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 RESPONSE TO AMICUS BRIEF

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Respondent, the People of the State of California, submit their Response to Amicus Brief filed by [redacted] Rabien, as follows:

INTRODUCTION

As established in the Respondent's brief and herein, the trial court did not err in admitting the Automated Red Light Enforcement System (hereinafter "ARLES") evidence and that ruling provides no basis for reversal of the judgment of conviction against Appellant. As developed in detail below, the Amicus' attempt to apply the holding of *Bullcoming v. New Mexico*, (2010) 131 S.Ct. 2705 is unavailing as the facts of this matter are readily and dispositively distinguishable from those in *Bullcoming*.

LEGAL ANALYSIS

I.

The Amicus' Effort to Apply The Holding of *Bullcoming v. New Mexico* Is Completely Unavailing Because The Facts of the Present Case Are Readily and Dispositively Distinguishable From Those in *Bullcoming*

In its brief, the Amicus struggles unsuccessfully to challenge the competent testimony of Officer Butkus by analogizing it to the rejected testimony of a "substitute" laboratory technician in *Bullcoming v. New Mexico* (2010) 131 S.Ct. 2705. In fact, that effort is unavailing and provides no basis for reversal here because the facts of the two cases and -- most particularly, the nature of the testimony in each -- establish that the high Court's finding that the Sixth Amendment precluded testimony by a "substitute witness" is in no way applicable in the present case.

In *Bullcoming*, the defendant was convicted of driving while intoxicated, the principal evidence against him being a laboratory blood alcohol concentration report. Rather than presenting the testimony of the laboratory technician who performed the testing and certified the report, the prosecution in *Bullcoming* offered the testimony of a substitute witness who testified as to laboratory procedures but had no personal knowledge of the particular testing and report

relative to Bullcoming's case and had neither participated in nor observed the test. (*Bullcoming, supra,* 131 S.Ct. at p.2702.) On appeal from the lower court's finding that the testimony of such a witness sufficed, the Supreme Court reversed. But the reasoning behind the high Court's decision establishes the striking distinction between ARLES cases and *Bullcoming*.

Specifically, the Court in *Bullcoming* found dispositive the fact that the technician who had performed the test was not "a mere scrivener," who "simply transcribed the results generated by the gas chromatograph machine" (131 S.Ct. at pp. 2711,2714) as the lower court had found (*id.* at p. 2713) because "[s]everal steps are involved in the gas chromatograph process, and human error can occur at each step." (*Id.* at p. 2711.) Further, the Supreme Court observed, the technician who performed the test made "representations, relating to past events and human actions not revealed in raw, machine-produced data, [which] are meet for cross-examination" (*id.* at p. 2714), such that he certified to more than a machine-generated number. In fact, the Supreme Court observed, the non-testifying technician had "performed on Bullcoming's sample a particular test, adhering to a precise protocol and that the non-testifying technician also had represented that no circumstance or condition had affected the integrity of the sample or the validity of the analysis. (*Id.* at p. 2711.) Importantly, the Court noted that "[i]n order to perform quantitative analyses satisfactorily and ... support the results under rigorous examination in court, the analyst must be aware of, and adhere to, good analytical practices and understand what is being done and why." (*Id.* [citation omitted]) Indeed, the Supreme Court quoted a source that stated that "[e]rrors that occur in any step can invalidate the best chromatographic analysis, so attention must be paid to all steps stating that 93% of errors in laboratory tests for BAC levels are human errors that occur either before or after machines analyze

samples.[1] (*Id.* at p. 2711.) These facts, which formed the basis for the holding in *Bullcoming*, are clearly and substantially distinguishable from those in the context of an ARLES case and – of course -- in the case *sub judice*.

Specifically, as contradistinct from the lab test in *Bullcoming* in which the critical involvement of human agency – rather than a computerized system -- required meticulous care and the presence of that human to establish that such care was taken, once the ARLES camera is activated, in the words of the Supreme Court, there are **no** "past events and human actions not revealed in raw, machine-produced data..." (*Bullcoming, supra*, 131 S.Ct at 2714.) Indeed, once the ARLES camera rolls, it is *all* "raw, machine-produced data" and the photograph properly becomes the silent witness of the violation depicted. (*People v. Bowley* (1963) 59 Cal.2d 855, 862.) Moreover, because the test in *Bullcoming* was the product of human agency, each time a report is prepared, the procedures are followed anew by a human being, necessitating the Court's – and the defendant's -- ability to verify that the procedures were followed correctly and that there were no errors. The person following – or not following – those procedures is subject to cross-examination, the ARLES machinery is not. The camera does its work and all that is left to do is to look at the photograph and lay the foundation for its admission.

Here, Officer Butkus, who testified competently and extensively to what he saw in the photograph and how the ARLES functioned relative to production of that photograph and the computer information. Officer Butkus – unlike the lab technician performing the blood testing in *Bullcoming* was available for and

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[1] The Court further alluded to the fact that in Colorado, a single forensic laboratory produced at least 206 flawed blood-alcohol readings over a three-year span, prompting the dismissal of several criminal prosecutions. In that instance, the Court explained, an analyst had used improper amounts of the internal standard, causing the chromatograph machine systematically to inflate BAC measurements. The analyst's error, a supervisor said, was "fairly complex." (*Bullcoming, supra*, 131 S. Ct. at 2711.)

underwent cross-examination. Other than Officer Butkus – quite simply -- there are no other witnesses. Nonetheless, the Amicus argues that "*Bullcoming*...precludes...using the live testimony of surrogate witnesses to introduce lab reports at trial." (Amicus Brief, footnote 2, p.6.) The People do not disagree. But in the present case, there is no suggestion of any such "surrogate witness" notwithstanding Amicus' argument to the contrary. No witness stood in for another as in *Bullcoming*. The sole witness was Officer Butkus and it was Officer Butkus who testified. Thus, the dispositive distinction between the present case and *Bullcoming* -- apparently lost on the Amicus -- is that relative to ARLES evidence, there is no percipient witness akin to the absent analyst in *Bullcoming* performing a test and importantly that there is no such witness who certifies to nothing more "than a machine-generated number." The ARLES evidence is, in fact, a "machine generated number" and properly shepherded into evidence by a knowledgeable, competent witness, *i.e.*, Officer Butkus. Thus, by its own terms, *Bullcoming* is readily distinguishable from an ARLES case in general and the present case in particular.

Further, inexplicably – and unpersuasively – the Amicus argues that "[r]eporting numbers from a machine/camera – as reflected in the data bar produced by Redflex – is no different than claiming to have seen a certain license plate number, a phone number that came up on caller ID, or indeed any objective physical item. In all of these instances, confrontation of the actual witness...allows the defendant to test the accuracy of the reported observations." (Amicus Brief, p. 7.) But as the Supreme Court observed, as stated above, there is indeed a significant difference (*Bullcoming, supra*, 131 S.Ct. 2711-2714) and that difference is at the heart of the distinction between the present case and *Bullcoming*. When a witness claims to have seen a license plate number and testifies as to what he or she *remembers* the number to be, that situation is completely different from one in which the license plate is produced in court. In turn, here, Officer Butkus is not testifying from memory about an ARLES printout

or photograph he might have seen. Rather, Officer Butkus appeared in court with the printout and photograph and carefully laid the foundation for their admission into evidence.

CONCLUSION

As established in Respondent's Brief and herein, the judgment of conviction against Appellant evolved from an application of the ARLES system that was – in every regard -- proper and lawful. Indeed, to the extent Appellant attempts to assert that the ARLES evidence is *ipso facto* inadmissible, that contention stands in stark contravention of the clear intent of our legislators in designing and enacting the ARLES statute. Fortunately, as articulated in Respondent's Brief and herein, the 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.

Dated: September 1, 2011

Respectfully submitted,

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