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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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THE PEOPLE,
Plaintiff/Respondent,

Court of Appeal No.: B231678

v.

(Los Angeles County

Superior Court Appellate No.: BR 048189

Conclusion

Trial Court No.: 102693IN)

██████████ GOLDSMITH,
Defendant/Appellant,

Certificate of Compliance

██████████ KUNG,
AMICUS CURIAE.

COURT OF APPEAL - SECOND DIST.
FILED
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JOSEPH A. LANE Clerk
V. GRAY Deputy Clerk

██████████ KUNG'S AMICUS CURIAE BIREF
IN SUPPORT OF DEFENDANT/APPELLANT

For Amicus Curiae

██████████ KUNG

IN PRO PER

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AMICUS CURIAE BIREF

TO PLAINTIFF/RESPONDENT AND THIS HONORABLE COURT:

PLEASE TAKE NOTICE that Amicus Curiae, [REDACTED] Kung (hereinafter Kung) hereby submits the following Brief in response to the Plaintiff/Respondent's, The People, (hereinafter Respondent), Response Brief, and in advance of any appellate hearing in the above-captioned matter.

INTRODUCTION

On August 10, the Second Appellate District of the Court of Appeal granted Kung's application to file amicus curiae brief.

Kung has an unique interest in this matter due to a Denial of Transfer Order issued by the Honorable William R. McGuiness, Administrative Presiding Justice, the Court of Appeal, First District, Division Three in *People v. [REDACTED] Kung* (Court of Appeal No.: A132573). In the Order, the Honorable McGuiness addressed that:

“In light of appellate proceedings pending in *People v. Goldsmith* (B2316780), transfer to this court is not necessary to secure uniformity of decision or settle an important question of law.”

Although Kung believes that the Court of Appeal was erred in denying transfer pursuant to *Guillory v. Superior Court* (2003) 100 Cal.App.4th 750, which such issue is pending on petition for review in the Supreme Court of California, filed on August 11, 2011. Nevertheless, the Order from the Honorable McGuiness has effectively put Kung into the “playing field” and become a party of interest of in similar matters. As such, any decisions will directly affect me, as an individual, to all the People throughout the State

of California. Therefore, with the approval of the Court, Kung respectively submits this amicus brief for consideration.

ARGUMENT

1. The Appellate Division was not erred in disagreeing *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1

The decision of *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1 was issued by the Superior Court of California, County of Orange, Appellate Division, which was certified for publication by the Fourth District of the Court of Appeal. The decision of *People v. Goldsmith* was issued by the Superior Court of California, County of Los Angeles, Appellate Division, which was certified for partial publication by the Second District of the Court of Appeal.

In discussing *Guillory v. Superior Court* (2003) 100 Cal.App.4th 750, First District of the Court of Appeal addressed that:

“Although we are bound by the Supreme Court's holding in *Manduley*¹, we are not similarly bound to follow the holding of the Second District in *Gevorgyan*²...”

While horizontal stare decisis is not recognized in California Judicial System, a decision is only binding within its own jurisdiction. Trial courts and appeal courts outside jurisdiction are welcomed to follow such precedence, but are not bound to do so.

Therefore, the Appellate Division was not erred in disagreeing *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1³.

¹ *Manduley v. Superior Court* (2002) 27 Cal.4th 537

² *People v. Superior Court (Gevorgyan)* (2001) 91 Cal. App.4th 602

³ Unless the Supreme Court is willing to intervene to secure the uniformity of decision.

**2. The Appellate Division was erred in denying Defendant/Appellant's
Constructional rights guaranteed by the Fifth and Sixth Amendment.**

a. Procedural Due Process under Fifth Amendment

With no doubt, the Appellate Division was not erred in interpreting Evidence Code §1552 and §1553 if they are interpreted alone. However, such interpretation may violate the Defendant/Appellant's procedural due process rights under the Fifth Amendment.

While the presumption under Evidence Code §1552 and §1553 shift the burden of proof to the Defendant/Appellant, such shift in fact results in violation of procedural due process. It effectively shifts the burden of proof away from the prosecutor, which the Defendant/Appellant basically has to prove her innocence by proving proof to challenge the evidence admitted.

b. Confrontation Right under Sixth Amendment

The Appellate Division, in denying Sixth Amendment right claim, contented that as the Defendant/Appellant failed to assert her confrontation right during trial, she lost her ground for appeal based on Confrontation Clause under the Sixth Amendment.

In denying such claim, the Appellate Division relied on *People v. Redd* (2010) 48 Cal. 4th 691 and *People v. D'Arcy* (2010) 48 Cal.4th 257. *People v. Redd* (2010) 48 Cal. 4th 691 deals with a false claim of violation of confrontation rights (as the witness in *People v. Redd* (2010) 48 Cal. 4th 691 were available to be confronted). *People v. D'Arcy* (2010) 48 Cal.4th 257 deals with dying declarations. None of these cases are related to this case except the forfeiture of the issue on appeal.

In term of the forfeiture of right, the Appellate Division contented that numerous decisions have established the general rule that trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal results in a forfeiture of the issue on appeal (*People v. Dykes* (2009) 46 Cal. 4th 731). However, when such forfeiture may be in violation of the Defendant/Appellant's Constitutional rights, such general rule should no longer applied as it will contradict with the U.S. Constitution, the supreme law of the land.

In *Crawford v. Washington* (2004) 541 U.S. 36, the U.S. Supreme Court has only established two exceptions when the Confrontation Clause under Sixth Amendment does not apply:

- Forfeiture by wrongdoing
- Dying declarations

While the U.S. Supreme Court did not establish other exceptions, trial counsel's failure to object to claimed evidentiary error on the same ground asserted on appeal should not result in a forfeiture of the issue on appeal.

3. The Respondent failed to lay foundation for compliance in Vehicle Code

§21455.7.⁴

Young testified his results of compliance in Vehicle Code §21455.7 by testing the minimum guidelines established by California Department of Transportation (Hereinafter

⁴ For such purpose, Kung does not intend to challenge the accuracy of Young's visual inspection and testimony at trial, but simply focus on the deficiency that the Respondent failed to lay in establishing compliance in Vehicle Code §21455.7.

Caltrans) were "...well above the required interval of 3.9 seconds," However, where is this 3.9 seconds requirement coming from?

According to the Respondent's Brief, the 3.9 seconds requirement is based on California Manual on Uniform Traffic Control Devices (Hereinafter MUTCD) published by Caltrans. The Respondent, relied on 2006 edition of MUTCD, was mandated a minimum yellow light change interval of 3.9 seconds based on a prima facie speed limit of 40 miles per hour for approaching vehicles.

a. No demonstrative evidence has ever admitted into evidence to associate with the 3.9 seconds requirement.

The 2006 edition of MUTCD, specifically, page 4D-11 and 4D-50, according to the Respondent, was not introduced as evidence and not admitted into evidence. The trial Court, relied on Young's testimony, accepted 3.9 seconds was the requirement for the minimum yellow light change interval.

Based on Evidence Code §1280, the MUTCD can be considered as an official record, as an exception of the hearsay rule. However, Young's testimony for the 3.9 seconds was in fact hearsay as he failed to substantiate that by introducing the MUTCD into the evidence. Such failure resulted in a forfeiture of the Defendant/Appellant's right of procedural due process under Fifth Amendment by allowing the Defendant/Appellant to examine or even challenge the validity of the said evidence.

b. No evidence has ever admitted into evidence to substantiate the 40 miles per hour speed limit.

The 3.9 seconds requirement, according to MUTCD, is based on a posted speed or prima facie speed of 40 mile per hour. However, why the speed limit has to be 40 miles per hour?

Based on MUTCD, minimum yellow light change interval depends on the posted speed limit or prima facie speed limit. In Young's testimony, he did not testify or offer any evidence to substantiate the 40 miles per hour speed limit. Therefore, the trial court was erred in believing the 40 miles per hour speed limit without any evidentiary support.

In conclusion, the Respondent failed to lay proper foundation to substantiate that the City of Inglewood has complied with Vehicle Code §21455.7. According, the Respondent was not in compliance with Vehicle Code §21455.7 and the trial court was erred in the determination of this matter.

4. Trial courts should examine the municipality's compliance of Vehicle Code §21455.5 before convicting an alleged violation of Vehicle Code §21453(a).

Vehicle Code §21455.5 governs the use of AES for the prosecution of Vehicle Code §21453(a). As the key element of conviction - legitimacy and foundation of the use of AES, the trial court failed to neither examine legitimacy and foundation 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), which the evidence resulted from AES is in fact in doubt for its admissibility.

CONCLUSION

For the foregoing reasons, Kung respectfully request that this court reverse Defendant/Appellant's conviction.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules of Court Rule 8.204(c)(1), I hereby certify that this brief contains 1620 words, including footnotes. In making this certification, I have relied on word count of the computer program used to prepare the brief. The brief has been typeset with double spacing and a 12-point font.

DATED: August 15, 2011

Respectfully submitted,

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