IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Finding of EUGENE FORTE as a Vexatious Litigant.	**Case No. S209663** **(Fifth District Appellate Court Case No. F066514)**

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

ISSUE PRESENTED: Did the Fifth Appellate Court abuse its discretion and deny petitioner due process by not appointing a guardian ad litem to represent Petitioner who was indigent and mentally incompetent at the time of the proceeding against him on February 13th, 2013? (Other issues are listed later in the Petition.)

I. STATEMENT OF THE CASE

On January 25th, 2013, a Writ F066517 was filed by petitioner Eugene Forte in his Merced County Superior Court Criminal case CRL001312, *State vs. Forte,* to stop a mental incompetency trial of petitioner being heard sua sponte on January 28th, 2013. The writ was denied by Justice Stephan Kane of the Fifth Appellate court. Justice Kane also on January 25th, 2013 initiated an original proceeding F066514, Notice of Hearing to Determine Vexatious Litigant and Enter Prefiling Order (Code of Civ. Proc., §391.7) and set the date of hearing for February 13th, 2013 at 2:00PM. Petitioner was informed that he could file evidence, points and authorities on the questions whether the court should declare petitioner a vexatious litigant subject to a prefiling order, provided that such papers were filed on or before February 6th, 2013.

On January 28th, 2013, Judge Cadle of the Merced Superior Court found petitioner an indigent criminal defendant mentally incompetent to stand trial and immediately thereafter dismissed the criminal actions against petitioner (over his objection) at the request of petitioner's sixth public defender, acting Merced County Public Defender Eric Dumars, and without objection by Merced County District Attorney Larry Morse, II.

On January 31st, 2013, Petitioner requested an extension of time to file papers and oppose the Notice of Hearing to Determine Vexatious Litigant and Enter Prefiling Order (Code of Civ. Proc., §391.7) to March 8th, 2013 and objected to the improper notice of a hearing based upon CCP §1003-1008. The request for extension was denied by Justice Stephan Kane but Forte was granted until 12:00PM on February 11th, 2013, to file opposition papers.

On February 11th, 2013, Forte filed Opposition papers and then on the early morning (1:00AM) of February 13th, 2013 submitted an Amended Opposition to the Notice of Hearing to Determine Vexatious Litigant and Enter Prefiling Order (Code of Civ. Proc., §391.7) which was refused to be accepted for filing or read by Justice Stephan Kane on February 13th, 2013 prior to the hearing at 2:00PM.

On February 13th, 2013 at the start of the hearing, Justice Kane ruled on a disqualification request made of him by Forte denying such and told Forte that "the hearing concerns Section 391 (a), not 391 (a) 3". Forte was then told he would be permitted twenty minutes to present oral argument. Forte requested to present supplemental information to the court at the hearing and the request was denied.

On February 20th, 2013 the court issued the subject order attached as Exhibit "A" finding that Forte was a California Vexatious Litigant within the meaning of CCP 391 and henceforth subject to a prefiling order pursuant to CCP Section 391.7. On March 7th, 2013, Forte timely filed a Petition for re-hearing which was denied on March 12th, 2013.

Forte now Petitions for Review the Order before the California Supreme Court.

II. PREFACE – PUBLIC ISSUE AND CONCERN

Of tantamount importance to public issues and concern is the need for this Supreme Court to review if, and why, the California Fifth Appellate Court intentionally concealed their knowledge that on January 28th, 2013, Petitioner Forte was declared to be an indigent mentally incompetent person unable to stand criminal trial because he believed his sixth public defender (Acting Merced County Public Defender Eric Dumars) was in league with Merced County District Attorney Larry Morse II, to undermine Forte's criminal defense and have the misdemeanor criminal cases (that had been pending for four years) dismissed against Forte without trial so the evidence of gross prosecutorial, judicial and defense misconduct would not be revealed.

III. NECESSITY FOR REVIEW

Review by this court is necessary in order to exhaust the petitioner's state remedies in showing that manifest errors of procedures and laws by the Fifth Appellate Court deprived petitioner of his constitutional rights under Articles 6 and 7 of the Humans Rights Act, Forte's rights to Due Process under the Fourteenth Amendment to the United States Constitution, under Article 1, Declaration of Rights of the California Constitution, and Rule 17(c)(2) of the Federal Rules of Civil Procedure wherein the court must appoint a guardian ad litem—or issue another appropriate order to protect an incompetent person who is unrepresented in an action.

The questions raised by this petition are ones that focus upon the public's growing distrust of government, public officials and the judiciary that is echoed in virtually every poll conducted by organizations such as the Pew Research Center for the People & The

Press (Distrust, Discontent, Anger and Partisan Rancor, April 18th, 2010), The New York Times (New Poll Finds a Deep Distrust of Government, October 25th, 2011), Gallup (Trust in Government, April 1st, 2013).

It has become an axiom of public sentiment that public officials, judicial officers and law enforcement officers tend not to hold each other accountable for crimes committed by each other, and will not fairly investigate evidence of such. The horrendous story of Los Angles ex-police officer Christopher Dorner comes to mind as a prime example of the public being left with the impression that the internal investigation/hearings associated with Dorner's termination were unfair, sending him over the edge to commit the indefensible violent acts of murder. Petitioner in no way, as any other citizen, condones the murderous acts of Dorner.

The subject case and questions raised within this review bring into focus how far perhaps even the Fifth Appellate Court will go to conceal the total breakdown of the rule of law by public officials who are retaliating against the petitioner for exposing public corruption for their own self-preservation in his paper the Badger Flats Gazette.

IV. QUESTIONS ON REVIEW

1. **Did the Fifth Appellate Court hold an irregular proceeding and was petitioner denied due process by not being assigned a guardian ad litem to represent his interests?**

Forte asserts the record will overwhelming show the Fifth Appellate Court had knowledge of Forte being found mentally incompetent, and that the answers to the question "why" they concealed their knowledge of it will require reversal of their finding

and the convening of a Federal Grand jury to investigate their actions along with other Merced County public/judicial officials.

There is no question from the opposition, request for extension, and Writ regarding the mental incompetency hearing filed by Forte between January 25th, 2013 through February 13, 2013, that the Fifth Appellate Court had knowledge Forte was found mentally incompetent (over his objection) prior to their holding what would be a trial on February 13th, 2013 (labeled as a hearing) of an original proceeding filed by them on January 25th, 2013. They were reminded of it again during his oral argument in *Forte v. Lichtenegger* before them in F062588 on December 10, 2012, which is attached and lodged with the court on an audio CD (Exhibit "B").

There is no question they knew the details of the competency proceeding in process from the criminal writ filed in CRL001412 with the Fifth Appellate Court by Forte on January 25th, 2013 (and denied literally within 35 minutes that same day), pleading that they intercede and not let what the record will show was to be a sua sponte competency trial heard on January 28th, 2013.

The question which remains is, why would the Fifth Appellate Court Justices, having full knowledge that Forte was an indigent mentally incompetent person, proceed to have him appear without assignment of counsel or a guardian ad litem to argue against a prefiling order under CCP 391.7 at a hearing that was not properly noticed according to CCP 1003-1008?

2. With Petitioner having to start with his credibility two feet in the grave when asking for review after being declared both mentally incompetent and vexatious (by design), is he entitled to ad litem counsel?

If Petitioner still has the attention of the person cursively reviewing this petition to decide if it should be put on the "A" or "B" list….or any list whatsoever for consideration, it is as good a time as any for Forte to address his coming before this court as an indigent mentally incompetent petitioner.

First, Forte submits that he is not by any stretch of the imagination mentally incompetent and should have not been declared such at a bench trial on January 28th, 2013 with never having been examined by a mental health professional. But Judge Cadle did find such and Forte and this court now have to live with it. It seems that Petitioner should be entitled to be assigned an ad litem counsel to draft this petition and represent his interests, just as he should have been provided ad litem counsel to oppose the order he is petitioning for review herein. Forte now does request such.

Further, Forte points out that he is a happily married man of 24 years whose oldest child just graduated Berkeley, whose second oldest child is in his second year at Duke and whose two younger children 17 and 15 are on track to become valedictorians of their high school classes just as their older siblings before them were. None of his children or his wife, personal friends, acquaintances, or even strangers passing in the night believes that Forte is mentally incompetent.

Of course, due to the "labeling/branding" by government officials in this matter, Forte realizes that everything he states or writes must be taken with a great grain of salt.

It is for this reason that Forte is more than confident that if the reviewer of this petition looks at the "purported facts" presented by this alleged mentally incompetent vexatious person, they will find that everything he says is supported by documentation.

It should also be known that Forte is the drafter of this petition and has studied various treatises on formulating a petition for review by individuals such as Mr. Mark Christiansen, former CCAP Staff attorney, and William M. Robinson, SDAF Staff attorney. Forte thanks both for their insight and hopes that his adversaries will not scold them for drafting such articulate documents that have assisted this alleged mentally incompetent vexatious person.

However, due to the legal finding that Forte is mentally incompetent, Forte believes he should be entitled to ad litem counsel.

3. Can the Fifth Appellate Court originate and hear a proceeding to declare Forte a vexatious litigant when they have never been sued by him?

Petitioner submits his being branded both mentally incompetent and vexatious was the Machiavellian plan of his adversaries, which regrettably include in fact at this point the Fifth Appellate Court. The Fifth Appellate Court was not presiding as a neutral uninterested party when they originated the proceeding (out of the blue) to declare Forte a vexatious litigant when they had never been sued by him.

The Fifth Appellate Court, which was not presiding as a neutral third party over a hearing, sought both a prefiling order and a determination that Forte was a vexatious litigant simultaneously. The Fifth Appellate court put themselves in the position of being plaintiff, judge, juror and executioner.

4. Has a violation of Civil Rights occurred against Forte, which appears to be retaliation for his seeking redress of grievances against government actors and exposing public official corruption in his paper The Badger Flats Gazette, and appears to punish Forte as a political dissident for running for Governor of California in 2003 on the platform of exposing public/judicial corruption while being the owner of a website called AttorneyBusters.com?

Forte submits (with tongue partially in cheek) that he may be the only person *"thus far"* in US History to have been declared mentally incompetent to stand criminal trial, to have the charges dismissed without objection from the prosecutor, DA Larry Morse II, and then to be forced to represent himself to oppose being found to be vexatious according to CCP 391 and subjected to a Prefiling Order…all within 17 calendar days.

It is quite much for the purported village idiot to grasp. Petitioner submits that even legal scholars would have a difficult time in justifying the legality of it. Legal scholars would see it to be comparable to the heinous acts out of the darkest days of Russia to silence those that spoke ill of government.

The "thus far" is the important issue of "public concern" which necessitates review by the Supreme Court. If the Fifth Appellate Court can get away with such an obvious miscarriage of justice, no citizen reporter or citizen seeking peaceful redress of grievance against public officials will be safe from attack.

Though the below list seems comprehensive, it still does not include all of the issues and questions presented for Review that, when looked at in detail, reveal the Fifth

Appellate Court violated almost every civil right Forte had to a fair tribunal, hearing, and due process afforded by the Fourteenth Amendment to the United States Constitution, Article 1, Declaration of Rights under the California Constitution, Rule 17(c)(2) of the Federal Rules of Civil Procedure, and his First Amendment Right in retaliation for his seeking redress of grievances against government actors and exposing public official corruption in his paper The Badger Flats Gazette. Forte is being punished as a political dissident for running for Governor of California in 2003 on the platform of exposing public/judicial corruption, and being the owner of a website called AttorneyBusters.com.

A. STATEMENT OF ISSUES/QUESTIONS PRESENTED FOR REVIEW

1. Can the California Fifth Appellate Court:

a. Initiate an original proceeding on their own behalf under CCP 391?

Can they initiate an original proceeding on their own behalf against Petitioner who they knew was an unrepresented mentally incompetent person to request a Prefiling Order under CCP 391.7 without petitioner ever having been declared a vexatious litigant by a defendant according to CCP 391?

b. Not provide a guardian ad litem to a mentally incompetent petitioner?

Can they not provide a guardian ad litem to the petitioner to represent petitioner to oppose the proceedings when they knew the petitioner was an indigent mentally incompetent person and not violate due process afforded the Fourteenth Amendment to the United States Constitution, Article 1, Declaration of Rights

under the California Constitution and Rule 17(c)(2) of the Federal Rules of Civil Procedure?

c. Avoid violating Separation of Powers when they initiate an original proceeding on their own behalf?

Can they initiate an original proceeding on their own behalf against Petitioner without violating Separation of Powers?

On February 20th, 2013 this court essentially issued a permanent injunction against Forte based on Cal. Civ. Proc. Code 391.7 (California's so-called "vexatious litigant statute" -"VLS"). The court of appeals itself is the only other party in the action of F066514 action. On the "Parties and Attorneys" page for this case (on the court of appeals web site) there is listed only one name - that of Forte! - No briefs were filed and no trial court information was listed.

The order labels itself as an "Original Proceeding". However, Black's Law Dictionary (4th ed. - 1968) defines a "proceeding" as being the following: "In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object".

But, in the Forte matter, who made the application to the court? No one. So how does the court have jurisdiction to proceed?

VLS sec. 391.7(a) states that . . . "391.7. (a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order . . ." But the Forte Order was entered in "addition" to . . . nothing. There

was no defendant for whom relief was provided. Where does the court have jurisdiction? - Or have standing? Can a judge take someone he just doesn't like (off the street) and enter a prefiling order against him?

So here, the court applies for relief for itself (to avoid being clogged) - and then it judges its own application! That sounds like an obvious conflict of interest to petitioner Forte. "No man shall be a judge in his own cause." Bonham's Case, 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (1610) cited in Arnett v. Kennedy, et al, 416 U.S. 134 (1974) (the right to an impartial decision maker is required by due process).

It is petitioner's understanding that, except for contempt proceedings (which are in regard to litigants already within the court's jurisdiction), judges cannot and do not initiate lawsuits civil or criminal. Apart from certain gatekeeping (e.g., procedural, jurisdictional, subject matter, administrative, and venue) requirements, the state courts have no control over what particular cases come before them or who can use the courts to resolve disputes. Within their jurisdiction, the courts also have no control over what litigants may file suit and appear before them. Judges do not perform inquisitorial functions. The prosecutors must investigate and prosecute their own criminal cases, and the litigants must investigate and prosecute their own civil cases.

In regard to this Fifth Appellate Court, this is even more relevant: The United States Supreme Court has declared that the "essential criterion of appellate jurisdiction" is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." (Marbury v. Madison (1803) 5 U.S. (1 Cranch) 137, 175 [2 L.Ed. 60, 73].).

It is the job of the Attorney General (Executive branch of government) to apply to the court in regard to someone considered a threat to the court system. In Forte's case, the court is usurping an executive function - something which violates Separation of Powers doctrine.

"Both the California and United States constitutions follow the principle of separation of powers among the legislative, executive and judicial branches of government. This principle precludes one branch from exercising, or interfering with the exercise of, the functions or powers of either of the other branches. (Cal. Const., art. III, § 3 [explicit declaration]; Springer v. Government of the Philippine Islands (1928) 277 U.S. 189, 48 S.Ct. 480, 482 [separation of powers implicit in United States Constitution].)" (Manduley v. Superior Court of San Diego County, 86 Cal.App.4th 1198 (2001).

In addition, the prefiling order under VLS sec. 391.7 is, in fact, a permanent injunction. A permanent injunction must be based on a cause of action. People v. City of Palm Springs, 51 Cal. 2d 38, 331 P.2d 4 (Cal. 10/24/1958). Where is the cause of action here based upon which a permanent injunction should be entered?

In regard to federal injunctions: "It is axiomatic that the judicial power conferred by Art. III may not be exercised unless the plaintiff shows "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).". . .

[But who is the plaintiff here? It is the appellate court itself! Doesn't this violate Separation of Powers doctrine?]

"It is not enough that the conduct of which the plaintiff complains will injure someone. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-167 (1972)."

d. Ruling on request for recusal?

Can they rule upon a request for recusal upon themselves when there is ample evidence presented that Justice Kane was a partner in the law firm that offered Forte $600,000.00 to settle a malicious prosecution case?

e. Fail to address arguments presented or refuse evidence to be filed?

Can they omit and misstate facts, not address argument made by petitioner, and refuse to allow evidence to be filed in determining a vexatious litigant issue pursuant to CCP 391, et seq., in their order to conceal that:

1. Petitioner was not given proper notice of the hearings,
2. Petitioner argued that he was the publisher of the Badger Flats Gazette that exposes public corruption, and that he was improperly declared to be mentally incompetent to stand trial over his objection, and at the request of his sixth assigned public defender, and that the charges were then dismissed to conceal he was being vindictively prosecuted.

B. OTHER ISSUES PRESENTED

The review is important to do away with any question the public could have that Forte, who ran for Governor of California on the platform of exposing public corruption in Monterey County, has been retaliated against by government actors whose efforts in part are to conceal that Secretary of Defense, Mr. Leon Panetta, contacted petitioner in 2003, asking that petitioner not expose the corruption of the Monterey Superior Court bench that found Panetta's son's law firm of Fenton & Keller at the center of trial fixing with Judge Robert O'Farrell, Judge Terrance Duncan, and local attorneys Mr. Larry Lichtenegger, James Cook and Dennis McCarthy.

C. NOT BRANDING THE PURPORTED VILLAGE IDIOT WITHOUT LEGAL REPRESENTATION

In the Federal sense, The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter prefiling orders against vexatious litigations but there is a strict adherence to due process and the opportunity to be heard.

The Fifth Appellate Court violated Forte's constitutional rights afforded due process under the Fourteenth Amendment when they unquestionably knew that Forte was an unrepresented indigent mentally incompetent person when he filed his request for an extension of time to file opposition to their original proceeding on January 31st, 2013, when he filed his opposition to the CCP 391.7 Prefiling Order hearing on February 11th, 2013, when he requested to have filed his Amended Opposition to the finding at 1:00AM February 13th, 2013, and again when he submitted his Petition for re-hearing on March 7th, 2013.

D. WAS THE ORIGINATION OF THE PROCEEDING IN RETALIATION FOR THE FILING OF A CRIMINAL WRIT, OR A PRE-EMPTIVE STRIKE?

The more than troublesome question posed on review is, was the original proceeding for a Prefiling Order under CCP 391.7 originated by the Fifth Appellate Court on January 25th, 2013 signed by Justice Stephan Kane in retaliation for Forte filing and having denied literally within 35 minutes (also signed by Justice Stephan Kane) on January 25th, 2013 the criminal Writ in the case of *The State v. Forte* (CRL001412) beseeching the Fifth Appellate Court to intercede and stop the mental competency trial Forte was clued to on the morning of January 25th, 2013 was going to be heard sua sponte on January 28th, 2013?

The review raises the question, was the originating of the prefiling order hearing by the Fifth Appellate Court an attempt to cut Forte off at his knees by putting the onus of his being not only mentally incompetent but vexatious as well? It seems contradictory to logic that a mentally incompetent person would be capable of having the mental capacity of knowing he was also vexatious.

Does it boil down to a simpler plot by the Fifth Appellate Court to further a plan to circumvent Forte's ability to file a new lawsuit (without being submitted to a prefiling review) against what he believes are the culpable parties comprised of Merced County officials, or amend his complaint which was on hold in the Federal Court case of *Forte v. Merced County* for new causes of action based upon concepts such as obstruction of justice, and a kangaroo court declaring him mentally incompetent?

Essentially, the issuance of the prefiling order would permit then the culpable parties in Merced County to decide if Forte should be able to sue them for what they had done in declaring him mentally incompetent without just cause. [Note: The entire Merced County Bench had disqualified themselves in the criminal case of CRL001412, and Judge Cadle was assigned as a retired judge by the recused presiding Judge McCabe even though Cadle regularly sits for the Merced Superior court on many cases.]

Prefiling orders are an extreme remedy that should rarely be used. *Molski v. Evergreen Dynasty Corp*., 500 F.3d 1047, 1057 (9th Cir. 2007) (internal citations omitted). Before the Federal District court grants a request for a prefiling review order, a court should: (1) give the litigant adequate notice and an opportunity to be heard; (2) compile an adequate record for review; (3) make substantive findings as to the frivolous or harassing nature of the litigant's actions; and (4) narrowly tailor the order "to closely fit the specific vice encountered." Id. (quoting *DeLong v. Hennessey*, 912 F.2d 1144, 1145-48 (9th Cir. 1990)). Pursuant to *Molski* and *DeLong*, before a party can be declared a vexatious litigant, that party must have notice and an opportunity to be heard.

The facts/questions presented for Review indicate that:

a. The Fifth Appellate Court did not give proper notice of the CCP 391.7 Prefiling Order hearing of February 13th, 2013(according to CCP 1003-1008) which denied Forte the fair opportunity to prepare to be heard for the hearing.

b. The Fifth Appellate Court knew at the time of the hearing on February 13th, 2013, that Forte had been declared an indigent mentally incompetent criminal defendant incapable to stand trial on January 28th, 2013.

c. The Fifth Appellate Court omitted from their Opinion and Order numerous valid arguments made by Forte, and stated false facts concerning the notice of the hearing given in *In re Luckett* (1991) 232 Cal.App.3d 107.

d. It appears to be a calculated unconscionable decision by the Fifth Appellate Court not to breathe a word in their order, that they knew at the time of Forte's hearing (and well before) that Forte was an indigent mentally incompetent person entitled to be assigned a guardian ad litem, mandated under due process Articles 6 and 7 of the Humans Rights Act, Forte's rights to Due Process under the Fourteenth Amendment to the United States Constitution, Article 1, Declaration of Rights under the California Constitution, and Rule 17(c)(2) of the Federal Rules of Civil Procedure wherein the court must appoint a guardian ad litem—or issue another appropriate order-- to protect an incompetent person who is unrepresented in an action, in order to gain an unfair advantage over a hearing they had brought for themselves.

II. ARGUMENT

A. The Fifth Appellate court was required to appoint a guardian ad litem to the petitioner to represent petitioner to oppose the proceedings when they knew the petitioner was an indigent mentally incompetent person, and not violate due process afforded the Fourteenth Amendment to the United States Constitution, Article 1, Declaration of Rights under the California Constitution and Rule 17(c)(2) of the Federal Rules of Civil Procedure?

In a recent court case, *POWELL v. SYMONS*, 680 F.3d 301 (3d Cir. 2012) heard by the United States Court of Appeals, the Third Circuit delved into Rule 17(c) (2) of the

Federal Rules of Civil Procedure which provides that: A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

The court in such case issued the opinion that it would be an abuse of discretion for the court not appoint a guardian ad litem even if they only entertained the idea that the person before them in a civil proceeding was mentally incompetent, let alone a finding before them as the Fifth Appellate court had that Forte had been declared mentally incompetent.

The Federal Rules of Civil Procedure require that litigants deemed to have mental health issues have counsel and/or a guardian ad litem. Specifically, Rule 17 provides that "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person." Fed. R. Civ. P.17(c). The Federal Rules of Civil Procedure are not applicable in removal proceedings but have been cited by the BIA as a guide for issues arising in deportation proceedings. *Matter of Taerghodsi*, 16 I&N Dec. 260 (BIA 1977).

This Rule has been applied to denaturalization proceedings. Noting that "'[a] denaturalization suit is not a criminal proceeding'; it is a 'civil case,'" the Sixth Circuit has held that, "Whereas due process protects incompetent criminal defendants by imposing an outright prohibition on trial, it protects incompetent civil parties by requiring

the court to appoint guardians to protect their interests and by judicially ensuring that the guardians protect those interests." *United States v. Mandycz*, 447 F.3d 951, 962 (6th Cir. 2006) (citing *Schneiderman v. United States*, 320 U.S. 118, 160 (1943), and *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

Due process considerations have supported conducting such an inquiry even in the absence of the Rule's mandate. The Second Circuit, noting that "a judgment entered against a mentally incompetent defendant not represented by a guardian or a guardian ad litem may be subject to collateral attack at a later date," has held that, "[a]lthough we do not find that Rule 17(c) requires courts to inquire into the necessity of appointing a guardian ad litem absent verifiable evidence of mental incapacity, we also note that nothing in that rule prevents a district court from exercising its discretion to consider sua sponte the appropriateness of appointing a guardian ad litem for a litigant whose behavior raises a significant question regarding his or her mental competency." *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 203 (2d Cir. 2003).

B. MENTAL COMPETENCY PROCEEDING INITIATED AGAINST FORTE FOR EXERCISING HIS RIGHT TO RECORD A PUBLIC OFFICIAL

Due to the Fifth Appellate Court being keenly aware as to what the lower court was attempting to find Forte mentally incompetent upon in his criminal proceeding, it should have sent off a number of red lights for them to inquire further. Forte, in his writ F066517 filed on January 28th, 2013, stated that the primary reason his public defender Dumars requested a competency proceedings against Forte on September 17th, 2012 was

due to Forte recording (with Dumars' knowledge and consent) all of his meetings and phone calls with Dumars since the inception of Dumars' representation of Forte.

The U.S. Supreme Court recently refused to hear a case on the constitutionality of recording police officers while they do their job. This means the court leaves in place a lower-court ruling, which found placing limits on taping police in public spaces was unconstitutional. The ACLU of Illinois brought the a suit against Cook County State's Attorney Anita Alvarez in 2010, after her office wanted to bring charges against ACLU staff recording audio of "police officers performing their public duties in a public place and speaking loudly enough to be heard by a passerby." The state attorney wanted to bring the charges based on Illinois' eavesdropping law, which has gained much attention lately.

"Two state court judges have ruled that the application of the law to prosecute individuals for recording police in a public place is unconstitutional," the ACLU said in a press release. "And, a Cook County jury last year acquitted a young woman charged with the offense."

Isn't Dumars, as a public defender, nothing more than a public servant with a law degree representing Forte? Dumars then could not seek to have Forte declared mentally incompetent for doing something protected under the First Amendment.

Forte submits that this is "another issue" under the petition for review indicating that the Fifth Appellate Court was on notice. There was evidence of something seriously wrong leading credence to Forte alleging there was gross prosecutorial misconduct at play with his own public defender "going along with it" to the detriment of Forte.

The law is significantly more developed in the criminal context, where federal and state judges have the benefit of both significant legislation and precedent. Much of this law is rooted in constitutional precepts that do not apply to civil, immigration proceedings. Nonetheless, the law governing mental health issues in the criminal context may inform decision-making with respect to a determination of fundamental fairness. According to studies conducted in the 1990s,

It is estimated that between 25,000 and 39,000 competency evaluations are conducted in the United States annually (Hoge et al., 1997; Steadman & Hartstone, 1983). Stated somewhat differently, between 2% and 8% of all felony defendants are referred for competency evaluations (Bonnie, 1992; Golding, 1993; Hoge, Bonnie, Poythress, & Monahan, 1992).

Ronald Roesch, Patricia A. Zapf, Stephen L. Golding & Jennifer L. Skeem, *Defining and Assessing Competency to Stand Trial*, in HANDBOOK OF FORENSIC PSYCHOLOGY 327

(Irving B. Weiner & Allen K. Hess, eds., 2d ed. 1999).

In *Dusky v. United States*, the Supreme Court of the United States, in a per curium opinion, held that,

[I]t is not enough for the district judge to find that "the defendant (is) oriented to time and place and (has) some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him."

362 U.S. 402, 402 (1960) (quoting the government's brief). *See also Cooper v. Oklahoma*, 517 U.S. 348, 354, 368 (1996) (holding that the criminal prosecution "of an incompetent defendant violates due process" and that "[t]he test for competence to stand trial . . . is whether the defendant has the present ability to understand the charges against him and communicate effectively with defense counsel"); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."); *Pate v. Robinson*, 383 U.S. 375, 378, 387 (1966) (noting that "the conviction of an accused person while he is legally incompetent violates due process" (citing *Bishop v. United States*, 350 U.S. 961 (1956)), and that, "[i]n the event a sufficient doubt exists as to his present competence such a hearing must be held").

This standard is essentially codified at 18 U.S.C. § 4241, *et seq.* Under the procedures specified therein:

> [T]he defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

Id. § 4241(a). Should a court find such a hearing is necessary, it is conducted pursuant to 18 U.S.C. § 4247, which the Ninth and Fifth Circuits have held provides that the government has the burden of demonstrating by a preponderance of the evidence that the defendant is competent to stand trial. *See United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1991); *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991); *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987) ("If a meaningful hearing can be held, the state also bears the burden of proof on the issue of competency."). However, "[i]n performing its fact-finding and credibility functions, a district court is free to assign greater weight to the findings of experts produced by the Government than to the opposing opinions of the medical witnesses produced by the defendant." *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1772 (9th Cir. 2002) (quoting *Frank*, 956 F.2d at 875).

A defendant cannot waive the issue of his or her competence to stand trial. *See Odle v. Woodford*, 238 F.3d 1084, 1089 n.5 (9th Cir. 2001) ("A petitioner who may be incompetent cannot 'knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial,' nor should he 'be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp.'" (quoting *Pate*, 383 U.S. at 384, and *Medina v. California*, 505 U.S. 437, 450 (1992))).

Another line of cases has focused on the standard to be applied where potentially incompetent respondents seek to proceed pro se. In *Godinez v. Moran*, 509 U.S. 389 (1993), an appeals court required a defendant seeking to waive his right to counsel to

satisfy a higher mental competency standard than the standard set forth in *Dusky*. The Supreme Court "reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard." *Id*. at 398. This holding was recently overturned in *Indiana v. Edwards*, 128 S.Ct. 2379 (2008), where the Court held that the paramount import of adequate representation requires a higher competency standard to apply in this context. In *Edwards*, the Supreme Court, noting that "[m]ental illness itself is not a unitary concept," *id*. at 2386, held that the "Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves," *id.* at 2388. Thus, as one commentator recently observed, "the Court held that the Constitution supports a higher competency standard for proceeding *pro se* than for proceeding to trial with representation." Anne S. Kimbol, *Competency Does Not Always Mean Competency, According to the Supreme Court*, Health Law Perspectives (Aug. 2008), *available at* http://www.law.uh.edu/healthlaw/perspectives/homepage.asp.

Edwards also illustrates that competency is not a static concept. The case involved a defendant who went through numerous competency hearings before he was found competent to stand trial (but not to represent himself). By analogy to our civil proceedings, the Immigration Judge may wish to inquire of counsel whether issues of competency make this an appropriate case for administrative closure until the respondent

can receive proper psychiatric care, with the aim that he or she is then able to understand the nature of the proceedings.

A third line of cases has focused on the standard for determining the post-conviction competency of death row inmates. Notwithstanding that there was "no suggestion that [the petitioner] was incompetent at the time of his offense, at trial, or at sentencing," determining that the State of Florida's procedure for verifying the competency of a death row prisoner was constitutionally inadequate, in *Ford v. Wainwright*, the Supreme Court held that the petitioner was "denied a fact finding procedure 'adequate to afford a full and fair hearing' on the critical issue" of his competency prior to his execution. 477 U.S. 399, 401, 418 (1986). Specifically, the Court found that "[t]he first deficiency in Florida's procedure lies in its failure to include the prisoner in the truth-seeking process," *id*. at 413; that a "related flaw in the Florida procedure is the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions," *id*. at 415, and that "[p]erhaps the most striking defect in the procedures . . . is the State's placement of the decision wholly within the executive branch," *id.* at 416.

Finally, significant litigation has focused on those due process concerns implicated where inmates are involuntarily transferred to a mental health hospital, *see, e.g.*, *Vitek v. Jones*, 445 U.S. 480 (1980), and/or involuntarily medicated with anti-psychotic drugs, *see, e.g.*, *Washington v. Harper*, 494 U.S. 210 (1990). The Bureau of Prisons has promulgated regulations setting forth administrative procedures for making such

determinations. *See* 28 C.F.R. § 549.43 (1992). Most recently, in *Sell v. United States*, the Court held that:

[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

539 U.S. 166, 179 (2003).

III. REQUEST FOR APPOINTMENT OF COUNSEL/GUARDIAN AD-LITEM

Forte herewith requests assignment of counsel and guardian ad litem to represent and assist him in this Petition for review.

IV. SUMMARY & CONCLUSION

This Petition for Review should be granted based upon first impression because it addresses a number of salient issues of public importance. It hinges upon the fact that Forte was a candidate for Governor of California who ran on the platform of exposing public official/judicial corruption that Forte is the operator of AttorneyBusters.com and is publisher of the Badger Flats Gazette whose by-line is "badgering corrupt public officials".

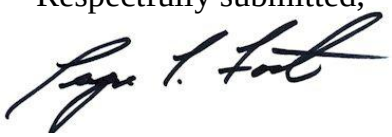
Forte's Badger Flats Gazette has been credited nationally for busting Mayor Tommy Jones of Los Banos with the California Fair Political Practices Commission for breaking disclosure laws and conflict of interest laws in 2010. Forte alleges that he received death threats from the mayor after doing so which were covered up by Merced County DA Larry Morse, and recently on March 13th, 2013 won the civil case against the person he said delivered the threats for Jones.

The question needs to be answered as to if Forte is being retaliated against by public officials, and did it begin with a call from Mr. Leon Panetta of the Panetta Institute in 2003 issuing a veiled threat that Forte would regret trying to expose public corruption by Panetta's son's law firm in Monterey County? Forte submits that this court can listen to the call from Panetta himself if they doubt the call was made.

In closing, Forte admits and apologizes to the justices of the Supreme Court in that some of his filings with the Fifth Appellate Court have been harshly worded, but also suggests they walk a mile in his shoes, and travel the road he has that evidences an all-out assault upon his rights before being overly critical.

Forte is indigent, mentally incompetent and now vexatious according to the Fifth Appellate Court deserving of compassion and review.

Respectfully submitted,



Eugene Forte

Certified word count: I hereby certify under penalty of perjury that this document contains 7, 157 words according to MS Word. Gene Forte

Exhibit “A”

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

FEB 20 2013

By_____
Deputy

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re Finding of

EUGENE FORTE

as a Vexatious Litigant.

F066514

OPINION AND ORDER DECLARING EUGENE FORTE A VEXATIOUS LITIGANT

THE COURT*

ORIGINAL PROCEEDING to determine whether Eugene Forte is a vexatious litigant.

Eugene Forte, in pro. per.

-ooOoo-

* Before Kane, Acting P.J., Poochigian, J. and Detjen, J.

Over the last seven years, Eugene Forte, in propria persona, has filed, prosecuted or maintained at least five appeals or writ petitions that have been finally determined against him. Accordingly, this court concludes on its own motion that Mr. Forte is a vexatious litigant within the meaning of Code of Civil Procedure section 391, subdivision (b)(1),[1] and should be subject to a prefiling order under section 391.7. We hereby issue that prefiling order.

PROCEDURAL HISTORY

On January 25, 2013,[2] this court served its "Notice of Hearing to Determine Vexatious Litigant and Enter Prefiling Order" (Notice) to Mr. Forte. The Notice informed Mr. Forte that this court was considering declaring him a vexatious litigant as defined by section 391, subdivision (b)(1), and prohibiting him from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge or justice of the court where the litigation is proposed to be filed. (§ 391.7.) The Notice invited Mr. Forte to file evidence and argument on or before February 6 on the question of whether this court should declare him a vexatious litigant subject to a prefiling order. The Notice stated the matter was set for oral argument on February 13 at 2:00 p.m. The Notice specifically listed the litigations filed in this court and another Court of Appeal that appeared to qualify Mr. Forte for vexatious litigant treatment.

On January 31, Mr. Forte filed papers requesting that this court continue the hearing to March 15 and the time within which to file opposition to March 8. Included in his papers were arguments in opposition to the motion. On February 4 this court denied

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1 Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2 All references to dates are to 2013 unless otherwise noted.

both requests but granted Mr. Forte until 12:00 noon on Monday, February 11, within which to file his opposition.

On February 11, in the afternoon, Mr. Forte emailed his objection and opposition to this court. This court accepted and reviewed said opposition papers which consisted of 31 pages plus 46 pages of exhibits.[3]

On February 13, Mr. Forte appeared and presented oral argument in opposition to the court's motion.

DISCUSSION

Vexatious Litigant Law

The vexatious litigant statutes were created to curb misuse of the court system by those acting in propria persona who repeatedly file groundless lawsuits or attempt to relitigate issues previously determined against them. (§§ 391-391.7; *Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169 [the statutes protect courts and litigants from such misuse by "persistent and obsessive" pro. per. litigants]; *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 222-223; for an overview of the vexatious litigant statutory scheme see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 1:914 et seq., pp. 216-222 et. seq. or 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 365 et seq., pp. 470-478.)

The statutory definition of "'[v]exatious litigant'" includes a litigant who: "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations ... that have been (i) finally determined adversely to the person ...." (§ 391, subd. (b)(1).) "'Litigation'" is defined as "any civil

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[3] Between 1:00 and 2:00 a.m. on the date of the February 13 hearing, Mr. Forte emailed to the clerk's office a document entitled "Amended Objection and Opposition ...," consisting of 167 pages. This document was submitted past the February 11 deadline for filing opposition. Mr. Forte did not seek court permission to file this document. Thus, while the clerk's office has "received" it, the document will not be deemed "filed." It has not and will not be read or considered by this court.

action or proceeding, commenced, maintained or pending in any state or federal court." (*Id.*, subd. (a).) "'Litigation'" for purposes of vexatious litigant requirements "includes proceedings initiated in the Courts of Appeal by notice of appeal or by writ petitions other than habeas corpus or other criminal matters." (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1219.)

The prefiling order provision curbs misuse by prohibiting a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge or justice of the court where the litigation is proposed to be filed. (§ 391.7, subd. (a); *In re R.H.* (2009) 170 Cal.App.4th 678, 690-692; *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 59-61 [rejecting constitutional challenges to § 391.7].)

A court on its own motion may declare a party a vexatious litigant and enter a prefiling order. (§ 391.7, subd. (a).) There need not be pending litigation for a court to move to declare an individual a vexatious litigant and subject him to a prefiling order. (*Bravo v. Ismaj*, *supra*, 99 Cal.App.4th at pp. 222-223.) For example, in *In re Luckett* (1991) 232 Cal.App.3d 107, the Court of Appeal issued a written order notifying Luckett that it appeared he was a vexatious litigant based on his having filed 43 different appeals and writs as well as unmeritorious motions, pleadings, and other papers. The order notified Luckett the court was considering entering a prefiling order declaring him a vexatious litigant and prohibiting him from filing any new litigation without first obtaining leave of the presiding judge. (*Id.* at p. 108.) The order directed the clerk to set the matter for hearing on a given date, advised Luckett of his right to appear before the court at that time and present argument and evidence on whether he was a vexatious litigant and whether the court should enter the proposed prefiling order. (*Ibid.*) Luckett submitted written materials disputing whether he met the criteria to be declared a vexatious litigant but did not appear at the scheduled hearing. (*Id.* at p. 109.) The court considered Luckett's written arguments, found him to be a vexatious litigant within the

meaning of the statute, and entered a prefiling order barring him from filing new litigation without the permission of the presiding judge. (*Id.* at p. 110.)

In *In re Whitaker* (1992) 6 Cal.App.4th 54, 57, the Court of Appeal declared Whitaker a vexatious litigant after ordering him to show cause why a prefiling order should not be granted. The matter was set for hearing, Whitaker appeared and presented arguments, and the court issued a written opinion declaring him a vexatious litigant subject to a prefiling order.

In *Andrisani v. Hoodack* (1992) 9 Cal.App.4th 279, 281, Andrisani had been found to be a vexatious litigant on two occasions in published Court of Appeal decisions. When Andrisani filed an application for a waiver of court fees and costs in anticipation of filing a new appeal, the court issued an order requesting the parties to file memoranda addressing whether the court should issue a prefiling order that would prohibit him from filing new litigation. (*Id.* at pp. 280-281.) Based on those responses, the court found no sound reason to preclude it from issuing a prefiling order and did so. (*Id.* at p. 281.)

Notice and Hearing Requirements

Although the statute is silent on the subject, an individual may not be declared a vexatious litigant without a noticed motion and hearing, which includes the right to oral argument and presentation of evidence. (*Bravo v. Ismaj*, *supra*, 99 Cal. App. 4th at p. 225.) However, failure to hold oral argument or a hearing does not necessarily constitute prejudicial error. If the litigant is afforded a full and fair opportunity to litigate the issues in the documents he or she files, the error may be harmless. (*Id.* at pp. 225-227.)

Application to Mr. Forte

Mr. Forte meets the definition of a vexatious litigant provided in section 391, subdivision (b)(1), in that in the immediately preceding seven-year period he has commenced, prosecuted, or maintained in propria persona at least five litigations that have been finally determined adversely to him. The following is a list of those five cases:

1. In H029909, *Forte v. O'Farrell*, Mr. Forte appealed from the trial court's judgment of dismissal. The Sixth District Court of Appeal affirmed the judgment of the lower court on August 30, 2007.
2. In F055229, *Forte v. Albov*, Mr. Forte appealed from the trial court's order granting summary judgment based on the expiration of the one-year statute of limitations. This court affirmed the judgment of the lower court on November 3, 2008.
3. In F058335, *Forte v. Tetra Tech, Inc.*, Mr. Forte filed a petition for writ of mandate, challenging an order on a disqualification motion under section 170.6. This court denied Mr. Forte's petition by order filed August 28, 2009.[4]
4. In F057677, *Forte v. Lichtenegger*, Mr. Forte appealed from the trial court's judgment of dismissal. This court affirmed the judgment of the lower court on February 3, 2011.
5. In F062558, *Forte v. Lichtenegger*, Mr. Forte appealed from the trial court's judgment granting nonsuit. This court affirmed the judgment of the lower court on November 1, 2012.

Forte's Contentions

In his opposition papers and at oral argument, Mr. Forte claimed that the vexatious litigant statutes are unconstitutional. We disagree. A number of appellate courts have addressed and rejected the same contentions. (See, e.g., *Fink v. Shemtov*, *supra*, 180

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[4] Appeals and writ petitions filed in the Courts of Appeal are litigations for purposes of the vexatious litigant statute. (*McColm v. Westwood Park Assn.*, *supra*, 62 Cal.App.4th at p. 1219.) The denial of a writ of mandate petition filed in the Court of Appeal challenging the outcome of trial court proceedings to disqualify a judge under section 170.3 or section 170.6 is a final determination thereof for purposes of the vexatious litigant statute. (*Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1172-1173.)

Cal.App.4th at p. 1170; *In re R.H.*, *supra*, 170 Cal.App.4th at p. 704 ["Neither section 391.7 nor our prefiling order violates due process because R.H. as the vexatious litigant has the right to seek the permission of the presiding judge or justice to file future litigation."]; *Bravo v. Ismaj*, *supra*, 99 Cal.App.4th at p. 222; *Wolfgram v. Wells Fargo Bank*, *supra*, 53 Cal.App.4th at pp. 60-61; *Wolfe v. George* (9th Cir. 2007) 486 F.3d 1120, 1124-1127.) We agree with the reasoning and conclusions of these cases, and therefore we reject Mr. Forte's challenge to the constitutionality of the statutes.

Additionally, Mr. Forte argues that the five litigations listed above were not shown to be frivolous or completely lacking in merit, and therefore it would be improper to brand him as a vexatious litigant.[5] His opposition argues: "The above litigations, though lost, do not example any vexatious nature by Forte ...." Mr. Forte's argument confuses section 391, subdivision (b)(1) with section 391, subdivision (b)(3). The proceedings before us are to determine whether Mr. Forte is a vexatious litigant as defined under section 391, subdivision (b)(1). Subdivision (b)(1) requires that the five litigations were "finally determined adversely to the person," not that they be found to be frivolous.

Finally, Mr. Forte argues we should have granted his request for a continuance. We disagree. Mr. Forte was provided reasonable notice and was given a fair and adequate opportunity to respond; he did, in fact, file extensive opposition and presented oral argument at the hearing.

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[5] At oral argument, Mr. Forte was under the impression that losing an appeal from a final judgment should not count in the tally under section 391, subdivision (b)(1) if, earlier in the same case, he successfully challenged on appeal an erroneous ruling by the trial court. Mr. Forte is mistaken, since it is the ultimate loss that matters. To the extent his argument is an effort to show a lack of frivolousness, we reiterate that section 391, subdivision (b)(1), merely requires the five litigations were finally determined adversely to the person.

DISPOSITION

This court finds that Eugene Forte is a vexatious litigant within the meaning of section 391. Henceforth, pursuant to section 391.7, Eugene Forte may not file "any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." (§ 391.7, subd. (a).) Disobedience of this order may be punished as a contempt of court. (*Ibid.*) "The presiding justice or presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3." (*Id.*, subd. (b).)

The clerk of this court is directed to provide a copy of this opinion and order to the Judicial Council. (§ 391.7, subd. (f).)

Petition for Review

In re Forte

F066514

Exhibit “B”

CD lodged to be lodged with the court.