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In the

Supreme Court of California

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

vs.

CARMEN GOLDSMITH,

Defendant and Appellant.

After a Decision by the Court of Appeal
Second Appellate District, Division Three, Case No. B231678

Los Angeles County Superior Court, Appellate Division, Case No. BR048189
Honorable Patti Jo McKay, Anita H. Dymant and Sanjay Kumar
Superior Court Case No. 102693IN

ANSWERING BRIEF ON THE MERITS

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I.

INTRODUCTION

This Court granted review to decide: (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 ATES-generated evidence?; and (2) Is ATES evidence hearsay and, if so, do any exceptions apply?

In response to this Court's first question: (a) ATES-generated images are original digital images that are just like other film photo or video evidence being offered as probative or "silent witness" evidence, and they should be authenticated in the same way, with the court presuming their validity and reliability under Evidence Code section 1553; (b) The machine-generated data bar printed on those images is, under Evidence Code section 1552, presumed to be valid, and may be authenticated just like any other computer-generated record. As this Court made clear in *People v. Martinez* (2000) 22 Cal.4th 106, 132, testimony about the acceptability, accuracy, maintenance, and reliability of the computer hardware and software that produced the data is not required.

In response to this Court's second question: Because ATES-generated evidence is not created using any human input, it is also not a "statement" of any kind, meaning that it is neither hearsay nor subject to a Sixth Amendment Confrontation Clause analysis. The Legislature has made that clear by amending Vehicle Code section 21455.5 to expressly state that ATES-generated evidence "does not constitute an out-of-court hearsay statement by a declarant . . ." (Veh. Code, § 21455.5, subd. (e) [as amended by Senate Bill 1303 (Stats. 2012, ch. 735) effective January 1, 2013].)

II.

SUMMARY OF ARGUMENT

ATES is a powerful deterrent, and its use at lighted intersections discourages drivers from risky behavior that is likely to cause serious and deadly accidents. ATES is a deterrent because it is an automated system that records images and data in real time after an intersection light turns red; ATES, unlike a person, does not miss anything and does not misremember. ATES-generated evidence is machine-generated evidence that is created and stored without any human input, so it accurately reflects and records "what the camera sees." For that reason, ATES-generated evidence, like other machine-generated or digitally stored evidence, is presumed under California law to be an accurate representation of what it purports to represent. (Evid. Code, §§ 1552, 1553.)

Applying the presumption of accuracy, ATES-generated images may be authenticated like other photographic or video evidence being offered as probative, or "silent witness," evidence, and ATES-generated data may be authenticated like other computer-generated records. There is no need, contrary to Goldsmith's assertion otherwise {Appellant's Opening Brief on the Merits ("AOB") pp. 13-20}, to subject ATES-generated evidence to a special test for authentication requiring the manufacturer of an ATES program, or a system programmer or technician, to testify in support of every image or bit of data generated by the machine. By Goldsmith's logic, images generated by automated security cameras, images generated by Magnetic Resonance Imaging ("M.R.I.") machines, velocity data generated by a speed gun, or time stamps automatically generated by email programs or servers, could only be authenticated by the manufacturers or programmers who created those technologies. That would be like requiring Bill Gates to authenticate every email exhibiting a time-stamp created by Microsoft Outlook.

Goldsmith's special authentication test is unwarranted and unnecessary because the reliability of ATES-generated images and data is presumed under California law, and the scientific validity of ATES was not raised below and is not at issue in this Court. Goldsmith never alleged that ATES was a novel technology, nor did she request a *Kelly* hearing. (*People v. Kelly* (1976) 17 Cal.3d 24, 30.) And in fact, ATES technology is not new or novel, it is merely a collection of digital cameras connected to electronic vehicle sensors and a computer that records and stores data. A very similar type of automated, though not digital, system was described by this Court in 1963 in *People v. Bowley* (1963) 59 Cal.2d 855, 860-861, where this Court first recognized the need to allow photographs to serve as "silent witnesses" of what they depict, to avoid excluding from evidence things like "pictures taken by a camera set to go off when a building's door is opened at night." That is essentially what ATES is, a system of cameras on a sensor set to go off when a traffic light turns red, instead of when a door is opened. For that reason, ATES-generated images should be authenticated just like other images being offered as probative or "silent witness" evidence, and the data recorded on them should be treated like any other computer-generated evidence.

Goldsmith's insinuation that ATES is unreliable or a threat to the integrity of the traffic court system {AOB 30-33, 37-39} is not reconcilable with the fact that ATES-generated images show a vehicle as it crosses, and after it crosses, the intersection limit line along with the color of the light at each point in time, the vehicle's license plate, the driver's face, and, in many cases, the street sign showing where the traffic violation occurred. That is, the images alone show a driver entering and driving through a particular intersection, along with the color of the light at each point in time, meaning the raw data collected by the machine establishes a defendant's guilt without the need for interpretation or testimony of any

kind. The information contained in the data bar merely confirms and contextualizes what the images depict and when they were taken.

Because all of the images and data are generated by a computer attached to the system at each particular intersection, ATES-generated evidence is not created using any human input and it is not a "statement" of any kind, meaning that it is neither hearsay nor, contrary to Goldsmith's assertion {AOB 10-12, 23-24}, subject to a Sixth Amendment Confrontation Clause analysis. If anything, ATES-generated evidence is more reliable than testimony from a live witness because a machine, particularly one that runs continuously and is not directed at any one person or class of persons, has no incentive, or ability, to lie, and is not dependent on fallible human memory or inputs. That is particularly so because ATES programs are regulated by statute, and, as of January 1, 2013, must report to the California Judicial Council information about the number of alleged violations captured or recorded, the number and type of citations issued based on the information captured, and the number and percentage of citations dismissed by courts. (Veh. Code, §§ 21455.5 [as amended by Senate Bill 1303 (Stats. 2012, ch. 735) effective January 1, 2013], 21455.7.) These regulations and reporting obligations imposed on ATES manufacturers, suppliers, and governmental agencies operating ATES programs, along with prohibitions on government agencies considering revenue generation in any decision to install or operate an ATES program, ensure that ATES-generated evidence is accurate and that collection of ATES-generated evidence is performed within the confines of the law, as it was in this case.

The trial court did not abuse its discretion in admitting testimony from investigator Young, who testified to how the ATES-generated evidence was collected in this case, how it came into his possession, what the ATES-generated images depicted, and to his own personal familiarity

with the intersection and yellow-light phasing where Goldsmith committed the crime at issue. That testimony was sufficient to authenticate the ATES-generated evidence in this case, and created a rebuttable presumption that the ATES-generated evidence was what it purported to be. Goldsmith failed to rebut that presumption or put on any contradictory evidence. Now, for the first time on appeal, Goldsmith raises additional objections to the sufficiency of the evidence and brings a challenge based on the Sixth Amendment. Goldsmith, by failing to raise those objections below, waived those objections on appeal.

Goldsmith's illegal activity—which she never rebutted or disputed—was revealed in the raw, machine-produced images and data from ATES, which, standing alone, demonstrated her guilt beyond a reasonable doubt. Goldsmith's conviction must stand and the Court of Appeal must be affirmed.

III.

STATEMENT OF THE CASE

A. ATES recorded a clear image of Carmen Goldsmith driving her car through an intersection against a red light

On March 13, 2009, ATES-generated evidence was recorded showing Carmen Goldsmith, driving a 2001 BMW, license plate number 4SRZ241, straight through the intersection of Centinela Avenue and Beach Avenue, in the City of Inglewood, against a red light. As a result, Goldsmith was charged, under Vehicle Code section 21453, subdivision (a), with failure to stop at a red light. {Clerk's Transcript p. 1.}

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B. At trial, police investigator Young authenticated the ATES-generated evidence

After receiving a Notice to Appear, Goldsmith requested a trial and stated her intent to plead not guilty. {CT 4.} At trial, the People offered the testimony of officer Dean Young. Young is an investigator with the Inglewood police department, and, at the time of trial had been in the traffic division, specifically working on red-light camera photo enforcement, for more than six years. {Reporter's Transcript page 5: lines 20-28.}

On the date of Goldsmith's trial, Young made a foundational statement applicable to all ATES cases being heard by the trial court. {RT 1:20-23.} In that statement, Young explained that the City of Inglewood had been operating an ATES program since 2003, and that the program involved a computer-based digital imaging system. Young testified that the system captured a series of images of drivers who entered an intersection after a traffic signal turned red, or who failed to stop for a red light prior to making a right-hand turn. The first image was a "pre-violation" photograph depicting a vehicle at, or before, the stop sign or crosswalk of the intersection, along with the traffic signal in its red phase. The system also captured a "post-violation" photograph showing the vehicle in the intersection. At the same time, the system captured images of the driver's vehicle license plate and recorded a 12-second video showing the driver's approach and progression through the traffic intersection. {RT 2:9-24.} Young explained there was a "data bar" on each still image that detailed information about when and where the traffic infraction took place, and how long the light had been red at the time each respective image had been recorded. {RT 2:26-3:4.}

After Young's foundational statement, Goldsmith's counsel challenged the ATES-generated images on the ground that the images did not clearly show the driver's face, and argued it was not clear beyond a

reasonable doubt that Goldsmith was driving the vehicle depicted in the images. {RT 3:11-18.} The trial court examined the photograph showing the driver's face and stated that the driver looked like Goldsmith, who was present in the courtroom, and that it was satisfied that Goldsmith was the person depicted in the image, unless Goldsmith had an identical twin. {RT 4:1-16.}

Young then showed the trial court ATES-generated images of Goldsmith driving her vehicle past a red light and straight through the middle of the intersection of Centinela and Beach Avenue in the City of Inglewood. {RT 4:21-25.} Goldsmith's counsel objected because he was "not aware of—if this is a police officer, attorney, or who he is," and also objected on the basis that there had not been an adequate foundation laid to support the evidence upon which Young was relying. {RT 4:26-5:16.} The trial court allowed counsel to voir dire Young.

In addition to explaining his background, Young explained that the evidence he was describing came from a system operated by the Inglewood Police Department and maintained by a company called Redflex. Young also explained that the system did not require any calibration and that the system operated independently, meaning that the cameras were connected to the red-light circuit of the traffic signal, and that they recorded anything within the intersection that took place after the signal turned. {RT 6:4-20.} Young testified that he acquired knowledge from Redflex about how the cameras operated, and from the City of Inglewood traffic engineers as to how the traffic signals worked. {RT 6:21-26.} Young testified that he did not design or personally operate the system. {RT 6:27-7:2.}

Young was asked how data from the system was collected and how often it was checked for potential traffic violations. Young explained that the data was contemporaneously recorded on the hard disc of a computer at each intersection, and that data was retrieved throughout the day

electronically by technicians at Redflex. {RT 7:3-9.} Goldsmith's counsel then objected to the ATES-generated evidence on the basis that it was hearsay and lacked foundation; he moved to strike the evidence. {RT 7:10-11.} The trial court overruled the objection, and Goldsmith's counsel stated he was "satisfied" and ended the voir dire process. {RT 7:19-21.}

Young then continued to testify about the images the trial court was examining. Young pointed out that at the time the pre-violation image was captured, the data bar showed the light had been red for 0.27 seconds, and Goldsmith's car was approaching the light at a speed of 53 miles per hour. The post-violation image, taken 0.66 seconds after the pre-violation image, showed Goldsmith's car in the intersection. Both photos showed the traffic signal along with the vehicle, and in both photos, the traffic signal was red. {RT 7:26-8:5.}

Young then explained the 12-second video, which showed the intersection and light as it transitioned from green, to yellow, to red. {RT 8:6-9.} When Young noted that the yellow light at the intersection was a "four-second yellow light," Goldsmith's counsel objected. Young then explained that he confirmed with the City of Inglewood traffic engineering department that the light at the intersection was supposed to be yellow for 4 seconds, and that he personally inspected the traffic signal and regularly measured the yellow-light phase timing with a stop watch to ensure that it was in compliance with Caltrans requirements that yellow lights be a minimum of 3.9 seconds in length on 40 mile per hour highways. Young testified he personally checked the yellow-light phasing at the Centinela and Beach Avenue intersection on February 16, 2009, approximately one month before Goldsmith's March 13, 2009 violation. Young stated that he checked the signal by conducting three separate timing checks and averaging those times. Using that method, the yellow phase at the intersection was 4.11 seconds. Young checked the intersection again three

days after Goldsmith's violation, and the yellow-light phase averaged 4.03 seconds. {RT 9-10.}

At the conclusion of Young's testimony, Goldsmith's counsel moved to strike all of the testimony on the ground that "it is not reliable testimony." Counsel stated that Young's testimony "by itself shows that the – that there is a significant variation in the length of the yellow light." The trial court overruled the motion on the basis that the yellow-light phasing exceeded what was required by Caltrans each time it was tested. {RT 11:1-14.} Counsel also moved to strike the testimony on the basis that it failed to meet the requirements of Vehicle Code section 21455.5. The trial court overruled that objection. {RT 11:24-12:11.} Goldsmith did not offer any evidence or make any additional motions or objections.

The trial court found Goldsmith guilty of failing to stop at a red light, in violation of Vehicle Code section 21453, subdivision (a), and fined her $436. {RT 12:14-17; CT 1.}

C. Goldsmith unsuccessfully appealed to the Appellate Division

Goldsmith appealed her conviction to the Appellate Division of the Los Angeles Superior Court. {CT 6, 12.} The Appellate Division affirmed the judgment of conviction. (*People v. Goldsmith* (2011) 193 Cal.App.4th Supp. 1.) The Appellate Division held that the ATES-generated evidence was presumed to be accurate and that Goldsmith failed to meet her burden to produce evidence rebutting that presumption or casting doubt on the accuracy or reliability of the evidence. The Appellate Division also found that Young's testimony provided adequate foundation for the ATES-generated evidence.

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D. Goldsmith's case was transferred to the Second District Court of Appeal, which upheld Goldsmith's conviction

The Second District Court of Appeal transferred Goldsmith's case to itself under Rules of Court, rule 8.1002. (*People v. Goldsmith* (2012) 203 Cal.App.4th 1515, 1521 ("*Goldsmith*") [depublished by grant of review in the present case].) The Court of Appeal also upheld Goldsmith's conviction. The court found that the trial court did not abuse its discretion in admitting the ATES-generated evidence, that testimony on the accuracy and reliability of computer software and hardware was not required as a pre-requisite to admission of computer records, and that the ATES-generated evidence was not hearsay. (*Id.* at pp. 1522-1526.) The court also found substantial evidence supported the trial court's factual finding that the yellow-light interval of the signal conformed to statutory requirements. (*Id.* at p. 1527.)

The Court of Appeal also expressly disagreed with *People v. Borzakian* (2012) 203 Cal.App.4th 525 ("*Borzakian*") (review granted, depublished by, *People v. Borzakian* 2012 Cal. LEXIS 4175), which held that ATES photographs could not be authenticated in the absence of evidence about the mode of preparation of ATES maintenance logs and information about their creation. The court disagreed with *Borzakian* on the ground that the opinion in that case failed to cite to the rule, developed by this Court in *People v. Martinez* (2000) 22 Cal.4th 106, 132 and followed in *People v. Nazary* (2010) 191 Cal.App.4th 727, 755, that testimony about the accuracy, maintenance, and reliability of computer records is not required as a pre-requisite to their admission. (*Goldsmith, supra*, 203 Cal.App.4th at p. 1526.) The court also expressly disapproved *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1 ("*Khaled*"), a case decided by the Appellate Division of the Orange County Superior Court,

because it too failed to follow the rule articulated in *Martinez* and *Nazary*. (*Goldsmith, supra*, 203 Cal.App.4th at pp. 1526-1527.)

IV.

MACHINE-GENERATED EVIDENCE IS NOT A "STATEMENT"

A. Because ATES-generated evidence is machine-generated, it is not a "statement" under the hearsay rule or the Sixth Amendment

The Confrontation Clause provides that, in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. (U.S. Const., amend. VI.) The Confrontation Clause bars the admission of "testimonial ***statements***" by a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine him or her. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54 ("*Crawford*") [emphasis added].)

While Goldsmith now argues that ATES-generated evidence is "inherently testimonial" and that she was entitled to confront and cross examine "Redflex's technician" {AOB 10-12}, a point she did not raise in the trial court, she fails to address the preliminary question of whether ATES-generated evidence constitutes a "statement." If there is no "statement" then the issue of whether evidence is "testimonial" is irrelevant, as is the question of whether evidence is "hearsay." "'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, subd. (a) [emphasis added].)

In California, "statement" means: "(a) oral or written verbal expression or (b) nonverbal conduct ***of a person*** intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225 [emphasis added].) As explained below, because ATES-generated

evidence is entirely machine generated it does not constitute a "statement" "of a person" sufficient trigger a defendant's Sixth Amendment rights or the hearsay rule. "'Person' includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity." (Evid. Code, § 175.)

The definition of "person" does not include "machine" or "computer." And, as numerous courts have noted, machines are not persons or witnesses, and machine-generated data are not "statements." (*U.S. v. Lamons* (11th Cir. 2008) 532 F.3d 1251, 1261, 1263-1264; *U.S. v. Moon* (7th Cir. 2008) 512 F.3d 359, 362 ("*Moon*"); *U.S. v. Washington* (4th Cir. 2007) 498 F.3d 225, 230 ("*Washington*"); *U.S. v. Lopez-Moreno* (5th Cir. 2005) 420 F.3d 420, 436.) Photographs and videotapes are also not assertive statements because they merely depict what a camera sees. (See *People v. Cooper* (2007) 148 Cal.App.4th 731, 746 [photographs and videos are demonstrative evidence and are not testimonial]; *U.S. v. May* (9th Cir. 1980) 622 F.2d 1000, 1007 [photograph is not an assertion and is admissible as substantive as well as illustrative evidence].)

In *Washington*, the Fourth Circuit Court of Appeals concluded that raw machine-generated data, upon which an expert based his testimony, was neither hearsay nor a "testimonial statement" implicating the Confrontation Clause. (*Washington, supra*, 498 F.3d at p. 227.) The "statements" at issue were an expert's assertions that a defendant's blood sample contained alcohol and the drug PCP. (*Id.* at p. 229.) The defendant objected to the expert's testimony because the expert never saw the blood sample and did not perform the testing. (*Ibid.*) The defendant argued that the expert's reliance upon the raw data obtained by lab technicians violated his rights under the Confrontation Clause because he was entitled to cross-examine the lab technicians who actually saw his blood and placed it in the testing machine. (*Ibid.*) The court, however, reasoned that "[t]he most the

technicians could have said was that the *printed data* from their chromatograph machines showed that the blood contained PCP and alcohol. The machine printout is the only source of the statement, and no *person* viewed a blood sample and concluded that it contained PCP and alcohol." (*Id.* at p. 229-230 [emphasis in original].) The court concluded: "[t]he raw data generated by the diagnostic machines are the 'statements' *of the machines* themselves, not their operators." (*Id.* at p. 230 [emphasis in original].)

The court further determined that the raw data generated by the machines were not hearsay statements for purposes of the Confrontation Clause. (*Washington*, *supra*, 498 F.3d at p. 231.) "Only a *person* may be a declarant and make a statement. Accordingly, 'nothing 'said' by a machine...is hearsay.'" (*Ibid.* [quoting 4 Mueller & Kirkpatrick, Federal Evidence, § 380, at 65 (2d ed. 1994)].) The court in *Washington* also noted that statements made by machines were not "testimonial" both because they did not relate to a past event, and because they were not created by the machine for purposes of a later criminal prosecution—machines process samples without knowing what the data will be used for. (*Washington*, *supra*, 489 F.3d at p. 232.)

The Seventh Circuit Court of Appeals applied a similar rationale in *Moon*, which relied upon *Washington* in holding that readings taken from instruments are not "statements" so it does not matter whether they are "testimonial" for purposes of the Confrontation Clause. (*Moon*, *supra*, 512 F.3d at p. 362.) In *Moon*, a chemist's testimony did not implicate the Confrontation Clause where the chemist relied on the output of machines that analyzed the chemical composition of a substance found on the defendant and believed to be cocaine. (*Id.* at pp. 361-362.) *Moon* reasoned that lab results are not testimonial "because data are not

'statements' in any useful sense[,]" and that a machine is not a "witness against" anyone and cannot be cross-examined. (*Id.* at p. 362.)

In *U.S. v. Hamilton* (10th Cir. 2005) 413 F.3d 1138, 1142, the Tenth Circuit Court of Appeals also concluded that information generated instantaneously by a computer without assistance or input of a person was not hearsay under Federal Rule of Evidence 801 because there was neither a statement nor a declarant. The defendant in *Hamilton* objected on hearsay grounds to computer-generated "headers" that contained information about when images depicting child pornography were posted online and the IP address of the person who posted each image—the IP address on the images was linked to the defendant's computer. (*Id.* at pp. 1140-1142.) The court found the data was not hearsay because it was automatically, and instantaneously, generated by a computer without the assistance or input of a person. On that basis, the court reasoned there was neither a "statement" or "declarant" for purposes of the hearsay rule. (*Id.* at p. 1142.)

Hamilton relied in part on *U.S. v. Khorozian* (3d Cir. 2003) 333 F.3d 498 ("*Khorozian*"), which held that a fax header generated by a fax machine and reflecting the date of a fax transmittal did not amount to hearsay. (*Khorozian*, *supra*, at pp. 503, 506.) In *Khorozian*, the Third Circuit Court of Appeals reasoned that a "statement" was something uttered by a person, and that nothing "said" by a machine could be hearsay. (*Id.* at p. 506 [citing 4 Mueller & Kirkpatrick, Federal Evidence § 380, at 65 (2d ed. 1994)].)

The distinction between computer-stored and machine-generated evidence is not an "artificial" distinction as Goldsmith appears to assert. {AOB 26} In fact, this Court recently made the distinction, in *People v. Lopez* (2012) 55 Cal.4th 569, 583 ("*Lopez*"), stating: "Not yet considered by the United States Supreme Court is whether the prosecution's use at trial of a machine printout violates a defendant's right to confront and cross-

examine the machine's operator when, as here, the printout contains no statement from the operator attesting to the validity of the data shown. We agree with those federal appellate courts that have upheld the use of such printouts." This Court then cited approvingly to *Moon*, *supra*, at 512 F.3d at p. 362 (instrument readouts are not "statements" so it does not matter whether they are "testimonial"), *Washington*, *supra*, 498 F.3d at p. 231 (raw machine-generated data are not "statements" and the machines are not "declarants"), and Justice Sotomayor's concurring opinion in *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, 2722 (prosecution's introduction of only machine-generated results may not violate defendant's confrontation right), and found that certain portions of an analyst's report on the defendant's blood alcohol level, consisting almost entirely of machine-generated data, did not implicate the defendant's Sixth Amendment right to confrontation.

The data at issue in the machine-generated printouts on pages 2 through 6 of the nontestifying analyst's report in *Lopez*, which this Court found did not implicate the Sixth Amendment's right to confrontation, are no different from the data at issue in this case. (*Lopez*, *supra*, 55 Cal.4th at p. 583.) As in *Lopez*, the data upon which the trial court and Officer Young relied was a machine output that did not contain any statement by any person attesting to the validity of the data shown. Goldsmith's guilt was established by raw data and objective facts evident in the ATES-generated data and images, and was not based upon any expert opinion, analysis, or interpretation of that data or those images.

Because ATES-generated evidence is not a "statement" it cannot implicate either the Confrontation Clause or the hearsay rule. Nevertheless, Goldsmith argues that ATES-generated evidence is "testimonial." {AOB 10-12.} To qualify as "testimonial," a statement must not be made during an ongoing emergency, and its primary purpose must be "to establish or

prove past events potentially relevant to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822.)

As explained by this Court in *Lopez,* "to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity . . . [¶] . . . [and] an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution[.]" (*Lopez, supra*, 55 Cal.4th at pp. 581-582.) In *Lopez*, as explained above, this Court found that a machine-generated report was not a testimonial statement because "unlike a person, a machine cannot be cross-examined." (*Id.* at p. 583.) It also found that a lab technician's notation on the first page of that report was not testimonial because it lacked the requisite "formality or solemnity" to qualify as "testimonial." (*Id.* at pp. 584-585.) This Court applied a similar analysis in the companion case of *People v. Dungo* (2012) 55 Cal.4th 608, finding that a pathologist could rely on observations in an autopsy report describing the condition of the victim's body because they lacked the required "formality and solemnity" of testimonial statements. As this Court noted, the statements "merely record objective facts" and "are less formal than statements setting forth a pathologist's expert conclusions." (*Id.* at pp. 619-620.) This Court also found that the "primary purpose" of the report was not to investigate and prosecute a crime, but to serve a range of "equally important purposes." (*Id.* at p. 621.)

If the statements of objective fact at issue in *Lopez* and *Dungo* were not testimonial, then the ATES-generated evidence here also cannot be said to be testimonial. (See also *People v. Geier* (2012) 41 Cal.4th 555, 606-607 [scientific evidence memorialized in routine forensic reports not testimonial].) No part of the ATES-generated evidence in this case could be considered to have the requisite formality or solemnity required of a "testimonial" statement, and none of the evidence shown to the trial court

by Young could be compared to a sworn statement, an affidavit, a formalized certificate, or a professional opinion. Equally important, ATES-generated evidence is not produced as part of a particular investigation, or to prosecute a particular person. The system records everything that takes place in and around an intersection after a traffic light turns red, meaning that, unlike a lab test or medical examination, it serves a purpose beyond prosecuting a particular crime. As noted in *Washington*, a machine cannot be said to be aware of whether results it generates will be used in a criminal prosecution or for some other purpose. (*Washington*, *supra*, 489 F.3d at p. 232.)

Here, ATES, as pointed out by amici in the Court of Appeal, is a deterrent that increases safety and reduces the number of fatal collisions at busy or dangerous intersections; the evidence it generates will also be used in government reports about the type and frequency of traffic violations. (Veh. Code, § 21455.5 [as amended (Stats. 2012, ch. 735) effective January 1, 2013]. See *People v. Park* (2010) 187 Cal.App.4th Supp. 9, 13-14 [disapproved on other grounds in *People v. Gray* (2012) 204 Cal.App.4th 1041, 1045, 1049-1050 (depublished by grant of review 2012 Cal. LEXIS 5930)] [explaining legislative history of Rail Traffic Safety Enforcement Act, which was expanded by, and was a precursor to, current ATES law].) In other words, ATES and ATES-generated evidence, like the evidence at issue in *Dungo*, serve a range of purposes.

ATES-generated evidence is not testimonial.

B. Per Vehicle Code section 21455.5, ATES-generated evidence is not an out-of-court statement for purposes of the hearsay rule

As explained above, ATES-generated evidence is not a "statement." It is also not hearsay, as a matter of law. Vehicle Code section 21455.5, which was amended in September 2012 by Senate Bill 1303 (Stats. 2012, ch. 735), states in amended subdivision (e): "The printed representation of

computer-generated information, video, or photographic images stored by an automated traffic enforcement system does not constitute an out-of-court hearsay statement by a declarant under Division 10 (commencing with Section 1200) of the Evidence Code."

This new legislation is effective January 1, 2013 and should retroactively apply to all ATES-generated evidence collected prior to that time. Generally, legislation is not retroactive unless it is clear that the Legislature intended it to be so. (*Myers v. Phillip Morris, Inc.* (2002) 28 Cal.4th 828, 840-841.) But, that general rule does not apply to legislation that merely clarifies existing law. (*Bowen v. Bd. of Retirement* (1986) 42 Cal.3d 572, 575 fn. 3.) Where a statute clarifies existing law so that it is obvious the Legislature intends to rectify misinterpretations or resolve disputes percolating through the courts, the Legislature's intent should be entitled to consideration by the courts. (*Carter v. Cal. Dept. of Veteran Affairs* (2006) 38 Cal.4th 914, 922-923, 930.)

Here, in enacting SB 1303, the Legislature intended to clarify that ATES-generated evidence was not hearsay and that it should be presumed accurate and reliable under Evidence Code sections 1552 and 1553. SB 1303 was expressly enacted in light of conflicting appellate decisions regarding the authentication and admission of ATES-generated evidence. In fact, the Senate Floor Analysis prepared by the Senate Rules Committee specifically stated that the conflicting decisions in *Borzakian* and *Goldsmith* demonstrated "a need for clarification in statute regarding the evidentiary standards required for prosecuting automated traffic enforcement violations." (Sen. Rules Com., Office of Sen. Floor Analyses, 3d Reading Analysis of Sen. Bill No. 1303 (2011-2012 Reg. Sess.) as amended May 29, 2012.) Similar evidence appears in other parts of the legislative history supporting SB 1303. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1303 (2011-2012 Reg. Sess.) as amended Jun. 26,

2012, pp. 13-14 [discussing *Borzakian* and *Goldsmith* and nothing that the law should be clarified in favor of the holding in *Goldsmith* that ATES-generated evidence is not hearsay and that Evidence Code sections 1552 and 1553 apply to ATES-generated evidence].[1])

The clarifications enacted as part of SB 1303 should be considered by this Court to be retroactive and applicable to all violations and citations issued prior to January 1, 2013.

V.

ATES-GENERATED EVIDENCE SHOULD BE AUTHENTICATED LIKE OTHER PHOTOGRAPHIC OR COMPUTER-GENERATED PROBATIVE EVIDENCE

A. The accuracy of ATES-generated images should be assumed, and they should be authenticated and admitted like any other probative photographic or video evidence

1. Images offered as probative, or "silent witness," evidence require authentication by a person familiar with the scene who can testify that the image is what "the camera saw"

Before a writing may be received in evidence, it must be authenticated. (Evid. Code, § 1401, subd. (a).) "'Writing' means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored." (Evid. Code, § 250.) "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

[1] Cited portions of the legislative history are attached to the Request for Judicial Notice filed concurrently with this Answering Brief.

evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.)

As this Court acknowledged in *People v. Bowley* (1963) 59 Cal.2d 855, 860 ("*Bowley*"), photographic images may, once authenticated, be used either as demonstrative evidence to help witnesses explain their testimony, or as probative evidence of what the images depict, whereby they take on the status of independent "silent witnesses." With respect to the latter category, this Court explained:

> There is no reason why a photograph or film, like an X-ray, may not, in a proper case, be probative in itself. To hold otherwise would illogically limit the use of a device whose memory is without question more accurate and reliable than that of a human witness. It would exclude from evidence the chance picture of a crowd which on close examination shows the commission of a crime that was not seen by the photographer at the time. It would exclude from evidence pictures taken with a telescopic lens. *It would exclude from evidence pictures taken by a camera set to go off when a building's door is opened at night.*
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> (*Id.* at p. 861 [emphasis added].)

To authenticate an image being offered as a silent witness, the proponent must offer testimony of a witness who is familiar with, and recognizes, the scene depicted in the image, who can explain the basis for his familiarity and recognition, and who testifies that the image depicts what the camera saw. (See *Bowley*, *supra*, 59 Cal.2d at p. 860 [citing *People* v. *Doggett* (1948) 83 Cal.App.2d 405, as example of foundation required of photograph offered as silent witness, where evidence showed when picture was taken, the place where it was taken, and expert gave opinion that picture was genuine and not faked]; *People v. Bowley* (1964) 230 Cal.App.2d 269, 270-271 ("*Bowley II*") [on appeal following second

trial, foundation held sufficient where police photographic expert testified that he reviewed film, that it had not been tampered with, and that it correctly represented "what the camera saw"; time film was taken was immaterial]; *S. Santa Clara Valley Water Conservation Dist. v. Johnson* (1964) 231 Cal.App.2d 388, 397 [once accuracy and authenticity of a photograph are established it may be used as a silent witness]; *Tennessee v. Williams* (Tenn. 1996) 913 S.W.2d 462, 465-466 [photographs from video surveillance camera used as "real evidence" and authenticated by store clerk testifying that images accurately reflected scene of robbery]; *U.S. v. Fadayini* (D.C. Cir. 1994) 28 F.3d 1236, 1241 [ATM surveillance photos authenticated by bank personnel familiar with operation of ATM cameras]; *U.S. v. Taylor* (5th Cir. 1976) 530 F.2d 639, 641-642 [citing *Bowley*, non-eyewitness testimony sufficient to authenticate bank surveillance photographs where witnesses testified to manner in which film was installed, how camera was activated, and chain of possession of film].)

2. ATES-generated images should be authenticated like other probative images, but they are presumed, under Evidence Code 1553, to be "what the camera saw"

ATES-generated images are like other probative images, and should be authenticated in the same manner. Unlike other types of images, however, ATES-generated images are presumed to be authentic, meaning that the proponent of ATES-generated images need not lay a foundation as to their accuracy because the images are presumed to be "what the camera saw."

Under Evidence Code section 1553, printed representations of images stored on a video or digital medium are presumed to be accurate representations of what they purport to represent. The presumption of accuracy affects the burden of producing evidence, and may be rebutted by an opponent that introduces evidence that the proffered representation is

inaccurate or unreliable. Once the opponent rebuts the presumption, the original proponent of the representation has the burden of proving, by a preponderance of evidence, that it is an accurate representation of the existence and content of the images that it purports to represent. (Evid. Code, § 1553.) Specifically:

> 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 representation of the existence and content of the images that it purports to represent.
>
> (Evid. Code, § 1553.)

That section applies, and has always applied, to ATES-generated images. If there was any doubt, the Legislature resolved the issue by clarifying Evidence Code section 1553, so that it now specifically refers to representations of video and photographic images stored by an ATES system. (Stats. 2012, ch. 735 [adding Evid. Code § 1553, subd. (b), effective January 1, 2013].) The Legislature also amended Vehicle Code section 21455.5 to state that: "The printed representation of computer-generated information, video, or photographic images stored by an automated traffic enforcement system does not constitute an out-of-court hearsay statement by a declarant...." (Stats. 2012, ch. 735 [adding Veh. Code, § 21455.5, subd. (e), effective January 1, 2013].) Because the amendment to Vehicle Code section 21455.5 closely tracks the language of Evidence Code section 1553, it evidences the Legislature's intent to make

clear that ATES-generated images may be presumed to be substantively accurate and reliable and, as a matter of law, not out-of-court hearsay statements.

In other words, there would be no need for the Legislature to have tracked the language of Evidence Code sections 1553 in the amendment to Vehicle Code section 21455.5, if it did not intend to make clear that the content of ATES-generated images should be presumed to be accurate, reliable, and admissible. Furthermore, the addition of Evidence Code section 1553 to the code strongly suggests that the Legislature did not intend to create a special, and more stringent, standard for authenticating digital images. On the contrary, the statute makes it easier for litigants to authenticate digital images, like ATES-generated images, by presuming them to be inherently reliable.

Goldsmith argues that the presumption in Evidence Code sections 1552[2] and 1553, may only be used to show that a computer's print function is working. Goldsmith relies on *People v. Hawkins*, (2002) 98 Cal.App.4th 1428, 1450 ("*Hawkins*") {AOB 21-22}, which is not reconcilable with the text of those sections or with this Court's decision in *Martinez*, *supra*, 22 Cal.4th at p. 132.

Hawkins examined whether computer printouts showing the time certain data files were accessed constituted hearsay, and whether any exceptions applied. (*Hawkins*, *supra*, 98 Cal.App.4th at pp. 1446-1447.) *Hawkins* expressly agreed with *State v. Armstead* (La. 1983) 432 So.2d 837, which concluded that the printed result of a computer's internal operations was not hearsay because it was not a statement, and *Hawkins*

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[2] Evidence Code section 1552 is nearly identical to section 1553, but relates to: "A printed representation of computer information or a computer program...." (Evid. Code, § 1552, subd. (a).) {See also Section V, subd. (B), *infra.*}

further concluded that the true test for admissibility of a printout was whether the computer was working properly at the time the information was printed. (*Id.* at pp. 1449-1450.) It was on *Hawkins* that *Borzakian* relied in rejecting admission of a maintenance log prepared by a Redflex employee but described at trial by an officer with the City of Beverly Hills, which city operated an ATES program. The maintenance log was, according to the court in *Borzakian*, the only evidence presented that could have demonstrated the ATES program in question working properly (*Borzakian, supra,* 203 Cal.App.4th at pp. 546-547.)

The rationale in *Hawkins* and *Borzakian* is not reconcilable with the text of Evidence Code sections 1552 or 1553, both of which provide for a rebuttable presumption that "printed representations" are accurate representations of the "existence and content" of what they purport to represent. If that language meant only that "a computer's print function has worked properly" then the use of the word "content" in that phrase would be rendered meaningless, as would language requiring that the opponent challenging the presumption must "introduce[ ] evidence that a printed representation. . . is inaccurate or unreliable." In other words, if the presumption does not affect accuracy or reliability, why do the statutes relate to the content of printouts and why are opponents required to introduce evidence of inaccuracy or unreliability? The purpose of the presumption is to expedite trials by dispensing with the need for parties to demonstrate the reliability of technology that is so commonplace that it can, and should, be presumed reliable in the absence of evidence suggesting it is not reliable. (See Evid. Code, §§ 603, 604.) Without these types of presumptions, or judicially noticed assumptions, trial courts would be bogged down resolving the scientific evidence issues raised by every computer-generated document, tape recorded image, motion picture, or x-ray.

If the Legislature was concerned about alteration of computer-generated information or digital images, as Goldsmith appears to be, then it could have, and would have, memorialized those concerns in the above-referenced statutes. The absence of a special test from these statutes indicates that the Legislature did not intend to differentiate computer-generated information or digital images from other types of objective facts or traditional photographs or videos.

This Court too presumed the reliability of computer records in *Martinez*, where it found that computer records should be presumed to be reliable in the absence of contrary evidence, finding that testimony on the acceptability, accuracy, maintenance, and reliability of computer hardware and software, was not a prerequisite to admission of computer records. (*Martinez*, *supra*, 22 Cal.4th at pp. 132-133.) As the Court of Appeal in *Goldsmith* correctly explained (*Goldsmith*, supra, 203 Cal.App.4th at pp. 1523-1524), *Martinez* relied on *People v. Lugashi* (1988) 205 Cal.App.3d 632, which, along with other California courts, rejected a special test for computer records that would have presumed their unreliability and required evidence proponents to disprove the possibility of computer error by introducing testimony on reliability, maintenance, and accuracy. (*Martinez*, *supra*, 22 Cal.4th at p. 132; *Lugashi*, *supra*, 205 Cal.App.3d at pp. 640-642.)

Martinez is not reconcilable with the special test for authentication that Goldsmith proposes. *Martinez*, like Evidence Code sections 1552 and 1553, stands for the proposition that machine-generated evidence should be presumed to be accurate and reliable, absent contrary evidence. If an opponent of machine-generated evidence rebutted the presumption of accuracy, it would be left to the proponent to overcome the challenge and to the trial court to weigh the evidence presented by both sides and to resolve the matter on a case-by-case basis.

The Legislature did not, and this Court should not, impose on all digital images or computer-generated information a special test for authentication. Because the presumptions in Evidence Code sections 1552 and 1553 are rebuttable, if there were a question about the validity or reliability of a particular piece of digital or computer-generated information, that concern could be easily addressed by the trial court weighing the evidence produced by the proponent and opponent of a particular piece of evidence. Goldsmith's contention that the *Martinez* rationale was abrogated in *Crawford, supra,* is incorrect. {Cf. AOB 23-24.} *Crawford* only relates to "testimonial statements" and, as explained in Section IV, *infra*, machine-generated data and images are not "statements."

3. ATES-generated images should not be subjected to a special test for authentication because they are digital

There is no reason for a blanket rule requiring a special test to authenticate digital images, as a digital image is just another type of writing. (See Evid. Code, § 250 ["writing" includes "any form of communication or representation...*regardless of the manner in which the record has been stored.*"] [emphasis added].) In the absence of any evidence that the image is altered or enhanced, the image should be authenticated like any other probative image, but the accuracy of "what the camera saw" should be implied or subject to judicial notice. (See Evid. Code, §§ 603 [presumption affecting burden of producing evidence facilitates determination of action], 604 [requires trier of fact to assume existence of presumed fact unless rebutted, trial court may make inferences as appropriate]; *People v. S. Pac. Co.* (1983) 139 Cal.App.3d 627, 632-633 [evidentiary presumptions are short-cuts designed to dispense with unnecessary evidence].

Digital photographs or video should be authenticated in the same manner as any other photograph or video. Other state courts have reached

that conclusion. (See *State v. William M.* (2010) 225 W.Va. 256, 261 fn. 6 [692 S.E. 2d 299] ["A digital photograph may be authenticated in the same manner as a film photograph, by a witness with personal knowledge of the scene depicted who can testify that the photograph fairly and accurately represents it."]; *Owens v. State* (2005) 363 Ark. 413, 421 [214 S.W.3d 840] ["we do not agree that this court should impose a higher burden of proof for the admissibility of digital photographs merely because digital images are easier to manipulate"].)

Goldsmith, in support of her contrary position, cites to *People v. Beckley* (2010) 185 Cal.App.4th 509, 514 ("*Beckley*"), and *State v. Swinton* (2004) 268 Conn. 781 ("*Swinton*") [847 A.2d 921], neither of which involved ATES-like evidence, and neither of which this Court should follow. *Beckley* involved authentication of a photo of a witness displaying gang signs, which an officer downloaded from the defendant's MySpace page. (*Beckley*, *supra*, 185 Cal.App.4th at p. 514.) The court found the photo, which was being offered to discredit the witness's credibility, was not properly authenticated because the People did not offer evidence to establish the photo was an "accurate depiction" of the witness displaying a gang sign. (*Id.* at pp. 514-515.) The fact that the image came from an internet web site played a role in the court's determination, as did the fact that the image was digital and, according to the court, more likely subject to manipulation. (*Id.* at pp. 515-516.) The *Beckley* court suggested that some expert testimony that the photo was not a composite or "faked" was required. (*Id.* at p. 515.)

As explained above, this Court should start with the presumption, as articulated in Evidence Code section 1553, that the images are what they purport to represent, unless the opposing party produces evidence to rebut that presumption. To do otherwise would be to force the proponent of electronic evidence to have to guess at what objections the opponent might

have, an unnecessary and unnecessarily time-consuming step, particularly where the evidence is machine-generated and more likely to be reliable than when produced by a person who might have a motive to alter or "fake" a photograph. A photo posted on an internet web site, like that in *Beckley*, without any information about who took the photo, posted the photo, or when it was uploaded, presents problems not applicable to machine-generated photographs from a known source, like those images recorded by ATES.

Swinton involved a traditional film photograph that was digitized and then enhanced to the point that it "reveal[ed] details to the human eye that were not visible before the enhancement." (*Swinton*, *supra*, 268 Conn. at pp. 804-805 fns. 23, 24.) In *Swinton*, the court found that the enhancement was so significant that it actually resulted in the creation of a part of the image. (*Id.* at p. 804, fn. 23.) The issue of "enhancement" was also addressed in *People v. McWhorter* (2009) 47 Cal.4th 318, 364-367 where an expert's testimony about the computer program he used to "electronically emboss" an image was insufficient because he could not explain the full process he used to "create" the image.

In this case, there was no allegation in the trial court that the ATES-generated images were enhanced or tampered with in any way, and the Court need not, and should not, use this case as a vehicle to craft a broad rule relating to authentication of digital images and computer-generated information. If, however, this Court were to address the issue, it should distinguish between enhanced images and original digital photographs, which Goldsmith does not do.

Not all computer-generated or digitally-stored images are of the same type, or created in the same way. As this Court recognized in *People v. Duenas* (2012) 55 Cal.4th 1, 20-22 ("*Duenas*"), a computer animation is not equivalent to a computer simulation, the two have different purposes

and are created in different ways. Digital images too, fall into different categories. As explained in the widely-cited case of *Lorraine v. Markel Am. Ins. Co.,* (D.Md. 2007) 241 F.R.D. 534, 561-562 (*"Lorraine"*), digital images may be one of three types: original digital images; digitized or digitally-converted images; and digitally enhanced images. ATES-generated images are of the first type, original digital images.

The distinction between these different types of images is significant because, in the absence of evidence to the contrary, there is no justification for assuming that an original digital image is less reliable or more likely to be tampered with than a traditional film photograph or video. For that reason, under a *Lorraine* analysis, original digital images "may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it." (*Lorraine*, *supra*, 241 F.R.D at p. 561.)

Digitized, or digitally-converted images, and digitally enhanced images, however, are, by their very nature, altered, and so require additional information about those alterations to be properly authenticated. (See *Lorraine*, *supra*, 241 F.R.D. at pp. 561-562.) Some of the processes involved in digital enhancement would fall within the realm of scientific or technical evidence subject to a *Kelly* hearing, much like a computer simulation. (*Ibid.*; see *Duenas*, *supra*, 55 Cal.4th at pp. 20-21.)

While Goldsmith's analysis focuses on the digitally enhanced images at issue in *Swinton*, Goldsmith fails to explain how, or why, the six factor test in *Swinton* should be applied to an original digital image, like the one captured by ATES. Failure to distinguish between different types of digital images could have the unintended consequence of making it difficult, if not impossible, to lay a foundation for an original digital image where the likelihood of tampering is low and the indicia of reliability high. For example, if a bystander took an original digital photograph of a car

accident using a camera phone, Goldsmith's suggested special test for authentication would require the proponent of the evidence to provide testimony that the camera phone was "accepted in the field as standard and competent, and was in good working order," that "qualified computer operators were employed," that "proper procedures were followed in connection with the input and output of information," that a "reliable" software program was utilized, that "the equipment was programmed and operated correctly," and that the exhibit was properly identified as the "output in question." {Opening Brief pp. 15-16.} One wonders who it is that could testify that a bystander, unavailable to testify at trial, was following "proper procedures" or what those procedures might be. The test just does not fit that circumstance, and it is not appropriately applied to original digital images that are as common, if not more common, than traditional film photography.

Applying a special test for authentication to *all* digital images, would also result in different foundational pre-requisites for nearly identical evidence. Take, for example, a surveillance camera in a convenience store. If the camera was a standard non-digital camera and was continuously running, the images it captured of individuals coming in and out of the store could be used as substantive evidence, according to Goldsmith {AOB 13}, if foundation was laid that established that the photos accurately represented the scene in question, regardless of whether the person testifying was present when the photos were taken. Using Goldsmith's special test, if the camera were a digital camera, the test for authentication would be entirely different, even though the only difference between the two circumstances is the way recorded data is stored—on film or video as opposed to a digital format. And yet another test, requiring testimony by a technician or programmer, would apply if the camera were automated so that it only recorded images when the front door of the store were opened.

If in each case, the camera is capturing images of individuals coming in and out of the store, why should the evidentiary foundation be drastically different depending on the method of data storage or the automation of the camera system? The answer is that it should not be, and that is what *Martinez* and the evidentiary presumptions in Evidence Code sections 1552 and 1553 aim to accomplish.

To the extent Goldsmith is suggesting that a special test should be applied to ATES-generated images and not to any other type of original digital image, she has not provided any justification for such a rule, nor has she contextualized a special test and its necessity where, as here, she did not provide any evidence to suggest the ATES-generated images were unreliable.

B. ATES-generated data should be presumed accurate, under Evidence Code section 1552, and should be authenticated like any other machine-generated record

ATES-generated data are no different from other machine-generated data, and should be authenticated in the same way, with the reliability and accuracy of the data being presumed under Evidence Code section 1552.

As the Court of Appeal pointed out in its opinion in *Goldsmith*, numerous courts have found that a digitally-generated and other computer-generated records constitute "writings." (*Goldsmith*, *supra*, 203 Cal.App.4th at p. 1522 [citations omitted].) This Court's conclusion in *Martinez*, and the plain language of Evidence Code section 250, make clear that "writing" includes ATES-generated data. (See Evid. Code, § 250 ["writing" includes "any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."]; *Martinez*, *supra*, 22 Cal.4th at p. 120 [analyzing computer printouts as writings].)

Machine-generated data or records may be authenticated by any knowledgeable witness who can testify to how the data was obtained or retrieved and what it shows. (See Evid. Code, § 1400.) As in *Martinez,* the computer-generated record should essentially be authenticated like an official or business record[3], and should be presumed to be accurate and reliable such that the proponent need not establish the accuracy or reliability of the hardware or software used to produce results, or how the machine was maintained. (*Martinez*, *supra*, 22 Cal.4th at p. 132. See *U.S. v. Glasser* (11th Cir. 1985) 773 F.2d 1553, 1559 [citing, inter alia, *Rosenberg v. Collins* (5th Cir. 1980) 624 F.2d 659, 665 and finding computer-generated business records admissible where kept pursuant to routine procedure designed to assure their accuracy, created for motives that would tend to assure accuracy, and are not accumulations of hearsay or uninformed opinion].)

In *Lugashi*, *supra*, upon which *Martinez* relied, a credit card fraud investigator was held to be competent to authenticate computerized bank records consisting of automatic machine inputs. (*Lugashi*, *supra*, 205 Cal.App.3d at pp. 636, 641-642.) The *Lugashi* court specifically noted that testimony by a knowledgeable person, even one without knowledge of how a machine was maintained or how software or hardware was designed, would suffice to lay foundation for a computer-generated record because precluding testimony by that person would mean that "only the original hardware and software designers could testify since everyone else

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[3] Because ATES-generated evidence is not a "statement" it need not be squeezed into the narrow exceptions to the hearsay rule, but the information could reasonably be considered either a business record (Evid. Code, § 1271) or an official record like that at issue in *Martinez.* (*Martinez*, *supra*, 22 Cal.4th at pp. 111-113 [uncertified computer printouts showing criminal history].)

necessarily could understand the system only through hearsay." The court found that result untenable. (*Id.* at p. 641.)

In *People v. Nazary,* the Fourth District Court of Appeal, relying on *Martinez* and *Hawkins*, found no reversible error where computer-generated information on a gas station receipt was admitted in the absence of evidence that the machine was operating properly or that the data was accurate or reliable, and based on testimony of the gas station's director of operations and technology supervisor, neither of which had personal knowledge about the particular machine that printed the receipts. (*People v. Nazary* (2010) 191 Cal.App.4th 727, 750-755.) The court also rejected the notion that the People had the burden to establish accuracy of the data and held it was the defendant's burden to impeach the evidence. (*Id.* at pp. 754-755.)

What these cases, and others, show, is that Goldsmith's claim that only a "technician" or "programmer" can authenticate the machine-generated data {AOB 24} is not consistent with *Martinez*, and applies a broad brush to an issue that should be, like other evidentiary matters, subject to a case-by-case analysis. The evidence required to "sustain a finding that it is the writing that the proponent of the evidence claims it is" may be different in every circumstance, depending on the charge. (Evid. Code, § 1400.) That is precisely why trial courts are granted great deference in their evidentiary rulings. (See *People v. Jones* (1998) 17 Cal.4th 279, 304 [internal citations omitted] [decision to exclude evidence will not be disturbed absent showing of abuse of discretion resulting in manifest miscarriage of justice].)

Goldsmith asserts that a witness like Young could never be effectively cross-examined about ATES-generated data because he "admitted that he had never operated Redflex's red light camera system" and he did not calibrate the system. {AOB 24.} A witness can testify to

machine-generated data without having "operated" the machine that generated the data because the idea of "operation" is a red herring, where the machine self-generates data without human input. Operation is immaterial, just as the court found it to be in *Moon* and *Nazary.* It would also be immaterial under any *Martinez* analysis. The same is true of Young's failure to calibrate the system, which, as he testified, was self-calibrating, and is directly linked to the red-light signal itself, meaning that ATES operates when the red light operates, as reflected in the images captured by the system. If the images are consistent with the data on the data bar, what is the basis for requiring that a programmer or technician be available for cross-examination, particularly where a defendant has not rebutted the presumptions under Evidence Code sections 1552 and 1553? One reason for the rebuttable presumption is to narrow the scope of evidence required to be presented at trial. If Goldsmith had produced challenging evidence, it would have been clear what, if any, evidence the People would have had to produce to overcome it.

There is no reason for this Court to create a broad rule requiring that, as a prerequisite to the admission of ATES-generated evidence, a "technician" or "programmer" testify to its regular maintenance. That is exactly the type of time-wasting and unnecessary pre-requisite that this Court sought to avoid imposing in *Martinez.*

Under Vehicle Code section 21455.5 local government agencies operating ATES programs may contract out equipment installation, inspection, and calibration, so long as the agency maintains overall control and supervision of the ATES program, which Young testified was the case here. (Veh. Code, § 21455.5, subd. (d).) The local agency only has an obligation to develop guidelines for screening and issuing violations, for

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inspecting warning signs, for overseeing the establishment or change of signal phases and timing, and for maintaining controls necessary to ensure that only citations that have been reviewed and approved by law enforcement are delivered to violators. (Veh. Code, § 21455.5, subds. (c), (d).) Any person familiar with the ATES program in a particular area who could testify that the agency complied with the law would be able to lay a foundation to authenticate ATES-generated data, just as Young did in this case.

VI.

THE TRIAL COURT DID NOT ERR IN ADMITTING ATES-GENERATED EVIDENCE THAT, STANDING ALONE, WAS SUFFICIENT TO ESTABLISH GOLDSMITH'S GUILT BEYOND A REASONABLE DOUBT

A. The trial court did not abuse its discretion in allowing and crediting Young's testimony about ATES-generated evidence

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion, and "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 [internal citations omitted.) The abuse of discretion standard applies to rulings on hearsay objections (*People v. Waidla* (2000) 22 Cal.4th 690, 725) and objections to foundation (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 319).

Here, Young testified that he was familiar with, and recognized, the intersection displayed in the ATES-generated images he displayed to the trial court. He also testified that he was familiar with the ATES program because he had six years of experience working in the City of Inglewood red-light camera program, he received training on ATES from Redflex, he personally checked each intersection on a monthly basis, and he reviewed images captured by ATES that he downloaded from Redflex. Young was

also able to testify what the ATES-generated images and data showed, and to explain to the trial court how the information in the data bar substantiated what "the camera saw." Given that testimony, the trial court cannot be said to have abused its discretion or to have acted beyond the bounds of reason in allowing Young's testimony or in relying on the ATES-generated evidence as probative evidence that Goldsmith failed to stop at the red light at the corner of Centinela and Beach Avenue.

That is particularly so because Goldsmith failed to offer any evidence to rebut the presumptions in Evidence Code sections 1552 and 1553, or the presumption in Vehicle Code section 41101, subdivision (b), which establishes that traffic devices conform to all legal requirements unless the contrary can be established by competent evidence. That evidence need not have been technical, it could have been evidence that the machine-generated evidence was inaccurate because Goldsmith recalled driving through the intersection and, at that time, the light was green. Goldsmith could have presented evidence from an independent expert who tested the yellow-light phasing at the intersection and found that the light was a 3-second light, meaning that the information on the data bar was incorrect. Goldsmith also could have produced evidence showing that she was out of town on the date, and at the time, the data bar reflected her image was captured running the red light. She did not produce any evidence at all. In the absence of evidence that the ATES-generated data was unreliable, the trial court did not abuse its discretion in crediting Young's testimony and finding Goldsmith guilty beyond a reasonable doubt.

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B. Substantial evidence supports the trial court's finding that Goldsmith was the driver depicted in the ATES-generated images and that the yellow-light interval was adequate

"The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings -- whether express or implied -- must be upheld if supported by substantial evidence." (*People v. Superior Court of Marin County* (1975) 13 Cal.3d 406, 410 [citations omitted].)

The trial court found Goldsmith was the driver depicted in the ATES-generated images, and there was no evidence offered to support any contrary result. Nor does Goldsmith contend on appeal that she was not the driver depicted in the images.

Similarly, as the Court of Appeal found, Young's testimony regarding the routine tests he performed to measure the yellow-light phasing at the intersection of Centinela and Beach Avenues constituted substantial evidence supporting the trial court's factual finding that the yellow-light interval conformed to the requirements of Vehicle Code section 21455.7. (*Goldsmith, supra*, 203 Cal.App.4th at p. 1527.) Specifically, the tests Young performed a month prior to the date Goldsmith ran through the red light showed an average yellow-light interval of 4.11 seconds. The tests Young performed three days after Goldsmith ran the light showed an average yellow-light interval of 4.03 seconds. Both of those intervals were well above the minimum yellow-light interval of 3.9 seconds for a 40 mile per hour highway, as established in the California Manual on Uniform Traffic Control Devices for Streets and Highways, which Young referred to as the requirements set by "Caltrans." (*Goldsmith, supra*, at p. 1527 [citing Cal. Manual on Uniform

Traffic Control Devices for Streets and Highways (2003 ed.) pt. 4, pp. 4D-11, 4D-50].) Goldsmith did not offer any contrary evidence.

C. Goldsmith failed to raise, and thereby waived, any Sixth Amendment objection

On appeal to this Court, Goldsmith asserts for the first time that the introduction of ATES-generated evidence violated her Sixth Amendment rights to confront and cross-examine. But, Sixth Amendment objections may not be raised for the first time on appeal, and should be treated as waived if not raised in the trial court. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.) An objection based on hearsay is not sufficient to raise a Confrontation Clause challenge. (*People v. Chaney* (2007) 148 Cal.App.4th 772, 779.)

Here, even if Goldsmith had asserted an objection under the Sixth Amendment, the ATES-generated evidence against her, as explained in detail above, does not implicate her rights to confront and cross-examine because it does not involve a statement by a human declarant.

Goldsmith's guilt was established beyond a reasonable doubt and her conviction must stand.

VII.

CONCLUSION

Carmen Goldsmith does not deny that she drove straight through a red light. And the trial court did not abuse its discretion in holding that photos unquestionably showing her breaking the law demonstrate her guilt beyond a reasonable doubt. It is that type of dangerous behavior that ATES programs are designed to deter. ATES-generated evidence is more, not less, reliable than testimony by a live witness, and the attempt to impose overly-burdensome authentication requirements on ATES-generated evidence is an attempt to help scofflaws avoid the consequences of their

actions, not to ensure the integrity of the traffic court system. This Court has already developed standards for authenticating probative evidence, and it should apply those standards to ATES-generated evidence, along with the rule established in *Martinez*. This Court should also recognize that machine-generated evidence, which will only become more commonplace in the future, is not equivalent to a human statement, and so cannot be subject to either the hearsay rule or the Confrontation Clause.

Respectfully submitted,

Dated: November 26, 2012

Best Best & Krieger LLP

By: _____

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CERTIFICATE OF WORD COUNT

The text of this Brief consists of 11,298 words as counted by the Microsoft Word 2002 word-processing program used to generate said document.

Dated: November 26, 2012

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PROOF OF SERVICE

The People of the State of California v. Carmen Goldsmith
S201443

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Executed on November 26, 2012 at Indian Wells, California.

Sally Melgarejo

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