SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, vs. SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO, Respondent, DARYL LEE JOHNSON, Real Parties In Interest.	Case No. S221296 First Appellate District, Division Five Case No. A140767 (Consolidated with Case No. A140768) San Francisco Superior Court Case No. 12029482 SCN 221362

OPENING BRIEF ON THE MERITS BY THE CITY AND COUNTY OF SAN FRANCISCO THROUGH THE SAN FRANCISCO POLICE DEPARTMENT

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.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

State Statutes & Codes

Other Authorities

ISSUES PRESENTED

1. Must a prosecutor comply with Evidence Code section 1043 and obtain a court order under Evidence Code section 1045 before accessing the confidential personnel file of a peace officer if the purpose of such access is to search for material that may be subject to disclosure to a criminal defendant under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*)?

2. When reviewing documents in camera under Evidence Code section 1045 for potential disclosure under *Brady*, does the trial court have an independent obligation to weigh peace officers' privacy interest in their personnel records and order disclosure only of those materials to which the defendant is entitled under *Brady*?

3. By order dated December 17, 2014, this Court requested that the parties also brief the following question: Would the prosecution's obligation under *Brady* and its progeny be satisfied if it simply informs the defense of what the police department has informed it (that the two officers' personnel file might contain *Brady* material), which would allow the defense to decide for itself to seek discovery of that material pursuant to statutory procedures? (See *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475 (*Gutierrez*).)

BACKGROUND

In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-537 (*Pitchess*), this Court held that a defendant's right to a fair trial encompasses the right to obtain discovery of records concerning past misconduct by peace officers, where relevant to the issues in the case. After concerns that the right announced in *Pitchess* was subjecting peace officers to random discovery and encouraging the destruction of law enforcement records, in 1978 the Legislature enacted a statutory scheme to

provide a discovery mechanism subject to reasonable limits. (See *Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278, 293 (*Commission on POST*); *San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189-190.) The *Pitchess* scheme requires the preservation of complaints against peace officers for a period of at least five years (Pen. Code, § 832.5, subd. (b)); it makes peace officer personnel files, including those complaints, confidential (Pen. Code, § 832.7, subd. (a) [hereafter "Section 832.7(a)"]); and it allows disclosure of information in the files by motion showing good cause (Evid. Code, § 1043 [hereafter "Section 1043"]). On such showing, the trial court must review the records in camera and may order disclosure of relevant information, subject to certain limitations. (Evid. Code, § 1045 [hereafter "Section 1045"].)[1]

This Court has previously considered the interaction of *Pitchess* and *Brady*. In *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14 (*Brandon*), this Court wrote that the *Pitchess* scheme "operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information." (See also *People v. Mooc* (2001) 26 Cal.4th 1216, 1225 (*Mooc*) [the *Pitchess* procedure "must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial"].) *Brandon* held that the trial court did not

[1] The court must exclude from disclosure (1) information from complaints of conduct more than five years old; (2) in any criminal proceeding, the conclusions of any officer investigating a complaint filed pursuant to Penal Code section 832.5, and (3) facts that are "so remote as to make disclosure of little or no practical benefit." (Evid. Code, § 1045, subd. (b.) The statute also provides for the issuance of protective orders. (Evid. Code, § 1045, subds. (d), (e).)

act improperly by reviewing information more than five years old, notwithstanding the time limitation in Section 1045(b), for possible disclosure to the defendant under *Brady*. (*Brandon*, at pp. 14-15 & fn. 3.)

In *Alford v. Superior Court* (2003) 29 Cal.4th 1033 (*Alford*), this Court considered whether the prosecution was entitled to receive copies of personnel records that the defendant obtained by motion under Section 1043. It held that, while the prosecution "remains free to seek *Pitchess* disclosure by complying with the procedure set forth in Evidence Code sections 1043 and 1045," it has no entitlement to receipt of those records based on the defense's motion: "Absent such compliance ... peace officer personnel records retain their confidentiality vis-à-vis the prosecution." (*Id.* at p. 1046 (lead opn.).) Several courts have stated that the confidentiality of peace officer personnel files in relation to the prosecution must be respected in the *Brady* context as in any other. (*Gutierrez, supra*, 112 Cal.App.4th at p. 1475 [rejecting defendant's contention that prosecution must directly access peace officer files to conduct *Brady* review notwithstanding Section 832.7(a)]; see also *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 56; *Garden Grove Police Dept. v. Superior Court* (2001) 89 Cal.App.4th 430, 435.)

A prosecutor nonetheless has an obligation under *Brady* to discover and disclose material information in the possession of investigating agencies. (*Kyles v. Whitley* (1995) 514 U.S. 419, 437 (*Kyles*); *People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*).) *Brady* treats the prosecution and the police as members of a single "prosecution team." (*In re Brown* (1998) 17 Cal.4th 873, 879 (*Brown*).) To facilitate the prosecution's performance of its *Brady* obligations while respecting the confidentiality of peace officer personnel records, in August 2010 the San

Francisco Police Department ("Police Department" or "Department") issued Bureau Order No. 2010-01, providing for ongoing identification of potential *Brady* material and notice to the district attorney. (1 App., tab 8, at 178-187.)[2] When the Department becomes aware of potential *Brady* material regarding an officer, a synopsis is created identifying the employee, the conduct at issue, and the documents and information for potential disclosure. A departmental *Brady* Committee—consisting of the Assistant Chief of the Office of the Chief of Staff, the Director of Risk Management, the head of the Legal Division, the Director of Staff Services, the author of the synopsis, and a retired judge with criminal law experience—reviews the synopsis and recommends to the Chief of Police whether the employee's name should be disclosed to the district attorney. If the Chief approves the committee's recommendation, the district attorney is notified that the officer "has material in his or her personnel file that may be subject to disclosure under" *Brady*. (*Id.* at 182-184.)

Upon determining that one of these officers is a material witness in a pending case, the district attorney moves under Section 1043 for in camera review and disclosure of any *Brady* material. (See *People v. Davis* (2014) 226 Cal.App.4th 1353, 1374 [explaining that "the People used the *Pitchess* procedure to perform its obligations under *Brady*"].) The Department furnishes the records to the court but does not disclose them to any party absent a court order for disclosure. The Department's submission to the trial court does not include the personnel files in their entirety but only those materials the *Brady* Committee has determined may be subject to

[2] City and County of San Francisco's Appendix in Support of Petition for Writ of Mandate, Prohibition or Other Appropriate Relief and Stay Request (Case No. A140768).

disclosure. (1 App., tab 8, at 184-185.) For several years, the Superior Court granted the prosecution's motions for in camera review and disclosed *Brady* material to the prosecution and the defense. (1 App., tab 2, at 22.) The procedure was supported not only by the Police Department and the District Attorney, but also by the Public Defender. (1 App., tab 6, at 159.)

The present proceeding arises from a felony domestic violence case, *People v. Daryl Lee Johnson* (Super. Ct. S.F. City and County, No. 12029482). Consistent with the Bureau Order procedure, the assistant district attorney filed a "Motion for Discovery of San Francisco Police Department Peace Officer Personnel Records under *Brady* and Evidence Code Sections 1043 and 1045(e)," supported by her declaration. She explained that Officers Paul Dominguez and Antonio Carrasco responded to the domestic violence distress call and were "necessary and essential witnesses for the prosecution in this case on virtually all the issues and each of the counts charged." Based on the Police Department's representation, she stated that she believed the officers' personnel files contain "sustained allegations of specific *Brady* misconduct, reflective of dishonesty, bias, or evidence of moral turpitude." She further stated: "I believe on these case facts, and given the officers' roles, that such misconduct would be constitutionally material to the instant case in the *Brady* sense." Finally, she explained that the records "are material to the pending litigation in that they pertain to the credibility of a necessary and material prosecution witness, and could either impeach said witness or lead to evidence exonerating the defendant." (1 App., tab 5, at 115-117.)

The Department responded by agreeing that the trial court should perform the requested review, and included a declaration from its counsel that "the SFPD *Brady* Committee believes that the defendant may be

entitled to receive material [from the officers' personal files] that is reflective of dishonesty, bias, or evidence of conduct of moral turpitude ...." (1 App., tab 8, at 175.) Johnson, the defendant, responded with his own *Brady* motion, requesting that the trial court perform the requested review, or in the alternative either declare Section 832.7(a) unconstitutional and direct the Department to allow the prosecutor to access the officers' personnel files, or dismiss the case based on the prosecution's failure to comply with *Brady*. (1 App., tab 6, at 147-161.)

The trial court denied the prosecution's motion for in camera review, finding that the district attorney could not establish a basis for the claim that the personnel files contain material evidence without knowing the contents of the files. (1 App., tab 12, at 231.) It further concluded that the *Pitchess* motion procedure does not apply to a review of personnel records under *Brady*, and that Section 832.7(a) is unconstitutional to the extent it bars prosecutorial access to those records. It ordered the Department to provide the records directly to the district attorney for review and disclosure to the defense. (*Id.* at 240-241.)

The Department and the People both filed petitions for writ of mandate. Johnson filed a reply in which he expressed support for the Bureau Order procedure. (Johnson Writ Reply at 6.) The respondent trial court filed a return defending its decision and adding that trial courts cannot and should not shoulder the burden of reviewing these records, particularly in a time of budget cuts and staffing reductions. (Return at 3-4.)

Consolidating the petitions, the Court of Appeal held that Section 832.7(a) does not impose any restriction on a prosecutor's direct access to personnel files for the purpose of identifying *Brady* material, and in the alternative that such access falls within Section 832.7(a)'s exception for

investigations or proceedings concerning peace officer conduct. (*People v. Superior Court (Johnson)* (2014) 228 Cal.App.4th 1046, 1067-1074 (*Johnson*).) It rejected the trial court's view that the *Pitchess* motion procedure does not apply in the *Brady* context, but held that such a motion is required only before documents are provided to the ***defendant***. (*Id.* at pp. 1087-1091.) Nonetheless, it found no role for the trial court, when conducting the in camera review, in balancing the officer's privacy interests against the defendant's need for disclosure. (*Id.* at p. 1091.)

The Department and the People both sought review in this Court on the grounds, among others, that *Johnson*'s holding that the prosecution has direct access to peace officer personnel files for *Brady* purposes conflicts with *Gutierrez*'s holding that Section 832.7(a) prohibits such access, and undermines this Court's holding in *Alford* that peace officer personnel files retain their confidentiality vis-à-vis the prosecution.

SUMMARY OF THE ARGUMENT

I.A. Section 832.7(a) opens with a rule that makes peace officer personnel records confidential and prohibits their disclosure other than by motion under Section 1043. It is followed by a limited exception for investigations or proceedings concerning the conduct of a peace officer, or his or her employing agency, conducted by a grand jury, a district attorney's office, or the Attorney General's office. The Court of Appeal held both that the rule does not prohibit prosecutorial access to personnel files for the purpose of conducting a *Brady* review, and also that the investigative exception authorizes such access. This approach violates fundamental rules of statutory construction. If the rule does not prohibit prosecutorial access in the first place, then the exception is superfluous; on the other hand, if the exception serves a purpose, then the rule must prohibit

prosecutorial access outside of the exception. The Court of Appeal took the rule and the exception in isolation, interpreting them inconsistently with each other, and never considered Section 832.7(a) as a whole.

I.B. The confidentiality of personnel records applies in relation to the prosecution as well as to the defense, as this Court has already held. The Legislature intended to protect peace officers' privacy interests to the fullest extent possible consistent with the defendant's right to a fair trial. Much of the information in personnel records would have no conceivable relevance to a *Brady* review in any event, and the prosecution is able to obtain access to potentially relevant records by motion under Section 1043. While peace officers serve as members of the prosecution team, personnel files are maintained by the police department in its administrative capacity, and are not prepared in connection with the investigation of the defendant. Numerous decisions have held that district attorneys do not represent the police department, and do not have access to such records other than by motion under Section 1043.

I.C. The language, rationale, and legislative history of the investigative exception all establish that it was intended for the situation in which peace officers are the target of a prosecutorial inquiry—circumstances in which a motion under Section 1043 is either unavailable altogether or would interfere with the investigation itself. When reviewing documents in a file to determine whether they satisfy *Brady*'s standard, the prosecutor is not investigating the conduct described in them, and there is no proceeding. The legislative history expressly refers to investigating crimes allegedly committed by peace officers, and explains why the prosecutor cannot file a motion under Section 1043 in that context. By contrast, the Court of Appeal's interpretation would afford prosecutors

routine access to the personnel files of thousands of peace officers in the State, in circumstances in which there is no obstacle to the filing of a motion under Section 1043. That construction is inconsistent with the intent of the exception.

II.A. The San Francisco Police Department assists the prosecution in satisfying its *Brady* obligations by providing ongoing notice to the district attorney of peace officers whose personnel files may contain *Brady* information. The prosecution moves for in camera review and disclosure whenever one of those officers is a material witness or will be called as a witness in a criminal case. The law is well established that *Brady*'s requirements are satisfied when the agency in possession of the records furnishes them to the trial court for in camera review. Johnson himself supports the San Francisco procedure that the Court of Appeal rejected.

II.B. The Court of Appeal framed the issue incorrectly by asking whether the case law authorizes the prosecution routinely to shift the burden of reviewing personnel records to the trial court. The question in this case concerns the authority of the ***Legislature*** to protect the confidentiality of a particular category of records by requiring disclosure through the process of in camera review, not the discretion of prosecutors to shift the burden of review. The Court of Appeal's analysis does not establish any constitutional obstacle to the Legislature's policy decision, which is supported by abundant case law approving the use of in camera review to make *Brady* determinations.

II.C. As an alternative to filing its own motion, the prosecution may instead supply the defense with the information provided by the Police Department, allowing the defense to bring its own motion under Section 1043. Courts have held that there is no *Brady* suppression when the

prosecution places the defense on notice of the existence of potentially exculpatory information and the defense has an opportunity to seek it out. Although the trial court held that the "good cause" showing required by Section 1043 cannot be met unless the moving party—whether the prosecution or the defense—already knows the contents of the personnel records, that self-defeating standard is contrary to this Court's precedent.

III. The Court of Appeal's holding that there is no role for the trial court in weighing peace officers' privacy interests when reviewing records in camera is also contrary to the purposes of the statutory scheme and this Court's prior cases. While the trial court may not deny the defendant anything to which he or she is entitled under *Brady*, the court does have a responsibility to ensure that confidential personnel records are not disclosed unnecessarily.

ARGUMENT

A trial court's order granting or refusing discovery of peace officer personnel records is ordinarily reviewed for abuse of discretion. (*Mooc*, *supra*, 26 Cal.4th at p. 1228.) However, review of the construction of applicable statutes is de novo. (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 488.)

I. SECTION 832.7 PROHIBITS PROSECUTORIAL ACCESS TO PEACE OFFICER PERSONNEL FILES FOR *BRADY* PURPOSES ABSENT COMPLIANCE WITH EVIDENCE CODE SECTION 1043

A. Section 832.7(a) Must Be Considered as a Whole

The starting point for any question of statutory interpretation is an examination of the statutory language, "giving it a plain and commonsense meaning," considered not in isolation, but in the context of the statute's overall scope and purposes. (*Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1106-

1107 (*Alameda Produce*).) Where the statutory language is unambiguous, its plain meaning controls; where it supports more than one reasonable construction, extrinsic aids may be considered, such as the ostensible objects to be achieved by the statute and its legislative history. (*Id.* at p. 1107.)

Section 832.7(a) consists of two sentences—a rule followed by a limited exception:

> 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.[3] This section shall not apply to investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

The Court of Appeal held that the first sentence of Section 832.7(a) presents no barrier to routine prosecutorial access for *Brady* purposes, reasoning that such access neither breaches the records' confidentiality nor constitutes a form of disclosure. It further held that the exception set forth in the second sentence authorizes prosecutorial access for *Brady* purposes on the theory that reviewing a personnel file for *Brady* material is an "investigation" of the peace officer's conduct. Each component of this analysis is erroneous, but as an initial matter, the Court of Appeal's bifurcated approach violates fundamental rules of statutory interpretation.

The court called its second holding an "alternative" one, perhaps in an acknowledgment that the two holdings cannot both be correct. If the

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[3] Evidence Code section 1046 concerns cases in which the party seeking disclosure alleges excessive force by a custodial or peace officer. It is not at issue in this case.

rule in the first sentence does not prohibit prosecutorial access to personnel records in the first place, then the exception in the second sentence cannot be intended to authorize such access. "'Well-established canons of statutory construction preclude a construction [that] renders a part of a statute meaningless or inoperative.' [Citation.]" (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1285.) In *Copley Press*, this Court applied that rule to the protections of Section 832.7(a). It rejected a newspaper publisher's contention that, because Section 832.7(a) expressly prohibits disclosure only "in any civil or criminal proceeding," there is no bar to disclosure outside of that context. It pointed out that subdivisions (c) and (d) of Section 832.7 authorize the release of certain kinds of data and factual information to the public notwithstanding subdivision (a), and that there would be little need for such exceptions if information from peace officer personnel records were otherwise obtainable. (*Ibid.*) The same reasoning applies to the investigative exception contained in Section 832.7(a) itself.

Moreover, because the exception sets forth the circumstances in which a prosecutor may access personnel files without complying with Section 1043, it should not be inferred that the Legislature intended to afford prosecutorial access in other circumstances it did not specify. "Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary. [Citation.]" (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424 (*Rojas*).) The consequence of that maxim here was stated in *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 618 (*Fagan*): "Where the exception afforded the district attorney by section 832.7, subdivision (a) is

inapplicable, he must proceed according to the provisions of Evidence Code section 1043."

In its alternative holdings, the Court of Appeal took each sentence of Section 832.7(a) in isolation, offering an interpretation of each one that is inconsistent with the interpretation it offered of the other, and never considered it as a whole. That approach is contrary to this Court's precedent. (See *Alameda Produce*, *supra*, 52 Cal.4th at p. 1107.)

As discussed below, the first sentence of Section 832.7(a) prohibits prosecutorial access to peace officer personnel records outside of a motion under Section 1043. (*Infra* Section I.B.) The second sentence creates an exception when the peace officer is the target of the prosecutorial inquiry—circumstances in which a motion under Section 1043 may be unavailable altogether or could interfere with the investigation. (*Infra* Section I.C.) Because the exception does not apply to a review of documents for *Brady* purposes, the prosecution must obtain access by motion for in camera review, but that approach is fully consistent with *Brady*'s requirements and fulfills the Legislature's intent to vest the trial court with the responsibility to protect the confidentiality of peace officer personnel records. (*Infra* Section II.)

B. The Protection Conferred By Section 832.7(a) Applies in Relation to the Prosecution as Well as to the Defense

1. Prosecutorial Access to Personnel Records Is a Breach of Their Confidentiality

Peace officers have a "just claim to confidentiality" in their personnel records. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84 (*Santa Cruz*).) That claim has force where peace officers are under no suspicion of wrongdoing. By enacting the statutory *Pitchess* scheme, "the Legislature has attempted to protect the defendant's right to a

fair trial and the officer's interest in privacy to the fullest extent possible." (*Mooc*, *supra*, 26 Cal.4th at p. 1227.) Opening peace officers' personnel records for prosecutorial inspection on a regular basis does not protect officers' privacy interest "to the fullest extent possible." And it cannot be said that such a routine invasion of privacy is necessary to protect the defendant's right to a fair trial: Johnson himself affirmed that the Bureau Order procedure was a "working system [that] harmonizes the statute with due process, avoiding any constitutionality issue." (Johnson Writ Reply at 6; see *infra* Section II.A.)

The phrase "personnel records" in Section 832.7(a) is defined to include all of the following:

> (a) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.
>
> (b) Medical history.
>
> (c) Election of employee benefits.
>
> (d) Employee advancement, appraisal, or discipline.
>
> (e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.
>
> (f) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

(Pen. Code, § 832.8; see *Commission on POST*, *supra*, 42 Cal.4th at p. 293 [the legislation protects all personnel records, not just records of complaints and disciplinary actions].) Many of these records are intensely personal and unlikely to contain any information even potentially subject to disclosure under *Brady*. When a party seeks access to a personnel file by motion under Section 1043, these private but irrelevant records are not subject to review even by the court. (*Mooc*, *supra*, 26 Cal.4th at p. 1229 [explaining that a personnel file will commonly contain many documents

that are irrelevant, and that the custodian need bring to court only potentially relevant documents for in camera review]; *Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 640 (*Stiglitz*) ["This limitation [on what materials are presented for review] balances privacy interests while permitting focused discovery"].) Yet under the Court of Appeal's interpretation, Section 832.7(a) affords none of these records any legal protection whatsoever against regular access by a prosecutor searching for *Brady* material. Any procedures for such access are left to the prosecutor in the exercise of his or her sole discretion. (*Johnson*, *supra*, 228 Cal.App.4th at pp. 1080-1081.)

The Court of Appeal quoted the dictionary definition of "confidential": "communicated, conveyed, acted on, or practiced in confidence: known only to a limited few: not publicly disseminated: PRIVATE, SECRET." (*Johnson*, *supra*, 228 Cal.App.4th at p. 1071.) Yet it later cited an opinion by the Attorney General that quoted only the phrase, "not publicly disseminated." (*Id.* at p. 1073, citing 66 Ops.Cal.Atty.Gen. 128, 129, fn. 3 (1981).) The word "confidential" certainly includes that notion, but it is an inadequate definition by itself, because disclosure even to particular individuals, as opposed to the public at large, can constitute a breach of confidentiality. While the Court of Appeal found the scope of the confidentiality afforded by Section 832.7(a) "unclear" (*id.* at p. 1071), in *Alford* this Court clearly held that it protects against access by the prosecution:

> 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. omitted.] Absent such compliance ... ***peace officer personnel records retain their confidentiality vis-à-vis the prosecution.*** [Citation.] [Fn. omitted.]

(*Alford, supra*, 29 Cal.4th at p. 1046, emphasis added.)

The Court of Appeal suggested that *Alford* was not controlling because it did not consider prosecutorial access for *Brady* purposes. (*Johnson, supra*, 228 Cal.App.4th at p. 1076.) But the entire premise of *Alford*'s holding was that the prosecution did not have access to the personnel records that the defendants obtained through their motion. Moreover, as revealed in a footnote accompanying the above-quoted text, *Alford* was mindful of the prosecution's obligations under *Brady*, but in that context too it suggested that the prosecution's access to personnel records arose by motion under Section 1043. (*Alford, supra*, 29 Cal.4th at p. 1046, fn. 6; see also *id.* at p. 1056, fn. 8 (conc. & dissent. opn. of Baxter, J.) [both mentioning but not resolving the issue of the prosecution's *Brady* obligations in a future case with respect to documents it obtained ***as a result of*** its own motion under Section 1043].)

The Court of Appeal reasoned that prosecutorial access would not breach the confidentiality of the records because the prosecution and the police department constitute a single "prosecution team." But that phrase does not mean that personnel files may be inspected at will by the district attorney with no breach of confidentiality. Indeed, when it held that personnel files retain their confidentiality vis-à-vis the prosecution, *Alford* itself observed that in most cases the officer whose personnel records are sought will be "affiliated with the prosecution team," but explained that the prosecution may be able to learn of available impeachment information against an officer who may serve as a prosecution witness "by interviewing him or her." (*Alford, supra*, 29 Cal.4th at p. 1046, fn. 7; see *Becerrada v. Superior Court* (2005) 131 Cal.App.4th 409, 415 ["The recognition by the Supreme Court that an officer remains free to discuss with the prosecution

any material 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. omitted.] However, this does not translate into a 'back door' for the prosecution to evade the legal requirements imposed by *Alford*"], emphasis added.)

While peace officers may serve as members of the prosecution team, personnel files are prepared and maintained by the Police Department in its administrative capacity. In *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305 (*Barrett*), the court considered discovery requests seeking California Department of Corrections records in a case charging the defendant with committing a murder while incarcerated. The court distinguished between records prison officials prepared in connection with the investigation, such as interviews of crime witnesses, and those generated in connection with CDC's administrative and security responsibilities in the course of running the prison. With respect to the latter category, the court explained, "CDC is not part of the prosecution team." (*Id.* at p. 1317.) Thus, while the court expected the prosecution to have access to, and to produce to the defendant, records prepared by CDC in its role as an investigatory agency, the same was not true for records that CDC did not prepare in connection with its investigation of the crime. (See also, e.g., *County of Placer v. Superior Court* (2005) 130 Cal.App.4th 807, 814 (*County of Placer*) [drawing similar distinction between different roles of the probation department]; cf. *In re Steele* (2004) 32 Cal.4th 682, 697 ["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***"], emphasis added.) While the prosecutor may have access to records connected to the

investigation, the same does not hold with respect to peace officer personnel records. (See *Alford, supra*, 29 Cal.4th at p. 1045 [characterizing *Pitchess* as a form of "third party discovery" even as to the prosecution].)

2. Prosecutorial Access Is Also a Form of Disclosure Prohibited by Section 832.7(a)

In addition to making personnel records confidential, Section 832.7(a) also prohibits their disclosure "in any criminal or civil proceeding except by discovery pursuant to" Section 1043. Each of these provisions must be accorded independent significance. (*Copley Press, supra*, 39 Cal.4th at pp. 1284-1285.) The Court of Appeal reasoned that prosecutorial access does not constitute "disclosure" of the records, citing *Michael v. Gates* (1995) 38 Cal.App.4th 737 (*Gates*), which rejected a former officer's claim that the police department had violated Section 832.7(a) by allowing a deputy city attorney, ***as counsel for the department***, to review the officer's personnel file without complying with Evidence Code section 1043.

Gates pointed out that, when a party files a motion under Section 1043, the police department must formulate a response to the motion, deciding whether and how to oppose it, and preparing for the hearing. "It is patent that the agency cannot make these decisions without reviewing the records, that meaningful decisions require the assistance of counsel...." (*Gates, supra*, 38 Cal.App.4th at p. 744.) Noting that it would be absurd to hold that the agency's own attorney could not review the records to respond to the motion without filing his or her own motion under Section 1043, *Gates* merely concluded that Section 832.7(a) does not prevent the agency from reviewing its own records. (*Id.* at p. 745.)

The Court of Appeal found that the same conclusion should be extended to the district attorney as the head of the prosecution team. But while *Gates* explained that the city attorney represented the police department in responding to the motion under Evidence Code section 1043, this Court has expressly held that the district attorney does not. (*Alford, supra*, 29 Cal.4th at p. 1045; *People v. Superior Court (Humberto)* (2008) 43 Cal.4th 737, 752.) A city attorney who represents the police department has a responsibility to act in the department's best interest. By contrast, the prosecutor's responsibilities in a criminal case do not run to the police; the prosecution's *Brady* obligation runs to the defendant. Moreover, as *Barrett* and *County of Placer* indicate, the fact that peace officers serve as members of a prosecution team does not make all records maintained by a police department in its administrative capacity—including many that could have no conceivable relevance to *Brady* in any event—records of the prosecution team accessible by the district attorney.

The Court of Appeal cited *Fagan*, which held that the district attorney could access peace officers' urinalysis tests but could not release them publicly or use them in a civil or criminal action without complying with Section 1043. (See *Fagan, supra*, 111 Cal.App.4th at p. 618.) But *Fagan* expressly found that the prosecutor's access was permitted ***under the investigative exception***, because the prosecutor was conducting a criminal investigation of the officers. (*Id.* at p. 615.) *Fagan* did not hold, as *Johnson* does, that nothing in Section 832.7(a) prohibits the prosecutor's access in the first place. Such a construction of the statute is impermissible because it would render the investigative exception superfluous. (*Copley Press, supra*, 39 Cal.4th at p. 1285.)

3. The Statutory Language Reveals the Legislature's Intent With Respect to Prosecutorial Access

The Court of Appeal stated that it found no concern with prosecutorial access in the legislative history of Section 832.7, and therefore found no reason to conclude that the first sentence of Section 832.7(a) protects against it. But the sentence is not ambiguous—as *Alford* held, personnel files are confidential vis-à-vis the prosecution—and therefore its plain meaning controls. (*Alameda Produce*, *supra*, 52 Cal.4th at p. 1107.) Moreover, in construing the first sentence, the Court of Appeal failed to consider the second: The investigative exception itself sets forth the circumstances under which the Legislature intended prosecutors to have access outside of a motion under Section 1043. The existence of an express exception precludes an inference here that the Legislature intended to afford prosecutors access in other situations it did not identify. (*Rojas*, *supra*, 33 Cal.4th at p. 424.) The lack of an explicit reference to *Brady* in the available legislative history is not dispositive. By requiring a motion and in camera review where the investigative exception does not apply, the Legislature sought to protect the officer's interest in privacy "to the fullest extent possible." (*Mooc*, *supra*, 26 Cal.4th at p. 1227.)

Accordingly, outside of the investigative exception, the protection that Section 832.7(a) confers on peace officer personnel files applies equally to the prosecution and to the defense.

C. The Investigative Exception in Section 832.7(a) Does Not Apply to a *Brady* Review of a Peace Officer's Personnel File

The next question is whether the investigative exception applies to a prosecutor's review of a personnel file for *Brady* material. The answer is no: The language of the exception, its rationale, its legislative history, and the case law interpreting it all demonstrate that it was intended for the

situation in which peace officers, or their employing agencies or departments, are themselves the target of some prosecutorial inquiry.

1. The Language of the Exception Indicates That It Is Intended for Situations in Which the Peace Officer Is the Target of the Prosecutorial Inquiry

The phrase "investigations or proceedings concerning the conduct of peace officers" naturally evokes the situation in which peace officers are the subject or target of the inquiry. That meaning is also suggested by the fact that the exception refers, first of all, to investigations or proceedings "conducted by a grand jury."[4] Contemplating situations in which the peace officer is the target of the prosecutorial investigation or proceeding, the exception would foreseeably be limited in both the frequency and reach of its application, consistent with case law that has understood the second sentence of Section 832.7(a) to create a "limited" exception to the otherwise broad protection the first sentence affords. (See *People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 404 (*Gremminger*) [characterizing Section 832.7(a) as providing broad confidentiality protection with a limited exception]; *Fagan, supra*, 111 Cal.App.4th at p. 615 [Section 832.7(a) contains "limited exception"].)

By contrast, the Court of Appeal's interpretation would expand the exception to the point where most peace officers' personnel files would be swept up in it, regularly and repeatedly. This interpretation would remove any legal protection against opening confidential personnel files to district

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[4] As originally enacted, the exception was only for investigations or proceedings "conducted by a grand jury or a district attorney's office." (Former Pen. Code § 832.7, subd. (a), added by Stats. 1978, c. 630, p. 2083, § 5.) The reference to the Attorney General's office was added by amendment to a bill conferring peace officer status on investigators with the Employment Development Department. (Assem. Amend. to Sen. Bill No. 1027 (1987-1988 Reg. Sess.) June 16, 1988.)

attorneys on a daily basis, simply because peace officers, as part of their regular job duties, have made an arrest or assisted in an investigation and will serve as a witness in the prosecution's case. With such pervasive application, it becomes the de facto rule and ceases to be an exception in any meaningful sense at all.

The Court of Appeal did not suggest that a district attorney's internal review of a peace officer's personnel file for *Brady* material could properly be characterized as a "proceeding." That word connotes some kind of process in which one or more parties appears before a tribunal, and does not describe the situation in which a prosecutor surveys the contents of a file in the solitude of his or her own office. The court instead focused on the word "investigation," writing that "when a prosecutor conducts a *Brady* review of an officer's personnel file, the prosecutor is investigating that officer's conduct to determine whether there is any evidence that could be used to impeach him or her at trial." (*Johnson*, *supra*, 228 Cal.App.4th at p. 1075.)

But that is not an accurate description of a *Brady* review. Examining the contents of a personnel file to determine whether there are documents subject to disclosure under *Brady* is different from conducting an investigation of the conduct that is reflected or described in them—conduct that may have occurred years or even decades earlier. (See, e.g., *Brandon*, *supra*, 29 Cal.4th at p. 14 [citizen complaints older than five years may be subject to disclosure under *Brady*].) "Investigate" means to "carry out a systematic or formal inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth" or "to try to find out the facts about (something, such as a crime or an accident) in order to learn

how it happened, who did it, etc."[5] It is not necessary for a prosecutor to investigate the underlying conduct and reach his or her own conclusions about what happened in order to decide whether a particular document reflecting that conduct should be disclosed to the defendant.

For example, in *United States v. Alvarez* (9th Cir. 1996) 86 F.3d 901, 905 (*Alvarez*), the Ninth Circuit explained that "[i]t is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false." (See also *United States v. Olsen* (9th Cir. 2013) 704 F.3d 1172, 1182 [documents were favorable to the defendant notwithstanding that Washington State Police investigation of forensic scientist had yet to make formal findings].) Similarly, in *People v. Morris* (1988) 46 Cal.3d 1, 30, fn. 14, this Court wrote that the duty of disclosure covers material that "reasonably appears favorable to the accused...." The quoted language likewise indicates that the role of the district attorney reviewing documents for *Brady* purposes is not to investigate the underlying conduct but rather to assess whether the information is favorable to the defendant and material to guilt or punishment. (*In re Sassounian* (1995) 9 Cal.4th 535, 544, fn. 5 [modifying *Morris* to the extent that material must be *both* favorable to the accused *and* material to guilt or punishment before there is an obligation to disclose].)

To be sure, a *Brady* materiality determination requires the exercise of judgment in light of the relevant legal principles. For example, the government has no obligation to communicate "preliminary, challenged, or speculative information." (*United States v. Agurs* (1976) 427 U.S. 97, 109,

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[5] The first definition appears at http://www.oxforddictionaries.com/us/definition/american_english/investigate, the second at http://www.merriam-webster.com/dictionary/investigate (as of Jan. 7, 2015).

fn. 16 (*Agurs*); *Gutierrez, supra*, 112 Cal.App.4th at p. 1472.) The same is true where a previous police department investigation establishes that a complaint against an officer was false and unfounded. (Cf. *People v. Jordan* (2003) 108 Cal.App.4th 349, 362 [where a complaint against a peace officer has been sustained as true by the officer's employer, it should be disclosed under *Brady*, but the prosecution has no duty to disclose a complaint made about an officer at an unrelated criminal trial by a defendant trying to avoid criminal liability].) But in making disclosure decisions in these kinds of cases too, a prosecutor is not conducting his or her own investigation of the officer's conduct.

The language of the investigative exception thus does not support the Court of Appeal's interpretation, and—as with the first sentence of Section 832.7(a)—because the language is unambiguous, its plain meaning controls. (*Alameda Produce, supra*, 52 Cal.4th at p. 1107.)

2. The Legislative History and Rationale of the Investigative Exception Likewise Indicate That It Is Intended for Situations in Which the Peace Officer Is the Target of the Prosecutorial Inquiry

Even if the legislative history and rationale of the exception is considered, however, it likewise leads to the conclusion that it is intended for situations in which a peace officer is the target of the inquiry.

The current language of the exception was adopted in 2003. Before then, it referred to investigations or proceedings "concerning the conduct of police officers or a police agency," as opposed to the broader term "peace officer" that appears in the first sentence. (Former Pen. Code § 832.7, subd. (a), added by Stats. 1978, c. 630, p. 2083, § 5.) After an appellate court concluded that the exception did not reach the personnel files of peace officers who were not ***police*** officers (see *Gremminger, supra*, 58

Cal.App.4th at p. 404), the Legislature responded by amending the language to mirror the terms used in the first sentence. (Assem. Bill No. 1106 (2003-2004 Reg. Sess.) § 1.)

Legislative analysis of the bill demonstrates that the intent of the exception is to afford prosecutorial agencies access to necessary records when a peace officer is the target of their inquiry.[6] It states: "This distinction [between police officer and peace officer] is clearly at odds with the intent of the statutory exemption for prosecutors. There is no meaningful distinction between ***investigating crimes allegedly committed by*** a police officer, deputy sheriff or custodial officer." (Assem. Com. on Public Safety, Analysis of Assem. Bill 1106 (2003-2004 Reg. Sess.) April 7, 2003, p. 2, emphasis added.)

Additional analysis explained that the *Gremminger* rule created problems in certain cases involving peace officers who were not police officers. Without access to personnel records, prosecutors lacked sufficient evidence to file criminal charges against the officer, but at the same time they could not file a motion under Section 1043 until charges were filed. This presented a "Catch-22" that could result either in "unwarranted charges being filed, or in investigations being dropped without prosecution where serious misconduct has occurred." (Sen. Com. on Public Safety, Analysis of Assem. Bill 1106 (2003-2004 Reg. Sess.) July 1, 2003, p. 8.)

While the available legislative history of the statute's original enactment in 1978 contains no discussion of the investigative exception, the analysis leading to the adoption of its current language demonstrates the

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[6] Reports by a legislative analyst are not dispositive but are properly considered as extrinsic aids to help determine legislative intent. (*Shippen v. Department of Motor Vehicles* (1984) 161 Cal.App.3d 1119, 1126.)

exception's purpose and rationale. Access to the files may be necessary to determine whether charges should be filed, at a time when there is no existing case in which a motion under Section 1043 could be brought. Moreover, even where the prosecutor is able to make a charging decision without access to a personnel file, there are reasons to allow such access without a motion under Section 1043. The motion would alert the officer and potentially delay or interfere with the investigation. (See *Fagan*, *supra*, 111 Cal.App.4th at p. 618 [the investigative exception "affords the district attorney the ability to review confidential peace officer personnel files when investigating police misconduct without notice to the individuals involved"].)

But none of these concerns are present when the role of the officer is merely to serve as a witness in the prosecution's case. Because there is a case pending against the defendant—the action in which *Brady* disclosure is sought—there is no legal impediment to a prosecution motion under Section 1043. Likewise, there is no practical or policy reason to conceal from the officer that access to his or her personnel file is sought. To the contrary, because the statutory scheme invests a neutral trial judge—not prosecutors—with the responsibility of protecting the officer's privacy interest in his or her personnel files (see *Mooc*, *supra*, 26 Cal.4th at p. 1227), the Legislature's purpose is furthered by providing notice to the officer and an opportunity to be heard.

Because the investigative exception thus does not apply to a prosecutor's review of personnel records for *Brady* purposes, the district attorney must obtain access by motion for in camera review.

II. COMPLIANCE WITH EVIDENCE CODE SECTIONS 1043 AND 1045 DOES NOT IMPEDE A DEFENDANT'S RIGHT TO RECEIVE EXCULPATORY EVIDENCE UNDER *BRADY*

Where reasonably possible, a statute should be interpreted so as to avoid calling its constitutionality into question. (*People v. Smith* (1983) 34 Cal.3d 251, 259.) The Court of Appeal found this principle meant that Section 832.7(a) should be construed to allow prosecutorial access to confidential personnel files for *Brady* purposes without any judicial involvement, whereas the trial court found the plain meaning of Section 832.7(a) inconsistent with such a construction and, for that reason, unavoidably unconstitutional. Neither court was correct, because the protection that the trial court properly read Section 832.7(a) to confer on peace officer personnel files does not mean that prosecutors are unable to satisfy any *Brady* obligation they possess with respect to information contained in those files. (See *Brandon*, *supra*, 29 Cal.4th at p. 12, fn. 2 [noting that the case did not present the issue of whether Section 832.7(a) "would be constitutional if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*"].) Section 832.7(a) expressly allows access to confidential personnel files by motion under Section 1043, and as *Alford* pointed out, such motions may be brought by the prosecution.

A. *Brady*'s Disclosure Requirements May Be Satisfied by Trial Court Review of Potentially Relevant Material Identified by the Police Department's *Brady* Committee

The procedure set forth in Bureau Order No. 2010-01 involves two steps. First, the Police Department, through its *Brady* Committee, identifies the pool of potentially relevant documents for a given officer, providing ongoing notice to the district attorney of officers with such material in their files. Second, on motion by the district attorney under Section 1043—

setting forth the charges against the defendant, the role of that officer in the case, and the Department's representation that its *Brady* Committee has identified material in the officer's personnel file that may be subject to disclosure—the trial court reviews the selected materials in camera to determine which of them, if any, must be disclosed to the defendant. Neither step presents any constitutional issue.

1. The Constitution Does Not Prohibit the Identification of Potential *Brady* Material by the Police Department's *Brady* Committee

The Court of Appeal itself acknowledged that the Police Department's initial identification of potentially relevant material for review is not constitutionally problematic. (*Johnson*, *supra*, 228 Cal.App.4th at pp. 1073, fn. 15 ["our decision does not prohibit a police department and district attorney from fashioning procedures to identify a pool of potential *Brady* materials for scrutiny by the prosecutor, much like a pool of such materials was identified for review by the trial court in the present case"], 1081 ["it may be that the current procedures used to identify materials requiring a *Brady* materiality determination could continue to be employed, with the prosecutor performing the review rather than the trial court"].)

Federal courts have likewise found no constitutional obstacle in a similar procedure in which the Assistant United States Attorney asks the relevant federal law enforcement agency to review its files for potentially relevant material under *Brady* and to provide notice of the results. (See, e.g., *United States v. Jennings* (9th Cir. 1992) 960 F.2d 1488, 1492 & fn. 3 (*Jennings*); *United States v. Dent* (3d Cir. 1998) 149 F.3d 180, 191 (*Dent*); see also U.S. Department of Justice "*Giglio* Policy," December 9, 1996, ¶¶ 4-5 <http://www.justice.gov/ag/policy-regarding-disclosure-prosecutors-

potential-impeachment-information-concerning-law> [as of Jan. 7, 2015] [prosecutor requests that agency conduct review for potential impeachment information concerning an agency witness in a pending criminal case].)

Some courts have observed that individual officers should not be shouldered with the responsibility of identifying their own *Brady* material (e.g., *Alvarez*, *supra*, 86 F.3d at p. 905 [problematic to delegate to nonattorney police investigator the task of reviewing his own and other officers' rough notes to determine whether they contain *Brady* information]), but no such issue is presented by the Bureau Order. The Police Department's *Brady* Committee includes, among others, the head of the Legal Division, a Department attorney, and a retired judge with criminal law experience. (1 App., tab 7, at 170.)

Moreover, while this Court has explained that those who assist the government's case are the prosecution's agents, and that the duty to disclose exculpatory evidence is nondelegable, it is nondelegable "to the extent the prosecution remains responsible for any lapse in compliance." (*Brown*, *supra*, 17 Cal.4th at p. 881.) *Brown* does not hold that the law enforcement agency in possession of the records may not identify the subset of potentially relevant documents. The ongoing notice that the *Brady* Committee provides to the district attorney of officers with potential *Brady* material in their personnel files is an instance of what the Supreme Court envisioned as procedures that would enable the prosecution to learn of the existence of such information. (See *Kyles*, *supra*, 514 U.S. at p. 438; 1 App., tab 5, at 122.)

2. The Constitution Does Not Prohibit the Disclosure of *Brady* Material Through a Trial Court's In Camera Review

Just as there is no constitutional issue when the agency in possession of the records identifies the potentially relevant material for *Brady* review, there is likewise no constitutional issue when a trial court, rather than the prosecutor, reviews those records in order to determine which of them must be disclosed to the defendant.

In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 (*Ritchie*), the Supreme Court approved the disclosure of *Brady* material through in camera review, ordering the trial court to review certain Children and Youth Services ("CYS") records to determine whether they contained any information to which the defendant was entitled under *Brady*. The Court noted that "neither the prosecution nor defense counsel has seen the information" contained in the files, which were confidential under state law. (*Id.* at p. 57.) But because the law permitted disclosure in certain circumstances, including by court order, the Court concluded that "Ritchie is entitled to have the CYS file reviewed by the trial court" to determine whether it contains information satisfying *Brady*'s standard for disclosure. (*Id.* at p. 58.) The Court went on to reject Ritchie's request to have his counsel review the file directly: "We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for in camera review." (*Id.* at p. 60; see also *Agurs*, *supra*, 427 U.S. at p. 106 [where defense counsel has a reasonable basis for claiming materiality, "it is reasonable to require the prosecutor to respond either by furnishing the information ***or by submitting the problem to the trial judge***"], emphasis added; *Dent*, *supra*, 149 F.3d at p. 191 ["The district court's in camera

inspection of Cassidy's personnel files fully satisfied *Brady*'s due process requirements."].)

This Court stated that it found *Ritchie* instructive when it held that a trial court conducting an in camera review under Evidence Code section 1045 may properly order the disclosure of any *Brady* material notwithstanding subdivision (b)(1) of that section, which would otherwise limit disclosure to citizen complaints less than five years old. (*Brandon*, *supra*, 29 Cal.4th at pp. 14-15.) It also cited *Ritchie* in *People v. Webb* (1993) 6 Cal.4th 494, 518 (*Webb*), where it explained that even documents subject to a state privacy privilege must be provided to a defendant under *Brady*, and further held that when the state seeks to protect them from disclosure, "the court must examine them in camera to determine whether they are 'material' to guilt or innocence."

In a recent decision, the Fourth District Court of Appeal likewise cited *Ritchie* when it explained that *Brady*'s disclosure requirements can be satisfied through the trial court's in camera review: "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. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1336 (*J.E.*).) The court held that, in cases involving confidential juvenile records, trial courts, rather than prosecutors, should review the records in camera to determine what materials must be disclosed to a defendant under *Brady*. (*Id.* at pp. 1338-1339.)

The use of in camera review to obtain *Brady* disclosure not only has been authorized repeatedly in the case law, but was urged by the defendant

in this case. In his brief in the Court of Appeal, Johnson, represented by the Public Defender, wrote:

> In the last three years the prosecution-police system has worked efficiently (the motions are brought pre-preliminary hearing) and well, giving crucial materials to accused citizens for their trials. Johnson, as he argued below and as the parties argue here, believes that this working system harmonizes the statute with due process, avoiding any constitutionality issue.
>
> Johnson concedes that the review does put an additional burden on the court, but the court is uniquely situated and traditionally has engaged in review of these types of records.
>
> Moreover, Johnson submits that it is a better system than just leaving the discovery of these records in the prosecution hands because when the court conducts an in-camera hearing a record of the items reviewed is made, allowing the possibility of review. Review of prosecution *Brady* error, at least from the defense point of view, is difficult because any erroneous prosecution decision is shrouded in secrecy. The discovery of the error is often based on sheer luck. This, at least, preserves some record of the materials reviewed.
>
> Also Johnson, though assuming good faith on part of the prosecution, recognizes that trial is an ultra-competitive event and supports any neutral (judicial) review in support of release of *Brady* materials that a prosecutor in a close call might unconsciously omit.

(Johnson Writ Reply Br. at 6-7.)

Because *Brady*'s disclosure requirements can be satisfied by a trial court's in camera review of a pool of potentially relevant records identified by the law enforcement agency that possesses them, interpreting Section 832.7(a) to protect those files from direct prosecutorial access presents no constitutional issue.

B. The Court of Appeal's Analysis Does Not Show That the Bureau Order Procedure Is Inconsistent with the Constitution

The Court of Appeal rejected Johnson's contention that the Bureau Order procedure protected his right to due process. Although it did not discuss Johnson's arguments, the court reasoned that the prosecutor is in a

better position than the trial court to evaluate whether particular documents satisfy *Brady*'s requirements for disclosure. (*Johnson, supra*, 228 Cal.App.4th at pp. 1077-1078.) The court also found that cases approving the use of in camera review to make *Brady* disclosure decisions do not support "a routine shift of the *Brady* obligation [from the prosecutor] to trial courts." (*Id.* at p. 1081.) The court's analysis does not establish any constitutional obstacle to using the procedures in Evidence Code sections 1043 and 1045 to obtain the disclosure of *Brady* information in peace officer personnel files.[7]

1. The Court of Appeal's View that the Prosecutor Is in a Better Position to Make Disclosure Decisions Has Little Force in the Context of Personnel Records and Does Not Establish a Constitutional Bar in Any Event

For the general proposition that the prosecutor is in a better position than the trial court to make disclosure decisions, the Court of Appeal cited *United States v. Holmes* (4th Cir. 1983) 722 F.2d 37, 41 (*Holmes*), which did make that statement. But the context was different. The case did not involve peace officer personnel files, and defense counsel simply requested that the trial court review of the entirety of the prosecution's own files after the prosecutor himself assured the court that all exculpatory evidence in them had been produced. The defense's request in that case thus presented a different issue from the one here. The Court of Appeal also cited *Villasana v. Wilhoit* (8th Cir. 2004) 368 F.3d 976, 980, but *Villasana*'s

[7] The Court of Appeal also wrote that Section 832.7(a) would raise constitutional issues if it were construed to mean that the prosecution has no *Brady* obligation at all with respect to peace officer personnel records. (*Johnson, supra*, 228 Cal.App.4th at p. 1077.) But that issue is not presented here, because under the Bureau Order procedure, the Department identifies potential *Brady* information in peace officer personnel files and the prosecution obtains the disclosure of any *Brady* material by motion for in camera review.

statement that the prosecutor is "in the best position to evaluate whether evidence must be disclosed" compared the prosecutor not to a trial court, but to scientists employed by the Highway Patrol Crime Laboratory whom the plaintiff was seeking to hold liable for violation of his constitutional rights in a damages action under 42 U.S.C. section 1983. It likewise did not consider the issue presented in this case.

Where the records at issue are peace officer personnel files—which by their nature consist of documents that were not prepared or generated in connection with the pending criminal case—any *Brady* material will almost certainly fall into the category of impeachment evidence. As the Court of Appeal acknowledged, "the significance of much impeachment evidence would likely be obvious to all...." (*Johnson*, *supra*, 228 Cal.App.4th at pp. 1077-1078.) The court surmised that there might be "other information" the import of which might be clear only to the prosecutor (*id.* at p. 1078), but that concern has little force in the context of personnel files.

Moreover, as it did in this case, the prosecution's motion provides the trial court with information about the charges against the defendant, the underlying facts, and the role of the officer in the prosecution's case—information on which the court may draw in making a *Brady* materiality determination. A representative of the Police Department is also available during the in camera review to answer any questions the court may have about the significance of the information the files contain. (1 App., tab 7, at 172:1-4.) Thus, there is little reason to believe that a trial court would lack sufficient information to determine whether the information is material under *Brady*.

In any event, it cannot be disputed that courts regularly are called upon to decide *Brady* materiality—both when they make disclosure

decisions in the first instance (*supra* Section II.A), and when they review decisions made by the prosecutor or assist the prosecutor in a particular case. (See, e.g., *Salazar, supra*, 35 Cal.4th at p. 1052, fn. 8 ["this court need not defer to a prosecutor's opinion that information already identified is or is not *Brady* material"]; *Holmes, supra*, 722 F.2d at p. 41 [noting that prosecutor should submit material to the district court in camera if he has doubts about whether it is exculpatory]; *United States v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1501 [prosecutor properly consulted with the judge where she had legitimate concerns about protecting the confidentiality of the material]; *Application of Storer Communications, Inc.* (6th Cir. 1987) 828 F.2d 330, 334 ["Several courts of appeals have approved the practice of prosecutors submitting possible *Brady* materials *in camera* to the trial court in order to obtain a pretrial determination of whether disclosure is required"].) Notwithstanding the Court of Appeal's view that the prosecutor is in a better position to make the disclosure decision, there is no constitutional bar to vesting the trial court with responsibility for reviewing certain confidential records, as the Legislature did through its enactment of Section 832.7(a).

2. The Court of Appeal's Discussion of Cases Authorizing In Camera Review Confirms that There Is No Constitutional Obstacle to the Bureau Order Procedure

The Court of Appeal discounted the cases approving in camera review because it did not see them as authorizing the prosecution routinely to shift the burden of reviewing documents to the trial court, which it described as the central issue in this case: "At issue in this case is whether the prosecution may routinely require the trial court to conduct the initial *Brady* materiality review of documents from officer personnel files

identified by the SF Police Department as containing potential *Brady* material." (*Johnson*, 228 Cal.App.4th at p. 1062.) But the issue in this case is not whether the ***prosecution*** may require the trial court to conduct the review. While the case law discussed above does allow the prosecutor to obtain the trial court's in camera review of personnel records identified by law enforcement agencies, the issue in this case is one of legislative authority rather than prosecutorial inclination—whether the ***Legislature*** may protect the confidentiality of a particular category of records by requiring the trial court to review them in camera rather than opening them to prosecutors in the first instance without any judicial oversight.

The Legislature has the power to do so as long as it does not infringe any right guaranteed to the defendant under the Constitution. (*City and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 103, 113 ["unless restrained by constitutional provision, the legislature is vested with the whole of the legislative power of the state"].) By enacting the protections of Section 832.7(a) and Sections 1043 and 1045, the Legislature has not exceeded its legitimate authority, because a defendant's right to *Brady* material may be satisfied by the trial court's in camera review of potentially relevant records identified by the law enforcement agency in possession of them. (*Supra* Section II.A.)[8]

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[8] In *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378, this Court described the prosecutor's *Brady*'s obligation as "self-executing and need[ing] no statutory support to be effective," and explained that the requirements of due process operate outside the statutory scheme. The context for that description, however, was the defendant's claim that Penal Code section 1054.1, subdivision (e), unconstitutionally narrowed the prosecutor's duty to disclose exculpatory evidence. Here, the procedural mechanism of in camera review does not operate to deny criminal defendants any material to which they are entitled under *Brady*. Its purpose instead is to ensure that peace officers' privacy interests in their personnel records are protected to the fullest extent possible consistent with the defendant's rights.

In *J.E.*, the court addressed the impact of Section 827 of the Welfare and Institutions Code—which protects the confidentiality of juvenile dependency records—on requests for *Brady* information in those files. The court wrote: "Given the highly sensitive material that may be contained in juvenile records, 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 the interests in maintaining confidentiality." (*J.E.*, *supra*, 223 Cal.App.4th at p. 1338.) In light of that responsibility, the court held that the trial court should make the *Brady* disclosure decision after reviewing the records in camera, even though, unlike Section 832.7(a), the statute permits inspection by a district attorney without restriction (*see* Welf. & Inst. Code, § 827, subd. (a)(1)(B)):

> As a policy matter, 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. ... [¶] A section 827 petition filed directly with the juvenile court bypasses the prosecutor as an intermediary and allows the court to make the disclosure decision in the first instance. This eliminates the need for the prosecution to request court permission for disclosure after its *Brady* review, and forestalls litigation brought by the defense over whether the prosecution has complied with its *Brady* obligations. Given that the Legislature has established the section 827 court petition process for access to juvenile files, it makes practical sense to allow use of this process to resolve *Brady* requests through a single procedure.

(*J.E.*, at pp. 1338-1339.) By likewise creating a process of mandatory in camera review for peace officer personnel files, the Legislature's *Pitchess* scheme assigns to a neutral trial judge the task of protecting their confidentiality. (*Mooc*, *supra*, 26 Cal.4th at p. 1227.) The Constitution does not prohibit the Legislature's policy decision.

The Court of Appeal pointed out that several of the cases explain that in camera review is especially appropriate where the government has

an interest in protecting the confidentiality of the files. (*Johnson*, 228 Cal.App.4th at p. 1083-1084, citing *Dupuy*, *supra*, 760 F.2d at p. 1501 and *United States v. Phillips* (7th Cir. 1988) 854 F.2d 273, 277 (*Phillips*); see also, e.g., *Webb*, *supra*, 6 Cal.4th at p. 518; *J.E.*, *supra*, 223 Cal.App.4th at p. 1336; *United States v. Brooks* (D.C. Cir. 1992) 966 F.2d 1500, 1505.) But that is precisely what Section 832.7(a) provides with respect to peace officer personnel files. The fact that courts have recognized the importance of in camera review in cases involving confidential records supports the conclusion that it is a proper way to obtain disclosure of *Brady* material in peace officer personnel files.

Finally, the Court of Appeal observed that several of the decisions concern defense requests for specific exculpatory evidence. (*Johnson*, *supra*, 228 Cal.App.4th at p. 1083, citing *United States v. Kiszewski* (2d Cir. 1989) 877 F.2d 210 and *Phillips*, *supra*, 854 F.2d 273.) In the first place, a trial court is equally able to make a *Brady* determination whether the request is made by the defendant or the prosecutor. But in any event, a defense request for specific exculpatory evidence is substantially similar to a prosecution motion under Section 1043.

Defendants are not entitled to in camera review of peace officer personnel files unless they can make a threshold showing of good cause. (Evid. Code, § 1043, subd. (a)(3); *Brandon*, *supra*, 29 Cal.4th at pp. 9, 15; see also, e.g., *Gutierrez*, *supra*, 112 Cal.App.4th at pp. 1475-76; *United States v. Navarro* (7th Cir. 1984) 737 F.2d 625, 631 (*Navarro*) [for defendant to obtain in camera review of a personnel file for *Brady* information, "mere speculation" that it will contain impeachment evidence is insufficient].) But a prosecutor will not seek the court's in camera review under Section 1043 except where there is good cause for it—*i.e.*, in

cases where the Police Department has identified an officer as having potential *Brady* information in his file, and the prosecutor believes that the officer's role in the pending case renders the existence of such information material to the defendant's guilt or punishment. The similarity between a prosecution and defense motion in this context—both seek the trial court's review of specific files because they have a basis to believe that they contain material evidence—means that these cases support the conclusion that in camera review is appropriate here.

C. The Prosecution May Satisfy Its *Brady* Obligation By Furnishing the Defense With Information to Bring Its Own Motion Under Section 1043

The foregoing discussion leads to the question raised by this Court in its December 17, 2014 order—whether the prosecution could satisfy its obligation under *Brady* and its progeny by simply informing the defense of what the police department has informed it (that the two officers' personnel file might contain *Brady* material), which would allow the defense to decide for itself to seek discovery of that material pursuant to statutory procedures. (See *Gutierrez, supra*, 112 Cal.App.4th at p. 1475.) With a possible qualification discussed below, the answer to that question is yes.

In *Gutierrez*, the court explained that prosecutors' inability to review peace officer personnel files does not create a constitutional issue because the defense is able to obtain exculpatory information by filing its own motion under Section 1043. (*Gutierrez, supra*, 112 Cal.App.4th at p. 1475.) Justice Baxter's concurring and dissenting opinion in *Alford* made the same point. Noting that the *Brady* disclosure obligation applies only to material that "would not otherwise be available to the defense," he wrote: "California solved this problem long ago with respect to the contents of police personnel files by establishing the *Pitchess* procedure and allowing

court-ordered discovery where the information is relevant to the action." (*Alford*, *supra*, 29 Cal.4th at p. 1056, fn. 8 (conc. & dissent. opn. of Baxter, J.); see also *Salazar*, *supra*, 35 Cal.4th at p. 1049 ["If the material evidence is ... available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence."].)

Of course, the threshold showing required to obtain in camera review must not be unconstitutionally demanding. But this Court resolved that issue in *Brandon*, where it adopted *Ritchie*'s holding that the moving party's papers need only establish "a basis for his claim" that the files contain material evidence. (*Brandon*, *supra*, 29 Cal.4th at p. 15, quoting *Ritchie*, *supra*, 480 U.S. at p. 58, fn. 15; see also *Gutierrez*, *supra*, 112 Cal.App.4th at p. 1476.) The Ninth Circuit cited that analysis when it rejected a habeas petitioner's claim that he was unconstitutionally denied access to exculpatory information more than five years old, agreeing that the "good cause" requirement articulated in *Brandon* and *Ritchie* (which the petitioner failed to satisfy) does not violate due process. (*Harrison v. Lockyer* (9th Cir. 2003) 316 F.3d 1063, 1066.) In passing, however, the court observed: "We are not instructed on how a defendant in a criminal case will know, or be able to make, a preliminary showing that a police personnel file contains evidence material to his defense." (*Ibid.*)

The question posed by this Court provides a response to the Ninth Circuit. The prosecution can facilitate a defense motion under Section 1043 by supplying the defense with the information it receives from the Police Department. There is no *Brady* violation where the government furnishes the defense with notice of the existence of potential exculpatory

information and an opportunity to seek it out. (See, e.g., *Dupuy*, *supra*, 760 F.2d at p. 1501, fn. 5; *United States v. Bond* (9th Cir. 2009) 552 F.3d 1092, 1097; *United States v. Bracy* (9th Cir. 1995) 67 F.3d 1421, 1428-1429.)[9]

This analysis does require a rejection of the trial court's construction of *Brandon* to impose a threshold showing so high that it would effectively deny the defense (as well as the prosecution) any ability to obtain disclosure of *Brady* material in peace officer personnel files. Although the trial court cited *Brandon*'s rule that the moving party need only establish "a basis for his claim" that the files contain material evidence (1 App., tab 12, at 234), it held as a matter of law that a party—whether the prosecution or the defense—cannot make the requisite showing unless it already knows what information the personnel files contain. (*Id.* at 231 ["any party seeking to present a *Brady* question regarding personnel records to a court must know both the particular case's facts, circumstances and legal theories ***as well as the files' particular contents*** in order to establish the required threshold showing"], emphasis added.)[10]

Apart from the obvious Catch-22 it creates, the trial court's rule that the moving party must already know the files' contents before he or she can establish an entitlement to the court's review of them is contrary to well established law. Section 1043(b)(3) requires the moving party to furnish affidavits "showing good cause for the discovery or disclosure sought,

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[9] In *Amado v. Gonzalez* (9th Cir. 2014) 758 F.3d 1119, 1137, the court held that the prosecution cannot justify a failure to produce *Brady* information simply by arguing that the defendant could have uncovered it with the exercise of due diligence, but reaffirmed that there is no *Brady* violation where the government affirmatively places the defense on notice of the existence of such information.

[10] The Court of Appeal declined to consider whether the trial court's construction of the standard was erroneous. (See *Johnson*, *supra*, 228 Cal.App.4th at p. 1091, fn. 34.)

setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has such records or information from such records." This Court has characterized the required "good cause" showing as a "relatively low threshold." (*Santa Cruz*, *supra*, 49 Cal.3d at p. 83.) The affidavits need not be made on personal knowledge; statements on information and belief are sufficient. (*Id.* at p. 89.) *Santa Cruz* also rejected the contention that the moving party must know what material exists in the files, noting that the Legislature rejected language in an earlier draft requiring a description of "particular" records. It quoted a committee staff report explaining the change: "If the petitioner already had the particulars of the records he would not need to use discovery." (*Id.* at p. 92.)

Establishing *a basis for* a claim that the files contain material evidence (*Brandon*, *supra*, 29 Cal.4th at p. 15) is different from establishing that they actually do contain such evidence. The distinction is evident in *Brandon* itself: It held that the trial court did not act improperly by reviewing the documents in camera, but that it erred by ordering their disclosure because they did not in fact satisfy *Brady*'s materiality standard. (*Id.* at pp. 15, fn.3, 16.)

The purpose of a good cause requirement is to ensure that peace officers will not have to present their confidential personnel records for review, and that courts will not have to review them, when the motion is nothing other than a fishing expedition. (*Pitchess*, *supra*, 11 Cal.3d at p. 538; see also, e.g., *Stiglitz*, *supra*, 60 Cal.4th at p. 640; *Navarro*, *supra*, 737 F.2d at p. 631.) But that does not describe the district attorney who files a motion under Section 1043. The "fishing expedition" is conducted by the

Police Department, which under its Bureau Order assumes an ongoing responsibility to notify the prosecution of potential *Brady* material in officers' files. (1 App., tab 7, at 170.) The trial court is not asked to review anything other than those records the Police Department has identified as containing potential *Brady* material. (*Id.* at 171.)

Moreover, the trial court is not asked to conduct such a review except where there is reason to do it given the officer's role in the case. The prosecutor's representation that the officer's testimony is necessary and essential, in conjunction with the Police Department's representation that potential *Brady* material exists in the files, is sufficient to establish a *basis* for a claim that the file contains material evidence. Information that could impeach a necessary witness could change the result of the trial. The trial court may determine during its in camera review that none, some, or all of the documents actually satisfy *Brady*'s standard. But whatever the outcome of the review, the prosecution's motion has established good cause for undertaking it.[11]

Herein lies the potential qualification when considering whether the prosecution could satisfy its *Brady* obligation by informing the defense of what the Police Department has informed it. The prosecution would have

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[11] In a footnote, *Brandon* stated: "We do not suggest that trial courts must routinely review information that is contained in peace officer personnel files and is more than five years old to ascertain whether *Brady* ... requires its disclosure." (*Brandon*, *supra*, 29 Cal.4th at p. 15, fn. 3.) An in camera review will not be "routine" because it will be granted only where the moving party has established good cause for it, as discussed above. The trial court was nonetheless concerned about the burden such reviews place on it. (*See* Return at 3-4.) It is true that by enacting the *Pitchess* scheme, the Legislature placed a burden on trial courts. But as the Court of Appeal explained in denying the trial court's request for judicial notice of its "Budget Snapshot," "the budgetary constraints faced by the court are not relevant to the issues of law we decide in this writ proceeding...." (*Johnson*, *supra*, 228 Cal.App.4th at p. 1062, fn. 8.) The trial court's concern is a matter for the Legislature's consideration.

no reason to supply the defense with that information except in cases where the prosecutor believes that the officer's role in the case renders it potentially material to an issue of guilt or punishment. As a result, there may be no practical reason to require a defense motion under Section 1043 to address it. But even if this Court were to conclude otherwise, the prosecution could satisfy its *Brady* obligation by also advising the defense that the officer is likely to be a necessary witness, allowing the defense to make the requisite showing of good cause with the same information that a prosecution motion would offer.

In fact, the prosecution did furnish the defense with that information in this case, and advised the defense to file its own motion in light of the Superior Court's recent practice of denying such motions by the prosecution. (1 App., tab 1, at 22.) And the defense did so, based on the information provided in the prosecution's motion and on testimony at the preliminary hearing. (1 App., tab 6, at 148-149, 153, 163-164.) The filing of motions by both parties below may be owed to the uncertainty created by the Superior Court's change in its view of the Bureau Order procedure. Once this Court has clarified the law, there should be no reason for duplicative motions by the prosecution and the defense. But the fact that the defense was able to bring its own motion here based on information provided by the prosecution supports an affirmative answer to this Court's question.

III. WHEN REVIEWING DOCUMENTS IN CAMERA, THE TRIAL COURT MUST PROTECT PEACE OFFICERS' PRIVACY INTERESTS BY ORDERING DISCLOSURE ONLY OF THOSE MATERIALS TO WHICH THE DEFENDANT IS ENTITLED UNDER *BRADY*

While finding that Section 832.7(a) offers peace officer personnel records no protection against prosecutorial access for the purpose of

conducting a *Brady* review, the Court of Appeal did find that it requires the prosecutor to file a motion under Section 1043 and obtain an order under Section 1045 before disclosing any materials to the defendant. But even as it held that the trial court must review the documents in camera, it held that in practice there would be no role for the trial court other than to issue appropriate protective orders. (*Johnson*, *supra*, 228 Cal.App.4th at p. 1091.)

Specifically, the court rejected the applicability of this Court's holding that the requirements of Section 1045 involve "a balancing of the officer's privacy interest against the defendant's need for disclosure." (*Santa Cruz*, *supra*, 49 Cal.3d at p. 84.) Allowing that the trial court may play a balancing role in *Pitchess* discovery, the Court of Appeal held that there is no such role when the trial court reviews documents for disclosure under *Brady*, because any exculpatory material satisfying *Brady*'s materiality standard may not be withheld on the basis of privacy considerations.

But to say that privacy considerations cannot override *Brady*'s constitutional requirements does not mean that there is no role for the trial court when reviewing the documents in camera. Several courts have expressly recognized that the trial court must weigh privacy interests when *Brady* material may be contained in confidential records. (E.g., *J.E.*, *supra*, 223 Cal.App.4th at p. 1338 [court must "engage in a careful balancing of the competing interests when making its disclosure decision"]; *Dupuy*, *supra*, 760 F.2d at p. 1501 [trial court can "weigh the Government's need for confidentiality against the defendant's need to use the material in order to obtain a fair trial"]; *Phillips*, *supra*, 854 F.2d at p. 278 ["*In camera* inspection of disputed materials likewise allows the court to engage in a

more delicate balancing of the competing interests"].) Where confidential personnel records are at issue, the purpose of such a balancing is not to deny the defendant something to which he or she is entitled, but as this Court explained in the *Pitchess* context, to protect the peace officer's interest "that such records should not be disclosed unnecessarily." (*Mooc*, *supra*, 26 Cal.4th at p. 1227.) That is an interest the trial court, rather than the prosecution, is charged with protecting.

The Court of Appeal acknowledged that "extending the privacy protections in Section 1043 and Section 1045 to *Brady* disclosure is wholly consistent with the Legislature's intent." (*Johnson*, *supra*, 228 Cal.App.4th at p. 1090.) The Legislature established the in camera review procedure in order to protect peace officers' privacy interests. (*Mooc*, *supra*, 26 Cal.4th at pp. 1220, 1227; *Santa Cruz*, *supra*, 49 Cal.3d at p. 84; cf. *J.E.*, *supra*, 223 Cal.App.4th at p. 1338.) "Evidence Code section 1045 expressly provides that in camera review is *mandatory* before disclosure in every case." (*Stiglitz*, *supra*, 60 Cal.4th at pp. 642-643.) The Court of Appeal's view that there are no privacy interests for the trial court to weigh in the *Brady* context is inconsistent with the Legislature's intent. This Court should reaffirm that peace officers' interest in the privacy of their personnel records must be considered by the trial court when reviewing documents in camera, and that the court should order disclosure only to the extent necessary to protect the defendant's right to a fair trial.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be reversed. This Court should hold that disclosure of *Brady* material in peace officer personnel records must be obtained by motion under Section 1043, and that when reviewing the records in camera, the

trial court must consider the officer's privacy interest to ensure that confidential materials are not unnecessarily disclosed.

Dated: January 9, 2015

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 13,855 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on January 9, 2015.

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PROOF OF SERVICE

I, HOLLY CHIN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On January 9, 2015, I served the following document(s):

OPENING BRIEF ON THE MERITS BY THE CITY AND COUNTY OF SAN FRANCISCO, THROUGH THE SAN FRANCISCO POLICE DEPARTMENT

on the following persons at the locations specified:

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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☒ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through File & ServeXpress or TrueFiling or whatever service name in portable document format ("PDF") Adobe Acrobat.

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

Executed January 9, 2015, at San Francisco, California.

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