

1 Jonathan Che Gettleman
Law Office of Jonathan Che Gettleman
2 223 River Street, Suite D
Santa Cruz, CA 95060
3 tel: (831) 427-2658
fax: (831) 515-5228

4 Attorney for ANNA GALEEN
5 RICHARDSON

6 Mark Briscoe (SBN 248139)
Biggam, Christensen, & Minsloff
7 2130 North Pacific Ave
Santa Cruz, CA 95060
8 (831) 429 1311

9 Attorney for MIGUEL ANGEL DELEON

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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CRUZ

12 PEOPLE OF THE STATE OF CALIFORNIA,)
13 ex rel. John G. Barisone, City Attorney for the)
City of Santa Cruz,)
14 Plaintiff)

15)
16 v.)
17)

18 ANNA GALEEN RICHARDSON and)
19 MIGUEL ANGEL DELEON,)
20 Defendants)

Case No: CV 162525
[Consolidated with Case No. 162526]

DEFENDANT ANNA
RICHARDSON'S AND MIGUEL
DELEON'S JOINT OPPOSITION TO
PLAINTIFF'S MOTION FOR
SANCTIONS; MEMORANDUM OF
POINTS AND AUTHORITIES

Honorable Timothy Volkmann
Date: March 19, 2010
Time: 9:00 am
Dept. 4

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1 And Now Comes, Anna Galeen Richardson and Miguel Deleon, by and through their
2 counsel, in opposition to the Santa Cruz City Attorney's attempt to jail them for camping in
3 public in the downtown section of Santa Cruz. In support of their Opposition, Defendants offer
4 the following recitation of facts; points and authorities of law and Declaration of Jonathan Che
5 Gettleman and Mark Briscoe.

6 **MEMORANDUM OF POINTS AND AUTHORITIES:**

7 **FACTS:**

8 Anna Gallen Richardson and Miguel Deleon are residents of Santa Cruz County and
9 specifically the City of Santa Cruz. Defendants have been homeless in the City of Santa Cruz for
10 approximately fifteen years. Due to facts beyond Defendants' control, they are often required to
11 sleep outside. One of the main factors causing this circumstance is the fact that the City of Santa
12 Cruz cannot support the majority of its homeless population in its homeless shelters.

13 On May 9, 2009, Honorable Paul Burdick issued a preliminary injunction forbidding
14 Defendants from violating Santa Cruz Municipal Code section 6.36.010 in specific areas of
15 downtown Santa Cruz. Despite the order from Judge Burdick, Defendants remain homeless
16 citizens of Santa Cruz, which still requires them to sleep outside.

17 On December 4, 2010, Ms. Richardson served a Request for the Production of
18 Documents on the City Attorney's office. The City Attorney agreed to produce the responsive
19 documents however, counsel only received those approximately 1000 pages of documents on
20 March 5, 2010, and will likely be unable to incorporate them into this memorandum. A trial date
21 was set in this case on the permanent injunction on June 14, 2010 at which point Defendants'
22 expect a full and fair opportunity to present their case.

23 Prior to disclosing the requested discovery and prior to the trial in this matter, the Santa
24 Cruz City Attorney brought an ex parte motion to show cause, thus short-circuiting Defendants'
25 attempts to fully defend themselves prior to a punishment such as jail being levied against them.
26 In essence, by pushing this contempt proceeding where the Court will have to determine the
27 legality of the injunction, it appears that the City Attorney seeks to have a mini-trial on the
28 propriety of the injunction on March 19, 2010 before June 14, 2010 when the full trial is set. It is

1 unclear what will remain to be litigated at trial.

2 **LEGAL ANALYSIS:**

3 **I. The Law of Civil Contempt Under the Code of Civil Procedure Section 1209, et seq.**

4 The California Supreme Court set forth the standard for contempt proceedings in the case
5 of *Hotaling v. Superior Court* (1923) 191 Cal. 501. The Supreme Court held, “Contempt of
6 court is a specific criminal offense.” *Id.* at 504 [internal cites omitted]. A contempt proceeding
7 is not a civil action, either at law or in equity, though it may be ancillary thereto, but is a separate
8 proceeding of a criminal nature and summary character. *Id.*

9 Further, it is the policy of our state that contempt citations not be taken lightly, especially
10 criminal contempts. *People v. Kalnoki* (1992) 7 Cal.App.4th Supp 8, *11. **An alleged**
11 **contemnor in this state is entitled to the full panoply of substantive and due process rights**
12 **in adjudicating even civil contempt.** *Id.* Contempt is a drastic power and should only be used
13 when necessary. *Id.* Judgments of contempt are to be strictly construed in favor of the contemnor
14 and review extends to the entire record. *Id.* For all these reasons, contempts are disfavored and
15 many fail to survive appellate review. *Id.*

16 California Code of Civil Procedure, section 1211 distinguishes between the two types of
17 contempt, direct contempt which occurs in the presence of the court and constructive contempt
18 which occurs outside the immediate presence of the court. *CCP § 1211.* The present case is
19 constructive contempt.

20 In *Hotaling, supra*, the California Supreme Court set forth the general procedure for
21 contempt proceedings:

22 In a prosecution for constructive contempt, the affidavits on which the
23 citation is issued constitute the complaint. The affidavits of defendant
24 constitute the answer or plea and the issues are framed by the respective
25 affidavits serving as pleadings. A hearing must be had upon these issues
26 at which competent evidence must be produced. The proceedings is of
27 such a distinctly criminal nature that a mere preponderance of evidence is
28 insufficient; the defendant cannot be compelled to be sworn as a witness,
and he cannot be convicted upon the uncorroborated testimony of an
accomplice. *Hotaling*, 191 Cal at 505.

Findings are to be strictly construed in favor of the accused and no intendments or
presumptions can be indulged in aid of their sufficiency. *Bennett v. Superior Court* (1946) 73

1 Cal.App.2d 203, 211.

2 **A. Defendants Must Be Afforded All Substantive Criminal Due Process Rights.**

3 In 1992, the Court of Appeals for the Fourth District clarified this procedure in *Gates v.*
4 *Municipal Court for the Judicial District of Orange County* (1992) 9 Cal.App.4th 45, 56. In
5 *Gates*, the defendant, like the defendants in the present case, was charged under Civil Code of
6 Procedure section 1209. *Id.* at 57. The *Gates* court distinguished between criminal and civil
7 contempt for the purposes of federal due process rights. Contempt is criminal ... if it is to
8 vindicate the authority of the court and the aim of the punishment is to punish rather than coerce.
9 *Id.* In the present case, the City Attorney specifically states the purpose of the contempt penalty
10 of jail is necessary as the “only meaningful punishment for defendants’ contempt.” Memorandum
11 of Points and Authorities in Support of Ex Parte Application for Order to Show Cause Re:
12 Contempt (Hereinafter “City Contempt Memo”), p. 5, line 21-23.

13 Therefore, the present contempt proceeding is punitive, which is why every single police
14 citation attached to the City’s Contempt Memo recommends punishment pursuant to PC 166(4)
15 and not CCP § 1209 for violating a court order. However, regardless of whether the contempt is
16 civil or criminal, the traditional California, or federal standards, we must view it as criminal in
17 nature, with [defendant] being entitled to all the protections the law typically affords criminal
18 defendants. *Gates, supra*, 9 Cal.4th at 56.

19 Defendants in criminal cases are also generally entitled to counsel, the right to face and
20 confront their accusers, the right to the presumption of innocence, the right to remain silent and
21 the right to compulsory process by the Court. *Fifth, Sixth and Seventh Amendments to the United*
22 *States Constitution.* The *Gates* court ruled in order to hold *Gates* **in contempt the evidence**
23 **must be established beyond a reasonable doubt.** *Id.*

24 Therefore, an Order to Show Cause is a misnomer in the present case, because it is the
25 City Attorney that must prove all facts beyond a reasonable doubt, with all presumptions,
26 particularly the presumption of innocence favoring the defendant. *Id; Ex Parte Lake* (1924) 65
27 Cal.App. 420, 427.

1 **B. Elements of Contempt**

2 In cases of contempt committed outside the presence of the court **it is necessary that the**
3 **affidavit charging the contempt show facts** which actually constitute contempt. *Wilde v.*
4 *Superior Court of San Diego County* (1942) 53 Cal.App.2d 168, 177. As a general rule, the
5 elements of contempt include (1) a valid order, (2) knowledge of the order, (3) ability to comply
6 with the order, and (4) willful failure to comply with the order. *In Re Ivey* (2000) 85 Cal.App.4th
7 793, 798; Citing *Anderson v. Superior Court* (1998) 68 Cal.App.4th 1240, 1245, 80 Cal.Rptr.2d
8 891; *In re Cassil* (1995) 37Cal.App.4th 1081, 1087, 44 Cal.Rptr.2d 267.

9 **II. DEFENDANTS’ SUBSTANTIVE ARGUMENTS**

10 **A. Defendants Hearby Object to a Hearing on Contempt Supported by**
11 **Testimonial Hearsay.**

12 The California Supreme Court held, “Contempt of court is a specific criminal offense.”
13 *Id.* at 504. A contempt proceeding is not a civil action , either at law or in equity, though it may
14 be ancillary thereto, but is a separate proceeding of a criminal nature and summary character. *Id.*
15 An alleged contemnor in this state is entitled to the full panoply of substantive and due process
16 rights in adjudicating even civil contempt. *Kalnoki*, 7 Cal.App.4th Supp at *11. One of those
17 rights is the right to confrontation. *Barber v. Page* (1968) 390 U.S. 719, 725.

18 In *Crawford v. Washington* (2004) 541 U.S. 36, the US Supreme Court held that it
19 violates the Sixth Amendment to the United States Constitution’s Confrontation Clause to admit
20 testimonial hearsay unless the witness is unavailable and subject to previous cross-examination.
21 *Id.* More recently, *Davis v. Washington* (2006) 126 S.Ct. 2266 held that statements contained in
22 police reports that were created as part of a criminal investigation are testimonial hearsay.

23 In the present case, all of the police reports expressly indicate that they were created as
24 part of an investigation into violations of Santa Cruz Municipal Code section 6.36.010 and
25 violations of Penal Codes section 166(4). For this reason, the police statement were created as
26 part of a criminal investigation. Therefore, all statements contained within the report, including
27 observations of officers constituting elements of the contempt charge are testimonial hearsay.
28 Contempt is a criminal proceeding in which the contemnor has all the rights of a criminal

1 defendant. *Kalnoki*, 7 Cal.App.4th Supp at *11. Regardless of whether these police reports fit
2 into an exception of the hearsay rules, Defendants possess a superceding constitutional right to
3 confront and cross-examine the persons whose statements appear in the police reports. *Davis*,
4 126 S.Ct. 2266. Mr. Richard Westfall’s declaration is also testimonial hearsay as it was created
5 as the factual basis of an element of the charge of contempt, to wit, the ability to comply with the
6 underlying order. *Id.* Without Mr. Westfall’s declaration, no facts exist to establish even by an
7 inference that the Defendants were able to comply with the Court’s order. If the Court is going to
8 consider information provided by Mr. Westfall, then Mr. Westfall must be subject to
9 confrontation. *Id.*

10 **B. The Charging Affidavit is Legally Insufficient to Provide the Court With**
11 **Jurisdiction to Proceed With a Hearing on Contempt.**

12 **1) Plaintiff’s Moving Affidavit Fails to Properly Allege All The Elements**
13 **of Contempt.**

14 The California Supreme Court has clearly held that the affidavit charging contempt must
15 show all the **facts** that constitute contempt. *Wilde, supra*, 53 Cal.App.2d at 177. The first step in
16 the present case analysis, then, is to establish which document is the charging affidavit. In the
17 present case the charging affidavit is clearly the Declaration of John. G. Barisone, City Attorney,
18 In Support of Ex Parte Application For Order To Show Cause Re Contempt (hereinafter “City
19 Attorney’s Declaration”). Mr. Barisone’s is the primary declaration, which then incorporates
20 facts from other declarations, that accompanied Mr. Barisone’s affidavit. In the next step of
21 analysis, the charging affidavit should be examined to determine if it states sufficient facts to
22 provide the contempt court with jurisdiction to rule on the contempt charge.

23 As part of it analysis, Defendants assert that the Court may not look outside the facts in
24 the charging document. It is the charging affidavit that must state facts constituting contempt.
25 Mr. Barisone never specifically asked for the Declarations of Richard Westfall, Alex Martin,
26 Daniel Forbus and William Winston to be incorporated in full into his charging affidavit. Mr.
27 Barisone also did not attach the dependant declarations as specific exhibits to his charging
28 affidavit. The dependent declarations merely filed simultaneously with the charging declaration
in the present case, not specifically joined together. Therefore, the facts in the accompanying

1 declarations that are not written into Mr. Barisone’s declarations may not be considered by the
2 Court. *Wilde, supra*, 53 Cal.App.2d at 177.

3 The City Attorney’s charging affidavit states no facts that establish the Defendant’s had
4 the ability to comply with Judge Burdick’s order. The City Attorney’s Declaration, paragraph 4,
5 merely states a legal conclusion: “Defendant’s having received these orders, were capable of
6 restraining from sleeping....” City Attorney’s Declaration., Paragraph 4. The only fact in
7 paragraph 4 is the fact that Defendants received the order. The City Attorney’s charging
8 declaration also does not in any way incorporate by reference the facts from Declaration of
9 Richard Westfall. The deficiency, as to the element of ability to comply with the underlying
10 order, is more clearly expressed by reference to the other paragraphs where Mr. Barisone at least
11 mentions the existence of police reports evidencing facts supporting the contempt charge.
12 Defendants urge the Court to look at paragraph 4 in relation to the later paragraphs of the City
13 Attorney Declaration.

14 The Court should note the direction of *Kalnoki*, 7 Cal.App.4th Supp. at 13, where that
15 Court held, “The defendant is entitled to the benefit of every reasonable doubt as to the true
16 interpretation of words or the construction of language used in the statute.” Therefore, even if
17 the City Attorney sufficiently alleged an ability to comply with the underlying order, no facts in
18 the City Attorney’s Declaration state that the violations were willful, which is also an essential
19 element of contempt. *In Re Ivey*, 85 Cal.App.4th at 798; *Wilde, supra*, 53 Cal.App.2d at 177.

20 For all the reasons mentioned in the foregoing section, this Court is without jurisdiction
21 in thi matter as the City Attorney has not stated facts in the charging affidavit that constitute each
22 element of the crime of contempt of a court order. *Wilde, supra*, 53 Cal.App.2d at 177.

23 **2) Plaintiff Has not Established Beyond a Reasonable Doubt that**
24 **Defendants Had a Legal Alternative to Sleeping Inside the Zone**
Forbidden by the May 29, 2009 Preliminary Injunction.

25 In the alternative, if the Court finds that the charging affidavit sufficient set forth all the
26 facts constituting the elements of contempt, then Richard Westfall’s affidavit still does not
27 factually establish beyond a reasonable doubt that the defendants both had the ability to legally
28 comply with the underlying order and that the Defendant’s violation of the law was willful. *In*

1 *Re Ivey*, 85 Cal.App.4th at 798; *Wilde, supra*, 53 Cal.App.2d at 177. In order to constitute
2 contempt, it is essential that the thing ordered to be done be within the power of the person to
3 perform. *Ex Parte Johnson (1935)* 9 Cal.App.2d 473, 477.

4 On May 29, 2009, Judge Burdick issued a preliminary injunction forbidding the
5 Defendants from violating Santa Cruz Municipal Code Section 6.36.010 within a specific
6 downtown corridor in Santa Cruz. See Exhibit 1 and 2 of Plaintiff's Ex Parte Application for
7 Order to Show Cause Re Contempt. However, Judge Burdick did not address the fact that it is
8 still illegal to sleep outside in the remainder of the City of Santa Cruz and illegal to sleep outside
9 in the entire County of Santa Cruz which has established a similar anti-camping ordinance. See
10 *Santa Cruz County Code sections 8.18.010, et seq., 10.04.170 and 10.16.010, et esq* (forbidding
11 camping in the County of Santa Cruz). The City Attorney has not established that other
12 accommodations were available to Defendants to enable them to **lawfully** obey Judge Burdick's
13 order.

14 The City Attorney instead offers an accompanying declaration of Richard Westfall
15 outside of, and not incorporated into, its charging instrument. Richard Westfall's declaration
16 does nothing more than document the size of the "forbidden zone" as determined by Judge
17 Burdick on May 29, 2009. The non-stated inference is that plenty of city remained so the
18 Defendant's could have slept somewhere else.

19 First, it is not clear that an order of contempt can be based on a mere inference of facts.
20 *Bennett, supra*, 73 Cal.App.2d at 211 (Findings are to be strictly construed in favor of the
21 accused and no intendments or presumptions can be indulged in aid of their sufficiency.).
22 Second, no document presented by the City Attorney addresses ability of the Defendants to
23 **legally** comply with the May 29, 2009 order.

24 As an analogy, it would be improper for the court to hold a person in contempt of court
25 for failing to pay a fine where they have no ability to do so. The fact that the person failed to
26 commit an illegal act, such as theft, to get the money would obviously not support a contempt
27 order. The same is true in this instance, it is illegal to set up a camp or sleep outside anywhere in
28 the entirety County of Santa Cruz. Without proving beyond a reasonable doubt that the

1 Defendant's had another legal option that was available, the City's contempt charge cannot stand.

2 The City Attorney has simply not offered sufficient facts in any of its supporting
3 documents to establish that Defendants had the ability to sleeping outside the injunction zone,
4 particularly in October when the Armory shelter was closed. It is Plaintiff's burden to prove
5 beyond a reasonable doubt that Defendant's **could legally comply** with Judge Burdick's May 29,
6 2009 order and that any violation on the part of Defendants was **willful**. Mr. Barisone's moving
7 affidavit and his supplemental affidavits fail to establish these essential facts.

8 **C. Defendants Did Not Factually Violate the May 29, 2009 Preliminary**
9 **Injunction.**

10 If the City Attorney survives all the high procedural hurdles to actually address the merits
11 of the citations, it then fails on the facts stated in the citations. Despite the charge on the citation
12 issued against Ms. Richardson on October 23, 2009, January 26 and February 12, 2010, the
13 officer's recitation of the facts do not state a violation of Section 6.36.010. Sleeping and setting
14 up bedding is only prohibited between the hours of 11pm to 8:30 am.

15 Setting up bedding is defined as follows:

16 To establish or maintain outdoors or in, on or under any structure not
17 intended for human occupancy, at any time between the hours of 11p.m. to
18 8:30 am, a temporary or permanent place for sleeping, by setting up any
19 bedding, sleeping bag, blanket, mattress, tent, hammock or other sleeping
20 equipment **in such a manner as to be immediately usable for sleeping**
21 **purposes.** *SCMC § 6.36.010 (b).*

22 The only act that is prohibited anytime is setting up a campsite. Setting up a campsite is
23 defined as follows:

24 To establish or maintain outdoors or in, on or under any structure not
25 intended for human occupancy, at any time between the hours of 11p.m. to
26 8:30 am, a temporary or permanent place for sleeping, by setting up any
27 bedding, sleeping bag, blanket, mattress, tent, hammock or other sleeping
28 equipment, **with the intent to remain in that location overnight.** *SCMC*
§ 6.36.010 (c).

The only difference between setting up bedding and setting up a campsite is that setting
up a campsite requires the additional intention to remain in that location overnight. Therefore,
the only way Ms. Richardson and Mr. Deleon can be found in contempt is if they are found guilty
beyond a reasonable doubt of having the intention of remaining **in that location overnight**.

1 As a preliminary matter all citations issued against Ms. Richardson were based on
2 officers' observations that were made between the hours of 8:30 a.m. and 11:00pm. The October
3 23, 2009 ticket, now five months old, was issued at 8:47am. The January 26, 2010 ticket was
4 issued at 5:33pm. The February 12, 2010 ticket was issued at 1:41pm.

5 Therefore, the only sub-section of Section 6.36.010 that could have possibly been
6 violated at these times was Setting Up a Campsite. This section requires an intention to remain
7 in that location overnight. None of the officers' reports indicated that Ms. Richardson appeared
8 to have the intention to remain in that location overnight. The officers' factual allegations
9 including "piles" of personal items also do not even circumstantially prove an intent to remain in
10 that specific location overnight beyond a reasonable doubt. Homeless people, having no homes,
11 are required by necessity to carry all of their belongings with them all day long, everywhere they
12 go. If this were a reasonable logical deduction, then every time a homeless person sat down
13 beside their belongings they could be in violation section 6.36.010 for setting up a campsite.

14 While lying on a blanket may ne setting up bedding, the mere fact that Ms. Richardson
15 was laying on a blanket next to her belongings does not make that location an automatic
16 campsite, nor does it establish an intent under the circumstances to remain in that location
17 overnight. This is especially true, where as here, the citations were issued no time close to when
18 a person would normally be setting up for overnight sleep. The sad part about this whole
19 contempt procedure is that Ms. Richardson was trying to comply with an injunction that the City
20 Attorney and police department are apparently using to keep her and her sole possessions out of
21 the downtown area at all hours.

22 In the case of a penal statute [i.e. the violation of Municipal Code section 6.36.010], it is
23 the policy of this state to construe the statute as favorably to the defendant as its language and the
24 circumstance of its application permit. As established above, even civil contempt is treated as a
25 criminal proceeding, summary in character. *Kalnoki, supra*, 7 Cal.App.4th Supp. at 13.
26 Therefore, Section 6.36.010 must be read as favorably to the Defendants as its language and the
27 circumstances permit.

28 Therefore, the facts contained in the police reports attached to the officers' declarations

1 regarding Ms. Richardson do not rise to the level of evidence beyond a reasonable doubt of either
2 a violation of Section 6.36.010 or the May 29, 2009 preliminary injunction order.

3 As for Mr. Deleon, the only separate citation he received was allegedly issued at **about**
4 7:55am on January 20, 2010. Taken at face value, this time is a mere 35 minutes prior to the
5 expiration of the time where having any bedding constitutes a violation of the bedding or
6 sleeping subsections of Section 6.36.010. So if the City Attorney overcomes all jurisdictional
7 procedural hurdles in this case, at best, on one occasion an officer actually witnessed what may
8 constitute a violation of Section 6.36.010. Further, this is would be one de minimus violation of
9 the court's order in an entire year, which hardly warrants the extreme penalties the City Attorney
10 seeks.

11 **III. The Plaintiff Must Prove Beyond a Reasonable Doubt that the May 29, 2009 Order**
12 **Was Lawfully Issued.**

13 One of the elements of Contempt is that the court order upon which the contempt is based
14 was lawfully issued. *Wilde*, 53 Cal.App.2d at 177. In *People v. Gonzales* (1996) 12 Cal.4th
15 804, the Supreme Court clearly established that an order of contempt cannot stand if the
16 underlying order is invalid. *Id.* at 816. The defendant in a contempt proceeding in this state may
17 challenge the validity of an injunction, the violation of which is the basis for the contempt
18 prosecution, even if no such claim was made when the injunction was issued. *Id.* at 818.
19 Further, "any acts which exceed the defined power of a court in any instance, whether that power
20 be defined by constitutional provision, express statutory declaration, or rules developed by the
21 courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction." *Id.*
22 Defendants challenge the constitutionality and legality of the May 29, 2009 Preliminary
23 Injunction and put the City Attorney to its burden in proving beyond a reasonable doubt that the
24 May 29, 2009 order was legally valid in light of the homeless housing crisis that exists in Santa
25 Cruz. The evidence of this crisis was presented in the two previously submitted Declarations of
26 Anna Richardson and the Declaration of Paul Lee and Paul Brindell in Support of
27 Defendants' Joint Response to Plaintiff's Supplemental Brief in Support of a Preliminary
28 Injunction.

1 **IV. Any Punish of Defendants Beyond the Statutory Maximum Punishment Is**
2 **Unconstitutional.**

3 **A. A Punishment of Jail or Community Service for Failing to Obey the**
4 **Preliminary Injunction Violates the Separation of Powers Clause of Article**
5 **III, Section 3 of the California Constitution and the parallel sections of the**
6 **United State Constitution.**

7 The California Supreme Court has conclusively held that the power to define crimes and
8 fix penalties is vested exclusively in the legislative branch, and the courts may not expand the
9 Legislature’s definition of a crime, nor may they narrow a clear and specific definition. *People v.*
10 *Farley* (2009) 46 Cal.4th 1053. Further, the legislative branch bears **sole** responsibility and
11 power to define criminal charges and to prescribe punishment, the executive branch decides
12 which crime to charge and judicial branch which imposes sentence **within legislative limits for**
13 **chosen crime.** *People v. Mikail* (1993) 13 Cal.App.4th.846, 854.

14 The court in *People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1385 stated this point
15 succinctly:

16 The matter of defining crimes and punishment is solely a legislative
17 function. The legislature has the authority to change the penalties, or
18 separate them by degree. Prescribing punishment ... is distinctly within
19 the police power of the states, as is the definition of the elements of
20 crimes and the delineation of their punishments. Evils in the same field
21 may be different dimensions and proportion, requiring different remedies.
22 Or so the legislature may think. Subject to the constitutional prohibition
23 against cruel and unusual punishment, the power to define crimes and fix
24 penalties is vested exclusively in the legislative branch. **The judiciary**
25 **may not interfere with the authority of the Legislature to define**
26 **crimes and prescribe punishment** unless a prescribed penalty is so
27 severe in relation to the crime that it violates the constitutional
28 prohibition of cruel and unusual punishment. *Id.* [Internal cites omitted].

29 In the present case, the Santa Cruz City Counsel, our local legislature, through the
30 democratic process, has determined that violations of its municipal code section 6.36.010 are an
31 infraction and not jailable offenses. Santa Cruz Municipal Code Chapter 4.04, section 4.04.010
32 (Criminal Violations- Misdemeanors and Infractions) provides,

33 It shall be unlawful for any person to violate any provision or fail to
34 comply with any provision of the requirements of the Santa Cruz
35 Municipal Code. Except as elsewhere stated in this code¹, a violation of
36 any requirements of the Santa Cruz Municipal Code or failing to comply

37 ¹ Section 6.36.010, the “camping ban” does not provide for misdemeanor punishment.

1 with any of the mandatory requirements of this code shall constitute an
2 infraction.... Any person charged with an infraction under the provisions
3 of this code, unless provision is otherwise herein made, **shall be**
4 **punishable by fine only** as follows... *Santa Cruz Municipal Code,*
5 *section 4.04.010.*

6 Santa Cruz Municipal Code section 4.04.020(2) (Civil Violations-Injunction and Civil
7 Penalties) provides,

8 **As part of a civil action filed to enforce provisions of this code, a court**
9 **may assess a maximum civil penalty** of two thousand five hundred
10 dollars per violation of the municipal code for each day during which any
11 person commits, continues or maintains a violation of any provision of this
12 code. *Santa Cruz Municipal Code, section 4.04.020.*

13 As an enforcement agent of the City, the City Attorney is properly designated in the
14 executive branch of local government. The City of Santa Cruz Municipal Code simply has not
15 authorized the City Attorney to seek the punishment of either incarceration or community service
16 for violations of section 6.36.010, pursuant to either a criminal or a civil proceeding. As such the
17 City Attorney is not authorized to pursue incarceration or community service punishments.
18 *Mikail, 13 Cal.App.4th.at 854; Rhodes, 126 Cal.App.4th at 1385* Further, the Court is similarly
19 not authorized to issue them. *Id.*

20 The Court should note that Defendants do not deny the general power of the Court to
21 defend its orders. However, the facts giving rise to the contempt proceedings in this case did not
22 occur in the presence of the Court. In this case, the sole basis for the injunction is the violation
23 of one criminal municipal statute. This act is already completely regulated by the Santa Cruz
24 City Counsel.

25 The City Attorney is trying to use the Court's inherent contempt powers to make law, i.e.,
26 raise the maximum punishment for the violation of 6.36.010. The City's memorandum in support
27 of contempt ("City's Contempt Memo") states that, "The City submits that given their history of
28 arrogant recalcitrance relative to compliance with obligations imposed upon them by the judicial
process, the only meaningful punishment for Defendants' contempt would be a jail sentence
levied with each violation." City's Contempt Memo, p 5. Lines 21-23. The City Attorney is
attempting to make law by utilize the judicial process of civil contempt to exceed the maximum
punishment permitted by the legislature for violations of section 6.36.010. In doing so, the City

1 Attorney also seeks to exceed the maximum punishment provided by the legislature pursuant to
2 its injunction authority provided in section 4.04.020. The Legislature has simply not provided
3 for enhanced penalties of jail or community service for repeat offenders of the camping
4 ordinance.

5 The Court should not condone the City Attorney’s attempted usurpation of legislative
6 powers by using the Court’s inherent contempt power to increase the punishment for a violation
7 of Section 6.36.010. Therefore, in the present case, despite the Court’s general power to jail or
8 order community service for contempt of its orders, in this situation, where the charge is
9 exclusively a violation of the municipal code and nothing more, punishing Defendants with jail
10 or community service violates of the Separation of Powers provisions of Article III, Section 3 of
11 the California Constitution. If the City Attorney thinks the punishments provided for by the City
12 Counsel for violations of section 6.36.010 are not sufficient, they should direct their attention to
13 the democratic process and not this Court.

14 **B. Any Punishment Beyond the Statutorily Defined Limitations Violates the**
15 **Doctrine Prohibiting Delegation of Legislative Powers.**

16 Even if the City Attorney is able to convince the Court that the punishment pursued by it
17 is implicitly authorized by the Legislature (City Council), the City Attorney still must overcome
18 the doctrine prohibiting the delegation of legislative powers. The California Supreme Court
19 held that the doctrine prohibiting the delegation of legislative power, although much criticized, is
20 well established in California. *Kugler v. Yocum* (1968) 69 Cal.2d 371, 375. The power to
21 change a law of the state is necessarily legislative in character, and is vested in the legislature and
22 cannot be delegated by it. *Id.* Moreover, the same doctrine precludes the delegation of
23 legislative powers of a city. *Id.* “[T]he Purpose If the doctrine that legislative power cannot be
24 delegated is to assure that truly fundamental issues will be resolved by the Legislature and that a
25 grant of authority is accompanied by safeguards adequate to prevent its abuse.” *Id.* at 376.

26 This doctrine has been limited to some degree so that legislative power may be delegated
27 if channeled by a sufficient standard. *Id.* It is well settled that the legislature may commit to an
28 administrative officer the power to determine whether facts of a particular case bring it within a

1 rule or standard previously established by the legislature. *Id.*

2 In the present case, the exception stated above may allow the City Attorney to determine
3 when and against whom to bring injunctive action, which is a mechanism that has been provided
4 for the use of the City Attorney in its discretion. *Id.* However, no law provides the City Attorney
5 the authority to seek the punishments of jail and community service for violations of Section
6 6.36.010. The Legislature has not, and cannot delegate to the City attorney, the authority to
7 arbitrarily increase the maximum punishment for violations of Section 6.36.010, when the City
8 Attorney feels a case so warrants the punishment. *Id.* This is true whether or not, the Court
9 maintains general contempt powers that it is authorized by statute to levy on a contemnor. The
10 prescription in relation to the doctrine against the delegation of legislative power to increase
11 maximum punishments for crimes operates against the City Attorney's power **to seek** that
12 punishment, as much as it does on the Court's general power to jail people for contempt, in this
13 instance.

14 **C. The Specific Law in Place Here Controls Over Attempts to Impose General** 15 **Orders**

16 It is horn book law that when the legislature (in this case the City Counsel) proscribes
17 specific enumerated punishments for specifically delineated violations, any attempt to increase
18 the punishments for those violations cannot be allowed to stand (discussed in A above.) The
19 reasoning behind this is that general enforcement of laws is circumscribed when a more specific
20 law, designed to address the same issue exists.

21 "It is well settled, also, that a general provision is controlled by one that is special,
22 the latter being treated as an exception to the former. A specific provision relating
23 to a particular subject will govern in respect to that subject, as against a general
24 provision, although the latter, standing alone, would be broad enough to include
25 the subject to which the more particular provision relates." (*Rose v. State of*
California (1942) 19 Cal. 2d 713, 723-724 [123 P.2d 505]; see also *People v.*
Moroney (1944) 24 Cal. 2d 638, 644 [150 P.2d 888].)" *People v. Honig* (1996)
48 Cal.App.4th 289 at 328.

26 Further, when two statutes essentially occupy the same space, or the same subject, and
27 one is a broad general provision and one specific, the specific controls.

28 "When two statutes relate to the same subject, ordinarily the more specific and
particular provision will govern as against the more general provision, although

1 the latter standing alone is broad enough to include the subject addressed by the
2 more particular provision. (*San Francisco Taxpayers Assn. v. Board of*
3 *Supervisors* (1992) 2 Cal.4th 571, 577; see also *In re Williamson*, (1954) 43
4 Cal.2d 651, 654.)” *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777 at
5 786. See also *People v. Walker* (2002) 29 Cal.4th 577. “The fact that the
6 Legislature has enacted a specific statute covering much the same ground as a
7 more general law is a powerful indication that the Legislature intended the
8 specific provision alone to apply.” (*People v. Jenkins* (1980) 28 Cal.3d 494, 505,
9 fn. omitted.)” *People v. Sainz* (1999) 74 Cal.App.4th 565 at 570. See also *Barnes*
10 *v. Superior Court of Los Angeles County* (2002) 96 Cal.App.4th 631.

11 The Court must also note that the specific versus general statutory construction applies
12 equally to civil actions and laws as to the criminal context. (See *People v. Neely* (2004) 124
13 Cal.App.4th 1258; *People v. Briceno* (2004)34 Cal.4th 451 --applying to voter initiatives-- and
14 *Ramos v. Superior Court (People)* (2007)146 Cal.App.4th 719--applying to procedural
15 provisions.)

16 Here, the City Counsel, whose actions embody the will of the people, has proscribed the
17 punishment for violations of the camping ban in downtown Santa Cruz. The City Counsel has
18 determined that the punishment for said crime (Municipal Code section 6.36.010--see A above) is
19 punishable by a fine only. That is the specific statutory provision that governs this case. The
20 more general civil contempt of court action is inapplicable and unconstitutional for the same
21 reasons where, as here, the scope of the order was limited to not violating 6.36.010.

22 An analogy can be drawn in this case to the circumstance when a criminal complaint is
23 filed against a probationer for violating the terms of their probation. There, the criminal
24 complaint controls, not a general order of contempt for violating probation terms.

25 **CONCLUSION:**

26 Based on all the foregoing averments of fact and points and authorities of law,
27 Defendants humbly request the Court deny Plaintiff’s requested relief.

28 Dated 3/11/2010

_____/s/_____
Jonathan Che Gettleman

Dated: 3/11/2010

_____/s/_____
Mark Briscoe