Chandler Police Dept/Desert Breeze Precinct
Photo Enforcement Office
Mail Stop 303W, PO Box 4008
Chandler, Arizona, 85244-4008

TRAFFIC VIOLATION NOTICE

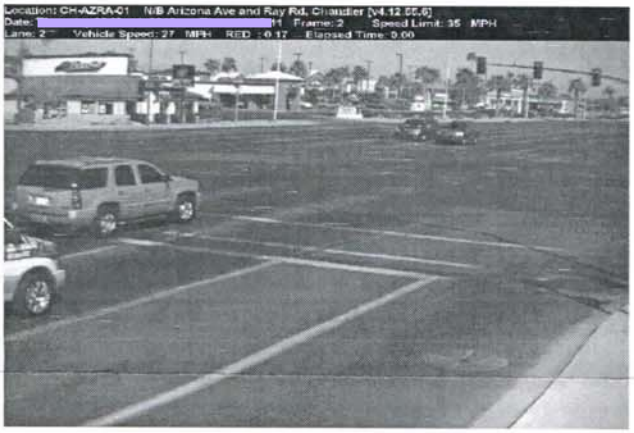
A
2
TEMPE AZ 85282

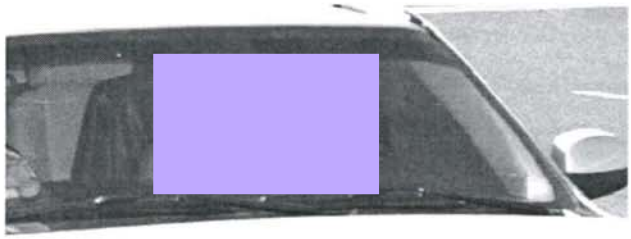
Mailing Date:
0

Violation # B-1		Case #		Military	☐Accident ☐Fatality	☐ Serious Physical Injury					☐ Commercial ☐ Haz Material		Dr #		Grid #			
Driver's License Number		State		Class	Endorsements								Agency Use					
					M	H	N	P	T	X	D							
DEFENDANT	First A		Middle		Last INC													
Residential Address 2			City TEMPE				State AZ		Zip 85282		Telephone							
Sex	Weight	Height	Eyes	Hair	Origin	Date of Birth	Restriction											
Business Address 2			City TEMPE				State AZ		Zip 85282		Telephone							
VEHICLE	Color	Year 2008	Make GMC	Model	Style 4D	License Plate	State AZ		Expiration									
Registered Owner A		IN	Address 2	85282			Vehicle Identification Number											

ON	Month	Day	Year	Time am	AM ☒ PM ☐	SPEED	Approx. 27	Posted 35	R&P	Beat	Speed Measurement Device
AT	Location ARIZONA AVE AND RAY RD NB										

A.	Section	A.R.S. 28-645A3A	Violation Description DRIVER DISOBEY RED LIGHT	Civil Traffic
	Docket #	Disposition Code	Disposition Date	Sanction





City of Chandler
Focus on Safety

TRAFFIC VIOLATION NOTICE

A traffic violation may be filed in the Chandler Municipal Court charging that a person driving a vehicle in the City of Chandler owned by you or your corporation violated traffic code provisions.

If you WERE the driver at the time of the violation, please fill in your information in the bottom of this page and return the completed form with your signature.

If you WERE NOT the driver or did not own the vehicle at the time of the violation, please identify the driver or the owner in the bottom section of this page and return the completed form with your signature.

YOU MUST INCLUDE AN ENLARGED, CLEAR COPY OF YOUR DRIVER'S LICENSE PHOTO IN ORDER FOR THIS INFORMATION TO BE ACCEPTED BY THE COURT!

TRAFFIC SURVIVAL SCHOOL FOR RED LIGHT VIOLATORS:
A plea of responsible or a finding of responsibility at a hearing for a red light violation requires completion of a traffic survival course. Violators will be notified by the Arizona motor Vehicle Department. (Traffic Survival Course is not to be confused with the Defensive Driving program.)

EL PROGRAMA DE SUPERVIVENCIA PARA INFRACTORES QUE SE PASAN SEMAFOROS EN ROJO:
Cuando un infractor se pasa un semáforo en rojo y se declara responsible o le declaran responsible en una audencia de transito, se le require que participle en el Programa de Supervivencia. El Departmento de Vehiculos Motorizados de Arizona notificará a esos infractores directamente. (No confunda el Programa de Supervivencia con el Programa de Manejo Defensivo.)

TOLL FREE INFORMATION LINE:

You may call the Focus on Safety Call Center 1-877-847-2338 – 7 AM to 5 PM, Monday – Friday, for information regarding this notice and photo speed camera enforcement.

LINÉA TELEFÓNICA DE INFORMACIÓN GRATUITA:

Para mas información sobre esta notificación y camaras de foto velosidad, llame al Centro de Enfoque en Seguridad, de Lunes a Viernes entre 7 AM y 5 PM, 1-877-847-2338.

- This Notice of Violation is not a court issued document and the recipient is under no obiligation to identify the person or respond to the notice.
- Failure to respond to the notice may result in offical service that may result in an additional fee.

COMPLETE THIS FORM AND RETURN BY: 0

Tear Here/Romper Aqui *Tear Here/Romper Aqui* *Tear Here/Romper Aqui*

IDENTIFY THE NEW OWNER OR DRIVER **Chandler Violation # B-1** **Issued to: A** **INC**

IF YOU WERE THE DRIVER OF THE VEHICLE at the time of the violation, please fill in your information in the space provided below.
IF YOU WERE NOT THE DRIVER OF THE VEHICLE at the time of the violation, please identify the driver or the owner in the space provided below.

Print Driver's Name: _____

Print Driver's Address: _____
Street

_____
City State Zip

Driver's License Number: _____ State: _____ Expiration: _____ DOB: _____

I declare under penalty of perjury that the information provided herein is true and correct to the best of my knowledge.

Signature: _____

Print Name: _____ Date: _____

Kielsky Rike PLLC
ATTORNEYS

Chandler Police Department
250 E. Chicago St .
Chandler, AZ 85225

RE: Violation # B-123456

Dear Chandler Police,

Please be advised that we have been retained[1] to respond to the above referenced notice, received purportedly from you. It is probable that this notice is fraudulent, as it seems unlikely the Chandler Police Department would so blatantly violate A.R.S. § 28-1593 & 28-1602 or maintain a Phoenix return mail address. Perhaps this was done by a third party on behalf of the Chandler Police. In any case, you have been notified of this gross violation of law. You are to direct any further communications on this matter to us.

Based on our review of the law, we find no authority requiring our client to respond to such a notice, even if duly issued in your name, or that such purported notice imposes any duty on our client. In fact, this notice is a nullity for failing to comply with explicit statutory requirements as noted above. Regardless, I am formally notifying you that our client hereby invokes the right to remain silent and to refuse any questioning or information requests. On our client's behalf, we insist that counsel be present prior to and throughout any encounters.

Moreover, our client does not consent to any search, and hereby invokes all rights, including but not limited to those listed in the 4th, 5th, 6th, 9th & 14th Amendments to the US Constitution, and the Declaration of Rights in our State Constitution.

Should our client be contacted by you or anyone else claiming to investigate a violation of law, our client will remain silent, invoke all rights, and request the assistance of counsel.

In Liberty,

Michael Kielsky

/cc: Chandler Police, Photo Enforcement, MS 303W, PO Box 4008, Chandler, AZ 85244
Chandler Police, Traffic Enforcement Office, PO Box 42034, Phoenix, AZ 85080

[1] Our representation and this response to your notice are not an admission or waiver of personal jurisdiction or consent to accept service for our client. We explicitly deny the existence of personal jurisdiction.

4635 SOUTH LAKESHORE DRIVE | TEMPE, AZ 85282 | PHONE 480.626.5415 | FAX 480.626.5543

www.KRazLaw.com

ATS Processing Services
PO Box 59995, H-5
Phoenix, AZ 85076
Reference ID:

ATS Processing Services™

NOTICE NUMBER :
AMOUNT DUE : $30.00
DUE DATE :

VIOLATION NOTICE -
Prenotification of Credit Card Charge

Summary of Charges

Affidavit Processing Fee :	$30.00
Balance :	$30.00

Amount Due : $30.00

Recently you rented a vehicle from The Hertz Corporation. Our records indicate that a violation was issued against the vehicle during the term of your rental. The details of your rental agreement and the violation are listed below. As stated in your contract, the customer is responsible for all fines, forfeitures, penalties, court costs assessed, and administration fees related to the cost of collection and/or the cost of providing information about you to a court or governmental agency.

ATS Processing Services manages traffic violations on behalf of The Hertz Corporation. We were required by the issuing authority to provide an affidavit that supplied your name and rental information so that the violation can be reissued to you. The issuing authority may contact you regarding the violation separately. Unless you choose an alternate form of payment listed in the Payment Instructions below, we will charge the credit card used to pay for the vehicle rental for the Amount Due on the Due Date. The charge will appear on the statement as WWWHERTZRENTALFINECOM. Per the rental contract, you have been invoiced for an administrative processing fee which is now due for the amount shown. Please note that your rental privileges may be affected unless payment is received promptly by ATS.

Rental Car Agency : HERTZ
Rental Agreement :
Plate State and Number :
Rental Start Date :
Rental Return Date :

Violation Number :
Violation Type : Speed Violation
Violation Date and Time :
Issuing Authority : Arizona Dept Of Public Safety
Po Box 6018
Phoenix, AZ 85005-9856

Payment Instructions

ONLINE : Visiting us online at www.HertzRentalFine.com is the fastest and easiest way to submit payment for this violation notice.

BY PHONE: Please call toll free (877) 977-5771 between the hours of 7:00 am to 7:00 pm Central Standard Time to make a payment.

BY MAIL: Your check or money order drawn on a United States bank (made payable to ATS Processing Services LLC) can be mailed to the address provided in the enclosed envelope with the attached payment coupon. If overseas, a postal money order may be sent.

FACS 501

Si necesitas ayuda en Espanol, favor de llamar al (877) 977-5771

ATS Processing Services™

- ✓ Easy payments online at www.HertzRentalFine.com
- ✓ If paying by mail, make check or money orders Payable to: ATS Processing Services, LLC
- ✓ DO NOT MAIL CASH
- ✓ Write the notice number on the front of your payment
- ✓ Insert this tear-off coupon in the enclosed envelope with the address (at the right) showing through the window
- ✓ To avoid additional late fees being assessed, you must respond to this violation notice before the Due Date

AMOUNT DUE : $30.00

Please pay with your Visa or MasterCard at www.HertzRentalFine.com or mail your check or money order with this coupon to the address below.

VISA

NAME:	DUE:
NOTICE NUMBER:	NOTICE DATE:
RENTAL AGREEMENT:	

ATS Processing Services, LLC
P.O. Box 956649
St. Louis, MO 63195-6649

El Mirage Police Department, Maricopa County

Arizona Traffic Ticket and Complaint

Complaint #	Case #	Military	☐ Accident ☐ Serious Physical Injury ☐ Fatality	☐ Commercial ☐ Haz Material	DR #	GRID #
Driver's License Number	State AZ	Class	Endorsements M H N P T X D		Agency Use	
DEFENDANT	First	Middle	Last			
Residential Address/Mailing	City PHOENIX	State AZ	Zip	Telephone		
Sex / Weight / Height / Eyes	Hair / Origin	Date of Birth 07/25/1959	Restrictions			
Business Address	City PHOENIX	State AZ	Zip	Telephone		
VEHICLE	Color / Year 2010	Make HYUN	Model / Style 4D	License Plate	State FL	Expiration
Registered Owner THE HERTZ CORPORATION	Address 1330 W SOUTHERN AV, TEMPE, AZ 85282				Vehicle Identification Number	

ON	Month	Day	Year	Time 3:31 pm	AM ☐ PM ☒	SPEED	Approx. 56	Posted 45	R&P	Beat	Speed Measurement Device
AT	Location PRIMROSE STREET & GRAND AVENUE EB									City of El Mirage	Maricopa County / Direction of Travel

The Defendant Committed the Following:

A.	Section	ARS/CC ARS 28-701A	Violation Description SPEED GREATER THAN REASONABLE AND PRUDENT	Civil Traffic
	Docket Number	Disposition Codes	Date of Disposition	Sanction

I certify upon reasonable grounds, I believe the person named herein committed the act(s) described and I have caused this complaint to be issued on: 04/09/2012.

R. T. Stephenson 3243

SUSAN GALLANT, Complainant ID No.

SUMMONS

You are hereby summoned and ordered to appear at the El Mirage Municipal Court (0759) – 14010 North El Mirage Rd, El Mirage, Arizona 85335 **NO LATER THAN:** **10:30 am** on a complaint charging you with the offense of: **SPEED GREATER THAN REASONABLE AND PRUDENT** on

James Mapp, Presiding Judge

If the sanction/fine and costs of $ **232.00** are received by the Court prior to the above date, you do not need to appear in court.

WARNING TO DEFENDANT

If you waive service or you are served with the Summons and Complaint and you fail to appear as directed, a default judgment may be entered against you, a civil sanction imposed, and your driver's license suspended. Your driver's license or non-resident privileges may remain suspended until the sanction is paid in full and you satisfy Motor Vehicle Division requirements (A.R.S. 28-1557).

WAIVER NOTICE: Rules: 4.1 and 4.2, Arizona Rules of Civil Procedure, require defendants living within the United States to cooperate in saving unnecessary costs of service of summons. To avoid further action and additional costs respond no later than 05/09/2012 by choosing one of the options on the Options Page (page 2). You must sign the reverse side of the coupon to avoid these costs. By law, you have been provided with a copy of the complaint and an enclosed envelope with which to comply.

- **This is a copy of the complaint with the offense described on the enclosed complaint that has been filed in the El Mirage Municipal Court. Please be advised that persons carrying weapons of any kind will not be permitted in the court building.**
  JUVENILE NOTICE: If you are a juvenile and choose to appear at the hearing to contest the violation you MUST appear with a parent/guardian at the date and time indicated

VIOLATOR/DEFENDANT COPY - Keep for your records

mesa·az

MESA POLICE DEPARTMENT

To: Mesa City Traffic Court
From: Chief Mesa
Date: July 1, 2009
Subject: Civil Traffic Complaints

Pursuant to Arizona Revised Statute 28-1593B, the below listed employees are hereby authorized to issue civil traffic complaints on behalf of, and as the duly authorized agents of, the Mesa Police Department. Authorization includes the authority to originate civil traffic complaints and serve those complaints by mail, registered mail, and through the use of process service as approved by the Mesa Police Department. Authorization would be limited to civil traffic violations generated by the Photo Safety Program.

Paul Dieringer	ID#14565
Dianne Pugens	ID#10454

Cc: Mesa Prosecuting Attorney
Mesa City Attorney
Mesa City Clerk
Mesa P D Legal

TEMPE MUNICIPAL COURT
140 EAST FIFTH STREET, SUITE 150
TEMPE, ARIZONA 85281

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	**CASE NO.: 10-[redacted]**
	)	
vs.	)	**ORDER**
	)	
[redacted],	)	
	)	
Defendant	)	
	)	

This Court has received Defendant's Motion to Dismiss, which was also served on Tempe City Attorney's Office on May 3, 2010.

It is hereby ordered, as the Tempe City Attorney has been provided an opportunity to file a Response/Objection to Defendant's Motion and has informed this Court that it declines to do so, Defendant's Motion to Dismiss is **granted.**

Done this day, May 5, 2010

Michael G. Wales

Commissioner
Tempe Municipal Court

State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 13-203

Judge: James M. Mapp

Complainant: Joseph Valentine

ORDER

The complainant alleged a municipal court judge improperly ruled in the absence of personal jurisdiction on a photo radar citation.

Rule 1.1 of the Code of Judicial Conduct requires judges to comply with the law, and Rule 1.2 requires that judges "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." Rule 2.2 requires judges to uphold and apply the law, and Comment 3 to this rule clarifies that while a "good faith error of fact or law does not violate this rule," a judge who has engaged in "a pattern of legal error or [intentionally disregarded] the law" may be found to have committed ethical misconduct.

Mr. Valentine, the complainant in this matter, received a traffic citation through the mail but was not personally served with the citation, as is required by law. When he called the court clerk's office to make an inquiry about his case, the court treated his phone call to the clerk's office as a waiver of the personal service requirement although there was no evidence that Mr. Valentine desired or intended to waive that requirement, and he did not meet any of the statutory requirements for such a waiver such as an appearance in court.

As confirmed in Judge Mapp's response, his court's standing policy is not to abide by the statutory requirements for waiver. The commission takes no position on whether a telephonic appearance should be treated as complying with the statute's allowance for a waiver through a court appearance, but there is no legal authority for treating a simple phone call to court staff as an effective waiver of personal service.

After reviewing the complaint, the judge's response, and related materials, the commission determined that clear and convincing evidence exists demonstrating that the judge engaged in a pattern of legal error and may also have intentionally disregarded the law.

Accordingly, Municipal Court Judge James M. Mapp is hereby publicly reprimanded for his conduct as described above and pursuant to Commission Rule 17(a). The record in this case, consisting of the complaint, the judge's response, and this order shall be made public as required by Rule 9(a).

Dated: October 22, 2013.

FOR THE COMMISSION

Louis Frank Dominguez
Commission Chair

Copies of this order were mailed
to the complainant and the judge
on October 22, 2013.

This order may not be used as a basis for disqualification of a judge.

Lower Case Appeal Decisions

(Download from: http://www.courtminutes.maricopa.gov/)

- State v. Sebring, LC2011-000805, Maricopa County Superior Court (right to confront)
- State v. Freeman, LC2011-000050, Maricopa County Superior Court (deficient service)
- State v. Espinosa, LC2009-000568, Maricopa County Superior Court (waiver of service)
- State v. Gutenkauf, LC2009-000408, Maricopa County Superior Court (ticket issuance)
- State v. Arneson, LC2009-000334, Maricopa County Superior Court (substantial evidence)
- State v. James, LC2009-000165, Maricopa County Superior Court (insufficient service)
- State v. McDonald, LC2007-000160, Maricopa County Superior Court (right to confront)
- State v. Palermo, LC2006-000235, Maricopa County Superior Court (uncertified complaint)
- State v. Williams, LC2006-000079, Maricopa County Superior Court (identity)
- State v. Gillespie, LC2005-000597, Maricopa County Superior Court (insufficient complaint)
- State v. Zanoff, LC2005-000530, Maricopa County Superior Court (uncertified complaint)
- State v. Musial, LC1998-000778, Maricopa County Superior Court (unsworn complaint)
- State v. Knox, LC2006-000075, Maricopa County Superior Court (setting aside default)

Other References

- Guidelines for Processing Photo Enforcement Citations in Limited Jurisdiction Courts, published by the Arizona Supreme Court, Administrative Office of the Courts, Revised 3-3108, at http://www.supreme.state.az.us/courtserv/attc/peprocessguidelines-v2-3-31-08.pdf
- Ring v. Taylor, 141 Ariz. 56 (App. 1984) (intersection definition explained, red light running)
- Arizona Ethics Opinion No. 87-14 (citing to Memorandum Decisions in lower courts)
- Attorney General Opinion No. I11-008 (R11-016)
- ADOT Traffic Engineering Policies, Guidelines, and Procedures, §§ 621 Signal Phase Change Intervals, 622 Left Turn Signal Timing

Pleading Snippets

NOTICE OF APPEARANCE

Pursuant to Rule 2(j), Ariz.R.Civ.P., Arizona Traffic Violation Cases, the law firm of KIELSKY RIKE PLLC by counsel undersigned, hereby enters its appearance on behalf of Defendant in this matter for the limited purpose of challenging the Court's jurisdiction, and further **denies** that proper jurisdiction exists.

NOTICE OF RULE 10.1 APPEARANCE

Pursuant to Rule 10.1, Ariz.R.Civ.P., Arizona Traffic Violation Cases, without waiving any defenses, counsel undersigned hereby provides notice that, should any hearings be set, he will appear by audiovisual or telephonic means, and states the following:

Requestor: Michael Kielsky, *Attorney for Defendant*

Mailing Address: 4635 S. Lakeshore Dr., Tempe, AZ 85282

Phone & Fax numbers: 480-626-5415 (phone) / 480-626-5543 (fax)

NOTICE ON SUFFICIENCY OF SERVICE

Defendant hereby provides notice that Defendant intends to question the sufficiency of service alleged, if any, or the perfection thereof, and requests that witness subpoenas issue to compel the presence of any process server, **if any**, who is alleged to have served process at any hearings to be set on personal jurisdiction or service of process.

Defendant requests the subpoenas issue so that Defendant may challenge any affidavits or certificates of service, alleging personal service, by examining the witnesses in open court and under oath, and so that Defendant may have an opportunity to present evidence or testimony to impeach the subpoenaed witnesses or their Affidavits of Service.

Defendant reasonably believes that the testimony of the witnesses and the information here requested are relevant to a determination of whether personal service has been perfected in accordance with applicable laws and rules.

MOTION TO DISMISS

Defendant, by and through counsel undersigned, hereby requests that this case be dismissed, or that judgment be entered for Defendant, for lack of personal jurisdiction, and because the procedures employed deprived this Court of the ability to enter a valid judgment, because the complaint and the complaint's certification was void.

This Motion is supported by the attached Memorandum of Points and Authorities and the complete docket and record herein, all of which are incorporated as if fully set forth.

MEMORANDUM OF POINTS AND AUTHORITIES

WITHOUT PERFECTED SERVICE, THE COURT OBTAINS NO JURISDICTION

Service of a traffic complaint is governed by A.R.S. § 28-1593(A):

> A traffic complaint may be served by delivering a copy of the uniform traffic complaint citation to the person charged with the violation or **by any means authorized by the rules of civil procedure**. At the discretion of the issuing authority, a complaint for a violation issued after an investigation in conjunction with a traffic accident may be sent by certified mail, return receipt requested and delivered to addressee only, to the address provided by the person charged with the violation. **Service of the complaint is complete on filing the receipt in the court having jurisdiction of the violation**. [emphasis added]

While notice is the purpose, the processes required by the law and rules must be observed in every particular, or the Court does not obtain personal jurisdiction.

> [S]ervice is not complete […] even if there is evidence that the summons and complaint were received. *See* Worrell v. B.F. Goodrich Co., 845 F.2d 840, 841-42 (9th Cir.1988), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3191 (1989). Until service is complete, no personal jurisdiction is obtained, and any judgment

entered is void. Endischee v. Endischee, 141 Ariz. 77, 79, 685 P.2d 142, 144 (App. 1984); Kadota v. Hosogai, 125 Ariz. 131, 134, 608 P.2d 68, 71 (App. 1980).

Tonner v. Paradise Valley Mag. Court, 171 Ariz. 449, 451, 831 P.2d 448, 450 (App. 1992).

Return of Service is governed by Rule 4(g), Ariz.R.Civ.P.:

> **Return of Service**. If service is not accepted or waived, then the person effecting service shall make **proof** thereof to the court. When the process is served by a sheriff or a sheriff's deputy, the return shall be officially endorsed on or attached thereto and returned to the court promptly. If served by a person other than the sheriff or a deputy sheriff, **return and proof of service shall be made promptly by affidavit thereof**. Each such affidavit of a registered private process server shall include clear reference to the county where that private process server is registered …. [emphasis added]

If service of process is incomplete, any resulting judgment is void and must be vacated upon request. Hilgeman v. American Mortgage Securities, Inc., 196 Ariz. 215, 994 P.2d 1030, ¶ 8 (App. 2000); Sprang v. Petersen Lumber, Inc., 165 Ariz. 257, 262, 789 P.2d 395, 400 (App. 1990); Martin v. Martin, 182 Ariz. 11, 15, 893 P.2d 11, 15 (App. 1994). When a judgment is void the Court has no discretion and must vacate the judgment. Martin, 182 Ariz. at 14, 893 P.2d at 14. See also Barlage v. Valentine, 210 Ariz. 270, 272, 110 P.3d 371, 373 (App. 2005).

A.R.S. § 28-1593(A) sets forth that service must conform to the rules of civil procedure, and should be read that service is not complete until evidence of service has been filed. Rule 4(g), Ariz.R.Civ.P., requires that the return of service be by affidavit. An affidavit is a "sworn statement in writing under oath". State v. McMann, 3 Ariz. App. 111, 113, 412 P.2d 286, 288 (1966). A statement prepared without the declarant's participation or review, outside of their purview and beyond the declarant's control, would be, at most, an unsworn statement. Renegade Tech. Grp. Inc. v. Pali Capital, Inc. (Ariz. App., 2011), quoting In re Wetzel, 143 Ariz. 35, 691 P.2d 1063, 1071 (1984) ("An 'affidavit' is a signed, written statement, made under oath before an officer authorized to administer an oath or affirmation in which the affiant vouches that what is stated is true."); Ariz. R. Civ. P. 80(i).

Importantly, the issue is not the fact of a "digital" nature of the signature, but whether the declarant was a participant in the placement of their signature on the purported Affidavit, or whether the declarant had an opportunity to review and ratify the placement of their signature before the purported Affidavit was filed with the Court.

This process cannot create an Affidavit, required by the applicable rules, as the purported declarant cannot be bound by any penalty of perjury – any allegation of perjury under these circumstances is easily turned aside of by a truthful recounting of the declarant's lack of involvement in placing their signature, executing the certificate, or ratifying it before it was filed with the Court. Without an oath knowingly executed and binding the declarant to the penalty of perjury, no Affidavit was created, and any such filed but deficient Certificate of Service fails as "return and proof of service … made promptly by affidavit thereof." Rule 4(g), Ariz.R.Civ.P.

As the Court of Appeals has taught, "service is not complete […] even if there is evidence that the summons and complaint were received. Until service is complete, no personal jurisdiction is obtained, and any judgment entered is void." Tonner v. Paradise Valley Mag. Court, 171 Ariz. 449, 451, 831 P.2d 448, 450 (App. Div. 1, 1992) (*internal citations omitted*).

Without perfected service, the Court does not obtain jurisdiction. "The incomplete service left the trial court without jurisdiction, i.e., without authority to enter the judgment." Postal Instant Press, Inc. v. Corral Restaurants, Inc., 186 Ariz. 535, 538, 925 P.2d 260, 263 (1996), opinion supplemented on reconsideration 187 Ariz. 487, 930 P.2d 1001.

Any claimed service on Defendant is incomplete, and any service has not been perfected. Without proper, perfected service, this Court does not have jurisdiction over Defendant, and no authority to enter a judgment of responsibility for the alleged traffic violations. For said reasons, Defendant respectfully requests that this matter be dismissed.

WITHOUT PROPER SERVICE, THE COURT OBTAINS NO JURISDICTION

The purpose of process is to give Defendant actual notice of the proceedings against them and that they are answerable to the claim of the State. Scott v. G.A.C. Finance Corp., 107 Ariz. 304, 305, 486 P.2d 786, 787 (1971). General service of process on an individual residing in Arizona is governed by Rule 4.1(d), Ariz.R.Civ.P.:

> **Service of Summons Upon Individuals**. Service upon an individual from whom a waiver has not been obtained and filed, other than those specified in paragraphs (e), (f) and (g) of this Rule 4.1, shall be effected by delivering a copy of the summons and of the pleading to that individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the pleading to an agent authorized by appointment or by law to receive service of process.

The State has two legal methods of serving Defendant with process in this case, personal service, or obtaining and filing a waiver of service executed by Defendant:

> If the acknowledgment of receipt is not executed, service is not complete under this method even if there is evidence that the summons and complaint were received. *See* Worrell v. B.F. Goodrich Co., 845 F.2d 840, 841-42 (9th Cir.1988), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3191 (1989). Until service is complete, no personal jurisdiction is obtained, and any judgment entered is void. Endischee v. Endischee, 141 Ariz. 77, 79, 685 P.2d 142, 144 (App. 1984); Kadota v. Hosogai, 125 Ariz. 131, 134, 608 P.2d 68, 71 (App. 1980).

Tonner v. Paradise Valley Mag. Court, 171 Ariz. 449, 451, 831 P.2d 448, 450 (App. 1992).

If a defendant is not properly served with process, any resulting judgment is void and must be vacated upon request. Hilgeman v. American Mortgage Securities, Inc., 196 Ariz. 215, 994 P.2d 1030, ¶ 8 (App. 2000). A court does not acquire personal jurisdiction over a

person who is not properly served, and any resulting judgment is void. Sprang v. Petersen Lumber, Inc., 165 Ariz. 257, 262, 789 P.2d 395, 400 (App. 1990); Martin v. Martin, 182 Ariz. 11, 15, 893 P.2d 11, 15 (App. 1994). When a judgment is void the Court has no discretion and must vacate the judgment. Martin, 182 Ariz. at 14, 893 P.2d at 14. See also Barlage v. Valentine, 210 Ariz. 270, 272, 110 P.3d 371, 373 (App. 2005).

Defendant has not been properly served, or the service has not been perfected. Without proper service, this Court does not have jurisdiction over Defendant, and no authority to enter a judgment of responsibility for the alleged traffic violations. For said reasons, Defendant respectfully requests that this matter be dismissed.

WITHOUT PERSONAL JURISDICTION, THE CASE MUST BE DISMISSED

A.R.S. § 28-1593(A) requires service of the Arizona Traffic Ticket and Complaint pursuant to means authorized by the rules of civil procedure. Rule 4.1(d), Ariz.R.Civ.P. requires personal service upon an individual, while Rule 12(b)(5), Ariz.R.Civ.P. permits dismissal when service has not been perfected. Here, Defendant was not properly served.

Rule 4.1(c) provides for an alternative process by which a plaintiff may file a waiver of service obtained from a defendant. That defendants must sign, under penalty of perjury, to waive service, is well-established law. “If the acknowledgment of receipt is not executed, service is not complete under this method even if there is evidence that the summons and complaint were received. Until service is complete, no personal jurisdiction is obtained, and any judgment entered is void.” Tonner v. Paradise Valley Mag. Court, 171 Ariz. 449, 451, 831 P.2d 448, 450 (App. Div. 1, 1992) (*internal citations omitted*).

Whether a defendant fails or refuses to execute a waiver is immaterial. “[A]ctual service is not complete under Rule 4.1(c) when the party to whom service is directed either fails, refuses, or is never given the requisite opportunity, to execute a formal ‘notice and acknowledgment of receipt ... under oath or affirmation.’ The fact that [the party’s] attorney may have advised [him] not to respond does not cure the defect.” Postal Instant Press, Inc. v. Corral Restaurants, Inc., 186 Ariz. 535, 538, 925 P.2d 260, 263 (1996), opinion supplemented on reconsideration 187 Ariz. 487, 930 P.2d 1001.

Without perfected service, the Court did not obtain jurisdiction. “The incomplete service left the trial court without jurisdiction, i.e., without authority to enter the judgment.” *Id*., *Supplemental Opinion*, 187 Ariz. 487, 488, 930 P.2d 1001, 1002.

Defendant has not been properly served, or the service has not been perfected, nor did Defendant execute a formal waiver under oath or affirmation. Defendant is not otherwise aware of any other basis properly establishing the Court’s personal jurisdiction. Rule 12(b)(2), Ariz.R.Civ.P., sets forth that lack of personal jurisdiction is a separate basis upon which the matters must be dismissed. For the foregoing reasons, Defendant respectfully requests that this case be dismissed.

WITHOUT PERSONAL JURISDICTION, NO TRIAL MAY BE SET

“Once the existence of personal jurisdiction is challenged, the party asserting

jurisdiction has the burden of establishing it." Lycoming Division of Avco Corp. v. Superior Court of Maricopa County, Ariz.App. 150, 152, 524 P.2d 1323, 1325 (App. Div. 1, 1974). Importantly, it is not for the Court to advocate on behalf of, or against, the question of whether personal jurisdiction has been established, nor may the Court merely assume its existence, but, as explicitly stated in Lycoming, it is the State's burden to establish it. As the State has not yet met its burden, setting a trial date pursuant to Defendant's challenge to the Court's exercise of personal jurisdiction, and before personal jurisdiction has been established, would be an error, and an abuse of discretion.

A court abuses its discretion if it reaches a conclusion without considering the evidence, or it commits a substantial error of law, or "the record fails to provide substantial evidence to support the trial court's finding." Grant v. Ariz. Pub. Serv. Co., 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982). Should the Court set a trial over Defendant's objections regarding lack of service and lack of personal jurisdiction, and in the face of evidence (or its absence in the record), that no executed waiver of service had been filed, and that there was no proper proof of service, such would constitute an abuse of discretion,.

Moreover, this lack of jurisdiction renders any further action by the Court void, and the Court, now apprised of this fact, should immediately prohibit prosecution from continuing until personal jurisdiction has been established. For the foregoing reasons, Defendant respectfully requests that no trial be set, and that this case be dismissed.

WITHOUT SUBJECT MATTER JURISDICTION, THE CASE MUST BE DISMISSED

A court must have both personal and subject matter jurisdiction to render a valid judgment. Peterson v. Jacobson, 2 Ariz.App. 593, 595, 411 P.2d 31, 33 (App. 1966). Subject matter jurisdiction may never be waived. State ex rel. Baumert v. Municipal Court of Phoenix, 124 Ariz. 543, 545, 606 P.2d 33, 35 (App. Div. 1, 1979). Moreover, challenges to subject matter jurisdiction may be raised at any stage of the proceedings. Rojas v. Kimble, 89 Ariz. 276, 279, 361 P.2d 403, 406 (1961).

THE COMPLAINT WAS NOT CERTIFIED PURSUANT TO STATUTE[1]

The complaint is "certified" by digitized signature. A.R.S. § 28-1561(A) provides:

> Uniform traffic complaint forms need not be sworn to if they contain a form of certification by the issuing officer in substance as follows: "I hereby certify that I have reasonable grounds to believe and do believe that the person named herein committed the offense or civil violation described herein contrary to law."

Based on the docket, upon information and belief, and prior experience, it was certified by a computer generated signature belonging to a "police aide" or an employee of a private organization, not a sworn "officer" as required by A.R.S. § 28-1561(A). It is believed that the individual whose signature appears is not a peace officer or any type of officer under State law, and that the signer had neither sworn any oath of office, or nor been issued any form of commission.

[1] Defendant readily concedes that this portion of the argument fails if the individual certifying the complaint was a sworn Arizona police officer at the time. Such would be a change from prior familiar practices.

It is an established rule of statutory construction that a court follows the plain language "unless application of the plain meaning would lead to impossible or absurd results." Bilke v. State, 206 Ariz. 462, 464, ¶ 11, 80 P.3d 269, 271 (2003). "A statute is to be given such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant." Bilke quoting Guzman v. Guzman, 175 Ariz. 183, 187, 854 P.2d 1169, 1173 (App. 1993). *See also* Richards v. United States, 369 U.S. 1 (1962); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971) (citing Richards v. United States, *supra*); accord with State v. Cassius, 110 Ariz. 485, 520 P.2d 1109 (1974). The Court of Appeals has stated the standard of review for statutory interpretation:

> Our first duty in interpreting a statute is to determine and give effect to the legislature's intent and the first place to look is the wording of the statute. If the language is plain and unambiguous, then no construction is necessary and our duty is simply to apply that plain and unambiguous language (citations omitted). We give effect to the statutory language in accordance with its commonly accepted meaning unless the statute provides a definition or "it appears from the context that a special meaning was intended." (citations omitted). If an ambiguity exists, "the court may examine a variety of factors including the language used, the context, the subject matter, the effects and consequences, and the spirit and purpose of the law." (citations omitted).

Tobel v. State Dept. Of Public Safety, 189 P.2d 168, 939 P.2d 801 (App. 1997) see also Chaparral Dev. RMED Int'l, Inc., 170 Ariz. 309, 823 P.2d 1317 (App. 1991).

The legislature is presumed to mean what it says. Padilla v. Industrial Comm'n, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976); *see also* State v. Johnson, 171 Ariz. 39, 41, 827 P.2d 1134, 1136 (App. 1992) (legislature is presumed to express itself in "as clear a manner as possible" and that "it accorded words their natural and obvious meanings unless stated otherwise").

Arizona law distinguishes between "officer" and agent. "Peace officers" are defined in A.R.S. § 9-901(3) to "include regularly salaried deputy sheriffs, policemen and police officers of duly organized police departments." "Peace officers" are also defined in A.R.S. § 1-215 (28) to include "sheriffs of counties, constables, marshals, policemen of cities and towns, commissioned personnel of the department of public safety" and other officers "who have received a certificate from the Arizona peace officer standards and training board".

A.R.S. § 28-1501, for the statutory chapter which includes A.R.S. § 28-1561, defines "Police officer" as "an officer authorized to direct or regulate traffic or make arrests for violations of traffic rules or for other offenses". It cannot be doubted that the Legislature intended to reference this definition when it used the term "officer" in A.R.S. § 28-1561.

A.R.S. § 28-626 mandates that the "provisions of this chapter and chapters 4 and 5 of this title are applicable and uniform throughout this state and in all political subdivisions in this state." The chapters covered include, *inter alia*, the chapters setting forth civil traffic violations for red light violations (A.R.S. § 28-645) and speed violations (A.R.S. § 28-701).

Furthermore, the Arizona legislature has granted local authorities the power to

regulate traffic on the streets and highways under their jurisdiction. A.R.S. § 28-627 sets forth the power of local authorities, permitting explicitly, local authorities' regulation of traffic by police officers. A.R.S. § 28-627 (A)(1). Importantly, subsection (E) specifies that, "[i]n addition to the appointment of peace officers, a local authority may provide by ordinance for the appointment of:"

> (1) Unarmed **police aides** or municipally approved **private contractors** who are employed or contracted by the police department and who are empowered to commence an action or proceeding before a court or judge for a violation of the local authority's **ordinances regulating the standing or parking of vehicles**. […] The authority […] as authorized in this section is limited to the enforcement of the ordinances of local authorities **regulating the standing or parking of vehicles**. […] **This paragraph does not grant to unarmed police aides** or municipally approved **private contractors other powers** or benefits **to which peace officers** of this state **are entitled**.

A.R.S. § 28-627 (E)(1), *emphasis added*.

Additionally, a local authority may appoint traffic investigators who may "[c]ommence an action […] for any violation of a state statute or local ordinance relating to traffic, **if the violation is related to a traffic accident** within the jurisdiction of the local authority." A.R.S. § 28-627 (E)(2)(b), *emphasis added*.

A further limitation on police aides, private contractors, or traffic investigators is that they are prohibited from serving "process resulting from **a citation** issued for a violation of article 3 or 6 of this chapter or of a city or town ordinance **for excessive speed** or **failure to obey a traffic control device** that is obtained using a **photo enforcement** system." A.R.S. § 28-627 (G), *emphasis added*. Finally, the statutes make explicit that traffic investigators are not granted other powers of peace officers. A.R.S. § 28-627 (H).

While A.R.S. § 28-1593 (B) provides authority for a "duly authorized agent" or traffic enforcement agency private contractor to issue a traffic complaint, this power is necessarily limited by its terms, and does not enlarge the limit of authority explicitly set forth in A.R.S. § 28-627, nor does A.R.S. § 28-1593 contradict or conflict with A.R.S. § 28-627.

If A.R.S. § 28-1593 (B) were interpreted to grant authority for non-officers to commence actions for violations of any traffic laws, such interpretation would render the limiting language of A.R.S. § 28-627 (E) (authority of police aides or private contractors limited to enforcement of ordinances regulating the standing or parking of vehicles) superfluous or insignificant. "A statute is to be given such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant." Bilke, *supra*.

In contrast, reading A.R.S. § 28-1593 (B) in harmony with A.R.S. § 28-627, it becomes clear that peace officers may issue any traffic complaint, while a duly authorized agent is limited to commencing an action "for a violation of the local authority's ordinances regulating the standing or parking of vehicles", and a traffic investigator is limited to commencing an action "if the violation is related to a traffic accident".

The allegation here is for a moving violation, and not one relating to the standing or

parking of vehicles, nor does it relate to a traffic accident, and as such, the action may be commenced, and the complaint issued, solely by a peace officer.

Furthermore, A.R.S. § 28-1593 does not affect the attestation requirement found in A.R.S. § 28-1561, nor does A.R.S. § 28-1593 contradict or conflict with A.R.S. § 28-1561. Rather, A.R.S. § 28-1593 permits either a "peace officer or duly authorized agent of a traffic enforcement agency" to issue a traffic complaint (as limited by A.R.S. § 28-627). However, the complaint must issue in the manner mandated by A.R.S. § 28-1561(A) ("Uniform traffic complaint forms need not be sworn to if they contain a form of certification by the issuing **officer** […]") which requires that a Uniform Traffic Complaint either: a) be separately sworn to, or, b) if issued by an officer, it must contain a specifically worded certification. The instant complaint was not issued by an officer, and it was not separately sworn to, and as such, the complaint is insufficient as a matter of law.

It appears that the individual whose signature appears on the complaint is not a peace officer and does not meet the statutory requirements for issuing or certifying a moving violation complaint, in hand or by computer generated signature. The complaint here is fatally defective, and thus deprives the Court of the ability to enter a valid judgment. For the foregoing reasons, Defendant respectfully requests that the case be dismissed.

WITHOUT INDEPENDENT JUDGMENT, THE COMPLAINT WAS VOID

The complaint in this matter was "certified" by a computer generated signature, pursuant to A.R.S. § 28-1561(A). While it includes certification language based on that required by statute, it suffers the same defect in the use of computer-generated certifications found in State v. Johnson, 184 Ariz. 521, 911 P.2d 527 (App. Div. 1, 1994), internal citations omitted:

> Clearly, the rules … do not contemplate a computer certifying its own documents. While Barckley does suggest that a "pen-and-ink" signature may be superfluous, it is only in circumstances where some human involvement in the certification process can be inferred from the face of the document. Where, as here, the record is barren of facts from which we may infer that the intent to certify is contemporaneous with and unique to the production of the specific record and is independent of computer control, additional foundation is required to establish the requisite "human involvement".

In the absence of competent evidence that the complaint was "certified" only following the required application of independent judgment, based on personal knowledge of the signer of the events or in reviewing records, evidence, or documents, prior to the complaint being certified, the case must be dismissed.

The personal knowledge and judgment of the individual "certifying" the complaint is the critical issue. Central to the adversarial process is the right for a party to confront the evidence presented against that party. There is nothing more fundamental that this right and it is questionable, at best, for a substitute person to testify as to information and evidence gathered by another. If a testifying person lacks personal knowledge regarding the specific facts which preceded the complaint being "certified", such must be deemed fundamental error since the ability to confront a credible witness on this issue goes to the

heart of the integrity of the system.

The meaning of the word "certifies" or "certification" is ascertainable by examining the common law requirements and how they were codified into the modern rules of evidence. Johnson, *supra*. Certify means "to authenticate or vouch for a thing in writing … to testify or vouch for in writing; to assure or make certain; to tell positively." Johnson, *supra*, citing Brown v. United States Natl. Bank of Omaha, 220 Neb. 684, 371 N. W.2d 692 (1985) (citing Black's Law Dictionary 207 (5th ed. 1979); American Heritage Dictionary of the English Language 220 (1981)).

Villas at Hidden Lakes Condominiums Assoc'n v. Geupel Construction Co., Inc., 174 Ariz. 72, 847 P.2d 117 (App. 1992) is instructive regarding the requirements for the admission of computer generated signatures. Pursuant to Hidden Lakes, competency to make a certification requires the person making the certification to review the documents they have certified. *Id* at 82, 847 P.2d at 127. Competency to certify that reasonable grounds exist to believe a person has committed a traffic violation involves more than verifying that the complaint is filled out. Reviewing the citation itself does nothing to make certain that there were reasonable grounds to believe the person named in the complaint committed the alleged acts. If the individual who "certified" the complaint possessed no personal knowledge upon which certification relies, which in fact the certification attests under penalty of perjury, the complaint was not certified as required by A.R.S. § 28-1561.

The rote, naked, and apparently automatically generated assertion to the contrary on the face of the ticket cannot cure this defect, as, on its face, there is evidence that the requirement that there be human involvement and independent judgment prior to its issuance was not met. Essentially, the State attempts to address the problem of a computer certifying its own documents, by having the computer routinely assert that the human whose signature is affixed by the computer was involved before it was generated. The complaint itself does not bear this out, as any assertion that the signer personally reviewed the photo evidence, and thereupon matched it to Defendant prior to the issuance of the computer generated complaint, is either mistaken, not credible, or even a fraud upon this Court, and the State's failure to present any evidence that the certification followed the application of the required independent judgment renders the complaint void.

The instant complaint was not properly issued, as an independent review of the photo evidence must fail as adequate basis of determining whether a registered owner was the actual driver at the time a violation is captured. As in Johnson, the instant citation lacks adequate "additional foundation" to support its automated certification signature. A process, such as this, which generates complaints in assembly-line fashion, "robo-signed" without the human involvement and independent judgment required by our statutory scheme and rules, results in a complaint which is a nullity, which necessarily deprives the Court of subject matter jurisdiction. These compounded procedural defects and deficiencies deprives the Court of the ability to enter a valid judgment. For the foregoing reasons, Defendant respectfully requests that this case be dismissed.

THE CITATION NOTICE VIOLATED STATUTORY REQUIREMENTS[1]

A.R.S. § 28-1593(C) provides that a mailed citation must "inform the person that there is no obligation to identify the driver or respond to the citation." A.R.S. § 28-1602(B) requires that the notice of violation must state the following:

1. The notice is not a court issued document and the recipient is under no obligation to identify the person or respond to the notice.
2. Failure to respond to the notice may result in official service that may result in an additional fee being levied.

The instant notice failed to include the statutorily mandated language. For the State's failures set forth, depriving the Court of the ability to enter a valid judgment, Defendant respectfully requests that this case be dismissed.

NON-CONFORMANCE TO STATUTORY REQUIREMENTS PERMITS DISMISSAL

A.R.S. § 28-1204(B) and (C) set forth specific statutory requirements on placement, distance, number, color, composition, content, or legibility of such signage. A.R.S. § 28-1203 provides additional requirements regarding the permissible placement of a photo enforcement system, which the State may have failed to strictly observe.

A.R.S. § 28-1204(D) provides: "If the standards and specifications prescribed pursuant to this section are not in effect during the operation of a photo enforcement system, the court may dismiss any citation issued to a person who is identified by the use of the photo enforcement system." A.R.S. § 28-1204(D).

For any failure to strictly comply with requirements set forth by statutes for photo enforcement, which would deprive the Court of the ability to enter a valid judgment, Defendant respectfully requests that this case be dismissed.

A MOTION ATTACKING JURISDICTION DOES NOT ADMIT JURISDICTION

Defendant's motion attacking jurisdiction may not be deemed by the Court as an admission of jurisdiction or waiving the requirement of personal service. Such a holding would be both manifestly unjust and irreconcilable with the applicable rules, procedures, and precedent, and would preclude defendants from ever attacking jurisdiction, since courts could simply deem the attack alone as an admission of jurisdiction.

"Defendants' attack has been jurisdictional. It would be anomalous and a distortion of the statutes to say that a defendant by attacking [the] lack of jurisdiction thereby conferred jurisdiction on the court to proceed to trial on the merits. A jurisdictional attack does not constitute a general appearance nor submission to the jurisdiction of the court." Stinson v.

[1] A.R.S. §§ 28-2593(C) and 28-1602(B) were amended enacting said requirements by SB 1398 (*see* http://azleg.gov//FormatDocument.asp?inDoc=/legtext/50leg/1r/laws/0308.htm, viewed 2/7/2012), Chapter 308, § 4 and § 6, respectively, and passed in 2011 in the First Regular Session of the Fiftieth Legislature, and approved by the Governor on April 28, 2011, and effective July 20, 2011 (*see* http://azleg.gov/GeneralEffectiveDates.asp, last viewed 2/6/2012).

Johnson, 414 P.2d 169, 171, 3 Ariz.App. 320, 322 (App., 1966), internal citations omitted.

An argument that a defendant "subjected himself to the jurisdiction of the court by [a] motion to dismiss [led the Appellate Court] to conclude that a motion to dismiss, as well as a motion to quash, is appropriate to question the trial court's jurisdiction over [defendant] upon the grounds of insufficiency of the service." *Id*. at 170, 321, internal citations omitted.

In State v. Burton, 205 Ariz. 27, 29, 66 P.3d 70, 72 (App. 2003), the Appellate Court has made clear that "**action on the part of a party** except to object to personal jurisdiction **that recognizes the case as in court** will constitute a general appearance." *Id*. (emphasis added). As in Burton, a jurisdictional objection is waived where the objecting party requests a hearing and then only objects to a later hearing to enforce the resulting order. Here, Defendant did not initiate the action, and Defendant objects to the Court's jurisdiction.

The cases cited by Burton on this point make the distinction clear. In Tarr v. Superior Court, 142 Ariz. 349, 351, 690 P.2d 68, 70 (1984), the Arizona Supreme Court held that the "late filing of an answer can constitute an appearance." Of course here, Defendant has never filed an answer, and objects to the exercise of personal jurisdiction. In Austin v. State ex rel. Herman, 10 Ariz.App. 474, 477, 459 P.2d 753, 756 (1969), the Court held a mere letter inquiring about a case was not an appearance, but introducing evidence and examining witnesses was. The reasoning is instructive:

> In Anderson v. Taylorcraft, Inc., 197 F.Supp. 872 (W.D.Pa.1961), the federal court in deciding whether or not a letter constitutes an appearance made the following observation at 197 F.Supp. 874:
>
> 'An appearance is ordinarily an overt act by which a party comes into court and submits himself to its jurisdiction. 6 C.J.S. Appearances § 1. It is an affirmative act requiring knowledge of the suit and an intention to appear. '(A)n appearance is always a matter of intention, and it is not to be inferred, except as the result of acts from which an intent may be properly inferred.' Durabilt Steel Locker Co. v. Berger Manufacturing Co., D.C.N.D.Ohio E.D.1927, 21 F.2d 139, 140; 6 C.J.S. Appearances & 12, p. 19. "Broadly stated, any action on the part of defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance * * *'; but, 'although an act of defendant may have some relation to the cause, it does not constitute a general appearance, if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, And no affirmative action is sought from the court.'' * * * Pellegrini v. Roux Distributing Co., 170 Pa.Super. 68, 84 A.2d 222, 224; 6 C.J.S. Appearances § 13.' (Emphasis in originals)

Austin v. State ex rel. Herman, 10 Ariz.App. 474, 477, 459 P.2d 753, 756 (1969).

In Arizona, jurisdiction is not waived where Defendant's act "in no way recognizes that the cause is properly pending or that the court has jurisdiction." *Id.* (internal citations omitted). A motion attacking personal jurisdiction for want of proper service and subject matter jurisdiction for a fatal defect in the complaint, even when other grounds for dismissal are included, cannot constitute "an intention to appear". *Id.*, (internal citations omitted).

Moreover, the Arizona Supreme Court has explicitly directed the limited jurisdiction courts that "[a] motion attacking jurisdiction/venue is not an appearance and should NOT be docketed using the [acknowledgment received] event code." Guidelines for Processing Photo Enforcement Citations in Limited Jurisdiction Courts[1] at p. 5.

THIS CASE IMPLICATES DEFENDANTS' CONSTITUTIONAL RIGHTS

In addition to the Constitutional Rights previously asserted, Defendant's prosecution here implicates specific additional Constitutional Rights as explicitly set forth in Arizona's Constitution as well as the Bill of Rights and Amendment XIV of the U.S. Constitution. Art. II, § 2, Ariz. Const. provides that governments "are established to protect and maintain individual rights." Art. II, § 4, Ariz. Const. makes explicit that "[n]o person shall be deprived of life, liberty, or property without due process of law." At an absolute minimum, due process requires the right to be adequately notified of charges or proceedings, the opportunity to be heard at these proceedings, and that the judicial officer deciding the case be impartial. Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

Art. II, § 11, Ariz. Const. requires that "Justice in all cases shall be administered openly, and without unnecessary delay." Art. II, § 11, Ariz. Const. assures that "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

Where the Defendant's Rights are violated by or in these actions, it is the Court's duty to safeguard those rights, and to "protect and maintain individual rights". To the extent that the process and procedure here employed denies or abridges any of Defendant's Rights, specifically those here enumerated, this Court is duty bound to expediently protect Defendant by dismissing these matters.

Though Arizona's prosecution of traffic offenses is ostensibly a "civil" matter, that designation is not determinative regarding certain constitutional rights. The U.S. Supreme Court has held that the statutory classification of an action as civil or criminal must be assessed in light of the sanction or fine. "[T]he labels affixed whether to the proceeding or to the relief imposed … are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law." United States v. Halper, 490 U.S. 435, 448 (1989), *citing* Hicks v. Feiock, 485 U.S. 624, 631 (1988).

"[I]n determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." Halper, at 447, FN7. "Retribution and deterrence are not legitimate nonpunitive governmental objectives." Bell v. Wolfish, 441 U.S. 520, 539, n. 20, 99 S.Ct. 1861, 1874, n. 20 (1979). "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." Halper, at 448.

It cannot be fairly argued that the penalty assessed in this type of traffic violation matter, though designated "civil penalty" pursuant to A.R.S. § 28-1521, is anything but

[1] Published by the Arizona Supreme Court, Administrative Office of the Courts, Revised 3-31-08, available at http://www.supreme.state.az.us/courtserv/attc/peprocessguidelines-v2-3-31-08.pdf, last retrieved 7-6-2011.

retributive or for purposes of deterrence. As such, important constitutional rights attach, including Defendant's Confrontation Rights.

DEFENDANT IS ENTITLED TO DUE PROCESS CONFRONTATION RIGHTS

One of the most hallowed of American liberties is the right to cross-examine (confront) witnesses presenting evidence against a party, and so the Defendant's right to confront the State's witnesses may not be denied at trials. Crawford v. Washington, 541 U. S. 36 (2004), requires that, with limited exception, witness testimony against a defendant is inadmissible unless the witness appears at trial. When a substitute witness testifies in place of the actual witness, the Defendant is denied the right to test the actual witness. Moreover, photographic and technical evidence offered by the State is of a kind and nature which, pursuant to Crawford, falls within the class of testimonial statements covered by the Confrontation Clause. This evidence offered by the State to show both that a traffic violation had occurred, and that the Defendant had committed the violation. The State offered this evidence for the precise purpose to which individuals responsible for the creation of this evidence would be expected to testify if called at trial.

Based upon knowledge and experience, not only is this evidence generated, as explained in Crawford, "under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial," but its sole purpose is to provide *prima facie* evidence of the violation and the identity of the violator.

If the actual witness is not in court, Defendant is deprived of the opportunity to test the witness in court, to have the witness explain the methods, process, and application actually employed by that witness in this case, and to inquire into the witness' training and experience.

While Arizona does not have any precedent precisely on point, other states and courts have ruled on similar issues. In State v. Workman, 536 Utah Adv. Rep. 3, 122 P.3d 639, (2005), the Utah Supreme Court confronted a situation where the toxicologist who initially created the toxicology report moved out of state and the State planned to use her supervisor as a substitute witness in her stead. After discussing the subjective nature of the toxicology report, the highly subjective nature of the tests, and the possibility for human error, the Utah Supreme Court held:

> Second, given the nature of the tests, it would be extremely difficult for defendants to challenge the evidence in the resulting reports without crossexamining those personally involved in the testing.
>
> . . . .
>
> Because there is a significant subjective element involved in the testing at issue, including a criminologist determining the results of the color tests and comparing the spectra from the gas chromatograph mass spectrometer test with the spectra from known substance, Wright's absence deprived Workman from confronting evidence presented against her.

State v. Workman, *id*., at ¶ 17. This is similar to the instant matter, one witness allegedly reviewed evidence and caused a complaint to issue, and a different witness is called by the

State to parrot the actual witness' conclusions. If a substitute is offered in place of the actual witness, the Defendant will be precluded from challenging the actual witness' conclusions. In United States v. Blazier, 69 M.J. 218, 223 (Ct. App. Armed Forces 2010) the Court of Appeals for the Armed Forces discussed the use of a substitute witness and its relation to the right to confrontation. This court held "the right of confrontation is not satisfied by confrontation of a surrogate for the declarant." The Court stated:

> We hold that where testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to crossexamination at trial or (2) unavailable and subject to previous cross-examination.

Blazier, *id*., at 222. In Bullcoming v. New Mexico, __ U.S.___, 131 S. Ct. 2705 (2011) the U.S. Supreme Court ruled on the propriety of the State's use of a substitute witness to validate a forensic laboratory report. In Bullcoming, *id*., the State did not call the original lab analyst to testify and did not assert the lab analyst was unavailable. The substitute witness was familiar with the testing device and the laboratory's testing procedure but had not participated in the original test. The U.S. Supreme Court held the trial court erred in allowing the in-court testimony of a scientist who did not sign the certification or perform or observe the lab test used to convict. The U.S. Supreme Court said:

> The accused's right is to be confronted with the analyst who made the certification unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Similarly, in this case, the State did not call the original complainant and did not assert unavailability. The substitute, even if familiar with the actual procedure employed, had not participated in making the original determination.

Pursuant to Melendez-Diaz v. Massachusetts, 557 U.S. ___ (2009), Defendant is entitled to "be confronted with" the persons offering this type of testimony at trial. As explained by the U.S. Supreme Court in that holding, the "Sixth Amendment guarantees a defendant the right 'to be confronted with the witnesses against him.'" The photo enforcement evidence expected to be introduced against Defendant is likely the only evidence introduced which alleged a violation.

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status, but not if they are produced only to be used as evidence for use at trial. As the Supreme Court in Melendez-Diaz explained: "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because [they were not] created for the purpose of establishing or proving some fact at trial [which would make them] testimonial." Here, as in *Melendez-Diaz*, whether or not the introduced evidence might qualify as business or official records, since it is prepared specifically for use at Defendant's trial, it is testimony against Defendants, and those responsible for its creation are subject to confrontation under the Sixth Amendment.

As the Supreme Court held in Crawford, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in

the crucible of cross-examination." Furthermore, the Supreme Court in Melendez-Diaz addressed the argument on testimonial evidence presented by "neutral" or apparently disinterested parties, stating that someone "responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution … Confrontation is one means of assuring accurate analysis." Moreover, the Supreme Court held that "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well."

In this case, this issue is magnified greatly because it appears the evidence was collected by a private corporation with a financial interest in the action. The evidence was obtained and generated using equipment wholly owned and controlled by this private corporation, and this private corporation exercised exclusive and complete control over the evidence for a time. Most damningly, this private corporation has a direct financial incentive in seeing Defendant found responsible, as it benefits financially from the fine assessed against defendants in this case, but it earns nothing if no fine is assessed.

Although each of the cited presented in a criminal context, the rationale used in these cases holds true in a civil traffic case where the State seeks to deprive a defendant of property in the form of a fine. In State v. Nichols, 169 Ariz. 409, 819 P.2d 995 (Ct. App. 1991), our Court of Appeals discussed the line between civil and criminal cases and referenced United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892 (1989), wherein the U.S. Supreme Court addressed the issue of seeking civil fines against a person who had been convicted of criminal charges stemming from the same conduct. Our Court of Appeals—in commenting on Halper, *id*., stated:

> The Court held that in determining whether a proceeding is criminal or civil, it is the character of the sanction imposed that is crucial, as opposed to the labels "criminal" and "civil." The Court noted that "civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.

Nichols, *id*., 169 Ariz. at 412, 819 P.2d at 998. In Nichols, *id*., the Court of Appeals held that a license suspension pursuant to the implied consent law was not a punitive act but, instead, was intended to protect the public from an impaired driver.

By contrast, civil penalties — fines — for traffic violations may assume more of the character of retribution. In State v. Boudette, 164 Ariz. 180, 791 P.2d 1063 (Ct. App. 1990) the Arizona Court of Appeals reviewed the history of civil traffic offenses and noted that — prior to 1983 — these offenses were criminal. In 1983, the Legislature reclassified these violations as civil. Thereafter, the courts determined which safeguards continued for defendants accused of the offenses. In Boudette, *id*., 164 Ariz. at 184, 791 P.2d at 1067, the Court of Appeals determined the Legislature created the civil traffic violation category as a way to expedite enforcement for these offenses. In reviewing Boudette's claim that the police had no authority to stop him for violating a civil traffic law, the Court of Appeals held it was a reasonable exercise of the State's police power to stop motorists for traffic violations as well as for potential criminal activity. The Court determined that although stopping an automobile and detaining a driver to serve a traffic citation is a seizure within the meaning of the Fourth Amendment, the exercise of this power did not depend on whether the State defined traffic offenses as civil or criminal. The Court stated:

> Moreover, even if we accepted Boudette's argument that the officer could not stop him for a civil violation, his interpretation of the law is hypertechnical at best. Fourth amendment cases often use the term "public offenses" when discussing search and seizure issues. The word "crime" includes violations of public laws, such as traffic regulations. In Arizona, an offense for which a sentence is a fine only is considered a petty offense, as defined in the criminal code.

Boudette*, id*., 164 Ariz. at 185, 791 P.2d at 1068 (internal citations omitted.) In contrast, in Taylor v. Sherrill, 169 Ariz. 335, 819 P.2d 921 (1991) our Arizona Supreme Court (1) discussed civil traffic tickets; (2) found traffic offenses to be civil; and (3) concluded civil traffic violations did not violate double jeopardy if the individuals were also prosecuted for criminal offenses arising from the same conduct. Boudette*, id*., and Sherrill*, id*., indicate differing Constitutional mandates in the context of civil traffic offenses. For double jeopardy purposes, the civil traffic offense lies squarely within the civil arena and therefore, does not preclude criminal charges arising from the same conduct. For Fourth Amendment purposes, civil traffic violations are akin to criminal acts and allow the police to stop and inquire about the activity.

Because traffic offenses fall within the realm of civil as opposed to criminal acts, Defendant has no right to confront witnesses against her under the Sixth Amendment. However, Defendant did retain a due process right to cross-examine witnesses under the Fifth and Fourteenth Amendments. In Goldberg v. Kelly, 397 U.S. 254, 269, 90 S. Ct. 1011 (1970) — a civil case involving receipt of financial aid under a federally assisted AFDC program — the U.S. Supreme Court held:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. What we said in Greene v. McElroy, is particularly pertinent here:
>
> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases * * * but also in all types of cases where administrative * * * actions were under scrutiny.

Id. (internal citations omitted.) If Defendant has no opportunity to cross-examine the complainant — the person tasked with making the initial determination that she was the responsible party for purposes of issuing a ticket — the failure to allow her the opportunity to cross-examine the witness deprived her of procedural due process.

Reading the U.S. Supreme Court's holdings in United States v. Halper, Hicks v. Feiock, Bell v. Wolfish, Crawford v. Washington, and Melendez-Diaz v. Massachusetts, *supra*, in harmony, Defendant is entitled to certain constitutional protections, among them the right to confront witnesses for the State, as a matter of due process.

Under these facts and circumstances, admission of the State's evidence without the requisite ability to confront and cross-examine those who were responsible for its creation would constitute a violation of Defendant's Confrontation Rights. A private corporation is responsible not only for the collection and creation of the evidence, using their privately owned equipment, installed, maintained, and operated by their employees, but also responsible for the production of said documents to be used as evidence in Defendant's trial. Testimony will likely establish that this private corporation has a direct financial incentive to have fines assessed against Defendant, which creates a significant conflict, and should reflect on the credibility of the evidence.

Importantly, the Court should note that this critical point is not a question implicating the rules of evidence, but rather Defendant's Constitutional Due Process Right to be able to confront the State's witnesses. The question is not whether such evidence is admissible, but whether Defendant has a Constitutional Right to confront the witnesses responsible for the creation of this evidence, and whether the proper remedy for denying Defendant the opportunity to confront witnesses is to preclude considering such evidence.

If, without evidence that would deny Defendant's Confrontation Rights, no substantial evidence remains, and in due regard to Defendant's objections to testimonial evidence without cross-examination, Defendant respectfully requests that this case be dismissed.

THE STATE SHOULD BE PRECLUDED FROM ASSERTING A VALID COMPLAINT AS UNSWORN COMPLAINTS CERTIFIED BY NON-OFFICERS HAVE BEEN HELD TO DEPRIVE TRIAL COURTS OF THE ABILITY TO ENTER A VALID JUDGMENT

Sup.Ct.R, Rule 111 (c) and the identical A.R.C.A.P., Rule 28 (c) state: "Dispositions as Precedent. Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited."

Res judicata is now called claim preclusion. *In re* Gen'l Rights of Gila River Sys., 212 Ariz. 64, 69, 127 P.3d 882, 887 (2006) (internal citations omitted). "The defense of claim preclusion has three elements: (1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between parties in the two suits." *Id*. at 69, 127 P.3d at 887.

Collateral estoppel is now called issue preclusion. *Id*. at 70, n. 8, 127 P.3d at 888, n. 8. Under the doctrine of the defensive use of issue preclusion, "a plaintiff and its privies are

barred from relitigating issues already settled in one case […] in another case. The party asserting the bar must show that (1) the issue was litigated to a conclusion in a prior action, (2) the issue of fact or law was necessary to the prior judgment, and (3) the party against whom preclusion is raised was a party or privy to a party to the first case." Maricopa-Stanfield Irr. & Drainage Dist. v. Robertson, 211 Ariz. 485, 492, 123 P.3d 1122, 1128 (2005) (internal citations omitted). Issue preclusion may be asserted against the plaintiff in the prior litigation by "one who was a complete stranger to the prior litigation." Di Orio v. City of Scottsdale, 408 P.2d 849, 852, 2 Ariz.App. 329, 332 (Ariz. App., 1965).

In State v. Musial, LC1998-000778 (Maricopa County Superior Court, 1998, and attached pursuant to Sup.Ct.R. 111)[1], the Superior Court, pursuant to Ariz.R.Civ.P., Arizona Traffic Violation Cases, was the appellate court for the limited jurisdiction court. That matter was brought as a civil traffic action by the State against the defendant Musial, pursuant to an Arizona Traffic Ticket and Complaint. *Id*. at p. 2. There, as in the instant action, Musial claimed the complaint failed to meet the requirements of A.R.S. § 28-1561. *Id*. Musial and the State fully litigated the issue in the trial court and again on appeal, each side filing memoranda and presenting oral argument. *Id*. at pp. 2, 5. The appellate memorandum decision held "that a Uniform Traffic Ticket Complaint either: a) be separately sworn to; or, b) if issued by an officer, it must contain a specifically worded certification." It further found that the "unsworn uniform traffic complaint [a non-police officer] purportedly issued was insufficient, as a matter of law, to confer jurisdiction on the" trial court. *Id*. at p. 5.

Pursuant to the holding in Musial and the doctrines of claim and issue preclusion, the State should be bound by the prior decision of the Superior Court on the limited issue as to whether an unsworn traffic complaint issued by a non-police officer deprives the trial court of the ability to enter a valid judgment, also at issue in the instant matter.

PRIVATE FINANCIAL INTEREST IN THE ACTION IS EVIDENCE OF BIAS

Arizona law recognizes "that evidence of a [potential financial gain] by a complaining witness against the defendant, arising from the same transaction that is the subject of the prosecution, has a direct bearing on the credibility of the witness to show bias and prejudice, as well as the witness' relationship to the case." State v. Gertz, 186 Ariz. 38, 42, 918 P.2d 1056, 1060 (App. Div. 1, 1995) (internal quotes and citations omitted).

Complainant's "financial interest in the litigation was properly explored as evidence of bias." Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 45, 945 P.2d 317, 356 (App. Div. 1, 1996) (citing *M. Udall et al.*, Arizona Practice Law of Evidence § 45 (3d ed.1991)). "The bias or interest of a witness is a matter that affects credibility." Maricopa County v. Barkley, 168 Ariz. 234, 240, 812 P.2d 1052, 1058 (App. 1990) (citations omitted).

If testimony at trial established that a private corporation owns and controls the equipment used to create the alleged photo enforcement evidence, that this private

[1] While Sup.Ct.R, Rule 111 (c) & A.R.C.A.P., Rule 28 (c) address the specific exceptions pursuant to which a memorandum decision may be cited, including, as here, for the purpose of the defensive use of issue preclusion, Arizona Ethics Opinion No. 87-14 also concludes that citing a memorandum decision of the Superior Court sitting as a reviewing court in a lower court appeal, even absent an application of the exceptions contained in the rules, is not unethical or prohibited by the rules.

corporation is responsible for the equipment's' installation, operation, and maintenance, that this private corporation has exclusive custody and control over the alleged evidence produced on their equipment for a time, that an employee of this private corporation certified the Complaint, that this private corporation employees prepared other evidence for use at trial, and that this private corporation benefits when a sanction is ordered in a case brought on their evidence, but this private corporation does not benefit if no sanction is ordered, such is evidence of bias, and motivation for a self-serving result based on evidence generated by this private corporation.

This private corporation has financial incentive, as well as the means and opportunity, to sculpt and mold evidence to increase the likelihood of a sanction being entered, or to manipulate evidence to allege violations, or even to manufacture evidence alleging a violation. Evidence offered which was produced by this private corporation, and by which this private corporation intends to obtain a direct financial benefit, should be afforded less credibility than evidence offered by unbiased sources. As such, once the source, custody, control, and financial incentive are factored, the offered evidence obtained from this private corporation should be given short shrift, leaving little or no credible evidence of Defendant's culpability in the acts alleged. For the foregoing reasons, Defendant respectfully requests that these cases be dismissed.

RED LIGHT PHOTO ENFORCEMENT UTILIZED UNLAWFUL DEVICES

Pursuant to A.R.S. §§ 28-641 and 28-643, the State "shall adopt a manual and specifications for a uniform system of traffic control devices" (the "Arizona manual"), which "shall correlate with and as far as possible conform to" the National Manual on Uniform Traffic Control Devices ("MUTCD"). All traffic control devices erected by the State or local authorities must conform to the Arizona manual. The MUTCD, at 1A.07, states that the manual adopted by the state shall have the force and effect of law.

Neither the Arizona manual nor the MUTCD contain any provisions for the use of "violation line" pavement markings at intersections for red light violation photo enforcement. Nor do they contain any provisions for the use of photo enforcement equipment as traffic control devices installed at such intersections.

The Federal Highway Administration (FHWA), within the U.S. Department of Transportation, in their Official Interpretation 3-232(I), "Markings for Red Light Violations" has determined that the use of such markings is unapproved and in conflict with the requirements of the MUTCD, which is adapted and incorporated in the Arizona manual. As explained by the Federal Highway Administration, jurisdictions wishing to use non-compliant markings must first request and receive FHWA approval. Arizona has not requested or received such approval.

The FHWA has ruled that such markings are a safety concern, since they introduce inconsistency and uncertainty in highway markings between the several states. In Arizona, this safety issue is magnified, as each local jurisdiction utilizing such markings has chosen varying designs, colors, widths, and applications. This, of course, is a direct consequence of the use of unlawful markings and devices not approved in the Arizona manual or the MUTCD. For the foregoing reasons, Defendant respectfully requests the case dismissed.

A.R.S. § 28-645(A) PERMITS VEHICLES WITHIN THE CROSSWALK BEFORE THE LIGHT SIGNALS RED TO PROCEED THROUGH THE INTERSECTION

Ring v. Taylor, 141 Ariz. 56, 685 P.2d 121 (App. 1984) is instructive and unambiguous: "[T]he plain and ordinary meaning of the statutory language [in A.R.S. § 28-645(A)] is that vehicular traffic must yield to both vehicles and pedestrians within either the intersection or the adjacent crosswalk at the time the traffic signal turns to green." *Id.* at 70, 135.

In Ring, the Court of Appeals reasoned that this is evident from the language of A.R.S. § 28-645(A)(1)(a): "Vehicular traffic facing a green signal may proceed [but] shall yield the right-of-way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time the signal is exhibited."

The Court concluded that, "if there is a crosswalk and the light changes to red while in the crosswalk, the vehicle may proceed through the crosswalk and intersection." Ring at 71, 136. For the foregoing reasons, Defendant respectfully requests that the case dismissed with prejudice.

A.R.S. § 28-645(A)(3)(A) MUST BE READ IN HARMONY WITH A.R.S. §§ 28-641 AND 28-643, RING, AND 23 U.S.C. 109(D) AND 402(A), AND C.F.R. 23 § 655.603

Not only does Arizona law require that all traffic control devices conform to the Arizona manual (and its adoption of the MUTCD), the same is required by Federal Regulation implementing Federal Law. C.F.R. 23 § 655.603, "Standards" provides in subsection (a) that the "MUTCD approved by the Federal Highway Administrator is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. 109(d) and 402(a)."

Subsection (b)(1) further explains the interaction between the Arizona manual and the MUTCD: "Where State or other Federal agency MUTCDs or supplements are required, they shall be in substantial conformance with the National MUTCD. Substantial conformance means that the State MUTCD or supplement shall conform as a minimum to the standard statements included in the National MUTCD."

The MUTCD standard statement on red signals and their use, at MUTCD 4D.04 C, provides a clear definition:

> Steady red signal indications shall have the following meanings: 1. Vehicular traffic facing a steady CIRCULAR RED signal indication alone shall stop at a clearly marked stop line, but if there is no stop line, traffic shall stop before entering the crosswalk on the near side of the intersection; or if there is no crosswalk, then before entering the intersection, and shall remain stopped until a signal indication to proceed is shown, or as provided below.

The clear and unambiguous definition required by federal law, pursuant to 23 U.S.C. 109(d) and 402(a), promulgated in C.F.R. 23 § 655.603, and implemented by the MUTCD, and which is explicitly referenced as the applicable standard in A.R.S. §§ 28-641 and 28-

643, requires that the stop line at an intersection, or in its absence, the crosswalk, or in the absence of both, the intersection itself, is the point before which traffic must stop upon facing a steady red signal. A vehicle which has passed beyond the point set out in the standard before the signal has displayed a steady red, by definition, cannot have been required to stop, and thus no violation may be found, consistent with the Court of Appeals holding in Ring, as well as Federal law and regulation, as explicitly adopted and made binding by Arizona law and regulation.

Moreover, even if any conflict within Arizona statutes were resolved in favor of the State[1], the Supremacy Clause of the U.S. Constitution, at Art. VI, para. 2, requires that federal law prevails in cases where federal and state laws conflict. Arizona's definition of what constitutes a red light violation must be read in harmony with (and, if necessary, yield to) the definition explicitly set forth by federal law, federal regulation, and Arizona law adopting and conforming thereto.

The red light violation at an intersection with a stop line or marked crosswalk occurs only if a vehicle crosses those markings after the signal shows a steady red, and cannot occur after a vehicle has crossed those markings, but before a steady red signal. The unlawful violation line pavement marking is void and of no effect. Arizona's definition of a red signal violation must be read in harmony with federal law, to the extent it is in conflict with such. The Ring court's reading not only brings harmony to the possibly conflicting interpretations, it is also binding precedent. For the foregoing reasons, Defendant respectfully requests that the case be dismissed with prejudice.

STATE'S FAILURE TO APPEAR MUST BE TAKEN AS A CONFESSION OF ERROR

Should the State, following proper service and notice of Defendant's motion to dismiss, fail to appear or otherwise defend, the Court may deem this the State's confession of error. The confession of error doctrine is one of common sense, and binding precedent, based on years of case law history. While, pursuant to Rule 12, Ariz.R.Civ.P., Arizona Traffic Violation Cases, the State need not be represented by counsel **at any hearing or appeal** on a civil traffic complaint, it does not permit the State to remain silent in the face of cogent and timely legal challenges by a defendant to substantive and procedural shortcomings in the case, nor may the Court fill the void left by the State's neglect.

Rule 2(i), Ariz.R.Civ.P., Arizona Traffic Violation Cases, provides that a "Party" does not include a "law enforcement officer, police aide, traffic investigator, or parking enforcement volunteer", and any such individual appearing at a hearing may appear only as a witness and may not argue the law in place of the State. An overbroad reading of Rule 12 that would permit the State to ignore all pleadings with impunity would effectively be a general prohibition on any motion practice, at the election of the State – a reading far beyond the language of Rule 12. Instead, Rule 12 should be limited as written.

"[B]y failing to file an answering brief, the [State] risks confession of error should the

[1] A proposition contrary to public policy, given principles favoring resolution of statutory contradictions and ambiguities in favor of defendants in actions brought by the State. *See e.g.* State v. Angelo, 800 P.2d 11, 166 Ariz. 24 (Ariz. App., 1990).

[defendant] raise a debatable issue which is also supported by the record." State ex rel. McDougall v. Superior Court In and For County of Maricopa, 850 P.2d 688, 690, 174 Ariz. 450, 452 (Ariz. App. Div. 1, 1993).

Pursuant to Rule 12, the State's election to absent itself from any hearing alone is insufficient cause to deem the State in default or to have abandoned the case. But Rule 12 does not permit the State to ignore a defendant's pleading with impunity. The rules cannot be read to grant the State a pocket veto which defeats any pleading by a defendant in a civil traffic matter, so long as the State makes no appearance and files no responsive pleading. Furthermore, the language of the rule itself limits the State's election to not appear to "the hearing or appeal", and should not be read to relieve the State from a confession of error which is a natural consequence when the State fails to file responses and the defendant has raised a debatable issue supported by the record.

"[The court] will normally take a failure to file an answering brief as a confession of error unless there are circumstances indicating that [it] should not." Arizona Tank Lines, Inc. v. Arizona Corp. Commission, 473 P.2d 821, 13 Ariz.App. 19 (Ariz. App., 1970).

"Our Supreme Court has held that when no responding brief is filed…, this may be taken as a confession of error if [petitioner] has presented debatable issues. *Id*., citing Tiller v. Tiller, 98 Ariz. 156, 402 P.2d 573 (1965), Siemers v. Randall, 94 Ariz. 302, 383 P.2d 753 (1963), Barrett v. Hiney, 94 Ariz. 133, 382 P.2d 240 (1963), Nelson v. Nelson, 91 Ariz. 215, 370 P.2d 952 (1962), State v. Sanders, 85 Ariz. 217, 335 P.2d 616 (1959).

"Where [defendant's pleading] raises a debatable issue, and [plaintiffs] do not timely file [a response], the court may elect to treat the lack of a brief as a confession of error." Dancing Sunshines Lounge v. Industrial Com'n of Arizona, 720 P.2d 81, 149 Ariz. 480 (Ariz., 1986), citing Bugh v. Bugh, 125 Ariz. 190, 608 P.2d 329 ([App.] 1980).

"We agree … that when [defendant] raises a debatable issue, the court, in its discretion, may find that [the State's] failure to file an answering brief constitutes a confession of error." McDougall, 850 P.2d 688, 174 Ariz. 450 (Ariz. App. Div. 1, 1993), citing State v. Greenlee County Justice Court, 157 Ariz. 270, 271, 756 P.2d 939, 940 (App.1988).

Not only is such doctrine one of common sense, its application is necessary to avoid any appearance of bias by the Court. Where defendants plead debatable issues of law, yet the State remains silent, the Court should not appear to presume what the State's position might be, and that this presumed argument is the better one. "Once the existence of [a legal point] is challenged, the party asserting [it] has the burden of establishing it." Lycoming Division of Avco Corp. v. Superior Court of Maricopa County, Ariz.App. 150, 152, 524 P.2d 1323, 1325 (App. Div. 1, 1974). Importantly, it is not for the Court to advocate on behalf of, or against, the contested point, nor may the Court merely assume that the State's implicit position is established, but, as taught in Lycoming, once challenged, it is the State's burden to contest and counter the argument, not remain silent.

For the foregoing reasons, if the State should fail to appear or otherwise contest the arguments raised in this pleading, Defendant respectfully requests that the Court deem such neglect a confession of error and that this case be dismissed.