

1 Richard Quigley
2 2860 Porter Street, pmb #12
3 Soquel, CA 95073
4 phone: 831-685-3108
5
6
7

8 **APPELLATE DEPARTMENT OF THE**
9 **SUPERIOR COURT OF CALIFORNIA**
10 **IN AND FOR SANTA CRUZ COUNTY**

11
12 People of the State of California,)
13 Plaintiff/Respondent,)
14 vs.)
15 Richard Quigley,)
16 Defendant/Apellant.)
17 _____)

Case #: AP001144,
AP001145 & AP001146

**ORDER AFTER HEARING
OF APPEAL
AND CERTIFICATION
OF ISSUES
FOR FURTHER APPEAL**

18
19 **ORDER AFTER HEARING OR APPEAL**
20 **AND CERTIFICATION OF ISSUES FOR FURTHER APPEAL**

21 Order after hearing of appeal, and certification of issues for further appeal,
22 are as follows:

23 In full acknowledgement of the Appellant's status as specified in the
24 pleadings in the file, based on the record including Appellant's Final Brief
25 on Appeal; on February 8, 2001, appeal was heard on the above-entitled
26 case, by the Appellate Division of the Superior Court of California, in and
27 for Santa Cruz County, upholding the decisions of the trial court in total,
28 and certifying the case for further appeal, held as follows:

1 **Authority of Traffic Referee.**

2 The court upheld the ruling of the trial court, finding that pursuant to
3 Government Code §72401 — which states “With respect to any infraction,
4 he *may* have the same jurisdiction and exercise the same powers and duties
5 as a judge of the court.” (GC §72401(c) – *emphasis* added.) – that the per-
6 missive “may” establishes subject matter jurisdiction over all infraction
7 matters, even against the will and over the objection of an accused; the
8 provisions of Penal Code §19.7 – Except as otherwise provided by law, *all*
9 *provisions of law relating to misdemeanors shall apply to infractions*
10 *including*, but not limited to, powers of peace officers, *jurisdiction of*
11 *courts*, periods for commencing action and for bringing a case to trial and
12 burden of proof. (Penal Code §19d – *emphasis* added) – notwithstanding.

13 Clearly, the “may” instead of “shall” in CGC §72401 was put there to
14 allow for some exception to what “shall” would otherwise require, but the
15 record will show that neither the Respondent nor the court offered any clue
16 as to what that might be other than a requirement for a stipulation sug-
17 gested by Appellant. It remains appellant’s assertion that if the Legislature
18 had intended that in all infraction cases, a Traffic Referee would have the
19 same jurisdiction and exercise the same powers and duties as a judge of the
20 court, they would have written it that way in the statute.

21 **FIRST QUESTION CERTIFIED FOR APPEAL TO THE SIXTH AP-**
22 **PELLATE COURT OF CALIFORNIA:** Does the word “may” in Gov-
23 ernment Code §72401 mean “may” – as in, under certain circumstances; or
24 “shall” – as in under all circumstances?

25 **SECOND QUESTION CERTIFIED FOR APPEAL TO THE SIXTH**
26 **APPELLATE COURT OF CALIFORNIA:** Does the permissive “may”
27 in Government Code §72401 constitute one of the exceptions “otherwise
28 provided by law” to the mandatory “shall” of Penal Code §19.7 as it relates

1 to jurisdiction of the traffic court, and a Traffic Referee assuming jurisdic-
2 tion over infraction matters, without the same stipulation required in misde-
3 meanor cases; even against the will and over the objection of an accused?
4 (NOTE: Appellant is not even going to ask the obvious question: Does the
5 Appellate Division of the Superior Court of California, in and for Santa
6 Cruz County, really believe that the California Legislature is too stupid to
7 know the difference between “shall” and “may”?)

8 **Sufficiency of Complaint.**

9 Citing Vehicle Code §40513(b), which provides that a Notice to Ap-
10 pear, on a form approved by the California Judicial Council, and a previous
11 ruling by the Santa Cruz County Superior Court stating that an accused is
12 not entitled to a verified complaint, upon request, as provided by
13 §40513(b); the trial court found the Notice to Appear, as a complaint, suffi-
14 cient and overruled defendant’s demur based on the grounds that it was
15 insufficient. (There has never been a contention on the part of the prosecu-
16 tor, or the court, that the complaint (citation) bears the name of the People
17 of the State of California, in whose name this action was brought.)

18 The Appellate court, in upholding the decision of the lower court, held
19 that a Notice to Appear constitutes a valid complaint which establishes juris-
20 diction of the trial court, even though it does not substantially conform to the
21 provisions of Penal Code §§950 & 952, and in spite of the fact that it is not
22 verified by the district attorney, Penal Code §§1004 and 959 notwithstanding.

23 **QUESTION #3 CERTIFIED FOR APPEAL TO THE SIXTH APPEL-**
24 **LATE COURT OF CALIFORNIA:** Do the requirements of Penal Code
25 §1004, and the requirements of Penal Code §959, on demur, apply to a
26 Notice to Appear when it is adopted by the trial court for the purposes of
27 establishing jurisdiction over a criminal matter, under the authority of Ve-
28 hicle Code §40513?

1 **Sufficiency of Complaint.**

2 Defendant demurred to the complaint on the grounds that it brought
3 allegations of violations of Vehicle Code §27803(b) as an infraction com-
4 plaint, rather than as a correctable violation subject to the provisions of
5 Vehicle Code §40303.5.

6 The trial court overruled demur stating that violations of Vehicle
7 Code §27803 do not involve “equipment,” and are therefore not subject to
8 the provisions of Vehicle Code §40303.5 – its placement in Division 12,
9 and the plain language of the statutes, notwithstanding.

10 On appeal, the court ruled that because the provisions of Vehicle
11 Code §40303.5 do apply to alleged violations of Vehicle Code §27803(b);
12 one or more of the disqualifying conditions of Vehicle Code §40610(b)
13 render the violations non-correctable – even though the defendant was
14 never charged with having violated any provisions of 40610(b) in the
15 charging document. The effect of this ruling is that the appellate has been
16 found guilty, on appeal, of violating Vehicle Code §27803, on the basis of
17 an unfounded allegation of violating one or more of the disqualifying con-
18 ditions contained in Vehicle Code §40610(b), without the defendant ever
19 being afforded the opportunity to defend against the §40610(b) allegation
20 (which ever it is), either at trial, or on appeal.

21 **QUESTION #4 CERTIFIED FOR APPEAL TO THE SIXTH APPEL-**
22 **LATE COURT OF CALIFORNIA:** Do the provisions of Vehicle Code
23 §40303.5 apply to alleged violations of Vehicle Code §27803(b)?

24 **QUESTION #5 CERTIFIED FOR APPEAL TO THE SIXTH APPEL-**
25 **LATE COURT OF CALIFORNIA:** Can the provisions of Vehicle Code
26 §40610(b) be applied against a defendant, by either the trial court or on
27 appeal, when the defendant was never formally charged with the violation,
28 and never given the opportunity to defend against the charges?

1 **QUESTION #6 CERTIFIED FOR APPEAL TO THE SIXTH APPEL-**
2 **LATE COURT OF CALIFORNIA:** Does an allegation of violation of
3 Vehicle Code §27803(b) *ipso facto*, under all circumstances, include a find-
4 ing of guilty relative to one or more of the disqualifying conditions of Ve-
5 hicle Code §40610(b) to adherence with the mandates of Vehicle Code
6 §40303.5?

7 **QUESTION #7 CERTIFIED FOR APPEAL TO THE SIXTH APPEL-**
8 **LATE COURT OF CALIFORNIA:** Does an allegation of violation of
9 Vehicle Code §27803(b) *ipso jure*, under all circumstances, include an alle-
10 gation of violation of one or more of the disqualifying conditions of Vehicle
11 Code §40610(b) to adherence with the mandates of Vehicle Code
12 §40303.5?

13 **QUESTION #8 CERTIFIED FOR APPEAL TO THE SIXTH APPEL-**
14 **LATE COURT OF CALIFORNIA:** Does a fact that alleged violations of
15 Vehicle Code §27803(b) includes either an unspecified charge of violation
16 of Vehicle Code §40610(b), or is treated as if a conviction of violation of
17 Vehicle Code §40610(b), deny a defendant of his right to due process as it
18 relates to being informed of all charges alleged against him, and of being
19 given the opportunity to defend against all germane allegations?

20 **Constitutionality of the Statute**

21 The appellate court also sustained the lower courts ruling denying the
22 defendant the opportunity to put on evidence of the vagueness of the hel-
23 met law, as applied to him, in a hearing separate from trial, on the conten-
24 tion that *Buhl, Bianco* and *Easyriders* have found the statute constitutional,
25 as written – without limiting its other rulings to the specific conditions
26 relative to constitutionality, required by *Buhl, Bianco* or *Easyriders*.

27 All these arguments were *not* made in the trial court, or on appeal,
28 because they were preempted by the court's finding that the statute was

1 constitutional, upheld on appeal – without regard to the limitations placed
2 on such an opinion by the higher courts.

3 The process invoked by the trial court, and then on appeal, effectively
4 denied the defendant/appellant any opportunity whatsoever to challenge the
5 constitutionality of Vehicle Code §27803(b) as applied to him – even
6 though one of the cases used by the courts to deny this challenge,
7 *Easyriders*, specifically pointed to the process being applied to the defen-
8 dant in issuing the original citation, as constituting a violation of the
9 defendant’s Fourth Amendment rights. (*Easyriders v. Hannigan*)

10 The Appellate Division of the Superior Court addressed this problem
11 by agreeing to have the matter certified for further appeal to the Sixth Ap-
12 pellate Court. However, in the absence of the evidence the defendant was
13 not allowed to get in the record in the court below, such certification as to
14 the specifics of that issue are far from complete enough for a thorough
15 consideration by the higher court, of the issues involved — the defendant/
16 appellant’s arguments, although outlined in his brief, are not supported by
17 the testimony of witnesses, because the witnesses were excused upon ruling
18 by the trial court that their testimony would not be relevant.

19 **QUESTION #9 CERTIFIED FOR APPEAL TO THE SIXTH APPEL-**
20 **LATE COURT OF CALIFORNIA:** Does due process require that the
21 court permit a defendant to put on a case, separate from trial, as to the con-
22 stitutionality of the statute being applied against the defendant?

23 **QUESTION #10 CERTIFIED FOR APPEAL TO THE SIXTH AP-**
24 **PELLATE COURT OF CALIFORNIA:** Does the opportunity for a de-
25 fendant to challenge the constitutionality of a statute, as applied to him,
26 have to be meaningful?

27 / / /

28 / / /

1 **Fairness of Process Applied to Appellant.**

2 The Appellant thoroughly briefed the issues on appeal, timely. The
3 Respondent did not.

4 The Appellant Division of the Superior Court extended the time for
5 the Respondent to file a Reply Brief over 60 days, in an ex parte motion
6 which was applied for 22 days after the Reply Brief was due (following the
7 first automatic 30 day extension granted by the Court Clerk when the Re-
8 spondent failed to file a Reply Brief by the first deadline) – 22 days after
9 jurisdiction to authorize such an extension was expired.

10 As a proximate result, the assumptions or presumptions of the
11 Appellant’s points and authorities on appeal as being correct and having
12 merit, were never afforded to the Appellant.

13 Beyond that, issues that the Respondent did not address at all were
14 nonetheless decided in favor of the Respondent, at times on grounds rising
15 for the first time on appeal.

16 For example, the Appellate Division of the Superior court held that a
17 Traffic Referee could assume jurisdiction over all infraction matters,
18 against the will and over the objection, when the Respondent never ad-
19 dressed the issue at all. The application of Government Code §72401 as
20 the determining factor of this decision, was not put in front of the Appellant
21 until the hearing on the appeal, as part of the court’s ruling, leaving the
22 Appellant with little opportunity to make his arguments against such an
23 interpretation.

24 Respondent argued in Reply against the issue of whether or not the
25 citation constituted a correctable equipment violation pursuant to Vehicle
26 Code §40303.5 based solely on the contention that “one is either wearing a
27 helmet or not.” The court below ruled that the provisions of §40303.5 did
28 not apply, because motorcycle safety helmets are not equipment (even

1 though they are, by common sense, equipment; and even in spite of the fact
2 that the statute appears in Division 12 of the Vehicle Code, which specifi-
3 cally addresses equipment.) However, the Appellate Court independently
4 *did* apply the provisions of Vehicle Code §40303.5, thereby acknowledging
5 that the lower court had erred in its judgment, instead calling on one of the
6 disqualifying conditions (still unspecified) of Vehicle Code §40610, in
7 upholding the decision of the trial court – in essence overruling the lower
8 court in part, without remanding the case so the defendant could answer the
9 additional allegations of violation of Vehicle Code §40610(b)’s disqualify-
10 ing conditions.

11 Relative to the ultimate rulings of the court, it is not evident that the
12 Appellant was given the benefit that should have been derived from the
13 failure of the Respondent to file a Reply brief timely, or address the issues
14 raised by Appellant on appeal. Nor did the court rule on Appellant’s re-
15 quest that the Reply Brief be stricken as filed untimely, an otherwise in
16 violation of the Rules of Court.

17 **QUESTION #11 CERTIFIED FOR APPEAL TO THE SIXTH AP-**
18 **PELLATE COURT OF CALIFORNIA:** What penalty, if any, is to be
19 imposed on a Respondent in an appeal, who does not timely file a Reply
20 brief, or otherwise address the issues, at all, raised on appeal?

21 **QUESTION #12 CERTIFIED FOR APPEAL TO THE SIXTH AP-**
22 **PELLATE COURT OF CALIFORNIA:** Do ex parte communications
23 between the court and the Respondent, negate the subsequent ruling of the
24 court?

25 **QUESTION #13 CERTIFIED FOR APPEAL TO THE SIXTH AP-**
26 **PELLATE COURT OF CALIFORNIA:** Were the Appellant's right to an
27 equal application of the law, violated by the Respondent being given spe-
28 cial treatment on appeal?

1 **Refusal to provide a record of proceedings.**

2 For whatever reason, the Appellate Division of the Superior Court of
3 California, in and for Santa Cruz County, has established a policy whereby
4 an appellant cannot obtain a record of appellate proceedings, even with
5 payment.

6 The state must allow access by an appealing defendant in a criminal case
7 to a record of sufficient completeness to permit proper consideration of
8 his appeal. This rule applies in both felony and misdemeanor cases, and
9 an indigent defendant in either type prosecution is entitled to have an
10 appropriate record on appeal furnished at the expense of the state. What
11 constitutes a record of sufficient completeness depends on the conten-
12 tions being urged in the appeal. Alternative methods of reporting trial
13 proceedings are permissible if they place before the appellate court an
14 equivalent report of the events at trial from which the appellant’s
15 contentions arise. A statement of facts agreed to by both sides might be
16 an adequate substitute equally as good as a transcript. Where the parties
17 are not in agreement, however, and the settled statement must depend
18 on failing memories or other uncertainties, it will ordinarily not suffice.
19 Thus the state must provide, on the defendant’s request, some method
20 of recording verbatim the testimony and other oral proceedings of a
21 felony or misdemeanor criminal action in its superior, municipal, and
22 justice courts. Anything less will deny a record of sufficient complete-
23 ness and thus deny an adequate appellate review. *In re Armstrong*
(1981, 1st Dist) 126 Cal App 3d 565, 178 Cal Rptr 902.

19 **QUESTION #14 CERTIFIED FOR APPEAL TO THE SIXTH APPEL-**
20 **LATE COURT OF CALIFORNIA:** Does the reasoning laid out above,
21 relative to a verbatim record, from *In re Armstrong, ibid.* apply to an appeal
22 of a criminal action, conducted in the Appellate Division of the Superior
23 Court?

24 SO ORDERED:

CONCUR:

25
26
27 _____
Honorable Judge Atack

25
26
27 _____
Honorable Judge Arthur Danner, III