

1 LAW OFFICES OF THE ALTERNATE DEFENDER
2 DAVID EPPS, # 160173
3 ALFONSO LOPEZ, # 203564
4 BRIAN MATTHEWS, # 191508
5 BICKA BARLOW, # 178723
6 701 Miller Street, 1st Floor
7 San Jose, CA 95110
8 Telephone: (408) 299-7234
9 brian.matthews@ado.sccgov.org

10 *Attorneys for Antolin Garcia-Torres*

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 IN AND FOR THE COUNTY OF SANTA CLARA

13 People of the State of California

14 Plaintiff,

15 --vs.--

16 Antolin Garcia-Torres

17 Defendant.

) Case No.: 213515

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(ENDORSED)
FILED
APR 24 2017

Clerk of the Court
Superior Court of CA County of Santa Clara
BY G. GOLDBENSON DEPUTY

18 Argument

19 The defense offers the following arguments regarding jury instructions. All of
20 them are predicated on Mr. Garcia-Torres's rights to due process and a fair trial under
21 the 5th, 6th, 8th, and 14th Amendments and their California corollaries.

1 **I. CALCRIM 200 (Duties of judge and jury)**

2 The defense requests that the Court provide additional language to the second
3 paragraph so that it reads: "It is up to all of you, and you alone, to decide what
4 happened *if you can*, based only on the evidence that has been presented to you in this
5 trial." Without the italicized language, the jury isn't given the option of saying that they
6 cannot decide what happened. Clearly, a jury that cannot decide what happened should
vote not guilty so failing to include that option prejudices the defendant.

7 **II. CALCRIM 207 (Proof need not show actual date)**

8 The defense objects to CALCRIM 207. The California Supreme Court has held
9 that it is error to give it when the proof shows the offense occurred on a particular date
10 and the defense presents an alibi defense. (*People v. Jennings* (1991) 53 Cal.3d 334,
11 358-359; *People v. Barney* (1983) 143 Cal.App.3d 490.) "The defendant is entitled as a
12 matter of due process to have the time of commission of the offense fixed in order to
13 demonstrate he was elsewhere or otherwise disenabled from its commission." (*People*
14 *v. Barney*, supra, 143 Cal.App.3d at p. 497.) The evidence presented in this case shows
15 that the crimes charged were committed on specific dates and the defense will argue
that Mr. Garcia-Torres was not present when they occurred. Thus, the timeline for the
offenses is significant and CALCRIM 207 should not be given.

16 **III. CALCRIM 220 (Reasonable Doubt)**

17 **A. Proposed language**

18 The defense requests that the Court instruct the jury with the following additional
19 language:

20 "The burden of proof is upon the prosecutor. All the presumptions of law
21 independent of evidence are in favor of innocence; and every person is presumed to be
22 innocent until he is proved guilty. If upon such proof there is reasonable doubt
23 remaining, the accused is entitled to the benefit of it by an acquittal. For it is not
24 sufficient to establish a probability, though a strong one arising from the doctrine of
25 chances, that the fact charged is more likely to be true than the contrary; but the
evidence must establish the truth of the fact to a reasonable and moral certainty; a

1 certainty that convinces and directs the understanding, and satisfies the reason and
2 judgment, of those who are bound to act conscientiously upon it. This we take to be
3 proof beyond reasonable doubt.” *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850)

4 The requested language is found in the United States Supreme Court case of
5 *Victor v. Nebraska* (1994) 511 U.S. 1, 8. The Court considered the California definition
6 of reasonable doubt and said that it came from an instruction that had been given in a
7 Massachusetts case. The California instruction truncates the Massachusetts instruction;
8 the requested language is the balance. Therefore, it is appropriate to use the additional
9 language since it comes from the same source as California’s reasonable doubt
10 definition and gives further definition to an amorphous concept.

11 **B. “Compare and Consider” language**

12 The defense objects to the portion of CALCRIM 220 that instructs the jury to
13 “compare and consider” the evidence. This language improperly places a burden on the
14 defendant to present evidence and tells the jury to compare the defense evidence to the
15 prosecution evidence rather than to compare the state of the evidence to the
16 reasonable doubt standard.

17 This objection is raised under the defendant’s rights to due process and a fair
18 trial under the 5th, 6th, 8th, and 14th Amendments as well as their California counterparts.
19 However, the defense recognizes this argument was rejected in *People v. Hernandez-*
20 *Rios* (2007) 151 Cal.App.4th 1154, 1156.

21 **IV. CALCRIM 226 (Witnesses)**

22 The defense asks the Court to delete the language regarding whether a witness
23 has engaged in conduct that reflects on his believability. The evidence does not support
24 the instruction.

25 **V. CALCRIM 332 (Expert witness testimony)**

Because experts testified and disagreed, the defense asks that the Court instruct
with the last paragraph of the instruction regarding weighing the expert opinions.

VI. CALCRIM 362 (Consciousness of guilt; false statements)

The defense objects to this instruction. It should not be given when the only
evidence that a statement was false is that it is inconsistent with the government’s

1 theory. Indeed, it has been held that the instruction is inapplicable when a defendant's
2 trial testimony is consistent with his pretrial statements to the police and is merely
3 inconsistent with the prosecution's case. (*People v. Green* (1980) 27 Cal.3d 1, 40-41;
4 *People v. Louis* (1984) 159 Cal.App.3d 156, 160 (disapproved of in *People v. Mickey*
5 (1991) 54 Cal.3d 612, 671 to extent opinion suggests adverb willfully must be added.)

6 CALCRIM 362 is justified when there is evidence that a defendant willfully
7 fabricated a story to explain his conduct. (*People v. Louis*, supra, 159 Cal.App.3d at p.
8 160.) For example, a defendant's prior statement might be shown to conflict with that of
9 other percipient witnesses regarding his whereabouts. No such contradiction has been
10 shown in this case. His statement is simply at odds with the prosecution theory of the
11 case, but it has not been shown to be willfully false. Therefore, the evidence is
12 insufficient to support the instruction.

13 **VII. CALCRIM 370 (Motive)**

14 The defense objects to this instruction. The Court does not have to give it sua
15 sponte and it is essentially a pinpoint instruction that improperly highlights the
16 prosecution evidence and invades the jury's province. (See *People v. Young* (1970) 9
17 Cal.App.3d 106, 110, *People v. Bermijo* (1935) 2 Cal.2d 270.)

18 **VIII. CALCRIM 375 (Evidence of other crimes)**

19 The defense objects to this instruction on the same grounds as we objected to
20 the evidence being admitted under Evidence Code section 1101, subd. (b).

21 **IX. CALCRIM 521 (First degree murder)**

22 The defense objects to instruction on a premeditation and deliberation theory for
23 first-degree murder. First, the evidence presented fails to support premeditation and
24 deliberation. And second, the defense was not on notice that the prosecution would be
25 pursuing this theory.

The defendant has a due process right to notice of the charges against him. The
accusatory pleading is designed to give the defendant notice. (*People v. Anderson*
(2006) 141 Cal.App.4th 430.) Generally, the accused is given adequate notice by the
accusatory pleading and the testimony presented before a grand jury. (*People v.*
Hughes (2002) 27 Cal.4th 287, 369-370.) The indictment in this case does not mention

1 premeditation and deliberation and the presentation to the grand jury was predicated on
2 a felony-murder theory. Thus, the notice the defense received was that it had to defend
3 against the felony-murder theory. Indeed, the grand jury wasn't instructed on a
4 premeditation/deliberation theory and the case was tried based on the felony-murder
5 theory. Due process requires that the defendant have notice of the prosecution theory
6 and, while the charge alone may sometimes provide that notice, no notice was given
under the circumstances of this case.

7 **X. CALCRIM 3400 (Alibi)**

8 The defense requests the Court give CALCRIM 3400. The Court does not have
9 an obligation to instruct the jury on alibi absent a request. (*People v. Hoffmann* (1970) 7
10 Cal.App.3d 39; *People v. Freeman* (1978) 22 Cal.3d 434.) The theme of the cases in
11 the area is clear that there is no sua sponte duty. But they all explain that the Court
12 doesn't have to instruct in the absence of a request. Here, we are making a specific
13 request that relates to the defense. This instruction is responsive to the facts of the case
and should be given.

14 Date: April 21, 2017

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16 Respectfully submitted,

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19 Brian Matthews
20 Deputy Alternate Defender
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