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CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION THREE

No. B231678

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

SEP - 6 2011

[REDACTED] GOLDSMITH,
Defendant and Appellant.

Appeal from the Appellate Division of the Superior Court of the
State of California for the County of Los Angeles
The Honorable Patti Jo McKay, Anita H. Dymant and Sanjay Kumar
Appellate Division Case No. BR048189
Superior Court Case No. 102693IN

RESPONDENT'S ANSWER TO **[REDACTED] RABIEAN'S AMICUS
CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT**

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The trial court convicted Appellant ██████████ Goldsmith ("Appellant") for driving through a red light in violation of California Vehicle Code section 21453(a). Appellant's conviction was based on photographic and video evidence generated by a red light camera system maintained and operated by the City of Inglewood in conjunction with Redflex Traffic Systems, Inc. ("Redflex"). The Appellate Division of the Los Angeles Superior Court affirmed Appellant's conviction and the case was subsequently transferred to the California Court of Appeal. After oral argument, this Court gave anyone interested until August 19, 2011 to file an amicus brief, and the parties until September 2, 2011 to file answers to amicus briefs.

Amicus curiae ██████████ Rabiean ("Amicus") advances various arguments in support of Appellant, but none warrant the reversal of Appellant's conviction. As a preliminary matter, the Court should wholly disregard Amicus's arguments based on the Confrontation Clause and due process, and that the Appellate Division improperly weighed the evidence, because such issues have not been raised by the parties.

Even if Amicus's Confrontation Clause argument were proper, it is meritless. Appellant misinterprets the case law and fails to overcome the well-established rule that the Confrontation Clause does not apply to machine-generated evidence like the photographs and videos at issue here. Amicus's due process argument would also fail if it were proper because the trial court did not prohibit Appellant from offering any testimony or evidence. Appellant remained free to call any witnesses on her behalf and to subpoena witnesses unwilling to testify voluntarily.

Amicus's argument that the Appellate Division improperly weighed the evidence also fails. The Appellate Division properly applied

the abuse of discretion standard of review to the trial court's decision and found that the trial court properly applied the law in admitting the evidence of Appellant's violation. Indeed, Amicus points to no part of the Appellate Division's opinion to support this assertion. The court even expressly declined to reweigh the evidence or assess the credibility of witnesses.

Accordingly, the Amicus Brief fails to offer any argument to support a reversal of Appellant's conviction. Appellant's conviction should therefore be affirmed.

II. ARGUMENT

A. THE COURT SHOULD DISREGARD THE MAJORITY OF THE AMICUS BRIEF BECAUSE IT IMPROPERLY ADDRESSES ISSUES NOT RAISED BY THE PARTIES IN THIS APPEAL

This Court should wholly disregard the majority of the Amicus Brief because it advances arguments that the parties themselves have not raised in this appeal. "The general rule . . . is that amicus curiae may not raise new issues but must 'accept the case as it finds it.'" Bruno v. Superior Court (1990) 219 Cal.App.3d 1359, 1365 (quoting Pratt v. Coast Trucking, Inc. (1964) 228 Cal.App.2d 139, 143); E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497, 510-11. "Amici curiae are not allowed to expand the issues raised by the parties." Pan Asia Venture Capital Corp. v. Hearst Corp. (1999) 74 Cal.App.4th 424, 429 n.4; see also United Parcel Service v. Lewis (1981) 451 U.S. 56, 61 n.2 (refusing to consider amicus's arguments because they were not raised by the parties). The California Court of Appeal has aptly summarized this principle as follows:

The rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and the propositions urged by the

appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.¹

Eggert v. Pacific States Sav. & Loan Co. (1943) 57 Cal.App.2d 239, 251.

In Eggert, a proposed amicus "urge[d] various propositions for the modification of the judgment which [were] not presented by either plaintiffs (respondents) or defendant (appellant)." Id. The court refused to consider the arguments because they were not raised by the parties in the appeal. Id.; see also Longval v. W.C.A.B. (1996) 51 Cal.App.4th 792, 798 n.5 (refusing to consider amicus's contentions of violations of certain constitutional and statutory provisions because such claims were not raised by either party).

Here, the Amicus Brief is filled with arguments not raised by either party to this appeal. In her Opening Brief, Appellant contends that her conviction should be reversed for exclusively the following reasons: (1) the yellow light interval at the intersection in question did not comply with the California Vehicle Code; (2) the prosecution failed to authenticate photographic and video evidence of Appellant's offense; (3) the evidence was inadmissible because the prosecution failed to demonstrate that the red light camera system was in proper working order at the time of the offense; and (4) the evidence constituted inadmissible hearsay. [See generally Opening Brief.] Appellant does not argue in this appeal that the trial court violated her rights under the Confrontation Clause or deprived her of due process. [See id.] Indeed, the Appellate Division held that she waived any Confrontation Clause argument by failing to assert it at trial. See People v.

¹ Courts have recognized two narrow exceptions to this rule: (1) where the argument would result in affirmance of the lower court decision and (2) where the argument is jurisdictional. E.L. White, supra, 21 Cal.3d at 511.

Goldsmith (Los Angeles Super. Ct., App. Div. Feb. 14, 2011), No. BR-048189, at 8.

The Amicus Brief contains the following arguments that have not been raised by either party in this appeal: (1) the trial court violated Appellant's rights under the Confrontation Clause by admitting the evidence without live testimony from a Redflex technician, [see Amicus Brief, pp. 2-13, 19]; (2) the trial court violated Appellant's right to due process by admitting the evidence without live testimony from a Redflex technician, [see Amicus Brief, pp. 20-21]; and (3) the Appellate Division improperly affirmed Appellant's conviction based on its own determination that the prosecution presented overwhelming evidence of guilt, [see Amicus Brief, pp. 13-15]. As noted above, Appellant's arguments on appeal are limited to evidentiary issues of authentication and hearsay, and non-compliance with the yellow light interval requirement. Neither the Confrontation Clause or due process are even mentioned in Appellant's Opening Brief. Moreover, the limited exceptions to the rule limiting amicus arguments do not apply here because Amicus is seeking reversal (not affirmance) of the lower court ruling and neither of the new arguments are jurisdictional in nature. The court should therefore disregard the majority of the Amicus Brief.

B. AMICUS'S CONFRONTATION CLAUSE ARGUMENT LACKS MERIT BECAUSE THE PHOTOGRAPHIC AND VIDEO EVIDENCE IS NOT TESTIMONIAL

For the reasons detailed above, the Court should wholly disregard Amicus's improper Confrontation Clause argument. Notwithstanding that fact, Amicus's Confrontation Clause argument fails because the photographic and video evidence of Appellant's violation is non-testimonial and thus outside the reach of the Confrontation Clause.

Amicus contends that the photographs and video here are testimonial because they were created for use as evidence at trial. [Amicus Brief, pp. 4-5.] To support his unfounded assertion, Appellant relies on Melendez-Diaz v. Massachusetts (2009) 129 S.Ct. 2527 and Bullcoming v. New Mexico (U.S. June 23, 2011) 564 U.S. ___, No. 09-10876, slip op. Appellant misinterprets those cases and plainly ignores a key fact that critically distinguishes them from this case – those cases involved reports prepared by **human analysts**, while the evidence at issue here was generated solely by a machine. This distinction is fatal to Amicus's position.

In Melendez-Diaz, the Court held that "affidavits" labeled "certificates of analysis" **prepared by human laboratory analysts** reporting the results of laboratory testing performed by the analysts were testimonial. Melendez-Diaz, *supra*, 129 S.Ct. at 2531-32. The Court reasoned that the certificates were "quite plainly affidavits: 'declaration[s] of facts written down and sworn by the declarant before an officer authorized to administer oaths.'" *Id.* at 2532 (quoting Black's Law Dictionary 62 (8th ed. 2004)). The Court stressed that the affidavits were statements made by the analysts that the analysts would have been expected to provide if called as witnesses at trial. Melendez-Diaz, *supra*, 129 S.Ct. at 2532. This, according to the Court, rendered the analysts "witnesses" under the Confrontation Clause. *Id.*

The Bullcoming Court merely applied Melendez-Diaz in deeming testimonial a forensic laboratory test report **created by a human analyst** certifying that he tested the defendant's blood sample and that the his blood-alcohol content was 0.21 grams per one-hundred milliliters. Bullcoming, *supra*, No. 09-10876, slip op. at 3. In finding the report testimonial, the Court stressed that "[I]ike the analysts in Melendez-Diaz, analyst Caylor tested the evidence and prepared a certificate concerning the

results of his analysis." Id. at 15. The Court further explained that the formalities associated with the report (e.g., a legend printed thereon regarding admission of the reports into evidence) were "more than adequate to qualify Caylor's assertions as testimonial." Id.

Melendez-Diaz and Bullcoming both plainly involved documents prepared by human witnesses intended to establish an element of a crime, not machine-generated evidence. Indeed, the Bullcoming holding was expressly based on the Court's finding that the certification "reported **more than a machine-generated number**," as the human analyst "certified that he received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number corresponded, and that he performed on Bullcoming's sample a particular test, adhering to a specific protocol." Id. at 10 (emphasis added). The Court further stressed that the analyst's representations "relating to past events and **human actions not revealed in raw, machine-produced data**" were matters that could be explored on cross-examination. Id. (emphasis added). Moreover, Justice Sotomayor made clear in her concurrence that the holding did not extend to "machine-generated results, such as a printout from a gas chromatograph." Id. at 6 (Sotomayor, J., concurring). Rather, the prosecution "introduced [the analyst's] statements, which included his transcription of a blood alcohol concentration, apparently copied from a gas chromatograph printout, along with other statements about the procedures used in handling the sample." Id.

It is well-established that machines cannot constitute "witnesses against" defendants whom the Confrontation Clause guarantees the right to cross-examine. United States v. Moon (7th Cir. 2008) 512 F.3d 359, 363. Therefore, raw data generated by a machine does not implicate the Confrontation Clause. United States v. Washington (4th Cir. 2007) 498

F.3d 225, 230-31; accord Moon, supra, 512 F.3d at 361-62. In Moon, the court held that admission of the test results reporting that a substance constituted cocaine did not violate the Confrontation Clause because raw data produced by scientific instruments is not testimonial and is thus outside the reach of the Confrontation Clause. Moon, supra, 512 F.3d at 362. According to the Moon court, a machine cannot constitute a "witness against" a defendant because such an interpretation would render the machine a declarant and producing and cross-examining a machine would serve nobody's interests. Id.; see also Washington, supra, 498 F.3d at 230 (holding that the Confrontation Clause did not apply to results of a blood test showing the presence of illegal substances because "'statements' made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause").

Here, the photographs and video depicting Appellant's violation do not contain any human statements. A computer activated the cameras and sent the photographs and video directly to Redflex. Like the test results in Moon and Washington, which a machine generated automatically without human interference, the Redflex automated enforcement system automatically produced the photographs, video and associated information without the assistance of a human operator. Thus, if Appellant had preserved her Confrontation Clause challenge for this appeal, which she did not, Amicus's argument would fail.

C. **AMICUS'S DUE PROCESS ARGUMENT FAILS BECAUSE THE COURT DID NOT PROHIBIT APPELLANT FROM OFFERING TESTIMONY**

Amicus finally argues that the trial court denied Appellant due process because "[t]he right 'to confront and cross-examine witnesses' has long been recognized as essential to due process." [See Amicus Brief, p. 20 (citation omitted).] For the reasons detailed above, the Court should

wholly disregard this argument because it has not been raised by any of the parties. Notwithstanding that fact, Amicus's argument is meritless.

Amicus offers no analysis in an attempt to show how the trial court violated Appellant's due process rights, but rather makes only a conclusory statement that "the trial court's decision violates the due process right of defendants in red light camera cases" because "due process requires an opportunity to confront and cross-examine adverse witnesses." [See *id.* at 21 (citation omitted).] Indeed, the cases relied upon by Amicus are inapposite because they involved instances where the court prohibited the complaining party from offering testimony or other evidence, not where a party simply chose not to offer testimony. See Chambers v. Mississippi (1973) 410 U.S. 284, 294-96 (finding due process violation where state law prohibited a party from impeaching its own witness); Crane v. Kentucky (1986) 476 U.S. 683, 684, 690-91 (finding due process violation where court prohibited defendant from introducing testimony regarding the trustworthiness of his confession); Goldberg v. Kelly (1970) 397 U.S. 254, 269 (finding due process violation where a state terminated welfare benefits without a hearing and an opportunity to cross-examine witnesses). The other case relied upon by Amicus, Kirby v. United States (1899) 174 U.S. 47, concerned only the Confrontation Clause with no mention of due process and is thus equally inapplicable here.

Here, in stark contrast to the cases relied upon by Amicus, the trial court did not prohibit Appellant from calling a witness to testify. Rather, the court found that the testimony and evidence offered at trial was sufficient to find Appellant guilty, and the Appellate Division agreed. The trial court did not forbid Appellant from offering any testimony or evidence and Appellant was free to call witnesses on her behalf and even subpoena witnesses who would not testify voluntarily. Accordingly, even if Amicus's due process argument were proper here, which it is not, it would fail.

D. AMICUS'S CONTENTION THAT THE APPELLATE COURT IMPROPERLY ACTED AS FACT-FINDER IS WITHOUT MERIT

Amicus appears to argue that the Appellate Division improperly affirmed Appellant's conviction based on its own determination that the prosecution presented overwhelming evidence of guilt. [See Amicus Brief, p. 15.] In doing so, according to Amicus, the Appellate Division improperly acted as a fact-finder. [See *id.*] For the reasons detailed above, the Court should wholly disregard this argument because it has not been raised by any of the parties. Notwithstanding that fact, Amicus's argument fails because the Appellate Division properly reviewed the trial court's decision for abuse of discretion and did not re-weigh the evidence.

Contrary to Amicus's contention, the Appellate Division properly analyzed Appellant's evidentiary challenges under the abuse of discretion standard of review. Goldsmith, *supra*, No. BR-048189 at 4. The court correctly defined this standard of review as requiring reversal only if "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." *Id.* (quoting People v. Hovarter (2008) 44 Cal.4th 983, 1004).

In affirming the conviction, the Appellate Division found that (1) the "evidence sufficiently supported the trial court's determination that the photographs were what the prosecution claimed them to be," (2) the trial court properly found that photographs and automatically generated information printed thereon does not constitute hearsay, (3) the evidence at trial demonstrated that the yellow light interval in question complied with the Vehicle Code and (4) the photographs and video represent demonstrative evidence depicting what the camera sees and thus do not constitute testimonial evidence to which the Confrontation Clause applies. Goldsmith, *supra*, No. BR-048189 at 6-9. In fact, in rejecting Appellant's

yellow light interval objection, the court expressly refused reweigh the evidence and assess the credibility of the testifying officer. *Id.* at 7-8.

Amicus does not (and cannot) point to any part of the Appellate Division's decision in which the court reweighed the evidence. Appellant appears to take issue with the Appellate Division's purported "own determination that the prosecution presented overwhelming evidence of guilt." [See Amicus Brief, p. 15.] Not surprisingly, Amicus cites to no part of the Appellate Division decision to illustrate this position. This is because the Appellate Division properly applied the abuse of discretion standard and found that the trial court properly admitted the evidence and found Appellant guilty. The court in no way reweighed the evidence or assessed the credibility of the witnesses. Amicus's argument therefore fails.

E. **AMICUS'S ARGUMENT THAT THE CALIFORNIA EVIDENCE CODE PRESUMPTIONS OF AUTHENTICITY DO NOT APPLY TO THE EVIDENCE IS MERITLESS**

Amicus argues that the Appellate Division erred in applying the presumptions of authenticity under Evidence Code sections 1552 and 1553 to the evidence of Appellant's violation. Amicus, however, fails to cite any case law or other authority in support of this position. Instead, Amicus cites to numerous cases from other states addressing completely different presumptions that are not even evidentiary in nature. [See *id.* at 17.] Because Amicus does not (and cannot) cite to any relevant authority counseling against the application of the presumptions to the evidence here, Amicus's argument should be wholly disregarded.

Amicus concludes this argument by asserting that the presumptions of authenticity in Evidence Code sections 1552 and 1553 "cannot be used to eliminate traffic defendants' constitutional right to confrontation." [See *id.* at 18.] As explained above, no party in this appeal has made an argument based on the Confrontation Clause. As a result, no

party or amicus has argued that the presumptions do trump the Confrontation Clause. As such, this contention is irrelevant and improper.

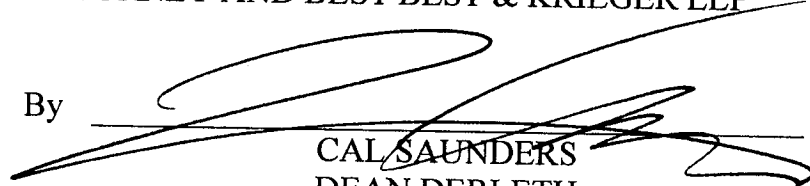
III. CONCLUSION

For the foregoing reasons, Respondent the People of the State of California respectfully request that this court affirm Appellant's conviction.

Dated: September 2, 2011

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