

# New grounds for challenging red light tickets after PA 96-1016 and *Melendez-Diaz*

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## I. Introduction

If you have ever been sitting in traffic at an intersection with red light cameras, you have probably thought, at least once, about how you would challenge a red light ticket, should you be so unfortunate to receive one. There is something that, to lawyers and layman alike, seems inherently unfair and even Orwellian about receiving a red light ticket from a discretionless automated camera system instead of a warm-blooded police officer. PA 96-1016, which amends 625 ILCS 5/11-208.3, the statute dictating the procedural processes for producing evidence for red light tickets, or, "photo enforcement" citations, has added new procedures that allow for more discretion and review of the photo produced by the red light camera, giving defendants new grounds on which to challenge photo enforcement citations.<sup>1</sup> This new Act, which became effective on January 1, 2011, will undoubtedly be welcomed by defendants, who before had few statutory grounds available for challenging the validity of photo enforcement citations. And while the recent amendments to §5/11-208.3 provide opportunities to challenge photo enforcement citations on grounds which were previously unavailable, these challenges become even more potent in light of the U.S. Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*,<sup>2</sup> which allows defendants to require lab technicians to testify as to the contents of their reports.<sup>3</sup>

## II. Section 11-208.3 of the Illinois Vehicle Code

Section 11-208.3 of the Illinois Vehicle Code sets forth the procedural rules for adjudicating photo enforcement citations.<sup>4</sup> On January 1, 2011, §5/11-208.3 was amended by PA 96-1016 to provide additional due process rights to drivers being charged under the statute.<sup>5</sup> The recent amendments, however, only apply in "the counties of Cook, DuPage, Kane, Lake, Madison, McHenry, St. Clair, and Will and to municipalities located within those counties."<sup>6</sup> In Cook County, "Chicago's automated traffic enforcement scheme employs cameras at traffic intersections throughout the city designed to photograph vehicles that enter an intersection against a red traffic light or make a turn in

the face of a red light when turning is prohibited,"<sup>7</sup> a system which is representative of the other photo enforcement systems throughout Cook County and the collar counties.<sup>8</sup> Among the most notable amendments<sup>9</sup> to §11-208.3 is the amendment to §11-208.3(b)(3), which adds the following language:

In municipalities with a population of less than 1,000,000 inhabitants and counties with a population of less than 3,000,000 inhabitants, the automated traffic law ordinance shall require that all determinations by a technician that a motor vehicle was being operated in violation of Section 11-208.6 or 11-1201.1 or a local ordinance must be reviewed and approved by a law enforcement officer or retired law enforcement officer of the municipality or county issuing the violation. In municipalities with a population of 1,000,000 or more inhabitants and counties with a population of 3,000,000 or more inhabitants, the automated traffic law ordinance shall require that all determinations by a technician that a motor vehicle was being operated in violation of Section 11-208.6 or 11-1201.1 or a local ordinance must be reviewed and approved by a law enforcement officer or retired law enforcement officer of the municipality or county issuing the violation or by an additional fully-trained reviewing technician who is not employed by the contractor who employs the technician who made the initial determination.

Before this recent amendment, a single technician reviewed the photographs from the red light camera to determine whether the driver violated the Illinois Vehicle Code or a local ordinance.<sup>10</sup> The State would then use the photo technician's determination as evidence against the driver.<sup>11</sup> After PA 96-1016, however, a police officer, retired police officer, or, in some cases, another, unaffiliated technician, must now review and approve the determination of the first technician.<sup>12</sup> The PA 96-1016 amendment, therefore, provides defendants receiving

photo enforcement citations significantly increased due process rights. But might defendants, under the recent *Melendez-Diaz* decision, be entitled to even greater due process rights? While *Melendez-Diaz* has yet to be applied to recently amended §11-208.3(b)(3), the answer seems to be "yes."

## III. *Melendez-Diaz v. Massachusetts*

In *Melendez-Diaz v. Mass.*, No. 07-591, slip op. (U.S. June, 20 2009), the defendant was involved in what turned out to be a drug deal.<sup>13</sup> The defendant was arrested and charged with "trafficking in cocaine in an amount between 14 and 28 grams," in violation of Massachusetts law.<sup>14</sup> At trial, the State submitted into evidence bags of white powder that the officers had recovered from the squad car which had transported defendant to the police station.<sup>15</sup> With the baggies, the State also submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances, which contained the weight of the substances and a finding that it was cocaine.<sup>16</sup> The defendant objected to the introduction of the technician's certificates on grounds that the "Confrontation Clause decision in *Crawford v. King*, 541 U.S. 36 (2004), required the analysts to testify in person."<sup>17</sup> The objection was overruled, however, and defendant was convicted.<sup>18</sup> The defendant appealed the conviction on the basis that he was denied the opportunity to confront the technicians in violation of the Sixth Amendment's Confrontation Clause.<sup>19</sup> The appellate court affirmed the trial court; the Supreme Judicial Court denied review; and the U.S. Supreme Court granted certiorari.<sup>20</sup>

The Sixth Amendment to the U.S. Constitution, "made applicable to the States via the Fourteenth Amendment...provides that '[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him."<sup>21</sup> *Crawford* established that the Confrontation Clause guarantees a defendant's right to confront those who "bear testimony" against the defendant.<sup>22</sup> A "witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination."<sup>23</sup> There-

fore, the issue in *Melendez-Diaz* turned on whether the lab technician's "certificates" qualified as "testimony" for Confrontation Clause purposes.<sup>24</sup> The *Melendez-Diaz* court held that the certificates qualified as "testimony" because "They are incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving a fact.'"<sup>25</sup> The *Melendez-Diaz* court found that the lab technician's certificates "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'"<sup>26</sup> and that it was therefore unconstitutional under the Sixth Amendment's Confrontation Clause to deny the defendant an opportunity to cross-examine the lab technicians.<sup>27</sup>

#### IV. Analysis: *Melendez-Diaz* Applied to §11-208.3

PA 96-1016 modified §11-208.3 to require that the first technician's determination be reviewed and approved by a police officer or another technician.<sup>28</sup> But does the Confrontation Clause require the technicians or officers to appear in court to testify? The issue, as in *Melendez-Diaz*, will turn on whether a "determination" qualifies as "testimony" for Confrontation Clause purposes. In *Melendez-Diaz*, the lab technician chemically reviewed a seized substance to determine whether the substance was, in fact, cocaine.<sup>29</sup> Thereafter, the lab technician submitted to the court "'certificates of analysis' showing the results of the forensic analysis performed on the seized substances," which "were admitted pursuant to state law as 'prima facie evidence of the composition, quality, and the net weight of the narcotic...analyzed.'"<sup>30</sup> Similarly, in the case of photo enforcement citations, a photo technician visually reviews the photograph taken by the camera to determine whether the driver did, in fact, run the red light or turn on a red light.<sup>31</sup> Thereafter, the photo technician submits a "notice" to the court (which includes the technician's "determination") as evidence of the traffic violation, which, by statute, "shall be prima facie correct and shall be prima facie evidence of the correctness of the facts shown on the notice. The notice, copy, or computer generated record shall be admissible in any subsequent administrative or legal proceeding."<sup>32</sup>

In both cases, a technician is given seized material (either cocaine, captured by the police, or a photo, captured by a camera) and asked to determine whether this material is evidence of a crime. If the technician determines that the material is evidence of a crime (cocaine or a photo of a driver run-

ning a red light), that determination is then memorialized and submitted to the court as prima facie evidence that the defendant has committed a crime. Whether the technician's finding is in the form of a "determination" of "affidavit," both are testimony for Confrontation Clause purposes because they "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination'"<sup>33</sup>—that is, testify as to the technician's finding that the substance or photo is evidence of a crime.

#### V. Impact of Applying *Melendez-Diaz* to §11-208.3

If Illinois courts rightfully extend the holding of *Melendez-Diaz* to photo enforcement citations, this will almost fatally reduce the economic benefit of employing red light cameras. As of yet, red light camera tickets have been virtually immune to legal challenges.<sup>34</sup> Red light cameras provide photographic evidence of a crime being committed—evidence rarely available in criminal cases. Photo enforcement citations, therefore have provided an impressive return-on-investment for counties and municipalities because with a nominal initial investment for the cameras and technicians to review photos, the tickets have been more or less unchallengeable, providing municipalities and counties with a steady non-tax income source.

However, this was before PA 96-1016 and *Melendez-Diaz*. If even a small minority of drivers now receiving photo enforcement citations move the court to have the first technician and the reviewing officer or second technician testify regarding their "determinations," this will require technicians and police officers to be constantly testifying as to the veracity of their findings. This, in turn, will become inordinately expensive for municipalities and counties because they will need to remunerate technicians and officers for time spent in court—time which technicians could be using to review images and time which police officers could be using to protect the public. Inevitably, the resources that local governments will expend on technicians and police officers to testify in court will eventually surpass the revenue that local governments have enjoyed prior to the wave of challenges that is sure to come. This may force local governments to rethink the economics of using red light cameras, even when these cameras seem, at first blush, to be a long-awaited panacea to government deficits.

#### VI. Conclusion

Prior to PA 96-1016 and the *Melendez-Diaz* decision, red light cameras appeared to be an ironclad way to produce nearly irrefutable evidence of traffic violations, which, in turn, promised to fill local government coffers in a time of economic strain. However, as the Illinois Legislature and the Supreme Court have erected greater due process barriers for the State to overcome in proving those traffic violations, the economics of employing red light cameras could ultimately render this law enforcement method untenable. This could mean that the assembly line citation factory that is red light cameras could come to a halt when it becomes more economically to station a human police officer at a stoplight to observe traffic violations and personally testify as to the veracity of their observations in court. ■

1. See generally PA 96-1016.
2. No. 07-591, slip op. (U.S. June 25, 2009).
3. See *Melendez-Diaz*, No. 07-951, slip op. at 5.
4. See generally 625 ILCS 5/11-208.3(b)(3) (West).
5. See *id.*
6. 625 ILCS 5/11-208.6(m) (West).
7. Jeffrey Parness, "Red Light Cameras: Innocent But Guilty," 98 Ill. B.J. 158 (2010). (quoting *Idris v. Chicago*, 2008 WL 182248 (N.D.), *aff'd*, 552 F.3d 564 (7th Cir. 2009)), available at <<http://www.isba.org/ibj/2010/03/civilpractice>>.
8. See 625 ILCS 5/11-208.6(a)
9. See, e.g., §§ 5/11-208.6(b-5); 5/11-208.6(c-5); 5/11-208.6(k-3).
10. See 625 ILCS 5/11-208.3(b)(3)
11. See 625 ILCS 5/11-208.6(f); 625 ILCS 5/11-208.3(b)(3).
12. See 625 ILCS 5/11-208.3(b)(3).
13. *Melendez-Diaz*, No. 07-951, slip op. at 1-2.
14. *Id.* at 2.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Melendez-Diaz*, No. 07-591, slip op. at 3.
20. *Id.*
21. *Id.* (quoting *Pointer v. Texas*, 380 U.S. 400, 403 (1965)).
22. *Id.* (quoting *Crawford*, 541 U.S. at 51).
23. *Id.* (citing *Crawford*, 541 U.S. at 54).
24. *Id.* at 4.
25. *Melendez-Diaz*, No. 07-591, slip op. at 4 (quoting *Crawford*, 541 U.S. at 51) (internal citations omitted).
26. *Id.*
27. *Id.* at 5.
28. See 625 ILCS 5/11-208.3(b)(3).
29. See *Melendez-Diaz*, No. 07-591, slip op. at 2.
30. *Id.* (quoting Mass. Gen. Laws, ch. 111, §13).
31. 625 ILCS 5/11-208.3(b)(3).
32. *Id.*
33. *Melendez-Diaz*, No. 07-591, slip op. at 4.
34. Parness, *supra* note 7 ("A variety of theories have been advanced to challenge automated traffic enforcement. Thus far, the challenges have largely failed!").