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IN THE SUPERIOR COURT OF CALIFORNIA FOR THE

COUNTY OF SANTA CLARA

People of the State of California, Plaintiff, vs. Antolin Garcia Torres, Defendant	Case No.: 213515 Reply to Opposition to Motion to Dismiss Date: December 2nd, 2015 Time: 9:00 am Dept.: 29 Time Est.: 1 Hour

Points and Authorities

Statement of the Case

The defense filed a Motion to Dismiss and the People have filed Opposition. The defense replies to the People's arguments in this brief with the exception of section I.E. "Absence of bleach and stun gun damage to Sierra's clothing." The defense withdraws that argument.

Argument

I. Basis for Relief

A defendant may bring a motion to dismiss pursuant to Penal Code section 995 when he alleges that he has been indicted without reasonable or probable cause or where the indictment isn't found, endorsed, and presented as prescribed by the Code. (Pen. Code § 995(a)(1)) Motions brought under section 995 are, generally speaking, limited to the record presented to the Magistrate or the Grand Jury. "The purpose of a motion to set aside the accusatory pleading under Penal Code section 995 is to review the sufficiency of the indictment or information on the basis of the record made before the grand jury in the one case or the magistrate at the preliminary hearing in the other. A section 995 motion does not contemplate the introduction of evidence at the hearing on the motion." (*People v. Crudgington* (1979) 88 Cal.App.3d 295, 299)

Defendants are not, however, limited to section 995 motions. The courts have authorized non-statutory motions to dismiss to redress violations of rights that may not be contained in the record before the magistrate or grand jury. (*Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 270) While the prosecutor claims that non-statutory motions to dismiss can only be brought to remedy violations of substantial rights, his authority never says that. While it may involve such violations, a defendant's right to petition for redress is not so limited.

There appear to be no cases directly answering the question of whether a motion brought under Penal Code sections 939.7, 939.71, and *Johnson v. Superior Court* (1975) 15 Cal.3d 248 are raised under Penal Code section 995 or as a non-statutory motion to dismiss. The nature of a *Johnson* claim, which requires demonstrating what evidence the prosecutor failed to enter into the record before the grand jury, suggests that it is properly considered a non-statutory motion to dismiss. The fact that the claim cannot be raised without going outside the record takes it out of the ambit of section 995.

Part III of the motion involves the impact of evidence that was improperly presented to the grand jury. Penal Code section 939.6 holds that an indictment should be dismissed when a court finds that inadmissible evidence was presented and the balance of the evidence is insufficient to support the indictment. A motion raising this claim could be considered a section 995 motion because it does not require going outside the record, but it could also be considered a motion brought separately under section 939.6. Again, there appears to be no case law to guide the court in making a determination.

Parts IV and V of the motion involve claims of prosecutorial misconduct and insufficiency of the evidence. The prosecutorial misconduct claim sounds in due process and requires an analysis of the impact the misconduct had on the defendant's right to a fair grand jury process. It is not technically part of the grounds listed in Penal Code section 995 and therefore is properly seen as a non-statutory motion. Part V involves a standard sufficiency of the evidence claim regarding the special circumstance. Section 995 applies to it.

Because counsel viewed most of the issues raised in the opening brief as non-statutory bases for relief, he anticipated bringing a subsequent section 995 motion should the non-statutory motion to dismiss be denied. Because the People discuss section 995 in their Opposition, counsel feels compelled to include section 995 arguments in this Reply. No objection will be made should the prosecutor request a continuance to respond to new arguments raised in this brief. Alternatively, the defense would be willing to withdraw section 995 issues without prejudice and refile them in a subsequent pleading. Our only request is that Mr. Garcia Torres be allowed to litigate issues arising from the pleadings—either in the context of this briefing or in subsequent briefing under section 995.

II. The prosecution's presentation to the grand jury deprived it of its independence and caused substantial prejudice

A. The grand jury's role as protector of individual rights

California employs two mechanisms to protect individuals from being unnecessarily forced to undergo the trauma and expense of a criminal trial: the preliminary examination and the evaluation of a case by an independent grand jury. (*McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1465-1466) The history of the California grand jury process shows that "the reason we have the grand jury in California in the early 21st Century is to act as an independent buffer between citizens and overzealous prosecutors." (*id.* at p. 1491) The Court of Appeal has recognized three important precepts stemming from this history: 1) the grand jury must play a role protecting the individual, 2) courts have never embraced the idea that a grand jury should be a rubber stamp of the prosecutor and 3) that several justices of the Supreme Court have expressed dismay with pervasive prosecutorial influence over grand juries. (Id.) Thus, the Court in *McGill* found that a reviewing court should examine grand jury proceedings so as to ensure the grand jury's independence. (*id.* at p. 1498)

When considering whether evidence should have been presented, it is important to give force to the grand jury's independent decision making role. "Even so, it is the grand jury who is the judge of credibility in this context, and the grand jury has the right to draw its own conclusions about witnesses beyond the fact of their testimony." (*id.*) Indeed, the *McGill* Court found that the Supreme Court in *Johnson* was not "concerned just with exculpatory qua exculpatory quality of testimony—it was also concerned about independence." (*id.*)

Ultimately, the question is not whether the prosecution has demonstrated substantial evidence of guilt, nor is it if there is evidence that might reasonably negate a defense. Rather, the proper question is whether the prosecution possessed information that would have reasonably tended to negate guilt. (*id.*) If so, it should have informed the grand jury of its existence and allowed the jurors to determine if they needed to order

witnesses or other evidence pursuant to Penal Code section 939.7. If the evidence isn't presented and substantial prejudice inures to the defendant, the indictment—or at least the relevant counts—should be dismissed. (Pen. Code § 939.71)

The argument presented in the following pages will address each item of evidence at issue. Before embarking on that enterprise, it is important to emphasize that there are two factors considered under the substantial prejudice prong of the analysis. Courts should consider the impact of the prosecutor's failure to present exculpatory evidence both on the independence of the grand jury and on the likelihood it would, if told of the exculpatory evidence, have returned an indictment. (*Breceda v. Superior Court* (2013) 215 Cal.App.4th 934)

B. The following items of evidence were exculpatory and the failure to allow the grand jury to consider them caused substantial prejudice

A violation of Penal Code section 939.71 occurs when the defense shows that: 1) the prosecution was in possession of evidence and failed to present it to the grand jury, 2) the evidence was exculpatory, and 3) the failure to present the evidence interfered with the grand jury's independence causing substantial prejudice.

1. Sierra's Spanish notebook

Though it isn't clear from its brief, the prosecution appears to concede it didn't inform the grand jury of the existence of writings in Sierra's Spanish notebook that suggested she planned on running away the day she disappeared. Rather, it claims that Sierra's sister would testify that the writing isn't Sierra's and that others had access to the notebook after Sierra disappeared and that this information meant the writing wasn't exculpatory.

The claim that the writing in what is indisputably Sierra's notebook was written by someone else is new to the defense. Indeed, we have only recently—since the initial filing--been provided with discovery of draft report reflecting this. It appears that Sierra's sister indicated that the handwriting wasn't Sierra's. The prosecution hasn't submitted so

much as a declaration from her in the moving papers. This Court should refuse to consider the prosecutor's bare assertion of what some witness would say.

In addition, the Court should consider that the prosecution had this interview conducted after the indictment had been returned. It would be unfair to consider this evidence now when the real issue is what the prosecutor had when he presented his case. Indeed, if the defense obtained expert handwriting analysis that indicated the handwriting belonged to Sierra now, the prosecutor would undoubtedly claim that he didn't have that expert opinion at the time.

The prosecution also claims that the note is not written in the same handwriting style as handwriting identified as Sierra's before the grand jury. He further suggests that, using information also not given to the grand jury, other people had the opportunity to write in Sierra's notebook and therefore he could decide not to present it to the grand jury because "the handwriting was obviously of a different type and therefore not Sierra's." (People's Response and Opposition to Defendant's Motion to Dismiss, at p. 22)

This argument betrays the assumption underlying the entire prosecution argument that the purpose of the proceedings was to obtain an indictment instead of fairly sorting out whether there was probable cause to indict. (See *McGill v. Superior Court*, supra, 195 Cal.App.4th 1454) The prosecutor exceeds his authority when he makes judgments like this. The grand jury should have had the opportunity to determine if it believed that it needed to inquire into the evidence pursuant to Penal Code section 939.71.

It is true that the defendant has the burden to establish that evidence that was not presented was exculpatory. (See Evid. Code § 500) There being no other description of the burden of proof, the burden defaults to a preponderance of the evidence. (Cal. Law Revision Com. com., West's Ann. Evid. Code (2015 ed.) § 500) In this case, the defense would need to show that the writing was more likely than not Sierra's. It is not disputed that the Spanish notebook belonged to Sierra. Other writing in the notebook is believed to be hers and the content references the very day she went missing. All these factors lead to the conclusion that the writing is hers. The fact that the notebook contains a writing

whose content appears to reflect the personal thoughts of the owner is sufficient to show it is exculpatory and should have been considered by the grand jury.

The prosecution's claims that the handwriting is different could have been presented to the grand jury and it could have made its own determination. The prosecution's argument that he didn't have to present the note because of his own determination that the handwriting was different is exactly the problem—it deprives the grand jury of its independence and makes it no more than a tool of the prosecution team. As the Court of Appeal has said, it is the grand jury and not the prosecutor who has the duty to sift through the evidence and weigh it. (*Breceda v. Superior Court* (2013) 215 Cal.App.4th 934) Indeed, the courts have further explained that it doesn't depend on a prosecutor's estimation of the weight of the evidence, it is simply whether the evidence reasonably tends to negate guilt. (*McGill v. Superior Court*, supra, 195 Cal.App.4th at p. 1517)

Indeed, the prosecutor presents no authority saying he could independently choose not to produce evidence because of his own comparison of the handwriting. Evidence Code section 1417 permits finders of fact to compare handwriting. (*People v. Rodriguez* (2005) 133 Cal.App.4th 545, 553) Under these circumstances, the grand jurors were the fact finders and, under section 1417, they could have compared the handwriting and determined if they need to hear additional evidence or if they believed the note was an expression of Sierra's state of mind. The note was exculpatory in that a preponderance of the evidence showed Sierra wrote it.

Having shown that the writing both was not presented to the grand jury and that it was exculpatory, this Court should proceed to consider whether its omission caused substantial prejudice. The grand jury was unable to consider whether the note represented circumstantial evidence of Sierra's state of mind and, therefore, was a source of doubt about the kidnapping and murder allegation. They were unable to compare the handwriting that was presented as Sierra's with the note and make a determination. And they were unable to determine whether they should call other witnesses to discuss their

opinions about the handwriting and Sierra's state of mind. Instead, they were left with only the prosecutor's theory. This led them down the path he wanted them to go, but it didn't create a process focused on a true assessment of probable cause.

The prosecutor argues that the notebook was not immediately seized and that others may have written in it. However, he presents no evidence showing that anyone else did write in it—just that they could have. This speculation should have been presented and argued to the grand jury and they could have determined whether they believed Sierra wrote the note.

Would the grand jury have refused to indict on the homicide and kidnapping allegation had they known there was evidence that Sierra was intending on leaving on the very day she disappeared? It very well may have. The prosecutor tried to show that Sierra was dead and had been kidnapped by suggesting that all the evidence showed she wouldn't leave. This note was evidence that Sierra was planning on leaving and completely contradicted the prosecutor's theory. Had it been presented to the grand jury, we would at least know that an independent grand jury had reviewed the evidence. That cannot now be said. Both prongs of the substantial prejudice element are met.

2. Writings in the shared notebook

The prosecutor apparently concedes that he failed to make the grand jury aware of the writings in the shared notebook. Again, he claims that the evidence is not exculpatory and that he was therefore not obligated to present it to the grand jury.

His claim that it isn't exculpatory is based on his allegation that Sierra didn't write the note. No declaration is provided showing that, as he claims, Sierra's friend Karissa wrote the note. Indeed, he only puts this surprising information in a footnote of his brief. The Court should refuse to consider this hearsay.

It appears that the prosecutor obtained this information only after the defense filed its Motion to Dismiss. As such, it suffers from a similar problem as his claim about the previous writing—he bases his claim that it isn't exculpatory on evidence obtained after the fact.

He also claims that the writing is clearly not Sierra's because the handwriting is different. But that decision isn't his to make. The grand jury should have been allowed to perform its function. Instead, the prosecutor is deciding what is credible and want isn't. By doing so, he raises one of the chief concerns of the Supreme Court—the concern about pervasive prosecutorial influence over grand juries. Justice Mosk, in an opinion that pre-dated the reforms articulated in *Johnson* and subsequent statutes, expressed the problem well. "Indeed, current indictment procedures create what can only be characterized as a prosecutor's Eden: he decides what evidence will be heard, how it is to be presented, and then advises the grand jury on its admissibility and legal significance." (*Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 592 (superseded by statute & constitutional amendment)) The reforms took us out of the prosecutor's Eden. Failing to adhere to them—especially section 939.71—brings us back.

The defense met its burden by a preponderance showing that the note was Sierra's. It was in a notebook that she and only three others shared, its content expressed an interest in leaving, and she is the only one of the contributors who left. The grand jury should have been allowed to hear from Karissa or anyone else who might have claimed to be the author. They could have made whatever credibility determinations that were necessary or even called for more evidence if they felt compelled to do so. But they were never told.

Indeed, the note is exculpatory even if Sierra didn't write it. The shared notebook was essentially a journal that was shared by several friends. They shared ideas, feelings, plans, and other things. It was essentially a non-verbal, running, discussion among friends. The fact that one of the friends would have added thoughts to the conversation about running away raises the inferences that the subject was discussed. It adds to the potential that Sierra ran away instead of having been abducted.

The failure to alert the grand jury to the note—a second note discussing leaving—caused further prejudice. It again limited the grand jury's independence and led the jurors to believe that the only evidence in existence showed that Sierra wouldn't leave. Whether

or not the prosecutor believes it, the grand jury should have heard about evidence that contradicted his theory, for credibility determinations of this sort are left to their judgment—not the prosecutor's. (See *McGill v. Superior Court*, supra, 195 Cal.App.4th at p. 1502)

3. The Fremont and Nebraska Sightings

The defense argued in its opening brief that the prosecution failed to present evidence that Sierra had been seen after the date of her appearance in Fremont and then, sometime later, in Nebraska. The prosecutor denies this and points to pages 1756-1761 of the grand jury transcript as evidence. Those pages offer no support for his denial and, indeed, reveal that the grand jury was misled on this point.

Rather than presenting evidence of the sightings in Fremont and Nebraska, the prosecutor simply asked the lead investigator if the Sheriff's Department had received "tips" regarding Sierra's whereabouts. It is disingenuous to argue that a general discussion about tips, including psychics, is the equivalent of presenting them with exculpatory evidence.

The sightings in Fremont and Nebraska were firm. The Fremont witness believed it was more like than not (recall the preponderance standard) the girl he saw was Sierra and the Nebraska witness said the girl he saw represented herself as Sierra and showed him an ID card that apparently supported the claim. Had the grand jury heard of these sightings, they could have called for the witnesses to present their testimony. They could have considered evidence that Sierra was alive.

But the prosecution discouraged them from hearing the evidence. Instead of presenting a true accounting of the sightings, they buried them in the generality of the tips. And then, through the questioning of Sgt. Leon, they discouraged the jurors from asking about the tips. For example, Sgt. Leon testified that the Sheriff's Office processed tips regarding Sierra's whereabouts and potential suspects. (RT 1756) He explained that they received thousands of such tips. The prosecutor asked if they received tips that said something like "I think I saw Sierra three weeks ago in Michigan." (RT 1757-1759) And

Sgt. Leon answered that yes, they had received tips as vague as that. (RT 1757-1759) He was then asked about tips from psychics and other 'fringe' tipsters. (RT 1761) Finally, he was asked if there had been any verified sightings of Sierra—leaving 'verified' undefined and Sgt. Leon responded no.

Though he possessed information about sightings that were far more than unverified, the prosecutor never presented them. Instead he included them with the thousands of tips the Sheriff's Department received and suggested the only information they obtained was vague or from unreliable sources. Then he asked if the grand jury wanted to hear the tips. This was a clear violation of the prosecutor's obligations before the grand jury and imperiled its independence. "A district attorney's office must also not, even if unintentionally, cause a grand jury to think that it would not be worth it's while to call a given witness when that witness's testimony is clearly relevant to the charges being considered." (*McGill v. Superior Court*, supra, 195 Cal.App.4th XXX) In spite of this clear direction, the prosecutor did exactly that with his questioning of Sgt. Leon. He made it seem like all the tips were from crackpots, that the Sheriff's Department had faithfully followed up on them and found them wanting. This message was wrong in two ways: first, it mischaracterized reliable sightings and second, it kept the grand jury from being independent. Once again, the prosecutor made the grand jury an arm of his office.

The prejudice inherent in this omission is clear. If Sierra were alive a few days after her disappearance in Fremont and sometime later in Nebraska, a reasonable fact-finder would have to doubt the charge of murder and the kidnapping allegation. Not only would it call into question the circumstances of her disappearance; it would also call into question Mr. Garcia Torres's alleged role in it. The prosecutor points to other evidence that was presented in an attempt to belittle the sightings. But this argument is simply another example of losing sight of the grand jury's role. The weighing of evidence is up to the grand jurors. By making his own determination that the sightings were not credible, the prosecutor invaded their function and deprived them of their independence.

The error that occurred in this case is very similar to that committed by the prosecutors in *Johnson*. (*Johnson v. Superior Court* (1975) 15 Cal.3d 248) The defendant in *Johnson* had been taken through a preliminary examination before the grand jury proceedings. He testified at the preliminary examination and the magistrate dismissed, finding a lack of probable cause. When the prosecutor subsequently presented the case to the grand jury, he left out the defense case that had been presented to the magistrate. Not only that, but he also suggested that information such as the defendant's testimony was unavailable because the defendant would refuse to testify. He did this by referencing the defendant's invocation of his Miranda rights following his arrest. The Court found that the comment was *Griffin* error, "but more importantly, the grand jury's power to order the production of evidence which might 'explain away' the charges under consideration was thereby thwarted." (*id.* at p. 253) The testimony of Sgt. Leon did not alert the grand jury to facts that might 'explain away' the charges. On the contrary, it buried the evidence under thousands of other tips of varying degrees of specificity and reliability. The prosecutor repeated the error cited in *Johnson* by eliciting such testimony.

4. Dog Scent Evidence

The prosecutor again concedes that he failed to present evidence that search dogs lost Sierra's scent near her house. He claims, however, that the evidence was not exculpatory and that, even if it were, its omission didn't cause substantial prejudice. He further claims that items provided in discovery show that search dogs located Sierra's scent on Dougherty and that this limits the viability of the inference that Sierra disappeared in her court.

Counsel has reviewed the discovery the prosecutor cites, a CD labeled DM-376, and has found only a note indicating dogs lost scent in the court and at one location on Daugherty. The location on Daugherty, however, heads in the opposite direction Sierra's bus stop. Losing a scent at that location does not mean a reasonable inference could not be drawn that Sierra was abducted (or voluntarily entered a car) on Paquita Espana and that she never made it to a thoroughfare. The grand jury could further have believed it

unlikely that Mr. Garcia Torres would be in her court at exactly the right time and, without any evidence showing a prior relationship, they could not have determined that he knew her schedule. While the prosecutor obviously chooses not to credit these inferences, they are reasonable ones the grand jury could have adopted had the grand jury been permitted to act independently. Alas, they were never informed of the dog scent information so they could not give it due consideration.

The prosecutor argues that his failure to present the dog scent evidence didn't cause substantial prejudice because the grand jury could have inferred that Mr. Garcia Torres was trolling for a victim. Of course, just because the grand jury could have drawn that inference doesn't mean substantial prejudice hasn't been shown. On the contrary, "The fact that the record can support a finding of probable cause does not mean there is no reasonable probability the jury would have rejected such a finding." (*Breceda v. Superior Court* (2013) 215 Cal.App.4th 934, 959) The dog scent evidence leads to just such a reasonable probability. Accepting the prosecutor's argument would mean that the grand jury would have had to believe that Mr. Garcia-Torres was 'trolling' for a victim and, in so doing, chose to attempt to find one in a court instead of looking in an area where one might reasonably expect more people—like a Safeway parking lot. Such an unlikely scenario could reasonably have been rejected by the grand jury. But the prosecutor prevented that by not disclosing the evidence.

5. The Missing Hair—Also Known As the Rope Theory

The prosecution is correct that the grand jury was presented with Defense Exhibit G. They were not presented with Defense Exhibit H. Exhibit G is a picture of a rope that was taken out of Mr. Garcia-Torres' car at the time it was recovered. There is no hair on the rope. Exhibit H is a picture of the same rope, but this shot is taken at the crime lab. Hair appears on the rope. One of those hairs was later tested and the lab believes it belonged to Sierra. This hair was an important piece of evidence. Most of the other DNA evidence was based on low levels of DNA without identifying alleles at all loci the kit tests. But the hair was different. The DNA was stronger. But how did the hair suddenly

appear on the rope between the search of the car and the crime lab? Had the prosecutor presented Defense Exhibit G in conjunction with Defense Exhibit H, the grand jury would have had to doubt how the hair came to be on the rope. It would likely have led to grand jury to explore the hair on the rope instead of simply accepting the prosecutor's version. At the very least, the grand jury could have asked for zoomed-in photos of the rope they were shown. The prosecutor's response focuses on Defense Exhibit G but ignores the interplay between the two photos of the rope.

6. DNA Statistics

The prosecutor presented the grand jury with statistics that overestimated the likelihood that Mr. Garcia-Torres' DNA was present at area 5 of Sierra's pants. We know they overestimated the likelihood because the statistics failed to account for another contributor that was identified in other testing of the same location. It is common knowledge of statistics that the certainty with which one can be sure a particular person contributed goes down as the number of contributors grow.

The prosecution claims that he satisfied his obligation by presenting the fact that autosomal DNA testing showed three contributors while Y-STR testing showed at least four. Undoubtedly, he presented that information. But he also presented misleading statistics.

The prosecutor quotes from notes made at the crime lab purporting to explain the statistics in question. It appears that the lab decided to use the statistic for the autosomal result and ignore the fact that the test had failed to identify at least one contributor because it most accurately reflected the results they obtain from the autosomal test. That may be true, but it certainly wasn't an accurate depiction of the state of the evidence.

The prosecutor further claims that he did not calculate the statistics and therefore didn't have them. He could easily have asked the crime lab to use their computer systems to calculate likelihood ratios based on at least four contributors instead of only three. He could have also asked them to factor in the obvious drop-out that occurred with this sample. Whether he willfully refused to do the work or did not think to ask for the

statistics, it cannot reasonably be found that they were not in his possession. The crime lab had the ability and the data—all it had to do was crunch the numbers.

Finally, the prosecutor faults the defense for not providing the Court with the alternative statistics. Counsel contacted the Santa Clara County Crime Lab and asked them to calculate the statistics. The lab indicated that the request must come from the prosecutor. Counsel asked the prosecutor to make the request and received the attached letter indicating his refusal. (Exhibit A)

Having an independent lab calculate the statistics would be unhelpful since the prosecutor could simply claim he didn't have the new statistics at the time he presented to the grand jury. Therefore, we don't have the alternative statistic. But we do know that the grand jury was given misleading evidence that overestimated the likelihood that Mr. Garcia-Torres is a contributor to the mixture from area 5.

7. Cummulative Error

The errors should not be considered in isolation. Instead, they worked together to contribute to a misleading picture of the state of the evidence. The prosecutor argued that all the evidence showed that Sierra would not have run away and then selectively presented evidence that supported his argument. Evidence that contradicted his version of events was kept from the grand jury. This both deprived them of their ability to play an independent role and caused Mr. Garcia-Torres to suffer substantial prejudice.

III. The Grand Jury should not have been presented the Safeway incidents

Penal Code section 939.6 says that, absent certain inapplicable exceptions, the grand jury shall not receive any evidence except that which would be admissible over objection at trial. It further says that "the fact that evidence that would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury." (Pen. Code § 939.6)

Competent evidence is material that, if relevant, is otherwise admissible under the laws of evidence. (*Arteaga v. Superior Court* (2015) 233 Cal.App.4th 851) The Safeway

incidents, therefore, are incompetent evidence if they would not be admissible at trial. And they would not be admissible at trial if they were improperly joined and/or inadmissible under Evidence Code section 1101. Therefore, a claim they were improperly admitted is cognizable under Penal Code section 939.6.

The prosecutor argues that the Safeway incidents and Sierra's disappearance would be cross-admissible under theories of intent and common scheme through Evidence Code section 1101(b). The logic of admissibility for intent is the idea that "if a person acts similarly in similar situations, he probably harbors the same intent in each instance . . . ." (*People v. Gallego* (1990) 52 Cal.3d 115, 171 (citing *People v. Robbins* (1988) 45 Cal.3d 867, 879-880)) Thus, admissibility assumes at least two things: 1) that the same person committed both acts and 2) that there are enough provable similar facts to show the existence of the same intent. Neither assumption is valid on these facts. First, all three victims of the Safeway incidents failed to identify Mr. Garcia-Torres. And there are no facts supporting an inference of any particular intent. There was no attempt to steal a car and no attempt to move the victims. The prosecutor will undoubtedly point to the absence of facts suggesting robbery, but there are no facts establishing any other intent.

When one compares the Safeway incidents to Sierra's disappearance, the water gets even murkier. There is no evidence describing how she ended up disappearing. Even the prosecutor's argument shows he cannot prove where she disappeared from, whether or not she voluntarily got into a car, or any other facts surrounding her disappearance. Was it similar to the Safeway incidents? No one can say.

Things get even worse when the discussion turns to common scheme or plan. The Safeway incidents would only be admissible under common scheme if it could be shown that there was ". . . such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (See *People v. Ewoldt* (1994) 7 Cal.4th 380) The prosecutor cites to just three similarities: that the alleged victim was female, that Mr. Garcia-Torres didn't know her, and that the assaults occurred out in the open. It is hard to see how the fact that they

were females who were unknown to Mr. Garcia-Torres are individual manifestations of a general plan and it hasn't been proved that Sierra was assaulted out in the open. There are insufficient facts to show a common scheme or plan.

The incidents are therefore not cross-admissible. And, as established in the opening brief, they should not have been joined. Their joinder caused significant prejudice and, without the Safeway incidents supporting the evidence of Sierra's disappearance and vice-versa, the balance of the evidence fails to establish probable cause to indict. The evidence of the Safeway incident essentially boiled down to Mr. Garcia-Torres's fingerprint being on a battery in the stun gun. That only established that at some point in time he touched the battery. In this way, the evidence was similar to that in *Birt v. Superior Court* (1973) 34 Cal.App.3d 934, where one fingerprint on a lighter in a van was found insufficient to show probable cause for burglary. Likewise, there are significant gaps in the evidence supporting the murder charge. The indictment should therefore be dismissed. (See Pen. Code § 939.6)

IV. The evidence was insufficient to show probable cause that that Mr. Garcia-Torres was a major participant in the crime

Mr. Garcia-Torres was indicted for the felony-murder special circumstance. Though they were never instructed as to aider and abettor liability, the facts could have lead the grand jurors to believe that Mr. Garcia-Torres was an aider and abettor. Specifically, the fact that Sierra's phone went back on the network the evening she disappeared at a time when Mr. Garcia-Torres was known to be home and away from the phone leads to the suggestion that he did not act alone. Finding the special circumstance true if they found he was an aider and abettor requires finding that he was a major participant in the crime. (CALCRIM 703)

The failure to instruct the grand jury in aider and abettor liability and the findings required for the special circumstance is fatal to count 1 in the indictment. At trial, the court has a sua sponte duty to instruct the jury on the mental state require for accomplice liability when a special circumstance is charged and there is sufficient evidence to

support the finding that the defendant was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117) For example, in *Jones*, the defense argued on appeal that the evidence showed the possibility that Jones committed robbery with another person and that the other person was the actual killer. The Court of Appeal found that the trial court erred when it refused to instruct the jury that an aider and abettor to the felony murder special circumstance had to be a major participant if he wasn't the actual killer. (Id., see *Enmund v. Florida* (1982) 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137 (*imposition of death penalty on aider and abettor who is not actual killer violates Eighth Amendment unless aider and abettor is substantial participant in the crime*) The error was harmless on the facts of that case and, in no small part, because the defense did not argue aider and abettor liability.

The evidence presented to the grand jury would have supported a finding that, even if Mr. Garcia-Torres were involved, he did not act alone. Further, if one were to assume that Sierra is deceased, there is no evidence about how she died or if Mr. Garcia-Torres was the actual killer. On the contrary, the fact that her phone returned to the network at a time when Mr. Garcia-Torres wasn't near it, leads to an inference that another person was involved. The failure to instruct the jury about aider and abettor liability and about the substantial participant element of the special circumstance prevented the grand jury from determining probable cause as to the special circumstance. It should therefore be dismissed.

Conclusion

The independence of the grand jury is one of the hallmarks of our criminal justice system. Without it, the grand jury protections become fiction. The grand jury itself becomes a tool of the prosecution and not a protector of the individual. The failure to introduce the exculpatory evidence discussed above deprived the grand jury of its independence and caused substantial prejudice. There is a reasonable probability that they would have refused to indict had they been made aware of the evidence. Because of this and the other errors noted, the indictment should be dismissed.

Date: November 23, 2015

Respectfully submitted,

Brian Matthews
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EXHIBIT

A

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Alternate Defender's Office
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San Jose, CA 95110

Re: ANTOLIN GARCIA TORRES
Docket No. 213515

Dear Mr. Lopez and Mr. Matthews:

This letter is in response to your November 19, 2015 (3:53 PM) e-mail where you request that the People provide the statistic that you declined to provide the Court in your allegation of PC §939.71 error and prejudice. The People do not intend to be an adjunct of the defense team and as a result, I do not intend to request that Michelle Bell calculate that statistic. As you are aware based on Ms. Bell's voicemail to you, she supplied the statistic that she and the Crime Lab feel is the most appropriate and accurate for the data obtained.

I would encourage you to contact one of the "consultants" that Mr. Lopez indicates you have retained and ask them to do the math prior to Monday. You, of course, have had plenty of time to do so since I filed my response on November 9, 2015. It seems to me that you must know the number already given that you accuse me of failing to provide exculpatory information to the grand jury. Otherwise how can you say the one given to the grand jury was misleading and yours is exculpatory, facts that are required to be proven in order to obtain the relief you seek in the motion.

Sincerely,

DAVID R. BOYD
Deputy District Attorney

DA Case #: 120511149

by leaving a true and correct copy at the clerk's office at the Hall of Justice and by e-mail to Deputy District Attorney David Boyd at his office e-mail account.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 23rd day of November at San Jose, California.