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VIA FEDERAL EXPRESS

Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

**Re: Reply to Request for Depublication: *People v. Rekte*, (2015),
---Cal. Rptr.3d---, 2015 WL 109840 (Cal.App. 4 Dist.), No. S224030 (Cal.),
No. E060272 (Court of Appeal, Fourth District, Division 2)**

To the Honorable Chief Justice Cantil-Sakauye and the Honorable Associate Justices
of the California Supreme Court:

On January 27, 2015, Redflex Traffic Systems, Inc. (Redflex), filed a Request for Depublication of the decision of the Court of Appeal, Fourth District, Division Two in the case of *People v. Rekte*, (2015),---Cal. Rptr.3d---, 2015 WL 109840, No. S224030 (Cal.), No. E060272 (Court of Appeal, Fourth District, Division 2). Defendant and Appellant Viktors Andris Rekte (Appellant) respectfully requests the Court deny Redflex's depublication request. The decision helpfully clarifies the law relating to Automated Traffic Enforcement Systems (ATES) by addressing issues of first impression concerning the application and operation of the evidentiary presumptions set forth in Evidence Code Sections 1552 and 1553.

**I. THE REDFLEX DEPUBLICATION REQUEST IS BASED ON
A FUNDAMENTAL MISUNDERSTANDING OF HOW THEIR
ATES SYSTEMS OPERATE IN THE REAL WORLD**

The overarching issue posed by the facts in the *Rekte* case is whether the installation and operation of an ATES and traffic signaling system in an intersection that violates multiple sections of the Manual on Uniform Traffic Control Devices ("MUTCD") and the California Vehicle Code can generate a legally enforceable citation. In lieu of responding to the foregoing issue in the course of their depublication request, Redflex

has chosen to ignore the cumulative effect of the MUTCD violations from the perspective of a driver like Appellant and instead has essentially resorted to touting the accuracy and reliability of its ATES equipment in the abstract by referring to the favorable foundational presumptions granted by the legislature as embodied in Evidence Code Sections 1552 and 1553 with no regard to the context in which the equipment is actually used.

1. The Unusual Geometry of the Intersection

Briefly, the underlying factual scenario in *Rekte* involved a motorist proceeding south bound in the right-hand turn lane of Tyler St. where it intersects with SR 91 adjacent to the Tyler Mall in the City of Riverside. The Redflex ATES camera was located on the median strip across four lanes of traffic. In light of the unusual geometry of the intersection, the nearest traffic signal to cars traveling in the right-hand turn lane was located 20° to the left of the oncoming driver's sight line thereby creating a dilemma requiring the driver to choose whether to look to the left toward the signal or straight ahead in the direction of travel.¹ Significantly, in order to optimize the ATES camera's view, the traffic signal was rotated clockwise on the pole toward the ATES camera and *away* from the oncoming driver such that 40% of the traffic signal's lens faces were obscured from the oncoming driver's view. At trial, Appellant's expert engineer testified that both the location of the traffic signal 20° to the left of the driver's sight line and the rotation of the traffic signal on the pole toward the ATES camera violated MUTCD Section 4D.12 which requires that the primary consideration in signal phase placement shall be to optimize the visibility of signal indications to approaching traffic.

2. The Controversy Over the Yellow Light Interval

In addition to the MUTCD violations involving the location and rotation of the traffic signal, Appellant's expert testified to yet another MUTCD violation regarding the yellow light interval at the subject intersection being 3.5 seconds (plus or minus .07 seconds) which is less than the 3.6 second legal minimum in a roadway with a 35 mile an hour speed limit.² During trial, Operator Teagarden sought to introduce into evidence a "court pack" containing a 12 second video of the alleged violation, a declaration from the Redflex custodian of records and the original citation generated by the Redflex ATES on October 26, 2012 containing printed information on a data bar at the top of the still photographs listing a yellow light interval of 3.65 seconds and

¹ The City of Riverside has since added a traffic signal at the junction of the right-hand turn lane and the freeway onramp which aligns almost perfectly with the oncoming driver's sight line.

² MUTCD Section 4D.26

noting that appellant's vehicle was approximately 6 feet behind the limit line when the signal had been red for least .96 seconds.

In the course of its depublication request³, Redflex asserts that Appellant "never presented any evidence as to the duration of the yellow light at the time of his specific violation" and that the video clips of the yellow light timing at the subject intersection taken by the defense engineering expert both before and after the date of appellant's citation documenting a 3.5 second yellow light interval are "too attenuated to rebut the statutory presumption that the video and photos 'constitute an accurate representation of the images [they purport] to represent,'" citing Evidence Code Section 1553 (a). Such an assertion reflects a basic unfamiliarity on the part of Redflex with the virtually insurmountable difficulties faced by California motorists cited by Redflex ATES red light cameras who try to obtain a digital copy of the 12 second video clip documenting their red light violation in order to try and verify the timing of the yellow light interval.

For many motorists, it may not be apparent that they have triggered an ATES camera until he or she receives a citation in the mail days or weeks afterwards. For motorists who suspect that they were the target of an ATES camera immediately after seeing the flash go off, it is likely that only a very small percentage would have the presence of mind to find and retain an engineering expert to visit the intersection and take video clips of the yellow light interval on the day of the alleged violation so as to comply with the aforementioned "attenuation test" articulated by Redflex.

Moreover, it is probable that after watching the 12 second video of their alleged violation online⁴, few people are cognizant of the fact that the ATES video clip does not contain a time index which precludes them from calculating the yellow light interval. Presuming the prosecution fails to disclose potentially exculpatory evidence prior to trial as required by *Brady v. Maryland* (1963) 373 U.S. 83 (which is precisely what occurred in *Rekte*), a defendant who wishes to verify the yellow light interval would have no alternative but to make arrangements for a competent expert to shoot video clips and perform the required analysis on a computer. In *Rekte* the defense expert compared two video clips from another ATES case involving the same intersection taken on September 14, 2012, approximately 6 weeks prior to Appellant's alleged violation on October 26, 2012, with two video clips taken on April 4, 2013. His computerized analysis of each of the four video clips revealed the yellow light interval to be the same: 3.5 seconds, plus or minus .07 seconds.⁵

³ See Redflex's Request for Depublication of *People v. Rekte*, p. 3, paragraph 3

⁴ Instructions for viewing the video clip online are included with the citation along with an access code.

⁵ After appearing on Respondent's behalf in the Court of Appeal, the Riverside City Attorney made a Motion to Augment the Record which was granted on July 1, 2014, approximately one week before Appellant's Reply Brief was due. Attached thereto as an exhibit was a CD containing a copy of the actual ATES video clip of Appellant's

Any hopes a California motorist might have of obtaining a digital copy by subpoena of the 12 second video depicting their alleged violation in order to have the yellow light interval independently assessed by an expert would be dashed upon learning that the Redflex corporate office that handles all ATES camera citations is located in Phoenix, Arizona--beyond the subpoena power of California courts. Similarly, any hope a California motorist might have of obtaining a digital copy of the 12 second video clip containing a video timing index from a law enforcement agency such as the Riverside Police Department in order to verify the yellow light interval would likewise evaporate in light of Operator Teagarden's trial testimony:

Q MR. ELLIOT: So is it your testimony that none of the videos that come from Redflex on these CDs or that are transmitted to the RPD have video indexing on them?

A MR. TEAGARDEN: I've never seen any.

Q Okay. And so is also correct, then, that on the citation, where the data is imprinted at the top, that's the only information that you have?--in terms of yellow light timing interval, for instance. Here it says—

A We obtain our yellow light timing information from that data bar, yes.

Q And you've never sought to independently confirm that using any of the computer programs that are customarily used, like Windows Movie Maker, for instance?

A No, I have not. (RT 14:9-22.)

Operator Teagarden's further testimony concerning inspections and calibrations of the ATES equipment was summarized by the *Rekte* majority as follows:

On cross-examination, Operator Teagarden acknowledged he could not tell if the monthly inspections of the equipment conducted by Redflex included verification of the time intervals for the signal lights, and did not know if anyone employed by the City of Riverside checked to make sure the system was calibrated properly. (*People v. Rekte supra.*, p. 3.)

It is abundantly clear that the *Rekte* majority correctly analyzed the documentary and testimonial evidence adduced at trial in deciding that sufficient evidence had been presented in order to rebut the presumptions established by Evidence Code Sections

alleged violation on October 26, 2012. Appellant's expert engineer performed the same kind of computer analysis of the video clip as he had with the four other video clips and found the yellow light interval to be the same: 3.5 seconds, plus or minus .07 seconds. Respondent's belated attempt to comply with its *Brady* obligations created a dilemma for Appellant concerning whether to file a motion pursuant to CRC 8.252 requesting that the Court of Appeal take evidence at oral argument regarding the defense expert's analysis of the video clip in light of the Court's tentative opinion which made no mention of the *Brady* case.

1552 and 1553. Both Redflex's depublication request and the *Rekte* dissent fail to appreciate that the threshold question the Court of Appeal was called upon to answer was whether or not relevant credible evidence had been presented by the defense to rebut the presumptions contained in the aforementioned Evidence Code sections with regard to the accuracy and reliability of the computer data and digital images generated by the Redflex ATES system.

Accordingly, given the fact that the defense expert was properly qualified during trial and no objections were made regarding the substance of his expert opinions and the facts he relied upon in forming them, relevant and credible evidence in the form of his opinions and observations made it incumbent upon Respondent to lay a proper foundation for the computer data and the digital images generated by the Redflex ATES system at the Tyler St.-SR 91 intersection. The fact that Respondent routinely chose not to have either counsel or the Redflex custodian of records present in court compels the conclusion that the presumptions created by Evidence Code Sections 1552 and 1553 were rarely rebutted (which likely accounts for the fact that *People v. Rekte* is a case of first impression).

II. THE MAJORITY IN *PEOPLE v. REKTE* GOT IT RIGHT

The Request For Depublication filed by Redflex is misguided and should not be granted as to do so would be contrary to the public interest. The notion of robotic law enforcement devices such as the Redflex ATES red light camera system is still a relatively novel one insofar as California jurisprudence is concerned. Consequently, appellate decisions that correctly interpret the law serve not only as guidance to the legal community and to the public at large but also as a safeguard against the kinds of illegal conduct evidenced by the facts in *People v. Rekte*.

Redflex has asserted that the majority opinion in *Rekte* would lead to confusion if not depublished. Nothing could be further from the truth. A close reading of the majority opinion reveals a logical and judicially restrained approach to a series of complex interrelated issues including a denial of Due Process under *Brady v. Maryland* and having to sort out the legal *sequelae* of three distinct violations of the MUTCD. Rather than attempt a definitive resolution of every issue, the majority had the good sense to first focus on a key foundational issue, viz., the MUTCD violation involving the discrepancy between the yellow light interval of 3.65 seconds printed on the citation generated by the Redflex ATES camera system versus the yellow light interval of 3.5 seconds (plus or minus .07 seconds) observed on the four video clips taken by the defense engineering expert on dates both before and after the date of Appellant's citation.

Following an extensive discussion regarding the substance and application of Evidence Code Sections 1552 and 1553, the *Rekte* majority concluded:

Here, the defendant undermined the presumptions created by Evidence Code Sections 1552 and 1553. He produced expert testimony and evidence that the printed representation of computer generated information (Evidence Code, section 1552) and the video or digital images admitted into evidence (Evidence Code Section 1553) were inaccurate and unreliable... The burden of producing evidence shifted to the city once the presumption was rebutted, but the expert's testimony and opinions were not refuted. (*People v. Rekte supra.*, p. 11.)

In response, Redflex's depublication request adopts the tortured logic in the *Rekte* dissent which relies upon the presumed reliability provided by Evidence Code Sections 1552 and 1553 to the time/distance data on the photographs generated by the Redflex ATES and completely disregards both the unrefuted testimony of the defense expert and the mandatory legal standards imposed by MUTCD Section 4D.26 regarding yellow light intervals in order to conclude that appellant ran the red light. The *Rekte* majority counters:

This misses the point: the presumption of reliability of the photographs was rebutted [by defendant]. Those photographs—and all the time stamped information thereon—were inadmissible. The lack of reliable evidence (admissible photographs or testimony from a percipient witness) that defendant ran the red light requires reversal of a conviction for lack of substantial evidence. (*People v. Rekte supra.*, p. 12.)

Requiring the prosecution to lay a proper foundation for the admissibility of ATES-generated digital evidence in circumstances such as those in *People v. Rekte* will hopefully act as an incentive for both Redflex and the California municipalities it contracts with to comply with the legal standards imposed by the MUTCD so as to avoid the factual scenario in *Rekte* where tens of thousands of motorists received citations subjecting them to a \$490 fine and one point on their DMV record from a rogue ATES red light camera system over the approximate seven year period the system was operational.⁶

By focusing on the threshold issue of proper foundation with regard to the ATES evidence proffered by Respondent, the *Rekte* majority was not obligated to directly confront the remaining MUTCD violations or the due process issue under *Brady v. Maryland, supra*. As a consequence, the majority opinion provides a much-needed

⁶ According to an article in the August 4, 2012 *Riverside Press-Enterprise* by Alicia Robinson: "There's no beating the camera and southbound Tyler Street and Highway 91—it's 2011 output was 9,330 citations."

precedent in response to an issue of first impression and thus, the Redflex publication request should be denied.

Respectfully submitted,

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