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COUNTY OF STANISLAUS

BY Ana Valencia

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF STANISLAUS

10 -----o0o-----

11 THE PEOPLE OF THE STATE OF CALIFORNIA,) CASE NO.: 1490969
12 Plaintiff,) **PEOPLE'S OPPOSITION TO**
13 vs.) **MOTION TO DISMISS FOR**
14) **PROSECUTORIAL MISCONDUCT**
15 FRANK CLIFFORD CARSON,)
16 BALJIT ATWAL,) Date: _____, 2015
DALJIT ATWAL,) Time: _____ a.m.
17 WALTER WESTLEY WELLS,) Dept: 26
GEORGIA DEFILIPPO,) The Honorable Barbara Zúñiga
18 **CHRISTINA DEFILIPPO,**)
EDUARDO QUINTANAR, and)
19 SCOTT MCFARLANE,)
Defendants.

20 -----o0o-----

21 Comes now the People of the State of California, by and through their attorney, BIRGIT
22 FLADAGER, Stanislaus County District Attorney, MARLISA FERREIRA, Chief Deputy
23 District Attorney, and respectfully submits the following opposition in response to the
24 defendant's motion to dismiss for alleged prosecutorial misconduct and/or prosecutorial error.

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1 LAW AND ARGUMENT

2 I.

3 **THE DEFENDANT HAS FAILED TO SHOW MISCONDUCT, DENIAL OF DUE**
4 **PROCESS OR PREJUDICE AS REQUIRED FOR DISMISSAL.**

5 Defense counsel Forkner, apparently acting as the attorney for all defendants in this
6 case, asks the court to dismiss the case against all defendants on the grounds of prosecutorial
7 misconduct and/or error. (Def.'s Motion, p. 18, line 18.) The defendant's motion is
8 unsupported by relevant facts or law. To quote Mr. Forkner, it is "a veritable screed of alleged
9 misconduct, innuendo, and character assassination." (*Id.* at p. 7, lines 14-15.)

10 No prosecutorial misconduct or error has occurred in this case. Further, even where
11 there *is* evidence of misconduct, case law holds that a defendant must demonstrate denial of a
12 substantial right or prejudice to warrant dismissal. The defendants in this case cannot show
13 misconduct, denial of a substantial right or prejudice. Accordingly, there are no grounds upon
14 which to dismiss the defendants' case.

15 **A. Prosecutorial Misconduct Standards**

16 "The applicable federal and state standards regarding prosecutorial misconduct are well-
17 established. A prosecutor's ... intemperate behavior violates the federal Constitution when it
18 comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to
19 make the conviction a denial of due process. Conduct by a prosecutor that does not render a
20 criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it
21 involves the use of deceptive or reprehensible methods to attempt to persuade either the court or
22 the jury." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; internal quotations and citations
23 omitted.)

24 As the following analysis will demonstrate, the prosecutor here has not engaged in a
25 pattern of conduct so egregious that it has denied the defendants due process in violation of the
26 Federal standard, nor has the prosecutor's conduct ever been deceptive or reprehensible in
27 violation of the state standard.

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1 **B. Standards for Dismissing a Prosecution for Governmental Misconduct**

2 The standards for dismissing a prosecution for governmental misconduct were discussed
3 in *People v. Uribe* (2011) 199 Cal.App.4th 836 where defendant's convictions for sex offenses
4 against his granddaughter were reversed for a *Brady* violation: the failure of a sexual assault
5 response team to disclose to the defense a videotape of the medical examination of the
6 granddaughter. After remand, defendant moved to dismiss the information for outrageous
7 prosecutorial misconduct in violation of his due process rights. The trial court found that the
8 deputy district attorney who prosecuted the first trial had testified untruthfully in the hearing on
9 defendant's motion, and it granted defendant's motion to dismiss. Substantial evidence
10 supported the trial court's determination that the deputy district attorney had engaged in
11 "egregious prosecutorial misconduct" by attempting to obtain false declarations from the trial
12 judge and defense counsel, misleading the judge, and testifying falsely. (*Id.* at p. 859.)

13 However, the appellate court reversed the trial court's dismissal of the case. The
14 appellate court stated that "we find that a showing of prejudice to defendant's right to a fair trial
15 was required and that the absence of such a showing precluded dismissal as a sanction for
16 prosecutorial misconduct." (*Id.* at p. 861.) In the absence of a deprivation of a fundamental
17 right, a showing of prejudice is required for a dismissal. The *Uribe* court found there was no
18 such showing. The *Uribe* court further explained that the trial court's dismissal of the
19 information "considered only the prosecutorial misconduct without regard to its impact on
20 defendant. The court failed to tailor the remedy to the harm caused by the misconduct, and
21 gave no consideration to societal interests in having those who have committed serious crimes
22 being brought to justice."

23 In the instant case, there has been no prosecutorial misconduct. Ms. Ferreira has fairly
24 represented to the court and the defendants that there are no formally negotiated testimonial
25 agreements with the witnesses. This is a no-time-waiver preliminary examination. Under the
26 time constraint, terms of testimonial agreements have not been negotiated and reduced to
27 formal agreements. The defendants cannot show that the lack of formal agreements has led to a
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1 denial of due process or prejudice. To show a denial of procedural due process,¹ the defendant
2 must show that the complained-of misconduct undermined the fundamental fairness of the
3 proceeding. (*People v. Ervine* (2009) 47 Cal.4th 745, 771.) Here, the witnesses' pending
4 charges have been discovered, the witnesses have been extensively cross-examined as to
5 whether they have plea agreements with the district attorney, and the magistrate is aware in
6 assessing witness credibility of the witnesses' potential motivation to aid the government in
7 their testimony.

8 **C. Defendant's 15 Alleged Instances of Misconduct Are Baseless, Repetitive,**
9 **Unsupported Accusations That in No Way Rise to Either the Federal or State**
10 **Standard of Prosecutorial Misconduct.**

11 The defendant claims that the following 15 items are representative of the prosecutor's
12 misconduct in this case. However, none of the instances cited rise to a level of (or are even
13 relevant to) prosecutorial misconduct.

14 1. The defendant complains that Kathy Grinolds testified to a "new-found
15 'recollection'" that had not been disclosed by the prosecutor.

16 However, the court found that the defense had not been prejudiced:

17 THE COURT: With respect to whether or not the defense has
18 been prejudiced, I totally disagree. This woman was on excruciating, tedious
19 cross-examination for most of the day with respect to whether or not she saw
20 the three men, where she was, what the evidence indicates. She said she saw
21 three men on the property. She didn't say that they were doing security work,
22 but she has been totally impeached with respect to what she told the officers
23 when she was initially interviewed and what she subsequently said.

24 ...

25 With respect to striking her testimony, that is denied. If you feel that
26 you need to have her reexamined, you want to cross-examine her again, let the
27 prosecution know. We'll put her back on. But your motion to strike her
28 testimony is denied.

(RT 914:24-915:6; RT 915:18-22.)

The exchange between Mr. Rien and the court was as follows:

¹ The *Uribe* court explained that "[t]he prosecution's obligations under *Brady* are founded on procedural due process considerations," not substantive due process. (199 Cal.App.4th at p. 864.)

1 MR. RIEN: Yes. I just wanted the record to be clear that the
2 Court is denying this motion on the basis that the prejudice has not been shown
3 from the failure to disclose.

4 I would ask that the Court rule on the question of
5 whether [Ms.Grinfelds testimony] should be excluded on the basis of a sanction
6 under Brady.

7 THE COURT: Oh, denied. This isn't a Brady violation, sir. It's
8 just poor lawyering.

9 I'm sorry, Ms. Ferreira. It's bad lawyering.

10 MR. RIEN: The Court finds that this is not a Brady violation?

11 THE COURT: Yes, I am, sir.

12 (RT 916:5-16.)

13 In sum, the court called the failure to timely write and provide a report "bad lawyering,"
14 not misconduct. The *trial* was not infected with such unfairness as to make the *conviction* a
15 denial of due process nor did it involve the use of deceptive or reprehensible methods in an
16 attempt to persuade the court.

17 Further, the court found no *Brady* violation and the court denied the defense motion to
18 strike the witness's testimony as the defense had failed to show prejudice because the witness
19 had been "excruciatingly" cross-examined and could be recalled if the defense wished.

20 The defendant again cites *People v. Verdugo* (2010) 50 Cal.App.4th 263, 284 in which
21 the appellate court found the prosecutor had violated Penal Code sections 1054.1 and 1054.7 in
22 failing to turnover a report involving the testimony of a witness *at trial*. A witness testified at
23 trial about louvers on the rear window of the defendant's vehicle. On the morning of the
24 witness's testimony, the prosecutor provided defense counsel with notes of an interview with
25 the witness that was conducted a week earlier. Although **the Verdugo court found no**
26 **prejudice**, it found a violation of the reciprocal discovery statute, under which the prosecutor
27 was required to immediately disclose his notes as to the witness's statement. Section 1054.7
28 provides that "[i]f the material and information becomes known to, or comes into the possession
of, a party within 30 days of trial, disclosure shall be made immediately[.]"

As the trial in this case is not yet set, there can have been no violation of section 1054.7
which requires disclosures to be made 30 days before trial. As stated, the court here found there

1 had been no prejudice in the late disclosure of Kathy Grinolds' statement.

2 ///

3 **2.** The defendant complains of late discovery of a police report of Michael Cooley
4 and Keith Hobbs' involvement in a robbery, and DDA Meghan Anderson's failure to charge
5 Mr. Hobbs. This claim, like defendant's others, is baseless. First, Mr. Cooley was not
6 implicated in the robbery. Neither victim Dalton Shoup, witness Amanda Wright, or Mr.
7 Hobbs himself reported to law enforcement that Mr. Cooley was part of the robbery. (Bates
8 13157-13172.)

9 Second, although the defendant makes the irrelevant statement that Ms. Ferreira
10 "supervises deputies like Ms. Anderson," the People wish to point out that Ms. Ferreira does
11 *not* supervise Ms. Anderson.

12 Third, in declining to issue the case against Mr. Hobbs, Ms. Anderson had no
13 knowledge that Mr. Hobbs was in any way associated with Ms. Ferreira's case. Ms. Anderson
14 will testify as such at the evidentiary hearing. In her explanation in declining to issue the case,
15 Ms. Anderson wrote:

16 Definitely more to this story. [Defendant] and 2 other witnesses are fairly
17 consistent about heroin theft and not seeing a 211. Vic[tim] lacks credibility
18 given drug use at time of offense. Can't prove BRD (beyond a reasonable
19 doubt).

20 (Bates 13171.)

21 ///

22 **3.** The defendant highlights the court's observation about "the culture out here":

23 THE COURT: ...Ms. Ferreira, I actually have to say, I was really
24 surprised you had not disclosed this information and I – I don't know if it's the
25 culture out here, but there seems to be a lot of fighting that goes on between the
26 defense and the prosecution.

27 (RT 914:9-13.)

28 As explained previously in number 1, *supra*, the court found the failure to write and
discover a report to be "bad lawyering," not misconduct. Further, at an earlier time in the
proceeding, the court referenced "the culture out here" in admonishing defense counsel to act

1 professionally:

2 THE COURT: Really, folks. I've made a comment about the
3 culture out here. You're all professionals. You treat each other with courtesy.
4 You don't see Ms. Ferreira laughing at you. And it's not right. Knock it off.

4 (RT 322:15-18.)

5 No legal argument is made by the defense. Thus, the People cannot respond.

6 ///

7 4. The defendant claims that the prosecution permitted Linda Burns to testify that
8 she never participated in selling stolen antiques. The prosecutor has no knowledge of Ms.
9 Burns having sold stolen antiques. The defendant's own transcripts of the testimony show that
10 Ms. Burns only introduced Mark Kavanaugh, whose mother sells antiques, to Michael Cooley.
11 The defense was free to cross-examine Ms. Burns at length as to her testimony.

12 ///

13 5. The defendant complains that Eula Keyes committed perjury as to whether she
14 had been offered a deal by the district attorney and that Ms. Ferreira knew the testimony was
15 false. On the contrary, there was no deal and Ms. Ferreira explained that was the reason that
16 Ms. Keyes testified as such:

17 MS. FERREIRA: ...And in terms of Eula Keyes, they have cross-
18 examined her on that issue completely. All day yesterday and the day before,
19 we heard cross-examination on the issue of, has anyone made you any
20 promises?

21 The reason she's up there saying no was because there aren't any
22 promises on the record for her – in her belief or on the part of the prosecution. I
23 disclosed the potential that they're going to receive consideration, which is far
24 beyond what the law requires me to disclose.

22 (RT 1942:15-23.)

23 The prosecutor's conduct does not fit the "egregious, unfair, deceptive or reprehensible"
24 standards necessary to a finding of misconduct.

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26 6. The defendant claims it was wrong for the prosecutor to seek an in-chambers
27 discussion as to issues around witness Michael Cooley's informant status.

28 This is a meritless point. As the defendants' attorneys were present, the prosecutor's

1 conduct certainly cannot be considered egregious, unfair, deceptive or reprehensible.

2 ///

3 7. The defendant complains it was misconduct for the prosecutor to represent in
4 court that the defendants are endangering witness Michael Cooley. The defendant's argument
5 is baseless. That the defendants have threatened Michael Cooley is set out in the arrest
6 affidavit. The warrant contains information from Justin Reedy who identified Frank Carson as
7 the person who said the following to Michael Cooley: "If I fucking catch you, especially you,
8 or any of your friends over on my property I will kill you." Justin Reedy also recalled
9 defendant Carson telling Cooley that he would bury him and no one would ever find him.
10 (Arrest Warrant, p. 31, lines 17-23.)

11 ///

12 8. The defendant complains that the People moved to seal motions until the
13 responses to said motions were filed.

14 The People's motion was made upon the reasonable ground that disclosure would taint
15 the venire. Any sealing was to have been temporary—only until such time as the response was
16 filed and *the requested order to seal was to apply to both the People's and the defendants'*
17 *motions.*

18 ///

19 9. The defendant contends that argument as to discovery was overextended. This is
20 not a basis for prosecutorial misconduct. The court informed the prosecutor that the defense is
21 entitled to discovery before the preliminary examination and the prosecutor has complied with
22 her discovery obligations. More specifically, the following exchange occurred:

23 THE COURT: ...I do recall addressing this issue and informing Ms.
24 Ferreira that I believe that the defense is entitled to the discovery prior to the
25 preliminary hearing. I also indicated to her that I had been writted on that in
26 Contra Costa County, and I was affirmed.

27 MS. FERREIRA: ... And we have provided them with discovery.

28 ...

MS. FERREIRA: And the issue of exculpatory evidence has been
provided in this matter. In fact, not only were they made aware that both Mr.

1 Cooley and Mr. Keyes had open cases, but they were given the case number, the
2 nature of the offense, and the date, and they've been provided numerous
discovery which conforms to that disclosure.

3 One is the very transcripts and audio files, while the audio files that were
4 discovered of the interview with them where these alleged promises in the
future were given at the earliest possible date by Investigator Bunch.

5 Two, is by way of the transcripts today.

6 And, three, by way of the fact that I've disclosed there will be a
testimony agreement in the future with these people or these individuals.

7 So there has been no Brady violation or withholding of evidence. There
has been no nondisclosure of pertinent facts....

8 (RT 1949:12-1950:17.)

9 ///

10 **10.** The defendant states that Ms. Ferreira made a false representation to the court
11 that the defendant could get the police report from the court's file.

12 In fact, Ms. Ferreira simply listed *several examples* of how the defendants might have
13 secured additional information about police reports or "something of that nature". More
14 specifically, the prosecutor stated:

15 MS. FERREIRA: ...If they wanted further information about the
16 police report or something of that nature, they could have either, one, gone to
the court file and gotten it themselves, or apparently they're pretty resourceful,
and get it from the other defense attorneys, or they could have asked us
specifically, hey, can we get the report on that case that we already know about?
But they didn't. That doesn't change the fact that they are on notice, and it is
disclosed to be used as impeachment and so on.

17 There may be other locations. That's what we could come up with in
18 short time.

19 (RT 1951:22-1952:4.)

20 Further, the magistrate was struck by the fact that attorneys do not acquire the police
21 reports on their own:

22 THE COURT: I actually - I am - I've always had attorneys go
23 and get their own police reports. The prosecution doesn't have to provide them.
I don't know if that's the culture here, that the DA provides them. Usually, the
attorneys go to the police department to get them.

24 ///

25 **11.** The defendant again argues that the prosecutor represented that she had not
26 made deals with witnesses when she in fact had. The defendant then hypothesizes as to the
27 terms of the nonexistent agreements. This neither brings the agreements into existence nor
28 provides a basis for a claim of misconduct.

1 As to the defendant's complaint about alleged differential treatment between Mr.
2 Cooley and Mr. Cooper, Deputy District Attorney DeJong testified at the evidentiary hearing
3 that in Mr. Cooper's case, the victim was unserved in a no-time-waiver preliminary hearing.
4 Therefore, the case was resolved for Mr. Cooper's plea to a four-year prison sentence. Ms.
5 Ferreira had no knowledge of Mr. Cooper's domestic violence case or its resolution and was
6 surprised when she discovered that he was in prison.

7 ///

8 **12.** The defendant reiterates that Ms. Ferreira represented to the court that there were
9 no formal testimonial agreements with the witnesses.

10 The fact remains that there are no formal testimonial agreements with prosecution
11 witnesses. The witnesses have been extensively cross-examined as to this issue.

12 ///

13 **13.** The defendant again complains about the lack of formal testimonial agreements
14 with prosecution witnesses.

15 The prosecutor has made the required disclosures. No formal agreements have been
16 made, but the prosecutor has disclosed the open cases of its witnesses and the fact that future
17 agreements will be made. (RT 1950:1-10.)

18 ///

19 **14.** The defendant argues that the prosecutor misrepresented to the court that there
20 was no task force in this case when the Ramey warrant stated that there was a task force. This
21 is a simple semantical issue. The fact is that officers from several agencies have investigated
22 this case as it involves more than one jurisdiction.

23 ///

24 **15.** The defendant complains that the People knew of "an extensive theft ring headed
25 by Michael Cooley," but made no effort to recover stolen property. However, law enforcement
26 was thwarted in its attempt to investigate any theft of defendant Carson's property because
27 defendant Carson refused to be interviewed as to the alleged thefts. Defendant Carson stated
28 that he would answer written questions, but he then refused to do so. Rigo deAlba from the

1 Modesto Police Department also attempted to interview defendant Carson in-person, but
2 defendant Carson would not speak with him.

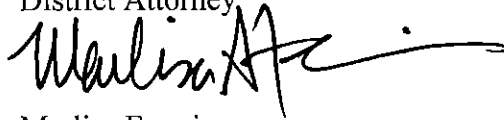
3 CONCLUSION

4 For the foregoing reasons, the People request that the court deny the defendant's motion
5 to dismiss.

6 Dated this 13th day of November, 2015, at Modesto, California.

7 Respectfully submitted,

8 BIRGIT FLADAGER
9 District Attorney

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11 Marlisa Ferreira
12 Chief Deputy District Attorney

13 MAF/BC/bc
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PROOF OF SERVICE BY ELECTRONIC MAIL AND FACSIMILE

STATE OF CALIFORNIA)
COUNTY OF STANISLAUS)

I, the undersigned, declare as follows:

That I am over the age of 18 years and am not a party to this action and I am employed by the Stanislaus County District Attorney’s Office, 832 12th Street, Suite 300, Modesto, California.


That I served a copy of the **People’s Opposition to Motion to Dismiss for Prosecutorial Misconduct** on November 13, 2015 pursuant to California Code of Civil Procedure section 1010.6(a)(6) by electronically sending a copy thereof to the offices of Timothy Rien at rienlaw@sbcglobal.net, Martha Carlton-Magana at carltnm@hotmail.com, Preciliano Martinez at attymartinezp@yahoo.com, Hans Hjertonsson at Hans.hjertonsson@gmail.com, Alonzo Gradford at gradfordlaw@gmail.com, Lawrence Niermeyer at lniermeyer@aol.com, Robert Lee Forkner at RLFCrimLaw@aol.com, Bruce Perry at brucerperry@msn.com and Stephanie Mitchell at stephanie.mitchell@stanct.org.

That I served a copy of the **People’s Opposition to Motion to Dismiss for Prosecutorial Misconduct** on November 13, 2015 via facsimile to Jesse Garcia at the number of (510) 887-0646 on November 13, 2015. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

That I placed a hard copy of the **People’s Opposition to Motion to Dismiss for Prosecutorial Misconduct** in the box assigned to each attorney located at the District Attorney’s Office at 832 12th Street, Suite 300, Modesto, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of November 2015, at Modesto, California.


Declarant

Case No. 140969
People v. Carson et al.
Dept. 26

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Comments:

Good Afternoon,
Please find attached the People's Opposition to Motion to Dismiss for Prosecutorial Misconduct.

Thank you,
Victoria Vasquez