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Supreme Court of California
350 McAllister Street
San Francisco, California 94102-7303

Also to the Special Attention of

Associate Justice Kathryn M. Werdegar
Chairperson
California Supreme Court Advisory Committee
on Rules for Publication of Court of Appeal Opinions

Re: Opposition to Request for Depublication of the Decision of the Orange County Superior Court of California, Appellate Division, in *People v. Park*, Case No. 30-2009-00329670

May It Please the Court:

This is the second time I am called upon to oppose requests by third parties to depublish red light camera related decisions of an appellate court. Both of these decisions were carefully made, properly published under 8.1105, important to almost every California automobile driver, and reflective of expertise in matters of traffic enforcement uniquely resident in the appellate department of a superior court.

I have dual concerns. First and foremost, I currently represent defendant [redacted] Chan in the red light camera based prosecution of *People v. Chan*. That matter is currently on appeal to the Appellate Department of the Alameda County Superior Court. Appellate Department, Superior Court of California, County of Alameda, Appellate Case No: 5074. Until *Park* our defense had rested upon unpublished authority, the only authority on point. One of these decisions goes back five years. The unpublished decisions are: *People of the State of California v. Fischetti* written by the Appellate Division of the Orange County Superior Court, December 18, 2008, 2009 WL 221042, 170; Cal.App.4th Supp. 1 (depublished); *People of the State of California v. Anna V*[redacted] Appellate Division Superior Court of California, County of Orange, Case No. 30-2008-00044334, filed Aug 28, 2008(unpublished); *People of the State of California vs. Fischetti*, Appellate Division of the Superior Court of California, County of

Orange, Case No. AP-14168, filed Jan 31, 2005.(unpublished), and *People v. Romero*, Appellate Department of the Superior Court of California - County of Orange Case No. 30-2009- 00270350 filed Jan 10, 2010 (unpublished).

Both *Fischetti* cases involve the same defendant and the same fact situation but separate citations issued 3 years apart. Because the first *Fischetti* decision was not published, Fischetti had to appeal the same issue twice – in the exact same court system. *People v. Vrska* was recommended by the authoring court to be published but was not published. *People v. Fischetti* was published by the authoring court but later depublished by the Supreme Court. In *People v. Romero* the court refused requests to publish saying that "the issue of statutory construction need not be addressed at this time" – even though it addressed that very construction in its ten page opinion signed by three judges. See *Minute Order* dated 3/02/2010.[1]

The trial court in *People v. Chan*, my case, refused to allow citation or discussion of these cases under the authority of Rule 8.1115(a).

I am incredulous that the Supreme Court countenances – let alone mandates - that numerous and uncontroverted decisions of appellate courts of the state which prosecutes that defendant, that have already determined that charges against that defendant must be dismissed, cannot be argued in the trial courts. This is an abomination – nothing less. You can do better than this.

Without the published *Park* decision, I as a lawyer, also cannot legally argue, or even bring to the attention of, the appellate court or even to the California Supreme Court, these exonerating authorities. Without published authority I will not be allowed to show conflict among districts should my appellate court hold contrary to these authorities. Something is clearly wrong here.

I would argue that court announced law is not reversed by silencing mention of that law by no-citation rules. It remains law. Common law is reason. Like dissents and other sources of knowledge unpublished decisions still capture court made reasoning, and squelching discussion of such law cannot be justified . This is America, where rightness is determined by enlightened argument, not circumscribed by a judicially ordered robe of darkness.

There is a serious threat of tyranny here. If the Supreme Court may at any time depublish any appellate decision, what stops it from tyrannically trapping those who rely upon precedent as a safe harbor by suddenly and without notice or stated reason making that precedent unmentionable? That is what is requested now, and it should not even be an option.

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[1] Two summary reversals of convictions have been issued by the Appellate Department of the San Mateo Superior Court, by Presiding Judge Mark Forcum after argument of failure to comply with §21455.5(b) See HighwayRobbery.Net .

Santa Ana City Attorney Joseph W. Fletcher wrote in his September 21 depublication request, "Santa Ana continues to operate a red light camera enforcement system" and "The *Park* decision should not be published because the court's interpretation of Vehicle Code Section 21455.5 is incorrect."

Clearly, Santa Ana wishes to be allowed to ignore the *Park* decision, as it has all of the other similar decisions of its appellate court for the past five years. What gave Santa Ana the idea that it could ignore any appellate decision related to the red light camera enforcement program? That the decisions were unpublished, that's what. Does the Supreme Court really intend to so emasculate the effect of appellate court decisions?

It is the responsibility of the Judiciary to determine the meaning of §21455.5. Published or not, the judiciary has done that. The judiciary can certainly *change* its determination with proper explanation, but it cannot blot out what it has done. The decision of an appellate court is not to be vacated upon a summary order; rather another court should carefully consider the involved issues and say what the law really is.

If this Court believes it can do a better job of construing §21455.5 it may certainly grant review of a case involving the issue. If Santa Ana makes its opinion on this matter known to the District Attorney of Orange County, I am sure it will have no difficulty arranging to have another case where §21455.5(b) is at issue raised through the appellate system. That proper process allows for contrasting the thinking of the *Park* Court such that its reasoning will not be lost to the body of law no matter what the result.

Suffice to say there is something wrong with a judicial system that responds to the kind of unnoticed lobbying of the Supreme Court that has become a part of the depublication practice. Something is very wrong here and it needs to be fixed.

My second concern is as chairman of the Committee for the Rule of Law; already known to you for our opposition to no-citation rules generally. You may recall that I have sued the Supreme Court to invalidate Rule 8.1115(a) as an unconstitutional prior restraint. That matter is on appeal to the USCA 9th.

We have previously brought all manner of objections to no-citation rules to you and your California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions ("Werdegar Commission"). Our comments to the Werdegar Commission focused on two important concerns highlighted in this matter.

First, we objected to the use of the arbitrary implementation of the standards of Rule 8.1105 to the effect that appellate decisions construing statutes or otherwise meeting the standards of 8.1105(c) "should be certified". We argued that the rule should say "is to be certified" in order that a definite publication standard exist.

The committee responded that "the committee carefully used "should" and not "must," in order to retain some discretion on the part of the justices not to certify an opinion for

publication if they conclude that the opinion does not assist in the reasoned and orderly development of the law" *Revised Recommendations for Amendment to California Rules of Court, Rule 976 Advisory Committee on Rules for Publication of Court of Appeal Opinions. Spring 2006*, Appendix Page 13 note 2.

That response has led us to ask "What are the characteristics of appellate decisions that determine the meaning of statutes or otherwise meet the criteria of 8.1105(c) that "do not assist in the reasoned and orderly development of the law." That question should be publicly answered before *Park* is depublished.

Whatever those characteristics may be, it is clear that discretion to not publish is regularly abused by appellate courts. This case and the tremendous turmoil that will be caused governments no matter how its publication status is resolved, result from the failure of appellate courts to decide the meaning of §21455.5 for our society in the first instance. Why do appellate courts shrink from their duty to publicly determine the law?

I have assumed that modesty is at work. Appellate judges must think, "Who are we to presume to determine the law for the entire state?" The answer, of course, is that appellate judges are chosen by the governor to do that very task. They have accepted that responsibility and have no right to evade it.

But I have been told by at least one appellate judge that "all that comes from publication is criticism". Perhaps. But that invitation to criticism is the nervous system of this democracy. Allowing judges to hide from that criticism with unpublished, uncitable opinions allows them to cower before difficult questions secure that, after all, they are not responsible for deciding the issue for all. It turns judges into mere bureaucrats, looking over their shoulders for popular or collegial approval. Encouraging such cowardice defeats the role of the judiciary and corrupts judicial independence from within.

The time tested remedy for judicial cowardice is to force public determination of issues one way or the other – as law for all. Then criticism is sure to flow no matter how any case is resolved and thus cannot be avoided. The only protection any judge can then have is to explain his or her decision in writing with compelling reasons stated. That is what we expect of judges – and published, citable decisions are the only way we can encourage that kind of service.

How many times will our courts hear these test cases without resolving the law for us? The matter of *Park* has been considered at least six times by appellate courts of California. Shall there be no result from such work? This situation is not unique to this case. Legions of cases of first impression are not resolved by our appellate courts, even under new Rule 8.1105. In short, our appellate courts regularly abdicate their responsibility for determining our law in the first instance. We ask this question – If the appellate courts will not construe statutes like Vehicle Code §21455.5 for our state, which institution of our government does that? Right now, in the context of this controversy, it appears to be the police departments of various cities and not the appellate court.

We also pointed out to the Werdegar Commission that decisions reversing trial judges *must be published.* We pointed out the conundrum for trial judges when reversals of their decisions are not published.

Consider what will be expected of the Hon. Daniel M. Ornelas, Commissioner, if *Park* is depublished. Judges are expected to rule as they have in past similar cases. Rule 8.1115(a) forbids him from relying upon the depublished *Park* to change his view of similar cases. So one would presume he should continue to convict in similar cases. But his decision in *Park* has been reversed. Should he ignore what his appellate court has told him and go on convicting other drivers? Is that what passes for equal protection in the Supreme Court of California?

What about a depublication order tells Commissioner Ornelas what he is to do in the future? What instructs the cities and the police? He knows now, but he will have no direction should this Court depublish *Park.* Is it a proper role of the Supreme Court to inject anarchy into our legal system?

It should concern this court greatly that Commissioner Kenneth I. Schwartz, who previously heard infractions for the Orange County Superior Court has been placed on administrative leave. Neither he nor anyone else at the court will speak about the reasons for this suspension. Rumor has it that he refuses to convict drivers because he is aware of unpublished appellate decisions deciding that he is not to do so. This matter must be investigated by persons more powerful then me. But this much is clear. If judges are to be removed from the bench or disciplined for following their own appellate courts simply because large amounts of revenue to the state are at stake, then we have a very serious problem indeed.

Is traffic enforcement more important than holding government to the law? Our society deals with traffic scofflaws sufficiently well, but if governments come to not abide by appellate decisions in pursuit of revenue our democracy will be undone. The worse option is clear.

Courts exist to determine the law as necessitated by the need for timely decision making, but only in the full and critical view of an entire democracy sensitized by the threat that such decisions will affect everyone via due process, equal protection, and *stare decisis*. Among that body politic are persons far more expert on what the law should be than the judges determining any particular case. That judges will be wrong is unavoidable. But we can avoid the law they state remaining wrong. Properly operated without no-citation rules, the process assures that the law and our government institutions will learn. Citable opinions incentivize criticism of court decisions such that our law can continuously be improved by input from the entire democracy, the body politic gets the final say as to what the law should be, and we can imagine that ultimately over time our law will be perfected.

For this Court to depublish *Park* would be to duplicitously say. "*Park* is not the law" while at the same time maintaining that depublication does not affect the law.

What law then remains? Such a practice does not in any way clarify the law. It would not galvanize those that need to change the law or maintain the law as is. Rather, it would allow the cities to continue lawlessly prosecuting drivers without ever seeking change in the law – exactly as they have done by ignoring the unpublished decisions of their appellate courts for five years.

The request to depublish Park should be denied and the no-citation rule abandoned forthwith.

Respectfully Submitted,

Kenneth J. Schmier