

(ENDORSED)
FILED
AUG 31 2016

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Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY J. Borman DEPUTY

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

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ANTOLIN GARCIA-TORRES,

Defendant.

NO. 213515
Trial Motion No.
MOTION FOR SEVERANCE

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND THE DISTRICT ATTORNEY
OF SANTA CLARA COUNTY:

STATEMENT OF THE CASE:

On May 21, 2012, Antolin Garcia-Torres was arrested for a violation of Penal Code section 187, Murder with special kidnapping allegations. After his arrest, charges were brought in juvenile court for three counts of attempted kidnapping during the commission of a car-jacking, Penal Code section 664/209.5, for three unrelated crimes that occurred three years prior. While Mr. Garcia-Torres' homicide case was pending in Superior Court the juvenile case was transferred to adult court. On February 11, 2014, the government sought an indictment where they consolidated the homicide case along with the juvenile case. Moreover, on May 19,

1 2014, the government notified Defense counsel that they will be seeking a death sentence
2 against Mr. Garcia-Torres. Both the juvenile case and the adult homicide case are pending jury
3 trial in Department 40.

4 **STATEMENT OF FACTS:**

5 On March 16, 2012, Sierra Lamar was last seen by her mother at 6 a.m. prior to leaving
6 for work. Ms. Lamar did not attend school that day and was not seen by anyone other than her
7 mother that early morning. The next day, on Saturday, her cell phone was found in a nearby
8 field in a wet condition. On Sunday, at a nearby farm shed, hidden among cacti, law
9 enforcement found her bag containing her personal belongings. Inside the bag were wet
10 clothes, shoes, makeup, schoolbooks, and other personal items.

11 Law enforcement tested various areas of her jeans and uncovered a complicated
12 mixture of DNA from the jeans found inside Ms. Lamar's bag. The DNA contained a mixture
13 of at least four individuals with low levels of DNA. From the mixture, law enforcement
14 created a possible partial DNA profile that would render hits from the state DNA database.
15 Their partial profile resulted in twelve different individual suspects as possible matches. Law
16 enforcement was able to exclude eleven of the profiles and could not exclude one. The
17 remaining profile belonged to Mr. Garcia-Torres. Law enforcement used the partial match to
18 obtain search warrants for Mr. Garcia-Torres' car, home, and person. On August 30, 2016, the
19 government informed Defense counsel that there are issues regarding the profile submitted to
20 the state data base resulting in the profile being deleted from the state database. The new
21 evidence calls into question whether Mr. Garcia-Torres' DNA was on the jeans.

22 A search of Mr. Garcia-Torres' red Jetta revealed low level mixture DNA inside the car
23 at the rear driver side arm rest area and on a pair of work gloves. The DNA mixture was
24 complex and Ms. Lamar's DNA profile could not be excluded as a possible contributor. A
25 single naturally shed hair belonging to Ms. Lamar was found on a rope inside the car's trunk.
26 A small amount of fibers similar to those from the car were found on Ms. Lamar's sweater,
27 pants, and shoe. Despite no blood being found in the red Jetta, the government believes Ms.
28 Lamar was killed.

On March 16, 2012, Mr. Garcia-Torres went fishing and passed by the area of Ms.
Lamar's school bus stop but he insisted he never made contact with her. He is seen leaving the

1 area of his home around 7 a.m. and is later cashing a check at his bank at around noon. He goes
2 home that evening and later that night Ms. Lamar's cell phone is operating and communicating
3 with cell towers in the area where the phone was found. Mr. Garcia-Torres lived about eight
4 miles from the area where the cell phone was located and his car was not seen leaving his home
5 around the time that the cell phone was communicating with the cell towers.

6 Safeway Incidents

7 On March 19, 2009, Cynthia Lundy was shopping at Safeway on Dunne Avenue in
8 Morgan Hill. After she entered her car she felt the need to lock the doors. Shortly after she
9 locked her doors she saw an individual attempt to open her car door and then tap the window
10 after the door wouldn't open. She left the area but later reported the incident because she
11 feared that the individual was attempting to commit a crime. Later that same night, Annette
12 Walters was exiting the Safeway on Tenant Avenue in Morgan Hill, located approximately 2
13 miles from the Dunne Safeway. As she entered her car, a suspect entered the rear door of her
14 car and grabbed her hair and assaulted her. The suspect appeared to be scared off by another
15 car when a motorist shined his car lights on Walters' car. The suspect fled but a stun gun was
16 later found inside her car. One week later, Eva Orozco went to the Tenant Avenue Safeway to
17 purchase food. As she was preparing to exit her car she decided to take a pocket knife for
18 protection. As she was preparing to exit her car, a suspect entered her car through the rear
19 door and grabbed her hand with the knife. There was a struggle for the knife and she told the
20 suspect that she was pregnant at which time the suspect fled.

21 Three years after the Safeway assaults, law enforcement decided to examine the stun
22 gun for latent prints. A nine volt battery inside the stun gun was also examined for latent
23 prints. On the nine volt battery, law enforcement developed a latent print which was similar to
24 Mr. Garcia-Torres' thumb print. None of the women assaulted at the Safeway stores
25 identified Mr. Garcia-Torres as their assailants nor was there any other credible evidence
26 against Mr. Garcia-Torres. Around the time of the assaults, Mr. Garcia-Torres worked at the
27 Tenant Avenue Safeway as a clerk. One of his duties was to repackage batteries that were
28 opened and return them to the shelves. He had been repackaging batteries for several months
before the Safeway assaults.

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1 **ARGUMENT:**

2 I.

3 **SEVERANCE IS REQUIRED BECAUSE**
4 **OF THE DANGER OF SUBSTANTIAL PREJUDICE**

5 Defendant recognizes that the mere fact that he is charged with an alleged violation of
6 Penal Code section 187 (murder) and section 664/209.5 (attempted kidnapping during car-
7 jacking) where an element of assault in each case renders the cases proper subjects for joinder
8 under section 954. However, the law is well settled that, even if the charges are proper
9 subjects for joinder, severance may be required upon a demonstration of prejudice that would
10 otherwise result from joint trial. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 447-454,
11 disapproved on other grounds in *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1229, fn.
12 19.) Such prejudice is established, and joinder is prohibited, where the prosecutor seeks to
13 join “a ‘weak’ case ... with a ‘strong’ case, or with another ‘weak’ case, so that the ‘spillover’
14 effect of aggregate evidence on several charges might well alter the outcome of some or all”
15 of the charges; certain charges are unusually likely to inflame the jury; and any of the charges
16 carries the death penalty. (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639; *see, also,*
17 *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 138-140.) The California Supreme
18 Court has more recently reiterated that

19 “The factors to be considered are these: (1) the cross-admissibility of the evidence
20 in separate trials; (2) whether some of the charges are likely to unusually inflame
21 the jury against the defendant; (3) whether a weak case has been joined with a
22 strong case or another weak case so that the total evidence may alter the outcome
23 of some or all of the charges; and (4) whether one of the charges is a capital
24 offense, or the joinder of the charges converts the matter into a capital case.”

25 (*Alcala v. Superior Court, supra*, 43 Cal.4th 1205, 1220-1221, quoting from *People v.*
26 *Mendoza* (2000) 24 Cal.4th 230, 261.) As explained in the following sections of this brief,
27 these factors require a severance herein.

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II.

**THE TWO ALLEGED CASES ARE NOT CROSS-
ADMISSIBLE UNDER EVIDENCE CODE SECTION 1108.**

Evidence Code section 1108 authorizes the consideration of a defendant's propensity to commit a defined sexual offense on the question of whether defendant is guilty of a charged sexual offense, including whether defendant is guilty of a rape-murder special circumstance. (*People v. Loy* (2011) 52 Cal.4th 46, 60.) However, it is improper to consider evidence of uncharged sex offenses as propensity evidence in determining whether the defendant committed a charged murder, *even when the alleged murder occurred during an alleged rape*. (See *People v. Villatoro* (2012) 54 Cal.4th 1152, 1181 (conc. & dis. opn., Corrigan and Werdegar, JJ.)) Rather, the uncharged incident cannot be considered on the murder charge unless it is admissible under Evidence Code section 1101, subdivision (b). (*Ibid.*)

The limitations of Evidence Code section 1108 were most recently applied in *People v. Jandres* (2014) 226 Cal.App.4th 340, where the Court of Appeal held that the trial judge committed reversible error in admitting evidence of uncharged sex offenses that were offered under Evidence Code section 1108, and in improperly instructing the jury concerning such evidence. First, the appellate court observed that evidence authorized by section 1108 is limited to sexual offenses, which excludes attempted kidnapping such as the Safeway incidents. The Sixth District further held that the trial judge erred in instructing the jury that they could consider the 1108 evidence with regards to the *charged* crimes although "the evidence could be used to establish defendant's propensity to commit only the charged *sexual* offenses." (226 Cal.App.4th at p. 359, original emphasis.)

So it is here. If the prosecution is stretching the facts by contending that the Safeway incidents are cross-admissible under Evidence Code section 1108 to show that each alleged victim was somehow sexually assaulted, they still are not admissible to show that that Sierra Lamar was *murdered*. This distinction is apparent from a comparison of *People v. Villatoro*, *supra*, 54 Cal.4th 1152, 1165; *id.* at p. 1181 (conc. & dis. opn., Corrigan, J.), with *People v. Story* (2009) 45 Cal.4th 1282. In *Story*, the:

1 Autopsy revealed that [the victim] had been strangled to death. Her body had
2 many abrasions and other injuries, some caused by the victim's struggling while
3 she was being strangled. The pathologist testified that the injuries were most
4 consistent with the victim's "being face up and someone applying their hands to
her neck and either their elbows on to the collar bones or the chest or perhaps even
their knees to straddle her and immobilize her."

5 (*Story, supra*, at p. 1285.) Thus, there was no dispute that the victim in *Story* was killed. The
6 issue was whether she was killed during the commission of an underlying felony, specifically,
7 rape. In that context, the *Story* court held that evidence of the defendant's other sexual
8 assaults were admissible under Evidence Code section 1108 for the purpose of demonstrating
9 that a rape was committed and thereby establish the application of the felony-murder rule to
10 the homicide that was concededly committed.

11 On the other hand, as Justice Corrigan explained in *Villatoro, supra*, 54 Cal.4th 1152,
12 1181:

13 For example, suppose the defendant is on trial for five murders and five rapes.
14 Five victims were each raped and then murdered in a similar manner. A
15 propensity instruction like the one at issue here tells the jury that, if it decides the
16 defendant committed one of the charged rapes, it can infer he had a propensity to
17 commit rape and thus may have committed the other charged rapes. The giving of
18 such an instruction raises problems, however, because a propensity inference is
19 *impermissible* in deciding the multiple murders.

20 (Original emphasis.)

21 Since the issue in the case at hand is whether Ms. Lamar was killed—as opposed to
22 having run away or being held captive—the Safeway incidents may not be considered unless
23 they establish a common scheme or plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394.) As
24 explained in *Ewoldt*, "Evidence of a common design or plan is admissible to establish that the
25 defendant committed the act alleged. Unlike evidence used to prove intent, where the act is
26 conceded or assumed, '[i]n proving design, the act is still undetermined . . .'" (*Id.* at p. 394,
27 fn. 2.) The Supreme Court described the requisite degree of similarity to prove a common
28 scheme or plan as follows:

in establishing a common design or plan, evidence of uncharged misconduct must
demonstrate 'not merely a similarity in the results, but such a concurrence of
common features that the various acts are naturally to be explained as caused by a
general plan of which they are the individual manifestations.' (2 Wigmore,

1 *supra*, (Chadbourn rev. ed. 1979) § 304, p. 249, italics omitted.) ‘[T]he
2 difference between requiring similarity, for acts negating innocent intent, and
3 requiring common features indicating common design, for acts showing design, is
4 a difference of degree rather than of kind; for to be similar involves having
5 common features, and to have common features is merely to have a high degree
6 of similarity.’ (*Id.* at pp. 250-251, italics omitted; see also 1 McCormick, *supra*, §
7 190, p. 805.)

8 To establish the existence of a common design or plan, the common
9 features must indicate the existence of a plan rather than a series of similar
10 spontaneous acts, but the plan thus revealed need not be distinctive or unusual.

11 (*Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

12 As a matter of law, the evidence herein fails to remotely approach the requisite degree
13 of similarity among the Safeway incidents themselves and with the disappearance of Ms.
14 Lamar. The charge against Cynthia Lundy fails to prove that a crime was even committed.
15 The suspect simply tried to open her car door at a different Safeway store than the others.
16 While Annette Walters was assaulted in her car later that night at a different Safeway, it is
17 unknown if the suspect was the same person. The assault on Mrs. Walter’s ceased once a
18 nearby car flashed his lights. The motive of Mrs. Walter’s assailant is unknown, whether it
19 was to rob Mrs. Walters or something else was not known because the assault was
20 interrupted. The assault on Eva Orozco occurred about one week later at the Tenant Safeway.
21 She was also assaulted by a suspect who entered her rear door but she struggled with the
22 suspect for a knife she possessed. After telling the suspect that she was pregnant the suspect
23 fled. Because the suspect ceased his assault, it is unknown if the assault was an attempted
24 robbery or something else. The Safeway incidents fail to establish a common scheme or plan
25 among themselves or that they were even committed by the same person.

26 The disappearance of Ms. Lamar is far different than the assaults at the Safeway in
27 almost all regards. The Safeway incidents occurred at night at a Safeway that was open for
28 business. It is unknown where and exactly when Ms. Lamar went missing other than being seen
by her mother around 6:00 a.m. at her house. Unlike the Safeway incidents, Ms. Lamar did not
drive or have a car so she could not have been assaulted in her car. The government’s theory
that Ms. Lamar was abducted by being dragged on the roadway as she went to her bus stop in
the morning and transported away in Mr. Garcia-Torres’ car presents facts drastically opposed

1 to those in the Safeway incidents. To argue a common scheme or plan among the Safeway
2 incidents and the disappearance of Ms. Lamar is a huge stretch of the imagination.

3 Further, the tremendous dissimilarity between the Safeway incidents and the
4 disappearance of Ms. Lamar prevents any consideration of the Safeway incidents for any
5 purpose, even on the kidnap-murder special circumstance. *People v. Earle* (2009) 172
6 Cal.App.4th 372 reversed a Santa Clara County sexual assault conviction because of the
7 erroneous admission of evidence of other sexual assaults under Evidence Code section 1108.

8 The court of appeal observed that

9 a trial court may not “admit or exclude every sex offense a defendant commits
10 [under the statute],” but must “consider other factors” bearing on the relevance,
11 probative value, and prejudicial potential of the evidence, including “*its similarity*
12 *to the charged offense.*” Obviously, the “lack of similarity” between charged and
13 uncharged offenses can be enough by itself to justify an exclusion of the latter in
14 an exercise of the trial court's discretion. Logically, it can also be enough to
15 *compel* its exclusion where, as here, any inference of predisposition to commit the
16 *charged* offense would be wholly speculative, i.e., where the uncharged offense
17 has no tendency in reason to show that the defendant actually *has* the propensity
18 whose proof the statute authorizes.

19 (At p. 397, original emphasis.) As in *Earle*, the lack of similarity herein *compels* exclusion of
20 the Safeway incidents because drawing any inference from the Safeway incidents that Mr.
21 Garcia-Torres killed Ms. Lamar would be wholly speculative, especially since the evidence
22 fails to prove Ms. Lamar was killed. (Accord, *People v. Jandres, supra*, 226 Cal.App.4th 340.)

23 The government claims that the Safeway incidents and the disappearance of Ms. Lamar
24 are cross-admissible to prove motive or intent. However, in the Safeway incidents the motive
25 and intent of the suspect is unknown. The Safeway assaults are charged as attempts because the
26 commission of the crime was never completed. Moreover, any evidence of motive or intent is
27 lacking from the government's evidence in the Safeway incidents. There is no evidence that the
28 Safeway assailant was planning to kidnap the alleged Safeway victims or that he was going to
car-jack them. To claim that the Safeway incidents are cross-admissible to prove intent or
motive in Ms. Lamar's disappearance ignores the fact that there is no evidence of intent or
motive in the Safeway incidents. The government seeks to present the Safeway incidents to
prejudice the jury against Mr. Garcia-Torres to make up for their lack of credible evidence
regarding the murder charge.

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III.

**THE EVIDENCE CONCERNING THE CHARGE THAT MS.
LAMAR WAS MURDERED IS RELATIVELY WEAK.**

A murder charge requires proof that the alleged victim was killed as opposed to being missing because she ran away or because she is being held captive. The case at hand is unusual in that the prosecution is not able to present any credible evidence that Ms. Lamar was killed. The government claims she was murdered despite never finding her body nor any forensic evidence suggesting her demise. Moreover, their failure is not for want of trying, extensive searches were conducted looking for her remains. Despite their tremendous efforts to find the body, no evidence was found even suggesting she was killed such as blood stains or damage to her clothes.

While the government may argue that Ms. Lamar was killed because she is missing and has not been contacted, there is no denying that “the killing of another” element of murder is relatively weak.

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IV.

**CONSIDERATION OF THE RELEVANT
FACTORS REQUIRE SEVERANCE.**

As noted above, although the charges herein are of the same class, and therefore presumptively proper subjects for joinder, the court must consider a combination of factors in determining whether severance is appropriate. Application of those factors in the case at hand requires severance. The evidence concerning the government’s theory that Mr. Garcia-Torres committed the Safeway assaults is not admissible on the question of whether Ms. Lamar was murdered. The evidence supporting the charge that Ms. Lamar was murdered is weak. The government is seeking the death penalty in the disappearance of Ms. Lamar while the Safeway incidents are not capital offenses. The government is attempting to try the Safeway incidents along with the alleged murder of Ms. Lamar to inflame the passions of the jury by claiming he is a predator who assaults and kills women.

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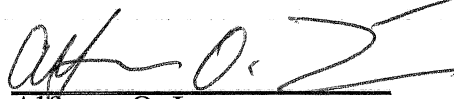
1 The Court should sever all the counts in the Safeway incidents among themselves and
2 also from the disappearance of Ms. Lamar case. Defense counsel is asking this Court to
3 conduct four separate trials to ensure that Mr. Garcia-Torres receives a fair trial within the
4 meaning of the state and federal due process rights as to each and every charge in the case.
5 Fairness dictates that a separate trial in this murder case be held to ensure Mr. Garcia-Torres'
6 constitutional rights are not violated in light of the government's decision to seek the ultimate
7 punishment: a death sentence.

7 **CONCLUSION:**

8 The prosecution seeks to join a relatively weak murder charge with three weak
9 attempted kidnapping during the commission of car-jacking charges. The alleged murder
10 charge is weak because the government does not have a body or any credible evidence
11 proving the "killing of another." Further, the separate incidents are not cross-admissible; the
12 charges are highly inflammatory; and carry the ultimate sanction of death. For all of these
13 reasons, severance is required.

14 Dated: August 31, 2016.

15 Respectfully submitted,

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17 Alfonso O. Lopez
18 Deputy Alternate Defender

(ENDORSED)
FILED
AUG 31 2016

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
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COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF
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VS.

ANTOLIN GARCIA-TORRES,

DEFENDANT

CASE NO.: 213515

Motion For Severance

Proof of Service

I am a citizen of the United States and employed in Santa Clara County. 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.

On August 31, 2016, I served the within *Motion For Severance* on the Plaintiff in this action by leaving a true and correct copy at the clerk's office at the Hall of Justice and by email to Deputy District Attorney David Boyd at his office e-mail account.

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

Executed on this 31st day of August at San Jose, California.