Court of Appeal Case No. B120734
(Appellate Div. Case No. BR048012)
(Trial Court Case No. BI 20734)
(Citation No. BI20734)

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

People of the State of California

Plaintiff and Respondent,

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

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This appeal is taken from a judgment of Los Angeles County Superior Court and is authorized by California Penal Code §1471.

ISSUES PRESENTED

1. Whether the trial abused its discretion in admitting People's Exhibit "1" into evidence, over Appellant's objection that Respondent failed to establish the foundation required for its admission.

2. Whether the trial abused its discretion in admitting People's Exhibit "1" into evidence, over Appellant's hearsay objection.

3. Whether the trial court abused its discretion in admitting People's Exhibit "1" into evidence, over Appellant's objection that she was denied her Sixth Amendment right to confront witnesses.

4. Whether the trial court erred in denying Appellant's Motion in Limine to exclude People's Exhibit "1."

STANDARD OF REVIEW

The abuse of discretion standard of review to any trial court ruling on the admissibility of evidence. [*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 CA4th 1103, 1111, 88 CR3d 778, 784; *Zhou v. Unisource Worldwide, Inc.* (2007) 157 CA4th 1471, 1476, 69 CR3d 273, 277]

SUMMARY OF FACTS

On July 8, 2009, a traffic citation was issued in a red light "photo enforcement" case in the City of Beverly Hills alleging a violation of Vehicle Code section 21453, subdivision (a) by the Appellant. (People's Exhibit "1") According to the computer produced citation, the date of the alleged violation was July 3, 2009. (People's Exhibit "1") A trial was held in the matter. (CR-144 Order Concerning Appellant's Proposed Statement on Appeal dated February 22, 2010, hereafter "CR-144.")

Respondent's sole witness at trial was, Officer Butkus, an Officer from the City of Beverly Hills Police Department. (CR-144) There was no prosecutor representing the People of California (hereafter "Respondent.")

Respondent's sole exhibit was People's Exhibit "1," (hereafter Respondent's Exhibit "1") containing the following:

(a) Three altered digital photographs taken and transmitted to the Beverly Hills Police Department by an Australian company located in the State of Arizona by the name of RedFlex Traffic Systems (hereafter "RedFlex).

(b) Data boxes superimposed on the RedFlex photographs.

(c) A RedFlex document entitled -Maintenance Job Statistics – Detail (3 pages).

(d) A RedFlex document entitled – Certificate of Mailing for: 6/08/09 (3 pages).

(e) Copy of a computer printed citation next to four photographs.

(f) An on-line internet based video recording which was not produced on CD and hence never became a part of Respondent's Exhibit "1." (Respondent's Exhibit "1") (CR-144)

Each document in Respondent's Exhibit "1" was produced by RedFlex. (Respondent's Exhibit "1") The custodian of records for RedFlex did not appear at trial nor was there a custodian of records declaration from RedFlex submitted by the Respondent. (CR-144) Officer Butkus' testimony was the sole basis for the trial court's finding of foundation for Respondent's Exhibit "1." (CR-144)

Appellant's trial began with Officer Butkus making a general statement to everyone in the courtroom that he was employed by the Beverly Hills Police Department. (CR-144) He had been so employed for 25 years. He had 5 years of experience in photo enforcement. He had undertaken 40 hours of training in photo enforcement some time in the past. He reviewed the photos and videos and determined whether a citation should issue. He testified about the requirements of the Vehicle Code section including what was necessary for the People to prove their case. Regarding the requirement that the equipment be calibrated and maintained regularly, he stated that the Beverly Hills Police Department contracts with a Company called RedFlex Systems. He stated that they are in charge of maintaining and servicing the equipment used for photo enforcement. He testified briefly regarding the triggering mechanism which causes the camera to take pictures and video. After his introductory testimony, the court held individual trials. (CR 143 Proposed Statement on Appeal Dated February 11, 2010, hereafter "CR-143")

At Appellant's trial, before Officer Butkus offered Respondent's Exhibit "1" into evidence, Appellant argued an oral Motion in Limine to exclude Respondent's Exhibit "1." (CR-143 and CR-144) Appellant's Motion in Limine was based on Lack of Foundation, Hearsay, and Sixth Amendment Right to confront witnesses. (CR-143 and CR-144) The trial

court denied Appellant's Motion in Limine and proceeded with trial. (CR-144)

After the court denied Appellant's Motion in Limine, Appellant asked and was permitted by the court to question Officer Butkus, on *vior dire*, regarding his lack of qualification to lay the foundation for Respondent's Exhibit "1." (CR-143 and CR-144)

The following represents the questions asked by Appellant and the answers given by Officer Butkus during his *voir dire*[1]:

Q: You are employed by the Beverly Hills Police Department?

A: Yes.

Q: You know a company by the name of Red Flex Systems?

A: Yes.

Q: They are an Arizona company, correct?

A: Actually, they are an Australian company. They are located in Arizona.

Q: You are not employed by them?

A: No.

Q: They do not pay your salary.

A: No.

Q: You are not the custodian or records for Red Flex Systems?

A: No.

Q: Do you know who the custodian of records for Red Flex is?

A: No.

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[1] Appellant's Proposed Statement (CR-143) accurately and fully reflects the *voir dire* conducted during trial. It sets forth the specific questions asked and the answers given by Officer Butkus. Appellant's *voir dire* was read by the Appellant from written form prepared before trial. Officer Butkus' answers were contemporaneously recorded by the Appellant. Appellant objected to the Court's Proposed Order (CR-144) as it did not completely and accurately document Appellant's *voir dire* (Appellant's Motion to Augment Trial Record dated March 22, 2010). Appellant's motion was denied.

Q: Is it Roberto Salcido?

A: I don't know.

Q: You are aware that Vehicle Code section 21455.5 requires that auto enforcement systems be regularly inspected?

A: Yes.

Q: That there be certification that they are properly installed?

A: Yes.

Q: That they are calibrated?

A: Yes.

Q: That they are operating properly?

A: Yes.

Q. You didn't inspect the photo enforcement unit in this case did you?

A: No.

Q: You weren't there when it was done?

A: No.

Q: It's not a part of your job duty to inspect or calibrate the photo enforcement unit right?

A: Right

Q: The entries in the log that you have, they were not made by you?

A: No.

Q: You weren't even there when the entries were made?

A: No.

Q: Someone else made the entries?

A: Yes.

Q: That person doesn't work for the Beverly Hills Police Department? A: No.

Q: Who calibrated the machine?

A: (Officer reads name from log)

Q: Do you personally know him?

A: No.

Q: How long has he been with the company?

A: I don't know.

Q: What qualifications does he have for calibrating and inspecting the machines?

A: I don't know.

Q. What was his professional background?

A: I don't know.

Q. Regarding these photos, you were not there when the photos were taken?

A: No.

Q: You did not take the photos or the video yourself?

A: No.

Q: Isn't it true that you have no independent knowledge that what is on this service log is true and accurate?

A: I'm reading what it says.

Q: You do not have independent personal knowledge of what is contained in this service log – your testimony is based not on your observation but on this sheet of paper?

A: Yes.

See (CR-144)

At the conclusion of the *voir dire*, Appellant again objected to the introduction of Respondent's Exhibit "1" as inadmissible hearsay, lacking in foundation and violative of Appellant's confrontation rights. (CR-143 and CR-144) The objection was overruled and the trial judge admitted into evidence Respondent's Exhibit "1." (CR-144)

Appellant did not testify. (CR-144) The Court found Appellant guilty of the alleged violation. (CR-144) A timely appeal followed.

It is indisputable that the only evidence supporting the conviction was the photographs and videotape from the red light camera system. The sole foundation offered for the admissibility of that evidence was the testimony of Officer Butkus.

The person who entered the relevant information (date of violation, time of violation, length of yellow interval light, etc.) into the camera-computer system did not testify. The person who entered that information was not subject to being cross-examined on the underlying source of that information. The person or persons who maintain the system did not testify. No one with personal knowledge testified about how often the system is maintained. No one with personal knowledge testified about how often the date and time are verified or corrected. The custodian of records for the company that contracted with the city to maintain, monitor, store, and disperse these photographs did not testify. The person with direct knowledge of the workings of the camera-computer system did not testify. Instead, the People chose to submit the testimony of a local police Officer, Officer Butkus. This witness 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 Butkus did not testify about the specific procedure for the programming and storage of the system information. This Officer could not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or the videotape were a reasonable representation of what it is alleged to portray. Officer Butkus did not testify he made the photographs or videotape himself.

He did not testify he was present at the time of Appellant's alleged Vehicle Code violation, and witnessed the events depicted in the

photographs. He did not testify to any personal knowledge of the contents of the photographic images or the method of their creation, storage or transmission. He did not testify regarding the background, training or qualifications of any of the RedFlex employees involved in any of those activities and, in fact, testified he did not know any of them. At most, Officer Butkus testified he had undergone training in the past in the operation and procedures involving the "red light" camera system, and that he was aware of some of the general operating procedures for the system. He did not, and could not, attest that the photos or videos were true representations of what they purported to depict because he had no such personal knowledge. In short, Officer Butkus failed to provide any of the evidence necessary to lay a foundation for the admission of the photographs or the videotape into evidence. Officer Butkus was not competent to nor laid the required foundation for the admission of the photos and the video. Nevertheless, this Officer sought to establish the foundation for the RedFlex records and the elements of the alleged violation with his testimony alone, without any declaration whatsoever from RedFlex, the company which caused every single document in Respondent's Exhibit "1" to be produced and sent to the Police Department.

Accordingly, without such foundation, the admission of Respondent's Exhibit "1" was erroneous and the trial court abused its discretion in admitting this exhibit. Without Respondent's Exhibit "1," there is a total lack of evidence to support the conviction in this case.

Regarding the trial court's settled statement (CR-144), Appellant respectfully submits that the Court's settled statement (CR-144) is not a complete and accurate narrative of the voir dire of Officer Butkus. It is a conclusionary statement prohibited by People v. Jenkins, which does not comply with the duty to set forth the evidence "fairly and truly."

Appellant's Proposed Statement is a complete and accurate record of the trial proceeding. (CR-143)

Since the *voir dire* was conducted for the purpose of showing that the officer was not qualified to lay the foundation for the records he sought to admit, the dialogue of the *voir dire* is an essential part of the trial record. Appellant took great care to create this record during trial, a record which is completely missing from the trial court's statement. The Appellant recorded the Officer Butkus' responses contemporaneously in her notes, which contained each questioned she asked in Court. The questions and answers were then provided in the proposed statement. (CR-143) The Court's Proposed Statement (CR-144) does not contain this narrative.

On March 2, 2010, Appellant filed Appellant's Objection to Order Concerning Appellant's Proposed Statement and Request for Hearing. Appellant therein objected to the Order Concerning Appellant's Proposed Statement on Appeal settled by the Court on February 22, 2010 (CR-144). The trial court denied Appellant's Objection. (Court's Response to Appellant's Objection Concerning Appellant's Proposed Statement on Appeal and Request for Hearing dated March 3, 2010).

ARGUMENT

A. Traffic Citation is a Criminal Matter with the Same Burden of Proof Requirement as a Misdemeanor

California Penal Code section 16 defines Crimes: "Crimes and public offenses include: 1. Felonies; 2. Misdemeanors; and 3. Infractions." California Penal Code section 17(a) further defines crimes as follows: "(a) A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions." California Penal Code section 19.7, entitled, application of misdemeanor- related laws to infractions, provides: "Except as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions including, but not limited to, powers of peace Officers, jurisdiction of courts, periods for commencing action and for bringing a case to trial and burden of proof." California Vehicle Code section 40901 subdivision c provides in relevant part. "...the court shall inform the defendant in writing of the nature of the proceedings and of his or her right to confront and cross-examine witnesses, to subpoena witnesses on his or her behalf, and to hire counsel at his or her own expense. The court shall ascertain that the defendant knowingly and voluntarily waives his or her right to be confronted by the witnesses against him or her, to subpoena witnesses in his or her behalf, and to hire counsel on his or her behalf before proceeding."

B. The Rules of Evidence Apply to Infraction Trials Under the Evidence Code.

Pursuant to Vehicle Code section 40901(e), "... nothing contained herein shall be interpreted to permit the submission of evidence other than in accordance with the law, nor to prevent courts from adopting other rules to provide for trials in accordance with the law." [emphasis added] Hence,

the Rules of Evidence apply to infraction trials under California's Vehicle Code.

C. The Trial Court Erred in Admitting Respondent's Exhibit "1" Over Appellant's Foundation and Hearsay Objection.

1. Respondent's sole witness at trial had no personal knowledge of the alleged traffic Code violation or the accuracy of the computer/camera system which produced the photographs/video and the computer data imprinted on the photographs. Authentication of the photos/video therefore required, at a minimum, that Respondent establish the reliability of the computer/camera system.

Officer Butkus had no personal knowledge of the alleged traffic violation. By his own admission, this witness had no personal knowledge of the alleged violation as he was not at the scene when the alleged violation occurred. As a result, he had no personal knowledge of: 1) The alleged traffic violation; 2) The date of the alleged traffic violation; 3) The time of the alleged traffic violation; 4) The identity of the alleged violator; or 5) Any other matter in the purview of a witness who was present at the scene. This witness testimony regarding the alleged violation, therefore, was not based on his personal knowledge.

By his own admission, Officer Butkus, had no personal knowledge of the accuracy, maintenance and condition of the camera which produced the photographs, video, and the information contained therein, as he was not at the scene when the camera was allegedly maintained. As a result, he had no personal knowledge of the maintenance and accuracy record of the camera that produced the photographs and video nor could he testify to the accuracy of the information contained on the photograph and video - namely the date and time of violation and the number of seconds the light had been yellow before it turned red (Vehicle Code section 21455.7). This

witness' testimony regarding the accuracy of the camera/video was, therefore, not based on his personal knowledge.

a. **Photographs and Video are Writings Requiring Authentication**.

Under the Evidence Code, photographs and videotapes are considered "writings." (Evid. Code, § 250; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 416 [photographs]; *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436,440 [videotapes].) A writing, including a photograph or videotape, must be Authenticated before it can be received in evidence. (Evid. Code, § 1401, subd. (a.)). "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) It is not necessary to present testimony of the individual who made the videotape or photograph in order to authenticate it. The testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is legally sufficient foundation for its admission into evidence. (Evid. Code, § 1413; Jones v. City of Los Angeles, supra, 20 Cal.App.4th at p. 440, quoting *People v. Bowley* (1963) 59 Cal.2d 855, 859; *People v. Doggett* (1948) 83 Cal.App.2d 405, 409-410.)

"No photograph or film has any value in the absence of a proper foundation. It is necessary to know when it was taken and that it is accurate and truly represents what it purports to show. It becomes probative only upon the assumption that it is relevant and accurate. This foundation is usually provided by the testimony of a person who was present at the time the picture was taken, or who is otherwise qualified to state that the representation is accurate. In addition, it may be provided by the aid of expert testimony, as in the *Doggett* case, although there is no one qualified

to authenticate it from personal observation." *Bowley, supra*, (1963) 59 Cal.2d 855, at 862

b. The Computer-Imprinted Data On the Photographs Was Inadmissible: The information imprinted on the photographs should have been excluded as there was no evidence at all presented to support a finding that the computer itself (either in the camera system at the intersection of Beverly and Wilshire or located at RedFlex Traffic Systems located in Arizona) was operating properly.

The RedFlex photographs admitted into evidence had a scoreboard-like box superimposed on each photograph containing writing used by Respondent's witness to testify as to the elements of the alleged violation. (Respondent's Exhibit "1")Specifically, Officer Butkus used the information on the photographs to testify to the location of the alleged violation, the date of the alleged violation, the time of the alleged violation, the date of each photograph, the red light length, the yellow light length, the time elapsed between photos, the speed of the vehicle over the sensors and other information. (CR-144) The writing imprinted on the photographs should not have been admitted based on hearsay or Evidence Code section 1152.

In *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769 at p. 797, concerning a printout of lottery winners, the court stated that "[C]omputer printouts are admissible and are presumed to be an accurate representation of the data in the computer... If offered for the truth, however, they must qualify under some hearsay exception, such as business records under Evidence Code sections 1271." As detailed below in paragraphs A.c.1, the writing on the photographs here does not qualify under any exception to the hearsay rule, including the business record exception.

Evidence Code section 1152 does not render the writings admissible. In *People v. Hawkins* (2002) 98 Cal.App.4th 1428, the trial court allowed into evidence computer printouts showing a date and time when computer files were last accessed (i.e., a date/time stamp). The defendant objected on hearsay grounds, arguing the computer printouts did not qualify under the business records exception. The court of appeal rejected defendant's argument after noting that hearsay is an out-of-court statement offered to prove the truth of the matter stated (Evidence Code §1200), that a statement is an oral or written verbal expression of a person (Evidence Code §225), and considering the definition of "person" (Evidence Code §175), the court stated that "the Evidence Code does not contemplate that a machine can make a statement." (*Hawkins*, supra, 98 Cal.App.4th at p. 1449).

The *Hawkins* court went on to cite and agree with "the leading case of *State v. Armstead* (La. 1983) 432 So.2d 837," which explained "[T]he printout of the results of the computer's internal operations is not hearsay evidence. It does not represent the output of statements placed into the computer by out of court declarant.". . . "there is no possibility of a conscious misrepresentation, and the possibility of inaccurate or misleading data only materializes if the machine is not functioning properly." (Id. at p. 840; cf. *Ly v. State* (Tex.App. 1995) 908 S.W.2d 598, 600.) "The role that the hearsay rule plays in limiting the fact finder's consideration to reliable evidence received from witnesses who are under oath and subject to cross-examination has no application to the computer generated record in this case. Instead, the admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy." [Citations](*Hawkins*, *supra*, 98 Cal.App.4th at p. 1449, quoting from *Ly v. State*, *Id.*) The Hawkins court concluded that "the true test for admissibility of a printout reflecting a computer's internal operations is not whether the printout was made in the

regular course of business, but whether the computer was operating properly at the time of the printout." (*Hawkins*, *supra*, 98 Cal.App.4th at p. 1449-1450).

The court in *Hawkins* stated, "[t]his presumption [Evidence Code section 1552(a)] operates to establish only that a computer's print function has worked properly. The presumption does not operate to establish the accuracy or reliability of the printed information. On that threshold issue, upon objection the proponent of the evidence must offer foundational evidence that the computer was operating properly." (*Hawkins*, *supra*, 98 Cal.App.4th at p; 1450) In other words, the presumption establishes only "that the data in the printout accurately represents the data in the computer." There is no presumption that the data itself is accurate or reliable. If the opponent objects on the ground that the data is unreliable, "the proponent of the evidence must offer foundational evidence that the computer was operating properly." (Jefferson, California Evidence Benchbook, 4th ed., § 3244 [citing *Hawkins at p. 1450*; emphasis in original].)

In this case, like the date/time stamp at issue in *Hawkins*, the data imprinted on the photographs is a function of the computer and camera system's own internal operations. Since the information printed on the photographs is a reflection of the system's internal operations, the imprinted information would be admissible unless defendant "objected on the ground that the data is unreliable," in which case the Respondent must have offered foundational evidence that the computer was operating properly. In this case, the Appellant objected to all of the evidence in the evidence packet including the imprinted data. So the Appellant did object to the reliability of the printed information on the photographs. Therefore, in the face of the objections, the Respondent would have had to show that both the camera system and its internal computer and/or the computer in Arizona were

functioning properly. (*Hawkins*, *supra*, 98 Cal.App.4th at p. 1450). Here, the proper functioning of the camera and computer system was never established at trial and the proper functioning cannot be established by the maintenance log alone. The maintenance log (which Appellant argues is inadmissible hearsay) showing maintenance of the camera system at the intersection, is insufficient under *Hawkins*, *supra*, to show regular inspection, maintenance and proper functioning of the internal computer system which produced the data on the photographs or of the underlying connected computer system, or server in Arizona where the information is remotely uploaded, stored and from where it is retrieved.

There is no evidence or mention in the maintenance log that the internal camera computer or its connected counterpart in Arizona, or the computer's date and specific time settings, the local or remote measurements of the exact signal, phase times, the speed calculations, the Arizona computer connection with each of the intersection camera systems, etc., were or are ever checked for proper functioning. According to the inspection logs, technicians only check the intersection equipment, with no mention of the computer at the intersection or in Arizona. They do not indicate that they check the accuracy of the settings and measurements being made by the system or verify the functionality of the Arizona computer or its connection to the intersection systems, and data transfer process, etc.

Thus, since the Appellant objected to the photographs containing the data box and there was no evidence at all presented to support a finding that the computer system itself (either in the camera system at the intersection or in Arizona) was operating properly, the information imprinted on the photographs should not have been admitted into evidence.

c. **Photographs and Video Were Inadmissible: The photographs and video should have been excluded as there was insufficient evidence to support a finding that the camera was operating properly at the date and time of the alleged violation.**

The settled statement establishes that sole foundation offered for the admissibility of the RedFlex photographs and online video (which was not preserved for appeal), was the testimony of Officer Butkus.

In *People v. Khaled*, (2010) 186 Cal.App.4th Supp 1, the police department of the City of Santa Ana issued a "photo enforcement" citation to the Appellant, Tarek 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.

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. Specifically, regarding the foundation for the photo-enforcement photographs, the Court in *Khaled* (supra) stated at p. 5: "These photo enforcement cases present a unique factual situation to the courts regarding the admissibility of videotapes and photographs. There are two types of situations where a videotape or photographs are typically admitted into evidence where the photographer or videographer does not testify. The first involves a surveillance camera at a commercial establishment (oftentimes a

bank or convenience or liquor store). In those situations, a person testifies to being in the building and recounts the events depicted in the photographs. Courts have consistently held that such testimony establishes a sufficient foundation if the videotape is a " 'reasonable representation of what it is alleged to portray....' " (*People v. Gonzalez* (2006) 38 Cal.4th 932, 952, 44 Cal.Rptr.3d 237, 135 P.3d 649; see generally, id. at pp. 952-953, 44 Cal.Rptr.3d 237, 135 P.3d 649; *People v. Carpenter* (1997) 15 Cal.4th 312, 385-387, 63 Cal.Rptr.2d 1, 935 P.2d 708; *People v. Mayfield* (1997) 14 Cal.4th 668, 745-747, 60 Cal.Rptr.2d 1, 928 P.2d 485; Imwinkelried, Cal. Evidentiary Foundations (3d ed. 2000) pp. 115, 117; see, also, *United States v. Jernigan* (9th Cir.2007) 492 F.3d 1050 (en banc).) The second situation involves what is commonly known as a "nanny cam." In that situation, a homeowner hides a surveillance camera in a room and then retrieves the camera at a later time. At the court proceeding, that person establishes the time and placement of the camera. This person also has personal knowledge of when the camera was initially started and when it was eventually stopped and retrieved. Neither of these situations is analogous to the situation at bar. Here the Officer could not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or the videotape were a "'reasonable representation of what it is alleged to portray....'" (*People v. Gonzalez*, supra, 38 Cal.4th at p. 952, 44 Cal.Rptr.3d 237, 135 P.3d 649.) A very analogous situation to the case at bar, however, is found in *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 349-350, 29 Cal.Rptr.3d 728, where the court held that the unauthenticated videotape allegedly showing an employee's actions lacked sufficient foundation to be admitted at an administrative hearing. And in so holding, the court noted that without establishing such a foundation, the videotape was inadmissible."

Here, as in the *Khaled* case, neither of the two situations is analogous to this case. Here, too, the Officer could not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or the videotape were a reasonable representation of what it is alleged to portray. Officer Butkus did not testify he made the photographs or videotape himself. He did not testify he was present at the time of Appellant's alleged Vehicle Code violation, and witnessed the events depicted in the photographs. He did not testify to any personal knowledge of the contents of the photographic images or the method of their creation, storage or transmission. He did not testify regarding the background, training or qualifications of any of the RedFlex employees involved in any of those activities and, in fact, testified he did not know any of them. At most, Officer Butkus testified he had undergone training in the past in the operation and procedures involving the "red light" camera system, and that he was aware of some of the general operating procedures for the system. He did not, and could not, attest that the photos or videos were true representations of what they purported to depict because he had no such personal knowledge. In short, Officer Butkus failed to provide any of the evidence necessary to lay a foundation for the admission of the photographs or the videotape into evidence. Officer Butkus was not competent to nor laid the required foundation for the admission of the photos and the video.

People v. Albert Jerome Beckley Jr. (2010) 185 Cal.App.4th 509, 110 Cal.Rptr.3d 362, addresses the issue of authentication of digital photographs.

The Court in *Beckely* brings *People v. Doggett* (1948) 83 Cal.App.2d 405 and *People v. Bowley* (1963) 59 Cal.2d 885 into the 21st century. In 1948 and 1963 when *Doggett* and *Bowley* were decided, in order for one to manipulate photographic images and movies, one would have to possess the equipment (i.e., special cameras, dark room, equipment and chemicals)

and skills to do what was at the time considered "trick photography." This was especially difficult with moving pictures (video).

In *Doggett*, a photography expert testified that the photo that was admitted was not a composite and had not been faked. The court in *Beckely* stated: "Such expert testimony is even more critical today to prevent the admission of manipulated images that it was when *Doggett* and *Bowley* were decided....Indeed, with the advent of computer software programs such as Adobe Photoshop 'it does not always take skill, experience, or even cognizance to alter a digital photo,' (Parry, Digital Manipulation and Photographic Evidence; Defrauding The Courts One Thousand Words At A Time (2009) 2009 J.L. Tech, & Pol'y 175, 183.)"

Hawkins, *supra*, states unequivocally that a computer expert is required to testify in order to establish a foundation for the computer generated date and time information. In this case, Officer Butkus' testimony indicates that he had no personal knowledge as to the date and time of the alleged violation, nor had he verified that any of the citation specific acts contained in the data bar was correct. The photographs admitted into evidence, against Appellant's objection, containing 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 should not have been admitted into evidence and the Officer should not have been permitted to use the photographs to testify as he had no independent personal knowledge of the purported violation.

1. The RedFlex Maintenance Log, the RedFlex Certificate of Mailing and the Citation Were Hearsay.

The maintenance log, certificate of mailing and citation contained in Respondent's Exhibit "1," should not have been admitted into evidence, over Appellant's hearsay objection.

Pursuant to Evidence Code section 1200, "(a) Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (b) Except as provided by law, hearsay evidence is inadmissible. (c) This section shall be known and may be cited as the hearsay rule."

The maintenance log, allegedly contained the description of the maintenance done by an employee of RedFlex. The RedFlex employee who prepared the maintenance log did not testify at trial, nor did Respondent submit the declaration of the custodian of records for RedFlex.

The State's sole witness, Officer Butkus, testified using this log in an attempt to prove that the camera was in working order so as to lay a foundation for the photographs and the video which required that someone testify as to the accuracy of the camera and the number of seconds the light had been yellow before it turned red (a necessary element of the charge pursuant to Vehicle Code section 21455.7). (CR-143 and CR-144) Respondent therefore was using the maintenance log for the truth of the matter asserted. Since the log was an out of court statement of the RedFlex employee who prepared the log and it was submitted by the Respondent to prove the truth of the matter stated in the log, the maintenance log was hearsay.

The Certificate of Mailing, contained redacted information purporting to prove the mailing of the citation to the Appellant. Since the certificate contained an out of court statement of the RedFlex employee

who prepared the certificate and it was submitted by the Respondent to prove the truth of the matter stated in the certificate, it was hearsay.

The computer generated and signed citation contained in Respondent's Exhibit "1" contained out of court statements of a declarant by the name of C. Williams. The citation was submitted by the Respondent, over Appellant's hearsay objection. Respondent did not testify that the submission was for any purpose other than for the truth of the matter stated on the citation.

a. Evidence Code section 1271 does not apply.

1) The Officer did not testify to the elements of Evidence Code section 1271; 2) The Officer was not a qualified witness or a custodian of record for RedFlex; and 3) The Officer could not have testified to the elements of Evidence Code section 1271 as the records were created for litigation.

1) Respondent did not establish the elements of 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;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

To warrant admission of business records under statutory business records exception to hearsay rule, there must be some evidence showing

that the basic minimal requirements –identifying records, mode of their preparation, and showing that they were prepared in the regular course of business have been met. *Gee v. Timineri* (1967) 248 Cal.App.2d 139, 56 Cal.Rptr. 211, The party offering business records evidence bears the burden of establishing the foundational requirements of trustworthiness.

Even though the trial court is vested with great discretion, there has to be some evidence in the record that the requirements of Evidence Code section 1271 have been met. In *Gee v. Timineri*, (1967) 56 Cal.Rptr. 211, the Court stated the following: "While it is true that the trial court has broad discretion in admitting business records under section 1953f (citation omitted) the authorities above cited and the express language of the statute, make it clear that there must be some evidence showing that the basic minimal requirements--identifying the records, the mode of their preparation...--have been met." (id at p. 147)

Referring to the Court's settled statement, (CR-144) it is silent as to any testimony by the State's witness regarding any of the elements of Evidence Code section 1271. This is because the State's witness did not testify to any of the elements of Evidence Code section 1271. The trial court's settled statement reflects this fact. (CR-144) The Appellant's main objection during trial and in her appeal was that Respondent failed to lay a foundation for Respondent's Exhibit "1." (CR-143 and CR-144) The record on Appeal and the Court's settled statement both are consistent in that they show that that the testimony of the Respondent's witness did not establish any of the basic minimal requirements of Evidence Code section 1271. (CR-143 and CR-144)

The State's sole witness, who testified without assistance from a prosecutor, did not testify as to any of the elements of Evidence Code section 1271. (CR-143 and CR-144) 23

2) **Respondent's witness was not a qualified witness or a custodian of record for RedFlex.**

Respondent's Exhibit "1" does not contain the business records of the Beverly Hills Police Department. Each of the documents contained in Respondent's Exhibit "1" was made and maintained by an independent, non-governmental, private company by the name of RedFlex Traffic Systems, an Australian company located in the State of Arizona. (CR-143) None of the documents in Respondent's Exhibit "1" were therefore the business records of the Beverly Hills Police Department. Hence, if they were to be held to be business records, they are not, they would be the business records of the RedFlex not that of the Beverly Hills Police Department.

In order to establish the proper foundation for the admission of a business record, an appropriate witness must be called to lay that foundation (*Bhatt v. Dept. of Health Services for the State of California* (2005) 133 Cal.App.4th 923, 929, 35 Cal.Rptr.3d 335.) The underlying purpose of section 1271 is to eliminate the necessity of calling all witnesses who were involved in a transaction or event. (*People v. Crosslin* (1967) 251 Cal.App.2d 968, 60 Cal.Rptr. 309.) Generally, the witness who attempts to lay the foundation is a custodian, but any witness with the requisite firsthand knowledge of the business's recordkeeping procedures may qualify. The proponent of the admission of the documents has the burden of establishing the requirements for admission and the trustworthiness of the information. (*People v. Beeler* (1995) 9 Cal.4th 953, at p. 978, 39 Cal.Rptr.2d 607, 891 P.2d 153.) And the document cannot be prepared in contemplation of litigation. (*Palmer v. Hoffman* (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; *Gee v. Timineri* (1967) 248 Cal.App.2d 139, 56 Cal.Rptr. 211.)

Here, Officer Butkus was an employee of a public agency. (CR-143) He was not an employee of RedFlex. The Officer here, simply read off the information provided through RedFlex, as if it was true and correct, without any basis for doing so. (CR-143)

In *People v. Khaled*, (2010) 186 Cal.App. Supp. 1, the Court held that the police Officer did not qualify as the appropriate witness to lay the foundation to admit photographs taken from a "photo enforcement" camera installed at an intersection within the business record exception, where Officer did not have the necessary knowledge of underlying workings, maintenance, or recordkeeping of the private company that contracted with the municipality to install, maintain, and store the digital photographic information.

Similarly, in this case, Respondent's sole witness, a police Officer, was not qualified as the appropriate witness to lay the fountain to admit the photographs and video taken from the "photo enforcement" camera installed and did not have the necessary knowledge underlying workings, maintenance, or recordkeeping of the private company that contracted with the municipality to install, maintain, and store the digital photographic information. Officer Butkus was not the custodian of records for RedFlex nor qualified to testify under Evidence Code section 1271(c) as the custodian of records for RedFlex Traffic Systems. The record simply does not support any finding that Officer Butkus was qualified to testify as the custodian of records for RedFlex. From the record, it may be inferred that Officer Butkus attended a seminar at RedFlex; however, the content of the program was never set forth on the record. Officer Butkus received, somehow, a packet from RedFlex, and then simply presented testimony based upon the content of the materials received. (CR-143)

Evidence Code section 1560 lays out the requirements and procedures for the admission of business records where there is no

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testimony presented from a qualified custodian of record. This is not a situation where, in compliance with a lawfully issued subpoena duces tecum, the custodian submitted a declaration attesting to the necessary *foundational facts*. (Evid.Code, § 1560 *et seq.; Taggart* v. *Super Seer Corp.* (1995) 33 Cal.App.4th 1697, 40 Cal.Rptr.2d 56.) No such subpoena duces tecum was issued or introduced here.

The burden to subpoena RedFlex rests with the party seeking to introduce the packet into evidence. Having failed to produce the custodian of records to testify concerning the records and their mode of preparation, the documents are inadmissible hearsay.

If the evidence fails to establish each foundation fact, this hearsay exception is not available. *People v. Mathews* (1991) 229 Cal.App. 4th 930, 940).

The trial court attitude towards the application of the Rules of Evidence during trial is further 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 Respondent's Exhibit to be admissible." (CR-144) 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.

Referring to the Court's settled statement (CR-144), it is silent as to the actual qualifications of the State's witness. This is because the Respondent's witness testified in a cursory conclusory manner. The trial court's settled statement reflects the cursory conclusory testimony even

though the court knew that its trial process was being subjected to appellate review, as it had notice of the appeal that was filed following the trial on this matter. The Appellant's main objection during trial and in her appeal was the lack of qualification of the Respondent's witness to lay the foundation for Respondent's Exhibit "1." (CR-143 and CR-144) The reason the trial court provided only its conclusions regarding the qualifications of the state witness is the court lacked more information. According to Appellant's statement, the Officer testified that he had taken a 40-hour course in photo enforcement and had 5 year's experience in photo enforcement. (CR-143) Here, Officer Butkus did not qualify as the appropriate witness and did not have the necessary knowledge of underlying workings, maintenance, or recordkeeping of RedFlex Traffic Systems. The foundation for the introduction of the photographs and the underlying workings of RedFlex was outside the personal knowledge of Officer Butkus. Accordingly, without such foundation, the admission of Respondent's Exhibit "1" was erroneous and thus the trial court abused its discretion in admitting this exhibit. Without these documents, there is a total lack of evidence to support the Vehicle Code violation in question.

3) **The Officer could not have testified to the elements of Evidence Code section 1271 as the records were created for litigation.**

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 this is not the case if the regularly conducted business activity is the production of evidence for use at trial.

In *Melendez-Diaz v. Massachusetts* (2009) 129 S. Ct. 2527, the Supreme Court stated the following: "Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943), made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was 'calculated for use essentially in the court, not in the business.' *Id.*, at 114, 63 S. Ct. 477, 87 L. Ed. 645. The analysts' certificates -- like police reports generated by law enforcement officials -- do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as 'excluding, however, in criminal cases matters observed by police Officers and other law enforcement personnel'"). . . Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here -- prepared specifically for use at petitioner's trial -- were testimony against

petitioner, and the analysts were subject to confrontation under the Sixth Amendment." (*Id*, at p.2540, 129 S. Sc. 2527) [emphasis added]

In the instant case, RedFlex has created and maintains a system of cameras and computers that produce photographs, videos and documents that are used by various law enforcement agencies to prosecute alleged traffic violators. (CR-143) In fact, the company's sole job is to deliver the products it produces (incriminating evidence) to law enforcement agencies as evidence for conviction. It is indisputable that the exclusive reason that these records are created (photos, video and logs) and given to law enforcement agencies is for use in prosecution. In fact, the sole purpose for the existence of RedFlex cameras is for the prosecution of alleged red light offenders. RedFlex generates the documents contained in the RedFlex packet (contained in Respondent's Exhibit "1"), with full knowledge that in every single case they may be needed in court for the prosecution of alleged violators. It is hard to argue that RedFlex, when creating the documents/evidence, did not expect the documents/evidence to be used in prosecution or trial when they are in the business of documenting incriminating evidence for delivery to law enforcement agencies. In this case, the only reason Respondent's Exhibit "1" was created, stored and delivered to the Beverly Hills Police Department by RedFlex was to present the court with evidence of an alleged traffic violation for prosecution. Here, the documents contained in the RedFlex packet is sent to the Beverly Hills Police Department who, in turn, reviews the documents, in this case, Officer Butkus, and issues a citation for the prosecution of the alleged violators. That is the sole purpose for this information - prosecution.

The trial court's admission of Respondent's Exhibit "1" circumvented constitutional protections that are in place to protect against the convenient production of "acceptable" hearsay evidence used to garner quick and defenseless convictions.

The trial court, and the appellate division in affirming the traffic court's conviction in this case, erred in finding Respondent's Exhibit "1," which was created solely for use in litigation/prosecution in a "photo enforcement" trial, to be a business record.

Respondent's Exhibit "1" cannot qualify as a "Business record" as it was not created for the purpose of the administration of an entity's affairs, rather it was created for establishing or proving some fact at trial.

Business and public records are generally admissible, absent confrontation, not because they qualify under an exception to the hearsay rules, but because they have been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.

Here that is not the case. If the records contained the check-in time of RedFlex employees, 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 sole reason for the picture that is produced by the camera is to be used to prosecute the driver of the car. The selective nature of the photos creates the basis for the argument that it is not a business record.

Further, the Officer did not testify as to the photos being created for any other reason than litigation. "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; . . ." It is the Respondent's

burden to prove that element. Respondent failed to make any such showing.

b. **Evidence Code section 1280 does not apply**.

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: (a) The writing was made by and within the scope of duty of a public employee. (b) The writing was made at or near the time of the act, condition, or event. (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Evidence Code section 1280 cannot be applied to the evidence provided to the Beverly Hills Police Department, as the RedFlex employees, who prepared Respondent's Exhibit "1" were not public employees or Officers, agents or employees of a public entity, and therefore do not operate under a duty to observe the facts and report them correctly. (*People v. Baske* 58 Cal.App.3d 775, 780] (CR-143)

Here, the signatories of the maintenance log and the certificate of mailing are employees of the "RedFlex Traffic Systems." (Respondent's Exhibit "1") At no point does the signatory state that RedFlex Traffic Systems is a public entity or that he or she is otherwise employed by a public entity. Absent this critical foundational information, the document that was created cannot be and is not an "official record" under section 1280.

In addition, section 1280 requires that "[t]he sources of information and method and time of preparation of the record be such as to indicate its trustworthiness." There is a total lack of evidence to establish this element of a section 1280 hearsay exception.

2. **Even if admissible, the maintenance log was not evidence that the camera was working properly on the date and time of the alleged violation.**

a) The log contained cut and paste information which did not indicate that camera was working properly on the date and time of the alleged violation.

b) The Officer's testimony that the cameras were working properly on the date and time of the Appellant's alleged violation was speculation as he was not qualified to give that opinion under the rules applicable to expert opinions nor did he have personal knowledge of the matter he testified about. Furthermore, the Officer's opinion could not have been established from the maintenance logs.

"Officer Butkus ... testified that he reviewed the technicians' logs and that the cameras were working properly on the date at the time of Appellant's alleged violation." (CR-144)) [Emphasis added] This was the extent of Respondent's evidence.

Officer Butkus' testimony was solely based on the RedFlex Maintenance Job Statistics- Detail sheet (Respondent's Exhibit "1") which showed an inspection lasting 50 minutes was done on May 29, 2009, and another inspection lasting 25 minutes was done on June 23, 2009. The work performed under each day's work was a cut and paste of the same duties performed each of the two days. No inspection was done on the date of the violation. There was no testimony from Officer Butkus establishing his qualification to testify as an expert for his opinion that the cameras were working properly nor for his opinion that the cameras were working properly on the date and time of the alleged violation. In fact, during *voir dire*, Officer Butkus admitted that the company who prepared the Job Maintenance Sheet, the sheet containing the description of the maintenance and the party responsible for maintaining the equipment which caused the

photographs and video to be recorded, was a company by the name of RedFlex Traffic Systems. Officer Butkus did not perform the maintenance nor was he present when it was done. Officer Butkus, while admitting that he was required to prove, as his case in chief, that necessary elements of the charge required that the equipment be regularly inspected, correctly installed and calibrated, and operating properly, failed to do so. By his own admission, his testimony was solely based on the maintenance log that was prepared by RedFlex. He did not know who the custodian of records was for RedFlex. Furthermore, the log did not show any proof of calibration. (CR-143 and CR-144)

Pursuant to Vehicle Code section 21455.5(c)(2)(B) and (C): "Only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system. As used in this subdivision, "operate" includes all of the following activities: ...(2) Performing administrative functions and day-to-day functions, including, but not limited to, all of the following:...(B) Ensuring that the equipment is **regularly inspected**. (Page 3) (C) Certifying that the equipment **is properly installed and calibrated, and is operating properly**." (Emphasis added)

The Respondent's sole witness, an Officer who is not the custodian of records for the automated enforcement system, could not provide the necessary evidence to prove the necessary elements of Vehicle Code section 21455.5(c)(2)(B) and (c).

California Evidence Code section 702(a) provides that "[S]ubject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." Here, Officer Butkus had no personal knowledge of the matters to which he testified.

c) The camera was not inspected regularly as required pursuant to Vehicle Code section 21455.5.

Pursuant to Vehicle Code section 21455.5(c)(2)(B) and (C): "Only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system. As used in this subdivision, "operate" includes all of the following activities: ...(2) Performing administrative functions and day-to-day functions, including, but not limited to, all of the following:...(B) Ensuring that the equipment is **regularly inspected**. (Page 3) (C) Certifying that the equipment **is properly installed and calibrated, and is operating properly**." (Emphasis added)

The maintenance log does not show that the camera was ever calibrated nor does it prove that the equipment was installed properly or regularly inspected.

D. The Court Erred in Denying Appellant's Motion in Limine.

Immediately after being called forward for trial, Appellant argued a Motion in Limine to exclude Respondent's Exhibit "1." [Court's Settled Statement] In her Motion in Limine, Appellant/Defendant sought to exclude Respondent's Exhibit "1," prepared by RedFlex. (CR-143 and CR-144)

Appellant's Motion in Limine was based on the fact that the evidence lacked foundation, was hearsay and violated the holding of the Supreme Court case, *Melendez-Diaz v. Massachusetts* (2009) 129 S. Ct. 2527. (CR-143 and CR-144)

The trial court should have granted Appellant/Defendant's Motion in Limine. Had the Court done so, Officer Butkus would not have been able to testify since he lacked personal knowledge of the facts he was testifying to during trial.

The Motion in Limine was grounded in the fact that the only witness testifying on behalf of the State of California, was a non-percipient witness who had no personal knowledge of the facts regarding any violation by the Appellant; The witness was proffering evidence which was hearsay; The witness did not have the ability to lay a foundation for the job maintenance log prepared by RedFlex, the photos which he did not take nor was present when they were taken or the video which was taken by a camera he did not operate nor could attest to its accuracy or maintenance; and the State violated Appellant's right to Confrontation by permitting testimony regarding the maintenance records without providing an opportunity to cross examine its author. The trial court's denial was an error.

E. Introduction of Respondent's Exhibit "1" Violated Appellant's Sixth Amendment Right to Confront Witnesses

The Sixth Amendment to the United States Constitution, as incorporated through the 14th Amendment to the Constitution, states that "in all criminal prosecutions, the accused shall enjoy the right to. . . be confronted with the witnesses against him. . ." These rights include the right to reasonable cross examination of these witnesses.

California Vehicle Code section 40901 subdivision (c) provides in relevant part: ". . . the court shall inform the defendant in writing of the nature of the proceedings and of his or her right to confront and cross-examine witnesses, to subpoena witnesses on his or her behalf, and to hire counsel at his or her own expense. The court shall ascertain that the defendant knowingly and voluntarily waives his or her right to be confronted by the witnesses against him or her, to subpoena witnesses in his or her behalf, and to hire counsel on his or her behalf before proceeding." (emphasis added)

Here, the Respondent produced no human being that could properly testify to first hand knowledge of the incident in question or the accuracy of, and the foundation for the photo(s), video and maintenance log intended as prima facie evidence. Nor did Respondent produce a traffic Officer who contemporaneously observed the offense in question.

The alleged evidence was produced by a mechanical camera, which is triggered remotely by non-human means, gathered after the fact, and developed and processed by a third party contractor that did not actually witness the incident in question. The third party in this instant case is a civilian contractor who operates the cameras for profit, i.e., a company that has a vested economic interest in the outcome of the production of evidence which leads to citations and convictions. (CR-143)

In this case, no RedFlex employee appeared at trial: not the camera technician who installed the camera, not the employee who maintained the system, not the person who processed the images into the packet introduced into evidence and which provide the sole basis for the conviction of the Appellant, not the employee who determined the system was working, and not the employee who set and maintained the date and time on the system.

Without the right to cross-examine these witnesses, there is no way to determine how the pictures were enhanced, whether the system was functioning properly, who at RedFlex may have processed the images, and why and how the pictures were enhanced with the drop box.

In both the *Crawford v. Washington*, (2004) 541 U.S. 36 and *Melendez-Diaz v. Massachusetts*, (2009) 129 S.Ct. 2527 cases, the Supreme Court addressed defendant's right under the Sixth Amendment's confrontation clause.

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 reasonably expect the statement to be available for use in a prosecution. (*Id.* at p.1402)

It is clear that Respondent's Exhibit "1" was created and kept by RedFlex for use in prosecution of alleged red light violators. The Appellant had a right to cross-examine the technician who maintained the system and whose time and work is recorded in the maintenance log and the person(s) who were involved in preparing Respondent's Exhibit "1."

The Appellate Division decision in this case(Appellate Division of the Superior Court Opinion dated November 24, 2010), when citing to the Supreme Court case Melendez-*Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, stated that the ". . . 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 Court 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)

The 6th Amendment to the United States Constitution as incorporated through the 14th Amendment to the Constitution states that "in all criminal prosecutions, the accused shall enjoy the right to. . . be confronted with the witnesses against him. . ." These rights include the right to reasonable cross examination of these witnesses. The fact is that the City had no human being that could properly testify to first hand knowledge of the incident in question or the accuracy of, and the foundation for the photo(s), video and maintenance log intended as prima facie evidence, nor is this a situation in which there was a traffic Officer who contemporaneously observed the offense in question.

Pursuant to Evidence Code Section 520, "[T]he party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." Here the State of California was claiming that the Appellant committed an infraction. Hence, the burden of proof to prove the crime was committed by the Appellant was on the State, not on the Appellant. As in any criminal case, the State has the entire burden of proof to prove guilt of the accused beyond a reasonable doubt.

During the trial, the trial court placed the burden of proof on the Appellant. When the Appellant raised the issue that the State did not lay the proper foundation for the admission of records, the court told the accused that instead of complaining there was no custodian of record, she should have subpoenaed the witness herself. (CR-143). According to the Court's Proposed Statement, the Court told the Appellant/Defendant "she could have filed a discovery motion or issued her own subpoenas, as many motorists do, had she cared to do so." (CR-143 and CR-144) By this statement alone, the court showed that it was placing the burden of proof on the Appellant and not on the State, as it was the Respondent's evidence that was being proffered without any foundation. In essence, the trial court was placing the burden on the Appellant/Defendant to procure the attendance of the Respondent's witness and to lay the foundation for the State's evidence. The Appellant was proffering no evidence hence had no need to supply any witnesses nor had a desire to help the prosecution by subpoenaing witnesses against her.

The court asserted that there was no Confrontation Clause violation in this case because Appellant had the ability to subpoena the custodian of records. But that power -- whether pursuant to state law or the Compulsory Process Clause -- is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. See, e.g., *Davis v. Washington*, 547 U.S. 813 at 820, 126 S. Ct. 2266, 165 L. Ed. 2d 224 ("[The witness] was subpoenaed, but she did not appear at . . . trial"). Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring

those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses.

CONCLUSION

The trial court permitted the Respondent to circumvent constitutional protections in place to aid in the convenient production of "acceptable" hearsay evidence that was needed to garner Appellant's quick and defenseless conviction.

The reason the Respondent did not bring forth their necessary witness was based on monetary consideration and because, as the trial court stated, because "[T]he 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 Respondent's Exhibit to be admissible." (CR-143 and CR-144)

The rules of Evidence are an integral part of our criminal justice system. They should not be compromised or dispensed with simply because it costs more money to comply with these rules, nor should they be dispensed 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. Trial court's 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 were enormous. The Supreme Court,

nevertheless, made the decision regardless of the financial burden it would cause.

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 compromised to exact revenues for government entities.

It is undisputed that modern machines are a marvel. However, no machine has ever been created that can convict a human being, that is - until today.

Respectfully submitted,

Dated: April 1, 2011

By: _____
Annette [redacted], Esq.