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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. 213515 DATE: September 19, 2016 DEPT: 40 PEOPLE'S FIRST SUPPLEMENTAL MOTIONS *IN LIMINE*

A. Defense Discovery

The People move this Court to order the defense to produce discovery under Penal Code section 1054.3. The People have complied with the pre-requisites to bringing such a motion and proof can be found in the People's Motion to Compel discovery filed on March 23, 2016.

The People have received from the defense a single expert report with proposed testimony as required under Penal Code section 1054.3. Additionally, the People have received a few selected defense interviews of potential witnesses, all of which occurred in 2013 or earlier. Finally the People have received a summary and analysis by their investigator of a large amount of video they subpoenaed along with a 186 page proposed PowerPoint presentation that is mostly not case specific and includes numerous pages of material that is irrelevant to this case.

With respect to the PowerPoint slides, the People have not received the expert's report or the proposed testimony required under section 1054.3(a). Because the defense has not provided the report or the statements of the expert, the People's disclosed cell phone expert, FBI Agent Chad Fitzgerald, has not been able to review any conclusions. Additionally, while the defense did provide some information relating to photos of Sierra the defense has apparently found on the internet, the defense has declined to provide, despite a request, a digital copy of the photos their expert is apparently relying upon to suggest they were taken after her abduction and murder. A description of the source of the photos and digital copies are necessary to examine the metadata within such photos.

The People have repeatedly requested defense discovery in this case. We sought a motion to compel defense discovery pre-trial (filed March 23, 2016) which was thereafter denied, but only after a closed hearing before Judge Williams where it is unknown what was said. [Vol. 24 at 370-381.] In this death penalty case that relies substantially on forensic evidence, the People have received no death penalty mitigation evidence, no expert reports in the fields of DNA, fingerprints, trace evidence or cell phones. The only expert report that has been received renders an opinion that requires no expertise (i.e. a hair cannot be seen in a photo). All the People know at this point is that Mr. Lopez stated at the motion to compel that DNA experts and mitigation evidence which would include experts and percipient witnesses was being worked on. [Vol. 24 at 356:1-18; 357:26-358:1.]

Penal Code section 1054 *et seq.* requires reciprocal discovery. This case is on the verge of selecting a jury. These are motion *in limine* and one of the purposes of such motions is to enable a "more careful consideration of evidentiary issues than would take place in the heat of battle during trial." *People v. Clark* (1992) 3 Cal.4th 41, 119. Additionally, motions *in limine* are designed to prevent the impossibility of "unringing the bell" of inadmissible evidence before the jury. *Blanks v. Shaw* (2009) 171 Cal.App.4th 336, 375. The People are hardly in any position to litigate fully the questions of admissibility of evidence, the propriety of expert testimony, indeed

the very foundation of any defense evidence when it has not been disclosed. This is to say nothing about the potential need for expert examination and rebuttal of the defense experts' conclusions.

Therefore, People move for the discovery to which it is entitled. At this advanced stage, it is hardly reasonable for the defense to take the position that they do not reasonably anticipate whom they are likely to be calling at trial. Disclosure is required - for both the prosecution and the defense - when a party reasonably anticipates calling a witness. *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 376 n. 11.

In *People v. Tillis* (1998) 18 Cal.4th 284, the California Supreme Court ruled that when counsel does not reasonably anticipate calling a witness, there is no compulsion to produce the information. *Id.* at 291-293. However, the Court in *Tillis* warned: "[t]he rule . . . we announce today does not license counsel to temporize about his or her intentions in the face of clear indications on the record that counsel in fact intends to call a particular witness." *Id.* at 293. The California Supreme Court, in *In re Littlefield*, held that for the purposes of determining whether counsel intends to call a witness, the standard is whether counsel "reasonably anticipates it is likely to call" a witness. *In re Littlefield* (1993) 5 Cal.4th 122, 129. While it is unknown exactly how many witnesses counsel is holding back, based upon court filings, it is clear counsel has consulted with numerous experts. At this late stage — trial has commenced — counsel is most assuredly aware of generally what experts will be called and what they propose to say. If counsel does not know these things, one wonders when counsel will know.

In addressing counsel's possible claim that they do not know, or cannot reasonably anticipate, whether they plan on calling an expert witness until some later date, this kind of avoidance of defense discovery obligations was addressed in *People v. Jackson* (1993) 15 Cal.App.4th 1197. In *Jackson*, defense counsel obtained a witness statement four months prior to trial that purported to be a declaration against penal interest, thus exculpating the defendant. Counsel failed to disclose the statement to the People and indicated to the Court after the People had rested that "he did not intend to use the statement or call the witness until moments before he announced it." *Id.* at 1200. The trial court noted their incredulity that defense counsel failed to

seriously consider calling a witness that would provide allegedly exculpatory testimony until mere moments before the witness was called. *Id.* at 1203. Accordingly, the trial court excluded the testimony for the discovery violation, which was upheld by the Court of Appeal. In evaluating the propriety of exclusion, the Court in *Jackson* stated: "the integrity of the adversary process would have been compromised as parties with little to lose would be encouraged to not comply with pretrial discovery rules." *Id.*

By accepting any attorney's representation of not knowing whether they will need to call a witness because their thinking about the issue has not yet crystalized, despite the fact that the attorney considered it important enough to retain the expert, and wants to leave the contingency of calling the witness open, is tantamount to a subjective test. However, this is not the test as held by the California Supreme Court in *In re Littlefield*, and would be directly contrary to the policies of PC §1054 *et seq.* as noted in *Jackson*. When a party "reasonably anticipates it is likely to call" a witness [*Littlefield*, *supra*, 5 Cal.4th at 129], the obligations under Penal Code section 1054.3 to produce the statements of that witness are triggered, whether it has been reduced to writing or not. *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 160.

Should counsel argue, as they did at the motion compel, that the People are asking the Court to speculate regarding the existence of proposed expert testimony, to the contrary, the People accept that qualified capital counsel - of which the defense most assuredly is - after more than four years have taken every step necessary toward preparing a vigorous defense. As a result they can now reasonably anticipate who they are likely to call at trial and more importantly what the expert the witnesses will say. What counsel should not be able to do, because the law does not permit it, is to know what they might reasonably anticipate presenting but avoid advance disclosure by identifying experts mid trial.

Frankly, counsel was quite candid when he said at the motion to compel, "we might obtain more experts throughout the trial and call them during the trial. There is nothing precluding us from retaining experts after trial has begun." [Vol. 24 at 346:12-15.] Counsel has been additionally careful to refer to his experts as "consultants" rather than witnesses or even potential

witnesses. The People cannot help but wonder if this is the kind of careful framing that is being taught at capital litigation clinics to avoid the principle as well as the terms of Penal Code section 1054.3. It appears from Mr. Lopez's remarks that he could know from his "consultant" that the consultant - or a different expert or range of potential experts - would, for example, question the validity of the statistical methods used in forensic DNA analysis, and know exactly what these experts would say, but not "retain" the specific expert until well into the trial so as to avoid disclosure ahead of trial. If this is not what is going on, so be it, but qualified capital counsel at this stage should know what evidence they reasonably anticipate they are likely to present to challenge the People's case.

Finally, given the likelihood that defense counsel will argue that some disclosure is barred as work product, the Court should note that work product is a creature of statute that is narrowly defined. *Izazaga, supra*, 54 Cal.3d at 381. While Penal Code section 1054.6 statutorily bars the disclosure of work product, such material is defined as: "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories . . . ." Cal. Code Civ. Proc. 2018.030(a). This narrowly tailored definition does not include who they have in fact subpoenaed or hired to testify, who they reasonably anticipate that they are likely to call, the factual statements of the defendant's and certainly does encompass what those witnesses are expected to say on the witness stand.

B. Preclude Reference in Opening Statement

The People move this Court to order the defense to not make reference to any fact in opening statement to any material not previously disclosed by the defense, contained in the People's discovery, or excluded by this Court. This is of course subject to the usual rule that counsel must have a good faith belief that the evidence will be admitted at trial. This motion includes the defendant's statement with the exception of any material the People have indicated we intend on presenting.

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C. Buttons/Bracelets Worn by Sierra's Family

Family and friends of Sierra LaMar may wear buttons depicting Sierra's face during court proceedings. Bracelets that do not depict Sierra, but contain words commemorating her, may also be worn. The buttons, which depict Sierra's face without any text or additional messages referring to the defendant or the proceedings themselves,[1/] are in accordance with the United States Supreme Court's holding in *Carey v. Musladin* (2006) 549 U.S. 70.

In *Musladin*, a trial out of Santa Clara County, several members of the murder victim's family wore buttons with the victim's photo on them. Reaching the U.S. Supreme Court via deferential habeas review, the Court determined that Supreme Court precedent did not support the argument that the defendant was inherently prejudiced when spectators wore buttons depicting the murder victim. The Court noted that the tests for determining inherent prejudice likely apply only to state-sponsored practices and not private actor conduct. *Id.* at 75. As a result, the LaMar family's decision to wear buttons displaying Sierra's photo, should they choose to do so during the jury trial, is not inherently prejudicial to the defendant. As private actors with buttons that do not express any opinion as to the guilt of the defendant or the outcome of the proceedings, they do not "brand the defendant with an unmistakable mark of guilt." *Id.* at 73 (quoting the California Court of Appeal).

Subsequent to *Musladin*, the California Court of Appeal has stated:

> allowing some courtroom spectators to wear commemorative buttons depicting the likeness of a fallen officer is not unduly suggestive of guilt. Defendant's claim to the contrary is an insult to the intelligence, integrity, and resolve of jurors. Here, there is no reason to believe that the jurors, when faced with the image of a fallen officer, would be unable or unwilling to base their verdict solely on the evidence presented during the trial.

People v. Zielesch (2009) 179 Cal.App.4th 731, 745. In *Zielesch*, the trial court gave the jury an admonition on the point. The People have no objection to this Court doing the same here.

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[1/] The text varies from, "Sierra LaMar, Everyone's Daughter" to "Bring Sierra LaMar home" to "#find sierra." One cannot read the bracelets when just passing by and the buttons do not appear to be any larger than approximately 2 inches in diameter.

D. Irrelevant Evidence

1. Corrective Action Reports

Occasionally, the Santa Clara County Crime Laboratory issues Corrective Action Reports (CARs) when there must be an adjustment to a conclusion of an issued report. No CARs were issued for any analysis conducted in this case. In an abundance of caution, the People provided to counsel for the defense CARs that involve two witnesses in this case. The CARs relate to events that occurred in 2001, 2002 and 2011.[2/] The People move to exclude any reference to the CARs because the events are not relevant to the results in this case or the analysts' credibility in this case.

The information in the CARs is not relevant because it involves a collateral issue; testing and review of samples in totally different cases and for the 2001 and 2002 CARs involved different lab procedures than those in place during the testing in this case. The CARs do not involve moral turpitude conduct and they do not contradict the People's evidence pointing toward guilt or point toward defendant's innocence. There is no evidence to suggest that there is a pattern or a character for mistakes, sloppiness, incompetence, or unprofessionalism in the analysts' field of expertise. In fact, if anything the CARs highlight how rare over the last fifteen years the Santa Clara County Crime Laboratory's analysts' work has been subject to official criticism over error within the crime lab and the herculean efforts that are undertaken to ensure that there are not reproductions of the event in the future as well as to confirm no similar issues were present in past work.

When evaluating the relevance of the CARs, the Court should also note that the events occurred prior to all of the work in this case and a review of the analysts's work before and after the events revealed no similar instances. In fact, it is the very nature that such problems can be verified that mitigates any relevance in this case. This is because, if there was such an event here, it is verifiable. If verified, either through the lab noting the issue as required in documenting the testing **in this case**, or through analysis by the defense's experts, then the defense will able to, and surely will, present such evidence to the jury. Admission of the CAR evidence relating to other

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[2/] The People will provide the Court a copy of the CARs to the Court on the hearing of this motion.

cases years earlier is other acts evidence and is prohibited character evidence under Evidence Code section 1101(a).

Even if marginally relevant as other acts evidence under Evidence Code section 1101(b), discussion of the issue before the jury would be in violation of Evidence section 352. Explaining the nature of the error in the CARs would be an undue consumption of time for no more than establishing that human beings sometimes make mistakes or unanticipated events sometimes occur despite following the procedures in place at the time. It would take further unnecessary time and confusion of the issues to then explain the lab's undertaking when events like those documented in the CARs to prove that they were isolated issues (i.e., not recurring) and whether lab procedures have since been modified to address the issue. Opening the door to such evidence would essentially allow both sides to inquire with each and every prosecution and defense analyst, including those who did not handle any physical evidence or do actual testing in this case, to describe each and every anomalous result, mistake or other similar type event in other cases that have no impact on the current case. Finally, allowing these other acts over a 352 objection should then permit the People to present hundreds, indeed thousands, of other acts showing that the analysts' work is professional, through, competent and without error [Evid. Code §1101(b)] to demonstrate that in the vast ocean of quality work by the analysts that just because there are a few benign icebergs doesn't mean we hit one in this case.

2. Reported Drug Use and/or Sexual Experimentation

The People move to exclude evidence of Sierra's reported drug use and/or sexual experimentation as irrelevant, improper character evidence and substantially more prejudicial than probative under Evidence Code sections 350, 1103 and 352. Frequently the evidence is additionally without foundation as the witnesses did not have personal knowledge of the facts and therefore amount to nothing more than speculation.

In the investigation of this case, Sierra's friends both from Fremont as well as her new hometown of Morgan Hill were exhaustively interviewed. Those interviews covered all aspects of Sierra's life in order to provide leads as to who might know something about her whereabouts and what might have happened to her. The law enforcement interviews addressed information

within the witnesses' personal knowledge, but also hearsay, rumor and innuendo to maximize the amount of potential leads that might be generated. Additionally, Sierra's digital fingerprint was exhaustively examined. For example, Facebook, Twitter, as well as her cell phone and computer were combed for evidence that might suggest what happened to her. No useful evidence was found with the exception of documenting that there is no non-criminal explanation for the forensic evidence tying Sierra's abandoned clothing to defendant or Sierra's hair and DNA in defendant's car.

While the evidence did not reveal any direct clues as to what happened to Sierra, other than the fact that she led a fairly common teenage girl life that included emotional highs and lows, boys, teenage drama and a small amount of drug and sexual experimentation. In the guilt phase, the People move to exclude references to Sierra's sexual experience with any partners as well as any reference to drug experimentation. There is no relevance to these facts to the extent they exist and there is no basis to suggest any of these facts had any impact on her disappearance or death.

Because the People are at a loss to articulate any possible theory of relevance, we cannot address further reasons for exclusion under Evidence Code section 1103 or 352. Should the defense wish to get into these areas, the People ask that the Court require the defense provide a specific offer of proof regarding their theory of relevance. They are required to do so. *People v. Morrison* (2004) 34 Cal.4th 698, 724; *People v. Brady* (2005) 129 Cal.App.4th 1314, 1332-1333.

Assuming relevance of the evidence, because much of the witnesses' discussion with law enforcement did not attempt to determine whether the witnesses had personal knowledge of the alleged conduct or whether it was hearsay or even less reliable rumor or innuendo, the People ask that the Court require a hearing under Evidence Code section 403(a) to determine whether any proffered witnesses has personal knowledge. "The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule." *Morrison, supra*, 34 Cal.4th at 724. At the Evidence Code section 403(a) hearing and/or after the defendant's required offer of proof, the People will further address relevance, hearsay and whether the evidence is admissible under Evidence Code sections, 1103 and 352.

3. Irrelevant Medical Information

In the course of discovery, the People produced to the defense the medical records of Annette Walters who went to Kaiser they day after she was attacked on March 19, 2009. The medical records, because they were obtained in 2012, contain a substantial amount of medical information, including medications, that post-dates her visit for acute injuries from the attack. The People move to exclude reference to the medical information, excluding her injuries from the attack and their treatment, as irrelevant.

E. Proposed Testimony That Does not Require an Expert

The defense has provided a report by Gregg Stutchman. Mr. Stuchman, an alleged photography expert, concludes that Sierra's hair which was discovered in an intensive examination within the crime lab looking for trace evidence "is not present in the corresponding area of the rope" in an image taken at the Sheriff's Office garage. Even if Mr. Stuchman can sufficiently qualify as an expert in this area to answer this question, his conclusion should not be permitted as it does not require expert testimony. Mr. Stuchman is looking at two pictures and saying that he cannot see something in one of them, but can in another. This most assuredly does not require expert qualifications or testimony, but rather the ability to use ones eyes.

Evidence Code section 801 states:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
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> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

EC §801; *see People v. Singleton* (2010) 182 Cal.App.4th 1. Where a layman is fully capable to form an opinion of the facts, expert testimony on the subject is beyond the permissible scope. *People v. Arguello* (1966) 244 Cal.App.2d 413, 420-421. Therefore the People move to exclude such testimony by Mr. Stuchman.

Mr. Stuchman also exceeds the rational - the hair[3/] cannot be seen - into the existential, by stating that the hair is not present. Assuming for the sake of argument that the only reasonable explanation is that none of the hairs would have migrated or moved despite the evidence being placed into an evidence bag and thereafter stored and eventually transported to the lab allowing the loosely adhered hairs to move around, it exceeds the realm of Mr. Stuchman's analysis or expertise to say that the approximately 80 micron (.08 millimeter) wide hair is not present as opposed to not discernible in a photo that was not taken for such a purpose. The People move to exclude such an opinion as without proper factual foundation.

F. Courtroom Decorum

This Court has the authority "to control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." CCP §128(a)(5); *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 117.

As a protective measure, although the People do not expect any such accusations, the People request that any accusations of failure to disclose evidence or accusations of prosecutorial misconduct be made outside the presence of the jury and only with a factual basis. Accusations without factual support or in reckless disregard for the truth violate the State Bar Act. *See* Bus. & Prof. Code § 6068(d); Cal. R. Prof. Conduct 5-200; *Doyle v. State Bar* (1976) 15 Cal.3d 973, 978 (gross carelessness and negligence constitute a violation of an attorney's oath to discharge his or her duties); *Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.

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[3/] There were 19 hairs retrieved from the approximately 76 foot coiled rope, 8 of which were retrieved in Mr.Gillis' examination where the photo was taken, but Mr. Stuchman describes a single hair.

G. Additional Motions in Limine

The People reserve the right to bring additional motions in limine either orally or in writing. Because the defense has not yet provided what will likely be substantial amounts of expert discovery, the People will likely file further written motions addressing the material.

DATED: September 16, 2016

Respectfully submitted,

JEFFREY F. ROSEN
District Attorney

DAVID R. BOYD
Deputy District Attorney

PROOF OF SERVICE

STATE OF CALIFORNIA) People v. ANTOLIN GARCIA TORRES
) ss.
COUNTY OF SANTA CLARA) Docket No. 213515

I am employed in the County of Santa Clara, State of California. I am over the age of eighteen years, and not a party to the above-entitled action. My business address is: Office of the District Attorney, 70 West Hedding Street, West Wing, San Jose, CA 95110

On September 16, 2016, I served the following documents upon the interested parties in this action by the method(s) indicated below:

PEOPLE'S FIRST SUPPLEMENTAL MOTIONS *IN LIMINE*

[ ] BY FIRST CLASS MAIL: by placing a true copy thereof, enclosed in a sealed envelope, for postage and deposit with the U.S. Postal Service on the same date it is submitted for mailing, and addressed as follows:

[ ] BY PERSONAL DELIVERY: by causing a true copy thereof to be hand-carried to the recipient at the address indicated:

[ ] BY FACSIMILE TRANSMISSION: by faxing a true copy thereof to the recipient at the facsimile number indicated:

[X] BY COUNTY PONY MAIL: by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Al Lopez
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San Jose, CA 95110

Brian Matthews
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San Jose, CA 95110

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 16, 2016, at San Jose, California.

Tina Beaudoin

Jeffrey F. Rosen
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