

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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Lin Ouyang,

*Petitioner-Appellant,*

v.

Achem Industry America, Inc.

*Respondent-Appellee*

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
APPEAL OF CALIFORNIA

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

**Question Presented No. 1**

This case involves an appeal from a misdemeanor judgment entered by Los Angeles Superior Court – unlimited civil jurisdiction against an indigent civil litigant, in the indigent's civil lawsuit. California Court of Appeal denied the indigent's request for court appointed counsel and dismissed the appeal without reaching its merit.

*The first question presented is:*

Whether the state court's dismissal of the appeal from misdemeanor conviction, despite the lack of assistance of counsel on appeal, violates the Equal Protection Clause of the Fourteenth Amendment.

**Question Presented No. 2**

California provides no procedure requiring notice of exemptions to judgment debtor and no procedure for claiming them prior to issuance of a turnover order.

*The second question presented is:*

Whether California enforcement of judgments law (California Code of Civil Procedures sections 680.101 through 724.260) is consistent with due process.

## PARTIES TO THE PROCEEDINGS BELOW

All parties appear in the caption of the case on the cover page.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Achem Industry America, Inc. is a wholly owned subsidiary of Achem Technology Corporation. Achem Technology Corporation 's stock is publicly traded. No publicly held entity owns 10% or more of the stock of Achem Technology Corporation. Yem Chio Corporation Ltd. holds controlling shares of Achem Technology Corporation's stock. Yem Chio Corporation Ltd. 's stock is publicly traded. No publicly held entity owns 10% or more of the stock of Yem Chio Corporation Ltd.

## RELATED CASES

*Ouyang v. Achem Industry America, Inc.*, No. BC468795, Los Angeles Superior Court, Judgment entered February 2, 2015.

*Ouyang v. Achem Industry America, Inc.*, No. B261929, California Court of Appeal, Judgment entered June 28, 2019.

## TABLE OF CONTENTS

<b>QUESTION PRESENTED .....</b>	<b>I</b>
<b>PARTIES TO THE PROCEEDINGS BELOW .....</b>	<b>II</b>
<b>RULE 29.6 CORPORATE DISCLOSURE STATEMENT.....</b>	<b>II</b>
<b>OPINION BELOW.....</b>	<b>1</b>
<b>JURISDICTION .....</b>	<b>1</b>
<b>CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....</b>	<b>1</b>
<b>STATEMENT OF CASE .....</b>	<b>1</b>
I. CALIFORNIA COURT OF APPEAL DENIED REQUEST OF COURT	
APPOINTED COUNSEL AND DISMISSED THE INDIGENT'S APPEAL OF A	
MISDEMEANOR CONVICTION ENTERED BY A CIVIL COURT.....	1
II. PETITIONER WAS CONVICTED OF CONTEMPT OF THE COURT FOR	
REFUSING TO TURN OVER HER PERSONAL ELECTRONIC DEVICES FOR	
THE COURT TO SEARCH FOR UNIDENTIFIED RESPONDENT'S FILES.....	3
III. CALIFORNIA ENFORCEMENT OF JUDGMENT LAW DOES NOT	
REQUIRE NOTICE TO JUDGMENT DEBTORS OF RIGHT TO CLAIM	
EXEMPTIONS BEFORE ISSUANCE OF A TURNOVER ORDER. ....	7
<b>REASON FOR GRANTING THE PETITION .....</b>	<b>8</b>
I. CERTIORARI SHOULD BE GRANTED BECAUSE STATE COURT DENIES	
THE INDIGENT'S RIGHT TO EQUAL ACCESS TO THE JUDICIAL SYSTEM..	8

A.	The Equal Protection Clause requires court appointed counsel in indigent's appeal of criminal conviction entered by a civil court.	8
B.	Trial Court's contempt conviction violates petitioner's Fourth Amendment right of being free from unreasonable search.	10
C.	Trial Court's contempt conviction violates petitioner 's right to effective assistance of counsel.	11
D.	Trial Court's contempt conviction violates petitioner 's right to an impartial judge under the Due Process Clause.	12
<b>II. THIS COURT SHOULD DECIDE WHETHER CALIFORNIA'S SCHEME GOVERNING JUDGMENT DEBTOR EXAMINATIONS DENIES PROCEDURAL DUE PROCESS.....</b>		<b>12</b>
A.	California Court of Appeal's opinion conflicts with this Court's precedent.	12
B.	California's scheme is contrary to fundamental principles governing procedural due process.	13
C.	There is a split among the Federal Courts and State Courts.	15
D.	This case presents an ideal vehicle for addressing this important question.	16
<b>CONCLUSION .....</b>		<b>17</b>

#### INDEX OF APPENDICES

- Appendix A. Decision of California Court of Appeal (6-28-2019) App. 1a-31a
- Appendix B. Order of California Court of Appeal Denying Application for Court Appointed Attorney (4-13-2016) App. 32a
- Appendix C. Judgment of Los Angeles Superior Court (3-30-2015) App. 33a-35a

Appendix D. Order of Los Angeles Superior Court Appointing Public Defender (7-17-2015) App. 36a-37a

Appendix E. Order of Los Angeles Superior Court (9-28-2015) App. 38a-39a

Appendix F. Order of Los Angeles Superior Court (9-30-2015) App. 40a-41a

Appendix G. Judgment of Los Angeles Superior Court (11-23-2015) App. 42a-47a

Appendix H. Order of Los Angeles Superior Court (12-2-2015) App. 48a-50a

Appendix I. Order of Los Angeles Superior Court (12-2-2015) App. 51a-52a

Appendix J. Order of Los Angeles Superior Court (1-12-2016) App. 53a-56a

Appendix K. Judgment and Commitment Order Under Misdemeanor Conviction of Los Angeles Superior Court-Unlimited Civil Jurisdiction (1-13-2016) App. 57a-62a

Appendix L. Order of Los Angeles Superior Court (1-14-2016) App. 63a-64a

Appendix L. Order of Los Angeles Superior Court (1-14-2016) App. 63a-64a

Appendix M. Order of Los Angeles Superior Court (2-3-2016) App. 65a-66a

Appendix N. Order of Los Angeles Superior Court (2-10-2016) App. 67a

Appendix O. Order of Los Angeles Superior Court (4-6-2016) App. 68a-70a

Appendix P. Order of California Court of Appeal dismissing appeal of contempt conviction. (11-6-2016) App. 71a-72a

Appendix Q. Order California Court of Appeal denying motion to stay remittitur (2-27-2017) App. 73a.

Appendix R. Order of Appellate Division of Los Angeles Superior Court denying application for relief from a late filing of notice of appeal. (4-19-2017) App. 74a.

Appendix S. Order of California Court of Appeal denying petition for transfer (6-19-2017) App. 75a.

Appendix T. Order of Appellate Division of Los Angeles Superior Court denying petition for rehearing and application for certification. (7-14-2017) App. 76a.

Appendix U. Order of California Supreme Court's denying petition for writ of certiorari. (9-13-2017) App. 77a.

Appendix V. Decision of California Supreme Court denying review (9-11-2019) App. 78a

Appendix W. Record of Los Angeles County Sheriff's department (personal identifications and images are redacted). (6-22-2016) App. 79a-94a

Appendix X. Excerpt of reporter's transcript of trial. App. 95a-204a

Appendix Y. Excerpt of clerk's transcript. App. 205a-249a

Appendix Z. Excerpt of settled statement. App. 250a-271a

Appendix AA. Excerpt of appellant's opening brief. App. 272a-273a

Appendix AB. Excerpt of appellant's reply brief. App. 274a-275a

Appendix AC. Transcript of oral argument on appeal filed with California Court of Appeal. App. 276a-280a

Appendix AD. Order of California Court of Appeal denying petition for rehearing. App. 281a

## TABLE OF AUTHORITIES

### CASES

<i>Aacen v. San Juan Cnty. Sheriffs Dep't</i> , 944 F.2d 691 .....	15
<i>Cuyler v. Sullivan</i> , 446 U.S. 335.....	11
<i>Deary v. Guardian Loan Co., Inc.</i> , 534 F. Supp. 1178.....	15
<i>Dionne v. Bouley</i> , 757 F.2d 1344.....	15
<i>Dorwart v. Caraway</i> , 966 P.2d 1121 .....	15
<i>Douglas v. California</i> , 372 U.S. 353 (1963).....	8
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985) .....	8
<i>Fuentes v. Shevin</i> , 407 U.S. 67 .....	12
<i>Greyhound Corp. v. Superior Court of Merced County</i> (1961) 56 Cal.2d 355 ....	10
<i>Griffin v. Illinois</i> , 351 U.S. 12, 20 (1956).....	8, 10
<i>Hutchinson v. Cox</i> , 784 F Supp. 1339 .....	15
<i>Illinois v. Gates</i> , 462 U.S. 213 .....	10
<i>Imperial Bank v. Pim Electric, Inc.</i> (App. 1 Dist. 1995) 39 Cal.Rptr.2d 432..	8, 13,
<i>15, 17</i>	
<i>In re Murchison</i> (1955) 349 U.S. 133.....	9, 12
<i>Jones v. Barnes</i> , 463 U. S. 745 (1983).....	9
<i>Mapp v. Ohio</i> , 367 US 643 (1961).....	10
<i>Matthews v. Eldridge</i> , 424 U.S. 319 .....	13
<i>McCahey v. L.P. Investors</i> , 774 F.2d 543.....	15
<i>Neeley v. Century Fin. Co. of Arizona</i> , 606 F. Supp. 1453.....	15
<i>New v. Gemini Capital Group</i> , 859 F. Supp. 2d 990 .....	15
<i>People v. Gonzalez</i> (1996) 12 Cal.4th 804 .....	8
<i>Riley v. California</i> (2014), 134 S. Ct. 2473 .....	10
<i>Smith v. Maryland</i> , 442U.S. 735 .....	10
<i>Strickland v. Washington</i> , 466 U.S. 668 .....	9, 11
<i>United States v. Sayan</i> , 968 F.2d 55, 64-65 (D.C.Cir.1992).....	11

### STATUTES

28 U.S.C. § 1257(a) .....	1
---------------------------	---

California Code of Civil Procedure section 170.1 .....	4
California Code of Civil Procedure section 170.6 .....	4
California Code of Civil Procedure section 700.010 .....	7
California Code of Civil Procedure section 703.520, subdivision (a) .....	7
California Code of Civil Procedure section 708.110 .....	7
California Code of Civil Procedure section 708.205 (a).....	7
California Code of Civil Procedure sections 703.140(b) and 704.010 et seq.....	7
California. Penal Code section 166.....	1

## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Lin Ouyang respectfully petition for a writ of certiorari to review the judgment of California Court of Appeal, Second Appellate District.

### **OPINION BELOW**

The opinion of California Court of *Appeal* in *Ouyang v. Achem Industry America, Inc.* is not published in the official report. App. 1a.

### **JURISDICTION**

The judgment of the California Court of Appeal was entered on June 28, 2019. App. 1a. California Supreme Court denied petition for review on September 11, 2019. App. 78a. This Court granted petitioner's application to extend time, up to and including February 8, 2020, to file her petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

United States Constitution, Amendment 14 provides, in relevant part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **STATEMENT OF CASE**

**I. California Court of Appeal denied request of court appointed counsel and dismissed the indigent's appeal of a misdemeanor conviction entered by a civil court.**

Petitioner Lin Ouyang was convicted on January 13, 2016, of contempt of the court, a misdemeanor charge under California. Penal Code section 166<sup>1</sup> and was sentenced to five days in jail in Los Angeles, California, by a civil trial judge acting as a prosecutor without filing a complaint or an affidavit, without a jury, under the same case title of petitioner's civil employment lawsuit against her

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<sup>1</sup> California Court of Appeal's opinion stated, "On December 2, 2015 . . . Judge Harwin found [petitioner] had knowingly and willfully refused to comply with the order (§ 1209, subd. (a)(5))." App. 6a. The record shows that in the proceeding of January 13, 2016, Judge Harwin changed the charge to C.C.P. §1211, then to C.C.P. §1219, and finally to P.C. §166 and set bail amount to one thousand dollars. App. App. 48a-50a, 57a-62a, 79a-94a, 135a:18-23, 168a:18-27, 175a:15-19, 177a:18-27.

former employer respondent Achem Industry America, Inc. App. 57a-62a, 79a-94a.

Petitioner served her sentence, App. 79a-94a, timely filed a notice of appeal with Los Angeles Superior Court-unlimited civil jurisdiction, where the conviction was entered, and later requested a court appointed counsel with California Court of Appeal on the ground of indigency. Commitment order that shows the misdemeanor charge was not attached to the notice of appeal but was attached to petitioner's request for court appointed counsel. California Court of Appeal denied petitioner's request of court appointed counsel and dismissed the appeal as an appeal from an unappealable order. App. 32a, 71a-72a.

After the dismissal, petitioner tried to file a notice of appeal with Los Angeles Superior Court-Criminal Jurisdiction, which rejected the appeal because the court did not have a record of the case. Petitioner also tried to bring the appeal directly to the appellate division of Los Angeles Superior Court, which handles misdemeanor appeal, but the court told petitioner that it did not handle misdemeanor conviction entered by a court with unlimited civil jurisdiction. Petitioner moved to stay the remittitur with California Court of Appeal, which denied the motion with an opinion, "Appellant's contention that a contempt judgment under Penal Code section 166 is appealable to this court is incorrect. By its terms, a judgment of contempt under subdivision (a) of Penal Code section 166 is a misdemeanor, and appellate jurisdiction therefore lies with the appellate division of the superior court. (Pen. Code, § 1466, subd. (b)(1).)" App. 73a.

Petitioner re-filed a notice of appeal with Los Angeles Superior Court-unlimited civil jurisdiction using a form for misdemeanor appeal and applied for court-appointed counsel on appeal at the same time, the notice was stamped as filed by Los Angeles Superior Court, which issued a letter later stating that the notice would not be processed because it was late. Petitioner filed an application for relief from a late filing with the Appellate Division of Los Angeles Superior Court asking the Appellate Division to construe her timely notice of appeal in the civil form as a constructive filing. The Appellate Division summarily denied petitioner's application without appointing an attorney for petitioner. App. 74a.

Petitioner timely filed petition for rehearing with the Appellate Division of Los Angeles Superior Court, petition for transfer with California Court of Appeal, petition for a writ of certiorari with California Supreme Court and petition for a writ of certiorari with this Court arguing an attorney on appeal should be appointed under the Fourteenth Amendment, all those petitions were denied. App. 75a-77a.

California Court of Appeal in its 6-28-2019 opinion finalized the dismissal order finding “Ouyang has not asked this court to reconsider APJ Boren’s order [concluding the contempt judgment was nonappealable, and we discern no reason to do so” App. 14a. The record shows that petitioner asked California Court of Appeal in her reply brief and in oral argument to transfer the appeal of misdemeanor conviction to the appellate division of superior court. App. 274a-275a, 278a.

Without assistance from an attorney, petitioner’s appeal was dismissed without reaching its merit. App. 14a, 32a. Now, petitioner has a criminal record of misdemeanor conviction and suffers collateral consequences such as loss of job opportunities, denial of certain public benefits, and damage to petitioner’s standing and associations in her community. App. 79a-94a.

**II. Petitioner was convicted of contempt of the court for refusing to turn over her personal electronic devices for the court to search for unidentified respondent’s files.**

Trial judge alleged that petitioner violated his order dated 3-30-2015. App. 57a-59a. Trial court’s order of 3-30-2015 requested petitioner to turnover her personal electronic devices for respondent Achem Industry America, Inc. (Achem) to search for certain Achem’s files listed in a document bates-stamped as “AC0001-13”. No document bates-stamped as “AC0001-13” is attached to the order. App. 33a-35a.

At the contempt hearing held on January 13, 2016, petitioner provided a CD-ROM, App. 163a:21-25,164a:26-28, explaining to the court that the CD ROM contained the copy of those files requested by Achem, and she had sent them to Achem attorney and had asked Achem attorney if there was any additional document for her to provide, Achem had not identify any additional documents,

thus she had complied with the 3-30-2015 order by providing the image backup of those files requested by Achem. App. 166a:19-28 – 167a:1-13. In response, Achem attorney did not deny that petitioner had provided the files that Achem requested, also did not deny that Achem did not identify any additional files, however the attorney represented to the trial court that the order required petitioner to turn over her computer for inspection. App. 164a:10-17. The trial judge stated to petitioner in the hearing that, “The order is to bring your computer.”<sup>2</sup> App. 169a:3-9. Petitioner did not agree to turn over her personal computer claiming her property right to the computer. App. 170a:10-16. Petitioner did not have any disorderly, contemptuous or insolent behavior toward the judge nor had any conduct of breach of the peace in the courtroom. App. 146a-204a. The trial judge found petitioner in contempt of the court for alleged violation of his order of 3-30-2015, sentenced petitioner to jail under California Penal Code §166, and ordered that petitioner be taken into custody at the same time. App. 57a-62a, 79a-94a.

Achem originally initiated the contempt proceedings against petitioner, however the trial judge construed that Achem attorney filed the motion under a wrong code and announced that the judge himself would prosecute petitioner after Achem attorney withdraw its motion at the request of the trial judge. App 135a:18-23, 138a:1-17. Petitioner filed a motion to disqualify the judge under California Code of Civil Procedure section 170.6 on the same day the trial judge announced that the judge himself would prosecute petitioner, and after that motion was denied, petitioner filed another motion to disqualify under California Code of Civil Procedure section 170.1, which was also denied. App. 51a-56a.

A public defender was appointed to represent petitioner in the contempt matter. App. 36a-37a. The public defender represented to the trial judge at the contempt hearing, “I just wanted to make it clear that, especially the filings of the 170.6, the 170.1 and any appellate actions were done without my acquiescence.”

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<sup>2</sup> The opinion of California Court of Appeal states, “Under the March 2015 order ... Following the expert’s review of the forensic image and copying of enumerated documents and files...” App. 11a. The record shows that no identification of documents and files is attached to the order, App. 33a – 35, and trial judge rejected petitioner ‘s interpretation of the order that the order was a request of image of the files requested by Achem. App. 166a:19-28 – 167a:1-13, 169a:3-9.

Trial judge responded, "Thank you. And the record may so reflect." App. 163a:10-16. In addition, the public defender represented to the trial judge, "I'm -- unfortunately as I stated before, almost seems like there is a dual track defense here", and repeatedly argued against petitioner at the contempt hearing, and the trial judge appeared approving such conduct by responding, "Certainly", "That's whole purpose of this hearing", "Absolutely". App. 171a:3-174a:25. Moreover, when neither a complaint nor an affidavit was filed against petitioner by the trial judge and trial judge kept changing his charges, from California Code of Civil Procedure section 1209.5, 1209 (a) (5), 1211 and 1219 to Cal. Penal Code §166, the public defender did not make any objections. App. 48a-50a, 135a:18-23, 168a:18-27, 175a:15-19, 177a:18-27.

Achem alleged that petitioner refused to return certain Achem's files and those files contained "Achem's confidential information"; Achem's allegation is based on petitioner 's trial testimony: petitioner testified that she downloaded 3,000 files from her work computer in September 2010, and later corrected that what she downloaded was a file list of 3,000 files, not the actual files. Achem alleged petitioner deleted those 3,000 files from her personal devices and moved the trial court to obtain an image of petitioner's personal devices so that Achem could "recover" the 3,000 files. App. 96a, 99a-100a, 205a-240a. The record shows that Achem had the 3,000 files in Achem's computer and knew what petitioner downloaded in September 2010 was a list of the files as Achem's witness HR Vestal testified at trial that she observed that there was one hour difference between the time stamps of the 3,000 files on petitioner's work computer during daylight saving time and standard time and petitioner's list of files was obtained in summer time. App. 102a-103a ["When she downloaded her file lists from her computer, she did it during daylight savings time."] Trial court anyhow granted Achem's motion on December 12, 2014. App. 34a.

Petitioner searched her personal devices, on December 22, 2014 found a compressed file containing a backup of her work files obtained on December 8, 2010 that contains the 3,000 files requested by Achem and files not requested by Achem. On December 24, 2014, petitioner sent the 3,000 files together with those files not requested by Achem to Achem attorney, petitioner did not use those files for any purpose. App. 241a-244a. Petitioner admitted at trial that that she did not

have a good memory toward of the end of year 2010 when she suffered severe panic attacks. App. 107a:11-20.

Achem attorney did not identify any additional files for petitioner to return, App. 167a:7-13, but still submitted a proposed order for the trial judge to approve. On March 30, 2015, trial court approved Achem's proposed order to obtain images of petitioner's personal devices to search for unidentified Achem's files. App. 32a-35a.

On appeal, petitioner challenged that the trial court's 3-30-2015 order is unconstitutional. California Court of Appeal rejected the argument<sup>3</sup> finding that the order is non-appealable because ““the March 2015 order was intended to preserve evidence potentially relevant to Achem's defense in the litigation between the parties -- including any retrial following the appeal”. App. 11a, 19a. The record shows that the 3-30-2015 is a final judgment ordering petitioner to return Achem's files. Specifically, The order states, “The defendant's expert is permitted to search for, restore, and copy those Achem documents it discovers that are identified in Exhibit A.”<sup>4</sup> App. 34a.; trial judge stated that the order was to request petitioner to “turn over all of Achem 's information on [petitioner's] computer.” App. 191a:12-19; In addition, even though Achem alleged in its motion to compel inspection that the documents requested by Achem were relevant to petitioner's “various continuing legal actions”, App. 208a, there is no cause of action, cross-complaint or affirmative defense against petitioner for obtaining or keeping Achem's files. Thus, there is no subsequent proceeding or retrial of relating to the 3-30-2015 order, except enforcement of the order.

Petitioner testified at the trial of her employment lawsuit that Achem let her to back up her work files. App. 106a:15-18.

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<sup>3</sup> In the footnote of the opinion, California Court of Appeal addressed petitioner's argument that the trial court's 3-30-2015 order is unconstitutional.

<sup>4</sup> In the opinion of California Court of Appeal, the description of trial court's 3-30-2015 order omitted item 3 of the order, which is “The defendant's expert is permitted to search for, restore, and copy those Achem documents it discovers that are identified in Exhibit A.” App. 11a, 34a.

**III. California Enforcement of Judgment Law does not require notice to judgment debtors of right to claim exemptions before issuance of a turnover order.**

California Code of Civil Procedure sections 703.140(b) and 704.010 et seq. provide a list of property which every person domiciled in California may hold exempt from satisfaction of the money judgment. However, California provides no procedure requiring notice of exemptions to judgment debtor and no procedure for claiming them prior to issuance of a turnover order, see California Code of Civil Procedure section 708.110, *Imperial Bank v. Pim Electric, Inc.* (App. 1 Dist. 1995) 39 Cal.Rptr.2d 432, 440, 33 Cal.App.4th 540, even though California Code of Civil Procedure section 708.205 (a) indicates that the court may only order the judgment debtor's interest in those property that is not exempt from enforcement of a money judgment to be applied toward the satisfaction of the money judgment.

Under the current scheme of California, exempt property may be released after claiming exemption with the levy officer who take the property into his custody. Specifically, California Code of Civil Procedure section 700.010 requires that the levying officer must promptly serve judgment debtors with copies of the notice of levy and the form listing exemptions upon taking custody of tangible personal property and California Code of Civil Procedure section 703.520, subdivision (a) provides that judgment debtors are able to raise exemption claims once a notice of levy is served. However, property owner is deprived usage of his or her property during the period the property is in the custody of levy officer.

In the present case, petitioner's exempt property, stock in the value of three thousand dollars, was ordered by the trial court to turnover to the levying officer at the conclusion of a judgment debtor's examination. App. 44a, 113a:16-18. Petitioner specifically asked the trial judge at the conclusion of the debtor's examination, "how do I claim exemption?" Trial judge responded, "... after the sheriff receives the property..." App. 114a:18-27. Even though, petitioner 's stock was released eventually, petitioner was not able to trade them for cash to support her livings before they were released.

Petitioner contends in her appeal that the statutory scheme governing judgment debtor examinations denies procedural due process. California Court of Appeal rejected the contention relying on *Imperial Bank v. Pim Electric, Inc.*

(App. 1 Dist. 1995) 39 Cal.Rptr.2d 432 holding "the statutory scheme adequately "safeguards the judgment debtor's procedural due process rights"" because judgment debtor is afforded the opportunity to recover exempt property after the property is taken in the custody of the levying officer. App. 25a.

#### **REASON FOR GRANTING THE PETITION**

##### **I. Certiorari should be granted because state court denies the indigent's right to equal access to the judicial system.**

###### **A. The Equal Protection Clause requires court appointed counsel in indigent's appeal of criminal conviction entered by a civil court.**

This Court held that U.S. Const. Amend. XIV guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make the appeal "adequate and effective," *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); among those safeguard is the right to counsel, *Douglas v. California*, 372 U.S. 353 (1963). The reasoning is that if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U. S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

In California, misdemeanor conviction is appealable under California Penal Code section 1466. *People v. Gonzalez* (1996) 12 Cal.4th 804. Thus, petitioner has a right to appeal the misdemeanor conviction under the state statute, and the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

It is apparent that the misdemeanor conviction in this case should be vacated because the conviction was obtained illegally in violation of the Due Process Clause, as petitioner was not notified that she was charged of misdemeanor contempt of the court under Penal Code section 166. App. 48a-50a, 135a:18-23, 166a:9-10, 168a:18-27, 175a:15-19, 177a:18-27. However, without assistance of counsel on appeal, petitioner has for the past four years unsuccessfully pursued every avenue open to her in an effort to vacate the unjust

conviction. While it is unclear as to what procedure to follow to appeal a criminal conviction entered by a civil court, petitioner, an indigent, has only the right to a meaningless ritual, while the rich man has a meaningful appeal. Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, an unconstitutional line has been drawn between rich and poor. *Douglas v. California*, 372 U.S. 353, 357 (1963)

The fact that the misdemeanor judgment arose from a civil matter should not be a concern to determine whether to appoint a counsel to assist the indigent to appeal from the criminal judgment. Even though petitioner raised the arguments relating to the civil matter such as whether she was denied a due process right to a notice and an opportunity to be heard before the trial court ordered petitioner to turn over her personal computers, the attorney needs not advance every argument, regardless of merit, urged by the appellant, *Jones v. Barnes*, 463 U. S. 745 (1983). Rather, what petitioner, an indigent, needs is attorney's assistance in preparing and submitting the appeal from the criminal judgment in a form suitable for appellate consideration on the merits. There are meritorious arguments in the appeal, such as whether it is a violation of due process when the trial judge acted as the judge and prosecutor at the same time, *In re Murchison* (1955) 349 U.S. 133, 75 S.Ct. 623, and whether it is a violation of right to counsel under U.S. Const. Amend. VI and U.S. Const. Amend. XIV, had the public defender objected or pointed out to the trial judge that there was no complaint or affidavit filed, petitioner would not have been convicted of misdemeanor, *Strickland v. Washington*, 466 U.S. 668. Unfortunately, none of these arguments were reviewed on its merit.

We cannot tell from the state court's opinions how many litigants or defendants are in the same situation as petitioner because the state court's opinions do not reflect the real situation unrepresented indigent litigants are facing. In this case, California Court of Appeal dismissed petitioner's contempt appeal as an appeal from non-appealable order without mentioning that petitioner was convicted of misdemeanor, an appealable judgment,<sup>5</sup> App. 14a, and the record is clear that petitioner received the punishment and suffered the collateral

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<sup>5</sup> Petitioner filed a timely petition for rehearing with California Court of Appeal on the ground, among other matters, the opinion is based on mistakes of significant facts. California Court of Appeal denied the petition. App. 281a.

consequence of a misdemeanor conviction. App. 57a-62a, 79a-94a. Even this case is the first instance that a civil litigant was convict of a crime by a civil court, certiorari still should be granted to ensure what happened to petitioner today won't happen to anyone else in the future.

“Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal.” *Griffin v. Illinois*, 351 U.S. 12, 16 (1956) This Court’s interpretation of the Equal Protection Clause is needed to cope with the current problem of denial of adequate review to the poor, and we will move closer to that goal.

B. Trial Court’s contempt conviction violates petitioner’s Fourth Amendment right of being free from unreasonable search.

This Court held that warrant is generally required under the Fourth Amendment before searching an individual’s cell phone, or similar electronic devices. *Riley v. California* (2014), 134 S. Ct. 2473. Fourth Amendment, made applicable to the states through the Fourteenth Amendment, prohibits unreasonable searches. *Mapp v. Ohio*, 367 US 643 (1961). Search warrants are issued upon a showing of probable cause. *Smith v. Maryland*, 442U.S. 735, 740. The assessment of whether the burden is met calls for “a practical, common-sense decision whether, given all the circumstances set forth ... there is a fair probability that contraband or evidence . . . will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983). In this case, neither the trial court nor respondent Achem was able to identify any additional Achem’s files for petitioner to return after she returned those files requested by Achem together with the files not requested by Achem on December 24, 2014, App. 163a:21-25,164a:26-28, 166a:19-28 – 167a:1-13, thus there is no showing of probable cause that any “contraband or evidence” will be found in petitioner’s personal electronic devices. Accordingly, the trial court’s 3-30-2015 order constitutes an unreasonable search and the contempt conviction is in violation of the Fourth Amendment.

California Court of Appeal denied petitioner ‘s Fourth Amendment argument in the foot note of the opinion holding that “the motion procedure for obtaining discovery orders is an adequate equivalent of a warrant” relying on *Greyhound Corp. v. Superior Court of Merced County* (1961) 56 Cal.2d 355, 394.

App. 16a. California Supreme Court 's opinion in *Greyhound* held that "just as search warrants are justifiable on the showing of good cause (and the provision of other protective procedures), so an order for the inspection of material in a civil case is reasonable when similar provision is made." *Ibid.* Term "good cause" used by *Greyhound* court has been confusing to the lower courts. This Court held that showing of relevancy and maturity fell short of the probable cause required for a warrant. *Carpenter v. United States*, 138 S.Ct. 2206, 2210. In this case, even we assume that there is a misappropriation cause of action and trial court's 3-30-2015 order is a discovery order, the order still lacks of support of probable cause, as the court has to examine each file on petitioner personal devices to decide whether it is Achem's file when the court does not know what file to search for.

Accordingly, the order failed to meet the Fourth Amendment warrant requirement. *Ibid.*

C. Trial Court's contempt conviction violates petitioner 's right to effective assistance of counsel.

Trial court appointed a public defender to represent petitioner in the contempt proceedings. App. 36-37. However, petitioner did not receive effective assistance of counsel and the contempt conviction is a violation of right to counsel under U.S. Const. Amend. VI and U.S. Const. Amend. XIV. (*Gideon v. Wainwright*, 372 U. S. 335, 344 (1963))

Specifically, the public defender at trial repeatedly argued against petitioner defending the prosecutor-trial judge, App. App. 171a:3-174a:25, *Cuyler v. Sullivan*, 446 U.S. 335, feared to antagonize the trial judge, App. 163a:10-16, *United States v. Sayan*, 968 F.2d 55, 64-65 (D.C.Cir.1992), and did not make any objections when the trial judge without filing a complaint or affidavit kept changing charges and finally convicted petitioner of misdemeanor. App. 48a-50a, 135a:18-23, 168a:18-27, 175a:15-19, 177a:18-27. *Strickland v. Washington*, 466 U.S. 668.

D. Trial Court's contempt conviction violates petitioner's right to an impartial judge under the Due Process Clause.

A judge cannot be prosecutor and judge. *In re Murchison* (1955) 349 U.S. 133. In this case, the trial judge showed a biased mind that he wanted respondent to win when he construed respondent's motion was filed under a wrong code and requested respondent to withdraw its motion so he could prosecute under the code that he believed correct. App. 138a:1-17. The evidence before the trial is clear that there is no merit of the contempt proceeding as petitioner had admitted that she had the files that Achem alleged containing "Achem's confidential information" and return them, and no additional files were identified by Achem. However, the trial judge apparently could not weigh the scales of justice equally between petitioner and himself, because if he failed to convict petitioner of contempt of the court, the judge more than likely, would have felt a great debt to respondent, who had invested time and money to the prosecution, but withdrew the motion at the advice of the judge.

**II. This Court should decide whether California's scheme governing judgment debtor examinations denies procedural due process.**

A. California Court of Appeal's opinion conflicts with this Court's precedent.

California Court of Appeal's opinion holding that "the statutory scheme adequately "safeguards the judgment debtor's procedural due process rights"" because judgement debtor is afforded the opportunity to recover exempt property after the property is taken in the custody of the levying officer, App. 25a, conflicts with this Court's opinion that a temporary, nonfinal deprivation of property is a "deprivation" in the terms of the Fourteenth Amendment " and is required under the mandate of due process to be preceded by notice and a hearing absent "extraordinary" or "truly unusual" circumstances. *Fuentes v. Shevin*, 407 U.S. 67, 82, 88, 90-91, 1972.

Here, the deprivation of judgment debtors' interest in exempt property is significant even though the deprivation is only temporary, specifically to the poor, because the debtors need the property to support and/or make a living. In this

case, petitioner needed to trade the stocks for cash to support her living during the period there was lien on it.

The reasoning of California Court of Appeal in *Imperial Bank v. Pim Electric, Inc.* (App. 1 Dist. 1995) 39 Cal.Rptr.2d 432, 553, fails to consider the damage of being unable to use the exempt property during the period the property is taken in custody of a levying officer, which is deprivation required under the Due Process Clause to be preceded by notice and a hearing. *Fuentes v. Shevin*, 407 U.S. 67, 82, 88.

**B. California's scheme is contrary to fundamental principles governing procedural due process.**

In determining whether a procedure complies with the Due Process Clause, the Court has often undertaken the three-part inquiry set forth in *Matthews v. Eldridge*, "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) Here, all three factors indicate that California's scheme is inconsistent with due process.

First, California Code of Civil Procedure sections 703.140(b) and 704.010 et seq. provide a list of property which every person domiciled in California may hold exempt from satisfaction of the money judgment. Petitioner, a judgment debtor, has a property interest in retaining exempt property, which is necessary for sustenance a living.

Second, California's procedures create a serious risk of erroneous deprivation of possession of exempt property. With no notice of exemptions, debtors are unlikely to know independently that they have such rights; the items exempt from execution are hardly matters of common knowledge. In this case, without notice of right to claim exemption prior to issuance of turnover order, petitioner, un-represented, failed to assert her right to claim exemption, despite that she told the trial court that she needed to claim exemption and sought legal

advice from the trial judge for procedures to claim exemption for her property. App. 113a:16-18, 114a:18-27. As a result, petitioner's stock in the amount of \$3,000, which is exempt by California Code of Civil Procedure section 703.140(B)(5) was order by the trial court to turn over to the levying officer. App. 44a. Because the turnover order created a lien over petitioner's stocks, California Code of Civil Procedure section 708.205 (a), petitioner was not able to trade them for cash to support her livings until they were released by the levying officer. A notice of right to claim exemption prior to issuance of a turnover order would be of great value in avoiding erroneous deprivations. Once a debtor knows his or her right to claim exemptions and the exemptions to which he or she is entitled, there is no great procedural bar to asserting those exemptions. In many instances, the claims will not be difficult to decide.

Third, state has important interests in facilitating collection of judgments issued by its courts: an interest in safeguarding the efficacy of its civil justice system. It also has an interest, reflected in the very adoption of the exemption statute, in keeping its citizens self-sufficient and independent. Requiring notice of exemptions to judgment debtor and a procedure for claiming them will help to achieve these interests of a state in a rational way: presumably the state does not have and would not assert an interest in having debtors erroneously deprived of their exempt property, even temporarily. Finally, a notice requirement can be imposed with very little additional administrative or fiscal burden: since clerks are issuing notice to appear at debtor's examination to judgment debtors already, all they need do is to add an addition notice of right to claim exemption.

Adjudicating additional exemption claims may impose some additional burden on the courts, but that is generally inescapable if there is a dispute whether certain properties are exempt. In addition, a notice requirement at the stage of debtor's examination will assist the state in providing less inexpensive and more rapid methods of collecting judgments because exempt property cannot be used to satisfy money judgment, adjudication of the matter at an early stage will save the cost of the creditor and shorten the time of collection.

For the above reasons, California's enforcement of judgment law is in violation of the Due Process Clause.

C. There is a split among the Federal Courts and State Courts.

Majority courts adjudicated the question presented in this case, and opinions are dividing.

Certain federal courts and state courts hold that post judgment execution statute without requiring a notice and hearing prior to attachment is constitutionally inadequate. These courts include but not limited to: *Aacen v. San Juan Cnty. Sheriffs Dep't*, 944 F.2d 691, 697 (10th Cir. 1991, exempted truck was seized and sold); *Hutchinson v. Cox*, 784 F Supp. 1339 (Ohio, 1992, exempted truck was seized and released later to the debtor); *Dorwart v. Caraway*, 966 P.2d 1121, 1143-45 (Supreme Court of Montana, 1998); *New v. Gemini Capital Group*, 859 F. Supp. 2d 990 (SD Iowa 2012); *Neeley v. Century Fin. Co. of Arizona*, 606 F. Supp. 1453, 1461 (D. Ariz. 1985); *Deary v. Guardian Loan Co., Inc.*, 534 F. Supp. 1178 (S.D.N.Y.1982).

Certain federal courts and state courts hold the opposite position: post judgment execution statute without requiring a notice and hearing prior to attachment is constitutionally adequate. These courts include but not limited to: *Imperial Bank v. Pim Elec., Inc.*, 39 Cal. Rptr. 2d 432 (Cal. Ct. App. 1995) found that giving notice of possible exemptions at time of seizure satisfied due process; *McCahey v. L.P. Investors*, 774 F.2d 543, 549 (2d Cir. 1985) rejected the argument that notice and a hearing must be accorded debtors before seizure considering the risk of that the debtor will conceal assets upon receiving notice of exemption. *Id.* at 550. *Dionne v. Bouley*, 757 F.2d 1344 (1st Cir.1985) addressed a concern similar to the concern of *McCahey* court, ““if notice were given the judgment debtor before issuing the garnishment, ‘the very advantage sought by the writ would possibly be of no avail, as a disposition could be made of the funds or property before service could be had.”” *Id.* at 1352.

It is hardly to connect notice of exemption with the risk of concealment of non-exempt assets. *McCahey* court did not elaborate its analysis in its opinion. *McCahey v. L.P. Investors*, 774 F.2d 543, 550 (2d Cir. 1985) It is possible that once a judgment debtor know what asset is exempt, there is a risk that the debtor will convert non-exempt asset to exempt asset, for example, a debtor has \$50 cash exceeding cash exempt limit and the debtor became aware upon receiving the notice that his or her house appliance under certain value is exempt, then the

debtor may purchase \$50 laundry detergent for a whole year's use. In this situation, notice of exemption helps debtors to maximize possible exempt asset and such acts of debtors should not be considered as "concealment." The analysis of *Dionne* is unsound as well. If a judgment debtor intends to dispose his or her fund, it will be done at the time a judgment is entered, and it wouldn't be at the time a notice of levy is served.

D. This case presents an ideal vehicle for addressing this important question.

The question presented in this case has been presented to the lower courts for quite some years in many other cases and the arguments of both sides of the question have been well developed. Now the question is ripe for this Court's review.

The major concern of those opposing providing notice and a hearing prior to seizure is that the notice may alert a debtor to dispose non-exempt asset, see *McCahey v. L.P. Investors*, 774 F.2d 543, 550 (2d Cir. 1985), *Dionne v. Bouley*, 757 F.2d 1344, 1352 (1st Cir. 1985). Notice of exemption does provide an opportunity for a debtor to convert non-exempt asset to exempt asset and at the same time, the amount a creditor could collect may get less comparing to the situation a debtor is not notified. While without notice and a hearing, there is a high risk of erroneous deprivation of necessities from the poor that creates concerns over the standard of humanity and civility that our laws provide and affects the stability of our society. That conflict, on a matter of great practical significance, will not be resolved without this Court's review.

In addition, when a creditor seeks a debtor's potential exempt asset, non-exempt asset that could be converted to exempt asset, generally only the poor is involved. This Court's review will also help to determine an important public policy with regards to whether an opportunity should be provided for judgment debtors to convert non-exempt asset to exempt asset so that the debtors could obtain maximum exempt assets available to them as provided by the state statute.

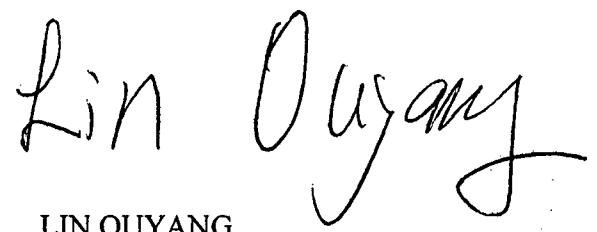
This case presents an ideal vehicle for addressing this important question. The proceedings and decision below precisely frame the question of law for the Court: "noting in [California] Code of Civil Procedure § 708.110, governing a

judgment debtor's own examination proceeding, requires that judgment debtors be given notice of the exemptions. Nor does that section describe the procedure to be used by the debtor in claiming an exemption in that proceeding." *Imperial Bank v. Pim Electric, Inc.* (App. 1 Dist. 1995) 39 Cal.Rptr.2d 432, 440, 33 Cal.App.4th 540. Without a notice of exemption, petitioner did not know that she could claim exemption prior to issuance of a turnover order, App. 113a:16-18, 114a:18-27, as a result, petitioner's exempt property, stock in the amount of \$3,000 was ordered to turnover to the levy officer. App. 44a. Even though, the property was released later, petitioner was not able to trade it for cash during the time there was a levy.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectively submitted,



LIN OUYANG

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