

No. S174773

NOV 28 2012

In the Supreme Court of California Frank A. McGuire Clerk
Deputy

Jewerelene Steen,
Petitioner,

vs.

Appellate Division,
Superior Court of Los Angeles County,
Respondent,

People of the State of California,
Real Party in Interest.

**RESPONDENT'S OPPOSITION TO MOTION
TO EXCLUDE APPELLATE DIVISION AS
PARTY LITIGANT**

Original Writ Petition Following A Judgment Of The Appellate Division
Superior Court Of Los Angeles County, No. BR046020
Hon. Debre K. Weintraub, Hon. Patty Jo McKay, Hon. Fumiko H. Wasserman

Appeal From A Judgment Following A Guilty Plea
Los Angeles County Superior Court, No. 6200307
Honorable Elizabeth Munisoglu, Commissioner

Service On The Attorney General Pursuant to Cal.R.Ct. 8.29(c)(1)

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TABLE OF CONTENTS

	Page
I INTRODUCTION	1
II STEEN'S MOTION IS UNTIMELY AND, IN ANY EVENT, UNMERITORIOUS	2
A. The Court Should Deny Steen's Motion As Untimely	2
B. The Court Should Deny Steen's Motion As Unmeritorious.....	4
III CONCLUSION.....	8

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Curle v. Superior Court</i> , 24 Cal.4th 1057 (2001)	4
<i>De Lucca v. Price</i> , 146 Cal. 110 (1905)	4
<i>Elkins v. Superior Court</i> , 41 Cal.4th 1337 (2007)	5
<i>Grant v. Superior Court</i> , 90 Cal.App.4th 518 (2001)	8
<i>Gressett v. Superior Court</i> , 185 Cal.App.4th 114 (2010)	2, 3, 5
<i>In re Koehler</i> , 181 Cal.App.4th 1153 (2010)	8
<i>James G. v. Superior Court</i> , 80 Cal.App.4th 275 (2000)	5
<i>Municipal Court v. County of Placer</i> , 200 Cal.App.3d 1173 (1988)	4
<i>Municipal Court v. Superior Court (Gonzalez)</i> , 5 Cal.4th 1126 (1993)	4, 5
<i>Municipal Court v. Superior Court (Sinclair)</i> , 199 Cal.App.3d 19 (1988)	4
<i>Municipal Court v. Superior Court (Swenson)</i> , 202 Cal.App.3d 957 (1988)	4
<i>Ng v. Superior Court</i> , 52 Cal.App.4th 1010 (1997)	4, 5, 7
<i>Omaha Indemnity Co. v. Superior Court</i> , 209 Cal.App.3d 1266 (1989)	4
<i>Settlemyre v. Superior Court</i> , 105 Cal.App.4th 666 (2003)	5

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes and Other Authorities

Pen. Code, § 959.1 1, 6
8 Witkin, California Procedure *Extraordinary Writs*, § 166, at 789
(3d ed. 1985) 4
California Courts, *Limited Court Service Days*, available at
<http://www.courts.ca.gov/12973.htm>..... 6
Jon B. Eisenberg et al., *California Practice Guide: Civil Appeals
and Writs Procedures on Writ Review* ¶ 15:142 (Westlaw 2012). 5

I INTRODUCTION

On July 20, 2009, Jewelerene Steen filed a petition for writ of mandate claiming that (1) Penal Code section 959.1(c)—which permits a court clerk to issue and file electronically a complaint for failure to appear, pay a fine, or comply with a court order—violates the separation-of-powers doctrine under the California Constitution and due process under the federal and California Constitutions; and (2) the prosecution against her for failure to appear under such a complaint was not commenced within the statute of limitations.

On September 9, 2009, after electing to retain the matter, this Court issued an order directing both The People (as Real Party in Interest) and the Appellate Division, Superior Court of Los Angeles County (as Respondent), to “show cause before this Court why the relief prayed for in the petition for writ of mandate filed July 20, 2009, should not be granted on the ground Penal Code section 959.1, subdivision (c), violates the separation of powers doctrine.” (Dkt. Entry Sept. 9, 2009) The Court directed both real party and respondent to file returns within thirty days. (*Id.*) The Appellate Division did so on October 5, 2009. (Dkt. Entry Oct. 5, 2009)

On September 12, 2012, more than three years into the life of this proceeding, this Court issued another order to show cause, directing the People and the Appellate Division to file additional returns, this time on the due process and statute of limitations issues.

(Dkt. Entry Sept. 12, 2012) The Appellate Division's return is due on December 13. (Dkt. Entry Nov. 8, 2012)

On November 16, 2012, however, Steen moved to exclude the Appellate Division as a party litigant on the ground that it is improper for the Appellate Division to appear in this proceeding.

This Court should deny Steen's motion out of hand. First, the motion is untimely. Steen had ample opportunity to file such a motion before now—but without any attempt at justification or excuse, she chose not to do so.

Second, the motion is unmeritorious. The law is settled: In a mandate proceeding, a trial court may file a return to an order to show cause that an appellate court issues and directs to the trial court where, as here, the proceeding involves an issue directly impacting court operations and procedures or potentially imposing financial obligations affecting court operations directly.

II

STEEN'S MOTION IS UNTIMELY AND, IN ANY EVENT, UNMERITORIOUS

A. The Court Should Deny Steen's Motion As Untimely

Because Steen's motion is untimely, the Court may deny it for that reason alone. *See Gressett v. Superior Court*, 185 Cal.App.4th 114, 117 n.3 (2010) (denying petitioner's motion to strike return that

trial court filed as untimely even though docket shows motion to strike was filed 11 days after trial court filed return).

Steen has filed her motion more than *three years* after this Court ordered the Appellate Division to show cause, in a return ordered filed in October 2009, why the petition should not be granted on separation of powers grounds, and more than three years after the Appellate Division filed that return. Her motion also comes two months after the Court ordered the Appellate Division to show cause, in another return, why the petition should not be granted on due process and statute of limitations grounds. And the motion comes more than a month after the Appellate Division first obtained an extension to file that return, and about a month before that return is due. At no time, however, did Steen ever challenge this Court's power to order the Appellate Division to file the returns or the Appellate Division's duty to comply with that order. This laxity alone is sufficient to deny the motion. *See Gressett*, 185 Cal.App.4th at 117 n.3.

Steen argues that she has not been dilatory because "the appellate division has *now* indicated its intention to appear in this litigation as a party" Mot. at 1 (ital. added). Wrong. As this Court can see for itself, this Court *ordered* the Appellate Division to show cause and to file returns, and the Appellate Division complied (and is complying) with those orders. Moreover, the first order issued more than three years ago, so there are no changes in circumstances that justify Steen's tardiness.

Without offering, much less establishing, any justification for making her motion earlier, the Court should deny it out of hand.

B. The Court Should Deny Steen's Motion As Unmeritorious

If the Court proceeds to the merits, it should deny Steen's motion as lacking any merit.

It is true that, generally, a trial court may not, and should not, appear in any proceeding to defend one of its own orders. *Municipal Court v. Superior Court (Gonzalez)*, 5 Cal.4th 1126, 1129, 31-32 (1993) (“*Gonzalez*”); *De Lucca v. Price*, 146 Cal. 110, 113 (1905); *Ng v. Superior Court*, 52 Cal.App.4th 1010, 1016 (1997), *disapproved on another ground in Curle v. Superior Court*, 24 Cal.4th 1057, 1069 n.6 (2001); *Omaha Indemnity Co. v. Superior Court*, 209 Cal.App.3d 1266, 1273 (1989); *Municipal Court v. County of Placer*, 200 Cal.App.3d 1173, 1176-80 (1988); *Municipal Court v. Superior Court (Swenson)*, 202 Cal.App.3d 957, 960-64 (1988); *Municipal Court v. Superior Court (Sinclair)*, 199 Cal.App.3d 19, 25 (1988); 8 Bernard E. Witkin, *California Procedure* Extraordinary Writs § 166 (5th ed. 2008).

The “apparent premise” of this general rule “is that the court should not assume a partisan role.’ *Ng*, 52 Cal.App.4th at 1016. Thus, “ ‘if certiorari, prohibition or mandamus is sought against a court, the respondent judge, as in an appeal from a judgment, is a neutral party in the controversy between the plaintiff and defendant in the main action. The adverse party in that action is the real party in interest’ ” *Id.* (quoting 8 Witkin, *California Procedure*

Extraordinary Writs, § 166, at 789 (3d ed. 1985)). “Such neutrality is also demanded by the duty of impartiality imposed upon judges by the California Code of Judicial Ethics (see canon 3).” *Ng*, 54 Cal.App.4th at 1016.

However, “[t]he duty of impartiality and neutrality does not ... necessarily preclude a respondent court from contesting a petition for extraordinary writ under all circumstances.” *Id.* at 1017. Thus, it is settled that, in a mandate proceeding, in compliance with an order to show cause that an appellate court issues and directs to the trial court, the trial court may appear and submit a return. *See generally* Jon B. Eisenberg et al., *California Practice Guide: Civil Appeals and Writs Procedures on Writ Review* ¶ 15:142 (Westlaw 2012) (collecting cases); *see also Gonzalez*, 5 Cal. 4th at 1138-39 (conc. & dis. opn. of Kennard, J.) (where “significant effect of an issue is on a trial court's procedures rather than on the litigation in which the issue arises,” the court, as respondent, may oppose a petition for extraordinary relief).

Such a mandate proceeding includes one where the “issue involved directly impact[s] the operations and procedures of the court or potentially impose[s] financial obligations which would directly affect the court’s operations.” *Ng*, 52 Cal.App.4th at 1019; *accord Gressett*, 185 Cal.App.4th at 117 n.3; *Settlemyre v. Superior Court*, 105 Cal.App.4th 666, 669 (2003); *James G. v. Superior Court*, 80 Cal.App.4th 275, 280 (2000). For example, recently, in *Elkins v. Superior Court*, 41 Cal.4th 1337, 1350-51 (2007), a mandate proceeding, this Court issued an order to show cause directing the trial court to file a return as to why the Court should not invalidate a local

court rule and trial scheduling order that required a party in marital dissolution proceedings to present a case by written declarations.

This proceeding involves issues bearing on section 959.1(c)'s constitutionality under the separation-of-powers doctrine and due process provisions and its relation to the statute of limitations. The Legislature enacted section 959.1(c) to "permit the clerk of the court to file an electronic complaint for offenses of failure to appear, pay a fine, or comply with a court order" and thereby "increase court efficiency by streamlining the filing of pleadings." Resp. Return (Oct. 5, 2009), Att. A. If the Court were to declare the statute unconstitutional or to hold the statute is subject to more stringent statute-of-limitations requirements than other statutes, the filing of pleadings would become substantially more cumbersome and court efficiency would decrease—an adverse consequence, especially today, when court resources are stretched. *See California Courts, Limited Court Service Days*, available at <http://www.courts.ca.gov/12973.htm> (as of Nov. 19, 2012) ("Superior courts statewide continue to face significant financial challenges as a result of the current fiscal crisis, which the Legislature has recognized as one of the most serious and dire ever to affect the state."). Consequently, section 959.1(c)'s constitutionality and its relation to the statute of limitations directly impact court operations and procedures and the outcome here potentially imposes financial obligations that directly affect court operations.

Steen relies on *Gonzalez, De Lucca, Ng, Omaha Indemnity, County of Placer, Sinclair*, and *Witkin*, all of which are cited above.

Each of these authorities states or implies that, generally, a trial court may not or should not appear in any proceeding to defend one of its own orders. None, however, even suggests that a court should decline to comply with an order to show cause that an appellate court issues and directs the trial court to file a return. And none suggests that a court should not file a return where, as here, the proceeding involves an issue directly impacting court operations and procedures or potentially imposing financial obligations directly affecting court operations. Indeed, as noted, *Ng* recognizes that a trial court may file a return where the “issue involved directly impact[s] the operations and procedures of the court or potentially impose[s] financial obligations which would directly affect the court’s operations.” *Ng*, 52 Cal.App.4th at 1019.

Steen’s argument also ignores that, by *ordering* the Appellate Division to submit returns to its orders to show cause, this Court has evidently, and deliberately, made a determination that the Appellate Division *is* a proper party litigant, perhaps because the issue presented directly impacts its operations. In that regard, her motion is not really a challenge to the *Appellate Division’s* right (and, now, duty) to appear, but in effect, a challenge to *this Court’s* directives that *ordered* the Appellate Division to show cause and file returns. If Steen believes that that challenge has merit, she should take it to the only Court higher than this one (assuming certiorari jurisdiction lies) or, that failing, to the Legislature.

III
CONCLUSION

Because Steen's motion to exclude the Appellate Division as a party litigant is untimely and, in any event, unmeritorious, this Court should deny it.

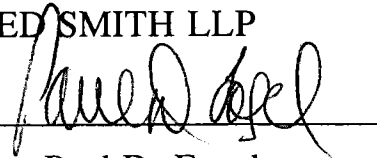
If this Court nevertheless is inclined to grant Steen's motion, it should consider the Appellate Division's two returns—the first already filed, the second about to be filed—as amicus curiae briefs. The Appellate Division is confident that its returns will prove “of assistance to this court” as it considers and decides this case. *Grant v. Superior Court*, 90 Cal.App.4th 518, 523 n.2 (2001); accord *In re Koehler*, 181 Cal.App.4th 1153, 1166 (2010).

DATED: November 26, 2012.

Respectfully submitted,

REED SMITH LLP

By



Paul D. Fogel

Attorneys for Respondent
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PROOF OF SERVICE

Jewelene Steen vs. Los Angeles Superior Court, Appellate Division (People of the State of California, Real Party in Interest),
Supreme Court No. S174773,
Los Angeles Appellate Division No. BR046020,
Los Angeles Superior Court No. 6200307

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On November 27, 2012, I served the following document(s) by the method indicated below:

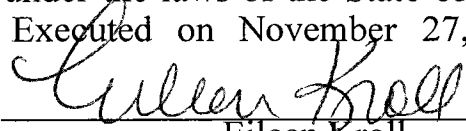
**RESPONDENT'S OPPOSITION TO MOTION TO EXCLUDE
APPELLATE DIVISION AS PARTY LITIGANT**

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
- by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 27, 2012, at San Francisco, California.



 Eileen Kroll