

FILED

JAN 07 2013

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: S. Friedman, Deputy

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA,
10 COUNTY OF MARIN, TRAFFIC DIVISION

11 PEOPLE OF THE STATE OF CALIFORNIA,

12 Plaintiff,

13 vs.

14 JONATHAN PAUL FRIEMAN,

15 Defendant.
16
17

Case No. CT 12035109

NOTICE OF MOTION AND MOTION TO
DISMISS CITATION FOR VIOLATION OF
DUE PROCESS; MEMORANDUM OF POINTS
AND AUTHORITIES

18
19 TO THE CLERK OF THE COURT AND ALL INTERESTED PARTIES:

20 PLEASE TAKE NOTICE that on January 7, 2013, at 3:00 p.m. or as soon thereafter as the
21 matter may be heard in the above entitled Court, defendant JONATHAN PAUL FRIEMAN shall move
22 that this action be dismissed.

23 The grounds of said motion are that the statute under which defendant is prosecuted is void
24 because it is vague, both on its face and as applied, and that defendant is therefore deprived of his right
25 to due process of law under both the United States and California Constitutions.
26

1 This motion shall be based on this notice, the attached memorandum of points and authorities
2 and on such further evidence and argument as is adduced at the hearing.
3

4
5 DATED: 1/17/13

HUB LAW OFFICES

By

Ford Greene, Esq.

Attorney for Defendant

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

On October 22, 2012, at approximately 7:30 a.m. defendant Jonathan P. Frieman, accompanied by his nonprofit corporation, JoMiJo Foundation, were driving south on Highway 101 in the carpool lane between the Rowland and Ignacio Exits in Novato, California.

The signs that are posted on that section of the freeway state "Carpool is 2 or more persons per vehicle."

Frieman was stopped by a highway patrol officer who advised him that he did not have two persons in the car. Frieman responded that he did have two persons in the car in that he had incorporation papers in his possession, the signs along the freeway notified him that two or more persons were to be in the car during restricted hours, and the Vehicle Code section 470 defined a person both as a "natural person" and a "corporation."

The officer cited Frieman for having violated Vehicle Code section 21655.5 (b).

II. LEGAL ARGUMENT: BECAUSE THE STATUTORY DEFINITION OF "PERSON" IS SUSCEPTIBLE OF A DOUBLE MEANING, ONE THAT IMPOSES LIABILITY FOR THE TAKING OR PROPERTY IN THE FORM OF A SUBSTANTIAL FINE AND ONE THAT DOES NOT, IT IS DOES NOT PROVIDE FAIR NOTICE AS TO THE CONDUCT TO BE AVOIDED

Vehicle Code section 21655.5 (b) states:

The Department of Transportation and local authorities, with respect to highways under their respective jurisdictions, shall place and maintain, or cause to be placed and maintained, signs and other official traffic control devices to designate the exclusive or preferential lanes, to advise motorists of the applicable vehicle occupancy levels, and, except where ramp metering and bypass lanes are regulated with the activation of traffic signals, to advise motorists of the hours of high-occupancy vehicle usage. No person shall drive a vehicle upon those lanes except in conformity with the instructions imparted by the official traffic control devices. A motorcycle, a mass transit vehicle, or a paratransit vehicle that is clearly and identifiably marked on all sides of

1 the vehicle with the name of the paratransit provider may be operated upon those exclusive or
2 preferential use lanes unless specifically prohibited by a traffic control device. [underline added]

3 Vehicle Code section 470 states, "'Person" includes a natural person, firm, copartnership,
4 association, limited liability company, or corporation."

5 The signs that are posted in that vicinity of the freeway state "Carpool is 2 or more persons per
6 vehicle."

7 Before a fine may be imposed, due process protections must be applied. (*King v. Meese* (1987)
8 43 Cal.3d 1217, 1230)

9 Because section 470 unambiguously states that a "person" includes both a "natural person" and a
10 "corporation," and the notice signs on the freeway clearly state that a "carpool is 2 or more persons per
11 vehicle," to prosecute Frieman for violating section 21655.5 (b) based on his traveling in a carpool lane
12 with his corporation violates both state and federal constitutional due process principles.

13 It is undeniably vague for the Vehicle Code to define a "person" to include a "corporation" and
14 then to prosecute a "natural person" for traveling with his corporation in the carpool lane.

15 "The constitutional interest implicated in questions of statutory vagueness is that no person be
16 deprived of 'life, liberty, or property without due process of law,' as assured by both the federal
17 Constitution [citation] and the California Constitution [citation]. Under both Constitutions, due
18 process of law in this context requires two elements: a criminal statute must 'be definite
19 enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a
20 standard for police enforcement and for ascertainment of guilt.' " [Citations.] (*People v.*
21 *Hagedorn, supra*, 127 Cal.App.4th at p. 745, 25 Cal.Rptr.3d 879.) We begin with "'the strong
22 presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly,
23 positively, and unmistakably appears. [Citations.]' " " (*Ibid.*) " " " 'A statute should be
24 sufficiently certain so that a person may know what is prohibited thereby and what may be done
25 without violating its provisions, but it cannot be held void for uncertainty if any reasonable and
26 practical construction can be given to its language.' " [Citation.] [Citation.]" (*Ibid.*, quoting
27 *Williams v. Garcetti* (1993) 5 Cal.4th 561, 567-568, 20 Cal.Rptr.2d 341, 853 P.2d 507.)

28 (*People v. Guamelon* (2012) 205 Cal.App.4th 383, 411-412)

1 At issue here is the plain language of section 470 which states that that a "person" is both a
2 "natural person" and also a "corporation."

3 Under the application of section 21655.5 (b), Frieman is left to guess when a corporation is a
4 person and when it is not.

5 When he relies on section 470's definition that a person is a corporation, how is he to know that
6 the freeway notices pursuant to section 21655.5 (b) mean otherwise?

7 When seeking to enforce section 21655.5 (b), how is the highway patrol able to differentiate
8 between when a person is a natural person and when a person is a corporation?

9 And last, but not least, how is a Court to adjudicate guilt if the definition of a "person" applies in
10 one instance, but does not apply in another? Such ambiguity is simply not fair because it leaves the
11 citizen guessing when his conduct may violate the law and when it does not.

12 "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those
13 who are subject to it what conduct on their part will render them liable to its penalties is a well-
14 recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of
15 law. * * * [Emphasis added.]

16 " * * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The
17 citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain
18 that they will reasonably admit of different constructions. A criminal statute cannot rest upon an
19 uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that
20 the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.
21 *Penal statutes prohibiting the doing of certain things, and providing a punishment for their*
22 *violation, should not admit of such a double meaning that the citizen may act upon the one*
conception of its requirements and the courts upon another." [Emphasis added by California Court
of Appeal; underline by defendant.)

23 (*People v. Clenney* (1958) 165 Cal.App.2d 241, 251-252 citing *Connally v. General Construction Co.*
24 269 U.S. 385, 70 L.Ed. 322, 328-329)

25 Because the vagueness at issue is on its face in that section 470 states that a "corporation" is a
26

1 "person," Frieman is also entitled to the benefit of the rule of lenity.

2 "It is the policy of this state to construe a penal statute as favorably to the defendant as its
3 language and the circumstances of its application may reasonably permit; [because,] just as in the
4 case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to
5 the true interpretation of words or the construction of language used in a statute." " [Citations.]"
6 (*Bradwell v. Superior Court* (2007) 156 Cal.App.4th 265, 270, 67 Cal.Rptr.3d 163 [applying rule
7 of lenity to interpretation of *ambiguous* penal statutes]; *People v. Ramirez* (2010) 184
8 Cal.App.4th 1233, 1239, 109 Cal.Rptr.3d 474 [where penal statute is subject to two
9 interpretations, that favorable to the accused must be adopted].)

10 But the rule is limited. In *People v. Avery* (2002) 27 Cal.4th 49, 115 Cal.Rptr.2d 403, 38 P.3d 1,
11 the court discussed the limitation: " 'The rule [of lenity] applies only if the court can do no more
12 than guess what the legislative body intended; there must be an egregious ambiguity and
13 uncertainty to justify invoking the rule.' " [Citation.] In *People v. Jones* (1988) 46 Cal.3d 585, 599
14 [250 Cal.Rptr. 635, 758 P.2d 1165], we described the rule of lenity in a way fully consistent with
15 [Penal Code] section 4: 'The rule of statutory interpretation that ambiguous penal statutes are
16 construed in favor of defendants is inapplicable unless two reasonable interpretations of the same
17 provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a
18 convincing manner is impracticable.' " (*People v. Avery, supra*, at p.58, 115 Cal.Rptr.2d 403, 38
19 P.3d 1.) The court warned: "[A]lthough true ambiguities are resolved in a defendant's favor, an
20 appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly
21 discern a contrary legislative intent." (*Ibid.*)

22 (*Id.*, at 411.)

23 Because the Vehicle Code clearly defines a person to include a corporation, and because the
24 freeway notice signs clearly define a "carpool is 2 or more persons per vehicle," Frieman clearly has not
25 violated section 21655.5 (b).

26 Section 21655.5 (b) requires that "No person shall drive a vehicle upon those lanes except in
27 conformity with the instructions imparted by the official traffic control devices." The traffic control
28 devices explicitly reference "persons." If contrary to section 470 "persons" do not include corporations,
the freeway notices should say that. Otherwise, it is impossible for a citizen, like Mr. Frieman, to know
that traveling with his corporation in a carpool lane is in violation of the Vehicle Code which
unambiguously states that a corporation is a person.

1 While the Framers of the Constitution "had little trouble distinguishing corporations from human
2 beings," (*Citizens United v. Federal Election Commission* (2010) 588 U.S. 310, 130 S.Ct. 876, 950,
3 Stevens dissent), the clarity of such distinction has become increasingly opaque as corporations attain
4 more rights and powers that have historically been the province of human beings. The instant
5 prosecution adds to such confusion.
6

7 In the case at bar, Frieman has been presented with a statutory double meaning as to what
8 constitutes a person for the purpose of section 21655.5 (b) enforcement. The penalty for choosing the
9 wrong meaning is a \$489.00 fine, the deprivation of property, which triggers due process protection.
10

11 Therefore, as applied here the statute is vague and the case should be dismissed.

12 **III. CONCLUSION**

13 Based on the foregoing, defendant Jonathan Paul Frieman respectfully submits that the Court
14 should grant his motion to dismiss.
15

16
17 DATED: 1/7/13

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By

Ford Greene, Esq.
Attorney for Defendant