

I. ISSUE PRESENTED FOR REVIEW

Whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 et seq. is appealable as a final judgment in a special proceeding.¹

¹ Government Code §37104 provides as follows:
The legislative body may issue subpoenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it.

II. NATURE OF THE CASE

A. Introduction

This Petition seeks review of an important unsettled issue relating to whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 et seq. is appealable as a final judgment in a special proceeding or whether it may only be reviewed by a petition for extraordinary writ.

The Courts of Appeal and the Superior Courts in this state must choose among conflicting authority on the appealability of Superior Court orders enforcing administrative and analogous legislative subpoenas issued pursuant to California Government Code §37104 et seq. Some courts have held such orders are non-appealable and may only be reviewed by writ. See, Bishop v. Merging Capital, Inc., 49 Cal.App.4th 1803, 1806-09, 57 Cal.Rptr.2d 556 (1996). Other courts, however, have found that the “better view” is that such orders are appealable as final judgments in special proceedings. Millan v. Restaurant Enterprises Group, Inc., 14 Cal.App.4th 477, 484-85, 18 Cal.Rptr.2d 198 (4th Dist. 1993).

Therefore, the question of whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 et seq. is appealable as a final judgment in a special proceeding, will be a recurring one for California’s courts.

This Court should grant review to give guidance to the lower courts in California on this important issue.

B. Procedural History

The Petitioner, THE POINT ALTERNATIVE, INC., A CALIFORNIA NON-PROFIT CORPORATION (hereinafter “The Point”) is a California non-profit organization duly organized under the laws of the State of California. The Point was created pursuant to the guidelines set forth by the California Attorney General as a collective for the cultivation and distribution of marijuana for medical purposes.

On or about June 29, 2009 the Real Party in Interest, caused to be issued a subpoena for the production of Business Records pursuant to California Government Code § 37104. Said subpoena contained a total of 44 production requests. The aforementioned subpoena was served upon the Petitioner on or about July 2, 2009 with a production date of July 27, 2009. The Petitioner was granted an extension until August 10, 2009 to respond. On or about August 10, 2009, the Petitioner provided its responses to the requested documents. These responses included both the appropriate objections, as well as numerous documents which evidence the Petitioner’s compliance with the California Attorney General Guidelines relating to the cultivation and distribution of marijuana for medical purposes.

On August 31, 2009, the Real Party in Interest filed a Petition seeking an Order to Show Cause Re Contempt for Non-Compliance of a legislative subpoena pursuant to California Government Code § 37104 et seq.

In support of the Order to Show Cause, the Real Party in Interest submitted the “Mayor’s Report,” which set forth the basis for the issuance of the Subpoena.

The report detailed the underlying purpose for the issuance of the subpoena, to wit: “Based on the information in the City’s possession regarding medical marijuana dispensaries operating within the City’s jurisdiction, the City Council authorized me on May 11, 2009, to issue subpoenas pursuant to Government Code § 37104 for the purpose of gathering information that could assist the City in its investigation as to whether medical marijuana dispensaries located in the City are operating in compliance with applicable law.”

On November 2, 2009, the trial Court ordered that the Petitioner’s custodian of records, produce all documents and records responsive to the City Subpoena to the City of Dana Point, no later than 5:00 p.m. on December 7, 2009. A copy of the order is attached hereto and incorporated herein by reference as Exhibit “A”.

On November 13, 2009, the Petitioner timely filed its Notice of Appeal to the Trial court’s order. Further, on December 3, 2009, the trial Court at the request of the Petitioner, stayed enforcement of its order during the pendency of the appeal.

On January 29, 2010, the Court of Appeal for the Fourth District on its own motion, found that the appeal in this case is not from an appealable order and deemed that the Notice of Appeal filed by the Petitioner on November 13, 2009, to be a petition for extraordinary writ and further ordered that the Petitioner had fifteen days from the date of the order to file a petition for extraordinary writ. A copy of the January 29th order is attached hereto and incorporated herein by reference as Exhibit “B”.

On February 10, 2010, the Petitioner filed its Motion to Vacate Order and Reinstate Appeal with the Court of Appeal. On February 11, 2010, the Court of

Appeal denied the Petitioner's motion, but allowed an extension up to and including March 12, 2010, for the Petitioner to file its extraordinary writ. A copy of the Court of Appeal order dated February 11, 2010 is attached hereto and incorporated herein by reference as Exhibit "C".

The Petitioner now seeks review of the Court of Appeal's ruling on February 11, 2010.

III. WHY REVIEW SHOULD BE GRANTED

The California Rules of Court provide for review in this Court “when necessary to secure uniformity of decision or to settle an important question of law.” (Cal. Rules of Court, Rule 8.500 (b)(1).) This case presents an important question of law that will arise frequently in California’s lower courts. Current decisions lack uniformity. Despite the ruling in *Millan v. Restaurant Enterprises Group, Inc., supra*, which sets forth that orders relating to legislative subpoenas are appealable as final judgments in special proceedings, the Court of Appeal in this case has found that the appeal is not from an appealable order.

In the absence of a definitive ruling from this Court, there will be no uniformity of decision as it relates to legislative subpoenas.

IV. LEGAL DISCUSSION

A. Nature of Action

Since the question of appealability goes to the jurisdiction of this court, it is invested with the authority to consider its own jurisdiction and the issue of appealability. Olson v. Cory, 35 Cal.3d 390 (1983).

It appears there is a present split of authority on the appealability on Superior Court orders enforcing administrative and analogous legislative subpoenas issued pursuant to California Government Code §37104 *et seq.* Some courts have held such orders are non-appealable and may only be reviewed by writ. See, Bishop v. Merging Capital, Inc., 49 Cal.App.4th 1803, 1806-09, 57 Cal.Rptr.2d 556 (1996). The Fourth District has, however, previously stated and found that the “better view” is that such orders are appealable as final judgments in special proceedings. Millan v. Restaurant Enterprises Group, Inc., 14 Cal.App.4th 477, 484-85, 18 Cal.Rptr.2d 198 (4th Dist. 1993).

Moreover, the better view is that “orders requiring compliance with the subpoenas are appealable as final judgments in special proceedings. . . Numerous cases, including cases from our Supreme Court, have decided appeals taken from similar orders on the merits without discussion of the appealability issue. Inasmuch as the Supreme Court is among those courts which have assumed the appealability of such orders, we conclude such an order is appealable . . . The issue on this appeal, whether the subpoena meets constitutional standards for enforcement, is a matter of law and is reviewed *de novo*. Millan, *supra* [internal citations omitted].

B. Applicable Principles of Law as to the Appealability of Legislative Subpoenas

The Sixth District Court of Appeal has expressly found that an order to

compel compliance with a legislative subpoena pursuant to Government Code §37104 is appealable as a final judgment. City of Santa Cruz v. Patel, 155 Cal.App.4th 234, 240-43, 65 Cal.Rptr.3d 824 (6th Dist. 2007). Millan is cited extensively in the Patel opinion in support for its ruling and a contrary line of cases from the Second District Court of Appeal was discussed and rejected in favor of the “better view” of the Fourth District Court of Appeal.

Further support for the appealability of a legislative subpoena is set forth in the more recent decision of State ex rel. Dept. of Pesticide Regulation v. Pet Food Express Ltd. (2008) 165 Cal.App.4th 841 [81 Cal.Rptr.3d 486]. In State ex rel. Dept. of Pesticide Regulation, the court noted, "Confusion exists regarding appealability of orders enforcing administrative subpoenas." (*Id.*, at p. 849; compare e.g., Millan v. Rest. Enters. Group, Inc. (1993) 14 Cal.App 4th 477, [18 Cal.Rptr.2d 198] (*Millan*) [holding that "the better view is that 'orders requiring compliance with the subpoenas are appealable as final judgments in special proceedings ' "], with Bishop v. Merging Capital, Inc. (1996) 49 Cal.App.4th 1803, 1809 [57 Cal.Rptr.2d 556] (*Bishop*) [concluding that orders compelling compliance with administrative subpoenas are not appealable].)

In following *Millan* and implicitly rejecting *Bishop*, the court in *State ex rel. Dept. of Pesticide Regulation* concluded that an order compelling compliance with an administrative subpoena is appealable as a final judgment: "[A] judgment is the 'final determination of the rights of the parties in an action or proceeding.' The statutory scheme provides for an original proceeding in the superior court, which

results in an order directing the respondent to comply with the administrative subpoena.

The court order enforcing the administrative subpoena is tantamount to a superior court judgment in mandamus which, with limited exceptions, is appealable under Code of Civil Procedure § 904.1. Whether the matter is properly characterized as an 'action' or a 'special proceeding', it is a final determination of the parties' rights. It is final because it leaves nothing for further judicial determination between the parties except the fact of compliance or noncompliance with its terms.

The fact that an intransigent respondent may be subject to a contempt order does not mean the court order is not final, because the same possibility exists with injunctions and final judgments which form the basis for contempt citations. The purpose of any judicial order which commands or prohibits specific conduct is to make the sanction of contempt available for disobedience. This fact does not render such an order 'nonfinal.' Indeed, the contempt judgment is not appealable but must be reviewed, if at all, by writ, and therefore review of the underlying order can reliably be had only if that order is appealable. [Citation.]" (*State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 851.).

The *State ex rel. Dept. of Pesticide Regulation* court rejected the argument that an order compelling compliance with an administrative subpoena is akin to a nonappealable discovery order: "We . . . reject the Department's . . . argument that we should analogize to discovery orders in civil litigation, which are not considered final, appealable orders. Such discovery orders, however, are made in connection

with pending lawsuits which have yet to be resolved. A discovery order does not determine all of the parties' rights and liabilities at issue in the litigation. The Department argues the same applies here, because even with the documents, the Department cannot impose administrative penalties unless an administrative hearing is held if such a hearing is requested. However, it is possible an administrative hearing may not be requested and, even if it is requested, it will not necessarily end up in court. [Fn. omitted.] In contrast to this case, pending civil litigation in which a discovery order occurs already involves the court and will continue to do so." (*State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 852.).

The holding in *State ex rel. Dept. of Pesticide Regulation, supra*, has also been cited and followed in the more recent case of *The People ex rel. Preston DuFauchard v. U.S. Financial Management*, (2009) 169 Cal.App.4th 1502, which sets forth:

“We agree with the court's analysis in *State ex rel. Dept. of Pesticide Regulation*. In this case, the trial court's order compelling compliance with the Commissioner's administrative subpoena constituted a final determination of the parties' rights, notwithstanding the possibility that further proceedings might be required to gain U.S. Financial Management's compliance with that order. (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 852.) As such, the order constitutes an appealable final judgment pursuant to Code of Civil Procedure § 904.1, subdivision (a)(1). (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 849.)”

Accordingly, in following the historical rulings from *Bishop* through the present, there has been a clear shift in the treatment of legislative subpoenas. The recent decisions have clearly rejected *Bishop* and are more in line with *Millan*, in

concluding that an order compelling compliance with an administrative subpoena is appealable as a final judgment.

V. CONCLUSION

For the reasons stated above, this Court should grant review to determine the whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 et seq. is appealable as a final judgment in a special proceeding.

DATED: February 17, 2010

Respectfully submitted,

By _____
LEE J. PETROS,
Attorneys for Petitioner

PROOF OF SERVICE

I, RAJASHREE DAYANAND, am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 1851 East First Street, Ste. 857, Santa Ana, CA 92705.

On February _____, 2010, I served the foregoing PETITION FOR REVIEW by placing a true copy thereof enclosed in a sealed envelope, as follows:

Court of Appeal
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Hon. Glenda Sanders
Judge of the Superior Court
Department C-17
700 Civic Center Drive West
Santa Ana, CA 92701

Rutan & Tucker
A. Patrick Munoz
Noam I. Duzman
Jennifer J. Farrell
611 Anton Blvd.,
14th Floor
Costa Mesa, CA 92626

I caused such envelopes to be deposited in the mail at Santa Ana, California or placed for collection and mailing on the date and at the place shown above following our ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing affidavit. The envelopes were mailed with postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this _____th day of February, 2010, at Santa Ana, California.

RAJASHREE DAYANAND