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SHERRY GENDELMAN, SBN 64757
Law Office of Sherry Gendelman
421 Grand Ave., Suite A
South San Francisco, CA 94080
(650) 615-0117
(650) 589-3980 FAX

FILED
ALAMEDA COUNTY

OCT 19 2009

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

Attorneys for Appellant/Defendant,
[Redacted] BLANKENSHIP

SUPERIOR COURT, STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
APPELATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

APPEAL NO 5017
Case No.5001179419
APPELLANT'S OPENING BRIEF

[Redacted] BLANKENSHIP,
Defendant and Appellant

Date: TBD
Time TBD
Appellant Dept. TBD

CASE SUMMARY: This case is derived from a Red Light Camera System, which was installed in the city of Emeryville, County of Alameda, for the sole purpose of prosecuting red light runners. The County installed the system in conjunction with a private contractor, Redflex Traffic Systems, Inc., (Herein after Redflex)

On September 16, 2008, an alleged violation of CVC § 21453(a), a photo enforced red-light camera violation occurred. The citation was issued to the defendant, [Redacted] Blankenship, who is the registered owner of the vehicle. Trial in

[Redacted] Blankenship Opening Brief

1 this matter commenced on July 20, 2009, in Dept. 103 of the above-entitled court.

2 At the outset of the trial defendant moved to dismiss the case pursuant to Vehicle
3 Code § 210, which requires the establishment of

4 "An "automated enforcement system" ...that photographically records a
5 driver's responses to ... an official traffic control signal described in Section
6 21450, and is designed to obtain a clear photograph of a **vehicle's** license
plate and the driver of the **vehicle**."

7 In the subject case the photograph of the driver is not clear, and therefore
8 violates the requirement of the Vehicle Code. The Court denied the motion, stating
9 a clear photograph was not required, only the establishment of a system that could
10 take a clear photo.

11
12 Emeryville Police Department employee, Ms. Sylvester, then testified that
13 she issued the citation in this case. Ms. Sylvester testified that she is a Service
14 Technician for Emeryville Police Department. Her job is to review Redflex, Inc.
15 photo enforcement materials. She has had classes and field training and she cited
16 Vehicle Code sections 21455.5-7 which she claims authorize non-sworn police
17 officers to issue citations. Ms. Sylvester said that she issued citation ER26976 after
18 reviewing photographs and determining that a violation had occurred. Counsel
19 made hearsay and foundational objections. Ms. Sylvester testified that she was
20 trained how to use the program and how to view the video and photos on the
21 Redflex website. Reviewing the photographs is part of her duties. Ms. Sylvester
22 testified she compared the photograph to Mr. Blankenship DMV records and then
23 issued this citation. Ms. Sylvester did provide, nor introduce, a copy of Mr.
24 Blankenship's DMV photograph into evidence. Defendant again made a motion to
25 dismiss pursuant to V.C. § 210.

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1 The Court asked Ms. Sylvester if Mr. Blankenship has submitted an
2 affidavit of non-liability stating he was not the driver. Counsel objected to the
3 court's inquiry. The Court's inquiry impliedly commented upon Mr. Blankenship's
4 Fifth Amendment right to remain silent. Counsel also raised foundation and hearsay
5 objections to Ms. Sylvester's testimony, all of which were overruled.

6 **MOTIONS:**

7
8 Counsel did not have any evidence to present on defendant's behalf. On
9 closing counsel moved for a dismissal Pursuant to Penal Code §1118, and/or
10 judgment of acquittal, based upon defendant's hearsay and foundation objections;
11 and pursuant to recent Supreme Court decision in Crawford v. Washington, (2004)
12 541 U.S. 36, and in Melendez-Diaz v. Massachusetts. (2009) 129 S. Ct. 2527, The
13 Sixth Amendment of the US Constitution guarantees defendant's the right to
14 confront all the witnesses against them. Counsel believes this holding extends to the
15 Redflex employees who operate the system and who had assembled and forwarded
16 the information to the Emeryville Police Department used solely to convict
17 defendant. Defendant also moved for an acquittal based upon the grounds that V.C.
18 §210 requires a clear photograph of the driver, and none was introduced in this
19 case. Defendant also moved for an acquittal because the Court's commenting upon
20 defendant's silence because defendant had not submitted an Affidavit of Non
21 Liability. Commissioner Carter overruled all of defense objections, denied the P. C.
22 § 1118 motion, admitted the packet, along with the DVD and all documents into
23 evidence.
24
25
26 /

1 **VERDICT AND SENTENCE:**

2 The court found the defendant guilty and imposed a fine of \$391.00.

3 **ARGUMENT:**

4 I. **QUESTIONS PRESENTED:**

5
6 **1. WAS DEFENDANT DENIED HIS RIGHT TO CROSS-**
7 **EXAMINE WITNESS PURSUANT TO THE SIXTH**
8 **AMENDMENT**

9 In both the Crawford v. Washington, (2004) 541 U.S. 36 and Melendez-
10 Diaz v. Massachusetts (2009) 129 S.Ct. 2527 cases the Supreme Court addressed
11 defendants' right under the Sixth Amendment's Confrontation Clause in Melendez-
12 Diaz v. Massachusetts (2009) 129 S.Ct. 2527. This case involved the admission of
13 certificates of analysis sworn by analysts at state laboratories, without requiring in
14 court testimony from said analysts. The question presented to the court was
15 "whether the affidavits are 'testimonial,' rendering the affiants 'witnesses' subject
16 to the defendant's right of confrontation under the Sixth Amendment.
17

18 The court using a Crawford, supra, analysis found that the documents were
19 "testimonial" evidence and as such were inadmissible absent the opportunity to
20 cross-examine the witness. Analysis of the Melendez-Diaz case has been stated as
21 follows:
22

- 23 "1. analysts' certificates of analysis were affidavits within core class of
24 testimonial statements covered by Confrontation Clause
25 2. analysts were not removed from coverage of Confrontation Clause on theory
26 that they were not "accusatory" witnesses;
27 3. analysts were not removed from coverage of Confrontation Clause on theory
28 that they were not conventional witnesses
4. analysts were not removed from coverage of Confrontation Clause on theory
that their testimony consisted of neutral, scientific testing

- 1 5. certificates of analysis were not removed from coverage of Confrontation
- 2 Clause on theory that they were akin to official and business records and
- 3 6. defendant's ability to subpoena analysts did not obviate state's obligation to
- 4 produce analysts for cross-examination." *Id.*, at 2527, 129 S.Ct. 2527.

5 "Business and public records are generally admissible absent confrontation, not
6 because they qualify under an exception to the hearsay rules but, because having
7 been created for the administration of an entity's affairs and not for the purpose of
8 establishing or proving some fact at trial, they are not testimonial. Whether or not
9 they qualify as business or official records, the analysts' statements here prepared
10 specifically for use at petitioner's trial were testimony against petitioner and the
11 analysts were subject to confrontation under the Sixth Amendment" *Id.*, at 2540, 129
12 S. Ct. 2527. In the case at hand, Redflex has created, and maintains, a system of
13 cameras and computers that produce photographs, DVDs and documents that are
14 then used to charge defendant as being a traffic violator. No Redflex employee,
15 including a custodian of records, ever appeared at the trial: not the camera
16 technician(s) who actually installed the camera/computer system, not the employee
17 who maintain said system, not the person who processes the images into the packet
18 introduced into evidence and which provide the sole basis for a conviction of the
19 defendant, and not the employee who determined the system was working, and that
20 the defendant had violated the law. Although someone, like the camera technician,
21 may not be an "accusatory" witness, nonetheless that person's presence is still
22 required under the Confrontation Clause. The same argument applies to the camera
23 technician not being a "conventional" witness. The technician's findings may be
24 seen as neutral and scientific but these facts do not remove it from the protections of
25 the Confrontation Clause. And despite any resemblance to business or official
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1 records, the presence of the technician as a witness is required under Diaz-
2 Melendez.

3 Without the right to cross-examine these witnesses there is no way to
4 determine whether the pictures are enhanced, whether the system was functioning
5 properly, who at Redflex may have processed the images, or who maintained the
6 system, and who at Redflex determined that the subject DVD and photos
7 constituted a violation of C.V.C. § 21453a. Defendant has a right to cross-examine
8 these witnesses pursuant to the Sixth Amendment and the Court's rulings in Diaz-
9 Menlendez and Crawford, supra. Defendant has been denied that right.

11 The California Court of Appeals in, People v. Isaiah, (2004) 118
12 Cal.App.4th. 1396, expanded on the definition of what testimonial hearsay evidence
13 is by stating that the pertinent question is whether an objective observer would
14 reasonably expect the statement to be *available for use* in a prosecution (Id. at p.
15 1402).

16 It is indisputable that the records contained in the Redflex Camera Packet
17 are hearsay. It is also clear that the exclusive reason these records are created and
18 kept is for the use in the prosecution of alleged red light violators. The defendant
19 had a right to cross-examine the technicians who determined he had violated CVC
20 Section 21453(a).

21 We emphasize that the only purpose for the existence of the Redflex
22 Cameras is for the criminal prosecution of red light runners. Redflex generates all
23 of the documents contained in the Redflex Packet with the knowledge that in every
24 single case they may be needed in court for the prosecution of the alleged violator.
25 Furthermore, every document contained in the Red Light Camera Packet is sent to
26 the Emeryville Police Department who in turn reviews the documents, in this case
27

1 Ms. Sylvester, and issues a citation for the prosecution of the alleged violators.
2 That is sole purpose for this information, i.e. prosecutorial.

3
4 Counsel is requesting a dismissal in this case based on the fact that
5 defendant has been denied the right to cross-examine witnesses under the
6 Confrontation Clause of the Sixth Amendment.

7 **2. VEHICLE CODE SECTION 210 REQUIRES A CLEAR**
8 **PHOTOGRAPH OF THE DRIVER AND NONE WAS INTRODUCED.**

9 Vehicle Code §210 defines the requirements of a photo-enforced system as
10 follows:

11
12 An "automated enforcement system" is any system operated by a
13 governmental agency, in cooperation with a law enforcement agency,
14 that photographically records a driver's responses to a rail or rail
15 transit signal or crossing gate, or both, or to an official traffic
16 control signal described in Section 21450, and is designed to obtain
17 a clear photograph of a **vehicle's** license plate and the driver of the
18 **vehicle.**

19 In the case at hand no clear photograph of the driver was introduced. The
20 photograph included in the four-photograph citation is blurry. No one can be
21 identified from that photo. If there is not evidence to identify who the driver was,
22 man or woman, young or old, not conviction can be entered against the defendant.
23 In this case the requirements of V.C. § 210 were not met and the matter should have
24 been dismissed. People's witness testified that she had compared the face photo to
25 the picture of Mr. Blankenship at the DMV. However, no DMV photograph was
26 introduced. Defendant objected to the testimony as hearsay.

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2. **DID THE COURT VIOLATE DEFENDANT'S RIGHTS
UNDER THE FIFTH AMENDMENT TO REMAIN SILENT?**

Defendant moved for a dismissal pursuant to Vehicle Code § 210, arguing that no clear photograph of the driver was presented, and therefore there was no clear and convincing evidence that Mr. Blankenship was the driver of the vehicle on the date of the alleged violation. The Court asked People's witness Ms. Sylvester whether the defendant had submitted an Affidavit of Non-Liability alleging he was not the driver. Ms. Sylvester answered that he had not. Counsel objected, and moved for a dismissal. Defendant has a right to remain silent and a right against self-incrimination, and his exercising that right cannot be interpreted to mean a confession of guilt. See Franklin v. Duncan (9th Cir. 1995) 70 F.3d 75, 76, holding that a comment on defendant's post-arrest silence and an instruction that jury could construe that silence as an adoptive admission violated petitioner's Fifth Amendment privilege against self-incrimination; and Mahorney v. Wallman (10th Cir. 1990) 917 F.2d 469, which held a prosecutor's comments that a presumption of innocence was designed to protect only the innocent and that it had been removed in this case violated the Fifth Amendment. Mr. Blankenship did not have to submit an Affidavit that he was not driving. The People had the burden to prove him guilty beyond a reasonable doubt, including by introducing a clear photograph of the face of the driver of the vehicle, the face of the alleged traffic violator. The People failed to carry their burden, and the case should have been dismissed. The Court was in error to comment upon Mr. Blankenship's not having provided the Emeryville Police Department with an affidavit of non-

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1 liability stating he was not the driver. Mr. Blankenship had a right to remain
2 silent.

3
4 **CONCLUSION:**

5 No conviction of VC Section 21453(a) can be sustained unless the record
6 contains substantial evidence supporting each element of the charged offense. Absent
7 the Custodian of Records of Redflex, or other Redflex employees, the entire photo
8 packet and video, and testimony of Ms. Sylvester, lacked foundation, were
9 inadmissible hearsay, violated Defendant's Sixth Amendment right, and the lack of a
10 clear photo violated Vehicle Code Section 210; and the Court's inquiry as to whether
11 defendant denied the allegation violated Defendant's Fifth Amendment right to remain
12 silent.
13

14 DATED: October 15, 2009

Respectfully submitted,

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17 SHERRY GENDELMAN
Attorney for Appellant.