IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC16-1976

LUIS TORRES JIMENEZ,

Petitioner,

v.

STATE OF FLORIDA, etc.,

Respondents.

RESPONDENT, CITY OF AVENTURA'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR REHEARING

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

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Respondent, City of Aventura ("City"), hereby files its response in opposition to petitioner, Luis Torres Jimenez's ("Jimenez") motion for rehearing.

ARGUMENT

JIMENEZ HAS FAILED TO MEET THE STANDARD FOR REHEARING

A. Jimenez is engaging in wholesale re-argument, not merely of positions already advanced in the briefs and considered by the Court, but of positions taken at the Third District Court of Appeal.

Jimenez concedes that the uniformity issue based on the varying BRQs of municipalities around the state ***was*** addressed in both his initial brief and his reply brief. Motion at 2, n. 2 (citing IB at 45-47 and RB at 19-21). Apparently, though, he believes the Court was incapable of appreciating those arguments because they were "buried deeply" in the briefs. *Id.* This Court has made it clear that the purpose of a motion for rehearing is not to engage in re-argument of points already considered and decided. *See, e.g., Strand v. Escambia County*, 992 So. 2d 150, 163 (Fla. 2008) ("A motion for rehearing shall not reargue the merits of the Court's order.").[1]

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[1] *See also Unifirst Corp. v. City of Jacksonville*, 42 So. 3d 247, 248 (Fla. 1st DCA 2009) ("Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation."); *Ayala v. Gonzalez*, 984 So. 2d 523, 526 (Fla. 5th DCA 2008) ("We thought that it was made relatively clear … that we do not view the privilege to seek a rehearing pursuant to rule 9.330, Florida Rules of Appellate Procedure, as

Jimenez transgresses further, though, and advances the unprecedented argument that rehearing is somehow warranted because counsel filing the motion believes his *co-counsel* engaged in "inept," "imprecise," "inartful" and "poor" presentation of the issues on appeal, and that co-counsel's "lack of clarity" somehow created confusion that prevented the Court from appreciating the issues properly.[2] Motion at 1-3, 7. Jimenez offers no authority for this novel proposition.

More troubling still, Jimenez's counsel on rehearing fails to explain why his signature block appears on both the initial and reply briefs filed by Jimenez, which he *now* roundly criticizes as poor advocacy. Surely, counsel on rehearing could have insisted that his name be omitted from the briefs if he believed they did not properly present his client's issues. Unfortunately, the City is left with the unshakeable sense that Jimenez's current motion for rehearing is not filed in good faith, but rather in some odd form of protest against co-counsel.[3]

Lastly, and perhaps most troubling, is Jimenez's "buyer's remorse" argument. Motion at 22-31. After agreeing to have his name placed on the briefs that placed the uniformity issues before the Court, Jimenez's counsel now argues that rehearing is warranted because presentation of the uniformity arguments was, in hindsight,

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an open invitation for an unhappy litigant or attorney to reargue the same points previously presented….").

[2] Not surprisingly, Jimenez's other attorneys who represented him throughout these proceedings have not signed off on this motion for rehearing.

[3] The City does *not* believe that Jimenez has been ill-served by his counsel's strategy on appeal, but even if that were so theoretically, Jimenez's remedy lies elsewhere, not in rehearing.

apparently a bad idea. Jimenez devotes several pages to rehashing the City's position during briefing *before the Third District*, where the City pointed out that the uniformity issue had not been raised in the trial court. Nonetheless, Jimenez acknowledges that *he* repeatedly raised the issues of preemption and uniformity as grounds for affirmance at the Third District.[4]

Jimenez also acknowledges having made the conscious decision to present the issue of uniformity to this Court and "rolled the dice."[5] Motion at 30. This is analogous to the kind of conduct Florida courts routinely disapprove of under the invited error doctrine. *See, e.g., Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 478 (Fla. 1995) (describing invited error doctrine as precluding a party from complaining about an "error" for which he is responsible or of rulings that he has invited the court to make). Failing all else, Jimenez essentially throws himself on the mercy of the Court and asks for a different outcome and new relief – the adoption of "a statewide set of guidelines with one … definition of what constitute a red light violation … in every local jurisdiction[.]" Motion at 31. The motion should be

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4 He neglects to mention his 47-page motion for rehearing filed at the Third District, signed by the same counsel advocating rehearing here, in which Jimenez continued to argue in favor of why the Third District *should* have adopted his "lack of uniformity" arguments and even sought rehearing en banc on that basis. For some unknown reason, the motion for rehearing was not included in the Third District's record, but a copy can be made available to the Court should it wish to review it.

5 To be clear, the *City* did not, as Jimenez contends, "roll the dice." The City came to the realization that it was possible, given the undisputed facts in the record, for this Court to decide the uniformity issue *as a matter of law* after understanding the limited purpose served by the BRQ, regardless of whether the BRQ's vary from jurisdiction to jurisdiction.

denied because Jimenez has ignored the standard for rehearing, and because Jimenez continues to evince an understanding of the BRQ at odds with the undisputed record evidence and the conclusions of this Court.

B. The premise of Jimenez's arguments is fatally flawed.

The City need not respond in minutiae to the innumerable protestations in the motion for rehearing, because the underlying premise of the motion is fundamentally and demonstrably incorrect. Jimenez asserts that the BRQ adopted by different jurisdictions around the state somehow represent "46 different definitions of general state law," and that as such, the use of the BRQ's violates Chapter 316's uniformity requirement. Motion at 1. The Court, however, has already expressly concluded that this premise is incorrect.[6]

The BRQ do not "redefine" state law, and Jimenez offers no evidentiary or legal authority for the conclusion that he or any other individual in the state has ever been cited for a violation of a BRQ standard. Instead, the BRQ are merely "written guidelines provided by the local government" to allow the "vendor t*o review and sort* information from red light cameras … before sending that information to a trained traffic enforcement officer who determines whether probable cause exists and a citation should be issued." Op. at 3 (emphasis added). The Court cited with approval evidence in the record that the traffic infraction enforcement officer issues

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[6] Jimenez focuses on the Court's use of the singular when discussing the City's BRQ as "proof" of the Court having misapprehended the existence of other BRQ. In doing so, Jimenez ignores that the Court views the BRQ as serving a very different function in the red light camera programs.

the citation based, not on the BRQs standards, but on "the same factors and criteria she uses when she issues a citation for a similar roadside violation" – namely, the applicable statutory provisions in Chapter 316. *Id.* at 7. The Court emphasized this point more than once. *See also* Op. at 9.

Whether the BRQ differ from local jurisdiction to local jurisdiction is immaterial to the analysis, because an officer ultimately makes the probable cause determination whether a violation occurred based on statutory criteria. In fact, as the Court rather conclusively observed on two different occasions:

> [S]ection 316.0083(1)(a) allows a local government's authorized agent to review images from red light cameras *for any purpose* short of making the probable cause determination to issue a traffic citation. Op. at 17 (emphasis added).
>
> [T]he Legislature has permitted a local government's agent to review information from red light cameras *for any purpose* short of making the probable cause determination as to whether a traffic infraction was committed. Op. at 22 (emphasis added).

See also Op. at 24 (Canady, J., concurring) ("The statute in no way precludes a local government from contracting with a third-party vendor to provide assistance in screening images from red light cameras *in any way the local government sees fit* other than authorizing the vendor to issue citations. *On this point, the critical issue is not the details of the relationship between the local government and the vendor*. Rather, the dispositive point is that … only law enforcement officers and traffic infraction officers … may issue traffic citations.") (emphasis added).

Even accepting as true, for the sake of argument, Jimenez's contention that the BRQ used throughout the state vary materially from jurisdiction to jurisdiction,

as long as a law enforcement officer is making his or her probable cause determination to issue a citation based on state law (as the evidence in this case reflects), it does not matter what the BRQ say or how they result in different categorizations of captured events from one jurisdiction to the next. Conspicuously, Jimenez does not dispute that the officer issuing the notice of violation and uniform traffic citation does so using state statutes as her guide.[7] To the extent any violator, Jimenez included, believes the reviewing officer has misapplied state law, he or she may raise that argument at a statutorily guaranteed hearing in opposition to the citation that issues.[8]

The only conceivable reason varying BRQs might be of factual interest is that, from jurisdiction to jurisdiction, the degree of under-inclusiveness of potential violations may vary. Stated differently, the number and type of potential violators who are not "pursued" for possibly violating a red light signal may vary from jurisdiction to jurisdiction because of the way the BRQ in a particular jurisdiction results in sorting of the captured events. The Court, though, squarely and correctly addressed this issue by observing that state law currently contemplates that

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[7] In fact, the uniform traffic citation specifies a violation of state statute, not a BRQ guideline.

[8] Therein lies the rub. Even if it were true that an officer ever issued a citation based on a BRQ standard (rather than state statute), nothing would preclude the alleged violator from arguing that such a citation should be dismissed because the officer incorrectly applied the uniform statutory standards in Chapter 316. The mere existence and use of the BRQ as part of the red light camera program to screen and sort events, though, would not provide a legal basis for invalidating any citation, much less an entire program.

municipalities have discretion regarding "enforcement of traffic infractions" and placement of red light cameras, and that "there will inevitably be traffic infractions that go undetected and uncited." Op. 21. It then quoted with approval Judge Wells' concurrence below, noting that the under-inclusiveness of images forwarded for review in the working queue "is neither a violation of the law nor a matter about which those cited for a violation have authority to complain." Op. at 21 (citing *State ex rel. City of Aventura v. Jimenez*, 211 So. 3d 158, 173-74 (Fla. 3d DCA 2016) (Wells, J., concurring). If the potential violators omitted from the working queue are immaterial to the legal analysis, then it does not matter if the number and type of omitted potential violators varies from jurisdiction to jurisdiction.[9]

CONCLUSION

Jimenez's motion for rehearing should be denied on both procedural and substantive grounds. He fails to demonstrate that the Court misapprehended or overlooked anything, opting instead to criticize some of his lawyers for the manner

[9] Jimenez takes issue with the Court's observation that he did not claim discriminatory enforcement of the law. Motion at 5-6. Jimenez's criticism ignores that the proscription against discriminatory enforcement is concerned with a *particular* governmental authority applying and enforcing the law against its citizens in a discriminatory manner. The concept does not address that different governmental authorities in different parts of the state make different law enforcement decisions. If that were the case, every traffic citation would be subject to challenge because the violator could point to another jurisdiction where different discretionary enforcement decisions are made every day. It is certainly not a valid basis for Jimenez to challenge his citation for turning right on red at a prohibited intersection that a neighboring jurisdiction, through the exercise of its discretion, has no such restrictions at its intersections.

in which the appeal was presented. Ironically, *he* misapprehends the actual import of the BRQ's and the role they play in red light camera programs by asserting that the BRQ's redefine Florida's substantive traffic laws. They do not, as this Court has already correctly concluded. Accordingly, the City respectfully requests that the Court deny Jimenez's motion for rehearing.

Respectfully submitted,

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By: /s/ *Edward G. Guedes*
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CERTIFICATE OF SERVICE

I certify that a copy of this motion was served via E-portal and e-mail this 30th day of May, 2018, on Amit Agarwal, Solicitor General (amit.agarwal@myfloridalegal.com) and Rachey Nordby, Deputy Solicitor General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399; Robert Dietz, Senior Assistant Attorney General (Robert.Dietz@myfloridalegal.com), Office of the Attorney General, 501 E. Kennedy Blvd., Suite 1100, Tampa, FL 33134; Stephen F. Rosenthal (srosenthal@podhurst.com) and Ramon A. Rasco (rrasco@podhurst.com), Podhurst Orseck, P.A., *Counsel for Petitioner*, Suntrust International Center, One S.E. 3rd Avenue, Suite 2700, Miami, Florida 33131; Marc A. Wites (mwites@wklawyers.com), Wites & Kapetan, P.A., *Counsel for Petitioner*, 4400 North Federal Highway, Lighthouse Point, Florida 33064; Louis C. Arslanian (arsgabriela@comcast.net), *Counsel for Petitioner*, 500 Sheridan Street, Hollywood, Florida 33021.

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