



JNTY DIST
BUREAU OF PROSECUTION SUPPORT OPERATIONS
WRITS AND APPEALS DIVISION • HABEAS CORPUS LITIGATION TEAM

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July 12, 2022

VIA TRUEFILING

Justices of Division Seven
COURT OF APPEAL, SECOND APPELLATE DISTRICT
300 South Spring Street, Second Floor, North Tower
Los Angeles, California 90013

Re: *Wasson et al. v. Superior Court*, B319704; Trial Case No. A334139

Dear Justices:

Where interests relating to the integrity of the justice system and public access to governmental process *strongly favor* public disclosure, the instant Writ Petition placed the People in the awkward position of again defending a sealing order which the prosecution did not seek, for a conditional examination proceeding which the prosecution opposed. Upon further consideration and consultation with the victim in the criminal prosecution, the People respectfully concede on the Writ Petition—the transcript should be unsealed and open to the public.

1. The Trial Court Has Inherent Authority to Unseal Evidentiary Hearings

In 2009, this Court issued a decision in a writ petition brought by Defendant Roman Polanski, and in doing so reminded the parties of the larger issues at stake in the administration of criminal justice.

(*Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 554-555.)

Drawing upon this Court's guidance in the *Polanski* opinion, the People submit that if the trial court had the inherent authority to order an evidentiary hearing to explore judicial and prosecutorial misconduct,

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then the trial court also has the authority to unseal the Gunson deposition in this case. (*Id.* at p. 555.)

Along these lines, one of the issues before this Court in 2009 was determining whether the trial court had improperly declined to hear Polanski's request to dismiss pursuant to Penal Code section 1385. (*Polanski, supra*, 180 Cal.App.4th at p. 554.) Polanski claimed dismissal was in the interest of justice on the basis of judicial and prosecutorial misconduct in post-sentencing proceedings. (*Ibid.*) Addressing the trial court directly in the opinion, this Court stated in part:

The trial court's justified refusal to consider Polanski's request . . . does not preclude the court from considering whether to offer relief—at the trial court's own instance in the furtherance of justice—based on the overarching systemic issues here of ensuring that the court system operates with integrity and responds appropriately to judicial and prosecutorial misconduct when it has occurred. The trial court is fully empowered, upon examining the evidence in this matter, to order an evidentiary hearing on whether to dismiss the prosecution in furtherance of justice

(*Polanski, supra*, 180 Cal.App.4th at p. 555.)

Two months after the *Polanski* decision issued and over the People's objection,¹ the trial court ordered the conditional examination of Deputy District Attorney Roger Gunson—upon application of Defendant Polanski—pursuant to Penal Code sections 1335 to 1345. (Exhibit 7 to Writ Petition, Reporter's Transcript, pp. 13-14; 187-188.)

Notably, conditional examinations preserve the testimony of victims and witnesses for later trial or adjudication, and are routinely sealed. (See Pen. Code §§ 1337; 1344.) By contrast, there is no statutory provision which would specifically permit testimony relating to alleged misconduct allegations such as this to remain confidential. The Gunson deposition in effect constituted a non-statutory evidentiary hearing exploring the allegations of judicial and prosecutorial misconduct—

1. The People had objected to the conditional examination and offered to make Gunson available for an interview which would be admissible in court. Both the defense and the court rejected this offer.

precisely what the Court of Appeal had suggested was within the trial court's inherent authority to order.

Courtroom evidentiary hearings are traditionally open to the public. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1219.) This is significant to presumptive First Amendment disclosure rules because a preliminary consideration is whether the criminal proceeding is "traditionally open to the public." (*Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 9.) Given that the Gunson deposition was effectively a post-plea evidentiary hearing on judicial and prosecutorial misconduct rather than a conditional examination to preserve the testimony of a vulnerable victim or witness, the transcript should be unsealed.

2. Unsealing the Transcript At This Time Would Serve The Interests of Justice

As this Court also noted, prosecutors have a broader role in the criminal justice system as "guardians of systematic integrity." (*Polanski, supra*, 180 Cal.App.4th at p. 556.) The Polanski case has tested the judicial system, and the combinations of interests that the People must consider during the prosecution of a case. At times, guarding integrity has meant opposing motions by a defendant who refused to submit to the jurisdiction of the court. To be sure, the People have remained steadfast in the determination to hold Defendant Polanski accountable, but also acknowledge that Petitioners are journalists with different interests in this matter.

Guarding integrity has also meant protecting the integrity of conditional examinations generally—including sealing procedures. Conditional examinations often preserve testimony of vulnerable witnesses, witnesses who have been threatened, and victims of human trafficking and domestic violence. (Pen. Code § 1337.) The People's initial opposition in the trial court and informal opposition to the Writ Petition were rooted in concerns for protecting the conditional examination process. Nevertheless, the Gunson deposition was not an ordinary conditional examination, and safety issues that might be present in cases where conditional examinations are frequently used are not present in this case. Indeed, the victim has requested unsealing of the transcript. Setting aside the statutory timing of unsealing under Penal Code section 1345, the People are not aware of any factual basis for keeping the transcript sealed.

In 2009, this Court referred to the Polanski case as “one of the longest-running sagas in California criminal justice history.” (*Polanski, supra*, 180 Cal.App.4th at p. 511.) Given that another decade has passed since that time, Petitioners made a persuasive point that sealing orders should not be permitted in perpetuity. Notwithstanding statutory rules for sealing conditional examination transcripts, given the amount of time that this case has been pending, and the subject of the examination proceedings, disclosure is in the interest of justice. Because the trial court had inherent, non-statutory authority to order an evidentiary hearing on the issue of judicial and prosecutorial misconduct, it logically follows that the trial court also possessed the inherent authority to unseal a deposition transcript on that subject in the interest of justice.

The Gunson deposition was effectively a post-plea evidentiary hearing on judicial and prosecutorial misconduct—rather than a conditional examination to preserve the testimony of a victim or witness for trial—and the safety issues frequently present in cases where conditional examinations are used are not present in this case. Thus, the transcript should be unsealed. Ultimately, the public and the victim have the right to know and scrutinize the transcript as it related to the conduct of judicial officers and prosecutors who served on their behalf. The People respectfully concede on the Writ Petition.

Respectfully submitted,

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Los Angeles County

BY: _____
TRACEY WHITNEY
Deputy District Attorney

DECLARATION OF SERVICE
WASSON ET AL. V. SUPERIOR COURT
NO. B319704/ LASC CASE NO. A334139

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause, and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document entitled **CONCESSION LETTER TO PETITION FOR WRIT OF MANDATE** by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail in the County and City of Los Angeles, California, addressed as follows:

HONORABLE SAM OHTA, Judge
Los Angeles County Superior Court
Clara Shortridge Foltz Criminal Justice Center
210 West Temple Street, Department 100
Los Angeles, CA 90012
(Via US Mail)

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Executed on July 12, 2022, at Los Angeles, California.

MONICA TSAI-CHEN