

COURT OF APPEAL CASE NO. : _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KELLY M. BRYAN

Petitioner,

vs.

SUPERIOR COURT FOR THE COUNTY OF ORANGE,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA

by their attorney, TONY RACKAUKAS,

DISTRICT ATTORNEY FOR THE COUNTY OF ORANGE

Real Party in Interest

**PETITION FOR WRIT OF CERTIORARI AND/OR PROHIBITION, REQUEST
FOR STAY OF ORDER PENDING DISPOSITION OF THE WRIT**

APPEALING ORDER OF
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF ORANGE, DEPARTMENT H-4
HONORABLE MATTHEW S. ANDERSON
CASE NO. 09HF1564

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CASE NO. _____

PETITION FOR WRIT OF
CERTIORARI OR
PROHIBITION OR
ALTERNATIVE WRIT;
POINTS AND AUTHORITIES
IN SUPPORT THEREOF;
EXHIBITS

**A REQUEST FOR A STAY
OF THE FINES IN THIS
MATTER IS REQUESTED**

**TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE
JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH DISTRICT, DIVISION THREE:**

Petitioner KELLY M. BRYAN petitions this Court for a writ of certiorari or prohibition directed to the Superior Court of the State of California, Orange County, Department H-4, Harbor Justice Center and by this verified petition, represents that:

I.

On November 30, and December 1, 2009, petitioner Kelly M. Bryan was a witness at a preliminary hearing for defendant Matthew Joseph Robinson on a felony complaint bearing case number 09HF1564. Petitioner was called by the People to testify as the alleged victim in a domestic violence case alleging a violation of Penal Code section 273.5.

II.

Petitioner refused to testify as to some questions and asserted her 5th Amendment privilege as well as Code of Civil Procedure section 1219(b). Petitioner was held in contempt twice, one for each day the preliminary hearing was held. Petitioner was ordered back each day for two days. Petitioner was fined the maximum sentence at the request of the District Attorney's office of \$1,000.00 each day for a total of \$2,000.00. The fines were stayed for three days and as of December 2, 2009, no minute order or order of contempt had been issued or executed by the trial court. On December 3, 2009, a minute order was issued and provided to Petitioner.

III.

A copy of the minutes and the transcript are attached to this Petition as Exhibit's "A" and "B" respectfully.

V.

The Petitioner has no adequate remedy at all. She has already been found in contempt and is now facing incarceration if she does not pay the \$2,000.00 in fines. (R.T. 30:11)

VI.

The Petitioner was ordered to appear at the defendant's arraignment on December 14, 2009. (R.T. 40-41) **A request for a stay on the fines is requested.**

VII.

The parties directly affected by the present proceeding now pending are petitioners, KELLY M. BRYAN by and through her writ counsel, Ronald Richards, from the Law Offices of Ronald Richards & Associates, A.P.C., respondent, the Superior Court of the State of California for the County of Orange, Department H-4, and the real party in interest, the People of the State of California, by their attorney, Tony Rakaukas, District Attorney for the County of Orange. All proceedings about which this petition is concerned have occurred within the territorial jurisdiction of respondent court and of the Court of Appeal, Fourth Appellate District, Division Three of the State of California.

VIII.

No other petition for writ of mandate has been made by or on behalf of this petitioner relating to this matter in this Court.

IX.

Petitioners has no other plain, speedy, or adequate pre-trial remedy at law because petitioner because a contempt order under Code of Civil Procedure 1218 is not appealable.

WHEREFORE, petitioner prays that:

1. A peremptory writ of prohibition be issued directing and compelling the respondent court to vacate its contempt order to make a new and different order discharging the contempt or a writ of certiorari be granted discharging the contempt order.
2. An alternative writ of prohibition be issued directing and requiring the respondent court to show cause before this Court, at a specified time and place, why the relief prayed for should not be granted; and that
3. Petitioner be granted such other and further relief as may be appropriate and just.

Dated: December 3, 2009

Respectfully submitted,

LAW OFFICES OF RONALD RICHARDS & ASSOCIATES, A.P.C.

By: _____

Ronald Richards, Esq.
Attorneys for Petitioner

I.

INTRODUCTION

Witness Kelly M. Bryan appeared in Department H-4 of the Orange County Superior Court as a subpoenaed witness in the criminal prosecution of defendant Matthew Joseph Robinson, Case #09HF1564. It was his preliminary hearing. Defendant Robinson is being prosecuted for spousal abuse in violation of PC 273.5 and a gun charge.

Ms. Bryan is 27 weeks pregnant which is about 6 ½ months. Mr. Robinson is the father of her child. On November 30, 2009, Ms. Bryan appeared in court pursuant to a subpoena issued by the People. She asserted her 5th Amendment privilege after answering some questions. The People offered immunity for the preliminary hearing only. She then refused to testify and asserted newly *amended* Code of Civil Procedure section 1219(b). The Court then proceeded to find her in contempt of court and fined her \$1,000.00, staying the order three days pursuant to Code of Civil Procedure section 128(e). The Court then ordered Ms. Bryan to return to Court on December 2, 2009 for the continued preliminary hearing, even though she had previously made it clear she would not testify in Mr. Robinson's case about the subject matter related to the prosecution.

On December 1, 2009, Ms. Bryan still again refused to testify in the exact same hearing. Ms. Bryan was again cited for contempt, a second time, and fined \$1,000.00, execution stayed three days.

No written order of contempt was issued on November 30, 2009 or on December

1, 2009 or on December 2, 2009. The minutes attached as Exhibit “A” reflect the contempt. The transcript relevant to Ms. Bryan is attached as Exhibit “B”. Ms. Bryan was ordered to appear at Mr. Robinson’s arraignment on December 14th, 2009. (R.T. 40-42).

Basis for Jurisdiction: A superior court contempt judgment is “final and conclusive” (CCP § 1222) but is expressly nonappealable. [CCP §§ 904.1(a)(1), 904.2(a)]. Thus, appellate review is available only by extraordinary writ (certiorari, prohibition, or habeas corpus, if confined). [See *In re Buckley* (1973) 10 C3d 237, 240, 110 CR 121, 122, fn. 1], *California Practice Guide, Civil Trials and Evidence*, Section 12:444.

II.

THE CONTEMPT CITATION IS INVALID

AS THERE IS NO VALID FINDINGS OR ORDER

When finding contempt, the court may impose a fine of up to \$1000 and/or the witness may be imprisoned for up to five days. [CCP §1218\(a\)](#); see *In re Farr* (1974) 36 CA3d 577, 583-584, 111 CR 649. Alternatively, a witness who refuses to testify may be imprisoned for the duration of the trial. See [CCP §1219\(a\)](#); *Morelli v Superior Court* (1969) 1 C3d 328, 332, 82 CR 374; *H.J. Heinz Co. v Superior Court* (1954) 42 C2d 164, 174, 266 P2d 5. Imprisonment may not be ordered, however, to coerce testimony from a victim of domestic violence.

An order of contempt must describe the contempt with specificity. A general description of the witness's conduct (*e.g.*, that the witness refused to answer counsel's

questions), which does not state the underlying facts, is insufficient. *In re D.W.* (2004) 123 Cal. App. 4th 491, 500, 20 CR3d 274 (order should have referred to witness's claim of privilege and judge's ruling on claim). The order must also state the exact punishment that is imposed because the witness is entitled to know what he or she is required to do to purge the contempt. 123 Cal. App. 4th at 500-501. In reviewing a civil contempt order, all presumptions are drawn against the validity of the order due to the summary nature of civil contempt proceedings. This places a burden on the judge who issues a contempt order to ensure that all requirements are satisfied. 123 Cal. App. 4th at 501.

In this particular case, the trial court's minute order is completely lacking in specificity, is not executed by the Judge, and does not specify what Ms. Bryan should or could have done to purge the contempt or what specific questions caused her to be held in contempt. The minute order is not a substitute for this District's clearly outlined requirements in *In Re D.W., supra*. The order simply provides generalized conclusions and lacks any specificity.

This Court in *In Re D.W., supra*, held that,

Contempt committed in the immediate view and presence of the court ... may be treated summarily. All that is required is that an order be made reciting the facts, adjudging the person guilty and prescribing the punishment." [H]owever, that such an order is valid only if it recites facts with sufficient particularity to demonstrate on its face that petitioner's conduct constituted a legal contempt. [Citations.]' " (*In re Littlefield* (1993) 5 Cal.4th 122, 138, 19 Cal.Rptr.2d 248, 851 P.2d 42; *In re Buckley*

(1973) 10 Cal.3d 237, 247, 110 Cal.Rptr. 121, 514 P.2d 1201.)

The trial court's order fails to recite sufficient details for a reviewing court to reach its own conclusion as to whether Ms. Bryan's conduct was contemptuous as required by law.

Rather than recite with specificity the exchange, the trial court summarized by simply stating Ms. Bryan refused to answer the questions. The minute order fails to identify what questions Ms. Bryan refused to answer or what steps were taken prior to the contempt being issued. It only shows the People made a motion and the trial court imposed the maximum sanctions. The order only generally describes the conduct and does not state the underlying facts such as Ms. Bryan's invocations of privilege, the court's rulings on the claimed privileges, or the appearance and participation of counsel. (*Boysaw v. Superior Court* (2000) 23 Cal.4th 215, 221, 96 Cal.Rptr.2d 531, 999 P.2d 748.)

This is exactly the type of generic orders this Court has held were invalid.

In reviewing a civil contempt order, the appellate court does not presume the order to be correct. Rather, because of the summary nature of civil contempt, all presumptions are drawn against the validity of the contempt order. (*In re Rosen* (1973) 31 Cal.App.3d 71, 74, 106 Cal.Rptr. 757.) Practically speaking, this places the burden on the court to "cross all the 'i's' and dot all the 't's.'" *In re D.W.* (2004) 123 Cal. App. 4th 491.

III.

THE SECOND CONTEMPT CITATION ISSUED BY THE DEPARTMENT H-4 CLEARLY WAS ILLEGAL AND WAS CLEARLY IMPROPER

The test for whether there were separate acts of contempt is whether there were separate insults to the authority of the court. Several such acts may occur on the same day.

(*Reliable Enterprises, Inc. v. Superior Court* (1984) 158 Cal. App. 3d 604, 621, 204 Cal. Rptr. 786, disapproved on other grounds by *Mitchell v. Superior Court* (1989) 49 Cal. 3d 1230, 1248 n.13, 265 Cal. Rptr. 144, 783 P.2d 731.

In re Keller (1975) 49 Cal. App. 3d 663, 668-669, 123 Cal. Rptr. 223 is right on point. The *Keller* Court, *supra*, held that consistent refusal to answer a series of questions relating to the same subject is treated as single act of contempt]; *accord, Conn v. Superior Court* (1987) 196 Cal. App. 3d 774, 787, 242 Cal. Rptr. 148 [failure to turn over document is single act of contempt--fine for each day the party is in contempt not allowed]

In addition, the multiple punishment violates Penal Code section 654 which precludes multiple punishments. 7 *Witkin, Cal. Proc. 5th* (2008) Trial, § 188, p. 228. The trial court should never have held Ms. Bryan in contempt twice in the same hearing for refusing to testify. She was punished twice for the same conduct. (See 3 *Cal. Crim. Law* (3d), *Punishment*, §129 et seq.). Penal Code section 654 is applicable to punishments for contempt under C.C.P. 1218. (*Conn v. Superior Court* (1987) 196 C.A.3d 774, 786, 242 C.R. 148 [citing *In re Keller* (1975) 49 C.A.3d 663, 123 C.R. 223, and distinguishing *Reliable Enterprises v. Superior Court* (1984) 158 C.A.3d 604, 204 C.R. 786, 8 *Cal. Proc. (5th), Enforcement of Judgment*, §361].

A. The Trial Court's Minute Order Collides with the Trial Court's Own Misunderstanding of What the Maximum Sentence it Could Impose

The trial court in its misguided rationale thought it was cutting Ms. Bryan a break by only imposing the maximum fine of \$1,000.00 when it believed it could have also imposed community service. (R.T. 16:8, 20:4). Code of Civil Procedure 1218 does not

provide for the imposition of community service in addition to a fine of \$1,000.00. This mistaken belief by the trial court that it was somehow imposing a sentence lower than the maximum is erroneous. The minute order, Exhibit “A”, on both December 1, 2009, seq. number 13, and on November 30, 2009, seq. number 29, both state the trial court imposed the maximum sentence. This conflicts with the trial court’s own statements beliefs.

In fact, on day two of the trial court’s and the District Attorney’s abuse of the witness, the trial court rejected Ms. Bryan’s counsel’s plea for a lower fine based on a false belief that it was cutting her a break. . (R.T. 30:17-26)

In fact, the trial court stated, albeit erroneously, that

THE COURT MAY ALSO, IN ADDITION TO A MONETARY FINE,
IMPOSE COMMUNITY SERVICE UNDER THESE CIRCUMSTANCES,
WHICH I AM DECLINING TO DO. (R.T. 31:1-3)

The District Attorney’s office asked the trial court to stop the preliminary hearing intentionally and to keep fining Ms. Ryan daily. (R.T. 20:20-26, 32:6-26, 33:1-15) Their position would be to keep assessing fines until she rolls over. Even the trial court had its limits when it told the District Attorney’s office they were “contorting” the system. However, this goes to show how ludicrous the People’s position was becoming. They would have had Ms. Bryan come back for weeks if they were allowed.

IV.

**THE CONTEMPT BY THE COURT IN THIS CASE VIOLATES THE DIRECT
MANDATE BY THE LEGISLATURE AND THIS COURT NEEDS TO PROVIDE
GUIDANCE TO THE LOWER COURTS SO VICTIMS WILL NOT BE ABUSED
LIKE MS. BRYAN WAS ABUSED IN THIS CASE**

Governor Schwarzenegger issued the following signing message regarding Stats.2008, c. 49 (S.B.1356):

“To the Members of the California State Senate:

“I am signing SB 1356 having heard from many individuals and groups involved in domestic violence cases.

“Some have argued that incarceration of domestic violence victims is an important tool in compelling victims to testify. However, I believe that the victims in these cases have suffered enough and that the decision to testify in these types of cases should be made by the individuals most impacted by these crimes.

“SB 1356 ensures that victims of domestic violence have the same statutory protections as sexual assault victims and exempts them from the threat of being incarcerated for refusal to testify against their perpetrators. Domestic violence victims, like many sexual assault victims, are victimized by perpetrators they know, and experience similar psychological trauma and fear of retribution from the abuser or the abuser's family members.

“I encourage domestic violence victim advocates and law enforcement officials to continue to collaborate on this important issue and improve public safety.

“Sincerely,

“Arnold Schwarzenegger

Yet, incredibly, even with this mandate staring the trial court in the face, it fined Ms. Bryan \$2,000.00 even though her attorneys told the trial court she was pregnant and this would inflict great financial hardship on Ms. Bryant. Instead, the trial court became an arm of the District Attorney’s office and ordered her to his courtroom each day and fined her \$1,000.00 per day then ordered her to appear again on December 14, 2009. (R.T. 40-42) Ordering Ms. Bryan, the alleged victim of Mr. Robinson, to appear at his arraignment is plain harassment and undermines the very purpose of the statute. Even the defendant’s public defender objected to this harassment. (R.T. 41:1-8)

Senate Bill 1356's (Bill which created C.C.P. 1219's amendment) author stated in the Senate Committee Analysis:

Under current law, violence victims in California can be found in contempt

of court for refusing to testify against their batterers. Current law provides that the punishment for contempt for domestic violence victims is incarceration. In contrast, sexual assault victims can be found in contempt, but they can not be incarcerated as part of their punishment. Sexual assault victims' exemption from being incarcerated was adopted in 1984, and was created to provide special consideration to sexual assault victims who often know their perpetrator. Current law provides this incarcerated exemption to sexual assault due to the severity of the psychological and emotional harm that often results from this type of crime. Domestic violence victims, like sexual assault victims, are victimized by perpetrators they know and experience the same psychological trauma and fear of retribution from the abuser or the abuser's family members. Domestic violence victims are also often victims of sexual abuse, but due to the intimate nature of the crime, it often goes unreported as part of the cycle of abuse.

This legislation will align protections for domestic violence victims with those for sexual assault victims by exempting domestic violence victims from being incarcerated when they are held in contempt for refusing to testify in court. When victims of domestic violence are incarcerated for "contempt" for refusing to testify, the incarceration of that victim often compromises the victim's safety and well-being. Victims of domestic violence are being re-victimized by the institutions that are charged to protect them. In addition, when a victim of domestic violence is

incarcerated, s/he faces additional legal consequences if they have children. Domestic violence victims report that once they are incarcerated, if they have children at home, Child Protective Services Agency becomes involved and places their children in foster home or alternative care during the incarceration. This bill relates only to the type of sentence a court may impose after finding a domestic violence victim in contempt for refusal to testify. It does not prevent the court from making a finding that a domestic violence victim is in contempt. Additionally, this bill does not impact the subpoena power of the court, under which the court may exercise its authority to require a domestic violence victim to appear in court.

The California Chronicle reported that on April 21, 2008, on a 29-6 vote, the California Senate overwhelmingly approved this legislation to protect domestic violence victims from the threat of incarceration when they refuse to testify against their abuser in court. Senate Bill (SB) 1356, authored by Senator Leland Yee (D-San Francisco/San Mateo), mirrored existing law for sexual assault victims, who are already shielded from such punishment.

"This three year effort to protect domestic violence victims from re-victimization through forced testimony, imprisonment, or community service now has significant momentum," said Yee. "SB 1356 also rightfully considers the children involved in these cases. Without this new law, those kids will continue to be put at risk and may be unfairly and unnecessarily pushed into foster care."

The victim in the case, Katina Britt, retold her ordeal to the Senate Public Safety Committee.

"I felt that the system had given up on me," said Britt. "The district attorney did not protect me, even though I was a victim of a serious bodily injury crime. The DA wanted to victimize me once more and the court willingly obliged. I wish I had the protection sought by Senator Yee's bill."

Ms. Bryan is 2009's version of Katina Britt. She is now being threatened with jail if she doesn't pay \$2,000.00 worth of fines and is being forced to be compelled to attend court again on December 14, 2009, (R.T. 40-42) for an arraignment where she will not be required to provide any testimony.

CONCLUSION

The trial court's admonishment of incarceration (R.T. 30:11) for refusal to pay fines simply does an end run around the statute which is supposed to protect victims from being re-victimized. It is requested that this Court discharge the two contempts and the order for Ms. Bryan to appear on December 14, 2009. (R.T. 40-42) It is further requested that some guidance be provided so victims of crime like Ms. Bryan are not further victimized by trial courts or District Attorney's who ignore the plight of single pregnant mothers who are alleged victims of domestic violence.

Dated: December 2, 2009 Respectfully submitted,

LAW OFFICES OF RONALD RICHARDS & ASSOCIATES, A.P.C.

By: _____
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