

**IN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA**

**APPELLATE DIVISION**

PEOPLE OF THE STATE OF  
CALIFORNIA

Appellate Division No.: 5113

Plaintiff/Respondent

Trial Court No.: 50608153/TRF

v.

**ENDORSED  
FILED  
ALAMEDA COUNTY**

**JUN 13 2011**

██████████ KUNG,  
Defendant/Appellant

CLERK OF THE SUPERIOR COURT  
By Shay Ryans, Deputy

**APPELLANT'S APPLICATION TO CERTIFY CASE FOR TRANSFER TO THE  
COURT OF APPEAL, FIRST DISTRICT**

Request for certification of an infraction case by the Appellate Division of the Superior  
Court of California, County of Alameda to the Court of Appeal

Superior Court of California, County of Alameda

HONORABLE Gloria Rhynes, Presiding Judge, Appellate Division

HONORABLE David Byron, Judge Pro Tem, Fremont Hall of Justice

For Defendant/Appellant

██████████ KUNG

IN PRO PER

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Telephone: ██████████

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## Table of Authorities

### Federal Cases

- *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527

### California Cases

- *People v. Bighinatti* (1975) 55 Cal.App.3d Supp. 5
- *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55
- *People v. Ruhl* (1976) 63 Cal.App.3d 6

### Statutes and Miscellaneous Cites

- Vehicle Code 21453(a)
- Vehicle Code 21455.5

## **Issues Sought to be Certified to the Court of Appeal**

1. Is material evidence prepared solely for prosecution constituted testimonial evidence under the Confrontation Clause of the Sixth Amendment?
2. Are trial courts required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code 21453(a)?
3. Is the current penalty assessment of Vehicle Code Section 21453(a) constitutes a violation of Excessive Fines Clause under the Eighth Amendment by allowing disproportional fine assessed?
4. What is the definition of “excessive” when the Court determines excessive delay in appeal?

## Introduction

Defendant/Appellant, [REDACTED] Kung, hereby requests the Appellate Division of the Superior Court of California, County of Alameda for certification of *People of the State of California v. [REDACTED] Kung* to the Court of Appeal in the interest of justice and to secure uniformity of decision.

On April 11, 2011, the Appellate Division of Superior Court of California, Alameda County, affirmed the Trial Court judgment. On April 21, 2011, the Appellate Division denied the Appellant's request for publication of opinion. On April 25, 2011, the Appellant filed a timely Petition for Rehearing. On May 5, 2011, the Appellant filed an untimely Application to Certify Case for Transfer to the Court of Appeal<sup>1</sup>. On May 17, 2011, the Application to Certify Case for Transfer to the Court of Appeal was denied, but the Petition for Rehearing was granted and the decision on April 11, 2011 was vacated. On June 1, 2011, the Appellate Division reversed the Trial Court judgment<sup>2</sup>.

## Discussion

1. Is material evidence prepared solely for prosecution constituted testimonial evidence under the Confrontation Clause of the Sixth Amendment?

This issue needs to be decided in order to secure uniformity of decision. The use of Automatic Enforcement System (hereinafter AES) on prosecuting an alleged violation of Vehicle Code Section 21453(a) is dramatically increasing throughout the State of California. When prosecuting an alleged violation of Vehicle Code Section 21453(a), the

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<sup>1</sup> Pursuant to the Dismissal Order by the Court of Appeal, First District, Division Three on June 8, 2011 (Court of Appeal Case No.:A131987)

<sup>2</sup> The decision on June 1, 2011 is used for the purpose of this Application.

prosecution, usually a peace officer representing the municipality, provides the trial court that an evidence packet, prepared by a third-party non-governmental vendor, to explain how the alleged violation occurred and how the prosecution issued a citation based on the evidence in the evidence packet. The representative from the vendor is not available to testify or authenticate the packet.

In *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, the U.S. Supreme Court addressed that the use of Affidavits constituted testimonial evidence as they were prepared for the purpose of a later criminal trial. By the interpretation of the *Melendez-Diaz* decision, is the evidence packet prepared for the prosecution of Vehicle Code Section 21453(a) constituted a testimonial evidence that subject to Confrontation Clause?

2. Are trial courts required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code 21453(a)?

Vehicle Code Section 21455.5 governs the use of AES for the prosecution of Vehicle Code Section 21453(a). As the key element of conviction - legitimacy of the use of AES, the trial courts often fail to neither examine legitimacy of the use of AES, nor request the prosecution to substantiate the legitimacy of the use of AES in the mean of prosecuting Vehicle Code 21453(a). In the interest of the justice, are the trial courts required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code 21453(a)?

3. Is the current penalty assessment of Vehicle Code Section 21453(a) constitutes a violation of Excessive Fines Clause under the Eighth Amendment by allowing disproportional fine assessed?

The total fine of the alleged violation of Vehicle Code 21453(a) imposed was \$446 with Traffic School. However, in the \$446 fine imposed, about 75% of the fine, known as penalty assessment, is not related with the violation itself. In other word, the penalty assessment has nothing to do with the alleged act of violation, but an additional assessment of fine itself. By the interpretation of the Eighth Amendment, assessing such amount of fine with no mean of preventing violation of Vehicle Code Section 21453(a) was unjustified.

4. What is the definition of “excessive” when the Court determines excessive delay in appeal?

*People v. Bighinatti* (1975) 55 Cal.App.3d Supp. 5, *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55, and *People v. Ruhl* (1976) 63 Cal.App.3d 6 addresses the Court’s interpretation of case dismissal on the ground of excessive delay in the process of appeal. However, none of these cases has set guidance on how such “excessive” was determined. In the interest of justice and uniformity of decision, this issue needs to be decided.

**Conclusion**

Defendant/Appellant requests certification of this case to the Court of Appeal, First District for decision on the above issues. Certification and transfer is necessary in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

DATED: June 9, 2011

Respectfully submitted,



 KUNG

Defendant/Appellant, IN PRO PER