CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

July 29, 2020

Please respond to:
JOHN T. PHILIPSBORN
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507 Polk Street, Suite 350
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The Honorable Jorge E. Navarrete
Clerk, California Supreme Court
Supreme Court of California
455 Golden Gate Ave., Ground Floor
San Francisco, CA 94102

Re: *People v. Cotsirilos*, S263461 (Court of Appeal Case No. D076870, Fourth Appellate District, Division 1; San Diego Superior Court No. 18T125881C)

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY LULA SOPHIA GONG COTSIRILOS, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

Dear Mr. Navarrete:

This letter is respectfully submitted by California Attorneys for Criminal Justice (hereafter "CACJ") pursuant to the California Rules of Court, Rule 8.500(g), in support of the Petition for Review filed by Lula Sophia Gong Cotsirilos (hereafter referred to as "Petitioner") in the above-entitled case.

Identification of *Amicus Curiae*

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California, and other applicable law," and the improvement of "the quality of the administration of criminal law." (Article IV,

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CACJ By Laws.) CACJ's membership consists of approximately 1,300 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 45 years, CACJ has appeared before this Court as an *amicus curiae* on matters of importance to the administration of justice and to its membership.[1]

Interest of CACJ in this Matter

Petitioner Cotsirilos argues that this matter raises fundamental questions about the protection of the rights of persons whose cases are the most frequently presented to California's Superior Courts – namely, persons charged with infractions. Petitioner refers to the Judicial Council's *2019 Court Statistics Report: Statewide Caseload Trends* to point out that between two-thirds and three-quarters of all 'criminal filings' have in fact been infractions, at least according to the statistics capturing fiscal years 2009 through 2018. *Id.*, at 97 [referencing *2019 Court Statistics Report: Statewide Caseload Trends* available at www.courts.ca.gov/documents/2019-court-statistics-report].

It stands to reason, then, that the members of CACJ who practice law either as public defenders or in other sorts of offices that provide legal representation to indigents in the Superior Court, or who are in private practice, will at times be responsible for representing individuals who are charged with infractions in the Superior Courts throughout California. In *People v. Carlucci* (1979) 23 Cal.3d 249, 257, this Court evidenced its awareness that infractions of various kinds can have serious consequences for the persons who are accused and convicted of them. Thus, notwithstanding the Court's concern to avoid "procedural intricacies" in such cases, it makes sense that the accuseds who have sought legal representation

[1]The undersigned certify by their signatures and as officers of this Court that no compensation has been paid by any of the parties to this litigation, or by any interested party, other than by CACJ and/or by the undersigned, for any time spent in the research or production of this brief, or for any costs associated with it.

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to address such charges should expect fair and orderly procedures when they appear in the Superior Court. *Id.*, at 257.

Given CACJ's stated purposes, including the defense of the rights of persons as guaranteed under the United States and California Constitutions, as well as the preservation of due process and equal protection of law "...for the benefit of all persons," CACJ respectfully urges the Court to find that it has a legitimate interest in the matters raised by Petitioner in this case.[2] CACJ is concerned that if allowed to stand as currently published, the decision of the Court of Appeal undermines important constitutional rights and encourages Superior Courts to become a litigator when a motion to suppress evidence is filed in an infraction case, which undermines the role of a judicial officer as a neutral decision maker. The Court of Appeal is also advocating for changes in procedural law that should be left to the Legislature.

ARGUMENT AND AUTHORITIES

CACJ joins and supports Petitioner Cotsirilos in her arguments in support of review beginning at page 12 of her Petition. First, the Court should grant review "to articulate fair and unbiased procedures for litigating motions to suppress in infraction cases." (Petition, at page 12.) Second, assuming, *arguendo*, that the Court of Appeal has announced a valid new rule of procedure, that rule is not properly applied to Petitioner's case. Third, the Court should grant review because the record below supports the view that the Judicial Officer soundly exercised a permissible judicial function in granting the motion to suppress. In sum, the Court of Appeal's ruling does not persuasively provide a basis for vacating the referee's dismissal. CACJ addresses some but not all of these points.

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[2] References are to CACJ's Bylaws, Article IV.

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I. The Court of Appeal Fails to Support Its Reasoning for Imposing On A Judicial Officer The Burden Of Presenting the Testimony Where A Motion to Suppress Evidence Has Been Filed

In its ruling, *People v. Cotsirilos* (2020) 50 Cal.App.5th 1023 [citation provided for convenience of the Court and parties], the Court of Appeal started its analysis focused on a question that was not actually presented to it in this case: "The question before us is whether a superior court must in every infraction case grant a motion to suppress when the prosecution does not respond in writing or appear at the suppression hearing." *Id.*, at 1020. Not so. And the analysis that followed suffers as a result.

The question framed here, as even the Court of Appeal recognized in an elaboration, is really more nuanced than that. It includes inquiry into whether Judicial Officers are under an obligation to question law enforcement officers summoned to appear as witnesses in a motion to suppress hearing in an infraction case where no explanation or request for that course of action has been made. Viewed in context of the record here, which included the Local Rules of the Superior Court in San Diego County, another nuance in the question framed by this case was whether given the prosecution's failure to notify the Court or the defense of its opposition to a filed motion to suppress evidence, it was error for a Judicial Officer to grant a motion to suppress evidence where, according to Local Rules, a failure to file a responsive brief to a criminal motion is a factor that the Court can consider as an admission that the motion is meritorious, and the Superior Court had no manifestation of the local prosecutor's interest in the matter on the date and at the time of the hearing.

In addition, in Petitioner's case, the Judicial Officer was presiding over a calendared motion hearing during which the prosecution failed to make known its intentions, notwithstanding having summoned and then ignored potential witnesses. Not surprisingly, faced with the presence of counsel for the defendants

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and a failure of a manifestation of the prosecution's interest in the matter, the Court exercised its authority in a manner authorized by law.

To justify its ruling, the Fourth District relied in part on its prior ruling in *People v. Smith* (2002) 95 Cal.App.4th 283. In *Smith*, the Court of Appeal was also reviewing a San Diego Superior Court ruling in a case in which a motion to suppress evidence had been filed. The accused pled guilty to a count of possessing methamphetamine for sale, claiming an error by the trial court in denying a motion to suppress evidence. *People v. Smith*, 95 Cal.App.4th 283, at 288-89. The Superior Court found it problematic that Smith had failed to reply to the prosecution's opposition to his motion to suppress, so he re-filed a motion to suppress and the prosecution re-filed its opposition. On this second occasion, Smith filed a reply. *Id.*, at 289-90. The Court of Appeal explored at great length the interrelationship between a motion to suppress and the requirements of a then-existent San Diego Superior Court Rules of Court. The Court of Appeal concluded that the Local Rules should not have been interpreted in such a way as to deprive the accused of the right to fully litigate the validity of the search of his car's trunk or the closed containers in it, nor did the Local Rule relieve the prosecution of its burden to establish the full justification for the search. *Id.*, at 303-04.

In *Cotsirilos*, having acknowledged the existence of this precedent that clearly did not deal with an utter failure by the prosecution to respond to a motion to suppress or to notify the Superior Court of its intent to oppose a motion that it knew was filed and being litigated by counsel, the Court of Appeal then finds not that the judicial officer erred given the procedural history and record of the hearing in question but rather that the Superior Court and then the Appellate Division of the Superior Court had in effect acted as though there is a mandate to grant a motion to suppress in an infraction case that is neither opposed in writing nor in person. That is not what either of the lower courts found. By contrast, *Smith* involved a situation in which both parties to a motion to suppress in a Superior Court had manifested their interests in the outcome of the case, and the result reached by the Court of Appeal in *Smith* was to recognize that where both

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parties had actively litigated a motion to suppress evidence, the Superior Court cannot abridge the rights of the parties through erroneous reference to the Local Rules.

The Fourth District's foundation for its analysis here, first, was a reference to this Court's ruling in *People v. Carlucci* (1979) 23 Cal.3d 249, a case that was decided by this Court to address a significantly different issue than the one at hand here. *Carlucci* involved a trial held in the then-existent Municipal Court in the County of Los Angeles – a court in which, for the prosecution of a speeding ticket (the issue at hand in *Carlucci*) a prosecuting attorney "...would normally have been present...." *Id.*, at 252. Because the assigned prosecutor was involved in the prosecution of "...a more serious offense elsewhere," the judge presiding over the proceedings permitted a Deputy Sheriff to give a "...narrative description of how he had paced [the defendant's] car and cited him for driving at an excessive speed." *Id.*, at 252.

A settled statement was prepared to provide a full record in *Carlucci* so as to permit the an appeal. This Court explained that under the circumstances, "...the absence of a prosecuting attorney at the trial of an infraction offense does not result in a per se deprivation of a defendant's right to due process and a fair trial." *Id.*, at 258. The Court found that the record in *Carlucci* supported the view that the Judge in the case demonstrated conduct "...consistent with what should be expected of any reasonable, conscientious judge in a similar situation." *Id.*, at 259. The Court in *Carlucci* rested some of its ruling on the authority vested in courts by Evidence Code section 775, that permits a court on its own motion or on the motion of any party to call witnesses and interrogate them. *Id.*, at 255.

But *Carlucci* involved a trial that a prosecutor was due to attend but provided an excuse for missing, in which the trial court allowed the citing officer to testify. The Municipal Court was not litigating a specific motion or seeking to provide justification for a warrantless search. Nor was it responding to a motion at which defense counsel appeared after having duly noticed the motion. Finally, nothing in *Carlucci* indicates that the Municipal Court was left to wonder at the

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prosecution's interest in the issues presented. The prosecutor had apparently explained the reason that he would be absent from the proceeding.

Having reviewed the analysis in *Carlucci*, the *Cotsirilos* Court of Appeal notes that there is "...no constitutional or statutory impediment" to the court calling or examining prosecution witnesses at an infraction trial if no prosecutor is present. 50 Cal. App. 5th at 1032. The *Cotsirilos* court, however, failed to reiterate what this Court had pointed out in *Carlucci, supra*. First, the fact that no prosecuting lawyer is present for a traffic violation trial does not deprive the accused of procedural rights, including the right to a full opportunity for cross-examination, nor does it permit a court to avoid acting "...in a judicious, independent, detached, and neutral manner." *Id.*, at 258. The defendant in *Carlucci* was not appearing through counsel, as was the case here, and he had not filed a pretrial challenge to the admissibility of the evidence against him – an issue requiring legal argument.

In addition, in *Carlucci*, this Court explained that in permitting courts to question witnesses in infraction cases, "...we caution that the trial court must not undertake the role of either prosecutor or defense counsel." *Id.*, at 258. In its ruling, the *Cotsirilos* court pays short attention to the issue of the judicial officer as a neutral. Canon 1 of the California Code of Judicial Ethics promotes the independence of the judiciary. The Court of Appeal endorsed the view that a rule change allowing judicial officers to question law enforcement officers under subpoena for a motion to suppress should be considered, clearly acknowledging it was encouraging the 'adoption' of a new procedure. *Cotsirilos*, 60 Cal.App.5th, at 1033. Apparently overcome by an interest in having Judges take over the prosecutorial function where motions to suppress have been noticed in infraction cases, the Court of Appeal neglected to consider how the public would necessarily view the Judicial Officer whose new function now included presenting the response to a motion brought by the defense. The extent of the Court of Appeal's plan in this regard is to explain that it would not have the Judicial Officer 'fill in the blanks' for the testifying officer. *Id.*, at 1033. It is hard to see how this new

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doctrine would be enforced or how it would promote confidence in the impartiality of the court.

The *Cotsirilos* court then reads into a decision of another one of the Fourth District's Divisions, *People ex rel. Kottmeier v. Municipal Court* (1990) 220 Cal.App.3d 602, far more than is actually supported by the ruling. *Kottmeier* was decided in the aftermath of *Carlucci, supra*, 23 Cal.3d 249, and was a case in which the District Attorney for San Bernardino County sought writ relief from a court order mandating the presence of prosecutors at the trials of traffic infractions as a blanket proposition. *Id.*, at 605-06. The *Kottmeier* court concluded that the trial court erred, in part because the Government Code gave the local District Attorney the latitude to not appear on traffic matters. The *Kottmeier* case, however, did not address the specific factual setting at issue here. Nor did it assess a specific Judge's ruling consistent with the inherent powers to control and manage proceedings before the Court provided in Code of Civil Procedure section 128, and acknowledged in *Kottmeier*, *supra*, at 611-12 should be viewed as improper–which is the Court of Appeal's mandated outcome here. Indeed, *Kottmeier* did not decide whether it is permissible for a Superior Court to decide, in an infraction case, that a non-appearance by a prosecutor combined with a failure to respond to a written motion, and a failure to advise the Court of prosecutorial intent in a case in which potential witnesses had been subpoenaed all add up to circumstances in which the Superior Court could appropriately grant a motion to suppress evidence.

For unexplained reasons, the Fourth District reads into the combination of *Carlucci, supra*, and *Kottmeier, supra*, the conclusion that a Judicial Officer should take the reins where the defense has noticed a cognizable motion to suppress in an infraction case, and must assume that the prosecutor in the jurisdiction meant for the Judicial Officer to serve as a surrogate prosecutor and present evidence to satisfy the prosecution's burden and overcome the defense motion to suppress. If that is not the point here, why suggest a rule change that clarifies the Judicial Officer's obligations? *Cotsirilos*, 50 Cal.App.5th, at 1033.

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The Court of Appeal confounds the task of Judicial Officers who sit daily in traffic and infraction courts, and permit peace officers – at the time scheduled for a trial (assuming no Deputy District Attorney or certified law student is assigned to the matter) – to recite the facts underlying a citation issued by the officer, with a situation in which the accused has responded to an infraction by having counsel file a motion to suppress evidence that the Judicial Officer is under no directive or mandate to present evidence on or to argue on behalf of the prosecutor.

More than one court has pointed out that there is no obligation placed on a Judge to take over the duties of a prosecutor or to take over the prosecution of a case. *See, People v. Clark* (1992) 3 Cal.4th 41, 143, *cited with approval in People v. Gomez* (2018) 6 Cal.5th 243, 292-93. This Court pointed out in *People v. Hawkins* (1995) 10 Cal.4th 920, that while a Judge can seek to clarify testimony and allow a witness his 'right of explanation' under Evidence Code section 775, the role is "...one of clarification rather than advocacy...." *Id.*, at 939. The Court of Appeal's ruling endorses the view that a Superior Court Judge should feel free to litigate the prosecution's response to a motion. That is advocacy, not clarification. And these rulings explain why the Court of Appeal here found it necessary to acknowledge that judicial concerns about the propriety of stepping in to question witnesses in a motion to suppress hearing would be "resolved by adopting the same procedures applicable to infraction trials." *Id.*, at 1033.

II. The Court of Appeal's Advocacy for the Adoption of Procedures Permitting Judicial Officers to Call and Question Law Enforcement Officers At A Suppression Hearing Is Both Clear Evidence of the Court's Recognition That No Such Rule Exists And Tacit Admission That There Was No Such Obligation Imposed On The Judicial Officer Here

The Court of Appeal's ruling in this case should not be allowed to stand as written, not only for the reasons stated above, which bear on the public perception about and actual integrity of judicial proceedings, but also because the Court of Appeal's ruling discusses a retrospective 'fix' for a problematic situation. The

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Court of Appeal's view of the need for a change in procedural law is no reason for having over-ruled the Appellate Division in this case.

If this Court allows the ruling in *Cotsirilos*, 50 Cal.App.5th 1023, to stand, this Court will have endorsed an unfounded ruling–unfounded as demonstrated by the Court of Appeal's call for a change in procedures for the litigation of motions to suppress in infraction cases. The Court of Appeal neglects the fragility of its analysis in favor of usurping the prerogative of the Legislature or of the judicial rule making bodies.

On one hand, the *Cotsirilos* Court of Appeal acknowledges that there are unanswered questions posed by this case, including by what this Court meant to convey when it discussed the differences between the "procedural intricacies" that characterize certain classes of criminal case litigations as compared with those involving infractions. *People v. Carlucci, supra*, 23 Cal.3d, at 257.

The *Cotsirilos* court tries to walk up an analytical ladder that begins with its reliance on *Carlucci* for the proposition that: "There is no constitutional for statutory impediment to the court calling and examining prosecution witnesses at an infraction trial in the prosecuting attorney's absence. [Citations omitted.]" *Cotsirilos*, 50 Cal.App.5th, at 1032. Conceding, next, that a court "cannot be forced to make the prosecution's case for it and must indeed proceed with utmost caution to avoid advocacy or any appearance of bias in questioning witnesses," the *Cotsirilos* court then agrees that a Judicial Officer "retains authority" to request a prosecutor's participation in a hearing but notes that the Officer cannot dismiss or acquit an ordinary infraction based only on the prosecutor's nonappearance. *Ibid.* That, of course, is not the only thing that happened in this case.

This analysis latter fails to consider the extent to which a court – and traffic and/or infraction courts are usually busy courts – can control the docket before it, under Code of Civil Procedure section 128, or make decisions that penalize the prosecution for failing to indicate any interest or involvement in a scheduled, noticed, motion hearing date. Moreover, having tried to make its case, the Court

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of Appeal was hard pressed to disregard the view that "...a trial judge should not be asked to 'ferret out' the justification for a search." *Cotsirilos*, at 1033.

The solution was not to point to existing law to support the reversal in this case but rather to lament the lack of a specific, instructive rule and then to observe that the concerns that had been expressed by the Appellate Division in this case would be "...resolved by adopting the same procedures applicable to infraction trials." *Id.*, at 1033. In other words, there is the need for a supplemental layer of regulation, but nonetheless, the lower courts should have seen that recommendation coming. The recommendation, of course, fails to address in substance the concerns expressed by the San Diego Superior Court Appellate Division that could see the problems looking. The procedure advocated does not simply call on the Judicial Officer to ask the law enforcement witness if he/she issued the citation and had a memory of events. Addressing a warrantless search is likely to entail questioning to make out a *prima facie* case of probably cause, or to justify the legality of the procedures used during the detention, arrest (if there was one), or search (if there was one), and/or post-arrest/booking search (if there was one).

The Court of Appeal fails to acknowledge in substance that the cautionary note sounded by the Appellate Division was aimed at avoiding the blurring of lines between Judicial Officer and advocate, where a judge is asked to address search issues during a proceeding involving a defense lawyer who is there to argue a motion to suppress.

Query whether attempts to change the rules, and then to apply them retrospectively to Petitioner might not present constitutional problems of the type this Court discussed in *People v. Smith* (1983) 34 Cal.3d 251, 259-62, in which this Court found that the combination of changes in substance and procedures in California law brought about by Proposition 8 of the 1982 ballot could present 'difficult questions,' to borrow the Court's phrase, under the *ex post facto* clause.

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While chiding the lower courts for their approach to this case, what clearly has happened here is that the Court of Appeal, having identified what it considered to be a need for a change of procedures to address pretrial motions in infraction case has aimed itself at law reform rather than an appropriate decision given the record here. The Court of Appeal has decided against a rational decision from the Appellate Division of the Superior Court that sustained a decision by a Judicial Officer that can be supported by existing law. And it has done so while clearly admitting, in the text of its opinion, that the effort it was undertaking was, as quoted several times above here, a law reform effort aimed at changing processes in infraction cases.

CONCLUSION

Petitioner is right. Review should be granted for the reasons urged by petitioner and by CACJ here.

Dated: July 29, 2020

Respectfully submitted,
STEPHEN K. DUNKLE, *Chair*
JOHN T. PHILIPSBORN, *Vice Chair*
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By: s/ John T. Philipsborn
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CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

PROOF OF SERVICE

I, Stephen K. Dunkle, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 222 E. Carrillo St., Ste. 300, Santa Barbara, CA 93101.

On today's date, I served the within document entitled:

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY LULA SOPHIA GONG COTSIRILOS, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Santa Barbara, CA, addressed as set forth below;

(X) By electronically transmitting a true copy thereof;

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

Executed this 29th day July, 2020, at Santa Barbara, California.

Signed: s/ Stephen K. Dunkle
By: Stephen K. Dunkle

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