SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

CENTRAL JUSTICE CENTER

In re the Matter of Henry Rodriguez,

Petitioner,

On Habeas Corpus

Case No. M15746

RULING

STATEMENT OF THE CASE

In 2000 Petitioner was convicted of one count of first degree murder, one count of second degree murder and one count of conspiracy to commit murder under an aiding and abetting theory of liability. The actual killer was separately tried and also convicted. In 2003, the Court of Appeal reversed Petitioner's conviction and returned the matter to the Superior Court for retrial. In 2006, that retrial again resulted in Petitioner's conviction. He is currently serving a sentence of forty years to life as a result of his second trial conviction.

In 2014, Petitioner filed the pending Petition for Writ of Habeas Corpus. In this Writ Petitioner alleges a number of violations of his constitutional rights related to his second trial.

This court has now conducted an evidentiary hearing related to the various issues raised by Petitioner's Writ of Habeas Corpus.

DISPOSITIVE ISSUES

1) WAS PETITIONER DEPRIVED OF DISCOVERY RELEVANT TO THE MASSIAH ISSUE RAISED BY HIS COUNSEL PRIOR TO HIS SECOND TRIAL?
2) IF SO, WAS THIS DISCOVERY "MATERIAL," AND DID PETITIONER SUFFER PREJUDE AS A RESULT OF ANY DEPRIVATION?
3) IF SO, DOES THE DISCOVERY DEPRIVATION REQUIRE THIS COURT TO VACATE PETITIONER'S CONVICTIONS AND ORDER A NEW TRIAL?

DISCUSSION

In advance of his second trial in 2006, Petitioner's counsel put the court and the prosecutor on notice that he intended to litigate the admissibility of certain statements allegedly made by Petitioner to another inmate in 1999 while both men were incarcerated in the Orange County Jail. Counsel contended that these statements, if made at all, were taken in violation of Massiah v. United States (1964) 377 U.S.

201. In an effort to discharge the investigative obligations imposed on him by In re Neely (1993) 6 Cal. 4th 901, counsel thereafter served five subpoena duces tecums on the Orange County Sheriff, requesting a broad variety of specific jail records related to the inmate, Michael Garrity, who had allegedly heard Petitioner's incriminating statements. On behalf of the Orange County Sheriff, the Orange County Counsel's office moved to quash each of these warrants.

The motions to quash were considered by the Honorable Frank Fasel on March 25, 2005 in open court. The matter was argued by a deputy county counsel and Petitioner's counsel. The transcript of that hearing, reviewed in its entirety by this court, suggests that a deputy district attorney was present for at least a portion of the argument in open court. During that proceeding in open court, Petitioner's counsel explained his reason for serving the subpoenas and requesting the specified information.

> "I believe we are entitled to the jail records pertaining to Michael Garrity and his assistance that he was giving to the sheriff's because, as the court knows, if we ever get to the point of in limine motions we are going to be dealing with a Massiah claim and whether or not Mr. Rodriguez had a right to counsel and whether or not questioning would have been violative of Miranda because Mr. Garrity was, essentially, a planted snitch...and we believe we should be entitled to all that information to show Mr. Garrity had a pattern or custom of doing this to other inmates and that the authorities knew or should have known of his customs and behavior and acting in such a manner as a snitch, as basically a hired gun." (Reporter's Transcript, 3/25/05 hearing, pages 10 and 11).

For a number of reasons, the deputy county counsel appearing on behalf of the Sheriff resisted the requested discovery. During her argument, counsel made certain representations to the court and defense counsel concerning the existence of some of the requested records. Several of these appear to have been inaccurate. For example, the deputy county counsel, in addressing the first subpoena, said this:

> "Essentially, they are looking for classification records that the jail has on Mr. Garrity, and we are objecting to production of this subpoena...There are no records. It is moot." (Reporter's Transcript, 3/25/05 hearing, page 6)

The evidence now shows that the Orange County Sheriff's Department did in fact have in its possession relevant jail classification records regarding Mr. Garrity on March 25, 2005.

Despite the fact that Judge Fasel and defense counsel accepted and relied upon the inaccurate representations of the Sheriff's lawyer, the judge nonetheless determined that he should conduct a limited in camera examination of certain documents brought to court by the Sheriff's custodian of records, Deputy James Fouste. That review took place as soon as the court adjourned its public session that morning. In chambers were Judge Fasel, the deputy county counsel representing the Sheriff, and Deputy Fouste. The documents contained in Exhibit 1 attached to Stipulation One agreed to by counsel during the recent evidentiary hearing were presented to Judge Fasel for his review. Some of these materials (despite the representations made moments earlier by the Sheriff's counsel i.e., "...there are no records") were described by Deputy Fouste as " the classification TREAD which are the notes reference him and all of his movement for every in-custody he has ever had since 1992..." (Reporter's Transcript, 3/25/05 in camera hearing, page 23) Judge Fasel's reaction to seeing these records was immediate and unequivocal:

"Okay. I think this is all discoverable...Some of this information is relevant if he is working as a confidential informant on other cases which is the whole thrust of the subpoena duces tecum." (Reporter's Transcript, 3/25/05 in camera hearing, page 24)

"...Basically, what they are looking for is what deals may have been cut by law enforcement with Mr. Garrity to testify in other cases and, for a limited purpose, that is discoverable. Like the court indicated to counsel out there, it is discoverable if he is working as a C.I. and has a quote unquote—I know this is overbroad—snitch jacket." (Reporter's Transcript, 3/25/05 in camera hearing, page 26)

Despite the judge's pointed comments, these records were never provided to defense counsel until March of 2015, as part of the discovery produced by the People in connection with the current Writ litigation. This court cannot find that this was an intentional omission by the deputy county counsel involved since Judge Fasel's final discovery order is arguably somewhat ambiguous. Nevertheless, the only discovery actually provided to Petitioner as a result of this in camera process was a short declaration of Deputy Fouste which was introduced at the recent hearing as Exhibit 2 attached to Stipulation #1. That declaration included no information concerning Mr. Garrity's prior activity as an informant on behalf of law enforcement.

The records reviewed by Judge Fasel (Stipulation #1, Exhibit One) in camera, the so-called "TREAD" records from the county jail, included the following specific information about Michael Garrity's past involvement as an informant for various law enforcement agencies:

A jail classification record dated 9/22/99 indicated Garrity had attempted to escape from the Theo Lacy facility in 1996 and he had a "rat jacket."

A TREAD entry dated 2/15/99 indicated Garrity "stated he is an informant for Riverside SO."

A TREAD entry dated 4/1/99 indicated Garrity "rolled himself out of mod N due to being found out he was a CI."

Another TREAD entry dated 4/1/99 indicated Garrity stated "his name may come out in discovery. Call will be made to APD to verify (his) story."

Another TREAD entry dated 4/1/99 indicated that Garrity "stated he has provided info on the 187 case of inmate Huizar, Juan."

Another TREAD entry dated 4/1/99 indicated Garrity "gave info to deputy in E-26 regarding another inmate having meth in E-26."

A TREAD entry dated 3/11/99 said "per investigator Vence of narc. (Garrity) gave info. to Inv. Vence about drugs coming into the jail."

None of this specific information was provided to defense counsel, despite Judge Fasel's observations concerning its discoverability, prior to the resolution of Petitioner's Massiah-related motion to exclude his alleged statement to Mr. Garrity that preceded Petitioner's second trial. That litigation culminated on January 5, 2006. The trial prosecutor, in support of his position that the Petitioner's motion to exclude the statements should be denied, made this argument at that time:

> "...there is no suggestion that Mr. Garrity, based on the record, has tried to get anything back in exchange for what he has done on any of these cases...We don't have somebody who ever was, as far as the record indicates, used as a plant in any of these cases. We have somebody who has heard bad stuff in jail and decided to relate it." (Reporter's Transcript, 1/5/06 hearing, page 113.) (Emphasis added.)

The record to which the prosecutor referred was essentially devoid of the information contained in the above-referenced TREAD entries. He was therefore able to suggest to Judge Fasel that, despite his criminal history, Mr. Garrity had come forward with this incriminating information because, as a human being, he found it offensive and he therefore felt morally compelled to share it with law enforcement. After listening to the prosecutor's argument, Judge Fasel denied Petitioner's motion to exclude at trial the statement allegedly heard by Mr. Garrity. As a result, the same prosecutor was able to later argue to the jury that Mr. Garrity came forward only because he "...thought it was a sick case," and that he "...didn't ask for anything...or want anything..." (Reporter's Transcript, 1/25/2006, page 1110).

It is impossible for this court ten years later to know with any certainty how the TREAD-related evidence might have influenced Judge Fasel's judgment on the Massiah issue raised by Petitioner. What is clear is that Petitioner had a right to possess this evidence as he prepared to litigate that motion. He and his counsel should have had the opportunity to evaluate it to determine how they might have best used that evidence to support their contention that Mr. Garrity was an agent of law enforcement as he interacted with Petitioner inside the Orange County Jail on June 7, 1999.

Indeed, in his recent testimony, the trial prosecutor, recently retired from the Office of the Orange County District Attorney, acknowledged his legal and ethical responsibility to have delivered this material to defense counsel in 2005 had he known about it. Likewise, the People's counsel throughout this hearing, when directly asked by the court, acknowledged that he too would have provided these records to Petitioner's counsel in 2005, pursuant to a Brady obligation, had he been aware of their existence. Unfortunately, neither was present during the March 25, 2005 in camera review of these documents so both were apparently unaware of the records existence until recently.

This court agrees with both of these veteran prosecutor's opinions that discovery of the documents reviewed by Judge Fasel in camera, described above, was mandatory in 2005. This is material that should have been delivered to the defense pursuant to the requirements of Brady v. Maryland (1963) 373 U.S. 83 in that these documents constituted potentially exculpatory material given the defendant's stated intent to litigate the admissibility of the statements at issue pursuant to the rules set forth in Massiah, supra. The People's failure to provide this discovery was an error of constitutional dimension.

The People argue that they are not responsible legally for the Sheriff's failure, through County Counsel, to provide these documents to Petitioner since 1) they were not privy to the in camera proceedings; and 2) the Orange County Sheriff was not part of the "prosecution team" in this matter.

In re Brown (1998) 17 Cal. 4th 873 largely resolves these issues in favor of Petitioner. In Brown the Supreme Court cited a long line of federal authority before quoting liberally from those cases.

> "We believe that the purposes of Brady would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are responsible for non-disclosure (Citation omitted)...The fact that the prosecutor in this case was blameless

therefore does not justify the State's failure to produce (the) firearm's worksheet." 17 Cal. 4th at 880.

"(A)ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." 17 Cal. 4th at 881.

"Constitutional error under Brady results from the 'character of the evidence, not the character of the prosecutor'." 17 Cal. 4th at 882

"Although rigorous, we do not perceive the duty imposed by Brady as too onerous. (Citation omitted.) Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him in bringing an accused to justice. But this burden is the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair. (Citation omitted)." 17 Cal. 4th at 883.

The People nonetheless rely on People v. Zambrano (2007) 41 Cal.4th 1082, and People v. Superior Court (Barrett) (2000) 80 Cal.App.4th 1305, as bases for their position that, under the circumstances of this case, they were not responsible for providing Petitioner with this Brady material that was in the possession of the Orange County Sheriff. This court agrees that in a case in which "the sheriff was only defendant's jailer" (Zambrano, supra, 41 Cal.4th at 1133), that sheriff's department may not be a member of the "prosecution team" for Brady purposes. However, that is not the case here.

As the court said in Barrett, supra, at page 1315:

"A prosecutor's duty under Brady to disclose material exculpatory evidence extends to evidence the prosecutor—or the prosecution team—knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel. (Citations omitted)...

A prosecutor has a duty to search for and disclose exculpatory evidence if the evidence is possessed by a person or agency that has been used by the prosecutor or the investigating agency to assist the prosecution or the investigating agency in its work. The important determinant is whether the person or agency has been 'acting on the government's behalf' (citations omitted) or 'assisting the government's case'." (Citation omitted)

In this case, when the Orange County Sherriff's Department intentionally inserted itself into the chain of events that generated evidence of a purported confession from Petitioner, and the Fullerton Police Department accepted the Sheriff's offer of assistance, OCSD joined the "prosecution team." Indeed, there would have been no alleged confession to argue about but for the "assistance" provided by the Orange County Sheriff's Department. This analysis is entirely consistent with both the spirit and the letter of the well-established rules laid out in Brady, Brown, Barrett, Zambrano, Massiah and Neely, as well as a host of other appellate cases. The District Attorney was therefore responsible for providing to the Petitioner any and all exculpatory evidence in the Sheriff's possession that related to the procurement of Petitioner's alleged confession to Michael Garrity.

Having found that Petitioner was deprived of relevant discovery material in 2005, the remaining issues to be resolved are whether the information was "material," and whether Petitioner was prejudiced by this deprivation. As the court indicated to counsel several times during the recent hearing, if Petitioner received discovery on a timely basis that was either the actual or functional equivalent of the materials that he did not receive, this court would then be unable to find that Petitioner was prejudiced by this deprivation. That is, however, not the case given the facts that have been presented because even if the Orange County Sheriff was not a part of the "prosecution team" and therefore OCDA had no duty to locate and disclose the TREAD classification records held by the Sheriff, Exhibit Four, the Informant Index memo, was created and maintained in house by the Orange County District Attorney's office itself.

Exhibit Four demonstrates that in February of 2005, almost a year before the Massiah motion was considered by Judge Fasel, a member of the Orange County District Attorney's staff, perhaps senior deputy DA Bob Jones, wrote in OCDA's Informant Index that Michael Garrity "did receive consideration on cases here in our county." That was a hotly contested factual issue when petitioner filed his motion to exclude evidence of his alleged conversation with Mr. Garrity. Petitioner alleged that Garrity was an experienced informant trying to benefit himself by cooperating with law enforcement. The People argued, as quoted above, that he was not. Curiously, particularly in light of the issues now before this court, the author of Exhibit Four concluded that memo with this comment: "BJ instructed (deputy district attorney Dennis) Conway to refrain from providing copies to defense unless ordered by the court per (deputy district attorney) E. Hatcher."

This court will not speculate about what impact Exhibit Four might have had on Judge Fasel's analysis or his 2006 ruling. What cannot be seriously debated is that, pursuant to Brady, this defendant had a right to see and consider this document in 2005 since it is potentially favorable evidence related to the Massiah issue. As the Supreme Court has said repeatedly, "Brady evidence" is "favorable to the accused, either because it is exculpatory, or because it is impeaching." Strickler v. Greene (1999) 527 U.S.263, 281-82. More plainly stated, "...evidence is favorable if it helps the defense or hurts the prosecution..." United States v. Bagley (1985) 473 U.S. 667, 676.

Pursuit of information such as these various records by defense counsel is mandated by In re Neely, supra. In that capital case the Supreme Court found a defense lawyer constitutionally ineffective for failing to thoroughly investigate all possible bases for a motion to suppress his client's allegedly inculpatory statements based on a Massiah-related theory. In discussing the same issue that defense counsel had timely raised on behalf of Petitioner in 2005, the Neely Court ruled that "a preexisting arrangement" between an informant and law enforcement "need not be explicit or formal, but may be 'inferred from evidence that the parties behaved as though there was an agreement between them, following a particular course of conduct' over a period of time." 6 Cal. 4th at 915.

Here, by requesting information concerning any and all work Mr. Garrity had done for law enforcement, and any consideration he had received for such services, defense counsel was pursuing exactly the sort of evidence that the Supreme Court held was relevant in Neely. In serving his subpoenas on the Orange County Sheriff, and explaining his theory to Judge Fasel, defense counsel was doing exactly what the Supreme Court had said he must to act competently on behalf of his client. If counsel had received the material he specifically asked for and to which he was legally entitled, he would then have been able to make an informed decision as to what do next, e.g., attempt to interview prosecutor Jones informally, and/or subpoena him to testify during the Massiah motion to confirm that Mr. Garritty did in fact have a

pre-existing relationship with law enforcement that had resulted in him receiving benefits "on cases." Such evidence might well have undermined the prosecutor's argument to Judge Fasel or the trial jury that Mr. Garrity had simply "heard some bad stuff in jail and decided to relate it."

The People suggest that this court can and should infer what the author of Exhibit Four was thinking as he, or she, wrote that memo based upon the its review of all of the other exhibits received during the course of the recent evidentiary hearing. This court respectfully disagrees. Mr. Jones was not called to testify by either side. Neither was any other potential author of Exhibit Four. Therefore, the court is left to speculate about what the author of Exhibit Four knew on February 10, 2005 which caused him, or her, to conclude that Michael Garrity had as of that date "receive(d) consideration on cases here in our county." The author may or may not have known about the information presented to this court. The author may or may not have relied on other information. This court declines to engage in such speculation. Petitioner had a right to obtain the TREADs and Exhibit Four in 2005 and to conduct his own investigation of these issues.

Finally, the evidence at issue is a purported confession by Petitioner in a case in which very little other evidence linked him to the charged homicide. This court finds that this evidence is "material' in that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley (1995) 514 U.S. 419, 438. This court also finds that the discovery failures that occurred in this case prejudiced Petitioner since the court believes that there is a reasonable probability that litigation related to his second trial would have produced a result more favorable to Petitioner had he received this discovery before that 2006 trial. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington (18984) 466 U. S. 668, 694.

CONCLUSION

The factual record in this case is troubling. The trouble began on March 25, 2005 during public argument concerning this case which took place in another courtroom in this courthouse, and continued during an in camera records review that occurred later that same day. The events of March 25 allowed a prosecutor eleven months later to successfully argue facts, to both a judge and a jury, which did not mirror reality. Furthermore, the materials related to witness Michael Garrity provided to Petitioner by the Orange County District Attorney before Petitioner's second trial in 2006 were not the actual or functional equivalents of the Brady material regarding Michael Garrity which has been provided to Petitioner by OCDA in 2015 and 2016.

In light of this record, and the preceding discussion and legal analysis, the court now rules as follows:

1) Petitioner was deprived of relevant discovery related to the Massiah issue raised by his counsel prior to his second trial in 2006.
2) The missing discovery was material on the Massiah issue; and Petitioner was prejudiced by this deprivation.
3) This discovery deprivation violated Petitioner's constitutional rights and therefore requires this court to grant Petitioner a new trial at which, now in possession of all of the relevant

information to which he was long ago entitled, he can relitigate the Massiah motion and, if necessary, retry the guilt issues.

As a consequence of this ruling, all other issues raised by Petitioner in his pleadings and argument become moot.

Petitioner's new trial is now set for April 11, 2016 in Department C-5. That is day 45 of 60 from today. Petitioner and counsel are ordered to be in that Department at 8:30 a.m. on that date. Bail is set at $1,000,000.

The court compliments counsel on their preparation and presentation of this matter.

It is so ordered.

Dated: 2/25/16

Judge of the Superior Court

THOMAS M. GOETHALS