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10 *Attorneys for Antolin Garcia-Torres*

11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12
13 IN AND FOR THE COUNTY OF SANTA CLARA

14 People of the State of California,) Case No.: 213515
)
15 Plaintiff,) Notice of Motion and Motion
) to Continue
16 -vs.-)
) Date: January 13, 2017
17 Antolin Garcia-Torres,) Time: 1:30 p.m.
) Dept.: 40
18 Defendant.) Time Est.: 15 minutes

19 TO THE CLERK OF THE ABOVE-ENTITLED COURT, AND
20 TO THE DISTRICT ATTORNEY FOR SANTA CLARA COUNTY:

21 Notice is hereby given that on the 13th day of January 2017, the defendant will move
22 the Court to continue the Kelly prong 3 hearing from January 13, 2017 to February 24, 2017
23 and the trial from January 18, 2017 (the day opening statements are scheduled) to February
24 27, 2017. This motion is based on Penal Code section 1050, the 5th, 6th, 8th, and 14th
25 Amendments to the U.S. Constitution, the California Constitution, Article I, sections 15, 16,
and 17, and the attached declaration of counsel.

(ENDORSED)
FILED
JAN 12 2017

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

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Date: January 12, 2017

Respectfully submitted,



Brian Matthews
Deputy Alternate Defender

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18 Issue Presented

19 The Court may continue the trial upon a showing of good cause. And it should grant
20 a continuance when one is necessary to preserve constitutional rights. DNA evidence is a
21 significant portion of the evidence in this case. The prosecutor provided approximately
22 1,000 pages of validation studies and updated protocols that relate to the DNA testing and
23 interpretation used in this case on January 10, 2017. He indicated in court that new lab
24 reports are in process that will contain the lab's evaluation of inculpatory samples using the
25 new protocols. These new protocols and new results may impact the defense approach to
the motion and my impact the evidence that may be presented at trial. Should the Court

1 grant a continuance to allow the defense to analyze the new discovery and to ensure the jury
2 is not exposed to unreliable evidence?

3 Points and Authorities

4
5 Argument

6 **I. A continuance should be granted to preserve Mr. Garcia-Torres's**
7 **constitutional rights**

8 Mr. Garcia-Torres, like all criminal defendants, has several constitutional rights that
9 are impacted by the Court's decision whether or not to grant a continuance. For example, he
10 has the right to due process under the 5th and 14th Amendments. He has the right to the
11 effective assistance of counsel and to confront witnesses against him under the 6th
12 Amendment. And he has the right to a reliable penalty determination under the 8th
13 Amendment. The California Constitution has similar guarantees. (Cal. Const., art. I, §§ 15,
14 16, 17.)

15 Penal Code section 1050 provides the process by which a defendant may seek a
16 continuance. It empowers a court to continue a case upon a showing of good cause. (Pen.
17 Code § 1050, subd. (e).) Trial courts are given discretion when determining whether good
18 cause exists, but they may not exercise it in a manner than deprives the defendant of a
19 meaningful opportunity to prepare a defense. (*Jennings v. Superior Court* (1967) 66 Cal.2d 867.)
20 Indeed, the constitutional rights to confrontation and effective representation give rise to a
21 "strong policy favoring continuances when necessary to preserve these rights." (*People v. Fong*
22 *Chung* (1907) 5 Cal.App. 587, 590.) An arbitrary "insistence upon expeditiousness in the face
23 of a justifiable request for delay" violates the right to the assistance of counsel. (*Ungar v.*
24 *Sarafite* (1964) 376 U.S. 575, 589.)

25 The right to counsel includes the right to adequately prepare a defense, including the
right to prepare and argue motions. (*People v. Maddox* (1967) 67 Cal.2d 647, 652.) It also
encompasses the right to the effective assistance of counsel. (*Strickland v. Washington* (1984)

1 466 U.S. 668.) This necessarily means that a defendant should not “be brought to trial too
2 soon, i.e., without adequate opportunity for preparation of his defense.” (*People v. Maddox*,
3 *supra*, 67 Cal.2d at p. 653.)

4 The right to due process includes the right to be heard at a meaningful time and in a
5 meaningful manner. (*Mathews v. Eldridge* (1976) 424 U.S. 319) Thus, defendants are entitled to
6 discovery for the purpose of bring a motion to suppress and to bring a motion to set aside
7 an indictment. (*Magallan v. Superior Court* (2011) 192 Cal.App.4th 1444; *People v. Mouchaourab*
8 (2000) 78 Cal.App.4th 403) A decision on a motion to continue may impinge on the right to
9 be heard in a meaningful manner when a defendant is given insufficient time to prepare in
10 the face of new discovery.

11 The discovery provided by the prosecution has the potential to change the evidence in
12 the case. It relates to a very significant step in the DNA testing process—the interpretation
13 of the results. Indeed, applying the new protocols to the evidence could result in the lab
14 changing their opinion about the source of the DNA on one or, indeed, several evidence
15 items. This could lead to what presently appears to be inculpatory evidence becoming either
16 exculpatory or inconclusive. We don’t yet know if this will be true because the reports
17 documenting the new analysis have not been received and the defense expert has had an
18 insufficient amount of time to review the material. Even if the lab determines that the new
19 protocols and procedures do not change their results, the defense may review them and
20 come to a different conclusion. At the very least, the defense has the right to conduct such a
21 review and, because we only received the complex and dense material yesterday, that review
22 will take more time than we have.

23 To the extent the new protocols are the “correct” procedures to be used, they may be
24 used by the defense during the Prong 3 hearing to demonstrate that proper procedures were
25 not used when the evidence was originally interpreted. In addition, the Prong 3 hearing
should apply to the new procedures as well since the lab is preparing new interpretations
using them. We cannot be prepared to conduct the hearing when we received such a large

1 volume of complicated material days before the hearing and when we haven't received the
2 new reports documenting the new interpretations.

3 The defense is also asking that the trial be continued so that we can analyze the new
4 material and understand what the lab is doing. Because the lab's interpretation of the DNA
5 ~~evidence appears to be changing, we must review their work in light of the new protocols.~~

6 The evidence to be presented to the jury could therefore change either due to a change in
7 opinion from the lab or because of motions the defense may bring challenging the evidence.
8 In addition, the defense may be able to use the protocols in our defense in ways we cannot
9 yet know because we haven't had the time to review them. We therefore object to
10 proceeding with opening statements and the taking of evidence when we don't know the
11 state of the evidence and have not had the opportunity to properly review it. Going forward
12 risks the jury being exposed to evidence that might later be excluded and denies the defense
13 the opportunity to discuss the new interpretations during opening statements.

14 Conclusion

15 The defense seeks a continuance to allow us to properly prepare both for the Prong 3
16 motion hearing and for the upcoming trial. It would be fundamentally unfair and a violation
17 of Mr. Garcia-Torres's constitutional rights to proceed with the hearing and the trial when
18 such significant evidence is disclosed this close to the relevant court dates. Indeed, without
19 the interpretation of the DNA results, we cannot say we know what evidence—at least in
20 this particular—will be presented at trial. Thus, we respectfully request that the Court
21 continue both the hearing and the trial to give us adequate time to prepare.

22 Date: January 12, 2017

23 Respectfully submitted,


24 
25 _____
26 Brian Matthews
27 Deputy Alternate Defender

Exhibit A

Exhibit A

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

7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 IN AND FOR THE COUNTY OF SANTA CLARA

9 PEOPLE,

10 Plaintiff,

11 vs.

12 ANTOLIN GARCIA-TORRES,

13 Defendant

Case No.: 213265

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

14
15
16 I Bicka Barlow do state and declare:

17 I am an attorney licensed to practice law in the State of California and I have been
18 retained to assist counsel for Antolin Garcia-Torres in the above matter in the capacity of
19 DNA attorney.
20

21 I have a B.S. from the University of California, Berkeley, in Genetics, and a M.S.
22 from Cornell University in Developmental Genetics, with minors in Cellular Biology and
23 Plant Molecular Biology. I received my J.D. from the University of San Francisco,
24 School of Law. I began consulting on DNA cases as a law student in 1994. In 2004, I
25 was hired as the DNA attorney for the San Francisco Public Defender's Office. During
26 my nine years at the office, my practice was focused almost completely on DNA cases. In
27
28

DECLARATION OF BICKA BARLOW 1

1 2013, I left the office and have been consulting on DNA cases throughout the United
2 States, in both state and federal courts.

3
4 I have acted as DNA counsel or as a consultant on cases involving DNA evidence
5 ~~in over 200 cases including capital cases, and in both trial and post-conviction~~
6 proceedings. Additionally, I have been retained in three cases as a "Strickland" expert to
7 assess the performance of trial counsel as it related to the DNA evidence. As DNA
8 counsel I have reviewed case files for DNA evidence from many labs throughout
9 California and the United States including the California Department of Justice, SERI,
10 Orchid Cellmark, the FBI, the St. Charles, MO, Police Department Crime Lab, Contra
11 Costa County Police Crime Lab, the Oakland Police Crime Lab, the Santa Clara County
12 District Attorney Crime Lab, and the Arizona Department of Public Safety.

13
14 I regularly communicate with attorneys and experts who specialize in DNA
15 evidence. I also regularly train attorneys in the area of DNA evidence. I have reviewed
16 the material provided to the defendant in this case regarding the DNA testing done. I
17 have been asked to offer my opinion regarding the type of information that counsel in a
18 case involving DNA evidence needs to offer competent representation and to be prepared
19 to confront and cross-examine the government's experts regarding the DNA evidence.
20
21

22
23 I have been provided with voluminous material relating to DNA testing in this
24 case, including internal validation studies conducted by the SCCCL that form the basis of
25 the lab's protocols. In a declaration filed by the government in support of its opposition
26 to the defendant's Motion to Exclude DNA Evidence pursuant to *Kelly*, a lab analyst,
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28

1 Brooke Barloewen proffers the fact that the lab has conducted internal validation studies
2 as a basis for her conclusion that the lab is using generally accepted methods (Decl. at pg
3 10-12). The lab uses the validation studies to establish that the method set forth in their
4 protocols are reliable and produce consistent, reproducible results. Based on internal
5 validation, the lab sets such important parameters as injection times, analytical and
6 stochastic thresholds as well as establishing interpretation guidelines.
7
8

9 On January 10, 2017, I was informed that additional discovery related to the DNA
10 testing in this case had been produced to the defense. The material consists of additional
11 validation studies for both the Identifiler Plus and Y-filer test kits used in the case. The
12 Identifiler Plus validation study consists of approximately 1000 pages of summaries and
13 reports. In addition, there are 200 pages of discovery on Y-Filer validation and an
14 updated lab protocol of over 200 pages. I immediately provided my DNA expert with the
15 discovery.
16
17

18 The new validation for both the Identifiler Plus and Y-Filer kits is directly relevant
19 to the defense in this case for two reasons. Both validation studies are focused on
20 complex mixtures, similar to the ones in this case. In this case, all but one of the
21 Identifiler Plus samples is a complex mixture of at least three individuals. All of the Y-
22 Filer results from which the lab drew inculpatory interpretation, are complex mixtures.
23 From the summaries of both studies, it appears that the lab is attempting to validate
24 interpretation of these types of mixtures. Prior to these studies, as laid out in the
25 defendant's motion to exclude the DNA evidence, these studies for Identifiler Plus were
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27
28

1 lacking. Based on these new validation studies, the lab has revised their protocols for
2 interpretation of both the Identifiler Plus and Y-Filer to reflect the findings in the
3 validation studies. The lab has now issued new protocols. Due to the complexity of the
4 studies and the volume of material it is not possible to proceed with either the *Kelly*
5 hearing or trial. Given the changes for both interpretation guidelines and the fact that it
6 appears the lab is re-analyzing the data in this case, it is likely that the defendant could
7 file a new motion to exclude DNA evidence on the new interpretations under both the
8 first and third prong *Kelly*.

9
10
11 I have reviewed the summary of the studies and in my opinion, based on the
12 review of validations studies from other labs, and this lab, this study is complex and will
13 take a substantial amount of time to digest and understand. I have spoken with my DNA
14 expert who has informed me that a review will take at least one month due to the quantity
15 of data and the complexity of the studies.
16
17

18 This new information and the changes to the lab's interpretation protocol, are not
19 trivial. Given the summary, evaluation of the validation studies and re-analysis of the
20 samples in this case by defense experts is necessary and could potentially change an
21 inculpatory piece of evidence into one that has little or no meaning (i.e., inconclusive or
22 uninterpretable) or exclusion. At this point the defense can only speculate as to possible
23 changes, however, should some or all of the interpretations change, it could significantly
24 impact the defense theory of the case, the defense presentation via cross examination and
25 defense experts, and the scope and emphasis on DNA evidence in opening statements.
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1 For instance, if the DNA results on the Y-Filer results for the sweatshirt said to have been
2 worn by Sierra LaMar would change from including Mr. Garcia-Torres to inconclusive
3 results or exclusion, that could impact both the prosecution and defense presentation.
4

5 More importantly, since all of the inculpatory evidence comes in the form of complex
6 mixtures, a change in the interpretation of the swab collected from Mr. Garcia-Torres
7 vehicle, S7, for which the lab's initial interpretation was that Ms. LaMar was a possible
8 major donor, would change to an inconclusive mixture from which no conclusions could
9 be draw, would significantly undermine the government's case and impact the defense
10 presentation.
11

12
13 Given the importance of the DNA evidence to the prosecution's case, to proceed at
14 this time without a thorough understanding of the DNA evidence that will be presented,
15 would mean that Mr. Garcia-Torres would receive ineffective assistance of counsel under
16 the 6th Amendment to the U.S. Constitution.
17

18 I declare under penalty of perjury that the foregoing is true and correct, and that
19 those matters stated upon information and belief are true to the best of my knowledge.
20

21 Executed at San Francisco, California on 1/12, 2017
22
23

24
25
26 
27 Bicka Barlow
28

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14)
15	Plaintiff,) Notice of Motion and Motion
16) to Continue
17	-vs.-)
18) <u>Proof of Service</u>
19	Antolin Garcia-Torres,)
20)
21	Defendant.)
22		/

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

On January 12, 2017 I served the District Attorney for Santa Clara County with the
attached Notice of Motion and Motion to Continue by hand in court.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
this 12th day of January 2017.

