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

13 PEOPLE OF THE STATE OF CALIFORNIA,

Case No.: CR154602

Respondent/Plaintiff,

vs.

14 [REDACTED] DAUGHERTY,

Appellant/Defendant.

FILED

JUL - 8 2011

Clerk of the Napa Superior Court
By: [Signature]
Deputy

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19 PEOPLE OF THE STATE OF CALIFORNIA'S APPEAL BRIEF AS
20 CALLED FOR IN ORDER GRANTING REHEARING
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1. Pursuant to the contract’s cost neutrality provision, if the flat fee threshold is not met through a sufficient number of citations over the duration of the contract and the twelve subsequent months, then the City’s payment to Redflex would be less than it would be if enough citations are issued to meet the threshold. Under these circumstances, does the contract not provide for payment to Redflex to be based, at least up to the flat fee threshold, on the number of citations generated? 1

2. Since it could potentially receive less money under the cost neutrality provision, does Redflex have some incentive to generate enough citations to meet the flat fee threshold, thereby violating the legislative purpose behind section 21455.5, subsection (g)(1), and providing a basis for public concern regarding manipulation of the evidence Redflex provides to the City from which the City decides which citations to issue? 6

3. Is the argument that the cost neutrality provision was never triggered based on an invalid assumption that the flat fee threshold was met through citations issued on accurate evidence?..... 7

4. Was the evidentiary presumption of Evidence Code section 1553 applicable to the production of the photographic and video evidence presented by the People at trial in this matter? (See *People v. Goldsmith* (2011) 193 Cal.App.4th Supp. 1.) 9

5. If Evidence Code section 1553 was applicable, and assuming that the City’s contract does violate Vehicle Code section 21455.5, subsection (g)(1), then was defendant’s presentation of the invalid contract provision sufficient evidence that the images were unreliable such that the burden of presentation switched back to the People to prove that the images were an accurate representation? 9

6. If Evidence Code section 1553 was not applicable in this case, or if defendant met her burden of showing unreliability, then what evidence did the People present to meet the burden of proving by a preponderance of evidence that the images were accurate, i.e. that the photo editing performed by Redflex prior to transferring the images to the City did not compromise the accuracy of the images? 12

7. If the trial court erred in determining that the contract did not violate Vehicle Code section 21455.5, subsection (g)(1), should the matter be

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remanded to allow for the reliability of the evidence to be re-determined
without a presumption of accuracy, or should the matter be dismissed
without further proceedings in the interest of justice? 13

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1 The People of the State of California provide the following brief,
2 addressing the questions posed by the Court in its Order Granting Rehearing
3 in this matter:

4 1. Pursuant to the contract's cost neutrality provision, if the
5 flat fee threshold is not met through a sufficient number of citations over
6 the duration of the contract and the twelve subsequent months, then the
7 City's payment to Redflex would be less than it would be if enough
8 citations are issued to meet the threshold. Under these circumstances,
9 does the contract not provide for payment to Redflex to be based, at least
10 up to the flat fee threshold, on the number of citations generated?

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12 No. "Citations generated" are never a consideration in payment due
13 from the City of Napa to Redflex, either by the terms of the contract, or in
14 actual practice. Defendant [REDACTED] Daugherty urges that the contract is
15 unlawful because the cost neutrality arrangement between the parties could
16 conceivably lead to Redflex receiving less revenue, temporarily, if the City
17 receives insufficient revenue to cover its monthly fixed fee invoice, or
18 permanently, if the City fails to receive enough revenue over the life of the
19 contract, and 12 months beyond, to cover any accumulated debt. (There is no
20 evidence that such a revenue shortfall has ever occurred.) Defendant
21 concludes that this creates an "illegal financial incentive" for Redflex, which
22 violates the Vehicle Code.

23 Defendant's challenge fails however, because there is no indication
24 that such a "cost neutrality" contract clause -- a flat fee payment arrangement,
25 which allows the potential for debt relief -- is what the Legislature had in its
26 sights, or intended to prohibit by enacting Vehicle Code section
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1 21455.5(g)(1). Instead, the Legislature *expressly identified a narrower and*
2 *more straightforward range of prohibited contract provisions, two to be*
3 *precise -- payment based on "number of citations generated, or ... percentage*
4 *of revenue generated."*

5 If the Legislature had intended the broader prohibition of potential
6 "financial incentive" urged by Defendant, it could without much trouble have
7 substantially broadened the prohibition, for example, "any contract, which
8 creates the possibility or potential, however remote, that (1) the manufacturer
9 or supplier may experience greater or lesser revenues based upon on the
10 amount of revenues generated to the public entity by the red light system, or
11 (2) which otherwise creates any financial incentive whatsoever for the
12 manufacturer or supplier to generate any additional increment of revenue to
13 the public entity through the use of the equipment authorized under this
14 section."

15 The Legislature obviously did not cast this broader net. The law
16 assumes that the Legislature knows how to adopt language to convey the
17 intended scope of its legislation, and consciously makes choices regarding
18 such scope. (See *In re Reeves* (2005) 35 Cal.4th 765, 789 (dis. opn. of Chin,
19 J.)) "[I]f the statutory language is not ambiguous, then we presume the
20 Legislature meant what it said, and the plain meaning of the language
21 governs." (*People v. Walker* (2002) 29 Cal.4th 577, 581.) The Court is to
22 "ascertain and declare" the terms and substance of a statute, and it must not
23 "substitute [its] will for that of the Legislature," nor "insert what has been
24 omitted" from a statute. (*People v. Dakin* (1988) 200 Cal.App.3d 1026, 1035;
25 C.C.P. section 1858; *People v. Guzman* (2005) 35 Cal.4th 577, 587.) A statute
26 is to be read as a whole, seeking to effectuate every word, clause and
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1 provision (*Gay Law Students Assn. v. Pac. Tel. & Tel. Co* (1979) 24 Cal.3d
2 458, 478), and “must be read in light of both the objective it seeks to achieve
3 and the evil it seeks to avert.” (*People v. Dakin*, 200 Cal.App.3d at 135.)
4 Where the statute is clear, courts will not “interpret away clear language in
5 favor of an ambiguity that does not exist.” (*People v. Coronado* [(1995)] 12
6 Cal. 4th 145, 151[internal citations omitted].)

7 Here, the Legislature prohibited only two contract arrangements by its
8 plain words: contract provisions expressly providing for (1) payment per
9 “citation generated” and (2) payment based on “percentage of revenue
10 generated.” The statutory language is not ambiguous, and Defendant has not
11 urged that it is. Neither prohibition is triggered by the City’s cost neutrality
12 clause, because that clause does not provide for payment based on “number of
13 citations generated.” Instead, it plainly provides for a flat fee payment due
14 every month, with no reference to numbers of “citations generated.”

15 In crafting section 21455.5, the Legislature sought to enable, legally
16 and practically, the use of red light camera systems to catch dangerous traffic
17 offenders. Review of the statute shows that, it contemplated private, profit
18 motivated companies selling their services to law enforcement to provide
19 such systems and services. Permitting profit-oriented companies to play a role
20 obviously created the potential for mischief and manipulation. Any fair
21 review of the entirety of section 21455.5 discloses that the Legislature sought
22 to balance a good it wished to facilitate (more effective red light violation
23 enforcement) with an evil it sought to avoid (the potential that service
24 providers might manipulate systems to increase their revenues). Obviously,
25 the Legislature could have sought to strike this balance in myriad ways. What
26 it chose is the specific combined protections set forth in Vehicle Code section
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1 21455.5, as explained below.

2 With or without a cost neutrality or debt relief provision, a red light
3 service provider is financially motivated for its public entity client to generate
4 enough revenue to cover the costs of its service. If those costs are not covered,
5 then no public agency will retain the provider's services for long.
6 Nevertheless, and in the face of this obvious economic truth, the Legislature
7 did not choose to outlaw all contracts containing any species of "financial
8 incentive" to generate revenue. Had it wished to remove every possible
9 potential for private financial motivation, the Legislature could simply have
10 prohibited any role whatever by private service providers. It also could have
11 adopted a broader subsection (g)(1), plainly prohibiting any potential for
12 "financial incentive" to a private service provider, as summarized above.

13 What the Legislature actually created -- to generate the "good" it
14 sought, and to prevent the attendant potential for "evil" -- was a *specific*
15 *combination* of (1) the narrowly circumscribed contract prohibitions, which
16 prohibit egregious profit-oriented contract terms, set forth in section
17 21455.5(g)(1), and simultaneously, (2) section 21455.5(c) and (d)'s *broad*
18 *requirements that law enforcement actually act as the "operator" of the*
19 *system:* that it "develop guidelines" for such programs, and that it closely
20 inspect, monitor and audit all material aspects of red light camera systems. By
21 these requirements, the Legislature sought to ensure that public officials act as
22 a "firewall," to be certain that the process is not infected by the potential
23 financial incentive inherent with private red light service providers. Perhaps
24 chief among these protections, *the Legislature required that the public law*
25 *enforcement agency "review and approve" every single citation prior to*
26 *delivery to violators.* The Legislature expressly made this, and other operating

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1 requirements, non-delegable (and the contract at issue here provides for
2 citations to be issued only in the sole discretion of Napa Police Department
3 personnel). The most reasonable assumption is that these detailed operational
4 requirements were intentionally combined with the focused contract
5 prohibitions, and intended to act together to eliminate the danger of
6 financially motivated citations. The Legislature must be assumed, under the
7 law, to have consciously balanced the good, and the potential for “evil,” in
8 such red light systems; the requirements and prohibitions of section 21455.5
9 are the coherent result of that work.

10 Defendant’s arguments here amount to an invitation to override the
11 careful balance struck by the Legislature in favor of Defendant’s notion as to
12 how best to effectuate the goal of trustworthy, accurate, effective red light
13 camera systems. The Court cannot and should not sweep away the
14 Legislature’s multi-pronged policy solution to the potential for impropriety:
15 the Legislature has expressly prohibited the most blatant financial motivation,
16 i.e., “pay-per-ticket” and “percentage of revenue” clauses, while it has also
17 required that public entities retain ultimate, detailed control over red light
18 camera systems, and over the issuance of citations. The Court cannot and
19 should not infer that the Legislature intended by the first prong to anticipate
20 and prohibit every potential, hypothetical “financial incentive.” That is not the
21 language it adopted. Defendant can provide this Court with no rational basis
22 to believe the Legislature considered, or intended to prohibit, contract clauses
23 beyond those it specifically identified and prohibited as part of its balanced
24 approach to providing effective, reliable red light camera systems to bolster
25 traffic enforcement and safety.

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1 2. Since it could potentially receive less money under the cost
2 neutrality provision, does Redflex have some incentive to generate
3 enough citations to meet the flat fee threshold, thereby violating the
4 legislative purpose behind section 21455.5, subsection (g)(1), and
5 providing a basis for public concern regarding manipulation of the
6 evidence Redflex provides to the City from which the City decides which
7 citations to issue?

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9 Although it could plainly have done so, the Legislature did not choose
10 to anticipate and prohibit any and every contract term which might create
11 “some incentive,” however remote, to generate revenue. Nor did it outlaw any
12 agreement which might conceivably create a “basis for public concern”
13 regarding manipulation of evidence. These were *motivations* – – but not the
14 language employed to create enforceable law. It is critical to note that even if
15 the Court believes that the Legislature intended by this legislation to remove
16 *all* such incentive, or to allay *all* such public concern, the law still requires the
17 Court to apply the plain terms of the statute to the contract before it, whether
18 or not such application perfectly accomplishes all of the Legislature’s
19 apparent goals. Put another way, a party’s assertion of a broad Legislative
20 “intent” cannot alter a narrower plain meaning of the words the Legislature
21 actually chose to adopt. A full reading of section 21455.5 strongly suggests
22 that the Legislature intended to prohibit blatant pay-per-ticket and percentage-
23 of-revenue agreements, and, hand-in-hand with those specific prohibitions, to
24 more broadly and aggressively safeguard the process by requiring that law
25 enforcement “operate” and control the systems, procedures, and issuance of
26 citations.

1 The Legislature clearly recognized that permitting private companies
2 to provide red light camera services provided some basis for public concern.
3 Yet it did so. Section 21455.5's nuanced balancing is the Legislature's
4 response to that potential public concern. Defendant's identification of a
5 basis for continued public concern (an amorphous concept, nearly impossible
6 to legislate away) is neither the product of, nor the litmus test for any actual
7 violation of section 21455.5. It is at most an indication that the statute may
8 not have -- whether intentionally or unintentionally -- completely allayed
9 every basis for public concern, or removed every potential for a private profit
10 incentive. The Court must assume that whatever basis for public concern may
11 remain in the limited prohibition of subsection (g)(1) was intended by the
12 Legislature to be addressed by the stringent operational requirements of
13 subsections (c) and (d) of section 21455.5. Here, Defendant does not and
14 cannot assert that the Legislature's scheme has not worked precisely as
15 intended -- there is no evidence or assertion of any manipulation of the
16 evidence supporting Defendant's conviction.

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18 **3. Is the argument that the cost neutrality provision was never**
19 **triggered based on an invalid assumption that the flat fee threshold was**
20 **met through citations issued on accurate evidence?**

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22 No. The cost neutrality provision has never been triggered; that is
23 undisputed fact. The assertion of that fact is not based on any invalid
24 assumption: every instance of a citation issued and paid, or a case tried to
25 conviction for violation of law based on red light camera evidence, has been
26 based in part on the legal presumption that digital photography and video

1 evidence supporting the violation is accurate, as a matter of law. (Evidence
2 Code section 1553.) To the People's knowledge, no challenge has been
3 sustained against any such evidence in any proceeding related to a Napa red
4 light camera violation. Whether or not there is an instance of such a
5 successful challenge, that has no impact on the many unchallenged, or
6 unsuccessfully challenged citations that have led to conviction and payment.

7 As set forth above, the Legislature has chosen and mandated multiple
8 protections against the potential for impropriety by private service providers,
9 including that law enforcement authorities must operate, control, and certify
10 the accuracy of the systems involved, and must control the issuance of
11 citations. No aspect of that mandated control has been challenged in this
12 action, and there is no basis for any assumption of improper conduct by
13 government authorities. Indeed, the law requires courts to assume that official
14 duties have been regularly and properly performed. (Evidence Code section
15 664; see *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 899-900.)

16 As a result of presumptively accurate and reliable evidence, and
17 presumptively valid citations which led to convictions and fine payments,
18 sufficient citations have been paid to cover each flat fee invoice due for each
19 camera, throughout the history of the City's red light camera program.

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1 **4. Was the evidentiary presumption of Evidence Code section**
2 **1553 applicable to the production of the photographic and video evidence**
3 **presented by the People at trial in this matter? (See *People v. Goldsmith***
4 **(2011) 193 Cal.App.4th Supp. 1.)**

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6 Yes. The People are not aware of any authority or argument
7 supporting any contrary position.

8
9 **5. If Evidence Code section 1553 was applicable, and**
10 **assuming that the City's contract does violate Vehicle Code section**
11 **21455.5, subsection (g)(1), then was defendant's presentation of the**
12 **invalid contract provision sufficient evidence that the images were**
13 **unreliable such that the burden of presentation switched back to the**
14 **People to prove that the images were an accurate representation?**

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16 No. Presentation of the "cost recovery" clause of the contract, without
17 more, did not shift the burden to the People to prove the digital images were
18 accurate or reliable, as set forth below.

19 First, the "cost recovery" clause of the contract is not unlawful, as
20 found by trial judge Stephen Kroyer, and as more fully established above.

21 Second, presentation of the "cost recovery" clause of the contract,
22 alone, provided no coherent evidence that the digital images in question were
23 unreliable or inaccurate; it provided no more than an alleged technical
24 violation of section 21455.5(g)(1). No authority states that such a technical
25 violation creates a basis for shifting the burden of production, let alone a basis
26 for exclusion of the digital image evidence. Indeed, and as asserted in detail in
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1 the People’s Petition for Rehearing, the Legislature knows how to make
2 evidence expressly inadmissible, and its failure to do so here indicates an
3 intent not to do so. “Except as otherwise provided by statute, all relevant
4 evidence is admissible.” (Evidence Code section 351.) “Where a statute ...
5 does not specifically provide that evidence shall be excluded for failure to
6 comply with said statutes and there are not constitutional issues involved,
7 such evidence is not inadmissible. Statutory compliance or non-compliance
8 merely goes to the weight of the evidence.” (*People v. Sangani* (1994) 22
9 Cal. App. 4th 1120, 1137, citing *People v. Adams* (1976) 59 Cal.App.3d
10 559, 566-567.) Moreover, the California Constitution prohibits the
11 exclusion of evidence in a criminal case unless compelled by the federal
12 Constitution or at the express direction of a statute adopted by two-thirds
13 vote of both houses of the Legislature. (Cal. Const. art. I, section 28(d);
14 *People v. Williams* (2002) 28 Cal.4th 408, 414, 417.)

15 Third, Defendant offered no evidence that the digital images were
16 inaccurate, or did not depict events as they actually occurred.

17 Fourth, even if the evidence offered would have supported another
18 trial judge’s exclusion of the People’s evidentiary images, Judge Kroyer, in
19 his broad discretion, admitted the evidence. It is axiomatic that such a
20 discretionary evidentiary determination is not reversible without a finding of
21 abuse of discretion by the reviewing court. (*People v. D’Arcy* (2010) 48
22 Cal.4th 257, 298.) Abuse of discretion applies only when the trial court
23 “exceeds the bounds of reason, all of the circumstances before it being
24 considered.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) The
25 abuse of discretion standard applies to a determination as to whether the
26 burden of production/presentation has been met. (See *People v. Lucas* (1995)

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1 12 Cal.4th 415, 466.) Here, the burden was on Defendant. (Evidence Code
2 section 1553.)

3 *Fifth, and dispositively, Defendant failed to object to the entry into*
4 *evidence of Exhibit 5, which contained the DVD/video of the violation, which*
5 *the audio record shows the trial judge reviewed, and found to support*
6 *conviction. (Audio Record of Trial at Minutes 40:00-41:02.)*

7 At trial, Judge Kroyer did not rule or suggest that the accuracy or
8 reliability of the digital images offered by the People had been called into
9 question by the cost neutrality clause or other evidence. If he had done so,
10 however, he also admitted and relied upon percipient witness evidence
11 provided by John Brandt of the Napa Police Department in support of the
12 accuracy of the images he relied upon to convict Defendant. (Audio Record
13 of Trial at Minutes 33:40-36:05; 1:07:55-1:09:30.) Thus, if the burden of
14 presentation had shifted to the People, Judge Kroyer must be deemed to have
15 determined that the People's burden was met.

16 No authority suggests, let alone establishes, that the trial court abused
17 its discretion in admitting the visual images which supported conviction. This
18 Court should not rule otherwise. Without such a ruling, there is no basis for
19 reversal, as the conviction was supported by substantial, admissible evidence.

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1 6. **If Evidence Code section 1553 was not applicable in this**
2 **case, or if defendant met her burden of showing unreliability, then what**
3 **evidence did the People present to meet the burden of proving by a**
4 **preponderance of evidence that the images were accurate, i.e. that the**
5 **photo editing performed by Redflex prior to transferring the images to**
6 **the City did not compromise the accuracy of the images?**

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8 The People are not aware of any basis for a claim that Evidence Code
9 section 1553 was not applicable at trial.

10 Defendant did not meet her burden of showing unreliability by
11 presenting the cost neutrality clause of the contract, as set forth above.
12 Admission of the visual evidence was properly within the discretion of the
13 trial court, and that discretion was properly exercised. It certainly was not
14 abused sufficient to support reversal, or even remand.

15 The People offered, and the trial court admitted and relied on
16 percipient testimony by John Brandt that the system was operating properly,
17 and that the photo and video evidence was therefore reliable. (Audio Record
18 of Trial at Minutes 33:40-36:05; 1:07:55-1:09:30.) Substantial, admissible
19 evidence supported the conviction.

20 Finally, it is crucial to note that *Defendant did not object to the entry*
21 *into evidence of Exhibit 5, the DVD containing the video of the violation,*
22 *which the trial court reviewed and relied on in convicting Defendant.* While
23 Defendant clearly objected to the still photos of the event, she just as clearly
24 did not object to the video, which was admitted into evidence, and which just
25 as clearly provided sufficient admissible evidence to support conviction.
26 (Audio Record of Trial at Minutes 40:00-41:02.)

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1 7. **If the trial court erred in determining that the contract did**
2 **not violate Vehicle Code section 21455.5, subsection (g)(1), should the**
3 **matter be remanded to allow for the reliability of the evidence to be re-**
4 **determined without a presumption of accuracy, or should the matter be**
5 **dismissed without further proceedings in the interest of justice?**

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7 The People of course request that if the Court reaches the question,
8 which it need not, that the Court determine that the contract is not unlawful.
9 As set forth above, this conviction may be affirmed solely on the basis that
10 substantial evidence was properly admitted by the trial court, which supported
11 conviction.

12 Assuming that the trial court erred in determining that the contract was
13 not unlawful, then as established above, the conviction should nevertheless be
14 affirmed because the trial court acted within its discretion when it heard
15 Defendant's objections and admitted all of the relevant evidentiary images
16 and the percipient testimony of John Brandt, all of which supported the
17 conviction. *Moreover, the DVD/video evidence which came into evidence*
18 *without objection, by itself, defeats this appeal. (Audio Record of Trial at*
19 *Minutes 40:00-41:02.)*

20 If the trial court erred both in (1) determining that the contract was not
21 unlawful, and separately, (2) in admitting the People's digital photos and
22 DVD/video images, then either of two outcomes is proper: the Court, having
23 expressly vacated its May 26, 2011 Opinion, may dismiss this matter in the
24 interest of justice, as was requested by the People (Napa Police Department)
25 earlier in this proceeding. The Court may also remand the matter to the trial
26 court for further proceedings to assess the admissibility of the photographic
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1 and DVD/video evidence at issue here.

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PEOPLE OF THE STATE OF CALIFORNIA

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5 July 8, 2011

By:


DAVID C. JONES
Deputy City Attorney

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