

● ORIGINAL ●

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

JUN 09 2010

ALAN CARLSON, Clerk of the Court

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

*J. KELLY*

Attorney for Defendant

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

10 PEOPLE OF THE STATE OF  
11 CALIFORNIA

12 PLAINTIFF  
13 v.

14 [REDACTED] CALHOON

15 DEFENDANT

) Case No. SA151929PE  
)  
) DEFENDANT'S MEMORANDUM OF LAW  
) IN SUPPORT OF MOTIONS IN  
) LIMINIE TO EXCLUDED EVIDENCE  
) DUE TO:  
) 1. FAILURE TO COMPLY WITH  
) SUBPOENA DUCES TECUM  
)  
) 2. FAILURE TO COMPLY WITH  
) EVIDENCE CODE REQUIREMENTS  
)  
)  
)

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20 TO THE ABOVE-ENTITLED COURT:

21  
22 The defendant, by and through his attorney, respectfully  
23 submits this memorandum of law in support of his motions in  
24 limine to exclude evidence due to failure to properly comply  
25 with his subpoena duces tecum.

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27 -I-

28 FAILURE TO COMPLY WITH SUBPOENA DUCES TECUM

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1  
2 The defendant respectfully requests that this court --  
3 based upon the failure to comply with a timely served subpoena  
4 duces tecum [hereinafter "SDT"] - order the exclusion of  
5 subpoenaed trial evidence, as a reasonable sanction for such  
6 failure to comply in this automated red light enforcement system  
7 prosecution [hereinafter "AES"].  
8

9 The subpoenaed evidence and related testimony should  
10 thereby be excluded from evidence based upon denial of state and  
11 federal Constitutional guarantees and Penal Code rights and  
12 protections afforded the defendant herein, including but not  
13 limited to those rights stated in California Constitution's  
14 Article 1, Sections 15 and 24, Penal Code §§ 1326, 1328 and  
15 1331, Penal Code § 166(a)(4) [a misdemeanor], Code of Civil  
16 Procedure § 1209(a)(3) and (5) [contempt], and Vehicle Code §  
17 40901, *inter alia*, and authorities cited herein, relating to the  
18 right to subpoena and failure to comply with the subpoena.  
19

20 A. A TRAFFIC INFRACTION PROSECUTION IS A CRIMINAL MATTER  
21

22 Penal Code § 16 defines Crimes: kinds, as follows:  
23

24 "Crimes and public offenses include:

- 25 1. Felonies;  
26 2. Misdemeanors; and  
27 3. Infractions." [Emphasis added.]  
28

1  
2 Penal Code § 17(a) further defines crimes as follows:

3 "(a) A felony is a crime which is punishable with  
4 death or by imprisonment in the state prison. Every other  
5 crime or public offense is a misdemeanor except those  
6 offenses that are classified as infractions. [Emphasis  
7 added.]  
8

9 Penal Code § 19.7 is entitled, as follows, and states in  
10 relevant part:

11 "§19.7. Application of misdemeanor-related laws to  
12 infractions.

13 "Except as otherwise provided by law, all provisions of law  
14 relating to misdemeanors shall apply to infractions including,  
15 but not limited to, powers of peace officers, jurisdiction of  
16 courts, periods for commencing action and for bringing a case to  
17 trial and burden of proof." [Emphasis added.]  
18

19 Vehicle Code § 40901, entitled "Trials; infractions; rules"  
20 states, in relevant part, at subdivision "c", as follows:

21 ". . . the court shall inform the defendant in writing of  
22 [a] the nature of the proceedings and [b] of his or her right to  
23 confront and cross-examine witnesses, [c] to subpoena witnesses  
24 on his or her behalf and [d] to hire counsel at his or her own  
25 expense." [Bracketed letters and emphasis added.]  
26

27 Subdivision "d" of Vehicle Code § 40901 is quoted, in  
28 relevant part, as follows:

1  
2 ". . nothing contained herein shall be interpreted [by the  
3 court] to permit the submission of evidence other than in  
4 accordance with the law. . . [and] to provide for trials in  
5 accordance with the law." [Emphasis and parenthetical phrases  
6 added.]

7  
8 B. SANCTIONS DUE TO FAILURE TO COMPLY WITH THE SUBPOENA

9  
10 9 Failure of the City of Santa Ana, [hereinafter "CITY"] to  
11 comply with the timely served subpoena duces tecum ["SDT"] in  
12 this AES prosecution would deny the defendant "due process",  
13 "compulsory process of law", effective "cross-examination and  
14 confrontation" and the "effective assistance of counsel" to  
15 which he is constitutionally entitled, *inter alia*. [California  
16 and Federal Constitutions.]

17  
18 The CITY was timely served on April 14, 2010 respectively,  
19 with the aforementioned SDT, for compliance on or before April  
20 19, 2010 pursuant to Evidence Code § 1560(b)(1), *inter alia*,  
21 requiring the Custodian of Records to deliver the subpoenaed  
22 items to the court in a seal envelope within five (5) days of  
23 service of the SDT.

24  
25 Not only is there a likely failure to properly comply with  
26 the SDT, there was no motion to quash the SDT, nor proper  
27 declaration from the CITY's supplier/manufacture of the CITY's  
28 automated red light enforcement system [hereafter "AES"], under

1 penalty of perjury, from the Custodian of Record pursuant to  
2 Evidence Code § 1560-1561, et seq, *inter alia*.

3  
4  
5 1. EXCLUSION: Given the People's and the CITY's inactions  
6 in this case, this Court should exclude the testimony and  
7 evidence from or by any witness on behalf of whose discovery  
8 and/or SDT compliance was not timely revealed  
9 informally/formally by the People. The defendant's requests  
10 produced little substantive results. [Penal Code § 1054.5(b) and  
11 (c).]

12  
13 Said exclusion or preclusion of all testimony or evidence,  
14 derived therefrom, who were purportedly involved in the  
15 investigation(s) relevant hereto, is proper. This is due since  
16 the preclusion sanction is supported by a showing of willful and  
17 deliberate discovery abuse patently calculated to or having the  
18 effect to obtain a tactical advantage at the pretrial and/or  
19 trial proceedings, *inter alia*.

20  
21 2. DISMISSAL: Also, given the People's and the CITY's  
22 actions in this case, the Court could dismiss this matter. In  
23 *People v. Brophy* (1992) 5 Cal.App.4th 932, the Court of Appeals  
24 held, as follows:

25 "(6) Criminal Law § 140--Discovery--Sanctions for Prosecution's  
26 Noncompliance.

1 Dismissal of charges is proper as a sanction for the  
2 prosecution's refusing to comply with a discovery order, when  
3 the effect of the refusal is to deny the defendant's right to  
4 due process."

5  
6 Dismissal is proper as a sanction for refusing to comply with a  
7 discovery order and/or SDT when the effect of such refusal is to  
8 deny defendant's right to due process. [People v. Broome (1988)  
9 201 Cal.App.3d 1479, 1497; Dell M. v. Superior Court (1977) 70  
10 Cal.App.3d 782, 786.] What has occurred in this matter has been  
11 fundamentally unfair. [Penal Code § 1054.5(b) and (c).]  
12 The functions of sanctions are to ameliorate the disadvantages  
13 caused to the wronged party by the discovery violation and to  
14 punish the offending party. [People v. Gonzales (1994)22  
15 Cal.App.4th 1744, 1757.]

16  
17 C. ADVERSE INFERENCE OR ADVERSE PRESUMPTION DUE TO  
18 FAILURE TO COMPLY WITH THE TIMELY AND PROPERLY  
19 SERVED SUBPOENA DUCES TECUM  
20

21 Based upon the failure to comply with the SDT [subpoena duces  
22 tecum] for records in the possession of the CITY, this court  
23 should draw an adverse inference or an adverse presumption as to  
24 the specific items subpoenaed that were not timely or properly  
25 produced.

26  
27 Furthermore, this court should not allow hearsay testimony by  
28 the officer to prove the content of the items specifically

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1 subpoenaed, which were not produced. This court should draw an  
2 adverse inference that directly or indirectly relates to the  
3 items specifically subpoenaed.

4  
5 Please note that the failures to comply with the SDT directly  
6 impacts the defendant's rights to [1] COMPULSORY PROCESS  
7 (subpoena power of the courts), [2] CONFRONTATION, [3] EFFECTIVE  
8 ASSISTANCE OF COUNSEL and [4] DUE PROCESS, *inter alia*.

9  
10 D. CASE AUTHORITY

11  
12 People v. Ellis (1995) 33 Cal.App.4th Supp. 25, 29, is a traffic  
13 infraction published opinion, relied upon by the Appellate  
14 Division of the Los Angeles Superior Court. The Appellate  
15 Department is quoted, as follows:

16  
17 "Allowing a defendant to attack the adequacy [of the  
18 automated red light enforcement systems and statutes]  
19 is an empty right if the document is not available for  
20 his or her use at trial." [Emphasis added] [Ellis,  
21 supra.] [Parenthetical phrase added.]

22  
23 Allowing a defendant herein to attack or question the propriety  
24 of [A] the legality of the requirements pursuant to the enabling  
25 statute, to wit, Vehicle Code § 21455.5 and [B] the requirements  
26 of Evidence Code requirements and state and federal  
27 constitutional requirements of "Confrontation", "Effective  
28 Assistance of Counsel", "Due Process" and effective "Cross

1 Examination", *inter alia*, are two of the very bases for the  
2 issuance of the SDT and the defendant's defense in this matter.  
3 By failing to comply with the SDT, the CITY will have caused  
4 defendant's constitutional and statutory rights to  
5 "compulsory process", "due process", "confrontation and cross-  
6 examination" and the "effective assistance of counsel" to be  
7 empty rights within the meaning of *Ellis, supra, inter alia*.

8  
9 Failure to comply with the timely and properly served SDT  
10 is also a violation of Penal Code §§ 1326, 1328 and 1331  
11 [contempt], Penal Code § 166(a)(4) [a misdemeanor], Code of  
12 Civil Procedure § 1209(a)(3) and (5) [contempt], Code of Civil  
13 Procedure §~ 1991 and 1992, and Vehicle Code § 40901, *inter*  
14 *alia, supra*.

15  
16 E. RIGHT TO PRESENT DEFENSE EVIDENCE

17  
18 A defendant in a criminal prosecution, such as this infraction  
19 trial, has the right to present defense evidence, [a] which  
20 negates an element of the charged crime, [b] which is a basis of  
21 an affirmative defense, [C] which impeaches a witness and/or  
22 declarant and/or [d] which negates any rebuttable presumption.

23  
24 In presenting such defense evidence, the defendant is  
25 constitutionally entitled

26  
27 [a] to the "Compulsory Process" of the law;

28 [b] to the "Effective Assistance of Counsel";



1 [c] to effective "Confrontation" and cross-examination  
2 of the witness(es) and evidence against him; and,  
3 [d] to "Due Process" of law.  
4 [California Constitution, Articles 1, §§15 and 24,  
5 *inter alia.*]

6  
7 -II-

8 THE CUSTODIANS OF RECORDS MUST EXECUTE A PROPER AFFIDAVIT BY THE  
9 CUSTODIAN OF RECORDS IF NO DEFENSE OBJECTION IS MADE PURSUANT TO  
10 EVIDENCE CODE § 1271(c)  
11

12 A. EVIDENCE CODE § 1560-1562

13 The affidavit by the custodian of records [or declaration (see  
14 Code of Civil Procedure § 2015.5)] accompanying the documents  
15 must be signed by the custodian of the records and must affirm  
16 that: [1] "The affiant is the duly authorized custodian of the  
17 records"; [2] The records are "true copies of the records  
18 described in the subpoena;" [3] "The records were prepared by  
19 the personnel of the business in the ordinary course of business  
20 at or near the time of the act, condition or event;" [4] The  
21 identity of the records; and [5] A description of their mode of  
22 preparation. [Evidence Code section 1561 (a) (1-5).]  
23

24 The last two requirements of § 1561 were added in 1996  
25 after *Taggart v. Super Seer Corp.* (1995)33 Cal.App.4th 1697  
26 ruled that the failure to included all of the elements of the  
27 business records exception rendered otherwise properly  
28 subpoenaed records inadmissible.

1  
2 B. EVIDENCE CODE § 1561

3 Evidence Code § 1561 is quoted, in relevant part, as  
4 follows:

5 "(a) The records shall be accompanied by the affidavit  
6 of the custodian [of records]. . . , stating in substance  
7 each of the following:

8 (1) The affiant is the duly authorized custodian of  
9 the records... and has authority to certify the  
10 records.

11 (2) The copy is a true copy of all the records  
12 described in the subpoena duces tecum.

13 (3) The records were prepared by the personnel of the  
14 business in the ordinary course of business at or near  
15 the time of the act, condition, or event.

16 (4) The identity of the records.

17 (5) A description of the mode of preparation of the  
18 records. [Emphasis and parenthetical phrase added.]  
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20 -III-

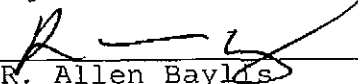
21 CONCLUSION

22  
23 For the reasons cited above and for additional argument that may  
24 be made at the trial of this automated photo red light  
25 enforcement [AES] matter, counsel for defendant PETER  
26 G [REDACTED] respectfully moves [1] for the exclusion of any  
27 evidence and/or testimony and [2] for dismissal.. . due to  
28 either or both [A] the failure to comply with the timely served

1 SDT and [B] the failure to comply with the California Evidence  
2 Code regarding both documentary and testimonial evidence in the  
3 automated red light enforcement system prosecution.  
4

5 Dated June 9, 2010

Respectfully submitted:

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7 By: R. Allen Baylis  
8 Attorney for Defendant  
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