

Fight for Discovery



THE WARRIORS:
Alameda County Assistant Public Defenders Kimberly Kupferer and James McWilliams fought for years for discovery in their defense of a murder suspect.

A federal judge's ruling could make it easier for defense attorneys to access federal evidence

By **SONIA GIORDANI**
RECORDER STAFF WRITER

OAKLAND — Samuel Lee Johnson is staring death in the face. His name appears on thousands of pages of federal documents that prosecutors say inculcate him in the 1996 kidnapping, torture and killing of alleged drug dealer Devon Chung and his girlfriend, 18-year-old Traci Carter.

Johnson and his attorneys have maintained that the documents — produced by an alphabet soup of federal agencies from the FBI to the INS — include exculpatory evidence crucial to the

defense, as well as important background information that could speak to the credibility of the prosecution's star witnesses.

For the last three years, the bulk of the documents has been off-limits to Johnson — until this week.

By an order of U.S. District Judge Samuel Conti, Johnson's attorneys — Alameda County Assistant Public Defenders Kimberly Kupferer and James McWilliams — got their hands on 2,500 pages of reports, notes, tests and test reports regarding two of the prosecution's witnesses. The documents also included witness statements that either contain exculpatory information

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or speak to the credibility of the prosecution's witnesses.

"In light of the dire nature of [Johnson's] circumstances, [the federal agencies'] refusal to produce the requested documents is unconscionable, unsupported and in violation of plaintiff's constitutional rights," wrote Conti in the published order in *Samuel Lee Johnson v. Janet Reno*, 99-5449.

Can federal agencies that assist in state criminal investigations be compelled to produce information and testimony to a defendant standing trial? The question is not only central to Johnson's case but to countless other criminal cases where defense attorneys and prosecutors regularly spar over accessibility to sensitive documents.

That's part of the reason Bay Area criminal defense attorneys are already treating Conti's order like a beacon to lead them out of the darkness shrouding most discovery hearings.

While the law requires federal agents to turn over exculpatory evidence in federal cases, federal courts have rarely used their authority to order U.S. government agents to produce evidence for use in a state criminal case. That often puts defense attorneys in a bind as they try to find alternative ways to access documents they say are crucial to their case.

Oakland-based criminal defense attorney Trina Thompson-Stanley noted that Conti's motion may result in extremely helpful guidelines for obtaining information from federal agencies that involve themselves in state investigations and have succeeded, in some cases, in keeping state attorneys from discovering vital information pertaining to their case.

"We are starting to see a trend of multiple agency investigations and special funding units," she said, citing drug units and gang

units that garner federal and state grants.

Other attorneys noted that the ruling may buttress other judges asked to rule in similar cases.

"This sort of ruling should give strength to other judges in the area of discovery to do what's right when they see an issue like this before them," said Elizabeth Grossman, a Berkeley criminal defense attorney and a director of the statewide Women Defenders Association.

"It creates a climate of respect for a defendant's need to get discovery, which is

'The only thing I'm concerned about is whether the defendant in the state case is going to get a fair trial.'

— Judge Samuel Conti

fundamental. A defense lawyer who doesn't get every piece of documentation out there with their client's name is not a good advocate," Grossman said.

THE LONG ROAD TO DISCOVERY

The Johnson case is a good example of the battles waged by defense attorneys who say they are trying to ensure their clients get a fair shake in the justice system and by prosecutors seeking to protect the privacy and safety of their sometimes intimidated witnesses.

Conti's order appears finally to resolve the years-long fight for discovery by Kupferer and McWilliams. They had been handed a couple thousand pages of police and other investigative reports when taking over the case from a private attorney in early 1998.

But when Kupferer and McWilliams

stumbled on the probation file of one of the prosecution's witnesses, they say they were tipped off to the involvement of federal agencies, including the INS and the FBI.

And they note that the star witness' cooperation with the federal agents may have been motivated by her resident alien status and by the fact that she was a defendant in a separate criminal case charging her with manslaughter in the death of two children and in other related civil cases.

The defense attorneys subpoenaed for the documents, but the U.S. attorney's office

information to him," Conti told Burton. "Aren't you interested in this man getting a fair trial?"

SAFETY V. DUE PROCESS

From the prosecution's perspective, the issue is not exactly about frustrating a defendant's right to a fair trial, but rather about protecting the safety of witnesses and other informants who agree to speak — but only with great reluctance.

One of the star witnesses in the prosecution's case against Johnson is a confidential informant who told federal agents that Johnson had been a hit man for her ex-boyfriend. Johnson was allegedly a member or associate of a prison and street gang known to place hits and impose physical retaliation on individuals who provided information to law enforcement, according to a brief filed by Burton.

In the brief filed on March 17, Burton still requested to redact the addresses of the informant, as well as another witness critical to the prosecution's case, "because of a fear for the safety of these witnesses if the information is released."

The brief justifies the fear by pointing out that at least one other man who had provided incriminating information about Johnson was murdered, and it notes that Johnson remains the subject of an ongoing ATF federal firearms investigation.

Of course, Penal Code §1054.2 clearly protects witnesses, stating, "No attorney may disclose or permit to be disclosed to a defendant the address or telephone number of a victim or witness whose name is disclosed to the attorney."

Still, the issue of witness protection is foremost in the minds of the federal agencies and the U.S. attorney's office, says Jerrold Ladar, a former chief of the U.S. attorney's office criminal division who now practices criminal defense at San Francisco's Ladar & Ladar.

"It's important for the FBI and other federal agencies to be able to say to a possible witness, 'Tell us about what happened and we won't tell anyone about you.' For them to have to come back and say, 'Sorry, we have to give up your identity and whereabouts' undermines everything," says Ladar.

Often, prosecutors and defense attorneys will strike a cautious agreement over which documents can be handed over. And state superior court judges sometimes threaten intransigent prosecutors with the possibility that the charges against a defendant will be thrown out if they fail to play fair in discovery.

"The feds will resist and resist and resist. They would tell you that handing over a sensitive document will open the floodgates," Ladar says.

Since Monday, Kupferer and McWilliams have been wading through a box filled with documents formerly withheld by the Bureau of Alcohol, Tobacco and Firearms, the Immigration and Naturalization Service, as well as the U.S. attorney's office. They now have more than 6,000 pages of discovery in their possession.

"I had no idea of the true extent of the federal agencies' involvement," said Kupferer.

"I'm outraged and dumbfounded that the federal government could have withheld so much information knowing that a man could be executed," she said.

The case is scheduled to go back to Alameda County Superior Court on April 7. But with more than 2,500 pages to wade through in just three weeks, Kupferer and McWilliams said they will likely ask for another continuance.

Reporter Sonia Giordani's e-mail address is sgjordani@therecorder.com.

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CONTACT GINA PONTICELLO AT 415/749-5538