law permitting courts to place defendants on probation rather than sentence them to prison where "there are circumstances in mitigation of the punishment" or where "the ends of justice would be subserved." (Dansky, p. 56), (Citing *n.57*, "Act of Feb. 3, 1903, ch. 34, § 1, 1903 Cal. Stat. 34.").

The very first person to have received a sentence of probation<sup>44</sup> under this new statute was James Clark (*Id.*, at *n. 58*, citing *New*

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<sup>40</sup> See *Faculty Scholarship Series Paper* at p., 261

<sup>41</sup> (Savitsky, 2009) (Citing Blackstone 1769: 329)

<sup>42</sup> (Langbein, 1983)

<sup>43</sup> *Id.*

<sup>44</sup> Black's Law Dictionary, 6<sup>th</sup> Ed. Provides as a definition of "probation": "Sentence imposed for commission of crime whereby a convicted criminal offender is released into the community under

*Probation Law*, L.A. TIMES, Mar. 17, 1904, at II2.), who was ordered to serve probation and “report once a month to arresting officer F.H. Steele” (Dansky, 2008).

Today (as of the Supreme Court’s holding in *Missouri v. Frye*), “Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”<sup>45</sup>

### **Due Process and Equal Protection Issues**

The Supreme Court has held that “[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount”<sup>46</sup>.

Deprivation of the ability to attend traffic violator school might survive the filter of this holding to prevent a person from driving a vehicle for purposes of preventing the dangers associated with driving under the influence of an intoxicating beverage, but concerning simple infractions, it should be noted that the prohibition against even asking a Judge to allow a CDL holder to attend traffic school prevents a person from requesting a prior hearing, especially noting that the practice of attending traffic school for purposes of masking an infraction has been in common use long before, and enjoyed by persons with driver licenses.

“Over the last century, the [U.S. Supreme] Court has held that “virtually all” of the individual rights found in the Bill of Rights apply to state and local government through the Due Process Clause of the Fourteenth Amendment.”<sup>47</sup>

the supervision of a probation officer in lieu of incarceration. *State v. Fields*, 67 Haw. 268, 686 P.2d 1379, 1387.”

<sup>45</sup> See *Missouri v. Frye*, ([Citing] Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, <http://www.albany.edu/sourcebook/pdf/t5222009.pdf>

<sup>46</sup> *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972)

<sup>47</sup> Brief for State of Texas et al. as *Amici Curiae*, *McDonald v. City of Chicago*, 561 U.S. 3025 (2010) (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34 (1991)).

Various Courts have also held that certain due process rights protected other rights found to be implied rights pursuant to the individual Bill of Rights.

In *Plyler v. Doe*<sup>48</sup> the Court, “[i]n concluding that “all persons within the territory of the United States,” including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, [] reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State.”<sup>49</sup>

One could easily submit that certainly, a CDL holder could not possibly be considered one who is not entitled to protections, such as enjoying the right to be admitted into an educational institution on the basis that one is “not within its jurisdiction” to correct a movable infraction. In fact, prior to the enactment of § 384.226 when resident CDL holders of the State of California were allowed to attend traffic violator school, one could choose from a list of venues to achieve completion of the required time needed anywhere within the state.

In the context of additional scrutiny on CDL holders, there have been past, yet brief discussions in the media arguing against the ability of CDL holders to retain the assistance of Counsel after receiving an infraction citation from a Peace Officer. However, it would violate Sixth Amendment law if Congress or any state were to ever draft and enact legislation depriving CDL holders from enjoying the right “to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”<sup>50</sup>

“An infraction is a criminal matter subject generally to the provisions applicable to misdemeanors, except for the right to a jury trial, the possibility of confinement as a punishment, and the right to court-appointed counsel if indigent. ([California] Pen. Code, §§ 16, 19.6.)”<sup>51</sup>

In *Gideon v. Wainwright*<sup>52</sup>, the U.S. Supreme Court noted that “[t]he right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial.”

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<sup>48</sup> 457 U.S. 202 (1982)

<sup>49</sup> Citing *Wong Wing v. United States*, 163 U. S. 228, 238 (1896)

<sup>50</sup> See U.S. Const. amend. VI

<sup>51</sup> See *People v. Simpson*, CA Sup.Ct.App.Div. BR 050810 (Jan. 2014)

<sup>52</sup> 372 U.S. 335 (1963)

If Congress has never taken up the idea of drafting legislation prohibiting CDL holders from retaining counsel to mount a defense against the state or federal government of a traffic infraction, how could they ultimately allow § 384.226 to be passed and enacted into law? Further, how could Congress enact legislation that would discriminate against a particular class of Citizen and go on the record by stating that it passes constitutional muster in an equal protection and due process context?

The reason government cannot engage in such constitutional violations is because of holdings that define clearly established state and federal law prohibiting violations of equal protection for certain classes of Citizens.

In the equal protection context, *Snowden v. Hughes*<sup>53</sup> was a Supreme Court case, which held that “[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.”<sup>54</sup>

The above holding was used as application in *Murgia v. Municipal Court*<sup>55</sup> when the Supreme Court of California stated that “[t]he equal protection clauses of the federal and state Constitutions safeguard individuals from "intentional and purposeful" invidious discrimination in the enforcement of all laws, including penal statutes, and a defendant may raise such a claim of discrimination as a ground for dismissal of a criminal prosecution.” (“California Supreme Court Resources”, 2009).

The *Murgia* court additionally held that “[a] conscious policy of selective enforcement directed against members or supporters of a particular labor organization is prima facie discriminatory and invalid under the equal protection clause.” (“California Supreme Court Resources”, 2009).

This holding may have been in response to targeted enforcement of a state statute to a labor organization, such as a labor union, but is it permissible under the Constitution to favor or disfavor a particular labor class such as the Trucking Industry for purposes of enacting a new law?

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<sup>53</sup> 321 U.S. 1 (1944)

<sup>54</sup> *Id.* at 8

<sup>55</sup> 15 Cal.3d 286

Suppose the Congress were to enact legislation making it unlawful for CDL holders to possess, carry, keep within a person's possession or within the surroundings of a Commercial Motor Vehicle, a firearm of any kind.

In the above scenario, there would be an automatic Second Amendment<sup>56</sup> and equal protection analysis triggered for such purposes, and such a statute would automatically be questioned in Federal Court because it discriminates against an entire class of individual Citizens on the basis that the Second Amendment has been blatantly violated.

In such a scenario, the applied case that would be referred to is likely to be *District of Columbia v. Heller*<sup>57</sup> and *McDonald v. City of Chicago*<sup>58</sup>.

In *Heller* and *McDonald*, both Courts discussed in very lengthy opinions, the idea, and notion that *interest-balancing* was a rational reason for continuing to ban guns in the home. The Court in *Heller* rejected this idea and noted that Justice Breyer's championed analysis of interest-balancing<sup>59</sup> of the Second Amendment has never passed a test in other cases involving the individual Bill of Rights.

In both cases, a very clear understanding of deeply rooted historical guideposts within our nation's fundamental system of ordered liberty was examined to arrive at the holdings of the Court in *Heller* and *McDonald*.

The Court has acknowledged in both cases, and will continue to acknowledge that gun violence is a major problem in our nation, and that there are ways in which our leaders will have to address it, but it was not the Court's prerogative to consider the Second Amendment extinct<sup>60</sup> and once again, in both cases, the Court never mentions the idea of discriminating against certain law-abiding classes based on the premise of gun control being an issue for discussion.

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<sup>56</sup> The Second Amendment provides:

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

U.S. Const. amend. II

<sup>57</sup> 554 U.S. 570 (2008)

<sup>58</sup> 561 U.S. 3025 (2010)

<sup>59</sup> *Id.* at 14, 20; See also *Heller*, Slip Op. at 62, BREYER, J., dissenting.

<sup>60</sup> *Heller*, Slip Op. at 64

Therefore, how could a regulation prohibiting CDL holders from carrying a firearm in their Commercial Motor Vehicle while properly licensed to do so, pass constitutional muster?<sup>61</sup> It could not. The same holds true for educational activities.

In *McDonald*, the Court held that the right, applied from *Heller*, is a protected right that the states must recognize, and therefore must also be protected by the Fourteenth Amendment's due process clause. Assuming for the sake of discussion that there could be a federal statute prohibiting CDL holders from carrying a firearm in a Commercial Motor Vehicle, it would still be unlawful for *any state* to "enforce any law which shall deprive any person of life, liberty or property without due process of law".<sup>62</sup>

Like in *Heller*, The *McDonald* Court also addressed Justice Breyer's championed *interest balancing test*, and again, rejected the notion by saying that while virtually every individual right in the Bill of Rights has been afforded protection under the Fourteenth Amendment's due process clause, the Court has never declined to afford that protection because of public safety implications.<sup>63</sup>

As another example, we could suppose that because it is statutorily permissible for Law Enforcement Officers to initiate traffic stops on CDL holders operating Commercial Motor Vehicles without the need for "probable cause", it is also permissible for the Legislature to pass a rule allowing CDL holders to be searched within their homes because of how they are "held to a higher standard."

In *Mapp v. Ohio*<sup>64</sup>, the Court addressed the unlawful entry into the home by Law Enforcement Officers with a fake search warrant (Kearns, 1961). While *Mapp* was originally a First and Fourth Amendment case, the Court decided not to address the First Amendment issue, and in that process, afforded Fourth Amendment protections under the Fourteenth Amendment's due process clause.<sup>65</sup>

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<sup>61</sup> There has been a long (unestablished) myth, alleging some kind of federal prohibition against CDL holders carrying a firearm (particularly a handgun) in a commercial motor vehicle for purposes such as self-defense. After a long and exhaustive effort in researching this so called regulation, I have found that there is no such regulation.

<sup>62</sup> U.S. Const. amend. XIV

<sup>63</sup> See *McDonald*, slip op. at 36

<sup>64</sup> 367 U.S. 643 (1961)

<sup>65</sup> See *Wolf v. Colorado*, 338 U.S. 25 (1949) (Overruled by *Mapp*)

In *Payton v. New York*<sup>66</sup>, the chief evil involved an unlawful entry into the home, this time, to affect a routine felony arrest without a warrant. The *Payton* Court held that the Law Enforcement must have a warrant to make a routine felony arrest, absent exigent circumstances.

In various cases since that time, *Mapp* and *Payton* have been mentioned and used to continue insisting that the government is not to enter a private residence without a warrant, absent any exigency<sup>67</sup>, including misdemeanors found to have occurred.

In *Hopkins v. Bonvicino*<sup>68</sup>, the U.S. Court of Appeals for the Ninth Circuit held that absent an exigency, it is not permissible for Law Enforcement Officers to enter a residence without a search or arrest warrant for purposes premised upon a fabricated welfare check.

In the *Hopkins* case, Law Enforcement Officers were conducting an investigation into an incident involving a suspected DUI offender who was responsible for a very minor motor vehicle collision incident; “an incident so minor that it did not cause as much as a scratch on either of the vehicles involved.”<sup>69</sup>

When the mishap occurred, the responsible driver (Hopkins) stopped and exited the vehicle to check for damage. After a finding by both parties<sup>70</sup> that there was no damage to any of the vehicles, Hopkins returned to his vehicle and proceeded to his residence. The driver of the victim vehicle subsequently followed Hopkins to his home where she contacted Law Enforcement, who arrived and made unlawful entry into the suspect home without a warrant. Entry was made on the premise that Hopkins may have been in a diabetic coma, guns drawn and pointed at Hopkins.<sup>71</sup>

The Court in *Hopkins* made it clear that law enforcement “must yield to the Fourth Amendment in *all but the ‘rarest’ cases*”, and that even exigencies do not always pave the way for Law Enforcement to break entry into a person’s castle without a warrant.<sup>72</sup>

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<sup>66</sup> 445 U.S. 573 (1980)

<sup>67</sup> *Id.*, 445 U.S. 573, 583-590

<sup>68</sup> 573 F.3d 752 (9th Cir. 2009)

<sup>69</sup> *Id.* at 764

<sup>70</sup> *Id.* at 760

<sup>71</sup> *Id.* at 759

<sup>72</sup> Citing *United States v. Johnson*, 256 F.3d 895, 909 n.6 (9th Cir. 2001) (*en banc*) (quoting *Welsh v. Wisconsin*, 466 U.S. 753 (1984)).”

None of these cases imply that a certain class of Citizen or group engaged in lawful activity can be exempt from the protections of the Constitution because of how that group is supposedly held to “a higher standard of safety.”

It is becoming more of an element of common knowledge among the Trucking Industry community that a CDL holder should have the same rights afforded as those of non-commercial drivers, including a person’s right to remain silent pursuant to the protections of the Fifth Amendment.

Invocation of a CDL holder’s right to remain silent cannot be penalized or threatened by Law Enforcement or any in government.

In *United States v. Harrison*<sup>73</sup>, the U.S. Court of Appeals for the Ninth Circuit held that “there are *no* circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor.”

If there were ever a state or federal statute that exempted a CDL holder from the protections under *Harrison*, there would be an almost automatic review of that statute, and it would likely fail as well.

In *United States v. Bushyhead*<sup>74</sup>, the same court also held that “Due process requires that defendants be able to exercise their constitutional right to remain silent and not be penalized at trial for doing so.”

### **The Tenth Amendment and Overstepping of Congress**

In *Bond v. United States*<sup>75</sup>, the U.S. Supreme Court decided a case involving a criminal matter where a bitter love triangle resulted in the smearing of certain caustic materials on surfaces that her former

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<sup>73</sup> 34 F.3d 886 (9th Cir. 1994)

<sup>74</sup> 270 F.3d 905, 912 (9th Cir. 2001) (Citing *United States v. Baker*, 999 F.2d 412, 415 (9th Cir.1993) (quoting *United States v. Negrete-Gonzales*, 966 F.2d 1277, 1280-81 (9th Cir.1992)); see also *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (The “prosecution may not use at trial the fact that [defendant] stood mute or claimed his privilege in the face of accusation.”).)

<sup>75</sup> 564 U.S. \_\_\_ (2011)

friend (who was pregnant at the time with the child of Bond's husband) touched.<sup>76</sup>

Petitioner Bond sought review, asserting a wrongful charge of violating a statute criminalizing the "possession or use, for nonpeaceful purposes, of a chemical that "can cause death, temporary incapacitation or permanent harm to humans."<sup>77</sup>

The question in *Bond* asked of whether or not 18 USC § 229 was enacted by Congress as a result of an overstepping of their authority for purposes of the Tenth Amendment's<sup>78</sup> protections. The Court concluded that it did.

The *Bond* Court notes that "[t]he Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived."<sup>79</sup>

Finally, the *Bond* Court provided that "by denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power[.]" and that "[w]hen government acts in excess of its lawful powers, that liberty is at stake."

Here, it may be believed that the Congress exceeded its authority over the states by forcing modifications to already existing statutory interpretations, thus, affecting certain classes of Citizens who should otherwise be allowed to enter into diversion programs when convicted of *any* traffic offense defined as being subject to the states' permissibility to attend traffic violator school.

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<sup>76</sup> See *Bond*, Syllabus

<sup>77</sup> 18 U.S.C. §229

<sup>78</sup> The Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U.S. Const. amend. X

<sup>79</sup> See *Bond* at slip Op. P. 8-9

## Do CDL Holders' Rights End After Conviction?

In all criminal proceedings, the accused is entitled to certain rights that are afforded to him or her under the U.S. Constitution and must be followed by every party from the arresting officer to the Judges of the dual court system and jail/prison officials when an inmate is incarcerated. When the accused is in court, these rights must be followed, and cannot be deprived by the government.

If these rights are not afforded to the accused, any of the appellate courts reviewing the decision of the trial court may include throwing out a conviction or remanding the case to the trial court for further proceedings, including re-trial.

If a defendant has been convicted of a crime that he or she committed, the convicted person's rights do not end. One other right that the convicted is entitled to is the Eighth Amendment.<sup>80</sup>

The Eighth Amendment's "Cruel and Unusual Punishments Clause is a guarantee binding on the States by the Due Process Clause of the Fourteenth Amendment."<sup>81</sup>

"[T]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment."[] (internal citations omitted). The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes."<sup>82</sup>

There are different standards of sentencing for persons convicted of crimes, and these standards must be followed properly. If a sentence imposed by a judge is not set according to the statutory sentencing standards, a case may be remanded for resentencing, or reversal of conviction, especially if that sentence should have been imposed by a Jury based on any of several sentencing guidelines.<sup>83</sup>

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<sup>80</sup> The Eighth Amendment provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. amend. VIII

<sup>81</sup> *Brown v. Plata*, 563 U. S. \_\_\_\_ (2011)

<sup>82</sup> *Grenning v. Miller-Stout*, No. 11-35579, (9th Cir. 2014) (Citing *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)

<sup>83</sup> See *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Cunningham v. California*, 549 U.S. 270 (2007)

Although more severe penalties for certain crimes or infractions committed may be acceptable by the public at large, until the Supreme Court takes up such a matter, it will always be unclear if it is constitutionally permissible for Citizens in a selected class of labor to be deprived of certain rights, such as the right not to be excessively penalized because they are operating a larger and heavier vehicle.

Meanwhile, if a defendant were being charged with certain drug offenses that call for the sentencing guidelines to be called upon for guidance, would it be acceptable for that defendant to be given a prison sentence exceeding the guidelines that call for a lesser sentence simply because that defendant was a CDL holder at the time of his or her arrest? The answer to that question would likely be no, and that answer would also hold true for defendants given sentences exceeding what is called for by the Sentencing Reform Act for the purpose of entering into drug diversion programs.

In *Tapia v. United States*<sup>84</sup>, the U.S. Supreme Court “[considered] whether the Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant’s rehabilitation. [The Court held] that it does,” and that “it is [an] error for a court to impose or lengthen a prison sentence to enable an offender to complete a treatment program or other wise to promote rehabilitation.”<sup>85</sup>

With that question asked, how, again could it be appropriate to encourage maximum or more severe punishment in lieu of a diversion program when rehabilitative sentencing has become the norm in our nation’s criminal justice system for those convicted of less serious crimes or even infractions?

### **Definition and Origins of Rehabilitation in Prison**

Even in the context of these errors, our nation’s system of criminal justice has strived to come up with better ways to help a person charged and convicted of certain crimes to become rehabilitated, rather than just punished and sent back out into society.

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<sup>84</sup> 131 S. Ct. 2382 – 2011

<sup>85</sup> *Id.*, at \_\_\_ (slip op., at 15).

“The art of rehabilitation in prison is to prepare a prisoner for release, whether it is an early release, or release upon the prisoner’s duration of his or her entire sentence.”<sup>86</sup>

This system has proven to be successful for a number of different reasons, several of which include cost benefit because of how parole is less expensive than housing a prisoner, and that this system allows a prisoner to become rehabilitated in the community. In addition, “protection of society is accomplished through a combination of surveillance and control of offenders, of treatment and rehabilitative services, and of incapacitation during the service of a prison sentence.”<sup>87</sup>

The idea of rehabilitation began in the 1950s as a replacement to punishment for those likely to be released from prison to re-enter society. Those being released were in need of a way to find themselves in life with the things necessary for lawful survival such as employment, housing, medical, mental health care and other necessities in life.

Today, rehabilitative functions in the criminal justice system are an essential necessity because of many elements, including the need for making the prison system available for more offenders. According to Cullen and Gendreau (2000), “there is theoretical and empirical support for the conclusion that the rehabilitation programs that achieve the greatest reductions in recidivism use cognitive-behavioral treatments, target known predictors of crime for change, and intervene mainly with high-risk offenders.”<sup>88</sup> (Royce, 2012).

Punishment of offenders has its history in our nation’s criminal justice system, and that history is well documented.

### **The Early Legal Code System**

Prior to the development of prisons in the United States, capital punishment was considered admissible for persons who committed offenses other than unlawful homicide, but this form of retribution was considered unlawful and inadmissible by certain judges who had a

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<sup>86</sup> (Seiter, 2011)

<sup>87</sup> (Seiter., 2011, Chapter 1)

<sup>88</sup> Assessing Correctional Rehabilitation: Policy, Practice, and Prospects. U.S. Department of Justice, National Institute of Justice).

desire to overhaul the criminal codes to reflect a more uniform and humane system of retributive punishment. These early codes reflected a more severe form of punishment, which judges thought were overly cruel and unusual, and there was a desire to administer more humane penalties to offenders (Royce, 2012).

According to Siegel, Schmalleger, and Worrall (2011), “besides early legal codes and the common law, other important sources of law include modern legal codes, administrative regulations, and constitutions. These have helped shape America’s courts (not to mention the criminal justice system in general) in many ways, as well.”<sup>89</sup> (Chapter 1). (Royce, 2012).

### **The Walnut Street Jail**

During the 18<sup>th</sup> Century, there was a plan to reform the prison system, and that plan was started and led by John Howard, who was the Sheriff of Bedfordshire, England. Howard encouraged reform of English jails in the late 1700s (Seiter., Chapter 1, 2011).

The Walnut Street Jail, which was the first penitentiary in the United States (Seiter., Chapter 1, 2011) was built and designed to house more serious offenders for longer periods of time, but the duration of sentences back in those days did not compare to the long duration of sentences today.

According to Takagi (1975), “Jail sentences were short and most sentences were indefinite. One might be sentenced, for example, “for a time,” or “during the pleasure of the Court,” or “till Saturday morning next,” or “until the last day of the week at night.” If a criminal sentence of a servant such as to “years of imprisonment” proved to be prejudicial to his master, the court frequently modified the sentence and released the offender.” (p. 3).

In this early system of incarceration, prisoners were required to perform hard labor, read certain material such as the Bible and conduct writings. Hard labor in the prison system was continued as a result of the Thirteenth Amendment.<sup>90</sup>

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<sup>89</sup> Siegel, L. J., Schmalleger, F., & Worrall, J. L. (2011)

<sup>90</sup> The Thirteenth Amendment provides:

“The use of the Punishment Clause to resubordinate the formerly enslaved was not the intended effect of the Thirteenth Amendment. For example, Representative (John Adam) Kasson argued that the “only kind of involuntary servitude known to the Constitution and the law” was when a prisoner was directly sentenced to hard labor in the state prison under the control of state officers”<sup>91</sup> (Armstrong, p. 843). Representative Kasson was instrumental in the efforts leading to ratification of the Thirteenth Amendment.<sup>92</sup> (Royce, 2012).

With all of these issues in mind, it seems far less sensible in this day and society for any state or federal legislature, or an agency to enact a rule that favors harsher punishment over diversion and rehabilitative solutions, but such is the case with section § 384.226, which calls for harsher punishment in lieu of diversion or rehabilitation for less serious and simple infractions. Further, it calls for prohibiting any form of plea bargaining.

If government is willing to spend perhaps, billions on rehabilitative services for those who have committed serious felonies, why would that same government call for eliminating diversion for mere infractions? With this statute in question, the government is asking for a reversal concerning the idea of rehabilitation and diversion for only one class of Citizen.

### Education and Constitutional Rights

Perhaps, one of the best known cases concerning education to have come out of the Supreme Court was in *Brown v. Board of Education*<sup>93</sup>, which held that the segregation of African and White children was unlawful and violated the equal protection clause,” and declared that “[t]he “separate but equal” doctrine adopted in *Plessy v. Ferguson*<sup>94</sup>, has no place in the field of public education.”

§ 1: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

§ 2: "Congress shall have power to enforce this article by appropriate legislation."  
U.S. Const. amend. XIII

<sup>91</sup> Slavery Revisited in Penal Plantation Labor

<sup>92</sup> "Usgenweb Archives Special Pr58 ojects", n.d.

<sup>93</sup> 347 U.S. 483 (1954)

<sup>94</sup> 163 U.S. 537 (1896)

In *Fisher v. University of Texas*,<sup>95</sup> the Supreme Court held (again) that racial classifications of admissions into schools on the basis of race, are entitled to the strictest of scrutiny. The Court in *Fisher* declined to overturn *Grutter v. Bollinger*.<sup>96</sup>

Although “education, of course, [may] not be among the rights afforded explicit protection under our Federal Constitution” (*San Antonio Independent School Dist. v. Rodriguez*)<sup>97</sup>, a significant part of the issue at heart in the Courts has been whether it violates the equal protection clause to disallow persons from admission into a school on the basis of race. However, there are several cases that also hold the same without the element of race, or other protected classes of race, gender, and religion.

In *Rumsfeld v. Forum for Academic and Institutional Rights*<sup>98</sup>, the Supreme Court held that the Universities cannot, under the Solomon Amendment; deny access to Military recruiters on the basis that the U.S. Military discriminated against persons who are homosexual.

The case that was presented dealt with equal protection as an issue because *other recruiters* were admitted into University campuses.

In *Edwards v. City of Goldsboro*<sup>99</sup>, the U.S. Court of Appeals for the Fourth Circuit held that Police Officers teaching concealed carry weapons classes as a secondary activity of employment while in their off-duty capacity as Police Officers were unlawfully terminated by their department’s Chief of Police as a result of an impermissible policy prohibiting the teaching activity.

The Court in *Edwards* held that there was a speech element in Sgt. Edwards’ activity of educating others and that it was a protected right.

The *Edwards* Court used *Roberts v. United States Jaycees* as application in that case by holding that “we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>100</sup>

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<sup>95</sup> 133 S.Ct. 2411 (2013)

<sup>96</sup> 539 U.S. 306 (2003)

<sup>97</sup> 411 U.S. 1, 34-35 (1973)

<sup>98</sup> 547 U.S. 47 (2006)

<sup>99</sup> 178 F.3d 231 (1999)

<sup>100</sup> 468 U.S. 609, 104 S. Ct. 3244, 82 L.Ed.2d 462, *Id.* at 622 (1984)

The Ninth Circuit Court recently reiterated the *Roberts* Court's holding in *Vasquez v. Rackauckas*<sup>101</sup> that “[the] First-Amendment protect[s] “expressive” activit[ies], such as attending religious services, participating in political demonstrations, or otherwise “associat[ing] with others in pursuit of [the] wide variety of political, social, economic, educational, religious, and cultural ends” “protected by the First Amendment.”<sup>102</sup>

In *Ezell v. City of Chicago*<sup>103</sup> the U.S. Court of Appeals for the Seventh Circuit held that the municipality cannot deprive residents of Chicago (or any other municipality) from enjoying the right to firearms education within Chicago city limits. That court also held that the prohibition against firearms range education was an act of *irreparable harm*,<sup>104</sup> however, it should also be noted that “[i]t is well established [] that [any] monetary injury is not normally considered irreparable.”<sup>105</sup>

The *irreparable harm* that may be likely to occur here as a result of § 384.226 is a result of being deprived of the ability of gaining employment after a person is ready to return to work after a long period of disability or unemployment, and cannot work for that desired position with benefits that may exceed that of another less desired employer with a less than satisfactory safety record.<sup>106</sup>

A number of U.S. Circuit Appeals Courts in this nation have reiterated the holding in *Roberts* that the First Amendment protects such activities as expression and speech which include engaging in education<sup>107</sup> making it so that there should not be a circuit split issue concerning this problem if or when § 384.226 is challenged in Court.

Concerning the explicit need for the safety of the Trucking Industry, there is a compelling interest in favor of as much government

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<sup>101</sup> No. 11-55795 (9th Cir. 2013)

<sup>102</sup> Citing *Roberts, Supra* at 468 U.S. 609, 622 (1984)

<sup>103</sup> 651 F. 3d 684 (7th Cir. 2011)

<sup>104</sup> *Id.* at 696

<sup>105</sup> *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (Citing *Sampson v. Murray, supra*, 415 U.S. at 90, 94 S.Ct. at 952.

<sup>106</sup> See <http://www.safersys.org> provides information on the safety rating of motor carriers.

<sup>107</sup> *Cromer v. Brown*, 88 F.3d 1315, (4th Cir. 1996), *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000), *Osburn v. Cox*, 369 F.3d 1283 (11th Cir. 2004), *Club Retro L.L.C. v. Hilton*, 568 F.3d 181 (5th Cir. 2009), *Heartland Academy Community Church v. Waddle*, 595 F.3d 798 (8th Cir. 2010), *Conestoga Wood Specialties Corporation v. Secretary of the United States Department of Health and Human Services*, No. 13-1144 (3rd Cir. 2013) *Vasquez v. Rackauckas*, 734 F.3d 1025 (9th Cir. 2013).

sanctioned education as possible, so for the FMCSA to propose and publish a rule depriving a CDL holder from attending an educational forum for purposes of improving their driving habits is contrary to the safety intentions of the Department of Transportation, the Federal Highway Administration and the FMCSA.

While the U.S. Article III Judiciary focuses on protecting the rights of certain criminal offenders' Constitutionally protected liberty interests (as should be), it should also be just as much of a priority for the same Judicature to affirm the protections of those involved in lawful labor activities (such as in Trucking) when others who are similarly situated can enjoy such unlimited Constitutional Liberties as entitled.

### **The History of Laws against Educating Enslaved Black Persons**

It is not difficult to find historical guideposts indicating that such laws imposing restrictions on the education of Black persons were alarmingly prevalent during the times prior to, and after the Civil War and Reconstruction.

“Fearing that black literacy would prove a threat to the slave system -- which relied on slaves' dependence on masters -- whites in many colonies instituted laws forbidding slaves to learn to read or write and making it a crime for others to teach them.” (Document Description, 2013).

The Slave Codes of the State of Georgia included in it, a statute prohibiting the teaching of slaves in reading and writing. According to The University of Dayton's Faculty web server, the Slave Codes of Georgia held at the time that “[i]f any slave, Negro, or free person of color, or any white person, shall teach any other slave, Negro, or free person of color, to read or write either written or printed characters, the said free person of color or slave shall be punished by fine and whipping, or fine or whipping, at the discretion of the court.”<sup>108</sup>

Fredrick Douglas stated in 1850 during his discussions of his experiences of slavery that “*[i]t is perfectly well understood at the*

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<sup>108</sup> ART. I. CRIMES, OFFENCES, AND PENALTIES

SEC. I CAPITAL OFFENCES:

SEC. II. MINOR OFFENCES:

“Punishment for teaching slaves or free persons of color to read.”

*South that to educate a slave is to make him discontented with slavery, and to invest him with a power which shall open to him the treasures of freedom[.]”*<sup>109</sup>

For any government today to prohibit any Citizen or class of Citizens from engaging in any form of legitimate education for any reason is to automatically go back to the way of that society in which the slavery era held concerning the prohibition of engaging in activities related to education.

### **Enforcement of Anti-Masking as an “Administrative Action”**

In *Judulang v. Holder*<sup>110</sup>, the U.S. Supreme Court held that “[w]hen an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one.”

The *Judulang* case involved a deportation action of petitioner (Judulang) who was involved in a fight where someone else shot and killed a person.<sup>111</sup> Judulang was charged as an accessory and later pleaded guilty to a lesser offense.

After pleading guilty to another offense some 18 years later, the Department of Homeland Security “commenced an action to deport [Judulang].”<sup>112</sup>

The *Judulang* Court also held that the Board of Immigration Appeals “policy for deciding when resident aliens may apply to the Attorney General for relief from deportation under a now-repealed provision of the immigration laws is arbitrary and capricious.”

When the Supreme Court provides a holding, which states (in part) that “[w]hen an administrative agency sets policy, it must provide a reasoned explanation for its action”, one should believe that the Court does not just speak of one particular agency, it is likely talking about any administrative agency setting policy.

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<sup>109</sup> Hofstra People. (n.d.)

<sup>110</sup> 565 U. S. \_\_\_, \_\_\_, 132 S.Ct. 476 (2011), (Slip Op., at 1)

<sup>111</sup> *Id.* Slip Op., at 8

<sup>112</sup> *Id.*

Here, the Federal Motor Carrier Safety Administration is an administrative agency, which has set a policy providing that states “must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CLP or CDL holder's conviction for any violation...”<sup>113</sup>

It is quite clear that through much research, the administrative agency has not been able to “provide a reasoned explanation for its action”<sup>114</sup>. It took some 10 plus years for the National District Attorney's Association to come up with that explanation for the FMCSA, but too little, too late. If the FMCSA cannot, it seems that to continue enforcement of § 384.226 will in all likelihood, be found arbitrary and capricious.

**The Anti-Masking Statute must be repealed in its entirety,  
or struck by a Court of proper jurisdiction**

Finally, the issues concerning the fact that Commercial Motor Vehicle operators are “held to a higher standard” are valid, and the problems giving rise to questions concerning accidents involving large trucks is a valid issue, and has to be addressed on a constant basis, but that does not give the government a license to consider the rights of CDL holders extinct just because of a concern that if they are not scrutinized in such ways as they are in this case, they might cause more mayhem and carnage.

When the anti-masking statute was enacted into law, Judges and Legislators may have questioned the validity of such a statute with regard to its constitutionality, but since this statute has not been challenged under due process and equal protection jurisprudence, State Traffic Courts may have no choice but to comply with the statute only if they choose not to use their discretion to reduce a violation code for purposes of the unconstitutionality of section § 384.226.

These state traffic courts may be aware that Constitutional violations are prevalent, and in some or many cases, may reluctantly affirm charges by finding a defendant CDL holder guilty without allowing him/her to attend a traffic violator school program, while at

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<sup>113</sup> See again, 49 C.F.R. § 384.226

<sup>114</sup> See *Judulang* at 479, (Slip Op., at 1).

the same time, allowing the next person who is similarly situated to the previous defendant to attend a traffic school program.<sup>115</sup>

The question concerning the statute's constitutional permissibility based on CDL holders who are similarly situated<sup>116</sup> to other CDL holders who are being cited and allowed by some states to enter into diversion programs after having received a simple moving violation while operating personal motor vehicles must be examined by the Article III Judiciary.

It may be worth noting here that where diversion programs existed in the past for criminal convicts who were either incarcerated or released as part of a set of terms and conditions, those diversion programs may either still be in existence or have never been eliminated due to *post hoc* rationalizations.

### Conclusion

For the foregoing reasons as stated in this article, the provisions of 49 C.F.R. § 384.226 are facially unconstitutional; and as applied to any individual who receives a minor traffic violation infraction while in possession of a Commercial Driver License, whether engaged in the operation of a Commercial Motor Vehicle or Non-Commercial Motor Vehicle, and the rule must be struck in its entirety by either the Congress of the United States, a State Court (if Constitutionally possible) or a Member Court under the Article III Judiciary.

Further, it is urged to any of the many prominent Constitutional Counsel to bring about such challenge for purposes of questioning the Constitutional validity of the statute being examined here, and work to have the statute struck in its entirety.

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<sup>115</sup> As an example, a CDL holder in California post AB 1888 who is operating a commercial motor vehicle under regulations pursuant to 49 C.F.R. should be similarly situated to a CDL holder operating a ½ ton pick-up truck with commercial registration during the course of employment, just in the same way that trucking and railroad operations are for purposes of fuel tax rates. (see *CSX Transportation, Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101; 562 U. S. \_\_\_\_ (2011)).

<sup>116</sup> See *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920)

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