


Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court *Court data last updated: 08/05/2013 07:05 AM*

Docket (Register of Actions)

PEOPLE v. NAHINU**Case Number S210853**

Date	Description	Notes
05/20/2013	Request for depublication filed (initial case event)	Defendant and Appellant: Andrew W. Nahinu Attorney: Matthew Dake Metzger
05/20/2013	Case start date (depublishation request)	
07/31/2013	Depublication ordered (case closed)	The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed March 11, 2013, which appears at 214 Cal.App.4th Supp. 1. (Cal. Const., art. VI, section 14; Cal Rules of Court, rule 8.1125(c)(1).) Werdegar, J., was absent and did not participate.

Click here to request automatic e-mail notifications about this case.

[Careers](#) | [Contact Us](#) | [Accessibility](#) | [Public Access to Records](#) | [Terms of Use](#) | [Privacy](#) © 2012
Judicial Council of California / Administrative Office of the Courts

PETITION FOR WRIT OF MANDATE

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

The proceedings in this case raise extremely important questions of critical importance about which unresolved conflicts now exist in California law. The fundamental issue involves whether a misdemeanor defendant on appeal must show anything more than a statutory violation of penal code section 1382 in challenging a violation of the right to a speedy trial following a final conviction or plea on appeal. In an Order dated April 4, 2013, the Appellate Division of the Superior Court for the City and County of San Francisco denied Appellant's petition for rehearing but granted the application for transfer to the First District Court of Appeal ". . . to settle an apparent conflict in the Courts of Appeal on the question of whether a showing of prejudice is required in a misdemeanor case alleging non-compliance with Penal Code § 1382." Nevertheless, on April 29, 2013, the First Appellate District denied transfer. Under these circumstances, it is appropriate for petitioner to seek relief in this court in this original petition for writ relief. (*See Randone v. Appellate Division* (1971) 5 Cal.3d 536, 542-545.)

In an opinion certified for publication March 11, 2013, the appellate division of the Superior Court for the City and County of San Francisco affirmed a judgment of the Superior Court for the City and County of San Francisco in which the appellate division

confirmed that trial *was* delayed two additional days beyond the “last day” but found that Appellant failed to show any actual prejudice from the delay.

In so ruling, the appellate division cast aside standing legal precedent recognizing that the denial of a speedy trial in a misdemeanor case is automatically prejudicial in view of the provision of Penal Code section 1387 requiring that Penal Code section 1382 is a bar to any subsequent prosecution, provided the case does not involve a misdemeanor identified in Penal Code sections 1382(a) (3) (A), (B), or (C). See, e.g., *People v. Wilson*, 60 Cal. 2d 139, 152-53, (“In a case where the statute of limitations would have been a bar to a new prosecution if the motion to dismiss had been granted, the erroneous denial of the motion would be prejudicial to the defendant.”); see also *id.*, n. 5 (“Similarly, in a misdemeanor prosecution the erroneous denial of such a motion to dismiss would be rendered prejudicial by Penal Code section 1387, which provides in pertinent part that an order of dismissal (under § 1382) “is a bar to any other prosecution for the same offense if it is a misdemeanor. ...”); *In re Smiley*, 66 Cal. 2d 606, 632 (“the denial of a speedy trial is automatically prejudicial in view of the provision in Penal Code section 1387 stating that an order of dismissal under section 1382 ‘is a bar to any other prosecution for the same offense if it is a misdemeanor’”).

For this reason, petition Andrew Nahinu, by and through his attorney, Mr. Matthew D. Metzger, Belvedere Legal, APC, hereby

files his verified petition for writ of mandate, respectfully urging this court to hear and resolve the following issues presented by this case.

ISSUES TO BE RESOLVED

1. For misdemeanor cases (excluding those identified by Penal Code sections 1382(a)(3)(A), (B), or (C)), is the denial of a speedy trial right automatically prejudicial in view of the provision of Penal Code section 1387 stating that an order of dismissal under section 1382 is a bar to any subsequent prosecution for the same misdemeanor offense?

2. Is *People v. Wilson*, 60 Cal. 2d 139, 152-53, binding legal precedent for the same?

3. For misdemeanor cases (excluding those identified by Penal Code sections 1382(a) (3)(A), (B), or (C)), is the “automatic prejudice” demonstrated by a hold-over beyond the “last day” sufficient to mandate dismissal (*Avila v. Mun. Court* (1983) 148 Cal.App.3d 807)? Or, must the same misdemeanant now meet the same actual prejudice standard required to prove a violation of a constitutional speedy trial right (*People v. Aguilar* (1998) 61 Cal. App 4th 615)?

VERIFIED PETITION

By this verified petition the following facts and causes are set forth for the issuance of the writ.

I.

Petitioner was appellant in the case entitled “People v. Andrew Nahinu” case number A138070, heard in the Appellate Division of the Superior Court for the City and County of San Francisco. The facts underlying that appeal are set forth in the paragraphs below.

II.

Respondent is the Appellate Division of Superior Court for the City and County of San Francisco. The People of the State of California, represented by the District Attorney of San Francisco, may be an additional real party in interest, having appeared in this matter to date.

III.

The District Attorney of the City and County of San Francisco charged by way of Complaint filed on June 20, 2011, Andrew Puni Nahinu (“Mr. Nahinu” and/or the “Appellant”) with: a violation of Penal Code § 23152(A) (Driving under the Influence of Alcohol or Drugs) – Count 1; and a violation of Penal Code § 23152(B) (Driving while having a 0.08% higher blood alcohol)– Count 2. The Complaint also alleged, as to Counts 1& 2, that Mr. Nahinu has one prior conviction on or about July 31, 2002, arising from an arrest on or about April 26, 2002.

IV.

Mr. Nahinu entered not guilty pleas to all charges and proceeded on a general time waiver. Mr. Nahinu also filed a motion to suppress under California Penal Code section 1538.5 on September 20, 2011.

V.

On September 28, 2011, Mr. Nahinu withdrew his general time waiver and the court set October 28, 2011 as the last day to begin jury trial on this matter

VI.

On October 14, 2011, the date set for trial, the People declared ready for both the hearing on the motion to suppress and for trial (CT 12). The Defense also declared ready.

VII.

The People elected to wait until October 17, 2011, to make a subpoena request for CHP Officer Williams. The same day, the People were informed that Officer Williams was scheduled for vacation. On October 19, 2011, the People learned that Officer Williams was not available for service of the subpoena until November 7, 2011. The same day, the prosecution filed a motion to continue the jury trial past the last day. The officer was never served.

VIII.

On October 21, 2011, the court put the matter over to October 27, 2011, for status of the prosecution's witness and hearing on the prosecution's Motion to Continue. On October 27, 2011, the court

found good cause to continue over defense counsel's objection and demand for a speedy trial. On October 28, 2011, the court continued the matter past the last day over defense counsel's objection and demand for a speedy trial.

IX.

On November 1, 2011, on day after the last day, the Department 17 Judge, Judge Little, ordered the case to Judge Cheng, in Department 12. The case however could not be sent to a jury on November 1, 2011 because no jury panel had been ordered for November 1, 2011. (*Reporter's Transcript, or "RT" 7:18*) (*emphasis added*). The same day, Defendant moved to dismiss the case for violation of Mr. Nahinu's Speedy Trial Right (Pen. Code §1382). The Defendant again confirmed he was ready for trial (RT 5:16). The Court denied the motion (RT 16-22).

X.

As a result, the case was continued again, *a second time*, to November 2, 2011, in order to allow for a Jury to be impaneled. Mr. Nahinu renewed the motion to dismiss on November 2, 2011, for failure to impanel a jury by November 1, 2011 (RT 121:28-122:-3). The Court denied the motion but noted that the issue was preserved (RT 122-4:16). Subject to the preservation of the objection, the parties agreed to hear in limine motions and the motion to suppress on November 2, 2011 before the jury was finally impanelled on November 3, 2011.

XI.

Also on November 2, 2011, Mr. Nahinu filed a Petition for Interlocutory Writ of Mandate and Request for Immediate Stay of Proceedings. The Appellant Division denied the interlocutory writ petition.

XII.

In denying the renewed motion to dismiss, the court never addressed in its ruling the issue of why a jury was not impaneled on November 1, 2012. The court noted that it found good cause on November 2, 2011 not to impanel a jury until November 3, 2011, based on the pending in limine motions, 402 hearing, and motion to suppress (*Id.*). However, the rationale for continuing the case from November 1, 2012 to November 2, 2012 – and for not impaneling a jury on November 1, 2012 – was never explained.

XIII.

On appeal, the Appellate Division found that trial was delayed two additional days beyond November 1 – the day to which the trial court had found good cause to continue trial on October 28, 2011. The Appellate Division also found that a jury was not impanelled on November 1 or November 2; thus, the court agreed that Appellant was not “brought to trial” until November 3, 2011. The Appellate Division further observed that each delay likely constituted a further continuance of trial, requiring a finding of good cause under §§ 1050 and 1382 and that the record reflected no findings of good cause of these additional delays.

XIV

Nevertheless, the Appellate Division affirmed the decision by reasoning that Appellant must show actual prejudice caused by the delay and Appellant failed to show any actual prejudice. The Appellate Division stated:

It is clear that a showing of prejudice is required, at least in felony cases, where the appellant argues denial of his statutory speedy trial right. (*People v. Villanueva* (2011) 196 Cal.App.4th 411; *People v. Johnson* (1980) 26 Cal.3d 557.) A distinction has been made in misdemeanor appeals, however, starting with the holding in *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, and based on the fact that a misdemeanor that has been dismissed under § 1382 cannot be filed again.

People v. Nahinu, 214 Cal.App.4th Supp. 1, 924-925.

The Appellate Division affirmed the judgment based on an observation that subsequent decisions distinguished *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807. The court then reasoned that a defendant appealing a violation of penal code section 1382 was required to show the prejudicial effect caused by the delay. As Nahinu failed to demonstrate any actual prejudice from the two-day in being brought to trial, the court affirmed the judgment.

XV.

On March 26, 2013, Petitioner filed his Petition for Rehearing and/or Certification. On April 4, 2013, the Appellate Division denied the request for rehearing but granted the request to certify the matter for transfer to the First District Court of Appeal, pursuant to California Rule of Court Rule 8.1005(d)(2), specifically in order to

settle “ . . . an apparent conflict in the Courts of Appeal on the questions of whether a showing prejudice is required in a misdemeanor case alleging non-compliance with Penal Code § 1382.”

XVI.

On April 23, 2013, Petition filed a request for judicial notice in the First District Court of Appeal, attaching as exhibits the petition for rehearing and/or certification, an amicus letter from the Los Angeles County Public Defender, an amicus letter from Public Defender for the City and County of San Francisco, and the Order Certifying Transfer.

XVII.

On April 29, 2013, Division Two of the First District Court of Appeal denied the Request for Judicial Notice and denied transfer.

XVIII.

On May 20, 2013, Petitioner filed in the Supreme Court of California a Request for Depublication.

XIX.

The following documents demonstrating the facts set forth above have been lodged with the Clerk of this Court at the time of filing this petition and are incorporated herein by reference.

Exhibit “A”: A copy of the complaint filed in the superior court in case number 10015661.

Exhibit “B”: A copy of the transcript of the proceedings of November 1, 2011 and November 2, 2011, in the trial court.

Exhibit “C”: A copy of Appellant’s Opening Brief in the Appellate Division.

Exhibit “D”: A copy of Respondent’s Brief in the Appellate Division.

Exhibit “E”: A copy of the Appellate Division’s memorandum judgment.

Exhibit “F”: A copy of petitioner’s Petition for Rehearing and/or Request for Certification.

Exhibit “G”: A copy of the Appellate Division’s Order certifying the case for transfer and denying the rehearing

Exhibit “H”: A copy of the amicus letter written by the Los Angeles County Public Defender.

Exhibit “I”: A copy of the amicus letter written by the Public Defender for the City and County of San Francisco.

Exhibit “J”: A copy of the Court of Appeal’s orders denying transfer and denying the request for judicial notice.

Exhibit “K”: A copy of petitioner’s request for depublication.

XX.

Petitioner has no plain, speedy, or adequate remedy at law. The judgment of the Appellate Division is not an appealable order, nor are the denial of certification or the denial of transfer. It is well settled that extraordinary relief lies under these circumstances. (*Dvorin v. Appellate Department* (1975) 15 Cal.3d 648, 650; *In re Wallace* (1970) 3 Cal.3d 289, 292.) This court has indicated that mandate is an

appropriate remedy when necessary to secure uniformity of decision and to settle important legal questions. (*Randone v. Appellate Department, supra*, 5 Cal.3d 536, 542-543.)

XXI.

No other petition for extraordinary relief has been sought or obtained by petitioner relating to this action.

XXII.

Petitioner has completed his sentence in the trial court, and no proceedings remain pending in this matter.

WHEREFORE, petitioner respectfully prays;

1) That this court issue its writ of mandate directed to the Appellate Division of the Superior Court for the City and County of San Francisco, requiring: a) that the court to recall its remittitur, if necessary; b) vacate and set aside its judgment of March 11, 2013, which affirmed the judgment of the trial court; c) direct the Appellate Division to enter a new and different judgment dismissing the case with prejudice pursuant to penal code section 1382; and

2) For such other and further relief as this court may deem just and proper.

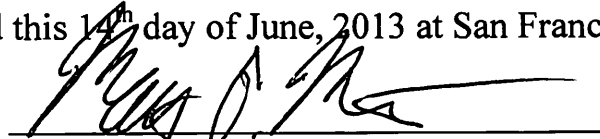
BELVEDERE LEGAL, APC

By 

Matthew D. Metzger,
Attorney for Appellant Andrew
Nahinu

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of June, 2013 at San Francisco, California.



Matthew D. Metzger

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF
PETITION FOR WRIT OF MANDATE

Table of Contents

I. Introduction.....	18
II. Writ Relief is Available to Appellant for a Jurisdictional Error	18
III. The Appellate Division Holding Contradicts Clear Supreme Court Precedent in <i>People v. Wilson</i> (1963) 60 Cal.2d 139.....	21
IV. No Split of Authority Justifies a Deviation from <i>People v. Wilson</i> (1999) 60 Cal. 2d, 139	26
V. Conclusion	28

Table of Authorities

Cases

<i>Abelleira v. District Court of Appeal</i> (1941) 17 Cal.2d 280	19, 20
<i>Auto Equity Sales, Inc. v. Superior Court</i> (1962) 57 Cal.2d 450	19
<i>Avila v. Mun. Court</i> (1983) 148 Cal.App.3d 807	21, 26
<i>Brown Co. v. Appellate Department</i> (1983) 148 Cal.App.3d 891	19
<i>Dvorin v. Appellate Department</i> (1975) 15 Cal.3d 648	19, 21
<i>In re Wallace</i> (1970) 3 Cal.3d 289	21
<i>In re Zerbe</i> , 60 Cal.2d 666.....	20
<i>People v. Aguilar</i> (1998) 61 Cal. App 4th 615	27
<i>People v. Cella</i> (1981) 114 Cal. App.3d 905	23
<i>People v. Egbert</i> (1997) 59 Cal.App. 4th 503	26
<i>People v. Garceau</i> (1993) 6 Cal.4th 140	25
<i>People v. Hernandez</i> (1992) 6 Cal.App.4th 1355	27
<i>People v. Laudermilk</i> (1967) 67 Cal.2d 272.....	23
<i>People v. Litke</i> (1980) 112 Cal.App.3d 489	23
<i>People v. Moore</i> (2003) 105 Cal.App.4th 94	23
<i>People v. Reyes</i> (1979) 98 Cal.App.3d 524.....	23
<i>People v. Robinson</i> (1997) 56 Cal.App.4th 363.....	23
<i>People v. Turner</i> (1985) 171 Cal.App.3d 116,.....	23

<i>People v. Wilson</i> (1999) 60 Cal. 2d, 139	18, 21, 25, 28
<i>Portnoy v. Superior Court</i> , 20 Cal.2d 375.....	20
<i>Simmons v. Superior Court</i> , 52 Cal.2d	20
<i>Tecklenburg v. Appellate Division</i> (2009) 169 Cal.App.4th 1402	20

Statutes

California Constitution, Article VI, § 13	25
Code Civil Procedure§ 1074.....	19
Penal Code Section 1382	18, 23, 25, 28
Penal Code sections 1382(a)(3)(A), (B), or (C)	23

Other Authorities

Goldberg, <i>The Extraordinary Writs and The Review of Inferior Court Judgments</i> (1948) 36 Cal.L.Rev. 558.....	20
---	----

Rules

Cal. Rules of Court, Rule 8.889.....	18
Cal. Rules of Court, Rule 8.1005.....	18

I. Introduction

After *Nahinu*, for misdemeanor defendants faced with a statutory violation of a speedy trial right, proceeding via appeal after final judgment is no longer a remedy; the appellant can no longer effectively appeal after a trial, where the refusal to timely bring him or her to trial is the very wrong of which he or she complains. The California Supreme Court rightly observed this problem in *People v. Wilson* (1999) 60 Cal. 2d, 139 recognizing that for defendants proceeding via interlocutory writ of mandate, absent a sufficient showing of good cause for the delay, “no further showing” was required (*Id.* at 151). In effect, a showing of a statutory violation of Penal Code section 1382 is analogous to a showing of “strict liability” and is sufficient to mandate dismissal. For misdemeanor defendants who elect to proceed via interlocutory writ of mandate, a mere statutory violation of Penal Code section 1382 is sufficient to mandate dismissal and serve as a statutory bar to the re-filing of the same misdemeanor case. *Nahinu’s* deviation from this binding legal precedent risks creating great legal confusion for misdemeanors statewide.

II. Writ Relief is Available to Appellant for a Jurisdictional Error

Appellant petitioned the appellate division for rehearing and applied for certification for transfer to First District Court of Appeal. (Cal. Rules of Court, rules 8.889, 8.1005.)¹ The appellate division denied the request for rehearing but certified the case for transfer.

¹ Undesignated rule references are to the California Rules of Court.

The First Appellate District denied the transfer. (Cal. Rules of Court, rules 8.1008, 8.1002.) Rule 8.500(a)(1) expressly precludes Appellant from petitioning the California Supreme Court for review of the decision of the First District Court of Appeal to deny transfer.

Code of Civil Procedure section 1068, subdivision (a), authorizes the grant of a writ of review “when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.” (See also Code Civ. Proc., § 1074.) The writ is not available to review ordinary legal error by a lower court, but only jurisdictional errors. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 454–455, [writ appropriate when lower court refuses to follow binding precedent]; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 290–291, [acts that exceed court's power under constitutional, statutory, or binding case law are in excess of jurisdiction]; *Brown Co. v. Appellate Department* (1983) 148 Cal.App.3d 891, 904, [neither certiorari nor mandate is appropriate where lower court's decision, albeit erroneous, was within its jurisdiction]; see *Dvorin v. Appellate Department* (1975) 15 Cal.3d 648, 650, [writ of mandate appropriate where appellate department's order of summary judgment, absent a motion for summary judgment, deprived party of fair trial].)

Certiorari, like prohibition, is, of course, a “jurisdictional” writ. While it cannot be used to attack an error of a lower tribunal

committed in the exercise of its jurisdiction, it is available when that tribunal has acted in excess of its “jurisdiction.” (*Simmons v. Superior Court*, 52 Cal.2d 373; *Portnoy v. Superior Court*, 20 Cal.2d 375.) The meaning of “jurisdiction” for the purposes of certiorari and prohibition is different and broader than the meaning of the same term when used in connection with “jurisdiction” over the person and subject matter. (*Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 288; Goldberg, *The Extraordinary Writs and The Review of Inferior Court Judgments* (1948) 36 Cal.L.Rev. 558, 576.). In commenting on the meaning of “jurisdiction” in a prohibition case, *Abelleira* noted that, “[s]peaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari.” (17 Cal.2d at p. 291.)

Writs have issued to the Appellate Division even when that court certified the matter to the Court of Appeal, resulting in a denial of transfer. (*In re Zerbe*, 60 Cal.2d 666, 667.) Thus, there would seem to be no basis for concluding that the new rules permitting a party to seek transfer in the absence of Appellate Division certification would make any difference in the availability of relief. In fact, this court has itself recently recognized the availability of this procedure, even after the adoption of the new rules. (See *Tecklenburg*

v. Appellate Division (2009) 169 Cal.App.4th 1402, 1405 [this court treated the matter as one in certiorari in that case].)

Accordingly, given the importance and continuing nature of the issues in this case, and the clear violation of the doctrine of *stare decisis*, a writ of mandate is required for a determination and clarification that the appellate division acted beyond its jurisdictional authority. A writ of mandate is the only remaining avenue for justice for Appellant and for all misdemeanor defendants suffering violations of penal code section 1382. Petitioner has no plain, speedy, or adequate remedy at law. The judgment of the Appellate Division is not an appealable order, nor are the denial of certification or the denial of transfer. It is well settled that extraordinary relief lies under these circumstances. (*Dvorin v. Appellate Department* (1975) 15 Cal.3d 648, 650; *In re Wallace* (1970) 3 Cal.3d 289, 292.) This court has indicated that mandate is an appropriate remedy when necessary to secure uniformity of decision and to settle important legal questions. (*Randone v. Appellate Department, supra*, 5 Cal.3d 536, 542-543.) Accordingly, writ review in this instance is clearly appropriate.

III. The Appellate Division Holding Contradicts Clear Supreme Court Precedent in *People v. Wilson* (1963) 60 Cal.2d 139.

The observation that reversible error exists when dismissal would generally bar further proceedings did not “start with” *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, as erroneously posited by the Appellate Division. Instead, that rule was recognized by the California Supreme Court in *People v. Wilson* (1963) 60 Cal.2d 139

(“People v. Wilson”). In that case the court stated that “In a case where the statute of limitations would have been a bar to a new prosecution if the motion to dismiss had been granted, the erroneous denial of the motion would be prejudicial to the defendant.” (*Id.*, 60 Cal.2d at p. 152.) In this passage, the Supreme Court drew no distinction between misdemeanors and felonies. Instead, the court indicated that it was the existence of a bar to further prosecution in any case which required a finding of inherent prejudice on appeal, and thus reversible error.

In an accompanying footnote, the Supreme Court made reference to the limits upon re-filing found in Penal Code section 1387. At that time, there was no statutory authority to refile any misdemeanor case dismissed under Penal Code section 1382, and no limit upon the number of times a felony case could be refiled. The court stated that "Similarly, in a misdemeanor prosecution the erroneous denial of such a motion to dismiss would be rendered prejudicial by Penal Code section 1387 " (*Id.*, 60 Cal.2d at p. 153, n. 5.) Again, the court was using “prejudicial” in the semantic context of “reversible error,” and this statement was clearly not due to some inherent difference between misdemeanors and felonies, but was due to the fact that, at the time, misdemeanors could not be refiled and felonies could.

The Appellate Division’s Order Certifying Case for Transfer to First District Court of Appeal justified the transfer to resolve “the apparent conflict in the Courts of Appeal on the question a showing of

prejudice is required in a misdemeanor case alleging non-compliance with Penal Code § 1382” (“Order Certifying Transfer”). The problem is that there is no conflict — as to the single, narrow-focused requirement from Penal Code section 1387 that a violation of Penal Code section 1382 is a bar to any subsequent prosecution, provided the misdemeanor case does not involve a misdemeanor identified in Penal Code sections 1382(a)(3)(A), (B), or (C).

The Appellate Division only found a “conflict” because it cited from authority that, when taken together, confuses three separate issues. The first issue is waiver: whether a defendant waives his right to raise an issue on appeal by entering a guilty plea. Although that issue is not presented by this case, since there was a trial, a brief indication of why the authority cited by this court incorrectly resolves this issue is important for an understanding of the authority on which the Appellate Division relied in crafting its opinion.

It is well-established in California law that a plea of guilty admits all the facts necessary to prove guilt, and thus waives any issues relating to guilt or innocence. However, the converse is also true; a plea of guilt or innocence does not waive issues which do not involve guilt or innocence, but go to the ability of the state to try the defendant despite his guilt. The authority upon this subject is voluminous. (*See, e.g. People v. Laudermilk* (1967) 67 Cal.2d 272, 282; *People v. Reyes* (1979) 98 Cal.App.3d 524, 532; *People v. Litke* (1980) 112 Cal.App.3d 489, 493. *People v. Robinson* (1997) 56 Cal.App.4th 363, 369; *People v. Cella* (1981) 114 Cal. App.3d 905,

915, fn. 5; *People v. Turner* (1985) 171 Cal.App.3d 116, 126-127; *People v. Moore* (2003) 105 Cal.App.4th 94, 100.)

A motion to dismiss on statutory grounds does not involve a question of the defendant's guilt or innocence; the sole question is whether statutory time limits have been exceeded without consent or good cause. (See *People v. Allim* (1979) 96 Cal.App.3d 268, 276; *People v. Halstead* (1985) 175 Cal.App.3d 772, 778-779.) Thus, under the clear authority cited above, a plea of guilty cannot waive an issue concerning the defendant's statutory speedy trial rights, since that is not an issue involving the defendant's guilt or innocence.

The second issue concerns prejudice, which is directly at issue in this case. However, it is critical to understand that the term has two different meanings in California law. One meaning is that the defendant's ability to defend against a criminal charge has been compromised (“substantive prejudice”). A motion to dismiss on constitutional speedy trial grounds will usually (though not always) involve a showing of this form of substantive prejudice. The motion can be based upon other forms of prejudice; see e.g. *Klopper v. North Carolina* (1967) 386 U.S. 213, 221 (not relevant to this discussion). What is important is that since, as discussed above, a motion to dismiss on statutory grounds does not involve any question of the defendant's guilt or innocence, substantive prejudice is entirely irrelevant to the issue.

The third issue involving prejudice is actually better termed “reversible error.” This is rooted in the California constitutional

requirement that “No judgment shall be set aside . . . unless . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Canst., art. VI, § 13.) This requirement is sometimes, and confusingly in the present context, referred to as the requirement of showing “prejudice on appeal.” (See *People v. Garceau* (1993) 6 Cal.4th 140, 210, 211.) However, to avoid semantic confusion, the clearer term is “reversible error.” In the particular context of a motion to dismiss, reversible error will exist when further proceedings would generally have been prohibited had the motion been granted, whether the defendant's ability to meet the charges has been compromised or not. In *Nahinu*, such reversible error clearly exists, regardless of whether any actual prejudice occurred.

Pursuant to *People v. Wilson* (1999) 60 Cal. 2d, 139 (“*People v. Wilson*”), however, a showing of actual prejudice is not even required. For defendants proceeding via interlocutory writ of mandate, absent a sufficient showing of good cause for the delay, “no further showing” was required (*Id.* at 151).² In effect, a showing of “statutory prejudice” – a violation of Penal Code section 1382 – without any showing of actual prejudice, was sufficient to mandate dismissal. For misdemeanor defendants who elect to proceed via interlocutory writ of mandate, a mere statutory violation of Penal Code section 1382 is sufficient to mandate dismissal and serve as a statutory bar to the re-filing of the same misdemeanor case. Stare decisis does not authorize

² In *Nahinu*, Appellant also raised the issue via interlocutory writ but the writ was denied.

a different outcome for a defendant appealing from a final judgment based on a violation of Penal Code section 1382.

IV. No Split of Authority Justifies a Deviation from *People v. Wilson* (1999) 60 Cal. 2d, 139

Avila v. Mun. Court (1983) 148 Cal.App.3d 807 (“*Avila*”), painting in broad strokes, held that denial of a statutory speedy trial right also is a cognizable issue on appeal from a final judgment of conviction following a guilty plea or nolo contendere to a misdemeanor (*Id.* at 812). *Avila* proceeded to note – correctly – that the impact of a Penal Code section 1382 violation on the prosecution of a misdemeanor is quite different from the impact of the same violation on the prosecution of a felony. “When a felony is dismissed pursuant to section 1382, the prosecution may refile the same charge. Once a misdemeanor has been dismissed pursuant to section 1382, it cannot be filed again” (*Avila*, 148 Cal. App. 3d at 812). The narrow holding of *Avila* – a holding that subsequent jurisprudence has distinguished but never overruled – provides that a violation of Penal Code section 1382 requires dismissal of the misdemeanor action without any showing of actual prejudice on appeal (*Id.*).

In *Nahinu*, the Court leapfrogged from the narrow holding of *Avila* to an incorrect conclusion that a showing of actual prejudice on appeal from a misdemeanor conviction is required, via a perceived conflict with subsequent jurisprudence that distinguished *Nahinu*. The problem – one which the Court rightly observed – is that no subsequent case law has overruled *Avila*.

People v. Egbert (1997) 59 Cal.App. 4th 503 (“*Egbert*”), distinguished the reasoning of *Avila* in order to narrow the holding of *Avila* to misdemeanors subject to a statutory bar to refiling, so that felony defendants could not extend *Avila* for the purposes of automatically showing prejudice when arguing a violation of constitutional speedy trial rights (*Id.* at 920).

People v. Hernandez (1992) 6 Cal.App.4th 1355 (“*Hernandez*”), which also dealt with felonies, again delimited the scope of *Avila*, in order to delineate the extent to which issues of waiver following a plea of guilty or nolo contendere to a felony affects the burden of showing prejudice on appeal.

People v. Aguilar (1998) 61 Cal. App 4th 615 (“*Aguilar*”) concentrated on the specific issue of waiver as it affects the burden of showing prejudice following a plea of guilty or nolo contendere to a misdemeanor. Yet, *Aguilar* dealt only with the showing of prejudice required to prove a violation of constitutional speedy trial right— a delay in over one year creates a rebuttable presumption of prejudice. Nowhere did *Aguilar* discuss the issue of “statutory prejudice,” which was the specific issue in both *Avila* and *Nahinu*.

Accordingly, the Court’s leapfrog conclusion in *Nahinu* is confused at best and creates uncertain consequences for misdemeanor appellants who have suffered a *statutory* violation of their speedy trial right. If, following *Nahinu*, misdemeanor defendants cannot prevail on appeal of a statutory speedy trial right issue following a conviction or plea without a showing of the same actual prejudice required on

appeal of a constitutional speedy trial right issue, misdemeanor defendants will have no choice but to lock-up the court dockets with interlocutory writs of mandate, where, following *People v. Wilson*, no showing of actual prejudice is required. Or, following *Nahinu*, must misdemeanor defendants proceeding via interlocutory writ also now show actual prejudice, in violation of *People v. Wilson*?

V. Conclusion

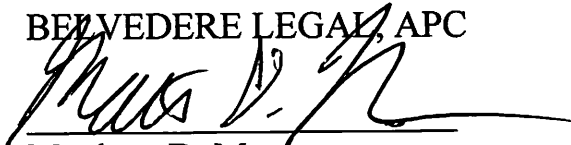
It remains true that the impact of a Penal Code section 1382 violation on the prosecution of a misdemeanor requires dismissal whereas the impact of the same violation on the prosecution of a felony requires a mere re-filing of the case. At issue is the procedural mechanism by which a misdemeanor defendant may challenge a violation of a speedy trial issue based on statutory prejudice as opposed to actual prejudice.

Following *People v. Wilson* and Penal Code section 1387, California law has been clear, up until now that a violation of Penal Code section 1382 is a bar to any subsequent prosecution, provided the misdemeanor case does not involve a misdemeanor identified in Penal Code sections 1382(a)(3)(A), (B), or (C). Despite the clear authority in this area, the published decision in *Nahinu* is not in comity with *People v. Wilson*, which expressly authorizes misdemeanor defendants to proceed via interlocutory writ of mandate and to obtain a dismissal and bar to refiling under Penal Code section 1382 with no further showing than a statutory violation of the speedy trial statute. Following *Nahinu*, what recourse is left to defendants

faced only with a statutory violation of Penal Code section 1382? To proceed via writ interlocutory writ with a burden of showing only statutory prejudice? Or to proceed via an appeal following a conviction or plea and attempt to meet the higher burden of showing substantive prejudice, the same burden that is required to prove a violation of a defendant's constitutional speedy trial rights? Any such outcome is a clear violation of the legal precedent set by *People v. Wilson* and risks creating great procedural confusion among misdemeanor appeals across the entire state of California.

Respectfully submitted,

BELVEDERE LEGAL, APC

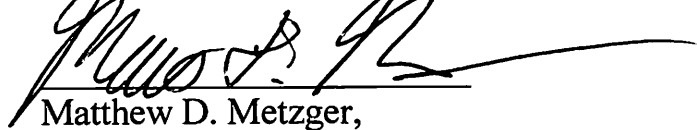


Matthew D. Metzger,
Attorney for Appellant Andrew
Nahinu

**CERTIFICATE OF WORD COUNT
(CRC Rule 8.204(c))**

I certify that this brief was prepared using 14-point type, Times New Roman typeface, and that the word-count of this brief is 6,210 words and thus below the 14,000 word limit. Cal Rules of Ct. 8.204(c).

BELVEDERE LEGAL APC

A handwritten signature in black ink, appearing to read "Matthew D. Metzger", written over a horizontal line.

Matthew D. Metzger,
Attorney for Appellant Andrew
Nahinu

PROOF OF SERVICE
IN THE SUPREME COURT OF CALIFORNIA

Action: ANDREW NAHINU V. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

Case #: S-_____ (1st Dist. No. A138070; App. Div. No. APP-12-007317; Trial Court. No. 10015661)

I, MATTHEW D. METZGER declare:

I am a citizen of the United States, a resident of San Mateo County, and am over 18 years of age. I am not a party to the above entitled action. My business address is Belvedere Legal, APC, 605 Market Street, Suite 505, San Francisco, CA 94105

On June 14, 2013, I served the following documents:

- 1. PETITION FOR WRIT OF MANDATE**
- 2. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

upon the interested parties in this action by the methods indicated below:

BY FIRST CLASS MAIL: by placing a true copy thereof, enclosed in a sealed envelope, for postage and deposit with the United States Postal Service on the same date it is submitted for mailing, and addressed as follows:

Appellate Division
Superior Court of California
County of San Francisco
850 Bryant Street, Room 101
San Francisco, CA 94103-4603

Court of Appeal, First
Appellate District, Division 2
350 McAllister Street
San Francisco, CA 94102

Office of the Attorney General
455 Golden Gate, Suite 11000
San Francisco, CA 94102-7004

San Francisco District
Attorney's Office
Attn: Louise Ogden
850 Bryant St
San Francisco, CA 94103

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 14, 2013 at San Francisco, California.

By: 
Matthew D. Metzger

EXHIBIT A

GEORGE GASCÓN, SB#182345
District Attorney
San Francisco District Attorney's Office
850 Bryant Street, 3rd Floor
San Francisco, CA 94103
Telephone: (415) 553-1752

FILED AND ENTERED
6/27/11 SAN FRANCISCO COUNTY
SUPERIOR COURT

2011 JUN 20 AM 9:36

CLERK OF THE COURT

BY: [Signature]
DEPUTY CLERK

17

ATTORNEYS FOR THE PEOPLE

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,

v.

ANDREW PUNI NAHINU
Defendant(s).

MISDEMEANOR COMPLAINT

CASE NUMBER:
11015661

The Undersigned, being sworn says, on information and belief, that:

COUNT: I

The said defendant, ANDREW PUNI NAHINU, did in the City and County of San Francisco, State of California, on or about the 12th day of June, 2011, commit the crime of DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, to wit: Violating Section 23152(a) of the California Vehicle Code, a Misdemeanor, in that the said defendant did then and there drive a vehicle while under the influence of an alcoholic beverage, under the influence of a drug and under the combined influence of an alcoholic beverage and a drug.

The said defendant, ANDREW PUNI NAHINU, previously convicted of the crime of DRIVING WHILE HAVING A 0.08% OR HIGHER BLOOD ALCOHOL, violating section 23152(b) of the Vehicle Code, a Misdemeanor, on or about the 31st day of July, 2002, in the Superior Court of California, County of San Mateo.

COUNT: II

The said defendant, ANDREW PUNI NAHINU, did in the City and County of San Francisco, State of California, on or about the 12th day of June, 2011, commit the crime of DRIVING WHILE HAVING A 0.08% OR HIGHER BLOOD ALCOHOL, to wit: Violating Section 23152(b) of the California Vehicle Code, a Misdemeanor, in that the said defendant did then and there drive a vehicle upon a highway and upon other than a highway in an area which was open to the general public with 0.08 percent or more, by weight, of alcohol in his/her blood.

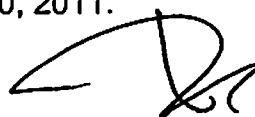
The said defendant, ANDREW PUNI NAHINU, previously convicted of the crime of DRIVING WHILE HAVING A 0.08% OR HIGHER BLOOD ALCOHOL, violating section 23152(b) of the Vehicle Code, a Misdemeanor, on or about the 31st day of July, 2002, in the Superior Court of California, County of San Mateo.

THE BELOW EXHIBIT(S) ARE INCORPORATED BY REFERENCE HERETO AS IF SET FORTH IN FULL HEREIN, AND PROVIDE PROBABLE CAUSE TO BELIEVE THAT THE SAID DEFENDANT(S) COMMITTED SAID OFFENSE(S).

CHP REPORT NO. 2011-00919
CHRONOLOGICAL REPORT(S) OF INVESTIGATION
CITIZEN'S ARREST CARD
VICTIM AND WITNESS STATEMENT(S)
LAB REPORT
OTHER: ANY AND ALL EXHIBITS, EVIDENCE, PHOTOCOPIES OF EVIDENCE AND NOTES, TAPES ATTACHED HERETO REPORT(S) OR REFERENCED IN REPORTS OR CHRONOLOGICAL REPORT OF INVESTIGATION.

Pursuant to Penal Code sections 1054 through 1054.7, the People request that, within fifteen (15) days, the defendant and/or his/her attorney disclose: (A) the names and addresses of persons, other than the defendant, he/she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements, of those persons including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial; (B) Any real evidence which the defendant intends to offer in evidence at the trial. This request is a continuing request, to cover not only all such material currently in existence, but all material which comes into existence to the conclusion of this case.

I state, declare, verify and certify under the penalty of perjury that the foregoing is true and correct. Executed in San Francisco, California on June 20, 2011.



OFFICER DAVID NAKASU

djh

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
APPELLATE DIVISION

---oOo---

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ANDREW NAHINU,
Defendant.

No. 11015661

ON APPEAL FROM THE JUDGMENT
OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

THE HONORABLE DONNA ALYSON LITTLE, JUDGE

REPORTER'S TRANSCRIPT ON APPEAL

November 1, 2011

Volume 1

RECEIVED
JUL 18 2012

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
3 HONORABLE DONNA ALYSON LITTLE, JUDGE PRESIDING
4 DEPARTMENT NO. 17

5 ----oOo----

6 PEOPLE OF THE STATE OF CALIFORNIA,
7

8 Plaintiff,

9 vs.

No. 11015661

10 ANDREW NAHINU,
11

Defendant. /
12

13 Reporter's transcript of proceedings

14 date of

15 November 1, 2011
16
17
18
19

20 A P P E A R A N C E S

21 For the People:

22 GEORGE GASCON, DISTRICT ATTORNEY

23 ELISA NADEAU, Assistant District Attorney

24 For the Defendant:

25 JEFF ADACHI, PUBLIC DEFENDER

26 KEVIN MITCHELL, Deputy Public Defender
27
28

Reported by: Anthony C. Vaughn - CSR No. 6185

1 November 1, 2012

A.M. Session

2 ----oOo----

3 THE COURT: 107, Andrew Nahimu.

4 MR. MITCHELL: Kevin Mitchell for Mr. Nahinu, who is
5 present out of custody.

6 There's been a motion filed with the Court today.
7 I'm serving a copy of the D.A. right now. This motion to
8 dismiss is for violation of speedy trial rights.

9 THE COURT: People have anything to add to what we
10 discussed extensively yesterday and before?

11 MS. NADEAU: Yes.

12 THE COURT: State your appearance.

13 We're on the record. We can't hear.

14 MS. NADEAU: Elisa Nadeau for the People.

15 The People would like to make the record that
16 actually a subpoena went out for Lou Williams, Officer
17 Williams, on September 30th of 2011.

18 And on October 3rd Lou Williams texted Mark Massarweh
19 saying that he was on vacation until October 20th.

20 Subpoenas kept going out every week because it was
21 trailing. And on October 17th Marc Massarweh texted
22 Officer Williams and asked what date he would be back.

23 On October 17th Lou Williams responded he would not
24 be back until October 31st.

25 So this shows that the People were diligent in that
26 right after the trial date was set they subpoenaed --

27 THE COURT: He's not back, right?

28 MS. NADEAU: He is back, and the People are ready.

1 THE COURT: Okay, we have a courtroom. Are you
2 ready?

3 MS. NADEAU: The People would also like to object to
4 the untimely notice of the continued motion. I haven't
5 even looked at it.

6 THE COURT: He's been objecting every day, so I don't
7 think it's untimely at all. In fairness to Mr. Mitchell,
8 he's been objecting every single time. So what's untimely
9 about it? He said yesterday he was going to file a
10 motion; that's why I put it on today.

11 MS. NADEAU: I haven't seen it yet, so I would like
12 to look at it.

13 THE COURT: There's nothing new. I found good cause
14 to continue it because you told me the officer was back.

15 MS. NADEAU: Then if there's nothing new --

16 THE COURT: And I made the record it's a very short
17 continuance. The last day in this case was the 28th, and
18 I said I would continue it until today. It was a short
19 continuance because I thought the People had used due
20 diligence. And the defendant was out of custody anyway.

21 So I think all of the parameters were met. The
22 motion to dismiss is denied. I have a courtroom for you.

23 MR. MITCHELL: I'm going to ask for a stay of
24 proceedings to writ the motion.

25 THE COURT: You're not getting a stay. That's
26 denied.

27 So there's a courtroom, and you'll be sent there for
28 tomorrow. You're going to go to Department 24, Judge

1 Breall. They have to stipulate to her since --

2 MR. MITCHELL: We're not stipulating.

3 THE COURT: Then you'll have to wait. She's the one
4 available.

5 MS. NADEAU: May I add one thing? The People have
6 not received witness statements or lists.

7 THE COURT: Well, he has to provide it or you have a
8 good reason for not being ready.

9 MR. MITCHELL: We don't have any statements. And I'm
10 informed and believe my expert is attending a seminar,
11 forensic training in L.A..

12 THE COURT: So you're not ready.

13 MR. MITCHELL: I'm not sure what dates.

14 THE COURT: So you're not ready. Are you announcing
15 ready or not?

16 MR. MITCHELL: We're still ready.

17 THE COURT: Apparently you're not. You want to call
18 an expert who is not --

19 MR. MITCHELL: We may have to call a different
20 expert.

21 THE COURT: Who is it? Because --

22 MR. MITCHELL: It's because of the delay caused by
23 their witness' failure to show up.

24 THE COURT: First of all, I'm not buying that.
25 You've known for some time that we're going to have this
26 issue. This is not an issue that just came up today. I
27 don't buy it all.

28 That's why you've been moving to dismiss.

1 That's why you've been objecting to the continuance
2 because this has been going on every day. They told you
3 their witness wasn't going to be back.

4 Now you're telling me that your witness is not
5 available so you need to get another one.

6 So that's not --

7 MR. MITCHELL: I'm not clairvoyant. I don't know
8 when their officer is on vacation.

9 THE COURT: Mr. Mitchell, we've been through all
10 this. That's why we put it on today. This didn't come up
11 today. What's new --

12 MR. MITCHELL: Find us a courtroom.

13 THE COURT: I got you a courtroom. You didn't want
14 the courtroom I got you.

15 MS. NADEAU: The People would also like to point out
16 that we did not receive any notice that the defendant
17 intends to call a witness. We would like to know who the
18 expert is and if there's anyone else.

19 THE COURT: Until you tell them who your expert is
20 going to be, they have good reason not to be ready. If
21 you're not going to tell them who the expert is, that's
22 another good cause for me to continue it further.

23 MR. MITCHELL: The same two I've always told them.

24 THE COURT: Who are the two?

25 MR. MITCHELL: John Seminoff and Jan Marks.

26 THE COURT: Marks is the one that's out, I believe.

27 MS. NADEAU: Who are these people? Could you repeat
28 for me?

1 THE COURT: Marks has been around forever. He's the
2 one who is unavailable.

3 Who is the other one?

4 MR. MITCHELL: John Seminoff.

5 THE COURT: In any event, for the record the reason
6 we have to stipulate to Judge Breall is her sister-in-law
7 is the supervisor of misdemeanor D.A.s.

8 If you do not want to stipulate that's fine.

9 ----oOo----

10 THE COURT: Andrew Nahinu.

11 MR. MITCHELL: Alisa Nadeau.

12 THE COURT: You guys are going out. We have a judge
13 for you. It's going to Judge Cheng, who is in Department
14 12. He would like to see you down there, and he will take
15 your case back to the other courthouse tomorrow and have a
16 panel for you. There's a room at the other courthouse.

17 MR. MITCHELL: So we won't have a jury today.

18 THE COURT: No panel has been ordered for today.

19 MR. MITCHELL: We'd again object to putting the
20 matter over.

21 THE COURT: I made my record several times. You're
22 going out to the judge today, right now, and he will do
23 whatever motions you have now. And have a panel for you
24 tomorrow morning.

25 ----oOo----

26

27

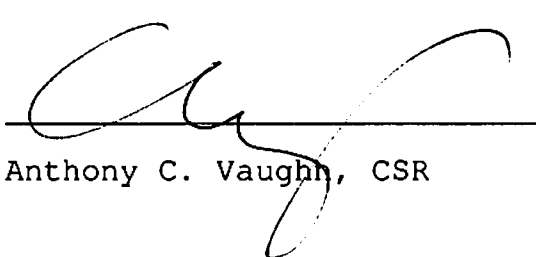
28

CERTIFICATE OF REPORTER

1
2 I, Anthony C. Vaughn, Certified Shorthand Reporter,
3 Certificate Number 6185, do hereby certify that I was the
4 Official Court Reporter assigned to the herein captioned
5 case; that I reported in shorthand the proceedings and
6 subsequently caused said shorthand to be prepared into
7 English.

8 I further certify that the foregoing is a full, true
9 and correct reflection of the proceedings had in the
10 herein-captioned case.

11 July 1, 2012

12 
13 Anthony C. Vaughn, CSR
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 APPELLATE DIVISION OF THE SUPERIOR COURT OF CALIFORNIA
2 COUNTY OF SAN FRANCISCO

3 ----oOo----

4 PEOPLE OF THE STATE OF CALIFORNIA)

5 Plaintiff/Appellant,)

6 vs.)

) Court No. 11015661

7 ANDREW NAHINU,)

8 Defendant/Respondent.)

9
10
11 ON APPEAL FROM THE JUDGMENT
12 OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
14 MISDEMEANOR TRIAL COURT

15 THE HONORABLE ANDREW CHENG, JUDGE

16 REPORTER'S TRANSCRIPT ON APPEAL

17 VOLUME 2, PAGES 101-154

18
19
20
21 RECEIVED JUN 8 2012

22
23
24
25
26
27 Reported by: Gordon F. Aiavao, CSR #11216

FILE COPY

28

1 SUPERIOR COURT OF CALIFORNIA
2 COUNTY OF SAN FRANCISCO
3 BEFORE THE HONORABLE ANDREW Y.S. CHENG, JUDGE PRESIDING
4 DEPARTMENT NUMBER 505

5 ----oOo----

6 PEOPLE OF THE STATE OF CALIFORNIA,)
7 Plaintiff,) Court No 11015661
8 vs.)
9 ANDREW NAHINU)
10 Defendant.)
11 _____)

12 Reporter's Transcript of Proceedings

13 WEDNESDAY, NOVEMBER 2ND, 2011

14
15 APPEARANCES OF COUNSEL:

16 For People:

17 Hon. Kamala Harris, District Attorney
18 BY: **ELISA NADEAU**, Assistant District Attorney

19 For Defendant:

20 Hon. Jeff Adachi, Public Defender
21 BY: **KEVIN MITCHELL**, Deputy Public Defender

22
23
24
25
26 Reported By: Gordon F. Aiavao, CSR #11216
27
28

I N D E X

PEOPLE'S WITNESSES

PAGE

OFFICER VU WILLIAMS

Direct examination by Ms. Nadeau	124
Cross-examination by Mr. Mitchell	134
Redirect examination by Ms. Nadeau	148
Recross-examination by Mr. Mitchell	152

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Wednesday, November 2nd, 2011

2 Department 505

3 People v. Andrew Nahinu

4 -----oOo-----

5
6 **MS. NADEAU:** Good morning, Your Honor. Elisa Nadeau for the
7 People.

8 **MR. MITCHELL:** Kevin Mitchell for Mr. Nahinu present out of
9 custody.

10 **THE COURT:** Welcome to you both counsel. I've looked at
11 your limine motions. I'll tell you my tentative rulings and
12 I'll give you a chance to argue.

13 As to the Defendant's limine rulings, my tentative is to
14 grant all of them except for 9, 12, 14, 15, 18 and 19. Those
15 I'll need argument on.

16 And as to the People's limine motion, my tentative ruling is
17 to grant all of them except for 25, 26, 28 and 29.

18 And as to 28 and 29 of the People's and 9 and 12 of the
19 Defense those involve the priors. Let's just talk about that
20 first.

21 Let me turn to you Mr. Mitchell. It's just one prior from
22 2002 is that right.

23 **MR. MITCHELL:** That's what I'm aware of.

24 **THE COURT:** And in terms of its being offered right now, you
25 don't know whether your client is going to testify.

26 **MR. MITCHELL:** I do not know at this time.

27 **THE COURT:** For the 2002 conviction let me turn to the
28 People. Ms. Nadeau, why are you offering it? Is it just for

1 general impeachment grounds? Do you plan to argue it's a crime
2 of moral turpitude? What is it being offered for?

3 **MS. NADEAU:** No, Your Honor. It's only being offered --
4 well assuming that the prior is going to be bifurcated -- it
5 won't be determined as to the issue of guilt in the first
6 proceeding. Then we are only offering it if the Defendant
7 produces some evidence contrary to the fact of the conviction
8 such as the defendant testifies, "I never drove. I've never
9 driven after drinking," or "I've never been convicted of a
10 drunken driving conviction before or offense before."

11 **THE COURT:** Well, I'm looking at the complaint. I'm not
12 even seeing an allegation in the complaint. So this is not a
13 DUI with a prior case, correct?

14 **MS. NADEAU:** It is alleged in the complaint.

15 **THE COURT:** Is there an amended complaint?

16 **MS. NADEAU:** No. It's in each count.

17 **THE COURT:** Oh, I see.

18 **MS. NADEAU:** The second paragraph.

19 **THE COURT:** I see. The second paragraph. All right. So I
20 wouldn't read that second paragraph. And I take it Mr. Mitchell
21 you would be bifurcating then.

22 **MR. MITCHELL:** That's correct.

23 **THE COURT:** So, motion to bifurcate is granted.

24 And as to the 2002 conviction, it makes sense to me that the
25 only way it would come in would be if your client takes the
26 stand and seems to suggest facts that he's never had such prior
27 behavior then the door might be open, but otherwise I don't see
28 any relevance to the prior.

1 **MR. MITCHELL:** Thank you.

2 **THE COURT:** Okay. So the motion is granted in part.

3 Defense will be able to exclude the 2002 conviction unless
4 the door is opened by testimony suggesting that either that
5 there was no prior misconduct but then you're not able
6 Ms. Nadeau to ask him that question point blank. It's only if
7 he voluntarily suggests that.

8 **MS. NADEAU:** Yes, I understand, Your Honor.

9 **THE COURT:** That disposes 9 and 12 for the Defense and 28
10 and 29 for the prosecution.

11 Let's go to the prosecution limine motions for 25. You're
12 asking for the Intoxilizer test to be admitted. Are you going
13 to be able to lay the foundation with the officer at today's
14 hearing.

15 **MS. NADEAU:** Yes, Your Honor.

16 **THE COURT:** So, subject to that foundation I'll wait and
17 see, same with the PAS result you'll lay the foundation on 26.

18 **MS. NADEAU:** I made an error, Your Honor. There is no PAS
19 result I was aware of that I just forgot to.

20 **THE COURT:** 26 is denied. It's moot. It's out of the case.

21 **MS. NADEAU:** Well, actually, Your Honor, there are still
22 Intoxilizer results just not PAS results.

23 **THE COURT:** So you have the Intoxilizer results you're
24 asking that be admitted to the fair decimal place. Let me hear
25 from you Mr. Mitchell.

26 **MR. MITCHELL:** Your Honor, we both have supplemental in
27 limines. You haven't had an opportunity to receive those yet.

28 **THE COURT:** No. Let me take a look at them. Let me hear

1 argument as to the third decimal place Mr. Mitchell.

2 **MR. MITCHELL:** Well, Your Honor, these machines are not
3 created or designed to read or to give a reading if the number
4 the breath machine detects less than .01 breath alcohol or of
5 the alcohol group in the chamber where it's reading for alcohol.

6 Because it doesn't read for alcohol at that small of a level
7 any reading to the third digit is inherently unreliable further
8 down the line.

9 Also, it's only required to be calibrated within .01
10 tolerance standard of deviation. There is no third digit
11 included in Title 17 and so on those grounds we believe the
12 third digit is misleading and not reliable.

13 **THE COURT:** Okay. Ms. Nadeau.

14 **MS. NADEAU:** The machines once they are above .01 can be
15 accurate to .01. And in fact we have testing of the machines
16 that shows that they are accurate of this particular machine
17 that we'll produce when we -- when we have the direct exam of
18 our expert. And she can testify that they are actually accurate
19 and that this machine specifically was accurate to the third
20 digit.

21 **THE COURT:** Is this going to be necessary to make your
22 burden of proof? This third digit or not?

23 **MS. NADEAU:** I don't think so, Your Honor.

24 **THE COURT:** All right. It strikes me on a 352 basis I'm
25 going to exclude the third digit and grant the Defense in limine
26 motion.

27 Okay. So, in terms of the other prosecution in limine
28 motions, there was one on the MVARs video. What is it that

1 you're seeking here Ms. Nadeau?

2 **MS. NADEAU:** If our officer can properly authenticate the
3 video, we would like to play the video for the jurors during
4 Officer Williams' testimony and he will be able to authenticate
5 it.

6 **THE COURT:** Mr. Mitchell, let me hear from you.

7 **MR. MITCHELL:** If there is a transcript -- I know the court
8 reporter isn't required to take down what occurs on the tape --
9 I haven't been provided with a copy of any transcript to review
10 and verify whether there's an accurate transcript available.
11 Without that I don't think it should be used in the People's
12 case in chief.

13 **THE COURT:** What's the basis for excluding the video?

14 **MR. MITCHELL:** Well, it lacks foundation at this point.
15 Further, if they are going to be starting and stopping it, it's
16 going to take the video out of context. And if there are any
17 edits made or any starting and stopping or fast forwarding, I'll
18 ask that -- the rule of completion basically says that I have a
19 right to have the whole tape played in response.

20 **THE COURT:** Ms. Nadeau, how long is the video?

21 **MS. NADEAU:** The video is 32 minutes but the People's
22 position is that the defendant is not entitled to a playing of
23 the entire thing. It would consume undue court's time under 352
24 and it's not necessary.

25 For example, the first five minutes of the video don't
26 involve the defendant at all. It's just the officer driving.
27 And you can't even see the defendant's vehicle.

28 I don't know of any statutory requirement that I produce a

1 transcript. However, I am preparing one, but I wanted to go
2 over it with my officer because it's difficult to hear and I
3 want to be accurate as possible. As soon as I have a transcript
4 I will provide it to the Court and the defendant.

5 **THE COURT:** Is there any way the parties can meet and confer
6 and agree on a segment that will be played? For example, I'm
7 sure you don't want the jury to be sitting there for 32 minutes
8 watching some blank screen of some officer driving. Is there
9 any way we can get to the heart of the video that can be shown
10 to the Defense and provided that a foundation is laid that that
11 amount of video, whether five, ten minutes, of the key portions
12 could be played? Mr. Mitchell, let me hear from you.

13 **MR. MITCHELL:** Some of what is going to be at issue in this
14 case, this may be a little preview, is the level of impairment
15 of Mr. Nahinu.

16 Now, the People are basing their charges on the accusation
17 leveled by Officer Williams that Mr. Nahinu swerved once. Now,
18 he also, the officer also mentioned that this had a close
19 proximity this was in close proximity to another vehicle.

20 And, so the way that Mr. Nahinu's driving impacts other
21 drivers around him may also be at issue here. The way that the
22 officer was driving also affects the way that other drivers
23 respond, and if he's going to call into question the way that
24 Mr. Nahinu was driving. Then if there's something that the
25 officer was doing that also contributed to the nature of Mr.
26 Nahinu's driving, then that is relevant and should be viewed by
27 the jury and assessed by the trier of fact.

28 **THE COURT:** Will the video have footage of Mr. Nahinu's

1 driving or not?

2 **MR. MITCHELL:** It will.

3 **THE COURT:** How long is that footage, Ms. Nadeau?

4 **MS. NADEAU:** It's very short. I would say it's no more than
5 five minutes. Although a lot of it is the defendant sitting at
6 a light waiting for the light to turn green after he's pulled
7 over.

8 And the People would strenuously object to any inference or
9 evidence regarding the officer's driving. It's completely
10 irrelevant and prejudicial and officers often times have to
11 drive in a different way than ordinary civilians are entitled to
12 drive because they're trying to uphold the law and prevent
13 emergencies.

14 **THE COURT:** Well, I'm just trying to figure out how much of
15 the video to show. Is it really going to help the jury if the
16 jury sees five minutes of Mr. Nahinu's driving? Are they going
17 to be able to conclude anything from it or not?

18 **MS. NADEAU:** Yes. The jury will be able to conclude that
19 the defendant was not driving safely because he veers right and
20 almost hits a taxicab and that is the basis for the stop.

21 **THE COURT:** All right. Let me hear from you, Mr. Mitchell.

22 **MR. MITCHELL:** Your Honor, I think this is one of the
23 problems with putting the horse before the -- or the cart before
24 the horse as it were. We haven't even litigated the grounds for
25 the stop yet. Mr. Nahinu's constitutional right to challenge
26 the stop has not been litigated up until now. And we're talking
27 about pretrial motions or trial motions at this point. Before
28 pretrial motions have been heard. It makes it very difficult to

1 make an informed argument about what's relevant and admissible
2 at trial without having the Fourth Amendment concerns resolved.

3 **THE COURT:** We'll get those resolved this afternoon. I'm
4 assuming either you knock it out, I find there wasn't a basis
5 for the stop. If I do find a basis for the stop I'm trying to
6 figure out what is it that actually would be played. Five
7 minutes worth. Is that what you're asking for Ms. Nadeau?

8 **MS. NADEAU:** No, Your Honor. It would be more than five
9 minutes worth because part of the video shows the defendant's
10 performance on some of the FSTs and we would definitely want to
11 introduce that. And there are some statements the defendant
12 makes against his interests and those we would seek to introduce
13 also. So I would say if I -- give me a second -- I can give you
14 a better time estimate for the segment we would want to produce.

15 **MR. MITCHELL:** While the People are looking for that, there
16 is about four minutes prior to the stop where the officer is
17 driving very fast crossing many lanes, multiple lanes at a time,
18 and he continues to do so up until he runs across Mr. Nahinu.
19 And those moments leading up to the stop, I believe, have an
20 impact on the way that another driver would perceive a vehicle
21 approaching in the rear and have had a direct impact on the way
22 Mr. Nahinu drove that night.

23 **THE COURT:** I guess I'm still missing who actually took the
24 video. How you're going to lay this foundation. Let's get back
25 to the fundamentals here. The video is part of the officer's
26 car that is running and then who can lay the foundation it was
27 in working order and all that?

28 **MS. NADEAU:** It isn't necessary for the officer to lay a

1 foundation it was in working order because it's like a picture.
2 All he has to do is testify this is an accurate representation
3 of what happened. But he can testify that these vehicles are
4 equipped with what they call MVARs. I can't remember the
5 acronym right now. It's an audio and video recording device
6 that automatically turns on and records footage and it's
7 certified by the police department or California Highway Patrol
8 that it's accurate.

9 So, it's also admissible under Evidence Code sections 1350,
10 1530 and 1532 and the officer can talk about how these videos
11 are maintained and how they come to -- you know -- be extracted
12 and -- you know -- placed on the DVD.

13 **THE COURT:** The real issue to me is not a hearsay issue. I
14 agree with you it can be admissible. The issue is whether it
15 would cause undue confusion to the jury. Whether they would
16 give undue emphasis to the video as opposed to the officer's
17 only testimony. And I understand why you're offering it.

18 I think the best way we frankly -- we just play the video
19 and all take a look at it. You've seen it obviously and if I
20 were to allow it right now I don't see any evidentiary ground
21 other than a 352 balancing test for not admitting it.

22 What would be your arguments? It's more prejudicial or
23 probative?

24 **MR. MITCHELL:** I have no argument. The only argument I
25 would have is if the People are trying to break it into chunks
26 instead of playing the complete tape.

27 **THE COURT:** Well, under the rule of completeness, granted
28 that's also subject to a 352 analysis -- under 356 if

1 Mr. Mitchell wants to contextualize the video, that's proper. I
2 don't have a problem consuming 32 minutes. I think it will be
3 awfully boring if there are stretches there. Can we at least
4 edit out the parts that you both agree that have nothing to do
5 with this case and shorten it to 15, 20 minutes? Is that
6 possible?

7 **MS. NADEAU:** I would also point out that there are some
8 things that the Defendant might not want in such as at the end
9 he's using some swear words. I'm sure the defendant would want
10 to stop early. There are parts the Defendant might not want. I
11 agree the swear words are probably 352.

12 **THE COURT:** Is there a way you can come to a stipulated --
13 you know -- in other words, my inclination would be allow the
14 video, but allow you to put in what additional parts of the
15 video the People have not shown, make it one tape, splice out
16 all the parts you don't -- is that doable?

17 **MS. NADEAU:** I don't really have the technical ability to do
18 that, but I would be happy if Defense counsel was able to do
19 that. That would be fine with me.

20 I also wanted to make one point about undue prejudice.
21 Since this is an actual representation of what happened, I don't
22 see how it could be more prejudicial than probative.

23 **THE COURT:** I agree. I think the only issue is, is it
24 giving an accurate representation of -- I'm hearing in other
25 words from the Defense, there are arguments of distortion. The
26 speed creating some sort of image that isn't accurate. I'm not
27 sure about that. I have to see the video.

28 But right now I'm inclined to allow the video and subject to

1 your putting in whatever parts you deem necessary under 356 to
2 put into proper context, make sure there isn't anything
3 prejudicial coming in, but short of that, figure out what you
4 both can agree on and only if you can agree on what parts of the
5 video can be shown I'll rule on it again. Okay?

6 Now, there was another issue on the, I think I've covered
7 all the People's in limines. Let me hear from you Mr. Mitchell
8 if there are any you wish to argue.

9 **MR. MITCHELL:** I'm sorry. If you can run the list by me one
10 more time, Your Honor.

11 **THE COURT:** Sure. I asked for argument as to 25, 26, 28 and
12 29. We disposed of those issues.

13 The rest of the in limine motions I was inclined to grant.
14 But let me hear from you. They may be covered in your
15 supplemental. Maybe I should go to your supplemental in
16 limines.

17 I granted the first one on the three digits. Oh, yes. The
18 partition ratio. Let me hear from you Mr. Mitchell. What are
19 you worried about here?

20 **MR. MITCHELL:** Well, I'm not worried about anything other
21 than admitting the partition ratio evidence. There's a case --
22 2009 case -- of People v McNeil at 46 Cal.4th 1183 which tells
23 us that the partition ratio is legally relevant to the (a)
24 count. While it's not under Bransford applicable or relevant to
25 the (b) count it, still comes in as to the impairment.

26 **THE COURT:** Do you agree with that analysis?

27 **MS. NADEAU:** Your Honor, I agree. I cited that case myself
28 and I apologize for failing to cite it in my initial motions in

1 limine that it can be relevant to the (a) count.

2 However, if there's going to be evidence on partition ratio,
3 then I would like a Kelly Frye hearing outside the presence of
4 the jury to determine if it meets Kelly Frye standards.

5 **THE COURT:** What particularly are you concerned about? What
6 foundation requirements are you looking for?

7 **MS. NADEAU:** I would like to know if there are studies
8 showing that a statistically relevant sample of the population
9 suffers from extremely low or extremely high partition ratios
10 such that if they were tested in accordance with the criteria
11 that we currently have, they might be -- you know -- they might
12 come out with a result that is so inaccurate as to impart guilt
13 when there should not be guilt.

14 **THE COURT:** What witness would you provide or what proffer
15 would you have Mr. Mitchell?

16 **MR. MITCHELL:** We can talk to Lois Woodworth about it.
17 That's the People's witness. My understanding is that this is
18 already established. That the level of impairment -- because
19 the machine takes breath and analyzes the breath to guess or
20 estimate what the blood impairment is, that the measure that
21 they use in order to make that connection is subject to
22 challenge.

23 And if that's what they're using, the breath machine to
24 estimate the blood content, then the way that they do that and
25 who had the breath test is a good predictor is subject to
26 testing by the Defense.

27 **THE COURT:** So, what you were going to do is just ask
28 Ms. Woodworth these questions during cross-examination?

1 **MR. MITCHELL:** That's right.

2 **THE COURT:** Why do you believe a separate hearing is
3 necessary?

4 **MS. NADEAU:** Because I think introducing this other issue is
5 going to confuse the jury. If it's not statistically relevant
6 because it doesn't have enough of an impact then there really
7 shouldn't be any evidence regarding these outliers of people
8 that have abnormally high or abnormally low partition ratios and
9 the impact that would have on testing. I think it's so remote
10 and so low and that the numbers that we currently use account
11 for that deviation in the normal population.

12 **THE COURT:** But what I'm hearing is the question would go to
13 the Prosecution's expert. If she ends up saying, "No. I
14 disagree with this analysis," then there is no evidence before
15 the jury, is there? In other words, why do we need a separate
16 hearing?

17 **MS. NADEAU:** I guess that's true. If so -- if the defendant
18 is going to lay the foundation sufficient under the Kelly Frye
19 standards for the partition ratio evidence to come in, then the
20 People would not object. If it comes through our expert.

21 **THE COURT:** Okay. We'll find out whether that foundation
22 can be laid. Right now I'm reserving ruling on this. It would
23 be relevant to the (a) count and subject to the proper
24 foundation. Either you can get it or you can't. If you can't,
25 then I won't allow you to argue it.

26 **MS. NADEAU:** Your Honor?

27 **THE COURT:** Yes Ms. Nadeau.

28 **MS. NADEAU:** I just wanted to make one other point on that.

1 Since I have not received anything from the defendant on what
2 theories he's going to be pursuing scientific theories through
3 his expert -- and I don't know who the expert is -- I also would
4 like a ruling that there won't be any other scientific theories
5 introduced without a Kelly Frye hearing and a offer of proof.

6 **THE COURT:** Are there any additional theories that you
7 intend to proffer?

8 **MR. MITCHELL:** I'm not aware of any authorities that proffer
9 me to put forward my defense. I would actually -- I think this
10 is tangentially related. I'm going to move the court for a
11 further in limine to preclude the People's expert from bringing
12 up any studies or talking about the results of any studies
13 because none have been provided to me at this time. And I would
14 have no way to attack or cross-examine the witness as to those
15 studies.

16 **THE COURT:** Does Ms. Woodworth intend to rely on any studies
17 or not?

18 **MS. NADEAU:** I have not asked her that question but
19 typically experts do rely on studies and I don't think we have
20 to produce all the studies they're going to be relying on.

21 And Ms. Woodworth is familiar to Defense counsel and -- you
22 know -- we've told Defense counsel from the beginning she's
23 going to be testifying. And I know Defense counsel recently --
24 in fact I think a week or two ago -- represented a different
25 defendant in a case involving Ms. Woodworth. So, I don't think
26 there is any sort of prejudice.

27 And getting back to Mr. Mitchell's comment that he doesn't
28 have to produce theories of his Defense, that may be true,

1 however, if he is going to rely on novel scientific theories
2 that have not been established under Kelly Frye, then we need to
3 know that so we can address that outside the presence of the
4 jury.

5 **THE COURT:** Okay. Right now we don't know if he's going to
6 go there. And I agree with Mr. Mitchell to the extent he
7 doesn't have to be required to produce it if he does -- he has
8 to lay the proper foundation as to Ms. Woodworth. I think you
9 have legions of her testimony at trial.

10 The only issue is he going to rely on anything new to rely
11 on studies you're not aware of. If in fact you can bring to the
12 court's attention that she's now relying on some novel studies
13 that have not been previously disclosed, I will certainly
14 consider whether that will be a properly excluded part of her
15 testimony, but I don't sense a notice issue right now.

16 To the extent you find Ms. Woodworth has gotten any new
17 theories or new approaches from the prior trials she's been in,
18 it probably makes sense to make that part of your overall
19 witness disclosure in terms of the substance of her testimony.
20 And that will guarantee it won't be precluded.

21 But my sense of her -- I've had three or four trials just of
22 my own with her. So -- you know -- is her testimony going to
23 vary significantly? It might. But why don't you check with
24 Ms. Woodworth. Find out whether she's been doing some
25 additional analysis that the Defense is not aware of. If she
26 has, then disclose those. If she hasn't, then we'll take it at
27 trial. Okay.

28 So let's talk about the third and final supplemental in

1 limine motion. Police reports pertaining to potential
2 witnesses. That's standard. We're talking about Ms. Woodworth.
3 And who is your other witness Ms. Nadeau?

4 **MS. NADEAU:** Your Honor, are we on the Defendant's motions
5 in limine?

6 **THE COURT:** Yes.

7 **MS. NADEAU:** In the supplemental.

8 **THE COURT:** Correct. Well, remind me who your two witnesses
9 are.

10 **MS. NADEAU:** My two witnesses?

11 **THE COURT:** Yes.

12 **MS. NADEAU:** Officer Vu Williams and Lois Woodworth.

13 **THE COURT:** How do you spell the first person.

14 **MS. NADEAU:** His first name is spelled V-U. And his last
15 name is W-I-L-L-I-A-M-S.

16 **THE COURT:** All right. So to your best knowledge are there
17 any additional police reports or other information regarding
18 Mr. Williams that have not been disclosed already?

19 **MS. NADEAU:** No, Your Honor.

20 **THE COURT:** Okay. So that's denied as moot. Let's then go
21 to -- I'll give Mr. Mitchell an additional chance to argue this.
22 Let's go to the Defense in limine motions. I've dealt with
23 the prior. So 9 and 12 we've addressed. 14 has to do with the
24 HGN and we get this in limine motion. Mr. Mitchell, why isn't
25 this just a question of weight, not admissibility?

26 **MR. MITCHELL:** Well, the reason is because this officer is
27 not trained medically. He's not been to optometry -- any school
28 where he would learn about what affects the eye. What other

1 things, other than alcohol, would cause someone to exhibit signs
2 of HGN or deviation onset prior to 45 degrees. All of these
3 things are observations that he can make, but he has no
4 scientific training or medical training as to what causes these
5 things to occur.

6 So, if he sees them, that's fine. He can talk about his
7 observations. But if he starts to import some sort of
8 conclusion from those observations, that's getting out of the
9 realm of a lay person's testimony.

10 **THE COURT:** Well, by conclusion the typical way I've heard
11 it done is it is a factor in the decision to eventually arrest
12 someone for driving under the influence. And I don't know that
13 beyond that typically an officer goes more beyond the typical
14 observations that are made at the scene. And -- well. Let me
15 ask Ms. Nadeau. Are you intending to draw any inferences from
16 the results of the HGN other than it was a factor in the arrest?
17 It's one of the factors that the officer relied on?

18 **MS. NADEAU:** No. We are not intending to elicit testimony
19 that Officer Williams thought that the HGN was caused by alcohol
20 use. He should be able to say it's a possible factor that the
21 HGN was possibly caused by alcohol use.

22 **THE COURT:** Okay. I'll have to hear it in the context of
23 trial. You preserve this objection at trial but I'm not hearing
24 anything that you're concerned about which are ultimate medical
25 conclusions which would be beyond the problems of the officer's
26 lay knowledge. I think it's certainly fair game for him to say
27 it was a factor that relied on determining under the totality of
28 circumstances that the, that there was enough for an arrest.

1 That's the typical -- you know -- standard with field sobriety
2 tests. That's the same argument on the other limine motions
3 that you had. It will be denied without prejudice to you
4 raising it at trial if it goes beyond what is currently
5 represented.

6 15. I need some argument about your concern about the
7 ultimate conclusion here.

8 **MR. MITCHELL:** I'm very concerned that the ultimate
9 conclusion the officer will give is Mr. Nahinu was too impaired
10 to operate a vehicle. That is a conclusion that is in the
11 province the jury the trier of fact and not something that any
12 witness should be testifying to. So the officer should be
13 precluded from expressing any opinion as to whether Mr. Nahinu
14 was so impaired that he could not operate a vehicle in a safe
15 manner.

16 **THE COURT:** Well, but in terms of the testimony leading up
17 to an arrest -- I don't know how -- maybe it's a difference in
18 phraseology -- but Ms. Nadeau, how were you going to approach
19 that? Were you going to say that based on all the tests you've
20 done at the scene and what you observed -- did you -- I mean are
21 you going to ask that ultimate question? Or are you going to
22 ask it more that you have enough basis for probable cause to
23 arrest and, etc? I don't know.

24 **MS. NADEAU:** I would like to ask the officer if it was his
25 opinion that defendant's driving was impaired due to alcohol
26 consumption. And I'm entitled to do that under Payes (phonetic)
27 versus Alcoholic Beverage Control, appeals board, which
28 expressly overrules the case cited by the Defendant, People

1 versus Smith, which was an appellate division of a Superior
2 Court.

3 And also based on Evidence Code Section 805 I am allowed to
4 elicit testimony regarding an opinion that embraces an ultimate
5 fact.

6 **THE COURT:** Yes. I know there's an Evidence Code directly
7 on point that also applies to experts too. Mr. Mitchell, why
8 wouldn't that principle govern here?

9 **MR. MITCHELL:** I don't think it would govern because it's
10 still something that comes down to the jury's analysis. It's
11 still in the realm of the jury to determine the ultimate fact
12 whether someone relied on it to make an arrest is a legal
13 determination that the officer makes. Whether someone is too
14 impaired to operate a vehicle is something for the jury and not
15 a witness to testify to.

16 **THE COURT:** I'm going to deny the in limine motion. I will
17 allow to you make that argument during closing. Obviously if
18 you pound it too much it could be subject to 352 question, but
19 that simple question, timing and all together, that will be
20 allowed.

21 Okay. In terms of 18, I'm a little confused what you're
22 trying to exclude here.

23 **MR. MITCHELL:** Well, you know when we give the scientific
24 names to these tests it makes them appear to be more reliable
25 than they actually are. These are indicators. These are
26 agility drills. These are coordination exercises. These are
27 not -- by using a term, "field sobriety tests," it imports more
28 significance upon these exercises than should be given.

1 And while it is commonly known as FSTs and we start
2 abbreviating it and calling it these acronyms in front of the
3 jury, it just lends credence to these tests where that -- where
4 it's not scientifically validated.

5 **THE COURT:** What would you suggest as the alternative?

6 **MR. MITCHELL:** I threw in a couple of things. Exercises.
7 Anything but field sobriety tests. I think "these exercises."

8 **THE COURT:** I'm going to deny 18. To the extent it gets
9 bandied about too much it will be a 352 analysis I'll employ,
10 but I think just the terms by themselves, and you'll have
11 latitude to argue they're not scientific or all the typical ways
12 they're attacked, but just using it is not unduly prejudicial.
13 Obviously if they're given too much weight or couched in a way
14 that is not supported by the evidence, I'll reconsider.

15 Let's go to 19. Nineteen was officer's history of arrests.
16 And I guess Mr. Mitchell this is typically the foundation for
17 officers. What's their expertise in the DUI field. They've
18 done X number of arrests. How would you lay the foundation for
19 their expertise?

20 **MR. MITCHELL:** Well, the problem is the questions that
21 follow. If they're making all these DUI arrests and
22 participated on all of these, it imports some message to the
23 jury these people are so experienced we should rely on what they
24 say. Carte blanche. That's not the case because they'll go on
25 to testify that all of the people, some of the people they
26 arrest are not arrested. And why not is the next question. And
27 they'll say because they weren't under the influence. It kind
28 of tells the jury, "Look. We never get it wrong. We get it

1 right all the time." And that's inappropriate.

2 If they're making all these arrests how about the arrest
3 they make that turn out not to be good arrests? How about the
4 ones that get dismissed? How about the ones that sued them
5 later for being false? How about those? The jury doesn't get
6 to hear about those. It tilts the scale in favor of the
7 Prosecution.

8 **THE COURT:** I hear what you're saying but again as long as
9 it's a very simple foundation laid by the Prosecution without
10 belaboring it, again you'll have latitude to argue all the
11 points you just made to me or also to cross-examine on those
12 base ifs necessary. But in terms of just laying a foundation
13 about X number of arrests I'm going to allow that. So 19 is
14 denied.

15 So Ms. Nadeau which ones would you like to argue the defense
16 motions in limine that I've granted?

17 **MS. NADEAU:** I apologize, Your Honor. I want to make sure
18 I'm not missing any but I don't believe I want to argue any of
19 them.

20 **THE COURT:** All right take your time. Mr. Mitchell are
21 there any that you wish to argue of the People's that we have
22 not covered already?

23 **MR. MITCHELL:** I think we're all right, Your Honor.

24 **THE COURT:** All right. What we'll do is we'll be back here
25 at 1:30 when your witness will be available.

26 **MS. NADEAU:** Yes.

27 **THE COURT:** We'll see you then for the 402.

28 **MR. MITCHELL:** Your Honor, the defendant is going to renew

1 our motion to dismiss. I would like to do it at the beginning
2 before we start the in limine motion. I didn't want to
3 interrupt the court.

4 **THE COURT:** That's appreciated. It's preserved for the
5 record. The court's position is the prior ruling in Department
6 17 is law of the case. There's a new circumstance of extending
7 one day. The court's position was that both sides wanted to
8 litigate the MTS. Otherwise I would have impaneled the jury
9 today.

10 So the Court continues to find good cause to continue this
11 case up until tomorrow. Obviously if we don't impanel tomorrow
12 I will probably grant your motion. But right now we're a few
13 days beyond the last day. Good cause was found by 17. Good
14 cause was found by this department, which is Department 505, and
15 we will see all of you at 1:30 to argue further motions. All
16 right? Thank you.

17 **(Whereupon the proceedings were in recess and recalled.)**

18 **THE COURT:** We are on the record. People versus Andrew
19 Nahinu. And may I have your appearances please.

20 **MR. MITCHELL:** Kevin Mitchell on behalf of Mr. Nahinu
21 present out of custody.

22 **MS. NADEAU:** Elisa Nadeau on behalf of the People.

23 **THE COURT:** Ms. Nadeau, let me hear from you. Are we having
24 witness issues?

25 **MS. NADEAU:** Yes. I know the witness is on his way. We
26 actually drove together and so he was parking and I thought that
27 he'd figured out already where he was going to be parked. I
28 don't know. Maybe he witnessed another crime or something.

1 **THE COURT:** All right. Let's give him another ten minutes
2 and see if you can track him down.

3 **MS. NADEAU:** Okay. I'm sorry.

4 **THE COURT:** We're in recess.

5 **(Whereupon the proceedings were in recess and recalled.)**

6 **THE COURT:** We are on the record in the case of People
7 versus Andrew Nahinu. May I have your appearances again?

8 **MS. NADEAU:** Elisa Nadeau on behalf of the People.

9 **MR. MITCHELL:** Kevin Mitchell only behalf of Mr. Nahinu who
10 is present out of custody.

11 **THE COURT:** Are we ready to proceed with the 402 hearing?

12 **MS. NADEAU:** Yes, Your Honor. I apologize for the delay.
13 It was a miscommunication on my part. My officer was waiting
14 outside.

15 **THE COURT:** That's fine.

16 **MS. NADEAU:** In this 402 hearing are we just doing the 402
17 before the motion to suppress?

18 **THE COURT:** Let's hear them together. So let's go ahead
19 with the motion to suppress.

20 **MS. NADEAU:** Okay. Ms. Nadeau would like to call Officer Vu
21 Williams to the stand.

22 **OFFICER VU WILLIAMS**

23 **(called to testify by the People was duly sworn by the clerk and**
24 **testified as follows:)**

25 **THE CLERK:** Please state your name and spell it for the
26 record.

27 **THE WITNESS:** It's Vu. V-U. Last name Williams
28 W-I-L-L-I-A-M-S.

1 you're essentially assigned to three different field training
2 officers and you learn the job in the field, which includes DUI
3 training.

4 Q. Prior to June 12th, 2011, approximately how many DUI field
5 investigations have you conducted?

6 A. Actual investigations I can guesstimate a number. About
7 250, 300.

8 Q. Where were you when you were on duty on June 12, 2011, at
9 approximately 2:30 a.m.?

10 A. That particular time I was traveling on I-280 Southbound
11 right around the two Allemany exits in the City and County of
12 San Francisco.

13 Q. And what happened when you were at that location?

14 A. As I was traveling southbound after having just transitioned
15 on to the 280, I was in one of the southbound lanes and I
16 observed ahead of my location a blue Charger in the number three
17 lane. And I observed it make a lane change into the number two
18 lane and start to drift back over and nearly collide into a
19 yellow taxicab, at which point I pulled the vehicle over.

20 Q. Now, that is in the City and County of San Francisco,
21 correct?

22 A. That is correct.

23 Q. Were you in uniform?

24 A. Yes I was.

25 Q. Were you in a CHP marked patrol vehicle?

26 A. Yes I was.

27 Q. And were you driving?

28 A. Yes I was.

1 Q. Were you working alone or with a partner at that particular
2 time?

3 A. At that very moment I was alone. I had a partner but we had
4 just split up. She had arrested somebody so I was rolling -- I
5 was going out solo.

6 Q. Officer, did you pull someone over on June 12th, 2011,
7 around 2:30 in the morning?

8 A. Yes, I did.

9 Q. Who was that?

10 A. Identified by his California drivers license as Andrew
11 Nahinu.

12 Q. Do you see that person in court today?

13 A. I do.

14 Q. Can you describe him?

15 A. Sitting to my left he's wearing a gray shirt. It looks like
16 dark pants. Blue jeans and brown shoes.

17 **THE COURT:** The witness has identified the defendant.

18 **BY MS. NADEAU**

19 Q. Did the defendant show you a California drivers license?

20 A. He did.

21 Q. And what did that drivers license say for height and weight?

22 A. I'm going to have to refresh my memory by looking at the
23 drivers license.

24 Q. That's fine. And let me know when you're done?

25 A. The actual license itself says 5' 10", 180 pounds.

26 Q. And what was the California driver license number?

27 A. The number?

28 Q. Yes.

- 1 A. Again, I have to look. I don't know the number.
- 2 Q. Go ahead, Officer.
- 3 A. The number itself on the license is V as in Victor 907-7834.
- 4 Q. And what did the birthdate say on the driver license?
- 5 A. Again I have to take a look at it again.
- 6 Q. Go ahead.
- 7 A. The birthdate of September the 24th, 1962.
- 8 Q. Officer, is your car equipped with a recording device?
- 9 A. Yes. A video system.
- 10 Q. What is that device called?
- 11 A. MVARs. We call it MVARs.
- 12 Q. Can you tell us a little bit about how MVARs works?
- 13 A. MVARs is essentially a video and sound recorder that comes
14 on. The video itself is generally running all the time when
15 you're driving around, but nothing gets burnt on to the
16 actual -- there's a DVD. And so you turn on your four red
17 lights to pull somebody over or Code 3 lights. It backtracks 30
18 seconds or a minute from the time you turn on the lights. You
19 have a recording of the previous 30 seconds to minutes stop time
20 leading up to the turning of the light. And then it stays on
21 essentially as you make the stop as you make the contact. And
22 it stays on until you physically turn it off in the -- in the --
23 on the dashboard itself in the vehicle.
- 24 Q. Can anyone alter that video?
- 25 A. I don't believe so.
- 26 Q. Have you watched the MVARs from this incident recently?
- 27 A. I have.
- 28 Q. Did you watch the whole thing?

1 A. I did.

2 Q. Did the MVARs accurately reflect the incident in regards to
3 this defendant Andrew Nahinu on June 12th, 2011?

4 A. It did.

5 Q. You mentioned that the video starts when you activate your
6 forward lights?

7 A. Forward red lights. Correct.

8 Q. Does that ever happen by accident, for example, if --
9 because in this particular -- well. In this particular video it
10 begins before you saw the defendant and activated your lights to
11 pull him over, correct?

12 A. Right. But I can explain why that is.

13 Q. Why is that?

14 A. Okay. I was saying it backtracks about a minute from the
15 time from when I turn on my light. If I turn on my light, the
16 video itself actually starts recording the data itself is stored
17 as you're going along. It goes back about a minute and that
18 event itself is recorded the entire time leading up to the
19 minute when you turn on the light as well as after you turn on
20 the light.

21 Q. If the period before was about five minutes or four minutes,
22 how would you, can you describe why maybe it was an inadvertent
23 forward lights when you started driving?

24 A. Okay. I have no idea. I mean the -- what sometimes happens
25 if you made a stop previously and you happen to leave your
26 lights on, you happen to leave the video recorder on, or in this
27 case -- you know -- I know my partner had arrested somebody
28 previous. We might have left it on for her arrest and I took

1 the car and left. That's why it would be on.

2 Q. Can you tell us why you decided to pull Andrew Nahinu over
3 on June 12th at 2:30?

4 A. As I indicated, when I was driving southbound I could see
5 him up ahead on the number three lane. He made a lane change to
6 get around a yellow taxicab into the number two lane. After he
7 made his lane change he began to -- he drifted over into the
8 three lane and actually nearly collided into the rear end of the
9 taxi, and then actually corrected himself and then brought
10 himself back into the two lane. And that's why I decided to
11 make the stop.

12 Q. What happened after you pulled the defendant over?

13 A. After I pulled him over I made contact with the defendant.
14 I explained him the reason for the stop. I asked him for his
15 license so I could identify who he was and that's how I was able
16 to identify who I had.

17 Q. When you were talking to him, did you observe objective
18 signs of intoxication?

19 A. Yes.

20 Q. And what did you see?

21 A. What I physically saw.

22 Q. Or heard?

23 A. Was the red and watery eyes, and then I used my other senses
24 to determine that there were objective signs.

25 Q. Can you tell us a little bit more about what you observed
26 with your other senses?

27 A. I could smell alcohol coming from the vehicle. I could also
28 hear that his speech was slurred.

1 Q. Did the defendant say anything to you about when you talked
2 to him about the unsafe lane maneuver?

3 A. He did.

4 Q. And what did he say?

5 A. I explained to him why I stopped him, because he almost
6 collided with the taxi when he came back over, and he said -- I
7 don't know his exact words -- but essentially he said the taxi
8 actually came over and cut him off and that's why he had to move
9 over.

10 Q. And was that true?

11 A. That's not what I saw.

12 Q. Did the defendant say anything about whether he had been
13 drinking that night?

14 A. I asked him if he had consumed any alcohol and he indicated
15 that he had two Bud Lite beers but quite a while before the
16 stop. Like 9:00 o'clock or 9:30 in the evening.

17 Q. Was there anyone else in the car with the defendant?

18 A. No. He was by himself.

19 Q. What did you do next?

20 A. After I made contact with him, and after I observed the
21 signs of alcohol consumption, I had him exit the vehicle and
22 then I had him just come stand by my patrol vehicle. And then I
23 performed the horizontal gaze field nystagmus test to determine
24 if he was impaired or not or if it was worth continuing with the
25 investigation.

26 Q. Okay. I'm going to stop you there. Let's talk a little bit
27 more about the horizontal gaze nystagmus test. With you
28 received training regarding HGN?

1 A. I have.

2 Q. What did that training entail?

3 A. Again, it's --

4 MR. MITCHELL: I'm sorry. This is vague as to time.

5 THE COURT: Overruled. You may answer.

6 MR. MITCHELL: Can we approach?

7 THE COURT: Well, what do you need?

8 MR. MITCHELL: Well, he just did a training. He just came
9 from training. We're talking about prior to the stop here.

10 THE COURT: Okay. Get a timeframe please.

11 BY MS. NADEAU

12 Q. On June 12th, 2011, by that time, had you received training
13 regarding HGN?

14 A. Yes.

15 Q. What did that training entail?

16 A. The training was again at the academy during the several
17 different blocks of DUI training which included training as far
18 as the reasons for HGN, horizontal gaze nystagmus, and how to
19 perform it properly in a standardized way. And you're
20 looking -- the certain clues that you're looking for that would
21 indicate that a driver is impaired.

22 Q. Please describe the test itself.

23 A. Well, the horizontal gaze nystagmus, the instruction is for
24 the party to put his feet together, heel and toes, hands down by
25 your side, and you use some sort of a moving stimulus, either
26 your fingertip or tip of a pen, you hold it approximately twelve
27 inches slightly elevated above the bridge of their nose. You
28 tell them to go ahead and focus on the tip of the pen and follow

1 the tip of the pen with their eyes only without moving their
2 head.

3 And then you actually -- the initial -- you make two
4 different passes of the one to the your right his left just to
5 make sure that the eyes are able to equally track. And
6 as you -- you know -- you don't have some other medical issues
7 going on, and then after that you -- you hold it in the middle,
8 you go out two seconds to your right to the extreme so that you
9 can see whether the eyes are what they call -- what's the word
10 I'm looking for -- there's a lack of smooth pursuit which
11 means -- you know -- when you move the pen tip normally eyes
12 will track smoothly, but what you're looking for is for the eyes
13 to essential skip and bounce.

14 It takes you two seconds to go to the right, about another
15 four seconds to come back to the left in the extreme, and then
16 do you that one more time. And again you're looking for the
17 lack of smooth pursuit.

18 After that you hold the pen tip all the way out to their
19 left extreme -- your right extreme. You hold that out for four
20 seconds essentially look to see if the -- if there is what they
21 call a distinct sustained nystagmus at the extremes which means
22 when you hold it out there you're going to see a bounce in the
23 eyeballs, which is the voluntarily jerking, the nystagmus, and
24 you should be able to see it and sustained which means after
25 four seconds you should still be seeing the nystagmus.

26 And your right you go to your left and then you go back to
27 your right and left again and then after that you come back in
28 the middle and you move that stimulus essentially 45 degrees.

1 And you're looking for the onset of nystagmus prior to
2 45 degrees. Again you do that twice two to the right, two to
3 the left.

4 Q. And were you trained that when you observe lack of smooth
5 pursuit and bouncing of the eyeballs that it suggests something
6 about the defendant or about the person who is taking the test?

7 A. It's a clue. Yes. That there's probably -- that there
8 is -- may be alcohol onboard their system and they may be
9 impaired.

10 Q. I think where we started this you were staying that you did
11 do an HGN test on the defendant?

12 A. I initially did the HGN test and then what I had him do I
13 had him sit down at the curbside because I was alone for officer
14 safety I didn't feel comfortable continuing so I called out for
15 another unit and while I was waiting I started to ask him the
16 pre-field sobriety testing questions.

17 Q. When you did the HGN forgive me if we already went over
18 there what was the defendant's results on the HGN?

19 A. I could see a lack of smooth pursuit and the nystagmus at
20 the extreme.

21 Q. And what about the onset at 45 degrees?

22 A. I could see that initially I did the HGN the second time you
23 saw it but that first time I did see that.

24 Q. Oh, I see. Okay. So tell us what happened after you did
25 the initial HGN.

26 A. I had him sit down. I asked the party the pre-field
27 sobriety test questions which I wrote in my report. I don't
28 know if you would like me to go over them.

1 Q. Yes. I would like you to go over them. Actually if I
2 may --

3 THE COURT: I'm not sure that's necessary.

4 MS. NADEAU: I'm not sure because I don't know the scope of
5 the motion to suppress yet.

6 THE COURT: Off the record.

7 (Discussion held at the bench off record.)

8 THE COURT: All right. Cross-examination.

9 MR. MITCHELL: Good afternoon, Officer.

10 THE WITNESS: Good afternoon, Counselor.

11 CROSS-EXAMINATION

12 BY MR. MITCHELL

13 Q. When did you first observe the vehicle Mr. Nahinu was
14 driving?

15 A. As I was transitioning from I think I was coming down the
16 280, the connector there, when I dropped down. I saw him in
17 essentially north of what we call the second Allemany Boulevard
18 exit.

19 Q. Was he on the same -- was he traveling on the same highway
20 as you or was he traveling on the highway that merged with
21 yours?

22 A. No. We were on the 280 already.

23 Q. Okay. Was he traveling on the 280 ahead of you before the
24 merge?

25 A. I don't know.

26 Q. You don't know. Okay. And you indicated I believe -- and
27 correct me if I'm wrong -- that you observed him change lanes,
28 is that correct?

- 1 A. That is correct.
- 2 Q. Did you observe any other vehicles change lanes at that
3 time?
- 4 A. I was focused on his vehicle so I saw his vehicle changing
5 lanes.
- 6 Q. Did you have a direct line of sight to his vehicle?
- 7 A. Yes, I did.
- 8 Q. Nothing in the way?
- 9 A. Nothing obstructing my vision.
- 10 Q. And as you observed him change lanes, did you tell us -- do
11 you know whether he used his blinker to change lanes?
- 12 A. I didn't see whether he did or not.
- 13 Q. Do you know whether or not he did?
- 14 A. I believe he did use his blinker.
- 15 Q. You indicated that he nearly collided into a taxi. How
16 would you characterize that description? Nearly collide. Can
17 you describe how close they got?
- 18 A. From my vantage point it looked like he got within -- you
19 know -- five, six feet of the rear of the taxi.
- 20 Q. How many feet are in a lane?
- 21 A. Twelve feet.
- 22 Q. Twelve feet. Okay. Do you know how wide say your patrol
23 vehicle is?
- 24 A. I believe it's approximately -- well. No. That would be a
25 guess. An estimate on my end.
- 26 Q. Okay. Would you be able to estimate how wide it is?
- 27 A. I'd say like nine feet.
- 28 Q. And you indicated in your testimony today that, well let me

1 ask you. Did he travel out of his, once after he made the lane
2 change, did he travel back into the lane to his right?

3 **A.** Into the number three lane. He did. His two right-side
4 tires actually crossed that lane and veered back into the number
5 three lane.

6 **Q.** Okay. Do you recall in your police report indicating that
7 the vehicle drifted to the right and began to travel on the lane
8 mediators?

9 **A.** I believe that's what I put in there.

10 **Q.** You didn't indicate he crossed over the lanes in your
11 report, did you?

12 **A.** I don't believe I did.

13 **Q.** And did you notice the taxicab do anything?

14 **A.** When he made his lane change or when he drifted back over.

15 **Q.** At any point?

16 **A.** When he made his left-lane change, he just went around the
17 taxicab. When I drifted back over I actually noticed the
18 taxicab move to the right. I think he saw -- I'm speculating --
19 but I'm assuming he saw the vehicle coming up on his back end
20 and he moved out of way.

21 **Q.** And you observed the taxi driver move?

22 **A.** Yes, I did.

23 **Q.** Okay. How far did he move?

24 **A.** I'd say he moved probably three four feet over the right.

25 **Q.** And you also indicated that Mr. Nahinu's or -- you observed
26 his vehicle go around the taxi. Did it pass the taxi?

27 **A.** When was that? Before or after the drift?

28 **Q.** At any point.

1 A. He actually went over -- he went to the left to get around
2 the vehicle, the taxi that was moving slower, because he was up
3 against the back end of the taxi.

4 Q. Okay. Did you observe him pass the taxi?

5 A. I observed him pass the taxi after he drifted back over and
6 the taxi moved out of the way and he changed lanes. Then he
7 moved back into the two lane and we went past the taxi. That's
8 when I turned my lights on.

9 Q. So, if I'm understanding right he used his blinker, got over
10 to the left, passed the taxi, veered to the right causing the
11 taxi to swerve three or four feet to the right, and then fell
12 back behind the taxi?

13 A. No. That's not correct.

14 Q. Okay. Can you describe it please.

15 A. Sure. He used his blinker. He was behind the taxi. He
16 moved to the number two lane. And then after he moved to the
17 number two lane, he drifted back to the right and at this point
18 he was still -- he was still essentially behind the taxi and
19 drifted back. And if he had kept -- to give you an idea, if he
20 kept coming over to the right, his right end, right front end
21 would have collided with the left rear of the taxi essentially.

22 Q. And you saw this from what distance?

23 A. Saw this from 150 feet.

24 Q. And you were directly behind the vehicle? Mr. Nahinu's
25 vehicle?

26 A. I was in the number two lane.

27 Q. That's the lane he had merged into?

28 A. That's correct.

1 Q. You were directly behind him?

2 A. That's correct.

3 Q. 150 feet back?

4 A. That's correct.

5 Q. Did you observe any other violations? Traffic violations?

6 A. With Mr. Nahinu at that time, no.

7 Q. Did you observe any violation?

8 A. As far as?

9 Q. Prior to making the stop, did you observe any violations of
10 the traffic code?

11 A. Just the fact that he couldn't maintain his lane.

12 Q. And how long did you observe the vehicle Mr. Nahinu was
13 driving before initiating the stop?

14 A. It was well within -- I don't know -- ten, fifteen seconds.

15 Q. In those ten or fifteen seconds, did you observe any other
16 bad driving conduct?

17 A. No.

18 MR. MITCHELL: I'm going to need a couple of minutes, Your
19 Honor.

20 THE COURT: Okay.

21 MR. MITCHELL: Whenever you're ready folks.

22 THE COURT: You may proceed.

23 BY MR. MITCHELL

24 Q. Officer, how would you characterize the way you were driving
25 just moments prior to observing Mr. Nahinu's driving?

26 A. I'm not sure I understand your question.

27 Q. How were you driving?

28 MS. NADEAU: Objection, Your Honor. Relevance.

1 **THE COURT:** Overruled. He may answer.

2 **THE WITNESS:** I was on the 280 doing the speed limit.

3 **MR. MITCHELL:** I'm sorry?

4 **THE WITNESS:** I was on the 280 doing the speed limit. In my
5 lane.

6 **BY MR. MITCHELL**

7 **Q.** Was Mr. Nahinu speeding?

8 **A.** I don't believe he was.

9 **Q.** As we're watching the video, does it refresh your
10 recollection watching this video of how you were driving in the
11 moments prior to your contact with Mr. Nahinu?

12 **A.** Yes. This is from my patrol vehicle.

13 **Q.** And are your lights activated?

14 **A.** Yes.

15 **Q.** Why did you activate the lights?

16 **A.** At that time there was actually a call for another unit. I
17 believe they were on Bosworth. They were at a party that was
18 getting combative. And so I was responding to back them up. In
19 fact that's why I was driving by myself. Because I described
20 the car and went after them because I think all the other units
21 were tied up.

22 **Q.** So, you weren't on routine patrol?

23 **A.** No.

24 **Q.** You were responding to a call?

25 **A.** It wasn't a call specifically made but I could monitor it.

26 **Q.** You were responding to provide back up?

27 **A.** Sure.

28 **Q.** And you're in a hurry?

1 A. Initially but once I got on the extension I know we don't
2 drive much over 75 or 80 over there.

3 Q. And 75 or 80 miles per hour would be speeding, correct?

4 A. Yes.

5 Q. And I'm just right now we're watching part of the video
6 where you're in the number three lane here to the number two and
7 to the number one?

8 A. Well, I'm in the three lane right there.

9 Q. Just there, what we just watched you traveled from the
10 number one to the number three lane?

11 A. That's correct.

12 Q. Okay. Your lights are no longer activated?

13 A. No. They're not.

14 Q. You didn't use a blinker, right?

15 A. I have no idea.

16 Q. You have no idea? Let's run it back. See if you notice.
17 So let's see. Are you using a blinker? Do you see any lights
18 blinking?

19 A. I don't see any lights blinking.

20 Q. As you continue driving, eventually you come upon the 280
21 merge, correct?

22 A. I'm on the 280 already. It's the connector essentially.
23 Correct.

24 Q. Connector with what highway?

25 A. 208 southbound to southbound.

26 Q. What are you observing now?

27 A. I'm in the two lane probably doing -- I don't know -- 65?
28 70?

- 1 Q. And you're passing vehicles?
- 2 A. That's correct.
- 3 Q. What about now? What did you just observe?
- 4 A. I'm not sure I get your question.
- 5 Q. I'm just going to ask you what you're observing on the
6 video.
- 7 A. I see vehicles ahead of me.
- 8 Q. Okay. Can you tell me what you're observing as you -- as
9 the two highways merge?
- 10 A. We haven't reached the merge yet. You want me to wait until
11 the merge or you want me to tell you what's happening? Oh. You
12 know what? Now we just merged. There's vehicles up ahead. It
13 looks like four or five vehicles.
- 14 Q. Okay. Did you notice anything out of the ordinary?
- 15 A. Well, that was the defendant's vehicle I believe right
16 there.
- 17 Q. Okay. So, now we've identified his vehicle. Let's back up
18 and just as you pass the Allemany exit do you notice him use his
19 blinker and get over to the left?
- 20 A. Sure.
- 21 Q. And then does he touch the lane line?
- 22 A. That's when he crosses the stripe.
- 23 Q. Did the taxi move anywhere?
- 24 A. Yeah. You can see the taxi move to the right.
- 25 Q. Let's look at it. The taxi didn't move, did it?
- 26 A. You can see it. It moved right there.
- 27 Q. It's moving forward?
- 28 A. No. It moved to the right.

1 Q. There's the lane line.

2 A. Okay.

3 Q. Taxi still going straight ahead.

4 A. No. You can see it move all the way to the right of the
5 lane.

6 Q. Okay. And then you instantly turn on your overhead lights?

7 A. That's correct.

8 Q. And as you pull him over he follows your instructions?

9 A. Yes.

10 Q. He complies?

11 A. Yes. Absolutely.

12 Q. Okay. And you didn't observe any other bad driving?

13 A. That was it.

14 MR. MITCHELL: Nothing further.

15 THE COURT: I don't think I need any redirect. You can step
16 down from now and we'll do some foundational questions later.

17 Mr. Mitchell, let me hear your argument.

18 MR. MITCHELL: I ask to exclude witnesses.

19 THE COURT: Yes. You may step outside for just a few
20 minutes.

21 THE WITNESS: Yes, Your Honor.

22 THE COURT: Thank you.

23 (Whereupon the witness was excused from the courtroom.)

24 MR. MITCHELL: There are three cases on the issue of weaving
25 within a lane. Two California cases on point are Perez and
26 Bracken. In Perez the car drifted about two feet both ways for
27 three quarters of a mile. The other case, Bracken,
28 B-R-A-C-K-E-N, it's located at 839 Cal.App.4th supplement one.

1 In Bracken the car weaved for about a half a mile the
2 officer in Bracken had previously qualified as an expert in the
3 field of driving under the influence and was trained to
4 recognize what the cues mean.

5 There's also a Ninth Circuit that applies. Perez. In that
6 case, the court finds insufficient evidence despite the driver
7 touching the lane -- guiding lines on two occasions over roughly
8 40 seconds of observation.

9 So, to justify a stop where there was no Vehicle Code
10 violation for weaving, the Prosecution needs to prove one, a
11 sufficiently expert officer in the field; two, evidence of
12 pronounced weaving per Perez; and three, the weaving occurred
13 over a substantial distance. Here there's insufficient evidence
14 on each point.

15 Since Mr. Nahinu was detained just moments after the officer
16 observed this movement within his lane, there's not enough
17 evidence that he can articulate a reasonable suspicion that Mr.
18 Nahinu was involved in any criminality.

19 And although a motorist's privacy interest is less than one
20 you would enjoy in your home, it's still afforded protection by
21 our constitution. And when there's no reasonable basis for
22 believing that criminality is a foot there creates a serious and
23 reoccurring threat to the privacy of countless individuals. A
24 substantial portion of the motoring public will weave within
25 their lane. That alone is not evidence that a crime has
26 occurred or is about to occur.

27 And in this instance there's no evidence from the video that
28 these vehicles almost collided or nearly collided. There's

1 evidence on the record that a vehicle like a patrol vehicle is
2 approximately nine feet wide. A lane of traffic is twelve feet.
3 Therefore you're always driving within five or six feet of
4 someone. That doesn't mean you nearly collided with them.

5 I mean if that was the case then every time you drive home
6 from work you're subject to being pulled over. And we all have
7 that feeling when we pass a motorist, when we pass a truck, or a
8 bus, we all have that feeling in our gut. "Oh, my goodness that
9 was a close call." We all have that. But that in and of itself
10 is not enough to justify a traffic stop. And I submit.

11 **THE COURT:** Okay. Thank you, Mr. Mitchell. Ms. Nadeau?

12 **MS. NADEAU:** The standard is not whether a crime is about to
13 occur. It's whether the officer views a Vehicle Code violation.
14 And Vehicle Code 21658 says, "*Whenever any roadway has been*
15 *divided into two or more clearly marked lanes for traffic in one*
16 *direction the following rules apply. A vehicle shall be driven*
17 *as nearly as practical entirely within a single lane and shall*
18 *not be moved from the lane until such movement can be made with*
19 *reasonable safety.*"

20 It continues on but I don't think that part is relevant.

21 Vehicle Code section 22107 turning movements and required
22 signals says, "*No person shall turn a vehicle from a direct*
23 *course or move right or left upon a roadway until such movement*
24 *can be made with reasonable safety.*" I think that's actually
25 turning though.

26 So our argument is that the officer saw a Vehicle Code
27 violation and was within his rights to pull the defendant over.

28 And regarding Perez I'm not sure, I haven't Shepardized that

1 particular case but I thought I saw some disproving authority
2 about it. I'm not sure.

3 And Bracken talks about weaving within your own lane. He
4 was outside the lane and it was unsafe and the taxi -- I looked
5 at the video myself and I did see the taxi move over in response
6 to the defendant's motion into his lane. With that I'll submit.

7 **THE COURT:** Mr. Mitchell, last word.

8 **MR. MITCHELL:** I would just point out that the officer --
9 his initial testimony was that he was on routine patrol that he
10 was driving normally clearly that was not the case. He also
11 said that the vehicle, the taxicab, swerved to the right three
12 or four feet. I think the video speaks for itself that that did
13 not occur.

14 The vehicle, Mr. Nahinu's vehicle, arguably touched the lane
15 delineators. He did not fail to maintain his lane. So there
16 was no Vehicle Code violation. The police officer cannot
17 legally stop a motorist unless the known facts and circumstances
18 will lead him to believe that criminality is afoot. And
19 according to the case law I don't think there's sufficient
20 circumstance, sufficient facts for the officer to point to to
21 justify a detention.

22 **THE COURT:** I've heard both sides. I would agree that the
23 evidence isn't particularly strong but the standard is one of
24 reasonable cause. And based on the officer's testimony, even if
25 you arguably disagree with it from looking at the video itself,
26 I think it's enough for reasonable cause to stop and detention
27 would be justified.

28 The motion to suppress on that ground will be denied. Do we

1 need to have the officer for any other foundational issues? I
2 know you've now played the video. Are you even going to contest
3 its introduction at this point?

4 **MR. MITCHELL:** No. I think the first eight-and-a-half
5 minutes of it are relate to the stop. Well, the initial three
6 minutes show the officer driving really fast and then about
7 eight-and-a-half-minute mark is when I think Mr. Nahinu is
8 stopped out of the vehicle. So I'm not entirely sure how much
9 the DA wants to play.

10 **THE COURT:** Ms. Nadeau, why wouldn't he just focus on the
11 portion that involves the defendant.

12 **MS. NADEAU:** That would be preferable to me. Yes. To focus
13 on that portion.

14 **THE COURT:** By stipulation by the parties we're really only
15 going to deal with the minute or two prior to Mr. Nahinu coming
16 on the scene and then obviously the entire sequence and then
17 stop at the end of the pull over because there aren't any issues
18 after that on the video are there?

19 **MR. MITCHELL:** I think most of the FSTs you can barely see
20 Mr. Anyone on the right-hand side.

21 **MS. NADEAU:** Actually I would like to show the parts of the
22 video for the FST there is a portion where you can see his
23 performance on the Rhomberg field sobriety tests and you can see
24 him swaying I think it's helpful and relevant.

25 **THE COURT:** What does it add beyond what the officer will
26 testify and the officer will say he was swaying? Do you need
27 some additional back up for that?

28 **MS. NADEAU:** Yes. Well, I don't know if I need it.

1 However, whatever we can give the jury to aid in
2 determination -- for instance, it's very similar to a photo. If
3 you can see the defendant his actual performance on FSTs then I
4 think it would aid the jurors in making a credibility
5 determination what the defendant says and what the officer says.

6 **THE COURT:** Well, is it contested that the performance on
7 the FSTs was not -- you know -- that great?

8 **MR. MITCHELL:** It is but the video does not show the officer
9 at all. It doesn't show his movements or the way he's
10 instructing Mr. Nahinu so to see one party and not the other
11 it's very difficult to put it into context. You can hear part
12 of what the officer is saying, but there's radio communications
13 in the background that interfere with the quality of the audio.
14 We can't determine what's being said back and forth the entire
15 time. I think there's only one. The one leg test and the
16 Rhomberg balance test I think are the only two tests that are
17 captured on video.

18 **MS. NADEAU:** That's probably accurate. I don't know
19 exactly.

20 **THE COURT:** Well, at this point if it's going to be
21 uncontested as to Mr. Nahinu's performance then I'd be
22 disinclined to play the video. If, however, there's going to be
23 a controversy as to what happened there then the video would be
24 relevant either in rebuttal. I'm worried about the cumulative
25 effect, undue emphasis placed on the video, instead of listening
26 to the testimony considering the totality of circumstances.

27 My tentative ruling is going to be that I'm not going to go
28 for the FST being played unless, however, it becomes at issue.

1 If it becomes at issue either through testimony by the defendant
2 or otherwise or through certain cross-examination questions then
3 I will reconsider that.

4 Anything else that we need the officer for?

5 **MS. NADEAU:** Yes, Your Honor. We talked earlier about
6 having the foundation laid for the intox test. I could do that
7 during direct or we can do it now.

8 **THE COURT:** Is there a serious dispute that he's going to be
9 able to lay the foundation?

10 **MR. MITCHELL:** I don't think they'll be able to lay a
11 foundation for the admission of the Intoxilyzer.

12 **THE COURT:** Through this particular officer.

13 **MR. MITCHELL:** Not through the officer.

14 **THE COURT:** All right. Let's call him in. Officer
15 Williams, welcome back. You're still under oath. You may
16 proceed.

17 **REDIRECT EXAMINATION**

18 **BY MS. NADEAU**

19 **Q.** Officer, can you explain to us what the Intoxilyzer test is?

20 **A.** It's a machine that the defendant will blow into that
21 measures essentially the content or the blood alcohol content.

22 **Q.** Have you been trained to conduct Intoxilyzer tests?

23 **A.** Yes.

24 **Q.** And did that training occur prior to June 12th, 2001?

25 **A.** Yes.

26 **Q.** What did that training entail?

27 **A.** It was put on by the San Francisco Crime Lab and it was six
28 hours of training including instruction and also practical hands

1 on how to use the machine itself.

2 Q. Have you ever conducted a Intoxilyzer or administered a
3 Intoxilyzer test during a DUI investigation?

4 A. Yes I have.

5 Q. How many times approximately?

6 A. Probably at least a hundred times.

7 Q. And how do you conduct the test?

8 A. Well, I explain -- you know -- I offer the -- whoever I'm
9 arresting or I might be doing it for somebody else -- I explain
10 the two options they have as far as for measurement of blood
11 alcohol content by law. If they choose the breath, I explain to
12 them what the breath test is.

13 I explain to them I show them the different mouthpieces
14 explain to them how long they have to blow into the machine for
15 to get a reading. I explain when they blow into it they're
16 going to hear a beeping tone and that they have to keep that
17 beeping going. If it's not beeping, then it's not registering
18 their breath. And then I tell them -- you know -- take a deep
19 breath in to get enough air. I tell them to put the mouthpiece
20 in their mouth not to blow outside the sides of their mouth.
21 Blow straight into the machine and do the test.

22 Q. Is there a waiting period before you can administer the
23 test?

24 A. There is.

25 Q. And what is that waiting period?

26 A. Fifteen minutes.

27 Q. And what needs to happen during the waiting period?

28 A. We just make sure that the party we're doing the test on

1 doesn't burp or regurgitate. That's to guard against sort of a
2 mouth alcohol that may come up when they burp and give you a
3 false reading.

4 Q. How do you read the results of the test?

5 A. When the results come out there is a three digit number.
6 It's a point 000 of some kind with a percentage. It tells you
7 the percentage of the blood alcohol.

8 Q. And do numbers always pop up or on some occasions do other
9 things happen?

10 A. Sometimes it may -- insufficient sample is given or if
11 there's some sort of interference with the machine you may not
12 get a proper reading, but it will actually tell you that you
13 haven't done a proper reading.

14 Q. Okay. And then how are the results of the test reported?

15 A. It's printed out on a piece of paper that I get. Then I
16 show the defendant. I include it with my report and I'm not
17 sure what the Crime Lab does as far as downloading those
18 numbers.

19 Q. Turning to the events of this night June 12th, 2011, did you
20 ask the defendant what method of testing he preferred?

21 A. I did.

22 Q. And what did the defendant say?

23 A. He opted for the breath tests.

24 Q. And did you conduct a 15 minute observation period?

25 A. I did.

26 Q. What time did that start?

27 A. It started -- I'd ask to refresh my memory by looking at my
28 report.

1 Q. Go ahead, Officer, and let me know when you're done.

2 A. Okay.

3 Q. When did you start the 15 minute observation period?

4 A. At 3:05 in the morning.

5 Q. And what were you doing during this period?

6 A. For the most part sitting in the vehicle with him while I
7 was driving I was driving the defendant to the office. Got the
8 party out of the vehicle walked him over to the office. Had him
9 sit down in the breath room. You know. Typed in the
10 information on the machine. Maybe fill out some paperwork while
11 I'm there and obviously explaining the test to the defendant.

12 Q. So, were you with the defendant the entire observation
13 period?

14 A. Yes.

15 Q. And did you observe the defendant burp or vomit or take in
16 any other fluids or food during this time of the observation
17 period?

18 A. I did not.

19 Q. What time was the breath test performed?

20 A. The first one was done at 3:24. The second one I have to
21 look to see what time exactly.

22 Q. You may look at your report to refresh your recollection
23 please.

24 A. It was done at 3:26.

25 Q. And what were the results of the defendant's test?

26 A. Again if you want I can look at the report I can read you
27 out the numbers.

28 Q. Yes that would be good. Thank you.

1 A. The first test came back at a .136.

2 MR. MITCHELL: Objection. Ask for an admonishment to
3 prevent third digit from being read.

4 THE COURT: I think we've gotten to the part of the
5 foundation. Let me allow Mr. Mitchell to cross-examine again.

6 CROSS-EXAMINATION

7 MR. MITCHELL: Q. Officer, do you personally know whether
8 or not the machine that you used to take a breath test for Mr.
9 Nahinu was properly calibrated?

10 A. Not personally.

11 Q. And that's because you don't calibrate the machine?

12 A. That's correct.

13 Q. Okay. Do you perform any maintenance on the machine?

14 A. Do I perform any?

15 Q. Yes.

16 A. I did not.

17 THE COURT: Let me stop you Mr. Mitchell. In terms -- we
18 can excuse the witness again. It will just be a few minutes.

19 (Whereupon the witness was excused from the courtroom.)

20 THE COURT: We're outside the presence of the witness
21 Ms. Nadeau how are we going to get through the 17 Cal. code
22 requirement 21 at second.

23 MS. NADEAU: I will call Lois Woodworth to the stand and she
24 will testify regarding the maintenance logs, the accuracy logs,
25 and also the calibration logs, or actually I think the accuracy
26 and calibration are one log, but then there's also a printout of
27 how this particular machine was performing through the month the
28 different tests for the month of June and she can testify

1 regarding all those issues.

2 **THE COURT:** Mr. Mitchell?

3 **MR. MITCHELL:** I don't have any information provided to me
4 that suggests that Lois Woodworth is the analyst to perform
5 these tests.

6 **THE COURT:** We'll find out whether she has foundation. If
7 she doesn't have foundation then the results could potentially
8 be inadmissible based on the lack of foundation. But if she
9 does have the foundation, I'll allow you to cross-examine.
10 Anything else for the record today?

11 **MR. MITCHELL:** Yes.

12 **THE COURT:** Yes.

13 **MR. MITCHELL:** As far as the PAS test offered and refused I
14 made a motion in limine precluding testimony to that effect. I
15 don't want anybody questioning an officer or anyone else whether
16 or not Mr. Nahinu submitted to a PAS test or refused one.

17 **THE COURT:** You were not intending --

18 **MS. NADEAU:** (shakes head from side to side)

19 **THE COURT:** That motion will be granted. You were not
20 intending to offer the PAS test results if there --

21 **MS. NADEAU:** There were none. He refused, but I was not
22 intending to elicit that from Officer Williams.

23 **THE COURT:** All right. That will be so ordered. Anything
24 else for today, Mr. Mitchell?

25 **MR. MITCHELL:** We're demanding a jury trial and move to
26 dismiss pursuant to 1385 today.

27 **THE COURT:** That is noted for the record. The court's prior
28 ruling stands and for today the reason for not impaneling today

1 was to conduct a MTS. The motion to suppress which has been
2 denied we will proceed with the jury trial impaneling at 9:30
3 tomorrow morning. Ms. Nadeau, anything for the record?

4 **MS. NADEAU:** Yes. I just wanted a ruling on the foundation
5 of the intox regarding Officer Williams that he conducted the
6 test and was -- you know -- he was trained and he was properly
7 read the test. So that I mean I thought that was the purpose of
8 the 402 hearing.

9 **THE COURT:** Yes. The two other foundational requirements
10 have been fulfilled. It's the third one, is the device in
11 working order, that has not been fulfilled. If Ms. Woodworth is
12 able to connect that up or -- I won't admit the ruling until we
13 get this, that third additional requirement met. Anything else?

14 **MS. NADEAU:** Well, that's a little bit sticky since I'll
15 have my officer testify and he's the one that took the results
16 and did the test he'll need to testify regarding what the
17 results were, but maybe it could be subject to -- I don't
18 know -- I was going to call Officer Williams first and then Lois
19 Woodworth.

20 **THE COURT:** Well, there is flexibility that the court has to
21 connect it up later. If you're making an offer of proof that
22 you can make that then I'll allow you to get that testimony.
23 But if she doesn't end up having the proper foundation then it
24 will be stricken and I'll have an instruction to the jury. Just
25 so you know that.

26 **MS. NADEAU:** That's fine. Thank you.

27 **THE COURT:** See you both tomorrow at 9:30 then.

28 **(Whereupon the proceedings were concluded.)**

1 State of California)
2 County of San Francisco)

3
4
5 I, Gordon F. Aiavao, Official Reporter for the Superior
6 Court of California, County of San Francisco, do hereby certify:

7 That I was present at the time of the above proceedings;

8 That I took down in machine shorthand notes all proceedings
9 had and testimony given;

10 That I thereafter transcribed said shorthand notes with the
11 aid of a computer;

12 That the above and foregoing is a full, true, and correct
13 transcription of said shorthand notes, and a full, true and
14 correct transcript of all proceedings had and testimony taken;

15 That I am not a party to the action or related to a party
16 or counsel.

17 That I have no financial or other interest in the outcome
18 of the action.

19
20
21 Dated: JUNE 22ND, 2012
22

23 _____
24 Gordon F. Aiavao, CSR No. 11216
25
26
27
28

EXHIBIT C

1 THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 COUNTY OF SAN FRANCISCO
3 APPELLATE DIVISION
4

5 ANDREW NAHINU)

) Appellate No. APP-12-007317

6 Appellant,)

) Court No. 11015661

7 v.)

8)
9) **ENDORSED**
10) **FILED**
11) Superior Court of California
12) County of San Francisco
13) APPELLATE DIVISION

9 THE PEOPLE OF THE STATE OF)
10 CALIFORNIA)

OCT 24 2012

11 Respondent.)
12)
13)

CLERK OF THE COURT

BY: 

14
15 Appeal from the Judgment of the Superior Court, San Francisco County
16 Honorable Donna Alyson Little, Judge Presiding
17

18 **APPELLANT'S OPENING BRIEF**
19
20
21

22 MATTHEW D. METZGER
23 State Bar No. 240437
24 mmetzger@belvederelegal.com

25 Belvedere Legal, APC
26 605 Market Street, Suite 505
27 San Francisco, CA 94105
28 Tel. (415) 513-5980
Fax. (415) 513-5985

Attorney for Appellant

Table of Contents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

ISSUE PRESENTED..... 3
STATEMENT OF APPEALABILITY 3
STATEMENT OF THE CASE 3
STATEMENT OF THE FACTS 6
ARGUMENT..... 7
 I. THE TRIAL COURT VIOLATED DEFENDANT’S RIGHT TO A SPEEDY TRIAL 7
 A. THE COURT ANALYZES “GOOD CAUSE” UNDER AN ABUSE OF DISCRETION STANDARD AND APPLIES A DE NOVO STANDARD TO QUESTIONS OF LAW OR MIXED QUESTIONS OF LAW AND FACT THAT IS PREDOMINANTLY LEGAL 7
 B. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING GOOD CAUSE FOR THE FIRST CONTINUANCE PAST THE LAST DAY 8
 C. THE DEFENDANT WAS NOT “BROUGHT TO TRIAL” AS OF THE SECOND CONTINUANCE BECAUSE NO JURY PANEL HAD BEEN SWORN 11
 D. THE VIOLATION OF APPELLANT’S SPEEDY TRIAL RIGHT TRIAL REQUIRES REVERSAL UNDER *CHAPMAN* 14
CONCLUSION..... 14

28

Table of Authorities

Cases

Baustert v. Superior Court (2005) 129 Cal. App. 4th 1269 11

Brown v. Superior Court (1987) 206 Cal.App.4th 817 7, 9

Chapman v. California, (1967) 386 U.S. 18, 24 13

Cunningham v. Municipal Court (1976)62 Cal. App. 3d 153..... 10, 11

Cunningham, 62 Cal. App. 3d at 155-156..... 11

Gaines v. Municipal Court (1980) 101 Cal. App. 3d 556 10

In re Begerow (1901) 133 Cal. 349, 8

Jones v. Superior Court (1970) 3 Cal.3d 734..... 8

Mendez v. Superior Court (2008) 162 Cal.App.4th 827 7

Neder v. U.S. (1999) 527 U.S. 1, 18 14

People v. Amati (1976) 63 Cal.App.3d Supp. 10 11

People v. Hajjaj (2010) 50 Cal.4th 1184, 1197..... 7

People v. Johnson (1980) 26 Cal.3d 557,..... 9

People v. Waidla (2000) 22 Cal.4th 690 7

People v. Wilson (1963) 60 Cal.2d 139 10

Rhinehart v. Superior Court (1984) 35 Cal.3d 772..... 9, 12

Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal.App.3d 201 11

Sykes v. Superior Court (1973) 9 Cal.3d 83 8

Statutes

Article I, section 13 of the California Constitution 8

Article I, section 15 of the California Constitution 11

Pen. Code Section 1382 8, 9

Pen. Code Sectopm 686 8

1 THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 COUNTY OF SAN FRANCISCO
3 APPELLATE DIVISION
4

5 ANDREW NAHINU) Appellate No. APP-12-007317
6)
7 Appellant,) Court No. 11015661
8)
9 v.)
10 THE PEOPLE OF THE STATE OF)
11 CALIFORNIA)
12 Respondent.)
13

14
15
16
17
18
19 Appeal from the Judgment of the Superior Court, San Francisco County
20 Honorable Donna Alyson Little, Judge Presiding

21
22 **APPELLANT’S OPENING BRIEF**
23
24
25
26
27

1 **ISSUE PRESENTED**

2 (1) Did the Court Abuse its Discretion in Finding Good Cause to
3 Continue the Trial Past Appellant’s Last Day?

4 (2) Should the Appellate Court, on *De Novo Review*, Find that
5 Appellant’s Right to a Speedy Trial was Violated When Appellant
6 Was Not “Brought to Trial” on November 1, 2011.

7 **STATEMENT OF APPEALABILITY**

8
9 This appeal is from a final judgment of conviction after jury trial
10 which finally disposes of all issues between the parties and is
11 authorized by Penal Code section 1237, subdivision (a). (Cal. Rules of
12 Court, Rule 8.204).

13 **STATEMENT OF THE CASE**

14
15 The District Attorney of the City and County of San Francisco
16 charged by way of Complaint filed on June 20, 2011, Andrew Puni
17 Nahinu (“Mr. Nahinu” and/or the “Appellant”) with: a violation of
18 Penal Code § 23152(A) (Driving under the Influence of Alcohol or
19 Drugs) – Count I; a violation of Penal Code § 23152(B) (Driving
20 while having a 0.08% higher blood alcohol)– Count II. The Complaint
21 also alleged, as to Counts 1& 2, that Mr. Nahinu has one prior
22 conviction on or about July 31, 2002, arising from an arrest on or about
23 April 26, 2002. Mr. Nahinu entered not guilty pleas to all charges and
24 proceeded on a general time waiver. (Clerk’s Transcript or “CT” 3).
25 Mr. Nahinu also filed a motion to suppress under California Penal
26 Code section 1538.5 on September 20, 2011 (CT 9).

1 ***(Reporter’s Transcript, or “RT” 7:18) (emphasis added).*** The same
2 day, Defendant moved to dismiss the case for violation of Mr.
3 Nahinu’s Speedy Trial Right (Pen. Code §1382). The Defendant again
4 confirmed he was ready for trial (RT 5:16). The Court denied the
5 motion (RT 16-22).

6 As a result, the case was continued again, ***a second time***, to
7 November 2, 2011, in order to allow for a Jury to be impaneled. Mr.
8 Nahinu renewed the motion to dismiss on November 2, 2011, for
9 failure to impanel a jury by November 1, 2011 (RT 121:28-122:-3).
10 The Court denied the motion but noted that the issue was preserved
11 (RT 122-4:16). Subject to the preservation of the objection, the parties
12 agreed to hear in limine motions and the motion to suppress on
13 November 2, 2011 before the jury was finally impanelled on
14 November 3, 2011.

15 In denying the renewed motion to dismiss, the Court never
16 addressed in its ruling the issue of why a jury was not impaneled on
17 November 1, 2012. The Court noted that it found good cause on
18 November 2, 2011 not to impanel a jury until November 3, 2011,
19 based on the pending limine motions, 402 hearing, and motion to
20 suppress. (Id.). However, the rationale for continuing the case from
21 November 1, 2012 to November 2, 2012 – and for not impaneling a
22 jury on November 1, 2012 – was never explained.

23 The Court held the Motion to Suppress Hearing November 2,
24 2011. The Court found reasonable cause to justify the warrantless
25 detention noting that the evidence was not particularly strong but the
26 standard was only one of reasonable cause. (RT 145).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

ARGUMENT

**I. THE TRIAL COURT VIOLATED DEFENDANT’S
RIGHT TO A SPEEDY TRIAL**

**A. THE COURT ANALYZES “GOOD CAUSE” UNDER
AN ABUSE OF DISCRETION STANDARD AND APPLIES
A DE NOVO STANDARD TO QUESTIONS OF LAW OR
MIXED QUESTIONS OF LAW AND FACT THAT IS
PREDOMINANTLY LEGAL**

The Court articulated the mixed standard of review well in *Brown v. Superior Court* (1987) 206 Cal.App.4th 817,824, as follows:

If the defendant is not ‘brought to trial’ within the statutory period, dismissal is required unless the trial court, in the exercise of its discretion, determines that good cause has been demonstrated. [Citations.] In order to avoid dismissal, the prosecution must meet the burden of demonstrating good cause for delay. [Citation.]” (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1197, 117 Cal.Rptr.3d 327, 241 P.3d 828 (*Hajjaj*), first italics added, second italics in original.) Thus, we review a trial court’s decision to grant a continuance for good cause for abuse of discretion. (*Hajjaj*, at pp. 1197–1198, 117 Cal.Rptr.3d 327, 241 P.3d 828; see also *Mendez v. Superior Court* (2008) 162 Cal.App.4th 827, 833, 76 Cal.Rptr.3d 538.) However, we apply the nondeferential de novo standard of review to a trial court’s resolution of a pure question of law or a mixed question of law and fact that is predominantly legal. (*People v. Waidla* (2000) 22 Cal.4th 690, 730, 94 Cal.Rptr.2d 396, 996 P.2d 46.)

Brown, 206 Cal.App 4th at 824.

Within the first issue on appeal – the violation of Appellant’s right to a speedy trial – there are two (2) issues to address: 1) whether or not the trial court had good cause to order the first continuance (from October 28, 2011 to November 1, 2011); and 2) whether or not trial was “in progress” as of the second continuance (from November 1, 2011 to November 2, 2011). The first issue is clearly factual in nature and falls

1 under the abuse of discretion standard. The second issue is a mixed
2 question of law in fact – predominantly legal in nature – and requires a
3 nondeferential *de novo* standard of review.

4
5 **B. THE TRIAL COURT ABUSED ITS DISCRETION IN**
6 **FINDING GOOD CAUSE FOR THE FIRST**
7 **CONTINUANCE PAST THE LAST DAY**

8 Penal Code Section 1382(a)(3)(A) provides:

9 The defendant enters a general waiver of the 60-day trial
10 requirement. A general waiver of the 60-day trial requirement
11 entitles the superior court to set or continue a trial date without
12 the sanction of dismissal should the case fail to proceed on the date
13 set for trial. If the defendant, after proper notice to all parties,
14 later withdraws, in open court, his or her waiver in the superior
15 court, the defendant shall be brought to trial within 60 days of the
16 date of that withdrawal. Upon the withdrawal of a general time waiver
17 in open court, a trial date shall be set and all parties shall be
18 properly notified of that date. If a general time waiver is not
19 expressly entered, subparagraph (B) shall apply.

20 Cal. Pen. § 1382(a)(3)(A).

21 The right to a speedy trial is a fundamental right secured by the Sixth
22 Amendment to the United States Constitution and is made applicable to the
23 states by the Fourteenth Amendment thereto (*Klopper v. North Carolina*
24 (1966)386 U.S. 312,323). Article I, section 13 of the California Constitution
25 independently guarantees the right to a speedy trial. In addition, our Legislature
26 has made the provision for "a speedy and public trial" as one of the
27 fundamental rights preserved to a defendant in a criminal action (Pen. Code §
28 686, subd. 1; *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 88). The function of

1 this vital constitutional right is "to protect those accused of crime against
2 possible delay, caused either by willful oppression or the neglect of the state or
3 its officers." (*In re Begerow* (1901) 133 Cal. 349,354-355; *Jones v. Superior*
4 *Court* (1970) 3 Cal.3d 734,738.)

5 The California Legislature has enacted Penal Code section 1382 in order
6 to implement the constitutional right to a speedy trial (*Rhinehart v. Superior*
7 *Court* (1984) 35 Cal.3d 772,776). The Legislature has therein prescribed
8 certain time periods beyond which the right to speedy trial is presumed to have
9 been violated. Accordingly, in the absence of a showing of good cause to the
10 contrary, a misdemeanor complaint must be dismissed if the accused is not
11 brought to trial within 30 or 45 days of his arraignment (depending upon his
12 custodial status at the time of arraignment) (Pen. Code § 1382, subd. (a)(3)), or,
13 if he consents to the matter being set for trial beyond that initial period, within
14 1.0 days of the last date to which he has consented his trial be delayed. (Pen.
15 Code § 1382, subd. (a)(3)(A)).

16 Violation of the deadlines of Penal Code section 1382 entitles the
17 defendant to a dismissal if good cause for the delay is not shown. (*Sykes v.*
18 *Superior Court* (1973) 9 Cal.3d 83, 88). Continuance for counsel's convenience
19 due to calendar conflict is not good cause to vitiate 1382; The consent of
20 counsel to a postponement of trial beyond the statutory period, if given
21 solely to resolve a calendar conflict and not to promote the best interests of his
22 client, cannot stand unless supported by the express or implied consent of the
23 client himself (*People v. Johnson* (1980) 26 Cal.3d 557,567).

24 It was held in *Brown v. Superior Court* (1987) 189 Cal. App. 3d 260, that
25 if the People have waited until the last minute to determine the availability of
26 their witness, then no due diligence may be found if the People discover that
27

1 the witness cannot be located or is unavailable. The reason is that if the
2 prosecution had determined the availability of their witness when the trial date
3 was set, an earlier date could have been set which would have protected both
4 the witness' interest and the defendant's right to speedy trial. Brown was
5 followed in *People v. Avila* (2005) 131 Cal. App. 4th 163,170.

6 As has been recognized in the courts of California for decades, police
7 officer vacations are set well in advance, and that information is readily
8 available to prosecutors who thus can, and should, coordinate trial dates and
9 vacation schedules. (*See Cunningham v. Municipal Court* (1976)62 Cal. App.
10 3d 153). Such matters must be brought to the court's attention sufficiently in
11 advance of trial to permit reasonable adjustment of the court's calendar. (*See*
12 *Gaines v. Municipal Court* (1980) 101 Cal. App. 3d 556,560-561).

13 The defendant's only duties are to object when the date is set beyond the
14 time period, to move to dismiss when the period expires, and, if applicable, to
15 object to the denial of the motion to dismiss to preserve the issue for appeal.
16 The Defendant has taken all of the above steps and not waived the right to a
17 speedy trial and to appeal the denial therefrom. (*See People v. Wilson* (1963)
18 60 Cal.2d 139, 144-145, 146).

19 Here, the People's scant showing of "due diligence" constituted an
20 affidavit demonstrating that they first attempted to subpoena Officer Williams
21 on October 17, 2011, four (4) days *after* they had declared ready for both the
22 hearing on the motion to suppress and trial. Doing so makes a mockery of the
23 Defendant's constitutional right to possible delay caused by willful oppression
24 or neglect of the state of the officers.

25 Moreover, the only "facts" submitted in the declaration was were
26 hearsay, or at best, facts submitted under "information and belief" that the
27

1 declarant had spoken with the CHP Liason who had communicated that Officer
2 Williams both on vacation and had scheduled Drug Recognition Expert (DRE)
3 training during his vacation time. These facts were not submitted upon
4 personal knowledge. The declaration, therefore, on its face, was not competent
5 evidence to support the facts contained therein (*Star Motor Imports, Inc. v.*
6 *Superior Court* (1979) 88 Cal.App.3d 201, 204).

7 At a substance level as well, an officer's scheduled vacation or
8 training is not good cause to continue a hearing (*Cunningham*, 62 Cal.
9 App. 3d at 155-156; *Baustert v. Superior Court* (2005) 129 Cal. App.
10 4th 1269). In *Cunningham* – just as in the instant case – the appellate
11 court issued a peremptory writ of mandate commanding the trial court
12 to grant the motion to dismiss on account of the fact that “the
13 postponement of the trial of an alleged misdemeanor beyond the
14 period specified in the subdivision over that individual's objection for
15 the sole purpose of serving the convenience of the People's witnesses
16 may not defeat that individual's constitutional right (see Cal. Const.,
17 art. I, § 15) to a speedy trial” (*Cunningham*, 62 Cal.App. 3d 153 at
18 156).

19
20 **C. THE DEFENDANT WAS NOT “BROUGHT TO**
21 **TRIAL” AS OF THE SECOND CONTINUANCE**
22 **BECAUSE NO JURY PANEL HAD BEEN SWORN**

23 The second issue involving the appeal of the denial of the
24 section 1382 motion concerns the trial court’s failure to have the
25 matter “brought to trial”.

26 “[T]he swearing of a panel of prospective jurors constitutes
27 bringing a case to trial ... so long as the panel is sworn in as a good

1 faith start to the jury selection process and not as a mere device to
2 avoid the impact of the statute.” (*People v. Amati* (1976) 63
3 Cal.App.3d Supp. 10, (*Amati*)); *see also Rhinehart* 35 Cal.3d 772 at
4 778). Where “the record objectively shows that a case is assigned for
5 trial to a judge who is available to try the case and the court has
6 committed its resources to the trial, the parties answer ready and a
7 panel of prospective jurors is summoned and sworn, the trial process
8 has commenced and [the] defendant has been ‘brought to trial’ as that
9 term is used in ... section 1382” (*Sanchez v. Municipal Court* (1979) 97
10 Cal.App.3d 806, 813).

11 *Rhinehart* concluded that, on the facts before it, the defendant
12 had not been brought to trial on the date the jury was impaneled
13 because the jury was impaneled in order to avoid dismissal under
14 section 1382 and the trial court was not “available or ready to try the
15 case to conclusion” (*Rhinehart*, 35 Cal.3d at 780).

16 Here, as of the second continuance, there was not even a
17 pretense of impaneling a jury to avoid dismissal under section 1382.
18 Rather, when agreeing to continue the matter a second time from
19 November 1, 2011 to November 2, 2011, the trial court noted that it
20 had a courtroom, but that no jury was available to be impanelled on
21 November 1, 2011. Rather, on November 1, 2011, the transcript reads
22 in material part:

23 THE COURT: . . . We have a judge for you. It's going to Judge
24 Cheng, who is in Department 12. He would like to see you down
25 there, and he will take your case back to the other courthouse
tomorrow and have a panel for you. There's a room at the other
courthouse.

26 MR. MITCHELL: So we won't have a jury today.

1 THE COURT: No panel has been ordered for today.
2 (RT 7:12-8).

3 All the jurisprudence as to when a Defendant is “brought to trial” is
4 consistent on the point that a Defendant is “brought to trial” – at the earliest –
5 as soon as jury is impanelled.

6 Here, even if assuming without conceding that the Court found no abuse
7 of discretion on behalf of the trial court in granting the first continuance, the
8 Court can find only that a speedy trial right violation occurred as of the second
9 continuance, because a jury was not impanelled until the third day after the last
10 day. In short, the improper sequence can be demonstrated in bullet points as
11 follows:

- 12 • Defendant’s last day was October 28, 2011.
- 13 • The trial court found good cause to continue the matter one business day,
14 or until November 1, 2011.
- 15 • However, no jury was available for impanelling on November 1, 2011.
- 16 • Rather, a jury was first available for impanelling on November 2, 2011.

17 Judge Cheng ultimately impanelled a jury November 3, 2011 because the
18 Court needed November 2, 2011 to hold hearing on evidence code section 402,
19 motions in limine, and motion to suppress. However, Judge Cheng’s good faith basis
20 to impanel a jury on November 3, 2011 instead of November 2, 2011 does not
21 vindicate the section 1382 error that occurred on November 1, 2011, when the trial
22 court was unable to impanel a jury.

**CERTIFICATE OF WORD COUNT
(CRC Rule 8.883(b)(1))**

I certify that this brief was prepared using 14-point type, Times New Roman typeface, and that the word-count of this brief, excluding the preliminary tables, is 3,231 words and thus below the 6,800 word limit for misdemeanor appeals. Cal Rules of Ct. 8.883(b)(1).

BELVEDERE LEGAL, APC



Matthew D. Metzger, Attorney
for Appellant Andrew Nahinu

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

Action: ANDREW NAHINU V. PEOPLE OF STATE OF CALIFORNIA

Case #: Appellate No. APP-12-007317
Court No. 11015661

I, MATTHEW D. METZGER declare:

I am a citizen of the United States, a resident of Santa Clara County, and am over 18 years of age. I am not a party to the above entitled action. My business address is Belvedere Legal, APC, 605 Market Street, Suite 505, San Francisco, CA 94105

On October 24, 2012, I served the following documents: **Appellant's Opening Brief** upon the interested parties in this action by the methods indicated below:

BY FIRST CLASS MAIL: by placing a true copy thereof, enclosed in a sealed envelope, for postage and deposit with the United States Postal Service on the same date it is submitted for mailing, and addressed as follows:

BY PERSONAL DELIVERY: by causing a true copy thereof to be hand-carried to the recipient at the address indicated:

San Francisco District Attorney's Office Attn: Louise Ogden 850 Bryant St San Francisco, CA 94103	
---	--

BY FACSIMILE TRANSMISSION: by faxing a true copy thereof to the recipient at the facsimile number indicated:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 24, 2012 in San Francisco, California.

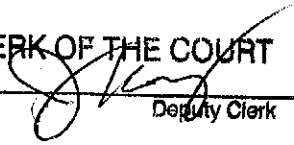
By: 
Matthew D. Metzger

EXHIBIT D

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
APPELLATE DIVISION

FILED
Superior Court of California
County of San Francisco
APPELLATE DIVISION

NOV 26 2012

CLERK OF THE COURT
BY: 
Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

v.

ANDREW NAHINU,

Defendant/Appellant.

App. No. 7317

Case No: 11015661

On Appeal from the Judgment of the
San Francisco County Superior Court of California
County of San Francisco

Honorable Donna Alyson Little, Judge

RESPONDENT'S BRIEF

GEORGE GASCÓN (SBN 182345)
District Attorney of San Francisco
CHRISTOPHER R. ULRICH (SBN 271288)
Assistant District Attorney
850 Bryant Street, Third Floor
San Francisco, California 94103
Telephone: (415) 551-9586
Facsimile: (415) 551-9505

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE..... 1

ARGUMENT 5

 1. STANDARDS OR REVIEW: ABUSE OF DISCRETION AND DE NOVO..... 5

 2. DEPARTMENT 17 DID NOT ABUSE ITS DISCRETION WHEN IT FOUND
 GOOD CAUSE TO CONTINUE THE TRIAL PAST THE LAST DAY..... 5

 a. Appellant Cannot Show That Department 17 Abused Its Discretion Because
 He Has Failed To Provide This Court With A Sufficient Record. 5

 b. Appellant Has Not Shown That Department 17 Abused Its Discretion. 7

 3. APPELLANT WAS BROUGHT TO TRIAL AS OF NOVEMBER 2, 2011;
 THEREFORE, THERE WAS NO SECOND CONTINUANCE. 8

 4. EVEN IF APPELLANT WAS NOT BROUGHT TO TRIAL AS OF
 NOVEMBER 2, 2011, GOOD CAUSE EXISTED TO CONTINUE THE CASE
 UNTIL NOVEMBER 3, 2011..... 11

CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

<i>Burgos v. Superior Court</i> (1987) 206 Cal.App.4th 817	5
<i>Owens v. Superior Court</i> (1980) 28 Cal.3d 238	6, 7
<i>People v. Hajjaj</i> (2010) 50 Cal.4th 1184	5
<i>Rhinehart v. Municipal Court</i> (1984) 35 Cal.3d 772	6, 9, 10, 11
<i>Sanchez v. Municipal Court</i> (1979) 97 Cal.App.3d 806	9, 10

Statutes

Penal Code § 1050	8
Penal Code § 1382	6, 9, 10

Rules

California Rules of Court, Rule 8.883	7
---	---

Constitutional Provisions

<i>Cal. Const., art. I, § 15</i>	6
<i>U.S. Const., 6th Amend</i>	6

STATEMENT OF THE CASE

On June 20, 2011, the San Francisco District Attorney charged Andrew Nahinu (hereinafter "Appellant") with driving under the influence in violation of Vehicle Code section 23152(a)-(b). It was further alleged that Appellant had previously suffered a conviction on July 31, 2002, for driving under the influence, in violation of Vehicle Code section 23152(b).

On June 27, 2011, Appellant was arraigned and pled not guilty to each count and denied the prior allegation. (CT 3, Minutes for 6/27/11.) On that date, Appellant entered a general time waiver. (*Id.*)

On August 23, 2011, Appellant withdrew his general time waiver, and set the case for trial with a last day of September 22, 2011. (CT 3, Minutes for 8/23/11.) On September 14, 2011, the case was called and continued for trial. (CT 3, Minutes for 9/14/11.) On September 16, 2011, the case was back on the trial calendar, and again continued. (CT 3, Minutes for 9/16/11.) On September 19, 2011, the case was again on calendar for trial and put over until the next day. (CT 3, Minutes for 9/19/11.) On September 20, 2011, the defense filed a Motion to Suppress (hereinafter "MTS"). (CT 3, Minutes for 9/20/11.) Counsel for the People and for Appellant stipulated to a last day of September 30, 2011. (*Id.*) They were ordered back on September 23, 2011, for jury trial. (*Id.*) However on that date, Appellant did not appear and a bench warrant was issued. (CT 5, Minutes for 9/23/11.)

Appellant's bench warrant was recalled in Department 17 on September 28, 2011. (CT 8, Minutes for 9/28/11.) The case was continued to October 14, 2011. (*Id.*) On that

date, the case was again continued, this time until October 21, 2011. (CT 12, Minutes for 10/14/12.)

On October 19, 2011, the People filed a Motion to Continue the Jury Trial. (CT 13.) In our motion to continue, the People stated that we needed a continuance until November 8, 2011. (*Id.*) We requested that continuance because CHP Officer Williams was a necessary witness and was unavailable. (*Id.*) Officer Williams began vacation on October 17, 2011, and would be training out of county during his time off. (*Id.*) On October 17, 2011, the People attempted to subpoena Officer Williams, but were informed by CHP Lieutenant Lobb and CHP liaison Michelle Klear, that he would not be available for service until November 7, 2011. (*Id.*)

On October 21, 2011, Department 17 heard the motion to continue, found good cause, and granted the motion.¹ (CT 14, Minutes for 10/21/11.) The case was again called on October 27, 2011, and continued until the next day. (CT 14, Minutes for 10/27/11.) On October 28, 2011, Department 17 again found good cause to continue the case past the last day and put it over until November 1, 2011.² (CT 14, Minutes for 10/28/11.)

On November 1, 2011, Appellant moved to dismiss the case for a violation of his right to a speedy trial. (1 RT 4:1-24.) Department 17 refused to grant Appellant's motion to dismiss, stating: "I found good cause to continue it because [the District Attorney] told me the officer was back...And I made the record it's a very short

¹ Appellant has not provided this court with a transcript of the proceedings in Department 17 on October 21, 2011.

² Appellant has not provided this court with a transcript of the proceedings in Department 17 on October 28, 2011.

continuance. The last day in this case was the 28th, and I said I would continue it until today. It was a short continuance because I thought the People had used due diligence...I think all of the parameters are met.” (1 RT 4:13-21.) However, on November 1, 2011, the People informed Department 17 that Officer Williams was back from vacation and declared ready for trial. (RT 3:14-28.) Department 17 then transferred the case forthwith to Judge Cheng in Department 12 for trial. (*Id.*) Once in Department 12 with Judge Cheng, the case was called and put over until the next day in Department 505 for a hearing on the MTS and motions in Limine.³ (CT 15, Minutes for 11/1/11.)

On November 2, 2011, the defense renewed its motion to dismiss. (CT 19, Minutes for 11/2/11.) Judge Cheng denied the motion, finding that good cause existed to continue the case. (2 RT 121:28-122:1-16.) Judge Cheng also heard and denied the MTS and heard and ruled on the motions in Limine. (CT 19, Minutes for 11/2/11.) On November 3, a jury panel was empaneled and the People began their case. (CT 23, Minutes for 11/3/11.) On November 8, the jury returned a verdict of guilty on both counts. (CT 32, Verdict filed on 11/8/11.)

Appellant filed an untimely appeal, but was granted relief from default by order of the court. (CT, Order granting request for relief from default.) In his appeal, Appellant raises two arguments. In the first, Appellant contends that Department 17 abused its discretion when it found good cause to continue the case past the last day for trial. In Appellant’s second argument, he claims that he was not brought to trial by November 2.

³ Appellant has not provided this court with a transcript of the proceedings in Department 12 on November 1, 2011.

Based on both of these arguments, Appellant contends that his case should have been dismissed for failure to comply with Penal Code section 1382.

Appellant's arguments fail. First, Appellant has not shown and cannot show that Department 17 abused its discretion by finding good cause to continue the trial past the last day. Second, Appellant actually was brought to trial by November 2, 2011. What's more, even if Appellant was not brought to trial by November 2, 2011, Judge Cheng's finding of good cause to continue saves the People's case. Thus, neither of Appellant's arguments warrant reversal of the convictions.

//

//

//

ARGUMENT

1. STANDARDS OR REVIEW: ABUSE OF DISCRETION AND DE NOVO.

If a defendant is not brought to trial within the statutorily prescribed period, dismissal is required unless the trial court, in its exercise of discretion, finds that good cause to continue the case exists. (*People v. Hajjaj* (2010) 50 Cal.4th 1184, 1197.) If the trial court concludes that a party has shown good cause, the factual findings that led to that conclusion will be reviewed for abuse of discretion. (*Hajjaj, supra*, 50 Cal.4th at pp. 1197-1198.) However, the reviewing court will apply the nondeferential de novo standard of review to “the purely or predominantly legal conclusions.” (*Burgos v. Superior Court* (1987) 206 Cal.App.4th 817, 824.) Thus, this court should review the trial court’s factual findings under the abuse of discretion standard and its legal findings de novo.

2. DEPARTMENT 17 DID NOT ABUSE ITS DISCRETION WHEN IT FOUND GOOD CAUSE TO CONTINUE THE TRIAL PAST THE LAST DAY.

Appellant contends that Department 17 abused its discretion when it found good cause to continue the trial. However, for the reasons discussed below, Appellant cannot show, and has not shown that Department 17 abused its discretion. Therefore, Appellant’s argument fails.

a. Appellant Cannot Show That Department 17 Abused Its Discretion Because He Has Failed To Provide This Court With A Sufficient Record.

The right to a speedy trial is guaranteed by the state and federal Constitutions. (*U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.*) So as to implement an accused's right to a speedy trial, the California Legislature enacted Penal Code § 1382. (*Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 776.) Penal Code section 1382(a)(3) provides that, absent a general time waiver, a misdemeanor case must be "brought to trial" within 30 or 45 calendar days of the arraignment or plea, whichever is later. In turn, Penal Code § 1382(a)(3)(A) states: "If the defendant, after proper notice to all parties, later withdraws, in open court, his or her waiver in the superior court, the defendant shall be brought to trial within 30 days of the date of that withdrawal."

Notwithstanding the mandate of Penal Code section 1382, in its discretion, a court may continue a case past the last day for trial when there is a showing of good cause. (Penal Code §§ 1050, 1382.) In order to invoke the court's discretion to grant a continuance to obtain the presence of a witness, pursuant to Penal Code section 1050, the moving party has the burden of showing that the *Owens* Factors are met. (*Owens v. Superior Court* (1980) 28 Cal.3d 238, 250-251.)

Here, The Honorable Donna Little, Judge Presiding over Department 17 determined that the People had met their burden and found good cause to continue the case past the last day for trial. In our motion to continue, the People provided Department 17 with a sworn affidavit in which we alleged facts that showed that the *Owens* Factors were met and that good cause existed to continue the trial. Department 17 concluded as much.

Even though the trial court specifically found on October 21 and October 28, 2011 that good cause existed to continue the case, Appellant has failed to provide this Court with the transcripts from those proceedings. It is his burden alone to provide the requisite record. (California Rules of Court, Rule 8.883.) Surely when reaching the conclusion that the People had shown good cause, Department 17 relied on the facts stated in People's motion to continue. However, it also probably relied on the oral statements made during the proceedings. The record is devoid of those statements. Moreover, Department 17 surely stated on the record its factual conclusions that led to the finding of good cause. Those factual conclusions are not part of the record on appeal.

Because Appellant has not provided this Court with essential transcripts, he cannot possibly show that Department 17 abused its discretion. He cannot make that showing because the appellate record does not explain how Department 17 exercised its discretion. Thus, for want of an adequate appellate record, appellant cannot possibly show that the court abused its discretion and his appeal should be dismissed.

b. Appellant Has Not Shown That Department 17 Abused Its Discretion.

Even if the facts of this appeal are limited to the meager appellate record provided, Appellant still has not shown that Department 17 abused its discretion when it found good cause. In *Owens*, the California Supreme Court stated that a continuance beyond the last day for trial may be had if the moving party can show that five factors are met. (*Owens, supra*, 28 Cal.3d at pp. 250-251.) They are: (1) That the movant has exercised due diligence in an attempt to secure the attendance of the witness at the trial by legal

means; (2) that the expected testimony is material; (3) that it is not merely cumulative; (4) that it can be obtained within a reasonable time; (5) that the facts to which the witness will testify cannot otherwise be proven. (*Id.*) When assessing whether good cause has been shown, the court “shall consider the general convenience and prior commitments of all witnesses, including peace officers.” (Penal Code § 1050(g)(1).) On a case-by-case basis, the prescheduled vacation of an arresting officer may support good cause to continue. (*Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, 274.)

In our motion to continue, the People showed that the *Owens* Factors were met. In that motion, we stated that we needed a continuance until November 28, 2011. We requested that continuance because CHP Officer Williams was a necessary witness and was unavailable. He began vacation on October 17, 2011, and would be training out of county during that vacation. The People attempted to subpoena Officer Williams, but were informed by CHP Lieutenant Lobb and CHP liaison Michelle Klear, that Officer Williams would not be available for service until November 7, 2011. Thus, the *Owens* Factors are met and Department 17 did not abuse its discretion.

As shown above, even if the facts of this appeal are limited to the meager appellate record provided, Appellant has not shown that that Department 17 abused its direction in finding that good cause to continue existed. As such, Appellant’s argument to the contrary fails.

**3. APPELLANT WAS BROUGHT TO TRIAL AS OF NOVEMBER 2, 2011;
THEREFORE, THERE WAS NO SECOND CONTINUANCE.**

Two California cases, one at either end of the spectrum, help explain what “brought to trial” means within the context of Penal Code § 1382. (*Rhinehart v. Municipal Court, supra*, 35 Cal.3d 772; *Sanchez v. Municipal Court* (1979) 97 Cal.App.3d 806.) In *Sanchez*, the Court of Appeal was presented with the issue of whether the defendant was “brought to trial” within 45 days of arraignment. (*Sanchez, supra*, 97 Cal.App.3d at 808.) The *Sanchez* Court held that “where...the record objectively shows that a case is assigned for trial to a judge who is available to try the case and the court has committed its resources to the trial, the parties answer ready and a panel of prospective jurors is summoned and sworn, the trial process has been commenced and the defendant has been ‘brought to trial’” within the meaning of Penal Code § 1382. (*Id.* at p. 813.)

Here, like in *Sanchez*, Appellant was “brought to trial” on November 2, 2011. The record objectively shows that on November 1, 2011, the case was assigned for trial to the Honorable Andrew Cheng, a judge who was available to try the case. The parties convened with the trial court and the case was put over until the following day. Then on November 2, 2011, the trial court heard the MTS and motions in Limine. The trial court had clearly dedicated itself to trial. Thus, Appellant was “brought to trial” as of November 2, 2011.

The fact that a jury was not sworn on November 2, 2011 does not sway the balance of the argument in favor of Appellant. Although the *Sanchez* Court relied on the fact that a jury had been summoned and sworn for trial, it specifically stated that the factors in that case were not exclusive. (*Sanchez, supra*, 97 Cal.App.3d at p. 813.) The

Court explained: “we do not mean to imply that these factors are the exclusive and necessary elements in all cases. Other possibilities will have to await future litigation.”

(*Id.*) Thus, although the swearing in a jury may help show that trial is underway, it is not a necessary element. In this case, the facts show that trial was underway.

Contrary to Appellant’s argument, this case is nothing like *Rhinehart*, the case at the other end of the spectrum from *Sanchez*. In *Rhinehart*, the defendant consented to a trial date beyond the 45 day period allowed for trial. (*Rhinehart, supra*, 35 Cal.3d at p. 775.) On November 27th, the last day of the Penal Code § 1382 10-day grace period, “the court informed the parties that the jury would be impaneled on that date, but that the trial would be delayed until December 3rd or 4th.” (*Id.*) The judge then stated that “the only reason for impaneling a jury on that date was to avoid a dismissal under section 1382.” (*Id.*) On December 2, the defendant successfully petitioned for a writ of prohibition. (*Id.* at p. 776.)

On appeal in *Rhinehart*, the California Supreme Court addressed the following question: “Is an accused ‘brought to trial’ within the meaning of Penal Code section 1382 when the trial court impanels a jury on the last day for trial permitted by statute but the case cannot proceed due to court congestion?” (*Rhinehart, supra*, 35 Cal.3d at p. 774.) Calling upon the reasoning of *Sanchez*, the *Rhinehart* Court stated, “[A]n accused is ‘brought to trial’ within the meaning of section 1382 when a case has been called for trial by a judge who is normally available and ready to try the case to conclusion. The court must have committed its resources to the trial, and the parties must be ready to proceed and a panel of prospective jurors must be summoned and sworn.” (*Id.* at p. 780.) Having

set forth the applicable rule, the *Rhinehart* Court affirmed the writ of prohibition. (*Rhinehart v. Municipal Court, supra*, 35 Cal.3d at p. 784.) The *Rhinehart* Court explained: “Under this test, it cannot be said that [the defendant] was ‘brought to trial’ within the meaning of section 1382. The trial judge indicated that the jury was impaneled solely to avoid a dismissal under section 1382. Moreover, the court was not available or ready to try the case... Thus, [the defendant] was not ‘brought to trial’ within the meaning of section 1382.” (*Id.* at p. 780.)

Thus, this case is not like *Rhinehart*, in which a trial was assigned to a judge merely as a charade, as a pretense of starting. Instead, this case is like *Sanchez*—it was assigned to Judge Cheng, who was ready and willing to devote his resources to trying the case until completion. Judge Cheng did just that—he dedicated his resources to trying the case until completion..

As shown above, Appellant was brought to trial by November 2, 2011. Therefore, Appellant’s argument to the contrary fails.

4. EVEN IF APPELLANT WAS NOT BROUGHT TO TRIAL AS OF NOVEMBER 2, 2011, GOOD CAUSE EXISTED TO CONTINUE THE CASE UNTIL NOVEMBER 3, 2011.

When the Honorable Judge Cheng called this case on November 2, 2011, he found that good cause existed to continue the jury trial until November 3, 2011. Thus, even if Appellant was not “brought to trial” by November 2, 2011, good cause existed to continue the case until the next day, the day on which the jury was actually empanelled and the People began their case.

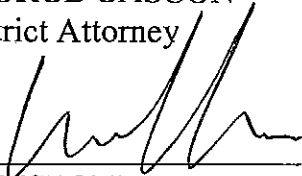
CONCLUSION

For the above-mentioned reasons, the People respectfully request that this Court
AFFIRM Appellant's conviction.

DATED: 11/26/12

Respectfully submitted,

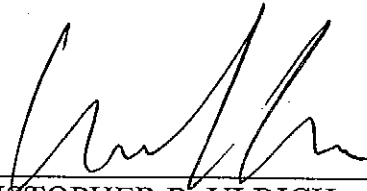
GEORGE GASCON
District Attorney

By: 
CHRISTOPHER R. ULRICH
Assistant District Attorney
Attorneys for Plaintiff/Respondent

CERTIFICATION

I, Christopher R. Ulrich, am the attorney of record for Respondent and declare that pursuant to California Rule of Court 8.883, the word count for this brief is 2,945 words (according to Microsoft Word).

DATED: 11/26/12

By: 
CHRISTOPHER R. ULRICH
Assistant District Attorney
Attorneys for Plaintiff/Respondent

DECLARATION OF SERVICE

Municipal Court No.: 11015661; Appellate Case No.: 7317.

I, Christopher R. Ulrich, state:

That I am a citizen of the United States, over eighteen years of age, an employee of the City and County of San Francisco, and not a party to the within action; that my business address is 850 Bryant St., San Francisco, California 94103.

That on November 26, 2012, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof in U.S. Mail to the following party at the following address:

Matthew D. Metzger
605 Market Street, Suite 505
San Francisco, CA 94105

By interoffice mail:

Hon. Donna Alyson Little, Judge
San Francisco Superior Court
850 Bryant Street
San Francisco, CA 94103

Hon. Andrew Cheng, Judge
San Francisco Superior Court
850 Bryant Street
San Francisco, CA 94103

I declare under penalty of perjury that the foregoing is true and correct. Executed
November 26, 2012, at San Francisco, California.


CHRISTOPHER R. ULRICH

EXHIBIT E

CERTIFIED FOR PUBLICATION
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,)	Appellate No. APP-12-007317
)	
Plaintiff/Respondent,)	Court No. 11015661
)	
vs.)	
)	
)	JUDGMENT ON APPEAL
ANDREW W. NAHINU,)	
)	
Defendant/Appellant.)	
)	

This matter came before the court on January 11, 2013. After considering the evidence, arguments, and applicable law, the December 19, 2011 judgment is AFFIRMED.

I. DISCUSSION ¹

A. Nahinu was not brought to trial until November 3, 2011

Nahinu argues that he was not brought to trial in satisfaction of his speedy trial rights.

We agree.

¹ This short form opinion is designed to provide the parties with a brief explanation of the reasons for the disposition, and assumes familiarity with the facts and arguments of the parties.

A defendant is brought to trial within the meaning of Penal Code § 1382 “when a case has been called for trial by a judge who is normally available and ready to try the case to conclusion. The court must have committed its resources to the trial, and the parties must be ready to proceed and a panel of prospective jurors must be summoned and sworn.” (5 Witkin, California Criminal Law 4th (2012) Criminal Trial, § 318, p. 542, citing *Rhinehart v. Superior Court* (1984) 35 Cal.3d 772, 780.)

On November 1, 2011, the court acknowledged that a jury had not been requested or impaneled that day. The court also acknowledged that it had, on October 28, 2011, found good cause to continue trial until only that day. The court noted, however, that trial could not begin until the following day, November 2, and attributed this additional one-day delay of trial to Nahinu’s refusal to stipulate to trial before a specific judge.

Then, with the matter now before Judge Cheng, on November 2, the court acknowledged that a jury had not been impaneled that day either, but stated that one would be impaneled on November 3. The court attributed the additional one-day delay to the parties desire to litigate Nahinu’s motion to suppress. The court also noted that it found “good cause” for the additional one-day delay, but was unclear as to whether that finding was based only on holding the suppression hearing or some additional basis.

Thus, trial was delayed two additional days beyond November 1, which was the day to which the court had found good cause to continue trial on October 28. As such, Nahinu is correct that a jury was not impaneled on November 1, that the jury was not impaneled until November 3, and that he was not “brought to trial” until November 3, 2011. As Nahinu suggests

on appeal, each delay likely constituted a further continuance of trial, requiring a finding of good cause under §§ 1050 and 1382. The record reflects no findings of good cause for these additional delays, however, leading us to conclude Nahinu's speedy trial rights were violated.

B. Nahinu has not shown prejudice from the delay

Nahinu argues that the combined continuances beyond the last day of October 28, 2011 constitute reversible error under *Chapman v. California* (1967) 386 U.S. 18. Specifically, he argues that “there can be no doubt at Appellant suffered irreparable damage. Appellant was denied the right to a speedy trial and was tried in violation of that right.” Nahinu does not, however, explain what “irreparable damage” he suffered, concluding only that continuing trial beyond the last day without good cause is sufficient to require reversal.

It is clear that a showing of prejudice is required, at least in felony cases, where the appellant argues denial of his statutory speedy trial right. (*People v. Villanueva* (2011) 196 Cal.App.4th 411; *People v. Johnson* (1980) 26 Cal.3d 557.) A distinction has been made in misdemeanor appeals, however, starting with the holding in *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, and based on the fact that a misdemeanor that has been dismissed under § 1382 cannot be filed again.

Multiple cases since, however, have disagreed with, but not overruled, *Avila* on this point. These decisions detail their agreed-upon view that the *Avila* court misunderstood the concept of prejudice as it applies in speedy trial claims, substituting the prejudice caused by denial of the motion for the prejudice caused by the delay in being brought to trial. (See *People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1359 [“The *Avila* court's discussion...reveals that it confused the “prejudice” which justifies granting a motion to dismiss with the “prejudice” which

results from the denial of that motion”], *People v. Egbert* (1997) 59 Cal.App.4th 503, 514 [“appellate review of a statutory speedy trial issue requires consideration of the type of prejudice arising from the delay in prosecution, not the prejudicial effect caused by denial of the motion itself”], and *People v. Aguilar* (1998) 61 Cal.App.4th 615, 621 [“The foundation for the decision in *Avila* rests upon its perceived distinction of a difference in the treatment of the concept of measuring prejudice when deciding a misdemeanor speedy trial motion as compared to a felony motion, an incorrect proposition”].) We believe these holdings indicate that an appellant making a speedy trial claim must show that he was prejudiced by the delay in being brought to trial. As the *Aguilar* court wrote, relying on *Serna v. Superior Court* (1985) 40 Cal.3d 239, 249:

The standard to be used in either misdemeanor or felony prosecutions is discussed in [*Serna*]: “Delays in arrest that are necessary for law enforcement purposes, i.e., those occasioned by inability to locate the accused or witnesses, or to conduct further investigation and gather evidence, do not violate the right to speedy trial unless the prosecution is delayed unreasonably. [Citation.] To determine if the delay is unreasonable and the right to speedy trial violated, „the prejudicial effect of the delay on [the accused] must be weighed against any justification for the delay.“ [Citation.]”

(*People v. Aguilar, supra*, 61 Cal.App.4th at p. 621.)

Nahinu has failed to demonstrate any prejudice from the two-day delay in being brought to trial. Beyond a conclusory statement, he has not articulated how he was prejudiced by the initial continuance to November 1 or the subsequent delays until November 3, 2011. As such, Nahinu has not shown that the trial court’s error requires reversal.

II. DISPOSITION

For the foregoing reasons, the trial court's December 19, 2011 judgment is affirmed.

IT IS SO ORDERED.

BY THE COURT:

Curtis E.A. Karnow, Presiding Judge

Bruce E. Chan, Associate Judge

Anne-Christine Massullo, Associate Judge

Trial Judge: Honorable Donna Alyson Little

Counsel on Appeal:

Matthew D. Metzger, Esq., for Appellant.

George Gascón, District Attorney of San Francisco, and Christopher R. Ulrich, Assistant District Attorney, for Respondent.

EXHIBIT F

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

this matter to the Court of Appeal pursuant to rule 8.1005
of the Rules of Court.



MATTHEW D. METZGER
State Bar No. 240437
mmetzger@belvederelegal.com

Belvedere Legal, APC
605 Market Street, Suite 505
San Francisco, CA 94105
Tel. (415) 513-5980
Fax. (415) 513-5985

Attorney for Appellant

Table of Contents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ARGUMENT 1

 I. THE COURT’S RULING THAT NAHINU MUST SHOW
 ACTUAL PREJUDICE CONFLICTS WITH *PEOPLE V. WILSON*
 (1999) 60 Cal.2d 139 AND WILL RESULT IN THE
 INEFFICIENT ADMINISTRATION OF JUSTICE BY LEAVING
 MISDEMEANOR DEFENDANTS CHALLENGING A
 STATUTORY SPEEDY TRIAL ISSUE NO RECOURSE OTHER
 THAN TO PROCEED VIA INTERLOCUTORY WRIT OF
 MANDATE 2

REQUEST FOR CERTIFICATION 5

CONCLUSION..... 6

Table of Authorities

Cases

People v. Aguilar (1998) 61 Cal. App 4th 615 4
People v. Egbert (1997) 59 Cal.App. 4th 503 4
People v. Hernandez (1992) 6 Cal.App.4th 1355 4
People v. Nahinu, APP-12007317 2
People v. Wilson (1999) 60 Cal. 2d 139 2, 5

Statutes

Penal Code section 1382..... 3, 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. THE COURT’S RULING THAT NAHINU MUST**
2 **SHOW ACTUAL PREJUDICE CONFLICTS WITH**
3 **PEOPLE V. WILSON (1999) 60 Cal.2d 139 AND WILL**
4 **RESULT IN THE INEFFICIENT**
5 **ADMINISTRATION OF JUSTICE BY LEAVING**
6 **MISDEMEANOR DEFENDANTS CHALLENGING A**
7 **STATUTORY SPEEDY TRIAL ISSUE NO**
8 **RECOURSE OTHER THAN TO PROCEED VIA**
9 **INTERLOCUTORY WRIT OF MANDATE**

10 After *Nahinu*, for misdemeanor defendants faced with a
11 *statutory* violation of a speedy trial right, proceeding via appeal is no
12 longer a remedy; the appellant can no longer effectively appeal after a
13 trial or entry of plea, where the refusal to timely bring him or her to
14 trial is the very wrong of which he or she complains. The California
15 Supreme Court rightly observed this problem in *People v. Wilson*
16 (1999) 60 Cal. 2d, 139 (“*People v. Wilson*”), recognizing that for
17 defendants proceeding via interlocutory writ of mandate, absent a
18 sufficient showing of good cause for the delay, “no further showing”
19 was required (*Id.* at 151). In effect, a showing of “statutory
20 prejudice” – a violation of Penal Code section 1382 – without any
21 showing of actual prejudice, was sufficient to mandate dismissal. For
22 misdemeanor defendants who elect to proceed via interlocutory writ
23 of mandate, a mere statutory violation of Penal Code section 1382 is
24 sufficient to mandate dismissal and serve as a statutory bar to the re-
25 filing of the same misdemeanor case.

26 *Avila v. Mun. Court* (1983) 148 Cal.App.3d 807 (“*Avila*”),
27 painting in broad strokes, held that denial of a statutory speedy trial
28 right also is a cognizable issue on appeal from a final judgment of

1 conviction following a guilty plea or nolo contendere to a
2 misdemeanor (*Id.* at 812). *Avila* proceeded to note – correctly – that
3 the impact of a Penal Code section 1382 violation on the prosecution
4 of a misdemeanor is quite different from the impact of the same
5 violation on the prosecution of a felony. “When a felony is dismissed
6 pursuant to section 1382, the prosecution may refile the same charge.
7 Once a misdemeanor has been dismissed pursuant to section 1382, it
8 cannot be filed again” (*Avila*, 148 Cal. App. 3d at 812). The narrow
9 holding of *Avila* – a holding that subsequent jurisprudence has
10 distinguished but never overruled – provides that a violation of Penal
11 Code section 1382 requires dismissal of the misdemeanor action
12 without any showing of actual prejudice on appeal (*Id.*).

13 In *Nahinu*, the Court leapfrogs from the narrow holding of
14 *Avila* to an incorrect conclusion that a showing of actual prejudice on
15 appeal from a misdemeanor conviction is required, via a perceived
16 conflict with subsequent jurisprudence that distinguished *Nahinu*.
17 The problem – one which the Court rightly observed – is that no
18 subsequent case law has overruled *Avila*.

19 *People v. Egbert* (1997) 59 Cal.App. 4th 503 (“*Egbert*”),
20 distinguished the reasoning of *Avila* in order to narrow the holding of
21 *Avila* to misdemeanors subject to a statutory bar to refiling, so that
22 felony defendants could not extend *Avila* for the purposes of
23 automatically showing prejudice when arguing a violation of
24 constitutional speedy trial rights (*Id.* at 920).

1 *People v. Hernandez* (1992) 6 Cal.App.4th 1355
2 (“*Hernandez*”), which also dealt with felonies, again delimited the
3 scope of *Avila*, in order to delineate the extent to which issues of
4 waiver following a plea of guilty or nolo contendere to a felony
5 affects the burden of showing prejudice on appeal.

6 *People v. Aguilar* (1998) 61 Cal. App 4th 615 (“*Aguilar*”)
7 concentrated on the specific issue of waiver as it affects the burden of
8 showing prejudice following a plea of guilty or nolo contendere to a
9 misdemeanor. Yet, *Aguilar* dealt only with the showing of prejudice
10 required to prove a violation of constitutional speedy trial right— a
11 delay in over one year creates a rebuttable presumption of prejudice.
12 Nowhere did *Aguilar* discuss the issue of “statutory prejudice,” which
13 was the specific issue in both *Avila* and *Nahinu*.

14 Accordingly, the Court’s leapfrog conclusion in *Nahinu* is
15 confused at best and creates uncertain consequences for misdemeanor
16 appellants who have suffered a *statutory* violation of their speedy trial
17 rights. If, following *Nahinu*, misdemeanor defendants cannot prevail
18 on appeal of a statutory speedy trial right issue following a conviction
19 or plea without a showing of the same actual prejudice required on
20 appeal of a constitutional speedy trial right issue, misdemeanor
21 defendants will have no choice but to lock-up the court dockets with
22 interlocutory writs of mandate, where, following *People v. Wilson*, no
23 showing of actual prejudice is required. Or, following *Nahinu*, must
24 misdemeanor defendants proceeding via interlocutory writ also now
25 show actual prejudice, in violation of *People v. Wilson*?

1 appeal. Certification of this issue is unquestionably important to
2 resolve to settle this important question of law, to provide uniformity
3 of decision, and to advise whether misdemeanor defendants following
4 a statutory speedy trial right violation have any practical recourse
5 other than to seek relief via interlocutory writ of mandate prior to the
6 commencement of trial. Appellant requests certification of the
7 following question:

8 1. For misdemeanors defendants only, on appeal from a final
9 conviction involving an alleged violation of a speedy trial right, must
10 a movant show anything beyond statutory prejudice, where no further
11 showing would be required of the same defendant when proceeding
12 via interlocutory writ of mandate?

13 14 **CONCLUSION**

15 This Court should grant rehearing in order to correct the
16 unintended consequence that misdemeanor defendants standing in the
17 same shoes as Nahinu faced with a statutory violation of the speedy
18 trial right now have no choice but to file an interlocutory writ of
19 mandate – a holding that is in direct conflict with *Avila* and the plain
20 language of Penal Code section 1382.

21 If, whether or without modification, the Court adheres to the
22 position that a showing of actual prejudice is required, then Appellant
23 respectfully urges this Court to certify this case to the Court of Appeal
24 in order to resolve the clear conflict in opinion and to settle the
25
26
27

1 important questions presented to misdemeanor defendants who may
2 face the same issue every day across the entire state of California.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Respectfully submitted this 26th day of March, 2013

BELVEDERE LEGAL, APC



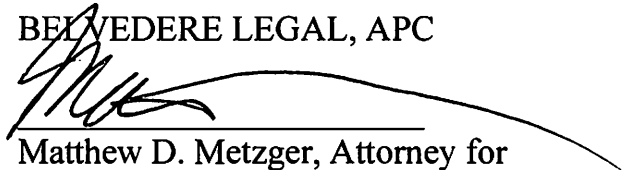
Matthew D. Metzger, Attorney for
Appellant Andrew Nahinu

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**CERTIFICATE OF WORD COUNT
(CRC Rule 8.883(b)(1))**

I certify that this brief was prepared using 14-point type, Times New Roman typeface, and that the word-count of this brief, excluding the preliminary tables, is 1,446 words and thus below the 6,800 word limit for misdemeanor appeals. Cal Rules of Ct. 8.883(b)(1).

BELVEDERE LEGAL, APC



Matthew D. Metzger, Attorney for
Appellant Andrew Nahinu

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

Action: ANDREW NAHINU V. PEOPLE OF STATE OF CALIFORNIA

Case #: Appellate No. APP-12-007317
Court No. 11015661

I, MATTHEW D. METZGER declare:

I am a citizen of the United States, a resident of San Mateo County, and am over 18 years of age. I am not a party to the above entitled action. My business address is Belvedere Legal, APC, 605 Market Street, Suite 505, San Francisco, CA 94105

On March 26, 2013, I served the following documents:

PETITION FOR REHEARING and/or CERTIFICATION

Appellant's Opening Brief upon the interested parties in this action by the methods indicated below:

BY FIRST CLASS MAIL: by placing a true copy thereof, enclosed in a sealed envelope, for postage and deposit with the United States Postal Service on the same date it is submitted for mailing, and addressed as follows:

BY PERSONAL DELIVERY: by causing a true copy thereof to be hand-carried to the recipient at the address indicated:

San Francisco District
Attorney's Office
Attn: Louise Ogden
850 Bryant St
San Francisco, CA 94103

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 26, 2013 in San Francisco, California.

By: 
Matthew D. Metzger

EXHIBIT G

ENDORSED
FILED
Superior Court of California
County of San Francisco
APPELLATE DIVISION

APR 04 2013

CLERK OF THE COURT
BY: CARLOS MURILLO
Deputy Clerk

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
APPELLATE DIVISION**

PEOPLE OF THE STATE OF CALIFORNIA,) Appellate No. APP-12-007317
)
Plaintiff/Respondent,) Court No. 11015661
)
vs.)
)
)
ANDREW W. NAHINU,) **ORDER CERTIFYING CASE FOR**
) **TRANSFER TO FIRST DISTRICT**
) **COURT OF APPEAL**
Defendant/Appellant.)
)
_____)

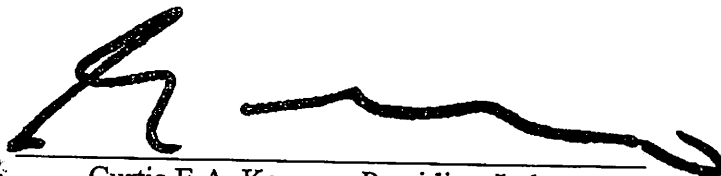
This matter came before the court on January 11, 2013. After considering the evidence, arguments, and applicable law, we affirmed the judgment in an opinion dated March 6, 2013 and filed March 11, 2013. We certified the opinion for publication in the Official Reports pursuant to California Rule of Court 8.1105.

On March 26, 2013, counsel for Appellant Nariño filed a Petition for Rehearing and/or Certification. We hereby deny the request for rehearing, but grant the request to certify the matter for transfer to the First District Court of Appeal, pursuant to California Rule of Court 8.1005. Specifically, pursuant to Rule 8.1005(d)(2), we certify the matter to settle an apparent

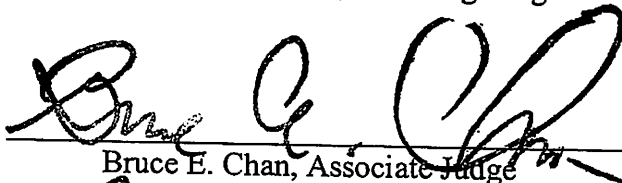
conflict in the Courts of Appeal on the question of whether a showing of prejudice is required in a misdemeanor case alleging non-compliance with Penal Code § 1382.

IT IS SO ORDERED.

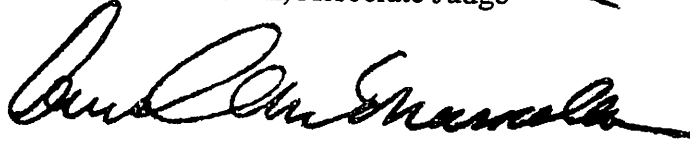
DATE: March 28, 2013



Curtis E.A. Karnow, Presiding Judge



Bruce E. Chan, Associate Judge



Anne-Christine Massullo, Associate Judge

CERTIFICATE OF SERVICE BY MAIL
(Code of Civil Procedure § 1013a(4))

I, Carlos Murillo, deputy clerk of the Superior Court of California, County of San Francisco, certify that I am not a party to this action.

On April 4, 2013, I served the attached **ORDER (7317)** by placing a copy thereof in a sealed envelope addressed to each of the following:

Louise Ogden (Inter-Office)
Assistant District Attorney
850 Bryant Street
San Francisco, Ca. 94103


Matthew D. Metzger
Belvedere Law APC
605 Market Street, Suite 505
San Francisco, Ca. 94105

Hon. Donna Little (Inter-Office)
Judge of the Superior Court
850 Bryant Street
San Francisco, Ca. 94103

and, I then placed the sealed envelope(s) in the outgoing mail at 400 McAllister Street, San Francisco, CA 94102, on the date indicated above for collection with the postage thereon fully prepaid, and mailed on that date following standard court practices.

DATE: April 4, 2013

CLERK OF THE COURT



Carlos Murillo, Deputy Clerk

EXHIBIT H

LAW OFFICES
LOS ANGELES COUNTY PUBLIC DEFENDER

Appellate Branch

590 Hall of Records

Ronald L. Brown

Public Defender

320 West Temple Street
Los Angeles, California 90012

Telephone: (213) 974-3002

John Hamilton Scott

Deputy Public Defender

March 26, 2013

Appellate Division
San Francisco County Superior Court
Civic Center Courthouse
400 McAllister St.
San Francisco, CA 94102

To the Honorable Judges of the Appellate Division:

Re: People v. Nahinu

Case Number APP-12-007307 (Trial Ct.No. 11015661)

This court has issued an opinion in the above-referenced action, certified for publication, in which, inter alia, this court discusses whether a defendant appealing the denial of his motion to dismiss based upon violation of his statutorily guaranteed right to speedy trial has an additional burden of showing "prejudice." This court's resolution of that issue relies upon case law which is manifestly in error, and fails to cite controlling California Supreme Court authority on the issue. This court also cites as supporting its ruling a case which actually conflicts with that ruling.

A petition for rehearing has been filed, and we believe that this court should grant that petition. We note that the propriety of a third-party presenting communications to a reviewing court concerning such issues, particularly in published cases, is well-established. (See In re Winnetka V. (1980) 28 Cal.3d 587, 591; People v. Green (1981) 115 Cal.App.3d 259, 261, fn. 1.) If this court requires a request for amicus status in order for this court to consider this communication, then we respectfully request such status. We believe our continuing interest in this issue is amply reflected in the argument below.

The authority relied upon by this court involves, and to a great extent confuses, three different issues. The first issue is waiver: whether a defendant waives his right to raise an issue on appeal by entering a guilty plea. Although that

Appellate Division
San Francisco County Superior Court
March 26, 2013
Page 2

issue is not presented by this case, since there was a trial, a brief indication of why the authority cited by this court incorrectly resolves this issue is important for an understanding of those cases.

It is well-established in California law that a plea of guilty admits all the facts necessary to prove guilt, and thus waives any issues relating to guilt or innocence. However, the converse is also true, a plea of guilt or innocence does not waive issues which do not involve guilt or innocence, but go to the ability of the state to try the defendant despite his guilt. The authority upon this subject is voluminous. (See, for example, People v. Lauder milk (1967) 67 Cal.2d 272, 282; People v. Reyes (1979) 98 Cal.App.3d 524, 532; People v. Litke (1980) 112 Cal.App.3d 489, 493. People v. Robinson (1997) 56 Cal.App.4th 363, 369; People v. Cella (1981) 114 Cal.App.3d 905, 915, fn. 5; People v. Turner (1985) 171 Cal.App.3d 116, 126-127; People v. Moore (2003) 105 Cal.App.4th 94, 100.)

A motion to dismiss on statutory grounds does not involve a question of the defendant's guilt or innocence, the sole question is whether statutory time limits have been exceeded without consent or good cause. (See People v. Allen (1979) 96 Cal.App.3d 268, 276; People v. Halstead (1985) 175 Cal.App.3d 772, 778-779.) Thus, under the clear authority cited above, a plea of guilty cannot wave an issue concerning the defendant's statutory speedy trial rights, since that is not an issue involving the defendant's guilt or innocence.

The other issues concern prejudice, which is directly at issue in this case. However, it is critical to understand that the term has two different meanings in California law. One meaning is that the defendant's ability to defend against a criminal charge has been compromised. A motion to dismiss on constitutional speedy trial grounds will usually (though not always) involve a showing of this form of prejudice. The motion can be based upon other forms of prejudice, see Klopper v. North Carolina (1967) 386 U.S. 213, 221, that is not important to this discussion. What is important is that since, as discussed above, a motion to dismiss on statutory grounds does not involve any question of the defendant's guilt or innocence, this form of prejudice is entirely irrelevant to the issue.

The second question of prejudice is actually better termed "reversible error." This is rooted in the California constitutional requirement that "No judgment shall be set aside . . . unless . . . the court shall be of the opinion that the error complained

Appellate Division
San Francisco County Superior Court
March 26, 2013
Page 3

of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13.) This requirement is sometimes, and confusingly in the present context, referred to as the requirement of showing “prejudice on appeal.” (See People v. Garceau (1993) 6 Cal.4th 140, 210-211.) To avoid this confusion, we will, where possible, use the less confusing term “reversible error.” In the particular context of a motion to dismiss, reversible error will exist when further proceedings would generally have been prohibited had the motion been granted, whether the defendant’s ability to meet the charges has been compromised or not. In this case, such reversible error does exist, and this court has erred in not reversing appellant’s conviction.

That reversible error exists when dismissal would generally bar further proceedings did not “start with” Avila v. Municipal Court (1983) 148 Cal.App.3d 807, as erroneously posited by this court. Instead, that rule was recognized by the California Supreme Court in People v. Wilson (1963) 60 Cal.2d 139. In that case the court stated that “In a case where the statute of limitations would have been a bar to a new prosecution if the motion to dismiss had been granted, the erroneous denial of the motion would be prejudicial to the defendant.” (Id., 60 Cal.2d at p. 152.) In this passage, the Supreme Court drew no distinction between misdemeanors and felonies. Instead, the court indicated that it was the existence of a bar to further prosecution in any case which required a finding of inherent prejudice on appeal, and thus reversible error.

In an accompanying footnote, the Supreme Court made reference to the limits upon refile found in Penal Code section 1387. At that time, there was no statutory authority to refile any misdemeanor case dismissed under Penal Code section 1382, and no limit upon the number of times a felony case could be refiled. The court stated that “Similarly, in a misdemeanor prosecution the erroneous denial of such a motion to dismiss would be rendered prejudicial by Penal Code section 1387” (Id., 60 Cal.2d at p. 153, fn. 5.) Again, the court was using “prejudicial” in its meaning of “reversible error,” and this statement was clearly not due to some inherent difference between misdemeanors and felonies, but was due to the fact that, at the time, misdemeanors could not be refiled and felonies could.

This rule was restated and applied by the California Supreme Court in a Penal Code section 1382 case in In re Smiley (1967) 66 Cal.2d 606: “Finally, as respondent concedes, the denial of a speedy trial motion is automatically prejudicial in view of the provision in Penal Code section 1387 that an order of dismissal under

section 1382 'is a bar to any other prosecution for the same offense if it is a misdemeanor' [Citing Wilson.] (Id., 66 Cal.2d at p. 632.) It was the statement of the rule in Smiley upon which the Court of Appeal relied in Avila. (148 Cal.App.3d at p. 812.) The rule was also recognized and applied in People v. Grey (1972) 23 Cal.App.3d 456, 462-463: "Had the motion to dismiss been granted on January 13, 1970, or at any later date during that spring, the People could have refiled and started the statute running again. [Citations.] Under those circumstances, and absent any showing in the trial court or here of any unusual circumstances, defendant has not shown the prejudice that Wilson requires." (Emphasis added.)

This rule was also discussed in a case which this court oddly cites for the contrary proposition: People v. Aguilar (1998) 61 Cal.App.4th 615. Aguilar concerned the constitutional right to a speedy trial, not the statutory right. Aguilar found (erroneously to our minds, but that is an issue beyond the ambit of this matter) that a constitutional speedy trial issue is waived by a guilty plea. However, the Aguilar court was not confused regarding the standards of reversible error: "If the motion [to dismiss] is denied, and the reviewing court deems the denial was in error, the error is inherently prejudicial because a grant of the motion would have precluded further prosecution in most circumstances." (Id., at p. 622; emphasis added.) Since a grant of appellant's motion would have precluded further prosecution in most circumstances, this court should have reversed appellant's conviction under Aguilar, as well as Wilson, Smiley, and the other authority cited herein.

This rule was also discussed, albeit not with perfect clarity, in Avila v. Municipal Court (1983) 148 Cal.App.3d 807:

"When a felony is dismissed pursuant to section 1382, the prosecution may refile the same charge. Once a misdemeanor is dismissed pursuant to section 1382, it cannot be filed again. This distinction leads to a different standard of appellate review of speedy trial issues for misdemeanors; a section 1382 error requires reversal and dismissal of a misdemeanor conviction without any showing of prejudice [citing, inter alia, In re Smiley, supra, 66 Cal.2d 606, 632]" (Id., at p. 812.)

Appellant admits this discussion is not perfect, and the Avila court did not clearly delineate whether it was discussing waiver or reversible error. Further, the

Appellate Division
San Francisco County Superior Court
March 26, 2013
Page 5

legal assumption made, that all misdemeanors were subject to a refiling bar, is not quite correct, since upon an additional showing, some misdemeanors can be refiled. However, that fact does not defeat the general rule. It should be recognized that while a dismissed felony can be refiled with no further showing, the same is not true of any dismissed misdemeanor, even under current law, with the exception of misdemeanors charged together with felonies, which are subject to the felony rule. (Pen. Code § 1387, subd. (a).)

There are some provisions permitting misdemeanors to be refiled if certain additional facts are proven. Penal Code section 1387, subdivision (a)(3), permits a misdemeanor to be refiled "only within six months" if the dismissal was due to the failure to appear of the "complaining witness," in certain cases of assault. This case is not such a prosecution, and it could not be refiled under that provision. Moreover, even if the rule of reversible error is to be different in such cases, the prosecution would clearly have the burden to show that a refiling would be possible, since the right to refile is not automatic in misdemeanor cases, as it is in once-terminated felony cases.

Similarly, Penal Code section 1387, subdivision (a)(4), permits a misdemeanor to be refiled "only within six months" if the dismissal was due to the failure to appear of the "complaining witness," in certain cases of domestic violence. And, again, this case is not such a prosecution, and it could not be refiled under that provision. Moreover, even if the rule of reversible error is to be different in such cases, the prosecution would clearly have the burden to show that a refiling would be possible, since the right to refile is not automatic in misdemeanor cases, as it is in once-dismissed felony cases.

Refiling may be possible in cases of witness intimidation or of substantial new evidence. (Pen. Code § 1387, subs. (a)(1), (a)(2).) But, yet again, no showing has been made that any of these factors exist in this case, making refiling a possibility. (It is possible, of course, that factors permitting refiling might arise or be discovered after a dismissal following a successful appeal. In such a case, refiling would clearly be permitted, just as it would be had the dismissal been granted by the trial court (as it should have been) or was the result of a pretrial writ petition.) In fact, even if it were possible to show that such factors might exist in a case, that still would not defeat the overall rule concerning reversible error.

That rule was stated in Aguilar (again, a case relied upon by this court) and is repeated here again:

“If the motion [to dismiss] is denied, and the reviewing court deems the denial to be error, the error is inherently prejudicial because a grant of the motion would have precluded further prosecution in most circumstances.” (People v. Aguilar, supra, 61 Cal.App.4th at p. 622; emphasis added.)

There are two cases cited by this court which do support its holding, both of which are demonstrably wrong. This court relies upon People v. Hernandez (1992) 6 Cal.App.4th 1355. The Hernandez decision is an almost unbelievably flawed decision, which hopelessly muddles issues of waiver, prejudice, and reversible error, but unfortunately underlies later, equally flawed, rulings. Hernandez is not a statutory speedy trial matter, but concerns a defendant's right to speedy trial as protected by the California Constitution.

The Hernandez court plainly confuses the waiver which may result from a guilty plea with the prejudice which must be shown on appeal, claiming that the defendant in that case did not show “the ‘prejudice’ which permits a defendant to raise an issue on appeal after he has pleaded guilty.” (Id., at p. 1359.) Again, a guilty plea waives issues which go to guilt or innocence, or which do not go to the legality of the proceedings, i.e., which involve issues which would have precluded conviction despite the defendant's guilt. On the other hand, reversible error must be shown on appeal whether there has or has not been a guilty plea.

The Hernandez court was clearly confused by its own use of the word “prejudice,” and while accusing other courts of misconstruing the term, itself completely misunderstands the concept. When the clearer term “reversible error” is used, the error of Hernandez is obvious. The Hernandez court claims no less than that a defendant who enters a guilty plea cannot show reversible error on appeal. It would appear too obvious to need further argument to show that this is simply wrong, and the cases are numberless in which reversible error has been found following a plea of guilty.

Indeed, the lack of analytical substance in Hernandez may be found in the fact that the court chooses to use ridicule rather than reasoning to make its points, and

fails even in that attempt. Thus, the Hernandez court, attempting to discredit Avila, states,

“Obviously, whenever a trial court denies a defendant’s motion which, if granted, would have made a favorable termination more likely, that defendant suffers ‘prejudice.’ This is true not only where the motion would lead to a dismissal with no refiling of charges, but also where the motion would lead to acquittal at trial, with retrial barred by the double jeopardy clause. The reasoning of Avila would permit a defendant to raise any issue on appeal after a plea of guilty, by arguing that, had his motion been granted, he could not have been successfully prosecuted at any time. We think the absurdity of such a position is obvious, and we reject the application of Avila beyond its facts.” (Id., 6 Cal.App.4th at p. 1360; emphasis (except on word “any”) added.)

What is “absurd” is this discussion. The Hernandez court sets forth a rule which is not stated or applied in Avila, or any other case, and then says that because the rule it has just made up is incorrect, it will not follow the rule which actually is set forth and applied in Avila, and the body of authority discussed above. The rule of Avila, and the rule of all the other case law in this area, is not that reversible error is shown if a proper ruling would make a favorable termination “more likely.” The rule applies when a favorable ruling would generally preclude further proceedings. The rule is not that reversible error is shown if a correct ruling might have led to acquittal at trial, since if a trial is possible the ruling would not preclude further proceedings; moreover, such an issue would almost certainly be waived as going to guilt or innocence. The rule is not that reversible error is shown if a prosecution would not be “successful.” The rule applies when a prosecution would generally not be possible. Indeed, while unjustifiably claiming that Avila is absurd, the Hernandez court fails even to mention Smiley, the Supreme Court case relied upon by the Avila court, or Wilson, the Supreme Court case in which the rule was first set forth.

Another example of the Hernandez court’s complete misconception of the legal standards applicable in this area is the following passage, where the Hernandez court again attempts, unsuccessfully, to ridicule the Avila decision: “Avila reasons that a defendant who can automatically show prejudice resulting from the denial of his motion should be able to raise the issue on appeal following a guilty plea; this rationale applies to a felony defendant who argues that his defense was

Appellate Division
San Francisco County Superior Court
March 26, 2013
Page 8

hampered by unconstitutional pretrial delays.” (Id. 6 Cal.App.4th at pp. 1358-1359.) As discussed above, an appeal is barred in the situation referenced by the Hernandez court because issues relating to guilt or innocence are waived by a guilty plea, not because the defendant could not show reversible error. The Hernandez court seems to have been completely unaware of this rule, and in its attempt to discredit Avila simply shows its own lack of understanding.

This error of the Hernandez court was again perpetuated in People v. Egbert (1997) 59 Cal.App.4th 503, upon which this court also relies. The defendant in that case advanced both a constitutional and a statutory speedy trial violation. The case involved a misdemeanor prosecution, and thus if the complaint had been dismissed, it could not have been refiled. The Egbert court grossly confused the prejudice which may support a motion to dismiss on constitutional grounds with the showing of reversible error required on appeal:

“As we discussed in the context of a constitutional speedy trial right, a defendant who pleads guilty to either a felony or a misdemeanor concedes the absence of prejudice. Because the appeal of a claimed statutory speedy trial violation likewise requires a showing of prejudice, a reviewing court is precluded by a defendant’s guilty plea, in either a felony or misdemeanor prosecution, from ‘weigh[ing] the effect of the delay in bringing defendant to trial or the fairness of the subsequent trial itself.’ (People v. Wilson, supra, 60 Cal. 2d at p. 151.) Simply stated, a statutory speedy trial violation does not survive a guilty plea, regardless of whether that plea is to a felony or a misdemeanor.” (Id., at p. 513.)

Simply stated, and with all due respect, this is gibberish. The fundamental problem is the Egbert court’s use of the word “prejudice” as meaning the same thing in two different contexts, when it actually means two different things (which is why appellant herein uses the less confusing term “reversible error”). A defendant who pleads guilty concedes his guilt, and waives any claim of “prejudice” only insofar as that may relate to guilt or innocence. Such a showing of “prejudice” may be made when a defendant moves to dismiss on constitutional speedy trial grounds. But, as every other case discussing the point has recognized, a statutory motion to dismiss has nothing to do with guilt or innocence. A guilty plea thus waives nothing in this context, because there is nothing to waive.

On the other hand, the "prejudice" which must be shown on appeal is not the same thing as the prejudice which will support a motion to dismiss on constitutional grounds. What must be shown on appeal is reversible error, a miscarriage of justice. According to the California Supreme Court, that is shown when a motion to dismiss is denied if further prosecution would have been precluded had the motion been granted. Just as in Hernandez, the rule set forth in Egbert would compel the conclusion that a defendant who enters a guilty plea is foreclosed from claiming reversible error, as may be seen if that term is substituted for the confusing word "prejudice": "A defendant who pleads guilty to either a felony or a misdemeanor concedes the absence of [reversible error]."

The Egbert court also attempts to demonstrate the probity of its ruling by making plainly incorrect arguments concerning the effect of the proper rule. For example, the Egbert court discusses what it believes to be the Avila court's "fallacy":

"As the court in Hernandez noted, Avila's reasoning that a misdemeanor defendant can automatically show prejudice resulting from the denial of a speedy trial motion would also apply to a felony defendant arguing a violation of his constitutional speedy trial rights. In both situations, retrial is barred. (People v. Hernandez, supra, 6 Cal. App. 4th at pp. 1358-1359.)" (Id., 59 Cal.App.4th at p. 514.)

This is not, however, a "fallacy;" it is, in fact, a correct statement of the law. If a defendant's motion to dismiss on constitutional grounds is granted the case cannot be refiled, and thus the erroneous denial of such a motion would constitute reversible error. Indeed, if the Avila court's ruling was fallacious, so was the ruling in Aguilar, in which the court uses the term "prejudicial" to describe reversible error: "If the [constitutional] motion is denied, and the reviewing court deems the denial was in error, the error is inherently prejudicial because a grant of the motion would have precluded further prosecution in most circumstances." (People v. Aguilar, supra, 61 Cal.App.4th at p. 622.)

Similarly, the Egbert court attempts to claim that the rule discussed and applied in Avila, as well as in Wilson, Smiley, and Aguilar, is incorrect because some felonies cannot be refiled, and, under some circumstances, some misdemeanors can be refiled. (People v. Egbert, supra, 59 Cal.App.4th at p. 514.) However, all this does is show different applications of the same rule; it in no way defeats the rule.

If a dismissal of a felony action, whether on statutory or constitutional grounds, would generally preclude further prosecution (for example, if the action had been previously terminated), then the erroneous denial of that motion is reversible error. As discussed above, there is no misdemeanor charge which can generally be refiled, but if the Legislature should provide for uniform refiling in misdemeanor cases, then the erroneous denial of a motion to dismiss in such cases would not be reversible error. It may be, perhaps, that if it can be shown that those factors exist in a misdemeanor case which would permit refiling under current law, then reversible error cannot be found automatically, but no such showing has been made in this case.

We note that the Los Angeles County Public Defender, as well as any large criminal defense agency, as well as every Appellate Division in the State of California has a vital interest in the correct resolution of this issue. It is well-settled that a defendant who seeks pretrial relief from a trial court ruling is not required to show reversible error under article VI, section 13, of the California Constitution. (See People v. Johnson (1980) 26 Cal.3d 557, 574-575.) Accordingly, should this court's decision stand, every misdemeanor defendant faced with denial of his motion to dismiss pursuant to Penal Code section 1382 will have no choice but to seek immediate extraordinary relief. This would not only be highly disruptive—and expensive—to defense offices, but would unduly burden the Appellate Divisions with having to rule in extraordinary writ matters which should (under a correct interpretation of the law) be more regularly considered in a post-conviction appeal, should such an appeal be pursued.

We recognize that the rule relieving a defendant of the burden of showing reversible error applies equally in felony cases, however the result is not the same. Since the rule is based upon the fact that a felony case can be refiled following a dismissal on statutory speedy trial grounds, there is not the same impetus to seek extraordinary relief which will result only in the refiling of charges under Penal Code section 1387. For the misdemeanor defendant, however, the statutory speedy trial dismissal will bar further proceedings, and if the only means of securing that dismissal is a pretrial writ petition, it is assured that the number of such petitions will increase exponentially.

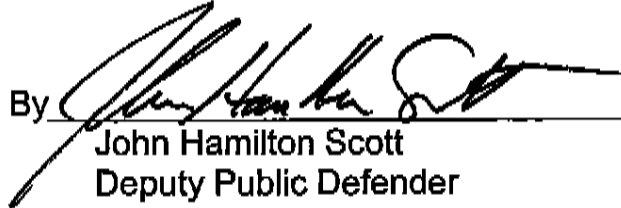
We thus urge this court to reject the patently erroneous rulings of Hernandez and Egbert, and to follow the statement of law found in Aguilar, as well as in the

Appellate Division
San Francisco County Superior Court
March 26, 2013
Page 11

controlling decisions of Wilson and Smiley, as well as Avila: the denial of a motion which, if granted, would have ordinarily barred further proceedings constitutes reversible error on appeal. This court has already ruled that appellant's motion to dismiss should have been granted. It is beyond dispute but that the granting of that motion would have barred further proceedings. Accordingly, the denial of that motion constituted reversible error, and appellant is entitled to reversal of his conviction.

Respectfully submitted,

RONALD L. BROWN, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By 
John Hamilton Scott
Deputy Public Defender

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 March 27, 2013, I served a copy of the within LETTER, *P. v. Nahinu*, 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:

San Francisco County District Attorney
850 Bryant Street
San Francisco, Ca 94103

Belvedere Legal, APC
Attn: Matthew D. Metzger, Esq.
605 Market St., Suite 505
San Francisco, Ca 94105

Hon. Donna Alyson Little, Judge
San Francisco County Superior Court
850 Bryant Street
San Francisco, Ca 94103

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 27, 2013, at Los Angeles, California.



CALICIA A. ALBURO

EXHIBIT I

PD

SAN FRANCISCO PUBLIC DEFENDER

JEFF ADACHI – PUBLIC DEFENDER

MATT GONZALEZ – CHIEF ATTORNEY



Court of Appeal First Appellate District
FILED
APR 12 2013
Diana Herbert, Clerk
by _____ Deputy Clerk

RECEIVED
APR 12 2013
OFFICE OF THE ATTORNEY GENERAL
SAN FRANCISCO, CALIFORNIA
BY _____ CLERK

April 12, 2013

Court of Appeal
First Appellate District, Division 2
350 McAllister Street
San Francisco, CA 94102

To: the Presiding Justice of Division 2, the Honorable J. Anthony Kline:

Re: *People v. Nahinu*; A138070; App. No. 12-07307 (MCN. 11015661) Letter in support of Court of Appeal review.

The Appellate Division has requested certification of its short form opinion in *Nahinu*. The Office of the Public Defender in San Francisco asks leave to file this amicus letter in support of the First District accepting this case to resolve what, if this case remains extant, will be more confusion in this area.

The Public Defender handles thousands of misdemeanors a years and in fact represented Nahinu below. We write here not specifically as to Nahinu, but in concern over this abrupt leap of law and how it generally affects the administration of justice in San Francisco.

An examination of what is not in controversy here is helpful. All agree that the wrongful denial of a statutory 1382 motion for dismissal remains grounds for dismissal — without any showing of defense prejudice, at least pretrial.

(*People v. Sutton* (2010) 48 Cal.4th 533, 546 fn 7.) Likewise, all agree that a defendant raising the wrongful denial of a 1382 motion by way of a writ need not show prejudice. (*Id.*, citing *Sykes v. Superior Court* (1973) 9 Cal.3d 83, 88-89.) An unresolved split of authority exists as to whether a misdemeanor can raise a wrongfully denied 1382 motion after he admits guilt. (*Avila v. Municipal Court* (1983) 148 Cal.App.3d 807 [may raise post-guilty plea] *People v. Egbert* (1997) 59 Cal.App.4th 503 [may not].) It seems the last issue is the one the Appellate Division actually weighed in on. But none of this is at issue: Nahinu entered no guilty plea; this was tried to a jury.

Rather, the issue is whether a wrongfully denied 1382 (trial error) is prejudice in a misdemeanor case where, if granted, it would be a bar to prosecution. No case supports the Appellate Division's reasoning or result; several felony cases, in analyzing prejudice, point to the common sense and logical result that losing the bar to prosecution would be prejudice.

1. The Appellate Division has confused two distinct issues: (1) waiver doctrine based on a guilty plea (not raised here); with (2) post-trial prejudice for reversal (raised here).

The Appellate Division has confused waiver of issues based on a guilty plea with post-trial showing of prejudice for reversal. All the misdemeanor cases it relies on in its analysis involve appeals after a misdemeanor guilty plea.

(*Egbert, supra*, at 508 [{"A} guilty plea also waives any irregularity in the proceedings that would not preclude a conviction, irregularities that could be cured, or that would not preclude subsequent proceedings to establish guilt, may not be asserted on appeal after a guilty plea."]; *People v. Hernandez* (1992) 6 Cal.App.4th 1355 [{"We agree with the People that the {1382} issues

did not survive the entry of defendant's guilty plea, and affirm the judgment.": contra: *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807 [misdemeanant may bring 1382 issue post plea]; see also, *People v. Wilson* (1963) 60 Cal.2d 139, which was not cited in the opinion).

And the case it relies on the most, *Aguilar*, is not even a statutory speedy trial case, but a constitutional speedy trial case, post plea, where factual proof of prejudice is often at issue and the general policy of forfeiture by pleas is most apt. (*People v. Aguilar* (1998) 61 Cal.App.4th 615.)

While we agree with the Los Angeles County Public Defender that this split should be resolved to allow appeal of a wrongfully denied 1382 motion under *Avila*, that just is not the issue here; and the Appellate Division reliance on plea cases is not helpful to the analysis of post-trial appeals. Here, Nahinu went to trial: the post-plea cases are not on point, the post-plea issue is not raised here, and it does not need to not be examined. In short, the Appellate Division has gone down the false trail of post-plea waiver when the extant law on 1382 and the prejudice showing post-trial supports Nahinu.

2. Prejudice is shown in post-trial appeals if correction of the error would bar further prosecution.

Prejudice is shown in post-trial appeals if correction of the error would bar further prosecution. (*People v. Wilson, supra*, 60 Cal.2d at 152 [a first dismissal is reversible prejudice in a felony where the court points out the statute of limitations would have run]; *In re Smiley* (1967) 6 Cal.2d 606, 632.) The Appellate Division's omission the of Supreme Court's *Wilson* and *Smiley* cases alone suggests that this opinion should be revisited.

Moreover, our Supreme Court has opined that prejudice for a reversal based on a 1382 dismissal is presumed where that prejudice would be to bar further prosecution: “Finally, as respondent concedes, the denial of a speedy trial in the case at bar is automatically prejudicial in view of the provision in Penal Code section 1387 that an order of dismissal under section 1382 is a bar to any other prosecution for the same offense if it is a misdemeanor. ...” (*In re Smiley, supra*, at 632 [internal cites omitted].) Indeed, both post-trial appeal cases (felony cases) cited by the Appellate Division support this logic. (*Nahinu*, Slip Opn. at 2).

First, the state Supreme Court in the 1980 *Johnson* case, after finding a 1382 violation, held the error was harmless for failure to show prejudice, because Johnson failed to show that the charges against him could not have been re-filed had the trial court granted the motion to dismiss: “In the present case the record shows no prejudice to defendant arising from the delay. This is not a case in which the statute of limitations would have been a bar to new charges, or one in *which a dismissal would itself have barred refiling.*” (*People v. Johnson* (1980) 26 Cal.3d 557, 574 [emphasis added], limited on other grounds in *People v. Sutton* (2010) 48 Cal.4th 533.)

It follows that if there had been a prior dismissal then the wrongfully denied 1382 motion *would* have been reversible prejudice because two dismissals in that type of felony would bar prosecution under Penal Code section 1387 as one dismissal here, in this type of misdemeanor, bars prosecution under section 1387. Of course, this is not the holding, but dicta of the Supreme Court are entitled to enhanced respect. (*Hubbard v. Superior Court* (1997) 66

Cal. App. 4th 1163, 1168-1169.) Moreover, the Court dictum here echoes the direct holding of its earlier *Smiley* case.

Next, the Appellate Division cited the more recent 2011 Court of Appeal's *Villanueva* case. There, again, a 1382 violation was found but held harmless because "A *single* dismissal of a felony prosecution is not a bar to a second prosecution for the same offense. (Pen. Code, § 1387.)" (*People v. Villanueva* (2011) 196 Cal.App.4th 411, 417 [emphasis added].) Again it follows that a second dismissal would bar refilling and would be prejudice!

Another case of the same stripe is the 1984 Court of Appeal's *Cory* decision: though a 1382 violation was shown on felony appeal, "since appellant's claim of error under section 1382 comes to us on appeal after conviction rather than on pretrial petition for writ, the error we have identified does not require reversal unless it is determined to have been prejudicial." (*People v. Cory* (1984) 157 Cal.App.3d 1094, 1101.) But the *Cory* Court then pointed out the if a prior dismissal had been shown prejudice *would* lie: "Furthermore, this is not a case in which pretrial dismissal would have barred further prosecution by reason of either section 1387 or the statute of limitations." (*Ibid.*)

Prejudice is shown on post-trial appeal where, as here, the error (wrongful denial of a 1382 motion), if corrected, would bar the prosecution from going forward. In the felony appeals of *Johnson*, *Villanueva*, and *Corey* that required proof (there missing) of a prior dismissal; but here, because only one dismissal bars re-filing in a misdemeanor under Penal Code 1387, no earlier dismissal need be shown.

3. Clarity is needed: The Court of Appeal should take this case to prevent the confusion from the plea-bargain-waiver rule (a split of opinion as it stands) from bleeding into what was a settled right (that failure to grant a 1382 in most misdemeanors is prejudice post-trial).

The confusion caused by the split of appellate authority as to whether a defendant can preserve a 1382 violation post-plea is confusion enough for litigants and courts. Until the *Nahinu* decision, no question was raised as to whether prejudice was shown in a misdemeanor appeal upon the showing of a wrongfully denied 1382 where it would serve to bar further proceedings — it was consistent with the language of *Johnson*, *Villanueva*, and *Corey* and makes logical and common sense. The Court of Appeal needs to guide litigants and trial courts out of this thicket; the uncertainty of the plea rule already confuses litigants, a nonbinding appellate division opinion would needlessly extend that confusion into post-trial appeals. And, as evidenced by March 26, 2013 letter from the Los Angeles Public Defender, it would have state-wide implications. The Office of the Public Defender of San Francisco asks the Court of Appeal to grant the Appellate Divisions request for certification and give binding guidance here.

Jeff Adachi
Public Defender
City and County of San Francisco
Matt Gonzalez
Chief Attorney

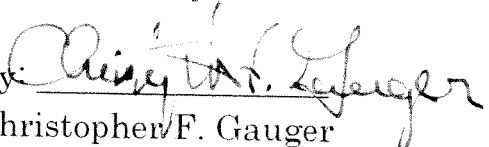
By 
Christopher F. Gauger
(SBN 104451)
Managing Attorney, Research Unit
Deputy Public Defender

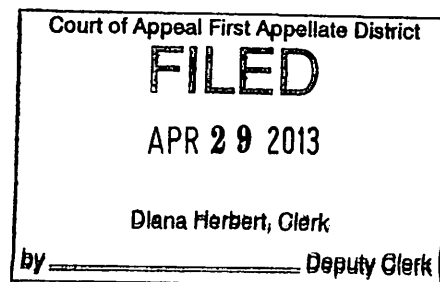
EXHIBIT J

Copy

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO



THE PEOPLE,
Plaintiff and Respondent,

v.

ANDREW W. NAHINU,
Defendant and Appellant.

A138070

(City & County of San Francisco
Super. Ct. No. 10015661;
Appellate No. APP-12-007317)

BY THE COURT:

After review of the appellate division's published opinion and the record filed herein, transfer of City and County of San Francisco Superior Court Appellate Case No. APP-12-007317 is denied.

Dated: APR 29 2013

KLINE, P.J.

P.J.

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 2

[Handwritten signature]

THE PEOPLE,
Plaintiff and Respondent,
v.
ANDREW W. NAHINU,
Defendant and Appellant.

A138070
San Francisco County No. 11015661

Court of Appeal First Appellate District
FILED
APR 29 2013
Diana Herbert, Clerk
by _____ Deputy Clerk

BY THE COURT:

The request for judicial notice is denied.

Date: APR 29 2013

]

KLINE, P.J.

P.J.

EXHIBIT K

MAY 20 2013

LAW OFFICES
BELVEDERE LEGAL APC
605 MARKET STREET, SUITE 505
SAN FRANCISCO, CA 94105
TELEPHONE (415) 513-5980
FAX (415) 513-5985
www.belvederelegal.com

Frank A. McGuire Clerk

Deputy

May 20, 2013

Frederick K. Ohlrich
Court Administrator and Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Andrew Nahinu*, No. 11015661 (First Appellate Dist., Div. 2,
Case No. A138070; City & County of San Francisco Super. Ct. No.
10015661; Appellate Division, Appellate No. APP-12-007317)

Dear Mr. Ohlrich:

Counsel for Appellant, Mr. Matthew Metzger, respectfully requests, pursuant to rules 8.1105 and 8.1125 of the California Rules of Court, that this Court order depublication of the Appellate Division's opinion in this case, published at 214 Cal.App.4th Supp. 1, a copy of which is attached hereto as Exhibit A.

I represent many indigent defendants and I write this letter on behalf of not only my client but all individuals charged with misdemeanor offenses involving speedy trial issues.

This letter is divided into two (2) sections. Section 1 explains the nature of the error and its consequences of misdemeanor defendants statewide. Section 2 presents the representative case law relied upon by the Appellate Division.

I. Nature and Consequences of the Error

The Appellate Division's March 11, 2013 opinion in *Nahinu* creates an unnecessary conflict in the definition of "prejudice" required to prevail on a post-conviction appeal alleging a violation of penal code section 1382(a)(3). As explained herein, the opinion also risks creating procedural havoc on Appellate Divisions statewide, as every misdemeanor defendant faced with a denial of motion to dismiss pursuant to section 1382 now will have no choice

but seek immediate extraordinary pre-trial relief, where a showing of reversible error is not required.

The Appellate Division identified a split of opinion concerning the question of whether a misdemeanor appellant must show anything more than a statutory violation of penal code section 1382 in challenging a speedy trial right violation following a final conviction or plea on appeal. The Appellate Division's own Order Certifying Case for Transfer to First District Court of Appeal stated "the apparent conflict in the Courts of Appeal on the question a showing of prejudice is required in a misdemeanor case alleging non-compliance with Penal Code § 1382" ("Order Certifying Transfer"). Appellate petitioned for rehearing and/or certification March 26, 2013. The Order Certifying Transfer was filed April 4, 2013. The First Appellate District issued an order denying the transfer April 29, 2013.

The authority relied upon by this court involves, and to a great extent confuses, three different issues. The first issue is waiver: whether a defendant waives his right to raise an issue on appeal by entering a guilty plea. Although that issue is not presented by this case, since there was a trial, a brief indication of why the authority cited by this court incorrectly resolves this issue is important for an understanding of the authority on which the Appellate Division relied in crafting its opinion.

It is well-established in California law that a plea of guilty admits all the facts necessary to prove guilt, and thus waives any issues relating to guilt or innocence. However, the converse is also true, a plea of guilt or innocence does not waive issues which do not involve guilt or innocence, but go to the ability of the state to try the defendant despite his guilt. The authority upon this subject is voluminous. (*See, e.g. People v. Laudermilk* (1967) 67 Cal.2d 272, 282; *People v. Reyes* (1979) 98 Cal.App.3d 524, 532; *People v. Litke* (1980) 112 Cal.App.3d 489, 493. *People v. Robinson* (1997) 56 Cal.App.4th 363, 369; *People v. Cella* (1981) 114 Cal. App.3d 905, 915, fn. 5; *People v. Turner* (1985) 171 Cal.App.3d 116. 126-127; *People v. Moore* (2003) 105 Cal.App.4th 94.100.)

A motion to dismiss on statutory grounds does not involve a question of the defendant's guilt or innocence; the sole question is whether statutory time limits have been exceeded without consent or good cause. (*See People v. Allim* (1979) 96 Cal.App.3d 268, 276; *People v. Halstead* (1985) 175 Cal.App.3d 772, 778-779.) Thus, under the clear authority cited above, a plea of guilty cannot waive an issue concerning the defendant's statutory speedy trial rights, since that is not an issue involving the defendant's guilt or innocence.

The other issues concern prejudice, which is directly at issue in this case. However, it is critical to understand that the term has two different meanings in California law. One meaning is that the defendant's ability to defend against a criminal charge has been compromised ("substantive prejudice"). A motion to dismiss on constitutional speedy trial grounds will usually (though not always) involve a showing of this form of substantive prejudice. The motion can be based upon other forms of prejudice; *see e.g. Klopfer v. North Carolina* (1967) 386 U.S. 213, 221 (not relevant to this discussion). What is important is that since, as discussed above, a motion to dismiss on statutory grounds does not involve any question of the defendant's guilt or innocence, substantive prejudice is entirely irrelevant to the issue.

The second question of prejudice is actually better termed "reversible error." This is rooted in the California constitutional requirement that "No judgment shall be set aside . . . unless . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Canst., art. VI, § 13.) This requirement is sometimes, and confusingly in the present context, referred to as the requirement of showing "prejudice on appeal." (*See People v. Garceau* (1993) 6 Cal.4th 140, 210, 211.) To avoid this confusion, I use, where possible, the less confusing term "reversible error." In the particular context of a motion to dismiss, reversible error will exist when further proceedings would generally have been prohibited had the motion been granted, whether the defendant's ability to meet the charges has been compromised or not. In *Nahinu*, such reversible error does exist, and the Appellate Division of the Superior Court - and by extension, the First District Court of Appeal, in denying the certification for transfer - have erred in not reversing appellant's conviction.

That reversible error exists when dismissal would generally bar further proceedings did not "start with" *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, as erroneously posited by the Appellate Division. Instead, that rule was recognized by the California Supreme Court in *People v. Wilson* (1963) 60 Cal.2d 139. In that case the court stated that "In a case where the statute of limitations would have been a bar to a new prosecution if the motion to dismiss had been granted, the erroneous denial of the motion would be prejudicial to the defendant." (*Id.*, 60 Cal.2d at p. 152.) In this passage, the Supreme Court drew no distinction between misdemeanors and felonies. Instead, the court indicated that it was the existence of a bar to further prosecution in any case which required a finding of inherent prejudice on appeal, and thus reversible error.

In an accompanying footnote, the Supreme Court made reference to the limits upon refiling found in Penal Code section 1387. At that time, there was no statutory authority to refile any misdemeanor case dismissed under Penal

Code section 1382, and no limit upon the number of times a felony case could be refiled. The court stated that "Similarly, in a misdemeanor prosecution the erroneous denial of such a motion to dismiss would be rendered prejudicial by Penal Code section 1387 " (*Id.*, 60 Cal.2d at p. 153, fn. 5.) Again, the court was using "prejudicial" in the semantic context of "reversible error," and this statement was clearly not due to some inherent difference between misdemeanors and felonies, but was due to the fact that, at the time, misdemeanors could not be refiled and felonies could.

II. Representative Cases

After *Nahinu*, for misdemeanor defendants faced with a statutory violation of a speedy trial right, proceeding via appeal is no longer a remedy; the appellant can no longer effectively appeal after a trial, where the refusal to timely bring him or her to trial is the very wrong of which he or she complains. The California Supreme Court rightly observed this problem in *People v. Wilson* (1999) 60 Cal. 2d, 139 recognizing that for defendants proceeding via interlocutory writ of mandate, absent a sufficient showing of good cause for the delay, "no further showing" was required (*Id.* at 151). In effect, a showing of a statutory violation of Penal Code section 1382 is analogous to a showing of "strict liability" and is sufficient to mandate dismissal. For misdemeanor defendants who elect to proceed via interlocutory writ of mandate, a mere statutory violation of Penal Code section 1382 is sufficient to mandate dismissal and serve as a statutory bar to the re-filing of the same misdemeanor case.

Avila v. Mun. Court (1983) 148 Cal.App.3d 807 ("Avila"), painting in broad strokes, held that denial of a statutory speedy trial right also is a cognizable issue on appeal from a final judgment of conviction following a guilty plea or nolo contendere to a misdemeanor (*Id.* at 812). *Avila* proceeded to note – correctly – that the impact of a Penal Code section 1382 violation on the prosecution of a misdemeanor is quite different from the impact of the same violation on the prosecution of a felony. "When a felony is dismissed pursuant to section 1382, the prosecution may refile the same charge. Once a misdemeanor has been dismissed pursuant to section 1382, it cannot be filed again" (*Avila*, 148 Cal. App. 3d at 812). The narrow holding of *Avila* – a holding that subsequent jurisprudence has distinguished but never overruled – provides that a violation of Penal Code section 1382 requires dismissal of the misdemeanor action without any showing of actual prejudice on appeal (*Id.*).

In *Nahinu*, the Appellate Division leapfrogged from the narrow holding of *Avila* to an incorrect conclusion that a showing of actual prejudice on appeal from a misdemeanor conviction is required, via a perceived conflict with subsequent jurisprudence that distinguished *Nahinu*. The problem – one

which the Court rightly observed – is than no subsequent case law has overruled *Avila*.

People v. Egbert (1997) 59 Cal.App. 4th 503 (“Egbert”), distinguished the reasoning of *Avila* in order to narrow the holding of *Avila* to misdemeanor defendants subject to a statutory bar to refiling, so that felony defendants could not extend *Avila* for the purposes of automatically showing prejudice when arguing a violation of constitutional speedy trial rights (*Id.* at 920).

People v. Hernandez (1992) 6 Cal.App.4th 1355 (“Hernandez”), which also dealt with felonies, again delimited the scope of *Avila*, in order to delineate the extent to which issues of waiver following a plea of guilty or nolo contendere to a felony affects the burden of showing prejudice on appeal.

People v. Aguilar (1998) 61 Cal. App 4th 615 (“Aguilar”) concentrated on the specific issue of waiver as it affects the burden of showing prejudice following a plea of guilty or nolo contendere to a misdemeanor. Yet, *Aguilar* dealt only with the showing of prejudice required to prove a violation of constitutional speedy trial right– a delay in over one year creates a rebuttable presumption of prejudice. Nowhere did *Aguilar* discuss the issue of a strict statutory violation of penal code section 1382, which was the specific issue in both *Avila* and *Nahinu*.

Accordingly, the Court’s leapfrog conclusion in *Nahinu* is confused at best and at worst creates dire consequences for misdemeanor defendants who have suffered a statutory violation of their speedy trial rights. If, following *Nahinu*, misdemeanor defendants cannot prevail on appeal of a statutory speedy trial right issue following a conviction or plea without a showing of the same actual prejudice required on appeal of a constitutional speedy trial right issue, misdemeanor defendants will have no choice but to lock-up the court dockets with interlocutory writs of mandate, where, following *People v. Wilson*, no showing of actual prejudice is required. Or, following *Nahinu*, must misdemeanor defendants proceeding via interlocutory writ also now show actual prejudice, in violation of *People v. Wilson*?

The holding of the Appellate Division, if permitted to stand, will set a precedent of causing all misdemeanor defendants faced with a denial of a motion to dismiss pursuant to Penal Code section 1382 to seek immediate extraordinary relief. It is well-settled that a defendant who seeks pretrial relief from a trial court ruling is not required to show reversible error under article VI, section 13 of the California Constitution. (*See People v. Johnson* (1980) 26 Cal.3d 557, 574-575). This would not only be highly disruptive, but would unduly burden Appellate Divisions with having to rule in

Page 6

extraordinary writ matters that should (under a correct interpretation of the law) be more regularly considered in post-conviction appeals.

Either way, the Court's conclusion in *Nahinu* is not in comity with *People v. Wilson*, which expressly authorizes misdemeanor defendants to proceed via interlocutory writ of mandate and to obtain a dismissal and bar to refiling under Penal Code section 1382 with no further showing than a statutory violation of the speedy trial statute. What recourse is left to defendants faced only with a statutory violation of Penal Code section 1382? To proceed via writ interlocutory writ with a burden of showing only the statutory violation? Or to proceed via an appeal following a conviction or plea and attempt to meet the higher burden of showing substantive prejudice, the same burden that is required to prove a violation of a defendant's constitutional speedy trial rights?

It remains true that the impact of a Penal Code section 1382 violation on the prosecution of a misdemeanor requires dismissal whereas the impact of the same violation on the prosecution of a felony requires a mere re-filing of the case. At issue is the procedural mechanism by which a misdemeanor defendant may challenge a violation of a speedy trial issue based on "statutory prejudice" as opposed to actual prejudice.

For these reasons, I respectfully request that the *Nahinu* opinion be decertified for publication pursuant to California Rule of Court 8.1125.

Respectfully,

A handwritten signature in black ink, appearing to read "Matt Metzger", with a long horizontal flourish extending to the right.

MATTHEW D. METZGER
State Bar No. 240437
mmetzger@belvederelegal.com

Belvedere Legal, APC
605 Market Street, Suite 505
San Francisco, CA 94105
Tel. (415) 513-5980
Fax. (415) 513-5985

Attorney for Appellant

PROOF OF SERVICE

CITY AND COUNTY OF SAN FRANCISCO

STATE OF CALIFORNIA

Action: ANDREW NAHINU V. PEOPLE OF STATE OF CALIFORNIA

Case #: Appellate No. APP-12-007317

Court No. 11015661

I, MATTHEW D. METZGER declare:

I am a citizen of the United States, a resident of San Mateo County, and am over 18 years of age. I am not a party to the above entitled action. My business address is Belvedere Legal, APC, 605 Market Street, Suite 505, San Francisco, CA 94105

On May 20, 2013, I served the following documents: **Request for Depublication - *People v. Andrew Nahinu*, No. 11015661 (First Appellate Dist., Div. 2, Case No. A138070; City & County of San Francisco Super. Ct. No. 10015661; Appellate Division, Appellate No. APP-12-007317)**

upon the interested parties in this action by the methods indicated below:

BY FIRST CLASS MAIL: by placing a true copy thereof, enclosed in a sealed envelope, for postage and deposit with the United States Postal Service on the same date it is submitted for mailing, and addressed as follows:

BY PERSONAL DELIVERY: by causing a true copy thereof to be hand-carried to the recipient at the address indicated:

San Francisco District Attorney's
Office
Attn: Louise Ogden
850 Bryant St
San Francisco, CA 94103

Appellate Division
Superior Court of California
County of San Francisco
850 Bryant Street, Room 101
San Francisco, CA 94103-4603

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 20, 2013 in San Francisco, California.

By: 

Matthew D. Metzger

EXHIBIT A

ENDORSED
FILED
Superior Court of California
County of San Francisco

MAR 11 2013

CLERK OF THE COURT
BY: CARLOS MURILLO
Deputy Clerk

CERTIFIED FOR PUBLICATION
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO
APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,) Appellate No. APP-12-007317
)
Plaintiff/Respondent,) Court No. 11015661
)
vs.)
)
)
)
ANDREW W. NAHINU,) **JUDGMENT ON APPEAL**
)
)
Defendant/Appellant.)
_____)

This matter came before the court on January 11, 2013. After considering the evidence, arguments, and applicable law, the December 19, 2011 judgment is **AFFIRMED**.

I. DISCUSSION*

A. Nahinu was not brought to trial until November 3, 2011

Nahinu argues that he was not brought to trial in satisfaction of his speedy trial rights.

We agree.

* This short form opinion is designed to provide the parties with a brief explanation of the reasons for the disposition, and assumes familiarity with the facts and arguments of the parties.

A defendant is brought to trial within the meaning of Penal Code § 1382 “when a case has been called for trial by a judge who is normally available and ready to try the case to conclusion. The court must have committed its resources to the trial, and the parties must be ready to proceed and a panel of prospective jurors must be summoned and sworn.” (5 Witkin, California Criminal Law 4th (2012) Criminal Trial, § 318, p. 542, citing *Rhinehart v. Superior Court* (1984) 35 Cal.3d 772, 780.)

On November 1, 2011, the court acknowledged that a jury had not been requested or impaneled that day. The court also acknowledged that it had, on October 28, 2011, found good cause to continue trial until only that day. The court noted, however, that trial could not begin until the following day, November 2, and attributed this additional one-day delay of trial to Nahinu’s refusal to stipulate to trial before a specific judge.

Then, with the matter now before Judge Cheng, on November 2, the court acknowledged that a jury had not been impaneled that day either, but stated that one would be impaneled on November 3. The court attributed the additional one-day delay to the parties desire to litigate Nahinu’s motion to suppress. The court also noted that it found “good cause” for the additional one-day delay, but was unclear as to whether that finding was based only on holding the suppression hearing or some additional basis.

Thus, trial was delayed two additional days beyond November 1, which was the day to which the court had found good cause to continue trial on October 28. As such, Nahinu is correct that a jury was not impaneled on November 1, that the jury was not impaneled until November 3, and that he was not “brought to trial” until November 3, 2011. As Nahinu suggests on appeal, each delay likely constituted a further continuance of trial, requiring a finding of good

cause under §§ 1050 and 1382. The record reflects no findings of good cause for these additional delays, however, leading us to conclude Nahinu's speedy trial rights were violated.

B. Nahinu has not shown prejudice from the delay

Nahinu argues that the combined continuances beyond the last day of October 28, 2011 constitute reversible error under *Chapman v. California* (1967) 386 U.S. 18. Specifically, he argues that "there can be no doubt that Appellant suffered irreparable damage. Appellant was denied the right to a speedy trial and was tried in violation of that right." Nahinu does not, however, explain what "irreparable damage" he suffered, concluding only that continuing trial beyond the last day without good cause is sufficient to require reversal.

It is clear that a showing of prejudice is required, at least in felony cases, where the appellant argues denial of his statutory speedy trial right. (*People v. Villanueva* (2011) 196 Cal.App.4th 411; *People v. Johnson* (1980) 26 Cal.3d 557.) A distinction has been made in misdemeanor appeals, however, starting with the holding in *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807, and based on the fact that a misdemeanor that has been dismissed under § 1382 cannot be filed again.

Multiple cases since, however, have disagreed with, but not overruled, *Avila* on this point. These decisions detail their agreed-upon view that the *Avila* court misunderstood the concept of prejudice as it applies in speedy trial claims, substituting the prejudice caused by denial of the motion for the prejudice caused by the delay in being brought to trial. (See *People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1359 ["The *Avila* court's discussion...reveals that it confused the "prejudice" which justifies granting a motion to dismiss with the "prejudice" which results from the denial of that motion"], *People v. Egbert* (1997) 59 Cal.App.4th 503, 514

["appellate review of a statutory speedy trial issue requires consideration of the type of prejudice arising from the delay in prosecution, not the prejudicial effect caused by denial of the motion itself"], and *People v. Aguilar* (1998) 61 Cal.App.4th 615, 621 ["The foundation for the decision in *Avila* rests upon its perceived distinction of a difference in the treatment of the concept of measuring prejudice when deciding a misdemeanor speedy trial motion as compared to a felony motion, an incorrect proposition"].) We believe these holdings indicate that an appellant making a speedy trial claim must show that he was prejudiced by the delay in being brought to trial. As the *Aguilar* court wrote, relying on *Serna v. Superior Court* (1985) 40 Cal.3d 239, 249:

The standard to be used in either misdemeanor or felony prosecutions is discussed in [*Serna*]: "Delays in arrest that are necessary for law enforcement purposes, i.e., those occasioned by inability to locate the accused or witnesses, or to conduct further investigation and gather evidence, do not violate the right to speedy trial unless the prosecution is delayed unreasonably. [Citation.] To determine if the delay is unreasonable and the right to speedy trial violated, 'the prejudicial effect of the delay on [the accused] must be weighed against any justification for the delay.' [Citation.]"

(*People v. Aguilar, supra*, 61 Cal.App.4th at p. 621.)

Nahinu has failed to demonstrate any prejudice from the two-day delay in being brought to trial. Beyond a conclusory statement, he has not articulated how he was prejudiced by the initial continuance to November 1 or the subsequent delays until November 3, 2011. As such, Nahinu has not shown that the trial court's error requires reversal.

//

//

//

//

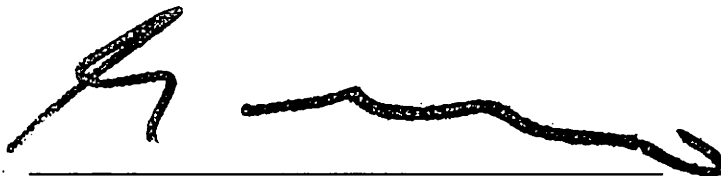
//

II. DISPOSITION

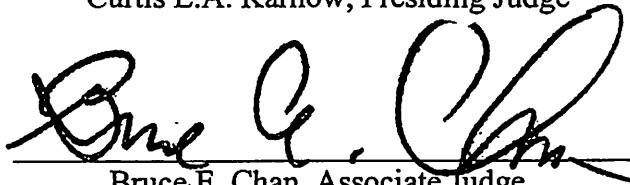
For the foregoing reasons, the trial court's December 19, 2011 judgment is affirmed.

IT IS SO ORDERED.

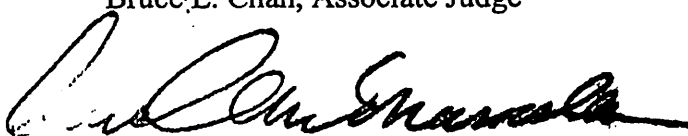
DATE: March 16, 2013



Curtis E.A. Karnow, Presiding Judge



Bruce E. Chan, Associate Judge



Anne-Christine Massullo, Associate Judge

Trial Judge: Honorable Donna Alyson Little

Counsel on Appeal:

Matthew D. Metzger, Esq., for Appellant.

George Gascón, District Attorney of San Francisco, and Christopher R. Ulrich, Assistant District Attorney, for Respondent.

CERTIFICATE OF SERVICE BY MAIL
(Code of Civil Procedure § 1013a(4))

I, Carlos Murillo, deputy clerk of the Superior Court of California, County of San Francisco, certify that I am not a party to this action.

On March 11, 2013, I served the attached **JUDGMENT ON APPEAL (7317)** by placing a copy thereof in a sealed envelope addressed to each of the following:

Louise Ogden (Inter-Office)
Assistant District Attorney
850 Bryant Street
San Francisco, Ca. 94103

Matthew D. Metzger
Belvedere Legal APC
605 Market Street, Suite 505
San Francisco, Ca. 94105

Erica Espinoza (Inter-Office)
Jean Jose
Appeals Clerk
850 Bryant Street
San Francisco, Ca. 94103

Julie Nicholls (Inter-Office)
850 Bryant Street
San Francisco, Ca. 94103

Hon. Donna Little (Inter-Office)
Judge of the Superior Court
850 Bryant Street
San Francisco, Ca. 94103

Hon. Cynthia Ming-Mei Lee(Inter-Office)
Judge of the Superior Court
400 McAllister Street
San Francisco, Ca. 94102

Hon. John Stewart (Inter-Office)
Judge of the Superior Court
850 Bryant Street
San Francisco, Ca. 94103

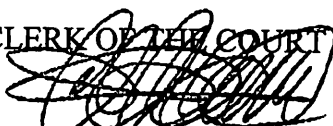
Edward Jessen
Supreme Court of California
Reporter of Decisions
350 McAllister Street
San Francisco, Ca. 94102

Susan Graham
1st District Court of Appeals
350 McAllister Street
San Francisco, Ca. 94102

and, I then placed the sealed envelope(s) in the outgoing mail at 400 McAllister Street, San Francisco, CA 94102, on the date indicated above for collection with the postage thereon fully prepaid, and mailed on that date following standard court practices.

DATE: March 11, 2013

CLERK OF THE COURT



Carlos Murillo, Deputy Clerk