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VIA OVERNIGHT MAIL

Hon. Tani Gorre Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-7303

with copy to:

California Court of Appeal
4th Appellate District, Division 2
3389 Twelfth Street
Riverside, California 92501

with copy to:

Attorney for Defendant and Appellant:

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Plaintiff and Respondent:

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Re: Request for Depublication of *People v. Rekte*, E060272
(Court of Appeal Fourth Appellate District, Division Two, filed January 8, 2015)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On behalf of Redflex Traffic Systems, Inc. ("Redflex"), we are writing to request that the Court depublish the recent opinion of the Court of Appeal Fourth Appellate District, Division Two, entitled *People v. Rekte*, Case No. E060272, filed January 8, 2015 ("*Rekte*"), a copy of which is enclosed as Attachment 1. This request is made pursuant to Rule 8.1125 of the California Rules of Court ("CRC").¹

¹ Redflex has an interest in depublication. At the time of the infraction, Redflex and respondent City of Riverside were parties to a contract providing for the city's ATES program. Redflex installed and maintained the digital cameras, computers and other components of the systems, including the one that captured Appellant's violation. Redflex is the largest red light ATES technology provider in the United States; its ATES programs are deployed in numerous California municipalities and counties. Redflex and its customers would be prejudiced if *Rekte* were left published, because it would cause confusion in the traffic courts and in the public.

1. Overview Of Request For Depublication

If left published, *Rekte* would confuse courts and result in valid infractions and convictions being dismissed. As noted by Justice King in his dissent in *Rekte*, the majority improperly applied this Court's opinion in *People v. Goldsmith* (2014) 59 Cal.4th 258.

"In sum, the defense produced no evidence to rebut the presumed accuracy or reliability of the still photographs, or when those photographs were taken, or that they did not in fact show what they purported to show: defendant running the red light. The majority errs in concluding the court was required to disregard the photographic and time stamp evidence showing defendant ran the red light. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 270-271.)" [*Rekte*, Dis., J. King, p. 2.]

Rekte improperly suggests that a yellow light timing discrepancy rebuts the statutory presumption that the video and photos "constitute an accurate representation of the images [they] purport[] to represent." Evidence Code § 1553(a).²

Specifically, the Court in *Rekte* fails to explain how a purported yellow timing discrepancy shows that the video and photos are not accurate representations of what they purport to represent. *Rekte* runs afoul of this Court's teaching in *Goldsmith* regarding "the need to carefully assess the specific nature of the photographic image being offered into evidence and the purpose for which it is being offered in determining whether the necessary foundation for admission has been met." [*Goldsmith*, 272, fn. 8.]

The photos and video in *Rekte* were not offered to prove a speed violation; nor were they offered to show the length of the light's yellow phase. They were offered to show that Mr. Rekte committed an infraction by entering an intersection against a steady red signal. See Vehicle Code Section 21453. "(a) A driver facing a steady circular red signal alone shall stop at a marked limit line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection, and shall remain stopped until an indication to proceed is shown, except as provided in subdivision (b)." The elements of the infraction do not

² Evidence Code Section 1553 states:

"(a) A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

(b) Subdivision (a) applies to the printed representation of computer-generated information stored by an automated traffic enforcement system.

(c) Subdivision (a) shall not apply to computer-generated official records certified in accordance with Section 452.5 or 1530."

include, or require the prosecution to show, that the yellow light phase was of a certain duration. More importantly, section 21453(a) does not require proof of the yellow light timing on unstated dates before or after Mr. Rekte committed the infraction – which was the expert testimony evidence the majority seized on in *Rekte*.

Based on the above, the majority in *Rekte* not only failed to properly analyze the photos and video based on the proposition for which they were offered, but they also erred by requiring the prosecution to prove an element not required under section 21453(a). As this Court held in *People v. Gray* (2014) 58 Cal.4th 901:

“[A] city’s compliance with section 21455.5(b)’s requirement of a 30-day period of issuing warning notices before using a red light camera to issue citations is not a jurisdictional precondition to enforcement of the red light traffic law (§ 21453, subd. (a)), and therefore the prosecution need not prove a city’s compliance with the warning requirement to establish a red light traffic violation.” *Id.* at 911.

As Justice King pointed out in his *Rekte* dissent, there was no doubt that the defendant committed the violation. In fact, the majority noted: “The photographic and video evidence showed the defendant’s vehicle to be approximately six feet behind the limit line when the signal had been red for at least 0.96 seconds, and showed the vehicle failed to stop for the red light, continuing to make a right turn.” [*Rekte*, p. 4.] The photos and video should not have been found inadmissible because of a yellow light timing discrepancy.

Rekte also improperly suggests that evidence of yellow light timing “before and after the date of the offense” somehow means the video and photos taken at the time of the offense were not accurate representations of what they purported to depict. Mr. Rekte never presented any evidence as to the duration of the yellow light at the time of his specific violation. He only showed that the yellow phase was supposedly too short on dates before and after the date of his violation. Such a showing is too attenuated to rebut the statutory presumption that the video and photos “constitute an accurate representation of the images [they] purport[] to represent.” Evidence Code § 1553(a).

Finally, the analysis of the majority in *Rekte* runs afoul of this Court’s opinion in *People v. Gray*. Mr. Rekte was accused of violating Vehicle Code Section 21453(a). The majority in *Rekte* erred by conditioning admissibility of the ATES evidence on the prosecution proving an element not required under section 21453(a).

The Court should depublish *Rekte* before it causes further confusion.

2. Factual And Procedural Overview Of Rekte

“Viktors Rekte received a citation by mail for a violation of Vehicle Code, section 21453, subdivision (a), for failing to stop at a red light, based on a photograph taken pursuant to the Automated Traffic Enforcement System (ATES).” [*Rekte*, p. 1.]

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"The automated camera system captures drivers who enter an intersection while facing a red traffic light. The system is triggered when a car goes through a red light while driving at least 15 miles per hour." [*Id.*, p. 3.]

"Digitally printed on the photographic image is information relative to the date, time, location, vehicle speed, and how long the signal light had been in the red at the time the photograph was taken. Although Operator Teagarden did not personally test the sequence, he testified that the yellow phases met or exceeded the minimum 'recommendations' established by the California Department of Transportation (CalTrans)." [*Id.*, pp. 3-4.]

"Prior to the commencement of trial, defendant made an in limine motion to exclude the photographic and video evidence on grounds: (1) the yellow light interval did not conform with the standards required by the MUTCD; . . ." [*Id.*, p. 2.]

"According to the digital information on the photographic evidence he received, Operator Teagarden testified that the yellow light interval time was 3.65 seconds, which exceeds the 3.6 seconds required for a 35 mile an hour roadway." [*Id.*, p. 4.]

"The photographic and video evidence showed the defendant's vehicle to be approximately six feet behind the limit line when the signal had been red for at least 0.96 seconds, and showed the vehicle failed to stop for the red light, continuing to make a right turn." [*Id.*, p. 4.]

"Thereafter, defendant presented expert testimony to rebut the presumption of the reliability of the photographic evidence due to noncompliance with the California Manual on Uniform Traffic Control Devices (MUTCD or Manual)." [*Id.*, p. 2.]

"The defense presented expert testimony by engineer Sean Stockwell, who visited the location of the infraction on more than one occasion, before and after the date of the offense, to time the yellow light interval. To time the interval, Stockwell took four video clips of the changing traffic signals, which he uploaded onto a video program on his computer, in order to get a time index. On each occasion, using the software indexing capability, the yellow light interval was found to be 3.5 seconds, plus or minus 0.07 seconds, which is less than the 3.6 second minimum interval required by the MUTCD." [*Id.*, p. 5.]

"When the case was closed to evidence, the defense argued for dismissal because the geometry of the intersection and placement of the signals requires the driver to look away from his or her direction of travel in order to see the light, and because the yellow light interval was less than the mandated 3.6 seconds, demonstrating that the equipment was not functioning properly and the evidence was unreliable." [*Id.*, pp. 5-6.]

"The trial court found defendant guilty of the offense. Defendant appealed to the Appellate Division of the Riverside County Superior Court, arguing, among other things, that the presumptions established by Evidence Code sections 1552 and 1553, affecting the burden of producing evidence, were rebutted. The Appellate Division affirmed the judgment and subsequently certified the matter for transfer to this court. We reverse." [*Id.*, p. 2.]

3. California Courts Have A Long Established Policy Of Selective Publication Of Appellate Decisions

California courts have long recognized this Court's role in selectively determining those opinions which should be published, and those that should not, as stated in *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 709-710:

"By specifically empowering the Supreme Court to determine which opinions of the Court of Appeal are appropriate for publication, the Legislature and the electorate have clearly disclosed an intent that the decisional law of this state does not require publication of every opinion of the intermediate appellate courts. Rather, the Supreme Court appropriately determines by selective publication the evolution and scope of this state's decisional law."

Depublication is warranted here not simply because the *Rekte* court erred in finding that the ATES evidence of Appellant's violation was inadmissible, but also because the decision does not properly interpret this Court's decisions in *Goldsmith* and *Gray* and would lead to significant public and judicial confusion.

4. Rekte Should Not Have Been Certified For Publication

Rekte does not meet the standard for publication set forth in Rule 8.1105 of the CRC. It does not correctly apply California law, nor does it advance a legal issue of continuing public interest.

Rekte neglects to understand the purpose for which the photos and video were being offered. They were not offered to show the defendant did not have time to stop because of the amber phase. They were not offered to show his speed was unsafe. They were offered to show he ran a red light. As this Court noted in *Goldsmith*, "The first step is to determine the purpose for which the evidence is being offered. The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case." [*Goldsmith*, p. 267.]

The key in the *Rekte* case was whether the defendant drove his vehicle through the intersection when the signal was red. This Court faced the same issue in *Goldsmith*: "Here the ATES evidence was offered to show what occurred at a particular intersection in Inglewood on a particular date and time when the traffic signal at the intersection was in its red phase." [*Id.*]

The majority in *Rekte* also ignored *Goldsmith's* explanation that the ATES system shows it is properly functioning when it captures a moving vehicle at exactly the right time and place in the intersection, while also depicting the light was in a red phase before the vehicle entered the intersection.

"Finally, we note that the content of the photographs themselves may be considered and here the content supplied further support for a finding that the images were genuine." [*Goldsmith*, p. 271.]

"Specifically, given Young's testimony regarding how the ATES system operates, the fact that in this case it produced a photograph showing defendant driving her

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vehicle at or before the limit line with the signal light in its red phase and then another photograph of defendant driving her vehicle in the intersection with the signal light in its red phase, as well as a 12-second video showing defendant's vehicle crossing the intersection and the transition of the traffic signal light phases, including a four-second yellow light, is circumstantial evidence that the system was working properly." [*Id.*, fn. 7.]

There was no dispute that the defendant in *Rekte* ran the red light. On that point, the majority noted: "The photographic and video evidence showed the defendant's vehicle . . . showed the vehicle failed to stop for the red light, continuing to make a right turn." [*Rekte*, p. 4.] The fact that the camera system captured Mr. Rekte committing the violation "is circumstantial evidence that the system was working properly." [*Goldsmith*, p. 15.]

There was also no dispute that the defense expert never timed the amber phase at the time of the infraction, i.e., the amber that preceded the red light that Mr. Rekte ran. Instead, the defense expert "visited the location of the infraction on more than one occasion, before and after the date of the offense, to time the yellow light interval." [*Rekte*, p. 5.]

Justice King put it best when he wrote: "In sum, the defense produced no evidence to rebut the presumed accuracy or reliability of the still photographs, or when those photographs were taken, or that they did not in fact show what they purported to show: defendant running the red light." [*Rekte*, Dis., p. 2.]

Finally, the analysis of the majority in *Rekte* runs afoul of *People v. Gray* (2014) 58 Cal.4th 901, 911 ("issuing warning notices before using a red light camera to issue citations is not a jurisdictional precondition to enforcement of the red light traffic law (§ 21453, subd. (a)), and therefore the prosecution need not prove a city's compliance with the warning requirement to establish a red light traffic violation").

The elements of Vehicle Code § 21453(a) do not include, or require the prosecution to show, that the yellow light phase was of a certain duration.³ Similarly, section 21453(a) does not require proof of the yellow light timing on unstated dates before or after the violation – which was the expert testimony evidence the majority relied on in *Rekte*.

The majority in *Rekte* conditioned admissibility of the ATES evidence on the prosecution proving that the yellow light phase was proper. That is not the law.

³ Vehicle Code Section 21453(a) states: "A driver facing a steady circular red signal alone shall stop at a marked limit line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection, and shall remain stopped until an indication to proceed is shown, except as provided in subdivision (b)."

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5. Conclusion

If left published, *Rekte* would cause significant confusion because it misinterprets *People v. Goldsmith*. Not only does *Rekte* fail to explain how a supposed yellow light timing phase rendered the photos and video inaccurate, but it relies on the testimony of an expert witness who did not time the yellow phase at the time of the infraction. *Rekte* also improperly circumvents the mandate of this Court in *People v. Gray*, by essentially adding an element (yellow light timing) not found in the statute.

Sincerely,



Michael D. Stewart
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH:436102331.1

Attachment: *People v. Rekte*