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10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF ALAMEDA**
12

13 PEOPLE OF THE STATE OF CALIFORNIA,) Case No. 0031799113
14 Plaintiff,)
15 vs.) MOTION IN LIMINE TO EXCLUDE
16 AHMAD HAYDARI,) LIDAR EVIDENCE AND
17 Defendant.) TESTIMONY; and MOTION TO
18) EXCLUDE EVIDENCE OF VISUAL
19) ESTIMATION OF SPEED
20) [Evidence Code §402]
21)
22) Department: 103
23) Date: February 8, 2010
24) Time: 8:30 a.m.
25

26
27 **TO THE HONORABLE _____,**
28 **COMMISSIONER/JUDGE OF THE SUPERIOR COURT:**

I

STATEMENT OF OBJECTION

29 The citation in this case alleges a violation of Vehicle Code §22349, and the basis
30 for the citation was a “Lidar” speed capture indicating that the defendant was operating
31 his vehicle at speed greater than the 65 mile per hour limit.

32 Defendant objects to the introduction of the above-described “Lidar” evidence
33 pursuant to Evidence Code §§400 through 403 and 802 through 803.

34 As is true of all new technology, and of older technology used in a new manner,
35 the proponent of the evidence must establish general acceptance of the validity of the
36 technology in the scientific community under the standards established in *Frye v. United*

1 *States* (D.C.Cir. 1923) 293 F. 1013, *People v. Kelly* (1976) 17 Cal.3d. 24, *People v.*
2 *Leahy* (1994) 8 Cal 4th 587, and the additional authority cited herein.

3 Further, Defendant objects to the introduction of any evidence or testimony
4 concerning the citing officer's use of or training in the visual estimation of speeds.

5 II

6 ARGUMENT

7 A. THE PROSECUTION BEARS THE BURDEN OF DEMONSTRATING 8 THAT LIDAR IS GENERALLY RELIABLE AND ACCEPTED IN 9 THE SCIENTIFIC COMMUNITY BEFORE A LIDAR "SPEED CAPTURE" 10 MAY BE ADMITTED INTO EVIDENCE

11 In *People v. Leahy* (1994) 8 Cal.4th 587, 593-604, 612, the California Supreme
12 Court reaffirmed its holding in *People v. Kelly* (1976) 17 Cal.3d 24, 30, that testimony
13 based upon new scientific methodology is admissible only if it has gained general
14 acceptance in the particular field to which it belongs. "General acceptance" under *Kelly*
15 means a consensus drawn from a typical cross-section of the relevant, qualified scientific
16 community. (*People v. Soto* (1999) 21 Cal.4th 512, 519, citing *Leahy*, supra, at p. 612.)

17 Under the *Kelly* standard, evidence based upon application of a new scientific
18 technique may be admitted only after the reliability of the method has been
19 foundationally established, usually by the testimony of an expert witness who first has
20 been properly qualified. The proponent of the evidence must also demonstrate that
21 correct scientific procedures were used in the application of the particular method.
22 (*People v. Kelly*, supra, 17 Cal.3d at p. 30; *People v. Leahy*, supra, 8 Cal.4th at p. 594;
23 *People v. Soto*, supra, 21 Cal.4th at p. 519.) *Kelly* "does not demand that the court decide
24 whether the procedure is reliable as a matter of scientific fact: the court merely
25 determines from the professional literature and expert testimony whether or not the new
26 scientific technique is accepted as reliable in the relevant scientific community and
27 whether scientists significant either in number or expertise publicly oppose [a technique]
28 as unreliable." (*Soto*, supra, at p. 519, citations and internal quotation marks omitted.)

1 Contrary to conventional belief, *no reported California case has accepted Lidar*
2 *nor subjected the reliability of Lidar technology to the Kelly/Frye admissibility*
3 *standards.*¹

4 Authority from other jurisdictions supports the contention that admission of
5 testimony regarding vehicle speed based upon a Lidar “speed capture” requires a
6 *Kelly/Frye* foundation.

7 In *People v. Canulli* (Ill.App. 2003) 792 N.E.2d 438, 445, the Illinois Court of
8 Appeal held that "the use of Lidar laser technology to measure the speed of an
9 automobile constitutes ‘new’ or ‘novel’ evidence" requiring an evidentiary hearing
10 pursuant to *Frye*.

11 More recently, in *Hall v. State* (Tex.Crim.App.2008) 264 S.W.3d 346, the Texas
12 10th District Court of Appeal stated:

13 "The State argued in the trial court that LIDAR "is a laser device and it's been
14 admissible by statute in every court in this state without any predicate to its
15 [admissibility]." However, the State did not cite any particular statute or court
16 decision to support this argument. In its appellate brief, the State cites several
17 Texas cases affirming the reliability of RADAR technology and several decisions
18 from other states affirming the reliability of LIDAR technology. "RADAR and
19 LIDAR are not the same. [fn. Omitted] See *Alan LoFaso, Review of Selected*
20 *1998 California Legislation: Transportation and Motor Vehicles*, 30 McGeorge L.
21 Rev. 819, 822 (1999). Radar uses radio waves to measure speed by calculating the
22 frequency variations or "Doppler shift" of the wave reflecting off a moving
23 vehicle. Light Detection and Ranging (LIDAR) is similar to radar, except that it
24 uses an infra red light (a laser beam) in lieu of radio waves to measure the speed of
25 a moving object. Id. (footnotes omitted). Therefore, judicial decisions affirming

26 ¹ Routine admission of testimony regarding Lidar “speed captures” in California Courts is inexplicable, and
27 probably attributable to the fact that few individuals retain attorneys to represent them in traffic matters. It may also
28 be attributable to the failure of the courts to distinguish between the very different scientific technology of radar and
lidar.

1 the reliability of RADAR technology are irrelevant to our inquiry. The parties
2 have not cited and our research has not disclosed any Texas authorities confirming
3 the reliability or admissibility of LIDAR technology. Therefore, we hold that
4 LIDAR technology is novel scientific evidence which may be admissible only
5 after its reliability has been judicially determined in a full-blown ‘gatekeeping’
6 hearing under *Kelly*."

7 In *Izer v. State* (Ga. Ct. App. 1999) 511 S.E.2d 625, 627, the Georgia Court of
8 Appeal addressed the issue presented herein and said: "Considering the dearth of
9 authority showing the scientific certainty of the technique, as well as the absence of
10 expert testimony on the subject, the trial court erred in admitting the evidence" of a police
11 lay-witness regarding Lidar.²

12 While the courts have addressed and resolved issues regarding the scientific
13 validity of Radar, it is not the same as Lidar. In fact, Radar, Sonar and Lidar all use
14 different media. Radar uses radio waves, Sonar uses sound waves and Lidar uses laser
15 light. (See *Alan LoFaso, Review of Selected 1998 California Legislation: Transportation*
16 *and Motor Vehicles*, 30 McGeorge L. Rev. 819, 822 (1999).) The differences in
17 technology were significant enough that the Texas Court of Appeal found the cases
18 affirming the reliability of radar technology irrelevant to the question of Lidar's scientific
19 foundation. (See *Hall v. State*, supra.)³

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21 III

22 ² The decisions in *State v. Stoa* (Haw App. 2006). 112 Hawaii 260, 265, 268, 145 P.3d 803, 808, 811, and *Godstein*
23 *v. State* (Md. 1995) 339 Md. 563, 664 A.2d 375, held otherwise. However, unlike California, Hawaii and Maryland
24 admit scientific evidence under the less rigorous test of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509
25 U.S. 579. (See *Nelson v. State*, 628 A.2d 69, 74 (Del. 1993) (rejecting *Frye* for *Daubert* in Delaware); and *State v.*
26 *Escobido-Ortiz* (2005 (Haw. App. 2005) 109 Hawaii 359, 367, 126 P.3d 402 (noting that the *Daubert* factors are
27 instructive with regard to admitting scientific evidence.) The California Supreme Court intentionally declined to
28 adopt *Daubert*. Furthermore, unlike the practice in Hawaii and many other states, California requires an evidentiary
hearing. (See *People v. Soto*, supra, 21 Cal.4th at p. 519.) The Hawaiian Court of Appeal in *Stoa* resorted to judicial
notice to supply evidence of reliability. That - judicial notice - is a method neither condoned nor possible under
California's procedure, which requires a hearing and expert testimony. (See *Ibid.*)

³ Interestingly enough, counsel for defendant has been unable to locate any case addressing the issue of the
admissibility of lidar “speed captures” *from hand-held devices*.

1 **CONCLUSION**

2 Pursuant to the authority and argument presented herein, defendant respectfully
3 submits that the Court must exclude testimony regarding the “speed capture” in this case
4 in the absence of a foundation establishing the scientific acceptance and viability of lidar
5 technology.

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7 Dated: February 8, 2010

Respectfully submitted,

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10 John Stanko
11 Attorney for Defendant
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