No. S202483

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff & Respondent,

vs.

STEVEN EDWARD 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 OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

"Whether, in an automated red light traffic enforcement system prosecution, the 30-day warning notice period and the public announcement requirements -- pursuant to Vehicle Code § 21455.5(b) -- are 'intersection specific' or 'system general' requirements." Pet. for Rev., p. 1 (internal citations, brackets and footnotes omitted). [1]

INTRODUCTION

California law allows municipalities to issue traffic citations to motorists that run red lights by using an Automated Traffic Enforcement System ("ATES"). Given the various risks associated with issuing citations through a computer (in lieu of a conventional citation issued by a police officer that personally observes the violation), the legislature has imposed numerous obligations on municipalities as conditions precedent for issuing ATES citations.

The instant Gray matter is a straight-forward case regarding "legislative intent", "statutory construction", the "rule of lenity" and the "public policy" to be served.

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[1] This court expressed the specific issue addressed herein as: "Does Vehicle Code section 21455.5, subdivision (b), require a local jurisdiction only to provide one 30-day warning notice period prior to the initial installation of an automated traffic enforcement system, or is such notice required prior to the installation of ATES equipment at each additional intersection within the jurisdiction?"

However, the fundamental issue that needs to be resolved is whether the Automated Traffic Enforcement System's "enabling statutes" in Vehicle Code §§§ 21455.5, 21455.6 and 21455.7 are mandatory and/or merely permissive.

Example 1 - **Vehicle Code § 21455.5(b)**: "[p]rior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program." (Vehicle Code § 21455.5, subdivision (b).)

The issue presented here is whether the prosecuting municipality, the City of Culver City, complied with these warning notices and public announcement requirements on an **intersection-specific basis** – i.e., the issuance of 30-days of warning notices and separate public announcement – in order to convict motorists cited in Culver City pursuant to an ATES at an intersection within its territorial jurisdiction.

Instead of providing the statutory requirements of 30-days of warning notices and a public announcement with respect to each intersection where Culver City installed photo red light camera systems (ATES), Culver City decided to eviscerate the statutory warning notice and public announcement requirements by merely providing a general notice in 1998 that it was implementing a red light camera program at one particular intersection (i.e., at Washington and La Cienega Boulevards). Conveniently taking the position that the warnings issued in 1998 regarding the ATES installed at that particular intersection should be sufficient to warn the public about the *subsequent* installation of cameras at numerous *other* intersections, Culver City failed to provide a separate warning and public announcement with respect to those various other intersections where an ATES was added after 1998.

Under Culver City's view, by issuing its warning in 1998 regarding the installation of an ATES at the Washington-La Cienega intersection, Culver City can perpetually add an ATES at every other intersection

throughout its territories, without having to issue new warnings for those other, subsequently-added intersections. Neither the text of the statute, nor common sense allows a municipality to evade its statutory obligations by diluting, emasculating – and, in effect, revising – the statutory warning requirements in such a manner. While a municipality can certainly discharge its warning obligations by issuing a single warning identifying all intersections where an ATES has been installed as of the time of the public announcement, the municipality must issue a separate warning notice with respect to intersections where an ATES is subsequently added/installed.

Given the undisputed fact that Culver City did not issue any warnings after 1998 with respect to any other intersections (besides Washington and La Cienega), the citation issued in this case with respect to a different intersection – where the ATES was installed several years after 1998 – must be dismissed.

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Culver City decided Not To Require Warning Period At New Intersections/approach pursuant to Vehicle Code § 21455.5(b)

In Culver City's contract with Redflex Traffic Systems, Culver City unilaterally decided that it would not provide the 30-days of warning notices and/or public announcement at each new intersection activated into their ATES red light enforcement program.

Quoting from paragraph 19 of the Culver City-Redflex contract. (2 CT 269.) [2]

"WARNING PERIOD/ENFORCEMENT PROCEDURES

19. Prior to issuing citations a 30-day warning period must commence (CVC 21455.5(a)(2)(b)).

c. The City does not require a separate and independent warning period for each new approach that goes live once the initial warning period has been completed." [Emphasis in original.]

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[2]. Volume 2 of the Clerk's Transcript, at page 170.

Compare this decision by Culver City to avoid the 30-days of warning notices and public announcement on an intersection-specific basis - pursuant to Vehicle Code § 21455.5, subdivision (b) - with numerous other municipalities, including but not limited to the City of Los Angeles. [3]

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[3]. Whereas, the City of Los Angeles has the "Warning Period" in its contract with Nestor/American Traffic Systems, as follows:

> "8.0. WARNING PERIOD
>
> There will be a 30-day warning period advertised Citywide upon activation of each new intersection. During this period, warning letters will be issued in lieu of citations. After the initial 30-day warning period, no further warnings at that intersection will be required. During the initial 30-day warning period of each new intersection, CONTRACTOR will not receive any fee or payment for that intersection." [Emphasis added.]

The entire contract between the City of Los Angeles and its supplier of the ATES system can be found at:

http://highwayrobbery.net/TrcDocsLosAngContr2006NestorRecd2010Dec29.pdf

Example 2 - **Vehicle Code § 21455.5(g)(1)**: Subdivision (g)(1) of § 21455.5 precludes the local jurisdiction from entering into a contract with a company that manufacturers or supplies the ATES equipment/computer, such as, Redflex Traffic Systems herein, where the contract permits a financial incentive/payment based upon the number of tickets issues or a percentage of the revenue generated by the ATES.

Subdivision (g)(1) is quoted as follows:

> "A contract between a governmental agency and a manufacturer or supplier of automated enforcement equipment may not include provision for the payment or compensation to the manufacturer or supplier based on the number of citations generated, or as a percentage of the revenue generated, as a result of the use of the equipment authorized under this section."

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Example 3 - **Vehicle Code § 21455.7**: Subdivision (a) and (b) of Vehicle Code § 21455.7 precludes and prohibits the local jurisdiction of setting the "yellow light change interval" below the minimum established by the California Department of Transportation.

Subdivision (b) and (c) are quoted as follows:

> "(a) At an intersection at which there is an automated enforcement system in operation, the minimum yellow light change interval shall be established in accordance with the Traffic Manual of the Department of Transportation.
>
> (b) For purposes of subdivision (a), the minimum yellow light change intervals relating to designated approach speeds provided in the Traffic Manual of the Department of Transportation are mandatory minimum yellow light intervals."

Pursuant to Vehicle Code § 21455.7, *supra*, the "minimum" yellow-light change-interval is established pursuant to the California Department of Transportation's Manual on Uniform Control Devices ("MUTCD"), found online at the Caltran's website, in Part 4 of the California MUTCD, entitled "Highway Traffic Signals", Section 4D.26 Yellow Change and Red Clearance Intervals, defining the **Standard** at Table 4D-102(CA).

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QUERIES:

Are these ATES statutory provisions, *supra* -- to wit, . . .

[i] 30-days of warning notices and public announcement,

[ii] no contract with a provision for revenue payments to the contractor based upon number of citations and/or percentage of revenue and/or

[iii] complying with the "minimum yellow change interval" established by the California Department of transportation's traffic manual

. . . **mandatory or permissive?**

What is the consequence if a local jurisdiction fails to comply with these "enabling statutes"?

Does the failure to comply with the "enabling statutes":

[i] deny the local jurisdiction the authority to issue the ATES citation,

[ii] cause the citation to thereby be deemed improvidently issued and/or

[iii] provide the court with only the jurisdiction and power to dismiss?

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STATEMENT OF THE CASE

A. Factual Background

1. Gray's Issued Citation

On November 21, 2008, appellant Steven Gray was charged with an infraction for allegedly violating Vehicle Code 21453(a). (2 CT 170.) The citation was mailed to Gray based on an ATES installed at the intersection of Washington Boulevard and Helms Avenue in Culver City. (*Id.*)

The ATES was installed pursuant to Culver City's contract with Redflex Traffic Systems, Inc. (2 CT 280-299.) Redflex is a private vendor paid by Culver City to issue ATES citations.

2. Culver City's ATES History [Stipulated Facts]

In 1998, Culver City implemented its first intersection in their ATES enforcement program at La Cienega Boulevard and Washington Boulevard AND complied with the 30-day warning notices and public announcement requirements in Vehicle Code § 21455.5, subdivision (b). (4 CT 631.)

From 1998 to 2006, an 8-year period, Culver City added 19 different intersections into its ATES enforcement program . . . without providing the 30-day of warning notice periods and/or public announcements for any of those 19 *subsequent*, new and additional intersections.

Thereafter, in June of 2006, the intersection of Helms Avenue and Washington Boulevard was one of the 19 *subsequent* intersections that had been added to Culver City's ATES enforcement program over that 8-year period. To reiterate, at the Helms-Washington intersection's, there was a stipulation by Culver City that it did not provide the 30 day warning notice

and/or public announcement requirements in Vehicle Code § 21455.5(b). (4 CT 631, *supra.*)

In 2008, Petitioner was cited at the Helms Avenue and Washington Boulevard intersection pursuant to the ATES enforcement program for a violation of Vehicle Code § 21453(a). (2 CT 170.)

B. Procedural Background

1. Proceedings in the Trial Court

In response to this infraction case, Gray entered a not-guilty plea. Various pretrial hearings subsequently took place in the trial court regarding discovery-related issues that are not relevant to this appeal. With respect to the issues raised here – i.e., the inadequacy of the warning notice provided by Culver City as required by the red light camera statute – both sides submitted briefing in the trial court. (2 CT 319-323 [Gray's memorandum of law]; 4 CT 566-585 [Culver City's brief].)

The trial judge then conducted a hearing to evaluate whether Culver City complied with its statutory, 30-days of warnings and public announcement requirements. Denying Gray's motion to dismiss this case based on this issue, the trial court entered a pre-trial order. (4 CT 630-634.) The trial court found that, based on the parties' stipulation, no "notices or announcements were done specifically for the intersection at which defendant was photographed allegedly running a red light." (4 CT 631; parentheses omitted.)

The court held that if it adopted Gray's "intersection-specific interpretation, then dismissal should be granted"; whereas adoption of Culver City's program-general view would result in denial of Gray's motion to dismiss. (4 CT 631-632.)

Having adopted Culver City's view, the court denied Gray's motion to dismiss. (*Id.*) [4]

Quoting from Judge Cho's February 18, 2010's trial court ruling, *supra*, [4 CT 631-632], as follows:

> **"If this Court adopts defendant's intersection-specific interpretation [*of Vehicle Code § 21455.5(b)*], then dismissal should be granted . . ."**
>
> **"whereas if this Court adopts the People's programmatic interpretation, the motion should be denied."**
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> [Parenthetical, italicized phrase and emphasis added.]

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[4] In response to the court's discussion of the parties' stipulation, Gray submitted a request to clarify the record in this regard. (4 CT 637-642.) The court subsequently issued a separate order, clarifying the record as follows: "both parties have stipulated to the following as established fact: Public announcements for the ARLES were done in 1998, for the intersection of Washington and La Cienega, and no other public announcements have been made since that time." (4 CT 649.)

The parties subsequently proceeded to trial. (4 CT 651 [listing dates].) On July 7, 2010, the court issued its judgment, finding Gray guilty. (4 CT 651-662.)

2. Proceedings in the Appellate Division

Gray appealed the trial court's decision to the appellate division of Los Angeles Superior Court on July 22, 2010. (Supplemental Clerk's Transcript ["SCT"] 36.) [5] The appellate division affirmed Gray's conviction by interpreting the red light camera statute to impose program-general warning requirements. *People v. Gray* (2011) 199 Cal.App.4th Supp. 10, 13-15.

Refusing to follow another published decision (*People v. Park* (2010) 187 Cal.App.4th Supp. 9), the appellate division held that proof of compliance with the warning requirement "was not part of the People's burden of proof because it was not an element of the charged crime." *Gray, supra,* 199 Cal.App.4th Supp. at 14. The appellate division also held that a violation of the warning requirement represents a non-jurisdictional defect, thus affirming Gray's conviction. *Id.* at 14-15.

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[5] In addition to the four volumes of the clerks' transcripts, an additional volume was prepared by the court clerk and certified. The page references on this volume are not legible on the copy received by counsel; as a result, the page references used here refer to the page numbers listed on the index created by the court clerk. That index is found at the beginning of the SCT.

3. Proceedings in the Court of Appeal

The court of appeal transferred the case to itself "pursuant to Code of Civil Procedure section 911 and California Rules of Court, rule 8.1002." *People v. Gray* (2011) 204 Cal.App.4th 1041, 1046. Affirming Gray's conviction, the court of appeal held that the warning requirements imposed by the red light camera statute are program-general, not intersection specific. *Id.* at 1047-1048. The court of appeal alternatively held that "[e]ven if Culver City failed to comply with section 21455.5, subdivision (b) by not commencing the 30-day warning notice program and not making the public announcement when the ATES was used at the intersection of Washington Boulevard and Helms Avenue, that noncompliance did not require exclusion of the ATES evidence, dismissal of the citation, or acquittal." *Id.* at 1051 (capitalization omitted).

The court reasoned that proof of compliance was not an element of the offense. *Id.* at 1051-52. The court also reasoned that the legislature had not provided a remedy for the prosecuting agency's violation of the 30-days of warning notices and public announcement requirements. *Id.* at 1052.

4. Proceedings in This Court

Gray subsequently sought review in this court, identifying the issue listed above. This court granted Gray's petition for review without issuing a separate specification of issues.

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STANDARD OF REVIEW

Questions of law that do not involve the resolution of disputed facts are subject to de novo review. *Prof'l Engineers in California Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1032; *Kavanaugh v. West Sonoma County Union High Sch. Dist.* (2003) 29 Cal.4th 911, 916 (where "the trial court's decision did not turn on any disputed facts," the trial court's decision "is subject to de novo review").

No factual dispute underlies the lower courts' decisions in this case. As confirmed by the trial court, there was a stipulation by Culver City that no 30-days of warning notices, nor public announcement were given for the intersection of Washington Boulevard and Helms Avenue. As the trial court noted: "both parties have stipulated to the following as established fact: Public announcements for the ARLES were done in 1998, for the intersection of Washington and La Cienega, and no other public announcements have been made since that time." (4 CT 649.)

It is also undisputed that Gray was cited for allegedly running the red light at a totally different intersection (to wit, Washington Boulevard and Helms Avenue), some 10 years later in 2008 . . . after the only warning notices and public announcement requirements by Culver City in 1998.

The only question is whether the lower courts properly interpreted the statutory 30-days of warning notice and public announcement requirements, thus triggering *de novo* review.

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LEGAL DISCUSSION

I. CULVER CITY'S INTERPRETATION OF THE RED LIGHT CAMERA STATUTE SHOULD BE REJECTED BASED ON BOTH LEGISLATIVE HISTORY AND PRACTICAL REASONS.

Having failed to provide a separate warning regarding its post-1998 installation of cameras at the location where Gray was cited, Culver City has no choice than to argue that its 1998 warning should be retroactively deemed to be sufficient here. As discussed below, this argument should be rejected on multiple grounds.

A. Culver City's Arguments Are Refuted by the Legislative History of the Red Light Camera Statute.

Culver City's argument that it is only required to provide a program-general warning to the public before issuing citations is refuted by the legislative history of the red light camera statute. As discussed in detail in *Park, supra,* 187 Cal.App.4th Supp. 9, consistent with the red light camera statute, the parallel statutes authorizing the use of red light cameras at rail road crossings similarly use the term "system" in an intersection-specific context. *Id.* at 14 (citing § 21362.5(a).)

Moreover, the fact that the legislature, on multiple occasions, rejected amendments to the red light camera statute (section 21455.5) -- which would have adopted Culver City's program-general view -- is even more important. Several versions of the proposed amendments to the statute would have allowed prosecuting agencies to merely provide a warning period "during the first 30 days after the first recording unit is installed." (Senate Bill No.

780 (2003–2004 Reg. Sess.) § 4, as amended March 24, 2003; Senate Bill No. 780 (2003–2004 Reg. Sess.) § 11, as amended April 28, 2003; Senate Bill No. 780 (2003–2004 Reg. Sess.) § 11, as amended May 13, 2003.)

While the legislature made other changes to the statute in question during the same time period, the omission of the quoted language from the amendments enacted in that year is indicative of a legislative intention to avoid linking the 30-day warning period with a municipality's initial installation of automated enforcement equipment. See *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88–89 (applying this rule of statutory construction).

In fact, instead of adopting the program-general view advanced by Culver City, the legislature ultimately amended the statute through a different bill, Assembly Bill No. 1022 (2003–2004 Reg. Sess.), without such language. The Legislative Counsel's Digest concerning that bill (Stats. 2003, ch. 511) confirmed that the ATES refers to the equipment located at each intersection as follows: "Existing law requires that, at an *intersection* at which there is an automated enforcement *system* in operation, the minimum yellow light change interval be established in accordance with the Traffic Manual of the Department of Transportation." (Legis. Counsel's Dig., Assem. Bill No. 1022 (2003–2004 Reg. Sess.); emphasis added.) Judging by this language, the "system" refers to the equipment located at each intersection. Therefore, the installation of an automated enforcement system at a new intersection triggers the 30-days of warning notices and public announcement requirements imposed by section 21455.5(b).

Accordingly, based on the legislative history of the red light camera statute, this Court should reject Culver City's arguments.

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B. In Addition, Culver City's Interpretation of the Statutory Language Should Be Rejected in Light of the Current Public Outcry Over the Abuse of Red Light Camera Systems.

Requiring the prosecution to provide intersection-specific warnings is particularly important in this economy in order to address the current public outcry over the ubiquitous abuse of red light camera tickets. As confirmed by a retired judge, numerous cities are issuing "more traffic citations so they can generate more revenue to counteract governmental budget deficits." Gray, *The Corrupting of Traffic Citations*, L.A. Daily J. (October 27, 2010). In one situation, for example, a motorist was issued a seat-belt citation that ended up costing him $825. Ortiz, *Jump in Traffic Tickets Raises Questions*, L.A. Daily J. (October 15, 2010) (discussing abuse of red light camera citations as well).

Allowing municipalities to adopt their self-serving interpretation of the red light camera statute – by providing a general warning as to one intersection and then adding a dozen intersections without providing any further warnings whatsoever – could stoke the fire in terms of the public's current distrust with respect to the administration of justice in traffic courts.

Given the public perception that municipalities have resorted to traffic tickets as a means to address their budgetary problems in this economy, this Court should reject the arguments raised by Culver City in order to ensure the public that red light camera programs – and, by extension, the administration of justice in traffic courts – will no longer be abused by municipalities. Otherwise, municipalities can trap unwary drivers by installing new cameras at additional intersections without issuing new warnings by relying on a warning given a decade earlier for a totally different intersection. While trapping unwary drivers by surprise may be an

attractive way to generate, "The law is not a game of 'gotcha'..." *Barragan v. Superior* Court (2007) 148 Cal.App.4th 1478, 1485.

II. ALTERNATIVELY, GRAY'S CONVICTION SHOULD BE REVERSED BASED ON THE AMBIGUITY OF THE RED LIGHT CAMERA STATUTE.

A. At a Minimum, the Red Light Camera Statute Is Ambiguous Because Each of the Three Lower Courts Have Contradicted Themselves – in Three Separate Sets of Cases – Regarding the Identical Issue Raised in This Case.

Alternatively, if the Court is not inclined to reverse Gray's conviction solely based on the legislative history and practical reasons discussed above, there are several independent grounds for reversal here.

First, as explained below, the statutory warning requirement is ambiguous, thus mandating reversal of Gray's conviction.

In resolving the ambiguity issue, it is critical to note that the lower courts, at every single level, have adopted mutually-exclusive interpretations of the warning requirement. Such dichotomy, whether adopted at the trial court level, at the appellate division level or at the court of appeal level, proves that the red light camera statute is ambiguous.

At the trial court level, for example, another Santa Monica trial judge, the Honorable Craig D. Karlan, Los Angeles Superior Court – in another case involving:

[i] the same prosecuting agency, Culver City,

[ii] the same Culver City prosecutor [Dapeer, Rosenblit & Litvak]

[iii] the same issue, *inter alia*; and

[iv] the same defense counsel-Ellison in the Gray matter herein.

Judge Karlan interpreted Culver City's statutory obligation to issue warning notices and public announcement as being intersection-specific. (See Motion for Judicial Notice ["MJN"], Exhibit "A", p. 27, lines 17-25.)

> Judge Karlan: ". . . BUT IT SEEMS TO THE COURT -- AND THIS IS THE FINDING I'M MAKING -- THAT THE WAY THE LEGISLATURE IS DEFINING SYSTEM IS INTERSECTION SPECIFIC. AND MY UNDERSTANDING OF THESE SYSTEMS IS THEY ARE NOT CONNECTED TO EACH OTHER. THERE'S NO NEED FOR THEM TO BE CONNECTED. EACH SYSTEM IS INDEPENDENT UNLIKE A TRAFFIC CONTROL SYSTEM THAT WOULD CONTROL ALL OF THE LIGHTS ON A STREET." [Emphasis added.]

In the Gray matter, by contrast, the trial judge deemed the requirement to be program-general, thus demonstrating the ambiguity of the statutory warning requirement.

Similarly, at the appellate division level, the Los Angeles Superior Court's appellate division reversed a defendant's conviction in another red light camera case based on City of Lancaster's failure to establish that it had complied with the warning requirement "before issuing the citation in this case." (MJN, Exhibit "B", 4:2-3.) [6] Also noting that "we do not know when the [ATES] was put into effect at this particular intersection" (*id.*, 4:3-4), the court reversed the defendant's conviction on this basis.

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6 The People v. Tammany Kay Fields decision, filed May 24, 2011, is being cited not as authority (Cal. Rules of Court, rule 8.1115), but rather to demonstrate the ambiguity of the statutory language, consistent with rule 8.1115(b)(2). See *Mangini v. J.G. Durand Int'l* (1994) 31 Cal.App.4th 214, 219 (citing depublished opinions "simply to illustrate" that the issue presented remained unresolved).

By contrast, the same appellate division – that of Los Angeles Superior Court – flip-flopped in Gray's case on this issue and upheld Gray's conviction. Once again, this contradiction illustrates the ambiguity of the warning requirement.

Likewise, in another decision involving red light cameras, the same court of appeal that decided the Gray case held that the automated traffic enforcement system refers to the equipment located at an *intersection*—as opposed to its current holding that the "system" refers to the entire network. Specifically, in *Leonte v. ACS State & Local Solutions, Inc.* (2004) 123 Cal.App.4th 521, Division Three of the Second District (the same division that decided Gray's case) examined former Vehicle Code section 21455.5. Consistent with Gray's view that the "system" refers to the ATES equipment installed at each intersection, *Leonte* noted that the red light camera statute permits "the use of automated traffic enforcement *systems* at intersections." *Leonte, supra,* 123 Cal.App.4th at 526 (emphasis added). By contrast, the same court concluded here that "the term 'system' refers to the overall ATES project and not to the installation of ATES equipment at each intersection." See *Gray, supra*, 204 Cal.App.4th at 1048. As a result, the court of appeal's contradiction of its own prior ruling in *Leonte* is particularly baffling here.

In sum, whether at the trial court level, at the appellate division level or at the court of appeal level, each court has issued contradicting decisions in interpreting the warning requirements imposed by the red light camera statute. As a result, the ambiguity of the statutory language is established based on the mere fact that the lower courts, at every single level, have adopted mutually exclusive views on the issue presented here.

Therefore, regardless of which view is the correct one, the bottom line is that the statute is ambiguous in light of these conflicting opinions.

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Because the statute is ambiguous, Gray's conviction should be reversed as discussed in more detail below.

B. Given the Ambiguity of the Statutory Warning Requirement, Culver City's Arguments Should Be Rejected Based on the Rule of Lenity.

The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos* (2008) 553 U.S. 507, 514 (plurality opinion of Scalia, J.). This rule "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States v. Wiltberger* (1820) 18 U.S. (5 Wheat.) 76, 95. The rule also minimizes disruptive conflicts over the interpretation of criminal statutes. See *Lewis v. United States* (1980) 445 U.S. 55, 65 (noting that the rule of lenity applies in situations where the meaning of a statutory provision is ambiguous).

Consistent with the "Rules of Statutory Construction", and if there are two plausible interpretations of the statutory language in Vehicle Code § 21455.5(b), the court must apply the "Rule of Lenity," under which courts resolve doubts as to the meaning of a statute in a criminal defendant's favor. *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312, 58 Cal.Rptr.2d 855, 926 P.2d 1042.

It has been frequently noted, as it is here, that the Rule of Lenity applies only if two reasonable interpretations of the statute stand in relative equipoise. *People v. Soria* (2010) 48 Cal.4th 58, 65, 104 Cal.Rptr.3d 780, 224 P.3d 99; accord, *People v. Lee* (2003) 31 Cal.4th 613, 627, 3 Cal.Rptr.3d 402, 74 P.3d 176.

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If the two plausible, reasonable interpretations are as expressed in *Park* and in *Gray*, and are of relative equipoise, then the statute should be interpreted consistent with the *Park* decision based on the Rule of Lenity.

Applying these authorities here, the court of appeal's decision should be reversed because the mere existence of conflicting authorities over the proper interpretation of the red light camera statute illustrates the ambiguity of this statute. The "venerable rule [of lenity] ... places the weight of inertia upon the party that can best induce" the legislature "to speak more clearly and keeps courts from making criminal law" in lieu of the legislature. *Id.* "[B]ecause of the seriousness of criminal penalties ... legislatures and not courts should define criminal activity." *United States v. Bass* (1971) 404 U.S. 336, 348 (brackets added).

In sum, to the extent that Culver City seeks to wash its hands off as to its warning requirements by merely providing program-general warnings (as opposed to intersection-specific warnings), Culver City's fight is with the legislature, not with this Court. Therefore, Culver City's arguments should be rejected on this ground.

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III. ALTERNATIVELY, ASSUMING THAT CULVER CITY'S INTERPRETATION OF THE STATUTE IS CORRECT, THE CONSTITUTIONAL ISSUES CREATED BY THE CONFLICTING INTERPRETATIONS OF THE STATUTORY WARNING NOTICES AND PUBLIC ANNOUNCEMENT LANGUAGE REQUIRE REVERSAL HERE.

A. Where, As Here, a Law Is Potentially Subject to Discriminatory Enforcement, Constitutional Due Process Principles Require Reversal.

A law can be unconstitutionally vague "for either of two independent reasons." *Hill v. Colorado* (2000) 530 U.S. 703, 732. A law is impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement," *id.*; *Kolender v. Lawson* (1983) 461 U.S. 352, 357-358, or if it "'fails to give a person of ordinary intelligence fair notice'" of what is prohibited. *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 162 (quoting *United States v. Hariss* (1954) 347 U.S. 612, 617).

If Culver City's interpretation of the red light camera statute is correct, the statute is necessarily void because it results in discriminatory enforcement. Under this "more important aspect of the vagueness doctrine," a law is impermissible if it fails to establish minimal guidelines to govern enforcement of the law. *Kolender, supra,* 461 U.S. at 357-358 (citing *Smith v. Goguen* (1974) 415 U.S. 566, 574). That is precisely the case here.

While some prosecuting agencies such as Culver City have interpreted the statutory warning requirement to be program-general, others may interpret it differently based on the contrary *Park* decision. As a result, there is a real possibility that different prosecuting agencies will employ different interpretations of the red light camera statute in deciding whether

to provide warnings when they install cameras at new intersections. Accordingly, assuming that Culver City's program-general interpretation is correct, the court of appeal's decision should be reversed on this alternative basis. 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). [7]

The mere existence of a split of authority – as evidenced by the conflicting decisions in *Park* and in the Gray case – illustrates the constitutional vagueness problems engendered by the court of appeal's decision in this case. As the Supreme Court explained nearly a century ago, "conflicting results which have arisen from the painstaking attempts" to apply the law are an "abundant demonstration" of vagueness. *United States v. L. Cohen Grocery Co.* (1921) 255 U.S. 81, 89. There is absolutely no basis to uphold a conviction where the ambiguity of the statute has negatively affected the judicial decision making process in this manner.

* * * *

Culver City may try to argue that the existence of this conflict is irrelevant because this Court can resolve the conflict in Culver City's favor. This argument would be completely flawed. The *Park* decision adopting Gray's view is directly relevant to the vagueness inquiry in this case.

In *Skilling v. United States* (2010) 130 S. Ct. 2896, the Supreme Court recently surveyed "the origin and subsequent application" of a criminal statute to determine whether the conduct of the convicted defendant could be interpreted to come within those decisions. "Reading the statute

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[7] Although the court of appeal rejected *Park*, once this Court granted review in *Gray*, the court of appeal's decision in this case was depublished. As a result, unless this Court overrules *Park*, the *Park* decision can be cited.

to proscribe a wider range of offensive conduct" than prior decisions understood the statute to have criminalized, the court acknowledged, "would raise the due process concerns underlying the vagueness doctrine." *Id.* at 2931; see also *id.* at 2940 (Scalia, J., joined by Thomas and Kennedy, JJ., concurring in part and concurring in the judgment) (statute void for vagueness because inconsistent interpretations of it "provide[] no ascertainable standard for the conduct it condemns"); internal quotation marks omitted. [8]

Applying the same rationale here, the fact that *Park* had adopted Gray's view prior to the court of appeal's decision in this case further underscores the need to reverse Gray's conviction here. Any other holding would raise serious due process concerns.

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[8] In an analytically analogous context, the court subsequently extended the same rationale to administrative fines. Specifically, in *FCC v. Fox TV Stations, Inc.* (2012) 132 S. Ct. 2307, 2319-20, the court held that an administrative fine violated the defendant's constitutional due process right in light of a prior agency ruling deeming similar conduct not to be actionable.

B. Even if the Statute Is Not Ambiguous, Gray's Conviction Should Be Reversed Based on the Lowers Court's Judicial Expansion of the Red Light Camera Statute.

Refusing to acknowledge the statute's ambiguity, Culver City stubbornly argued in its answer to Gray's petition for review that the statute is clear on its face. Even if we assume that the statute is not ambiguous, Gray's conviction would still need to be reversed – albeit for a different constitutional reason.

In *Bouie v. City of Columbia* (1964) 378 U.S. 347, the Supreme Court recognized that even if the text of the applicable statute is clear—which is not the case here—where the statute is "unforeseeably and retroactively expanded by judicial construction," this presents a "potentially greater deprivation of the right to fair notice" than the garden-variety vagueness case where "the uncertainty ... resulted from vague or overbroad language in the statute itself." *Id.* at 351-352 (internal citations omitted). In this particular case, the court of appeal judicially expanded the statutory conditions for obtaining a conviction by effectively eliminating the 30-day warning notice period and public announcement requirements imposed by law. Rendering the key language of the statute as mere surplusage (i.e., the requirement to provide warnings "*prior* to issuing citations"), the court of appeal held that this condition precedent for issuing citations does not have to be enforced.

In other words, under the court of appeal's view, even if the prosecution violates this mandatory language, the defendant can still be convicted nonetheless — as illustrated in this case. As a result, the court of appeal judicially expanded the circumstances for obtaining a conviction by simply excusing the prosecution's failure to provide the statutory warning. Under *Bouie*, however, the Constitution precludes such a result.

Therefore, even if we accept Culver City's argument that the statute is not vague, the lower court's judicial construction of the warning requirement (in particular, the elimination of the warning requirement) would lead to the same result: reversal of Gray's conviction. See *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 574, fn. 22 (noting that, under *Bouie*, "retroactive application of new construction of statute violate[s] due process").

IV. FINALLY, THIS COURT SHOULD REJECT THE NOTION THAT ANY ERROR WAS HARMLESS

Adding insult to injury, the court of appeal held that even if Culver City were statutorily required to issue intersection-specific warnings, Culver City's undisputed failure to issue a separate warning for the intersection where Gray was cited does not change the legal outcome here. Specifically, the court held that Culver City's violation of the red light camera statute can be ignored because, after all, the statute "does not require the prosecution to show compliance with its requirements in order to use ATES evidence in prosecuting" such cases. *Gray, supra*, 204 Cal.App.4th at 1052. The court of appeal also held that "the Legislature did not establish any remedy for a local jurisdiction's failure to comply" with the warning requirements. *Id.* The court of appeal's rationalization does not withstand scrutiny for several reasons. [9]

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[9] Apparently realizing the constitutional issues implicated in this case, the court of appeal did not adopt the appellate division's rationale for ignoring Culver City's failure to warn. According to the appellate division, "[w]here constitutional issues are not involved ... noncompliance with the statute goes merely to the weight of the evidence, and does not render the evidence automatically inadmissible." *Gray, supra,* 199 Cal.App.4th Supp. at 14-15. Having failed to adopt this alternative rationale, the court of appeal effectively rejected the appellate division's post-hoc rationalization, thus

A. The Rationale Adopted by the Court of Appeal Completely Ignores the Jurisdictional Nature of the Issues Raised Here.

The court of appeal's justification for condoning Culver City's violation of the warning requirement is that the red light camera statute "does not require the prosecution to show compliance with its requirements in order to use ATES evidence in prosecuting" such cases. *Gray, supra*, 204 Cal.App.4th at 1052. This explanation completely ignores the fundamental principle that "the prosecution must prove all ... required elements of the crime, *including the jurisdiction of the court.*" Levenson & Ricciardulli, California Criminal Law (2011-2012 ed.) § 2:2 (emphasis added in italics).

In order for the court to obtain jurisdiction, a proper complaint must be filed in the first place. See Pen. Code § 949 (complaint is the first pleading); Vehicle Code § 40518 (defining what constitutes a complaint for red light camera tickets); see also *Anger v. Municipal Court* (1965) 237 Cal.App.2d 69 (court did not have jurisdiction over defendant where prosecution failed to file a complaint charging him with violation of vehicle code and defendant had not waived the filing of a complaint); *Gavin v. Municipal Court* (1960) 184 Cal.App.2d 712, 714 (court has no jurisdiction over defendant until a proper complaint charging him with a vehicle code violation is filed).

As a result, without a proper complaint (in light of section 21455.5(b)'s mandatory requirement to warn the public "*prior* to issuing citations"), the trial court had no jurisdiction in the first place. Without

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further raising serious doubts about the various excuses offered by Culver City to have Gray's conviction affirmed.

jurisdiction, Gray cannot be convicted. Therefore, the court of appeal's rationale for upholding Gray's conviction should be rejected on jurisdictional grounds. See *Ralph v. Police Court* (1948) 84 Cal.App.2d 257, 260 ("If a judgment is rendered by a court which did not have jurisdiction to hear a cause, such judgment is *void ab initio*").

B. In Addition, the Court of Appeal's Rationale Is Inherently Flawed Because It Encourages Prosecuting Agencies to Violate the Warning Notices and Public Announcement Requirements with Impunity.

Contrary to the court of appeal's view, the red light camera statute requires appropriate warnings as a condition precedent for issuing citations. As discussed above, section 21455.5(b) states that warnings must be provided "*prior to issuing citations.*" Applying basic principles of logic, it necessarily follows that the converse is equally true: that if warnings are *not* provided "prior to issuing citations," then the driver cannot be cited in the first place.

Any other holding would allow – and practically encourage – prosecuting agencies to ignore the statutory warning requirement at no risk. After all, under the court of appeal's approach, the prosecution has no incentive to comply with the warning requirement, particularly in this economy to the extent that compliance requires some financial expenditures – knowing that any non-compliance will be simply ignored by the court. As a result, the court of appeal's decision to immunize the prosecuting agencies from violating this statute makes absolutely no sense, other than the fact that it breeds distrust by creating this dual standard of justice. "An appearance of arbitrariness is to be avoided, even in the crowded conditions of traffic court proceedings." *People v. Kriss* (1979) 96 Cal.App.3d 913.

Culver City's view, if adopted, "also enhances a public perception that the court is merely an instrument of law enforcement." *People v. Marcroft* (1992) 6 Cal.App.4th Supp. 1, 5 (traffic judge cannot solicit ex parte correspondence from the officer in order to help defendant prosecute his appeal of traffic ticket). "The courts suffer not only as such doubts in the integrity of the ... legal system grow, but suffer also because the courts rightfully may be considered responsible when they fail to act to protect the public despite their authority to do so." *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 610 (addressing attorney discipline system). "Enforcement of laws which are widely perceived as unreasonable and unfair generates disrespect and even contempt toward those who make and enforce those laws." *People v. Goulet* (1992) 13 Cal.App.4th Supp. 1, 4 (addressing another issue in a traffic infraction appeal).

Therefore, the court of appeal's rationale for ignoring Culver City's violation of the statutory 30-day warning notice and public announcement requirements – while upholding Gray's conviction for violating the identical statute – should be summarily rejected.

CONCLUSION

Gray's conviction should be reversed.

Dated: September 7, 2012

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.520(c)(1), counsel for petitioner herein certifies that the word count in the above-reference Appellant's Opening Brief on the Merits to the California Supreme Court is 6628.

This certification by counsel is based upon the word count from the WordPerfect computer program that was used to prepare this brief.

Dated: September 7, 2012

Respectfully submitted,

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PROOF OF SERVICE

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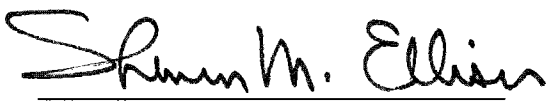
I am resident in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 15303 Ventura Boulevard, 9th Floor, Sherman Oaks, California 91403.

On September 10, 2012, I personally served the foregoing document described as APPELLANT'S OPENING BRIEF ON THE MERITS on the interested parties in this action by [X] Federal Express overnight delivery to the California Supreme Court, [ ] e-mailing, and/or [X] depositing in the U.S.Postal Service said motion, as listed herein below, a true copy thereof in a sealed envelope, addressed to the parties and/or interested entities.

See Attached Service List

I declare, under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, except as to those matters stated on information and/or belief, and as to those matters, I believe them to be true; and that this Declaration was executed on September 10, 2012.



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