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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN DIEGO
12 CENTRAL DIVISION

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15 PEOPLE OF THE STATE OF CALIFORNIA,
16 PLAINTIFF,
17 VS.
18 ELLIOT NERIA,
19 DEFENDANT.

Case No.: CD254562

DECLARATION OF ATTORNEY ANTON
VIALTSIN IN SUPPORT OF EX PARTE
MOTION FOR ANCILLARY FEES (FILED
UNDER SEAL)

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21 I, Anton Vialtsin, declare:

- 22 1. That I am currently an attorney licensed to practice law in the State of California. I am
23 the attorney of record for Elliot Neria in San Diego County Superior Court Case
24 Number CD 254562 which is now pending in the Central Division of the San Diego
25 Superior Court.
26 2. Prior to the incident giving rise to this case, Defendant had a clean criminal record.
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3. On March 4, 2014, San Diego police received several 911 calls of a physical fight. By the time the officers arrived at the scene, the parties involved in a fight fled. Police interviewed several by standers and began searching for the parties. Police officers located the victims roughly a mile from the scene. The two victims, Jose Flores and Edward De La Rosa, gave conflicting accounts of the number of assailants. Further, the victims gave very broad and vague descriptions of the suspects. Independent witnesses interviewed by police also gave conflicting accounts of the number of individuals involved and likewise could not provide detailed descriptions of the assailants.

4. The following chart summarizes the descriptions provided by the victims.

	Jose Flores (Discovery at 17)	Edward De La Rosa (Discovery at 21)	Officer Hopper Crime/Incident Report (Discovery at 10.)
Suspect 1	“Chubbs”	Heavysset, wearing a short sleeve black collar shirt (“gangster style shirt”) and jeans	Hispanic Male. Age: 18-25 Height: 5’9”-5’10” Weight: 300-330 Build: Fat Hair: Black, Short, Thick, Straight Facial Hair: Mustache Clothing: Dark Blue Shirt
Suspect 2	Chubbs’s Brother (Daniel Robles): Hispanic male, approximately 5’8” tall, normal build, 18-20 years old, with short black hair, with a mustache and hair on his chin, and marijuana leaf tattoo on his upper arm. (Discovery at 17) * Officer Hopper had previously met Daniel Robles. Discovery at 244.	Light skin, gray hat, black shirt, blue jeans, and blue chucks;	Hispanic Male. Age: 18-25 Height: 5’8”-5’9” Weight: __ Build: Normal Hair: Black, short, thick Hair Style: Unknown Facial Hair: Unknown Complexion: Medium Additional Info: Marijuana Leaf Tattoo on Right Upper Arm Clothing: White t-shirt, blue jeans
Suspect 3		Light skin, white shirt, black and blue jeans, black shoes;	Hispanic Male. Age: 18-25 Height: 5’8”-5’9” Weight: Build: Normal Hair: Black, short, thick Hair Style: Unknown Facial Hair: Mustache Complexion: Medium Additional Info: swollen left eye Clothing: black t-shirt
Suspect 4		Medium skin, bald, blue and gray striped shirt, jeans, and unknown shoes; and	Hispanic Male. Age: 18-20 Height: 5’6”-5’7” Build: Normal Hair: Black, short, thick Hair Style: UNKNOWN Facial Hair: UNKNOWN Complexion: Medium Additional Info: Thick Eyebrows Clothing: blue t-shirt
Suspect 5		Unknown clothing, no further details.	Hispanic Male. Age: 18-20 Weight: __ Height: 5’8”-5’9” Hair Color: __ Hair: UNKNOWN Hair Style: Unknown Complexion: Unknown

5. The following day, the officers, purportedly relying on a description given by one of the victims, detained Elliot Neria. When Hopper commanded Neria to stop, Neria was pushing a stroller with a child and walking with two young female relatives down the alley of 3500 Madison Ave. Police detained Neria in the middle of the day in a residential neighborhood. Having his younger siblings with him, Neria remained

1 very cooperative. Even though Neria did not appear to pose an immediate danger to
2 the officers or the general public, the officers told Neria to sit in the back seat of a
3 police vehicle without handcuffs or on the front bumper of the vehicle with handcuffs
4 on. Neria sat in the back seat of the police vehicle.

5 6. The officer explained to Neria that he was stopped because he matched a description
6 of a male involved in an incident the police were investigating. While Neria was
7 seated in the vehicle, the police began a two to three hour investigation into the
8 assault. The officers took pictures of Elliot Neria and called additional detectives to
9 the scene. While waiting for back up to arrive, the officers took photos of Neria, his
10 shoes, and injuries to his hand. Police also took DNA samples of the stains located
11 on Neria's shoes. Detective Timothy Smith arrived at the scene and chose to use
12 Neria's photo to arrange a sequential photo lineup to show one of the victims, Jose
13 Flores. Detective Smith then had to locate Flores, drive to meet with him, and
14 conduct a photo lineup. Flores identified Neria. In the meantime, Neria remained
15 seated in the patrol vehicle being observed by other officers. After several hours of
16 detention, Neria was advised that he was under arrest, placed in handcuffs, and
17 transported to the police substation.

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19 7. Kristin Beyers of the San Diego Police Department, Forensic Biology Unit, tested the
20 collected DNA samples from the shoes and two other reference samples. The blood
21 stain on the outside of the shoe did not match the suspects, the victims, or the
22 reference points.¹ However, another stain matched at least three people including
23 Elliot Neria, who was deemed just a minor contributor. Beyers usually worked on
24 five to ten cases at one time, and each case could have a large number of samples.
25 While working on the batch containing the samples from this case, she noticed that
26 the DNA instrument malfunctioned. The beads in one of the tubes clumped up and
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28 ¹ Preliminary Hearing Transcript at 59.

1 the pipette tip clogged.² Beyers claimed that this malfunction did not influence the
2 testing in this case even though it happened in the same batch of defective samples.

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4 8. Elliot Neria is facing a gang enhancement under PC 186.22(b)(1) for each of the
5 charged crimes even though he does not have a criminal history. At the preliminary
6 hearing a San Diego Police Detective Timothy Smith gave an extensive account as to
7 how a gang membership is defined. He focused solely on the SDPD's internal policy
8 on identifying gang members. The detective used a number of factors to classify
9 Neria as a gang member:

- 10 a. He had only one arrest,
11 b. He was twice seen with known and documented gang members. He was
12 walking with a friend, Chile, at the time of the detention in this case,
13 c. Displaying Sign and Symbols, and
14 d. Neria frequented a well-known gang area.

15 9. Detective Smith used this pending case as his basis that Neria committed a crime with
16 other gang members. He also claimed that the assailants were yelling "MD" and
17 "MDLS" at the time of the assault, yet he later stated that none of the reports
18 mentioned this fact.³ Additionally, he believed that the carport where the incident
19 occurred is known as MDLS gang spot. The detective disregarded the possibility that
20 a person may simply live in a "gang area."

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22 10. Based upon all of this information, I am of the belief that substantial investigative work
23 (here retained counsel lists the ancillary services that are required) will be necessary to
24 fully investigate and/or evaluate the facts surrounding this incident because:

- 25 a. A **private investigator** is necessary in this case because there are a number of
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27 ² Id. at 68.

28 ³ Id. at 91.

1 witnesses to the crime and detention that followed. The witnesses and victims
2 gave conflicting accounts as to the number of assailants and their descriptions.
3 The witnesses and victims need to be located and interviewed. Police did not
4 interview a single witness to the detention including any of the family
5 members that stood next to Elliot Neria.

6 b. This incident involves three scenes, namely the crime scene, the area where
7 the victims were found, and the area where Neria was detained. An
8 investigator is needed to testify as to the proximities of these areas to each
9 other.

10 c. Based on counsel's review of discovery, the State's evidence in this case
11 appears to consist largely on the DNA results derived from the stains found on
12 Elliot Neria's shoes. Here, the **DNA expert** is necessary to interpret the
13 results of the DNA reports and underlying data. Further, this expert is
14 required to educate counsel for further investigation and cross-examination of
15 the State's expert witnesses. The lab results from the State's expert witness
16 are technical and not comprehensible to a layperson. At the preliminary
17 hearing, the State's expert testified that there was other DNA present in the
18 stains and that Neria was just a minor contributor. Neria intends to subpoena
19 the raw data which will be even more technical. The expert's interpretation of
20 the raw data may well form the basis of Defendant's trial strategy.

21 d. The state's expert also stated that she usually worked on five to ten cases at
22 one time, and each case could have a large number of samples. While
23 working on the batch containing the samples from this case, she noticed that
24 the DNA instrument malfunctioned. The beads in one of the tubes clumped
25 up and the pipette tip clogged.⁴ Beyers claimed that this malfunction did not
26 influence the testing in this case even though it happened in the same batch of
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28 ⁴ Id. at 68.

1 samples. Without guidance from an independent DNA expert, the defense
2 counsel would not be able to determine whether testing procedures were not
3 followed. Further, only an expert could tell whether the malfunction
4 influenced the test results in this case.

5 e. Counsel further represents that the DNA reports are unintelligible to him, and
6 that even with research, he would be unable to make meaningful sense of
7 them, without the assistance of a forensic DNA expert. Given the central
8 importance of the DNA evidence to the state's case and hence the defendant's
9 defense, the denial of an expert's assistance may well result in a
10 fundamentally unfair trial.

11 f. Defendant would further need an **Eyewitness Identification expert** to testify
12 at trial. Based on counsel's review of discovery, the State's evidence in this
13 case appears to consist of the descriptions of the assailants by the victims and
14 other independent eyewitnesses. Police officers, relying on these
15 identifications, detained Neria as a suspect in the alleged assault. The suspect
16 chart listed on paragraph 4 summarizes the description provided by the
17 victims. There are number of discrepancies between the accounts provided by
18 the victims and Officer Hopper's report. Detective Timothy Smith also
19 conducted a photo lineup with one of the victims a full day after the alleged
20 crime took place. "The vagaries of eyewitness identification are well-known;
21 the annals of criminal law are rife with instances of mistaken identification."
22 United States v. Wade, 388 U.S. 218, 228 (1967).

23 g. The problems of mistaken identification continue unabated to the present day.
24 Due to advances in DNA evidence, we know that mistaken identification
25 evidence is the single largest cause of wrongful convictions. See Wells, et. al,
26 Eyewitness Identification Procedures: Recommendations for Lineups and
27 Photospreads, Law and Human Behavior, Vol. 22, No. 6 (1998).

28 h. Eyewitness identifications play a pivotal role in the criminal justice system

1 and in this case, yet they have an alarmingly high rate of error. Because of a
2 large number of mistaken eyewitness identifications, there is an emerging
3 national trend toward the admission of eyewitness identification expert
4 testimony. United States v. Smithers, 212 F.3d 306, 311 (6th Cir. 2000).

5 i. “Expert testimony that can explain to a jury the problems inherent in
6 eyewitness identification is extremely relevant. Given the unreliability
7 and pervasive influence of eyewitness testimony, expert testimony is
8 not only more probative than prejudicial, it prevents the eyewitness
9 testimony from having an overly prejudicial effect. Courts and
10 scholars have long recognized the untrustworthiness of eyewitness
11 testimony.” United States v. Langford, 802 F.2d 1176, 1182 (9th Cir.
12 1986)

13 ii. “In a case in which the sole testimony is casual eyewitness
14 identification, expert testimony regarding the accuracy of that
15 identification is admissible and properly may be encouraged ... ”
16 United States v. Moore, 786 F.2d 1308, 1313 (5th Cir.1986)

17 iii. “[E]xpert testimony on eyewitness perception and memory [should] be
18 admitted at least in some circumstances.” United States v. Downing,
19 753 F.2d 1224, 1232 (3d Cir.1985)

20 iv. “The day may have arrived, therefore, when Dr. Fulero's testimony can
21 be said to conform to a generally accepted explanatory theory.”
22 United States v. Smith, 736 F.2d 1103, 1107 (6th Cir.1984). State v.
23 Buell, 22 Ohio St.3d 124, 489 N.E.2d 795 (1986) overruled per se rule
24 and held expert testimony admissible to inform jury about factors
25 generally affecting memory process.

26 v. Several courts have held that it is an abuse of discretion to exclude
27 such expert testimony. See, e.g., United States v. Stevens, 935 F.2d
28 1380, 1400–01 (3d Cir.1991) (reversing and remanding for new trial);

1 Smith, 736 F.2d at 1107 (holding error harmless in light of other
2 inculpatory evidence); Downing, 753 F.2d at 1232 (holding error
3 harmless in light of other inculpatory evidence); State v. Chapple, 135
4 Ariz. 281, 660 P.2d 1208 (1983) (reversing and remanding for new
5 trial). United States v. Smithers, 212 F.3d 306, 311 (6th Cir. 2000).

- 6 i. As noted, **Eyewitness Identification expert** will provide admissible evidence
7 that will assist the defense counsel in providing an effective assistance to
8 Elliot Neria.
- 9 j. There are a number of identification issues present in this case. The victims
10 and independent eyewitnesses gave conflicting accounts as to the number of
11 assailants. The descriptions provided by the victims were very broad,
12 matching almost any young Hispanic male in the area. The arresting officers
13 detained Neria based on a description of Chubbs's brother – a suspect whom
14 police already knew from previous contacts. Officer Robert Hopper wrote a
15 suspect report, which does not accurately match the descriptions provided to
16 him by the victims and other witnesses. During Neria's detention a full day
17 after the incident, one of the detectives conducted a photo lineup with a
18 victim, Jose Flores. Given the central importance of the eyewitness
19 identification to Neria's detention and subsequent photo identification, the
20 denial of an expert's assistance may well result in a fundamentally unfair trial.
- 21 k. The counsel request funding for a **gang expert**. Based on counsel's review of
22 discovery, the State's evidence in this case relies on Detective Timothy
23 Smith's testimony in proving the gang allegation. The State expert received
24 his gang related training from San Diego Police Department, and he may not
25 be aware of other nationally recognized policies and procedures. These other
26 policies will assist the trier of fact in determining whether the gang
27 enhancement is appropriate in this case. Counsel further represents that he is
28 not familiar with gang related policies around the country, and that even with

1 research; he would be unable to convey to the trier of fact all the nuances of
2 the reasonable procedures.

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- 4 11. That at present, the defendant's family has retained my services under the belief that
5 they would be able to pay for those legal services per the attached fee agreement. My
6 services are paid by Elliot Neria's grandmother, Maria Garcia, at \$200 a week.
7 Unfortunately, she cannot always meet her contractual obligations each week due to
8 financial hardships. In any event, she indicates she will have no additional resources to
9 address the immediate payment of all of the costs of anticipated ancillary services
10 addressed herein. Despite these funding limitations I am representing to the court that I
11 intend to continue to serve as defense counsel through the conclusion of trial in this case.
- 12 12. That without obtaining the reasonable and necessary ancillary services outlined above, I
13 will be unable to effectively represent the client as guaranteed under the Sixth
14 Amendment to the Constitution of the United States.
- 15 13. That in order to safeguard the Defendant's rights to Due Process under the present
16 financial limitations of his personal situation, I am, therefore, constrained to request
17 government funding assistance for necessary ancillary services as noted above.
- 18 14. That due to the sensitive and confidential nature of the personal financial and attorney-
19 client privileged information contained within this motion and the documents attached
20 herewith, I am requesting that these documents be sealed in their entirety.

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22 I declare under penalty of perjury, under the laws of the State of California, that the
23 foregoing is true and correct.

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25 Executed on this November 4, 2014, at San Diego, California.

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Anton Vialtsin, Esq.

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