Supreme Court of California

People of the State of California, Petitioner, vs. **The Superior Court of the City and County of San Francisco,** Respondent.	No. **S221296**
Daryl Lee Johnson Real Parties in Interest.	

Real Party Johnson's Answer Brief on the Merits

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Issues presented

(1) Does the prosecution have a duty to review peace officer personnel files to locate material that must be disclosed to the defense under *Brady v. Maryland* (1963) 373 U.S. 83?

(2) Does the prosecution have a right to access those files absent a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531?

(3) Must the prosecution file a *Pitchess* motion in order to disclose such *Brady* material to the defense?

(4) Would the prosecution's relay to the defense the police department's alert that certain officers' personnel files might contain *Brady* material satisfy their obligation under *Brady v. Maryland* (1963) 373 U.S. 83, leaving it to the defense to file any discovery motion?

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

Statement of facts and the case

Real party adopts the prosecution's opening brief rendition of the facts and case.

Argument

Introduction

Real party, Johnson, is most concerned that defendants get the exculpatory materials secreted in police personnel files, to which they are entitled under *Brady*. The precise methods for providing the material will be discussed, as some seem more effective and do less damage to the statutory scheme than others. But the underlying principle — embraced by the trial court, the Court of Appeal, and the parties —is that the current "*Pitchess*" system does not in fact work to get exculpatory evidence secreted in police files into the hands of the defense. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

To this end, Johnson urges this Court to endorse the Court of Appeal's reasoning that the prosecution has a constitutional duty to obtain and provide to the defense exculpatory evidence relating to its witnesses. On this point, the prosecution and police agree; indeed, in an ethical and praiseworthy attempt to comply with this duty, the

prosecution and police set up the current system they defend. (And Johnson thinks, as practiced, it was most workable and least damaging to current precedent.) For three years, defendants in San Francisco received essential, exculpatory evidence that they would not otherwise have obtained (and did not for the previous 30 years).

The trial court agreed that the prosecution had the constitutional duty, under due process and *Brady*, to reveal exculpatory information secreted in the police files. But it found the prosecution's process overbroad and burdensome, instead ruling Penal Code section 832.7 unconstitutional and ordering the prosecution to go into the personnel files and retrieve any *Brady* material, divulging the product to the defense. (*Brady v. Maryland* (1963) 373 U.S. 83.)

Johnson is ultimately not adverse to the trial court's method of discovery, or the Court of Appeal's procedure, or to the prosecution's *Pitchess* procedure. But Johnson has a procedural preference for the prosecution's *Pitchess* procedure because: 1) via the in-camera system it reduces the chance that the prosecuting attorney's review is consciously or subconsciously warped by the competitive lens of trial; and 2) the in-camera system includes a record of the files examined, preserving this for review (*People v. Mooc* (2001) 26 Cal.4th 1216.)

Finally, Johnson disagrees with the proposition that the prosecution could fulfill its *Brady* obligation by merely alerting the defense of officer-witnesses whose files contain potential *Brady* material. The trial court and Court of Appeal both gave direct access to the prosecution, while still barring defense access. So this only becomes an issue if this Court authorizes the prosecution's current in-camera *Brady* scheme. And though Johnson supports that system, due to its pragmatic success in San Francisco, he disagrees that the burden of obtaining exculpatory information secreted in police personnel files should shift once the prosecution discloses the identity of police officers with potential *Brady* material. This shifts the responsibility for disclosure from the prosecution and its most intimate team members (police witnesses) to the defense to plead for information that should be divulged by rights. The close ties between the prosecution and police militate that the onus of filing the motion and securing the discovery remain with the prosecution.

1. The prosecution has the duty to divulge *Brady* materials, even in police personnel files; *Pitchess* does not secure the same items.

For over thirty-five years, Penal Code section 832.7 has served to preclude defendants from access to exculpatory materials. The *Pitchess* procedure is inadequate and results in injustice when exculpatory evidence is secreted from a citizen accused of a crime. During this stretch, some Courts of Appeal have erronously held that *Pitchess* and *Brady* provide the same discovery of exculpatory evidence. For instance, in *People v. Gutierrez*, the Court of Appeal claimed that one gets the same or more discovery from a *Pitchess* complaint. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1474.) Not so.

Though *Brady* and *Pitchess* both require disclosure of relevant evidence, they employ different standards of materiality. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7.) The constitutional materiality standard in *Brady* tests whether evidence is material to a fair trial under the federal Due Process Clause. (*Brady, supra,* 373 U.S. 87.)

By contrast, a defendant seeking *Pitchess* disclosure must only make a threshold showing that the information sought is material "to the subject matter involved in the pending litigation." (Evid. Code, § 1043(b) (3).)

Because the standards are different, *Pitchess* and *Brady* do not necessarily address the same evidence. Indeed, *Pitchess* laws were neither designed to facilitate, nor do they mention, prosecutors' *Brady* duties. And the actual discovery is quite different. *Brady* is not barred by the five-year *Pitchess* limit; nor is the discovery limited to names and address, but includes all evidence that might lead to impeachment or substantive *Brady* material.

So, the state statutory avenue to obtain material from police files, under *Pitchess* and Penal Code Section 832.7, does not satisfy the constitutional right to receive *Brady* material. Rather, they impede full release, ultimately violating a defendant's due process rights.

A. *Pitchess* does not satisfy Due Process, as it put the onus on the defense to allege a theory and facts.

Pitchess laws address only state-law issues of criminal discovery and officer-privacy rights, imposing numerous conditions and restrictions on a criminal litigant's right to obtain information from a peace officer's personnel file. Thus, a party seeking this information must file a motion, showing good cause and identifying the officers suspected of wrongdoing. (See Evid. Code, § 1043 [describing *Pitchess* motion requirements].)

But a *Pitchess* motion can only reach evidence that a defendant can plausibly relate to a specific defense contention or theory. (*City*

of Santa Cruz v. Municipal Court (Kennedy) (1989) 49 Cal.3d 74, 90-92.) Hence, a defendant's *Pitchess* motion is necessarily limited to officer misconduct the defendant already knows about, or suspects, and that supports an articulable defense theory; the motion will be denied if the defendant cannot make the requisite showing.

Brady, on the other hand, reaches material completely unknown to the defendant.

B. Because *Brady* material must be unknown to the defendant; it follows that the defense cannot shoulder a materiality showing.

Brady requires a prosecutor to engage in a search for information unknown to the defendant. Indeed, a *Brady* search is not limited to information already known to the prosecutor's office — it must take good-faith steps to actively and effectively learn about the existence of *Brady* evidence known only to others acting on its behalf. (*Kyles v. Whitley* (1995) 514 U.S. 419, 438; *People v. Salazar* (2005) 35 Cal.4th 1031, 1042.) Because *Brady* evidence is necessarily unknown to a defendant, it is unlikely ever to be the subject of a pre-existing defense theory supporting a pretrial *Pitchess* motion. (See, e.g., *People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1340 [mere defense denial insufficient for *Pitchess* discovery]; *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1317-1318.)

A defendant's pretrial request for production of *Brady* material triggers the prosecution's duty to review officer personnel files, and the defendant has no burden to make an initial showing of materiality. (*United States v. Henthorn* (9th Cir. 1991) 931 F.2d 29, 30-31 ["The government is incorrect in its assertion that it is the defendant's burden to make an initial showing of materiality"].) The prosecution need only turn over items that are material to the defendant's case (*Id.* at 31), and where unsure of the materiality, the government can submit it to the court for in camera review. (*Ibid.* [if prosecution uncertain about materiality of information, it may submit it to trial court for in camera inspection].)

However determined, *Brady* evidence must be disclosed to the accused early enough to be of value to the defense. (*Tennison v. City and County of San Francisco* (2009) 570 F.3d 1078, 1093.)

C. Hence, the *Pitchess* statutory scheme cannot be a substitute for *Brady*.

Thus, *Brady* encompasses more exculpatory information than is reachable through a defense *Pitchess* motion, including the production of otherwise unknown and unanticipated evidence that provides new defenses to a criminal prosecution. But no California process, including a *Pitchess* motion, allows a party to check for the existence of unknown and unsuspected exculpatory information. A

defendant cannot make a nonspecific *Pitchess* motion to enforce a prosecutor's broad *Brady* duty with regard to unknown exculpatory information; indeed, courts have refused to allow criminal defendants to use procedures to enforce *Brady* if those procedures bypass *Pitchess* requirements. (See, *Garden Grove Police Dep't v. Superior Court* (2001) 89 Cal.App.4th 430; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010.)

Recognizing this potential for conflict, this Court in the 2002 *Brandon* decision noted that "the law is unsettled as to whether prosecuting authorities can access the [officer personnel] records for purposes of meeting their *Brady* obligation." (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal. 4th 1, 17.) And this Court left open 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*." (*Id.* at 12, fn 2.) That question must be answered here.

Because there is no adequate mechanism in place for the prosecution to seek out the potential *Brady* material that indisputably exists in the Police Department files, and given the

penalties a prosecutor might face for violating section 832.7, California law impedes the defendant's right to *Brady* material.

If the facts of a case do not suggest a *Pitchess* motion, crucial information to which a defendant is constitutionally entitled would be missed but for untriggered *Brady* discovery. Consider an officer who has *Brady* material in his personnel file consisting of hundreds of pages of an internal investigation of acts that, if prosecuted, would amount to felonies and crimes of moral turpitude (discovery similar to this has actually come to light via prosecution *Brady/Pitchess* motions). Assume the result of the inquiry was internal discipline. These documents would not have been automatically discovered by the prosecution or defense under the system prior to the 2010 arrangement.

Now assume this officer's role appears minor, such as interaction with a witness in a cold-show identification procedure. His testimony might only become important if the witness testifies at trial to not making the positive 100% identification as recorded in the police report, but that the suspect was of the general build and race. Now the officer's credibility becomes a material issue. It is much too late for a *Pitchess* motion — the defense would not have thought to file one anyway — but the information in the personnel

file should have been provided under *Brady,* as exculpatory impeachment.

It follows that the prosecution's duty to learn of and disclose to the defense any favorable evidence favorable to the defense involving their police witnesses (*Kyles v. Whitley* (1995) 514 U.S. 419, 437; *Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-870; *People v. Whalen* (2013) 56 Cal.4164; *Brandon, supra*, 29 Cal.4th at 8), must extend to the exculpatory and impeachment information secreted in police personnel files.

2. Changing the burden to the defense to seek exculpatory evidence in the police files will undermine the spirit and policy behind *Brady* and causing delay and injustice.

On the one hand, if this Court accepts the First District's reasoning – that Penal Code section 832.7, properly construed, does not preclude prosecutorial access to officer personnel files for *Brady* purposes, because inspection of the files is not a "disclosure" in a criminal proceeding; or, alternatively (as the Attorney General argued), the review falls within the investigation exception (Pen. Code, §832.7(a)) – then the prosecution would have exclusive access. Meanwhile the defense, having no such access, could not bring the *Brady/Pitchess* motion.

The same is true if this Court agrees with the trial court position that Section 832.7 is unconstitutional, giving access to the prosecution. The trial court did not authorize the defense to view or subpoena the files; it only wanted the prosecution to secure them pending discussion of a discovery process. So under this position as well, the prosecution maintains exclusive access to the *Brady* materials and the defense could not proceed via separate motion.

Finally, only if the Court finds the prosecution is barred access to police personnel files by section 832.7 will the issue arise whether the defense can also bring a *Brady* motion under *Pitchess*. If the Court chooses this course, Johnson posits that, as a matter of policy and in the spirit of *Brady*, the prosecution should bring the motion. The defense should bring the motion only if the prosecution refuses and the defense can make "a showing there is a reasonable basis to believe exculpatory or impeachment evidence exists in" the records. (See for example, *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1339.)

As policy matter — and this Court is the ultimate policy maker in this state — shifting the burden of obtaining exculpatory material in the state's possession to the defense violates the spirit of *Brady* and, practically speaking, may result in decreased production of *Brady* materials from these files. The trial court's finding that section 832.7

was unconstitutional (giving the prosecution direct access to personnel files), or the Court of Appeal's system (that a fair reading of the statute gives the prosecution the duty to review the files) represent better policy and fairness than would a system that shifts to the citizen-accused the onus of fighting for exculpatory evidence in the possession of the agency that actively works with the prosecution to convict.

The prosecution and defense are not similarly-situated with respect to the police. The prosecution negotiated and set up the current memorandum of understanding among the police management, police union, and itself. In large part, it rested on the understanding that the identified potential *Brady* files would be received by a judge in camera, with a fair review upon the guarantee of their partner agency, the prosecution. The defense does not have ties to, or trust of, the police. Traditionally the defense bar cross-examines and often attacks the police. Any system that relies on good faith and agreements of police union and management to facilitate the discovery is best served with the understanding that the information will be released through the prosecution and then to the defense — this will elicit trust and compliance.

Additionally, if the defense brings the motion and obtains the discovery, it will have no duty to divulge it to the prosecution,

because the defense has no *Brady* duty. It would only have to turn over the discovery divulge if the defense intended to call the witness, as provided in Penal Code section 1054.3. But if the defense intended only to use it in cross-examination, there would be no obligation to provide it. (*People v. Tillis* (1998) 18 Cal.4th 284.) This result, while making it harder for the defense to obtain *Brady* information, would undoubtedly spur further litigation around the withholding of materials the defense does discover.

The City Attorney and prosecution cite *Barrett* for the proposition that personnel files of a prosecution's law enforcement team member are not within the prosecution's control. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305.) Thus, the argument goes, it is in no better position to obtain these materials than the defense.

Barrett does not control. First, it involved a discovery request for administrative materials from the California Department of Corrections. The court characterized it as "information possessed by an agency that has *no connection* to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team." (*Barrett, supra,* 80 Cal.App.4th at 1315 [emphasis added].) No legitimate argument exists here that the police department has no connection to the prosecution.

Further, *Barrett* did not address the prosecution's *Brady* obligations, but only its duties under the California discovery statute, and there was no suggestion that the materials sought from the CDC constituted *Brady* evidence. In that vacuum, the court held that Barrett needed to resort to a subpoena duces tecum. (*Barrett, supra,* 80 Cal.App.4th at 1317.) Police and prosecution aims and goals are so comingled here that they form one team and the prosecution must be responsible for any *Brady* materials in their personnel files.

If this Court endorses the prosecution's in-camera review procedure, over the direct-access decisions of the trial court and the Court of Appeal, it should make clear that it is the prosecution's motion, because of the symbiotic relationship between the prosecution and the police.

Conclusion

The police are the main ally and witness for the prosecution. Their *Brady* duty, as the San Francisco District Attorney's Office and the San Francisco Police department have acknowledged via their efficient *Pitchess/Brady* in-camera system, include seeking obtaining and delivering exculpatory evidence in police personnel files to the defense. Johnson would happily continue under the prosecution's in-camera system, but baulks at the suggestion that the responsibility for securing impeachment and exculpatory evidence

from police personnel files should rest with the defense. This flies in the face of the constitutional *Brady* duty that lies at the feet of prosecutors for good reason — only they have the unique and historically close relationship with the police officers upon whose testimony they actively rely in virtually every case.

Johnson applauds the prosecution's efforts to deliver *Brady* material that defendants had, until recently, been denied. But Johnson's constitutional right to *Brady* discovery in personnel files — though without the safeguards of judicial review or record preservation — are also served under 1) the trial court's ruling that 832.7 is unconstitutional giving the prosecution direct access to personnel files, or 2) the Court of Appeal's well-reasoned decision that the statute allows the prosecution direct access to police personnel files.

The bottom line is that police personnel files cannot be used to diminish the prosecution's *Brady* duties. Johnson asks this court to ensure timely, full release of the *Brady* in the two officers' files here.

Dated: February 09, 2014

Respectfully submitted,
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By: _____
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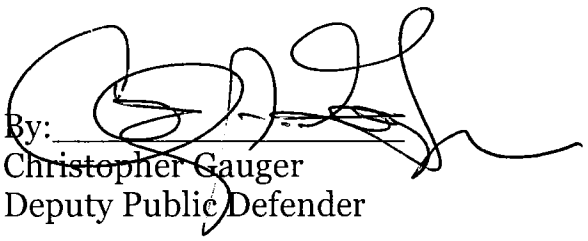
Word Count Certificate

I, Christopher Gauger, declare under penalty of perjury that I am an attorney licensed to practice law in the State of California and employed as a San Francisco Deputy Public Defender co. I certify that the attached brief was prepared in 13-point Georgia Font (heading in 15 font) and contains 2999 words, excluding captions tables, this certificate, and proof of service.

Dated: February 09, 2015



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Proof of Service

I declare under penalty of perjury that I am over eighteen years of age, not a party to the within action; that my business address is 555 Seventh Street, San Francisco, California 94103; and that on February 09, 2015 I personally served the attached Brief on the following parties:

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