No. S201443

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff & Respondent,

vs.

GOLDSMITH
Defendant & Appellant.

After Decision by Court of Appeal, Second District, Div. Three
Appeal Transferred from Appellate Division of Los Angeles Superior Court
Appeal No. B231678; App. Div. No. BR048189; Trial Court No. 102693IN
Hon. John Johnson, Commissioner

OPENING BRIEF ON THE MERITS

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ISSUES ON WHICH REVIEW WAS GRANTED

1. "What testimony, if any, regarding the accuracy and reliability of the automated traffic enforcement system (ATES) is required as a prerequisite to admission of the ATES-generated evidence?"

2. "Is the ATES evidence hearsay and, if so, do any exceptions apply?" (Order, May 9, 2012.)

INTRODUCTION

This case involves a criminal appeal in connection with defendant Goldsmith's conviction for violation of California's red light camera statute. (Vehicle Code, § 21455.5.) Goldsmith was convicted by the traffic court commissioner of an infraction based on red light camera materials presented at her trial. The evidence presented at Goldsmith's trial, consisting of digital red light camera images, had been prepared by a private contractor that was paid by the prosecuting agency to generate those photos for use at trial.

However, instead of presenting testimony by the private contractor's technician in charge of preparing such evidence, the prosecution sent a surrogate witness. Specifically, the prosecution sent an "investigator" with the Inglewood police department to testify as the sole witness against Goldsmith. In his brief trial testimony, the investigator admitted to the following crucial facts regarding the red light camera system: (1) he had "no actual expertise in designing or operating the system" (RT 6:27-7:2); (2) the system was maintained by Redflex Traffic Systems, Inc. (a private vendor previously caught falsifying evidence used in traffic trials); and (3)

the red light camera system was not even calibrated, notwithstanding such a statutory requirement. (Vehicle Code, § 21455.5(c)(2)(C).)

Based on such testimony alone, the prosecution's case was dead on arrival. Nonetheless, the traffic court commissioner overruled Goldsmith's evidentiary objections and found Goldsmith guilty beyond a reasonable doubt. The conviction should be reversed for the following four independent reasons.

First, Goldsmith's constitutional right to confrontation was violated because the Redflex technician in charge of preparing the evidence package did not even bother to show up at Goldsmith's trial. Neither did the police department employee that allegedly operated the red light camera system. As a result, the "investigator" sent by the prosecution to trial as the sole witness was a secondary surrogate witness that testified in lieu of the primary surrogate witness (i.e., the police department employee that allegedly operated the system). Consequently, Goldsmith's conviction cannot be upheld based on such "double surrogacy."

Irrespective of this constitutional ground for reversal, Goldsmith's conviction must be reversed because the digital evidence prepared by Redflex was not properly authenticated. Erroneously applying the authentication test used for conventional, *non*-digital photographs, the lower courts applied the wrong standard in deeming Redflex's evidence to be authenticated. "Inevitably one who asks the wrong question gets the wrong answer." (*Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 825 (conc. opn. of Mosk, J.).) Applying the proper test for authentication of digital evidence, this Court should reverse Goldsmith's conviction.

Third, the computer-stored information used at Goldsmith's trial to establish guilt constitute hearsay. Neither the business records exception nor the public records exception to the hearsay rule applies to this case. As

a result, the prosecution's attempt to squeeze Redflex's evidence into such exceptions are simply futile.

Finally, irrespective of these independent grounds for reversal, requiring live testimony by Redflex's technician is particularly important in order to restore the public's confidence in the integrity of the traffic court system. "Rather than help pro per defendants, traffic commissioners often rush them through their trials, discount their individual recollection of the events and accept the computer-generated evidence as gospel." (Tait, *Red Light Cameras Deny Defendants the Right of Confrontation*, L.A. Daily J. (October 1, 2001).) Given the widespread treatment of traffic court defendants as second class litigants, it is absolutely critical that this Court finally restore the public's trust in the traffic court system.

Accordingly, the court of appeal's decision should be reversed based on these alternative grounds.

STATEMENT OF THE CASE

I. Trial Proceedings

A. The Prosecution Presents Its Surrogate Witness at Trial. Goldsmith Unsuccessfully Challenges the Materials Relied upon by the Prosecution.

The entire case presented by the prosecution at trial was based on the package created by Redflex for the prosecution's use at trial. In order to present this evidence package, the prosecution presented the testimony of Dean Young as the sole witness against Goldsmith.

1. Young initially provides his pre-trial testimony regarding the red light camera program.

Essentially seeking to obtain convictions against all defendants sitting in court on an *en masse* basis, Young began his testimony before Goldsmith's trial. (RT 1:26-3:5; 5:8-12.) Discussing the red light camera system in general terms, Young testified that the red light camera photos are produced by "a computer-based digital imaging system." (RT 2:2-9.) The first image shows the vehicle before reaching the crosswalk of the intersection. (RT 2:13-17.) The "final recorded image" shows the vehicle within the intersection. (RT 2:17-20.) In addition, "a photograph of the driver's vehicle license plate are also recorded," Young said. (RT 2:20-22.)

According to Young, a twelve-second video is also recorded, showing the progress of the motorist through the intersection. (RT 2:23-26.) "Imprinted on these still images is a data bar information [sic] with information relative to the infraction itself. This information includes the date, time and location of the violation as well as how long the light had been red at the time each respective image was taken." (RT 2:26-3:3.)

2. In his subsequent *voir dire* examination during Goldsmith's trial, Young discloses that he had no actual expertise in operating the red light camera system.

After Young made these pre-trial comments regarding the red light camera system, the traffic court commissioner called Goldsmith's case. (RT 3:6-7.) In response to defense counsel's objections based on lack of foundation (RT 4:26-5:4), the court allowed counsel to conduct *voir dire* examination. (RT 5:5-16.)

In his *voir dire*, Young testified that he was an investigator with the Inglewood police department, assigned to enforce red light camera citations over the past six years. (RT 5:22-28.) According to Young, the red light camera system was operated by the police department. (RT 6:4-6.) Young also confirmed on the record that he had "no actual expertise in designing or operating the system." (RT 6:27-7:2.) Young did not explain why the police department had decided to send Young to court to testify, despite his lack of expertise in operating the system, even though *some one else* at the police department was operating the system. (RT 6:4-6.) Young also did not disclose the identity of the individual in the police department that was operating the system. (*Id.*)

3. Young discloses during Goldsmith's trial that the system is maintained by Redflex and has no calibration. Conversely, Young fails to testify regarding numerous critical issues.

Having overruled the various objections raised by Goldsmith, the commissioner deemed Young to be a qualified witness, allowing Young to testify regarding the materials prepared by Redflex. (RT 5:18-7:18.)

In terms of maintenance issues, Young testified that the system is maintained by "Reflex Traffic Signal." (RT 6:5.) Young also confirmed on the record that "there is no calibration of this system." (RT 6:6.)

Young then testified that, according to the information that he had received from "Redflex Traffic Systems" at an unspecified point (RT 6:23-24), the camera system is an "independently operated system which merely records the events occurring within the intersection after the traffic signal has turned red." (RT 6:9-12.) When asked to explain the system's procedures for data collection, Young testified that "the information as it is

reported is stored on a hard disc on a computer at the scene, and it is retrieved periodically throughout the day by technicians of Redflex Traffic Systems by way of internet D.S.L. connection." (RT 7:3-9.)

There was no testimony that Redflex's computer data is secured or otherwise protected from hackers. There was no testimony that Redflex's computer system is password-protected. Similarly, there was no testimony that any checks are performed on the router, modem, communication link, etc.

There was also no testimony that the "equipment is properly installed." (Veh. Code, § 21455.5(c)(2)(C).) There was no testimony that "the equipment is regularly inspected." (Veh. Code, § 21455.5(c)(2)(B).) In fact, there was no testimony regarding the nature, scope, timing or frequency of the system maintenance at all.

Finally, there was no testimony that "the equipment is . . . operating properly." (Veh. Code, § 21455.5(c)(2)(C).)

4. The specific factual allegations pertaining to Goldsmith's citation

Relying solely on the materials prepared by Redflex, Young claimed that Goldsmith violated the red light camera statute by running a red light on March 13, 2009. (RT 4:21-25.) Young also testified that, according to Redflex's materials, the data bar indicates that the "light had been red for 0.27 seconds" when Goldsmith crossed the intersection of Centinela and Beach Avenue. (RT 7:26-27; RT 4:22-24.) [1]

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1 Young also mentioned that a video recorded the incident without going into similar details. (RT 8:6-9.) The rest of Young's testimony focused on an issue that is beyond the scope of this brief; i.e., whether the traffic light

B. The Commissioner Finds Goldsmith Guilty.

In light of the adverse evidentiary rulings, and based on the testimony of Young, the commissioner found Goldsmith guilty of violating Vehicle Code section 21453(a) at the conclusion of the trial. (CT 5.) At that point (i.e., on November 6, 2009), the court imposed a fine of $436.00. (RT 12:14-17.)

II. Appellate Proceedings

A. Goldsmith Appeals Her Conviction to the Appellate Division.

On December 4, 2009, Goldsmith appealed her conviction to the appellate division of Los Angeles Superior Court (CT 6-9), as authorized by Penal Code, § 1466, subd. (b)(1). Goldsmith also designated the trial transcripts for the appeal. (CT 9.)

The appellate division affirmed Goldsmith's conviction. In its previously/partially published opinion, the appellate division listed "the following contentions: (1) the photographs depicting the traffic violation were inadmissible because no foundation was established that the photographs were reasonable representations of what they were alleged to portray, and they constituted hearsay; (2) the yellow light interval of the traffic light did not conform to the requirements of Vehicle Code section 21455.7; (3) the prosecution's use of photographic evidence violated appellant's Sixth Amendment right to confront witnesses; and (4) the

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remained yellow during the entire time period required by Vehicle Code section 21455.7. (RT 8:14-11:22.)

prosecution failed to prove appellant was the driver depicted in the photographs." (*People v. Goldsmith* (2011) 193 Cal.App.4th Supp. 1, 3-4.)

Disagreeing with another published decision (*People v. Khaled* (2010) 186 Cal.App.4th Supp. 1), the appellate division rejected Goldsmith's arguments. The appellate division held that "photographs taken by an ATES may be admissible even if the testifying officer was not a percipient witness to the violation and was not personally responsible for setting up the camera. We conclude the accuracy of the photographs is subject to a rebuttable presumption pursuant to Evidence Code sections 1552, subdivision (a), and 1553. Moreover, apart from such a presumption, the photographs may be authenticated by a law enforcement officer who has knowledge about the methods used by the ATES to transmit the photographs to the officer's law enforcement agency. Finally, the data and images on the photographs did not constitute hearsay because they did not amount to a 'statement' from a human declarant." (*Goldsmith, supra*, 193 Cal.App.4th Supp. at 4.) [2]

B. The Court of Appeal Transfers the Case to Itself and Affirms the Lower Courts' Decisions.

Pursuant to California Rules of Court, rule 8.1002, Division Three of the Second District transferred the case to itself and issued another published opinion in this case.

Disagreeing with another red light camera case that was published a few weeks earlier by Division Seven of the Second District, Division Three

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2 In addition to rejecting Goldsmith's constitutional argument on procedural and substantive grounds, the appellate division rejected Goldsmith's arguments regarding the duration of the yellow light interval and identification issues. (Typed Op., pp. 7-10.)

held that "the photographs and video were not hearsay, the hearsay rule did not require their exclusion from evidence, and therefore no hearsay exception was necessary to admit this evidence." (*People v. Goldsmith* (2012) 203 Cal.App.4th 1515, 1519.) With respect to authentication issues, the *Goldsmith* court invoked the statutory presumptions in Evidence Code sections 1552 and 1553, holding that "printed representations of computer information and of images stored on a video or digital medium are accurate representations of the computer information and images they purport to represent." (*Id.* at 1522-1523.) While acknowledging that these presumptions "operate only to establish that a printed representation accurately reflects data in the computer" (*id.* at 1523), the court of appeal held that "the admission of computer records does not require foundational testimony showing their accuracy and reliability." (*Id.* [citing *People v. Martinez* (2000) 22 Cal.4th 106].) The court of appeal did not address the Sixth Amendment constitutional issues raised in this case at all. [3]

C. This Court Grants Goldsmith's Petition for Review, Identifying the Issues Presented in This Case.

Goldsmith subsequently filed a petition for review. This Court granted Goldsmith's petition for review and indentified the issues listed above to be briefed and argued in this case. (*People v. Goldsmith*, 2012 Cal. LEXIS 4378.) In addition, on its motion, this Court granted review in *People v. Borzakian* (2012) 203 Cal.App.4th 525 – the conflicting case

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3 The court also rejected Goldsmith's argument that the traffic signal's yellow light interval did not conform to the requirements of Vehicle Code section 21455.7. (*Goldsmith, supra,* 203 Cal.App.4th at 1527.) That issue is not addressed in this brief.

authority decided by Division Seven – and deferred briefing in that case pending the disposition of *Goldsmith*.

LEGAL DISCUSSION

I. BECAUSE THE MATERIALS PREPARED BY REDFLEX TO CONVICT DRIVERS ARE INHERENTLY TESTIMONIAL, THE CONSTITUTIONAL RIGHT TO CONFRONTATION REQUIRES THE PROSECUTION TO PRESENT THE TESTIMONY OF REDFLEX'S TECHNICIAN AT TRIAL.

"The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment . . . provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 320 [initial ellipses added].) Accordingly, "in order for testimonial evidence to be admissible, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Michigan v. Bryant* (2011) 131 S. Ct. 1143, 1153 [citing *Crawford v. Washington* (2004) 541 U.S. 36, 68].) "To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.'" *Bullcoming v. New Mexico* (2011) 131 S. Ct. 2705, 2714 [quoting *Davis v. Washington* (2006) 547 U.S. 813, 822].) [4]

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4 Under the recent decision in *Williams v. Illinois* (2012) 132 S. Ct. 2221, the test is "whether an out-of-court statement has 'the primary purpose of accusing a targeted individual of engaging in criminal conduct.'" (*Id.* at 2262 [Thomas, J., concurring in judgment; discussing the plurality's test].) As discussed below, there can be no question here that the package

Given the undisputed fact that the red light camera packages prepared by Redflex are created solely for use as evidence against motorists in criminal trials, the content of such packages is unquestionably testimonial within the meaning of the Sixth Amendment. For example, according to the testimony presented at Goldsmith's trial, the data bar superimposed by Redflex on the photos identifies "how long the light had been red at the time each respective image was taken." (RT 2:26-3:2.) The photos themselves are similarly testimonial because they were presented to prove "past events" that are "relevant" to Goldsmith's prosecution; namely, to show that Goldsmith actually ran the red light. (*Davis, supra,* 547 U.S. at 822.)

In fact, this is the prosecution's entire case: by relying on Redflex's package, the prosecution seeks to prove that the motorist is guilty of violating Vehicle Code sections 21455.5 and 21453. Conversely, without such documents prepared specifically for use in Goldsmith's trial, the prosecution had no case against Goldsmith; no officer claimed that he or she observed Goldsmith running the red light.

Having chosen to prosecute Goldsmith by relying on the documents prepared by Redflex – based on computer records created, collected *and* maintained by Redflex (RT 7:3-9; 2:26-3:2; 6:1-5 [confirming system maintenance]) – the prosecution was constitutionally required to present the testimony of Redflex's technician at trial. Ignoring Goldsmith's constitutional right of confrontation, the prosecuting agency sent Young to testify at Goldsmith's trial. But the opportunity to cross-examine Young as a surrogate witness did not satisfy the constitutional requirement for a meaningful cross-examination.

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prepared by Redflex meets the plurality's test, thus constituting "testimonial" evidence.

For example, Young acknowledged that neither the police department nor himself had actually maintained the red light camera system. (RT 6:4-6.) Young further admitted that he had no first-hand knowledge as to how the red light camera system works; he had merely obtained his information from Redflex. (RT 6:21-26.) He also admitted, somewhat begrudgingly, that everything he learned about the operation of the camera system "is strictly from what other people have told" him. (RT 6:27-7:2.)

If cross-examination is "the greatest legal engine ever invented for the discovery of truth," the identity of Redflex's anonymous technician is the key that turns the starter. (*Lilly v. Virginia* (1999) 527 U.S. 116, 124 (plurality opinion) [citation omitted].) "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." (*Smith v. Illinois* (1968) 390 U.S. 129, 131 [addressing disclosure of the name and address of the witness].)

In sum, the Sixth Amendment precludes the prosecution from laundering the testimony of Redflex's technician by sending Young to court to testify at Goldsmith's trial.

II. THE DIGITAL EVIDENCE PREPARED BY REDFLEX TO CONVICT MOTORISTS MUST BE PROPERLY AUTHENTICATED BEFORE ADMITTING SUCH MATERIALS INTO EVIDENCE.

"Authentication of a writing is required before it may be received in evidence." (Evid. Code, § 1401, subd. (a).) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid.

Code, § 1400.) It is undisputed that this requirement applies to the "[p]hotographs, videos and digitally generated data" prepared by Redflex. (RB 10.)

A. In Order to Authenticate Digitally-Prepared Evidence, the Proponent of Such Evidence Cannot Simply Rely on the Test for Authentication of Non-Digital Photos.

1. The court of appeal erred by treating digital and non-digital evidence equally in terms of the authentication of these two types of evidence.

The most fundamental flaw in the court of appeal's opinion regarding the issue of authentication is the lower court's complete failure to appreciate the differences between digital photos and photos prepared by traditional cameras. While authentication of non-digital (i.e., conventional/traditional) photos merely entails testimony that the photos accurately represent the scene in question (whether presented by the person who took the photos or by a third party), authentication of digital photos is much more complicated. Having failed to appreciate that these two types of photos are apples and oranges, the lower court erred by exporting the authentication requirements for traditional photos to the digital photos presented at Goldsmith's trial. (See *Goldsmith*, *supra*, 203 Cal.App.4th at 1522.) [5]

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5 Although the court of appeal cited *People v. Beckley* (2010) 185 Cal.App.4th 509, 514 -- a case involving digital photos -- without any analysis (*Goldsmith, supra*, 203 Cal.App.4th at 1522), *Beckley* held that a digital photograph was not properly authenticated while applying the more lenient standard for authentication of traditional photos. As a result, *Beckley* did not even address the proper test for authentication of digital photos.

2. There are major differences between digital and non-digital photographs.

"Digital cameras, in contrast to their analog complements, do not store information in a continuous medium. Instead, information is recorded in discrete bits of information called binary code, which is a string of ones and zeroes that makes up the storage language of hard drives, compact discs, computers, and all other digital devices. By using a series of numbers, instead of the continuous crests and troughs characteristic of analog information, digital image manipulation is much easier, cheaper, and infinitely more difficult to detect than an analog alteration." (Parry, *Digital Manipulation and Photographic Evidence: Defrauding the Courts One Thousand Words at a Time* (2009) 2009 U. Ill. J.L. Tech. & Policy 175, 179 [footnotes omitted].)

"The possibility of digital image compression also distinguishes digital images from photographs. Unlike a traditional camera that limits the number of photographs taken to the amount of film in the camera, digital cameras allow users to choose the number of images they want to capture and store on a storage medium. Through a process called 'compression,' users can choose to store a greater number of images of lesser quality by permanently discarding some of the information originally contained in the digital image. When the user wants to view the image, the decompression process 'guesses' what information was discarded to produce a complete image." (Witkowski, *Can Juries Really Believe What They See? New Foundational Requirements for the Authentication of Digital Images* (2002) 10 Wash. U. J.L. & Policy 267, 270.) "Digital images are highly susceptible to manipulation. Manipulation, as distinct from enhancement, consists of changing the elements of a photograph or image by changing the colors, *moving items from place to place on the image*, or otherwise altering the

original image." (*Id.* at 271 [emphasis added].) Because "[d]igital images are highly susceptible to undetectable manipulation[,] evidence that the image has not been manipulated is crucial to a showing that the image is authentic[.]" (*Id.* at 291.)

B. To Address the Numerous, Additional Risks Associated with the Authenticity of Digital Images, the Proponent of Such Evidence Must Present Competent Testimony to Specifically Address Those Additional Risks.

While California courts have not articulated the proper test for authenticating digital photos or digital videos, courts in other states have blazed the trail. In particular, the test adopted by the Connecticut Supreme Court adequately addresses the concerns raised by both sides in criminal prosecutions. This Court should do the same. (See *Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1190 ["In the absence of any California cases on point, we look to how other jurisdictions have dealt with the problem"].)

In *State v. Swinton* (Conn. 2004) 847 A.2d 921, the Supreme Court of Connecticut addressed authentication issues when digitally created or altered evidence is offered for evidentiary purposes. Adopting a multi-factor test for authentication of digital evidence, the court held that trial testimony should be presented by the proponent of the evidence as to the following: "(1) the computer equipment is accepted in the field as standard and competent and was in good working order, (2) qualified computer operators were employed, (3) proper procedures were followed in connection with the input and output of information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated

correctly, and (6) the exhibit is properly identified as the output in question." (*Id.* at 942.)

Applying this test to evaluate the admissibility of computer generated exhibits, the court addressed whether photographs showing a bite mark on a murder victim, as well as images of the defendant's teeth superimposed on the bite mark by a computer program, were properly authenticated. (*Id.* at 943-945.) After examining the detailed testimony presented by the prosecution's witness at trial addressing those six factors, the court concluded that the prosecution presented adequate testimony to admit into evidence the enhanced photos of the bite mark. (*Id.* at 944.) Conversely, applying the six-factor test, the court held that the second piece of evidence – a computer image of the defendant's teeth superimposed on the bite mark – was improperly admitted into evidence. (*Id.* at 952.) The court reasoned that the witness "could not articulate sufficiently how the visual effect of the defendant's translucent teeth superimposed over the bite mark was produced. The defendant should have had the opportunity to question someone who could testify accurately as to the reliability of the evidence and the processes used to generate it." (*Id.*)

Applying the same test here, the prosecution should be required to present testimony regarding these six factors in red light camera prosecutions.

C. Because the Prosecution Failed to Present Testimony as to Five of the Six Factors in Its Attempt to Authenticate Redflex's Digital Evidence, the Prosecution Failed to Prove Its Case Against Goldsmith Beyond a Reasonable Doubt.

In order to convict Goldsmith based on the digital images prepared by Redflex, the prosecution should have presented the following testimony at Goldsmith's trial, consistent with the language of the red light camera statute:

► (1) Redflex's computer equipment was in good working order at the time of taking Goldsmith's photos;

► (2) Redflex employed qualified computer operators to retrieve the data regarding Goldsmith's alleged violation (RT 7:3-9 [admitting that unknown "technicians" at Redflex retrieve unspecified "information" daily using an internet DSL connection]);

► (3) Redflex followed proper procedures in connection with the input and output of information used in preparing the evidence package presented at trial. Specifically, all of the camera systems at the subject intersection (including their various components) were "properly installed and calibrated, and [were] operating properly." (Vehicle Code, § 21455.5(c)(2)(C).) In addition, the camera systems accurately (a) collected, (b) processed, and (c) reported the information found on the data bar in terms of the date, time and location of Goldsmith's car as the traffic light was changing;

► (4) Redflex used a reliable software program in order to process and store this information on its computer system; and

► (5) the computer, camera and video systems were programmed correctly and operated without any malfunctions or unauthorized/improper access by others.

Having failed to present any testimony whatsoever on these five critical issues, the prosecution obtained a conviction in this case by merely stating a conclusion – that the photos presented at Goldsmith's trial represented the output of Redflex's "computer-based digital imaging system" – in order to address the sixth factor required by *Swinton*. (RT 2:9.) Having addressed only one of those six factors, the digital images and the data bar presented by the prosecution were not properly authenticated. As a result, the Court should reverse Goldsmith's conviction on this additional ground.

Goldsmith's view is further supported by this Court's decision in *People v. McWhorter* (2009) 47 Cal.4th 318. In that case, this Court upheld the exclusion of computer-enhanced photos that the defense sought to present to the jury. (*Id.* at 367.) Although the defense had presented "an expert in the field of electronic processing of visual and audio recorded data" to establish the foundation for those photos (*id.* at 364), this Court deemed the expert's testimony to be inadequate for several reasons. First, the Court noted that "the actual software program utilized by [the expert] to create the enhanced image was not identified." (*Id.* at 365.) Second, the Court reasoned that despite the expert's impressive credentials, "it will suffice to observe that he could not identify the computer program he used to enhance or 'electronically emboss' the image in question, nor could he satisfactorily explain the *full nature of the process* he used to create it." (*Id.*

[emphasis added].) Noting that the expert did not "know the exact mechanical process by which the computer does that which it does," the Court ultimately upheld the exclusion of the evidence under *Kelly*. (*Id.* at 366-367.) This principle was reinforced by this Court two days ago in another case. (See *People v. Duenas* (Aug. 6, 2012, S077033) __ Cal.4th __ [2012 Cal. LEXIS 7251 at * 37] [holding that computer-generated evidence that is used as substantive evidence – e.g., a computer simulation – requires foundational testimony under *Kelly*].)

This Court's rationale in excluding the photos in *McWhorter* is highly informative in analyzing the authentication issues raised here. Just like that case, the proponent of the evidence here, the prosecution's sole witness (1) failed to identify the software program used to alter the red light camera photos – whether by imprinting the data bar or otherwise, and (2) did not even pretend to know "the exact mechanical process by which the computer does that which it does." (*McWhorter, supra,* 47 Cal.4th at 366.) As a result, adopting the six-factor test articulated in *Swinton* is fully consistent with this Court's own prior decision in *McWhorter.*

Refusing to acknowledge these major evidentiary gaps in the record, the prosecution argued that Young properly authenticated the information produced by Redflex's computer system. While Young testified that an anonymous employee of Redflex retrieves the information stored on Redflex's computer system, "it is apparent that the trial court did not know whether [the employee] was a seasoned professional manager of computer records or a janitor." (*In re Vee Vinhnee* (9th Cir. BAP 2005) 336 B.R. 437, 448.) "There is no information regarding [Redflex's] computer policy and system control procedures, including control of access to the pertinent databases, control of access to the pertinent programs, recording and logging of changes to the data, backup practices, and audit procedures utilized to assure the continuing integrity of the records. All of these

matters are pertinent to the accuracy of the computer in the retention and retrieval of the information at issue." (*Id.* at 448-449.) As a result, judging by Young's totally deficient testimony, the prosecution failed to authenticate the digital images presented at Goldsmith's trial.

D. The Statutory Presumptions Invoked by the Prosecution Do Not Cure the Evidentiary Gaps in This Case Based on the Lack of Authentication of Redflex's Evidence.

Attempting to sweep these evidentiary problems under the rug, the prosecution also argued on appeal that the burden shifted to Goldsmith to show that the digital images presented in this case (as well as the data bar) were not properly authenticated. (RB 10-12.) To support this argument, the prosecution invoked Evidence Code sections 1552 and 1553.[6]

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6 Section 1552 provides as follows: "A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent."

Section 1553 provides as follows: "A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate

The prosecution's argument is totally flawed. "This presumption operates to establish only that a computer's print function has worked properly. The presumption does not operate to establish the accuracy or reliability of the printed information. On that threshold issue, upon objection the proponent of the evidence must offer foundational evidence that the computer was operating properly." (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1450.)

For example, if a computer print-out states that "the earth is flat," this statute does not create a presumption that the earth is in fact flat; it merely creates a presumption that this phrase was printed correctly from the computer (i.e., without a printing malfunction). The statute would not change the parties' burdens to establish whether the earth is actually flat (if that were the issue presented in the case). Having refused to acknowledge this basic point, the prosecution's argument that this presumption shows that Goldsmith was actually "driving through the red light" is fatally flawed (RB 12); the presumptions do not address the merits (i.e., the ultimate validity) of the assertions printed by Redflex's computer system.

Another critical flaw in the prosecution's argument is that the two cited statutes, by their own terms, merely affect the "burden of producing evidence"—as opposed to affecting the burden of proof. (Evid. Code, § 1552, subd. (a); § 1553.) There is a major distinction between these two types of presumptions. Simply representing an evidentiary shortcut, "the former implements no public policy and merely is enacted to facilitate trials." (*People v. Southern Pac. Co.* (1983) 139 Cal.App.3d 627, 632-633 [citing Evid. Code, §§ 603, 605].) More importantly, as soon as the opposing party "produces some quantum of evidence casting doubt on the truth of the presumed fact, the other party is no longer aided by the

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representation of the existence and content of the images that it purports to represent."

presumption. The presumption disappears, leaving it to the party in whose favor it initially worked to prove the fact in question." (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 882.) For example, if a party proves that a letter was mailed, it is presumed that the letter was received. "However, if the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 604, p. 59.)

Applying these principles here, the statutory presumption under sections 1552 and 1553 is that the red light camera "computer's print function has worked properly" in terms of printing the data bar and transferring the stored images (the photos and video) into a tangible medium for practical use. (*Hawkins, supra,* 98 Cal.App.4th at 1450.) "The output, however sophisticated it may seem, is only as reliable as the input and the processing. Garbage in, garbage out." (Garcia, "*Garbage In, Gospel Out": Criminal Discovery, Computer Reliability, and the Constitution* (1991) 38 UCLA L. Rev. 1043, 1087.) Contrary to the prosecution's suggestion, Goldsmith is not claiming that the data bar printed on the photos (or the content of the photos/video) that were presented at trial are different than what was generated by Redflex's computer. For example, there was no allegation that Dean Young altered the photos or other evidence after he obtained them from Redflex. Goldsmith's argument is that there was no evidence that the information that the computer stored was properly fed *into* the computer in the first place – or that it was subsequently processed properly by the computer system *before* it was printed. To be blunt, Goldsmith's challenge was focused on the "garbage-*in*" feature of Redflex's computer system. Therefore, the statutory presumptions invoked by the prosecution – in support of its "gospel-out"

theory – cannot salvage this case by capitalizing on the fact that Young's "testimony gave a false aura of computer infallibility." (*People v. Hernandez* (1997) 55 Cal.App.4th 225, 241.)

E. The Cases Cited by the Prosecution Are Obsolete and/or Inapplicable.

The decisions cited by the prosecution in the court of appeal cannot be used to eliminate these basic evidentiary requirements. Specifically, the prosecution cited *Martinez*, *supra*, 22 Cal.4th 106 in order to justify its failure to present proper testimony regarding the accuracy and reliability of Redflex's evidence. (RB 13 [authentication], RB 31 [hearsay].) In *Martinez*, a majority of this Court quoted with approval an intermediate appellate court's statement that "testimony on the acceptability, accuracy, maintenance, and reliability of ... computer hardware and software" is not required before admitting computer print-outs into evidence. (*Martinez, supra,* 22 Cal.4th at 132 [quoting *People v. Lugashi* (1988) 205 Cal.App. 3d 632, 642].)

But since *Lugashi* was decided nearly a quarter of a century ago, there has been a significant transformation in the law on evidence. 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. Because *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), the *Lugashi* "rule" – though applied by this Court in *Martinez* during the pre-*Crawford* era – was based on the outdated analysis under the old *Roberts* regime for evaluating admission of evidence.

But even if *Lugashi* or *Martinez* had survived the *Crawford* revolution, the red light camera photos presented here would still have to be excluded for several reasons. First, the majority opinion in *Martinez* was based on the premise that the defendant has the opportunity to challenge the "acceptability, accuracy, maintenance, and reliability of ... computer hardware and software" on cross-examination. (*Martinez, supra,* 22 Cal.4th at 132.) In this case, by contrast, Young admitted that he had never operated Redflex's red light camera system. (RT 6:27-7:2.) The most he could testify to was that some anonymous technicians employed by Redflex retrieve the computer information by using an internet connection, presumably from a remote location. (RT 7:3-9.) Young also testified that the system is maintained by Redflex, thus precluding Goldsmith from cross-examining Young on key maintenance issues. Finally, according to Young's testimony, the police department was operating the system but – for reasons that he failed to divulge on the record – the police department sent Young to testify, even though Young admitted that he personally had no expertise in "operating the system." (RT 6:27-7:2.) As a result, the entire premise of *Martinez*'s holding – the availability of meaningful cross-examination as to the computer's reliability – is completely missing here, thus making the majority's decision inapplicable here.[7]

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7 Other courts have similarly found *Martinez* to be inapplicable on several grounds, including the fact that "the court limited its decision to the record of the case." (*People v. Steele* (2002) 83 Cal.App.4th 212, 223, fn. 8 [internal citation omitted].)

III. BECAUSE SOME OF THE DATA BAR INFORMATION STORED ON REDFLEX'S COMPUTER SYSTEMS CONSTITUTE HEARSAY, SUCH EVIDENCE IS NOT ADMISSIBLE AT TRAFFIC TRIALS WITHOUT LIVE TRIAL TESTIMONY BY REDFLEX'S TECHNICIAN.

In addition to these threshold evidentiary problems, there is another fundamental ground for reversing Goldsmith's conviction: the packages prepared by Redflex include hearsay evidence. (See *Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1028 ["authentication of a writing is independent of the question of whether the content of the writing is inadmissible as hearsay"].) As a result, without live testimony by Redflex's technician, the prosecution cannot obtain convictions in red light camera cases.

A. The Definition of Hearsay Includes Some of the Computer-Based, Data Bar Information Presented at Goldsmith's Trial.

Hearsay evidence "is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) More succinctly, "hearsay" is an out-of-court statement offered for its truth.

In deciding what constitutes hearsay, a few courts have made a distinction between computer-stored information and computer-generated information. (Compare *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797 [holding that "computer printouts ... must qualify under some hearsay exception, such as business records" to be admissible without making such a distinction] with *Hawkins, supra*, 98 Cal.App.4th at

1451 [distinguishing another case that had deemed computerized information to be hearsay on the ground that the prior case "involved computer-stored information, not computer-generated information"].) Such an artificial distinction ignores the fact that computer-generated materials are not per se admissible. (See *Duenas, supra,* __ Cal.4th __ [2012 Cal. LEXIS 7251 at * 37] [holding that unlike demonstrative evidence used to help the jury understand substantive evidence, computer-generated materials that are used as substantive evidence such as a computer simulation must meet the *Kelly* test before admitting them into evidence].) [8]

But even if we assume for the sake of argument that this is a valid distinction – i.e., assuming that only computer-*stored,* rather than computer-generated, information may qualify as hearsay – the admission of computer-stored information at Goldsmith's trial requires reversal here in light of Young's testimony. Specifically, addressing the collection of data by Redflex's automated enforcement system, Young testified that "the information as it is reported is stored on a hard disc on a computer at the scene, and it is retrieved periodically throughout the day by technicians of Redflex Traffic Systems by way of internet D.S.L. connection." (RT 7:3-9.)

With respect to the critical information used by the prosecution to convict drivers (regarding the length of time that had passed after the traffic light turned red when the photo was taken), this computer-stored information qualifies as hearsay under the case authority relied on by the prosecution. (RB 20-22 [citing *Hawkins*].) On the other hand, the

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8 Although *Duenas* did not address hearsay issues presented by computer-generated evidence, this Court's holding in that case preempts the notion that Redflex's materials, used as the sole documentary evidence against Goldsmith, merely constitute "demonstrative evidence" in this case. (See *Goldsmith, supra,* 203 Cal.App.4th at 1525-1526 [using this rationale in holding that no hearsay violation occurred here].)

computer-generated information (i.e., the date and time of the photograph as reflected on the data bar) do not qualify as hearsay. (See *People v. Nazary* (2010) 191 Cal.App.4th 727, 754 [under *Hawkins*, "the date, time, and totals" printed on receipts were non-hearsay as they were "generated by the ... machine"].) [9]

Accordingly, in response to the questions posed by the court in its order granting review, at a minimum, the computer-stored information reflected on the data bar as to the length of time that had passed after the light turned red – at the time Goldsmith's photos were taken – constitutes hearsay. As discussed below, given the inapplicability of any hearsay exceptions, the trial court erred by convicting Goldsmith based on such inadmissible information.

B. The Two Hearsay Exceptions Invoked by the Prosecution Do Not Apply to the Materials Prepared by Redflex.

1. The business records exception does not apply.

Subject to strict foundational requirements, business records that are otherwise hearsay are admissible when the proponent of such evidence proves each of the following:

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9 Although the date and time of the photograph printed on the data bar do not qualify as hearsay, the test for *their* "admissibility is whether the machine was operating properly at the time of the reading, and that the mechanical recordings of [such] information are subject to impeachment through evidence of machine imperfections or by cross-examination of the expert who explained or interpreted the information in the device." (*Nazary, supra,* 191 Cal.App.4th at 754.) As discussed above, given Young's failure/inability to provide such information, the prosecution failed to meet that test, thus making even this computer-generated information inadmissible.

(a) "The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271.)

The burden of proving these elements was on the prosecution as "the proponent of the evidence." (*People v. Diaz* (1992) 3 Cal.4th 495, 534-535 [articulating this rule].) With respect to the third and fourth elements, the testimony presented by Dean Young on behalf of the prosecution shows that the prosecution failed to come anywhere close to establishing these conjunctive elements. Therefore, the commissioner erred by admitting Redflex's materials at Goldsmith's trial.

a. The prosecution's sole witness was not qualified to testify regarding the mode of preparation of Redflex's evidence.

Young practically admitted – albeit reluctantly – that he was not qualified to testify regarding the mode of preparation of Redflex's evidence. Specifically, Young admitted that he had "no actual expertise in designing or operating the system." (RT 6:27-7:2.) He never claimed that he had received any training – whether formal or informal – whatsoever regarding the operation of Redflex's system.

Young also admitted that his information regarding the operation of the system was "strictly from what other people have told" him. (RT 7:1-2.)

When asked to explain how he acquired his "knowledge of how the system works," he responded as follows: "From Redflex Traffic Systems as far as the camera operations go, and from the City of Inglewood traffic engineers as far as how the traffic signals and system works." (RT 6:21-26.) As a result, given Young's testimony that he had no personal, first-hand knowledge regarding the operations of Redflex's system, the prosecution's decision to send this surrogate witness to testify as the sole witness against Goldsmith is simply baffling—to say the least. (See *Municipality of Anchorage v. Baxley* (Alas. App. Ct. 1997) 946 P.2d 894, 897 [upholding the lower court's holding that speed radar photos were inadmissible, citing the lack of "testimony by a trained police officer who is certified to operate the equipment"; alternatively holding that the photo-radar evidence carries little weight].) Consequently, given Young's own admissions regarding his lack of expertise or personal knowledge in operating the system (RT 6:27-7:2), his own testimony defeats the prosecution's argument that the hearsay evidence presented at trial "comes within the business records exception to the hearsay rule." (*Prato-Morrison v. Doe* (2002) 103 Cal.App.4th 222, 230 [relying on party's own testimony in reaching this conclusion].)

Young's testimony is particularly disturbing because he initially testified that "the system is operated by the police department." (RT 6:4-5.) He also testified that he had no actual expertise in operating the system. (RT 6:27-7:2.) But the fact that the police department would send Young to testify in court, while *another* police employee was operating the system, raises more questions. In sum, given Young's testimony confirming his lack of personal knowledge regarding the operations of the system – and consequently, regarding the preparation of the evidence presented at trial – Young was not a "qualified witness" as required by section 1271, subdivision (c). Therefore, the prosecution's reliance on the business records exception is simply flawed. (See, e.g., *California Steel Bldgs., Inc.*

v. Transport Indem. Co. (1966) 242 Cal.App.2d 749, 759 [recipient of invoice cannot vouch for mode of preparation of the invoice]; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1313 [FBI agent was not qualified witness in lieu of custodian of records to admit retailer's sales receipt into evidence; no prejudicial error found due to other reasons].)

b. The mere fact that Redflex prepared the evidence used at Goldsmith's trial is the ultimate reason for its untrustworthiness. Several other facts reinforce this point.

The bottom line foundational requirement for admitting business records is that the source of information and the method of preparation of the record is such that it indicates its "trustworthiness." (Evid. Code, § 1271(d).) Therefore, even if another police department employee (i.e., the one actually operating the system) had testified at Goldsmith's trial, the prosecution's reliance on this exception to the hearsay rule would still be futile for multiple reasons.

First, the most obvious reason that the red light camera package prepared by Redflex is untrustworthy is that it was prepared by Redflex, a commercial enterprise whose entire existence depends on generating revenues by maximizing the number of convictions. In fact, Redflex's reputation precedes itself in light of its prior felony conduct in fabricating evidence used against motorists in traffic courts. (See *Arizona Official Confirms Redflex Falsified Speed Camera Documents,* <http://www.thenewspaper.com/news/24/2464.asp> [as of August 2, 2012].) While being motivated to generate profits is certainly not a crime,

falsifying evidence *is*. (See Pen. Code, § 134.) [10] Therefore, the mere fact that the prosecution hired – and financially compensated – Redflex to generate evidence speaks volumes in terms of the untrustworthiness of the evidence prepared by Redflex.

As another court explained in connection with a felony appeal – where the defendant had taken photos of an intersection from an angle in such a way as to mislead the traffic court in order to contest an infraction ticket – "a photograph need not be digitally changed or otherwise physically altered to qualify as 'false'" within the meaning of section 134. (*People v. Bamberg* (2009) 175 Cal.App.4th 618, 627.) As a result, it is possible for Redflex to be guilty of a felony for violating this statute, even without altering the evidence presented in red light camera trials. While Goldsmith admittedly does not have evidence to prove beyond a reasonable doubt that Redflex committed such a felony here – whether by installing the cameras to take photos from a particular angle to mislead the court or otherwise – there is also no reason to believe that Redflex's evidence is per se trustworthy.

Second, the prosecution's witness confirmed in this case that the red light camera system was not actually calibrated. (RT 6:4-6.) In authorizing the use of red light camera systems, the legislature expressly contemplated that -- in order to ensure the trustworthiness of such a system -- law enforcement agencies must "certify[] that the equipment is properly installed and calibrated, and is operating properly" as part of their administrative "day-to-day functions." (Vehicle Code, § 21455.5(c)(2)(C).) Emphasizing the critical importance of this requirement, the legislature also

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10 This statute provides in full text as follows: "Every person guilty of preparing any false or antedated book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of felony."

precluded law enforcement agencies from delegating this particular task (among others) to private contractors. (Vehicle Code, § 21455.5, subd. (d).) Here, however, the prosecution confirmed that the system was not even calibrated in this case (RT 6:4-6), thus raising serious doubts regarding the trustworthiness of the photos used at Goldsmith's trial.

Third, the red light camera photos are digital in nature. Having altered those photos by superimposing the data bar on the photos – which asserted the length of time that the light had been red when the photos were taken – Redflex's evidence was even more untrustworthy based on the empirical analysis discussed in the secondary authorities cited above regarding the alteration of such evidence. Setting aside the fact that "it does not always take skill, experience, or even cognizance to alter a digital photo" (*Beckley, supra,* 185 Cal.App.4th at 515), given the prosecution's failure to allege that Redflex's internet connection was secure (see *id.* at 515-516 [discussing additional risks posed by hackers]), the trustworthiness of Redflex's evidence is further questionable based on this additional ground.

Similarly, Young's own testimony that unidentified technicians retrieve the information stored on Redflex's computer "by way of internet D.S.L. connection" (RT 7:3-9) ignores the "untrustworthiness of images downloaded from the Internet," a point emphasized by other courts. (*Beckley, supra*, 185 Cal.App.4th at 515-516 [also noting that "hackers can adulterate the content of any web-site from any location at any time"].) Moreover, in the absence of any evidence of a password requirement for accessing – including editing, manipulating or deleting – the content of Redflex's computer records/images, the prosecution cannot prove its allegation that Redflex's computer records are trustworthy.

Finally, for obvious reasons, documents prepared by a party or its experts, retained specifically for purposes of providing advice in

anticipation of litigation, are considered inherently untrustworthy and thus inadmissible. (See, e.g., *Palmer v. Hoffman* (1943) 318 U.S. 109, 113-114 [the trustworthiness requirement cannot be compromised by rule allowing admission of business records created in anticipation of litigation].) Given that documents prepared for settlement discussions are not admissible under the business records exception (*Gee v. Timineri* (1967) 248 Cal.App.2d 139, 147–148 [financial statement prepared to facilitate settlement]), the materials prepared by Redflex with the sole purpose of convicting motorists such as Goldsmith are *ad fortiori* untrustworthy. Having been "prepared specifically for use in litigation" in order to generate convictions, Redflex's documents are "dripping with motivations to misrepresent." (*AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.* (7th Cir. 1990) 896 F.2d 1035, 1045 [internal citation omitted].)

Therefore, the prosecution cannot possibly establish the last—and most important—requirement for admissibility of business records: trustworthiness. (See *Municipality of Anchorage, supra,* 946 P.2d at 897 [rejecting testimony of speed camera vendor's experts because "individuals who have a great deal at stake financially ... will testify to whatever it takes to convince the court in a given case"].)

2. The public records exception does not provide a basis to admit Redflex's evidence in traffic trials.

The public records exception to the hearsay rule, codified in Evidence Code § 1280, provides as follows:

> "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in

any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

(a) The writing was made by and within the scope of duty of a public employee.

(b) The writing was made at or near the time of the act, condition, or event.

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

As discussed below, given the prosecution's failure to prove these conjunctive requirements, the evidence package prepared by Redflex is not admissible under this exception to the hearsay rule.

a. The prosecution failed to present any evidence to prove that Redflex was legally authorized to prepare the evidence presented at Goldsmith's trial.

The prosecution argued on appeal that the first requirement for applying section 1280 was satisfied here because Redflex "collected and processed the photographic and video evidence" that was presented at Goldsmith's trial "pursuant to a contractual duty under its contract" with the prosecuting agency, a public entity. (RB 32.) While no one disputes that the prosecuting agency had entered into such a contract with Redflex prior to Goldsmith's trial, in order to carry its burden to prove that subdivision (a) was satisfied, the prosecution was required to prove the validity – i.e., the *legality* – of that contract.

However, based on the motion for judicial notice presented by amicus David Martin in the court of appeal (which was granted by that court), Redflex's contract was legally void because Redflex was not even licensed as a contractor until 2011, nearly two years after Goldsmith's citation was issued. (1 CT 3.) As a result, the contract relied upon by the prosecution was completely void. (See Bus. & Prof. Code, § 7028.15, subd. (e) ["Any contract awarded to ... a contractor who is not licensed pursuant to this chapter is void" when awarded by a government agency].) Given the voidness of that contract, the prosecution cannot show that the first requirement under section 1280 is satisfied here. End of story.

b. The prosecution also failed to present any evidence to prove its allegation that the evidence prepared by Redflex was trustworthy.

As with the other requirements imposed by section 1280, the prosecution had the burden to prove that the documents prepared by Redflex were trustworthy in order to invoke the public records exception to the hearsay rule. Based on the preceding discussion under the business records exception, the prosecution cannot prove the trustworthiness element under section 1280. (See *ante,* pp. 30-33.) As a result, the public records exception does not provide a basis for the prosecution to salvage Goldsmith's conviction.

c. The prosecution cannot squeeze Redflex's materials into the public records exception by invoking the general presumption that an official duty is regularly performed.

The prosecution also argued that the presumption that an official duty is regularly performed shifted the burden to Goldsmith to show that Redflex's documents were not "properly prepared." (RB 31 [invoking Evid. Code, § 664].) This presumption, however, "operates only if the facts giving rise to the presumption have been found or otherwise established beyond a reasonable doubt." (*People v. Acevedo* (2003) 105 Cal.App.4th 195, 198 [citing Evid. Code, § 607].) No statutory presumption arises when there is no foundation established for the record. (See, e.g., *Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 1001-1005 [no presumption arises when there is no foundation established (e.g., type of device, officer's training, etc.) for admission of PAS test results].) As discussed above, the limited testimony presented by Young conclusively showed that he had no personal knowledge regarding the most fundamental aspects of Redflex's system. Therefore, the prosecution's argument, essentially based on circular reasoning by assuming proper foundation, is completely flawed.

Finally, the prosecution's reliance on Evidence Code section 663 makes no sense. (RB 32.) That statute merely states that a "ceremonial marriage is presumed to be valid." This does not appear to be an issue in this case.

IV. REGARDLESS OF HOW THIS COURT RULES ON THE PRECEDING ISSUES, REQUIRING LIVE TESTIMONY BY REDFLEX IS PARTICULARLY IMPORTANT IN ORDER TO RESTORE THE PUBLIC'S CONFIDENCE IN THE INTEGRITY OF THE TRAFFIC COURT SYSTEM.

Finally, the dynamics of the traffic court system provide additional grounds for imposing and enforcing strict evidentiary requirements as a condition precedent for obtaining red light camera convictions in traffic courts.

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 vast majority of defendants cannot spend thousands of dollars in attorneys' fees to challenge a $480 citation. "Rather than help pro per defendants, traffic commissioners often rush them through their trials, discount their individual recollection of the events and accept the computer-generated evidence as gospel." (Tait, *supra*, L.A. Daily J. (October 1, 2001).) To ensure that pro per defendants' rights are no longer systematically abused, this Court should require prosecuting agencies to prove their case without relaxing the evidentiary standards governing other criminal cases. Any other ruling would perpetuate the current double standard by allowing "traffic commissioners ... [to] accept the computer-generated evidence as gospel." (*Id.*)

This Court has not hesitated to crack down on similar policies employed in lower courts in other contexts. Refusing to tolerate a double standard in the administration of family law involving pro per litigants, this Court held that such litigants "should not be subjected to second-class status or deprived of access to justice. Litigants with other civil claims are entitled to resolve their disputes in the usual adversary trial proceeding

governed by the rules of evidence established by statute. It is at least as important that courts employ fair proceedings" in resolving such disputes. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1368.) The "same judicial resources and safeguards should be committed" to ensure that pro per defendants are not convicted based on the questionable evidence prepared by Redflex in order to generate convictions. (*Id.*) Otherwise, relaxing the evidentiary standards for admission of red light camera photos would "create both the appearance and the reality of a two-track system of justice." (*Inquiry Concerning Judge Richard W. Stanford., Jr.* (2012) 53 Cal.4th CJP Supp. 1, 6 [removing judge from bench for applying a double standard in connection with traffic tickets].)

For example, while the prosecuting agency gets away with *its* violation of the red light camera statute – in light of Young's statement that the camera system was not even calibrated as required by that statute (RT 6:6) – the driver is convicted for violating the very same law that the prosecution itself has violated! "The vice in this favoritism" is "the damage to the reputation of the judiciary from the double standard." (*Inquiry Concerning Wasilenko* (2005) 49 Cal.4th CJP Supp. 26, 49.)

Emphasizing this point in another traffic infraction appeal, this Court has previously held 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 [quoting *People v. Rhodes* (1974) 12 Cal.3d 180, 185].) 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; accord, *People v. Marcroft* (1992) 6 Cal.App.4th Supp. 1, 5 [reiterating that it is "all the more important that the

court at such [traffic] trials use the utmost care to preserve not only the reality but also the appearance of fairness and lack of bias"].)

"Few 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.'" (*Mayer v. City of Chicago* (1971) 404 U.S. 189, 197 [internal citation omitted].) Given the public's distrust of the prosecuting agencies' use of traffic citations for ulterior motives, the need to restore the public's trust in the integrity of the traffic court system is extremely important at this time. (See Ortiz, *Jump in Traffic Tickets Raises Questions*, L.A. Daily J. (October 15, 2010) [discussing statistical data provided by Judicial Council showing an artificial 46% increase in the number of citations issued over the last ten years].)

Accordingly, in order to ensure that pro per defendants are not subject to a double standard in terms of the administration of justice by traffic courts, this Court should be particularly vigilant in holding the prosecution's feet to the fire by requiring proper testimony in such cases. In the absence of such testimony, excluding the red light camera photos "is necessary to restore public confidence in the integrity and impartiality of the judiciary and honor the ... mandate to ensure the evenhanded administration of justice." (*Stanford., supra,* 53 Cal.4th CJP Supp. at 6.)

CONCLUSION

The lower courts' decisions should be reversed based on the grounds articulated above.

Respectfully submitted,

DATED: August 8, 2012

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen. I am not a party to this action; my business address is 555 South Flower Street, 29th Floor, Los Angeles, California 90071.

On **August 8, 2012**, I caused the foregoing document described as **OPENING BRIEF ON THE MERITS** to be served on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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