

~~CONFIDENTIAL~~

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10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF NAPA
12 APPELLATE DIVISION

13 PEOPLE OF THE STATE OF CALIFORNIA,
14
15 Petitioner/Plaintiff,

16 vs.

17 [REDACTED] DAUGHERTY,
18
19 Respondent/Defendant.

20) Case No.: CR154602
21) PEOPLE OF THE STATE OF CALIFORNIA'S PETITION
22) FOR REHEARING AND
23) MEMORANDUM OF POINTS
24) AND AUTHORITIES

25 The People of the State of California hereby request rehearing of this
26 matter by the Appellate Division of this Court, as set forth herein:

27 1. The Appellate Division of the Court may grant rehearing on
28 petition of a party, or on its own motion, at any time prior to the decision
becoming final, which occurs 30 days after the decision is filed. A party may
file and serve a petition for rehearing within 15 days after the decision is filed.
(California Rule of Court ("CRC") Rules 8.888(a)(1), 8.889(a)(1).) The
Court's Opinion in this matter was filed May 26, 2011.

2. The grounds for granting rehearing are not expressed in the
California Rules of Court; however, the Court has broad discretion in its
determination to grant rehearing. (See *In re Winnetka V.* (1980) 28 Cal.3d.
587, 594 [no limitations on judge's discretion to order rehearing *sua sponte*])

1 except arbitrariness or unfair procedure]).

2 3. Rehearing is appropriate in this case because:

3 a. Due to excusable mistake by the City there was no briefing,
4 argument or appearance for the People (*see* Declaration of David C. Jones);
5 only Defendant briefed the appeal, and appeared (by counsel), thus, the Court
6 received briefing from, and heard argument by one attorney, for one party;

7 b. a full, fair hearing of the matter serves the interests of justice
8 (*See eg. In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1282 (rehearing
9 appropriate in interest of justice));

10 c. the Court's Opinion contained one or more errors of law, as
11 more fully described in the accompanying Memorandum of Points and
12 Authorities (*See Alameda County Mgmt. Empees Assn. v. Superior Court*
13 (2011) 195 Cal.App.4th 325, 2011 Cal.App. LEXIS 563, *24, 26, fn. 10.)

14 d. the legality of the City's contract with Redflex is a complex,
15 important issue of California law and public policy;

16 e. the Court's Opinion has the potential to broadly impact all red-
17 light cases pending in the Napa Superior Court;

18 4. The City Attorney of the City of Napa has obtained permission
19 from the District Attorney for the County of Napa, pursuant to Government
20 Code Section 41803.5, to represent the People of the State of California in
21 this matter.

22
23 PEOPLE OF THE STATE OF CALIFORNIA

24 June __, 2011

By:

25 _____
26 DAVID C. JONES
27 Deputy City Attorney

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
2 **OF PETITION FOR REHEARING**

3 As set forth herein, the People request rehearing of this matter by the
4 Appellate Division. If rehearing is granted, the People will assert that the
5 Court should affirm Judge Kroyer's conviction of Defendant [REDACTED]
6 Daugherty for violation of Vehicle Code Section 21453(a) because: (1) the
7 City of Napa's Contract with its red light camera service provider does not
8 violate state law, and (2) even if the Contract violated terms of the Vehicle
9 Code, the trial court's admission of evidence was within its discretion, and
10 supported defendant's conviction of violation of the Vehicle Code.

11
12 **A. The Fee Arrangement in the Contract Does Not Violate Section**
13 **21455.5(g)(1) of the CVC Because it Provides for the City to Pay**
14 **the Red Light Operator a Fixed Monthly Fee**

15 Contrary to the Court's Opinion, the City's contract with Redflex (the
16 City's red light camera service provider) dated June 13, 2008, ("Contract")
17 does not violate section 21455.5(g)(1) of the California Vehicle Code.
18 Section 21455.5(g)(1) provides that "a contract between a governmental
19 agency and a manufacturer or supplier of automated enforcement equipment
20 may not include *a provision for the payment or compensation to the*
21 *manufacturer or supplier based on the number of citations generated*, or as a
22 percentage of the revenue generated, as a result of the use of the equipment
23 authorized under this section." (Cal. Veh. Code § 21455.5(g)(1) [italics
24 added].) A leading purpose of this mandate is to eliminate "payment based
25 on the number of tickets issued" and to avoid concerns that "these systems
26 can be manipulated for profit." (See Exhibit 1: California Bill Analysis, A.B.

1 1022, April 21, 2003, p. 5.)¹

2 The fee arrangement in the Contract here complies with the plain
3 language and purpose of section 21455.5(g)(1). The Contract, by its terms,
4 contains no provision, term or calculus which bases payment to Redflex on
5 “numbers of citations generated” or on percentage of revenue. Instead, the
6 Contract calls for the City to pay Redflex a single monthly fixed fee per
7 intersection. Over the term of the Contract, Redflex is paid no more, and no
8 less, than that fixed fee, per intersection, per month. Whether the City – –
9 *which entirely controls the decision to issue any citation* – – writes one or one
10 thousand red light citations, it owes Redflex the same flat dollar amount,
11 under the express terms of the Contract. (Contract, Exhibit A, “Scope of
12 Services,” Section 7.5 [decision to issue citation is in “sole discretion” of
13 City, Redflex has no role; Exhibit B “Payment Provisions,” Section 1 [City
14 pays fixed fee of \$5,670 or \$6,000 per intersection, per month, depending on
15 physical configuration of intersection.]])

16 The Contract contains a “cost neutrality” provision which is triggered
17 only if on a monthly basis the revenue received by the City from the system
18 falls short of the fixed fee due for the services. In that event, the City pays
19 Redflex the amount of the revenue received that month. However, the
20 payment obligation for the full balance of the flat fee does not “go away.” The
21 City remains obligated to pay any balance, which continues to accumulate,
22 through the term of the Contract, and 12 months beyond. “Payment will only
23 be made by City up to the amount of cash received by City through the
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26 ¹ The People hereby request that the Court take judicial notice of this
27 legislative history pursuant to Evidence Code Section 452(c). *People v.*
Soto (2011) 51 Cal.4th 229, 239, fn.6.)

1 collection of automated red light violations up the amount currently due.”
2 (Contract, Exhibit B, Chapter 1.2 “Cost Neutrality.”) Patently, the cost
3 neutrality provision does not provide for payment based upon any number of
4 citations generated, and thus is not a violation of section 21455.5(g)(1).

5 “Where the words of the statute are clear, we may not add to or alter
6 them to accomplish a purpose that does not appear on the face of the statute or
7 from its legislative history.” (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562;
8 see also *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601; *Rojo v. Klinger*
9 (1990) 52 Cal.3d 65, 73.) By the plain words of the statute, the Legislature
10 forbade “payment... based on the number of citations written;” it did not
11 expressly or impliedly forbid flat fee obligations and payments accompanied
12 by an agreement to write off debt 12 months following termination of the
13 agreement, if and only if sufficient citation revenue to retire the debt was not
14 generated.² Under the relevant Contract, 200, or 1,000 or 5,000 citations, all
15 decided solely by City of Napa police personnel, all result in the same fixed-
16 fee obligation and payment to Redflex. This is not the arrangement the
17 Legislature intended to, or did, outlaw.

18 The People assert that the Court’s Opinion arose from addition or
19 alteration of the plain words of Vehicle Code Section 21455.5(g)(1). The
20 Court identified no term of the Contract which compensates Redflex based
21 upon numbers of citations written, or number of citations paid, or number of
22 violations identified. Any such arrangement would of course violate the plain

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24 ² Importantly, cost neutral fee arrangements have never been triggered in
25 Napa. In 100% of the months since inception of the City of Napa program,
26 revenues generated by citations have well exceeded the City’s fixed fee
27 obligation to Redflex. Those numbers prove that not one single citation has
28 ever been issued because the City needed additional revenue to pay
Redflex. (Troendly Decl. ¶ 2 – 3.)

1 language of the statute, and would provide Redflex with real-world
2 motivation to increase citations issued in hopes of raising additional revenue
3 for each additional citation written. The Contract here contains no such term
4 and creates no such motivation. Indeed, the terms of the Contract make it
5 impossible for Redflex to increase citations, even if it had economic incentive
6 to do so. In determining that the Contract is unlawful, the Court's Opinion
7 improperly added to and altered the statute's express words to determine that
8 they outlaw an arrangement in no way suggested by the statutory language: an
9 expressly fixed fee contract that requires a write-off of any unextinguished
10 debt 12 months after termination.

11 Moreover, what can be gleaned about legislative intent strongly
12 suggests that the fee arrangement in the Contract is not the type that the
13 Legislature sought to prohibit in enacting Section 21455.5(g)(1). The
14 Contract emphasizes that the decision to issue a citation is the sole and
15 exclusive decision of police officers, and not Redflex. (Contract, Exhibit 1,
16 Section 7.5.) Redflex is not involved in determining whether a citation should
17 be issued. As such, the cost neutrality clause cannot possibly provide an
18 avenue for Redflex to increase the number of citations issued in an attempt to
19 maximize profit. (See California Bill Analysis, A.B. 1022, April 21, 2003, p.
20 5.) Instead, the cost neutrality clause separates any financial incentive Redflex
21 might theoretically have to contribute to more citations from any actual ability
22 to generate more citations. *Conversely, because the City cannot be compelled*
23 *to pay Redflex money which has not been generated by red light citations,*
24 *there is no potential that the City will ever be tempted to issue "enough"*
25 *citations to satisfy its financial obligations to Redflex.* This is not an
26 arrangement the Legislature showed any interest or intent to outlaw, nor
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1 should it have. This Court should therefore affirm the trial court's conviction
2 of this defendant.

3 **B. Even if the Contract Violates Section 21455.5(g)(1), the Trial**
4 **Judge Properly Admitted Evidence of the Violation and the**
5 **Conviction Should be Affirmed.**

6 Even if the fee arrangement in the Contract were in violation of
7 Vehicle Code Section 21455.5(g)(1), the trial court still correctly admitted the
8 evidence of Defendant's violation and found Defendant guilty. The Appellate
9 Division improperly reversed the conviction based on inadmissibility of the
10 People's evidence. A trial judge's determination whether a proper foundation
11 has been laid for the admission of evidence will not be disturbed on appeal
12 absent a showing of abuse. *County of Sonoma v. Grant W.* (1986) 187
13 Cal.App.3d 1439, 1450. This standard is met only when the trial court, in its
14 exercise of discretion, "exceeds the bounds of reason, all of the circumstances
15 before it being considered." *Denham v. Superior Court* (1970) 2 Cal.3d 557,
16 566.

17 Failure to comply with a statute regarding the collection or analysis of
18 evidence does not alone render the evidence inadmissible. *People v. Williams*
19 (2002) 28 Cal.4th 408, 414; *People v. Adams* (1976) 59 Cal.App.3d 559, 567.
20 Compliance with such a statute is sufficient to support admission, but not
21 necessary, because "[n]oncompliance goes only to the weight of the evidence,
22 not its admissibility." *Williams*, 28 Cal.4th at 414 (citing *Adams*, 59
23 Cal.App.3d at 567).

24 In *Williams*, the California Supreme Court held that evidence of
25 defendant's blood-alcohol content collected by a preliminary alcohol
26 screening test ("PAS Test") was admissible even though the police officers
27 who administered the test failed to comply with a California regulation

1 regarding the use of PAS Tests. *Williams*, 28 Cal.4th at 413, 416-17. More
2 specifically, the officers failed to sufficiently test the instrument and were not
3 properly trained to perform the tests. *Id.* at 413. The Court explained that
4 failure to comply with a regulation regarding the proper collection of
5 evidence does not render such evidence inadmissible. *Id.* at 414.

6 Here, the basis for admission of the photo evidence is stronger than it
7 was in *Williams*. In *Williams*, the challenge to the evidence was that it was not
8 collected pursuant to legal requirements, and therefore was potentially
9 untrustworthy to establish grounds for conviction. Here, the infirmity
10 identified in the Court's Opinion does not speak to the accuracy or reliability
11 of the evidence supporting conviction; it speaks only to a technical
12 requirement in the contractual relationship between the law enforcement
13 agency and the equipment operator. The Court's Opinion identifies no reason
14 the relevant evidence might not have been trustworthy for purposes of
15 establishing the relevant violation of law.

16 A federal district court in Washington dismissed a similar claim
17 challenging the same cost-neutrality provision under Washington's analogue
18 to Section 21455.5(g). See *Todd et al. v. City of Auburn, et al.*, 2010 WL
19 774135, *4 (W.D. Wash. 2010). In *Todd*, the Court granted the red light
20 camera companies' motion to dismiss on this same theory:

21 "Plaintiff's third challenge is that the municipalities' contracts with
22 ATS and Redflex violate Washington law. WASH. REV.CODE
23 46.63.170(1)(i) states that 'the compensation paid to the manufacturer or
24 vendor of the equipment used must be based only upon the value of the
25 equipment and services provided or rendered in support of the system, and
26 may not be based upon a portion of the fine or civil penalty imposed or the
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1 revenue generated by the equipment.’ Plaintiffs argue that the contracts
2 violate this statute in two ways, but they are misinterpreting the law. First, the
3 contracts contain “stop-loss” provisions. These provisions allow the
4 municipalities to defer payment until the cameras generate enough revenue to
5 cover their expense. But they do not change the amount that the
6 municipalities must eventually pay the camera companies. Plaintiffs insist
7 that these provisions run counter to the prohibition on any system of
8 compensation based on a portion of the revenue generated. The Court does
9 not agree. Under this system, it is the payment schedule, not the amount of
10 compensation, that is based on a portion of revenue generated. The stop-loss
11 provisions have allowed the municipalities to purchase traffic enforcement on
12 a layaway plan, but not to change the price.” Id.³

13 Here, even if the payment provision were in violation of Section
14 21455.5(g)(1), the evidence of Defendant's violation would not be rendered
15 inadmissible as a result. Such compliance is not necessary for admissibility
16 because failure to comply with the statute would go only to the weight of the
17 evidence, not its admissibility. See *Williams*, 28 Cal.4th at 414. Thus, like
18 the evidence in *Williams*, which was admissible even though the police
19 officers failed to comply with a statute regarding collection of the evidence,
20 the evidence here would be admissible even if the Contract were in violation
21 of section 21455.5(g)(1). Accordingly, the trial court correctly admitted the
22 evidence of Defendant's violation and found Defendant guilty of violating
23 CVC section 21453(a).

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³ The California Rules of Court do not prohibit citation to unpublished federal decisions. (*Hellum v. Breyer* (2011) 194 Cal.App.4th 1300, 1313, fn.5.)

1 **C. Napa's Cost Neutral Fee Arrangements Promote Public Safety by**
2 **Making the Red Light Photo Enforcement Program Affordable.**

3 As set forth herein, the Contract cost neutrality clause at issue here is
4 not unlawful upon facial analysis, nor is it the type of agreement that the
5 Legislature clearly intended to outlaw: an agreement which rewards a red
6 light service provider for generating more violation citations. Moreover, there
7 are important policy reasons to favor cost neutrality guarantees of the sort
8 presented here: those which protect public funds while providing a valuable
9 enforcement tool.

10 Cost neutral fee arrangements in contracts between municipalities and
11 private red light photo enforcement companies make photo enforcement
12 systems feasible and thereby promote public safety. Red light photo
13 enforcement systems have been shown to reduce accidents caused by
14 motorists running red lights. In July 2002, the California Bureau of State
15 Audits found that in five local municipalities, "the number of accidents
16 decreased between 3% and 21% after the implementation of the red light
17 cameras." (See California Bill Analysis, A.B. 1022, April 21, 2003, p. 4.)
18 Also telling, the audit found that when one municipality suspended use of red
19 light photo enforcement systems, accidents caused by red light violations
20 increased by 14% in just four months. *Id.* Because of these benefits to public
21 safety, section 21455.5 of the CVC expressly allows the use of red light photo
22 enforcement systems. See Cal. Veh. Code § 21455.5.

23 Cost neutral fee arrangements provide municipalities with assurance
24 that red light photo enforcement systems will not overwhelm public resources
25 available to pay for the service. As discussed above, cost neutral fee
26 arrangements require municipalities to pay private photo enforcement
27 companies a monthly fixed fee per intersection. However, if the revenue
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1 generated from the system is less than the fixed fee in any given month, the
2 municipality pays only the amount of the revenue, thereby avoiding a loss on
3 the system in that month. The deficit must be made up in the following
4 months, as revenues match or exceed obligations. This fee arrangement
5 provides local municipalities with assurance that they can avoid losses during
6 months in which citations are low, while at the same time requiring that that
7 financial obligation survive the life of the agreement, and beyond, to be paid
8 when revenues permit. In effect, cost neutral fee arrangements provide for a
9 flat fee, but also protect cash-strapped municipalities from incurring
10 substantial losses in any given month.

11 Municipalities obtain cost neutral fee arrangements in red light photo
12 enforcement contracts so that they can promote public safety without placing
13 additional or excessive demands on limited public resources. To deny
14 municipalities the ability to enter into beneficial fee arrangements because of
15 an unfounded fear of contractual impropriety would be a disservice to local
16 governments and public safety. Cost neutral fee arrangements, such as that
17 between Napa and Redflex, promote the goals of section 21455.5, keep the
18 decision making regarding issuance of citations 100% in law enforcement
19 hands, and remove the possibility that the flat fee service contract might
20 “break the bank” of the public entity. This Court should therefore find that
21 the cost neutral fee arrangement in the Contract does not violate CVC section
22 21455.5(g)(1).

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24 PEOPLE OF THE STATE OF CALIFORNIA

25 June __, 2011

By:

26 DAVID C. JONES
Deputy City Attorney

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court Rule 8.883, counsel for People hereby certifies that the brief uses proportionately spaced type at 13-point, double spaced (except for headings, footnotes and quotations), and the word count is 2,982 (including footnotes).

DAVID C. JONES

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2 DAVID C. JONES, DEPUTY CITY ATTORNEY (SBN 129881)
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9 Attorneys for THE PEOPLE OF THE STATE OF CALIFORNIA

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF NAPA

12 PEOPLE OF THE STATE OF CALIFORNIA,) Case No.: CR154602
13)
14 Petitioner/Plaintiff,) DECLARATION OF DAVID C.
15) JONES IN SUPPORT OF
16 vs.) PEOPLE OF THE STATE OF
17) CALIFORNIA'S PETITION
18 [REDACTED] DAUGHERTY,) FOR REHEARING
19)
20 Respondent/Defendant.)

21 I, David Jones, declare as follows:

22 1. I am an attorney licensed to practice in the State of California, and
23 a member of this Court. I have central responsibility for representing the City
24 of Napa in this action. I make this declaration of my own personal
25 knowledge, and if called upon, could testify competently to the facts stated
26 herein.

27 2. My duties include assisting the Police Department with legal
28 challenges to red light camera citations. Since the Court's May 26, 2011
Opinion in this matter was provided to me by the Police Department, I have
carefully reviewed the Court's file in this matter, and have reviewed
documents provided by the Police Department. The Court's file, and
documents provided by the Police Department suggest that the PD was
informed of the filing of the appeal, and received notice that oral argument

1 was scheduled. From my review, it seems that only the District Attorney's
2 office received notice of any briefing schedule.

3 3. The relevant documents suggest that the Police Department never
4 knew what issues were involved in the appeal, and never received Ms.
5 Daugherty's appeal brief. As a result, the City Attorney's Department was
6 never notified about the pendency of this appeal, let alone of the important
7 issues raised herein.

8 4. I first learned of this matter when I read the Court's Opinion issued
9 May 26, 2011. I immediately sought, and shortly thereafter obtained District
10 Attorney Gary Lieberstein's permission to seek rehearing of the matter on
11 behalf of the People of the State of California.

12 5. My research discloses that numerous courts have heard legal
13 challenges of red light contracts and related convictions, based upon
14 purported violations of Vehicle Code Section 21455.5. To my knowledge,
15 none of these decisions has resulted in a published decision which remains
16 good law.

17 6. The City's failure to appear in this matter on behalf of the People
18 appears to have been caused by limited notice to the Police Department of the
19 matter, and limited if any notice of the issues raised on this appeal. Given that
20 the Court's Opinion was based solely on briefing, appearance and argument
21 by one party, a rehearing of the matter, with new briefing by the appellant and
22 opposition by the People, is in the interest of justice. Such a full adversarial
23 process can only assist the Court in making a fully informed ruling, and will
24 not unduly prejudice Defendant/Appellant.

25 I declare under penalty of perjury under the laws of the State of
26 California that the foregoing is true and correct, and that this declaration was
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1 executed in Napa, California on June ____, 2011.

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DAVID C. JONES

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