

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE, APPELLATE DIVISION

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff/Respondent,

v.

██████████ FRANCO,

Defendant/Appellant,

CITY OF FULLERTON (Police
Department), Real Party in Interest.

Case No. 30-200800093057

Orange County Superior Court
Case No. FL45261PE

MOTION TO RECALL REMITTITUR

ON APPEAL FROM THE SUPERIOR COURT, DEPT. N1
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**TO THE HONORABLE PRESIDING JUDGE ROBERT J. MOSS
AND ASSOCIATE JUDGES OF THE APPELLATE DIVISION OF
THE ORANGE COUNTY SUPERIOR COURT:**

I. INTRODUCTION.

As a Real Party in Interest, the City of Fullerton respectfully moves this Court to recall the remittitur in the above-entitled action, filed on December 9, 2008 and/or order the Superior Court to rescind its order in compliance therewith on December 26, 2007, dismissing the citation and vacating the guilty counts in this matter, for the purpose of modifying the Judgment on Appeal to omit reference to a contract of the City of Fullerton, as the City had no notice of the appellate proceedings in this matter and was precluded from participating in such proceedings by such failure of notice. The failure of the City to be notified of any appellate proceedings in this matter was a fundamental denial of due process, which requires this Court's recall of its remittitur, in order to rectify such violation of due process.

II. STATEMENT OF FACTS AND CASE.

The City of Fullerton, as a Real Party in Interest in this matter, moves this Court to recall its remittitur in this matter, as having been improperly issued in violation of the City's due process rights, due to the failure of the City to receive any notice of appellate proceedings in this matter.

Defendant, [REDACTED] Franco ("Franco"), was charged with

running a red light in violation of California Vehicle Code Section 21453 (a) on September 4, 2007, in case number FL45261PE in the Superior Court of the State of California, County of Orange. (See City's Request for Judicial Notice, filed concurrently herewith ("RJN"), Item 1 (Docket Report, at p.1, 9/10/07, l. 3)).¹ In particular, she was cited for such violation by way of a red light camera. (RJN, Item 1 (Docket Report at p. 1, 12/26/07, l. 9)).

Franco was convicted of such violation and appealed that conviction to the Appellate Division of the Superior Court. (RJN, Item 1 (Docket Report at p. 2, 12/26/07, l. 19 & 1/11/08, l. 1)). Her notice of appeal was filed January 11, 2008. (See RJN, Item 2 (Notice of Appeal)).² Her proof of service on that notice of appeal indicates that she served a copy of it only by mail to the *Orange County District Attorney's Office*. The City of Fullerton received no notice of any appellate proceedings in this matter. (See *infra* p. 25 (Declaration of Kevin Hamilton ("Hamilton Decl.") at ¶¶ 2, 6); p. 28 (Declaration of Linda McElwee ("McElwee Decl.") at ¶ 2); and p. 29 (Declaration of Krista MacNevin Jee ("Jee Decl.") at ¶ 2)).

Although the criminal court docket report indicates that the Superior

¹ The City has requested that this Court take judicial notice of this document, which is already part of the Court's file in this matter, by the Request for Judicial Notice, filed concurrently herewith, ("RJN") item no. 1.

² The City has also requested that the Court take judicial notice of this document in the Court's file. See RJN, item no. 2.

Court gave notice of Defendant Franco's notice of appeal to "Officer McElwee," who is with the Fullerton Police Department, no such notice was ever received by her or the Fullerton Police Department or the City. (See infra p. 25-6 (Hamilton Decl. at ¶¶ 4, & 6); p. 28 (McElwee Decl. at ¶ 2); p. 29 (Jee Decl. at ¶¶ 2 & 4)). In fact, the City is informed and believes from the Criminal Operations Division of the Superior Court, which handles all Traffic and Criminal appeals, that it routinely provides notice of appeals only to the *District Attorney*. (See infra p. 29 (Jee Decl. at ¶ 3)).

A hearing on the settled statement on appeal was heard on April 2, 2008. (RJN, Item 1 (Docket Report at p. 2, 4/2/08, l. 1)). Notice of this hearing was mailed only to Defendant and the *District Attorney*. (RJN, Item 1 (Docket Report at p. 2, 3/6/08, l. 1)).

Moreover, the City did not actually participate in any of the appellate proceedings, including the hearing on the settled statement on appeal. The Superior Court's docket explicitly reflects that, at the hearing, the "People [were] represented by Daryl Bassin," who is erroneously identified in the docket as the "Deputy City Attorney," but does not act in any such capacity for the City of Fullerton. (RJN, Item 1 (Docket Report at p. 2, 4/2/08, l. 5)); see also infra pp. 29 (Jee Decl. at ¶ 4)). The City is informed and believes that Mr. Bassin represents the City of *Anaheim*. (Infra p. 30 (Jee Decl. at ¶ 4)). There is no such individual acting as

Deputy City Attorney for the City of Fullerton. (*Infra* p. 29 at ¶ 4) At no time did Mr. Bassin have authority to act on behalf of Real Party in Interest, the City of Fullerton, if he even ever did. (*Infra* p. 30 at ¶ 4).

The City was provided no notice of the appellate proceedings in this matter. (See *infra* p. 25-6 (Hamilton Decl. at ¶¶ 4 & 6); p. 28 (McElwee Decl. at ¶ 2); and p. 29-30 (Jee Decl. at ¶¶ 2 & 4)). No one on behalf of the City actually participated in any appellate proceedings relating to Defendant Franco. (See *infra* p. 29-30 (Jee Decl. at ¶ 4)).

In particular, no written notice was provided to the City of the appellate proceedings in this matter. (RJN, Item 1 (Docket Report, at p. 2, 1/11/08, l. 2; 3/6/08, l. 1)); *infra* p. 25-6 (Hamilton Decl. at ¶¶ 4 & 6); p. 28 (McElwee Decl. at ¶ 2); and pp.29-30 (Jee Decl. at ¶¶ 2 & 4)). Instead, the City first learned of the appeal and dismissal on or about December 11, 2008, when Jennifer Muir of the Orange County Register contacted Officer Kevin Hamilton of the Fullerton Police Department for the City's comment on the ruling on the decision on appeal in Defendant Franco's case. (*Infra* p. 25 (Hamilton Decl. at ¶ 2)). At approximately the same time, Officer Hamilton received a call from the Orange County Register affiliate reporter Barbara Giasone regarding the ruling. (*Infra* p. 25 (Hamilton Decl. at ¶ 3)). At or about the same time, Commissioner Stone informed Officer Ryan Warner of the Fullerton Police Department regarding the ruling, since

Officer Warner is a Fullerton motor officer who regularly testifies in traffic court at the North Justice Center of the Orange County Superior Court. (*Infra* p. 25 (Hamilton Decl. at ¶ 5)).

The Orange County Register article for which Jennifer Muir was seeking comment from the City of Fullerton on the citation dismissal was published on December 12, 2008. (*Infra* p. 26-7 (Hamilton Decl. at ¶ 7)). Notably, the article reflects the fact that “Fullerton officials were unaware of the ruling until contacted by Register reporters on Thursday.” (*Infra* p. 26-7 (Hamilton Decl. at ¶ 7, Exhibit A)).

The failure of notice to the City is critical because Defendant Franco apparently challenged the contract by which the City of Fullerton provides for operation, maintenance and documentation of its red light cameras as part of her appeal. In particular, Section 21455.5 of the California Vehicle Code prohibits contracts which allow compensation to a contractor operating automated enforcement equipment “based on the number of citations generated, or as a percentage of the revenue generated.” Cal. Veh. 21455.5 (g)(1). The City of Fullerton maintains that its contract for red light camera maintenance and operation is in compliance with California Vehicle Code Section 21455.5, but was precluded from addressing the substantive merits of this contract by the failure of notice to the City as to any appellate proceedings in this matter, or notice as to any challenge

during the appellate proceedings regarding the validity of its contract.

Judgment was issued on the appeal on December 8, 2008, when the trial court's judgment was reversed and the citation was dismissed. (RJN, Item 1 (Docket Report at p. 3, 12/8/08, l. 1)). The judgment, to the extent it purported to determine the validity of a contract not properly before it and concerning parties without notice of such consideration, was in violation of law. By the time the City discovered that the appellate proceedings had occurred and that a decision had purportedly been made relating to the validity of its contract, the time to request reconsideration by this Court or to request transfer to the Court of Appeal had expired. If this Court does not intervene to recall its remittitur, the due process rights of the City will have been violated to the detriment of the public interest.

This motion is brought within a reasonable time³ of the City having inadvertently discovered that appellate proceedings occurred in the above-referenced matter, at which challenges were made to the validity of a City contract, without notice to the City or the City's participation in those

³ Although the Minute Order of the Superior Court dismissing the citation did not occur until December 26, 2008, that order was not yet reflected in the docket report at the time, December 15, 2009, that the City was researching the appellate proceedings about which it inadvertently learned had already occurred. In addition, there is no indication that the City was provided any notice of the further proceedings in the Superior Court on December 26, 2008. In fact, as set forth in this motion and the supporting declarations filed with this motion, the City was *not* provided any notice. Furthermore, as with all other documents in this matter, the remittitur was served on the Orange County District Attorney's Office. Any reasonable delay in seeking relief from the Court of Appeal or this Court by the City was due to both a failure to receive any notice of proceedings in this matter in the first instance, as well as the time for preparation of the Petition for Writ of Mandate to the Court of Appeal, this subsequent motion and the City's due diligence in researching what notice had been give by the Court as to the appellate proceedings.

appellate proceedings, and after the City could conduct a due diligence investigation as to notice that it had or had not received.⁴ (*Infra* p. 30 (Jee Decl. at ¶ 5)).

III. ARGUMENT.

The City's due process rights were violated when the above-entitled action was dismissed without any notice to the City that any appellate proceedings were pending in this matter, or that there was any substantive challenge to the validity of its contract. This constitutes a miscarriage of justice which can only be remedied by the granting by this Court of the requested recall of the remittitur. If this Court's remittitur and this Court's Judgment on Appeal are permitted to stand based as they currently are upon the purported finding of the invalidity of a City contract not properly before this Court, the City will have been deprived of its due process rights in violation of law. In addition, the public interest will have been detrimentally affected, in that an appellate judgment by this Court as to the validity of the City's contract will be permitted to stand without valid process of law, and without an adversarial hearing with interested parties, in violation of fundamental rights and public policy. By this Court's Judgment on Appeal, the validity of the City of Fullerton's contract with its

⁴ The City filed a Petition for Writ of Mandate on April 22, 2009 with the Court of Appeal. The Court of Appeal denied that petition May 7, 2009, without prejudice to the filing of the instant motion to recall the remittitur with the Appellate Division.

red light camera operator has been called into question with respect to all past, present, and future red light prosecutions and convictions, without adequate appellate inquiry into the validity of such agreement. This violation of rights must be corrected by this Court's recall of the remittitur and modification of the Judgment on Appeal to remove findings relating to the City's contract.

A. **The City's Due Process Right Were Violated as The City Was Not Given, But Was Entitled to, Notice and An Opportunity to Be Heard in the Appellate Proceedings.**

The City was simply not provided any notice at any time that any appellate proceedings were pending in this matter, or that the validity of its contract was at issue in such appellate proceedings. (*Infra* p. 25-6 (Hamilton Decl. at ¶¶ 4 & 6); p. 28 (McElwee Decl. at ¶ 2); p. 29 (Jee Decl. at ¶¶ 2 & 4)). All appellate notices were sent to the *District Attorney's Office*. (*Infra* p. 29 (Jee Decl. at ¶3)). The City, as a Real Party in Interest as to the challenge by Franco to the City's red light camera operator contract, was entitled to notice and an opportunity to be heard, based on fundamental concepts of due process, but was precluded from participating in the appellate proceedings challenging its contract, and from exercising any available appellate or review rights by the failure to receive notice of the appellate proceedings, this Court's judgment on appeal and the

subsequent dismissal of the matter by the Superior Court. In fact, the City of Fullerton would have had the ability to prosecute the matter itself with the approval of the District Attorney, if the District Attorney has, for instance, a blanket policy not to prosecute misdemeanor appeals. Cal. Govt. Code § 41803.5.

The City did not learn of the appeal until December 11, 2008, and then only inadvertently and not by notice (*infra* p. 25 (Hamilton Decl. at ¶ 2)); since the judgment was filed November 21, 2008, any appellate rights had at that point already expired, and in any event, additional time was required for the City to independently verify the information obtained regarding the judgment from unofficial sources. See Cal. Rules Ct., Rule 8.889 (petition for rehearing required to be filed within 15 days after decision on appeal filed); Cal. Rules Ct., Rule 8.1005 (application for certification to transfer misdemeanor appeal to Court of Appeal must be filed “within 15 days after judgment is pronounced”).

The failure of due process is critical because the findings by this Court in its judgment on appeal in this matter purport to determine the validity of a contract between the City of Fullerton and a third party. (RJN, Item 3 (Judgment on Appeal)). The judgment, issued in violation of the due process rights of the City, affects past, present and future red light camera prosecutions within the City of Fullerton.

Since the City was given no notice whatsoever of the existence of any appellate proceedings on Defendant Franco's conviction, or of the challenge she apparently made during such proceedings to the City's contract, the City was deprived of the ability to participate in proceedings which purportedly determined the validity of a contract to which it is a party but in which neither the District Attorney nor Franco had any interest. In fact, the City only inadvertently learned of the proceedings after the proceedings had already concluded and *after* the time had already expired as to any appellate rights to overturn such decision, such as a petition for certification of the matter for transfer to the Court of Appeal or for rehearing by the this Court, as cited above.

Notably, the California Supreme Court, in virtually identical procedural circumstances as presented herein, has found that a police department is a *real party in interest* as to the validity of its red light camera enforcement operations. See People v. Fischetti/(Santa Ana Police Department), 2009 Cal. LEXIS 2544, Order filed March 10, 2009 in Case No. S170231. The Supreme Court, in fact, specifically changed the title of the case in Fischetti to reflect the "City of Santa Ana Police Department" as a "Real Party in Interest."⁵

⁵ An Appellate Division opinion was depublished by the California Supreme Court in *People v. Fischetti*, 170 Cal. App. 4th Supp. 1 (2008). Subsequently, the Supreme Court issued the modified order referenced in the text in order "to reflect the title" as indicated. The Appellate

The City, then, is at minimum a Real Party in Interest and has been prevented, by a denial of due process, from participating in the appellate proceedings as to the purported determination of the validity of the City's contract with a third party. The City has further been deprived of any ability to timely and properly challenge this Court's Judgment on Appeal, due to the City receiving no notice of the appellate decision in this matter or of subsequent proceedings after the appellate decision.

The issues presented in this motion are of great importance, both because of the public interest in fair and full legal proceedings, and due to the impact that this Court's findings and judgment on appeal has on past, present and future prosecutions of red light violations within the City of Fullerton.

When Defendant Franco appealed her conviction in this matter, notice of the appeal was *not* provided to the City, nor was notice provided to the City of her challenge to the City's contract with its red light camera operator. (*Infra* pp. 25-6 (Hamilton Decl. at ¶¶ 4 & 6); p. 28 (McElwee Decl. at ¶ 2); pp. 29-30 (Jee Decl. at ¶¶ 2 & 4)). Further, no notice was provided of any subsequent appellate proceedings relating to that appeal.

Division's depublished opinion indicates that the underlying facts are virtually the same as this case, i.e. a criminal defendant challenged a red light camera conviction and the City police department that issued the citation was deemed a real party in interest. The depublished opinion is referenced here not for any precedential value, but for context in recognizing the significance of the later order issued by the California Supreme Court.

(Id.) Since notices relating to the appellate proceedings were sent only to the *District Attorney* and Defendant Franco, the City never received any notice whatsoever of the appellate proceedings and their direct affect on the City's interests. (*Infra* p. 29 (Jee Decl. at ¶ 3)). Even though it was apparently important enough for the Court to have purportedly provided a copy of the notice of appeal to Officer McElwee of the Fullerton Police Department, no such notice was ever received by her, and it is apparently the practice of the Court's clerk to only send the notice of appeal to the *District Attorney*. (*Infra* p. 28 (McElwee Decl. at ¶2); p. 29 (Jee Decl. at ¶ 3)). The Court's docket even erroneously represents that a Deputy City Attorney for the City of *Anaheim* appeared at the hearing on the settled statement on appeal. This individual was never representing the City of Fullerton, and the City had no notice of this or any other appellate proceedings in this matter. (*Infra* p. 26 (Hamilton Decl. at ¶ 6); pp. 29-30 (Jee Decl. at ¶¶ 2 & 4)).

Defendant Franco apparently claimed, during the appellate proceedings challenging her red light violation conviction, that the contractual agreement between the City of Fullerton and its red light camera operator was invalid. Without due process of law, the Appellate Division made a determination on such claim, granting her appeal without any notice to, or participation by, the City of Fullerton, which is a Real

Party in Interest as to such claim. It was impermissible for this Court to have purported to decide the validity of such contract without notice to the City of Fullerton. This manifest violation of due process was twofold: Defendant Franco's claim of contractual invalidity was not substantively addressed by any adversarial process represented by the parties, *and* the validity of a contract of the City of Fullerton, which was not even a named party to the proceedings, was challenged without notice to the City or its opportunity to participate in such challenge. Based on the foregoing, there was a direct violation of due process, which can only be corrected by this Court's recall of the remittitur and modification of the Judgment on Appeal to omit any purported findings as to the validity of the City's contract with its red light operator.

The City's right to due process under these circumstances is clear. As mentioned above, the California Supreme Court has recognized a police department as a real party in interest in similar circumstances. People v. Fischetti/(Santa Ana Police Department), 2009 Cal. LEXIS 2544, Order filed March 10, 2009 in Case No. S170231. In fact, the situation in this matter is akin to a Pitchess motion for the release of peace officer personnel records. Cal. Evid. Code § 1043. Although the Pitchess procedures have now been codified, the right of an employing police department to participate as a *real party in interest* in the decision to reveal its employee's

personnel records in any criminal proceeding, even though it may not be directly involved in the criminal prosecution, has long been recognized. Pitchess v. Superior Court, 11 Cal. 3d 531 (1974). The principles underlying the two circumstances are the same; a party with a direct and substantial interest in an important issue being decided, whether the privacy of records or the validity of a contract underlying all red light camera prosecutions, has a right and an interest in participating in such proceedings.

In addition, the City's rights, as a Real Party in Interest, to due process and to participate in proceedings relating to its contract validity are similar to the right of the People to due process, which right is readily recognized. See Miller v. Superior Court, 21 Cal. 4th 883, 896 897 (1999) ("the prosecution's right to due process has been invoked to affirm its right to be heard in various preliminary or collateral proceedings"). The People have a constitutionally recognized "interest in successful prosecutions and... [have a] right to due process of law under article I, section 28, subdivision (d) of the California Constitution." Story v. Superior Court, 109 Cal. App. 4th 1007, 1014 (2003) (citing Menendez v. Superior Court, 3 Cal.4th at p. 456, fn. 18)).

Furthermore, without question, due process requires "*the opportunity to be heard*, a right that has little reality or worth unless one is *informed*

that the matter is *pending* and can *choose* for himself whether to contest. In the context of the opportunity to be heard, it is not just the defendant but *also the People* who are entitled to due process in a criminal proceeding. In an adversary proceeding where an order may affect the rights of an adverse party, *notice must be given* to protect the adverse party's right to be heard on the issue as a matter of due process of law." Dep't of Corr. v. Superior Court, 199 Cal. App. 3d 1087, 1092 (1988) (internal citations, quotations and deletions omitted) (emphasis added). In a criminal case, the People of the State of California explicitly have the right to due process, pursuant to provisions of the California Constitution, as well as having the right to a speedy and public trial. Cal. Const., art. I, §29.

The California Supreme Court recently reiterated the fundamental concept of due process being a right of the People, in the context of that Court's consideration of a petition for writ of habeas corpus. The Supreme Court found that a superior court's order was "properly reversed because the court *violated the People's right to due process by not giving them notice or the opportunity to be heard*. Due process required those things at the least. The very purpose of giving the parties notice and the opportunity to be heard is to give them a chance to *present information* that may affect the decision." In re Large, 41 Cal. 4th 538, 551 552 (2007) (internal citations omitted) (emphasis added).

The Supreme Court has further stated that there is “no doubt that, as a party to the underlying criminal proceeding, the [prosecuting authority] under general due process principle is entitled to notice of the date and place of the hearing. . . . In this manner, if the court requires clarification or explanation of any matters set forth in the supporting affidavits, it will be able to ask questions of both the defense and the prosecution and thus obtain any information the court deems essential to a fair and proper decision.” Alford v. Superior Court, 29 Cal. 4th 1033, 1044 1045 (2003) (internal quotations omitted). For instance, in People v. Gonzales, 235 Cal. App. 2d Supp. 887, 891 (1965), the Court of Appeal found that the lower court could *not dismiss* a criminal case pursuant to California Penal Code section 1385 on its own motion *without affording the prosecution notice and an opportunity to be present*.

And although the rights of the People and third parties with a limited interest in criminal actions may be aligned, they are not the same, such that notice to one can be deemed notice to the other. In People v. Superior Court (Humberto S.), 43 Cal. 4th 737, 752 (2008), the California Supreme Court recognized that, at third party discovery hearings, “the prosecution’s interests and arguments may align with those of one or more third parties, but the prosecution does not thereby assume representation of those parties.” In fact, the Supreme Court held in Humberto S. that the district

attorney may not even have a right to participate in third party discovery matters. Similarly, a purported determination by this Court of the rights, obligations and validity of a contract between the City of Fullerton and its red light camera operator was not of primary interest to the District Attorney and should, respectfully, not have been determined absent notice and an opportunity to be heard being provided to the *City*. Like the third party discovery at issue in Humberto S., the red light camera operator contract was relevant to the interests of only third parties, including the City, which had no notice whatsoever of the appellate proceedings.

Based on the above principles, the City of Fullerton, as a Real Party in Interest, was entitled to notice of the appeal proceedings commenced by Defendant Franco, or at a minimum, was entitled to notice and an opportunity to participate in those proceedings prior to the Appellate Division issuing findings relating to the validity of the City's contract with its red light operator. Notice to another governmental entity, the *District Attorney's Office* for the *County* of Orange, does *not* suffice to put the City of Fullerton on notice as to the direct challenge made by Defendant Franco to the *City's* contractual rights and obligations. No more fundamental and self-evident violation of due process could have occurred than that this Court purportedly decided the validity of a contract for which the primary parties with any interest in such contract were not notified in any way of the

consideration of such contract.

The City of Fullerton, which is not even itself a party to the criminal action, was prevented from participating in proceedings which directly challenged the validity of an on-going contractual relationship between the City and a third party. Of critical importance is the fact that this contractual relationship is on-going and the Appellate Division's judgment in this matter in violation of due process impacts past, present and future citations and convictions within the City of Fullerton. This significant deprivation of the City's due process rights cannot be permitted to stand, or else the very backbone of our judicial system would be detrimentally undermined.

In fact, the Appellate Division's judgment on appeal is, in fact, *void*. See, e.g., Reid v. Balter, 14 Cal. App. 4th 1186, 1193 (1993) ("dismissal was a clear violation of plaintiffs' due process rights and the order of dismissal is *void*") (internal citation omitted). As discussed above, this Court's judgment was without proper due process of law to the City of Fullerton and, therefore, resulted in a void judgment. This Court, therefore, is respectfully requested to recall its remittitur in this matter and/or to order the Superior Court to rescind its order dismissing the citation in this matter and vacating the guilty finding.

B. This Court May Issue A Recall of Its Remittitur at Any Time For Good Cause, and There Is Good Cause Under the Circumstances of this Case.

California Rules of Court, Rule 8.890 provides that the Appellate Division of the Superior Court may recall its remittitur for “good cause” on the motion of any party. Cal. Rules Ct., Rule 8.890 (c)(2). There is no time limit stated in Rule 8.890.

Generally, a remittitur may be recalled upon improper notice. In In re Martin, 58 Cal. 2d 133 (1962), a habeas corpus petition was considered after the dismissal of a criminal defendant’s appeal due to his failure to file an appellate brief. Similarly, in People v. Hickok, 92 Cal. App. 2d 539 (1949), a defendant’s appeal was dismissed for failure to file an appellate brief, but the appeal was reinstated by recall of the remittitur due to *improper notice* having been provided to the *wrong legal counsel* for the defendant.

Even a delay of several years will not render recall of a remittitur and reinstatement of an appeal either untimely or improper. See, e.g., People v. Campbell, 239 Cal. App. 2d 252 (1966) (recall of remittitur granted as to 1954 conviction when case involved a “constitutional violation [which] is relevant to an issue at the heart of which is the fundamental principle of due process -- fairness of the proceedings . . .”).

See also, e.g., People v. Collins, 220 Cal. App. 2d 563, 566 (1963) (recall of remittitur granted after lapse of 10 years); In re Fierro, 169 Cal. App. 3d 543 (1985) (recall of remittitur granted based upon improper notice to defendant).

Based on the above, recall of a remittitur, even months after the judgment on appeal in this matter, is both proper and appropriate. Under the circumstances, good cause is undoubtedly present for such action by this Court. (*Infra* p. 30 (Jee Decl. at ¶¶ 5)). There has been a fundamental violation of due process and a resulting void judgment which necessitates, in fact, recall of this Court's remittitur. The City of Fullerton, although a Real Party in Interest in the Court's judgment and findings that the City's red light camera operator contract is invalid, was provided no notice of the appellate proceedings in this matter relating to the contract; the City was completely prevented from participating in the appeal on these issues in any way. (*Infra* p. 25-6 (Hamilton Decl. at ¶ 4 & 6); p. 28 (Hamilton Decl. at ¶ 2); p. 29-30 (Jee Decl. at ¶¶ 2 & 4)). The appellate proceedings were thus a sham and not representative of justice or a proper adversarial search for truth and the rule of law, as to the issues purportedly decided on appeal. As such, the judgment cannot stand, as presently stated with its invalid findings and recall of the remittitur to rectify such invalid findings.

C. Granting a Recall of the Remittitur Does Not Offend Notions of Double Jeopardy or Res Judicata.⁶

Cases have uniformly found that a dismissal sought by the defendant in a criminal matter constitutes a *waiver* of double jeopardy. People v. Mills, 148 Cal. App. 2d 392, 395 (1957) (consent “inherent” in defendant making a motion for mistrial, precluding claim of double jeopardy); People v. Hathcock, 8 Cal. 3d 599, 613 (1973) (“the plea of double jeopardy cannot be maintained if the defendant has consented to the prior discharge of the jury”). See also, People v. Finch, 119 Cal. App. 2d Supp. 892, 894 (1953).

In Finch, the Appellate Division of the Superior Court *rejected* the defendant’s contention that the people had no right to appeal because jeopardy had attached and, generally, citing Craig v. United States, 81 F.2d 816, 819-20 (1936), the Finch Court stated that, “. . . where an indictment is *quashed* at defendant’s instance, though after jeopardy has attached, he cannot thereafter plead former jeopardy when placed on trial on another indictment for the same offense; his action in having the indictment

⁶ The possible implications of double jeopardy and res judicata are addressed herein only based on the anticipation that Defendant Franco will raise these issues. Although it appears that an untimely (and possibly deficient) letter was submitted by her to the Court of Appeal on May 7, 2009 in response to the previously submitted Petition for Writ of Mandate in this matter, the Court’s docket does not reflect that such letter was actually filed with or received by the Court of Appeal. Moreover, the Petition was denied by the Court of Appeal and the case closed on the same date as her letter. However, a copy of her letter was served on the City and raises two key, but irrelevant and inapplicable, issues: double jeopardy and res judicata. Therefore, these matters are preemptively addressed herein, in anticipation of Defendant Franco’s claims in response to this motion.

quashed constitutes a *waiver* of his constitutional privilege.” Id. at 898 (emphasis added).

Moreover, the recall of a remittitur merely reinstates the proper appeal that was previously pending in the *same* matter, due to the fact that the remittitur was issued and the citation was ultimately dismissed, in contravention of basic, fundamental and critical principles of due process. Thus, the remittitur was issued improvidently, in error and in a wholly *void* manner. Under these circumstances, there is no implication of double jeopardy in the requested relief; the motion seeks only to *continue* a previous matter which was improperly terminated in the first instance. Moreover, the motion seeks only to remedy the error by the removal by this Court of findings within the Judgment relating to the contract between the City of Fullerton and its red light camera operator. Since such matters were not properly considered by this Court and were in violation of the City’s due process rights, this Court may rectify the violation by granting the motion for the purpose of removing such findings.

Similarly, *res judicata* does not bar the requested relief. The doctrine of *res judicata* does not apply to rulings in the *same action*. Lennane v. Franchise Tax Bd., 51 Cal. App. 4th 1180, 1185 (1996) (“The doctrine of *res judicata* fails . . . [when] the first ruling was not in a *former* action . . .”) (emphasis in original). The Supreme Court has recognized that “[t]he

doctrines of res judicata and collateral estoppel apply to *later litigation* to give conclusive effect to a *former judgment* or an issue determined in a *former proceeding*.” Griset v. Fair Political Practices Comm., 25 Cal. 4th 688, 701-702 (2001) (emphasis added). Specifically, the Griset Court held that a plaintiff’s motion for summary judgment upon return of the matter after appeal was not a “separate lawsuit” such that res judicata could apply. Id.

California Code of Civil Procedure Section 1908 defines this long-standing principle of res judicata. Notably, Section 1908 provides that a former judgment may be held against a party to the decision “provided they have notice, actual or constructive, of the pendency of the action or proceeding.” As has been set forth in detail in this motion, the City had no actual or constructive notice of the appellate proceedings in this matter.

Based on the principles above, res judicata does not apply to the recall of this Court’s remittitur. This Court’s power to recall its remittitur and rescind or modify its invalid, unjust and void judgment on appeal is part of its authority over the whole of the appellate proceedings in this matter; no new, separate lawsuit has been initiated by this motion which would in any way be subject to res judicata.

Therefore, this Court may properly recall its remittitur in this matter, and indeed must, in order to preserve the due process rights of the City of

Fullerton, as a Real Party in Interest in this matter as to the findings regarding its contract, when the City of Fullerton did not justly have notice or any opportunity to participate in proceedings relating to its contract.

IV. CONCLUSION

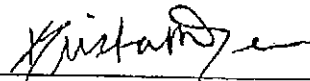
The City of Fullerton respectfully moves this Court to immediately recall its remittitur in the above-referenced matter and/or order that the Superior Court rescind its order dismissing the citation and dismissing the guilty count in this matter. The remittitur was improperly granted and this Court's judgment on appeal is therefore void, as there was no notice or opportunity to participate provided to the City of Fullerton, a Real Party in Interest as to the findings purportedly made regarding the contract with its red light camera operator. Since the judgment of this Court on appeal is void, a violation of due process and manifestly unjust, this Court is requested to recall its remittitur and modify its judgment on appeal to remove findings relating to the contract, and to order the Superior Court to rescind its order of December 26, 2008.

Dated: June 26, 2009

Respectfully submitted,

JONES & MAYER

By: _____



Kimberly Hall Barlow and
Krista MacNevin Jec,
Attorneys for Real Party in Interest
City of Fullerton

**DECLARATION OF KEVIN HAMILTON IN SUPPORT OF MOTION TO
RECALL REMITTITUR**

I, KEVIN HAMILTON, DECLARE AS FOLLOWS:

1. I am an officer with the Fullerton Police Department and am an employee of the City of Fullerton. I have personal knowledge of the following facts and could and would testify competently thereto if called upon.

2. Orange County Register writer Jennifer Muir contacted me on or about December 11, 2008, to inquire about the City of Fullerton's reaction to the dismissal of the citation and reversal of the trial court's judgment on appeal in the above-referenced matter. I informed Ms. Muir that the City of Fullerton had no knowledge of any such appellate proceeding and/or outcome.

3. At about the same time as I received the above telephone call from Ms. Muir, I also received a call from Orange County Register affiliate reporter Barbara Giasone.

4. I thereafter researched the issue and verified that the Fullerton Police Department had not been notified of any appeal, appellate proceedings, or appellate decision relating to the above-referenced matter.

5. As part of my research, I learned from Sergeant Steve Williams that Commissioner Stone had, at or about the same time, informed Officer Ryan Warner of the Fullerton Police Department regarding the ruling, since Officer Warner is a Fullerton motor officer who testifies in traffic court regarding the City's automated traffic signal enforcement program.

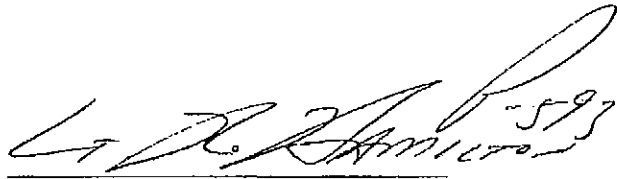
6. Prior to the information being obtained by the officers identified above as to the appellate proceedings in this matter, the Fullerton Police Department and Officer Mcelwee, in particular, received no notice whatsoever of the appeal filed by Defendant Franco, the appellate proceedings conducted relating to this matter, or the appellate decision issued on appeal in this matter.

7. The Orange County Register article for which Jennifer Muir was seeking comment from the City of Fullerton on the citation dismissal was published on December 12, 2008. As part of my research of the issues

identified in this declaration, I searched on the internet and accessed the Orange County Register article on December 15, 2008 at the website maintained by the Orange County Register. A true and correct copy of that article is attached hereto, and incorporated herein by reference, as Exhibit A.

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

Executed this 20TH day of May, 2009

A handwritten signature in black ink, appearing to read "Kevin Hamilton", with a horizontal line underneath it. There are some scribbles and a number "593" visible in the signature.

Kevin Hamilton

RECEIVED
MAY 20 2009
CLERK OF SUPERIOR COURT
ORANGE COUNTY, CALIFORNIA

**DECLARATION OF LINDA MC ELWEE IN SUPPORT OF MOTION TO
RECALL REMITTITUR**

I, LINDA MC ELWEE, DECLARE AS FOLLOWS:

1. I am a parking control officer with the Fullerton Police Department and am an employee of the City of Fullerton. I have personal knowledge of the following facts and could and would testify competently thereto if called upon.

2. I have never received any notice or notification from the Orange County Superior Court in connection with the criminal appeal of [REDACTED] Franco, Case No. FL45261PE, including any notice of appeal.

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

Executed this 27 day of May, 2009


Linda McElwee

**DECLARATION OF KRISTA MACNEVIN JEE IN SUPPORT OF
MOTION TO RECALL REMITTITUR**

I, Krista MacNevin Jee, declare:


1. I am an attorney licensed to practice law in all the courts in the State of California, and am an Associate with Jones & Mayer and an Assistant City Attorney for the City of Fullerton
2. In particular, I declare that prior to the information being obtained by Fullerton Police Department officers of the appeal as detailed in the above declaration of Kevin Hamilton, the City of Fullerton received no notice of the appeal filed by Defendant Franco, no notice of the appellate proceedings conducted relating to that matter, and no notice of the appellate decision issued on appeal in that matter.
3. I have been informed by the Criminal Operations division of the Superior Court that copies of the notices of appeal in criminal matters are only provided to the District Attorney. I spoke to Jeff Moises of the Criminal Operations of the Superior Court at Fullerton on April 3, 2009 in this regard.
4. At no time did any representative of the City of Fullerton in this matter appear in any appellate proceedings relating to [REDACTED] Franco, Case No. FL45261PE. Furthermore, there is no individual named Darryl Bassin representing or authorized to represent the City of Fullerton.

In fact, I am informed and believe that Mr. Bassin represents the City of Anaheim. At no time did Mr. Bassin have authority to act on behalf of the City of Fullerton, if he even ever did.

5. This motion is brought as soon as reasonably practicable after the City of Fullerton learned of the appeal proceedings, were able to conduct an investigation regarding whether notice had been provided to the City, and to obtain authority to proceed with this motion, after having first unsuccessfully sought a writ of mandate from the Court of Appeal without prejudice to the bringing of the within motion.

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

Executed on June 26, 2009



Krista MacNevin Jee