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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

CHRISTINA HARRIS and all UNNAMED AND FUTURE PETITIONERS SIMILARLY SITUATED, Petitioner, VS. SUPERIOR COURT OF SAN DIEGO COUNTY, And DOES 1-10; Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	**CASE NO. GIC 876101** **Court No. CN215995** **REPLY** TO RESPONDENT'S **EVIDENTIARY** OBJECTIONS TO PETITIONER'S PETITION FOR WRIT OF PROHIBITION/MANDATE

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TO THE COURT, ATTORNEYS AND ALL PARIES OF RECORD:

Plaintiff, CHRISTINA HARRIS, through her attorney of record, Richard L. Duquette, hereby replies to Respondent's Evidentiary Objections to Petitioner's Petition for Writ of Prohibition/Mandate, as follows:

I

RESPONDENTS FAILURE TO DENY PETITIONER'S ALLEGATIONS AMOUNTS TO AN ADMISSION

The court's "return" is **not verified**, and thus fails to comply with CCP§1089. It is understandable that Respondent's counsel refuses to verify that the Vista Court has an illegal blanket policy. There are no verified allegations AT ALL, just argument. The Respondent in its return failed to deny the existence of a "blanket policy" so, no factual issue is joined for resolution by the reviewing court. Respondent court failed to join any factual issue by failing to deny Petitioners claims. The effect of the failure to deny Petitioners allegations is to ADMIT those allegations, and to relieve Petitioner of any burden of proving them. (Rodriguez v. Municipal Court (1972) 25 Cal.App.3d 521, 526-527.)

Accordingly, Respondent's entire argument, consisting of attacks upon the sufficiency of Petitioner's evidence, is completely irrelevant: the court has admitted Petitioner's allegations and **no further proof** is necessary.

Nevertheless, in an abundance of caution, Petitioner submits the following additional argument proving Respondents challenge to Petitioners evidence is without merit:

Waiver:

The Respondent **waived** any objections at the hearing below. They are now **untimely**. Hearsay to which no objection is made is competent evidence. (People v. Bailey (1991) 1 Cal.App.4th 459, 463.) There was no objection.

Questions relating to the admissibility of evidence will not be reviewed on appeal unless there was a timely and specific objection in the trial Court made on the ground to be raised on appeal. (See People v. Rogers (1978) 21 Cal.3d 542; People v. Privittra (1979) 23 Cal.3d 697)

Matters not raised in the trial Court generally **cannot** be raised for the first time on appeal (People v. Mills, 1978, 81 Cal.App.3d 171, 176). Moreover, the Supreme Court continues to **find no excuse** for trial counselor's failure to specify the grounds of an objection. (See People vs. Alvarez, 1996, 14 Cal.4Th 4, 1554, 186 – In that case the grounds stated were not specific to preserve an objection.)

Admissions:

A statement is not inadmissible hearsay if offered against declarant in an action. (Evidence Code §1220)

Regarding comments by Prosecutor Tag, he was a party who as a trial attorney observed the patterns and practices in Judges Mill's and Kirkman's Court.

Further, his statements are **admissions**. They are *not* unreliable, because under the Rules of Professional Conduct he must be truthful and accurate. He is **ethically bound** not to mislead the Court.

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Rules of Professional Conduct:

> **Rule 5-200; "In presenting a matter to a tribunal, a member of the Bar (B) shall not seek to mislead a Judge, judicial officer, or Judge by an artifice or false statement of fact or law; shall not intentionally misquote the language of a tribunal, book, statute, or decision."**

The ethical duty of a prosecutor requires he not knowingly mislead the Court through a misstatement. Professionalism requires thorough and accurate representations to the Court.

How can Respondent now deny observations and personal opinions of percipient parties? Respondent cites no case authority for its position regarding Mr. Tag. The trial prosecutor's statements were indeed reliable and valid proof of an illegal "blanket policy".

As for Judge Kirkman (the trial call judge), he is clearly stating what he sees coming into his Court room from Division 1. These are his personal observations, *not* assumptions. There is no indication his statements are not unreliable. Further,

Standards of Judicial Conduct:

CANON 1

> **A JUDGE SHALLL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICARY**
>
> *"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective. A judicial decision or administration act later determined to be incorrect legally is not itself a violation of this Code."*

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CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. Promoting Public Confidence

"A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Further, a trial Judge has the power to **comment** on the matters before the court and also on the testimony and credibility of any witness; California Constitution Article VI, Section 10, also see Penal Code §§1093, and 1127. The California Supreme Court has recommended a wide use of this power by stating that this provision makes the Judge a "real factor in the administration of justice rather than a mere referee. He is no longer confined to a colorless recital of the evidence…. and express his views with respect to credibility, People v. Friend (1958) 50 Cal.2d 570, 577.

Mandatory Judicial Notice of Rules of Professional Conduct and State's Rules of Practice and Procedure:

Judicial notice shall be taken of rules of **professional conduct** for members of the Bar adopted pursuant to the Business and Professions Code §6076 and the rules of practice and procedure for the Courts of the state adopted by the Judicial Counsel. (See Evidence Code §451(c)) The comment to 451, notes that these adopted rules are as binding on the parties as procedural statute because they must be approved by the Court. So, there is no indication the statements by real party in interest or the trial court are unreliable. Moreover, the Rules of Professional conduct for the court and counsel presume statements on the record shall be reliable.

The <u>un</u>challenged statements of court officers (which would include lawyers and certainly judges) are the equivalent of <u>sworn</u> testimony. (<u>People v. Laudermilk</u> (1967) 67 Cal.2d 272; <u>People v. Wolozon</u> (1982) 138 Cal.App.3d 456).

For a case combining both rules, see <u>Garamendi v. Mission Ins. Co.</u> (1993) 15 Cal.App.4th 1277.

<u>Judicial Notice</u>:

The DA's statement was a matter Judge Kirkman could, and seems to have taken judicial notice. (Evid. Code §452(g)). Judge Kirkman's statement of his observations was a matter of which he could take judicial notice. (Evid. Code §452(d)). Judicial notice is not subject to a hearsay objection.

Respondent's claim that the DA is not an expert (if he needed to be, which is doubtful) as to the operations of the court in which that DA routinely appears is ludicrous. The same can be said with regard to Judge Kirkman.

<u>Judicial Notice by Review in Court</u>:

Evidence Code § 459(a) provides that the reviewing Court shall take notice of all matters properly noticed by the trial Court and all matters that should have been judicially noticed by the trial Court under Evidence Code §450, et seq.. Actually, Judge Kirkman and Prosecutor Tag raised the issue of court operations and take judicial notice of it per their statements on the record which is now before this court.

The Respondent's use of the word "dicta" is an unfair attempt to redefine the clear statements by judicial law officers Judge Kirkman and Prosecutor Tag. Dicta is the plural of the word Dictum, meaning:

> **"A remark, statement or observation of a judge that is not a necessary part of the legal reasoning needed to reach the <u>decision</u> in a case.**

Here, by **<u>contrast</u>**, Judge Kirkman and Prosecutor Tag's comments were relevant, and were specific observations of the cases they observed coming from Judge Mill's Court room and into Judge Kirkman's trial call court room which is certainly relevant to the issue at hand. The Respondent's attempts to disregard Judge Kirkman and Prosecutor Tag are because they do not like the evidence, and because they know all relevant evidence is prejudicial. Those observations of an experienced prosecutor and a seasoned trial call Judge <u>are relevant</u>. Respondent seeks to have this Court adopt Judge Kirkman and Prosecutor Tag's assumption that the Court docket reflects Judge Mills' reasoned order. However, there is no reason to put good intentions (presumed) behind Judge Mill's orders when he in fact never ordered the Petitioner to appear. This is mere speculation by the Respondent.

Furthermore, these statements of observation were based upon some consideration in that **three** cases of legal authority (on the Penal Code §977 issue) were provided to Judge Kirkman and Prosecutor Tag two days **in advance** of the Hearing, for their consideration. Therefore the comments they made were specific and learned. Judge Kirkman admitted having read the cases **ahead of time**. Moreover, this case (Harris) was continued a second time **<u>before</u>** the comments were made, giving Judge Kirkman and Prosecutor Tag **more time** to accurately reflect on the policies and practices from Division 1 to Division 5. Therefore, Judge Kirkman and Prosecutor Tag specifically addressed the issued raised – including the **policy and practices** of the lower Court and its **operations**.

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Contemporaneous Statements:

A statement is not inadmissible hearsay if it is offered to explain, qualify, or make understandable the conduct of the declarant, and was made while the declarant was engaged in that conduct. (Evidence Code §1241) The statement may be admitted to explain and make the conduct understandable. (Evidence Code §1241, comment). This is another basis for the admission of Judge Kirkman and Prosecutor Tag's observations on the record.

Statistics:

The Judicial Council statistics are obviously admissible and/or judicial notice can be taken of them per Evidence Code Section 450, et. seq. The appellate justices have a right to take notice of their experiences regarding the percentage of San Diego cases are heard in Vista.

In terms of statistics, judicial notice was offered of the statistics and statements and therefore they are admissible as non-hearsay, or an exception to the hearsay rule. Perceptions of the percipient witnesses are admissible as well.

Miscellaneous Hearsay Exceptions – Published Compilations:

A statement other than an opinion contained in a tabulation or other published compilation is not inadmissible if the compilation is generally used and relied upon in the course of a business. (Evidence Code §§ 1270 and 1340.)

Permissive Notice of Court Records:

Judicial notice of Court records may be taken of records of any Court of the state or any Court of record of the United States. (See Evidence Code §452(d)) This Evidence Code also permits the Court to take judicial notice of the records of other California Courts in a prior proceeding as supporting documentation, for example in a

Motion for Summary Judgment. (See Cuenca v. Safeway San Francisco Employees Federal Credit Union (1986) 180 Cal. App. 3rd 985, 997.)

Permissive Notice/Knowledge:

Judicial notice may be taken of facts and propositions that are of such common knowledge within the territorial jurisdiction of the Court that they cannot be reasonably subject to dispute, like the statistics denoted above in this case. (See Evidence Code 452(g)) For example, if a road were heavily traveled, this is such a fact or common knowledge.

Permissive Notice of Verifiable Records:

Judicial notice may be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by sources of reasonably indisputable accuracy. (Evidence Code 452(h)) In fact, in evaluating a breach of duty case, the Court took judicial notice under Evidence 452(h) of "relevant criteria promulgated by a professional association" in the case of Nguyen v. Scott (1998) 206 Cal.App.3rd 725, 736-737. Such items listed in 452 can be determined by the Court without much assistance of the parties.

Evidence Code §454 provides the Judge with **wide latitude** to decide which cases are trustworthy.

Dated: January 11, 2007

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CHRISTINA HARRIS