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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARTIN ROBERT LARRANAGA, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; THE PEOPLE et al., Real Parties in Interest.	G036475 (Super. Ct. No. 05NF1789) O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Randall J. Sherman, Judge. Petition granted.

Deborah A. Kwast, Public Defender, Thomas Havlena, Chief Deputy Public Defender, Kevin Phillips, Assistant Public Defender and Donald E. Landis, Jr., Deputy Public Defender, for Petitioner.

No appearance for Respondent.

Benjamin P. de Mayo, County Counsel, and Teri Maksoudain, Deputy County Counsel, for Real Party in Interest, Orange County Sheriff Department.

* * *

We find ourselves confronted once again by problems of procedure in discovery motions pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. Specifically, we are faced with the issue of whether a defendant may file a sealed affidavit in support of his motion for discovery to avoid revealing privileged material to the prosecution and police, and who should see such a declaration. It is a complex and difficult issue and our previous resolution of it (*People v. Garcia* (2004) 120 Cal.App.4th 1252) is presently before the California Supreme Court (review granted Sept. 22, 2004).

We have struggled anew with this problem. Only one member of this panel was on the *Garcia* panel, so fresh minds have tried to arrive at a resolution somehow different or better than *Garcia*. We have failed. Despite new briefing, new argument, and a different panel, we find ourselves in exactly the same place the *Garcia* court was: greatly concerned about the privacy rights of police officers, implacably committed to the criminal defendant's right to a fair trial, and thoroughly convinced the preservation of one should not require compromise of the other. We remain convinced that counsel for the defendant should be allowed to file privileged or confidential information under seal with the court determining the *Pitchess* motion; we have found no reason to doubt the ability of the trial courts to sort through such information and determine what is actually privileged, what should remain confidential and what should not; and we have found nothing in the history of *Pitchess*, discovery law in general, or our own experience to persuade us the intervention of a third party such as a city attorney is necessary to protect the privacy rights of the police officers. As near as we can determine, the trial courts have done an admirable job of that, and we can find nothing suggesting they need help.

We admire the zeal and commitment of the agencies offering that help. The critics of public service employees who are so ready to question their dedication and work ethic should be heartened by the tenacity with which city attorneys and county counsels in this state have fought to take up the extra burden of fighting to defend the privacy rights of their employees.

But, for the reasons set forth in *Garcia*, their ardor to insure those privacy rights seems to us admirable but unnecessary. It seems to us that just as it would be bad business to spend $10,000 every year to insure against an unlikely $1,000 loss, it is bad government to compromise the fair trial rights of the citizenry to protect against a heretofore undemonstrated and largely inchoate concern that trial courts might not appreciate the significance of police officer privacy, and might not adequately guard it.

For these reasons, we largely repeat here what we said in *Garcia* – not because we are unwilling to disagree with our colleagues, not because we are displeased that the wisdom of their earlier words has not been seen and embraced, but because we are persuaded, after much additional consideration, that the *Garcia* court arrived at the right result. Being so convinced, we cannot arrive at a different result and are hard-pressed to state it more clearly, so – in large measure – we merely re-state it.

* * *

Petitioner Martin Robert Larranaga was charged by complaint with a depressing catalogue of felony offenses, including possession of methamphetamine for sale, receiving stolen property, various offenses related to the fact he was in possession of a loaded firearm while a felon and while in possession of methamphetamine, and prior convictions reflecting his dismal criminal record. He sought discovery of information in the personnel files of the deputy sheriffs who arrested him, based on a declaration of his attorney. A redacted version of that declaration was filed with the court and the district attorney; an unredacted version – which included information Larranaga's attorney considered privileged and confidential – was filed only with the court.

The trial court reviewed the declaration and concluded the best way to handle it was to allow the Orange County counsel's office to review the unredacted version so they could file an opposition on behalf of the deputy sheriffs. Larranaga's attorney requested the opportunity to meet with the court in camera to explain why the portions of the unredacted version not contained in the redacted version were privileged, and was refused. Instead, the court read from the unredacted statement from the bench, explaining why he felt most of it was not privileged, counsel renewed his request to discuss the matter in camera, was refused again, and withdrew his motion.

Two weeks later, Larranaga's counsel filed a new *Pitchess* motion. He once again filed a redacted copy on the sheriff's department and the court, and an unredacted copy only with the court. The trial court, relying as before, upon *City of Los Angeles v. Superior Court (Davenport)* (2002) 96 Cal.App.4th 255, refused to consider counsel's declaration in support of the motion unless an unredacted copy were provided to the Orange County counsel's office under a protective order not to divulge the information to the prosecution. He invited counsel to present any arguments he could without reference to confidential information in open court. Counsel declined, saying, "I apologize. I understand that under *Torres v. Superior Court* [(1990) 221 Cal.App.3d 181(?)] that I am supposed to state as much in open court as possible to insure the greatest amount of adversarial discussion . . . at this point I can't in open court argue my good cause." The motion was denied for lack of a showing of good cause and Larranaga brought this petition.

I

We first deal with real party in interest's contention that in fact, "The court did not order petitioner to reveal the sealed declaration in support of his motion," but rather, "gave Petitioner every opportunity to supplement his redacted declaration orally, but Petitioner refused," so "the court in fact denied Petitioner's second *Pitchess* motion for failure to allege good cause as required by Evidence Code § 1043." In essence, real

party argues the issue of filing a sealed affidavit in support of a *Pitchess* motion, is somehow not before us.

The problem with this argument is that it begs the question.[1] It assumes that petitioner had no right to proceed on an affidavit which included some confidential information not divulged to real party. It assumes the only avenue available to petitioner was full disclosure in open court and that having failed to take advantage of that opportunity, he is now foreclosed from complaining of the rejection of his request for in camera review. That is fallacious – in the strict logical sense. While we would very much prefer that to be the issue because it would be as easy to resolve as real party suggests, we are convinced we must face the issue of whether petitioner had a right to proceed as he sought to do: by filing an unredacted affidavit with the court and defending *in camera* his right to privilege and confidentiality with regard to some portions of that affidavit, a redacted version of which was provided to real party. That is a procedure which comports with *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118. It is a procedure not significantly different from the one approved by the Supreme Court in another context in *Keenan v. Superior Court* (1981) 31 Cal.3d 424, 430. And we feel our obligation to address the propriety of that procedure cannot be avoided by the legal sleight of hand represented by saying that once a party is denied that procedure his failure to comply with another forfeits his right to argue for it.

II

So the question then becomes the propriety of the *City of Alhambra* solution. In dealing with a different but closely analogous discovery question, the court in *City of Alhambra v. Superior Court, supra,* 205 Cal.App.3d 1118, allowed criminal defense counsel to file an ex parte discovery motion for police records. In response to the

[1] We hesitate to use a term which has been so thoroughly co-opted in the vernacular to mean "invites the question," but where, as here, the original logical fallacy of "begging the question," to mean assuming the thing sought to be proved, is actually committed, it would seem wrong not to call it by its correct name.

opposition of the City of Alhambra and the Los Angeles District Attorney's Office to that procedure, the court upheld the *in camera* procedure adopted, but cautioned that confidentiality was the exception rather than the rule, that the People and other interested third parties were entitled to due process, and that claims of confidentiality should be scrutinized by the court to determine their validity. It said, "Thus, the initial inquiry to be made by the court should go to the question of how much, if any, of the matters submitted for in camera review must remain confidential. A balance must be struck between the requirement that a defendant make a plausible justification for the requested discovery and the limitations on prosecutorial discovery. It is conceivable that if too much is required of a defendant, he could be forced to reveal anticipated defense strategy. The court should resolve this question in an ex parte in camera hearing. [Citations.]" (*City of Alhambra v. Superior Court*, *supra*, 205 Cal.App.3d at p. 1131.)

We are in complete agreement with this statement, and it is the basis of our resolution of this case. As strongly as we are prepared to defend the right of the People and/or interested third parties to due process in discovery, we conclude the balance must, in instances such as the one before us, be struck in favor of protecting the fair trial guaranteed by our constitutions to all criminal defendants. We conclude the court erred in not reviewing the petitioner's discovery requests in chambers and deciding whether parts of them should be kept confidential from either the district attorney or the county counsel.

"Pursuant to Evidence Code sections 1043 and 1045, a party seeking personnel records, or information contained in those records, must follow a specific discovery procedure. The party requesting discovery must file and serve the motion 21 days before the hearing (Code Civ. Proc., § 1005), and give written notice to the governmental agency housing the records. (Evid. Code, § 1043, subd. (a).) The governmental agency must notify the individual whose records are sought. (*Ibid.*) The motion must include a description of the type of proceeding in which the discovery is

sought, the identification of the person seeking the records, the name of the peace officer whose records are being sought, the identity of the governmental agency that houses the records, and the time and place the motion shall be heard. (Evid. Code, § 1043, subd. (b)(1).) It must also include '[a] description of the type of records or information sought' and include '[a]ffidavits showing good cause for discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.' (Evid. Code, § 1043, subds. (b)(2), (3).)" (*City of Los Angeles v. Superior Court (Williamson)* (2000) 111 Cal.App.4th 883, 889-890.) "The statutory scheme thus carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

"Good cause" for disclosure of otherwise privileged peace officer personnel records requires the moving party to demonstrate the materiality of the requested records. (*City of Los Angeles v. Superior Court (Davenport), supra,* 96 Cal.App.4th at p. 260.) The supporting affidavit or declaration need not be made on personal knowledge, but may include factual allegations based on "information and belief." (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at p. 86.) "The materiality of the requested information may be established by reading of the police reports in conjunction with defense counsel's affidavit." (*Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 105.) Nevertheless, the moving party must allege facts with sufficient specificity to demonstrate more than a general interest in information helpful to the defense. (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at p. 85; *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 395.)

Admittedly, the mechanisms for implementation of Evidence Code section 1043 are largely the outgrowth of the ingenuity of the parties and courts who've applied

it. And, while an argument can be made that Evidence Code section 1043 does not expressly permit the practice of filing a confidential affidavit, we agree with the courts that have preceded us in examining the statute that a fair reading of it compels the conclusion such a practice is allowed. It cannot be gainsaid that the statute does not explicitly prohibit the procedure and it is utilized in other comparable settings.

We are guided by our Supreme Court's observation that, "The *Pitchess* procedure is . . . in essence a special instance of third party discovery." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045.) The court compared the *Pitchess* procedure to Penal Code sections 1326 and 1327, "which empower either party in a criminal case to serve a subpoena duces tecum requiring the person or entity in possession of the materials sought to produce the information in court for the party's inspection. [Citations.]" (*Alford v. Superior Court, supra,* 29 Cal.4th at p. 1045.) The court also commented on the requirement for good cause and the ability of the custodian of records to object, but stated, "Significantly in this context, the defense is not required, on pain of revealing its possible strategies and work product, to provide the prosecution with notice of its theories of relevancy of the materials sought, but instead may make an offer of proof at an in camera hearing. [Citation.]" (*Id.* at pp. 1045-1046; *City of Alhambra v. Superior Court, supra,* 205 Cal.App.3d at p. 1130 ["To preserve a defendant's claim of confidentiality at the time of any discovery motion, declaration and other supporting evidence may be submitted to the trial court for in camera examination so that the court may decide if the claim of confidentiality is justified and, if so, to what extent."]; see also *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1320.) Without an express prohibition of the practice of filing supporting declarations or affidavits under seal in *Pitchess* motions, and given the acceptance of the practice in other similar proceedings, for reasons equally present and compelling, logic dictates acceptance of the practice as a sometimes-necessary component of a *Pitchess* motion.

Nevertheless, the proponent of a *Pitchess* motion cannot prevent a judicial determination as to the legitimacy of his or her claim of privilege by filing a sealed declaration or affidavit and serving a redacted declaration or affidavit on opposing counsel. "The trial court should not be bound by defendant's naked claim of confidentiality but should, in light of all of the facts and circumstances, make such orders as are appropriate to ensure that the maximum amount of information, consistent with protection of the defendant's constitutional rights, is made available to the party opposing the motion for discovery. [Fn. omitted.]" (*City of Alhambra v. Superior Court*, *supra*, 205 Cal.App.3d at p. 1130.) All parties are entitled to due process in these matters; the problem is accommodating conflicting claims to due process.

The basic elements of due process are reasonable notice and an opportunity to be heard. "The People (and interested third parties) are entitled to that process no less than the defendant." (*City of Alhambra v. Superior Court*, *supra*, 205 Cal.App.3d at p. 1131.) The *Pitchess* proceeding requires the custodian of records to produce information "relevant to the subject matter involved in the pending litigation." (Evid. Code, § 1045, subd. (a).) To ensure due process, the custodian of records must have sufficient facts to properly respond to the motion. However, the rights of the custodian of records may not force a criminal defendant into the Hobson's choice of either pursuing his or her discovery efforts and revealing privileged information or foregoing discovery in order to protect his or her constitutional rights and prevent unwanted disclosures. (See *People v. Superior Court (Barrett)*, *supra*, 80 Cal.App.4th at pp. 1320-1321.) And we are convinced the delicate balance of competing interests recognized and protected by the *Pitchess* procedure can safely bear the weight of supporting affidavits or declarations filed under seal.

Real party cites *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1025, for the proposition that in a *Pitchess* motion, "What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the

pertinent documents." (*Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1025.) "That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report." (*Id.* at pp. 1024-1025.) From this, real party concludes that all a criminal defendant need do to get access to police personnel files is deny the facts asserted in the police report. He argues, "Petitioner would have us believe that here, even a simple denial of the police report was not possible without revealing attorney-client privilege . . ." and that since a denial of the facts in the police report will never require privileged information, no affidavits purporting to include same should ever be allowed.

But this argument seems to us to prove too much. We cannot believe real party really wants us to hold that *Warrick* provides access to police personnel files on no more of a showing than a statement by defendant that the police report is a tissue of lies or that some other dude did it.

In fact, of course, *Warrick* supports no such position. The Supreme Court clearly recognized in *Warrick* that while some cases may have facts that make it easy for counsel to support a request for personnel records, "In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments '[v]iewed in conjunction with the police reports,' and any other documents suffice to 'establish a plausible factual foundation' for the alleged officer misconduct and to 'articulate a valid theory as to how the information sought might be admissible at trial.' ([*City of*] *Santa Cruz* [*v. Superior Court*], *supra*, 49 Cal.3d at p. 86.) Although a *Pitchess* motion is obviously strengthened by a witness account corroborating the occurrence of officer misconduct, such corroboration is not required. What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents. ([*City of*] *Santa Cruz* [*v. Superior Court*], *supra*, 49 Cal.3d at p. 86; *Haggerty v. Superior Court*

[(2004)] 117 Cal.App.4th [1079,] 1087.)" (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1025.)

It is these closer cases that are likely to require disclosure of privileged or otherwise confidential information. Suppose counsel has to explain a theory of the case not obvious from the police reports. Suppose he anticipates a defense that relies upon a particular kind of police bias or inefficiency other than that the garden variety *Pitchess* motion is aimed at. Suppose the admissibility of the defense evidence depends upon a tactical approach such as impeachment of an apparently friendly witness's statement. The defense would be under no obligation to disclose any of these things to the prosecution if they were not seeking *Pitchess* records, and we are unable to see why they should have to forfeit that confidentiality in order to obtain otherwise allowable discovery.

III

And we are further unable, despite considerable personal background on the prosecutorial side of these motions, to understand why all facets of every *Pitchess* motion require adversarial litigation. We agree with the *Davenport* court that, "in proceedings held pursuant to Evidence Code Section 1043, the question whether the defendant has shown 'good cause' should be, whenever possible, tested by adversarial proceedings." (*City of Los Angeles v. Superior Court (Davenport), supra,* 96 Cal.App.4th at p. 263.) But that statement presupposes that there will be cases when it is *not* possible. It says that adversarial proceedings should be provided "whenever possible." Our holding today is no more than that the trial court must, in the first instance, determine from the affidavit filed by counsel, *and from a hearing in chambers,* whether this is one of those cases. If full adversarial process is possible – that is, it will not jeopardize the defendant's rights under the state and federal constitution or violate our state's rules of privilege – a full adversarial hearing can be had. But if disclosure would compromise those rights, we think the trial courts can be counted on to provide a sympathetic ear and a fair hearing on

the issue of police privacy, without the assistance of an attorney for the officer who is fully and absolutely conversant with every aspect of the defense case.

In this case, as in most *Pitchess* motion cases, the real party in interest is a third party representing the interests of the police officers whose records are sought. This third party, usually referred to as the custodian of the records, is often a police officer. In some cities and counties, it is a civilian employee charged with maintaining police records. Either way, it is almost invariably someone either on a first-name basis with the officers in charge or at least working with them daily. We are asked to hold that counsel for this individual be entitled to full access to information submitted by the defense in a *Pitchess* declaration, including confidential and privileged information.

In this case, the custodian of the records is represented by the Orange County Counsel. As real party in interest, it is their contention they are denied due process if not allowed full review of the basis for petitioner's request. While we are sympathetic to their position, it seems to us fraught with danger.

In *City of Alhambra v. Superior Court, supra,* 205 Cal.App.3d 1118, the appellate court reasoned, "To preserve a defendant's claim of confidentiality at the time of any discovery motion, declarations and other supporting evidence may be submitted to the trial court for in camera examination so that the court may decide if the claim of confidentiality is justified, and, if so, to what extent. [¶] . . . [¶] Thus, the initial inquiry to be made by the court should go to the question of how much, if any, of the matters submitted for in camera review must remain confidential. A balance must be struck between the requirement that a defendant make a plausible justification for the requested discovery and the limitations on prosecutorial discovery. It is conceivable that if too much is required of a defendant, he could be forced to reveal anticipated defense strategy. The court should resolve this question in an ex parte in camera hearing. [Citations.]" (*Id.* at pp. 1130-1131.) It is precisely this kind of revelation – whether intentional or

accidental – that we fear if counsel for the custodian of records is given full access to a defense declaration that includes privileged and/or confidential material.

In *City of Los Angeles v. Superior Court (Davenport), supra,* 96 Cal.App.4th at page 264, the appellate court wrestled with accommodation of the ex parte procedure outlined in *City of Alhambra* with the custodian of records' due process claim to being allowed to view the showing made by defense counsel in order to try to rebut it. The court concluded the proper remedy was to permit the city attorney to review and challenge defendant's affidavit under a protective order. The *Davenport* court concluded the custodian of records' status as a third party permitted such a procedure. It stated simply, "the city attorney's office is not the agency 'prosecuting' Davenport." (*Id.* at p. 263.) The appellate court reviewed a copy of the sealed declaration and concluded, "to allow the city attorney to review it, under a protective order, will in no way compromise Davenport's defense or right to a fair trial. Likewise, Davenport's rights will not be jeopardized if, should the city attorney wish to file a response or opposition regarding the contents of the affidavit, it does so under seal. These procedures will protect the defendant's right to confidentiality and at the same time allow the matter to be properly 'tested by the stringent and wholesome requirements of adversary litigation.' [Citation.]" (*Id.* at p. 264.)

But the opinion did not specify whether Davenport's declaration contained privileged material and it had the declaration of counsel before it and could say, unequivocally, that its disclosure would not prejudice defendant's rights. That may have been exactly the right decision in that case. Having not seen the declaration, we are in no position to tell. But its guidance is limited in this case because here the trial court refused to consider the sealed declaration, and our review of it indicates it may well include privileged information.

So here, the privilege issue is squarely before us. Petitioner explicitly claimed the declaration involved privileged material and asked for an in camera hearing

to explain the application of privilege to the declaration. That request was denied. We have reviewed the declaration, and it does contain apparently privileged material. Since real party argues he was entitled to see the declaration regardless of its content, we must determine whether a third party is entitled to review a putative confidential declaration without regard to whether it contains privileged material. We conclude he is not.

The attorney-client privilege is "a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . ." (Evid. Code, § 954.) It "'is one of the oldest recognized privileges for confidential communications' [citation] and is 'one which our judicial system has carefully safeguarded with only a few specific exceptions' [citation]." (*People v. Gurule* (2002) 28 Cal.4th 557, 594.) It is considered so absolutely inviolate that when an attorney declares a conflict – at any stage of the proceedings, no matter how costly to the state, no matter how devastating to the witnesses or the prosecution's case – that declaration must be accepted, and the court may not so much as inquire into its basis for fear of violating the privilege. (See *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 539, fn. 5.)

The second privilege directly at issue here, "The work product privilege, now codified in Code of Civil Procedure section 2018 and applicable in criminal as well as civil proceedings [citation], absolutely bars the use of statutory discovery procedures to obtain '[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories' (Code Civ. Proc., § 2018, subd. (c)), and bars discovery of any other aspect of an attorney's work product, unless denial of discovery would unfairly prejudice a party [Code Civ. Proc., § 2018] subd. (b)). [¶] This privilege reflects 'the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of the case; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts.'

(Code Civ. Proc., § 2018, subd. (a).)" (*People v. Coddington* (2000) 23 Cal.4th 529, 605-606.)

Penal Code section 1054.6 recognizes the sanctity of both statutory privileges and specifically acknowledges their applicability to criminal cases. "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (c) of Section 2018 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States." Further, the statutory privileges mirror a criminal defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. (*People v. Superior Court (Barrett), supra*, 80 Cal.App.4th at pp. 1320-1321.) But the preparation of a case for trial is also encompassed within a criminal defendant's constitutional rights, namely his or her Sixth Amendment right to counsel. (*Alford v. Superior Court*, *supra*, 29 Cal.4th at p. 1046.) The nature of the privilege is not determinative for purposes of our analysis.

We are not persuaded the *Davenport* court's procedure, i.e., release of the sealed affidavit under a protective order, adequately protects a criminal defendant's constitutional and statutory rights *in all circumstances*. We are not persuaded it was meant to. As noted above, the *Davenport* court limited itself to a set of circumstances which simply do not obtain in all cases. This seems to us to be one of those cases.

True, the custodian of records here is not the ultimate adversary in the underlying criminal case. However, in a *Pitchess* proceeding, the custodian of records is the immediate adversary. The protection afforded a criminal defendant's claim of privilege should not turn on the status of his or her immediate adversary. (See *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1145 [fact defendant is not percipient witness does not void application of Fifth Amendment privilege against self-incrimination for purposes of *Pitchess* motion].)

And the attorney who represents the custodian of records *will* likely be the criminal defendant's adversary if he defeats the criminal prosecution and subsequently files a civil rights action against the police and the city or county that employs them. To put the criminal defendant's fair trial rights in the hands of a party only one step removed from civil litigation against him or her, requires a considerable leap of faith. This is, after all, not just a matter of the custodian of records eating lunch with the police officers involved in the request, it is a matter of the county counsel or city attorney being forced to gear up for civil action on behalf of their city or county if the records lead to acquittal.

"Ultimately, whether a motion to discover police personnel records has been supported by an affidavit sufficient to show good cause and materiality of the requested information to the subject matter involved in the pending litigation is a factual determination made by the court in its sound discretion. [Citation.]" (*City of Los Angeles v. Superior Court (Davenport), supra*, 96 Cal.App.4th at p. 260.) The trial court's exercise of its discretion is not compromised by first conducting an ex parte in camera review of the defendant's claimed privileged or confidential information versus simply releasing that information to the custodian of records under a protective order. Rather, the ex parte in camera procedure followed in general criminal discovery motions involving claims of privilege promotes the balancing of interests recognized by the *Pitchess* procedure. We conclude a criminal defendant's constitutional rights are better protected by submitting affidavits, declarations, or other supporting evidence under seal to the court for ex parte in camera review. (*City of Alhambra v. Superior Court, supra,* 205 Cal.App.3d at p. 1130), and we believe the threat posed by such a procedure to the due process rights of either the custodian of records or the police officers involved is nugatory.

We believe release of privileged information to law enforcement's custodian of records also raises other issues. Opposing counsel is not a truly neutral third party so long as he or she serves as law enforcement's counsel and claims the privilege

on behalf of the police officer. In this scenario the police officer is the client and the holder of the privilege in the *Pitchess* proceeding and an adverse witness in the criminal proceeding. It seems likely that, in order to pose a credible argument as to the lack of materiality of the requested inquiry into otherwise confidential personnel records, counsel would find it necessary to consult with the police officer client. To disallow such an attorney-client communication would be its own violation of basic due process. Furthermore, communications between the attorney and police officer client would almost certainly include confidential information concerning the defendant. And it seems to us an unreasonable burden to direct someone to consider information disclosed for the purposes of a *Pitchess* proceeding and then erase that information from his or her memory for purposes of the criminal prosecution.

We conclude the best approach to these cases begins with the defendant who seeks to use the ex parte in camera procedure in connection with a *Pitchess* motion first giving "proper and timely notice" of the claim of privilege. (*City of Alhambra v. Superior Court*, *supra*, 205 Cal.App.3d at p. 1131.) "The trial court should then make a clear finding, on the record, that it has received and considered such paper and that it finds or does not find that the in camera procedure is both necessary and justified by the need to protect a constitutional or statutory privilege or immunity." (*Ibid.*) The court's decision should be based on an evaluation of the validity of the defendant's claim and the desirability of both parties participating in the proceedings to the fullest extent possible. (*Ibid.*) If the court finds that in camera proceedings are unnecessary, the defendant should file and serve his or her papers in the cause and "openly and regularly litigate[] according to the normal procedures of criminal litigation." (*Id.* at p. 1142, conc. opn. of Danielson, J.) If the court determines ex parte in camera review of the material is necessary, it should proceed to rule on defendant's claim of privilege after considering all the factors presented to it (*City of Alhambra v. Superior Court, supra,* 205 Cal.App.3d at

p. 1132), including whatever input can be provided by counsel for the custodian of records based on all information the court deems unprivileged and non-confidential.

As noted above, the defendant's supporting declaration or affidavit may be based on information and belief. Should the court conclude the supporting declaration or affidavit contains privileged information that must remain confidential, appropriate redactions can be accomplished. The court can then order that the redacted version be served on opposing counsel. The court should assure that both versions are preserved in the court file, with the unredacted version kept under seal.

Real party feels such a procedure sounds the death knell for the "stringent and wholesome requirements of adversary litigation." We disagree. In other settings, the *defendant* operates with less than all the facts. Indeed, the next step in the process we have just described is review by the trial court of the personnel files without any input at all from defense counsel, who never sees them. (Evid. Code, § 1042, subd. (d) [motion for disclosure of the identity of a confidential informant].) We frequently receive appellate briefs plaintively asking us to review the trial court's determination of probable cause in a search warrant because the affidavit has been sealed and the appellant has no idea what it says. We review the warrant for probable cause without the assistance of defense counsel and we do not perceive that to be a critical diminution of the defendant's rights – we certainly do not see it as a denial of due process. In such cases, "the parties must do the best they can with the information they have, and the appellate court will fill the gap by objectively reviewing the whole record. [Citation.]" (*City of Alhambra v. Superior Court*, *supra*, 205 Cal.App.3d 1132, fn. 15.) These procedures have not previously been seen to threaten the fairness of the process, and we have not found in them any denial of the *defendant's* right to due process. Nor do we think determination of *Pitchess* motions in the loss of carefully limited information to the police officers' representations rise to the level of a denial of *their* due process.

We reluctantly conclude the trial court abused its discretion in refusing to review the declaration of counsel in chambers. Our reluctance is based simply on the fact we would rather have a perfect solution. We would like to be able to say we could construct a scheme which provides perfect protection to what we regard as a vital interest – protection of the privacy of our police officers – and still guarantees our citizenry the full panoply of their rights when accused of a crime. We cannot. We do not think such a solution exists. And we have reluctantly concluded that the threat to privacy, protected by an independent and sympathetic judiciary is less likely to become pernicious than the threat to the rights of criminal defendants protected by the good will of parties who share the same employers, lunch rooms, and municipal treasuries as the police officers in question.

As public servants ourselves, we want to make it clear that we are not impugning the integrity of county counsels, city attorneys, or independent lawyers hired by governmental agencies to perform those functions. We are merely recognizing that their position in the process advocated by real party in interest would be *adversarial*. And as adversaries, they would apply their diligence and considerable skills in the interest of their clients. Common experience has taught us that even the best public servants in the law, well-meaning deputy district attorneys, public defenders, city attorneys, county counsels, and officers of the law of every stripe, sometimes make mistakes of judgment in the *adversarial* pursuit of the interests they are sworn to represent. We think the interests at stake here are better safeguarded by equally fallible but disinterested parties: the judges of the superior courts of the state.

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue directing the superior court to set aside its order denying Larranaga's motion for discovery of police records and hold an in camera hearing at which it determines whether disclosure of any material in the "Sealed Declaration of Counsel"

would violate defendant's constitutional rights or statutory rules of privilege. Should the court find any such material in the declaration, it shall not disclose such material to any party and shall keep it sealed in the court file.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.