

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

<i>People of the State of California,</i>)	Case No. G052933
)	(O.C. Superior Court No. 15ZF0002)
Petitioner)	(Related Case Nos. 12CF2292,
)	14ZF0338, 12NF1681, 12ZF0154)
v.)	
)	
<i>The Superior Court of California,</i>)	
<i>County of Orange</i>)	
)	
Respondent)	
)	
_____)	
)	
<i>Aleksandar Apostolovic,</i>)	
)	
<i>Real Party in Interest</i>)	
_____)	

**OPPOSITION OF RESPONDENT, THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE, TO THE PETITION FOR WRIT OF
MANDATE/PROHIBITION**

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ISSUE PRESENTED

Whether the Superior Court abused its discretion in denying the District Attorney's office the ability to continue to use California Code of Civil Procedure Section 170.6 to exclude Judge Goethals from hearing virtually all murder cases on the ground that such use of the statute violates the California Constitution and its assurance of separation of powers.

INTRODUCTION

On February 24, 2014, Superior Court Judge Thomas Goethals found that a Deputy District Attorney failed to comply with his obligations to disclose exculpatory evidence under *Brady v. Maryland*, (1963) 373 U.S. 83. Judge Goethals stated his intention to recuse that Deputy District Attorney from continued involvement in the case. In the same month, in *People v. Dekraai*, Judge Goethals indicated that he would hold hearings on motions by the defense counsel as to whether jailhouse informants had been used in violation of the Constitution and *Massiah v. United States*, (1964) 377 U.S. 201.

The District Attorney's office then immediately began a practice of using its authority under California Code of Civil Procedure Section 170.6 ("Section 170.6") to disqualify Judge Goethals from hearing virtually all murder cases. From February 25, 2014 through early December 2015, Judge Goethals was assigned 58 murder cases and the Orange County District Attorney's office used Section 170.6 to disqualify Judge Goethals

in 55 of those cases.¹ For the three prior years, from December 7, 2010 through February 24, 2014, Judge Goethals was assigned 35 murder cases for trial and only once did the Orange County District Attorney's office use its authority under Section 170.6 to disqualify Judge Goethals.

Contrary to the assertion of the District Attorney, Section 170.6 does not create an absolute right to disqualify a judge. Like any statute, it cannot be used in a manner that violates the United States or the California Constitutions. For example, it cannot be used in a way that violates equal protection, such as by systematically excluding an African-American or a woman judge. (*People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688.) Nor can it be used in a manner that violates separation of powers under the California Constitution.

¹ In its *Order Denying Motion to Disqualify Judge §170.6*, the Superior Court stated: "From February 25, 2014 through September, 2015, a period of eighteen months, Judge Goethals was assigned 49 murder cases for trial and was disqualified 46 times by the people." (p. 1) Subsequently, the Superior Court discovered additional cases during this time period in which the District Attorney's office disqualified Judge Goethals from hearing murder cases. The Superior Court issued amended orders listing these cases. *First Amended Order Correcting Exhibit 1 to Order Denying Motion to Disqualify Judge* (December 11, 2015); *Second Amended Order Correcting Exhibit 1 to Order Denying Motion to Disqualify Judge* (December 22, 2015) (Attachment A). Thus, the Orange District Attorney's office during this time disqualified Judge Goethals in 55 of 58 murder cases. This brief uses this corrected number. But whether the number used is disqualification in 46 of 49 cases, as the Superior Court initially found, or the actual number of 55 of 58 cases, the legal issue before this Court is obviously the same.

The law is clear that separation of powers is violated when one branch of government “materially impair[s] the inherent functions of another.” (*Steen v. Appellate Div., Superior Court* (2014) 59 Cal. 4th 1045, 1053.) The Superior Court found that “the People’s ‘blanket’ disqualification of Judge Goethals has significantly impaired this court’s constitutional duty to administer justice in connection with these numerous murder cases, as well as all felony cases.” (*People v. Tejada* (Case No. 14ZF0338), *Order Denying Motion to Disqualify Judge C.C.P. §170.6* (December 3, 2015), at 12-13 (hereafter cited as “*Order Denying Motion to Disqualify Judge.*”)) Moreover, the District Attorney’s use of Section 170.6 in obvious retaliation for Judge Goethals’ findings of misconduct is a threat to judicial independence, which is a core aspect of the judicial function in the system of separated powers. California is not the first state in which district attorneys have used laws like §170.6 to attempt to blanket paper a judge. In each instance, the state courts have found that this is an unconstitutional interference with judicial independence and separation of powers. (See *People ex rel Baricevic v. Wharton* (1990) 136 Ill.2d 423, 432-3 (the blanket use of peremptory challenges posed “a substantial threat to the dignity and independence of the judiciary.”); *State of Minnesota v. Erickson* (1989) 589 N.W.2d 481, 483 (“blanket filing” against the judge was “a threat to the independence and integrity of the judiciary which cannot be allowed.”); *State v. City Court of Tucson* (1986) 150 Ariz. 99,

102-03 (blanket paper of a judge was “an improper attempt to influence a judge in his judicial capacity.”))

As a result of its factual finding that the District Attorney’s “blanket papering” of Judge Goethals had significantly impaired the court’s duty to administer justice, on December 3, 2015, the Superior Court denied motions by the District Attorney’s office to disqualify Judge Goethals from four additional murder cases. On December 10, the Superior Court denied a motion by the District Attorney’s office to disqualify Judge Goethals from another murder case. The Superior Court found that the District Attorney’s office practice of blanket disqualification of Judge Goethals violated separation of powers by interfering with the functioning of the judiciary.

On December 17, 2015, the District Attorney’s office filed a Petition for Writ of Mandate/Prohibition seeking review of the Superior Court’s decision. The issue before this Court is whether the Superior Court abused its discretion – acting in a manner that “exceeds the bounds of reason,” *Dorman v. DWLC Corp.* (1995) 35 Cal. App. 4th 1808, 1815 – in concluding that the District Attorney’s office interfered with the functioning of the judiciary and violated separation of powers in its use of Section 170.6 to disqualify Judge Goethals from hearing virtually all

murder cases. Under the extreme facts of this situation, the Superior Court's decision is justified and certainly not an abuse of discretion.²

STATEMENT OF RELEVANT FACTS

In 2012, Judge Thomas Goethals, an experienced Superior Court judge who has been on the bench since 2003, was assigned the long cause case of *People v. Scott Dekraai* (Case No. #12ZF0128). On January 15, 2013, the defense filed a formal discovery motion requesting information on an informant, called Inmate F., to whom the defendant allegedly made incriminating statements. In its formal discovery motion, the defense

² The Superior Court of Orange County has standing under California law to oppose the Petition for a Writ of Mandate/Prohibition because the issues raised are about the legality of the Superior Court's procedures and the way in which the actions of the District Attorney's office violate separation of powers by interfering with the Court's functioning. As the California Supreme Court explained: "[W]hen the legality of the respondent court's procedures is at issue, that court may conclude that its interests will not be adequately represented by the real party in interest. In that instance, the real party in interest and the respondent court each appear separately to argue the merits of the petition." (*Municipal Court v. Superior Court (Gonzalez)* (1993) 5 Cal.4th 1126, 1138, 857 P.2d 325, 22 Cal.Rptr.2d 504 (citations omitted)). See also *D.M. v. Superior Court* (2011) 196 Cal.App.4th 879, 884-85 ("Case law recognizes that '[e]xcept where the issues involve the trial court's procedures rather than the litigation in which the issues arise, it is inappropriate for trial judges to make their voices heard in the appellate process.... Because the petition is directed at the trial court's operating procedures, rather than being limited to the narrow question of Referee Kesler's disqualification, the superior court has standing to oppose the petition. Further, input from the superior court is helpful to this court in arriving at a reasoned decision in the matter.") (citations omitted). At the very least, this Court can treat this brief from the Superior Court of Orange County as an *amicus* brief and allow the Superior Court to participate on this basis. (*Zilog, Inc. v. Superior Court* (2001) 86 Cal.App.4th 1309, 1315, fn. 2, 104 Cal.Rptr.2d 173.)

alleged that Inmate F. had obtained tape-recorded statements from the defendant while they were both inmates at the Orange County Jail. It further alleged that law enforcement officers had placed the recording device in the defendant's cell after he had obtained counsel, which, under *Massiah v. U.S.* (1964) 377 U.S. 201, violated the defendant's rights under the Sixth Amendment to the United States Constitution.

In its opposition to the discovery motion, Petitioner Orange County District Attorney objected to divulging information about Inmate F.'s involvement in other cases because they would not be calling him as a witness in *Dekraai*, and also because Inmate F.'s informant activities before he contacted the defendant were irrelevant. After reviewing the defendant's motion and the District Attorney's opposition, Judge Goethals found good cause for the discovery request and granted the defendant's motion on January 25, 2013.

One year later, in January 2014, the defense filed three motions -- to dismiss the death penalty, to recuse the District Attorney, and to exclude the defendant's statements to Inmate F. -- alleging misconduct within the District Attorney's office, including conspiracy, perjury, subornation of perjury, intentional violations of defendants' constitutional rights, and obstruction of justice. The defense alleged that Orange County Sheriff deputies had a practice of housing prolific informants near certain defendants to elicit incriminating statements, which violated those

defendants' Fifth and Sixth Amendment rights. It further alleged that the District Attorney's office participated in this misconduct, or was aware of this misconduct but did nothing to stop it, and did not disclose this to the defense as required under *Brady v. Maryland* (1963) 373 U.S. 83. Because of this misconduct, the *Dekraai* defense sought the recusal of the District Attorney's office and the exclusion of the defendant's statements to Inmate F.

On February 18, 2014, Judge Goethals was assigned two cases involving alleged beatings that took place in the Orange County Jail under the direction of the Mexican Mafia. (Case numbers 13ZF0172; 13ZF0175). On February 24, 2014, after a contested hearing, Judge Goethals found that Deputy District Attorney Erik Petersen had committed an intentional *Brady* violation in these cases and would therefore be recused from further involvement in the case.

On March 7, 2014, Judge Goethals issued a tentative ruling that he would hold an evidentiary hearing on the defense's motions in the *Dekraai* case. The court began this hearing on March 18, 2014. In the hearing, Judge Goethals allowed testimony pertaining to misconduct in cases other than *Dekraai*. After the hearing, on August 4, 2014, Judge Goethals issued a decision finding that the allegations of misconduct were true, but denied the defense's motions to dismiss the death penalty and recuse the District

Attorney's office. Judge Goethals only granted the defense's motion to exclude statements the defendant made to Inmate F.

After Judge Goethals issued his decision, the defense moved to reopen the hearings because it had obtained new evidence that the Orange County Jail had a previously undisclosed computerized system that documented the movement of inmates and informants throughout the jail. Judge Goethals agreed to reopen the hearings on December 11, 2014, and heard testimony regarding this new evidence in February 2015. On March 12, 2015, Judge Goethals issued his second ruling in the *Dekraai* case, finding that the District Attorney's office failed to disclose documents from the Orange County Jail's computerized system, which constituted a serious discovery violation. Judge Goethals stated that "the evidence demonstrates that some of those agents [of the District Attorney's office] have habitually ignored the law over an extended period of time to the detriment of the defendant." Judge Goethals concluded: "The District Attorney has a conflict of interest in this case which has actually deprived the defendant of due process in the past. And given this ongoing conflict, the District Attorney's continued participation in this prosecution will likely prevent the defendant from receiving a fair trial in the future."

Judge Goethals' ruling to disqualify Deputy District Attorney Petersen because of an intentional *Brady* violation occurred on February 24, 2014, and soon after, Judge Goethals decided to hold an evidentiary

hearing on the defense motion of prosecutorial misconduct in the *Dekraai* case. The District Attorney's office then immediately began the practice of "blanket papering" Judge Goethals in murder cases.

Six months after the District Attorney's office began its blanket papering of Judge Goethals, the four other long cause judges -- who hear all death penalty cases and all other felony cases that are estimated to last more than ten days at trial -- had significantly more murder cases than Judge Goethals. This raised serious concerns about the ability to protect defendants' right to a speedy trial, which the long cause distinction was designed to safeguard. To reduce the caseloads of these four other long cause judges, in September 2014, Judge King, the Supervising Judge of the Felony Panel for the Superior Court of Orange County, reassigned eleven murder cases to Judge Goethals. The District Attorney disqualified Judge Goethals in ten of these cases.

In October 2014, Judge King reassigned ten murder cases to Judge Goethals and the District Attorney disqualified him in all ten of these cases. Judge King made another effort in December 2014 to redistribute the caseload of the four other long cause judges by reassigning eight murder cases to Judge Goethals. The District Attorney disqualified Judge Goethals in all eight of these cases. In total, from February 25, 2014 through early December 2015, Judge Goethals was assigned 58 murder cases and the Orange County District Attorney's office disqualified Judge Goethals in 55

of those cases. For the three prior years, from December 7, 2010 through February 24, 2014, Judge Goethals was assigned 35 murder cases for trial and only once did the Orange County District Attorney's office use its authority under Section 170.6 to disqualify Judge Goethals.

On December 3, 2015, Judge King assigned this case and four others to Judge Goethals. That very same day, the District Attorney's filed additional Section 170.6 motions to disqualify Judge Goethals from four of these cases. A week later, on December 10, the District Attorney filed a Section 170.6 motion to disqualify Judge Goethals from the fifth of these cases.

Judge King made factual findings that the District Attorney's blanket papering of Judge Goethals severely affected the operation and administration of the Superior Court and its ability to meet the constitutional and statutory requirements for speedy trial for criminal defendants. Reviewing all of these circumstances and the impact of the District Attorney's actions on the functioning of the Superior Court, Judge King issued orders denying the District Attorney's Section 170.6 motions in these five cases.

STANDARD OF REVIEW

The Superior Court's "findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious."

Haraguchi v. Superior Court (2008) 43 Cal.4th 706, 711-12. More specifically, this Court reviews a decision to deny a Section 170.6 motion for abuse of discretion. (*Grant v. Superior Court* (2001) 90 Cal. App. 4th 518, 523.) The abuse of discretion standard asks whether “the court exceeds the bounds of reason, all of the circumstances before it being considered.” (*Dorman v. DWLC Corp.* (1995) 35 Cal. App. 4th 1808, 1815.) Each trial court has substantial latitude under this standard, (*In re Baby Girl M.* (2006) 135 Cal. App. 4th 1528, 1536), only erring if its determination of the facts cannot support its ultimate decision. (*Shamblin v. Brattain* (1988) 44 Cal. 3d 474, 479.) Furthermore, a reviewing court can overturn a lower court’s decision for abuse of discretion only if there has been a miscarriage of justice. (*Dorman*, 35 Cal. App. 4th at 1815.)

Because the denial of a Section 170.6 motion is considered on an abuse of discretion standard of review, this Court only may grant the writ if it finds both that Judge King exceeded the “bounds of reason” when he determined that the District Attorney’s blanket papering of Judge Goethals was impermissible under Section 170.6, and also that Judge King’s decision resulted in a miscarriage of justice.

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ARGUMENT

The Superior Court Did Not Abuse its Discretion in Concluding that the District Attorney's Use of Section 170.6 Interfered with the Operation of the Superior Court and Violated Separation of Powers.

A. Section 170.6 Must Be Exercised In a Manner Consistent with the Constitutions of California and the United States.

The California Constitution is the supreme law of the state, subordinate only to the United States Constitution. (*California Logistics, Inc. v. State* (2008) 161 Cal. App. 4th 242, 250 (citing *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 902)). Statutes, of course, may not contravene any state or federal constitutional provision. (See *Consulting Engineers & Land Surveyors of California, Inc. v. Prof'l Engineers in California Gov't* (2007) 42 Cal.4th 578, 588; see also *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara Cty. Open Space Auth.* (2008) 44 Cal.4th 431, 449.) It is axiomatic that all statutes must be exercised in a manner consistent with the California and United States Constitutions. This, of course, includes the power to exercise a peremptory challenge of a judge that is created by Section 170.6.

The Orange County District Attorney's Petition for a Writ of Mandate/Prohibition takes the position that the authority of a party to paper a judge under Section 170.6 is absolute and unlimited. Petitioner declares: "The only limits to the disqualification of a judge under section 170.6 are the number and timeliness of the motion. . . . In other words, 'a motion that

conforms to all the requirements of 170.6 *must* be granted.” (Pet. at 10 (citation omitted)). The District Attorney’s office states: “[J]udges may not second-guess the motivation behind a motion declaration pursuant to section 170.6.” (*Ibid.*)

But this cannot be correct. As a statute, Section 170.6 cannot be used in a manner that violates the California Constitution or the United States Constitution. Imagine that there was one African-American judge on a Superior Court bench and that a District Attorney’s office disqualified that judge in every case where there was an African-American defendant. Or imagine that there was one woman judge on a Superior Court bench and that a District Attorney’s office disqualified her in every rape case. There is no doubt that such use of Section 170.6 would be unconstitutional, refuting the District Attorney’s claim that parties have an absolute power to “paper” a judge under this statute.

Indeed, that is exactly what the Court held in *People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688, in ruling that parties cannot exclude a judge on the basis of race. At the outset of its opinion, the Court expressly rejected the notion that Section §170.6 creates an absolute right for parties to disqualify a judge. The Court stated: “We recognize that ‘[s]uch a right is not absolute and unlimited. Inherent in its exercise is the requirement of conformance to certain reasonable procedures invoked for the benefit of ... all ... litigants.’” (*People v. Jackson* (1960) 186

Cal.App.2d 307, 317, 8 Cal.Rptr. 849; see also *People v. Genser* (1967) 250 Cal.App.2d 351, 363, 58 Cal.Rptr. 290.)” (8 Cal.App. 4th at 698.) The Court thus concluded: “Section 170.6 cannot be employed to disqualify a judge on account of the judge's race. A fortiori, section 170.6 cannot be implemented in such a way as to preclude inquiry into whether the statute has been employed to disqualify a judge on account of race.” (*Id.* at 707.)

Of course, another key aspect of the Constitution is its assurance of separation of powers. Article III, section 3 of the California Constitution divides the powers of the state into the legislative, executive, and judicial branches, and dictates that “[p]ersons charged with the exercise of one power may not exercise either of the others.” (Cal. Const. art. III, § 3.) This provision was designed to “prevent the combination of the basic or fundamental powers of government in the hands of a single person or group.” (*California Assn. of Retail Tobacconists v. State of California* (2003) 109 Cal. App. 4th 792, 829.)

Just as the Fourteenth Amendment’s equal protection clause protects an individual from discrimination on the basis of race, *see Williams*, 8 Cal.App.4th at 707, article III, section 3 of the California Constitution protects the judiciary from the legislative and executive branches’ arbitrary infringement of its powers and obligations. And just as Section 170.6 may not be used in a way that violates the Fourteenth Amendment, Section

170.6 also may not be used in a way that violates article III, section 3 of the California Constitution.

Simply stated, contrary to the District Attorney's assertion, the exercise of authority under Section 170.6, of course, is limited by the Constitution. The Superior Court can deny a peremptory challenge of a judge if it violates the California Constitution.

B. The Superior Court Did Not Abuse its Discretion in Concluding that the Blanket Papering of Judge Goethals By the Orange County District Attorney's Office Violated Separation of Powers.

The issue before this Court is whether Judge King, as the assigning judge in the Superior Court, acted “beyond all reason” and created a “miscarriage of justice” in concluding that the blanket papering of Judge Goethals violated separation of powers. (*Dorman v. DWLC Corp.* 35 Cal. App. at 1815.)

The doctrine of separation of powers prohibits any branch of government from “materially impair[ing] the inherent functions of another.” (*Steen v. Appellate Div., Superior Court* (2014) 59 Cal.4th 1045, 1053.) When reviewing a question of separation of powers, a court should focus on “the degree to which the governmental arrangements comport with, or threaten to undermine, . . . the independence and integrity of one of the branches or levels of government.” (*City of Sacramento v. California State Legislature* (1986) 187 Cal. App.3d 393, 398-99 (citation omitted)).

In analyzing separation of powers infringements on the judiciary, the California Supreme Court explained: “One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers, and jurisdiction by constitutional provisions, has been the right to control its order or business, and to so conduct the same that the rights of all suitors before them may be safeguarded. This power has been recognized as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs.” (*Lorraine v. McComb* (1934) 220 Cal. 773, 756, 32 P.2d 960 (citations omitted)).

Judge King made factual findings that the blanket papering of Judge Goethals since February 2014 “materially impaired” the functioning of the Orange County Superior Court. There certainly is “substantial evidence” to support this factual conclusion. Judge King, who has been responsible for assigning all felony cases for trial since September 2, 2014, found that the District Attorney’s “actions have substantially disrupted the orderly administration of criminal justice in Orange County. . . . It has negatively impacted not only the assignment of murder cases, but all felony cases as well.” (Order Denying Motion to Disqualify Judge, at 2.) Judge King explained that the District Attorney’s “blanket disqualification of Judge Goethals impacted the functioning of the long cause panel and the resolution of murder cases. Therefore, the court eliminated the long cause

panel and began assigning murder cases to short cause judges. But while that reduced a backlog of murder cases, it caused backlogs elsewhere, requiring further modifications.” (*Id.* at 46.) The disruption of the Superior Court impeded its ability to carry out its constitutional duty of ensuring a speedy trial for all defendants.

The Superior Court properly concluded that the District Attorney’s blanket papering of Judge Goethals immediately after he found misconduct was a serious threat to judicial independence and thus a violation of separation of powers. The papering of Judge Goethals in virtually all murder cases began right after he found misconduct by the District Attorney’s office, specifically an intentional *Brady* violation by Assistant District Attorney, Erik Petersen, and as a sanction recused Petersen from continuing to be involved in a case. The District Attorney has disqualified Judge Goethals in 55 of 58 murder cases since then.

The District Attorney’s office prosecutes all felony cases and there is a clear message from its action: a judge who finds misconduct by a Deputy District Attorney risks being denied the ability to hear criminal cases through the District Attorney’s use of Section 170.6.³ The Superior Court

³ Of course, if the District Attorney (or any party) has a basis for believing that a particular judge is biased, a motion can be made for disqualification under C.C.P. Section 170.1. The right to a fair trial requires disqualification of a judge who is shown to be biased. (*See* Section 170.1, subd. (a)(6)(B): (“Bias or prejudice toward a lawyer in the proceeding may be grounds for disqualification.”) But this would mean that a judge could

expressed this concern: “To allow a party to manipulate the court into removing a judge from hearing certain criminal cases – when that judge, in the performance of his judicial duties, has conducted a hearing which exposed that same party’s misconduct – not only goes against the very cornerstone of our society: the rule of law, but would be a concession against judicial independence.” (*Order Denying Motion to Disqualify Judge*, at 19.)

It is especially in this context, when the use of Section 170.6 is in obvious retaliation for Judge Goethals’ finding of misconduct by the District Attorney’s office, that its blanket use undermines separation of powers and threatens the independence of the judiciary. As the Minnesota Supreme Court held in a similar situation where it denied the ability of a prosecutor to engage in blanket papering of a judge pursuant to Minnesota law: “Such use of the rule does nothing to further the spirit of the rule, but instead strikes at the very heart of judicial independence, which is so essential in a free society. The misuse of [the peremptory challenge rule] by the County Attorney’s office send the clear message that dissatisfaction with a judge’s rulings will result in removal of that judge from virtually all

be disqualified in a large number of cases only if cause was shown. The issue in this case is whether the District Attorney can blanket “paper” a judge in virtually all murder cases and disrupt the operation of the Superior Court by using Section 170.6 without needing to offer any justification.

similar cases.” (*State of Minnesota v. Erickson* (1989) 589 N.W.2d 481, 484-85.)

The District Attorney’s office relies on two cases that it claims support the legality of its actions in papering Judge Goethals in virtually all murder cases since February 2014. But neither of these decisions involved – or considered – a situation like this, where a single party, the District Attorney, papered one judge in 55 of 58 cases or where the Superior Court explicitly found that the use of Section 170.6 interfered with the operation of the court and therefore violated separation of powers.

Johnson v. Superior Court (1958) 50 Cal.2d 693, simply upheld the facial constitutionality of Section 170.6. The California Supreme Court had declared unconstitutional an earlier version of this law, holding that it constituted an “unwarranted and unlawful interference with the constitutional and orderly process of the courts.” *Austin v. Lambert* (1938), 11 Cal.2d 73, 79. Twenty years later in 1957, Section 170.6 was enacted and the Court upheld its constitutionality. *Johnson* was a facial challenge to Section 170.6. The Court acknowledged that there could be abuses, but said that this possibility was not a basis for declaring the law to be facially unconstitutional. The Court explained “the fact that some persons may abuse the section is not a ground for holding the provision to be unconstitutional.” (*Johnson, supra*, 50 Cal.2d at 697.) The Court

expressed hope that the safeguards in the statute and the system would prevent abuse.

The Court's holding that the statute is facially constitutional obviously does not mean that every application of the law is constitutional. *Johnson* did not consider the issue presented in this case: when does the use of Section 170.6 by a District Attorney so interfere with the functioning of a court as to violate separation of powers?

The other case relied on by the District Attorney is *Solberg v. Superior Court* (1977) 19 Cal.3d 182. A deputy district attorney used Section 170.6 to disqualify a judge from hearing four misdemeanor prostitution cases because the prior week that judge had dismissed similar charges in another case. The California Supreme Court again rejected a facial challenge to Section 170.6. The Court explained that *Johnson* upheld the facial constitutionality of Section 170.6, even though it recognized that abuses are possible. The Court in *Solberg* stated: "There is thus no doubt that in *McCartney* we strongly disapproved of the practice of 'blanket challenges' and we reaffirm that position herein. But it is also manifest from *McCartney* that we do not believe the practice vitiates the statute." (19 Cal.3d at 203-04 (citations omitted)). The Court was asked, and declined, to interpret Section 170.6 to eliminate peremptory challenges of judges in criminal cases or to deny them to prosecutors. The primary

focus of the Court in *Solberg* was whether the abuse of Section 170.6 “vitiates” the statute and makes it facially unconstitutional.

Without explanation, *Solberg* also rejected an “as applied” challenge to the use of Section 170.6. But the facts and legal issue in *Solberg* were much different than in this case. *Solberg* involved the use of 170.6 in four misdemeanor cases. Most importantly, there was no claim, and no finding, that this disrupted the operation of the courts. Thus, the central issue raised in this case – whether 170.6 may be used in a manner that interferes with the functioning of the judiciary and violates separation of powers – was not present in *Solberg*. This case, in stark contrast to *Solberg*, involves the District Attorney’s office disqualifying a Superior Court judge in 55 of 58 murder cases and an explicit factual finding by the assigning judge that this significantly disrupted the operation of the Superior Court. Also, in *Solberg*, the use of Section 170.6 to challenge a judge in four cases did not follow a finding by that judge of misconduct by the District Attorney’s office and thus does not present the issues of judicial independence and separation of powers raised in this case. Thus, the Superior Court’s order denying the District Attorney’s Section 170.6 motions is completely consistent with *Solberg*.

The truly extraordinary and unprecedented nature of the District Attorneys’ actions relative to Judge Goethals is reflected in the absence of any remotely similar case to this one in California in the almost 60 year

history of Section 170.6. This, of course, makes it even harder to conclude that the Superior Court abused its discretion in concluding that this unprecedented conduct by a District Attorney violated separation of powers.

Although this situation never before has arisen in California, it has occurred in other states that allow a peremptory challenge of judges. In each of these states, their courts found that such blanket papering of a judge violated separation of powers and was impermissible. Admittedly, these cases are not binding in California and involve different constitutional and statutory provisions. Nonetheless, they provide persuasive authority supporting Judge King's ruling.

For example, in *People ex rel Baricevic v. Wharton* (1990) 136 Ill.2d 423, a prosecutor used an Illinois statute, which is very similar to Section 170.6, to disqualify a judge in six felony cases. The Illinois Supreme Court found that the prosecutor's action violated separation of powers. The Court explained that where a single challenge would have only a "peripheral effect on the administration of justice," the blanket use of peremptory challenges posed "a substantial threat to the dignity and independence of the judiciary." (*Id.* at 432-33.) The Illinois Supreme Court said that such blanket challenges were a "coercive tool to thwart the chief judge's independent exercise of his assignment authority" and were not to be allowed. (*Id.* at 435.)

Similarly, in *State v. City Court of Tucson* (1986) 150 Ariz. 99, 102-03, the Arizona Supreme Court found that the blanket papering of a judge to be impermissible. The chief city prosecutor declared a policy that all deputies would disqualify a magistrate judge in any proceeding involving allegations of driving under the influence. Over a three-week period, 258 peremptory challenges were filed against the magistrate judge. The Arizona Supreme Court concluded that this “amounted to an improper attempt to influence a judge in his judicial capacity.” (*Id.* at 102-03.) The Court found that it “was an attempt to intimidate not only [that judge] but by example the entire Tucson city court.” (*Id.*) The Arizona Supreme Court ordered the dismissal all of the peremptory challenges of the judge.

State of Minnesota v. Erickson (1989) 589 N.W.2d 481, also involved a county attorney’s office engaging in the blanket use of peremptory challenges against a judge. The judge ruled against the prosecution in a juvenile criminal case and the prosecutors then exercise peremptory challenges against the judge in 188 out of 254 felony cases and 240 out of 334 misdemeanor cases. The Minnesota Supreme Court held that “blanket filing” against the judge was “a threat to the independence and integrity of the judiciary which cannot be allowed.” (*Id.* at 483.)

On the record in this case, Judge King was justified in concluding that the blanket papering of Judge Goethals in virtually all murder cases interfered with the functioning of the judiciary and violated separation of

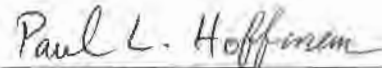
powers. At the very least, Judge King's action was certainly not an abuse of discretion.

Conclusion

For these reasons, the Superior Court did not abuse its discretion by denying the District Attorney's Section 170.6 motion. The District Attorney's petition for a writ of mandate/prohibition should be denied.

Dated: January 15, 2016

Respectfully submitted,



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ATTACHMENT A

DEC 22 2015

ALAN CARLSON, Clerk of the Court

BY KRISTEN LADISKY DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA,)
Plaintiff,)
)
)
 v.)
)
RITO TEJEDA,)
Defendant)

Case No. 14ZF0338
SECOND AMENDED
ORDER CORRECTING
EXHIBIT 1 TO
ORDER DENYING
MOTION TO
DISQUALIFY JUDGE

C.C.P. § 170.6

On 12/11/15, this court issued an order explaining that Exhibit 1, filed with its "Order Correcting Exhibit 1 to Order Denying Motion to Disqualify Judge," failed to include all case numbers of the Code of Civil Procedure section 170.6 motions which had been filed against Judge Goethals after February 24, 2014. The 12/11/15 order indicated that seven disqualification motions had been inadvertently omitted from the original Exhibit 1; however, due to a clerical error, the order listed only four case numbers.

Now that this error has come to the court's attention, the court corrects it by listing the following cases in which disqualification motions against Judge Goethals were filed but were inadvertently omitted from Exhibit 1: Case numbers 12WF2492, 12NF1705, 12NF3471, 13CF0606, 13CF0461, 13CF2496, and 13CF2963.

In addition, case number 13CF0461, *supra*, was inadvertently omitted from *Exhibit 1, as amended 12/11/15* and has been added to the exhibit. Consequently the newly-amended Exhibit 1 is designated as *Exhibit 1, as amended 12/22/15* ("PC § 187(a) Cases assigned to Judge Goethals, December 2010 through December 2015").

Neither this order nor the newly amended Exhibit 1 changes the order/judgment.

The clerk of the court is directed to serve this order and *Exhibit 1, as amended 12/22/15* on counsel for the parties.

DATED: 12-22-15



R M KING
RICHARD M. KING
JUDGE OF THE SUPERIOR COURT

Exhibit 1, as amended 12/22/15
PC 187 (a) Cases assigned to Judge Goethals
December 2010 through December 2015

Count	Case#	Defendant Name	Date Case Assigned to Goethals	Date Peremptory Challenge Filed Against Judge Goethals
1	09CF0998	Martinez, Manuel Alejandro	12/07/10	
	09CF0998	Murillo, John Leonard	12/07/10	
	09CF0998	Sincox, Frank Lewis	12/07/10	
2	10CF0832	Vallejo, Janeth Hernandez	12/07/10	
3	10ZF0095	Enriquez, Javier Ricky	12/13/10	
4	09CF0613	Guevara, Johnny	12/27/10	
5	07NF2178	Krasnoperov, Vitaliy	12/27/10	
	07NF2178	Murteza, Iftekhhar	12/27/10	
	07NF2178	Murphy, Charles Anthony	12/27/10	
6	09CF1955	McKinney, John	12/27/10	
	09CF1955	Hill, Curtis	12/27/10	
7	09CF0780	Sandoval, Jonathan	12/27/10	
8	09ZF0066	Garay, Joe	12/27/10	
9	09CF0090	Carrasco, Letitia	12/27/10	
	09CF0090	Carrasco, Noel	12/27/10	
10	10ZF0093	Fuentes, Jose	12/27/10	
11	10CF0597	Gonzalez, Arnulfo	12/27/10	
12	09CF3144	Valencia, Juana Perez	12/27/10	
1	09CF0998	Miramontes, Jesus Daniel	12/28/10	
13	08CF2697	Rolle, Craig Christopher	01/25/11	
14	08NF4115	Brown, Yolanda	03/16/11	
	08NF4115	Reynolds, Charles Michael	03/16/11	
	08NF4115	Simon, Stanley Miles Jr	03/16/11	
	08NF4115	Valerio, Nicholas Diogenes	03/16/11	
	08NF4115	Kelly, Jarrel	03/16/11	
15	09NF2376	Delgado, Elias Ortega	05/05/11	
	09NF2376	Fuentes, Juan Manuel Garcia	05/05/11	
	09NF2376	Patrick, Jimmy Ray	05/05/11	
16	10CF2457	Gallindo, Christian Moises	05/10/11	
17	11ZF0112	Adams, Derek	06/01/11	06/11/11
18	05HF1371	Choi, Sunyhe	06/20/11	
19	11ZF0113	Cho, Beong Kwun	07/15/11	
20	11ZF0123	Bilotti, Marissa Starr	10/07/11	
21	09NF3148	Salazar, Dylan	12/14/11	
22	12ZF0128	Dekraai, Scott Evans	01/18/12	
23	09CF0473	Luna, Jason Anthony	01/30/12	
	09CF0473	Castaneda, Aaron Ernesto	01/30/12	
24	11CF2110	Galvin, Kirk Michael	06/22/12	
25	11CF2245	Fry, Steve Gerald	06/26/12	
	11CF2245	Hlgareda, Sandra Ann	06/26/12	
26	10CF2458	Baez, Joseph Anthony	02/06/13	
27	11ZF0107	Baez, Joseph Anthony	02/06/13	
28	10CF2948	Marta, Cesar Gerardo	06/18/13	

Exhibit 1, as amended 12/22/15
PC 187 (a) Cases assigned to Judge Goethals
December 2010 through December 2015

Count	Case#	Defendant Name	Date Case Assigned to Goethals	Date Peremptory Challenge Filed Against Judge Goethals
29	12ZF0147	Bruno, Steven Joseph	07/12/13	
30	13ZF0150	Wood, Louis Richard	07/12/13	
31	12CF1980	Carrera, Lucero	07/24/13	
32	09WF1880	Thongphun, Lae Thong	10/23/13	
33	12ZF0143	Coale, Ryan	01/15/14	
34	12ZF0142	Nguyen, Phillip Ngoc	02/24/14	
35	14CF0205	Zavala, Vanesa	02/24/14	
	14CF0205	Brito, Candace	02/24/14	
2/24/14: Judge Goethals tentative ruling removing gang prosecutor Erik Peterson from the Mexican Mafia cases 13ZF0172 and 13ZF 0175 due to intentional Brady violations.				
36	10CF0100	Ochoa, Christopher Rudy	02/25/14	02/25/14
	10CF0100	Vela, Adrian Raphael	02/25/14	02/25/14
37	12NF3903	Orozco, Gabriel	02/26/14	03/06/14
38	13NF0356	Camarillo, Jose Luis	03/12/14	03/14/14
	13NF0356	Galvez, Pablo Robert Andrew	03/12/14	03/14/14
3/18/14: Judge Goethals decision to expand Dekrail hearing on misconduct to other cases.				
39	10NF1302	Martinez, Adrian	03/28/14	03/28/14
	10NF1302	Salgado, Edgar Raul	03/28/14	03/28/14
	10NF1302	Sanchez, Aquiles	03/28/14	03/28/14
40	13WF1895	Price, Robert Joseph	04/03/14	04/03/14
41	12WF2492	Solozano, Javier	04/03/14	04/03/14
42	13WF0932	Valladares, Leobardo	04/10/14	04/10/14
43	13HF1149	Morlett, Oscar Luis III	04/16/14	04/16/14
44	12NF1705	Calderon, Gabriel	04/16/14	04/16/14
	12NF1705	Madriles, Richard	04/16/14	04/16/14
45	13NF0854	Carillo, Giovanni	05/09/14	05/09/14
	13NF0854	Penalzoza, Rene Daniel	05/09/14	05/09/14
	13NF0854	Silva-Suarez, Erick	05/09/14	05/09/14
46	13NF0873	Rodas, Christopher Antonio	05/14/14	05/14/14
47	09CF2301	Hernandez, Manuel Juarez	05/16/14	05/16/14
	09CF2301	Vasquez, Huber Juarez	05/16/14	05/16/14
48	13CF1715	Medina, Christian Manuel	05/20/14	05/20/14
49	13CF0461	Campbell, David	06/03/14	06/03/14
50	12NF3471	Jimenez, Christian	06/11/14	06/11/14
51	12ZF0136	Montes, Samuel Oscar	06/19/14	
8/4/14: Judge Goethals ruling in Dekrail 1				
52	13CF2963	Roca, Danilo Arturo	7/15/14	7/15/14
53	13CF2496	Alvarez, Daniel	7/29/14	7/29/14
54	13CF0606	Lopez, Salomon	9/3/14	9/3/14
	13CF0606	Vega, Vicente	9/3/14	9/3/14
	13CF0606	Sanchez, Julio	9/3/14	9/3/14
55	13CF2054	Carachure, Armando Andres	09/24/14	09/29/14
56	13CF1954	Rodriguez, Mario Alberto	09/24/14	09/29/14

Exhibit 1, as amended 12/22/15
PC 187 (a) Cases assigned to Judge Goethals
December 2010 through December 2015

Count	Case#	Defendant Name	Date Case Assigned to Goethals	Date Peremptory Challenge Filed Against Judge Goethals
57	12CF3159	Mcdermott, Daniel Edward	09/24/14	10/01/14
58	12CF1499	Enriquez, Javier	09/24/14	10/03/14
59	11CF0732	Maroquin, Christian Rogelio	09/24/14	10/03/14
	11CF0732	Montes, Adsalon Isai	09/24/14	10/03/14
60	12ZF0138	Valdovinos, Ricardo	09/24/14	10/03/14
61	11CF0319	Alegria, Pedro	09/24/14	10/09/14
62	11CF2363	Shin, Edward Younghoon	09/24/14	
63	07NF1823	Sosa, Juan	09/25/14	10/03/14
64	10CF2410	Burclaga, Manuel	09/25/14	10/03/14
65	12NF2483	Bernal, Rafael	10/03/14	10/07/14
	12NF2483	Perez, Mauro Verdin	10/03/14	10/07/14
66	12NF3711	Calabrese, Anthony Joseph	10/03/14	10/07/14
67	12NF3701	Calabrese, Anthony Joseph	10/03/14	10/07/14
	12NF3701	Castaneda, Israel	10/03/14	10/07/14
	12NF3701	Castaneda, Ubaldo	10/03/14	10/07/14
68	10CF0133	Saway, John	10/03/14	10/08/14
	10CF0133	Keo, Ruon Phi	10/03/14	10/10/14
69	06CF2893	Gonzalez, Sergio	10/03/14	10/09/14
70	11CF1985	Galvan, Juan Manuel	10/03/14	10/10/14
71	09CF0221	Martinez, Hector Hugo	10/03/14	10/10/14
72	14ZF0333	Sachs, Ashton Colby	10/07/14	10/08/14
73	13ZF0161	Drew, Charles Patrick	10/07/14	10/08/14
74	07NF2414	Lopez, Armando Antonio	10/07/14	10/16/14
	07NF2414	Lopez, Samuel Agustin	10/07/14	10/16/14
	07NF2414	Lopez, Xavier Francisco	10/07/14	10/16/14
75	14ZF0337	Cano, Franc	11/14/14	11/17/14
	14ZF0337	Gordon, Steven Dean	11/14/14	11/17/14
76	12CF3455	Alcala, Ricardo Ray	12/02/14	12/02/14
	12CF3455	Martinez, Issac Angel	12/02/14	12/02/14
	12CF3455	Melendez, Jeamy Beatriz	12/02/14	12/02/14
77	13CF2980	Tellez, Irvin	12/02/14	12/02/14
78	09CF3144	Valencia, Juana Perez	12/02/14	12/04/14
79	07WF1046	Sosa, Juan Osbaldo	12/03/14	12/09/14
80	14NF2382	Jones, Jihad Qahr Nasir	12/03/14	12/03/14
	14NF2382	Peterson, Jonathan	12/03/14	12/03/14
81	14HF1008	Marsicano, Brad Phillip	12/03/14	12/04/14
82	12CF2663	Martinez, Christopher	12/03/14	12/04/14
	12CF2663	Miguel-Hernandez, Brian Jose	12/03/14	12/04/14
83	07CF2786	Vega, Leonel	12/03/14	12/04/14
84	12ZF0137	Wozniak, Daniel Patrick	01/27/15	01/29/15
3/12/15: Judge Goethals ruling in Dekrail 2				
85	13ZF0164	Tulosega, Nelson Tuumamao	05/20/15	
86	11WF1945	Castellanos, Ivan	09/03/15	09/04/15

Exhibit 1, as amended 12/22/15
PC 187 (a) Cases assigned to Judge Goethals
December 2010 through December 2015

Count	Case#	Defendant Name	Date Case Assigned to Goethals	Date Peremptory Challenge Filed Against Judge Goethals
87	14NF0040	Espinoza, Arthur Palma	09/03/15	09/09/15
88	13CF1025	Bridget, Anthony Edward	09/04/15	09/04/15
89	14NF4672	Esquivel, Alejandro Jesus	09/04/15	09/11/15
90	14ZF0338	Tejeda, Rito	12/3/2015	12/3/2015
91	12ZF0154	Wilhelm, Thomas	12/3/2015	12/3/2015
92	15ZF0002	Apostolovic, Aleksandar	12/3/2015	12/3/2015
93	12CF2292	Zacaula, Ismael	12/3/2015	12/3/2015
94	12CF2292	Montes, Jesus	12/3/2015	12/3/2015
93	12NF1681	Avalos, Ismael	12/3/2015	12/10/2015
	12NF1681	Galvan, George	12/3/2015	12/10/2015

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 723 Ocean Front Walk, Venice, California 90291.

January 15, 2016 I served the foregoing documents described as:

**OPPOSITION OF RESPONDENT, THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE, TO THE PETITION FOR WRIT OF
MANDATE/PROHIBITION**

on all interested parties in this action by placing an original or X a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

 X (BY MAIL) I caused such envelope to be deposited in the mail at Venice, California. The envelope was mailed with postage thereon fully prepaid.

 (BY PERSONAL DELIVERY) I caused the foregoing document to be personally served on the interested party.

 (BY ELECTRONIC SERVICE) I caused the foregoing document to be electronically served on the interested party.

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

Executed this 15th day of January, 2016 at Venice, California.


Kai Valenzuela

People of the State of CA v. The Superior Court of CA, County of Orange
Court of Appeals Case No. G052933, Trial Case No. 15ZF0002

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