

1 JON E. HOPKINS (State Bar No. 52478)
 District Attorney
 2 JOHN LANGAN (State Bar No. 201241)
 Deputy District Attorney
 3 Lake County District Attorney's Office
 255 N. Forbes St.
 4 Lakeport, California 95453

FILED
 SUPERIOR COURT
 COUNTY OF LAKE

MAY 13 2009

By May E. Smith, Clerk
MELANIE HANSON
 Deputy Clerk

5 Attorneys For: The People

6
 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 IN AND FOR THE COUNTY OF LAKE

9
 10 PEOPLE OF THE STATE OF CALIFORNIA)
)
 11)
) Plaintiff,)
 12 vs.)
)
 13)
) BISMARCK FLORES DINIUS)
)
 14)
) Defendant.)
 15)
 16)

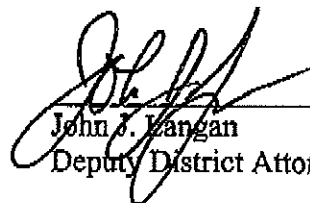
Case No.: CR 912639
 NOTICE OF MOTION AND
 MOTION TO CONTINUE
 JURY TRIAL; POINTS AND
 AUTHORITIES; DECLARATION
 OF DDA JOHN J. LANGAN
 Date: May 19, 2008
 Time: 9:00 a.m.
 Place: Department A

17 TO DEFENDANT, HIS ATTORNEY OF RECORD VICTOR S. HALTOM, AND TO
 18 THE CLERK OF THE SUPERIOR COURT:

19 PLEASE TAKE NOTICE that on May 19, 2009, at 9:00 a.m., or as soon thereafter as this
 20 matter can be heard in the above-entitled court, the People will move to have the above-entitled
 21 matter continued. The motion is based on this Notice of Motion, the Points and Authorities
 22 attached hereto, the pleadings, records, and files in this action, and any oral and documentary
 23 evidence that may be presented at the hearing of the motion.

24 Dated: May 13, 2009

Respectfully Submitted,

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 26 
 27 John J. Langan
 Deputy District Attorney
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 2 District Attorney
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF LAKE

10	PEOPLE OF THE STATE OF CALIFORNIA)	Case No.: CR 912639
11)	
12	Plaintiff,)	DECLARATION OF DDA
13	vs.)	JOHN J. LANGAN
14	BISMARCK FLORES DINIUS)	
15)	
16	Defendant.)	

17
18 DECLARATION OF JOHN J. LANGAN

19 I, John J. Langan, declare as follows:

20 I am a Deputy District Attorney for the County of Lake.

21 I am informed and believe that Defendant is not in custody. I am informed and
 22 believe that Defendant withdrew his general time waiver in the above-entitled action on
 23 May 8, 2009, and that the trial in this matter must commence on or before July 7, 2009.

24 I am informed and believe that Russell Perdock is a necessary and material
 25 witness in the above-entitled action, in that it is undisputed by all parties that Mr.
 26 Perdock was operating his powerboat at the time that the powerboat collided with the
 27 sailboat on April 29, 2006; this collision resulted in the death of Lynn Thornton, a
 28 passenger seated in the stern area of the sailboat at the time of the collision.

1 On or about April 27, 2009, I became informed and believe that certain
2 individuals were contacted by investigators from the Lake County District Attorney's
3 Office [DA's office], and that these individuals have provided information to the DA's
4 office regarding the activities of Mr. Perdock in the hours prior to the April 29, 2006
5 collision that appears to be in conflict with the information previously provided to the
6 DA's office by other witnesses in this regard.

7 I am informed and believe that former Sergeant James Beland is a necessary and
8 material witness in this action, in that Mr. Beland was on duty as a Lake County Sheriff
9 Sergeant on April 29, 2006, and responded to the scene of the collision and had contact
10 with Russell Perdock. I am informed and believe that former Sgt. Beland ultimately
11 transported Mr. Perdock to then Adventist Health Redbud Community Hospital in
12 Clearlake, California, in part to obtain a sample of Mr. Perdock's blood for toxicological
13 analysis.

14 I am further informed and believe that on or about May 18, 2008, former Sgt.
15 Beland provided the DA's office with information regarding Mr. Beland's desire to have
16 had a Preliminary Alcohol Screen [PAS] test administered to Mr. Perdock on April 29,
17 2006 at the scene of the collision, and Mr. Beland's contention that he was "ordered" not
18 to administer the PAS test by the LCSO.

19 I am informed and believe that subsequent to Mr. Beland's May 18, 2008
20 disclosure to the DA's office, and subsequent to Mr. Beland's testimony in the
21 preliminary hearing in this matter on or about May 22, 2008, the LSCO apparently
22 conducted an internal affairs investigation of then Sgt. Beland, that focused in part on
23 Mr. Beland's statements to the DA's office regarding his desire to administer this PAS
24 test, and on Mr. Beland's testimony at the preliminary hearing. I am further informed
25 and believe that after this IA investigation concluded, Mr. Beland's employment with the
26 LCSO was terminated.

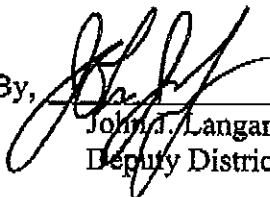
27 On or about April 27, 2009, I became informed and believe that another former
28 Sergeant with the LCSO who was present and on duty at the scene on April 29, 2006 was
contacted by investigators from the Lake County District Attorney's Office, and that this

1 individual has provided information to the DA's office apparently indicating that former
 2 Sgt. Beland may have indeed been "ordered" not to administer a PAS test to Mr.
 3 Perdock. Based in part on the foregoing, and on the prosecution's obligations as outlined
 4 in *Brady v. Maryland* (1963) 373 U.S. 83, *United States v. Cadet* (9th Cir. 1984) 727 F.2d
 5 1453, and *Alford v. Superior Court* (2003) 29 Cal.4th 1, the People have filed a motion to
 6 examine former Sgt. Beland's LCSO personnel records pursuant to *Pitchess v. Superior*
 7 *Court* (1974) 11 Cal.3d 531. I am further informed and believe that the People's *Pitchess*
 8 request will not be addressed by the Court until May 19, 2009, the presently scheduled
 9 trial date in this action.

10 I am informed and believe that the District Attorney Investigator presently
 11 assigned to this case, Mr. John Flynn, cannot complete the necessary follow-up
 12 investigation that has now arisen in this matter by the trial date of May 19, 2009,

13 The People of the State of California respectfully request a continuance of the
 14 jury trial in this matter, to a date convenient to all parties in this case.

15 Executed at Lakeport, California on the 13th day of May, 2009.

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 17
 18 By, 
 19 John J. Langan
 20 Deputy District Attorney
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 2 District Attorney
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6 Attorneys For: The People

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF LAKE

10 PEOPLE OF THE STATE OF CALIFORNIA)

Case No.: CR 912639

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MEMORANDUM OF
POINTS AND AUTHORITIES

vs.

BISMARCK FLORES DINIUS

Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE PEOPLE ARE ENTITLED TO A CONTINUANCE OF THE JURY TRIAL
UPON A SHOWING OF GOOD CAUSE.

Applicable California statutes permit continuance of preliminary hearing
or trial at the request of either the defense or the prosecution upon a showing of
"good cause." (Pen. Code, §§ 859b, 1050(e).) "What constitutes good cause for
the delay of a criminal trial is a matter that lies within the discretion of the trial
court." (*People v. Johnson* (1980) 26 Cal.3d 557, 570; see also, *People v.*
Strozier (1993) 20 Cal.App.4th 55, 60.) A trial court's ruling on a motion for a

1 continuance is ordinarily reviewed for an abuse of discretion. (*People v. Jenkins*
2 (2000) 22 Cal.4th 900, 1037.)

3 In *Owens v. Superior Court* (1980) 28 Cal.3d 238, the California Supreme
4 Court set forth the legal criteria of good cause when a continuance is sought to
5 secure the attendance of a witness: “(1) That the movant has exercised due
6 diligence in an attempt to secure the attendance of the witness at the trial by legal
7 means; (2) that the expected testimony is material; (3) that it is not merely
8 cumulative; (4) that it can be obtained within a reasonable time; and (5) that the
9 facts to which the witness will testify cannot otherwise be proven.” (*Id.* at p.
10 251; see also, *People v. Howard* (1992) 1 Cal.4th 1132, 1171.)

11 Good cause for a continuance has been found to exist when a prosecution
12 witness was unavailable through no lack of prosecutorial diligence. (*Gaines v.*
13 *Municipal Court* (1980) 101 Cal.App.3d 556, 558-562; *Pickett v. Municipal*
14 *Court* (1970) 12 Cal.App.3d 1158, 1162-1163.) And in *People v. Bronaugh*
15 (1950) 100 Cal.App.2d 220, the court found good cause for a continuance where
16 prosecution witnesses were hospitalized and unable to appear for trial. (See also,
17 *People v. Bracamonte* (1967) 253 Cal.App.2d 980, 984.)

18 A properly served subpoena may, by itself, show sufficient due diligence.
19 In *Gaines v. Municipal Court, supra*, 101 Cal.App.3d 556, for example, the
20 prosecution requested a continuance beyond the statutory time for trial until a
21 subpoenaed police officer who was a material witness returned from vacation.
22 The trial court found good cause for a continuance. The Court of Appeal rejected
23 defense arguments that the prosecution should have made additional efforts to
24 contact the police officer. The subpoena alone showed the exercise of due
25 diligence. (Similarly, see *People v. Alvarez* (1989) 208 Cal.App.3d 567, 578.)

26 II. THE PROSECUTION HAS A DUTY TO INVESTIGATE AND A
27 DUTY TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE.

28 A prosecutor has a “public duty to prepare a complete prosecution.”

1 *Pachaly v. City of Lynchburg* (4th Cir. 1990) 897 F.2d 723, 728. That duty and
 2 authority is so vital to the public order that it will not be subjected to prior
 3 restraint by a court "except under extraordinary circumstances." *Manchel v.*
 4 *County of Los Angeles* (1966) 245 Cal.App.2d 501, 505-510.

5 Pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, the prosecutor must
 6 disclose material exculpatory evidence whether the defendant makes a specific
 7 request, a general request, or no request at all. *United States v. Agurs* (1976) 427
 8 U.S. 97, 107. Evidence is exculpatory if it might be helpful to the defense by way
 9 of establishing a defense or attacking the prosecution's case, including the
 10 impeachment of prosecution witnesses. Evidence is "material" if there is a
 11 "reasonable probability" that had the matter been known to the defense, a
 12 different result or verdict might have been obtained in the trial. *Kyles v. Whitley*
 13 (1995) 514 U.S. 419, 434; *In re Sassounian* (1995) 9 Cal.4th 535. A "'reasonable
 14 probability' of a different result...is shown when the Government's evidentiary
 15 suppression 'undermines confidence in the outcome of the trial.'" *Kyles v.*
 16 *Whitley, supra*, 514 U.S. at ____.

17 III. CONTRARY TO DEFENDANT'S ASSERTIONS, "USEFULNESS" TO
 18 THE PROSECUTION IS NOT GAUGED BY INCREASING THE
 19 LIKELIHOOD OF A CONVICTION.

20 The aim of the prosecutor is not to "win" the case, but to see that justice is
 21 done: "The [prosecutor] is the representative not of an ordinary party to a
 22 controversy, but of a sovereignty whose obligation to govern impartially is as
 23 compelling as its obligation to govern at all; and whose interest, therefore in a
 24 criminal prosecution is not that it shall win a case, but that justice shall be done.
 25 As such he [or she] is in a peculiar and very definite sense the servant of the law,
 26 the twofold aim of which is that guilt shall not escape or innocence suffer. He [or
 27 she] may prosecute with eagerness and vigor—indeed, [the prosecutor] should do
 28 so. But, while [the prosecutor] may strike hard blows, he [or she] is not at liberty

1 to strike foul ones. It is as much [the prosecutor's] duty to refrain from improper
2 methods calculated to produce a wrongful conviction as it is to use every
3 legitimate means to bring about a just one." *Berger v. United States* (1935) 295
4 U.S. 78, 88.

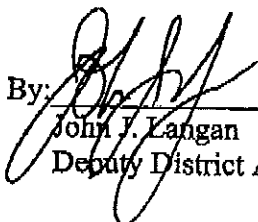
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6 IV. CONCLUSION

7 Based on the foregoing statutory authorities, case law, and the Declaration
8 of DDA John J. Langan, the People respectfully request that the Court grant the
9 People's Motion to Continuance the Jury Trial in this matter.

10 Dated: May 13, 2009

Respectfully submitted,

11
12 JON E. HOPKINS
13 District Attorney

14
15 By: 
16 John J. Langan
17 Deputy District Attorney

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Lake. I am over the age of 18 years and not a party to the within action. My business address is 255 North Forbes Street, Lakeport, California 95453.

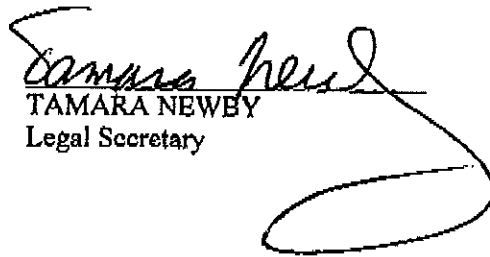
On the 13th day of May, 2009 I served the within NOTICE OF MOTION AND MOTION TO CONTINUE JURY TRIAL; POINTS AND AUTHORITIES on the parties in the said action by serving a true copy thereof on the parties/counsel, addressed as follows:

VICTOR S. HALTOM
ATTORNEY AT LAW

The following is the procedure in which service of this document was effected:

- Courthouse Box
- U.S. Postal Service, by placing such envelope(s) with postage thereon, fully prepaid, in the designated area for outgoing mail in accordance with the office's practice, whereby the mail is deposited in a U.S. Mailbox in the City of Lakeport, California.
- Federal Express
- Express Mail
- Facsimile Transmission (No (916) 444-1546.)
- Personal Service

I declare under penalty of perjury, under laws of the State of California, that the foregoing is true and correct and that this document was executed at Lakeport, California on the 13th day of May, 2009


TAMARA NEWBY
Legal Secretary

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