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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

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| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>v.<br><br>ANTOLIN GARCIA-TORRES,<br><br>Defendant. | Criminal Case No. 213515<br><br>DATE: January 3, 2017<br>DEPT: 40<br><br>PEOPLE'S SIXTH SUPPLEMENTAL MOTIONS *IN LIMINE* (DISCOVERY) |

On October 18, 2016, this Court directed that defense counsel produce discovery with respect to Dr. Henry Lee, Skip Palenik, Peter Barnett, Robert Royce and Chris Conrad by November 19, 2016. The People have received *nothing* from the defense with respect to Dr. Lee, Mr. Palenik, or Mr. Barnett. Despite the vigorous *in limine* challenge to the forensic DNA in this case, the defense has provided not a single page of discovery of what they will be presenting to challenge the damaging DNA evidence.

With only two weeks to opening statements, the People believe that the defense reasonably anticipates they may call experts to discuss DNA and the proper procedures for handling DNA, yet despite naming several witnesses who may testify in this area, they have not provided any statements. Additionally, the defense has retained psychologist Dr. Gretchen White to testify to

the defendant's "psycho-social history" but has not provided what that testimony will look like in the form of a diagnosis, any opinions or facts from personal knowledge.[1/]

Because the defense has failed to produce the discovery in a timely manner the People request that this Court employ a sanction. Because the Court has stated its reticence to exclude defense evidence for failure to comply with discovery[2/] and because the court has indicated that personal sanction of counsel is not an effective remedy[3/], that leaves the People with two remaining options: continuance of the trial so the defense can comply with its obligations or advising the jury of its non-compliance. When the People last brought this issue to the Court's attention on December 9, 2016, the Court stated that it would "not avail itself of" a continuance. [RT Vol. 88, 4944:18-19.] That leaves advising the jury of its failure. However, such a remedy has risks. See *People v. Thomas* (2011) 51 Cal.4th 449, 480-484. As a result, unless the Court revisits its prior comments regarding other potential remedies or has a more creative remedy of its own, the compulsory provisions of Penal Code section 1054.3 have effectively become advisory.

**A. Defense Discovery**

The People have repeatedly requested defense discovery in this case. We sought a motion to compel defense discovery pre-trial (filed March 23, 2016) which was thereafter denied, but only after a closed hearing before Judge Williams where it is unknown what was said. [RT Vol. 24 at 370-381.] The People further requested discovery as part of its motions *in limine* which resulted

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[1/] The first time the People heard of Dr. White in this case was via letter, November 29, 2016. The sum total of the disclosure has been: "You will see that we are providing notes created by Dr. Gretchen White. Dr. White is a psychologist who would testify regarding Mr. Garcia-Torres's psycho-social history. She has not written a report." The notes are notes of witness interviews, they are barely legible and not particularly sensible. Regardless, they do not contain any diagnosis or expert opinions or a summary of her testimony.

[2/] "I am not unsympathetic to the timing of all of this, and I think the Defense has heard the Court's concerns about timing. But the remedy appears to the Court to be an exclusion order. And I don't think that is probably good for this record. That is not something the Court is going to do." RT Vol. 59 (10/31/2016), 2165:10-15.

[3/] "Short of that, sanctioning people, fining people, really doesn't accomplish what the People want, which is to get the information." RT Vol. 59 (10/31/2016), 2166:18-21

in the Court's order to produce material by November 19, 2016. As this Court is aware, the lack of defense discovery has been a topic from the earliest days of assignment to this department.

Penal Code section 1054 *et seq.* requires reciprocal discovery. This case is on the verge of opening statements. We are in jury selection and the defendant's failure to produce timely discovery has already deprived the People of the ability to voir dire on matters that could "ascertain jurors views about these facts." *People v. Carasi* (2008) 44 Cal.4th 1263, 1286-87; *People v. Jackson* (2009) 45 Cal.4th 662, 689-690) (denying as untimely a late request for self representation because it would in all likelihood reopen voir dire to query juror on the issue).

While most of the motions *in limine* have been heard, none have addressed discovery not yet produced. One of the purposes of such motions is to enable a "more careful consideration of evidentiary issues than would take place in the heat of battle during trial." *People v. Clark* (1992) 3 Cal.4th 41, 119. Additionally, motions *in limine* are designed to prevent the impossibility of "unringing the bell" of inadmissible evidence before the jury. *Blanks v. Shaw* (2009) 171 Cal.App.4th 336, 375. Given the lack of discovery, the People are hardly in any position to litigate the questions of admissibility of evidence, the propriety of expert testimony, or the very foundation of any defense evidence when it has not been disclosed. This is to say nothing about the potential need for expert examination and rebuttal of the defense experts' conclusions. This could include a People's expert to examine the defendant himself based upon the yet to be disclosed "psycho-social" history of the defendant.

Because the Court at various times in the proceedings indicated at the very least a reluctance to entertain the sanction of exclusion, attorney sanction, or a continuance, that leaves only a single option: disclosure to the jury of the defense's failure to timely produce evidence. But as noted in in *Thomas, supra,* 51 Cal.4th at 480-484, this can be problematic, perhaps error depending on its wording. At this advanced stage, it is hardly reasonable for the defense to take the position that they do not reasonably anticipate whom they are likely to be calling at trial or what they might say. Disclosure is required - for both the prosecution and the defense - when a party reasonably anticipates calling a witness. *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 376 n. 11.

In *People v. Tillis* (1998) 18 Cal.4th 284, the California Supreme Court ruled that when counsel does not reasonably anticipate calling a witness, there is no compulsion to produce the information. *Id.* at 291-293. However, the Court in *Tillis* warned: "[t]he rule . . . we announce today does not license counsel to temporize about his or her intentions in the face of clear indications on the record that counsel in fact intends to call a particular witness." *Id.* at 293. The California Supreme Court, in *In re Littlefield*, held that for the purposes of determining whether counsel intends to call a witness, the standard is whether counsel "reasonably anticipates it is likely to call" a witness. *In re Littlefield* (1993) 5 Cal.4th 122, 129. While it is unknown exactly how many witnesses counsel is holding back, it is clear counsel has consulted with numerous experts. At this late stage — trial has commenced — counsel is most assuredly aware of generally what experts will be called and what they propose to say.

In addressing counsel's possible claim that they do not know, or cannot reasonably anticipate, whether they plan on calling an expert witness until some later date, this kind of avoidance of defense discovery obligations was addressed in *People v. Jackson* (1993) 15 Cal.App.4th 1197. In *Jackson*, defense counsel obtained a witness statement four months prior to trial that purported to be a declaration against penal interest, thus exculpating the defendant. Counsel failed to disclose the statement to the People and indicated to the Court after the People had rested that "he did not intend to use the statement or call the witness until moments before he announced it." *Id.* at 1200. The trial court noted their incredulity that defense counsel failed to seriously consider calling a witness that would provide allegedly exculpatory testimony until mere moments before the witness was called. *Id.* at 1203. Accordingly, the trial court excluded the testimony for the discovery violation, which was upheld by the Court of Appeal. In evaluating the propriety of exclusion, the Court in *Jackson* stated: "the integrity of the adversary process would have been compromised as parties with little to lose would be encouraged to not comply with pretrial discovery rules." *Id.*

By accepting any attorney's representation of not knowing whether they will need to call a witness because their thinking about the issue has not yet crystalized, despite the fact that the

attorney considered it important enough to retain the expert, and wants to leave the contingency of calling the witness open, is tantamount to a subjective test. However, this is not the test as held by the California Supreme Court in *In re Littlefield*, and would be directly contrary to the policies of PC §1054 *et seq*. as noted in *Jackson*. When a party "reasonably anticipates it is likely to call" a witness [*Littlefield, supra*, 5 Cal.4th at 129], the obligations under Penal Code section 1054.3 to produce the statements of that witness are triggered, whether it has been reduced to writing or not. *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 160.

Should counsel argue, as they did at the motion compel, that the People are asking the Court to speculate regarding the existence of proposed expert testimony, to the contrary, the People accept that qualified capital counsel - of which the defense most assuredly is - after more than four and a half years have taken every step necessary toward preparing a vigorous defense. As a result they can now reasonably anticipate who they are likely to call at trial[4/] and more importantly what the expert witnesses will say. What counsel should not be able to do, because the law does not permit it, is to know what testimony they might reasonably anticipate presenting but avoid advance disclosure by identifying experts mid trial.

Frankly, counsel was quite candid when he said at the motion to compel, "we might obtain more experts throughout the trial and call them during the trial. There is nothing precluding us from retaining experts after trial has begun." [RT Vol. 24 at 346:12-15.] Counsel has been additionally careful to refer to his experts as "consultants" rather than witnesses or even potential witnesses, except for Henry Lee, Skip Palenik, and Peter Barnett who have been given to the jury as witnesses.

Finally, given the likelihood that defense counsel will argue that some disclosure is barred as work product, the Court should note that work product is a creature of statute that is narrowly

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[4/] After all, they have taken the time to tell the jury what the names are at least for Dr. Lee, Mr. Barnett and Mr. Palenik. And, of course they intend to present a defense at the penalty phase. Time will tell, but the idea that the only penalty phase expert that they are considering is Dr. White borders on near fantasy. While they have not acknowledged any further experts, the defense has made clear there is more to come in the penalty phase discovery.

defined. *Izazaga, supra*, 54 Cal.3d at 381. While Penal Code section 1054.6 statutorily bars the disclosure of work product, such material is defined as: "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories . . . ." Cal. Code Civ. Proc. 2018.030(a). This narrowly tailored definition does not include who they have in fact subpoenaed or hired to testify, who they reasonably anticipate that they are likely to call, the statements of those witnesses, and certainly does not encompass what those witnesses are expected to say on the witness stand. Penal Code section 1054.3.

**B. Conclusion**

The People ask this Court to fashion its own remedy or to reconsider its previously declined remedy of a continuance to a date where the defense will have provided the discovery to which the People are entitled, specifically with respect to witnesses Henry Lee, Peter Barnett, Skip Palenik and Dr. Gretchen White. The People further request the Court inquire with counsel in detail as to what additional experts they reasonably expect to retain for testimony during trial (these are unknown to the People) that are outstanding along with realistic, and aggressive, dates for discovery compliance. Because the other remedies raise problematic concerns regarding fairness of the proceedings to the defendant, should the Court forge forward and decline any remedy for the defendant's failure to comply with this Court's order, it would effectively nullify Penal Code section 1054.3 and 1054.7; thus compromising "the integrity of the adversary process" because there would be "little to lose" with no encouragement to comply with pretrial discovery. *Jackson, supra*, 15 Cal.App.4th at 1203.

DATED: December 29, 2016

Respectfully submitted,

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