S221296

SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN FRANCISCO,

Respondent.

DARYL LEE JOHNSON,

Real Party In Interest.

RESPONDENT SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO'S NOTICE OF FILING THE BRIEF IT FILED IN THE COURT OF APPEAL

After a Published Decision by the Court of Appeal, First Appellate District, Division Five, filed August 11, 2014 (Case Nos. A140767 & A1407698)
Superior Court of California, County of San Francisco (Case Nos. 12018656, 221362)
The Honorable Richard B. Ulmer, Jr., Judge

Michael L. Fox (State Bar No.173355)
SEDGWICK LLP
333 Bush Street, 30th Floor
San Francisco, CA 94104
(415) 781-7900
(415) 781-2635
Email: michael.fox@sedgwicklaw.com
Attorneys for Respondent
Superior Court of California, County of San Francisco

S221296

SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN FRANCISCO,

Respondent.

DARYL LEE JOHNSON,

Real Party In Interest.

RESPONDENT SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO'S NOTICE OF FILING THE BRIEF IT FILED IN THE COURT OF APPEAL

After a Published Decision by the Court of Appeal, First Appellate District, Division Five, filed August 11, 2014 (Case Nos. A140767 & A1407698)
Superior Court of California, County of San Francisco (Case Nos. 12018656, 221362)
The Honorable Richard B. Ulmer, Jr., Judge

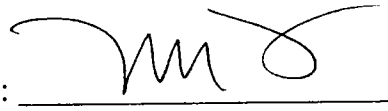
Michael L. Fox (State Bar No.173355)
SEDGWICK LLP
333 Bush Street, 30th Floor
San Francisco, CA 94104
(415) 781-7900
(415) 781-2635
Email: michael.fox@sedgwicklaw.com
Attorneys for Respondent
Superior Court of California, County of San Francisco

Respondent Superior Court of California, County of San Francisco ("Superior Court"), filed its Return to Order to Show Cause and Response to Consolidated Petitions for Writs of Mandate, Prohibition, or Other Appropriate Relief ("Return") in the Court of Appeal on April 21 2014, after the Court of Appeal issued its order to show cause and granted the Superior Court's request to address issues presented by the petitions that directly affect court operations. (*James G. v. Superior Court* (2000) 80 Cal.App.4th 275, 279-280.) The Superior Court relies on its Return to address the issues presented for review and this Court's December 17, 2014 Order, and herein files its Return (attached hereto as Exhibit A), pursuant to California Rules of Court, Rule 8.520(a)(2). The Superior Court further offers to submit any additional briefing that this Court may request.

DATED: February 6, 2015

Respectfully submitted,

SEDGWICK LLP

By: 

Michael L. Fox
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rules 8.204(c((1) and 8.360(b)(1) of the California Rules of Court, this Notice was produced on a computer, using the word processing program Word 2007, and the Font is 13 point Times New Roman.

According to the word count feature of the program, this document contains 137 words, including footnotes, but not including the table of contents, table of authorities, verification and this certification.

DATED: February 6, 2015

Michael Fox

EXHIBIT A

Nos. A140767, A140768

Court of Appeal

State of California, First Appellate District
Division Five

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner*

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN FRANCISCO,
Respondent

DARYL LEE JOHNSON,
Real Party in Interest

CITY AND COUNTY OF SAN FRANCISCO, through the
SAN FRANCISCO POLICE DEPARTMENT, *Petitioner*

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN FRANCISCO,
Respondent

PEOPLE OF THE STATE OF CALIFORNIA and DARYL LEE JOHNSON,
Real Parties in Interest

RESPONDENT SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO'S RETURN TO ORDER TO SHOW CAUSE AND RESPONSE TO CONSOLIDATED PETITIONS FOR WRITS OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

San Francisco Superior Court Case Nos. 12018656, 221362
Hon. Richard B. Ulmer Jr., Judge

Michael L. Fox (State Bar No. 173255)
SEDGWICK LLP
333 Bush Street, 30th Floor
San Francisco, CA 94104
(415) 781-7900
(415) 781-2635
michael.fox@sedgwicklaw.com
Attorneys for Respondent

DRAFT 04/17/14

Nos. A140767, A140768

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

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,*
v.
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO,
Respondent.

DARYL LEE JOHNSON,
Real Party in Interest

CITY AND COUNTY OF SAN FRANCISCO, through the SAN FRANCISCO POLICE DEPARTMENT, *Petitioner,*
v.
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO,
Respondent.

PEOPLE OF THE STATE OF CALIFORNIA and DARYL LEE JOHNSON,
Real Parties in Interest

RESPONDENT SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO'S RETURN TO ORDER TO SHOW CAUSE AND RESPONSE TO CONSOLIDATED PETITIONS FOR WRITS OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

San Francisco Superior Court Case Nos. 12018656, 221362
Hon. Richard B. Ulmer Jr., Judge

Michael L. Fox (State Bar No. 173355)
SEDGWICK LLP
333 Bush Street, 30th Floor
San Francisco, CA 94104
(415) 781-7900
(415) 781-2635
michael.fox@sedgwicklaw.com
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Statutes

Other Authority

INTRODUCTION

Following the settled law of the California Supreme Court, the San Francisco Superior Court issued an order on January 7, 2014. That order denied the District Attorney's motion for a court search through 505 pages of police personnel records under *Brady v. Maryland.*

There were three grounds. *First*, the Supreme Court has stated that such reviews are not to be undertaken routinely. *Second*, the Supreme Court requires a threshold showing before any such review is to be conducted – a showing not made here. *Third*, no legal support exists for the District Attorney's assertion that the Evidence Code mandates such reviews. The January 7, 2014 order also granted the defendant's motion that the Police Department allow the District Attorney direct access to the personnel records, as the Highway Patrol has historically done with its officers' personnel files.

The District Attorney and the Police Department filed writ petitions relying on a quintet of lower court opinions. However, those cases (1) in no way diminish the Supreme Court's statement that "*Brady* reviews" are not to be routinized, (2) confirm that the Supreme Court's threshold showing must be made before any court review is to be conducted, (3) demonstrate again that "*Brady* reviews" are not mandated by the Evidence Code, and (4) provide no ground for barring the District Attorney from access to the personnel records so he can perform his constitutional *Brady*

obligations.

Petitioners seek to write the California Supreme Court's threshold requirement – that they establish a basis for their claim that the "potential *Brady* materials" contain ***material*** evidence – out of the law. In so doing, they would improperly burden already overburdened courts. The writ petitions should be denied.

I. TRIAL COURTS ARE NOT TO ROUTINELY SEARCH THROUGH PEACE OFFICER PERSONNEL RECORDS FOR INFORMATION MEETING *BRADY*'S MATERIALITY STANDARD

Neither the District Attorney nor the San Francisco Police Department ("the SFPD") dispute the California Supreme Court's statement in *Brandon*: "We do not suggest that trial courts must routinely review information that is contained in peace officer files ... to ascertain whether *Brady* [*v. Maryland* (1963)] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215, requires its disclosure." (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 15, n. 3.) Yet that is precisely what Petitioners advocate here. Their effort to write *Brandon*'s threshold showing out of the law and to shift the prosecution's constitutional obligations would routinize "*Brady* reviews" and thus significantly impact the operations, procedures, and budgets of already overburdened courts.

In this case, the SFPD's "potential *Brady* materials" consist of 505 pages. (Petition, A140768, at pp. 6.) As the SFPD's stock "potential *Brady*

files" go, this is a modest set of documents; many are larger. (Transcript, 1/6/14, at p. 18 [Ex. 11, JOHNSON0222].)[1] Nonetheless, the District Attorney sought 160 reviews of stock "potential *Brady* materials" maintained by the SFPD in 2012, and the number has already increased significantly, as he intends to seek 250 "*Brady* reviews" each year going forward. (Order, 1/17/14, at p. 2 [Ex. 12, JOHNSON0238; Transcript, 1/6/14, at pp. 2-3, 30 [Ex. 11, JOHNSON0206-0207, 234].) Thus, Petitioners would have Respondent routinely review at least 126,250 pages (250 x 505 = 126,250) every year without the prior, constitutionally required, evaluation by the prosecution team.[2]

Respondent already faces substantial challenges given recent budget cuts and staffing reductions:

- Respondent was required to close ten courtrooms in 2011;
- Respondent's current staffing levels are 25% lower than in 2008, with 140 positions lost in the last five years;

[1] Reference is made to the exhibits lodged with the People's Petition (A140767) on January 21, 2014.

[2] The participation of district attorneys from Santa Clara and Ventura counties and the Appellate Committee of the California District Attorneys Association as amici indicates the potential statewide impact of the changes sought by Petitioners. While San Francisco is a jurisdiction with 812,000 residents, in a larger county, such as Los Angeles with a population of 10 million, there would be thousands of "*Brady* reviews" at the cost of tens of thousands of judicial hours.

- Respondent's annual revenue is $9,048,225 less than it was in fiscal year 2008-2009.[3]

The mere filing of hundreds of motions for "*Brady* reviews" each year would require Respondent to formally calendar the matters and incur staff and infrastructure costs (courtroom time, court and records retrieval staff, etc.), when these resources could be better spent on trials. With tighter budgets, the courts cannot take on additional burdens and responsibilities of hearing potentially unnecessary *Brady* motions and sifting through thousands of pages of often-irrelevant documents, especially when the prosecution team has not already determined whether it believes any of the "potential *Brady* materials" are material to the actual case involving the defendant.

Indeed, Petitioners acknowledge "the many demands placed on the judiciary ... that have only grown in years of shrinking budgets" (Petition, A140768, at p. 13), as well as the "economic harm" that the relief sought by Petitioners would impose on Respondent. (People's Supplemental Brief, A140767 and A140768, 3/3/14, at p. 7.)

The demands are even greater when the prosecution team seeks to

---

[3] See Superior Court of California, County of San Francisco, *Budget Snapshot* (January 2014) <http://www.courts.ca.gov/partners/documents/County_Budget_Snapshot_SanFrancisco_2014.pdf> [as of April 21, 2014]. The Court may take judicial notice of the *Budget Snapshot* pursuant to Evidence Code section 459, as set forth in Respondent's separately filed Motion for Judicial Notice.

shift its constitutional *Brady* responsibilities to the courts without providing enough detail about the particular case to allow meaningful materiality determinations. As Respondent's January 7, 2014 Order states: "No one disputes that the District Attorney best knows the facts, circumstances, and legal theories in particular cases like Mr. Johnson's and so is best-suited – and legally required – to make *Brady* disclosures to the defense." (Order, 1/7/14, at p. 3 [Ex. 12, JOHNSON0239].) Making case-specific determinations of *Brady* materiality is the prosecution's constitutional obligation.[4] Unless and until the prosecution's threshold showing is made,

---

[4] As noted by a commentator:

> Courts have long held the prosecutor must be the main gatekeeper for *Brady* material and speak on behalf of the entire government regarding exculpatory evidence in a criminal case. This makes sense, as the prosecutor must determine whether evidence is sufficiently exculpatory to affect the outcome of the case and merit disclosure under *Brady*. In making that decision, the prosecutor must undertake a purely hypothetical analysis and decide whether there would be a "reasonable probability" of a different result in the criminal proceeding if the evidence were disclosed. This calculation will often turn on the strength of the remaining evidence in the case, and requires application of the unique legal skills and factual knowledge possessed by prosecutors in specific cases. A prosecutor is also well-suited to make such a call based on the prosecutor's unique ethical constraints.

(Neri, *Pitchess v. Brady: The Need for Legislative Reform of California's Confidentiality Protection for Peace-Officer Personnel Information* (2012) 43 McGeorge L.Rev. 301, 319-320 [footnotes omitted].)

courts cannot and should not be called upon to sift through stock files of "potential *Brady* materials" to try to determine what information, if any, should be provided to the defendant.[5]

II. PETITIONERS FAILED TO MAKE THE THRESHOLD SHOWING FOR COURT REVIEW

The California Supreme Court stresses that parties cannot "'require the trial court to search through'" a peace officer's personnel file "'without first establishing a basis for'" a "'claim that it contains *material* evidence,' that is evidence that could determine the trial's outcome, thus satisfying the materiality standard of *Brady*." (*Brandon, supra*, 29 Cal.4th at p. 15 [quoting *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 58, n. 15; internal citations to *Ritchie* and *Brady* omitted; emphasis in original]; Order, 1/7/14, at pp. 4-7, 9-10 [Ex. 12, JOHNSON0240-0243, 0245-0246].)[6]

---

[5] Indeed, even when limited information has been provided to Respondent to aid materiality determinations, the SFPD's stock "potential *Brady* files" often contain few if any documents that could meet the *Brady* standard in a particular case. (Order, 1/7/14, at pp. 2-3 [Ex. 12, JOHNSON0238-0239].)

[6] Respondent's January 7, 2014 Order finds that this is the ***threshold showing*** required by *Brandon*, and ***not*** the *Brady* materiality standard a court would apply were it to undertake an in camera review. The SFPD and some amici ignore this distinction. (Petition, A140767, at p. 38; Petition, A140768, at p. 36; Ventura County District Attorney's Amicus Curiae Brief, A140767, at p. 9; Peace Officers' Research Association of California et al.'s Amicus Curiae Brief, A140767 & A140768, at p. 6; Santa Clara District Attorney's Amicus Curiae Brief, A140767, at pp. 6-7.)

The SFPD argues that this statement in *Brandon* is not a directive by our Supreme Court. (Petition, A140768, pp. 30, 32-34.) However, the very cases that Petitioners rely upon most – *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, and *People v. Gutierrez* (2003) 112 Cal.App.4th 1463 – quote the *Brandon* statement and recognize it as a directive. (*Gutierrez, supra,* 112 Cal.App.4th at pp. 1475-76; *Abatti, supra,* 112 Cal.App.4th at pp. 55-56.)[7]

Abatti further demonstrates how the *Brandon* threshold showing may be made. *Abatti* involved the veracity of a former police officer who was a key witness to a supposed crime. (112 Cal.App.4th at p. 44.) Defense counsel thoroughly investigated the former officer, including an interview of the former officer himself, and learned that police department files contained "counseling memos," citizen complaints, and grievances casting doubt on his truthfulness. (*Id.* at pp. 44-46.) Thus, defense counsel knew the facts, circumstances and legal issues of the case, as well as contents of the police files, and made the *Brandon* threshold showing that is

[7] The third case relied upon – *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430 – was decided ***before*** the California Supreme Court adopted the *Ritchie* threshold requirement in *Brandon* in 2002. A fourth case – *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607 – does not mention *Brady* or *Brandon.*

required before any in camera review by a court.[8] Importantly, *Abatti* held that the trial court should have reviewed ***specific counseling memos*** contained within the officer's personnel file – which were explicitly identified by the records custodian and then sought by the defendant – and not the entire personnel file or ambiguously described documents. (*Id.* at p. 60.)

Petitioners also rely upon the Fourth District's recent opinion in *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, which held that "when a petitioner files a [Welfare and Institutions Code] section 827 petition requesting that the court review a confidential juvenile file and provides a reasonable basis to support its claim that the file contains *Brady* exculpatory or impeachment material, the juvenile court is required to conduct an in camera review." (223 Cal.App.4th at p. 1333.)

J.E. is inapposite. First, *J.E.* did not involve peace officer personnel records, which are the sole subject of the Petitions here. Second, no statute or law imposes an "exclusive obligation" on the trial court to be the "shield" and "doorkeeper" in adult proceedings as Welfare and Institutions Code section 827 imposes in juvenile proceedings. Rather, the courts repeatedly stress that the *Brady* obligations in adult proceedings belong to "the prosecution team," and not the courts. (See, e.g., *Brandon, supra,* 29

[8] No motion was filed under *Brady* in *Gutierrez* (112 Cal.App.4th at p. 1468), so the *Brandon* threshold showing was not necessary there.

Cal.4th at p. 29.) Third, Section 827 requires the juvenile defendant to make only a "good cause" showing for an in camera review of the contents of juvenile records. However, the United States Supreme Court's *Ritchie* decision – as the Fourth District recognized – requires more: "The *Ritchie* court required the petitioner to make a threshold showing of materiality." (*J.E.*, *supra*, 223 Cal.App.4th at p. 1336, 1339.) This is precisely the "threshold showing" adopted by the California Supreme Court in *Brandon*, and repeatedly relied upon in Respondent's January 7, 2014 Order. (See *Brandon*, *supra*, 29 Cal.4th at p. 15.)

It is undisputed that neither the District Attorney nor the SFPD reviewed the "potential *Brady* materials" here to determine whether they contain "evidence that could determine ***the*** trial's outcome." (Petition, A140767, at pp. 7-8 [emphasis added]; see also Sariaslani Decl., ¶ 7 [Ex. 8, JOHNSON0179] ["the SFPD is unable to meet the materiality standard"].) Thus, it is also undisputed that the parties failed to make the threshold showing required before the court could review the SFPD's "potential *Brady* materials."

The *Brandon* threshold exists for good reasons. Without it, trial courts would spend thousands of hours sorting through stock files, trying to make materiality determinations in a vacuum. Respondent's scarce and shrinking resources should not be spent shouldering the prosecution's constitutional obligations.

III. EVIDENCE CODE SECTIONS 1043 AND 1045 DO NOT APPLY TO MOTIONS SEEKING COURT REVIEW OF PEACE OFFICER PERSONNEL RECORDS UNDER *BRADY*

As stated in Respondent's January 7, 2014 Order, no legal support exists for the District Attorney's assertion that courts are "mandated" by California Evidence Code sections 1043, et seq.[9] to search through peace officer files for "*Brady* materials." (Order, 1/7/14, at pp. 9-12 [Ex. 12, JOHNSON0245-0248].)

The California Supreme Court instructs in *Brandon* that, while both *Brady* and *Pitchess* may implicate peace officer personnel records, it is important to distinguish carefully between the two. (*Brandon, supra*, 29 Cal.4th at pp. 7-9, 14-15.) Most importantly here, Evidence Code sections 1043, et seq. "codif[y]" the ***state***-law "*Pitchess* decision," while *Brady* is ***federal*** constitutional law. (*Brandon, supra*, 29 Cal.4th at p. 7, 9.) Thus, the procedures of Evidence Code sections 1043 and 1045 do not apply to a motion made under *Brady*. (*See* Order, 1/7/14, at p. 3 [Ex. 11, JOHNSON0239].)

---

[9] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, held that criminal defendants are entitled to an in camera review of peace-officer personnel files upon a showing of good cause. Legislation enacted four years later "codified the privileges and procedures surrounding what had come to be known as '*Pitchess* motions' ... through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81.)

Petitioners and amici rely on lower court opinions, but none of them state that trial courts are mandated by Evidence Code sections 1043 or 1045 to search through peace officer personnel files for *Brady* materials.

In *Gutierrez,* as noted above, the defendant made only a *Pitchess* motion, and not a *Brady* motion. (*Gutierrez, supra,* 112 Cal.App.4th at p. 1468.) A key passage of the decision states that "the *Pitchess* scheme does not unconstitutionally trump a defendant's right to exculpatory evidence as delineated in *Brady.* Instead, the two schemes operate in tandem. *** [T]he *Pitchess* process operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information." (*Gutierrez, supra,* 112 Cal.App.4th at pp. 1473-74 [citing *Brandon, supra,* 26 Cal.4th at p. 14; internal quote marks omitted].) Thus, as *Brandon* teaches, the *Brady* and *Pitchess* processes are distinct – "tandem" or "parallel" – and there is no suggestion that the "codification of the *Pitchess* decision" (Evid. Code §§ 1043, et seq.) applies to *Brady.* (*Brandon, supra,* 29 Cal.4th at p. 7.)

In *Abatti,* the trial court denied what the Court of Appeal called a "hybrid *Brady/Pitchess*" motion for review of a former police officer's personnel records and thus conducted no in camera review. (*Abatti, supra,* 112 Cal.App.4th at p. 42.) A key passage from *Abatti* follows *Brandon* in finding that the *Pitchess* and *Brady* processes are "parallel," rather than unitary, and thus the five-year limitation of *Pitchess* set by Evidence Code section 1045(b)(1) does not apply to *Brady.* (*Abatti, supra,* 112

Cal.App.4th at pp. 54-55.) Hence, rather than support Petitioners' argument that sections 1043 and 1045 apply to *Brady*, *Abatti* explicitly rejects it.

Moreover, while the Court of Appeal faulted the trial court for not conducting an in camera review of documents (as shown above, the defense made the *Brandon* threshold showing needed before a *Brady* review), it did ***not*** find that Evidence Code section 1043 mandates a *Brady* review by the trial court whenever one is requested, or that the California Evidence Code applies to *Brady* at all. (*Abatti*, *supra*, 112 Cal.App.4th at p. 60.)

As noted above, *Garden Grove* pre-dates *Brandon* (which both *Gutierrez* and *Abatti* cite repeatedly) and thus could not account for the California Supreme Court's most important pronouncements on the interplay between *Brady* and *Pitchess* law. (*Garden Grove*, *supra*, 89 Cal.App.4th 430.) In any event, *Garden Grove* merely holds that a defendant must file a *Pitchess* motion to enable disclosure of police-officer birthdates. (*Id.* at pp. 434-435.) *Brady* is mentioned only fleetingly (*id.* at p. 435) and is not discussed in any meaningful way.

Fagan, *supra*, 111 Cal.App.4th at p. 607, involved efforts to discover urinalysis results for a rogue police officer, and the opinion never mentions, much less discusses, *Brady* or *Brandon*, and *Pitchess* is cited only in a footnote. (*Fagan*, *supra*, 111 Cal.App.4th at p. 613, n. 7.)

Petitioners' complete lack of support for their assertion that courts

are "mandated" by Evidence Code sections 1043 and 1045 to search through police officer files for "*Brady* materials" extends to legislative history. This is telling. A recent law review article observes that "California's legislature did not take *Brady* into account when drafting the *Pitchess* legislation." (Neri, *supra,* 43 McGeorge L.Rev. at p. 309.) It would have been logical for the Legislature not to account for *Brady,* because *Brady* is federal constitutional law and attempting to abrogate it would violate the federal Supremacy Clause. (*Id.* at p. 310.)

Finally, Petitioners and amici fail to contemplate the full implications of their argument that Evidence Code sections 1043 and 1045 apply to *Brady.* Were that actually true, for example: (1) ***any*** information relevant to a "subject matter involved in the litigation" would have to be disclosed in response to a *Brady* motion, not just information that "could determine the trial's outcome" (see Evid. Code § 1043(b)(3), *Brandon,* 29 Cal.4th at 15); (2) *Brady* information would be limited to "five years before the event or transaction that is the subject of the litigation," just as *Pitchess* information is (see Evid. Code § 1045(b)(1)); and (3) *Brady* would no longer be self-executing in California; rather, a written motion would be required. (See Evid. Code § 1043(a).) Of course, none of this is so.

IV. PENAL CODE SECTION 832.7 DOES NOT AND CANNOT BAR THE DISTRICT ATTORNEY FROM OBTAINING ACCESS TO PEACE OFFICER PERSONNEL RECORDS TO COMPLY WITH *BRADY*

The Supreme Court in *Brandon* highlighted but did "not reach the question of whether Penal Code section 832.7, which precludes disclosure of officer records 'except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code,' would be constitutional if it were applied to defeat the right of the prosecutor to obtain access to officer personnel records in order to comply with *Brady*." (*Brandon*, *supra*, 29 Cal.4th at p. 12, n. 2.)

The SFPD argues: "This is not a case where the Police Department was attempting to defeat access to its records." (Petition, A140768, at p. 40.) But whether the SFPD desired so or not, the effect of its refusal to allow the District Attorney any access to the records defeated the access that *Brady* requires. Thus, Section 832.7 is unconstitutional as applied by the SFPD because it was used to bar disclosure of constitutionally required materials. (Order, 1/7/14, at p. 14 [Ex. 12, JOHNSON0250].)[10]

Petitioners argue that Evidence Code sections 1043 and 1045 provide mechanisms for disclosing "*Brady* materials." For this, Petitioners

---

[10] Indeed, the District Attorney himself has advocated the unconstitutionality of the SFPD's position: "One still might certainly argue that *Brady*, decided on constitutional principles, surely trumps California's statutory scheme, thus mandating direct access by a prosecutor to an officer's personnel file without leave of court." (Order, 1/7/14, at p. 13 [Ex. 12, JOHNSON0249, 0257].)

and amici rely on the California Supreme Court's decision in *Alford v. Superior Court* (2003) 29 Cal.4th 1033, which held that the prosecution could not obtain the fruits of a defendant's ***Pitchess*** motion without filing its own ***Pitchess*** motion.

As shown above, the entire premise underlying Petitioners' arguments, and their reliance on *Alford*, is incorrect – the ***Pitchess*** statutes, including Section 832.7, do not apply to the prosecution team's constitutional obligations under ***Brady***.[11]

Permitting a District Attorney to review police personnel files for *Brady* material is not a radical notion. The other policing agency with a significant number of San Francisco criminal cases – the California Highway Patrol – has "historically offered to let Assistant District Attorneys themselves view the officers' personnel files to see if they contained *Brady* material." (Stay Order, 1/10/14, at p. 3 [Ex. 15, JOHNSON0327].) This procedure fulfills the prosecution team's constitutional obligation under *Brady* and *Brandon* without shifting responsibility to, or imposing additional burdens on, the courts and

[11] An alternative to finding Section 832.7 unconstitutional as applied would therefore be to confirm that the section does not apply to *Brady*.

maintains the privacy of the officers. As Respondent ordered, the same procedure should have been employed here. [12]

CONCLUSION

For the reasons stated above, and for those set forth in Respondent's January 7, 2014 Order, this Court should deny the Petitions.

DATED: April 21, 2014

Respectfully submitted,

SEDGWICK LLP

By: _____

Michael L. Fox
Attorneys for Respondent

[12] Respondent's Orders and existing law would maintain the confidential nature of the records and protect the officer-witnesses' privacy rights. (Order, 1/7/14, at p. 16 [Ex. 12, JOHNSON0252] ["If a close question nonetheless remains as to whether information in a specific document or documents should be disclosed under *Brady*, the District Attorney will be able to make the threshold *Brandon* showing to this Court. The Court would then expeditiously review the specific document or documents."]; Order, 1/10/14, at p. 3 [Ex. 15, JOHNSON0328] ["if the Police Department believes protective measures are needed, they could be crafted readily"]; see also *Brandon*, *supra*, 29 Cal.4th at p. 15.)

RETURN BY ANSWER TO PETITIONS FOR WRITS OF MANDATE, PROHIBITION OR OTHER ALTERNATIVE RELIEF

Respondent Superior Court of California, County of San Francisco, in answer to the consolidated Petitions of the People of the State of California and the City and County of San Francisco, through the San Francisco Police Department, admits, denies, and alleges as follows:

Respondent admits the allegations of paragraphs I through XV of the People's Petition (A140767) and paragraphs 1 through 22 of SFPD's Petitions (A140768), except that, because the exhibits referenced therein – including relevant transcripts and Respondent's orders – speak for themselves, Respondent neither admits nor denies the accuracy of the characterization of the exhibits.

Respondent denies the allegations of paragraph XVI of the People's Petition (A140767) to the extent they mischaracterize the Respondent's orders as errors of law.

Respondent denies the allegations of paragraphs 23 through 27 of SFPD's Petition (A140768).

Respondent admits that it issued its order "in part because of its concern that reviewing peace officer personnel files is a time-consuming endeavor for the Court [and that t]he Police Department is well aware of the many demands placed on the judiciary, demands that have only grown in recent years of shrinking budgets," but otherwise denies the allegations in

paragraph 28 of SFPD's Petition (A140768).

Respondent denies the allegations of paragraphs 29 through 31 of SFPD's Petition (A140768); the request for a stay is moot given Respondent's stay order issued on January 10, 2014, and the Court of Appeal's stay order issued on January 29, 2014.

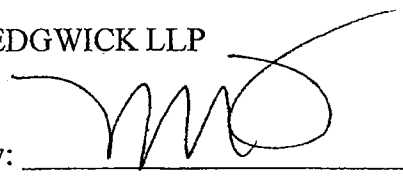
PRAYER

Respondent Superior Court of California, County of San Francisco prays that this Court deny the consolidated Petitions for Writs of Mandate, Prohibition, or Other Appropriate Relief.

DATED: April 21, 2014

Respectfully submitted,

SEDGWICK LLP

By: 

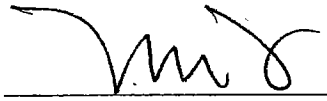
Michael L. Fox
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rules 8.204(c((1) and 8.360(b)(1) of the California Rules of Court, the brief of Respondent Superior Court of California, County of San Francisco was produced on a computer, using the word processing program Word 2007, and the Font is 13 point Times New Roman.

According to the word count feature of the program, this document contains 3,142 words, including footnotes, but not including the table of contents, table of authorities, and this certification.

DATED: April 21, 2014



Michael L. Fox

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Sedgwick LLP, 333 Bush Street, 30th Floor, San Francisco, CA 94104. On the date indicated below, I served the within document(s):

RESPONDENT SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO'S RETURN TO ORDER TO SHOW CAUSE AND RESPONSE TO CONSOLIDATED PETITIONS FOR WRITS OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

☐ FACSIMILE - by transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications Cover Page(s) on this date

☑ **MAIL** - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. **(SEE ATTACHED SERVICE LIST FOR MAIL RECIPIENTS)**

☑ **PERSONAL SERVICE** - by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below via Specialized Legal Services.

Court of Appeal
350 McAllister Street
San Francisco, CA 94102
[original and three copies]

☑ **ELECTRONIC SERVICE**

California Supreme Court
[Submitted Electronically Through the Court Of Appeal E-Submission]

☑ **ELECTRONIC SERVICE (E-MAIL)** - based on a court order or an agreement of the parties to accept electronic service, I caused the documents listed above to be sent to the persons at the electronic service addresses listed on the attached service list

See attached Service List

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 21, 2014, at San Francisco, California.

Dawn Lyons

Dawn Lyons

Sedgwick LLP

SERVICE LIST

City and County of San Francisco et al. v. Superior Court County of San Francisco
Division 5 - **Case Number A140767**

Party	Attorney
The People : Petitioner	Allison G. Macbeth Office of the San Francisco District Attorney 850 Bryant Street, Room 322 San Francisco, CA 94103-4611 Email: allison.macbeth@sfgov.org Jerry Peter Coleman District Attorney's Office 850 Bryant St., Room 322 San Francisco, CA 94103 Email: jerry.coleman@sfgov.org
Daryl Lee Johnson : Real Party in Interest	Christopher Gauger Office Of The Public Defender 555 Seventh Street San Francisco, CA 94103-1221 Email: Chris.Gauger@sfgov.org
San Francisco Police Department : Interested Entity/Party	Nina D. Sariaslani SFPD - Legal Division 850 Bryant Street, Room 575 San Francisco, CA 94103 Email: nina.sariaslani@sfgov.org
City and County of San Francisco : Interested Entity/Party	Christine Van Aken Office Of City Attorney 1 Dr. Carlton B. Goodlett Place City Hall - Room 234 San Francisco, CA 94102 Email: christine.van.aken@sfgov.org
Gregory D. Totten, Ventura County District Attorney : Amicus curiae for petitioner	Michael David Schwartz Office of the District Attorney 800 S. Victoria Ave. Ventura, CA 93009 Email: michael.schwartz@ventura.org
Peace Officers' Research Association of California (PORAC) : Amicus curiae; PORAC Legal Defense Fund : Amicus curiae; San Francisco Police Officers' Association : Amicus curiae	Michael L. Rains Rains Lucia Stern, PC 2300 Contra Costa Boulevard - Suite 230 Concord, CA 94523-4142 Email: mrains@rlslawyers.com
Appellate Committee of the California District Attorneys Association : Amicus curiae for petitioner	Jeff Rubin Alameda County District Attorney 1225 Fallon Street, 9th Floor Oakland, CA 94612 Email: jeff.rubin@acgov.org
Jeffrey F. Rosen, Santa Clara County District Attorney : Amicus curiae for petitioner	David Albert Angel Office of the District Attorney 70 W Hedding St. San Jose, CA 95110 Email: dangel@da.sccgov.org

SERVICE LIST
City and County of San Francisco et al. v. Superior Court County of San Francisco
Division 5 - **Case Number A140768**

Party	Attorney
City and County of San Francisco : Petitioner	Christine Van Aken Office Of City Attorney 1 Dr. Carlton B. Goodlett Place City Hall - Room 234 San Francisco, CA 94102 Email: christine.van.aken@sfgov.org
San Francisco Police Department : Petitioner	Nina D. Sariaslani SFPD - Legal Division 850 Bryant Street, Room 575 San Francisco, CA 94103 Email: nina.sariaslani@sfgov.org
The People : Real Party in Interest	Allison G. Macbeth Office of the San Francisco District Attorney 850 Bryant Street, Room 322 San Francisco, CA 94103-4611 Email: allison.macbeth@sfgov.org Jerry Peter Coleman District Attorney's Office 850 Bryant St., Room 322 San Francisco, CA 94103 Email: jerry.coleman@sfgov.org
Daryl Lee Johnson : Real Party in Interest	Christopher Gauger Office Of The Public Defender 555 Seventh Street San Francisco, CA 94103-1221 Email: Chris.Gauger@sfgov.org
Gregory D. Totten, Ventura County District Attorney : Amicus curiae for petitioner	Michael David Schwartz Office of the District Attorney 800 S. Victoria Ave. Ventura, CA 93009 Email: michael.schwartz@ventura.org
Peace Officers' Research Association of California (PORAC) : Amicus curiae; PORAC Legal Defense Fund : Amicus curiae; San Francisco Police Officers' Association : Amicus curiae	Michael L. Rains Rains Lucia Stern, PC 2300 Contra Costa Boulevard - Suite 230 Concord, CA 94523-4142 Email: mrains@rlslawyers.com
Appellate Committee of the California District Attorneys Association : Amicus curiae for petitioner	Jeff Rubin Alameda County District Attorney 1225 Fallon Street, 9th Floor Oakland, CA 94612 Email: jeff.rubin@acgov.org
Jeffrey F. Rosen, Santa Clara County District Attorney : Amicus curiae for petitioner	David Albert Angel Office of the District Attorney 70 W Hedding St. San Jose, CA 95110 Email: dangel@da.sccgov.org

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Sedgwick LLP, 333 Bush Street, 30th Floor, San Francisco, CA 94104. On the date indicated below, I served the within document(s):

RESPONDENT SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO'S NOTICE OF FILING THE BRIEF IT FILED IN THE COURT OF APPEAL

☐ FACSIMILE - by transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications Cover Page(s) on this date

☑ **MAIL** - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. **(SEE ATTACHED SERVICE LIST FOR MAIL RECIPIENTS)**

☐ PERSONAL SERVICE - by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below via Specialized Legal Services.

☐ ELECTRONIC SERVICE (E-MAIL) - based on a court order or an agreement of the parties to accept electronic service, I caused the documents listed above to be sent to the persons at the electronic service addresses listed on the attached service list

See attached Service List

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 6, 2015, at San Francisco, California.

Rosemary Pereda

Rosemary Pereda

Sedgwick LLP

Parties and Attorneys

PEOPLE v. S.C. (JOHNSON)

Case Number S221296

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Office of the Clerk
Telephone: 415-865-7000

Party	Attorney
The People : Petitioner	Allison G. Macbeth Office of the San Francisco District Attorney 850 Bryant Street, Room 322 San Francisco, CA 94103-4611 Email: allison.macbeth@sfgov.org Jerry Peter Coleman District Attorney's Office 850 Bryant Street, Room 322 San Francisco, CA 94103 Email: jerry.coleman@sfgov.org Laura Lee vanMunching Office of the District Attorney 850 Bryant Street, Room 322 San Francisco, CA 94103 James Ralph Thompson Office of the District Attorney 850 Bryant Street, Room 322 San Francisco, CA 94103 Attorney General - San Francisco Office 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004
Daryl Lee Johnson : Real Party in Interest	Christopher Gauger Office of The Public Defender 555 Seventh Street San Francisco, CA 94103-1221 Email: Chris.Gauger@sfgov.org
San Francisco Police Department : Interested Entity/Party	Nina D. Sariaslani San Francisco Police Department Legal Division 850 Bryant Street, Room 575 San Francisco, CA 94103 Email: nina.sariaslani@sfgov.org Jeremy M. Goldman Office of the City Attorney 1 Drive Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102 jeremy.goldman@sfgov.org

City and County of San Francisco : Interested Entity/Party	Christine Van Aken Office of the City Attorney 1 Drive Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102 Email: christine.van.aken@sfgov.org Jeremy M. Goldman Office of the City Attorney 1 Drive Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102 jeremy.goldman@sfgov.org
Office of the District Attorney : Pub/Depublication Requestor	Linh Lam Office of District Attorney 330 West San Diego, Suite 860 San Diego, CA 92101
First District Court of Appeal	Diana Herbert Clerk of the Court First District Court of Appeal First Appellate District 350 McAllister St. San Francisco, CA 94102 First Appellate District Project 730 Harrison Street, Suite 201 San Francisco, California 94107
San Francisco Superior Court	Clerk of the Superior Court San Francisco Superior Court Criminal Division 850 Bryant St., Dept. 22 San Francisco, CA 94103

Sedgwick LLP