S174773

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA **COPY**

JEWERELENE STEEN,	S174773
Petitioner,	
v.	(2d Dist.No. B217263; App.Div.No. BR046020; Trial Ct.No. 6200307)
APPELLATE DIVISION OF THE LOS ANGELES COUNTY SUPERIOR COURT	
Respondent,	
PEOPLE OF THE STATE OF CALIFORNIA,	
Real Party in Interest.	

SUPREME COURT
FILED
JAN 22 2013
Frank A. McGuire Clerk
Deputy

PETITIONER'S SUPPLEMENTAL TRAVERSE TO RETURN OF REAL PARTY

and

MOTION TO STRIKE EXHIBITS

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

RONALD L. BROWN, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

Ilya Alekseyeff,
John Hamilton Scott,
(State Bar No. 58258)
Deputy Public Defenders

Appellate Branch
320 West Temple Street, Room 590
Los Angeles, California 90012

Telephone: (213) 974-3002

Attorneys for Petitioner

TOPICAL INDEX

		Page
SUPPLEMENTAL TRAVERSE AND MOTION TO STRIKE		1-5
VERIFICATION		6
POINTS AND AUTHORITIES		
	INTRODUCTION	7-8
I	THE PEOPLE HAVE FAILED TO DEMONSTRATE THAT ALLOWING CLERKS TO INITIATE CRIMINAL PROCEEDINGS COMPORTS WITH DUE PROCESS	8-18
II	THE PEOPLE'S CLAIM THAT DUE PROCESS IS PROTECTED BY THE PROSECUTOR'S CLAIMED ABILITY TO DISMISS A CRIMINAL PROSECUTION AFTER IT IS INITIATED IS MERITLESS	18-22
III	FURTHER PROCEEDINGS ARE NECESSARY TO DETERMINE WHETHER THE CRIMINAL PROCEEDINGS WHICH WERE INITIATED WHEN THE PROSECUTOR CONCURRED IN THE COMPLAINT WERE TIME-BARRED	22-29
CONCLUSION		29-30

TABLE OF AUTHORITIES CITED

Page

Cases

Bordenkircher v. Hayes
(1978) 434 U.S. 357 ... 12

Dix v. Superior Court
(1991) 53 Cal.3d 442 ... 11

Gananian v. Wagstaff
(2011) 199 Cal.App.4th 1532 ... 7

People v. Abayhan
(1984) 161 Cal.App.4th 324 ... 24

People v. Angel
(1999) 70 Cal.App.4th 1141 ... 28

People v. Benevides
(1998) 64 Cal.App.4th 728 ... 18

People v. Black
(2003) 114 Cal.App.4th 830 ... 7

People v. Daggett
(1988) 206 Cal.App.4th Supp. 1 ... 7

People v. Eubanks
(1996) 14 Cal.4th 580 ... 13

People v. Johnson
(2006) 145 Cal.App.4th 895 ... 28

People v. Madden
(1988) 206 Cal.App.3d Supp. 14 ... 16

People v. Municipal Court (Pellegrino)
(1972) 27 Cal.App.3d 193 ... 8,9,10,11,12,13

TABLE OF AUTHORITIES CITED (Cont)

Page

Cases (Cont.)

People v. Peevy
(1998) 17 Cal.4th 1184 — 3

People v. Romero
(1936) 13 Cal.App.2d 667 — 19-20

People v. Sesslin
(1968) 68 Cal.2d 418 — 26

People v. Superior Court (Copeland)
(1968) 262 Cal.App.2d 283 — 25,26,27-28

People v. Superior Court (Romero)
(1996) 13 Cal.4th 497 — 19

People v. Tenorio
(1970) 3 Cal.3d 89 — 19

People v. Viray
(2005) 134 Cal.App.4th 1186 — 9,10,21

People v. Williams
(1999) 21 Cal.4th 335 — 4,23

Tracy v. Municipal Court
(1978) 22 Cal. 3d 760 — 25

United States v. Cowan
(5th Cir. 1975) 524 F.2d 504 — 19

Winton v. Municipal Court
(1975) 48 Cal.App.3d 228 — 3

TABLE OF AUTHORITIES CITED (Cont)

	Page
Statutes	
Education Code	
§ 15288	7
Government Code	
§ 100, subd. (b)	7
§ 26500	7
Penal Code	
§ 684	7
§ 802, subd. (a)	15
§ 803, subd. (d)	15
§ 817	28
§ 959.1	2,7,10
§ 1385	19
§ 1386	8,18,19
Vehicle Code	
§ 40508	23,24,25,26,27
§ 40515	24,26
Constitutions	
United States Constitution	
Fourth Amend.	26
Court Rules	
Federal Rules of Criminal Procedure	
rule 48(a)	19
rule 48(b)	19

TABLE OF AUTHORITIES CITED (Cont)

Page

Texts and Others

	Page
56 Ops.Atty.Gen 165	25,26
ABA Standards of Criminal Justice Relating to the Prosecution Function	13,14
Standard 3-1.2(b)	14
Standard 3-1.2(c)	14
Boren, "The Hillside Strangler Trial" 33 Loyola L.A. L.Rev. 707	20

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEWERELENE STEEN, Petitioner, v. APPELLATE DIVISION OF THE LOS ANGELES COUNTY SUPERIOR COURT Respondent, PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	S174773 (2d Dist.No. B217263; App.Div.No. BR046020; Trial Ct.No. 6200307)

PETITIONER'S SUPPLEMENTAL TRAVERSE

TO RETURN OF REAL PARTY

and

MOTION TO STRIKE EXHIBITS

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

Petitioner Jewerelene Steen, by and through her attorney Michael P. Judge, Public Defender of Los Angeles County, hereby makes her Traverse to the Supplemental Return filed on behalf of real party in interest People (hereinafter "Supp.Ret. RPI").

I

Petitioner realleges as true all allegations contained in her petition for writ of mandate, and denies any contrary allegations in the Supplemental Return.

II

Petitioner admits the allegations of the Return insofar as they may be supported by the record before this court, while not admitting that all those allegations are relevant to the issues presented by this proceeding, with the following exception.

III

Petitioner denies the allegation made in Paragraph 9 of the Supplemental Return (previously found in Paragraph 3 of the Return) that the complaint in this matter was "electronically filed." Petitioner affirmatively alleges that the evidence tends to show that the complaint was not electronically filed, since the document is signed. Petitioner further alleges that the Appellate Division found it unnecessary to resolve the question whether the document was electronically filed, ruling instead that Penal Code section 959.1 permits courts clerks to file criminal charges, whether electronically or otherwise. (Exh. "F," p. 5.)

Petitioner does not dispute that a warrant was issued for her arrest in 2002. However, petitioner denies that any records show that an arrest warrant was issued for violation of Vehicle Code section 40508 following a determination by a magistrate that petitioner had failed to appear.

IV

Petitioner denies the allegations in Paragraph 11 of the Supplemental Return except insofar as those allegations are quotations from the record. In particular, petitioner denies that petitioner did not challenge her prosecution as time barred. Petitioner affirmatively alleges that petitioner's counsel specifically stated that since the offense of failure to appear occurred in 2002, the initiation of proceedings by virtue of the City Attorney's concurrence in the complaint filed by the clerk in 2007 was "too late," which was a reference to the statute of limitations.

Moreover, the statute of limitations issue never materialized in the trial court. The trial court ruled that proceedings commenced in 2002 when the clerk filed the complaint. The statute of limitations issue does not arise unless it is determined that it is the consent of the prosecutor which initiates a criminal proceeding. Consequently, despite counsel's argument, there was actually no basis for a statute of limitations objection.

V

Petitioner denies the allegation in Paragraph 12 that the complaint does not show on its face that the prosecution was time-barred. All the complaint shows is a document filed by a clerk. The complaint does not show on its face the concurrence of the authorized prosecutor, and thus on its face fails to demonstrate satisfaction of the statute of limitations by the filing of a valid accusatory pleading.

VI

Petitioner denies that the issuance of an arrest warrant constituted the commencement of criminal proceedings, as alleged in Paragraph 13, and denies that the record before this court is sufficient to resolve that issue. Petitioner also notes that no such claim was made in the trial court, and the documents before this court were not considered by the trial court, nor by the Appellate Division. [1/] Accordingly, those documents are not properly presented to this court in the first instance, and must be stricken. "[A]n appellate court is not the forum in which to develop an additional factual record . . . ." (People v. Peevy (1998) 17 Cal.4th 1184, 1207; see also Winton v. Municipal Court (1975) 48 Cal.App.3d 228, 236-237.) Petitioner therefore moves this court to strike those exhibits from the record.

[1/] The People made a motion to have the Appellate Division consider those documents, which was not granted.

However, petitioner acknowledges that since both the trial court and Appellate Division ruled that proceedings against petitioner commenced with the clerk's filing of a complaint, the question whether a prosecution commenced in 2007 was timely was never presented to the trial court for resolution. Thus, should this court agree that court clerk's cannot initiate criminal proceedings absent the prior screening and approval by the authorized prosecutor, petitioner suggests that this matter should be remanded to the trial court so that the People may have the opportunity to prove that the initiation of proceedings in 2007 was not barred by the statute of limitations.

VII

Petitioner denies the claim in Paragraph 14 that the entry of a plea of no contest results in forfeiture of the right to litigate a statute of limitations issue. It is well settled that a conviction, even if based on a plea of guilty, is subject to collateral or direct attack if the charge was originally barred by the applicable limitation period. (People v. Williams (1999) 21 Cal.4th 335, 340.)

VIII

Petitioner incorporates herein all allegations and argument made in her petition for writ of mandate, as well as all documents filed thereafter. The accompanying points and authorities are also incorporated herein by reference.

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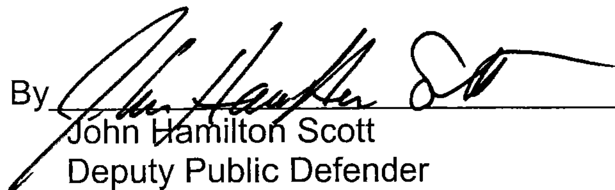
WHEREFORE petitioner renews her prayer that this court order the Appellate Division of the Los Angeles County Superior Court to recall its remittitur and to vacate and set aside its judgment of June 8, 2009, and to thereafter reverse the judgment of the trial court on the basis that the charge in this case was improperly initiated by a court clerk, and to remand the matter for such further proceedings as may be appropriate.

RONALD L. BROWN, 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 traverse, 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 traverse and the exhibits heretofore lodged with this court, and I know the contents thereof to be true as based upon my reading of true copies of court documents on file in this action and 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 15th day of January, 2013, at Los Angeles, California.

John Hamilton Scott
Deputy Public Defender

POINTS AND AUTHORITIES

INTRODUCTION

At the outset, petitioner reiterates her position that in amending Penal Code section 959.1, the Legislature was not attempting to give court clerks the power to initiate criminal proceedings. Petitioner notes the decision of Gananian v. Wagstaff (2011) 199 Cal.App.4th 1532, a case decided subsequent to the filing of that petition. It was there contended that Education Code section 15288 either created a mandatory duty upon the prosecutor to file charges, or allowed private parties to compel the prosecutor to do so. After a lengthy discussion of the constitutional underpinnings of the prosecutor's exclusive right to initiate criminal proceedings, the court stated, "[E]ven assuming for the sake of analysis that the Legislature could constitutionally mandate prosecutions for one category of alleged criminal offenses, it would be remarkable if it did so without acknowledging and clearly stating that it was making an exception to the principle of prosecutorial discretion." (Id., at p. 1544, emphasis added.) One may examine section 959.1 in vain for any such clear statement of the Legislature's intent to imbue court clerks with the powers of prosecutors.

One of the issues raised in petitioner's original Petition for Writ of Mandate was that the idea the individuals could file criminal pleadings, even if subject to the approval of the authorized prosecutor, had been superseded by later legislative action firmly placing the filing of criminal charges in the hands of the prosecutor, and mandating that such prosecutions be brought in the name of the People, who cannot be represented by private individuals. (See Pet., pp. 23-23; see Pen. Code § 684, Gov. Code §§ 100, subd. (b), 26500, People v. Black (2003) 114 Cal.App.4th 830, 833; People v. Daggett (1988) 206 Cal.App.3d Supp. 1, 4.) However, this court did not issue an order to show cause as regards these issue, which have consequently not been

further discussed by petitioner. Petitioner wishes to make it clear that she has not abandoned these points, and only assumes the validity of the Pellegrino discussion of private parties filing criminal pleadings for the purpose of responding to the issues which upon which this court has requested discussion.

I

THE PEOPLE HAVE FAILED TO DEMONSTRATE THAT ALLOWING CLERKS TO INITIATE CRIMINAL PROCEEDINGS COMPORTS WITH DUE PROCESS

> "The due process clause of both United States and California Constitutions is a bar to the deprivation of liberty except by the regular administration of the law and in accordance with general rules designed to protect individual rights.
>
> "* * *
>
> "[T]he theme which runs throughout the criminal procedure in this state is that all person 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." (People v. Municipal Court (Pellegrino) (1972) 27 Cal.App.3d 193, 205-206, emphasis added, footnote omitted.)

The People begin their latest argument by discussing prior claims regarding the application of the separation of powers doctrine. They note that allowing the judiciary to initiate criminal proceedings "did not violate the separation of powers doctrine because it did not impede the prosecution's ability to exercise its independent discretion on whether to authorize or concur in the prosecution of charges." (Supp.Ret. RPI, p. 15.) Of course, petitioner has shown the invalidity of this claim, and does so again below. Once criminal proceedings have been initiated, the prosecutor is without power to terminate those

proceedings. That power rests exclusively with the judiciary, and thus allowing the judiciary to initiate criminal proceedings divests the prosecution of its ability to authorize or concur in the prosecution of the charges. (Pen. Code § 1386; People v. Viray (2005) 134 Cal.App.4th 1186, 1202-1203.)

In their discussion of the due process implications of allowing court clerks to file criminal charges, the People begin by appearing to agree with petitioner's construction of Pellegrino and its progeny on most points. Under Pellegrino, a criminal complaint can be signed and submitted by a private person. [2] However, that complaint is ineffective to commence a criminal prosecution until such time as the authorized prosecutor has screened the case and approved or authorized the complaint. Until such time as the prosecutor has given that authorization, the complaint is a nullity.

The People seem to agree that a criminal charge is a nullity if filed by a non-prosecutor without authorization from the prosecuting attorney. (Supp.Ret. RPI, p. 17.) The People seem to recognize the holding of People v. Municipal Court (Pellegrino) (1972) 27 Cal.App.3d 193 that a criminal filing "must be 'approved, authorized or concurred in' before the private person's complaint can be effective in instituting criminal proceedings." (Supp.Ret. RPI, p. 17; emphasis added.)

However, the ultimate position of the People is that the prosecutor may "forgo a case-by-case review and instead approve and concur in all failure to appear complaints filed by clerks . . . ." (Supp.Ret. RPI, p. 23.) It is thus the position of the People that the prosecutor can give anticipatory and blanket authority to a private person to initiate criminal proceedings within that private person's

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[2] How that private person can lawfully file a document in the name of the People, as statutory required, remains problematical.

discretion, and that this prior authority serves to allow a private person to initiate criminal proceedings without any overview by a prosecutor either before or after the proceedings are initiated.

Thus, under the People's theory, they can advise an individual (including a court clerk) that the individual is empowered to initiate criminal proceedings–or simply not object to the individual doing so–and that satisfies the due process concerns discussed in Pellegrino and Viray. Of course, if this were true, then it was true when Pellegrino and Viray were decided. If the People are right, then no statutory authorization was necessary for the prosecutor to exercise his authority to delegate his duties to private citizens, and the Legislature was making no change in the law in amending Penal Code section 959.1. [3/] Moreover, the Legislature's limitation of the authorization purportedly given clerks to initiate criminal proceedings to those complaints filed electronically would be ineffective, since clerks (or anybody else) could file any complaints so long as a prosecutor did not object to the practice.

The People fail to demonstrate that giving blanket authorization to an individual to initiate criminal proceedings comports with the due process concerns discussed in Pellegrino. If the prosecutor is allowing someone else to initiate criminal proceedings, then the prosecutor is not "screening criminal cases prior to instituting a prosecution."

The People assert that petitioner has not cited any authority for the proposition that a defendant has a due process right to have a

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[3/] This also appears to have been the conclusion of the Appellate Division below, which held that a clerk could file criminal proceedings even if they were not electronically filed despite that limitation in Penal Code section 959.1. The Legislature does not appear to have agreed that it did not have to take action to authorize such a procedure.

prosecutor screen criminal charges before a prosecution is initiated. (Supp.Ret. RPI, p. 20.) This claim is unfathomable in view not only of the many decisions, statutes, and standards cited by petitioner (cf. Petition for Writ of Mandate, pp. 12-18), but particularly in view of the prosecutor's own description of the holding in People v. Municipal Court (Pellegrino), supra, 27 Cal.App.3d 193: "the filing must be 'approved, authorized or concurred in' before the private person's complaint can be effective in instituting criminal proceedings." (Supp.Ret. RPI, p. 17; emphasis added, internal quotation marks omitted.) Nevertheless, although not directly saying so, the People appear to challenge the holding of Pellegino, concurred in by Viray, by referencing this court's decision in Sundance v. Municipal Court (1986) 42 Cal.App.3d 1101, in which this court stated, "Plaintiffs cite no authority for the proposition that the prosecutor's failure to exercise sufficient, or indeed any, discretion in determining whether to file charges constitutes a denial of due process." (Id., at p. 1132; see Supp.Ret. RPI, 21.) However, since this court was no doubt aware of the decision in Pellegrino, it is obvious that this court was discussing a different issue.

When a prosecutor decides whom to charge, what charges to file, and what punishment to seek, the courts presume that prosecutorial discretion has been legitimately founded in all the "complex considerations" which a prosecutor alone has the authority, and the expertise, to consider. (See Dix v. Superior Court (1991) 53 Cal.3d 442, 451.) Thus, when the prosecutor makes a charging decision, the courts are not in a position to interfere with how a prosecutor exercises his discretion, nor to define what factors the prosecutor must consider in initiating a criminal proceeding. That is the point being made in Sundance: when it is the authorized public prosecutor who acts, the courts will presume the prosecutor acted

properly and not set forth a laundry list of factors the prosecutor is required to consider. However, no such presumption may be indulged when it is a clerk who initiates the proceedings, since a clerk has none of the constitutional or ethical duties of the public prosecutor. [4/]

Significantly, there is at least one factor that a prosecutor must determine exists before a criminal proceeding in initiated: whether there is probable cause to believe that the person to be accused committed a criminal offense. "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." (Bordenkircher v. Hayes (1978) 434 U.S. 357, 364, emphasis added.) See also California Rules of Professional Conduct, rule 5-110: "A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause." It seems obvious that a prosecutor cannot avoid this responsibility simply by refusing to look at the charges before criminal charges are instituted and that potential defendants have a due process right to have that decision made by the prosecutor.

Of course, in Sundance charges were filed by the authorized prosecutor, and there does not appear to have been any suggestion in Sundance that charges were being filed in the absence of a prosecutorial determination of probable cause. The fact that a prosecutor may believe that a person who provides information that a crime has been committed (such as a clerk or police officer) is usually

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[4/] What a clerk also does not have is prosecutorial immunity. That may be of concern given the claim of the Appellate Division that thousands of cases have been filed beyond the applicable statute of limitations.

correct in that assessment does not relieve the prosecutor of the independent constitutional and ethical duty to independently determine that such probable cause exists, and to initiate criminal charges only after having made that determination.

Obviously, a prosecutor might decide not to exercise any discretion at all beyond making the required probable cause determination. However, the point of Pellegrino is that the defendant has a due process right to have charges screened before they are filed by a public official who at least can exercise appropriate prosecutorial discretion. [5] This court has recognized that prosecutorial discretion extends far beyond a mere probable cause determination, and has stated that "The importance, to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised 'with the highest degree of integrity and impartiality, and with the appearance thereof' [citation]. . . ." People v. Eubanks (1996) 14 Cal.4th 580, 589; emphasis added.) Allowing other parties, especially those employed by the judiciary, to initiate criminal proceedings does not assure the exercise of discretion with integrity and impartiality, and certainly does not result in the appearance of such conduct.

The requirement of due process is that the decision to initiate criminal proceedings is made by the prosecutor, and not by some other person. It is only the prosecutor who has the duty, the authority, and the expertise to properly exercise prosecutorial discretion. Since the charges in Sundance were being reviewed and filed by the authorized prosecutor, that decision has nothing to do with the issue of how the

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[5] The Pellegrino court noted the American Bar Association's standards for prosecution, including the standard that "The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be initiated." (Id., 27 Cal.App.3d at p. 206, fn. 8.)

authorized prosecutor must review charges before a criminal proceeding is initiated. That is undoubtedly the reason that Pellegrino is not even mentioned in the Sundance opinion.

It may be that a prosecutor has no constitutional duty to exercise discretion in the filing of criminal charges, beyond his duty to assure that charges are supported by probable cause. However, a prosecutor certainly has the ethical duty to do so. As stated in the ABA Standards of Criminal Justice Relating to the Prosecution Function, "The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions." (Standard 3-1.2(b).) Additionally, "The duty of the prosecutor is to seek justice, not merely to convict." (Standard 3-1.2(c).) These ethical duties are not applicable to court clerks, nor to any other individual to whom a prosecutor might delegate his charging responsibility. Even though the courts may presume that the prosecutor has fulfilled these functions, that does not detract from the fact that a criminal defendant has at least a due process interest in assuring that charging decisions are made by the public official who has those ethical responsibilities, even if the prosecutor may choose to ignore those duties.

The People also assert that there is no need to impose those kinds of ethical duties upon the person filing failure to appear charges. (Supp.Ret. RPI, pp. 22-23.) The People first assert that "There are no legal issues to evaluate." (Id., at p. 22.) However, the Return filed by the Appellate Division shows this to be incorrect. According to the Declaration provided by the reviewing court, "The Clerk electronically issues and files under section 959.1(c) complaints for failure to appear not only for recent violations but also for violations going back five or even ten years." (Supplemental Return, Appellate Division, Dec., p. 3.)

The statute of limitations for filing charges against a person who has violated his promise to appear is one year (unless the clerk is filing felony charges, in which case the limitations period would the three years). (Pen. Code § 802, subd. (a).) If a prosecutor determined that the defendant was out of state after the offense was committed, allegations could be included in an accusatory pleading extending that period, but only for a maximum of three additional years. (Pen. Code § 803, subd. (d).) Obviously, such matters are beyond the knowledge of a clerk, and petitioner would be astounded if appropriate allegations were included in any complaint filed over a year after the event. [6/]

Since this information was provided in support of the claim that there are 8,000 complaints for failure to appear filed each week (a claim which remains perplexing), one may only assume that the Appellate Division is asserting that there are thousands of cases being filed which are actually barred by the statute of limitations. From the Declaration, it would appear that the reason this is not coming to light is that the trial courts are obtaining agreements from defendants to have misdemeanor charges reduced to infractions without appointing counsel and in the absence of a prosecutor. The defendants are then allowed to enter guilty pleas in ignorance of the time-barred nature of the charges–charges which have never been seen by either a prosecutor or defense attorney. One would expect that even the most cursory review of these cases prior to the initiation of charges by the authorized prosecutor would screen out thousands of time-barred prosecutions, and thus avoid the improper prosecution–and conviction–of defendants against whom charges should never have been brought. Petitioner

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[6/] Petitioner has noted that clerks are not protected by prosecutorial immunity for improperly filing criminal charges. In view of that, the clerk's institution of perhaps thousands of time-barred charges must be viewed with concern.

suggests that this "legal issue" alone is sufficient reason to recognize that due process requires screening by the public prosecutor before charges are initiated.

Another legal issue that must be determined is whether the charge should be filed as a misdemeanor or an infraction (or in the case of a failure to appear upon a felony charge, as a felony or a misdemeanor). The Appellate Division claims that court clerks file all failures to appear as misdemeanors, but that upon the defendants' appearance the court will advise the defendant that the prosecutor believes the case is properly prosecuted as an infraction. (Supp.Ret. App.Div., Declaration, p. 3.) There is no suggestion that the judiciary is engaging in plea bargaining with the defendant and offering a reduction only in exchange for a guilty plea. It thus appears that the court clerks are filing thousands of charges which, if the prosecutor were involved, would be filed as infractions. Even if the Appellate Division's claims are incorrect (and petitioner suspects they are), it remains true that a legal decision as to the level of the charge must be made by a prosecutor when criminal proceedings are initiated.

Yet another legal issue is whether the failure to appear charge is to be joined with the underlying traffic infractions. The Los Angeles County Superior Court Appellate Division held that such joinder is improper in People v. Madden (1988) 206 Cal.App.3d Supp. 14. Yet, as demonstrated in this case, the clerk simply joins the new charge with the traffic infractions. If there is some reason to ignore the ruling in Madden, that is obviously a legal determination which must be made by a prosecutor, not by a clerk.

The People also claim that it is more efficient for charges to be filed by a clerk, because otherwise clerks would have "to submit documentation of thousands of failure to appear offenses to the prosecutor . . . ." (Supp.Ret., RPI, p. 22.) However, the People seem

to acknowledge that at some point a prosecutor must review the charges, if only to exercise the prosecutor's purported authority to dismiss them. Thus, even if efficiency was a valid basis for restricting due process, the claimed efficiency does not exist. All the documentation must at some point be provided to the prosecutor–the only question is one of timing.

The People also assert that no investigation need be done, because the failure to appear alone constitutes the offense. (Supp.Ret., RPI, p. 22.) However, this merely highlights why there is a need for prosecutorial discretion to be exercised. As petitioner has noted, there are many cases in which, despite a record showing a failure to appear, a prosecutor might well decide not to file a criminal charge.

What if the defendant has an excuse for his nonappearance? The question of whether there is such an excuse is one which will require an inquiry. The failure to appear alone might not constitute the offense. Whether there is an excuse, or the excuse given is legally sufficient to constitute a defense, or whether despite legal insufficiency it is sufficient to make a prosecution inadvisable, are obviously not issues which can or will be resolved by a clerk.

What if the defendant is one day late? What if the failure to appear is solely for an equipment violation "fix it ticket"? What if the defendant has not failed to appear, but is late with payment of a fine? In all these cases, an investigation may be necessary both to determine whether, in fact, a crime has occurred and, if it has, whether a prosecution is advisable.

In short, the People have failed to make any argument which defeats the proposition which has been basic to the law of California for at least four decades: the actions of a private person in purporting to file a criminal action do not initiate a criminal proceeding until such time as

a prosecutor has screened the charges to be brought, and has approved, authorized, or concurred in the commencement of a criminal action. In this case, that did not occur until 2007, long after the expiration of the statute of limitations.

II

THE PEOPLE'S CLAIM THAT DUE PROCESS IS PROTECTED BY THE PROSECUTOR'S CLAIMED ABILITY TO DISMISS A CRIMINAL PROSECUTION AFTER IT IS INITIATED IS MERITLESS

As has been the case throughout this litigation, the prosecutor is faced with the problem that once a criminal proceeding has been initiated it is no longer within the power of the prosecutor to <u>terminate</u> that proceeding. The power of termination rest <u>exclusively</u> with the judge. (Pen. Code § 1386.) The prosecutor's current answer to that dilemma is to assert that "In the unlikely event that a court refused a prosecution request to dismiss when 'society represented by the People' did not have a 'legitimate interest' in the prosecution of the offense, the court would have overstepped the bounds of its judicial function and its ruling would be reviewable as an abuse of discretion. [Citations.]" (Supp.Ret. RPI, p. 25.)

The People's argument fails. In the first instance, it is questionable whether a court's decision <u>not</u> to exercise its discretion to dismiss can be reviewed in any event. The law is clear that a trial court must be aware of its authority, and must <u>consider</u> the factors bearing upon its decision. But if the trial judge simply comes to a different conclusion regarding the impact of those factors than the defendant, the prosecutor, or a reviewing court, the matter is not subject to <u>any</u> interference by any other court: "There is no authority granting the appellate courts the ability to review a court's informed decision to not

exercise its section 1385 power in the furtherance of justice." (People v. Benevides (1998) 64 Cal.App.4th 728, 735.)

The sole authority relied upon by the People for a contrary conclusion is a federal case, United States v. Cowan (5th Cir. 1975) 524 F.2d 504, which obviously is not discussing the standards of Penal Code sections 1385 and 1386, but which the People assert is "instructive." (Supp.Ret. RPI, pp. 23-25.) That case concerned the application of Rule 48(a) of the Federal Rules of Criminal Procedure, which permits a prosecutor to abandon a prosecution "with leave of court." The Cowan decision makes it clear that this rule did not "usurp or interfere with the good faith exercise of the Executive power . . . ," but was intended solely to protect defendants from harassment and assure the fair administration of justice. Thus, the Government's "absolute power" to terminate a prosecution need only be exercised "in good faith," and a governmental decision not to prosecute may not be disturbed unless it is "clearly contrary to manifest public interest." (United States v. Cowan, supra, 524 F.2d at pp. 509-512; emphasis added.)

Contrary to the assertion of the People, this decision is hardly "instructive," since the federal law is vastly different from the law in California. [7] The People do not have the "absolute power" to terminate a prosecution. "Formerly, the prosecutor alone had authority to dismiss a criminal action, but with the adoption of sections 1385 and 1386 of the Penal Code, this authority was transferred to the court." (People v.

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[7] One of the most notable differences between federal procedure and that of California is that the federal court has no power to dismiss a prosecution on its own motion except for unnecessary delay. (FRCP, Rule 48(b); compare People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 509-517; People v. Tenorio (1970) 3 Cal.3d 89, 94.)

Romero (1936) 13 Cal.App.2d 667, 670.) The power to dismiss has thus been totally removed from the prosecutor, who can only move the court for an order of dismissal, which the court is completely free to deny, even if the court does not dispute that the motion is made "in good faith."

It is obvious that in the vast majority of cases a court will grant a prosecutorial motion to dismiss, and–perhaps due to the universal understanding of the principle that it is the court's discretion which is involved–petitioner is unaware of any published opinion discussing whether a court abused its discretion in denying such a motion from the prosecution. However, petitioner may refer to one highly-publicized case where the prosecutor moved to dismiss in the good faith belief that a prosecution would not be successful and that motion was denied–the case of Angelo Buono in which then Superior Court Judge Ronald George denied such a motion. (See Boren, "The Hillside Strangler Trial," 33 Loyola L.A.L.Rev. 707, 710-711.) Under the People's theory, the court erred in refusing to dismiss the Buono prosecution, since the prosecution had a good faith basis for making its motion to dismiss. Obviously, the court did not agree.

The point the People ignore is that under California law it is the court, not the prosecutor, whose determination of what may, or may not, be in the interests of justice is determinative. If the prosecutor's views were the test, then there could be a system much like that found federally. However, in California a prosecutor's conclusions regarding the interests of justice do not bind the court and may not at all times be equivalent to conclusions of the judiciary. Factors a prosecutor may properly consider in determining whether to bring charges are whether there are alternatives to conviction and the prosecutorial costs involved in pursuing a charge. Those factors may not motivate the judiciary. Take, for example, a case in which the defendant has failed to appear

on driving infractions. A prosecutor might decide not to charge the failure to appear should the defendant admit guilt on the infractions and pay a fine. A prosecutor could conclude that pursuing misdemeanor charges in such a case is not worth the expense to the taxpayers. However, faced with a motion to dismiss the failure to appear charge, a judge might believe that it is more important to deter people from violating their promises to appear by proceeding with the prosecution. That would be an abuse of discretion under federal standards. In California, however, the decision not to dismiss under such circumstances, even if reviewable, would plainly not constitute an abuse of discretion.

Thus, the due process right of the defendant to have the prosecutor make the decision on what charges to bring is not protected by the procedure which gives the judge discretionary power to grant a motion to dismiss. Moreover, since the judge can indisputably deny a prosecutor's motion to dismiss for valid reasons independent of the prosecutor's views, what the prosecutor is suggesting is no less than that the discretionary power to initiate a criminal may be exercised by someone other than the authorized prosecution, and that the ability to maintain a criminal prosecution thereafter may lawfully be shifted from the prosecutor to the judge. As was stated in People v. Viray, 134 Cal.App.4th at p. 1203, that would effectively make the prosecutor a functionary of the court in violation of the separation of powers. Not only does this deny the defendant the due process right to review by the prosecutor before criminal proceedings are initiated, it also violates the separation of powers doctrine.

Thus, the argument by the People that a defendant's due process right to the exercise of prosecutorial discretion before a criminal proceeding is filed is satisfied by the prosecutor's ability to

dismiss after charges are initiated fails. And if fails because a prosecutor has no such power.

III

FURTHER PROCEEDINGS ARE NECESSARY TO DETERMINE WHETHER THE CRIMINAL PROCEEDINGS WHICH WERE INITIATED WHEN THE PROSECUTOR CONCURRED IN THE COMPLAINT WERE TIME-BARRED

The trial court ruled that the misdemeanor charge against petitioner was initiated in 2002 when the court clerk filed a criminal complaint. If the trial court was correct, then there is no statute of limitations issue in this case. Since the trial court so ruled, there was no statute of limitations issue in the trial court. Since there was no statute of limitations issue in the trial court, petitioner's counsel was under no duty to advance a statute of limitations argument there–indeed, he had no basis for doing so. However, counsel did note the problem of the time elapsed between the filing of the complaint and the prosecutor's concurrence should the court rule that the concurrence constituted the initiation of proceedings.

The People dispute whether that was the argument counsel was making, but as noted above that simply does not matter. There is no statute of limitations issue in this case unless and until it is determined that the clerk did not initiate a criminal proceeding in 2002. The People claim that petitioner had an obligation to object on statute of limitations grounds in the trial court in order to advance such a claim in this court. (Supp.Ret. RPI, p. 26.) However, the People fail to explain the basis upon which such an objection might be made in light of the trial court's ruling that proceedings were initiated within the statutory period. Obviously, there was no forfeiture.

Moreover, if a court clerk is not authorized to initiate criminal proceedings without the concurrence of the prosecutor at some point,

as the People themselves admit is true, then the complaint shows on its face that the statute of limitations was not satisfied. The complaint shows only that it is a document filed by a clerk, and is devoid of information which would justify the filing. The People might have a response to the facial invalidity–e.g. a showing that there was a prior approval by a prosecutor–but that does not detract from the fact that the complaint is facially invalid. This is no different from a complaint which is filed beyond the statute of limitations period. The prosecution may be able to show some reason the statute was tolled, for example the defendant's absence from the state, but the accusatory pleading would remain facially insufficient. Accordingly, petitioner could not forfeit the statute of limitations issue by failing to raise it in the trial court. (People v. Williams, supra, 21 Cal.4th at p. 345.) At any rate, as petitioner has shown, petitioner did raise the issue as far as could be done in the face of the trial court's ruling that, in fact, proceedings had commenced within the statutory time limit.

If, contrary to the ruling of the trial court, a court clerk cannot commence criminal proceedings in the absence of the prior approval of the authorized prosecutor, then the proceedings in this case were not initiated until 2007, long after the expiration of the applicable statutory period. However, the People raise two other issues. The first is easily dealt with. The People assert that petitioner cannot claim the protection of the statute of limitations because she was a fugitive. (Supp.Ret., RPI, pp. 33-36.) However, petitioner failed to appear upon charges as to which she had signed a promise to appear. This case does not involve those charges. This case involves a charge of violating Vehicle Code section 40508. Petitioner was not a "fugitive" as to that charge. She had signed no promise to appear on that charge, and was under no court order to appear. Indeed, it is undoubtedly true that she did not even know such a charge was pending.

Indeed, in most cases a defendant cannot be a fugitive in a case where the statute of limitations is at issue, since that issue arises only when there has been a delay in filing a charge. The case cited by the People, People v. Abayhan (1984) 161 Cal.App.4th 324, involved a unique situation: the defendant was charged by felony complaint (which did not satisfy the statute of limitations), and then absconded. In this case, petitioner did not abscond with knowledge of the pending charge, and, indeed, since this issue does not arise unless petitioner was not legally charged until 2007, petitioner was not a fugitive as to that charge during the period of delay–she was not even charged with that offense. She obviously did not forfeit her right to challenge that delay as resulting in an untimely filing.

The People do, however, make one point worth considering. The People argue that an arrest warrant was issued for violation of Vehicle Code section 40508, and that the issuance of that warrant, even in the absence of the initiation of criminal proceedings, satisfied the statute of limitations. (Supp.Ret. RPI, pp. 30-32.) As petitioner will demonstrate, while there might be merit to that claim, the present record is insufficient to determine the issue. Since the issue was not litigated in the trial court, petitioner acknowledges that the People should be given the opportunity to prove the facts which would support their argument.

The People's argument is based initially upon the provisions of Vehicle Code section 40515. That statute provides that if a person has signed a written promise to appear and fails to post bail or appear "the magistrate may issue and have delivered for execution a warrant for his or her arrest within 20 days after his or her failure to appear . . . ."

What is significant about this statute in the present context is that it authorizes a warrant to be issued in connection with the charges upon which the defendant has failed to appear. Nothing in the statute

purports to give a judicial officer power to issue a warrant for a violation of Vehicle Code section 40508, or any other statute other than those charged in the pleading upon which the defendant has failed to appear. However, it is only if the warrant was issued for a section 40508 violation that the warrant would serve to toll the statute of limitations for a violation of section 40508. It is obviously not the case that the issuance of an arrest warrant satisfies the statute of limitations for any offense the defendant may have committed, named or unnamed.

This statute was considered in People v. Superior Court (Copeland) (1968) 262 Cal.App.2d 283. That case did not involve a prosecution for violating section 40508, but the validity of an arrest upon a warrant. It is unclear from that opinion whether the magistrate purported to issue a warrant for a violation of section 40508. The opinion may just as easily be read as stating that because the defendant had violated his promise to appear, a warrant was issued upon the underlying charges. While it is true that the opinion refers to a "misdemeanor warrant," the traffic offenses occurred in 1967, when there were no infractions in California, and thus any warrant issued in the matter would be a "misdemeanor warrant." (See Tracy v. Municipal Court (1978) 22 Cal. 3d 760, 765.)

However, what is clear is that if the Copeland court was saying that a magistrate can issue an arrest warrant for a violation of Vehicle Code section 40508, rather than for the offenses upon which the defendant has failed to appear, that conclusion is not supported by the statutes cited–the statutes authorize an arrest warrant, but not for an uncharged offense. This same ambiguity is found in the Attorney General's opinion applying Copeland: 56 Ops.Atty.Gen. 165.

However, assuming that both Copeland and the Attorney General were authorizing a warrant for a violation of Vehicle Code section 40508, and that this is actually permitted by the relevant

statutes, the People's argument still must fail for two reasons: 1) Copeland was not correctly decided, and 2) even if correctly decided, warrants issued under the Copeland procedure are insufficient to satisfy the statute of limitations.

The basic premise of the Copeland decision was this: "The offense, failure to appear, occurs in front of the magistrate, satisfying in every case the requirements of Penal Code, section 813, and People v. Sesslin [1968] 68 Cal.2d 418 . . . ." (Id., 262 Cal.App.2d at p. 285, emphasis added.) However, the mere failure of the defendant to be present in court was and is not sufficient to show a violation of Penal Code section 40508. Vehicle Code section 40515, then as now, provides that a warrant may be issued only if the defendant fails to appear and has not posted bail. The defendant is perfectly free to deposit bail, and allow the bail forfeiture to constitute conviction of the offense. The defendant's absence from court may be apparent to the magistrate; the defendant's posting of bail, vel non, is not. That is information that the magistrate must obtain from some other source, and for an arrest warrant validly to be issued that information must be presented in an affidavit. (U.S. Const., Fourth Amend.; People v. Sesslin (1968) 68 Cal.2d 418, 423.) The Copeland court failed to discuss or recognize this issue, and by failing to do so came to the erroneous conclusion that when a defendant is not in court the magistrate has all the information needed to issue a warrant for a violation of Vehicle Code section 40508.

The Attorney General's opinion improperly expands upon Copeland. That decision was predicated upon facts occurring before the magistrate. The Attorney General's opinion states that "The offenses here being examined, however, occur in front of the magistrate, if not literally, at least to the extent that they are documented in the court's own records." (56 Ops.Atty.Gen. at p. 166.)

However, information which may or may not exist in records which are never properly presented to the magistrate are not "in front of the magistrate," and it was only that factor which led the Copeland court to permit the issuance of a warrant absent compliance with the complaint procedure. The Attorney General cites nothing in support of this unwarranted and unauthorized expansion of both Copeland and the applicable statutes.

Moreover, even if Copeland is authorizing warrants for 40508 violations, rather than for the underlying traffic offense, and that procedure is valid, the opinion is still referencing warrants issued for an uncharged 40508 violation (and nothing in either Copeland or the Attorney General's opinion suggests that the magistrate is permitted to initiate a criminal proceeding as well as issue a warrant). It is clear that the opinion is not concerned with the statute of limitations. If that were the issue, the Copeland decision would have had to find that the statute was not satisfied, because not only was there no oath or affirmation in support of the warrant, but the issue of probable cause was never even presented to a magistrate for decision. As stated in Copeland, "A computer generates the warrant. No magistrate ever sees it. A court clerk affixes a magistrate's signature facsimile stamp . . . ." (Id., 262 Cal.App.2d at p. 284.)

Such a procedure, which appears to be the same as that utilized in the Los Angeles Superior Court, is insufficient to generate a warrant which will satisfy the statute of limitations. In discussing whether an arrest alone would satisfy the statute of limitations, the Court of Appeal has stated,

> "[S]ubdivision (d) of section 804 is drawn from former sections 800 and 802.5. [Citation.] A review of the legislative history of former section 802.5 suggests the Legislature wanted those [sic, there?] to be a finding of probable cause, by grand jury,

magistrate, or judge, within the limitations period. [Citation.] In contrast to issuance of an arrest warrant, an arrest does not involve a finding of probable cause made by a neutral judicial officer or body." (People v. Angel (1999) 70 Cal.App.4th 1141, 1146; see also People v. Johnson (2006) 145 Cal.App.4th 895, 901.)

In fact, in accordance with this discussion, the California Legislature has adopted rules regulating the issuance of an arrest warrant which is not based upon an accusatory pleading, which is designated "a warrant of probable cause." (Pen. Code § 817.) Such warrants cannot be issued unless a peace officer presents a declaration of probable cause to a magistrate, and the magistrate makes a finding of probable cause and signs the warrant. It is this statute which now controls the issuance of arrest warrants when a criminal proceeding has not been initiated. Even if warrants may validly be issued under some other procedure, it is only warrants issued in this manner which are sufficient to satisfy the statute of limitations.

If, as appears probable from the declarations supplied by the Appellate Division, arrest warrants are issued based solely upon information placed into a computer by a clerk, from which warrants are automatically generated, then the warrants have not been preceded by the judicial finding of probable cause necessary to permit that warrant to satisfy the statute of limitations. Petitioner recognizes that the "complaint" in this case purports to be a declaration on information and belief by a clerk including the language of Vehicle Code section 40508. However, the court clerk is not a peace officer, and thus cannot begin the warrant process under Penal Code section 817. Moreover, even if that declaration would be sufficient to allow a magistrate to issue a warrant, no signature of a magistrate appears on the document and there is no indication that any judicial finding of probable cause was

made prior to the issuance of the warrant. Instead, it appears that the procedure was the same as in Copeland: no magistrate ever saw the warrant. The warrant was thus insufficient to commence a proceeding within the meaning of the statute of limitations.

Of course, as noted above, the trial court's ruling obviated any necessity for the prosecution to show that a warrant was issued which could satisfy the statute of limitations, i.e., one issued by a magistrate upon information properly provided to the magistrate by a peace officer, and petitioner acknowledges that they must be given an opportunity to do so.

Finally, petitioner stresses that in this case, assuming that a valid warrant was issued following a judicial determination of probable cause, the criminal proceeding was commenced in 2007 when the prosecutor affirmatively approved the initiation of proceedings in this case. The resolution of the statute of limitations question in this case does not detract from the fundamental point, which is that criminal proceedings cannot be initiated absent the prior screening and approval of the authorized prosecutor.

CONCLUSION

The People have failed to show that due process is satisfied by allowing clerks (or anybody else) to initiate criminal proceedings without the charges being subject to prior screening and authorization by the public prosecutor. Accordingly, the Appellate Division must be directed to vacate its contrary opinion. However, the People have raised a reasonable argument that the statute of limitations may have been satisfied in this case when the prosecutor's approval was given in 2007.

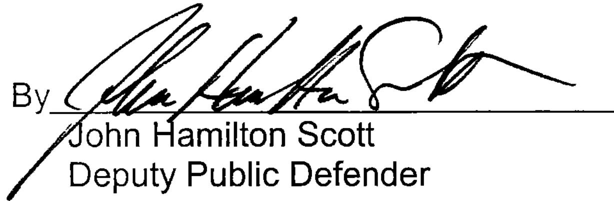
Since the trial court ruled that charges were initiated in 2002, the question of application of the statute of limitations never arose in that court, and the present factual record is insufficient to determine the issue. Petitioner acknowledges that the People are entitled to present

evidence on this issue in the trial court should this court rule that the criminal proceedings against petitioner were initiated in 2007.

Respectfully submitted,

RONALD L. BROWN, 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 COMPLIANCE

Counsel of Record hereby certifies that the enclosed Petitioner's Supplemental Traverse to Return of Real Party and Motion to Strike Exhibits is produced using 13-point Roman type including footnotes and contains approximately 8,388 words, which is less than the words permitted by this rule. Counsel relies on the word count of the computer 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 January 17, 2013, I served the within PETITIONER'S SUPPLEMENTAL TRAVERSE TO RETURN OF REAL PARTY AND MOTION TO STRIKE EXHIBITS, JEWERELENE STEEN, on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles, addressed as follows:

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

CITY ATTORNEY
APPELLATE DIVISION
500 CITY HALL EAST
200 NORTH MAIN STREET
LOS ANGELES, CA 90012

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

CLERK, COURT OF APPEAL
SECOND APPELLATE DISTRICT
300 SOUTH SPRING STREET
LOS ANGELES, CA 90013

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

REED SMITH, LLP
PAUL D. VOGEL, ESQ.
101 SECOND AVENUE, SUITE 1800
SAN FRANCISCO, CA 94105

I further declare that I served the above referred-to document by hand delivering a copy thereof addressed to:

JACKIE LACEY, DISTRICT ATTORNEY
APPELLATE DIVISION
320 WEST TEMPLE STREET, SUITE 540
LOS ANGELES, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 17, 2013, at Los Angeles, California.

EDNA R. SANTOS