IN THE
SUPREME COURT OF FLORIDA

LUIS TORRES JIMENEZ,

Petitioner,

vs.

CASE NO. SC16-1976
L.T. Case Nos. 3D15-2303
3D15-2271

STATE OF FLORIDA, by and through the CITY OF AVENTURA, and the FLORIDA ATTORNEY GENERAL, PAMELA JO BONDI,

Respondents.
_____/

MOTION TO RECALL MANDATE AND OTHER RELIEF

Petitioner hereby files this Motion, and as grounds states:

1. In the Third District, Petitioner filed a Motion to Stay or Withhold Issuance of the Mandate Pending Review in the Florida Supreme Court which Motion was denied.

2. At the time of the filing of that Motion, Petitioner had not filed a brief on jurisdiction which is based upon: i) certification of great public importance of three questions; and ii) conflict with *City of Hollywood v. Arem*, 154 So. 3d 359 (Fla. 4th DCA 2014), *rev. denied*, 168 So. 3d 224 (Fla. 2015).

3. As authority for this Motion to Recall Mandate, Petitioner relies upon *State v. Roberts*, 661 So. 2d 821 (Fla. 1995), wherein this Court granted a motion

to recall the mandate. *See also Redland Estates, Inc. v Dirico*, 163 So. 3d 512 (Fla. 2015), motion to recall mandate and other relief denied where Court, in same order, refused to accept jurisdiction.

4. Generally, where a party seeks to have a mandate withheld, a stay preserving the status quo is appropriate upon a showing of irreparable harm from the denial of a stay, and a likelihood of success. District courts have cited to four factors: 1) the likelihood that the Supreme Court will accept jurisdiction; 2) the likelihood of success on the merits; 3) the likelihood of harm if the stay is not granted; and 4) whether the harm would be irreparable. *State v. Miyasato*, 805 So. 2d 818, 825-26 (Fla. 2d DCA 2001).

In *Miyasato*, the court stated that similar elements would apply to consider withdrawing a mandate that had been issued. Petitioner will address these elements.

I. <u>This Court Has Two Equally Solid Bases on Which to Accept Jurisdiction</u>.

The Third District certified three questions of great public importance to this Court. In addition, Petitioner is seeking this Court's jurisdiction on conflict grounds, the brief on which is being filed on November 15, 2016 in accordance with this Court's order. Petitioner adopts all arguments contained therein on this issue. In light of the significant numbers of motorists and local governments

affected by the issues raised in this case, either discretionary ground for review provides this Court with compelling reasons to accept jurisdiction.

II. Petitioner Has a Reasonable Likelihood of Success, and the Harm to Respondent is Minimal.

Florida courts have concluded that the chance of success is a less significant consideration where there is a lack of harm to the other party. *See Miyasato*, 805 So. 2d at 826 (noting the difficulty to gauge likelihood of success, while finding that even a "small" chance of success was sufficient if the harm to the other side was minimal, and also finding a chance of success where the party seeking relief has arguments to present in good faith). The only potential harm to the Respondent and other municipalities due to a Stay Order would be a delay in receiving money assuming the citations are eventually deemed proper by this Court. As more fully discussed below, without a Stay Order, motorists, however, would have to pay fines and have their driving records tarnished, with no guaranty of getting their money back or clearing up the matter with their insurance companies, if this Court reverses this case. The minimal harm to the Respondents of maintaining a stay lessens Petitioner's need for showing likelihood of success on the merits.

Nonetheless, assuming this Court accepts jurisdiction over Petitioner's case, Petitioner intends to present good faith arguments for which he is likely to prevail. At the outset, this Court declined jurisdiction to review *City of Hollywood v. Arem*,

168 So. 3d 224 (Fla. 2015), creating at least an inference that *Arem* was correctly decided. Although Petitioner is not obligated to submit the equivalent of an initial brief on the merits, he will summarize the good faith argument he expects to present to this Court.

Petitioner intends to show, in part, that the Third District's failure to conduct an adequate analysis of the key statutory provision at issue in this case, § 316.0083(1)(a), Fla. Stat., which permits a municipality to outsource "a review of information of a traffic infraction detector." The Third District read this phrase loosely, permitting the City to outsource a "review" that entailed more than just the private agent viewing the camera images to make sure they are clear and usable, but instead allowing the agent to consider a set of contractual standards the City selected for what constitutes a red-light infraction within its jurisdiction and making preliminary assessments against those standards as to whether the images depict a violation. In contrast, the Fourth District concluded in *Arem* that § 316.0083 had to be strictly construed against municipal authority, based upon statements by this Court in *Masone v. City of Aventura*, 147 So. 2d 492 (Fla. 2014):

> As the supreme court recognized in *Masone v. City of Aventura*, 147 So. 3d 492, 2014 Fla. LEXIS 1885, 39 Fla. L. Weekly S406 (Fla. June 12, 2014), the history of Florida traffic law supports the conclusion that these statutes should be <u>strictly construed</u> to effectuate their purpose, and any attempt by a local government to circumvent chapter 316 either by ordinance or contract is invalid <u>unless expressly authorized by the legislature</u>.

Arem, 154 So. 3d at 363 (emphasis added).

The Fourth District, having considered principles of statutory construction, also recognized the need to strictly construe the provisions of Chapter 316 to achieve its uniformity purpose:

> As a result of concerns about interference by municipalities in enacting and enforcing state traffic laws, the legislature adopted two sections which expressly limit the power of a municipality to legislate over traffic matters — sections 316.002 and 316.007, Florida Statutes — so as "to create a uniform, statewide traffic control system." *State v. Smith*, 584 So. 2d 145, 147 (Fla. 2d DCA 1991). From that, chapter 316 was titled as the "Florida Uniform Traffic Control Law." § 316.001, Fla. Stat. (2013) (italics added). The legislature created chapter 316 to address two abuses arising from the municipal court system of handling traffic infractions — the "history of inconsistency of penalties imposed" by the municipal courts and the inconsistency of traffic laws in municipalities across the state. *Miller v. City of Indian Harbour Beach*, 453 So. 2d 107, 111-12 (Fla. 5th DCA 1984).

Arem, 154 So. 3d at 362-63 (emphasis added).

At issue in both *Arem* and the instant case was the key phrase from § 316.0083(1)(a):

> This paragraph does not prohibit <u>a review of information from a traffic infraction detector</u> by an authorized employee or agent of the department, a county, or a municipality before issuance of the traffic citation by the traffic infraction enforcement officer.

Consistent with this Court and the Fourth District's understanding that Chapter 316, and this specific provision therein, must be strictly construed, Petitioner has a significant chance of succeeding on his argument that the Legislature's

authorization of an agent to review information from a traffic infraction detector does not expressly authorize that agent to make decisions as to which images to forward to the police for prosecution when such decisions entail analysis and interpretation akin to finding the existence or lack of probable cause.

In contrast, the Third District's opinion in this case is devoid of substantial statutory construction or analysis, rendering its contrary conclusion inadequately supported and unlikely to prevail before this Court.

Petitioner anticipates that once this Court performs the appropriate statutory analysis and construction of § 316.0083(1)(a), it will reach the results consistent with the principles announced in its decision in *Masone* and which guided the Fourth District in reaching its conclusions in *Arem*. For this reason, alone, Petitioner has a likelihood of success necessary to obtain a stay in light of the weighing of the potential harms to each side.

III. Tens of Thousands of Motorists will Suffer Severe Prejudice and Irreparable Harm Absent a Stay.

If the mandate is not recalled, thousands of traffic court trials, and protective appeals during the pendency of this case, all may be completely unnecessary, and this potential burden on the judicial system can be avoided by extending the stay until this case has been resolved. In addition, not withdrawing the mandate without stay relief creates an immediate harm to thousands of individual motorists, who will face the real cost of being forced to undertake the time and expense of

trials and appeals. Each defendant adjudicated guilty would have to file his or her own separate appeal to the Third District, then to the Florida Supreme Court, incurring filing fees and attorney's fees.

Any contention that the trial judge, without a recall of the mandate, could simply order the return of all the money paid by defendants that were adjudicated guilty, and enter orders to correct their driving records is incorrect. The only parties to the instant action are Petitioner Jimenez and Respondent City of Aventura. Thus, while other motorists may bring their own individual actions, or join together in a class, should this Court quash the Third District's decision, and seek a refund of fines paid for unlawfully issued red-light tickets, the trial judge would be without authority to order a refund of monies to parties not presently before his court.

IV. The Questions Certified to be of Great Public Importance Would Lose Their Great Importance Unless the Mandate is Recalled.

The Third District certified the questions it did to be of great public importance, at least in part, if not completely, because the questions affect tens of thousands of people statewide, all similarly situated, and all depending upon the resolution of these questions.

If the mandate is not recalled, the door will open for the many municipalities in Miami-Dade County and statewide to gear up and proceed with the litigation in

the thousands of red light camera cases that would be affected by this Court's ultimate determination of the certified questions of great public importance.

If they do so, the county courts will be bound to determine all of those cases without the benefit of the resolution, by this Court, of the questions certified to be of great public importance.

The resolution of these cases will require a significant expenditure of resources by the private citizen drivers, the local governments, and the county court system. Additionally, while this case is pending review before the Florida Supreme Court many, if not all, of the unsuccessful parties in the hundreds of thousands of red light camera cases are likely to seek appellate review of those decisions, adding to the burden on the court system.

Should the Florida Supreme Court, however, exercise its discretionary review and determine that the local government's red-light-camera traffic programs are unlawful, all of that effort will have been for naught. Indeed, if the Florida Supreme Court were to quash this Court's decision in whole or in part, the task of undoing the convictions and payments of unlawfully issued fines that occur in the meantime might be monumental. All of that potential waste could be avoided through the expediency of a recall of the mandate pending the Florida Supreme Court's review.

Withdrawal of the mandate will not bring harm to any of the local governments, Jimenez, or the many other drivers with pending cases. Instead, it will merely maintain the status quo for all concerned parties. *See Perez v. Perez*, 769 So. 2d 389, 391 n.4 (Fla. 3d DCA 1999) (purpose of issuing a stay under Rule 9.310 is to "preserv[e] the status quo during an appellate proceeding"). Considering that it was the City which originally requested the stay pending the resolution of the appellate proceedings, it would seem to have already conceded that legal certainty outweighs any benefit associated with prosecuting its red light camera tickets. The jurisdictional briefing schedule under the appellate rules is tight, such that the parties will learn in short order whether the Florida Supreme Court has decided to address the certified questions of great public importance and/or resolve the *Jimenez* and *Arem* conflict. If so, all parties will benefit and not be unduly harmed by awaiting the final resolution of these questions governing the lawfulness of the local governments' red light camera traffic programs.

V. There Has Been, and Continues to be, an Overriding Need to Preserve the Status Quo.

As detailed in the companion Motion for Review of Stay Order, there has been an overriding concern to preserve the status quo – to allow the appellate courts to rule before making decisions affecting the rights of thousands and thousands of people. This overriding concern to preserve the status quo remains intact, and is not lessened in any fashion, because the matter is now being

considered for review by the Court. If anything, the overriding concern to preserve the status quo is heightened, because the Court's decision will be the final word.

CONCLUSION

The Court has the authority to recall the mandate, and the Court should exercise that authority to do so for all of the reasons advanced herein.

WHEREFORE, Petitioner requests the entry of an Order directing the Third District to recall the mandate issues, to grant any related stay relief, along with any other relief deemed just and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-portal and/or e-mail service on this 15th day of November, 2016 upon: **Edward G. Guedes**, Weiss Serota Helfman Cole & Boniske, P.L., 2525 Ponce de Leon Blvd., Suite 700, Coral Gables, Florida 33134, eguedes@wsh-law.com, szavala@wsh-law.com; **Samuel I. Zeskind**, Weiss Serota Helfman Cole & Boniske, P.L., 2525 Ponce de Leon Blvd., Suite 700, Coral Gables, Florida 33134, szeskind@wsh-law.com, ozuniga@wsh-law.com; **Robert Dietz**, Office of the Attorney General, 501 E. Kennedy Blvd., Suite 1100, Tampa, Florida 33134, Robert.Dietz@myfloridalegal.com.

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