

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT

REHAN NAZIER,

Petitioner

v.

THE SUPERIOR COURT OF LOS ANGELES  
COUNTY

Respondent.

B310806

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

(Super. Ct. No. VA151320

(Lee W. Tsao, Judge)

Real Party in Interest.

RETURN AND RESPONSE

RESPONDENT SUPERIOR COURT OF LOS ANGELES COUNTY

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**1. Summary: The trial court properly denied motions to dismiss enhancements and to amend the information to remove enhancements because they were based upon general policy and not facts pertaining to the particular defendant or crimes charged.**

The District Attorney of the County of Los Angeles has adopted a Special Directive 20-08 (Exhibit B to the Petition) which directs prosecutors to no longer pursue certain enhancement allegations, and in pending cases, to amend the charging document to dismiss or withdraw any such enhancements. By its terms, the directive sets forth the policy of the District Attorney's Office that "the current statutory ranges for criminal offenses alone, without enhancements, are sufficient to both hold people accountable and also to protect public safety." The Directive does not discuss the individual circumstances of any defendant or the facts of the crimes with which they are charged.

Over two hearings, one on December 11, 2020 (Exhibit C, 12/11/20 Reporter's Transcript), and one on December 18, 2020 (Exhibit D, 12/18/21 Reporter's Transcript), the trial court denied the prosecutor's

motion pursuant to Penal Code 1385 to dismiss enhancements in the present case; and the motion to file an amended information in the pending case deleting the enhancements.

The Court denied the Penal Code 1385 Motion because it did not find that dismissal of the enhancements was in furtherance of justice, as required by applicable case law. The Court noted that the exclusive basis presented by the People was the Special Directive, and that accordingly, the Court would need to adopt the reasoning of the Special Directive in order to grant the motion on that basis. Because the Court found that neither the Special Directive nor the People discussed the individual circumstances of the offense or the background or character of Mr. Nazir, the People had failed to make the required showing. The Court, as it was required to do, considered the individual circumstances of the offense and the background and character of the defendant as presented in the hearing, the preliminary hearing, the Information, and the Probation Report. Based upon its review of all of these materials, the Court determined that to dismiss the enhancements would not be in furtherance

of justice. See Exhibit D, 12/18/20 Reporter's Transcript, page 6:5-18, page 17:26-29 and page 18:1-24.

The Court determined that it would be improper to proceed on an Amended Information that failed to allege the enhancements that were the basis of the Penal Code 1385 motion that had just been denied, particularly in light of the fact that the clear remedy if the People were dissatisfied with the Court's denial of the Penal Code 1385 motion was to dismiss and refile or to appeal the Court's denial. See Exhibit D, 12/18/20 Reporter's Transcript, page 19:13-28, Page 20:1-4, Page 20:22-24.

Moreover, as set forth In Penal Code 1009, where, as here, the defendant has entered a plea, the information may only be amended with leave of court to correct any defect or insufficiency. There was no defect or insufficiency claimed here. The prosecutor has no independent right to amend an information or indictment or file an amended information, indictment, or complaint. *People v. Volladoli* (1996)13 Cal 4<sup>th</sup> 590, 606, fn. 3; *People v. Lettice* (2013) 221 Cal.App.4<sup>th</sup> 139, 149.



**2. Respondent Court has only limited standing to respond to the Order to Show Cause.**

Counsel for Petitioner, defendant in the underlying proceeding, filed the present Petition contending that the trial court's orders denying the prosecution's motion under Penal Code 1385 are contrary to law and are an abuse of discretion.<sup>1</sup> Petitioner contends that the prosecutor has the power to determine what charges are filed and prosecuted, in either a new or pending case, and that permitting the enhancements to be prosecuted in pending cases such as this one, while such enhancements are not being charged in new cases violates petitioner's right to equal protection of the law.

The Court of Appeal initially denied the petition. On May 26, 2021, the California Supreme Court granted review of that determination, and transferred the matter to the Court of Appeal, Second Appellate District, Division Seven, with directions to vacate its order denying mandate and to

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<sup>1</sup> There may be an issue as to petitioner's standing to bring this petition as Penal Code 1385 does not provide for a defendant to move for such a dismissal. *People v. Andrade* (1978) 86 Cal.App.3d 963, 973.

issue an order directing the Respondent Superior Court to show cause why the relief sought in the petition should not be granted. In accordance with those directions the Court of Appeal by order filed June 2, 2021, ordered the Superior Court of the State of California for the County of Los Angeles to show cause why it should not be compelled to vacate its order of December 18, 2020 and issue a new and different order granting the People's motion to dismiss and withdraw allegations of sentencing enhancements pursuant to Los Angeles County District Attorney George Gascon's Special Directive 20.08 or granting the People leave to file an amended information.

If an appellate court is to conduct a hearing on the petition it does so by means of an order to show cause or an alternative writ. Code of Civil Procedure 1087. When the order to show cause is directed to a ministerial officer, corporation or association, the respondent is the adverse party In the fullest sense. 8 Witkin (4<sup>th</sup> ed.), California Procedure, Extraordinary Writs, section 163, p. 963. The issuance of an order to show cause can cause confusion when the trial court is the respondent. When the respondent is a trial court, there are only limited circumstances when it

has standing to respond. As stated by the California Supreme Court in *Steen v. Appellate Division of Superior Court* (2014) 59 Cal. 4th 1045, fn. 1 at 1050:

“Courts have no beneficial interest in the outcome of the cases they decide and are not entitled to litigate the correctness of their rulings in a reviewing court. (See *Municipal Court v. Superior Court (Gonzalez)* (1993) 5 Cal.4th 1126, 1129 [22 Cal. Rptr. 2d 504, 857 P.2d 325]; *Matter of De Lucca* (1905) 146 Cal. 110, 113 [79 P. 853].) We have, however, occasionally permitted the respondent courts in writ proceedings to address the legality of their challenged procedures. (E.g., *People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, 1170 [17 Cal. Rptr. 2d 815, 847 P.2d 1031] [considering whether respondent court's master calendar department operated as such for purposes of Code Civ. Proc., § 170.6]; *Hernandez v. Municipal Court* (1989) 49 Cal.3d 713, 715–716 [263 Cal. Rptr. 513, 781 P.2d 547] [considering whether respondent court's practice of transferring criminal cases among branch courthouses was

consistent with the vicinage requirement of the 6th Amend. of the U.S. Const.]”

As indicated in *Steen*, notwithstanding this general rule, there are rare cases and circumstances where the trial court may have standing, or the appellate court has issued an order or provided some other communication unequivocally indicating that a response from trial court would be appreciated or expected. *See, e.g., James G v. Superior Court* (2000) 80 Cal.App.4th 275.

Both the Supreme Court and the Court of Appeal have issued orders indicating that a response from the Superior Court is expected in this case. Accordingly, respondent Superior Court files this response to explain its rulings to assist the appellate courts, as directed. However, it does not do so as an advocate. The respondent here is the Superior Court not the trial judge. *See* C.E.B., *Civil Writ Practice* 3d, section 7.8; 8 Witkin (4<sup>th</sup> ed), *California Procedure, Extraordinary Writs*, section 164, p. 964. The Los Angeles Superior Court has approximately 600 judicial officers serving in some thirty-eight locations spread out over the approximately 4,000 square miles of the County of Los Angeles. Each individual judge of the

Court is an independent constitutional officer with the authority and discretion to independently rule as they deem fit.

At various points during the hearings on December 11 and December 18, Petitioner's counsel referred to a "systematic interpretation" by the Los Angeles Superior Court (see, e.g., 12.11.120 Page 3:23-28, Page 4:1-7, 12.18.20Page 7:20-24). Petitioner's counsel also made reference to news reports regarding judicial rulings on Penal Code Section 1385 motions. Petitioner's counsel also submitted a declaration characterizing other alleged rulings by the Court on the same day that Petitioner's case was heard. Petitioner has failed, however, to point to any court wide procedure or policy concerning the consideration of Penal Code Section 1385 motions, and, in fact, his Equal Protection argument seems to suggest just the opposite.

"[E]very rule, regulation, order, policy, form, or standard of general application adopted by a court to govern practice or procedure in that court or by a judge of the court to govern practice or procedure in that judge's courtroom" is a "Local Rule" which must be adopted and published according to specific procedures. California Rules of Court, rule 10.613.

The Superior Court has not adopted court wide procedures or policies concerning the issues at hand, and resolution of the issues are unlikely to affect the Court's budget. Accordingly, this response will be generally limited to setting forth the trial court's decision and the authority supporting it.

**3. Prosecutors have discretion to determine whom to charge with crimes and what crimes to charge in new cases.**

Prosecutors have discretion to determine whom to charge with crimes and what crimes to charge. This discretion arises from the considerations necessary for the effective and efficient administration of law enforcement. It is not subject to supervision by the judicial branch. California Constitution, Article III, section 3 (Persons charged with the exercise of one power may not exercise either of the others"); Government Code 26501; *People v. Birks* (1998) 19 Cal.4<sup>th</sup> 109, 134.

Inherent in the prosecutor's charging discretion is his or her power not to bring charges. *People v. Wallace* (1985) 169 Cal.app.3d 406, 409. There is no appellate review of a decision to not prosecute. Courts are generally powerless to compel a prosecutor to proceed in a case he or she

believes does not warrant prosecution. Courts must avoid interfering with the prosecutor's charging discretion. *People v. Cortes* (1999) 71 Cal.App.4<sup>th</sup> 62, 79; *People v. Solis* (2015) 232 Cal.App.4<sup>th</sup> 1108, 1122.

Consistent with this authority, the trial court indicated the prosecutor was free to dismiss the present case and refile it with whatever charges he or she deemed appropriate. Exhibit D, 1/18/20 Reporter's Transcript, page 19, line 26 to page 20, line 4. However, as discussed below, in pending cases which the prosecutor intends to prosecute, this discretion is subject to court supervision and must be justified by good cause and substantial justification based upon case-by-case facts relating to the defendant and the crimes charged.

**4. By contrast, the power to dispose of charges that have been filed is a judicial power.**

The power to dispose of charges that have been filed is a judicial power. Sentencing decisions are properly assigned to the judicial branch. Within statutory limits, a court has broad discretion for sentencing decisions, including whether to grant probation (California Rules of Court, rule 4.414); selection of the term of imprisonment (Penal Code 1170(b);

California Rules of Court, rule 4420(b)); whether to impose concurrent or consecutive terms for multiple offenses (Penal Code 669; California Rules of Court, rule 4.425); whether to stay punishment for a count (Penal Code 654); whether to reduce a felony to a misdemeanor (Penal Code 17(b)); and whether to dismiss offenses or enhancements in the furtherance of justice (Penal Code 1135); *People v. Clancy* (2013) 56 Cal.4<sup>th</sup> 562, 579-580.

As stated by our Supreme Court in *Manduley v. Superior Court* (2002) 27 Cal.4<sup>th</sup> 537, 553: [T]he separation of powers doctrine prohibits the legislative branch from granting prosecutors the authority, *after* charges have been filed, to control the legislatively specified sentencing choices available to the court.” [Emphasis added.] A prosecutor cannot dismiss a charge and proceed with the prosecution without leave of court. *Owen v. Superior Court* (1976) 54 Cal.App.3d 928, 834

**5. A Penal Code 1385 Dismissal must be in the furtherance of justice based upon case-by-case facts relating to the defendant and the crimes charged.**

Penal Code 1385(a) provides a court with the discretion to dismiss an action “in furtherance of justice.” This discretion to dismiss includes the



power to strike or dismiss sentencing enhancement allegations. *In re Varnell* (2004) 30 Cal.4<sup>th</sup> 1132, 1137. Section 1385(c)(1) provides for striking the additional punishment for an enhancement that a court may otherwise dismiss or strike under subdivision (a). Penal Code 1386 provides that “neither the Attorney General nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in Section 1385.”

The power to initiate a dismissal under section 1385 is limited to the court and to the prosecutor. Section 1385 does not provide for a defendant to move for dismissal. *People v. Andrade* (1978) 86 Cal.App.3d 963, 973 (*Andrade*). The dismissal must be “in furtherance of justice” and must consider “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit.” *People v. Williams* (1998) 17 Cal.4<sup>th</sup> 148, 161. There must be considerations of the defendant’s individual circumstances. *People v. Dent* (1995) 38 Cal.App.4<sup>th</sup> 1726, 1731.

When determining if a dismissal furthers the interests of justice, the court must also consider the interests of society, as well as the defendant's constitutional rights. *People v. Orin* (1975) 13 Cal.3d 937, 945. Society has an interest in the fair prosecution of properly alleged crimes and enhancements. Generally, if courts terminated prosecutions of crimes or enhancements under section 1385 without adequate reason, "it would frustrate the orderly and effective operation of our criminal procedure as envisioned by the Legislature." *Id.*, at p. 947.

The burden is on the party seeking dismissal to offer evidence in support of a request that the court exercise its discretion to dismiss in furtherance of justice pursuant to section 1385. *People v. Leel* (2008) 161 Cal.App.4<sup>th</sup> 124, 129. Here no facts relating to the defendant or to the charges and their circumstances were offered in support of the motion. The only offer was the Special Directive based on general policy views and not upon the individual circumstances of the defendant or the facts of the crimes with which he is charged. The court found that was not in furtherance of justice.

**6. No evidence of a violation of Equal Protection was presented to the Court.**

Although counsel contends that the action of the prosecution not to charge enhancements in future cases violates the constitutional right of the defendant in this case to Equal Protection, no facts were presented as to any other defendant or the circumstances of the charges against such defendant that would support a finding of denial of equal protection in comparable circumstances. Barring a showing of different treatment based upon similar facts and circumstances there can be no finding of a violation of Equal Protection, and the trial court herein made no findings concerning those rights.

As previously discussed, counsel has not established, and the Los Angeles Superior Court has not adopted systemwide interpretations or procedures for handling the issues presented.

**7. The Petition should be denied.**

Respectfully Submitted,



Frederick R. Bennett<sup>2</sup>

**CERTIFICATION OF WORD COUNT**

Pursuant to California Rules of Court, Rule 8.204(c), I, Frederick R. Bennett, certify that, according to my word processing program, Microsoft Word 2016, there are 3,178 words in this Petition for Writ of Mandamus filed on behalf of respondent Los Angeles Superior Court.



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Frederick R. Bennett

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<sup>2</sup> As this Return is filed by a state/county agency, it need not be verified. Code of Civil Procedure 446(a). Factual allegations must be rebutted by replication or proof. *Elliott v. Contractors State License Bd.* (1990) 224 Cal.App.3d 1048, 1054.

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