No. S202483

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff & Respondent,

vs.

[redacted] **GRAY**

Defendant & Appellant.

After Decision by Court of Appeal, Second District, Div. Three
Appeal Transferred from Appellate Division
of Los Angeles Superior Court
Appeal No. B236337; App. Div. No. BR048502;
Trial Court No. C165383
Hon. Lawrence H. Cho, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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PREAMBLE

Appellant hereby submits his Reply Brief on the Merits.

There are 38 million residents in the State of California. Appellant respectfully inquires of this Honorable California Supreme Court.

Query 1: Must Culver City comply with the laws as codified in Vehicle Code §§ 21455.5-21455.7, the "enabling statutes"?

Query 2: Pursuant to those enabling statutes, did the California legislature conditionally authorize municipalities to issue automated traffic enforcement system ("ATES") red light traffic citations?

Query 3: Shouldn't this Honorable Supreme Court mandate that a municipality, i.e., Culver City, first comply with the enabling statutes before issuing ATES citations as instructed in the enabling statutes?

Query 4: Isn't Culver City -- as a governmental entity -- held to a higher standard and specific duty to first know and comply with the law, when compared with the general duty of the motoring public?

Query 5: Isn't Culver City required to comply with the "enabling statutes" before it can use same to issue citations pursuant to an ATES's camera system?

Query 6: Shouldn't this Honorable Supreme Court assure the motoring public in California that it will require Culver City, a subordinate municipality, to comply with the law?

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INTRODUCTION

In what appears to be a hail-Mary attempt to rescue Gray's conviction from reversal, Culver City tries to reconceptualize the statutory authority for prosecuting agencies to issue red light camera citations. The ultimate flaw in Culver City's position is that it assumes that a state law can somehow override federal constitutional requirements. It cannot.

Regardless of Culver City's speculation as to what the California legislature may have or must have contemplated in enacting the red light camera statute, drivers are constitutionally entitled to a municipality's compliance with the law and an adequate grace period to become familiar with the implementation of red light camera systems on an intersection-specific basis. Contrary to Culver City's suggestion, the issue presented here is not whether the average driver knows that he is required to stop at a red light. No one disputes that drivers know that they must stop at red lights.

The issue is whether interpreting the subject enabling statute to require only a program-general notice, as opposed to intersection-specific notice, is constitutionally adequate when the law can potentially result in inconsistent enforcement by different prosecuting agencies.

In sum, regardless of what the legislature may have or must have intended, drivers are entitled to intersection-specific notice.

Keeping its head in the sand like an ostrich, Culver City adamantly denies any split of authority over this issue, notwithstanding the conflict

between the Court of Appeal's decision here and the contrary decision in *People v. Park* (2010) 187 Cal.App.4th Supp. 9. (Answer 31.) Given Culver City's refusal to acknowledge the practical ramifications of this split of authority, its myopic arguments are flawed for this additional reason.

Finally, because Culver City's entire criminal case against Gray was based on red light camera photos, Culver City's failure to properly implement the camera system at the subject intersection -- where Gray was accused of violating the law -- means that the photos should have been excluded. In light of the trial court's erroneous failure to exclude those photos (the entire basis for initiating and prosecuting this case) despite Culver City's own admission that it did not provide intersection-specific notice for the subject intersection, Gray's conviction should be reversed.

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LEGAL ARGUMENT

I. CULVER CITY'S ARGUMENTS BASED ON LEGISLATIVE HISTORY AND RULES OF STATUTORY CONSTRUCTION ARE PREEMPTED ON CONSTITUTIONAL GROUNDS.

A. Culver City's Arguments Completely Ignore the Constitutional Requirements for Adequately Publicizing the Statutory Amendments at Issue.

With the enactment of the red light camera statute, prosecuting agencies such as Culver City commenced criminal proceedings in traffic courts based on photos prepared by Automated Traffic Enforcement System "ATES" equipment. Culver City acknowledges that ATES enforcement "was not a program well-known at the time of enactment of the ATES legislation" and the "sole exposure that the driving public had" to ATES enforcement was in connection with "railroad crossings." (Answer 9.) Given this background, the adoption of Culver City's arguments yields constitutional problems, particularly given that the law authorizing ATES equipment at railroad crossings "was enacted only a year earlier." (*Id.*)

In order to avoid potential due process problems, the U.S. Supreme Court has required legislatures, after enacting a law that affects substantial

rights, to "publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply.' (*Texaco, Inc. v. Short* (1982) 454 U.S. 516, 532.) Upholding a new state law that deemed certain property that had not been used for twenty years to be abandoned, the Court found the law in *Texaco* to pass constitutional muster because it allowed a two-year grace period for "property owners in the State to familiarize themselves with the terms of the statute and to take any action deemed appropriate to protect existing interests." (*Id.* at 533.) This basic requirement has been reinforced in other cases. (See, e.g., *Turner v. New York* (1897) 168 U.S. 90, 94 [holding that statute extinguishing rights to land did not offend Constitution because it provided six-month grace period for the filing of claims to land]; *Wheeler v. Jackson* (1890) 137 U.S. 245, 256 [finding constitutional a statute providing six months in which to bring an action to compel the execution of certain conveyances or leases because it afforded parties a "reasonable opportunity to protect their rights under the new law"].)

Seeking to bypass these principles, Culver City argues that the red light camera statute should be deemed to be program-general because once the initial public announcement is provided, the public will learn about the city's use of ATES systems in the "community." (ABOM 18.) This argument, based on the suggestion that the public should be deemed to be aware of the ATES systems subsequently installed at other intersections, is flawed.

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"While citizens 'are presumptively charged with knowledge of the law,' *Atkins v. Parker*, 472 U.S. 115, 130 (1985), that presumption may not apply when 'the statute does not allow a sufficient 'grace period' to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it." (*Hodel v. Irving* (1987) 481 U.S. 704, 733 (Stevens, J., concurring) [internal quotation marks and citation in original].)

While a 30-day warning period is certainly a sufficient grace period for informing the public regarding the addition of an ATES at a particular intersection, the initial public announcement cannot be deemed to be sufficient in connection with the subsequent installation of an ATES ten years later, particularly if the new system was installed twenty miles away from the original intersection by the same municipality. (See, e.g., *Atkins*, supra, 472 U.S. at 130-31 [food stamp recipients received constitutionally-adequate notice of reduction of benefits based on 90-day grace period before statutory amendment went into effect]; *Hodel*, *supra*, 481 U.S. at 733-34 [federal statutory escheat law was unconstitutional because affected property owners "did not receive a reasonable grace period" or "an adequate opportunity to put their affairs in order" to avoid the consequences of the new law] (Stevens, J., concurring).)

In other contexts when the legislature has amended a law, the Supreme Court has similarly imposed a reasonableness test in evaluating the constitutional due process issue in terms of the application of the amendments to those affected by the law. For example, when a law is

amended to reduce the statute of limitations after the time period for filing an action has started accruing, the Court "consider[s] whether the time allowed in this statute is, under all the circumstances, reasonable." (*Terry v. Anderson* (1877) 95 U.S. 628, 632-33 [a judicial interpretation of a statute of limitations that gives injury victims no time in which to file suit is unconstitutional]; accord, *Koshkonong v. Burton* (1881) 104 U.S. 668, 675 [holding that amendment of statute to provide for different accrual date, and one-year grace period in which litigants could commence causes of action otherwise barred by the new accrual date, was constitutional because statute provided a reasonable time to commence an action before the statutory bar took effect].)

Applying these cases here, a judicial interpretation of the ATES statute that provides the accused no time to become familiar with its application at a particular intersection would raise serious constitutional concerns. This is particularly true in light of Culver City's acknowledgment that the warning requirement and the public announcement requirement were imposed "to vitiate the novelty of the new legislation" authorizing red light camera prosecutions. (Answer 9.) Given the need to "avoid surprise" (*id.*), a program-general warning would be inadequate to educate the public regarding the adoption of such systems at a particular intersection, particularly in light of the potentially substantial temporal and geographical gaps between the time of the original installation of ATES equipment at the initial location and its subsequent implementation at various other locations. (Answer 9.)

To summarize, Culver City's convoluted arguments based on rules of statutory construction can be disregarded based on the constitutional floor for providing adequate notice to the public. Culver City's arguments completely ignore the fact that the federal Constitution preempts the adoption of Culver City's view as to what form of public notice the statute should be deemed to provide. [1]

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[1]. While *Texaco* was deferential to the length of time imposed by state legislators (*Texaco, supra*, 454 U.S. at 532 [a two-year grace period in that case]), contrary to Culver City's approach, that does not mean that the judiciary may rubberstamp the legislators' decision without independently evaluating the adequacy of the time alleged to be provided by the statute.

B. Given the Ambiguous Nature of the Statutory Language Imposing Warning Requirements, Culver City's Arguments Should Be Rejected on This Additional Ground.

1. The statutory warning requirements are vague because they can potentially result in inconsistent enforcement actions by plaintiffs in criminal cases.

Culver City also argues that Gray's conviction can be upheld here, notwithstanding the vagueness issues associated with the red light camera statute, because Gray knew that it is illegal to run a red light. (Answer 28-29.) According to Culver City, its "manner of complying with section 21455.5(b) is in no way related to articulating the conduct prohibited by the red light law." (Answer 28 [citing section 21453(a)].)

Culver City completely misses the point. While vagueness as to the elements of a criminal offense is one way to trigger reversal under the vagueness doctrine, it is not the only way. If the law is such that it can potentially result in discriminatory (i.e., differential/inconsistent) methods of enforcement, that is an alternative scenario where the void-for-vagueness doctrine would require a reversal. (See *Gentile v. State Bar* (1991) 501 U.S. 1030, 1051 ["[T]he question is not whether discriminatory enforcement occurred here, ... but whether the [law] is so imprecise that discriminatory

enforcement is a real possibility"; brackets added; internal citations omitted]; accord, *McDonald v. City of Chicago* (2010) 130 S. Ct. 3020, 3094 ["The need for certainty and uniformity is more pressing, and the margin for error slimmer, when criminal justice is at issue"] (Stevens, J., dissenting).)

Because different municipalities have adopted different views as to whether the law requires intersection-specific or program-general warning requirements (Opening Brief, 5, 23-24), the red light camera statute "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109.)

Therefore, regardless of the need to provide adequate notice to defendants as to what constitutes a violation, "laws must provide explicit standards for those who apply them" -- i.e., *plaintiffs* in criminal cases -- in order to prevent "arbitrary and discriminatory enforcement[.]" (*Id.* at 109.) Therefore, Gray's conviction must be reversed -- despite Gray's admitted knowledge that it would be against the law to run a red light and despite his receipt of the citation identifying the pending charges -- because the law is so vague that it has allowed plaintiffs (prosecuting agencies) to adopt their own subjective view as to whether the warning requirements are intersection-specific -- as Los Angeles has adopted -- or program-general -- as Culver City has adopted. (Opening Brief, 5.) "Where inherently vague statutory language permits ... selective law

enforcement, there is a denial of due process." (*Smith v. Goguen* (1974) 415 U.S. 566, 576.)

While the focus here is on the impact of the statutory language on plaintiffs, that does not mean that the law's impact on the defendant is irrelevant. A driver is still entitled to proper notice that an ATES has been installed at a particular intersection, thus allowing the driver the opportunity to alter his conduct; e.g., whether by avoiding the intersection altogether or otherwise. "A statute which denies the affected party a reasonable opportunity to avoid the consequences of noncompliance may work an injustice similar to that of invalid retroactive legislation. In both instances, the party who 'could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct.'" (*Hodel, supra*, 481 U.S. at 733, fn. 18 (Stevens, J., concurring) [internal citations omitted].)

The opportunity to provide drivers with adequate notice to avoid an ATES intersection is particularly important, given the risks associated with a criminal prosecution based solely on ATES materials (e.g., inaccuracy, unreliability, potential alteration, etc.).

For example, a driver may decide that, rather than risk a $480 citation, an adverse DMV report, and a couple of thousand dollars in increased insurance premiums over the course of three years based on a questionable conviction predicated solely on ATES materials, it is simply easier to avoid such an intersection by altering his/her route (e.g., using a parallel street).

In order for drivers to have this opportunity (i.e., the option to avoid such risks), intersection-specific warnings should be required. [2]

Otherwise, under Culver City's view, if a municipality provides a single warning regarding its intent to use ATES equipment at one intersection in the entire jurisdiction (or at an unspecified intersection), it can then use that warning in perpetuity without providing any additional warnings for twenty other intersections. Just as a statute that provides "no opportunity to comply with the law and avoid its penalty" violates the Due Process Clause (*Lambert v. California* (1957) 355 U.S. 225, 229), a statutory interpretation that precludes drivers from having an adequate opportunity to alter their conduct should be avoided.

Accordingly, Culver City's arguments should be rejected.

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[2]. While municipalities are also required to post a sign at each intersection with ATES equipment (Veh. Code, § 21455.5, subd. (a)(1)), the prosecution's theory simply *assumes* that all municipalities always comply with this particular requirement. In reality, while there is no study that measures the compliance rate for this requirement, judging by Culver City's no-harm, no-foul arguments here, municipalities have no incentive to comply with this requirement because, after all, the court can find drivers guilty regardless of statutory compliance. (Answer 37-39.)

2. The conflicting judicial interpretations of the statutory warning requirements further illustrate the ambiguity of such statutory language.

The fact that the lower courts have previously disagreed regarding what the ATES statute requires further demonstrates that the statute is far from clear; i.e., liability is not reasonably apparent on the face of the statute. Under such circumstances, as another court recently held in a traffic infraction appeal, "[c]onstitutional due process considerations mandate against creating criminal liability where none is apparent on the face of the statute." (*People v. Harris* (2012) 208 Cal.App.4th Supp. 1, 7 [citing *Lambert, supra*, 355 U.S. at 229]; see also *Rabe v. Washington* (1972) 405 U.S. 313, 315-316 [conviction reversed on vagueness ground where state Supreme Court's interpretation failed to give defendant "fair notice that criminal liability is dependent upon" the location where the allegedly obscene film was displayed by defendant].)

Because the existence of a split of authority can preclude civil liability by prosecuting agencies for initiating such cases, the split of authority should *ad fortiori* preclude a criminal conviction based on the same law. In evaluating liability under 42 U.S.C. § 1983, "[b]ecause the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the

officer's conduct would violate the Constitution," the officer's qualified immunity bars liability. (*Brosseau v. Haugen* (2004) 543 U.S. 194, 198.) The same is true in other contexts.

As a result, given the split of authority on the issue presented in this case, the statutory language that is the subject of this appeal is inherently vague. If vagueness of the law provides a shield for prosecuting agencies by precluding their civil liability, the same vague law cannot be used as a sword by those agencies to obtain criminal convictions -- at least in the context of a traffic infraction.

Accordingly, the Court should reject Culver City's arguments based on these alternative grounds. [3]

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[3]. (See, e.g., *Diepenbrock v. Brown* (2012) 208 Cal.App.4th 743, 749 ["the conflicting legal authority on an unsettled issue" precluded discovery sanctions]; *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 36 [judgmental immunity immunizes attorneys from legal malpractice liability "resulting from an honest error in judgment concerning a doubtful or debatable point of law"]; *Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 202-204 [split of authority precludes finding of insurance bad faith for denial of coverage].)

II. CULVER CITY'S FAILURE TO PROVIDE ADEQUATE WARNINGS TO THE PUBLIC MANDATES A REVERSAL HERE, PARTICULARLY IN ORDER TO AVOID THE APPEARANCE OF A DOUBLE STANDARD.

A. Culver City's Self-Serving Interpretation of the Warning Requirements Cannot Be Washed Off Based on the Harmless Error Rule.

The notion that a municipality's failure to provide adequate warnings to the public can be relegated to the harmless error category is equally flawed. (Answer 37-39.) The Supreme Court has held that remedies for constitutional violations should return one who was unconstitutionally denied an opportunity to the same position he would have occupied in the absence of the constitutional violation. (See *United States v. Virginia* (1996) 518 U.S. 515, 547 [internal citations omitted].) In other words, the Constitution demands that the remedy be tailored to the violation. (See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco* (1990) 496 U.S. 18, 22, 31 [if a state collects a tax that discriminates against interstate commerce, the Due Process Clause mandates that the state provide backward-looking relief that fully removes the discriminatory effects of the unconstitutional tax]; *Marbury v. Madison* (1803) 5 U.S. 137, 163 [there must be a proper remedy for the violation of a vested legal right].)

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Here, as a member of the public, Gray was legally entitled to proper notice of Culver City's implementation of the red light camera system at the subject intersection. Excluding the photos at trial is the only proper remedy for Culver City's violation of its mandatory obligation to provide proper notice. (See *Fuentes v. Shevin* (1972) 407 U.S. 67, 81 ["If the right to notice ... is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented"; addressing pre-deprivation notice requirement]; see also *In re Fratus* (2012) 204 Cal.App.4th 1339, 1351-52 [an error may not be deemed harmless when such an error 'undermine[s] confidence in the outcome'"]; quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

The exclusion of evidence obtained in violation of the law is nothing new. In the context of the Fourth Amendment and Miranda violations, the fruits of the poisonous tree based on an improper search and seizure, and a confession illegally obtained, are routinely excluded, respectively. (See, e.g., Penal Code, § 1538.5, subd. (a)(1)(B)(v) [court may "suppress as evidence any tangible or intangible thing obtained" based on the former].) The purpose of the exclusionary rule, of course, is to ensure that law enforcement agencies do not violate the law, even if that results in releasing a violent felon from prison. If the exclusionary rule can be applied in that context, it should certainly apply in this infraction case. Otherwise, absent such a remedy, the adoption of Culver City's no-harm, no-foul argument would effectively create a double-standard.

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While Culver City's violation of the law is ignored (e.g., based on its failure to provide constitutionally and statutorily mandated notice), drivers are punished for violating the red light camera statute on a massive scale in traffic courts across the state. Culver City's brief does not adequately explain how such a double standard can be justified in a civilized society.

B. The Other Arguments Raised by Culver City Should Be Rejected as Well.

None of the remaining arguments raised by Culver City provides a basis to affirm Gray's conviction.

As for the standing argument, because Culver City's failure to provide proper notice renders its complaint invalid, Culver City could not legally commence this prosecution against Gray in the first place. (Opening Brief 28-29.) Therefore, Culver City's attempt to bury this threshold jurisdictional defect by claiming lack of standing is misguided. (Answer 27-28.)

Culver City also argues that the rule of lenity does not apply here because any ambiguity under section 21455.5 -- which it conveniently denies -- relates to an "administrative" provision. (Answer 35-36; Answer 34 [erroneously labeling this statute "an administrative statute" rather than a "charging statute"].) There are multiple flaws associated with this false dichotomy.

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First, it contradicts Culver City's own argument that noncompliance with section 21455.5 constitutes an affirmative defense. (Answer 24.) If noncompliance is an affirmative defense and if the language of a statute is such that it does not inform the public as to the existence or validity of that defense, the same concerns that trigger the rule of lenity based on the ambiguity of a charging statute are present: the public does not know whether a particular form of conduct will result in criminal conviction.

Therefore, attaching a euphemistic label to section 21455.5 as an "administrative" statute does not preclude the application of the rule of lenity. (See, e.g., *Simpson v. United States* (1978) 435 U.S. 6, 14-15, abrogated by statue on other grounds as stated in *United States v. Gonzales* (1997) 520 U.S. 1, 10 [the rule of lenity is not limited to substantive provisions but also applies to sentencing provisions].)

Second, whether compliance with the notice requirement is technically classified as an element of the offense or not is irrelevant. Under Penal Code section 1019, a defendant's "plea of not guilty puts in issue every material allegation of the accusatory pleading." The key allegation in the citation that was issued here was that it was based solely "on photographic evidence." (2 CT 170.) It is hard to imagine a more "material" allegation than one alleging that the prosecuting agency properly implemented the red light camera system -- the entire basis for initiating the criminal proceeding -- in the first place by complying with the warning requirements imposed by law.

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As a result, Culver City's stipulated failure to provide intersection-specific warning compels reversal, even if this statutory requirement is not deemed to be an "element" of the red light camera statute.

Culver City also argues that Gray's conviction should be upheld in order to increase public safety. (Answer 1, 39.) The Court should view this argument with a healthy dose of suspicion. While the private industry has relied on self-serving studies that are at best dubious, numerous studies have shown that red light cameras actually cause more accidents, thus creating various safety threats. (See *Red Light Camera Studies Roundup*, <http://www.thenewspaper.com/news/04/430.asp> [as of March 26, 2013] [compiling studies].) For example, as reflected in the legislative materials submitted by Culver City, one of the studies cited in those materials has been sharply criticized. (Respondent's Motion for Judicial Notice, Ex. A, p. 3; Answer 5, fn. 4.) The empirical evidence is, at best, inconclusive. As a result, the notion that prosecuting agencies invest in ATES equipment for safety reasons (rather than to use them as cash cows) should be summarily dismissed.

Culver City also argues that, notwithstanding the public outcry over the abuse of ATES citations, this Court should not interpret the law to require intersection-specific warnings. (Answer 36-37.) Asking this Court to allow municipalities to continue abusing the traffic court system in order to fill their coffers, Culver City incredibly goes so far as to suggest that this Court should defer to the legislature to handle the public outcry. But given

the corruption and bribery scandals involving ATES contractors, that argument rings hollow. (See Scott, *Lure of Revenue Corrupts Cities' Parking Management*, Critics Say, L.A. Daily J. (Sept. 12, 2007) [noting that one vendor spent nearly half a million dollars in lobbying expenses in a single year to buy its influence in Sacramento]; see also *Largest Red Light Camera Program In World Faces Widened Corruption Probe*, February 11, 2013 <http://www.thenewspaper.com/rlc/news.asp?ID=4022&m=print> [as of March 27, 2013] [addressing Redflex].) As a result, the public has no reason to expect any relief from the legislature.

Consistent with Gray's view, courts have not hesitated to construe a statute, notwithstanding its literal language, by questioning the legislature's judgment in terms of its choice of words. (See *People v. Skinner* (1985) 39 Cal.3d 765, 768-769 [interpreting "and" to mean "or" as used in the statutory definition of insanity defense]; *Friedman v. City of Beverly Hills* (1996) 47 Cal.App.4th 436, 444 [same for Vehicle Code statute governing parking regulations].)

As a result, none of the remaining arguments raised by Culver City provides a valid reason to uphold Gray' improper conviction.

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CONCLUSION

Irrespective of the statutory arguments raised by Culver City, the Court should reverse Gray's conviction based on the constitutional principles discussed above. Reversal is particularly necessary in order to avoid a double standard in terms of the prosecution of ATES cases.

Dated: April 1, 2013

Respectfully submitted,

SHERMAN M. ELLISON
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[redacted] GRAY