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**FILED**  
SEP 30 2016

DAVID H. YAMASAKI  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY \_\_\_\_\_ DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

People of the State of California,	)	Case No.: 213515
	)	
Plaintiff,	)	Trial Motion #5
	)	
-vs.-	)	Motion to continue trial
	)	
Antolin Garcia-Torres,	)	
	)	
	)	Date: October 3, 2016
	)	Time: 9:00 am
	)	Dept.: 40
Defendant.	)	

20 TO THE CLERK OF THE ABOVE-ENTITLED COURT, AND  
21 TO THE DISTRICT ATTORNEY FOR SANTA CLARA COUNTY:

22 Notice is hereby given that on the 3<sup>rd</sup> day of October 2016, the defendant will move  
23 the Court to continue jury selection in the above-entitled action from October 17, 2016 to  
24 December 5, 2016. This motion is based on Penal Code section 1050, the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and  
25 14<sup>th</sup> Amendments to the U.S. Constitution, the California Constitution, Article I, sections 15,  
16, and 17, and the attached declarations of counsel.

1 Date: September 30, 2016

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3 Respectfully submitted,

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Brian Matthews  
7 Deputy Alternate Defender

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9 *Attorneys for Antolin Garcia-Torres*

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11 IN AND FOR THE COUNTY OF SANTA CLARA

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14 -vs.-	) Motion to continue trial
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15 Antolin Garcia-Torres,	)
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	) Date: October 3, 2016
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	) Dept.: 40
16 Defendant.	)
	/

17  
18 Issue Presented

19 Every capital defendant has constitutional rights to due process, a fair trial, a reliable  
20 penalty determination, and to the effective assistance of counsel. These rights are impacted  
21 when a case goes to trial before the defense is prepared and when it is reasonably likely that a  
22 juror's verdict will be based on information obtained outside of the courtroom. The defense  
23 has filed declarations explaining both what is left to be done and why it hasn't been done yet.  
24 In addition, there are two Propositions on November's ballot that relate directly to the death

1 penalty. Should the Court continue the case so that the defense can be prepared and to avoid  
2 the prejudicial impact of the coming political campaign?

3 Points and Authorities

4 Statement of Facts

5 The Court has tentatively set October 17, 2016 as the date on which jury selection  
6 will commence. The electorate will vote on Propositions 62 (eliminating death as a possible  
7 punishment) and 66 (purporting to speed up the death process) on November 8, 2016. Many  
8 of the potential jurors will be among those voting and, even if they do not vote, nearly all of  
9 the jurors will be exposed to the political campaigns for and against each proposition.

10 Argument

11 **I. The trial should be continued to a date sufficiently beyond the November**  
12 **election to allow the impact of the campaign to abate and to permit jurors to**  
13 **vote**

14 Jury selection is scheduled to begin in a unique political environment in California.  
15 Just as jurors will be reporting to begin the voir dire process, they will begin to be exposed to  
16 two political campaigns addressing issues directly related to the trial. Specifically, Proposition  
17 62 would eliminate the death penalty as a possible punishment and Proposition 66 would  
18 attempt to speed up the process by which a capital defendant's appeals are processed. These  
19 campaigns are likely to include newspaper articles and television advertisements both  
20 supporting and opposing capital punishment. The advertising is likely to include discussions  
21 of notorious crimes and defendants and can be predicted to discuss the impact of these prior  
22 crimes on the victims. The defense has strong concerns about the ability of both sides to  
23 obtain a fair trial in this environment.

24 The U.S. Supreme Court has long identified the risks inherent in conducting high-  
25 profile trials. "The theory of our system is that the conclusions to be reached in a case will  
be induced only by evidence and argument in open court, and not by any outside influence,  
whether of private talk or public print." (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 351 (citing

1 *Patterson v. State of Colorado ex rel Attorney General* (1907) 205 U.S. 454, 462 (Holmes, J.) “We  
2 have always held that the atmosphere essential to the preservation of a fair trial—the most  
3 fundamental of all freedoms—must be maintained at all costs.” (*Estes v. State of Texas* (1965)  
4 381 U.S. 532, 540.) Trial courts have a serious obligation to ensure the fairness of the trial  
5 process. These Supreme Court pronouncements are more than mere words; rather, they are  
6 official recognition of the ability and obligation of trial courts to ensure fairness.

7 The Supreme Court does not stand alone in its concern about fair trials. The  
8 Legislature has also expressed the importance of maintaining the integrity of the jury system.  
9 For example, it has mandated that trial judges must instruct juries that they shall not  
10 converse among themselves or with anyone else about any subject connected with the trial.  
11 (Pen. Code § 1122, subd. (a)(1).) Similarly, they are to be barred from conducting research  
12 about any subject connected with the trial. (*Id.*) Finally, they are to be ordered not to read or  
13 listen to any accounts or discussions of the case reported by newspapers or other news  
14 media. (Pen. Code § 1122, subd. (a)(2).)

15 These rules are designed to ensure that jurors base their verdicts only on information  
16 that they have learned through the trial itself. While one cannot ensure complete compliance,  
17 the rules are an attempt to keep the parties from suffering an adverse verdict because of  
18 information they cannot challenge, such as an article, an advertisement, or a conversation.  
19 These things are not subject to cross-examination and it would be fundamentally unfair to  
20 either side to allow jurors to base their decisions on outside influences.

21 Starting jury selection in a capital case during a campaign focused on the death  
22 penalty presents an uncommon, if not novel, issue. However, the California Supreme Court  
23 dealt with a similar claim in *People v. Clark* (2011) 52 Cal.4<sup>th</sup> 856. *Clark* was a capital case  
24 where the defense moved to impanel a separate jury for the sanity and penalty phases or, in  
25 the alternative, to poll the jurors to determine if any had decided the penalty issue before the  
start of the penalty phase. The defense made the request after Clark was convicted but  
before the sanity phase began. Defense counsel argued that Clark could not get a fair trial in  
the sanity and penalty phases because of the “near-daily barrage of newspaper articles on the

1 Polly Klass and Kimber Reynolds murders and coverage of the statewide and local efforts to  
2 enact the "Three Strikes" sentencing law." (*Id.* at p. 965.) The trial court expressed some  
3 sympathy with counsel's concerns, but denied the motions. The Supreme Court upheld the  
4 denial citing Penal Code section 190.2's preference that the same jury determine guilt and  
5 penalty. A showing of good cause to have separate juries requires a factual showing of a  
6 demonstrable reality that the jury is unable to perform its function. (*Ibid.*) It found that the  
7 defense was only able to speculate about the publicity's impact on the jurors and therefore  
8 could not establish good cause either to impanel a new jury or poll the jury they had. (*Ibid.*)

9 Perhaps the key difference between *Clark* and the present situation is that we have yet  
10 to select a jury. The court in *Clark*'s case was limited by Penal Code section 190.2 and its  
11 preference for one jury. This Court faces no such limitation. Indeed, it is within this Court's  
12 discretion and, the defense suggests, part of its obligation, to continue the case beyond the  
13 election to a time when the publicity's impact will have dissipated.

14 Selecting a jury in this environment will cause several problems, including  
15 necessitating extensive voir dire about the impact of the political campaigns, requiring the  
16 Court to instruct jurors not to discuss the case or issues connected to it while the jurors are  
17 trying to decide how to vote on the Propositions, and running the risk that voir dire will be  
18 ineffective.

#### 19 Extended voir dire

20 Selecting a jury in this political environment will require extensive voir dire. The  
21 parties will want to question potential jurors about their views on the death penalty and how  
22 those views have been impacted by the political campaigns. Indeed, it is customary to ask  
23 potential jurors how they would vote on a hypothetical proposition regarding the death  
24 penalty. But in the present environment, that would be tantamount to asking people how  
25 they plan to vote in November. Is it fair to ask such questions? And, once a juror commits  
to a position on the general death penalty propositions, how will that commitment impact  
their ability to hear and consider the evidence?

1 Even more problematic is the law that a juror cannot be excused just because they are  
2 against the death penalty, including those planning on voting in favor of eliminating it. These  
3 potential jurors will need to be asked whether they can put aside those feelings and apply the  
4 law, whether they agree with it or not, to the facts of this case. Voir dire in a capital case is  
5 complicated enough, voir dire including the political campaigns will be even more so and  
6 take significantly longer.

6 Contradiction between court's instructions and juror's civil obligation to vote

7 As mentioned above, the Court will undoubtedly instruct the potential jurors not to  
8 discuss with anyone any issue related to the trial. Obviously, this includes the death penalty.  
9 Jurors will be hard-pressed to follow this instruction when they are confronted with political  
10 advertising about the death penalty. Indeed, part of the point of the advertising is to get  
11 people to discuss the issue in partisan ways. And that is part of exercising the right to vote. It  
12 is central to the conduct of our democracy. Asking jurors not to discuss the death penalty  
13 during the heat of a campaign focused on the death penalty is inconsistent with the  
14 democratic process.

14 A compelling need to start jury selection before the election might outweigh this  
15 concern, but no such need exists. Mr. Garcia-Torres has waived time and the defense is  
16 aware of no compelling witness availability or other issues that require the trial to start now.  
17 This Court could avoid the problems associated with picking a jury in the middle of a  
18 political campaign by exercising its discretion to continue the case to a point when the  
19 impact of the campaigns has diminished—a simple matter of about six weeks.

19 Indeed, the requirement that the Court order jurors not to discuss issues about which  
20 they will be voting in an upcoming election impinges on the juror's voting rights. Many of us  
21 exercise our First Amendment rights by relying on others in our communities, including  
22 spouses and friends, to help us decide how to vote. This may entail extensive discussion of  
23 the positives and negatives of an issue and sometimes involves heated debate. This may be  
24 especially true with Propositions 62 and 66 because they are so clearly polar opposites. And  
25 it is quite possible that this case will be raised during those discussions—especially among

1 those who are called as potential jurors. Ordering potential jurors not to discuss the issues  
2 on the ballot, but then having them vote, gets in the way of this process. It puts the Court in  
3 the middle of what is essentially a political act by restricting voters from having a free and  
4 open discussion of the issues upon which they are asked to vote. In so doing, and under  
5 these unique circumstances, the Court would be violating the potential jurors' First  
6 Amendment rights.<sup>1</sup>

7 Ineffective voir dire

8 The ultimate purpose of voir dire is to ensure that a fair jury decides the case. The  
9 purpose of the attorney's questions is to identify jurors that may be excused for cause.  
10 Meaning those people who, for some reason, cannot be fair either because they have pre-  
11 judged the issues or because they harbor beliefs that are contrary to being a fair judge of  
12 facts. Assuming the Court elects to death-qualify the jury, questioning will include an  
13 exploration of the potential jurors' position on the death penalty: would they automatically  
14 impose it? Would they never impose it? It can be difficult to question jurors on this topic  
15 and to obtain direct answers because these aren't questions people typically address in their  
16 regular lives.

17 Normally it can be done. But the conditions under which we would be doing that if  
18 the Court doesn't continue the case are not conducive to effective voir dire. This is because  
19 the campaigns are actively trying to change public opinion one way or the other and we  
20 don't know when a potential juror will feel the impact of their rhetoric. Thus, a juror could  
21 explain that they could impose the death penalty in the right case, but change their view and  
22 either decide they would automatically impose it or never impose it after being questioned.  
23 The parties and the Court would have no way of knowing about the change and the change  
24 would have been occasioned by forces outside the courtroom. Importantly, a juror could go

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25 <sup>1</sup> A defendant has standing to assert the 1<sup>st</sup> Amendment rights of jurors. (*See Powers v. Ohio*  
(1991) 499 U.S. 400, 413-416 (*criminal defendant has standing to challenge systemic exclusion of third-*  
*party group in jury selection proceeding.*)



1 from one who is qualified to serve to one who would be an agreed-upon cause challenge  
2 without anyone becoming aware.

3 A juror's attitudes may change in any trial at any time. And we can't necessarily always  
4 control for that. It is one of the short-comings of an inherently human, and therefore  
5 fallible, system. But the Court has the opportunity to limit the chances of it happening in this  
6 case. The failure to exercise discretion in a way that protects Mr. Garcia-Torres's  
7 constitutional rights will result in an intolerable risk that he will receive a fundamentally  
8 unfair trial.

#### 8 Limiting right to a fair jury

9 Conducting voir dire before the election raises the concern that Mr. Garcia-Torres  
10 will be denied a fair trial. The time estimate the Court gives to the jurors is important when  
11 one considers its impact on the number of hardship claims that must be heard. The longer  
12 the case, the more people who will be unable to serve on the jury. Indeed, the longer the trial  
13 estimate, the more likely we will get a homogenous jury filled with retirees and government  
14 employees. While a long trial estimate may be unavoidable in this case, it is beyond argument  
15 that adding a penalty phase will extend the estimate. The defense is asking the Court to limit  
16 the prejudice inherent in long length of trial estimates by waiting to see if the electorate  
17 eliminates the death penalty. This would require a delay of only several weeks, but  
18 eliminating the need for a penalty phase would increase the likelihood that a wider group of  
19 potential jurors could serve.

#### 18 Judicial Economy

19 Another interest the Court should consider is judicial economy. It is well-established  
20 that voir dire in a capital case takes longer than voir dire in a non-capital case. If the  
21 electorate votes to eliminate the death penalty, the Court will not have to death-qualify the  
22 venire. This would save at least a couple weeks of court time, if not more.

23 There is no reason to push this case forward in this environment. Both Mr. Garcia-  
24 Torres's rights and the rights of the government are jeopardized by going forward. A  
25 reasonable delay is warranted.

1 **II. This Court should continue the case to protect Mr. Garcia-Torres's**  
2 **constitutional rights and because he has demonstrated good cause under**  
3 **Penal Code section 1050**

4 Mr. Garcia-Torres, like all criminal defendants, has several constitutional rights that  
5 are impacted by the Court's decision whether or not to grant a continuance. For example, he  
6 has the right to due process under the 5<sup>th</sup> and 14<sup>th</sup> Amendments. He has the right to the  
7 effective assistance of counsel and to confront witnesses against him under the 6<sup>th</sup>  
8 Amendment. And he has the right to a reliable penalty determination under the 8<sup>th</sup>  
9 Amendment. The California Constitution has similar guarantees. (Cal. Const., art. I, §§ 15,  
10 16, 17.)

11 Penal Code section 1050 provides the process by which a defendant may seek a  
12 continuance. It empowers a court to continue a case upon a showing of good cause. (Pen.  
13 Code § 1050, subd. (e).) Trial courts are given discretion when determining whether good  
14 cause exists, but they may not exercise it in a manner than deprives the defendant of a  
15 meaningful opportunity to prepare a defense. (*Jennings v. Superior Court* (1967) 66 Cal.2d 867.)  
16 Indeed, the constitutional rights to confrontation and effective representation give rise to a  
17 "strong policy favoring continuances when necessary to preserve these rights." (*People v. Fong*  
18 *Chung* (1907) 5 Cal.App. 587, 590.) An arbitrary "insistence upon expeditiousness in the face  
19 of a justifiable request for delay" violates the right to the assistance of counsel. (*Ungar v.*  
20 *Sarafite* (1964) 376 U.S. 575, 589.)

21 **A. The right to counsel and to present mitigation**

22 The right to counsel includes the right to adequately prepare a defense, including the  
23 right to prepare and argue motions. (*People v. Maddox* (1967) 67 Cal.2d 647, 652.) It also  
24 encompasses the right to the effective assistance of counsel. (*Strickland v. Washington* (1984)  
25 466 U.S. 668.) This necessarily means that a defendant should not "be brought to trial too  
soon, i.e., without adequate opportunity for preparation of his defense." (*People v. Maddox,*  
*supra*, 67 Cal.2d at p. 653.)

To be effective, counsel must conduct an investigation into both guilt and penalty  
phases. The A.B.A. Guidelines for the Performance of Counsel in Death Penalty Cases have

1 been accepted as an indicator of the standard of care required of counsel. (*Wiggins v. Smith*  
2 (2003) 539 U.S. 510, 522.) The Guidelines require that counsel conduct an “ongoing,  
3 exhaustive, and independent investigation of every aspect of the client’s character, history,  
4 record and any circumstances of the offense, or other factors, which may provide a basis for  
5 a sentence less than death.” (ABA Supplementary Guidelines for the Mitigation Function of  
6 Defense Teams in Death Penalty Cases (2008), Guideline 5.1.) This includes investigating  
7 the client’s “medical history; complete prenatal, pediatric and adult health information;  
8 exposure to harmful substances in utero and in the environment; substance abuse history;  
9 mental health history; history of maltreatment and neglect; trauma history; educational  
10 history; employment and training history; military experience; multi-generational family  
11 history, genetic disorders and vulnerabilities, as well as multi-generational patterns of  
12 behavior; prior adult and juvenile correctional experience; religious, gender, sexual  
13 orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and  
14 political factors.” (*Id.*)

15 The mitigation investigation is one of exceptional breadth and depth. It takes time and  
16 cooperation to complete. But there is no alternative to completing it. Counsel has been  
17 working hard to do so. The attached declaration demonstrates that the defense has been  
18 working diligently to prepare for a possible penalty phase, but that the investigation is not  
19 complete. We are working hard to complete the investigation—something that must be done  
20 before strategic choices can reasonably be made. (See *Rompilla v. Beard* (2005) 545 U.S. 374.)

### 21 **B. Right to Present a Defense**

22 An important component of the constitutional rights that apply is the right to present  
23 a defense. Indeed, a defendant cannot be prevented from presenting witnesses who are  
24 capable of providing relevant and material testimony. (*Washington v. Texas* (1967) 388 U.S. 14,  
25 23.) And in a capital case such as this, the 8<sup>th</sup> and 14<sup>th</sup> Amendments require that the sentence  
not be precluded from considering any aspect of a defendant’s character or record that may  
form the basis for a sentence less than death. (*Lockett v. Ohio* (1978) 438 U.S. 586.)

1 Failing to give the defense the time that is necessary to thoroughly investigate both the  
2 guilt and penalty phases of a capital trial deprives the defendant of his right to present a  
3 defense and will preclude the jury from learning of mitigating evidence. The attached  
4 declarations demonstrate that the defense is diligently working to be prepared, but that there  
5 are outstanding items that must be completed before the defense is prepared to properly  
6 defend the case.

7 Conclusion

8 This Court should continue this case to ensure that Mr. Garcia-Torres receive a fair  
9 trial. It would be violate due process to force the case forward and require the parties to  
10 conduct voir dire in the middle of a contentious political campaign centered on the death  
11 penalty. Fundamental fairness and judicial economy supporting continuing the case to a  
12 point beyond the election when the campaigns will have stopped and their impact lessened.  
13 It is simply too dangerous to attempt to impanel a jury in this environment and there is no  
14 compelling reason for the Court to do so.

15 In addition to the reasons related to the political environment, the defense has  
16 submitted declarations establishing good cause for a continuance. We respectfully asks this  
17 Court to protect Mr. Garcia-Torres's constitutional rights and grant a continuance.

18 Date: September 30, 2016

19 Respectfully submitted,

20   
21 Brian Matthews  
22 Deputy Alternate Defender  
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EXHIBIT A

EXHIBIT A

1 LAW OFFICES OF THE ALTERNATE DEFENDER  
2 DAVID EPPS, Supervising Attorney, # 160173  
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4 BRIAN MATTHEWS, #191508  
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9 Telephone: (408) 299-7207

10 Attorneys for Defendant  
11 *Antolin Garcia-Torres*

12 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **IN AND FOR THE COUNTY OF SANTA CLARA**

14	PEOPLE OF THE STATE OF CALIFORNIA,	NO. 213515
15		Plaintiff, DECLARATION OF COUNSEL
16		(Motion to Continue)
17	vs.	
18	ANTOLIN GARCIA-TORRES,	
19		Defendant

20 I, Alfonso O. Lopez, declare as follows:

- 21 1. I am an attorney at the Office of the Alternate Defender for the County of Santa Clara
- 22 and I am assigned to represent Mr. Garcia-Torres in the above-entitled matter along with
- 23 Brian Matthews;
- 24 2. That I have discussed trial readiness with my office and believe that the defense is not
- 25 ready for trial and we need more time, a minimum of six weeks is needed at this time;
- 26 3. That other than a pending sentencing hearing in another case, I am working exclusively
- 27 on this case, making tremendous progress, but need more time to be ready;
- 28 4. That I have been working on the trace evidence aspect of the case and feel my continued
- work will lead to exculpatory evidence once completed;
5. That my trace evidence consultant has received fibers from the government
- approximately two weeks ago and is reviewing them;

6. That he was out of his office last week presenting a forensic training seminar and could not work on the case until this week;
7. That he is also working on other trace evidence in the case including reviewing the glass beads, insects, and plant material found on Sierra LaMar's clothing and may need to review those items as well;
8. That more time is needed to arrange for his review of the additional trace evidence in the case;
9. That beginning the jury selection process without adequate consultant on all the relevant trace evidence would amount to ineffective assistance of counsel as knowing the issues and dealing with them at the jury selection stage of the case is critical to any defense;
10. That defense counsel is willing to elaborate on the specific work being completed by their trace evidence consultant in camera to protect attorney work product;
11. That defense counsel has retained a human trafficking consultant who has reviewed relevant material in the case and needs additional work to be done in the case;
12. That defense counsel has prepared, sent the proper notices, and is in the process of filing a WIC 827 petition in Alameda County;
13. That defense counsel is also in the process of serving several SDT motions related to their discussions with their consultant;
14. That defense counsel did not anticipate a need for the needed documents until last week after they retained and discussed a possible related defense with their consultant;
15. That defense counsel is willing to elaborate on the specific work being completed by their human trafficking consultant in camera to protect attorney work product;
16. That defense counsel has recently spent a vast amount of time preparing and filing a voluminous motion to exclude DNA evidence and a supplemental motion as well;
17. That defense counsel has recently prepared and filed a writ on this Court's denial of the severance motion and previously filed a writ on the denial of the change of venue motion both being time consuming;

- 1 18. That besides filing several other trial motions, defense counsel has prepared and will  
2 file several other trial motions today which were also time consuming;
- 3 19. That I will be working on additional trial motions related to the evidence and will file  
4 them soon;
- 5 20. That all the motions being filed are necessary to effectively represent Mr. Garcia-  
6 Torres and to protect his state, statutory, and federal rights;
- 7 21. That defense counsel is also in the process of developing their witness list by  
8 attempting to anticipate their intended defenses, a task which is difficult in light of the  
9 multiple consultants who have not yet completed their work on the case;
- 10 22. That there are at least three other anticipated consultants needed for the case who have  
11 not reviewed the relevant case material in whole or in part;
- 12 23. That my law office was appointed to represent Mr. Garcia-Torres on June 7, 2012, but  
13 no preliminary hearing was conducted because an indictment was brought against him  
14 in February, 2014;
- 15 24. That in April, 2014, lead attorney Tracy Owens left the office of the Alternate  
16 Defender for reasons that are unknown to me and that I had to assume her role in the  
17 case despite having a full homicide case load;
- 18 25. That shortly thereafter Brian Matthews was assigned to the case along with me but he  
19 was also carrying a full homicide case load including taking a murder case to verdict;
- 20 26. That the defense was first notified by the government that they were seeking a possible  
21 death sentence on May 19, 2014;
- 22 27. That in November, 2014, through mid-December, 2014, I was engaged in a jury trial in  
23 a murder case that went to verdict;
- 24 28. That in February, 2015, through mid-March, 2015, I was engaged in another jury trial  
25 in murder case that went to verdict with extensive litigation regarding a new trial  
26 motion that followed;
- 27 29. That in May, 2016, through early August, 2016, I was engaged in yet another jury trial  
28 in a murder case that went to verdict;

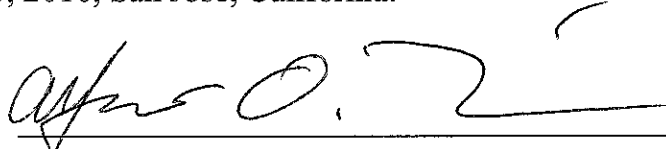


- 1 30. That besides the other jury trials I was engaged in I also conducted several murder case  
2 preliminary hearings and settled several homicide cases that were part of my caseload;
- 3 31. That other than a pending sentencing hearing on another murder case, I was successful  
4 in clearing my homicide caseload to be dedicated to Mr. Garcia-Torres' case;
- 5 32. That discovery in the case is voluminous, has been produced in batches, and it  
6 continues to be produced to date;
- 7 33. That the grand jury transcripts are voluminous, approximately 2,000 pages, and they  
8 were received in March 2014;
- 9 34. That the discovery including lab reports and police reports are voluminous,  
10 approximately 20,000 pages, and they took a great deal of time to review and organize;
- 11 35. That the discovery also includes thousands of pictures and hundreds of hours of video  
12 all of which was reviewed, organized, summarized, evaluated, and discussed with  
13 consultants some of which is still on-going;
- 14 36. That this case involves extreme amounts of DNA testing which is complicated and  
15 involves low amounts that are not reliable so that a tremendous amount of time and  
16 resources were spend dealing with the DNA aspect of the case by the defense;
- 17 37. That in January, 2016, defense counsel realized that the DNA aspect of the case was  
18 too time consuming and it was preventing defense counsel from completing their work  
19 on other import aspects of the case including other defenses and mitigation;
- 20 38. That in the early part of 2016, defense counsel retained Bicka Barlow, DNA attorney,  
21 to help with parts of the time consuming DNA aspects of the case so that defense  
22 counsel could have time to work on other defenses and other non-DNA aspects of the  
23 case;
- 24 39. That I am actively working with Mrs. Barlow on the DNA aspects of the case;
- 25 40. That I am also working on all other aspects of the case along with Mr. Matthews;
- 26 41. That despite great efforts and vast amounts of resources spent by the defense we are  
27 not ready for trial including inlimine motions and jury selection and need a minimum  
28 of (6) weeks in hopes that we will be ready by that time frame;

1 42. That despite the fact that we are not ready, it is not for lack of trying given the  
2 voluminous amount of discovery, complicated DNA aspects of the case, other forensic  
3 work, the government's decision to seek a death verdict, and representing clients in  
4 other murder cases including jury trials.

5 I declare under the penalty of perjury that the foregoing is true and correct.

6 Executed on September 30, 2016, San Jose, California.

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9 Alfonso O. Lopez  
10 Deputy Alternate Defender

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EXHIBIT B

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1 LAW OFFICES OF THE ALTERNATE DEFENDER  
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9 *Attorneys for Antolin Garcia-Torres*

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11  
12 IN AND FOR THE COUNTY OF SANTA CLARA

13 People of the State of California, ) Case No.: 213515  
14 )  
15 Plaintiff, )  
16 )  
17 -vs.- ) Declaration of Counsel in  
18 ) Support of Motion to Continue  
19 Antolin Garcia-Torres, )  
20 )  
21 )  
22 Defendant. )  
23 /

24 I, Brian Matthews, hereby declare the following under penalty of perjury:

- 25 1. I am an attorney with the Office of the Alternate Public Defender for Santa Clara County;
2. As such, I am assigned to represent Mr. Garcia-Torres in the above-captioned case;
3. The Court has tentatively scheduled jury selection to begin on October 17, 2016;
4. The defense is not presently ready and will not be ready for jury selection to start on that date;

- 1           5.     The case has been pending for over four years, but I have not been assigned
- 2           to the case for much of that time;
- 3           6.     Additionally, it has not been my only case during that time;
- 4           7.     Until recently, I have been responsible for defending three capital cases, this
- 5           prosecution and two others;
- 6           8.     One of those cases was very active and involved a mitigation investigation of
- 7           international scope and required a significant amount of time to prepare a
- 8           presentation to convince the District Attorney not to seek the death penalty;
- 9           9.     That case involved the death of a young child and required a significant
- 10          commitment of time and resources to investigate the science behind the
- 11          alleged cause of death;
- 12          10.    During that time I was also responsible for three non-capital homicides, one
- 13          which required substantial investigation to obtain a dismissal and another that
- 14          resulted in a month-long jury trial;
- 15          11.    Also during that time, I was responsible for researching, drafting, and filing a
- 16          Petition for a Writ of Habeas Corpus in a homicide case based on an
- 17          allegation of a *Brady* violation. This required briefing in the Santa Clara County
- 18          Superior Court, the Sixth District Court of Appeal, and the California
- 19          Supreme Court;
- 20          12.    In spite of the additional responsibilities my office has given me, I have
- 21          worked to prepare motions, a penalty phase presentation, and assisted with the
- 22          guilt phase preparation. This work included a substantial *Johnson* motion that
- 23          required me to become familiar with an over 20,000 page file and a nearly
- 24          2,000 page grand jury transcript. Work on this motion took approximately six
- 25          months;
13.    Thus, although the case has been pending for over four years, I have not been
- able to work on it exclusively during that period of time;
14.    More recently, my office has relieved me of many of my other responsibilities

1 to allow me to dedicate more time to this case;

2 15. I have used that time to draft several motions now pending before this Court  
3 or recently decided by this Court as well as two Petitions for Writs of Mandate  
4 currently pending at the Sixth District Court of Appeal;

5 16. I have also been working closely with our mitigation specialist to prepare for a  
6 possible penalty phase;

7 17. Despite this work, we are not ready and still have tasks to complete, for  
8 example:

9 a. [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED];

14 b. [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED];

18 c. [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED];

22 d. [REDACTED]  
23 [REDACTED];

24 e. [REDACTED]  
25 [REDACTED];

1 f. [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED];  
5 g. [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED];

9 18. In addition to the specific penalty phase items we need to complete before  
10 being ready, we are continuing to receive discovery from the prosecution. In  
11 fact, we received discovery just yesterday. I have been unable to review it due  
12 to other work related to the case;

13 19. Work on the case would slow if counsel were required to be in court four days  
14 a week selecting a jury and would result in the defense being less ready than if  
15 that time could be spent preparing the case;

16 20. Because of the reasons stated above, it is my professional opinion that we will  
17 be unable to provide Mr. Garcia-Torres the effective assistance of counsel  
18 without a continuance of approximately six weeks.

19 Executed on the 30<sup>th</sup> day of September 2016 at San Jose, California.


20   
21 Brian Matthews  
22 Deputy Alternate Defender

EXHIBIT C

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1 LAW OFFICES OF THE ALTERNATE DEFENDER  
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*Attorneys for Antolin Garcia-Torres*

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF SANTA CLARA

10 People of the State of California, ) Case No.: 213515  
11 )  
12 Plaintiff, ) Declaration of Counsel  
13 )  
14 -vs.- )  
15 Antolin Garcia-Torres, )  
16 Defendant. )  
17 /

16 I, Bicka Barlow, hereby declare the following:

- 17 1. I have been retained by the Office of the Alternate Defender to assist in the  
18 above captioned case regarding the DNA evidence.
- 19 2. In previous declaration I have laid out the timing of my hiring and the amount  
20 of discovery and work tasks to be done in this case.
- 21 3. I also outlined missing discovery, including the validation studies for both the  
22 Identifiler Plus and Y-filer test kits.
- 23 4. In an email exchange between myself, counsel and David Boyd regarding the  
24 Identifiler Plus validation study, over a period of days from September 9  
25 through September 12, it became clear that the validation studies had been  
produced early in the discovery process, but the disc containing that material

1 had been misplaced by the OAD. The disc replacing that initial production  
2 did not contain all of the files that had been in the first production and the  
3 validation studies were not provided. Shortly after this email exchange, the  
4 validation studies were provided on September 13, 2016. I immediately  
5 provided that discovery to my experts. They have begun their assessment but  
6 have not completed it.

7 5. On September 28, 2016, the Y-filer validation study consisting of over 1,500  
8 pages was produced to the defense. I immediately provided that discovery to  
9 my experts.

10 6. Since my last declaration, I have completed my Kelly motion regarding the  
11 Identifiler Plus testing.

12 7. I have spoken with my expert regarding the Y-filer testing and he has  
13 informed me that without the validation studies, he cannot offer an opinion  
14 on the Y-filer testing. The Y-filer testing is complex and many of the samples  
15 tested in this case reveal mixed samples that require interpretation.

16 8. I have also filed a supplemental brief regarding the PCAST report which was  
17 issued September 20, 2016 and the validation studies for the Identifiler Plus  
18 kit.

19 9. On August 30, 2016, the defense received a letter stating that the sample  
20 106189-5ec, was going to be removed from the state database by Cal DOJ. I  
21 immediately requested additional documentation from Mr. Boyd regarding this  
22 decision including communications between the lab and Cal DOJ and I  
23 submitted a public records request from Cal DOJ regarding the policy change  
24 that resulted in the removal of this sample. I obtained some of the requested  
25 documents September 20, 2016. Since that time I have been drafting a  
supplemental brief regarding the 1538.5 motion and the constitutionality of  
the California database.

10. I have only had one chance to speak with one of my experts regarding trial  
testimony and he was waiting for production of the validation studies to

1 complete his review. Additionally, the second expert just returned from a trip  
2 abroad on September 27, 2016. During his absence he was unavailable for  
3 consultation on the new production of validation studies. I have provided  
4 him with the new documents, but he has just begun his review of the more  
5 than 2000 pages of documentation.

6 11. The defense has also requested additional information from the prosecution  
7 including the electronic data for the two CODIS candidate matches that were  
8 found during the database search in 2012. The prosecution has declined to  
9 obtain this information from DOJ.

10 12. Because I have spent a considerable amount of time on the Kelly motion as  
11 well as the two other briefs described above, reviewing the new validation  
12 studies (over 750 pages in length), I have not had sufficient time to begin  
13 work on trial exhibits, opening statement and direct and cross examination of  
14 experts. Without a final opinion from my experts, finalizing any of these  
15 projects is not possible.

16 13. Cross examination of experts in this case is anticipated to be complex and  
17 require numerous visual exhibits to help aid the jury in understanding the  
18 complex nature of DNA testing in general, and specific issues related to the  
19 DNA testing in this case. The trial also involves multiple experts and multiple  
20 tests systems that are quite different from each other.

21 14. Because my experts have not yet completed their analysis of the various DNA  
22 tests methods and samples in this case, I am limited in my ability in consulting  
23 with them on their opinions as well as issues that related to cross examination  
24 of government experts. I cannot complete a number of tasks that I have  
25 started work on relating to trial preparation including drafting cross  
examination questions, producing exhibits, drafting questions for direct  
examination and determining the appropriate exhibits including visual exhibits  
and scientific journals.

//



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9 *Attorneys for Antolin Garcia-Torres*

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 IN AND FOR THE COUNTY OF SANTA CLARA

12	People of the State of California,	) Case No.: 213515
13		)
14	Plaintiff,	) Trial Motion #5
15		)
16	-vs.-	) Motion to continue trial
17		)
18	Antolin Garcia-Torres,	)
19		)
20		) <b><u>Proof of Service</u></b>
21		)
22	Defendant.	)

23 I am a citizen of the United States and employed in Santa Clara County. I am over  
24 the age of eighteen years and not a party to this action. My business address is 701 Miller  
25 Street, San Jose, CA 95110.

On September 30, 2016 I served the attached Motion to continue trial on the  
plaintiff, through Dep. District Attorney David Boyd, by hand in court.

I declare under penalty of perjury that the foregoing is true and correct. Executed on  
this 30<sup>th</sup> day of September 2016 at San Jose, California.

