JEFFREY F. ROSEN
District Attorney
DAVID R. BOYD
Deputy District Attorney
California State Bar No. 184614
County Government Center, West Wing
70 West Hedding Street
San Jose, California 95110
Telephone: (408)792-2968

Attorneys for Plaintiff

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 PEOPLE'S **REPLY** TO DEFENDANT'S OPPOSITION TO DA MOTION TO COMPEL DISCOVERY

In an untimely response[1/] to the People's Motion to Compel Discovery, counsel added to his opposition an improper attempt to get the Court to consider an order that the prosecution produce additional discovery. Putting aside the fundamentally flawed allegations of misconduct, as well as the fact that an opposition to the People's motion is not the proper place for a defense motion to compel, counsel has failed to comply with the pre-requisites of Penal Code section 1054.5(b).

//

//

1/ *See* SCC Local Rule of Court 5.B.4.c requiring all written responses to be filed no later than five full court days prior to the date set for hearing. *See also* Ca. Rule of Court, rule 4.111(a).

That section mandates that:

> Before any party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order.

A review of the counsel's own attachments reveals that the requisite 15 days has not elapsed since the informal requests were made. Additionally, counsel again[2/] fails to inform this Court of the informal efforts at resolving some of the issues addressed in his demand. Because the motion is untimely, improperly brought in an opposition to the People's motion and in contradiction of the requirements of Penal Code section 1054.5, the People, rather than summarizing here its efforts to resolve the issues informally, move to strike the portions of defendant's reply that purport to bring a motion to compel discovery from the People.

While it may seem like a hypertechnical response, it is made because, by defendant's motion, he has avoided the timing requirements that promote the important objective of resolving discovery disputes informally. For example, the People were on the finishing touches of the response to the remainder of the numerous issues addressed in counsel's March 25, 2016 letter [Def. Exh. A]. The People were additionally about to send the response to the defendant's letter of April 1, 2016 [Def. Exh. B] when their opposition was emailed to counsel on April 7, 2016. That letter, dated April 7, 2016, is now completed and is attached as Exhibit 1.

The requests in those letters required investigation, the consultation with other persons, and sometimes review by experts outside of the prosecution team; all of which take time. Time that Penal Code section 1054.5(b) gives a party before a motion to compel maybe brought. Because counsel attempts to bring a motion to compel in his untimely filed opposition, and because the

---

[2/] The People extensively discussed the omission of significant facts and background of other defense discovery requests in its Opposition to Defendant's Motion to Compel Discovery which was filed on September 11, 2015. This Court denied the defendant's motion in its entirety on September 22, 2015.

People did not physically see it until mid morning on April 7, 2016,[3] SCC Local Rule 5.B.4.c gives the People only a single full court day for a response. However if counsel had properly filed his motion to compel discovery - should that even be necessary - the People would have at least seven court days to gather the history of the defendant's requests, the People's efforts toward complying with the requests and a legal response as to whether the demands were meritorious under Penal Code section 1054.1.

To assist this Court in understanding the incomplete picture that defense provides by simply attaching his two letters, the People offer the following single example. Counsel suggests that because the People have not yet responded to their desire to do mitochondrial testing of Sierra's hair[4] found on a coiled rope in the trunk of defendant's car, that "the government's delay in responding is hindering the defense's readiness for trial." What counsel leaves out is that the People addressed the need for counsel to identify items for independent testing with former lead counsel, Traci Owens, as far back as 2013. The People brought up the subject again with Brian Matthews during the weeks in which various evidence views were conducted last year which was no less than six months ago. The People followed up on the issue in writing to the defense again in February 2016. To blame the People for delaying defense readiness when it is the defense asking for independent expert mitochondrial DNA testing **for the first time** only 31 days before a trial that they admit they are not ready for, is a highly questionable assertion. Without informing this Court of the full history of the issue and the fact that the People repeatedly addressed the concept and its urgency with defense counsel, months and years previously, and to attempt to use a six court day delay in the People's informal response to the numerous issues presented in their March 25th letter as a tactical weapon in an improperly brought motion is brazen. Counsel's accusation of prosecutorial misconduct is even more so.

---

[3] Despite filing it at 1:51 p.m. on April 6, 2016, counsel e-mailed it to the People and the Court the next day. This prosecutor did not open the e-mail until a break in morning meetings at around 10:30 a.m. Regardless, it was filed a day later than required.

[4] This hair was tested for nuclear DNA and a single source profile was developed that concludes that Sierra LaMar, and no one else, was the source of the DNA.

The defendant was told in writing that his conversations on the jail telephone that were not with his attorneys would be monitored and recorded. [See attachment to Exh. 1.] The recordings themselves provide the same admonition before conversation can commence. The defense made no effort to inform the District Attorney's Office, and apparently made no effort to inform the Department of Corrections either, that they had hired a third party entity and would be permitting their client to talk with the entity over a knowingly monitored jail telephone. On these facts defense counsel declares "prosecutorial misconduct." It is no such thing as outlined in the attached Exhibit 1.

The People have and will continue to respond more fully to the defendant's informal discovery requests via informal correspondence as contemplated by Penal Code section 1054 *et seq.* The People will respond to a timely and properly filed motion to compel should one be brought. The People ask this Court to strike defendant's improperly brought motion to compel discovery as described in his opposition [Def. Motion at p.2, line 24 - p.3, line 20] and to remind counsel of their obligation to follow the timing requirements of the local rules of court, the California Rules of Court and the Penal Code as well as standard motion practice.

DATED: April 8, 2016

Respectfully Submitted,

JEFFREY F. ROSEN
District Attorney

DAVID R. BOYD
Deputy District Attorney

County of Santa Clara

Office of the District Attorney

70 West Hedding Street, West Wing, 5th Floor
San Jose, California 95110
(408) 299-7400

Jeffrey F. Rosen
District Attorney

David R. Boyd
Deputy District Attorney
(408)792-2968
dboyd@da.sccgov.org

April 7, 2016

Al Lopez
Alternate Defender's Office
701 Miller Street
San Jose, CA 95110

Re: ANTOLIN GARCIA TORRES
Docket No. 213515

Dear Mr. Lopez:

I am in receipt of your April 1, 2016 letter regarding jail calls to CRI at [redacted]. As you are aware, the Sheriff's Department makes commendable efforts not to inadvertently record or listen any communications potentially covered by the attorney-client privilege. Communications made from jail between inmates and other persons (even when those other persons are attorneys) are not confidential and thus are not protected by the attorney-client privilege when the inmate is expressly informed that the calls are subject to being recorded and monitored by third parties.[1] The communication at issue falls within that category. (See attached Notice of Telephone Monitoring Policy.)

---

[1] Although no California court has specifically addressed the question, courts in other jurisdictions have fairly uniformly held that such conversations are **not** subject to the attorney-client privilege, either under the theory the privilege did not initially attach or the privilege was waived - even where the defendant spoke directly to the attorney on a monitored line. (**See *United States* v. *Mejia*** (2d Cir. 2011) 655 F.3d 126, 131-134 [inmate's telephone call conveying information to his attorney, through his sister, on a recorded telephone line he knew was recording his sister was not covered by the attorney-client privilege because there could be no reasonable expectation of confidentiality and thus the attorney-client privilege was waived]; ***United States* v. *Hatcher*** (8th Cir.2003) 323 F.3d 666, 674 [requiring the government to turn over tapes of conversations between the cooperating co-conspirators and their attorneys to a defendant over the government's objection that it would violate co-conspirator's attorney-client privilege because prisoners and their attorneys had no reasonable expectation of privacy since they knew their conversations were being recorded]; ***United States* v. *Lentz*** (E.D. Va. 2005) 419 F.Supp.2d 820, 828 [inmate's telephone conversations with counsel are not protected by the attorney-client privilege where the inmate is notified at the outset that the calls are recorded and subject to monitoring, even though attorney told the inmate the calls would be privileged notwithstanding the fact they were being recorded]; ***United States* v. *Pelullo*** (D. N.J. 1998) 5 F.Supp.2d 285, 289 [prison inmate's phone calls to non-attorneys who then placed an attorney on the line were not

However, as noted in my letter of March 28, 2016, and notwithstanding the fact the communications with CRI are not confidential communications, when I was informed by Sergeant Leon that Lt. Quinones of the Santa Clara County Sheriff's Office had listened to a recorded conversation that took place between CRI and your client, I informed the Sheriff's Department to stop listening to any calls between CRI and your client. Additionally, I made sure that I would not be apprised of, nor be able to make use of any information contained in the recorded conversations between your client and CRI. Please note, it was the Sheriff's Office who brought this issue to my attention despite the admonition to your client that the calls are recorded, and therefore not in confidence. Thereafter, you were informed of the facts.

As noted in my letter, if there are any other persons whose communications with the defendant if confidential would fall under the protection of the attorney-client privilege you should provide the jail with the telephone numbers of those persons so as to avoid any future recording of those communications. If you have not already done so, please let me know if I can be of any assistance in this regard.

In your correspondence, you suggest my office sought jail calls associated with CRI. This is not correct. I asked that the Sheriff's Office listen to defendant's **recorded** jail conversations. Because recorded jail conversations are noted as being monitored, I knew that whatever recorded jail conversations took place would not be protected by a privilege as I was aware of the policy of the Sheriff's Department not to record calls between the attorney and client. Indeed, it appears the only reason that Lt. Quinones inadvertently ended up listening to a conversation between your client and CRI is because the number for CRI was never provided to the jail. (See attached Declaration of Records Certification.) If I am wrong in this regard, please let me know.

---

protected by attorney-client privilege where the defendant waived the privilege by engaging in telephone conversations with attorneys knowing that such conversations were taking place on a monitored and recorded telephone line]; **Watson v. Albin** (N.D. Cal. 2008 unreported) 2008 WL 2079967, at *4 [noting that "most correctional facilities **(including the Santa Clara County DOC)** have an alternative unmonitored phone system for when inmates have conversations with attorneys" because "despite the strong protections typically afforded attorney-client privilege, if an inmate calls an attorney on a monitored phone line, the privilege will be waived for lack of confidentiality"]; ***United States* v. *Eye*** (W.D.Mo. 2008 unreported) 2008 WL 1701089, *12 [communications between custodial inmate and attorney were not protected by attorney-client privilege where inmate knew conversation was being recorded, and also finding no constitutional violation because no showing government listened to conversations or purposely intruded on the conversation]; ***United States* v. *Thompson*** (C.D. Ill. 2007 unreported) 2007 WL 2700016, *2 [communications between inmate and attorney made where both parties knew conversation was being recorded were not protected by attorney-client privilege because calls could not be shown to have been made in confidence]; **cf.**, ***United States* v. *Madoch*** (7th Cir.1998) 149 F.3d 596, 602 [holding that the marital communications privilege did not apply where the wife knew that her husband was in jail in light of the "well-known need for correctional institutions to monitor inmate conversations"].) In such circumstances, it is speaking in the presence of the **monitoring system**, which is "the functional equivalent of the presence of a third party" (***United States* v. *Hatcher*** (8th Cir.2003) 323 F.3d 666, 674) and which "is no different from [the client] electing to proceed with these conversations notwithstanding the known presence of a third party within earshot of the conversation" (***United States* v. *Lentz*** (E.D.Va. 2005) 419 F.Supp.2d 820, 828) that is what the courts rely on in concluding the privilege does not attach in the first place or is waived. (**See also *United States* v. *Mejia*** (2d Cir. 2011) 655 F.3d 126, 134 ["The fact that the call was being recorded amounts essentially to the presence of an unsympathetic third party—BOP—listening in"]; ***United States v. Mitchell*** (M.D. Fla., 2013 unreported 2013 WL 3808152, at pp. *12-*13 [citing to ***United States v. Walker*** (M.D.Ala. Jul. 13, 2011) 2011 WL 2728460, at *2 for the proposition that "the presence of the recording device is the functional equivalent of the presence of a third party, such that the attorney-client privilege is destroyed."].)

Your accusations of misconduct and breach of the attorney client privilege are at odds with the facts and the way this office and the prosecution team have dealt with this incident. The office and I have tried to take the high road. We have adhered to strict ethical standards regarding the communication. We are voluntarily mooting any issues by declining to make any direct or indirect use of the conversation inadvertently overheard. We are instituting measures to stop any further dissemination of the conversation. And we are keeping you apprised of what occurred. Would the sky fall if you were to respond by acknowledging these efforts instead of referring to what occurred as misconduct?

I will be happy to have hand delivered the CDs that contain the telephone calls between your client and telephone number [redacted] to you at mutually convenient date. Please let me know if you desire those CDs; they are not at the District Attorney's Office.

Sincerely,

David R. Boyd
Deputy District Attorney

DA Case #: 120511149

Declaration of Records Certification

Title of Action:	**People v Antolin Garcia**
File Number:	**213515**
Due Date:	**None Noted**
Requested by:	**David Boyd, Deputy District Attorney, Santa Clara County**

I, April McHugh, the undersigned, say:

1. **I am the duly authorized Custodian of Records for the Santa Clara County Department of Correction;**
2. **I have the authority to certify copies of these records;**
3. **Check either A, B, or C**

A. ☒ **The copies transmitted herewith are to the best of my knowledge, true and correct copies of the original records in the custody and control of the Santa Clara County Department of Correction as described in the above-named request.** Enclosed: 1 Page of the Notice of Telephone Monitoring Policy for Antolin Garcia DZK109.

B. ☐ **Copies did exist, but have since been destroyed in accordance with Local and State Law and Department of Correction Policy.**

C. ☒ **No copies are transmitted herewith, because the Santa Clara County Department of Correction has none of the records described in the above-named request.** Note: The Santa Clara County Department of Correction (DOC) does not have a record of any communication between the Santa Clara County Alternate Defender's Office or their research firm requesting that their telephone numbers be made private. Additionally, telephone numbers that are made private do not make the "this call may be monitered or recorded" admonishment. The DOC did not receive Inmate Request Forms from Antolin Garcia DZK109 requesting telephone numbers be made private.

4. **The records referred to above were prepared by the personnel of the Santa Clara County Department of Correction in the ordinary course of business at or near the time of the act, condition, or event.**

Executed on: 04/05/2016
I declare under penalty of perjury that the above is true and correct.

Captain McHugh
Signature of Declarant

CAPTAIN
Title of Declarant

I _____ **in the absence of the Custodian of Records am authorized to certify Records for the Custodian of the Records.**

_____
Signature of Declarant

_____
Title

NOTICE OF TELEPHONE MONITORING POLICY

Arrestee's Name: GARCIA, ANTOLIN

Arrestee's Booking Number: 12022749

For security reasons, it is the policy of the Santa Clara County Department of Correction to monitor and/or record on a random basis all of the inmate telephone lines within the jails. Attorney/client, Licensed Physician and Religious Advisor telephone calls are considered confidential communications and will not be knowingly monitored or recorded without a warrant. The telephone numbers of Licensed Attorneys with offices in Santa Clara, Santa Cruz, Monterey and San Mateo Counties will be blocked from monitoring. In order to place a confidential call to a Licensed Physician or Religious Advisor you must submit an Inmate Request Form 48 hours in advance of the call.

I fully understand that if I choose to use the inmate telephones in any of the Santa Clara County Department of Correction jail facilities, I am doing so with the knowledge that the telephone call may be monitored and/or recorded.

LA POLIZA DE NOTICIA DE GRABACION

Por rasones de seguridad, es la poliza del Condado de Santa Clara Departmento de Correcion de grabar todas las liñas de teléfono de los encarcelados. Ademas, todas las liñas de teléfono de los encarcelados son sujeto de "vigilar en vivo" en hecho al azar basico. Llamadas con su Abogado, Consejero Religioso y Medico se consideradan confidencial. Estas llamadas no seran grabadas sin orden de la corte. Los numeros de teléphono de Abogados que tengan oficina's en los condados de Santa Clara, Santa Cruz, Monterey y San Mateo no seran grabadas o "vigiladas en vivo". Si quiere hablar con su Medico o Consejero Religioso por telephono tiene que someter una solicitud de encarcelado 48 hours antes del la llamada.

Yo comprendo completamente que si escojo usar cualquiera de las liñas de teléfono de los encarcelados en cualquiera de las facilidades del las carcel del condado de Santa Clara, lo hago con conocieniento que la llamada de telefono sera grabada y possiblemente sera vigilada en vivo.

Arrestee's Signature: X
(Firma)

Witnessing Officer's Signature: FIGUEROA Badge Number: 2854

Date: 5-21-2012

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 April 8, 2016, I served the following documents upon the interested parties in this action by the method(s) indicated below:

People's Reply to Defendant's Opposition DA Motion to Compel Discovery

[ ] 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
Alternate Defenders Office

Brian Matthews
Alternate Defenders Office

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 April 8, 2016, at San Jose, California.

Dina Garcia

Jeffrey F. Rosen
District Attorney
County of Santa Clara
San Jose, CA. 95110