Study J-1402 June 16, 2006

First Supplement to Memorandum 2006-21

**Statutes Made Obsolete By Trial Court Restructuring: Appellate and Writ Jurisdiction in a Civil Case**

John Hamilton Scott, an attorney in the Appellate Branch of the Los Angeles County Public Defender's Office, has submitted extensive comments on Memorandum 2006-21 (available from the Commission, www.clrc.ca.gov). Mr. Scott's comments are attached as Exhibit pages 1-6. Mr. Scott has been involved in writ litigation in all of the California courts for over 25 years. The Commission is fortunate to have his input. He raises a number of concerns.

**Factual Error**

First, Mr. Scott points out a factual error in Memorandum 2006-21. Specifically, the memorandum states at page 3 that "[b]efore the 1982 amendment of Section 904.1, if a civil litigant disagreed with a pretrial ruling made by a municipal or justice court, the litigant could seek an extraordinary writ *from the appellate department* of the superior court." (Emphasis added.) A similar statement appears in the Comment to proposed new Section 904.3 (shown on pp. 12-13 of Memorandum 2006-21). Mr. Scott notes that before trial court unification the appellate department of the superior court actually "had *no* extraordinary writ jurisdiction." Exhibit p. 1 (emphasis in original). Rather, "a litigant could seek pretrial review of a municipal or justice court order in the *superior court*, in a single-judge writ court, but *not* in the appellate department." *Id*. (emphasis added).

Mr. Scott is correct about this. The staff regrets the error and is grateful to Mr. Scott for pointing it out. At a minimum, the Comment to proposed new Section 904.3 needs to be revised to reflect that review was "by the superior court," not "by the appellate department of the superior court." Mr. Scott thinks the matter also has other implications.

**Implications of the Historical Approach**

Mr. Scott writes that the "appealability of superior court orders granting or denying writ relief prior to 1982 ... was possible *only* because they were *superior court* orders subject to Code of Civil Procedure section 904.1." *Id.* at 2 (emphasis

in original). Historically, decisions of the appellate department, as contrasted with decisions of the superior court, were not subject to appeal. *Id*. at 3.

Mr. Scott says that because appellate department decisions historically were not appealable, (1) no action is necessary to preclude an appeal from a decision of the appellate division on a writ of mandamus or prohibition, and (2) permitting an appeal from an appellate division decision on a writ of certiorari would represent a change in the appellate jurisdiction of the courts of appeal. As he puts it,

> [t]he only reason why orders in extraordinary writ matters were appealable under prior law was that they were orders of the *superior court*, subject to appeal under Code of Civil Procedure section 904.1. No action would be necessary to *prevent* appeals in mandate and prohibition matters which are now heard in the Appellate Division, since Appellate Division orders are not, and have never been, subject to appeal. The change which has occurred, shifting writ jurisdiction from the superior court to the Appellate Division, has effectively eliminated any right to appeal in such cases.
>
> However, *permitting* appeals in certiorari matters would be a radical change in the jurisdiction of the Court of Appeal over Appellate Division rulings. Such rulings have *never* been appealable. What was held in *Bermudez v. Municipal Court* (1982) 1 Cal. 4th 855, was that Code of Civil Procedure section 904.1 did not affect the appealability of a *superior court* order on a petition for writ of certiorari, which the court found to be an "anomaly." That "anomaly" no longer exists, since the superior court no longer hears certiorari petitions. There appears to be little need to resurrect the anomaly as you propose.

*Id*. (emphasis in original).

Mr. Scott does not say so expressly, but he clearly believes that an appellate division decision on a writ of certiorari in a limited civil case is not a "caus[e] of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995," and thus does not fall within the constitutional mandate (Cal. Const. art. VI, § 11) that "courts of appeal have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995." His comments essentially amount to an argument that the Constitution does not require a decision on a writ of certiorari in a limited civil case to be appealable to the courts of appeal.

At pages 15-16, Memorandum 2006-21 presents a different argument for the same conclusion. Whether either argument would succeed in the courts is unclear.

Mr. Scott's theory would make the nature of the tribunal ruling on a writ petition (appellate department versus superior court judge) determinative of whether a cause is "of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995." The staff thinks it more likely that the substantive nature of a matter (e.g., a petition for a writ of certiorari in what was traditionally a municipal court case) will be considered determinative. Further, the appellate division is not the same as the former appellate department. The appellate division is a constitutional entity, subject to constitutional constraints such as assignment of judges by the Chief Justice for a specified term. Cal. Const. art. VI, § 4. In contrast, the former appellate division was a creature of statute. See *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1, 30-31, 33; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 74-75, 132-35 (1998). The historical treatment of the appellate department does not necessarily dictate the proper current treatment of the appellate division. Perhaps most importantly, under Mr. Scott's theory, trial court unification eliminated the right to appeal from a ruling on a writ of certiorari in a limited civil case. If so, then as unification proceeded on a county-by-county basis, a litigant in a county with a municipal court would have been able to appeal from such a ruling, while a litigant in a county with a unified court would not have been able to appeal. That would be contrary to a key principle of the unification effort, preventing disparity in treatment of similarly situated litigants. *See generally Lempert v. Superior Court*, 112 Cal. App. 4th 1161, 1169, 5 Cal. Rptr. 3d 700 (2003); *General Electric Capital Auto Financial Services, Inc. v. Appellate Division of the Superior Court of Los Angeles County*, 88 Cal. App. 4th 136, 141, 105 Cal. Rptr. 2d 552 (2001); *Revision of Codes*, *supra*, 28 Cal. L. Revision Comm'n Reports at 60.

The staff thus continues to believe there is a significant risk that Article VI, Section 11, of the California Constitution will be interpreted to require appealability of a decision on a petition for a writ of certiorari in a limited civil case. As the court stated in *General Electric Capital*, "[u]nification was to have no impact on appellate jurisdiction." 88 Cal. App. 4th at 145; *see also People v.* Nickerson, 128 Cal. App. 4th 33, __, 26 Cal. Rptr. 3d 563 (2005) ("[T]rial court unification — and the resulting elimination of the municipal court — did not

change the court to which cases were to be appealed."); Revision *of Codes, supra*, 28 Cal. L. Revision Comm'n Reports at 73 (effect of Cal. Const. art. VI, § 11, "is to perpetuate court of appeal jurisdiction as it existed on June 30, 1995, but allow for statutory expansion of court of appeal jurisdiction").

Mr. Scott's comments have, however, caused the staff to rethink proposed new Code of Civil Procedure Section 904.3 (shown on pp. 12-13 of Memorandum 2006-21). As drafted, subdivision (a) of the new provision would state:

> (a) An appeal may be taken from a judgment of the appellate division of a superior court granting or denying a petition for issuance of a writ of certiorari directed to the superior court, or a judge thereof, in a limited civil case. The appeal is to the court of appeal.

Before trial court unification, a superior court decision on a writ of certiorari in a municipal court case was appealable, but there was no statute expressly stating as much. The matter simply fell within the general language of Code of Civil Procedure Section 904.1, permitting an appeal from a judgment of the superior court.

Thus, perhaps it would not be better not to say anything in proposed new Section 904.3 about the appealability of a decision on a writ of certiorari in a limited civil case. If Mr. Scott is correct that a right of appeal no longer exists, that clearly is the best approach. On the other hand, if a right of appeal is constitutionally guaranteed, then the constitutional provision (Cal. Const. art. VI, § 11) is sufficient authority and a statutory provision is unnecessary. It may even be counterproductive to enact such a provision, because the wisdom of allowing an appeal in this context is questionable and the statute would draw attention to the right of appeal.

If the Commission agrees with that assessment, then **proposed new Section 904.3 should be revised to read:**

> **Code Civ. Proc. § 904.3 (added). Appeal from judgment on petition for mandamus or prohibition in limited civil case**
>
> SEC. ____. Section 904.3 is added to the Code of Civil Procedure, to read:
>
> 904.3. An appeal may not be taken from a judgment of the appellate division of a superior court granting or denying a petition for issuance of a writ of mandamus or prohibition directed to the superior court, or a judge thereof, in a limited civil case. An appellate court may, in its discretion, review the judgment upon petition for extraordinary writ.

**Comment.** Section 904.3 continues the substance of former Section 904.1(a)(1)(C), with revisions to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Before 1982, if a litigant disagreed with a prejudgment ruling of a municipal or justice court, the litigant could seek an extraordinary writ from the superior court. A judgment on the writ petition could be appealed to the appropriate court of appeal. See Gilbert v. Municipal Court, 73 Cal. App. 3d 723, 140 Cal. Rptr. 897 (1977); Burrus v. Municipal Court, 36 Cal. App. 3d 233, 111 Cal. Rptr. 539 (1973).

In 1982, the Legislature amended Section 904.1 to preclude an appeal from a superior court judgment on a petition for a writ of mandamus or prohibition directed to a municipal or justice court. See 1982 Cal. Stat. ch. 1198, § 63.2. The language added in 1982, with some modifications, later became former Section 904.1(a)(1)(C).

In a unified court system, cases that used to be adjudicated in the municipal and justice courts are classified as limited civil cases and adjudicated in the superior court. See Section 85 & Comment; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 64-65 (1998). If a litigant disagrees with a prejudgment ruling in a limited civil case, the litigant can seek an extraordinary writ from the appellate division of the superior court. See Cal. Const. art. VI, § 10; see also Sections 1068(b), 1085(b), 1103(b) & Comments.

By precluding an appeal from a judgment of the appellate division on a petition for a writ of mandamus or prohibition directed to the superior court in a limited civil case, Section 904.3 preserves the intent of former Section 904.1(a)(1)(C). Like former Section 904.1(a)(1)(C), Section 904.3 makes clear that although such a judgment of the appellate division cannot be appealed, a litigant may seek review of the judgment by extraordinary writ.

The clause in former Section 904.1(a)(1)(C) permitting an appellate court to review a sanction order upon petition for an extraordinary writ is not continued. That clause was unnecessary and redundant. See Section 904.1(b) (sanction order of $5,000 or less against party or attorney for party may be reviewed on appeal after entry of final judgment in main action, or, at discretion of court of appeal, reviewed upon petition for extraordinary writ); see also Section 904.1(a)(12) (sanction order exceeding $5,000 is appealable).

**Misdemeanor and Infraction Cases**

Mr. Scott notes that Memorandum 2006-21 "discusses the subject of writ review only in the context of a limited civil case." Exhibit p. 2. He points out that "petitions for extraordinary writ relief are governed by the *same* constitutional and statutory provisions, whether the underlying case is a limited civil case or a

misdemeanor or infraction case." *Id*. (emphasis in original). His comments are meant to apply to both types of cases. *Id*.

Mr. Scott is correct that the same constitutional provision (Cal. Const. art. VI, § 10) governs writ jurisdiction in both civil and criminal cases. He is also correct that the key statutory provisions on writ procedure — Code of Civil Procedure Sections 1067 *et seq.* (writ of certiorari), 1084 *et seq*. (writ of mandamus), and 1102 *et seq*. (writ of prohibition) — apply to both civil and criminal cases.

But the provisions governing appeals in civil cases (Code Civ. Proc. §§ 904, 904.1, 904.2) differ from the provisions governing appeals in criminal cases (Penal Code §§ 1235 *et seq*., 1466 *et seq.*). The provisions governing appeals in criminal cases no longer contain any municipal court references. In contrast, Code of Civil Procedure Section 904.1(a)(1)(C) still includes a municipal court reference that needs to be eliminated. That is why Memorandum 2006-21 focuses on limited civil cases and not on misdemeanor and infraction cases.

Mr. Scott's point may be, however, that Section 904.1(a)(1)(C) was meant to apply to both civil and criminal cases. If so, he does not say so directly.

On the one hand, such a construction would be difficult to reconcile with Code of Civil Procedure Section 904, which for many years has stated that "[a]n appeal may be taken in a *civil* action or proceeding as provided in Sections 904.1, 904.2, 904.3, 904.4 and 904.5." (Emphasis added.) On the other hand, perhaps the thought was that since the general provisions governing writ procedure for a criminal case are in the Code of Civil Procedure, the provision governing appealability of a writ decision in a criminal case should also be in the Code of Civil Procedure.

Unless the Commission otherwise directs, **the staff will look into this point further and consider the implications for the reforms suggested in Memorandum 2006-21 and this supplement.** On initial consideration, we do not think there is a problem. Since Section 904.1(a)(1)(C) currently makes no express reference to a criminal case, the lack of such a reference in the proposed new section continuing the substance of Section 904.1(a)(1)(c) — proposed Code Civ. Proc. § 904.3 — should not be problematic even if Section 904.1(a)(1)(C) was meant to apply to a writ of mandamus or prohibition in a misdemeanor or infraction case.

**Contempt Proceedings**

Mr. Scott makes a number of points about contempt proceedings and the discussion of such proceedings in Memorandum 2006-21.

*Different Types of Contempt Proceedings*

First, Mr. Scott points out that there are two main types of contempt proceedings. Exhibit p. 4. A contempt order can be issued under Code of Civil Procedure Section 1209 *et seq.*, or a contempt can be prosecuted as a misdemeanor under Penal Code Section 166.

If contempt is prosecuted as a misdemeanor, the defendant can appeal from a judgment of conviction. *See, e.g.*, *People v. Lombardo*, 50 Cal. App. 3d 849, 123 Cal. Rptr. 755 (1975). Because the judgment is appealable, a writ of certiorari cannot be taken challenging the judgment. *See Bermudez v. Municipal Court*, 1 Cal. 4th 855, 862, 823 P.2d 1210, 4 Cal. Rptr. 2d 609 (1992); 8 B. Witkin, California Procedure *Extraordinary Writs* § 32, at 811 (4th ed. 1997). The problem discussed in Memorandum 2006-21, relating to appealability of a decision on a writ of certiorari in a traditional municipal court case, does not arise in this context.

In contrast, if a contempt order is issued under Code of Civil Procedure Section 1209 *et seq.*, the order is "final and conclusive" and there is no right of appeal. Code Civ. Proc. §§ 904.2, 904.2, 1222. That is true regardless of whether civil contempt (enforcement of an order for the benefit of a private party) or criminal contempt (interference with court procedure) is involved. Consequently, a writ of certiorari is available to challenge the order. Witkin, *supra, Extraordinary Writs* § 33, at 811-12. Historically, if the order was issued by a municipal court, a writ of certiorari could be sought in the superior court, and the decision on the writ could be appealed to the court of appeal. *See Bermudez*, 1 Cal. 4th 855. The issues discussed in Memorandum 2006-21 arise only in this context. *See generally* Comment, *Appellate Review in California with the Extraordinary Writs*, 36 Cal. L. Rev. 94, 96 n. 127 (1948); Broaddus, Note, *Contempt: Scope of Review of Contempt Orders in California*, 37 Cal. L. Rev. 301, 301 n.2 (1949).

The staff was aware of this distinction between different types of contempt proceedings in drafting Memorandum 2006-21. We did not mention it, because that would have complicated the discussion and the suggested reforms make no specific reference to contempt proceedings. Nonetheless, it may be helpful for the Commission to bear the distinction in mind in considering the jurisdictional issues.

*Proper Tribunal for a Writ of Certiorari to Review a Contempt Order*

Mr. Scott makes an interesting point regarding the proper tribunal for a petition for a writ of certiorari challenging a contempt order under Code of Civil Procedure Section 1209 *et seq*. relating to a limited civil case or a misdemeanor or infraction case. Under the Constitution as revised to accommodate trial court unification, "[t]he appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court *in causes subject to its appellate jurisdiction*." Cal. Const. art. VI, § 10 (emphasis added). Mr. Scott says that a contempt order under Code of Civil Procedure Section 1209 *et seq*. is not a cause subject to the appellate jurisdiction of the appellate division. Exhibit p. 4. He explains that such a contempt order is nonappealable and is a separate and distinct proceeding, albeit ancillary to the limited civil case or misdemeanor or infraction case in which it arises. *Id*. He further explains that because the contempt order is not within the appellate jurisdiction of the appellate division, a petition for a writ of certiorari challenging the order is not within the original jurisdiction of the appellate division. *Id*. In his opinion, "[t]he only jurisdiction for reviewing such a superior court order by certiorari, no matter what the ancillary case might be, would be in the Court of Appeal." *Id*.

This is certainly a possible interpretation of the constitutional provision governing the extraordinary writ jurisdiction of the appellate division. It might, however, be overliteral.

Under such an interpretation, there would have been disparity of treatment of similarly situated litigants as unification proceeded on a county-by-county basis. In a county with a municipal court, a petition for a writ of certiorari relating to a contempt order in a municipal court case would have been heard by the superior court. In a county with a unified court, a petition for a writ of certiorari relating to a contempt order in a traditional municipal court case would instead be heard in the court of appeal. The staff questions whether the constitutional provision should be interpreted to have called for such disparate treatment.

Such an interpretation would also amount to an expansion of the appellate jurisdiction of the courts of appeal. It would conflict with sentiments against any such expansion, which were strongly expressed when the Constitution was revised to accommodate trial court unification. *See generally, Trial Court Unification: Constitutional Revision (SCA 3), supra*, at 27-28.

The staff believes a more reasonable interpretation would be that the extraordinary writ jurisdiction of the appellate division includes causes subject to its appellate jurisdiction *and* any ancillary matters such as a contempt order. Among other effects, this approach would avoid an odd consequence of Mr. Scott's interpretation — i.e., the possibility that a litigant contesting a contempt order, by choosing whether to seek a writ of habeas corpus or a writ of certiorari, is also able to choose which court (superior court or court of appeal) will consider the challenge to a contempt order. Exhibit p. 5.

Could the Commission take any steps to encourage the interpretation urged by the staff? If so, should it do so?

One possibility would be to propose a new statute advancing that interpretation. Courts accord a "strong presumption in favor of the Legislature's interpretation of a provision of the Constitution." *See, e.g., Methodist Hosp. of Sacramento v. Saylor*, 5 Cal. 3d 685, 692, 488 P.2d 161, 97 Cal. Rptr. 1 (1971). Enactment of a statute interpreting the constitutional provision on writ jurisdiction might help to prevent confusion regarding the proper tribunal for seeking a writ of certiorari to overturn a contempt order in a limited civil case or a misdemeanor or infraction case. **The staff will develop the idea further if the Commission is interested.**

**Writ Jurisdiction in a Small Claims Case**

At pages 31-36, Memorandum 2006-21 suggests the possibility of adding three new provisions to clarify the use of extraordinary writs with regard to a small claims case. These new provisions would permit a judicial officer of the superior court to issue an extraordinary writ directed to a superior court with respect to a judgment or a prejudgment ruling in a small claims case, so long as the judicial officer issuing the writ is not the officer who heard the case in the small claims division. The suggested new provisions would also make clear that the appellate division of the superior court is authorized to issue an extraordinary writ directed to the superior court with respect to a postjudgment enforcement order in a small claims case. Mr. Scott raises several concerns about this approach.

*Constitutionality*

Mr. Scott sees a "grave problem in [the staff's] proposed solution, which is to provide that a writ petition contesting the order of a superior court judge in a

small claims case would be heard by a superior court judge." Exhibit p. 5. He writes:

> [P]resent law is that a writ of review, mandate, or prohibition can be issued *only* to an inferior tribunal. Your proposal would allow the superior court to issue a writ to the superior court, which is *not* an inferior tribunal. Not only is this contrary to the procedures applicable in all other areas, it is probably unconstitutional. Except in habeas corpus, "one department of the superior court cannot enjoin, restrain, or otherwise interfere with the judicial act of another department of the superior court." (*Ford v. Superior Court* (1968) 188 Cal.App.3d 737, 742.) Thus, if a writ petition in a small claims case is not to be heard in the Appellate Division, it must be heard in the Court of Appeal, not the superior court.

*Id*. at 5-6 (emphasis in original).

The California Supreme Court recently considered a similar constitutional argument in a slightly different context. In *People v. Konow*, 32 Cal. 4th 995, 1001, 88 P.3d 36, 12 Cal. Rptr. 3d 301 (2004), the "Court of Appeal concluded that in ruling on a motion by a defendant to set aside an information under [Penal Code Section 995], the superior court is not authorized to review a prior order of the superior court compelling the magistrate to reinstate the complaint under [Penal Code Section 871.5], and that the superior court would violate the California Constitution were it to do so." Like Mr. Scott, the court of appeal took the position that one superior court judge cannot enjoin, restrain, or otherwise interfere with the judicial act of another superior court judge. *Konow*, 32 Cal. 4th at 1019.

The Supreme Court ruled, however, that a superior court judge who considers an order entered earlier by another superior court judge does not enjoin, restrain, or otherwise interfere with the judicial act of another superior court judge *when the later judge acts under statutory authority*. *Id*. at 1019-21. The Court thus held that, "in ruling on a motion to set aside an information under section 995, the superior court is authorized to review a prior order compelling the magistrate to reinstate the complaint under section 871.5, and may do so without violating the California Constitution." *Id*. at 1021.

If the suggested new provisions on small claims writs were enacted, the situation would be comparable to the one discussed in *Konow*. There would be statutory authority for one superior court judicial officer to review an earlier decision made by another superior court judicial officer. Thus, the suggested new provisions do not appear to be constitutionally flawed. If anything, those

provisions might be helpful or even necessary to ensure that writ review of a small claims judgment may continue to occur in the superior, as before trial court unification.

*Distinction Between Postjudgment Enforcement Order and Judgment or Prejudgment Ruling*

Mr. Scott also questions the suggested distinction between:

> (1) A postjudgment enforcement order in a small claims case, which would be reviewable by writ in the appellate division of the superior court; and
>
> (2) A judgment or prejudgment ruling in a small claims case, which would be reviewable by writ before a superior court judicial officer other than the judicial officer who heard the matter in small claims court.

Exhibit pp. 5-6. As explained at pages 32-33, the suggested distinction is based on *General Electric Capital*, in which the court of appeal concluded that

> (1) "[T]he appellate division of the superior court has appellate and extraordinary writ jurisdiction of postjudgment enforcement orders in small claims actions." 88 Cal. App. 4th at 145. This is consistent with the situation before trial court unification, in which "small claims postjudgment enforcement orders were reviewed by the appellate department of the superior court, not the Courts of Appeal." *Id*.
>
> (2) "The appellate division of the superior court has no appellate jurisdiction over appeals from small claims court *judgments*. That jurisdiction rests with the superior court and is exercised by a trial de novo before a superior court judicial officer, other than the judicial officer who heard the action in small claims court." *Id*. at 144. This too is consistent with the situation before trial court unification, in which a small claims judgment entered in municipal court was reviewed de novo by a superior court judicial officer. *See Revision of Codes, supra,* 28 Cal. L. Revision Comm'n Reports at 75.

Mr. Scott regards the decision in *General Electric Capital* as "absurd" and points out that it does not expressly address the review path for a prejudgment ruling in a small claims case. Exhibit p. 5. He suggests that because the appellate division has appellate jurisdiction of *a piece* of a small claims case (a postjudgment enforcement order), perhaps the Constitution should be interpreted to give the appellate division writ jurisdiction of *the entire* small claims case, or at least everything except the judgment itself. *Id*.

While it might be attractive to place writ review of an entire small claims case in the same tribunal, the staff cautions against adopting the approach suggested by Mr. Scott. In *General Electric Capital*, the court of appeal determined that the appellate division lacks jurisdiction of an appeal from a small claims judgment. Under Article VI, Section 10, of the California Constitution, the appellate division has extraordinary writ jurisdiction only "in causes subject to its appellate jurisdiction." It is thus at questionable at best whether the appellate division has jurisdiction to entertain a writ challenging a judgment in a small claims case. Further, it would not seem to make sense to draw a distinction between writ jurisdiction of a small claims judgment and writ jurisdiction of a prejudgment ruling in a small claims case. Perhaps the staff is mistaken, but that appears to pose the specter of having the same prejudgment ruling potentially subject to two different writ review paths, depending on whether the writ is taken before entry of judgment or is sought in connection with a judgment that has already been entered. The staff thus continues to recommend the three new provisions suggested at pages 33-36 of Memorandum 2006-21.

**Peer Review Problem**

Mr. Scott is "aware of the 'peer review' problem" discussed in Memorandum 2006-21. Exhibit p. 3. Like the staff, he does not think it would justify "a rule of appealability which would apply *only* to an extremely limited class of cases: certiorari." *Id*. (emphasis in original). Rather, he thinks that the problem should be studied and addressed more broadly. He specifically suggests that "the whole area of the review of orders made in small claims cases, including judgments, needs to be reconsidered in light of court consolidation." *Id*. at 6.

The Commission undertook such an effort in its study of Appellate and Writ Review Under Trial Court Unification (Study J-1310). That study is currently inactive. Minutes (Nov. 2003), p. 8. The Commission should take Mr. Scott's comments into consideration if it decides to reactivate that study.

Respectfully submitted,

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June 6, 2006



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Dear Ms. Gaal:

re: Memorandum 2006-21

I was made aware of your Memorandum concerning appellate and writ jurisdiction in the Appellate Division following court consolidation in connection with my work with the Appellate Division Rules Working Group of the Administrative Office of the Courts. I am a deputy public defender for Los Angeles County, and I have been involved in writ litigation in all the courts of California for over 25 years. I think there are several areas in which you might wish to reconsider some of the Memorandum.

The first issue is historical, but the error there leads to other problems in your discussion. You state, in the history of Section 904.1(a)(1)(C), that "Before the 1982 amendment of Section 904.1, if a civil litigant disagreed with a pretrial ruling made by a municipal or justice court, the litigant could seek an extraordinary writ from the appellate department of the superior court." This is incorrect. Prior to court consolidation, and the amendment of article VI, section 10, of the California Constitution to reference the Appellate Division, the appellate department (as then denominated) had no extraordinary writ jurisdiction. Thus both before and after the 1982 amendment, and until 1998, a litigant could seek pretrial review of a municipal or justice court order in the superior court, in a single-judge writ court, but not in the appellate department.

I do not know whether you are familiar with Los Angeles County practice, but the means by which this was accomplished in Los Angeles was that there was a single court, Department 70 of the superior court, which was designated as the court in which all petitions for extraordinary relief arising out of municipal or justice court

proceedings were to be filed. The court was staffed, in rotation, by the judges assigned to the appellate department, but it operated as a single-judge writ court. That court still exists, but only to consider petitions for writ of habeas corpus filed in connection with an appeal, since the Appellate Division does not have habeas corpus jurisdiction.

I also note that your memo discusses the subject of writ review only in the context of a limited civil case. However, petitions for extraordinary writ relief are governed by the same constitutional and statutory provisions, whether the underlying case is a limited civil case or a misdemeanor or infraction case. Consequently, both types of cases are referenced herein.

Your memo is, of course, correct concerning the appealability of superior court orders granting or denying writ relief prior to 1982, which was possible only because they were superior court orders subject to Code of Civil Procedure section 904.1. That statute is applicable only to the superior court, and not to the Appellate Division (or, previously, appellate department) of the superior court. Under current law the Appellate Division has writ jurisdiction, but orders made by the Appellate Division in writ proceedings remain not subject to appeal.

Although the superior court has, of course, retained its jurisdiction in mandate, prohibition, and certiorari matters, as a matter of law that jurisdiction cannot be exercised in matters which should be filed in the Appellate Division, i.e., cases within the appellate jurisdiction of the Appellate Division. In such cases, the order to be issued would be to the superior court, and, statutorily, the superior court can issue such writs only to inferior tribunals. (Code Civ. Proc. §§ 1068, subd. (a); 1085, subd. (a); 1103, subd. (a).) It is only the Appellate Division which can issue orders to the superior court in writ actions arising from limited civil and misdemeanor/infraction cases. (Code Civ. Proc. §§ 1068, subd. (b); 1085, subd. (b); 1103, subd. (b).) (There is a difference in habeas corpus proceedings, in which one superior court judge can issue orders to another superior court judge. See In re Ramirez (2001) 89 Cal.App.4th 1312; Fuller v. Superior Court (2004) 125 Cal. App. 4th 623.)

Consequently, your discussion regarding preventing appeals in mandate and prohibition matters heard in the Appellate Division, and permitting appeals in certiorari matters heard in the Appellate Division, raises issues not heretofore

addressed. This may be traced back to your erroneous belief that under prior law an appellate department ruling in an extraordinary writ matter was subject to appeal. As noted, there was no such appeal because the appellate department did not have writ jurisdiction. The only reason why orders in extraordinary writ matters were appealable under prior law was that they were orders of the superior court, subject to appeal under Code of Civil Procedure section 904.1. No action would be necessary to prevent appeals in mandate and prohibition matters which are now heard in the Appellate Division, since Appellate Division orders are not, and have never been, subject to appeal. The change which has occurred, shifting writ jurisdiction from the superior court to the Appellate Division, has effectively eliminated any right to appeal in such cases.

However, permitting appeals in certiorari matters would be a radical change in the jurisdiction of the Court of Appeal over Appellate Division rulings. Such rulings have never been appealable. What was held in Bermudez v. Municipal Court (1992) 1 Cal.4th 855, was that Code of Civil Procedure section 904.1 did not affect the appealability of a superior court order on a petition for writ of certiorari, which the court found to be an "anomaly." That "anomaly" no longer exists, since the superior court no longer hears certiorari petitions. There appears to be little need to resurrect the anomaly as you propose.

I am aware of the "peer review" problem you discuss. However, this is a problem which exists in all reviews conducted by the Appellate Division, whether in writs or appeals. While this problem is significant, it does not appear to make sense to adopt a rule of appealability which would apply only to an extremely limited class of cases: certiorari. The vast majority of Appellate Division rulings are in appeals, not writs, and those writs which are heard by the Appellate Division are almost all in mandate or prohibition. Petitions for writ of certiorari are extremely rare. The "peer review" problem is one which is certainly deserving of attention, but it does not seem to me to constitute a valid basis for the innovation of permitting appellate review of Appellate Division orders only in certiorari cases.

Indeed, there are many issues which the "peer review" problem raises. Should a litigant have a right to review in a higher court than the superior court? Should a litigant at least have the right to petition for review in the California Supreme Court (which is presently unavailable)? Since there is no municipal court to which decisions can be applicable, are Appellate Division opinions binding on any

court? If not, should they still be subject to publication? These are all issues which deserve thoughtful consideration, but I do not believe that allowing an appeal from the Appellate Division to the Court of Appeal in the rare case of certiorari will do anything to resolve the issues.

Another problem with your discussion is the assumption that jurisdiction to review a contempt order by means of certiorari made in connection with a limited civil or misdemeanor/infraction case lies with the Appellate Division. This concerns contempt orders issued under Code of Civil Procedure section 1209. Contempts prosecuted under Penal Code section 166 are misdemeanor actions and subject to the ususal rules for such cases. An examination of the properties of a section 1209 contempt order indicates that jurisdiction to issue certiorari to review such orders does not lie in the Appellate Division.

The Appellate Division has writ jurisdiction only in cases within its appellate jurisdiction, which broadly means limited civil and misdemeanor/infraction cases. However, an order of contempt is not a limited civil nor misdemeanor/infraction case. It is its own separate action. "[A] contempt proceeding is not a civil action, either at law or in equity, but is a separate proceeding of a criminal nature [citations] notwithstanding the recognized practice to prosecute the contempt in the cause or proceeding out of which it arose, and not as a separate proceeding with a title of its own. [Citations.]" (In re Wales (1957) 153 Cal.App.2d 117, 119, emphasis added.) This rule was cited with approval in Sarracino v. Superior Court (1974) 13 Cal.3d 1, 10, in which the California Supreme Court referred to contempt proceedings as 'distinct proceedings,' albeit ancillary to the same principle action . . . ."

Not only is a contempt proceeding an action which is separate and distinct from the limited civil or misdemeanor/infraction case out of which it arises, but it is also an order which is not appealable–the Appellate Division is specifically deprived of appellate jurisdiction in such cases. (Code Civ. Proc. § 904.2, subd. (a)(2).) For both these reasons, an order of contempt is not made in a case within the appellate jurisdiction of the Appellate Division. Therefore, there does not appear to be any way in which jurisdiction exists in the Appellate Division to review contempt orders in certiorari. The only jurisdiction for reviewing such a superior court order by certiorari, no matter what the ancillary case might be, would be in the Court of Appeal.

This does lead to an unusual situation. Contempt orders involving custody are usually pursued in habeas corpus; those involving fines only are usually contested in certiorari proceedings. However, nothing precludes a certiorari petition when custody is imposed. Pursuant to the Ramirez decision, supra, a petition for writ of habeas corpus contesting any contempt order will ordinarily have to be filed first in the superior court. However, as discussed above, certiorari jurisdiction appears to be exclusively in the Court of Appeal. A litigant thus, by choosing his remedy, can also choose which court will consider the challenge to a contempt order.

Finally, although I am certainly no small claims expert, I think the subject of extraordinary writ review in such cases requires more attention. The discussion is not helped by what I think to be the absurd decision in General Electric, etc. v. Appellate Division (2001) 88 Cal.App.4th 136. In that case the Court of Appeal ordered that a writ action in a postjudgment small claims case had to be heard in the Appellate Division. Of course, if this is true, then a small claims case must be, in some manner, within the appellate jurisdiction of the Appellate Division. The Court of Appeal recognized that the Appellate Division does not have jurisdiction over a small claims court judgment (Code Civ.Proc. § 116.770), but found that this was a limitation only to the judgment itself, and not to any other order.

This must raise the question, then, of what is a "case" subject to the Appellate Division's jurisdiction when the Appellate Division has partial appellate jurisdiction. Your conclusion is that the "case" is that portion of the case which the Appellate Division may review, and thus the Appellate Division has no jurisdiction to hear a writ petition involving any judgment or prejudgment order. However, the conclusion in General Electric was that it was only the judgment itself which was excluded from Appellate Division jurisdiction, thus leaving prejudgment orders within that jurisdiction. Moreover, one could as easily conclude that since the Appellate Division does have some appellate jurisdiction, that it has appellate jurisdiction in the "case," and thus can properly hear any and all extraordinary writ proceedings.

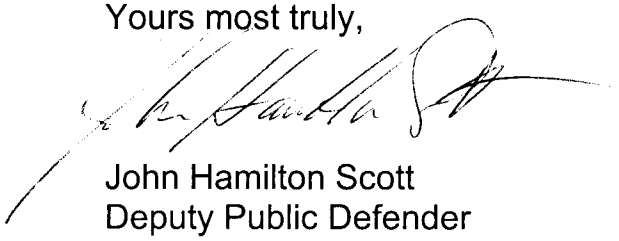
This would solve a grave problem in your proposed solution, which is to provide that a writ petition contesting the order of a superior court judge in a small claims case would be heard by a superior court judge. However, as discussed above, present law is that a writ of review, mandate, or prohibition can be issued only to an inferior tribunal. Your proposal would allow the superior court to issue a

writ to the superior court, which is not an inferior tribunal. Not only is this contrary to the procedures applicable in all other areas, it is probably unconstitutional. Except in habeas corpus, "One department of the superior court cannot enjoin, restrain, or otherwise interfere with the judicial act of another department of the superior court." (Ford v. Superior Court (1986) 188 Cal.App.3d 737, 742.) Thus, if a writ petition in a small claims case is not to be heard in the Appellate Division, it must be heard in the Court of Appeal, not the superior court.

It seems that the whole area of the review of orders made in small claims cases, including judgments, needs to be reconsidered in light of court consolidation. For example, while the form of "appeal" provided by statute made some sense when the judgment was made in a municipal court, and the "appeal" heard in the superior court, it now makes little sense that the "appeal" of the ruling of a superior court judge in a small claims action is actually a hearing de novo before another superior court judge. However, until that occurs, I think that the better idea would be to conclude that since most orders made in a small claims action are within the appellate jurisdiction of the Appellate Division, a small claims action is a "case" within that jurisdiction, and thus all petitions for writ in small claims actions are to be presented to the Appellate Division.

I hope these comments are helpful in your examination of the statutes applicable to extraordinary writ proceedings in California, and if I can be of any assistance to you please do not hesitate to contact me.

Yours most truly,



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