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THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, APPELLATE DIVISION

CHRISTINA HARRIS, et al. Petitioner, vs. SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY Respondent,	Case No. GIC876101 **RESPONDENT'S EVIDENTIARY OBJECTIONS TO PETITIONER'S PETITION FOR WRIT OF PROHIBITION/MANDATE**
PEOPLE OF THE STATE OF CALIFORNIA Real Party in Interest.	

TO THE COURT, ATTORNEYS AND ALL PARTIES OF RECORD:

Respondent, the Superior Court of California, County of San Diego, by and through its retained counsel, Randal L. Glaser of Fuller Glaser Jenkins, hereby objects to the following portions of Petitioner Christina Harris's Petition for Writ of Prohibition/Mandate and Memorandum of Points and Authorities in support thereof:

1. The statement, "we all know that it's Judge Mills (*sic*) practice to order a defendant to appear at trial call...." (RT p.1, lines 22-23 dated November 9, 2006.)" Said statement, attributed to Deputy District Attorney Matthew Tag, is located at p. 4, lns. 12 through 15 of the Petition and is relied on and/or repeated throughout petitioner's submitted court papers.

2. The statement, "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 (*sic*) on may. (RT p.19 lines 13-15 dated November 9, 2006) Exhibit 'O')." Said statement, attributed to the Hon. Michael Kirkman of the North County Branch of the respondent court, is located at p. 4, lns. 15 through 18 (emphasis in original) and is relied on and/or repeated throughout petitioner's submitted court papers.

3. That potion of defendant's Petition (including petitioner's Exhibit L attached to her petition), and all of petitioner's submitted court papers that repeat or rely thereon, which states the following:

> 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 Section 450-460). The Vista court shares over 25% of these statistics, by conservative estimate (Exhibit L).

Said evidence, is located at p. 4, lns. 8-13., and Exhibit "L" is referenced at p. 11, lns. 8-9. Said evidence is relied on and/or repeated throughout petitioner's submitted court papers.

In the event that multiple objections are made with respect to individual pieces of evidence, each objection should be considered as independent or otherwise offered in the alternative to each other objection.

BASIS FOR OBJECTION

EVIDENCE: "[W]e all know that it's Judge Mills (*sic*) practice to order a defendant to appear at trial call...." (RT p.1, lines 22-23 dated November 9, 2006.)" Said statement, attributed to Deputy District Attorney Matthew Tag during a proceeding in this matter, is located at p. 4, lns. 12 through 15 of the Petition and is relied on and/or repeated throughout petitioner's submitted court papers.

OBJECTION(S):

a) Said Statement is Hearsay.

Evidence Code section 1200 defines hearsay as: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. [¶] (b) Except as provided by law, hearsay evidence is inadmissible."

Here, DDA Tag's statement was made while arguing matters before the respondent court, and not while he was under oath or subject to cross-examination. Petitioner offers the statement to support her assertion that there exists in the North County branch of the respondent court a blanket policy that uniformly and mechanically denies misdemeanants certain rights under Penal Code section 977, 1043 and elsewhere. Accordingly, the statement is offered for the "truth of the matter stated." Hence it is hearsay.

b) Said Statement Lacks Foundation.

Because DDA Tag has not been identified as an expert by petitioner, his statement must be analyzed pursuant to Evidence Code section 800, which provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."

DDA Tag was not a witness to any proceeding in this matter, not did he offer any testimony. As such, his statement fails to qualify as opinion evidence even on a fundamental level inasmuch as Evidence Code section 800 specifically pertains to "a witness" who offers "testimony." (Evid. Code, § 800, subds. (a) and (b).).

Moreover, there is no way for this court to determine whether DDA Tag's statement was based on his own perception, from hearsay statements of others, or if he had any real basis for making the statement at all. Hence, petitioner cannot here assert that DDA tag's statement was "[r]ationally based on the perception of the witness" as prescribed by subdivision (a) of Section 800

The statement lacks foundation and must be excluded.

* * *

EVIDENCE: "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 (*sic*) on may. (RT p.19 lines 13-15 dated November 9, 2006) Exhibit 'O')." Said statement, attributed to the Hon. Michael Kirkman of the North County Branch of the respondent court, is located at p. 4, lns. 15 through 18 (emphasis in original) and is relied on and/or repeated throughout petitioner's submitted court papers.

OBJECTION(S):

a) Said Statement is Hearsay.

Evidence Code section 1200 defines hearsay as: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. [¶] (b) Except as provided by law, hearsay evidence is inadmissible."

Here, Judge Kirkman's statement was made, one guesses, while discussing his apparent observations concerning the matters that came before him from Judge Mills' pre-trial department. Judge Kirkman was not a witness to the proceeding, did not testify, was not under oath when he made the statement and was not subject to cross-examination of any kind. Petitioner offers this statement, too, to support her assertion that there exists in the North County branch of the respondent court a blanket policy that uniformly and mechanically denies misdemeanants certain rights under Penal Code section 977, 1043 and elsewhere. Accordingly, the statement is offered for the "truth of the matter stated." Hence it is hearsay.

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b) Said Statement Lacks Foundation.

Because Judge Kirkman has not been identified as an expert by petitioner, his statement must be analyzed pursuant to Evidence Code section 800, which provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."

Judge Kirkman was not a witness to any proceeding in this matter, not did he offer any testimony. As such, his statement fails to qualify as opinion evidence even on a fundamental level inasmuch as Evidence Code section 800 specifically pertains to "a witness" who offers "testimony." (Evid. Code, § 800, subds. (a) and (b).).

Moreover, there is no way for this court to determine whether DDA Tag's statement was based on his own perception, from hearsay statements of others, or if he had any real basis for making the statement at all. Hence, petitioner cannot here assert that DDA tag's statement was "[r]ationally based on the perception of the witness" as prescribed by subdivision (a) of Section 800.

The statement lacks foundation and must be excluded.

Duplicate

* * *

EVIDENCE: That potion of defendant's Petition (including petitioner's Exhibit L attached to her petition), and all of petitioner's submitted court papers that repeat or rely thereon, which states the following:

> 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 Section 450-460). The Vista court shares over 25% of these statistics, by conservative estimate (Exhibit L).

Said evidence, is located at p. 4, lns. 8-13., and Exhibit "L" is referenced at p. 11, lns. 8-9. Said

evidence is relied on and/or repeated throughout petitioner's submitted court papers.

OBJECTION(S):

a) Said Evidence Lacks Foundation.

Neither petitioner nor petitioner's counsel have been identified as experts in this matter. As such, the statement "[t]he Vista court shares over 25% of these statistics, by conservative estimate (Exhibit L)" must be analyzed pursuant to Evidence Code section 800, which provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony."

Neither petitioner nor petitioner's counsel were witnesses to any proceeding concerning this issue specifically, not did they offer any testimony. As such, their statements fail to qualify as opinion evidence even on a fundamental level inasmuch as Evidence Code section 800 specifically pertains to "a witness" who offers "testimony." (Evid. Code, § 800, subds. (a) and (b).)

Moreover, there is no way for this court to determine whether petitioner's estimate, as provided, is at all accurate. There is no independent verification of the estimate, nor is there any methodology immediately apparent from petitioner's submitted court papers for determining how that estimate was derived. As a result, the estimate is without foundation and should be excluded.

CONCLUSION

For all the above reasons, plaintiff respectfully requests that this court sustain its objection to the herein referenced portions of the Petition and any and all documents submitted by petitioner that repeat said statements or rely thereon.

Respectfully submitted,

Dated: January 8, 2007

FULLER GLASER JENKINS

By: _____
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THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, APPELLATE DIVISION

CHRISTINA HARRIS, et al.

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest.

Case No. GIC876101

RESPONDENT'S RETURN TO ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF PROHIBITION/MANDATE

Comes now the Respondent, the Superior Court of California, County of San Diego, by and through its retained counsel, Randal L. Glaser of Fuller Glaser Jenkins, and respectfully submits the following Return to the Order to Show Cause on Christina Harris's Petition for Writ of Prohibition/Mandate, and alleges the following:

I. SCOPE OF RESPONDENT'S RETURN

Although rare, a respondent court may oppose a petition for extraordinary relief when: "(1) the real party in interest did not appear; and (2) '[t]he issue involved directly impacted the operations and procedures of the court or potentially imposed financial obligations which would directly affect the court's operations.'" (*James G. v. Superior Court* (2000) 80 Cal.App.4th 275, 280, citing *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1018-1019, *cf. Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1059.)

In the instant case, in addition to her request for a prerogative writ concerning issues that affect her individual penal interests, petitioner seeks an order from the appellate court awarding her attorneys' fees and costs pursuant to Code of Civil Procedure section 1021.5, said fees to be paid by the respondent court. Petitioner also seeks an order "directing the Vista Superior Court to set aside it's (*sic*) 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." (Petition, p. 2, lns. 18-25, emphasis in original; Petition, p. 12-13, lns. 21-2.)

On or about December 11, 2006, the real party in interest, the People of the State of California, timely filed its return in response to the instant petition. As one might expect, real party has no direct interest as to whether the appellate division awards petitioner her requested attorneys' fees, or whether the respondent court is directed to amend an existing court-wide procedure as alleged by petitioner. Consequently, while it addressed the issues directly related to the substantive issues attendant to the individual criminal action, *People v. Christina Harris*, real party did not address those issues of immediate and significant concern to respondent.

If granted, petitioner's request for attorneys' fees could potentially impose a substantial

financial obligation on the respondent court and, as a result, directly affect the respondent court's operations. Similarly, to the extent this Court were to grant petitioner's request concerning the respondent court's alleged "blanket policy" concerning misdemeanants, it would impact the operations and procedures of the respondent court on a court-wide basis. As the respondent court has a beneficial interest in the outcome of these proceedings as to each of these specific issues, and because the real party has not addressed either of these issues in its return to the degree necessary to sufficiently protect those interests, the respondent court properly appears on its own behalf for that purpose, and that purpose only. The respondent court does not take a position with respect to the merits of the petition as it relates to the underlying decision in the individual criminal action *People v. Christina Harris*.

II. ARGUMENT

A. THE PETITIONER FAILS TO ESTABLISH THAT THE RESPONDENT COURT PRACTICES OR MAINTAINS AN IMPROPER "BLANKET POLICY" CONCERNING MISDEMEANOR DEFENDANTS

The issuance of a writ is proper where an inferior court or tribunal has acted without or in excess of its jurisdiction, or has failed to act as prescribed by law. (Code Civ. Proc., §§ 1102, 1084-1985.) It is fundamental, therefore, that before a court may issue a writ, petitioner must first demonstrate that there exists circumstances which necessarily require the issuance thereof. A petition for extraordinary relief to the reviewing court must include a memorandum of points and authorities sufficient to permit review of the challenged practice or ruling. While the memorandum need not repeat facts included in the petition (Cal Rules of Ct., rule 8.490(b)(5)), a writ may not issue where petitioner fails to establish legal and factual grounds therefore.

As her petition concerns the internal policies and procedures of the superior court, petitioner contends that a writ must issue directing the North County branch of the respondent court to desist in further pursuing an alleged "blanket policy" "requiring all defendants (or most of them) to appear at trial (without a hearing determining a proper purpose)...." (Petitioner's Points and Authorities in Support of Petition, p. 5. lns. 4-6.) As such, petitioner's writ petition seeking to vindicate her own rights, as well as those of a purported class of "unnamed and future petitioners similarly situated and

charged with misdemeanors,"[1] appears to be similar to the writ petition filed and granted in the published case, *Olney v. Municipal Court* (1982) 133 Cal.App.3d 455.

In *Olney*, the Municipal Court for the El Cajon Judicial District of San Diego County had established a blanket policy of requiring misdemeanor defendants to personally appear at every readiness and sentencing hearing, irrespective of whether the individual defendants had waived there right to be personally present and regardless of whether the specific facts and circumstances of each individual case justified ordering a defendant to make a personal appearance. Misdemeanor defendant Olney, who pursuant to this blanket policy had been denied his right to be sentenced in absentia, petitioned the superior court for a writ of mandamus on behalf of himself and others similarly situated to end enforcement of this blanket policy. He also sought attorneys' fees pursuant to Code of Civil Procedure section 1021.5. The superior court granted the petition and awarded fees. The municipal court thereafter appealed the superior court's decision to the court of appeal.

On appeal the municipal court argued that the superior court had erred in issuing the writ on the grounds that there existed no statutory limitation on the power of a municipal court to require the personal presence of a misdemeanant at the time of sentencing. The appellate court disagreed, finding that a blanket policy that operates to "blindly strip all misdemeanants of their statutory right to be absent and represented by counsel where their particular case does not warrant a personal appearance at sentencing" may not be utilized. (*Id.*, at p. 462.) Instead, with respect to misdemeanants, the court must ensure that each defendant "be accorded an individual judicial assessment of his case before any judicial determination requiring his presence at sentencing." (*Id.*)

Olney, which is cited in petitioner's points and authorities, is easily distinguished from the instant case for the simple reason that, in *Olney*, there was in fact a well-supported basis for finding that the municipal court had in fact established a blanket policy which "ignore[d] the necessary

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[1] While it appears that petitioner seeks treatment as a class fro the purposes of justifying any award of attorneys' fees and costs pursuant to Code of Civil Procedure section 1021.5, the law provides that a class action may be certified only after filing of a properly-noticed motion and hearing. (*City of San Jose v. Superior Court (Lands Unlimited)* (1974) 12 Cal.3d 447, 453; *Carabini v. Superior Court (King)* (1994) 26 Cal.App.4th 239, 242; see also, Cal. Rules of Ct., rule 3.764(c), 3.765, 3.768.0.) Furthermore, each party would be entitled to discovery before the court sought to certify a class. (*Carabini*, *supra*, 26 Cal.App.4th at p. 244.) Petitioner has failed to follow the mandatory procedures for seeking class certification. As such, the respondent court generally objects to petitioner's efforts in this regard.

exercise of judicial discretion which must precede the deprivation of a misdemeanant's statutory right to be absent and appear through counsel." (*Id.*) Not only was there evidence that each misdemeanant was required to execute a written form providing: "DEFENDANT MUST BE PERSONALLY PRESENT AT THE READINESS HEARING UNLESS HE RESIDES OUT OF THE COUNTY. HE MUST ALSO BE PRESENT AT THE TRIAL," but that the municipal court refused to sentence Olney in absentia for the stated reason that it "was the uniform practice of the court to require the presence of defendants at sentencing." (*Id.*, at p. 458, uppercase in original.) Hence, the appellate court had little difficulty in finding that the municipal court had not only established a mechanical, uniformly-applied blanket policy violative of Olney's individual rights as provided by Penal Code section 977, but was improper on its face insofar as it stripped defendants of their statutorily-mandated entitlement to an individual assessment of whether they should have to personally appear at sentencing.

In contrast to the petitioner in *Olney*, who established clearly the existence of the offending practice, petitioner here fails utterly to establish the existence of a blanket policy, formal or otherwise, in the North County branch of the respondent court that in any way mechanically denies misdemeanants any right whatsoever. Indeed, despite the "blanket" and presumably ubiquitous nature of the uniform policy allegedly promulgated by the respondent court, petitioner is able to present a scant two bits of support—if it can be called that—to suggest that it even exists.

First, petitioner refers to an on-the-record statement by Deputy District Attorney Matthew Tag, one of the deputies involved in prosecuting the underlying action against petitioner, wherein he asserts, "we all know that it's Judge Mills practice to order a defendant to appear at trial call...." (Petition, p. 4, lns. 12-15.) Petitioner additionally relies on a statement by Judge Kirkman, one of the judges who presided over an aspect of petitioner's criminal proceedings, where, with respect to petitioner's claims about Judge Mills' alleged blanket policy, he makes the point, "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 (*sic*) many." (Petition, p. 4, lns. 15-18.)

For the purposes of sustaining petitioner's claims in her petition for extraordinary relief, this is thin gruel, to be sure.

Under no circumstances does DDA Tag's statement qualify as admissible evidence of any policy, formal or informal, adhered to by Judge Mills or any other judicial officer of the respondent court concerning misdemeanant defendants. DDA Tag's statement was not taken under oath, nor was it subject to cross-examination. Furthermore, nothing in the record establishes whether DDA Tag was speaking from personal knowledge or otherwise, or the basis for his opinion concerning Judge Mills' alleged practices. As such, DDA Tag's statement both lacks foundation and is hearsay. Accordingly, pursuant to respondent's objection filed herewith, DDA Tag's statement should be disregarded by this court.

In a similar vein, nothing in the record suggests that Judge Kirkman, when making his statement regarding Judge Mills' docket, was doing anything more than speaking extemporaneously, regarding the issue of whether Judge Mills (or anyone else) adhered to a blanket policy or practice concerning misdemeanants. Indeed, it seems that Judge Kirkman's statement can best be described as *dicta*, unrelated to the subject matter of what he was dealing with at the time he made it—*viz.*, whether petitioner should be required to appear personally—and nothing close to a finding of fact concerning Judge Mills' judicial practices or policies. As such, Judge Kirkman's statement should be disregarded by this court as little more than one judge's off-the-cuff remark about his particular experience with another judge's docket.

But even if the Court were to accept Judge Kirkman's statement as anything other than *dicta*, it is apparent that his statement favors respondent's position significantly more so than it does petitioner's. Judge Kirkman makes the point that while he sees many cases from Judge Mills' department where a misdemeanant has been ordered to appear at trial, such is not always the case. Accordingly, petitioner's claim that there exists a blanket policy that uniformly and mechanically requires misdemeanants to appear at court proceedings regardless of the circumstances is belied by nothing less than petitioner's very own evidence which, taken on its face, demonstrates that in effect no such policy exists.

Importantly, nothing in Judge Kirkman's statement comes close to suggesting that Judge Mills or any judicial officer of the respondent court has ever imposed or enforced a uniform policy that might wrongfully require a misdemeanant to personally appear at trial or any other court

proceeding. Indeed, that Judge Kirkman might be of the impression that "many" misdemeanants appearing before him after going through Judge Mills' pretrial department had been ordered to appear at trial in no way suggests that Judge Mills, after using the appropriate degree of discretion on an individualized basis, did not have good reason to order each of those defendants to appear. After all, not all misdemeanor defendants stipulate to identification, many do not waive their right to be personally present at trial, and many are properly ordered to appear at trial because of other valid reasons.[2] Hence, even assuming that Judge Kirkman finds that many of the misdemeanants reporting from Judge Mills' department have been ordered to appear at trial, his observation says absolutely nothing about whether or not there exists a blanket policy that wrongfully requires misdemeanants to appear in person at trial.[3]

Simply stated, petitioner has failed to sustain her burden of establishing through the submission of admissible evidence that there exists a blanket policy in the North County branch of the respondent court that operates to uniformly and mechanically deny either petitioner or other misdemeanants any right provided them by law. Petitioner has therefore failed to sustain her burden of demonstrating that this court has reason to issue a writ directing the North County branch of the superior court to in any way amend its policies or procedures, written or otherwise, with respect to misdemeanor defendants.

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[2] For instance, during the relevant time period, Penal Code section 977(a)(2) specifically provided (and still provides) that, irrespective of Section 977(a)(1), persons charged with violations of "a misdemeanor offense involving domestic violence, as defined in Section 6211 of the Family Code, or a misdemeanor violation of Section 273.6, the accused shall be present for arraignment and sentencing, and at any time during the proceedings when ordered by the court for the purpose of being informed of the conditions of a protective order issued pursuant to Section 136.2." Ironically, as of January 1, 2007, persons charged with a misdemeanor offense of driving under the influence may, "in an appropriate case," be ordered to be present at the time of arraignment, time of plea, or time of sentencing. (Penal Code, § 977(a)(3).)

[3] Despite the negative connotation, not all "blanket policies" are improper. If the court were to maintain a blanket policy that required judges to uniformly and mechanically apply the mandate of Penal Code sections 977 and 1043, such a policy would not be improper. It is worth noting, therefore, that Judge Kirkman's observation could just as easily be construed so as to suggest that, if there is a blanket policy in Judge Mills' department, it is exactly this.

B. PETITIONER HAS FAILED TO DEMONSTRATE THAT SHE IS ENTITLED TO ATTORNEYS' FEES PURSUANT TO CODE OF CODE CIV. PROC., § 1021.5

1. Petitioner Has Failed to Achieve Her Litigation Objectives.

It is undisputed that a court may award attorneys' fees under the so-called "private attorneys general theory" as codified in Code of Civil Procedure section 1021.5, where a party is successful against one or more opposing parties in actions "resulting in enforcement of an important right affecting the public interest." (*Id.*) Under Section 1021.5, the party seeking fees must demonstrate that a significant benefit, whether pecuniary or non-pecuniary, has been conferred on the general public or a large number of persons; that the necessity and financial burden of private enforcement are such as to make a fee award appropriate; and finally, that the interests of justice require that such fees be paid by the opposing parties rather than out of any recovery obtained in the litigation. (Code Civ. Proc., § 1021.5.)

It is the party seeking the fee award who bears the burden of demonstrating an entitlement to such fees. (*Save Open Space Santa Monica Mountains v. Superior Court (County of Los Angeles)* (2000) 84 Cal.App.4th 235, 246.) At a minimum, the fee claimant must demonstrate to the court that it achieved its litigation objectives. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 570-571; *Lyons v. Chinese Hosp. Ass'n* (2006) 136 Cal.App.4th 1331, 1345.)

As argued in Section II above, petitioner has failed to demonstrate that there exists (or that there ever existed) a blanket policy that uniformly and mechanically denies misdemeanants any right conferred upon them by Penal Code sections 977 or 1043. Petitioner's request for a writ directing the respondent court to in any way amend its operating procedures must therefore be denied.

Given this, it cannot be said that petitioner enforced an important right affecting the public interest, that she obtained a significant benefit for the public, or that she even achieved her litigation objectives insofar as they concerned the court as a whole, its formal or informal policies or any impact those policies might have on the general public. In turn, it follows that petitioner's concomitant request for attorneys' fees pursuant to 1021.5 must be denied for want of a successful result as required by *Graham v. DaimlerChrysler Corp.*, *supra*, 34 Cal.4th at pp. 570-571 and *Lyons v. Chinese Hosp. Ass'n, supra*, 136 Cal.App.4th at p. 1345.

2. Petitioner Has Failed to Demonstrate that Her Petition Primarily Vindicates a Public Benefit.

"Section 1021.5 is intended as a 'bounty' for pursuing public interest litigation, not a reward for litigants motivated by their own interests who coincidentally serve the public." (*California Licensed Foresters Association v. State Board of Forestry* (1994) 30 Cal.App.4th 562, 570; *Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1047.) An award of attorneys' fees is not proper under Section 1021.5 where the litigation's *primary effect* is vindication of plaintiff's own personal rights or economic interest. (*Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 636, emphasis added.) In addition to establishing each statutory requirement of Section 1021.5, petitioner bears the burden of demonstrating that its litigation costs transcend her personal interest in the litigation. (*Save Open Space Santa Monica Mountains*, *supra*, 84 Cal.App.4th at p. 246.)

Here, petitioner is a criminal defendant in a DUI case that has yet to be fully adjudicated. There is currently a bench warrant issued for her arrest that, but for the stay imposed by this court, would subject petitioner to immediate arrest and extradition to California from her place of residence in Arizona for purposes of appearing before the respondent court as ordered by Judge Mills. Service and execution of the bench warrant subjects petitioner to a fine or imprisonment or both, and could further require petitioner to post bond to secure her release during the pending court proceedings on her case. By her own admission, "appearing at trial would pose a hardship on Plaintiff, as stated in detail in herein and outlined in her financial declaration, attached hereto as Exhibit "F." (Petition, p. 10, lns. 5-7.) Petitioner observes that during the proceedings before the trial court, "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." (Petition, p. 8, lns. 9-10, emphasis in original.) Assuming she is successful, petitioner prays for an immediate dismissal of the case against her for failure to prosecute her case in a manner consistent with her asserted rights to a speedy trial. (Petitioner's Points and Authorities in Support of Petition, p. 6, lns. 7-13; p. 8, lns. 15-16.)

Given these facts, petitioner cannot reasonably contend that, by her petition, she does not in fact seek to primarily vindicate her personal rights and economic interests *at least* to the same extent

she seeks to vindicate the public's rights as a whole. Hence, even if this court is persuaded by petitioner's unsupported arguments that a writ should issue directing the North County branch of the respondent court to amend its polices and procedures, petitioner would still not be entitled to attorneys' fees pursuant to Section 1021.5 insofar as any success she might have is demonstrably motivated at least as much by her personal pecuniary and penal interests as it is by any coincidental vindication of any public right. (*California Licensed Foresters Association, supra*, 30 Cal.App.4th at p. 570; *Ryan v. California Interscholastic Federation, supra*, 94 Cal.App.4th at p. 1047.)

It is ironic that in seeking attorneys' fees, petitioner cites again to *Olney, supra*, which clearly works *against* her with respect to her request for Section 1021.5 fees. In its discussion of whether Olney was entitled to an award of attorneys' fees, the appellate court observed:

> Unlike *Marini*, the result of this action was not wholly coincidental to the attainment of his personal goals. He stood convicted and, consequently, the result of the litigation would neither alter that reality nor his sentence. His personal goal was simply incidental to the broader violation of the statutory right in dispute held by all within his class. Moreover, he had no personal financial interest in the outcome to offset the litigation expenses incurred.

(*Olney v. Municipal Court, supra*, 133 Cal.App.3d at p. 464, referencing *Marini v. Municipal Court* (1979) 99 Cal.App.3d 829 [any public benefit possibly derived from litigation was incidental to petitioner's primary purpose of avoiding conviction and gaining entry into local diversion program.].) Applied directly to the instant case, the *Olney* court would most certainly hold differently with regard to petitioner's request for Section 1021.5 attorneys' fees.

Paraphrasing *Olney*, petitioner has yet to be convicted and, consequently, the result of the instant petition could in fact alter whether she is ever convicted or sentenced. Petitioner's personal goal can hardly be said to be incidental to the alleged violation of the statutory right in dispute held by those within her proposed class. Moreover, petitioner admits—bemoans, even—that she has a significant personal financial interest in the outcome of the litigation which, consequently, tends to offset the expense and burden of bringing the petition on her own behalf. (Petition, p. 8, lns. 9-10; p. 10, lns. 5-7.)

Petitioner has failed to demonstrate that she is a "true" private attorney general seeking to

vindicate a public right greater than her own personal interest in the outcome of the litigation. Accordingly, irrespective of whether the court grants petitioner's request for a prerogative writ, she is not entitled to attorneys' fees and costs pursuant to Code of Civil Procedure section 1021.5.

IV. CONCLUSION

Respondent appropriately appears in this action on the grounds that the instant petition for extraordinary relief that, if granted, would directly impact the operations and procedures of the respondent court or potentially impose financial obligations which would directly affect the court's operations, and as to which the real party in interest has not addressed. Petitioner has failed to demonstrate by the submission of admissible evidence that there exists a "blanket policy" which uniformly and mechanically operates to deny misdemeanor defendants any rights conferred otherwise conferred upon them under Penal Code sections 977, 1043 or any other provision of law. As a result, petitioner cannot establish that this court should issue a writ directing that the North County branch of the respondent court should in any way amend its formal or informal policies and procedures. Because petitioner has failed to establish the predicate facts necessary to secure the issuance of a writ directing the respondent court to amend its polices, petitioner cannot establish an entitlement to attorneys' fees and cost pursuant to Code of Civil Procedure section 1021.5. Moreover, because petitioner's writ request, granted or not, seeks to vindicate her own personal pecuniary and non-pecuniary interests at least as much as it seeks to vindicate a public benefit, petitioner is barred from seeking fees as a "private attorney general" under Section 1021.5.

Based upon the argument and authorities presented herein, respondent respectfully requests that this court deny petitioner's request for any relief which might impact the respondent court's formal or informal polices and procedures, and that it further deny petitioner's request for costs and attorneys' fees under Code of Civil Procedure section 1021.5.

Respectfully submitted,

Dated: January 8, 2007

FULLER GLASER JENKINS

By: _____
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