

IN THE SUPREME COURT OF CALIFORNIA

[REDACTED] KUNG,
Petitioner,

Supreme Court No.: TBD

v.

Court of Appeal No.: A132812

THE COURT OF APPEAL OF
CALIFORNIA, FIRST APPELLATE
DISTRICT,

(First Appellate District Court of Appeal
No.: A132573

Respondent,

Trial Court No.: 50608153/TRF)

THE PEOPLE,

Real Party In Interest.

THE PEOPLE,

Court of Appeal No.: A132573

Plaintiff and Respondent,

v.

(Alameda County

[REDACTED] KUNG,
Defendant and Appellant.

Superior Court Appellate No.: 5113

Trial Court No.: 50608153/TRF)

Review

**PETITION FOR WRIT OF CERTIORARI;
MOTION TO CONSOLIDATE APPEAL**

**SUPREME COURT
FILED**

For the Petitioner

[REDACTED] KUNG
IN PRO PER

AUG 11 2011

Frederick K. Ohlrich Clerk

Deputy

Telephone: [REDACTED]

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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
- *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal 3d 158
- *Sampson v. Sapoznik* (1953) 117 Cal. App. 2d 607
- *Guillory v. Superior Court* (2003) 100 Cal.App.4th 750
- *Strauss v. Horton* (2009) 46 Cal.4th 364
- *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1
- *People v. Borza* (2011) Case Pending (Court of Appeal No. B229748)
- *People v. Goldsmith* (2011) Case Pending (Court of Appeal No. B231678)

Statutes and Miscellaneous Cites

- ABX3
- SBX4 13
- SB 857
- Government Code §70372
- Government Code §70373

- Government Code §76000
- Government Code §76000.5
- Government Code §76104.6
- Government Code §76104.7
- Penal Code §1464
- Penal Code §1465.7
- Penal Code §1465.8
- Vehicle Code §21453(a)
- Vehicle Code §21455.5
- Vehicle Code §40508.6
- Vehicle Code §42006

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION
TO CONSOLIDATE APPEAL**

STATEMENT OF THE CASE

1. On April 20, 2010, the Petitioner, was convicted for the violation of Vehicle Code § 21453(a) in *People v. [REDACTED] Kung*, Alameda County Superior Court Trial Court No.: 50608153/TRF, Appellate No.: 5113, Court of Appeal No.: A192573 (Kung I).
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.
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.

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)
Petition for Writ of Certiorari / Motion to Consolidate Appeal – *People v. [REDACTED] Kung / Kung v. The Court of Appeal of California, First Appellate District*

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. Petitioner requested that the Court of Appeal, First Appellate District to order Kung I 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 1, attached hereto and incorporated herein by this reference.)
13. On August 3, 2011, Petitioner filed a timely Petition for Writ of Mandamus in the Court of Appeal, First Appellate District as *Kung v. The Court of Appeal of California, First Appellate District*, Court of Appeal No.: A132812 (Kung II).
14. On August 5, 2011, the panel (consists of the Honorable Stuart R. Pollak, Associate Justice, the Honorable Peter J. Siggins, Associate Justice, and the Honorable Martin J. Jenkins, Associate Justice) of the Court of Appeal, First Appellate District, Division Three, summarily denied the petition by order. (See Exhibit 2, attached hereto and incorporated herein by this reference.)

² The decision on June 1, 2011 is used for the purpose of this Petition for Transfer. Petition for Writ of Certiorari / Motion to Consolidate Appeal – People v. [REDACTED] Kung / Kung v. The Court of Appeal of California, First Appellate District

**CONSOLIDATION IS NECESSARY TO CONSIDER TOGETHER TWO
MATTERS WHICH CONCERN ISSUES ARISING FROM THE SAME
AGREEMENT AND WHICH HAVE OVERLAPPING APPELLATE RECORDS**

The standard test for consolidation on appeal is whether the cases to be consolidated share at least one common issue. *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal 3d 158. This is a factual question which requires consideration of "whether the questions presented are so related as to make it advisable to consolidate..." *Sampson v. Sapoznik* (1953) 117 Cal. App. 2d 607. There is no question here that the standard has been met for the following reasons:

1. Both Kung I and Kung II arise out of Kung's reversed conviction of Vehicle Code §21453(a). For both Kung I and Kung II, the Petitioner seek the Court of Appeal to secure uniformity of decision and settle an important question of law.

2. One of the principal issues in Kung II is whether the Court of Appeal was erred in denying the transfer, which arise out of Kung I.

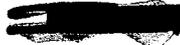
CONCLUSION

For the reasons stated above, the appeal in Kung I and the writ petition in Kung II should be consolidated for the purposes of briefing, oral argument and decision.

DATED: August 11, 2011

Respectfully submitted,

A large, thick black horizontal bar redacting a signature.

 KUNG

Petitioner, IN PRO PER

STATEMENT OF APPEALABILITY

This Petition for Writ of Certiorari is taken from an order of the Court of Appeal, First District, Division Three and an judgment of Superior Court of California, County of Alameda and is authorized by Rules of Court Rule 8.500(a)(1).

ISSUES PRESENTED

1. Whether the Court of Appeal was erred in denying the Petitioner's Petition for Transfer.
2. Whether material evidence prepared solely for prosecution constituted testimonial evidence under the Confrontation Clause of the Sixth Amendment.
3. Whether trial courts are required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code §21453(a)
4. Whether the current penalty assessment of Vehicle Code §21453(a) constitutes a violation of Excessive Fines Clause under the Eighth Amendment by allowing disproportional fine assessed.
- 5.. Whether the existing case law provides a definition of "excessive" when the Court determines excessive delay in appeal.

INTRODUCTION

Petitioner, [REDACTED] Kung, hereby petition the Supreme Court to grant the Writ of Certiorari of Kung I and Kung II (collectively “Kungs”) in the interest of justice and to secure uniformity of decision.

REQUEST FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI WITHOUT TRANSFER TO THE COURT OF APPEAL

The Petitioner respectfully requests the Supreme Court to grant the Petition for Writ of Certiorari without ordering transfer to the Court of Appeal.

In *Strauss v. Horton* (2009) 46 Cal.4th 364, the Supreme Court exercised its discretion to review the validity of Proposition 8 with a leave to waive ordinary legal process. Such exercise of discretion is necessary in this case, which is explained as follow:

1. It is a matter of time that the Supreme Court’s intervention is required.

Similar to *Strauss v. Horton* (2009) 46 Cal.4th 364, this case can be deemed as a high profile case as it involves everyday traffic law. People through the State of California are impacted daily. Currently, in addition to Petitioner’s case Kungs, there are 2 additional cases pending the Court of Appeal’s review:

- *People v. Borza* [REDACTED] (Court of Appeal No. B229748)
- *People v. Goldsmith* (Court of Appeal No. B231678)

With a little doubt, if the Court of Appeal fails to address the issues properly, any, or both, of these cases will eventually seek a writ of certiorari from the Supreme Court, as it involves in rights guaranteed by the United States Constitution.

2. Existing case precedence are conflicting with each other, as well as difference in practice throughout the Judicial System

In the State of California, there are totally one Supreme Court, six Districts of the Court of Appeal, and fifty-eight Superior Courts. However, in processing alleged violation of Vehicle Code §21453(a), none of these courts in fact work in an uniform way in the interest of justice.

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.

Furthermore, Superior Courts tend to take this matter in “their own hands”, without considering the rights that any defendants are entitled. For instance, Superior Court of California, Los Angeles County has prepared a preprinted order named “Order

Overruling Objections to Admissibility of Documentary Evidence” in anticipating any defendants which wish to exclude evidence by Motion in limine. Superior Court of California, San Francisco County provided a previous ruling for admissibility of evidence at their website, in hope to eliminate any defendants’ intent to contest admissibility of evidence. All of these practices are in fact resulted prejudicial errors against defendants.

3. Without a decision from the Supreme Court with published opinion, the Judicial System will be burdened for the unnecessary cost for processing alleged violation of Vehicle Code §21453(a)

Current practice of Superior Court of California, San Mateo County is a good example to demonstrate the waste in resources within the Judicial System.

In San Mateo County, Commissioners are responsible for Traffic Court trials. While defendants of alleged violation of Vehicle Code §21453(a), who are usually represented, move the Trial Court for the issue of admissibility of evidence based on *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1, Commissioners of the Traffic Court will deny such Motion and convict the defendant. Dramatically, whenever the defendants decide to appeal such conviction, the Appellate Division of Superior Court of California, San Mateo County will automatically reverse the conviction based on *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1.

Such practice demonstrates the need of intervention by the Supreme Court – as what’s the point for all these?

In conclusion, pursuant to Rules of Court Rule 8.500(b)(2), the Court of Appeal lacked jurisdiction to proceed further, which warrants the Supreme Court's intervention in this matter.

ARGUMENT

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

The Court of Appeal abused its discretion not to grant Petitioner's Petition for transfer and Petition for Writ of Mandamus.

The Honorable William R. McGuiness, Administrative Presiding Justice, addressed the rationale of denying the transfer (See Exhibit 1):

“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.”

In denying the Petition for Writ of Mandamus, the panel of the Court of Appeal did not provide any rationale but (See Exhibit 2):

“The petition for a writ of mandate is denied.”

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.

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 the Supreme Court to grant the Writ of Certiorari under Rules of Court Rule 8.500(b)(1) to secure uniformity of decision.

b. *People v. Goldsmith* and *Kungs* are similar only to certain extend.

The following are the summary of the similarities and differences between *People v. Goldsmith* and *Kungs*:

Similarities

1. Both *People v. Goldsmith* and *Kungs* 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 *Kungs* seek review pursuant to *Melendez-Diaz v.*

Massachusetts (2009) 129 S.Ct. 2527

Differences

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

⁴ *People v. Superior Court (Gevorgyan)* (2001) 91 Cal. App.4th 602
Petition for Writ of Certiorari / Motion to Consolidate Appeal – *People v. [REDACTED] Kung v. The Court of Appeal of California, First Appellate District*

1. Kungs, but not *People v. Goldsmith*, seeks review of the fine assessment under Excessive Fines Clause of the Eighth Amendment;
2. Kungs, but not *People v. Goldsmith*, seeks review of the procedural due process for convicting alleged violation of Vehicle Code §21453(a);
3. Kungs, but not *People v. Goldsmith*, seeks review of the discretion of dismissal on the basis of excessive delay in appeal.
4. The conviction of Kungs, but not *People v. Goldsmith*, was reversed.

Based on the above, the Court of Appeal was erred in linking *People v. Goldsmith* with Kungs as the elements of cases are substantially different. This warrants the Supreme Court to grant the Writ of Certiorari under Rules of Court Rule 8.500(b)(1) to settle an important question of law, which is if the Court of Appeal abused its discretion of review in denying a transfer simply based on a similar case in another District of the Court of Appeal.

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

While *People v. Goldsmith* and Kungs 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. Material evidence prepared solely for prosecution constituted testimonial evidence under the Confrontation Clause of the Sixth Amendment.

The Supreme Court's intervention of this issue is needed in order to secure uniformity of decision and settle an important question of the law.

The use of AES on prosecuting an alleged violation of Vehicle Code §21453(a) is dramatically increasing throughout the State of California. When prosecuting an alleged violation of Vehicle Code §21453(a) by the use of AES, 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 for purposes of the Sixth Amendment's Confrontation Clause. By the interpretation of the *Melendez-Diaz* decision, the evidence packet prepared for the prosecution of Vehicle Code §21453(a) constituted testimonial evidence that subject to Confrontation Clause.

Therefore, the Supreme Court's intervention is required to settle this important question of law - the application of *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct.

2527 in the State of California, which warrant the Supreme Court to grant the Writ of Certiorari under Rules of Court Rule 8.500(b)(1).

3. 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 courts often fail 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).

Therefore, the Supreme Court's intervention is required to settle this important question of law, which warrant the Supreme Court to grant the Writ of Certiorari under Rules of Court Rule 8.500(b)(1).

4. Current penalty assessment of Vehicle Code§21453(a) constitutes a violation of Excessive Fines Clause under the Eighth Amendment as the penalty assessment does not relate to the conviction but a surcharge.

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, but a surcharge of the fine itself, which includes:

- State Penalty Fund (Per Penal Code §1464) - \$10.00 for every \$10.00
- County Penalty Fund (Per Government Code §76000) - \$7.00 for every \$10.00

- State Court Facilities Construction Fund (Per Government Code §70372) - \$5.00 for every \$10.00
- DNA Identification Fund (Per Government Code §76104.6, 76104.7 & ABX3) - \$4.00 for every \$10.00
- County Emergency Medical Services (Per Government Code §76000.5) - \$2.00 for every \$10.00
- State Surcharge (Per Penal Code §1465.7) - 20% of Base Fine
- Court Security Fee (Per Penal Code §1465.8, SBX4 13, and SB 857) - \$20.00, \$10.00 & \$10.00 (respectively)
- Conviction Assessment (Per Government Code §70373) - \$35.00 per conviction
- Night Court Fee (Per Vehicle Code §42006) - \$1.00 per case
- Administrative Assessment (Per Vehicle Code §40508.6) - \$10.00 per case

Under the Excessive Fines Clause of the Eighth Amendment, such assessment with no mean of preventing violation of Vehicle Code §21453(a) was unjustified as the fine is not assessed based on the conviction but a surcharge to the fine, which warrants the Supreme Court to grant the Writ of Certiorari to review the application of the Excessive Fine Clause of the Eighth Amendment in the State of California.

5. The Supreme Court should issue guidance on case dismissal for determining 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.

Due to budget issue, the operation of the Court System has been impacted. While the cases above provided an avenue for appellants to seek dismissal on the ground of excessive delay in the process of appeal, 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 reviewed to ensure that: 1) Appellate Process will not be overburdened by aged cases; and 2) Appellants are probably protected for their rights.

CONCLUSION

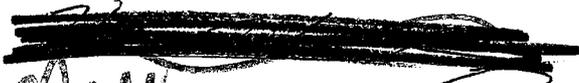
Petitioner requests the Supreme Court to grant the Writ of Certiorari of Kungs for the above issues. The transfer is necessary in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules of Court Rule 8.504(d), I hereby certify that this brief contains 3553 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 11, 2011

Respectfully submitted,


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 11, 2011


KUNG

Exhibit 1

Order of Denial of Transfer by the
Honorable William R. McGuiness 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.  KUNG,
Defendant and Appellant.

A132573

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

BY THE COURT:

Defendant  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.

Exhibit 2

Order of Denial of the Writ of Mandamus by

the Division Three of the Court of Appeal,

First Appellate District on August 5, 2011

Kung v. The Court of Appeal of California,

First Appellate District

(Court of Appeal No.: A132812)

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Court of Appeal First Appellate District
FILED
AUG - 5 2011
Diana Herbert, Clerk
by _____ Deputy Clerk

~~_____~~ KUNG,
Petitioner,

v.

THE CALIFORNIA COURT OF
APPEAL, FIRST APPELLATE
DISTRICT,

Respondent;

THE PEOPLE,

Real Party in Interest.

A132812

(First Appellate District Court
of Appeal Case No. A132573)

THE COURT:*

The petition for a writ of mandate is denied.

Dated: AUG - 5 2011

Pollak, J. Acting P.J.

* Pollak, Acting P.J., Siggins, J., & Jenkins, J.