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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN DIEGO

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11 THE PEOPLE OF THE STATE OF  
12 CALIFORNIA,

13 Plaintiff,

14 v.

15 IN RE 8 SDPD PHOTO RED LIGHT CASES  
HEARD 06-23-2010

16 Defendant.

) Case No.: B16464A, B16681A, B16772A,  
) B17833A, B17968A, B17983A, B18095A,  
) B18404A

) THE DEFENSES REPLY TO THE  
) PEOPLES OPPOSITION TO THE  
) MOTION TO EXCLUDE EVIDENCE AS  
) HEARSAY AND VIOLATIVE OF THE  
) DEFENDANTS' SIXTH AMENDMENT  
) RIGHT TO CONFRONT WITNESSES

) Dept.: Traffic Court - KM-3

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20 INTRODUCTION

21 On July 9, 2010, the People were served with "Motion & Points Authorities" in this  
22 matter by Defense Counsel, Mitchell Mehdy. The People then on July 19, 2010, served Defense  
23 counsel, Mitchell Mehdy with their opposition to the defenses motion to exclude the evidence  
24 involved IN RE 8 SDPD PHOTO RED LIGHT CASES HEARD 06-23-2010. The Defense in  
25 this matter is replying to the Peoples opposition in these papers.

26 We believe that the trial court in this matter should render a favorable verdict for the  
27 defendant by excluding the declaration provided by ATS and the information contained therein.  
28 The defendant's objections on grounds of hearsay and violation of the confrontation clause are

1 valid as to the declaration being used for proving the plaintiffs case in chief. Absent the  
2 information contained in the declaration, there is insufficient evidence for the prosecution to  
3 meet there burden of proof. Accordingly, the case should be dismissed.

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5 **POINTS AND AUTHORITIES**

6 **I.**

7 **THE PHOTOGRAPHS AND VIDEO OF THE ALLEGED VIOLATION**  
8 **CONTAIN STATEMENTS THAT AMOUNT TO HEARSAY AND SHOULD BE**  
9 **INADMISSIBLE.**

10 This court should follow the Appellate Division of the Superior Court of Orange County  
11 decision in People v. Khaled (App. Div. Orange County, 5/10) as to the issue of the photographs  
12 and video being considered hearsay and inadmissible at trial. The statements contained in the  
13 declaration are hearsay and no official records exception or business records exception exists.  
14 While the Khaled decision is not binding on this court, it is persuasive in its reasoning as to why  
15 the photographs and video of the alleged incident should not be admissible. Based on the Khaled  
16 decision and the Defenses written motion to exclude the photographs and video, the court should  
17 find the photographs and video evidence inadmissible.

18 **II.**

19 **THE EVIDENCE SOUGHT TO BE ADMITTED IS TESTIMONIAL IN NATURE**  
20 **AND IS IN DIRECT VIOLATION OF THE DEFENDANTS SIXTH**  
21 **AMENDMENT RIGHT TO CONFRONT HIS WITNESS.**

22 The People believe that the documents received by the court are non-testimonial and  
23 therefore there is no violation of the Sixth Amendment. The Sixth Amendment to the United  
24 States Constitution, is applicable to the States via the Fourteenth Amendment, Pointer v. Texas,  
25 380 U.S. 400, 403, 85 S. Ct. 1065 (1965). The Sixth Amendment of the United States  
26 constitution expresses a preference that in all criminal prosecutions, the accused shall enjoy the  
27 right to be confronted with the witnesses against him. USCS Const. Amend. 6.

1 Under Crawford, a witness's testimony against a defendant is inadmissible unless the  
2 witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for  
3 cross-examination. 541 U.S., at 54, 124 S. Ct. 1354. Various formulations of this core class of  
4 testimonial statements exist: ex parte in-court testimony or its functional equivalent -- that is,  
5 material such as affidavits, custodial examinations, prior testimony that the defendant was unable  
6 to cross-examine, or similar pretrial statements that declarants would reasonably expect to be  
7 used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials,  
8 such as affidavits, depositions, prior testimony, or confessions; statements that were made under  
9 circumstances which would lead an objective witness reasonably to believe that the statement  
10 would be available for use at a later trial." Id., at 51-52, 124 S. Ct. 1354, (internal quotation  
11 marks and citations omitted). Plainly affidavits are "declaration[s] of facts written down and  
12 sworn to by the declarant before an officer authorized to administer oaths." Black's Law  
13 Dictionary 62 (8th ed. 2004). Affidavits are incontrovertibly a "solemn declaration or  
14 affirmation made for the purpose of establishing or proving some fact." Crawford, supra, at 51,  
15 124 S. Ct. 1354, (quoting 2 N. Webster, An American Dictionary of the English Language  
16 (1828)). In, Melendez-Diaz v. Massachusetts, the Supreme Court held that it was a violation of  
17 the Sixth Amendment right of confrontation for a prosecutor to submit a chemical drug test  
18 report without the testimony of the scientist. 129 S.Ct. 2527 (2009). Finally, requirements of the  
19 Confrontation Clause may not be relaxed because they make the prosecutions task burdensome.  
20 (quoting Scalia; Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009). )

21 The People argue that our case is factually distinguishable from Melendez-Diaz. In our  
22 situation there is a field technician and other maintenance personnel who prepare reports in  
23 regard to the camera and its operation. These technicians and maintenance personnel provide  
24 reports to KIM BOAZ who then certifies that the camera, the records and the information it  
25 stores is true and accurate. The technicians and personnel involved in the operation of the camera  
26 are performing a role similar to the lab analyst. While the lab analyst in Melendez-Diaz  
27 determined that the substance was a drug and submitted that in his affidavit, the technicians and  
28 maintenance personnel are determining that the camera is in perfect working order and

1 accurately recorded an alleged violation and in sum that a violation occurred. If the technician  
2 and or maintenance personnel who are responsible for a camera that records an alleged violation  
3 are not present, then how can a defendant receive a fair trial when he has questions as to if the  
4 camera was working properly or has an inquiry to its maintenance records? The People may be  
5 correct in asserting that no person single handedly captures and stores the photos and videos, but  
6 there is someone who is controlling these machines and those people have answers to these  
7 specific devices that convict people for alleged violations that may or may not have occurred.

8 The Court in Melendez-Diaz also stated that "documents kept in the regular course of  
9 business may ordinarily be admitted at trial despite their hearsay status...but that is not the case  
10 if the regularly conducted business activity is the production of evidence for use at trial."

11 The evidentiary items sought to be introduced here are testimonial in nature as they are  
12 the only evidence against defendant to prove that the defendant committed the crime he or she is  
13 accused of, and in so far as these items are testimonial they are subject to the Sixth Amendment  
14 and defendants have a right confront and cross-examine the individuals that were responsible for  
15 the information contained in these items.

16 The sole purpose of the Declaration is to introduce the other evidentiary items as  
17 evidence. The Declaration in these cases not only identifies the evidentiary items to be  
18 introduced, but it also provides testimonial evidence as to the procedures and contents of the  
19 evidentiary items and how it they were obtained. The testimonial statements in the Declaration  
20 are subject to cross-examination and those statements should be excluded unless the custodian is  
21 present and available for cross-examination as to his or her personal knowledge of the  
22 testimonial statements.

23 The Image Log sought to be introduced is testimonial in nature as it provides evidence as  
24 to how and when the photo and video images were downloaded. This information is important  
25 as it start the chain of events that leads to the eventual issuance of a citation. No foundation has  
26 been laid for the introduction of this document. The individual who created this document is not  
27 made available for cross-examination and there is no information in the Image Log to determine  
28 the qualifications of this individual and what steps were taken to ensure the accuracy of this

1 information. There is no detailed description of what steps were taken to generate this document  
2 and whether any other individuals were involved in the process. The defendants have a right  
3 under the confrontation clause to question this individual and have these questions answered.  
4 Not having this individual present in court (and not be able to identify him or her) to allow  
5 defendants to cross-examine this individual denies the defendants their right to confront all  
6 witnesses against them. The reason this document was created was for the purpose of producing  
7 it at trial and this is exactly the type of document that the confrontational clause of Sixth  
8 Amendment was intended to apply, and defendants have not been afforded that opportunity.

9       The Maintenance and Job Statistics document is testimonial in nature as they provide the  
10 only evidence to the maintenance and accuracy of the system and they are being offered as  
11 evidence of the maintenance of the system. No foundation has been laid for the introduction of  
12 this document. The individual who conducted the maintenance checks and who subsequently  
13 entered the information into ATS's database has not been made available for cross-examination.  
14 There is no information as to the qualifications of the individual who conducted these  
15 maintenance checks and what steps were taken to ensure the accuracy of this information. There  
16 is no information as to whether the individual that conducted the maintenance checks is the  
17 same individual that entered the information into ATS's database. There is no information as to  
18 when the data was entered in relation to when the maintenance check was done. Does the  
19 individual doing the maintenance check use a check list at the time of the maintenance check to  
20 make sure he or she does all the checks listed on the entry and if so, where is that checklist? Did  
21 this individual in fact perform each of the tasks outlined in the entries? Where any problems  
22 found with the system and where those problems corrected? Are these problems documented  
23 and where are they documented. This document should be excluded along with the other  
24 documents as defendants have been denied the right to confront the individual responsible for the  
25 contents of this document.

26       The People further state that in People v. Chikosi, the court in that case stated that  
27 documents prepared in the regular course of equipment maintenance may well qualify as non-  
28 testimonial records, because the cross-examination of the technician who merely tests the

1 accuracy of a machine or other equipment is not as likely to be fruitful for the defense, unlike the  
2 cross-examination of the person who conducts the substantive analysis of the key piece of  
3 evidence. However, in our situation, the documents are prepared in the anticipation of trial; they  
4 are testimonial in nature, because the cross-examination of the technician who works on the  
5 machine can be a fruitful defense. If the defense is allowed to cross-examine the witness we  
6 would be able to get to the root of the problem when certain situations arise in regards to the  
7 maintenance history of the machine, if the machine was functioning properly when the date the  
8 alleged violation occurred.

9 Finally, the People argue that the police officer that is present to act as a witness for the  
10 People is available for cross-examination to answer any and all questions. While the officer may  
11 be highly trained and well versed in the operations of the photo red light camera systems he still  
12 is only there to present the evidence supplied to him by someone else. The officer does not  
13 personally go out to the machines and "work" on them and update logs to maintain their  
14 functionality. An officer may have been out numerous times with technicians and observed them  
15 while they did their field inspection, but that is to say that if an officer was present in the lab with  
16 the analyst from Melendez-Diaz and he viewed the analyst determine the substance in that case  
17 was cocaine then that would make it admissible. The officer, through no fault of his own, is not a  
18 sufficient witness to cross-examine and answer questions about a camera system that is not his  
19 sole job to maintain.

20 All the evidentiary items sought to be introduced by the People do not afford the  
21 defendants the opportunity to cross-examine the individuals responsible for the creation and  
22 content of these documents and this is violation of the defendants' confrontational rights under  
23 the Sixth Amendment. The defendants are being asked to take these documents on faith that what  
24 these documents purport to prove is in fact the truth without any opportunity to question those  
25 responsible for the creation and content of these documents.

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