CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN

No. B229748

THE 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 of the State of California for the County of Los Angeles
The Honorable Patti Jo McKay, Anita H. Dymant and Fumiko H. Wasserman
Appellate Division Case No. BR048012
Superior Court Case No. BI020734

~~APPLICATION FOR LEAVE TO FILE~~ AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT

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I. INTRODUCTION

Instead of contending that she did not commit the crime in question, Appellant Annette B[redacted] ("Appellant") asks the Court to disregard California law, as well as the substantial public policy benefits of red light camera systems, and hold that the evidence of her violation generated by such a system is inadmissible. This Court should follow well-established California law and consider California's substantial public policy interest in promoting traffic safety and affirm Appellant's conviction.

II. STANDARD OF REVIEW

A judgment may not be set aside on the ground of the improper admission or exclusion of evidence unless the error has resulted in a "miscarriage of justice." Cal Const., art. VI, § 13; Cal. Evid. Code, § 352 (emphasis added). The trial judge's determination whether a proper foundation has been laid for the admission of evidence will not be disturbed on appeal absent a showing of abuse. County of Sonoma v. Grant W. (1986) 187 Cal.App.3d 1439, 1450. This standard is met only when the trial court, in its exercise of discretion, "exceeds the bounds of reason, all of the circumstances before it being considered." Denham v. Superior Court (1970) 2 Cal 3d 557, 566.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Statement of Relevant Facts

Redflex Traffic Systems, Inc. ("Redflex") and the City of Beverly Hills jointly operate and obtain information from red light camera systems in Beverly Hills. [Clerk's Transcript ("CT"), p. 18.] On July 3, 2009, a Redflex red light camera system photographed Appellant driving through a red light in Beverly Hills. [CT, p. 29.] The Beverly Hills Police Department issued Appellant a citation for failure to stop at a red light in

violation of California Vehicle Code ("CVC") section 21453(c). [CT, p. 1.] The red light camera that photographed Appellant driving through a red light was inspected and serviced on June 23, 2009, shortly before Appellant's violation. [CT, p. 29.]

B. Relevant Procedural History

1. Trial Court Proceedings

At trial on January 21, 2010, Officer Mike Butkus of the Beverly Hills Police Department testified for the prosecution. [CT, pp. 28-29.] He testified that he was trained in the operation of and had experience working with Redflex red light camera systems. [CT, p. 28.] More specifically, he testified that he had five years of experience in red light automated enforcement and that he had completed 40 hours of automated enforcement training. [CT, p. 18.]

Officer Butkus then gave Appellant a packet containing photographs of her violation, a Maintenance Log pertaining to the red light camera that captured her violation for before and after her violation occurred and other documents related to her citation. [CT, p. 28.] Officer Butkus testified in detail how the Redflex red light camera system works and is maintained. [CT, p. 28.] He testified as to the meaning of the data boxes imprinted on the photographs and how they are generated. [CT, p.28.] He also explained the workings of the triggering mechanism that causes the system to take photographs and a video of drivers in the intersection during a red light. [CT, p. 18.] For the sake of clarity, he used enlarged photographs for purposes of demonstration and urged Appellant to refer to her own citation to understand how his testimony related to her particular citation. [CT, p. 28.]

Officer Butkus testified that he personally reviewed the photographs captured by the red light camera to determine whether

Appellant should have been issued a citation. [CT, pp. 18, 29.] He testified that Appellant's violation occurred at approximately 7:08 p.m. on Wednesday, June 3, 2009 at the intersection of Beverly Drive and Wilshire Boulevard in the City of Beverly Hills. [CT, p. 29.] Based on his review of the photographs and video depicting Appellant's violation, Officer Butkus testified that the traffic light at issue had been yellow for 3.15 seconds before it turned red, and that such an interval is compliant with California law. [CT, p. 29.] He further testified that the light had been red for 0.28 seconds when Appellant entered the intersection at a speed of 29 miles per hour and that the driver in the photograph appeared to be Appellant. [CT, p. 29.] He then played the video of Appellant's violation, both in real-time and in slow motion. [CT, p. 29.]

In addition to Officer Butkus's testimony, the prosecution offered into evidence photographs and a video depicting Appellant's violation and a Maintenance Log for the red light camera system at issue . [CT, pp. 25, 29.] Officer Butkus testified that he reviewed the Maintenance Log and that based on his review, the camera system was working properly on the date and at the time of Appellant's violation. [CT, p. 29.]

Appellant made an oral motion in *limine* to exclude the photographs and video depicting her violation and the Maintenance Log on grounds of lack of foundation, hearsay and a violation of the Confrontation Clause of the Sixth Amendment. [CT, p. 28.] The court denied the motion. [CT, p. 28.] Appellant then asked for and was granted an opportunity to conduct *voir dire* of Officer Butkus, and once again objected to the introduction of the evidence. [CT, p. 29.] The trial court overruled Appellant's objection and admitted the evidence, holding that testimony of a Redflex employee was not required to authenticate and lay the foundation for admissibility of the evidence. [CT, p. 28.] The court made clear that the prosecution had never been required to offer testimony of a Redflex

employee (such as the custodian of records or a field service technician) for the evidence to be admissible. [CT, p. 28.] According to the court, Officer Butkus was qualified to authenticate the evidence and lay the foundation for its admission. [CT, p. 28.] The court also noted that Appellant could have filed a discovery motion or subpoenaed a Redflex employee, but she chose not to do so. [CT, p. 28.]

On the basis of the evidence described above, the trial court found Appellant guilty of violating CVC section 21453(a). [CT, p. 15.] The trial court ordered Appellant to pay a fine in the amount of $435.00. [CT, p. 16.]

2. Appellate Division Proceedings

Appellant appealed her conviction to the Appellate Division of the Superior Court, which affirmed her conviction. See People v. B[redacted] (Los Angeles Super. Ct., App. Div. Nov. 24, 2010), No. BR-048012, at 6. The Appellate Division rejected Appellant's contentions that the photographic and video evidence of her violation and the related Maintenance Log were not properly authenticated and constituted inadmissible hearsay and that their admission violated her rights under the Confrontation Clause. Id. at 3-6.

The Appellate Division held that Officer Butkus's testimony was sufficient to authenticate the evidence of Appellant's violation. Id. at 3-4. The court also held that the photogarphic and video evidence did not constitute hearsay because a photograph is not a "statement" to which the hearsay rule applies. Id. at 4. Even if it were to constitute hearsay, the court held that the evidence was admissible under the business records exception to the hearsay rule because Officer Butkus's testimony that he was familiar with the creation of the evidence based on his knowledge of

how the Redflex red light cameras worked rendered him a "qualified witness" under the exception. Id. at 3-4.

The court also rejected Appellant's Confrontation Clause argument, holding that the photographs and video did not constitute testimonial hearsay because they did not contain "statements" to which the hearsay rule applies. Id. at 4. The court also held that the Maintenance Log did not constitute testimonial hearsay because to the extent that it was a computer generated testing report, it too was not a "statement" to which the hearsay rule applies. Id. The court explained that the Maintenance Log would not be hearsay even if it contained entries by a human technician because it was created for the purpose of determining the accuracy of the camera; thus, it was not an out-of-court analog to trial testimony and lacked the formality of such testimony. Id. Alternatively, the court held that the Maintenance Log was not testimonial because it qualified is a document prepared in the ordinary course of equipment maintenance. Id. at 6.

In rejecting Appellant's Confronattion Clause argument, the Appellate Division distinguished Melendez-Diaz v. Massachusetts (2009) 129 S.Ct. 2527 on the ground that that case involved "sworn affidavits" prepared by human analysts concerning laboratory testing. Id. at 5. In contrast, according to the court, this case involves photographs and videos automatically generated by a machine with no input by human technicians. Id. Moreover, the court noted that the Melendez-Diaz Court expressly refused to extend its holding to accuracy-testing reports like the Maintenance Log. Id.

3. The Present Appeal

In this appeal, Appellant once again argues the trial court improperly admitted the evidence of her violation because the evidence was not properly authenticated, the evidence constituted inadmissible hearsay

and she was not given an opportunity to confront the witnesses against her in violation of the Confrontation Clause. [See Appellant's Opening Brief, pp. 11-40.]

IV. ARGUMENT

A. THE TRIAL COURT'S PROCEDURE IN ADJUDICATING APPELLANT'S RED LIGHT CAMERA OFFENSE WAS CONSISTENT WITH CALIFORNIA'S PUBLIC POLICY INTEREST IN JUDICIAL ECONOMY

The procedure for adjudicating CVC violations based on evidence collected by red light cameras is consistent with California's important public policy interest in an efficient judicial system. The California Supreme Court has made clear that "[f]or sometime it has been recognized that it is in the interests of the defendant, law enforcement, the courts, and the public to provide simplified and expeditious procedures for the adjudication of less serious traffic offenses." People v. Carlucci (1979) 23 Cal.3d 249, 257; see also In re Dennis B. (1976) 18 Cal.3d 687, 695 (recognizing "the state's substantial interest in maintaining the summary nature of minor motor vehicle violation proceedings"); People v. Battle (1975) 50 Cal.App.3d Supp. 1, 7 (Holmes, P.J., concurring) ("In the overwhelming majority of infraction cases the primary interest of the accused will be served by expedition in disposal."). Indeed, "[t]he chief reason for classifying some prohibited acts as infractions is to facilitate their swift disposition." Dennis B., supra, 18 Cal.3d at 695.

Because of these important considerations, traffic courts are "[u]nrestrained by the more stringent procedural requirements of a major criminal trial" and "are free to develop innovative procedures to expedite traffic cases." Id. Examples of such procedures include the right of a defendant to have an immediate trial at his or her arraignment on a traffic violation and permitting the use of highway patrol officers to perform tasks

typically performed by a District Attorney or City Attorney. Id. Another example is permitting the trial judge to call and question witnesses – a task typically performed by a District Attorney. Carlucci, supra, 23 Cal.3d at 258-59.

The adjudication of red light statute violations based on evidence generated by red light camera presents the same public policy considerations. In addition to their public safety benefits, such systems advance the State's interest in "simplified and expeditious procedures for the adjudication of less serious traffic offenses." Id. at 257. The use of a police officer with extensive red light camera training and experience to authenticate the photographic evidence generated by such systems is vital to the expedient disposal of such cases. Requiring anything more than the procedure already used in adjudicating these offenses (which, as explained in detail below, satisfies the requirements of California law) would directly contravene the State's substantial interest in the summary nature of traffic infraction proceedings.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE PHOTOGRAPHIC AND VIDEO EVIDENCE OF APPELLANT'S VIOLATION

The trial court was correct in finding that the prosecution properly authenticated the photographic and video evidence of Appellant's violation and that such evidence did not constitute inadmissible hearsay. Alternatively, even if the evidence were deemed hearsay, which it is not, it is admissible under the business records and official records exceptions to the hearsay rule.

1. The Prosecution Properly Authenticated the Photographic and Video Evidence

Appellant failed to overcome the important presumptions of authenticity that California law affords to the photographic and video

evidence of her violation. Moreover, notwithstanding those presumptions, Officer Butkus's expert testimony, based on his extensive red light camera training and experience sufficiently authenticated the evidence.

a. Appellant Failed to Overcome the Presumptions of Authenticity That Apply to the Evidence

Photographs, videos and digitally generated data describing the content of photographs and videos constitute "writings" under the Evidence Code. People v. Jones (1970) 7 Cal.App.3d 48, 53 (photographs); Ashford v. Culver City Unified School Dist. (2005) 130 Cal.App.4th 344, 349 (videos); Aguimatang v. California State Lottery (1991) 234 Cal.App.3d 769, 798 (digitally generated date and time stamp describing contents of photograph). A writing may be authenticated by (1) the introduction of evidence sufficient to sustain a finding that the writing is the writing that the proponent claims it to be, or (2) any other means provided by law. Cal. Evid. Code § 1400.

The Evidence Code's policy in favor of the admission of photographic and video evidence is embodied in two important presumptions of authenticity. Evidence Code section 1552(a) provides:

> **A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent**. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer

> information or computer program that it purports to represent.

Cal. Evid. Code § 1552(a) (emphasis added).

Additionally, Evidence Code section 1553(a) provides:

> **A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent**. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

Cal. Evid. Code § 1553(a) (emphasis added).

In People v. Goldsmith (2011) 193 Cal.App.4th Supp. 1, the court made clear that the presumptions of authenticity in Evidence Code sections 1552 and 1553 apply to photographic and video evidence generated by red light camera systems, including the computer-imprinted information affixed to the photographs. Id. at 6.[1] In Goldsmith, the court held that photographic and video evidence produced by a Redflex red light camera was presumed authentic under Evidence Code sections 1552 and 1553, and that the appellant failed to meet her "burden of producing evidence casting doubt on the accuracy or reliability of the photographs."

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[1] Goldsmith is currently on review in the California Court of Appeal, Second District, Division Three. Oral argument was held on July 13, 2011.

Id. According to the court, "[w]ithout any evidence of inaccuracy, the photographs were properly presumed to be accurate and authenticated." Id. The appellant's bare and unsupported assertion that authentication of such evidence required testimony from a percipient witness to the violation or a person responsible for setting up the camera was not enough. Id. at 4, 6.

Here, as the court held in Goldsmith, the Evidence Code section 1552 presumption applying to a "printed representation of computer information" plainly covers the computer-imprinted information affixed to the photographs, while the Evidence Code section 1553 presumption applying to "a printed representation of images stored on a video or digital medium" covers the images depicted in the photographs and videos themselves.

To overcome these presumptions, the opponent of the evidence must introduce "**evidence**" that the photographs or videos (and computer-generated information printed thereon) are inaccurate or unreliable. Cal. Evid. Code §§ 1552; 1553 (emphasis added). Thus, contrary to Appellant's assertion, merely objecting to the reliability of the evidence does not shift the burden to the proponent of the evidence to prove that it is reliable and accurate. [See Opening Brief, p. 15.] As in Goldsmith, Appellant failed to provide any evidence that the photographs or video, including the computer-imprinted information affixed to the photographs, were inaccurate or unreliable. Appellant's bare and unfounded assertion that authentication of such evidence requires eyewitness testimony from someone present at the time of the violation is plainly insufficient to overcome these well-rooted presumptions. As such, the burden never shifted to the prosecution to prove that the machine-generated photographs and video were accurate representations of Appellant's driving through the red light at the subject intersection, or to

prove that the computer-imprinted information affixed to the photographs was accurate.

Tellingly, Appellant spends no time in her Reply brief attempting to rebut the applicability of these presumptions of authenticity. Instead, in her Reply, Appellant completely skips this stage of the analysis and focuses solely on trying to show that Officer Butkus's testimony did not sufficiently authenticate the evidence. Though such testimony was not even required because of Appellant's failure to overcome the presumptions of authenticity, Appellant's attack on Officer Butkus's testimony fails for the reasons detailed below.

b. Notwithstanding the Presumptions, Officer Butkus's Testimony and the Maintenance Log Sufficiently Authenticated the Photographic and Video Evidence

As detailed above, Appellant failed to overcome the statutory presumptions of authenticity that apply to the photographic and video evidence of her violation. Even without those presumptions, however, Officer Butkus's testimony was sufficient to authenticate the evidence. Contrary to Appellant's unfounded position, California courts have firmly established that authentication does not require the person who takes a photograph to testify in order to lay a proper foundation for admission of the photograph into evidence. Holland v. Kerr (1953) 116 Cal.App.2d 31, 37; Goldsmith, supra, 193 Cal.App.4th Supp. at 5-7. Rather, "authentication of a photograph 'may be provided by the aid of expert testimony . . . although there is no one qualified to authenticate it from personal observation.'" Goldsmith, supra, 193 Cal.App.4th Supp. at 5 (quoting People v. Bowley (1963) 59 Cal.2d 855, 862).

The rationale behind this well-established principle is that when photographs or videos are offered as probative evidence of what they depict, they act as "silent witnesses" and are thus admissible without

eyewitness testimony that they accurately depict what they purport to show. Bowley, supra, 59 Cal.2d at 860; see also People v. Doggett (1948) 83 Cal.App.2d 405, 410. Rather, such evidence may be authenticated by testimony from anyone who can testify to process by which the camera captured the photographs, and those witnesses may be assisted by other matters, even those that are an inherent part of the photograph itself. Doggett, supra, 83 Cal.App.2d at 410; accord United States v. Taylor (5th Cir. 1976) 530 F.2d 639, 641-642.

In Goldsmith, the court held that testimony of a police officer was adequate to authenticate the photographic and video evidence generated by a Redflex red light camera system. Goldsmith, supra, 193 Cal.App.4th Supp. at 6-7. The court held that there was sufficient evidence of authentication because the officer provided expert testimony regarding the operation of the red light camera and the photographs it produced based on information he had from Redflex as well as his six years of professional experience working with red light cameras. Id.

Similarly, in Taylor, the defendants were convicted of bank robbery based on surveillance photographs taken during the commission of the crime. Taylor, supra, 530 F.2d at 640-41. The defendants argued that the photographs were inadmissible because "none of the eyewitnesses to the robbery testified that the photographs accurately represented the bank interior and the events that transpired." Id. at 641. The court rejected this argument and held that testimony from government witnesses who were not present during the actual robbery was sufficient to lay the foundation for admissibility of the photographs. Id. Such testimony was sufficient because the witnesses "testified as to the manner in which the film was installed in the camera, how the camera was activated, the fact that the film was removed immediately after the robbery, the chain of its possession, and

the fact that it was properly developed and contact prints made from it." Id. at 641-42.

Here, the photographic and video evidence was offered at trial as probative evidence of the scene depicted therein – namely, Appellant's driving through a red light in violation of the CVC. Thus, as in Goldsmith, no eyewitness testimony was required for admission. As in Goldsmith, Officer Butkus – a witness with in-depth knowledge of how red light camera systems operate based on his over five years of experience working with such systems – testified in great detail to the operation of the system. Officer Butkus's testimony was substantively identical to the officer's testimony in Goldsmith, which was found to be sufficient to authenticate the red light camera evidence. Both officers had at least five years of red light camera experience and had knowledge of such cameras through professional training. Accordingly, Officer Butkus's testimony was plainly sufficient for admission of the photographic evidence.

Even so, the prosecution went above and beyond its authentication duties by admitting the Maintenance Log showing that the Redflex red light camera system at issue had been confirmed to be in proper working order both before and after Appellant's violation. [CT, pp. 25, 29.] While Appellant's failure to overcome the presumptions of authenticity in Evidence Code sections 1552 and 1553 and Officer Butkus's testimony were both independently sufficient to authenticate the photographic and video evidence, the introduction of the Maintenance Log leaves no doubt that the red light camera system was operating properly and that the evidence was properly authenticated.

Appellant's reliance on Ashford v. Culver City Unified School District (2005) 130 Cal.4th 344 in contending that the evidence was not properly authenticated is misguided. In Ashford, the court held that videotapes were not properly authenticated because the plaintiff offered no

testimony whatsoever as to how the videos were made, who made the videos, whether the videos had been edited or spliced or the accuracy of the videos in general. Id. at p. 347. Also, the videos themselves skipped around and had time lapses. Id. Here, in contrast, Officer Butkus testified in great detail to the process by which the Redflex red light camera system collected, stored, and processed the photographic evidence and provided it to the Police Department. Also unlike Ashford, Appellant here offered no evidence that the evidence was inaccurate or otherwise unreliable.

c. Contrary to Appellant's Position, Authentication of a Photograph Does Not Require Testimony from a Photographic Expert

Appellant's contention in her Reply brief that testimony of a photographic expert is required to authenticate a photograph is completely without merit. Indeed, the Court need look no further than the cases relied upon by Appellant herself to illustrate this point. In Doggett, the court expressly held that photographs may be authenticated "by the testimony of **anyone** who knows that the picture correctly depicts what is purports to represent." Doggett, 83 Cal.App.2d at 409 (emphasis added). In People v. Samuels (1967) 250 Cal.App.2d 502, the court held that a photograph may be authenticated "either by the testimony of the person who made it or by **one who is otherwise qualified**." Id. at 512 (emphasis added). Similarly, in Bowley, the court held that a photograph may be authenticated "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**." Bowley, 59 Cal.2d at 862. (emphasis added). The Bowley court further explained that such authentication "**may** be provided by the aid of expert testimony." Id. (emphasis added).

Thus, while parties are free to introduce the testimony of a photographic expert to authenticate a photograph, California law does not

require such testimony. Tellingly, Appellant points the Court to no authority supporting such a requirement. Appellant's misinterpretation of the above case law should therefore be disregarded in its entirety.

d. Appellant's Reliance on People v. Khaled in Support of her Authentication Argument is Misguided

Appellant erroneously relies on People v. Khaled (2010) 186 Cal.App.4th Supp. 1 in contending that the photographic and video evidence of her violation was not properly authenticated. Khaled is confined to the specific facts of that case and has no applicability here. The officer in Khaled was found to "not have the necessary knowledge of the underlying workings, maintenance or recordkeeping of Redflex Traffic System [sic]." Id. at 8. The officer testified that "sometime in the distant past, he attended a training session where he was instructed on the overall workings of the system," but "was unable to testify about the specific procedure for the programming and storage of the system information." Id. at 5. Officer Butkus, on the other hand, testified in great detail based on his over five years of red light camera experience to how such cameras collect, process and maintain photographs and videos depicting violations, a far cry from the clearly inadequate testimony of the officer in Khaled. Khaled therefore has no bearing on this analysis.

2. The Photographic and Video Evidence of Appellant's Violation is Not Hearsay

Photographs and videos generated by red light camera systems are not hearsay under California law. Hearsay evidence is evidence of "a statement that was made other than by a witness testifying at the hearing and that is offered to prove the truth of the matter stated." Cal. Evid. Code § 1200. A "statement" in this context means "(a) a **person's** oral or written verbal expression or (b) a **person's** non-verbal conduct

intended by the **person** as a substitute for oral or written verbal expression." Id. § 225 (emphasis added). A "person" for purposes of the hearsay rule includes "a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity." Id. § 175.

Notably absent from the definition of "person" in the hearsay definition is a camera system or any other type of machine. Machine-generated printouts are not hearsay because "[t]he Evidence Code does not contemplate that a machine can make a statement." People v. Hawkins (2002) 98 Cal.App.4th 1428, 1449. Indeed, the rationale for the hearsay rule does not apply to machine-generated evidence because there is no possibility of conscious misrepresentation and thus their truth cannot be tested on cross-examination. Id.

Moreover, photographic and video evidence generated by red light cameras is not hearsay for another independent reason – such images constitute "**demonstrative evidence**" of a crime and thus fall outside the definition of hearsay and the purpose of the rule altogether. People v. Cooper (2007) 148 Cal.App.4th 731, 746; Goldsmith, supra, 193 Cal.App.4th at 7-8. In Cooper, the California Court of Appeal held that photographs and videos "are demonstrative evidence, depicting what the camera sees" and thus "are not hearsay." Cooper, supra, 148 Cal.App.4th at 746. The Goldsmith court made clear that this rule extends to photographic and video evidence collected by a Redflex red light camera system, holding:

> As for the images depicted in the photographs, they were demonstrative evidence of appellant's crime and, hence, did not render the photographs inadmissible under the hearsay rule. (citation omitted)

Goldsmith, supra, 193 Cal.App.4th at 7-8.

Here, the photographic and video evidence was generated solely by a machine, not a "person" capable of making a "statement" within the meaning of the hearsay rule. Because there is no possibility of conscious misrepresentation by a red light camera, the rationale for the hearsay rule is wholly inapplicable here. Alternatively, the photographs and video depicting Appellant's driving through the red light constitutes demonstrative evidence of her crime, not a statement by a person within the meaning of the hearsay rule. Thus, as the court held in Goldsmith, the photographic and video evidence of Appellant's crime generated by a Redflex red light camera system is plainly non-hearsay under California law. Accordingly, the trial court did not abuse its discretion in admitting the evidence over Appellant's hearsay objection.

3. The Computer-Imprinted Information on the Photographs is Not Hearsay

Contrary to Appellant's assertion, the computer-imprinted information on the photographs setting forth the location of the violation, the date and time of the violation, the speed of the vehicle at the time of the violation and the length of time the light had been yellow and red is also not hearsay. As Appellant acknowledged in her Opening Brief, "'[t]he printout of the results of a computer's internal operations is not hearsay evidence.'" Hawkins, supra, 98 Cal.App.4th at 1449 (quoting State v. Armstead (La. 1983) 432 So.2d 837, 840). In Hawkins, the California Court of Appeal held that computer printouts showing the date and time of a computer's internal operations are not hearsay for the same reasons that computer-generated photographs and videos are not hearsay – namely, because they are not produced by human declarants and thus cannot constitute "statements" under the hearsay rule. Id. at 1449.

In Goldsmith, the court held that the rule set forth in Hawkins applies to the computer-imprinted information on photographs generated by

a Redflex red light camera system. The court reasoned that such information is not inputted by a person but rather is generated by the red light camera system once the system's sensors are triggered by a potential violation. Goldsmith, supra, 193 Cal. App. 4th Supp. at 10. The court further explained:

> The purpose of the hearsay rule is to subject the declarant to cross-examination in order to bring to light any falsities, contradictions or inaccuracies that may not be discernible in the declarant's out-of-court statement. [citation omitted.] Under no scenario could appellant have cross-examined the [red light camera system] to ask what time it recorded appellant's traffic violation. Simply put, the data bars were not 'statements' from a person that were subject to the hearsay rule.

Id. at 7.

Here, Appellant concedes that "the data imprinted on the photographs **is a function of the computer and camera system's own internal operations**." [Opening Brief, p. 15 (emphasis added).] Thus, like the evidence in Goldsmith and Hawkins, such information, which includes the date and time of the photographs, the location of the intersection, the length of time the light had been yellow and red and the vehicle speed, represents the results of the internal operations of the red light camera system. No human declarant inputted the data. The information therefore does not constitute hearsay; simply put, this information is not a "statement" from a "person."

4. Even if the Photographic and Video Evidence Were Deemed Hearsay, it Would be Admissible Under the Business Records Exception to the Hearsay Rule

The photographic and video evidence of Appellant's violation, which was captured in the ordinary course of business by the

Beverly Hills Police Department and Redflex, is plainly admissible under the business records exception to the hearsay rule. Evidence Code section 1271 provides that "[e]vidence of a writing made as a record of an act, condition, or event [is admissible] to prove the act, condition, or event if: (a) the writing was made in the regular course of 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 mode of preparation; and (d) the sources of information and method and time of preparation were such as to indicate its trustworthiness." Cal. Evid. Code § 1271.

a. The Photographic and Video Evidence Was Prepared in the Regular Course of Business

In this context, the Police Department's business in operating red light camera systems is enforcing the CVC and collecting evidence of potential violations in order to improve public safety. The Police Department regularly collects and processes red light camera data in the course of carrying out those duties. Thus, the Police Department collected the evidence of Appellant's violation in the regular course of its business. This element is also satisfied as to Redflex, which is in the business of manufacturing red light camera systems and assisting cities in collecting and processing evidence of violations. Redflex collects photographic and video evidence in the ordinary course of its business for each and every vehicle that triggers one of its systems. Thus, because collecting such evidence **is** Redflex's business and Redflex collects the evidence for every vehicle that triggers its system, Redflex plainly collected the evidence of Appellant's violation in the ordinary course of business.

b. The Photographic and Video Evidence Was Created at the Time of Appellant's Violation

A writing stored on a computer is deemed made at the time the data is entered into the computer, not the time the data is retrieved. Aguimatang, supra, 234 Cal.App.3d at 798. In Aguimatang, the California Court of Appeal held that computer records showing four winning lottery ticket transactions were admissible under the business records exception even though they were printed 21 months after the transactions because they were recorded daily but printed only on an as-needed basis. Id. at 798. Here, the photographs and videos depicting Appellant's violation were created at the very time of Appellant's violation, as indicated by the computer-generated information printed on the photographs. As such, they were made at the time of the event depicted therein, satisfying the second requirement of the business records exception.

c. Officer Butkus Was Qualified to Testify to the Identity and Mode of Preparation of the Photographic and Video Evidence

"Any 'qualified witness' who is knowledgeable about the documents may lay the foundation for introduction of business records – the witness need not be the custodian or the person who created the record." Jazayeri v. Mao (2009) 174 Cal.App.4th 301, 324. "[A] person who generally understands the system's operation and possesses sufficient knowledge and skill to properly use the system and explain the resultant data, even if unable to perform every task from initial design and programming to final printout, is a 'qualified witness' for purpose of Evidence Code section 1271." People v. Lugashi (1988) 205 Cal.App.3d 632, 640; see also Jazayeri, supra, 174 Cal.App.4th at 322 ("The witness need not have been present at every transaction to establish the business records exception; he or she need only be familiar with the procedures

followed.") Moreover, a qualified witness may rely on hearsay in laying the foundation for a business record. Lugashi, supra, 205 Cal.App.3d at 641.

In Lugashi, a bank's loss control specialist with five years of relevant experience testified to lay the foundation for admission of computer-generated bank records showing fraudulent transactions. Id. at 636. The witness testified to the process by which transaction information was generated and recorded. Id. at 635-36. The appellant argued that the witness was not a "qualified witness" because she was neither the official custodian of records nor a computer expert and because her testimony relied on hearsay. Id. at 640-41. The court rejected this argument, holding that even though she did not personally run the program that resulted in the computer-generated records, she "was an experienced credit card fraud investigator familiar with merchant authorization terminals, counterfeit cards, credit card sales, and the manner in which sales are recorded." Id. at 641. The court stressed that it was irrelevant that some of her knowledge may have come from hearsay. Id.

Here, as the Appellate Division aptly held, Officer Butkus was more than qualified to testify to the identity and mode of preparation of the photographic and video evidence because he had detailed knowledge of the procedure by which such evidence is collected and processed by the system. [CT, pp. 18, 28-29.] Similar to the witness in Lugashi, he has over five years of experience working with such systems and testified in painstaking detail as to how the systems work, covering everything from how the system is triggered and how the computer-generated information on the photographs is generated to his own personal review of the evidence of Appellant's particular violation. [CT, pp. 18, 28-29.] Such detailed testimony from an officer with over five years of red light camera experience and training is plainly sufficient to authenticate the evidence.

Appellant's contention that Officer Butkus was not a qualified witness merely because he is an employee of the Police Department, and not Redflex, is wholly without merit. Not surprisingly, Appellant cites to no authority establishing such a requirement. As explained above, California law has made clear that "the witness need not be the custodian or the person who created the record;" all that is required is that the witness "be familiar with the procedures followed." Jazayeri, supra, 174 Cal.App.4th at 324. There can be no dispute that based on his over five years of red light camera systems experience, as well as his detailed account of the procedures employed in the collection and processing of evidence generated by such systems, Officer Butkus was familiar with the procedures involved in the automated enforcement process.

Moreover, Appellant's contention in her Reply that Officer Butkus established no facts regarding his qualifications to lay the foundation for the business records is completely without merit. Appellant acknowledges (as she must) that Officer Butkus testified that (1) he had been employed by the Beverly Hills Police Department for over 25 years; (2) he had over five years of red light camera experience; (3) he had completed over 40 hours of training on the operation of red light camera systems; and (4) he had reviewed the photographic and video evidence of Appellant's violation to determine whether a citation was warranted. [Reply, p. 5.] Appellant's only issue with such testimony is that Officer Butkus did not explain when he took the training course or what he learned in the course, whether he completed a refresher course, whether he had ever visited Redflex's facilities or whether he had knowledge regarding Redflex's record-keeping procedures. [Reply, p. 5.] Such testimony was not required to show that Officer Butkus was "familiar with the procedures followed" in the collection of the evidence; his extensive training and experience alone met that standard. See Jazayeri, supra, 174 Cal.App.4th at

324. Moreover, Appellant could have inquired into these matters during *voir dire* of Officer Butkus, but did not.

d. The Photographs and Video Depicting Appellant's Violation are Trustworthy

The reliability of evidence generated by automated enforcement systems is reflected in various principles of California law. The Evidence Code sections 1552 and 1553 presumptions that printed representations of computer information and images stored on a video or digital medium are accurate representations of the information or images that they purport to represent make clear that California law deems photographs, videos and other computer-generated information particularly trustworthy. Cal. Evid. Code §§ 1552; 1553. Indeed, the California Supreme Court has held that photographs are more reliable than human testimony because they present no memory concerns. Bowley, supra, 59 Cal.2d at 861; see also, Lugashi, supra, 205 Cal.App.3d at 642 (holding that a lesser showing is required for admission of computer-generated data because it consists of retrieval of **automatic** inputs, as opposed to **manual** inputs).

To meet this trustworthiness requirement, the proponent of machine-generated evidence is not required to show that the machine was working properly or that the evidence itself is accurate. Lugashi, supra, 205 Cal.App.3d at 640. In Lugashi, the appellant argued that computer-generated bank records showing fraudulent credit card charges were not admissible as business records because the proponent offered no evidence regarding the accuracy or maintenance of the machine. Lugashi, supra, 205 Cal.App.3d at 638. The court rejected the appellant's contention, holding:

> Appellant's proposed test incorrectly presumes computer data to be unreliable, and, unlike any other business record, requires its proponent to disprove the possibility of error, not to convince

> the trier of fact to accept it, but merely to meet the minimal showing required for admission. If applied to conventional hand-entered accounting records, appellant's proposal would require not only the testimony of the bookkeeper records custodian, but that of an expert in accounting theory that the particular system employed, if properly applied, would yield accurate and relevant information.

Id. at 640.

Here, Appellant offered no evidence to even suggest that the photographs and video depicting her violation are untrustworthy. Her bare assertions that such evidence is untrustworthy is plainly insufficient to cast doubt on the reliability of the evidence under California law. As established in Lugashi, the prosecution was not required to show that the Redflex system was in proper working order or that the evidence was accurate to meet this requirement. Moreover, the various provisions of California law demonstrating the reliability of automatically-generated photographs and videos, together with Officer Butkus's expert testimony establishing how the evidence was created, demonstrate that the evidence is trustworthy.

e. The Photographs and Video are Admissible as Business Records Even Though They Were Produced for Use in the Prosecution of Appellant's Traffic Violation

Contrary to Appellant's assertion, it is irrelevant whether the photographs and videos depicting Appellant's violation were produced for use by a law enforcement agency in prosecuting Appellant for violating the CVC. [See Opening Brief, p. 22.] Appellant erroneously relies on Palmer v. Hoffman (1943) 318 U.S. 109 in support of this assertion.

In Palmer, the plaintiff railroad employee signed a statement that described his version of a grade crossing accident involving the

locomotive he operated. Id. at 110-11. The defendant offered the statement into evidence, but the Court held that it was not admissible as a business record because it was not made in the regular course of business. Id. at 111. The Court reasoned that the defendant was in the railroad business, and the "accident report" was "not made for the systematic conduct of the business as a business." Id. at 113. The Court further reasoned that if the exception were to apply to the accident report at issue, "any business by installing a regular system of recording and preserving its version of accidents for which it was potentially liable would qualify those reports" under the exception and thus circumvent the hearsay rule. Id. According to the Court, the report was "calculated for use essentially in the court, not in the business." Id. at 114.

Palmer has no application here. As a threshold matter, the Palmer holding is limited to "accident reports," which are not at issue here. Moreover, the business at issue in Palmer was a railroad company whose ordinary business obviously did not involve preparing accident reports. Here, on the other hand, the Police Department is in the business of collecting evidence of red light statute violations to improve public safety, and producing such evidence at trial. Redflex is likewise in the business of collecting, processing and making available to law enforcement agencies photographic and video evidence of violations – indeed, that is Redflex's business in its entirety. Redflex collects such data for each and every vehicle that triggers its system, without regard to whether the Police Department ultimately decides to issue the alleged violator a citation. As such, unlike the railroad company in Palmer, the City and Redflex here are no doubt in the business of collecting the records at issue – photographic and video evidence of a red light statute violation. Collecting such records is precisely the "systematic conduct of the business" of both the City and Redflex. Id. at 113.

Moreover, the photographic and video evidence here simply does not raise the suspicion of bias with which the Palmer Court was concerned. In Palmer, the Court was concerned that if the business records exception applied to accident reports, businesses would always prepare self-serving accident reports in circumvention of the hearsay rule and offer them into evidence at trial. See id. That concern is simply absent here because the red light camera system generates photographic and video evidence for each and every vehicle that triggers the system. The system simply captures the violation as it occurs, and is not capable of inserting bias into the process. The evidence is therefore admissible under the business records exception to the hearsay rule.

5. The Photographic and Video Evidence is Also Admissible Under the Official Records Exception to the Hearsay Rule

The photographic and video evidence of Appellant's violation is also admissible under the official records exception to the hearsay rule. Evidence Code section 1271 provides that evidence of a writing is admissible to prove an act, condition, or event if: (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; and (c) the sources of information and method and time of preparation were such as to indicate trustworthiness. Cal. Evid. Code § 1280.

A "public employee" for purposes of the official records exception is defined as "an officer, agent, or employee of a public entity." Cal. Evid. Code § 195. Thus, contrary to Appellant's unsupported assertion, in addition to public employees themselves, the official records exception applies to acts of private entities under a contractual duty to perform tasks for a public entity, such as a local law enforcement agency. Burge v. Dept. of Motor Vehicles (1992) 5 Cal.App.4th 384, 388-89 (finding a private laboratory's blood test report to law enforcement agencies

admissible under the official records exception); Imachi v. Dept. of Motor Vehicles (1992) 2 Cal.App.4th 809, 816-17 (admitting a private laboratory technician's blood test report under the official records exception because the technician acted as an agent of the public entity and thus met the definition of public employee).

Additionally, a writing is trustworthy under the official records exception if it is made by an employee who has a duty to observe facts and report them accurately. See People v. Parker (1992) 8 Cal.App.4th 110, 116. The presumption that an official duty is regularly performed, see Cal. Evid. Code § 664, shifts the burden to the opponent of the evidence to show that the record was not properly prepared. Santos v. Dept. of Motor Vehicles (1992) 5 Cal.App.4th 537, 547-48. To meet the trustworthiness requirement, the proponent of the evidence is not required to demonstrate that the machine that generated the evidence was in proper working order when the record was created. Martinez, supra, 22 Cal.4th at 132 (explaining that questions as to the accuracy of an official record may be addressed on cross-examination but do not affect admissibility). Moreover, testimony is not required to lay the foundation for admissibility of an official record. Jazayeri, supra, 174 Cal.App.4th at p. 319.

Here, the photographic and video evidence of Appellant's violation collected by the City and Redflex is admissible under the official records exception. The City is clearly a public entity to which the exception applies. Moreover, contrary to Appellant's position, the exception applies equally to Redflex because, like the private laboratories in Burge and Imachi, it collected and processed the photographic and video evidence of Appellant's violation pursuant to a contractual duty under its contract with the City, a public entity. California law has made clear that the official records exception applies to acts of private companies who provide evidence to law enforcement agencies pursuant to a contract. See,

e.g., Burge, supra, 5 Cal.App.4th at 388-389; Imachi, supra, 2 Cal.App.4th at 816-817. Additionally, the red light camera captured the photographic and video evidence at the very moment of the act recorded (i.e., Appellant's driving through the red light).

Furthermore, for the same reasons discussed above with respect to the business records exception, the photographs and video are trustworthy because they were generated solely by a machine and thus did not depend on human memory or performance. As the Martinez court made clear, the prosecution did not have the burden of showing that the Redflex system was in proper working order or that the evidence was accurate to meet this trustworthiness requirement. Moreover, though testimony is not required to lay the foundation for admission of an official record, Officer Butkus offered his expert testimony as to the identity and mode of preparation of the records. Lastly, Appellant has completely failed to rebut the presumption that the official duties of the City and Redflex in collecting evidence of her violation were properly performed, and the photographs and video properly prepared. See Cal. Evid. Code § 664.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE MAINTENANCE LOG, THE CERTIFICATE OF MAILING AND THE CITATION

The trial court also correctly admitted the Maintenance Log, the Certificate of Mailing and Appellant's citation. The Maintenance Log is admissible under the business records exception to the hearsay rule. In any event, even if the Maintenance Log were inadmissible, which it is not, its admission would plainly constitute harmless error under California law. Finally, the citation and associated Certificate of Mailing constitutes a complaint, not evidence, and thus cannot be objected to on evidentiary grounds.

1. The Trial Court Properly Admitted the Maintenance Log

a. The Maintenance Log is Admissible Under the Business Records Exception to the Hearsay Rule

Redflex maintains a Maintenance Log on a regular basis for each and every one of its red light cameras to keep track of and record the results of its field technicians' routine inspections of its cameras. Redflex technicians complete the Maintenance Log at the time they inspect the systems. Moreover, Officer Butkus, who (as explained above) has over five years of red light camera training and experience, testified that he reviewed the technician's Maintenance Log for the system that captured the violation and that it showed that the system was in proper working order both before and after Appellant's violation. For the same reasons discussed above with respect to the photographic and video evidence itself, Officer Butkus's vast red light camera experience plainly qualified him to authenticate and lay the foundation for admission of the Maintenance Log as a business record.

Moreover, as with the photographic and video evidence itself, the Maintenance Log is not rendered inadmissible solely by virtue of its having been produced in connection with the prosecution of a traffic violation. Unlike the accident report prepared by the railroad company in Palmer, Redflex regularly maintains a Maintenance Log for each and every one of its red light camera systems as an integral part of its business. As such, the Maintenance Log is decidedly distinguishable from the report in Palmer.

b. The Maintenance Log is Admissible Under The Official Records Exception To The Hearsay Rule

As explained in Section IV.C.5, supra, the official records exception to the hearsay rule applies to Redflex's activities, as well as the City's, because Redflex collects and processes red light camera evidence

pursuant to a contractual duty under its contract with the City. See Burge, supra, 5 Cal.App.4th at 388-89; Imachi, supra, 2 Cal.App.4th at 816-17. Redflex maintains and produces the Maintenance Log pursuant to a contractual duty under its contract with the City, a public entity, and produces it at the request of the Police Department. Moreover, Redflex field technicians complete the Maintenance Log contemporaneously with their inspection of the system. Finally, the Maintenance Log is trustworthy because it is maintained in the ordinary course of business by Redflex field technicians. Notably, Appellant has not contended that the Maintenance Log is inaccurate or otherwise unreliable.

c. Even if the Maintenance Log Were Inadmissible, its Admission Would Constitute Harmless Error

As explained above, a conviction can be overturned on the ground of an improper admission of evidence only if such admission resulted in a "miscarriage of justice." Cal Const., art. VI, § 13; Cal. Evid. Code § 352. Based on this constitutional and statutory directive, California courts long ago adopted the rule that a conviction will not be overturned where the improper admission of evidence constituted "harmless error." People v. Cahill (1993) 5 Cal.4th 478, 490-93. Under the harmless error rule, a conviction can be overturned based on the improper admission of evidence only if "the court after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." Id. at 492 (internal quotations omitted).

Here, introduction of the Maintenance Log into evidence was not required for Appellant to be convicted of the underlying offense. Appellant utterly failed to bring forth any evidence that the red light camera system that captured her violation was not in proper working order. As such, Appellant failed to overcome the presumptions of authenticity that

apply to the photographs and video depicting her violation. The prosecution was therefore never obligated to introduce evidence that the system was in proper working order. Even so, Officer Butkus's testimony based on his review of the Maintenance Log that the system was inspected and confirmed to have been in proper working order at the time of the violation was sufficient. For these independently sufficient reasons, Appellant's conviction was not dependent in any way on the admission of the Maintenance Log into evidence. Thus, even if the Maintenance Log were inadmissible (which it is not), such admission would plainly constitute harmless error and would not require reversal of Appellant's conviction.

2. The Citation and Certificate of Mailing Do Not Constitute Evidence to Which the Hearsay Rule Applies

Appellant's hearsay objections to her citation and the related Certificate of Mailing are unfounded because such documents do not constitute evidence to which the hearsay rule applies. "Whenever a written notice to appear has been issued by a peace officer . . . based on an alleged violation of Section 21453 . . . recorded by an automated enforcement system . . . and delivered by mail . . . with a certificate of mailing obtained as evidence of service, ... [the notice] **shall constitute a complaint to which the defendant may enter a plea**." Cal. Veh. Code § 40518(a). Thus, a notice to appear and associated Certificate of Mailing serve not as evidence, but rather as a complaint. As such, Appellant's contention that such documents constitute inadmissible hearsay is wholly without merit.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EVIDENCE OF APPELLANT'S VIOLATION OVER HER CONFRONTATION CLAUSE OBJECTION

1. The Confrontation Clause Does Not Apply to the Photographic and Video Evidence of Appellant's Violation or the Computer-Imprinted Information on the Photographs

The photographic and video evidence of Appellant's violation, as well as the computer-imprinted information on the photographs, are non-testimonial and thus outside the reach of the Confrontation Clause. The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. The Confrontation Clause guarantees the right to confront only those "witnesses" who "bear testimony" against the defendant. Crawford v. Washington (2004) 541 U.S. 36, 51; accord People v. Geier (2006) 41 Cal.4th 555, 597. Thus, the Confrontation Clause is implicated only where "testimonial" evidence is at issue. Crawford, 541 U.S. at 68. It is well-established that machines cannot not constitute "witnesses against" defendants whom the Confrontation Clause guarantees defendants the right to cross-examine. United States v. Moon (7th Cir. 2008) 512 F.3d 359, 363. Therefore, raw data generated by a machine does not implicate the Confrontation Clause. United States v. Washington (4th Cir. 2007) 498 F.3d 225, 230-31; accord Moon, supra, 512 F.3d at 361-62.

In Moon, the defendant was convicted of distributing cocaine after laboratory tests indicated that the substance he possessed constituted cocaine. Moon, 512 F.3d at 360-61. The Seventh Circuit affirmed the conviction and held that admission of the test results did not violate the Confrontation Clause because raw data produced by scientific instruments is not testimonial and is thus outside the reach of the Confrontation Clause. Id. at 362. According to the Moon court, a machine cannot constitute a

"witness against" a defendant because such an interpretation would render the machine a declarant and producing and cross-examining a machine would serve nobody's interests. Id.; see also Washington, 498 F.3d at 230 (holding that the Confrontation Clause did not apply to results of a blood test showing the presence of illegal substances because "'statements' made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause").

The United States Supreme Court recently re-affirmed the long-standing principle that machine-generated evidence does not implicate the Confrontation Clause. In Bullcoming v. New Mexico, 564 U.S. __, No. 09-10876, slip op. (U.S. June 23, 2011), the Court held that a forensic laboratory test report created by a human analyst certifying that he tested the defendant's blood sample and that his blood-alcohol content was 0.21 grams per one-hundred milliliters was testimonial. Id. at 3, 14-16. The Court's holding was based on its finding that the certification "reported **more than a machine-generated number**," as the human analyst "certified that he received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number corresponded, and that he performed on Bullcoming's sample a particular test, adhering to a specific protocol." Id. at 10 (emphasis added). The Court held that these representations "relating to past events and **human actions not revealed in raw, machine-produced data**" were matters that could be explored on cross-examination. Id. (emphasis added).

In stressing that the Bullcoming did not render machine-generated evidence testimonial under the Confrontation Clause, Justice Sotomayor made clear in her concurrence that the holding did not extend to "machine-generated results, such as a printout from a gas chromatograph." Id. at 6 (Sotomayor, J., concurring). Rather, as Justice Sotomayor

explained, the prosecution "introduced [the analyst's] statements, which included his transcription of a blood alcohol concentration, apparently copied from a gas chromatograph printout, along with other statements about the procedures used in handling the sample." Id. Such statements from a human declarant are plainly distinguishable from photographic and video evidence generated automatically by a red light camera which, under long-established Confrontation Clause jurisprudence, is not testimonial.

Here, the Appellate Division properly reasoned that the Confrontation Clause does not apply to the photographic and video evidence of Appellant's violation because there were no humans involved in creating the evidence; rather, a computer activated the cameras and sent the photographs and video directly to Redflex. B[redacted] No. BR048012, at 5. Like the test results in Moon and Washington, which a machine generated automatically without human interference, the Redflex automated enforcement system automatically produced the photographs, video and associated information without the assistance of a human operator. Indeed, Appellant admits that the "evidence was produced by a mechanical camera, which is triggered remotely by **non-human means**." [Opening Brief, at 26 (emphasis added).] The trial court therefore did not abuse its discretion in admitting the photographic and video evidence over Appellant's Confrontation Clause objection.

2. The Confrontation Clause Does Not Apply to the Maintenance Log

a. The Maintenance Log is Not Testimonial

Contrary to Appellant's unfounded contention, the Maintenance Log also constitutes non-testimonial evidence and thus does not implicate the Confrontation Clause. Indeed, Appellant cites no authority to support her novel position that the Maintenance Log is testimonial. The California Supreme Court has laid out the following

guidelines to be used in determining whether a statement is testimonial: (1) the statement must be "an out-of-court analog[], in purpose and form, of the testimony given by witnesses at trial"; (2) the statement must be given "under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony"; and (3) the statement "must have been given and taken *primarily for* the *purpose* ascribed to testimony – to prove some past fact for possible use in a criminal trial." People v. Cage (2007) 40 Cal.4th 965, 984 (emphasis in original).

The Appellate Division properly held that the Maintenance Log is not testimonial under the Cage guidelines. The Maintenance Log is kept by Redflex field technicians in the ordinary course of business to ensure that Redflex's red light cameras are working properly; it is not prepared for use as, or as an analog to, testimony to be given at trial. Indeed, the Maintenance Log is prepared and maintained for each system notwithstanding the existence of any pending trial. Moreover, the Maintenance Log is completed by Redflex technicians without taking an oath and without any other safeguards that give it the formality and solemnity characteristics of testimony. Finally, the primary purpose of the Maintenance Log is to record the results of system inspections and alert Redflex personnel when a system is in need of maintenance, **not** to prove some past fact for possible use at a criminal trial. As such, the Confrontation Clause plainly does not apply to the non-testimonial Maintenance Log.

b. Melendez-Diaz v. Massachusetts Does Not Render the Maintenance Log Testimonial

Contrary to Appellant's position, Melendez-Diaz does not render the Maintenance Log testimonial. In Melendez-Diaz, the Court held that "affidavits" labeled "certificates of analysis" prepared by human laboratory analysts reporting the results of laboratory testing performed by

the analysts were testimonial. Melendez-Diaz v. Massachusetts (2009) 557 U.S. __, 129 S.Ct. 2527, 2531-32. The Court reasoned that the affidavits were intended to prove a key element of the underlying offense – namely, that the substance tested by the analysts was indeed cocaine. Id. at 2532. This, according to the Court, rendered the analysts "witnesses" under the Confrontation Clause. Id.

Significantly, the Melendez-Diaz Court expressly made clear that admission of an accuracy-testing report like the Maintenance Log here does not require testimony from the person who actually performed the test, particularly where the report is prepared in the regular course of equipment maintenance:

> [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. While the dissent is correct that '[i]t is the obligation of the prosecution to establish the chain of custody, [citation omitted], this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, [citation omitted], **'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. Additionally, **documents prepared in the regular course of equipment maintenance may well qualify as non-testimonial business records**.

Id. at 2532 n. 1 (emphasis added).

Here, the Appellate Division properly noted that the Melendez-Diaz Court expressly refused to extend its ruling to accuracy-testing reports such as the Maintenance Log. B[redacted] No. BR048012, at 5. The affidavits in Melendez-Diaz are critically distinguishable from the Maintenance Log because they contained human statements establishing a primary element of the underlying offense (i.e., that the substance tested was cocaine). Id. at 2531-32. Such affidavits were plainly testimonial because they were prepared under oath for the **sole** purpose of establishing a critical element of the underlying offense. The Maintenance Log, on the other hand, did not report a person's conclusion that Appellant drove through the red light or any other past fact required to meet an element of a red light statute violation. Rather, the Maintenance Log is a record kept by Redflex technicians in the ordinary course of business to ensure that the red light cameras are functioning properly. Also unlike the affidavits in Melendez-Diaz, the Maintenance Log was not prepared under oath – one of the key characteristics of testimonial evidence under the Cage guidelines.

Moreover, for the reasons detailed in Section IV.D.1.a, supra, the Maintenance Log qualifies under the business records exception to the hearsay rule. Thus, it is not testimonial and outside the each of the Confrontation Clause. See id.

3. The Recent Holding in Bullcoming v. New Mexico Does Not Render the Maintenance Log Testimonial

Appellant's reliance in her Reply on the recent United States Supreme Court case Bullcoming v. New Mexico, 564 U.S. __, No. 09-10876, slip op. (U.S. June 23, 2011) is a red herring that should not factor into this analysis. Bullcoming merely clarifies the type of testimony that is required for the introduction of testimonial hearsay; it does not extend the definition of testimonial hearsay laid out in Melendez-Diaz and prior cases.

As such, Bullcoming does not change the fact that the Confrontation Clause simply does not apply to the Maintenance Log.

In Bullcoming, the prosecution introduced a forensic laboratory test report created by a human analyst certifying that he tested the defendant's blood sample and that the his blood-alcohol content was 0.21 grams per one-hundred milliliters. Id. at 3. At trial, the prosecution called another analyst to the stand who did not prepare the report. Id. at 5. After finding that the report was testimonial under Melendez-Diaz, the Court held that the surrogate testimony from an analyst other than the one who performed the testing and created the report did not meet Confrontation Clause standards. According to the Court, "[a]s a rule, **if an out-of-court statement is testimonial in nature**, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront the witness." Id. at 6 (emphasis added).

Thus, because Bullcoming addresses only the type of testimony that is required for the introduction of testimonial evidence, and does not extend the definition of testimonial hearsay, it does not change the conclusion established above – that the Maintenance Record is simply non-testimonial and thus outside the ambit of the Confrontation Clause.

E. RED LIGHT CAMERA SYSTEMS AND THE PROCEDURES USED IN ADJUDICATING RED LIGHT CAMERA VIOLATIONS PROMOTE PUBLIC SAFETY

1. California Has a Compelling Public Policy Interest in Improving Traffic Safety

The California Legislature authorized the implementation of red light camera programs "to improve enforcement and safety at high crash or other high-risk locations where on-site traffic enforcement personnel cannot be utilized." See Assem. Com. on Transportation,

Analysis of Assem. Bill No. 1022 (2003-2004 Reg. Sess.) April 21, 2003, p. 3, available at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_1001-1050/ab_1022_cfa_20030418_132257_asm_comm.html.[2] Moreover, the Legislature has recognized that various studies have found that red light camera programs improve public safety. Id. at 3-4. For instance, the Legislature cited a 2001 Insurance Institute for Highway Safety ("IIHS") study finding significant crash reductions after the City of Oxnard, California implemented red light cameras. Id. at 3. That study found that red light cameras in Oxnard resulted in a 29% reduction in crashes at intersections equipped with red light cameras, with front-into-side crashes decreased by 32% overall and front-into-side crashes resulting in injuries decreased by 68%. Id.

California courts have firmly established that the State of California has a substantial public policy interest in maximizing safety on California roadways. Due to this important public policy consideration, California courts have validated the use of streamlined regulatory and judicial procedures in various settings in order to improve traffic safety. See, e.g., Ingersoll v. Palmer (1987) 43 Cal.3d 1321, 1335 (holding that sobriety checkpoints are constitutional even though they are not based on reasonable suspicion because the primary purpose of the checkpoints is to "promote public safety"); People v. Wells (2006) 38 Cal.4th 1078, 1083-84 (finding that an anonymous and uncorroborated tip may itself create reasonable suspicion that a driver is operating a vehicle under the influence of alcohol in part because of the grave public safety threats caused by drunk drivers); Lowry v. Gutierrez (2005) 129 Cal.App.4th 926, 942-43 (same). For the reasons detailed below, red light camera systems and the procedures

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[2] A copy of this Analysis is attached as Exhibit A to the Request for Judicial Notice filed concurrently herewith.

used in adjudicating traffic offenses based on evidence generated by such systems constitute a vital component in the State of California's effort to improve traffic safety.

2. Red Light Camera Systems Have Been Proven to Improve Public Safety

Various studies have proven that red light camera systems improve safety on the road and thereby reduce the social costs associated with automobile collisions.

a. 2011 Insurance Institute for Highway Safety Study

Most recently, in February 2011, the Insurance Institute for Highway Safety ("IIHS") published its findings from an intensive study ultimately finding that red light camera systems have reduced fatalities from red light running crashes. See Wen Hu et al., Insurance Institute for Highway Safety, Effects of Red Light Camera Enforcement on Fatal Crashes in Large U.S. Cities (2011), available at http://www.iihs.org/research/topics/pdf/r1151.pdf.[3] The IIHS identified 14 cities with red light camera programs during 2004-2008 but not during 1992-1996, and 48 cities without such programs during either period, and compared the per capita rate of fatal red light running crashes during the two periods. Id. at 1.

Not surprisingly, the study found that red light cameras save lives. All but two of the 14 cities with red light camera programs during 2004-2008 experienced reductions in the rate of fatal red light running crashes, and all but three experienced reductions in the rate of all fatal crashes at signalized intersections. Id. at 6. Across the 14 cities, the

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[3] A copy of this study is attached as Exhibit B to the Request for Judicial Notice filed concurrently herewith.

average annual rate of all red light running crashes declined by about 35%, and the average annual rate of all fatal crashes at signalized intersections decreased by about 14%. Id. at 6, 13. Of those cities that experienced reductions in both fatal crash rates, all but one had percentage reductions for fatal red light running crashes that were larger than those for all fatal crashes at signalized intersections. Id. at 6.

The study found that the implementation of red light camera programs improved roadway safety even in those cities without such programs. About half of the 48 cities without red light camera programs during either period experienced reductions in fatal red light running crashes during the period of 2004-2008, and about one-third of such cities experienced reductions in the rate of all fatal crashes at signalized intersections. Id. at 6. The average annual rate of all red light running crashes declined by about 14% across the 48 cities. Id. at 6, 13.

The IIHS study also utilized a Poisson regression model taking into account the effects of other predictors on the per capita rate of fatal crashes. Id. at 7, 13. The Poisson model concluded that the rate of fatal red light running crashes during 2004-2008 in cities with cameras was 24% lower than would have been expected without cameras. Id. The Poisson model also concluded that the annual per capita rate of all fatal crashes at signalized intersections in 2004-2008 was 17% lower than what would have been expected without the cameras. Id.

b. 2005 U.S. Federal Highway Administration Study

In April 2005, the U.S. Federal Highway Administration published the results of a study assessing the safety benefits of red light cameras. See Forrest M. Council et al., Federal Highway Administration, Safety Evaluation of Red-Light Cameras (2005), available at http://blog.chron.com/cityhall/files/legacy/archives/Federal%20Highway%

20Administration%20study.pdf.[4] The objective of this study was to identify the effect of red light cameras on the frequency of right-angle side impact crashes, left-turn crashes, rear end crashes and other types of crashes. Id. at 29. The study analyzed many intersections with an average pre-camera period of six years and average post-camera period of 2.76 years. Id. at 41.

The study found that right-angle crashes decreased by an average of about 25% (but rear-end crashes increased by about 15%) in the post-camera period at intersections equipped with red light cameras. Id. at 63. At nearby intersections not equipped with cameras, the study found that right-angle crashes decreased by an average of about 9% in the post-camera period, and rear-end crashes increased nominally by about 1.8%. Id. Because right-angle crashes are generally more severe and costly than rear-end collisions, the study concluded that each red light camera system results in an economic benefit of between $39,000 and $50,000 per year. Id. at 67, 76.

c. 2002 California Bureau of State Audits Study

In July 2002, the California Bureau of State Audits ("BSA") issued the results of its study on red light camera programs. See California Bureau of State Audits, Red Light Camera Programs: Although They Have Contributed to a Reduction in Accidents, Operational Weaknesses Exist at the Local Level (2002), available at http://www.bsa.ca.gov/pdfs/reports/2001-125.pdf.[5] The BSA analyzed

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4 A copy of this Analysis is attached as Exhibit C to the Request for Judicial Notice filed concurrently herewith.

5 A copy of this study is attached as Exhibit D to the Request for Judicial Notice filed concurrently herewith.

accident data from January 1995 through September 2001, and found that the average number of accidents caused by red light running declined by 10% statewide in cities with red light cameras compared to no change in the number of such accidents in cities without cameras. Id. at 47. The number of red light accidents decreased between 3% and 21% after installation of red light cameras in five of the jurisdictions sampled, and increased by 5% in one. Id. Accident rates at individual intersections actually equipped with red light cameras decreased by as much as 55%. Id. Moreover, the study found that after San Diego suspended its red light camera program in June 2001, accidents caused by red light violations increased city-wide by 14% and by 30% at intersections where red light cameras had previously been in place. Id.

The California Legislature has relied on the results of the BSA study in amending the CVC section authorizing the use of red light cameras. See Analysis of Assem. Bill No. 1022, supra, at p. 3. The Legislature noted that the BSA study found that the number of accidents reduced by as much as 21% after implementation of red light cameras. Id.

3. The Procedures Currently in Place for Adjudicating Red Light Camera Offenses Make Red Light Camera Programs Feasible and Thereby Promote Public Safety

The statistics set forth above demonstrate the success that red light cameras have had in furthering California's public policy interest in enhancing public safety on California roads. Indeed, the studies show that red light cameras have dramatically decreased the number of fatal crashes caused by red light running. The presence of red light cameras thus function as a successful deterrent to drivers who would ordinarily run red lights.

In addition to being contrary to the rules of evidence, if accepted, Appellant's position that testimony of a Redflex employee is

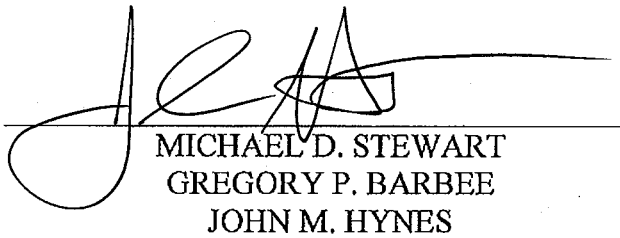
required to authenticate and lay the foundation for admission of red light camera evidence would severely jeopardize red light camera programs in California. Ignoring the Evidence Code and seeking compliance would place too great a burden on red light camera providers. The Court should not deprive the citizens of California of this invaluable public safety benefit by requiring such a strict procedure, particularly since the present procedure comports with California law.

V. CONCLUSION

For the foregoing reasons, *amici curiae* Redflex Traffic Systems, Inc. and the City of Garden Grove respectfully request that this court affirm Appellant's conviction.

DATED: July 14, 2011

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By 

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