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DEC 28 2010

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ORIGINAL

Court of Appeal Case No. _____
(Appellate Div. Case No. BR048012)
(Trial Court Case No. BI 20734)
(Citation No. BI20734)

Ruling due 1/18/11
Opinion by Justice _____
Answer due 1/17/11

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

COURT OF APPEAL - SECOND DIST.

FILED

DEC 28 2010

JOSEPH A. LANE Clerk

DIVISION _____

People of the State of California

Plaintiff and Respondent, Deputy Clerk

v.

Annette B [REDACTED]

Defendant and Appellant.

Appeal from the Appellate Division of the Superior Court for Los Angeles County,
Justices Wasserman, Dymant and Kumar

PETITION TO TRANSFER TO COURT OF APPEAL

Annette [REDACTED] (224143)

Attorney for Appellant

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Assigned to DIVISION SEVEN

Assigned to DIVISION SEVEN

STATEMENT OF ISSUES

Pursuant to Rules of Court, rule 8.1008(b), a party may file a petition to transfer the case to the Court of Appeal citing the necessity of the transfer to secure uniformity of opinion or to settle an important question of law. Defendant and Appellant respectfully requests the granting of this transfer petition to secure uniformity of decision and to settle an important question of law.¹

The Granting of This Petition is Necessary to Secure Uniformity of Decision

On July 9, 2010, the Appellate Division of the Orange County Superior Court, certified for publication its opinion in case number 30-2009-304893 entitled People v. Khaled, (2010) 186 Cal.App.4th Supp 1, 113 Cal.Rptr 3d 796 reversing the conviction in a “photo enforcement” citation trial.

On November 24, 2010, the Appellate Division of the Superior Court of Los Angeles, in People v. B [REDACTED] affirmed the trial court’s judgment of conviction in a “photo enforcement” citation trial, with the exact same facts as People v. Khaled, *supra*, 186 Cal.App.4th Supp 1, 113, directly contradicting its decision and findings. A copy of this Opinion is attached hereto as Exhibit “1”.

The Court of Appeal is respectfully requested to transfer this case to the Court of Appeal to secure a uniformity of decision following contradictory decisions issued by the Appellate Division of Orange County (published decision) and by the Appellate Division of Los Angeles County.²

¹ The Appellate Division of the Superior Court of the County of Los Angeles denied Appellant’s application for certification for transfer to the Court of Appeal on December 15, 2010.

² This request for transfer to the Court of Appeal is not a challenge to the use or constitutionality of the automated traffic enforcement systems to enforce red light violators. Rather, this request to transfer is challenging the systematic government prosecution by a municipality to exact revenues with the help of traffic court’s disregard for the rules established to protect the right of the accused to a fair trial.

In People v. Khaled, *supra*, 186 Cal.App.4th Supp 1, the police department of the City of Santa Ana issued a “photo enforcement” citation to the appellant, [REDACTED] Khaled, alleging a violation of Vehicle Code section 21453, subdivision (a). A traffic trial was held on the matter. The prosecution sought to establish the majority of the violation with the testimony of an officer and a declaration from Redflex, a private company contracting with the City to install and maintain the camera-computer system, purporting to show the appellant driving through an intersection against a red light. Appellant objected to the introduction of the photographs and declaration as inadmissible hearsay, and violative of appellant's confrontation rights. The objection was overruled and the trial judge admitted the photographs as business records, official records, and because a proper foundation for the admission had been made based on the submitted declaration. The Appellate Court reversed the judgment holding that “the trial court erred in admitting the photographs and the accompanying declaration over the appellant's hearsay and confrontation clause objections. Absent the photographs and content in the declaration, there is insufficient evidence to support the violation. Accordingly we reverse the judgment.” The decision of the Appellate Court was published in People v. Khaled, (2010) 186 Cal.App.4th Supp 1, 113 Cal.Rptr. 3d 796.

In this instant case, the police department of Beverly Hills issued a “photo enforcement” citation to appellant, Annette B. [REDACTED] alleging a violation of Vehicle Code section 21453, subdivision (a). A traffic trial was held on the matter. The officer sought to establish the violation with his testimony alone, and without any declaration whatsoever from Redflex company, although he had no personal knowledge of the violation and was not the custodian of records, to show the appellant driving through an intersection against a red light. Appellant objected to the introduction of the photographs, video and the maintenance logs as inadmissible hearsay, lack of foundation and violative of appellant's confrontation rights. The objection was overruled and the trial judge admitted the photographs, the video and the maintenance log as a business records. The Appellate Division of Los Angeles County, having Judicial Notice of the published

opinion in People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, affirmed the conviction and denied Appellant's request for publication or certification.

The Facts of Khaled and B██████████ Are Exactly the Same

The facts in these two cases are exactly the same:

a) In People v. Khaled, the police department of the City of Santa Ana issued a traffic citation to appellant, ██████████ Khaled, alleging a violation of Vehicle Code section 21453(a). Similarly, in this case, the police department of the City of Beverly Hills issued a traffic citation to appellant, Annette B██████████ alleging a violation of Vehicle Code section 21453(a). People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

b) In People v. Khaled, a trial was held on the traffic matter. Similarly, in this case, a trial was held in the traffic matter. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

c) In People v. Khaled, the prosecution sought to establish the violation with a declaration from Redflex and the testimony of a local police officer to show the appellant driving through an intersection against a red light. Here, unlike Khaled, the city of Beverly Hills, did not even have a declaration from Redflex to lay the foundation for the photographs, video and the maintenance logs. Instead, in this case the city sought to establish the violation with the testimony of only a local police officer to show the appellant driving through an intersection against a red light. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

d) In People v. Khaled, appellant objected to the introduction of the photographs and declaration as inadmissible hearsay, and violative of appellant's confrontation rights. Similarly, in this case, appellant objected to the introduction of the photographs, video and the testimony of the police officer as inadmissible hearsay, lack of foundation and violative of appellant's confrontation rights. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

e) In People v. Khaled, the objections were overruled and the trial judge admitted the photographs as business records and because proper foundation for the admission had been made. Similarly, here the objections were overruled and the trial judge

admitted the photographs and video as business records and because proper foundation for the admission had been made. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

f) In People v. Khaled, no police officer witnessed the alleged traffic violation. Similarly, in this case, no police officer witnessed the alleged traffic violation. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

g) In People v. Khaled, a police officer testified about the general area depicted in a photograph taken from a camera installed at an intersection in Santa Ana. Similarly, in this case a police officer testified about the general area depicted in a photograph taken from a camera installed at an intersection in Beverly Hills. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

h) In People v. Khaled, Redflex, a private company contracted with the municipality to install, maintain and store digital photographic information. Similarly, in this case the same exact company, Redflex, contracted with the city of Beverly Hills to install, maintain and store digital photographic information. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

i) In People v. Khaled, an officer testified that these photographs were periodically sent back to the police department for review as possible driving violations. Similarly, in this case an officer testified that photographs were periodically sent back to the police department for review as possible driving violations. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

j) In People v. Khaled, the person who entered the information depicted in the photographs, such as the date, time and other information into the camera-computer, did not testify. Similarly, in this case the person who entered the information depicted in the photographs, such as the date, time and other information into the camera-computer, did not testify. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

k) In People v. Khaled, the person who entered the information into the camera-computer was not subject to being cross-examined on the underlying source of that information. Similarly, in this case the person who entered the information into the

camera-computer was not subject to being cross-examined on the underlying source of that information.

l) In People v. Khaled, the person who maintained the system did not testify. Similarly, in this case the person who maintained the system did not testify. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

m) In People v. Khaled, no one with personal knowledge testified about how often the system is maintained. Similarly, in this case no one with personal knowledge testified about how often the system is maintained. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

n) In People v. Khaled, no one with personal knowledge testified about how often the date and time were verified or corrected. Similarly, in this case no one with personal knowledge testified about how often the date and time were verified or corrected. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

o) In People v. Khaled, the custodian of record for the company who contracted with the city to maintain, monitor, store, and dispense the photographs did not testify. Similarly, in this case, the custodian of record for the company who contracted with the city to maintain, monitor, store, and dispense the photographs did not testify. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

p) In People v. Khaled, the person with direct knowledge of the workings of the camera-computer system did not testify. Instead the prosecution chose to submit the testimony of a local police officer. Similarly, in this case the person with direct knowledge of the workings of the camera-computer system did not testify. Instead the city chose to submit the testimony of a local police officer. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

q) In People v. Khaled, the police officer testified that some time in the distant past, he attended a training session where he was instructed on the overall workings of the system at the time of the training. The officer was unable to testify about the specific procedure for the programming and storage of the system information. Similarly, in this case, the officer testified that some time in the distant past he attended a training session

where he was instructed on the overall workings of the system at the time of the training. Officer Berg was unable to testify about the specific procedure for the programming and storage of the system information. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

r) In People v. Khaled, the People presented a declaration from the custodian of records of Redflex. In this case, no declaration was submitted from Redflex at all. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

s) In People v. Khaled, the only evidence outside of the contents of exhibit No. 3 (the declaration by Redflex) describing the workings of the photo enforcement system and recordation of information from that system came from Officer Berg who, admittedly, was unable to testify about the specific procedure from the programming and storage of the system information. Similarly, in this case the only evidence describing the workings of the photo enforcement system and recordation of information from that system came from Officer Butkuss who was unable to testify about the specific procedure for the programming and storage of the system information. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 4.

t) In People v. Khaled, the Court stated that the document purporting to be a business record cannot be prepared in contemplation of litigation. The Court then cited to Evidence Code section 1271, citing the first element that must be proved by the qualified witness that the writing be made in the regular course of business. In this case, officer Butkuss never testified that the documents purporting to be business records were made in the regular course of business. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1.

The Decisions in People v. Khaled and People v. B ██████████ Contradict Each Other

The November 24, 2010 decision of the Appellate Division of the Superior Court of Los Angeles in this instant case, affirming the trial court's judgment of conviction in

“photo enforcement” citation trial³, directly contradicts the findings of a published decision of the Appellate Division of the Superior Court of Orange County reversing the conviction in a “photo enforcement” citation trial in People v. Khaled, *supra*, 186 Cal.App.4th Supp 1. The contradictory decision, based on exactly same facts and the exact same company Redflex, affects one of the most important rights citizens have been guaranteed by the Constitution – that being an accused’s Sixth Amendment right of confrontation.

a) In People v. Khaled, the Appellate Court reversed the trial court’s judgment with directions that the charge be dismissed. In this case, unlike in Khaled, the Appellate Court affirmed the trial court’s judgment. People v. Khaled, *supra*, 186 Cal.App.4th Supp.1, 9 and People v. B [REDACTED] Opinion, page 6.

b) In People v. Khaled, the Court found that the use of photographs and declaration by Redflex and the testimony of an officer without any personal knowledge to prove that a motorist ran a red light violated the Evidence Code and the driver’s constitutional right to confront his accuser. Unlike Khaled, in this case, the Court found that the use of photographs and video by a police officer’s testimony to prove that a motorist ran a red light did not violate the Evidence Code nor did the driver have a constitutional right to confront his accuser.

c) In People v. Khaled, the defense objected on the ground that the photographs, which had certain information entered on them, such as the time and date they were taken, were inadmissible hearsay. The trial court disagreed, admitted the photos and a supporting declaration from Redflex, and found the defendant guilty. The Appellate

³ In reaching a contradicting decision in People v. B [REDACTED], the Los Angeles Appellate Division, having considered Appellant’s Request for Judicial Notice of the published decision in People v. Khalid, in footnote 4 declared that, “...a decision by one appellate division is not binding on another.”

Court for Orange County said the objection should have been sustained and reversed the conviction. Similar to Khaled, the defense objected on the ground that the photographs and video which had certain information entered on them, such as the time and date they were taken, were inadmissible hearsay. The trial court disagreed, admitted the photos and video, and found the defendant guilty. Unlike Khaled however, the Appellate Court of the County of Los Angeles, said the objection should have been overruled and affirmed the conviction.

d) The Justices in People v. Khaled explained that the admission of a photograph requires testimony from the photographer or the person who took the video, or from a person who was present and witnessed the event that the photograph or video purports to depict, or from someone who has personal knowledge as to when the camera was started or stopped. Unlike Khaléd, the Justices ruling over People v. B [REDACTED] did not hold the same view.

e) In this case, the lack of evidence establishing the purported foundation for the maintenance logs was so blatant that the Appellate Court had to make presumptions as to the very nature of the maintenance logs in its Decision. The Appellate Court's Decision on page 4 lines 12-14 provides as follows: "[D]efendant also contends that the maintenance logs prepared by Redflex are hearsay. The record does not indicate whether the logs consisted of entries created by a computer-generated testing or a field technician. To the extent that the logs consisted of computer-generated testing reports.... If the logs contained entries by a field technician," The proponent of the evidence did not lay the foundation for the maintenance records as argued by the Appellant. If they had, then the Appellate Division would not have had to make a presumption. The absence of facts necessary to lay the foundation for the business records exception for the maintenance logs should not be construed against the defendant who is challenging their admissibility, rather it should be construed against the proponent of the evidence, which here is the City of Beverly Hills. The Appellate Division, in its Decision, in effect noted the absence of the necessary facts establishing the foundation purportedly laid by the officer when, in its Decision, the Court had to make presumptions regarding the very nature of the evidence

due to lack of the evidence. Here, the lack of the evidence is one of the challenges made to the admissibility of the evidence. Hence, the Court erred in making presumptions regarding evidence which was not a part of the record. The presumption the Court made regarding the maintenance logs were made because there were no facts in the record establishing the foundation.

As a result, under the current contradiction of decisions, there is disparate treatment of those whose “photo enforcement” citation trials are held in a Los Angeles courtroom versus those whose trials are held in an Orange County courtroom with regard to the same exact principles of law which are: The admissibility of evidence and the lack of statutory and constitutional compliance with the procedures employed by several municipalities in “photo enforcement” citation trials. The citizens of both counties should be treated equally under the laws of this state no matter where their trials are held. It is therefore respectfully requested that the Court of Appeal accept this petition for transfer which is necessary to secure uniformity of decision.

The Decision in People v. B [REDACTED] Contradicts With the Supreme Court case of Melendez-Diaz

The Appellate Division which rendered the Decision which is subject of this Petition to Transfer, when citing to the Supreme Court case Melendez-Diaz v. Massachusetts (2009) 129 S.Ct. 2527, said of the Melendez-Diaz Court citing only a portion of the opinion as follows: “...Court expressly did not extend its ruling in Melendez-Diaz to accuracy-testing reports such as the one here. ‘[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case...’”

A reading of the case however, reveals the opposite conclusion. The full context of the footnote which contains the quotation from which the Appellate Division concluded that the Supreme Court did not extend its ruling in Melendez-Diaz to accuracy-testing reports, provides a very important exception to the rule, that being if the testimony was

introduced and the defendant objected, then the testimony must be introduced live. The full text of the quotation provides as follows:

“FN1. Contrary to the dissent's suggestion, *post*, at 2544 - 2545, 2546 (opinion of KENNEDY, J.), we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that “[i]t is the obligation of the prosecution to establish the chain of custody,” *post*, at 2546, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *ibid.*, from *United States v. Lott*, 854 F.2d 244, 250 (C.A.7 1988), “gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.” **It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live...**” (emphasis added)

Ultimately, the Appellate Division in *People v. B [REDACTED]* found that the field technician logs, which were the People's only proof that the equipment was maintained properly and was in proper working condition at the time the pictures and the video were taken, was not within the definition of testimonial evidence and hence the Appellant did not have the right to confront and challenge its author. The California Court of Appeals in, *People v. Isaiah* (2004) 118 Cal. App. 4th 1396, expanded the definition of what testimonial hearsay evidence is by stating that the pertinent question is whether an objective observer would reasonable expect the statement to be available for use in a prosecution. (Id at p.1402)

In this case, no Redflex employee, appeared at trial: not the camera technician who was charged with maintaining the system in working order and monitoring and determining the accuracy of the date, time and other relevant information that was imprinted on the photographs. The person from Redflex who had this information was not subject to being cross-examined on the underlying source of that information. Instead, a local police officer testified after having reviewed a packet that was sent to him by Redflex. This officer testified that sometime in the distant past he attended a

training session where he was instructed on the system. He did not testify about any of the foundational requirements of Evidence Code section 1271.

The defendant had a right to cross-examine the technician who maintained the system and whose time and work is recorded in the maintenance log. Specially because the photographs and maintenance record contain hearsay evidence concerning the information superimposed on the photographs allegedly indicating the date, time, length of the amber light (a requirement under Vehicle Code section 21455.7) and other information which are all elements of the crime. The date, the time and the length of amber light are all elements of the charge. The officer who testified had no personal knowledge of any of these facts. He simply read off this information from the box that was superimposed on the photograph. Without the right to cross-examine there is no way to challenge the state's evidence. The People are therefore unbeatable in these cases.

Appellant respectfully requests that this Court accept this Appeal, as this is a question of a systemic violation of an accused's right to confront his accuser, a right guaranteed by the constitution.

Important Questions of Law

Important Question of Law #1: Can photos, video and maintenance records created for litigation ever constitute a business record

The Appellate Division of the County of Los Angeles, in affirming the traffic court's conviction in this case, found that photos, videos and field technician logs/maintenance records, which Appellant argues were created solely for use in litigation/prosecution in a "photo enforcement" trial, to be a business record, when by definition, business records exclude evidence prepared solely for litigation.

The court's finding of these documents to be business record is contrary to well established law which provides that only business record created for the administration of an entity's affairs qualify as business records. Pursuant to Evidence Code section 1271,

“Evidence of a writing made as a record of an act, condition or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: (a) The writing was made in the regular course of a business; ..”

The challenge here lies in the fact that the photographs and the video maintained by Redflex cannot possibly qualify as a “Business record” simply because they were not created for the purpose of the administration of an entity’s affairs; rather they were created for establishing or proving some fact at trial. If the records contained the timesheets of the employees of Redflex for example, then that would fall under the category of business records of Redflex, but not photos solely taken for purposes of prosecution. The same reasoning attaches to the videotape evidence. These are not business records. The Redflex camera does not take a photograph of every car which passes through the intersection. If it did, then an argument can be made that the photos were business records. But the camera only takes a picture when the sensor indicates that a car has passed the light when it was red. The officer testified to this fact. The sole reason for the picture that is produced by the camera and maintained by Redflex is to be used to prosecute the driver of the car by the municipality which has contracted with Redflex. The selective nature of the photos creates the basis for the argument that they are not a business records. According to the Supreme Court of the United States, documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status, but if the regularly conducted business activity is the production of evidence for use at trial they are not considered business records. The rationale behind this rule is that business and public records are generally admissible, absent confrontation, not because they qualify under an exception to the hearsay rules, but because they were created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial. This is why they are not testimonial evidence.

Here that is not the case. Further, the officer did not testify as to the photos being created for any other reason than litigation. In order to establish the business record

exception, the People had to prove that the writing was made in the regular course of a business. It is the People's burden to prove that element. They failed to make any such showing. In fact, the People proved the opposite that being the camera takes a picture only when it detects a red light violation. Hence, proving that the photo and video were produced and maintained for litigation. That is the sole purpose for this information: prosecution.

Important Question of Law #2: Whether traffic courts commit error when they admit altered photographs containing hearsay information into evidence and allow the hearsay information to prove the elements of the charge

Traffic courts, as a routine admit into evidence, even against Defendant's objection, altered photos containing blacked out portions of photographs, showing that the photographs were obviously manipulated after being created by a remotely operated, inanimate machine, and that the pictures had images of a "scoreboard-like box" superimposed upon them, containing hearsay evidence concerning the date, time, length of the amber light (a requirement under Vehicle Code section 21455.7) and other information necessary to prove the elements of the charge. Traffic courts, as a routine, go even further and permit an officer, who has no personal knowledge of the purported violation, to testify as to the date and time of the violation and the length of amber light when the officer has no personal knowledge of any of this information and is solely relying on the hearsay information imprinted on the photograph.

Here, the Appellate Division incorrectly stated that Appellant contends that the photographs are hearsay (page 4 lines 4-11). The Court then explained why a photograph was not hearsay. Appellant, however, never argued that the photographs were hearsay. Rather, she argued that the information printed on the photographs was hearsay. The distinction is great. The photos were admitted into evidence against Defendant's objection even though they contained obviously altered and blacked out portions of photographs, showing that the photographs were obviously manipulated after being

created by a remotely operated, inanimate machine, and that the pictures had images of a "scoreboard-like box" superimposed upon them, containing hearsay evidence concerning the date, time, length of the amber light (a requirement under Vehicle Code section 21455.7) and other information which the officer used to testify as he had no independent personal knowledge of the purported violation.

CONCLUSION

The City of Beverly Hill's desire to raise revenue should not and does not trump or negate the City's obligation to follow the well established evidentiary court rules and standards and extremely important, fundamental Constitutional and Due Process Rights which protect and are the right of the citizens of the United States and the State of California, nor should the government be able to contract those obligations away.

This Court should not allow the City to circumvent constitutional protections to aid in the convenient production of "acceptable" hearsay evidence needed to garner quick and defenseless convictions in a for-profit money-making scheme, run by the City in conjunction with civilian for-profit contractors.

The trial court's statement regarding the application of the Rules of Evidence during trial is illustrated by the trial court's statement contained in the Court's Order Concerning Appellant's Statement on Appeal. The trial court stated: The People have never been required to have Redflex employees such as the custodian of records or the field service technicians present in court in order for the People's exhibits to be admissible. What the trial court is saying here, is that it is acceptable for the trial court to continue its practice of not applying the Rules of Evidence because it has not been told otherwise. It is clear that unless a higher court compels the trial court to do right, it will continue to hold trials that are more akin to proceedings before a neighborhood referee than a real trial in a courtroom.

The rules of Evidence are an integral part of our criminal justice system. They should not be compromised or dispensed with simply because it would cost more money

to comply with these rules. Nor should they be dispensed with because the trial is held in traffic court. If a defendant has a right to trial where the rules of Evidence apply, as they do in traffic trials, then trial courts should abide by those rules. They should not be permitted to simply dispense with their obligation to hold the People to their burden and dispense with the rules of evidence entirely for monetary or expediency considerations.

Gideon v. Wainwright (1963) 372 U.S. 335 would never have happened if the Court allowed monetary considerations of their decision to override the constitutional rights of Mr. Gideon. The costs of the Gideon decision to the states of this nation was enormous. The Supreme Court, nevertheless, made the decision regardless of the financial burden it would cause. Prosecutors all over this state, routinely call as witnesses in DUI trials, the officer who maintains the breathalyzer machine to testify to its maintenance and accuracy before its results are admitted against a defendant. Financial considerations and expediency are not sufficient reasons to dispense with complying with the rules of Evidence in a court of law. The sanctity of a courtroom should not be allowed to be compromised so the City of Beverly Hills and other municipalities can get even richer. It is undisputed that modern machines are a marvel. To this day however, no machine has ever been created that can convict a human being. Despite this fact, machines are being used to convict people, everyday because it is so difficult to challenge the system that has been put in place to exact the revenues that are being collected by municipalities using our Courts.

Dated: December 27, 2010

Respectfully submitted,

By 

Annette B  Esq.

EXHIBIT “1”

NOV 24 2010

John A. Clarke, Executive Officer/Clerk
By *Connie L. Hudson* Deputy
CONNIE L. HUDSON

APPELLATE DIVISION OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

11	PEOPLE OF THE STATE OF CALIFORNIA,)	BR 048012
12	Plaintiff and Respondent,)	Beverly Hills Trial Court
13	v.)	No. BI20734
14	ANNETTE B. [REDACTED])	
15	Defendant and Appellant.)	OPINION

Defendant Annette B. [REDACTED] appeals from the judgment of conviction for violating Vehicle Code¹ section 21453, subdivision (a), failure to stop at a red signal light. We affirm.

BACKGROUND

Defendant was cited on June 3, 2009 for the above-mentioned violation.² On January 21, 2010, the matter proceeded to a court trial.

The statement on appeal reflects the following: Defendant was issued a citation pursuant to the automated traffic enforcement system statutes. (§§ 21455.5-21455.7.)

¹All further statutory references are to the Vehicle Code unless otherwise indicated.

²Section 21453, subdivision (a) provides as follows: "A driver facing a steady circular red signal alone shall stop at a marked limit line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection, and shall remain stopped until an indication to proceed is shown, except as provided in subdivision (b)."

1 Officer Mike Butkus of the Beverly Hills Police Department initially testified about his
2 background, experience, and training. He stated what the City of Beverly Hills did
3 before commencing operation of the system, and explained how the system worked, and
4 how it was maintained. He stated that he reviewed the photographs and videos to
5 determine whether a citation should issue. The police department contracted with a
6 company called Redflex Systems, which was in charge of maintaining and servicing the
7 system. Butkus provided defendant with a packet containing photographs of the alleged
8 violation, and logs reflecting maintenance performed on the system both before and after
9 the citation. He also testified about the data that was contained in boxes imprinted on the
10 photographs.

11 Defendant made an oral motion in limine to exclude the evidence obtained from
12 the automated system on the grounds of lack of foundation and hearsay, and the court
13 denied the motion. Butkus then testified as follows: The photographs showed that
14 defendant failed to stop for a red light in the City of Beverly Hills at 7:08 p.m. on June 3,
15 2009, as she traveled northbound on Beverly Drive at Wilshire Boulevard. Based on
16 Butkus's review of the field technician logs, the cameras were working properly at the
17 time of the citation. He reviewed the photographs obtained from the cameras
18 installed at the intersection and concluded that the light, which defendant was facing, had
19 been yellow for 3.15 seconds before it turned red, which is legally sufficient in an
20 intersection as this one, where the speed limit is 25 miles per hour. The light had
21 been red for 0.28 seconds when defendant crossed the limit line at a speed of 29 miles
22 per hour. A video of defendant committing the violation was played twice during trial.
23 Butkus testified that the driver depicted in the photographs and video appeared to be
24 defendant. Defendant objected to the evidence on the same grounds as raised in her
25 motion in limine, relying on *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527
26 (*Melendez-Diaz*). The court overruled defendant's objection, finding that *Melendez-Diaz*
27 was inapplicable and that there was a sufficient foundation laid by the officer.

28 The court found defendant guilty. This timely appeal followed.

1 finding that this was an adequate foundation for admission of evidence. (*County of*
2 *Sonoma, supra*, 187 Cal.App.3d at pp. 1448-1451.)⁴

3 *The photographic evidence and maintenance logs do not constitute testimonial hearsay*

4 Addressing defendant's contention that the photographic evidence is hearsay, a
5 photograph cannot be considered hearsay under the Evidence Code because it is not a
6 statement. Evidence Code section 225 provides: "'Statement' means (a) oral or written
7 expression or (b) nonverbal conduct of a person intended by him as a substitute for oral
8 or written verbal expression." "Photographs are demonstrative evidence, depicting what
9 the camera sees. [Citations.]" (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746
10 (*Cooper*)). Therefore, the court did not abuse its discretion in overruling defendant's
11 hearsay objection to the photographic evidence.

12 Defendant also contends that the maintenance logs prepared by Redflex are
13 hearsay. The record does not indicate whether the logs consisted of entries created by a
14 computer-generated testing or a field technician. To the extent that the logs consisted of
15 computer-generated testing reports, they are not hearsay. Similar to a camera, when a
16 computer generates a report of results from an internal accuracy testing, it does not make
17 a statement. (*Cooper, supra*, 148 Cal.App.4th at p. 746.)

18 If the logs contained entries by a field technician, the information was not subject
19 to exclusion as testimonial hearsay. The United States Supreme Court held in
20 *Crawford v. Washington* (2004) 541 U.S. 36, 68-69 (*Crawford*), that where a declarant is
21 absent, admission of "testimonial" hearsay violates a defendant's Sixth Amendment right

22
23
24 ⁴Defendant's request that this court take judicial notice of the decision in *People v. Khaled*
25 (2010) 186 Cal.App.4th Supp. 1 is granted. (Evid. Code, § 451, subd. (a).) However, *Khaled* is
26 distinguishable from the case *sub judice*. In *Khaled*, it could not be determined where the
27 videotape had originated from, who had made the videotape and when it was created. Here,
28 however, the origin of evidence was clearly established. The cameras were activated by a
computer that triggered the photographic evidence, which was electronically sent to the vendor,
Redflex. Further, we note that a decision by one appellate division is not binding on another.
(See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.)

1 of confrontation.⁵ The California Supreme Court set forth the following tests in
2 determining whether a statement is testimonial: (1) whether the statement is an
3 “out-of-court analog, in purpose and form, of the testimony given by witnesses at trial”;
4 (2) whether the statement given “under circumstances that imparted, to some degree, the
5 formality and solemnity characteristic of testimony”; and (3) was the primary purpose for
6 taking and giving the statement, “taken primarily for the purpose ascribed to testimony-to
7 establish or prove some past fact for possible use in a criminal trial.” (*People v. Cage*
8 (2007) 40 Cal.4th 965, 984 (*Cage*.)

9 Applying the above tests, we conclude that the field technician logs are not within
10 the definition of testimonial hearsay. Presumably, the documents were created for the
11 purpose of determining the accuracy of the equipment. To the extent that the logs
12 contain entries by field technicians, they are not “out-of-court analogs” to trial testimony
13 by witnesses, and lack the “formality and solemnity” normally associated with such
14 testimony. (*Cage, supra*, 40 Cal.4th at p. 984.)

15 Defendant relies on *Melendez-Diaz, supra*, for the proposition that the admission
16 of the evidence violated her right to confrontation. In *Melendez-Diaz*, the Court held that
17 “sworn affidavits” concerning laboratory testing could not be admitted in lieu of a
18 technician’s testimony. However, as discussed *ante*, there were no technicians involved
19 in creating the video in this case. The cameras were activated by a computer and the
20 photographs and video were then electronically sent to Redflex. In addition, the Court
21 expressly did not extend its ruling in *Melendez-Diaz* to accuracy-testing reports such as
22 the one here. “[W]e do not hold, and it is not the case, that anyone whose testimony may
23 be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of
24 the testing device, must appear in person as a part of the prosecution’s case. . . .

25 ///


26 ///


27
28 ⁵The statement in *Crawford* was a recorded police interrogation.


1 Additionally, documents prepared in the regular course of equipment maintenance, may
2 well qualify as nontestimonial records. [Citation.]" (*Id.* at p. 2532.)

3 The judgment is affirmed.

7 We concur.

5 
6 Wasserman, J.

8 
9 Dymant, J.

11 
12 Kumar, J.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

all
DEC 15 2010

John A. Clarke, Executive Officer/Clerk
By *Connie L. Hudson* Deputy
CONNIE L. HUDSON

APPELLATE DIVISION OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,) No. BR 048012
Plaintiff and Respondent,) Beverly Hills Trial Court
v.) No. BI20734
ANNETTE B. [REDACTED])
Defendant and Appellant.) **ORDER**

Appellant's application for certification for transfer to the Court of Appeal,
having been filed and duly considered by this court, is hereby denied.

[REDACTED]
Wasserman, J.

[REDACTED]
Dymant, J.

[REDACTED]
Kumar, J.