2nd Civ. No. B229748

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANNETTE B[redacted],

Defendant and Appellant,

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CALIFORNIA CASES

CALIFORNIA STATUTES AND RULES OF COURT

Respondent, the People of the State of California, submit their Respondent's Brief, as follows:

INTRODUCTION

In an effort to overturn her conviction for failure to stop at a red traffic light at a busy intersection in the City of Beverly Hills,[1] Appellant makes no claim of factual innocence but rather launches an attack on the automated red light enforcement system ("ARLES")[2] itself. In so doing, Appellant contends erroneously that the officer who provided the uncontradicted foundational testimony for admission of the ARLES evidence against her was not qualified to testify because he was not a percipient witness to her violation. The fact that there is, by definition, no percipient witness to a violation recorded by the ARLES is, of course, fundamental to the system's design and implementation.[3] Thus, Appellant's effort to assert that the ARLES evidence is *ipso facto* inadmissible stands in stark contravention of the clear intent of our legislators in enacting the ARLES statute to reduce the traffic deaths and injuries that occur when motorists like Appellant run red lights. Fortunately, California law supports the continued use of the ARLES and the evidence it generates when, as in the present case, the system was operated -- and its evidence utilized -- in a legal, constitutional manner. Similarly, the judgment of conviction finding Appellant guilty as charged was without error because California law firmly supports the rulings made by the trial court.

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[1] A violation of Vehicle Code § 21453(a).

[2] The ARLES was installed by the City pursuant to Vehicle Code § 21455.5.

[3] The ARLES is a camera/computer system by way of which a series of high-speed photographs are taken when the system's sensors are triggered by a vehicle's entry into the intersection during the red light phase. The ARLES photographs depict the vehicle entering the intersection, the front license plate number of the vehicle and the driver behind the wheel. The ARLES automatically records data (*i.e.*, the timing of appellant's violation) and photographs of the violation.

As detailed below, each of Appellant's contentions on appeal is without merit. More particularly, the trial court did not err in admitting the photographs and the data text on the photographs establishing Appellant's violation because in addition to the authenticating effect of certain statutory presumptions offered by the Evidence Code, the testifying officer competently and sufficiently authenticated the ARLES photographs, the text on the photographs, as well as the maintenance logs showing that the ARLES equipment at the relevant intersection was in working order on the date of Appellant's violation.

Appellant's hearsay objections are equally unavailing. Neither the ARLES photographs nor the data text printed thereon nor the video of the violation fall within the definition of hearsay under the Evidence Code because they are not statements made by a person but rather are generated automatically by the ARLES mechanism. In any event, even if this Court were to determine that the ARLES evidence is hearsay, the business records exception to that rule applies to allow for the admissibility of the ARLES evidence. Moreover, just as the lack of human agency renders the ARLES evidence non-hearsay so, too, does it prevent that evidence from being testimonial for purposes of the Sixth Amendment. Because the ARLES evidence is non-testimonial, introduction of the ARLES evidence neither implicated nor violated Appellant's Sixth Amendment right to confront the evidence against her.

In light of the fact that this Court's decision to accept transfer of this case was predicated on a desire to assure uniformity of decision in ARLES cases, it is important to note that affirming the judgment herein will accomplish that goal. This case is on "all fours" with the recently decided and published case, *People v. Goldsmith* (2011) 193 Cal.App.4th Supp. 1. In *Goldsmith*, the Appellate Division of the Los Angeles County Superior Court ("LASC") affirmed a conviction based on the introduction of ARLES evidence that was -- as here -- authenticated by the testimony of a knowledgeable police officer. Conversely, the facts in *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1 – in which an ARLES conviction was

reversed based on the inadmissibility of an out of court declaration and incompetent officer testimony -- are readily and dispositively distinguishable from those in the present case. In *Khaled*, the prosecution relied on an out-of-court declaration by a person not present in court and the testimony of a police officer who lacked any personal knowledge of the ARLES. In the present case, the People did not rely on any out-of-court declaration; rather, the testifying officer had expansive knowledge of the ARLES in general and the documenting of Appellant's violation in particular. Accordingly, by affirming the judgment of conviction in the present case, this Court will maintain uniformity of decision, providing that competent and sufficient officer testimony is required before a trial court can admit ARLES evidence.

For all these reasons, developed in detail below, the trial court did not err in admitting the ARLES evidence and that ruling – whether as to Appellant's motion *in limine* or her trial objections relative to that evidence -- provides no basis for reversal of the judgment of conviction against her. Accordingly, the People respectfully request that the judgment of conviction be affirmed.

FACTUAL BACKGROUND & STATEMENT OF THE CASE

Appellant's violation occurred on June 3, 2009, at the intersection of Beverly Drive and Wilshire Boulevard in the City and was photographed by the ARLES system installed at that intersection. (Clerk's Transcript ("CT") p. 1). [4]

Appellant's trial took place on January 21, 2010 (CT, p. 5.) The testifying officer was Officer Mike Butkus of the Beverly Hills Police Department

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[4] Vehicle Code, § 21455.5 was originally enacted in 1995 (Sen. Bill No. 833 (1995–1996 Reg. Sess.); Stats. 1995, ch. 922). According to the Legislative Counsel's Digest for Senate Bill No. 833, section 21455.5 expanded the use of "automated rail crossing enforcement systems" (at that time codified in Veh.Code § 22451, subd. (c)), to encompass "all places where a driver is required to respond to an official traffic control signal showing different colored lights." With this expansion, the system was renamed "automated enforcement system." (*People v. Park* (2010) 187 Cal.App.4th Supp. 9, 115 Cal.Rptr.3d 337, 340.)

("BHPD"), whose initial testimony was in the form of a presentation to all motorists in court that morning relative to ARLES trials. (CT. p. 28). At that juncture, Officer Butkus testified as to his expertise resulting from his training and experience, the prerequisites of the ARLES system, how the system operates and how it is maintained. (*Id.*). He testified about the data boxes imprinted on the photographs and the letters and numbers, what they mean and how they are generated. (*Id.*). Officer Butkus "testified about his background, training and experience, what the City had to do before being allowed to operate the red light camera ticket system, how the system works and how it is maintained." (CT, p. 28). Officer Butkus stated that he reviewed the photographs and videos to determine whether a citation should issue.

Specifically, as to Appellant's citation, the People introduced People's Exhibit #1, comprised of the three digital photographs with data box text, maintenance logs, certificate of mailing, Notice to Appear, *i.e*, the photographs and documents supporting the violation, accompanied by the testimony of Officer Butkus. (CT, pp. 28-29.) Officer Butkus testified that he had reviewed the technician's maintenance logs that apply to the period before and after the citation was issued (CT, p. 28) and that the cameras were working properly on the date and at the time of Appellant's alleged violation. (CT, p. 29). He stated that he had reviewed the videos and photographs taken by the cameras at the intersection of the citation and that the light had been red for .28 seconds when Appellant traversed the limit line and that the driver photographed by the ARLES appeared to be Appellant. (*Id.*).

The trial court denied Appellant's oral motion *in limine* and overruled her hearsay objections, [5] finding that there was sufficient foundation laid by the testimony of Officer Butkus to admit the evidence and that the *Melendez-Diaz*

[5] As the trial court states, the written motion appended to Appellant's Proposed Statement under item 4b(1)(d) was not submitted to the trial court at any time during the proceedings below. (CT, p. 28).

case was distinguishable. (CT, p. 29.) The Court explained to Appellant that the testimony of Redflex employees is not required to authenticate and lay foundation for admissibility of the People's Exhibit #1 (CT, p. 30) and that Officer Butkus was perfectly capable of authenticating the documents and laying the foundation and did both. (*Id.*). The trial court adjudged Appellant guilty as charged and assessed a fine and penalty. (CT, p. 5.)

On February 11, 2010, Appellant filed her Proposed Statement on Appeal. (CT, p. 11). On February 22, 2010, the trial court filed its Order Concerning Appellant's Proposed Statement on Appeal ("Order Concerning Statement")(CT, p. 27), containing corrections to the Proposed Statement.

On March 2, 2010, Appellant filed her Objection to the Order Concerning Statement. On March 3, 2010, the trial court filed its Response to Appellant's Objection to Order Concerning Appellant's Proposed Statement on Appeal and Request for hearing, overruling Appellant's objections and denying her request for a hearing "before a Court Reporter" and certifying that the Order Concerning Statement "is a complete and accurate summary of the trial court proceeding." (Additional Clerk's Transcript ("Additional CT"), p. 6). [6]

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[6] In its Order Concerning Settled Statement on Appeal, the trial court noted the questionable nature of Appellant's effort to offer a verbatim "transcript" of her *voir dire* examination of Officer Butkus, stating "[s]ince there was neither a court reporter, nor a court recorder, nor an official recording of the proceedings, this bench officer is unable to explain how Appellant could purport to be providing a verbatim account of what was said by her, the officer or the court during the hearing on this motion nor during any other portion of the trial. Without any explanation for this by Appellant, the Court suspects Appellant either surreptitiously recorded the proceedings in violation of California Rules of Court, Rule 1.150(d) or that she is simply making things up and using quotations [sic] marks to make the statements appear authentic." (CT, p. 28.) CRC, Rule 1.150, subd.(d) provides, as follows:

"The judge may permit inconspicuous personal recording devices to be used by persons in a courtroom to make sound recordings as personal notes of the proceedings. A person proposing to use a recording device must obtain advance

On November 24, 2010, the Appellate Division of the LASC affirmed the judgment of conviction against Appellant. (B[redacted] Opinion, attached hereto as Exhibit A.) On January 5, 2011, this Court granted Appellant's petition to transfer in the interest of uniformity of decision in light of *People v. Khaled.* On May 11, 2011, this Court granted Respondent's Motion to Augment adding the Additional Clerk's Transcript to the record.

STANDARD OF REVIEW

An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence (*People v. Dixon* (2007) 153 Cal.App.4th 985, 997), including one that turns on the hearsay nature of the evidence in question. (*People v. Waidla* (2000) 22 Cal.4th 690, 725, citing, *People v. Alvarez* (1996) 14 Cal.4th 155, 203; *People v. Rowland* (1992) 4 Cal.4th 238, 264.)[7] Under the abuse of discretion standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

LEGAL ANALYSIS

I.

SUBSTANTIAL, ADMISSIBLE EVIDENCE SUPPORTS THE JUDGMENT OF CONVICTION AGAINST APPELLANT

A. The Record Contains Sufficient Reasonable, Credible Evidence Of Guilt Beyond A Reasonable Doubt

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permission from the judge. The recordings must not be used for any purpose other than as personal notes."

[7] "General standards of appellate review apply to appeals ... transferred for decision to the Courts of Appeal." (*People v. Disandro* (2010) 186 Cal.App.4th 593, 599, quoting *City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 382.)

In reviewing the sufficiency of the evidence, an appellate court must, of course, affirm a judgment when the record contains substantial evidence supporting conviction. The court on appeal "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible and of solid value – such that a reasonable trier of fact could find the Appellant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578). Indeed, a judgment must be upheld if any rational trier of fact could have found the elements essential to the crime proved beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319).

In the present case, as amply established below, Appellant's conviction must be upheld because substantial, admissible evidence supports that judgment based on the ARLES evidence properly admitted by the trial court.

B. The Trial Court Did Not Err In Admitting The ARLES Evidence Of Appellant's Red Light Violation

At Appellant's trial, the court admitted People's Exhibit #1, which was comprised of, *inter alia*, ARLES evidence including three digital photographs with data text, maintenance logs, *i.e*, the photographs and documents supporting the violation. (CT, p. 29.) The People also produced the ARLES videotape of Appellant's violation. (CT, p. 29.) As established below, in the first instance, those items were properly authenticated and the People laid the requisite foundation for the admission into evidence of each. Moreover, none of the ARLES evidence constitutes hearsay and even if it did, the business records exception to the hearsay rule – as provided for by Evidence Code, § 1271 -- applies such that the ARLES evidence is soundly admissible thereunder. Further, Appellant's assertion that admission of the ARES evidence violated her Sixth Amendment right to confrontation is completely without merit.

Accordingly, the trial court properly admitted the ARLES evidence of Appellant's violation, which in turn constitutes the substantial evidence more than sufficient to establish guilt beyond a reasonable doubt.

1. The ARLES Evidence Was Properly Authenticated And A Sufficient Foundation Laid For Its Admission

a. The People Established That The ARLES Evidence Was What It Purported To Be

Evidence Code, § 1401 provides that a writing -- including a photograph (*People v. Beckley* (2010) 185 Cal.App.4th 509, 514) must be authenticated before it is received in evidence. (Evidence Code, § 1401, subd. (a).) In turn, authentication of a writing requires only that the party presenting it produce sufficient evidence to sustain a finding that "the document is what it purports to be." (*Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 34-35, citing *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.)[party's counsel's declaration stating that documents were opposing party's interrogatory responses was sufficient to authenticate those responses it stated that the documents were what they purported to be.]

In the present case, Officer Butkus testified about the ARLES evidence – including the photographs with data text and video – establishing that the documents produced as People's Exhibit #1 were what they purported to be, *i.e.*, photographs and text thereon establishing that on June 3, 2009 at 7:08 pm, as Appellant traveled northbound on Beverly Drive in the number two lane, she traversed the limit line at the intersection of Beverly Drive and Wilshire Boulevard at a speed of 29 mph when the light at the intersection had been red for .28 seconds. (CT, p. 29.) In testifying as to how the ARLES operates, Officer Butkus explained the data boxes imprinted on the photographs and the letters and numbers contained in them, what they mean, how they are generated and how they relate to the citation (CT, p. 28.) Officer Butkus also testified as to the maintenance logs

and how the ARLES is maintained. (CT, p. 28.) [8] Thus, Officer Butkus's extensive testimony showed that each element of People's Exhibit #1 was what it purported to be, *i.e.*, photographs of and computer data documenting Appellant's violation of the red light law at the intersection of her violation and evidence derived from the ARLES at the intersection of Appellant's violation and the maintenance records pertinent to that location. (CT, pp. 28-29.) Accordingly, this testimony constituted proper authentication of the ARLES documents as required by Evidence Code, § 1401, thus accomplishing the threshold showing for admission of that evidence.

b. Officer Butkus's Testimony Properly Authenticated The ARLES Evidence Against Appellant and Laid the Foundation for Its Admission Even Though He Was Neither A Witness To The Recording of the ARLES Evidence Nor A Witness to the Violation Itself

Notwithstanding Appellant's insistence that Officer Butkus could not lay the foundation for admission of the ARLES evidence because he was not a percipient witness who had observed the violation recorded by the ARLES evidence against her, California law establishes that Officer Butkus was, as the trial court found "perfectly capable" of authenticating the ARLES evidence and laying the foundation for its admission and that he did so. (CT, p. 30.)

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[8] The detailed maintenance logs that were included in People's Exhibit #1 are a record of numerous inspection tasks executed on the ARLES equipment at the intersection of Appellant's violation performed seven (7) days prior to Appellant's violation and seventeen (17) days thereafter. (See, People's Exhibit #1.) Those tasks include a physical check to verify the structure, clean glass, ensure that the area is free of debris, a check of foundation seals, ensure that the equipment is clean and the enclosures are secure, a communication check to ensure that the router, modem and communication link are in working order, a check that all loop grounding is secure and within specification, a check that all incoming voltage level are within specification and that foreign voltage does not exist, a check that next images, hard-drives, video and phasing are fully operational, and a check to ensure that the system's certification is valid. (Maintenance Logs, People's Exhibit #1.)

i. The ARLES Photographs Were Properly Authenticated

Authentication of a photograph or film does not require the testimony of the person who made the evidence or a person who witnessed the events depicted therein in order to lay a proper foundation for admission of the photograph into evidence. (*People v. Samuels* (1967) 250 Cal.App.2d 501, 512.) In *Samuels*, the court of appeal held that a motion picture film of Samuels' assault on another man was sufficiently authenticated by the testimony of three photographic experts who had neither witnessed the events depicted in the film nor placed the camera. (*Id.* at p. 512.) Indeed, the court in *Samuels* found that such testimony sufficed "for all purposes" and that it established that, *inter alia*, the film "accurately represented the scene before the camera" (*Id.* at p. 512), notwithstanding the fact that none of the experts had viewed the scene.

In finding the film before it admissible evidence, the court in *Samuels* cited *People v. Doggett* (1948) 83 Cal.App.2d 405, in which the court of appeal upheld the admissibility of photographed or filmed images of sexual crimes. In *Doggett*, the appellate court held that the photographs in question, although not authenticated by the person who took them, were properly admitted into evidence because there was unimpeached expert testimony that they were not "faked" and because there was "an entire absence of any evidence which might tend to raise the slightest doubt about the matter." (*Samuels, supra*, 250 Cal.App.2d at 512, citing *Doggett, supra*, 83 Cal.App.2d 405.) In citing *Doggett*, the court of appeal in *Samuels* referenced a California Supreme Court case, *People v. Bowley* (1963) 59 Cal.2d 855, noting that "[t]he *Doggett* holding was reaffirmed in [*Bowley*] where the court held that even though a film cannot speak for itself as to its own authenticity, it may become probative once it has been shown, either by the testimony of the person who made it or by one who is otherwise qualified, that it is accurate and truly represents what it purports to show." (*Samuels, supra*, 250 Cal.App.2d at 512, citing *Bowley, supra*, 59 Cal.2d 855.) Indeed, in *Bowley*, the

California Supreme Court observed that a photograph constitutes a "silent witness" to the acts it shows (*id.*) and that foundation for admission of such evidence "may be provided by the aid of expert testimony ... although there is no one qualified to authenticate it from personal observation." (*Id.* at p. 862).

Once a proper foundation has been established as to the accuracy and authenticity of a photograph – as accomplished here by the testimony of Officer Butkus – a photograph speaks as a silent witness and constitutes substantive evidence to be weighed by the trier of fact. (*Bowley, supra*, 59 Cal.2d 855, 860-862). In stating that a photograph may be authenticated by a knowledgeable witness who did not personally observe the act recorded by the photograph, the Court in *Bowley* court observed that "[t]o hold otherwise would illogically limit the use of a device whose memory is without question more accurate and reliable than that of a human witness" (*Bowley, supra*, 59 Cal.2d at 861), such that it is a "sound rule" to allow a picture to "speak for itself" and to admit it as a silent witness "just as X-ray photographs are admitted into evidence although there is no one who can testify from direct observation inside the body that they accurately represent what they purport to show." (*Id.* at p. 860).

Thus, in *Samuels*, *Doggett*, and *Bowley*, California appellate courts -- including the California Supreme Court -- have agreed that experts who were not eyewitnesses to the scene depicted in a photograph, film or video and who had not "made" those images, may provide testimony sufficient to authenticate that evidence. [9] Accordingly, based on the precedent of those cases, Officer Butkus's testimony as to the ARLES photographs and video sufficed to authenticate the

[9] As the court of appeal stated in *Doggett* "[t]he question of the sufficiency of the preliminary proofs offered to identify the photograph or to show that it is a fair and accurate representation of the objects which it purports to portray is a matter within the discretion of the trial court.'" (*Doggett, supra*, 83 Cal.App.2d at 409, citing section 730, 20 American Jurisprudence 610.)

evidence. This is especially true in light of the fact that, as in *Doggett*, the foundation for admission of the evidence laid by the People in the present case (*i.e.*, Officer Butkus's testimony) "fully establish[ed] the period of time during which the pictures were taken, the place where they were taken, and identif[ied] the persons shown". (*Doggett, supra*, 83 Cal.App.2d at p. 408; CT, pp. 28-30.)

Moreover, in the specific context of a defendant's challenge to the admissibility of ARLES evidence, the LASC Appellate Division recently held that the photographs taken by the ARLES "may be admissible even if the testifying officer was not a percipient witness to the violation and was not personally responsible for setting up the camera" such that the officer's testimony provided the foundation necessary to demonstrate the photographs were a reliable portrayal of data and images contained therein. (*People v. Goldsmith*[10] (2011) 193 Cal.App.4th Supp. 1, 3.)[11] In *Goldsmith*, as here, the only witness for the People was a police officer who had worked in the area of red light camera enforcement for several years (*Id.* at p. 1) and who, based on that experience as well as knowledge he acquired from the company that maintained the system, explained the issuance of the traffic citation to the satisfaction of both the trial court and the LASC Appellate Division. (*Id.*) In that regard, the LASC Appellate Division held that "the evidence sufficiently supported the trial court's determination that the photographs were what the prosecution claimed they portrayed, namely, a digital

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[10] On March 29, 2011, Division 3 of the California Court of Appeal for the Second Appellate District ordered that *Goldsmith* be transferred to it for hearing and decision. The case is presently on calendar for July 13, 2011.

[11] In so opining, the LASC Appellate Division in *Goldsmith* expressly disagreed with *People v. Khaled.* The appellate court in *Goldsmith* stated that it is not necessary that the testifying officer have been a percipient witness in order to authenticate the ARLES photographs. (*Goldsmith, supra*, at 193 Cal.App.4th Supp. at 1.) As described in detail *infra*, the present case is on all fours with *People v. Goldsmith* and readily distinguishable from *People v. Khaled.*

depiction of appellant entering the intersection against a red signal light." (*Id.* at p. 3.)

In the present case, Officer Butkus – exactly as did the officer in *Goldsmith* -- provided expert testimony regarding the operation of the ARLES, the photographs and data it produces based on his training and experience with the images obtained from the ARLES equipment. (CT, pp. 28-29.) Accordingly, the trial court's finding that Officer Butkus was the knowledgeable witness required to authenticate the photographic evidence and to lay the foundation for its admission into evidence (CT, p. 29) comports with the holding in *Goldsmith.* Specifically, as to Officer Butkus credentials, the record shows that Officer Butkus "testified about his background, training and experience, what the City had to do before being allowed to operate the red light camera ticket system, how the system works and how it is maintained." (CT, p. 28). As the trial court correctly observed, Officer Butkus was "perfectly capable" of authenticating the documents and laying the foundation for the admission of the ARLES evidence and that he had accomplished both of these tasks. (CT, p. 30). Thus, like the testifying officer in *Goldsmith*, Officer Butkus was a qualified witness for purposes of admitting computer records because he possessed the skill to fully explain the data generated by the system.

Conversely, Appellant's reliance on *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344 (AOB, p. 18) offers no support for her assertion that Officer Butkus was not competent to authenticate the ARLES evidence. *Ashford* is hardly, as Appellant would have it, "very analogous" to the present case but rather is readily distinguishable therefrom. In *Ashford*, the school district sued Ashford, its employee, for performing plumbing services for private customers on days for which he was on paid sick leave. At the administrative hearing, the school district presented no foundation for videotapes that purportedly depicted Ashford engaged in that private work, the sole witness being someone with no knowledge of the making of the videotapes. (*Ashford, supra*, 130 Cal.App.4th

347.) Further, the videotapes in *Ashford* were suspect because they skipped around and had time lapses and the district's witness admitted she had no knowledge as to whether the videotapes had been edited, spliced or pieced together. (*Id.*, at p. 347.) In the present case, as clearly distinguishable from the scenario in *Ashford*, Officer Butkus provided the requisite testimony as to the ARLES system and its functioning as well as his detailing own expertise relative to the system. (CT, pp. 28-29.) Importantly, too, there is no evidence whatever suggesting that any of the ARLES images were doctored, as was the case with the evidence in *Ashford*. (*Ashford, supra*, 130 Cal.App.4th at 347.) [12]

Officer Butkus's undeniable qualifications distinguish his testimony conclusively from that of the unqualified testifying officer in *People v. Khaled* and Appellant's reliance on that case provides no basis for her efforts to reverse her conviction.[13] Specifically, in *Khaled*, in the absence of competent officer testimony, the People relied instead on an out-of-court declaration to establish the majority of the red light violation – a declaration that the SCOC Appellate

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[12] Similarly unavailing is Appellant's reliance on *People v. Beckley* (2010) 185 Cal.App.4th 509. (AOB, p. 19.) In *Beckley*, the prosecution offered a photograph downloaded from the internet as evidence that an individual was flashing a gang sign. (185 Cal.App.4th at p. 514.) The court of appeal held that the photograph was unauthenticated and inadmissible, emphasizing that because photographs downloaded from the internet are easily "adulterate[d]" (*Id.* at p. 516.) In the present case, the ARLES photographs are printed out directly from the ARLES computer, as distinguishable from *Beckley*, in which an existing photograph was placed by way of human intervention on the internet and thus subject to manipulation. The appellate court in *Beckley* found that fact crucial to the inadmissibility of the photographs, stating that "[a]nyone can put anything on the Internet." (*Id.* at p. 515.) In the present case, the presumptions of Evidence Code, §§ 1552 and 1553 apply to authenticate the fact that the photograph as presented was what, in fact, the ARLES had captured, *i.e.*, that the computer printout was "an accurate representation of the computer information or computer program that it purports to represent."

[13] In fact, a decision by one appellate division is not binding on another. (See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409.)

Division held to be hearsay. (186 Cal.App.4th Supp. at p. 4.) In turn, the testifying officer in *Khaled* "was unable to testify about the specific procedure for the programming and storage of the system information..." (*Id.* at p. 5.) In the present case, as clearly distinguishable from *Khaled*, the testimony of Officer Butkus was competent and his testimony more than sufficient to authenticate and lay the foundation for admission of the ARLES evidence and there was no reliance on any declaration made by a person not before the court.

In sum, California case law establishes that Officer Butkus's testimony was sufficient to authenticate and lay the foundation for the ARLES photographs and Appellant's arguments to the contrary are without merit.

ii. The ARLES Data Text on the Photographs Was Properly Authenticated

As with photographs, testimony by a knowledgeable witness suffices to lay the foundation for admission into evidence of computer records. (*People v. Lugashi* (1988) 205 Cal.App.3d 632, 640.) In *Lugashi,* the appellate court held that a credit card fraud investigator was competent to authenticate and lay the foundation for admission of computerized bank records because she "understood the records and interpreted them in great detail notwithstanding the fact that she was neither a computer expert nor the custodian of records (*Id.* at p. 641.) Thus, even in the absence of evidence relative to the reliability of the hardware and software, or evidence as to the computer system's internal maintenance and security checks, the court of appeal in *Lugashi* held that the trial court had not abused its discretion in admitting the computer evidence, especially because "the data consists of retrieval of automatic inputs rather than computations based on manual entries." (*Id.* at p. 642.) Indeed, the appellate court in *Lugashi* observed that precluding admission of such testimony would be untenable because in that event, "only the original hardware and software designers could testify since everyone else necessarily could understand the system only through hearsay." (*Id.* at p. 641.) In the present case, the People provided the requisite authenticating

evidence of the computer-generated data text on the photographs by way of a "knowledgeable witness" (*Lugashi, supra,* 205 Cal.App.3d at 640) *i.e.*, Officer Butkus.

In sum, the People provided, by way of Officer Butkus, all of the evidence necessary to authenticate the ARLES evidence and Appellant's argument to the contrary is completely without merit, shows no error by the trial court and, accordingly, provides no basis for reversal of the judgment of conviction.

2. The Accuracy of the ARLES Evidence Was Sufficiently Established

a. A Statutory Presumption of Accuracy Applies to the ARLES Photographs, Data Text and Video

A photograph is subject to a rebuttable presumption of accuracy pursuant to Evidence Code, § 1553, which provides, in pertinent part, that "[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." (*Id.*) As the LASC Appellate Division stated in *Goldsmith, supra*, "[w]e conclude the accuracy of the photographs is subject to a rebuttable presumption pursuant to Evidence Code sections 1552, subdivision (a), and 1553." (*Goldsmith, supra*, 193 Cal.App.4th Supp. at 1.) Thus, by way of Evidence Code, § 1553, the ARLES photographs were "an accurate representation" of the images those photographs purport to represent, *i.e.*, Appellant's vehicle crossing the limit line against the red light (CT, 28-29.) In turn, Evidence Code § 1553 affects the burden or producing evidence such that a party seeking to challenge the accuracy or reliability of the video or digital medium images must introduce evidence of inaccuracy or unreliability in order to shift the burden of proof to the party presenting the photographs that the representation is an accurate representation of the images it purports to represent. (Evidence Code, § 1553.)

As with the photographs and video of Appellant's violation, the data bar text on the photographs is subject to a presumption of accuracy. In that regard,

Evidence Code, § 1552, subd.(a) provides, in pertinent part, as follows: "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." And as with the photographs and the statutory presumption regarding them, the presumption of accuracy provided by Evidence Code, § 1553 shifts the burden of proof to the party challenging the computer information. (Evidence Code, § 1552.) As it did with Evidence Code, § 1553, the LASC Appellate Division in *Goldsmith* recognized that presumption of Evidence Code, § 1552 also applied to authenticate the ARLES photographs and data. (*Goldsmith, supra*, 193 Cal.App.4th Supp. at 1.)

As to the extent of the statutory presumptions of accuracy, the court of appeal in *People v. Hawkins* (2002) 98 Cal.App.4th 1428 stated that Evidence Code, § 1552 establishes that a computer's print function has worked properly. (*Hawkins, supra*, at 1450.) Thus, by virtue of Evidence Code, § 1552, there exists a presumption that the print function of the ARLES equipment was working properly, *i.e.*, that the photograph and data text accurately reflected the existence and content of the computer information relative to the ARLES. Further, the People presented evidence that showed that the ARLES was working properly even beyond its print functions by way of the testimony of Officer Butkus and the maintenance logs, even though – as described below – the People did not have a burden to produce foundational evidence showing that the system was working properly. Whether by way of the statutory presumptions of accuracy or testimony relative thereto by Officer Butkus, the burden was on Appellant to raise doubts as to the reliability of the ARLES. This she utterly failed to do. [14]

[14] Moreover, Vehicle Code § 41101, subd. (b) provides a presumption that traffic devices comply with the requirements of law unless the contrary is established by competent evidence.

b. It Was Not the People's Burden to Establish That The ARLES Was in Working Order

Notwithstanding Appellant's contention that the People had a foundational burden to show that the ARLES was in working order (AOB, p. 15), California law as to admission of computer record evidence establishes otherwise.[15] Indeed, "our courts have refused to require, as a prerequisite to admission of computer records, testimony on the 'acceptability, accuracy, maintenance, and reliability of ... computer hardware and software.'" (*People v. Martinez* (2000) 22 Cal.4th 106, 132 [admission of computer-generated printout of defendant's criminal history not abuse of discretion in the absence of foundational testimony as to accuracy], citing *Lugashi, supra*, 205 Cal.App.3d 632, 642.) In *Lugashi*, the court of appeal stated that Lugashi's contention that the People had to produce foundational evidence of the accuracy of a bank's computer hardware and software was meritless, "especially where, as here, the data consists of retrieval of automatic inputs rather than computations based on manual entries." (*Lugashi, supra*, 205 Cal.App.3d at 642.) In the ARLES context, of course, the data consists of just such retrieval of automatic inputs and not manual entries such that, as stated in *Lugashi*, the party presenting the evidence does not have to produce evidence that a computer's hardware and software are accurate and reliable. (*Lugashi, supra*, 205 Cal.App.3d at 642.)

Similarly, in *People v. Nazary* (2010) 191 Cal.App.4th 727, the court of appeal held that computer generated information contained on gas station receipts offered to establish Nazary's theft were admissible, notwithstanding the absence of foundational evidence that the PIC ("pay island cashier") machine was operating properly at the time the computer printouts were made or any showing of accuracy or reliability of the printed information on the receipts. (*Nazary,*

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[15] In *People v. Martinez*, the California Supreme Court observed that questions as to the accuracy of computer printouts affect only the weight and not the admissibility of business records. (*Martinez, supra*, 22 Cal.4th at p. 132.)

supra, 191 Cal.App.4th 727, 754.) In rejecting the argument that the prosecution had a foundational burden to establish the accuracy of the PIC machines, the court of appeal in *Nazary* held that it was the defendant's burden to impeach the mechanical records through evidence of machine imperfections or by way of cross-examination of the expert witness who explained or interpreted the information in the device. (*Id.* at p. 754 quoting *Hawkins, supra,* 98 Cal.App.4th at pp. 1449–1450.)[16] Thus, based on *Nazary* and *Lugashi*, it is clear that the kind of extensive foundational evidence that Appellant demands in the instant case contravenes the requirements for admission of computer records firmly established in California.

Finally, while *Lugashi* and *Nazary* establish that the People in the present case did not have the burden to produce foundational evidence of reliability of the ARLES, the fact is that such evidence *was* provided by the testimony of Officer Butkus in conjunction with the ARLES maintenance logs that were included in People's Exhibit #1. Thus, even if this Court agrees that the People were required to produce foundational evidence of accuracy of the ARLES, that evidence was produced – as detailed immediately below -- and the trial court did not err in admitting the ARLES evidence.

c. <u>The People Produced Evidence That Establishes That The ARLES Was Accurate</u>

i. Officer Butkus Testified That The ARLES Was in Working Order

In addition to the presumption of accuracy provided by Evidence Code, §§ 1552 and 1553 as to the data text on the photographs and the photographs of the violation -- and despite the lack of a foundational requirement to make such a

[16] The court of appeal in *Nazary* stated that "even if we consider Nazary's counsel's statement at the close of trial renewing his earlier hearsay objections as preserving the issue, we conclude the trial court properly overruled them and admitted the printed portion of the exhibits." (*Nazary, supra*, 191 Cal.App.4th at 754.)

showing -- Officer Butkus testified that the ARLES was in good working order. Specifically, Officer Butkus testified that he had reviewed the technician's maintenance logs relative to the ARLES equipment at the intersection of Appellant's violation and that the cameras were working properly on the date and at the time of Appellant's alleged violation. (CT, pp. 28-29). In turn, the detailed maintenance logs themselves established the working order of the ARLES. The maintenance logs show that the first inspection was completed May 27, 2009 and the second inspection was completed on June 23, 2009. (Maintenance Logs, People's Exhibit #1.) Appellant's violation took place on June 3, 2009. Thus, the maintenance logs establish that the myriad maintenance tasks were performed seven (7) days prior to Appellant's violation and seventeen (17) days thereafter. (*Id.*)

Appellant's reliance on *People v. Hawkins, supra,* to suggest that the prosecution in the present case did not present sufficient evidence of accuracy ignores critical facts in *Hawkins*. In *Hawkins*, the computer-generated evidence in question pertained to the accuracy of the date on which certain computer files were downloaded and the accuracy of the printed date was crucial to the establishment of a crime. (*Hawkins, supra*, 98 Cal.App.4th at pp. 1434-1435.) Nonetheless, the court of appeal in *Hawkins* was satisfied with testimony that was, at best, perfunctory, *i.e.*, "that when the source code files were accessed on the...computer, it *appeared* the computer's clock was functioning properly" (*Hawkins, supra*, 98 Cal.App.4th at 1437) even though the prosecution's witness "acknowledged that...a systems administrator could change the time on a computer clock." (*Id.* at p. 1437.) But simple observation of the printout in *Hawkins* provided no clue as to whether or not the printout was accurate and it was unclear whether or not a printed date is accurate, or might have been manipulated, as the prosecution in *Hawkins* conceded. (*Hawkins, supra*, 98 Cal.App.4th at 1437.)

In the present case, evidence that the ARLES computer was in working order far outweighs the vague evidence of reliability in *Hawkins*. (*Hawkins, supra*, 98 Cal.App.4th at p.1450.) Here, unlike the assumption of accuracy relative to the time of the downloading of computer information in *Hawkins*, the ARLES photographs alone are sufficient to establish that a vehicle entered the intersection after the light turned red because the facts established by the product of the computer's operations, the printout, are consistent with the facts depicted by the photographs and *vice versa*. Further, the video shown at trial further corroborated the information contained on the photographs and in the printed computer data.

In that regard, the ARLES printout consists of a recording of intersection location, time/date stamps, speed limit at the intersection, vehicle speed, duration of amber light, amount of time that the red light was illuminated when the vehicle was before the limit line and after the vehicle had fully entered the intersection, and time elapsed between photographs. (People's Exhibit #1.) In turn, the identification of the intersection, the date of the infraction and the duration of the amber light were corroborated by testimony of the officer in court. (CT, p. 28-29.) There is no indication that the computer data is inconsistent with the photographs. The hour of the violation is shortly after 7 PM in June, and the photographs show that the sky is not yet fully dark but the streetlights and car headlights are illuminated. The vehicle speed is recorded to be 29 MPH and the elapsed time is 0.75 second. The photograph shows that the car traveled about one (1) car length during that time. (People's Exhibit #1.) Those facts are internally consistent, thereby demonstrating that the computer was functioning properly. Indeed, our Ninth Circuit has held that photographs may be properly explained and authenticated by the contents of a photograph itself, together with other circumstantial or indirect evidence such as an identification of the scene itself and its coordinates in time and place. (*United States v. Stearns* (9th Cir. 1977) 550 F.2d 1167, 1171.) Here, the contents of the ARLES photographs serve to authenticate and support their admission.

ii. The ARLES Video of Appellant's Violation Established That the ARLES Was in Working Order

In addition to Officer Butkus's testimony that the ARLES was in working order and the maintenance logs establishing that fact, the video of Appellant's violation -- which is recorded by a camera other than that providing the still photographs of the ARLES -- of Appellant's violation corroborates the photographs and data text thereon and thus confirms that the ARLES was working properly. The video itself substantiates the photographic evidence that the camera was working by showing that the lights were red, where Appellant's vehicle was when the traffic light turned yellow and then red. (People's Exhibit #1) Appellant had the opportunity to review the video not once but twice when Officer Butkus "played the video of the alleged violation two times: first in real time and then again in slow motion"; in fact, "Appellant confirmed that she did see the video both times." (CT, p. 29.)

d. The ARLES Evidence Was Properly Admitted Because Appellant Failed To Carry Her Burden of Presenting Evidence Casting Doubt On The Accuracy or Reliability of the ARLES Evidence

Whether by way of the statutory presumptions provided by Evidence Code, §§ 1552 and 1553 or the testimony of Officer Butkus and his presentation of the maintenance logs, the People's showing of accuracy of the ARLES evidence shifted the burden to Appellant to show inaccuracy of the system. As to the computer function of the ARLES equipment and the data text recorded thereby, the presumptions provide evidence that the printer functioned properly and thus shifted the burden to Appellant to show that there was inaccuracy or unreliability as to the print function. (Evidence Code, § 1552; *Hawkins, supra*, 98 Cal.App.4th at 1450.) Appellant, in turn, failed to present any evidence to suggest that the print function of the ARLES computer as reflected by the data text on the photographs

or the photographs themselves was in any way inaccurate or unreliable, thus failing to carry her burden. Similarly, in regard to the showing that the equipment was in good working order and accurate even beyond the print function, the testimony of Officer Butkus in conjunction with the maintenance logs shifted the burden to Appellant. Once again, Appellant failed to carry that burden, making no showing of unreliability or inaccuracy of the ARLES.[17]

In sum, it was Appellant's burden to produce evidence calling into question the accuracy or reliability of the ARLES evidence and having failed to carry that burden, the ARLES photographs, data text and maintenance logs – all authenticated and a foundation laid for each -- were properly held to be admissible. (CT, p. 28-29.) In turn, that ruling by the trial court provides no basis for reversal of the judgment of conviction against Appellant.

3. The Trial Court Did Not Err in Holding That The ARLES Evidence is Not Hearsay

a. The ARLES Photographs and Data Text Are Not Hearsay

Also without merit is Appellant's contention that the ARLES photographs and data text constitute hearsay evidence. Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evidence Code, § 1200, subd. (a).) In turn, a "statement" is (a) oral or written verbal expression or (b)

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[17] Appellant's claim that the maintenance logs failed to show good working order of the ARLES system because they did not address the computer in the Redflex offices in Arizona is without merit. (AOB, p. 16.) The information relative to the violation was recorded at the intersection of Appellant's violation. To the extent that computer in Arizona is involved it would neither analyze nor calculate information but simply print out what was already recorded by the computers for which the maintenance logs exist. Accordingly, the accuracy of that computer is established by the presumption of accuracy provided by Evidence Code, §1553. In turn, application of the presumption shifted the burden to Appellant to show some unreliability or inaccuracy – this she failed to do.

nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evidence Code § 225.)[18] The definition of a statement does not apply to the ARLES photographs and video. The ARLES were captured by an automated camera and the data text was generated by computer, such that they can be neither an oral or written verbal expression nor the non-verbal conduct of a person and thus cannot be a statement. (Evidence Code, § 225.) And because the photographs, video and data text do not constitute statements, such evidence cannot be defined as hearsay under Evidence Code, § 1200.

Indeed, California law soundly supports the non-hearsay nature of the ARLES photographs and data text. In *Hawkins, supra,* in which the court of appeal rebuffed Hawkins' hearsay objection to a computer printout showing the time certain computer files were last accessed (*Hawkins, supra*, 98 Cal.App.4th at p. 1446), the court of appeal found that unlike printouts which contain information entered by human operators, those which reflect information the computer generated on its own cannot be considered hearsay. (*Id.* at p. 1449.) The court in *Hawkins* concluded that, "[t]he Evidence Code does not contemplate that a machine can make a statement" (*Hawkins, supra*, 98 Cal.App.4th at p. 1449) such that the hearsay rule did not apply to such evidence. And in *Nazary, supra*, the court of appeal held that as to mechanically-generated receipts from machines which accepted customers' cash as payment for gas, "[t]he printed portions ... including the date, time, and totals were not statements inputted [sic] by a person, but were generated by the PIC machine" and, as such were admissible and were not hearsay. (*Nazary, supra*, 191 Cal.App.4th at 754-755.)

As stated in *Nazary*, the fact that the hearsay rule does not apply to mechanical evidence comports with the rationale behind the rule, *i.e.*, the "requirement that testimonial assertions shall be subjected to the test of cross-

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[18] "Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity." (Evidence Code, §175; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1449.)

examination." (*Nazary, supra*, 191 Cal.App.4th at 754-755.) 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. (*Goldsmith, supra*, 193 Cal.App.4th Supp. at p. 4, citing *Hawkins, supra,* 98 Cal.App.4th at p. 1449.) In the present case, there is no chance that the ARLES evidence could have been cross-examined because it is not based on statements input by a person, but rather information that was generated by machine. Put another way, the ARLES equipment cannot make a statement, cannot be cross-examined and thus cannot constitute hearsay for purposes of Evidence Code, § 1200. Accordingly, the testimony of a knowledgeable witness was sufficient to lay the foundation for its admission.[19]

Further, California courts have held that images depicted in photographs are demonstrative evidence of a crime and, as such, are not inadmissible under the hearsay rule. (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746) [holding that photographs and video "are demonstrative evidence, depicting what the camera sees," and "are not hearsay"].) In *Cooper*, the court of appeal held that a videotaped tour of a residence depicting the condition of the home of a theft victim was demonstrative, non-testimonial evidence that was not objectionable "because there is no statement of a witness ... [and] [b]ecause a defendant cannot possibly cross-examine photographic evidence at all...." (*Cooper, supra*, 148 Cal.App.4th

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[19] Relative to the hearsay issue, the LASC Appellate Division, in affirming the trial court's judgment in the present case, correctly held that the photographic evidence and maintenance logs do not constitute hearsay, noting that the photographs are demonstrative evidence and not statements by a person such that the trial court did not abuse its discretion in overruling the hearsay objection to the photographic evidence. (B[redacted]Opinion, p. 4.) As to the maintenance logs, the LASC Appellate Division stated that if logs are created by field technicians -- as were the logs here -- they are not subject to exclusion as hearsay because they are created for the purpose of determining accuracy of equipment and not out of court analogs to trial testimony that constitute testimonial evidence. (B[redacted] Opinion, pp. 4-5, citing *People v. Cage* (2007) 40 Cal.4th 965, 984.)

746.) As in *Cooper*, the ARLES photographs, data text and video are not statements of a witness that can be cross-examined and, accordingly, they do not constitute testimonial hearsay.

b. Even If Deemed To Be Hearsay, The ARLES Evidence Is Admissible Under The Business Records Exception To The Hearsay Rule

Even if this Court were to conclude that the ARLES photographs, data text and maintenance logs are hearsay that evidence falls soundly within the business records exception to the hearsay rule and is admissible on that basis. In that regard, Evidence Code § 1271 requires the following:

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

This exception to the hearsay rule is based on the assumption that records kept in the general course of business usually are accurate, and may be used as evidence of the matter recorded. (*Doyle v. Chief Oil Co.* (1944) 64 Cal.App.2d 284, 292). In the present case, the prerequisites for application of Evidence Code § 1271 are soundly met by the ARLES evidence.

i. The ARLES Evidence Was Made in the Regular Course of Business

Evidence Code, § 1271(a) requires that a business record be a writing made in the regular course of a business. In the instant matter, all of the documents presented at trial -- the photographs, video, maintenance logs and the other evidence presented herein -- were prepared in the ordinary course of business of the BHPD. More particularly, the regular business of the BHPD in the present context is to safeguard the public and protect the health, safety, and welfare of the people (see, generally, *McKay Jewelers v. Bowron* (1942) 19 Cal.2d 595, 600) by,

inter alia, monitoring intersections and encouraging safe driving habits. Citing traffic violators is, indisputably, a function of the regular business of the traffic division of the BHPD. As to the maintenance logs, not every maintenance log becomes evidence in a criminal matter. Indeed, maintenance of the ARLES system and the creation of the logs documenting that work are not prepared with litigation in mind but to document that the system is being properly maintained. (See, maintenance logs (People's Exhibit #1.)

Accordingly, the ARLES evidence satisfies the first prong of the business records exception under Evidence Code, § 1271, subd. (a).

ii. The ARLES Evidence Was Made At Or Near The Time Of The Act, Condition, Or Event

Evidence Code, § 1271, subd.(b) provides that a business record must be "made at or near the time of the act, condition, or event..." In the present case, the ARLES photographs, data text and video were, as described by Officer Butkus and as evidenced by the photographs video themselves, recorded at the time of the violation. (CT, pp. 28-29.) As to the maintenance logs, those are prepared at the time the inspection of the ARLES equipment is accomplished, as indicated on the logs. Accordingly, each element of the ARLES evidence is created at the time of the event it records, as required by Evidence Code, § 1271, subd. (b).

iii. Officer Butkus Was Qualified To Authenticate The ARLES Evidence As Business Records

As provided in Evidence Code § 1271, subd.(c), business records are authenticated when "the custodian or other qualified witness testifies to its identity and the mode of its preparation." (*Id.*)(emphasis added.) In turn, a person is a "qualified witness" in the business records context when that witness is familiar with the procedures surrounding the creation of the records. (*County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1450-1451.) Moreover, such business records can be authenticated and admitted in the absence of the technician who actually made the record. (*Id.* at p. 1449.) Because the statute expressly provides

that a qualified witness may authenticate business records, Appellant's insistence that admission of the ARLES evidence of her violation required, *ipso facto*, the presence of Redflex's custodian of records or the technicians who performed maintenance on the equipment at the intersection of her violation is without merit.

In the present case, Officer Butkus was exactly the "qualified witness" required by Evidence Code § 1271, subd. (c) to render the ARLES evidence admissible. As detailed above, Officer Butkus's testimony established his familiarity with the ARLES system, his training and experience relative to the ARLES and his knowledge about how the system operates and how it is maintained. (CT, pp. 28-29). Officer Butkus also testified about the details of the ARLES photographs and how they are generated (CT, p. 29), as well as describing the contents of the videos and photographs of Appellant's violation. (*Id.*). Thus, the trial court properly found sufficient foundation for admission of that evidence. (CT, pp. 29-30).

As to Appellant's claim that the People had to present testimony from the actual Redflex field technicians, not everyone "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." (*Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, 2532, fn.1, 174 L.Ed.2d 314.) As particularly relevant here, the majority noted "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records. .." (*Ibid.*) In sum, as the record shows, Officer Butkus was a witness qualified to lay the foundation for business records under Evidence Code, § 1271, subd. (a) and did provide that foundation.

iv. The Sources Of Information And Method And Time Of Preparation of The ARLES Evidence Indicate Its Trustworthiness

The ARLES evidence, as required by Evidence Code, § 1271, subd.(d), establishes that its "sources of information and method and time of preparation were such as to indicate its trustworthiness."

In the context of the recordation of an ARLES violation, the ARLES photographs and video are activated by a computer that triggers the photographs and video, electronically storing the photographs and video and then sending the information to Redflex. As to the trustworthiness of such a process, the California Supreme Court has noted that a camera is a "device whose memory is without question more accurate and reliable than that of a human witness" (*Bowley*, *supra*, 59 Cal.2d, 861). In so holding, the *Bowley* court observed that it was proper to admit such "device" evidence because that it is a "sound rule" to allow a picture to "speak for itself" and to admit it as a silent witness (*Id.* at p. 860). As to the computer data, a lesser evidentiary showing is required for its admission because "the data consists of retrieval of automatic inputs rather than computations based on manual entries." (*Lugashi*, *supra*, 205 Cal.App.3d at 642).

Further, as described above, Evidence Code, §§ 1552 and 1553, respectively, create a presumption that printed representations of computer information or of images stored on a video or digital medium are accurate representations of the images they purport to represent, unless a defendant introduces evidence that the information is inaccurate or unreliable. (Evidence Code §§ 1552, 1553). Finally, as to the issue of reliability and as discussed above, Appellant provided no evidence whatever suggesting that there was any problem with the equipment or the manner of maintenance and thus failed to carry her burden relative to that issue.

v. Admission of the Evidence Was Within The Trial Court's Sound Discretion And Should Not Be Disturbed On Appeal

To the extent the ARLES evidence is considered business records, the trial judge has broad discretion in admitting it and in determining whether sufficient foundation has been laid for it (*People v. Dorsey* (1974) 43 Cal.App.3d 953, 961); absent a showing of abuse, the exercise of such wide discretion will not be disturbed on appeal. (See, *Exclusive Florists, Inc. v. Kahn* (1971) 17 Cal.App.3d 711, 716; *Grant W., supra*, 187 Cal.App.3d at 1450.) As to photographs, "'[t]he question of the sufficiency of the preliminary proofs offered to identify the photograph or to show that it is a fair and accurate representation of the objects which it purports to portray is a matter within the discretion of the trial court.'" (*Doggett, supra*, 83 Cal.App.2d 405, 409, quoting 20 Am.Jur. 610, § 730). The same principle militates against appellate court involvement when the trial court judge has admitted evidence and where there is substantial evidence to support his or her ruling, it will be sustained. (*People v. Mullen* (1953) 115 Cal.App.2d 340, 345).

Accordingly, should this Court determine that any or all of the ARLES evidence of Appellant's violation was, in the first instance, hearsay, it should hold that that evidence was properly admitted under the business records exception by way of the testimony of Office Butkus as a qualified person under Evidence Code § 1271, subd.(c) such that admission of that evidence provides no reversible error.[20]

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[20] Even though the trial court did not reach the issue of a hearsay exception, having ruled against Appellant's hearsay objection in the first instance, the decision to admit the ARLES evidence if determined by this Court to be correct based on a hearsay exception suggests no prejudicial error by the trial court. Simply put, regardless of the trial court's reasoning, the court of appeal will affirm when the conclusion is correct. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610; see also, *Little v. Los Angeles County Assessment Appeals Boards*

4. Admission Of The ARLES Evidence Did Not Implicate – Much Less Violate -- Appellant's Sixth Amendment Right To Confrontation

a. Appellant Waived Her Right To Argue A Sixth Amendment Violation Because She Failed To Subpoena Witnesses

As described above, it was not part of the People's burden to produce the Redflex custodian of records or maintenance technicians at Appellant's trial because, as the trial court stated, Officer Butkus was competent to lay the foundation for admission of the ARLES evidence. (CT, p. 29-30.) Indeed, if Appellant wished to have the custodian of records of Redflex present, she should have exercised her prerogative to subpoena that person, as the trial court explained to her. (CT, p. 30). It was Appellant's choice not to do so and she cannot now be heard to complain that it was the People's burden to produce the Redflex custodian of records or other "witnesses". In fact, in choosing not to subpoena certain people, Appellant waived her Sixth Amendment right to confront them. (*Monaghan v. Department of Motor Vehicles* (1995) 35 Cal.App.4th 1621, 1624, 1626.)

When, as here, a motorist fails to utilize subpoena procedures, he cannot successfully argue that his right to cross-examination has been violated. (*Monaghan, supra,* 35 Cal.App.4th at 1624.) In *Monaghan*, the court of appeal held that when a motorist did not properly invoke the subpoena process for securing the presence of a blood test analyst, his right to cross-examination was *not* violated. (*Id.* at pp. 1624, 1626; see also, *Park Motors, Inc. v. Cozens* (1975) 49 Cal.App.3d 12, 17-18 [failure to invoke right to cross-examine witnesses whom the Department of Motor Vehicles did not produce meant that plaintiff could not be heard to complain of deprivation of any right]).

(2007) 155 Cal.App.4th 915, 925, fn. 6—["Respondents are free to urge affirmance of the judgment on grounds other than those cited by the trial court".]

In the present case, Appellant has waived her argument relative to any alleged right to cross-examine additional witnesses because she did not issue any subpoenas compelling attendance of such persons. In fact, Appellant never even sought discovery in her case. (CT, p. 30).

b. There Was No Violation of Appellant's Right To Confrontation

i. The ARLES Evidence is Not Testimonial And Does Not Implicate the Sixth Amendment

Even if Appellant had not waived her right to subpoena the Redflex custodian of records or technicians who maintained the ARLES equipment, the absence of such witnesses at trial does not implicate – much less violate – her Sixth Amendment right to confrontation. In fact, the Sixth Amendment requires the presence at trial of a technician who actually prepared evidence *only* if that evidence is "testimonial". (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177.)[21]

In stating that the Confrontation Clause bars admission of testimonial hearsay, the Court in *Crawford* described "testimonial statements" as "ex parte in-court testimony or its functional equivalent"; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and, statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Crawford, supra,* at 541 U.S. at 68.) In turn, this "core class of testimonial statements" implicates the Sixth Amendment and requires the presence in court of the witnesses who actually made the statements. (*Id.*) Because – as detailed below – ARLES evidence emphatically is *not* testimonial hearsay as such is described in *Crawford* and its progeny, Appellant's

[21] *Crawford* also provides that presence of the document preparer is not required if the declarant is unavailable at trial and the defendant has had a prior opportunity to cross-examine him. (*Crawford, supra,* 541 U.S. 51-52).

claim of Sixth Amendment violation based on admission of that evidence is conclusively without merit.

ii. ARLES Photographic, Data Text and Video Evidence Is Non-Testimonial Because It Is Not the Product of Human Agency

As a threshold matter, the ARLES evidence cannot be testimonial because it created by a device and is not the product of human agency. Put another way, there is no technician who analyzes and interprets raw ARLES data; the information is captured on the photograph and in the data text and video without any such intermediary. Just as this evidence cannot constitute hearsay because it does not involve a statement by a person, neither does the ARLES evidence come within the purview of the Sixth Amendment.

More particularly, the ARLES photographs and video are not testimonial for purposes of the Sixth Amendment because, as recognized by the court of appeal in *People v. Cooper*, "[p]hotographs and videotapes are demonstrative evidence, depicting what the camera sees. ..They are not testimonial ..." (*Cooper, supra,* 148 Cal.App.4th at p. 746.) Accordingly, as with Appellant's hearsay objection, the Sixth Amendment argument is unavailing for the very reason that the ARLES – like evidence generated by other mechanisms determined by California courts not implicate hearsay or Sixth Amendment concerns – cannot be cross-examined. (See, *Cooper, supra*, 148 Cal.App.4th 746.) Indeed, here, as in *Nazary,* the only testimony available – or required – when evidence is generated by a device is that of an expert witness who explains the data. Here, that witness was Officer Butkus and Appellant had – and, as she concedes, exercised – her right to confront him.

iii. The ARLES Evidence is Non-Testimonial Because It Is A Contemporaneous Recordation of Observable Events

In addition to the fact that the ARLES evidence is not subject to Sixth Amendment constraints because no human agency capable of being cross-examined was involved in generating the photographs or data text, neither does the Sixth Amendment require testimony by Redflex technicians who were involved with the maintenance of the ARLES and who prepared the maintenance logs relative to the intersection of Appellant's violation.

Specifically, as to the testimony of technicians relative to the rule established in *Crawford*, the California Supreme Court in *People v. Geier* (2007) 41 Cal.4th 555, held that laboratory DNA reports that were a "contemporaneous recordation of observable events" were not "testimonial" and did not require the presence in court of the lab technicians who had produced the evidence. (*Id.* at p. 607). Thus, a person knowledgeable about a laboratory's procedures may testify about test results in the absence of the technician who produced those results, without violating a defendant's Sixth Amendment rights. (*Geier, supra,* 41 Cal.4th at p. 605.) In *Geier*, the California Supreme Court specifically held that admission of laboratory DNA reports did not implicate a defendant's right of confrontation and that admission of such results did not require the presence in court of the lab technicians who had produced the evidence. (*Geier, supra,* 41 Cal.4th at p. 607.)[22]

As in *Geier*, in the ARLES context, the record is a contemporaneous observation of events. The photographs, data and video capture a red light violation at the moment it occurs. The maintenance logs are executed when the equipment inspection is completed. Further, as in *Geier*, all of the ARLES evidence in the ARLES context is explained and authenticated by the testimony of

[22] *Geier, supra*, 41 Cal.4th 555, cert. den. Jun. 29, 2009, No. 07-7770, sub nom. *Geier v. California* (2009) 129 S.Ct. 2856, 174 L.Ed.2d 600, 77 U.S.L. Week 3709.

a person knowledgeable with the procedures underlying the evidence and available to be cross-examined as to the contents of the evidence. (See, *Geier, supra,* 41 Cal.4th at p. 605, 607.)

iv. ARLES Evidence Is Non-Testimonial Because It Constitutes Business Records

Returning for a moment to *Crawford*, the Supreme Court in that case stated that evidence may be testimonial when it is reasonably believed that it will later be used at trial, but also noted that business records "by their nature [are] not testimonial". (*Crawford, supra*, at 541 U.S. 56.). Thus, "[t]he fact that business records may, at times, become relevant evidence in a criminal trial, or that such future use may be foreseeable, does not change the purpose for which the records were prepared." (*People v. Taulton* (2005) 129 Cal.App.4th 1218, 1224.) Accordingly, while business record evidence may ultimately be used in criminal proceedings, if it is not prepared primarily for the purpose of providing evidence in criminal trials, it is not testimonial and not subject to Sixth Amendment consideration. (*Id.* at p. 1224.) As established above, ARLES evidence first and foremost constitutes business records, maintained in the ordinary course of BHPD business, regardless of whether violations are captured.[23] In turn, it is not testimonial and its admission does not Because the ARLES evidence is not testimonial, its admission into evidence did not implicate, much less violate, Appellant's Sixth Amendment right to confrontation.

c. *Melendez-Diaz* Does Not Apply to the Present Case and The Holding Therein Does Not Alter The Fact That Admission of ARLES Evidence Did Not Violate Appellant's Sixth Amendment Rights

[23] While the Court in *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, 174 L.Ed.2d 314 held that the business records exception to the hearsay rule does not trump the Sixth Amendment right to confrontation, such is the case only when the evidence, in the first instance, is testimonial in nature. (*Ibid.* at p. 2540.)

Ignoring, understandably, analogous case law establishing that ARLES evidence is non-testimonial, Appellant invokes *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, 174 L.Ed.2d 314, in an effort to argue that admission of the ARLES evidence violated her right to confrontation. (AOB, p. 28). In *Melendez-Diaz*, the United States Supreme Court held that the right to confrontation required the presence in court of laboratory technicians who, in lieu of testifying, submitted sworn affidavits stating that material seized was cocaine. (*Melendez-Diaz, supra*, 129 S.Ct. at 2532.) In so holding, the *Melendez-Diaz* Court observed that those affidavits constituted the sort of core testimonial evidence identified in *Crawford* and, absent the presence in court of the affiants were inadmissible. (*Melendez-Diaz, supra*, 129 S.Ct. at 2532.)

In the present case, as the trial court expressly and properly held, *Melendez-Diaz* is inapplicable to the present case. (CT, p. 29). As detailed below, ARLES evidence is readily distinguishable from that found to implicate Sixth Amendment rights in *Melendez-Diaz*. Moreover, the facts surrounding admission of the ARLES evidence in the present case are closely analogous to those in *Geier*, in which the California Supreme Court held that laboratory DNA reports were properly admitted in the absence of the technicians who performed the underlying tests. (*Geier, supra,* 41 Cal.4th at p. 607.) Indeed, *Geier* remains good law after *Melendez-Diaz*.[24]

In *Melendez-Diaz*, the Supreme Court held that sworn affidavits stating that a technician had tested material seized and found it to be cocaine could not be admitted in lieu of testimony by the technician who had done the testing. (*Melendez-Diaz, supra*, 129 S.Ct. at 2532.) In the capturing of an ARLES violation, as contrasted with the test procedure in *Melendez-Diaz*, there is no

[24] The United States Supreme Court denied certiorari in *Geier* four days after the *Melendez-Diaz* decision. The effect of the *Melendez-Diaz* decision on the *Geier* decision is currently pending before the California Supreme Court in several cases.

human agency involved in ascertaining the results; the ARLES cameras are activated by a computer that triggers the photographs and video, electronically storing them and sending the information to Redflex. There was no such device evidence at issue in *Melendez-Diaz*, but only the "human element", *i.e.*, the statements of the actual technicians who had performed the drug tests and submitted declarations in lieu of being present in court.

The present case -- as is *Geier* -- is further distinguishable from *Melendez-Diaz* on at least two important grounds, *i.e.*, the contemporaneity of the preparation of the evidence with the event recorded and the presence in court of a qualified witness to authenticate and lay the foundation for the evidence.

i. Unlike the Affidavits in *Melendez-Diaz*, ARLES Evidence Is A Contemporaneous Recordation of Observed Facts

ARLES evidence differs in crucial and dispositive ways from the affidavits in *Melendez-Diaz* such that it does not require testimony by the technicians who produced the evidence. Specifically, in *Melendez-Diaz*, the Court emphasized the fact that the sworn affidavits in question were not contemporaneous recordations but were prepared "almost a week after the tests were performed." (*Melendez-Diaz, supra*, 129 S.Ct. at 2535). Conversely, ARLES evidence -- as described above -- is a contemporaneous recordation of observable events rather than the documentation of past actions. In that regard, ARLES evidence is similar to the evidence in *Geier*, which was presented by a competent witness (though not the preparer of the documents) and which constituted evidence recorded contemporaneously with the events observed, *i.e.*, the lab report in *Geier* was created at the time the tests and examination were conducted. (*Geier, supra*, 41 Cal.4th at 605, 607.) Thus, the ARLES photographs of the violation and the maintenance logs, prepared at the time those events occurred, resemble in that regard the properly admitted technician reports in *Geier* and are clearly distinguishable from the affidavits held to be inadmissible in *Melendez-Diaz*.

ii. Unlike the Affidavits in *Melendez-Diaz*, ARLES Evidence Was Introduced By A Competent Witness Available for Cross-Examination

Another basis on which the presentation of ARLES evidence in the present case is like that in *Geier* and dissimilar from the evidence in *Melendez-Diaz*, is the fact that in *Geier*, the analyst's supervisor testified to the nature of the tests reflected in the report and the procedures for recording the observations described therein. (*Geier, supra*, 41 Cal.4th at pp. 596-609.) Specifically, the director of the laboratory where the DNA testing occurred testified that she supervised the analysts' work in the laboratory, including that of the analyst who matched the DNA found on the victim's body to the defendant's DNA. (*Geier, supra*, 41 Cal.4th at p. 594). The director testified that she reviewed the testing and determined that it was accomplished according to protocol and her testimony was subject to cross-examination. (*Id.* at p. 596). Here, as in *Geier*, ARLES evidence was presented and explained in detail by a witness with personal knowledge of it, competent to testify to the procedures surrounding its creation and fully available for cross-examination by Appellant.

No such competent testimony was introduced in *Melendez-Diaz*; rather, the sworn affidavits held to violate the right to confrontation in that case were submitted in lieu of live testimony. Indeed, the U.S. Supreme Court emphasized the fact that the affidavits contained only "bare-bones" statements such that the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analyst may not have possessed." (*Melendez-Diaz, supra*, 129 S. Ct. 2537). Unlike a live witness, these affidavits were not subject to cross-examination. In the present case, Appellant cross-examined Officer Butkus at length.

In sum, the ARLES evidence is clearly distinguishable from the evidence found to be testimonial in *Melendez-Diaz*. Accordingly, Appellant's efforts to

argue that *Melendez-Diaz* establishes a Sixth Amendment violation of her right to confrontation or supports a reversal of the judgment of conviction against her is entirely without merit.

In sum, the trial court did not err in admitting the ARLES evidence which was authenticated and for which a foundation was laid. Moreover, and Appellant's hearsay and Sixth Amendment arguments are without merit. Accordingly, Appellant's claims of error provide no basis whatever for reversal of the judgment of conviction against her.

III.

AFFIRMING THE JUDGMENT OF CONVICTION AGAINST APPELLANT WILL SECURE UNIFORMITY OF DECISION WITH EXISTING CASE LAW

A. The Present Case Is On All Fours With *People v. Goldsmith*, Such That Affirming The Judgment of Conviction Will Constitute Uniformity of Decision

Because this Court accepted transfer of the instant case to ensure uniformity of decision relative to ARLES cases, it is critical to note that the present case is on all fours with *People v. Goldsmith, supra,* in its facts and rulings relative to the admissibility of ARLES evidence. In *Goldsmith*, as in the present case, the central issue was whether the testifying police officer was qualified to authenticate and lay the foundation for admissibility of the ARLES evidence. The answer to that question in *Goldsmith* was a resounding "yes" -- as it should be in the present case.

As detailed above, the LASC Appellate Division in *Goldsmith* stated that if an officer's testimony demonstrated that the portrayal of ARLES data and images contained therein were what the prosecution claimed they portrayed, namely, a digital depiction of a motorist entering the intersection against a red signal light, the photographs would be admissible even if the testifying officer was not a percipient witness to the violation and was not personally responsible for setting

up the camera. (*Goldsmith, supra*, 193 Cal.App.4th Supp. 1). Thus, in *Goldsmith*, the LASC Appellate Division held that ARLES photographs and the data thereon are presumed to be accurate under the Evidence Code and that they had been additionally authenticated by the testifying officer who had the knowledge about the methods used by the ARLES to transmit the photographs to the officer's law enforcement agency. (*Goldsmith, supra*, 193 Cal.App.4th Supp. 1). The LASC Appellate Division also held that the data and images on the photographs did not constitute hearsay because they did not amount to a "statement" from a human declarant. (*Goldsmith, supra*, 193 Cal.App.4th Supp. 1).

In *Goldsmith*, as here, the only witness for the People was a police officer who had six years of experience working in the area of automated red light enforcement, as well as the knowledge necessary to explain the issuance of the traffic citation. (*Goldsmith, supra*, 193 Cal.App.4th Supp. 1.). On the basis of that expertise, LASC Appellate Division in *Goldsmith* held that the officer's testimony was sufficient to authenticate and lay the foundation for admission of the ARLES evidence. (*Id.* at pp. 1,3).

In the present case, as in *Goldsmith*, the testifying officer (here, Officer Butkus) was a witness highly experienced in all the workings of the ARLES, the images obtained from the cameras, as well as the particulars of individual citations, including Appellant's. Based on that experience and knowledge, Officer Butkus provided expert testimony regarding the operation of the system, photographs and data it produces and all the details of Appellant's particular violation. (CT, pp. 28-29.)

In sum, because the *bona fides* of the testimony of the officer in *Goldsmith* so closely resemble those of Officer Butkus in the present case, affirming Appellant's conviction herein will be consistent with the holding in *Goldsmith*, *i.e.*, that such testimony establishes the admissibility of ARLES evidence. Accordingly, in affirming the judgment of conviction in the present case, this

Court will guarantee uniformity of decision in California courts relative to the admissibility of ARLES evidence.

B. The Present Case is Readily Distinguishable From *People v. Khaled* Such That Affirming The Judgment of Conviction in the Present Case Will Constitute Uniformity of Decision

Unlike the similarities between the present case and *People v. Goldsmith*, the instant case is readily distinguishable from *People v. Khaled, supra,* in which the OCSC Appellate Division reversed the conviction of an ARLES defendant. (*Khaled, supra*, 186 Cal.App.4th Supp. 1.) Accordingly, the striking differences between the present case and *Khaled,* establish that *Khaled* provides no authority for reversal here. In turn, affirming of the judgment in the present case will not result in any lack of uniformity in case law relative to the prosecution of ARLES cases.

1. In *Khaled* The People Relied On A Declaration By A Person Not A Witness To Lay The Foundation For The ARLES Evidence; In the Present Case, The People Presented Competent Testimony Authenticating the ARLES Evidence And Laying The Foundation For Its Admission

In the absence of competent officer testimony, in *Khaled*, the People relied instead on an out-of-court declaration attempting to establish foundational facts relative to the ARLES. (*Khaled, supra*, 186 Cal.App.4th Supp .4.)[25] The SCOC Appellant Division focused on the inadmissibility of that declaration in finding the declaration to be inadmissible hearsay and reversing Khaled's conviction, observing that "[t]he prosecution sought to establish the majority of the violation with a declaration that was intended to support the introduction of photographs

[25] Indeed, such a declaration is reminiscent of the declaration found to constitute inadmissible hearsay in *Menendez-Diaz* but bears no relation to the foundation for admission laid by the People in the present case.

purporting to show the appellant driving through an intersection against a red light." (*Id.* at 1, 4.)

In the present case, the People did not rely on a hearsay declaration to provide the foundational facts relative to the ARLES evidence; rather, the courtroom testimony of Officer Butkus established that he had personal knowledge of the workings of the ARLES sufficient to lay the foundation for the admission of the ARLES evidence against Appellant. (CT, pp. 28-30.) Indeed, just as the reliance on a hearsay declaration differentiates *Khaled* from the present case, so, too, does it distinguish *Melendez Diaz* from the case at bar. In short, because the present case did not involve an attempt to replace competent in-court testimony with submission of a hearsay declaration as in *Khaled* (and *Melendez-Diaz*), the reversal of the judgment in *Khaled* does not suggest – much less support -- reversal here and affirming Appellant's conviction will constitute a decision assuring uniformity of decision among our courts on the subject of ARLES prosecutions.

2. In *Khaled*, The People Relied on Incompetent Testimony By An Officer Without Personal Knowledge of the ARLES; In The Present Case, There Was Competent Officer Testimony

In addition to the absence of an inadmissible declaration in the present case, it is distinguishable from *Khaled* based on the amount and quality of evidence presented by the testifying officer. In *Khaled*, the court of appeal held that the testifying officer, Alan Berg, did not qualify as an appropriate witness to lay a foundation for admission into evidence of the ARLES evidence because he did not have the necessary knowledge of the underlying workings, maintenance, or recordkeeping of the ARLES (*Khaled, supra*, 186 Cal.App.4th Supp at 8.), such that it was an abuse of discretion to admit evidence derived therefrom. (*Id.*) Indeed, Officer Berg "could not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or the videotape were a " 'reasonable representation of what it is alleged to portray.... "(*Khaled, supra*, 186

Cal.App.4th Supp at p. 5.) As has been exhaustively established throughout this brief, Officer Butkus was qualified to authenticate and lay the foundation for admission of the ARLES evidence and the record establishes that he did so.

In sum, the trial court's judgment here is consistent with that in the factually similar case of *Goldsmith* and does not contradict the judgment in *Khaled* in which the facts were so clearly – and dispositively -- distinguishable. Accordingly, in affirming the judgment of conviction against Appellant, this Court will assure uniformity of decision relative to the prosecution of ARLES cases in California.

CONCLUSION

As established throughout this brief, none of Appellant's contentions on appeal suggest that the trial court erred in admitting the ARLES evidence that established beyond a reasonable doubt that Appellant was guilty of violating the red light law. Rather, California law provides that when – as here -- a knowledgeable witness authenticates and lays the foundation for admission of evidence of a crime, claims of hearsay and Sixth Amendment violation simply will not lie. Thus, Appellant's theory that the lack of a percipient witness to her violation establishes that she cannot be convicted of a violation so clearly depicted by the ARLES photographs, data text and video lacks all merit and provides no basis for reversal of the judgment of conviction against her.

More particularly, Appellant's assertion that the People failed to provide foundational evidence that the ARLES was in working order is without merit. When, as here, computer-generated information is at issue, the burden is on the party objecting to that evidence to raise doubt as to its accuracy or reliability. Nonetheless, the People presented the maintenance logs -- competently shepherded into evidence by Officer Butkus -- that established that the ARLES at the intersection of Appellant's violation was in working order at the time of her offense. With the burden shifted to her, Appellant presented no evidence that the

ARLES was not functioning properly. Accordingly, the ARLES was properly authenticated.

In insisting that the ARLES evidence of her violation was hearsay, Appellant ignores the fact that evidence generated not by human agency but by a machine does not constitute hearsay because it does not involve a statement by a person, a fact our courts have recognized repeatedly. Further, even if the ARLES evidence were considered hearsay, it is subject to the exception provided by Evidence Code, § 1271, because it was made in the course of business at the time of the event, characterized by qualities that made its reliability clear and a foundation was laid for its admission by a qualified witness.

And just as the ARLES photographs and data cannot constitute hearsay, neither are they testimonial, such that the ARLES evidence raises no Sixth Amendment issue. As California case law firmly establishes relative to other automatic devices, the ARLES cannot itself be cross-examined – rather, a defendant's Sixth Amendment right to confrontation is provided by the opportunity to cross-examine a witness with sufficient personal knowledge of the workings of that device. Appellant availed herself of the opportunity to cross-examine Officer Butkus, failing nonetheless to cast any doubt on the reliability of the ARLES or any of the evidence of her violation. Accordingly, admission of the ARLES evidence cannot implicate – much less violate – Appellant's Sixth Amendment right to confrontation.

Finally, as to this Court's understandable concern with assuring uniformity of decision in our courts as to the admissibility of ARLES evidence, the trial court's decision in the present case is on all fours with the recently published decision in *People v. Goldsmith*. In *Goldsmith*, the LASC Appellate Division affirmed an ARLES conviction, rejecting arguments as to the admissibility of the evidence because the testimony of an experienced, knowledgeable officer authenticated and laid the foundation for admission of the ARLES evidence. Just such testimony was provided in the present case.

In contrast, the case *sub judice* bears no relation to *People v. Khaled* in which the People relied on a hearsay declaration and testimony of an officer bereft of the requisite personal knowledge of the ARLES. In affirming the judgment of conviction in the present case, then, this Court will act in a manner securing uniformity of decision in case law relative to admissibility of ARLES evidence. More particularly, affirming the present judgment will establish the viability of the ARLES when – and only when – there is competent testimony to support the admissibility of the evidence of a violation captured by the system.

Finally, affirming judgment in the present case is consistent with the intent clearly evinced by our Legislature in enacting Vehicle Code, § 21455.5. The history of that legislation speaks clearly on that subject:

> "Sponsors of the red light photographic enforcement equipment provisions cite the use of such equipment in reducing the rate of violations as well as the number of accidents and fatalities at intersections. Various studies and tests of the equipment have concluded that a substantial portion of urban vehicle crashes occur at intersections involving drivers running through red lights. Such violators, as a group, are younger, less likely to wear seatbelts, and have poorer driving records. Reports from Victoria, Canada showed a 72 percent drop in red light violations while Melbourne, Australia reported a 30 percent reduction in traffic fatalities, both cases attributable to use of the automated enforcement units."
>
> (California Bill Analysis, S.B. 833 Assem., 7/10/1995.)

When, as here, the protections for the public built into the ARLES are observed, the statute must be allowed to function as our Legislature intended. And when – as here – a red light violator mounts an attack on the very existence of the photo enforcement system supported by spurious arguments, this Court must

reject that effort. In sum, because the ARLES was properly implemented in the present case and because the trial court did not err in adjudging Appellant guilty of violating the red light law, the People respectfully request that this Court affirm the judgment of conviction.

Dated: May 23, 2011

Respectfully submitted,

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