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FILED
ALAMEDA COUNTY

JUN 10 2009

CLERK OF THE SUPERIOR COURT
By Marie Mayrudo Deputy

9 **SUPERIOR COURT, STATE OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF ALAMEDA**
11 **APPELATE DIVISION**

12 **PEOPLE OF THE STATE OF CALIFORNIA,**
13 **Plaintiff and Respondent,**
14 **vs.**

15 **APPEAL NO 4983**
16 **Case No.5007 [REDACTED]**
17 **APPELLANT'S OPENING BRIEF**

18 [REDACTED] **SINGH,**
19 **Defendant and Appellant**

20 **Date: TBD**
21 **Time TBD**
22 **Appellant Dept . TBD**

23 **CASE SUMMARY:** This case is derived from a Red Light Camera System,
24 which was installed in the city of Newark and County of Alameda, for the sole purpose
25 of prosecuting red light runners. The County installed the system in conjunction with
26 a private contractor, Redflex Traffic Systems, Inc., (Herein after Redflex)

27 On October 16, 2007, an alleged violation of CVC § 21453(a), a photo
28 enforced red-light camera violation occurred. The citation was issued to the
defendant who is the registered owner of the vehicle. Newark Police Officer Roger

[REDACTED] Singh Opening Brief

1 Bacon issued the citation. Officer Bacon determined, after his review of the
2 contents of the red-light camera documents, that a violation of CVC §21453a had
3 occurred. This case came on for trial in the Traffic Department in the above-
4 mentioned court on December 16, 2008, before Commissioner John Porter. Newark
5 police officer Bacon died prior to the trial. The People's witness, Newark Police
6 Officer Hall, appeared at the trial and offered into evidence a photo enforcement
7 package that contained hearsay evidence identifying ██████████ Singh as the driver
8 of the vehicle. Counsel objected to the introduction of the red light photo packet on
9 hearsay and foundation grounds, and on Crawford issues as well. The objections
10 were overruled. Officer Hall testified that he is a Newark police officer who had
11 been assigned to red light photo enforcement for a few months only. His assignment
12 began after Officer Bacon died. Officer Hall testified that he had 8 hours of training
13 on the operation of the camera system; that he had a week of training about Newark
14 Police Department photo enforcement police procedures; that he has no training in
15 the operation of computers or photo enforcement systems; that he only knows how
16 the system works in general terms only because of his 8 hour training. Officer Hall
17 testified that he does not know what the business procedures of Redflex are; he does
18 not know how many employees at Redflex process Newark citations, he does not
19 know whether or not the documents in the court packet were prepared in the normal
20 course of Redflex business; and he does not know whether the documents in the
21 court packet were prepared at or near the time of the violation. Officer testified that
22 he is aware that the Newark police department contracts with Redflex Camera
23 Systems, Inc. to enforce red light violations. The evidence packet, including the
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28 ██████████ Singh Opening Brief

1 declaration of the custodian of records and photographs, in addition to the DVD of
2 the incident was admitted into evidence over counsel's objection.

3 **MOTIONS:**

4 Defendant, appearing through counsel, objected to the introduction of the
5 evidence packet and the DVD from Redflex on foundation and hearsay grounds.

6 Counsel. The packet was admitted over defense objections. After People rested
7 defendant made a Penal Code 1118 motion for dismissal. Counsel argued that under
8 Section 1271 of the Evidence Code, the custodian of records from Redflex must be
9 present in court to testify to the veracity of the documents contained in the packet.

10 Counsel further objected to the introduction of the Redflex Packet because the

11 citing officer was not available, and the information contained in the packed

12 violates the findings of Crawford v. Washington, (2004) 541 U.S. 36. The

13 defendant had a right to confront all the witnesses, the officer who issued the

14 citation as well as the Redflex employees who had assembled and forwarded the

15 information to the Newark Police Department, as well as the citing officer.

16 Commissioner Port overruled all of defense objections, denied the P. C. § 1118


17 motion, admitted the packet, along with the DVD and all documents into evidence.

18 **VERDICT AND SENTENCE:**

19 The Court later made a finding of guilt and ordered the defendant to pay a
20 fined of \$147 by February 17, 2009.

21 **ARGUMENT:**

22 **I. QUESTIONS PRESENTED:**

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1 **WHETHER THE COURT WAS IN ERROR TO DENY DEFENDANT'S**
2 **HEARSAY OBJECTIONS REGARDING THE REDFLEX PACKET AND DVD.**

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4 **1. THE REDLIGHT CAMERA DOCUMENTS ARE INADMISSABLE**
5 **HEARSAY. THEY ARE NOT ADMISSABLE UNDER THE**
6 **BUSINESS RECORDS OR PUBLIC RECORDS EXCEPTIONS TO**
7 **HEARSAY.**

8 California Evidence Code §1271 "business records" exception to hearsay
9 states:

10 "Evidence of a writing made as a record of an act, condition,
11 or event is not made inadmissible by the hearsay rule when offered to
12 prove the act, condition, or event if:

- 13 (a) The writing was made in the regular course of a business;
14 (b) The writing was made at or near the time of the act,
15 condition, or event;
16 (c) The custodian or other qualified witness testifies to its
17 identity and the mode of its preparation; and
18 (d) The sources of information and method and time of preparation
19 were such as to indicate its trustworthiness.

20 Clearly none of the protections mandated in E.C. § 1271 are present in the
21 subject case. The Custodian of Records of Redflex did not appear at the trial. It
22 cannot be assumed that the packet was assembled in the regular course of the
23 Redflex business without testimony from the custodian of records or other qualified
24 witness from Redflex. The documents were admitted into evidence in error. Further,
25 Officer Hall had no information whatsoever about the documents in the packet. He
26 testified that he had 8 hours of training 3 months earlier. The requirements for
27 "other qualified witness" are not met by 8 hours of training.

28 "Evidence Code § 1271 (c) requires that the custodian of the record or some
other qualified witness testify to the identity of the writing and to its mode of

1 preparation. Officer Hall's 8 hour training, as reflected by his testimony at the trial,
2 cannot not be considered an "other qualified witness". His testimony was the exact
3 opposite. He did not know how or when or who prepared the subject documents. It
4 would be impossible for a trial judge to determine that the requirements for the
5 1271© hearsay exception have been met . . ." (Jefferson, Cal. Evid. Bench Book
6 (Cont. Ed. Bar, 3d Ed. 1997) Business Records, § 4.6, p. 114.) [Emphasis added.]
7

8 In this case, no foundation for the admission of the Redflex documents and
9 DVD was laid because there was no qualified representative from Redflex present
10 in court to testify. The officer from the Newark PD was not even the officer who
11 reviewed the court packet, determined a violation had occurred and then signed the
12 citation. The declaration of the custodian of records was inadmissible hearsay and
13 did not constitute "testimony" as required by E.C. § 1271.
14

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16 There was no offer or assertion made that the documents were admissible
17 pursuant to California Evidence Code §1280. It is apparent that E.C. Section 1280
18 does not apply to the case at hand.
19

20 California Evidence Code § 1280 states,

21 **1280. Evidence** of a writing made as a record of an act, condition,
22 or event is not made inadmissible by the hearsay rule when offered in
23 any civil or criminal proceeding to prove the act, condition, or
24 event if all of the following applies:

(a) The writing was made by and within the scope of duty of a
25 public employee.

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

(c) The sources of information and method and time of preparation
27 were such as to indicate its trustworthiness.
28

1 This exception does not apply because the documents in question were not
2 made "by and within the scope of duty of a public employee." Redflex is a private,
3 for profit, company, incorporated in the state of Arizona. No employee of Redflex
4 is under any public duty to comply. As such, the documents are not admissible
5 under the "public records" exception to hearsay.
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8 **2. IN ORDER TO BE INTRODUCED UNDER THE BUSINESS**
9 **RECORDS EXCEPTION THEY MUST COMPLY WITH THE**
10 **REQUIREMENTS OF EVIDENCE CODE SECTION 1560**

11 Evidence Code § 1560 lays out the requirements and procedures for the
12 admissibility of business records, when there is no testimony presented from a
13 qualified custodian of records.

14 **1560.**

15 (b) Except as provided in Section 1564, when a subpoena duces
16 tecum is served upon the custodian of records or other qualified
17 witness of a business in an action in which the business is neither a
18 party nor the place where any cause of action is alleged to have
19 arisen, and the subpoena requires the production of all or any part
20 of the records of the business, it is sufficient compliance therewith
21 if the custodian or other qualified witness delivers by mail or
22 otherwise a true, legible, and durable copy of all of the records
23 described in the subpoena to the clerk of the court ...

24 (c) The copy of the records shall be separately enclosed in an
25 inner envelope or wrapper, sealed, with the title and number of the
26 action, name of witness, and date of subpoena clearly inscribed
27 thereon; the sealed envelope or wrapper shall then be enclosed in an
28 outer envelope or wrapper, sealed, and directed as follows:

(3) In other cases, to the officer, body, or tribunal conducting
the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or
unless the sealed envelope or wrapper is returned to a witness who is
to appear personally, the copy of the records shall remain sealed
and shall be opened only at the time of trial, deposition, or other
hearing, upon the direction of the judge, officer, body, or tribunal
conducting the proceeding, in the presence of all parties who have

1 appeared in person or by counsel at the trial, deposition, or
2 hearing...

3 In the case at hand the custodian of records for Redflex Cameras did not appear
4 in court. While there is a signed affidavit, this document is hearsay, and without the
5 presence of the custodian of records for Redflex, the only way the documents are
6 admissible is through the procedures outlined in E.C. Section 1560 above. The
7 documents must be delivered to the court in response to a subpoena in a sealed
8 envelope.

9 The burden to subpoena the Redflex packet rests with the party seeking to
10 introduce the packet into evidence. The burden to introduce the documents does not
11 rest with the defense. The defense is not seeking to introduce the documents. The
12 defense is arguing that if the documents are hearsay and there is no custodian of
13 records to testify to the mode of preparation, then the only way for the documents to be
14 introduced into evidence, is to have the prosecution issue a subpoena for such
15 documents and for the presentation of such documents to comply with the
16 requirements of E.C. § 1560. It is apparent that the requirements of the Evidence Code
17 exceptions to the hearsay rule were intended to insure the reliability of documents that
18 are hearsay. Those rules are at times inconvenient. The rules define the requirements to
19 the admissibility of the evidence. They provide the trier of fact with the understanding
20 that the evidence has met certain hurdles and can be relied upon. Having failed to
21 produce the custodian of records to testify concerning the records and their mode of
22 preparation the documents are inadmissible hearsay.
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26 **II. QUESTION PRESENTED:**
27 **WHETHER THE COURT WAS IN ERROR TO DENY DEFENDANT'S**
28 **HEARSAY OBJECTIONS BASED ON CRAWFORD V. WASHINGTON**

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2 Objection was also made that the testimony of Officer Hall, as well as the
3 documents contained in the red light packet, violate the Supreme Court's decision
4 in Crawford v. Washington, (2004) 541 U.S. 36. Officer Hall was not the police
5 officer who reviewed the documents and who made the determination that a
6 violation had occurred. Officer Bacon, who was the citing officer, died, subsequent
7 to the issuance of this citation and prior to the trial of the case. The matter should
8 have been dismissed. Defendant had a right to confront the citing officer. Further,
9 the documents in the packet, as counsel has argued before, are testimonial evidence.
10 As such they violate the Crawford decision, supra, which held that testimonial
11 hearsay cannot be admitted into a criminal trial unless the declarant is unavailable
12 and there was prior opportunity to cross-examine. There was no opportunity for
13 defendant to cross-examine Officer Bacon prior to the trial. Defendant learned of
14 his death at the trial. The Court in Crawford expressed deep concern about the
15 current discretion Judges had to admit certain hearsay statements into evidence on
16 the basis that they were considered reliable, or that they fell into some well rooted
17 exception to the Hearsay Rule. The concern was displayed by the Courts decision
18 to overrule their previous opinion in Ohio v. Roberts (1980) 448 U.S. 56, to the
19 extent that it permits the admission of hearsay so long as the trial court finds that it
20 is sufficiently reliable.

21 The California Court of Appeals in, People v. Isaiah, (2004) 118
22 Cal.App.4th. 1396, expanded on the definition of what testimonial hearsay evidence
23 is by stating that the pertinent question is whether an objective observer would
24 reasonably expect the statement to be *available for use* in a prosecution (Id. at p.
25 1402).

26 It is indisputable that the records contained in the Redflex Camera Packet
27 are hearsay. It is also clear that the exclusive reason these records are created and

1 kept is for the use in the prosecution of alleged red light violators. Further, the
2 owner of the vehicle who was cited for the violation accused the defendant of being
3 the driver. The defendant had a right to challenge the owner in court. The
4 defendant had a right to cross-examine the police officer that determined he had
5 violated CVC Section 21453a.

6 We emphasize that the only purpose for the existence of the Redflex
7 Cameras is for the criminal prosecution of red light runners. Redflex generates all
8 of the documents contained in the Redflex Packet with the knowledge that in every
9 single case they may be needed in court for the prosecution of the alleged violator.
10 Furthermore, every document contained in the Red Light Camera Packet is sent to
11 the Newark Police Department who in turn reviews the documents, in this case
12 Officer Bacon, and issues a citation for the prosecution of the alleged violators.
13 That is sole purpose for this information, i.e. prosecutorial.

14 CONCLUSION:

15 No conviction of VC Section 21453(a) can be sustained unless the record
16 contains substantial evidence supporting each element of the charged offense. Absent
17 the Custodian of Records of Redflex, and the citing officer, the entire photo packet and
18 video, and testimony of Officer Hall, were inadmissible hearsay evidence unless they
19 complied with Evidence Code Section 1560.
20

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22 DATED: June 10, 2009

23 Respectfully submitted,
24 [REDACTED]

25 SHERRY GENDELMAN
26 Attorney for Appellant.

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28 [REDACTED] Singh Opening Brief

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2 **PROOF OF SERVICE**
3 **C.C.P. 1013(a)(4)**

4 I, the undersigned, state that I am over the age of eighteen and not
5 A party to the within action.

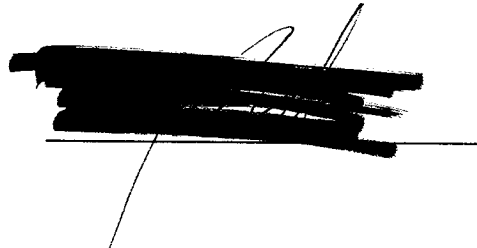
6 My business address is 421 Grand Ave., Suite A, South San Francisco,
7 California, in the San Mateo County, in which the foregoing "APPELLANT'S
8 OPENING BRIEF" was mailed.


9
10 On June 9, 2009, I served the foregoing "APPELLANT'S OPENING
11 BRIEF" on respondent by placing a true copy of it in a separate sealed envelope,
12 with the correct postage on it, in a United States Postal Service mailbox, in South
13 San Francisco, County of San Mateo, California, addressed as follows:

14 Alameda County District Attorney
15 1225 Fallon Street, 9th Floor
16 Oakland, CA 94612

17 I declare under penalty of perjury under the laws of the State of California
18 that the foregoing is true and correct.

19
20 DATED: June 9, 2009

A large blacked-out redaction covers the signature area. A thin line extends from the bottom of the redaction down towards the center of the page.

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28  Singh Opening Brief

PROOF OF DEPOSIT WITH TRIAL COURT

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I, the undersigned, state that I am over the age of eighteen and not
A party to the within action.

My business address is 421 Grand Ave., Suite A, South San Francisco,
California, in the San Mateo County, in which the foregoing "APPELLANT'S
OPENING BRIEF" was mailed.

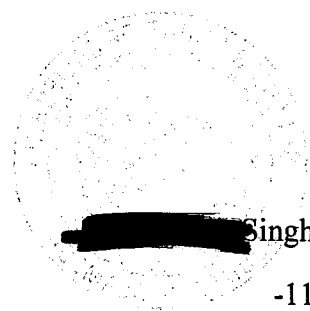
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postage on it, in a United States Postal Service mailbox, in South San Francisco,
County of San Mateo, California, addressed as follows:


Superior Court of California, Alameda
Pleasanton Traffic Division
Attn: Commissioner John Porter
5672 Stoneridge Drive
Pleasanton, CA 94588

I declare under penalty of perjury under the laws of the State of California
that the foregoing is true and correct.

DATED: June 9, 2009





 Singh Opening Brief