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7

8 **Superior Court of the State of California**
9 **City and County of San Francisco**

10
11 People of the State of California,)

12 Plaintiff,)

13 vs.)

14)
15 Roberto Ramos,)

16 Defendant.)

Case No. **2386759**

**Defendant's Opposition
to the People's Motion
to Continue Trial**

Date: March 12, 2010
Time: 9:00 a.m.
Dept: 22

17)
18 _____)
19 To the District Attorney of San Francisco County and the Above-entitled Court:

20 Defendant, Roberto Ramos opposes the People's Motion to Continue Trial (hereinafter
21 referred to as "Motion"). This opposition is based on the attached memorandum of points
22 and authorities, the declaration of K. Kleigh Hathaway, the records and files in this
23 action, such oral and documentary evidence as may be presented at the hearing of this
24 motion and any such further evidence that this Court may wish to consider.
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Memorandum of Points of Authorities

Statement of Facts

Roberto Ramos is charged with violating two counts of Health and Safety Code § 11351 – possession for sales of cocaine salt and heroin. This case stems from an arrest which occurred on September 25, 2008. According to the police report, the police suspected Ramos of selling drugs. The police detained Ramos, searched him, and found suspected cocaine salt and heroin.

According to the police report, these substances were booked into evidence and then tested at a lab. The prosecution gave the defense a Crime Lab Narcotics Analysis Form showing criminalist Francis Woo tested the substances on September 26, 2008; the results were reviewed by criminalist Debbie Madden.

On March 10, 2010, the San Francisco Chronicle reported the San Francisco Police crime lab had been shut down amid allegations a former technician, Debbie Madden, had stolen and used some of the cocaine salt from the crime laboratory. (See Attached as Exhibit “A”.) According to San Francisco Police Chief George Gascón, the police knew the lab was in trouble in December of 2009: ““Officials discovered that the evidence was missing during a crime lab audit conducted in December, police said. That review was triggered when other technicians suspected someone had been stealing evidence and a supervisor noticed apparent tampering with the packaging of drug evidence.””¹ The S.F.P.D. investigation linked Madden to wrongdoing in at least six cases where drugs were missing.²

Despite the fact an audit kick-started a police investigation, the state has not discovered any audit to defense, and the defense does not know what audit Gascon

¹“SFPD drug-test technician accused of skimming,” *San Francisco Chronicle*, 3/10/2010. See: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/03/10/MN4R1CDCVH.DTL>.

²*Id.*

1 referred to in his public comments. There was an audit performed, dated November 17-
2 20, 2009. Based on the police investigation, it is reasonable to conclude the entire work
3 product of the lab may be compromised: “Gascón said that when interviewed as part of
4 the investigation, she had leveled charges of her own about the lack of control over drug
5 evidence. One official said Madden called the drug-testing process at the lab ‘sloppy.’”³

6 Until March 10, 2010, San Francisco prosecutors disavowed any knowledge of the
7 audit, the police investigation, and any other relevant impeachment material relating to
8 Criminalist Debbie Madden and the San Francisco Crime Lab. However, the San
9 Francisco Police Department’s Press Release, dated March 9, 2010, states police met with
10 prosecutors as early as February 23, 2010. (See Attached as Exhibit “B”.)

11 Despite these facts, the District Attorney discovered no evidence of an audit, problems
12 with the San Francisco Crime Laboratory, missing narcotics, or any other relevant
13 impeachment evidence to the defense.

14 The defense requests the court inquire further into the reasons for the prosecution’s
15 request for a continuance to be able to rule effectively on this motion.

16 On March 10, 2010, ADA Karen Hallet filed a motion to continue the trial.

17 Discussion

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19 **The motion to continue should be denied for lack of good cause because**
20 **a)the prosecution did not show due diligence; b) the evidence is**
cumulative; c) the remedy is a prosecutorial dismissal.

21 **A. The state has failed to exercise due diligence in preparing for trial.**

22 When requesting a continuance for additional preparation time, counsel must
23 demonstrate “due diligence and all reasonable efforts to prepare for trial.”⁴ “To be
24 entitled to a continuance on the ground of lack of preparation, 'It must be shown on the
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26 ³*Id.*

27 ⁴*People v. Grant* (1988) 45 Cal.3d 829, 844; see also *People v. Johnson* (1970) 5
28 Cal.App.3d 851, 859.

1 motion that counsel had used due diligence and all reasonable effort to prepare for trial”
2 (internal citations omitted).) Here, the state’s declaration as to the reasons for
3 continuance are inadequate.

4 For example, unavailability of a witness constitutes good cause for a continuance
5 where five criteria are met: (1) the party seeking the delay has exercised due diligence in
6 securing the witness’s attendance at trial; (2) the testimony of the witness is material; (3)
7 the testimony is not merely cumulative; (4) the attendance of the witness can be obtained
8 within a reasonable time; and (5) the facts about which the witness is expected to testify
9 cannot otherwise be proven.⁵

10 Here, the police department met with the District Attorney’s Office about the possible
11 mishandling of narcotic evidence as early as February 23, 2010. Counsel failed to
12 exercise “all reasonable efforts” to prepare for trial in a timely fashion. In the absence of
13 an adequate justification for the need for the drugs to be retested, such inaction cannot
14 constitute good cause.

15 Because the state failed to aver facts that justify a need for retesting of evidence and
16 failed to exercise due diligence in retesting the evidence before trial; therefore, no good
17 cause exists to justify the continuance.

18 **B. Good cause to continue a trial does not exist where the evidence would be**
19 **cumulative.**

20 It is not error to deny an application for continuance on the ground of absence of
21 witnesses, where it appears that the facts sought to be proved by them could be proved by
22 other witnesses. An affidavit for continuance on the ground of absence of witnesses must
23 show that there are no other persons by whom a party could prove the same facts.⁶

24 Here, Debbie Madden reviewed the testing of the narcotics in this case done by
25 Francis Woo. Though the state’s motion and declaration do not state the reason, one can

26 ⁵ *Owens*, supra, 28 Cal.3d at 250-251.; see also *Baustert*, supra, 129 Cal.App.4th at
27 1277.

28 ⁶*People v. Collins* (1925) 195 Cal. 325; *People v. Ah Fat* (1874) 48 Cal. 61.

1 infer that Madden's involvement in this case is, in part, the reason for the need for
2 retesting. However, the state's inadequate declaration fails to specify why Madden's
3 testimony would not be cumulative of Woo's. Alternatively, if the scope of the problem
4 is larger than Madden, and the entire work product of the crime lab is in question, then
5 the state's declaration fails to aver how a continuance to retest a contaminated sample will
6 fix their problem.

7 **C. The Proper Remedy – if the prosecution is not ready to go forward – is to dismiss**
8 **the matter and the state has the option of re-filing the same charges under Pen. Code**
9 **§ 1387.**

9 If there is no good cause to continue a trial, the prosecution has the option to dismiss
10 this matter and re-file the same charges within the three-year statute of limitations. Here,
11 the prosecution is not ready to commence the trial on the trial date. The state has a choice:
12 proceed to trial, dismiss the case and re-file the charges if and when they are ready to
13 proceed, or aver sufficient facts to justify a good cause continuance. Here, in the absence
14 of good cause, the state should dismiss the case and re-file if and when they are ready to
15 proceed.

16 **Conclusion**

17 Ramos is in custody. He should not be prejudiced by the District Attorney's failure to
18 prepare diligently for trial. A motion to continue requires the moving party to aver with
19 specificity the reasons for the request. Here the state's declaration lacks specificity and
20 fails to explain the need for retesting or who would retest it.

21 For the foregoing reasons, the defense respectfully requests that this Court deny the
22 prosecutor's motion to continue.

23 Dated: March ____, 2010

Respectfully Submitted,

Office of the Public Defender

26 _____
27 K. Kleigh Hathaway
28 Deputy Public Defender
Attorney for Defendant
Roberto Ramos

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DECLARATION

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I, K. Kleigh Hathaway, declare as follows:

1. I am an attorney licensed to practice law in all of the courts of the State of California and am a Deputy Public Defender employed by the San Francisco Office of the Public Defender.
2. I am the attorney of record for the defendant in the above-referenced matter and as such am informed of the evidence necessary for the trial of this matter.
3. Mr. Roberto Ramos is charged with two counts of possession for sale of narcotics.
4. Debbie Madden was the supervising criminalist at the SF Crime Lab and in her duty as such reviewed the results in this case and her signature appears on the drug analysis form. (Attached as Exhibit C)
4. On March 10, 2010 the District Attorney dismissed 12 cases due to the fact that the SF Crime Lab was closed and the narcotics could not be tested.
5. I am informed and believe that the reason for this closure is the criminal investigation of Debbie Madden who worked as the supervising criminalist. She had worked for 29 years at the San Francisco Crime Lab and retired abruptly December 8, 2009.
6. I am informed and believe that Ms. Madden was convicted of a crime of moral turpitude in 2008, while she was still employed at the SF Crime Lab.
7. I am informed and believe that the District Attorney’s Office knew on or before February 23, 2010 that Ms. Madden was being investigated for mishandling of the evidence. (Exhibit B - Press release from Chief Gascon)
8. I am informed and believe that most of the cases that were mishandled involve cocaine salt since a “skimming” was conducted during the handling of the narcotics.
9. I am informed and believe that investigators noted cocaine missing and evidence that was tampered with as early as December 2009. (Exhibit A - San Francisco Chronicle article quoting Chief Gascon)

I declare under penalty of perjury that the foregoing is true and correct, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

Executed on March____, 2010, at San Francisco, California.

K. Kleigh Hathaway

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Proof of Service

I, the undersigned, say:

I am over eighteen years of age and not a party to the above action.

My business address is 555 Seventh Street, San Francisco, California
94103.

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

Office of the District Attorney
Attn:
City and County of San Francisco
850 Bryant Street, Room 300
San Francisco, California 94103

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

Executed on _____, 2010 at San Francisco, California.

