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1322 Webster St., Suite 208
Oakland, CA 94612
www.SafeAccessNow.org
Phone: 415-573-7842
Fax: 510-251-2036

Americans for Safe Access

Joseph D. Elford
Staff Attorney
Americans for Safe Access
861A Hayes St.
San Francisco, CA 94117
(415) 573-7842

August 17, 2005

Department of Motor Vehicles
Licensing Operations Division
Driver Safety Branch
4700 Broadway, 2d Floor
Sacramento, CA 95820

Via Facsimile Transmission

**Re: *Amanda Whittemore*, DL File No. B7273208
Notice of Reexamination**

Dear Ms. Sir or Madam:

Please be advised that I will represent Amanda Whittemore at the August 24, 2005, hearing on the order revoking Ms. Whittemore's driver's license. In advance of that hearing, I wish to state our initial objections to these proceedings and to request additional discovery.

CONSTITUTIONAL AND STATUTORY OBJECTIONS TO THESE PROCEEDINGS

I. These Proceedings Violate Ms. Whittemore's Constitutional Right to Due Process

These proceedings arose from a traffic stop for parking alongside the roadway on February 14, 2005, wherein the officer discovered that Ms. Whittemore was a qualified medical marijuana patient. Without issuing a citation, the officer referred the matter to the DMV and, on February 15, 2005, the DMV issued a Notice of Reexamination, requiring

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Ms. Whittemore to submit a Driver Medical Evaluation and, later, to a driving test. Despite the fact that Ms. Whittemore's physician stated her medical marijuana use would not impair her ability to operate a motor vehicle safely and she performed satisfactorily on her driving test with one exception, the DMV has revoked her license for a single error in her driving test for a "lane violation." Ms. Whittemore was not offered another driving test before the DMV took this drastic remedy, likely because she is a qualified medical marijuana patient.¹

Whereas the initial basis for the reexamination of Ms. Whittemore's license was to determine if her "ability to operate a motor vehicle safely is affected because of an addiction to or habitual use of drugs," the DMV revoked her license for a "lack of skill," due to a single error on her driving test having nothing to do with any addiction to or habitual use of drugs. The DMV's shifting grounds for its action against Ms. Whittemore violates due process. (See *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995); see also *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) ["To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case"].)

2. *These Proceedings Violate the Compassionate Use Act*

To the extent that these proceedings are predicated on Ms. Whittemore's status as a qualified medical marijuana patient, which is evidenced by the DMV's shifting positions and its departure from its own practice and policy, they conflict with and, therefore, violate the Compassionate Use Act. (Cal. Health & Safety Code § 11362.5) Under California law, "seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana. . . ." (Cal. Health & Safety Code § 11362.5(b)(1)(A)) There is no evidence, much less proof that Ms. Whittemore's use of marijuana when she is not operating a motor vehicle impairs her ability to operate a motor vehicle in any way. The revocation of her driver's license for a single error on her driving test, which did not result in a collision or even a near collision, is not authorized by the Vehicle Code and violates the Compassionate Use Act.

3. *The DMV Did Not Have the Authority to Reexamine Ms. Whittemore's Driver's License or to Revoke Her License*

As Ms. Whittemore contended prior to her driving test, the DMV does not have the discretion to reexamine one's driver's license simply for possessing documentation indicating her status as a qualified patient. (See Cal. Health & Safety Code § 11362.5(b)(1)(A)) The statutory provisions authorizing a license reexamination, Vehicle Code sections 113800 and 13801, do so only for serious driving offenses, such as accidents causing death or serious injury to persons or property, serial accidents or drunk driving offenses, and fraudulent use of a driver's license. (See Vehicle Code §§ 13800(a), (b) & (e)) While a record of conviction for a driving offense involving the use of a

¹ It bears noting that the driving test examiner appears to have recommended that Ms. Whittemore be retested and that this recommendation was rejected by the hearing officer.

controlled substance is sufficient to trigger an investigation (Vehicle Code §§ 13800(f)), this is most assuredly not the case here. Falling well short statutorily authorized basis for reexamination, the DMV lacks the discretion to require the submission of a medical questionnaire. (Cf. *Kriesel v. McCarthy* (1963) 214 Cal.App.2d 69, 72 [“Section 12810 of the Vehicle Code does not confer the basic authority upon the Department of Motor Vehicles to suspend or revoke an operator’s license.”]; *Beamon v. DMV* (1960) 180 Cal.App.2d 200, 207 [“The authority to initiate an investigation or require reexamination of the licensee is not the authority to state what acts violate the law”]). So, too, does it lack the authority to revoke Ms. Whittemore’s driver’s license for a single error on her driver’s test not resulting in a collision or near collision.

4. *The Actions of the DMV Are Arbitrary and Capricious*

By singling out Ms. Whittemore for reexamination based on her status as a qualified medical marijuana patient and revoking her license for a single error without offering her another driving test, the DMV’s actions are arbitrary and capricious, in violation of California’s Administrative Procedure Act.

REQUEST FOR DISCOVERY

Today, counsel for Ms. Whittemore received initial discovery from the DMV. Pursuant to Government Code section 11507.6, Ms. Whittemore hereby requests discovery of all relevant evidence, as provided under that statutory provision in advance of the August 24, 2005, hearing. In particular, Ms. Whittemore requests additional discovery of the following categories of information:

1. The names and addresses of all witnesses known to the DMV, specifying those whom the DMV intends to call at the hearing of this matter (see Government Code § 11507.6);
2. All statements, whether written or oral, made by any party to another person or party (see Government Code § 11507.6(b));
3. All writings which the DMV proposes to offer into evidence (see Government Code § 11507.6(d));
4. All policies, procedures, practices, guidelines, manuals, regulations, or other guidance materials relating to the suspension or revocation of a driver’s license due to a “lack of skill,” as found by the DMV in this case. Such materials include, but are not limited to guidance materials defining the inability to operate a motor vehicle safely due to a mental or physical disorder, pursuant to Vehicle Code sections 12806 and 13953. Such materials are relevant and admissible, and, therefore, discoverable under Government Code section 11507.6(e) because, among other reasons, they will likely reveal that the DMV has departed from its policies and practices in this case.

5. All policies, procedures, practices, guidelines, manuals, regulations, or other guidance materials relating to the Compassionate Use Act. Such materials are relevant and admissible, and, therefore, discoverable under Government Code section 11507.6(e) because they will likely reveal that the DMV's policies conflict with the Compassionate Use act or, alternatively, the DMV has departed from its policies and practices in this case.

6. All records of suspensions and revocations of a driver's licenses due to a "lack of skill." Such materials include, but are not limited to records of license suspensions and revocations based on the inability to operate a motor vehicle safely due to a mental or physical disorder, pursuant to Vehicle Code sections 12806 and 13953. Such materials are relevant and admissible, and, therefore, discoverable under Government Code section 11507.6(e) because, among other reasons, they will reveal that the single error committed by Ms. Whittemore on her driver's test does not rise to the level of a critical error warranting the revocation of her driver's license.

REQUEST FOR THE ISSUANCE OF SUBPOENAS

Pursuant to Vehicle Code section 14104.5, Ms. Whittemore requests that the DMV issue subpoenas for the following persons: (1) DMV Hearing Officer A. Smith; (2) DMV Employee C. Belche, and (3) Placer County Sheriff's Officer Andrew Scott.

STATEMENT OF REASONS FOR NOT TAKING THE WRITTEN DRIVING TEST

Ms. Whittemore has been orally notified that she must appear early for the August 24, 2005, in order to take a written driving test. Her license, however, was not revoked due to "lack of knowledge of traffic laws," so such test does not appear necessary. I request that this matter be addressed at the August 24, 2005, hearing and I have instructed Ms. Whittemore not to take such test in advance of that hearing.

Sincerely,

Joseph D. Elford

Cc: Amanda Whittemore