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CHRISTINA HARRIS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION

CHRISTINA HARRIS and all	)	CASE NO.
UNNAMED AND FUTURE)	
PETITIONERS SIMILARLY	)	PETITION FOR WRIT OF
SITUATED,	)	PROHIBITION/MANDATE;
	)	STAY REQUESTED;
Petitioner,	)	VERIFICATION; MEMORANDUM
	)	OF POINTS AND AUTHORITIES;
VS.	)	REQUEST FOR ATTORNEY FEES
	)	& COSTS; AND EXHIBITS
SUPERIOR COURT OF SAN DIEGO)	
COUNTY, And DOES 1-10;	)	<u>IMMEDIATE STAY OF 12/4/06</u>
	)	<u>JURY TRIAL REQUESTED</u>
Respondent,)	
	)	(Local Rule 7.2.3)
_____)	
	)	Word Count: 3,336

PETITION FOR WRIT OF PROHIBITION/MANDATE

Immediate Action Requested

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO, HONORABLE J. SAMMARTINO, PRESIDING JUDGE:

Petitioner lawfully authorized her counsel to appear for her in a misdemeanor matter pursuant to Penal Code sections 977 and 1043, and thus was **not** personally in court on September 8, 2006 (readiness hearing before Judge Mills) or November 8, 2006

(trial call before Judge Kirkman) (Exhibit B). The trial court called petitioner's case, **and** since petitioner was **not** personally present, the court issued a warrant for her arrest, but stayed it until December 4, 2006. When the court was thereafter informed that petitioner was lawfully appearing: 1.) through counsel 2.) was **never** ordered in open court on the record to appear at the readiness conference contrary to the court docket (Exhibit P), and thus had 3.) **not** failed to appear, the court refused to send the case out for a speedy Jury Trial. Instead, it ordered petitioner back to trial on December 4, 2006 – pending appellate review (Exhibit O).

As a result of the illegal and improper orders of the Vista Superior Court, petitioner is in the constructive custody of that court and subject to an unlawfully issued arrest warrant. Petitioner is unquestionably entitled to relief from these unlawful orders, i.e., Judge Mill's and Judge Kirkman's orders to be personally present for her Jury Trial.

Thus, petitioner is seeking an immediate order from this court requiring the Vista Superior Court to recall the illegally issued warrant for her arrest, and for prohibition relief requiring the Vista Superior Court to vacate its orders issuing that warrant.

Further, petitioner is seeking an immediate order directing the Vista Superior Court to set aside its blanket policy of requiring misdemeanor defendants to personally appear at trial and permit defendant and all unnamed and future petitioners similarly situated and charged with misdemeanors to be permitted to appear through counsel, rather than in person, unless the specific circumstances of an individual case, after a noticed hearing, justify ordering an accused to appear in person at trial for a proper purpose.

Last, Petitioner seeks damages (reasonable attorney fees and costs) for all actual direct losses (economic and non economic) in fact suffered as a direct result of

defendants conduct.

By this verified petition the following facts and causes are set forth for the issuance of the writ:

I

Petitioner is the defendant named in a misdemeanor criminal action now pending in the San Diego County Superior Court (Vista) entitled "People of the State of California, Plaintiff, v. Christina Harris, Defendant," case number CN215995 (Exhibit A). In a complaint filed on August 14, 2006, Defendant Christina Harris was charged for being in violation of Vehicle Code section 23152(a) and Vehicle Code section 23152(b), alleged to have occurred on July 2, 2006 (This is a basic non accident .10 rising blood alcohol case, where plaintiff has no prior criminal history). Other similarly situated current and future petitioners are all unnamed and are within her class. Said Plaintiffs have standing to file a class action (Chance v. Superior Court (1962) 58 Cal 2d 275, 291). Reaves v. Superior Court (Patterson) (1971) 22 CA 3d 587. Hereafter named "Plaintiffs".

Since Petitioner's Statutory and Constitutional rights have been violated, no speedy remedy is available.

An ascertainable class of Plaintiffs exists. They are misdemeanor defendants ordered to personally appear at trial during the year 2006, in violation of Penal code Sections 977 and 1043.

A well defined community of interest among the Plaintiff class members exists, as follows:

A predominate common question of law or fact exists. For example:

1. Can Misdemeanor defendants be ordered to be personally present at trial?
2. Can Misdemeanor defendants be ordered to be personally present at Trial

without a noticed and meaningful hearing establishing a valid reason compelling their presence?

3. Can Misdemeanor defendants be ordered to be personally present at trial if it would pose a personal or financial hardship on them?

4. As a matter of local Judicial policy, is this non published local “personal appearance at trial” rule in conflict with State Law?

The Petitioner’s claims or defenses are typical of the class. According to the Published California Judicial Council Statistics for the year 2004-5, there are over 38,000 misdemeanor defendants of which over 22,000 are set for trial in San Diego County (Judicial notice requested per Evidence Code Sections 450-460). The Vista court shares over 25% of these statistics, by conservative estimate (Exhibit L). Moreover, according to Prosecutor Tag, “we all know that it’s Judge Mills practice to order a defendant to appear at trial call....” (RT p.1, lines 22-23 dated November 9, 2006). Also, Judge Kirkman states, (in reference to ordering misdemeanor defendants to appear at trial). “I don’t find that order on every single docket that comes out of the pretrial hearing department, where Judge Mills sits, but I find in on many.” (RT p.19 lines 13-15 dated November 9, 2006) (Exhibit O). Judge Kirkman presides over the criminal case trial call department in Vista.

Petitioner can adequately represent the class, as she has retained counsel who has agreed to litigate these issues. She has no beneficial or financial interest in this case other than its fair application of law to her and those similarly situated. Had Petitioner not undertake this litigation, their important statutory and constitutional rights would be trampled in a wholesale fashion. Thus, their burden is disproportionate to their own individual stake in the matter.

II

Other interested parties to this petition may include the People of the State of California for the County of San Diego, by their attorney of record, Office of the District Attorney, County of San Diego.

III

On July 2, 2006, petitioner was released on her own recognizance and an arraignment was scheduled for August 17, 2006.

IV

On August 17, 2006, petitioner, through her attorney of record, RICHARD L. DUQUETTE, ESQ. fax arraigned her case with the superior court, HONORABLE JUDGE J. SAMMARTINO, presiding (Exhibit E). Petitioner, by and through her attorney of record, RICHARD L. DUQUETTE, ESQ. entered a plea of **not** guilty and thereafter officially represented said petitioner, CHRISTINA HARRIS. The matter was calendared for a misdemeanor readiness hearing on September 8, 2006, with a back up Jury trial on November 8, 2006, in Division 5. A Jury Trial was demanded and a general statutory time waiver was entered. Ms. Harris Statutory and Federal Constitutional rights to a speedy trial and Due Process were not waived, and were thus preserved at trial call (Exhibits G and H). More specifically, her following statutory and constitutional rights were violated, as was the will of the legislation and people of the great state of California:

1. The Statutory Right to appear through counsel during a Jury Trial per Penal Code Sections 977 and 1043.
2. The right to a speedy Jury Trial per Penal Code section 1382 (if no stay is granted); and the Federal Due Process clause (5th – Fifth Amendment) and Sixth Amendment Speedy Trial Rights.

3. The violation of her Federal Due Process Rights to be heard and have reasonable access to the courts.
4. The Statutory Right to Notice of any local policy that conflicts with State Law per CCP §575.1 and Federal Due Process (5th – Fifth Amendment).
5. The Statutory right to Class Action Status for all unnamed and future petitioners similarly situated per California Code of Civil Procedure section 382.
6. The Statutory right to damages (Attorney fees and costs) for all actual direct losses (economic and non economic) in fact suffered as a direct result of dependants conduct. California Code of Civil Procedure section 1210.5 and “The Substantial Benefit Theory” (Serrano v. Priest (1977) 20 Cal 3rd 25).
7. All other relief that is just and proper.

V

Petitioner was released upon her own recognizance and at no time was she knowingly ordered by Honorable Judge J. Sammartino or Judge R. Mills ordered to be personally present at the pretrial hearing or at the back up jury trial. The tape recording of Judge Mills’ September 8, 2006 readiness hearing fails to require Petitioner’s personal appearance. Judge Kirkman was given those original (high speed) tapes (Exhibit M) and stated in relevant part regarding whether they were audible “...I can’t tell from the tape”, (RT p.19 line 10 dated November 9, 2006). Later, a normal speed recording was made of the original tapes, and it was confirmed, as defense counsel has argued all along, there was no order by Judge Mills that Petitioner was ordered to appear at trial (Exhibit P). Moreover, Judge Mills’ written settlement conference guidelines do not require defendant

to be personally present for a jury trial, nor was there any published local rule requiring personal appearance for trial, as required by Code of Civil Procedure section 575.1. Petitioners (for the last year (2006)) have had no valid notice of a “personal trial appearance” policy in Judge Mills court.

VI

Only after obtaining a copy of the Court’s Docket reflecting the minute orders from the September 8, 2006 readiness hearing, Mr. Duquette, Esq. noticed that the docket required the Plaintiff had to be personally present at the upcoming trial date of November 8, 2006. Defense counsel stated in court he did not recall such an order being made in open court. This correct assertion was confirmed upon review of the slow speed copy of the original tape (Exhibit P). Defense counsel ordered and reviewed the readiness conference tapes, but failed to locate any specific order that defendant be personally present at trial call. This was consistent with Judge Kirkman’s findings. Defense counsel invited the prosecutor to provide any taped “appearance order” by J. Mills, but he failed to do so. Instead, he attempted to personally attack defense counsels efforts to verify the existence of Judge Mills orders, if any.

VII

Consequently, On September 27, 2006, petitioner executed a written waiver of her right to be present during proceedings in her case, permitting her attorney to appear for her as authorized by Penal Code section 977 (Exhibit B). A copy of this waiver was filed with the court on October 20, 2006. On October 27, 2006 Petitioner also executed a stipulation (admission) as to her identity and authorizations to enter into stipulations. A copy of this authorization (admission) was filed with the court on November 2, 2006 (Exhibit C). Petitioner was counseled on her waivers and rights in advance of trial. She

acknowledged understanding them (Exhibit O).

VIII

Richard Duquette, Esq. served and filed a copy of the Penal Code Section 997 Waiver and stipulation (admission) authorizations on the Deputy District Attorney's Office and requested a formal stipulation to identity to allow defendant not to be personally present, since the defendant resided in Arizona and did not have sufficient funds to purchase travel fare or lodging so that she could attend the Jury Trial in person (Exhibit F). Also, the prosecutor was informed defendant was a full time college student and pet sitter and sitting through a three day Jury Trial would constitute a **hardship** to her. The prosecutor (assigned to the case) declined the stipulation, even though the police report and booking photo provided by the prosecution in discovery clearly identified the defendant. That booking photo of Petitioner was produced through District Attorney discovery procedures on or about August 24, 2006. It describes her names, height, date of birth, sex, race, a clear photo of her face and side view. There are no marks or tattoos. These facts are also consistent with petitioners' description in her arrest report. Her address and physical description also match her criminal computer index print out – a third form of identification (Exhibit K). Since these business records were provided by the prosecution they are conclusively presumed authentic per Evidence Code sections 623, 1414, and 1421 (Exhibit I).

Nevertheless, in light of the facts, the prosecutor failed to produce any genuine dispute as to petitioner's identity (per Evidence Code sections 210 and 352, see *People v. Bonin* (1988) 47 C3d 808, 848). He refused to enter into a formal stipulation as to her identity, a non-issue, thus not relevant per Evidence Code section 351.

Regardless, defense counsel's written documentation and authority filed with the

court, admit identity (Evidence Code sections 1220-27.) Petitioner's identity is not a genuine issue, but the prosecutor disingenuously attempts to make it one.

On or about November 07, 2006, Mr. Duquette provided Judge Kirkman and the prosecutor three cases that authorized him to proceed to trial in the defendant's absence. Those cases are: 1.) "Beasley" 32 Cal.App. 3d 1020. 2.) "Olney" 133 Cal.App. 3d 455. 3.) "Simmons v. Superior Court" (1988) 203 Cal.App. 3d 71.

Moreover, Defense Counsel, on or about November 07, 2006, (in advance of trial) personally appeared before Judge Mills and requested clarification of his court docket minute entry requiring defendant's presence at trial. Judge Mills declined to calendar the case, in order to modify or clarify his order, leaving it to Judge Kirkman to address at trial call.

Sometime before noon on November 8th and 9th, 2006, the court called petitioner's matter. Petitioner, having authorized counsel to appear in her stead, was not present. Nevertheless despite the written authorizations of counsel to appear for petitioner in the court's file and admission of identity, the court rescinded her release and issued a warrant for petitioner's arrest.

IX

Specifically, Petitioner's counsel appeared before Judge Kirkman at the November 8th and 9th, 2006 trial, and advised the court that he was authorized to appear for petitioner pursuant to Penal Code sections 977 and 1043, and that petitioner had therefore not failed to appear. Counsel asked that the case proceed to a speedy Jury Trial. The court declined to do so. The court did not assert either that the court had ordered petitioner to be present for a proper purpose, nor that petitioner was required to

obtain advance authorization from the court before waiving her right to be present. Judge Mills' court docket failed to articulate any proper purpose for requiring Plaintiff to be personally present at trial, nor was a hearing held establishing a proper purpose for her personal appearance. Appearing at trial call would pose a hardship on Plaintiff, as stated in detail herein and outlined in her financial declaration, attached hereto as Exhibit "F".

X

The following documents demonstrating the facts set forth above have been lodged with the Clerk of this court at the time of filing this petition, and are incorporated herein by reference:

Exhibit "A": A copy of misdemeanor complaint number CN215955.

Exhibit "B": A copy of petitioner's written waiver of her right to be present and authorization of counsel to appear on her behalf.

Exhibit "C": A copy of Petitioners Authorization (admission) and Stipulation as to identity.

Exhibit "D": A copy of the Policy and Procedures of Dept. 1 – Judge Mills.

Exhibit "E": A copy of the Fax Arraignment form.

Exhibit "F": A copy of Petitioners financial declaration.

Exhibit "G": A copy of Petitioner demand for a Jury Trial.

Exhibit "H": A copy of Petitioners supplemental demand for a Jury Trial.

Exhibit "I": A copy of a letter by defense counsel to the prosecutor to articulate any valid identity dispute.

Exhibit “J”: A copy of Judge Mills minute docket entry ordering defendant’s presence at trial.

Exhibit “K”: A copy of Plaintiffs booking photo and face sheet of her arrest report and criminal computer index printout provided in discovery by the District Attorneys office, along with the face sheet of the arrest report (per discovery disclosure procedures dated 8/24/06).

Exhibit “L”: A copy of the Superior Court Filings and Method of disposition by County Fiscal Year 2004-2005, p. 123.

Exhibit “M”: A copy of the 9/8/06 tapes (to be lodged) in Judge Mills Courtroom.

Exhibit “N”: A copy of the prosecutor’s objection.

Exhibit “O”: A copy of the pre-trial hearing transcripts.

Exhibit “P”: A copy of the original September 8, 2006 pre-trial hearing (no appearance was ordered).

XI

The transcripts of these proceedings (trial call) are attached, dated November 9, 2006.

XII

The Superior Court acted beyond its jurisdiction and abused its lawful discretion in forfeiting petitioner’s own reconnaissance status and issuing a warrant for petitioner’s arrest, (as well as ordering her back for trial on December 4, 2006) when counsel had properly been authorized to appear for petitioner. Consequently, that court equally erred in failing to grant relief from those unlawful orders. Petitioner’s contentions in this regard

are more fully set forth in the accompanying points and authorities which are incorporated herein by reference.

XIII

Petitioner has no plain, speedy, or adequate remedy at law, as Statutory and Federal Due Process (5th) Fifth Amendment) and (6th) Sixth Amendment Speedy Trial Constitutional issues are involved. The order issuing a warrant for petitioner's arrest is not an appealable order. Petitioner's case is currently set for Jury Trial on **December 4, 2006** at 9:00 a.m. and requires petitioners presence.

XIV

Other than stated above, no other petition for extraordinary relief has been sought or obtained by petitioner relating to this action.

WHEREFORE petitioner respectfully prays:

1) That this court forthwith direct the San Diego County Superior Court to recall the warrant issued for petitioner's arrest on November 6, 2006;

2) That this court issue its writ of Prohibition/Mandate and thereafter order the superior court to **vacate and set aside** its orders of September 6, 2006 and November 8th and 9th, 2006, issuing a warrant for petitioner's arrest, forfeiting her own recognizance status, and mandating that petitioner and all those unnamed and future petitioners similarly situated charged with misdemeanors be permitted to appear through counsel, rather than in person, unless a proper purpose specific to each individual case justify ordering an accused to appear in person is established after a noticed hearing.

3) For an award **of damages** (reasonable attorney fees and costs pursuant to Code of Civil Procedure section 1021.5) for all actual direct losses (economic and non

economic) in fact suffered as a direct result of defendants conduct, as well as those authorized by the “substantial benefit” theory.

4) For a **dismissal** of this case, or in the alternative a speedy Jury trial.

5) For such other and further relief as this court may deem just and proper.

Dated: November 28, 2006

LAW FIRM OF RICHARD L. DUQUETTE

By: _____
Richard L. Duquette, Esq.
Attorney for Petitioner

VERIFICATION

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO) ss.

RICHARD L. DUQUETTE declares as follows:

I am an attorney at law licensed to practice in all the courts of California.

In that capacity I am attorney of record for petitioner in the foregoing **Petition for Writ of Prohibition / Mandate**, and I make this verification on her behalf for the reason that the facts alleged therein are more within my knowledge than hers.

I have read the foregoing petition and the exhibits lodged with this court, and, except for those matters stated on information and belief which I believe to be true, I know the contents thereof to be true as based upon my reading of true copies of court documents on file in this action, including the verified **Petition for Writ of Prohibition / Mandate** filed in the Superior Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 28th day of November, 2007, at Carlsbad, California.

Richard L. Duquette, Esq.