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**LAW OFFICES**
**LOS ANGELES COUNTY PUBLIC DEFENDER**
**Appellate Branch**
590 Hall of Records
320 West Temple Street
Los Angeles, California 90012
Telephone: (213) 974-3002

**Ronald L. Brown**
Public Defender

**John Hamilton Scott**
Deputy Public Defender

March 4, 2014

SUPREME COURT
FILED

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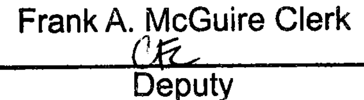
Frank A. McGuire Clerk



Deputy

Clerk
California Supreme Court
350 McAllister St.
San Francisco, CA 94102

Dear Sir:

Re: Steen v. Appellate Division
Case No. S174773 (2d Dist.No. B217263;
App.Div.No. BR046020; Trial Ct.No. 6200307)

Petitioner requests that this court receive and consider this letter which is presented to invite this court's attention to a recent appellate decision which is uniquely significant in this litigation.

This case involves the constitutionality of Penal Code section 959.1, subdivision (c)(1), which purports to give court clerks the power to file criminal charges involving failures to appear. Petitioner's challenge began in 2009 as an appeal heard in the Appellate Division of the Los Angeles County Superior Court, in which petitioner asserted that permitting a judicial functionary, rather than the authorized prosecutor, to file criminal charges violates both due process and the separation of powers doctrine. In an unpublished opinion, the Appellate Division rejected those arguments, asserting, inter alia, that the prosecutor's claimed ability to "nullify" a complaint satisfied petitioner's separation of powers concerns. (See Exh. "F," Mem.Judg., pp. 3-4.)

Thereafter, after this court's issuance of its order to show cause, the Appellate Division has appeared as an interested litigant in these proceedings (over petitioner's objection), continuing to advance the claim that permitting the judiciary to initiate criminal proceedings does not violate the separation of powers doctrine. (See Returns to Order to Show Cause filed October 5, 2009, and

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December 12, 2012.) However, it appears that in the intervening time period, the Appellate Division has changed its collective mind.

On January 24, 2014, the same Appellate Division of the Los Angeles County Superior Court issued its opinion, certified for publication, in the matter of People v. Simpson (2014) 223 Cal.App.4th Supp. 6. In that case the defendant was charged with illegally entering a HOV lane. (Veh. Code § 21655.8, subd. (a).) During the course of trial, evidence was presented demonstrating that the defendant also made an unsafe lane change. The court thereupon itself added that charge (Veh. Code § 21658, subd, (a)), and found the defendant guilty of both offenses.

The Appellate Division reversed the illegal lane change conviction, ruling that "permitting a court itself to amend a notice to appear or a complaint would be unconstitutional based upon a violation of separation of powers." (223 Cal.App.4th at p. 10; emphasis original.) The Appellate Division explained:

> "A court cannot authorize the institution of a criminal prosecution without the approval of the prosecutor. (People v. Municipal Court (Pellegrino) (1972) 27 Cal.App.3d 193, 204.) Thus, the trial court usurped the prosecutor's discretionary power to control the institution of criminal proceedings and violated the separation of powers by sua sponte adding a charge to the complaint." (Ibid.)

Remarkably, the Appellate Division's citation of Pellegino in support of its ruling is flatly contrary to the court's claim made in this court that Pellegino should not be read as limiting the initiation of criminal actions to the prosecutor, and was, in fact, "irrelevant" to the issue. (See Return, December 6, 2012, pp. 31-33.) Indeed, the Appellate Division claimed that Pellegrino was applicable only to the attempt of private parties to initiate criminal proceedings. (Id., at p. 34.) Petitioner welcomes the Appellate Division's apparent recognition that the arguments it has previously submitted to this court are without merit.

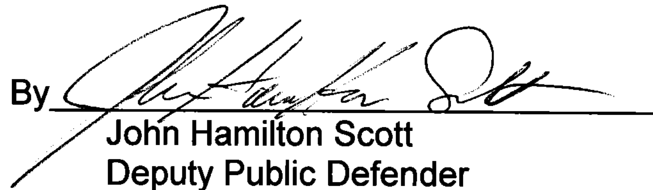
Petitioner notes that the Appellate Division has argued that the procedures authorized by Penal Code section 959.1 are permissible because traffic matters are "sufficiently different from more serious criminal offenses that the more

flexible, efficient procedures applied to them is warranted and justified." (Return, October 5, 2009, p. 11.) The Appellate Division has now recognized that the separation of powers doctrine prevents a judge from initiating a prosecution for an infraction, where the most flexibility and efficiency would be warranted. Petitioner must conclude that the Appellate Division would now agree that the same doctrine prevents the judiciary from initiating criminal proceedings which can (and did in this case) result in the imprisonment of the defendant.

Petitioner obviously welcomes the support for her position now to be found in the published ruling of the Appellate Division whose prior unpublished ruling is presently the subject of the instant review in this court. Petitioner assumes that, despite its previous arguments, the Appellate Division will not object when this court rules, in conformance with People v. Simpson, that the initiation of the misdemeanor proceeding against her by a court clerk was constitutionally invalid. A copy of that opinion is attached hereto for this court's convenience.

Respectfully submitted,

RONALD L. BROWN, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By 
John Hamilton Scott
Deputy Public Defender

Attorneys for Petitioner

Filed 1/24/14 (reposted same date to correct processing error)

**TO BE PUBLISHED IN THE OFFICIAL REPORTS**

This opinion has been certified for publication in the Official Reports. It is being sent to assist the Court of Appeal in deciding whether to order the case transferred to the court on the court's own motion under rules 8.1000-8.1018.

**CERTIFIED FOR PARTIAL PUBLICATION***

APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

| | |
|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA, | No. BR 050810 |
| Plaintiff and Respondent, | (Metropolitan Trial Court No. B717240) |
| v. | |
| ERICA SIMPSON, | |
| Defendant and Appellant. | **OPINION** |

APPEAL from a judgment of the Superior Court of Los Angeles County, Metropolitan Trial Court, Deborah Christian, Judge. Reversed.

Erica Simpson, in pro. per., for Defendant and Appellant.

Michael N. Feuer, City Attorney, Debbie Lew, Assistant City Attorney, John R. Winandy, Deputy City Attorney, for Plaintiff and Respondent.

* * *

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part III.B.

## *I. INTRODUCTION*

Appellant and defendant Erica Simpson appeals the judgment of conviction following a court trial for crossing double yellow lines into a high-occupancy vehicle (HOV) lane, and for making an unsafe lane change. (Veh. Code, §§ 21655.8, subd. (a), 21658, subd. (a), respectively.) Pursuant to Government Code section 68081, the parties were provided with an opportunity to submit supplemental briefs addressing the issue of whether the trial court violated the separation of powers doctrine or its statutory authority by amending the complaint sua sponte to add the charge of making an unsafe lane change during the trial.

As discussed below in the published portion of this opinion, we reverse the judgment of conviction for making an unsafe lane change. The court did not have authority on its own motion to amend the complaint to add the charge. In the unpublished portions of this opinion, we reject defendant's arguments that the judgment should be reversed with respect to her conviction for crossing double yellow lines into an HOV lane.

## *II. FACTUAL AND PROCEDURAL BACKGROUND*

On April 9, 2012, defendant was issued a citation for crossing double yellow lines into an HOV lane in violation of section 21655.8, subdivision (a). Defendant signed a promise to appear in court on or before June 14, 2012. Defendant requested and was provided a trial by written declaration. The ticketing officer submitted a declaration concerning the infraction. After being found guilty, defendant requested a trial de novo.

At the trial de novo on March 11, 2013, Los Angeles Police Department Officer Schoop testified that he observed defendant's vehicle traveling southbound on the 405 Freeway north of the Avalon exit. Defendant changed lanes in front of the officer into the HOV lane, crossing over a set of clearly visible double yellow lines which were in good repair. Defendant caused Schoop to brake suddenly in order to avoid a traffic collision.

Schoop testified that he originally wrote on the citation that the incident occurred "South of Avalon," but prior to defendant signing her promise to appear, he made a correction to the citation indicating that the violation occurred "North of Avalon." Defendant asked Schoop at trial why he wrote "south" in his declaration, and he responded that he "made a mistake." Defendant requested that the case be dismissed because her citation stated that the violation occurred south of Avalon, and she prepared her defense relying on the location specified in her citation. The court denied her request, pointing out that the court's copy of the citation provided that the location of the violation was north of Avalon. The court further stated that the correction on the original citation regarding the location must not have gone through the carbon paper onto defendant's copy of the citation.

The court told defendant that it was going to find her guilty, and asked Schoop whether defendant's lane change was unsafe. The officer responded, "Yes." The court then added the charge of making an unsafe lane change under Vehicle Code section 21658, subdivision (a), and found defendant guilty both of crossing double yellow lines into an HOV lane, and of making an unsafe lane change. The court imposed a fine, and defendant filed a timely notice of appeal.

## *III. DISCUSSION*

### *A. The Court's Amendment to Add a Charge*

An infraction is a criminal matter subject generally to the provisions applicable to misdemeanors, except for the right to a jury trial, the possibility of confinement as a punishment, and the right to court-appointed counsel if indigent. (Pen. Code, §§ 16, 19.6.) A written notice to appear filed with the trial court constitutes a complaint charging a person with an infraction. (Veh. Code, § 40513, subds. (a), (b).) A complaint may be amended at any stage of the proceedings, so long as "the amendment does not prejudice the substantial rights of the defendant [citations]." (*People v. Valles* (1961) 197 Cal.App.2d 362, 371.) "An amendment may be made even at the close of trial where no prejudice is shown. [Citations.]" (*People v. Witt* (1975) 53 Cal.App.3d 154, 165.)

Penal Code section 1009 only allows a court to "order or permit . . . the filing of an amended complaint," meaning that only a prosecutor may amend a complaint. In the present case, the court did not grant a motion to amend by the prosecution, but rather *itself* amended the complaint by adding to the notice to appear the unsafe lane change violation. As such, it exceeded the statutory authority given to it by Penal Code section 1009. Moreover, as explained below, permitting a court *itself* to amend a notice to appear or a complaint would be unconstitutional based on a violation of separation of powers.

Article III, section 3 of the California Constitution provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." "It is well settled that the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial 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."' [Citation.] 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. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 134.) A court cannot authorize the institution of a criminal prosecution without the approval of the prosecutor. (*People v. Municipal Court (Pellegrino)* (1972) 27 Cal.App.3d 193, 204.) Thus, the trial court usurped the prosecutor's discretionary power to control the institution of criminal proceedings and violated the separation of powers by sua sponte adding a charge to the complaint.

We reject the People's argument in their supplemental brief that defendant failed to preserve the issue by not objecting on this ground in the trial court. Based on the court's action of ordering the amendment and immediately thereafter finding defendant guilty, we find defendant did not have the opportunity to object, and, in any event, because the issue raised "involve[s] only questions of law based on undisputed facts" (*People v. Rosas* (2010) 191 Cal.App.4th 107, 115), we conclude that the issue is properly before us.

B. *Contentions Regarding Crossing Double Yellow Lines Conviction* [Not Certified For Publication]

Defendant argues that the court failed to consider the evidence that the original citation stated that the violation occurred north of Avalon, but that her citation stated it occurred south of Avalon. We review a trial court's ruling admitting or excluding evidence for abuse of discretion. (*People v. Cortes* (2011) 192 Cal.App.4th 873, 908.) Defendant failed to show that the court did not consider the evidence. The court noted that defendant's citation and the one filed with the court were different, but found that the error was a result of the failure of Schoop's correction to the citation to transfer through the carbon paper.

Defendant argues that Schoop violated section 40500, subdivision (d) by altering the citation filed with the court. Section 40500, subdivision (d) makes it a misdemeanor for any person to alter or modify a citation prior to it being filed in court. We reject the argument because the court believed Schoop's testimony that he corrected the citation prior to having defendant sign the promise to appear, and therefore he did not violate this statute.

Defendant maintains on appeal that she has video proof that Schoop did not correct the citation prior to giving it to her. However, "documents and facts that were not presented to the trial court and which are not part of the record on appeal, cannot be considered on appeal. [Citation.]" (*Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 882.)

Defendant further argues that the judgment should be reversed because Schoop made the correction in violation of requirements contained in the Los Angeles Police Department Manual

that corrections be made by drawing a line through the error, accompanied by the initials "VCC" ("Violator's copy corrected"), and the initials of the citing officer. Assuming arguendo that the Los Angeles Police Department's Manual so provides, and Schoop violated this requirement, we nevertheless reject defendant's argument because she cites no authority that a judgment should be reversed based on violation of a police manual. (Cal. Rules of Court, rule 8.928(a)(1)(A); *People v. Foote* (2001) 91 Cal.App.4th Supp. 7, 12-13.)

[The balance of the opinion is to be published.]

*IV. DISPOSITION*

The judgment of conviction for making an unsafe lane change is reversed. The judgment of conviction is affirmed regarding the conviction for crossing double yellow lines into an HOV lane.

**CERTIFIED FOR PARTIAL PUBLICATION**

Ricciardulli, J.

We concur.

Kumar, Acting P. J.

Keosian, J.

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 March 4, 2014, I served a copy of the within LETTER, STEEN v. APPELLATE DIVISION, on each of the persons named below by depositing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid in the United States Mail in the County of Los Angeles, California, addressed as follows:

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

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

CITY ATTORNEY
CRIMINAL APPELLATE DIVISION
500 CITY HALL EAST
200 NORTH MAIN STREET
LOS ANGELES, CA 90012

CLERK, APPELLATE DIVISION
LOS ANGELES SUPERIOR COURT
111 NORTH HILL STREET, RM. 607
LOS ANGELES, CA 90012

COUNTY COUNSEL
LOS ANGELES SUPERIOR COURT
ROOM 546
LOS ANGELES, CA 90012

PAUL D. FOGEL, ESQ.
REED SMITH, LLP
101 SECOND STREET, SUITE 1800
SAN FRANCISCO, CA 94105

I further declare that I served the above referred-to document by hand delivering a copy thereof addressed to:

JACKIE LACEY, DISTRICT ATTORNEY
APPELLATE DIVISION
320 WEST TEMPLE STREET, SUITE 540
LOS ANGELES, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 4, 2014, at Los Angeles, California.

EDNA R. SANTOS