

***Pitchess* Procedures**

The Appellate Record & Raising the Issue

What is *Pitchess*?

Pitchess v. Superior Court (1974) 11 Cal.3d 531: The defendant may make a motion for disclosure of the record of prior complaints of misconduct made against an officer, when potentially relevant to the defense of the current charges. (Evid. Code, §§ 1043-1047; Pen. Code, §§ 832.5, 832.7, 832.8.)

Source of Confidentiality

Penal Code section 832.7, subdivision (a) makes peace officer personnel file confidential except through discovery procedures under Evidence Code section 1043 and 1046.

Rationale for Confidentiality

Protecting the rights of the officer against “an unwarranted invasion of personal privacy” (Pen. Code, § 832.8, subd. (f)) and protecting the officer and agency from “unnecessary annoyance, embarrassment or oppression” (Evid. Code, § 1045, subd. (d)). (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1227.)

Trial Procedures

The custodian of records must deliver to the trial court any records in the officer’s file potentially responsive to the defense’s discovery request. (*Mooc*, at pp. 1228-1230.) The trial court must examine the records in camera (Evid. Code, § 1045, subd. (b)) and make a record of the documents it examines (*Mooc*, at pp. 1228-1230). If the documents are not voluminous, the court can photocopy them and place them in a sealed file, or alternatively it can make a sealed list of the documents, or state for the record what documents it examined and seal the transcript. (*Ibid.*)

Appellate Augment Procedures & Raising the *Pitchess* Issue

The record of the *Pitchess* in camera review proceeding is not automatically part of the record on appeal, and must be requested under California Rules of Court, rules 8.328 and 8.324. (*People v. Rodriguez* (2011) 193 Cal.App.4th 360, 366.)

- **Is *Pitchess* an issue?**

Unless the *Pitchess* issue would not be cognizable on appeal (e.g. appellant entered a guilty plea), appellate counsel should raise the *Pitchess* issue whenever the trial court has granted the *Pitchess* motion, in whole or in part, and conducted an in camera review. In order to raise the issue, appellate counsel must make sure that the sealed in camera *Pitchess* proceedings are part of the record on appeal by making sure they have been filed with the appellate court.

- **Is it clearly part of the record?**

If trial counsel has complied with rule 8.328(c) [application by counsel to include specified in camera proceedings in record], and the trial court has filed the sealed *Pitchess* record with the appellate court in compliance with rule 8.328(c)(4), no augmentation motion should be

necessary. Appellate counsel should recognize that this has occurred because s/he should receive notice of it under rule 8.328(c)(5)(B). If appellate counsel does not receive this notice, then the trial court has not complied with the rule, and counsel should take the remedial action of moving to augment with the sealed in camera proceedings, because arguably, if the proper procedure has not been followed, the appellate court could find the sealed *Pitchess* record is not properly before it.

Where trial counsel has not applied to include the *Pitchess* material in the record on appeal under rule 8.328(c), the record on appeal may nonetheless show that trial counsel made a *Pitchess* motion which was granted, in whole or in part, and that an in camera review of *Pitchess* materials was conducted. In this case, as long as the issue is cognizable on appeal, appellate counsel should still move to augment with the sealed transcript of the in camera *Pitchess* proceedings.

If the trial court has, however, on its own motion, filed the sealed *Pitchess* record in the appellate court, this action does not appear to be authorized by rule 8.324. Moreover, in so doing, the trial court will likely not have complied with rule 8.328(c) by providing notice to the prosecution and the defense. In this situation as well, appellate counsel should probably file a motion to augment in the appellate court in order to make sure that the sealed *Pitchess* proceedings are part of the record on appeal. Making sure that the applicable rules of court have been followed is the best insurance.

CCAP finds no authority requiring a rule 8.328(c) motion to be made in the trial court before appellate counsel may move to augment for sealed *Pitchess* materials in the appellate court. While rule 8.324(c) permits trial counsel to make an application for the reporter's transcript of the in camera hearing when s/he files the notice of appeal, it also provides that such an application will be treated as denied if it is filed after the record is sent to the reviewing court. Because appellate counsel will rarely receive the appellate appointment in sufficient time to be able to make such a timely application in the trial court, s/he should move to augment in the appellate court.

- **No unsealing of record**

If it is part of the record, or if augmentation is ordered, the sealed transcript will not be sent to the parties. Current legal authority does not permit appellate counsel to receive a copy of the sealed, in camera *Pitchess* proceedings. (See rule 8.328(c)(4) and (6).) Only an appellate justice and parties who had access to the transcript in the superior court and their attorneys may examine it. The parties on appeal will receive only an index of the proceedings showing the date and persons present, but not the substance of the matter. (Rule 8.328(c)(5).)

- **Raising the *Pitchess* issue on appeal**

Even though the record itself remains sealed, the appellant requests the Court of Appeal to examine the record and make a ruling. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; see *People v. Price* (1991) 1 Cal.4th 324, 493 [when an appeal challenges the trial court order withholding evidence as privileged or non-discoverable, the reviewing court will fill gap caused by the party's

lack of access to the record by reviewing it objectively].)

[Sample AOB Pitchess issue/arguments](#)

This briefbank sample provided by a panel attorney shows proper presentation of two *Pitchess*-related issues. The first issue requests that the Court of Appeal examine the materials disclosed pursuant to *Mooc* at the in camera hearing in the trial court as to two officers. The second issue challenges the trial court's ruling denying an in camera review of third officer's personnel file.