OFFICE OF THE ATTORNEY GENERAL

MEMORANDUM

TO: **Roger Vanderpool, Director**
Arizona Department of Public Safety

FROM: **Terry Goddard, Attorney General**

DATE: **February 27, 2009**

RE: **State Photo Enforcement System Issues**

Maricopa County Attorney Andrew Thomas recently issued a press release announcing that his office will not prosecute photo-radar cases referred by the Arizona Department of Public Safety under A.R.S. § 41-1722. (Press Release, 2/23/09.) Mr. Thomas' press release states that the language of Section 41-1722 (enacted in 2008) implementing a state photo enforcement system indicates that "photo radar was intended for civil traffic fines only, not for prosecution of alleged criminal charges." (*Id.*, ¶ 3.) The press release further states that "[t]he plain language of the law, as well as other legal and constitutional principles, disallows criminal prosecution of motorists based on photo-radar evidence." (*Id.*) You have asked our office to examine the County's position and advise you as to whether Mr. Thomas is correct in stating that criminal prosecution cannot occur if it is based on photo-radar evidence. For reasons that follow, Mr. Thomas' conclusions do not appear to be supportable as a matter of law.

1. <u>The State Photo Enforcement System Statute Contemplates Enforcement of Civil and Criminal Violations</u>.

A.R.S. § 41-1722 provides as follows:

> A. Notwithstanding any other law, the department shall enter into a contract or contracts with a private vendor or vendors pursuant to chapter 23 of this title to

> establish a state photo enforcement system consisting of cameras placed throughout this state as determined by the director *to enforce the provisions of title 28, chapter 3, articles 3 and 6 relating to vehicle traffic and speed.*
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> B. Notwithstanding any other law, the civil penalty or fine for a citation or a notice of violation issued pursuant to this section is one hundred sixty-five dollars and is not subject to any surcharge except the surcharge imposed by § 16-954. State photo enforcement citations shall not be included in judicial productivity credit calculations for fiscal year 2008-2009.
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> C. The photo enforcement fund is established consisting of monies received from citations or notices of violation issued pursuant to this section. The director shall administer the fund. Monies in the fund are subject to legislative appropriation and are appropriated to the department for administrative and personnel costs of the state photo enforcement system. Monies remaining in the fund in excess of two hundred fifty thousand dollars at the end of each calendar quarter shall be deposited, pursuant to §§ 35-146 and 35-147, in the state general fund.
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> D. Notwithstanding any other law, if a person is found responsible for a civil traffic violation or a notice of violation pursuant to a citation issued pursuant to this section, the department of transportation shall not consider the violation for the purpose of determining whether the person's driver license should be suspended or revoked. A court shall not transmit abstracts of records of these violations to the department of transportation.

Laws 2008, Ch. 286 § 23, effective Sept. 26, 2008, retroactively effective to July 1, 2008. (Emphasis added.)

The assertion that A.R.S. § 41-1722 was not intended for prosecution of alleged criminal offenses is inconsistent with the express language of Subsection A, which references enforcement of previously enacted provisions of Title 28, chapter 3, articles 3 and 6, which relate to vehicle traffic and speed. Article 3 authorizes photo enforcement zones and specifically references the use of "photo enforcement equipment" "to identify violators of this article and article 6 of this chapter." A.R.S. § 28-654(E). Article 6 includes not only civil traffic violations for exceeding a reasonable and prudent speed under A.R.S. § 28-701, but also criminal traffic violations for excessive speed under A.R.S. § 28-701.02.[1] Thus, the state photo enforcement

[1] A.R.S. § 28-701.02 provides as follows:

statute set forth in Section 41-1722(A) applies to criminal traffic violations as well as civil traffic violations.

Mr. Thomas suggests that Subsection D of Section 41-1722 prohibits the use of photo-radar in criminal cases because it prohibits "the use of photo-radar evidence for suspension or revocation of driver's licenses." (Press Release, ¶ 4.) However, as set forth above, Subsection D provides only that a civil traffic violation or a notice of violation cannot be used as a basis for suspending or revoking the offender's driver license. Subsection D is silent regarding whether a criminal conviction can be considered by the department of transportation in determining whether the person's driver license should be suspended or revoked, and Subsection D makes no mention of a rule of preclusion preventing the State from using photo-radar as part of the evidence utilized to prove criminal excessive speed.

Mr. Thomas further suggests that the language of Section 41-1722 "indicates photo radar was intended for civil traffic fines only, not for prosecution of alleged criminal charges." (Press Release ¶ 3.) However, the language to which he is apparently referring in Subsection B simply provides that there is a "civil penalty or fine for a citation or a notice of violation issued pursuant to this section" of "one hundred sixty-five dollars and is not subject to any surcharge except the surcharge imposed by § 16-954." That language does not prohibit a criminal conviction; it

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A. A person shall not:
1. Exceed thirty-five miles per hour approaching a school crossing.
2. Exceed the posted speed limit in a business or residential district by more than twenty miles per hour, or if no speed limit is posted, exceed forty-five miles per hour.
3. Exceed eighty-five miles per hour in other locations.
B. A person who violates subsection A of this section is guilty of a class 3 misdemeanor.
C. A person charged with a violation of this section may not be issued a civil complaint for a violation of section 28-701 if the civil complaint alleges a violation arising out of the same circumstances.

simply specifies the amount to be levied as a "civil penalty or fine for a citation or notice of violation." Accordingly, the import of Subsection B is that a $165 fine may be imposed based on showing by a preponderance of evidence that a person has committed a civil violation. As with Subsection D, Subsection B does not preclude the state from using photo-radar evidence as part of the evidence necessary to prove an excessive speeding criminal violation.

Prior to the enactment of the 2008 statute, Title 28, Chapter 3, Article 3 clearly authorized the use of photo radar in enforcing criminal violations. See A.R.S. § 28-654(E). Cities throughout the State have been using photo radar in criminal cases, and the newly-enacted statute does not purport to alter or limit Article 3 and, in fact, specifically incorporates Article 3 without any suggestion that photo-radar enforcement of criminal statutes is inappropriate. Thus, the new statute should not be read to call into question the use of photo radar in criminal cases.

Mr. Thomas posits that the legislature intended that DPS cameras not be used to establish criminal violations for excessive speed. However, the legislature did not include language to that effect in the statute, and the legislative history underlying the enactment of Section 41-1722 does not establish such an intent. The fact sheet for House Bill 2210 states that the bill:

- Establishes a civil penalty or fine of $165 for a citation or notice of violation for state photo enforcement. This fine or notice of violation is not subject to any surcharge except for the 10% surcharge for the Citizens Clean Elections Fund. This applies retroactively to July 1, 2008.

- Stipulates that if a person is found responsible for a civil traffic violation or a notice of violation for state photo enforcement, the Arizona Department of Transportation (ADOT) must not consider the violation for the purpose of determining whether to suspend or revoke the person's driver license. This applies retroactively to July 1, 2008.

House of Representatives HB 2210, Forty-eighth Legislature – Second Regular Session. The amended Senate fact sheet for the same legislation explains that the bill:

> 14. Specifies, retroactive to July 1, 2008, the civil penalty or fine for a citation or a notice of violation issued for state photo enforcement is $165 and is not subject to any surcharge except for the ten percent surcharge for the Citizens Clean Elections Fund.
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> . . .
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> 18. Prohibits, retroactive to July 1, 2008, if a person is found responsible for a civil traffic violation or a notice of violation as a result of a citation issued by the system, the Arizona Department of Transportation (ADOT) from considering the violation for the purpose of determining whether the person's driver license should be suspended or revoked. Prohibits the court from transmitting abstracts of records of these violations to ADOT.
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> . . .
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> 21. Requires, for a person who fails to respond to the notice of violation or contests responsibility, a uniform traffic complaint citation to be served and filed by established means.

Arizona State Senate, Forty-eighth Legislature, Second Regular Session, Amended Fact Sheet for H.B. 2210.

The first bullet point in the House legislative history obviously reflects an intent to create a civil penalty. The second bullet point in the House fact sheet notes that, "if a person is found liable for a civil traffic violation or notice of violation," the violation will not be reported to or considered by ADOT for purposes of determining whether to suspend or revoke the person's driver license. If the House did not intend that photo radar could be used as evidence in a criminal case, there would have been no need to include the word "civil" in the second bullet point, and the fact sheet presumably could have referenced simply a "violation or notice of violation for state photo enforcement." The Senate fact sheet simply specifies what penalty results for a civil violation and notes that if a person is found responsible for a civil traffic violation, the violation will not be reported to ADOT.

In any event, given the fact that Section 41-1722 incorporates existing law regarding photo radar, which contemplates its use as evidence in a criminal case, and given the absence of any language suggesting an intent to change that law even if, for example, a driver was determined to be driving more than 100 miles per hour, Section 41-1722 should not be read to preclude a criminal conviction based on photo radar evidence derived from a DPS camera.

Finally, Mr. Thomas' anecdotal explanations of potential abuses of the criminal process based on the use of photo radar do not provide a reasoned basis for an assertion that photo radar cannot be used to establish a criminal violation. Mr. Thomas has stated that he will dismiss "all criminal speeding and reckless driving cases brought to him when the only evidence presented is a photo radar ticket." (www.thenewspaper.com, at ¶ 2.) He further notes that "DPS keeps pressing us on this," and he states:

> The cases we are receiving underscore why we have these constitutional rules. Some of the cases that were brought to my attention – there was one case in which the defendant was male but the driver in the photo appeared to be female. In another one the age didn't match, and a much older woman, someone in her seventies, was the defendant but it appeared that someone else was driving the vehicle.

(*Id*. *at* ¶ 8.) As previously noted, under Title 28, chapter 3, article 3, (which Section 41-1722 specifically incorporates), photo radar cannot be used to establish criminal *reckless* driving. Thus, there are no criminal "reckless driving cases" in which this issue must be addressed. As to cases referred by DPS that involve a defendant who does not match the person photographed by photo radar, the defendant would presumably not be charged with, much less convicted beyond a reasonable doubt of, a criminal offense.

2. <u>The Admissibility of Evidence in a Criminal Proceeding is not Determined by Statute.</u>

Under Rule 401 of the Arizona Rules of Evidence, "all relevant evidence is admissible" in a criminal case. Photo-radar evidence is obviously relevant to a charge of criminal speeding under A.R.S. § 28-701.02. Under the Arizona Constitution, the Arizona Supreme Court is given the authority to make rules relative to all court procedural matters. Ariz. Const. Art. 6, § 5(5). The Arizona Rules of Evidence were promulgated pursuant to this authority. *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590, 691 P.2d 678, 681 (1984). Therefore, even assuming the statute could be interpreted as Mr. Thomas appears to be interpreting it, the State would not necessarily be precluded from using photo radar evidence from DPS cameras to establish a criminal conviction. Although the Legislature may enact procedural rules consistent with the Arizona Rules of Evidence, a legislative rule that is inconsistent with those court rules would be invalid. *See, e.g., State v. Taylor*, 196 Ariz. 584, 588, ¶ 11, 2 P.3d 674, 678 (App. 1999) (statutory rule concerning the admissibility of hearsay statements by a minor was invalid where it was inconsistent with the Arizona Rules of Evidence). As long as photo-radar evidence is admissible under the Arizona Rules of Evidence, it may be used in prosecuting a criminal case.

Arizona appellate courts have not specifically addressed whether photo radar evidence alone is sufficient to establish a criminal speeding violation; however, Arizona courts have routinely permitted and considered evidence derived from radar devices in criminal cases. *See, e.g., State v. Payan*, 148 Ariz. 293, 714 P.2d 463 (App. 1986) (radar clocking of speeding vehicle supported police officer's assertion of reasonable justification for an investigatory stop). Arizona courts have similarly authorized evidence derived from other types of devices, such as video-tape recorders or cameras. *See State v. Haight-Gyuro*, 218 Ariz. 356, 360, ¶¶ 7-14, 186 P.3d 33, 35-37 (App. 2008) (store surveillance tape recording is admissible in a criminal

case when proper foundation is laid); *State v. Paul*, 146 Ariz. 86, 88, 703 P.2d 1235, 1237 (App. 1985) ("[T]he requirements for admission of a video recording [are] the same as for a photo, that it fairly and accurately depicts that which it purports to show.") (citations omitted). Other states have followed this same approach with regard to photo-radar evidence, *see State v. Weber*, 19 P.3d 378, 381 (Or. App. 2001), and there is no reason to believe the same rule would not be followed by Arizona appellate courts were the issue to be raised here.

3. Using Photo-Radar Evidence Does Not Create a Confrontation Clause Violation.

Mr. Thomas states that prosecutions based on photo radar evidence would violate the Confrontation Clauses of the United States and Arizona Constitutions because a defendant would have "no opportunity to question or cross-examine a camera." (Press Release, ¶ 6.) Mr. Thomas ignores, however, the fact that non-testimonial evidence such as a surveillance tape or an Intoxilyzer test result is routinely admitted in criminal cases without implicating the Confrontation Clause. Under Mr. Thomas' interpretation of the Confrontation Clause, the evidentiary use of surveillance tapes or Intoxilyzer test results, as well as any other mechanical measuring device, would be improper because there is no opportunity to question or cross-examine the tape or the measuring device.

Furthermore, the United States and Arizona Confrontation Clauses, by their express terms, only afford a criminal defendant the opportunity to confront the *witnesses* against him. *See* U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the *witnesses* against him . . . .") (emphasis added); Ariz. Const. Art. 2, § 24 ("In criminal prosecutions, the accused shall have the right . . . to meet the *witnesses* against him face to face . . . .") (emphasis added). A defendant's right to confrontation does not extend to *physical evidence. See United States v. Restrepo*, 994 F.2d 173, 183 (5th Cir. 1993) (rejecting

claim that confrontation clause requires government to produce controlled substance defendant is accused of possessing because "the Sixth Amendment right of confrontation deals with witnesses and not physical evidence," and noting that "the witnesses upon whom the government relied to establish the nature of the controlled substance testified at trial and were available for cross-examination"); *State v. Williams*, 913 S.W.2d 462, 465 (Tenn. 1996) (upholding admission of surveillance photographs from robbery scene because "both the federal and [Tennesee] constitutional confrontation provisions are restricted, by their own terms, to 'witnesses' and do not encompass physical evidence or objects, such as photographs").

The Confrontation Clause applies only to the admission of "testimonial" hearsay. U.S. Const. Amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42–68 (2004); *see also* Ariz. R. Evid. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Neither an image from a photo radar camera nor the speed the camera records constitutes hearsay because a machine cannot serve as a "declarant" for hearsay purposes. *See generally*, Ariz. R. Evid. 801 ("A 'declarant' is a *person* who makes a statement.") (emphasis added); *see also Weber*, 19 P.3d at 380–81 (even assuming that inscription of defendant's speed on photo radar image qualifies as a "statement" for hearsay purposes, that statement "was generated by a machine, and not made by a person," and therefore did not qualify as hearsay); *Murray v. State*, 804 S.W.2d 279, 284 (Tex. Ct. App. 1991) ("If [an officer reads] . . . information which was simply being automatically recorded by [a] machine, such as climatological data, a hearsay problem is not presented. The mere fact that the same data was ultimately printed in hard copy would not convert it into hearsay.") (quotations omitted).

To prosecute a criminal speeding case based on photo radar, the State would typically produce one or more witnesses to authenticate the image from the camera, *see* Ariz. R. Evid. 901, and, presumably, to testify regarding the camera's reliability, maintenance, and calibration. A defendant would be able to confront and cross-examine such witnesses, and his state and federal constitutional rights to confrontation would thus be satisfied. *See Restrepo*, 994 F.2d at 183 (noting that the Confrontation Clause guarantees only the opportunity for effective cross-examination—not cross-examination to whatever extent a defendant wishes—and stating, "[Defendant] had ample opportunity to cross-examine the witnesses who testified as to the nature of the controlled substance."). Accordingly, the use of photo-radar evidence in a criminal case does not implicate Confrontation Clause concerns.

Finally, defendants are, of course, entitled to present their own testimonial witnesses to attack the State's case, including properly qualified expert witnesses to challenge the accuracy of scientific or technical evidence such as photo radar evidence.