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SUPERIOR COURT OF CALIFORNIA  
CENTRAL JUSTICE CENTER

SEP 15 2010

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ORANGE  
APPELLATE DIVISION

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DISTRICT ATTORNEY'S OFFICE  
SANTA ANA, CALIFORNIA

BY: \_\_\_\_\_

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent

Appellate No.: 30-2010-00381069

Vs.

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

██████████ SORIANO

Case No.: SA151252PE

SEP 15 2010

Defendant/Appellant

ALAN CARLSON, Clerk of the Court

*[Signature]*  
BY J. GOMEZ

On appeal from the Superior Court of California – County of Orange  
Honorable Carmen R. Luege, Commissioner

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**APPELLANT ██████████ SORIANO'S OPENING BRIEF**

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## APPELLANT'S OPENING BRIEF

### FACTUAL BACKGROUND AND JUDICIAL PROCEEDINGS

This matter came regularly for trial on May 12, 2010. Defendant, represented by counsel, did not appear at trial. The People were not represented by counsel. Defendant was charged with violating Vehicle Code § 21453(a), failing to stop for a steady red circular signal prior to entering the intersection at Harbor and Warner within the City of Santa Ana.

Evidence of the violation was based on photos and a video captured by the City of Santa Ana's automated traffic enforcement system (ATE). No law enforcement officer was present at the scene of the alleged offense. (SOA:1)

Santa Ana Police Department (SAPD) Officer Mark Bell testified as the one and only witness for the People. Officer Bell testified in a narrative format. Officer Bell did not personally observe the violation occur. Officer Bell's testimony did not rely on his personal knowledge, but on the Exhibits (1, 2, 3A-3D, and 5) received in a package from Redflex, a privately owned out-of-state corporation based in Arizona in the primary business of collecting, manipulating and then creating reports for the purpose of litigation. These exhibits are a group of photographs, video and data collected and compiled from a group of cameras and lights controlled by a computer system at or near the intersection which is remotely connected to

another computer in Redflex's Arizona headquarters. There the data is reviewed and manipulated with computer software to produce the best quality photos for People's Exhibit 1, Notice of Traffic Violation. (SOA: 1-6).

Officer Bell testified that he had received 40-hours of RedFlex training and had observed installation of ATE systems at other intersections. Officer Bell had not personally observed installation of the ATE at the intersection at Harbor and Warner at question in this matter. Officer Bell has not personally inspected the ATE to confirm it has a computer within a traffic box and where it was actually located. Officer Bell did know that the pole mounted housings contained cameras and that a traffic box computer must be present, based on the fact that he had received, from RedFlex, the transmission of the proffered exhibits bearing labels indicating the contained photographs were captured at the intersection in question at the times listed on them. (SOA:2-3).

Officer Bell does not control, maintain or operate the ATE system. Officer Bell did not participate in the design, set-up, calibration, or creation of operating procedures. Officer did not witness the circumstances under which the ATE system captured photos or video. Redflex caused each of the Exhibits (1, 2, 3A-3D, and 5) to be delivered to Officer Bell. Redflex

caused a citation to be issued to the registered owner of the vehicle. (SOA:6-7).

The testimony of Officer Bell was received subject to Defendant's objection to the photographs, video and other hearsay statements, authentication, secondary evidence, and confrontation. Based on the photos and the video (Exhibits 1-5), Officer Bell testified that, in his opinion, the photos and video show a violation of Vehicle Code § 21453(a) by the Defendant, the registered owner of the vehicle. The court denied defendant's motion to dismiss and found the defendant guilty of a violation of Vehicle Code § 21453(a). (SOA:1-7)

Defendant's Motion for Reconsideration was denied by the court who issued a six-page opinion denying the motion and distinguishing this matter from *People v. Khaled* (2010) 30-2009-304893.

#### STATEMENT OF APPEALABILITY

This appeal is taken from a judgment of the Orange County Superior Court and is authorized by California Code of Civil Procedure §904.1 (a)(1).

## ISSUES PRESENTED

- I. WHETHER THE COURT IMPROPERLY ADMITTED EVIDENCE THAT LACKED PROPER FOUNDATION;
- II. WHETHER THE COURT IMPROPERLY ADMITTED HEARSAY EVIDENCE THAT CONSTITUTED HEARSAY NOT FALLING WITHIN ANY EXCEPTION TO THE HEARSAY RULE;
- III. WHETHER THE COURT IMPROPERLY ADMITTED EVIDENCE IN VIOLATION OF DEFENDANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION.

## STANDARD OF REVIEW

Whether substantial evidence supports the conclusion of the trier of fact. (*People v. Crittenden* (1994) 9 Cal.4<sup>th</sup> 83, 139 [36 Cal.Rptr.2d 474, 885 P.2d 887]; *People v. Johnson* (1980) 26 Cal.3d 557, 575-577 [162 Cal.Rptr. 431, 606 P.2d 738, 16 A.L.R.4th 1255].)

To be "substantial," evidence must be reasonable, credible, and of solid value. (*People v. Mayfield* (1997) 14 Cal.4<sup>th</sup> 668, 767 [60 Cal.Rptr.2d 1, 928 P.2d 485].)

## ARGUMENT

### I.

#### THE COURT IMPROPERLY ADMITTED PHOTOGRAPHIC AND VIDEO EVIDENCE WITHOUT REASONABLE LEGAL FOUNDATION.

In order to establish a proper foundation for the admission of a business record, an appropriate witness must be called to that foundation. *Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929.

The trial court is vested with “wide discretion” in determining whether a sufficient foundation is laid to qualify evidence under these hearsay exceptions. And “on appeal, exercise of that discretion can be overturned on a clear showing of abuse.” *People v. Beeler* (1995) 5 Cal. 4th 953.

Officer Bell testimony relies on photographs and statements from unknown declarants to form the basis for his testimony. Officer Bell has no personal knowledge and

*People v. Khaled* (2010) 30-2009-304893, a recently published case that is similar to the case at hand. In *Khaled*, the court held that a police officer trained by Redflex, a private, for-profit corporation was able to lay a proper foundation for the introduction of evidence. The *Khaled* court held that the Santa Ana police officer was unable to lay a proper foundation for introduction of video and photographic evidence because the witness, a



police officer, could not reasonably testify that the evidence was “a reasonable representation of what it is alleged to portray” (see generally, *People v. Gonzales* (2006) 38 Cal.4th 932, 952-953). Similarly, the Court held that where the officer cannot establish the time in question, the method of retrieval, or whether the video and photographs were a “reasonable representation of what they allege to portray.” (*Khaled* at p. 5-6)

In *Ashford v. Culver City* (2005) 130 Cal.App.4th 344, 349-450, the court held that the unauthenticated video allegedly showing employee’s actions lacked sufficient foundation to be admitted at an Administrative Hearing. The court specifically stated that without a proper foundation, the video recording was inadmissible. Another court held that “[p]hotographs are not hearsay and their admission requires a proper foundation, but not an exception to the hearsay rule” *People v. Cooper* (2007) 148 Cal.App.4th 731, 746.

The sufficiency of Officer Bell’s testimony relies not on whether he is a qualified expert to testify about the RedFlex ATE system, but on the hearsay he relies on as material to his testimony to the issues before the court. For example, the time the photographs were taken, the location of the intersection, whether the automated “self-check” was performing properly, how does the witness know that the data bars captured in the photographs

are accurate and working properly, as well as when specific maintenance tasks were performed accurately, as testified to under penalty of perjury by RedFlex Employees in the hearsay declaration. (See *Khaled* at p. 7).

Therefore, this matter should be dismissed for abuse of discretion in admitting the evidence without legally proper foundation.

## II.

### THE COURT IMPROPERLY ADMITTED A HEARSAY STATEMENT MADE IN THE FORM OF A DECLARATION CONTAINING MULTIPLE HEARSAY STATEMENTS WITHOUT A VIABLE HEARSAY EXCEPTION.

#### A.

#### Business Records Exception

The prosecution argues that the documents and photographs were properly admitted into evidence under the California Evidence Code § 1271.

EC § 1271. "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

- (a) The writing was made in the regular course of a business;
- (b) The writing was made at or near the time of the act, condition, or event;
- (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

The purpose of the exception is to prevent having to have multiple witnesses testify who were involved in an action of event. (*People v. Khalid*, citing *People v. Crosslin* (1967) 251 Cal.App.2d 968). In the

majority of cases, the witness testifying is a custodian of records. But any witness who has first-hand knowledge of the business's record keeping procedures may qualify. The burden of establishing admission and trustworthiness of the information of each document is on the proponent of the evidence. *People v. Beeler* (1995) 5 Cal. 4th 953.

California Evidence Code § 1560 lays out the requirements and procedures and admissibility of business records, when there is no testimony presented from a qualified custodian of records.

E.C. 1560 (b) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, and the subpoena requires the production of all or any part of the records of the business, it is sufficient compliance therewith if the custodian or other qualified witness delivers by mail or otherwise a true, legible, and durable copy of all of the records described in the subpoena to the clerk of the court ...

(c) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness, and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and directed as follows: ... (3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(d) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing.

In the case at hand, the custodian of records did not appear to testify in court. A signed declaration appears, but this document is hearsay, and without the presence of a custodian of records for RedFlex, the only way the documents can be made admissible is through the procedures outlined in California Evidence Code § 1560. The documents must be delivered to the court in response to a valid subpoena duces tecum. The People failed to utilize the exception and use its subpoena power to introduce documentary evidence.

Having failed to produce the custodian of records to testify concerning the records and their mode of preparation the documents are inadmissible hearsay. If the evidence fails to establish each foundational fact, neither hearsay exception is available. *People v. Matthews* (1991) 229 Cal.App. 4th 930, 940.

B.  
Official Records

California Evidence Code § 1280 states:

“Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: (a) The writing was made by and within the scope of duty of a public employee. (b) The writing was made at or near the time of the act, condition, or event. (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

California Evidence Code § 1280(a) requires that the proponent of the evidence be a “public employee.” Plain reading of this subsection (a) makes it clear makes it clear that this section does not apply. This exception does not apply because the documents in question were not made “by and within the scope of a public employee, as required by Evidence Code § 1280(c). Redflex is an out-of-state, for-profit corporation, with the primary purpose of creating evidence for purposes of prosecution at trial. Redflex employees have a legal duty to their employer. The public employee must also be under legal duty to make such reports. *People v. Clark* (1992) 3 Cal.4<sup>th</sup> 41, 158-159. No RedFlex employee owes a legal duty to the State of California, Santa Ana Police Department or its citizens. Furthermore, Redflex employees do not have a legal duty to make reports.

### III.

#### THE COURT IMPROPERLY ADMITTED PHOTOGRAPHIC, VIDEO AND HEARSAY DECLARATION INTO EVIDENCE IN VIOLATION OF DEFENDANT’S CONFRONTATION RIGHTS UNDER THE SIXTH AMENDMENT AND VEHICLE CODE § 40109(C).

Objection was also made that introduction of the photographs, video and declarations on the grounds that they violate Defendant’s confrontation rights. Defendant argues that her confrontation rights are protected by the Sixth Amendment to the U.S. Constitution and rights under the California Vehicle Code § 40901(c) and that the photographs, video and declarations

violate the Supreme Court's decision in *Crawford v. Washington* (2009) 541 U.S. 36 and *U.S. vs. Melendez -Diaz* (2009) 557 U.S. \_\_\_\_ (129 S. Ct 2527, 174 L.Ed.2d 314) which define testimonial hearsay evidence and require protection of a Defendant's right to confront witnesses. The declaration at issue and the photographs with imprinted data goes far beyond what might be considered neutral information and instead sets forth a series of alleged facts that directly related to guilt or innocence.

"Business and Public Records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rule, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as a business or official records, the analyst's statements here-prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analyst's were subject to confrontation under the Sixth Amendment." *Melendez-Diaz* at 2539.

This rationale applies equally to the right to confrontation afforded under California Vehicle Code § 40901(c) states:

"Prior to the entry of a waiver of constitutional right pursuant to any rules adopted under this section, the court shall inform the defendant in writing of the nature of the proceedings and of his or her right to confront and cross-examine witnesses, to subpoena witnesses on his or her behalf, and to

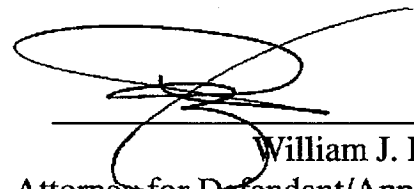
hire counsel at his or her own expense. The court shall ascertain that the defendant knowingly and voluntarily waives his or her right to be confronted by the witnesses against him or her, to subpoena witnesses in his or her behalf, and to hire counsel on his or her behalf before proceeding.”

Under the Courts holding in *Crawford* and *Melendez-Diaz*, and as guaranteed by the Constitution and California Vehicle Code, the declaration, video and photographs are testimonial in nature. Therefore the admission of photographs and video over objection constitutes abuse of discretion by the court. The evidence objected to in Exhibits 1-3D and 5 should be stricken and the case dismissed.

#### CONCLUSION

Therefore, without a proper foundation for the admission and trustworthiness of the photographs, video and declarations prepared by Redflex employees, no proper exception to the hearsay rule and denial of Defendant’s right to confront the witnesses against her, the trial court’s admission of such evidence constitutes an abuse of discretion. The Court should overrule the conviction.

Dated: September 15, 2010

  
\_\_\_\_\_  
William J. Duffy  
Attorney for Defendant/Appellant

**CERTIFICATE OF COMPLIANCE**

Pursuant to 8.204 of the California Rules of Court, I certify that the attached APPELLANT'S OPENING BRIEF contains 2572 words as determined by Microsoft Word.

Dated:

A handwritten signature in black ink, appearing to read "William J. Duffy", is written over a horizontal line. The signature is somewhat stylized and loops back.

**William J. Duffy**  
**Attorney for Defendant/Appellant**