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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
JUL 21 2010
ALAN CARLSON, Clerk of the Court
BY: DEPUTY

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

PEOPLE OF THE STATE OF CALIFORNIA PLAINTIFF v. [redacted] CALHOON [redacted] CHAPMAN [redacted] COLLINS JAMES F[redacted] [redacted] GREENE [redacted] SAAVEDRA [redacted] TRUONG DEFENDANTS	) Case Nos. SA151929PE) SA154656PE) SA153758PE) SA154550PE) SA154097PE) SA154608PE) SA152672PE)) RESPONSE TO SANTA ANA CITY' ATTORNEY'S OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY SANTA ANA CITY ATTORNEY AS PROSECUTOR FOR THE PEOPLE OF THE STATE OF CALIFORNIA.) GOVERNMENT CODE §§100; 72193; 26500; 41803.5(a)) PENAL CODE §§ 1424(b); 19.7; 684) Date: July 21, 2010 Time: 1:30 PM Dept. C52

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TO THE ABOVE-ENTITLED COURT:

The defendant in the above-entitled action submits the following in response to the Santa Ana City Attorney's Opposition to Defendant's Motion to Disqualify the City Attorney as Prosecutor for the People of the State of California.

First, the language of Government Code §72193 is clear. Subsection (a)'s reference to "**all such misdemeanors**…" refers to the statement in the previous paragraph "**misdemeanor offenses arising out of violations of state laws**….

There is simply no authority cited by the City Attorney that would suggest that the phrase "all such misdemeanors" refers only to those state law misdemeanors that the City Attorney on an ad hoc basis chooses to prosecute.

The Santa Ana City Attorney in exercising his discretion in attempting to act as prosecutor for the People of the State of California must be neutral and not subject to the influence of a third party. *Hambarian v. Superior Court*, 27 Cal.4th 826. The City Attorney is attempting to act as the public prosecutor in these cases in order to further the interests of a third party (the City of Santa Ana) and not simply in the interest of the People of the State of California. As evidence of this, Defendants submit a true and correct copy of a letter signed by Mr. Ryan O. Hodge and submitted to the California Supreme Court

requesting depublication of *People v. Khaled*, 30-2009-00304893 (Orange County Super. Ct., Ap. Div., filed May 25, 2010). Upon reading the City Attorney's letter to the Supreme Court, it becomes clear that the purpose of the City Attorney's involvement in these cases is to protect the City's interests, not the interests of the People of the State of California. There is nothing different about these seven red light camera cases than the seven cases set for trial in Department C54 this afternoon; except for the fact that these seven defendants are represented by this attorney, who has a proven track record of winning red light camera cases at trial and on appeal.

For all the foregoing reasons, this Court should grant defendant's motion and disqualify the city of Santa Ana's City Attorney as prosecutor for of these alleged violations of state law on behalf of the People of the State of California.

Dated 7-21-10

Respectfully submitted:

By: R. Allen Baylis
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July 2, 2010

VIA FEDERAL EXPRESS

Honorable Ronald M. George, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-7303

Re: *People of the State of California v. [redacted] Khaled*
Superior Court, Orange County, Appellate Division
Case No. 30-2009-304893

To the Chief Justice and the Associate Justices of the California Supreme Court:

Pursuant to California *Rules of Court*, Rule 8.1125(a)(1), the City of Santa Ana respectfully requests that this Court order the opinion certified for publication in the case of *People of the State of California v. [redacted] Khaled*, Superior Court, County of Orange, Appellate Division Case No. 30-2009-304893, a copy of which is attached herewith, not be published on the following grounds:

There was a Lack of Due Process Resulting from an Insufficient Record on Appeal

The Settled Statement on Appeal was drafted by the Appellant alone. As a result, the Appellate Division was presented with a record that did not accurately reflect the testimonial evidence that was presented to the trial court regarding the validity of the City of Santa Ana's automated photo enforcement system. Such a skewed record is not acceptable for accurate review, and it clearly affected the ultimate ruling of the Appellate Division.

The instant matter began on August 2, 2008, when the City's automated traffic enforcement system captured Appellant failing to stop at a red light at the intersection of Seventeenth Street and Tustin Avenue in the City of Santa Ana, in violation of *Vehicle Code* section 21453(a). Subsequently, on August 8, 2008, a Notice of Traffic Violation and Notice to Appear was issued to the Appellant and filed with the Orange County Superior Court.

In preparation for trial, counsel for Appellant served an informal discovery request dated November 10, 2008, on the City of Santa Ana. The Santa Ana City Attorney's Office, as counsel for the Custodian of Records for the Santa Ana Police Department and a real party in interest, responded in writing on November 19, 2008. This response was sent not only to Appellant's counsel but also to the Court.

Thereafter, the matter proceeded to a court trial on April 1, 2009. Santa Ana Police Department Officer Alan Berg was present in court and testified for the People. After hearing testimony from Officer Berg, the court admitted and received the People's exhibits into evidence. At the conclusion of arguments, the Court denied the *Penal Code* section 1118 motion made by the defense, reviewed the photographs and video of the incident, and found the Appellant guilty of violating *Vehicle Code* section 21453(a), as charged in the original citation.

In response, according to the Court Docket, Appellant filed a Notice of Appeal with the court on April 29, 2009. The Court Docket also indicates that Appellant filed a Proposed Statement on Appeal on that same date. *California Rule of Court* Rule 8.901(b) provides that when a notice of appeal of an infraction is filed, the trial court clerk must promptly mail a notification of the file to the parties. However, the City never received notice or actual service of either Appellant's Notice of Appeal or Proposed Statement on Appeal. The Docket also indicates that on May 19, 2009, the Notice of Hearing on Settlement of Statement on Appeal was mailed to Defendant, the District Attorney's Office and defense counsel, but not to the City of Santa Ana. Even though both the Appellant and the court were aware of the response by the City of Santa Ana as a real party in interest, all notices and briefs from both the Appellant and the court were served on the District Attorney, who never made an appearance, and not the City Attorney.

According to the Court Docket, the hearing on the Proposed Statement on Appeal was heard by the trial court on May 29, 2009. However, since the City was not provided notice of the appeal or the hearing, the City was not present. In fact, the District Attorney, technically the prosecutor on the case, did not appear either. As a result, the Court Docket indicates that since there were no parties present, the Appellant's Proposed Settled Statement became the Engrossed Settled Statement without any review or opposition from any other party regarding the accuracy of Appellant's Proposed Statement.

After first becoming aware of the appeal, the City of Santa Ana filed a motion to intervene as Real Party in Interest and requesting a rehearing on the Settlement of Statement of Appeal. However, the trial court never responded to this motion. In fact, the Court Docket does not acknowledge the filing of this motion for rehearing, even though a copy of the City's motion is found in the Clerk's Transcript sent to the Appellate Division.

The City did not receive any further information regarding the subject appeal until September 23, 2009, when the Appellate Division officially served the City of Santa Ana with Notice of Filing Record on Appeal and Notice of Briefing Schedule. In accordance with the Appellate Division's briefing schedule, the City timely filed a Response Brief on November 23, 2009. However, this Appellate Division issued a Minute Order dated December 9, 2009, rejecting the City's filing without prejudice to the making of a motion to appear as real party in interest in this matter. As such, the City again filed a Motion to Intervene as Real Party in Interest and for Rehearing on Settlement of Statement on Appeal. After review of the same, the Appellate Division issued a Minute Order dated February 3, 2010, denying the City's Motion, thus precluding the City from participating in the matter as a real party in interest and preventing a rehearing on the settled statement, which was drafted solely by Defendant without any opportunity for the City to present its objections to the same.

In previous appeals involving the City of Santa Ana's automated photo enforcement citation system, the City Attorney's office received notice, briefing schedules and notification of oral argument. Further, and more importantly, the Supreme Court recognized that the City of Santa Ana Police Department is a Real Party in Interest in a similar case in which the Court and the ticketed driver simply ceased serving the City of Santa Ana with notice of an appeal of an automated red-light photo citation. (*People v. Fischetti*; City of Santa Ana Police Department, Real Party in Interest, 2009 Cal. LEXIS 2544 (Cal., Mar. 10, 2009), amending *People v. Fischetti*, 2009 Cal. LEXIS 1589 (Cal., Feb. 25, 2009). In *Fischetti*, the California Supreme Court specifically amended its order granting the City's petition for depublication by changing the case title and adding the City of Santa Ana Police Department as Real Party in Interest. (*Id.*)

The fact that the Appellate Division decided a case of this nature based on a settled statement created by only a single party makes a sham of the adversarial system. As the United States Supreme Court has noted, the adversarial system is a bedrock principle of the Anglo-American system of justice. "'[Truth],' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.' This dictum describes the unique strength of our system of criminal justice. 'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' *Herring v. New York*, 422 U.S. 853, 862 (1975)." *United States v. Cronic*, 466 U.S. 648, 655 (1984) (footnote omitted).

Here, the outcome of this case is not only of great concern to the City of Santa Ana, but also potentially affects other cities operating such systems. In not being afforded notice of the appeal, Appellant's Proposed Statement on Appeal, or the Hearing for the same, as well as having one Motion for Rehearing ignored by the trial court and another Motion for Rehearing denied by the Appellate Division, the City of Santa Ana

was denied the opportunity to respond to the proposed record on appeal, and was therefore fundamentally denied notice and the opportunity to be heard on a matter that has potential severe consequences for the City of Santa Ana, as well as other cities throughout the state. The failure to allow the City of Santa Ana any opportunity to be heard on the validity of Appellant's Proposed Statement on Appeal allowed the matter to proceed to the Appellate Division with a biased and insufficient record of what was truly presented to the trial court. As such, these failures deprived the City of Santa Ana of due process.

The record is clear that the only submission, either written or oral, regarding the Statement on Appeal delineating the trial court record for the Appellate Division was from the Appellant. Such a one-sided record should never lead to a published opinion, but it is even more egregious in this particular ruling, in which the Appellate Division heavily relied on the Appellant's Statement on Appeal to determine that the evidence presented by the People was foundationally insufficient in this particular case. The City of Santa Ana was fundamentally denied notice and the opportunity to be heard on the trial record, which greatly affected the Appellate Division's ruling in the instant matter. As a result, such a flawed record is not proper for a published ruling.

The Appellate Division Erroneously Ruled that the Evidence was Inadmissible

The photographic and video evidence presented by the People at the time of trial was admissible. The Appellate Division improperly ruled that the photographic and video evidence was inadmissible hearsay. Photographs and video are not statements, and therefore are not hearsay. Pursuant to *Evidence Code* section 1553, "A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent." Essentially, photographs and videos are "demonstrative evidence depicting what the camera sees. They are not testimonial and they are not hearsay." *People v. Cooper*, (2007) 148 Cal.App.4th 731, 746. See also, *People v. Bowley*, (1963) 59 Cal.2d 855, 860, and *People v. Doggett*, (1948) 83 Cal.App.2d 405. Accordingly, no photographic or video evidence should have been precluded as inadmissible hearsay.

The information in the data bar on the photographs, including the date, time, and location of the alleged violation, is also not hearsay. This information is automatically generated by a computer. There is no witness stamping the information into the data bar on the photograph, as suggested by the Appellate Division's ruling. The data bar is encrypted in the photograph by the computer at the time the cameras take the photographs. The software program on the computer maintains the information, runs internal tests to confirm the information is accurate, and automatically encrypts the photographs with the data bar. See, *People v. Hawkins*, (2002) 98 Cal.App.4th 1428. In *Hawkins*, the Court held that the timing of a "computer's clock" is presumed accurate under *Evidence Code* section 1522. The *Hawkins* Court explained that a computer's

internal time and date clock are records of its internal operations and not hearsay because "the Evidence Code does not contemplate that a machine can make a statement." Therefore, the information in the data bar is not hearsay, and no hearsay exception should be necessary to admit the data bar into evidence.

The foundational evidence necessary to admit photographs and videos into evidence depends upon the way in which the photographs and video are presented and used. Photographs and video may be used to supplement oral testimony. However, photographs and video "may also be used as probative evidence of what they depict. Used in this manner they take on the status of independent 'silent' witnesses." *People v. Bowley*, (1963) 59 Cal.2d 855, 860. See also, *United States v. Taylor*, 530 F.2d 639, 642 (5th Cir. 1976). The photographs and video submitted in this matter depicted Defendant running a red light in violation of *Vehicle Code* section 21453. Therefore, the photographs and video submitted at trial were themselves probative evidence of the offense.

When the silent witness approach is used to admit photographs and video into evidence, a witness must explain the reliability of the process by which the photograph or video was created. *Id.* In the instant matter, Santa Ana Police Officer Alan Berg, who had personal training, experience, and knowledge pertaining to the City of Santa Ana's red light camera enforcement system, testified regarding the system. However, the biased Statement on Appeal prepared solely by the Appellant did not accurately reflect the testimony of Officer Berg, and the City was denied an opportunity to participate in drafting the Statement on Appeal for the record before the Appellate Division.

Based upon the insufficient Statement on Appeal that improperly portrayed Officer Berg as ignorant regarding the red light camera system, the Appellate Division ruled that Officer Berg's testimony did not provide sufficient foundation for the evidence, and noted that no other witnesses were presented. However, the prosecution is not required to present the individual who designed the software for the system, or every person who has physically touched the system. In *People v. Lugashi*, (1988) 205 Cal.App.3d 632, 641, the Court noted, "That some of her knowledge came from hearsay discussions with fellow workers ... no more renders her testimony incompetent than if it resulted from reading hearsay information manuals from hardware or software manufacturers ... If appellant were correct, only the original hardware and software designers could testify since everyone else necessarily could understand the system only through hearsay." Based on the training and experience of Officer Berg, which was unfortunately left out of the Statement on Appeal, the testimony provided regarding the automated enforcement system was sufficient to properly authenticate and lay the foundation for admission of the exhibits into evidence.

With respect to the documentary evidence determined by the Appellate Division to be hearsay statements offered for the truth of the matter, the Appellate Division

incorrectly ruled that such evidence does not qualify for either the official records exception to the hearsay rule pursuant to *Evidence Code* section 1280, or the business records exception under *Evidence Code* section 1271. However, both of these hearsay exceptions properly apply to the subject evidence. Both the business records exception and the official records exception require that the evidence presented must have been made in the regular course of business, at or near the time of the event, and that there is an indication of trustworthiness. The business records exception also requires that a qualified witness testify to the identity and mode of preparation of the evidence. The official records exception does not require such testimony, so long as the evidence was made by and within the scope of duty of a "public employee." *Evidence Code* section 195 defines a "public employee" as "an officer, agent, or employee of a public entity."

Since the City of Santa Ana entered into a contract with Redflex to install and operate red light cameras, Redflex is an agent of the City of Santa Ana, which is a public entity, as permitted by *Vehicle Code* section 21455.5(d). Therefore, documents prepared by Redflex may be imbued with the trustworthiness of a public police agency so long as it is functioning as an agent of the government entity. See, *Imachi v. DMV* (1992) 2 Cal.App.4th 809, 816-817 (trustworthiness indicia supplied by fact that private lab technician, acting on behalf of law enforcement agency, was reporting first hand observations as well as presumption of official duty regularly performed, citing *Evidence Code* section 664). The fact that Redflex serves as an agent for the City of Santa Ana meets the chief foundation of the special reliability granted official and business records, which is that they are based on first hand observation of someone whose job it is to know the facts recorded. Thus, Redflex documents are not inadmissible hearsay and should be properly admitted by the court.

With respect to testimony, the business records exception in *Evidence Code* section 1271 only requires that "The custodian *or other qualified witness* testifies to its identity and the mode of its preparation (emphasis added)." There is no requirement that the custodian be present. Rather, any qualified witness may testify as to the foundation of the document to qualify for this exception. Every Santa Ana Police Officer who works with the Redflex red light camera system, including Officer Berg who testified in the underlying trial, has participated in specialized class and field training through Redflex regarding the technical operation of the system. Upon completion of such training sessions, the Santa Ana Police Officers, including Officer Berg, are certified to operate the Redflex automated enforcement system. Such credentials establish all of the Redflex certified Santa Ana Police Officers, including Officer Berg, as qualified witnesses to testify as to the operation of the Redflex automated enforcement system. In addition, the official records exception in *Evidence Code* section 1280 does not even require any testimony, in contrast to the business records exception. As such, the testimony that was presented at trial was sufficient to certify the admissibility of the evidence presented in the instant matter. However, since the Statement on Appeal was drafted by Appellant

alone and did not accurately reflect the trial testimony, as detailed above, the record before the Appellate Division did not properly reflect this foundational testimony.

As detailed herein, the evidence presented in this matter was admissible. Photographic and video evidence are not hearsay. In addition, the documentary evidence from Redflex is admissible under hearsay exceptions and was properly admitted into evidence. With respect to foundation, had the Statement on Appeal properly reflected the testimony regarding Officer Berg's training and experience with the system, it would be clearly evident that sufficient foundation was provided for the admission of the evidence.

The Appellate Division Mistakenly Found a Violation of the Confrontation Clause

The Sixth Amendment right to confrontation does not apply to the submission of Redflex photographs, video and documents into evidence. Accordingly, the admission of such evidence does not require the availability of the exact Redflex employees involved in the preparation of the instant photographs, video and documents for cross-examination.

The recent United States Supreme Court case of *Melendez-Diaz v. Massachusetts*, (2009) 129 S. Ct. 2527, discusses the need to present certain witnesses to fulfill an opposing party's right to confront any witnesses against them. However, the *Melendez-Diaz* case is distinguishable from the subject case. In *Melendez-Diaz*, the Court was analyzing the sufficiency of an affidavit relaying the results of a forensic test conducted upon a piece of evidence submitted by the Police Department, which determined that the substance in question was cocaine. Essentially, the Court was making a determination on the admissibility of documentary evidence created as a direct result of scientific analysis to convey the conclusions of an individual who performed actual tests and analysis on a piece of evidence.

In the underlying matter, Redflex did not conduct an analysis of the evidence presented, did not exercise any judgment, and did not provide any test results in the form of documentary evidence. Rather, Redflex merely provided the photographic and documentary evidence that was collected to the Santa Ana Police Department so that the Santa Ana Police Officers could analyze the evidence and make a determination as to any possible violations depicted. In fact, *Vehicle Code* section 21455.5(d) prohibits the activity of analyzing the evidence from being "contracted out to the manufacturer or supplier of the automated enforcement system," but rather, as required under subsection (c)(2)(F), the police department must be "Maintaining controls necessary to assure that only those citations that have been reviewed and approved by law enforcement are delivered to violators." In accordance with statutory requirements, Santa Ana Police Officers reviewed the photographs and documents provided by Redflex and made the determination to issue the citation against the Appellant. Since the Santa Ana Police Officers are the ones who analyzed and formed the conclusion, Santa Ana Police Officer Alan Berg was present and testified at trial.

The *Melendez-Diaz* Court considered the fact that there may be a chain of custody to the evidence presented at trial, and determined that it is not necessary to call such individuals in to testify at trial. Specifically, the Court clearly stated that, "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." *Melendez-Diaz*, 129 S. Ct. at 2532, fn 1. Accordingly, it was not necessary for all Redflex employees involved in the processing and packaging of photographs, video, and documents to appear and testify at trial regarding evidence obtained by Redflex, as intimated by the judgment of the Appellate Division in the instant matter.

Based on the foregoing arguments, the ruling of the Appellate Division in the instant matter is not proper for publication. There was clearly a fundamental denial of due process, and the Appellate Division erroneously denied admission of the evidence based upon a biased Statement on Appeal. Thus, the City of Santa Ana respectfully requests that this Court order that the Superior Court's Appellate Division opinion in this matter not be published.

Respectfully submitted,

JOSEPH W. FLETCHER
CITY ATTORNEY

Ryan O. Hodge
Deputy City Attorney

ROH
Attachments: Appellate Division Ruling; and
Proof of Service