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Attorneys for Antolin Garcia-Torres

(ENDORSED)
FILED
APR 3 2017

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

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

10	People of the State of California)	Case No.: 213515
11	Plaintiff,)	
12	--vs.--)	Motion for remedy due to destruction
13)	of evidence [<i>Cal. v. Trombetta</i> (1984)
14	Antolin Garcia-Torres)	467 U.S. 479]
15	Defendant.)	

Issue Presented

17 Due process requires that the prosecution preserve material, exculpatory,
18 evidence in its possession. Law enforcement seized Mr. Garcia-Torres's shoes
19 pursuant to a search warrant and the crime lab analyzed dirt found on the shoes. The
20 criminalist used tape lifts on the dirt and observed glass beads. The defense is unable
21 to do a soil comparison to exclude the dirt and beads from being related to Ms. LaMar's
22 disappearance because of the adhesive from the tape. Does the fact that the defense
23 cannot perform the necessary soil analysis due to law enforcement's actions entitle him
24 to relief?

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3 Points and Authorities

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5 Statement of Facts

6 Law enforcement found clothing belonging to Ms. LaMar shortly after she
7 disappeared. They brought the clothing to the crime lab for analysis. On March 29,
8 2012, Melissa Dupee, a criminalist in the trace evidence section of the lab, analyzed the
9 clothing. She noticed debris on the clothing and observed microscopic glass beads
10 among the debris. At the time, Ms. Dupee was being trained by Faye Springer, a more
11 senior criminalist who was not employed by the Santa Clara County lab. Ms. Springer
12 also observed the beads and suggested they might be reflective road beads.

13 On June 28, 2012, Ms. Dupee sent Ms. Springer an email message asking
14 about, among other things, the wisdom of performing a soil analysis to compare soils
15 from Ms. LaMar's clothing, reference samples from relevant sites, and debris from Mr.
16 Garcia-Torres's shoes. She indicated that the Sheriff's Department wanted the analysis
17 done. Ms. Springer told Ms. Dupee that, if Mr. Garcia-Torres had been wearing the
18 boots for the three weeks between the disappearance and when law enforcement
19 seized the car, a comparison would likely result in an exclusion. But that if unusual
20 mineral material was present in the clothing soil that could be targeted when analyzing
21 the boot dirt, it might be worth doing. (BATES 02732)

22 On February 7, 2017, the shoes were examined for beads and plant material.
23 The debris was removed from the boots with a metal tool. Larger debris was separated
24 and the rest was transferred onto tape and placed in plastic sheets. Ms. Dupee
25 subsequently observed glass beads on the tape lifts that were similar to those found
with the debris from Ms. LaMar's clothing.

The defense has requested its expert, Skip Palinek, to conduct a soil analysis in
an effort to determine if the soil from the boots was the same as the soil from any of the
reference sites, including an area from Ms. LaMar's bus stop, an area and the end of

1 As the communication logs demonstrates, the crime lab and Ms. Springer knew
2 that a soil comparison could be performed and that the results were likely to result in an
3 exclusion. Such a result would clearly be exculpatory—it would show that soil from
4 areas associated with Ms. LaMar’s disappearance was not found on Mr. Garcia-Torres’s
5 shoes. The log also shows that the lab knew that a soil analysis might be done in the
6 future, especially if mineral material present in the soil from the clothing sample could
7 be targeted in the debris from the boots. As it turns out, mineral material wasn’t
8 identified but glass beads were. The soil analysis makes perfect sense once glass
9 beads were found on the boots.

9 Despite knowing that a soil analysis would be worth doing, Ms. Dupee collected
10 the debris with a metal tool and then tape lifted. This left no way of knowing what part of
11 the shoe the debris came from and combined different soils. It also made a soil
12 comparison very difficult because of the adhesive from the tape. She essentially
13 destroyed the evidence in the sense that her work has made it impossible for the
14 defense to conduct an analysis that would likely be exculpatory.

15 The Court has the authority to provide a variety of remedies in this situation. The
16 defense suggests that the most appropriate remedy is to exclude testimony regarding
17 the shoes, the debris associated with them, and the glass beads associated with the
18 debris. This would effectively mitigate the situation.

19 Conclusion

20 The lab was aware in 2012 that a soil analysis could result in an exclusion and
21 that a soil analysis/comparison would be worth doing if something unique about the soil
22 could be identified. The glass beads are that unique thing. Yet in 2017 the lab collected
23 the debris from Mr. Garcia-Torres’s boots in a manner that prevents the defense from
24 conducting an adequate soil analysis to challenge the suggestion that the beads came
25 from the area Ms. LaMar was allegedly abducted. The defense is left unable to defend
against this evidence because of law enforcement’s actions. Handling the evidence in a
way that prevents important defense testing in this manner violates federal and state
due process, deprives Mr. Garcia-Torres of his right to a fair trial, to the effective

1 assistance of counsel, and to a reliable penalty determination. (U.S. Const., 5th, 6th, 8th,
2 14th amends.) The defense therefore requests an appropriate and fair remedy and
3 suggests exclusion of the boots and any evidence obtained from them.

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8 Date: 4/3/2017

9 Respectfully submitted,

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11 Brian Matthews
12 Deputy Alternate Defender
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Exhibit A

Exhibit A

Melissa Hengood - RE: Soil from LaMar clothing

From: "Springer, Faye (DA)" <[REDACTED]>
To: 'Melissa Hengood' <[REDACTED]>
Date: 7/2/2012 10:57 AM
Subject: RE: Soil from LaMar clothing

Melissa

I called CA State Mines and Geology and they recommended that you contact the NRCS. Apparently the state is outsourcing most of the soil/geology to the Feds these days. They have a web site - www.ca.nrcs.usda.gov/soils.html. The state office downtown says that each county has a local office. For Santa Clara County it is in Hollister.

HOLLISTER SERVICE CENTER
 2337 TECHNOLOGY PKWY STE A
 HOLLISTER, CA 95023-2544
 (831) 637-4360
 (831) 636-7643 fax

I would start here for inquiring as to the possibility of establishing providence of the soil based on what you have available. I would show them how much soil you have and would like to keep it from being altered at this time, pending a forensic soil comparison in the future.

As far as a soil comparison, I don't think that this will be very useful at this point. If your suspect has been wearing the boots for 3 weeks, then you would expect that a traditional soil comparison will likely to be an exclusion. If there was some type of unusual mineral present in your clothing soil that could be targeted as a specific mineral to look for in the soil from the boots, then maybe it is worth a look. I don't think that the soil is going to be similar to the references that you collected to date. I am not sure why it would be useful to do this at this time. I would definitely talk to the NRCA first before doing a soil comparison. I would think be better to wait until a possible body site is found before proceeding. The two individuals that I would use for forensic geology is Mariene Bottrell, [REDACTED], at the FBI Laboratory or Bill Schneck, [REDACTED], at Washington State. Bill does the forensic geology as a private contractor and would likely be much quicker to get results back to you.

As to plant DNA, there is a plant DNA scientist associated with the UC Davis forensic program who has done some forensic work for Bakersfield. I will send you his name and you can contact him as to the feasibility of doing a species or subspecies ID of the seed or lichen based on plant DNA. Also, you might be able to get you a plant lichen specialist to ID the material without DNA. I will inquire about this also for you. Is there any suspected plant material collected at this point? Just keep in mind that DNA analysis will be destructive. Have you considered taking the plant expert around to the different sites to see if he recognizes any of these plants?

Faye Springer

Communication Log - M120319

From: Melissa Hengood [mailto: [REDACTED]]
Sent: Thursday, June 28, 2012 2:55 PM
To: Springer, Faye (DA)
Subject: Soil from LaMar clothing

Hi Faye. The Sheriff is insistent on soil analysis on the clothing of Sierra LaMar. I'm limited in my knowledge of soil exams, so I figured I would ask you first. They want it done for a variety of reasons including:

Soil ID of the soil from her clothing - they are hoping there is something unique in the soil that will lead them to her body. Is this realistic? I told them probably the best thing about that soil is the glass beads.

Soil comparison from soil on vic clothing to soil reference samples I have collected from around Morgan Hill - they are hoping the soil on the clothing will "match" one of these areas, thus providing them with investigative info. I know soil exam is limited because of the wide variation between small areas. Can soil exam provide that kind of association?

Soil comparison from soil on vic clothing to soil from susp shoes recovered 3 weeks after incident - I think too much time has lapsed between incident and recovery to make any meaningful associations, especially when it comes to soil on the bottom of shoes. Do you agree?

I would think an ID for investigative purposes could be done by a non forensic soil expert, but any comparisons (especially vic-susp association) should be done by a forensic lab. Do you know of any forensic labs, other than FBI, that do soil exam?

Also, do you a contact for plant DNA? The botanist from Santa Clara would find it useful if we could type the lichen and the aquatic seed from the clothing.

Trevor is working through his competency and I started organizing myself to get back on fiber training, while taking care of LaMar stuff on the side.

Melissa A. Hengood
Criminalist III
Santa Clara County Crime Laboratory
250 W Hedding St
San Jose, CA 95110
phone: 4 [REDACTED]

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Exhibit B

Exhibit B

1 LAW OFFICES OF THE ALTERNATE DEFENDER
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10 *Attorneys for Antolin Garcia-Torres*

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14 IN AND FOR THE COUNTY OF SANTA CLARA

15 People of the State of California) Case No.: 213515
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17 Plaintiff,)
18)
19 --vs.--) Motion for remedy due to destruction
20) of evidence [Cal. v. Trombetta (1984)
21) 467 U.S. 479]
22)
23 Antolin Garcia-Torres) Declaration of Mr. Skip Palenik
24)
25 Defendant.)
/

1 I, Skip Palenik, declare the following:

1. I am a forensic scientist qualified to perform soil analysis and comparison;
2. I have taught forensic soil examination and comparison to scientists from all over North America and Europe and have written an authoritative text on the subject;
3. I was retained by the defense to perform soil analysis of debris obtained from the boots recovered from Mr. Garcia-Torres's residence;
4. By randomly removing the soil from the shoes and transferring virtually all of it to adhesive tape, the forensic laboratory rendered meaningful analysis impossible by embedding those soil grains in adhesive;
5. The laboratory also frustrated the analysis by combining the different soils from

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the shoes. In my opinion, based on my examination of the remaining soil traces, there were different soils on the shoes. Because they were mixed when collected I am, therefore, unable to determine which soil was associated with the glass beads.

I declare the above under penalty of perjury.

Executed on this 30th day of October of 2017 at Elgin, Illinois.


Skip Patenik

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IN AND FOR THE COUNTY OF SANTA CLARA

10	People of the State of California)	Case No.: 213515
)	
11	Plaintiff,)	
)	<u>Proof of Service</u>
12)	
)	Motion for remedy due to destruction
13	--vs.--)	of evidence [<i>Cal. v. Trombetta</i> (1984)
)	467 U.S. 479]
14	Antolin Garcia-Torres)	
)	
15	Defendant.)	
)	
16		/	

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

20 On April 3, 2017, I served the within Motion for remedy due to destruction of
21 evidence on the Plaintiff in this action by serving a true and correct copy by hand to
22 Deputy District Attorneys David Boyd and Dana Veazey.

23 I declare under penalty of perjury that the foregoing is true and correct. Executed
24 on this 3rd day of April 2017.



Brian Matthews
Deputy Alternate Defender