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Attorneys for Antolin Garcia-Torres

(ENDORSED)
FILED
AUG 31 2016
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

People of the State of California,	) Case No.: 213515
	)
Plaintiff,	) Notice of Motion and Motion
	) to Continue Trial
-vs.-	)
	) Date: September 2, 2016
Antolin Garcia-Torres,	) Time: 1:30 am
	) Dept.: 40
Defendant.	) Time Est.: 10 minutes
_____/	

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

Notice is hereby given that on the 2nd day of September 2016, the defendant will move the Court to continue the trial of the above-entitled action from September 19, 2016, to November 21, 2016. This motion is based on Penal Code section 1050, the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution, the California Constitution, Article I,

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sections 15, 16, and 17, and the attached declarations of counsel.

Date: August 31, 2016

Respectfully submitted,

Alfonso O. Lopez
Deputy Alternate Defender

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Superior Court of CA County of Santa Clara
BY J. Berman DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

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Issue Presented

The Court may continue the trial upon a showing of good cause. And it should grant a continuance when one is necessary to preserve constitutional rights. The defense has submitted a declaration describing tasks that must still be completed before it is ready for trial. Is there good cause to continue the matter where time has been waived?

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Points and Authorities

Argument

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

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

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

A. The right to counsel and to present mitigation

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) 466 U.S. 668.) This necessarily means that a defendant should not "be brought to trial too

soon, i.e., without adequate opportunity for preparation of his defense." (*People v. Maddox, supra,* 67 Cal.2d at p. 653.)

To be effective, counsel must conduct an investigation into both guilt and penalty phases. The A.B.A. Guidelines for the Performance of Counsel in Death Penalty Cases have been accepted as an indicator of the standard of care required of counsel. (*Wiggins v. Smith* (2003) 539 U.S. 510, 522.) The Guidelines require that counsel conduct an "ongoing, exhaustive, and independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other factors, which may provide a basis for a sentence less than death." This includes investigating the client's "medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors." (ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008), Guideline 5.1.)

The mitigation investigation is one of exceptional breadth and depth. It takes time and cooperation to complete. But there is no alternative to completing it. Counsel has been working diligently to do so. The attached declaration demonstrates that the defense has been working diligently to prepare for a possible penalty phase, but that the investigation is not complete. We are working hard to complete the investigation—something that must be done before strategic choices can reasonably be made. (See *Rompilla v. Beard* (2005) 545 U.S. 374.)

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B. Right to Present a Defense

An important component of the constitutional rights that apply is the right to present a defense. Indeed, a defendant cannot be prevented from presenting witnesses who are capable of providing relevant and material testimony. (*Washington v. Texas* (1967) 388 U.S. 14, 23.) And in a capital case such as this, the 8th and 14th Amendments require that the sentencing authority not be precluded from considering any aspect of a defendant's character or record that may form the basis for a sentence less than death. (*Lockett v. Ohio* (1978) 438 U.S. 586.)

Failing to give the defense the time that is necessary to thoroughly investigate both the guilt and penalty phases of a capital trial deprives the defendant of his right to present a defense and will preclude the jury from learning of mitigating evidence. The attached declarations demonstrate that the defense is diligently working to be prepared, but that there are outstanding items that must be completed before the defense is prepared to properly defend the case.

C. Mr. Garcia-Torres right to due process and a fair trial are jeopardized by starting jury selection in the middle of a political campaign centered on the question of whether California should eliminate or attempt to speed up the death penalty

As this Court is undoubtedly aware, two competing propositions have qualified for this November's ballot related to the death penalty. Proposition 62 would repeal the state's death penalty law and replace all death sentences with sentences of life without the possibility of parole. Also on the November ballot is Proposition 66 which would limit the appellant rights of a person sentenced to death so that the government would kill death row inmates much sooner. There are four major issues related to beginning jury trial prior to the November election which all result in violating Mr. Garcia-Torres' right to a fair trial.

First, the publicity for and against Proposition 62 and 66 will soon increase just prior to the election. This Court does not have the authority to order jurors not to vote and not to become well informed regarding the November election propositions including 62 and 66.

Jurors will have to struggle with their views on the death penalty outside the court room, whether to repeal it or speed it up. In other words, the Court will not be able to control the information that jurors are receiving regarding the death penalty. Mr. Garcia-Torres will be prejudiced by the November election campaigning that will saturate jurors with information to consider regarding the death penalty that has nothing to do with the evidence of this case. For example, the Klass Kids Foundation has regularly organized searches for Sierra Lamar and its members have attended court hearing in this case. The Klass Kids Foundation has publically announced their support of Proposition 66 which may lead to jurors considering such information as a voter which will also prejudice the jury trial.

The next two issues are related to defense counsel strategies related to defending a capital case. In capital cases, the jury must become "death qualified" or agree that they can impose a death sentence if supported by the facts. During jury selection, effective defense counsel strategy should be to seek a jury that is less likely to impose a death verdict. Such a strategy is carried over to the trial where effective defense counsel presents a defense that is focused on avoiding a death verdict more so than on an acquittal. These strategies are not necessary in non-capital cases. If defense counsel is forced to employ a capital defense and later during the jury trial the death penalty is repealed, Mr. Garcia-Torres will have grounds for a new trial and appellant review. His case will have been prejudiced by having to employ strategies to defend against a death sentence that was repealed during the trial.

The last issue is related to the cost and trial preparation related to the penalty phase of the case. Effective defense counsel must be prepared with a mitigation defense in the unfortunate event that the jury renders a death verdict. Such a defense is very expensive costing the defense hundreds of thousands of dollars exclusively related to penalty phase mitigation. Moreover, effective defense counsel must expend a vast amount of resources and time related to the penalty phase. Mr. Garcia-Torres is prejudiced by the requirement of penalty phase preparation by his defense team because resources directed toward the

penalty phase could have been focused on the guilty phase of the trial. Moreover, the Court and County of Santa Clara would waste a tremendous amount of resources on this case for nothing if the death penalty is repealed.

Conclusion:

Based on the defense showing of good cause in this time waived case and to ensure Mr. Garcia-Torres receives a fair trial, the Court should grant the defense motion to continue to November 21, 2016.

Date: August 31, 2016

Respectfully submitted,

Alfonso O. Lopez
Deputy Alternate Defender

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Antolin Garcia-Torres

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Superior Court of CA County of Santa Clara
BY J. Borman DEPUTY

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 DECLARATION OF COUNSEL (Motion to Continue)

I, Alfonso O. Lopez, declare as follows:

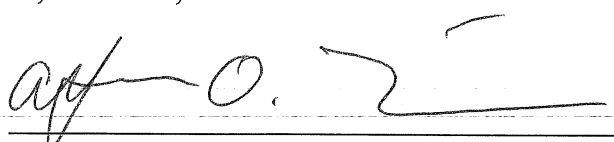
1. I am an attorney at the Office of the Alternate Defender for the County of Santa Clara and I am assigned to represent Mr. Garcia-Torres in the above-entitled matter along with Brian Matthews;
2. That I have reviewed Bicka Barlow's declaration in the motion to continue and believe that the defense is not ready for trial and needs a minimum of six weeks to complete their work;
3. That I have been working on the trace evidence aspect of the case and feel my continued work will lead to excupatory evidence once completed;
4. That in order to develop the exculpatory evidence regarding trace evidence, my consultant must examine fibers in the possession of the government;
5. That I have been in communication with the People regarding my consultant's review

of the fibers and we are working on a court order to allow the release of that evidence;

6. That my consultant will need approximately two to three weeks to complete his review of the fibers once they are received by his laboratory;
7. That six weeks is needed to complete the entire process of procuring an order, sending the fibers, a forensic review , and consultant reporting;
8. That beginning the jury selection process without adequate consultant on the trace evidence would amount to ineffective assistance of counsel as knowning the issues and dealing with them at the jury sellection stage of the case is critical to any defense;
9. That defense counsel is willing to elaborate on the specific work to be completed by their trace evidence consultant in camera to protect attorney work product;
10. That Brian Matthews had a family emergency and will be unavailable for at least several weeks;
11. That his work on the case is necessary especially in the area of motions and mitigation;
12. That more time is needed to be ready for the penalty phase of the case;
13. That on August 30, 2016, we received more discovery related to the removal of the partial profile used to identify Mr. Garcia-Torres in the state database as a result of the DNA profile being below the acceptable threshold. The defense will need to litigate this issue further, will bring additional motions and add to the pending suppression motion currently being heard.

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

Executed on August 30, 2016, San Jose, California.



Alfonso O. Lopez
Deputy Alternate Defender

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Attorneys for Antolin Garcia-Torres

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.	Case No.: 213515 Declaration of Bicka Barlow in support of the Defendant's Motion to Continue

I, Bicka Barlow, hereby declare the following:

1. I am an attorney licensed to practice law in the State of California and I have been retained to assist counsel for Antolin Garcia-Torres in the above matter in the capacity of DNA attorney. I was retained in January 2016.

2. I have a B.S. from the University of California, Berkeley, in Genetics, and a M.S. from Cornell University in Developmental Genetics, with minors in Cellular Biology and Plant Molecular Biology. I received my J.D. from the University of San Francisco, School of Law. I began consulting on DNA cases as a law student in 1994. In 2004, I was hired as the DNA attorney for the San Francisco Public Defender's Office. During my nine years at the office, my practice was focused almost completely on DNA cases. In 2013, I left the office and have been consulting

on DNA cases throughout the United States, in both state and federal courts.

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

4. I regularly communicate with attorneys and experts who specialize in DNA evidence. I also regularly train attorneys in the area of DNA evidence. I have reviewed the material provided to the defendant in this case regarding the DNA testing done. I have been asked to offer my opinion regarding the type of information that counsel in a case involving DNA evidence needs to offer competent representation and to be prepared to confront and cross- examine the government's experts regarding the DNA evidence. The defense will not be ready for trial on the dates set by the Court for the following reasons:

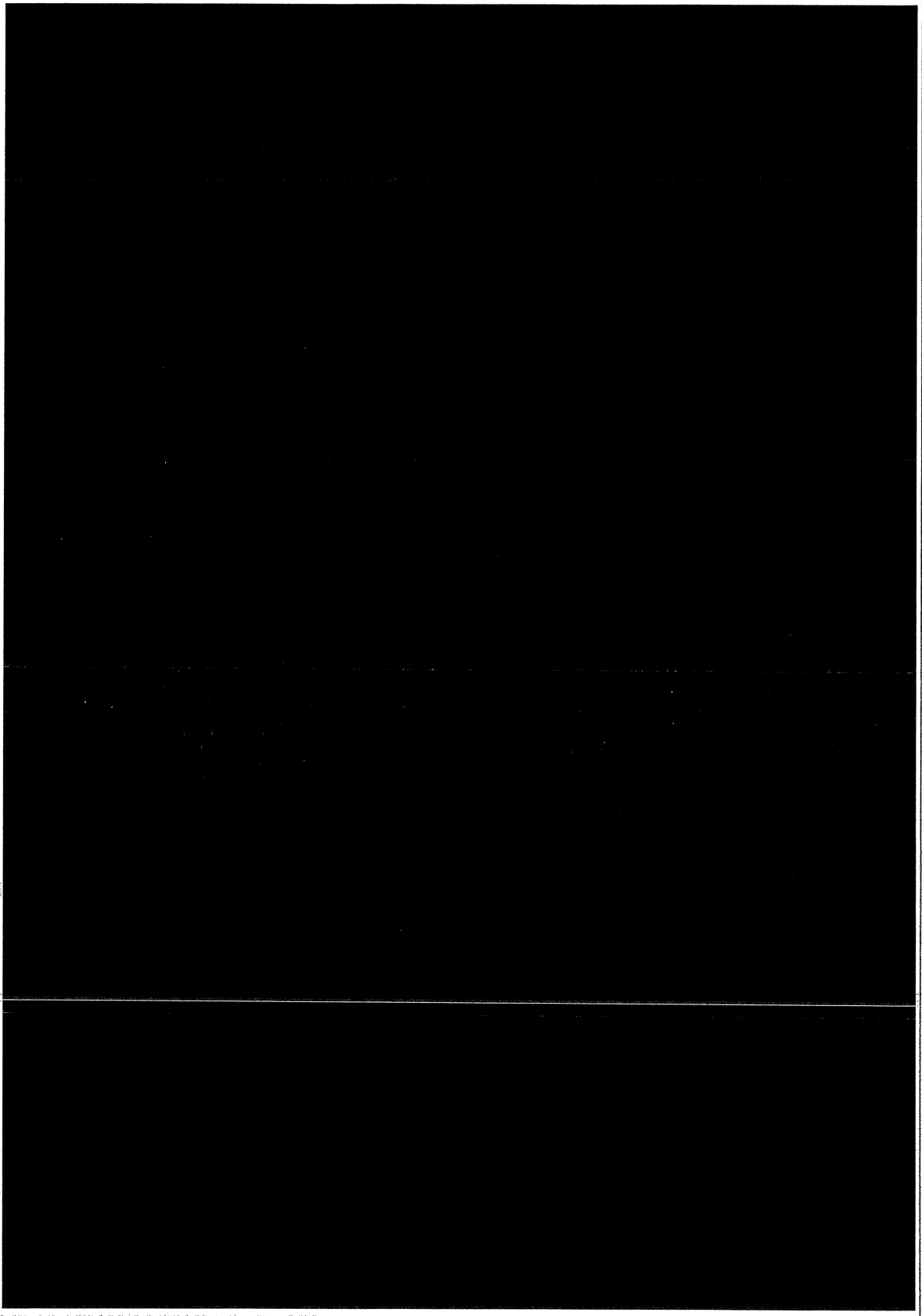
5. I have been provided with over 2,800 digital files comprising 5 gigabytes of memory. The Santa Clara County Crime Lab (SCCCL) issued reports on testing of over 200 items of evidence, with testing conducted using two separate and distinct test methods, the Identifiler Plus test kit (which tests nuclear DNA) and the Y-filer test kit (which tests Y or male specific DNA). Mitochondrial DNA testing was also conducted on some evidence by the California Department of Justice. On July 20, 2016, additional reports and data were produced by the District Attorney, consisting of 38 files comprising over 38 megabytes of data. The total number of reports from the lab is now 70 (although not all of these involve DNA testing). This total does not include grand jury transcripts, hundreds of pages of communication logs between the

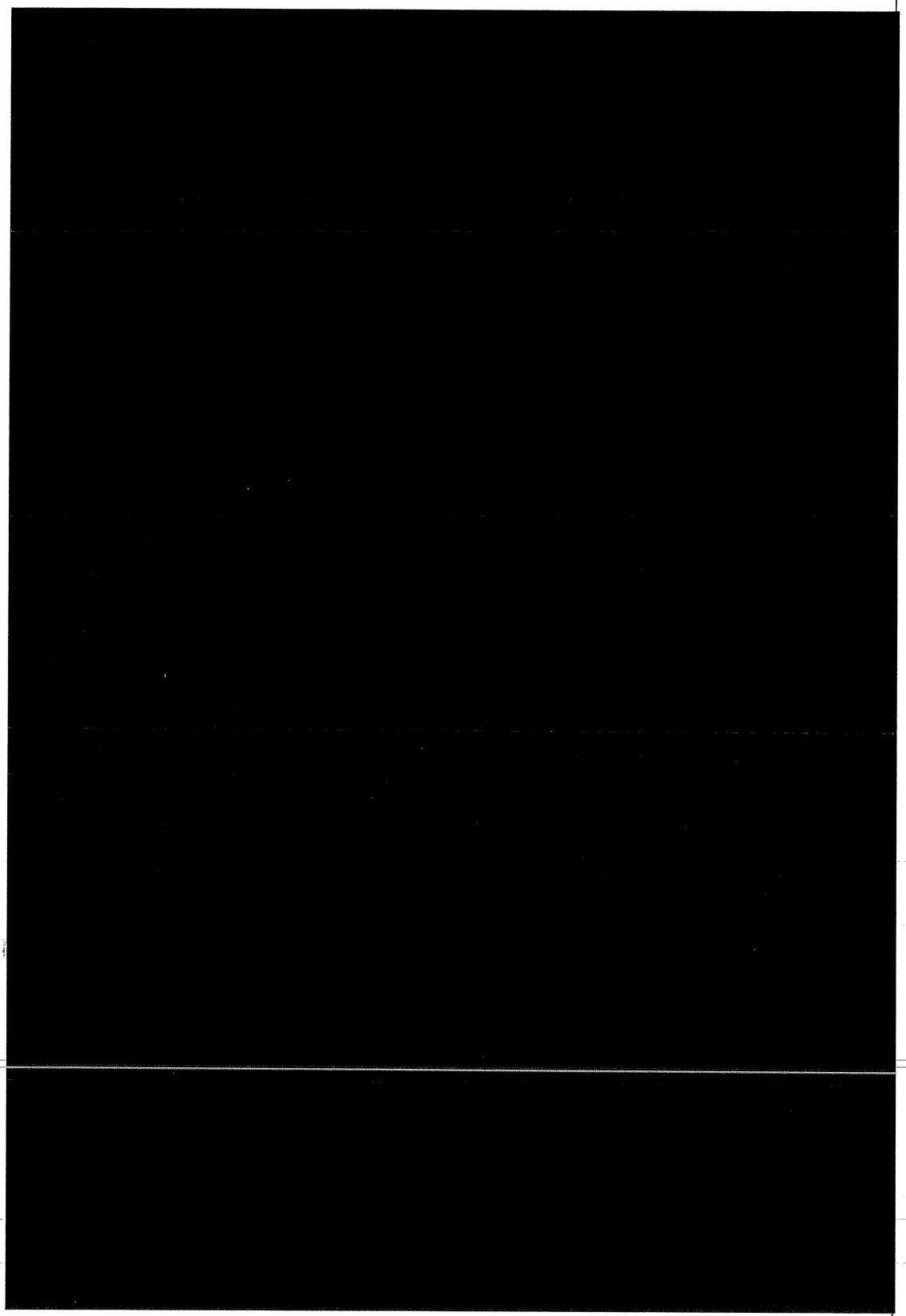
lab and the law enforcement, lab protocols and chain of custody documents. Additionally, although we have not been provided the validation studies in this case, I am aware that the validation studies for Identifler Plus alone consist of over 1,500 pages of summaries and data. The review of these items and integration into motions and trial preparation is technical and time consuming since most of it consists of lab reports, bench notes, data, and statistical interpretation.

6. Under the ABA Capital Guidelines, in my role as DNA attorney, I must thoroughly investigate all of the facts underlying the DNA testing in this case which include evidence collection, chain of custody of each item of evidence, quality of testing done on all evidentiary items, conclusions drawn regarding the testing, and any affirmative defense to be found in the testing. This includes reviewing the test data and reports for evidence of third party suspects or evidence that disproves the government theory of guilt as well as an overall assessment of the strengths and weakness of the evidence that is inculpatory or exculpatory. In order to competently work with the team in this case, I also must have a thorough understanding of the facts of the case, the government's theory of the case and the defense theory. This investigation also is relevant to the penalty phase for arguments related to lingering doubt.

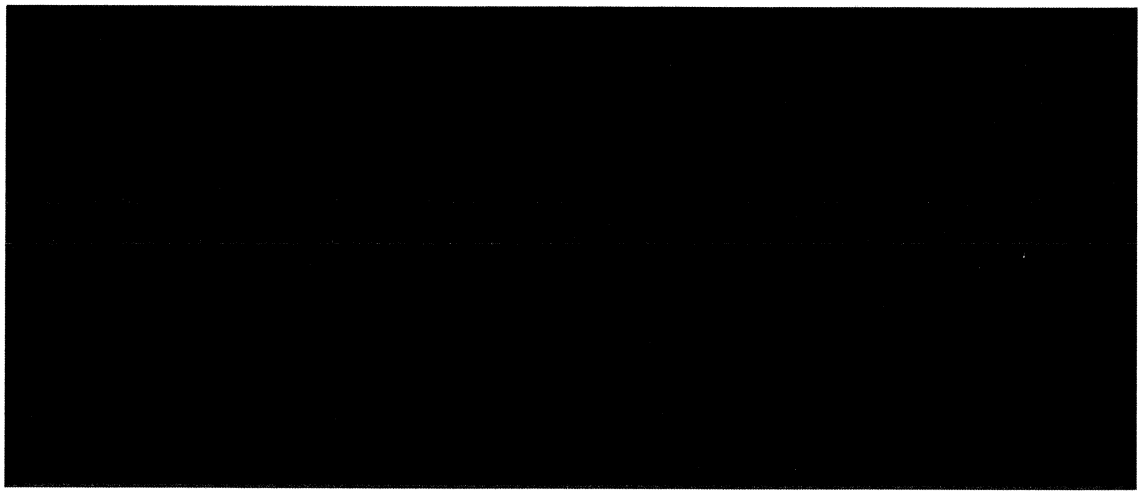
7. During the period of time that I have been working on this case, I also had prior obligations in a number of cases including a capital case in Maricopa County, Arizona which is currently set for trial in March 2017, two large Federal RICO cases in the Northern District of California, and a post-conviction case in Texas;

[redacted]





[1] https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics, website last visited August 25, 2016



10. The identity and reports of testifying experts will be disclosed once the defense knows what they will say. It is anticipated that the prosecution will need a continuance to review the material once it is ready;

11. For the above reasons, I am not prepared for trial in this matter. Based on my experience as a "Strickland" expert on DNA cases as well as my experience in both capital and non-capital trials, my performance would not meet the standards of competence for an attorney in this type of case and I would be ineffective under the Sixth and Fourteenth Amendments should the Court not grant this motion to continue.

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

Executed at San Francisco, California on August 30, 2016

Bicka Barlow

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J. Berman

IN THE SUPERIOR COURT OF CALIFORNIA FOR THE

COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. ANTOLIN GARCIA TORRES, DEFENDANT /	CASE NO.: 213515 Motion to Continue Trial **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 to Continue Trial* 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 e-mail 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.