

S174773

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEWERELENE STEEN,)
)
 Petitioner,)
)
 v.)
) (2d Dist.No. B217263;
) App.Div.No. BR046020;
 APPELLATE DIVISION OF THE LOS) Trial Ct.No. 6200307)
 ANGELES COUNTY SUPERIOR COURT)
)
 Respondent,)
)
 PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Real Party in Interest.)

S174773

SUPREME COURT
FILED

JUN 28 2010

Frederick K. Ohlrich Clerk

Deputy

REQUEST FOR JUDICIAL NOTICE

From the Appellate Division, Los Angeles County Superior Court
Hon. Patti Jo McKay, Presiding Judge

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Ilya Alekseyeff,
John Hamilton Scott,
(State Bar No. 58258)
Deputy Public Defenders

Appellate Branch
320 West Temple Street, Room 590
Los Angeles, California 90012

Telephone: (213) 974-3050

Attorneys for Petitioner

RECEIVED

JUN 28 2010

CLERK SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEWERELENE STEEN,)
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) Petitioner,)
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) App.Div.No. BR046020;
) Trial Ct.No. 6200307)
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) APPELLATE DIVISION OF THE LOS)
) ANGELES COUNTY SUPERIOR COURT)
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) Respondent,)
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) PEOPLE OF THE STATE OF CALIFORNIA,)
)
)
) Real Party in Interest.)
)

REQUEST FOR JUDICIAL NOTICE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The above-entitled matter concerns the constitutional validity of Penal Code section 959.1, subdivision (c)(1), insofar as that statute appears to authorize court clerks to initiate criminal proceedings. The People have taken the position that after a clerk has initiated a criminal proceeding, "the prosecution still retains the ability to exercise its discretion to authorize or concur in the prosecution of the charges." (Real Party's Answer to Brief of Amicus Curiae, p.; 6; see also Brief of Amicus Curiae, pp. 2, 6-14.) Petitioner has responded that this is simply untrue, since once a criminal proceeding has been initiated, only the court has the power to terminate the prosecution pursuant to Penal

Code section 1386. (Petitioner's Reply to Brief of Amicus Curiae, pp. 8, 14-15.)

It is in connection with this dispute that petitioner has recently been provided documents reflecting how such issues are actually resolved in the trial courts of California. Petitioner expects to rely upon the facts shown in these documents during oral argument of this matter. Petitioner thus requests this court take judicial notice of the following documents from proceedings in the Fresno County Superior Court in the matter of "People v. Johnny Brown, III," case number 1873110 (these documents are enclosed herein, and for ease of reference are identified by exhibit letters sequential to the exhibits lodged in support of the petition for writ of mandate):

Exhibit "K": A copy of Defendant Brown's demurrer to a charge of violating Vehicle Code section 40508 which was not filed by the prosecuting attorney filed on August 17, 2009.

Exhibit "L": A copy of the transcript of the proceedings of September 2 and 9, 2009.

Exhibit "M": A copy of the superior court's ruling on demurrers issued September 11, 2009.

Exhibit "N": A copy of Defendant Brown's petition for writ of mandate filed in the Appellate Division of the Fresno County Superior Court filed September 28, 2009 (not including supporting documents).

Exhibit "O": The order of the Appellate Division on the Petition for Writ of Mandate, issued October 14, 2009.

Those documents demonstrate that on November 18, 2008, Defendant Brown was cited twice for driving offenses, and thereafter failed to appear on both citations. (Exh. "K," p. 3; Exh. "M," pp. 1-2.) Thereafter, a misdemeanor charge of violating Vehicle Code section 40508 was entered on the court's register of actions, which the Appellate Division of the superior court found demonstrated that an

accusatory pleading had been filed in electronic form as authorized by Penal Code section 959.1, subdivision (c)(1). (Exh. "O," pp. 2-3.)

On August 17, 2009, Defendant Brown demurred to the charge of violating section 40508 on the basis that it had not been filed by the prosecutor. Before that demurrer was ruled upon, the matter was called in Department 61 of the Fresno County Superior Court, the Honorable D. Tyler Tharp, judge presiding. The Deputy District Attorney advised the court that "Our office never intended to proceed on . . . any of these cases with a misdemeanor charge . . ." (Exh. "L," p. 3.) Accordingly, the People had offered, and Defendant Brown had accepted, a plea bargain in which the defendant would enter a plea as to the underlying driving offenses as infractions, and the charges of violating Vehicle Code section 40508 would be dismissed. (*Id.*, pp. 2-3.) The matter was then continued to September 9, 2009.

On September 9, 2009, the court asked the prosecutor, "what authority to you have . . . for the proposition that the District Attorney can dismiss failures to appear? It's like the District Attorney dismissing contempt charges, which they can't. It's my prerogative. [¶] You have any authority for the proposition that you can flush failures to appear?" (Exh. "L," p. 6.) The prosecutor responded that he had no such authority, and the court thereupon rejected the plea agreement. (It is noteworthy that at the same time the court rejected similar plea agreements in other cases.)

The superior court thereafter overruled Defendant Brown's demurrer on the basis that a court is authorized to issue a warrant for the arrest of a defendant who fails to appear, without the filing of a complaint, based upon an Attorney General's opinion on that subject.

(Exh. "M," p. 11, citing 56 Ops.Atty.Gen. 165. ^{1/}) Brown challenged this ruling in a petition for writ of mandate filed in the Appellate Division of the Fresno Superior Court. (Exh. "N.") The Appellate Division did not adhere to the trial court's reasoning, but as noted above, the Appellate Division ruled that the trial court's addition of the misdemeanor charge of violating Vehicle Code section 40508 had been by means of a complaint in electronic form, and was thus authorized by Penal Code section 959.1, subdivision (c)(1). (Exh. "O," pp. 2-3.)

These documents are clearly relevant to this court's determination whether, after a court has acted unilaterally to file a misdemeanor complaint, the prosecutor thereafter retains the ability to exercise discretion to terminate the prosecution. Accordingly, pursuant to Evidence Code section 452, subdivision (d)(1), petitioner respectfully requests that this court take judicial notice of the documents identified herein.

Respectfully submitted,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By 
John Hamilton Scott
Deputy Public Defender

Attorneys for Petitioner

^{1/} In actuality, the Attorney General's opinion concerned only the validity of an arrest warrant, and did not consider the separate issue of whether a defendant could be prosecuted upon a charge of violating Vehicle Code section 40508 in the absence of a misdemeanor complaint filed by the authorized prosecutor. No party has relied upon that opinion in the instant litigation.

EXHIBIT "K"

1 Tina M. Barberi, 213267
2 Attorney at Law
3 7493 N. Ingram, Ste. 103
4 Fresno, CA 93711
5 (559) 447-1240

6 Attorney for Defendant, Johnny Brown, III

SEP 18 10 10 AM '09

7 IN THE SUPERIOR COURT IN THE STATE OF CALIFORNIA
8 FRESNO DIVISION

9 STATE OF CALIFORNIA,
10

Case No. 1873110

11 Plaintiff,

**DEMURRER FOR LACK
OF JURISDICTION, UNCERTAINTY,
FAILURE TO STATE A PUBLIC
OFFENSE, BARRED PROSECUTION
(California Penal Code §1004(1), 1004(2),
1004(4), 1004(5))**

12 vs.

13
14 JOHNNY BROWN, III

DATE: September ^{2nd} 3, 2009
DEPT: ⁶¹ 461
TIME: 8:30 a.m.

15 Defendant.
16

17 TO THE CLERK OF THE COURT AND THE DISTRICT ATTORNEY FOR THE
18 COUNTY OF FRESNO:

19 PLEASE TAKE NOTICE that on September ^{2nd} 3, 2009, at the hour of 8:30 a.m., or as soon
20 thereafter as the matter may be heard in department ⁶¹ 1 of the Fresno Superior Court of the above
21 entitled court, defendant, Johnny Brown, III demurrers this complaint (or lack thereof), by and
22 through his attorney, and will hereby move this Court to sustain the demurrer on the ground that
23 Court lacks jurisdiction; California Penal Code §§950 and 952 has not been complied with; the
24 failure to file a complaint makes it impossible to state that Defendant Brown committed a public
25 offense; and, there is a legal bar to the prosecution.

26 This motion will be based on this notice of motion and memorandum of points and
27 authorities served and filed herewith, on such supplemental memoranda of points and authorities
28

1 as may hereafter be filed with the court or stated orally at the conclusion of the hearing on the
2 motion, on all the papers and records on file in this action, and on such oral and documentary
3 evidence as may be presented at the hearing of the motion.

4 Dated: 8/17/07



Tina M. Barberi

Attorney for Defendant

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **FACTUAL BACKGROUND**

3 The pertinent facts for this demurrer are that, at about 0800 hours on November 18, 2008,
4 Officer D. Zavala, Badge Number 5152, of the Fresno Police Department stopped defendant
5 Brown for allegedly driving without a license and no proof of insurance at the intersection of
6 Hughes and Dakota Avenues.

7
8 Defendant Brown is also charged with a Failure to Appear, in violation of California
9 Vehicle Code section 40508(a), a misdemeanor. The District Attorney's Office, however, has
10 not filed a complaint against Defendant Brown.

11 **DEMURRER TO COMPLAINT**

12
13 Demurrers are used to challenge the defects that appear on the face of the accusatory
14 pleading. California Penal Code §1004. California Penal Code section 1004 states:

15 The defendant may demur to the accusatory pleading at any time prior to the entry
16 of a plea, when it appears upon the face thereof either:

- 17 1. If an indictment, that the grand jury by which it was found had no legal
18 authority to inquire into the offense charged, or, if an information or
19 complaint that the court has no jurisdiction of the offense charged therein;
- 20 2. That it does not substantially conform to the provisions of Section 950 and
21 952, and also Section 951 in case of an indictment or information;
- 22 3. That more than one offense is charged, except as provided in Section 954;
- 23 4. That the facts stated do not constitute a public offense;
- 24 5. That it contains matter which, if true, would constitute a legal justification or
25 excuse of the offense charged, or other legal bar to the prosecution.

26 The objections specified in section 1004 are the only grounds for a valid demurrer.
27 *People v. Saffell* (1946) 74 Cal. 2d. Supp. 967, 972. A demurrer must be made before the entry
28 of the plea and in open court. Penal Code §§1003-1004.

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I.
**A DEFENDANT MAY CHALLENGE THE JURISDICTION OF THE COURT OVER
THE OFFENSE CHARGED AGAINST HIM WHENEVER LACK OF JURISDICTION
APPEARS UPON THE FACE OF THE ACCUSATORY PLEADING**

Under California Penal Code §1004(1), a defendant may demur to the pleading when it appears that the court has no jurisdiction of the offense charged.

The misdemeanor complaint is a formal charge that gives the court jurisdiction to proceed to trial. *Serna v. Superior Court* (1985)40 Cal 3rd 239, 257. "The filing of a complaint is essential to invoke the jurisdiction of the court." *City of San Diego v. Municipal Court* (1980) 102 Cal. App. 3d. 775, 779; see also *Rupley v. Johnson* (1953) 120 Cal.App.2d 548, 552; Penal Code § 949. Jurisdiction refers to the Court's inherent power to hear and determine a particular case. It can neither be waived nor conferred by consent or stipulation. *Griggs v. Superior Court* (1976) 16 Cal. 3rd 341, 344 n2. A complaint must be filed in the proper court to confer subject matter jurisdiction on the Court. See *Harrington v. Superior Court* (1924) 194 Cal 185; *Bayle-Lacoste & Co. v. Superior Court* (1941) 46 Cal. App. 2d 636. Any judgment without subject matter jurisdiction is void. *Taliaferro v. County of Contra Costa* (1960) 182 Cal 2d 587.

Vehicle Code section 40513(a) reads:

Whenever written notice to appear has been prepared, delivered, and filed with the court, an exact and legible duplicate copy of the notice when filed with the magistrate, in lieu of a verified complaint, shall constitute a complaint to which the defendant may plead "guilty" or "nolo contendere."

If, however, the defendant violates his or her promise to appear in court or does not deposit lawful bail, or pleads other than "guilty" or "nolo contendere" to the offense charged, **a complaint shall be filed that shall conform to Chapter 2 (commencing with Section 948) of Title 5 of Part 2 of the Penal Code**, which shall be deemed to be an original complaint, and thereafter proceedings shall be had as provided by law, except that a defendant may, by an agreement in writing, subscribed by him or her and filed with the court, waive the filing of a verified complaint and elect that the prosecution may proceed upon a written notice to appear. (Emphasis added).

1 language without any technical averments or any allegations of matter not
2 essential to be proved. It may be in the words of the enactment describing the
3 offense or declaring the matter to be a public offense, or in any words sufficient to
4 give the accused notice of the offense of which he is accused.

5 The function of criminal pleadings in California is to give an accused adequate notice of
6 the charges against him. Even though the particular circumstances of the charge need not be
7 alleged, sufficient notice to satisfy due process must be given. *People v. Jackson* (1978) 88 Cal.
8 App. 3d 490 (disapproved of by, *People v. Barnum* (2003) 29 Cal. 4th 1210). If the complaint is
9 not written with sufficient clarity to enable defendant to present a defense, he should demur on
10 one or more of the grounds set forth in Penal Code, section 1004. *People v. Randazzo* (1957) 48
11 Cal. 2d 484; (see also *People v. Schoeller* (1950) 96 Cal. App. 2d 61, 62; *People v. Waid* (1954)
12 127 Cal. App. 2d 614, 616-617.

13 A bare literal compliance with Penal Code section 952 is insufficient to obviate a
14 demurrer where a pleading in the words of the statute is insufficient to give constitutionally
15 adequate notice of the offense. *People v. Jordan* (1971) 97 Cal.Rptr. 570.

16 Here, the District Attorney has not filed a complaint against Defendant Brown, let alone a
17 complaint that is in compliance with Penal Code sections 950 and 952.¹ Defendant Brown has
18 not been adequately advised of the charges against him. It does not appear that the District
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21 ¹ Defendant also contends that a demurrer is proper because of the failure to comply with any part of Penal Code section
22 959, which states that "The accusatory pleading is sufficient if it can be understood therefrom:

- 23 1. That it is filed in a court having authority to receive it, though the name of the court be not stated.
- 24 2. If an indictment, that it was found by a grand jury of the county in which the court was held, or if an
25 information, that it was subscribed and presented to the court by the district attorney of the county in which the court was
26 held.
- 27 3. If a complaint, that it is made and subscribed by some natural person and sworn to before some officer
28 entitled to administer oaths.
4. That the defendant is named, or if his name is unknown, that he is described by a fictitious name, with a
statement that his true name is to the grand jury, district attorney, or complainant, as the case may be, unknown.
5. That the offense charged therein is triable in the court in which it is filed, except in case of a complaint filed
with a magistrate for the purposes of a preliminary examination. That the offense was committed at some time prior to
the filing of the accusatory pleading."

1 Attorney even knows this case is being prosecuted. Because of the lack of a charging document,
2 the mere allegation is not sufficiently definite to inform Defendant of the charges against him.

3
4 The defendant is at a loss as to how to mount a defense because there is not a complaint filed or
5 in conformity with sections Penal Code 950 and 952, the demurrer must be sustained.

6
7 **III.**
8 **A DEFENDANT MAY CHALLENGE BY DEMURRER AN ACCUSATORY PLEADING**
9 **IN WHICH THE FACTS STATED DO NOT CONSTITUTE A PUBLIC OFFENSE**

10 California Penal Code §1004(4) provides in part: "The defendant may demur when it
11 appears that the facts stated do not constitute a public offense."

12 The Court docket states that Defendant Brown is charged with driving without a license,
13 Vehicle Code section 12500, a misdemeanor; Vehicle Code section 16028(a), an infraction; and
14 Vehicle Code section 40508(a), a misdemeanor.²

15 Because of the lack of complaint, the District Attorney has not properly stated that
16 Defendant Brown committed a public offense. There is no way for Defendant Brown to know
17
18

19 ² Vehicle Code section 40508(a) states: "A person willfully violating his or her written promise to appear or a lawfully
20 granted continuance of his or her promise to appear in court or before a person authorized to receive a deposit of bail
21 is guilty of a misdemeanor regardless of the disposition of the charge upon which he or she was originally arrested."
22 Judicial Council Of California Criminal Jury Instruction 2240 states:

23 The defendant is charged [in Count ___] with failing to appear in court [in violation of Vehicle Code
24 section 40508(a)].

25 To prove that the defendant is guilty of this crime, the People must prove that:

26 1. The defendant received a citation;

27 2. In connection with that citation, the defendant (signed a written promise to appear (in
28 court/[or] before a person authorized to receive a deposit of bail)/ [or] received a lawfully granted
continuance of (his/her) promise to appear);

AND

3. The defendant willfully failed to appear (in court/[or] before a person authorized to receive
a deposit of bail).

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that
he or she intend to break the law, hurt someone else, or gain any advantage.

[It does not matter whether the defendant was found guilty of the violation of the Vehicle Code alleged
in the original citation.]"

1 the exact violation of laws and apprise Defendant Brown of the crime with which he is accused.
2 Therefore, a demurrer must be sustained for failure to comply with Penal Code section 1004(4).

3
4 **IV.**
5 **A DEFENDANT MAY CHALLENGE BY DEMURRER AN ACCUSATORY PLEADING**
6 **ALLEGING MATTERS THAT WOULD CONSTITUTE A LEGAL BAR TO THE**
7 **PROSECUTION**

8 A demurrer is proper when it appears upon the accusatory pleading that the pleading
9 contains matter which, if true, would constitute a legal bar to the prosecution. Penal Code
10 section 1004(5).

11 The District Attorney's failure to file accusatory pleadings thereby constitutes a legal bar
12 to prosecution of the charges set forth above. Furthermore, Defendant's due process rights have
13 been violated because of the failure to file a complaint, which in the interest of justice should be
14 a legal bar to prosecution. As a result, the demurrer should be sustained.

15 **CONCLUSION**

16
17 Therefore, for the foregoing reasons, Defendant Brown requests this Court to sustain the
18 demurrer without leave to amend and dismiss the pending charges against defendant because this
19 Court lacks jurisdiction to hear the matter and the failure to file a complaint against Defendant
20 Brown has resulted in uncertainty, has not stated a public offense as well as it has resulted in a
21 legal bar to prosecution.

22
23 Respectfully submitted:

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25 Dated: 8/17/07


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27 Tina M. Barberi
28 Attorney for Defendant

EXHIBIT "L"

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO
CENTRAL DIVISION

Before the Honorable D. Tyler Tharpe, Judge
Department 61

-o0o-

THE PEOPLE OF THE STATE)
OF CALIFORNIA,)
Plaintiff,) Case No. 1873110
vs.) TRANSCRIPT OF CD
JOHNNY BROWN and)
MITCHEL XYADETH,)
Defendants.)

Fresno, California September 2, 9, 2009

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A P P E A R A N C E S:

FOR THE PEOPLE: ELIZABETH A. EGAN, District
Attorney of the County of Fresno
BY: BRIAN HUTCHINS
Deputy District Attorney

FOR THE DEFENDANT: TINA BARBERI
ATTORNEY AT LAW
7493 N. Ingram, Ste. 103
Fresno, California

CD Transcribed by:

DOREEN L. PERKINS, C.S.R., R.M.R., C.R.R.
Certificate No. 5150

SEPTEMBER 2, 2009 - MORNING SESSION

(Thereupon the following proceedings were held in open court in the presence of the Court and Counsel:)

THE COURT: We'll recall the matters of Johnny Brown and Mitchell Xyadeth.

MS. BARBERI: Good morning, Your Honor. Tina Barberi for both defendants appearing 977 on his -- on their behalf.

Your Honor, this is set for a demur. We have -- I believe we have reached a resolution in these matters. Um -- I have spoken to the District Attorney. And instead of hearing the motions it would be the offer of the District Attorney to allow each of the Defendants to plead to the initial charges and the failures to appear will be dismissed in light of the pleas.

MR. HUTCHINS: Brian Hutchins for the People.

That is correct. That is our offer. Apparently these cases -- some of these cases were filed as misdemeanors originally. Marjorie Webb, who is the one who was handling this, I am appearing on her behalf.

But, in any event, if they plead to the original or underlying infraction then we have no

1 objection, and we would join and it would be the
2 request to have the failures to appear lifted.

3 MS. BARBERI: And the only request that I would
4 have is that they be allowed to make payments.

5 THE COURT: Are the People confident that I can
6 do that on a failure to appear?

7 MR. HUTCHINS: I have not researched the issue,
8 Judge. It is my understanding from talking to
9 Ms. Webb these cases were not -- were turned down
10 for prosecution as misdemeanors. Apparently an
11 error was made, it is Ms. Webb's belief, with the
12 Clerk's Office that they were proceeded on as
13 misdemeanors rather than infractions. Somewhere in
14 there an FTA was entered against them and sent to
15 the DMV, which I believe is now an issue with their
16 driver's license. Our office never intended to
17 proceed on these case -- any of these cases with a
18 misdemeanor charge, we're just asking that they
19 plead to the original or underlying infraction for
20 which they were stopped, and then any other
21 consequences be removed.

22 THE COURT: All right. I do need to do some
23 research on that issue. Assuming I can set aside
24 the failures to appear, are the People then
25 amending the underlying charges from misdemeanors
26 down to infractions?

1 MR. HUTCHINS: That is correct, Your Honor. We
2 would so move.

3 THE COURT: All right. I only have three case
4 sheets here. It seems like there was more than
5 three cases.

6 MS. BARBERI: Seven total. Some of them are --
7 they have not been converted or made. They are in
8 the process of --

9 THE COURT: Okay.

10 MS. BARBERI: We can set it over maybe a week
11 if that would be enough time or --

12 THE COURT: Yes, that would be plenty of
13 time.

14 MS. BARBERI: Let me just double check my
15 calendar.

16 MR. HUTCHINS: I'll not be here next week, but
17 either Ms. Webb could perhaps come up from
18 Department 1, or else my replacement could handle
19 it, either one. So Ms. Barberi can -- would
20 probably want to talk to that -- whoever is here
21 that week before proceeding on the record.

22 THE COURT: What days --

23 MS. BARBERI: Your Honor, maybe we can just
24 continue the motions --

25 THE COURT: Yes.

26 MS. BARBERI: -- at this point to September --

1 September 9th. Oh, hang on, I have a hearing in
2 drug court downstairs that could take a while.
3 Maybe two weeks to the 16th. Oh, no, that's not --
4 that's not a good date, never mind. You know what,
5 I'll do it on the 9th, that's fine, because the
6 16th the court --

7 THE COURT: Yes. So what time window is good
8 for you? You want to do morning? Afternoon?

9 MS. BARBERI: 8:30.

10 THE COURT: All right. We'll set all seven
11 matters over for continued hearing on the demur
12 next Wednesday, September 9, 2009, at 8:30 in the
13 morning in this department.

14 MS. BARBERI: Thank you.

15 (Thereupon the recess was
16 taken.)

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SEPTEMBER 9, 2009 - MORNING SESSION

(Thereupon the following
proceedings were held in open
court in the presence of the
Court and Counsel:)

THE COURT: The Court will call the matters of
Johnny Brown, case ending 111, and case ending in
110.

MS. RAND: I'm sorry, Judge, what case did you
call?

THE COURT: Johnny Brown.

MS. RAND: Your Honor, that's a bunch of
infractions. Brian Hutchins indicated he would
dismiss all the FTA's if he pleads to the
underlying traffic infractions.

THE COURT: Right.

MS. BARBERI: We'll leave it up to the Court.

THE COURT: Well, Mr. Hutchins told me that,
and my comment to him, or my question to him is,
what authority do you have or does he have for the
proposition that the District Attorney can dismiss
failures to appear? It's like the District
Attorney dismissing contempt charges, which they
can't. It's my prerogative.

You have any authority for the proposition that
you can flush failures to appear?

1 MS. RAND: Um -- nope. I'll leave it up to the
2 Court.

3 MS. BARBERI: Your Honor, we'd (Inaudible) then
4 I would proceed on the demur at this point because
5 there is no complaint filed on these cases.

6 THE COURT: Okay. I have read and considered
7 the motions. Do you care to argue the demur?

8 MS. BARBERI: I would submit it on my -- my --
9 my written pleadings. I don't think the District
10 Attorney has prepared any written argument. And I
11 have not seen a copy of the complaints on any of
12 these matters.

13 THE COURT: The Court takes the demur under
14 submission. I'll give a written ruling in the
15 Brown cases in the next few days. Court rejects
16 the plea agreement.

17 The Court will call the case of Mitchell
18 Xyadeth, case ending 44JS, case ending 6479, case
19 ending 3370, case ending 1162, case ending 2272.

20 MS. RAND: Susan Rand for the People.

21 MS. BARBERI: Tina Barberi for Mr. Xyadeth
22 appearing 977 on his behalf.

23 THE COURT: Same issue is presented here. The
24 Court rejects the plea agreement.

25 MS. RAND: And, Your Honor, the main issue is
26 the traffic infractions with that issue. My

1 position, is the District Attorney's Office
2 actually even a party in interest at this point?

3 THE COURT: And any further argument on the
4 demurs?

5 MS. BARBERI: Um -- no, Your Honor. The same
6 argument that I stated in Brown.

7 THE COURT: The Court takes the matters under
8 submission. I'll rule on the demurs within the
9 next few business days.

10 MS. BARBERI: And Your Honor, just one
11 question, and I don't know the Court's ruling, but
12 if any of the demurs are denied -- um -- is this
13 Court going to allow these matters to be placed
14 back on calendar for jury motion, jury trial?

15 THE COURT: Yes, absolutely.

16 MS. BARBERI: Okay. That will be in the ruling
17 or --

18 THE COURT: Yes.

19 MS. BARBERI: Thank you.

20 MS. RAND: And, Judge, that gets back to my
21 issue, is the People a party in interest then,
22 because we're not necessarily the moving parties on
23 the FTA's?

24 THE COURT: I think we still -- not you, I
25 think the People still are a party.

26 MS. BARBERI: Thank you, Your Honor.

1 THE COURT: Thank you.

2 (Thereupon the recess was taken.)

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COUNTY OF FRESNO)
) ss.
STATE OF CALIFORNIA)

I, DOREEN L. PERKINS, Official Certified Shorthand Reporter of the State of California, County of Fresno, do hereby certify that the foregoing transcript, pages 1 through 10, inclusive, is a complete, true and correct transcription to the best of my ability of the FTR Gold disk in the above-entitled matter.

Dated this 9th day of June, 2010.



DOREEN L. PERKINS, CSR, RMR, CRR
Certificate No. 5150

EXHIBIT "M"

1 R1873110 and 1873111.DTT:snf

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

9

CENTRAL DIVISION

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11

THE PEOPLE OF THE STATE OF) No. 1873110 and Dept. 61
CALIFORNIA,) No. 1873111

12

Plaintiff,)

13

v.)

RULING ON DEMURRERS

14

JOHNNY WALTER BROWN, III,)

15

Defendant.)

16

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22

In connection with each of the above-referenced cases, Defendant Johnny Walter Brown (Defendant) has filed a demurrer for "lack of jurisdiction, uncertainty, failure to state a public offense and barred prosecution." For the reasons stated below, the demurrers are overruled in all respects.

23

THE UNDERLYING ALLEGED AND JUDICIALLY NOTICED FACTS

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At approximately 8:00 a.m. on November 18, 2008, Defendant was issued a citation for driving without a license and failing to provide evidence of financial responsibility, respectively violations of Vehicle Code sections 12500(a) and 16028(a). Defendant signed the promise to appear on the citation

1 and committed to appear on the citation within 60 days of
2 issuance. Defendant failed to appear. Thereafter, the court sent
3 a courtesy Failure to Appear (FTA) notice to Defendant. Defendant
4 took no action. Thereafter, the court transmitted a license hold
5 to the California Department of Motor Vehicles (DMV). In April
6 2009, the court sent the case to collections. In August 2009,
7 Defendant filed the instant demurrer.

8 At approximately 8:15 a.m. on November 18, 2008,
9 Defendant was again issued a citation for driving without a
10 license and failing to provide evidence of financial
11 responsibility, respectively violations of Vehicle Code sections
12 12500(a) and 16028(a). Defendant signed the promise to appear on
13 the citation and committed to appear on the citation within 60
14 days of issuance. Defendant failed to appear. Thereafter, the
15 court sent a courtesy FTA notice to Defendant. Defendant took no
16 action. Thereafter, the court transmitted a license hold to the
17 DMV. In April 2009, the court sent the case to collections. In
18 August 2009, Defendant filed the instant demurrer.

19 DEMURRERS GENERALLY

20 A demurrer is a pleading (Pen. Code, § 1002¹) that
21 raises an issue of law as to the sufficiency of an accusatory
22 pleading. (§ 1004). Section 1004 covers all accusatory
23 pleadings, thus including complaints in municipal court.
24 Demurrers lie only for defects appearing on the face of the
25 accusatory pleading. (§ 1004; *People v. McConnell* (1890) 82 Cal.

26
27 ¹ All further references to a Section are to the Penal Code unless otherwise
28 specified.

1 620; *People v. Muniz* (1970) 4 Cal.App.3d 562, 568.) The grounds
2 of demurrer specified in Section 1004 are exclusive. (See *People*
3 *v. McConnell*, supra.) Fundamental defects, when appearing on the
4 face of an accusatory pleading, may be reached by demurrer.

5 A defendant may also demur when the accusatory pleading
6 does not substantially conform to the provisions of Sections 950,
7 951 and 952. (§ 1004(2).) This ground attacks the failure to
8 meet the extremely simple pleading requirements, and is
9 essentially a demurrer for uncertainty. (See *People v. Horiuchi*
10 (1931) 114 Cal.App. 415, 421, 422, 424, 429.) Further, a
11 defendant may demur when it appears on the face of the accusatory
12 pleading that more than one offense is charged, except as provided
13 in Section 954. (§ 1004(3); see *People v. Kemp* (1961) 55 Cal.2d
14 458, 474.)

15 ANALYSIS

16 The filing of an accusatory pleading commences a
17 criminal action. The pleading may take the form of an indictment,
18 an information, an accusation or a complaint. The form of the
19 pleading depends on the nature of the offense charged.

20 Misdemeanor prosecutions are commenced by complaint, unless
21 otherwise provided by law. (See §§ 682(3), 740 and 949.) Except
22 as otherwise provided by law, all misdemeanors and infractions
23 must be prosecuted by written complaint under oath subscribed by
24 the complainant. Such complaint may be verified on information
25 and belief. (§ 740.) A citation is a written notice to appear
26 which is authorized by law for certain kinds of offenses. (See
27 §§ 853.5 [infractions], 853.6 [misdemeanors where defendant does
28 not demand to be taken before magistrate]; Veh. Code, §§ 40000.1,

1 40006 [Veh. Code infractions], 40000.5-40000.25 [Veh. Code
2 misdemeanors], 40300-40311 and 40500-40521 [Veh. Code violations
3 or violations of traffic ordinances].)

4 In cases like these, the arresting officer issues a
5 citation in lieu of filing a complaint or taking the arrested
6 person before a magistrate, and this constitutes notice to appear
7 in court or before an officer authorized to accept bail. (See
8 §§ 827.1, 853.5, 853.6a, 853.6(a) and 853.85 and Veh. Code
9 §§ 40500 and 40502.) The citation or written notice to appear is
10 filed with the court in lieu of a complaint, and the defendant may
11 plead guilty or nolo contendere. If the defendant enters a
12 different plea, a complaint must generally be filed, unless the
13 defendant waives this right. (§ 853.9(a).) There is one
14 exception to this and it is applicable in these cases: Where the
15 written notice to appear is on a form approved by the Judicial
16 Council and is verified, it constitutes a complaint. If it is not
17 verified, the defendant can demand a verified complaint.
18 (§ 853.9(b).)

19 Defendant's primary argument is that the court lacks
20 jurisdiction over the offenses charged. Defendant relies on
21 Section 1004(1) and asserts that he may demur to the pleading when
22 it appears that the court has no jurisdiction of the offenses
23 charged. Defendant argues that the lack of jurisdiction stems
24 from the lack of the filing of a formal complaint. Defendant
25 forgets that this is a demurrer and the defects complained of must
26 appear on the face of the accusatory pleading. To prevail on a
27 demurrer, Defendant must show that from the face of the complaint
28 the court has no jurisdiction of the offenses charged. Arguing

1 that there is no complaint fails to show lack of jurisdiction
2 pursuant to Section 1004(1). The demurrer on this ground is
3 overruled.

4 The court will treat the demurrer as a motion to dismiss
5 based upon the lack of a complaint. That motion is denied because
6 there are complaints in these cases.

7 Defendant relies on *City of San Diego v. Municipal Court*
8 (1980) 102 Cal.App.3d 775 and *Board of Trustees v. Municipal Court*
9 (1979) 95 Cal.App.3d 322. Those cases involved parking violations
10 and writs of mandate to force the court to process parking
11 violations. In those cases the notice of parking violation was
12 attached to the unattended vehicle. The courts held that those
13 notices were not the equivalent of complaints. The court held
14 that not every notice given is the equivalent of a complaint;
15 rather, it is a notice to which a plea of guilty (or nolo
16 contendere) may be entered after it is filed with the magistrate,
17 and until then it is simply a notice that a sum is due for the
18 offense and may be paid to avoid further proceedings. (*Board of*
19 *Trustees v. Municipal Court* (1979) 95 Cal.App.3d 322, 326.) The
20 situation we have in these cases is not the same as in the cases
21 cited by Defendant. The original citations in these cases were
22 indeed the equivalent of a complaint and a plea could have been
23 timely entered as to them.

24 Defendant relies on Vehicle Code section 40513 in
25 arguing that a formal complaint is required because he failed to
26 appear. (See Veh. Code § 40513(a).) Defendant fails to realize
27 that a formal complaint is not necessary in these cases.
28 Defendant ignores subsection (b) of Vehicle Code section 40513. A

1 similar issue was addressed in *Heldt v. Municipal Court* (1985) 163
2 Cal.App.3d 532, 537. In that case the petitioner contended that a
3 written notice to appear on an approved form, when filed in lieu
4 of a formal complaint, may not serve as a complaint "for all
5 purposes" as to confer jurisdiction on the court to proceed to
6 trial and toll the statute of limitations, but may be used only
7 for the limited purpose of taking a plea and issuing a warrant
8 thereon. The court disagreed. The specific issues in these cases
9 are different from those in *Heldt*. *Heldt* dealt with Section
10 853.9--not Vehicle Code section 40513. It must be noted that the
11 language is virtually identical and the statutory interpretation
12 is the same. In fact, the language in subsection (b) of Section
13 853.9 and Vehicle Code section 40513 is identical.

14 In *Heldt*, the court found that petitioner's
15 interpretation of Section 853.9 could be accepted only by ignoring
16 the plain language of the section and by isolating it from
17 Sections 740 and 853.6. Section 740 is not ironclad; it requires
18 public offenses in inferior courts to be prosecuted by formal
19 written complaints "[except] as otherwise provided by law."
20 (Emphasis added.) Sections 853.6 and 853.9 constitute such
21 exception. Section 853.6(e)(3) permits the prosecuting attorney
22 to "initiate prosecution by filing the notice or a formal
23 complaint...." Section 853.9 defines those circumstances under
24 which a notice to appear may be used in lieu of a formal complaint
25 in prosecuting an action.

26 The *Heldt* court made it very clear that Section 853.9(a)
27 simply provides that if the accused pleads not guilty to a non-
28 approved form, the prosecutor must file a formal complaint before

1 proceeding further, unless a complaint is waived. (*Id.* at p.
2 538.) Subdivision (b) is an exception; it applies
3 "[notwithstanding] the provisions of subdivision (a)...." It
4 allows the prosecutor to use a notice to appear on an approved
5 form in lieu of a formal complaint even when the accused pleads
6 not guilty. The court observed that petitioner's interpretation
7 of Section 853.9 would render subdivision (b) a nullity, for if
8 the prosecutor must file a formal complaint even when an accused
9 pleads not guilty to a notice on an approved form, subdivision (b)
10 would add nothing to subdivision (a). (*Ibid.*)

11 The court found that petitioner's interpretation would
12 render the last sentence of subdivision (b) meaningless. It
13 provides: "If the notice to appear is not verified, the defendant
14 may, at the time of arraignment, request that a verified complaint
15 be filed." If, as petitioner contended, the prosecutor must file
16 a formal verified complaint whenever an accused pleads not guilty,
17 there would be no need to provide the accused an opportunity to
18 request such a complaint. The court found that the last sentence
19 of subdivision (b) only reinforced its conclusion that it is an
20 exception to subdivision (a). (*Ibid.*) Under subdivision (a) the
21 prosecutor is relieved from filing a formal complaint against an
22 accused who pleads not guilty only if the accused expressly waives
23 a formal complaint. Under subdivision (b), however, the accused
24 is entitled to a verified formal complaint only upon request.

25 Defendant wants this court to ignore subsection (b) just
26 as the petitioner in *Heldt* wanted the court to ignore subsection
27 (b). Defendant primarily relies on *City of San Diego v. Municipal*
28 *Court* (1980) 102 Cal.App.3d 775 just like the petitioner in *Heldt*.

1 The court quoted Vehicle Code section 40513, subdivision (a),
2 which is virtually identical to the language of section 853.9,
3 subdivision (a). The court in *Heldt* stated that *San Diego* is no
4 solace to petitioner for several reasons.

5 The first reason set out in *Heldt* is applicable to
6 Defendant. Section 40513 includes a subdivision (b) that is
7 identical to subdivision (b) of Section 853.9. Yet the court in
8 *San Diego* made no reference to subdivision (b) and does not
9 purport to interpret its meaning. There is no indication in *San*
10 *Diego* that the notice of violation was on a form approved by the
11 Judicial Council and thus subject to subdivision (b). In the
12 instant cases, there is no dispute that the notices to appear were
13 on an approved Judicial Council form.

14 The norm is that the court has no jurisdiction to try an
15 offense without a complaint or its waiver. However, Sections
16 853.6 and 853.9 and Vehicle Code section 40513 provide for
17 circumstances, as in these cases, where the notice to appear (the
18 citation) may be used in lieu of a formal complaint to invoke the
19 jurisdiction of the court in a misdemeanor or infraction
20 prosecution.

21 The court in *People v. Barron* (1995) 37 Cal.App.4th
22 Supp. 1, 4, interpreted subsection (b) of Section 40513. In that
23 case, the defendant refused to enter a plea and demurred to the
24 complaint. The demurrer was overruled. The defendant pled not
25 guilty and brought a motion to dismiss. The court found that the
26 first eight words of Vehicle Code section 40513, subdivision (b),
27 "Notwithstanding the provisions of subdivision (a) of this
28 section," clearly indicate that the provisions of subdivision (b)

1 are to be read as an exception to subdivision (a). (*Ibid.*)

2 This court reads Vehicle Code section 40513, subdivision
3 (b), to mean that where, as here, written notices to appear were
4 prepared on a form approved by the Judicial Council, an exact and
5 legible duplicate copy of the notice when filed with the
6 magistrate constitutes a complaint to which the defendant may
7 enter a plea, i.e., a plea of guilty, a plea of nolo contendere,
8 or a plea of not guilty.

9 Given the foregoing, there are complaints on file in
10 each of these cases. The court has written notices to appear (the
11 citations) on forms approved by the Judicial Council upon which a
12 plea may be entered. Each is signed by Defendant. Defendant has
13 failed to show that the face of these complaints reveals a lack of
14 jurisdiction of the offenses charged.

15 Defendant next demurs on the ground of uncertainty,
16 contending that the accusatory pleadings do not substantially
17 conform to the provisions of Section 950, 951 and 952.
18 (§ 1004(2).) The objection that an information does not state
19 with sufficient clarity the offense to enable the defendant to
20 present his defense must be raised by demurrer. (*People v.*
21 *Perfetti* (1928) 88 Cal.App. 609.) The familiar argument is that
22 there are no complaints so they could not possibly conform to
23 these provisions. As stated above, the citations are sufficient
24 and are considered complaints. They are on approved Judicial
25 Council forms, meet the charging requirements and are not so
26 uncertain that Defendant cannot defend himself. In these cases,
27 the offenses are clearly stated. Defendant argues that he is at a
28 loss as to how to mount a defense because no complaints have been

1 filed, to which the court responds: he can simply do as every
2 other traffic defendant does and request a copy of the citations.
3 Defendant has failed to demonstrate that the complaints are
4 uncertain and the special demurrer is overruled.

5 Defendant next argues that no offenses have been stated.
6 The court could sustain a demurrer on this ground if the facts
7 stated in the accusatory pleading do not constitute a public
8 offense. (§ 1004(4).) Defendant's familiar argument is that
9 since there are no complaints there are no offenses stated.
10 Defendant argues that there is no way to know the exact violations
11 of law and to apprise him of the crimes with which he is accused.
12 There are complaints and they adequately set out the alleged
13 violations. Defendant has failed to demonstrate that the
14 accusatory pleadings are deficient and the demurrer on this ground
15 is overruled.

16 Finally, Defendant demurs on the ground that the
17 accusatory pleadings contain matter which, if true, would
18 constitute a legal justification or excuse of the offenses
19 charged, or other legal bar to the prosecution. (§ 1004(5).) As
20 previously discussed, Defendant passionately argues that there are
21 no complaints then remarkable makes an about-face arguing that
22 there are complaints and that their contents are favorable to him.
23 Defendant cannot have it both ways. There are complaints in these
24 cases and Defendant makes no attempt to explain what the legal
25 justification or excuse for the offenses charged, or other legal
26 bar to the prosecution is. The demurrer on this ground is
27 overruled.

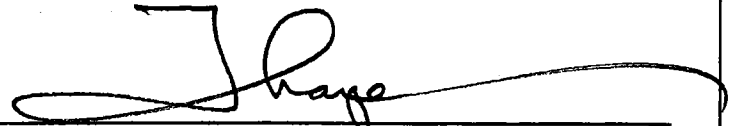
28 ///

1 front of the magistrate, if not literally at least to the extent
2 that they are documented in the court's own records. In other
3 words, and contrary to the usual situation, the magistrate does
4 not need to be independently persuaded as to Defendant's guilt.
5 No judicial discretion is involved or required.

6 DISPOSITION SUMMARY AND FUTURE SETTINGS

7 The demurrers are overruled in all respects and the
8 matters are hereby set for jury motion on September 30, 2009, at
9 8:30 a.m. in Department 61.

10 Dated this 11TH day of September, 2009.

11
12 

13 _____
14 D. TYLER THARPE
15 JUDGE OF THE SUPERIOR COURT
16
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EXHIBIT "N"

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
APPELLATE DIVISION

JOHNNY BROWN, III
Petitioner,

vs.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR FRESNO COUNTY,
Respondent

THE PEOPLE OF THE STATE
OF CALIFORNIA, BY THEIR
ATTORNEY, ELIZABETH EGAN,
DISTRICT ATTORNEY FOR THE
COUNTY OF FRESNO,
Real Party in Interest

No. 0002179

Fresno County
Superior Court No.1873110

**PETITION FOR WRIT OF
MANDATE**

**IMMEDIATE STAY
REQUESTED**

FILED

SEP 28 2009

FRESNO COUNTY SUPERIOR COURT
BY _____
C.L. DEPUTY

PETITION FOR PEREMPTORY WRIT OF MANDATE

AND REQUEST FOR IMMEDIATE STAY

**Form Orders of the Superior Court of the State of California, County of
Fresno, Case No. 1873110, The Honorable Judge D. Tyler Tharpe, Presiding**

TINA M. BARBERI, #213267
7493 North Ingram, Suite 103
Fresno, California 93711
Tel: (559) 447-1240
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Attorney for Petitioner,
JOHNNY BROWN, III

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
APPELLATE DIVISION

JOHNNY BROWN, III Petitioner,)	No. _____
)	
)	Fresno County
vs.)	Superior Court No. 1873110
)	
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR FRESNO COUNTY, Respondent)	PETITION FOR WRIT OF MANDATE
_____)	IMMEDIATE STAY REQUESTED
)	
THE PEOPLE OF THE STATE OF CALIFORNIA, BY THEIR ATTORNEY, ELIZABETH EGAN, DISTRICT ATTORNEY FOR THE COUNTY OF FRESNO, Real Party in Interest)	
_____)	

**PETITION FOR PEREMPTORY WRIT OF MANDATE AND REQUEST
FOR IMMEDIATE STAY**

**Form Orders of the Superior Court of the State of California, County of
Fresno, Case No. 1873110, The Honorable Judge D. Tyler Tharpe, Presiding**

TO THE HONORABLE DONALD BLACK, PRESIDING JUDGE OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA, FRESNO COUNTY:

Petitioner, JOHNNY BROWN, III, by and through his attorney, TINA M.
BARBERI, petitions for a peremptory writ of Mandate directed to the Respondent

Court to grant the Demurrer, which was denied by Respondent Court on September 11, 2009.

In support of the requested writ of Mandate, Petitioner, by this verified petition, alleges as follows:

I

Defendant is charged with driving without a license and failing to provide evidence of financial responsibility, respectively violations of California Vehicle Code sections 12500(a) and 16028(a).

II

It is further alleged that Defendant signed a promise to appear and failed to appear, in violation of California Vehicle Code section 40508(a). A courtesy notice was allegedly sent to Petitioner. Soon after that, defendant was charged with a Failure to Appear ("FTA"). Thereafter, the Court transmitted a license hold to the California Department of Motor Vehicles, pursuant to California Vehicle Code section 40509.5. The Court sent the case to GC Services, a collection agency.

III

At no time did the District Attorney authorize the filing of a complaint. Furthermore, once the FTA was added to the charges against Petitioner, the

District Attorney's Office never authorized the filing of a complaint, nor was a complaint filed against Petitioner.

IV

On September 9, 2009, the Demurrer was heard. No oral arguments were made by either party except that Attorney Barberi pointed out that there still was no complaint filed by the District Attorney, nor was there a response from their office. Judge Tharpe stated that he would have a written decision in three to four days. On September 11, 2009, the Ruling on the Demurrers was signed by Judge Tharpe, where the Demurrer was denied. The ruling on the Demurrer was served by mail on September 16, 2009.

V

No other petition for writ of Mandate or Mandate has been made by or on behalf of Petitioner relating to this issue, except a similar petition is being made in case number 1873111 for the same reasons as this petition.

VI

Petitioner has no plain, speedy, or adequate remedy at law other than this petition. An actual controversy exists between the petitioner, the respondent and the real party relating to the legality of the denial of the demurrer. Accordingly, a petition for a writ of Mandate is the appropriate remedy. (Code Civ. Proc. § 1086.) Unless this Court issues the requested writ of Mandate, Petitioner must

answer for a crime without being fully and substantially informed of the charges against him. The lack of complaint also requires Petitioner to defend against a charge without having protection from being put in jeopardy once again for the same offense. Without review, Petitioner will be compelled to go through a trial and then must appeal from a final judgment. The unreasonableness of the delay and expense is clearly evident.

VII

Petitioner is the party beneficially interested in these proceedings and the aggrieved party to the denial of the Demurrer by the Respondent Court. Other interested parties are the Respondent Court, the Superior Court of Fresno County, Central Division and the People of the State of California, by and through their attorney, Elizabeth Egan, District Attorney, County of Fresno, State of California are also a real party in interest because they are the plaintiffs and respondents in this action. All actions complained of in this petition occurred within the territorial jurisdiction of the Respondent court.

VIII

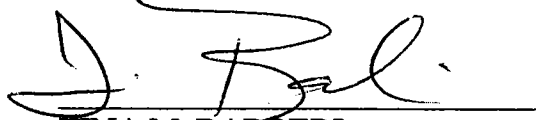
This petition is brought pursuant to section 1085 of the Code of Civil Procedure. Venue is proper in this Court in the first instance pursuant to section 394 of the Code of Civil Procedure.

WHEREFORE, Petitioner prays that:

1. A writ of Mandate issue, directing Respondent court to grant Petitioner's Demurrer for Lack of Jurisdiction, Uncertainty, and Failure to State a Public Offense, under California Penal Code sections 1004(1), 1004(2), 1004(4).
2. An immediate stay of proceedings in the Fresno County Superior Court, Fresno Division, with respect to Case No. 1873110 currently pending against Petitioner; and,
3. This Court grant such other and further relief as it deems appropriate in the interests of justice.

Dated: September 26, 2009

Respectfully submitted,



TINA M. BARBERI

Attorney at Law

7493 North Ingram Avenue, Suite 103

Fresno, CA 93711

Tel: (559) 447-1240

Fax: (559) 447-1285

Attorney for Petitioner,
JOHNNY BROWN, III

VERIFICATION

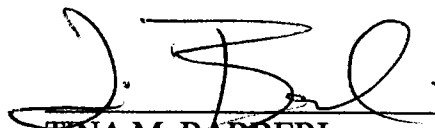
I, TINA M. BARBERI, declare as follows:

I am an attorney admitted to practice in the State of California. I was retained to represent petitioner herein.

In my capacity as attorney for petitioner, I am making this verification on his behalf.

I have read the foregoing Petition for Writ of Mandate and Request for Immediate Stay and the Memorandum of Points and Authorities in support of that Petition attached hereto, and declare that the contents of the Petition for Mandate and Request for Immediate Stay and the Memorandum of Points and Authorities are within my knowledge, except as to those matters which are alleged therein on information and belief and as to those matters, I believe them to be true.

Executed this 26th day of September 2009, at Fresno, California.



TINA M. BARBERI

Attorney at Law

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Fresno, CA 93711

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Attorney for Petitioner,
JOHNNY BROWN, III

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE PRESENTED

WHETHER THE DEMURRER WAS PROPERTLY DENIED BY THE TRIAL COURT WHEN THE COMPLAINT LACKS JURISDICTION, UNCERTAINTY, AND IT FAILS TO STATE A PUBLIC OFFENSE.

SUMMARY OF ARGUMENT

The trial court abused its discretion when it failed to grant Petitioner's Demurrer. The Demurrer was improperly denied by the trial court. Petitioner's brief constituted an accurate statement of the facts, an accurate statement of relevant law and a proper application of the relevant law to the facts of this case.

The People never replied to Defendant's Demurrer and made *no* attempt to oppose the demurrer. In fact, the Deputy District Attorney even questioned whether or not the People were a party of interest in the matter.

The trial Court's denial of the Demurrer did not resolve the problem because Defendant is still required to answer for a crime without being fully and substantially informed of the charges against him because of the lack of a proper complaint.

FACTUAL HISTORY

On November 18, 2008, at approximately 8:00 a.m., Defendant was charged with driving without a license and failing to provide evidence of financial

responsibility, respectively violations of California Vehicle Code sections 12500(a) and 16028(a) (Exhibit A)

It is further alleged that Defendant signed a promise to appear and failed to appear, in violation of California Vehicle Code section 40508(a). (Exhibit B) A courtesy notice was allegedly sent to Petitioner. (Ibid.) On or about March 1, 2009, defendant was charged with a Failure to Appear (“FTA”). (Ibid.) On April 18, 2009, the Court transmitted a license hold to the California Department of Motor Vehicles, pursuant to California Vehicle Code section 40509.5. (Ibid.) On April 19, 2009, the Court sent to case to GC Services, a collection agency. (Ibid.)

At no time did the District Attorney authorize the filing of a complaint. (Exhibit B) Furthermore, once the FTA was added to the charges against Petitioner, the District Attorney’s Office never authorized the filing of a complaint, nor was a complaint filed against Petitioner. (Ibid.)

PROCEDURAL HISTORY

In August of 2009, Attorney Barberi, on Petitioner’s behalf, contacted the Fresno Superior Court with a request to have the matter calendared for arraignment. (Exhibit C) At that time, the Court clerk informed Attorney Barberi that she would have to file an “Application to Show Good Cause to Vacate Civil Assessment”. (Ibid.) On August 18, 2009, Attorney Barberi returned to the Traffic Department of the Fresno Superior Court and advised them that she wanted

to calendar a Demurrer and to have the matter calendared in the misdemeanor court of the Fresno Superior Court. (Exhibit D)

Believing that the matter would be placed in the courtroom based on the usual course and conduct of the Fresno Superior Court, Attorney Barberi requested the matter to be placed on the date for motions in department 1 of the Fresno Superior Court on September 3, 2009. (Exhibit D) At that time, the supervisor of the Traffic Department informed Attorney Barberi that it would have to be heard on a Monday, Tuesday, or Wednesday in Department 61 of the Fresno Superior Court. (Ibid.) At that time, the date was changed to September 2, 2009. (Ibid.)

On August 18, 2009, Attorney Barberi sent a letter and a conformed copy of the motion to the Fresno County District Attorney's Office. (Exhibit E) The letter informed the District Attorney's Office of the new court date and department. (Ibid.)

On September 2, 2009, Attorney Barberi appeared for Petitioner on his behalf.¹ (Exhibit F) At that time, Deputy District Attorney Brian Huchins offered to settle the matter by allowing Petitioner to plead to the original citation with the understanding that the FTA would be dismissed. (Exhibit C) Attorney Barberi agreed to the offer on behalf of Petitioner. (Ibid.)

When the case was heard, Attorney Barberi stated the agreement on the record before the Demurrer was heard. (Exhibit C) Deputy District Attorney

¹ As this is a misdemeanor case, the proceedings were tape-recorded. Attorney Barberi has ordered the recording, but at this time, Attorney Barberi has not received the recording. Due to the emergent nature of the Petition for Peremptory Writ of Mandate, Petitioner relies upon a declaration of counsel for the Petitioner concerning both hearings.

Brian Huchins also stated that the People wanted this agreement and did not wish to prosecute the failure to appear. (Ibid.) Judge Tharpe stated that he did not know if he (meaning his Honor) had authority to dismiss the case. (Ibid.) Judge Tharpe stated he needed to research the matter. (Ibid.) Attorney Barberi suggested setting the matter over one week, to September 9, 2009. (Ibid.) At that time, Judge Tharpe ordered the case continued for Demurrer to September 9, 2009, in department 62 of the Fresno Superior Court. (Exhibit F)

On September 9, 2009, the Court rejected the plea agreement stating that the District Attorney did not have authority to dismiss the FTA charges against Petitioner. (Exhibit C) At that point, the Demurrer was heard. (Exhibit G) No oral arguments were made by either party except Attorney Barberi pointed out that there still was no complaint filed by the District Attorney, nor was there a response from their office. (Exhibit C) Judge Tharpe stated that he would have a written decision in three to four days. (Ibid.) At that time, Deputy District Attorney Susan Rand, appearing for the People, asked whether the people were a party to the action. (Ibid.)

On September 11, 2009, the Ruling on the Demurrers was signed by Judge Tharpe.² (Exhibit H) The proof of service stated that it was mailed on September 16, 2009. (Exhibit I) A copy of the Ruling on the Demurrers was sent to Tina M. Barberi, Petitioner's Attorney, Susan Rand, Deputy District Attorney, Honorable

² Petitioner had two motions heard that day, each case dealing with the same issues. The other case number was 1873111. The Court denied the Demurrers on both cases in his Ruling on Demurrers.

Bruce Smith, Presiding Judge, and Tiffany Alvarado, Traffic Department Manager. (Ibid.) A calendar request was also served on Tina M. Barberi, where the matter was set for jury motion on September 30, 2009. (Exhibit J)

Petitioner seeks a Writ of Mandate directing Respondent court to grant the Demurrer, and directing the Superior Court, Central Division, to stay any and all proceedings in the pending case, #1873110.

DISCUSSION

I

WRIT OF MANDATE IS THE PROPER MEANS TO GRANT PETITIONER RELIEF

Under Code of Civil Procedure section 1085, “a writ of mandate may be issued by a court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station.” “The writ will lie where the petitioner has no plain, speedy and adequate alternative remedy, the respondent has a clear, present and usually ministerial duty to perform, and the petitioner has a clear, present and beneficial right to performance.” (Lewis v. Superior Court of Santa Clara (2008) 169 Cal.App. 4th 70, 77, quoting Kong v. City of Hawaiian Gardens Redevelopment Agency (2002) 101 Cal.App.4th 1317, 1325 [125 Cal.Rptr.2d 1].)

“Where a trial court is under a legal duty to sustain a demurrer, it may be directed to do so by a writ of mandate.” Fogarty v. Superior Court (1981) 117 Cal.App.3d 316, 320, 172 Cal.Rptr. 594. “As in prohibition, the remedy by

appeal is usually deemed inadequate in these situations, and mandamus is allowed.” Ibid. quoting 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, § 104, p. 3879. “The court with jurisdiction over an action or proceeding has a positive duty to exercise that jurisdiction and, if it refuses, may be compelled by mandamus to assume jurisdiction.” City of San Diego v. Municipal Court (1980) 102 Cal. App. 3d 775, 778.

This Petition challenges the Respondent Court’s denial of the Demurrer. The appropriate standard of review for an order overruling a demurrer is de novo. Caliber Bodyworks, Inc. v. Superior Court, 134 Cal. App. 4th 365, 373, 36 Cal.Rptr.3d 31. In reviewing demurrers, the court must accept “as true all properly pleaded facts in the complaint and exercises independent judgment to determine whether the complaint states a cause of action as a matter of law.” Ibid. at 373.

II

NO WAIVER OF ARGUMENT INTENDED

Petitioner intends no waiver of issues raised or arguments made at the trial court level by not expressly reiterating them herein. Petitioner’s original Demurrer comprises Exhibit D of this Petition and all arguments made below are hereby incorporated in this Petition.

III

THE TRIAL COURT IMPROPERLY FAILED TO TREAT PETITIONER'S DEMURRER AS A DEMURRER

Petitioner brought a demurrer based on lack of jurisdiction, uncertainty, failure to state a public offense, and barred prosecution.³ Demurrers are used to challenge the defects that appear on the face of the accusatory pleading.

California Penal Code §1004. The Court did not treat Petitioner's Demurrer as a Demurrer, but rather a Motion to Dismiss for lack of Complaint. (Exhibit H, page 5, Line 4-6.)

California Penal Code section 1004 states:

The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;
2. That it does not substantially conform to the provisions of Section 950 and 952, and also Section 951 in case of an indictment or information;
3. That more than one offense is charged, except as provided in Section 954;
4. That the facts stated do not constitute a public offense;
5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

³ Petitioner agrees that the demurrer was properly sustained as to the barred prosecution only.

Here, Petitioner has never denied that the citation could not act as a complaint. However, when the failure to appear charge is added, a criminal complaint must be filed in order for the Court to have jurisdiction. Furthermore, the complaint cannot be uncertain and it must state a public offense. As discussed below, the Court improperly denied the Demurrer.

VI

THE COURT LACKED JURISDICTION BECAUSE OF THE FAILURE OF THE DISTRICT ATTORNEY TO FILE A COMPLAINT AGAINST PETITIONER

Under California Penal Code §1004(1), a defendant may demur to the pleading when it appears that the court has no jurisdiction of the offense charged.

The misdemeanor complaint is a formal charge that gives the court jurisdiction to proceed to trial. Serna v. Superior Court (1985) 40 Cal 3rd 239, 257. “The filing of a complaint is essential to invoke the jurisdiction of the court.” City of San Diego v. Municipal Court (1980) 102 Cal. App. 3d. 775, 779; see also Rupley v. Johnson (1953) 120 Cal.App.2d 548, 552; Penal Code § 949).

Jurisdiction refers to the Court’s inherent power to hear and determine a particular case. It can neither be waived nor conferred by consent or stipulation. Griggs v. Superior Court (1976) 16 Cal. 3rd 341, 344 n2. A complaint must be filed in the proper court to confer subject matter jurisdiction on the Court. (See Harrington v. Superior Court (1924) 194 Cal 185; Bayle-Lacoste & Co. v. Superior Court (1941)

46 Cal. App. 2d 636. Any judgment without subject matter jurisdiction is void.

Taliaferro v. County of Contra Costa (1960) 182 Cal 2d 587.

The Court states that the defects complained of must appear on the face of the Complaint. Petitioner is in agreement that the defects must be on the face of the complaint and argues that the defects are on the face of the complaint. In Petitioner's Demurrer, Petitioner relied on Vehicle Code section 40513.⁴

Vehicle Code section 40513 reads in full:

(a) Whenever written notice to appear has been prepared, delivered, and filed with the court, an exact and legible duplicate copy of the notice when filed with the magistrate, in lieu of a verified complaint, shall constitute a complaint to which the defendant may plead "guilty" or "nolo contendere."

⁴ In the Courts ruling however, the Court relied on Penal Code section 853.9. It reads in full:

(a) Whenever written notice to appear has been prepared, delivered, and filed by an officer or the prosecuting attorney with the court pursuant to the provisions of Section 853.6 of this code, an exact and legible duplicate copy of the notice when filed with the magistrate, in lieu of a verified complaint, shall constitute a complaint to which the defendant may plead "guilty" or "nolo contendere."

If, however, the defendant violates his or her promise to appear in court, or does not deposit lawful bail, or pleads other than "guilty" or "nolo contendere" to the offense charged, a complaint shall be filed which shall conform to the provisions of this code and which shall be deemed to be an original complaint; and thereafter proceedings shall be had as provided by law, except that a defendant may, by an agreement in writing, subscribed by him or her and filed with the court, waive the filing of a verified complaint and elect that the prosecution may proceed upon a written notice to appear.

(b) Notwithstanding the provisions of subdivision (a) of this section, whenever the written notice to appear has been prepared on a form approved by the Judicial Council, an exact and legible duplicate copy of the notice when filed with the magistrate shall constitute a complaint to which the defendant may enter a plea and, if the notice to appear is verified, upon which a warrant may be issued. If the notice to appear is not verified, the defendant may, at the time of arraignment, request that a verified complaint be filed.

As this Court can see, these two statutes are virtually identical. Because this case involves Vehicle Code violations and not Penal Code violations, Petitioner will use the Vehicle Code statute, with the understanding that the Penal may also apply.

If, however, the defendant violates his or her promise to appear in court or does not deposit lawful bail, or pleads other than “guilty” or “nolo contendere” to the offense charged, a complaint shall be filed that shall conform to Chapter 2 (commencing with Section 948) of Title 5 of Part 2 of the Penal Code, which shall be deemed to be an original complaint, and thereafter proceedings shall be had as provided by law, except that a defendant may, by an agreement in writing, subscribed by him or her and filed with the court, waive the filing of a verified complaint and elect that the prosecution may proceed upon a written notice to appear.

(b) Notwithstanding subdivision (a), whenever the written notice to appear has been prepared on a form approved by the Judicial Council, an exact and legible duplicate copy of the notice when filed with the magistrate shall constitute a complaint to which the defendant may enter a plea and, if the notice to appear is verified, upon which a warrant may be issued. If the notice to appear is not verified, the defendant may, at the time of arraignment, request that a verified complaint be filed. In the case of an infraction violation in which the defendant is a minor, the defendant may enter a plea at the arraignment upon a written notice to appear. Notwithstanding any other provision of law, in the case of an infraction violation, no consent of the minor is required prior to conducting the hearing upon a written notice to appear.

The most comparable case Petitioner has found on the issue of whether a complaint must be filed is City of San Diego v. Municipal Court, supra, 102 Cal. App. 3d 775. The Court stated that Vehicle Code section 40513(a) “does not mean any notice given is the equivalent of a complaint; rather, it is a notice to which a plea of guilty (or nolo contendere) may be entered after it is filed with the magistrate, and until then it is simply a notice that a sum is due for the offense and may be paid to avoid further proceedings (Board of Trustees v. Municipal Court (1979) 95 Cal. App. 3d 322, 326.” Ibid. at 778-779.

The Court, however, relied heavily on section (b) stating there is an exception to the requirement of filing a complaint. Petitioner agrees that there is an exception, but that exception does not apply here because Petitioner is charged with a FTA and the FTA charge is not on the original citation.

To justify its disregard of paragraph 2 of subsection (a), the Court relies almost exclusively on Heldt v. Municipal Court (1985) 163 Cal. App. 3d 532. In Heldt, the Petitioner was arrested for speeding (Vehicle Code, § 22350) and driving while intoxicated (Vehicle Code, § 23152). The arresting officer issued a verified notice to appear on a form approved by the Judicial Council, directing petitioner to appear in court. Petitioner did in fact appear and pled not guilty to the charge of driving while intoxicated. The People moved for leave to file an amended complaint. Petitioner opposed, contending the court lacked jurisdiction. The court granted the motion to amend. Ibid.

The Heldt Court held that the notice to appear, if the notice of violation was on a form approved by the Judicial Council and thus subject to subdivision (b), properly served as a complaint to initiate the prosecution and confer jurisdiction on the court to proceed to trial on the offense charged. Ibid.

Here, Petitioner asserts his case is clearly distinguishable from Heldt. First, Heldt did not deal with the failure to appear charge under Vehicle Code section 40508(a). The Court in Heldt did not mention the second paragraph in subsection (a) because it was inapplicable to the facts in that case. Heldt appeared in court to

answer the charges on the citation. Therefore, the ruling in Heldt was based on the fact that Heldt could enter a plea to the charges on the citation.

Furthermore, the Court in Heldt did agree that the court has no jurisdiction to try an offense without a complaint or its waiver. Heldt, supra, 163 Cal. App. 3d 532. There are certain circumstances where the notice may be used in lieu of a formal complaint and would invoke jurisdiction of the Court. Ibid. Petitioner's case, however, is not one of the exceptions. This case is not where the exception in subdivision (b) would invoke the jurisdiction of the Court because there is a FTA charge alleged against Petitioner.

Second, the Court relies on People v. Barron (1995) 37 Cal, App. 4th Supp. 1. In Barron, Defendant was prosecuted for failing to wear a safety helmet while operating a motorcycle (Veh. Code, § 27803, subd. (b)). Defendant was issued a verified notice to appear, on a Judicial Council form, directing defendant to appear in court, which he did appear. The trial court denied the request for a verified complaint and accusatory pleading, and found him guilty. Ibid.

The Court in Barron again only interpreted subsection (b) of Vehicle Code section 40513. The Court held the first eight words of Vehicle Code section 40513, subdivision (b), "Notwithstanding the provisions of subdivision (a) of this section," clearly indicate that the provisions of subdivision (b) are to be read as an exception to subdivision (a). People v. Barron, supra, 37 Cal, App. 4th Supp. 1

Again, Barron is not comparable to Petitioner's case in that there was not a FTA charge alleged. Unlike the two cases that the trial court relied almost

exclusively on, this case is significantly different because of the FTA allegation which is not on the original citation. Both of these cases did not deal with the second paragraph of subsection (a) because it was irrelevant to the cases before the Court. Here, however, the trial court ignored the same paragraph even when the second paragraph clearly addresses the procedure for a FTA.

It is evident that the second paragraph of subsection (a) is the controlling law and therefore it is essential to analyze this paragraph. It is apparent that the legislature made it a point to distinguish between an ordinary traffic ticket and an ordinary traffic ticket where a FTA charge is added. In fact, the legislature added an entire paragraph that describes the exact procedure for cases that involve FTAs. Therefore, a careful look at paragraph 2 of subsection (a) of Vehicle Code section 40513 is necessary.

The first line in that paragraph states: **“If, however, the defendant violates his or her promise to appear in court...”** Vehicle Code 40513(a). The “if, however” clearly means there is an exception to the rule in subsection (a). The plain language of the statute makes it clear that the charging of a FTA is an exception.

Second, it states: **“...a complaint shall be filed which shall conform to the provisions of this code and which shall be deemed to be an original complaint...”** Vehicle Code 40513(a). Again, it is clear that the Legislature intended a complaint to be filed and it is mandatory when there is an FTA. It is also evident that the complaint must be in conformity with the code. Therefore, it

is mandatory to file a complaint and be in conformity with the Code if the People of the State of California want to prosecute this charge.

Third, the last section of the paragraph states that **“except that a defendant may, by an agreement in writing, subscribed by him or her and filed with the court, waive the filing of a verified complaint and elect that the prosecution may proceed upon a written notice to appear.”** Again, this is an exception to the rule regarding FTA cases. Here, the Defendant may elect, in writing, subscribed by him, and filed in court, waive the verified complaint filing. As stated in the original demurrer, Petitioner has not waived the filing requirement and does not wish to proceed on the written notice to appear.

Vehicle Code section 40513(b) does not apply at this point. In order for section (b) to apply, the original citation would have to cite the violation for FTA. When an officer cites an individual for a traffic violation, the officer does not know if the defendant will or will not appear in court. Therefore, because it is unforeseen that the individual will not appear, the exception by the legislature was created. The only possible way section (b) would apply at all is if an officer gave a Defendant a new citation for the FTA and this is not the case. Once the FTA is charged, a verified complaint is required. Therefore, the denial of the demurrer for lack of jurisdiction was improper.

EVEN IF THE ORIGINAL CITATION CAN SERVE IN LIEU OF A COMPLAINT, THE PLEADING DOES NOT SUBSTANTIALLY CONFORM TO THE PROVISIONS OF CALIFORNIA PENAL CODE SECTIONS 950, 951 AND 952

The Trial Court denied the Demurrer on the ground of uncertainty. The trial court suggests that Petitioner should obtain a copy of the citation, just “as every other traffic defendant does.” Petitioner, in fact, obtained a copy of the citation and there are only two charges against Petitioner, yet the docket clearly states that Defendant is accused of three offenses. (see Exhibit A and Exhibit B)

A defendant may demur when the accusatory pleading does not substantially conform to the provisions to California Penal code sections 950, 951 and 952. Penal Code § 1004(2). A demurrer is proper when there is a failure to meet the extremely simple pleading requirements. Penal Code section 950 states: “The accusatory pleading must contain: 1. [t]he title of the action, specifying the name of the court to which the same is presented, and the names of the parties; 2.[a] statement of the public offense or offenses charged therein.”

Penal Code section 952 in part states:

In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.

The function of criminal pleadings in California is to give an accused adequate notice of the charges against him. Even though the particular circumstances of the charge need not be alleged, sufficient notice to satisfy due process must be given. People v. Jackson (1978) 88 Cal. App. 3d 490 (disapproved of by, People v. Barnum (2003) 29 Cal. 4th 1210). If the complaint is not written with sufficient clarity to enable defendant to present a defense, he should demurrer on one or more of the grounds set forth in Penal Code section 1004. People v. Randazzo (1957) 48 Cal. 2d 484; (see also People v. Schoeller (1950) 96 Cal. App. 2d 61, 62; People v. Waid (1954) 127 Cal. App. 2d 614, 616-617.

A bare literal compliance with Penal Code section 952 is insufficient to obviate a demurrer where a pleading in the words of the statute is insufficient to give constitutionally adequate notice of the offense. People v. Jordan (1971) 19 Cal. App. 3d 362, 369.

Petitioner does not deny the fact that the original citations could be used in lieu of a complaint if there was not a FTA allegation attached. Once there is a FTA charged, however, the complaint "shall be filed that shall conform[s] to Chapter 2 (commencing with Section 948) of Title 5 of Part 2 of the Penal Code, which shall be deemed to be an original complaint, and thereafter proceedings shall be had as provided by law, except that a defendant may, by an agreement in writing, subscribed by him or her and filed with the court, waive the filing of a

verified complaint and elect that the prosecution may proceed upon a written notice to appear.”

The original citation does not comply with the extremely simple pleading requirements because the citation fails to state each charge against Petitioner. Furthermore, a complaint has not been filed against Petitioner that is in compliance with Vehicle Code section 40513(a), as well as Penal Code section 952.

Here, if the complaint was in conformity with the extremely simple pleading requirements, then it leads to the question of why was the defendant unable to plead to the original citation. Petitioner agreed to plead to all the charges on the citation, but the plea was rejected by the trial court. If the pleadings were in fact in conformity, as the trial court suggests, then Petitioner’s plea to the citation would have been accepted.

The inability of Petitioner to plead to the original citation leads to only one conclusion: the pleading was not in conformity with Penal Code section 952. The pleading is supposed to give an accused adequate notice of the charges against him. Here, the notice is completely lacking. If Petitioner was unable to plead guilty to the “complaint”, then Petitioner can safely say that he does not have adequate notice to set the matter for trial. There is not a proper pleading in place that specifically lays out the charges against him. Therefore, the trial court incorrectly denied the Petitioner’s demurrer.

VI

THE TRIAL COURT INCORRECTLY DENIED THE DEMURRER BECUASE THE ACCUSATORY PLEADING DID NOT CONSTITUTE A PUBLIC OFFENSE

The trial court stated that there was a complaint that adequately set out the alleged violations against Petitioner. The Petitioner respectfully disagrees.

California Penal Code §1004(4) provides in part: “The defendant may demur when it appears that the facts stated do not constitute a public offense.”

The Court docket states that Petitioner is charged with driving without a license (Vehicle Code § 12500), a misdemeanor; no insurance (Vehicle Code § 16028(a)), and infraction; and FTA (Vehicle Code § 40508(a)), a misdemeanor. (Exhibit B)

The original citation states that Petitioner is charged with driving without a license (Vehicle Code § 12500), a misdemeanor; no insurance (Vehicle Code § 16028(a)), and infraction. The original citation does not state that Petitioner is charged with a FTA (Vehicle Code § 40508(a)). Because of the lack of complaint, the pleading does not properly states Petitioner committed a public offense as to the failure to appear.

The Court specifically ruled on the failure to appear charges. (Exhibit H, Page 11). The first question by the trial court is whether a formal complaint is required. The Court denies the Demurrer, but gives absolutely no reasoning behind his ruling regarding the FTA. Ibid.

First, the trial Court raised the question of whether a formal complaint must be filed on the violations of Vehicle Code section 40508(a). Ibid. This is clearly the issue that Petitioner has been asking. The Court then answers the question with a “clearly ‘no’”. Ibid. Then the Court proceeds to state the statute of the offense Petitioner is charged with in the docket. The Court failed to look at Vehicle Code section 40513(a), as Petitioner clearly set out above and in his Demurrer. In addition, the Court failed to give a reason why the answer was “clearly ‘no’”.

Second, the Court raises the issue of whether a magistrate needs to file a written complaint. Ibid. Again, the answer was “clearly ‘no’”. Ibid. The Court then answers a different question, specifically whether a magistrate could properly order the issuance of an arrest warrant for a misdemeanor offense of “failure to appear” or “failure to pay” without filing a written complaint. Ibid. Petitioner agrees that the Court may issue an arrest warrant, yet this is not the issue Petitioner raised on Demurrer.

In determining if a demurrer should be granted, the Court will normally assume everything in the complaint is true, and will determine whether there is enough to state an offense. Here, Petitioner tried to plead to all charges alleged on the original citation. This plea was rejected because Petitioner was not pleading to the failure to appear. The trial court is inconsistent in its rulings. If the complaint was properly plead, then why was the defendant unable to plead to the charges

against him on the original citation? The only logical explanation is the demurrer was valid because the complaint does not state a public offense as to the FTA or the plea would not have been rejected. Therefore, because there is no charging document alleging the FTA, the demurrer should have been granted and the court.

VII

CONCLUSION

For the reasons given above, the court erroneously denied Petitioner's demurrer. Accordingly, it is respectfully requested that the Superior Court of the State of California, County of Fresno, Appellate Division, issue the requested Writ of Mandate as prayed for, and to order stayed the proceedings in the Fresno County Superior Court, Fresno Courthouse, until such time as the Writ of Mandate has been executed.

Dated: September 26, 2009

Respectfully Submitted,



TINA M. BARBERI

EXHIBIT "O"

FILED

OCT 14 2009

FRESNO COUNTY SUPERIOR COURT

By _____ - DEPUTY

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6 IN THE APPELLATE DIVISION OF THE SUPERIOR COURT
7 COUNTY OF FRESNO, STATE OF CALIFORNIA
8

9 JOHNNY BROWN, III,

10 Petitioner,

11 v.

12 SUPERIOR COURT,

13 Respondent
14

) Case Nos.: 2179 and 2180

) ORDER ON PETITIONS
) FOR WRIT OF MANDATE

15
16 Petitioner challenges a trial court order overruling demurrers filed in each of
17 these four cases on four grounds:

- 18 1. that the court had no jurisdiction over the offense charged [§1004(1)]
19 2. that the complaint does not substantially conform to Penal Code §§950 and
20 952 [§1004(2)]
21 3. that the facts described don't constitute a public offense [§1004(4)]
22 4. that the facts, if true, would constitute a bar to prosecution or legal justification
23 [§1004(5)].¹

24 In the order overruling the demurrer as to the underlying traffic infractions, the
25 trial court found that both Penal Code §853.9(b) and Veh. Code §40513(b) make it clear
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¹ At fn. 4 on page 13 of the writ memo petitioners concede that the demurrer was properly sustained on this latter ground

1 that when a written notice to appear has been prepared on a form approved by the
2 Judicial Council,

3 an exact and legible duplicate copy of the notice when filed with the magistrate
4 shall constitute a complaint to which the defendant may enter a plea and, if the
5 notice to appear is verified, upon which a warrant may be issued. If the notice to
6 appear is not verified, the defendant may, at the time of arraignment, request that
7 a verified complaint be filed.

8 As to the additional charges of failure to appear under Veh. Code §40508(a),
9 the court also found that no formal complaint had to be filed, even though that charge
10 was not included in the original traffic citation which had been properly filed with the
11 court pursuant to Veh. Code §40513(b).

12 Though it appears the underlying demurrers challenged not only the lack of a
13 formal complaint filed as to the failure to appear charges, but the lack of a complaint as
14 to the traffic infractions, the writ petitions make clear that it is only the "failure to appear"
15 charges that petitioners claim have not been properly put before the court.

16 The trial court's order addresses those charges as well, citing 1973 Cal. AG\
17 LEXIS 39, 56 Ops. Cal. Atty. Gen. 165] as affirming that a magistrate can properly issue
18 an arrest warrant on an FTA charge without there having been a written complaint filed,
19 since the crimes occur in the presence of the court.

20 Petitioner contends that that the court has ignored the second paragraph of Veh.
21 Code §40513(a) which provides in relevant part that if the defendant violates his
22 promise to appear, "a complaint shall be filed that shall conform to Chapter 2
23 (commencing with §948) of Title 5 of Part 2 of the Penal Code..." unless the defendant,
24 by an agreement in writing, waives the filing of a verified complaint.

25 Petitioner argues that in order for the court to rely on §40513(b) as it appears to
26 have done, the original citation filed with the court would have had to have charged the
27 failure to appear along with the underlying traffic violations, and he contends that once
28 the FTA is added as a charge, a verified complaint is required.

However that ignores the provisions of Penal Code §959.1 which states in

1 relevant part:

2 (a) Notwithstanding Sections 740, 806, 949, and 959 or any other law to the
3 contrary, a criminal prosecution may be commenced by filing an accusatory
4 pleading in electronic form with the magistrate or in a court having authority to
5 receive it.

6 (b) As used in this section, accusatory pleadings include, but are not limited to,
7 the complaint, the information, and the indictment.

8 (c) A magistrate or court is authorized to receive and file an accusatory pleading
9 in electronic form if all of the following conditions are met:

10 (1) The accusatory pleading is issued in the name of, and transmitted by,
11 a public prosecutor or law enforcement agency filing pursuant to Chapter
12 5c (commencing with Section 853.5) or Chapter 5d (commencing with
13 Section 853.9), or by a clerk of the court with respect to complaints issued
14 for the offenses of failure to appear, pay a fine, or comply with an order of
15 the court.

16 (2) The magistrate or court has the facility to electronically store the
17 accusatory pleading for the statutory period of record retention.

18 (3) The magistrate or court has the ability to reproduce the accusatory
19 pleading in physical form upon demand and payment of any costs
20 involved.

21 It appears in this case that there was in fact "an accusatory pleading in electronic
22 form" when the "failure to appear" allegation was entered on the court's register of
23 actions. There is no indication petitioner has either requested or offered to pay any
24 costs of reproducing that accusatory pleading, and thus there appears to have been no
25 error in the court's order overruling the demurrers to the FTA charges.


26 The petition for mandamus relief will therefore be denied.

27 It is so ordered,

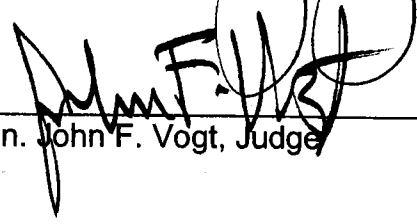
28 Dated this 14 day of October, 2009

Hon. Donald S. Black, Presiding Judge
Appellate Division of Fresno Superior Court

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Hon. Debra J. Kazanjian, Judge



Hon. John F. Vogt, Judge

Dated this 9th day of October, 2009

DECLARATION OF SERVICE

I, the undersigned, declare:

I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012; that on June 23, 2010, I served a copy of the within REQUEST FOR JUDICIAL NOTICE, JEWERELENE STEEN, on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid in the United States Mail in the County of Los Angeles, California, addressed as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

PRESIDING JUDGE
SUPERIOR COURT
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

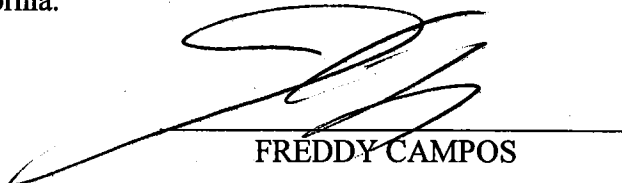
CLERK, APPELLATE DIVISION
SUPERIOR COURT
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

CARMEN TRUTANICH, CITY ATTORNEY
CRIMINAL APPELLATE DIVISION
500 CITY HALL EAST
200 N. MAIN STREET
LOS ANGELES, CA 90012

CLERK, CALIFORNIA COURT OF APPEAL
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

COURT COUNSEL
111 NORTH HILL STREET, SUITE 546
LOS ANGELES, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 23, 2010, at Los Angeles, California.


FREDDY CAMPOS