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. S221296 First Appellate District, Division Five No. A140767/ A140768 Consolidated Cases Superior Court No. 12029482 SCN 221362
DARYL LEE JOHNSON, **Real Party in Interest.**	SUPREME COURT FILED JAN - 9 2015 Frank A. McGuire Clerk Deputy

OPENING BRIEF ON THE MERITS

After a Published Decision by the Court of Appeal,
First Appellate District, Division Five, filed August 11, 2014
Superior Court of California, County of San Francisco
The Honorable Richard B. Ulmer, Jr.

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. S221296 First Appellate District, Division Five No. A140767/ A140768 Consolidated Cases Superior Court No. 12029482 SCN 221362
DARYL LEE JOHNSON, **Real Party in Interest.**	

OPENING BRIEF ON THE MERITS

After a Published Decision by the Court of Appeal,
First Appellate District, Division Five, filed August 11, 2014
Superior Court of California, County of San Francisco
The Honorable Richard B. Ulmer, Jr.

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 AUTHORITIES iv

ISSUES ON REVIEW 2

STATEMENT OF FACTS AND OF THE CASE 2

INTRODUCTION 6

ARGUMENT 7

I. THE PROSECUTION SATISFIES ITS OBLIGATIONS UNDER *BRADY* WHEN IT INFORMS THE DEFENSE THAT AN OFFICER'S PERSONNEL FILE MAY CONTAIN *BRADY* MATERIAL. 7

A. SINCE POTENTIAL DISCOVERY CONTAINED WITHIN OFFICER PERSONNEL FILES IS EQUALLY ACCESSIBLE TO THE DEFENSE THROUGH THE *PITCHESS* PROCEDURES, SUCH EVIDENCE CANNOT BE CONSIDERED SUPPRESSED FOR *BRADY* PURPOSES 8

B. *GUTIERREZ*, FOLLOWING THIS COURT'S DECISION IN *ALFORD*, INSTRUCTS THAT BOTH THE PROSECUTION AND THE DEFENSE MUST COMPLY WITH THE *PITCHESS* PROCEDURES IN ORDER TO OBTAIN ACCESS TO MATERIALS WITHIN CONFIDENTIAL PEACE OFFICER PERSONNEL FILES 11

II. OFFICER PERSONNEL FILES ARE NOT PART OF THE PROSECUTION TEAM BECAUSE THE PROSECUTION HAS NO READY ACCESS ABSENT COMPLIANCE WITH EVIDENCE CODE SECTION 1043 *ET SEQ.* 12

A. BECAUSE THE *PITCHESS* PROCEDURE IS IN ESSENCE THIRD PARTY DISCOVERY, PEACE OFFICER PERSONNEL FILES ARE NOT PART OF THE PROSECUTION TEAM ABSENT COMPLIANCE WITH EVIDENCE CODE SECTION 1043 *ET SEQ.* 15

TABLE OF CONTENTS

Page

B. *JOHNSON* IS INCONSISTENT WITH THIS COURT'S STATEMENTS IN *ALFORD*, *BRANDON*, AND *MOOC*. 18

C. *GARDEN GROVE*, *GREMMINGER*, *BECERRADA*, AND *REZEK* ALL RECOGNIZE THAT THE PROSECUTION MUST COMPLY WITH THE *PITCHESS* PROCEDURES TO REVIEW OFFICER PERSONNEL RECORDS. 22

III. CONTRARY TO *JOHNSON*, PROSECUTORIAL ACCESS TO OFFICER PERSONNEL FILES CONSTITUTES DISCLOSURE AND BREACHES CONFIDENTIALITY IN THOSE FILES. 24

A. PROSECUTORIAL INSPECTION OF OFFICER PERSONNEL FILES FOR *BRADY* PURPOSES CONSTITUTES DISCLOSURE. 24

B. OFFICER PERSONNEL RECORDS ARE CONFIDENTIAL VIS-A-VIS THE PROSECUTOR SEEKING FAVORABLE MATERIAL INFORMATION OF OFFICER-WITNESSES. 26

IV. REQUIRING THE PROSECUTION TO COMPLY WITH THE *PITCHESS* PROCEDURES TO ACCESS PERSONNEL FILES OF OFFICER-WITNESSES IS NOT CONTRARY TO FEDERAL CONSTITUTIONAL LAW. 30

A. *GUTIERREZ* DOES NOT RELY ON AN OVERLY EXPANSIVE READING OF *ALFORD*. 30

B. *GUTIERREZ* IS NOT CONTRARY TO FEDERAL CONSTITUTIONAL LAW 32

V. THE "INVESTIGATION EXCEPTION" UNDER PENAL CODE SECTION 832.7, SUBDIVISION (A) DOES NOT PERMIT THE DISTRICT ATTORNEY TO REVIEW OFFICER PERSONNEL RECORDS OF OFFICER WITNESSES FOR POTENTIAL *BRADY* MATERIAL. 34

TABLE OF CONTENTS

Page

A. THE PLAIN LANGUAGE OF THE "INVESTIGATION EXCEPTION" INDICATES THAT IT APPLIES TO THE CONDUCT OF AN OFFICER WHO IS A SUSPECT IN AN INVESTIGATION OR A TARGET OF CRIMINAL PROSECUTION. 34

B. CASE LAW DEMONSTRATES THAT THE "INVESTIGATION EXCEPTION" APPLIES TO THE CONDUCT OF AN OFFICER WHO IS A SUSPECT IN AN INVESTIGATION OR A TARGET OF CRIMINAL PROSECUTION 36

VI. INITIAL *IN CAMERA* REVIEW BY THE COURT ENSURES CONFIDENTIALITY AND DUE PROCESS AND PRESERVES THE RECORD FOR APPELLATE REVIEW 39

CONCLUSION 45

CERTIFICATION OF COMPLIANCE 47

DECLARATION OF SERVICE 48

TABLE OF AUTHORITIES

Page

United States Supreme Court Cases

Brady v. Maryland (1963) 373 U.S. 83 ..... *passim*

Kyles v. Whitley (1995) 514 U.S. 419 ..... 6, 13, 30

Pennsylvania v. Ritchie (1987) 480 U.S. 858 ..... *passim*

Strickler v. Greene (1999) 527 U.S. 263 8

United States v. Agurs (1976) 427 U.S. 99 28

United States v. Bagley (1985) 473 U.S. 667 ..... 8, 31

United States v. Valenzuela-Bernal (1982) 458 U.S. 858 10

California Supreme Court Cases

Alford v. Superior Court (2003) 29 Cal.4th 1033 ..... *passim*

Barnett v. Superior Court (2010) 50 Cal.4th 890 ..... 14, 18

Chambers v. Superior Court (2007) 42 Cal.4th 673 18

City of Los Angeles v. Superior Court (Brandon) (2002) 29 Cal.4th 1 ..... *passim*

City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74 33

Copley Press, Inc. v. Superior Court (2006) 39 Cal.4th 1272 ..... 34, 35

Garcia v. Superior Court (2007) 42 Cal.4th 63 15

In re Brown (1998) 17 Cal.4th 873 ..... 6, 13

In re Steele (2004) 32 Cal.4th 682 ..... 13, 14

Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal.4th 257 35

TABLE OF AUTHORITIES, cont.

Page

California Supreme Court Cases, cont.

People v. Hammon (1997) 15 Cal.4th 117 44

People v. *Lucas* (2014) 60 Cal.4th 153 8

People v. Mooc (2001) 26 Cal.4th 1216 ..... *passim*

People v. Morrison (2004) 34 Cal.4th 698 9

People v. Salazar (2005) 35 Cal.4th 1031 ..... 8, 13

People v. Superior Court (Humberto S.) (2008) 43 Cal.4th 737 26

People v. Webb (1993) 6 Cal.4th 494 ..... 42, 43, 44

People v. Zambrano (2007) 41 Cal.4th 1082 9

Pitchess v. Superior Court (1974) 11 Cal.3d 531 6

California Court of Appeal Cases

Abatti v. Superior Court (2003) 112 Cal.App.4th 39 ..... *passim*

Becerrada v. Superior Court (2005) 131 Cal.App.4th 409 19

Board of Trustees v. Superior Court (1981) 119 Cal.App.3d 516 20

City of Hemet v. Superior Court (1995) 37 Cal.App.4th 1411 . 18, 20, 28, 29

City of Richmond v. Superior Court (1995) 32 Cal.App.4th 1430 17

City of Tulare v. Superior Court (2008) 169 Cal.App.4th 373 29

Fagan v. Superior Court (2003) 111 Cal.App.4th 607 ..... 38, 45

Fletcher v. Superior Court (2002) 100 Cal.App.4th 386 32

TABLE OF AUTHORITIES, cont.

Page

California Court of Appeal Cases, cont.

Garden Grove Police Department v. Superior Court (Reimann) (2001) 89 Cal.App.4th 430 ..... 22, 37

J.E. v. Superior Court (2014) 223 Cal.App.4th 1329 ..... 39, 41, 42, 44

Michael v. Gates (1995) 38 Cal.App.4th 737 ..... 24, 27

People v. Gutierrez (2003) 112 Cal.App.4th 1463 ..... *passim*

People v. Gwillim (1990) 223 Cal.App.3d 1254 38

People v. Jordan (2003) 108 Cal.App.4th 349 ..... 12, 14

People v. Reber (1986) 177 Cal.App.3d 523 44

People v. Superior Court (Barrett) (2000) 80 Cal.App.4th 1305 ..... 13, 14, 15, 16

People v. Superior Court (Johnson) (2014) 228 Cal.App.4th 1046 ..... *passim*

People v. Superior Court (Gremminger) (1997) 58 Cal.App.4th 397 23

Rezek v. Superior Court (2012) 206 Cal.App.4th 633 23

Rosales v. City of Los Angeles (2000) 82 Cal.App.4th 419 ..... 28, 29

San Diego Trolley, Inc. v. Superior Court (2001) 87 Cal.App.4th 1083 ..... 20, 39

San Francisco Police Officers' Association v. Superior Court (1988) 202 Cal.App.3d 183 17

Federal Cases

Cunningham v. Wong (9th Cir. 2013) 704 F.3d 1143 9

TABLE OF AUTHORITIES, cont.

Page

Federal Cases, cont.

United States v. Aichele (9th Cir.1991) 941 F.2d 761 9

United States v. Brooks (D.C. Cir. 1992) 296 U.S. App. D.C. 219, [966 F.2d 1500, 1504-1505] 42

United States v. Dupuy (9th Cir. 1985) 760 F.2d 1492 34

United States v. Griggs (11th Cir. 1983) 713 F.2d 672 34

United States v. Herring (9th Cir. 1996) 83 F.3d 1120 10

United States v. Pena (2d Cir. 2000) 227 F.3d 23 42

United States v. White (7th Cir. 1992) 970 F.2d 328 34

Statutes

Evid. Code § 915, subd. (b) 21

Evid. Code § 1040 21

Evid. Code § 1043 ..... *passim*

Evid. Code § 1045 ..... *passim*

Evid. Code § 1047 7

Pen. Code § 273.5, subd. (a) 3

Pen. Code § 591.5 3

Pen. Code § 832.5, subd. (a)(1) 17

Pen. Code § 832.7, subd. (a) ..... *passim*

Pen. Code § 832.8 ..... 27, 44

TABLE OF AUTHORITIES, cont.

Page

Statutes, cont.

Pen. Code § 1054.1 ..... 22-24, 37

Pen. Code § 5000 15

Pen. Code § 5003 15

Pen. Code § 5054 15

Welf. & Inst. Code § 827 ..... 39, 45

Other Authorities

66 Ops.Atty.Gen. 128 ..... 25, 27

Assem. Com. On Criminal Justice, Analysis of Sen. Bill No. 1436 (1977-1978 Reg. Sess.) 28

Cal. Rules of Court, rule 5.552, subd. (b)(1)(A) 45

S.F. Charter, § 4.127 17

www.oxforddictionaries.com/us/definition/american_english/investigate?searchDictCode=all 35

Treatises

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 ..... 30, 32, 33, 35

Pipes & Gagen, Cal. Criminal Discovery (4th ed. 2008) 24, 25

Constitutional Provisions

Cal. Const., art. XI, § 5 17

Cal. Const., art. I, § 1 20

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. S221296

OPENING BRIEF ON THE MERITS

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner, the People of the State of California, respectfully submits this Brief on the Merits following the October 29, 2014 Order granting review.

ISSUES ON REVIEW

As stated in our Petition for Review, the issues on review are as follows (Cal. Rules of Court, rule 8.520, subdivision (b)(2)(B)):

1. Whether a prosecutor has unfettered direct access to a peace officer's personnel file for purposes of routine *Brady*[1] 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 (*Gutierrez*), 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 (*Alford*).

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.

4. On December 17, 2014, this Court requested that the parties brief whether the prosecution satisfies its obligations under *Brady* "if it simply informs the defense of what the police department has informed it (that the two officers' personnel files might contain *Brady* material), which would allow the defense to decide for itself whether to seek discovery of that material pursuant to statutory procedures? (See *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475.)"

STATEMENT OF FACTS AND OF THE CASE

This case reviews a writ of mandamus/prohibition regarding *in camera* review of statutorily protected peace officer personnel records for favorable material evidence.

---

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

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

The San Francisco Police Department ("SFPD") Legal Division notified SFDA that both responding and reporting officers have identified but unspecified *Brady* materials in their personnel files. Accordingly, 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 the officers to determine whether any items in their files were material under *Brady* and thus subject to disclosure; (2) disclose to SFDA 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 the officers are necessary prosecution witnesses on virtually all of the issues and in both of the counts. (*Johnson, supra,* 228 Cal.App.4th at p. 1058.) 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.*) Petitioner averred that the records are in the exclusive possession and control of SFPD. (*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 SFPD's Bureau Order No. 2010-01 ("Bureau Order"). (*Johnson, supra,* 228 Cal.App.4th at p. 1059.) Based on the premise that SFDA cannot legally access confidential officer personnel files absent a motion and court order under Evidence Code section 1043, the Bureau Order outlines SFPD's procedures for disclosure of *Brady* materials in employee personnel files. (*Ibid.*) The Bureau Order provides that SFPD advises 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*, so that SFDA may make a motion for *in camera* review and disclosure under Evidence Code sections 1043 and 1045. (*Id.* at pp. 1059-1060.)

In response to 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 Penal Code section 832.7, subdivision (a) unconstitutional and direct 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.*)

SFPD also filed a response to SFDA's motion. SFPD generally agreed with 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 SFDA's Evidence Code section 1043 motion for *in camera Brady* review and directed SFPD "'to give the District Attorney access to the personnel files of [the officers] "so the prosecution can comply with its *Brady* mandate."'" (*Johnson, supra*, 228 Cal.App.4th at p. 1061.)

On January 17, 2014, 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. (*Ibid.*) Petitioners further requested that the Court of Appeal direct respondent court to accept the officer personnel records proffered by SFPD, review the records *in camera*, and disclose all *Brady* materials to both the prosecution and defense counsel subject to a protective order. (*Ibid.*)

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.)

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.*)

Petitioner filed a Petition for Review before this Court, which was granted on October 29, 2014.

INTRODUCTION

SFDA is mindful of its federal due process obligation to disclose favorable and material evidence to the defense. (*Brady, supra*, 373 U.S. at p. 86.) SFDA also knows that such a duty reaches not only information in our own files, but information contained within the files of all members of the prosecution team. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437 (*Kyles*); *In re Brown* (1998) 17 Cal.4th 873, 879 (*Brown*).)

Beyond prosecution and police case files for any particular case, however, there exist officer personnel files, which potentially contain allegations or sustained findings of misconduct. Access to such information may be obtained by both the prosecution and the defense through the *Pitchess* [*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)] process codified in Evidence Code sections 1043-1047. These

files have been protected for decades under state statutory privileges (often referred to as the *Pitchess* procedure).

Johnson, nonetheless, allows the prosecution unprecedented and unfettered access to such privileged records, without notice, initial showing or *in camera* review, all contrary to this Court's holdings in *Alford, supra,* 29 Cal.4th 1033 and *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1 (*Brandon*). *Johnson* also relies upon an overly-broad construction of Penal Code section 832.7, which has no basis in case law.

SFDA and SFPD sought not to avoid constitutional disclosure by hiding behind a state statutory privilege. Rather, Petitioners sought to honor the competing rights at stake and negotiated a system which satisfied this Court's directives relative to officer personnel files. As such, SFDA therefore respectfully requests that this Court to reverse *Johnson* to the extent that it holds that the prosecution has direct access to officer personnel files.

ARGUMENT

I. THE PROSECUTION SATISFIES ITS OBLIGATIONS UNDER *BRADY* WHEN IT INFORMS THE DEFENSE THAT AN OFFICER'S PERSONNEL FILE MAY CONTAIN *BRADY* MATERIAL.

This Court requested that the parties brief whether the prosecution satisfies its obligations under *Brady* "if it simply informs the defense of what the police department has informed it (that the two officers' personnel files might contain *Brady* material), which would allow the defense to decide for itself whether to seek discovery of that material pursuant to statutory procedures? (See *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475.)" Petitioner SFDA answers this question, "yes."

Where the police department has pre-identified officers having potential favorable material evidence in their files, the prosecution so notifies the defense in a pending case involving that officer, and a specific factual showing regarding the officer's materiality is made, the prosecution's *Brady* obligation has been satisfied. Once such notification has been made, the defense and/or the prosecution have the information necessary to make a sufficient plausible showing for an *in camera* review.

A. SINCE POTENTIAL DISCOVERY CONTAINED WITHIN OFFICER PERSONNEL FILES IS EQUALLY ACCESSIBLE TO THE DEFENSE THROUGH THE *PITCHESS* PROCEDURES, SUCH EVIDENCE CANNOT BE CONSIDERED SUPPRESSED FOR *BRADY* PURPOSES.

A true *Brady* violation occurs only when three conditions are met: "'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" (*People v. Lucas* (2014) 60 Cal.4th 153, 274 (*Lucas*), quoting *Strickler v. Greene* (1999) 527 U.S. 263, 281-282; accord *People v. Salazar* (2005) 35 Cal.4th 1031, 1042-1043 (*Salazar*).) "[E]vidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it '"by the exercise of reasonable diligence."'" (*Salazar, supra,* 35 Cal.4th at p. 1049.)

The purpose behind the rule in *Brady* is to ensure that "criminal trials are fair" (*Brady, supra,* 373 U.S. at p. 86), and "that a miscarriage of justice does not occur." (*United States v. Bagley* (1985) 473 U.S. 667, 675 (*Bagley*).) While "'the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession *or is available to a defendant through the exercise of due diligence*, then ... the defendant has all that is

necessary to ensure a fair trial....'" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1134 (ital. in orig.), quoting *Salazar, supra,* 35 Cal.4th at pp. 1048-1049; see also *People v. Morrison* (2004) 34 Cal.4th 698, 715 ["when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim"]; *Cunningham v. Wong* (9th Cir. 2013) 704 F.3d 1143, 1154 [no suppression of medical records where defense attorneys knew victim had been shot and treated]; *United States v. Aichele* (9th Cir.1991) 941 F.2d 761, 764 (*Aichele*) [where "defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression"].)

The *Pitchess* procedure provides both the defense and the prosecution with the means to obtain favorable material evidence (potential *Brady* material) contained within peace officer personnel files. In *Brandon*, the defendant sought discovery from the personnel files of two arresting officers, relying both on *Pitchess* and *Brady*. (*Brandon, supra,* 29 Cal.4th at p. 6.) *Brandon* held that the five year time limitation in Evidence Code section 1045 does not create an absolute bar to disclosure of favorable material evidence. (*Id.* at pp. 13-16.) "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*." (*Id.* at p. 10.) Accordingly, *Brandon* held that a court may order disclosure of favorable material evidence contained with officer personnel files to the defense even if the conduct exceeds the five year time limitation. (*Id.* at p. 15.)

Brandon demonstrates that the *Pitchess* procedural mechanism can provide any party to a criminal proceeding with the means to obtain favorable material evidence contained within officer personnel records,

even if the conduct exceeds the five year time limitation contained within Evidence Code section 1045, subdivision (b)(1). The prosecutor's notice that an officer's personnel file may contain *Brady* material, coupled with the facts demonstrating the officer's materiality in the case provide the sufficient plausible showing to trigger an *in camera* review for potential *Brady* material. (See *Brandon, supra*, 29 Cal.4th at pp. 14-15; see also *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 58, fn. 15 (*Ritchie*), quoting *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867; see also *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 58 (*Abatti*) [sufficient materiality under *Brady* to trigger an *in camera* review].) As such, favorable material evidence contained within officer personnel files is equally accessible to both the prosecution and the defense through the *Pitchess* procedures.

Constitutionally adequate notice, though, requires collaboration between prosecutorial and law enforcement agencies. Where police have pre-identified officers whose personnel files contain evidence of dishonesty, bias or misconduct involving moral turpitude (or any other form of impeachment or potential *Brady* material), the police notify the prosecution, and the prosecution, in turn, notifies the defense of the same, both the prosecution and the defense will possess information necessary to make a showing for an *in camera* review in light of the facts of the individual case. SFDA and SFPD have implemented such an agreement.

When SFPD becomes aware of potential *Brady* material regarding an officer, SFPD *Brady* Committee reviews such material and recommends whether or not SFDA should be notified.[2] (Pet. Exh. 8,

---

[2] Initial review of personnel files by law enforcement for potential *Brady* material has been approved by the Ninth Circuit and even by *Johnson*. (See *United States v. Herring* (9th Cir. 1996) 83 F.3d 1120, 1121-1122; *Johnson, supra*, 228 Cal.App.4th at p. 1092.)

JOHNSON0185-JOHNSON0187.) SFPD then notifies SFDA "'of the names of employees who have information in their personnel files that may require disclosure under *Brady*.'"[3] Notice to the defense that an officer's personnel file might contain *Brady* material, coupled with facts demonstrating the officer's materiality allows either the prosecution or defense to make the showing necessary for an *in camera* review. Since this material is then available and equally accessible to the defense, such evidence cannot be considered suppressed for *Brady* purposes, as set forth in *Zambrano*, *Salazar,* and *Morrison*.

B. *GUTIERREZ*, FOLLOWING THIS COURT'S DECISION IN *ALFORD*, INSTRUCTS THAT BOTH THE PROSECUTION AND THE DEFENSE MUST COMPLY WITH THE *PITCHESS* PROCEDURES IN ORDER TO OBTAIN ACCESS TO MATERIALS WITHIN CONFIDENTIAL PEACE OFFICER PERSONNEL FILES.

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.) On appeal, defendant contended that the statutory *Pitchess* procedures set forth in Penal Code sections 832.5, 832.7, and 832.8 and Evidence Code sections 1043 and 1045 undermine prosecutors' ability to carry out their duties under *Brady*. (*Id.* at p. 1471.) The court of appeal disagreed, holding that defendant's claim was foreclosed by this Court's decisions in *Brandon,* 29 Cal.4th 1 and *Alford, supra,* 29 Cal.4th 1033. (*Id.* at pp. 1471, 1474-1475.)

Gutierrez recognized that the *Pitchess* procedure is the only means by which citizen complaints may be discovered. (*Gutierrez, supra*, 112

---

[3] According to the Bureau Order, "Brady material" includes dishonesty, bias, and misconduct involving moral turpitude. (Pet. Exh. 6, JOHNSON0125-JOHNSON0127.)

Cal.App.4th at p. 1475, citing *People v. Jordan* (2003) 108 Cal.App.4th 349, 360 (*Jordan*).) "While the prosecution is free to seek such information by bringing its own *Pitchess* motion in compliance with the procedures set forth in Evidence Code sections 1043 and 1045, '[a]bsent such compliance ... *peace officer personnel records retain their confidentially (sic) vis-a-vis the prosecution.*'" (*Ibid.*, quoting *Alford*, *supra*, 29 Cal.4th at p. 1046 (ital. added in *Gutierrez).*) "Given *Alford's* limitation on disclosure to prosecutors, the *Brady* review suggested by Gutierrez is not tenable." (*Ibid.*)

Gutierrez, following this Court's decision in *Alford*, instructs that all parties in a criminal action – both the prosecution and the defense – must comply with the *Pitchess* procedures in order to access any potential discovery within confidential officer personnel files. Since both the prosecution and the defense must comply with the *Pitchess* procedures in order to access potential discovery within officer personnel files, those files are equally accessible by both parties.

II. OFFICER PERSONNEL FILES ARE NOT PART OF THE PROSECUTION TEAM BECAUSE THE PROSECUTION HAS NO READY ACCESS ABSENT COMPLIANCE WITH EVIDENCE CODE SECTION 1043 *ET SEQ.*

Notifying the defense that an officer's personnel file might contain *Brady* material, thereby allowing the defense to seek discovery under the *Pitchess* procedures, also satisfies a prosecutor's obligations under *Brady* because peace officer personnel files are not in the constructive possession of the "prosecution team," absent compliance with Evidence Code section 1043 *et seq*.

Johnson held that prosecutorial access to officer personnel files for *Brady* purposes does not constitute disclosure or a breach of confidentiality in those records. (*Johnson*, *supra*, 228 Cal.App.4th at pp.

1067-1074.) *Johnson* concluded that officer personnel files are within the actual or constructive possession of the prosecution team. (See *id.* at pp. 1067-1068, 1073.) This conclusion, however, is inconsistent with (1) this Court's holding that officer personnel records are not reasonably accessible to the prosecution absent compliance with Evidence Code section 1043 *et seq.*, (2) this Court's characterization of these records as third party discovery, and (3) the hybrid nature of the records possessed by Petitioner SFPD.

A prosecutor's duty to search for material exculpatory and impeachment evidence under *Brady* "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[.]'" (*Brown, supra,* 17 Cal.4th at p. 879, quoting *Kyles, supra,* 514 U.S. at p. 437; accord *In re Steele* (2004) 32 Cal.4th 682, 696-697 (*Steele*); see also *Salazar, supra,* 35 Cal.4th at p. 1042, quoting *Kyles, supra,* 514 U.S. at p. 437.) "Thus, the prosecution is responsible not only for evidence in its own files but also for information possessed by others acting on the government's behalf that were **gathered in connection with the investigation.**" (*Steele, supra,* 32 Cal.4th at p. 697 (emph. added).) Stated differently, "[a] prosecutor's duty under *Brady* to disclose material exculpatory evidence extends to evidence the prosecutor - - or the prosecution team - - knowingly possesses or has the right to possess." (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1314-1315 (*Barrett*); accord *Jordan, supra,* 108 Cal.App.4th at p. 358.) As this Court explained in *Steele,*

> [A] prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information. Thus, information possessed by an agency that has no connection to the investigation or

> prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material[.]

(*Steele, supra*, 32 Cal.4th at p. 697, quoting *Barrett, supra,* 80 Cal.App.4th at p. 1315; accord *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 903 (*Barnett*).)

Gutierrez held that prosecutors do not have direct access to officer personnel files for *Brady* purposes, under *Jordan.* "[A] 'prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or the prosecution team, *knowingly possess 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 *Jordan, supra*, 108 Cal.App.4th at p. 358 (ital. added in *Gutierrez*).) With no direct access, *Gutierrez* concluded that officer personnel files are not in the constructive possession of the prosecution team. (See *ibid.*) *Gutierrez*, therefore, held that the prosecution has no obligation to perform routine reviews of officer personnel files for *Brady* material. (*Ibid.*)

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 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.) *Gutierrez*, *Abatti*, and *Jordan* all demonstrate that officer personnel files are not part of the prosecution team, absent compliance with section 1043 *et seq*.

A. BECAUSE THE *PITCHESS* PROCEDURE IS IN ESSENCE THIRD PARTY DISCOVERY, PEACE OFFICER PERSONNEL FILES ARE NOT PART OF THE PROSECUTION TEAM ABSENT COMPLIANCE WITH EVIDENCE CODE SECTION 1043 *ET SEQ.*

This Court has characterized "the *Pitchess* procedure" as essentially "a special instance of third party discovery." (*Alford, supra,* 29 Cal.4th at p. 1045; accord *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 73.) When the defense has made a *Pitchess* motion, "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." (*Ibid.*) "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.)[.]" (*Id.* at p. 1046.) As third party discovery, the prosecution similarly has no reasonable access to officer personnel files, without first complying with the *Pitchess* procedures.

In *Barrett*, the defendant was charged with the murder of his cellmate in the administrative segregation unit of Calpatria State Prison. (80 Cal.App.4th at p. 1309.) Prior to trial, defendant sought discovery of 17 categories of records maintained by the California Department of Corrections (CDC). (*Ibid.*) The prosecution contended, however, that it had no obligation to produce some of the materials ordered by the trial court. (*Id.* at p. 1311.)

Barrett first noted that CDC supervises, manages, and controls state prisons, making specific reference to statutory authority that creates such responsibilities. (*Barrett, supra,* 80 Cal.App.4th at p. 1317, citing Pen. Code §§ 5000, 5003, 5054.) While the parties agreed that CDC was an investigatory agency in the case and part of the investigation team to the extent that CDC interviewed witnesses to the murder, prepared reports, and performed other "investigative tasks in connection with the homicide

that took place inside the prison," *Barrett* concluded that CDC was not part of the prosecution team to the extent that CDC performed administrative and security responsibilities in housing prisoners. (*Id.* at p. 1317.) Thus, *Barrett* concluded that CDC maintained a "hybrid status: part investigatory agency, part third party." (*Ibid.*)

Barrett noted that the bulk of the documents sought by the defendant were not gathered in connection with the charged homicide. (*Barrett, supra*, 80 Cal.App.4th at p. 1318.) "Rather, these CDC documents, most of which predate the homicide, are kept by CDC in the course of running a prison." (*Ibid.*) *Barrett* stated further that the materials sought by defendant were not discoverable under Evidence Code section 1054 *et seq.* because CDC generated these materials "when it was not acting as part of the prosecution team." (*Ibid.*) "To the extent that Barrett is seeking records that CDC maintains in the regular course of running Calpatria State Prison, Barrett is trying to obtain materials from a third party." (*Ibid.*) As third party discovery, *Barrett* ruled that the defendant must resort to a subpoena duces tecum to obtain the records sought from CDC. (*Ibid.*)

The prosecution does not, for purposes of *Brady*, possess the contents of an officer's personnel file (absent compliance with the *Pitchess* procedure) because, like CDC in *Barrett*, police departments also maintain a hybrid status: part investigatory agency relative to the investigation and prosecution of the criminal charge(s) against a defendant, and part third party relative to their administrative and supervisorial duties.

State law obligates police departments, like CDC, to perform functions that are separate and distinct from their function of investigating criminal charges against a defendant. For example, Penal Code section 832.5 requires police departments to "establish a procedure to investigate complaints by members of the public against the personnel of these

departments or agencies." (Pen. Code § 832.5, subd. (a)(1); see also *City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1434 (*City of Richmond*).) The California Constitution also "authorizes a city charter to make and enforce local regulations governing municipal affairs and specifically authorizes such a charter to provide for 'the constitution, regulation, and government of the city police force.'" (*San Francisco Police Officers' Association v. Superior Court* (1988) 202 Cal.App.3d 183, 190 (*SFPOA*); Cal. Const., art. XI, § 5.) Like Penal Code section 832.5, San Francisco's City Charter provides for the regulation of the Police Department through the Office of Citizen Complaints (OCC). (S.F. Charter, § 4.127; see also *SFPOA*, *supra*, 202 Cal.App.3d at pp. 185, 190.) The staff of OCC "promptly, fairly and impartially" investigates "[c]omplaints of police misconduct or allegations that a member of the Police Department has not properly performed a duty." (S.F. Charter, § 4.127.)

Of course, police departments investigate crime, such as the crimes charged against Johnson. In that case, a police department performs investigative tasks in connection with the alleged crime. Officers interview witnesses, prepare reports, and collect evidence, all on behalf of the prosecution in relation to the case against a particular suspect. Information obtained by police when acting in that capacity is possessed by the prosecution team and is subject to discovery under *Brady*.

But police departments do more than investigate crimes – they discharge their administrative and supervisorial responsibilities with respect to their sworn personnel. These responsibilities may include review of citizen complaints against officers or internal investigations regarding an officer's misconduct. (See e.g., Pen. Code § 832.5; see also *City of Richmond, supra,* 32 Cal.App.4th at p. 1440 [records of investigation into citizens' complaints are confidential]; *City of Hemet v.*

Superior Court (1995) 37 Cal.App.4th 1411, 1416, 1431 [internal investigation records are confidential].) In such instances, police departments do not act on behalf of the prosecution or under its control relative to the criminal charge against a defendant when claims of misconduct involve entirely different parties and circumstances. (See *Barnett, supra*, 50 Cal.4th at p. 904.) This is particular true when the allegations of misconduct predate the charged offense against a defendant and/or are investigated by a citizen oversight committee, like OCC.[4] Thus, a police department is acting as a third party in this circumstance because it performs these administrative and supervisorial duties in the regular course of running a police department. As such, the prosecution does not possess an officer's personnel files for purposes of *Brady* and has no access to such files for potential *Brady* material, absent compliance with section 1043.[5]

B. *JOHNSON* IS INCONSISTENT WITH THIS COURT'S STATEMENTS IN *ALFORD*, *BRANDON*, AND *MOOC*.

Gutierrez and *Abatti* rely on this Court's statement in *Alford, supra,* 29 Cal.4th at p. 1046, to support their conclusion that the prosecution does

---

[4] In this case, the materials contained within the personnel files of the two officers necessarily predated Johnson's alleged crimes as 24 jurists in the two years preceding January 6, 2014, had reviewed the files. (Pet. Exh. 11, JOHNSON0213.)

[5] The record demonstrates that judges on multiple occasions had disclosed potential *Brady* material from the personnel files of the two officers in the instant case to prosecutors. (Pet. Exh. 11, JOHNSON0213.) Disclosures, though, were made pursuant to a protective order, as required by Evidence Code section 1045. As such, the materials could not be legally accessed by the prosecution outside the contours of each individual case. (Cf. *Chambers v. Superior Court* (2007) 42 Cal.4th 673, 681-682.) Assuming, arguendo, that prior disclosure even with a protective order confers access in the *Brady* sense upon the prosecution, these records were nevertheless equally accessible to the defense via the *Pitchess* procedure and thus are not suppressed for *Brady* purposes.

not have direct access to officer personnel records for *Brady* purposes. (*Johnson, supra*, 228 Cal.App.4th at p. 1076, citing *Gutierrez, supra*, 112 Cal.App.4th at pp. 1474-1475 and *Abatti, supra*, 112 Cal.App.4th at p. 56.) *Johnson* dismisses this reliance. (*Ibid.*) According to *Johnson*, *Alford* did not consider whether the prosecution had direct access to those files to comply with its *Brady* obligations, and *Brandon, supra,* 29 Cal.4th at p. 12, fn. 2, decided six months after *Alford*, left the question open. (*Johnson, supra*, 228 Cal.App.4th at pp. 1075-1076.)

Petitioner submits that *Alford's* holding that the prosecution is required to comply with the *Pitchess* procedure if it seeks information in confidential officer personnel records that was obtained pursuant to a successful defense *Pitchess* motion, means that officer personnel files are not in the possession of the prosecution absent compliance with the *Pitchess* procedures. Immediately after stating that absent compliance with the procedures set forth in sections 1043 and 1045, officer personnel records retain their confidentiality vis-a-vis the prosecution, this Court observed in a footnote that unlike the defense, "the prosecutor may be able to learn of available impeachment material against the officer by interviewing him or her...." (*Alford, supra,* 29 Cal.4th at p. 1046 fn. 7.) The prosecutor would have *no need to interview an officer* to determine if the officer has impeachment material in his/her personnel file *if the prosecutor had direct access to that file.*

Becerrada v. Superior Court (2005) 131 Cal.App.4th 409, 415 (*Becerrada*) agreed. *Becerrada* stated, "The recognition by the Supreme Court that an officer remains free to discuss with the prosecution any materials in his files, in preparation for trial, means that the officer practically may give to the prosecution that which it could not get directly. [fn. om.] However, this does not translate into a 'back door' for the prosecution to evade the legal requirements imposed by *Alford*." (*Ibid.*)

Moreover, if as *Alford* states, *Pitchess* is third party discovery, if the district attorney represents neither the custodian of records nor their subject, and if the district attorney must file its own *Pitchess* motion, then the prosecution has no direct access to police personnel files. Logic does not permit the conclusion that the officer's personnel records are in the possession of the prosecution for the purposes of *Brady* but not *Pitchess*, i.e., 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. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1227 (*Mooc*); *Brady, supra*, 373 U.S. 83; see generally *City of Hemet, supra,* 37 Cal.App.4th at p. 1430 ["Logic does not permit the conclusion that information may be 'confidential' for one purpose, yet freely disclosable for another."].)

Moreover, *Johnson's*[6] acknowledgement that under *Alford, supra*, 29 Cal.4th at p. 1046, the prosecution has no right to discover the fruits of a successful defense *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 inconsistent. Either the prosecution has direct access or it does not. *Johnson* effectively eliminates the need of the prosecution to ever file a *Pitchess* motion. *Johnson* also eliminates the need for the defense to file a *Pitchess* motion since the defense can rely on the prosecution's direct access to the file and their *Brady* duty to disclose.

Johnson also creates an anomaly. Non-peace officers have a qualified right of privacy in their personnel files. (Cal. Const., art. I, § 1; *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1097 (*San Diego Trolley*); *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526.) Materials in the personnel file of a non-peace

---

[6] 228 Cal.App.4th at p. 1076.

officer may be disclosed only with the consent of the employee or pursuant to court order following *in camera* review. (Evid. Code §§ 1040, 915, subd. (b).) Civilians who are employed by the police department, participated in the investigation in some capacity, and who testify on behalf of the government but who are not peace officers, e.g., lab technicians and forensic analysts, now enjoy greater protections over their personnel records under *Johnson* than peace officers, on whose behalf sections 832.7, 1043, and 1045 were enacted. Non-peace officers are entitled to the initial *in camera* review denied the officers. *Johnson* upends the statutory scheme.

Johnson's conclusion is also inconsistent with *Mooc*. *Mooc, supra,* 26 Cal.4th at p. 1225, recognizes that for roughly one quarter-century, trial courts have conducted *Pitchess* reviews of officer personnel files *in camera* for evidence that may be relevant to a defendant's defense.

Of course defendants must receive all information to which they are entitled under *Brady*. No one disputes that. But when favorable material information is contained in confidential records, an additional interest exists "that such records should not be disclosed unnecessarily." (*Mooc, supra*, 26 Cal.4th at p. 1227.) *Johnson* dismisses the importance of the "intervention of a neutral trial judge, who examines the personnel records in camera, away from the eyes of either party, and orders disclosed to the defendant only those records that are found both relevant and otherwise in compliance with statutory limitations." (*Ibid.*) *Johnson* also dismisses the importance of a neutral trial judge creating a record for appellate review, a benefit defendants are denied in a system of direct prosecutorial review.

In *Brandon*, the majority held that the *Pitchess* procedure permits disclosure of *Brady* information. (*Brandon, supra*, 29 Cal.4th at p. 14.) Justice Moreno, in his dissent, also observed that the prosecutor must

comply with *Pitchess* to seek discovery. (*Brandon, supra*, 29 Cal.4th at p. 21 (Moreno, J. dis. opn.).) *Alford* requires the prosecutor to follow the statutory *Pitchess* procedure to access confidential officer personnel files after a trial court has determined potential impeachment information exists and has disclosed records to the defense following a defense-initiated *Pitchess* motion. It is paradoxical to conclude at the same time, as *Johnson* does, that the prosecutor has direct access to those same confidential files, in the absence of a defense *Pitchess* motion and when no court has yet determined that potential impeachment information exists in those files. In sum, *Johnson* is inconsistent with this Court's statements in *Alford*, *Brandon*, and *Mooc*.

C. *GARDEN GROVE, GREMMINGER, BECERRADA,* AND *REZEK* ALL RECOGNIZE THAT THE PROSECUTION MUST COMPLY WITH THE *PITCHESS* PROCEDURES TO REVIEW OFFICER PERSONNEL RECORDS.

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, in *Gutierrez* and *Abatti*, respectively, have acknowledged, contrary to *Johnson*.

Two years before *Abatti*, the Fourth District in *Garden Grove Police Department v. Superior Court (Reimann)* (2001) 89 Cal.App.4th 430, 431-432 & fns. 1 & 2, 434 (*Garden Grove*), held that the trial court abused its discretion when it ordered the police department to disclose the birth dates of three officers to the district attorney so that the district attorney could run criminal records 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. cit. om.] discovery motion." (*Id.* at p. 435.)

In *People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 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."

Similarly, the Second District in *Becerrada, supra*, 131 Cal.App.4th at p. 415 affirmed that a prosecutor must comply with the *Pitchess* procedures to obtain material disclosed to the defense. Consistent with *Gutierrez*, the Second District reasoned that footnote 7 in *Alford, supra*, 29 Cal.4th at p. 1046 fn. 7, did not establish the right of the prosecution to obtain material disclosed to the defense without filing its own *Pitchess* motion. (*Ibid.*) "To hold that *Alford* confers a right on the prosecution ignores the privacy rights of the officer that *Alford* expressly protected...." (*Ibid.*, quoting *Alford, supra*, 29 Cal.4th at p. 1046.)

In *Rezek v. Superior Court* (2012) 206 Cal.App.4th 633, 638, 641 (*Rezek*), statements of witnesses to the defendant's crime were obtained as the result of an internal affairs investigation and placed in an officer's personnel file. Defendant filed a motion pursuant to Evidence Code section 1043 to obtain those statements. (*Id.* at p. 641.) The Fourth District held that the trial court had erroneously denied defendant's *Pitchess* motion on the mistaken belief that the discovery must be obtained from the prosecutor pursuant to Penal Code section 1054.1. (*Id.* at pp. 641-642, 643.) *Rezek* reasoned that because the records were contained in the confidential officer records, the prosecutor did not have access to those

records, and thus they were not subject to disclosure under section 1054.1. (*Id.* at pp. 641-644.)

Garden Grove, *Gremminger*, *Becerrada,* and *Rezek* all recognize that the prosecution (and defense) must comply with Sections 1043 and 1045 to review officer personnel records.

III. CONTRARY TO *JOHNSON*, PROSECUTORIAL ACCESS TO OFFICER PERSONNEL FILES CONSTITUTES DISCLOSURE AND BREACHES CONFIDENTIALITY IN THOSE FILES.

A. PROSECUTORIAL INSPECTION OF OFFICER PERSONNEL FILES FOR *BRADY* PURPOSES CONSTITUTES DISCLOSURE.

Johnson concludes that "prosecutorial inspection of an officer's personnel file for *Brady* purposes is not a disclosure of the file within the criminal proceeding." (*Johnson, supra*, 228 Cal.App.4th at p. 1070.) *Johnson* relies in part upon *Michael v. Gates* (1995) 38 Cal.App.4th 737 (*Gates*), to support its conclusion. (*Id.* at pp. 1068-1070.) *Johnson* also relies on the authors of the treatise California Criminal Discovery. (*Id.* at p. 1069 fn. 13, quoting Pipes & Gagen, Cal. Criminal Discovery (4th ed. 2008) § 10:20.3.1, p. 964.)

Gates held that where a governmental agency and its attorney conduct a limited review of officer personnel files within the custody and control of the agency for a relevant purpose, there is no disclosure under the statutes (§§ 832.7, 1043, 1045). (*Johnson, supra*, 228 Cal.App.4th at p. 1069, citing *Gates, supra*, 38 Cal.App.4th at p. 745.) In *Gates*, the city attorney defending the police department in a lawsuit was allowed access to personnel records of a former officer. 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. (*Gates, supra*, 38 Cal.App.4th at pp. 744-745.) While the appellate court in 1995

thought that it would be "absurd" to require the prosecution to file its own *Pitchess* motion in order to review an officer's records, eight years later in 2003 this Court in *Alford* and the Second District itself in *Gutierrez* disagreed, reaching the opposite conclusion. (*Alford, supra*, 29 Cal.4th at p. 1046; *Gutierrez, supra*, 112 Cal.App.4th at p. 1475.)

A closer look at Pipes and Gagen's discussion reveals they too rely on *Gates* and the Attorney General's Opinion (66 Ops.Atty.Gen. 128, 130 (1983)) to support their conclusion, a conclusion rejected by *Alford*. (Pipes & Gagen, *supra*, Cal. Criminal Discovery, § 10:20.3.1 at pp. 963-964.) Further, Pipes and Gagen acknowledge that "controlling California authority treats the personnel records of peace officers who are material prosecution witnesses as third-party records that are not possessed by the prosecution...." (*Id.* at § 10:25.2.3 at p. 985, citing *Alford, supra*, 29 Cal.4th 100; *Gutierrez, supra*, 112 Cal.App.4th 1463; and *Abatti, supra*, 112 Cal.App.4th 39; see also Pipes & Gagen, *supra*, § 10:24.2 at p. 980.)

Johnson and *Gates* reason that while the district attorney in a criminal prosecution is not the attorney for SFPD, the joint operation of the agencies as a prosecution team is a sufficiently analogous relationship to justify the same result. (*Johnson, supra*, 228 Cal.App.4th at p. 1069.) But this rationale is the same whether in the *Brady* or the *Pitchess* context. Either the prosecutor is deemed to act as the attorney for the police department when reviewing personnel files of officer-witnesses for evidence favorable to the defense, or it is not. *Alford*, however, rejected this rationale: "In a *Pitchess* hearing, the district attorney prosecuting the underlying criminal case represents neither the custodian of records nor their subject...." (*Alford, supra*, 29 Cal.4th at p. 1045.)

In *Humberto S.*, this Court explained its earlier comment in *Alford* that a prosecutor who actively challenges defendant's third party *Pitchess* discovery "'advance[s] the interests of the third party custodian and police

officer.'" (*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 752, quoting *Alford, supra*, 29 Cal.4th at p. 1045.) As *Humberto S.* explained, this comment should not be interpreted to mean that the prosecutor in doing so literally represents the third party custodian or officer. (*Ibid.*) That is because as a matter of law, the prosecutor does not. (*Ibid.*) Rather, the prosecutor's arguments simply benefit the interests of the third party custodian and officer. (*Ibid.*) Unlike the city attorney in *Gates*, the district attorney does not represent the third party custodian or officer, and logically does not have direct access to confidential officer personnel records.

In a criminal prosecution, the prosecutor does not defend the police department. Nor is the officer-witness a party to the criminal action. Moreover, while the city attorney has a duty to act in the best interest of its client, the police agency, the same cannot be said of the prosecutor. The prosecutor's client is not the police agency, and thus the prosecutor is not required to act in its best interest. *Johnson* too easily dispatches this significant distinction of *Gates*. Personnel records must, therefore, be seen as confidential vis-a-vis the prosecutor when seeking *Brady* information of officer-witnesses, but may be reviewed upon compliance with the procedures set forth in section 1043 *et seq*.

B. OFFICER PERSONNEL RECORDS ARE CONFIDENTIAL VIS-A-VIS THE PROSECUTOR SEEKING FAVORABLE MATERIAL INFORMATION OF OFFICER-WITNESSES.

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* also concludes that such an inspection would not breach the confidentiality of the files. (*Id.* at p. 1072.)

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.)

There are several problems with this conclusion. First, *Johnson* and the Attorney General are in conflict with this Court. (*Alford, supra*, 29 Cal.4th at p. 104.)

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, this language in *Gates* is inconsistent with *Alford.*

Third, Penal Code section 832.8 defines "personnel records" as including "personal data," marital status, home addresses, medical history, election of employee benefits, and "any other information the disclosure of which would constitute an unwarranted invasion of personal privacy." Under *Johnson*, this information, which has no exculpatory or impeachment value to the defense, is now subject to repeated inspections by prosecutors without notice or limitation, court approval or oversight. Even complaints or investigations of complaints that the employing

agency determined to be "unfounded," "exonerated," or "frivolous" (§ 832.5) are subject to inspection under *Johnson*, notwithstanding that by their very nature they are not *Brady* material under *United States v. Agurs* (1976) 427 U.S. 99, 109 fn. 16 ["'It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information.'" (cit. om.)]. *Johnson* effectively eliminates the statutory procedures that balance the defendant's need for disclosure of relevant information with the officer's legitimate expectation of privacy in his or her personnel records. (*Mooc, supra*, 26 Cal.4th at p. 1220.)

Fourth, it is clear from the words of the statute that confidentiality and the use of the procedures set forth in section 1043 *et seq.* are the required standard. Evidence Code section 1043, subdivision (a) states that its written motion procedure is applicable to "*any* case in which discovery or disclosure is sought of peace or custodial officer personnel records." (Ital. added.) "Section 832.7 does not create a limited privilege; it creates a general privilege and then carves out a limited exception." (*City of Hemet, supra*, 37 Cal.App.4th at p. 1427.) "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 in both criminal and civil proceedings."'" (*Johnson, supra*, 228 Cal.App.4th at p. 1067, quoting Assem. Com. On Criminal Justice, Analysis of Sen. Bill No. 1436 (1977-1978 Reg. Sess.) as amended Aug. 7. 1978; see also p. 1071.) It is true that the officer cannot prevent disclosure of his or her personnel records simply because he does not desire disclosure,[7] but "[i]f section 832.7 is to

---

[7]*Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 426-427 (*Rosales*).

have any real meaning for the officer, it must extend a right enforceable by him as well." (*City of Hemet, supra*, 37 Cal.App.4th at p. 1431.)

Prior to *Johnson*, and consistent with *Gutierrez* and *Abatti*, those rights included a filed motion, 16 court days' notice, and an *in camera* hearing under section 1043 *before* the prosecutor reviewed the file of an officer witness, in other words, due process. "A properly noticed motion does not restrict disclosure of the information; it merely allows a sufficient time for the law enforcement agency and its officers to challenge and scrutinize the adequacy of the motion in question. Thus the balance between a fair trial and the officer's interest in privacy is maintained." (*City of Tulare v. Superior Court* (2008) 169 Cal.App.4th 373, 383.)

Direct district attorney access destroys the confidentiality of the records without notice to the officer. "Because police personnel records are confidential, their disclosure requires adherence to the motion and hearing requirements of Evidence Code sections 1043 and 1045, despite the context in which such records are requested." (*Rosales, supra*, 82 Cal.App.4th at p. 426.)

Fifth, if there were no breach of the records' confidentiality, and if prosecutorial review of officer personnel files for favorable material information were not considered disclosure, then no reason exists for the Legislature to have included the second, qualifying sentence in section 832.7, subdivision (a), which explicitly gives the district attorney access.[8]

---

[8] Penal Code section 832.7, subdivision (a) provides:

> 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

Consequently, officer personnel records are confidential vis-a-vis the prosecutor seeking favorable material information of officer-witnesses contained therein.

IV. REQUIRING THE PROSECUTION TO COMPLY WITH THE *PITCHESS* PROCEDURES TO ACCESS PERSONNEL FILES OF OFFICER-WITNESSES IS NOT CONTRARY TO FEDERAL CONSTITUTIONAL LAW.

Johnson, supra, 228 Cal.App.4th at pp. 1076-1077, concludes that "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." (Fn. om.) *Johnson* dismissed *Gutierrez* as "an overly expansive reading of *Alford*," and as contrary to well-established, federal constitutional law requiring the prosecution to learn of any evidence favorable to the defendant known to the police. (*Id.* at p. 1077, citing, among others, *Kyles, supra,* 514 U.S. at p. 437 and 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, 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. om.).]".)

A. *GUTIERREZ* DOES NOT RELY ON AN OVERLY EXPANSIVE READING OF *ALFORD*.

Gutierrez does not rely on "an overly expansive reading of *Alford.*" *Alford* explicitly recognizes that prosecutors may file a motion under Evidence Code section 1043 *et seq.* to obtain access to officer personnel

---

agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

records. (*Gutierrez, supra*, 112 Cal.App.4th at p. 1475, citing *Alford, supra*, 29 Cal.4th at p. 1046.) And *Gutierrez* plainly states, "the *Pitchess* scheme does not unconstitutionally trump a defendant's right to exculpatory evidence as delineated in *Brady*. Instead, the two schemes operate in tandem." (*Id.* at p. 1473.) *Gutierrez* looked to *Mooc* and *Brandon*.

In *Mooc*, this Court explained that *Pitchess* and its subsequent statutory enactments are based on the premise that evidence in an officer's personnel file may be relevant to an accused's defense and that to withhold such relevant evidence would violate the defendant's due process right to a fair trial. (*Mooc, supra*, 26 Cal.4th at p. 1227; *Gutierrez, supra*, 112 Cal.App.4th at pp. 1473-1474.) This Court, citing *Brady*, stated that the *Pitchess* procedural mechanism "'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 rights to a fair trial.'" (*Mooc, supra*, 26 Cal.4th at p. 1225, citing *Bagley, supra,* 473 U.S. at pp. 674-678 and *Brady, supra*, 373 U.S. at p. 87; *Gutierrez, supra*, 112 Cal.App.4th at p. 1474.)

The following year in *Brandon*, this Court reiterated that the "'*Pitchess* process" operates in parallel with *Brady* and does not prohibit disclosure of *Brady* information.'" (*Brandon, supra*, 29 Cal.4th at p. 14, quoted in *Gutierrez, supra*, 112 Cal.App.4th at p. 1474.) Indeed, *Brandon* concluded that the trial court did not act improperly by reviewing *in camera* information more than five years old, notwithstanding the time limitation in section 1045, subdivision (b), for possible disclosure under *Brady*. (*Brandon, supra*, 29 Cal.4th at p. 15 fn. 3.) This Court gave no indication that consideration of *Brady* material in the context of a motion brought pursuant to section 1043 was in any way improper. Simply put,

rather than being "overly expansive," *Gutierrez* is consistent with *Alford*, *Brandon*, and *Mooc*.

B. *GUTIERREZ* IS NOT CONTRARY TO FEDERAL CONSTITUTIONAL LAW.

Nor is *Gutierrez* contrary to federal constitutional law, notwithstanding the assertion by Mr. Neri and adopted by *Johnson*. Neri asserts that *Gutierrez* improperly attempts to subordinate a federal constitutional right to state privacy interests. (Neri, *supra*, 43 McGeorge L.Rev. at p. 310.) Five sentences later, Neri quotes the United States Supreme Court in *Ritchie, supra,* 480 U.S. 39 that "a process for *Brady* review must be superimposed on state confidentiality laws that do not provide for *Brady* compliance." (*Id.* at pp. 310-311.) California law *does provide* a process for *Brady* review that is superimposed on this state's confidentiality laws. That process is a motion by the prosecution or the defense under Evidence Code section 1043 *et seq.* – consistent with *Gutierrez* and *Alford* – that both affords the officer notice of the intent to obtain access to his or her personnel file and seeks *in camera* review. Indeed, *Abatti* points out, "The difference between *Ritchie*[9] and this case [*Abatti*] is that California has a legislatively established, exclusive method for gaining access to police officer personnel records for discovery of such exculpatory material – the so-called *Pitchess* procedures...." (*Abatti, supra,* 112 Cal.App.4th at p. 58, citing *Brandon, supra*, 29 Cal.4th at pp. 14-15; see also *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 400 [*Pitchess* procedures may be used to obtain impeachment material in an officer's file].) "'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

[9]*Ritchie, supra,* 480 U.S. 39.

all information pertinent to his defense.'" (*Alford*, *supra*, 29 Cal.4th at p. 1039, quoting *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-84.)

Citing *Abatti, supra*, 112 Cal.App.4th at p. 59, Neri himself recognized, "Presumably, a prosecutor may bring a *Pitchess* motion on any ground, including the need to conduct a *Brady* review in compliance with federal law." (Neri, *supra*, 43 McGeorge L.Rev. at pp. 314-315.) Petitioner herein is not seeking to hide behind statutory protections afforded officer personnel files in order to avoid our constitutional *Brady* obligations. The danger identified in *Brandon, supra*, 29 Cal.4th at p. 12, fn. 2, that section 832.7 would be "applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady,*" a sentiment echoed by Neri,[10] does not exist in the procedures followed by the SFDA and SFPD. 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*." Petitioner uses sections 832.7, 915, and 1043 *et seq.* to *secure access* to the personnel files, while at the same time respecting an officer's constitutional right of privacy in his or her records. As Neri himself observed, "Presumably, the *Pitchess* laws should enable a prosecutor to obtain nearly automatic in camera review of officers' personnel files based on the 'good cause' of complying with Brady...." (Neri, *supra*, 43 McGeorge L.Rev. at p. 318.)

Moreover, as this Court recognized in *Zambrano*, *Salazar*, and *Morrison* if the defense has the means to obtain exculpatory evidence, then no *Brady* violation occurs. Federal constitutional law is in accord. "'Where defendants . . . had within their knowledge the information by which they could have ascertained the supposed *Brady* material, there is no

---

[10] Neri, *supra*, 43 McGeorge L.Rev. at p. 310.

suppression by the government.'" (*United States v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1501 n. 5, quoting *United States v. Griggs* (11th Cir. 1983) 713 F.2d 672, 674; see also *Aichele, supra,* 941 F.2d at p. 764.) The *Pitchess* procedures provide both the defense and the prosecution with the means to obtain potential *Brady* information contained within officer personnel files. Accordingly, any impeachment evidence contained within an officer's personnel file could not be considered suppressed for *Brady* purposes. Thus, the *Pitchess* statutory scheme is not contrary to federal constitutional law.

V. THE "INVESTIGATION EXCEPTION" UNDER PENAL CODE SECTION 832.7, SUBDIVISION (A) DOES NOT PERMIT THE DISTRICT ATTORNEY TO REVIEW OFFICER PERSONNEL RECORDS OF OFFICER WITNESSES FOR POTENTIAL *BRADY* MATERIAL.

A. THE PLAIN LANGUAGE OF THE "INVESTIGATION EXCEPTION" INDICATES THAT IT APPLIES TO THE CONDUCT OF AN OFFICER WHO IS A SUSPECT IN AN INVESTIGATION OR A TARGET OF CRIMINAL PROSECUTION.

Johnson concludes that the "investigation exception" contained within Penal Code section 832.7, subdivision (a), applies to "*Brady* review of officer personnel files." (*Johnson, supra,* 228 Cal.App.4th at p. 1074.) The plain language of the statute, however, indicates that the exception applies to the conduct of an officer who is a suspect in an investigation or a target of criminal prosecution.

A court must first look at the language of the statute "[w]hen faced with a question of statutory interpretation[] and must "give effect and significance to every word and phrase." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1285 (*Copley*).)

"Investigate" is defined as, "Carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.)

so as to establish the truth." (www.oxforddictionaries.com/us/definition/american_english/investigate?searchDictCode=all (ital. in orig.).)

In a *Brady* review of officer personnel files, the district attorney is not "investigating" the officer's conduct by "carrying out a systematic or formal inquiry to discover and examine the facts (of an incident, allegation, etc.) so as to establish the truth." Rather, the district attorney is simply reviewing the officer's documented disciplinary history in his or her personnel file. (See Neri, *supra*, 43 McGeorge L.Rev. at p. 308 ["[A] *Brady* inquiry is rarely an investigation targeting an officer for criminal prosecution; instead, the inquiry usually focuses on settled disciplinary history. [fn. om.]."].) The district attorney does not interview witnesses or request additional evidence. The district attorney is not attempting to examine the facts so as to establish the truth because the district attorney is not the fact finder. Instead, the district attorney accepts the contents of the personnel file and simply determines whether the contents meet the standard of disclosure under *Brady*.

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. "'Well-established canons of statutory construction preclude a construction [that] renders a part of a statute meaningless or inoperative.'" (*Copley*, *supra*, 39 Cal.4th at p. 1285, quoting *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274.)

Had the Legislature intended to authorize district attorneys to have unlimited access to otherwise confidential officer personnel records 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".[11] That would be very similar to the language in Welfare and Institutions Code section 827, subdivision (a)(1)(B),[12] which gives the district attorney direct access to juvenile files. Alternatively, the statute could have been written, "This section does not apply to reviews of personnel files conducted by a district attorney's office in order to comply with *Brady v. Maryland*." The Legislature did not so draft section 832.7.

B. CASE LAW DEMONSTRATES THAT THE "INVESTIGATION EXCEPTION" APPLIES TO THE CONDUCT OF AN OFFICER WHO IS A SUSPECT IN AN INVESTIGATION OR A TARGET OF CRIMINAL PROSECUTION.

Johnson, supra, 228 Cal.App.4th at pp. 1074, 1075, 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, appearing as amicus curiae. (*Id.* at pp. 1074, 1075 & fn. 18.) *Johnson* reasons that 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.) Petitioner disagrees.

First, this Court necessarily rejected this reasoning in *Alford*, when it held that the district attorney is not entitled to the fruits of a successful defense-initiated *Pitchess* motion, but rather must file its own *Pitchess* motion in compliance with sections 1043 and 1045. (*Alford, supra*, 29 Cal.4th at p. 1046.) *Alford* specifically requires the prosecution to comply

---

[11] 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."

[12] 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 attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law."

with Evidence Code sections 1043 and 1045 to secure *Pitchess* material. No basis in section 832.7 exists to make a distinction between "investigations or proceedings concerning the conduct of peace officers" for purposes of district attorney *Brady* reviews but not *Pitchess* reviews. And query why would the Legislature require the prosecutor to pursue a two step court process to secure information regarding an officer's disciplinary history for *Pitchess* purposes but implicitly allow the prosecutor direct review of that same information for *Brady* purposes, when both seek to protect defendants' rights to due process. *Johnson* allows the district attorney to make an end run around the *Pitchess* process by requesting the officer's personnel records under the theory of a *Brady* inquiry. (Cf. *Garden Grove, supra,* 89 Cal.App.4th at p. 435 ["We cannot allow [defendant] Reimann 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* discovery motion."].) Either the district attorney has direct access to officer personnel files or he does not.

Second, as stated by this Court, "*Brady's* constitutional materiality standard is narrower than the *Pitchess* requirement[s]." (*Brandon, supra,* 29 Cal.4th at p. 10.) "[A]ny citizen complaint that meets *Brady's* test of materiality necessarily meets the relevance standard for disclosure under *Pitchess*." (*Ibid.*) In performing their *Brady* obligations by reviewing officer personnel records, prosecutors would also by necessity perform *Pitchess* reviews.

Johnson concludes, "despite petitioner's 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 *Brady* materials they identify to the defense." (*Johnson, supra*, 228 Cal.App.4th at p. 1079 (ital. in orig.).) Petitioner believes *Johnson* indeed nullifies the *Pitchess* scheme

because *Johnson* permits direct prosecutorial review, a review by an outside agency that neither creates, is the custodian of, nor – unlike the city attorney in *Gates* – is the attorney legally obligated to represent the interests of the agency that both creates and holds the personnel records. And *Johnson* permits direct prosecutorial review without either notice to the officer or *in camera* review in the first instance, in direct contravention of sections 1043 and 1045.

Third, 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 all 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 (*Fagan*) [prosecution properly obtained urinalysis results placed in personnel files of off-duty officers arrested and charged following a street fight]; but see *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 direct 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. 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) or private employers, 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.

Petitioner submits that limiting prosecutorial access to when an officer is the target or subject of a criminal investigation or prosecution does not leave the prosecutor or the defense empty handed. Rather, the prosecutor or defense counsel must simply comply with Evidence Code section 1043 *et seq.* in order to gain access to protected peace officer files.

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

Under *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1333 (*J.E.*), "when a petitioner files a [Welfare and Institutions Code] section 827 petition requesting that the court review a confidential juvenile file and provides a reasonable basis to support its claim the file contains *Brady* exculpatory or impeachment evidence, a juvenile court is required to conduct an in camera review." (See also p. 1339 ["upon a showing there is a reasonable basis to believe exculpatory or impeachment evidence exists in E.W.'s juvenile records, petitioner is entitled to have the juvenile

court conduct an in camera review of the records."].) *J.E.* gave three supporting reasons for its decision.

First, given the highly sensitive material that juvenile records may contain, the Legislature has imposed an exclusive obligation on the juvenile court to shield access to these files unless the court determines the interests supporting disclosure outweigh those in maintaining confidentiality. (*J.E., supra*, 223 Cal.App.4th at p. 1338.) Second, "the Legislature's placement of trust in the juvenile court to serve as the doorkeeper to these confidential files supports that the court should conduct a *Brady* review upon request by a petitioner." (*Ibid.*) Third, use of a section 827 petition to secure *Brady* review streamlines the review process, eliminates the need for the prosecution to request permission for disclosure after its *Brady* review, and forestalls litigation by the defense over whether the prosecution has complied with its *Brady* obligations. (*Id.* at p. 1339.)

Johnson found *J.E.* unpersuasive. While acknowledging that Johnson had filed a separate motion for *Brady* material, *Johnson* nevertheless distinguished *J.E.*, like *Ritchie*, as a case involving "a request by a defendant [or juvenile] for judicial *Brady* review for specific exculpatory evidence." (*Johnson, supra*, 228 Cal.App.4th at p. 1085 & fn. 25.) In a footnote, *Johnson* notes that "petitioners d[id] not argue that Johnson sought specific exculpatory evidence the prosecution had failed to disclose." (*Id.* at p. 1085 fn. 25.)

Petitioners SFDA and SFPD "d[id] not argue that Johnson sought specific exculpatory evidence the prosecution had failed to disclose" because Johnson – like the People – is statutorily precluded from directly reviewing officer personnel records, and thus could not know what "specific exculpatory evidence the prosecution had failed to disclose." The People, like Johnson, requested *in camera* review with as much

specificity as we could, by declaring that SFPD had advised SFDA that both officers' personnel files actually contain material that may be subject to disclosure under *Brady*. "To require specificity in this regard would place an accused [and the People] in the Catch-22 position of having to allege with particularity the very information he is seeking." (*Abatti, supra*, 112 Cal.App.4th at p. 59 fn. 7.)

According to *Johnson*, while *J.E.* held that a juvenile is entitled to judicial *Brady* review upon a showing that a reasonable basis exists to believe exculpatory or impeachment material is contained in the files, *J.E.* did not suggest the prosecutor could compel the court to perform the initial *Brady* review. (*Johnson, supra*, 228 Cal.App.4th at p. 1085, citing *J.E., supra*, 223 Cal.App.4th at p. 1339.) Petitioner respectfully disagrees.

Petitioner is not attempting to compel the court to perform the initial review for potential *Brady* material. SFPD has already done that, reviewing all of the information contained in the officer's personnel file and identifying that which constitutes potential *Brady* material. Petitioner seeks court review of that subset of materials. Moreover, Petitioner is not seeking to compel the court to shoulder the burden of prosecutorial *Brady* duties. It is the state Legislature which has compelled our trial courts to follow the statutory procedures before any party can gain access to such records. So long as these procedures are constitutional, the trial court's initial burden as the locus of decision-making is appropriate.

Indeed, *J.E.* explicitly states, "Although the government's *Brady* obligations are typically placed upon the *prosecutor*, the courts have recognized that the *Brady* requirements can also be satisfied when a *trial court* conducts an in camera review of documents containing possible exculpatory or impeachment evidence." (*J.E., supra*, 223 Cal.App.4th at p. 1336, citing *Ritchie, supra,* 480 U.S. at pp. 57-58 (ital. in *J.E.*); *United*

States v. Brooks (D.C. Cir. 1992) 296 U.S. App. D.C. 219, [966 F.2d 1500, 1504-1505] (*Brooks*).) *J.E.*'s citation to *Ritchie* is important.

In *Ritchie,* defendant was charged with sexual offenses against his daughter. (*Ritchie, supra*, 480 U.S. at p. 43.) The daughter reported the incident to police, and the matter was then referred to the Children and Youth Services (CYS), a protective service agency charged with investigating cases of mistreatment and neglect. (*Ibid.*) Ritchie served CYS with a subpoena for the records concerning his daughter and a prior report concerning his children. (*Ibid.*) CYS refused to comply with the subpoena, claiming the records were privileged under Pennsylvania law. (*Ibid.*) Pennsylvania law provided that the records were conditionally privileged but could be disclosed pursuant to court order. (*Id.* at pp. 43, 57-58.) The trial court refused to order CYS to disclose the files. (*Id.* at p. 44.) No suggestion existed that the prosecutor was aware of the contents of the file or given access to it at any point in the proceedings. (*Id.* at pp. 44 fn. 4, 57.)

The United States Supreme Court held that after establishing a basis for his claim that the CYS file contained material evidence, Ritchie was, as a matter of due process, "*entitled* to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial." (*Ritchie, supra,* 480 U.S. at pp. 58 & fn. 15, 56 (ital. added).)

J.E. observes that following *Ritchie's* selection of the *in camera* review procedure, courts have recognized that *in camera* review is appropriate when a "'special interest in secrecy'" is afforded to the files. (*J.E., supra*, 223 Cal.App.4th at p. 1336, citing *Brooks, supra*, 966 F.2d at pp. 1504-1505; *People v. Webb* (1993) 6 Cal.4th 494, 518 (*Webb*); *United States v. Pena* (2d Cir. 2000) 227 F.3d 23, 27.) Moreover, *J.E.* quotes this

Court in *Webb*. (*J.E., supra*, 223 Cal.App.4th at p. 1336, quoting *Webb, supra*, 6 Cal.4th at p. 518.)[13]

Webb involved a defense subpoena of a private psychiatrist and a county mental health center for records relating to psychotherapy administered to a prosecution witness. (*Webb, supra,* 6 Cal.4th at pp. 515-516.) Defendant argued, and the prosecutor seemingly agreed, that assuming the records showed the witness suffered from delusions or other mental disorders affecting her competence or credibility, defendant's rights to due process and confrontation would prevail over any state law privilege or privacy interest the witness might have in the records. (*Id.* at p. 516.) The magistrate and superior court each reviewed the records *in camera,* found little relevant information contained therein, and provided only sanitized excerpts to the defense and prosecution. (*Id.* at pp. 516-517.) Questioning whether the records were even in the possession of the government, this Court nevertheless found no error in the restrictions placed on defendant's discovery of the witness' psychiatric records. (*Id.* at p. 518.)

Of interest to this case and to *J.E.* are this Court's statements in *Webb*. *Webb* acknowledged that due process requires the government to disclose to the defendant all material exculpatory evidence in its possession, even when the evidence is otherwise subject to a state privacy privilege, at least when no clear state policy of confidentiality exists. (*Webb, supra*, 6 Cal.4th at p. 518.) *J.E.* quotes *Webb*: "'When the state

---

[13] Similarly, *Abatti* noted that in *Brandon*, this Court "found instructive" the United States Supreme Court's approval in *Ritchie, supra,* 480 U.S. 39 of *in camera* review of information, like officer personnel records, that enjoys "'qualified statutory confidentiality'" to determine whether it included material subject to disclosure under *Brady*. (*Abatti, supra*, 112 Cal.App.4th at p. 55, citing *Brandon, supra*, 29 Cal.4th at p. 14.)

seeks to protect such privileged items from disclosure, the court must examine them in camera to determine whether they are "material" to guilt or innocence.'" (*J.E., supra*, 223 Cal.App.4th at p. 1336, quoting *Webb, supra*, 6 Cal.4th at p. 518.) *Webb*, in turn, looked back to *Ritchie* as holding that *in camera* review of confidential records generated by a state agency as part of an investigation was *required* where the defendant claimed they might undercut the victim's credibility and where state law did not absolutely bar their disclosure. (*Webb, supra*, 6 Cal.4th at p. 518.)

Here, materials in officer personnel records, like those in juvenile records (*Ritchie* and *J.E.*) and psychiatric records (*Webb*) are statutorily privileged.[14] As required by *Ritchie, supra*, 480 U.S.at p. 58 & fn. 15, SFDA and the defense can establish a basis for our claim that these files contain material evidence based on the notification from SFPD. Because SFPD seeks to protect those privileged items from disclosure absent court review, "'the court must examine them in camera to determine whether they are "material" to guilt or innocence.'" (See *J.E., supra*, 223 Cal.App.4th at p. 1336, quoting *Webb, supra*, 6 Cal.4th at p. 518; see generally *Ritchie, supra*, 480 U.S. at pp. 58 & fn. 15.)

Given the sensitive material that may be contained in officer personnel records (see, e.g., Pen. Code § 832.8), the Legislature imposed an exclusive obligation on the court under sections 832.7, 1043, and 1045 to shield access to these files unless the court determines the interests supporting disclosure outweigh the interests in maintaining confidentiality. (See *Gutierrez, supra*, 112 Cal.App.4th at pp. 1472-1473, 1475; *Alford, supra*, 29 Cal.4th at p. 1046; *J.E., supra*, 223 Cal.App.4th at p. 1338.) An Evidence Code section 1043 motion by the prosecution or defense for *in*

---

[14] See also *People v. Hammon* (1997) 15 Cal.4th 117; *People v. Reber* (1986) 177 Cal.App.3d 523, overruled in part, *Hammon, supra*, 15 Cal.4th at p. 1123.

camera inspection of officer personnel files is recognized as *the* appropriate method to protect the defendant's right to a fair trial and the state and SFPD's interests in confidentiality of the files. (See *Gutierrez, supra*, 112 Cal.App.4th at pp. 1472-1473, 1475; *Alford, supra*, 29 Cal.4th at p. 1046; *J.E., supra*, 223 Cal.App.4th at p. 1338.) Section 1043, like a section 827 petition, carefully balances two directly conflicting interests.[15] In such a landscape of competing rights, the court serves best as the "locus of decisionmaking." (*Mooc, supra,* 26 Cal.4th at p. 1229.)

Moreover, *in camera* review eliminates the need for the prosecution to request subsequent permission to disclose under *Fagan, supra,* 111 Cal.App.4th at pp. 618-619, 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.

CONCLUSION

Brady is a clear and long-settled prosecutorial obligation. The *Pitchess* procedures, too, have a long and carefully balanced procedural pedigree. In California, *Brady* and *Pitchess* operate in tandem, with the trial court providing the critical balance between the two. *Johnson* upsets this long balance and misreads clear statutes and case law. This Court must restore that balance and reverse *Johnson* to the extent that it holds that the prosecution has direct access to officer personnel files of officer-witnesses for *Brady* purposes.

---

[15] Arguably, the protection afforded officer personnel records under Penal Code section 832.7 is greater than that afforded juvenile records under Welfare and Institutions Code section 827. The district attorney may inspect juvenile records under section 827, subdivision (a)(1)(B) and Cal. Rules of Court, rule 5.552, subdivision (b)(1)(A) but has no general authority to inspect officer personnel files under Penal Code section 832.7, subdivision (a).

Date: January 8, 2015

Respectfully submitted,

GEORGE GASCÓN
District Attorney

Jerry P. Coleman
Special Assistant District Attorney

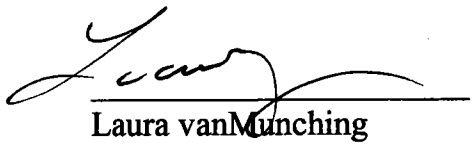
Laura vanMuching
Managing Assistant District Attorney

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 13,608 words. (California Rules of Court, rule 8.504(d).)



Laura vanMunching

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:

OPENING BRIEF ON MERITS

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

John Alden
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

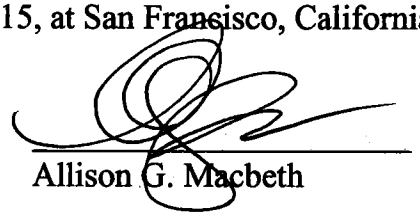
Kamala D. Harris
Attorney General
State of California
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102
Attn: Gerald Engler, Seth Schalit

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 January 9, 2015, at San Francisco, California.



Allison G. Macbeth