

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

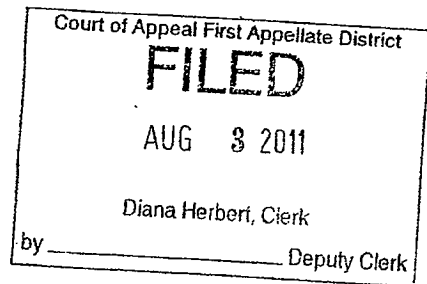
~~_____~~ KUNG,
Petitioner,

Court of Appeal No.: TBD

v.

THE COURT OF APPEAL OF
CALIFORNIA, FIRST APPELLATE
DISTRICT,
Respondent,

THE PEOPLE,
Real Party In Interest.



PETITION FOR WRIT OF MANDAMUS
RELATED APPEAL PENDING (*PEOPLE V. ~~_____~~ KUNG; A192573*) A13 2573

For the Petitioner

~~_____~~ KUNG
IN PRO PER
~~_____~~
~~_____~~
Telephone ~~_____~~

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TABLE OF AUTHORITIES

California Cases

- *Guillory v. Superior Court* (2003) 100 Cal.App.4th 750
- *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1
- *People v. Borz* [REDACTED] (2011) Case Pending (Court of Appeal No. B229748)
- *People v. Goldsmith* (2011) Case Pending (Court of Appeal No. B231678)

Statutes and Miscellaneous Cites

- Code of Civil Procedure §1085

PETITION FOR WRIT OF MANDAMUS

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE
ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA:

1. By this original Verified Petition for Writ of Mandamus, Petitioner [REDACTED] Kung (hereinafter Petitioner) hereby seek a writ of mandamus, pursuant to California Constitution Article VI, Section 10 and Code of Civil Procedure §1085, ordering the Court of Appeal, First Appellate District, an infraction case, *People v. [REDACTED] Kung* (Court of Appeal No.: ~~A192573~~ Related Appeal Pending) be transferred for hearing and decision to secure uniformity of decision and settle an important question of law.
A132573
2. On April 11, 2011, the Appellate Division of Superior Court of California, Alameda County, affirmed the Trial Court judgment.
3. On April 21, 2011, the Appellate Division denied the Petitioner's request for publication of opinion.
4. On April 25, 2011, the Petitioner filed a timely Petition for Rehearing.
5. On May 5, 2011, the Petitioner filed an untimely Application to Certify Case for Transfer to the Court of Appeal¹.
6. On May 16, 2011, the Petitioner filed a timely Petition for Transfer.

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

7. 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.
8. On June 1, 2011, the Appellate Division reversed the Trial Court judgment.
9. On June 8, 2011, the Court of Appeal, First District issued a dismissal order for the Petition for Transfer filed on May 16, 2011.
10. On June 16, 2011, the Petitioner filed a timely Application to Certify Case for Transfer to the Court of Appeal for its decision on June 1, 2011 and requested the Appellate Division for publication of opinion. The Application was automatically denied pursuant to the Rules of Court Rule 8.1005(c) on July 1, 2011, which the appellate division decision on June 1, 2011 was final. The Petitioner never received a response for its request for publication of opinion.
11. On July 12, 2011, Petitioner filed a timely Petition for Transfer² in the Court of Appeal, First Appellate District. (See Exhibit 1, attached hereto and incorporated herein by this reference.) Petitioner requested that the Court of Appeal, First Appellate District to order *People v. [REDACTED] Kung* be transferred for hearing and decision to secure uniformity of decision or settle an important question of law.
12. On July 29, 2011, the Honorable William R. McGuiness, Administrative Presiding Justice, of the Court of Appeal, First Appellate District, Division Three, denied transfer. (See Exhibit 2, attached hereto and incorporated herein by this reference.)
13. By this petition, Petitioner seeks an order of this Court directing the Court of Appeal, First Appellate District to order *People v. [REDACTED] Kung* be transferred for hearing

² The decision on June 1, 2011 is used for the purpose of this Petition for Transfer.

and decision.

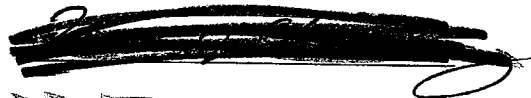
14. Petitioner has been harmed by the failure of the Court of Appeal, First Appellate District to order *People v. [REDACTED] Kung* be transferred in that Petitioner is entitled to a review, and the failure of the Court of Appeal, First Appellate District to order the above be transferred for hearing and decision is resulting in an unlawful restraint on Petitioner's liberty and property.
15. Petitioner has no administrative remedy available to him to compel the Court of Appeal to order *People v. [REDACTED] Kung* be transferred. Petitioner has no plain, speedy or adequate remedy in the ordinary course of the law to compel the Court of Appeal to order *People v. [REDACTED] Kung* be transferred. Mandamus, pursuant to California Constitution Article VI, Section 10 and Code of Civil Procedure §1085, is the appropriate remedy for failure of the Court of Appeal to order *People v. [REDACTED] Kung* be transfer.

WHEREFORE Petitioner prays that:

1. A peremptory writ of mandamus issue from this Court directing the Court of Appeal to order *People v. [REDACTED] Kung* be transferred for hearing and decision immediately, or that;
2. An alternative writ of mandamus issue from this Court directing the Court of Appeal to immediately order *People v. [REDACTED] Kung* be transferred for hearing and decision or in the alternative to show cause before this Court at a specified time and place why the relief prayed for should not be granted, and that;
3. Petitioner be granted such other and further relief as this Court deems just.

DATED: August 3, 2011

Respectfully submitted,


[REDACTED] KUNG



Petitioner, IN PRO PER

VERIFICATION

I am the petitioner in this action. All facts alleged in the above petition are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: August 3, 2011


 KUNG

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF MANDATE**

1. The Court of Appeal was erred in denying Petitioner's Petition for Transfer.

The Court of Appeal abused its discretion in denyng Petitioner's Petition for transfer.

The Honorable William R. McGuiness, Administrative Presiding Justice, addressed the rationale of denying the transfer (See Exhibit 2):

“In light of appellate proceedings pending in *People v. Goldsmith* (B231678), transfer to this court is not necessary to secure uniformity of decision or settle an important question of law.”

a. The Court of Appeal was erred in recognizing horizontal stare decisis

In discussing *Guillory v. Superior Court* (2003) 100 Cal.App.4th 750, the same District of the Court of Appeal denying Petitioner's Petition to transfer addressed that:

“Although we are bound by the Supreme Court's holding in *Manduley*³, we are not similarly bound to follow the holding of the Second District in *Gevorgyan*⁴...”

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.

³ *Manduley v. Superior Court* (2002) 27 Cal.4th 537

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

Based on the Order issued by the Honorable William R. McGuiness, trial courts and the Court of Appeal throughout the State of California (except those which are under Second District of the Court of Appeal) are welcomed, but not required, to bound with the decision of *People v. Goldsmith*. This result no uniformity of decision throughout the State of California, except to those which are under Second District of the Court of Appeal. Hence, this warrants for the transfer pursuant to Rules of Court Rule 8.1006 to secure uniformity of decision and settle an important question of law.

b. *People v. Goldsmith* and *People v. [REDACTED] Kung* are similar only to certain extend.

The following are the summary of the similarities and differences between *People v. Goldsmith* and *People v. [REDACTED] Kung*:

Similarities

1. Both *People v. Goldsmith* and *People v. [REDACTED] Kung* arise from an alleged violation of Vehicle Code §21453(a) by the use of Automatic Enforcement System (hereinafter AES);
2. Both *People v. Goldsmith* and *People v. [REDACTED] Kung* seek review pursuant to *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527

Differences

1. *People v. [REDACTED] Kung*, but not *People v. Goldsmith*, seeks review of the fine assessment under Excessive Fines Clause of the Eighth Amendment;
2. *People v. [REDACTED] Kung*, but not *People v. Goldsmith*, seeks review of the procedural due process for convicting alleged violation of Vehicle Code §21453(a);

3. *People v. [REDACTED] Kung*, but not *People v. Goldsmith*, seeks review of the discretion of dismissal on the basis of excessive delay in appeal.

4. The conviction of *People v. [REDACTED] Kung*, but not *People v. Goldsmith*, was reversed.

Based on the above, the Court of Appeal was erred in linking *People v. Goldsmith* with *People v. [REDACTED] Kung* as the elements of cases are substantially different.

c. The Court of Appeal violated Petitioner's right under the Equal Protection Clause of the Fourteenth Amendment.

While *People v. Goldsmith* and *People v. [REDACTED] Kung* seek judicial review in different aspect of the law, by denying the transfer, the Court has effectively violated the Petitioner's right of protection under the Equal Protection Clause of the Fourteenth Amendment.

Specifically, the Court of Appeal granted transfer of *People v. Goldsmith* to secure uniformity of decision or settle an important question of law. However, the Court of Appeal failed to use the same standard of review in considering Petitioner's Petition for Transfer. This creates an irreparable damage under the Equal Protection Clause of the Fourteenth Amendment.

2. Existing case precedence are conflicting with each other.

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.

Both decisions discussed the admissibility of the evidence package used for prosecuting alleged violations of Vehicle Code §21453(a). However, none of their discussions is conclusive as the decisions are contradict with each other without consensuses.

In conclusion, the Court of Appeal lacked jurisdiction to deny the Petition for Transfer.

CONCLUSION

Petitioner requests the Court of Appeal, First Appellate District to grant the Writ of Mandamus Writ by ordering *People v. [REDACTED] Kung* be transferred for hearing and decision to secure uniformity of decision and settle an important question of law, in the interest of justice.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules of Court Rule 8.204(c)(1) and 8.490(b)(6), I hereby certify that this brief contains 1815 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.

[REDACTED]
[REDACTED] KUNG

Exhibit 1

Petition for Reconsideration and Transfer

Filed on July 12, 2011

People v. [REDACTED] Kung (Court of Appeal

No.: A132573)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

PEOPLE OF THE STATE OF
CALIFORNIA


Plaintiff/Respondent

Court of Appeal No.: A131987

Appellate Division No.: 5113

v.


Trial Court No.: 50608153/TRE

 KUNG,
Defendant/Appellant

Court of Appeal First Appellate District FILED JUL 12 2011 Diana Herbert, Clerk by _____ Deputy Clerk
--

PETITION FOR RECONSIDERATION AND TRANSFER

For the Petitioner

 KUNG
IN PRO PER


Telephone: 

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

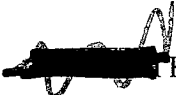
PEOPLE OF THE STATE OF
CALIFORNIA
Plaintiff/Respondent

Court of Appeal No.: A131987

Appellate Division No.: 5113

v.

Trial Court No.: 50608153/TRF


KUNG,
Defendant/Appellant

PETITION FOR RECONSIDERATION

Request for reconsideration for transfer of an infraction case to the Court of Appeal, First
Appellate District

Court of Appeal, First District, Division Three


HONORABLE William R. McGuiness, Administrative Presiding Justice

For the Petitioner

 KUNG

IN PRO PER

Telephone: 

Petition for Reconsideration and Transfer - People  Kung

Statement for Reconsideration

This reconsideration is taken from a dismissal order of the Court of Appeal, First District and is authorized by Code of Civil Procedure Section 1008(a).

Summary

Petitioner, [REDACTED] Kung, defendant and appellant of *People of the State of California v. [REDACTED] Kung*, hereby petition the Court of Appeal to grant reconsideration for the transfer of *People of the State of California v. [REDACTED] Kung* 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 Petitioner's request for publication of opinion. On April 25, 2011, the Petitioner filed a timely Petition for Rehearing. On May 5, 2011, the Petitioner filed an untimely Application to Certify Case for Transfer to the Court of Appeal¹. On May 16, 2011, the Petitioner filed a timely Petition for Transfer. 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 judgment². On June 8, 2011, the Court of Appeal, First District issued a dismissal order for the Petition for Transfer filed on May 16, 2011. On June 16, 2011, the Petitioner filed a timely Application to Certify Case for Transfer to the Court of Appeal for its decision on June 1, 2011 and requested the Appellate Division for publication of opinion. The Application

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

² The decision on June 1, 2011 is used for the purpose of this Petition for Reconsideration.

was automatically denied pursuant to the Rules of Court Rule 8.1005(c) on July 1, 2011, which the appellate division decision on June 1, 2011 was final. The Petitioner never received a response for its request for publication of opinion.

Discussion

1. The issuance of a new decision should effectively allow the Petitioner to request a new transfer in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

The Dismissal Order issued on June 8, 2011 was based on the Application to Certify Case for Transfer to the Court of Appeal on May 5, 2011 and Petition to Transfer on May 16, 2011. However, by granting the Petition of Rehearing on May 17, 2011, the Appellate Division has effectively modified its decision and the date related to finality of decision, and timeliness for appeal should have reset by the Appellate Division's action in accordance to the Rules of Court. Therefore, the Petitioner should be allowed to petition for transfer again in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

Conclusion

Petitioner requests the Court of Appeal to grant reconsideration for the Transfer of *People of the State of California v. [REDACTED] Kung*. The transfer is necessary in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

DATED: July 11, 2011

Respectfully submitted,

[REDACTED] KUNG

Petitioner, IN PRO PER

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE**

PEOPLE OF THE STATE OF
CALIFORNIA
Plaintiff/Respondent

Court of Appeal No.: A131987

Appellate Division No.: 5113

v.

Trial Court No.: 50608153/TRF

 KUNG,
Defendant/Appellant

PETITION FOR TRANSFER

Request for transfer of an infraction case to the Court of Appeal, First Appellate District

Superior Court of California, County of Alameda, Appellate Division
HONORABLE Gloria Rhynes, Presiding Judge

Superior Court of California, County of Alameda, Fremont Hall of Justice
HONORABLE David Byron, Judge Pro Tem

For the Petitioner

 KUNG

IN PRO PER

Telephone 


Petition for Reconsideration and Transfer - People v.  Kung

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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

Statement of Appealability

This appeal is taken from a judgment of Superior Court of California, County of Alameda and is authorized by Penal Code Section 1471.

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

Petitioner, Kin Wah Kung, defendant and appellant of *People of the State of California v. [REDACTED] Kung*, hereby petition the Court of Appeal to grant transfer of *People of the State of California v. [REDACTED] Kung* in the interest of justice and to secure uniformity of decision.

Petitioner [REDACTED] Kung, defendant and appellant of *People of the State of California v. [REDACTED] Kung*, hereby petition the Court of Appeal to grant reconsideration for the transfer of *People of the State of California v. [REDACTED] Kung* 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 Petitioner's request for publication of opinion. On April 25, 2011, the Petitioner filed a timely Petition for Rehearing. On May 5, 2011, the Petitioner filed an untimely Application to Certify Case for Transfer to the Court of Appeal³. On May 16, 2011, the Petitioner filed a timely Petition for Transfer. 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 judgment⁴. On June 8, 2011, the Court of Appeal, First District issued a dismissal order for the Petition for Transfer filed on May 16, 2011. On June 16, 2011, the Petitioner filed a timely Application to Certify Case for Transfer to the Court of Appeal for its decision on June 1, 2011 and requested the Appellate Division for publication of opinion. The Application

³ Pursuant to the Dismissal Order by the Court of Appeal, First District, Division Three on June 8, 2011 (Court of Appeal Case No.:A131987)

⁴ The decision on June 1, 2011 is used for the purpose of this Petition for Reconsideration.

was automatically denied pursuant to the Rules of Court Rule 8.1005(c) on July 1, 2011, which the appellate division decision on June 1, 2011 was final. The Petitioner never received a response for its request for publication of opinion.

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 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

Petitioner requests the Court of Appeal to grant transfer of *People of the State of California v. [REDACTED] Kung* for decision on the above issues. The transfer is necessary in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

DATED: July 11, 2011

Respectfully submitted,

[REDACTED]

[REDACTED] KUNG

Petitioner, IN PRO PER

Exhibit 2

Order of Denial of Transfer by the
Honorable William R. McGuiness Filed on

July 29, 2011

People v. [REDACTED] Kung (Court of Appeal

No.: A132573)

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

FILED

JUL 29 2011

Court of Appeal - First App. Dist.
DIANA HERBERT

By _____
DEPUTY

THE PEOPLE,
Plaintiff and Respondent,

v.
[REDACTED] KUNG,
Defendant and Appellant.

A132573

(Alameda County
Superior Court Appellate No. 5113
Trial Court No. 50608153/TRF)

BY THE COURT:

Defendant [REDACTED] Kung's petition to transfer pursuant to rule 8.1006 of the California Rules of Court is denied. In light of appellate proceedings pending in People v. Goldsmith (B231678), transfer to this court is not necessary to secure uniformity of decision or settle an important question of law.

Date: JUL 29 2011

 McGuinness, P.J. P.J.