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7 EDUARDO ALVARADO

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES
9 CENTRAL DISTRICT

10 PEOPLE OF THE STATE OF CALIFORNIA,

11 Plaintiff,

12 v.

13 EDUARDO ALVARADO,

14 Defendant.

Case No. BA375787

NOTICE OF MOTION, MOTION TO
COMPEL DISCLOSURE OF PEACE
OFFICERS' PERSONNEL RECORDS;
MEMORANDUM OF POINTS AND
AUTHORITIES, DECLARATION OF
COUNSEL, AND EXHIBITS

DATE: December 28, 2010
TIME: 8:30 a.m.
DEPT: 127

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20 **TO THE CLERK OF THE ABOVE-ENTITLED COURT, THE LOS ANGELES POLICE
21 DEPARTMENT, AND THE LOS ANGELES CITY ATTORNEY:**

22 **PLEASE TAKE NOTICE** that, on the 28th day of December 2010, at the hour of 8:30
23 a.m., or as soon thereafter as the matter may be heard in Department 127 of the above-entitled
24 court, the defendants, by and through their counsel, will move that the Court order the Los
25 Angeles Police Department [hereinafter "the Department"] make the materials and information
26 specified below available to defendants' attorney for purposes of examination, inspection and
27 duplication.

28
**MOTION FOR ORDER TO COMPEL DISCLOSURE OF
PEACE OFFICERS' PERSONNEL RECORDS**

1 The records that are the subject of this motion concern the following individuals, each of
2 whom was at all times relevant to the herein action, employed by the Los Angeles County
3 Police Department:

- 4 1. Los Angeles Police Officer Burke, #36665
- 5 2. Los Angeles Police Officer Amaral, #34749

6
7 The materials consist of the following:

8 (1) the name, address, date of birth and telephone number of any person
9 who has filed a complaint with the Department against any one of the
10 above- named deputies alleging unnecessary acts of aggression, violence or
11 attempted violence, coercive conduct, excessive force or attempted excessive
12 force, regardless of the complaint's disposition;

13 (2) the name, address, date of birth and telephone number of any person
14 who has filed a complaint with the Department against any one of the
15 above-named deputies alleging fabrication of charges, evidence,
16 reasonable suspicion or probable cause, illegal search, seizure or arrest,
17 perjury, filing a false or misleading crime, internal, medical or overtime
18 report, or any other misconduct amounting to moral turpitude, regardless
19 of the complaint's disposition;

20 (3) all statements, whether written or oral, obtained by the Department, its
21 investigators or any other personnel acting on its behalf, from any
22 person who has filed a complaint against any of the above-named
23 deputies in connection any allegations of a nature consistent with those
24 described in items (1) or (2) above;

25 (4) the names, addresses, dates of birth, and telephone numbers of all persons
26 interviewed by the Department, its investigators or any other personnel acting
27 on its behalf, during its investigation into any complaint containing any
28 allegations of a nature consistent with those described in items (1) or (2) above;

1 (5) all statements, whether written or oral, made by any person interviewed
2 by the Department, its investigators or any other personnel acting on its
3 behalf, in connection with any complaint described in items (1) or (2), above;

4 (6) any and all reports, notes, memoranda, recordings and/or transcriptions
5 prepared or obtained by the Department or its investigating personnel in
6 connection with any investigation of any complaint described in items (1) or (2)
7 above;

8 (7) a copy of the Department's written procedures and policies in effect on
9 or about the date of February 6, 2009, that concern the manner in which the
10 Department and its investigating personnel investigate any complaint containing
11 allegations such as those described in items (1) or (2) above;

12 (8) all records maintained by the Department concerning the Department's
13 findings, recommendations or decisions made in connection with any
14 complaint or report containing any allegation described in items (1) or (2) above,
15 as well as any related record of discipline imposed therefor by the
16 Department upon any of the above-named deputies;

17 (9) the name, address, telephone number and transcribed testimony of any
18 person who testified at any Civil Service Commission hearing wherein any one of
19 the aforementioned deputies was accused of misconduct of a nature consistent
20 with that described in items (1) or (2) above; and

21 (11) any other material in the Department's possession or control which is
22 exculpatory or impeaching within the meaning of *Brady v. Maryland* (1963) 373
23 U.S. 83.

24 This motion will be made upon state statutory grounds, as well as constitutional
25 grounds, including the due process clause of the state and federal Constitutions.

26 The motion will be further based upon this Notice of Motion, the attached Memorandum
27 of Points, Authorities and Argument, the Declaration of Counsel and the Los Angeles Police
28 Department's reports, filed and served herewith, the pleadings and records on file in this action

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1 and any such oral or documentary evidence, as well as arguments, as may be presented at the
2 hearing on this motion.

3 DATED: December 1, 2010

4 Respectfully Submitted,

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Anikó M. Rushakoff, Esq.
7 Attorney for Defendant, EDUARDO ALVARADO
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 **I.**
4 **INTRODUCTION**

5 In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, the California Supreme Court held
6 that a defendant in a criminal case may, in some circumstances, compel disclosure of police
7 officers' or sheriff's deputies' personnel records and, specifically, relevant information contained
8 therein that relates to prior allegations of excessive force, displays of bias or prejudice,
9 falsification of reports and planting of evidence.

10 Drawing upon the principals previously stated in *Hill v. Superior Court* (1974) 10 Cal.3d
11 812, 816, *Cash v. Superior Court* (1959) 53 Cal.2d 72, 75 and *Powell v. Superior Court* (1957)
12 48 Cal.2d 704, 708, the high court cited the "fundamental proposition that [an accused] is
13 entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible
14 information" as the basis for its decision. *Pitchess v. Superior Court, supra*, 11 Cal.3d at 535.

15 Legislation enacted in 1978 codified, in part, the privileges and procedures that have
16 come to be associated with the Supreme Court's decision in *Pitchess*. The statutory scheme is set
17 forth in Evidence Code sections 1043 through 1047 and Penal Code sections 832.5, 832.7 and
18 832.

19 Accordingly, a defendant seeking disclosure of information contained within a peace
20 officer's personnel records must file a written motion with the appropriate court and provide
21 written notice thereof to the governmental agency with custody and control of the desired
22 records. Evidence Code § 1043, subd. (a).

23 Evidence Code § 1043, subd. (b)(1), directs that the motion identify the proceeding for
24 which disclosure is sought, the party seeking disclosure, the peace officer(s) whose records are
25 sought, the governmental agency with custody or control of the records and the time and place at
26 which the motion shall be heard.

27 In addition to a description of the type of records or information sought, the motion must
28 also include an affidavit showing good cause for the disclosure sought, setting forth the
materiality thereof to the subject matter involved in the pending litigation and stating upon

1 reasonable belief that the governmental agency identified has the records or information from the
2 records. Evidence Code §§ 1043, subd. (b)(2) and (3), 1043-1047.

3 For purposes of a motion seeking to compel disclosure of information contained within a
4 peace officer's personnel records, a showing of "good cause" requires a specific factual scenario
5 establishing a "plausible factual foundation" for alleged misconduct connected to the defendant.
6 *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86. In other words, the
7 "information sought must be... limited to instances of officer misconduct related to the
8 misconduct asserted by the defendant." *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021;
9 *Pitchess v. Superior Court, supra*, 11 Cal.3d at 537; *accord, People v. Mooc*, (2000) 26 Cal.4th
10 1216, 1226; *City of Santa Cruz v. Superior Court, supra*, 49 Cal.3d at 85.

11 "[A] plausible scenario of officer misconduct is one that might or could have occurred."
12 *Warrick v. Superior Court, supra*, 35 Cal.4th at 1024-1025.

13 Factual assertions made by way of affidavit need not, however, be based on personal
14 knowledge and may instead be based on information and belief. *City of Santa Cruz v. Municipal*
15 *Court, supra*, 49 Cal.3d at 84-86; *see also People v. Mooc, supra*, 26 Cal.4th at 1226. Proof of
16 the requested materials' existence is not necessary, either. *Hill v. Superior Court* (1974) 10
17 Cal.3d 812, 817; *Cash v. Superior Court* (1953) 53 Cal.2d 72, 75-76; *In re Valerie D.* (1975) 50
18 Cal.App.3d 213, 219.

19 [A] defendant should not be required to produce the names of
20 specific citizen complainants. Ordinarily, an accused would never
21 be in a position to know what complaints, if any, had been filed
22 against certain police officers in the community. To make such a
23 showing a condition precedent to production would make an
24 accused's rights dependent upon the highly fortuitous circumstances
25 of the accused's detailed knowledge as to the contents of the police
26 officers' personnel files. *In re Valerie D, supra*, 50 Cal.App.3d 213,
27 219.

28 The threshold for disclosure pursuant to Evidence Code §1043 has been characterized by
the Supreme Court as being "relatively low." *City of Santa Cruz v. Superior Court, supra*, 49
Cal.3d at 83; *Garcia v. Superior Court (City of Santa Ana)* (2007) 42 Cal.4th 63, 70. "All the law
requires to show good cause . . . is the 'materiality' of the information to the subject matter of the

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1 litigation and a reasonable belief that the governmental agency has the ‘type’ of information
2 requested.” *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392.

3 Depending upon the circumstances of the case, the affidavit “may consist of a denial of
4 the facts asserted in the police report.” *Warrick v. Superior Court, supra*, 35 Cal.4th at 1024-
5 1025. In other cases, the court will have before it defense counsel’s affidavit and, in addition, a
6 police report, witness statements, or other pertinent documents. “The court then determines
7 whether defendant's averments, viewed in conjunction with the police reports and any other
8 documents, suffice to establish a plausible factual foundation for the alleged officer misconduct
9 and articulate a valid theory as to how the information sought might be admissible at trial. *Ibid*;
10 *City of Santa Cruz, supra*, 49 Cal.3d at 86; *Haggerty v. Superior Court, supra*, 117 Cal.App.4th
11 at 1087.

12 A defendant who complies with the aforementioned statutory requirements meets the
13 materiality requirement set forth in Evidence Code § 1043. *Warrick v. Superior Court, supra*, 35
14 Cal.4th at 1026; *see also Garcia v. Superior Court (City of Santa Ana), supra*, 42 Cal.4th 63.

15 Once good cause for the records’ disclosure has been established, Evidence Code §
16 1045, subd. (b), instructs that the court shall then examine the information, *in camera* and in
17 conformity with Evidence Code § 915.

18 The manner in which the *in camera* review should be conducted is addressed by both
19 statute [Evidence Code § 1045, subs. (a) through (e), inclusive] and relevant case law [see, e.g.,
20 *People v. Mooc, supra*, 26 Cal.4th at 1226-1227; *City of Santa Cruz v. Municipal Court, supra*,
21 49 Cal.3d at 84]. The records’ custodian must present all potentially relevant documents to the
22 court. Should the custodian harbor any doubts regarding a particular document’s relevance, it,
23 too, should be presented for the court’s review. Further, the court must make a record of the
24 material examines: it may prepare a list, log, or index of the specific documents reviewed or
25 photocopy the documents and place them in a confidential file. Alternatively, the court may
26 identify each document for the record. The custodian of records also must be examined under
27 oath regarding the documents he or she reviewed and chose either to present or not to present to
28 the court. An inquiry should be made as to the reasons the custodian deemed the latter material
irrelevant or otherwise non-responsive to the request for disclosure.

During its *in camera* review, the court is directed by Evidence Code § 1045 to exclude

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1 from disclosure (1) complaints that concern conduct that had occurred more than five years
2 before the event that is the subject of the litigation for which disclosure is sought, (2) the
3 conclusions of any officer investigating a complaint and (3) any other facts that are so remote as
4 to make their disclosure of little or no practical benefit. It also “establishes general criteria to
5 guide the court's determination and insure that the privacy interests of the officers subject to the
6 motion are protected.” *City of Santa Cruz v. Municipal Court, supra*, 49 Cal.3d at 81-84; *Alford*
7 *v. Superior Court (People)* (2003) 29 Cal.4th 1033, 1038.

8 The *Pitchess* decision and its statutory progeny “are based on the premise that evidence
9 contained in a law enforcement officer's personnel file may be relevant to an accused's criminal
10 defense and that to withhold such relevant evidence from the defendant would violate the
11 accused's due process right to a fair trial.” *People v. Mooc, supra*, 26 Cal.4th at 1227; *see also*
12 *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53. Combined, relevant statutory and
13 decisional laws “recognize that the officer in question has a strong privacy interest in his or her
14 personnel records and that such records should not be disclosed unnecessarily.” *Ibid.*

15 “By providing that the trial court should conduct an *in camera* review, the Legislature
16 balanced the accused’s need for disclosure of relevant information with the law enforcement
17 officer’s legitimate expectation of privacy in his or her personnel records.” *People v. Mooc,*
18 *supra*, 26 Cal.4th at 1219-1220.

19 Moreover, in any case where disclosure is permitted, the court “shall ... order that the
20 records disclosed or discovered shall not be used for any purpose other than a court proceeding
21 pursuant to applicable law.” Evidence Code § 1045, subd. (e).

22 **II.**
23 **THE DEFENDANT IS ENTITLED TO**
24 **THE MATERIAL AND INFORMATION REQUESTED**

25 Evidence Code Section 1045(a) provides, in pertinent part:

26 Nothing in this article shall be construed to affect the right of access
27 to records and complaints, or investigations of complaints, or
28 discipline imposed as a result of such investigations, concerning an
event or transaction in which the peace officer participated, or
which he perceived, and pertaining to the manner in which he

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1
2 performed his duties, provided that such information is relevant to
3 the subject matter involved in the pending litigation.

4 In the instant case, the information sought by the defendant is unquestionably relevant to
5 the subject matter of pending prosecution and a critical component of his anticipated defenses
6 thereto.

7 The Information makes the following allegations:

8 Count I alleges that Mr. Alvarado transported and offered to sell Ecstasy in violation of
9 Health and Safety Code § 11379(a).

10 Count II alleges that Mr. Alvarado possessed marijuana for sale in violation of Health
11 and Safety Code § 11359.

12 Count III alleges that Mr. Alvarado resisted an executive officer in violation of Penal
13 Code § 69 by allegedly attempting by means of threats and violence to deter and prevent Los
14 Angeles Police Officer Everard Amaral from performing a duty imposed upon him by law.

15 Finally, Count IV alleges that Mr. Alvarado resisted an executive officer in violation of
16 Penal Code § 69 by allegedly attempting by means of threats and violence to deter and prevent
17 Los Angeles Police Officer Christopher Burke from performing a duty imposed upon him by
18 law.

19 Mr. Alvarado has entered a plea of not guilty to the offenses with which he is charged.
20 Moreover, Mr. Alvarado categorically denies having committed the offenses with which he is
21 charged and accuses the Los Angeles Police Officers named herein of using excessive and
22 unnecessary force or violence upon him, placing him each arrest without justification or cause,
23 intentionally lying about the circumstances leading up to Mr. Alvarado's arrest in order to justify
24 the injuries they inflicted upon him, and, thereafter, making false representations regarding the
25 circumstances of his arrest in the report they provided to the District Attorney's Office.

26 The defendant's contentions are more fully set forth in the declaration executed by
27 counsel, which is attached hereto and incorporated by reference herein.

28 The defendant seeks, by way of the instant motion, to compel disclosure of information
contained within the specified deputies' personnel records either relevant to the aforementioned
deputies' character, habits, customs and credibility, or which may lead to evidence thereof.

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1 Relevant evidence is defined by section 210 of the Evidence Code as meaning “. . .
2 evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in
3 reason to prove or disprove any disputed fact that is of consequence to the determination of the
4 action.”

5 Moreover, an officer’s “habit” or “custom” may be established by evidence of repeated
6 instances of similar conduct. *People v. Gill* (1997) 60 Cal.App.4th 743.

7 Evidence Code §1105 further provides that evidence of character, habit or custom is
8 admissible to prove conduct on a specified occasion in conformity with the specified character
9 habit or custom. Additionally, the character traits of the specified officers that are relevant to the
10 accused’s defense may be shown by evidence of the formers’ specific acts, opinion, or
11 reputation. Evidence Code §1103.

12 “[D]isciplinary records are necessary as character evidence of the officers’ tendency to
13 violence in support of [a defendant’s] theory of self-defense [and are] unquestionably relevant
14 and admissible under Evidence Code section 1103.” *Pitchess v. Superior Court, supra*, 11 Cal 3d
15 at 537.

16 Moreover, prior complaints of an officer’s fabrication of probable cause and planting of
17 evidence are also subject to disclosure when such evidence reasonably supports the defendant’s
18 contention that the probable cause for his arrest was fabricated. *People v. Gill, supra*, 60 Cal App
19 4th at 750.

20 Disclosure of the information requested herein is not, in any event, contingent upon its
21 admissibility at trial: the material need only contain information of a nature likely to assist the
22 defendants in the preparation of their respective defenses or lead to other relevant material.
23 *Cadena v. Superior Court* (1978) 79 Cal App 3d 212; *Kelvin L. v. Superior Court* (1976) 62 Cal
24 App 823.

25 The Evidence Code clearly supported appellant's theory [that]
26 discovery might lead to evidence of habit or custom admissible to
27 show that a person acted in conformity with that habit or custom on a
28 given occasion. ‘Habit’ or ‘custom’ is often established by evidence
of repeated instances of similar conduct. Plainly, evidence that the
interrogating officers had a custom or habit of obtaining confessions
by violence, force, threat, or unlawful aggressive behavior would
have been admissible on the issue of whether the confession had
been coerced.

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2 Furthermore, evidence of reputation, opinion, and specific
3 instances of conduct is admissible to show, inter alia, motive,
4 intent, or plan. Evidence that the interrogating officers had acted
5 according to a plan or with a motive to coerce appellant's
6 confession, or had intended to do so, would have been relevant to
7 appellant's claim of involuntariness. Reputation or opinion
8 evidence would also have been relevant on this issue. *People v.*
9 *Memro* (1985) 38 Cal.3d 658, 681.

10 The defendant needs not, for purposes of the herein motion, identify or commit to, his
11 intended defense: he needs do nothing more than show the information's relevance to their
12 available defenses. *People v. Memro, supra*, 38 Cal 3d 658; *Arcelona v. Municipal Court* (1980)
13 113 Cal App.3d 523; *Kelvin L. v. Superior Court, supra*, 62 Cal App 3d 823.

14 The state's high court has admonished that any plausible showing of facts that might or
15 could have occurred during the incident at issue is sufficient to require *in camera* review. "To
16 require a criminal defendant to present a credible or believable factual account of, or motive for,
17 police misconduct suggests that the trial court's task in assessing a *Pitchess* motion is to weigh or
18 assess the evidence. It is not." *Warrick v. Superior Court, supra*, 35 Cal.4th at 1026.

19 An *in camera* review of the specified deputies' personnel records is warranted in the
20 present matter: defendant's counsel has alleged, by way of the attached declaration, sufficiently
21 specific and plausible facts demonstrating that the requested information is material to the
22 subject matter involved in the pending litigation. Specifically, counsel asserts her reasonable
23 belief that the specified officers used excessive force upon Mr. Alvarado and unlawfully
24 detained, restrained, arrested and physically assaulted him. Finally, counsel states, upon further
25 information and belief, that Officer Amaral filed a report with his Department that
26 misrepresented the preceding events. Furthermore, Officer Burke's testimony at the preliminary
27 hearing also completely misrepresented the preceding events.

28 The moving party has thereby demonstrated that a plausible scenario of misconduct that,
undeniably, could or might have occurred. *Warrick v. Superior Court, supra*, 35 Cal.4th at 1016.

Given the aforementioned circumstances, the court's order compelling the requested
information's disclosure should not be restricted to records of those officers characterized by the
charging document as "victims." Rather, the order of disclosure should pertain to all of the

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1 officers involved in the fracas that resulted in the herein prosecution. *Hinojosa v. Superior Court*
2 (1976) 55 Cal.App.3d 692.

3 Defendants in a criminal case are entitled to discover the discipline imposed upon a peace
4 officer as a result of a citizen's complaint of misconduct. *City of San Jose v. Superior Court,*
5 *supra*, 5 Cal 4th 47. However, the court's order should be inclusive of all relevant complaints
6 pertaining to the aforementioned officers: "unsustained complaints are discoverable as well as
7 sustained complaints." *People v. Zamora* (1980) 28 Cal.3d 88, 106 fn. 1; *see also Saulter v.*
8 *Municipal Court* (1977) 75 Cal.App.3d 231, 240; *Kelvin L. v. Superior Court, supra*, 62
9 Cal.App.3d at 829.

10 The defendant is also entitled to disclosure of any disciplinary proceedings that may
11 have been initiated against any one of the aforementioned officers as a result of any prior
12 complaints for the misconduct of the kind specified herein for reason that quasi-judicial
13 administrative proceedings are presumptively open to the public and the decisions reached are
14 generally considered a public record. *Bradshaw v. City of Los Angeles* (1990) 221 Cal.App.3d
15 908.

16 **CONCLUSION**

17 For the reasons set forth above and in the attached declaration, the defendants
18 respectfully request that the court grant the relief requested and order disclosure of the
19 information sought.

20 DATED: December 1, 2010

21 Respectfully Submitted,

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23 _____
24 Anikó M. Rushakoff, Esq.
25 Attorney for Defendant, EDUARDO ALVARADO
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1 **ORDER**

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3 **IT IS HEREBY ORDERED** that the foregoing items as set forth in the Notice of
4 Motion for Disclosure of Peace Officers' Personnel Records be delivered to DAVID S.
5 CHESLEY, Attorney at Law, or his representative, on or before the ____ day of
6 _____, 2009.

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8 _____
9 JUDGE OF THE SUPERIOR COURT

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