No. S174773

In the Supreme Court of California

Jewerelene Steen,
Petitioner,

vs.

Appellate Division,
Superior Court of Los Angeles County,
Respondent,

People of the State of California,
Real Party in Interest.

RESPONDENT'S OPPOSITION TO MOTION TO STRIKE AND TO REQUEST FOR EVIDENTIARY HEARING

Original Writ Petition Following A Judgment Of The Appellate Division,
Superior Court Of Los Angeles County, No. BR046020
Hon. Debre K. Weintraub, Hon. Patty Jo McKay, Hon. Fumiko H. Wasserman

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Appeal From A Judgment Following A Guilty Plea
Superior Court Of Los Angeles County, No. 6200307
Honorable Elizabeth Munisoglu, Commissioner

Service On The Attorney General Pursuant to Cal.R.Ct. 8.29(c)(1)

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I
INTRODUCTION

On July 20, 2009, Jewelerene Steen filed a petition for writ of mandate in this Court, claiming that (1) Penal Code section 959.1(c) (section 959.1(c))—which permits a court clerk to issue and file electronically a complaint for failure to appear, pay a fine, or comply with a court order—violates the separation of powers doctrine under the California Constitution and due process under the federal and California Constitutions; and (2) the prosecution against her for failure to appear under such a complaint was time-barred.

Six weeks later, after electing to retain the matter, this Court directed The People (as Real Party in Interest) and the Appellate Division, Superior Court of Los Angeles County (as Respondent) to file returns on the separation of powers issue. (Dkt. Entry Sept. 9, 2009) The Appellate Division did so in early October 2009. (Dkt. Entry Oct. 5, 2009)

Almost three years later, this Court issued another order to show cause, directing the People and the Appellate Division to file additional returns, this time on the due process and statute of limitations issues. (Dkt. Entry Sept. 12, 2012) The Appellate Division did so in mid-December 2012. (Dkt. Entry Dec. 13, 2012)

In the meantime, in mid-November 2012, Steen moved to exclude the Appellate Division as a party litigant, effectively striking its first return and precluding its second, arguing that it was improper

for the Appellate Division to appear in this proceeding. (Dkt. Entry Nov. 16, 2012) The Appellate Division filed opposition and Steen filed a reply. (Dkt. Entries Nov. 28, 2012 and Dec. 6, 2012). In its opposition, the Appellate Division showed that the motion was untimely because Steen had ample opportunity to file such a motion previously but did not do so. (Opp. to Motion to Exclude at 2-4) The Appellate Division also showed that the motion was unmeritorious because, in a mandate proceeding, a lower court *may* file a return where, as here, the proceeding encompasses an issue involving court operations or procedures—and indeed *must* file a return where, as here, it is directed to do so by a higher court. (*Id.* at 4-7) This Court has not yet ruled on Steen's motion.

In her supplemental traverse to the Appellate Division's second return, Steen now moves to strike *both* of the Appellate Division's returns. She also requests an evidentiary hearing at which she proposes to cross-examine Greg Blair, the Senior Administrator for the Metropolitan Courthouse of the Superior Court of Los Angeles County, on the contents of two declarations he made, one each attached to the Appellate Division's two returns. (*Id.* at 2-4)

This Court should deny the motion to strike as untimely, duplicative, and unmeritorious. It should also deny the request for an evidentiary hearing as authorized and unwarranted.

II
STEEN'S MOTION TO STRIKE IS UNTIMELY, DUPLICATIVE AND UNMERITORIOUS

This Court should deny Steen's motion to strike the Appellate Division's first return because it is untimely and duplicative of her prior motion, and it should deny the motion to strike both the first and second returns because it is unmeritorious.

A. The Court Should Deny Steen's Motion To Strike The Appellate Division's First Return As Untimely And Duplicative Of Her Prior Motion

To the extent Steen's motion seeks to strike the Appellate Divisions' first return, it is untimely, coming more than three years after this Court directed the Appellate Division to file the return and the Appellate Division complied. The Court should deny the motion for that reason alone. *See Gressett v. Superior Court*, 185 Cal.App.4th 114, 117 n.3 (2010) (denying petitioner's motion to strike return as untimely even though motion was filed only 11 days after return).

To the extent Steen's motion seeks to strike the Appellate Division's first return, it is also duplicative of her motion to exclude the Appellate Division as a party litigant. The Court should deny the motion for that reason as well. *See In re Marriage of Falcone and Fyke*, 203 Cal.App.4th 964, 976 (2012) (it is "not irrational to deny a repetitive motion").

B. In Any Event, The Court Should Deny Steen's Motion To Strike The Appellate Division's First And Second Returns As Unmeritorious

In any event, Steen's motion to strike the Appellate Division's first and second returns is unmeritorious.

In its opposition to Steen's motion to exclude it as a party litigant, the Appellate Division showed that it could—and indeed, had to—file a return because this Court directed it to do so on an issue that implicates court operations and procedures. (Opp. to Motion to Exclude at 4-7)

In her motion to strike, Steen argues the Appellate Division is inappropriately "appear[ing] ... to defend its ruling" affirming her failure to appear conviction. (Suppl. Traverse to App. Div.'s Second Return at 2). Steen also argues that the Appellate Division is even more inappropriately "advanc[ing] arguments not made by" the People or by her, "go[ing] so far as to disagree with the arguments made by the People," "tak[ing] on the role of advocate," and including "declarations setting forth facts which were never presented" to it in the course of her appeal. (*Id.* at 2-3 (underscoring in original)) Neither claim has merit.

First, the Appellate Division has not inappropriately appeared to defend its affirmance of the judgment. Rather, it has appeared, at this Court's direction, to give the Court assistance in interpreting and applying section 959.1(c). Second, the Appellate Division has offered this Court the soundest arguments it can frame, without allegiance to

either party, to assist in that task. It has disagreed with the People's approach to this case as readily as it has disagreed with Steen's.

Third, the Appellate Division has not inappropriately included declarations setting forth facts outside the appellate record. Mandate is an original proceeding, not an appellate one, and as such is not circumscribed by a pre-existing record. *See McCarthy v. Superior Court*, 191 Cal.App.3d 1023, 1031 n.3 (1987) ("on an original petition for mandamus relief," a higher court "may consider" a "declaration was not before" the lower court "together with all other relevant evidence"); *see also Bruce v. Gregory*, 65 Cal.2d 666, 670-71 (1967) (a court "hearing a mandamus proceeding may properly consider, in deciding whether to issue a peremptory writ, all relevant evidence, including facts not existing until after the petition for writ of mandate was filed"). Steen must have recognized as much, since she ventured outside the appellate record in the introduction to her petition. (*See* Pet. for Writ of Mandate at 2 ("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."); *id.* at 2 n.1 ("[B]etween 200 and 300 criminal cases are filed by court clerks in the Metropolitan Courthouse of the Los Angeles County Superior Court alone."))

Because Steen's motion to strike lacks merit, this Court should deny it.

III
STEEN'S REQUEST FOR AN EVIDENTIARY HEARING IS UNAUTHORIZED AND UNWARRANTED

This Court should deny Steen's request for an evidentiary hearing at which she proposes to cross-examine Metropolitan Courthouse Senior Administrator Greg Blair on the contents of his declarations. The request is unauthorized and unwarranted.

In support of her request, Steen relies solely on *People v. Williams*, 30 Cal.App.3d 502 (1973). *Williams*, however, held only that a criminal defendant cannot testify on his or her own behalf without subjecting him- or herself to cross-examination. *Id.* at 510. It did not consider whether mandate, which is a paper proceeding, requires or permits an evidentiary hearing and, if so, under what circumstances. Inasmuch as an "opinion is not authority for a proposition not therein considered," *Ginns v. Savage*, 61 Cal.2d 520, 524 n.2 (1964), *Williams* is not authority for the availability of an evidentiary hearing here.

In any event, Steen fails to show that she would be entitled to an evidentiary hearing even if such a hearing were available to her. *Spaccia v. Superior Court*, 209 Cal.App.4th 93 (2012) shows that there is no such entitlement.

Spaccia addressed Penal Code section 1424, which permits a party to move to recuse a district attorney from a criminal prosecution and makes an evidentiary hearing available. By analogy to habeas corpus proceedings, the Court of Appeal held that a moving party is

entitled to an evidentiary hearing when he or she "make[s] a prima facie showing by affidavit"—i.e., a showing of "facts demonstrated by *admissible* evidence, which would sustain a favorable decision if the evidence submitted by the movant is credited." *Id.* at 111-12 (italics original).

If a party who is statutorily entitled to an evidentiary hearing must nevertheless make a prima facie showing to obtain such a hearing, it logically follows that Steen, who has petitioned for mandate and is *not* statutorily entitled to such a hearing, should at least be required to make a similar showing. Steen has not done so.

Moreover, Mr. Blair's declarations do not address the proper interpretation or application of section 959.1(c). Rather, they respond to allegations that Steen made in her mandate petition on information and belief (*see* Pet. for Writ of Mandate at 2), and do so in the interest of accurately describing the practices and procedures by which the Superior Court of Los Angeles County implements the statute.

Steen has shown no facts by admissible evidence—and certainly no facts that would support the issuance of a writ. To be sure, she asserts that she "strongly disputes the accuracy of many of [the] allegations" based on Mr. Blair's declarations and "wishes to present contrary evidence at [an evidentiary] hearing." (Suppl. Traverse to App. Div.'s Second Return at 4) But to show her entitlement to an evidentiary hearing, she had to present such "contrary evidence" in the first place. She didn't. *Cf. People v. Staten*, 24 Cal.4th 434, 466-67 (2000) (an "evidentiary hearing to determine the truth or falsity of

allegations of jury misconduct ... 'should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred' ").

Although in her request for an evidentiary hearing Steen does not identify any of the "many ... allegations" that she "strongly disputes" (Supp. Traverse to App. Div.'s Second Return at 4), in the body of her supplemental traverse she indicates that she disagrees with Mr. Blair on the following issues: (1) how many failure-to-appear complaints the Clerk of the Superior Court of Los Angeles County issued and filed electronically under section 959.1(c) in Fiscal Year 2007-2008; (2) how much in fines, forfeitures, and assessments arose from such complaints; (3) how many violations charged by such complaints as misdemeanors were disposed of as infractions; and (4) how many violations charged as misdemeanors did prosecutors consent to disposition as infractions. (Id. at 4-7) None of these issues, however, is material to the constitutionality, interpretation, or application of section 959.1(c)—the issues before the Court here—and Steen does not attempt to show otherwise.

It is noteworthy, however, that there is one "allegation" that Steen no longer "disputes"—that the complaint charging her with failure to appear was in fact issued and filed by a clerk electronically under section 959.1(c).

IV
CONCLUSION

This Court should deny Steen's motion to strike the Appellate Division's first and second returns and her request for an evidentiary hearing. If this Court is inclined to grant Steen's motion to strike, it should consider the two returns as amicus curiae briefs, since they will be "of assistance to this court" as it considers and decides this case. *Grant v. Superior Court*, 90 Cal.App.4th 518, 523 n.2 (2001); *accord In re Koehler*, 181 Cal.App.4th 1153, 1166 (2010).

DATED: February 5, 2013.

Respectfully submitted,

REED SMITH LLP

By _____
Paul D. Fogel

Attorneys for Respondent
Appellate Division, Superior
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PROOF OF SERVICE

Jewerelene Steen vs. Los Angeles Superior Court, Appellate Division (People of the State of California, Real Party in Interest),
Supreme Court No. S174773,
Los Angeles Appellate Division No. BR046020,
Los Angeles Superior Court No. 6200307

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On February 6, 2013, I served the following document(s) by the method indicated below:

RESPONDENT'S OPPOSITION TO MOTION TO STRIKE AND TO REQUEST FOR EVIDENTIARY HEARING

☑ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 6, 2013, at San Francisco, California.

Eileen Kroll