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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. IN RE 8 SDPD PHOTO RED LIGHT CASES HEARD 6-23-2010, Defendants.	Case Nos. B16464A, B16681A, B16772A, B17833A, B17968A, B17983A, B18095A, B18404A THE PEOPLE'S OPPOSITION TO MOTION TO EXCLUDE EVIDENCE AS HEARSAY AND VIOLATIVE OF THE DEFENDANTS' SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES Dept.: Traffic Court--KM-3

INTRODUCTION

Defendants are charged with a violation of California Vehicle Code section 21453(a) failing to stop at a red traffic signal. Defendants plead not guilty to the violation, and the matters were set for trial on June 23, 2010. The People issued a valid subpoena duces tecum (SDT) to American Traffic Solutions (ATS) for the records pertaining to these violations, including but not limited to a copy of the notice to appear, the photographs and video that were taken of Defendants, and the maintenance records for the camera before and after the date of the offense. The People believe that documents responsive to the SDT were delivered to the court with a declaration from the Custodian of Records for ATS in accordance with the procedures set forth in California Evidence Code sections 1560 and 1561.

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On the date set for trial, Defendants through their counsels, Elizabeth Aronson and Mitchell Mehdy moved for a consolidated trial on all of the matters. A motion to exclude the documents that were subpoenaed from ATS was made prior to the People's witness testifying. Defense counsel requested to voir dire the People's witness, San Diego Police Officer Graves, regarding his knowledge of the camera system and ATS procedures.

Officer Graves' testimony established that he is familiar with the ATS system, that he received training and completed the training with the system. In addition to the original training, he has personally observed the technicians that service the cameras and he is familiar with what they check and how they inspect the cameras. Additionally, he has visited the actual ATS headquarters in Arizona. During that inspection trip, he saw what happens to the photos at each step that it goes through as it is processed by ATS. He is also familiar with San Diego Police Department's process for reviewing the citations and issuing the citations.

The voir dire also established that Officer Graves was not present at the City Council hearings relating to the establishment of the system and that he has no firsthand knowledge of the specific computer programs and/or technology that allow the photos to be transmitted to Arizona. He also testified that he did not know off hand what database the information was stored on, but that he had received training on it and could look it up. During the voir dire process, defense counsel made legal arguments regarding the exclusion of the evidence. However, Officer Graves did not testify as part of a case in chief, as the matter was taken under submission at the end of the legal argument.

On July 9, 2010, the People were served with a "Motion & Points & Authorities" in this matter by Defense Counsel, Mitchell Mehdy. On July 16, 2010, four days after the time set for filing and service of papers, the People were served with moving papers by Defense counsel, Elizabeth Aronson. The People are responding to all argument of Defense counsel in these moving papers.

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ARGUMENT

I

THE PHOTOGRAPHS AND VIDEO OF THE ALLEGED VIOLATIONS IN THEIR ENTIRETY ARE ADMISSIBLE

The defense has raised essentially two objections to the admission of the evidence in these cases. The first being, that all of the documents, including the photographs and video, that are produced by ATS in response to a subpoena duces tecum issued by the People are hearsay. The defense claims that these documents do not fall under the Official Records Exception codified in Evidence Code section 1280 and/or the Business Records Exception codified in Evidence Code section 1271. In making these arguments, the defense relies heavily on the Appellate Division of the Superior Court of Orange County decision in *People v. Khaled (*App. Div. Orange County, 5/10). The defense reliance is misplaced. The Court should not rely on this opinion as it is not binding on this Court, it is factually distinguishable, and is now under review by Division Three of the Fourth Appellate District. (*See* Exhibit 1.)

A. THE VIDEOS AND PHOTOGRAPHS THEMSELVES ARE NOT HEARSAY.

Videos and photographs are "demonstrative evidence depicting what the camera sees. *They are not testimonial and they are not hearsay.*" *People v. Cooper*, 148 Cal. App. 4th 731, 746 (2007) (emphasis added). Videos and/or photographs may also be used as probative evidence of what it depicts, in which case the video or photograph takes on the status of an independent 'silent' witness. *People v. Bowley*, 59 Cal. 2d 855, 860 (1963). Photographs and videos have been admitted by the court when there is evidence of the point in time the picture was taken, the place where it was taken and that the defendant is the person shown in the picture. *People v. Doggett*, 83 Cal. App. 2d 405 (1948). No eyewitness is required to state that the picture accurately depicts what it purports to show. *Id.*

B. THE INFORMATION CONTAINED IN THE PHOTOGRAPHS AND VIDEOS IS AUTOMATICALLY GENERATED BY THE COMPUTER AND IS PRESUMED ACCURATE PURSUANT TO EVIDENCE CODE SECTION 1552.

There are jurisdictions that have recognized that a computer can be programmed to generate information on its own, and that such computer-generated information is not hearsay

because it is not a statement by a person. *People v. Hawkins*, 98 Cal. App. 4th 1428, 1449 (2002). In *Hawkins*, the court found that the true test for admissibility of a printout reflecting a computer's internal operations is not whether the printout was made in the regular course of business, but rather whether the computer was operating properly at the time of the printout. The internal operation that was at issue in *Hawkins* was the date and time stamp by the computer. *Id.* at 1449-50. The court went on to state that Evidence Code section 1552 provides a presumption that the printout of the information stored in the computer is accurate as to what is stored, however, the proponent of the evidence must still be able to lay a foundation that the computer was operating properly.

The instant cases are similar to the situation in *Aguimatang v. California State Lottery*, 234 Cal. App.3d 769 (1991), which involved in part, the admission of computer records from the private company, GTECH Coporation, which contracted with the state to operate the lottery system. Appellants objected that the records were inadmissible hearsay. However, the court found that computer printouts were admissible and were presumed to be an accurate representation of the data in the computer. However, if offered for the truth of the matter asserted they must fall under some hearsay exception, such as business records pursuant to Evidence Code section 1271. *Id.* at 797. The court went on to recognize that a "qualified witness" for the purpose of admitting the computer records does not need to be a computer expert, but must only generally understand the system's operation and possess sufficient skill to properly use the system and explain the resulting data. In *Aguimatang*, the Court admitted the declarations of the custodian of records to lay the foundation for the computer records which included statements that the various records were obtained in accordance with correct procedures and that the printout contained pertinent and conforming information.

Further, it is permissible for the qualified witness' knowledge to be based on hearsay. *People v. Lugashi*, 205 Cal. App.3d 632, 641 (1988). In *Lugashi*, the defendant objected to a fraud investigator from Wells Fargo Bank laying the foundation for the computer records because the fraud investigator could not explain Wells Fargo's hardware or software, nor could she physically perform each process from initial query to final printout. Additionally, what she could

explain was based on hearsay and not on personal knowledge. The court found that contentions meritless. *Id.* at 642. In explaining the Courts reasoning, the court stated "That some of her knowledge came from "hearsay" discussions with fellow workers employed and trained by the bank and its computer component suppliers no more renders her testimony incompetent than if it resulted from reading "hearsay" information manuals from the hardware or software manufacturers or Wells Fargo computer management. If appellant were correct only the original hardware and software designers could testify, since everyone else necessarily could understand the system only through hearsay." *Id.*

It is clear based on established case law that both Kim Boaz as the Custodian of Records for ATS and an officer that is trained in regards to the photo red light system should be able to lay the foundation for these documents. Although defendants claim that Kim Boaz declaration is hearsay upon hearsay they fail to actually identify what part of her declaration is based on hearsay. Her declaration appears to be based on her personal knowledge of the business procedures used by ATS, however, even if they are based on hearsay from reading a manual of regarding the business operations, that is sufficient to lay the foundation for the documents.

Officer Graves in the limited testimony that he was able to give did state that all of the information on the "data bar" that appears in the pictures and video is automatically stamped on the photograph by the computer at the time of the violation. The photo and/or video image with all of the information is then transmitted to ATS headquarters. Defense counsel states "a field technician or some other analyst enters such data," however, this is contrary to what the testimony actually was on June 23, 2010, and there is no evidence to support such a claim. The People recognize that at some point in time, the computer was programmed by a human with a date and time and the ability to measure the yellow light interval, etc, however, this is true of all computers, including the computers in *Hawkins, Aguimatang,* and *Jenkins*. The law does not require that the person who programmed the computer be present to personally testify. It is sufficient to show that the computer was functioning properly on the date of the alleged violation.

In these matters, the evidence packages all contain Field Service and Inspection Logs, the admissibility of which is discussed below, from before and after the date of the violations. The

People anticipate that Officer Graves will be able to review these documents and testify that based upon his review the cameras and computers were functioning properly on the date of the alleged violations. The Court may also review the documents and determine based on these Field Service and Inspection Logs whether there is anything that calls into question whether a particular camera or computer was functioning properly. If the Court or defense counsel has questions, Officer Graves is available for cross-examination as to what particular entries mean. If the Court is not satisfied, the Court should dismiss the case for that particular violation, it should not however, simply dismiss all of the violations because based on the evidence for one camera on one particular date the Court finds the required foundation lacking.

All of the information included on the photographs and videos is automatically generated by the computer at the time the photograph and/or video is taken. It is not hearsay, because there is no declarant, i.e. the computer would be the declarant. It is presumed accurate under Evidence Code section 1552, and all that is required to lay the foundation for the admission of this evidence, is to establish that the computer and/or cameras were working properly on the date in question. The People believe that this foundation can be laid through the Field Service and Inspection Logs for the applicable period, and request that the evidence be admitted once that is done.

C. ALL OF THE DOCUMENTS CONTAINED IN THE PACKET THAT WAS FORWARDED TO THE COURT BY ATS PURSUANT TO A SUPOENA DUCES TECUM ARE OFFICIAL RECORDS AND SHOULD BE ADMITTED INTO EVIDENCE PURSUANT TO EVIDENCE CODE SECTION 1280

Evidence Code section 1280 provides that 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. In order for a writing to be admissible under this section, it must be made by and within the scope or duty of a public employee; it must be made at or near the time of the act, condition or event; and the sources of information and method of time of preparation must be such as to indicate its trustworthiness. If all three of these conditions are met, the item is admissible.

Public employee is defined as an officer, agent or employee of a public entity. Evidence Code section 195. All of the documents provided in response to the subpoena duces tecum and sought to be admitted into evidence are documents that were created by an ATS employee. The City of San Diego has a contract with ATS to operate an automated enforcement system pursuant to Vehicle Code section 21455.5. To qualify as a "public employee" for the purposes of Evidence Code section 1280, the person does not have to work for a public entity, it is sufficient that the private entity have a contract with the public entity to perform duties of the public entity. *Imachi v. DMV*, 2 Cal. App. 4th 809, 816-17 (1992).

In these cases, there is evidence of the contractual relationship between ATS and the City of San Diego which is one of the things that distinguishes them from *Khaled*. In that case, the court stated that there was no evidence that the Redflex Traffic System was a public entity or that they were otherwise employed by a public entity, and therefore the first prong of the test was not met. *People v. Khaled* (App. Div. Orange County, 5/10). Here, the first prong is clearly met.

Although, defense does not address the second prong of the Official Records Exception, the documents sought to be admitted were made at or near the time of the act, condition, or event. Specifically, Kim Boaz declaration states that the Field Service Technician logs are completed contemporaneously with the inspection. The Field Service and Inspection Log itself seems to be bear this out. The time that service began and ended is noted. The date of the service is also noted. And the document is signed under penalty of perjury that it is true and correct by the Field Service Technician. The photographs and video are taken contemporaneously with the violation, and Officer Graves testified that all of the information stamped on the photos by the computer is done so at the time of the violation. Kim Boaz's declaration states that all the photographs are reviewed by ATS personnel at or near the time that the notice to appear was created. The Certificate of Bulk mailing is done at the time of the mailing. In short, all of the documents sought to be excluded by defense were prepared at or near the time of the event, condition, or act, and therefore meet the second prong of the Officer Records Exception under Evidence Code section 1280.

The final prong of Evidence Code section 1280 is that the sources of information and method and time of preparation need to indicate trustworthiness. There are multiple grounds on which the Court may find that these documents are trustworthy. First, the declaration of custodian of records, the image log, and the Field Service and Inspection Logs are all sworn to under the penalty of perjury. The Field Service and Inspection Logs are created as part of a legal duty to ensure that the cameras are installed, calibrated and functioning properly as required by Vehicle Code section 21455.5(c)(2)(B)-(C). The declaration of the custodian of records along with the testimony of the officer supports the trustworthiness of the photographs, including all of the information contained in the data bar. Specifically, the custodian of records states that the images are encrypted at the time the photo is taken, and that they are not altered at any point. The Image Log also confirms that the photographs are imported via a secure Virtual Private Network.

Officer Graves' testimony can also provide a sufficient independent basis to support the trustworthiness of these documents. Officer Graves' testified that he has seen how this process works from beginning to end, including traveling to ATS headquarters in Arizona. Officer Graves established that Kim Boaz is the only person that handles the evidence packages for the City of San Diego. He can review the Field Inspection and Service Logs to determine that they are being done properly and as required by the contract. He can review the photos and testify that this is the intersection that the photograph says that is. In short, Officer Graves' testimony is a sufficient independent basis for the Court to find that these documents are trustworthy.

Additionally, pursuant to Evidence Code sections 1552 and 1553 the printed representations of computer information or a computer program or of images stored on a video or digital medium are presumed to be an accurate representation of the images they purport to represent. This presumption affects the burden of producing the evidence. It is up to the defendant to produce some evidence that a printed representation is inaccurate or unreliable. If a defendant does that, then it is the burden of the proponent of the evidence to prove by a preponderance of the evidence standard that the printed representation is an accurate representation. It is not enough for defendant to simply say "it could be inaccurate," they must produce some evidence.

The documents contained in the evidence packages are official records pursuant to Evidence Code section 1280 and should be admitted into evidence in each of these cases. Whether the proper foundation has been laid, is a question for the Court in each individual case, and the Court should not pre-judge the testimony and exclude the evidence in all cases because in one case in Orange County the Appellate Division found that there was not a proper foundation, especially, when the Fourth District Appellate Court has chosen on its motion to review that finding.

D. THE DOCUMENTS CONTAINED IN THE EVIDENCE PACKAGE SUBMITTED PURSUANT TO A VALID SUBPOENA WITH A DECLARATION FROM THE CUSTODIAN OF RECORDS ARE ADMISSIBLE AS BUSINESS RECORDS PURSUANT TO EVIDENCE CODE SECTIONS 1271, 1560 AND 1561

The court has wide discretion to determine if sufficient evidence is presented to qualify evidence as a business record. *People v. Lugashi*, 205 Cal. App. 3d 632, 640 (1988). A writing that is admissible under the official records exception is also admissible under the business records exception. *People v. Flaxman*, 74 Cal. App. 3d Supp. 16, 21 (1977) (*quoting* Jefferson, *Cal. Evidence Benchbook* 1st ed. at 97). The significant difference between the two hearsay exceptions is that a custodian or other qualified witness must testify to the identity and the mode of production in every instance to admit the documents under the business records exception. *Id.* In the instant cases, that qualified witness has attested to the identity and mode of production as required and allowed by Evidence Code sections 1560 and 1561.

To qualify as a business record a document must be made in the regular course of business; must be made at or near the time of the act, condition or event; a custodian or other qualified witness must testify to the identity and the mode of its preparation; and the sources of the information and method and time of preparation must be such as to indicate its trustworthiness. Cal. Evid. Code section 1271. In these matters, as discussed above, all of the documents sought to be admitted are made in the regular course of business, they are made at or near the time of the act, condition or event as evidenced by the documents themselves, Officer Graves' testimony, and the affidavit of the custodian of records. The custodian of records has provided an affidavit identifying the records being produced, and providing the mode of

preparation. Based on all of the evidence, including Officer Graves' testimony regarding how the records are produced and the affidavit signed under penalty of perjury, the information provided in the packet is trustworthy.

Evidence Code section 1560 allows for the subpoenaing of business records in a criminal action and sets forth how a business must comply with a subpoena duces tecum. The records received by the Court in these matters were received in response to a subpoena duces tecum issued by the People, and were accompanied by an affidavit of the custodian of records pursuant to Evidence Code section 1561. The copy of the records is admissible in evidence if the original records would have been admissible and the requirements of Evidence Code section 1271 have been met. Cal. Evid. Code section 1562. The matters so stated in the affidavit are presumed to be true, and this presumption is one that affects the burden of producing evidence, i.e. the statements in the affidavit are presumed to be true unless and until some evidence is presented by the Defendants that it is not. At which time, the proponent of the evidence must establish by a preponderance of the evidence that the statements are true in order for the documents to be admissible.

Again, the defense relies heavily on *Khaled* to support its opinion that these documents are not business records. In doing so, the defense completely ignores footnote 5 in the *Khaled* decision which states,

> This is not a situation where, in compliance with a lawfully issued subpoena duces tecum, the custodian submitted a declaration attesting to the necessary foundation facts (Evid. Code §1560 et seq.). See also Taggart v. Super Seer Copr. (1995) 33 Cal. App.4th 16097. No such subpoena duces tecum was issued or introduced here.

People v. Khaled, (App. Div. Orange County Superior Court, 5/10). This fact distinguishes theses cases from the *Khaled* decision, making that opinion not only non-binding on the Court, but also totally unpersuasive on this issue.

An additional rule imposed by case law interpreting the business records exception is that the documents cannot be prepared in contemplation of litigation. *Palmer v. Hoffman*, 318 U.S.

109 (1943). The argument that this evidence package, or more specifically the Affidavit of the Custodian of Records is prepared in contemplation of litigation is a red herring. Affidavits of Custodian of Records in compliance with Evidence Code sections 1560 and 1561 are *always* going to be prepared for litigation, because the subpoena duces tecum is always issued as part of litigation. If the defense's argument is followed to its logical conclusion, no business records would ever be admissible without a live witness from the business to attest to them. This would render Evidence Code sections 1560-1562 totally inoperable and meaningless.

The more reasonable reading is that the documents that are part of the evidence package must not be "produced for litigation." It was argued at the hearing on this matter, that all of the documents are produced for litigation because the purpose of the automated photo red light system is to create citations and charge individuals with a violation of Vehicle Codes section 21453. This argument completely ignores the reasoning behind this rule as laid out in *Palmer v. Hoffman,* 318 U.S. 109 (1943). In that case, the documents at issue were accident reports that the company had generated containing statements of witnesses in preparation for litigation. There The videos and photographs are not hearsay, and therefore, are admissible as long as the proper foundations is laid. Likewise, the information on the date bar contained on the photograph and video is automatically generated by the computer at the time of the alleged violation. As such it is not hearsay, however, to be admitted for the truth of the matter asserted, the proper foundation, i.e. that the computer was working properly at the time of the alleged violation, must be laid. As discussed above, the People anticipate being able to lay this foundation.

None of the other records are produced for the purposes of litigation. The Field Service and Inspections Logs are kept in the regular course of business and as part of a legal duty pursuant to Vehicle Code section 21455.5. The Certificate of Mailing is also done as a part of a legal duty and is done in the regular course of business. All of these documents reflect the routine day to day operations of the business. The rule as stated in *Palmer* was an additional safeguard to make sure the documents and records being admitted were trustworthy. There is sufficient independent evidence and the manner and source of the documents is sufficient to show their trustworthiness.

II

THE EVIDENCE SOUGHT TO BE ADMITTED IS NON-TESTIMONIAL IN NATURE AND THEREFORE IS EXEMPT FROM THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT

Defendants have objected to the admission of all of the documents that were received by the court in response to the subpoena duces tecum on the ground that to admit such evidence would violate their right to confront witnesses contained in the Sixth Amendment to the United States Constitution.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause guarantees a defendant the right to confront those who "bear testimony" against him. *Id.* at 51. The Court described the class of testimonial statements covered by the Confrontation Clause to include things such as affidavits, custodial examinations, prior deposition testimony. *Id.* at 51-52. *Crawford*, and it progeny *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), only apply to testimony hearsay, both cases specifically note that there are types of evidence that are not testimonial in nature. The documents sought to be excluded in this case are non-testimonial in nature.

This case is factually distinguishable from the documents that were sought to be admitted in *Melendez-Diaz*. In that case, the prosecution sought to admit an affidavit prepared by a lab analyst documenting the testing that he or she had done on a specific piece of evidence and stating that the substance was cocaine. The witness who was not called to testify had also made physical observations of the substance that was being tested. There were no witnesses who were available to testify regarding the findings or the testing. In these cases however, unlike in *Melendez-Diaz*, there is no person operating the cameras at the intersection. The cameras are controlled by the local computer located at the intersection. The local computer triggers the cameras to capture the photos and video and electronically stores and transmits the data. There is no person involved in capturing and storing the photos and video, so there is no one to confront regarding these issues.

The videos and photo themselves are not out of court statements, which defense counsel Aronson conceded at the hearing on June 23, 2010. As discussed above, the information contained on the data bar is admissible and again, because all of the information provided in it is automatically generated by the computer at the time the photo and/or video is taken, there is no one to confront.

Defense counsel argues that the lack of foundation with most of these documents is the "severe root" of the problem. However, none of these documents lack foundation. These documents are all official records and business records and it is acceptable to lay the foundation through the procedures established by Evidence Code sections 1560-1562.

The only documents which could conceivably have a witness to cross-examine would be the Field Service Inspection and Maintenance Logs. However, the court noted in *Melendez-Diaz* in the very first footnote, that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." *Id.* at n.1. Since the Supreme Court decision in *Melendez-Diaz* at least two courts have addressed situations analogous to the one in these cases.

The Fourth Appellate District, Division Three recently ruled that the accuracy records of an Alco-Sensor machine were admissible, despite the fact that the person who had conducted the accuracy checks did not testify. *People v. Chikosi*, G041014 (2010). In discussing the *Melendez-Diaz* opinion the court specifically stated that it made good sense that the documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records, because the cross-examination of the technician who merely tests the accuracy of a machine or other equipment is not as likely to be fruitful for the defense, unlike the cross-examination of the person who conducts the substantive analysis of the key piece of evidence. The court in *Chikosi* recognized that in the wake of *Melendez-Diaz* testing technicians generally do not play such an important role in the adversarial process so as to mandate their appearance at trial.

Similarly, in *United States v. Bacas*, 662 F. Supp. 2d 481 (E.D. Va 2009), the defendant challenged his conviction for speeding on the grounds the prosecution failed to produce the technician who tested the accuracy of a certain tuning fork. The defendant in that case argued that

the technician's testimony was required by the tuning fork had been used by the officer to calibrate the radar that detected his driving speed. Similar to the cases before the Court here, the defendant sought live testimony about the test applied to the subject equipment to show that it performed correctly. *Id.* at 484.

In *Bacas*, the court ruled that, "Collateral facts that do not speak to a defendant's guilt or innocence have been excepted from Sixth Amendment protection. Neutral statements that related only to the operation of a machine constitute such collateral facts." The court went on to state that the calibration test results propound neutral information relating only to the proper operation of the radar equipment, unlike the certificates at issue in *Melendez-Diaz*. Such calibration results do not pertain to any particular defendant or specific case, and therefore they lack the essential primary purpose of establishing or proving past events potentially relevant to later criminal prosecution that would render them testimonial. *Bacas*, 662 F. Supp. 2d at 485.

Just like *Chikosi* and *Bacas* the Field Service Inspection and Maintenance Logs contain neutral information that is not generated for use against a specific defendant. Rather the information relates to the proper functioning of a machine that is commonly used in law enforcement. The records are produced contemporaneously with the inspection, and are not created to prove a past fact that is relevant to the prosecution. Therefore they do not fit within the United States Supreme Court's definition of testimonial hearsay.

Additionally, another point of distinction between this case and *Melendez-Diaz* is that the Defendants do have a witness who is available for cross-examination regarding the documents in the packet. The People believe based on the voir dire that was conducted by the defense, that Officer Graves has significant training and experience with the photo red light system. He testified that he has seen how the images are processed at the headquarters of ATS in Arizona. He has been out numerous times with the technicians and observed them while they did the field inspection. He knows what the information contained in the photos means, and he is able to interpret the data and testify regarding whether there is a violation of Vehicle Code section 21453(a) depicted.

Further, Kim Boaz' declaration as the custodian of records is not testimonial. It is a document provided to lay the foundation for business records produced in accordance with a subpoena duces tecum pursuant to Evidence Code sections 1560 and 1561. Ms. Boaz declaration simply states neutral facts relating to the business procedures used by ATS and describing the method and manner of production of the records. Nothing in Ms. Boaz' declaration is specific to the particular violation, except for the list of the documents that are attached. This is very different than the affidavit involved in *Melendez-Diaz*. If Ms. Boaz' declaration is not admissible to lay the foundation, then no business records produced in response to a subpoena duces tecum are ever admissible in a criminal proceeding.

The defense does not get to dictate who the People must call as witnesses. It is true that questions may be posed to the officer that the officer is unable to answer. The Court will have to determine on those occasions whether the inability to answer the question prevents the proper foundation from being laid, or is relevant to the issue of whether the Defendants violated Vehicle Code section 21453. However, that should be a case by case analysis. The officers are continuously undergoing training on the system. There is no reason that the officer, having not known the answer to a question on one day cannot search out the answer and be trained on the issue. An officer being trained on the issue is no different than a field technician, or someone else at ATS being trained on an issue and coming into to testify about it.

Further, the fact that notations such as the notation regarding the sensor needing to be replaced which was discussed at the hearing exist in the Field Service and Inspection Logs is another indication that these documents are reliable, they are made for the purpose of servicing and maintaining the cameras and computers at the scene, and are made in the regular course of business. These documents while relevant for foundational purposes of showing that the computers and cameras were working on the date in question are not prepared for litigation and are not accusatory in nature. They are prepared as part of the legal duty to ensure that equipment is regularly inspected, and to certify that the equipment is properly installed and calibrated and is operating properly as required by Vehicle Code sections 21455.5(c)(2)(B)-(C).

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III.

FUNDAMENTAL FAIRNESS WEIGHS IN FAVOR OF THE COURT FINDING SUCH EVIDENCE ADMISSIBLE IN ORDER TO PROVIDE ALL PARTIES WITH A FAIR TRIAL

Fundamental fairness weighs in favor of admitting the records that were subpoenaed from ATS in their entirety. The California Evidence Code sets out the rules of admitting evidence at trial. The People have complied with all of the rules. The Defendants have absolutely nothing to point to which calls into doubt the accuracy of the evidence as presented by the People. In fact, in the Defendants' moving papers there is not one fact alleged to indicate that anything about the information provided is inaccurate or untrue. The Defendants simply do not like the photo red light system because once the evidence is admitted, it is almost incontrovertible. However, the fact that the People have good evidence does not mean that admitting it is unfair.

The defense seems to indicate that if they could call a technician from ATS that they could question that individual about the camera's entire history. That is simply not true. Just because a witness is on the stand does not mean that everything he knows is relevant. The fact that a particular camera had an issue one year ago is totally irrelevant to whether the camera was working properly on the date in question. Moreover, while the Sixth Amendment guarantees the right to confront and cross-examine witnesses who "bear testimony" against you, it does not require the People to call as a witness everyone who has ever inspected a camera, or viewed the image, or sent a notice to appear. These items are non-testimonial in nature, they are neutral foundational elements, and although Defendants would have the Court believe that unless the Court rules in their favor they have no alternatives that is simply not true. The Defendants have the ability to subpoena witnesses just as the prosecution does. While the court has made clear that the ability to subpoena witnesses is not a reason to relax the Sixth Amendment guarantees, when as in this case, there is no violation of the Sixth Amendment, it is a viable option for Defense.

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IV

VEHICLE CODE SECTION 21453 CONTAINS THE ELEMENTS THE PEOPLE MUST PROVE BEYOND A REASONABLE DOUBT IN ORDER FOR DEFENDANT TO BE FOUND GUILTY.

All of the Defendants in these cases are charged with a violation of Vehicle Code section 21453(a). That section requires that a driver facing a steady circular red signal stop at a marked limit line and remain stopped until an indication to proceed is received. If there is no limit line, the driver shall stop before entering the crosswalk on the near side of the intersection, or if there is no crosswalk, the driver shall stop before entering the intersection. Cal. Veh. Code section 21453(a). To prove a violation of this section, the People must prove beyond a reasonable doubt, that the individual defendants in these cases, while facing a steady circular red signal failed to stop at the limit line, or if there is no limit line, before entering the crosswalk or the intersection. That is it.

The brief received from Defense Counsel Aronson essentially argues that the People must prove compliance with every section of Vehicle Code section 21455.5 in order to prove the violation of Vehicle Code section 21453(a). There is no authority cited for this proposition. However, the People will briefly discuss the issues raised.

A, WARNING NOTICES WERE ISSUED FOR THIRTY DAYS PRIOR TO THE ISSUING CITATIONS PURSUANT TO VEHICLE CODE SECTION 21445.5(B).

The People contend that this is not an element that must be proven in order to establish a violation of Vehicle Code section 21453(a). However, despite that fact, it is the People's understanding that a copy of all of the public notices, and a record of all of the thirty day warning periods are on site at the Courthouse. These records were compiled by the Department of Traffic and Engineering and the San Diego Police Department, and are therefore, Official Records and should be admissible under the exception contained in Evidence Code section 1280. While the People do not believe that this is an element of the offense, if the Court requires that this fact be proven because fundamental fairness requires that the People show that the photo enforcement

system is being operated according to law, the People believe that the evidence can be provided once the matter actually proceeds to trial and request the court allow that opportunity.

Defense argues that there was no testimony at trial about this point, and says that Officer Graves testified that he had not personally issued any warning notices. In reviewing the tapes of the proceedings over a week ago, the People do not recall any testimony at all regarding the warning notices, because during the voir dire of Officer Graves there were no questions posed as to that issue. In reviewing the declarations from the Custodian of Records, Kim Boaz, the People do not actually see anything relevant to this document, and therefore, will submit on the previous argument regarding why that document is admissible.

B. THE PEOPLE BELIEVE THAT OFFICER GRAVES COULD PROVIDE TESTIMONY REGARDING THE UNIFORM GUIDELINES FOR SCREENING AND ISSUING VIOLATIONS PURSUANT TO VEHICLE CODE SECTION 21455.5 IF ALLOWED THE OPPORTUNITY TO TESTIFY IN A CASE IN CHIEF.

Again, this is not technically an element of proving the violation of Vehicle Code section 21453(a). However, the People believe that Officer Graves and/or any other officer from SDPD can and will provide testimony regarding the fact that SDPD has created uniform guidelines for screening and issuing violations. Officer Graves did state that SDPD has provided guidelines to ATS but he did not elaborate on what they are because he was not given a chance to. Defense counsel states that citations are still regularly issued to registered drivers despite clear differences of race, sex, and/or age. There is of course no evidence of such mistakes being made that is offered, however, the People would concede that such mistakes have been made. The system requires human review by trained police officers. The fact that human error will occur is inevitable and does not mean that SDPD has failed to promulgate and enforce uniform guidelines for the screening and issuing of these violations.

C. THE PEOPLE HAVE PROVIDED EVIDENCE THAT THE CAMERAS AND COMPUTERS AT THE INTERSECTIONS ARE REGULARLY MAINTAINED AND INSPECTED.

As previously discussed above, the Field Service and Inspection Logs are admissible under both the Official Records exception in Evidence Code section 1280 and the Business Records Exception in Evidence Code section 1271. Although the People have only produced

limited inspections relating to before and after the violation alleged in each case, Officer Graves did testify that the cameras are regularly inspected, and that he has previously gone out to the inspections with the engineers. This evidence is sufficient to show that the cameras are being regularly inspected. For the reasons discussed above, the calibration records of the machines are admissible as non-testimonial documents, without the technician who completed them testifying.

D. THE PEOPLE CAN PRODUCE EVIDENCE THAT THE EQUIPMENT WAS PROPERLY INSTALLED AND CALIBRATED.

Defense counsel claims that "the system is not checked or calibrated to ensure that these timing devices are accurate." She states absolutely no authority for such a claim, and the claim itself contradicts what Officer Graves testimony was and what the Field Service and Inspection Logs demonstrate. Officer Graves gave limited testimony regarding calibrating the machines using police vehicles and officers, checking the time of the yellow light phase, and other details of the machine. He also referenced checks done by the Department of Traffic and Engineering in his testimony. Officer Graves or any other officer may testify to what the policy and procedure is for installing the cameras and calibrating them, even if their knowledge of that policy and procedure is based on hearsay. *People v. Lugashi* 205 Cal. App.3d 632, 641 (1988).

E. THE YELLOW LIGHT CHANGE INTERVAL IS ESTABLISHED PURSUANT TO THE DEPARTMENT OF TRANSPORTATION GUIDELINES.

Again, the People's position is that this is not an element of a violation of Vehicle Code section 21453(a). However, Officer Graves testified that the yellow light interval is established above the guidelines set by the Department of Transportation. It is the People's understanding that there is a California Department of Transportation (Cal Trans) Manual at the traffic court and that the yellow light intervals are set forth therein. If this is correct, the Court may take judicial notice of the yellow light intervals. Further, the photographs have the measurement of the actual amber/yellow phase immediately prior to the light turning red. Officer Graves testified that this is measured each time. Using these two sources of information, the Court should find that the People have proved that the yellow light interval requirement is being complied with according to the requirements of Vehicle Code section 21455.5. Further, there is no indication that the City of San Diego has failed to comply with the requirement of Vehicle Code section

21455.5(c)(2)(E) prohibiting the City from contracting out the establishment or change of signal phases and the timing thereof. The fact that the reading of the amber phase is done by ATS equipment does not affect the establishment or the change of the signal phase, nor does the fact that an ATS field technician checks the phase timing to make sure that it is accurate.

CONCLUSION

All of the records subpoenaed from ATS and sought to be admitted into evidence are admissible and should be admitted against each of the respective Defendants.

Dated: July 19, 2010

JAN I. GOLDSMITH, City Attorney

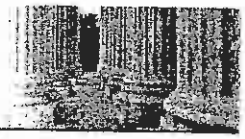
By Melissa Ables
Melissa D. Ables
Deputy City Attorney

Attorneys for Plaintiff

EXHIBIT 1

CALIFORNIA APPELLATE COURTS

Case Information



4th Appellate District Division 3

Change court

Court data last updated: 07/15/2010 01:05 PM

Case Summary Docket Scheduled Actions Briefs
Disposition Parties and Attorneys Trial Court

Docket (Register of Actions)

The People v. Khaled
Case Number G043865

Date	Description	Notes
07/02/2010	Certification from appellate department filed.	based on published opinion from Superior Court.
07/02/2010	Filed original superior court file.	Record on transfer 1 vol of superior court file.
07/09/2010	Order filed.	The Appellate Division of the Orange County Superior Court certified for publication its opinion in case number 30-2009-304893. On the court's own motion, the superior court is ordered to transmit to this court within 5 days from the date of this order all exhibits admitted, refused, or lodged in traffic case number SA128676PE. (Cal. Rules of Court, rules 8.1010 and 8.921(a), (d).)
07/12/2010	Received document entitled:	letter from City of Menlo Park addressed to Supreme Court re:voicing its support for depublication of the Orange County Superior Court, Appellate Division, case People v Khaled.
07/14/2010	Exhibits lodged.	O.C. Superior Court exhibits #1-7

Click here to request automatic e-mail notifications about this case.

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

DECLARATION OF SERVICE BY MAIL	Case Nos. B16464A, B16681A, B16772A, B17833A, B17968A, B17983A, B18095A, B18404A *People v. IN RE 8 SDPD PHOTO RED LIGHT CASES HEARD 6-23-2010*

I, Janette A. Myers, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the action; and I am employed in the County of San Diego, California, in which county the within-mentioned mailing occurred. My business address is 1200 Third Avenue, Suite 700, San Diego, California, 92101-4103. I served the following document(s): **THE PEOPLE'S OPPOSITION TO MOTION TO EXCLUDE EVIDENCE AS HEARSAY AND VIOLATIVE OF THE DEFENDANTS' SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES,** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Mitchell J. Mehdy
3990 Ninth Avenue
San Diego, CA 92103

Elizabeth Aronson
P.O. Box 235774
Encinitas, CA 92023

I then sealed each envelope and with the postage thereon fully prepaid, deposited each in the United States mail at San Diego, California on July 19, 2010.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 19, 2010, at San Diego, California.

Janette A. Myers

PROOF OF SERVICE BY MAIL
C.C.P. §§ 1013(a); 2015.5