No. S201443

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff & Respondent,

vs.

CARMEN 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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The Answer's theme seems to be that regardless of the various risks associated with digital photos and computerized data, traffic courts should simply *assume* that such materials are accurate and reliable. Despite its subtle efforts to distance itself from Redflex – in light of Redflex's questionable conduct in the past in connection with traffic cases – the prosecution stubbornly tries to hang its hat on the presumptions referenced in Evidence Code sections 1552 and 1553 to support its view.

Instead of acknowledging the unique context of the issues raised here, the prosecution asks this Court to adopt a one-size-fits-all approach in identifying the proper test for authentication of digital photos. This Court does not need to define the proper test for authentication of *all* digital images, regardless of the context, thus rendering moot the prosecution's doomsday theories. (ABOM 30-31.) The authentication issues raised here involve traffic infraction cases where (1) convictions are obtained *exclusively* based on ATES materials in lieu of personal observation by an officer, (2) there is no right to a jury trial or appointed counsel (Pen. Code § 19.6), (3) the entire trial typically lasts a few minutes, (4) the pro per defendant faces a well-rehearsed witness from a prosecuting agency but (5) has no incentive to spend thousands of dollars in attorneys' fees to fight a $438 citation. In formulating the proper test for authentication of ATES materials, the Court should keep this unique combination of facts in mind in order to view this evidentiary issue from the proper angle. (See Judicial Council of Cal., Rep. on Statewide Action Plan for Serving Self-Represented Litigants (2004), p. 20 [confirming that a pro per party's single experience with the traffic court "can determine an individual's trust and confidence in the courts"].)

Furthermore, because the prosecution's statutory arguments violate the most basic constitutional principles that govern criminal cases, the Court should dismiss the arguments predicated on presumptions, "the slipperiest member of the family of legal terms." (2 McCormick, Evidence (6th ed. 2006) Presumptions, § 342.) Otherwise, the nominally-rebuttable presumptions invoked by the prosecution effectively act as conclusive presumptions in traffic courts, rendering pro per defendants presumptively guilty.

The last time this Court decided an infraction case, 34 years ago, this Court emphasized that "[i]t is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice." (*People v. Carlucci* (1979) 23 Cal.3d 249, 258.) The abuse of the traffic court system in ATES cases – particularly in this economy and as facilitated by the advent of digital technology and the oligopoly of private ATES vendors – has fueled a public outcry like no other. Given that this case presents the first opportunity for this Court to restore the public's trust in the integrity of the traffic court system, the Court should keep these practical issues in mind in evaluating the prosecution's desire not to be "bogged down" in obtaining ATES convictions. (ABOM 24.)

There is absolutely no margin for error here, given the fact that drivers are sometimes prosecuted based on ATES photos "for running a red light by one-tenth of a second." (Ortiz, *Jump in Traffic Tickets Raises Questions,* L.A. Daily J. (October 15, 2010) [also quoting a government official's observation that "California traffic fines are among the highest in the country and have become extremely onerous"].) Given this background, the Court should invoke its inherent authority to regulate criminal procedures governing traffic courts, thus rendering moot the flawed statutory arguments raised by the prosecution.

Finally, because the prosecution did not come anywhere close to properly authenticating the ATES materials used at Goldsmith's trial, the Court should reverse Goldsmith's erroneous conviction, regardless of any Sixth Amendment or hearsay issues.

LEGAL DISCUSSION

I. THE STATUTORY PRESUMPTIONS INVOKED BY THE PROSECUTION CANNOT RELIEVE THE PROSECUTION FROM ITS OBLIGATION TO PROPERLY AUTHENTICATE THE DIGITAL PHOTOS PRESENTED AT RED LIGHT CAMERA TRIALS.

A. The Prosecution's Interpretation of the Evidence Code Is Textually Flawed.

Seeking to transform the scope of the presumptions set forth in Evidence Code sections 1552 and 1553, the prosecution argues that these statutes create an automatic, rebuttable presumption that the contents of the ATES materials are accurate and reliable. (ABOM 24.) To advance this argument, the prosecution attacks *People v. Hawkins* (2002) 98 Cal.App.4th 1428, despite its own prior reliance on that case. (RB 19-21.)

In *Hawkins*, the court confirmed that the statutory presumption under section 1552 "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." (*Hawkins, supra,* 98 Cal.App.4th at 1450.) The prosecution argues that this holding is inconsistent with the statutory language that the presumption of accuracy

encompasses both the "existence and content" of the ATES materials. (ABOM 24.)

The problem with the prosecution's textual argument is that the presumption of accuracy of the computer information (§ 1552) and images (§ 1553) kicks in only at the last level of a three-step process. Initially, the "printed representation" of the computer information and image is presumed to be "an accurate representation of the computer information" and of the image "it purports to represent." (Evid. Code, §§ 1552-1553.) At the next step, if the defendant disputes the accuracy of the ATES materials (e.g., by providing evidence in the form of her own testimony by simply indicating that she did not run the red light as shown on the ATES materials), the presumption is gone from the case. (OBOM 22.) The only way to admit the materials at that point would be if the prosecution presents affirmative evidence (e.g., testimony by Redflex's technician) in order to meet its "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 and image "that it purports to represent." (Evid. Code, §§ 1552-1553.) Until this third step is completed, the prosecution cannot obtain a conviction based on the ATES materials by merely invoking these statutes.

To bolster its authentication argument, the prosecution also relies on *People v. Bowley* (1963) 59 Cal.2d 855. (ABOM 3, 20-21.) Half a century ago, before the advent of the digital age, this Court held "that a photograph may, in a proper case, be admitted into evidence" as probative evidence without testimony by the person who took the traditional, non-digital photo, a point that is not challenged by Goldsmith. (*Id.* at 861, 862-63.) The Court cautioned that it remains "necessary to know when [the photo] was taken and that it is accurate and truly represents what it purports to show," noting

that the photo "becomes probative only upon the assumption that it is relevant and accurate." (*Id.* at 862.)

Post-*Bowley* developments, however, preclude the prosecution's treatment of the ATES materials as substantive evidence (ultimate proof) of the driver's guilt by invoking the presumptions referenced in sections 1552 and 1553. Under the Evidence Code, enacted four years after *Bowley,* a "presumption is not evidence." (Evid. Code, § 600.) At the time of *Bowley*, by contrast, "presumptions had the effect of evidence which had to be weighed against conflicting evidence." (*Marvin v. Adams* (1967) 224 Cal.App.3d 956, 961.) That ship sailed in 1967. Accordingly, the prosecution's disguised attempt to turn the clock back by over forty years, by resurrecting the old standard, should be dismissed.

In sum, the prosecution's flawed interpretation of the Evidence Code should be rejected.

B. Applying the Presumptions Cited by the Prosecution in the Unique Context of Traffic Courts Raises Various Constitutional Problems.

Ignoring the textual problems with its position, the prosecution insists that sections 1552 and 1553 provide a rebuttable presumption that the ATES materials are accurate and reliable. (ABOM 19-35.) The prosecution's argument runs roughshod over defendants' due process rights in criminal cases.

A rebuttable presumption violates due process if it is "arbitrary" or "operates to deny a fair opportunity to repel it." (*Western & Atlantic Rail Road v. Henderson* (1929) 279 U.S. 639, 642.) The presumptions cited by the prosecution, as applied to traffic court defendants, fail both of these disjunctive tests.

1. It is arbitrary to assume that evidence prepared by a private ATES vendor previously caught falsifying evidence is reliable.

As reflected in the documents presented with Goldsmith's concurrently-filed motion for judicial notice, Redflex has falsified evidence used against motorists in connection with traffic tickets in the past. As a matter of common sense, attaching a presumption of reliability and accuracy to documents prepared by a private vendor that has falsified evidence would be totally arbitrary. If anything, the presumption should be that evidence prepared by such a private vendor is presumptively *un*reliable and *in*accurate. Otherwise, the contrary presumption – at least as applied to such a vendor – would be arbitrary and, as such, unconstitutional.

Consistent with *Henderson*'s constitutional test of arbitrariness, California courts refuse to apply even conclusive presumptions when their "underlying policies are not furthered." (*County of Orange v. Leslie B.* (1993) 14 Cal.App.4th 976, 980.) This is all the more reason to refuse to apply the "rebuttable" presumptions invoked by the prosecution here. Otherwise, rubber-stamping Redflex's materials based on the presumptions invoked by the prosecution will "protect policies which in this case do not exist." (*Comino v. Kelley* (1994) 25 Cal.App.4th 678, 685 [refusing to apply a presumption on this basis even though the legislature had classified it as a conclusive presumption; internal quotation marks and citation omitted].)

2. Alternatively, the presumptions cited by the prosecution are unconstitutional under *Henderson* because, as a practical matter, pro per traffic court defendants cannot adequately challenge them.

Under the disjunctive test articulated in *Henderson*, a rebuttable presumption is unconstitutional if it operates to deny a fair opportunity to repel the presumption. (*Henderson, supra,* 279 U.S. at 642.) That is precisely the case here.

The presumptions referenced in sections 1552 and 1553 operate to deny traffic court defendants (parties that are almost universally in pro per) a fair opportunity to repel these presumptions. Because such pro per defendants do not have the means, motive or opportunity to engage in discovery prior to trial (unlike civil litigants) by spending thousands of dollars on attorneys' fees or expert fees, as a practical matter, these presumptions yield guilty verdicts by allowing the prosecution to introduce Redflex's ATES materials without proper authentication.

Though rebuttable in name, the presumptions are conclusive in practice. Pro per drivers are forced to reconstruct history and disprove the preordained conclusion that they are guilty of running a red light based on ATES materials. In other words, upon mere issuance of an ATES citation, the state's burden to prove beyond a reasonable doubt that the driver entered the intersection after the light changed is extinguished. By effectively shifting the burden to the driver to prove that she is not guilty of the offense, despite the defendant's inadequate opportunity to do so, the presumptions – though labeled as rebuttable – are effectively conclusive. To borrow from a familiar refrain in individual rights jurisprudence, one might characterize the "rebuttable" presumptions cited by the prosecution as "rebuttable in theory, conclusive in fact." (See *Fullilove v. Klutznick*

(1980) 448 U.S. 448, 519 (Marshall, J., concurring) [quoting the conventional wisdom that strict scrutiny review is "strict in theory, but fatal in fact"].) [1]

Therefore, while these statutory presumptions may be perfectly fine in civil cases or other cases, they cannot be applied in traffic court because they deny the accused a fair opportunity to defend themselves. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]; *Holmes v. South Carolina* (2006) 547 U.S. 319, 324 [the Constitution precludes the application of evidentiary rules that are "arbitrary or disproportionate to the purposes they are designed to serve"; internal citation and quotation marks omitted].)

3. In order to avoid additional constitutional problems, the prosecution's statutory arguments should be summarily rejected.

To implement the presumption of innocence, the enforcement of which "lies at the foundation of the administration of our criminal law" (*Coffin v. United States* (1895) 156 U.S. 432, 453), this Court should reject

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1 The Court has repeatedly struck down irrebuttable presumptions as violating due process. (See, e.g., *U.S. Dep't. of Agriculture v. Murry* (1973) 413 U.S. 508, 514 [deeming an irrebuttable presumption to violate due process because the presumption often operated "contrary to fact"]; *Stanley v. Illinois* (1972) 405 U.S. 645, 654-55 [Illinois' irrebuttable presumption that all unmarried fathers are unqualified to raise their children violates due process]; *Heiner v. Donnan* (1932) 285 U.S. 312, 325 ["a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment"].)

the prosecution's reliance on sections 1552 and 1553. Doing so is necessary in order to "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) Contrary to the prosecution's view, in criminal law, as elsewhere, even "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." (*Evitts v. Lucey* (1985) 469 U.S. 387, 401.)

As confirmed by practitioners, traffic court commissioners treat ATES packages as gospel, thus robotically convicting pro per defendants. (See Tait, *Red Light Cameras Deny Defendants the Right of Confrontation*, L.A. Daily J. (October 1, 2001).) Applying the evidentiary presumptions invoked here would exponentially increase the constitutionally unacceptable risk that commissioners would convict defendants based on the inference of reliability suggested by the prosecution here. While the prosecution has put all of its eggs in this statutory basket, it refuses to acknowledge "that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." (*Heiner, supra,* 285 U.S. at 329.)

In sum, neither section 1552 nor section 1553 helps the prosecution because, as applied to traffic court defendants, each of them represents a "significant diminution [that] calls into question the ultimate 'integrity of the fact-finding process[.]'" (*Chambers, supra,* 410 U.S. at 296 [internal citation omitted].)

Otherwise, having failed to acknowledge the differences between the burden of production versus the burden of persuasion (OBOM 21-22), the

prosecution's argument -- if accepted -- would effectively shift the burden of persuasion to the defense.[2] Because the ATES materials are the only form of evidence presented at trial (as opposed to live testimony by an officer who witnessed the defendant running a red light), once the ATES package is admitted into evidence, the pro per defendant's conviction is a foregone conclusion based on the practical reasons discussed above. As a result, even if the defendant happens to be lucky enough to face a commissioner that does not treat such materials as gospel, the effect of the statutory presumptions invoked by the prosecution is to shift the burden of persuasion to the defendant. The Constitution precludes this inevitable outcome. (See *Dowling v. United States* (1990) 493 U.S. 342, 352-53 [the Due Process Clause prohibits states from regulating criminal procedure in ways that contravene any recognized principle of fundamental fairness]; *United States v. Salerno* (1987) 481 U.S. 739, 763 (Marshall, J., dissenting) [describing due process as the constitutional locus of "the invaluable guarantee afforded by the presumption of innocence"].)

4. Other state supreme courts have similarly refused to apply statutory presumptions in traffic cases.

Other courts have reinforced the constitutional principles discussed above by rejecting the prosecution's arguments. In *State v. Kuhlman* (Minn. 2007) 729 N.W.2d 577, for example, the Supreme Court of Minnesota refused to apply another presumption in a red light camera case. The Court

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2 The burden of producing evidence "means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.) The burden of proof, on the other hand, "means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.)

held that a municipal ordinance allowing ATES-based convictions conflicted with criminal statutes which required uniform application of the criminal laws throughout the state. "The problem with the presumption that the owner was the driver is that it eliminates the presumption of innocence and shifts the burden of proof from that required by the rules of criminal procedure[,]" the court held. (*Id.* at 583). Because "the state has the burden to prove beyond a reasonable doubt that the owner was driving at the time of the red-light offense, and the owner has no obligation to prove anything[,]" the court struck down a municipality's red light camera program as being preempted by state law. (*Id.* at 584). The court also held that the ordinance violates the basic rule of criminal procedure "that a defendant be 'presumed innocent until proven guilty beyond a reasonable doubt.'" (*Id.*)

The Oregon Supreme Court similarly reversed a traffic conviction based on photo radar, refusing to apply a rebuttable presumption that would have otherwise allowed a conviction against the registered owner -- based on the statutory presumption that the driver is the registered owner. (*State v. Clay* (Ore. 2001) 29 P.3d 1101.) Unlike the deficient testimony in Goldsmith's case, the police officer even testified at trial that he had personally operated the photo radar as the defendant was driving in his presence. (*Id.* at 1102.) Nonetheless, to minimize the possibility of erroneous convictions, the court refused to treat the officer as a "neutral, dispassionate and impartial official." (*Id.* at 1104.) Having rejected the prosecution's reliance on a statutory, rebuttable presumption regarding the driver's identity, the court concluded that due to "the lack of evidence in this record, defendant's conviction cannot stand." (*Id.*) [3]

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3 Likewise, the Missouri Supreme Court struck down another municipality's administrative proceeding system for challenging red light camera tickets as "void" because the accused drivers' statutory right to

Consistent with these cases, this Court should reject the prosecution's attempt to obtain criminal convictions by relying on a presumption of reliability of ATES materials while jeopardizing the presumption of innocence. As between these two presumptions, the latter should control.

II. IN ORDER TO FINALLY RESTORE THE PUBLIC'S TRUST IN THE INTEGRITY OF THE TRAFFIC COURT SYSTEM, THIS COURT SHOULD EXERCISE ITS INHERENT POWERS HERE, THUS RENDERING MOOT THE PROSECUTION'S FLAWED STATUTORY ARGUMENTS.

The prosecution does not dispute the current double standard facing traffic court defendants or the public outcry over the systematic abuse of ATES cases. (OBOM 37-39.) Nonetheless, the prosecution asks this Court to sanction the use of "rebuttable" presumptions while conveniently ignoring the risks of erroneous convictions magnified by adopting this approach.

The same inevitable risk of infecting the administration of justice became reality after the legislature adopted a law treating a parking citation as prima facie evidence of a violation. (Veh. Code, § 40202, subd. (a).) In the analogous context of "the increasingly lucrative world of public parking enforcement," the practical repercussions of adopting such a "rebuttable" presumption – one that, in effect, functions as a "game over" presumption – have already been documented. (See Scott, *Lure of Revenue Corrupts Cities' Parking Management, Critics Say*, L.A. Daily J. (Sept. 12, 2007)

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appear before a judge had been violated under the system. (*City of Springfield v. Belt* (Mo. 2010) 307 S.W.3d 649, 653.)

[discussing falsification of parking citations].) There is no reason to believe that admitting ATES materials based on a blanket rebuttable presumption would pose a lower risk of false positives, particularly given that ATES citations generate revenues several times greater than parking citations.

Furthermore, while a parking citation entails merely a civil penalty, given the criminal nature of ATES cases, the Court should be particularly vigilant in minimizing the risk of false positives for other reasons. "In a civil suit between two private parties for money damages," courts "view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." (*In re Winship* (1970) 397 U.S. 358, 371 [Harlan, J., concurring].) By contrast, in criminal cases, it is the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." (*Id.* at 372.) Given the prior falsification of evidence by private ATES vendors, the need to minimize the possibility of false convictions is even more acute here. (OBOM 30-31; Motion for Judicial Notice, Ex. 1; see *Redflex Admits Bribery Scheme in Two More Cities,* March 5, 2013 <http://www.thenewspaper.com/news/40/4046.asp> [as of March 14, 2013] [discussing additional, recent scandals].)

The prosecution also argues that if the legislature were concerned about the unreliability of digital images, it would have expressly required a different test to govern the admission of ATES materials in red light camera trials. (ABOM 25-26.) But given the fact that the ATES industry succeeded in lobbying Sacramento to quietly pass a law in an ill-conceived attempt to tie this Court's hands in ruling in this case – while ignoring the Separation-of-Powers Clause issues created by this tactic – the prosecution is asking this Court to abdicate its judicial responsibilities. (See Turk, *eDiscovery: Traffic Camera Law Quietly Enacted*, L.A. Daily J. (January 4, 2013) [noting the recent statutory amendment cited by the prosecution "never saw

the light of advance public scrutiny"].) This is precisely why *this* Court needs to step in by exercising its "inherent supervisory powers over the courts of this state" in order to close any statutory gaps or the suggested loopholes invoked by the prosecution. (*People v. Coleman* (1975) 13 Cal.3d 867, 872 [invoking this ground in resolving issue of criminal procedure].) Consistent with its prior practice of invoking its "inherent authority to ensure the orderly administration of justice" in family law cases to ensure that pro per litigants "have their day in court" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1346, 1367), this Court should do the same here. Otherwise, given the public perception of the current abuse of the traffic court system through private ATES vendors (OBOM 37, 39), the prosecution's view – if adopted – would undo everything this Court has done over the past decade to gain the public's confidence in the integrity of the judicial system. (See George, *Fair for All*, L.A. Daily J. (January 18, 2002) [emphasizing the "critical" need to regain the public's confidence in the judiciary and outlining implementation of new measures].)

Unable to dispute these points, the prosecution claims that it should be allowed to use evidentiary presumptions as a short-cut in order to "expedite trials" so that it can obtain convictions in traffic courts quickly—without being "bogged down." (ABOM 24.) But the prosecution "seems to have its priorities confused." (*In re Marriage of Brantner* (1977) 67 Cal.App.3d 416, 422.) Ignoring the obvious fact that "speed is not always compatible with justice," the prosecution's attempt to perpetuate "the low-man-on-the-totem-pole treatment" currently given to traffic court defendants – whose cases are typically "fobbed off on a commissioner" – should be summarily rejected. (*Id.* [rejecting the identical arguments raised in the family law context].)

While administrative efficiency provides no basis to trample on a defendant's constitutional right to due process, the prosecution's view that

traffic courts need to dispense justice in an assembly-line format is refuted by recent statistics. (ABOM 24, 34.) Because only 7% of traffic infraction cases actually go to trial, the prosecution's view ignores the fact that it does not have to present any testimony (or documents) whatsoever in 93% of such cases as they are disposed of before trial. (Judicial Council of Cal., Court Statistics Rep. (2012) Statewide Caseload Trends, p. 49.)

The Supreme Court of Wisconsin rejected the identical efficiency arguments raised by the prosecution here in another infraction case. (ABOM 24.) In *State v. Hanson* (Wis. 1978) 270 N.W.2d 212 [85 Wis.2d 233], the Court held that requiring case-specific testimony does not "place an onerous burden upon the law enforcement[.]" (*Hanson, supra*, 270 N.W. at 219.) The Court emphasized that "these conditions are necessary to maintaining and improving the public confidence in the law enforcement and judicial systems. For the average law abiding American citizen, minor traffic offenses constitute the only contact such a person will have with the law enforcement and judicial systems. Public confidence rests upon the fairness of such proceedings." (*Id.*) California courts are in accord. (See *People v. Goulet* (1992) 13 Cal.App.4th Supp. 1, 4 ["Enforcement of laws which are widely perceived as unreasonable and unfair generates disrespect and even contempt toward those who make and enforce those laws"; addressing traffic infraction appeal].)

In sum, in order to restore the public's trust in the administration of justice in traffic courts, this Court should exercise its inherent powers to regulate criminal procedure, thus rejecting the prosecution's suggestion that this Court's hands are tied by statutory law.

III. NONE OF THE EXCUSES OFFERED BY THE PROSECUTION JUSTIFY REDUCING ITS EVIDENTIARY BURDEN AT TRIAL.

A. The Prosecution's Arguments Regarding the Proper Test for Authentication of Digital Images Are Inaccurate and Flawed.

1. The prosecution's factual arguments are based on major distortions of the record.

Without citing anything in the record, the prosecution makes the self-serving assertion that "ATES-generated images" are "original digital images." (ABOM 29.) Based on this misrepresentation of the record, the prosecution launches into its argument that the authentication test for ATES photos and traditional photos should be the same because an ATES photo is no less reliable than "a traditional film photograph or video." (*Id.*) The prosecution is absolutely wrong again.

First, the same appellate court that decided this case confirmed in another case pending before this Court – involving the same ATES vendor (Redflex) – that "ATES equipment at an intersection does not produce photographs or a video; it generates digital information and sends it to another location, where a computer *converts* the digital information to produce photographic and video evidence." (*People v. Gray* (2012) 204 Cal.App.4th 1041, 1049, review granted June 20, 2012, S202483 [emphasis added].) Therefore, the prosecution's assertion that the ATES photos represent "original" photographs that are not "digitally-converted" (or that they are created without any opportunity for alteration or enhancement) is simply false. (ABOM 29.)

Similarly, the same amici that the prosecution has relied upon in its brief contradict the prosecution's factual assertion in this case. (ABOM 17.) According to the prosecution in *Gray*, the ATES equipment interacts with the "central computer processing installations of the system that convert the digital codes from the intersection into photographs at a remote location." (Answer Brief on the Merits, p. 14 [2012 WL 6569404 at * 14].) Therefore, the prosecution's own amici refute its factual assertion that the ATES photos are not "digitally-converted." (ABOM 29.)

Finally, the trial testimony in this case refutes the prosecution's theory that the ATES photos are not altered. According to the prosecution's own witness, a data bar is "imprinted" on the digital images to identify the date, time and location of the alleged violation. (RT 2:26-3:2.) In order to create enough space to imprint the data bar, the images will presumably/necessarily have to be adjusted to fit the reduced space on the photo. Given the prosecution's concession that alteration or enhancement of digital photos would trigger a different authentication test than the one adopted for traditional photos (ABOM 26), the prosecution practically concedes defeat.

* * * *

The prosecution also resorts to semantics by attempting to distinguish ATES photos from an image that has been enhanced or "electronically emboss[ed]." (ABOM 28.) But whether the data bar on ATES photos are "embossed", superimposed, or simply added by having them "imprinted" on the photos makes no difference. (RT 2:26.) These synonyms trigger the identical concerns – alteration of the original image *without* the data bar in order to have sufficient space to add the data bar onto the photo – regardless of the label attached. (See *People v. Goldsmith*

(2012) 203 Cal.App.4th 1515, 1526 [confirming that the data bar was printed on the photographs themselves, as opposed to on a separate piece of paper].)

To summarize, the prosecution's distortions of the record should be disregarded.

2. The test for authenticating traditional photos should not be exported to the realm of digital photos.

Notwithstanding the susceptibility of digital photos to undetectable manipulation (OBOM 14-15), the prosecution claims that this Court should refuse to adopt a different test for authenticating digital photos—as compared to traditional photos. Technological advancements in the digital age render this argument obsolescent. (*Id.*)

Addressing difficult issues has been one of the hallmarks of this Court's jurisprudence, even when doing so bucked well-established law. (Dear & Jessen, *'Followed Rates' And Leading State Cases*, 1940-2005 (2007) 41 U.C. Davis L. Rev. 683, 693.) It was well settled that manufacturers were not strictly liable for product defects until *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57. It was well settled that there was no such thing as comparative fault until *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804. In today's digital era, labeling the test for authentication of digital photographs as a "special" test does not justify the adoption of the anachronistic arguments raised by the prosecution here. (ABOM 29-31.) The district court decision cited by the prosecution similarly confirms that "[d]igital photographs present unique authentication problems because they are a form of electronically produced evidence that may be manipulated and altered." (*Lorraine v. Markel American Ins. Co.*

(D. Md. 2007) 241 F.R.D. 534, 561.) If "unique" problems require "special" tests, so be it.

While this part of *Lorraine* supports Goldsmith's arguments, the prosecution's heavy reliance on that district court decision should be rejected as the prosecution conveniently ignores California law governing the presentation of photos/exhibits in traffic trials. (OBOM 31.) Under California law, "a photograph need not be digitally changed or otherwise physically altered" in order to raise concerns regarding inaccuracy when used in traffic trials. (*People v. Bamberg* (2009) 175 Cal.App.4th 618, 627 [upholding felony conviction for presenting unaltered photos in a misleading manner to the traffic court judge].) Therefore, given *Bamberg*'s potential ramifications, even if an ATES photo is never altered, this does not eliminate the risk of an erroneous guilty verdict; the defense must be given the opportunity to evaluate whether the ATES photos were taken from such an angle that increased the likelihood of an erroneous conviction. As a result, even if Redflex changed its technology tomorrow to use "original digital images" (ABOM 29), that would not minimize the need for proper authentication.

The prosecution's reliance on *Owens v. State* (Ark. 2005) 214 S.W.3d 849 is misplaced. In that case, because a store employee who had personally witnessed a crime had "testified about his knowledge of the [store's] surveillance cameras[,]" the court held that "the State met its burden of proof required for authenticating the photographs in this case, and, thus, laid a proper foundation for admission of the photographs." (*Id.* at 854.) Without any analysis of the authentication issues associated with digital photos, the court then stated that it would not "impose a higher burden of proof for the admissibility of digital photographs merely because

digital images are easier to manipulate." Such *dicta* hardly has any persuasive value.[4]

The prosecution also claims that ATES materials are trustworthy because they are generated from a "known source" -- unlike photos posted on an internet website. (ABOM 28.) Even if we ignore Young's testimony that ATES images are "retrieved" by an "internet D.S.L. connection" (which necessarily means that they are transmitted through the internet [RT 7:7-9]), the prosecution's cavalier approach – "Trust me, I'm an expert, and it makes sense to me" – has been rejected even in the civil context. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1120, fn. 12.) Where, as here, the "known source" is known for having previously falsified evidence presented in traffic courts (Motion for Judicial Notice, Ex. 1), this hardly provides any comfort to the defendant facing a criminal conviction.

Accordingly, the prosecution's position that this Court should export the test for authentication of non-digital photos to digital ATES photos should be rejected.

B. The Remaining Arguments Raised by the Prosecution Are Equally Meritless.

In the grab-bag final section of its brief, the prosecution raises a hodgepodge of arguments. None of them has any merit.

Apparently realizing that ATES-based convictions cannot be upheld based on the deficient testimony provided in this case, the prosecution

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4 The court also noted that, unlike this case, "there was no indication that the still photographs had been enhanced from the videotape or *altered* in any way." (*Id.* [emphasis added].) The other case cited by the prosecution from West Virginia provides even less "analysis." (ABOM 27.)

politicizes the issues raised here, claiming that pro per drivers should be convicted to increase public safety. (ABOM 38-39.) The prosecution also claims that Goldsmith has not denied that she drove through the red light as captured by Redflex's ATES materials. (*Id.*)

The first point, of course, is highly debatable. In fact, studies done in various states – including an audit by a local municipality – have found that ATES "cameras actually make intersections less safe because they encourage drivers to make sudden stops." (Ortiz, *supra,* L.A. Daily J. (October 15, 2010); see also *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 501, fn. 17 [declining to rely on research study partially funded by appellant].)

As for the second point, Goldsmith's decision to exercise her constitutional right not to testify proves nothing and cannot supply the missing elements of the prosecution's case. An accused who (like Goldsmith) wishes to contest the charges against her need only enter a general plea of not guilty. "At trial, a defendant may ... choose to contest the Government's proof on every element; or he may concede some elements and contest others; or he may do nothing at all. Whatever his choice, the Government still carries the burden of proof beyond a reasonable doubt on each element." (*Old Chief v. United States* (1997) 519 U.S. 172, 199-200 [O'Connor, J., dissenting].)

IV. APPLYING THE LAW TO THIS CASE, GOLDSMITH'S CONVICTION SHOULD BE REVERSED.

A. The Prosecution Failed to Authenticate the ATES Materials Presented by Young at Goldsmith's Trial.

In order to prove its case beyond a reasonable doubt, the prosecution was required to prove that Goldsmith crossed the limit line after the light changed. (Veh. Code, § 21453, subd. (a).) While Young described the data bar superimposed on the photos, he failed to properly authenticate the data bar or the photos. (OBOM 17-18.)

In order to do so, it is not enough to describe the function of the data bar. The prosecution must present proper testimony that the process used by Redflex's computer equipment (1) accurately captures/processes the data in the first place and (2) produces an accurate result (i.e., an accurate data bar) in each case being litigated. Here, however, the prosecution asks this Court to pretend that Redflex's computerized system is somehow immune from the general risks associated with the accuracy of computerized data (e.g., incomplete/erroneous data entry, mistakes in output instructions, programming errors, damage/contamination of storage media, power outages, or equipment malfunctions).

Unable to cure the evidentiary gaps in the record now, the prosecution twists Goldsmith's argument, claiming that she is asking for too much by demanding the testimony of the Redflex computer programmer or the operator of the ATES. (ABOM 33-34.) No one is claiming that the actual computer programmer that designed Redflex's computer system (or the ATES operator) must personally testify at trial. A Redflex employee that has personal knowledge regarding the reliability of the Redflex computer system, whether labeled as a "technician" or

otherwise, can present testimony regarding system reliability without requiring testimony by "hardware and software designers." (ABOM 32.) [5]

The main problems with Young's testimony, on the other hand, include the following:

(1) there is no testimony that the procedure developed for capturing/processing data by Redflex's computer has built-in safeguards to ensure accuracy and to identify errors during the data-collection or the data-processing phase;

(2) there is no testimony regarding any operational inspections of the cameras themselves (e.g., to ensure proper functionality); and

(3) there is no testimony that, with respect to the data bar created in this particular case, there was no malfunction based on the procedures used by Redflex's computer system in terms of data collection or the ultimate data output.

"The accuracy of the most indisputable scientific theory is subject to its application in particular conditions. The application of any virtually undisputed scientific fact to the immediate surrounding conditions must be explained in ascertaining its accuracy." *Hanson, supra*, 270 N.W. at 218.

In *Hanson*, the court held that while the prosecution was entitled to a presumption of the accuracy of radar evidence used in speeding cases, a defendant could not be found guilty in traffic court unless the prosecution presented proper testimony to show that the radar was properly *applied* in each case. (*Id.* at 218-219.) Likewise here, the statutory presumptions invoked by the prosecution – at best – can make it easier to admit the ATES materials by eliminating the need to present testimony in each case to show

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5 In order to allow the defense the opportunity for an effective/meaningful cross-examination, however, the prosecution's witness must have first-hand knowledge regarding how the ATES operates -- e.g., based on prior training -- as opposed to basing one's operational knowledge on what others might have told the witness as in Young's case. (RT 6:27-7:2.)

the general reliability of ATES technology. (ABOM 3.) Thus, while the presumptions can eliminate the need for a *Kelly* hearing, the presumptions cannot provide the prosecution with *carte blanche* to establish that the ATES technology was properly applied in each case in generating the photos and data bar. [6]

To the extent that "the machine self-generates data without human input" (ABOM 34), the need for such testimony is even greater, not less, in order to eliminate the "false aura of computer infallibility" suggested by the prosecution and commonly accepted by commissioners handling ATES cases. (*People v. Hernandez* (1997) 55 Cal.App.4th 225, 241; OBOM 3.) Presenting such testimony to authenticate the ATES materials can take less than three minutes, thus rendering the prosecution's inefficiency argument baseless. But given the total lack of evidence on any of these threshold evidentiary issues, neither the data bar nor the photos were authenticated here.

Seeking to rehabilitate Young's deficient testimony, the prosecution focuses on another issue where Young claimed that he had independently verified the length of the yellow-light phase to ensure that it meets the minimum time required by law. (ABOM 8, 37-38.) However, because Goldsmith is no longer raising that particular issue (OBOM 9, fn. 3), this post-trial attempt to rehabilitate Young is too little too late. [7]

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6 Contrary to the prosecution's suggestion, a *Kelly* hearing is not required in ATES cases based on the notion that ATES is a "novel technology." (ABOM 3.) The test articulated by Goldsmith takes this into account by eliminating the need for the prosecution to present evidence that "the computer equipment is accepted as standard equipment in the field." (*Compare* OBOM 15-16 [*Swinton*'s language] *with* OBOM 17-18 [Goldsmith's proposed test].)

7 It is noteworthy that while this particular issue was not raised in the petition for review or in this Court's specification of issues, Young contradicted himself regarding the legal requirements governing the

Finally, in the absence of any suggestion in the record that Redflex has implemented proper policies or procedures for control of access to the data (or any backup and audit procedures), the prosecution's theory of authentication is even more implausible. In sum, the prosecution's self-serving assertion that the ATES materials were properly authenticated in Goldsmith's case is refuted by the record.

B. The Recent Legislative Amendments Cannot Be Constitutionally Used to Salvage Goldsmith's Conviction from Reversal.

After this Court granted review in this case, the two statutes invoked by the prosecution were amended to indicate that they apply to ATES materials, effective January 1, 2013. [8] The prosecution claims that the statutory amendments should be retroactively applied here to uphold Goldsmith's 2009 conviction. (ABOM 18.) There are several flaws in this argument.

First, the statutory amendments do not cure any of the textual or constitutional defects discussed above. The amended statutes simply indicate that they apply to ATES materials. But Goldsmith is not arguing that the statutes, *on their face*, are inapplicable to ATES materials.

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minimum length of the yellow light, thus raising further questions regarding his entire testimony. (RT: 9:7 [four seconds]; RT 10:25-26 [3.9 seconds].)

8 Section 1552 was amended to indicate that it "applies to the printed representation of computer-generated information stored by an automated traffic enforcement system." (Stats. 2012, ch. 735, § 1 (SB 1303), effective January 1, 2013.) Section 1553 was amended to indicate that it "applies to the printed representation of video or photographic images stored by an automated traffic enforcement system." (Stats. 2012, ch. 735, § 2 (SB 1303), effective January 1, 2013.)

Goldsmith's position is that the remaining/substantive language of the statutes does not provide the *relief* requested by the prosecution, whether the case involves a red light camera prosecution, a felony case or a civil lawsuit. In other words, judging by their initial subdivisions, these statutes do "not operate to establish the accuracy or reliability of the printed information." (*Hawkins, supra,* 98 Cal.App.4th at 1450 [analyzing section 1552].) The amended language in the latter subdivisions of these statutes does not purport to address this issue.

Alternatively, Goldsmith's position is that even if these statutes were deemed to operate to establish the accuracy or reliability of the ATES materials, the application of such a statutory provision – though otherwise permissible in a civil lawsuit involving an accident caught on a red light camera – would be unconstitutional under *Henderson* in the unique context of traffic courts. Therefore, while the private ATES industry is free to continue lobbying Sacramento to make such amendments, such legislative amendments cannot constitutionally deprive traffic court defendants from having their day in criminal courts. Therefore, the statutory amendments are meaningless here.

Instead of acknowledging this point, the prosecution claims that retroactive application of the statutory amendments is justified here. (ABOM 18.) While this is an academic point (nothing plus nothing equals nothing), the prosecution is wrong, even if the legislature amended these statutes tomorrow to indicate that the presumptions invoked by the prosecution establish the accuracy or reliability of the ATES materials. Such an amendment, if passed, would be effectively "lowering the quantum of evidence required to convict." (*Carmell v. Texas* (2000) 529 U.S. 513, 546.) By enacting such an amendment, "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction." (*Id.* at 533.) This is

precisely the type of result precluded under the Ex Post Facto Clause. (*Id.* at 531-533.) Therefore, the legislative amendments do not help the prosecution for these alternative reasons.

C. The Lower Courts' Decisions Should Be Reversed Irrespective of the Confrontation Clause and Hearsay Issues.

In the opening brief on the merits, Goldsmith challenged her conviction based on the Sixth Amendment and on hearsay grounds. While "the hearsay rule may not be applied mechanistically to defeat the ends of justice" where "constitutional rights directly affecting the ascertainment of guilt are implicated" (*Chambers, supra,* 410 U.S. at 302), in light of this Court's subsequent interpretation of the Sixth Amendment and the hearsay rule (*People v. Lopez* (2012) 55 Cal.4th 569, 583-585), Goldsmith does not address this issue at this time. However, Goldsmith respectfully requests that the Court entertain supplemental briefing based on future developments in this fluid area of the law to the extent that such cases are decided by this Court or by the U.S. Supreme Court before the disposition of this case.

CONCLUSION

The decisions by the lower courts should be reversed.

Respectfully submitted,

DATED: March 15, 2013

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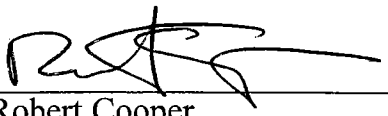
By 
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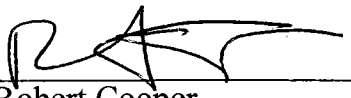
By 
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 **March 15, 2013**, I caused the foregoing document described as **REPLY 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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