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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yolo)

LIONELL THOLMER,

 Petitioner,

 v.

THE SUPERIOR COURT OF YOLO COUNTY

 Respondent;

THE PEOPLE,

 Real Party in Interest.

C069723

(Super. Ct. No.
HCCR117)

A person sentenced to death or life in prison without the possibility of parole is entitled, upon a proper showing, to postconviction "discovery materials" to further a petition for writ of habeas corpus or motion to vacate a judgment. (Pen. Code, § 1054.9, subd. (a); further statutory references are to the Penal Code.) Here, 18 years after being sentenced to life without the possibility of parole, petitioner filed a petition

pursuant to section 1054.9 to obtain such discovery materials. As we shall explain, we accept the People's concession that the respondent superior court erred in denying the petition to the extent it seeks discovery of statements petitioner made to police officers and to the rap sheets of three witnesses. We further conclude petitioner is entitled to additional witness statements based on his showing that these documents were or should have been disclosed by the prosecution to the defense prior to trial. But we otherwise conclude the respondent court did not err in denying the petition.

FACTS

In 1993, petitioner Lionell Tholmer was convicted after a jury trial of the first degree murders of Cynthia Sparpana and her three-year-old daughter, Danyel. The jury also found that petitioner personally used a firearm, and found true special circumstances of multiple murders and the commission of a prior murder. The jury set the penalty at death, but the trial court "rejected the jury's determination and, upon its independent review, imposed a sentence of life without the possibility of parole, based on the court's lingering doubt." We affirmed the conviction on appeal in *People v. Tholmer* (Jan. 26, 1995, C015830) [nonpub. opn.].

To the extent relevant to our analysis of petitioner's discovery motion, we briefly summarize the facts of the murders from our appellate opinion:

Cynthia Sparpana was found dead in her home on November 5, 1985. She had been beaten in the face with a blunt instrument such as the butt or barrel of a gun, strangled, and shot in the back of the head with a small caliber gun. Sparpana's daughter, Danyel, was missing and has never been found. Sparpana owned a Harrington and Richard, Inc. (H&R) 929 .22 caliber handgun, which was missing. Some of Sparpana's injuries were consistent with being struck with the barrel of this gun, and a bullet recovered from Sparpana's head was .22 caliber. Evidence indicated Sparpana died between Saturday evening, November 2, and Sunday morning, November 3.

Petitioner told investigators that Sparpana was murdered by John Meadows, petitioner had loaned his car to Meadows the weekend of Sparpana's murder, Meadows abandoned the car in Thornton, and when petitioner retrieved the car he found in it a .22 caliber handgun and Danyel's security blanket with blood on it. Petitioner claimed he gave the handgun to Troy Barron to sell. Barron told investigators he sold the gun to either Floyd Johnson or Manuel Vasquez. Johnson turned over to authorities an H&R .22 caliber handgun which fit the description of Sparpana's gun, but the butt had been sawed off so there was no way conclusively to identify the gun as Sparpana's.

Prior to his trial for the Sparpana murders, petitioner was convicted of murdering John Meadows, who died on or about November 3 or 4, 1985. Bullets recovered from Meadows's body could have been fired from Sparpana's H&R .22 caliber handgun. Petitioner confessed to murdering Meadows, but claimed Meadows

told him he murdered the Sparpanas. The People argued petitioner killed Meadows to make him a scapegoat in order to cover up petitioner's murders of the Sparpanas.

We filed our opinion affirming petitioner's conviction of murdering the Sparpanas, and his sentence to life without the possibility of parole, on January 26, 1995.

On March 30, 2011, petitioner filed in the respondent superior court a form habeas corpus petition, which he recaptioned, "Petition for Postconviction Discovery Penal Code Section 1054.9." Petitioner's verified petition asserted he sought discovery materials the prosecution currently possesses, to which petitioner was entitled prior to or at trial, which will aid him in preparing a petition for writ of habeas corpus, and petitioner had unsuccessfully sought to obtain the materials from his trial attorney.

The petition expressly requested access to the following documents:

"(1) A printout from the California Law Enforcement Telecommunication System (CLETS) records for the Rohm gun, serial number IC190317, introduced against petitioner at trial without the CLETS record."

"(2) The chain of custody records listing the identities of the Sacramento City police officers who seized the Rohm gun serial number IC190317 from Floyd Johnson['s] Sacramento 5th Ave residence in December 1985.

"(3) The records generated by the Sacramento City police related to the December 1985 seizure of serialized gun IC190317 from Floyd Johnson's 5th Ave residence.

"(4) All of the statements Floyd Johnson made to police who were investigating the Meadows/Sparpana murders regarding his purchase and possession of two guns that police later came to possess, specifically a H&R 929 and Rohm serial number IC190317 that was reported to have been sold to Floyd Johnson by Troy Barron.

"(5) All police reports of any statement Troy Barron made to police regarding purchasing or selling two guns to Floyd Johnson in December 1985.

"(6) Reports written by Yolo County detectives Mayoral and Farmer documenting contacts they had with Floyd Johnson, Troy Barron, Manual Vasques [sic] Casanova, regarding the purchase and or sells [sic] of guns in December 1985.

"(7) The micro taped statement of December 14, 1985 taken by Lieutenant John Edward Kane of the Sacramento City police of petitioner.

"(8) A copy of the taped statement petitioner gave to Yolo County officer Penny Welch and Lieutenant Kane in 1986."

At the conclusion of his petition, petitioner also requested the "Rapp [sic] sheets for Johnson, Barron and Vasquez."

As to whether these documents existed in the defense files, petitioner declared, as relevant, that his trial attorney informed petitioner that "he never had a copy of the CLETS

report, nor did counsel have a copy of the chain of custody on the Rohm gun serial number IC190317, or any of the discovery petitioner hereby seeks." Petitioner also declared his trial attorney had given his "trial files" to petitioner, but petitioner examined the files "and the items sought are missing from the files, and to some degree weren't ever disclosed by the prosecution." Further, petitioner contacted a deputy district attorney and informally sought the records "to no avail."

The respondent superior court issued an order to show cause, and the People filed a return. Petitioner attached to his traverse his declaration, as relevant, that he "had but lost Floyd Johnson, Troy Barron, and Manual [sic] Vasquez's statements regarding the guns," and petitioner lost his copy of a statement petitioner gave to Lieutenant Kane, which was recorded using a microcassette recorder. Petitioner further asserted he also lost the rap sheets.

On October 19, 2011, the respondent superior court denied the petition, indicating petitioner failed to demonstrate that the materials fall within the discoverable materials set forth in *In re Steele* (2004) 32 Cal.4th 682.

Petitioner filed a petition for writ of mandate in this court on November 23, 2011, seeking an order directing the respondent superior court to grant his section 1054.9 petition. We issued an order to show cause, and appointed counsel to represent petitioner in this court. Having received the People's return and petitioner's traverse, and the parties' supplemental return and traverse, we shall order the issuance of

a peremptory writ of mandate directing the respondent superior court to grant the section 1054.9 petition in part.

DISCUSSION

Through section 1054.9, the Legislature has provided a vehicle for an inmate, sentenced to death or life without the possibility of parole, to obtain postconviction discovery for a habeas corpus petition or motion to vacate a judgment. If the inmate makes a "showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (c), order that the defendant be provided reasonable access to any of the materials described in subdivision (b)." (§ 1054.9, subd. (a).) The exception of subdivision (c) of section 1054.9, inapplicable here, provides: "In response to a writ or motion satisfying the conditions in subdivision (a), court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining access to physical evidence for purposes of postconviction DNA testing are provided in Section 1405, and nothing in this section shall provide an alternative means of access to physical evidence for those purposes."

"Discovery materials" are described in subdivision (b) as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." (§ 1054.9, subd. (b).)

"The actual costs of examination or copying pursuant to this section shall be borne or reimbursed by the defendant." (§ 1054.9, subd. (d).)

Section 1054.9 has no time limit, and thus an inmate sentenced to death or life without the possibility of parole may file a section 1054.9 motion (or petition) years after his conviction. (*Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304-305.) An inmate may file a section 1054.9 motion either when the inmate is preparing a habeas corpus petition or when he has already filed the habeas corpus petition. (*In re Steele, supra*, 32 Cal.4th at p. 691.) The motion may be filed by an inmate acting in propria persona. (*Burton v. Superior Court* (2010) 181 Cal.App.4th 1519, 1522.)

"The legislative history behind section 1054.9 shows that the Legislature's main purpose was to enable defendants efficiently to reconstruct defense attorneys' trial files that might have become lost or destroyed after trial." (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 897.) However, the language of section 1054.9 "does not limit the discovery to materials the defendant *actually possessed* to the exclusion of materials the defense *should have possessed*." (*In re Steele, supra*, 32 Cal.4th at p. 693.)

"Accordingly, . . . section 1054.9 [requires] the trial court, on a proper showing of a good faith effort to obtain the materials from trial counsel, to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show either (1) the prosecution did provide at time of trial but have since become lost to the defendant; (2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or (4) the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them." (*In re Steele*, *supra*, 32 Cal.4th at p. 697.)

However, section 1054.9 requires the prosecution to disclose only materials currently in its possession. "[I]t includes only materials 'in the possession of the prosecution and law enforcement authorities,' which we take to mean in their possession *currently*. The statute imposes no preservation duties that do not otherwise exist. It also does not impose a duty to search for or obtain materials not currently possessed." (*In re Steele*, *supra*, 32 Cal.4th at p. 695.)

"[S]ection 1054.9 requires defendants who seek discovery beyond file reconstruction to show a reasonable basis to believe that other specific materials actually exist. Otherwise, a discovery request can always become . . . a free-floating request for anything the prosecution team may possess." (*Barnett v. Superior Court, supra*, 50 Cal.4th at p. 899.) "[A] reasonable basis to believe that the prosecution had possessed the materials in the past would also provide a reasonable basis to believe the prosecution still possesses the materials. Petitioner need not make some additional showing that the prosecution still possesses the materials, a showing that *would* be impossible to make." (*Id.* at p. 901.)

"[W]hen the trial court denies a defendant's discovery request under section 1054.9 and the defendant seeks writ relief in the appellate court, the defendant must show the appellate court he would have been entitled to the materials he requested at time of trial. Absent such a showing, the defendant cannot carry his burden of showing the trial court abused its discretion in denying his discovery request." (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 363.)

Neither section 1054.9 nor the cases construing it require an inmate who seeks discovery of materials that were disclosed to the defense but have since been lost (i.e., materials for "file reconstruction") to make any showing of relevance of those materials to the inmate's anticipated habeas corpus petition.

But, when an inmate seeks to justify section 1054.9 discovery on the ground that the prosecution should have

disclosed the material at trial under a duty imposed by statute (§ 1054.1, subd. (e)) or constitution (*Brady v. Maryland* (1963) 373 U.S. 83), the inmate must provide a specific explanation of how the material is exculpatory. (*Kennedy v. Superior Court, supra*, 145 Cal.App.4th at pp. 366-367, 370-371; see also *Barnett v. Superior Court, supra*, 50 Cal.4th at p. 901 ["If petitioner can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence"].)

"Where the defendant seeks to justify a discovery request based on a theory of third party culpability, the defendant must--at the very least--explain *how* the requested materials would be relevant to show someone else was responsible for the crime. Likewise, where the defendant seeks to justify a discovery request on the ground the requested materials would have been relevant to impeach a prosecution witness, the defendant must--at the very least--explain what that witness's testimony was and how the requested materials could have been used to impeach that testimony." (*Kennedy v. Superior Court, supra*, 145 Cal.App.4th at p. 372; see also *id.* at p. 389 [trial court did not abuse its discretion in denying section 1054.9 motion because inmate failed to show requested material "could have been used to impeach the trial testimony of [witnesses] or could have otherwise constituted exculpatory or favorable evidence subject to disclosure under *Brady* and/or section 1054.1(e)"].) However, to the extent the inmate seeks evidence he claims should have been disclosed at the time of trial under

Brady v. Maryland, *supra*, 373 U.S. 83, he is not required to show the evidence is "material" within the meaning of *Brady*, i.e., "that it is reasonably probable the result would have been different had the evidence been disclosed." (*Barnett v. Superior Court*, *supra*, 50 Cal.4th at pp. 900-901.) We note that *Barnett* implicitly overrules *Kennedy* to the extent *Kennedy* holds that the inmate must show not only that the evidence is exculpatory but also that it is material under *Brady*. (See *Kennedy v. Superior Court*, *supra*, 145 Cal.App.4th at pp. 376-377, 379-382, 387-388, 392-393, 396-397.)

With this legal framework in mind, we turn to the items requested in petitioner's section 1054.9 petition.

A. *Items 1 to 3, Related to a "Rohm Gun"*

The first three discovery items sought by petitioner relate to a "Rohm gun" with a serial number of IC190317, i.e., a CLETS printout, chain of custody records, and police records regarding the seizure of the gun. Petitioner concedes these items were not produced by the prosecution to his trial attorney at the time of trial. Accordingly, these items are not subject to postconviction discovery for purposes of record reconstruction.

Petitioner argues the items are subject to discovery because they should have been produced at trial or the prosecutor would have been obligated to produce them if the defense had requested them. This is so, petitioner asserts, because "[t]he Rohm gun, and witness testimony about how it was obtained by the investigating law enforcement agencies, were

admitted into evidence at the request of the prosecutor, who argued that [petitioner] had sold the gun to Troy Barron." In support of this assertion, petitioner cites his declaration and this court's opinion affirming his conviction. Petitioner also asserts the three items he seeks related to the Rohm gun might have impeached the credibility of Barron, Johnson or the officers who obtained, transferred and stored the gun.

While our opinion affirming petitioner's conviction discusses at length that petitioner gave to Troy Barron a "Harrington & Richard, Inc. (H&R) 929 .22 caliber handgun," our opinion makes no mention of a "Rohm gun." Our opinion does indicate that in response to the arrest of Troy Barron as an accessory to murder, Barron "gave [Detective] Farmer information that led to recovery of a .22 revolver, but the gun did not match the description of Cynthia's gun," and that after Barron was interviewed again Barron led Detective Farmer to Floyd Johnson, who produced an H&R .22 that fit the description of Cynthia's gun. We are left to speculate that petitioner means that the Rohm gun is the first .22 revolver that Barron gave to the police.

Petitioner does not contend that the first three items of his discovery request fall within the materials the prosecution was required to disclose to the defense under section 1054.1. Section 1054.1 provides: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows

it to be in the possession of the investigating agencies: [¶]
(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] (b) Statements of all defendants. [¶] (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

Nor does petitioner explain how information regarding a Rohm gun was in any way exculpatory or relevant. We are left to presume that petitioner means that evidence about the Rohm gun would be relevant to a theory of third party culpability. But, petitioner fails to explain how the requested materials would have been relevant to show someone else was responsible for the crime. Further, petitioner fails to explain why there would have been any reason for his trial attorney to have requested information regarding the Rohm gun, or why the authorities would have had any reason to respond to a discovery request for information regarding this gun. Petitioner fails to explain how

information about the Rohm gun was anything other than a dead end.

Further, petitioner fails to explain how the materials would be relevant for impeachment. Thus, he fails both to describe the testimony of Barron or Johnson or the officers who petitioner asserts obtained, transferred and stored the Rohm gun, or to show how discovery of items 1 to 3 could have been used to impeach those witnesses' testimony.

The respondent court did not err in denying petitioner's motion as to items 1 to 3.

B. Items 4 to 6, Statements by Johnson and Barron, and Detectives' Reports Regarding Contacts with Johnson, Barron and Vasquez

In items 4 to 6, petitioner requested all statements Floyd Johnson made to police regarding his purchase and possession of "two guns," the H&R 929 and the Rohm handgun; all police reports of any statement Troy Barron made to police regarding purchasing or selling the two guns to Johnson in December 1985; and reports written by Yolo County detectives Mayoral and Farmer regarding contacts with Johnson, Barron and Vasquez regarding the purchase and sale of guns in December 1985. Petitioner contends the respondent superior court erred in denying his request for these items because Johnson, Barron and Vasquez testified at trial, and in any event the defense would have been entitled to receive such reports and statements upon request.

Petitioner declared (in support of his traverse filed in the superior court) that he "had but lost Floyd Johnson, Troy

Barron, and Manual [sic] Vasquez's statements regarding the guns." Although petitioner's declaration is not specific, it appears to be adequate to show that his trial attorney had these documents but they are now missing from his records, and, accordingly, that petitioner properly sought these items for record reconstruction.

But even were we to reject petitioner's declaration as insufficiently specific, the respondent superior court should have granted the motion as to the statements for another reason. It appears from our appellate opinion that Johnson, Barron and Vasquez testified during petitioner's trial. In addition, our opinion makes clear that Detective Farmer interviewed Johnson and Barron regarding the H&R .22 caliber handgun, and may also have interviewed Vasquez regarding that gun. It is reasonable to presume that Detective Farmer and other police officers obtained statements from the three potential prosecution witnesses, and would have documented their interviews with the witnesses. Because it appears the prosecutor intended to call these witnesses at trial, petitioner's trial attorney would have been entitled to receive copies of items 4 to 6 had he requested them.

The People make no specific argument against disclosure of items 4 to 6 other than the general assertions that petitioner failed to make good faith efforts with the prosecution to recreate the defense files, and that petitioner fails to show that the items actually exist. But, petitioner declared in support of his section 1054.9 motion that he sought the records

from a deputy district attorney "to no avail." And, because it is reasonable to believe the prosecution possessed these items in the past, it is reasonable to believe the prosecution still possesses them.

The respondent court erred in denying petitioner's motion as to items 4 to 6.

C. Items 7 and 8, Petitioner's Recorded Statements, and the Rap Sheets of Johnson, Barron and Vasquez

Finally, petitioner requested his own statements, recorded by Sacramento police lieutenant John Edward Kane on December 14, 1985, and Lieutenant Kane and Yolo County police officer Penny Welch in 1986, as well as the rap sheets of Johnson, Barron and Vasquez. The People concede the respondent court erred in denying petitioner's request as to these materials, and we accept the concession. Petitioner made a sufficient showing that his trial attorney had these documents but they are now missing from his records. Accordingly, petitioner properly sought these materials for record reconstruction.

DISPOSITION

Let a peremptory writ of mandate issue directing the respondent superior court to vacate its October 19, 2011, order denying petitioner's habeas corpus petition (i.e., petitioner's section 1054.9 motion), and to enter a new order granting petitioner's section 1054.9 motion as to items 4 through 8 and the rap sheets of Johnson, Barron and Vasquez, to the extent the materials are in the possession of the prosecution or law

enforcement authorities, and subject to petitioner's obligation to bear or reimburse the costs of copying the materials.

_____ HULL _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MAURO _____, J.