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ENDORSED
FILED
2016 APR -6 1:51
Mark McCoy

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

NO: 213515

DEFENSE OPPOSITION TO DA
MOTION FOR DISCOVERY

Date: 04/12/16

Time: 1:30 P.M.

Dept.: 29

Time Est.: 30 MINUTES

18 **BACKGROUND:**

19 The government brought a motion to compel seeking defense discovery under Penal Code
20 section 1054.3 and served said motion on March 22, 2016. The government filed their motion (34)
21 days before trial and after hearing assurances from defense counsel that they would be receiving a
22 defense discovery packet that very week. On March 25, 2016, (31) days before trial, the government
23 did receive a voluminous packet of defense discovery. Namely, defense counsel produced to the
24 government (44) CD/DVD and (374) pages of defense discovery. The government has turned over
25 more prosecution discovery to the defense on March 28, 2016, and has received more defense
26 discovery that was informally requested by the government.
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Defense Counsel Has Complied With Section 1054.3

The motion to compel discovery brought by the government was brought on prematurely and was seeking defense discovery before it was required by section 1054.7 which clearly states, “disclosures required under this chapter shall be made at least 30 days prior to trial...” On March 25, 2016, the defense complied with section 1054.3 by producing witness names, addresses, and relevant statements for witnesses they anticipate calling to testify (see Exhibit A). Moreover, defense counsel has disclosed the reports of their consultants which they anticipate calling to testify as defense experts during the trial.

The government was put on notice that defense DNA consultants and change of venue consultants had not yet completed their work so they were not being disclosed. Defense counsel cannot make a determination on whether they will call their consultants to testify as experts in the trial until their evaluation of the case is completed. As communicated to the government, once the defense consultants complete their evaluations and defense counsel anticipates calling them as experts in the trial, discovery will be disclosed to the government immediately. Section 1054.7 contemplates situations when materials and information becomes known to a party within the (30) day requirement and mandates that in those situations discovery shall be disclosed immediately.

The government suggests that defense counsel is somehow delaying their decision whether to call their consultants or not during the trial in an effort to delay their discovery obligations. The government’s claim is misguided, reckless, and not based on any credible information. The government’s motion to compel defense discovery should be denied.

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The Government Should Be Compelled to Produce Evidence

In their March 25, 2016, letter to the government, defense counsel sought a portion of a hair that was allegedly recovered from a rope from the red Jetta. Defense counsel has arranged to conduct its own DNA testing on the hair and sought the government’s assistance in having a portion sent to the

1 defense DNA lab. As of the writing of this motion the government has not responded to the defense's
2 request for the portion of hair. The government's delay in responding is hindering the defense's
3 readiness for trial. Similarly, defense counsel has repeatedly sought voicemail and text messages, some
4 may be stored on the Samsung phone data, and the government has not responded to the request.

5 On March 28, 2016, the government disclosed prosecutorial misconduct by alerting defense
6 counsel that at least one of the government investigators secured and listened to confidential
7 communications between Mr. Garcia-Torres and defense investigators. In an effort to fully investigate
8 the extent of the misconduct and the prejudice to Mr. Garcia-Torres, defense counsel sought the
9 government's assistance to interview members of the government's team regarding their access to the
10 confidential communications and what information they uncovered. Moreover, defense counsel sought
11 the actual recordings that the government wrongfully possessed to assess the extent of the prejudice. As
12 of the writing of this opposition, the government has not responded to the defense request (see Exhibit
13 B).

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16 Defense counsel is seeking the Court's assistance in compelling the government to produce
17 evidence related to their requests. In the event that the government is unwilling to make their team
18 members available to defense counsel to investigate the extent of the prosecutorial misconduct,
19 Defense counsel is seeking an evidentiary hearing related to the government obtaining and listening to
20 confidential communications which are protected by the attorney-client privilege.

21 Dated: April 6, 2016

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23 Respectfully submitted,
24 Davis Epps
25 Alternate Defender

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27 Alfonso O. Lopez
28 Deputy Alternate Defender

EXHIBIT A

County of Santa Clara

Law Offices of the Alternate Defender

701 Miller Street, 1st Flr.

San Jose, CA 95110

(408) 299-7207 / Fax (408) 298-2516



DAVID EPPS

Supervising Attorney

March 25, 2016

David Boyd

Office of the District Attorney

70 W. Hedding Street

San Jose, CA 95110

RE: Antolin Garcia Torres
DOCKET#: 213515

Dear Mr. Boyd:

This is an informal request for discovery pursuant to the procedures specified in Penal Code section 1054.5(b) and *Brady v. Maryland* (1963) 373 U.S. 83, *Kyles v. Whitley* (1994) 514 U.S. 419, *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480, *People v. Little* (1997) 59 Cal.App.4th 426, *People v. Wheeler* (1992) 4 Cal.4th 284, and *In re Brown* (1998) 17 Cal.4th 873.

We have not received your penalty phase witnesses, their statements, nor witness list for either phase of trial. Please provide at least those materials immediately. Once we have your witness list the defense can prepare their witness list as reciprocal discovery. As discussed with you informally last week, the defense will be asking to be sent out to a trial department off the Master Trial Calendar to begin trial motions. Currently, we are not ready for trial and are working diligently to be ready as soon as possible. The defense has DNA consultants working on the case, but their work is not complete. When it is completed and if we tactically choose to use them we will disclose their reports and/or statements to you immediately. Similarly, we are also conducting surveys for a Change of Venue motion and expect to file it as soon as our consultants complete their work. Once they complete their work we will produce copies of the reports to you immediately.

My DNA consultants would also like to test the hair belonging to item 216-4, Supplemental Report 44. It is my understanding that a full hair was recovered from the rope in the Jetta, the root was cut and tested as item 216-4 and matched to Sierra LaMar's nuclear DNA profile. We are requesting a portion of the hair shaft (full hair) that was part of item 216-4 to conduct our

own mitochondrial DNA testing. Please arrange with the D.A. crime lab the packaging of a piece of that hair shaft and I will provide them with the address of my consultant lab for the testing.

My cell phone consultant, Robert Aguerro, has not completed his work on the Sierra LaMar last photo portion, see attached reports, because more discovery is needed. He has uncovered that the last photograph of LaMar was taken on March 17, 2012, at her residence from an Iphone and posted on the internet. The defense needs access to the original photo metadata from her lap top to determine the date and location of the original photo and who took the Iphone photo. Please give my consultant the opportunity to review the original lap top photograph's metadata.

In the past, the defense has sought voicemail and text messages from LaMar's Samsung phone. Mr. Boyd has informally discussed the possibility of powering up the phone to retrieve the messages on the phone. The defense is requesting that said procedure is conducted and that the defense consultant be present during the extraction and power up. In the alternative, the defense consultant is agreeable to performing the procedures at the DA crime lab or at his lab in Murrieta, CA. Please advise on your position in this matter.

We will potentially call all witnesses from the discovery you provided and have included a list below of witnesses we anticipate calling to testify including their attached relevant statements. Once we have a copy of your witness list we can produce one for the defense. The defense is disclosing the following witnesses and their relevant statements pursuant to Penal Code section 1054.3 in the event that we decide to call them:

- David Jaquez, Defense Investigator, Alternate Defender, reports enclosed;
- Robert Aguerro, Cell Phone Expert, reports enclosed;
- [REDACTED]
- Gregg Stutchman, Stutchman Forensic Lab, report and exhibits enclosed;
- [REDACTED]
- Michael John Allegretti, report enclosed;
- [REDACTED]
- Danny Fernandez, see DA discovery;
- Mario Fernandez, see DA Discovery;
- Christina Miller, report enclosed;
- James Ong, report enclosed;
- Dennis Martinez, report enclosed;
- Victoria Sarmiento, report enclosed.

I am enclosing my investigator reports which include his rain report for March 16, 2012, his observation memo dated March 11, 2013, at Safeway including pictures, and interviews with Allegretti, Miller, Ong, Martinez, and Sarmiento. Danny Fernandez and Mario Fernandez do not have relevant written reports (I will double check with my investigator next week as he's on vacation). Danny will testify regarding the video of the ski trip which he recorded on his GoPro and produced it to the defense, DVD is enclosed. Mario did not attend the ski trip but was home

County of Santa Clara

Law Offices of the Alternate Defender

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DAVID EPPS
Supervising Attorney

April 1, 2016

David Boyd
Office of the District Attorney
70 W. Hedding Street
San Jose, CA 95110

RE: Antolin Garcia-Torres
DOCKET#: 213515

Dear Mr. Boyd:

I have received your letter dated March 28, 2016, notifying me that the prosecution obtained and listened to confidential attorney-client communications between Community Resource Initiative (CRI) and Mr. Garcia-Torres. CRI employs licensed investigators and they were retained by the Alternate Defender to work on this case as investigators under the attorney-client umbrella. Everything that was communicated between CRI and Mr. Garcia-Torres was privileged confidential communications.

It's disturbing that your office sought jail call communications associated with CRI and that your investigator listened to the calls in whole or in part. I take this misconduct very seriously and will be fully investigating the extent of your violation of the attorney-client privilege. I am seeking your full cooperation in my office's investigation into this matter. Please deliver to me any and all communications, including notes, emails, and oral statements, regarding CRI in your possession or knowledge. Included in this request is the imputed knowledge and constructive possession of your entire prosecution team whether law enforcement or office staff. If there are any recordings that you once had in your possession that were returned to the jail I am requesting your assistance in having those communications delivered directly to me. I am also requesting that you provide me with the names and contact information of everyone from the prosecution team who had access to the communications associated with CRI. I would appreciate your cooperation in making those members of your team available to my lead investigator, David Jaquez, to be interviewed regarding the CRI communications.

Your cooperation and quick response will be appreciated.

Sincerely,

Alfonso Lopez

Alfonso Lopez
Deputy Alternate Defender
(408) 299-7207

PROOF OF SERVICE

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STATE OF CALIFORNIA)
)
COUNTY OF SANTA CLARA)

No. 213515 **ENDORSED FILED**
People v. Garcia-Torres

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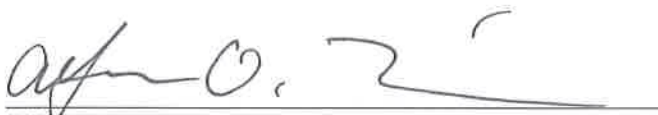
I am a citizen of the United States and am employed in the County aforesaid; I am over the age of eighteen years and not a party to this action; My business address is: 701 Miller Street, San Jose, CA 95110-2121.

On April 6, 2016, I served the within Defense Opposition to DA Motion For Discovery on the Plaintiff in this action, by personally serving a true and correct copy thereof on:

THE OFFICE OF THE DISTRICT ATTORNEY
SANTA CLARA COUNTY
70 West Hedding Street
San Jose, CA 95110
via court clerk's office and email

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on April 6, 2016, at San Jose, California.



Alfonso O. Lopez
Deputy Alternate Defender