

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

February 12, 2015

The Honorable Frank A. McGuire
Clerk, California Supreme Court
Supreme Court of California
455 Golden Gate Ave., Ground Floor
San Francisco, CA 94102

Please respond to:
JOHN T. PHILIPSBORN
Law Offices of J.T. Philipsborn
507 Polk Street, #350
San Francisco, CA 94102

Re: *Dana Lee Orcutt v. Superior Court; Alexander Pinto, Real Party in Interest,*
S223757 S223993 (Court of Appeal Case No. E061844; Riverside County Superior
Court No. RIC1309053)

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY DANA LEE ORCUTT, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

Dear Mr. McGuire:

This letter, permitted by the California Rules of Court, Rule 8.500(g), is submitted by California Attorneys for Criminal Justice (hereafter 'CACJ') in support of the Petition for Review filed by Dana Lee Orcutt (hereafter referred to as 'Petitioner').

Identification of *Amicus Curiae*

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California, and other applicable law," and the improvement of "the quality of the administration of criminal law." (Article IV,

RECEIVED

FEB 13 2015

CLERK SUPREME COURT

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

CACJ By Laws). CACJ's membership consists of approximately 1700 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 35 years, CACJ has appeared before this Court as an *amicus curiae* on matters of importance to the administration of justice, and to its membership.¹

Interest of CACJ in this matter

CACJ has as one of its main purposes the protection of the Constitutional rights of individuals, and often appears as an *amicus curiae* in matters concerning criminal procedure and substantive criminal law. While this case involves civil litigation, the issues framed by Petitioner are focused on the extent to which the privilege against self incrimination recognized by the Fifth Amendment to the United States Constitution and by Article I §15 of the California Constitution, and referenced in California Evidence Code section 940, apply where civil discovery proceedings pose a potential threat of criminal investigation and prosecution. CACJ's members, most of whom practice criminal defense in either private law firms or publicly funded indigent defense offices throughout California, are often called upon to address issues that arise when a person is the subject of proceedings in both civil and criminal courts related to the same subject matter.

In the present case, Petitioner sought to limit the scope of pretrial discovery in a civil proceeding that threatened to elicit incriminating answers from her. She was only partially successful. The relief granted was sufficiently limited that Petitioner correctly asserts that she has been left in the position in which questioning and discovery on information and evidence that may provoke criminal prosecution is still being permitted. She is asserting that California law recognizes this threat and that greater specificity in defining the type of judicial inquiry and

¹ The undersigned Chair of the CACJ Amicus Curiae Committee certifies by his signature as an officer of this Court that no compensation has been paid by any of the parties to this litigation, or by any interested party, other than by CACJ and/or by the undersigned, for any time spent in the research or production of this brief, or for any costs associated with it.

analysis associated with assertion of the privilege in a civil case is needed to protect her. See, generally, *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App.3d 682; also, *Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1044-45.

Petitioner correctly points out in her Petition that while the case law generously references the Fifth Amendment and related privileges, it has not been clarified to fully address her situation. CACJ respectfully submits that it has an interest in this matter and in the issues framed by it. CACJ has an interest in ensuring that case law on the issue framed is suitably clarified.

ARGUMENT AND AUTHORITIES

Petitioner correctly asserted before the Court of Appeal, and that court recognized, that the issue that she framed required prompt adjudication. See, generally, *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 304-05. But then the Court of Appeal mistakenly upheld the trial court's limited upholding and protection of Petitioner's Fifth Amendment privilege against self-incrimination.

CACJ is aware, as pertinent cases point out, that a party in a civil case is "...not entitled to decide for himself or herself whether the privilege against self-incrimination may be invoked." *Id.*, at 305-06. However, once pertinent objections are made with the required specificity, the trial court has the task, first, of making the required 'particularized inquiry' with respect to *each specific area* that the questioning party seeks to explore. This is the principle recognized in *Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1044-45, relying in part on the Eighth Circuit's ruling in *Heligman v. United States*, 407 F.2d 448 (8th Cir., 1969). It is worthy of note that *Heligman* had limited instructional value about deciding the applicability of the Fifth Amendment in context, since it involved a violation of 26 U.S.C. §7203 – willful failure to file a return, supply information, or pay tax. More pertinent was the short list of Fifth Amendment decisions by the United States Supreme Court cited by *Heligman* in the preamble to the substantive discussion of the issues, including the decision in *Albertson v. Subversive Activities Control Board* (1965) 382 U.S. 70. *Albertson* is a case in which the

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

United States Supreme Court reversed a lower court's decision upholding the legitimacy of the assertion of the Fifth Amendment privilege, where a particular form of registration called upon a registrant to admit membership in the Communist Party, thereby prompting the threat of prosecution. The Supreme Court reviewed the various ways that a registrant could be exposed to prosecution by answering questions either in writing or verbally. *Id.*, at 78-79. It upheld the applicability of the privilege.

The specific standard announced in *Warford* follows the guidance from the United States Supreme Court. That guidance is pertinent here. A witness in a civil case who is asserting the Fifth Amendment privilege and its California analog, must demonstrate that "...his or her fear of incrimination is reasonable and not advanced fancifully or merely imagined. [citation omitted]" *Warford*, at 1044-45. Once that is done, the trial court makes the 'particularized inquiry' using the context of the case at issue. A finding of a 'speculative risk' of prosecution is far removed from the factual scenario of Petitioner's case. The Federal cases that have upheld the assertion of the Fifth Amendment have found speculation, for example, in the argument that being compelled to testify in a U.S. proceeding would expose the declarant to incrimination under foreign law. See, for example, *Zicarelli v. New Jersey Commission of Investigation* (1972) 406 U.S. 472, 477-78, relied on in *Warford, supra*, 160 Cal.App.3d at 1043-44.

Here, Petitioner had brought to the attention of the Court of Appeal that Petitioner's criminal liability was a pending matter, as the Mohave County Attorney's Office was still, according to the record provided to the Court of Appeal, investigating the matter. Petitioner had opposed the motion to compel that had been brought based on the argument that charges had been recommended to be filed against her, and that she was still within the pertinent statute of limitations (Petitioner's Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief, filed before the Court of Appeal in September 2014, at pp.11-12).

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

Petitioner correctly framed the issues to the trial court and to the Court of Appeal. As Petitioner asserts, particularly under *Warford*, 160 Cal.App.3d at 1044, answers cannot be compelled unless, after consideration and analysis of all the circumstances in the case at issue "...an answer to the challenged question cannot possibly have a tendency to incriminate the witness."

Petitioner focuses her argument here in part with the guidance of several rulings related to the concept of possession and control of contraband (Petition at p.13) as well as based on the analysis, and some of the vocabulary, of the rules related to possession addressed in a Fourth Amendment context. Thereafter, Petitioner provides this Court a series of references to decisions from courts in California rendered in the context of criminal cases that frame Petitioner's zone of criminal liability. Petitioner has demonstrated that a correctly conducted particularized inquiry should broaden the relief afforded her. She persuasively argues that the Court should address the procedure that the trial court should have used.

CONCLUSION

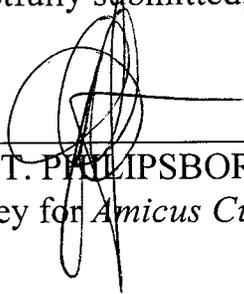
CACJ agrees with Petitioner that the law in California needs to be clarified. This case offers this Court the opportunity to use elements such as: evidence and assertions of contacts between the parties in a civil case and a prosecutor's office that has asserted interest in the facts and circumstances of the civil case at issue; information pertinent to the law enforcement investigation of the subject matter of the civil suit, including recommendations by an investigating officer that a prosecution should be initiated against the witness at issue; analysis of the type of activity at issue, here behavior related to the operation of a motor vehicle and to the possible possession or use of intoxicants, either legal or illegal (including legal in some contexts but illegal in a driving context). The combination of facts and circumstances framed by Petitioner make this a useful case for this Court to review to make the determinations urged by Petitioner, so that the courts in California may have the benefit of more definitive guidance on the issues related to

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

assertions of the privilege against self-incrimination in civil cases than they have at present.

For the reasons stated here, this Court should grant the Petition for review.

Respectfully submitted,



JOHN T. PHILIPSBORN
Attorney for *Amicus Curiae* CACJ

Please respond to:

JOHN T. PHILIPSBORN
Law Offices of J.T. Philipsborn
507 Polk Street, #350
San Francisco, CA 94102

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102.

On today's date, I served the within documents entitled:

**LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR
REVIEW FILED BY DANA LEE ORCUTT (CALIFORNIA
RULES OF COURT, RULE 8.500(g))**

- (X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;

Meredith S. White
Office of the Attorney General
P.O. Box 85266-5299
San Diego, CA 92186-5266
**Counsel for Respondent Superior
Court of Riverside County**

Court of Appeal
Fourth Appellate District, Division 2
3389 Twelfth Street
Riverside, CA 92501

John S. Lowenthal
Lewis Brisbois Bisgaard & Smith LLP
650 E. Hospitality Lane, Ste 600
San Bernardino, CA 94208

Cynthia E. Tobisman
Greines, Martin, Stein & Richland LLP
5900 Wilshire Blvd., 12th Floor
Los Angeles, CA 90036
Counsel for Petitioner Dana Lee Orcutt

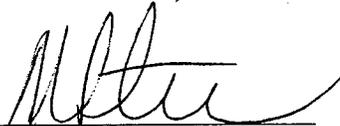
CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

Robert Juskie
Wingert Grebing Brubaker & Juskie
600 West Broadway, Ste 1200
San Diego, CA 92101

Ernest Algorri
DeWitt Algorri & Algorri
25 East Union Street
Pasadena, CA 91103
**Counsel for Alexander Pinto, Real
Party in Interest**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 12th day of February, 2015, at San Francisco, California.

Signed: 
Melissa Stern