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SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEWERELENE STEEN,

Petitioner,

vs.

APPELLATE DIVISION OF THE LOS ANGELES COUNTY SUPERIOR COURT,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party In Interest.

Case No. S174773

(Ct. of App., 2nd Dist., Div. 4, Case No. B217263)
(Willhite, Acting P.J., Manella, J., Suzukawa, J.)

(Appellate Div. Sup. Ct. No. BR046020)
(Weintraub, J., McKay, P.J., Wasserman, J.)

(Trial Ct. No. 6200307)
(Munisoglu, C., Dept. 66)

REAL PARTY'S INFORMAL RESPONSE TO PETITION FOR WRIT OF MANDATE PURSUANT TO THE COURT'S LETTER OF JULY 29, 2009

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INTRODUCTION

In the pending Petition for Writ of Mandate ("petition"), petitioner argues that it is a violation of due process for anyone other than a prosecutor to file a complaint, and that it violates the separation of powers doctrine for a clerk of the court to file a complaint. But, the issue in this case is far narrower. This case involves the Legislature's effort to "increase court efficiency" with a resource-saving procedure that is consistent with technological advances and applicable to limited offenses of a special nature, here, a failure to appear. In this case, the question is whether the Legislature was permitted to address those goals by enacting a procedure which allows court clerks to issue and file electronic complaints under the unique circumstances that exist when a defendant fails to appear.

Most often, when a defendant fails to appear, it is *only* the clerk who has personal knowledge or is in possession of credible information of the commission of the offense. Thus, the clerk is the best possible *complainant* to issue a complaint stating facts supportive of those allegations, and that is why Penal Code section 959.1, subdivision (c)(1), means precisely what it says, that a court may receive a complaint in electronic form issued by a clerk – the complaining witness with knowledge of the facts of the offense of a failure to appear. The Legislature recognized that it would be unreasonably burdensome to require court clerks to submit to the prosecutor reams of paper detailing every individual who fails to appear, pay a fine, or comply with a court order, and in turn require the prosecuting attorney to reciprocate in order to issue and file complaints for these charges.

Here, the prosecution was well aware of this statutory procedure and the court's utilization of it. But, in any event, at the moment a defendant fails to appear, he or she is a fugitive and the offense is continuing until the defendant surrenders. Under these circumstances, the complaint need not be "approved, authorized or concurred in" by a prosecutor until the defendant returns to court. Only then can the prosecution proceed, the defendant raise additional facts or defenses to the charge, and the prosecutor object to the complaint, negotiate a plea, or otherwise exercise its discretion. For the same reasons, the statute of limitations is

inapplicable when a defendant commits this unique offense, which continues until he or she returns. In that situation, the "clock" cannot run against the prosecutor; the prosecution has been held in abeyance by the defendant's failure to appear.

The legislative procedure at issue is consistent with constitutional principles and is an efficient and effective means of addressing the unique offense of failing to appear. As a result, this is not the proper case for the Court to exercise its original jurisdiction and grant extraordinary relief, and real party requests that the Court summarily deny the instant petition.

FACTUAL AND PROCEDURAL SUMMARY

A. Trial Court Proceedings.

On June 8, 2002, petitioner was cited for driving a motor vehicle with an expired registration, driving a motor vehicle without a valid driver's license, and failing to provide evidence of financial responsibility. (Petition, Exhibit D, Respondent's Brief in the Appellate Division ["Respondent's Brief"], p. 2.) On the Citation, petitioner signed and declared, "Without admitting guilt, I promise to appear" on or before July 23, 2002, at the Clerk's Office of the Superior Court at 1945 South Hill Street, Los Angeles, California, 90007. (*Ibid.*)

On August 13, 2002, a misdemeanor complaint was issued electronically charging petitioner with a violation of Vehicle Code section 40508, subdivision (a), willfully violating her written promise to appear in court. (Petition, Exhibit A, Misdemeanor Complaint filed in the Los Angeles County Superior Court in case no. 6200307 ["complaint"].)

On July 27, 2007, petitioner's case was called before the Honorable Elizabeth M. Munisoglu, Commissioner presiding. (Petition, Exhibit B, Reporter's Transcript of the Proceedings of July 27, 2007 ["RT"] 1.) Petitioner was represented by Deputy Public Defender Ilya Alekseyeff, and the People were represented by Deputy City Attorney David Bozanich. Petitioner's counsel made an oral demurrer to the charges and objected to the participation of the City Attorney in the proceedings. Counsel argued that the complaint in this case was invalid because it was issued solely by the Clerk of the Superior Court, not the City Attorney, and that the

prosecutor was "the only entity that is authorized to prosecute people in this state." (RT 1-4.) Defense counsel claimed that the court lacked jurisdiction to hear the case, and that allowing the prosecution to go forward violated California constitutional separation of powers doctrine and due process. (RT 2-4.) Counsel additionally argued that Penal Code section 959.1, subdivision (c)(1), also violated the separation of powers doctrine under the California Constitution "to the extent that the clerk signed this complaint pursuant to" that section. (RT 4.)

The court found that the complaint was valid as long as it was "approved, authorized, or concurred in" by the prosecutor. (RT 4-5.) Accordingly, the court asked the prosecutor whether he authorized or concurred "in the complaint as presently constituted," and Deputy City Attorney Bozanich answered yes. (RT 5.) Bozanich added that the City Attorney's Office:

> approve[s] and concur[s] [with] this complaint as well as all the other complaints that are filed in all the other cases in this courthouse. We know the practice exists where a complaint is generated via a notice to appear in which a person cited in the notice to appear has failed to appear. We have not asked the Court and/or its clerk to stop. [¶] Moreover, we have not filed a motion to dismiss in this case. Additionally, when the case was presented to our office [on July 27, 2007], we reviewed the complaint and made an offer on that particular case. Therefore, based upon all those actions, we not only explicitly approve and concur in this complaint, but our actions in this case and in all other cases demonstrate, unless otherwise indicated, that we approve and concur in these complaints.

(RT 6-7.)

Defense counsel responded that "even if it's approved ultimately, [it] has to be timely." (RT 7.) He argued that, "[i]t is too late for the City Attorney to concur" in the complaint because "[o]therwise . . . this Court will invite private parties to file criminal complaints against individuals en mass . . . ." (RT 7-8.)

The court overruled the demurrer and concluded "that there is no basis to find that the complaint is invalid on its face." (RT 8.) Specifically, the court found that there was no separation of powers problem in this case

because court clerks "do not exercise judicial functions," but instead "[t]heir functions are ministerial," and because "[t]he Supreme Court has never applied rigid interpretations to the divisions between executive, legislative, and judicial powers." (RT 5.) The court additionally found that "one could realistically say that the Court clerk is the witness to the violation and, therefore, is the appropriate party to initiate the complaint as approved, concurred in by the City Attorney." (RT 5.)

With respect to the constitutionality of Penal Code section 959.1, the court ruled that it was "assumed to have been enacted by the Legislature with a full understanding of prior case law and other statutes, including Government Code [section] 100 which vests the power to prosecute in the District Attorney or the City Attorney." (RT 5-6.) In "attempt[ing] to harmonize those statutes with the facts before it and the arguments made," the court ruled that "the fact that the prosecution in this matter has concurred in the complaint as it stands is sufficient to render it constitutional and provide the Court with [an] adequate legal basis for denying your demur[rer]." (RT 6.)

After the demurrer was overruled, petitioner entered a plea of no contest to the "misdemeanor charge of 40508 of the Vehicle Code." (RT 8-9.) The court then denied probation and sentenced petitioner to serve 50 days in the county jail against 6 days of credit, and gave her notice that her driver's license was suspended. (RT 9-10.)

B. Appellate Division Proceedings.

Petitioner timely appealed her conviction to the Appellate Division of the Los Angeles Superior Court, the named respondent in this matter. On appeal, petitioner filed an opening brief containing several claims of error attacking the validity of the complaint. Specifically, petitioner argued that: (1) the complaint was not sufficient to confer jurisdiction on the court because it was not brought in the name of "The People of the State of California," (2) any complaint filed by a court clerk instead of a prosecutor violates due process and the separation of powers doctrine, (3) Penal Code section 959.1, subdivision (c)(1), which permits a court to receive a complaint in electronic form if it "is issued in the name of, and transmitted

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," was not actually intended to allow a clerk to issue and file a complaint, (4) if section 959.1, subdivision (c)(1) did, in fact, authorize court clerks to issue and file electronic complaints for failures to appear, it would have to be struck down as unconstitutional, and (5) even if it is permissible for a clerk to issue and file an electronic complaint for a failure to appear where authorized by a prosecutor, the statute of limitations expired before the complaint was authorized in this case. (Petition, Exhibit C, Appellant's Opening Brief in the Appellate Division, pp. 4-21.)

After reviewing petitioner's claims and the record on appeal, real party moved pursuant to rules 8.783(a)(7) and (10), 8.784, 8.788, and 8.791 of the California Rules of Court, to remand the matter to the trial court for proper settlement, certification, and augmentation of the record on appeal. No formal hearing to settle the statement on appeal had been held in this case, and real party discovered that the record transmitted to the Appellate Division did not include all the documents in the trial court's file.[1]

Noting that "[i]n addition to her constitutional arguments, appellant also challenges the validity of the complaint on statute of limitation grounds," real party identified one known omission to the record: the "Expanded Traffic Record System" ("ETRS"), which included a notation on the issuance of a warrant. (See Pen. Code, § 804 [prosecution for an offense is commenced when ... "[a]n arrest warrant or bench warrant is issued...."].) Real party requested a remand so the trial court could "settle and certify its ETRS records as part of the record on appeal, and, if necessary, explain any notations or abbreviations contained within them." Real party also requested a remand so the court could settle and certify "any other documents, statements, or evidence relevant to the issues raised on appeal regarding the court's process of filing failures to appear." (Motion to Remand To Augment Record on Appeal and to vacate Briefing Dates;

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[1] Real party also requested proper certification of the reporter's transcript because it had not been given the opportunity to review it for corrections.

Declaration of Katharine H. Mackenzie; Memorandum of Points and Authorities attached hereto as "Real Party's Exhibit A.")

On September 2, 2008, the Appellate Division denied real party's motion. (Appellate Division Order of September 2, 2008, attached hereto as "Real Party's Exhibit B.")

Real party subsequently filed a responsive brief addressing each of petitioner's claims, and petitioner filed a reply. (Respondent's Brief; Petition, Exhibit E, Appellant's Reply Brief in the Appellate Division.)

On June 8, 2009, in a memorandum judgment,[2] the Appellate Division rejected petitioner's claims of error and affirmed the judgment of conviction. (Petition, Exhibit F, Appellate Division's Memorandum Judgment ["Judgment"].) The Appellate Division ruled that the plain language of Penal Code section 959.1, subdivision (c)(1), "allows a court to receive a complaint in electronic form issued in the name of, and transmitted by, a clerk of the court for certain offenses, including the offense at issue here," and therefore the statute "authorized the electronic issuance of the instant complaint." (Judgment, pp. 4-5.) Although the court found that, "[o]n review of the appellate record, it is less than clear whether the complaint was electronically issued by a court clerk," the court nevertheless held that "a complaint issued by a court clerk is not restricted to electronic form, but may be issued by other means, such as on paper" because "[n]owhere in the statute does it specify that such a complaint is valid only if issued electronically." (Judgment, p. 5.)

The Appellate Division held that there was no due process violation because the prosecutor "approved and authorized the initiation of criminal proceedings," and that there was no separation of powers violation because the City Attorney's Office "at all times retained the authority to dismiss the complaint by objecting to its issuance," thus retaining its prosecutorial discretion. (Judgment, pp. 3-4.) As to petitioner's argument that the complaint violated the statute of limitations, the Appellate Division held that "the action was commenced on August 13, 2002, upon the filing of the complaint as authorized by the city attorney's office," and therefore, "the

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[2] The Appellate Division did not issue a published opinion.

statute of limitations did not bar prosecution of the offense." (Judgment, p. 6.) Finally, the Appellate Division ruled that the failure of the complaint to expressly state "The People of the State of California" did not deem it to be a deficient pleading because that defect did not prejudice any substantial right on the part of petitioner. (Judgment, p. 6.)

On June 19, 2009, pursuant to California Rules of Court, rules 8.1005 and 8.889, petitioner filed in the Appellate Division a petition for rehearing and/or certification to the Court of Appeal. On June 30, 2009, the Appellate Division issued an order denying rehearing and certification. (Petition, Exhibits G&H.)

C. Subsequent Proceedings.

On July 6, 2009, pursuant to California Rules of Court, rule 8.1008(b), petitioner filed a petition for transfer with the Court of Appeal, Second Appellate District, Division 4 (case no. B217263). On July 16, 2009, that Court denied transfer. (Petition, Exhibits I&J.)

On July 20, 2009, petitioner filed the instant petition with this Court. On July 29, 2009, the Clerk of this Court served real party by U.S. mail with a letter requesting an informal response to the petition, to be served and filed on or before August 18, 2009, addressing "the merits as well as any procedural issues that real part[y] wish[es] to raise."[3]

ARGUMENT

I
Penal Code Section 959.1, subdivision (c)(1), Authorizes a Court Clerk to Issue and File Complaints For Failures To Appear.

Petitioner claims the Appellate Division incorrectly concluded that Penal Code section 959.1 authorizes court clerks to file complaints for

[3] This Informal Response is submitted pursuant to the Clerk's July 29, 2009 letter. Because the Court has not issued an alternative writ or order to show cause, real party requests that the Court allow real party an opportunity to answer the petition, to admit or deny the factual allegations contained therein, to more fully brief the merits of the legal issues the Court requests to be briefed, and to orally argue the matter, if the petition is not summarily denied. (See Cal. Rules of Court, rule 8.487(b)(1).)

failures to appear. (Petition, pp. 24-28.) On the contrary, the Appellate Division correctly held that the complaint in this case was authorized by statute. (Judgment, pp. 4-6.)

> The well-settled objective of statutory construction is to ascertain and effectuate legislative intent. [Citations.] To determine that intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the statutory language is clear, we need go no further. If, however, the language supports more than one reasonable interpretation, we look to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, the legislative history, the statutory scheme of which the statute is a part, and contemporaneous administrative construction, as well as questions of public policy.

(*In re Derrick B.* (2006) 39 Cal.4th 535, 539.) As discussed below, the plain statutory language of section 959.1, particularly read in light of the statutory scheme in which it is found, authorized the clerk of the court to file the complaint in this case. But, even assuming there was any lack of clarity in the language of the statute, the relevant legislative history is consistent with the plain language of the statute. Based on the nature of a failure to appear, the Legislature created a statutory scheme to allow the individual best positioned to be the complaining witness, the court clerk, to issue and file the complaint.

A. The Express Statutory Language Authorizes a Clerk of the Court to Issue and File The Complaint As The Complaining Witness.

Section 959.1 is found within Chapter 2, Title 5 of the Penal Code. The exclusive subject of Chapter 2 of Title 5 is the "form" that an accusatory pleading may take.[4] Consistent with the chapter's focus on form, Penal Code section 959.1 was added in 1988 to accommodate

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[4] Title 5 of the Penal Code is entitled "The Pleadings." Chapter 2 of that title is designated "Rules of Pleading." A careful review of the sections contained in chapter 2 (§§ 948-973), discloses its exclusive function – to set forth the form and rules for the issuance of pleadings in criminal actions. For example, section 950 delineates the contents of the accusatory pleading, section 951 provides a sample form for an indictment or information, section 952 governs the form of the charging language contained in an accusatory document, and section 954 governs the method for joining more than one offense in a single pleading.

advances in computer technology and permit the complaint to be filed with the court in the form of electronic data in place of the traditional physical document. Section 959.1 allows for the issuance of electronic pleadings by three complainants – a public prosecutor, a law enforcement agency, or a clerk of the court. Section 959.1 provides, in pertinent part:

> (a) . . . a criminal prosecution may be commenced by filing an accusatory pleading in electronic form with the magistrate or in a court having authority to receive it.
>
> (b) As used in this section, accusatory pleadings include, but are not limited to, the complaint, the information, and the indictment.
>
> (c) A magistrate or court is authorized to receive and file an accusatory pleading in electronic form if all of the following conditions are met:
>
> (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.

Petitioner argues that the statute is unclear "whether the reference to the clerk of court applies both to the issuance and transmittal of complaints, or only to the transmittal," however, by its express terms, section 959.1 authorizes the court to receive an accusatory pleading in electronic form if it "is *issued* in the name of, and transmitted 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." (Emphasis added.) Thus, the plain language of section 959.1 authorizes a clerk of the court to <u>issue</u> complaints in three, narrow circumstances.

Furthermore, if section 959.1 was interpreted the way petitioner proposes – essentially to authorize court clerks to merely accept a complaint for filing in those three narrow circumstances - the language "or by a clerk of the court" in subdivision (c)(1), which was added by amendment, would be completely superfluous and meaningless. Subdivision (c) already authorizes "[a] magistrate or court" to "receive and

file an accusatory pleading in electronic form" if the conditions present in subdivision (1) are met. The only reasonable interpretation of the language of section 959.1 is that it authorizes court clerks to *issue and file* complaints "for the offenses of failure to appear, pay a fine, or comply with an order of the court." Because the statutory language is clear, "we need go no further." (*In re Derrick B., supra*, 39 Cal.4th at p. 539.)

B. The Legislative Intent and Other "Extrinsic Aids" Support The Plain Language of Section 959.1, Authorizing Clerks to File Complaints for Failures to Appear As Complainants.

Petitioner acknowledges that at least one of the legislative materials of which the Appellate Division took judicial notice in this case indicates "that the effect of [section 959.1] was to provide that the accusatory pleading may be issued in the name of, and transmitted by, a clerk of court," but then she argues that the Legislature still could not have had that intent. Without any support except what she deems a *lack* of additional legislative history indicating "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," petitioner argues the Legislature only intended to provide a more efficient means of filing paperwork which the clerk was already permitted to file. (Petition, pp. 25-28.) But, petitioner's only legislative citations stand solely for the indisputable proposition that AB 3168 was meant to make electronic filing of complaints for failures to appear more convenient – a fact which further indicates the Legislature was addressing the unique nature of a failure to appear. Even assuming section 959.1 was in any way ambiguous, none of the "extrinsic aids" used to interpret a statute, including legislative intent, support petitioner's claim that the statute merely authorizes a clerk to "receive" a complaint filed by a public prosecutor. (See *In re Derrick B., supra*, 39 Cal.4th at p. 539.)

In 1990, section 959.1 was amended by Assembly Bill No. 3168 to include the language relevant to this case ("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."). (See Respondent's Brief, p. 7.) Contrary to petitioner's position, the notes to AB 3168, introduced by Assembly Member Frazee, stated:

> Existing law provides that a criminal prosecution may be commenced by filing an accusatory pleading in electronic form with the magistrate or in a court having authority to receive it, *provided specified conditions are met*, including a condition that the accusatory pleading *be issued in the name of, and transmitted by, a public prosecutor or law enforcement agency* filing pursuant to specified provisions.
>
> This bill would revise the above condition to provide that the accusatory pleading *may also be issued in the name of, and transmitted 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.

(See Respondent's Brief, p. 8, citing 1990 Cal. AB 3168, emphasis added; Office of Criminal Justice Planning Summary of AB 3168, Document PE-4 ["AB 3168 (Frazee) would revise the current law to expand the capability of electronically filing accusatory pleadings to clerk courts [*sic*] as well as public prosecutors and law enforcement agencies."].) The stated purpose of AB 3168 is in fact consistent with the statutory language, which authorizes clerks, in addition to public prosecutors and law enforcement agencies, to *issue and file* complaints under three narrow circumstances, one of which is the failure to appear.

C. Penal Code Section 959.1 Is Consistent With The Purpose, Function, and Definition of a Complaint.

The Legislature is presumed to be aware of judicial decisions already in existence, "and to have enacted or amended a statute in light thereof." (*People v. Giordano* (2007) 42 Cal.4th 644, 659.) Thus, the Legislature presumably enacted Penal Code section 959.1, subdivision (c), consistently with decisional law defining complaints and their functions. While a "complaint" is defined as the accusatory pleading upon which criminal proceedings commence, it is also simply the charge or accusation against the offender made by a private person:

> The term "complaint" is a technical one descriptive of proceedings before magistrates. It is and has been defined to be the preliminary charge or accusation against an offender, **made by a private person or an informer to a justice of the peace or other officer**, charging that [the] accused has violated the law. It has also been defined as a preliminary charge before a committing magistrate; . . . The complaint is the foundation of the jurisdiction of the magistrate, and it performs the same office that an indictment or information does in superior courts.

(*Rupley v. Johnson* (1953) 120 Cal.App.2d 548, 552, emphasis added.) The "complaint" also serves as the basis for the issuance of an arrest warrant. In this regard, Penal Code section 1427 provides:

> (a) When a complaint is presented to a judge in a misdemeanor or infraction case appearing to be triable in the judge's court, the judge must, if satisfied therefrom that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, issue a warrant, for the arrest of the defendant.

As explained by the California Supreme Court in *In re Walters* (1975) 15 Cal.3d 738, 748, in order for the judge to determine whether the complaint sets forth an offense and reasonable ground to believe the defendant has committed it, and thus mandating the issuance of a warrant thereon, the complaint or affidavit in support thereof must either: (1) state facts within the personal knowledge of the complainant; or (2) identify the source of credible information.[5]

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[5] Petitioner's argument that the complaint is deficient to confer jurisdiction on the trial court because it did not specifically name the People of the State of California as plaintiff is erroneous. Penal Code section 959 enumerates the criteria required for a sufficient accusatory pleading, and that provision does not require that the "People of the State of California" be named as a plaintiff. (Pen. Code, § 959.) Petitioner does not contend that the complaint was otherwise insufficient under Penal Code section 959, and it appears from the record that it met the criteria. Further, "[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." (Pen. Code, § 960; *People v. Saugstad* (1962) 203 Cal.App.2d 536, 550-551.) There is nothing in the record to suggest that the failure to include "People of the State of California" in the complaint prejudiced a

Thus, the Legislature amended Penal Code section 959.1 consistently with the purpose and function of a complaint: section 959.1, subdivision (c), permits court clerks -- who have personal knowledge of the commission of an offense -- to file complaints as complainants. A clerk of the court will either have personal knowledge or be in possession of credible information of the commission of the specific offense of failure to appear (or pay a fine or comply with a court order). Thus, the clerk is the best possible *complainant* to issue a complaint stating facts supportive of those allegations.

The Appellate Division correctly concluded the complaint in this case was authorized by statute because section 959.1 permits a court clerk to issue complaints as a complainant for failures to appear.

II
The Issuance of the Complaint Did Not Violate Any Constitutional Principles.

Before discussing any of the statutory language addressed above, petitioner argues that any complaint issued by a clerk of the court without prior approval of a prosecutor violates due process. (Petition, pp. 12-18.) She contends the power to initiate criminal charges is vested exclusively in the public prosecutor, so no other entity may do so. (*Ibid.*) However, this statute, which permits clerks to issue and file complaints in unique circumstances, does not encroach on the exercise of executive power. In considering the constitutionality of section 959.1, we begin with the well-settled rule of law that legislative enactments must be interpreted to avoid any unconstitutionality.

> In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal

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substantial right. Moreover, as discussed above, a complaint is traditionally just that: an *accusation* that a person has violated the law (*Rupley, supra*, 120 Cal.App.2d at p. 552; see also *People v. Viray* (2005) 134 Cal.App.4th 1186, 1205 ["it appears true as a general matter that in most jurisdictions" the function of a "complaint" is merely to secure a defendant's arrest]), and in the case of a failure to appear, it is most often *only* the complaining witness – the clerk of the court – with knowledge of the facts of the offense when the complaint is filed.

> Constitution is clear and unquestionable, we must uphold the Act. [Citations.] Thus, wherever possible, we will interpret a statute as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statute. [Citation].

(*California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594.)

A. The Limited Filing Function Authorized By Section 959.1 Does not Violate Due Process By Allowing Individuals To Step Into The Role of The Public Prosecutor.

By issuing a complaint, the clerk is merely the complaining witness who has personal knowledge of the offense. Prosecutorial discretion is still left to the prosecutor. As stated by the Court of Appeal in the case on which petitioner's due process claim chiefly relies, the mere issuance and filing of a complaint will not institute criminal charges unless its filing is "approved, authorized or concurred in by the [prosecuting] attorney. . . ." (*People v. Municipal Court (Pellegrino)* (1972) 27 Cal.App.3d 193, 206.)

Petitioner cites *Pellegrino* for the proposition that the complaint in this case could not validly be filed without *prior* approval, but *Pellegrino* does not stand for the proposition that *prior* approval is required. In *Pellegrino*, three private citizens (Pellegrino, Stromstad, and Bishop) were involved in a neighborhood dispute. Bishop, who was the victim of a battery, signed and filed a misdemeanor criminal complaint naming Pellegrino and Stromstad as defendants, and the district attorney's office reviewed and approved the filing. Pellegrino, in turn, signed and attempted to have the district attorney file a criminal complaint naming Bishop as defendant. However, the district attorney refused to approve the filing of her complaint. So, Pellegrino filed the complaint herself, had her personal attorney appointed as "special prosecutor," and the district attorney was disqualified. As a result, Bishop was charged with several criminal offenses that the district attorney determined lacked merit. (*Pellegrino, supra*, 27 Cal.App.3d at pp. 195-197.)

The Court of Appeal ordered Pellegrino's complaint dismissed, holding:

> The procedure permitting private individuals to institute criminal proceedings without approval of the district attorney when coupled with the prosecutor's inability, because of

> sections 1385 and 1386, after the complaint is filed to control when and if the prosecution should proceed, improperly impairs the discretion of the district attorney and encroaches upon the executive power in violation of article III, section I of the California Constitution.
>
> In fact, 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.

(*Pellegrino, supra*, 27 Cal.App.3d at p. 204.) The court concluded that "[t]he complaints filed by Pellegrino against Bishop without the district attorney's authorization were nullities. The municipal court lacked discretion and in fact jurisdiction to do anything in the matter except to dismiss." (*Id.* at p. 206.)

However, contrary to petitioner's contention, that holding did not turn on *when* the complaint was approved. Instead, the court determined the complaint filed by Pellegrino was a nullity because it was issued and filed without any authorization at all. Conversely, the complaint issued and filed under Bishop's signature was not a nullity because its issuance and filing were done with the prosecutor's approval. (*Pellegrino, supra*, 27 Cal.App.3d at p. 196.) Further, the form of the complaint -- i.e., who signs, issues, or files it – is not dispositive of whether criminal proceedings have been properly initiated. Rather, as explained by the *Pellegrino* court:

> By this holding we do not mean to imply that criminal complaints need take any different form than they presently do, but only that their filing must be approved, authorized or concurred in by the district attorney before they are effective in instituting criminal proceedings against an individual.

(*Id.* at p. 206.) In the case of a failure to appear, consistent with *Pellegrino*, the complaining witness (here the clerk of the court) issues and files a complaint based on the only fact necessary to make such an accusation: that the defendant did not appear. And, as the Appellate Division found, this procedure was known to and approved by the prosecution initiating the action in the instant case. As discussed above, section 959.1 was amended to include filings by a clerk of the court in

1990, and as the record reflects, the City Attorney is aware of this practice, yet there is nothing to suggest the City Attorney opposes or objects to any of these filings, including the filing in this case. As the prosecutor stated below, "We know the practice exists where a complaint is generated via a notice to appear in which a person cited in the notice to appear has failed to appear. We have not asked the Court and/or its clerk to stop." (RT 6-7.)

Regardless, a prosecution for a failure to appear cannot proceed *until the defendant returns to court*, at which time the prosecutor may review any additional facts, the defendant may raise any defenses, and the prosecutor can disapprove or object to the complaint. In this case, that is precisely what occurred. When appellant returned to court on July 27, 2007, the prosecutor "reviewed the complaint and made an offer on that particular case." As the Appellate Division found, the City Attorney also *expressly* approved this individual complaint in open court the day petitioner reappeared after "he had taken action in prosecuting this case." (RT 5; Judgment, p. 3.)

The complaint in this case was "approved, authorized or concurred in" by the prosecution. The Appellate Division correctly held that there was no due process violation.

B. The Clerk's Employment with the Court Does Not Violate the Separation of Powers Doctrine.

Petitioner's claim that the complaint in this case also violated the separation of powers doctrine is premised on the same faulty assumption that a prosecutor may not approve a complaint after it is filed. Further, there is no separation of powers problem simply because a clerk of the court is an employee of the judiciary. Article III, section 3 of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." This separation of powers extends to the role of each branch of government in the criminal process. The legislative branch bears the sole responsibility and power to define criminal charges, and to prescribe punishment.

> [T]he charging function of a criminal case is within the sole province of the executive branch, which includes the Attorney General and the various district attorneys. (Cal. Const., art. V, § 13, [citations].) Once the executive power has been exercised by the filing of a criminal charge, "the process which leads to acquittal or to sentencing is fundamentally judicial in nature."

(*People v. Mikhail* (1993) 13 Cal.App.4th 846, 854, citing *People v. Tenorio* (1970) 3 Cal.3d 89, 91, and *People v. Navarro* (1972) 7 Cal.3d 248, 258.) However, as explained by the California Supreme Court, the performance of incidental tasks normally associated with one branch of the government does not automatically violate the doctrine.

> As this court explained over a half century ago: "The courts have long recognized that [the] primary purpose [of the separation-of-powers doctrine] is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government. [Citations.] *The doctrine has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of the government, it can never be used thereafter by another. . . .*" (Italics added.) (*Parker* v. *Riley* (1941) 18 Cal.2d 83, 89-90 [113 P.2d 873, 134 A.L.R. 1405].) Indeed, as a leading commentator on the separation-of-powers doctrine has noted: "From the beginning, each branch has exercised all three kinds of powers." [Citation.]

(*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76.)

The court's reasoning in *Davis* is particularly pertinent here. That case involved a challenge to the constitutionality of San Francisco's diversion program. The diversion guidelines provided that when the prosecutor originally filed a "wobbler" as a felony, the defendant was ineligible for diversion. The defendant argued that was an infringement on the trial court's power for a prosecutor to decide whether an eligible defendant should be diverted. The *Davis* court recognized that the case presented a technical departure from separation of powers because once "the decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature." (*Id.* at p. 83,

citation omitted.) However, the court held that the district attorney's discretion to charge a wobbler as a felony did not ultimately "usurp judicial power or unconstitutionally infringe the judicial function." (*Id.* at p. 86.)

> [W]hen a district attorney is given a role during the "judicial phase" of a criminal proceeding, such role will violate the separation-of-powers doctrine if it accords the district attorney broad, discretionary decisionmaking authority to countermand a judicial determination, but not if it only assigns the district attorney a more limited, quasi-ministerial function.

(*Id.* at p. 85, citations omitted.)

Similarly, section 959.1 gives a court clerk "a more limited, quasi-ministerial function" and does not accord the clerk "broad, discretionary decisionmaking authority" that should be left to the executive. Under controlling case law, the prosecutor "ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. [Citation.]" (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451.) Prosecutorial discretion typically includes an analysis of complex factors such as the prosecutor's "opinion of guilt, likelihood of conviction, evaluation of legal issues, witness problems, whether the accused is regarded as dangerous, and the alternatives to prosecution." (*People v. Gephart* (1979) 93 Cal.App.3d 989, 999-1000, citation omitted.) However, those complex factors simply do not exist when the offense is a failure to appear. For example, there is no "opinion" of guilt or any legal issues to evaluate; the evidence is indisputable because the defendant has either honored his or her promise to appear, or has not. There are also no witness problems to evaluate because the court clerk is the solitary witness.[6] The issuance of a complaint charging a failure to appear merely requires a review of the court file to determine whether the defendant in fact appeared on the date promised. (See *People v. Superior Court (Copeland)* (1968) 262 Cal.App.2d 283, 285 [a magistrate is not required to

[6] In fact, because a court may judicially notice its own records (Evid. Code, § 452, subd. (d)(1)), clerks who file failure to appear charges need not testify at trial.

determine whether "an offense occurred" or if reasonable grounds implicate a defendant when the defendant fails to appear].) Under these unique circumstances, the clerk exercises a limited, ministerial function and not broad authority usurping prosecutorial power. (See *Copley Press v. Superior Court* (1992) 6 Cal.App.4th 106, 155; *Riley v. Superior Court* (1952) 111 Cal.App.2d 365, 367; see also Gov. Code, § 71280.1 [clerk to keep minutes and records of court]; Gov. Code, § 71280.4 [clerk endorses date on each piece of paper filed with the court].)[7] The issuance of a complaint by a court clerk is not an unconstitutional delegation of the prosecuting attorney's exclusive crime charging function to the judiciary.

III
The Failure To Appear Is a Continuing Offense That Extinguishes The Statute of Limitations And Delays The Prosecution.

Petitioner faults the Appellate Division for ruling that the filing of the complaint extinguished the limitations period because, she contends, the complaint was a nullity without prior authorization by a prosecutor. She also argues in the alternative that the complaint could not have become "effective as a charging document" until it was approved by a prosecutor. Since the prosecutor did not expressly approve the complaint until 2007, petitioner complains that was a "belated screening" which violated the statute of limitations. (Petition, p. 22.) But, again, petitioner's argument ignores the fundamental nature of a failure to appear: the prosecution cannot proceed until the defendant surrenders and answers to the charge. The facts that would allow a prosecutor to exercise discretion and expressly approve or object to the complaint cannot be known until the defendant is

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[7] Notably, section 959.1 is not unique in allowing an entity other than a prosecutor to perform traditionally-prosecutorial tasks. (See *Heldt v. Municipal Court* (1985) 163 Cal.App.3d 532, 539 ["[Penal Code] sections 853.6 and 853.9 provide for circumstances, as in this case, where the notice to appear may be used [by the arresting officer] *in lieu of* a formal complaint to invoke the jurisdiction of the court in a misdemeanor prosecution." Italics in original.]; see also *People v. Carlucci* (1979) 23 Cal.3d 249, 256 ["the trial court at a traffic infraction hearing may call and question witnesses in the absence of a prosecutor. Such actions constitute neither a per se denial of due process nor transmute the judge into prosecutor."]; see also Pen. Code, § 917 [authorizing grand juries to "inquire into all public offenses committed or triable within the county and present them to the court by indictment."].)

in court. Accordingly, the fugitive defendant does not reap the benefit of the running of the statute of limitations.

Various federal and state jurisdictions, including the Ninth Circuit, have concluded that the failure to appear "is a continuing offense as a matter of law." (*United States v. Alcarez Camacho* (9th Cir. 2003) 340 F.3d 794, 797; *United States v. Gray* (9th Cir. 1989) 876 F.2d 1411, 1419; *United States v. Elliott* (7th Cir. 2006) 467 F.3d 688, 690 [failure to report for imprisonment]; *United States v. Green* (6th Cir. 2002) 305 F.3d 422, 432-433; *United States v. Lopez* (2nd Cir. 1992) 961 F.2d 1058, 1060; *United States v. Martinez* (10th Cir. 1989) 890 F.2d 1088, 1092-1093; *Woolsey v. State* (Nev. 1995) 111 Nev. 1440, 1443-1444.) "[C]onsidering *the nature of the crime* of a failure to appear compels the conclusion that a failure to appear is a continuing offense." (*Green, supra*, 305 F.3d at pp. 432-433, italics in original.) As a result, "[t]he crime is not complete on the day that a defendant fails to appear . . . but rather continues until the defendant is apprehended and finally appears" in the proceedings. (*Alcarez Camacho, supra*, 340 F.3d at p. 797; see also *Gray, supra*, 876 F.2d 1411 [holding that the statute of limitations for failure to appear is "similarly tolled," like the crime of escape, for "the period that the escapee remains at large."].)[8]

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[8] Similarly, this Court has held that the failure of a registered sex offender to notify law enforcement of a change of address within 30 days is a continuing offense. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 528.) The court reasoned that, although the statute "does not expressly state a continuing offense," the statutory language is mandatory and "nothing in the statute indicates the mere passage of time will extinguish the notification requirement." (*Id.* at pp. 526-527.) "A defendant does not commit the crime only at the particular moment the obligation arises, but every day it remains unsatisfied." (*Id.* at p. 528.) The *Wright* court also quoted the Court of Appeal in *In re Parks* (1986) 184 Cal.App.3d 476, as follows: "The statute *does not relieve a person of the duty to register* if he fails to do so within the 30-day time frame. The 30-day period was employed to discourage premature police action and allow a reasonable time to accomplish registration; it was not intended as a signal to sex offenders to "lay low" for one year. The statute obviously intended the continuing failure to register to be the criminal act." Similarly, as to the failure to *appear*, in *Martinez, supra*, the 10th Circuit reasoned that allowing the statute of limitations to start running before the defendant appeared would have encouraged him to remain a fugitive longer to wait out the limitations period. (*Martinez, supra*, 890 F.2d at pp. 1092-1093.)

In California, the Legislature codified this principle by including warrants in its definition of what documents *commence a prosecution* and, thus, extinguish the running of the statute of limitations. Penal Code section 802 provides that a "prosecution for an offense not punishable by death or imprisonment in the state prison shall be commenced within one year after commission of the offense." Penal Code section 804 provides that a:

> prosecution for an offense is commenced when any of the following occurs: .... (d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.

The result is that, in California, like the Ninth Circuit and other jurisdictions cited above, a defendant's fugitive status extinguishes any limitations period. And, consistent with that principle, a failure to appear is uniquely amenable to California's statutory scheme because that scheme allows a court clerk to issue and file a complaint, as well as a warrant, which commences the action and extinguishes the statute of limitations. Subsequently, when a defendant surrenders and avails herself of the jurisdiction of the court, the public prosecutor may then object to the complaint or expressly continue its approval. That is what occurred in this case: the very day petitioner reappeared, the prosecutor expressly approved the complaint and petitioner entered into a plea agreement. That procedure did not require prior approval or violate the statute of limitations.

IV
The Procedural Posture of This Case Is Not Amenable To The Court Exercising Its Original Jurisdiction.

In its letter of July 29, 2009, the Court invited real party to address the merits "as well as any procedural issues that real part[y] wish[es] to raise." Real party addresses those issues below.

The instant petition states, "The proceedings in this case raise extremely important questions of general importance about which unresolved conflicts now exist in California law." (Petition, p. 1.) However, petitioner filed two separate petitions for transfer to the Court of

Appeal, and both the Appellate Division and the Court of Appeal denied her requests because she failed to "explain why transfer is necessary to secure uniformity of opinion or to settle an important question of law." (Cal. Rules of Court, rule 8.1008(b)(3).) Further, the rulings by those courts on that very issue are not reviewable. (Cal. Rules of Court, rule 8.500(a)(1) [the denial of transfer of a case within the appellate jurisdiction of the superior court is not reviewable].) Yet, while the instant petition is titled as a petition for writ of mandate, it is otherwise indistinguishable from a petition for review and clearly seeks the same review she would not be entitled to had she merely titled the petition as a petition for review.

Additionally, petitioner cites three cases for the proposition that "it is appropriate for petitioner to seek relief in this court in this original petition for writ relief," yet none of those cases are comparable to the case at bar. (See *Randone v. Appellate Division* (1971) 5 Cal.3d 536; see also *Dvorin v. Appellate Dep't of Superior Court* (1975) 15 Cal.3d 648 [civil creditor/debtor case cited by petitioner involving a petition for writ of certiorari]; see also *In re Wallace* (1970) 3 Cal.3d 289 [habeas corpus exhaustion requirement excused because petitioner did not receive a timely notice from the clerk].)

In *Randone*, one month after filing suit against the debtor, a collection agency attached the debtor's bank account and the debtor could not access any of the funds. The debtor filed a motion to dissolve the attachment arguing that a pre-judgment attachment violated due process. The debtor also sought an expedited hearing because of the financial hardship caused by the attachment. The Municipal Court heard the motion and denied it. The debtor appealed to the Appellate Division of the Superior Court of Sacramento County, and that court "affirmed the municipal court decision without written opinion," and denied transfer to the Court of Appeal one week later. Unlike this case, there was no procedure at that time to independently petition the Court of Appeal for transfer. This Court held that the due process issue raised by the debtor "involved a question of general importance, over which a considerable conflict had emerged in our lower courts, and that the issue would often arise in municipal court proceedings from which no appeal to our court

would be possible without a certification by the superior court," and therefore the Court "issued an alternative writ of mandamus to determine whether the lower court abused its discretion in refusing to dissolve the attachment at issue." (*Randone, supra*, 5 Cal.3d at pp. 542-543.)

Unlike *Randone*, in this criminal case, petitioner pleaded guilty to a charge of failure to appear, was heard on appeal and denied in a written memorandum judgment, and was denied transfer not only by the Appellate Division but also by the Court of Appeal. The procedure for filing complaints at issue has existed since 1990, and petitioner has pointed to no "question of general importance, over which a considerable conflict had emerged in our lower courts." Additionally, quite different from *Randone*, there is nothing to suggest this issue is one where "there is no adequate remedy in the ordinary course of law." As a result, this case is not "a proper one for the exercise of [this Court's] original jurisdiction." (*Id.* at p. 543; see also Cal. Code Civ. Proc, § 1086 [a writ of mandate is only issued "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law."]; see also *In re Rose* (2000) 22 Cal.4th 430, 445 ["An order summarily denying a petition for writ of mandate or prohibition generally reflects a discretionary refusal to exercise original jurisdiction over a matter that properly may be pursued in the lower courts."].)

Finally, petitioner argues that her constitutional challenges to the validity of Penal Code section 959.1 present "extremely important questions of general importance," but also contends "there was no claim or showing that the 'complaint' in this case was filed electronically," and that the Appellate Division upheld the filing of the complaint "although it was not clear that the complaint in this case was filed electronically."[9] (Petition, pp. 6, 8.) Additionally, petitioner argues that the statute of limitations expired in this case because the complaint was invalid. (Petition, p. 22.)

[9] Petitioner made no objection in the trial court on the basis that the complaint in this case was not electronically filed. Further, both parties and the court proceeded without any dispute as to whether the complaint was electronically filed. Petitioner's written demurrer, both the prosecutor's and defense counsel's oral argument at the hearing on the demurrer, and the trial court's ruling assumed Penal Code section 959.1 governed the complaint.

Real party has already detailed its attempt in the Appellate Division to augment the record with the ETRS indicating that a warrant was issued for petitioner in this case, as well "as any other documents, statements, or evidence relevant to the issues raised on appeal regarding the court's process of filing failures to appear." To the extent the Court agrees with petitioner that she is entitled to relief because of deficiencies in the record, this is not an appropriate matter for this Court to exercise its original jurisdiction. (See Cal. Rules of Court, rule 8.486(b)(1)(C) [a petition for writ of mandate "must be accompanied by an adequate record," which includes any documents "necessary for a complete understanding of the case and the ruling under review."].)

CONCLUSION

The complaint in this case was properly issued pursuant to a constitutionally-valid procedure that has been in effect since 1990, and governs the filing of a complaint for the offense of failure to appear. There is no difference of opinion among various courts or important question of law to be settled on that point. As a result, certification for transfer was properly denied in this case by two courts because petitioner did not meet the criteria for transfer. Real Party in Interest, the People of the State of California, urges this Court to summarily deny the instant Petition for Writ of Mandate. However, real party respectfully requests the right to file a complete return should this Court order real party to show cause.

DATED: August 17, 2009

Respectfully submitted,
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EXHIBIT A

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FILED
LOS ANGELES SUPERIOR COURT
AUG 14 2008
JOHN A. CLARKE, CLERK
BY S. MURPHY, DEPUTY

APPELLATE DIVISION OF THE SUPERIOR COURT
OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JEWERELENE STEEN, Defendant and Appellant.	BR 046020 (Trial Court Citation No. 6200307) MOTION TO REMAND TO AUGMENT RECORD ON APPEAL AND TO VACATE BRIEFING DATES; DECLARATION OF KATHARINE H. MACKENZIE; MEMORANDUM OF POINTS AND AUTHORITIES

Respondent, People of the State of California, hereby requests this Court to remand the above-entitled matter to the trial court for proper settlement and certification of the record on appeal.

This motion is made pursuant to rule 8.791, on the grounds that the record on appeal is deficient to address the issues raised by appellant in her opening brief. For example, the court documents known as "Expanded Traffic Record System" [ETRS] containing notations of the court's actions in this matter were not included in the record on appeal. Moreover, although the transcript was prepared and filed January 16, 2008, prior to the record being transferred to the Appellate Division, respondent, whose attorneys appeared and prosecuted this matter in the trial court below, were not given notice or an

opportunity to obtain the transcript, review it, and appear on January 30, 2008, when the court signed the transcript. Because no formal hearing to settle the statement was noticed or held on January 30, 2008, respondent did not have an opportunity to bring to the court's attention any additional documents, evidence or statements that needed to be included in the record on appeal in order to adequately address the issues raised by appellant.

Therefore, respondent requests that the instant case be remanded so that:

> (1) the court can settle and certify its ETRS records as part of the record on appeal, and, if necessary, explain any notations or abbreviations contained within them;
>
> (2) the court can give notice to the parties and hold a hearing to settle the transcript of the proceedings held on July 27, 2007, in Division 66
>
> (3) the court can prepare any additional settled statement of the proceedings, if deemed necessary; and,
>
> (4) the court can settle and certify to this Court any other documents, statements, or evidence relevant to the issues raised on appeal regarding the court's process of filing failures to appear.

Respondent also request this Court to vacate the current briefing dates and that they be reset after the record on appeal has been properly settled and certified.

This motion is based upon California Rules of Court, rules 8.783 and 8.791, the attached Memorandum of Points and Authorities, and the Declaration of Katharine H. MacKenzie.

DATED: August 14, 2008 Respectfully submitted,

ROCKARD J. DELGADILLO, City Attorney
DEBBIE LEW, Assistant City Attorney
Supervising Attorney, Criminal Appellate Division

By:
KATHARINE H. MACKENZIE
Deputy City Attorney
Attorneys for Plaintiff/Respondent
PEOPLE OF THE STATE OF CALIFORNIA

DECLARATION OF KATHARINE H. MACKENZIE

I, KATHARINE H. MACKENZIE, am an attorney at law employed as a Deputy City Attorney for the City of Los Angeles, and in that capacity declare as follows:

At the time the appeal was filed in the instant matter, respondent did not realize that it was a misdemeanor matter because the case had an infraction case number derived from appellant's traffic ticket citation. It was not until respondent received Appellant's Opening Brief that respondent realized that this appeal involved a misdemeanor conviction for failure to appear and that appellant was challenging the constitutionality of the process by which failure to appear complaints are filed by the court pursuant to Penal Code section 959.1.

On August 6, 2008, while conducting a routine review of incoming opening briefs in infraction cases, Deputy City Attorney Rick Curcio noticed that the appeal in the instant case contested a misdemeanor conviction rather than an infraction. On August 11, 2008, I was assigned to handle the briefing of this case. In preparation of Respondent's Brief, which is presently due for filing on August 15, 2008, I reviewed Appellant's Opening Brief and a copy of the court file obtained from the Appellate Division. Among the arguments appellant raises to contest the validity of the complaint charging her with a violation of Vehicle Code section 40508 is that the charge was filed after the statute of limitations had expired. (AOB 19-21.) Under Penal Code section 804, actions can be commenced by several means including the issuance of a warrant. I noted that the "Case Action Summary (Misdemeanor Docket)" dated July 27, 2007, indicated that a warrant for appellant's arrest had been recalled on that date. However, the documents in my possession from the Appellate Division's file did not contain any documents showing the court's minutes or actions regarding when the warrant was issued.

On August 11, 2008, I went to the Appellate Division and reviewed its file. Slipped inside the back of the transcript were two loose sheets of paper

that appear to be the court's ETRS printout of its actions in this matter, which include a notation on the issuance of a warrant. These documents were not stamped with the Appellate Division's case number and they were not separately listed on either of the Clerk's Certificates of the Record on Appeal that were transmitted on January 30, 2008, and March 10, 2008. On April 12, 2008, I spoke to Assistant City Attorney Ellen Sarmiento, who had reviewed the trial court file at the Metropolitan Branch. She verified that these two ETRS pages are contained in the trial court file. These two documents should have been included as part of the record on appeal as they are minutes of the court's actions (rule 8.783) and they document proceedings in the trial court that are "material to a disposition of the appeal" (rule 8.791).

Moreover, Appellant's Opening Brief references a reporter's transcript of the proceedings of July 27, 2007, at which the demurrer on the constitutionality of Penal Code section 959.1 was litigated. I noted that the opening brief, relying on the transcript, mentioned that "a prosecutor, a deputy Los Angeles City Attorney [was] present in the courtroom" and participated in contesting the demurrer. (AOB 2-3.) However, the Criminal Appellate Division of the City Attorney's Office has never received a Proposed Settled Statement from appellant indicating what issues she would be raising on appeal or that she would be relying on a reporter's transcript. I have reviewed the Proposed Settled Statement in the Appellate Division's file and it does not appear to comply with the California Rules of Court as there was no proof of service attached to it. (See rule 8.784(d), Cal. Rules of Court ["An appellant who desires to have a statement settled shall, within 15 days after the filing of the notice of appeal, serve on respondent and file with the trial court a proposed statement on appeal."].) Although respondent received notice that a hearing to settle the statement would be held on September 25, 2007, in Division 64, apparently, that hearing was never held. (See Appellant's "Request for Relief From Default and Request to Remand to Settle Statement on Appeal", p. 2.) Thereafter, respondent never received notice from the clerk or the court reporter that a transcript had been filed in this matter on January 16, 2008. Respondent did not receive notice from the clerk of a hearing to settle the transcript. And, it appears that no hearing was in fact scheduled or

held. (See Appellant's "Request for Relief From Default and Request to Remand to Settle Statement on Appeal", pp. 2-3; Order of the Appellate Division filed April 2, 2008.)

Because respondent never received a Proposed Settled Statement and because there was no hearing to settle the transcript, respondent has never had a chance to determine if there was additional evidence on the issue of the constitutionality of the process of the court filing failures to appear that should be part of the record on appeal. Furthermore, on April 11, 2008, I reviewed the Appellate Division's copy of the transcript and verified that a deputy city attorney did appear on behalf of the People at the hearing on the demurrer. On April 13, 2008, respondent has ordered the preparation of the transcript.

Given the significance of the issues involved in the instant case, it is imperative that the matter be remanded to the trial court for a proper review and certification of the record on appeal. Accordingly, respondent requests that the instant case be remanded so that:

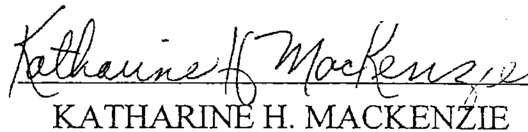
> (1) the court can settle and certify its ETRS records as part of the record on appeal, and, if necessary, explain any notations or abbreviations contained within them;
>
> (2) the court can give notice to the parties and hold a hearing to settle the transcript of the proceedings held on July 27, 2007, in Division 66
>
> (3) the court can prepare any additional settled statement of the proceedings, if deemed necessary; and,
>
> (4) the court can settle and certify to this Court any other documents, statements, or evidence relevant to the issues raised on appeal regarding the court's process of filing failures to appear.

Furthermore, the People respectfully request that the court vacate the current briefing dates pending resolution of this motion and augmentation of the record. This request is made in good faith and not for purposes of undue delay or harassment of appellant. Appellant had previously requested that this Court remand the matter for a hearing to settle of the transcript, which was

denied without prejudice. The above-noted deficiencies in the appellate record were not apparent until Appellant's Opening Brief was filed and the matter was thereafter assigned to me for briefing on August 11, 2008. Based on my review of the file and the Sheriff's website, it does not appear that appellant is in custody in this matter.

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

Executed this 14th day of August 2008, at Los Angeles, California.



KATHARINE H. MACKENZIE

MEMORANDUM OF POINTS AND AUTHORITIES

California Rules of Court, Rules 8.783, 8.784, 8.875, 8.788, and 8.791 Authorize the Requested Augmentation

Respondent seeks to have this matter remanded for augmentation of the record on appeal, so that:

> (1) the court can settle and certify its ETRS records as part of the record on appeal, and, if necessary, explain any notations or abbreviations contained within them;
>
> (2) the court can give notice to the parties and hold a hearing to settle the transcript of the proceedings held on July 27, 2007, in Division 66;
>
> (3) the court can prepare any additional settled statement of the proceedings, if deemed necessary; and,
>
> (4) the court can settle and certify to this Court any other documents, statements, or evidence relevant to the issues raised on appeal regarding the court's process of filing failures to appear.

California Rules of Court, rules 8.783(a)(7), 8.784, 8.788, and 8.791 authorize such an augmentation in the instant case.

In a criminal case, pursuant to rule 8.783(a)(7) and (10), the record on appeal to the Superior Court Appellate Division "shall consist of the following items . . .":

> (7) All other minutes of the court relating to the action;
>
> . . .
>
> (10) Any statement or transcript on appeal, or both, settled and certified as hereinafter provided for in rules 8.784 and 8.788.

(Cal. Rules of Court, rule 8.783(a)(7) & (10).) Rule 8.784 requires that "[a]n appellant who desires to have a statement settled shall, within 15 days after filing the notice of appeal, serve on respondent and file with the trial court a proposed statement on appeal." Compliance with this notice requirement provides respondent with an opportunity under rule 8.785 to correct any

deficiencies in the record to be used on appeal by giving respondent 15 days to "serve on the appellant and file proposed amendments to the statement or transcript, or both." Moreover, rule 8.788 mandates that the trial court give the parties "at least five days" notice of the hearing to settle the statement or the transcripts. When the record on appeal is deficient, rule 8.791 provides:

> On a sufficient showing by affidavit, or otherwise, that evidence was taken or proceedings were had in the trial court or that papers are there on file which are material to a disposition of the appeal and are not included in the record on appeal, and a showing of good cause why the same have not been included in said record, the superior court may authorize the trial judge to make further certificate as to such evidence or other proceedings or papers, and direct the same, when so certified, to be added to the record.

As has been set forth in the attached declaration, appellant has raised a significant issue on appeal challenging the constitutionality of the process by which failure to appear complaints are filed by the court pursuant to Penal Code section 959.1. In addition to her constitutional arguments, appellant also challenges the validity of the complaint on statute of limitation grounds. However, the court file reflects that respondent was not served with notice of these issues, thereby precluding respondent from having an opportunity to file amendments. The court file also reflects that no notice was given that the reporter's transcript had been prepared and filed, and that although the trial court signed the transcript on January 30, 2008, respondent was not given notice and an opportunity to appear on that date for a hearing to settle the record that would be used on appeal to address appellant's issues. Remand and augmentation for the items set forth above is necessary because they are "material to a disposition of the appeal" on the grounds raised by appellant in her opening brief.

As has been set forth in the attached declarations, the deficiencies in the record were not apparent until the respondent received Appellant's Opening Brief, reviewed the trial court and appellate court files, reviewed the court's copy of the reporter's transcript, and spoke to respondent's attorneys at the trial branch. Under these circumstances, rules 8.783(a)(7) and (10), 8.784, 8.788, and 8.791, of the California Rules of Court, support the requested

remand and augmentation.

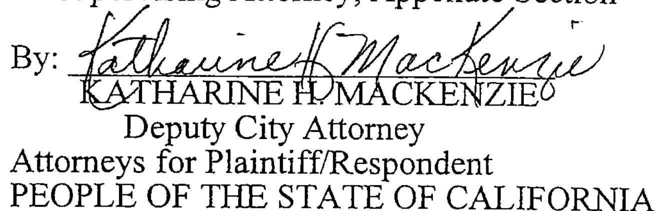
CONCLUSION

For these reasons, the respondent respectfully requests that this Court issue an order remanding this matter back to the trial court for augmentation and settlement of the record on appeal as specifically set forth above. Respondent also respectfully requests that the present briefing dates be vacated pending augmentation and resettlement of the record on appeal.

DATED: August 14, 2008

Respectfully submitted,

ROCKARD J. DELGADILLO, City Attorney
DEBBIE LEW, Assistant City Attorney
Supervising Attorney, Appellate Section



By: KATHARINE H. MACKENZIE
Deputy City Attorney
Attorneys for Plaintiff/Respondent
PEOPLE OF THE STATE OF CALIFORNIA

PROOF OF SERVICE BY MAIL

APPELLATE DIVISION OF THE SUPERIOR COURT
OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE V. JEWERELENE STEEN
BR046020 (Trial Court Citation No. 6200307)

I, the undersigned, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the above-referenced action. My business address is 200 North Main Street, 500 City Hall East, Los Angeles, California 90012.

I am readily familiar with the practice of the Los Angeles City Attorney's Office, City Hall East, for collection and processing correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On **August 14, 2008,** I served the following document

MOTION TO REMAND TO AUGMENT RECORD ON APPEAL AND TO VACATE BRIEFING DATES; DECLARATION OF KATHARINE H. MACKENZIE; MEMORANDUM OF POINTS AND AUTHORITIES

by placing a true copy in a sealed envelope(s) for collection and mailing, following ordinary business practice, at 200 North Main Street, 500 City Hall East, Los Angeles, California 90012. The person(s) served, as shown on the envelope(s), are:

Honorable Elizabeth Munisoglu
Commissioner of the Superior Court
Metropolitan Courthouse
Department 67
1945 South Hill Street
Los Angeles, CA 90007

John Hamilton Scott
Deputy Public Defender
Appellate Branch
320 West Temple Street, Room 590
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on **August 14, 2008,** at Los Angeles, California.

YOLANDA FLORES, Secretary

EXHIBIT B

FILED
LOS ANGELES SUPERIOR COURT
SEP 02 2008
John A. Clarke, Executive Officer/Clerk
By ____________, Deputy

APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
JEWERELENE STEEN,
Defendant and Appellant.

No. BR 046020
Metropolitan Trial Court
No. 6200307

ORDER

Respondent has filed a motion seeking to remand the case to the trial court in order to have that court hold a noticed hearing to settle and certify (1) the reporter's transcript of proceedings on July 27, 2007; (2) the Expanded Traffic Record System (ETRS) documents for this case; and (3) any other documents relevant to the issue of the court's filing of failure to appear charges. Respondent also requests that the remaining briefing schedule be vacated and reset after this court receives the additional records. The court, having read and considered the motion, hereby rules as follows:

IT IS ORDERED that the motion to remand for a hearing with respect to the July 27, 2007 transcript is denied for failure to show good cause. On March 17, 2008, appellant served and filed a motion seeking remand for the same purpose. Respondent did not file a response. On April 2, 2008, this court denied appellant's motion, noting the unusual circumstances of this case, i.e., that the reporter's transcript had been forwarded as

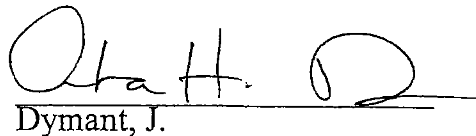
part of the record on appeal, had been certified in accordance with California Rules of Court, rule 2.952(g), and there was no indication by either party that the transcript was inaccurate or incomplete. As a result, this court issued an order allowing the transcript to be used in the same manner as if it had been filed in compliance with the California Rules of Court. A copy of this court's ruling on appellant's motion was served on respondent, which did not file any corresponding request for relief. Respondent's current motion does not allege that the transcript is inaccurate or incomplete.

IT IS FURTHER ORDERED that the motion with respect to the ETRS and other unspecified trial court documents, which we construe as a motion to augment the record on appeal, is denied for failure to comply with California Rules of Court, rule 8.791. Said rule allows for augmentation of the record on a showing that (1) the items are on file in the trial court and are material to the appeal, and (2) there is good cause why such items were not included in the record on appeal. Respondent has failed to show that the ETRS documents are on file with the trial court. Respondent has also failed to show that other documents, which respondent does not describe with particularity, are on file with the trial court and material to this appeal. As to both types of documents, no good cause has been shown for failure to include them in the record on appeal.

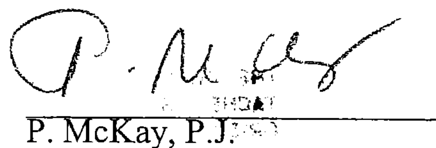
IT IS FURTHER ORDERED that the remaining briefing schedule is reset as follows:

Respondent's Brief: SEP 22 2008

Appellant's Reply Brief: OCT 02 2008



Dymant, J.



P. McKay, P.J.

PROOF OF SERVICE BY MAIL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEWERELENE STEEN V. APPELLATE DIVISION
Case No. S174773

I, the undersigned, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the above-referenced action. My business address is 200 North Main Street, 500 City Hall East, Los Angeles, California 90012.

I am readily familiar with the practice of the Los Angeles City Attorney's Office, City Hall East, for collection and processing correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On **August 17, 2009,** I served the following document

REAL PARTY'S INFORMAL RESPONSE TO PETITION FOR WRIT OF MANDATE PURSUANT TO THE COURT'S LETTER OF JULY 29, 2009

by placing a true copy in a sealed envelope(s) for collection and mailing, following ordinary business practice, at 200 North Main Street, 500 City Hall East, Los Angeles, California 90012. The person(s) served, as shown on the envelope(s), are:

Attorney General
State of California
Department of Justice
300 South Spring Street
Los Angeles, CA 90013

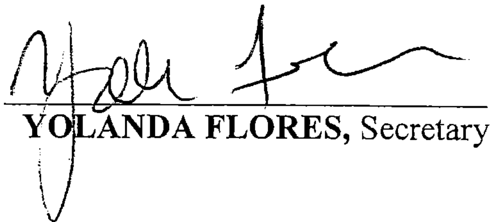
Clerk, Court of Appeal
Second Appellate District
300 South Spring Street
Los Angeles, CA 90013

Clerk, Appellate Division
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

Honorable Charles W. McCoy Jr.
Presiding Judge
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

John Hamilton Scott, Public Defender
Office of the Public Defender
Appellate Branch
320 West Temple Street, Room 590
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on **August 17, 2009**, at Los Angeles, California.



YOLANDA FLORES, Secretary