No. B231678

IN THE
COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff & Respondent,

vs.

[redacted]GOLDSMITH
Defendant & Appellant.

Appeal Transferred from Los Angeles County Superior Court
Appellate Division, Case No. BR048189
Trial Court Case No. 102693IN

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN ADDITION TO AMICUS BRIEF IN SUPPORT OF DEFENDANT/APPELLANT

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INTRODUCTION

Pursuant to this Court's order issued on July 13, 2011, this application is made in order to submit the attached amicus brief in support of defendant and appellant in this red light camera case.

INTEREST OF AMICUS CURIAE

The issues presented in this case implicate the rights of defendants to challenge the red light camera program implemented by numerous cities throughout the state. Amicus curiae [redacted] Rabiean, having been issued a traffic infraction citation based on a red light camera, has a substantial interest in the present matter to ensure that the Court is fully apprised of the constitutional issues raised in this case. As a member of the public, he also has an inherent interest in seeing that criminal trials follow procedures that respect the bedrock principles established by the Sixth Amendment while focusing on the ultimate goal of seeing justice done. The procedures sanctioned by the lower courts in this case did neither.

Having reviewed the appellate briefs filed by the parties in this case, Rabiean is familiar with the issues before this Court and the scope of their presentation. Rabiean believes that further briefing is necessary to address matters not fully analyzed in the parties' briefs. For example, the parties' briefs do not discuss the recent U.S. Supreme Court decision in *Bullcoming v. New Mexico* (2011) 180 L.Ed.2d 610 as it was issued three days after the respondent's brief was filed in this case. Furthermore, in addition to discussing out-of-state authorities addressing the evidentiary problems associated with red light cameras, this brief also discusses the practical ramifications of Redflex's involvement in procuring evidence for criminal cases in light of Redflex's past history.[1]

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[1] Neither the parties nor their counsel authored the attached amicus brief in whole or in part and no one made a monetary contribution intended to fund the preparation or submission of this brief. (CRC rule 8.200(c)(3)(a).)

CONCLUSION

Given the dispositive nature of the arguments raised herein, the filing of amicus briefs on the prosecution's behalf, and the absence of a right to appeal infractions to this Court, Rabiean respectfully requests that the Court (1) accept the accompanying brief for filing (2) and schedule oral argument so that Rabiean's counsel can present oral argument with respect to *Bullcoming*'s implications for this case.

Respectfully submitted,

DATED: August 17, 2011 LAW OFFICES OF JOSEPH SINGLETON

By _____
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INTRODUCTION

The ultimate issue raised in this case is whether the trial court properly convicted defendant [redacted] Goldsmith ("Goldsmith") for running a red light based on the photos generated by a private contractor, Redflex Traffic Systems, Inc. ("Redflex"), hired by the City of Inglewood to operate such cameras.

The prosecution's entire brief is based on the false premise that the reliability of the red light camera photos (a disputed point) obviates the hearsay problems associated with the photos. Contrary to the prosecution's view, even if we assume that the photos in question are completely trustworthy and reliable evidence, this would not render the photos or the data bar printed on the photos admissible. In sum, the fundamental flaw in the prosecution's argument is that it is based on obsolete law.

As discussed below, the Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36, 43 effected a sea change in the meaning of a criminal defendant's Sixth Amendment right to "confront[] ... the witnesses against him." Under *Crawford* and its progeny, an out-of-court testimonial statement is inadmissible – *irrespective of its reliability* -- if the declarant is not subject to cross-examination. By applying this new test for evaluating Sixth Amendment challenges, *Crawford* discarded decades-old precedent that had pegged admissibility of out-of-court statements to their reliability. See *Ohio v. Roberts* (1980) 448 U.S. 56, 65-66. Apparently oblivious to this sea change caused by *Crawford* and its progeny, the prosecution's brief—in addition to omitting any citation to this key case—simply relies on the outdated analysis applied by California courts under the old *Roberts* regime for evaluating hearsay objections. Having buried its head in the sand, the prosecution's arguments should be summarily rejected.

LEGAL ARGUMENT

I. THE CONFRONTATION CLAUSE UNQUESTIONABLY PROHIBITS PROSECUTORS FROM LAUNDERING TESTIMONIAL EVIDENCE PREPARED BY A QUESTIONABLE FORENSIC WITNESS BY PRESENTING IT THROUGH A "PROFESSIONAL WITNESS."

A. The History of the Right to Confrontation

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The point of this provision is to regulate "the manner in which [the prosecution's] witnesses give testimony in criminal trials." *Crawford, supra,* 541 U.S. at 43 (brackets added). Specifically, the Clause requires the prosecution to follow the common-law method of "open examination of witnesses *viva voce*" at trial. 3 W. Blackstone, Commentaries on the Laws of England 372 (1768).

The right to cross-examination forms the core of the Confrontation Clause. *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678. Described as the "greatest legal engine ever invented for the discovery of truth" (*California v. Green* (1970) 399 U.S. 149, 158), it represents one aspect of the defendant's broader right to present a defense. Put in modern terms, the Clause requires the prosecution to present "live testimony" from its witnesses "in court subject to adversarial testing." *Crawford, supra*, 541 U.S. at 43. In order to enforce that rule, the Clause forbids the prosecution from presenting "[t]estimonial statements of witnesses absent from trial" unless "the declarant is unavailable" and the core requirement of confrontation has already been satisfied – that is, "the defendant has had a prior opportunity to cross-examine." (*Id.* at 59.)

As Sir Matthew Hale explained three centuries ago, the "opportunity of confronting the adverse witnesses" arises from the "*personal* appearance and testimony of witnesses." Matthew Hale, The History of the Common Law of England 258 (1713) (emphasis added). The Supreme Court echoed this sentiment in one of its earliest confrontation opinions, making clear that confrontation entails a "personal examination" of "the witness," "subjecting him to the ordeal of cross-examination." *Mattox v. United States* (1895) 156 U.S. 237, 242, 244. Subjecting someone else to cross-examination obviously is not a substitute for such "personal" questioning. After all, even Sir Walter Raleigh, whose "notorious" trial in 1603 served as a rallying cry for the right to confrontation (*Crawford, supra,* 541 U.S. at 44), was "perfectly free to confront those who read [his accomplice's] confession in court." (*Id.* at 51; see also *id.* at 44-46 [discussing the background of Raleigh's trial].)

B. Because the Red Light Camera Photos Constitute Testimonial Evidence, the Sixth Amendment Requires the Presence of Redflex's Technician at Trial.

In light of the above-mentioned text, history, and constitutional purpose, the Supreme Court has held in several recent cases that the prosecution violates the Confrontation Clause when it introduces testimonial evidence through the in-court testimony of a surrogate witness – i.e., a person used as a substitute for the non-testifying witness. Applying those cases here, as discussed below, the trial court violated Goldsmith's right to confrontation.

1. The photos are inherently testimonial.

The first major case that focused on the definition of testimonial evidence – in other words, evidence triggering the right to confrontation – is *Melendez-Diaz v. Massachusetts* (2009) 129 S. Ct. 2527. In that case, the prosecution introduced affidavits of crime lab analysts stating that the material seized by the police was cocaine of a certain quantity. (*Id.* at 2530.) Although the affidavits were notarized (*id.* at 2531), the Court held that the analysts' failure to testify at trial precluded the prosecution from relying on the affidavits at trial. Because the prosecution had improperly relied on such evidence, the Court reversed the defendant's conviction based on the violation of his Sixth Amendment right during his drug trial.

The Court reasoned that the affidavits were testimonial statements – thus precluding the use of a surrogate witness – because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" (*Id.* at 2530.) Addressing the importance of applying the right to confrontation to documentary evidence, the Court explained that "[l]ike the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony." (*Id.* at 2537.) Rejecting the prosecution's reliance on the business record exception to the hearsay rule, the Court held that while documents kept in the regular course of business may be admitted at trial despite their hearsay status, "that is not the case if the regularly conducted business activity is the production of evidence for use at trial." (*Id.* at 2538.)

Applying the same reasoning here, the red light camera photos qualify as testimonial evidence because they were created *solely* for the purpose of using them as evidence at trial. Judging by the City's own admission that "Redflex is in the business of manufacturing automated

enforcement systems, and assisting cities in collecting and processing" red light camera photos as "evidence of violations" (RB 24), the photos were "made under circumstances which would lead an objective witness" to believe that they "would be available for use at a later trial[.]" *Melendez-Diaz, supra,* 129 S. Ct. at 2530. Furthermore, even if the photos qualify as business records or official records of Redflex or the City, they cannot be used to convict Goldsmith in the absence of live testimony by Redflex's technician. "Whether or not they qualify as business or official records," the photos prepared by Redflex, having been "prepared specifically for use at petitioner's trial--were testimony against [Goldsmith], and [Redflex's] analysts were subject to confrontation under the Sixth Amendment." (*Id.* at 2540.)

Another recent decision, *Bullcoming v. New Mexico* (2011) 180 L. Ed.2d 610, further compels this conclusion. In that case, the Supreme Court expounded on the definition of "testimonial" evidence and held that a forensic lab report containing a certification that is used to prove a particular fact at trial -- e.g., to prove the defendant's blood alcohol content in a DUI trial -- triggers the Sixth Amendment right to confrontation. Reiterating its prior definition of "testimonial" evidence as articulated in *Melendez-Diaz*, *Bullcoming* explained that a "document created solely for an evidentiary purpose ... made in aid of a police investigation ranks as testimonial." *Bullcoming, supra,* 180 L.Ed.2d at 623. Because the prosecution had relied on a lab report without presenting the witness that had prepared the report to establish the defendant's BAC, the Court reversed the defendant's conviction based on the violation of his Sixth Amendment right to confront his witness. (*Id.* at 626.) [1]

[1] *Bullcoming* is also significant because it precludes the practice upheld by the California Supreme Court in *People v. Geier* (2007) 41 Cal.4th 555,

Applying these cases here, the red light camera photos are testimonial because they "are functionally identical to live, in-court testimony" (*Melendez-Diaz, supra,* 129 S. Ct. at 2532), doing "precisely what a witness does on direct examination." *Davis v. Washington* (2006) 547 U.S. 813, 830 (emphasis deleted). In sum, Redflex technicians in charge of handling the photos in question have to testify at trial because the photos are "*inherently* testimonial." (*Id.* [emphasis added].)

2. Because the photos are inherently testimonial, the trial Court violated Goldsmith's constitutional right to confront Redflex's technician at trial by allowing a surrogate witness to testify at trial.

Contrary to the prosecution's view, the Confrontation Clause cannot "be evaded by having a note-taking police [officer] recite the unsworn hearsay testimony of the declarant." *Davis, supra,* 547 U.S. at 826; see also *Crawford, supra,* 541 U.S. at 68 ("the State admitted [third party's] testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That *alone* is sufficient to make out a violation of the Sixth Amendment") (brackets/emphasis added).

Reporting 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 a caller ID, or indeed any objective physical item. In all of these instances, confrontation of the actual witness whose testimonial statements the prosecution seeks to introduce – with the witness under oath and in the

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596-607 in terms of using the live testimony of surrogate witnesses to introduce lab reports at trial.

presence of the fact-finder and the defendant – allows the defendant to test the accuracy of the reported observations. With respect to the data bar reflected on the red light camera photos, for example, without the opportunity to cross-examine Redflex's technician, the defendant cannot ascertain whether Redflex manipulated the red light camera system in a manner that caused the observations recorded on the data bar to be misleading or inaccurate.

In addition to the data bar, the photos themselves reflect past events and human actions, not just machine-generated data. The photos showing the defendant running the red light constitute powerful evidence – indeed the sole evidence – against the defendant. Some of the obvious reasons for forensic errors associated with these photos include the improper timing of the camera, the improper location of the sensor triggering the photos, and/or the lack of proper maintenance of the entire system. See DeBenedictis, *Red Light Cameras Get Rebuke*, L.A. Daily J. (Aug. 31, 2010) (discussing class action lawsuit filed against Redflex as "the leading camera-system operator").

Given the trial testimony by the officer in this case that "the system" was "maintained" by Redflex (RT 6: 4-6), the notion that none of these things occurred here thus provided fodder for potentially important cross-examination. Nonetheless, the absence of Redflex's technician from the trial insulated the officer's testimonial assertions from adversarial testing. This violated the Confrontation Clause under any reasonable interpretation of this constitutional provision.

3. Enforcing the right to confrontation is particularly important in traffic cases in light of Redflex's motive, opportunity and documented history of falsifying evidence.

The need for confronting one's witness at a red-light-camera trial is even more urgent because private contractors are involved in procuring the evidence used in such trials. In fact, Redflex concedes that "collecting such evidence is Redflex's business." (Amicus Brief, p. 16; emphasis in original.) Similarly, the City concedes that Redflex is "in the business of collecting [and] processing ... photographic and video evidence of violations – indeed, that is Redflex's business in its entirety." (RB 29.)

The fact that Redflex's entire existence depends on creating such evidence shows that Redflex has a great deal at stake financially. Rejecting the testimony of the employees of another automated enforcement company, another court observed that such

> "individuals who have a great deal at stake financially ... will testify to whatever it takes to convince the court in a given case. Obviously a favorable decision by this court could be cited elsewhere and would be of great value to American Traffic Systems in fostering the growth of a market for its product. Thus, the pecuniary interest of Mr. Davis [an "expert" that had designed the photo radar unit at issue] and Mr. Davies [the director of field services for the private contractor] goes far beyond the Anchorage program and would appear to be so great as to call into question their objectivity when discussing their product. This is not the sort of testimony that persuades this court to find the [prosecution's] evidence of speeding admissible. Moreover, were we to find this evidence admissible, the questionable reliability of the testimony renders it insufficient to sustain a conviction beyond a reasonable doubt in each of these cases. Accordingly, the court orders the cases against the above

defendants dismissed." *Municipality of Anchorage v. Baxley* (Alas. App. Ct. 1997) 946 P.2d 894, 897 (brackets added).

Upholding the lower court's dismissal of several traffic infraction cases based on this reasoning, the *Baxley* court rejected the municipality's argument that the prosecution presented sufficient evidence to prove guilt beyond a reasonable doubt. (*Id.* at 898-899.) Given such judicial reluctance to accept the testimony of private contractors at face value, this Court should be vigilant in enforcing traffic defendants' right to confrontation because Redflex is particularly untrustworthy in light of its prior falsification of evidence.

As discussed in the media, a Redflex representative was previously caught falsifying court documents that are used to obtain speeding convictions based on Redflex's speed camera. (See *Arizona Official Confirms Redflex Falsified Speed Camera Documents*, July 9, 2008 <http://www.thenewspaper.com/news/24/2464.asp> [as of August 16, 2011].) Unless this Court requires Redflex's technicians to present their testimony at trial, it would be virtually impossible for traffic-court defendants to question the photos generated by such a questionable company at trial. [2]

As the Court confirmed in *Melendez-Diaz,* because "forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." *Melendez-Diaz, supra,* 129 S. Ct. at 2536. "A forensic analyst responding

[2] We have not been able to verify whether Redflex was in fact prosecuted for falsifying documents in that case. While this is a felony (Penal Code § 134), given the prosecution's close relationship with Redflex, one can assume that Redflex would not be prosecuted as a practical matter.

to a request from a law enforcement official may feel pressure--or have an incentive--to alter the evidence in a manner favorable to the prosecution." (*Id.*) If a scientist can engage in such underhanded conduct, this is all the more reason to expect such conduct from Redflex, a corporation whose entire existence depends on procuring convictions—one that has also been caught falsifying court documents in the past. [3]

To summarize, allowing the prosecution to launder Redflex's evidence by presenting it through a police officer – a "professional witness" – is repugnant to our system of justice. See *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 733 ("Because it relates to the fundamental fairness of the proceedings, cross-examination represents an 'absolute right,' not merely a privilege").

4. Even if the photos in question were completely reliable, *Crawford* and its progeny preclude the prosecution from relying on a surrogate witness in order to establish traffic defendants' guilt at trial based on photos prepared by Redflex.

Under the old *Roberts* regime, "an unavailable witness's out-of-court statement may be admitted so long as it has adequate indicia of reliability--i.e., falls within a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Crawford, supra*, 541 U.S. at 43. Expressly

[3] The willingness of such companies to spend large sums on lobbyists further illustrates the magnitude of their financial interest and, thus, the potential for abuse. See Scott, *Lure of Revenue Corrupts Cities' Parking Management, Critics Say*, L.A. Daily J. (September 12, 2007) (noting that another private contractor that handles red light camera tickets, ACS, spent nearly half a million dollars on lobbying in just one year in order to increase its revenues based on parking citations).

rejecting this test and the arguments advanced by the prosecution in this case, *Crawford* held that "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." (*Id.* at 61.) *Crawford* reasoned that the Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Id.*)

Applying the same analysis here, the prosecution's argument that the photos in question represent reliable evidence of guilt should be summarily rejected. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Id.* at 62.)[4]

Undeterred by its futile efforts to have Goldsmith's conviction affirmed, the prosecution seeks to sweep this constitutional issue under the rug by requiring defendants to question the police officer regarding Redflex's mode of collecting evidence. But "the Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming, supra,* 180 L.Ed.2d at 615.

Contrary to the prosecution's view, "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the

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[4] In his dissent, Justice Kennedy noted that under *Crawford* and its progeny, there may even be an inverse relationship between the reliability of a statement and its admissibility. *Bullcoming, supra,* 131 S.Ct. at 2725 (Kennedy, J., dissenting). Therefore, the alleged reliability of the red light photos (even if true) does not make them admissible per se; in fact, this may even be a factor against admissibility, as Justice Kennedy noted, under the *Crawford* regime.

courts' views) those underlying values." *Giles v. California* (2008) 554 U.S. 353, 375. Accordingly, just as the Confrontation Clause does not tolerate "[d]ispensing with confrontation because" a court believes that "testimony is obviously reliable" (*Crawford, supra*, 541 U.S. at 62), the Clause does not tolerate dispensing with confrontation because a court believes that questioning one witness about another's testimonial evidence provides a fair opportunity for cross-examination. "[T]he guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'" *Giles, supra*, 554 U.S. at 375. Therefore, giving defendants the opportunity to cross-examine the police officer regarding the photos prepared by Redflex does not cure the constitutional violation of defendants' right to confrontation. Redflex technicians are personally "subject to confrontation," even if they have "the veracity of Mother Theresa." *Melendez-Diaz, supra,* 129 S. Ct. at 2537 n.6. The same must be true here, even if the technicians supposedly did nothing more than "retrieve" what a machine said. (RT 7: 3-9.)

The Court's analysis of the right to counsel, another right guaranteed by the Sixth Amendment, further illustrates this point. In *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, the Court rejected the prosecution's argument that denying a defendant his counsel of choice would not violate the Sixth Amendment so long as "substitute counsel's performance" did not prejudice the defendant. (*Id.* at 144-145.) Expressly analogizing to the *Crawford* line of cases (*id.* at 145-146), the Court held that while "the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial," this does not mean "that the rights can be disregarded so long as the trial is, on the whole, fair." (*Id.* at 145.) If a "particular guarantee" of the Sixth Amendment is violated, no substitute procedure can cure the violation, and "[n]o additional showing of prejudice is required to make the violation 'complete.'" (*Id.* at 146 [footnote omitted].)

The same is true here. Just as substitute counsel cannot satisfy the Sixth Amendment, neither can confrontation of a substitute/surrogate witness. This is particularly true here because the prosecution presented a "professional witness" in lieu of the Redflex technician at Goldsmith's trial. See *Melendez-Diaz, supra,* 129 S. Ct. at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second").

In sum, presenting a non-testifying witness's testimonial statements through the in-court testimony of a surrogate witness -- in this case, the Inglewood police officer -- thwarts all four "elements of confrontation" that the Court has identified: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Maryland v. Craig* (1990) 497 U.S. 836, 846.

II. NONE OF THE EXCUSES OFFERED BY THE PROSECUTION JUSTIFIES DENYING GOLDSMITH OR OTHER TRAFFIC DEFENDANTS THE RIGHT TO CROSS-EXAMINE REDFLEX TECHNICIANS AT TRIAL.

A. Whether Goldsmith Testified at Trial Is Completely Irrelevant in This Appeal.

The briefs submitted by the prosecution and its *amici* divert attention from the real issue in the case: whether the prosecution met its burden of proof. For example, the common theme repeated throughout their entire briefs is that Goldsmith did not argue that she never ran a red light. The prosecution and its *amici* are dead wrong.

Goldsmith's decision to exercise her constitutional right not to testify proves nothing and cannot supply the missing elements of the

prosecution's case. An accused who (like Goldsmith) wishes to contest the charges against her need only enter a general plea of not guilty. After pleading not guilty, even a defendant who breaks down and openly admits his or her guilt on the stand is "justified ... in defending solely in reliance on the presumption of his innocence and the State's burden of proof." *Connecticut v. Johnson* (1983) 460 U.S. 73, 87 n. 16 (plurality opinion); accord *Old Chief v. United States* (1997) 519 U.S. 172, 199-200 (O'Connor, J., dissenting) ("[a]t trial, a defendant may ... choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element").

Consistent with these cases, the Supreme Court has also held that the Constitution forbids the entry of a directed verdict against a defendant in a criminal proceeding. See *United States v. Martin Linen Supply Corp.* (1977) 430 U.S. 564, 573 (reiterating this rule); *United Brotherhood of Carpenters v. United States* (1947) 330 U.S. 395, 408 (articulating this rule); *Sparf & Hansen v. United States* (1895) 156 U.S. 51, 105-106 (same). Refusing to acknowledge these cases, the prosecution argues that the appellate division properly affirmed Goldsmith's conviction by holding that the photos in question constituted reliable and trustworthy evidence.

To allow the appellate division to uphold the removal of an element of the prosecution's case – in connection with the allegation that the defendant ran a red light – based on the court's perception that this element was established by "trustworthy" evidence, or that the element was "not in dispute," would be tantamount to allowing directed verdicts of guilt based on "overwhelming evidence." The Supreme Court's analysis of structural errors associated with granting a directed verdict in other contexts is instructive by analogy.

For example, where the trial court takes an element completely away from the jury, thus yielding an incomplete jury verdict, "the problem would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury." *Carella v. California* (1989) 491 U.S. 263, 269 (Scalia, J., concurring). For this reason, "[t]he absence of a formal verdict on [an element] cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury." *California v. Roy* (1996) 519 U.S. 2, 6 (Scalia, J., concurring); accord, e.g., *Johnson, supra*, 460 U.S. at 86 ("The fact that the reviewing court may view the evidence [on an element] as overwhelming is ... simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence ... when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made"); *United States v. Hasting* (1983) 461 U.S. 499, 516 (Stevens, J., concurring) (an "appellate court should not find harmless error merely because it believes that the other evidence is 'overwhelming'").

While it is true that a defendant has no right to a jury trial in an infraction case, the cases discussed above, by analogy, preclude an appellate court from affirming a defendant's conviction in such a case based on the appellate court's own determination that the prosecution presented overwhelming evidence of guilt. After all, appellate judges are not fact-finders. Similarly, this Court should reject the prosecution's argument that Goldsmith's conviction should be affirmed based on her alleged failure to dispute whether she ran the red light.

B. Applying the Presumption Suggested by the Prosecution Is Totally Inconsistent with Case Law from Various Jurisdictions.

The prosecution also argues extensively that the "presumption" of reliability for computer-generated data, as interpreted by other California courts, cures the evidentiary gap in its case against Goldsmith. (RB 10-12.) As the Court warned in *Crawford*, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Crawford, supra*, 541 U.S. at 54. Therefore, even if California courts have applied a presumption of reliability in other contexts based on Evidence Code sections 1552 and 1553 (RB 10-14), *Crawford* and *Bullcoming* preclude the application of those California cases/presumptions here.

Apparently realizing that this argument does not work, the prosecution argues alternatively that the red light camera photos should be admissible based on the official records exception to the hearsay rule. Specifically, the prosecution claims that "[t]he presumption that an official duty is regularly performed ... shifts the burden" to the defendant "to show that the record was not properly prepared." (RB 31.) Rejecting such an argument, the Oregon Supreme Court reversed a traffic conviction based on photo radar in *State v. Clay* (Ore. 2001) 29 P.3d 1101.

Dismissing the conviction of the driver of the vehicle based on a statutory provision authorizing the issuance of such citations against the registered owner, the court refused to apply the presumption that an official duty has been regularly performed in order to uphold the conviction. (*Id.* at 1104). The Court's holding is particularly noteworthy because, unlike this case, the police officer testified at trial that he had personally operated the photo radar as the defendant was driving in his presence. (*Id.* at 2202.)

Refusing to accept the prosecution's theory that the officer was simply performing his legal duties, the court observed that the officer "was a person interested in enforcing a certain statutory scheme relating to vehicular speeding, and his act in sending the citation was in furtherance of that interest." (*Id.* at 1104.) Contrasting the officer's motives with a disinterested judge, the court refused to treat the officer as a "neutral, dispassionate and impartial official." (*Id.*) Applying *Clay* to this case, this Court should reject the prosecution's argument that "[t]he presumption that an official duty is regularly performed ... shifts the burden" to the defendant "to show that the record was not properly prepared." (RB 31.)

As another court held over fifty years ago in another automated traffic enforcement case, "it takes more than necessity to validate a presumption in a criminal case[.]" *People v. Hildebrandt* (1955) 308 N.Y. 397 [126 N.E.2d 377] (reversing a speeding conviction based on speed computed through two photographs taken by a "phototraffic camera" at a set time interval; rejecting the notion that the registered owner is presumed to be the driver).

More recently, the Supreme Court of Minnesota refused to apply another presumption in a red light camera case. In *Minnesota v. Kuhlman* (Minn. 2007) 729 N.W.2d 577, the court held that a municipal ordinance allowing Redflex to operate its red light system conflicted with Minnesota criminal statutes which required uniform application of the criminal laws throughout the state. "The problem with the presumption that the owner was the driver is that it eliminates the presumption of innocence and shifts the burden of proof from that required by the rules of criminal procedure[,]" the court held. (*Id.* at 583). Because "the state has the burden to prove beyond a reasonable doubt that the owner was driving at the time of the red-light offense, and the owner has no obligation to prove anything[,]" the court struck down a municipality's red light camera program as being

preempted by state law. (*Id.* at 584). The court also noted that the ordinance violates the basic rule of criminal procedure "that a defendant be 'presumed innocent until proven guilty beyond a reasonable doubt.'" (*Id.*) Finally, the court summarily rejected the municipality's argument that red light cameras protect the public by minimizing the number of crashes, explaining that these artificial justifications should be presented to the legislature. (*Id.*) [5]

Other courts have similarly taken proactive measures to ensure that drivers' constitutional rights are not violated in red light camera cases. For example, the Missouri Supreme Court recently struck down another municipality's administrative proceeding system for challenging red light camera tickets as "void" because the accused drivers' statutory right to appear before a judge was violated. *City of Springfield v. Belt* (Mo. 2010) 307 S.W.3d 649, 653. In addition, the Colorado Supreme Court rejected a major challenge by various municipalities to state laws that required the cities to adopt various procedural safeguards in order to ensure that drivers targeted by the red light cameras receive adequate protection. See *City of Commerce City v. State* (Colo. 2002) 40 P.3d 1273, 1276-1277.

In sum, the presumptions set forth in Evidence Code sections 1552 and 1553 cannot be used to eliminate traffic defendants' constitutional right to confrontation. Federal law preempts state law, not the other way around. Therefore, consistent with the other cases discussed above, this Court should reject the prosecution's reliance on such presumptions.

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[5] Contrary to the prosecution's assertion, studies have shown that red light cameras actually cause more accidents. See Del Quentin Wilber & Derek Willis, *D.C. Red-Light Cameras Fail to Reduce Accidents*, Washington Post, Oct. 4, 2005, at A1 (summarizing studies showing that red light cameras increase rear-end collisions, T-bone collisions and even fatal crashes).

C. The City's Desire to Save Money by Presenting the Testimony of Its Police Officer Is No Excuse for Violating Traffic Defendants' Right to Confrontation.

The City also claims that California has a "substantial interest in the summary nature of red light statute violation proceedings." (RB 8.) According to the City, requiring Redflex's technician to testify at trial would preclude a "simplified and expeditious" trial, presumably by raising costs associated with prosecuting/adjudicating traffic cases. (RB 9.)

In *Melendez-Diaz*, the Court rejected the dissent's argument – the same argument raised by the prosecution in this case – that requiring live testimony "imposes enormous costs on the administration of justice." *Melendez-Diaz, supra,* 129 S. Ct. at 2549 (Kennedy, J. dissenting). Similarly, the Court in *Bullcoming* emphatically rejected the dissent's argument – as advanced in this case by the prosecution – that the court's ruling precluded "scarce state resources" from being "committed to other urgent needs in the criminal justice system." *Bullcoming, supra,* 180 L.Ed.2d at 636. Describing the prosecution's argument about the extra costs associated with requiring live testimony as "refrain rehearsed and rejected in *Melendez-Diaz*" (*id.* at 624), *Bullcoming* reiterated that the right to confrontation "may not [be] disregard[ed] ... at our convenience ... and the predictions of dire consequences, we again observe, are dubious[.]" *Bullcoming, supra,* 180 L.Ed.2d at 624 (internal citations and quotation marks omitted).[6]

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[6] In *Bullcoming*, the forensic report in question was entered into evidence during the defendant's trial. By contrast, in *Williams v. Illinois* (Ill. 2010) 939 N.E.2d 268, cert. granted June 28, 2011, __U.S.__ [2011 U.S. LEXIS 5008]), the U.S. Supreme Court will decide whether the Sixth Amendment is violated where a lab report is not entered into evidence but the prosecution's expert witness testifies about the results of the tests

Accordingly, this Court should reject the prosecution's arguments based on costs. To the extent that requiring Redflex's technicians to appear at trial reduces Redflex's profits or the City's revenues, that is not a legal excuse for violating traffic defendants' constitutional right to confrontation.

III. THE OPPORTUNITY TO CALL REDFLEX TECHNICIANS AT TRIAL IS CRUCIAL TO TRAFFIC DEFENDANTS' CONSTITUTIONAL RIGHT TO PUT ON A DEFENSE. BY ALLOWING THE INGLEWOOD OFFICER TO TESTIFY IN LIEU OF THE REDFLEX TECHNICIAN, THE TRIAL COURT ALSO VIOLATED GOLDSMITH'S RIGHT TO DUE PROCESS.

Because "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324), the trial court's ruling also raises serious due process concerns. The right "to confront and cross-examine witnesses" has "long been recognized as essential to due process." *Chambers v. Mississippi* (1973) 410 U.S. 284, 294. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Id.*; see also *Crane v. Kentucky* (1986) 476 U.S. 683, 690 ("the Constitution guarantees criminal defendants a *meaningful* opportunity to present a complete defense") (emphasis added, internal citation and quotation marks omitted).

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performed by the non-testifying analyst. In addition, the California Supreme Court is currently considering *Bullcoming*'s implications in California. See *People v. Dungo* (2011) 2011 Cal. LEXIS 7255. Review was granted in that case after the appellate court reversed the defendant's conviction based on the prosecution's reliance on a medical examiner's autopsy report despite the medical examiner's failure to testify at trial. *People v. Dungo* (2011) 102 Cal.Rptr.3d 282. The medical examiner, much like Redflex, was caught falsifying his credentials, and had been fired by one county and had resigned "under a cloud" in other counties. *People v. Dungo* (2009) 176 Cal.App.4th 1388, 1391.

As Justice Douglas emphasized, "[c]onfrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life." *Peters v. Hobby* (1955) 349 U.S. 331, 351 (Douglas, J., concurring); see also *Kirby v. United States* (1899) 174 U.S. 47, 56 (describing the right to confrontation of one's accuser as "essential for the due protection of life and liberty"). In sum, because "due process requires an opportunity to confront and cross-examine adverse witnesses" (*Goldberg v. Kelly* (1970) 397 U.S. 254, 269), the trial court's decision violates the due process right of defendants in red light camera cases. Therefore, Goldsmith's conviction should be reversed for this additional reason. [7]

CONCLUSION

The trial court's decision allowing the prosecution to present police testimony on the most important issue in this case – the admissibility of the *only* piece of evidence against the defendant – is a blatant departure from the Supreme Court's recent decisions. Moreover, it disregards the "truth-seeking goal" of the criminal trial process as protected by the Sixth Amendment. *Maryland v. Craig* (1990) 497 U.S. 836, 857.

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[7] Although Goldsmith's opening brief does not advance due process as an independent ground for reversal, her argument based on her right to confrontation should be deemed to subsume and raise the due process issue because "[a]n improper denial of the right of cross-examination constitutes a denial of due process." *McCarthy v. Mobile Cranes, Inc.* (1962) 199 Cal.App.2d 500, 506. Otherwise, even if the court refuses to examine Goldsmith's argument in this manner, an "appellate court has discretion to consider new issues raised by an amicus." *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 503 (citing cases); see also Eisenberg, et. al, Civil Appeals & Writs (Rutter Group 2010) ¶ 9:210.1 (same).

The trial court's decision is flawed for additional reasons. "The touchstone of due process is freedom from arbitrary governmental action." *Ponte v. Real* (1985) 471 U.S. 491, 495 (citations omitted). Defendants and the public accept the legitimacy of criminal sanctions because our constitutional rules guarantee that courts will impose them only after fair trials. In order to achieve these crucial values of integrity, fair and efficient administration of justice, and preservation of the truth-seeking function of trials, "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams* (1976) 425 U.S. 501, 503. Accordingly, a driver's conviction cannot be based on the self-serving testimony of a police officer acting as a surrogate witness for a private contractor that has been caught falsifying court documents.

As the Supreme Court explained in *Mayer v. City of Chicago* (1971) 404 U.S. 189, "[f]ew citizens ever have contact with the higher courts. In the main, it is the police and the lower court Bench and Bar that convey the essence of our democracy to the people. 'Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts." (*Id.* at 197; internal citation omitted.)

Likewise, when addressing issues raised in traffic courts, the California Supreme Court has emphasized that "[i]t is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as possible, the appearance of impropriety." *People v. Carlucci* (1979) 23 Cal.3d 249, 258 (internal citation omitted). Traffic courts are "often the only contact citizens have with the court system. It is important that the proceedings appear to be fair and just." *People v. Kriss* (1979) 96 Cal.App.3d 913, 921.

As reported by a retired judge, numerous cities are issuing "more traffic citations so they can generate more revenue to counteract governmental budget deficits." Gray, *The Corrupting of Traffic Citations*, L.A. Daily J. (October 27, 2010). Since "[m]ost red-light tickets range between $420 and $480" (DeBenedictis, *Red Light Cameras Run Into Problems*, L.A. Daily J. (June 11, 2010)), the public's perception of the court system as a revenue-generating arm of the government is inevitable. To avoid such a public outcry, it is particularly important to protect defendants' constitutional rights in traffic cases.

On top of these practical reasons, reversal is appropriate here because the lower court's "draconian decision ... flies in the face of the truth-finding goals of trial, the constitutional safeguards to a full defense, [and] the liberal thrust of the rules of evidence." *U.S. v. Nacchio* (10th Cir. 2009) 555 F.3d 1234, 1281 (Henry, J., dissenting).

Respectfully submitted,

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By _____
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