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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOSE ANTONIO GARCIA, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; CITY OF SANTA ANA, Real Party in Interest.	G032739 (Super. Ct. No. 02CF1970) 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, Carla Singer, Judge. Petition granted.

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

No appearance for Respondent.

Joseph W. Fletcher, City Attorney and Paula J. Coleman, Assistant City Attorney for Real Party in Interest.

Once again we address the nuances of the discovery tool known as a *Pitchess*[1] motion. (Evid. Code, §§ 1043, 1045.) This particular case presents two issues of first impression. First, may a criminal defendant file a declaration under seal in support of his or her *Pitchess* motion on the grounds that it contains information protected from disclosure by the attorney-client (Evid. Code, § 954) and/or attorney work product (Code Civ. Proc., § 2018) privileges? Second, assuming a criminal defendant may file a supporting declaration under seal, what steps must the court take to preserve the subject peace officer's legitimate expectation of privacy in his or her personnel records, as recognized by and protected by statute, while simultaneously protecting the rights of the accused to a fair trial?

Because the statutes outlining the *Pitchess* procedure are silent on the issue of filing supporting declarations or affidavits under seal, nothing expressly prohibits a defense attorney from making use of this practice where privileged or confidential information is included to demonstrate good cause for the release of peace officer personnel records. In fact, this practice has been employed in other settings and there is no compelling reason to preclude it here.

Likewise, when confronted with a sealed declaration or affidavit in support of a *Pitchess* motion, the trial court should apply the procedures similar to those followed in other third-party discovery motions. First, the criminal defendant who submits a sealed declaration in connection with a *Pitchess* motion must provide timely and proper notice to the third party, specifically claiming his or her attorney-client, attorney work product, or other recognized privilege or immunity. Second, the trial court must review the sealed declaration or affidavit in camera with defense counsel to determine what portions of the document, if any, contain legitimately privileged information. The court should then order that those limited portions of the document remain under seal.

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Declarations or affidavits filed in support of *Pitchess* motions need not contain information based on personal knowledge, but may include averments based on information and belief. Finally, the redacted declaration is to be filed and served upon the custodian of records for proceedings on the merits of the defendant's motion.

We issue the writ directing the superior court to vacate its order of August 15, 2003, and to enter new orders consistent with this opinion. The stay will be vacated when this opinion becomes final as to this court.

I

FACTS AND PROCEDURE

On November 8, 2002, petitioner Jose Antonio Garcia was charged by information with assault with a deadly weapon on a custodial officer (Pen. Code, § 245.3), of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)), and with two counts of street terrorism (Pen. Code, § 186.22, subd. (a)). The information also alleged he had previously been convicted of felony car theft (Veh. Code, § 10851, subd. (a)) and had committed the current crimes for the benefit of F-Troop, a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)). The alleged assault arose out of a scuffle between petitioner and custodial officers on July 31 during the booking process in the Santa Ana jail.

On July 25, 2003, petitioner's counsel filed a *Pitchess* motion requesting the disclosure of personnel records for the six custodial officers allegedly involved in the altercation. The request identified five "potentially relevant" files, including (1) internal affairs complaints "regardless of disposition," (2) internal affairs complaints "in a general file, i.e. those found without merit," (3) "substantiated or unsubstantiated complaints, evaluations, academy evaluations, select indicators, and other performance evaluations," (4) psychiatric or psychological records "that are probative of the officers' propensity for violence, false police writing, and dishonesty," and (5) supervising officers' "informal files" described as containing citizen and fellow officer comments and files entitled "Risk

Management," "Division," and "Human Resource." Purportedly, the requested materials would relate to the officers' credibility, previous use of excessive force, hostility or aggression, commission of wrongful acts involving moral turpitude, general veracity, and any conduct unbecoming to an officer or neglect of duty. Petitioner also described the "scope" of the materials requested, which amounted to a demand for all identified materials including documents and/or recordings.

Petitioner's counsel submitted a copy of the incident report, which included interviews with petitioner, four inmates who observed the altercation, a nurse who witnessed the fight and treated one of the injured custodial officers, and each of the six custodial officers identified as participants in the incident. Counsel also submitted a declaration under seal in support of his motion, serving a redacted copy of the declaration to the custodial officers' attorney, the City of Santa Ana (real party). Real party filed an opposition to the motion, asserting it could not adequately respond without first reviewing the sealed declaration.

At the August 15, 2003 hearing, petitioner requested the court conduct an ex parte in camera review of the sealed declaration. Real party did not object to this procedure. Following the in camera review, the court concluded some information, information generally contained in the incident reports but also revealing defendant's trial strategy, could be released under a protective order. The court also found other statements fell under the either the attorney-client or work product privilege and ordered these portions redacted. It ruled, "I think the record should reflect that the court did review the sealed declaration of defense counsel in support of motion for discovery of peace officer personnel records, and did convey to [defense counsel] that it was this court's feeling that certain material contained therein should be redacted from the declaration, would constitute privilege, and should not be provided as relevant and

necessary under the authority of *Davenport.*[2] [¶] . . . [¶] [T]he court believes that the material the court intends to disclose to the city attorney is relevant and necessary for the city attorney to appropriately respond to the discovery, and that *Davenport's* authority would allow this court to issue a protective order in which the court would have sufficient confidence to make the disclosures."

The court granted petitioner one week to file a writ petition with this court. On August 21, 2003, petitioner filed a petition for writ of mandate/prohibition and request for an immediate stay of the trial court's order, and a motion to seal the declaration submitted under seal and the reporter's transcript of the court's in camera review. This court issued the stay prohibiting the trial court from compelling disclosure of counsel's sealed declaration and granted petitioner's motion. Real party filed an informal response. We subsequently issued an order to show cause, scheduled oral argument, and invited real party to file a formal response and petitioner a formal reply. For reasons more fully developed below, we grant the petition.

II

DISCUSSION

Numerous opinions detail the development of the *Pitchess* procedure from its birth in 1974 as a creature of case law (*Pitchess v. Superior Court, supra,* 11 Cal.3d at p. 536), to its codification by the Legislature in 1978 (Pen. Code, §§ 832.7, 832.8 & Evid. Code, §§ 1043-1045), through its development by statutory amendment and case law. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1219-1221; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-84; *City of Los Angeles v. Superior Court (Williamson)* (2003) 111 Cal.App.4th 883, 888-890; *City of Los Angeles v. Superior Court (Davenport), supra,* 96 Cal.App.4th at pp. 259-260; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019-1020; *City of San Jose v. Superior*

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2 *City of Los Angeles v. Superior Court (Davenport)* (2002) 96 Cal.App.4th 255.

Court (1998) 67 Cal.App.4th 1135, 1141-1144; *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118.) We need not reiterate the entire history of the *Pitchess* procedure because this case deals specifically with the procedural requirements of the motion.

"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), supra,* 111 Cal.App.4th at pp. 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, supra,* 49 Cal.3d at p. 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 conjuction 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.)

As noted, petitioner filed a sealed declaration in support of his *Pitchess* motion, asserting the declaration contained privileged information. Real party first contends Evidence Code section 1043 does not expressly permit this practice. A fair reading of the statute yields this conclusion. Nevertheless, the statute does not explicitly prohibit the procedure and it is utilized in other comparable settings. Our Supreme Court recently observed, "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), supra,* 80 Cal.App.4th at p. 1320.) Without an express prohibition of the practice of filing supporting declarations or affidavits under seal in *Pitchess* motions and 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 as petitioner seems to suggest. "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.)

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, right of the custodian of records may not simultaneously 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.) The delicate balance of competing interests recognized and protected by the *Pitchess* procedure can withstand the weight of supporting affidavits or declarations filed under seal.

Having concluded the statutory *Pitchess* procedure did not prohibit petitioner from filing his supporting declaration under seal, we now determine if the trial court correctly reviewed and disclosed the appropriate material. 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.)

Recently, in *City of Los Angeles v. Superior Court (Davenport), supra,* 96 Cal.App.4th at page 264, the appellate 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 record's 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.) The opinion did not specify whether Davenport's declaration contained privileged material, although the trial court had concluded it did. The court apparently concluded the conditional release of privileged information to a third party did not infringe on the defendant's constitutional rights.

Real party, relying on *Davenport*, asserts this court should likewise permit it to review the entire declaration under a protective order. Petitioner seeks to distinguish his case from *Davenport* by noting that he is claiming the attorney-client (Evid. Code § 954) and work product (Code Civ. Proc. § 2018) privileges rather than the deprivation of the right to a fair trial by disclosure of a defense or trial strategy as discussed in *Davenport*. Petitioner's purported distinction is not persuasive.

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.) "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* (2003) 29 Cal.4th 1033, 1046.) The nature of the privilege is not determinative for purposes of our analysis.

Nevertheless, 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. True, the custodian of records 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, supra,* 67 Cal.App.4th at p. 1145 [fact defendant is not percipient witness does not void application of Fifth Amendment privilege against self-incrimination for purposes of *Pitchess* motion].) "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. Contrary to *Davenport*, 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.)

Release of privileged information to law enforcement's custodian of records 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. In order to pose a credible argument as to the lack of materiality of the requested inquiry into otherwise confidential personnel records, one must assume counsel would find it necessary to consult with the police officer client. To disallow such an attorney-client communication, conflicts with basic due process. Communications between the attorney and police officer client would almost certainly include confidential information concerning the defendant. It is an unreasonable burden to direct a police officer to consider information disclosed for the purposes of a *Pitchess* proceeding and then direct the same officer to erase that information from his or her memory for purposes of the criminal prosecution.

The preferred procedure 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 proceeds to rule on defendant's claim of privilege. (*City of Alhambra v. Superior Court, supra,* 205 Cal.App.3d at p. 1132.)

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 shall be accomplished. The court shall then order that the redacted version be served on opposing counsel. The court shall assure that both versions are preserved in the court file, with the unredacted version kept under seal.

Real party argues 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. (Evid. Code, § 1042, subd. (d); [motion for disclosure of the identity of a confidential informant].) 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.) Further, the trial court's ruling on a claim of privilege and its good cause finding are subject to review under the abuse of discretion standard. (*People v. Memro* (1985) 38 Cal.3d 658, 675.)

To establish an abuse of discretion, a party must demonstrate "that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) Utilizing this standard, we have reviewed the trial court's ruling.

The trial court conducted a thorough review of the sealed declaration. It concluded some information generally contained in the incident reports but also revealing defendant's trial strategy could be released under a protective order. The court also found information falling under the attorney-client privilege and ordered these portions redacted. We find fault only with the court's determination that information containing defendant's trial strategy and other attorney work product could be released under a protective order. We remand the matter for the court to redact privileged information from the declaration. At this point, real party may challenge the sufficiency of the declaration or affidavit should it oppose the motion. In deciding the sufficiency of the declaration, the trial court may consider the privileged information. To state it another way, on occasion, the finding of good cause may be based in part on privileged information not released to the custodian of records. The procedure set forth above simply affords defense counsel the opportunity to include privileged information without the fear of disclosure to any other party.

We acknowledge that the procedure we have outlined does not provide a perfect resolution as to all of the competing interests, but is a procedure that is intended to best provide for basic fairness to all involved. We believe defense counsel must be afforded this option lest we tip the delicate balance between the custodian of record's due process right to participate in the proceedings and the criminal defendant's Fifth

Amendment right against self-incrimination and Sixth Amendment right to counsel in the custodian's favor.[3]

III

DISPOSITION

Petition for writ of mandate is granted. The superior court is directed to vacate its order of August 15, 2003, and to enter new orders consistent with this opinion. The stay will be vacated when this opinion is final as to this court. We decline to award costs in the interests of justice. (Cal. Rules of Court, rule 56.4(a).)

MOORE, J.

WE CONCUR:

O'LEARY, ACTING P. J.

FYBEL, J.

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[3] Finally, real party contends petitioner waived the attorney-client privilege by including the information in a sealed declaration, relying on *Mitchell v. Superior Court* (1984) 37 Cal.3d 591. We are not persuaded. As petitioner points out, *Mitchell* was not a criminal prosecution, but a civil action for personal injuries, property damage and monetary loss. There are increased constitutional and statutory rights granted to those accused of crime. Further, the court in *Mitchell* ruled the plaintiff had not impliedly waived the attorney-client privilege by tendering a cause of action for emotional distress. (*Id.* at p. 601.) We find this case inapplicable and conclude petitioner did not waive to right to assert the privilege.