S174773

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

REPLY TO RESPONDENT'S RETURN

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

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

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) 974-3050

Attorneys for Petitioner

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (Cont.)

TABLE OF AUTHORITIES CITED (Cont.)

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)

REPLY TO RESPONDENT'S RETURN

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 Reply to the Return filed on behalf of respondent Appellate Division of the Los Angeles County Superior Court, and alleges and denies as follows:

I

Petitioner admits allegations in Paragraph 1 of the Return, and in the first sentence of Paragraph 2 of the return, insofar as those allegations are supported by petitioner's admission of guilt in the trial court.

II

Petitioner denies the allegation in the second sentence of Paragraph 2 of the Return that "a complaint was issued electronically." Petitioner affirmatively alleges that the fact that the complaint is signed indicates that it was not filed electronically. Petitioner affirmatively alleges that the Appellate Division's Memorandum Judgment itself acknowledges that it is "less than clear" whether the complaint was issued electronically, but the Appellate Division found that Penal Code section 959.1 authorized both electronic and non-electronic filing of complaints by court clerks. (See Exh. "F," p. 5.) There does not appear to be any basis for the Appellate Division's alteration of its position on this subject.

Petitioner denies the allegations in the third sentence of Paragraph 2 of the Return that a complaint was filed electronically and that Penal Code section 959.1 authorizes a clerk to initiate criminal proceedings in such a manner.

III

Petitioner admits the allegations of Paragraphs 3, 4, 5, and 6 of the Return insofar as those allegations are supported by the record, and not otherwise. Insofar as those allegations are descriptive of the rulings of lower courts, petitioner admits that such rulings were made, but denies that such rulings were correct.

IV

As regards the allegations in Paragraph 7, while petitioner acknowledges that the problem of clerks initiating criminal proceedings is acute, petitioner has no knowledge of the precise number of proceedings being initiated by the judiciary. Since allegations "on information and belief" are insufficient to establish any facts, neither the Return nor the accompanying declaration are sufficient to establish the facts alleged, which are therefore denied.

Petitioner specifically denies the unsupported claim that there are 8,000 electronic criminal complaints charging misdemeanor failure to appear filed in Los Angeles County every week. That would mean that 416,000 such charges were filed every year. For Fiscal Year 2007-2008 (the most recent information available), the Los Angeles County Superior Court reported the total number of traffic misdemeanors filed in that court as 215,165, and of non-traffic misdemeanors as 322,474. (Judicial Council 2009 Court Statistics Report, Table 7a.) Indeed, the 416,000 figure would represent over 20% of the total number of misdemeanor case filings in the entire state. (Ibid.)

V

Petitioner admits the allegations in Paragraph 8. Petitioner affirmatively alleges that the effect of those allegations is to show that in Los Angeles County alone the judiciary has usurped the executive authority and duty of seventeen separate and independent prosecutors to review and authorize the filing of criminal charges prior to the institution of criminal proceedings.

VI

Although not repeated by the Appellate Division in its Return, petitioner denies the claim made in the accompanying declaration that "The vast majority of these FTA's [sic] are treated as an infraction by the prosecuting agencies . . . ." (Dec., first and second unnumbered pages.) Petitioner affirmatively alleges that she is informed and believes that the clerk invariably files charges of violating Vehicle Code section 40508 as misdemeanors, and that once such an action is commenced the prosecutor is without authority to treat the matter as an infraction–a power held only by the court subject to approval by the defendant. (Pen. Code § 17, subd. (d)(2).) It may be correct that these misdemeanor charges are often resolved as infractions, but the power

to do so is not held by any prosecutor if the clerk is authorized to initiate a misdemeanor prosecution.

VII

As regards the allegations in Paragraph 9, petitioner again alleges that allegations "on information and belief" are insufficient to establish any facts, and thus neither the Return nor the accompanying declaration are sufficient to establish the facts alleged. Petitioner denies that the prosecutors of Los Angeles County or the State of California have insufficient resources to properly consider and file criminal charges. Petitioner alleges that no claim of prosecutorial inability to review and file criminal charges was made prior to 1988, nor was any such difficulty referenced in any legislative materials supporting the adoption of the amendment to Penal Code section 959.1 in that year.

VIII

Petitioner further alleges that respondent Appellate Department's Memorandum Judgment indicated that it remained the duty of the prosecutor to review criminal charges–albeit allowing such review after the institution of charges–thus failing to support the implicit assertion in the Return that the filing of criminal charges by clerks relieves prosecutors of that responsibility. (Exh. "F," pp. 3-4.) The Appellate Division's present proposition that misdemeanor and felony prosecutions may be conducted entirely by the judiciary, absent prosecutorial participation at any time, pursuant to People v. Carlucci (1979) 23 Cal.3d 249 (Ret., pp. 10-12), is newly-advanced in this court, was not suggested by any party, nor was it mentioned in the Appellate Division's Memorandum Judgment. The newly-advanced argument, even if it can properly be made by a reviewing court in the first instance, is without merit.

IX

Petitioner denies that the Los Angeles County Superior Court has collected "fines, forfeitures and civil assessments," in the amount of $75 million based upon misdemeanor or felony failure to appear charges filed by court clerks, or infraction disposition of such charges. Since a conviction of any charge involving failure to appear does not result in either a forfeiture or civil assessment, income from such sources cannot result from the filing of a failure to appear charge, nor from a conviction of such a charge. Petitioner very much doubts that fines imposed upon conviction of failure to appear total $75,000,000 each year.

The January, 2009, edition of the Uniform Bail and Penalty Schedules calls for a total fine of $201, including many assessments which are not retained by the local court, for a violation of Vehicle Code section 40508 punished as an infraction, which is significantly higher than the fine in prior years. The Appellate Division asserts that the "vast majority" of failure to appear cases resolve as infractions. To reach a total of $75 million, even using the 2009 fine amount, that fine would have to be imposed in over 373,000 cases, which again (since these charges are filed as misdemeanors) is not supported by the number of case filings reported by the Los Angeles County Superior Court. If the maximum infraction fine of $100 (Veh. Code § 42001) was imposed in every case, that total fine of $435 would have to be imposed in over 172,000 cases. Even if the scheduled fine for misdemeanor violations, $245, was imposed in every case, that fine would have to be imposed in over 306,000 cases.

X

Petitioner further alleges that the filing of criminal charges results in many increased costs, since such an accusation entitles the defendant to appointed counsel and a jury trial before a judge, and can

result in incarceration, which costs may far exceed any income which might be generated upon a conviction for a failure to appear charge. Consequently, the Appellate Division's theory that adherence to constitutional due process protections, and preservation of the separation of powers, would result fewer criminal charges being filed and decreased revenue is purely speculative and may in fact be entirely incorrect.

Petitioner further alleges that issues of due process and separation of powers cannot be resolved simply by reference to the purported, and unproven, costs of providing due process or adhering to the constitutional separation of powers mandate.

XI

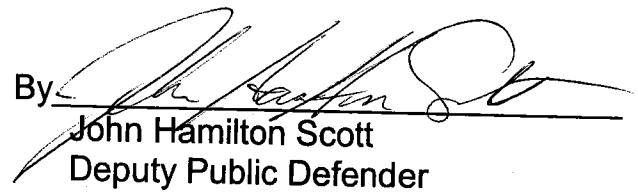
Petitioner alleges that the argument now presented by the Appellate Division that no separation of powers issue is raised by the judiciary filing criminal charges because the courts have power to summarily punish contempts (Ret., pp. 10-15) is newly-advanced in this court, was not suggested by any party, nor was it mentioned in the Appellate Division's Memorandum Judgment. The newly-advanced argument, even if it can properly be made by a reviewing court in the first instance, is without merit.

XII

The Appellate Division has failed to justify its Memorandum Judgment; indeed, in many respects it has not attempted to do so. The newly-advanced arguments of the Appellate Division are without merit, and the law remains that the initiation of criminal proceedings by court clerks is violative of due process and the separation of powers. Petitioner's contentions in this regard are more fully set forth in the accompanying points and authorities which are incorporated herein by reference.

WHEREFORE petitioner again prays that this court grant the relief requested in his Petition for Writ of Mandate.

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

By 
John Hamilton Scott
Deputy Public Defender

VERIFICATION

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

John Hamilton Scott declares as follows:

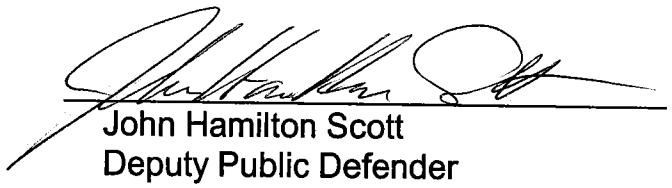
I am an attorney at law licensed to practice in all the courts of California, and I am employed as a deputy public defender for the County of Los Angeles.

In that capacity I am attorney of record for petitioner in the foregoing Reply, 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 Reply and the exhibits previously lodged with this court, and I know the contents thereof to be true as based upon the exhibits and other referenced documents, except as to matter stated on information and belief, which I believe to be true.

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

Executed this 19th day of October, 2009, at Los Angeles, California.



John Hamilton Scott
Deputy Public Defender

POINTS AND AUTHORITIES

I

THE APPELLATE DIVISION HAS AGAIN FAILED TO SHOW THAT THE INITIATION OF CRIMINAL PROCEEDINGS BY COURT CLERKS COMPORTS WITH DUE PROCESS

This court's order to show cause was limited to the separation of powers issue discussed below. However, the Appellate Division has chosen to address the due process issue as well. In its Memorandum Judgment, the Appellate Division ruled that there was no due process violation when a court clerk initiates criminal proceedings, because the prosecutor had approved of the charges after they were filed. (Exh. "F," p. 3.) Petitioner has demonstrated that all applicable authority holds that due process requires that criminal charges be reviewed by a prosecutor before criminal proceedings are initiated, and that any attempted initiation of criminal proceedings absent such prior approval is a nullity. (Pet., pp. 12-18; see People v. Municipal Court (Pellegrino) (1972) 27 Cal.App.3d 193; People v. Viray (2005) 134 Cal.App.4th 1186.)

The Appellate Division now appears to have abandoned that ruling–at least, the Appellate Division does not attempt to defend it. Instead, the Appellate Division now presents an even more remarkable proposition–a proposition not suggested by any party nor previously mentioned by the reviewing court. [1/] It now seems to be the position of the Appellate Division that any "traffic proceeding," including criminal charges of failure to appear, may be initiated and adjudicated by the

---

[1/] Had the Appellate Division based its ruling in this case upon such grounds, petitioner would have been statutorily entitled to a rehearing in that court. (Gov. Code § 68081.)

judiciary without any intervention by a prosecutor at any stage of the proceedings. (Ret., pp. 10-12.)

In support of this claim, the Appellate Division cites only People v. Carlucci (1979) 23 Cal.3d 249. The question presented by Carlucci was whether it was a denial of due process for a judge to examine witnesses in the absence of a prosecutor during the trial of a traffic infraction. Of course, the propriety of the judge questioning witnesses, so long as the judge does not cross the line into advocacy, is well-settled even in criminal cases. (See People v. Mayfield (1997) 14 Cal.4th 668, 739.) The Carlucci court had no occasion to discuss how those infraction charges had been initiated. Presumably, the charges were filed by the executive, not unilaterally initiated by the judiciary. Nothing in Carlucci suggests that a judge is authorized not only to question witnesses, but to initiate the charge in the first instance, even in an infraction matter. [2/]

At any rate, the Carlucci court referenced In re Dennis B. (1976) 18 Cal.3d 687, in which this court discussed the need for flexibility and innovative procedures in infraction matters. This court's discussion was based upon the premise that in such cases confinement is not available as a punishment, the possible fine is not excessive, and there is generally no stigma attached to a conviction. (Id., at pp. 694-695.) This court contrasted such proceedings with the prosecution of misdemeanors and felonies, in which this court recognized the

---

[2/] As petitioner has previously noted, Penal Code section 853.9 allows a police officer to commence an infraction prosecution by filing a verified complaint with a magistrate. (See Pet., p. 15, fn. 5.) The validity of that procedure in infraction matters is not before this court. However, it should be noted that even in this instance the initiation of charges is by the executive, not by the judiciary. (People v. Williams (1999) 72 Cal.App.4th 1460, 1463, fn. 5 [police officers are executive officers].)

possibility of harassment and expense to the defendant, and thus imposed higher burdens upon prosecutors to review criminal charges before they were filed. (Id., at p. 694, 696.)

The charge at issue herein is a misdemeanor, not an infraction. Not only was petitioner subject to confinement, she was in fact sentenced to serve 50 days in jail. In the experience of petitioner's counsel, failure to appear charges are usually filed as misdemeanors, and in some cases may constitute felonies. There is simply no support in Carlucci or elsewhere for the Appellate Division's newly-advanced claim that due process permits such criminal proceedings to be taken, and sentences imposed, in the absence of any participation whatsoever by the authorized prosecutor.

II

THE APPELLATE DIVISION HAS AGAIN FAILED TO SHOW THAT THE INITIATION OF CRIMINAL CHARGES BY COURT CLERKS COMPORTS WITH THE SEPARATION OF POWERS

In its Memorandum Judgment, the Appellate Division held that there was no violation of the separation of powers when a court clerk initiated charges, because the prosecutor "at all times retained the authority to dismiss the complaint . . . ." (Exh "F," p. 4.) The Appellate Division repeats that claim in this court. (Ret., p. 14.) However, as petitioner has shown, this statement of facts is simply wrong. Once criminal charges have been initiated, the prosecutor is thereafter deprived of authority to dismiss the accusation, and must instead request the court to do so. (Pen. Code § 1386; People v. Viray, supra, 134 Cal.App.4th at pp. 1202-1203; see Pet., pp. 19-21.)

The Appellate Division quotes its own erroneous discussion of People v. Municipal Court (Pellegrino), supra, 27 Cal.App.3d at p. 206. (Ret., p. 14; see Exh. "F," pp. 3-4.) The Appellate Division therein claimed that the Pellegrino court held that a court must dismiss a

criminal proceeding initiated by someone other than the prosecutor upon request of the prosecutor, but that otherwise the prosecution was authorized. However, that simply was not the holding of Pellegrino.

The Pellegrino court did not hold that a prosecutor had the ability to dismiss a pending criminal action. Instead, the court specifically stated to the contrary:

> "Once a complaint is filed and the jurisdiction fo the court or magistrate invoked, the power to dismiss is vested in the judge or magistrate. At that point the prosecution may only move the court for a dismissal. The court is not required to grant such motion." (Id., 27 Cal.App.3d at p. 200; emphasis added.)

The Pellegrino court thus recognized that the question presented was not whether the prosecutor could terminate a prosecution initiated by some other party–the court recognized that the prosecutor could not do so. The Appellate Division's repeated claim tht the Pellegino court held that the prosecutor could terminate a prosecution once it was commenced is entirely unsupported and contrary to the actual holding of Pellegrino. Instead, the question addressed in Pellegrino, and now presented to this court, was, and is, "where the power to control the initial filing of complaints does or should reside." (Id., at p. 200; emphasis added.) The Pellegrino court found that "the jurisdiction of the district attorney includes the power to control the institution of criminal proceedings." (Id., at p. 201; emphasis added.)

The Pellegrino court thus did not hold, as incorrectly claimed by the Appellate Division, both in its ruling and in this court, that a complaint is "nullified" by the disapproval of a prosecution. It held, to the contrary, that a complaint filed absent the prior approval of the prosecutor is a nullity ab initio, and that the trial court thus is not faced with any choice whether to allow the prosecution to continue, whether

upon the belated agreement of the prosecutor or otherwise: "The municipal court lacked discretion and in fact jurisdiction to do anything in the matter except to dismiss." (Id., 27 Cal.App.3d at p. 206.)

That the separation of powers prevents the judiciary from initiating criminal proceedings was affirmed by this court in People v. Superior Court (Greer) (1977) 19 Cal.3d 255, in which this court described Pellegrino as establishing not that a court should dismiss charges upon motion of the prosecutor, but that a trial court is "barred . . . from accepting for filing criminal charges instituted without the approval of the district attorney." (Id., at p. 262.) This court cited People v. Smith (1975) 53 Cal.App.3d 655 as well, and stated, "Both cases [Pellegrino and Smith] enforced the allocation to the executive of the function of determining which persons are to be charged with what criminal offenses." (Id., 19 Cal.3d at pp. 262-263.)

As was stated in State of California v. Superior Court (1986) 184 Cal.App.3d 394, 397-398: "It is also well established a court may not tell a district attorney whom to prosecute nor otherwise interfere with the charging function, another purely executive power. [Citing Pellegrino, Smith, and Greer.]" This court itself reaffirmed the exclusive prosecutorial authority to initiate criminal proceedings mandated by the separation of powers doctrine in People v. Birks (1998) 19 Cal.4th 108.

> "It is well settled that the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial function to choose, for each particular case, the actual charges from among those potentially available arises from '"the complex considerations necessary for the effective and efficient administration of law enforcement."' [Citations.] The prosecution's authority in this regard is founded, among other

things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch." (Id., 19 Cal.4th at p. 134; emphasis added; see also gen. People v. Andreotti (2001) 91 Cal.App.4th 1263, 1267-1274.)

This court further stated that, "it is ordinarily the prosecution's function to select and propose the charges." (People v. Birks, supra, 19 Cal.4th at p. 136; emphasis original.) Thus, while it is true that one branch of government may perform incidental functions of another branch, "The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." (Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal.4th 287, 297.) It can hardly be disputed that the determination of whether to file criminal charges and the charges to be made is a "core function" of the prosecutor. Indeed, it has been recognized that the charging decision is the heart of the prosecutorial function. (People v. Smith (1975) 53 Cal.App.3d 655, 659.)

If the judiciary could take it upon itself to initiate criminal proceedings, this would do more than merely impinge upon the authority of the prosecutor. It would entirely eliminate the prosecutor's authority and duty to screen the circumstances and to determine whether to file charges and, if so, what charges are to be filed. When the judiciary takes it upon itself to decide who to prosecute and for what charges, and to decide whether thereafter to dismiss such charges, that cannot rationally be claimed to be the exercise of a mere incidental prosecutorial power. It is, instead not just a prohibited material impairment of the prosecutorial function, it entirely defeats the power and authority of the prosecutor. (See Obrien v. Jones (2000) 23 Cal.4th 40, 49-57.)

Nevertheless, the Appellate Division insists that the judiciary may initiate criminal proceedings with impunity, because the judiciary has the power to punish for contempt, claiming that "The historical acceptance of judicial branch authority to initiate quasi-criminal contempt proceedings for acts and omissions directly related to court proceedings is little different in nature from the authority to initiate the filing of a complaint in traffic cases for acts and omissions directly related to court proceedings." (Ret., p. 13.)

The Appellate Division cites nothing in support of its claim that there is no difference between a contempt citation and the initiation of criminal proceedings, which, again, is an assertion not advanced by any party heretofore, nor ever previously suggested by the Appellate Division. [3/] It is obvious that the Appellate Division is incorrect, both specifically and generally.

In the first instance, the accusation in this case was that petitioner failed to appear after signing a promise to appear, a violation of Vehicle Code section 40508. Such conduct could not constitute a contempt of court under any theory. A traffic citation does not represent a court order, nor is it a subpoena. Consequently, even if it were true that the judiciary could institute criminal proceedings under circumstances where a contempt citation would be permissible, that would not authorize the filing of a criminal charge based upon a failure to appear upon a traffic citation. The Appellate Division's newly-fashioned claim must be rejected on that basis alone.

Moreover, the fundamental premise is indefensible. The claim that a contempt is somehow similar to a criminal charge does not transform jurisdiction to commence one proceeding into jurisdiction to commence the other. Contempt punishable under Code of Civil

---

[3/] See footnote 1, ante.

Procedure section 1209 is a matter solely within the authority of the judiciary. While a prosecutor can present facts to a court, a prosecutor cannot initiate such a contempt, and indeed is barred even from appearing in the proceedings as a party. (Safer v. Superior Court (1975) 15 Cal.3d 230, 242.)

On the other hand, even contempts prosecuted as criminal offenses under Penal Code section 166 must be brought by the prosecutor in the name of the People of the State of California. (Bridges v. Superior Court (1939) 14 Cal.2d 464, 473.) It was explicitly held in Safer that the fact that the prosecuting attorney is authorized to prosecute contempts under Penal Code section 166 does not mean that the prosecutor is equally authorized to pursue a contempt under Penal Code section 1209, an exclusively judicial function. (Id.. 15 Cal.3d at p. 241.) That the judiciary may, under limited circumstances, punish offenses against the court as contempts does not even logically support the conclusion that the judiciary may exercise the functions of the executive by bringing criminal charges in the name of the People of the State of California. The two remedies are separate, and the court's jurisdiction to punish offenses against the court involves jurisdiction entirely different from the executive's jurisdiction to initiate prosecutions for offenses against the people. (See In re Morris (1924) 194 Cal. 63, 68-69.)

The Appellate Division actually goes further, and claims not only that the judiciary may initiate prosecution for contempts as criminal offenses, but may initiate criminal proceedings for any conduct which is directly related to a court proceeding. (Ret., p. 13.) Thus, under the Appellate Division's construction of the separation of powers, if a homicide occurred in a courtroom, the judiciary could then file murder charges against the alleged assailant. To state the proposition is to expose its absurdity.

The issue is one of jurisdiction. Proceedings involving contempts against the authority of the court under Code of Civil Procedure 1209 are exclusively judicial, and the executive is prohibited from interfering in the exercise of that judicial function. Proceedings involving contempts against the authority of the state under Penal Code section 166, as well as any other criminal charge, are exclusively executive, and the judiciary is prohibited from interfering in the exercise of that executive function. In sum, the separation of powers doctrine prohibits the judiciary from initiating criminal actions in the name of the People of the State of California. [4/]

Finally, the declaration submitted by the Appellate Division highlights a further problem with the court initiating criminal charges. Petitioner has noted that a failure to appear in a felony case can be filed as a felony. (Pen. Code § 1320, subd. (b); see Pet., p. 26.) However, it is also true that a violation of Vehicle Code section 40508 can be filed as a misdemeanor or as an infraction. (Pen. Code § 19.8.) Under the Appellate Division's construction, the judiciary has exclusive control over whether that charge shall be pursued as a misdemeanor or infraction.

The character of the prosecution is established in the first instance at the moment of filing. If the case is filed as an infraction, it is thereafter an infraction (absent objection by the defendant). (Pen. Code § 17, subd. (d)(1).) Thus, if the clerk files the charge as an infraction, the prosecutor is thereafter without authority to attempt to punish the offense as a misdemeanor, even should the prosecutor conclude that increased punishment is warranted. On the other hand,

---

[4/] Of course, as has been noted, Penal Code section 959.1 actually provides that criminal proceedings should be prosecuted in the name of the court clerk. (Pet., p. 23-24.)

if the case is filed as a misdemeanor, the prosecutor cannot reduce the charge to an infraction, even should the prosecutor conclude that this would be the wiser course. The power to reduce a misdemeanor to an infraction rests exclusively with the court (again, subject to the approval of the defendant). (Pen. Code § 17, subd. (d)(2).)

Consequently, when the clerk files such charges, the prosecutor has been entirely eliminated from the decision whether charges should be pursued as misdemeanors or infractions. [5/] This transfer of power is not alleviated by the Appellate Division's erroneous claim that the prosecutor can dismiss charges initiated by a clerk. If the prosecutor believes that an offense should be punished as a misdemeanor which has been filed as infraction, the purported ability of the prosecutor to dismiss the infraction is of no benefit. Similarly, if the prosecutor believes misdemeanor punishment is unwarranted, but would have filed the matter as an infraction, the prosecutor's choice would still only be dismissal of the misdemeanor–only the court which filed the misdemeanor could thereafter reduce the charge. Petitioner would submit that when the decision to prosecute an offense as a misdemeanor or infraction (or a felony rather than a misdemeanor) becomes the exclusive province of the judiciary, the violation of the separation of powers doctrine is obvious. [6/]

//

//

//

[5/] The same is, of course, true as regards the decision whether to pursue a failure to appear in a felony case as a felony or a misdemeanor. (Pen. Code §§ 1320, subd. (b); 17, subd. (b).)

[6/] Indeed, petitioner continues to find it puzzling that the prosecutor continues to insist that it is appropriate for the judiciary to so prevent the prosecutor from exercising that official's powers and duties.

III

THE APPELLATE DIVISION HAS FAILED TO SHOW THAT FINANCIAL CONSIDERATIONS OVERCOME THE CONSTITUTIONAL INVALIDITY OF COURT-INITIATED CRIMINAL PROCEEDINGS

The Appellate Division includes in its Return many allegations concerning purported financial issues which would arise should it be determined that only prosecutors can initiate criminal proceedings. (Ret., pp. 7-8, Paras. 7, 8, 9.) As alleged in the above Reply, the Appellate Division has supported none of those claims with evidence, and the claims do not appear to be accurate.

Indeed, it is quite possible that should the responsibility for filing criminal charges be returned to the authorized prosecutor, where it should be, the prosecutors' ability to exercise discretion would result in more efficient and less expensive methods of collecting fines for traffic violations than the filing and prosecution of criminal charges. For example, compliance with a traffic citation may be obtained through a "hold" on the driver's license or auto registration, which may be more effective and far less expensive than pursuing criminal remedies. (See Veh. Code §§ 40509, 40509.5, 4760.1, 12807.) Perhaps civil assessments will be available, as intimated by the Appellate Division. (Pen. Code § 1214.1; see Ret., p. 8,) Many prosecutors may conclude that such alternative proceedings would result in a better allocation of scarce resources, and result in greater income to state government. [7/] Moreover, relieving clerks of the burdens of filing criminal charges in

---

[7/] Even under the Appellate Division's incorrect claim that the prosecutor could dismiss charges initiated by a clerk, that would occur only after the expense of filing a charge, issuing an arrest warrant, holding the defendant in custody, and bringing the defendant to court. Some prosecutors may find it preferable to avoid such expenses.

addition to all their other duties would certainly result in a cost savings to those functionaries.

However, even if the claims were accurate, the Appellate Division includes no argument suggesting how such financial considerations have any relevance to the issues presented to this court. It is certainly true that it would be more efficient to allow the judiciary to both initiate and adjudicate criminal charges. Eliminating the phalanx of prosecutors charged with reviewing reports, deciding what charges to file, initiating prosecutions, and conducting trials, would save a lot of money.

However, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives–or the hallmarks–of democratic government . . . ." (I.N.S. v. Chadha (1983) 462 U.S. 919, 944.) As Justice Brandeis has noted, the fundamental purpose of the separation of powers is to check the extent of power exercisable by any one branch of government, "not to promote efficiency but to preclude the exercise of arbitrary power" and "to save the people from autocracy." (Myers v. United States (1926) 272 U.S. 52, 293; Brandeis, J., dissenting.)

Thus, if the Appellate Division is intending to advance the proposition that this court should allow the judiciary to invade the province of the executive, and permit judges and their clerks to initiate (and perhaps prosecute) criminal offenses, because it would be more efficient to do so, this court must summarily reject that proposition. It will probably always be more efficient and less expensive for one branch of government to exercise not only its own powers, but those of the other branches as well. However, the purpose of the separation of powers is "to prevent the combination in the hands of a single person

or group of the basic or fundamental powers of government." (Kasler v. Lockyer (2000) 23 Cal.4th 472, 495.) That purpose would not be advanced by allowing the judiciary to also be the prosecutor.

CONCLUSION

The arguments newly-presented to this court by the Appellate Division are without merit. The filing of criminal charges by the judiciary comports neither with due process nor the separation of powers, and any contention that such a means of initiating criminal proceedings should be authorized because of speculation that it might be cheaper to prosecute criminal cases absent compliance with the Constitution must be rejected. The Appellate Division has presented no argument which would show that petitioner is not entitled to the relief she has requested, and petitioner therefore again respectfully urges this court to grant that relief.

Respectfully submitted,

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

Ilya Alekseyeff,
John Hamilton Scott,
Deputy Public Defenders

By _____
John Hamilton Scott
Deputy Public Defender

Attorneys for Petitioner

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to the California Rules of Court, the REPLY TO RESPONDENT'S RETURN in this action contains 5,424 words. Counsel relies on the word count of the WordPerfect X3 program used to prepare this brief.

JOHN HAMILTON SCOTT
Deputy Public Defender

DECLARATION OF SERVICE

I, the undersigned, declare:

I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012; that on October 19, 2009, I served a copy of the within REPLY TO RESPONDENT'S RETURN, JEWERELENE STEEN, on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid in the United States Mail in the County of Los Angeles, California, addressed as follows:

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

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

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

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

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

COURT COUNSEL
111 NORTH HILL STREET, SUITE 546
LOS ANGELES, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 19, 2009, at Los Angeles, California.

ALICIA A. ALBURO