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June 23, 2010

Our File Number: 03NT-135784

*VIA OVERNIGHT MAIL*

Hon. Ronald M. George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-7303

Re: Request for Depublication of the Decision of the Orange County Superior Court of California, Appellate Division, in People v. Khaled

Dear Chief Justice George and Associate Justices:

On behalf of Redflex Traffic Systems, Inc. ("Redflex"), we are writing to request that the Court depublish the recent decision of the Orange County Superior Court, Appellate Division in People v. Khaled, 30-2009-00304893 (Orange Super. Ct., Ap. Div., filed May 25, 2010) ("Khaled"), a copy of which is enclosed. This request is made pursuant to Rule 8.1125 of the California Rules of Court.

## 1. Redflex's Interest In Depublication

Redflex and the City of Santa Ana are parties to a contract providing for the City's automated red light camera enforcement system. Redflex installed and maintains the digital cameras, computers and other components of the system.

Redflex is the largest traffic photo enforcement technology provider in the United States, with more than 1,200 fully operational systems in more than 240 communities in 21 states. Redflex's systems are deployed in 67 California municipalities and/or counties. Many other California municipalities contract with Redflex's competitors to provide other photo enforcement systems in California.

The Legislature has set forth a comprehensive statutory scheme governing automated traffic enforcement systems. See Vehicle Code § 21455.5. While Redflex obviously has an interest in continued municipal use of its red light camera systems, Redflex is not paid on a per citation basis. Vehicle Code § 21455.5(g)(1). Therefore, Redflex, like any automated red light camera enforcement vendor, can only charge a flat fee, regardless of how many citations the city generates or, for that matter, whether the system generates any revenue or citations.

Despite the Legislature's statutory framework for automated enforcement systems, red light violators caught by automated systems sometimes mount vocal campaigns, generally focusing on the revenue that cities generate. Such criticism is misguided because it is factually incorrect and it ignores the safety benefit that such systems provide.

Depending on the jurisdiction, a California red light citation can range between approximately $420 and $480. Of that, the State of California receives over $200, the county receives approximately one-third, and the city receives the remainder (but generally incurs almost all of the enforcement and related costs). Cities and law enforcement agencies lack the resources to hire more officers to further monitor and enforce red light violations. Meanwhile, the State can ill-afford to lose the millions of dollars a year it receives from automated red light enforcement systems, especially at this time of fiscal crisis.

From a safety perspective, numerous studies and law enforcement agencies, including the California Police Chiefs Association, routinely validate the safety benefits that such systems provide. See www.stoperedlightrunning.com. In contrast, red light runners down-play or simply ignore the devastation caused by side-impact collisions when drivers run red lights.

## 2. Khaled Should Not Have Been Certified For Publication

As detailed below, Khaled does not apply existing evidentiary rules, nor does it advance a legal issue of continuing public interest. On the contrary, Khaled is causing public and judicial confusion and misapplies the rules of evidence.

The 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 not simply because Khaled was wrongly decided, but also because it illustrates what happens when the adversary system is undermined.

## 3. The Trial And Defense Counsel's Submission Of His Proposed Settled Statement On Appeal

The prosecution of traffic violations on behalf of the People is, in theory, the province of the District Attorney. However, in practice, the District Attorney rarely participates in any way, and had no participation in the Khaled case, either at trial or on appeal.

Red light violations are adjudicated in traffic court. Prosecutors (such as city attorneys) rarely attend or participate at the trial level and there is rarely a court reporter. The testifying officer simply appears and, when the case is called, takes the stand. Khaled was no different.

Alan Berg is one of three Cit of Santa Ana police officers who provides testimony on the City's automated red light camera enforcement system. Officer Berg testified at the trial on Mr. Khaled's citation – without the benefit of a prosecutor or a court reporter. The defendant, Mr. Khaled, appeared through his attorney, R. Allen Baylis. Officer Berg authenticated seven exhibits, consisting in part of declarations, four digital photographs, and a 12-second digital video depicting the defendant running a red light in the City of Santa Ana.

Officer Berg was the only witness. The defendant neither testified, nor appeared at trial. The defense did not produce any evidence suggesting defendant did not run the red light, or that he was not the person depicted in the photos and video. The defense simply raised evidentiary challenges.

The trial court, Commissioner Daniel M. Ornelas, found the defendant guilty of failing to stop for a red light in violation of Vehicle Code § 21453(a). The defendant appealed and, because there was no court reporter transcript, submitted a five-page proposed settled statement on appeal, presumably drafted by defendant's attorney, Mr. Baylis.

To suggest that the proposed settled statement is one-sided is an understatement. If it did correctly depict Officer Berg's testimony and the traffic court's statements, the traffic court would not have found the defendant guilty. Perhaps telling, defense counsel (who is no stranger to the City or Redflex and often represents red light violators) served his proposed settled statement only on the District Attorney, knowing full well that there would be no response or opposition. Because there was no objection by the District Attorney, the traffic court signed the proposed settled statement.

The City filed with the Appellate Division (1) a motion to intervene as real party in interest and for rehearing on the settlement of statement on appeal; and (2) an application to file an amicus curiae brief. In its motion to intervene, the City explained:

> "The City of Santa Ana must be considered a Real Party in Interest to this case because the appeal presents a direct challenge to the validity of the City of Santa Ana's automated red light photo enforcement camera system and procedures. As such, any decision by the Court will directly affect the City of Santa Ana and its camera system. Accordingly, the City of Santa Ana Police Department is a Real Party in Interest to the instant matter, and thus has the right to participate in these proceedings.
>
> In addition, the City of Santa Ana seeks a rehearing on the Settlement of Statement on Appeal because the court was presented with only one side of the issues involving the underlying proceedings, which relate to the City of Santa Ana's automated photo enforcement system. The City of Santa Ana did not receive any notice or service of the Notice of Appeal, Appellant's Proposed Statement on Appeal, or the Hearing on Settlement of Statement on Appeal for

> this matter, and as a result the City of Santa Ana was not afforded the opportunity to participate in the hearing."
>
> "Further, and more importantly, the Supreme Court recognized that the City of Santa Ana Police Department is a Real Party in Interest in a similar case in which the Court and the ticketed driver simply ceased serving the City of Santa Ana with notice of an appeal of an automated red-light photo citation. (*People v. Fischetti; City of Santa Ana Police Department*, Real Party in Interest, 2009 Cal. LEXIS 2544 (Cal., Mar. 10, 2009), amending *People v. Fischetti*, 2009 Cal. LEXIS 1589 (Cal., Feb. 25, 2009). In *Fischetti*, the California Supreme Court specifically amended its order granting the City's petition for depublication by changing the case title and adding the City of Santa Ana Police Department as Real Party in interest. (Id.)"

The underlying record is not a model of clarity, but it appears that the Appellate Division denied the City's motion to intervene to correct the settled statement. The Appellate Division did grant the City's amicus request, but appears to have largely, if not totally, ignored the arguments raised in the City's amicus brief. Simply put, the Appellate Division has left depublication as the only avenue to redress Khaled's errors.

## 4. Khaled Is Causing Confusion In The Courts And Elsewhere

Before addressing how Khaled was wrongly decided, Redflex wishes to point out the confusion that Khaled is causing.

As a threshold matter, this Court has questioned whether rulings from the Appellate Division can create legal precedent. See Suastez v. Plastic Dress-Up Co. (1982) 31 Cal.3d 774, 779 ("although decisions of the appellate department have persuasive value, they are of debatable strength as precedents"). Furthermore, like any case, Khaled only applies to the facts, testimony and violation at issue in that specific trial. See Huscher v. Wells Fargo Bank (2004) 121 Cal.App.4th 956, 962 ("the language of an opinion must be construed with reference to the facts of the case, and the positive authority of a decision goes no farther than those facts").

However, judges, commissioners and others have, during the past few weeks, repeatedly misconstrued Khaled as requiring the automatic dismissal of red light camera-generated citations without hearing evidence.

The *Orange County Register* reported on June 11, 2010, that "Defense attorneys said that since the decision, several citations have been dismissed in court, and at least one local police department decided to dismiss several tickets in court while it reviewed the effects of the decision." http://www.ocregister.com/news/red-253066-light-court.html. Redflex has been made aware that several of the cities it provides services to have had cases dismissed out of hand, or have determined not to prosecute based on traffic court views concerning the purportedly sweeping mandate of Khaled.

Such confusion is not confined to Orange County, where Khaled was issued, but has spread state-wide. For example, a Northern California District Attorney's June 11, 2010 email to multiple city police chiefs announced: "the Appellate Division of the Orange County Superior Court has ruled that evidence obtained from red light cameras is inadmissible hearsay, since there are no percipient witnesses to the violation. The opinion was ordered published so it can be cited as precedent."

The Northern California press has fostered further confusion. For example, *The Modesto Bee* published an article on June 20, 2010, asking – in light of Khaled – whether red light camera systems are legal:

> "But are they legal? A panel of Southern California judges last month said no, and law enforcement agencies in Stanislaus County are taking notice. In its May 21 decision to throw out a man's red-light ticket, an appellate panel of Orange County Superior Court judges ruled the photos taken by the red-light cameras were inadmissible in court.
>
> * * *
>
> [T]he recent decision gave Turlock officials pause. The city has suspended indefinitely a proposal to install up to 10 red-light cameras over five years." See http://www.modbee.com/2010/06/19/1217776/ruling-a-red-light-for-fast-cameras.html#ixzz0rcgMprSb.

Similarly, the *Los Angeles Daily Journal* published a June 11, 2010 article stating: "Automatic photos of drivers running red lights are hearsay, an Orange County Superior Court appellate panel has ruled. If the decision stands, cities with the red-light cameras would have to do much more to win fines from red-light tickets, cutting deeply into their promising but controversial source of revenue."

In the same vein, the *OC Weekly* published a June 4, 2010, article essentially agreeing with Khaled's defense attorney's announcement that Khaled is the "death sentence for red light cameras in California." See http://blogs.ocweekly.com/navelgazing/a-clockwork-orange/ruling-ends-red-light-cameras/.

There is simply no mistake that Khaled is causing confusion among the courts, law enforcement, the press, and the public. Properly viewed, Khaled only holds that a specific officer's testimony did not, at that time, support admission of the video and photos depicting the defendant's violation. Contrary to the confusion triggered by Khaled, the decision does not hold that all evidence generated by a red light photo enforcement system is inadmissible, or that red light camera evidence could not be admissible in another case. In fact, Khaled only found that based on Officer Berg's testimony there was a "lack of evidence to support the vehicle code *violation in question*." Khaled, at p. 10, lines 1-2, emphasis added.

Khaled should be depublished. It does not settle a disputed issue of law. Instead, it has caused confusion. Furthermore, and as detailed below, Khaled was wrongly decided.

## 5. Overview Of Khaled's Faulty Analysis

The Appellate Division's decision in Khaled suffers from various flaws, apart from the fact that the settled statement was drafted exclusively by defendant's counsel. Khaled fails to mention, much less address, key statutes and cases that most courts rely upon when adjudicating the admissibility of computer generated images and time/date stamp information. Additionally, Khaled's interpretation of the confrontation clause contravenes the Fourth District Court of Appeal's opinion in People v. Chikosi (May 6, 2010, G041014) ___ Cal.App.4th ___ [2010 WL 1804679].

## 6. Khaled Ignores Evidence Code Sections 1552 And 1553

Khaled ignores the presumption of authenticity afforded computer generated video and photographic images such as those generated by the Redflex computer operated digital system. See Evidence Code §§ 1552 and 1553.

The Appellate Division acknowledged in Khaled that Redflex "contracts with the municipality to install, maintain, and *store the digital photographic information.*" Khaled, p. 2, lines 20-23, emphasis added. Khaled repeatedly states that the Redflex system is a "*camera-computer system.*" Khaled, p. 3, line 4 and line 16, emphasis added.

The Appellate Division realized that Redflex's system is computer operated and generates images stored on a digital medium. More specifically, the Redflex automated enforcement system takes a video and four digital photographs, one showing a vehicle behind the limit line when the light is red, one showing the vehicle in the intersection, one from the front showing the driver, and one shot of the license plate with a zoomed lens. Data associated with each photo (including date, time, and location) is digitally imprinted into each image, forming a "data bar" that is "part of the image" and as such shares its "digital signature."

The data bar on each of the photos shows the date and time the photos were taken. This data bar information is added to the photos by the camera system computer at the point of capture and taken from the computer's clock. The camera system computer is a standard computer system running Windows XP. The camera system computer clock is synchronized to Redflex's time server which in turn is linked to an atomic clock.

The primary problem with Khaled's foundational analysis is that it ignores Evidence Code Sections 1552 and 1553 which specifically address the foundation and burden of production for digital images and video, along with computer generated time and date stamps imprinted on those digital images.

Certain evidence is presumed authentic. Jacobson v. Gourley (2000) 83 Cal.App.4th 1331, 1334. A presumption acts as an evidentiary short-cut designed to facilitate trials by dispensing with unnecessary evidence. People v. Southern Pac. Co. (1983) 139 Cal.App.3d 627, 632–633.

Evidence Code section 553 states "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." Similarly, section 1552 states "A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent."

With respect to the burden of production for digital images or videos, section 1153 explains:

> "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."

Section 1552 sets forth the same presumption shifting mechanism for a "printed representation of computer information or computer program." Khaled does not mention, much less analyze, sections 1552 and 1553.

## 7. Khaled Imposes Too High A Bar For Police Officer Testimony

Khaled opines that Officer Berg "was unable to testify about the specific procedure from the programming and store of the system information (SS 1:24-26)." Khaled, p. 9, lines 10-14.

The person laying a foundation for computer generated images or data need not "testify about the specific procedure from the programming and store of the system information," as Khaled required. In fact, case law demonstrates that the testimony required to admit computer generated data enjoys a relatively low threshold. See People v. Lugashi (1988) 205 Cal.App.3d 632, 641-644 (discussing the national trend towards "less extensive foundational showings" required for computer generated records); Aguimatang v. Cal. State Lottery (1991) 234 Cal.App.3d 769, 797.

In Lugashi, supra, the Court rejected the challenge that the witness need possess the programming expertise Khaled requires to authenticate computer generated data, otherwise "only the original hardware and software designers could testify since everyone else necessarily could understand the system only through hearsay." Id. at 641.

The competency level required of a testifying officer is well-illustrated and explained in People v. Flaxman (1997) 74 Cal.App.3d Supp. 16. In that case, the court addressed a defendant's challenge that the testifying officer could not "competently testify as to appellant's speed because there was no proof of the [radar gun's] accuracy." In rejecting that argument, the court held:

> "It is a daily occurrence in our courts for witnesses to rely on the accuracy of machinery such as X-ray cameras and various kinds of testing devices without being required to explain the functioning of the machine or to vouch for its accuracy. Otherwise, we would constantly be 're-inventing the wheel' thereby imposing an inordinate cost on litigants and causing a great waste of judicial time.
>
> It is sufficient that the operator of a radar machine be familiar with the device and its operation and, recognizing that the device might not be properly functioning upon occasion, take a reasonable amount of precautionary measures to assure that it is properly operating." Id. at 24.

Khaled sets up too restrictive a standard in requiring a police officer to "testify about the specific procedure from the programming and store of the system information."

**8. Khaled Improperly Holds That Videos And Photos Are Hearsay**

Khaled opines that the photos and video generated by the Redflex system are hearsay. Khaled is mistaken. Videos and photographs are "demonstrative evidence depicting what the camera sees. They are not testimonial and they are not hearsay." People v. Cooper (2007) 148 Cal.App.4th 731, 746, emphasis added; People v. Bowley (1963) 59 Cal.2d 855, 860 (photos "may also be used as probative evidence of what they depict. Used in this manner they take on the status of independent 'silent' witnesses.")

**9. Khaled Improperly Holds That Computer Generated Date And Time Information Is Hearsay**

With respect to the date and time information on the photos, Khaled opines that the "photographs contain hearsay evidence concerning the matters depicted in the photograph including the date, time and other information." Khaled, p. 3, lines 1-3.

The Khaled court was referring to the data bar on each of the photos showing the date and time the photos were taken, which as mentioned above is generated automatically by a computer and server linked to an atomic clock.

The date and time records or stamp automatically generated by a computer is not hearsay. People v. Hawkins (2002) 98 Cal.App.4th 1428. In Hawkins, the court held that the timing of a "computer's clock" is presumed accurate under Section 1522. There, the defendant appealed a conviction of knowingly accessing and taking data from his former employer's computer system.

One of the key issues was the date the defendant last accessed his prior employer's source code files, particularly whether the computer's internal clock showed access after the defendant no longer worked for that employer.

The defendant objected at a pre-trial hearing, stating "the date and time on that is hearsay. It is a statement generated by the computer being admitted . . . for the truth of the matter asserted." Id. at 1446-47. The trial court rejected the hearsay objection, stating "The declarant is a computer. It's not a person. So when you are talking about hearsay, you are talking about an out-of-court statement by the declarant. And there is no declarant here. The computer made the date-and-time record." Id. at 1447. The Court of Appeal agreed with the trial court, holding that a computer's internal time and date clock are records of its internal operations and are not hearsay because "The Evidence Code does not contemplate that a machine can make a statement." Id.

Hawkins, which relied in part on Section 1552, demonstrates that a computer's internal date and time clock are presumed accurate and are not hearsay. The time and date reflected in the data bar are generated by the computer's internal operations. To paraphrase Hawkins, they "do not represent the output of statements placed into the computer by an out of court declarant." Therefore, the information in the data bar is not hearsay, and no hearsay exception should be necessary to admit the data bar into evidence.

**10. Khaled Misinterprets The Confrontation Clause**

The Sixth Amendment of the United States Constitution provides a criminal defendant with "the right . . . to be confronted with the witnesses against him." This is known as the Confrontation Clause and is rooted in the same concerns as the hearsay rules.

Khaled took great issue with the fact that the persons who created the automated enforcement system did not testify, noting that "Appellant objected to the introduction of the photographs and declaration as inadmissible hearsay, and violative of appellant's *confrontation rights*." Khaled, p. 1, line 28, to p. 2, line 2, emphasis added. In fact, the Khaled court expressly based its holding on the confrontation clause, stating:

> "We hold that the trial court erred in admitting the photographs and the accompanying declaration over appellant's hearsay and confrontation clause objections." Id. at p. 2, lines 8-10.

Three weeks before Khaled was published, the California Court of Appeal addressed whether the Confrontation Clause applied to accuracy records relating to a breathalyzer testing machine. People v. Chikosi (May 6, 2010, G041014) ___ Cal.App.4th ___ [2010 WL 1804679]. In Chikosi, the defendant argued that the person who supplied the breathalyzer accuracy records did not testify, thus depriving the defendant of his rights under the Confrontation Clause. In rejecting the defendant's Confrontation Clause objections, the Court held that the "accuracy

records were nontestimonial in nature," and therefore the evidence derived from those records did not violate the defendant's right to confrontation.

Similarly, numerous cases hold that information generated by machines, similar to the photographs and video generated by the Redflex system, are non-testimonial statements outside the ambit of the Confrontation Clause. United States v. Bacas (E.D. Va. 2009) 662 F.Supp.2d 481, 484; United States v. Washington (4th Cir. 2007) 498 F.3d 225, 230-31; United States v. Moon (7th Cir. 2008) 512 F.3d 359, 361-62 (machines do not constitute "witnesses against" defendants); United States v. Crockett (E.D. Mich. 2008) 586 F.Supp.2d 877, 885.

Khaled misconstrues the Confrontation Clause and contravenes the Court of Appeal's opinion in People v. Chikosi.

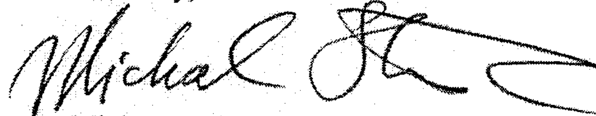
## 11. Conclusion

Redflex submits that the Legislature did not enact the statutory framework for automated traffic enforcement systems and allow municipalities and others to invest millions of dollars in such systems, so that those systems and investments could be undermined by a case with as poor a record and flawed evidentiary conclusions as Khaled.

Left alone, Khaled will continue to cause confusion. Judges, commissioners and judges pro tem will view Khaled as requiring the dismissal of citations based on automated enforcement systems. When not dismissed out of hand, testifying officers will have to overcome evidentiary hurdles that better reasoned decisions have rejected. Cities may continue to refrain from prosecuting red light violations and may even abandon or forego installing automated traffic enforcement systems.

The State, counties and cities will lose millions of dollars in revenue, while red light violators will go unscathed, and the public will lose an important safeguard. Redflex respectfully requests that the Appellate Division's opinion in Khaled be depublished.

Sincerely,



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Enclosure