SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

PEOPLE OF THE STATE OF CALIFORNIA

V.

SCOTT DEKRAAI

RULING (MOTION FOR SANCTIONS RELATED TO ONGOING DISCOVERY ABUSE)

INTRODUCTION

This defendant was arrested on October 12, 2011 and charged with the worst mass killing in the history of Orange County.

On January 17, 2012 the defendant was indicted by the Orange County Grand Jury. The Indictment alleged eight counts of first degree murder, along with the relevant multiple murder special circumstance; one count of attempted murder; and personally using a firearm in the commission of these crimes. The defendant entered pleas of not guilty to all charges; he also denied the special allegations. The case was thereafter assigned to this court for motions and trial. The parties made their first appearances before this court on January 27, 2012.

Early on, the People, represented at that time by the Orange County District Attorney, provided discovery materials to defense counsel which suggested that, while incarcerated in the Orange County Jail soon after his arrest, the defendant made incriminating statements to another inmate about the murders. The People also asserted that the inmate who heard the defendant's statements did not solicit them; that he asked the defendant no questions; that he never acted as an agent of law enforcement; and that he was not seeking, nor had he been offered, any consideration for his involvement in the investigation of this case.

In response to its receipt of this discovery the defense, pursuant to In re Neely (1993) 6 Cal. 4th 901, requested additional information related to the relevant inmate regarding his background and criminal history. The People resisted this request, arguing that since they did not intend to call that inmate as a witness such discovery was legally unnecessary and irrelevant. The People argued further that, since they planned only to offer audio recordings of the defendant's custodial statements, no discovery regarding the other involved inmate was required or appropriate. To support their position the People

again asserted that this inmate had asked for nothing, and the People had offered him nothing as consideration for services rendered.

On January 25, 2013, after considering arguments from both sides on the issue, this court ordered that discovery related to the relevant inmate, including his criminal record and informant history, be provided to the defense. Within a matter of weeks, the People began to comply with the court's order by providing hundreds of pages of discovery material. Hundreds soon turned into thousands. Thereafter the defendant requested, and the court eventually granted, a lengthy continuance of the case in order to afford the defense team adequate time to digest the material it was receiving.

On January 31, 2014 the defendant filed lengthy motions, supported by thousands of pages of attached exhibits. The motions requested various forms of relief. These pleadings required the court to conduct an initial evidentiary hearing that commenced on March 18, 2014.

On April 22, 2014, after the first month of that first hearing, the People conceded the defendant's so-called Massiah motion (the motion based on the United States Supreme Court's decision in Massiah v. United States (1964) 377 U.S. 201), effectively agreeing that any statements made by the defendant to another inmate in the Orange County Jail after he had been arrested, charged with these crimes, and provided by the court with appointed counsel could not be offered against him at trial.

Thereafter, the motion hearing continued. On May 2, 2014, the defendant entered guilty pleas to all of the felony charges pending against him: eight counts of first degree murder and one count of attempted murder. He also admitted the multiple murder special circumstance and the gun use allegation. In accepting his open ended guilty pleas, this court informed the defendant that its only sentencing options would be consecutive sentences of life in prison without the possibility of parole, or death. The defendant acknowledged this, and confirmed his intent to enter his guilty pleas and admissions which this court then accepted. As a result, any subsequent trial in this case would only involve penalty issues.

The evidentiary hearing on the defendant's remaining motions then continued. On August 5, 2014, this court issued its initial ruling on those motions. In that ruling, the court granted certain relief requested by the defendant, but denied his motion to recuse the Orange County District Attorney from the case, and also the defendant's request that the court prohibit the pending penalty trial.

During the fall of 2014, the parties returned to court with what ultimately turned out to be a joint request to resume the evidentiary hearing related to the defense motions. The court accepted the request and the hearing resumed on February 5, 2015.

On March 15, 2015, the court issued a supplemental ruling in which it recused the entire staff of the Orange County District Attorney from further involvement in this prosecution. That recusal order was unanimously affirmed by the District Court of Appeal on November 22, 2016. California's Attorney General thereafter became the prosecutor of record in this matter.

During the pendency of this case, the court has issued a series of discovery orders which remain in full force and effect as of this writing. None of these orders has been appealed. Many have required

production of materials related to informant operations conducted by the Orange County Sheriff's Department within the Orange County Jail. The record in this case reflects the number of hearings that this court has conducted concerning compliance, or the lack thereof, with its lawful discovery orders.

The court has recently completed a third evidentiary hearing that focused largely on that same issue. During the course of the three evidentiary hearing this court has heard sworn testimony from more than fifty witnesses and reviewed thousands of pages of documentary evidence. In the current motion the defendant once again seeks an order barring a penalty trial in this case.

The court has considered the evidence presented and the arguments made by counsel during all three evidentiary hearings as it formulates its current ruling which must stand or fall based on the merits of the entire record in this case alone. The court also incorporates by reference into this ruling, unless otherwise indidcated, all findings included in its prior rulings.

DISCUSSION

As it considers the pending motion, this court has in mind the testimony of all the witnesses it has heard from over the course of the three evidentiary hearings. The majority of those witnesses were either current or former sworn peace officers. A good number were current or former prosecutors.

As discussed in prior rulings, the evidence produced during these hearings demonstrates the existence of serious misconduct committed by key elements of the prosecution team. This misconduct has required the court to impose increasingly severe sanctions in its prior rulings. Now, in the face of what this court can best describe as chronic obstructionism by the prosecution team with respect to discovery compliance, this court is required to consider imposing an even more serious sanction. In order to impose such a sanction, this court must find that the prosecution team's chronic discovery abuse has created a constitutional deprivation which compromises this defendant's right to due process and a fair penalty trial (United States v. Agurs (1976) 427 U.S. 97). This effectively requires the court to attempt to predict the future by examining the past.

This court does not take this issue lightly as it is well aware that this defendant has admitted perpetrating the largest mass killing in the history of Orange County. After entering his guilty pleas, this defendant deserved swift and sure punishment for the terrible crimes he committed. This court has been unable to impose such punishment as it has been legally required to resolve the many serious issues raised by defense motions. Any trial court has the right to expect, and to insist upon, compliance with its lawfully issued orders. To accept chronic non-compliance with such orders in any case, much less a case of this magnitude, would dangerously undermine the integrity of, and ultimately the community's respect for, the justice system. This court believes that maintaining the integrity and viability of Orange County's criminal justice system remains of paramount importance.

This court has been patient, perhaps to a fault, as it has awaited compliance by the prosecution team with its lawful orders. It has for months provided transparent warnings to the People as to what the consequences of ongoing non-compliance with its lawful discovery orders could be. The court has given the prosecution team every opportunity to respond completely to its orders. And yet compliance has not been achieved. Time and again relevant documents have been tardily produced along with sworn declarations claiming that exhaustive searches have been conducted and no additional responsive documents exist. And then, months later, additional relevant documents have appeared along with new sworn assurances.

This court for some time maintained hope that the Orange County District Attorney and the Orange County Sheriff, in the face of objectively verifiable evidence, would accept the reality that for many years illegal activities occurred inside the Orange County Jail involving represented defendants and working informants. Unfortunately, rather than accepting this court's earlier findings and working to correct "the systemic problems" discussed at length by the District Court of Appeal in its unanimous affirmation of this court's decision to recuse the District Attorney (People v. Dekraai (2016) 5 Cal. App. 5th 1110), members of the prosecution team chose to either deny, or ignore, these glaring illegalities. One of the apparent byproducts of this response has been the prosecution team's chronic failure to comply with this court's discovery orders.

In the face of such relentless non-compliance, this court is vested with "broad discretion" to impose appropriate sanctions. As the Supreme Court said in People v. Zamora (1980) 28 Cal. 3d 88:

> We first observe that the courts enjoy a large measure of discretion in determining the appropriate sanction that should be imposed because of the destruction of discoverable records and evidence. 28 Cal. 3d at 99.

In this case, the evidence demonstrates that "discoverable records and evidence" have repeatedly been withheld. Recent evidence also strongly suggests, as discussed below, that some of those "discoverable records and evidence" have likely now been destroyed.

The Supreme Court, citing Zamora, spoke again on this subject in People v. Jenkins (2000) 22 Cal. 4th 900:

> The cases cited by defendant recognize that courts have broad discretion in determining the appropriate sanction for discovery abuse, and recognize that sanctions ranging from dismissal to the giving of special jury instructions may be required in order to insure that the defendant receives a fair trial, particularly when potentially favorable evidence has been suppressed. 22 Cal. 4th at 951.

Long after this court issued the first of its lawful discovery orders in this case, Sheriff's sworn personnel gave false and/or intentionally misleading testimony regarding the existence of relevant jail records. The evidence proves the existence at relevant times of voluminous discoverable data bases created and maintained by OCSD sworn personnel. These include at a minimum an extensive classification data base known as TRED, and a Special Handling log. Both of these contain hundreds, perhaps thousands, of pages of information relevant to the defendant's claims concerning prosecution team misconduct. The

Sheriff's failure to produce this material on a timely basis in the face of this court's repeated orders to do so constitutes the type of "discovery abuse" contemplated by the Supreme Court in both Zamora and Jenkins.

The court does not intend to summarize here all of the compelling evidence it has heard concerning this long term discovery abuse. It has already discussed much of that testimony in its prior rulings. A representative sampling of recent evidence nonetheless seems appropriate. A good deal of that evidence dealt with OCSD's lack of timely compliance with this court's discovery orders as well as the possible destruction of jail records by Sheriff's personnel.

The first witness to appear during the recent hearing, OCSD Lieutenant Andrew Stephens, who oversees the Sheriff's newly-formed Custody Intelligence Unite (the successor in interest to the problematic Special Handling Unit), testified that on the day of his appearance (May 23, 2017), well over four years after this court made its initial discovery order requiring the production of specific informant-related information in the Sheriff's custody, CIU was in possession of sixty eight bankers' boxes full of Special Handling Unit records which had not yet been fully reviewed to determine whether any of them contained materials subject to the court's orders. Sixty eight boxes containing, by the lieutenant's estimate, one hundred files each.

The next witness, Carol Morris, a high ranking OCSD civilian employee responsible for the retention and maintenance of sensitive OCSD records, testified that in 2012 she became "alarmed" when she learned that deputies were handling documents pursuant to the directives of a "Jail Operations Manual" which permitted the destruction of jail records. Any such destruction, according to this knowledgeable witness, was in violation of both the controlling resolution from the Orange County Board of Supervisors and a 2009 "legal hold" placed on all such records as a result of a pending federal investigation of alleged OCSD misconduct. The witness testified that upon learning of this situation she immediately instructed deputies to cease and desist. Despite that instruction, evidence demonstrates that Special Handling Unit deputies were "shredding" jail documents at times relevant to this hearing and long after the "legal hold" on all such documents had taken affect.

Exhibits 17-14, 17-15, 17-16 and 17-17, for example, describe such shredding.

Exhibit 17-15 is an excerpt from the Special Handling log written on February 5, 2009 by Deputy Grover. In it Grover wrote that one action he took on that date was to "(s)ort through numerous boxes of 'Old Special Handling documents'..then Shred (sic) same at HQ Warehouse."

Exhibit 17-16 is an anonymous excerpt from the Special Handling log that was apparently written on or about October 8, 2009. The writer indicates that during his shift he "cleared out my Special Handling inbox...shredded a lot of stuff."

Exhibit 17-17 is another excerpt from the Special Handling Log written by Deputy Garcia dated November 289, 2009. In it Garcia indicates that on that date he "Worked on desk drawer and shredded old files."

Exhibit 17-14 is a "Work Station Log" date December 15, 2014, related to "CLX Special Handling." Hearing testimony established that "CJX" refers to the Men's Central Jail Complex in Santa Ana. The log entry indicates that on that date, long after the current litigation had begun and directives had been issued by OCSD to stop destroying jail documents, "Deputy Grover sorted and shredded the pile of 'stuff' left in his office."

No records were kept to memorialize exactly what was shredded on any of these occasions.

OCSD Lt. Michael McHenry also testified concerning the possible destruction of relevant records, including a specific portion of the Special Handling log. McHenry was apparently asked to join the Sheriff's "working group" created to investigate the various discovery issues raised in this case due to his computer engineering background. One of his first tasks was to determine whether an alleged gap in the Special Handling log actually existed. He concluded that it did.

> The Court: ... And we have got an unexplained gap between April 12th and October 2nd of 2011. Those are the facts as we know them, right?
>
> The Witness: Yes, sir.
>
> The Court: Can you think, with your computer background experience, and your investigative training and experience, what's the rational explanation for the gap?
>
> The Witness: I can think of two rational explanations.
>
> The Court: Okay. Tell me.
>
> The Witness: One is journaling like that log was—takes a lot of effort. And if you are busy and nobody is paying attention, it doesn't get done. It is not something that anybody was checking. It is not a safety check log that a sergeant signs off every day.
>
> The Court: So that's the random explanation? Just wasn't done?
>
> The Witness: Just didn't happen is the random explanation.
>
> The Court: What's the other explanation?
>
> The Witness: It got deleted.
>
> (Reporter's Transcript, page 10189).

Deputy Jonathan Larson's testimony followed that of Lt. McHenry. Deputy Larson worked in Special Handling during most of 2011, the time period when the Special Handling log gap occurred. He testified that although he only made occasional entries in the log personally, during the gap period he was aware that other Special Handling deputies were making regular entries as he and his sergeants were reading them almost daily. Deputy Larson's testimony, which was credible, seems to negate the viability of the "random explanation" for the Special Handling log gap in 2011 which leaves only the "other explanation" offered by Lt. McHenry: "It got deleted."

Other recent evidence related, as was the case during prior hearings, to the nature and extent of OCSD's use of informants inside the Orange County Jail system. Commander Jon Briggs, a member of the Sheriff's executive command staff and the current supervisor of all OCSD custodial facilities, testified about that.

> The Court: When did you reach the conclusion that you shared with us yesterday and that you confirmed this morning that Special Handling deputies, in fact, have cultivated, utilized, developed and supervised informant activity in the jail?
>
> ...
>
> The Witness: As soon as I read the logs. So I would say March 2016.
>
> ...
>
> The Court: This morning you also, if I heard you correctly in response to a question by Mr. Sanders... And he said do you believe that L-20 was being employed by Special Handling deputies as a snitch tank, and you said yes. Did I misunderstand that?
>
> The Witness: I believe, in looking at where they were moving folks into L and looking at the Special Handling log, that you are right...and they were certainly putting the informants they had cultivated and that they were utilizing into L-20...Totally inappropriate.
>
> ...
>
> The Court: And so I understand the challenges of supervision. But the log suggests to the reasonable reader, perhaps, that that kind of improper misconduct was going on not for days or weeks or months, but probably years. Do you agree with that?
>
> The Witness: Yes, your honor.
>
> ...
>
> The Court: So in hindsight, these deputies who were getting all the accolades and awards should have been facing disciplinary action?
>
> The Witness: Absolutely, your honor.
>
> (Excerpted from Reporter's Transcript at pages 8616-8622.)

OCSD Commander William Baker, another member of the Sheriff's executive command staff, testified on the same subject.

> The Court: ...Based on your review of all the information that is currently available to anybody in the Sheriff's Department, is it your current conclusion, Commander Baker, that over a course of years, rather than over a course of days or weeks or months, Sheriff's deputies operating inside

the Orange County Jail system intentionally moved working confidential informants into close proximity with targeted defendants? Did that happen?

The Witness: Yes, sir.

The Court: And do you believe that the goal in arranging such movements was to elicit incriminating statements from the targeted defendants? Do you believe that happened?

The Witness: Yes sir.

The Court: And again we're not talking once or twice over the course of days or weeks. That happened for a long time, years, didn't it?

The Witness: Yes, sir.

(Reporter's Transcript, page 9821)

OCSD Lt. Martin Ramirez, provided testimony on this same subject. Lt. Ramirez was the Intake and Release Center (IRC) classification sergeant who, along with one other sergeant, supervised Special Handling Unit operations during the first half of 2013. He has since been promoted and has worked as a jail watch commander. Lt. Ramirez's testimony included the following:

Question: Were there modules that were kept in the—in the jail that were at times used to have informants and potential targets placed together?

Ramirez: I know that there is...I have heard that some of these informants or targets were placed in—I think it was Mod L or something like that.

Question: So when you heard that in the news, that was the first time that ever hit you? Like, you had never heard that before?

Ramirez: No, I had heard that before.

Question: You heard that when you were working there, right?

Ramirez: Yeah...So I don't know if I learned that before I was classification sergeant or when I was a sergeant, you know. But I know that. I mean, it is common knowledge that—for me anyways, from what I heard, is that, you know, informants do work the jails.

...

Question: But, you know, it sounds like you were also aware when you were in the jail that Mod L was being used for informants. You knew that; right?

Ramirez: Yes.

...

Question: All right. So while you were a Special Handling sergeant—I call it Special Handling sergeant, but it is really a classification sergeant?

Ramirez: Yes.

Question: When you were a classification sergeant, you knew about the use of Mod L?

Ramirez: Yes.

Question: Okay. And tell me what you knew about it.

Ramirez: I just knew that it had been used in the past to put informants in there and put targets in there.

...

Question: Okay. And so once you learn that, you realize people are working informants in the jail, and that kind of traditional sense of working, they are moving informants around. And targets. They are putting them in a particular sector. You know that is going on, right?

Ramirez: I knew that was happening.

(Excerpted from Reporter's Transcript at pages 9499-9503)

The Court: Based on your current experience, lieutenant, in the Orange County jail system, based on everything you've heard and everything you've read, as you sit here today under oath, do you believe that confidential informants were placed in specific mods, like Mod L, in the Orange County Jail, perhaps before you got there, for the purpose of seeing if they could hear incriminating statements from target defendants?

The Witness: Based on everything I heard, yes, I do.

(Reporter's Transcript, page 9623)

Assistant Sheriff Adam Powell, another member of the Sheriff's executive command staff, testified concerning many of these same subjects. Powell informed the court that he was ODSD's "point man" in its investigation of the ongoing discovery issues. He concluded that these problems resulted from "a failed system," "terrible policies" and "worse protocols." His testimony also included the following:

The Court: Based on your review of all of that information, so all the information that is currently available to the Orange County Sheriff's Department, is it your current conclusion that over the course of many years Sheriff's deputies operating inside the jail, the Orange County jail system, intentionally moved working informants into close proximity with targeted defendants who had already been charged with criminal offenses and were represented by counsel? Do you think that happened?

The Witness: Yes. ...

The Court: And that happened for years, not days, weeks, or months, didn't it?

The Witness: I think it happened in years, yes.

(Reporter's Transcript, page 10701).

The Court: Have you read any of the Fernando Perez handwritten notes? ... Have you read any of those?

The Witness: I am not talking about Fernando Perez and his workings because—

The Court: He's an active working, hard-working informant; right?

The Witness: Absolutely.

The Court: And some of your Special Handling deputies managed and cultivated him, didn't they?

The Witness: Yes.

(Reporter's Transcript, page 10703).

A number of recently admitted exhibits also related to the nature of the Special Handling unit's long term relationship with informants in the jail system.

Exhibit 17-20 is an OCSD memo from Lt. B. Guidice to Sgt. D. Johnson, dated October 23, 2009, regarding "Special Handling Deputies Duties." Among the duties listed is "Handle and maintain 'confidential Informants'."

Exhibit 17-21 is an OCSD memo, dated December 16, 2009, regarding "Special Handling class ideas." The memo includes this somewhat cryptic notation: "THIS ALL IN THE MEMO TO SGT LAGARET DATED 8-31 HANGING ON THE S/H WALL." (Grammatical errors and caps in original.) "Idea" number three in the memo is "Cultivate/manage Confidential Informants."

Exhibit 17-24 is an undated OCSD memo labeled "L-20 Thoughts/Requests." The memo notes that "Inmates are handpicked to be in L-20 for both OCSD & other agencies." Also, "There are several current investigations being conducted, so PLEASE don't get into anything (exchanging any information with inmates). PLEASE contact S/H." And finally, "Module Deputies are not the inmate's handlers...Special Handling are the handlers."

Exhibit 17-37 is an OCSD memo, dated March 29, 2007, from Sergeant B. Irish to Captain B. Wilkerson, labeled "Theo Lacy Facility Classification/Special Handling Team Summary." Among the "overall duties" listed for team members is "Intelligence Gathering: the Theo Lacy Special Handling/Classification team possesses an excellent expertise in the cultivation and management of informants. This expertise is recognized by the Orange County District Attorney's Office, as well as, numerous law enforcement agencies throughout Southern California." (Emphasis in original.)

Exhibit 17-54 is an OCSD memo dated August 31, 2009, apparently written by a member of the "IRC Special Handling detail" to Sergeant Lagaret. The memo sets forth "a sampling of the duties and responsibilities of an Intake and Release (IRC) Special Handling Deputy." Among those listed is "Handle and maintain 'Confidential Informants.' "

Exhibit17-65 is an OCSD memo, dated October 30, 2012, from Deputy Grover to Sergeant Cope. Several witnesses described it as a "brag sheet" which would typically be written by a deputy in anticipation of an upcoming annual performance review. In this memo Deputy Grover "brags" that he "developed a confidential informant" related to criminal activity occurring in south Orange County. He also claims that he and Deputy Garcia engaged in an informant operation inside the Orange County Jail on behalf of the Anaheim Police Department that resulted in a "full confession from one of the suspects."

Finally, Orange County Sheriff Sandra Hutchens testified on a number of topics including her current understanding of past informant operations conducted within the Orange County Jail system.

> The Court: ...Sheriff, based on your review of all the information that is currently available to anybody in the Sheriff's Department, is it your current conclusion that over a course of years, rather than over a course of days or weeks or even months, Sheriff's deputies operating inside the Orange County Jail system intentionally moved working confidential informants into close proximity with targeted defendants?...
>
> The Witness: I would say yes. ...
>
> The Court: ...And do you believe that the goal in arranging such movements was to elicit incriminating statements from targeted defendants?'
>
> The Witness: Yes.
>
> The Court: And we're not talking once or twice over the course of days or weeks, this happened for a long time, years, didn't it?
>
> The Witness: Yes.
>
> (Reporter's Transcript, page 10491).

During her testimony the Sheriff also acknowledged at least some of her Department's discovery failures in this case and apologized to the court for them (Reporter's Transcript, page 10489).

Nonetheless, the Sheriff's testimony included her belief that the jail informant issue has been "blown out of proportion," perhaps due to "sensational" media coverage. This testimony was consistent with prior statements made by the Sheriff, including those contained in a "LETTER FROM THE SHERIFF" released by OCSD several weeks before her testimony. During her recent testimony the Sheriff acknowledged that she wrote this in that latter:

> For well over a year, a handful of local media outlets have relentlessly reported on court proceedings concerning the use of informants in our jail system. In my view, the media coverage

> has painted an inaccurate picture of OCSD and has unfairly maligned the good work done by the men and women of this department. Comments made by a handful of public officials have been equally troubling and ill-informed.
>
> Despite this misinformation, the real facts are beginning to emerge. ...
>
> (Exhibit 17-82).

The court is struck by the content of this recent letter. If the Sheriff continues to deny the existence of the "systemic problems" related to her Department's use of informants inside the county jail system which was discussed in such detail by the District Court of Appeal, how can this court generate any reasonable optimism that OCSD will effectively address those problems? More importantly, in the face of such ongoing denials, and given OCSD's compliance record to date, how can this court generate any confidence that the Sheriff's Department will produce all relevant documentation in its possession concerning a problem which the Sheriff herself apparently continues to believe is non-existent?

During the course of the recent evidentiary hearing, the court also saw seven members of the Sheriff's sworn staff invoke their rights to remain silent pursuant to the Fifth Amendment of the United States Constitution. Seven current members of law enforcement, sworn peace officers potentially still authorized to wear badges and carry firearms, several of whom appeared to testify wearing their OCSD uniforms, refused to answer questions under oath for fear that their responses might incriminate them and subject them to criminal prosecution. The fact that the People agreed to grant four of these witnesses use immunity (which required them to testify) does not change the fact that in this court's forty years of experience in the criminal justice system such events are unprecedented.

The court is mindful of the statutory limits on its authority. Penal Code section1054.4(c), for example, directs that a "...court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States." Likewise, Penal code section 1385.1, prohibits a trial judge from striking or dismissing any special circumstance "which is admitted by a plea or guilty or nolo contendere or is found by a jury or a court..." But this court entertains no thought of dismissing or striking any charge or enhancement in this case. In fact there is no such motion pending. Rather, this court will impose an additional sanction only if it determines that the prosecution team's misconduct, when considered in its overall context, has resulted in a constitutional deprivation to the defendant that has effectively compromised his rights to due process and a fair penalty trial.

In that regard, the court is also mindful of a relevant discovery discussion in In re Steele (2004) 32 Cal. 4th 682. Although Steele deals primarily with statutory (Penal code section 1054.9) rather than constitutional (Brady) discovery obligations in the context of a post-conviction habeas petition, in its opinion the Supreme Court discussed both. After citing Strickler v. Greene (1999) 527 U.S. 263, the court quoted directly from United States v. Bagley (1985) 473 U.S. 66.

> The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of

independent investigation, defenses, or trial strategies that it might otherwise have pursued." Bagley, supra, at 682-83.

This language to some degree mirrors a defense argument in this case that suggests the defendant has suffered a due process deprivation here related to his ability to fully prepare for his pending penalty trial due to the fact that the prosecution has so consistently failed to comply with this court's lawful discovery orders. Although Steele unambiguously indicates that the People's self-executing Brady obligation "does not extend to evidence that relates solely to the defendant personally and whose exculpatory nature would therefore not otherwise be apparent to the prosecution..." (Steele, supra, at 701), the Supreme Court also confirmed that Brady does require such disclosure in the face of "a specific request" by the defense. Once such a specific request has been made by the defense, the People are obliged to provide evidence that is "both favorable to the defendant and material on either guilt or punishment." In re Sassounian (1995) 9 Cal. 4th 535. Here, the defense has made such "a specific request."

In determining its future course this court has looked for guidance to other statutory discovery schemes within California's criminal justice system such as that implemented in Penal Code sections 1040-42. Those sections also deal with informant related discovery issues, although in a somewhat different context than that now before the court.

In a case involving Penal Code section 1040-42 issues, a defendant moves the court to order the prosecutor to identity a particular witness involved in the case against him. In the face of this request, law enforcement may designate that witness a confidential informant and assert the privilege created by Penal Code sections 1040-42. In the face of such an assertion, a qualified judge conducts an in camera hearing with a sworn peace officer who reasserts the privilege while explaining its legal basis in that particular case. The court then rules on the propriety of the privilege claim.

If the court sustains the claim, the prosecution proceeds with the defendant remaining unaware of the informant's identity. If the court overrules the claim, the prosecution is ordered to identify the witness, which leaves the prosecution team with a choice: either name the informant, and provide all relevant information about his or her background; or elect not to identify the informant in which case the prosecution may end with a dismissal of the affected charges. The decision rests with the prosecutor. The situation here is analogous. This court has issued lawful discovery orders. If the prosecution team elects not to comply with those orders, it must anticipate, just as in the case involving Penal Code section 1040-42, the possibility of a terminal sanction.

Lest there be any uncertainty about how this analogy applies here, this court has for many months warned the People in no uncertain terms what the consequence of a continued lack of discovery compliance might be. It has attempted to educate and also cajole the prosecution team into compliance. Yet such compliance remains an elusive goal. As a result, this court has finally lost confidence that it can ever secure full compliance with its lawful discovery orders. The great irony is that the primary basis for this conclusion is the court's evaluation of the testimony of sworn peace officers and prosecutors, and its review of thousands of pages of law enforcement generated documents.

CONCLUSION

The legal principles that will determine the outcome of the pending motion are largely axiomatic. The parties agree that American courts must expect, and if necessary demand, compliance with their lawful orders. Constitutional due process requires prosecutors to disclose exculpatory evidence in their possession to charged criminal defendants. (Brady v. Maryland (1963) 373 U.S. 83). This discovery obligation exists even in the absence of any request from the defense. (United States v. Agurs, supra). For Brady purposes, exculpatory evidence includes impeachment evidence. (Strickler v. Greene (1999) 527 U.S. 263). The prosecution's discovery obligation extends not only to material in the prosecutor's immediate possession; it also applies to evidence in the possession of other members of the prosecution team, including law enforcement. (Kyles v. Whitley (1995) 514 U.S. 419). A Brady violation therefore can occur when the government fails to turn over to the defense exculpatory evidence known only by police investigators and not by case prosecutors. (Youngblood v. West Virginia (2006) 547 U.S, 867).

As this court formulates its ruling, it recalls again a statement made by the District Court of Appeal in People v. Guillen, (2014) 227 Cal App. 4th 934:

> The rights of the respective parties here are extremely important ones, namely defendant's right to a fair trial and the People's right to prosecute persons believed to be responsible for the commission of serious crimes. Guillen, supra, at 1006-07.

These competing interests weigh heavily on this court's mind as it considers its options. This defendant has committed crimes of such horrible magnitude than they can hardly be compared to any others in the history of Orange County. Without naming names, other defendants whose crimes bear any resemblance to these have in recent years almost invariably been tried, convicted and sentenced to death. If this case had been prosecuted from the outset by the Orange County District Attorney within the most fundamental parameters of prosecutorial propriety, this defendant would likely today be living alongside other convicted killers on California's Death Row in the state prison at San Quentin. Instead, this case hardly seems closer to resolution this morning than it did on that day more than five years ago when it arrived in this courtroom as prosecution team compliance with this court's outstanding discovery orders remains an elusive goal.

Recent events plainly demonstrates the serious compliance issues. For example, the first witness called during the most recent evidentiary hearing, a Sheriff's lieutenant, informed the court that he was aware as he testified of sixty-eight banker's boxes, containing hundreds of individual files, stored within the Orange County Jail that had not yet been fully reviewed and which potentially contained material subject to this court's outstanding discovery orders.

During her testimony the Sheriff herself offered no explanation as to how this situation could exist so many years after this court issued its first discovery order.

Even more recently the current prosecutor informed the court that not long ago as many as thirteen thousand e-mails and eight thousand other documents were delivered to the Attorney General's Office by OCSD; he opined that some of these could also contain material subject to the court's outstanding discovery orders. The record of that exchange between counsel and the court speaks for itself but, after sharing that information, the deputy Attorney General wondered aloud, perhaps somewhat rhetorically, "When does it end?" That question reflects this court's sentiments exactly.

In its prior rulings, this court expressed concern over the prosecution team's history of discovery abuse in this case. In its original ruling over three years ago this court observed that "throughout this pending litigation additional materials that appear to have been subject to this court's January, 2013 discovery order have continued to emerge." Months later, in its second ruling, the court concluded that "the discovery situation in this case is far worse than the court realized." Those rulings resulted in the court's imposition of increasingly serious sanctions upon the People. Since that second ruling it has become apparent that the prosecution team's discovery record is even worse than was previously suspected. Another highly relevant data base, the Special Handling Log, has turned up along with a host of other relevant documents. Despite declarations and promises to the contrary, hundreds of potentially relevant files were until very recently ignored for no apparent reason. Potential issues concerning thousands of additional e-mails and other documents remain unresolved.

This court believes that the truth is the truth. Truth is not the product of political debate. It does not present itself in alternative versions. Our justice system finds the truth primarily through the presentation of evidence, testimonial and physical, which is then subjected to the crucible of cross examination. That is the exact process that has been employed throughout the lengthy proceedings conducted in this courtroom. A list of witnesses who have testified, complete transcripts of their testimony, and all admitted exhibits are matters of public record available to interested members of this community to scrutinize and evaluate for themselves. As a result of this "due process," the facts, and the truth, have become obvious.

The truth is, to quote Sheriff Sandra Hutchens herself during her recent testimony, "over a course of years, rather than over a course of days or weeks or even months, Sheriff's deputies operating inside the Orange County jail system intentionally moved working confidential informants ...to elicit incriminating statements from targeted defendants." To use the descriptive phrase coined by the District Court of Appeal to describe OCSD's informant operation, this "well established program" (Dekraai, supra, at 1141) is not a myth. Nor is it any sort of fantasy, fairy tale or fable. Although apparently created and operated largely by word of mouth, this program has been very real for many years. As the DCA concluded in its unanimous decision on this very subject, "(t)he magnitude of the systemic problems cannot be overlooked." (Dekraai, supra, at 1149). Indeed, the truth is in June of 2016 the District Attorney's office acknowledged many of these "systemic problems" in a "Press Release" (quoted below) which is a part of the record in this case (Exhibit 17-85).

The truth is competent evidence has established beyond any reasonable doubt that "...the OCSD, in its secondary capacity as county jailer, created and maintained a CI program whereby it continued to

investigate criminal activity in contravention of targeted defendants' constitutional rights." (Dekraai, supra, at 1145).

The truth is "...OCSD SHU deputy sheriffs operated a well-established program whereby they placed CIs, Perez and Moriel, next to targeted defendants who they knew were represented by counsel to obtain statements...There was also evidence the prosecution team explicitly or implicitly promised consideration in exchange for information and Perez and Moriel expected a benefit." (Dekraai, supra, at 1141).

The truth is Fernando Perez, at the time of his placement next to this defendant, was an experienced and highly motivated informant who vigorously worked on multiple investigations within the Orange County Jail at the behest of his OCSD handlers in the hope that his pending life sentence would be reduced. After completing what Perez himself described as his "mission" on this and many other cases, it was.

The truth is more than one member of the Orange County Sheriff's Department has either lied or willfully withheld evidence from this court during testimony given concerning the various defense motions. "Needless to say, there was overwhelming evidence...Garcia and Tunstall intentionally lied or willfully withheld information at the first hearing and they lacked credibility." (Dekraai, supra, at 1141).

The truth is the Orange County District Attorney has been complicit in the Orange County Sheriff's misconduct. In point of fact, there was "no legitimate reason for OCSD to create and maintain such a sophisticated, synchronized, and well-documented CI program other than to obtain statements that will benefit prosecutions." (Dekraai, supra at 1142). "(D)uring this entire period, prosecutors failed their professional responsibility to properly investigate Perez's CI work and produce information to Dekraai." (Dekraai, supra, at 1143).

The truth is it was neither an accident nor a coincidence that the Orange County District Attorney resisted the defendant's initial request for discovery concerning the criminal background and informant history of Fernando Perez. "Not only did the OCDA intentionally or negligently ignore the OCSD's violations of targeted defendants' constitutional rights, but the OCDA on its own violated targeted defendants' constitutional rights through its participation in the CI program." (Dekraai, supra, at 1145).

The truth is it was neither an accident nor a coincidence that on January 23, 2013, two days before this court was scheduled to make its initial discovery order in this matter, the OCSD's "Special Handling Log" was terminated.

The truth is that the Orange County District Attorney, in its June 9, 2016 "Press Release," conceded that the Orange County Sheriff's Department engaged in significant misconduct involving the use of informants within its jail operations. Quoting directly from that OCDA Press Release:

> "The SH Log was kept from 2008 to 2013 and includes informal descriptions of activities which the deputies variously termed "plans," "capers", and "operations," which often included use of covert recordings devices...There are informer names on almost every page as well as numerous

mentions of high-profile inmates and frequent confidential informer (CI) interaction with numerous inmates, including high-profile inmates. The SH Log also mentions outside agencies interacting with special handling deputies about inmates and their numerous inquiries about running "operations..."

"The jail special handling deputies cultivated and utilized a group of informers. The informers were often kept in a particular sector, and they would often know each other. In exchange for their information, some informers were given favors such as phone calls and visits. The SH Log contains references to extensive recordings in multiple sectors of the jail."

(Exhibit 17-85)

The Press Release concluded with "OCDA's Action Plan to Remedy Legal Issues."

The truth is thereafter OCDA failed to significantly follow up on its promise to address these "systemic problems."

And the truth is, for whatever reason, the Orange County Sheriff's Department has consistently responded to this court's lawful orders with such indolence and obfuscation that this court has lost confidence that it can ever secure compliance from the prosecution team with those orders.

It might be fairly asked at this point why any of these truths matter in a case in which this defendant committed his historically horrendous crimes in front of countless eyewitnesses and later reportedly confessed to all of them on videotape? That is a fair question. In this court's view these truths matter because what has always made America a beacon of justice, stability and hope both at home and abroad is the fact that this great country operates under the rule of law. To insure the ongoing integrity of America's system of justice--which implements that rule of law--courts must demand that everyone follow the same set of rules. No individual or agency is above the law. If this court permits any individual or agency to disregard its orders, to in effect ignore the law, then it has failed to fulfill its sworn obligation to fairly and consistently enforce that law. In so acting this court would betray its oath to uphold and defend the Constitution, and also its daily duty to provide faithful service to its constituents.

This court cannot here provide a global remedy for all of the problems it has heard described. This court is legally empowered only to resolve specific cases and controversies. This ruling must therefore rise or fall only on the merits of the evidence presented in this case. Nonetheless, this court hopes that these hearings may have some prophylactic impact on future prosecution team conduct.

As a result of these truths the court finds itself at an analytical fork in the road. Taking one fork would require this court to ignore the facts, to impose no additional sanctions for the continuous course of misconduct engaged in by the prosecution team. To take that road would, in this court's estimation, be unconscionable, perhaps even cowardly. And so this court must consider traveling the other road which would require it to impose a sanction that not long ago would have been unthinkable.

In determining its course, the court cannot help but observe that perhaps the only two prosecutorial/law enforcement agencies in the great state of California still enveloped in denial as to

what has happened here over the years are the Orange County District Attorney and the Orange County Sheriff. For example, the court is aware that the California District Attorneys Association's quarterly publication, Prosecutor's Brief, not long ago included an article about this very case, written by a senior deputy DA in a neighboring county. In that article, captioned "People v. Dekraai: The 'Gift' That Keeps on Giving," CDAA's representative wrote this concerning some of the issues presented to this court:

> "...the informant program was wrong—the deputies were improperly secretive about inmate tracking and the district attorney was careless regarding what the sheriff was doing...
>
> The Dekraai decision is ... a recusal decision based on an "institutional conflict of interest" because the District Attorney's loyalty to the sheriff conflicted with his higher duty to the rule of law...
>
> The Orange County Sheriff's Department set up a network of informants to stand next to choice criminal defendants listening for details of their crimes. But the sheriff failed woefully in monitoring the informants' behavior. Many informants exhorted suspects for such details... (Emphasis in original)
>
> Simultaneously, the sheriff's department taught deputies not to mention the inmate tracking system, in public, in private, or in court to such a degree that when deputies were questioned under oath, they "forgot" about the tracking system..."
>
> Prosecutor's Brief, Volume 39, Number 3, Spring 2017, at pages 280, 281 and 286.

Again this is from California District Attorneys Association's official publication, read and relied upon by prosecutors statewide.

In formulating its ruling, the court also hears the words of the victim's families ringing in its ears. I want to take a moment to speak to you fine people directly. I meant it when I thanked many of you for coming to court to share with me your thoughts about this case which has so terribly impacted each of your lives. I meant it when I promised to remember what you said to me.

You are not unanimous in your opinions as to how this court should proceed. Nor would any reasonable person expect you to be. You live daily with the almost unbearable pain that this defendant has thrust upon you and your families. As innocent victims of these horrendous crimes you are angry. Your hearts ache as a result of your unspeakable losses. You miss those who were so suddenly and senselessly taken from you by this defendant's cruel brutality. But, as good people often do in the face of such tragedy, while protecting and treasuring the memories of your loved ones, you are at the same time moving forward with your lives as best you can through your grief. You are all impressive both individually and as a group and I thank you for your patience and your perseverance.

This is not a situation in which the majority must necessarily rule, nor can this court abdicate its responsibility to fairly apply the law to comply with their wishes, but many of the survivors have asked this court to do what little it can to mitigate their suffering by imposing the eight consecutive sentences

of life without possibility of parole that will end this case now and insure that this defendant dies a forgotten man in some obscure maximum security prison.

And so, after considering and attempting to balance all of the relevant considerations, the question must be asked and answered. What does an allegiance to the rule of law now require of this court? Ultimately the court's analysis must return to the questions raised concerning law enforcement's chronic failure to comply with this court's lawful discovery orders, and the impact this chronic failure has on the defendant's right to due process and a fair penalty trial.

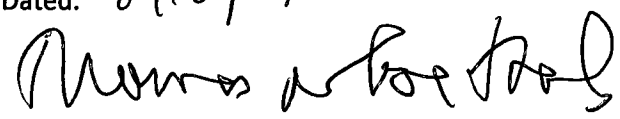
This court has issued its ongoing discovery orders to provide this defendant the constitutionally mandated due process to which he is legally entitled. The court finds that the prosecution team is unable and/or unwilling to comply fully with these lawful orders that remain in full force and effect. As a result, this court now exercises its discretion to strike the death penalty as a potential punishment for this defendant, despite the horrendous nature of his crimes. This is not a punitive sanction designed to punish the prosecution team for past misconduct. Rather, it is a remedial sanction necessitated by the ongoing prosecutorial misconduct related to discovery proceedings which has effectively compromised this defendant's right to procedural and substantive due process and prospectively to a fair penalty trial.

The death penalty having been stricken from further consideration, this court intends to sentence the defendant to the maximum remaining possible sentence at its first legal opportunity to do so.

The court once again compliments all counsel for their diligence and professionalism in preparing and presenting their positions.

IT IS SO ORDERED.

Dated: 8/18/17



THOMAS M. GOETHALS

JUDGE OF THE SUPERIOR COURT