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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; WILLIAM AUSTIN et al., Real Parties in Interest.	B251464 (Los Angeles County Super. Ct. No. BA361090)

ORIGINAL PROCEEDINGS in Mandate. Lisa M. Chung, Judge. Writ granted.

Reily & Jeffery, Inc., Oren Rosenthal and Janine K. Jeffery for Petitioner.

No appearance for Respondent.

Ronald L. Brown, Public Defender, Albert J. Menaster, Mitchell Bruckner, Monnica Thelen and Robin Bernstein-Lev, Deputy Public Defenders, for Real Parties in Interest.

Petitioner California Department of Corrections and Rehabilitation (the Department) petitions for a writ of mandate compelling the trial court to vacate orders compelling the Department to produce 16 documents from the confidential prison files of certain inmates subpoenaed by Real Party in Interest William Nathan Austin (Austin). As explained below, we grant the petition and issue the writ.

BACKGROUND

Killing of Richard Ponton

By indictment prosecuted by the Los Angeles County District Attorney's Office, Austin is charged with the murder of Richard Ponton (Pen. Code, § 187, subd. (a)), with the special circumstance allegation that he was previously convicted of murder (Pen. Code, § 190.2, subd. (a)(2)). The prosecution is seeking the death penalty.

The killing occurred on January 24, 2006, when Austin (already serving a sentence of life without the possibility of parole for murder) was an inmate with Ponton (himself serving life without parole) at the Department's prison in Lancaster. Ponton was killed inside his cell by strangulation and an incised wound to the neck. At the time of the killing, inmate Christopher Bass was Ponton's cellmate. Austin was housed in the adjacent cell with inmate Raul Hernandez. Bass told Los Angeles County Sheriff's Detectives that on the morning of the killing, he left the cell he shared with Ponton around 6:15 a.m., and returned around 11:15 a.m., when he discovered Ponton's body. Hernandez told Sheriff's Detectives that he went to breakfast with Austin, after which Austin went to "pill call" and Hernandez returned to their cell alone. He did not see Austin again until

the cell door opened at 9:30 a.m., and Hernandez saw Austin leaving Ponton's cell. Austin said that he had entered Ponton's cell and "fucked him up."

Inmate Randy Hanson told officers assigned to the Department's Institutional Gang Office that Hernandez and inmate Francisco Cornejo planned Ponton's murder and used Austin as the killer. According to Hanson, their motive was that Cornejo took $900 from inmate "Tone" Loreto ostensibly to provide him drugs. But Cornejo's real intent was to have Loreto assaulted and then refuse to pay the debt. However, Ponton, who was Program Clerk, arranged for Loreto to move to a different housing unit to protect him. Cornejo viewed this as an act of disrespect, and said that he wanted Ponton killed. Hernandez suggested he use Austin as the killer. Hanson told officers that Austin evidenced mental instability, and Cornejo and Hernandez took advantage of his condition.

Hanson also told officers that on the morning of the murder, he had breakfast with Freddie Gonzalez (Cornejo's cell mate), Hernandez, and Austin. Later, he saw Hernandez hand an object to Austin outside Ponton's cell and heard Cornejo tell Hernandez to "make sure he kills him." Hanson saw Austin enter Ponton's cell when the door was opened, heard sounds consistent with someone being thrown on the floor and strangled, and a few minutes later saw Austin standing over Ponton's body.

Another inmate, John Jose Guillen who worked with Ponton as a Program Clerk, told Sheriff's Detectives that Ponton made money arranging bed moves for inmates. Ponton had drug debts, was a former cell mate of Cornejo, and owed Cornejo money. Guillen described Cornejo as a "button pusher" who would have reason to want Ponton killed if Ponton had made promises he could not keep. Guillen also said that Cornejo was an instigator, and was the type to pump up Austin to kill Ponton.

Inmate Johnnie Lee Ray told Sheriff's Detectives that Ponton owed Austin $200. He described Austin as an Aryan Brotherhood drop out known as a "heavy." Ray said that on the morning of the killing he saw Austin enter Ponton's cell when the door was opened and later saw him leave and return to his own cell.

2009 Subpoenas

In September 2009, before deciding to seek the death penalty against Austin, the prosecution subpoenaed from the Department the prison records of Austin and Christopher Bass (Ponton's cellmate). In November 2009, Austin subpoenaed from the Department his own prison records and those of Bass, Ponton, and Raul Hernandez (Austin's cellmate who was implicated in the murder by Randy Hanson). The Department moved to quash the subpoenas, contending, inter alia, that the confidential inmate files contained information protected from disclosure by the privileges for official information and for identity of an informer provided by Evidence Code sections 1040 and 1041, respectively.[1] In April 2010, following an in camera review of the confidential portions of the files for Austin, Ponton, Bass, and Hernandez, the court ordered that certain documents in the files be disclosed subject to a protective order which provided that the documents were for the "attorney's eyes only," that no copies be made, and that the names of witnesses not be disclosed to Austin. In May 2010, the Department produced the documents.

2012 Subpoenas and Order of Production

In June 2012, the prosecution elected to seek the death penalty for Austin. Following that decision, Austin served subpoenas on the Department seeking the

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[1] All undesignated section references are to the Evidence Code.

unredacted files of Randy Hanson (who was a percipient witness to the killing and implicated Francisco Cornejo and Raul Hernandez in the planning), Cornejo, Freddie Gonzalez (Cornejo's cellmate), John Guillen (who worked with Ponton as a Program Clerk and told Sheriff's Detectives that Ponton arranged bed moves for inmates and owed Cornejo money), Johnnie Lee Ray (who saw Austin enter and leave Ponton's cell), and "Tone" Loreto (who, according to Hanson, was the inmate whose bed move Ponton arranged, thereby angering Cornejo). Austin also moved for production of the entire, unredacted files of the inmates involved in the 2009 subpoenas, which included Christopher Bass and Raul Hernandez.

The Department moved to quash the subpoenas and opposed the release of unredacted files, again contending that the confidential portions were protected from disclosure under sections 1040 and 1041.

In December 2012, the court denied the motion to quash, declined to conduct an in camera hearing to review the files, and ordered that all the requested files be produced without redaction to the defense and prosecution, subject to protective orders.

First Petition for Writ of Mandate

The Department petitioned this court for a writ of mandate. In February 2013, we issued an alternative writ directing the trial court either to vacate its orders of production and conduct an in camera review of the files using the balancing analysis required by sections 1040 and 1041, or show cause why a peremptory writ should not issue.

The trial court complied with the alternative writ and conducted in camera hearings attended by counsel for the Department and Everett Fischer, a Parole Agent III and Litigation Coordinator for the Office of Correctional Safety. The

court issued orders of production in July and August of 2013 requiring the production of approximately 125 confidential documents, some of which were redacted. The production is subject to a protective order that limits disclosure to Austin's attorney, investigator, paralegal, and expert witness. It bars disclosure of names mentioned in the documents to anyone, and requires Austin's counsel to give the Department 14-days notice before interviewing any inmate mentioned in the documents. We ultimately dismissed the Department's first petition for writ of mandate as moot.

Current Petition

The Department produced 109 of the ordered documents, but filed a second petition for writ of mandate in this court, seeking to overturn the trial court's July and August 2013 orders of production as to 16 confidential documents. On October 24, 2013, we issued an alternative writ directing the trial court to vacate its order of production regarding the disputed documents or show cause why a peremptory writ should not issue. The trial court declined to vacate its order. Austin filed a return to the alternative writ, and the Department filed a reply. We have reviewed all the documents, filed with the petition, the return, and the reply, including the following documents under seal: (1) the 16 disputed documents; (2) reporter's transcripts of the in camera hearings resulting in the order of production; and (3) a confidential declaration by one of Austin's attorneys filed in support of Austin's opposition to the Department's motions to quash Austin's subpoenas .

DISCUSSION

Section 1040, subdivision (b)(2) provides a conditional privilege for "official information," which is defined as "information acquired in confidence by

a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (§ 1040, subd. (a).)[2] The conditional privilege of subdivision (b)(2) states that "[a] public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and . . . [¶] [d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Thus, the privilege requires a balancing of the interest in confidentiality against the interest of disclosure. (See *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1126 [once public entity shows the information was obtained in confidence, the court must apply the balancing test].)

Similarly, section 1041, subdivision (a)(2) provides a conditional privilege against disclosure of the identity of an informer. It provides in relevant part that "a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another from disclosing the person's identity, if the privilege is claimed by a person authorized by the public entity to do so and either of the following apply: [¶] . . . [¶] (2) Disclosure of the identity of the informer is against the public interest because the necessity for preserving the confidentiality of his or her identity outweighs the necessity for disclosure in the interest of justice." Subdivision (b) states in relevant part that the privilege applies to

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[2] Subdivision (b)(1) provides an absolute privilege for official information if "[d]isclosure is forbidden by an act of the Congress of the United States or a statute of this state." The absolute privilege is not involved here.

"information . . . furnished in confidence by the informer to . . . [a] law enforcement officer."

In non-confidential filings in the trial court in connection with its motions to quash the various subpoenas, the Department produced the declarations of Everett Fischer and Brian Snider, a Litigation Coordinator at the California Correctional Institution. As explained in these declarations, the inmate confidential files from which the 16 documents in question come are kept by the Department in strictest confidence and available for review by Department personnel only under "need to know" circumstances defined by regulation. They contain four categories of information: (1) confidential enemies lists containing the names of persons about whom the inmate has informed to prison officials and persons who have informed on the inmate; (2) confidential interviews with informants, meaning information given in confidence by informants about the inmate or by the inmate about other prisoners; (3) debriefing reports, which are extensive interviews of an inmate who is dropping out of a gang, and which are placed in the file of the debriefed inmate and the file of any inmate mentioned in the debriefing; and (4) victim notification information, which is personal information about the inmate's crime victims. According to each declarant, the disclosure of the confidential files would subject the persons identified and their friends and families to attack, whether in or out of prison, in retaliation.

As noted, we have reviewed the 16 documents in question filed under seal and the sealed transcripts of the court's in camera review. Each of the documents contains the type of information described in these declarations -- information that qualifies as official information as defined in section 1040, subdivision (a), and/or as the identity of informers who have furnished information to prison officers regarding violations of law that qualify under section 1041, subdivision (b). They

were thus properly subject to in camera review, attended by counsel for the Department and Everett Fischer. As stated in *Ochoa v. Superior Court* (2011) 199 Cal.App.4th 1274, 1283, regarding in camera review of prison records – in that case, confidential information relied on by Governor to reverse a parole grant: "'"[Q]uestions of confidentiality are complex and can only be made by trained, experienced correctional authorities knowledgeable about the inmate in question, the entire content of his file (not just the contested documents the court reviews), prison life in general, morality and ethics of the prison setting, prison relationships, and the rehabilitative process. In many cases the reasons for confidentiality may not spring from the face of the document but may be based on other factors in the inmate's file or other conditions in the institution, or a psychological factor that would require expert analysis to appreciate." . . . "Such a hearing would allow the custodian of records . . . to explain the significance of the documents and the reasons for their being withheld. Anything less would have the court acting in a vacuum, unable to obtain or use the factual tools which are essential to an informed judgment."'"

Austin notes that the privileges of sections 1040 and 1041 must yield when nondisclosure would deprive the defendant of a fair trial. (See *People v. Garcia* (1967) 67 Cal.2d 830, 841.) He argues that failure to disclose the 16 documents in issue will compromise his right to a fair trial, to due process, to confront and cross-examine witnesses, and to the effective assistance of counsel. He posits several theories supporting discovery: guilt phase issues such as a potential defense that Austin's mental health deteriorated to such a degree that he did not premeditate and deliberate, whether other inmates are also responsible for Ponton's killing, and whether other information shows that Ponton was killed under the circumstances

described by Randy Hanson; penalty phase issues regarding aggravating and mitigating factors.

We review the trial court's orders of production arising from the in camera hearings for abuse of discretion (*Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695, 700), and have considered Austin's constitutional rights and the need for disclosure to effectively protect those rights. We have also considered the Department's interest in confidentiality, and the articulated reasoning of the trial court. Based on our review of the sealed material, we conclude that the trial court erred in ordering disclosure of the 16 disputed documents. We do not do so lightly, and commend the trial court for its diligence in undertaking the difficult task of reviewing the voluminous records presented and fashioning protective orders designed to protect the information from further disclosure that might endanger those persons mentioned in the confidential documents. However, with respect to the 16 confidential documents at issue in this writ proceeding, it is clear that the interest in preserving the confidentiality of the information and identity of persons mentioned outweighs Austin's interest in a fair trial. These documents are of such tangential materiality to the issues presented by Austin in support of disclosure, and the danger to the persons mentioned in the documents is so substantial, that the privileged nature of the documents must be upheld, even if subject to the trial court's protective order.

Austin contends that if we determine that the documents in issue should not be produced, we should remand the matter to the trial court to give him an opportunity to participate in an adversarial inquiry consistent with the suggestion in dicta of *People v. Superior Court* (*Biggs*) (1971) 19 Cal.App.3d 522, 531 that following an in camera hearing "[t]he court should continue its inquiry in an adversary setting, probing the information's relevance to the defense, exploring

with counsel the availability of other alternatives and, if necessary, hearing testimony voir dire. Only at the conclusion of an adversary inquiry is the court in a position to assess the counter-balancing weight of the defendant's need, to appraise the possibility of reasonable alternatives and to determine what cost shall be exacted of the prosecution. Only at the conclusion of an adversary inquiry is the court qualified to rule for or against the government's claim of privilege."

For several reasons, we disagree. The trial court made redactions and withheld information on many documents that are not the subject of this proceeding. However, although Austin's attorney objected to any redactions or the withholding of any documents, he did not suggest that an adversary hearing and testimony seeking to probe alternatives should be held. Moreover, the court sought to implement an alternative by ordering certain disclosures subject to protective orders. Finally, in his return, Austin fails to suggest how further adversary proceedings investigating alternatives would be productive. No remand is necessary.

DISPOSITION

We issue a peremptory writ of mandate to the trial court directing it to vacate the portion of the orders of July 9, 2013 and August 27, 2013, which denied the Department's motions to quash and directed production of confidential inmate prison files reflected in Exhibits 1-16 of the instant petition, and make a new and different order granting the motions to quash as to those records.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.