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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, DOES 1-10; 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 REAL PARTY IN INTERESTS' RETURN TO ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF PROHIBITION / MANDATE

I

JUDGE MILLS MADE NO ORDER

The State quotes a Superior Court docket requiring defendant's presence at trial. However, the assertion conflicts with the hearing tape and hearing transcript. See Exhibits P and Q. If there was a lawful order by Judge Mills, the State should produce a

transcript proving this assertion. They have failed to do so. As such, the transcript trumps the docket. The docket only concludes what happened at the hearing. The transcript is the final word barring complication in the production of the transcript, not present here.

Secondly, how can the State claim a court order by Judge Mills is lawful if it was entered on the court docket with no notice to Petitioner, nor an opportunity to be heard. The fact is, Judge Mills never informed Petitioner's counsel of any intent to require Petitioner's presence at "trial call" when the trial date was set.

II

AUTHORITY TO REQUIRE PETITIONER'S PRESENCE (under PENAL CODE §1043(e)) WAS NEVER EXERCISED BY JUDGE MILLS

The State concedes there must be an individual assessment concluding a Defendant's presence is necessary for the proper conduct of a trial under Penal Code Section 1043(e) before Petitioner's presence is required and opposed. They also concede a blanket policy would also be illegal under PC977. However, they fail to offer any record or evidence that there was an identification or any other issue raised as suggested by Penal Code §1043(e) necessary to properly "conduct the trial" by the Prosecution and before Judge Mills.

On September 8, 2006, defense counsel appeared per Penal Code §977 in Judge Mills courtroom. See Exhibit P, wherein it states:

Judge Mills: **Christina Harris, Christina Harris.**

Mr. Duquette: **Yes, your Honor, Richard Duquette, on her behalf. I just want to confirm the date. I am appearing on 977; she lives in**

Arizona. It is a .10 rising, the offer is a DUI; they won't give me a wet, so …

Judge Mills: **Alright, trial date for now is at least confirmed 2-3 day trial 11/8/06.**

Mr. Duquette: **That's fine.**

Judge Mills: **The next one is a change of plea, this is on Zachary Dunmore, D U N M O R E.**

After Petitioner's counsel discovered the court docket entry requiring his client's personal presence at trial call, he promptly filed and served a Penal Code §977 written waiver, identification / admission forms for Petitioner after counseling her as to their effect (Exhibit C). This was done on October 20, 2006 and November 2, 2006, respectively.

Defense counsel then filed those two forms in advance of the November 8, 2006 trial date.

The argument that a judge can order a Defendant to be present WHEN NECESSARY to properly conduct the trial is, of course, correct, but requires some EVIDENTIARY SHOWING of a proper purpose for ordering a Defendant to appear. But the argument has **no** application to these facts.

At no time did the courtroom Deputy District Attorney or Judge Mills **ever raise** the **need** for Petitioner's presence or state a valid reason for her presence at trial at the September 8, 2006 hearing. They never mentioned identification, driving or **any** other issue. It is obvious they did not do it because there is no real ID issue in this simple Driving Under the Influence case. If there were, an evidentiary showing may have occurred. The I.D. issue has **no** facts to support it in their record.

Defense counsel proceeded to trial and out of an abundance of caution, two days before trial, again appeared in Judge Mills' court ex parte asking if he would add the case onto his calendar to clarify the newly discovered "presence at trial call" docket entry. He did this even though, by law a defendant does not have to comply with an illegal court order in order to advance its illegality. See **Beasley v. Municipal Court** (1973) 32 Cal App 3d 1020 (Defendant's speedy trial right violated by an illegal order requiring a personal appearance even thought defendant did not appear.) Judge Mills declined to clarify his order and told counsel to take the issue up with Judge Kirkman, the trial call judge.

As for Judge Mills' **unwritten** blanket policy, there is plenty of evidence to support it ranging from Judge Kirkman's statements that he had seen it on the dockets to Prosecutor Tag's admissions. Mr. Tag's admissions are **omitted** from the Respondent's Real Party in Interest's return. Mr. Tag, who appears at trial call on a regular basis stated on page 1, lines 20-25:

THE COURT (JUDGE KIRKMAN): Did you wish to respond?

MR. TAG: Well, Your Honor, we all know that it's Judge Mills' practice to order a misdemeanor defendant to appear at trial call, and if we think about why that is it's pretty obvious. It's not arraignment. It's not a readiness conference. [emphasis added]

Therefore, the trial court's and prosecutor's statements on the record (as a Judicial Officer and Officer of the Court) are substantial proof of the existence of Judge Mills' unwritten blanket policy. Further, see **People v. American Bankers Insurance Co.** 191 Cal.App.3d 742.

As far as, the absence of a written policy guideline ordering misdemeanor Defendants to trial despite PC Section 977 waivers in Judge Mills' court, it is not unreasonable to believe that he would not write down an illegal blanket policy and display it in his courtroom as the Real Party States. Such a policy would only be discovered and then possibly opposed, as individual defense counsel came to trial and the issue is raised and then opposed by the Prosecution.

The written guidelines that defense counsel submitted are offered to show defense counsel had no forewarning of Judge Mills' unwritten and unpublished blanket policy which is contrary to law because it did not exist. So, even if a defense counsel is experienced, he would not know of this policy. Publishing the rules would of course allow for a policy debate and ensure the citizens' procedural Due Process of law.

The Prosecution harps on the issue of identification as if to bring into existence a **non-**existent original court order (for an alleged unstated proper purpose) by Judge Mills. Again, petitioner submits there was never an issue of identification in Judge Mills' pre trial courtroom. The People omit the portion of Penal Code §1043(e) which **permits** the Defendant to be **absent** upon a stipulation to identification, and their argument that a stipulation would be insufficient is illogical. If the stipulation which would be read to the jury as fact is that the Defendant was the driver who was arrested, what doubt could the Jury have? Furthermore, the purported insufficiency of the stipulation was not raised by the People in the trial call court, nor was it the basis for ordering the Defendant to appear after the hearing concluded at pre-trial.

Can the People refuse to stipulate to the issue of identification solely for the purpose of requiring the Defendant to personally appear, and for no other reason? In civil and criminal cases, parties can remove an issue from dispute by merely offering to

stipulate to a fact. Herein, defense counsel offered to stipulate to the identification of the Petitioner. As in the case of **People v. Bonin** (1989) 47 Cal.3d 808, 848-849, the court should have **compelled the prosecution** to accept the defense's offer. In **Bonin**, through the offer of the defense, the facts covered by the proposed stipulation were removed from dispute. Therefore testimony regarding such facts were irrelevant and inadmissible. Thus, the Court herein, Judge Kirkman, at trial call, should have compelled the Prosecution to accept the defense's offer of stipulation. See also **Simons**, **California Evidence Manual** (2006) p8 (for other cases compelling a stipulation).

The case **Khoury v. Municipal Court** (1980) 111 Cal.App.3d 284 cited by the Prosecution is far from "on all fours" for many reasons, two of which are addressed here. First of all, as the Prosecution readily admits, in **Khoury**, on each occasion, the Court ordered Ed **Khoury** to appear.

That is fundamentally different from Petitioner's case herein because Judge Mills **never** ordered Petitioner's presence. This distinguishes **Khoury**. Further, the authenticity of the written PC 977 waiver is not an issue here.

A second major distinguishing fact is that the law has changed since Khoury (1980) with regard to an offered stipulation. In **Bonin** (cited above) decided in 1989 by the CA Supreme Court, the Court ruled the stipulated offer should have been accepted because the proposed facts to be proved by testimony were inadmissible once the stipulation had been accepted. Here the Prosecution offered only one issue, identification at trial call, as the reason the Defendant needed to be present. The stipulation which should have been accepted under **Bonin** foreclosed the need for the Defendant's presence. To allow otherwise would undermine the rights conferred upon the Defendant by the legislature without good cause. Such a position would violate the State and Federal doctrines of

Separation of Powers and Due Process. See **Frase v. Gourley** (2000) 85 Cal App4th 762.

The law is clear on this point that once an attorney makes a conscious or deliberate tactical choice to forego a particular course of instruction, the invited error doctrine bars any argument on appeal, for example, that an instruction was omitted in error. In the **People v. Concepcion** (July 26, 2006) 072606 CAAPP4, E036353 case (Fourth District, Second Division), the defense counsel could have easily requested clarification, but he failed to do so and waived any claim in light of error, citing **People v. Craig** (1991) 227 Cal.App.3d 644, 650 and **People v. Wader** (1993) 5 Cal.4th 610, 658:

> "More importantly, after learning that the court intended to allow testimony from the correctional officers regarding the escape, defense counsel expressly asked the court to instruct the jury that flight from custody is not proof of the substance of the charges. The court indicated that already was an instruction to that effect, i.e., that CALJIC No. 2.52 can be tailored for an escape from custody. Defense counsel asked for nothing else, indicating he was ready to proceed. On appeal the defendant apparently overlooks this fact and that the result is **invited error**.
>
> "As stated in ***People v. Wader*** (1993) 5 Cal.4th 610, '[w]hen a defense attorney makes a 'conscious, deliberate tactical choice' to forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was omitted in error. [Citations.] When defense counsel makes an equally **conscious** and **deliberate tactical** choice to request a particular instruction- such as the instruction defense counsel specifically requested here – there is no reason to apply a different rule. Accordingly, we conclude the error was invited, and defendant **cannot raise it on appeal**.' (*Id.* at p. 658)
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> "Furthermore, defense counsel could have requested a clarifying instruction to take into account the admonitions given earlier that day. He failed to do so. Thus, he has **waived** any claim that, in light of the unusual facts of this case, amplification was required. (***People v. Craig*** (1991) 227 Cal.App.3d 644, 650). [emphasis added]

Since identification is the Prosecution's **only** objection that was raised here, they invited error and waived any argument. See **Howard S. Wright Construction Co. v.**

BBIC Investors, LLC, (January 31, 2006) 013106, CAAP1, A109876 citing **Norgart v. Upjohn Co.** (1999) 21 Cal. 4th 383, 403 and **Doers v. Golden Gate Bridge etc. Dist.** (1979) 23 Cal.3d 180, 185-185:

> "Ordinarily we would consider whether to **dismiss the appeal** based on doctrines such as **invited error or waiver**. (See generally ***Norgart v. Upjohn Co.*** (1999) 21 Cal. 4th 383, 403 [invited error as estoppel]; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 185-185 [waiver or forfeiture].) We need not do so in the matter before us, because the propriety of the court's ruling does not turn on its construction of the statute. (See *post*.) But **it is nevertheless rather disingenuous – and disrespectful to the trial court – to attack** the court and its ruling without acknowledging Wright's **own contribution** to the court's misstatement of the law." [emphasis added]

As in **Howard S. Wright Construction Co. v. BBIC Investors, LLC**, supra, it is disingenuous and disrespectful to the court to attack a ruling without acknowledging Respondent's own contribution to any misstatement by the court. Also see Weaver, 26 Cal.4th 876, 917.

III

RECONSIDERATION UNDER C.C.P. Section 1008 WAS FUTILE

The Prosecution's argument that the tape recording of Judge Mills' order was inaudible is incorrect. As this Honorable Court knows from the transcript provided by Petitioner herein, a second audible tape was obtained showing no order by Judge Mills. See Exhibit Q.At trial call, defense counsel had yet to receive the credible tape recording of Judge Mills' hearing. Cautious, defense counsel stated he did not recall or hear it. Defense counsel said, "I don't believe, in fact, he (Mills) did that." Defense counsel was correct.

The audible record now before the Court speaks the truth and a courtesy copy of the actual tape recording (not just a transcript) is attached so the Prosecution can listen for themselves (Exhibit P).

Any suggestion of or inference that defense counsel "perhaps did this for bad purposes" is merely an unfair attempt to disparage defense counsel – which was already put to rest by Judge Kirkman as unsupportable.

IV

THE PENAL CODE §977 WAIVER WAS VALID

The Prosecution has **failed** to fully state the Petitioner's trial waiver in a sordid attempt to disparage Defense Counsel again, as was done repeatedly and unfairly below.

The documents "Stipulation as to Identity, Authorizations to enter into Stipulations (filed under Exhibit E) states **"I waive my personal presence at trial."** It could not be more clear.

Moreover, Defendant's personal presence waiver also states "**other proceedings in this case**". This includes a trial proceeding.

Last, defense counsel can **verbally** waive Petitioner's presence at trial and defense counsel did so, on the record (Exhibit O, p. 1, lines 9-11). (See **People v. American Bankers Insurance Co.** (1987) 191 Cal.App 3d. 742, 746-747.

As a matter of law, an attorney has no obligation to prove his authority to represent his client beyond his **oral statement** to the Court that he is appearing for his client and is ready to proceed absent a showing of evidence otherwise. Any suggestion the **Khoury** case required the defendant to be physically present just to see whether the defendant was really waiving his presence was put to rest in the "**American Bankers Case** (1987) (cited above)" The Court **can** rely **merely upon the oral representation of counsel** that

the accused is going to be absent from the proceedings. It is always presumed that an attorney appearing and acting for a party has authority to do so. See **People v. American Bankers Co.** (1987) 191 Cal.App.3d 742, 746-747, citing **Olney v. Municipal Court** 133 Cal.App.3d 455, 461 fn. 5, also **Pacific Paving Co. v. Vizelich** (1903) 141 Cal.4, 8.

V

THE STIPULATION WAS VALID

The Petitioner is charged with a violation of Vehicle Code §23152(a) and (b), that is, driving a vehicle while under the influence and with a blood alcohol content at .08 or above. The Prosecution is claiming Petitioner's stipulation in some fashion needs to be delved into, **more** than what is required by Penal Code §1043(e), and thus they object. The State puts forth several naked conclusions and possibilities as to why the proposed stipulation is vague. However, The People **omit** the portion of Penal Code §1043(e) which permits the Defendant to be absent upon a stipulation as to identity. Penal Code §1043(e), specifically states:

> "(a) Except **as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial**.
>
> "(e) If the defendant in a misdemeanor case fails to appear in person at the time set for trial or during the course of trial, the **court shall proceed with the trial**, unless good cause for a continuance exists, if the defendant has authorized his counsel to proceed in his absence pursuant to subdivision (a) of Section 977.
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> "**If there is no authorization** pursuant to subdivision (a) of Section 977 and if the defendant fails to appear in person at the time set for trial or during the course of trial, the court, in its discretion, may do one or more of the following, as it deems appropriate:
>
> "(4) Proceed **with the trial if** the court finds the defendant has absented himself voluntarily with full knowledge that the trial is to be held or is being held.

> "Nothing herein shall limit the right of the court to order the defendant to be personally present at the trial for purposes of identification unless counsel stipulate to the issue of identity."

Moreover, the Prosecution's formal objection (Exhibit N) **concedes** defense counsel "represented … his client **waives** her right to be personally present at trial in the above captioned matter" but mistakenly concludes he had no authority to override Judge Mills' (non-existent) order.

On review, the State attempts to raise the legal bar and complain. Before trial, even after defense counsel requested specifics from the Prosecutor, he refused to mention any specific stipulation issues existed. They have waived any objection and created their own prejudice. In other words, they have invited error, per the authority cited supra.

It is clear, according to the police report, that the officer stopped and arrested only the Petitioner for driving, **not** the passengers. There is **no** evidence submitted by the Prosecution that there were **any** facts suggesting that anyone in the car Petitioner was driving attempted to drive other than the Petitioner.

Should the Prosecution have genuinely felt there was a driving issue as to the other occupants, as they **now** argue, they would have **subpoenaed** the other passengers to prove the opposite. This record does not support any attempt to do so.

The Prosecution's vague objection to the defense's stipulation, which is really an admission by the Petitioner, is a further attempt to undermine the Legislature's will as authorized by Penal Code §1043(e), thereby violating the doctrine of separation of powers between the executive and legislative branches. If the Prosecution had it their way in the face of an exercised Penal Code §§977/1043 rights, as demonstrated herein,

they could: remain silent, arbitrarily file an objection just before trial and fail to clarify it upon request, and then attempt to undermine Penal Code §1043(e) with an untimely objection **on review**. Under these circumstances, there could never be a valid Penal Code §§977/1043 waiver unless the Prosecution consented.

By definition, evidence is relevant only if it relates to an issue in dispute. In **People v. Hall** (1980) 28 Cal.3d 143.

See *California Evidence Manual* by Justice Mark B. Simons, §1:5, pages 7-8

Citing **People v. Valentine**, supra, the Supreme Court said in the **People v. Bonin** (1989) 47 Cal.3d 808, 848-849:

> "'If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code Sections 210 and 350 respectively.' Through the offer of the defense, the facts covered by the proposed stipulation … were removed from dispute. Therefore, the testimony elicited to prove such facts was irrelevant and inadmissible … Thus the court should have compelled the prosecution to accept the defense's offer and barred it from eliciting testimony on the facts covered by the proposed stipulation."

Herein, defense counsel offered the Prosecution a valid stipulation as to Petitioner's identity thereby removing any issue as to identity in the matter from dispute. Therefore, **no** evidence regarding the issue of the identity of Petitioner would be required at trial. The State abused its discretion by refusing to accept the offer to stipulate, even though identification was clearly not a genuinely disputed fact.

VI

JUDGE MILLS FAILED TO ISSUE ANY ORDER AT ALL

The State leaps over the fact that there was never a meaningful order by Judge Mills. Thus, he never exercised his discretion. In court, Judge Mills never stated identity or any other reason that Petitioner's personal presence was required. This is so, even

though Petitioner's Penal Code §977 waiver and identification stipulation were in the court file – giving the Court and the Prosecutor advance notice of Petitioner's intention over a month before trial call – due to her hardships.

Even after defense counsel gave Judge Mills a second chance to clarify his court dockets two days before trial, nothing changed. Judge Mills sent defense counsel off to trial call. So, it is not a matter of a wrong reason for an order, as suggested by the Prosecutor, **there was no order at all**, even after every opportunity to make a valid one existed and defense counsel was ignored. Further, at trial call before Judge Kirkman, Defense Counsel offered to stipulate to the reason asserted to deny the Penal Code §977 waiver, but this offer was rejected. Judge Kirkman made no findings but merely attempted to support Judge Mills' non-existent order. Essentially, the only reason for the (non-existent) appearance order latter applied by Judge Kirkman was to put financial pressure on Petitioner to force a guilty plea.

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VII

CONCLUSION

Petitioner did not fail to appear on November 8th and 9th, 2006. Petitioner lawfully appeared in court through counsel as authorized by Penal Code Sections 977 and 1043. Judge Kirkman's order in the face of **written** authorizations for counsel to appear in petitioner's stead and issuing a warrant for petitioner's arrest was patently unlawful. Petitioner thus respectfully urges this court to issue writs of Prohibition and Mandate, and thereafter compel the Superior Court to recall the warrant issued for petitioner's arrest and to vacate the orders requiring her personal appearance at trial. Further, Petitioner requests a dismissal of this case under Penal Code Section 1382 which was addressed in the moving papers but was not addressed by Real Party in Interest.

Respectfully submitted:

Dated: December 14, 2006

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