B251854

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MARY CUMMINS,
Plaintiff and Appellant,

v.

AMANDA LOLLAR,
Defendant and Appellee

Appeal from Order of Los Angeles Superior Court
Case No. BS143169, Honorable Carol Boas Goodson

APPELLANT'S PETITION FOR REHEARING

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: B251854

Case Name: Cummins v Lollar

Please check the applicable box:

☒ There are NO interested entities or parties to list in this certificate pursuant to California Rules of Court rule 8.208(d).

Interested entities or parties are listed below:

None

Mary Cummins
Signature of Party Submitting Form

Dated: March 8, 2015

Printed Name: Mary Cummins

Party Represented: Petitioner

IDENTITY OF PARTIES AND COUNSEL

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TABLE OF CONTENTS	Page

Case Law INDEX OF AUTHORITIES	Pg
Fickett v. Rauch 31 Cal.2d 110	28
Lombardi v. Citizens Nat. Trust & Sav. Bank (1951) 137 Cal App.2d 206, 209, [289 P.2d 8231]	10
People v. Bradford (2007) 154 Cal.App.4th 1390	10
People v. Rogers supra, 39 Ca1.4th at p. 857	9
People v. Sturm (2006) 37 Cal.4th 1218, 1237	13
Pratt v. Pratt (1903) 141 Cal. 247, 252.	9, 13
Constitutional Provisions	
U.S. Const., 14th Amend., §1	19
U.S. Const., 5th Amend.	8, 9
U.S. Const., 6th Amend.	9
U.S. Const., 8th Amend.	9, 13
Statutes and Rules	
California Rules of Court, Rule 1.150 (d)	4
California Rules of Court 1.150 (c)	6
Civil Code Civil Procedure § 170.6	2
Civil Code Civil Procedure § 527.6	1
Civil Code Civil Procedure § 657	12

INTRODUCTION

Plaintiff, Petitioner, Appellant Mary Cummins ("Cummins") appeals from a judgment of the Los Angeles Superior Court Department 75 denying her petition under Code of Civil Procedure § 527.6 for an injunction preventing harassment against her by Defendant, Respondent, Appellee Amanda Lollar ("Lollar"). Cummins further appeals the award of attorney fees to Appellee. Cummins contends that during the hearings conducted on her § 527.6 petition the trial Judge Carol Boas Goodson ("Judge Goodson") exhibited extreme bias against Cummins in violation of her constitutional right to due process and right to a fair hearing. Cummins further argues that the trial judge engaged in acts of judicial misconduct and committed errors of law that deprived Cummins of a fair trial.

The Appeals court released their opinion on this case February 23, 2015 affirming the Superior Court's order. The reason for affirming the order was that the Appeals Court must rely on the written record of the court if there is no transcript which says otherwise. In this case there was no transcript through no fault of the Appellant but the Court.

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ARGUMENT

This case presents important issues regarding rights to a fair trial after the State fired the court reporters without notifying parties or providing other means for a transcript making all of these cases unappealable.

Appellant makes this petition for rehearing because the opinion misstates the record and the lack of a court reporter, transcript, adequate record is one of the fundamental errors which caused the lack of a fair trial.

I. Opinion misstates the record

A. (Opinion, pg 2) The opinion does not include the fact that there was a hearing on June 14, 2013. A second Judge reading the same application extended the TRO to the next hearing, July 1, 2013. Two separate experienced Judges read the application and both agreed that a restraining order was warranted based on the application alone.

B. (Opinion, pg 2) The opinion misstated when Appellant filed the first 170.6 affidavit of prejudice. It was filed along with the motion for reconsideration August 15, 2013. It was never heard or ruled upon as per the court order and record. Appellant filed a second 170.6 September 5, 2013. September 6, 2013 the Court ruled that the September 5, 2013 affidavit of prejudice was untimely. The Court never ruled on the first 170.6 This is clear error.

C. (Opinion, pg 5) The opinion misstated Appellant's contention in regard to presenting "new or different facts, circumstances, or law." Appellant came to court with phone records, audio to show that Appellee had threatened to kill Appellant on the phone. Judge Goodson again **did not allow** Appellant to show evidence (Appeal, pg 7, last paragraph) "Judge Goodson again did not allow petitioner to show any old or new evidence, give oral testimony or argue her case (2 CR 260:14-19). Judge ruled against Cummins at the hearing stating "The court finds that the petitioner did not provide new or different facts, circumstances, or law to substantiate a reversal of this court's order" (1 CR 67)." The order does not reflect the court proceedings. Appellant tried to record the hearing but was denied her right to record which is error and shows bias. Appellant included the few seconds of audio in the court file, record.

II. Rehearing is Required Because The Lack Of A Transcript Was Not The Fault of Appellant But The Court Which Is Further Proof Of Denial Of A Fair Trial

Appellant was not notified that all the court reporters had been fired before the July 1, 2013 hearing. The court, court coordinator and Judge did not notify anyone in the courtroom or before about the lack of a court reporter before the hearing. Even if Appellant had been notified that there

were no court reporter, Appellant pro se who is not an attorney was not notified than an appeal is impossible without the transcript if the Clerk does not write honest and accurate minutes. Appellant could never have foreseen that the Judge and Clerk would not write accurate notes in the order. Appellant was not notified of her rights as per the court order. This alone is proof that Appellant did not receive a fair trial. Appellant was deprived of a transcript by the court which is needed for appeal.

At the subsequent hearing to reconsider the denial Appellant gave notice in her motion that Appellant would record the hearing which is Appellant's right as per California Rules of Court, Rule 1.150 (d)[1]. Appellant began to record the hearing with a small "inconspicuous personal recording device" of "high quality" when Judge Goodson told her she was not allowed to record. On the audio recording Appellant clearly states she must record as there are no court reporter[2]. The Judge may only not allow recording if it interferes with the courtroom which this device did not California Rules of Court, Rule 1.150 (d). Then the Judge ordered the bailiff to take the recording device from Appellant preventing Appellant from having any audio notes to recreate a transcript or settled statement for this Court.

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[1] http://www.lacourt.org/newsmedia/uploads/14201410894656CRC1.1502014.pdf

[2] http://www.marycummins.com/judge_carol_boas_goodson.mp3

After realizing there was no transcript Appellant who took very accurate written notes in the July 1, 2013 included exact quotes from the Judge in her motion to reconsider. The Judge and Appellee received copies of all filings in this appeal. Neither the Judge nor the Appellee ever stated that what was written in the motion by Appellant was not accurate. They did not contradict the facts as stated by Appellant even though they were presented with the opportunity to do so. In fact in Respondent's reply to Petitioner's motion to reconsider Respondent stated "Judge (sic) Goodman denied the RRO on the face of the application itself." Respondent admits that Judge Goodson prejudged the case by denying the RRO on the face of the application itself. If Appellant had falsely quoted what the Judge said in Appellant's written document, the Judge would have struck the document and sanctioned Appellant for perjury and fraud. That didn't happen and is not included in the court order.

All LA courtrooms had and still have "Electronic Recording Monitors." This courtroom was able to record the hearings in question as per the stamp on the top right corner of the July 1, 2013 order. This courtroom records the hearings if a pro tem Judge is over seeing the hearing that day as per court Deputy M Lewis. The Judge may also record the proceedings

for any other purpose as per California Rules of Court 1.150 (c). The Judge and/or Court Clerk could have turned on the recording device knowing that there is no court reporter and no order can be appealed without one if the Clerk does not take honest and accurate minutes. The Court failed to do so. "The judiciary is responsible for ensuring the fair and equal administration of justice."

While sufficient evidence was put forth in Appellant's motions in this case the Appeals Court ruled based on the court order alone as there was no transcript. If the Court will rule on only what is written in the court order, they must also rule based on what is not included in the court order. The court order did not state "Parties were advised there was no court reporter so there will be no transcript. Parties were advised of the necessity of a transcript for appeal. Parties waived their rights to a court reporter and transcript. Parties were advised that they could record the hearing. Parties waived the right to record the hearing." As this was not in the court order, Appellant did not waive her rights to a court reporter, transcript or audio.

Appellant is borrowing a friend's iPhone. It has the ability to record the hearing in high quality. This phone was used to make the recording at the second hearing. It would have been sufficient to record the entire

proceedings. If Appellant was notified of her rights at the first hearing, Appellant could have instantly recorded the hearing on the iPhone. Appellant could have recorded the first hearing had Appellant been advised of her rights. Just because Appellant didn't have a court reporter does not mean she waived her right to one. If Appellant had been notified of the issues with a court reporter, Appellant could have requested a continuance of two weeks to try to find a solution to the problem.

Even if Appellant were advised that there was no court reporter at the July 1, 2013 hearing, Appellant would not have been able to afford one. Appellant would have had to find a pro bono reporter. There is currently no system in place to provide court reporters for indigent pro se civil parties. Appellant has claimed indigency in waiving the fees on appeal. To deprive an indigent pro se person of a court reporter would deprive that person of a fair trial.

While the court order falsely states that Appellant "gave testimony," the court order does not state that "Appellant showed evidence and exhibits to the court." Appellant was not allowed to show evidence to the court even though she came prepared with audio, video and written evidence of

harassment, assault and police reports from crimes committed by Appellee. Not being able to show any evidence deprived Appellant of a fair trial.

Appellant had no other way to provide the Appeals court with a record of the hearings. If Appellant had requested a settled statement, Appellee's attorney Dean Rocco would have refused. Rocco was not returning Appellant's emails and still doesn't. If Appellant had been allowed to record, Appellant would have been able to make a transcript for review and agreement with the recording. The hearings were extremely short and Appellee did not even show for any of them.

All people have the right to a fair trial especially if they will be deprived of life, liberty or property without due process of law (Fifth Amendment of the United States Constitution). In this case Appellant was ordered to pay Appellee $6,350 within 90 days. Appellant could be seen in violation of this court order and could be incarcerated until she pays the amount. As Appellant is indigent this could be for an indefinite time. In this case Appellees stated in appeal documents they will spend $144,000 to write their 14 page reply to this appeal. Appellant could then possibly be owing at least $150,000 just for trying to get a stay away, don't communicate order against Appellee who has been harassing, stalking, threatening to kill,

committing crimes against Appellant for the past four years as evidenced by multiple police reports. "The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand." (Pratt v. Pratt (1903) 141 Cal. 247, 252.)

The lack of record of the trial court's hearings is a fundamental error which deprived Appellant of her constitutional rights to due process as well as other statutory rights. Appellant argues that the failure to record these proceedings resulted in the lack of an adequate record on appeal, and therefore violated the appellant's due process and trial rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, as well as the applicable statutes. There is no legal support for the proposition that a defendant forfeits an issue on appeal by failing to anticipate that an officer of the court will overstep his or her authority in a way that results in profound violations of the defendant's constitutional rights.

Defendant is entitled to a record sufficient to permit adequate and effective appellate review. (RB 91, citing People v. Rogers, supra, 39 Ca1.4th at p. 857, and Griffin v. Illinois (1956) 351 U.S. 12, 16-20.) The lack of a transcript is not adequate to permit effective review.

In (People vs Bradford (2007) 154 Cal.App.4th 1390) part of a trial was not recorded. Appellant showed that "no record sufficient to permit meaningful review could be prepared, for reasons attributable to the State." "At a minimum the lack of a record compounds the lack of confidence society can have in the integrity of the proceedings. A record is critical to ensure adequate appellate review and a fair process." The judgment was reversed.

The trial judge has a "duty to see that a miscarriage of justice does not occur through inadvertence." Lombardi v. Citizens Nat. Trust & Sav. Bank (1951) 137 Cal App.2d 206, 209, [289 P.2d 8231].

In (Fickett v. Rauch , 31 Cal.2d 110[3]) the court reporter died before a transcript could be made from reporter's notes. Appellant requested a new trial as there was no transcript and was denied. Appellant appealed and Appeals court ruled that the motion should have been granted because "Appellant was denied a fair trial due to lack of a transcript" and reversed the order.

In this case Appellant had included exactly what was said, a statement of the evidence, in the July 1, 2013 hearing in her motion to reconsider

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[3] http://scocal.stanford.edu/opinion/fickett-v-rauch-26026

which is part of the court record. Appellant tried to create a satisfactory record. Appellee has never stated that Appellant's record was not accurate. Appellee never objected to Appellant's statement of the evidence in court documents. This clearly shows reversible error affirmatively appearing on the face of the record - which, in this situation includes reversible error due to the lack of an adequate record.

The lack of court reporters in California court rooms "undermines the administration of justice in court proceedings in California,"[4] (Exhibit 1) as stated by Director, Chief Counsel Victoria B. Henley of the official California Commission on Judicial Performance in her letter to Governor Brown. Henley stated February 2012 when the court reporter layoffs first started that half of her investigations had no transcript. Most Judges Henley investigated were reported for inappropriate behavior in the court room. Henley goes on to tell the Governor "action should be taken to ensure when the court reporters are released another means of creating a record is provided." Henley continues "the use of private court reporters hired by one party in litigation raises numerous concerns, including the questionable admissibility of the transcript as an official court record and access to

[4] https://judicialcouncilwatcher.files.wordpress.com/2012/03/letter-2-29-12-1.pdf

justice for those with limited financial means." Even if Appellant found a pro bono reporter who recorded the transcript, that transcript might not be admissible as it would not be the "official" court record but just one party's recording. The State's own oversight commission stated the lack of court reporters "**undermines the administration of justice in court proceedings.**" In this case Appellant was never even notified there was no court reporter as evidenced by the lack of inclusion of this in the court order.

The "lack of an adequate record" is itself an error; It was the court's responsibility to make that record or to inform Appellant that there was no court reporter so there will be no transcript and no possibility to appeal, and it failed to do so. Appellant never gave up her right to a court reporter, transcript or ability to appeal as a statement to this effect is not included in the court order. This is a fundamental error.

CONCLUSION

Taken individually, it is possible that none of the above acts of judicial misconduct or the error in excluding evidence would constitute an error that "materially affect[ed] the substantial rights" of Cummins such that a new trial was necessary (§ 657). However, "the cumulative effect of the trial

judge's conduct requires reversal." (People v. Sturm, supra, 37 Cal.4th at p. 1243.) "The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand." (Pratt v. Pratt (1903) 141 Cal. 247, 252.)

The order should be reversed and the matter remanded to the superior court for a new trial before a different judge with a court reporter or audio recording. In the alternative the Appellant requests leave to file a motion for judicial notice of the application for restraining order and a statement of the evidence and proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1)

Pursuant to California Rule of Court 8.504(d), I certify that the text of this brief is 2,709 words which is fewer than the allowed 8,400 words. In so certifying, I am relying on the word count of Apple iPages, the computer program used to prepare this brief.

DATED: March 8, 2015

Respectfully submitted,

By Mary Cummins

Mary Cummins
Appellant in Pro Per

PROOF OF SERVICE BY MAIL
(FRCivP 5 (b)) or
(CCP 1013a, 2015.5) or
(FRAP 25 (d))

I am Plaintiff in pro per whose address is 645 W. 9th St. #110-140, Los Angeles, California 90015-1640. I am over the age of eighteen years. I further declare that on the date hereof I served a copy of:

APPELLANT'S PETITION FOR REHEARING

on the following parties by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at 645 W. 9th St. #110-140, Los Angeles, CA 90015-1640.

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Los Angeles, CA 90012

Second District Court of Appeals
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Supreme Court of California
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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed this day, March 8, 2015, at Los Angeles, California.

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February 29, 2012

Honorable Edmund G. Brown, Jr.
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Honorable Darrell Steinberg
Senate President pro Tem
State Capitol, Room 205
Sacramento, CA 95814-4900

Honorable Tani Cantil-Sakauye
Chief Justice of California
Supreme Court
350 McAllister Street
San Francisco, CA 94102

Honorable John A. Pérez
Speaker of the Assembly
State Capitol
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Sacramento, CA 94249-0046

Dear Governor Brown, Chief Justice Cantil-Sakauye, Senator Steinberg, and Speaker Pérez:

This letter is written at the request of the Commission on Judicial Performance to alert you to a problem that the commission believes impairs its ability to fulfill its mandate to protect the public, and undermines the administration of justice in court proceedings in California. It involves decreased reporting of court proceedings in California's courts of record. The commission takes no position on how the problem should be fixed but urges, for the public's protection, that the problem be addressed and resolved.

In summary:

- Some courts are cutting costs by terminating court reporters. Nothing requires courts to replace court reporters with another means of recording proceedings. As a result, there are fewer official records of court proceedings in California's courts of record.

- The Commission, which is responsible for investigating and disciplining misconduct by state court judges, is held to a clear and convincing evidence standard in its cases. Without any record of the proceedings, it can be difficult, if not impossible, to establish what occurred in the courtroom, where 95% of the complaints to the Commission each

year originate. In December 2011, there were transcripts or recordings in only half of the Commission's pending investigations that involve courtroom conduct.

- California, ordinarily a leader in the administration of justice, is falling behind other states in which the public is protected and the administration of justice is preserved by recording *all* court proceedings.

- At a minimum, action should be taken to ensure that when court reporters are released, another means of creating an official record is provided.

These points are addressed in greater detail in the remainder of this letter.

As California's budget crisis has persisted and trial court funding was reduced, trial courts individually began to impose measures to achieve cost reductions, including termination of the services of court reporters. According to news reports, in October, 15 court reporters were laid off in Alameda County; in November, San Francisco Superior Court laid off 22. The website of the California Official Court Reporters Association states that Santa Cruz County Superior Court pulled reporters from civil courts in 2010, and, as of October 2011, reporters were being laid off in Napa and Marin, and warnings of imminent layoffs were being made in Los Angeles and Ventura.[1] In some counties, litigants in civil proceedings and their counsel are being told to bring their own reporters if they want a record of the proceedings.[2] If the trend continues towards decreased reliance upon court reporters without the substitution of other means of creating an official record, court reporters will be used only in the proceedings required by law to be reported, and there will be no official record – electronic or otherwise—of any other court proceedings.

As you are all aware, the Commission on Judicial Performance is the body constitutionally charged with responsibility to investigate and discipline misconduct by state court judges. Each year, 95 percent of the complaints submitted to the commission concern conduct by judges in the course of performing judicial duties in court proceedings. Because the standard of proof in commission disciplinary proceedings is clear and convincing evidence, it can be very difficult, if not impossible, to establish what was said and what occurred in the courtroom without any record of the proceedings. Over the past decade, there were six cases in which judges were removed from office for conduct involving courtroom proceedings. In five of those cases, there were transcripts or recordings of the proceedings that substantiated the charges of misconduct. Similarly, over the same period, in six of the seven cases in which judges were censured for

[1] http://cocra.org/
[2] (Foster, *Laid-Off Reporters Organize, Get Backing of Judges and Bar*, S.F. Recorder (Oct. 5, 2011).)

conduct that involved courtroom proceedings, there were transcripts or recordings of the proceedings.

A review of pending investigations involving court proceedings at the commission's December 2011 meeting revealed, however, that transcripts or recordings exist in only half of the cases, which means that it may not be possible to establish with certainty whether or not misconduct occurred in half of the cases. The absence of transcripts or recordings thus impedes the commission in determining that misconduct has occurred and in protecting the public from abusive judges. Equally important, the absence of a record of court proceedings prevents the swift and complete exoneration of judges by the commission when appropriate.[3] In addition to causing anxiety for judges, prolonged investigations also increase their defense costs. For the commission – which has operated for the past several years with a 25 percent reduction in staffing – other investigations are inevitably delayed, when extensive interviews must be conducted because a transcript or recording is not available. This situation will become more extreme if fewer court proceedings are reported.

Ironically, California, ordinarily a leader in the administration of justice, is falling behind other states in which the public is protected and the administration of justice is preserved by recording *all* court proceedings. Some might argue that this is easier to accomplish in smaller states, yet in New York, a jurisdiction with twice as many judges as California, all proceedings are reported in courts of record and, since 2008, even the 1,200 courts that are not courts of record have been mandated to audio record all proceedings, on equipment furnished by the Office of Court Administration. That office also provides remote transcription assistance when necessary to make an actual transcript. Similarly, Utah passed legislation in 2010 requiring all justice, county and municipal courts to audio record proceedings starting July 1, 2012. Proceedings in all Utah state courts – the Supreme Court, Court of Appeals, district courts and juvenile courts – are already reported. Court reporters and video reporting in those courts are being phased out in favor of audio reporting. Other states in which all court proceedings are recorded include Alaska, Maryland, Massachusetts, Missouri, New Hampshire and New Jersey. Where audio recordings are easily made available, our counterparts in other jurisdictions report that they are able to quickly obtain and review the recordings and make a prompt determination whether an investigation is necessary, thereby avoiding unnecessary and prolonged proceedings.

In California, we are aware of nothing that requires courts to replace court reporters with any other means of reporting proceedings, unless a record is prescribed by law. We are also aware of nothing that requires consistency in how trial courts address this problem.

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[3] Commissions in states that have reporting of all proceedings, particularly audio proceedings, generally bear out our own experience that a record of court proceedings exonerates the judge more often than not.

The effect on commission proceedings is obviously not the only negative impact of decreased reporting of court proceedings in California. The elimination of reporting of court proceedings is likely to increase the workload of the trial courts and further delay both trial court and appellate proceedings. Without any official record, the trial courts will be required to produce settled statements in those cases in which appeals are taken, a time-consuming and imprecise process at best. The use of private court reporters hired by one party in litigation raises numerous concerns, including the questionable admissibility of the transcript as an official court record and access to justice for those with limited financial means. The public's confidence in the courts is also undermined. For instance, in a complaint submitted to the commission in October 2011, the complainant wrote: "Also, I feel there's misconduct also of the court due to, I was just informed when I was trying to get a recording of that hearing [], that there was no recording nor transcripts! Well how handy."

This problem should be addressed before the administration of justice in California is further compromised, in the commission's cases as well as in judicial proceedings. At a minimum, action should be taken to ensure that when court reporters are released, another means of creating an official record is provided.

The commission appreciates your consideration of its concerns and will provide any additional information that might be helpful to you.

Very truly yours,

Victoria B. Henley

Victoria B. Henley
Director-Chief Counsel

VBH:ng

cc: Joseph L. Dunn, Executive Director
State Bar of California