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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARK JEFFREY BROWN, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent.	D045137 (San Diego County Super. Ct. No. SCD 174976)

Proceedings in mandate after the superior court denied defense application. Peter C. Deddeh, Judge. Petition granted.

FACTUAL AND PROCEDURAL BACKGROUND

Following in camera proceedings in superior court, defendant Mark Brown filed a motion in the trial court seeking to dismiss the criminal action against him or, in the alternative, strike the special circumstances or preclude imposition of the death penalty. In his moving papers, Brown asserted the superior court's refusal to appoint and pay for a qualified investigator under Penal Code section 987.9 denied him his constitutional right to effective assistance of counsel and due process. (Unless otherwise designated, all

further statutory references are to the Penal Code.) Brown had the notice of motion and companion points and authorities and notice of lodgment filed publicly (i.e., not under seal) and served on the prosecutor.

After a hearing in the courtroom with the prosecutor in attendance, the trial court determined that, regardless of the label "motion to dismiss," the motion raised a section 987.9 issue and transferred it to the Presiding Department. At the request of the defense, before sending the parties on their way, the court marked as exhibit 1 a declaration by the deputy district attorney listing the names and describing the experience of the investigators the People utilized on the case.

Counsel proceeded to the Presiding Department. In a hearing in open session again with the prosecutor participating, the court explained the motion concerned a dispute over how much to pay a particular investigator, with the defense asking for $50 an hour and the court allowing only $35 an hour. The court stated:

> "[F]irst of all, I don't think it would be denying the [defendant his] constitutional rights. Because I'm not saying I'm not going to appoint an investigator. And I'm not saying that I'm not going to appoint a qualified investigator. I guess we are just quibbling over how much money should the county pay for a qualified investigator. And apparently this particular investigator, which I agree is somebody who could handle a case like this. This particular qualified investigator does not . . . want to work for less than $50 an hour. And apparently you have contacted other qualified investigators -- or let me ask you that question: have you contacted the other qualified investigators?"

In a colloquy with the court, the defense attorneys responded they had contacted professionals with less experience than the investigator they had requested who also were qualified to handle a capital case but none were available. They added they had factored

out investigators who did not work on capital cases as well as investigators qualified to handle death penalty cases but who are based in Los Angeles and whose expenses would be higher because of travel costs. The attorneys also represented that they had canvassed the five or so local investigators qualified to handle this case and none would accept it, the investigator they requested would not agree to the rate authorized by the court and the prevailing rate was higher than $50 an hour—i.e., private investigators charge between $65 and $165 an hour, federal courts pay $55 an hour and appellate courts pay $75 an hour.

The court denied the motion to dismiss, finding the appropriate remedy for the denial of ancillary funding was a writ of mandate. The court stated it was going to maintain the position it had taken in camera, i.e., the funds would be capped at what the court had authorized in a past death penalty case, and added it believed qualified investigators in the county had agreed to work on capital cases for $35 an hour. The court then reconvened in closed session without the prosecutor to discuss confidential matters with the defense.

Brown filed a petition for writ of mandate in the Supreme Court challenging solely the denial of ancillary funding (and not the denial of his motion to dismiss), and served a copy of the petition and exhibits on respondent superior court only. The Supreme Court transferred the matter to us. We stayed the October 4 trial and requested a response from the superior court. The superior court declined to file any opposition.

DISCUSSION

I

Confidentiality

Section 987.9, subdivision (a), makes both the fact that a capital defendant has applied for ancillary funding and the contents of the request confidential. The statute also requires that a judge other than the trial judge rule on the request at an in camera hearing. (§987.9, subd. (a).) The statutory requirements are designed to provide defendants in death penalty cases with the funding necessary to prepare and present a complete and effective defense and at the same time avoid "the disclosure of potentially significant information to the prosecution." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1134.) The record in ancillary funding cases—both in superior court and on review—is normally shrouded in secrecy.

In this proceeding, however, after submitting papers under seal and appearing unsuccessfully in camera, defense counsel filed a motion to dismiss for denial of section 987.9 funding and the companion paperwork in the trial department. The paperwork was publicly filed and served on the prosecutor. The court heard the motion to dismiss in open court with the prosecutor in attendance, with the result that Brown's request for ancillary funding, his specific request that the court appoint a particular investigator at the hourly rate of $50, and the court's $35 limit was in the public record.

Sensitive defense information that is otherwise entitled to confidentiality loses its protection to the extent it is shared with the prosecution in written form or at a hearing in open court. (See *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321.) We

therefore refer to the material disclosed in public filings and in open session in the opinion and rely on it to determine whether the court abused its discretion in denying the funding. (*Ibid*.) However, we will not discuss confidential information contained in sealed filings or communicated in camera that was not disclosed to the People and is not reflected in the public record.

II

Request for ancillary services

The issue before us is not whether the court is going to appoint an investigator, whether it is going to appoint an investigator qualified for capital cases, or even whether the investigator the defense requested is qualified. The issue before us is one of marketplace economics.

In *Smithson v. Superior Court* (1981) 116 Cal.App.3d 32, the court authorized the total amount requested by the defense for a private investigator, but ordered counsel not to spend more than $12.50 an hour and advised that the court maintained a list of investigators who would work for that rate. Counsel contacted investigators both on and off the list and found that none would work for $12.50 an hour—that the minimum hourly rate was $20. When counsel sought authorization to spend $20, the court denied the request because it had determined that investigators were boycotting present court rates and was unwilling to let them dictate the fee for court-appointed work.

The appellate court ordered that the investigator be paid $20 an hour. The opinion explained: "The practical problem is one of economics, not philosophy, and the solution is a function of supply and demand. [The superior court] has no power to compel any

particular investigator to work for any particular fee. Absent that power, and absent a source of supply willing to work for a lesser fee, the reasonable rate for investigators' services is the lowest going rate in the community." (*Id*. at p. 34, fn omitted.) The court suggested parenthetically the possibility that "the collective refusal" of investigators to work for $12.50 may amount to a restraint of trade "should not be tested at the expense of one criminal defendant's rights." (*Id*. at pp. 34-35, fn. 1.)

Like *Smithson*, our case involves an issue of supply and demand: the defense represented that the investigator they were seeking would not work for less than $50 an hour, the prevailing hourly rate exceeded $50, there were only five local investigators with capital case experience and none would accept the case for $35 an hour. The record demonstrates, however, that the superior court denied the application not because it found the services unnecessary or the amount unreasonable—it denied the funding based on what it had authorized in some earlier death penalty case and a belief that qualified investigators in the county had agreed to work on capital cases for $35 an hour.

In ruling on a request for ancillary funding, the court must be "guided by the need to provide a complete and full defense for the defendant." (§987.9, subd. (a).) Adherence to a historical rate, or even a theoretical rate of what unnamed investigators accepted at some unknown point in time, is no answer to what it will realistically take to provide this particular defendant a complete and full defense today. Economic conditions fluctuate, costs normally rise with time and the question for the court is solely what is reasonable—what is the lowest going rate—for investigative services in the current market. (*Smithson v. Superior Court, supra*, 116 Cal.App.3d at p. 34.) If, as defense

counsel asserted, no qualified investigator will work for less than $50 an hour, the court's adherence to a rate that is $15 short leaves the defendant here facing the death penalty on a cold case with charges dating back to 1995 without any investigator at all.

Under these circumstances, we conclude the court abused its discretion in denying the funding based on arbitrary and improper factors. (See also *Corenevsky v. Superior Court, supra,* 36 Cal.3d 307 at p. 323 [court abused its discretion in denying ancillary funding based on perceived budgetary issues and not lack of need].) The matter is remanded to superior court to conduct further proceedings as necessary to determine the reasonableness of the request. On remand, the defense attorneys should provide the court with declarations under penalty of perjury containing sufficient detail to demonstrate that they cannot secure the services of a death penalty qualified investigator in the San Diego area willing to work for $35 an hour, indicating precisely who was contacted and what was said. The court should also consider any relevant funding guidelines, including but not limited to regulations on State reimbursement for investigators referenced in section 987.9, subdivision (c).

Because there are no disputed factual issues, the legal error is clear, and the matter should be expedited, a peremptory writ in the first instance is appropriate. (Code Civ. Proc., § 1088; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.)

DISPOSITION

Let a peremptory writ of mandate issue directing the superior court to vacate its order denying ancillary funding, conduct further proceedings consistent with this opinion, and determine the matter. This opinion shall become final 10 days from the date of

filing. (Cal. Rules of Court, rule 24(b)(3).) The stay issued on September 30, 2004, will be vacated when the opinion is final as to this court.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.