S221296

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO,

Respondent.

DARYL LEE JOHNSON,

Real Party in Interest.

Case No.

First Appellate District,
Division Five
No. A140767/ A140768
Consolidated Cases
Superior Court No. 12029482
SCN 221362

STAY REQUESTED
On calendar on October 14, 2014
to set jury trial
Hon. Bruce Chan
(415) 551-0322

PETITION FOR REVIEW

Hon. Richard B. Ulmer, Jr.
(415) 551-3846

GEORGE GASCÓN [SBN 182345]
District Attorney of San Francisco
JERRY P. COLEMAN [SBN 78744]
Special Assistant District Attorney
LAURA L. vanMUNCHING [SBN 142419]
Managing Assistant District Attorney
JAMES R. THOMPSON [SBN 191413]
Assistant District Attorney
ALLISON G. MACBETH [SBN 203547]
Assistant District Attorney
850 Bryant Street, Rm. 322
San Francisco, California 94103
Telephone: (415) 553-1488 (Macbeth)
(415) 551-9577 (vanMunching)
FAX: (415) 575-8815
Attorneys for Petitioner & Real Party in Interest
The People of the State of California

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Petitioner,** **vs.** **THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO,** **Respondent.**	Case No. First Appellate District, Division Five No. A140767/ A140768 Consolidated Cases Superior Court No. 12029482 SCN 221362 **STAY REQUESTED** **On calendar on October 14, 2014 to set jury trial** Hon. Bruce Chan (415) 551-0322
DARYL LEE JOHNSON, **Real Party in Interest.**	

PETITION FOR REVIEW

Hon. Richard B. Ulmer, Jr.
(415) 551-3846

GEORGE GASCÓN [SBN 182345]
District Attorney of San Francisco
JERRY P. COLEMAN [SBN 78744]
Special Assistant District Attorney
LAURA L. vanMUNCHING [SBN 142419]
Managing Assistant District Attorney
JAMES R. THOMPSON [SBN 191413]
Assistant District Attorney
ALLISON G. MACBETH [SBN 203547]
Assistant District Attorney
850 Bryant Street, Rm. 322
San Francisco, California 94103
Telephone: (415) 553-1488 (Macbeth)
(415) 551-9577 (vanMunching)
FAX: (415) 575-8815
Attorneys for Petitioner & Real Party in Interest
The People of the State of California

TABLE OF CONTENTS

Page

TABLE OF CONTENTS, cont.

Page

TABLE OF CONTENTS, cont.

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES, cont.

Page

Statutes

Other Authorities

TABLE OF AUTHORITIES, cont.

Page

Rules

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Petitioner, v. THE SUPERIOR COURT OF SAN FRANCISCO, Respondent, DARYL LEE JOHNSON, Real Party in Interest.	No. _____

PETITION FOR REVIEW

Petitioner, the PEOPLE OF THE STATE OF CALIFORNIA, by and through their attorney GEORGE GASCÓN, District Attorney for the County of San Francisco, respectfully petitions this Court to review the

order of the Court of Appeal, First Appellate District, Division Five, filed on August 11, 2014, denying the Petition for Writ of Mandamus and/or Prohibition to the extent that it affirms "the respondent superior court's order requiring the SF Police Department to provide the prosecution access to officer personnel files to allow for identification of any *Brady*[1] materials in those files." A copy of the order is attached to this petition. The Court of Appeal's decision in this case affects every pending criminal case in the state.

ISSUES ON REVIEW

This case presents the following issues on review:

1. Whether a prosecutor has unfettered direct access to a peace officer's personnel file for purposes of routine *Brady* review when an officer is a mere witness in a criminal case, even though cases including *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, hold that the prosecution has no direct access.

2. Whether the Court of Appeal's opinion is inconsistent with the confidentiality protections for peace officer personnel files recognized by this Court in *Alford v. Superior Court* (2003) 29 Cal.4th 1033.

3. Whether the "investigation exception" under Penal Code section 832.7, subdivision (a), broadly permits the prosecution to review personnel records of peace officer witnesses for potential *Brady* material, even though the officer is not the target of a criminal investigation.

//

//

//

//

[1] *Brady v. Maryland* (1963) 373 U.S. 83.

APPROPRIATENESS OF REVIEW

Review of the Court of Appeal's order should be granted, consistent with Rule 8.500, subdivision (b)(1) of the California Rules of Court, because it is necessary to secure uniformity of decision and to settle important questions of law.

Review is necessary to: (1) settle a now-existing split of opinion regarding prosecutorial access to statutorily protected peace officer personnel files for *Brady* review of officer witnesses; (2) clarify this Court's decision in *Alford* in the context of prosecutorial access to statutorily protected peace officer personnel files because the Court of Appeal's opinion creates a conflict in opinions interpreting *Alford*; and (3) resolve the important question of whether Penal Code section 832.7's "investigation exception" applies to officers who are not the target of a criminal investigation.

This Petition presents issues of statewide importance for all parties involved in a criminal case: the prosecution; officers who investigate the case; and defendants.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2012, Petitioner, the San Francisco District Attorney's Office ("SFDA"), filed a complaint charging defendant Johnson ("Johnson") with a violation of Penal Code section 273.5, subdivision (a) (domestic violence), a felony, and a violation of Penal Code section 591.5 (injuring a wireless communication device), a misdemeanor. (*People v. Superior Court (Johnson)* (1st Dist. Aug. 11, 2014) 228 Cal.App.4th 1046.)

At the December 2013 preliminary hearing, San Francisco Police Department ("SFPD") Officer Paul Dominguez testified that on November 11, 2012, he and Officer Antonio Carrasco responded to a 911 call from a residence. (*Johnson, supra,* 228 Cal.App.4th at p. 1058.) Johnson admitted

that he had hit the victim, but claimed that she had "'[m]aced'" him. (*Ibid.*) The victim showed Officer Dominguez a two-inch lump on the back of her head where Johnson had struck her, and also told the officer that Johnson had tried to prevent her from calling 911 by grabbing her cell phone and then a cordless phone out of her hands. (*Ibid.*)

SFPD Legal Division notified SFDA that both reporting Officer Carrasco and his partner Officer Dominguez have identified but unspecified *Brady* materials in their personnel files. Accordingly, petitioner SFDA filed a "Notice of Motion for Discovery of San Francisco Police Department Peace Officer Personnel Records Under *Brady* and Evidence Code Sections 1043 and 1045(e)" ("*Brady* Motion") in December 2013. (*Johnson, supra,* 228 Cal.App.4th at pp. 1058-1059.) Petitioner requested that the court: (1) conduct an *in camera* review of personnel records of Officers Dominguez and Carrasco to determine whether any items in their files were material under *Brady* and thus subject to disclosure; (2) disclose to the District Attorney's Office and the defense any *Brady* materials located therein; and (3) issue a protective order. (*Ibid.*)

Petitioner's *Brady* Motion was supported by a declaration from the assistant district attorney prosecuting the case. The declaration stated that Officers Dominguez and Carrasco are necessary and essential prosecution witnesses on virtually all of the issues and in both of the counts. (*Johnson, supra,* 228 Cal.App.4th at p. 1058.) The SFPD had informed the prosecution that each officer had "'material in his ... personnel file that *may* be subject to disclosure under'" *Brady*. (ital. in *Johnson*) (*Ibid.*) The records are, however, in the exclusive possession and control of the Police Department; the District Attorney does not have actual or constructive possession of those records. (*Id.* at pp. 1058-1059.) Based on the representation from the SFPD that the files contained potential *Brady* material, the assistant district attorney "'believe[s]' the officers' personnel

files contain 'sustained allegations of specific *Brady* misconduct, reflective of dishonesty, bias, or evidence of moral turpitude,'" which, given the officers' roles, would be constitutionally material under *Brady*. (*Id.* at p. 1059.)

Petitioner's *Brady* Motion was in line with the SFPD's Bureau Order No. 2010-01 ("Bureau Order"). (*Johnson, supra,* 228 Cal.App.4th at p. 1059.) Based on the premise that the District Attorney cannot legally access confidential officer personnel files absent a motion and court order under Evidence Code section 1043, the Bureau Order provides the SFPD's procedures for disclosure of *Brady* materials in employee personnel files. (*Ibid.*) The Bureau Order provides that the SFPD advises the SFDA on an ongoing basis of the names of officers who have information in their personnel files that may be subject to disclosure under *Brady*. (*Ibid.*) When the SFDA determines that a law enforcement officer, identified by the SFPD as having possible *Brady* material in their personnel file, is a material witness in a pending criminal case, the SFDA then makes a motion under Evidence Code sections 1043 and 1045 for *in camera* review of the records by the court and disclosure. (*Id.* at p. 1060.) The SFPD will not disclose material from officer personnel files to any party absent a trial court order for disclosure. (*Ibid.*) The "Bureau Order explains, 'The purpose of this procedure is to ensure that prosecutors and the defense receive sufficient information to comply with the constitutional requirements of *Brady* while protecting the legitimate privacy rights of law enforcement witnesses.'" (*Ibid.*)

In response to the SFDA's December 2013 *Brady* motion, defendant filed his own "Motion for Brady discovery." (*Johnson, supra,* 228 Cal.App.4th at p. 1060.) Johnson requested in the alternative that the trial court: (1) conduct the requested *in camera Brady* review; (2) declare section 832.7, subdivision (a) unconstitutional and direct the SFPD to allow

the prosecutor to access the officer personnel files to perform a *Brady* review; or (3) dismiss the case for the prosecution's failure to comply with *Brady*. (*Ibid.*)

The SFPD also filed a response to the SFDA's motion. The SFPD generally agreed with the SFDA and urged the trial court to perform the *in camera* review as outlined in the Bureau Order. (*Johnson, supra*, 228 Cal.App.4th at p. 1060.)

On January 7, 2014, the superior court issued its "Order Re *Brady* Motions" following a hearing. (*Johnson, supra*, 228 Cal.App.4th at p. 1060.) The court concluded that the prosecution had not made a sufficient showing of *Brady* materiality to justify court review of the records. (*Id.* at pp. 1060-1061.) The superior court also ruled that the *Pitchess* motion procedures found in section 1043 *et seq.* do not apply to motions seeking review of officer personnel records under *Brady*, and that section 832.7, subdivision (a) is unconstitutional to the extent it prevents the prosecution from obtaining access to officer personnel records in order to comply with its *Brady* obligations. (*Id.* at p. 1061.)

The superior court denied the district attorney's section 1043 motion for *in camera Brady* review and directed the San Francisco "Police Department 'to give the District Attorney access to the personnel files of officers Dominguez and Carrasco "so the prosecution can comply with its *Brady* mandate."'" (*Johnson, supra*, 228 Cal.App.4th at p. 1061.) According to the Order, once the District Attorney has reviewed the personnel files, he will be able to fulfill his constitutional duty to disclose to the Public Defender any *Brady* material. (*Ibid.*)

On January 17, 2014, Petitioners SFDA and SFPD each filed writ petitions. (*Johnson, supra*, 228 Cal.App.4th at p. 1061.) Petitioners sought a writ of mandate/prohibition ordering respondent superior court to vacate its January 2014 order denying the prosecution's section 1043

motion, directing the SFPD to give the prosecution access to officer personnel files, and declaring section 832.7, subdivision (a) unconstitutional. (*Ibid.*) Petitioners further requested that the Court of Appeal direct respondent court to accept the officer personnel records proffered by the SFPD, review the records *in camera*, and disclose all *Brady* materials to both the prosecution and defense counsel subject to a protective order. (*Id.*)

The First District Court of Appeal stayed the superior court's January 2014 Order and Johnson's trial, consolidated the two writ proceedings, and issued an order to show cause to respondent court. (*Johnson, supra*, 228 Cal.App.4th at p. 1061.) The Court of Appeal granted applications for leave to file amicus curiae briefs supporting petitioners by the Appellate Committee of the California District Attorneys Association, Ventura County District Attorney, Santa Clara County District Attorney, and the Police Officers' Research Association of California. (*Id.* at pp. 1061-1062.) The Attorney General also filed an amicus brief. (*Id.* at p. 1062.)

On August 11, 2014, the Court of Appeal issued its opinion, certifying it for publication. The court "den[ied] the writ petitions to the extent they challenge the respondent superior court's order requiring the SF Police Department to provide the prosecution access to officer personnel files to allow for identification of any *Brady* materials in those files." (*Johnson, supra*, 228 Cal.App.4th at p. 1057.) The court concluded that section 832.7, subdivision (a) "does not create a barrier between the prosecution and the performance of its duty under *Brady*," thus rendering it unnecessary to consider the constitutionality of barring prosecutorial access to officer personnel files for the purpose of identifying *Brady* materials in those files. (*Id.* at p. 1057.) The Court of Appeal "grant[ed] the writ petitions to the extent they challenge the respondent superior court's refusal

to consider any request for disclosure of *Brady* materials pursuant to a motion under Section 1043." The court "conclude[d] that, prior to disclosure to the defendant of any *Brady* material identified by the District Attorney, the prosecution must seek an order authorizing such disclosure under Section 1043." (*Ibid.*)

A petition for rehearing in the Court of Appeal was not sought because neither the facts nor the issues discussed in the opinion are disputed.

Because of the far-reaching statewide impact of the Court of Appeal's opinion, this Petition for Review also requests this Court stay proceedings pending review by this Court. The defendant is out of custody. The case proceeds on a general time waiver basis, and the matter is scheduled for October 14, 2014, in Department 22 of the San Francisco Superior Court to set the jury trial date. On August 14, 2014, the superior court issued an "Amended Order Modifying January 2014 Orders re *Brady* Motions," ordering the SFPD to give the SFDA access to the personnel files of Officers Dominguez and Carrasco "within 10 days of the remittitur."

ARGUMENT

I. REVIEW SHOULD BE GRANTED BECAUSE *JOHNSON* IS IN DIRECT CONFLICT WITH PUBLISHED DECISIONS LIMITING A PROSECUTOR'S ACCESS TO STATUTORILY PROTECTED PEACE OFFICER PERSONNEL FILES FOR THE PURPOSE OF CONDUCTING *BRADY* REVIEWS OF OFFICER WITNESSES.

Review of the First District Court of Appeal's decision in *Johnson* is necessary to secure uniformity of decision because *Johnson* cannot be reconciled with decisions from both the Second and Fourth District Courts of Appeal: "We therefore disagree with the decisions in *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1474-1475 [cit. om.] and *Abatti v.*

Superior Court (2003) 112 Cal.App.4th 39, 56 [cit. om.], to the extent that they interpret *Alford* to hold that Section 832.7(a) prohibits the prosecution from accessing officer personnel files for *Brady* purposes." (*Johnson, supra*, 228 Cal.App.4th at p. 1076; see also pp. 1086-1087 ["As we explained previously, we disagree with *Gutierrez, supra*, 112 Cal.App.4th 1463, and *Abatti, supra*, 112 Cal.App.4th 39, to the extent they conclude that Section 832.7(a) precludes prosecutorial access to officer personnel files for *Brady* purposes."].) This lack of uniformity puts prosecutors and police departments in an untenable position.

A. *GUTIERREZ*, CONTRARY TO *JOHNSON*, HELD THAT THE PROSECUTION DOES NOT HAVE ACCESS TO PEACE OFFICER PERSONNEL FILES IN ORDER TO CONDUCT A *BRADY* REVIEW.

In *Gutierrez*, the Second District considered the defendant's claim that a prosecutor is obligated to review an officer's personnel file for potential *Brady* material. (*Gutierrez, supra,* 112 Cal.App.4th at pp. 1474-1475.) *Gutierrez* rejected the defendant's claim that the prosecutor has direct access to review peace officer personnel files for potential *Brady* material. Rather, *Gutierrez* held that a prosecutor could only seek potential *Brady* information from an officer's personnel file by filing a motion pursuant to Evidence Code section 1043 *et seq.* because "'*peace officer personnel records retain their confidentiality vis-à-vis the prosecution.*'" (*Id.* at p. 1475, quoting *Alford, supra*, 29 Cal.4th at p. 1046. (emph. added [in *Gutierrez*]).)

Gutierrez drew further support for its conclusion that prosecutors do not have direct access to peace officer personnel files for *Brady* purposes from *People v. Jordan*: "a 'prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team, *knowingly possesses or has the right to possess*' that is

'actually or constructively in its possession or accessible to it.'" (*Gutierrez, supra,* 112 Cal.App.4th at p. 1475, quoting *People v. Jordan* (2d Dist. 2003) 108 Cal.App.4th 349, 358 (ital. added [in *Gutierrez*]).) Ultimately, *Gutierrez* concluded that the prosecution has no obligation to perform routine reviews of peace officer personnel files for *Brady* material because a "prosecutor does not generally have the right to possess and does not have access to peace officer files[.]" (*Id.*)

Johnson cited the very same authority relied upon by *Gutierrez* to reach the opposite conclusion – that the prosecution *does* have access to peace officer personnel files because the district attorney's office and the police department "constitute a single prosecution team[.]" (*Johnson, supra*, 228 Cal.App.4th at p. 1072.) For example, *Johnson* quoted the same passage from *Jordan, supra*, 108 Cal.App.4th at p. 358 (i.e., prosecutor must disclose material exculpatory evidence possessed by the prosecution team), but reached the opposite conclusion to that reached by *Gutierrez*: (*Johnson, supra*, 228 Cal.App.4th at pp. 1076-1077; see also pp. 1067-1069, 1072.) *Johnson* and *Gutierrez* are in direct conflict.

B. *JOHNSON* ALSO CONFLICTS WITH *ABATTI*, WHICH CONCLUDED THAT THE PROSECUTION DOES NOT HAVE ACCESS TO REVIEW PEACE OFFICER PERSONNEL FILES FOR POTENTIAL *BRADY* MATERIAL.

In *Abatti*, the defendant sought potential *Brady* material contained within an officer's personnel file. (*Abatti, supra,* 112 Cal.App.4th at p. 42.) While *Abatti* recognized that the question before the court did not involve "the prosecutorial duty to disclose[,]" the Fourth District, relying upon *Jordan, supra*, 108 Cal.App.4th at p. 360, noted that peace officer personnel files are not "technically" part of the prosecution team because the *Pitchess* procedure is the *sole means* by which the prosecution may obtain and review potential *Brady* information from officer personnel files.

(*Abatti, supra*, 112 Cal.App.4th at pp. 57-58.) *Johnson* reaches the opposite conclusion, that prosecutors have direct access to peace officer personnel files and any inquiry for *Brady* purposes does not breach the confidentiality afforded those files by Penal Code section 832.7, subdivision (a). (*Johnson, supra*, 228 Cal.App.4th at pp. 1067-1074.)

C. THE DIRECT CONFLICT BETWEEN *GUTIERREZ* AND *ABATTI*, ON THE ONE HAND, AND *JOHNSON*, ON THE OTHER, NECESSITATES REVIEW SO THAT THIS COURT MAY SETTLE AN IMPORTANT ISSUE FOR PROSECUTORS AND POLICE STATEWIDE.

The direct conflict between the district Courts of Appeal places prosecutors statewide in an untenable position. *Gutierrez* and *Abatti* direct prosecutors to follow the procedures enacted by Evidence Code section 1043 *et seq.* in order to review potential *Brady* material located in peace officer personnel files, while *Johnson* effectively requires prosecutors to inspect all peace officer personnel files for potential *Brady* material in the first instance without complying with the mandates of section 1043 *et seq.* The effect of this conflict creates disparate practices amongst prosecutors statewide: while some prosecutors take the position that peace officer personnel files are not part of the prosecution team under *Gutierrez* and *Abatti*, thus generating no obligation to review officer personnel files for potential *Brady* material, other prosecutors will follow *Johnson* and inspect the files for potential *Brady* material in the first instance. This split in authority also permits trial courts to follow *Gutierrez* and *Abatti* or *Johnson*, which may lead to splits in the same county. (See *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4 ["As a practical matter a superior court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so. Superior Courts in

other appellate districts may pick and choose between conflicting lines of authority."].)

Such disparate, yet legally sound practices require resolution. True, access presents a safer route for a prosecutor, but such a route directly conflicts with other binding case law and comes at the price of an officer's constitutionally and statutorily recognized rights of privacy and confidentiality in his or her personnel file. The conflict in authority will make it difficult or impossible for the district attorney and police to agree upon "orderly procedures to identify and provide materials for *Brady* review by prosecutors" endorsed by *Johnson, supra,* 228 Cal.App.4th at p. 1080. The parties will not be able to agree upon anything when California law is in conflict as to the rights and responsibilities of each party. Review by this Court, therefore, is necessary to settle an important issue for prosecutors and police statewide.

II. REVIEW SHOULD BE GRANTED BECAUSE *JOHNSON* DISMISSES THE IMPORT OF THIS COURT'S STATEMENTS IN *ALFORD*, *BRANDON*, AND *MOOC* THAT OFFICER PERSONNEL FILES ARE NOT WITHIN THE POSSESSION OF THE PROSECUTION AND THUS THE PROSECUTION MUST COMPLY WITH SECTION 1043 *ET SEQ.* IN ORDER TO REVIEW PEACE OFFICER PERSONNEL RECORDS OF OFFICER WITNESSES.

In *Alford*, the California Supreme Court held that the prosecution is not entitled to the fruits of a defendant's successful *Pitchess*[2] motion. (*Alford, supra,* 29 Cal.4th at p. 1046.) The high Court reasoned, "The *Pitchess* procedure is, . . . , in essence a special instance of third party discovery." (*Id.* at p. 1045.) "In a *Pitchess* hearing, the district attorney prosecuting the underlying criminal case represents neither the custodian of records nor their subject, and thus has no direct stake in the outcome."

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

(*Ibid.*) The Court held, "Of course, the prosecution itself remains free to seek *Pitchess* disclosure by complying with the procedure set forth in Evidence Code sections 1043 and 1045. (fn. om.) **Absent such compliance, . . . , peace officer personnel records retain their confidentiality vis-à-vis the prosecution.** (Pen. Code, § 832.7; see *People v. Superior Court (Gremminger)* (1997) 58 Cal. App.4th 397, 407." (*Id.* at p. 1046 (emph. added; fns. om.).)

If the *Pitchess* procedure is third party discovery, if the district attorney represents neither the custodian of records nor their subject, and if the prosecution must file its own section 1043 motion for *Pitchess* discovery, then the Supreme Court has effectively held that police personnel files are not in the possession of the prosecution. It would make no sense to conclude they are in the possession of the prosecution for the purposes of *Brady* but not *Pitchess*, or, stated differently, that the prosecution has direct access to those records under section 832.7 for *Brady* purposes but not for *Pitchess* purposes, because both *Brady* and *Pitchess* seek evidence favorable to the defense, though employing different standards and subject to different limitations.

Either the prosecution has direct access in both situations or it does not. *Johnson's, supra,* 228 Cal.App.4th at p. 1076, acknowledgment that under *Alford, supra*, 29 Cal.4th at p. 1046, the prosecution has no right to participate in a defense-initiated *Pitchess* motion and discover the information disclosed to the defense but rather must file its own *Pitchess* motion, while at the same time concluding that the prosecution has direct access to those same personnel files under section 832.7 for *Brady* purposes is illogical. Query, why would a prosecutor bother filing a *Pitchess* motion under *Alford* as *Alford* requires, if under *Johnson* the prosecution has direct access to the materials? The practical import of *Johnson's* reading of *Alford* is to forgo the entire *Pitchess* scheme, for both the district attorney

and the defense, and have all parties rely on the district attorney's *Brady* right, per *Johnson*, to cull through every officer witness' personnel file for potential impeachment material. The Supreme Court in *Alford* could not have intended to dismantle the Legislatively-crafted post-*Pitchess* statutory scheme.

That officer personnel records are not in the possession of the prosecution does not mean that the prosecution does not have a means to access them. We do, by complying with the procedures set forth in Evidence Code section 1043 *et seq*. when the officer is a witness. Indeed following the quote, "Absent such compliance, . . . , peace officer personnel records retain their confidentiality vis-à-vis the prosecution[,]" the Supreme Court in *Alford, supra,* 29 Cal.4th at p. 1046, cites to Penal Code section 832.7 and *Gremminger, supra,* 58 Cal.App.4th at p. 407. Penal Code section 832.7, subdivision (a) provides that peace officer personnel records are confidential and provides the means by and circumstances under which the prosecution can access those records, to wit a motion under sections 1043 and 1045 (or direct access if the district attorney exemption [see infra Section III] is applicable). Similarly, in *Gremminger*, *supra*, 58 Cal.App.4th at p. 407, the court stated, "where the People seek discovery of the peace officer personnel records of a criminal defendant who was not employed as a police officer at the time the crime was allegedly committed, the district attorney is not exempted under the provisions of Penal Code section 832.7, subdivision (a), and must comply with the requirements of Evidence Code sections 1043 et seq."

The conclusions that an officer's personnel files are not within the possession of the prosecution and thus the prosecution must comply with section 1043 *et seq*. in order to review personnel records of officer witnesses is further buttressed by the Supreme Court's earlier statements in

People v. Mooc (2001) 26 Cal.4th 1216 and *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1.

This Court noted that for the last quarter century, trial courts have entertained *Pitchess* motions, screening law enforcement personnel files *in camera* for evidence that may be relevant to a defendant's defense. (*Mooc, supra*, 26 Cal.4th at p. 1225.) This Court *directly linked Pitchess* procedures to *Brady* discovery in *Mooc*: "This procedural mechanism for criminal defense discovery, which must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial (cits.), is now an established part of criminal procedure in this state." (*Ibid.*, citing *United States v. Bagley* (1985) 473 U.S. 667, 674-678; *Brady, supra,* 373 U.S. at p. 87, among others.) In *Brandon*, this Court stated, "'the *Pitchess* process' operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information.'" (*Brandon, supra,* 29 Cal.4th at p. 14.)

Justice Moreno in *Brandon* recognized that the prosecution does not actually or constructively possess peace officer personnel records.

> As stated in *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1144 [],: "'[W]here the People seek discovery of the peace officer personnel records ... the district attorney is not exempted under the provisions of Penal Code 832.7, subdivision (a), and **must comply with the requirements of Evidence Code sections 1043 et seq.**'" (Quoting *People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 407 [fn.5] []).

(*Brandon, supra*, 29 Cal.4th at p. 21 (Moreno, J. dis. opn.) (emph. added) (parallel cits. om., fn. added).)

Johnson dismisses the import of this Court's statements in *Alford*, *Brandon*, and *Mooc*. In *Johnson*, the court stated that the issues before the Supreme Court in *Alford* concerned the prosecution's right to participate in

defense-initiated *Pitchess* motions and discover the information disclosed to the defense, not whether the prosecution could access officer personnel files in order to comply with its *Brady* obligations. (*Johnson, supra*, 228 Cal.App.4th at p. 1076.) Consequently, *Johnson* did "not understand that brief passage in *Alford* [peace officer personnel records retaining their confidentiality vis-à-vis the prosecutor absent compliance with section 1043 *et seq.*] to have resolved, without so acknowledging, the precise constitutional dilemma *Brandon* so carefully delineated and left open just months earlier [in footnote 2]." (*Ibid.*)

In *Brandon,* this Court declined to reach the question of whether Penal Code section 832.7, which precludes disclosure of officer personnel records except by discovery pursuant to section 1043 *et seq.*, "would be constitutional if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*." (*Brandon, supra*, 29 Cal.4th at p. 12, fn. 2.) That danger does not, however, exist in the procedures followed by the SFDA and the SFPD at issue in these writ petitions because neither agency seeks to use section 832.7 "*to defeat* the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*." Rather, both agencies seek to use the procedures set forth in 832.7 and 1043 *et seq.* to *secure access* to the personnel files in order to *comply* with our *Brady* mandate, while at the same time respecting an officer's constitutional right of privacy in his or her records.[3] Contrary to *Johnson*, the conclusion that peace officer personnel files are not in the possession of the prosecution does not

---

[3] See *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1097 [trolley operator's "personnel records and employment history are within the scope of the protection provided by both the state and federal Constitutions."].

mean that the prosecution cannot access them in a means that protects both a defendant's right to due process and an officer's right of privacy.

A. THIS COURT'S STATEMENTS IN *ALFORD*, *BRANDON* AND *MOOC* ARE NOT SO EASILY DISMISSED, AS RECOGNIZED BY *GUTIERREZ*, *ABATTI*, *GARDEN GROVE*, *GREMMINGER*, AND *BECERRADA*.

Unless directly investigating the police officer for a crime, prosecutors do not have any means independent of *Pitchess* to obtain police officer personnel records. (*Brandon, supra*, 29 Cal.4th at p. 21 (Moreno, J. dis. opn.). *Gutierrez*, contrary to *Johnson*, held that the prosecutor is not obliged to routinely review the complete files of all police officer witnesses because under *Alford, supra*, 29 Cal.4th at p. 1046, the prosecutor does not generally have the right to possess and does not have access to confidential peace officer files. (*Gutierrez, supra,* 112 Cal.App.4th at p. 1475, also citing *Jordan, supra*, 108 Cal.App.4th at p. 358.)[4]

In *Abatti,* 112 Cal.App.4th 39, 43, 60, the Fourth District granted Abatti's petition and directed the trial court to vacate its order denying Abatti's hybrid *Pitchess/Brady* motion and to conduct an *in camera* review of the counseling memos in the officer's personnel records to ascertain whether they contain information required to be disclosed under *Brady*. *Abatti* observed, "Recently, our Supreme Court in *Alford* confirmed that the prosecutor, as well as the defendant, must comply with the statutory *Pitchess* requirements for disclosure of information contained in confidential peace officer records. (*Alford, supra*, 29 Cal.4th at p. 1046.)." (*Abatti, supra*, 112 Cal.App.4th at p. 56.) In reaching this conclusion, *Abatti* also referred to Justice Brown's concurrence in *City of Los Angeles (Brandon), supra,* 29 Cal.4th at p. 17:

---

[4] This Court denied review in *Gutierrez*. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, *rev. denied*, 2004 Cal. LEXIS 829 (Jan. 28, 2004).)

> In Justice Brown's concurring opinion in *City of Los Angeles*, she noted that reliance on *Ritchie* for trial court in camera review of confidential peace officer records for *Brady* material would be misplaced if "a prosecutor, seeking to comply with *Brady*, to review the personnel records of a police officer who is a witness in a criminal case," were permitted access to such files under some exception to the *Pitchess* procedures.

(*Abatti, supra*, 112 Cal.App.4th at p. 56.)

Similarly, *Garden Grove Police Dept. v. Superior Court* (4th Dist. 2001) 89 Cal.App.4th 430, 431-432 & fns. 1 & 2, 434, held that the trial court abused its discretion when it ordered the police department to disclose birth dates of three officers to the district attorney so that the district attorney could run criminal record checks under Penal Code section 1054.1, subdivisions (d) and (e) and *Brady*. "We cannot allow [defendant] to make an end run on the *Pitchess* process by requesting the officers' personnel records under the guise of a Penal Code section 1054.1 and *Brady* [fn. 6] discovery motion." (*Id.* at p. 435 & fn. 6 [*Brady, supra,* 373 U.S. 83].)

In *Gremminger, supra*, 58 Cal.App.4th at p. 407, the Sixth District stated, "where the People seek discovery of the peace officer personnel records of a criminal defendant who was not employed as a police officer at the time the crime was allegedly committed, the district attorney is not exempted under the provisions of Penal Code section 832.7, subdivision (a), and must comply with the requirements of Evidence Code sections 1043 et seq."

Becerrada v. Superior Court (2d Dist. 2005) 131 Cal.App.4th 409, 412, 415, held that a limited release to an officer of information contained in his own personnel file would not disturb the balance between a defendant's right to a fair trial and the officer's right to privacy. *Alford's* footnote 7 [prosecutor may be able to learn of impeachment material against the officer by interviewing him] *did not*, however, *establish* the

right of the prosecution to obtain material disclosed to the defense without filing its own *Pitchess* motion. (*Id.* at p. 415, citing *Alford, supra*, 29 Cal.4th at p. 1046 fn.7.) "To hold that *Alford* confers a right on the prosecution ignores the privacy rights of the officer that *Alford* expressly protected: 'Absent such compliance [with *Pitchess*] ... peace officer personnel records retain their confidentiality vis-a-vis the prosecution.'" (*Ibid.*, quoting *Alford, supra*, 29 Cal.4th at p. 1046.)

A conflict exists between *Johnson* and all five other published decisions (*Gutierrez, Abatti, Garden Grove, Gremminger,* and *Becerrada*) over the meaning of this Court's statements in *Alford*. This Court should grant review to decide whether the prosecution must follow the procedures set forth in section 1043 *et seq.* when seeking access to officer personnel records for *Brady* review. Given the split in appellate authority on the point, any definitive discussion of the Supreme Court's meaning of its *Alford* opinion should come from this Court.

B. *ALFORD* DISAGREES WITH THE AUTHORITY RELIED UPON BY *JOHNSON* TO CONCLUDE THAT THE PROSECUTION HAS ACCESS TO PEACE OFFICER PERSONNEL FILES.

Johnson relies in part upon *Michael v. Gates* (1995) 38 Cal.App.4th 737, to support its conclusion that the prosecution has access to officer personnel files. (*Johnson, supra*, 228 Cal.App.4th at pp. 1068-1070.)

In *Gates, supra,* 38 Cal.App.4th at pp. 744-745, the Second District stated that it would be "absurd" to require the prosecuting attorney to make a motion under section 1043 and obtain court permission prior to viewing officer personnel records sought in a defense-initiated *Pitchess* motion. However, to the extent the appellate court stated in 1995 that it would be "absurd" to require the prosecution to file its own *Pitchess* motion in order to review an officer's records, in 2003 both this Court in *Alford* and the

Second District itself in *Gutierrez* disagreed. (*Alford, supra*, 29 Cal.4th at p. 1046; *Gutierrez, supra*, 112 Cal.App.4th at p. 1475.)

Evidence Code section 1043, subdivision (a), by its very terms, applies "in *any* case in which discovery or disclosure is sought of peace ... officer personnel records." (emph. added.) This includes cases in which a party seeks *Brady* material contained in the personnel files of officer witnesses, as the Second and Fourth Districts have acknowledged, contrary to *Johnson.*

Johnson, supra, 228 Cal.App.4th at p. 1076, concluded that *Alford, supra*, 29 Cal.4th at p. 1046, did not require the prosecution to comply with Evidence Code sections 1043 and 1045 when seeking access to peace officer personnel files in order to comply with *Brady*. *Johnson, supra*, 228 Cal.App.4th at p. 1077, went so far as to say that "[u]nder *Gutierrez's* reasoning, the prosecution arguably has no obligation under *Brady* to devise procedures to uncover exculpatory evidence in officer personnel files because those materials are outside the *Brady* disclosure requirements[,]" a conclusion contrary to well-established, federal constitutional law. *Johnson* continues, "petitioner's interpretation of section 832.7(a), which relies on *Gutierrez*, raises serious constitutional questions because it would interfere with the disclosure of exculpatory evidence in police files, contrary to *Brady* and its progeny." (*Ibid.*)

Petitioner, the SFDA, did not and does not argue that the prosecution has no obligation to devise procedures to uncover exculpatory evidence in officer personnel files. We have used section 832.7(a), in conjunction with sections 1043 and 1045 in order to review police personnel files for exculpatory material, while at the same time protecting the confidential nature of the files and officers' privacy rights in their files.

III. REVIEW IS NECESSARY TO ADDRESS THE IMPORTANT STATEWIDE ISSUE OF WHETHER THE "INVESTIGATION EXCEPTION" UNDER PENAL CODE SECTION 832.7, SUBDIVISION (A) BROADLY PERMITS THE DISTRICT ATTORNEY TO REVIEW PEACE OFFICER PERSONNEL RECORDS OF OFFICER WITNESSES FOR POTENTIAL *BRADY* MATERIAL, EVEN THOUGH THE OFFICER IS NOT THE TARGET OF A CRIMINAL INVESTIGATION.

Penal Code section 832.7, subdivision (a) provides,

> Peace officer ... personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal ... proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers ..., conducted by a grand jury, a district attorney's office, or the Attorney General's office.

A. REVIEW IS NECESSARY TO DETERMINE WHETHER OFFICER PERSONNEL RECORDS ARE CONFIDENTIAL VIS-À-VIS THE PROSECUTOR SEEKING *BRADY* INFORMATION OF OFFICER WITNESSES.

The first sentence of section 832.7, subdivision (a) reiterates that officer personnel records are confidential, and that information from those records shall not be disclosed except by discovery through the procedures set forth in Evidence Code sections 1043 and 1046. Confidentiality and the use of the procedures set forth in section 1043 *et seq.* are the norm. District attorney access in the second sentence is the exception, an exception that is limited by both statute and case law.

Johnson concludes that because the district attorney's office and police department constitute a single prosecution team and because the police department acts as the prosecutor's "agent" with respect to retention of *Brady* material, an inspection by the head of the prosecution team for *Brady* purposes would not involve disclosure outside the prosecution team,

and therefore is not prohibited by section 832.7. (*Johnson, supra*, 228 Cal.App.4th at pp. 1072, 1074.)

Johnson relies, in part, on a construction of the term "confidential" in a 1983 Attorney General Opinion. According to the Attorney General, "'confidential' information" is "'not publicly disseminated,'" and disclosure to the district attorney would not compromise the confidentiality of the files. (*Johnson, supra,* 228 Cal.App.4th at p. 1073, citing 66 Ops.Cal.Atty.Gen. 128, 129 fn. 3, 130 (1983).) The Attorney General concluded "'as long as the district attorney is duly investigating "the conduct of peace officers or a police agency" as specified in section 832.7, he need not first obtain a court order for access to the records in question.'" (*Ibid.*, quoting 66 Ops.Cal.Atty.Gen., *supra*, at p. 128.)

First, *Johnson* and the Attorney General are in conflict with the Supreme Court. (*Alford, supra*, 29 Cal.4th at p. 1046.) Second, *Johnson, supra*, 228 Cal.App.4th at pp. 1068-1069, 1073, finds that there is no "discovery" or "disclosure" among members of the same prosecution team based in part on reliance on *Gates, supra,* 38 Cal.App.4th at p. 743. As discussed above, *Gates* is inconsistent with *Alford*. (See Section IIB infra.) *Johnson's* conclusion is also contradicted by the very language of section 832.7, subdivision (a).

Section 832.7, subdivision (a) provides that the "records ... are confidential and shall not be disclosed in any criminal ... proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." Evidence Code section 1043, subdivision (a) clearly states, "in any case in which *discovery* or disclosure is sought of peace ... officer personnel records ..., the party seeking the *discovery* or disclosure shall file a written motion ...." (ital. added.) Section 1043, subdivision (a) also provides that the written notice must be in compliance with the time provisions set forth in subdivision (b) of Section 1005 of the Code of Civil Procedure, in other

words, 16 court days' notice of the motion, with an additional 5 calendar days' notice if the motion is mailed. Section 1043, subdivision (a) further requires that "the government agency served shall immediately notify the individual whose records are sought." Prior to *Johnson*, and in line with *Gutierrez* and *Abatti*, section 1043, subdivision (a) afforded the officer notice that the district attorney was seeking to disclose his or her personnel file even before the prosecutor reviewed the file and disseminated it to the defense. Prior to *Johnson*, the officer, who is a witness in a case, had the rights to a filed motion, notice, and an opportunity to be heard before his or her file is reviewed. Section 1043, subdivision (c) makes this clear: "*No hearing* upon a motion for *discovery* or disclosure shall be held without *full compliance* with the notice provisions of this section except upon a showing" of good cause or a waiver. (ital. added) (Evid. Code § 1043, subd. (c).) *Johnson* denies the officer notice and procedural due process when [s]he is a witness in a case.

In addition, *Johnson*, *supra*, 228 Cal.App.4th at pp. 1068-1069 relies upon *Gates, supra*, 38 Cal.App.4th at pp. 743-745, for the conclusion that the joint operation of the police department and district attorney's office is a sufficiently analogous relationship to that between the city attorney and police to justify treating the prosecutor's review of officer personnel records in the same manner and outside the definition of "disclosure" in 832.7(a). Such reliance is questionable. The district attorney, who is temporarily the head of a created legal construct that includes both the prosecutor and all members of agencies that give even limited assistance to the prosecutor, is doubtfully in the same position relative to an officer's personnel file as the city attorney who is the legal representative of the agency that created the files and has unlimited access to those files for any legitimate purpose. *Alford, supra*, 29 Cal.4th at p. 1045, instructs that in section 1043 hearings, "the district attorney prosecuting the underlying

criminal case represents neither the custodian of records nor their subject...." Review by this Court is, therefore, necessary to determine whether officer personnel records are confidential vis-a-vis the prosecutor when seeking *Brady* information of officer-witnesses.

B. REVIEW IS NECESSARY TO DETERMINE WHETHER THE DISTRICT ATTORNEY EXCEPTION IN SECTION 832.7, SUBDIVISION (A), APPLIES TO REVIEWS OF PERSONNEL FILES OF OFFICER WITNESSES.

If prosecutorial access to officer personnel records for *Brady* purposes were deemed to be a disclosure or a breach of confidentiality, *Johnson, supra*, 228 Cal.App.4th at pp. 1074, 1075, alternatively concludes that the "investigation exception" of section 832.7, subdivision (a) grants the district attorney direct access to personnel files of officer witnesses for potential *Brady* material. In reaching this conclusion, *Johnson* agrees with the Attorney General. (*Id.* at pp. 1074, 1075 & fn. 18; see also p. 1073 & fn. 16.)

We acknowledge that the Attorney General's Opinion, in the absence of controlling authority, is persuasive because courts presume that the Legislature was aware of the Attorney General's construction and would have taken corrective action if it disagreed with that construction. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 103-104.) We respectfully, however, disagree with the Attorney General's Opinion because *Courts* of Appeal in *Gutierrez* and *Abatti* took corrective action 20 years after the Opinion.

Petitioner asserts that a district attorney conducts "investigations and proceedings concerning the conduct of peace officers" when the officer is a suspect in an investigation or target of a criminal prosecution for conduct that occurred while employed as an officer. This was the case in the cases interpreting section 832.7's exception. (See, e.g. *People v. Gwillim* (1990)

223 Cal.App.3d 1254, 1269, 1270 [prosecution had right under 832.7 to obtain defendant officer's immunized statements in personnel file when officer charged with crimes against another officer while on duty]; *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 610, 618-619 [prosecution properly obtained urinalysis results placed in personnel files of off-duty officers arrested and charged following a street fight]; *Gremminger, supra*, 58 Cal.App.4th at p. 407 [investigation exception rejected because prosecution sought discovery of officer personnel records of a criminal defendant who was not employed as an officer at the time the murder was committed].)

In the limited circumstance where the officer is being investigated for possible criminal prosecution, it makes sense that the district attorney's exemption should apply in order to facilitate the investigation. A noticed motion could slow the investigation, alert the suspect officer to the criminal investigation, and potentially hinder its effectiveness. In that circumstance, the district attorney needs unfettered access to the officer's personnel records.

In contrast, in a routine criminal case where officers are only witnesses, the focus of the district attorney's investigation and proceedings is the defendant. The district attorney is not conducting an investigation or proceeding of their officer witness any more than they are conducting an investigation or proceeding of a civilian witness. *Johnson* reasons, "when a prosecutor conducts a *Brady* review of an officer's personnel file, the prosecutor is investigating that officer's conduct to determine whether there is any evidence that could be used to *impeach* him or her at trial." (*Johnson, supra*, 228 Cal.App.4th at p. 1075 (ital. added).) But taken to its logical extreme, *Johnson's* rationale could permit the district attorney to root through personnel files of civilian employee witnesses of public agencies (e.g., Medical Examiner and Crime Lab), which are protected by

both the state and federal Constitutions (*San Diego Trolley, supra,* 87 Cal.App.4th at p. 1097), to see if any impeachment (*Brady*) material might possibly be contained therein.

Johnson acknowledges that in *Gremminger*, *Gwillim*, and *Fagan*, the investigation exception was considered in cases where the officer was the target of a criminal investigation, but nonetheless concludes that none of those cases expressly excludes other types of investigations of officer conduct from the scope of the district attorney exemption. (*Johnson, supra* 228 Cal.App.4th at p. 1075.) In addition, "Neither does section 832.7(a) contain any such limiting language; it does not, for example, limit the application of the exception to investigation of the conduct of police officers who are *defendants or suspects*." (*Ibid.* (ital. in *Johnson*).)

To interpret the district attorney exemption in section 832.7 to mean that the district attorney has unrestricted access to officer personnel files would render superfluous the limiting language of that exception. Had the Legislature intended to authorize district attorneys to have unlimited access to otherwise confidential officer personnel records when the officer is the target of a criminal investigation, when the prosecution seeks *Pitchess* information, or when the prosecution conducts a *Brady* review, it could easily have done so by not including the phrase "investigations or proceedings concerning the conduct of peace officers or custodial officers, [...], conducted by".[5] That would be very similar to the language in Welfare and Institutions Code section 827, subdivision (a)(1)(B), which gives the district attorney direct access to juvenile files. Section 827, subdivision (a)(1) provides, "Except as provided in Section 828, a case file may be inspected only by the following: (B) The district attorney, a city

[5] In that case, the statute would read, "This section shall not apply to the grand jury, a district attorney's office, or the Attorney General's office."

attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law." The Legislature did not so draft section 832.7.

How the exception carved out in section 832.7, subdivision (a) is interpreted affects both prosecutors and police statewide. For prosecutors, *Johnson's* interpretation of the "investigation exception" would provide direct access to privileged peace officer personnel files, in direct conflict with *Gutierrez* and *Abatti*. For police, *Johnson's* interpretation of the "investigation exception" would expand rather than limit prosecutorial access thereby obviating the need for an exception in the first place. Review is, therefore, required to address this important issue of law.

IV. INITIAL *IN CAMERA* REVIEW BY THE COURT ENSURES CONFIDENTIALITY AND DUE PROCESS AND PRESERVES THE RECORD FOR APPELLATE REVIEW.

J.E. v. Superior Court (2014) 223 Cal.App.4th 1329, 1339, held that a juvenile is entitled to a court's *in camera Brady* review upon a showing that there is a reasonable basis to believe exculpatory or impeachment evidence exists in the confidential dependency files. *J.E.* pragmatically noted, which *Johnson* acknowledged though declined to adopt, that *in camera* review by the court forestalls litigation brought by the defense over whether the prosecution has complied with its *Brady* obligations. (*J.E., supra*, 223 Cal.App.4th at p. 1339; *Johnson, supra*, 228 Cal.App.4th at p. 1085.) *In camera* review preserves the record for appellate review by the defense, helps eliminate habeas litigation years later over what records the police department provided to the district attorney for review, and protects officers' interest in confidentiality of the files.

J.E. is closely analogous to the instant situation: long-established statutory privileges limiting access to records must be balanced against defendants' right to due process at trial, should such records be material. In

such a landscape of competing rights[6] it is precisely a court's job to be the "locus of decisionmaking." (*Mooc, supra,* 26 Cal.4th at p. 1229.)

We do not seek to shift our *Brady* responsibility to the trial court, but rather to enlist the trial court's traditional neutral role, court-reported proceedings, and balancing-of-competing-rights power to conduct *Brady* reviews of this limited class of protected officer personnel records. Only such *in camera* review can truly serve due process for all the parties: the People, the defendant, and the peace officers.

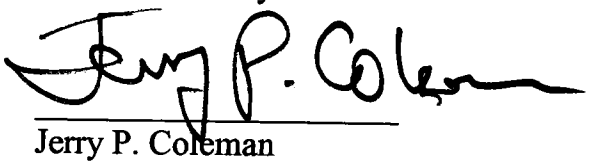
CONCLUSION

For the foregoing reasons, the People of the State of California request that this Court grant review of these issues. We further request that this Court stay proceedings pending review by this Court.

Date: September 18, 2014

Respectfully submitted,

GEORGE GASCÓN
District Attorney



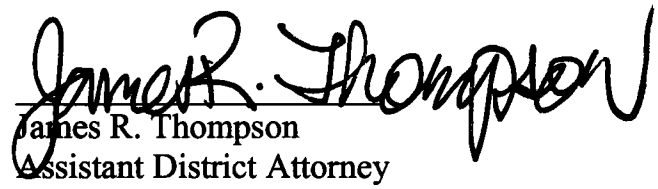
Jerry P. Coleman
Special Assistant District Attorney

//

//

[6] See also *People v. Hammon* (1997) 15 Cal.4th 1117; *People v. Reber* (1986) 177 Cal.App.3d 523, overruled in part, *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.

Laura vanMunching
Managing Assistant District Attorney



James R. Thompson
Assistant District Attorney

Allison G. Macbeth
Assistant District Attorney

CERTIFICATION OF COMPLIANCE

I certify that the attached Petition for Review uses a 13 point Times New Roman font and 1.5 line spacing and, according to Microsoft Word, contains 7938 words. (California Rules of Court, rule 8.504(d).)

Laura vanMunchiing

ORDER DENYING PETITION FOR WRIT (COURT OF APPEAL) IN PART

People v. Superior Court (San Francisco)

Court of Appeal of California, First Appellate District, Division Five

August 11, 2014, Opinion Filed

A140767 , A140768

Reporter
228 Cal. App. 4th 1046; 2014 Cal. App. LEXIS 722; 2014 WL 3896138

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; DARYL LEE JOHNSON, Real Party in Interest.CITY AND COUNTY OF SAN FRANCISCO ex rel. THE SAN FRANCISCO POLICE DEPARTMENT, Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; THE PEOPLE et al., Real Parties in Interest.

Prior History: [**1] Superior Court of San Francisco City and County, No. 12029482, Richard B. Ulmer, Jr., Judge.

Core Terms

disclosure, personnel file, materials, confidential, trial court, discovery, district attorney, files, records, police department, prosecutorial, in camera, disclose, personnel records, investigating, purposes, superior court, procedures, officer's, requires, exculpatory evidence, Sections, prosecution's, Citations, police officer, criminal proceeding, prosecution team, present case, exculpatory, cases

Case Summary

Overview
HOLDINGS: [1]-The prosecution was not precluded under *Pen. Code, § 832.7, subd. (a)*, from obtaining access to peace officer personnel files to conduct a preliminary review for material evidence favorable to the defense because such a review, which took place within the prosecution team and informed the exercise of prosecutorial discretion under *Gov. Code, § 26500*, did not constitute either disclosure under *Evid. Code, § 1043*, or a breach of confidentiality; [2]-Alternatively, the investigation exception allowed such access; [3]-Because it was the prosecutor's duty to identify and disclose material evidence favorable to the defense, the trial court had no obligation to undertake an in camera review under *Evid. Code, § 1045*, to identify such evidence absent a preliminary review by the prosecution; [4]-Disclosure to the defense required the prosecution to file a motion under *§ 1043*.

Outcome
Petitions denied in part and granted in part.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

HN1 Where resolution of the issues in a proceeding turns on the interpretation of statutes, review is de novo.

Governments > Legislation > Interpretation

HN2 In any case involving statutory interpretation, the court's fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose. The court begins by examining the statutory language, giving it a plain and commonsense meaning. The court does not, however, consider the statutory language in isolation; rather, the court looks to the statute's entire substance in order to determine its scope and purposes. That is, the court construes the words in question in context, keeping in mind the statute's nature and obvious purposes. The court must harmonize the statute's various parts by considering it in the context of the statutory framework as a whole. If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then the court may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN3 The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The duty to disclose such evidence exists even though there has been no request by the accused, encompasses impeachment evidence as well as exculpatory evidence, and extends even to evidence known only to police investigators and not to the prosecutor. Such evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN4 Responsibility for Brady compliance lies exclusively with the prosecution. The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge any favorable evidence known to the others acting on the government's behalf. Courts have thus consistently declined to draw a distinction between different agencies under the same government, focusing instead upon the prosecution team, which includes both investigative and prosecutorial personnel. Thus, an individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. This is because Brady places on the prosecution an affirmative duty to disclose evidence favorable to a defendant, and procedures and regulations can be established to carry the prosecutor's burden and to insure communication of all relevant information on each case to every lawyer who deals with it. Since the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN5 The United States Supreme Court has unambiguously assigned the duty to disclose exculpatory evidence solely and exclusively to the prosecution; those assisting the government's case are no more than its agents. By necessary implication, the duty is nondelegable at least to the extent the prosecution remains responsible for any lapse in compliance. Since the prosecution must bear the consequences of its own failure to disclose, a fortiori, it must be charged with any negligence on the part of other agencies acting in its behalf.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > Scope of Disclosure

HN6 The California Supreme Court has held criminal defendants have a right to discover citizen complaints of misconduct found in peace officer personnel files. The holding was an extension of judicially created doctrine evolving in the absence of guiding legislation, based on the fundamental proposition that an accused is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. A defendant may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial. The requisite showing may be satisfied by general allegations which establish some cause for discovery other than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime. Although these procedures must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial, the decision itself did not actually rely on the prosecutor's obligations under Brady as a basis for its holding.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > Scope of Disclosure

HN7 The California Legislature has codified the privileges and procedures for discovery of citizen complaints of misconduct in peace officer personnel files through the enactment of *Pen. Code, §§ 832.7*, *832.8*, and *Evid. Code, §§ 1043 through 1045*. The Penal Code provisions define personnel records in *§ 832.8* and provide that such records are confidential and subject to discovery only pursuant to the

procedures set forth in the Evidence Code. § 832.7. Sections 1043 and 1045 set out the procedures for discovery in detail. Section 1043, subd. (a), requires a written motion and notice to the governmental agency which has custody of the records sought, and § 1043, subd. (b)(2), (3), provides that such motion shall include, inter alia, a description of the type of records or information sought; and affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > Scope of Disclosure

HN8 A finding of good cause under Evid. Code, § 1043, subd. (b), is only the first hurdle in the discovery process. Once good cause for discovery has been established, Evid. Code, § 1045, provides that the court shall then examine the information in chambers in conformity with Evid. Code, § 915 (i.e., out of the presence of all persons except the person authorized to claim the privilege and such other persons as he or she is willing to have present), and shall exclude from disclosure several enumerated categories of information, including: (1) complaints more than five years old; (2) the conclusions of any officer investigating a complaint; and (3) facts which are so remote as to make disclosure of little or no practical benefit. § 1045, subd. (b). 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. The relatively relaxed standards for a showing of good cause under § 1043, subd. (b)—materiality to the subject matter of the pending litigation and a reasonable belief that the agency has the type of information sought—insure the production for inspection of all potentially relevant documents.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > Scope of Disclosure

HN9 The in camera review procedure and disclosure guidelines set forth in Evid. Code, § 1045, guarantee a balancing of the officer's privacy interests against the defendant's need for disclosure. As a further safeguard, moreover, the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

HN10 See Pen. Code, § 832.7, subd. (a).

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN11 In complying with Brady with respect to materials in peace officer personnel files, there are two analytically distinct stages, identification and disclosure. The first requires access to officer personnel files to identify materials that must be disclosed under Brady. The second stage is disclosure of Brady materials to the defendant in a criminal proceeding.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

HN12 Evid. Code, § 1043, applies to any case in which discovery or disclosure of peace officer personnel records is sought. The statutes thus protect officer privacy rights by requiring a noticed motion, in camera hearing, and court order before officer records could be introduced or otherwise used in any litigation. But the legislative intent to balance a litigant's need to present a case and a peace officer's right to privacy would not be advanced by extending the procedural requirements to a preliminary review of peace officer records, where there is no disclosure in litigation, and no discovery. In ordinary legal usage, "discovery" refers to the inspection of documents and other materials in the possession or control of an adverse party in litigation, a process which has as its principal purpose the elimination of the game element of litigation. An agency which reviews its own records with its attorney has not engaged in discovery.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

HN13 Where a governmental agency and its attorney conduct a contained and limited review of peace

officer personnel files within the custody and control of the agency, for some relevant purpose, there is no disclosure under the statutes governing discovery or disclosure of such files. The statutory scheme is designed to protect peace officers' just claim to confidentiality and to regulate the use of peace officer personnel records in civil and criminal proceedings. It was not intended to, and does not, create substantive or procedural obstacles to a police agency's review of its own files.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN14 Under *Gov. Code, § 26500*, a district attorney is the public prosecutor in a criminal prosecution, representing the People of the State of California. The district attorney leads a prosecution team, which includes both investigative and prosecutorial personnel. Due to the close working relationship between the police and prosecutors, courts in the Brady context have consistently declined to distinguish between separate agencies of the same government that are part of the prosecution team. Even though the district attorney in a criminal prosecution is not the attorney for the police department, the joint operation of the agencies as a prosecution team is a sufficiently analogous relationship, justifying the same result under *Pen. Code, § 832.7, subd. (a)*. Therefore, a prosecutorial inspection of an officer's personnel file for Brady purposes is not a disclosure of the file within the criminal proceeding.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

HN15 The word "confidential" in *Pen. Code, § 832.7, subd. (a)*, has independent significance. Interpreting the word "confidential" as establishing a general condition of confidentiality and interpreting the phrase "shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to *Sections 1043* and *1046 of the Evidence Code*" as creating a limited exception to the general principle of confidentiality gives meaning to both clauses of the provision. The term "confidential" is undefined in the statute and ambiguous. Clearly the term prohibits public disclosure of information from officer personnel files, but it is otherwise unclear what limits it sets on access. It does not create an absolute bar to access, because presumably members of a police department that have legitimate reasons for accessing officer personnel files do not thereby breach the confidentiality of the files. It also seems safe to assume that designating the files as confidential means that government employees both inside and outside the police department that do not have a legitimate basis for accessing officer personnel files cannot do so.

Governments > Legislation > Interpretation

HN16 Where a statute is ambiguous, a court may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy. The court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN17 The district attorney's office and police department constitute a single prosecution team in any given criminal case, and the police department acts as the prosecutor's agent with respect to the retention of potential Brady material. For this reason, an inspection of officer personnel files by a prosecutor does not constitute disclosure of the files within the criminal proceeding. Similarly, such an inspection does not breach the confidentiality of the files. The district attorney has the discretion to initiate and conduct on behalf of the people all prosecutions for public offenses, as provided in *Gov. Code, § 26500*, and information about important officer witnesses may be necessary to the informed exercise of that discretion. An inspection by the head of the prosecution team for Brady purposes does not involve any disclosure outside the prosecution team, much less public disclosure of information from the files. It is consistent with the Legislature's intent to restrict discovery of the files, while preserving the prosecutor's ability to comply with its constitutional obligations.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

HN18 An inspection of an investigatory agency's peace officer personnel files for Brady materials by the prosecutor does not constitute a breach of the confidentiality of the files under *Pen. Code, § 832.7, subd. (a)*.

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > General Overview

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN19 If prosecutorial Brady review constitutes disclosure in a criminal proceeding or breach of the confidentiality of officer personnel files within the meaning of *Pen. Code, § 832.7, subd. (a)*, then the investigation exception applies and permits such review.

Governments > Courts > Judicial Precedent

HN20 Cases are not authority for propositions not considered.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN21 In California, the scope of the Brady disclosure requirement has been described as follows: A prosecutor's duty under Brady to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team, knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel. The prosecution must disclose evidence that is actually or constructively in its possession or accessible to it.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

HN22 Well established, federal constitutional law obligates the prosecution to learn of any evidence favorable to the defendant known to the police, including impeachment evidence. Impeachment evidence in officer personnel files cannot constitutionally be excluded from the prosecution's Brady disclosure obligations. The prosecutor is in the best position to evaluate whether evidence must be disclosed because it is materially favorable to the defense. The prosecutor is the only person with access to the entire landscape of evidence that will or could be presented against the defendant at trial. At the pretrial stage, the trial court's knowledge of the details of the case is often very limited. Although the significance of much impeachment evidence would likely be obvious to all, the import of other information might be clear to the prosecutor but not to the trial court. The Brady materiality standard looks at the suppressed evidence considered collectively, not item by item. Therefore, the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of reasonable probability is reached. The trial court cannot analyze the cumulative impact of nondisclosure of a piece of exculpatory—but not itself material—evidence in an officer's personnel file.

Constitutional Law > ... > Case or Controversy > Constitutional Questions > Necessity of Determination

HN23 The common practice is to construe statutes, when reasonable, to avoid difficult constitutional questions. If reasonably possible the courts must construe a statute to avoid doubts as to its constitutionality.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > Scope of Disclosure

HN24 A Pitchess motion may be initiated by a defendant, so a defendant can obtain any information from personnel files discoverable under the Pitchess scheme, regardless of whether the prosecutor concludes there is evidence that must be disclosed under Brady. Moreover, Brady and Pitchess employ different standards of materiality. Unlike the high court's constitutional materiality standard in Brady, which tests whether evidence is material to the fairness of trial, a defendant seeking Pitchess disclosure need

only show that the information sought is material to the subject matter involved in the pending litigation. *Evid. Code, § 1043, subd. (b)(3)*. Because Brady's constitutional materiality standard is narrower than the Pitchess requirements, any citizen complaint that meets Brady's test of materiality necessarily meets the relevance standard for disclosure under Pitchess. *Evid. Code, § 1045, subd. (b)*.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

HN25 Brady imposes the disclosure obligation on the prosecution, but it allows some flexibility in how the prosecution complies with that obligation. District attorneys need some mechanism for ensuring that they learn of Brady material within their constructive possession. But the choice of that mechanism is within district attorneys' broad discretionary powers in the initiation and conduct of criminal proceedings.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN26 Absent a specific request from the defendant, initial Brady materiality reviews are performed by the prosecution alone. Thus, in the typical case where a defendant makes only a general request for exculpatory material under Brady, it is the state that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. It may be appropriate for a court to conduct in camera Brady review of confidential files for specific exculpatory evidence requested by a defendant. Prosecutorial review of possible Brady materials is normally sufficient, and in camera review is reserved for cases where the defense has become aware that exculpatory evidence was withheld.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN27 The government is primarily responsible for deciding what evidence it must disclose to the defendant under Brady. And at least where a defendant has made only a general request for Brady material, the government's decision about disclosure is ordinarily final—unless it emerges later that exculpatory evidence was not disclosed. When the defendant seeks access to specific materials that the government maintains are not discoverable under Brady, however, a trial court may in some instances conduct an in camera review of the disputed materials. To justify such a review, the defendant must make some showing that the materials in question could contain favorable, material evidence. Accordingly, nothing suggests that, merely because information is of a sensitive nature, the prosecution may compel a trial court to conduct the review for Brady materials in the first instance, particularly where the prosecution may access those files and conduct its own review for Brady materials.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > General Overview

HN28 That there may be some role for the trial court in assisting prosecutors to make difficult determinations about the materiality of specific items of evidence, particularly where there are confidentiality concerns, does not mean prosecutors may obligate the trial court to perform an extensive initial Brady review, as opposed to reviewing particular documents identified by the prosecutor. The responsibility for performing an initial Brady review remains with the prosecution. A trial court has no obligation to conduct a general Brady-rule in camera search through the files of the prosecutor when the prosecutor has assured the court that all possibly exculpatory material has been produced.

Governments > Legislation > Interpretation

HN29 Language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > Scope of Disclosure

HN30 Although the prosecution has the obligation to identify evidence in officer personnel files that meets the Brady materiality standard, a motion under *Evid. Code, § 1043*, is required to disclose the Brady material to the defendant.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Denying the prosecution's request (*Evid. Code, § 1043*) to perform an in camera review (*Evid. Code, § 1045*), the trial court ordered a police department to give the prosecution access to officer personnel files to allow for identification of any material evidence favorable to the defense that might be contained in those files. (Superior Court of the City and County of San Francisco, No. 12029482, Richard B. Ulmer, Jr., Judge.)

The Court of Appeal denied in part and granted in part petitions for writ of mandate/prohibition filed by the San Francisco District Attorney and the San Francisco Police Department, and directed the trial court to modify its order to provide for the prosecution's filing of a motion for disclosure (*Evid. Code, § 1043*) if the prosecution identified evidence to be disclosed to the defense. The prosecution was not precluded (*Pen. Code, § 832.7, subd. (a)*) from obtaining access to peace officer personnel files to conduct a preliminary review for exculpatory evidence because such a review, which takes place within the prosecution team and informs the exercise of prosecutorial discretion (*Gov. Code, § 26500*), does not constitute either disclosure or a breach of confidentiality. Alternatively, the investigation exception allows such access. Because it is the prosecutor's duty to identify and disclose material evidence favorable to the defense, the trial court had no obligation to undertake an in camera review to identify such evidence absent a preliminary review by the prosecution. (Opinion by Simons, Acting P. J., with Needham and Bruiniers, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1)

Statutes § 29 > Construction > Language > Legislative Intent > Effectuating Purpose.

In any case involving statutory interpretation, the court's fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose. The court begins by examining the statutory
language, giving it a plain and commonsense meaning. The court does not, however, consider the statutory language in isolation; rather, the court looks to the statute's entire substance in order to determine its scope and purposes. That is, the court construes the words in question in context, keeping in mind the statute's nature and obvious purposes. The court must harmonize the statute's various parts by considering it in the context of the statutory framework as a whole. If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then the court may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.

CA(2) (2)

Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Materiality.

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The duty to disclose such evidence exists even though there has been no request by the accused, encompasses impeachment evidence as well as exculpatory evidence, and extends even to evidence known only to police investigators and not to the prosecutor. Such evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

CA(3) (3)

Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Prosecution Team.

Responsibility for *Brady* compliance lies exclusively with the prosecution. The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge any favorable evidence known to the others acting on the government's behalf. Courts have thus consistently declined to draw a distinction between different agencies under the same government, focusing instead upon the prosecution team, which includes both investigative and prosecutorial personnel. Thus, an individual prosecutor has a duty to learn of any favorable

evidence known to the others acting on the government's behalf in the case, including the police. This is because *Brady* places on the prosecution an affirmative duty to disclose evidence favorable to a defendant, and procedures and regulations can be established to carry the prosecutor's burden and to insure communication of all relevant information on [*1048] each case to every lawyer who deals with it. Since the prosecutor has the means to discharge the government's *Brady* responsibility if he or she will, any argument for excusing a prosecutor from disclosing what he or she does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

CA(4) (4)

Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Nondelegable.

The United States Supreme Court has unambiguously assigned the duty to disclose exculpatory evidence solely and exclusively to the prosecution; those assisting the government's case are no more than its agents. By necessary implication, the duty is nondelegable at least to the extent the prosecution remains responsible for any lapse in compliance. Since the prosecution must bear the consequences of its own failure to disclose, a fortiori, it must be charged with any negligence on the part of other agencies acting in its behalf.

CA(5) (5)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files.

The California Supreme Court has held criminal defendants have a right to discover citizen complaints of misconduct found in peace officer personnel files. The holding was an extension of judicially created doctrine evolving in the absence of guiding legislation, based on the fundamental proposition that an accused is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. A defendant may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial. The requisite showing may be satisfied by general allegations which establish some cause for discovery other than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime. Although these procedures must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial, the decision itself did not actually rely on the prosecutor's obligations under *Brady* as a basis for its holding.

CA(6) (6)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files.

The California Legislature has codified the privileges and procedures for discovery of citizen complaints of misconduct in peace officer personnel files through the enactment of *Pen. Code, §§ 832.7*, *832.8*, and *Evid. Code, §§ 1043 through 1045*. The [*1049] Penal Code provisions define personnel records (*§ 832.8*) and provide that such records are confidential and subject to discovery only pursuant to the procedures set forth in the Evidence Code (*§ 832.7*). *Sections 1043* and *1045* set out the procedures for discovery in detail. *Section 1043, subd. (a)*, requires a written motion and notice to the governmental agency which has custody of the records sought, and *§ 1043, subd. (b)(2), (3)*, provides that such motion shall include, inter alia, a description of the type of records or information sought; and affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records.

CA(7) (7)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files.

A finding of good cause under *Evid. Code, § 1043, subd. (b)*, is only the first hurdle in the discovery process. Once good cause for discovery has been established, *Evid. Code, § 1045*, provides that the court shall then examine the information in chambers in conformity with *Evid. Code, § 915* (i.e., out of the presence of all persons except the person authorized to

claim the privilege and such other persons as he or she is willing to have present), and shall exclude from disclosure several enumerated categories of information, including: (1) complaints more than five years old; (2) the conclusions of any officer investigating a complaint; and (3) facts which are so remote as to make disclosure of little or no practical benefit (*§ 1045, subd. (b)*). 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 or her defense. The relatively relaxed standards for a showing of good cause under *§ 1043, subd. (b)*—materiality to the subject matter of the pending litigation and a reasonable belief that the agency has the type of information sought—insure the production for inspection of all potentially relevant documents.

CA(8) (8)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files.

The in camera review procedure and disclosure guidelines set forth in *Evid. Code, § 1045*, guarantee a balancing of the officer's privacy interests against the defendant's need for disclosure. As a further safeguard, moreover, the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question.

CA(9) (9)

Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Peace Officer Personnel Files.

In complying with *Brady* with respect to materials in peace officer personnel files, there are two analytically distinct stages, identification and disclosure. The first requires access to officer personnel files to identify materials that must be disclosed under *Brady*. The second stage is disclosure of *Brady* materials to the defendant in a criminal proceeding.

CA(10) (10)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files > Preliminary Review by Prosecutor.

Evid. Code, § 1043, applies to any case in which discovery or disclosure of peace officer personnel records is sought. The statutes thus protect officer privacy rights by requiring a noticed motion, in camera hearing, and court order before officer records could be introduced or otherwise used in any litigation. But the legislative intent to balance a litigant's need to present a case and a peace officer's right to privacy would not be advanced by extending the procedural requirements to a preliminary review of peace officer records, where there is no disclosure in litigation, and no discovery. In ordinary legal usage, "discovery" refers to the inspection of documents and other materials in the possession or control of an adverse party in litigation, a process which has as its principal purpose the elimination of the game element of litigation. There is no suggestion that the Legislature intended any other meaning here. An agency which reviews its own records with its attorney has not engaged in discovery.

CA(11) (11)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files > Preliminary Review by Prosecutor.

Where a governmental agency and its attorney conduct a contained and limited review of peace officer personnel files within the custody and control of the agency, for some relevant purpose, there is no disclosure under the statutes governing discovery or disclosure of such files. The statutory scheme is designed to protect peace officers' just claim to confidentiality and to regulate the use of peace officer personnel records in civil and criminal proceedings. It was not intended to, and does not, create substantive or procedural obstacles to a police agency's review of its own files.

CA(12) (12)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files > Preliminary Review by Prosecutor.

Under *Gov. Code, § 26500*, a district attorney is the public prosecutor in a criminal prosecution, representing the People of the State of California. [*1051] The district attorney leads a prosecution team, which includes both investigative and prosecutorial

personnel. Due to the close working relationship between the police and prosecutors, courts in the *Brady* context have consistently declined to distinguish between separate agencies of the same government that are part of the prosecution team. Even though the district attorney in a criminal prosecution is not the attorney for the police department, the joint operation of the agencies as a prosecution team is a sufficiently analogous relationship, justifying the same result under *Pen. Code, § 832.7, subd. (a)*. Therefore, a prosecutorial inspection of an officer's personnel file for *Brady* purposes is not a disclosure of the file within the criminal proceeding.

CA(13) (13)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files > Confidentiality.

The word "confidential" in *Pen. Code, § 832.7, subd. (a)*, has independent significance. Interpreting the word "confidential" as establishing a general condition of confidentiality and interpreting the phrase "shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to *Sections 1043* and *1046 of the Evidence Code*" as creating a limited exception to the general principle of confidentiality gives meaning to both clauses of the provision. The term "confidential" is undefined in the statute and ambiguous. Clearly the term prohibits public disclosure of information from officer personnel files, but it is otherwise unclear what limits it sets on access. It does not create an absolute bar to access, because presumably members of a police department who have legitimate reasons for accessing officer personnel files do not thereby breach the confidentiality of the files. It also seems safe to assume that designating the files as confidential means that government employees both inside and outside the police department who do not have a legitimate basis for accessing officer personnel files cannot do so.

CA(14) (14)

Statutes § 42 > Construction > Aids.

Where a statute is ambiguous, a court may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy. The court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.

CA(15) (15)

Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Peace Officer Personnel Files > Preliminary Review by Prosecutor.

The district attorney's office and police department constitute a single prosecution team in any given criminal case, and the police department acts as the prosecutor's agent with respect to the [*1052] retention of potential *Brady* material. For this reason, an inspection of officer personnel files by a prosecutor does not constitute disclosure of the files within the criminal proceeding. Similarly, such an inspection does not breach the confidentiality of the files. The district attorney has the discretion to initiate and conduct on behalf of the people all prosecutions for public offenses (*Gov. Code, § 26500*) and information about important officer witnesses may be necessary to the informed exercise of that discretion. An inspection by the head of the prosecution team for *Brady* purposes does not involve any disclosure outside the prosecution team, much less public disclosure of information from the files. It is consistent with the Legislature's intent to restrict discovery of the files, while preserving the prosecutor's ability to comply with its constitutional obligations.

CA(16) (16)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files > Preliminary Review by Prosecutor > Confidentiality.

An inspection of an investigatory agency's peace officer personnel files for *Brady* materials by the prosecutor does not constitute a breach of the confidentiality of the files under *Pen. Code, § 832.7, subd. (a)*.

CA(17) (17)

Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files > Investigation Exception.

If prosecutorial *Brady* review constitutes disclosure in a criminal proceeding or breach of the confidentiality

of officer personnel files within the meaning of *Pen. Code, § 832.7, subd. (a)*, then the investigation exception applies and permits such review.

CA(18) (18)
Courts § 38 > Stare Decisis.

Cases are not authority for propositions not considered.

CA(19) (19)
Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Prosecution Team.

In California, the scope of the *Brady* disclosure requirement has been described as follows: A prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team, knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel. The prosecution must disclose evidence that is actually or constructively in its possession or accessible to it.

CA(20) (20)
Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Peace Officer Personnel Files > Materiality > Duty of Prosecutor.

Well established, federal constitutional law obligates the prosecution to learn of any evidence favorable to the defendant known to the police, including impeachment evidence. Impeachment evidence in officer personnel files cannot constitutionally be excluded from the prosecution's *Brady* disclosure obligations. The prosecutor is in the best position to evaluate whether evidence must be disclosed because it is materially favorable to the defense. The prosecutor is the only person with access to the entire landscape of evidence that will or could be presented against the defendant at trial. At the pretrial stage, the trial court's knowledge of the details of the case is often very limited. Although the significance of much impeachment evidence would likely be obvious to all, the import of other information might be clear to the prosecutor but not to the trial court. The *Brady* materiality standard looks at the suppressed evidence considered collectively, not item by item. Therefore, the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of reasonable probability is reached. The trial court cannot analyze the cumulative impact of nondisclosure of a piece of exculpatory—but not itself material—evidence in an officer's personnel file.

CA(21) (21)
Constitutional Law § 26 > Legislation > Construction in Favor of Constitutionality.

The common practice is to construe statutes, when reasonable, to avoid difficult constitutional questions. If reasonably possible the courts must construe a statute to avoid doubts as to its constitutionality.

CA(22) (22)
Discovery § 42.6 > Criminal Cases > By Defendant > Law Enforcement Officers > Personnel Files > Standards of Materiality.

A *Pitchess* motion may be initiated by a defendant, so a defendant can obtain any information from personnel files discoverable under the *Pitchess* scheme, regardless of whether the prosecutor concludes there is evidence that must be disclosed under *Brady*. Moreover, *Brady* and *Pitchess* employ different standards of materiality. Unlike the high court's constitutional materiality standard in *Brady*, which tests whether evidence is material to the fairness of trial, a defendant seeking *Pitchess* disclosure need only show that the information sought is material to the subject matter involved in the pending litigation (*Evid. Code, § 1043, subd. (b)(3)*). Because *Brady*'s constitutional materiality standard is narrower than the *Pitchess* requirements, any citizen complaint that meets *Brady*'s test of materiality necessarily meets the relevance standard for disclosure under *Pitchess* (*Evid. Code, § 1045, subd. (b)*).

CA(23) (23)
Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Procedures for Compliance.

Brady imposes the disclosure obligation on the prosecution, but it allows some flexibility in how the prosecution complies with that obligation. District attorneys need some mechanism for ensuring that they learn of *Brady* material within their constructive possession. But the choice of that mechanism is within

district attorneys' broad discretionary powers in the initiation and conduct of criminal proceedings.

CA(24) (24)

Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Materiality > In Camera Review.

Absent a specific request from the defendant, initial *Brady* materiality reviews are performed by the prosecution alone. Thus, in the typical case where a defendant makes only a general request for exculpatory material under *Brady*, it is the state that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. It may be appropriate for a court to conduct in camera *Brady* review of confidential files for specific exculpatory evidence requested by a defendant. Prosecutorial review of possible *Brady* materials is normally sufficient, and in camera review is reserved for cases where the defense has become aware that exculpatory evidence was withheld.

CA(25) (25)

Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Materiality > In Camera Review.

The government is primarily responsible for deciding what evidence it must disclose to the defendant under *Brady*. And at least where a defendant has made only a general request for *Brady* material, the government's decision about disclosure is ordinarily final—unless it emerges later that exculpatory evidence was not disclosed. When the defendant seeks access to specific materials that the government maintains are not discoverable under *Brady*, however, a trial court may in some instances conduct an in camera review of the disputed materials. To justify such a review, the defendant must make some showing that the materials in question could contain favorable, material evidence. Accordingly, nothing suggests that, merely because information is of a sensitive nature, the prosecution may compel a trial court to conduct the review for *Brady* materials in the first instance, particularly where the prosecution may access those files and conduct its own review for *Brady* materials.

CA(26) (26)

Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Materiality > In Camera Review.

That there may be some role for the trial court in assisting prosecutors to make difficult [*1055] determinations about the materiality of specific items of evidence, particularly where there are confidentiality concerns, does not mean prosecutors may obligate the trial court to perform an extensive initial *Brady* review, as opposed to reviewing particular documents identified by the prosecutor. The responsibility for performing an initial *Brady* review remains with the prosecution. A trial court has no obligation to conduct a general *Brady*-rule in camera search through the files of the prosecutor when the prosecutor has assured the court that all possibly exculpatory material has been produced.

CA(27) (27)

Statutes § 30 > Construction > Absurd Consequences.

Language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.

CA(28) (28)

Discovery § 42.6 > Discovery > By Defendant > Law Enforcement Officers > Personnel Files > Evidence Favorable to Defendant.

Although the prosecution has the obligation to identify evidence in officer personnel files that meets the Brady materiality standard, a motion under Evid. Code, § 1043, is required to disclose the *Brady* material to the defendant.

CA(29) (29)

Criminal Law § 140 > Discovery > Evidence Favorable to Defendant > Duty to Disclose > Peace Officer Personnel Files > Materiality > Duty of Prosecutor.

The trial court did not err in refusing to undertake a *Brady* review of materials identified by a police department, where the prosecution had not undertaken such a review and identified for the court the documents it believed met *Brady*'s materiality standard. Pen. Code, § 832.7, subd. (a), does not preclude prosecutorial access for *Brady* review, and *Brady* and

its progeny allocate responsibility for compliance to the prosecution.

[*Erwin et al., Cal. Criminal Defense Practice (2014) ch. 70, § 70.04.*]

Counsel: George Gascón, District Attorney, Jerry P. Coleman, Laura vanMunching and Allison G. MacBeth, Assistant District Attorneys, for Petitioner and Real Party in Interest the People.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Laurence K. Sullivan and Seth K. Schalit, Deputy Attorneys General, for California Attorney General as Amicus Curiae on behalf of Petitioner and Real Party in Interest the People. [*1056]

Gregory D. Totten, District Attorney (Ventura County) and Michael D. Schwartz, Assistant District Attorney, as Amicus Curiae on behalf of Petitioner and Real Party in Interest the People.

Rains Lucia Stern and Michael L. Rains for Peace Officers' Research Association of California (PORAC), The PORAC Legal Defense Fund and The San Francisco Police [**2] Officers' Association as Amici Curiae on behalf of Petitioner and Real Party in Interest the People.

Nancy E. O'Malley, District Attorney (Alameda County) and Jeff Rubin, Deputy District Attorney, for Appellate Committee of the California District Attorneys Association as Amicus Curiae on behalf of Petitioner and Real Party in Interest the People.

Jeffrey F. Rosen, District Attorney (Santa Clara) and David A. Angel, Assistant District Attorney, as Amicus Curiae on behalf of Petitioner and Real Party in Interest the People.

Dennis J. Herrera, City Attorney, and Christine Van Aken, Deputy City Attorney, for Petitioner City and County of San Francisco.

Nina D. Sariaslani for Petitioner San Francisco Police Department.

Sedgwick and Michael L. Fox for Respondent.

Jeff Adachi, Public Defender, Matt Gonzalez, Chief Attorney, and Christopher Gauger, Deputy Public Defender, for Real Party in Interest Daryl Lee Johnson.

Judges: Opinion by Simons, Acting P. J., with Needham and Bruiniers, JJ., concurring.

Opinion by: Simons, Acting P. J.

Opinion

SIMONS, Acting P. J.—This case presents an issue of first impression: In fulfilling its federal constitutional duty to disclose exculpatory evidence to a criminal defendant under *Brady v. Maryland (1963) 373 U.S. 83 [10 L. Ed. 2d 215, 83 S. Ct. 1194]* (*Brady*), is the prosecution entitled to direct access to peace officer personnel files? In this consolidated writ proceeding, petitioners the San Francisco District Attorney and the San Francisco Police Department[1] [*1057] argue that [**3] in this state such access is barred by *Penal Code section 832.7, subdivision (a)* (*Penal Code section 832.7(a)*). *Section 832.7(a)* is among the statutes adopted by the Legislature to codify the decision in *Pitchess v. Superior Court (1974) 11 Cal.3d 531 [113 Cal. Rptr. 897, 522 P.2d 305]* (*Pitchess*), regarding the discovery in criminal cases of citizen complaints against law enforcement witnesses. *Section 832.7(a)* provides, in part, that peace officer personnel records are confidential and may be disclosed in a criminal proceeding only pursuant to a motion under *Evidence Code section 1043* (*Section 1043*). Petitioners argue that, because *section 832.7(a)* bars direct prosecutorial access to these files, the trial court is required, after a proper showing by the prosecution, to conduct the *Brady* review of the files to identify materials that must be disclosed to the defendant. Petitioners suggest the prosecution may obtain such a review and disclosure by filing a motion under *Section 1043*.

[1] One petition (**A140767**) was filed in the name of the People of the State of California, represented by the San Francisco District Attorney (hereafter referred to as the "People," "District Attorney," "prosecution," or "prosecutor"). The other petition (A140768) was filed by the City and County of San Francisco through the San Francisco Police Department (referred to herein as the "SF Police Department"). Defendant Daryl Lee Johnson is a real party in interest [**4] in both petitions, and the People are an additional real party in interest in the SF Police Department's petition.

Respondent Superior Court of the City and County of San Francisco rejected petitioners' contentions, concluding that *Section 1043* does not apply to motions seeking review of peace officer personnel records under *Brady*, and *section 832.7(a)* is unconstitutional to the extent it bars the prosecution from obtaining access to officer personnel records in order to comply with *Brady*. The court directed the SF Police Department to give the District Attorney access to the relevant officer personnel files so that the District Attorney can comply with *Brady*'s disclosure obligations.

We deny the writ petitions to the extent they challenge the respondent superior court's order requiring the SF Police Department to provide the prosecution access to officer personnel files to allow for identification of any *Brady* materials in those files. We conclude that *section 832.7(a)*, properly interpreted, does not create a barrier between the prosecution and the performance of its duty under *Brady*; our construction of *section 832.7(a)* makes it unnecessary to consider the constitutionality of barring prosecutorial access to officer personnel files for the purpose of identifying *Brady* materials therein. [**5] [2] On the other hand, we grant the writ petitions to the extent they challenge the respondent superior court's refusal to consider any request for disclosure of *Brady* materials pursuant to a motion under *Section 1043*. We conclude that, prior to disclosure to defendant of any *Brady* material identified by the District Attorney, the prosecution must seek an order authorizing such disclosure under *Section 1043*. [*1058]

BACKGROUND

The two petitions for writ of mandate/prohibition involved in the present proceeding arise from a felony domestic violence case, *People v. Johnson* (Super. Ct. S.F. City and County, No. 12029482).

On November 14, 2012, the District Attorney filed a complaint charging defendant Johnson with one count of felony domestic violence (*Pen. Code, § 273.5, subd. (a)*), and one count of misdemeanor injuring a wireless communication device (*Pen. Code, § 591.5*). At the December 2013 preliminary hearing, Police Officer Paul Dominguez [**6] testified regarding an incident on November 11, 2012, during which he and Police Officer Antonio Carrasco responded to a 911 call from a residence in San Francisco. Johnson admitted he hit the victim, a female minor; Johnson claimed the minor had "[m]aced" him. The victim showed Officer Dominguez a two-inch lump on the back of her head where Johnson struck her. She also told the officer Johnson had tried to prevent her from calling 911 by grabbing her cell phone and then a cordless phone out of her hands.

The District Attorney's Motion for in Camera Brady *Review*

In December 2013, the prosecution filed a "Notice of Motion for Discovery of San Francisco Police Department Peace Officer Personnel Records Under *Brady* and *Evidence Code Sections 1043* and *1045(e)*." The motion requested that the court conduct an in camera review of personnel records of Officers Dominguez and Carrasco to determine whether any items in their files were material under *Brady* and therefore subject to disclosure.[3] It also requested that the court "disclose to the District Attorney's Office and the defense any *Brady* material located in the personnel files, and ... issue a protective order to protect the officers' statutory right of privacy in their personnel [**7] files."

The December 2013 motion was supported by a declaration from the assistant district attorney prosecuting the case. The declaration averred that Officers Dominguez and Carrasco "are necessary and essential witnesses for the prosecution in this case on virtually all the issues and each of the counts charged." The SF Police Department had informed the prosecution that each of the officers had "material in

---

[2] In *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1 [124 Cal. Rptr. 2d 202, 52 P.3d 129] (***Brandon***), the California Supreme Court reserved "the question of whether Penal Code section 832.7, which precludes disclosure of officer records 'except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code,' would be constitutional if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*." (*Brandon*, at p. 12, fn. 2.)

[3] The trial court previously denied a similar prosecutorial motion with respect to Officer Carrasco only. The trial court's order following the December 2013 motion is the order at issue in this proceeding.

his ... personnel file that *may be* subject to disclosure under" *Brady*. (Italics added.) The declaration did not state that the prosecutor had viewed the potential *Brady* material. Instead, it stated the records were in the "exclusive possession and control" of the SF Police Department and the District Attorney did not have "actual" or "constructive" [*1059] possession of the records. Nevertheless, the prosecutor averred that, based on the representation from the SF Police Department that the files contained potential *Brady* material, she "believe[s]" the officers' personnel files contain "sustained [**8] allegations of specific *Brady* misconduct, reflective of dishonesty, bias, or evidence of moral turpitude. I believe on these case facts, and given the officers' roles, that such misconduct would be constitutionally material to the instant case in the *Brady* sense." The declaration further explained that the records "are material to the pending litigation in that they pertain to the credibility of a necessary and material prosecution witness, and could either impeach said witness or lead to evidence exonerating the defendant."

Bureau Order No. 2010-01

The prosecution's December 2013 motion was in accordance with the SF Police Department's bureau order No. 2010-01 (Bureau Order), which established the department's procedures for *Brady* disclosure of materials in employee personnel files.[4] A premise underlying the Bureau Order is that the District Attorney cannot legally access confidential officer personnel files absent a trial court order obtained pursuant to a motion under *Section 1043*. The Bureau Order explains its purpose as follows: Because "[r]epetitive requests by the District Attorney that the [SF Police] Department check employee personnel files of Department employees who may be witnesses create unnecessary [**9] paperwork and personnel costs ... the Department is adopting a procedure under which the Department advises the District Attorney's Office of the names of employees who have information in their personnel files that may require disclosure under *Brady*. The District Attorney's Office then makes a motion under *Evidence Code 1043* and *1045* for *in camera* review of the records by the court."

The Bureau Order includes examples and definitions of evidence that may constitute "potential '*Brady* material.'" The Bureau Order contemplates that potential *Brady* material will be identified on an ongoing basis and that the District Attorney's office will be notified on an ongoing basis that the personnel files for particular officers may contain *Brady* material. When the SF Police Department becomes aware of potential *Brady* material regarding an officer, a synopsis is created identifying the employee, the conduct at issue, and the documents and information for potential disclosure. Thereafter, a departmental "'*Brady* Committee'" meets to review the synopsis and recommend to the chief of police [**10] whether the employee's name should be disclosed [*1060] to the District Attorney.[5] The chief of police approves or disapproves the committee's recommendation. If disclosure of an officer's name is approved, the District Attorney is notified only that the officer "has material in his or her personnel file that may be subject to disclosure under" *Brady*.

The Bureau Order contemplates that the District Attorney "will create a list of Department employees who have potential *Brady* material in their personnel files." It further contemplates that, "When the District Attorney's office deems that a law enforcement officer, identified by the Department as having possible *Brady* material in their personnel file, is a material witness in a pending criminal case ... the District Attorney shall make a 'Brady' motion under *Evidence Code Sections 1043* and *1045(e)* to the court for *in-camera* review of the records." The SF Police Department will not disclose material from officer personnel files [**11] to any party absent a trial court order for disclosure. In its conclusion, the Bureau Order explains, "The purpose of this procedure is to ensure that prosecutors and the defense receive sufficient information to comply with the constitutional requirements of *Brady* while

[4] The Bureau Order relates to both police officer and civilian personnel records, but we refer herein only to officer personnel records.

[5] This committee consists of the assistant chief of the office of chief of staff, the director of risk management, the head of the legal division, the director of staff services, the author of the synopsis, and a retired judge with criminal law experience.

protecting the legitimate privacy rights of law enforcement witnesses."

Defendant Johnson's and the SF Police Department's Responses

Defendant Johnson responded to the prosecutor's December 2013 motion with his own "Motion for Brady discovery." Johnson requested that the trial court either conduct the requested in camera *Brady* review; declare section 832.7(a) unconstitutional and direct the SF Police Department to allow the prosecutor to access the officer personnel files to perform a *Brady* materiality review; or dismiss the case due to the prosecution's failure to comply with *Brady*. Johnson indicated his belief that he could not himself obtain disclosure of the material in the personnel files, stating, "defendant knows only that those files contain potential *Brady* material, but cannot move for it specifically because ... he does not know what it is, or how it might impact his defense."

The SF Police Department responded to the prosecutor's [**12] motion, generally expressing agreement with the positions taken by the prosecutor and urging the trial court to perform the in camera review contemplated by the Bureau Order's *Brady* disclosure protocol.

The Trial Court's Ruling

On January 7, 2014, following a hearing, the superior court issued a lengthy "Order Re *Brady* Motions." The court concluded the prosecution had [*1061] not made a sufficient showing of *Brady* materiality to justify court review of the records.[6] The court also concluded that the *Pitchess* motion procedures (§ 1043 et seq.) do not apply to motions seeking review of police officer personnel records under *Brady*, and section 832.7(a) is unconstitutional to the extent it bars the prosecution from obtaining access to officer personnel records in order to comply with *Brady*.

The trial court denied the prosecution's Section 1043 motion for in camera *Brady* review and directed the SF Police Department "to give the District Attorney [**13] access to the personnel files of officers Dominguez and Carrasco 'so the prosecution can comply with its *Brady* mandate.'" The order continued, "Once the District Attorney has reviewed the personnel records, he will be able to fulfill his constitutional obligation to disclose to the Public Defender any information that is material under *Brady*. If a close question nonetheless remains as to whether information in a specific document or documents should be disclosed under *Brady*, the District Attorney will be able to make the threshold" materiality showing necessary to justify review of the documents by the trial court.

The Present Writ Proceeding

Petitioners filed the present petitions on January 17, 2014. Petitioners seek issuance of a writ of mandate and/or prohibition ordering respondent superior court to vacate its January 2014 order denying the prosecution's Section 1043 motion, directing the SF Police Department to give the prosecution access to officer personnel files, and declaring section 832.7(a) unconstitutional. Petitioners request that this court direct respondent court to accept the officer personnel records proffered by the SF Police Department and to review the records in camera and disclose all [**14] *Brady* materials to both the prosecution and defense counsel, subject to a protective order.[7]

This court stayed the January 2014 order and trial in defendant Johnson's criminal case, consolidated the two writ proceedings, and directed the respondent court to show cause why the relief requested in the petitions should not be granted. This court also granted applications for leave to file amicus curiae briefs supporting petitioners by the Appellate Committee of the California District Attorneys Association, the Ventura County District Attorney, the Santa Clara County District Attorney, and the Police Officers' [*1062] Research Association of California et al. This court also granted the respondent superior court's

---

[6] The prosecution argued it only needed to make "'some plausible showing'" the personnel files contain *Brady* material and the showing could be made by informing the trial court that the officers were critical witnesses and the SF Police Department had indicated the files had potential *Brady* material.

[7] In his briefing in this writ proceeding, defendant and real party in interest Johnson does not object to the relief sought by petitioners, involving in camera *Brady* review by the trial court.

request to file a response to the petitions, and the Attorney General filed an amicus curiae brief.[8]

DISCUSSION

This case is the latest in a body of case law considering the "interplay" between the United States Supreme Court's 1963 decision in *Brady, supra, 373 U.S. 83*, and the statutory discovery procedures enacted by the California Legislature after the California Supreme Court's decision in *Pitchess, supra, 11 Cal.3d 531*. (*Brandon, supra, 29 Cal.4th at p. 7*.) "In *Brady*, the high court announced a rule, founded on the due process guarantee of the federal Constitution, that requires the prosecution to disclose evidence that is favorable and 'material' to the defense." (*Ibid.*) The *Pitchess* procedures include, among others, the key statutory provisions at issue in the present case, *section 832.7(a)*, *Section 1043*, and *Evidence Code section 1045* (*Section 1045*).[9] *Section 832.7(a)* declares that peace officer personnel records "are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant" to *Section 1043*.[10] *Section 1043* sets forth requirements for a motion seeking "discovery or disclosure" of peace officer personnel records, and *Section 1045* contains "protective provisions" related to officer privacy interests. (*City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 83 [260 Cal. Rptr. 520, 776 P.2d 222]* (*City of Santa Cruz*).)

At issue in this case is whether the prosecution may routinely require the trial court to conduct the initial *Brady* materiality review of documents from officer personnel files identified by the SF Police Department as containing potential *Brady* material.[11] Petitioners argue *section 832.7(a)* prohibits the prosecution from accessing officer personnel files absent a motion under [*1063] *Section 1043*. They contend the trial court erred in denying the prosecution's request under *Section 1043* that the court perform an in camera *Brady* review of the documents identified by the SF Police Department and that the court authorize the disclosure to the parties of any evidence the court deemed material under *Brady*. They further contend the trial court erred in concluding that *section 832.7(a)* is unconstitutional to the extent it denies prosecutorial access to officer personnel files for *Brady* purposes, and in directing the SF Police Department to give the prosecution access to the personnel files of two officer witnesses, so that the prosecution could identify any materials required [**17] to be disclosed under *Brady*.

We conclude that, properly construed, *section 832.7(a)* does not preclude prosecutorial access to officer personnel files for *Brady* purposes. Thus, we need not reach the constitutionality issue addressed by the trial court and reserved [**18] in *Brandon, supra, 29 Cal.4th at page 12, footnote 2*. At various places in our opinion we refer to the initial review and identification of *Brady* materials by the prosecution as the "first stage" of the *Brady* disclosure process. We further conclude that, prior to disclosing the identified *Brady* material to the defendant, the prosecution must file a motion for such disclosure under *Section 1043*. We refer to this request for disclosure as the "second stage" of the *Brady* disclosure process. This resolution is consistent with the statutory language, the

---

[8] On April 21, 2014, respondent superior court filed a motion for judicial notice of the "Budget Snapshot" for the court's 2014–2015 fiscal year. Because the budgetary constraints faced by the court are [**15] not relevant to the issues of law we decide in this writ proceeding, the motion for judicial notice is denied.

[9] Unless otherwise indicated, all further undesignated statutory references are to the Evidence Code.

[10] Section 832.7(a) also [**16] references section 1046, but that provision is not relevant in the present case. Section 1046 contains special requirements applicable to requests for disclosure involving allegations of excessive force.

[11] Petitioners may take issue with our suggestion that they seek to "routinely" shift review to the trial court. However, their position essentially would shift the responsibility for identifying *Brady* material in officer personnel files to the trial court; such a categorical change is properly characterized as mandating routine trial court review for those materials. The prosecution informed the trial court that the District Attorney's office would be making approximately 250 requests for such reviews each year. Petitioners may also take issue with our characterization of the requested trial court review as the "initial" *Brady* materiality review, because they seek for the court to review a pool of potential exculpatory materials identified by the SF Police Department. But the SF Police Department review is not a review for *Brady* materiality in the context of a particular case, so the requested trial court review would be the first true *Brady* review.

Legislature's intent for a judicial role in disclosure to protect officer privacy, and the prosecution's federal constitutional obligations under *Brady*.

I. *Standard of Review and Statutory Interpretation Principles*

HN1 Resolution of the issues in this writ proceeding turns on the interpretation of statutes, primarily section 832.7(a) and Section 1043. Our review is de novo. (*Ceja v. Rudolph & Sletten, Inc, (2013) 56 Cal.4th 1113, 1119 [158 Cal. Rptr. 3d 21, 302 P.3d 211]*.)

CA(1) (1) "'As ***HN2*** in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose.' [Citation.] The well-established rules for performing this task require us to begin by examining the statutory language, giving it a plain and commonsense meaning. [Citation.] We do not, however, consider [**19] the statutory language in isolation; rather, we look to the statute's entire substance in order to determine its scope and purposes. [Citation.] That is, we construe the words in question in context, keeping in mind the statute's nature and obvious purposes. [Citation.] We must harmonize the statute's various parts [*1064] by considering it in the context of the statutory framework as a whole. [Citation.] If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history. [Citation.]" (*Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC (2011) 52 Cal.4th 1100, 1106–1107 [133 Cal. Rptr. 3d 738, 264 P.3d 579]*.)

II. *The Prosecution's Disclosure Obligations Under* Brady

CA(2) (2) "In *Brady*, the United States Supreme Court held 'that ***HN3*** the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' [Citation.] The high court has since held that the duty to disclose such evidence exists even though there has been no request by the accused [citation], that the duty encompasses [**20] impeachment evidence as well as exculpatory evidence [citation], and that the duty extends even to evidence known only to police investigators and not to the prosecutor [citation]. Such evidence is material '"if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."' [Citation.]" (*People v. Salazar (2005) 35 Cal.4th 1031, 1042 [29 Cal. Rptr. 3d 16, 112 P.3d 14]*.)

HN4 ***CA(3)*** (3) "Responsibility for *Brady* compliance lies exclusively with the prosecution ... ." (*In re Brown (1998) 17 Cal.4th 873, 878 [72 Cal. Rptr. 2d 698, 952 P.2d 715]* (*Brown*).) "The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf . ...' [Citation.] Courts have thus consistently 'decline[d] "to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel."' [Citation.]" (*Id. at p. 879*; see *Brandon, supra, 29 Cal.4th at p. 8* [the *Brady* disclosure requirement "encompasses evidence 'known only to police investigators and not to the prosecutor'"].) Thus, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the [**21] government's behalf in the case, including the police." (*Kyles v. Whitley (1995) 514 U.S. 419, 437 [131 L. Ed. 2d 490, 115 S. Ct. 1555]* (*Kyles*); accord, *Youngblood v. West Virginia (2006) 547 U.S. 867, 869–870 [165 L. Ed. 2d 269, 126 S. Ct. 2188]*; *People v. Whalen (2013) 56 Cal.4th 1, 64 [152 Cal. Rptr. 3d 673, 294 P.3d 915]*; *Brandon, supra, 29 Cal.4th at p. 8*.) This is because *Brady* places on the prosecution an "affirmative duty to disclose evidence favorable [*1065] to a defendant" (*Kyles, at p. 432*), and "'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it ...' [citation]" (*id. at p. 438*). *Kyles* continued, "Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and

even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." (*Kyles, at p. 438*; accord, *Brown, at p. 881*.)

CA(4) (4) As the California Supreme Court emphasized in *Brown*, ***HN5*** "the Supreme Court has unambiguously assigned the duty to disclose solely and exclusively to the prosecution; those assisting the government's case are no more than its agents. [Citations.] By necessary implication, the duty is nondelegable at least to the extent the prosecution remains responsible for any lapse in compliance. Since [**22] the prosecution must bear the consequences of its own failure to disclose [citations], a fortiori, it must be charged with any negligence on the part of other agencies acting in its behalf [citations]." (*Brown, supra, 17 Cal.4th at p. 881*.)

III. *The* Pitchess *Decision and Its Codification in Statutory Law*

CA(5) (5) In *Pitchess, supra, 11 Cal.3d 531*, ***HN6*** the California Supreme Court held criminal defendants have a right to discover citizen complaints of misconduct found in peace officer personnel files. Specifically, the court permitted the defendant, charged with battery on sheriff's deputies, to discover any complaints of excessive force in the deputies' personnel files. (*Id. at p. 534*.) The holding was an extension of "judicially created doctrine evolving in the absence of guiding legislation ... based on the fundamental proposition that [the accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." (*Id. at p. 535*, citations omitted.) The court explained that a defendant "may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial." (*Id. at p. 536*.) "The requisite showing may be satisfied by general allegations which establish some cause for discovery other than 'a mere desire [**23] for the benefit of all information which has been obtained by the People in their investigation of the crime.' [Citations.]" (*Id. at p. 537*.) Although the *Pitchess* procedures "must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial" (*People v. Mooc (2001) 26 Cal.4th 1216, 1225 [114 Cal. Rptr. 2d 482, 36 P.3d 21]* (*Mooc*)), the *Pitchess* decision itself did not actually rely on the prosecutor's obligations under *Brady* as a basis for its holding. [*1066]

CA(6) (6) In 1978, ***HN7*** the California Legislature "codified the privileges and procedures surrounding what had come to be known as '*Pitchess* motions' ... through the enactment of *Penal Code sections 832.7* and *832.8* and *Evidence Code sections 1043 through 1045*." (*City of Santa Cruz, supra, 49 Cal.3d at p. 81*, fn. omitted.) *City of Santa Cruz* described the statutory scheme as follows: "The Penal Code provisions define 'personnel records' (*Pen. Code, § 832.8*) and provide that such records are 'confidential' and subject to discovery only pursuant to the procedures set forth in the Evidence Code. (*Pen. Code, § 832.7*.) ... *[S]ections 1043* and *1045* set out the procedures for discovery in detail. As here pertinent, *section 1043, subdivision (a)* requires a written motion and notice to the governmental agency which has custody of the records sought, and *subdivision (b)* provides that such motion shall [**24] include, inter alia, '(2) A description of the type of records or information sought; and [¶] (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records.'" (*City of Santa Cruz, at pp. 81–83*.)

CA(7) (7) *City of Santa Cruz* continued: ***HN8*** "A finding of 'good cause' under *section 1043, subdivision (b)* is only the *first* hurdle in the discovery process. Once good cause for discovery has been established, *section 1045* provides that the court shall then examine the information 'in chambers' in conformity with *section 915* (i.e., out of the presence of all persons except the person authorized to claim the privilege and such other persons as he or she is willing to have present), and shall *exclude* from disclosure several enumerated categories of information, including: (1) complaints more than five years old, (2) the 'conclusions of any officer investigating a complaint ...' and (3) facts which are 'so remote as to make disclosure of little or no practical benefit.' (*§ 1045, subd. (b)*.)" (*City of Santa Cruz, supra, 49 Cal.3d at p. 83*; accord, *Alford v. Superior Court (2003) 29 Cal.4th*

1033, 1039 [130 Cal. Rptr. 2d 672, 63 P.3d 228] (*Alford*).) "The statutory scheme thus carefully balances two directly conflicting [**25] interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to his defense. The relatively relaxed standards for a showing of good cause under section 1043, subdivision (b)—'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought—insure the production for inspection of all potentially relevant documents. ***HN9 CA(8)*** (8) The in camera review procedure and disclosure guidelines set forth in section 1045 guarantee, in turn, a balancing of the officer's privacy interests against the defendant's need for disclosure. As a further safeguard, moreover, the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead ... that the agency reveal only the name, [*1067] address and phone number of any prior complainants and witnesses and the dates of the incidents in question. [Citations.]" (City of Santa Cruz, at p. 84; see Mooc, supra, 26 Cal.4th at p. 1227.)[12]

IV. Section 832.7(a) Does Not Preclude Prosecutorial Access to Officer Personnel Files for Brady Purposes

Section 832.7(a) provides: ***HN10*** "Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office." As noted previously, section 832.7(a) was adopted by the Legislature as part of the codification of the *Pitchess* decision. The stated purpose of the bill that resulted in the enactment of section 832.7(a) and Sections 1043 and 1045 was "'to give the peace officer and his or her employing agency the right to refuse to disclose any information concerning the officer or complaints or investigations of the officer [**27] in both criminal and civil proceedings. ... Personnel files of peace officers ... are deemed confidential and not subject to disclosure or discovery except as provided in this bill.'" (Assem. Com. on Criminal Justice, Analysis of Sen. Bill No. 1436 (1977–1978 Reg. Sess.) as amended Aug. 7, 1978; see County of Los Angeles v. Superior Court (1990) 219 Cal.App.3d 1605, 1609 [269 Cal. Rptr. 187].)

HN11 CA(9) (9) In complying with *Brady* with respect to materials in peace officer personnel files, there are two analytically distinct stages: identification and disclosure. The first requires access to officer personnel files to identify materials that must be disclosed under *Brady*. The second stage is disclosure of *Brady* materials to the defendant in a criminal proceeding. Petitioners contend that section 832.7(a), by effectively precluding prosecutorial access to the personnel files, requires, at the first stage, that the trial court make the decision as to what must be disclosed under *Brady* without identification by the prosecutor of the materials that should be disclosed. As explained below, we disagree that section 832.7(a) eliminates prosecutorial access; although the statute specifies procedures for the second stage *disclosure* of *Brady* [*1068] materials in criminal proceedings (see pt. VII., *post*), it does not prohibit the prosecutor, as the head [**28] of the prosecution team, from performing the constitutionally mandated role of identifying *Brady* materials in the personnel files. In particular, when a prosecutor acting as the head of a prosecution team inspects officer personnel files, or portions thereof, for *Brady* purposes, that inspection does not constitute disclosure of the files in a criminal proceeding, or otherwise breach the confidentiality of the files.

A. *Prosecutorial Access to Personnel Records for* Brady *Purposes Does Not Constitute Disclosure of the Files in a Criminal Proceeding*

---

[12] Due to this limitation on discovery under *Pitchess*, the potential material for disclosure under *Brady* may be much more extensive than the potential material for disclosure under *Pitchess*. In the present [**26] case, for example, the prosecution indicated that a previous *Pitchess* motion resulted in the disclosure of six pages; in contrast, there were 505 pages of potential *Brady* material.

In determining whether prosecutorial access to officer personnel files constitutes a disclosure prohibited by section 832.7(a), the decision in Michael v. Gates (1995) 38 Cal.App.4th 737 [45 Cal. Rptr. 2d 163] (*Gates*) provides guidance. There, in an earlier proceeding, a police department permitted a deputy city attorney to review the personnel records of a former police officer in order to identify impeachment evidence for use in a lawsuit against the department, in which the former officer was an expert witness for the plaintiff. (*Id. at p. 740*.) No evidence from the personnel records was actually introduced in the case. (*Ibid.*) Subsequently, the former officer sued members of the police department and city attorney's office, alleging, [**29] among other things, invasion of his right to privacy and violation of section 832.7(a) and Section 1043. (*Gates, at p. 741*.) As petitioners argue in the present case, the former officer in *Gates* argued the deputy city attorney was prohibited from reviewing the personnel files without a noticed motion under Section 1043 "and, presumably, without obtaining a court order after the in camera hearing prescribed in Evidence Code section 1045." (*Gates, at p. 743*.)

CA(10) (10) In holding that the officer's claims failed, *Gates* focused on the language in section 832.7(a) directing that officer personnel records "shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." *Gates* concluded there was no "'discovery or disclosure' of [the officer's] records within the meaning of the statutes." (*Gates, supra, 38 Cal.App.4th at p. 743*.) The court reasoned: ***HN12*** "[*Section 1043*] applies to 'any case in which discovery or disclosure' of peace officer personnel records is sought. The statutes thus protect [officer] privacy rights by requiring a noticed motion, in camera hearing, and court order before [officer] records could be introduced or otherwise used in any litigation." (*Gates, at p. 743*.) But the legislative intent "to balance a litigant's need to present a case and a peace officer's right to privacy ... [¶] ... would not be advanced by extending the procedural [**30] requirements to a preliminary review of peace officer records, where there is no disclosure in litigation, and no 'discovery.' In ordinary legal usage, 'discovery' refers to the inspection of [*1069] documents and other materials in the possession or control of an adverse party in litigation, a process which has as its principle purpose the elimination of the 'game' element of litigation. [Citation.] There is no suggestion that the Legislature intended any other meaning here. An agency which reviews its own records with its attorney has not engaged in discovery." (*Id. at p. 744*, citation omitted.)

CA(11) (11) *Gates* stated its holding as follows: "Thus, we hold that ***HN13*** where, as here, a governmental agency and its attorney conduct a contained and limited review of peace officer personnel files within the custody and control of the agency, for some relevant purpose, there is no disclosure under the statutes. The statutory scheme is designed to protect peace officers' 'just claim to confidentiality' and to regulate the use of peace officer personnel records in civil and criminal proceedings. [Citation.] It was not intended to, and does not, create substantive or procedural obstacles to a police agency's review of its own files." (*Gates, supra, 38 Cal.App.4th at p. 745*.)

CA(12) (12) The present [**31] case is not materially distinguishable. ***HN14*** Under Government Code section 26500, the District Attorney is the public prosecutor in a criminal prosecution, representing the People of the State of California. (*Dix v. Superior Court (1991) 53 Cal.3d 442, 451 [279 Cal. Rptr. 834, 807 P.2d 1063]*.) As noted previously, the District Attorney leads a " ' " 'prosecution team' " which includes both investigative and prosecutorial personnel." ' [Citation.]" (*Brown, supra, 17 Cal.4th at p. 879*, fn. omitted.) Due to the "'close working relationship'" between the police and prosecutors (*id. at fn. 3*, quoting *U.S. v. Brooks (D.C. Cir. 1992) 296 U.S. App.D.C. 219 [966 F.2d 1500, 1503]* (*Brooks*)), courts in the *Brady* context have "consistently" declined to distinguish between separate agencies of the same government that are part of the prosecution team (*Brown, at p. 879*; see *id. at p. 881* ["those assisting the government's case are no more than its agents"]). Even though the District Attorney in a criminal prosecution is not the attorney for the SF Police Department in the same sense as in *Gates*, the joint operation of the agencies as a prosecution team is a sufficiently analogous relationship, justifying the same result under section 832.7(a).

We therefore conclude the reasoning of Gates is applicable in the present case.[13] In particular, a prosecutorial inspection of an officer's personnel file for *Brady* purposes is not a disclosure of the file within the criminal proceeding. [*1070]

B. *Prosecutorial Access to Personnel Records for* Brady *Purposes Would Not Breach the Confidentiality of the Files*

A separate issue not directly addressed in *Gates* is the significance of section 832.7(a)'s designation of officer personnel files as "confidential." (§ 832.7(a) [records are "confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code"].)

CA(13) (13) In Copley Press, Inc. v. Superior Court (2006) 39 Cal.4th 1272, 1279 [48 Cal. Rptr. 3d 183, 141 P.3d 288] (*Copley*), the California Supreme Court held that ***HN15*** the word "confidential" in section 832.7(a) has independent significance. There, the court considered a newspaper publisher's request under the California [**33] Public Records Act (Gov. Code, § 6250 et seq.) for records relating to a peace officer's administrative appeal of a disciplinary matter. The publisher argued section 832.7(a) did not apply because it was not seeking disclosure in a criminal or civil proceeding. (Copley, at p. 1284.) *Copley* concluded the records were nonetheless confidential and not subject to disclosure under the public records act, reasoning, "If, in passing section 832.7, the Legislature had intended 'only to define procedures for disclosure in criminal and civil proceedings, it could have done so by stating that the records "shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code ... ," without also designating the information "confidential." [Citation.]' [Citations.] Thus, by interpreting the word 'confidential' [citation] as 'establish[ing] a general condition of confidentiality' [citation], and interpreting the phrase 'shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code' [citation] as 'creat[ing] a *limited exception* to the general principle of confidentiality,' we 'give[] meaning to both clauses' of the provision in question. [Citation.]" (Copley, at p. 1285.) Because the personnel files were "confidential," they were exempt from disclosure [**34] under the public records act (Gov. Code, § 6254, subd. (k)).[14] (Copley, at p. 1283; see Long Beach Police Officers Assn. v. City of Long Beach (2014) 59 Cal.4th 59, 67 [325 P.3d 460]; City of Richmond v. Superior Court (1995) 32 Cal.App.4th 1430, 1440 [38 Cal. Rptr. 2d 632].)

Although the officer personnel files within the scope of section 832.7(a) are confidential and may not be disclosed publicly pursuant to the public records [*1071] act, neither *Copley*, nor the Court of Appeal decisions *Copley* cites (Copley, supra, 39 Cal.4th at pp. 1284–1285 & fn. 5), address whether permitting a prosecutor to inspect officer personnel files in the possession of another member of the prosecution team would constitute a breach of confidentiality. The term "confidential" is undefined in the statute and ambiguous. The dictionary defines "confidential" as "communicated, conveyed, acted on, or practiced in confidence : known only to a limited few : not publicly disseminated : PRIVATE, SECRET." (Webster's 3d New Internat. Dict. (2002) p. 476.) Clearly the term prohibits public disclosure of information from officer personnel files, but it is otherwise unclear what limits it sets on access. It does not create an absolute bar to access, because presumably members of a police department who have [**35] legitimate reasons for accessing officer personnel files do not thereby breach the confidentiality of the files. It also seems safe to

---

[13] [**32] The authors of the treatise California Criminal Discovery reach the same conclusion, stating: "When the district attorney (or Attorney General) prosecutes a criminal case arising out of an investigation by a law enforcement agency, the investigating law enforcement agency is part of the 'prosecution team,' the district attorney is the attorney for the 'prosecution team,' and the disclosure to the district attorney of the contents of the personnel records of a police officer employed by that investigating law enforcement agency does not constitute 'disclosure' of the personnel records within the meaning of Penal Code section 832.7(a)." (Pipes & Gagen, Cal. Criminal Discovery (4th ed. 2008) § 10:20.3.1, p. 964.)

[14] Government Code section 6254, subdivision (k) exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

assume that designating the files as confidential means that government employees both inside and outside the police department who do *not* have a legitimate basis for accessing officer personnel files cannot do so. However, the scope of the confidentiality is otherwise unclear.

HN16 CA(14) (14) Where a "statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy. [Citation.]" (*People v. Gonzalez (2008) 43 Cal.4th 1118, 1126 [77 Cal. Rptr. 3d 569, 184 P.3d 702]*.) "'We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*People v. Coronado (1995) 12 Cal.4th 145, 151 [48 Cal. Rptr. 2d 77, 906 P.2d 1232]*.) The Legislature's intent in enacting the statutory *Pitchess* procedures has been summarized as follows: "The report by the Senate Committee on the Judiciary indicates that the main purpose of the 1978 legislation (Sen. Bill No. 1436) was to curtail the practice of record shredding and discovery abuses which allegedly occurred in the wake of the [**36] [*Pitchess*] decision ... . [¶] The analysis of Senate Bill No. 1436 prepared for the Assembly Committee on Criminal Justice notes that '[t]he thrust of this bill is to give the peace officer and ... employing agency the right to refuse to disclose any information concerning the officer or complaints or investigations ... in both criminal and civil proceedings.' ... [¶] The report also explained that the purpose of the bill was to protect personnel records from random discovery by defendants asserting self-defense to charges of criminal assault upon a police officer. [¶] Thus, the Legislature evidenced its purpose to provide retention of relevant records while imposing limitations upon their discovery and dissemination." (*San Francisco Police Officers' Assn. v. Superior Court (1988) 202 Cal.App.3d 183, 189–190 [248 Cal. Rptr. 297]*, citation omitted; accord, *Berkeley Police Assn. v. City of Berkeley (2008) 167 Cal.App.4th 385, 393 [84 Cal. Rptr. 3d 130]*; see Assem. Com. on Criminal Justice, Analysis of [*1072] Sen. Bill No. 1436 (1977–1978 Reg. Sess.) Aug. 18, 1978, p. 2 ["*Discovery* of police personnel files is limited to those instances set forth in *Section 1043 of the Evidence Code* as added by this bill." (italics added)].)

Thus, the Legislature's intent was to protect officer personnel files from public disclosure, and to specify a procedure for discovery of information in such files. The committee reports associated with the enactment never make *any* reference to *Brady*, or [**37] express concern with prosecutorial access to personnel files. (See Neri, Pitchess *v.* Brady*: The Need for Legislative Reform of California's Confidentiality Protection for Peace-Officer Personnel Information* (2012) *43 McGeorge L.Rev. 301, 304* (hereafter Neri) ["The *Pitchess* laws were neither designed to facilitate, nor do they mention, prosecutors' *Brady* duties. Instead, they address only state-law issues regarding criminal discovery and officer privacy rights."].) The legislative history does not support a construction that would deem prosecutorial inspection of officer personnel files for *Brady* purposes a breach of confidentiality within the meaning of *section 832.7(a)*.

HN17 CA(15) (15) The district attorney's office and police department constitute a single prosecution team in any given criminal case, and the police department acts as the prosecutor's "agent" with respect to the retention of potential *Brady* material. (*Brown, supra, 17 Cal.4th at pp. 879, 881*.) For this reason, we determined above that an inspection of officer personnel files by a prosecutor would not constitute disclosure of the files within the criminal proceeding. Similarly, such an inspection would not breach the confidentiality of the files. The district attorney has the discretion to "initiate [**38] and conduct on behalf of the people all prosecutions for public offenses" (*Gov. Code, § 26500*), and information about important officer witnesses may be necessary to the informed exercise of that discretion. An inspection by the head of the prosecution team for *Brady* purposes would not involve any disclosure outside the prosecution team, much less public disclosure of information from the files. It would be consistent with the Legislature's intent to restrict discovery of the files, while preserving the prosecutor's ability to comply with its constitutional obligations. Our construction of the statute is also consistent with *Copley, supra, 39 Cal.4th at page 1283*, which held that the inclusion of the word "confidential" made peace officer personnel files privileged under the public records act. Thus, our conclusion that designating the personnel files as "confidential" does not prohibit prosecutorial access

for *Brady* purposes does not render the word meaningless. Finally, recognizing that prosecutors are not prohibited from accessing officer personnel files for *Brady* purposes is consistent with the apparent access prosecutors have to other confidential information, such as police investigation reports (*Rackauckas v. Superior Court (2002) 104 Cal.App.4th 169, 174–177 [128 Cal. Rptr. 2d 234]*) and the identities of confidential [**39] informants (*People v. Hobbs (1994) 7 Cal.4th 948, 957–964 [30 Cal. Rptr. 2d 651, 873 P.2d 1246]*). [*1073] As the head of the prosecution team, the prosecutor has access to a range of materials otherwise considered to be confidential.[15]

This construction of the term "confidential" in *section 832.7(a)* is also supported by a 1983 Attorney General opinion, the relevant reasoning of which was approved in *Fagan v. Superior Court (2003) 111 Cal.App.4th 607, 617–618 [4 Cal. Rptr. 3d 239]* (*Fagan*).[16] The Attorney General had been asked to consider "what restrictions are placed upon a district attorney in obtaining access to the personnel records of a police officer ... ." (*66 Ops.Cal.Atty.Gen. 128 (1983)* (1983 Attorney General Opinion).) [**40] Applying an exception for investigations of officer conduct (see pt. IV.C., *post*), the Attorney General concluded that "as long as the district attorney is duly investigating 'the conduct of police officers or a police agency' as specified in *section 832.7*, he need not first obtain a court order for access to the records in question." (*66 Ops.Cal.Atty.Gen., supra, at p. 128*.) In the course of reaching that conclusion, the Attorney General considered what it meant for the files to be confidential. The Attorney General noted that "the Legislature and the courts have generally allowed public access to government files relating to the conduct of official business but not to those files relating to the personal lives of individuals. [Citations.] The latter have been treated as 'confidential' so as to protect the right of privacy." (*Id. at p. 129*, fn. omitted.) "'Confidential' information," the Attorney General observed, is "'not publicly disseminated.'" (*Id.* at fn. 3.) The Attorney General further reasoned that disclosure to the district attorney would not compromise the confidentiality of the files. (*Id. at p. 130*.)

Fagan applied the same exception for investigations of officer conduct, and held a district attorney properly obtained the results of urinalysis tests contained in confidential peace officer personnel files in investigating off-duty criminal conduct by the officers. (*Fagan, supra, 111 Cal.App.4th at pp. 610, 615*.) As pertinent in the present case, the court further held that the district attorney's access to the tests did not mean that the tests were no longer [*1074] confidential. (*Id. at pp. 617–618*.) After discussing the 1983 Attorney General Opinion, *Fagan* concluded that, while the district attorney properly accessed the test results, the district attorney was obligated "to maintain the nonpublic nature of the files absent judicial review of the relevance of the information" through a motion under *Section 1043*. (*111 Cal.App.4th at p. 618*.)

CA(16) (16) For the above reasons, we conclude that ***HN18*** an inspection of an investigatory agency's peace officer personnel files for *Brady* materials by the [**42] prosecutor would not constitute a breach of the confidentiality of the files under *section 832.7(a)*.

C. *In the Alternative, the Exception for District Attorney Investigations of Officer Conduct Is Applicable*

Appearing as amicus curiae in this proceeding, the Attorney General encourages this court to conclude the investigation exception applies to *Brady* review of

---

[15] We hold only that such *Brady* reviews of officer personnel files do not breach the confidentiality of the files under section 832.7(a). Our holding should not be construed to mean the prosecution has unlimited access to peace officer personnel files for other reasons, and we do not address whether other disclosures to other governmental entities for other purposes are permissible under section 832.7(a). Furthermore, our decision does not prohibit a police department and district attorney from fashioning procedures to identify a pool of potential *Brady* materials for scrutiny by the prosecutor, much like a pool of such materials was identified for review by the trial court in the present case (see pt. IV.F., *post*).

[16] "'Opinions of the Attorney General, while not binding, are entitled to great weight. [Citations.] In the absence [**41] of controlling authority, these opinions are persuasive "since the Legislature is presumed to be cognizant of that construction of the statute."' [Citation.]" (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 [270 Cal.Rptr. 796, 793 P.2d 2].) It can be presumed that, if an opinion "'were a misstatement of the legislative intent, "some corrective measure would have been adopted."'" (*Ibid.*)

officer personnel files. That exception, contained in the second sentence of section 832.7(a) and referenced just above, provides, "This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office."[17] Petitioners contend the exception applies only "when the officer is a suspect in an investigation or target of a criminal prosecution for conduct that occurred while employed as an officer." We agree with the Attorney General and conclude that, even if prosecutorial access to officer personnel files for *Brady* purposes were deemed to be a disclosure in a criminal proceeding or breach of the confidentiality of the files, the investigation exception is applicable. [**43]

People v. Superior Court (Gremminger) (1997) 58 Cal.App.4th 397 [67 Cal. Rptr. 2d 910] (*Gremminger*), cited by petitioners, is not to the contrary. There, the defendant was a former police officer charged with murder; the prosecution subpoenaed the defendant's personnel records, which were delivered to the court. (Id. at pp. 400–401.) The trial court denied the prosecution's request for disclosure of the files, and *Gremminger* denied the prosecution's petition for writ of mandate, concluding the investigation exception did not apply. (Id. at p. 404.) *Gremminger* reasoned in part, "the People cannot reasonably contend that the district attorney seeks to review [the defendant's] ... police officer personnel records in order to investigate his [*1075] conduct as a police officer. Instead, the district attorney seeks disclosure of [the defendant's] records in order to prepare the prosecution's case against [the defendant], a private citizen." (Id. at p. 406.) *Gremminger* [**44] held, "where the People seek discovery of the peace officer personnel records of a criminal defendant who was not employed as a police officer at the time the crime was allegedly committed, the district attorney is not exempted under the provisions of [section 832.7(a)], and must comply with the requirements of [Section 1043] et seq." (Gremminger, at p. 407.)

In contrast to *Gremminger*, when a prosecutor conducts a *Brady* review of an officer's personnel file, the prosecutor is investigating that officer's conduct to determine whether there is any evidence that could be used to impeach him or her at trial. Although in *Gremminger*, *Gwillim*, and *Fagan* the investigation exception was considered in circumstances where the officer was the target of a criminal investigation, none of the cases expressly excludes other types of investigations of officer conduct from the scope of the exception. Neither does section 832.7(a) contain any such limiting language; it does not, for example, limit the application of the exception to investigations of the conduct of police officers who are *defendants or suspects*. (See Pipes & Gagen, Cal. Criminal Discovery, *supra*, § 10:20.3.3, p. 966.)

HN19 ***CA(17)*** (17) If prosecutorial *Brady* review constitutes disclosure in a criminal proceeding or breach of the confidentiality of officer personnel files within [**45] the meaning of section 832.7(a), then the investigation exception applies and permits such review.[18]

D. Alford *Does Not Preclude Our Construction of Section 832.7(a)*

CA(18) (18) As noted in a footnote at the outset of this decision, [**46] in *Brandon* the California Supreme Court reserved the question "whether Penal Code

---

[17] The investigation exception has been applied outside the *Brady* context. (Fagan, supra, 111 Cal.App.4th at p. 615 [the exception applied to an investigation of off-duty conduct by the officer-defendants]; People v. Gwillim (1990) 223 Cal.App.3d 1254, 1260, 1270 [274 Cal. Rptr. 415] [under the exception, a district attorney investigating an allegation of sexual assault by an officer could access a statement the officer-defendant provided during a police internal investigation].)

[18] The amicus curiae brief filed by the Attorney General takes the position that the investigation exception can be "reasonably construed to authorize direct access of personnel records by a district attorney's office to satisfy the prosecutor's *Brady* obligation." The Attorney General's brief does not directly address whether such a *Brady* review constitutes disclosure in a criminal proceeding or breach of the confidentiality of officer personnel files within the meaning of the first sentence of section 832.7(a). Nevertheless, the Attorney General generally supports the proposition that the Legislature would not have viewed prosecutorial access as a breach of confidentiality in stating, "the Legislature, aware that the prosecution is deemed to have constructive knowledge of the material exculpatory information in the files of the prosecution team that must be disclosed under *Brady* to the defendant for trial, could readily have concluded that there was no 'just claim to confidentiality' vis-à-vis the prosecution for such information."

section 832.7, which precludes disclosure of officer records 'except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code,' would be constitutional if it were applied to defeat the right of the prosecutor to obtain [*1076] access to officer personnel records in order to comply with *Brady*." (*Brandon, supra, 29 Cal.4th at p. 12, fn. 2.*) Just six months later, the court stated in *Alford*, without elaboration, that "peace officer personnel records retain their confidentiality vis-à-vis the prosecution" absent compliance with Sections 1043 and 1045. (*Alford, supra, 29 Cal.4th at p. 1046.*) The issues before our high court in *Alford* involved the prosecution's right to participate in a defense-initiated *Pitchess* motion and discover the information disclosed to the defendant. *Alford* did not purport to consider whether the prosecution could access officer personnel files to comply with its *Brady* disclosure obligations. We do not understand that brief passage in *Alford* to have resolved, without so acknowledging, the precise constitutional dilemma *Brandon* so carefully delineated and left open just months earlier. We therefore disagree with the decisions in *People v. Gutierrez (2003) 112 Cal.App.4th 1463, 1474–1475 [6 Cal. Rptr. 3d 138]* (*Gutierrez*), and *Abatti v. Superior Court (2003) 112 Cal.App.4th 39, 56 [4 Cal. Rptr. 3d 767]* (*Abatti*), to the extent they interpret *Alford* to hold that section 832.7(a) prohibits the prosecution from accessing officer [**47] personnel files for *Brady* purposes. In any event, neither *Alford*, nor *Gutierrez*, nor *Abatti* considered the particular issues of statutory interpretation addressed in the present case, and "it is axiomatic that ***HN20*** cases are not authority for propositions not considered." (*People v. Alvarez (2002) 27 Cal.4th 1161, 1176 [119 Cal. Rptr. 2d 903, 46 P.3d 372]* (*Alvarez*).)

E. *Petitioners' Interpretation of Section 832.7(a) Presents Avoidable Constitutional Questions*

HN21 CA(19) (19) In California, the scope of the *Brady* disclosure requirement has been described as follows: "A prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team, knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel. [Citations.] The prosecution must disclose evidence that is actually or constructively in its possession or accessible to it. [Citation.]" (*People v. Jordan (2003) 108 Cal.App.4th 349, 358 [133 Cal. Rptr. 2d 434]* (*Jordan*); see *People v. Superior Court (Barrett) (2000) 80 Cal.App.4th 1305, 1315 [96 Cal. Rptr. 2d 264]* ["[t]he scope of the prosecutorial duty to disclose encompasses exculpatory evidence possessed by investigative agencies to which the prosecutor has reasonable access"].)

CA(20) (20) In *Gutierrez*, after concluding the prosecution could not access officer personnel files absent a motion under Section 1043, the court relied on *Jordan* in concluding [**48] that officer personnel files were outside the scope of the prosecution's *Brady* disclosure obligation. (*Gutierrez, supra, 112 Cal.App.4th at pp. 1474–1475.*) The court rejected the defendant's contention "that the [*1077] prosecutor was obliged to conduct a review of the files of 'all significant police officer witnesses' and disclose any *Brady* material." (*Ibid.*) *Gutierrez* reasoned, "Because under *Alford* the prosecutor does not generally have the right to possess and does not have access to confidential peace officer files, Gutierrez's argument for routine review of the complete files of all police officer witnesses in a criminal proceeding necessarily fails." (*Id. at p. 1475.*) Under *Gutierrez*'s reasoning, the prosecution arguably has no obligation under *Brady* to devise procedures to uncover exculpatory evidence in officer personnel files, because those materials are outside the *Brady* disclosure requirements.[19] But that conclusion, which rests on an overly expansive reading of *Alford*, seems contrary to ***HN22*** well-established, federal constitutional law obligating the prosecution to learn of any evidence favorable to the defendant known to the police (*Kyles, supra, 514 U.S. at p. 437*), including impeachment evidence (*People v. Salazar, supra, 35 Cal.4th at p. 1042*). (See *Youngblood v. West Virginia, supra, 547 U.S. at p. 870.*) That is, impeachment evidence in officer personnel files cannot [**49] constitutionally be excluded from the prosecution's *Brady* disclosure

[19] The People embrace this holding in *Gutierrez*, expressing dismay that, if section 832.7(a) does not preclude prosecutorial access to personnel files for *Brady* purposes, "prosecutors will be duty bound ... to examine the personnel files of every peace officer witness in every case to search for potential *Brady* material." We address that argument later in the decision. (See pt. IV.F., *post.*)

obligations. (See Neri, *supra*, 43 McGeorge L.Rev. at p. 310 [asserting *Gutierrez* "violates the federal Supremacy Clause by redefining prosecutors' federal *Brady* duty to exclude peace-officer personnel files, and is an improper attempt to subordinate a federal constitutional right to state privacy interests" (fn. omitted)].) Thus, petitioner's interpretation of section 832.7(a), which relies on *Gutierrez*, raises serious constitutional questions because it would interfere with the disclosure of exculpatory evidence in police files, contrary to *Brady* and its progeny.

Interpreting section 832.7(a) to shift the *Brady* review from the prosecutor to the trial court raises additional constitutional concerns. The prosecutor is "in the best position to evaluate whether evidence must be disclosed because it is materially favorable [**50] to the defense." (Villasana v. Wilhoit (8th Cir. 2004) 368 F.3d 976, 979; see U.S. v. Holmes (4th Cir. 1983) 722 F.2d 37, 41 [pointing out that the trial court "generally does not know the government's theory of the prosecution nor what possible defense might be available to defendants, and thus it is unlikely that it would recognize in a general in camera search anything but the most obviously exculpatory data"].) The prosecutor is the only person with access to the entire landscape of evidence that will or could be presented against the defendant at trial. At the pretrial stage, the trial court's knowledge of the details of the case is often very limited. Although the significance of much impeachment evidence would [*1078] likely be obvious to all, the import of other information might be clear to the prosecutor but not to the trial court. This is particularly true because the *Brady* materiality standard looks at the "suppressed evidence considered collectively, not item by item." (Kyles, supra, 514 U.S. at p. 436, fn. omitted.) Therefore, "the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." (Id. at p. 437.) The trial court cannot analyze the cumulative [**51] impact of nondisclosure of a
piece of exculpatory—but not itself material—evidence in an officer's personnel file.[20]

CA(21) (21) Thus, in addition to the reasons set out above for our construction of section 832.7(a), the statutory interpretation principle of avoiding difficult constitutional questions provides additional support for our approach. (People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 509 [53 Cal. Rptr. 2d 789, 917 P.2d 628]; see ***HN23*** In re Smith (2008) 42 Cal.4th 1251, 1269 [73 Cal. Rptr. 3d 469, 178 P.3d 446] ["Our common practice is to 'construe[] statutes, when reasonable, to avoid difficult constitutional questions.' [Citation.]"]; People v. Smith (1983) 34 Cal.3d 251, 259 [193 Cal. Rptr. 692, 667 P.2d 149] ["if reasonably possible the courts must construe a statute to avoid doubts as to its constitutionality"].)

F. *Petitioners' Additional Arguments Regarding Section 832.7(a)*

CA(22) (22) Petitioners contend that interpreting section 832.7(a) to permit the prosecutor to access officer personnel files would render superfluous the *Pitchess* procedures in Sections 1043 and 1045. However, ***HN24*** a *Pitchess* motion may be initiated by a defendant, so a defendant can obtain any information from personnel files [**52] discoverable under the *Pitchess* scheme, regardless of whether the prosecutor concludes there is evidence that must be disclosed under *Brady*. Moreover, *Brady* and *Pitchess* "employ different standards of materiality." (Brandon, supra, 29 Cal.4th at p. 7.) "Unlike the high court's constitutional materiality standard in *Brady*, which tests whether evidence is material to the fairness of trial, a defendant seeking *Pitchess* disclosure ... need only show that the information sought is material 'to the subject matter involved in the pending litigation.' (§ 1043, subd. (b)(3).) Because *Brady*'s constitutional materiality standard is narrower than the *Pitchess* requirements, any citizen complaint that meets *Brady*'s test of materiality necessarily meets the relevance standard for disclosure under *Pitchess*. (... § 1045, subd. (b).)" (Brandon, at p. 10; see id. at p. 14.) Thus, because certain information that [*1079] would not be

[20] We are aware of no court that has approved routinely shifting the responsibility for performing the initial *Brady* review from the prosecution to the court. That allocation of responsibility has long been a fundamental aspect of modern constitutional criminal procedure, and it is not to be altered lightly.

deemed material under *Brady* would be deemed material under *Pitchess*, the *Pitchess* scheme is not rendered superfluous by our interpretation of section 832.7(a). Moreover, despite petitioners' arguments to the contrary, permitting direct access to officer personnel files will not "nullif[y]" the protections of the *Pitchess* scheme, because we conclude prosecutors must use motions under Section 1043 to *disclose* the [**53] *Brady* materials they identify to the defense. (See pt. VII., *post*.)

Petitioners also contend the decision in Fagan, supra, 111 Cal.App.4th 607 supports their position that section 832.7(a) prohibits the district attorney from accessing officer personnel files for *Brady* purposes absent a motion under Section 1043. *Fagan* held the district attorney in that case properly obtained the results of the officer-defendants' urinalysis tests from personnel files under the section 832.7(a) investigation exception. (Fagan, at p. 610.) *Fagan* further held the results could not "be publicly disclosed or disseminated absent compliance with [Section 1043], including a judicial determination of their admissibility [citation], relevancy [citations], and the need for a protective order [citation]." (Fagan, at p. 610.) In the course of its analysis, *Fagan* did state, "Where the exception afforded the district attorney by [section 832.7(a)] is inapplicable, he must proceed according to the provisions of [Section 1043]." (Fagan, at p. 618.) However, because *Fagan* did not consider whether prosecutorial review for *Brady* purposes would, under section 832.7(a), constitute disclosure in a criminal proceeding or breach the confidentiality of the officer personnel files, that statement is not properly treated as contrary authority; the same reasoning applies to similar language in Gremminger, supra, 58 Cal.App.4th at page 407. (Alvarez, supra, 27 Cal.4th at p. 1176.)

Notably, [**54] *Fagan* supports the distinction we make between prosecutorial access to a personnel file to *identify Brady* material and *public disclosure* of that material: "The exception contained in section 832.7[(a)] affords the district attorney the ability to review confidential peace officer personnel files when investigating police misconduct without notice to the individuals involved. At the same time, it requires the district attorney to maintain the nonpublic nature of the files absent judicial review of the relevance of the information to a criminal or civil action." (Fagan, supra, 111 Cal.App.4th at p. 618.) Similarly, our construction of section 832.7(a) affords the prosecution the ability to review confidential peace officer personnel files in order to comply with its obligation to identify *Brady* material in the possession of the prosecution team. And we further hold the District Attorney is required to maintain the nonpublic nature of the files and seek judicial review prior to any disclosure to the defendant through a motion under Section 1043. (See pt. VII., *post*.) [*1080]

Citing *Fagan*, the People argue it would not save judicial resources to require the prosecution to perform the initial *Brady* review, because "the [trial] court will still be required to review the same records itself [**55] before ordering disclosure to the defense, causing it the exact burden it sought to avoid in the initial in camera review." (Boldface & italics omitted.) However, that presupposes prosecutors will conclude that all of the potential *Brady* materials identified by the police department should be disclosed in all cases, which seems unlikely.[21] In any event, our decision that the prosecutor must perform the initial materiality review is based not on the burdens such review would impose on the trial court. Instead, our decision is based on the fundamental constitutional proposition that the *Brady* disclosure requirement is the prosecution's obligation and our conclusion that section 832.7(a) does not preclude prosecutorial access for *Brady* review.

---

[21] Defendant Johnson argues that the standard for pretrial disclosure is not the *Brady* materiality standard, because Penal Code section 1054.1, subdivision (e) "requires the prosecution to disclose '[a]ny exculpatory evidence,' not just material exculpatory evidence." (Barnett v. Superior Court (2010) 50 Cal.4th 890, 901 [114 Cal. Rptr. 3d 576, 237 P.3d 980].) That section of the Penal Code "illustrates the difference between being entitled to relief for a *Brady* violation and being entitled merely to receive the evidence." (Barnett, at p. 901.) Johnson argues the prosecution will be obligated to disclose any evidence from [**56] officer personnel files that meets that statutory standard for disclosure. The Penal Code section 1054.1, subdivision (e) disclosure requirements are not at issue in this writ proceeding, and nothing in this opinion is intended to address the scope of the prosecution's obligations under that statute.

Finally, petitioners suggest a system that gives the prosecution access to officer personnel files for *Brady* purposes would be problematic and impractical. For example, the District Attorney argues, "while the ... system of maintaining a *Brady* alert list permits the files of only those officers whom [the SF Police Department] believes to have potential *Brady* [material] to be subject to court review," an "open file policy would require every prosecutor in any trial at any time to examine personal personnel records to look for more recent potential *Brady* material." The People also assert that "prosecutors will be duty bound ... to examine the personnel files of every peace officer witness in every case to search for potential *Brady* material."

CA(23) (23) However, our decision does not prohibit police departments and district attorneys from designing orderly procedures to identify and provide materials for *Brady* review by prosecutors. ***HN25*** *Brady* [**57] imposes the disclosure obligation on the prosecution, but it allows some flexibility in how the prosecution complies with that obligation. As a decision of this district recently explained, "District attorneys need some mechanism for ensuring that they learn of *Brady* material within their constructive possession. [Citation.] But the choice of that mechanism is within district attorneys' broad 'discretionary powers in the initiation and conduct of criminal proceedings ...'. ... [Citation.]" (*People v. Rose (2014) 226 Cal.App.4th 996,* [*1081] 1006–1007 [172 Cal. Rptr. 3d 516] (*Rose*).) Indeed, it may be that the current procedures used to identify materials requiring a *Brady* materiality determination could continue to be employed, with the prosecutor performing the review rather than the trial court. Of course, as always, the prosecution bears the risk of reversal if the adopted procedures are inadequate and *Brady* material is not disclosed. (*Rose, at p. 1007*.) In any event, because *Brady* requires that exculpatory evidence within officer personnel files be disclosed, petitioners' position would not result in any fewer files being reviewed; it would simply result in those files being reviewed by the court.

V. *The Federal Cases Cited by Petitioners Do Not Support the Requested Shift in Responsibility* [**58] *for Performing Initial* Brady *Reviews*

As discussed above, petitioners seek to routinely shift responsibility for performing the initial *Brady* materiality review of officer personnel files from the prosecutor to the trial court. None of the cases cited by petitioners supports such a routine shift of the *Brady* obligation to trial courts.

A. *The* Ritchie *Decision*

In *Pennsylvania v. Ritchie (1987) 480 U.S. 39 [94 L. Ed. 2d 40, 107 S. Ct. 989]* (*Ritchie*), the defendant, charged with molesting his daughter, served a subpoena seeking disclosure of confidential reports prepared by the child protective services agency that investigated the charges. (*Id. at p. 43*.) The agency refused to comply with the subpoena on the basis the records were privileged under state law. (*Ibid.*) As described in *Ritchie*, the applicable statute provided that child abuse reports "'shall be confidential and shall only be made available to'" specified entities, including "'[a] court of competent jurisdiction pursuant to a court order.'" (*Id. at p. 44, fn. 2*.) The Pennsylvania Supreme Court held the defendant's attorney was entitled to review the files for relevant evidence. (*Id. at p. 46*.)

The United States Supreme Court reversed. The court rejected the prosecution's argument that the reports were not subject to disclosure even if they were [**59] material within the meaning of *Brady*. (*Ritchie, supra, 480 U.S. at p. 57*.) *Ritchie* reasoned that state law permitted disclosure pursuant to a court order, and, therefore, the reports could be disclosed "when a court of competent jurisdiction determines that the information is 'material' to the defense of the accused." (*Id. at p. 58*.) The court held the defendant "is entitled to have the [protective services agency] file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial." (*Ibid.*) However, *Ritchie* cautioned that the defendant could not "require the trial court to search through the [agency's] file without first establishing a [*1082] basis for his claim that it contains material evidence." (*Id. at p. 58, fn. 15*; see *Brandon, supra, 29 Cal.4th at p. 15*.) The court also held the defendant's "right to discover exculpatory evidence" under *Brady* did not require that *his* counsel be permitted to search through the protective services agency's files. (*Ritchie, at p. 59*.)

CA(24) (24) Petitioner SF Police Department asserts *Ritchie* stands for the proposition that courts may be

"enlisted to use in camera review to strike the careful balance between a defendant's access to *Brady* evidence and state law protections [**60] for privacy or confidentiality." However, *Ritchie* emphasized that, ***HN26*** absent a specific request from the defendant, initial *Brady* materiality reviews are performed by the prosecution alone. (*Ritchie, supra, 480 U.S. at p. 60.*) Thus, the court explained, "In the typical case where a defendant makes only a general request for exculpatory material under [*Brady*], it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." (*Ritchie, at p. 59*, fn. omitted.) It appears *Ritchie*'s decision to remand for in camera review by the trial court was due to the fact that the *defendant* had made a motion requesting *specific* exculpatory evidence that he had reason to believe existed, thus making the case unlike the "typical case." (*Ibid.*)

CA(25) (25) As pertinent to the present case, we understand *Ritchie* to support *at most* only the proposition that it may be appropriate for a court to conduct in camera *Brady* review of confidential files for specific exculpatory evidence requested by a defendant. This is the understanding adopted by *Brooks, supra, 966 F.2d 1500*, which concluded that, under *Ritchie*, "prosecutorial review [**61] of possible *Brady* materials" is "normally sufficient," and in camera review is reserved "for cases where the defense had become 'aware that ... exculpatory evidence was withheld,' [citations]." (*Brooks, at p. 1505*; see *U.S. v. Caro-Muniz (1st Cir. 2005) 406 F.3d 22, 30* ["When a defendant fails to present a narrowly tailored and specific request, *Brady* places the burden of disclosing evidence favorable to the defendant on the government, not on the court."].) *U.S. v. Prochilo (1st Cir. 2011) 629 F.3d 264, 268*, adopted the same understanding of *Ritchie*, summarizing the rule as follows: ***HN27*** "The government is primarily responsible for deciding what evidence it must disclose to the defendant under *Brady*. [Citation.] And at least where a defendant has made only a general request for *Brady* material, the government's decision about disclosure is ordinarily final—unless it emerges later that exculpatory evidence was not disclosed. [Citation.] [¶] When the defendant seeks access to specific materials that the government maintains are not discoverable under *Brady*, however, a trial court may in some instances conduct an in camera review of the disputed materials. [Citations.] To justify such a review, the defendant must make some showing that the materials in question could contain favorable, material evidence. [**62] [Citations.]" [*1083]

Accordingly, nothing in *Ritchie* suggests that, merely because information is of a sensitive nature, the *prosecution* may compel a trial court to conduct the review for *Brady* materials in the first instance, particularly where the prosecution may access those files and conduct its own review for *Brady* materials. In other words, *Ritchie* is a case regarding a defendant's motion to obtain discovery of specific, identified potential *Brady* materials; it is not a case about procedures for the prosecution to comply with its own *Brady* obligations.

B. *Petitioner's Additional Federal Cases*

Petitioners cite a handful of federal cases, which the District Attorney asserts demonstrate that "[n]umerous courts, including the United States Supreme Court, have also recognized that an *in camera* hearing is the appropriate vehicle to review documents for *Brady* material." As the court in *Application of Storer Communications, Inc. (6th Cir. 1987) 828 F.2d 330* (*Storer*), explained, "Several courts of appeals have approved the practice of prosecutors submitting possible *Brady* materials *in camera* to the trial court in order to obtain a pretrial determination of whether disclosure is required. [Citations.]" (*Storer, at p. 334*, citing *U.S. v. Tucker (7th Cir. 1985) 773 F.2d 136, 141*, *U.S. v. Dupuy (9th Cir. 1985) 760 F.2d 1492, 1501* (*Dupuy*) and *U.S. v. Holmes, supra, 722 F.2d at p. 41*.) Similarly, in *United States v. Agurs (1976) 427 U.S. 97 [49 L. Ed. 2d 342, 96 S. Ct. 2392]* (*Agurs*), the United States Supreme [**63] Court stated in passing, "Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information *or by submitting the problem to the trial judge*." (*Agurs, at p. 106*, italics added.)

Petitioners' federal decisions do not support their request for an initial judicial *Brady* materiality review. Some of the cases involve defendant-initiated requests for particular exculpatory evidence (*U.S. v. Kiszewski (2d Cir. 1989) 877 F.2d 210*; *U.S. v. Phillips (7th Cir. 1988) 854 F.2d 273*),[22] which, as explained previously, is not the same as a scheme under which the prosecution routinely submits potential *Brady* materials for trial court review. Other cases have suggested that court review is particularly appropriate where confidentiality issues are involved. For example, in *Dupuy, supra, 760 F.2d at page 1501*, the prosecutor took notes of separate plea negotiations with two codefendants. The prosecutor promised the negotiations would remain confidential, but she subsequently decided the notes contained potential *Brady* [*1084] material. (*Dupuy, at p. 1501*.) She submitted the issue to the trial court, [**64] which *Dupuy* stated "satisfied her duty to disclose exculpatory material." (*Ibid.*; but see *id. at p. 1504* (conc. opn. of Ferguson, J.) ["The constitutional duty to disclose articulated in [*Brady*], however, never shifts from the prosecution to the court."].) *Dupuy* proceeded to hold the trial court erred in failing to conduct an in camera review of the notes. (*Id. at p. 1502*.) *Dupuy* commented, "[c]onsultation with the judge is particularly appropriate when the Government has legitimate reasons for protecting the confidentiality of the material requested, for the trial judge can then weigh the Government's need for confidentiality against the defendant's need to use the material in order to obtain a fair trial." (*Id. at p. 1501*; see *Phillips, at p. 278*.)[23]

CA(26) (26) However, ***HN28*** that there may be some role for the trial court in assisting prosecutors to make difficult determinations about the materiality of specific items of evidence, particularly where there are confidentiality concerns, does not mean prosecutors may obligate the trial court to perform an extensive initial *Brady* review, as opposed to reviewing particular documents identified by the prosecutor. One of the cases petitioners cite, *U.S. v. Holmes, supra, 722 F.2d 37*, clarified the responsibility for performing an initial *Brady* review remained with the prosecution, noting: "We add, however, that we think that the district court was correct in ruling that it had no obligation to conduct a general *Brady*-rule in camera search through the files of the prosecutor when the prosecutor had assured the district court that all possibly exculpatory material had been produced. Of course it would be the prosecutor's obligation to submit any material to the district court in camera if he had any doubts about [**66] whether it might be exculpatory. The district court, however, generally does not know the government's theory of the prosecution nor what possible defense might be available to defendants, and thus it is unlikely that it would recognize in a general in camera search anything but the most obviously exculpatory data." (*Holmes, at p. 41*.)

VI. *The Other California Cases Cited by Petitioners Do Not Support the Requested Shift in Responsibility for Performing Initial* Brady *Reviews*

A. *J.E. v. Superior Court*

The recent decision in *J.E. v. Superior Court (2014) 223 Cal.App.4th 1329 [168 Cal. Rptr. 3d 67]* (*J.E.*), is a California case involving a *Ritchie*-type [*1085] request by a defendant (in *J.E.*, a juvenile) for disclosure of specific, potentially exculpatory evidence. In *J.E.*, a minor who was the subject of delinquency proceedings requested that the juvenile court conduct an in camera inspection of a prosecution witness's juvenile dependency file for *Brady* material. (*J.E., at p. 1332*.) J.E.'s counsel "offered to provide specific information supporting the request 'off the record or under seal.'" (*Id. at p. 1333*.) The request was made pursuant to *Welfare and Institutions Code section 827*, which allows a juvenile court to release information from juvenile files. The juvenile court refused, ruling the prosecutor should undertake the *Brady* review.

---

[22] *Brooks, supra*, 966 F.2d 1500, described *Kiszewski* as a case in which in camera review was justified because "the defense had become 'aware that ... exculpatory evidence was withheld', [citations]." (*Brooks*, at p. 1505.)

[23] It is unclear what confidentiality interest could justify the withholding of evidence that meets *Brady*'s materiality standard, but that is an issue we need not resolve in the present case. As Judge Ferguson explained in his concurrence in *Dupuy*, "the *Brady* decision has already identified where the ***Fifth Amendment*** has struck the balance between the suppression [**65] or disclosure of material exculpatory information requested by the defendant. *Brady* teaches that a trial in which the prosecution withholds material exculpatory information ... is not a fair trial." (*Dupuy, supra*, 760 F.2d at p. 1504 (conc. opn. of Ferguson, J.).)

(*J.E., at p. 1332.*) Thereafter, the [**67] prosecutor reviewed the records and informed the minor's counsel there was no *Brady* material. (*J.E., at pp. 1333–1334.*)[24] The minor's counsel renewed her request that the juvenile court conduct a *Brady* review, and the court again refused. (*J.E., at p. 1334.*) Citing *Ritchie*, the *J.E.* court issued a writ of mandate directing the juvenile court to conduct the requested *Brady* review "upon a showing there is a reasonable basis to believe exculpatory or impeachment evidence exists in" the juvenile records at issue. (*J.E., at p. 1339.*)

J.E. stated that procedure made "practical sense" because it "eliminates the need for the prosecution to request court permission for disclosure after its *Brady* review, and forestalls litigation brought by the defense over whether the prosecution has complied with its *Brady* obligations." (*J.E., supra, 223 Cal.App.4th at p. 1339.*) Nevertheless, *J.E.*, like *Ritchie* and unlike the present case, involved a request by a defendant (or juvenile) for judicial *Brady* review for specific exculpatory evidence.[25] Although *J.E.* held that a juvenile is entitled to judicial *Brady* [**68] review "upon a showing there is a reasonable basis to believe exculpatory or impeachment evidence exists in" the files (*J.E., at p. 1339*), *J.E.* did not suggest the prosecutor could compel the juvenile court to perform the initial *Brady* review. Instead, absent such a request from the juvenile, the prosecutor "request[s] court permission for disclosure after its *Brady* review." (*Ibid.*) Although "policy and practical considerations" (*id. at p. 1334*) may have provided a justification for the judicial *Brady* review in that case, it did not, unlike our case, involve any shifting of the prosecutor's constitutional obligation to identify materials for disclosure under *Brady*. Because in any given case the prosecutor is in a [*1086] better position to perform the *Brady* materiality review than the trial court (see pt. IV.E., *ante*), we do not believe that considerations of policy and pragmatism are a sufficient basis to support the shift in responsibility requested by petitioners, especially because reasonable policy arguments can be made in favor of both approaches.

B. *Other California Cases*

The California Supreme Court in *Brandon* held that a trial court that conducts an in camera review of officer personnel files pursuant to a defendant's motion under *Section 1043* may order the disclosure of material in the files that is discoverable under *Brady* but not under *Pitchess*. (*Brandon, supra, 29 Cal.4th at p. 15.*) In that case, the information at issue was a 10-year-old citizen complaint against an officer. (*Ibid.*) *Brandon* held the court "did not act improperly in evaluating" the complaint, but cautioned, "[w]e do not suggest that trial courts must routinely review information that is contained in peace officer personnel files and is more than five years old to ascertain whether *Brady, supra, 373 U.S. 83*, requires its disclosure." (*Brandon, at p. 15, fn. 3.*) *Brandon* did not suggest the prosecution could require the trial court to undertake an initial *Brady* materiality review under *Sections 1043* and *1045*.

Petitioners are also mistaken in suggesting the California Supreme Court's decision in *People v. Hammon (1997) 15 Cal.4th 1117 [65 Cal. Rptr. 2d 1, 938 P.2d 986]* [**70] supports the requested judicial *Brady* review. In *Hammon*, the Supreme Court held the trial court properly quashed a subpoena duces tecum the defendant served on the victim's psychotherapists, without first conducting an in camera review of the material. (*Hammon, at p. 1119.*) The court held "the trial court was not required, at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of third party psychotherapy providers." (*Ibid.*) *Hammon* also rejected the defendant's claim the information he

---

[24] The statutory scheme authorized the prosecutor to access juvenile records (Welf. & Inst. Code, § 827, subd. (a)(1)(B)), but prohibited the prosecutor from disclosing the information to an unauthorized person without a court order (Welf. & Inst. Code, § 827, subd. (a)(4), (5); *J.E., supra*, 223 Cal.App.4th at p. 1337).

[25] In the present case, Johnson filed a separate motion for *Brady* material, but petitioners do not argue Johnson sought specific exculpatory evidence the prosecution had failed to disclose. [**69] We need not and do not address in the present case what showing a defendant would be required to make in order to obtain judicial *Brady* review of files in the possession of the prosecution team. (See *J.E., supra*, 223 Cal.App.4th at pp. 1333, 1339 [adopting "reasonable basis" test for such a request in the context of juvenile records].)

sought was "in the government's possession within the meaning of" *Ritchie* and *Brady*. (*Hammon, at p. 1125, fn. 3*.) In essence, *Hammon* is a case about a defendant's request for pretrial discovery from a third party; the decision includes no broad pronouncements about the role of the trial court in the *Brady* review or disclosure process.

None of petitioners' other cases compel this court to rule in favor of the judicial *Brady* review petitioners seek. As we explained previously, we disagree with *Gutierrez, supra, 112 Cal.App.4th 1463*, and *Abatti, supra, 112 Cal.App.4th 39*, to the extent they conclude *section 832.7(a)* precludes [*1087] prosecutorial access to officer personnel files for *Brady* purposes.[26] Neither *Garden Grove Police Department v. Superior Court (2001) 89 Cal.App.4th 430, 433–435 [107 Cal. Rptr. 2d 642]* (*Garden Grove*) nor *Eulloqui v. Superior Court (2010) 181 Cal.App.4th 1055, 1068 [105 Cal. Rptr. 3d 248]* (*Eulloqui*) holds that *section 832.7(a)* precludes prosecutorial access to officer personnel files, or that prosecutors may shift to the trial court the responsibility for identifying *Brady* materials in such files. *Garden Grove* supports a conclusion that *Section 1043* should be used to obtain *disclosure* to the defense of *Brady* materials in officer personnel files, which is the issue to which we now turn.[27]

VII. *The Prosecution Must File a Motion Under Section 1043 to Disclose* Brady *Material in Officer Personnel Files to a Defendant*

Having decided that *section 832.7(a)* does not prevent the prosecutor from complying with its constitutional obligation to *identify Brady* material in officer personnel files, we address the second issue: is the prosecution permitted to *disclose* the *Brady* material without seeking permission from the trial court, or must the prosecution file a motion under *Section 1043* to obtain [**72] court authorization for the disclosure to the defense? In its order, the trial court concluded flatly that "*Evidence Code § 1043 et seq.* does not apply to *Brady*." (Boldface omitted.) The court directed the SF Police Department to give the District Attorney access to the relevant officer personnel files, and indicated a willingness to conduct an in camera review only "[i]f a close question nonetheless remains as to whether information in a specific document or documents should be disclosed under *Brady*."[28] On the other hand, petitioners argue that disclosure of information from personnel files may only be made through a motion under *Section 1043*. [*1088]

The plain language of *section 832.7(a)* and *Section 1043* compels the conclusion that any disclosure to the defendant must be pursuant to a motion under *Section 1043*. The relevant language in *section 832.7(a)* is that peace officer personnel records "shall not be disclosed in any criminal or civil proceeding except by [**73] discovery pursuant to *Sections 1043* and *1046 of the Evidence Code*."[29] No party suggests any reasonable construction of that language under which disclosure of *Brady* material from a personnel file to a criminal

---

[26] We also disagree with *Gutierrez*'s assertion that, "if a defendant meets the good cause requirement for *Pitchess* discovery, any *Brady* material in an officer's file will necessarily be included." (*Gutierrez, supra*, 112 Cal.App.4th at p. 1474.) *Gutierrez* fails to consider certain respects in which *Pitchess* discovery of officer personnel files is narrower than *Brady* discovery. (See Neri, *supra*, 43 McGeorge L.Rev. at pp. 312–314.) For example, *Pitchess* discovery does not encompass "complaints concerning conduct occurring [**71] more than five years before" the events underlying the criminal case (§ 1045, subd. (b)(1)), while *Brady* discovery is not so time limited. (*Brandon, supra*, 29 Cal.4th at p. 14.) Furthermore, under *Pitchess* courts have generally required only the disclosure of "the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question." (*City of Santa Cruz, supra*, 49 Cal.3d at p. 84.) The *Brady* disclosure obligation has no such limitation.

[27] In *People v. Davis* (2014) 226 Cal.App.4th 1353, 1361 [172 Cal. Rptr. 3d 714], the trial court granted the prosecutor's postjudgment motion under Sections 1043 and 1045 for in camera *Brady* review of a police officer's personnel file. However, the issue in the case was whether the defendant could appeal from the trial court's determination there were no *Brady* materials in the file (*id.* at p. 1365); the propriety of the prosecutor's motion was not at issue.

[28] The superior court's return appears to take the same position. The return several times identifies the issue narrowly as whether Sections 1043 and 1045 mandate the court "to search through police officer files for '*Brady* materials.'" But elsewhere it asserts more broadly that "the procedures of [Sections 1043 and 1045] do not apply to a motion made under *Brady*."

[29] Section 1046 is not applicable. (See p. 1062, fn. 10, *ante*.)

defendant is not a disclosure of personnel records in a criminal proceeding. The relevant language in Section 1043, subdivision (a) (Section 1043(a)) requires a motion under the section "[i]n any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records." Again, no party suggests any reasonable construction of that language under which disclosure of *Brady* material from an officer personnel file to a criminal defendant is not a disclosure within the scope of Section 1043(a). Accordingly, the relevant language in section 832.7(a) and Section 1043(a) is *not* ambiguous, and "its plain meaning controls." (Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC (2011) 52 Cal.4th 1100, 1107 [133 Cal. Rptr. 3d 738, 264 P.3d 579].)

CA(27) (27) We recognize, of course, that ***HN29*** ""'language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend."'" (People v. Ledesma (1997) 16 Cal.4th 90, 95 [65 Cal. Rptr. 2d 610, 939 P.2d 1310].) We also recognize that Section 1043 is in some ways an awkward fit with a motion to disclose *Brady* material. For example, Section 1043, subdivision (b)(3) requires the movant to provide an affidavit "showing good cause [**74] for the 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." That standard of materiality—materiality "to the subject matter involved in the pending litigation"—is broader than the *Brady* standard. The "narrower" *Brady* standard tests "whether evidence is material to the fairness of trial." (Brandon, supra, 29 Cal.4th at p. 10.) Nevertheless, we do not read that language as requiring the trial court to use the *Pitchess* materiality standard in resolving a motion for disclosure of *Brady* materials; the *Brady* materiality standard would apply in establishing "good cause."

Another provision that fits imperfectly with *Brady* disclosure is to be found in Section 1045. As noted previously, Section 1043 operates in conjunction [*1089] with Section 1045: Section 1043 is "only the *first* hurdle in the discovery process," and Section 1043's "relatively low" discovery threshold is "offset" by the "protective provisions" in Section 1045. (City of Santa Cruz, supra, 49 Cal.3d at p. 83.) Section 1045, subdivision (b)(1) requires the trial court to exclude from disclosure records concerning conduct occurring more than five years before the events underlying the criminal case. In contrast, *Brady* [**75] does not exempt conduct older than five years from its disclosure obligations. (Brandon, supra, 29 Cal.4th at pp. 14–15.) Nevertheless, *Brandon* concluded the provision was not "an absolute bar to disclosure" of older *Brady* materials. (Brandon, at p. 13.) There, the court held that a trial court considering a defendant's Section 1043 discovery motion could order disclosure of a 10-year-old record of police misconduct that is material under *Brady*, despite Section 1045, subdivision (b)(1). (Brandon, at pp. 13–15.) In reaching that conclusion, *Brandon* expressed agreement with the Attorney General's contention that "the '"*Pitchess* process" operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information.'" (Brandon, at p. 14; see Gutierrez, supra, 112 Cal.App.4th at pp. 1473–1474; Abatti, supra, 112 Cal.App.4th at p. 43; Garden Grove, supra, 89 Cal.App.4th at pp. 434–435.)

Other provisions in the *Pitchess* scheme that are protective of officer privacy are consistent with a motion for disclosure of *Brady* material. Section 1043(a) requires that the officer whose records are sought receive notice of the motion for disclosure. (See Abatti, supra, 112 Cal.App.4th at p. 56.) Furthermore, Section 1045 contains provisions for optional and mandatory protective orders. Thus, Section 1045, subdivision (d) authorizes the court, upon motion, to "make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression."[30] And Section 1045, subdivision (e) *requires* the trial court to "order that the records disclosed or discovered may not be used

[30] Section 1045, subdivision (d) provides in full: [**76] "Upon motion seasonably made by the governmental agency which has custody or control of the records to be examined or by the officer whose records are sought, and upon good cause showing the necessity thereof, the court may make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression."

for any purpose other than a court proceeding pursuant to applicable law."[31] (See *Alford, supra, 29 Cal.4th at pp. 1039–1043*.) These provisions provide added protection for officer privacy by regulating the use and further disclosure of materials disclosed pursuant to a *Section 1043* motion. In particular, *Section 1045, subdivision (e)*'s *mandatory* protective order "carefully balances peace officers' privacy [*1090] interests in their personnel records against defendants' rights of access to information relevant to their defense." (*Alford, at p. 1042*.)

We conclude that, despite the awkward fit between some language in *Sections 1043* and *1045* and a request for disclosure of *Brady* materials, giving effect to the plain statutory language requiring a *Section 1043* motion to obtain disclosure of information from officer personnel files in a criminal proceeding does not produce an absurd result contrary to legislative intent. (*People v. Ledesma, supra, 16 Cal.4th at p. 95*.) As explained previously (pt. IV.B., *ante*), the Legislature's intent in enacting the statutory *Pitchess* procedures was to protect officer personnel files from public disclosure, and to specify a [**77] procedure for discovery of information in such files. (See *San Francisco Police Officers' Assn. v. Superior Court, supra, 202 Cal.App.3d at pp. 189–190*.) Although there is no indication the Legislature specifically had in mind disclosures required under *Brady*, extending the privacy protections provided in *Section 1043* and *Section 1045* to *Brady* disclosure is wholly consistent with the Legislature's intent.[32]

Our conclusion that the prosecution must file a motion under *Section 1043* to disclose to the defendant the *Brady* materials it has identified should not be construed to mean that it would be proper for a trial court to decline to disclose materials that must be disclosed under *Brady* in reliance on limitations on disclosure in *Section 1043* or *1045*. As explained previously, under *Brandon, supra, 29 Cal.4th at pages 13–15*, the five-year limitation on *Pitchess* disclosure does not preclude broader *Brady* disclosure. *Eulloqui, supra, 181 Cal.App.4th at page 1065*, construed *Brandon* to support the broader proposition that "if materiality [**78] under the more stringent *Brady* standard is shown, the statutory restrictions pertaining to the *Pitchess* procedure are inapplicable [citation]; but if the defendant only shows materiality under the less stringent *Pitchess* standard, the statutory limitations apply [citation]." We agree.

The Supreme Court has also characterized *Sections 1043* and *1045* as guaranteeing "a *balancing* of the officer's privacy interests against the defendant's need for disclosure." (*City of Santa Cruz, supra, 49 Cal.3d at p. 84*, italics added; accord, *Alford, supra, 29 Cal.4th at p. 1039*.) The [*1091] disclosure of *Pitchess* materials may involve such a balancing, but we are aware of no authority that exculpatory material in officer personnel files subject to disclosure under *Brady*'s federal constitutional requirements may be exempted from disclosure due to privacy considerations. (See *Dupuy, supra, 760 F.2d at p. 1504* (conc. opn. of Ferguson, J.).) For example, in *Ritchie, supra, 480 U.S. at page 58*, the United States Supreme Court held, despite the conditional privilege accorded child abuse reports, the defendant was entitled to receive any information that met the *Brady* materiality standard; the court did not suggest there was any need to balance the defendant's need for the information with the privacy interests involved. Accordingly, in the *Brady* context, the main practical consequence [**79] of requiring a *Section 1043* motion for disclosure appears to be the provision of notice to the impacted officers and an opportunity for the issuance of appropriate protective orders. The disclosure

---

[31] Section 1045, subdivision (e) provides in full: "The court shall, in any case or proceeding permitting the disclosure or discovery of any peace or custodial officer records requested pursuant to Section 1043, order that the records disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law."

[32] In *Alford*, the California Supreme Court concluded the prosecution did not have a right to receive *Pitchess* materials disclosed pursuant to a defendant's *Pitchess* motion. (*Alford, supra*, 29 Cal.4th at p. 1046.) *Alford* did not, however, preclude the possibility that a party could file a Section 1043 motion for disclosure of materials from personnel files to *all* parties in the case. Neither does the language of Section 1043 preclude such a motion.

determination does not itself require a balancing of officer privacy interests.[33]

CA(28) (28) In sum, ***HN30*** although the prosecution has the obligation to identify evidence in officer personnel files that meets the *Brady* materiality standard, a motion under *Section 1043* is required to disclose the *Brady* material to the defendant.[34]

VIII. *Conclusion*

CA(29) (29) The trial court did not err in refusing to undertake a *Brady* review of the materials identified by the SF Police Department, where the prosecution had not undertaken such a review and identified for the court the documents it believed met *Brady*'s materiality standard. *Section 832.7(a)* does not preclude prosecutorial access for *Brady* review, and *Brady* and its progeny allocate responsibility for compliance on the prosecution. As emphasized by our high court in *Brown, supra, 17 Cal.4th at page 883*, "Although rigorous, we do not perceive the duty imposed by *Brady* as too onerous. [Citation.] 'Obviously some burden is placed on the shoulders of the prosecutor when he is required to be responsible for those persons who are directly assisting him [*1092] in bringing an accused to justice. But this burden is the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair.' [Citations.] This obligation serves 'to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution [**81] is not that it shall win a case, but that justice shall be done."' [Citations.] It also tends 'to preserve the criminal trial, as distinct from the prosecutor's private deliberations [or some other agency's independent assessment of materiality], as the chosen forum for ascertaining the truth about criminal accusations. [Citations.]' [Citations.]" (Fn. omitted.) We do not decide that the prosecution must conduct a review of the personnel file of every officer witness. And, as noted previously, we do not preclude the District Attorney and the SF Police Department from devising their own procedures for *Brady* compliance, including a process similar to the current process, but with the prosecutor utilizing the pool of documents selected by the SF Police Department to identify *Brady* materials. (See *Rose, supra, 226 Cal.App.4th at pp. 1006–1007*.) Of course, regardless of the procedure devised, the prosecutor remains ultimately responsible for complying with *Brady*. (*Rose, at p. 1007*.)

Prosecutorial access to officer personnel files for *Brady* purposes does not threaten the privacy interests protected by *section 832.7(a)*, where the officer witnesses are members of the prosecutorial team led by the prosecutor directing the review, and the review itself does not entail disclosure of information [**82] from the files outside the prosecution team. The legislative history shows clearly that the Legislature was concerned with public disclosure of information from officer personnel files. We are aware of nothing in the legislative history suggesting the Legislature intended to prevent prosecutors from inspecting officer personnel files for *Brady* purposes or to otherwise dictate the manner in which *Brady* materials in an officer's personnel files may be identified. (See pt. IV.B., *ante*; Neri, *supra*, *43 McGeorge L.Rev. at pp. 304, 309*.) The Legislature's interests in protecting officer privacy are fully preserved by our conclusion that the prosecution must bring a motion under *Section 1043* to disclose *Brady* material in officer personnel files to the defendant.

DISPOSITION

The petitions for writ of mandate/prohibition are denied in part and granted in part. Let a peremptory writ of mandate issue, directing the San Francisco Superior Court to modify its January 7, 2014 "Order re *Brady* Motions" to provide that, if the San Francisco

---

[33] Because we do not construe Section 1043 or 1045 as precluding disclosure of evidence that meets *Brady*'s materiality standard, we need not address whether the Legislature could constitutionally prohibit disclosure of such material based on considerations such as privacy. (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 509; *In re Smith, supra*, 42 Cal.4th at p. 1269.)

[34] Petitioners devote a substantial portion of their briefing in this writ proceeding to the contention that the trial court imposed the wrong "good cause" standard for obtaining in camera review under Section 1043. We need not reach that issue, because the trial court correctly determined section 832.7(a) did not bar prosecution access to the personnel files for *Brady* purposes. That initial prosecutorial review may render immaterial any future dispute regarding the good cause standard, [**80] because the prosecution, having seen the documents it seeks to disclose, should be able to make the required showing regardless of the standard.

District Attorney identifies any evidence in the San Francisco Police Department personnel files for Officers Dominguez and Carrasco that should be disclosed to defendant Johnson under *Brady v. Maryland, supra, 373 U.S. 83*, the District Attorney shall file [**83] a motion under [*1093] *Evidence Code section 1043* to obtain such disclosure. In all other respects, the writ petitions are denied. The previously imposed stay of trial in defendant Johnson's criminal case shall dissolve upon issuance of the remittitur.

Needham, J., and Bruiniers, J., concurred.

DECLARATION OF SERVICE

I, Allison G. Macbeth, am over the age of eighteen years and not a party to this action. My business address is 850 Bryant Street, Room 322, San Francisco, California, 94103. On the date entered below, I served the within:

PETITION FOR REVIEW; REQUEST FOR STAY

by personally serving (except where noted) a true and accurate copy thereof to the following at the following addresses:

Nina Saraislani
San Francisco Police Department
Legal Division
850 Bryant Street, Room 575
San Francisco, California 94103

Hon. Richard B. Ulmer, Jr.
Judge of the Superior Court
Civic Center Courthouse
400 McAllister St, Dept. 306
San Francisco, California 94102

Jeremy Goldman
Deputy City Attorney
City Attorney's Office
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682

Michael L. Fox
Sedgwick LLP
333 Bush Street, 30th Floor
San Francisco, California 94104-2834
[Via U.S. Mail and Email: Michael.fox@sedgwicklaw.com]

Christopher Gauger
Stephanie Lacambra
Deputy Public Defenders
555 Seventh Street
San Francisco, California 94103

Kamala D. Harris
Attorney General
State of California
555 Golden Gate Avenue, Suite 11000
San Francisco, California 94102
Attn: Gerald Engler, Seth Shalit

Clerk of the Superior Court
San Francisco Superior
Court, Criminal Division
850 Bryant St., Dept. 22
San Francisco, CA 94103

First Appellate District Project
730 Harrison Street, Suite 201
San Francisco, California 94107
[U.S. Mail only]

Diana Herbert
Clerk of the Court
First District Court of Appeal
First Appellate District
350 McAllister St.
San Francisco, CA 94102
[Via E-File as well]

I declare under penalty of perjury that the foregoing is true and correct. Executed September 18, 2014, at San Francisco, California.

Allison G. Macbeth