

1 LAW OFFICES OF THE ALTERNATE DEFENDER
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6 701 Miller Street, First Floor
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(ENDORSED)
FILED
JAN 18 2017

~~DAVID H. YAMASAKI~~
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

Attorneys for Antolin Garcia-Torres

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA CLARA

10 People of the State of California,) Case No.: 213515
11)
12 Plaintiff,)
13)
14) Application to file under seal
15) [Cal. Rule of Court 2.551]
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23)
24)
25)
Defendant.

Issue Presented

Mr. Garcia-Torres has a right to a fair trial and a reliable penalty determination under the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and their California corollaries. He is applying to file portions of the declaration of his attorney, Bicka Barlow, under seal. The portions to be filed under seal reveal the thoughts, impressions, and plans of the defense team. Should the Court permit the filing of a redacted declaration?

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3 Memorandum of Points and Authorities


4 **I. This Court should permit the filing of a redacted declaration**

5 California Rule of Court 2.551 establishes the procedures by which a party may file a
6 record under seal. It holds that the party seeking sealing must file an application asking the
7 Court for permission. The application should be accompanied by a memorandum and a
8 declaration establishing facts justifying sealing. The application must be served on the parties
9 to the action. The party requesting sealing must lodge the record with the court where it will
10 be maintained conditionally under seal pending determination of the application.

11 Utilizing the procedures in Rule 2.551, the defense is asking this Court for permission
12 to file a redacted declaration supporting its Motion to Continue. Redaction is necessary
13 because the redacted information consists of the thoughts, impressions, and plans of the
14 defense team and therefore constitutes work product. Protecting work product from
15 disclosure serves to protect Mr. Garcia-Torres's constitutional rights under the 5th, 6th, 8th,
16 and 14th Amendments.

17 Date: January 18, 2017

18 Respectfully submitted,

19 
20 Brian Matthews
21 Deputy Alternate Defender
22
23
24

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DEPUTY
Superior Court of Santa Clara

Attorneys for Antolin Garcia-Torres

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SANTA CLARA

10 People of the State of California,) Case No.: 213515
11)
12 Plaintiff,)
13)
14 -vs.-) Application to file under seal
15) [Cal. Rule of Court 2.551]
16)
17 Antolin Garcia-Torres,)
18)
19 Defendant.)

20 I, Brian Matthews, hereby declare the following under penalty of perjury:

- 21 1. I am an attorney with the Alternate Defender's Office for Santa Clara County;
- 22 2. I am counsel for the accused, Antolin Garcia-Torres;
- 23 3. I have prepared a Motion to Continue; attached to the motion is a declaration signed
24 by Bicka Barlow;
- 25 4. I have redacted portions of Ms. Barlow's declaration that, in my opinion, constitute
defense work product.
5. Sealing the redacted information is appropriate in an effort to avoid disclosing work
product.

1 6. I will lodge an unredacted declaration with the Court in an envelope marked "Lodged
2 Conditionally Under Seal" and serve the District Attorney with a redacted copy
3 pending the Court's ruling on this application.
4

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7 Executed on this 18th day of January 2017 at San Jose, California.
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10 Brian Matthews
11 Deputy Alternate Defender
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Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara

Attorneys for Antolin Garcia-Torres

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF SANTA CLARA

10 People of the State of California,) Case No.: 213515
11)
12 Plaintiff,) Supplemental Motion
13) to Continue
14)
15) Date: January 19, 2017
16) Time: 1:30 p.m.
17) Dept.: 40
18) Time Est.: 15 min.
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Issue Presented

18 The prosecution's case rests on the interpretation of DNA testing results. Though the
19 case has been pending for nearly five years, the defense was provided with newly developed
20 protocols and supporting validation studies just last week. We were also provided new
21 reports documenting the lab's revised interpretations of the key items of evidence. The
22 defense is asking the Court to grant us time to review the new interpretation guidelines and
23 to assess their impact to the case. The material has been provided to our consultants. Based
24 on discussions with them and among the defense team, we believe we will need four to six
25 weeks to digest the information we have provided, review the lab's reinterpretation of the

1 test results, and incorporate the new information into our defense. Should the Court grant
2 the defense request for a continuance?

3
4 Statement of Facts

5 The prosecution's case rests on the crime lab's interpretation of complex mixtures of
6 DNA profiles. The lab has adopted new protocols, based on new validation studies, which
7 have been used to reinterpret the testing results they obtained during the investigation. The
8 new protocols and new interpretations may significantly alter the evidence that will be
9 presented to the jury. The new validation studies, protocols, and interpretations of results
10 were provided to the defense near the close of business on January 10, 2017. They consist of
11 over 1,000 pages of complex material. The defense immediately began reviewing the material
12 and provided it to our consultants. We also filed a motion to continue and asked for six
13 weeks to review the material and prepare for both the upcoming prong 3 hearing and the
14 trial. The Court continued opening statements for two weeks and gave the defense the
15 opportunity to present additional information and argument supporting our request for a
longer continuance.

16 Argument

17 **I. A six-week continuance should be granted to preserve Mr. Garcia-Torres's
constitutional rights**

18 **A. The Court should grant the time requested to preserve the 6th Amendment
19 right to counsel**

20 It is well-known that a criminal defendant has the right, under the 6th and 14th
21 Amendments to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S.
22 668; *People v. Ledesma* (1987) 43 Cal.3d 171.) Counsel is ineffective if he fails to adequately
23 investigate the prosecution's case and his client's defense. (*In re: Edward S.* (2009) 173
24 Cal.App.4th 387.) Indeed, the right to counsel may be rendered illusory if counsel is not given
25 a reasonable amount of time to prepare a defense. (*People v. Haskett* (1982) 30 Cal.3d 841.)

1 The ultimate purpose of the right to counsel is “to protect the defendant’s
2 fundamental right to a trial that is both fair in its conduct and reliable in its result.” (*People v.*
3 *Ledesma*, supra, 43 Cal.3d at p. 215.) Thus, a criminal defendant can “reasonably expect that
4 before counsel undertakes to act at all he will make a rational and informed decision on
5 strategy and tactics founded on adequate investigation and preparation.” (*ibid.*)

6 A trial court abuses its discretion when it forces a case to proceed when defense
7 counsel’s inability to be prepared results in a denial of the defendant’s rights to the effective
8 assistance of counsel and to confront and cross-examine witnesses. (*People v. Fontana* (1982)
9 139 Cal.App.3d 326.) The *Fontana* case provides an example of when a trial court abused its
10 discretion when it denied a request for a continuance. Defense counsel in that case was
11 unprepared for a probation violation hearing because he had been engaged in complex
12 litigation the week before. He told the court that he needed time to review 150 pages of
13 material, discuss the material with his client, and compare statements with statements made
14 in police reports and other places. The Court of Appeal ruled that the trial court should have
15 granted the continuance. If anything, the defense is in a worse situation. We have over 1,000
pages of complicated information to review and digest and then must incorporate the
information into our defense.

16 Under Penal Code section 1050, a court considering a continuance request should
17 consider the benefit the moving party anticipates, the likelihood the benefit will result, the
18 burden on other participants, and whether substantial justice will be served by granting the
19 request. (*People v. Samayoa* (1997) 15 Cal.4th 795, 840.) The defense anticipates a substantial
20 benefit from being able to review the information before trial begins. It will allow us to be
21 prepared to deal with new information that appears to limit the subjective discretion of the
22 lab analysts when they interpret mixtures. We know the new protocols have helped the
23 defense in terms of the Y-STR results. We expect the new protocols to assist with the
24 defense as to the autosomal results as well. Even though the lab has indicated that, in their
25 opinion, some of the inculpatory results have not changed, our review of the discovery
shows that we do not have the new interpretation for one of the inculpatory results and for

1 others the lab went outside even their new protocols to obtain results. While a four to six
2 week delay may inconvenience potential jurors, they will not have to be in court during that
3 time and can go about their lives. Mr. Garcia-Torres has waived time and understands his
4 attorney's need for a continuance. The People recognize the need for a continuance, but
5 simply suggested a shorter period of time. It must be noted that the District Attorney crime
6 lab is the party that generated the new data the defense must digest; they really do not suffer
7 any prejudice from a four to six week delay. Finally, substantial justice is served by granting
8 four to six weeks. As this Court is aware, Mr. Garcia-Torres's life is at stake. Giving his
9 attorneys and their consultants time to review material that the prosecution's lab has had
10 and, indeed, created, allows us to be prepared and increases the reliability of the adversarial
11 process.

12 The interpretation of the results of DNA testing is often more consequential than the
13 testing itself. The new information provided to the defense last week involves new rules
14 governing the interpretation of complex mixtures of DNA, the exact types of results the lab
15 obtained for most of the inculpatory evidence that was tested in this case. The defense needs
16 time to perform its function—to review the prosecution evidence and interpretation and
17 determine whether, and how, to challenge it. While the case has been pending for nearly five
18 years and we have had the evidence for some time less, the reinterpretations, the protocols,
19 and the supporting documentation are new.

20 The material we have been provided is complex forensic science. We have exercised
21 due diligence by providing the material to our consultants, who have in turn been diligent in
22 beginning to review it. But it is unreasonable to expect them or the defense team to be able
23 to conduct an adequate investigate and prepare to challenge or otherwise make use of the
24 information we were only just recently provided. To provide constitutionally effective
25 counsel, we must determine whether the protocols appear to be scientifically valid or should
be challenged. We must further determine whether, assuming their validity, they were
properly applied to the evidence. Even acting with utmost diligence and recognizing the
procedural posture of the case, we simply need four to six weeks. Without this we will be

1 unable to make the informed decisions necessary to provide Mr. Garcia-Torres with the
2 effective assistance of counsel to which he is entitled.

3 **B. A four to six week continuance should be granted to protect Mr. Garcia-**
4 **Torres's right to due process**

5 The denial of a continuance in spite of good cause may violate the defendant's right
6 to due process. (*Ungar v. Sarafite* (1964) 376 U.S. 575.) There are no mechanical tests for
7 deciding when a denial of a continuance is so arbitrary as to violate due process; rather, the
8 answer must be found in the circumstances of the individual case. (*ibid.*)

9 The reinterpretation of the DNA results and the adoption of new protocols related to
10 the reinterpretation has the potential of challenging the factual predicate for the capital
11 charge. The defense is very aware of the procedural posture of the case, but Mr. Garcia-
12 Torres has the due process right to be heard and to challenge the evidence brought against
13 him. (*See Mathews v. Eldridge* (1976) 424 U.S. 319.) The defense cannot adequately respond to
14 the new information we were provided in less than two weeks. Affecting as it does the
15 central factual pillar of the prosecution's case, the defense review may impact opening
16 statements and strategy for cross-examining the prosecution's witnesses. It is not an
17 adequate remedy to suggest we could continue our review while the prosecutor presents his
18 case. Denying a continuance is the equivalent of denying Mr. Garcia-Torres of his right to
19 heard in a meaningful way and therefore his right to due process.

18 Conclusion


19 The defense requests a four to six week continuance to allow us to prepare for trial.
20 Our request is made because we were provided over 1,000 pages of complex material only
21 days ago and need to review it. We cannot provide the effective assistance of counsel
22 without being giving the time we are requesting to prepare.

23 The information we have received is central to the prosecution's case. Just as Mr.
24 Garcia-Torres has the right to have his counsel review the initial lab results, he has the right
25 to have counsel review these new protocols. They are complex and counsel needs time to do

1 it. The defense is asking that the Court ensure the fundamental fairness of these proceedings
2 by giving us the time we need to do our job in light of the new disclosures. Refusing to give
3 his defense team the time it needs will violate Mr. Garcia-Torres's rights to due process, a
4 fair trial, the effective assistance of counsel, to confront witnesses against him, and to a
5 reliable penalty determination (8th Amendment).

6 Date: January 18, 2017

8 Respectfully submitted,

9
10 
11 Brian Matthews
12 Deputy Alternate Defender

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JAN 18 2017

~~DAVID H. YANAGISAWA~~
Chief Executive Officer, Clerk
Superior Court of California in Santa Clara

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,) Case No.: 213515
14)
15 Plaintiff,) Declaration of Bicka Barlow
16) in Support of Supplemental Motion
17) to Continue
18)
19 -vs.-)
20)
21 Antolin Garcia-Torres,)
22)
23 Defendant.)
24)
25)

Public—Redacts Matters From Conditionally Sealed Record

1
2 Bicka Barlow
3 SBN 178723
4 2358 Market Street
5 San Francisco, CA 94114
6 Phone/Fax: 415-553-4110

7
8
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

10
11 IN AND FOR THE COUNTY OF SANTA CLARA

12
13 PEOPLE OF THE STATE OF
14 CALIFORNIA,

15
16 Plaintiff,

17 vs.

18
19 ANTOLIN GARCIA-TORRES,

20
21 Defendant

Case No.: 213265

DECLARATION OF BICKA BARLOW
IN SUPPORT OF DEFENDANT'S
MOTION TO CONTINUE

22
23 I Bicka Barlow do state and declare:

24
25 I am an attorney licensed to practice law in the State of California and I have been

26
27 retained to assist counsel for Antolin Garcia-Torres in the above matter in the capacity of
28 DNA attorney.

On January 10, 2017, I was informed that additional discovery related to the DNA testing in this case had been produced to the defense. The material consists of additional validation studies for both the Identifiler Plus and Y-filer test kits used in the case. The Identifiler Plus validation study consists of approximately 1000 pages of summaries and reports. In addition, there are 200 pages of discovery on Y-Filer validation and an

1 updated lab protocol of over 200 pages. I immediately provided my DNA expert with the
2 discovery.

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4 This declaration is intended to supplement the previous declaration filed in support
5 of defendant's motion to continue dated 1/12/17.

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23 Contrary to Mr. Boyd's assertion that the results for the autosomal (Identifiler
24 Plus) testing remains the same, the lab went back and reassessed the data, concluding that
25 the new interpretation guidelines would not change their analysis. The notes regarding
26 this re-analysis are extensive and involve numerous mathematical calculations and
27
28

1 assumptions in order to reach the interpretation. Additionally, for sample 170206-R, the
2 glove, the lab calculated a new likelihood ratio that appears to be far more inculpatory
3 than previously.
4

5 Mr. Boyd also states in his motion that the lab is reassessing every inculpatory
6 piece of evidence. As of the date of the writing of this declaration the defense has not
7 receive any updated analysis of sample S7, a swab taken from the interior of Mr. Garcia-
8 Torres's vehicle in which the lab identifies Ms. LaMar as the major contributor. Should
9 this conclusion change, the government's case would be substantially weaker.
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11 In order to prepare for opening statements the following tasks must be completed
12 by myself and my experts:
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DECLARATION OF BICKA BARLOW 4

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DECLARATION OF BICKA BARLOW 5

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4 There is not enough time for me and my experts to assess this evidence prior to
5 January 26 when the *Kelly* hearing is set.

9 If I were to be
10 preparing for the hearing on such short notice, I would not be able to work with the team
in assessing the defense theory.

14 Both types of preparation are necessary. Given the importance of the DNA
15 evidence in this case, Mr. Garcia-Torres would be denied his rights under the 6th, 8th and
16 14th Amendments to the U.S. Constitution should he be forced to go forward with counsel
17 who has not had the opportunity to explore the new evidence and changed circumstances
18 of the DNA evidence, who was not prepared to challenge the reliability of the evidence in
19 pre-trial hearings and to present a defense at every step of the way including opening
20 statements.
21

23 I declare under penalty of perjury that the foregoing is true and correct, and that
24 those matters stated upon information and belief are true to the best of my knowledge.
25

26 Executed at San Francisco, California on 1/18 2017

27
28 
Bicka Barlow

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DAVID H. TAYLOR
Chief Executive Officer/Deputy
Superior Court of the State of Santa Clara
SAN JOSE, CALIFORNIA

Attorneys for Antolin Garcia-Torres

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IN AND FOR THE COUNTY OF SANTA CLARA

10 People of the State of California,) Case No.: 213515
11)
12 Plaintiff,) Supplemental Motion
13) to Continue
14 -vs.-)
15 Antolin Garcia-Torres,)
16)
17 Defendant.)

18 I am a citizen of the United States and employed in Santa Clara County. I am over
19 the age of eighteen years and not a party to this action. My business address is 701 Miller
20 Street, San Jose, CA 95110.

21 On January 18, 2017 I served the District Attorney for Santa Clara County with the
22 attached Application to file under seal and Supplemental Motion to Continue electronically
23 by sending a true and correct copy to his work email address.

24 I declare under penalty of perjury that the foregoing is true and correct. Executed on
25 this 18th day of January 2017 at San Jose, California.

