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September 18, 2012

VIA OVERNIGHT MAIL

E056987

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:

Hon. Joseph R. Brisco
Presiding Judge
Appellate Division
California Superior Court, County of San Bernardino
401 N. Arrowhead Ave.
San Bernardino, California 92415-0063

with copy to:

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

with copy to:

San Bernardino District Attorney
Appellate Services Unit
412 Hospitality Lane, First Floor
San Bernardino, California 92415

with copy to:

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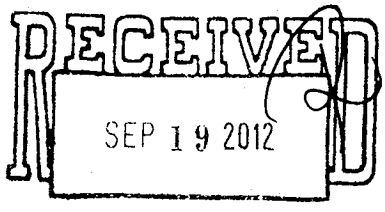
Hesperia, California 92345



Re: Request for Depublication of *People v. Winters*, ACRAS 1100151 (San Bernardino Super. Ct., App. Div., filed June 28, 2012; ordered published Aug. 3, 2012)

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 San Bernardino County Superior Court, Appellate Division, in *People v. Winters*, Case No. ACRAS 1100151 (San Bernardino Super. Ct., App. Div., filed June 28, 2012; ordered published Aug. 3, 2012) ("*Winters*"), 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]

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[1] In addition to the reasons set forth below, *Winters* should be depublished because the Appellate Division missed the deadline for ordering publication under the CRC. Under

1. Factual and Procedural Background

Appellant was captured driving through a red light by a red light automated traffic enforcement system ("ATES") in the City of Victorville (the "City") in violation of Section 21453(a) of the California Vehicle Code ("CVC"). *Winters*, ACRAS 100151 at 1-2. At trial on October 4, 2011, Barbara Hill from the Victorville Police Department testified for the prosecution to lay the foundation for admission of the photographic and video evidence of Appellant's violation. *Id.* at 2-3. Officer Hill read a pre-prepared Foundational Statement including a detailed discussion of how the ATES captures, processes, and stores photographic and video evidence, as well as the procedures used for synchronizing, inspecting, and maintaining the system. *Id.* Officer Hill also introduced an Evidence Package, which included the photographs and video depicting Appellant's violation, and testified to the contents of the photographs and video. *Id.* at 3-4.

The trial court admitted all evidence of Appellant's violation and overruled Appellant's hearsay and Confrontation Clause challenges on the grounds that none of Officer Hill's testimony included declarations by out-of-court declarants and the photographs and videos constituted demonstrative evidence that did not meet the definition of hearsay. *Id.* at 4-5. Based on this evidence, the trial court found Appellant guilty of a violation Section 21453(a) of the CVC. *Id.* at 1, 5.

Appellant appealed to the Appellate Division of the San Bernardino Superior Court, which reversed his conviction on the grounds that (1) the photographs, video, and Foundational Statement constituted inadmissible hearsay; (2) Officer Hill's testimony was insufficient to authenticate the photographs and video because she did not have personal knowledge of the contents thereof; and (3) Appellant's Confrontation Clause rights were violated when the trial court failed to require the prosecution to call a Redflex employee to testify regarding the ATES evidence. *Id.* at 8-11.

On September 17, 2012, the California Court of Appeal, 4th Appellate District, Division 2, ordered the case transferred to the Court of Appeal. *People v. Winters*, Case No. E056987 (Cal. Ct. App., 4th App. Dist., Div. 2, Sep. 17, 2012).

2. Redflex's Interest In Depublication

Redflex and the City are parties to a contract providing for the City's ATES program. Redflex installed and maintains the digital cameras, computers and other components of the systems, including the one that captured Appellant's violation.

Rule 8.1105, the Appellate Division must order publication before the decision is final in that court. *Winters* became final on July 30, 2012, but the Appellate Division did not certify the opinion for publication until August 3, 2012.

Redflex is the largest red light ATES 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 ATES programs. *See* Cal Veh. Code § 21455.5. Despite the Legislature's statutory framework for ATES programs, red light violators caught by red light cameras sometimes mount vocal campaigns, generally focusing on procedural and evidentiary aspects of citation prosecutions, rather than whether they actually committed the violation at issue. Such criticism is misguided because it is factually and legally incorrect and it ignores the safety benefits that such systems provide.

ATES programs serve a critical purpose in improving safety on California roadways. 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 ATES programs, especially at this time of fiscal crisis.

The *Winters* court ignored firmly established California law regarding the admissibility of photographic evidence as well as the public safety benefits derived from ATES programs. 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, in bringing these types of challenges, red light runners downplay or simply ignore the devastation caused by side-impact collisions when drivers run red lights.

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."

This policy is particularly applicable to Appellate Division decisions. This Court has questioned whether rulings from the Appellate Division can even create legal precedent. *See Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 779 ("[A]lthough decisions of the

appellate department have persuasive value, they are of debatable strength as precedents"). Furthermore, like any case, *Winters* 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 ("[T]he 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.").

Depublication is warranted here not simply because the *Winters* court erred in finding that the ATES evidence of Appellant's violation was inadmissible, but also because the decision does not clarify a legal issue of continuing public interest, but rather would lead to significant public and judicial confusion.

4. *Winters* Should Not Have Been Certified For Publication

As detailed below, the court should not have certified the *Winters* opinion for publication because there are two cases currently pending before the California Supreme Court involving the same facts and legal issues raised in *Winters* relating to the admissibility of ATES evidence. Just as importantly, there is also a bill pending in the California Legislature awaiting the Governor's signature that directly covers the issues raised in *Winters* and, if signed into law, would render the opinion moot. Additionally, *Winters* has been transferred to the Court of Appeal and thus the opinion will be rendered moot once the Court of Appeal renders its decision. As such, if left published, *Winters* would cause significant confusion in the courts and elsewhere and would not advance the interpretation of evidentiary rules as applied to ATES evidence.

Additionally, *Winters* does not correctly apply California law, nor does it advance a legal issue of continuing public interest. On the contrary, *Winters* misinterpreted the facts and misapplied the California Evidence Code ("Evidence Code"), the Confrontation Clause, and California case law. Permitting such a case to remain published would lead to significant public and judicial confusion, and would not serve the ends of justice.

a. *Winters* Should be Depublished Because Two Cases Involving the Same Legal Issues are Currently Pending Before the California Supreme Court

There are currently two cases involving the admissibility of ATES evidence pending before the California Supreme Court – *People v. Goldsmith*, 203 Cal.App.4th 1515 (2012) and *People v. Borzakian*, 203 Cal.App.4th 525 (2012). *Goldsmith* and *Borzakian* involve legal issues identical to *Winters* – the proper authentication of ATES evidence and the application of the hearsay rule and Confrontation Clause to such evidence.

In *Borzakian*, the California Court of Appeal held that ATES evidence was inadmissible because the prosecution failed to properly authenticate the evidence. *Borzakian*, 203 Cal.App.4th at 542-48. The court concluded that the presumptions of authenticity in Sections 1552 and 1553 of the Evidence Code were not sufficient to meet the prosecution's burden on this issue, and that upon the appellant's objection, the prosecution failed to establish that the ATES

was working properly because the evidence it relied upon in an attempt to do so – maintenance logs pertaining to the system – constituted inadmissible hearsay. *Id.*

About a month after *Borzakian* was issued, the Court of Appeal issued its opinion in *Goldsmith*, holding that the ATES evidence at issue was admissible. *Goldsmith*, 203 Cal.App.4th at 1519. The court reasoned that Sections 1552 and 1553 of the Evidence Code established a presumption that the ATES evidence accurately represented the data and images stored on the system and that the appellant failed to present evidence that the images and data were flawed. *Id.* at 1522-24. The court further held that under firmly established California case law, the prosecution was not required to offer evidence that the ATES was working properly at the time of the violation for the evidence to be admissible. *Id.* at 1523-25. Finally, the court held that ATES evidence cannot constitute hearsay because it is generated solely by a machine and, alternatively, it represents demonstrative evidence of the scene depicted by the ATES, not an out-of-court statement subject to the hearsay rule. *Id.* at 1525-26.

The *Goldsmith* court expressly disagreed with *Borzakian* and the earlier Appellate Division case relied upon by the *Borzakian* court – *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1 – on the ground that those courts ignored longstanding California case law making clear that (1) proponents of computer-generated evidence are not required to offer foundational evidence regarding the reliability of the system that generated the evidence and (2) machine-generated evidence (such as ATES evidence) does not constitute hearsay. *Id.* at 1526-27.[2]

Because of the pending *Goldsmith* and *Borzakian* cases, *Winters* plainly does not meet the standard for publication set forth in Rule 8.1105 of the CRC. The forthcoming *Goldsmith* and *Borzakian* opinions will represent the high court's first opportunity to weigh in on the admissibility of ATES evidence – the precise issue raised in *Winters* – and will provide much needed clarification on this issue, which has been litigated in lower courts for years. Publishing *Winters* will only add to the confusion surrounding the admissibility of ATES evidence that currently exists as a result of the throng of inconsistent trial court and Appellate Division opinions regarding this issue. As a result, if left published, *Winters* would not clarify a legal issue of continuing interest, advance a new interpretation or clarification of an existing rule of law, or meet any other publication standard under Rule 8.1105 of the CRC. And in any event, once the Supreme Court issues a decision in either *Goldsmith* or *Borzakian*, the *Winters* opinion would be rendered moot and any value in publishing the opinion would be lost.

Indeed, the Supreme Court's owns actions in handling the *Goldsmith* and *Borzakian* reviews demonstrate that the Court does not want to add any published opinions regarding the admissibility of ATES evidence to the existing body of law until *Goldsmith* is resolved. The

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2 On May 9, 2012, the California Supreme Court granted review of both *Borzakian* and *Goldsmith*. In *Goldsmith*, the appellant filed her opening brief on August 9 and the respondent's answer brief is currently due on October 25. The Supreme Court has deferred action on *Borzakian* pending resolution of *Goldsmith*.

Court ordered review of *Borzakian* on its own motion, without any petition for review having been filed, only after it granted a petition for review in *Goldsmith*, showing that the Court did not want the *Borzakian* Court of Appeal opinion to have any precedential value during its review of *Goldsmith*. The Court also deferred action, including briefing, on *Borzakian* pending its resolution of *Goldsmith*, further demonstrating that the Court does not want *Borzakian* (or any other cases relating to the admissibility of ATES cases) to be decided and published while *Goldsmith* is pending.

This Court should not permit the *Winters* decision to add to the already excessive confusion concerning the admissibility of ATES evidence. Instead, the Court should order the opinion depublished and maintain the status quo until the high court resolves these issues in *Goldsmith* and *Borzakian*.

b. *Winters* Should be Depublished Because a Bill Regarding the Admissibility of ATES Evidence is Currently Pending in the California Legislature

In addition to *Goldsmith* and *Borzakian*, there is also a bill pending in the California Legislature concerning the same issues regarding the admissibility of ATES evidence that are involved in *Winters*. Senate Bill 1303, a copy of which is enclosed as Attachment 2, seeks to (1) amend the Evidence Code to provide that the presumptions of authenticity in Sections 1552 and 1553 apply to ATES evidence and (2) amend Section 21455.5 of the CVC to expressly provide that ATES evidence does not constitute hearsay. *See* SB 1303, enclosed as Attachment 2, pp. 3-7 The bill has passed both the California Assembly and the California State Senate and is currently awaiting the Governor's signature. The Governor has until September 30 to sign or veto the bill.

Like the pending *Goldsmith* and *Borzakian* cases, the existence of SB 1303 renders meritless any contention that *Winters* meets the standards for publication under Rule 8.1105 of the CRC. If signed into law, SB 1303 would render the issues raised in *Winters* moot because it expressly covers the primary issues involved in the case – authentication of ATES evidence and the application of the hearsay rule to ATES evidence. As such, *Winters* does not clarify a legal issue of continuing interest nor satisfy any other standard for publication under Rule 8.1105 of the CRC, but would instead add an extra layer of confusion to the existing body of law regarding the admissibility of ATES evidence.

Leaving the *Winters* opinion published pending review would not facilitate the clarification of these evidentiary issues, but would only further confuse the state of the law. This Court should not permit such an opinion to remain published.

c. *Winters* Should be Depublished Because the Case has Been Transferred to the Court of Appeal

Additionally, *Winters* should be depublished because on September 17, 2012, the Court of Appeal ordered the case transferred to the Court of Appeal for hearing and decision. *People v.*

Winters, Case No. E056987 (Cal. Ct. App., 4th App. Dist., Div. 2, Sep. 17, 2012). As such, the *Winters* opinion will be rendered moot once the Court of Appeal decides the merits of the case. Because the opinion will soon be superseded by the Court of Appeal, leaving the opinion published pending review would not clarify any issues relating to the admissibility of ATES evidence but would only add to the present confusion surrounding these issues, particularly given the pending nature of *Goldsmith*, *Borzakian*, and SB 1303 (discussed above). This Court should eliminate this additional layer of confusion and uncertainty by ordering *Winters* depublished.

d. *Winters* Should be Depublished Because the Court Plainly Erred in Holding that the ATES Evidence Was Not Properly Authenticated

In addition, *Winters* should be depublished because the court erred in holding that the ATES evidence at issue was inadmissible. The court first erroneously held that Officer Hill's testimony was insufficient to authenticate the ATES evidence and incorrectly suggested that testimony from an eyewitness and/or a Redflex employee was required to do so.

California law provides for presumptions of authenticity for both "a printed representation of images stored on a video or digital medium, Cal. Evid. Code § 1553(a), and "a printed representation of computer information or a computer program, *id.* § 1552(a). To overcome these presumptions, the opponent of the evidence must introduce "***evidence***" that the photographs or videos (and computer-generated information printed thereon) are inaccurate or unreliable. *Id.* §§ 1552; 1553 (emphasis added).

Notwithstanding these presumptions of authenticity, California courts long "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." *People v. Martinez* (2000) 22 Cal.4th 106, 132 (internal quotations and citation omitted). Moreover, authentication does not require the person who takes a photograph to testify in order to lay a proper foundation for admission of the photograph. *Holland v. Kerr* (1953) 116 Cal.App.2d 31, 37. This is so because when photographs or videos are offered as probative evidence of what they depict, they act as "silent witnesses" and are thus admissible without eyewitness testimony that they accurately depict what they purport to show. *People v. Bowley* (1963) 59 Cal.2d 855, 860; *see also People v. Doggett* (1948) 83 Cal.App.2d 405, 410. Rather, such evidence may be authenticated by testimony from anyone who can testify to the process by which the camera captured the photographs, and those witnesses may be assisted by other matters, even those that are an inherent part of the photograph itself. *Doggett*, *supra*, 83 Cal.App.2d at 410.

The *Goldsmith* court relied on the above authorities in finding that the prosecution sufficiently authenticated ATES evidence with testimony from a police officer with ATES experience. *Goldsmith*, *supra*, 203 Cal.App.4th at 1519-20, 1522-24. Moreover, in the legislative history regarding SB 1303, a copy of which is enclosed as Attachment 3, the California Legislature expressly found "the *Goldsmith* ruling more persuasive" than *Borzakian*. See July 3, 2012 SB 1303 Bill Analysis, enclosed as Attachment 3, p. 14. On the issue of authentication, the Legislature found that the *Borzakian* court "ignor[ed] binding authority that

admission of computer-generated representations does not require first-hand testimony on the accuracy and reliability of the computer system." *Id.* at 13. Additionally, by amending Sections 1552 and 1553 of the Evidence Code to expressly provide that the presumptions of authenticity apply to ATES evidence, the Legislature has declared that it also agrees with the *Goldsmith* court, and not the *Borzakian* court, on that issue. *Id.* at 14.

The *Winters* court erred in ignoring the authorities discussed above and concluding without citation to any controlling precedent that the prosecution failed to sufficiently authenticate the ATES evidence. The court first erred in failing to even consider the presumptions of authenticity applying to photographic and video evidence under Sections 1552 and 1553 of the Evidence Code. Additionally, the court's suggestion that authentication of ATES evidence requires testimony from someone present at the scene of the violation and/or from a Redflex employee flies in the face of longstanding California law providing that photographic and video evidence may be authenticated by testimony from anyone who can testify to process by which the camera captured the photographs. *See Doggett*, *supra*, 83 Cal.App.2d at 410. As the *Goldsmith* court held, and with which the Legislature has agreed, a police officer trained in ATES enforcement who can describe the process by which the system captures, processes, and stores the photographs and video plainly meets this standard for authentication.

e. ***Winters* Should be Depublished Because the Court Plainly Erred in Holding that the ATES Evidence Constituted Inadmissible Hearsay**

In holding that the ATES evidence of Appellant's conviction constituted inadmissible hearsay, the court ignored longstanding California case law establishing that machine-generated evidence cannot constitute hearsay.

Hearsay is defined as "a statement that was made other than by a witness testifying at the hearing and that is offered to prove the truth of the matter stated." Cal. Evid. Code § 1200. California courts have made clear that machine-generated printouts are not hearsay because "[t]he Evidence Code does not contemplate that a machine can make a statement." *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1449. California courts have also established that photographs and videotapes are not hearsay for another, independent reason – "photographs and videotapes are demonstrative evidence, depicting what the camera sees" and as such "they are not hearsay." *People v. Cooper* (2007) 148 Cal.App.4th 731, 746; *see also People v. Nazary* (2010) 191 Cal.App.4th 727, 754-55; *Hawkins, supra*, 98 Cal.App.4th at 1449.

The Court of Appeal in *Goldsmith* relied on the above authorities in holding that the ATES evidence at issue did not constitute hearsay and sharply criticized the *Borzakian* court for failing to recognize these cases. *Goldsmith, supra*, 203 Cal.App.4th at 1525-27. Notably, in the legislative history regarding SB 1303 (enclosed), the Legislature stressed that the *Borzakian* court improperly "failed to address the threshold question of whether the evidence offered was hearsay and instead jumped immediately into an analysis of hearsay exceptions."

The *Winters* court erred by simply concluding without any supporting authority that the ATES evidence at issue constituted hearsay and ignoring longstanding California case law establishing that photographic and video evidence does not constitute hearsay.

f. *Winters* Should be Depublished Because the Court Plainly Erred in Holding that the Trial Court Violated Appellant's Confrontation Clause Rights

The *Winters* court further erred in holding that the trial court should have sustained Appellant's Confrontation Clause challenge because ATES evidence is non-testimonial and thus not subject to the Confrontation Clause.

The Confrontation Clause guarantees the right to confront only those "witnesses" who "bear testimony" against the defendant. *Crawford v. Washington* (2004) 541 U.S. 36, 51; *accord People v. Geier* (2006) 41 Cal.4th 555, 597. Thus, the Confrontation Clause is implicated only where "testimonial" evidence is at issue. *Crawford, supra*, 541 U.S. at 68. Because machines cannot not constitute "witnesses against" defendants whom the Confrontation Clause guarantees defendants the right to cross-examine, raw data generated by a machine does not implicate the Confrontation Clause. *United States v. Moon* (7th Cir. 2008) 512 F.3d 359, 363; *United States v. Washington* (4th Cir. 2007) 498 F.3d 225, 230-31 230.

The *Winters* court failed to even consider whether the ATES evidence at issue constituted testimonial hearsay subject to the Confrontation Clause and instead based its holding solely on the principle that it was the prosecution's, not Appellant's, duty to call a Redflex employee to testify at trial. The court should not even have made it to this step in the analysis because the evidence at issue was generated solely by a machine (the ATES) and thus did not constitute testimonial hearsay to which the Confrontation Clause applies. Because the Confrontation Clause was never implicated in the first place, the prosecution did not have the burden to call a Redflex employee to testify at trial. Moreover, even if the evidence were testimonial, which it was not, Officer Hill's testimony would have satisfied Confrontation Clause requirements.

5. Conclusion

If left published, *Winters* would cause significant confusion in the courts and in the public. The exact issues raised in *Winters* regarding the admissibility of ATES evidence are currently pending before both the State's high court and the Legislature and *Winters* itself has been transferred to the Court of Appeal for hearing and decision. As such, leaving this Appellate Division opinion published would not clarify a legal issue of continuing interest, advance a new interpretation or clarification of an existing rule of law, or meet any other publication standard under Rule 8.1105 of the CRC. Rather, the opinion would add extra confusion to an already muddled area of law and, in any event, would be rendered moot once the Court of Appeal decides the case on transfer or the Supreme Court or Legislature speaks on these issues. This Court should not permit such a result and instead should order the opinion depublished and let the higher courts and/or Legislature resolve these issues.

Additionally, the *Winters* opinion should be depublished because it misinterprets the facts and relevant law and plainly ignores controlling California case law. As such, it should not be permitted to represent binding law in the County of San Bernardino and persuasive authority in other California jurisdictions. Leaving such a decision published would be wholly inconsistent with California's selective publication policy.

Redflex therefore respectfully requests that the *Winters* opinion be depublished in its entirety. In the alternative, Redflex respectfully requests that *Winters* be depublished pending the Court of Appeal's decision on transfer, or until such time that the California Supreme Court speaks on these issues in *Goldsmith* and/or *Borzakian* or the California Legislature resolves these issues via SB 1303.

Sincerely,

Gregory P. Barbee

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH:406715490.1
Enclosures