

1 MITCHELL J. MEHDY. State Bar# 123626
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5 Attorney for Defendant
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN DIEGO**

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11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,

13 Plaintiff,

14 v.

15 B16464A, B16681A, B16772A, B17833A,
16 B17968A, B17983A, B18095A, B18404A

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

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

) **MOTION & POINTS & AUTHORITIES**

) Hearing Date: June 23, 2010
) Hearing Time: 2:30 pm

20 TO: THE CLERK OF THE COURT AND THE CITY ATTORNEY OF SAN DIEGO
21 COUNTY:

22 NOTICE IS HEREBY GIVEN that on the above date and time the case was heard,
23 defendant, by and through his attorney, Mitchell J. Mehdy, moved this court to make the
24 evidence against him pursuant to the California Rules of Evidence and the Sixth Amendment of
25 United States Constitution inadmissible.
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1 The items to be found inadmissible are listed as follows:

- 2 1. One declaration packet from ATS, Inc. signed by the custodian of records, KIM
- 3 BOAZ, containing photographs and other pertinent evidence that establish the
- 4 prosecution's case.
- 5 2. The entire declaration by custodian of records, KIM BOAZ.
- 6 3. Photos included in the declaration by KIM BOAZ.
- 7 4. Videos included in the declaration by KIM BOAZ.
- 8 5. Image Log included in the declaration by KIM BOAZ.
- 9 6. Maintenance Records included in the declaration by KIM BOAZ.

10 STATEMENT OF CASE

11 This case involves an issue that has been highly contested in recent months; specifically
12 this case deals with the admissibility of evidence and the statutory compliance of the procedures
13 in use by municipalities in regards to "red light photo enforcement" violations.

14 On the date and time stated on the defendant's citation, the City of San Diego had issued
15 a traffic citation alleging a violation of the California Vehicle Code section 21453(a). A traffic
16 trial for this matter and other cases (B16464A, B16681A, B16772A, B17833A, B17968A,
17 B17983A, B18095A, and B18404A) was held on June 23, 2010 at approximately 2:30 p.m with
18 the Honorable Karen A. Riley (Commissioner). The prosecution (Officer Graves) sought to
19 establish the majority of the violation with a declaration obtained from ATS (Automated Traffic
20 Systems), which included photographs, videos, time logs, and other pertinent information in
21 order to support their burden in proving the defendant did in fact violate section 21453(a) of the
22 California Vehicle Code. Attorneys for the defendants objected to the introduction of evidence
23 contained in the declaration by ATS as inadmissible hearsay, a violation of the defendant's
24 confrontation rights, and other practical arguments regarding fundamental fairness. The trial
25 ended with the Honorable Karen A. Riley taking the case under submission.

26 We believe that the trial court in this matter should render a favorable verdict for the
27 defendants by excluding the declaration provided by ATS and the information contained therein.

28 The defendant's objections on grounds of hearsay and violations 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 cases should be dismissed.

4 **STATEMENT OF FACTS**

5 On the time and date stated on the various defendants citations it is alleged that they all at
6 some point and time ran a red light at an intersection and therefore were in violation of the
7 California Vehicle Code §21453(a). The only witness to this alleged violation was a camera not
8 an actual police officer or even a human being for that matter. On the day of trial a police officer,
9 Officer Graves, who deals with the enforcement of the photo red light citations, used a
10 declaration packet supplied to him in order to present his case and meet his burden of proof.

11 This information, which is contained in the declaration, comes from a private company
12 which has contracted with the County of San Diego to mount cameras, preserve, and store all the
13 information in the declaration that is supplied. The primary evidence that is being used is
14 photographs and video that depicts the alleged violation. These photographs and video contain
15 hearsay evidence which include statements of dates, time, and other pertinent information. The
16 reason it is considered hearsay is because the person who entered such information, regarding the
17 time, date and other information does not testify. Officer Graves instead uses these pictures and
18 the statements they contain in order to prove his case. No one from ATS, Inc., the private
19 company that contracts with the County of San Diego, is present in order to testify in regards to
20 the accuracy and methods used in obtaining such information. ATS, Inc. does have a field office
21 in San Diego. The custodian of records, Kim Boaz, who personally prepares the evidence and
22 information contained in the declaration packet only ensures its contents like an affidavit,
23 however she is not present to testify. Rather, Officer Graves appeared and did answer the
24 questions to the best to his knowledge about how he has been trained on the system, but still
25 could not answer every question that was asked by the attorneys. Officer Graves was not able to
26 testify to specific procedures and methods used by ATS, Inc. in programming and storing
27 information from the red light cameras in operation. Further, when asked about a specific
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1 malfunctioning camera, in which sensors were replaced, he had no personal knowledge regarding
2 the matter.

3 POINTS AND AUTHORITIES

4 I.

5 THE PHOTOGRAPHS AND VIDEO OF THE ALLEGED VIOLATION 6 CONTAIN STATEMENTS THAT AMOUNT TO HEARSAY AND SHOULD BE 7 INADMISSIBLE.

8 A. The statements contained in the photographs and video are hearsay.

9 In general, hearsay evidence is inadmissible. Evidence Code § 1200 provides, in pertinent
10 part: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness
11 while testifying at the hearing and that is offered to prove the truth of the matter stated. Correa v.
12 Superior Court, 27 Cal. 4th 444 (2002).

13 Here, the photographs and videotapes submitted in KIM BOAZ's declaration contain
14 hearsay. Officer Graves relies on the statements in the photographs and video such as the time,
15 date, and location of the alleged violation in order to prove his case. The information that is
16 contained in the photographs and video is the statement of another, other than the witness, and it
17 is offered to prove the truth of the matter asserted. A field technician or some other analyst enters
18 such data and the information is therefore transcribed on to the photographs and video. This
19 person who enters such information needs to be available to testify to the accuracy of the
20 statements and be cross-examined by the defendant. Officer Graves in reality is taking the
21 statements entered by someone at ATS, Inc. and repeating those statements in court in order to
22 prove that the alleged violation occurred. By allowing this method to prove the alleged violation
23 the court is admitting hearsay every single time.

24 Since there are statements in the photographs and videos the witness testifying should not
25 be allowed to repeat those statements in order to prove the alleged violation occurred because
26 this is a violation of hearsay.

1 **B. The Official Records Hearsay Exception is not applicable in this situation to**
2 **admit the statements contained in the declaration.**

3 Under § 1280 of the Evidence Code, evidence of a writing made as a record of an act,
4 condition, or event is not made inadmissible by the hearsay rule when offered in any civil or
5 criminal proceeding to prove the act, condition, or event if all of the following applies: a) the
6 writing was made by and within the scope or duty of a public employee; b) the writing was made
7 at or near the time of the act, condition or event; c) the sources of information and method and
8 time of preparation were such to indicate its trustworthiness.” The first step in accepting this
9 exception is that the writing needs to be made by a public employee. Peo v. Khaled (App. Div.
10 Orange County Superior Court, 05/10). The next step in the process in admitting a statement
11 under the official records exception is that the statement needs to be trustworthy. Peo v. Khaled
12 (App. Div. Orange County Superior Court, 05/10). However, § 1280 does permit the court to
13 admit an official record if the court takes judicial notice or if sufficient independent evidence
14 shows that the record or report was prepared in such a manner to assure its trustworthiness. Peo
15 v. Khaled (App. Div. Orange County Superior Court, 05/10); Bhatt v. State Dept. of Health
16 Services 133 Cal. App. 4th 923, 929 (2005).

17 Here, § 1280 does require that the writing to be admitted under the official records
18 exception be “made by a public employee.” In order for this statement to be admitted under the
19 exception the signator of the declaration, KIM BOAZ, needs to declare that she is a public
20 employee and that she is otherwise employed by a public entity. This first step is critical in
21 laying the proper foundation for the statement to be admitted, without this critical information,
22 an exception to hearsay rule cannot be considered an “official record” under the Evidence Code,
23 §1280.

24 Similarly, § 1280 requires that “the sources of information and method and time of
25 preparation need to indicate trustworthiness.” This is the second step after the first step has been
26 met. Even for a brief moment assuming the first step has been met in which the statement is
27 made by a public employee, there is nothing that signifies that the documents contained in the
28 declaration are trustworthy. The declaration and the statements by KIM BOAZ in the declaration

1 contain multiple hearsay beginning with her second paragraph, this goes to the issue of
2 trustworthiness of the document. Without any other indication of trustworthiness the evidence
3 should be excluded, it cannot be considered trustworthy just because KIM BOAZ says it is.

4 Finally, in any ditch attempt to admit such evidence judicial notice would need to be
5 taken and it has not been done so here.

6 Thus, absent any judicial notice, or having established trustworthiness and that the
7 statement was made by a public employee, the evidence as official records should be found
8 inadmissible.

9 **C. The Business Records Hearsay Exception is not applicable in this situation to**
10 **admit the statements contained in the declaration.**

11 Evidence of a writing made as a record of an act, condition or event is not made
12 inadmissible by the hearsay rule when offered to prove the act, condition, or event if: a) the
13 writing was made in the regular course of a business; b) the writing was made at or near the time
14 of the act, condition or event; c) the custodian or other qualified witness testifies to its identity
15 and the mode of its preparation; d) the sources of information and method and time of
16 preparation were such as to indicate its trustworthiness. Evidence Code §1271. However to
17 establish the proper foundation for the admission of a business record a witness needs to be
18 called to lay the proper foundation. Peo v. Khaled (App. Div. Orange County Superior Court
19 05/10). Anyone with first-hand knowledge may qualify as a proper witness to lay foundation.
20 Peo v. Khaled (App. Div. Orange County Superior Court, 05/10). The proponent of the
21 admission of the documents has the burden of establishing the requirements for admission and
22 the trustworthiness of the information. Peo v. Khaled (App. Div. Orange County Superior Court,
23 05/10); People v. Beeler, 9 Cal4th 978. Further the document can't be prepared in contemplation
24 of litigation. Palmer v. Hoffman, 318 U.S 109 (1943); Gee v. Timineri, 248 Cal.App.2d 139.

25 Here, the declaration is not deemed a business record because in order to admit a business
26 record a proper witness must be called to lay the correct foundation. No proper witness has been
27 called to lay this foundation in court detailing that the documents conform to the requirements of
28 a business record and that such documents are trustworthy. The only person who tries to admit

1 these documents is the officer present in court at the day of trial. In our situation Officer Graves
2 does not qualify as an appropriate witness and does not have the necessary knowledge of the
3 underlying workings, maintenance, or record keeping of ATS red light camera systems which
4 was evidenced by his inability to answer specific question about the system through no fault of
5 his own. Further, this declaration is not prepared in the regular course of business but rather is
6 prepared in the contemplation of litigation when the trial date is set for a defendant.

7 Thus, without a proper foundation being laid down and because the documents are
8 prepared in contemplation of litigation the declaration and its contents are inadmissible and
9 without such information there is lack of evidence to support the vehicle code violation in
10 question.

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12 **II.**

13 **THE DOCUMENTS, PHOTOGRAPHS, AND VIDEOTAPES CONTAINED IN**
14 **THE DECLARATION SHOULD BE FOUND INADMISSIBLE BECAUSE**
15 **ADMITTING SUCH EVIDENCE IS IN DIRECT VIOLATION OF THE**
16 **DEFENDANTS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESS**
17 **AGAINST HIM.**

18 The Sixth Amendment to the United States Constitution, is applicable to the States via
19 the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065 (1965). The
20 Sixth Amendment of the United States constitution expresses a preference that in all criminal
21 prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of
22 the State and district wherein the crime shall have been committed, which district shall have been
23 previously ascertained by law, and to be informed of the nature and cause of the accusation; to be
24 confronted with the witnesses against him; to have compulsory process for obtaining witnesses
25 in his favor, and to have the Assistance of Counsel for his defense. USCS Const. Amend. 6.

26 Under Crawford, a witness's testimony against a defendant is inadmissible unless the
27 witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for
28 cross-examination. 541 U.S., at 54, 124 S. Ct. 1354. Various formulations of this core class of
testimonial statements exist: ex parte in-court testimony or its functional equivalent -- that is,

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

17 Here, the custodian of records, KIM BOAZ, has written a declaration that is used in
18 proving the entire case from beginning to end. After reading the entire declaration, that more or
19 less resembles an affidavit, it thoroughly details the procedures and the exact contents of the
20 evidence in her declaration and how it was obtained. The officer uses this information to present
21 his case and in essence is relying on the testimony found in the declaration to prove his case.
22 Affidavits according to the Supreme Court of the United States have found to be testimonial. In
23 her affidavit/declaration KIM BOAZ details the procedures and operations of ATS. The whole
24 purpose for KIM BOAZ in submitting her declaration is to establish that the photographs, time
25 logs, citation information, video are all establishing and proving some fact.

26 Further, the Supreme Court in *Melendez-Diaz* held that it was a violation of the Sixth
27 Amendment right of confrontation for a prosecutor to submit a chemical drug test report without
28 the testimony of the scientist. Our situation is very similar and the case in our situation deeply

1 resonates with that case. There a chemical drug test report was not admitted because the
2 testimony of the scientist used in creating it was also needed. Here, a report is also admitted that
3 is not solely created by KIM BOAZ but other ATS, Inc. employees and neither KIM BOAZ or
4 other ATS, Inc. employees are present to present their testimony. The defendants' rights to
5 confront his witness should not be relaxed because the declaration is accompanied by a
6 document on the front of the packet that states KIM BOAZ believes everything to be true and
7 accurate.

8 The lack of foundation with most of these documents is the severe root of the problem.
9 For instance, when a light sensor (as an example used in court that day) goes out we have no
10 record of when it was fixed or who fixed it and what exactly happened. Rather an officer is sent
11 in to recite some statements made on a page regarding the situation as he reads it to be. The
12 whole purpose of the declaration submitted by KIM BOAZ is to act as an affidavit to ensure all
13 the information is true and accurate. This violates the defendants Sixth Amendment right. The
14 problem with this method is that KIM BOAZ did not go and personally fix the sensor she is
15 relaying on statements made by the field technician and then when those questions are posed in
16 court the officer present recites what KIM BOAZ has certified in her declaration. Thus, given the
17 reasoning above the declaration is an affidavit and is acting as testimony and is violating the
18 defendant's Sixth Amendment right to confront the witness against him. The sheer lack of
19 foundation also exists with other parts of the declaration, specifically with the data contained in
20 the photos and the maintenance records. There is no information as to the qualifications of each
21 of the employees of ATS, Inc. and no one with first-hand knowledge is testifying in person to
22 anything.

23 Thus, by not appearing in court and affording the defendant a right to cross-examine the
24 witness against him by submitting the affidavit to prove their case, the prosecution is violating
25 the defendants Sixth Amendment right and such evidence should not be admitted.
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IV.

**FUNDAMENTAL FAIRNESS WOULD FURTHER WEIGH IN FAVOR OF
FINDING SUCH EVIDENCE INADMISSIBLE SO THE DEFENDANT IS
AFFORDED HIS RIGHT TO CONFRONT HIS WITNESS AND A FAIR TRIAL.**

In Rochin v. The People of California, the Supreme Court stated in its opinion that a court must ascertain whether or not government actions "offend those canons of decency and fairness which express the notions of justice of English speaking peoples" even when dealing with defendants charged with the most heinous offenses. 342 U.S. 165 (1952). While that case dealt with defining what violates due process the statement quoted above does find a place in this case. Fundamental fairness requires that an average citizen, as well as an attorney, should be able to cross-examine a witness that has knowledge of the maintenance history, workings of the camera system, and other pertinent information related to the alleged violation. To ensure a fair trial it is not an undue burden for the camera company to provide a witness to testify on the workings of the particular camera in question to make sure everything is accurate and not just take someone's word for it.

It should not cost an exorbitant fee to bring a witness from the company that has a local office here in San Diego to provide for a fair and equitable trial and hear critical testimony from this witness that might result in an outright dismissal, fine reduction, or even an amendment to the original vehicle code section. To remedy this situation, the camera company can have the technician show up on a specified date, in the past this court has set photo ticket trials for a particular day of the week and if it did that ATS, Inc. could schedule someone to be there at the specified time.

The right to confront a witness in a criminal trial is a fundamental right and is not one that should be relaxed by taking shortcuts because a declaration is submitted. It is time for a change on how these cases are handled and that time is now.


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CONCLUSION

For the foregoing reasons, defendant's motion to find the evidence inadmissible should be granted.

Dated: July 08, 2010

Respectfully submitted,

By: 

Mitchell J. Mehdy
Attorney for Defendant
State Bar # 123626