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11 **Superior Court of California, County of San Francisco**

12 The People of the State of California,) Dept. No. 22
13)
14 Plaintiff,) SCN:
15) MCN:
16 v.)
17) Date: March 25, 2010
18 **Name of client,**) Time: 9:00 A.M.
19)
20 Defendant.)

21 **Defendant's *In Limine* Motion To Exclude**
22 **Evidence of Alleged Narcotics**

23 The defendant moves this Court *in limine* to exclude the evidence of narcotics on the
24 grounds the state cannot prove to a "reasonable certainty" that the evidence was not
25 altered. In the alternative, the court must conduct a hearing under Evidence Code § 402.

26 **Issue presented:** The state must prove its narcotics evidence was not altered and the
27 court must exclude it when a vital link in the chain of custody is not accounted for.¹

28 Here, criminalist Madden originally tested the alleged narcotics. Then, Madden
retired without official explanation amidst allegations of theft and tampering with
narcotics during her career. Moreover, an ASCLAD audit from November 17-20, 2009

¹ *People v Lucas* (1995) 12 Cal.4th 415, 444.

1 found the SF Crime Lab did not maintain a secure chain of custody, failed to keep
2 detailed case records, and fell below industry standards for cleanliness. Can the state
3 prove the now re-tested substance was the original and satisfy the chain of custody
4 requirement to a “reasonable certainty”?

5 The motion will be based on the Court file, the statement of facts and memorandum of
6 points and authorities below, the attached declaration of counsel, and additional evidence
7 and authority that may be presented at the hearing on the motion.

8 **Points and Authorities**

9 **1. Proffering party must show by a preponderance that the evidence** 10 **was not altered**

11 “The ‘chain of custody’ rule is a variation of the principle that real evidence must be
12 authenticated prior to its admission into evidence.”² “The purpose of this threshold
13 requirement is to establish that the item to be introduced... is what it purports to be.”³
14 Consequently, “[c]hain-of-custody issues are present whenever physical evidence capable
15 of submission to the jury is introduced at trial.”⁴

16 The chain of custody is established when the party offering a particular item in
17 evidence shows that it is reasonably certain the evidence has not been altered.⁵ The
18 “reasonable certainty” standard is, essentially, the equivalent of proof by a preponderance
19 of the evidence.⁶ This is a foundational issue: an improper chain of custody precludes
20 testimony or evidence on the issue involved.

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24 ² *U.S. v Howard-Arias* (4th Cir 1982) 679 F2d 363, 366.

25 ³ Mueller & Kirkpatrick, *Evidence Under the Rules*, p 957 (2d ed 1993).

26 ⁴ *People v Baldine* (2001) 94 Cal.App.4th 773, 779.

27 ⁵ See *People v Catlin* (2001) 26 Cal.4th 81, 134; *People v Lucas* (1995) 12 Cal.4th 415,
28 444.

⁶ *People v Herrera* (2000) 83 Cal.App.4th 46, 61.

1 For example, in *Jimenez*,⁷ prosecution witness failed to resolve key foundational
2 issues about the chain of custody of a DNA reference sample taken from the defendant.
3 The trial court admitted, over objection, the reference sample and criminalist’s testimony
4 about a comparison of the reference sample with DNA taken from crime scene evidence.
5 The Court of Appeal found an abuse of discretion and reversed for a new trial.⁸

6 The state may claim that flaws in the evidence regarding the chain of custody “merely
7 goes to weight” as opposed to the admissibility as if to suggest chain-of-custody is an
8 irrelevant issue at trial. If the possibility that someone has tampered with the evidence is
9 supported by only bare speculation, then “it is proper to admit the evidence and let what
10 doubt remains go to its weight.”⁹ This is only true where the attack is mere speculation.
11 But here, that the chain was affected by Madden’s misconduct is well beyond
12 speculation.

13 **2. Chain of custody must be proven — or the evidence must be** 14 **excluded**

15 The party offering real evidence has the burden of showing to the satisfaction of the
16 trial court it is reasonably certain that there was no alteration. “The requirement of
17 reasonable certainty is not met when some vital link in the chain of possession is not
18 accounted for, because then it is as likely as not that the evidence analyzed was not the
19 evidence originally received. Left to such speculation the court must exclude the
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23 ⁷ *People v Jimenez* (2008) 165 Cal.App.4th 75, 81.

24 ⁸ *People v Jimenez* (2008) 165 Cal.App.4th 75, 81.

25 ⁹ *People v Williams* (1989) 48 Cal.3d 1112, 1134 (unexplained anomalies in prosecution
26 handling of latent fingerprint card went to weight of evidence after prosecution had made
27 prima facie showing that card had not been tampered with); *In re Ruth H.* (1972) 26
28 Cal.App.3d 77, 83 (inference that pills placed in envelope by high school security agent
were same as those picked up within short time by deputy sheriff was sufficient to deny
chain-of-custody objection).

1 evidence. ... Conversely, when it is the barest speculation that there was tampering, it is
2 proper to admit the evidence and let what doubt remains go to its weight.”¹⁰

3 Though the trial court has broad discretion to determine the admissibility of evidence
4 — that discretion is not without bounds.¹¹ The requirement of “reasonable certainty” is
5 not met when some vital link in the chain of possession is not accounted for, because then
6 it is as likely as not that the evidence analyzed was not the evidence originally received.¹²
7 Left to such speculation, our Supreme Court cautions, the court must *exclude* the
8 evidence.¹³

9 Here, however, it is undisputed that Madden was a crucial part of the chain of custody.
10 [FILL IN MORE FACTS HERE SPECIFIC TO YOUR CASE FACTS.]. Moreover, the
11 prosecution’s attempts to remove Madden from the chain cannot prevail because the
12 proffering party has the burden of proof on this issue.

13 **3. In limine motions must be binding on the trial court**

14 The defense moves the court for an order that all evidentiary objections made in these
15 *in limine* motions be deemed objections under all applicable provisions of the
16 Constitutions of both the State of California and the United States.¹⁴ Additionally, the
17 defense requests the acceptance of a stipulation that each objection to the admission of
18 certain specified evidence posed during these motions *in limine* shall constitute a
19 continuing objection at trial.¹⁵

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22 ¹⁰ *Lucas, supra*, at 444.

23 ¹¹ *People v. Williams* (1997) 16 Cal.4th 153, 196.

24 ¹² *Ibid.*

25 ¹³ *Jimenez, supra*, 165 Cal.App.4th 75.

26 ¹⁴ *Fay v. Noia*, (1963) 372 U.S. 391 [to preserve a claim of error for violation of a federal
27 constitutional right, defendant must make a timely objection in the trial court on the
federal grounds].

28 ¹⁵ *People v. Jennings* (1988) 46 Cal.3d 963; *People v. Karis* (1988) 46 Cal.3d 612;
People v. Antik (1975) 15 Cal.3d 79, 95.

4. Brady Motion and request for discovery

Defense counsel moves for discovery of any information that would be helpful to the defense or harmful to the prosecution's case, as required by *Brady v. Maryland*¹⁶ and Penal Code sections 1054 et. seq. Prosecutors are required to disclose to the defense evidence favorable to a defendant that is either exculpatory or impeaching and is material to either guilt or punishment. Evidence is "favorable" to the defendant if it either helps the defendant or hurts the prosecution.¹⁷ Failure to discover any favorable evidence violates due process irrespective of the good faith or bad faith of the prosecution.¹⁸ Moreover, the duty to disclose applies *even though there has been no request by the accused*.¹⁹ Such evidence is material if "there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment"²⁰ To ensure compliance with these rules, the United States Supreme Court on more than one occasion has urged the "careful prosecutor" to err on the side of disclosure.²¹

Conclusion

Here, in a narcotics prosecution, the chain of custody of the narcotics is a crucial issue at trial, especially where compromised as here. Whenever the proponent of the evidence cannot establish the chain of custody with reasonable certainty that the evidence was not altered, it must be excluded. The infamous phrase, "a chain is only as strong as its weakest link," was first written over two centuries ago. In Thomas Reid's *Essays on the Intellectual Powers of Man*, 1786, he wrote: "In every chain of reasoning, the evidence of

¹⁶ *Brady v. Maryland* (1963) 373 U.S. 83; *Kyles v. Whitley* (1995) 514 U.S. 419; *In re Brown* (1998) 17 Cal.4th 873.

¹⁷ *In re Sassounian* (1995) 9 Cal.4th 535, 543-544.

¹⁸ *Brady v. Maryland*, supra, 373 U.S. at 87.

¹⁹ *Strickler v. Greene* (1999) 527 U.S. 203, 280-281; *United States v. Agurs* (1976) 427 U.S. 97, 107.

²⁰ *U.S. v. Price* (9th Cir.2009) 566 F.3d 900, 914 citing *Cone v. Bell*, --- U.S. ----, (2009); see also *Duncan v. Ornoski* (9th Cir.2008) 528 F.3d 1222, 1245.

²¹ *Kyles v. Whitley*, supra, 514 U.S. 419, 440; *United States v. Agurs*, supra, 427 U.S. 97, 110.

1 the last conclusion can be no greater than that of the weakest link of the chain, whatever
2 may be the strength of the rest.”

3 Dated: _____, 2010

Respectfully submitted,

4 JEFF ADACHI
5 PUBLIC DEFENDER

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7 **Matthew J. Rosen**
8 Attorney at Law

1 **Proof of Service**

2 I, Attorney Name the undersigned, say:

3
4 I am over eighteen years of age and not a party to the above action. My business
5 address is 555 Seventh Street, San Francisco, California 94103.

6 On _____, 2010, I personally served copies of the attached on the
7 following:

8
9 San Francisco District Attorney
10 850 Bryant Street
11 San Francisco, CA 94103
12 ATTN: ADA _____

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

14 Executed on _____, 2010, in San Francisco, California.

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16
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18 _____
19 **Attorney Name**
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