

This file is the City of Fullerton's Petition for Writ of Mandate in P. v. Franco.

At the back of the Petition is the judge's order.

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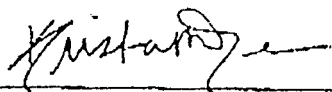
**CERTIFICATE OF INTERESTED PARTIES**

I, KRISTA MACNEVIN JEE, certify that Petitioner, the People of the State of California By and Through the City of Fullerton, is a governmental entity. Petitioner knows of no entity or person that must be identified to this Court pursuant to California Rules of Court, Rule 8.208.

Dated April 21, 2009

Respectfully Submitted,

JONES & MAYER

By:   
\_\_\_\_\_  
Krista MacNevin Jee,  
Attorneys for Petitioner

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**TO THE HONORABLE PRESIDING JUSTICE DAVID G. SILLS  
AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL:**

Petitioner, the People of the State of California by and through the City of Fullerton, respectfully request this Court's extraordinary relief in the form of a writ of mandate, or other appropriate relief, ordering the Appellate Division of the Superior Court to rescind its improper dismissal of the above-referenced matter, due to no notice to, or participation by, the People in the appellate proceedings by which a dismissal was ordered. The failure of the People to be notified of any appellate proceedings in the underlying criminal appeal was a fundamental denial of due process requiring this Court's extraordinary writ relief.

**INTRODUCTION**

Petitioner, the People of the State of California by and through the City of Fullerton, seek a writ of mandate, or other appropriate relief from this Court as to the Appellate Division's dismissal of the above-referenced matter, due to no notice to Petitioner of any pending appellate proceedings.

Defendant, ~~██████████~~ 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 Attachments hereto ("Att."), at 27 (Certified Copy of Docket Report, at p.1, 9/10/07, 1. 3)). In particular, she was cited for such violation by way of a red light

camera. (Att. at 27, (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. (Att. at 28 (Docket Report at p. 2, 12/26/07, l. 19 & 1/11/08, l. 1)). Her notice of appeal was filed January 11, 2008. (Att. at 31-80 (Certified copy of Notice of Appeal)). Her proof of service indicates that she served a copy of this notice only by mail to the Orange County District Attorney's Office. (Att. at 35).

Although the criminal court docket report indicates that the Superior 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, as set forth herein. (See infra at 23; 25-6). In fact, Petitioner 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 at 25-6).

A hearing on the settled statement on appeal was heard on April 2, 2008. (Att. at 28 (Docket Report at p. 2, 4/2/08, l. 1)). Notice of this hearing was mailed only to Defendant and the District Attorney. (Att. at 28 (Docket Report at p. 2, 3/6/08, l. 1)). Petitioner also did not receive any notice of this proceeding, as set forth herein. At the hearing, the "People [were] represented by Daryl Bassin," who was identified as the "Deputy City Attorney," but does not act in any such capacity for the City of

Fullerton, as set forth herein. (Att. at 28 (Docket Report at p. 2, 4/2/08, l. 5); Att. at 25-6). Petitioner is informed and believes that Mr. Bassin represents the City of *Anaheim*. Judgment was issued on the appeal on December 8, 2008, when the trial court's judgment was reversed and the citation was dismissed. (Att. at 29 (Docket Report at p. 3, 12/8/08, l. 1)).

The above-referenced matter has been dismissed by the Appellate Division of the Superior Court in violation of law and by the time Petitioner discovered that the appellate proceedings had occurred, the time to request reconsideration or transfer to this Court had expired. If this Court does not intervene, the due process rights of the People will have been violated to the detriment of the public interest.

This writ is brought within a reasonable time of the People having inadvertently discovered that appellate proceedings occurred in the above-referenced matter without notice to the People or the People's participation in those appellate proceedings, and due diligence investigation.

### **PETITION**

By this petition, Petitioner, the People of the State of California by and through the City of Fullerton, alleges and shows as follows:

1. Defendant, [REDACTED] Franco ("Franco"), was charged with running of a red traffic light in the City of Fullerton, in violation of California Vehicle Code Section 21453 (a). (Att. at 27 (Docket Report, at p. 1, 9/10/07, l. 1)). Defendant Franco was convicted of that violation.

(Att. at 28 (Docket Report at p. 2, 12/26/07, l. 19)).

2. Thereafter, Defendant apparently appealed her criminal conviction. (Att. at 28 (Docket Report at p. 2, 1/11/08, l. 1)). Petitioner was given no notice whatsoever, at any time, of Defendant Franco's notice of appeal, any hearing on the settled statement on appeal, or any other appellate proceedings regarding the above-referenced matter; petitioner is informed and believes that such notices, to the extent they were given by the Court and/or Defendant Franco, regarding such proceedings were, instead, given to the Orange County District Attorney's Office. (Att. at 28 (Docket Report at p. 2, 1/11/08, l. 2; 3/6/08, l. 1)). (See Declaration of Kevin Hamilton ("Hamilton Decl."), attached hereto and filed concurrently herewith, at 23; Declaration of Krista MacNevin Jee ("Jee Decl."), attached hereto and filed concurrently herewith, at 25-6). No one on behalf of the People actually participated in any appellate proceedings relating to Defendant Franco. (Jee Decl., at 25-6).

3. Petitioner is informed and believes that Defendant Franco, as part of her appeal, challenged the contract by which the City of Fullerton provides for operation, maintenance and documentation of its red light cameras. 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.

4. Petitioner is informed and believes that a hearing on the settled statement on appeal was held on April 2, 2008, at which the People were supposedly represented by “Daryl Bassin, Deputy City Attorney.” There is, however, no such individual acting as Deputy City Attorney for the City of Fullerton, as set forth herein. (Jee Decl., at 25-6). Petitioner is informed and believes that Daryl Bassin instead represents the City of Anaheim. (Id.). At no time did Mr. Bassin have authority to act on behalf of Petitioner. Jee Decl., at 26. In addition, except in connection with this Petition, Petitioner had no prior knowledge that Mr. Bassin would be acting, or had acted, on its behalf. (Hamilton Decl., at 23 & 81-83; Jee Decl., at 26).

5. A judgment on appeal was rendered on December 8, 2008 by the Appellate Division of the Superior Court of Orange County, at which time the trial court’s conviction was reversed and the citation against Defendant Franco was dismissed. (Att. at 29 (Docket Report, at p. 3, 12/8/08, l. 1); Att. at 30 (Docket Report, at p. 4, 12/26/08, ll. 6-9)).

A true and correct certified copy of the Appellate Division’s

order/judgment, at issue in this Petition, is attached hereto at 84.

6. Petitioner is informed and believes that the Appellate Division dismissed the citation due to the City of Fullerton's contract with its automatic red light enforcement equipment operator, and further, that the Appellate Division purported to interpret and/or invalidate such agreement that the City of Fullerton has with its red light camera operator. These invalid and improper actions of the Appellate Division were taken, Petitioner is informed and believes, without notice to Petitioner and/or the City of Fullerton. Petitioner was in fact precluded from participating in the appellate proceeding by the failure of the Superior Court and/or Defendant Franco to provide any notice to Petitioner whatsoever regarding any appellate proceedings being conducted relating to Defendant Franco's conviction. Petitioner is informed and believes that since Petitioner was prevented from participating in the appellate proceedings in the above-referenced matter due to a violation and lack of due process, it is clear that, at a minimum, Petitioner was deprived of its ability to advocate for a proper and full evaluation and interpretation of the contract that the City of Fullerton has with its red light camera operator.

7. Respondent is the Appellate Division of the Superior Court of the State of California in and for the County of Orange, which Division presided over the appellate proceedings relating to Defendant Franco's

criminal conviction appeal referenced above. The Appellate Division was exercising judicial functions in connection with the criminal appeal described hereinabove. (Att. 29 (Docket Report, at p. 3, 7/18/08, ll. 1-5; 12/8/08, l. 1)).

8. By the above actions, in particular the dismissal of the citation against Defendant Franco, without notice to Petitioner as to pending appellate proceedings relating to the conviction of Defendant Franco, was a violation of Petitioner's due process and a miscarriage of justice.

9. Petitioner is beneficially interested in the issuance of a Writ by virtue of the fact that it has a significant interest in the fair and full consideration by the Appellate Division of the merits of Defendant's appeal, and proper consideration and interpretation of the contract between the City of Fullerton and its red light camera operator, as well as Petitioner being entitled to full due process of law, which it was not provided in connection with Defendant Franco's appeal.

10. Petitioner has no plain, speedy or adequate remedy at law save this extraordinary Writ Petition. By the time Petitioner learned of Defendant Franco's appeal and the Appellate Division's dismissal of the conviction, the time had already expired in accordance with the California Rule of Court for any petition for certification of the matter for transfer to

this Court or for any petition for rehearing.

In particular, no written notice was provided to Petitioner of the appellate proceedings in this matter. (Att. at 28 (Docket Report, at p. 2, 1/11/08, l. 2; 3/6/08, l. 1); Hamilton Decl., at 22-3; Jee Decl., at 25-6). In addition, the City of Fullerton Police Department 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 for the City's comment on the ruling on the decision on appeal in Defendant Franco's case. (Hamilton Decl., at 22, ¶ 3-6). At approximately the same time, Officer Hamilton received a call from the Orange County Register affiliate reporter Barbara Giasone regarding the ruling. (*Id.*). 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. (*Id.*).

11. 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. Notably, the article reflects the fact that "Fullerton officials were unaware of the ruling until contacted by Register reporters on Thursday." A true and correct copy of this article is attached hereto, at 81-83. See also, Hamilton Decl. at 23-4.

12. No direct appeal lies from Respondent Court's order dismissing the appeal in this matter, and the time had already expired for any application for certification to transfer the matter to this Court, or for re-hearing by the Appellate Division, by the time the City of Fullerton learned of the existence of the appeal and the decision on appeal.

13. If the orders of Respondent Court are permitted to stand, Petitioner will have been deprived of its due process rights in violation of law, and the public interest will have been detrimentally affected, in that a valid criminal conviction will be permitted to have been dismissed without just cause, without valid process of law, and against public policy. In addition, the validity of the City of Fullerton's contract with its red light operator will have 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 that agreement.

14. Petitioner seeks the within writ as soon as practically reasonable after it learned of the appellate proceedings and decision, and after Petitioner was able to conduct a proper inquiry to determine that it had, in fact, not received notice of the appeal proceedings relating to Defendant Franco's conviction.

**PRAYER**

WHEREFORE, Petitioner, the People of the State of California by and through the City of Fullerton, prays that this Court:

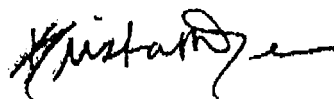
1. Issue a peremptory writ in the first instance directing Respondent Court to vacate its dismissal of Defendant Franco's conviction, and reconsider the appeal with prior notice to Petitioner, as required by due process of law;
2. Alternatively, first issue an alternative writ directing Respondent Court to vacate its dismissal, or, in the alternative, show cause why it should not do so; and thereafter issue a peremptory writ directing Respondent Court to vacate its dismissal of Defendant Franco's conviction, and to reconsider the with prior notice to Petitioner, as required by due process of law;
3. Award Petitioner its costs in this proceeding; and
4. Grant such other relief as may be just and proper.

Date: April 21, 2009

Respectfully submitted,

JONES & MAYER

By: \_\_\_\_\_



Kimberly Hall Barlow and  
Krista MacNevin Jee,  
Attorneys for Petitioner,  
People of State of California,  
By and Through City of Fullerton

**MEMORANDUM OF POINTS AND AUTHORITIES**

**IN SUPPORT OF PETITION FOR**

**WRIT OF MANDATE AND/OR PROHIBITION**

**I.**

**EXTRAORDINARY RELIEF IS WARRANTED DUE TO**  
**PETITIONER RECEIVING NO NOTICE OF ANY APPELLATE**  
**PROCEEDINGS.**

Writ review is appropriate where there is “not a plain, speedy, and adequate remedy in the ordinary course of law.” Cal. Civ. Proc. Code § 1086. Here, the order of the Appellate Division dismissing the underlying criminal conviction, after conducting appellate proceedings for which the People had no notice whatsoever, was in violation of the People’s right to due process and fundamental principles regarding the minimum amount of due process that is required to be provided to interested and necessary parties to legal proceedings.

The People are presently without a legal remedy in challenging the Court’s order of dismissal, due to the very failure of due process in the conduct of the appellate. Because no notice of the appellate proceedings was provided to the People, the People only inadvertently discovered the ruling and were unable at that time to exercise any of the review procedures provided for Appellate Division rulings. A writ under these circumstances

is clearly warranted. See Chavez v. Superior Court, 123 Cal. App. 4th 104, 108 (2004) (“A writ of mandamus may issue to compel the trial court’s performance of an act which the law specifically enjoins. . . .”).

A writ petitioner often must demonstrate that he or she will suffer “irreparable injury” if the writ is not granted. Omaha Indem. Co. v. Superior Court (Greinke), 209 Cal. App. 3d 1271, 1274 (1989). There is certainly irreparable injury here, as the People were precluded by the violation of due process from exercising any available appellate or review rights relating to the dismissal, and Petitioner was also deprived of its right to participate in the appellate proceedings and to challenge the order on appeal, by virtue of the failure to give notice in the manner required by law as to the existence of the appellate proceedings. Perhaps most importantly, the findings by the Appellate Division call into question the very validity of a contract between the City of Fullerton and a third party and have potential ramifications relating to all past, present and future red light camera prosecutions by the People.

Since the People were given no notice whatsoever of the existence of any appellate proceedings on Defendant Franco’s conviction, the People only inadvertently learned of the proceedings after they had already concluded and, therefore, after the time had already expired as to any remedies to which Petitioner would have otherwise been entitled, such as

