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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ELIZABETH MORENO FRAUSTO, Defendant and Appellant.	B171848 (Los Angeles County Super. Ct. No. VA075613)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey L. Falcone, Judge. Affirmed in part, reversed in part, and remanded.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Elizabeth Moreno Frausto appealed from a conviction for sale of a controlled substance, contending that the trial court erred in rejecting her request for an in camera review of the confidential personnel files of the four deputies involved in her arrest. We issued an opinion affirming the judgment, but then granted a petition for rehearing to consider whether the court committed error under *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 when it imposed the upper prison term after making factual findings at the sentencing hearing. We conclude that the court may have erroneously considered sentencing factors already used for purposes of sentence enhancement or which do not fall within the recidivism exception of *Blakely*. Consequently, remand is required for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by information with one count of possession for sale of a controlled substance in violation of Health & Safety Code section 11351. In connection with that charge, it was further alleged that appellant possessed for sale 14.25 grams or more of a substance containing heroin within the meaning of Penal Code section 1203.07 and Health and Safety Code section 11352.5, subdivision (1); that in 1975, 1981, and 1993, she had suffered three prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a); and that she had suffered one prior conviction in 1993 within the meaning of Penal Code section 667.5, subdivision (b), that a term was served as described in Penal Code section 667.5, and that she did not remain free of prison custody or offense during a period of five years subsequent to the conclusion of the term.

Pitchess Motion

Appellant was arrested on March 5, 2003, by Los Angeles County Deputy Sheriff Brian Bishop and his partner Deputy Poff. Deputy Mia Doeve and her partner Deputy Herrera were called to the scene to perform a search incident to arrest. The search led to appellant's arrest for possession of heroin.

Appellant's counsel filed a motion for pretrial discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531,[1] seeking materials "which relate, directly or indirectly, to accusations and/or evidence that [the four deputies who participated in her arrest] have engaged in acts of misconduct." Specifically, the motion sought materials that indicated the deputies engaged in dishonesty or illegal acts, such as "false arrest, fabrication of evidence or probable cause, filing or writing false police reports, perjury, planting evidence or using false police reports to cover up the use of excessive force, improper police tactics, or making false or misleading internal reports such as false overtime or false medical reports." The motion also sought "[a]ny other material which is exculpatory [of appellant] or which impeaches the credibility of any above named deputy."

In support of the application, appellant attached copies of the two reports of her arrest. Deputy Bishop's report stated that appellant was arrested in front of her home, "a known drug house where heroin is being sold" and that "has ties to the Southside Whittier gang"; that appellant consented to the search by saying "go ahead and strip search me if you want"; and that appellant's daughter had been arrested for possession of heroin found hidden in her groin area. Deputy Doeve

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[1] Defendant in *Pitchess* was charged with committing battery on four deputy sheriffs. Defendant asserted that he acted in self-defense in response to the use of excessive force by the deputies. He sought records of internal investigations of citizen complaints alleging that the deputies had used excessive force on previous occasions. The Supreme Court concluded that he was entitled to such records.

stated in her report that prior to the search which she and her partner Deputy Herrera conducted, Deputy Bishop informed her that appellant and other of appellant's family members were known to use heroin and that they commonly hid narcotics in the groin area.

Appellant's counsel stated in her declaration: "[The four deputies] claim in their report, and in the probable cause declaration attached to their report, that while on routine patrol, they observed a vehicle in front of a home that is alleged to be known as a drug house where heroin is being sold from and which has ties to the Southside Whittier Gang. Deputies immediately recognized [appellant] who resides at the location with her family. [¶] Deputies contacted and arrested [appellant] for two outstanding warrants. Deputies Bishop and Poff were suspicious of a bulge in [appellant's] groin area and asked if she was carrying any drugs. [Appellant] denied the possession of any drugs and told the deputies to 'go ahead and strip search me if you want.' Deputy Doeve was called to the scene to conduct a field search of [appellant] and found in her underwear two baggies containing a total of 62 balloons of heroin. This is all false. The deputies are lying. [Appellant] did not have any drugs on her person and she has been the subject of continued harassment by these deputies."

After reviewing the moving papers, the court denied the motion, citing insufficient showing of good cause to warrant an in camera review. In so doing, the court stated that its first inclination was to grant, but that it was convinced otherwise by *Warrick v. Superior Court* (2003) 107 Cal.App.4th 1271, review granted June 25, 2003, S115738, in which the court held that although the defendant provided a specific factual scenario to support his *Pitchess* motion, it

was not reasonably plausible, and therefore the trial court did not err in denying the motion.[2]

Evidence at Trial

Deputy Bishop testified that on March 5, 2003, at approximately midnight, he noticed appellant inside a vehicle in front of a house with which he was familiar from previous contacts. He knew she had two outstanding warrants for traffic violations, and placed her under arrest. He visually inspected appellant for weapons, and called for a female deputy to conduct a more thorough search. Deputy Doeve and Deputy Herrera arrived, took appellant to their vehicle, and searched her, finding two plastic baggies. One contained 8 multicolored balloons and the other contained 54 multicolored balloons.

Deputy Bishop opined that appellant possessed the heroin in order to sell it. He based his opinion on several factors. First, appellant was unemployed, and "[s]he needs money to buy this heroin and to use heroin, and she doesn't have a job to pay for it." Second, appellant possessed a large number of heroin balloons. Deputy Bishop testified that average heroin users utilize about two to three balloons of heroin per day. He further explained that average heroin users would not keep more than two to three balloons in their possession at one time because (1) "they don't have the money to buy more than that a day at a time";[3] (2) "if they have too much in their possession at one time they'll use it all at once, overdosing"; and (3) "they don't keep a lot on them because friends will come over

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[2] Since *Warrick* is now under review by the Supreme Court, we do not rely on it. Review was granted after the trial court's ruling.

[3] Deputy Bishop testified that the approximate street value of the heroin found on appellant was between $300 to $600, with each balloon costing somewhere between $5 to $10.

and steal it from them or rob them for it." Third, appellant had a cellular phone on her person, which Deputy Bishop argued could be used "to facilitate illegal drug sales." Finally, at the time of her arrest, appellant did not have in her possession any device to ingest heroin.

Appellant testified that she did not have any balloons of heroin in her possession and was not wearing any type of underwear conducive to hiding such a quantity of drugs. Appellant complained of injuries and was checked out by a doctor after the arrest and search. She did not remember who conducted the search, but remembered that it occurred after the female officers arrived and took her to their car.

The jury found appellant guilty.

Sentencing

At the sentencing hearing, appellant admitted three Health and Safety Code section 11352, subdivision (a) priors. However, there was a dispute over the dates. The court made findings "[w]ithout [appellant's] stipulation" based on certified copies of records. Specifically, the court found that appellant had been convicted under section 11352, subdivision (a) in April 1975, March 1981, and August 1993.

During the sentencing hearing, the court made reference to other priors--"[c]arrying a loaded firearm, receiving stolen property, battery, petty theft"--but made no specific findings concerning these priors.[4] In addition, the prosecution contended that "[t]here is some indication on one of the parole discharges on her

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[4] The information concerning these priors came solely from the probation officer's report, which listed a number of misdemeanor convictions of appellant in the 1970's and 1980's for petty theft, battery, drunk driving, and carrying a firearm. There were also a number of later convictions for possession of a controlled substance or being under the influence of a controlled substance.

last conviction that she did go back to prison in 2000 on a parole revocation." Again, the court made no specific finding concerning this allegation.[5]

Health and Safety Code section 11351 specifies that a violation "shall be punished by imprisonment in the state prison for two, three, or four years." The court imposed the upper term of four years. In discussing its decision, the court noted that the evidence indicated possession of 62 balloons of heroin, and that "the jury . . . found . . . true the enhancement under 1203.07(a)(1)[[6]] and 11352.5, sub (1),[[7]] which requires the mandatory state prison sentence." The court further stated: "If any case required a maximum sentence, this case would be it. It's not just the possession of the drugs. It's the transportation, the selling, and the intent to sell in this case." Later, the court gave three specific reasons for imposing the high term: "As far as the finding of guilt as to 11351, the court does select the high-term of 4 years in the state prison. The high-term because the aggravating circumstances outweigh the mitigating circumstances[:] The aggravating circumstances including [appellant's] prior convictions, number 1; number 2, a

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[5] The probation officer's report referred to four parole violations, but did not specify when they occurred. There is no indication of anything happening after 1998.

[6] Penal Code section 1203.07, subdivision (a)(1) states that "probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons: [¶] (1) Any person who is convicted of violating Section 11351 of the Health and Safety Code by possession for sale 14.25 grams or more of a substance containing heroin."

[7] Health and Safety Code section 11352.5, subdivision (1) provides for a fine for "[a]ny person who is convicted of violating Section 11351 of the Health and Safety Code by possessing for sale 14.25 grams or more of a substance containing heroin."

prior prison term; and number 3, that her performance on probation or parole has been unsatisfactory."[8] The court found "no circumstances in mitigation."[9]

The court also imposed nine additional years to run consecutively, three years for each of the "three state prison priors" by which we presume was meant the section 11352 priors. As a result, appellant was sentenced to a total of 13 years. A timely appeal was noticed.

DISCUSSION

I

A

The primary issue raised in the original appeal was whether the trial court erred in denying appellant's *Pitchess* motion. The standard of review for a trial court's ruling on a motion of this kind is the abuse of discretion standard. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

The process by which a criminal defendant may discover confidential peace officer personnel records through a *Pitchess* motion was codified by the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. (See *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81.) The two Penal Code provisions make clear that peace officer personnel records are generally confidential, and the Evidence Code provisions provide the specific

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[8] The court's stated reasons appear to have been drawn from the probation officer's report, which listed the following "circumstances in aggravation": "1. [Appellant's] prior convictions as an adult or adjudication of commission of the crimes as juvenile are numerous or of increasing seriousness. [¶] 2. [Appellant] has served a prior prison term whether or not charged or chargeable as an enhancement under section 667.5. [¶] 3. [Appellant's] prior performance on probation or parole was unsatisfactory."

[9] Likewise, the probation officer's report found "no circumstances in mitigation."

procedures that must be followed to obtain discovery of such records. In particular, Evidence Code section 1043, subdivision (b)(3) requires "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation . . . ."

Section 1045, subdivision (b) provides that the court, if it grants the motion, shall examine the information in chambers. The law thus strikes a balance between the peace officer's claim to confidentiality, and the criminal defendant's interest in all information relevant to his or her defense. "The relatively relaxed standards for a showing of good cause under section 1043, subdivision (b) . . . insure the production for inspection of all potentially relevant documents. The in camera review procedure and disclosure guidelines set forth in section 1045 guarantee, in turn, a balancing of the officer's privacy interests against the defendant's need for disclosure." (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at p. 84.)

The test for determining whether good cause exists was set forth in *City of Santa Cruz v. Municipal Court, supra,* wherein the Supreme Court stated that the requisite showing "'may be satisfied by general allegations which establish some cause for discovery' other than a mere desire for all information in the possession of the prosecution" and that the information sought must be "'requested with adequate specificity to preclude the possibility that defendant is engaging in a "fishing expedition."'" (49 Cal.3d at p. 85, quoting *Pitchess v. Superior Court, supra,* 11 Cal.3d at pp. 536-538.) Defendant in *City of Santa Cruz* was charged with resisting arrest. The police reports made clear that considerable force was used to effect the arrest. Defense counsel's declaration asserted that the officers used excessive force. The court concluded that the declaration set forth "a specific factual scenario" to support the assertion that excessive force was used, and "[v]iewed in conjunction with the police reports," the declaration "establish[ed] a

plausible factual foundation for an allegation of excessive force, put the court on notice that the officers' alleged use of excessive force will likely be an issue at trial, and articulate a valid theory as to how the information sought might be admissible." (49 Cal.3d at pp. 85-86.)

In the wake of the Supreme Court's decision in *City of Santa Cruz*, courts evaluate defense *Pitchess* motions according to whether they provide "a 'specific factual scenario' establishing a 'plausible factual foundation'" for their allegations of misconduct. (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1150; accord, *People v. Collins* (2004) 115 Cal.App.4th 137, 151; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020.)

Whether a sufficient showing of good cause was or was not made has been the subject of numerous appellate decisions, and the answer has turned on the specific facts presented. In *City of San Jose, supra,* where consent to search was an issue, defense counsel stated that "'knowing and voluntary consent to enter was not in fact obtained by the officers'" without explaining "whether the officers coerced [the defendant] into consenting (and if so, what means of coercion the police employed), or whether the officers simply failed to obtain [the defendant's] consent." (67 Cal.App.4th at p. 1147.) Similarly, counsel alleged that "'evidence disclosed during that search was mishandled by the officers to such an extent as to deny [defendant] a fair trial,'" but "failed to specify which item or items of evidence were mishandled [or] how the evidence was mishandled." (*Ibid.*) The Court of Appeal concluded that discovery should not have been allowed, reversing a trial court order. (*Id.* at p. 1150.)

In *People v. Collins, supra,* 115 Cal.App.4th 137, this court affirmed a trial court's denial of a *Pitchess* motion where defendant was charged with possession of drugs found during an attempted body cavity search that had been conducted based on information received in an anonymous note. Defendant claimed that two

specific officers "'did not follow policy and procedures, destroyed material evidence, and failed to follow search procedures [by] tampering with evidence [and] acting without probable cause on an unreliable and bogus confidential letter that was destroyed by design.'" (*Id.* at pp. 149-150.) The trial court denied the motion because there was no evidence to suggest that the two officers whose records he sought to discover "'ever had any dealings with the evidence [or] that they participated in the search.'" (*Ibid.*) We agreed with the trial court because the two officers were neither "involved in the attempted visual body cavity search that ultimately led to the discovery of the heroin" nor participated in "retriev[ing] the heroin balloons from the floor after defendant dropped them there," and because "defendant's declaration merely made general allegations of misconduct against [the two officers] without alleging any facts that provided reason to believe the misconduct had occurred." (*Id.* at p. 151.)

In *People v. Hustead* (1999) 74 Cal.App.4th 410, on the other hand, the court agreed with the defense that confidential material should have been reviewed in camera where the declaration in support of the *Pitchess* motion contained specific statements concerning misstatements in the arresting officer's report. "[A]ppellant's counsel asserted in his declaration that the officer made material misstatements with respect to his observations, including fabricating appellant's alleged dangerous driving maneuvers. He also stated that appellant asserted that he did not drive in the manner described by the report and that his driving route was different from that found in the report. In addition, he claimed that a material and substantial issue in the trial would be the character, habits, customs and credibility of the officer. These allegations were sufficient to establish a plausible factual foundation for an allegation that the officer made false accusations in his report. It demonstrated that appellant's defense would be that he did not drive in the manner

suggested by the police report and therefore the charges against him were not justified." (*Id.* at pp. 416-417.)

A basis for in camera review was also found in *People v. Gill* (1997) 60 Cal.App.4th 743, where the defendant asserted that one of two arresting officers "pushed [his] face into a garage door, gashing his cheek," and that "'[i]t will be a defense in this matter that the alleged contraband was placed on [defendant] by [the arresting officer] to cover up for his use of excessive force and that the officer has [a] pattern of fabricating probable cause in dope cases.'" (*Id.* at pp. 746, 750.) The defendant did not seek review of the other arresting officer's personnel files, although both of the officers involved in the arrest testified to seeing the defendant drop rocks of cocaine. The court held that the defendant "has demonstrated good cause for the requested discovery and that the trial court abused its discretion by summarily denying the discovery motion." (*Id.* at p. 750.)

In *California Highway Patrol v. Superior Court, supra,* 84 Cal.App.4th 1010, the court concluded that defendant did not meet the good cause requirement for discovery of personnel records pertaining to unrelated misconduct where he alleged that two officers (McCain and Conley) used excessive force in arresting him and had testimony from an independent witness that defendant did not act violently until the officers used excessive force. Based on those allegations, the trial court had been prepared to turn over documents related to a problem police report prepared by *Conley* and documents related to a time card documentation issue on the part of McCain. The Court of Appeal issued a writ directing the trial court to vacate that order because the report indicating that defendant was violent and resisted arrest was prepared by *McCain* and because the time card issue was irrelevant. "Defendant has not claimed that Officer Conley prepared a false police report concerning his arrest, nor did his motions set forth a specific factual scenario to support an allegation of any kind of misconduct on Officer Conley's part other

than excessive force. [¶] Similarly, defendant's motion failed to show good cause for discovery of the investigation of Officer McCain's time card documentation issue. As we have discussed, defendant showed good cause for discovery of complaints of false police reports filed by Officer McCain. However, that showing is not good cause for defendant's request for records reflecting time card irregularities, because there is insufficient similarity between an allegation of officer misconduct consisting of filing a false police report and prior officer misconduct consisting of time card irregularities." (84 Cal.App.4th at p. 1023.)

The court disagreed with defendant's position, which it characterized as follows: "(1) it is common knowledge that officers will lie to protect each other; (2) therefore, an officer's credibility is always at issue; and (3) any records reflecting dishonesty on the officer's part are material to the defense and thus discoverable . . . as impeachment evidence." (*California Highway Patrol, supra,* at pp. 1023-1024.) The court rejected the notion that defendants could obtain discovery of all information contained in an officer's personnel records which potentially reflect on the officer's credibility merely by asserting that "police officers are known to lie" because such a procedure "would effectively abrogate the good cause requirement . . . by permitting fishing expeditions into the arresting officers' personnel records in virtually every criminal case." (*Id.* at p. 1024.) The court did not consider the "unsupported allegation by defendant that officer credibility is relevant because all officers are dishonest and are likely to lie about their fellow officers' use of excessive force" to be the "showing of good cause" required by Evidence Code section 1043. (*Id*. at p. 1025.)

B

As can be seen from the above discussion, the issue presented in review of a *Pitchess* motion is whether the defendant has provided a "specific factual scenario"

which establishes a “plausible factual foundation” for how the material sought might aid in the defense, or whether the support for the motion could more accurately be characterized as generic assertions that “all officers are dishonest” raised in order to engage in a “fishing expedition” into otherwise confidential information. Our analysis of the record leads us to agree with the trial court that appellant failed to make the good cause showing required to warrant an in camera review of the deputies’ personnel files.

Counsel’s declaration misleadingly describes the deputies’ reports, implying that they indicate that all four deputies “recognized” appellant and her home as a “known drug house [with] ties to the Southside Whittier Gang.” Nothing supports that assumption. The reports indicate that only Deputy Bishop was familiar with appellant or her home or her family’s alleged activities. Counsel’s declaration charges that “[appellant] has been the subject of continued harassment.” There are no specifics provided to back up that bald assertion. The only information that can be gleaned either from counsel’s declaration or the deputies’ reports is that Deputy Bishop was aware that appellant’s family had a history of drug sales, that her daughter had been arrested for possession of heroin hidden in her groin area, and that he knew appellant had two outstanding warrants. The declaration did not contend that Deputy Bishop’s information was faulty or that he had ever undertaken improper action with respect to appellant or any member of her family. A law enforcement officer does not engage in “harassment” by keeping abreast of criminal activity and outstanding warrants in his patrol area. Appellant’s vague accusation of harassment does not support review of any of the deputies’ confidential files.

The final and most serious accusation in the declaration was that “[t]he deputies” were “lying” when they said they “found in her underwear two baggies containing a total of 62 balloons of heroin.” Although appellant did not explicitly

so state, the court was apparently expected to draw the conclusion that the 62 balloons of heroin were planted. Again, however, appellant provides no specifics--who, when, how, why--and the known facts undermine the claim. The declaration states that Deputy Bishop and his partner, after taking appellant into custody for having two outstanding warrants, became "suspicious of a bulge in [appellant's] groin area and asked if she was carrying any drugs." Appellant denied being in possession of drugs and told the deputies "to 'go ahead and strip search me if you want.'" The reports put the fact slightly differently. They state that Deputy Doeve noticed the bulge in appellant's groin area, asked appellant if she was in possession of drugs, and received permission to search.

The most salient point was not disputed: two different sets of deputies were involved, and there was no evidence that the deputies who conducted the search had ever heard of appellant before that day. Deputy Bishop, the sole deputy familiar with appellant and her prior activities, was not involved in the search in any way. Thus, based on nothing more than one deputy's familiarity with appellant's history as a drug offender, we are expected to conclude that four deputies silently and instantaneously conspired to plant drugs on her during a routine search. Like the court in *California Highway Patrol*, *supra*, 84 Cal.App.4th 1010, we reject the notion implicit in appellant's contentions that all law enforcement officers are dishonest and lie to back up their fellow officers. Appellant did not provide a "specific factual scenario" establishing a "plausible factual foundation" for her claim of misconduct. She did not, for example, allege that evidence was planted in order to cover up use of excessive force (see *City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d 74; *People v. Gill, supra,* 60 Cal.App.4th 743); nor did she claim that the officers were lying about her consent to the search (cf. *City of San Jose v. Superior Court, supra,* 67 Cal.App.4th 1135; *People v. Collins, supra,* 115 Cal.App.4th 137). Her only attempt to suggest a

motive--Deputy Bishop's knowledge of her background and presumed desire to catch her in possession--fell short since Deputy Bishop did not conduct the search or claim to have found the heroin balloons. The trial court did not abuse its discretion in denying her motion.

II

Appellant claimed in the second half of her original brief on appeal that the constitutional rights described in *Brady v. Maryland* (1963) 373 U.S. 83 were somehow violated. Under *Brady*, the prosecution must disclose any evidence that is favorable to the defendant and material on the issues of guilt or punishment. (See *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1471.) This obligation to disclose includes both impeachment and exculpatory evidence, and exists irrespective of whether the defendant makes a specific request for such information. (*Ibid.*; see also *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 52.) "'The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf[,]"' including the police." (*People v. Gutierrez*, *supra*, 112 Cal.App.4th at p. 1472, quoting *In re Brown* (1998) 17 Cal.4th 873, 879.)

Under *Brady*, evidence is considered material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7-8, quoting *United States v. Bagley* (1985) 473 U.S. 667, 682.) "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' [Citation.]" (*Kyles v. Whitley* (1995) 514 U.S. 419, 434; see also *People v. Gutierrez*, *supra*, 112 Cal.App.4th at p. 1472.) However, it must be

noted that "*Brady* did not create a general constitutional right to discovery in a criminal case." (*People v. Gutierrez*, *supra*, 112 Cal.App.4th at p. 1472; see also *Abatti v. Superior Court*, *supra*, 112 Cal.App.4th at p. 52.)

The interplay between *Brady* and *Pitchess* was described by our Supreme Court in *City of Los Angeles v. Superior Court*, *supra*, 29 Cal.4th at page 14: "Our state statutory scheme allowing defense discovery of certain officer personnel records creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady*, *supra*, 373 U.S. 83. Unlike *Brady*, California's *Pitchess* discovery scheme entitles a defendant to information that will 'facilitate the ascertainment of the facts' at trial (*Pitchess, supra,* 11 Cal.3d at p. 536), that is, 'all information pertinent to the defense' (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53 . . .)." The court went on to say that "[b]ecause *Brady*'s constitutional materiality standard is narrower than the *Pitchess* requirements, any citizen complaint that meets *Brady*'s test of materiality necessarily meets the relevance standard for disclosure under *Pitchess*." (*City of Los Angeles* v. *Superior Court*, *supra*, 29 Cal.4th at p. 10.)

The converse is also true. Evidence is material under *Brady* only "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" (*City of Los Angeles v. Superior Court, supra,* 29 Cal.4th at pp. 7-8.) For purposes of *Pitchess*, however, "defendant need only show that the information sought is material 'to the subject matter involved in the pending litigation.'" (*Id*. at p. 10.) It follows that "if a defendant cannot meet the less stringent *Pitchess* materiality standard, he or she cannot meet the more taxing *Brady* materiality requirement." (*People v. Gutierrez*, *supra*, 112 Cal.App.4th at p. 1474.)

Appellant's real argument seemed to be that *Brady* requires routine review of the complete files of all personnel records of police officer witnesses in a

criminal proceeding. The court in *Gutierrez* rejected this assertion and the assertion that “the prosecutor was obliged to conduct a review of the files of ‘all significant police officer witnesses’ and disclose any *Brady* material.” (112 Cal.App.4th at pp. 1474-1475.) The court cited the Supreme Court’s holding in *Alford v. Superior Court*, *supra*, 29 Cal.4th 1033, 1046, that unless the prosecution seeks *Pitchess* disclosure “by complying with the procedure set forth in Evidence Code sections 1043 and 1045[,] . . . peace officer personnel records retain their confidentiality vis-à-vis the prosecution.” Since the Supreme Court has held that information in confidential personnel files is not deemed to be in the possession of the prosecution, the failure to conduct a review of the files and disclose any negative information to the defense could not have violated *Brady*.

III

In her brief in support of the petition for rehearing, appellant contended that the trial court committed sentencing error under *Blakely v. Washington, supra*, ___ U.S. ___ [124 S.Ct. 2531] and *Apprendi v. New Jersey, supra,* 530 U.S. 466, because it imposed the upper term after making factual findings concerning aggravating and mitigating factors.

In *Apprendi*, the court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi v. New Jersey*, *supra,* at pp. 483, 490.) In *Blakely*, the Supreme Court expanded the scope of *Apprendi*, making its rule potentially applicable to a wide range of traditional sentencing factors. The court explained: “[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] . . . [T]he relevant ‘statutory maximum’ is not the

maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (124 S.Ct. at p. 2537.)

Respondent contends, as a preliminary matter, that appellant waived or forfeited this contention by failing to object to the sentencing at the time of trial, citing *People v. Sample* (2004) 122 Cal.App.4th 206, 220-221, review granted December 1, 2004, S128561. In *People v. Vaughn* (2004) 122 Cal.App.4th 1363, review granted December 15, 2004, S129050, we announced our disagreement with *Sample's* holding that failure to raise *Apprendi* in the trial court resulted in forfeiture of the right to argue *Blakely* on appeal. Instead, in accord with the courts in *People v. George* (2004) 122 Cal.App.4th 419, 424, review granted December 15, 2004, S128582, and *People v. Barnes* (2004) 122 Cal.App.4th 858, 879, review granted December 15, 2004, S128931, we held: "The Supreme Court's decision in *Blakely* extended the *Apprendi* rationale into a new area, and created an opportunity for reviving the debate over *Apprendi's* ultimate meaning and impact . . . . Appellant cannot have forfeited or waived a legal argument that was not recognized at the time of his trial." (*People v. Vaughn*, *supra*, at p. 1369.) Although review was granted by the Supreme Court in *Vaughn*, we see no reason to diverge from its reasoning, particularly in view of the increasing number of courts that take the same approach. (See, e.g., *People v. Ackerman* (2004) 124 Cal.App.4th 184, 193-195; *People v. Juarez* (2004) 124 Cal.App.4th 56, 75-76; *People v. Picado* (2004) 123 Cal.App.4th 1216, 1233-1234; *People v. Fernandez* (2004) 123 Cal.App.4th 137, 142; *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1583.)

Turning to the merits, appellant contends that the trial court erred in imposing the upper term and foregoing the standard term based on facts other than recidivism not found by the jury. Respondent maintains that "[t]his Court recently rejected this argument in *People v. Vaughn*, [*supra*]." In *Vaughn*, the jury found defendant guilty of two counts of murder with special circumstances and 11 counts of attempted murder. The trial court made no separate factual findings. It imposed the upper term for one of the attempted murder charges based on the violence and multiplicity of appellant's crimes. Since the court's basis for imposing the upper term was derived from facts inherent in the jury verdict, we had no need to address whether an upper term sentence based on other facts would run afoul of *Blakely*.[10]

The facts in this case are closer to those in our recent decision in *People v. White* (Dec. 15, 2004, B166502) ___ Cal.App.4th ___ where we concluded that "the Washington sentencing scheme struck down by *Blakely* is equivalent in all essential respects to California's," and agreed with those courts holding *Blakely* applicable to upper term sentencing. We further held that we could not "go along with those courts that have held that a single true aggravating factor will transform the maximum sentence permissible from the midterm to the upper term and salvage sentences based in large part on judicial factfinding," believing such outcome to be foreclosed by the Supreme Court's rejection of a similar argument raised in *Apprendi*. (*People v. White*, *supra*, ___ Cal.App.4th at p. ___.) The sole issue that needs to be addressed here, therefore, is whether the trial court

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10 In a similar vein, in *People v. Calhoun* (2004) 123 Cal.App.4th 1031, 1053-1054, where the jury's verdict included findings that defendant was guilty of two counts of vehicular manslaughter involving separate victims, the Court of Appeal held that the trial court's reliance on "multiple victims" to impose upper term did not result in *Blakely* error because the term was imposed "solely on the basis of the facts reflected in the jury verdict."

considered improper factors in choosing the upper term, and if so, whether such error was harmless.

In this regard, appellant contends all *Blakely* error is structural, requiring reversal per se because it is tantamount to denial of a jury trial, citing *People v. Lemus* (2004) 122 Cal.App.4th 614, review granted December 1, 2004, S128771, where the court stated that "the loss of the jury trial right cannot be found harmless on the theory that if a jury trial had been held the defendant would have lost on the issue." (*Id*. at p. 622.)

We assume without deciding that harmless error analysis applies because we believe that the error here cannot be deemed harmless. The trial court gave three express reasons for imposing the upper term of four years: (1) appellant's "prior convictions"; (2) appellant's "prior prison term"; and (3) her prior "unsatisfactory" performance on probation or parole.

The Supreme Court said in *Apprendi* that "a prior conviction" is an appropriate factor for consideration by the judge that need not be submitted to the jury. (*Apprendi*, *supra*, 530 U.S. at p. 490.) Moreover, the "prior conviction" exception has been construed broadly to apply not just to the fact of the prior conviction, but to other issues relating to the defendant's recidivism. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 221.)[11] We see no reason why the definition of recidivism should not include a defendant's prior prison term. The problem with the court's use of this factor here, however, is that the record is unclear about which prior convictions and/or prison terms were used to justify the upper term. Penal Code section 1170, subdivision (b) provides that "[t]he court may not impose

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[11] The court in *Thomas* gave as examples of matters related to recidivism that could properly be resolved by the judge issue pertaining to whether the defendant committed a new offense within a certain number of years of being released from prison or whether defendant served a prior prison term. (91 Cal.App.4th at pp. 222-223.)

an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law." Although the probation officer's reports contained a long list of prior offenses, primarily misdemeanors, committed by appellant, the court received evidence and made specific findings only as to the three Health and Safety Code section 11352 priors. As we have seen, those priors formed the basis for three 3-year enhancements. Thus, it would have been error for the court to rely on those priors--or the prison terms resulting from them--to form the basis for the upper term.

The other specific factor set forth by the court--that appellant's performance on parole was "unsatisfactory"--may be proper in some circumstances, for example, where the defendant's prison-system records indicate that parole was granted at some point and then revoked prior to completion. Such finding would fit within the recidivism exception to *Blakely*. On the other hand, it would be unacceptable under *Blakely* for a judge to make a finding that some specific conduct occurred while the defendant was on parole--such as use of drugs or failure to meet with the parole officer--if such conduct did not lead to parole revocation. Like the reference to prior convictions and prior prison terms, however, we cannot determine from the record whether the court simply meant that a period of parole had been revoked prior to completion when it stated that appellant's performance on parole was "unsatisfactory."

There were two other potential factors mentioned by the court at the sentencing hearing--that the evidence indicated possession of 62 balloons of heroin, and that "the jury . . . found . . . true the enhancement under 1203.07(a)(1) and 11352.5, sub (1) which requires the mandatory state prison sentence." The former is an example of judicial factfinding outside the sphere of recidivism, the latter fact was used for enhancement of the sentence in other ways.

In sum, the basis for the court's decision to impose the upper term is not clear. The record contains indications that the court may have utilized factors either improper under *Blakely* or under Penal Code section 1170, subdivision (b). Therefore, we cannot say with complete assurance that any improper factfinding the court engaged in represented harmless error--assuming arguendo that is the appropriate standard for *Blakely* review. The court might well have come to a different conclusion concerning the upper term had it been aware of the restrictions on its power imposed by *Blakely*. We, therefore, reverse as to the sentence only, and remand for a new sentencing hearing.

DISPOSITION

The judgment is reversed as to the sentence only, and the matter remanded to the court to conduct a new sentencing hearing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

We concur:

EPSTEIN, P.J.

HASTINGS, J.