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SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff,** **v.** **BRANDON McINERNEY,** **Defendant.**	**COURT NO. 2008005782** **OPPOSITION TO DEFENSE MOTION FOR DISCOVERY AND FORMAL DISCOVERY ORDER (MURGIA)** **Date: December 29.2008** **Time: 8:30** **Courtroom: 14**

TO THE JUDGE OF THE SUPERIOR COURT, DEFENDANT BRANDON McINERNEY AND HIS COUNSEL OF RECORD, SCOTT WIPPERT AND ROBIN BRAMSON; the People of the State of California responds as follows in opposition to defendant's motion for discovery per *Murgia V. Municipal Court,* (1975) 15 Cal.3d 286.

STATEMENT OF FACTS

The filing decision in this case was based on the following information which became known to law enforcement very shortly after the murder: On February 12, 2008, Defendant Brandon

McInerney brought a .22 caliber revolver to school. After sitting through roll in his 1st period English class, which he shared with victim Larry King, the class walked over to a computer lab. McInerney was the last one to enter the lab. He sat directly behind Larry for some twenty minutes and then withdrew the gun. From a seated position at a distance of approximately 3 to 4 feet, and without saying a word, he fired one shot into the back of Larry's head. He then stood up, and as Larry collapsed to the floor, looked around at his astonished classmates and delivered a second coup-de-grace shot into the back of Larry's head. He then dropped the gun, raised his hood and according to witnesses, "power walked" out the courtroom. He was several blocks from the school, on his cell phone with his father when he was arrested shortly thereafter. After being advised of his rights per *Miranda v. Arizona*, he invoked his right to an attorney and was booked. He was charged with attempted murder with the use of a firearm and an additional enhancement that the crime committed was a hate crime. By the initial arraignment, Count 1 was amended to murder.

The pre-charging investigation revealed that McInerney was a classmate of Larry's for a period of some months prior to the murder. Defendant, white and a head taller than Larry, had been dropped from the GATE program for lack of participation. Larry, a slightly built 15 year-old of mixed racial heritage, white and African-American, was seen by the defendant and other classmates as effeminate. He experienced a troubled home life with his adoptive parents and may have exaggerated possible abuse in order to be removed from the King home to Casa Pacifica.

Larry and the defendant had several classes together and had an acrimonious relationship that was characterized by typical 8th Grade back and forth insults; some sexual, some not. According to witnesses, Larry was usually not the aggressor in the verbal sparring in which he engaged with the defendant, or other students. Rather, the facts indicate that in the short weeks and months before his death, Larry had just begun to retort to the ongoing teasing which he had endured nearly continuously due to his effeminate demeanor. He did not specifically target McInerney in his verbal sparring, but rather had words for plenty of his classmates, many of whom tried to degrade and humiliate him to varying degrees on a daily basis.

For a couple of weeks prior to the murder, according to Larry's friend A.L., Larry's female friends would use him as a tool to clear a table for them at lunch. They would send Larry over to a crowded table of boys, sometimes including the defendant. Larry would ask if he could sit with them which would cause the boys to react with disgust. As anticipated, the boys would get up and leave, sometimes calling Larry derogatory names like, "faggot," in the process, but nevertheless making the table available to Larry and his girlfriends.

Another classmate, S.S., observed what she described as typical negative interaction between the two during their seventh period class the day before the shooting. They were arguing back and forth, "as usual." The defendant was calling Larry derogatory names and Larry was "staring" back at him. Larry got up and left the table and McInerney commented, "I'm going to shoot him." S.S. believes that Larry heard it as well.

Later, there was some pushing and shoving between the two of them as they left the class.

Then, just after seventh period, K.L. heard Larry say "I love you" to McInerney as they passed each other in the hallway. The defendant responded by telling K.L. that he was he was "going to get a gun and shoot [Larry.]" Shortly after that, the defendant told A.L., "Say goodbye to your friend Larry because you're never going to see him again." None of the students took these threats seriously. A.L. assumed Brandon was joking because he was always saying mean things to her and teasing her.

In the days before the shooting, the defendant tried to enlist others to administer a beating to Larry. When that failed for lack of interest, he decided to kill Larry. Once having made the decision, the defendant obtained a firearm, presumably from his grandfather's locked closet. The defendant had a familiarity with firearms. He had fired that particular weapon in the past during target shooting outings with his family. He was in possession of a training video entitled "Shooting in Realistic Environments" which shows highly advanced, technical shooting demonstrations and offers detailed, point-by-point lessons on the defensive use of firearms and appropriate safety precautions. Defendant was a member of the Young Marines and the Second Amendment Society, fully aware of the lethal capabilities of a .22 caliber revolver.

Defendant is an adherent of racist skinhead philosophy. On the day of the murder, a search warrant of his room uncovered a large amount of Nazi, Neo-Nazi and racist skinhead materials, including books and writings from the internet, copies of

Hitler's speeches, plus defendant's own numerous detailed drawings of swastikas, "SS" lightening bolts and Death's Head insignia. Others depict "88," which in white supremacist philosophy represents the phrase "Heil Hitler" and "14" from David Lane's infamous "14 Words." Still another depicts a bloody hand clutching a Jewish Star in front of a Swastika. In the weeks prior to the murder, Defendant commented to classmates that they shouldn't waste their tears for victims of the Holocaust because people are killed by gangs everyday. He indicated that he would have liked to have been a member of Hitler's SS, because he thought they were "cool." Defendant absented himself from a school field trip to the Museum of Tolerance. Defendant's family members confirmed Defendant's interest in white supremacist philosophy. His father raised the subject with a school counselor shortly before the murder.

The fact that his English class was studying World War II related topics was coincidental to and not the source of defendant's existing fascination with the hateful skinhead philosophy. This is supported by Defendant's failure to complete any part of the paper that he was supposed to write on his selected topic, Adolph Hitler. His teacher indicated that he had produced nothing toward a finished product and had received zero credit thus far for the paper. On the day of the murder, he told her that he had completed the paper, which wasn't true. These facts support the filing of the hate crime allegation.

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PROCEDURAL POSTURE

Since the filing of the formal motion, the People have discovered to the defense a document previously made public through a Public Records Act Request by the Ventura County Star Newspaper (Attached hereto as "Exhibit A") which lists all the cases from 2006 through June 30, 2008 in which the Ventura County District Attorney charged juveniles as adults along with the criminal case numbers for those cases.

The People object to each of the specific requests of defendant as follows:

1. **"Any and all notes, communications, correspondence, internal memoranda and other materials relating to internal standards or guidelines, whether or not previously reduced to writing, used or referenced by the Ventura County District Attorney to determine which cases involving minors to direct-file in criminal court."** This request is outside the scope of Penal Code section 1054 et seq; overbroad, overly burdensome, irrelevant, subject to the Deliberative Process Privilege and Code of Civil Procedure 2018.030 (work product privilege).

2. **"Any and all materials related to training given to employees of the Ventura County district Attorney regarding standards for direct-filing cases involving minors in criminal court."** Outside the scope of Penal Code section 1054 et seq; overbroad, overly burdensome, irrelevant and subject to the Deliberative Process Privilege and Code of Civil

Procedure 2018.030 (Work Product Privilege).

3. **"Any and all notes, communications, correspondence, internal memoranda and other materials, whether or not previously reduced to writing, relating to the District Attorney's decision to direct-file this case in criminal court."** Outside the scope of Penal Code section 1054 et seq; overbroad, overly burdensome, irrelevant and subject to the Deliberative Process Privilege and Code of Civil Procedure 2018.030 (Work Product Privilege).

4. **"The names and contact information of any and all persons consulted regarding the decision to direct file this case, and other cases involving minors in Ventura County, in criminal court."** Outside the scope of Penal Code section 1054 et seq; overbroad, overly burdensome, irrelevant and subject to the Deliberative Process Privilege and Code of Civil Procedure 2018.030 (Work Product Privilege).

5. **"Any and all notes or summaries of conversations, whether or not previously reduced to writing, relating to the decision to direct file this case and other cases involving minors in Ventura County criminal court."** Outside the scope of Penal Code section 1054 et seq; overbroad, overly burdensome, irrelevant and subject to the Deliberative Process Privilege and Code of Civil Procedure 2018.030 (Work Product Privilege).

6. **"Statistics since March 8,2000(Date that Proposition**

21 went into effect) relating to the percentage of cases involving minors charged with crimes that could potentially be filed in criminal court, which in fact resulted in being direct-filed in criminal court." The information pertaining to the requested material has been provided for the time period of 2006 through June 30, 2008. The request for materials outside this time frame is outside the scope of Penal Code section 1054 et seq; overbroad, overly burdensome, and irrelevant.

7. **"Case names and case numbers of all direct-filed cases since March 8, 2000 (Date that Proposition 21 went into effect)."** The information pertaining to the requested material has been provided for the time period of 2006 through June 30, 2008. The request for materials outside this time frame is outside the scope of Penal Code section 1054 et seq; overbroad, overly burdensome, and irrelevant.

8. **"All materials as defined by penal Code section 1054.1."** This request is overbroad. Notwithstanding the objection, the People assert that they are in compliance with 1054.1 as to ALL materials requested by the defense with the exception of gang expert Dan Swanson. Detective Swanson is still engaged in ongoing investigation which ultimately will lead to his opinion, but discovery on that issue is premature.

MEMORANDUM OF POINTS AND AUTHORITIES

I.
THE DEFENSE HAS FAILED TO MAKE THE NECESSARY PRIMA FACIE SHOWING TO JUSTIFY A MURGIA DISCOVERY ORDER

The defense seeks discovery of material to support a defense of discriminatory prosecution under *Murgia v. Municipal Court* (1975) 15 Cal.3d 286. They fail to make an adequate showing to justify such burdensome discovery. They fail to present the court with a prima facie showing of the essential elements of the defense - discriminatory effect and discriminatory intent - necessary to support discovery.

The California Supreme Court explained in *Manduley v. Superior Court* (2002) 27 Cal.4th 537 at 568-569:

> Claims of unequal treatment by prosecutors in selecting particular classes of individuals for prosecution are evaluated based on ordinary equal protection standards. *Baluyut v. Superior Court* (1996) 12 Cal.4th 826. These standards require the defendant to show that he or she has been singled out deliberately for prosecution on the basis of some invidious criterion, and that the prosecution would not have been pursued except for the discriminatory purpose of the prosecuting authorities (Citation omitted.) "[A]n invidious purpose for prosecution is one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests..." (Citation omitted.)

The necessary prima facie showing by a defendant alleging discriminatory prosecution must include some evidence all of the following points to justify a discovery order:

(a) That he or she was prosecuted because of membership in a certain classification protected by the equal protection clause (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301-302);

(b) That the prosecution was based on an intentional, purposeful, and unjustifiable classification such as race, religion or other arbitrary classification. *Oyler v. Boles* (1962) 368 U.S. 448; (*In re Elizabeth G.* (1975) 53 Cal.App.3d 725);

(c) That the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities (*Murgia v. Municipal Court, supra,* at p. 298; *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338); and

(d) That the prosecution is unfair and accompanied by a malicious intent (*In re Elizabeth G., supra,* at p. 732).

Criminal discovery was strictly a judicial creation when *Murgia* was decided. Then, the defense had only to establish plausible justification for the requested information. (*Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 306-307.) But criminal discovery underwent a revolution in 1990 when the electorate adopted the statutory discovery procedures of Penal Code section 1054, et seq. Subdivision (e) of section 1054 prohibits criminal discovery that is not expressly required by statute or mandated by the U.S. Constitution. Neither section 1054.1, nor any other California statute, requires the prosecutor to disclose information to the defense which may support a discriminatory prosecution motion. Nor does the Due Process Clause of the Fourteenth Amendment impose such a burden of

discovery upon the prosecution. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559; *Wardius v. Oregon* (1973) 412 U.S. 470, 474.) Thus, discovery relating to a discriminatory prosecution claim is no longer authorized in California, except to the extent that it is required by the U.S. Constitution.

The U.S. Constitution mandates discovery in support of a discriminatory prosecution claim **only** when the defense provides some evidence tending to show the existence of each essential element of the defense - discriminatory effect and discriminatory intent. (*United States v. Armstrong* (1996) 517 U.S. 456, 468.) This includes evidence that similarly situated defendants of other races or classifications could have been prosecuted but were not. "The justifications for a rigorous standard for the elements of a selective-prosecution claim thus required a correspondingly rigorous standard for discovery in aid of such a claim." (*Id.* at pp. 468-469.)

Under section 1054, subdivision (e), the defense must now carry its burden of producing some evidence in support of their discriminatory prosecution claim to justify burdening the prosecution with this non-case-specific discovery. Mere plausible justification is no longer sufficient. (*People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, 1190-1191.)

California developed a body of case law under *Murgia* which is still instructive. In *People v. McPeters* (1992) 2 Cal.4th 1148, 1170-1171, the court held that apparent disparities in the criminal justice system are inevitable. A defendant's reliance on superficial similarities to cases treated differently, and which ignores "readily-available, case specific data," is

insufficient to support a request for discovery.

Even under the earlier cases, discovery of such matter was greatly restricted. Because this form of discovery would require the People to search a variety of records to uncover the requested information, and create documents that currently do not exist, the court has a responsibility not to so burden the People without a preliminary showing by defendant that the information may be useful. (*Robinson v. Superior Court* (1978) 76 Cal.App.3d 968, 982-983). A "prima facie" showing of invidiously discriminatory prosecution was required when the discovery sought would be unduly burdensome on the People. (*Perakis v. Superior Court* (1979) 99 Cal.App.3d 730, 733; *Bortin v. Superior Court* (1976) 64 Cal.App.3d 873, 878).

The required showing was ordinarily made by affidavits showing *facts* which demonstrate the evil alleged. For example, in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, one hundred affidavits were offered showing specific actions of the prosecutor teaming up with farmers to prosecute UFW members, but not equally guilty farmers, in connection with union picketing of farms. Discovery was properly denied where the defense showing consists only of opinions with few supporting facts. (See, e.g., *Perakis v. Superior Court*, *supra*, 99 Cal.App.3d at pp. 733-734; *Robinson v. Superior Court*, *supra*, 76 Cal.App.3d at pp. 982-983.)

Similarly, in *People v. Keenan* (1988) 46 Cal.3d 478, 505-507, the court held a declaration showing that other persons whose crimes were superficially similar were not charged with the death penalty was "patently insufficient to raise the issue

of individual or systematic discrimination on invidious grounds." (*Id.* at p. 507.)

In deciding whether the defendant has made an adequate showing for discovery, the court may consider any counteraffidavits submitted by the People negating either discriminatory effect or intent. (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1774-1776; *People v. Moya* (1986) 184 Cal.App.3d 1307, 1310.)

> "[A]n equal protection violation does not arise whenever officials 'prosecute one and not [another] for the same act' [citation]; instead, the equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis."

Murgia v. Municipal Court (1975) 15 Cal.3d 286, 297.

To prevail in this defense, a defendant must show by admissible evidence, and by a preponderance of the evidence, that he or she has been selected out of a much larger number of persons equally subject to prosecution. The defendant must also show this selection was deliberate, was based on an invidious or unjustifiable standard such as race, religion or other arbitrary classification, and would not have occurred except for the discriminatory design of the prosecutor. (*Murgia v. Municipal Court, supra*, at p. 298;see also, *People v. Milano* (1979) 89 Cal.App.3d 153, 165; *People v. Garner* (1977) 72 Cal.App.3d 214, 216-217.)

The second element of the defense of discriminatory prosecution is that defendant's selection was deliberate and based on an invidious standard. Appellate cases have repeatedly

emphasized that the mere conscious exercise of some selectivity in enforcement is not itself a constitutional violation. (See, .g., *People v. Ashmus* (1991) 54 Cal.3d 932, 980; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 299.) "Prosecutorial discretion permits the choice among possible defendants which to prosecute." (*People v. Superior Court (Lyons Buick-Opel-GMC, Inc.)* (1977) 70 Cal.App.3d 341, 344.) The equal protection clause does not abrogate a prosecutor's authority in the charging process. (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 87.) The prosecution can discriminate among offenders if there is a reasonable basis for such discrimination. (*People v. Ashmus, supra;* see, e.g., *People v. Keenan* (1988) 46 Cal.3d 478, 505-507 [prosecutorial discretion in choosing among defendants eligible for death penalty does not show arbitrariness or violate constitutional principles]; *People v. Garner* (1977) 72 Cal.App.3d 214 [proper to prosecute bookmakers instead of bettors]; *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338 [proper to prosecute prostitutes instead of customers]; see also, *People v. Owens* (1997) 59 Cal.App.4th 798 [proper to prosecute police officer involved in illegal chain mail scheme for a felony while allowing civilian defendants to plead to misdemeanors].)

II
THE DELIBERATIVE PROCESS PRIVILEGE IS VALID UNDER CALIFORNIA LAW

The deliberative process privilege comes from federal law but has been adopted by the California Supreme Court. A government body may "withhold documents that reflect advisory

opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated." (*FTC v. Warner Communications Inc.* (9th Cir. 1984) 742 F.2d 1156, 1161, citing *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 150; accord, *National Wildlife Federation v. United States Forest Service* (9th Cir. 1988) 861 F.2d 1114, 1116-1117.)

The purpose of the privilege is to "promote frank and independent discussion among those responsible for making governmental decisions." (*FTC v. Warner Communications, Inc., supra,* 742 F.2d at p. 1161.) "The ultimate purpose of the privilege is to protect the quality of agency decisions." (*Ibid.*) The deliberative process privilege applies to private communications among county officers and their staff. (*United States v. Irvin* (C.D. Cal. 1989) 127 F.R.D. 169, 172.)

The California Supreme Court relied upon the deliberative process privilege in *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325. The issue arose in that case in the context of a Public Records Act request for the Governor's appointment calendars and schedules. In denying disclosure, the court relied upon the "deliberative process" or "executive" privilege, noting that it had been interpreted primarily by federal courts. (*Id.*, at p. 1339 and fn. 10.) The court held at pages 1340-1341:

> "Human experience teaches that those who expect public dissemination of the their remarks may well temper candor with a concern for appearances ...to the detriment of the decisionmaking process." [Citation.] To prevent injury to the quality of executive decisions, the courts have been

> particularly vigilant to protect communications to the decisionmaker before the decision is made. "Accordingly, the. . . courts have uniformly drawn a distinction between predecisional communications, which are privileged [citations]; and communications made after the decision and designed to explain it, which are not."

The court noted that while courts sometimes distinguish between deliberative and factual materials, this distinction is not absolute. (*Id.*, at p. 1341.) The court explained that the privilege "is intended to protect the deliberative *process* of government and not just deliberative *material*. [Citations.] Accordingly, in some circumstances, 'the disclosure of even purely factual material may so expose the deliberative process. . . that it must be deemed exempted. . .'"

"The key question in every case is 'whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" (*Id.*, at p. 1342.) That is precisely the effect that disclosure would have in the present case.

The deliberative process privilege has been applied to documents prepared by the Attorney General's office in determining whether to prosecute. (*Gomez v. City of Nashua, N.H.* (D.N.H. 1989) 126 F.R.D. 432.) The court recognized the "policy against exploratory inquiries into the mental processes of governmental decisionmakers." (*Id.*, at p. 434.)

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ANALYSIS

The facts known at the time of filing support the decision to charge defendant in criminal court. The decision was not based on the consideration of any improper motive, nor has the defense hinted at such. Neither is defendant entitled to a blow-by-blow description of the internal decision making process which is the purview of the elected District attorney. Such disclosure is against public policy by virtue of the work product and deliberative process privileges.

It appears that Defendant misses the import of Murgia altogether and makes what might be termed a "*reverse Murgia*" motion. That is, he argues that *no discretion* was exercised before the decision was made. Defendant bases this odd premise on a selection of generic statements without context made by the District Attorney and his personnel regarding the case. What these statements demonstrate, if anything, is up for debate, but as the basis for a *Murgia* discovery order, they are clearly insufficient.

Even assuming, for the purpose of argument, that defendant is correct and that no discretion was exercised, this fact does not demonstrate the required **discriminatory effect and discriminatory intent -- based on the use invidious criteria.**

No proffer has been made that the defendant is a member of any protected class or that the District Attorney used anything other than the facts of the murder, known at the time of filing; namely, that the defendant committed a vicious, execution-style First Degree Murder, that he used a firearm to deliver not one, but two fatal shots to the back of his victim's head and that

his potential motive was based on hatred. Anything other than an adult filing would constitute an abuse of discretion.

Regarding the defendant's all inclusive request for a blanket order pursuant to Penal Code section 1054.1, the People draw the court's attention to the fact that the informal discovery request was served on the People on October 28, AFTER the date that criminal proceedings were suspended in this case and the formal motion for discovery was served on the People the day that criminal proceedings were reinstated.

As the goal of the criminal discovery statute is for arguments to be worked out between counsel before involving the courts, the People request the court to delay a ruling on this portion of the motion until such time as all counsel can discuss the matter and determine what, if any, items are actually missing. It is the position of the People that we have already turned over everything outlined in the defendant's informal discovery request, excluding materials pertaining to white supremacy expert Dan Swanson. That material will be given to the defense once Detective Swanson's investigation is complete and he has formulated his opinion.

CONCLUSION

For all the above stated reasons, the People of the State of California request that this court deny Defendant's *Murgia* motion for discovery in its entirety and reserve the issue of a discovery order pursuant to Penal Code section 1054.1 for another day, after counsel can informally resolve those issues

out of the presence of the court.

Respectfully submitted,

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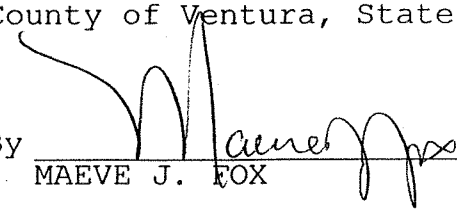
DATED: December 17, 2008 By 
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