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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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JEWERELENE STEEN, Petitioner, v. APPELLATE DIVISION OF THE LOS ANGELES COUNTY SUPERIOR COURT Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	S-_____ (2d Dist.No. B217263; App.Div.No. BR046020; Trial Ct.No. 6200307)

SUPREME COURT
FILED
JUL 20 2009
Frederick K. Ohlrich Clerk
Deputy

PETITION FOR WRIT OF MANDATE

From the Appellate Division, Los Angeles County Superior Court
Hon. Patti Jo McKay, Presiding Judge

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

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PETITION FOR WRIT OF MANDATE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The proceedings in this case raise extremely important questions of general importance about which unresolved conflicts now exist in California law. The fundamental issue involves whether criminal proceedings may be commenced by court clerks absent prior screening of such charges by the authorized public prosecutor. Nevertheless, the Appellate Division has denied certification and the Court of Appeal has denied transfer. Under these circumstances, it is appropriate for petitioner to seek relief in this court in this original petition for writ relief. (See Randone v. Appellate Division (1971) 5 Cal.3d 536, 542-545.)

In an opinion filed on June 8, 2009, the Appellate Division of the Los Angeles County Superior Court affirmed a judgment of the Los Angeles County Superior Court in which charges against petitioner were initiated by a clerk of court. In so ruling, the Appellate Division refused to apply decades of judicial authority establishing that it is a violation of due process for a defendant to be subjected to criminal prosecution unless the initiation of criminal proceedings is preceded by individual screening and approval by the authorized prosecutor. (See, for example, People v. Municipal Court (Pellegrino) (1972) 27 Cal.App.3d 193, 205; People v. Viray (2005) 134 Cal.App.4th 1186, 1204.)

Every week, hundreds of criminal prosecutions are being initiated by court clerks, without any prosecutor individually screening such prosecutions prior to the filing of charges. [1/] Yet, as demonstrated herein, the filing of charges in such a manner violates not only a defendant's right to due process of law, but violates the separation of powers itself. Consequently, a decision by this court is necessary to resolve important questions of law concerning the authority of court clerk, or anybody else, to initiate criminal proceedings prior to screening and authorization by the authorized prosecutor.

For all these reasons, petitioner Jewerelene Steen, by and through her attorney Michael P. Judge, Public Defender of Los Angeles County, hereby files her verified petition for writ of mandate, and respectfully urges this court to hear and resolve the following issues presented by this case.

[1/] Undersigned counsel is informed that between 200 and 300 criminal cases are filed by court clerks in the Metropolitan Courthouse of the Los Angeles County Superior Court alone.

ISSUES TO BE RESOLVED

1. Does a defendant have a due process right to have the authorized prosecutor screen and authorize a criminal prosecution prior to the initiation of criminal proceedings? (See People v. Viray (2005) 134 Cal.App.4th 1186, 1204; People v. Smith (1975) 53 Cal.App.3d 655, 659; People v. Municipal Court (Pellegrino) (1972) 27 Cal.App.3d 193, 205-206.)

2. Does the prosecutor have the authority to delegate his responsibility to screen and authorize prosecutions prior to the initiation of criminal proceedings to a clerk of court?

3. If a court clerk purports to initiate a criminal proceeding absent prior screening and authorization of that proceeding, is the resulting complaint a nullity?

4. Is the initiation of criminal proceedings by a court clerk a violation of the separation of powers? (See People v. Viray, supra, 134 Cal.App.4th at pp. 1202-1203; People v. Cimarusti (1978) 81 Cal.App.3d 314, 323.)

5. Does Penal Code section 959.1 authorize a court clerk to initiate criminal proceedings absent the prior screening and approval of the prosecutor? If so, does it do so if the complaint is not in electronic form? If so, is section 959.1 constitutional?

6. If a prosecutor may authorize a prosecution after the fact, is a complaint valid prior to such authorization? If not, and the authorization occurs after the expiration of the statute of limitations, is the prosecution barred?

7. May a defendant be tried upon a criminal complaint which is not brought in the name of the People of the State of California? (See Gov. Code § 100, subd. (b); People v. Black (2003) 114 Cal.App.4th 830, 833.) If so, may the City Attorney or District Attorney appear as

counsel for a party when a prosecution is brought in the name of a court clerk?

VERIFIED PETITION

By this verified petition the following facts and causes are set forth for the issuance of the writ:

I

Petitioner was the appellant in the case entitled "People v. Steen," case number BR046020, heard in the Appellate Division of the Los Angeles County Superior Court. The facts underlying that appeal are set forth in the paragraphs below.

II

Respondent is the Appellate Division of the Los Angeles County Superior Court. The People of the State of California, by their attorney Carmen Trutanich, City Attorney for the City of Los Angeles, may be a real party in interest, and have appeared in this matter so far. Given the Appellate Division's ruling in this case, the correct real party may be the court clerk in whose name the instant criminal proceeding was purportedly initiated.

III

On June 8, 2002, petitioner was apparently issued a traffic citation for driving a vehicle with expired registration (Veh. Code § 4000), not having proof of insurance (Veh. Code § 16028), and driving without a license (Veh. Code § 12500 – it was not specified whether this charge was an infraction or misdemeanor). Petitioner was apparently cited to appear on July 23, 2002, and failed to do so.

IV

On August 13, 2002, a document purporting to be a misdemeanor complaint was filed in the Los Angeles County Superior Court (although the document stated it was filed in the "Municipal Court of Los Angeles – Met Judicial District"). The document purported to

charge petitioner with the previously alleged Vehicle Code violations, and an additional charge of violating Vehicle Code section 40508, subdivision (a) (violation of a promise to appear), at least, petitioner was named as a "defendant," although no identification was given of a plaintiff. In particular, the document does not claim to have been filed by or on behalf of "The People of the State of California." Again, it was not clearly specified whether the alleged violation of section12500 was an infraction or misdemeanor; a violation of section 40508(a) is a misdemeanor.

V

It is undisputed that the document purporting to be a misdemeanor complaint was not filed by any prosecuting attorney. Although the name of the Honorable Carol H. Rehm, Jr., judge, appears on the "complaint," all parties agreed below that the document was actually executed by a clerk of court. (Exh. "B,"pp. 1, 5, 6-7.)

VI

On July 27, 2007, petitioner appeared in the superior court before Commissioner Elizabeth M. Munisogh, presiding as temporary judge. Petitioner filed her written demurrer to the charge that she had violated Vehicle Code section 40508, subdivision (a), on the basis that the purported criminal proceeding had not lawfully been commenced by a prosecuting attorney, and thus the complaint on its face showed a bar to prosecution and the court was without jurisdiction of the asserted accusation. (Pen. Code § 1004, subds. 1, 5.)

VII

Hearing upon the demurrer was commenced immediately. The court asserted that so long as a prosecutor approves the complaint "as it is presented" the complaint then "is authorized." The court then asked a prosecutor, a deputy Los Angeles city attorney then present in the courtroom, whether the City Attorney was "authorizing or concurring

in the complaint as presently constituted." The prosecutor responded, "yes." (Exh. "B," p. 5:3-11.)

VIII

The court then asserted that a clerk does not exercise "judicial functions," and that the functions of a court clerk are "ministerial." At a later point, the court also asserted that the constitutional separation of powers was not to be applied "in a rigid, unbending manner." (Exh. "B," p. 6:7-12.) The court also claimed that the clerk is the "witness" to the violation and is therefore "the appropriate party to initiate the complaint as approved, concurred in by the City Attorney." (Exh. "B," p. 5:18-22.)

IX

The court then referenced Penal Code section 959.1, subdivision (c)(1), which permits a clerk to file an accusatory pleading in electronic form, although there was no claim or showing that the "complaint" in this case was filed electronically. The court appeared to believe that section 959.1 authorizes a clerk to initiate a criminal proceeding, and that the statute would have to be found unconstitutional should clerks be prohibited from initiating criminal proceedings. [2/] (Exh. "B," pp. 5:23-6:6.)

X

The court asked the prosecutor to respond, and the prosecutor asserted that the City Attorney was aware that superior court clerks were purporting to initiate criminal proceedings, and that the prosecutor had not asked them to stop, which, according to the prosecutor, indicated a overall approval of any criminal charge initiated by a clerk. (Exh. "B," pp. 6:19-7:10.)

[2/] The meaning and application of Penal Code section 959.1, which, in fact, does not authorize clerks to initiate criminal proceedings, or, if it does, is unconstitutional, will be discussed post.

XI

Petitioner's counsel responded that even if the prosecutor could validate an unconstitutional attempt by the clerk to initiate a criminal proceeding by approving such a proceeding after the fact, such an approval would have to occur within the time period in which the charge might be filed. The charge against petitioner was based upon conduct occurring in 2002, and the prosecutor's concurrence did not happen until 2007, long after the expiration of the statute of limitations. (Exh. "B," pp. 7:23-8:8.) No response was made by the prosecutor or the court to this point.

XII

The court thereupon overruled the demurrer. Petitioner then entered her plea of no contest to the charge of violating Vehicle Code section 40508, subdivision (a). Probation was denied, and petitioner was ordered to serve 50 days in jail. (Exh. "B," p. 9:11-23.) A timely notice of appeal was thereafter filed.

XIII

On appeal, the Appellate Division found that the City Attorney had approved the actions of the court clerk in filing criminal complaints in general. Without discussing the point that the prosecutor had neither screened nor authorized the charge before it was filed against appellant, the Appellate Division found that such a blanket authorization comported with due process requirements.

The Appellate Division stated that the City Attorney could at any time cause the complaint to be dismissed by withdrawing consent to its filing, and that therefore there was no violation of the constitutional requirement of separation of powers when criminal proceedings were initiated by a judicial functionary.

The Appellate Division held that the reference in Penal Code section 959.1 to clerks filing complaints in electronic form authorized

clerks to initiate criminal proceedings, and that, although it was not clear that the complaint in this case was filed electronically, the statute's authorization was not limited to complaints filed in electronic form.

The Appellate Division held that the failure of the complaint to name the People of the State of California as the plaintiff was a mere error in form.

XIV

On June 19, 2009, petitioner filed a Petition for Rehearing and/or Certification in the Appellate Division, which the Appellate Division summarily denied without comment on June 30, 2009.

XV

On July 6, 2009, petitioner filed her petition for transfer in the California Court of Appeal, Second Appellate Division. The petition was denied on July 16, 2009, by Division Four of that court. The court cited rule 8.1008(b)(3), apparently indicating the court's conclusion that the question of whether court clerks can file criminal charges is not an important issue.

XVI

The following documents demonstrating the facts set forth above have been lodged with the Clerk of this court at the time of filing this petition, and are incorporated herein by reference:

Exhibit "A": A copy of the "complaint" filed in the superior court in case number 6200307.

Exhibit "B": A copy of the transcript of the proceedings of July 27, 2007, in the trial court.

Exhibit "C": A copy of Appellant's Opening Brief in the Appellate Division.

Exhibit "D": A copy of Respondent's Brief in the Appellate Division.

Exhibit "E": A copy of Appellant's Reply Brief in the Appellate Division.

Exhibit "F": A copy of the Appellate Division's memorandum judgment.

Exhibit "G": A copy of petitioner's Petition for Rehearing and Request for Certification.

Exhibit "H": A copy of the Appellate Division's denial of rehearing and certification.

Exhibit "I": A copy of petitioner's Petition for Transfer.

Exhibit "J": A copy of the Court of Appeal's order denying transfer.

XVII

Petitioner has no plain, speedy, or adequate remedy at law. The judgment of the Appellate Division is not an appealable order, nor are the denial of certification or the denial of transfer. It is well settled that extraordinary relief lies under these circumstances. (Dvorin v. Appellate Department (1975) 15 Cal.3d 648, 650; In re Wallace (1970) 3 Cal.3d 289, 292.) This court has indicated that mandate is an appropriate remedy when necessary to secure uniformity of decision and to settle important legal questions. (Randone v. Appellate Department, supra, 5 Cal.3d 536, 542-543.)

XVIII

No other petition for extraordinary relief has been sought or obtained by petitioner relating to this action.

XIX

Petitioner has completed her sentence in the trial court, and no proceedings remain pending in this matter.

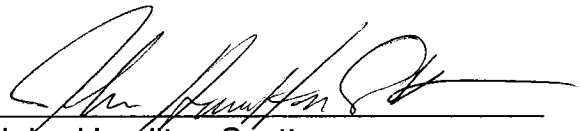
WHEREFORE petitioner respectfully prays:

1) That this court issue its writ of mandate directed to the Appellate Division of the Los Angeles County Superior Court, requiring

that court to recall its remittitur, if necessary, and to vacate and set aside its judgment of June 8, 2009, affirming the judgment of the trial court dismissing the complaint against petitioner, and directing the Appellate Division to enter a new and different judgment reversing the trial court's order; and

2) For such other and further relief as this court may deem just and proper.

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By 
John Hamilton Scott
Deputy Public Defender

VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

John Hamilton Scott declares as follows:

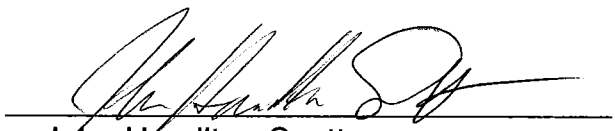
I am an attorney at law licensed to practice in all the courts of California, and I am employed as a deputy public defender for the County of Los Angeles.

In that capacity I am attorney of record for petitioner in the foregoing petition for writ of mandate, and I make this verification on her behalf for the reason that the facts alleged therein are more within my knowledge than hers.

I have read the foregoing petition and the exhibits lodged with this court, and I know the contents thereof to be true as based upon my representation of petitioner in the Appellate Division and the Court of Appeal.

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

Executed this 17th day of July, 2009, at Los Angeles, California.



John Hamilton Scott
Deputy Public Defender

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

I

THE INSTITUTION OF CRIMINAL PROCEEDINGS ABSENT PRIOR SCREENING AND PRIOR APPROVAL OF A PROSECUTOR VIOLATES DUE PROCESS

Two constitutional arguments were presented by petitioner below. [3/] The first was that the initiation of criminal charges absent prior screening and approval by the public prosecutor deprives the potential defendant of due process of law; and the second was that the initiation of criminal charges by a functionary in the judicial branch of government violates the separation-of-powers doctrine. Those two points will be discussed in order.

It has been firmly established in the law of California for many years that it is the prosecuting attorney, and the prosecuting attorney alone, who has the power and authority to bring criminal charges, and that initiating criminal proceedings absent the prior screening and prior approval of the prosecutor denies due process. [4/] In People v. Municipal Court (Pellegrino), supra, 27 Cal.App.3d 193 [sometimes cited as "People v. Municipal Court (Bishop)"], the Court of Appeal

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[3/] Petitioner herein discusses only the erroneous reasoning of the Appellate Division. The equally erroneous reasoning of the trial court is not discussed except insofar as it was adopted by the Appellate Division.

[4/] The case law generally refers to "district" attorneys. However, the power to charge and try misdemeanor matters may be and often is delegated by the District Attorney to a local City Attorney or City Prosecutor, and the assumption below was that the charge in this case was properly within the authority of a City Attorney. Accordingly, the executive power discussed herein will be generally referred to as that of a "prosecuting" attorney.

stated, "the decision of when and against whom criminal proceedings are to be instituted is one to be made by the executive, to wit, the district attorney." (Id., 27 Cal.App.3d at p. 204; citing Esteybar v. Municipal Court (1971) 5 Cal.3d 119 and People v. Tenorio (1970) 3 Cal.3d 89.) The Court of Appeal further held that "Due process of law requires that criminal prosecutions be instituted through the regular processes of law. These regular processes include the requirement that the institution of any criminal proceeding be authorized and approved by the district attorney." (Id., at p. 206.)

Pellegrino was cited with approval by this court in Hoines v. Barney's Club, Inc. (1980) 28 Cal.3d 603, 611-612, and the rule has been cited and applied in numerous other decisions. See, for example, People v. Smith (1975) 53 Cal.App.3d 655, in which the Court of Appeal included the following statement:

> "[T]he district attorney, part of the executive branch, is the public prosecutor charged with conducting all prosecutions on behalf of the People. This function includes instituting proceedings against persons suspected of criminal offenses and the drawing up of informations and indictments. (Gov. Code, §§ 26500-26502.) The discretionary decision to bring criminal charges rests exclusively in the grand jury and the district or other prosecuting attorney [Citation.] 'The charging decision is the heart of the prosecutorial function. The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be made requires that the greatest effort be made to see that this power is used fairly and uniformly.' (A.B.A. Standards Relating to Administration of Criminal Justice (1971) The Prosecution Function, commentary to § 3.9(a).)" (Id., 53 Cal.App.3d at p. 659, emphasis original; see also Hicks v. Board of Supervisors (1977) 69 Cal.App.3d 228, 240; People v. Cimarusti (1978) 81 Cal.App.3d 314, 323; Salcido v. Superior Court (1980) 112 Cal.App.3d 994, 1001; People v. Morris (1979) 97 Cal.App.3d 358; 363-364.)

The necessity for the exercise of sound prosecutorial discretion in the filing of criminal charges was also set forth in People v. Gephart (1979) 93 Cal.App.3d 989, 999-1000:

> "The public prosecutor is vested with discretion in deciding whether to prosecute. (Gov. Code § 2501.) This discretion is broad and quasi-judicial in nature. [Citations.] The discretion exercised is broader than 'probable cause' and includes the opinion of guilt, likelihood of conviction, evaluation of legal issues, witness problems, whether the accused is regarded as dangerous, and the alternatives to prosecution."

The Pellegrino court also noted the language of the American Bar Association Project on Standards for Criminal Justice: "Whatever may have been feasible under conditions of the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official." (Pellegrino, supra, 27 Cal.App.3d at p. 206, fn. 8.)

The Legislature has also firmly placed the responsibility for commencing criminal actions upon the prosecuting attorney. Prior to 1980, Government Code section 26500 read: "The district attorney is the public prosecutor [¶] He shall attend the court and conduct on behalf of the people all prosecutions for public offenses." However, in 1980 the statute was amended to read, "The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." (Emphasis added.) The purpose of the amendment was to place the

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decision whether or not to prosecute in the hands of the district attorney. (People v. Daggett (1988) 206 Cal.App.3d Supp. 1, 4.) [5/]

This court has itself explained that the function of a prosecutor in exercising his discretion in criminal matters is to act in the interests of the People at large, and not as or under the control of any interested individual. (People v. Eubanks (1996) 14 Cal.4th 580, 589-590.) This requirement is found in the Constitutional and statutory duties imposed upon the public prosecutor. (Id., at pp. 588-589.) No such duties are imposed upon a court clerk, who is not mandated to act on behalf of the People (and did not purport to so act in this case), nor to eschew private bias, and is not a professional, trained, responsible public official. The initiation of criminal proceedings by a clerk is therefore the antithesis of due process.

The Appellate Division opined that it was sufficient that the prosecutor had effectively given blanket authorization to court clerks to file criminal charges by failing to object to clerk's doing so. However, while the Appellate Division quoted part of People v. Municipal Court (Pellegrino), supra, 27 Cal.App.3d 193 (Exh. "F," p. 2), the court

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[5/] It is true that Penal Code section 853.9 allows a verified citation filed by a police officer with a magistrate to constitute a complaint. However, this rule only applies to infraction matters, since citations for misdemeanors cannot ordinarily be filed with a magistrate. (Pen. Code § 853.6, subd. (e)(3).) Moreover, the defendant retains the right to compel review by the prosecuting attorney by demanding that a formal complaint be filed. (Pen. Code § 853.9, subd. (b).) There is an intriguing question involving the constitutional validity of allowing an infraction citation to be filed as a complaint without the approval of the prosecuting attorney, especially if the prosecuting attorney is without power to thereafter terminate the prosecution under Penal Code section 1385. (See discussion, post.) That question is not presented by this case, however. The charge of which petitioner was convicted is a misdemeanor, not an infraction.

pointedly failed to quote the portion of that ruling which clearly provides that for due process to be satisfied there must be a prosecutorial screening prior to the initiation of criminal charges, and that an individual determination of whether to file a charge must be made by a prosecutor before that charge is filed: "the theme which runs throughout the criminal procedure in this state is that all persons should be protected from having to defend against frivolous prosecutions and that one major safeguard against such prosecutions is the function of the district attorney in screening criminal cases prior to instituting a prosecution." (Id., 27 Cal.App.3d at pp. 205-206, emphasis added, footnote omitted.) This court has cited this discussion with approval, noting that "The preservation of prosecutorial impartiality is perhaps most important during the charging process, the phase of a criminal proceeding when the prosecutor's discretion is most apparent." (People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 267, fn. 8; emphasis added.)

The Attorney General has concurred in this analysis. In rejecting a proposed "worthless check" program which would eliminate prosecutions if restitution was paid, the Attorney General stated,

> "Another problem we see in the proposed worthless check program is the apparent substitution of a clerical procedure for the exercise of prosecutorial discretion by the public prosecutor. As the proposed program has been explained, the filing of criminal charges will depend on whether restitution is made or not, rather than upon any weighing of appropriate factors by the public prosecutor or his deputy. We have serious doubts that such a substitution of a criterion based solely on the fact of restitution for the exercise of prosecutorial discretion on a case by case basis will produce the kind of screening that due process requires. [Citing Pellegrino.]" (63 Ops.Atty.Gen. 861, emphasis added.)

The Pellegrino court further noted that prior authorities seemed to recognize, "albeit obliquely," that criminal prosecutions require "the

district attorney's approval for their institution." (Id., 27 Cal.App.3d at p. 200; emphasis added.) Pellegrino was also more recently discussed in People v. Viray (2005) 134 Cal.App.4th 1186:

> "[T]he Pellegrino court concluded that subjecting one citizen to criminal prosecution upon the whim of another citizen would deny the accused due process of law, since 'all persons should be protected from having to defend against frivolous prosecutions and ... one major safeguard against such prosecutions is the function of the district attorney in screening criminal cases prior to instituting a prosecution.' (Pellegrino, supra, 27 Cal. App. 3d at pp. 205–206, fn. omitted.) The court did not entirely foreclose the possibility that the filing of a criminal complaint by a private person might operate to commence a valid prosecution, but held that in order to do so the filing 'must be approved, authorized or concurred in by the district attorney before [it is] effective in instituting criminal proceedings against an individual.' (Id. at p. 206.)." (People v. Viray, supra, 134 Cal.App.4th at p. 1204; emphasis added.)

The Viray court clearly understood that no prosecution has been validly initiated until such time as an individual complaint has been authorized by the prosecutor: due process is not protected by a prosecutor's blanket authorization to any other body or individual to file criminal charges which have not been reviewed and authorized prior to the initiation of criminal proceedings.

The due process requirement that a prosecutor examine a case before proceedings are initiated was also at the heart of the ruling in People v. Smith (1975) 53 Cal.App.3d 655:

> "[T]he district attorney, part of the executive branch, is the public prosecutor charged with conducting all prosecutions on behalf of the People. This function includes instituting proceedings against persons suspected of criminal offenses and the drawing up of informations and indictments. (Gov. Code, §§ 26500-26502.) The discretionary decision to bring criminal charges rests exclusively in the grand jury and the district or other prosecuting attorney [Citation.] 'The charging decision is the

> heart of the prosecutorial function. The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be made requires that the greatest effort be made to see that this power is used fairly and uniformly.' (A.B.A. Standards Relating to Administration of Criminal Justice (1971) The Prosecution Function, commentary to § 3.9(a).)" (Id., 53 Cal.App.3d at p. 659, emphasis deleted and added.

This court has also emphasized that the discretion to be exercised by the prosecutor involves whether or not to institute criminal proceedings: "Prosecutors have broad discretion to decide whom to charge, and for what crime. As we have observed, '[i]t is well established that a district attorney's enforcement authority includes the discretion either to prosecute or to decline to prosecute an individual when there is probable cause to believe he has committed a crime.' (Davis v. Municipal Court (1988) 46 Cal.3d 64, 77 [additional citation].)" (People v. Lucas (1995) 12 Cal.4th 415, 477; emphasis added.)

Based upon the erroneous statement that all a prosecutor need do is delegate the responsibility for filing charges to some other person, the Appellate Division has concluded that it is permissible for a court clerk to initiate a criminal proceeding when the matter has never been reviewed or even seen by a prosecutor. However, it has heretofore been firmly established in the law of California that one vital protection provided to a defendant is that criminal charges shall be filed only after a proper exercise of discretion on a case by case basis by a professional, trained, responsible prosecutor, with the duty of ensuring that all prosecutions are conducted fairly and uniformly. The Appellate Division's ruling simply ignores this law, and permits criminal prosecutions to be commenced by court clerks. Such a procedure not only violates the potential defendant's right to due process of law, but also directly violates the separation-of-powers doctrine.

II

SINCE ONLY THE COURT CAN DISMISS A CRIMINAL CHARGE ONCE PROCEEDINGS ARE INSTITUTED, IT IS UNCONSTITUTIONAL FOR THE JUDICIARY TO INSTITUTE CRIMINAL PROCEEDINGS

The Appellate Division did not dispute that a court clerk is a judicial functionary, nor that the clerk was acting in that role when initiating a criminal proceeding. Instead, the Appellate Division stated that because the prosecutor could withdraw consent after criminal proceedings were initiated, and thereby force the court to dismiss the proceeding, the prosecutor "retained the ultimate discretion on whether to proceed on the criminal complaint." (Exh. "F," pp. 3-4. [6/]) The Appellate Division cited People v. Municipal Court (Pellegrino), supra, 27 Cal.App.3d at p. 206, in support of its claim. However, the Appellate Division plainly misunderstood the holding of Pellegrino, which actually defeats the Appellate Division's ruling.

What the Appellate Division suggested is the rule of Pellegrino is instead what the trial court had ordered in Pellegrino, a procedure rejected by the Court of Appeal. The Court of Appeal did not suggest that a retroactive approval or disapproval of an unauthorized complaint was permissible. Instead, the Pellegino court found that an unscreened and unauthorized complaint was a nullity ab initio, and that the court had to dismiss that complaint no matter what the prosecutor's position might be.

This point was discussed in People v. Viray, supra, 134 Cal.App.4th 1186:

[6/] As discussed below, there is also a question of whether a prosecutor can effectively terminate an action which is not brought in the name of the People, but in the name of a clerk of court.

> "The superior court [in Pellegrino] issued a writ directing that the appointment be vacated, and suggesting that the prosecutor move to dismiss the complaints if, upon reexamining the matter, he deemed such action appropriate. [Citation.] [¶] The reviewing court sustained the superior court's annulment of the appointment order but went further, declaring that the complaints, having been privately prepared and filed without the approval of the public prosecutor, were 'nullities,' as to which the municipal court lacked any power 'except to dismiss.' (Pellegrino, supra, 27 Cal.App.3d at p. 206.)" (People v. Viray, supra, 134 Cal.App.4th at p. 1202.)

It is simply not correct that the trial court has authority to proceed upon an improperly filed complaint so long as the prosecutor does not move to dismiss the action, as the Appellate Division appears to believe. As explained in Viray, the Pellegrino court rejected the idea that the prosecution could proceed so long as the prosecutor did not move to dismiss. The Pellegrino court found instead that since the charges were filed absent the prior approval of the prosecutor, they were nullities which had to be dismissed no matter what the position of the prosecutor might be.

On the other hand, if the complaint was valid when filed, and not a nullity as was held in Pellegrino, then termination of the prosecution initiated by the clerk would be governed by Penal Code section 1386: "The entry of a nolle prosequi is abolished, and neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in Section 1385." Penal Code section 1385, of course, puts the determination of whether to dismiss a prosecution within the exclusive discretion of the court, not the prosecutor. This issue was also recognized in Pellegrino as discussed in Viray:

> "The critical nature of the complaint flows in part from the abolition of nolle prosequi, by which the Legislature had divested the prosecutor, a member of the executive branch of

government, of the power to discontinue a prosecution, and had given that power to the judicial branch. ([Pellegrino, supra], at p. 199.) The court held that if the Legislature were to simultaneously empower 'private individuals to institute criminal proceedings without approval of the district attorney,' the combined effect would be to 'improperly impair[] the discretion of the district attorney and encroach[] upon the executive power in violation of article III, section I of the California Constitution.' (Id. at p. 204; see id. at pp. 201–202.) Thus 'the existence of a discretionary power in the district attorney to control the institution of criminal proceedings is a necessary prerequisite to the constitutional validity of the requirement that the district attorney seek court approval for abandoning a prosecution as required by sections 1385 and 1386 of the Penal Code.' (Id. at p. 204.) In other words, the Legislature might cede to the courts the power to decide to initiate a prosecution, or it might cede to them the power to decide to terminate a prosecution; but it could not grant them both of these powers without effectively making the prosecutor a functionary of the courts in violation of the separation of powers. This interrelation between the power to initiate prosecutions and the power to discontinue them has been recognized in at least one other jurisdiction, where the courts have justified the private initiation of criminal charges by noting the prosecutor's traditional power to desist from pursuing such charges—a power no longer available to prosecutors in this state. (See State v. Rollins (1987) 129 N.H. 684 [533 A.2d 331] ['The common law of this State does not preclude the institution and prosecution of certain criminal complaints by private citizens [citations], although any such prosecution is subject to the authority of the attorney general or the appropriate county attorney to enter nolle prosequi'].)" (People v. Viray, supra, 134 Cal.App.4th at p. 1202-1203.)

Moreover, similar to the point that a prosecutor is not required to screen cases after a prosecution commences, nothing in this court's ruling, or any other law, mandates that a prosecutor approve or disapprove of a prosecution proceeding after that prosecution has been initiated. Thus, even if a prosecutor could, if he chose, make that determination, there is still nothing which prevents a prosecution from

being initiated upon the sole initiative of the court's clerk, rather than the prosecutor, and thereafter prosecuted with no exercise of executive discretion as to whether such charges, or any charges, should be filed. Such a procedure plainly violates the requirement of separation of powers.

III

IF A PROSECUTOR CAN BELATEDLY VALIDATE A COMPLAINT, THAT MUST BE DONE PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS

As discussed above, the Pellegrino and Viray courts concluded that a complaint filed absent prior screening and prior authorization by the public prosecutor is a nullity. However, it might be argued that once the prosecutor has screened and authorized a complaint, that the complaint then becomes effective as a charging document. That occurred in this case in 2007. However, since the offense is alleged to have occurred in 2002, if the prosecutor's belated screening and approval resulted in a valid charge, that prosecution was barred by the statute of limitations.

The Appellate Division found that the statute of limitations was satisfied because the document filed by the clerk initiated a criminal proceeding, no less than had the document been filed by a prosecutor. As discussed above, if this is so, then the Appellate Division's conclusion that the prosecutor could cause a dismissal of the proceeding absent court approval is incorrect as a matter of law.

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IV

CRIMINAL PROCEEDINGS NOT BROUGHT IN THE NAME OF THE PEOPLE ARE INVALID

Penal Code section 684 provides, "A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense." Government Code section 100, subdivision (b), says, "The style of all process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." These provisions result in a mandate that all prosecutions be conducted in the name of "The People." (People v. Black (2003) 114 Cal.App.4th 830, 833.)

The document filed in this case does not purport to have been filed by or on behalf of the People of the State of California – or anybody else, for that matter. The court's clerk is not an employee of the executive, nor is the clerk a lawyer, and the clerk obviously cannot represent the People nor take action in their behalf. Accordingly, the document filed in this case was ineffective to give any court jurisdiction over a criminal prosecution.

The response of the Appellate Division to this point was to admit that criminal prosecutions must be brought in the name of the People, but to assert that the failure to name the People was a defect in form which does not prejudice a substantial right of the defendant. (Exh. "F," p. 6.) However, this was not a defect in form. This is not a case in which the charges were brought in the name of the People, or by an attorney authorized to represent the People, and the complaint merely omitted that statement. A court clerk has no power to represent the People of the State of California, and thus the complaint was not defective: it properly reflected that the charges were not brought by the

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People, but by a court clerk. [7] That is not a defect of form, it is a defect of jurisdiction. Moreover, it was prejudicial since, as discussed above, it deprived petitioner of her due process right to have the charges against her screened, and discretion whether to file such charges exercised, by the authorized prosecutor prior to the institution of criminal proceedings.

V

PENAL CODE SECTION 959.1 DOES NOT AUTHORIZE CLERKS TO INITIATE CRIMINAL PROCEEDINGS; IF IT DID, IT WOULD BE UNCONSTITUTIONAL

Penal Code section 959.1, subdivision (c), authorizes a magistrate or court to receive and file an accusatory pleading in electronic form if, among other conditions, "(1) The accusatory pleading is issued in the name of, and transmitted by, a public prosecutor or law enforcement agency filing pursuant to Chapter 5c (commencing with section 853.5) or Chapter 5d (commencing with Section 853.9), or by a clerk of the court with respect to complaints issued for the offenses of failure to appear, pay a fine, or comply with an order of the court." What is unclear is whether the reference to the clerk of court applies both to the issuance and transmittal of complaints, or only to the transmittal.

This language was enacted as an amendment to the statute in 1990. (Stats. 1990, chap. 289, § 1.) The underlying bill was AB 3168, which was sponsored by the Association of Municipal Court Clerks.

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[7] Indeed, as discussed below, if the Appellate Division is correct that Penal Code section 959.1 authorizes clerks to initiate criminal proceedings, the statute further states that such proceedings are to be brought "in the name of . . . a clerk of the court," not in the name of the People, which further demonstrates why such a construction of section 959.1 is erroneous. (See post.)

The Appellate Division took judicial notice of the legislative materials relating to this amendment. It is true that the Legislative Council's Digest states that the effect of the amendment was to provide that the accusatory pleading may be issued in the name of, and transmitted by, a clerk of court, and the Appellate Division has ruled that such is the effect of the amendment. However, that does not appear to have been the understanding of the Legislature. The Enrolled Bill Report shows that the intent of the bill was to permit a complaint to be "electronically filed and transmitted by a clerk of the court." As may be seen, nothing in the Report indicates that the Legislature understood that it was making the radical change in California procedure which would occur should court clerks be given the power of prosecutors to initiate criminal proceedings.

Moreover, the relevant committee reports make it clear that the Legislature was not embarking upon the momentous legal change of authorizing clerks to initiate criminal proceedings, nor was any such change suggested by the clerks' Association. The legislation was merely intended to provide a more efficient means of filing paperwork which the clerk was already permitted to file.

Both the report of the Assembly Committee on Public Safety of April 17, 1990, and the report of the Senate Committee on Judiciary of June 19, 1990, state that the bill would "allow court clerks to file electronically complaints issued for the offenses of failure to appear, failure to pay a fine, or failure to comply with an order of the court." It is significant that the bill did not state that the clerk was to be allowed to "issue and electronically file" such complaints. Obviously, the Legislature understood that another, appropriate agency (i.e., the prosecuting attorney) would be issuing the complaint: the clerk's sole authority was to file that complaint electronically. The reports reflect that the need for the legislature was that "some courts are in the

process of developing automated systems that eliminate the need for hard paper." (Emphasis added.) The bill was proposed because "Electronic filing should increase court efficiency by streamlining the filing of pleadings by court clerks." (Emphasis added.)

The power which would be given to clerks had the Legislature intended to allow them to initiate criminal proceedings would be momentous. The statute does not refer to any particular statutory provision, but permits clerks to file any charge of "failure to appear." Penal Code section 1320, subdivision (b), provides that "failure to appear" following an own recognizance release in a felony case is a felony, punishable by up to three years in prison. Moreover, if the person charged with such an offense has prior felony "strike" convictions, the offense may carry a punishment of life in prison. (Pen. Code §§ 667, subd. (e); 1170.12.) Petitioner sees no indication that the Legislature intended to allow clerks to effectuate lifetime prison sentences.

To read the statute as does the Appellate Division requires not only that clerks be permitted to initiate criminal proceedings, but that such proceedings be conducted "in the name of . . . a clerk of the court . . ." (See Exh. "F," p. 4.) Thus, this reading of the statute also has to be taken as a repeal, by implication, of Government Code section 100 and Penal Code section 684, which the Appellate Division acknowledges requires criminal cases to be prosecuted "in the name of the people of the State of California." (Exh. "F," p. 6.) Moreover, since a prosecuting attorney is not authorized to represent a clerk, or any other judicial functionary, it raises the question of what authority the prosecuting attorney has to interfere with a prosecution not brought in the name of the People, but in the name of a clerk of court. Indeed, the Appellate Division's construction of the law raises the substantial question of what authority does the City Attorney or District Attorney

have to appear as counsel in any respect in a proceeding not filed by such agencies and in which the plaintiff is not the People of the State of California, but a clerk of court? Petitioner suggests there is no such authority. [8/]

There is no suggestion in the materials prepared by and for the Legislature to indicate that the Legislature had suddenly decided to abandon decades of consistent constitutional and statutory law limiting the initiation of criminal proceedings to the authorized prosecutor acting in the name of the People, and to put that power into the hands of a court clerk acting in his or her own name. If the Legislature had understood that it was enacting such a fundamental change in criminal procedure in California, it is to be expected that such an effect of the legislation would have been included in the reports of the legislative committees involved. Yet those reports say nothing about such a major change, but speak only of "streamlining" and "efficiency." It is obvious that the legislation was intended only to give clerks a more efficient means of doing electronically what they had previously done with "hard paper." No increase in the authority of a clerk was intended or enacted.

Indeed, if it was the intent of the Legislature to give the power to initiate felony and misdemeanor criminal proceedings to a clerk, why do so only if the complaint was electronically filed? Why not permit the clerk to initiate all such prosecutions, even if commenced on "hard paper"? The obvious answer to this question is that the Legislature was not intending to so expand the power of clerks.

The less obvious answer of the Appellate Division to this conundrum was to simply read the limitation upon clerk's filing charges

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[8/] One must question the appearance of the City Attorney, as a representative of the People, in an action purportedly prosecuted in the name of a clerk of court. The City Attorney is not counsel for court clerks.

in electronic form out of the statute, and hold that section 959.1 authorizes clerks to initiate criminal proceedings whether they do so by electronic means or otherwise. The Appellate Department justified this construction by noting that the word "may" appears in the statute. (Exh "F," p. 5.) However, the word "may" appears in subdivision (a) of the statute, and not in subdivision (c) which is at issue.

Thus, the Appellate Division's rewriting of section 959.1 in order to avoid the problems inherent in their construction of that statute violates several rules of statutory construction, including that when statutory language is clear and unambiguous there is no need for judicial construction, and the courts should not indulge in it (People v. Chadd (1981) 28 Cal.3d 739, 746), and that significance should be attributed to every word and phrase of a statute, including, in this case, the words "in electronic form" as found in subdivision (c) of section 959.1. (People v. Woodhead (1987) 43 Cal.3d 1002, 1010.)

Further, if the Legislature had intended such a change, the statute would obviously be unconstitutional, as violative of both the defendant's right to due process and the separation-of-powers doctrine, as discussed above. Consequently, if it could actually be concluded that by amending Penal Code section 959.1 the Legislature was intending to empower court clerks to initiate criminal proceedings in their own name, then that portion of Penal Code section 959.1 would have to be struck down as unconstitutional, because there is no construction of the law which would permit court clerks to initiate criminal proceedings within the bounds of the constitutional prerogatives of the executive and a defendant's constitutional right to due process of law.

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CONCLUSION

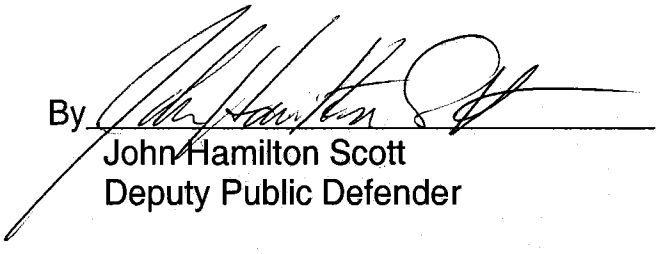
California law has, up until now, been clear that a defendant in a criminal matter has a right to due process, which right includes the requirement that the initiation of criminal proceedings be preceded by screening and a case-by-case authorization of the filing of charges by the public prosecutor. California law has, up until now, been clear that the filing of criminal charges is the sole province of the executive, and is beyond the authority of the judiciary. California law has, up until now, been clear that criminal charges are to be brought in the name of the People of the State of California, and not in the name of a clerk of court.

Despite the clear authority in all of these areas, the Appellate Division has sanctioned the initiation of criminal charges by a clerk of court, not in the name of the People, and absent any prior screening or individual authorization by the prosecutor. The Appellate Division was clearly wrong in so doing, and in order to protect the due process rights of thousands of potential defendants prosecuted by clerks, this court should issue its writ of mandate and compel the Appellate Division to issue an opinion which conforms with constitutional law.

Respectfully submitted,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Ilya Alekseyeff,
John Hamilton Scott,
Deputy Public Defenders

By 
John Hamilton Scott
Deputy Public Defender

Attorneys for Petitioner

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to the California Rules of Court, the PETITION FOR WRIT OF MANDATE in this action contains 7,970 words. Counsel relies on the word count of the WordPerfect X3 program used to prepare this brief.

JOHN HAMILTON SCOTT
Deputy Public Defender

DECLARATION OF SERVICE

I, the undersigned, declare:

I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012; that on July 20, 2009, I served a copy of the within PETITION FOR WRIT OF MANDATE, JEWERELENE STEEN, on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid in the United States Mail in the County of Los Angeles, California, addressed as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

PRESIDING JUDGE
SUPERIOR COURT
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

CLERK, APPELLATE DIVISION
SUPERIOR COURT
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

CARMEN TRUTANICH, CITY ATTORNEY
CRIMINAL APPELLATE DIVISION
500 CITY HALL EAST
200 N. MAIN STREET
LOS ANGELES, CA 90012

CLERK, CALIFORNIA COURT OF APPEAL
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 20, 2009 at Los Angeles, California.

ALICIA A. ALBURO