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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JUL 21 2010

ALAN CARLSCH, Clerk of the Court
BY: *[Signature]* DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

PEOPLE OF THE STATE OF CALIFORNIA	) Case Nos. SA151929PE
PLAINTIFF	) SA154656PE
	) SA153758PE
v.	) SA154550PE
	) SA154097PE
██████████ CALHOON	) SA154608PE
██████████ CHAPMAN	) SA152672PE
██████████ COLLINS)
JAMES F. ██████████	) SUPPLEMENT TO DEFENDANT'S TRIAL
██████████ GREENE	) BRIEF \$21455.5 et. seq.
██████████ SAAVEDRA	) EVIDENCE CODE §§ 1271; 1280
██████████ TRUONG	) GOVERNMENT CODE §72193
DEFENDANTS	) PENAL CODE §§ 684; 19.7
	) CAL RULES OF COURT 8.1115
	) 6 TH Amendment United States
	) Constitution
)

TO THE ABOVE-ENTITLED COURT:

The defendants in the above-entitled actions submit this supplemental trial brief in order to inform the Court as to recent cases and issues which bear on the admissibility of the evidence proffered by the People in these cases. Since this case was heard at trial on June 17 2010, new cases have been published which bear on the issues raised at trial an in defendant's previous brief.

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1
2 AUTHENTICATION OF EVIDENCE

3 *People v. Albert Jerome Beckley Jr.* (2010 WL 2293410 As
4 Modified on Denial of Rehearing June 24, 2010) addresses the
5 issue of authentication of digital photographs. The Court in
6 *Beckely* brings *People v. Doggett* ((1948) 38 Cal.App.2d 405) and
7 *People v. Bowley* ((1963) 59 Cal.2d 885) into the 21st century. In
8 1948 and 1963 when *Doggett* and *Bowley* were decided, in order for
9 one to manipulate photographic images and movies one would have
10 to possess the equipment (i.e. special cameras, dark room,
11 equipment and chemicals) and skills to do what was at the time
12 considered "trick photography." This was especially difficult
13 with moving pictures (video). In *Doggett* a photography expert
14 testified that the photo that was admitted was not a composite
15 and had not been faked. The court in *Beckely* stated:

16 "Such expert testimony is even more critical
17 today to prevent the admission of manipulated
18 images that it was when *Doggett* and *Bowley* were
19 decided... Indeed, with the advent of computer
20 software programs such as Adobe Photoshop "it does
21 not always take skill, experience, or even
22 cognizance to alter a digital photo." (Parry,
23 Digital Manipulation and Photographic Evidence:
24 Defrauding The Courts One Thousand Words At A Time
25 (2009) 2009 J.L. Tech.& Pol'y 175, 183.) Even the
26 Attorney General recognizes the untrustworthiness
27 of images downloaded from the internet, quoting
28 the court's warning in *St. Clair v. Johnny's*

1 Oyster & Shrimp, Inc. (S.D.Tex.1999) 76 F.Supp.2d
2 773, 775 that "[a]nyone can put anything on the
3 Internet. No website is monitored for accuracy and
4 nothing contained therein is under oath or even
5 subject to independent verification absent
6 underlying documentation. Moreover, the Court
7 holds no illusions that hackers can adulterate the
8 content of any website from any location at any
9 time.'"

10 The Officer Bell testified that, based on his Redflex
11 training the company uses a digital signature to protect the
12 integrity of the data sent from the intersection to the Redflex
13 server in Phoenix. While this may assist in assuring that the
14 images and other data are not adulterated during that
15 transmission, it does nothing to assure that the images and data
16 are not altered, whether willfully or not, once they are in the
17 hands of Redflex and the police.

18
19 Additionally, the type of computer generated date and time
20 information at issue here is readily distinguishable from that
21 presented in *People v. Hawkins* (2002)98 Cal.App.4th 1428 in that
22 the date and time information contained in the "data bar" of the
23 Redflex digital images, is not merely a print-out of the
24 computer's internal operations as they were in *Hawkins*. The
25 information in the Redflex data bar is converted from a text
26 output to a digital image which is part of the overall image of
27 the scene depicted in the digital photograph. And even if the
28 date and time were merely a print-out of the computers internal

1 operations, *Hawkins* states unequivocally that a computer expert
2 is required to testify in order to establish a foundation for
3 the computer generated date and time information. In these
4 cases, Officer Bell's testimony indicates that he had no
5 personal knowledge as to the date and time of the alleged
6 violation, nor had he verified that any of the citation specific
7 facts contained in the data bar was correct.

8
9 Furthermore, the data (date, time etc.) presented in the
10 data bar of the Redflex images is not text based output, but is
11 manipulated by the computer in such a way that it actually
12 becomes part of the overall jpg digital image, and can be easily
13 manipulated or altered with the most basic of photo editing
14 software installed on any computer. Thus authentication of the
15 date, time, length of yellow phase and length of time the light
16 is alleged to have been red must be subject to the analysis for
17 proof of authenticity presented in *Beckley supra*.

18
19 CONFRONTATION OF WITNESSES

20 *People v. Marshall Frank Chikosi* 185 Cal.App.4th 238 (May 6,
21 2010) Supports defendant's claim that his sixth amendment right
22 to confront and cross-examine witnesses was violated by the
23 absence of the employee of Redflex that processed the violation
24 data, photographs and video which resulted in the issuance of
25 the subject citation. The facts presented in *Chikosi* are readily
26 distinguishable from those presented here. In *Chikosi*, Officer
27 Rowe (who did not testify) performed the accuracy test on the
28 breathalyzer which was used to determine the defendant's Blood-

1 Alcohol level. Officer Rowe made a record of the verification
2 test. Officer Nunley testified that he too was qualified to
3 perform the same test that Rowe performed and was qualified to
4 use the machine to perform breath tests on DUI suspects. Also, a
5 forensic alcohol analyst testified as to the accuracy of the
6 breathalyzer. The record made by Rowe was admitted into evidence
7 to show that the machine was operating correctly at the time the
8 Officer Nunley used it to test the defendant's breath. The
9 document produced by Rowe was admissible because it was not used
10 to directly establish defendant's blood alcohol level, only to
11 prove that the machine was working correctly. Here, we have
12 unsworn photos, video and data that were prepared by a third
13 party, independent contractor for the sole purpose of proving
14 the defendant's guilt at trial. The circumstance presented here
15 are even less trustworthy than the sworn affidavits of the lab
16 analysts which were prepared for the sole purpose proving the
17 defendants guilt at trail in *Melendez-Diaz*. (*Melendez-Diaz v.*
18 *Massachusetts* 129 S.Ct. 2527) Just like the lab analysts in
19 *Melendez-Diaz*, this defendant's sixth amendment right to
20 confront and cross-examine witnesses was violated by the failure
21 of the People to make available for confrontation and cross-
22 examination the persons who obtained and processed the photos,
23 video and data that was used to incriminate him. The processing
24 of the incident information, and search of the DMV records to
25 determine who the vehicle is registered to is the evidence in
26 this case; it is not peripheral to the case and cannot be deemed
27 to be "collateral facts" that do not speak to the defendant's
28 guilt or innocence. The defendant has the constitutional right

1 to confront and cross-examine the Redflex employee who processed
2 the evidence in this case. This as yet anonymous person or
3 persons had their fingers on the keyboard of the computer that
4 manipulated the photos to at least some extent, and could have,
5 either by mistake or design, altered the data in such a way as
6 to alter the outcome of this case. The sixth amendment is
7 clearly implicated here.

8
9 BUSINESS RECORDS

10
11 Evidence Code §1280 cannot be applied to the evidence
12 provided to the Santa Ana Police Department, as the Redflex
13 employees are not public employees or officers, agents or
14 employees of a public entity, and therefore do not operate under
15 a duty to observe the facts and report them correctly. (See
16 *People v. Baske* 58 Cal.App.3d 775, 780) In determining whether
17 or not Redflex is an agent or employee of the City or acts as an
18 independent contractor, one must first determine the intent of
19 the parties. The intent of the parties can easily be determined
20 by the language of the Santa Ana/Redflex contract. Section 13 on
21 page 12 of that document clearly states that "Contractor shall
22 during the entire term of this Agreement, be construed to be an
23 independent contractor and not an employee of the City. This
24 Agreement is not intended nor shall it be construed to create an
25 employee-employer relationship, a joint venture relationship, or
26 to allow City to exercise discretion or control over the
27 professional manner in which Contractor performs the services
28 (See Copy of Contract, attached) (See *Toyota Motor Sales U.S.A.
Inc v. Superior Court (Lee et al. Real Parties in Interest)* 220

1 Cal.App.3d 864, 873) In applying the test set out in the
2 Restatement Second of Agency section 220 and adopted by the
3 court in *Toyota Id.*, one must conclude that Redflex is an
4 independent contractor. As stated above, that is the
5 relationship established by the terms of the contract.

6
7 However the extent of control which Santa Ana may exercise
8 over the details of the work performed by Redflex is minimal.
9 Santa Ana does not choose which employees of Redflex actually
10 perform the processing of incident information. (In fact,
11 neither Officer Fratus, nor the Redflex employees who testified
12 at trial could name the employees at Redflex who processed the
13 incident data in this case.) The City does not oversee the
14 details of the work done to install or maintain the system
15 equipment, hardware or software either at the intersection or at
16 the Redflex facility in Phoenix, AZ. At most, the City provides
17 a set of "business rules" for screening incident data which it
18 expects Redflex employees to follow while processing incidents.
19 However, given that no one knows which employee processed any
20 given incident; there clearly is no accountability for
21 malfunctions or malfeasance.

22
23 The work of Redflex clearly is a distinct occupation or
24 Business. The City of Santa Ana is a government agency which
25 includes a Police Department charged with law enforcement
26 duties. Redflex on the other hand is in the business of
27 development, installation and operation of technology for the
28 sole purpose of collecting evidence to be used in the
prosecution of traffic infractions. The City does not develop,

1 install or operate the equipment, which is a separate and
2 distinct occupation and business from that of the City.

3
4 In the Redflex facility in Phoenix AZ, the work of the
5 Redflex employees is done by specialists, outside the direct
6 supervision of the City. The City has no supervision over the
7 work done by any Redflex employee in Phoenix or in the field no
8 matter what their occupation or role in the operations of
9 Redflex; other than having supplied the business rules for the
10 screening of incident data.

11
12 The City of Santa Ana does not possess the skills required
13 to develop the hardware and software technology employed by
14 Redflex.

15
16 The City does not supply any of the instrumentalities,
17 tools, or the place of work for the persons doing the work of
18 Redflex. All of these are supplied by the independent
19 contractor, Reflex.

20
21 The business of development, installation and operation of
22 technology used by Redflex to gather the evidence in these cases
23 is not part of the regular business of the City. However Redflex
24 performs these functions for a large number of cities in
25 California and, in fact, world wide. This is the regular
26 business of Redflex.

1 However, the most important factor in determining whether
2 Redflex is an agent or an independent contractor is whether the
3 employer has the right to terminate the services of the employee
4 whenever he sees fit to do so. (*Toyota Id.* at 875) Here again,
5 we look to the terms of the contract. Section 21 of the contract
6 states that either party may terminate the relationship for
7 cause if either party commits a material breach of the
8 agreement. This does not constitute an "at will" employment, and
9 thus Redflex cannot be considered an employee or agent of the
10 City.

11
12 Also, Officer Bell had no personal knowledge of the
13 citation specific facts stated in the "Declaration of Custodian
14 of Records" prepared by Redflex, and he did not know some of the
15 specific facts stated in the "Declaration of Custodian of
16 Records" relating to, for example, the average number of
17 incidents recorded per day which Redflex uses to determine if
18 the citations issued on the date of this alleged violation falls
19 within the number required for the incident to be deemed valid.
20 Therefore, Officer Bell's testimony fell short of that necessary
21 to lay a foundation for the evidence presented and could not be
22 deemed sufficient to be a "qualified witness" within the meaning
23 of Evidence Code §1280. To this, add the fact that all of the
24 evidence collected by Redflex was prepared in anticipation of
25 litigation, and it is clear that none of the evidence can
26 qualify for admissibility under the Government Records exception
27 to the hearsay rule.

1
2
3 CONCLUSION

4 The court should find that each of the People's exhibits is
5 not admissible evidence in this case. The witnesses lacked
6 sufficient personal knowledge of the facts specific to this case
7 to lay a foundation for the admissibility of the citation, the
8 photographs, video, and the Declaration of Custodian of Records.

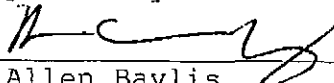
9 Also, Officer Bell's testimony was not sufficient to
10 authenticate the documents, photographs and video presented as
11 evidence in this case. All the witness could say is that the
12 digital images didn't look like they had been altered. All this
13 proves is that if someone (or something) altered the images they
14 did a good job of it.

15
16 Admitting the people's exhibits would violate the
17 defendant's sixth amendment right to confront and cross-examine
18 witnesses, as the un-named Redflex employees who obtained and
19 processed the evidence in this case were not available at trial.

20
21 Defendant further requests that the Court provide
22 written findings as to each, if any grounds are found for
23 admissibility of any of the contested documents.

24
25
26 Date: 7-21-10

27 Respectfully submitted,

28 
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