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April 10, 2012

Chief Justice Tani Gorre Cantil-Sakauye
Associate Justices Baxter, Chin, Corrigan,
Liu, Kennard, Werdegar
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, CA 94102

Re: *People v. E* , Court of Appeal Case No. B229748
Request for Depublication

To the Chief Justice and the Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court ("CRC"), Rule 8.1125(a), the People of the State of California ("the People") respectfully request depublication of the opinion of the Court of Appeal of California, Second Appellate District, Division Seven in *People v. E* (2012) 203 Cal.App.4th 525.[1]

I. Summary Of The Case

Appellant, Annette E , was convicted of running a red light in violation of Vehicle Code[2], § 21453(a) in the City of Beverly Hills ("the City"), a violation recorded by an automated red light enforcement system camera at the intersection of Beverly Drive and Wilshire Boulevard in the City of Beverly Hills on June 3, 2009. At Appellant's trial, foundation for admission of the ARLES photographic and videographic evidence was established by the testimony of Beverly Hills Police Officer Mike Butkus.

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[1] The *E* opinion (Case No. B229748) was issued on January 23, 2012 as unpublished and subsequently certified for publication on February 10, 2012. For the convenience of the Court, a copy of the case is enclosed with this letter. (Exhibit 1).

[2] All subsequent statutory references are to the Vehicle Code, unless otherwise stated.

In addition to his training and extensive knowledge of the operation and maintenance of the system (Clerk's Transcript ("CT"), p. 28), Officer Butkus had reviewed the technician's maintenance logs that apply to the period before and after the citation was issued (CT, p. 28) and testified that the cameras were working properly on the date and at the time of Appellant's alleged violation. (CT, p. 29). The Los Angeles Superior Court Appellate Division ("LASCAD") affirmed the judgment of conviction. Upon Appellant's request, the Court of Appeal transferred the case for review and reversed. That reversal was predicated solely on the finding by the Court of Appeal that the ARLES evidence of Appellant's violation was inadmissible because the record did not establish that the police officer who sought to lay the foundation for that evidence had sufficiently testified that the system was in good working order. (*B* , *supra*, 203 Cal.App.4th at 547).

II. The Interest Of The People In Depublication

The People's interest in depublication lies in the fact that the ARLES is operated throughout the state of California and is a mechanism intended by our Legislature to reduce vehicular injury and death on California's streets. The People have a profound and abiding concern with the effective and proper enforcement of the red light law by way of the ARLES, which is crucial to the safety of those who travel the streets of our state. The People respectfully submit that the depublication of *B* is necessary to avoid both mischief and unintended results flowing from a decision which is purely procedural and a "one-off" – an opinion so closely bound by the peculiar facts of the case as to make application of its holding to any other case highly unlikely.

III. Why The *B* Opinion Should Not Be Published

The *B* case is an inherently procedural and fact-bound case. The central issue in the case was a "deficient" settled statement. The "deficiency" was the trial judge's failure to set forth a "narrative summary" of Officer Butkus' testimony. The Court of Appeal noted that appellant tried to have the trial court include a detailed summary in the settled statement, and that when appellant objected to the insufficiency of the statement, the trial court settled the proposed statement without modification. Thus, the reversal in *B* was ordered because of deficiencies in the settled statement – not because of any new interpretation of the Vehicle Code.

It is true that the Court of Appeal observed that the photographs taken by the Redflex camera were inadmissible – but this was simply because of the deficiency in the settled statement. "There is nothing in this record to support the conclusion that Officer Butkus described the mode of preparation of the maintenance logs in any respect or that the sources of information and method and time of preparation were such as to indicate trustworthiness." (*B* , *supra*, 203 Cal.App.4th at 547).

Another division of the Court of Appeal for the Second Appellate District recently issued a published opinion criticizing the opinion in *B*. *See*, *People v. Goldsmith*, 203 Cal.App.4th 1515, 1526 (2012)[3]. However, in sharp contrast to *B*, there was no question in *Goldsmith* regarding the sufficiency of the record on appeal. (*Goldsmith*, *supra*, 203 Cal.App.4th at 1519-1520).

It is true that, as *Goldsmith* notes, the Court in *B* does not mention and, indeed, appears to contradict, this Court's holding in *People v. Martinez*, 22 Cal.4th 106 (2000), that testimony as to the accuracy, maintenance, and reliability of computer records is not required as a prerequisite to their admission. However, the central holding in *B* was that the record on appeal was so deficient that the Court of Appeal could not tell what, exactly, Officer Butkus said on the witness stand. Having made that finding, the balance of the Court's musings may be categorized as *dicta*.

The *B* opinion states "[t]here is nothing in this record to support the conclusion that Officer Butkus described the mode of preparation of the maintenance logs..." (*B*, *supra,* 203 Cal.App.4th at 547), concluding therefrom that the People had not established that the automated red light enforcement system was in working order. (*Id.*) Thus, the entire thrust of *B* is that *in this particular case*, the record was lacking without articulating what would constitute sufficient foundation in that regard. This simply does not satisfy the standards for publication of an opinion.[4]

The *B* opinion cites *People v. Jenkins*, 55 Cal.App.3d Supp. 55, 64 (1976) for the proposition that, "[i]n the infraction context, where the settled statement is deficient, a matter is properly remanded to the trial court for preparation of a settled statement in compliance with California Rules of Court". (*B*, *supra*, 203 Cal.App.4th at 539). Having cited the proper rule, the *B* court proceeds to ignore it. Having found the settled statement herein deficient, the Court did not remand for preparation of a proper settled statement but, instead, simply reversed the judgment. This furnishes an additional reason for depublication of the *B* opinion.

California courts have noted that there would be "chaos in precedent research ... if all Court of Appeal opinions were published..." (*Schmier v. Supreme Court*, 78 Cal.App.4th 703, 708 (2000)). Indeed, as described above, chaos is exactly what will result if *B* remains published. An order depublishing *B* will avoid both

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[3] On April 6, 2012, a Petition For Review was filed by Appellant in the *Goldsmith* case.

[4] In fact, the standards for certification for publication provided by CRC, Rule 8.1105(c) establish that when -- as here -- a decision turns on the specific facts of a case rather than a rule of law, it is inappropriate for publication.

misinterpretation of the Vehicle Code requirements and mischief in the processing of individual automatic red light enforcement systems throughout the state.

Moreover, this Court may exercise its constitutional power of depublication when the Court believes the opinion "to be wrong in some significant way" (*Conrad v. Ball Corporation,* 24 Cal.App.4th 439, 445, fn. 2 (1994)). As established herein, the *B* opinion is wrong not only "in some significant way" but on several fronts.

As noted above, in *Goldsmith,* the court confronted a case with the same facts and evidentiary issues as *B*, including the question of whether a testifying officer, expert in the operation and maintenance of the ARLES had laid a sufficient foundation for admission of the evidence generated by the system. But in holding that the ARLES evidence was inadmissible because the prosecution had failed to establish working order of the system (*E*, *supra,* 203 Cal.App.4th at 547), the Court of Appeal in *E* -- as the *Goldsmith* court would later explain with great clarity -- ignored the California rule on that subject. (*Goldsmith*, *supra*, 2012 WL 662290, p. 6). Specifically, pertinent California precedent provides that the proponent of machine-generated evidence need not establish the accuracy, acceptability, maintenance or reliability of the mechanism that has created the evidence in order for that evidence to be admissible. (*Id.*).

The fact that *Goldsmith* – and not *E* -- is correct and provides appropriate precedent for future ARLES adjudications is clear from the quality of the court's analysis in *Goldsmith*. In discussing the reliability of digital computer data such as that derived from the ARLES, *Goldsmith* quotes *People v. Martinez* (2000) 22 Cal.4th 106, observing that "the California Supreme Court has determined that the admission of computer records does not require foundational testimony showing their accuracy and reliability" (*Goldsmith*, *supra*, 2012 WL 662290, p. 3) and that "our courts have refused to require, as a prerequisite to admission of computer records, testimony on the 'acceptability, accuracy, maintenance, and reliability of ... computer hardware and software.' " (*Id.* at p. 4, quoting *Martinez, supra,* 22 Cal.4th at 132). *Goldsmith* noted that *Martinez* had relied on *People v. Lugashi* (1988) 205 Cal.App.3d 632, which rejected a test that would require the proponent of computer evidence to introduce testimony on the reliability and acceptability of hardware, software, and internal maintenance and accuracy checks as a prerequisite to admission of computer data evidence. (*Goldsmith*, *supra*, 2012 WL 662290, p. 4). In *Lugashi*, the court stated that given the "the minimal showing" required for admission of such evidence (*Lugashi, supra,* 205 Cal.App.3d. at 640), no such showing was appropriate, especially when the records consisted of computer-generated data rather than manually input, human-generated data. (*Id.* at p. 642).

In expressly following *Martinez* and *Lugashi,* the court in *Goldsmith* held that "we do not presume computer data to be unreliable, and do not require the proponent of such evidence to disprove the possibility of error to meet the minimal showing required for admission.".(*Goldsmith, supra*, 2012 WL 662290, p. 4.) Neither is the proponent of the

computer records evidence required to produce testimony on the acceptability, accuracy, maintenance, and reliability of the computer hardware and software, especially where, as here, the computer data consists of retrieval of automatic inputs rather than computations based on data entered into the computer by human beings." (*Goldsmith*, *supra*, 2012 WL 662290, p. 4, citing *Lugashi, supra,* 205 Cal.App.3d at p. 642). Thus, in carefully and correctly applying existing precedent, the court in *Goldsmith* concluded "that there was no abuse of discretion in the trial court's admission of the [ARLES] computer-generated photographs, video, and data" (*Goldsmith*, *supra*, 2012 WL 662290, p. 4).

As strikingly distinct from the adherence to precedent in *Goldsmith*, the *E* opinion did not address the *Martinez/Lugashi* line of cases. Ignoring this bright line of authority, *E* instead relied on the decision of the Orange County Superior Court Appellate Division ("OCSCAD") in *Khaled,* a case expressly disapproved in *Goldsmith.* (*Goldsmith*, *supra*, 2012 WL 662290, p. 5). In *Khaled*, the OCSCAD reversed an ARLES conviction, ruling that there was no sufficient foundation for admission of the evidence because the testifying officer "was unable to testify about the specific procedure for the programming and storage of the system information…" (*Khaled, supra*, 186 Cal.App.4th Supp. at 7).[5] Reliance on *Khaled,* in turn, led the Court of Appeal to ignore case law from higher courts establishing that testimony on the accuracy, acceptability, maintenance or reliability of computer records is *not* required as a prerequisite to admission of ARLES evidence. Based on *Khaled*, *E* erroneously reversed on the basis that the record did not establish that the People had presented sufficient evidence of the elements of working order – such as accuracy and maintenance -- that our courts have emphatically stated need not be established. In its disapproval of *Khaled*, *Goldsmith* points to this error (*Goldsmith*, *supra*, 2012 WL 662290, p. 6) and adds that, in any event, such factors would not go to the admissibility of the evidence. (*Goldsmith*, *supra*, 2012 WL 662290, p.4).

Because it followed *Khaled* and ignored the *Martinez/Lugashi* line of cases, the *E* decision is erroneous and its publication will only create confusion in what would otherwise be clear precedent now made specific to the admission of ARLES evidence by *Goldsmith.*

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[5] The facts in *Khaled* are dispositively different from those in *E* in which there was no reliance on any declaration made by a person not before the court. As to the issue of working order of the ARLES in *E* , the record shows that in addition to his knowledge of the maintenance of the system (CT, p. 28), Officer Butkus had reviewed the technician's maintenance logs that apply to the period before and after the citation was issued (CT, p. 28) and that the cameras were working properly on the date and at the time of Appellant's alleged violation. (CT, p. 29). No such evidence was presented in *Khaled.*

A. *B* Incorrectly States That The Data Text On ARLES Photographs Constitutes Hearsay

In addition to disregarding case law establishing that the proponent of computer-generated information need not offer foundational evidence of working order, *B* disregards reported cases that soundly support the non-hearsay nature of the ARLES photographs and data text. [6] Indeed, it is on that additional basis that *Goldsmith* disagrees with *B* and disapproves *Khaled*. (*Goldsmith*, *supra*, 2012 WL 662290, pp. 5-6).

In *People v. Hawkins* (2002) 98 Cal.App.4th 1428, in which the court of appeal held that unlike printouts that contain information entered by human operators, those that reflect information a computer generated on its own cannot be considered hearsay because "[t]he Evidence Code does not contemplate that a machine can make a statement" (*Hawkins, supra*, 98 Cal.App.4th at p. 1449). And in *People v. Nazary* (2010) 191 Cal.App.4th 727, 754, the appellate court held that as to mechanically-generated receipts from machines which accepted customers' cash as payment for gas, "[t]he printed portions ... including the date, time, and totals were not statements inputted [sic] by a person, but were generated by the PIC machine" and, as such, were not hearsay and were admissible. (*Id.* at pp. 754-755). In failing to apply properly the law of *Hawkins* and *Nazary*, *B* relies erroneously once again on *Khaled*, finding that ARLES photographs contained hearsay, inadmissible in the absence of an exception to the hearsay rule. (*B*, *supra*, 203 Cal.App.4th 540). And to the extent *B* mentions *Hawkins* and *Nazary* at all, those cases offer no support for the finding that the ARLES evidence was not admissible. In each of these cases, however, machine-generated evidence was held to be admissible, the foundation having been laid by a person with training and experience knowledgeable in its operation, a person like Officer Butkus.

Unlike the faulty analysis of *B*, the decision in *Goldsmith* rests on the firm footing of *Hawkins* and *Nazary*, properly concluding that the ARLES data was not hearsay, such that it was admissible in the absence of an exception to the hearsay rule, disagreeing with *B* and disapproving *Khaled* on their holding that ARLES

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[6] Further, *B* creates uncertainty by stating that ARLES evidence 'necessarily has a "primary purpose" of "'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution'" (*B*, *supra,* 203 Cal.App.4th Opinion, p. 24, fn. 11, quoting *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, 2714, 2717, fn. 11). This categorical statement promises confusion for litigants and courts in subsequent ARLES litigation, implying – without stating or supporting that implication -- that ARLES evidence cannot fall within the business records exception to the hearsay rule in the absence of testimony by the person who actually prepared the records.

evidence is not admissible in the absence of an exception to the hearsay rule. (*Goldsmith*, *supra*, 2012 WL 662290, pp. 5-6). Here again, *Goldsmith* provides strong, well-grounded precedent while publication of *B* will only muddy the waters, depending as it does on a lower court case now disapproved by the Court of Appeal.

Accordingly, the People respectfully request that this Honorable Court order the *B* Opinion returned to its original – and appropriate – status as an unpublished decision.

Respectfully submitted,

DAPEER, ROSENBLIT & LITVAK LLP

By: William Litvak

cc: See attached proof of service