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In the

SUPREME COURT

FILED

Supreme Court of California

NOV 27 2012

THE PEOPLE OF THE STATE OF CALIFORNIA **Frank A. McGuire Clerk**

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

**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF
ANSWERING BRIEF ON THE MERITS**

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I.

REQUEST FOR JUDICIAL NOTICE

Respondent respectfully requests this Court take judicial notice, under Evidence Code sections 452(c), 453, and 459, of selected portions of the legislative history of Senate Bill 1303 (Stats. 2012, ch. 735), which portions are referenced in the Respondent's Answering Brief on the Merits filed concurrently with this Request. The documents, though not presented to the trial court or Court of Appeal, are cognizable legislative history evidencing the Legislature's intent in adopting portions of SB 1303 was to clarify existing law relating to ATES-generated evidence. SB 1303 was enacted in October 2012, after conclusion of the trial and appellate court proceedings in this matter, and it is effective on January 1, 2013.

Specifically, Respondent requests this Court take judicial notice of:

(1) A Floor Analysis produced by the Senate Rules Committee relating to SB 1303, as amended May 29, 2012. (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.) Attached as Exhibit A;

(2) The Bill Analysis prepared by the Assembly Committee on Judiciary relating to SB 1303 as amended June 23, 2012. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1303 (2011-2012 Reg. Sess.) as amended Jun. 26, 2012, pp. 13-14.) Attached as Exhibit B.

Both of these publicly available documents, as explained more thoroughly in Respondent's Brief on the Merits, demonstrate that the Legislature sought certain amendments to the Evidence and Vehicle Codes in order to make it easier to authenticate and admit ATES-generated evidence. The Legislature also sought specifically to clarify the

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law relating to ATES-generated evidence to resolve confusion among the courts reflected in *People v. Borzakian* (2012) 203 Cal.App.4th 525 (“*Borzakian*”) [review granted, depublished by, *People v. Borzakian* 2012 Cal. LEXIS 4175] and *People v. Goldsmith* (2012) 203 Cal.App.4th 1515 [depublished by grant of review in the present case].

II.

POINTS AND AUTHORITIES

Upon a party’s request (or by the court on its own motion), appellate courts have the same power as trial courts to take judicial notice of a matter properly subject to judicial notice. (Evid. Code, § 459.) Judicial notice may be taken even where the subject of notice was not before the trial court. (*Brosterhous v. State Bar of Cal.* (1995) 12 Cal.4th 315, 325.)

Where legislative intent is not clear from the face of a law, courts may review and consider extrinsic aids, including legislative history, public policy, and the statutory scheme of which the statute is a part. (*Runyon v. Bd. of Trustees of Cal. State U.* (2010) 48 Cal.4th 760, 767 [citing *Elsner v. Uveges* (2004) 34 Cal.4th 915, 929].)

Here, the legislative history at issue evidences an intent by the Legislature to amend existing law for the specific purpose of clarifying how ATES-generated evidence should be authenticated and admitted into evidence. The attached sampling of evidence, like other parts of the legislative history, makes clear that the Legislature, in enacting SB 1303, intended that ATES-generated evidence not be treated as hearsay or subject

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to a special test for authentication, and that the views expressed in
Borzakian be rejected.

Respectfully submitted,

Dated: November 26, 2012

Best Best & Krieger LLP

By: 

Dean R. Derleth

John D. Higginbotham

Kira L. Klatchko

Attorneys for Respondent

EXHIBIT “A”

(REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF
ANSWERING BRIEF ON MERITS)

BILL ANALYSIS

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|SENATE RULES COMMITTEE | SB 1303 |
|Office of Senate Floor Analyses | |
|1020 N Street, Suite 524 | |
|(916) 651-1520 Fax: (916) | |
|327-4478 | |
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THIRD READING

Bill No: SB 1303
 Author: Simitian (D)
 Amended: 5/29/12
 Vote: 21

SENATE TRANSPORTATION & HOUSING COMMITTEE : 8-0, 3/27/12
 AYES: DeSaulnier, Gaines, Harman, Kehoe, Pavley, Rubio,
 Simitian, Wyland
 NO VOTE RECORDED: Lowenthal

SENATE APPROPRIATIONS COMMITTEE : 7-0, 4/30/12
 AYES: Kehoe, Walters, Alquist, Dutton, Lieu, Price,
 Steinberg

SUBJECT : Automated traffic enforcement systems (i.e.,
 red light cameras)

SOURCE : Author

DIGEST : This bill changes the laws governing automated
 traffic enforcement systems to ensure that red light camera
 programs maximize traffic safety and are implemented in a
 lawful and transparent manner.

Senate Floor Amendments of 5/29/12 clarify validity of
 evidence and what can be included in courtesy notices,
 which are letters generally sent to violators who cannot be
 identified.

ANALYSIS : Existing law authorizes the use of automated
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traffic enforcement systems at railroad crossings and
 intersections to record violations of unlawful grade
 crossings and red light running.

Only a governmental agency, in cooperation with a law
 enforcement agency, may operate an automated enforcement
 system. Under existing law, "operating" a system means
 that a governmental agency, among other things, inspects
 and maintains signs that warn drivers that an automated
 enforcement system is in use. These signs must either be
 visible to traffic approaching an intersection where an
 automated enforcement system operates or posted at all
 major entrances to a city such as at freeways, bridges, and
 state highway routes.

Prior to entering into a contract with a vendor to
 implement an automated enforcement system, the legislative
 body of the local government (e.g., city council or county
 board of supervisors) must conduct a public hearing on the
 proposed use of the system. A contract between a
 governmental agency and a vendor of automated enforcement
 equipment may not include a provision for payment to the
 vendor based on the number of citations issued or the
 amount of revenue generated, unless the contract was
 entered into prior to January 1, 2004.

Prior to issuing citations, an agency utilizing an
 automated traffic enforcement system must make a public
 announcement of the system and issue only warning notices
 for 30 days. A peace officer or qualified employee of a
 law enforcement agency reviews the photographs and issues
 citations, as appropriate. A citation results in a notice
 to appear, a Judicial Council form that contains specific
 information, including the name and address of the
 registered owner of the vehicle identified in the
 photograph, the license plate number of the vehicle, the
 violation charged, and the time and place when the person

may appear in court. The law enforcement agency must mail the notice to appear within 15 days of the alleged violation to the current address of the registered owner of the vehicle.

This bill:

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1. Requires a governmental agency to post signs identifying the use of automated traffic enforcement within 200 feet of an intersection where a system is operating, while eliminating the option that allows an agency to post signs at all major entrances to the city. Agencies with systems in place as of the effective date of this bill that have not already posted signs in accordance with this provision must do so by January 1, 2014.
 2. Requires, for systems installed after January 1, 2013, a governmental agency to make and adopt a finding of fact that the system is needed at a specified location for reasons related to safety. At the same time, this bill expressly prohibits a governmental agency from considering revenue generation when it deliberates about whether to install and operate an automated traffic enforcement system.
 3. Requires the vendor, in cooperation with governmental agencies that utilize its systems, to submit an annual report to the Judicial Council that includes the following information, provided the information is "in the possession of, or readily available to," the vendor:
 - A. The number of alleged violations captured by the system and resulting citations.
 - B. The number of citations involving a vehicle traveling straight through an intersection, turning right, and turning left.
 - C. The number and percentage of citations that a court dismisses.
 - D. The number of traffic collisions at each intersection that occurred prior to and after the installation of the system.
 4. Provides that if, after a law enforcement agency has issued a citation, the citing officer determines that the citation or notice should be dismissed, the citing agency may recommend in writing to the court that it dismiss the case.

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5. Permits the issuing agency and the vendor to issue "courtesy notices" to the registered owner of the vehicle or the alleged violator prior to issuing a notice to appear. Includes a "Notice of Nonliability" form to replace courtesy notices sent by law enforcement agencies, as specified.
 6. Requires that both a notice to appear (i.e., citation or ticket) and a courtesy notice contain the following information:
 - A. The methods by which the registered owner of the vehicle or the alleged violator may view and discuss with the issuing agency, both by telephone and in person, the evidence used to substantiate the violation.
 - B. The contact information of the issuing agency.
 7. Prohibits a vendor or governmental agency from altering the notice to appear, the courtesy notice, or any other Judicial Council form. If a governmental agency or vendor materially alters the form, then the court may dismiss the case.
 8. Clarifies that computer-generated and photographic

evidence stored by automated traffic enforcement systems is presumed to represent accurately what it purports to be unless evidence to the contrary is submitted.

9. Specifies that evidence from automated traffic enforcement systems is not hearsay.

Comments

According to the author's office, this bill was introduced to protect the rights of Californians cited by automated traffic enforcement systems. To do so, this bill prohibits the use of automated systems for the purpose of raising revenue, requires that governmental agencies demonstrate a safety need when approving the use of such systems, and improves the means by which a person may challenge citations issued in error. The author's office contends

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this bill is necessary to increase public confidence in the purpose and fairness of red light camera operations. The author's office also suggests this bill will likely be needed to address issues raised in two recent appellate court decisions.

Recent court decisions . The 2nd District Court of Appeals in Los Angeles has published two decisions recently concerning automated traffic enforcement system evidence submitted to convict violators of running red lights. In February, a three-judge panel on the appellate court ruled in *People v. Borzakian* (2012) that an officer testifying in the case was not qualified to authenticate video and picture evidence, because the city has contracted for the maintenance and operation of the automated traffic enforcement system and therefore operating the system was not part of the ordinary course of business for the police department. The city's evidence was not properly admitted because the officer could not authenticate the videos and pictures, and without this evidence, nothing supported the alleged violation. The court reversed Borzakian's conviction based on this finding.

Later that month, in *People v. Goldsmith* (2012), a different three-judge panel from the same appellate court came to a different conclusion. The panel determined that testimony on the accuracy and reliability of computer systems isn't required for photos or video to be admitted as evidence unless alternative evidence is introduced casting doubt on the photo or video's accuracy. Because Goldsmith did not provide any substantial evidence undermining the reliability of the video and photographic evidence, the court concluded that the evidence did not need to be authenticated and therefore upheld the conviction.

These conflicting decisions demonstrate a need for clarification in statute regarding the evidentiary standards required for prosecuting automated traffic enforcement violations.

Governor's veto . This bill is essentially the same as SB 29 (Simitian), which the Senate passed 38-0 on September 1, 2011, the Governor ultimately vetoed. The Governor's veto

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message indicates that, while SB 29 standardizes rules for local governments to follow when installing and maintaining red light cameras, the Governor feels this is something that elected officials can and should oversee. The author's office indicates they are in discussions with the administration and expects to find a compromise that the Governor can support. The author's office believes that, in light of the recent court rulings and ensuing legal ambiguity, the Governor may wish to sign a bill that helps bring clarity to the prosecution of red light violations while also increasing public confidence in the purpose and fairness of red light camera operations.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes
Local: Yes

According to the Senate Appropriations Committee:

Likely minor one-time costs to Judicial Council to develop and adopt courtesy notice forms, and minor ongoing costs to compile and maintain reports received from operators of automated traffic enforcement systems (Trial Court Trust Fund).

Non-reimbursable local costs to post signage and develop uniform guidelines and procedures by January 1, 2014. Additional local costs related to the discretionary act of installing future automated traffic enforcement systems.

JJA:dok 5/29/12 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

**** END ****

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EXHIBIT “B”

(REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF
ANSWERING BRIEF ON MERITS)

BILL ANALYSIS

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Date of Hearing: July 3, 2012

ASSEMBLY COMMITTEE ON JUDICIARY

Mike Feuer, Chair

SB 1303 (Simitian) - As Amended: June 26, 2012

As Proposed to be Amended

SENATE VOTE : 38-0SUBJECT : Vehicles: Automated Traffic Enforcement SystemsKEY ISSUES :

- 1) Should A "courtesy Notice" sent to owners of vehicles that were photographed for failing to stop at a red light be modified to clarify that the notice is not a formal citation?
- 2) Should photographs generated by red-light cameras be treated as hearsay evidence?

FISCAL EFFECT : As currently in print this bill is keyed fiscal.

SYNOPSIS

Under existing law, local jurisdictions are free to adopt (or not adopt) automated "red light cameras" that use motion sensors and computer programs to determine if a vehicle entered an intersection after the traffic light turned red. These systems have been both praised and condemned, producing competing claims about their effectiveness, their reliability, and their fairness. This bill would impose additional requirements and restrictions on local governmental agencies that opt to use red light cameras and require the vendors who operate these systems to submit annual reports to the Judicial Council relating to the general effectiveness of the systems. The following analysis, however, will focus on two issues most relevant to this Committee: (1) the so-called "courtesy notice" and "notice of non-liability" that is sent to the owner of the vehicle when the photograph taken by the camera does not appear to match the registered owner's driver license photograph; and (2) the questions that arise when photographs generated by red-light cameras are introduced as evidence in court. As noted in the analysis, on the first issue the author and various stakeholders

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have reached an agreement on the contents of the notice. On the second point, relating to the use of photographs as evidence, this bill seeks to resolve two competing court cases - by different panels of the same appellate court - that came to different conclusions as to (1) how the photographs were to be properly "authenticated" under the rules of the evidence code; and (2) whether the photographs constituted hearsay that could only be admitted as evidence through a recognized hearsay exception. As noted in more detail below, this bill effectively codifies the opinion holding that such photographs do not present insurmountable authentication problems and do not constitute hearsay. The author will take amendments in this Committee relating to the "courtesy notice" or "notice of non-liability." This amendment appears to have removed nearly all of the opposition to this bill. However, "Safer Streets, LA," a grassroots organization based in Los Angeles, remains strongly opposed to this bill for a variety of reasons.

SUMMARY : Creates additional standards for the installation of automated red-light camera systems and makes other changes relating to the notices sent to vehicle owners and to the use of red-light camera photographs as evidence in court. Specifically, this bill :

- 1) Requires that signs identifying an automated traffic enforcement system be posted within 200 feet of an intersection where the system is operating. Prohibits a governmental agency that uses an automated traffic enforcement system and that had signs posted on or before January 1, 2013, that met the requirements in effect on January 1, 2012, from removing those signs until the governmental agency posts signs that meet the requirements imposed by the bill.
- 2) Requires a governmental entity that operates an automated traffic enforcement system to develop uniform guidelines and establish procedures to ensure compliance with those guidelines, and that the governmental entity adopt a finding

establishing the need for the system. Sets dates for compliance with these requirements depending upon when the system was adopted.

- 3) Prohibits a governmental agency that proposes to institute an automated traffic enforcement system from considering revenue generation, beyond covering operating costs, as a factor when considering whether or not to install or operate a system

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within its jurisdiction.

- 4) Authorizes the mailing of a "notice of non-liability" or "courtesy notice" by the issuing agency, manufacturer, or supplier of the system to the registered owner or the alleged violator prior to issuing a notice to appear, prescribes the form that must be sent, and prohibits the manufacturer or supplier of the system, or the governmental entity, from altering the notice to appear or notice of non-liability.
- 5) Provides that an evidentiary rebuttable presumption that the printed representation of computer information is presumed to be an accurate representation of the computer information, shall apply to the printed representation of computer-generated information stored by an automated traffic enforcement system. (See #5 in the Existing Law section.)
- 6) Provides that an evidentiary rebuttable presumption that printed representations of images stored in a video or digital medium is presumed to be an accurate representation of the images that it purports to represent, shall apply to the printed representation of video or photographic images stored by an automated traffic enforcement system. (See #6 in the Existing Law Section.)

EXISTING LAW :

- 1) Permits the limit line, intersection, or other places where a driver is required to stop to be equipped with an automated enforcement system, as defined, if the governmental agency using the system identifies the system by signs that clearly indicate the system's presence and are visible to traffic approaching from all directions, or posts signs at all major entrances to the city, including, at a minimum, freeways, bridges, and state highway routes. (Vehicle Code Section 21455.5 (a).)
- 2) Requires that, prior to issuing citations under an automated enforcement system, a local jurisdiction using the system shall issue only warning notices for the first 30 days. Requires the local jurisdiction to also make a public announcement of its intent to use the system at least 30 days prior to commencement of enforcement of the system. (Vehicle Code Section 21455.5 (b).)

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- 3) Provides that only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system. Specifies that "operating" a system includes all of the following activities:
- a) Developing uniform guidelines for screening and issuing violations and for the processing and storage of confidential information, and establishing procedures to ensure compliance with those guidelines.
 - b) Establishing guidelines for administrative functions and day-to-day functions, including, but not limited to, selecting locations for the system, ensuring that the system is regularly inspected, certifying that the equipment is properly installed and operating properly, maintaining warning signs, and maintaining controls necessary to ensure that only those citations that have been reviewed and approved by law enforcement are delivered to violators.
 - c) Provides that the above operating activities, except as specified, may be contracted out by the governmental agency so long as it maintains overall control and supervision of the system. (Vehicle Code Section 21455.5 (c).)
- 4) Specifies that a contract between a governmental entity and a manufacturer or supplier of automated enforcement equipment

may not include a provision for the payment or compensation to the manufacturer or supplier based on the number of citations generated, or as a percentage of the revenue generated, as a result of the use of the equipment. (Vehicle Code Section 21455.5 (g).)

5) Provides, for purposes of authenticating evidence used at trial, that a printed representation of computer information or of a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. However, if a party to an action introduces evidence that a printed representation or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of the evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent. (Evidence Code Section 1552.)

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6) Provides, for the purposes of authenticating evidence used at trial, that 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. 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 the evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent. (Evidence Code Section 1553.)

7) Defines "hearsay evidence" as 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 asserted. Provides that, except as provided by law, hearsay evidence is inadmissible. Defines a "statement" to mean (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.

8) Creates several statutory exceptions to the hearsay rule which, if applicable, make hearsay statements admissible. (Evidence Code Sections 1220-1350.)

COMMENTS : In 1998, after the completion of two prior pilot programs, the Legislature enacted SB 1136 (Chapter 54, Stats. of 1998), which authorized local governments to install and operate red light cameras - or "automated traffic enforcement systems" - at intersections. The use of these devices has been a source of considerable controversy since their introduction, and based on the initial and ongoing opposition to this bill, the controversy shows no signs of abating. Although state law sets out the general parameters for installing the systems, local governments are free to adopt or not adopt the systems and operate them on a day-to-day basis based on guidelines that they develop. Most, if not all, local governments contract out many of the operational aspects to the system to the private vendors that manufacture and install these systems; however, state law requires that certain aspects of the operation remain under the control of the governmental agency and require that information generated by the system be reviewed by law enforcement officials before a citation may be sent to the alleged violator.

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According to the author, the intent of this bill is to preserve the ability of red light camera systems to operate while at the same time addressing legitimate concerns that have been raised about the fairness and accuracy of the system. Specifically, the bill addresses a number of distinct issues: the justifications for adopting such systems; required signage that puts drivers on notice that the systems are in place; the transparency of notices that are sent to vehicle owners when the photograph of the driver does not clearly match the photograph of the registered owner; and the evidentiary use of red light camera photographs. Because the question of the overall worth and effectiveness of these systems and issues like signage have been addressed in prior Committees, this analysis will focus on

two issues of greatest concern to this Committee: (1) the so-called "notice of non-liability" or "courtesy notice" sent to the vehicle owner; and (2) concerns that have been raised by the use of red-light camera photographs as evidence in court.

The "Courtesy Notice" or "Notice of Non-Liability. :" Based on information provided to the Committee by the author's office and various stakeholders, the private vendors that local governments typically contract with to operate the red-light system, under the ultimate control and supervision of the governmental entity, send the photographic and related data to the law enforcement agency charged with issuing traffic tickets. The law enforcement agency reviews the information and decides if there is enough evidence of a violation to justify sending a citation or a "notice of non-liability" (sometimes called a "courtesy notice"). In short, if law enforcement decides that the zoom image of the driver that is captured by the red light camera appears to match up with the driver's license photograph of the registered car owner, then a citation (or ticket) and notice to appear is sent to the registered owner of the vehicle. However, if the photograph captured by the red light camera appears to be a different person than the one on the driver's license picture of the registered owner - or if it is impossible to say whether it is the same person - then law enforcement sends the "notice of non-liability" or "courtesy notice" to the registered owner. The "courtesy notice" informs the owner that his or her vehicle was photographed failing to stop for a red light, and then gives the owner the opportunity to detach and return a "notice of non-liability" that asks the owner to identify the actual driver, or to provide some other explanation for why the owner is not liable for the violation. (For example, the owner may have sold the car to someone else before the violation or the

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system may have simply made mistake.) Critics of the red-light camera system refer to the notices as "snitch tickets," because they encourage the owner to "snitch" on the person who was actually driving the vehicle.

According to many critics of the red-light cameras, the "courtesy notice" is misleading. Critics claim that the notice appears to be a semi-official document, if not an actual citation, that seems to require the owner to "name names," so to speak, and return the "notice of non-liability" or possibly assume liability for the violation. In fact, the notice is not a citation, and there is no consequence for failure to return the notice, since unlike a parking ticket, the owner and driver are not jointly liable for the violation. When it comes to moving violations, the driver, not the owner, is the only person who can be cited. To suggest, therefore, that an owner is liable and must name the driver is simply misleading. On the other hand, supporters of the red-light cameras inform the Committee that these notices are important because the driver is not always the owner and it is not always possible to establish a definite match due to the quality (or lack thereof) of the photographs. Supporters of the red-light system, therefore, allow the driver to be done with the matter immediately and allow law enforcement to issue the citation against the right person.

This bill attempts to increase the transparency of the "courtesy" notice by making it clear that the notice is not a citation and that the owner is not required to turn over the name of the actual driver, even if the owner knows who it was. The burden, after all, is on law enforcement to prove their case by identifying the driver who committed the violation; the burden is not on the third party, even if he or she owns the vehicle, to identify the driver.

Proposed Author Amendments to Address the Above Concerns : Since this bill was heard by the Assembly Transportation Committee, the author and certain stakeholders have worked with the Committee to craft a notice that will provide transparency to the recipient while at the same time keeping the form as a useful tool that will help law enforcement identify the violator. Specifically, the author has agreed to make the following changes to the "notice of non-liability" that now appears on page 11 of the bill in print. The form, as proposed to be amended, appears on the following page of the analysis.

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At the top of each page of the in larger, bold, and capital letters the: "Courtesy Notice: This is Not a Ticket."

In the smaller print just below this line, the notice in the bill in print says the recipient is "encouraged" to review the photographic evidence before taking action on the notice. The amended version will be rephrased to add that the recipient is "encouraged" to respond to the notice, an affirmative way of informing the recipient that he or she is not required to respond.

The option for "None of the above" is removed as a checkbox option (which law enforcement sees as a "scofflaw" box that would invite people to shirk responsibility.)

The confusing and redundant comments referenced by the * are deleted.

As amended today in Committee, the form will read as follows:

COURTESY NOTICE: THIS IS NOT A TICKET
Yinsert agency name)
INSTRUCTION PAGE

The Reason You Received This Notice:

A vehicle registered in your name was photographed failing to stop for an official red light traffic control signal. This is a violation of the State of California Vehicle Code Section 21453(a) or (c) pursuant to Section 21455.5.

You are encouraged to view the video of this violation and to respond to this notice. You may make an appointment to view the evidence by calling the Yinsert agency name) at (000) 000-0000. During this viewing, an officer or qualified employee will show you a high quality video and still images depicting the violation in greater detail than the printed photos in this notice.

You can also view the video online at www.0000000000.

The video is available online for 60 days from the date of violation. After 60 days an appointment must be made with

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Yinsert agency name).

DO NOT CALL THE COURT REGARDING THIS NOTICE. For additional questions contact the Photo Enforcement Program at (000) 000-0000.

Tear Here Tear Here Tear Here

NOTICE OF NON-LIABILITY

IF YOU WERE NOT THE DRIVER/OWNER

Violation #: <> Last Issued
To: <>

Yinsert agency name)

CHECK ONE:c The person named below was the driver of the vehicle.

- c I sold the vehicle prior to the violation date to the person named below.
c I have never owned this vehicle or license plate.

CHECK ONE:cI am an individual.

- c I am a car rental or leasing company.

Print Actual Driver/New Owner's
Name: Driver's License/ID
No.:

Address: Is
sued in the State of:

City, State, ZIP Code: Date of Birth:

Gender: _____ Hair Color: _____ Eye Color: _____
Height: _____ Weight: _____

DECLARATION
I CERTIFY THAT THE FOREGOING IS TRUE AND CORRECT

Signature _____ Print Name _____

Your Telephone Number (_____) _____ - _____ Date _____

Evidentiary Issues: This bill also attempts to address two competing appellate court decisions on the admissibility of red-light camera photographs as evidence in court. Specifically, the use of these photographs raises two distinct issues which, unfortunately, are sometimes improperly conflated. The first issue concerns what is required to "authenticate" or "lay a foundation" sufficient to show that the photographs are a reasonably accurate representation of what they purport to represent. The second issue is whether the photograph is inadmissible "hearsay" evidence - that is, is it an out-of-court "statement" by someone who is not in court and which is offered to prove the truth of the matter asserted in the statement?

Authentication of a "Writing ." One of the criticisms of the use of red-light photographs as evidence in court is that the person who usually appears as a witness for the issuing agency is a law enforcement officer who reviewed the photographic evidence and

because the vendor operates the equipment, the officer who appears to testify has no knowledge of whether or not the system was working and therefore cannot verify or "authenticate" the photograph. (This was the argument made by defendants in the two cases discussed below.) Evidence Code Section 1401 requires the "authentication" of any "writing" before it may be received into evidence, and Evidence Code Section 250 defines a "writing" to include photographs or videos, including computer-generated and digital photographs or videos. "Authentication" simply requires evidence sufficient to sustain a finding that the

decided whether or not to issue a citation. Critics clai

writing is what the proponent of the evidence claims that it is. This is sometimes referred to as "laying a foundation." This does not require proving that the photograph is accurate or that it proves anything, but simply that the evidence is what the proponent claims it to be: in this case, a photograph taken by a red light camera.

While Evidence Code Section 1401 may work well enough when it comes to traditional photographs, questions have been raised about whether computer-generated digital photographs and videos can be authenticated in the same, relatively easy manner. The Legislature first tried to address this question by enacting Evidence Code Sections 1552 and 1553, dealing with computer-generated printouts and images. Evidence Code Section 1552 says that, for purposes of authenticating evidence used at trial, a printed representation of computer-generated information is presumed to be an accurate representation of the computer information that it purports to represent. This is a rebuttable presumption: if the party objecting to the evidence introduces evidence that a printed representation or computer program is somehow inaccurate or unreliable, then the party seeking to introduce the printed representation into evidence has the burden of proving, by a preponderance of the evidence, that the printed representation is an accurate representation of the computer information that it purports to represent. Of course, one could argue that this presumption only establishes that the printed representation accurately reflects the information in the computer, not that the computer data itself is accurate. (See e.g. People v Hawkins (2002) 98 Cal. App. 4th 1428.) However, the California Supreme Court has addressed this issue and determined that the admission of computer records does not require foundational testimony showing their accuracy or reliability. "Our courts have refused to require," the Supreme

Court held, "as a requisite to admission of computer records, testimony on the acceptability, accuracy, maintenance, and reliability of . . . computer hardware or software." (People v. Martinez (2000) 22 Cal. 4th 106, 132; See also People v. Nazary (2010) 191 Cal. App. 4th 727, 755.)

If Evidence Code Section 1552 creates a rebuttable presumption regarding representations of computer-generated information, Section 1553 deals with representations of images stored on a video or digital medium and is therefore perhaps more relevant to the red-light camera issue. Moreover, the logic applied to the court rulings on Section 1552 would also apply to Section

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1553. The presumption it creates is that an image in video or digital form is presumed to be an accurate representation of the image that it purports to be, and the courts would not require testimony on the reliability of the system that produced it unless there was some evidence to suggest unreliability.

Is the Red-Light Photograph "Hearsay" Evidence? Objections to the admission of evidence based on a party's failure to authenticate the evidence are analytically distinct from objections to admissibility based on the claim that evidence is "hearsay." Hearsay is the statement of a person who is not in court but which is offered to assert the truth of the thing asserted. The general rule is that hearsay evidence is not admissible; however the courts recognize a number of "hearsay exceptions" that, though originally developed by the courts, have been codified in the Evidence Code. Before considering whether one of these exceptions applies, however, courts will first consider whether or not the evidence is hearsay, because if it is clearly not hearsay, there is no need to find a hearsay exception.

In People v Goldsmith (2012) 203 Cal. App. 4th 1515, the California Court of Appeal for the Second District found that a red-light camera photograph was not hearsay. The court began its analysis by noting, first, that hearsay must be "a statement" by a "person." Evidence Code Section 225 defines a statement to mean (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. A photograph, the court reasoned, is neither a "written or verbal expression" nor "conduct of a person." It is merely an image generated by a machine that has no ability to speak for itself, let alone offer testimony. The court did not conclude that a photograph was not a "statement" merely because it lacked words, citing cases which have held that printed receipts (which do typically have words on them) are not hearsay, because they were not statements of a person but a printout from a machine. Such evidence would need to be authenticated, of course, but it is not hearsay, the courts have held. As the Goldsmith court put it, "The Evidence Code does not contemplate that a machine can make a statement, and a printout of the results of a computer's internal operations is not a 'statement' constituting hearsay evidence." (Goldsmith at 1525, citing People v. Hawkins (2002) 98 Cal. App. 4th 1428.)

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In explaining its reasoning, the Goldsmith Court noted that the underlying purpose of the hearsay rule "stems from the requirement that all testimony should be tested by cross-examination, which can best expose what may lie beneath a witness's bare, untested assertions." It is not possible, the court observed, to cross-examine computer-generated photographs or videos. That is why photographs and videos are treated not as "testimonial" evidence that can and should be subject to cross-examination, but as "demonstrative evidence" that cannot speak for itself. To be hearsay a statement must declare or assert something, but a photograph is demonstrative evidence that is only used to demonstrate; it cannot declare or assert anything by itself.

Goldsmith and Borzarkian: Conflicting Opinions on the Admissibility of Red-Light Photographs: In reaching its conclusion, the Goldsmith court disapproved of People v. Borzarkian (2012) 203 Cal. App. 4th 525, a decision issued only a month earlier by a different panel of judges of the same appellate court. On the question of "authentication," the Borzarkian court found that a police officer who reviewed the

photographs for purposes of issuing a citation was not qualified to lay a proper foundation because he was not present when the camera took the picture and had little knowledge as to the reliability of the system. Contrary to Goldsmith, the court rejected the idea that Evidence Code 1552 authorized admission of the evidence because that section only creates an assumption that a computer's "print function" was working properly; it did not create an assumption that the underlying data is accurate or reliable. In disapproving of this holding, the Goldsmith court noted that Borzarkian failed to take account of the California Supreme Court's Martinez ruling, which has expressly rejected this view and held that "Our courts have refused to require as a requisite to admission of computer records, testimony on the acceptability, accuracy, maintenance, and reliability of . . . computer hardware or software." (Martinez at 132.)

In addition to ignoring binding authority that admission of computer-generated representations does not require first-hand testimony on the accuracy and reliability of the computer system, on the hearsay question the Borzarkian also failed to ask the critical threshold question of whether or not the photographic evidence was hearsay. Instead, the court appeared to assume that it was and launched into an analysis of whether the evidence could be admitted under one of the hearsay

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exemptions. The Court argued that the evidence could not be admitted under the "official records" exception because that exception only applies if the records were made by and within the scope of duty of the public employee, and the court concluded that records were made by the vendor, a private entity. The court concluded that the photographs could not be admitted under the "business records" exception because that exception requires the custodian of the records to testify, and the court found that the private vendor, not the police officer who testified at trial, was the custodian of the records. However, while this analysis might be a reasonable application of those hearsay exceptions, the Goldsmith decision concluded that such an analysis is beside the point if the evidence is not hearsay, since if it is not hearsay there is no need for a hearsay exception. In short, Borzarkian's failed to address the threshold question of whether the evidence offered was hearsay and instead jumped immediately to an analysis of hearsay exceptions.

This Bill Embraces the Goldsmith Reasoning : The author believes that this bill provides an opportunity to clarify the conflicting rulings in favor of Goldsmith. Although the Committee is not a court, it finds the Goldsmith ruling more persuasive for the reasons stated. But trying to determine which court "got it right" is a fool's quest and at any rate ultimately irrelevant. More important, beyond the hearsay question, the courts differed fundamentally in their interpretation of Evidence Code Sections 1552 and 1553, and on what is required to authenticate the photographs. Because the Legislature enacted those sections, it is arguably both the right and duty of the Legislature to clarify what is meant by them when two courts reach different conclusions about what they mean. The author attempts to achieve this clarification by amending the evidence codes section on authentication and specifying that both Sections 1552 and 1553 apply to images generated by red-light camera systems. In addition, it expressly states for the limited purposes of contested red-light citations, the photographs shall not constitute hearsay. It is important to note that this bill does not create a new "hearsay exception" to add to the traditional list of exceptions. It is instead saying that the photographs are not hearsay, and therefore that there is no need for a hearsay exception.

ARGUMENTS IN SUPPORT : According to the author:

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The growing use of automated traffic enforcement systems have highlighted areas of abuse. Senate Bill 1303 is designed to allow the continued use of automated traffic enforcement systems to enhance public safety while addressing the significant potential for misuse. The measure establishes ground rules for the operation of red light camera programs to address legitimate concerns about accuracy, privacy, and due process.

There are two broad deficiencies in existing law first is conflicting appellate court cases. The bill would resolve this conflict by providing that computer generated evidence that is part of an automated traffic enforcement system is admissible unless the defendant shows that the evidence is faulty in some way. The second deficiency is with the general lack of clear rules surrounding operation of automated traffic enforcement systems. The bill would make a number of changes to existing law that will bring fair practice to the use of the technology.

ARGUMENTS IN OPPOSITION : YNOTE: Reflex, the company which serves as the vendor for most of the red-light camera systems in California, and several law enforcement groups strongly opposed the provision of this bill that allowed recipients of the "notice of non-liability" to check "None of the above" as an option. However, the Committee has been informed that with the amendment to remove that option, these groups no longer oppose the bill and may even move to a position of support. However, no letters of support or letters withdrawing opposition had been received by the Committee at the time of this writing.]

Safer Streets L.A. however, continues to strongly oppose nearly every aspect of this bill because, it believes, "it would impair defendants' rights to confront their accusers and would sanction the mailing of deceptive governmental notices." Further, Safer Streets contends that "the bill's provisions that purport to protect the rights of Californians would provide little or no relief from the abusive use of red light cameras by some jurisdictions in the state." Safer Streets, L.A. describes its specific objections, in its own words, as follows:

1. Provisions in this bill affecting the hearsay rule would permit the introduction of testimonial evidence from a third party in photo enforcement cases, thereby carving

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out an exception to long held constitutional protections affording defendants the right to confront their accusers.

2. California law holds motor vehicle drivers responsible for violations of the vehicle code. However, this bill would permit agents of the government in cases where they know that the registered owner was not the person driving to send out an official looking "notice of non-liability" to the registered owner that appears to require them to identify the driver of the vehicle although no such requirement exists in California law.

3. Specifying that it is permissible to mail a "notice of non-liability" prior to sending an actual citation could be interpreted to alleviate jurisdictions of the current requirement to deliver citations within 15 days of the alleged violation.

4. Where a jurisdiction chooses to place photo enforcement signs at red light camera intersections rather than at entrances to the city, this bill eliminates the requirement to post warning signs at all approaches to the intersection. Instead, the bill only requires warning signs in the directions in which the automated traffic enforcement system is being utilized to issue citations. This is problematic in that some systems are located where a motorist might approach the enforcement system after making a right or left turn off a parallel street. Without the requirement to locate warning signs on all approaches, many drivers would have no warning whatsoever that photo enforcement is being used at the intersection.

5. Some reporting requirements could be used to erroneously justify the use of the enforcement systems. For example, the bill requires that the number of traffic collisions at each intersection that occurred prior to and after the installation of the system be reported. However, the bill does not require that the type of collision be reported nor does it state the length of time before and after the installation of the system for which collision data be reported. Without listing the specific types of accidents that have occurred and providing for a long enough data collection period, the information could be misused to provide justification for the use of red light cameras where no justification exists.

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6. Provisions requiring that jurisdictions make and adopt a finding of fact establishing that the system is needed for reasons related to safety and prohibit them from considering revenue generation are virtually meaningless. Currently no jurisdiction openly admits that they consider revenue generation, although their actions in running their systems clearly point to revenue generation as a motive. Furthermore, all that would be required for a jurisdiction to find that the system is needed for safety would be for them to show that violations are taking place at a particular intersection. The bill provides no objective criteria for determining whether a system is needed "for reasons related to safety" and therefore does not help protect citizens from photo enforcement abuses.

REGISTERED SUPPORT / OPPOSITION :

Support

None on file

Opposition

Safe Streets, L.A.

Opposition (To 6/26 version of the bill)

Association for Los Angeles Deputy Sheriffs
California Police Chiefs Association Inc.
California Traffic Defense Bar Association
California Walks
City of Beverly Hills
League of California Cities
Los Angeles Protective League
National Motorists Association
North American Transportation Association Inc.
Redflex Traffic Systems
Riverside Sheriffs' Association

Analysis Prepared by : Thomas Clark / JUD. / (916) 319-2334

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PROOF OF SERVICE

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

At the time of service I was over 18 years of age and not a party to this action. My business address is 74-760 Highway 111, Suite 200, Indian Wells, California 92210. On November 26, 2012, I served the following document(s):

**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF
ANSWERING BRIEF ON THE MERITS**

- By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):
- Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

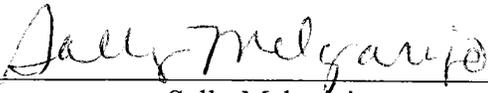
I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Indian Wells, California.

- by placing the document(s) listed above in a sealed ***U.P.S./OVERNIGHT DELIVERY*** envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to ***CALIFORNIA SUPREME COURT*** agent for delivery.
- By e-mail or electronic transmission.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

PLEASE SEE ATTACHED MAILING LIST

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

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



Sally Melgarejo

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

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