COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITIONER'S TRAVERSE

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

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

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John Hamilton Scott,
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PETITIONER'S TRAVERSE

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

Petitioner Jewerelene Steen, by and through her attorney Michael P. Judge, Public Defender of Los Angeles County, hereby makes her Traverse to the Return filed on behalf of the People.

I

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

II

Petitioner admits the allegations of the Return insofar as they may be supported by the record before this court, while not admitting

that all those allegations are relevant to the issues presented by this proceeding, with the following exception.

III

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

IV

The accompanying points and authorities are incorporated herein by reference.

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

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:

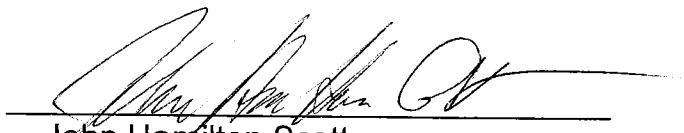
I am an attorney at law licensed to practice in all the courts of California, and I am employed as a deputy public defender for the County of Los Angeles.

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

I have read the foregoing traverse and the exhibits heretofore lodged with this court, and I know the contents thereof to be true as based upon my reading of true copies of court documents on file in this action and my representation of petitioner in the Appellate Division and the Court of Appeal.

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

Executed this 8th day of December, 2009, at Los Angeles, California.



John Hamilton Scott
Deputy Public Defender

POINTS AND AUTHORITIES

I

THE INITIATION OF CRIMINAL PROCEEDINGS IS A CORE EXECUTIVE FUNCTION WHICH CANNOT BE EXERCISED BY THE JUDICIARY

The Appellate Division held that the separation of powers doctrine was not implicated by the judiciary filing criminal charges, because the prosecutor had the discretion to dismiss charges instituted by a court clerk, and thus ultimately controlled the prosecution. (Exh. "F," pp. 3-4.) As petitioner has demonstrated, the Appellate Division was simply legally incorrect. Once a criminal proceeding has been initiated, only the court has authority to terminate that prosecution. (Pen. Code § 1386; see Pet., pp. 19-22.)

The People do not appear to be arguing in support of the Appellate Division's reasoning in this regard. [1/] The People instead have now taken a radically different position. The People now argue that the separation of powers doctrine does not prohibit the judiciary from instituting criminal proceedings at all, because filing criminal charges is a judicial function. (Ret., pp. 14-23.) The People argue that "Among a prosecutor's amalgam of roles, it [the initiation of criminal proceedings] is the most judicial function he or she has." (Ret., p. 23; emphasis added.) The People also claim that even if filing criminal

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[1/] The People make cryptic reference to a prosecutor's discretion being "preserved," (Ret., p. 28), and deciding whom and how to prosecute after a defendant has been arrested upon an accusatory pleading filed by a clerk. (Ret., p. 29) Petitioner discusses this more thoroughly below. Suffice it to say that the People do not explain these statements nor do they argue that a prosecutor can unilaterally dismiss a prosecution after it has been commenced.

charges is an executive function, it is not a "core" executive function, and thus can lawfully be exercised by the judiciary. (Ret., p. 20.)

It thus appears to be the People's position that the Legislature could abolish the position of public prosecutor in its entirety, and provide that all criminal charges would henceforth be filed by judges, with no impact upon the separation of powers doctrine. This is an argument the People have not made before. Indeed, petitioner feels reasonably secure in believing that it is an argument which has never previously been made by any prosecutor in the history of California.

While one must credit the People with taking a bold position, petitioner assumes that it is highly unlikely that this court will overturn decades of consistent precedent in California, and depart from a rule which is consistent throughout the United States, with the exception of one jurisdiction, whose contrary rule is based upon a unique constitutional and statutory history. The otherwise universal rule is that the institution of criminal proceedings is under the sole and exclusive control of the executive, to wit, the prosecutor, and that the separation of powers doctrine prohibits the exercise of such power by the judiciary. [2/]

Decisions from California

The People do not cite any case from California which states that the filing of criminal charges is a judicial function, nor that the judiciary may appropriately commence criminal proceedings. The reason for that is obvious: that is not the law in California. Indeed, it is not the law in most of the United States. In California, the rule that the discretionary decision concerning what charges to file and when is

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[2/] Of course, petitioner does not abandon her contention that the filing of criminal charges by the judiciary would violate due process protections as well as separation of powers. (People v. Municipal Court (Pellegrino) (1972) 27 Cal.App.3d 193, 206; see Pet., pp. 12-18.)

under the exclusive control of the executive, and is not an exercise of judicial authority, has been stated repeatedly. It was stated most recently by this court in a case involving the filing of criminal charges against minors:

> "The charging authority implicated by section 707(d) constitutes an exclusive executive function, generally reviewable by the judicial branch only for certain constitutionally impermissible factors, such as discriminatory prosecution. (People v. Superior Court (Alvarez) (1997) 14 Cal. 4th 968, 976 [60 Cal.Rptr. 2d 93, 928 P.2d 1171].) ' "The action of a district attorney in filing an information is not in any way an exercise of a judicial power or function." [Citation.]' (Ibid.)" (Manduley v. Superior Court (2002) 27 Cal.4th 537, 556, emphasis added.)

This court has also determined, contrary to the apparent claim of the People that this is an executive function by virtue only of statute, that the exclusive control over the filing process in the executive is required by the constitutional separation of powers doctrine.

> "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. (E.g., People v. Eubanks (1996) 14 Cal. 4th 580, 588-589 [59 Cal.Rptr. 2d 200, 927 P.2d 310]; Dix v. Superior Court (1991) 53 Cal. 3d 442, 451 [279 Cal.Rptr. 834, 807 P.2d 1063].) This prosecutorial discretion 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." ' (People v. Keenan (1988) 46 Cal. 3d 478, 506 [250 Cal.Rptr. 550, 758 P.2d 1081], quoting People v. Heskett (1982) 30 Cal. 3d 841, 860 [180 Cal.Rptr. 640, 640 P.2d 776].) 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. (People v. Wallace (1985) 169 Cal. App. 3d 406, 409 [215 Cal.Rptr. 203]; People v. Adams (1974) 43 Cal. App. 3d 697, 708 [117 Cal.Rptr. 905]; see also Taliaferro v. Locke (1960) 182 Cal.

App. 2d 752 [6 Cal.Rptr. 813].)" (People v. Birks (1998) 19 Cal.4th 108, 134, emphasis added.)

In 1991 this court reasoned,

"The parties to a criminal action are the People, in whose sovereign name it is prosecuted, and the person accused (§§ 684, 685; Gov. Code, § 100); the victim of the crime is not a party (see People v. Parriera (1965) 237 Cal.App.2d 275, 282-283 [46 Cal.Rptr. 835]). The prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor. (Gov. Code, §§ 26500, 26501; see Cal. Const., art. V, § 13.)

"The prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. (E.g., People v. Sidener (1962) 58 Cal.2d 645, 650 [25 Cal.Rptr. 697, 375 P.2d 641].) No private citizen, however personally aggrieved, may institute criminal proceedings independently (e.g., Rosato v. Superior Court (1975) 51 Cal.App.3d 190, 226 [124 Cal.Rptr. 427]), and the prosecutor's own discretion is not subject to judicial control at the behest of persons other than the accused. (People v. Wallace (1985) 169 Cal.App.3d 406, 410 [215 Cal.Rptr. 203]; Hicks v. Board of Supervisors (1977) 69 Cal.App.3d 228, 240-241 [138 Cal.Rptr. 101]; Taliaferro v. Locke (1960) 182 Cal.App.2d 752, 755-757 [6 Cal.Rptr. 813].) An individual exercise of prosecutorial discretion is presumed to be ' "legitimately founded on the complex considerations necessary for the effective and efficient administration of law enforcement. . . ." ' (People v. Keenan (1988) 46 Cal.3d 478, 506 [250 Cal.Rptr. 550, 758 P.2d 1081], quoting People v. Heskett (1982) 30 Cal.3d 841, 860 [180 Cal.Rptr. 640, 640 P.2d 776].)" (Dix v. Superior Court (1991) 53 Cal.3d 442, 451, emphasis added; see also People v. Vargas (2001) 91 Cal.App.4th 506, 534.)

Even earlier, this court stated,

"In both People v. Tenorio (1970) 3 Cal.3d 89 [89 Cal.Rptr. 249, 473 P.2d 993] and Esteybar v. Municipal Court (1971) 5 Cal.3d 119 [95 Cal.Rptr. 524, 485 P.2d 1140], this court struck down under the separation of powers doctrine legislative attempts to subject an exercise of judicial power to prosecutorial

concurrence. But in both cases it was recognized that the prosecutor -- as a representative of the executive -- is vested with discretion to forego prosecution in the first instance. (People v. Tenorio, supra, 3 Cal.3d 89, 94; Esteybar v. Municipal Court, supra, 5 Cal.3d 119, 127.) 'Thus, Esteybar and Tenorio stand as clear and explicit authority for the proposition that the decision of when and against whom criminal proceedings are to be instituted is one to be made by the executive, to wit, the district attorney.' (People v. Municipal Court (1972) 27 Cal.App.3d 193, 204 [103 Cal.Rptr. 645, 66 A.L.R.3d 717].) It follows that the prohibition of Penal Code section 1379 must be limited to the situation dealt with in sections 1377 and 1378, thereby rendering exclusive those procedures by which misdemeanor charges may be dismissed in the case of civil injuries to the victim of the criminal act. This does not preclude prosecutorial initiative to refrain from charging or moving to dismiss in other proper cases." (Hoines v. Barney's Club, Inc. (1980) 28 Cal.3d 603, 611-612, emphasis added.)

The Court of Appeal has also agreed with the argument, which then made by the People, that the separation of powers mandates that the charging function rest solely with the executive:

"The People correctly contend that the California Constitution, article V, section 13 gives to the Attorney General and the district attorneys exclusive responsibility for prosecution. This is confirmed by Government Code section 26500 et seq. No private citizen can initiate a misdemeanor complaint absent the district attorney's approval, authority or concurrence (People v. Municipal Court (Bishop) (1972) 27 Cal.App.3d 193, 199-206 [103 Cal.Rptr. 645, 66 A.L.R.3d 717]), nor may his power be controlled by the courts (e.g., Hicks v. Board of Supervisors (1977) 69 Cal.App.3d 228, 240-241 [138 Cal.Rptr. 101]; Taliaferro v. Locke (1960) 182 Cal.App.2d 752, 755-757 [6 Cal.Rptr. 813]). 'The power to enforce the state's laws is vested in the Attorney General [citation], and the responsibility for investigating and prosecuting criminal activity is vested in the district attorney or the grand jury. [Citations.] No one can institute criminal proceedings without the concurrence, approval or authorization of the district attorney.' (Rosato v. Superior Court (1975) 51 Cal.App.3d 190, 226 [124 Cal.Rptr. 427].)

"The Legislature therefore has no constitutional power to subject the prosecutor's decision to the control of a private citizen, whether a defendant or not." (People v. Shultz (1978) 87 Cal.App.3d 101, 106, emphasis added.)

Indeed, it was the application of the separation of powers doctrine which resulted in the express prohibition upon judges engaging in "plea bargaining" with defendants, and substitution the court's own view as to a proper criminal charge. [3/]

"[T]he district attorney, part of the executive branch, is the public prosecutor charged with conducting all prosecutions on behalf of the People. This function includes instituting proceedings against persons suspected of criminal offenses, and drawing up informations and indictments. (Gov. Code, §§ 26500- 26502.) The discretionary decision to bring criminal charges rests exclusively in the grand jury and the district or other prosecuting attorney. (See People v. Adams (1974) 43 Cal.App.3d 697, 707-708 [117 Cal.Rptr. 905]; Williams v. Superior Court (1973) 30 Cal.App.3d 8, 12 [106 Cal.Rptr. 89]; People v. Municipal Court (1972) 27 Cal.App.3d 193, 203-204 [103 Cal.Rptr. 645, 66 A.L.R.3d 717]; Gov. Code, §§ 26500- 26502.) The choice of the appropriate offense to be charged is also within the discretionary power of the prosecuting attorney. (People v. Ulibarri (1965) 232 Cal.App.2d 51, 55 [42 Cal.Rptr. 409], disapproved on other grounds in People v. Williams (1965) 63 Cal.2d 452, 460, fn. 8 [47 Cal.Rptr. 7, 406 P.2d 647].) 'The charging decision is the heart of the prosecution function. The broad discretion given to a prosecutor in deciding whether to bring charges and in choosing the particular charges to be made requires that the greatest effort be made to see that this power is used fairly and uniformly.' (A. B. A. Standards Relating to Administration of Criminal Justice (1971) The Prosecution Function, commentary to § 3.9(a).) The trial court, by allowing respondent to withdraw his plea of not guilty to Penal Code section 245 and enter a plea

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[3/] Should this court accept the People's novel claim that filing charges is a judicial function then, of course, that long-standing principle would have to be abandoned, and the defendant permitted to engage in independent plea negotiation with the judiciary.

of guilty to Penal Code section 242 instead, encroached upon the prosecutor's function of charging offenses. There was no disposition of the section 245 charge unless the court's action were to be treated as a sub silentio dismissal of the charge. Moreover, the court took it upon itself to charge the respondent with an otherwise uncharged and nonincluded, although related, lesser offense than that which had been charged by the People. That action was unlawful; just as the executive may not exercise judicial power, so the judiciary is prohibited from entering upon executive functions. (Cal. Const., art. III, § 3.) The court acted beyond its authority in accepting a plea of guilty to a lesser nonincluded but related offense over the prosecutor's objection." (People v. Smith (1975) 53 Cal.App.3d 655, 659, emphasis added; see also Bradley v. Lacy (1997) 53 Cal.App.4th 883, 890-891.)

Although the decisional law from other jurisdictions will be discussed more fully below, it is noteworthy that Smith has been relied upon to find a violation of the separation of powers in Alaska:

"While the reduced charge in Smith was a related but not a lesser included offense as it is in the case at bar, the policy considerations of the Smith court are persuasive. It reasoned that the executive branch and the grand jury have exclusive authority for charging a criminal defendant. The court then concluded that the trial court could not charge a non-included offense. 126 Cal.Rptr. at 198. We must go further, and hold that although the court may judicially determine the disposition of a charge based on the evidence, the law and its sentencing power, it may not, in effect, usurp the executive function of choosing which charge to initiate based on defendant's willingness to plead guilty to a lesser offense." (State v. Carlson (Alaska 1976) 555 P.2d 269, 272, emphasis added.)

Many other California cases have set forth and applied this rule:

"In the case before us the statute deals with the initial determination of the charge to be filed, a decision which, in its nature, occurs before an accusatory pleading is filed and thus before the jurisdiction of a court is invoked and a judicial proceeding initiated. It involves a purely prosecutorial function

and does not condition judicial power in any way. The function thereby conferred relates only to what is clearly the province historically of the public prosecutor, i.e., the discretion whether or not to prosecute." (People v. Adams (1974) 43 Cal.App.3d 697, 707, emphasis added.)

"Application of Penal Code section 1192.5 to the situation presented by the case at bench requires the accommodation of two sets of California Supreme Court doctrine. Both sets deal with separation of powers (Cal. Const., art. III, § 3). One doctrine defines the scope of exclusive judicial authority in the area of sentencing and disposition of charges, while the other delineates the sweep of executive power in the filing of criminal charges and the negotiation of their disposition with a defendant willing to negotiate." (People v. Superior Court (Felmann) (1976) 59 Cal.App.3d 270, 275, emphasis added.)

"Clearly the charging function of the criminal process is within the exclusive control of the executive." (People v. Cimarusti (1978) 81 Cal. App. 3d 314, 323.)

"The prosecution of public offenses is a function to be executed by the district attorney. The decision to prosecute separate offenses belongs exclusively to the prosecuting arm of the executive branch of the government. It is not a judicial function; it is not a choice for the court to make. [Citations.]" (People v. Andrade (1978) 86 Cal.App.3d 963, 976, emphasis added.)

"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. (People v. Municipal Court (Pellegrino) (1972) 27 Cal.App.3d 193, 207 [103 Cal.Rptr. 645, 66 A.L.R.3d 717]; People v. Smith (1975) 53 Cal.App.3d 655 [126 Cal.Rptr. 195]; see discussion in People v. Superior Court (Greer) (1977) 19 Cal.3d 255, 262 et seq. [137 Cal.Rptr. 476, 561 P.2d 1164], permitting the court to disqualify a prosecutor but otherwise validating the exclusive executive control over the charging function.) The Greer case, supra, notes other prosecutorial decisions immune from court control: the district attorney may conduct a case in the manner he chooses, have the same control over trial tactics, within legal bounds, as

any attorney, and negotiate a plea bargain. (People v. Superior Court (Greer), supra, at p. 267.)" (State of California v. Superior Court (1986) 184 Cal.App.3d 394, 397-398, emphasis added.)

"The decision to initiate and proceed with prosecution of the charges was not [the victim's] to make. That power rests exclusively with the district attorney (Gov. Code, § 26500), who was under no obligation to follow her wishes. " (People v. Abraham (1986) 185 Cal.App.3d 1221, 1227.)

"Based on article III, section 3 of the California Constitution, cases have held the 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). (People v. Sidener (1962) 58 Cal.2d 645, 650 [25 Cal.Rptr. 697, 375 P.2d 641], overruled on other grounds in People v. Tenorio (1970) 3 Cal.3d 89, 91 [89 Cal.Rptr. 249, 473 P.2d 993].) 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. Tenorio, supra, 3 Cal.3d at p. 94.) Thus while the legislative branch bears the sole responsibility and power to define criminal charges and to prescribe punishment, it is the executive branch which decides which crime to charge and the judicial branch which imposes sentence within the legislatively determined limits for the chosen crime. (People v. Navarro (1972) 7 Cal.3d 248, 258 [102 Cal.Rptr. 137, 497 P.2d 481].)" (People v. Mikhail (1993) 13 Cal.App.4th 846, 854, emphasis added.)

To accept the People's argument would require that every decision noted above be overturned. Indeed, if the judiciary can institute criminal proceedings unilaterally, then it cannot also be true that the initiation of such proceedings requires screening and approval by the authorized prosecutor, so that People v. Municipal Court (Pellegrino), supra, 27 Cal.App.3d 193, would also have to be disapproved. If filing criminal charges is a judicial function, then prior screening and approval by the prosecutor is irrelevant.

The People claim that the judiciary was permitted to perform the "traditional" task of a prosecutor in People v. Carlucci (1979) 23 Cal.3d 249. (Ret., p. 28, fn. 7.) This is not correct. What Carlucci discussed was the well established judicial power to call and question witnesses. (Id., 23 Cal.3d at p. 255.) Indeed, this court strongly admonished judges not to perform the task traditionally (and constitutionally) exercised by a prosecutor to advocate for a conviction: "[W]e caution that the trial court must not undertake the role of either the prosecutor or defense counsel." (Id., at p. 258.) Carlucci provides no support whatsoever for the People's position. [4/]

It might be said with some justification that there are few, if any, propositions more clearly settled in California law than that the separation of powers doctrine applies to place the discretionary decision whether to initiate a criminal proceeding under the exclusive control of the executive. The filing of criminal charges is not a judicial function, nor may the judiciary in any way interfere with the prosecutor's sole discretion whether and when to file criminal charges. This is also the rule throughout the United States.

Decisions from other jurisdictions

The People state, "Petitioner apparently assumes that the initiation of criminal proceedings is a core executive function simply because it is routinely performed by a prosecutor." (Ret., p. 23.) Perhaps. Or perhaps it is because that the proposition been the consistent holding of every case ever to address the point in jurisdictions across the United States, with one unique exception.

[4/] Indeed, the People seem to be advocating for a system in which judges would initiate criminal charges, conduct the trial in its entirety, render a verdict, and impose a sentence. Petitioner imagines that the prosecuting attorneys of California would certainly not be unanimous in concluding that such a system would be constitutional.

Justice Antonin Scalia has stated that "Governmental investigation and prosecution of crimes is a quintessentially executive function." (Morrison v. Olson (1988) 487 U.S. 654, 705 (Scalia, J., dissenting), emphasis added.) Justice Clarence Thomas has concurred: "The power to bring federal prosecutions . . . is manifestly and quintessentially executive power." (United States v. Lara (2004) 541 U.S. 193, 216 (Thomas, J., concurring), emphasis added; see also State v. Clay (1989) 230 N.J. Super. 509, 521, 553 A.2d 1356, 1363.) Circuit Judge Robert Bork also agreed, stating, "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . . ." (Community for Creative Non-Violence v. Pierce (D.C. Cir. 1986) 786 F.2d 1199, 1201, emphasis added.)

As did Judge Bork, the United States Supreme Court has recognized that the institution of criminal charges is not only an exclusive executive function, but a core executive function:

> "We explained in [Wayte v. United States (1985) 470 U.S. 598] why courts are 'properly hesitant to examine the decision whether to prosecute.' 470 U.S. at 608. Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. 'Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.' Id., at 607. It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. 'Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.' Ibid." (United States v. Armstrong (1996) 517 U.S. 456, 465, emphasis added; see also State v. Wesco, Inc. (2006) 180 Vt.

345, 351, 911 A.2d 281, 285-286; State v. Hatchett (S.D. 2003) 667 N.W.2d 680, 686.)

That the institution of criminal proceedings is an executive function, and one which may be exercised exclusively by the executive, has been recognized repeatedly in decisions in the United States, and petitioner suggests that these courts have not ruled based merely upon an unsupported assumption, as claimed by the People herein.

The rule has been set out in decisions of the courts of the United States:

> "The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." (United States v. Cox (5th Cir. 1965) 345 F.2d 167, 171, emphasis added.)

> "The United States Attorney is an officer of the executive department and in that function exercises a discretion as to whether or not there shall be a prosecution in a particular case. Incident to the Constitutional separation of powers, the Courts have no jurisdiction to interfere with the free exercise of the discretionary powers of the attorneys of the United States and their control over criminal prosecutions. [Citing Cox.]" Zimmerman v. Spears (W.D.Tex. 1977) 428 F.Supp. 759, 762, emphasis added.)

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As noted above, this has been recognized as the law in Alaska:

"Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best. [Citations.] This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases. [Citations.] [¶] When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts. To interfere with that discretion would be a violation of the doctrine of separation of powers." (Public Defender Agency v. Superior Court (Alaska 1975) 534 P.2d 947, 950-51.)

It is the law in Arizona:

"More than one branch of government may have a proper role in a particular area of public policy. For example, each branch has important and proper roles in law enforcement. The legislature possesses the power to define the acts which constitute crime and the power to prescribe punishment for those acts. [Citation.] [¶] The executive branch also possesses important powers in this area. The decision of what charges, if any, will be filed, and the discretion to proceed or not to proceed after the criminal action has been commenced, properly reside in the executive branch. [Citations.] The prosecutor may decide which charges to bring and whether to assert any mandatory sentence-enhancing allegations. [Citations.]" (State v. Dykes (1990) 163 Ariz. 581, 583, 789 P.2d 1082, 1084.)

"The prosecutor has broad discretion in determining what charges, if any, are to be filed. [Citations.] The courts have no power to interfere with the discretion of the prosecutor unless he is acting illegally or in excess of his powers." (State v. Frey (1984) 141 Ariz. 321, 324, 686 P.2d 1291, 1294.)

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In Colorado:

"A prosecuting attorney belongs to the executive branch. And, as a general matter, the power to initiate, alter, or dismiss charges rests solely within the prosecuting attorney's discretion, and may not be controlled or limited by judicial intervention." (People v. Renander (Colo.App. 2006) 151 P.2d 657, 659.)

In Florida:

"Although state attorneys, like all attorneys, are officers of the court, the execution of criminal statutes by enforcement, including prosecution, is an executive function of government. The state attorney, when acting as prosecuting officer under article V, section 17, of the Florida Constitution and under chapter 27 of the Florida Statutes, is performing an executive function and not a judicial function." (Fulk v. State (Fla.App. 1982) 417 So.2d 1121, 1126.)

In Illinois:

"It is a familiar and firmly established principle that the State's Attorney, as a member of the executive branch of government, is vested with exclusive discretion in the initiation and management of a criminal prosecution. [Citations.] That discretion includes the decision whether to prosecute at all, as well as to choose which of several charges shall be brought. [Citations.]" (People ex rel. Daley v. Moran (1983) 94 Ill.2d 41, 46, 445 N.E.2d 270, 272.)

Kansas has adopted the law as set forth in Colorado:

"It is clear that while a district attorney is an officer of the court, as is any member of the bar, he is not a judicial officer nor a part of the judicial branch of government. The district attorney belongs to the executive branch of the government. [Citation.] As an executive officer charged with the duty to prosecute persons for violations of the criminal laws, he has a broad discretion in the performance of his duties. See 1 ABA Standards for Criminal Justice, The Prosecution Function, 3-3.9 (2d Ed. 1980). The scope of this discretion extends to the power to

investigate and to determine who shall be prosecuted and what crimes shall be charged." (People v. District Court (Colo. 1981) 632 P.2d 1022, 1024; applied in State v. Compton (1983) 233 Kan. 690, 697-698, 664 P.2d 1370, 1377.)

The rule is consistent in Kentucky:

"The power to define crimes and assign their penalties belongs to the legislative department. [Citations.] The power to charge persons with crimes and to prosecute those charges belongs to the executive department. [Citations.] The power to conduct criminal trials, to adjudicate guilt, and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department. [Citations.]" Hoskins v. Maricle (Ky. 2004) 150 S.W.3d 1, 11-12.)

In Massachusetts:

"[T]he decision whether to prosecute a defendant rests with the executive branch, not the judicial branch." (Watson v. Walker (2006) 447 Mass. 1014, 1014, 854 N.E.2d 1247, 1248.)
"In the context of criminal prosecutions, the executive power affords prosecutors wide discretion in deciding whether to prosecute a particular defendant, and that discretion is exclusive to them." (Commonwealth v. Cheney (2003) 440 Mass. 568, 574, 800 N.E.2d 309, 314.)

In Michigan:

"Decisions regarding the initiation of criminal charges are discretionary executive acts." (People v. Mrozek (1985) 147 Mich.App. 304, 310, 382 N.W.2d 774, 777.)

In Minnesota:

"Under our separation of powers doctrine, the power to decide whom to prosecute and what charge to file resides with the executive branch." (Johnson v. State (Minn. 2002) 641 N.W.2d 912, 917.)

"At common law the executive branch had the exclusive power to initiate and discontinue a criminal prosecution. As a general proposition, that is also the case under the separation-of-powers doctrine." (State v. Krotzer (Minn. 1996) 548 N.W.2d 252, 256.)

In Nebraska:

"We have recognized that prosecutorial discretion is an inherent executive power. [Citation.] One of the key aspects of prosecutorial discretion is the charging function, the power to determine what, if any, charges should be brought against a person accused of committing a crime." (Polikov v. Neth (2005) 270 Neb. 29, 37, 699 N.W.2d 802, 808.)

In New York:

"[T]he Attorney-General's decision to act or not to act in seeking an injunction or to institute criminal prosecution is an executive action not reviewable by the courts . . . ." (Schumann v. 250 Tenants Corp. (1970) 65 Misc. 2d 253, 256, 317 N.Y.S.2d 500, 504.)

In Tennessee:

"So long as the prosecutor has probable cause to believe that the accused committed an offense defined by the statute, the decisions of whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.' [Citations.] The district attorneys general for this state are officers with the executive branch of government and as an incident of the constitutional separation of powers, the courts are not to interfere with the free exercise of this discretionary authority in their control over criminal prosecution." (State v. Gilliam (Tenn.Crim.App. 1995) 901 S.W.2d 385, 389.)

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In Virginia:

"[T]he the institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion." (Bradshaw v. Commonwealth (1984) 228 Va. 484, 492, 323 S.E.2d 567, 572.)

In Vermont:

"Because prosecutors function as delegates of the executive, they retain broad discretion to enforce the law including–so long as probable cause is present–the decisions whether to prosecute in any given case and what charge to file." (State v. Wesco, Inc., supra, 180 Vt. 345, 351, 911 A.2d 281, 286.)

And, finally, in Wyoming:

"In its exercise of the judicial power, the judicial department has the exclusive power to adjudicate, to pronounce a judgment and carry it into effect. [Citation.] By entering a judgment whether of acquittal or of conviction or of discharge, the judicial department is performing a significant act of government. [Citations.] On the other hand, the judicial department has no power to initiate a criminal prosecution. That department's exercise of the prosecution power would be a constitutionally impermissible encroachment on the executive department's prosecution power. [Citation.]" (Billis v. State (Wyo. 1990) 800 P.2d 401, 415-416.)

This court should not conclude that other unmentioned jurisdictions have ruled contrary to the consistent authority set forth above. Rather, these are the decisions from every jurisdiction which diligent research indicates has addressed the issue. Petitioner is confident that if there was any contrary authority beyond the single case cited by the People and discussed below, the People would have brought such a decision to this court's attention.

The People claim that because some judicial authority, in recognizing prosecutorial immunity, has referred to the prosecutor's function as "quasi-judicial," that the initiation of criminal proceedings is

properly within the discretion of the judiciary. (Ret., pp. 20-23.) However, it is obvious that the jurisdictions which have used the "quasi-judicial" term have not come to that conclusion.

Thus, the People cite Imbler v. Pachtman (1976) 424 U.S. 409, 422-423. (Ret., p. 22.) Yet the United States Supreme Court has clearly stated that the initiation of criminal proceedings is a core executive function to which the courts must defer. (United States v. Armstrong, supra, 517 U.S. at p. 465.) The People cite Yaselli v. Goff (2nd Cir. 1926) 12 F.2d 396, 404. However, the Second Circuit has followed the Fifth Circuit in affirming that despite their status as officers of the court, prosecutors exercise executive authority in deciding whether or not to charge an offense. (Inmates of Attica Correctional Facility v. Rockefeller (2nd Cir. 1973) 477 F.2d 375, 379, quoting United States v. Cox, supra, 345 F.2d at p. 171.) The People cite McCray v. Maryland (4th Cir. 1972) 456 F.2d 1, 3-4. (Ret., p. 23.) However, the Fourth Circuit has firmly stated that, "The caselaw is legend [sic, legion?] from the Supreme Court and the courts of appeals that the investigatory and prosecutorial function rests exclusively with the Executive." (United States v. Derrick (4th Cir. 1998) 163 F.3d 799, 824-825.)

The People cite Watts v. Gerking (1924) 111 Ore. 641, 657, 228 P. 135. (Ret., p. 22.) However, the rule giving prosecutors exclusive power to initiate criminal proceedings is the same in Oregon: "[T]he prosecutor has the exclusive power to select the crime with which he will charge the defendant." (State v. Washington (1975) 273 Ore. 829, 849; 543 P.2d 1058, 1068.) The People cite Smith v. Parman (1917) 101 Kan. 115, 116-117. (Ret., p. 23.) However, the rule that a prosecutor is an executive officer who exercises independent executive authority is established in Kansas. (State v. Compton, supra, 233 Kan. at pp. 697-698, 664 P.2d at p. 1377.)

The People fail to cite any jurisdiction in which it has been found that the "quasi-judicial" nature of a prosecutor's actions transforms the filing of criminal charges into a judicial function. That is not even the basis of the unique Wisconsin rule discussed below. As may be seen, the rule in every other jurisdiction is that the decision whether to file criminal charges is a function under the exclusive control of the executive.

Wisconsin

Against this vast and uniform body of opinion showing that the initiation of criminal proceedings is a core executive function which cannot be exercised or controlled by the judiciary, the People cite a single contrary ruling: State v. Unnamed Defendant (1989) 150 Wis.2d 352, 441 N.W.2d 696. In that case, the Wisconsin court examined a statute authorizing what is called a "John Doe criminal proceeding." The statute permitted a private individual, should a prosecutor decline to pursue criminal charges, to seek to have that decision overturned by a judge who could, following a hearing, direct that a criminal complaint be filed. The Wisconsin court found that this did not violate the separation of powers doctrine as that doctrine was implicitly found in the Wisconsin Constitution. However, this was based upon a constitutional and statutory history which is unique to Wisconsin.

In its interpretation of the Wisconsin Constitution, the Unknown Defendant court relied primarily upon the fact that "The John Doe criminal proceeding has a long history in Wisconsin. The proceeding has been used by courts, pursuant to statute, since 1839." (Id., 150 Wis.2d at p. 358-359, 441 N.W.2d at p. 698, emphasis added.) The court noted that the intent of the framers of the Constitution might not always govern the present interpretation of the Constitution, but reasoned:

"The framers' intent, however, has special significance when we are dealing with a matter which was demonstrably contemplated by the framers. We may confidently presume that the framers were familiar with, and earnestly concerned about, the question we address in this case: the proper procedure for initiation of criminal actions. In this circumstance, we find especially persuasive the fact that the same procedure we review today was in use in 1848, and was presumably considered constitutionally sound by the framers themselves. [Citation.].

"Added weight to the constitutional validity of this procedure is given by the long and continuous use of the procedure since 1848, and the uniform acquiescence in its constitutionality. The instant attack on the propriety of judicial initiation of criminal prosecution comes to this court now for the first time after nearly one hundred and fifty years of usage. Persuasive value is accorded to a long-standing, uniform and continuous interpretation of a constitutional provision. [Citation.]" (Id., 150 Wis.2d at p. 362, 441 N.W.2d at pp. 699-700, emphasis added.)

Petitioner has no dispute with the principle of interpretation applied in Unknown Defendant. Were petitioner attacking, for the first time, a statutory procedure in California which had been in existence from the era when the California Constitution was adopted in 1879, and in which there had been acquiescence thereafter, then Unknown Defendant might have some probative value in this discussion. However, that is not the case. The statute herein at issue, Penal Code section 959.1, subdivision (c)(1), became effective in 1991 (Stats. 1990, chap. 289, § 1), and has never been judicially approved. Instead, the "long-standing, uniform, and continuous interpretation" of the separation of powers doctrine in California, as in every other jurisdiction outside Wisconsin, is that the discretionary initiation of criminal proceedings is a core executive function which cannot be exercised or controlled by the judiciary. Thus, when the question is examined by the means employed in Wisconsin, by examination of long-standing, uniform, and

continuous interpretation, the result in every other jurisdiction will be contrary to the result in Wisconsin, with its singular history.

Indeed, the application of the otherwise uniform separation of powers principle to an Ohio statute similar to Wisconsin's is instructive. Ohio Revised Code section 3517.13 permitted private citizens to bring allegations of violation of the Corrupt Practices Act before a judge. If the judge found that a violation occurred, the judge was required to compel the prosecutor to prosecute the case. The statute was found unconstitutional as violative of the separation of powers in In re Metzenbaum (1970) 26 Ohio Misc. 47, 265 N.E.2d 345:

> "The executive power is defined as the power to execute the laws of the state. This includes the power and duty of Ohio's county prosecutors to enforce the penal laws of the state by investigating and prosecuting persons accused of crime. The Attorney General is the chief law officer of the state and assumes the powers of a prosecuting attorney in cases where the Governor and General Assembly so direct (R. C. 109.02). The judiciary may not encroach upon or usurp these functions. [Citations.]
>
> "Prosecution pursuant to R. C. 3517.13 may result in a fine, imprisonment and forfeiture of office (R. C. 3517.13, 3599.04, 3599.07). Thus it is a penal statute. The power thereby granted the court to investigate a possible violation and to make the decision to prosecute is clearly an executive governmental function. Under the doctrine of separation of powers, such powers are confined by the Constitution to the executive department. [Citation.] The prerogatives of the executive department may not be invaded by the judiciary. [Citation.] The preservation of this separation is essential if our system of government under the state Constitution is to be maintained unimpaired." (Id., 26 Ohio Misc. at pp. 48-49, 265 N.E.2d at p. 346, emphasis added.)

There thus can be no reasonable dispute on this subject. With the exception of a single jurisdiction, based upon a unique statutory and constitutional history, the rule applied in the United States in general,

and in California in particular, is that the initiation of criminal charges is a core executive function which cannot be exercised or controlled by the judiciary.

II

THE FILING OF CRIMINAL CHARGES IS NOT A LIMITED, MINISTERIAL FUNCTION

In conduct surprising for a prosecutor, the People have consistently understated the importance of the duties and functions of the public prosecutor throughout these proceedings. [5/] The People claim that the issues presented when the question of whether a criminal charge should be filed may be answered with merely "a review of the court file . . . ." (Ret., p. 29.) Thus, claim the People, in filing a criminal complaint, "the clerk exercises a limited, ministerial function and not broad authority usurping executive power." (Ibid.) However, as has been correctly stated, "There can be no question but that discretion permeates the entire process of bringing charges against a person suspected of having committed a crime. And it is the district attorney who is vested with discretionary power to determine whether to prosecute." (People v. Superior Court (Felmann), supra, 59 Cal.App.3d at p. 276.)

The People claim that the initiation of criminal proceedings is a ministerial function. (Opp., p. 18.) The Appellate Division did not find the initiation of criminal charges to be a ministerial duty of a clerk, but held instead that such a discretionary power could properly be exercised by the clerk. It is clear that the initiation of criminal charges is not a ministerial duty.

[5/] It should be noted that the Appellate Division did not make any such attack upon the importance of the exercise of prosecutorial discretion, but instead ruled, erroneously, that such discretion could be exercised after criminal proceedings had been initiated.

"A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment. [Citation.]" (Rodriguez v. Solis (1991) 1 Cal.App.4th 495, 501-502; emphasis added.)

When a duty is purely ministerial in character, not only is the public officer without power to exercise any discretion in determining whether or not to perform the duty, but exercise of the duty may be compelled by mandamus. (Id., at p. 501; see State of California v. Superior Court (1974) 12 Cal.3d 237, 247.) If the filing of a criminal charge is a action within the "ministerial" duties of a court clerk, then a clerk not only may, but must file such charges in every case, without the exercise of any discretion whether to file such charges. If the clerk fails to file such charges, he may be forced to do so by a writ of mandate.

Appellant is unaware of any law or rule which requires court clerks to file criminal charges. Even if court clerks were authorized to file criminal charges, there would be no public duty upon court clerks to file criminal charges, nor could anyone compel a court clerk to file criminal charges in a proceeding in mandate. The filing of criminal charges, even were court clerks authorized to do so, is not a ministerial duty. It is, rather, patently obvious that the question of whether a criminal charge shall be filed remains a matter of prosecutorial discretion. [6/]

[6/] Petitioner notes that the People have made this claim previously, with this same response. The People have yet to cite any authority for the claim that filing criminal charges is a ministerial duty of a clerk.

Moreover, far more is involved than merely a determination whether the defendant appeared at the particular time and date required. There are many issues which must be addressed, even when deciding whether or not to file a charge of failure to appear. In addition to the same questions which arise when deciding whether to file any criminal charge (including whether the perpetrator is dangerous and whether there are reasonable alternatives to prosecution), many other questions arise with regularity.

Shall a criminal charge be filed if a defendant fails to appear on the date specified on a ticket, but voluntarily appears one day later? Although, perhaps, a technical violation of the law has occurred, most prosecutors would probably decline to pursue criminal charges in such a case as an exercise of discretion.

Shall a criminal charge be filed if a defendant fails to appear, but thereafter provides an excuse? The question of whether a defendant's explanation would provide a legal defense, and whether in light of that explanation charges should be filed even if it did not rise to a legal defense, will affect the prosecutor's decision whether to file a criminal charge as an exercise of discretion.

Shall a criminal charge be filed if the failure to appear is upon a matter merely requiring repair of equipment? Shall a criminal charge be filed when a defendant has appeared in court, but is late with the payment of a fine? Again, a prosecutor might well decide not to file criminal charges in such cases, as an exercise of discretion.

Perhaps the most obvious situation requiring an exercise of discretion is to determine what level of offense shall be filed. Ordinarily, a failure to appear charge is a "wobblette," chargeable as a misdemeanor or an infraction. (Pen. Code §§ 17, subd. (d), 19.6.) Once that decision has been made, the People have no power to change it. Pursuant to section 17(d), a misdemeanor may be reduced

to an infraction only by the court with the consent of the defendant, and it is only upon the demand of the defendant that an infraction can be raised to a misdemeanor. The determination of whether to file an infraction or a misdemeanor is obviously not one which can be made merely by "reviewing the court file," and is one which has continuing effect throughout the prosecution.

Even more significant, the failure to appear by an accused felon is a "wobbler," which can be filed either as a misdemeanor or a felony. (Pen. Code § 1320, subd. (b).) What is the clerk's "ministerial duty" in that case: to file the felony, or the misdemeanor? It is even more obvious that such a determination cannot be made merely by "reviewing the court file." Is it truly the position of the People that clerks can initiate felony criminal proceedings, and have the additional authority to make the discretionary decision to pursue such a charge as a misdemeanor? What if the defendant has prior felony convictions? Should those be alleged, and if so, under which applicable statute? Is the clerk bound by local prosecutorial policies concerning the filing of "third strike" allegations? And, again, once the decision has been made to file a matter as a felony or misdemeanor, the ability to change that designation is removed from the control of the prosecutor. Indeed, petitioner's counsel has been consistently perplexed that a prosecutor seems willing to cede such authority over criminal prosecution to court clerks. [7/]

Obviously, discretion must be exercised in all of these situations, and more. Even if a decision is made to file all such charges, that decision is still an exercise of discretion. The People

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[7/] Petitioner has raised this point repeatedly, but the People have yet to explain why they believe that court clerks have, or should have, the authority to choose between felony and misdemeanor charges.

make the odd comment that Penal Code section 959.1, subdivision (c), "increase[s] court efficiency while preserving the prosecutor's ability to exercise discretion." (Ret., p. 28, emphasis added.) And again that, "This procedure does not usurp any part of the prosecutor's chief duty in deciding whom and how to prosecute, because this can only occur once the defendant surrenders and avails himself or herself of the jurisdiction of the court." (Ret., p. 29, emphasis original.) These comments do not make any sense. If a criminal charge has been initiated by a court clerk, then the clerk has decided whom and how to prosecute, and the only discretion exercised (e.g., to file an infraction or a felony) has been exercised by that clerk. These statements would be true only if one of two propositions are accepted, neither one of which is enunciated by the People.

First, it would be true if the clerk's filing of a criminal charge did not initiate a criminal proceeding, leaving the determination of whether to do so to a prosecutor. Despite the filing of the complaint, no criminal proceeding would be initiated until the matter had been screened by a prosecutor and the charge approved. However, if that were true, then the statute of limitations would continue to run even after the clerk had acted, and in many cases, including this one, would have expired before a proper prosecutorial decision to proceed was made. The People's position in this case is clearly that the clerk's filing of a charge initiates a criminal proceeding, no less than a complaint filed by a prosecutor.

Second, it would be true if the prosecutor had authority to dismiss a criminal proceeding after it was instituted. While this was the basis of the Appellate Division's ruling in this case, petitioner has demonstrated the invalidity of that claim. (See Pen. Code § 1386; People v. Viray (2005) 134 Cal.App.4th 1186, 1205.) The People have

not attempted to demonstrate the propriety of this ruling of the Appellate Division.

The People have challenged petitioner's reliance upon Viray for this proposition because that case involved the Sixth Amendment right to counsel. (Ret., p. 18, fn. 5.) However, the point for which Viray was cited in the context of the issue now before this court was that the prosecutor cannot dismiss a criminal proceeding once that proceeding has been initiated, which is why the separation of powers doctrine reserves the power to initiate the proceeding to the executive: "[T]he Legislature might cede to the courts the power to decide to initiate a prosecution, or it might cede to them the power to decide to terminate a prosecution; but it could not grant them both of these powers without effectively making the prosecutor a functionary of the courts in violation of the separation of powers." (People v. Viray, supra,, 134 Cal.App.4th at p. 1203, emphasis original.) Obviously, the understanding of the Viray court was that the power to terminate a prosecution was given exclusively to the courts, and the People cite no authority to the contrary.

In claiming that filing a criminal complaint is a matter of little gravity or importance, the People assert that a police officer can initiate a misdemeanor proceeding by issuing a notice to appear. The People cite Penal Code sections 853.6 and 853.9, and include the following citation: "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.'])" (Ret., p. 20, emphasis added and deleted.)

The emphasized interpolation added by the People results in a manifest misrepresentation of what Heldt said and what the law

provides. The cited Penal Code sections do not give authority to a police officer to initiate a misdemeanor proceeding by issuing a notice to appear. (See Pet., p. 15, fn. 5.) In an infraction matter the officer may initiate a prosecution by filing a notice to appear with a magistrate. (Pen. Code § 853.6, subd. (e)(1): "It [the notice to appear] shall be filed with the magistrate if the offense is an infraction." If the matter is a misdemeanor, the officer will present the notice to appear to the prosecutor, who may then either direct the officer to file the notice with a magistrate, or the prosecutor may file either the notice or a formal complaint with a magistrate. (Pen. Code § 853.6, subds. (e)(2), (e)(3). [8/])

It is clear that the Heldt court was not authorizing the institution of misdemeanor proceedings by police officers. The court instead noted that in misdemeanor cases, "After the notice is so filed, 'the prosecuting attorney . . . within his or her discretion, may institute prosecution by filing the notice or a formal complaint with the magistrate specified there in within 25 days from the time of arrest.' (§ 853.6, subd. (e)(3); italics added.)" (Heldt v. Municipal Court (1985) 63 Cal.App.3d 532, 536.) The claim being made by the defendant in Heldt was that the prosecutor could not initiate a criminal proceeding by filing a notice to appear with the magistrate, but only by means of a formal complaint. The Heldt court rejected this claim, and found that

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[8/] It is somewhat unclear whether section 853.6, subd. (e)(2), allows the prosecutor to delegate the authority to institute misdemeanor criminal proceedings to police officers without executive review and approval. If it does, then it may suffer from the same constitutional infirmity as section 959.1(c)(1). (But see Pen. Code 853.9, subd. (b).) Of course, the question whether Penal Code section 853.6(e)(2) does permit such delegation, and whether such delegation or the permissive filing of infraction charges by police officers would be constitutional, is not presented by this case.

the prosecutor could file either a notice to appear or a formal complaint, as specifically stated in section 853.6(e)(3).). Obviously, whichever means was used, it would only be upon an exercise of discretion by the prosecutor to initiate a criminal proceeding.

Thus, were one to properly add words to the Heldt court's decision, the quote would be: "[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 prosecutor] in lieu of a formal complaint to invoke the jurisdiction of the court in a misdemeanor prosecution." (Heldt v. Municipal Court, supra, 163 Cal.App.3d at p. 539, emphasized portion added.)

CONCLUSION

Beyond a single decision, based upon statutory and constitutional history unique to Wisconsin, the settled principle throughout the United States, and particularly in California, is that discretionary power to initiate criminal proceedings is a core executive function which cannot be exercised or controlled by the judiciary. The People's claim that the filing of a criminal charge is a ministerial duty which can lawfully be exercised by a court clerk is meritless and must be rejected.

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Accordingly, petitioner again respectfully urges to grant the relief she has requested in her petition for writ of mandate.

Respectfully submitted,

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

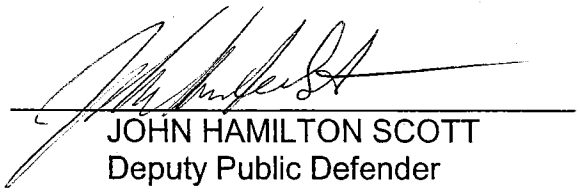
Ilya Alekseyeff,
John Hamilton Scott,
Deputy Public Defenders

By _____
John Hamilton Scott
Deputy Public Defender

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to the California Rules of Court, the enclosed Petitioner's Traverse is produced using 13-point Roman type including footnotes and contains approximately 9,708 words. Counsel relies on the word count of the computer program used to prepare this brief.



JOHN HAMILTON SCOTT
Deputy Public Defender

DECLARATION OF SERVICE

I, the undersigned, declare I am over eighteen years of age, and not a party to the within cause; my business address is 320 West Temple Street, Suite 590, Los Angeles, California 90012; that on December 8, 2009, PETITIONER'S TRAVERSE, JEWERELENE STEEN, on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles, addressed as follows:

CARMEN A. TRUTANICH, CITY ATTORNEY
CRIMINAL APPEALS SECTION
500 CITY HALL EAST
200 NORTH MAIN STREET
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PRESIDING JUDGE
LOS ANGELES SUPERIOR COURT
111 NORTH HILL STREET
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CLERK, COURT OF APPEAL
SECOND APPELLATE DISTRICT
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CLERK, APPELLATE DIVISION
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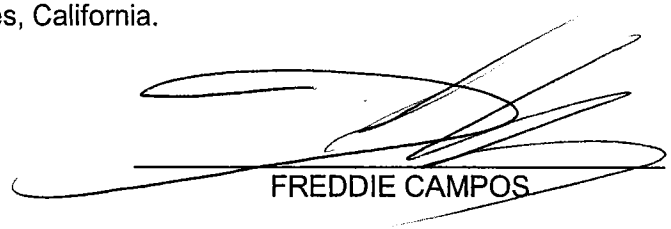
LOS ANGELES, CA 90013

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 8, 2009, at Los Angeles, California.



FREDDIE CAMPOS