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8 ABRAM G [REDACTED]

FILED
SAN MATEO COUNTY

OCT 28 2010

Clerk of the Superior Court
By [Signature]
DEPUTY CLERK

9 SUPERIOR COURT, STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF SAN MATEO
11 APPELATE DIVISION

12 PEOPLE OF THE STATE OF CALIFORNIA,
13 Plaintiff and Respondent,
14 vs.

APPEAL NO 5207
Case No.455847
APPELLANT'S OPENING BRIEF

15 ABRAM G [REDACTED]
16 Defendant and Appellant

Date: TBD
Time TBD
Appellant Dept. TBD

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19 **CASE SUMMARY:** On April 9, 2010, an alleged violation of CVC §
20 21453 (c), a photo enforced red-light camera violation occurred. The citation was
21 issued to Abram G [REDACTED] who is not the registered owner of the vehicle. This case
22 came on for trial in the Traffic Department in the above-mentioned court on July
23 21, 2010, before Commissioner Susan Greenberg.
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28 G [REDACTED] Opening Brief

1 Defendant appeared through counsel. Officer Pangalos was the only witness
2 for the People. He testified to the following facts. That San Mateo Police
3 Department has a contract with the City of Millbrae to issue red light camera tickets
4 in that city. The timing of the yellow light in this case is three seconds, which meets
5 Cal Trans standards. Warning signs were posted at this intersection on November
6 6, 2009 in accordance with CVC 21455.5(b). He was the issuing officer in this case.
7

8 He testified then testified to his training. In October of 2008 he received 24
9 hours of in-house training with the City of Millbrae. In September of 2008 he
10 received training with ATS. In November of 2007 he attended a seminar and in
11 October of 2008 he attended a second seminar. On August 26, 2009 he attended a
12 one-day training at ATS in Arizona. In January 2010 he had a training with a
13 technician from ATS. On June 29, 2010 he received additional training.
14

15 He stated that the information and documents presented to the court were
16 produced by himself. He downloaded the information from a secure data vault and
17 line from ATS, which he cannot manipulate. The data was secured in a secure
18 cabinet until today. The camera has a signature and data code. The information is
19 transmitted through a VPN and ATS checks this for authenticity. The information is
20 then stored in an electronic vault. He can only darken, lighten, crop and zoom the
21 image.
22

23 This red light violation occurred on Southbound 101 and Millbrae in the
24 City of Millbrae. Pages 1 and 2 contain the Notice to Appear. Page three is the
25 Statement of Technology. The following page is 4 photos from April 9, 2010 at
26 11:05 a.m. The driver was identified as Abram G [REDACTED] through his Cal photo. He
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1 is not the registered owner of the vehicle. He was cited for a violation of CVC
2 21453(a).

3
4 Counsel then cross- examined Officer Pangalos. Counsel asked if he knew
5 who from ATS had originally processed the photographs. He stated that he did not
6 know. Counsel asked if the person who signed the Statement of Technology,
7 Raymond Pedrosa was present in court to testify to the document. He replied no.
8 Counsel asked whether any employee of ATS was present to testify to the
9 technology and or the business practices of ATS. He responded in the negative.
10 Counsel asked several questions about Officer Pangalos' training at ATS. Counsel
11 questioned whether the registered owner G [REDACTED] Y [REDACTED] as originally issued
12 the citation. He stated that this was correct but he didn't remember if he was the one
13 who issued the original citation. Counsel questioned whether Mr. Y [REDACTED] was the
14 one who signed the affidavit of non-liability. He stated that he verified the signature
15 with comparing it to cal photo. Counsel requested that the word verified be stricken
16 from the record. Counsel asked Officer Pangalos whether he had ever met with Mr.
17 Y [REDACTED] or whether he witnessed him signing the affidavit of non-liability and he
18 responded no. Counsel asked whether Mr. Y [REDACTED] was present in court to be cross-
19 examined as to the document he allegedly signed. Officer Pangalos responded no.
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1 **MOTIONS:**

2 Counsel had no evidence to present to the court except to point out that Mr.
3 Y [REDACTED] and Mr. G [REDACTED] resembled one another. Counsel argued that the
4 defendant had a Sixth Amendment right under *Melendez-Diaz* to cross-examine all
5 witnesses against him, which in this case would have been the employees of ATS
6 who were involved in the issuance of this citation in addition to Mr. Y [REDACTED] who
7 allegedly turned the defendant's name in to the Millbrae Police Department.
8 Counsel made Hearsay and Foundational objections to the court packet. Counsel
9 argued that the recent Orange County decision in *People vs. Khaled* has found that a
10 police officer who may have had training was not a qualified witness under EC
11 1271 to testify to the business practices of a red light vendor.

12 **VERDICT AND SENTENCE:**

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14 The court found the defendant guilty and imposed a fine of \$446.00.
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16

17 **ARGUMENT:**

18 **QUESTIONS PRESENTED:**

- 19 **1. WHETHER THE COURT WAS IN ERROR TO DENY DEFENDANT'S**
20 **FOUNDATION AND HEARSAY OBJECTIONS REGARDING THE**
21 **REDFLEX PACKET AND DVD.**

22 The complaining witness, Officer Pangalos, has offered into evidence a
23 court packet, which did not contain an affidavit of non-liability signed by the owner
24 of the vehicle, who was not called to testify at the trial. The officer stated he did not
25 know who issued the original citation, nor did he know if it was Mr. Y [REDACTED] who
26 signed the affidavit of non-liability. The packet contained photographs, certain
27

28 G [REDACTED] Opening Brief

1 maintenance and other camera records were offered, all purportedly to establish that
2 the defendant allegedly failed to stop for a red arrow. However, the People did not
3 call to testify any representative from ACS, the company that provides the camera
4 equipment and technology, to lay a foundation for the admissibility of the four
5 photographs, the DVD or the other documents. A custodian of records or other
6 qualified company representative would be able to testify to the technology, where
7 the equipment is placed, the procedures for operating the system, the procedures for
8 maintaining the system and where records of the company are stored. Only a
9 company employee, i.e. custodian of records, could testify as to where ACS set up
10 their equipment, how they operate and maintain it, and the procedures followed to
11 cause a Notice to Appear to issue. Only an ACS employee can testify to as to
12 whether or not the subject packet and DVD were created in the "normal course of
13 business" at or near the time of the incident.

16 In the case at hand no employee from ACS offered any testimony that he or
17 she is familiar with the operation of the cameras, computers and maintenance,
18 including troubleshooting problems. An ACS employee could address how the
19 image was transmitted to a location in Phoenix for processing, and then
20 retransmitted to the Millbrae Police department for the preparation of the "court
21 package". No ACS employee was present to testify how the image was downloaded
22 into a computer, and how that image may have been subjected to manipulation
23 within the computer to add information, or enhance or enlarge the image, and to add
24 information to the top center, and information as to the elapsed time of the yellow
25 and red lights.

1 Officer Pangalos could only testify that he signed a Notice to Appear based
2 on information given to him by ACS, and that he reviewed the information
3 collected, assembled and enhanced by others.
4

5 **1. WAS DEFENDANT DENIED HIS RIGHT TO CROSS-**
6 **EXAMINE WITNESS PURSUANT TO THE SIXTH**
7 **AMENDMENT**

8 In both the *Crawford v. Washington*, (2004) 541 U.S. 36 and *Melendez-Diaz*
9 *v. Massachusetts* (2009) 129 S.Ct. 2527 cases the Supreme Court addressed
10 defendants' right under the Sixth Amendment's Confrontation Clause in *Melendez-*
11 *Diaz v. Massachusetts* (2009) 129 S.Ct. 2527. This case involved the admission of
12 certificates of analysis sworn by analysts at state laboratories, without requiring in
13 court testimony from said analysts. The question presented to the court was
14 "whether the affidavits are 'testimonial,' rendering the affiants 'witnesses' subject
15 to the defendant's right of confrontation under the Sixth Amendment.
16

17 The court using a *Crawford, supra*, analysis found that the documents were
18 "testimonial" evidence and as such were inadmissible absent the opportunity to
19 cross-examine the witness. Analysis of the *Melendez-Diaz* case has been stated as
20 follows:
21

- 22 "1. analysts' certificates of analysis were affidavits within core class of
23 testimonial statements covered by Confrontation Clause
24 2. analysts were not removed from coverage of Confrontation Clause on theory
25 that they were not "accusatory" witnesses;
26 3. analysts were not removed from coverage of Confrontation Clause on theory
27 that they were not conventional witnesses
28 4. analysts were not removed from coverage of Confrontation Clause on theory
that their testimony consisted of neutral, scientific testing

- 1 5. certificates of analysis were not removed from coverage of Confrontation
- 2 6. defendant's ability to subpoena analysts did not obviate state's obligation to
- 3 produce analysts for cross-examination." *Id.*, at 2527, 129 S.Ct. 2527.

4 "Business and public records are generally admissible absent confrontation, not
5 because they qualify under an exception to the hearsay rules but, because having
6 been created for the administration of an entity's affairs and not for the purpose of
7 establishing or proving some fact at trial, they are not testimonial. Whether or not
8 they qualify as business or official records, the analysts' statements here prepared
9 specifically for use at petitioner's trial were testimony against petitioner and the
10 analysts were subject to confrontation under the Sixth Amendment" *Id.*, at 2540, 129
11 S. Ct. 2527. In the case at hand, ACS has created, and maintains, a system of
12 cameras and computers that produce photographs, DVDs and documents that are
13 then used to charge defendant as being a traffic violator. No ACS employee,
14 including a custodian of records, ever appeared at the trial: not the camera
15 technician(s) who actually installed the camera/computer system, not the employee
16 who maintain said system, not the person who processes the images into the packet
17 introduced into evidence and which provide the sole basis for a conviction of the
18 defendant, and not the employee who determined the system was working, and that
19 the defendant had violated the law. Although someone, like the camera technician,
20 may not be an "accusatory" witness, nonetheless that person's presence is still
21 required under the Confrontation Clause. The same argument applies to the camera
22 technician not being a "conventional" witness. The technician's findings may be
23 seen as neutral and scientific but these facts do not remove it from the protections of
24 the Confrontation Clause. And despite any resemblance to business or official

1 records, the presence of the technician as a witness is required under *Diaz-*
2 *Melendez*.

3 Without the right to cross-examine these witnesses there is no way to
4 determine whether the pictures are enhanced, whether the system was functioning
5 properly, who at ACS may have processed the images, or who maintained the
6 system, and who at ACS determined that the subject DVD and photos constituted a
7 violation of C.V.C. § 21453(c). Defendant has a right to cross-examine these
8 witnesses pursuant to the Sixth Amendment and the Court's rulings in *Diaz-*
9 *Menlendez* and *Crawford*, supra. Defendant has been denied that right.

11 The California Court of Appeals in, *People v. Isaiah*, (2004) 118
12 Cal.App.4th. 1396, expanded on the definition of what testimonial hearsay evidence
13 is by stating that the pertinent question is whether an objective observer would
14 reasonably expect the statement to be *available for use* in a prosecution (Id. at p.
15 1402).

16 It is indisputable that the records contained in the ACS Camera Packet are
17 hearsay. It is also clear that the exclusive reason these records are created and kept
18 is for the use in the prosecution of alleged red light violators. The defendant had a
19 right to cross-examine the technicians who determined he had violated CVC
20 Section 21453(a).

21 We emphasize that the only purpose for the existence of the ACS Cameras
22 is for the criminal prosecution of red light runners. ACS generates all of the
23 documents contained in the ACS Packet with the knowledge that in every single
24 case they may be needed in court for the prosecution of the alleged violator.
25 Furthermore, every document contained in the Red Light Camera Packet is sent to
26 the Millbrae Police Department who in turn reviews the documents, in this case
27

1 Officer Pangalos, and issues a citation for the prosecution of the alleged violators.
2 That is sole purpose for this information, i.e. prosecutorial.

3 Defendant's Sixth Amendment right to cross-examine all witnesses against
4 him, in this case the citing officer, was violated.

5 Defendant's right to confront all witness against him was also violated when
6 he was given no opportunity to cross-examine the person who signed the affidavit
7 of non-liability that nominated him as the driver of the vehicle.

8

9 **II. WHAT IS IMPACT OF ORANGE COUNTY APPELLATE**
10 **DECISION, *PEOPLE V. KHALED*, ON ADMISSABILITY OF THE**
11 **RED LIGHT CAMERA PACKET?**

12 The case before the court deal with the same issues addressed in
13 *People v. Khaled*, (2010) 186 Cal.App.4th 1, i.e. the admissibility of certain
14 evidence in photo enforced red light citations. The facts are similar in that the police
15 department contracts with a private vendor. The vendor's equipment captures
16 photos, and then processes these items. The captured images, along with other
17 information, are then forwarded to the appropriate police department for processing.
18 The police issue a citation to the registered owner of the vehicle.

19 In the *Khaled* case, a police officer was the only witness for the people. He
20 testified that, "sometime in the distant past, he attended a training session where he
21 was instructed on the overall workings of the system at the time of the training. *Id*
22 *at p. 2.*

23
24 No custodian of records for the camera company was present in court to
25 testify. Officer Berg "was unable to testify about the specific procedure from the
26 programming and storage of the system information." *Id at p. 3.*

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28

1 In the current case, Officer Pangalos presented the case for the People. No
2 representative from ATS was present to answer questions regarding that company's
3 business practices. Officer Pangalos presented the court with a document entitled
4 "Officer's Declaration." This document gives information regarding the ATS
5 camera system, in addition to details in the camera packet.

6 The *Khaled* court found that:

7
8 "To be more specific, the photographs contain hearsay evidence concerning
9 the matters depicted in the photographs including the date, time, and other
10 information. The person who entered that relevant information into the camera-
11 computer system did not testify. The person who entered that information was not
12 subject to being cross-examined on the underlying source of that information. The
13 person or persons who maintain the system did not testify. No one with personal
14 knowledge testified about how often the system is maintained. No one with
15 personal knowledge testified about how often the date and time are verified or
16 corrected. The custodian of records for the company that contracts with the city to
17 maintain, monitor, store, and disperse these photographs did not testify. The person
18 with direct knowledge of the workings of the camera-computer system did not
19 testify. Instead, the prosecution chose to submit the testimony of a local police
20 officer, Santa Ana Police Officer Alan Berg." *Id* at p. 1.

21 Similar to the *Khaled* case, the person who entered the relevant information
22 into the computer system did not appear at the trial in this matter to testify. The
23 statement of Technology signed by Raymond Pedrosa of ATS was not present in
24 court to testify to the statement contained therein. Officer Pangalos cannot tell the
25 court whether the documents prepared by Redflex, Inc. were prepared in the normal
26 course of business, no matter what training he may have received. He is not an
27 employee of ATS, nor is he a custodian of records for that company. Someone from
28 ATS inspected the photos before they were sent to the Millbrae Police Department.
That person was not present in court to testify and it is likely that Officer Pangalos
would not be able to provide the name of that person. Officer Pangalos does not

1 know who actually processed the subject images, and therefore it is not possible to
2 cross-examine that person.

3 Just as in the *Khaled* case “The person, or persons, who maintain the system
4 did not testify.” at this trial. None of the technicians from ATS were present for
5 cross-examination as to the maintenance of the camera systems. Although Officer
6 Pangalos may have received several hours of training from ATS, he cannot be
7 cross-examined regarding the technician’s duties at that specific intersection
8 Defense argues that *Khaled* requires those individuals to be present in order to lay a
9 foundation, and to fall within an exception to the hearsay evidence rule

10 We believe that *People vs. Beckley* 2010 WL 2293410 (Cal.App.2 Dist.), a
11 recent California Supreme Court case which addresses the issue of the admissibility
12 of digital photographs into evidence, applies to photo enforced red light violations
13 as well. According to E. C. §§ 250, 1401(a), “A photograph is a ‘writing’ and
14 ‘authentication of a writing is required before it may be received into evidence.’”
15 The *Beckley* court, citing *People v. Bowley* (1963), 59 Cal.2d 835) held “It is well
16 settled, that the testimony of a person who was present at the time a film was made
17 that it accurately depicts what it purports to show is a legally sufficient foundation
18 for its admission into evidence. And that authentication of a photograph ‘may be
19 provided by the aid of expert testimony, as in the *Doggett* case, although there is no
20 one qualified to authenticate it from personal knowledge. In *People v. Dogget*
21 (1948) 83 Cal.App.2d 405, the people produced evidence of when and where the
22 picture was taken and that the defendants were the persons committing the crime, in
23 addition to having a photographic expert testify that the picture was not a composite
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1 and had not been faked.” The *Beckley* court dealt with a MySpace photograph
2 allegedly depicting the defendant flashing a gang sign. There was no testimony
3 from a person with personal knowledge that the photograph truthfully portrayed the
4 defendant flashing the gang sign, and, unlike *Dogget*, no expert testified that the
5 picture was not a composite or faked.” The appeals court found that the images
6 were admitted in error.

7
8 In the present case there is a technician, or technicians, who install the
9 camera. There are technicians who maintain the camera and technicians who repair
10 the cameras. Digital images are taken of the alleged violators. At the trial in this
11 case, no one with personal knowledge of the event depicted in the photo was
12 present to testify. Neither was there testimony from a film expert who could state
13 that the photos offered into evidence had not been tampered with. No one with
14 knowledge of the operation of the camera and computer, and of the process which
15 transfers the images between vendor and the police, was present to testify.
16 Accordingly, appellant argues that the images are inadmissible under *Beckley* as
17 well.
18

1 **CONCLUSION:**

2 No conviction of VC Section 21453(a) can be sustained unless the record
3 contains substantial evidence supporting each element of the charged offense.
4 Absent the Custodian of Records of ACS, or other ACS employees, the entire photo
5 packet and video, and testimony of Officer Pangalos, lacked foundation, were
6 inadmissible hearsay, and violated Defendant's Sixth Amendment right. The
7 People's failure to produce all the witnesses against defendant was a violation of his
8 Sixth Amendment rights. The Appellant respectfully requests this court set aside the
9 judgment of conviction, and dismiss the citation.
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12 DATED: October 27, 2010

Respectfully submitted,

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15 MARLA SOILEAU
16 Attorney for Appellant.
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