SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, **Petitioner,** **vs.** **THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO,** **Respondent.** **DARYL LEE JOHNSON,** **Real Party in Interest.**	Case No. S221296 First Appellate District, Division Five No. A140767/ A140768 Consolidated Cases Superior Court No. 12029482 SCN 221362

SUPREME COURT
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REPLY BRIEF ON THE MERITS

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

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Petitioner, v. THE SUPERIOR COURT OF SAN FRANCISCO, Respondent,	No. S221296
DARYL LEE JOHNSON, Real Party in Interest.	

REPLY BRIEF ON THE MERITS

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

Petitioner, the People of the State of California, respectfully submits this Reply Brief on the Merits to Respondent Superior Court's Return to Order to Show Cause filed in the court of appeal and Real Party in Interest Johnson's Answer Brief on the Merits.

INTRODUCTION

The prosecution and defense seldom find common ground. In this case, that common ground has been found between the most unlikely of partners – the prosecution, the police, *and* the defense – all who embrace the *Pitchess*[1] procedures to secure potential *Brady*[2] material in peace officer personnel files and have implemented a system to ensure the rights of all interested parties involved are honored. (See Johnson Answer at pp. 1-3, 14-15.) Petitioner commends Johnson's approval of and overall preference for this system.

ARGUMENT

I. BECAUSE THE SFPD HAS A HYBRID STATUS, PART INVESTIGATORY AGENCY AND PART THIRD PARTY, THE DISTRICT ATTORNEY DOES NOT POSSESS OFFICER PERSONNEL RECORDS FOR *BRADY* PURPOSES, ABSENT COMPLIANCE WITH EVIDENCE CODE SECTION 1043 *ET SEQ.*

Johnson contends that Petitioners' reliance upon *People v. Superior Court (Barrett)* (2008) 80 Cal.App.4th 1305, for the proposition that officer personnel files are not within the prosecution's control is misplaced. (Johnson Answer at p. 13.) Johnson makes two arguments. First, *Barrett* involved a discovery request for administrative materials from the California Department of Corrections, which *Barrett* characterized as "'information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant....'" (*Ibid.*, quoting *Barrett, supra,* 80 Cal.App.4th at p. 1315 (emph. om.).) According to Johnson, "No legitimate argument exists here that the police department has no connection to the prosecution." (*Ibid.*) Second, *Barrett* did not address the prosecution's *Brady* obligations, only

[1]*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).
[2]*Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

its duties under the California discovery statute. (*Id.* at p. 14.) Thus, in that vacuum, *Barrett* held that defendant needed to resort to a subpoena duces tecum. (*Ibid.*, citing *Barrett, supra*, 80 Cal.App.4th at p. 1317.)

First, Petitioners do not contend that the police department has no connection to the prosecution. The SFPD investigated the crimes charged against Johnson. What Petitioners contend is that like the CDC in *Barrett*, SFPD maintains a "hybrid status: part investigatory agency, and part third party." (*Barrett, supra*, 80 Cal.App.4th at p. 1317.) *Barrett* reasoned that many of the documents were "not gathered by CDC in connection with its investigation of the April 9, 1996 homicide" for which defendant was on trial. (*Id.* at p. 1318.) "Rather, these CDC documents, most of which predate the homicide, are records kept by CDC in the course of running the prison" and thus generated when CDC was not acting as part of the prosecution team. (*Ibid.*)

SFPD is part investigatory agency relative to the investigation and prosecution of the charges against Johnson and part third party relative to their administrative and supervisorial duties of the department. (See *Barrett, supra*, 80 Cal.App.4th at p. 1317.) As a general proposition, many of the documents contained in officer personnel files were not gathered by SFPD in connection with its investigation of the crime charged against the defendants who are then on trial. (*Barrett, supra*, 80 Cal.App.4th at p. 1318.) In this case, no suggestion is made that the contents of the officers' personnel files were gathered in connection with SFPD's investigation of the crime charged against Defendant Johnson. (See Pet. Exh. 11 at JOHNSON0213.) Rather, documents in officer personnel files that SFPD identifies as potential *Brady* material often predate the crime charged against the defendant, are records kept by SFPD in the course of its administrative duties running the police department, are investigated by other agencies like the Office of Citizen Complaints, and thus are generated

when SFPD is not acting as part of the prosecution team. (*Barrett, supra*, 80 Cal.App.4th at p. 1318; see also Pen. Code § 832.5.)

Second, it is incorrect to say that "*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." (Johnson Answer at p. 14.) In *Barrett*, the district attorney argued to the court of appeal that he was under no "constitutional mandate" to produce the disputed material. (*Barrrett, supra*, 80 Cal.App.4th at p. 1311.) Under the heading "Constitutional Mandate to Disclose Exculpatory Evidence," the *Barrett* Court spent nine paragraphs discussing *Brady* and the prosecution's obligations thereunder. (*Id.* at p. 1314.) With this background *Barrett* held, "In connection with its administrative and security responsibilities housing California felons while they serve their sentences, CDC is *not part of the prosecution team*" and thus the bulk of the materials defendant sought must be obtained by subpoena duces tecum. (*Id.* at pp. 1317-1318 (emph. added).) "Being part of the prosecution team" is the prerequisite for the existence of a duty under *Brady*. (See generally, *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.) Consequently, under *Barrett*, officer personnel records are not within the district attorney's possession, absent compliance with Evidence Code section 1043 *et seq.*[3]

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[3]Petitioner recognizes there would be a qualification to this general rule if a complaint arose from the same incident as the charges against a defendant. (See, e.g., *Rezek v. Superior Court* (2012) 206 Cal.App.4th 633, 638, 641, 642 [requiring an Evidence Code section 1043 motion even in that situation due to lack of direct access by the prosecution.].)

II. THE DISTRICT ATTORNEY MUST COMPLY WITH EVIDENCE CODE SECTION 1043 *ET SEQ.* IN ORDER TO REVIEW OFFICER PERSONNEL FILES FOR *BRADY* MATERIAL.

Respondent Superior Court argues that the procedures set forth in Evidence Code section 1043 *et seq.* do not apply to a prosecution's *Brady* motion. (Return at pp. 10-13.) The presumption that the Legislature enacted section 1043 *et seq.* with *Brady* in mind and subsequent case law demonstrate otherwise.

A. BECAUSE THE LEGISLATURE ENACTED EVIDENCE CODE SECTION 1043 *ET SEQ.* 15 YEARS AFTER *BRADY*, IT CAN BE PRESUMED THAT IT ENACTED THE *PITCHESS* PROCEDURES WITH *BRADY* IN MIND.

Respondent Court asserts that the California Legislature did not take *Brady* into account when drafting the *Pitchess* Legislation. (Return at p. 13.) Petitioner disagrees.

Fifteen years after the United States Supreme Court decided *Brady, supra,* 373 U.S. 83, the California Legislature enacted Evidence Code section 1043 *et seq.* in 1978. Section 1043 states that it applies "in *any* case in which discovery or disclosure is sought of peace officer personnel records." (emph. added.) Because "it is generally presumed that [...] the Legislature [is] deemed to be aware of laws in effect" at the time new laws are enacted, "and have enacted the new laws in light of existing laws having direct bearing upon them," it can, therefore, be presumed that the Legislature enacted section 1043 *et seq.* with *Brady* in mind. (See *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 624.)

Observations by commentator Neri, upon whom Respondent relies, actually support Petitioner's position that the Legislature took *Brady* into account when drafting section 1043 *et seq.* Neri wrote:

> In 1987, the United States Supreme Court held that state confidentiality statutes cannot ignore *Brady's* mandate and that a process for *Brady* review must be superimposed on state confidentiality laws that do not provide for *Brady* compliance. In *Pennsylvania v. Ritchie*, the Court effectively wrote an in camera review procedure into state law, requiring Pennsylvania judges to examine confidential information for the presence of *Brady* material without regard to state-law restrictions and despite the absence of state law authorize such reviews in criminal cases.

(Neri, *Pitchess v. Brady: The Need for Legislative Reform of California's Confidentiality Protection for Peace-Officer Personnel Information* (2012) 43 McGeorge L.Rev. 301, 310-311; see also p. 318.)

Like *Ritchie*, Evidence Code section 1043 *et seq.* "superimposes" an *in camera* review on the state confidentiality provisions of Penal Code section 832.5 *et seq.*, requiring judges to examine confidential information for the presence of *Brady* material. (See also *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 58 (*Abatti*), citing *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14-15; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1056 (Baxter, J. dis. opn.) (*Alford*).) "When the state seeks to protect such privileged items from disclosure, the court must examine them in camera to determine whether they are 'material to guilt or innocence." (*People v. Webb* (1993) 6 Cal.4th 494, 518, citing *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57-61 (*Ritchie*).) Contrary to Respondent's assertion, the Legislature has indeed accounted for *Brady*.

B. THIS COURT HAS RECOGNIZED THAT THE DISTRICT ATTORNEY MUST COMPLY WITH EVIDENCE CODE SECTION 1043 *ET SEQ.* WHEN SEEKING ACCESS TO OFFICER PERSONNEL FILES.

Respondent asserts that no legal support exists for Petitioner's argument that section 1043 *et seq.* requires *in camera* review by courts. (Return at p. 10.)

This Court's pronouncements are consistent with the conclusion that the district attorney must comply with section 1043 *et seq.* when seeking access to officer personnel files for *Brady* material. Fourteen years ago, this Court in *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*), linked *Pitchess* procedures to *Brady*: "This **procedural mechanism for criminal defense discovery**, which **must be viewed against** the **larger background of the prosecution's constitutional obligation to disclose** to a defendant **material exculpatory evidence** so as not to infringe the **defendant's right to a fair trial** (cits.), is now an **established part of criminal procedure in this state**." (*Id.* at p. 1225, citing ***United States v. Bagley*** (1985) 473 U.S. 667, 674-678; ***Brady**, supra*, 373 U.S. at p. 87, among others (bold added).)

The following year in *Brandon*, this Court stated that section 1043 *et seq.'s* procedural mechanism "'operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information.'" (*Brandon, supra*, 29 Cal.4th at p. 14.) """[W]here the People seek discovery of the peace officer personnel records ... the district attorney is not exempted under the provisions of Penal Code section 832.7, subdivision (a), and must comply with the requirements of Evidence Code sections 1043 et seq."""" (*Id.* at p. 21 (Moreno, J. dis. opn.), quoting *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1144, quoting *People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 407.)

In *Brandon*, the Attorney General cited *Ritchie, supra,* 480 U.S. 39, for the proposition that a trial court is authorized to review materials that "enjoy a 'qualified statutory confidentiality' to determine whether they include material exculpatory evidence subject to disclosure under *Brady*." (29 Cal.4th at p. 14.) *Brandon* found *Ritchie* "instructive" and concluded that trial courts are permitted to undertake an *in camera* review of confidential documents for *Brady* material. (*Id.* at p. 15.) The *Pitchess* procedures are analogous to the *in*

camera proceedings approved by *Ritchie* for the review of statutorily protected officer personnel files.

Finally, the following year in *Alford, supra,* 29 Cal.4th at p. 1046, this Court declared that absent compliance with Evidence Code sections 1043 and 1045, peace officer personnel records retain their confidentiality relative to the prosecution.

Respondent further asserts that section 1043 *et seq.* cannot apply to *Brady* because "*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)." (Return at p. 13.) *Brandon* squarely rejected Respondent's contention. *Brandon* concluded that records of exculpatory evidence contained within the officer's personnel files may be subject to disclosure even if the conduct occurs beyond the five year limitation of section 1045, subdivision (b)(1). (29 Cal.4th at p. 15.)

In sum, Respondent's assertion that no legal support exists for Petitioner's argument that section 1043 *et seq.* requires *in camera* review by courts is incorrect. Under the language of section 1043 itself, *Mooc*, *Brandon*, and *Alford*, the district attorney must comply with section 1043 *et seq.* when seeking access to *Brady* material in officer personnel files.

C. FOLLOWING THIS COURT'S LEAD, COURTS OF APPEAL HAVE HELD THAT SECTION 1043 *ET SEQ.* APPLIES TO HYBRID *BRADY/PITCHESS* MOTIONS.

Following this Court's decisions in *Mooc*, *Brandon*, and *Alford*, courts of appeal have concluded that the procedures set forth in section 1043 *et seq.* apply to all discovery sought from officer personnel files. For instance, the Fourth District in *Abatti, supra,* 112 Cal.App.4th at p. 56, affirmed *Alford's* holding that a "prosecutor, as well as the defendant, must comply with the statutory *Pitchess* requirements for disclosure of information contained in confidential peace officer records." *Abatti* noted that under *Ritchie*, a defendant has a due

process right to gain access to material exculpatory evidence for the preparation of a defense. (*Id.* at p. 58.) "California has a legislatively established, exclusive method for gaining access to police officer personnel records for discovery of such **exculpatory material** – the so-called ***Pitchess* procedures**." (*Ibid.*, citing *Brandon, supra*, 29 Cal.4th at pp. 14-15 (bold added).) Respondent is, therefore, incorrect in contending that *Abatti* rejects the application of sections 1043 and 1045 to *Brady*. (Respondent's Return at pp. 11-12.)

Even before *Abatti*, the Fourth District had held that a defendant must comply with Evidence Code section 1043 *et seq.* to obtain *Brady* material. *Garden Grove* concluded, "We cannot allow [defendant] to make an end run on the *Pitchess* process by requesting the officers' personnel records under the guise of a Penal Code section 1054.1 and *Brady* [fn. 6] discovery motion." (*Garden Grove Police Dept v. Superior Court* (2001) 89 Cal.App.4th 430, 435 & fn. 6 [*Brady, supra*, 373 U.S. 83] (*Garden Grove*).) While Respondent is correct that *Garden Grove* pre-dates *Brandon*, *Garden Grove* is nonetheless consistent with *Mooc*, *Brandon*, *Alford*, *Gutierrez*, and *Abatti*. *Garden Grove* is also consistent with *Gremminger, supra,* 58 Cal.App.4th at p. 407, and *Beccerada v. Superior Court* (2d Dist. 2005) 131 Cal.App.4th 409 (*Beccerada*) [*Alford's* footnote 7 [prosecutor may be able to learn of impeachment material against the officer by interviewing him] did not establish the right of the prosecution to obtain material disclosed to the defense without filing its own *Pitchess* motion. (*Id.* at p. 415, citing *Alford, supra*, 29 Cal.4th at p. 1046, fn. 7.)].

Like the Fourth District, the Second District held that Evidence Code section 1043 *et seq.* applies to *Pitchess/Brady* motions. After the defendant in *Gutierrez* sought *Brady* material in two officers' personnel records, *Gutierrez* considered the constitutionality of the *Pitchess* scheme in light of a defendant's right to exculpatory evidence under *Brady*. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1470-1471, 1473-1475 (*Gutierrez*).) *Gutierrez* reasoned that

the *Pitchess* procedures do not prohibit the disclosure of *Brady* material: "the statutory *Pitchess* procedures implement *Brady* rather than undercut it." (*Id.* at p. 1474.) *Gutierrez* held that a prosecutor could seek potential *Brady* information from an officer's personnel file only by filing a motion pursuant to section 1043 *et seq.* (*Id.* at p. 1475, citing *Alford, supra*, 29 Cal.4th at p. 1046.)[4]

Lastly, the First District recognized that the prosecutor does not have unfettered access to officer personnel files. *Fagan* involved an investigation by SFDA into the off-duty conduct of several officers. (*Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 610 (*Fagan*).) *Fagan* held that under Penal Code section 832.7, subdivision (a), SFDA properly obtained the results of the officers' urinalysis tests that had been placed in their personnel files, but that those results could not be publicly disclosed or disseminated absent compliance with section 1043 *et seq.* (*Id.* at pp. 610, 618-619.) *Fagan* notes, "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." (111 Cal.App.4th at p. 618, citing *Gremminger, supra*, 58 Cal.App.4th 397.) True, *Fagan* does not discuss *Brady* or *Brandon*. *Fagan* does, however, recognize the limits of prosecutorial access to confidential officer personnel records in the first instance.

Thus, Respondent Court's reliance on *Brandon* for the proposition that "there is no suggestion that the 'codification of the *Pitchess* decision' (Evid. Code §§ 1043, et seq.) applies to *Brady*" (Return at p. 11, citing *Brandon, supra*, 29 Cal.4th at p. 7) is misplaced. *Brandon, Alford, Abatti*, and *Gutierrez* all conclude otherwise. (*Brandon, supra*, 29 Cal.4th at pp. 12, fn. 2, 14-15;

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[4] Respondent's argument that in *Gutierrez* the defendant made only a *Pitchess* motion and not a *Brady* motion is a distinction without a difference, since defendant sought *Brady* material in the personnel files and argued for routine prosecutorial review of officer personnel files for *Brady* material. (*Gutierrez, supra*, 112 Cal.App.4th at pp. 1470-1471, 1474-1475.)

Alford, supra, 29 Cal.4th at pp. 1038, 1046; *Abatti, supra*, 112 Cal.App.4th at p. 58; *Gutierrez, supra*, 112 Cal.App.4th at pp. 1474-1475.)

D. *BRANDON* ITSELF ADDRESSES RESPONDENT COURT'S CONCERNS REGARDING THE APPLICATION OF EVIDENCE CODE SECTION 1043 *ET SEQ.* TO *BRADY*.

Respondent Court asserts that "Petitioners and amici [below] fail to contemplate the full implications of [our] argument that Evidence Code sections 1043 and 1045 apply to *Brady*." (Return at p. 13.) Respondent contends that if sections 1043 *et seq.* apply to *Brady*, "**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.'" (Return at p. 13, citing Evid. Code § 1043, subd. (b)(3), *Brandon, supra*, 29 Cal.4th at p. 15 (emph. in Return).) *Brandon* itself rejects Respondent's argument, finding "the high court's decision in *Ritchie, supra*, 480 U.S. 39, instructive here." (*Brandon, supra*, 29 Cal.4th at p. 15.)

> Under *Ritchie*, a trial court that in response to a criminal defendant's discovery motion undertakes an in-chambers review of confidential documents can, if the documents contain **information whose use at trial could be dispositive on either guilt or punishment**, order their disclosure.

(*Ibid.*, citing *Ritchie, supra*, 480 U.S. 39 (bold added).)

Respondent further alleges that if sections 1043 *et seq.* apply to *Brady*, then *Brady* is no longer self-executing in this state, but rather dependent upon a written motion. (Return at p. 13.) This argument fails to acknowledge both the state's interest in the confidentiality of the statutorily protected files and the solution provided by the Supreme Court in *Ritchie* that the trial court can protect both the defendant's and the state's interests through *in camera* review. *Ritchie* "authorize[ed] trial court review of information [like peace officer personnel records] that enjoys a 'qualified statutory confidentiality' to determine whether it includes material exculpatory evidence subject to

disclosure under *Brady, supra*, 373. U.S. 83." (*Brandon, supra*, 29 Cal.4th at p. 14.) And as *Brandon* notes, "Ritchie could not 'require the trial court to search through the [agency's] file without first establishing a basis for his claim that it contains *material* evidence' ([*Ritchie, supra*, 480 U.S.] at p. 58, fn. 15 [], ...), that is, evidence that could determine the trial's outcome, thus satisfying the materiality standard of *Brady, supra*, 373 U.S. 83." (*Id.* at p. 15 (ital. in orig.).) Because, according to the Supreme Court, a showing of materiality is a valid prerequisite to the disclosure of evidence contained in conditionally privileged state agency files, such as officer personnel files,[5] and because the defendant's and the state's interests can be protected by requiring the files be submitted to the trial court for *in camera* review,[6] requiring compliance with section 1043 *et seq.*, i.e., a written motion, does not violate due process.

III. THE *PITCHESS* PROCEDURES PROVIDE BOTH THE PROSECUTION AND THE DEFENSE WITH THE MEANS TO ACCESS *BRADY* MATERIAL CONTAINED WITHIN PEACE OFFICER PERSONNEL FILES.

A. THIS COURT HAS LONG HELD THAT THE *PITCHESS* PROCEDURES PERMIT DISCLOSURE OF *BRADY* INFORMATION.

Johnson asserts that the *Pitchess* system does not serve as a means to access favorable material evidence contained within peace officer personnel files. (Johnson Answer at pp. 1, 5, 8-9.) Not so.

This Court has long held that the *Pitchess* procedures permit disclosure of *Brady* information. (*Brandon, supra,* 29 Cal.4th at p. 14 [the *Pitchess* procedures do not prohibit disclosure of *Brady* information]; see also *Mooc, supra,* 26 Cal.4th at pp. 1225-1226.) *Abatti* similarly concluded

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[5] *Gutierrez, supra*, 112 Cal.App.4th at p. 1475, citing *Ritchie, supra*, 480 U.S. 39.

[6] *Ibid.*, citing *Ritchie, supra*, 480 U.S. at pp. 57-61.

that a defendant may access potential *Brady* material contained within peace officer personnel files through the *Pitchess* procedures. (*Abatti*, *supra*, 112 Cal.App.4th at pp. 54-59 [defendant established sufficient materiality under *Brady*].)

B. PRIOR PRECEDENT DEMONSTRATES THAT A DEFENDANT MAY ACCESS *BRADY* MATERIAL CONTAINED WITHIN PEACE OFFICER PERSONNEL FILES THROUGH THE *PITCHESS* PROCEDURES.

Johnson assumes that a defendant cannot file a *Brady* motion. In that same vein, Johnson argues that Penal Code section 832.7 has served to preclude defendants from access to exculpatory materials contained within peace officer files. (Johnson Answer at p. 4.) Several cases demonstrate otherwise.

For example, in *Brandon*, the defendant sought *Brady* information from the personnel files of the two arresting officers. (29 Cal.4th at p. 6.) *Brandon* concluded that Evidence Code section 1045's five-year time limit does not preclude disclosure of disclosure of *Brady* material that occurred ten years earlier. (*Id.* at p. 15.) Similarly, in *Abatti*, the defendant filed a hybrid *Brady/Pitchess* motion to seek material from a former police officer's personnel file. (112 Cal.App.4th at p. 42.) *Abatti* concluded that the trial court abused its discretion when it declined to conduct an *in camera* review on the defendant's motion. (*Id.* at p. 58.)

Likewise, in *Gutierrez*, the defendant argued that the *Pitchess* scheme unconstitutionally trumps a defendant's right to exculpatory evidence under *Brady*. (112 Cal.App.4th at p. 1473.) *Gutierrez* disagreed, holding that the *Pitchess* procedures implement rather than undercut *Brady*. (*Id.* at p. 1474.) Should a defendant satisfy the good cause requirement for *Pitchess*, *Gutierrez* concluded a defendant will also satisfy the *Brady* materiality requirement. (*Ibid.*) Lastly, in *Eulloqui*, the defendant sought

Brady material from an officer's personnel file. (*Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1061 (*Eulloqui*).) Based upon the showing made by the defendant, *Eulloqui* concluded that the trial court was required to review the officer's personnel file for *Brady* material related to prior complaints that the officer had concealed payments or incentives to an informant. (*Id.* at p. 1068.)

Brandon, *Abatti*, *Gutierrez*, and *Eulloqui* all demonstrate that a defendant can make a *Brady* motion through the *Pitchess* procedures. These cases also show that Penal Code section 832.7 does not stand as a hurdle to defense access to exculpatory material in peace officer personnel files, as Johnson claims.

C. THE PROSECUTION DOES NOT HAVE EXCLUSIVE ACCESS TO OFFICER PERSONNEL FILES FOR *BRADY* PURPOSES.

In a related argument, Johnson asserts that if this Court accepts the First District's reasoning that section 832.7 does not preclude prosecutorial access to officer personnel files for *Brady* purposes, then the prosecution would have exclusive access to those records. (Johnson Answer at p. 10.) Or, if this Court agrees with Respondent Court's position that section 832.7 is unconstitutional, and accepting Respondent Court's ruling which did not authorize the defense to view the files but rather only the prosecution to secure them, Johnson argues the prosecution again maintains exclusive access to the *Brady* materials, and the defense could not proceed via separate motion. (*Id.* at p. 11.) According to Johnson, only if this Court finds that the section 832.7 bars the prosecution from accessing officer personnel files does the issue arise of whether the defense can also bring a *Brady* motion under *Pitchess*. (*Ibid.*)

That the district attorney may have direct access to officer personnel files under section 832.7, or may be required to follow the procedures set forth in section 1043 *et seq.* to obtain those records does not ipso facto

mean that the district attorney's access is exclusive. As shown above, *Brandon*, *Abatti*, *Gutierrez*, and *Eulloqui* all demonstrate that a defendant can make a *Brady* motion using the *Pitchess* procedures.

D. A *Brady* Motion Secures More Discovery Than a Pure *Pitchess* Motion.

Johnson further claims that *Pitchess* does not secure the same items that would be disclosed under *Brady*. (Johnson Answer at p. 4.) True. A pure *Pitchess* motion secures only the name, address, and phone number of any prior complainants or witnesses and the date of the incident. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.) A pure *Pitchess* motion is also limited to conduct occurring five years before the subject of litigation. (Evid. Code § 1045, subd. (b)(1).)

That said, a *Brady* motion – be it by the defense or prosecution – yields much more information from a peace officer's file. For example, the five-year time limit under *Pitchess* does not bar disclosure of *Brady* evidence beyond that time period. (*Brandon, supra*, 29 Cal.4th at pp. 13-15; *Eulloqui, supra,* 181 Cal.App.4th at p. 1065.) Nor do the *Pitchess* procedures prohibit disclosure of *Brady* information. (*Brandon, supra*, 29 Cal.4th at p. 14.) Therefore, Johnson incorrectly asserts that the *Pitchess* procedures and Penal Code section 832.7 impede full release of *Brady* material. (Johnson Answer at p. 5.)

E. Contrary to Johnson's Claim, the Prosecution May Satisfy Its *Brady* Obligations When It Provides the Defense with the Information Necessary to File an Evidence Code Section 1043 Motion.

Johnson disagrees with the proposition that the prosecution may fulfill its *Brady* obligations by notifying the defense that an officer's

personnel file contains potential *Brady* material. (Johnson Answer at pp. 3, 10-13.) The *Pitchess* procedures, however, provide both the prosecution and the defense with the means to obtain *Brady* material contained in peace officer files. (*Brandon, supra*, 9 Cal.4th at p. 14.) This is especially true where a law enforcement agency, like SFPD here, notifies the prosecution that the officer's personnel file may contain *Brady* material. This notice, if communicated to the defense, places the prosecution and the defense on an equal footing to access the materials, and thus no *Brady* violation can occur. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1134; *People v. Salazar* (2005) 35 Cal.4th 1031, 1042-1045; *People v. Morrison* (2004) 34 Cal.4th 698, 715; see also *United States v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1501, fn. 5 ["Since suppression by the Government is a necessary element of a *Brady* claim (cits. om.) if the means of obtaining exculpatory evidence has been provided to the defense, the *Brady* claim fails."].) Indeed, a defendant stands in a better position to advance his theories of the case and outline potential grounds of impeachment. (See, e.g., *Barrett, supra*, 80 Cal.App.4th at p. 1319.)

As a policy matter, the prosecution should also pursue such motions for two reasons. First, if the prosecution notifies the defense that an officer's personnel file may contain *Brady* evidence, but defense counsel does not seek out such material, any subsequent conviction may become subject to an ineffective assistance of counsel claim. Second, as Johnson points out, if the defense files the motion and obtains the discovery, the defense will have no obligation to disclose this information to the prosecution. (Johnson Answer at pp. 12-13, citing *People v. Tillis* (1998) 18 Cal.4th 284.) Thus, while the defense has equal access to potential *Brady* material in an officer's personnel file, a prudent district attorney will also file a *Brady* motion when alerted by the police department that an officer's file may contain *Brady* material.

IV. CONTRARY TO RESPONDENT COURT'S CLAIM, PETITIONERS MADE THE REQUISITE SHOWING NECESSARY TO TRIGGER AN *IN CAMERA* REVIEW.

Respondent Court claims that Petitioners failed to make the "threshold showing" necessary to trigger an *in camera* review because "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[.]'" (Return at p. 9, bold in orig.) In other words, SFDA could not meet the *Brandon* standard because they did not know the actual contents of the files. (Return at pp. 7-9.) Respondent Court errs.

To obtain *Brady* material from an officer's personnel file, a party need only provide a basis for a claim that the personnel file contains material evidence. (*Brandon, supra*, 29 Cal.4th at p. 15, quoting *Ritchie, supra,* 373 U.S. at p. 58.) A party need not, however, prove what *Brady* material the file contains to garner an *in camera* review. "To require specificity in this regard would place [the moving party] in the Catch-22 position of having to allege with particularity the very information he is seeking. Neither the Evidence Code nor *Pitchess* was intended to be applied in this manner." (*Abatti, supra*, 112 Cal.App.4th at p. 59, fn. 7.)

Eulloqui, supra, 181 Cal.App.4th at p. 1068, demonstrates that a party need not know the actual contents of the file to make a sufficient showing to garner an *in camera* review. In *Eulloqui*, the defendant learned after his conviction that the chief witness against him at trial was a paid police informant. (*Id.* at p. 1060.) After the court of appeal issued an order to show cause on the defendant's writ of habeas corpus, the defendant sought disclosure of concealed payments or incentives to informants, among other things, from an officer's personnel file. (*Id.* at pp. 1061, 1068.) The defendant made no averment that the officer's file actually

contained such information. (*Id.* at p. 1061.) Rather, defense counsel presented two declarations: one from the officer stating that the witness had not been a paid informant, and one from the witness stating that he had not become a paid informant until after his testimony in the defendant's case. (*Ibid.*)

Eulloqui held that prior complaints that the officer had concealed payments or incentives would be relevant to impeach the officer's declaration and proposed testimony that the witness was not a paid informant at the time of the defendant's trial. (181 Cal.App.4th at p. 1068.) *Eulloqui*, therefore, held that the defendant had made a sufficient showing of materiality under *Brady*. (*Ibid.*)

The defense in *Eulloqui* did not know that the personnel file actually contained *Brady* material. Yet, *Eulloqui* held that the defense made an adequate showing for an *in camera* review. Both the prosecution and the defense in this case make a more substantial showing than in *Eulloqui* based on SFPD's notice that the officers' personnel files may contain *Brady* information. Furthermore, SFDA set out a specific factual scenario outlining the officers' roles in the case. Information regarding dishonesty, bias, or conduct of moral turpitude so identified by SFPD would be relevant to impeach the officers' credibility, and a result, their testimony at trial regarding Johnson's incriminating statements or the recovery of evidence implicating the defendant. (See, e.g., Evid. Code § 780; *People v. Jordan* (2003) 108 Cal.App.4th 349, 362 [sustained citizen complaints of officer misconduct likely involve moral turpitude and thus contain admissible impeachment evidence]; *In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-513 [bias against racial groups].) Therefore, Petitioners made a sufficient collective showing of materiality under *Brady*.

Johnson likewise claims that a defendant cannot make the requisite showing to obtain *Brady* material through the *Pitchess* procedures because

Brady information is necessarily unknown to the defense, and that such a requisite showing places an onus on the defense, thereby violating due process. (Johnson Answer at pp. 5-7.) Once the prosecution discloses to the defense that an officer's personnel files may contain *Brady* material, the defense can make the requisite showing to obtain *Brady* materials in light of the facts of the case. Furthermore, this Court answered Johnson's claims long ago in *Mooc* and *Brandon*. (*Mooc, supra*, 26 Cal.4th at pp. 1225-1226; *Brandon, supra*, 29 Cal.4th at p. 14.) In both *Mooc* and *Brandon*, this Court concluded that the *Pitchess* procedures facilitate disclosure of *Brady* evidence to the defense. (*Mooc, supra*, 26 Cal.4th at p. 1227; *Brandon, supra*, 29 Cal.4th at p. 14.) Indeed, *Mooc* observed that one of the premises underlying the *Pitchess* procedures was to ensure that a defendant's due process right to a fair trial. (26 Cal.4th at p. 1227.)

Johnson further cites *People v. Sanderson* (2010) 181 Cal.App.4th 1334 (*Sanderson*) and *People v. Thompson* (2006) 141 Cal.App.4th 1312 (*Thompson*) to support his claim that it is unlikely that a defendant will be able to make the requisite showing to garner an *in camera* review. (Johnson Answer at p. 6.) *Sanderson* and *Thompson* do not assist Johnson.

In both *Sanderson* and *Thompson*, the defendant filed a *Pitchess* motion seeking disclosure of officer personnel files. (*Sanderson, supra*, 181 Cal.App.4th at p. 1338; *Thompson, supra*, 141 Cal.App.4th at p. 1315.) In both cases, the defendants simply denied the facts asserted in the police report. (*Sanderson, supra*, 181 Cal.App.4th at p. 1340; *Thompson, supra*, 141 Cal.App.4th at p. 1317.) *Sanderson* concluded that the trial court did not abuse its discretion when it denied the defendant's motion because the defendant failed to present an alternate version of events. (*Sanderson, supra,* 181 Cal.App.4th at pp. 1340-1342.) *Thompson* likewise concluded that the trial court reasonably concluded that the defendant did not show good cause because the defendant failed to present a specific factual

scenario that is plausible in light of the circumstances. (*Thompson*, *supra*, 141 Cal.App.4th at p. 1316.)

This case presents a much different scenario. Once the prosecution discloses to the defense that which SFPD disclosed to the prosecution in this case – the officers' personnel files may contain *Brady* material – a defendant would be in a significantly different position than the defendants in *Sanderson* and *Thompson*. In such a scenario, the defendant ***knows*** what is generally contained in the officers' personnel files, unlike *Sanderson* and *Thompson*. In this case, Johnson ***knows*** that the officers' personnel files may contain *Brady* material, which SFPD has defined as evidence of dishonesty, bias, or moral turpitude – all quintessential forms of impeachment. Therefore, a defendant under these circumstances can make a much stronger showing necessary to trigger an *in camera* review. Accordingly, *Sanderson* and *Thompson* are distinguishable.

V. RESPONDENT COURT'S UNDULY BURDENSOME BUDGET ARGUMENT IS LEGALLY UNSOUND AND FACTUALLY INCORRECT.

Respondent Court contends that a rule requiring it to conduct *Brady* reviews would "significantly impact the operations, procedures, and budgets of already overburdened courts" when Respondent "already faces substantial challenges given recent budget cuts and staffing reductions." (Return at pp. 2-3.) "[T]hese resources could be better spent on trials." (*Id.* at p. 4.)

First, *Fagan* held that Penal Code section 832.7 requires the "district attorney to maintain the nonpublic nature of the [officer personnel] files absent judicial review of the relevance of the information to a criminal … action." (*Fagan, supra,* 111 Cal.App.4th at p. 618.) This is consistent with this Court's conclusion "that access to confidential peace officer personnel

files for one purpose by a party does not allow disclosure of the information to other parties…." (*Ibid.*, citing *Alford, supra*, 29 Cal.4th at pp. 1045-1046.) Consequently, assuming for the sake of argument that Respondent is correct that the district attorney has direct access to officer personnel files, under *Fagan, supra*, 111 Cal.App.4th at p. 618, Respondent Court must still review those same records for relevance before ordering disclosure to the defense.[7] The burden to Respondent cannot be avoided.

Second, *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1339, noted that use of a Welfare and Institutions Code section 827 *in camera* procedure can serve to streamline the review process because it bypasses the prosecutor as an intermediary, allows the court to make the disclosure decision in the first instance, eliminates the need for the district attorney to request the court's permission for disclosure after his *Brady* review, and forestalls litigation by the defense over whether the district attorney has complied with the his *Brady* obligations. (*Id.* at p. 1339.) These reasons apply with equal force to initial *in camera* review by the court under section 1043 *et seq.*

Third, Respondent's citation to dwindling court resources as a ground to deny the parties initial *in camera* review is legally unsound. (See *People v. Hajjaj* (2010) 50 Cal.4th 1184, 1198 [The unavailability of judges, courtrooms, or chronic congestion of the court's calendar does not, in the absence of exceptional circumstances, constitute good cause to continue a case beyond the times of Penal Code section 1382.]; *People v. Andrade* (1978) 86 Cal.App.3d 963, 976 ["The People's right to be heard cannot be frustrated to accommodate judicial convenience or because of court congestion."]; *People v. Mack* (1975) 52 Cal.App.3d 680, 684 [Penal

[7] Even the *Johnson* Court of Appeal decision currently on review so held. (*People v. Superior Court (Johnson)* (2014) 228 Cal.App.4th 1046, 1088, 1090-1091.)

Code section 1385 dismissal of a case on the basis of court congestion is not in furtherance of justice.].) Any burden upon the trial courts is not a justification to deny the parties due process.

Fourth, Respondent Court operates on a significant misunderstanding, namely that SFPD produces the entire personnel file for *in camera* review. (Return at pp. 3-5, 8 [referencing "routine[] review" of "often-irrelevant documents"].) SFPD *Brady* Committee has already reviewed the entirety of the officers' personnel files and compiled only those materials reflective of dishonesty, bias, or evidence of moral turpitude. (Pet. Exh. 8 at JOHNSON0178-0179.) Consistent with this Court's instructions in *Mooc, supra*, 26 Cal.4th at pp. 1228-1229, SFPD then provided only those records that are responsive to SFDA's *Brady* motion – not the entire personnel file. (Pet. Exh. 11 at JOHNSON0228-229.) Legal Counsel for SFPD is present in chambers for the *in camera* hearings and can assist the trial court in its understanding of police records, internal affairs or disciplinary procedures, and why such particular records were selected as potential *Brady* materials. (Pet. Exh. 16; see also Pet. CCSF Petition at pp. 44-45.) Along with a statement of facts of the case, this should be sufficient for the trial court to allow meaningful materiality determinations, contrary to Respondent's claim.

Finally, trial courts routinely conduct *in camera* reviews of privileged records, balancing a defendant's right to a fair trial with a witness' privilege. (See, e.g., *People v. Hammon* (1997) 15 Cal.4th 1117; *Kling v. Superior Court* (2010) 50 Cal.4th 1068.) Officer personnel files should not be any different.

VI. PENAL CODE SECTION 832.7 IS NOT UNCONSTITUTIONAL AS APPLIED.

In *Brandon*, this Court 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*." (29 Cal.4th at p. 12, fn. 2.) Respondent argues that "Section 832.7 is unconstitutional as applied by SFPD because it was used to bar disclosure of constitutionally required materials." (Return at p. 14.)

Courts, when determining a statute's constitutionality, start from the premise that it is valid, resolve all doubts in favor of its constitutionality, and uphold it unless it is in clear and unquestionable conflict with either the state or federal Constitutions. (*Kyle O. v. Donald R.* (2000) 85 Cal.App.4th 848, 860 (cits. om.); see also *Brandon, supra*, 29 Cal.4th at pp. 10-11 [all presumptions and intendments favor the constitutional validity of a statute].) Even if not unconstitutional on its face, a statute may be unconstitutional as applied. (*Kyle O., supra*, 85 Cal.App.4th at p. 861.)

Respondent has not carried its "heavy burden" to prevail on its constitutional claim[8] because under *Brandon*, the *Pitchess* process operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information. (29 Cal.4th at p.14; see also *Mooc, supra*, 26 Cal.4th at p. 1225; *Gutierrez, supra*, 112 Cal.App.4th at p. 1474.) In a system like San Francisco's, where SFPD notifies SFDA that potential *Brady* material exists in an officer's personnel file, SFDA so notifies the defense, and either party files a *Brady* motion setting forth the facts of the case and the officer's materiality thereto and utilizing the procedures set forth in section

[8] *Brandon, supra*, 29 Cal.4th at p. 10.

1043 *et seq*., the danger identified in *Brandon's* footnote 2 does not exist. The danger does not exist because section 832.7 is not being used to defeat the right of the prosecutor to obtain access to officer personnel files in order to comply with *Brady*. Rather, both SFPD and SFDA seek to use section 1043, in conjunction with section 832.7, to simultaneously respect the officer's privacy rights and protect the defendant's due process rights. As this procedure mirrors the very procedure set forth by the Supreme Court in *Ritchie*, section 832.7 is not unconstitutional as applied in San Francisco.[9]

CONCLUSION

In San Francisco, SFPD and SFDA have negotiated an arrangement wherein SFPD provides SFDA with the names of officers having potential *Brady* material in their personnel files. Indeed, SFPD made such a notification to SFDA regarding both officers who play critical roles in this case. Thereafter, both the prosecution and the defense filed *Pitchess* and *Brady* motions, anticipating that Respondent Court would conduct an *in camera* review of the responsive materials in accord with well-established statutes and case law that balance the due process rights of two compelling interests.

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[9] Respondent argues that the procedure followed by the California Highway Patrol should have been employed here. (Return at pp. 15-16.) The CHP has chosen to waive the officers' rights. (See section 1043, subd. (c).) A governmental agency is not, however, required to waive notice, but rather may assert its rights and the rights of the subject officer. (*Becerrada, supra*, 131 Cal.App.4th at p. 415 ["No officer is required … to share any of that material with the prosecution."].) Consistent with *Alford*, SFPD and their officers have chosen to exercise their rights under section 1043 *et seq*., but have done so in a manner that protects the officers' and the defendants' rights.

Respondent Court refuses to conduct any *in camera* reviews. Respondent Court went so far as to declare Penal Code section 832.7, subdivision (a) unconstitutional, an unnecessary and erroneous decision. Thus began the instant writ proceedings, bringing together an unusual coalition of prosecution, defense, and police to seek to reinstate the flow of discovery.

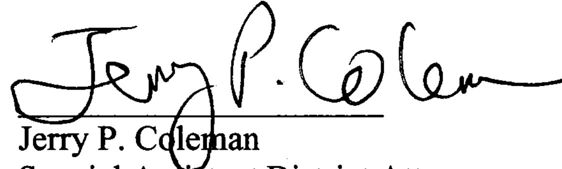
The Court of Appeal also provided little or no role for Respondent Court, reserving such intervention at the end of the proceedings – almost as a mere formality. But that decision, giving the prosecution total access to all protected police personnel files, was also erroneous, as it conflicted with the views of this Court and all courts of appeal that had touched upon the issue to date.

All three parties now come to this Court to correct these errors. The system in place in San Francisco is constitutional, is progressive, provides due process to all parties, and honors the roles of all parties, including Respondent Court. Such a system, in use throughout the State and in a growing number of counties, is not just a workable solution, but is the precise paradigm to balance these competing interests and harmonize state statutes with federal constitutional law. Accordingly, Petitioner requests that this Court mandate Respondent Court to return to this time-honored practice of conducting an *in camera* review of peace officer personnel files for *Brady* material.

Date: February 27, 2015

Respectfully submitted,

GEORGE GASCÓN
District Attorney



Jerry P. Coleman
Special Assistant District Attorney

Laura vanMunching
Managing Assistant District Attorney

James R. Thompson
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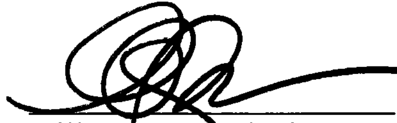

Allison G. Macbeth
Assistant District Attorney

CERTIFICATION OF COMPLIANCE

I certify that the attached Petition for Review uses a 13 point Times New Roman font and 1.5 line spacing and, according to Microsoft Word, and contains 7160 words. (California Rules of Court, rule 8.520(c)(1).)

Laura vanMunching

DECLARATION OF SERVICE

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

REPLY BRIEF ON THE MERITS

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

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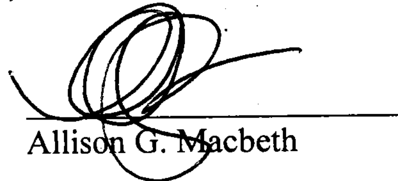
I declare under penalty of perjury that the foregoing is true and correct. Executed March 2, 2015, at San Francisco, California.



Allison G. Macbeth