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FILED
FEB 14 2013
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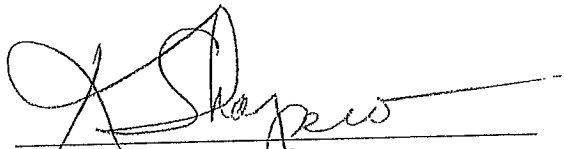
IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE) Criminal Case No. C1233134
OF CALIFORNIA,)
)
Plaintiff,)
) ORDER SHORTENING TIME
v.)
)
ANTOLIN GARCIA-TORRES,)
)
Defendant.)
)

GOOD CAUSE APPEARING THEREFORE:

IT IS HEREBY ORDERED that the time for filing the People's
Response and Opposition to Ex Parte Subpoenas Duces Tecum is
hereby shortened and said motion may be filed on February 14,
2013.

DATED: February 14, 2013


KENNETH SHAPERO
JUDGE OF THE SUPERIOR COURT

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

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

v.

ANTOLIN GARCIA-TORRES,

Defendant.

Criminal Case No. C1233134

DECLARATION IN SUPPORT
OF ORDER SHORTENING TIME

I, DAVID R. BOYD, do hereby declare that:

1. I am the assigned Deputy District Attorney to the above-referenced case.
2. The People prepared an opposition to defendant's Motion for Ex Parte Subpoena Duces Tecum Process to be filed on February 12, 2013 (hereafter Opposition).
3. Upon completion of the Opposition on November 11, 2013, the undersigned neglected to recall that November 12, 2013 was a court holiday and as a result the response could not be filed

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on November 12, 2013. The People did, however, serve the motion on defense on November 12, 2013.

4. The People presented to the clerk's office its response on November 13, 2013, the Opposition, however it was declined for filing as untimely.

5. Prior to receiving word from the clerk's office, the People sent to Judge Shapero's court clerk a courtesy copy of the Opposition on November 13, 2013.


6. The People sent an e-mail on November 13, 2013 to Al Lopez, Alternate Defender's Office, seeking agreement to this request for an order shortening time along with a copy of the Opposition. As of execution of this affidavit, there has been no response from Mr. Lopez.

7. The motion hearing is currently set for February 20, 2013.

8. The People believe that defense will suffer no prejudice from the untimely filing and would agree to any continuance should the defense seek one to accommodate a timely filing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

DATED: February 14, 2013.



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FILED
FEB 20 10 2 31
Nicole D. Cooke

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

11	THE PEOPLE OF THE STATE)	Criminal Case No. C1233134
	OF CALIFORNIA,)	
12)	DATE: February 20, 2013
	Plaintiff,)	TIME: 9:00 a.m.
13)	DEPT: 39
	v.)	TIME EST.: 30 MINUTES
14)	
	ANTOLIN GARCIA TORRES,)	RESPONSE AND OPPOSITION
15)	TO EX PARTE SUBPOENA DUCES
	Defendant.)	TECUM
16)	
)	

17
18 I.

19 STATEMENT OF THE CASE

20 Counsel for defendant Torres asserts - in his request for
21 carte blanche to issue, and inspect the records produced, ex parte
22 subpoenas duces tecum - that the People have no "no legitimate
23 interest in" defense subpoenas. This is simply false. In *Kling*
24 *v. Superior Court* (2010) 50 Cal.4th 1068, the California Supreme
25 Court unambiguously held that the People do have a legitimate
26 interest in defense SDTs. Further the California Supreme Court
27 has held that the People have the right to notice of such
28 proceedings and the trial court is permitted to entertain argument

1 from the People. *People v. Superior Court (Humberto S.)* (2008) 43
2 Cal.4th 737, 750.

3 To be clear, the People do not object to counsel's
4 representation that they can, in very limited circumstances,
5 obtain records from a third party without disclosure to the People
6 of the reasons, however such sealed affidavits must both justify
7 the non-disclosure of the reasons based upon actual privileges or
8 attorney work product and only those portions that would reveal
9 confidential material are to be withheld.

10
11 II.

12 MEMORANDUM OF POINTS AND AUTHORITIES

13 A. Ex Parte Subpoenas Duces Tecum

14 In *Kling*, the trial court was presented with a similar
15 request to defendant's here. There, the defense sought to issue
16 SDTs and to entirely prevent the prosecution from learning the
17 identity of the non-party producing the records, the reasons for
18 the SDT as well as the nature of the records released. The
19 defense claimed that release of any of this information would
20 reveal defense strategies and work product. The trial court found
21 that there was "no authority supporting the defense request to
22 have no documentation in the file identifying the receipt of
23 subpoenaed documents and the agency or person from whom they were
24 received" and concluded that such information was not privileged."
25 *Kling*, 50 Cal.4th at 1072-73.

26 After conducting the in camera process authorized by Penal
27 Code section 1326(c), the trial court examined the records in the
28 presence of defense counsel, released the documents and sealed the

1 transcripts of the hearings. The People received no notice for
2 some of the hearings. *Id.* at 1073.

3 The People requested that the trial court review the camera
4 hearings for release of all material that did not reveal defense
5 theories of relevance or privileged information. The Court did so
6 and a portion of that ruling became the issue on review.

7 On appeal, the defense took the position that if the records
8 were not used at trial, the hearings must remain sealed and the
9 identity of the third-parties was confidential. Like the trial
10 court, the California Supreme Court rejected this position.
11 "Kling's arguments as to why the People are not entitled to notice
12 of the identity of the subpoenaed party or the nature of the
13 documents sought, however, are based on misconceptions as to the
14 scope and operation of the discovery statutes." *Id.* at 1076.

15 1. **Withholding the identity of the third party or the**
16 **nature of the records sought is not permissible**

17 Regarding identity of the third party record holder or the
18 nature of the records, the defense argued that the scheme was not
19 sufficiently reciprocal, that work product would be revealed and
20 PC §1054.3 was the limit of the defense disclosure requirement.
21 All these reasons were rejected. *Id.* at 1076-77. Specifically
22 with respect to the work product doctrine, *Kling* stated:

23 It is true that allowing the prosecution to learn that
24 certain records have been subpoenaed from a third party
25 may cause the defense to face the difficult decision
26 whether to subpoena the records and run the risk of
27 bringing possibly adverse information to the attention
28 of the prosecutor or to forgo seeking information that
could be beneficial to his defense. However difficult
that decision may be, we do not see it as impairing the
policies behind [a defendant's] right to counsel. In
essence it is [the defense] position that the
prosecution, by ... knowing [the records] have been

1 subpoenaed by the defense, will have access to his
2 attorneys' work product because the prosecutor will be
3 able to 'glean' the attorneys' thought processes and
4 determine defense strategy. There is no basis in law
5 for interpreting attorneys' work product so broadly.

6 *Kling* at 1077-1078 (internal quotations omitted) (citing
7 *Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d
8 1087, 1097). In other words, *Kling* addressed the same argument
9 made here regarding the "Hobson's choice" and rejected it.

10 As an example of the absurdity of the defense position, the
11 People were contacted by [REDACTED], the father of the deceased
12 [REDACTED]. Mr. [REDACTED] provided the People a copy of a NOTICE TO
13 CONSUMER (see CCP §§1985.3, 1985.6) indicating that the defense
14 had sought to subpoena the cell phone records from Verizon
15 Wireless for both Mr. [REDACTED] as well as his daughter [REDACTED]. There
16 is hardly any reason for the defense to legitimately withhold the
17 identity of the record holder (Verizon) or the records sought
18 (cell records for [REDACTED] and [REDACTED] during the month of March
19 2012). The People's possession of that information could hardly
20 reveal any confidential defense strategy or privilege. It is
21 unknown how many other SDTs the defense may have issued.

22 2. The People have Due Process rights in SDTs

23 It appears defense pays rather short shrift to the California
24 Supreme Court's recognition of the People's Due Process rights in
25 these proceedings. Cal. Const., art. I, sec. 29. Defense counsel
26 seems to ignore any argument - other than to say we have no
27 legitimate interest in their SDTs - that there is no due process
28 afforded to the People when they are "categorically barred from
learning the identity of the subpoenaed party or the nature of the

1 documents requested." *Kling* at 1078 (citing *Humberto S., supra*,
2 43 Cal.4th at 750).

3 The trial court is duty bound to balance the People's due
4 process and a meaningful opportunity to effectively challenge the
5 discovery request against the defendant's right to protect work
6 product and attorney client privilege. *Kling* at 1079. It must be
7 noted that the trial court is not bound by defense counsel's naked
8 claims of confidentiality" [*id.*], but rather must make orders
9 ensuring the "maximum amount of information" is disclosed to the
10 People consistent with the defendant's constitutional rights. *Id.*
11 (citing *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 72.

12 Given that the California Supreme Court expressly did not see
13 how the disclosure of the identity of the third party record
14 holder or the nature of the records sought would impair the
15 policies behind defendant's right to counsel, it follows that
16 sealing such information would be inappropriate. *Kling* at 1077-
17 1078. The Court added that there was no basis in law read the
18 purported ability of the prosecution to "'glean' the attorneys'
19 thought processes and determine defense strategy" so broadly. *Id.*
20 at 1078. Rather, "disclosure of the identity of subpoenaed party
21 and the nature of the records sought may, in many circumstances,
22 effectuate the People's right to due process under the California
23 Constitution." *Id.*

24 B. Requirement for Sealing Subpeona Decus Tecum

25 There is a very specific procedure to overcome the
26 presumption of openness in criminal proceedings. What follows is
27 a discussion of the SDT process and the hurdles defense must
28

1 overcome to prevent the disclosure of their reasons for seeking
2 third party discovery via SDT.

3 1. Method to obtain third party records

4 "Documents and records in the possession of nonparty
5 witnesses and government agencies other than the agents or
6 employees of the prosecutor are obtainable by subpoena duces
7 tecum." *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th
8 1305, 1318. In criminal cases, a subpoena is not legal process
9 entitling access to the records until there has been a judicial
10 determination that the party is entitled to receive them. *Kling*
11 at 1074. Entitlement to receive the subpoenaed material requires
12 the party seeking the records to make a good cause showing of the
13 need for the records. *Alford v. Superior Court* (2003) 29 Cal.4th
14 1033, 1045-1046.

15 At that hearing the People "generally have the right to file
16 a motion to quash so that evidentiary privileges are not
17 sacrificed just because the subpoena recipient lacks sufficient
18 self-interest to object or is otherwise unable to do so." *Id.* at
19 1078 (citing *Humberto S.*) (internal quotations and citations
20 omitted). Of course, the third party has the right to challenge
21 the SDT for various reasons as well, however as a non-party, they
22 may often have little incentive to do so as recognized in *M.B. v.*
23 *Superior Court* (2002) 103 Cal.App.4th 1384, 1392. In the case of
24 records subpoenaed by the defense, a trial court cannot order
25 released records to be provided to the prosecution, except as
26 required discovery under Penal Code section 1054.3. PC §1326(c).

27 There is a presumption that these proceedings and the motions
28 upon which they are based are open to public view. Only if that

1 presumption is rebutted, can the court order the proceedings, or
2 pleadings, sealed.

3 2. Criminal proceedings are open except in limited
4 and unusual circumstances

5 In the context of criminal proceedings, the United States
6 Supreme Court has stated that, "[c]losed proceedings, although not
7 absolutely precluded, must be rare and only for cause shown that
8 outweighs the value of openness." *Press-Enterprise Co. v.*
9 *Superior Court of California, Riverside County* (1984) 464 U.S.
10 501, 509. Court records are presumed to be open unless
11 confidentiality is required by law. California Rules of Court
12 (CRC) Rule 2.550(c).

13 The People agree that the Court may permit defense counsel to
14 submit under seal its theories of relevancy of the materials
15 sought. *Alford, supra*, 29 Cal.4th at 1045-1046. However, a
16 sealing order "is appropriate only if there is 'a risk of
17 revealing privileged information' and a showing 'that filing under
18 seal is the only feasible way to protect that required
19 information.'" *Kling* at 1075 (citing *Garcia v. Superior Court*
20 (2007) 42 Cal.4th 63, 73) (emphasis added). Please note, this
21 does not apply to the identity of the third party record holder or
22 a description of the records sought, but rather the good cause
23 reasons for the defense seeking the records under *Alford*.

24 A court may seal a record "only if it expressly finds facts
25 that establish: (1) There exists an overriding interest that
26 overcomes the right of public access to the record; (2) The
27 overriding interest supports sealing the record; (3) A substantial
28 probability exists that the overriding interest will be prejudiced

1 if the record is not sealed; (4) The proposed sealing is narrowly
2 tailored; and (5) No less restrictive means exist to achieve the
3 overriding interest." CRC Rule 2.550(d). Even if CRC 2.550 et
4 seq. does not apply due to the exception found in CRC 2.550(a)(2)
5 or (a)(3),^{1/} the rule provides a useful method for the
6 determination that sealing is the only feasible way to safeguard
7 the defendant's constitutional rights as required under *Kling* and
8 *Garcia*.

9 CRC Rule 2.551 sets forth the proper procedure to be followed
10 to seal a record. A party must request that a record be filed
11 under seal. CRC Rule 2.551(b)(1). This request must be
12 accompanied by a memorandum and declaration containing facts
13 sufficient to justify the sealing. *Id.* The moving party must
14 then serve all parties and lodge with the court the record for
15 which the sealing order is sought. CRC Rule 2.551(b)(2) and
16 (b)(4). The court then holds the record "conditionally under
17 seal" while the motion is being decided. CRC Rule 2.551(b)(4).
18 A record may only be sealed if all the requirements of CRC Rule
19 2.550 are met. Further, if the order is granted, the trial court
20 must "specifically state the facts that support the findings" and
21 only seal the documents and pages "that contain material that
22 needs to be placed under seal." CRC Rule 2.550(e)(1)(A) and
23 (e)(1)(B).

24 As noted earlier, this Court is not bound by defense
25 counsel's claims of confidentiality. *Kling* at 1079. This Court

26
27 ^{1/} This rule does not apply to "records required to be
28 kept confidential by law" and "discovery motions and records
filed or lodged in connection with discovery motions or
proceedings." CRC Rule 2.550(a)(2) and (a)(3).

1 must find that without the sealing order, there would be a release
2 of privileged material in the form of work product or attorney
3 client privilege. Even then, blanket claims of defense impairment
4 of these principles is insufficient. This is especially true
5 given the fact that the courts have not accepted that the mere
6 disclosure of the identity of the third party as well as the
7 description of the records would reveal defense strategies.

8
9
10 III.

11 CONCLUSION

12 The People respectfully request that the defendant's motion
13 for sealing of the identity of the subpoenaed party and the nature
14 of the records be denied. The People further request that this
15 Court carefully weigh the proffered reasons submitted under seal
16 and only seal, if appropriate, the reasons for seeking the
17 records. All other portions should remain open for public
18 inspection.

19 DATED: February 11, 2013

20
21 Respectfully Submitted,

22 JEFFREY F. ROSEN
23 District Attorney

24 
25 DAVID R. BOYD
26 Deputy District Attorney
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