IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEWERELENE STEEN,

Petitioner,

v.

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

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

S174773

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

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

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

REAL PARTY'S OPPOSITION TO PETITIONER'S REQUEST FOR JUDICIAL NOTICE

CARMEN A. TRUTANICH, City Attorney
DEBBIE LEW, Assistant City Attorney
Supervisor, Criminal Appellate Division
KATHARINE H. MACKENZIE,
Deputy City Attorney
katharine.mackenzie@lacity.org
State Bar No. 106349
CRIMINAL APPELLATE DIVISION
500 City Hall East
200 N. Main Street
Los Angeles, California 90012
Telephone: 213-473-6900
Fax: 213-978-8779

Attorneys for Real Party in Interest
PEOPLE OF THE STATE OF CALIFORNIA

Service on the State Attorney General required by California Rule of Court 8.29(c)(1)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEWERELENE STEEN, Petitioner, v. APPELLATE DIVISION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	**S174773** (Ct. of App., 2nd Dist, Div. 4, Case No. B217263) (Willhite, Acting P.J., Manella, J., Suzukawa, J.) (Appellate Div. Sup. Ct. No. BR046020) (Weintraub, J., McKay, P.J., Wasserman, J.) (Trial Ct. No. 6200307) (Munisoglu, C., Dept. 66)

REAL PARTY'S OPPOSITION TO PETITIONER'S REQUEST FOR JUDICIAL NOTICE

Real party in interest, the People of the State of California, opposes petitioner's request to take judicial notice of documents from a Fresno County Superior Court file of an unrelated criminal prosecution. Petitioner states that he "expects to rely upon the facts shown in these documents during oral argument." (Request for Judicial Notice p. 2.) However, this appellate court is not the appropriate forum in which develop an additional factual record and the "facts" petitioner proffers are not relevant to the legal issue this Court has directed the parties to brief in the instant case.

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INTRODUCTION

On September 9, 2009, this Court issued an order to show cause "why the relief prayed for in the petition for writ of mandate filed July 20, 2009, should not be granted on the ground that Penal Code section 959.1, subdivision (c), violates the separation of powers doctrine." Thereafter, comprehensive briefing on that constitutional issue ensued by real party, petitioner, and amicus curie, the District Attorney of Los Angeles County. With the filing of real party's response to amicus curiae's brief on February 23, 2010, this matter was "fully briefed" and is now pending the setting of oral argument.

On June 28, 2010, petitioner filed a request for judicial notice. He seeks judicial notice of the following documents from the court files of the Superior Court of Fresno County in the matter of *People v. Johnny Brown, III*, case no. 1873110:

> 1) Defendant's "Demurrer for Lack of Jurisdiction, Uncertainty, Failure to State a Public Offense, Barred Prosecution (California Penal Code § 1004(1), 1004(2), 1004(4), 1004(5))" – Ex. K
>
> 2) Transcript of the trial court proceedings of September 2 and 9, 2009 – Ex. L
>
> 3) Trial court's "Ruling on Demurrers" – Ex. M

Petitioner further seeks judicial notice of documents from the court file of the Appellate Division of the Superior Court of Fresno County in the matter of *Johnny Brown, III v. Superior Court, App. Div.* case no. 0002179 (trial court case no. 1873110):

> 4) Petition for Writ of Mandate – Ex. N
>
> 5) Appellate Division "Order on Petitions for Writ of Mandate" – Ex. O

Petitioner states that the following facts are reflected in these documents: When Defendant Brown failed to appear on two traffic

citations, a misdemeanor charge of failing to appear in violation of Vehicle Code section 40508 was entered into the court's register of actions. The defendant filed a demurrer to the charge on the basis that it had not been filed by the prosecutor. The deputy district attorney told the trial court that the District Attorney's Office had not intended to proceed on the misdemeanor charge. The prosecution and the defense negotiated a plea bargain in which the defendant would enter a plea to the traffic infractions, but the failure to appear charge would be dismissed. The trial court

> asked the prosecutor, "what authority to [sic] you have . . . for the proposition that the District Attorney can dismiss failures to appear? It's like the District Attorney dismissing contempt charges, which they can't. It's my prerogative. [¶] You have any authority for the proposition that you can flush failures to appear?"

When the prosecutor failed to provide any authority, the court rejected the plea agreement. The trial court overruled the defendant's demurrer, relying on an Attorney General opinion which stated that a court is authorized to issue a warrant for the arrest of a defendant who fails to appear. Defendant Brown filed a writ of mandate in the Appellate Division of the Superior court challenging the trial court's ruling. The Appellate Division found that the failure to appear charge had been filed by means of a complaint in electronic form, as authorized by Penal Code section 959.1, subdivision (c)(1). (Request for Judicial Notice, pp. 2-4.)

Petitioner states, "These documents are clearly relevant to this court's determination whether, after a court has acted unilaterally to file a misdemeanor complaint, the prosecutor thereafter retains the ability to exercise discretion to terminate the prosecution." He asserts that the above "documents reflect[] how such issues are actually resolved in the trial courts of California." And, he states that he "expects to rely upon the facts shown in these documents during oral argument of this matter." (Request for Judicial Notice, pp. 2, 4.)

Petitioner's request for judicial notice lacks merit and should be denied.

ARGUMENT

Petitioner's Request for Judicial Notice Should Be Denied Because the Facts Contained in Documents in an Unrelated Court File are Irrelevant

Petitioner collects "facts" contained in selected documents of a Fresno Superior Court file to create a factual narrative about how one trial court responded to a prosecutor's request to terminate a failure to appear charge that had been filed by the court. He claims that these "'facts' reflect[]" not just how one judge in Fresno County handled the matter, but reflects "how such issues are actually resolved in the trial courts of California." Through means of judicial notice, petitioner seeks to add evidence to the current appellate record, so that he can "rely upon the facts shown in these documents during oral argument of this matter." (Request for Judicial Notice, pp. 2, 4.) Although Evidence Code section 452, subdivision (d)(1), permits judicial notice of the "Records of . . .any court of this state," petitioner's request should be rejected.

For the first time in this Court, petitioner attempts, to use judicial notice in order to supply additional facts of how trial courts in the state allegedly resolve the issue of a prosecutor's discretion to terminate failure to appear charges. But, such "efforts, . . . to supply additional evidence that there exists a widespread practice" in the state, "are in contravention of the general rule that an appellate court is not the forum in which to develop an additional factual record . . . ." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207 [Supreme court rejected defendant's request for judicial notice of a trial transcript in an effort to supply the appellate court with additional evidence that there existed a widespread practice by police in California to ignore a suspect's invocation of the right to counsel].)

Moreover, judicial notice of petitioner's proffered facts should be rejected because they are irrelevant to the limited legal issue before this Court.

> Although a court may judicially notice a variety of matters (Evid. Code, § 450 et seq.), only *relevant* material may be noticed. "But judicial notice, since it is a substitute for proof [citation], is always confined to those matters which are relevant to the issue at hand." [Citation.] "While Evidence Code section 451, provides in mandatory terms that certain matters therein must be judicially noticed, the provisions contained therein are subject to the qualification that the matter to be judicially noticed must be relevant (Evid. Code, § 350, 450)," as well as "qualified by Evidence Code section 352 . . . ." [Citations.] We therefore "decline" to judicially notice material that "has no bearing on the limited legal question at hand." [Citation.]

(*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, italics in original.)

At bar, this Court's order to show cause was expressly limited to the constitutional issue of whether "Penal Code section 959.1, subdivision (c), violates the separation of powers doctrine. (Cal. Const., art. III, § 3.)" (Order to Show Cause filed September 9, 2009.)[1] If petitioner's point is that these documents *factually* illustrate that many trial courts believe that they do not have to dismiss a failure to appear count that the prosecution has not authorized and does not want to prosecute – petitioner's proffered "evidence" is irrelevant to the narrow legal issue before this Court. Real party has argued that *under the law* the prosecution retains the discretion whether or not the to prosecute failure to appear charges filed under Penal Code section 959.1. The mere fact that one trial court in Fresno County did not let a prosecutor dismiss a failure to appear charge is irrelevant to the legal issue of whether the statute constitutionally infringes on the executive function. The issue before this Court is not how one trial court has or has not ruled on the issue. Likewise, the issue before this court is not how one

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[1] In addition to his constitutional separation of powers challenge to Penal Code section 959.1, petitioner's petition also raised statutory challenges based on the statute of limitations and whether the complaint statutorily conferred jurisdiction over a criminal prosecution if it was not in the name of the People under Penal Code section 684. (Petition, pp. 22-24.)

appellate division has or has not ruled on this issue.[2]

Furthermore, petitioner's proffered documents do not even reflect how courts throughout the state are analyzing the legal issue of whether Penal Code section 959.1, subdivision (c), violates the separation of powers. A review of petitioner's documents show that no one argued or briefed this constitutional issue. In his demurrer, Defendant Brown argued that the traffic ticket citations and the failure to appear charges should dismissed because they were not filed in a complaint that conformed with the statutory provisions of Vehicle Code section 40503, subdivision (a), and Penal Code sections 950 and 952. (Ex. K, pp. 1-8.) At the pre-trial hearing, when the parties raised a possible plea bargain, the court asked the prosecutor if she had any "authority . . . for the proposition that the District Attorney can dismiss failures to appear?" The prosecutor's only response was "Um – nope. I'll leave it up to the Court." Thereafter, Defendant Brown's counsel submitted on her written pleadings. (Ex. L, pp. 6-8.) The trial court overruled the demurrer finding that the prosecution of the traffic offenses was statutorily authorized under Vehicle Code section 40513, subdivision (b), because the notices to appear were on Judicial Council forms. (Ex. M, pp. 1-10) And, the trial court ruled that an arrest warrant could issue for the failure to appear charges without a separate complaint because the offense occurred in front of the court. (Ex. M., pp. 11-12.) Defendant Brown's writ petition merely reiterated the same statutory arguments he made in his demurrer. (Ex. N, pp. 1-26.) The Appellate Division's order denying the writ petition found that the failure to appear charge was filed in a complaint in electronic form under Penal Code section 959.1. (Ex. O, pp. 2-3.)

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[2] Petitioner's request for judicial notice of the Appellate Division's unpublished order denying the writ also "circumvents the rule that, with exceptions not pertinent here, an unpublished decision 'shall not be cited or relied upon by a court or party in any other action or proceeding . . . .' (Cal. Rules of Court, rule 977(a), (b).)" (*People v. Webster* (1991) 54 Cal.3d 411, 428, fn. 4].) Former rule 977(a) and (b), of the California Rules of Court, is now rule 8.1115(a) and (b).

Clearly, the documents and "facts"[3] petitioner proffers are irrelevant since the constitutional issue this Court has asked the parties to brief – whether Penal Code section 959.1 violates the separation of powers – was never raised, briefed, or argued in Defendant Brown's case. Therefore, real party requests this Court to "'decline' to judicially notice material that 'has no bearing on the limited legal question at hand.' [Citation.]" (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [in an action involving tobacco advertising, Supreme court declined to judicially notice reports of federal agencies on tobacco use because it was "irrelevant to the preemption question" that was on review].)

CONCLUSION

For all the foregoing reasons, real party respectfully requests this Court deny petitioner's request for judicial notice.

DATED: July 13, 2010

Respectfully submitted,

CARMEN A. TRUTANICH, City Attorney
DEBBIE LEW, Assistant City Attorney
Superyisor, Criminal Appellate Division

By: Katharine H. MacKenzie
KATHARINE H. MACKENZIE
Deputy City Attorney

Attorneys for Real Party in Interest
PEOPLE OF THE STATE OF CALIFORNIA

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[3] It is also questionable whether the "facts" petitioner has picked from selected court documents to create his factual narrative are the proper subject of judicial notice. In *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1570, the Court of Appeal held that while it may be proper to take judicial notice of the fact that a document exists in a file and even that a court made a particular ruling, a court could not take judicial notice of the facts in the court document as true. The *Sosinsky* court listed a number of facts in court files that are essentially hearsay allegations, which cannot be judicially noticed as true: "facts" in pleadings, affidavits, and court orders; "facts" set forth in an arrest report; comments made at a hearing by an attorney and a judge; "facts" contained in a declaration; "facts" contained in a deposition transcript filed with a court; and an appellate opinion's statement of facts. (*Ibid.*)

PROOF OF SERVICE BY MAIL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JEWERELENE STEEN V. APPELLATE DIVISION
(Ct. of App. B217263, App. Div. Sup. Ct. No. BR046020,
Trial Court No. 6200307)

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

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

On **July 13, 2010,** I served the following document

REAL PARTY'S OPPOSITION TO PETITIONER'S REQUEST FOR JUDICIAL NOTICE

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

John Scott Hamilton
Deputy Public Defender
Appellate Division
320 West Temple Street, Room 590
Los Angeles, CA 90012
Attorney for Petitioner, Jewerelene Steen

Joseph Lane, Clerk of the Court
California Court of Appeal
Second Appellate District
Division 4
2nd Floor-North Tower
300 South Spring Street
Los Angeles, CA 90013

Clerk of the Court
Appellate Division
Department 70, Room 607
111 North Hill Street
Los Angeles, CA 90012

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

Honorable Elizabeth Munisoglu
Commissioner of the Superior Court
West Los Angeles Courthouse
Department 92
1633 Purdue Avenue
Los Angeles, CA 90025

Office of the Attorney General
State of California
Edmund G. Brown, Jr.
5th Floor, North Tower
300 South Spring Street
Los Angeles, CA 90013

Office of the Los Angeles District Attorney
Phyllis C. Asayama
Deputy District Attorney
540 Hall of Records
320 West Temple Street
Los Angeles, CA 90012
Attorney for Petitioner, Amicus Curiae

Frederick Raymond Bennett
Court Counsel, Los Angeles Superior Court
111 North Hill Street, #546
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on **July 13, 2010**, at Los Angeles, California.

TRACIE D. NGO, Secretary