SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

After a Published Decision by the Court of Appeal,
First Appellate District, Division Five, filed August 11, 2014

Superior Court of California, County of San Francisco
The Honorable Richard B. Ulmer Jr.

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INTRODUCTION

No party has argued that the procedure set forth in the San Francisco Police Department's Bureau Order No. 2010-01, when permitted to operate as it did for three years before Respondent Superior Court ("Respondent") began denying the People's motions for in camera review, fails to satisfy defendants' rights under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) to receive exculpatory information contained in peace officer personnel files. To the contrary, Real Party in Interest Johnson ("Johnson") joins Petitioners in asking this Court to uphold the Bureau Order procedure, which he argues ***better*** protects his rights than the alternatives set forth in the lower courts' rulings, and is most faithful to the case law construing Penal Code section 832.7, subdivision (a) ("Section 832.7(a)"). (Johnson Answering Brief ("AB") at p. 2.) And nowhere does he seek to defend the Court of Appeal's holding that a trial court reviewing documents in camera has no obligation to consider peace officers' privacy interests in their personnel records when determining what materials should be disclosed under *Brady*. (See CCSF's Opening Brief on the Merits ("OBM") at pp. 44-46.)

Respondent, in its Return,[1] contends that it should play no role at all in the disclosure of peace officer personnel records under *Brady*. Its position, however, rests on arguments that were properly rejected by the Court of Appeal—that Section 832.7(a) and Evidence Code section 1043 have no application in the *Brady* context, and that in camera review burdens the court excessively in a time of budget cuts and staffing reductions. Respondent's arguments that *Brady* mandates a disregard of the entire

[1] Respondent has elected to use the Return it filed in the Court of Appeal as its answering brief in this Court.

statutory *Pitchess*[2] scheme, and that the threshold showing for any motion for in camera review under *Brady* requires the moving party already to know what information the records contain, cannot be squared with unambiguous statutory language and several decades of case law.

Below we argue, first, that Section 832.7(a) cannot be disregarded in the *Brady* context because it indisputably creates a qualified privilege for peace officer personnel records, and the law of *Brady* has long recognized that such state-law privileges must be respected by securing disclosure through a trial court's in camera review. Second, we argue that Evidence Code section 1043 furnishes the procedural mechanism to obtain that review, that Respondent misconstrued the law in holding that the moving party cannot make the required threshold showing without knowing what information the records contain, and that Respondent's concern about the burden such a review imposes is a matter for legislative consideration but cannot control the resolution of the legal issues presented in this case. Finally, we respond to Johnson's arguments that the prosecution, rather than the defense, should the bring the motion for in camera review.

ARGUMENT

I. SECTION 832.7(a) CREATES A QUALIFIED PRIVILEGE FOR PEACE OFFICER PERSONNEL RECORDS THAT MUST BE RESPECTED IN THE *BRADY* CONTEXT THROUGH THE TRIAL COURT'S IN CAMERA REVIEW

Respondent's order declared Section 832.7(a) unconstitutional as a consequence of Respondent's view that in camera review must be denied where the moving party does not already know the personnel files' contents. (1 App., tab 12, at pp. 237-239.)[3] That view is addressed in

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

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

Section II below, but Respondent's brief argues in the alternative that Section 832.7(a) simply has no application in the *Brady* context. (Return at p. 15 & fn. 11.) This argument is contrary to the statute's text and to the case law.

A. Section 832.7(a) Creates a Qualified Privilege for All Peace Officer Personnel Records

By its express terms, Section 832.7(a) makes peace officer personnel records confidential, and protects them from disclosure absent compliance with Evidence Code section 1043. Respondent's effort to limit this statutory confidentiality to the *Pitchess* context must be rejected.

First, this Court has pointed out that the Legislature did not limit Section 832.7(a)'s protection to the kinds of documents at issue in *Pitchess* motions—records of complaints and disciplinary actions—but rather extended it to ***all*** peace officer personnel records, which are "broadly defined" in Penal Code section 832.8. (*Commission On Peace Officer Standards And Training v. Superior Court* (2007) 42 Cal.4th 278, 293.) By broadly defining the records entitled to confidential treatment, the Legislature was not concerned solely with the *Pitchess* context.

Second, this Court has expressly rejected the contention that the qualified privilege created by Section 832.7(a) is limited to the situation in which a defendant seeks *Pitchess* discovery in a criminal case. In response to a newspaper publisher's contention that the protection applies only in the context of judicial proceedings, it held that the confidentiality conferred by Section 832.7(a) has general application and prohibits disclosure of personnel records in response to a request under the California Public Records Act. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284-1286; accord *City of Hemet v. Superior Court* (1995) 37

Cal.App.4th 1411, 1427 [Section 832.7(a) creates a "general privilege" that is not limited to judicial proceedings and applies to requests under the CPRA].)

Thus, Respondent's contention that Section 832.7(a) is limited to *Pitchess* discovery and does not apply in the *Brady* context is contrary to the statute's language and ignores the decisions of this Court concerning its general applicability.

B. *Brady* Disclosure of Protected Material Is Properly Obtained Through In Camera Review

The law of *Brady* has long accommodated qualified privileges established by state law through the mechanism of in camera review. In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 57-58 (*Ritchie*), the Supreme Court considered files of Pennsylvania's children and youth services agency that state law made qualifiedly confidential, allowing disclosure in judicial proceedings pursuant to court order. Without expressing an opinion on the result if Pennsylvania law had instead provided that the records were absolutely privileged (*id.* at p. 58, fn.14), the Court held that the proper procedure was for the trial court to review the records—which neither the prosecution nor the defense had seen—in camera to determine whether they contained any information satisfying *Brady*'s materiality standard. (*Id.* at p. 58.) Federal appellate courts have understood *Ritchie* to require such review when records potentially subject to disclosure under *Brady* are protected by a state-law qualified privilege. (E.g., *Browning v. Trammell* (10th Cir. 2013) 717 F.3d 1092, 1095 ["when the *Brady* obligation to disclose comes up against the various legal privileges that protect sensitive information from disclosure ... the Supreme Court has directed lower courts to review such information *in camera* to determine

whether it meets the *Brady* standard"]; *United States v. Hach* (7th Cir. 1998) 162 F.3d 937, 947 [under *Ritchie*, confidential psychiatric, medical, or investigative information should be reviewed in camera "to balance the needs of the defendant and the state or individual's need to keep those records private"].)

This Court has reached the same conclusion. (*People v. Webb* (1993) 6 Cal.4th 494, 518 [discussing *Ritchie* and explaining that "[w]hen 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"]; see also *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1336 (*J.E.*).) And it has held that peace officer personnel records fall within the scope of this rule: In *City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 14-15 (*Brandon*), this Court likened the "qualified statutory confidentiality" enjoyed by peace officer personnel records to the qualified privilege for the files at issue in *Ritchie*. Finding *Ritchie* "instructive," *Brandon* held that the trial court acted properly by reviewing the personnel records in camera to determine whether they contained any information subject to disclosure under *Brady*. (*Id.* at p. 15; see also *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 58 (*Abatti*) [because peace officer personnel records are confidential but available by court order, under *Ritchie* their disclosure must be obtained through in camera review].)

Because Section 832.7(a) creates a qualified privilege for peace officer personnel records, under *Ritchie*—as *Brandon*, *Webb*, *Abatti*, *J.E.*, and numerous federal courts have explained—the proper way to obtain *Brady* disclosure is through the trial court's in camera review.

II. EVIDENCE CODE SECTION 1043 ALLOWS THE PROSECUTION TO OBTAIN IN CAMERA REVIEW AND DISCLOSURE OF *BRADY* INFORMATION IN PEACE OFFICER PERSONNEL FILES

The requirement that a trial court review confidential materials in camera for potential disclosure under *Brady* necessitates a procedural mechanism by which to obtain such review. Respondent contends that Evidence Code section 1043, notwithstanding that it is expressly referenced in Section 832.7(a), cannot provide such a mechanism because it was intended for state-law *Pitchess* discovery and therefore does not apply to requests for review of material subject to disclosure under *Brady*. (Return at p. 10.) Moreover, for any motion seeking in camera review of potential *Brady* materials, Respondent construes *Brandon* (and, by extension, *Ritchie*) to impose a threshold showing so high that the moving party must already know "the files' particular contents" in order to meet it. (1 App., tab 12, at p. 231.) Having thus construed the law to impose a standard that the prosecution cannot meet without accessing the files, Respondent concludes that Section 832.7(a) is unconstitutional to the extent it prohibits prosecutorial access. (Return at p. 14; 1 App., tab 12, at pp. 237-239.)

As explained below, both the statutory text and case law establish that Evidence Code section 1043 may be used to obtain in camera review of potential *Brady* material, and that the moving party need not know what information the records contain in order to make the requisite threshold showing. Because the prosecution can thereby ask the trial court to review the records in camera and disclose *Brady* information to the defense, there is no basis to conclude that Section 832.7(a)'s prohibition on direct prosecutorial access is an unconstitutional exercise of the Legislature's authority to protect the confidentiality of peace officer personnel records. (See CCSF's OBM at pp. 27-32.)

A. Evidence Code Section 1043 Provides a Means by Which a Party May Obtain In Camera Review for *Brady* Purposes

Evidence Code section 1043, subdivision (a), states that its written motion procedure is applicable to "***any case*** in which discovery or disclosure is sought of peace or custodial officer personnel records." (Emphasis added.) It neither limits its applicability to *Pitchess* motions nor contains any exception for *Brady* motions. The Court of Appeal found Respondent's position that Section 832.7(a) and Evidence Code section 1043 have no applicability in the *Brady* context contrary to their plain and unambiguous language. (*People v. Superior Court (Johnson)* (2014) 228 Cal.App.4th 1046, 1088 (*Johnson*).)

Respondent also cites a law review article stating that the Legislature "'did not take *Brady* into account when drafting the *Pitchess* legislation.'" (Return at p. 13 [quoting 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, 309].) But with the words "[i]n any case" in Evidence Code section 1043, the Legislature created a rule of general application, expressing its intent that the procedure should apply to all discovery requests for law enforcement officer records, regardless of the context in which it is made. (See *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1040 ["Because the statutory language is generally the most reliable indicator of [the Legislature's] intent, we look first at the words themselves, giving them their usual and ordinary meaning."].) Where, as here, the statutory language is unambiguous, its plain meaning controls. (*Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1107.)

Respondent's argument is inconsistent not only with the statutory language, but also with *Brandon*, in which the defendant's motion sought

information about complaints against the officers under both *Pitchess* and *Brady*, and this Court found that the trial court properly reviewed the materials in camera for disclosure in accordance with both doctrines. (*Brandon*, *supra*, 29 Cal.4th at pp. 6, 14-15 & fn. 3.) Likewise, the court of appeal in *Abatti* clearly rejected Respondent's position, explaining that the *Pitchess* procedures in Evidence Code sections 1043 and 1045 are the "exclusive method" for gaining access to peace officer personnel records and are appropriately used to obtain disclosure of *Brady* material in accordance with *Ritchie*'s requirement of in camera review. (*Abatti*, *supra*, 112 Cal.App.4th at p. 58; accord, *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1475-1476.)

Both Respondent and Johnson point out that *Pitchess* and *Brady* employ different standards of materiality, and that Evidence Code section 1045 places limits on disclosure that do not apply to *Brady* material, such as the restriction to information less than five years old. (Return at p. 13; AB at pp. 4-5.) But this Court has already explained that material older than five years may be disclosed where required by *Brady*, regardless of that limitation. (*Brandon*, *supra*, 29 Cal.4th at p. 15.) *Brandon*'s explanation that the *Pitchess* scheme "operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information" (*id.* at p. 14), means that its substantive limits will not operate as a bar to disclosure of information that satisfies *Brady*'s standard for materiality.

Finally, although not framed as a response to any argument by Petitioners, Johnson argues that the ability of criminal defendants to use the *Pitchess* procedure is insufficient to protect their rights under *Brady*, because a defendant's *Pitchess* motion is premised on an existing suspicion of officer misconduct that would support an articulable defense theory,

whereas *Brady* imposes an obligation to provide defendants with exculpatory or impeachment evidence of which they may be completely unaware. (AB at p. 6.) The author of the law review article cited by Respondent expresses the same view. (See Neri, *supra*, 43 McGeorge L. Rev. at pp. 310-313.) But this objection, as Johnson acknowledges, concerns the situation in which there is no procedure in place for the prosecution and the police to identify potential *Brady* material for disclosure to the defendant. Johnson himself asks this Court to uphold the Bureau Order procedure at issue in this case, which does provide the defense with *Brady* material of which it may be unaware. (AB at pp. 1-2.) And Neri, although he does not discuss the extant procedures in counties like San Francisco, likewise observes that prosecutors "presumably" could file *Pitchess* motions to comply with *Brady*, which should enable them to obtain "nearly automatic in camera review" of information in officers' personnel files. (Neri, *supra*, 43 McGeorge L. Rev. at pp. 314-15, 318.)[4]

B. A Party Seeking Disclosure of *Brady* Material Under Evidence Code Section 1043 Is Not Required to Know What Information the Records Contain

Respondent observes that in *Brandon*, this Court cited *Ritchie* for the proposition that the moving party must establish a basis for a claim that the files contain material evidence in order to be entitled to in camera review. (Return at p. 6.) But Respondent's construction of that standard to mean

[4] Not only is Neri's article primarily addressed to the situation in which no such procedure is in place, but it is also cast as a call for legislative reform, recognizing that the Legislature must change the law if it wishes the prosecution to have direct access to peace officer personnel records for *Brady* purposes. (Neri, *supra*, 43 McGeorge L. Rev. at pp. 321-322.) Thus, on the relevant issues of statutory construction, the article is consistent with Petitioners' interpretation of the text, and confirms that the Legislature is the proper forum for policy debates concerning the confidentiality of peace officer personnel records.

that the moving party must already know "the files' particular contents" (1 App., tab 12, at p. 231)—and Respondent's conclusion that Section 832.7(a) therefore prevents the prosecution from meeting it under the Bureau Order procedure—is wrong.

In *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74 (*Santa Cruz*), this Court considered what kind of showing the moving party must make under Evidence Code section 1043(b) to obtain in camera review. After rejecting the general contention that the supporting affidavits must be based on personal knowledge (*id.* at pp. 86-89), the Court then considered whether it was necessary for the moving party to know of particular prior complaints against the officer whose records were sought. It answered that question in the negative for three reasons.

First, the fact that the statute calls for a description only of the "type" of records sought means that it "does not require the affiant to prove the existence of *particular* records." (*Santa Cruz*, *supra*, 49 Cal.3d at p. 90.) Second, the case law prior to the enactment of Evidence Code section 1043—of which the Legislature was presumed to be aware, and which there was no evidence the Legislature sought to change—"had overwhelmingly rejected the notion that defendants seeking discovery of police records of citizen complaints must demonstrate knowledge of prior complaints." (*Id.* at p. 91.) Third, the Legislature expressly rejected language in an earlier draft requiring a description of "particular" records. (*Id.* at p. 92.)

The affidavit in *Santa Cruz* alleged acts of excessive force by the officers when they arrested the defendant, and stated counsel's "belief" that the City "may" have other complaints of excessive force against them. The Court found it "readily apparent" that this affidavit was sufficient to carry the defendant's burden. Simply on the basis of averments that the officers

had used excessive force in arresting the defendant, the Court found it "altogether fair and rational" that counsel would "entertain a 'reasonable belief' or inference that the same officers may have been accused of the use of excessive force in the past, and that such information may be found in their personnel records." (*Santa Cruz*, *supra*, 49 Cal.3d at p. 93.)

Ritchie's and *Brandon*'s requirement that the moving party establish "a basis for" a claim that the files contain material evidence does not require a knowledge of the files' contents that this Court rejected in *Santa Cruz*. In both *Ritchie* and *Brandon*, the threshold showing was modest. In *Ritchie*, the defendant argued that "he was entitled to the information because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence." (*Ritchie*, *supra*, 480 U.S. at p. 44.) In *Brandon*, the defendant, citing both *Pitchess* and *Brady*, sought information from complaints against officers "relating to acts of falsification of police reports, lying, perjury, dishonesty, untruthfulness or other acts of moral turpitude that reflect on the officers' honesty or truthfulness" on the ground that he "may" assert that witnesses were coached in an effort to fabricate evidence. (*Brandon*, *supra*, 29 Cal.4th at p. 6.)

In examining the threshold showing required by *Ritchie*, a federal court of appeals used language that echoes *Santa Cruz*: "When, as in *Ritchie* and in the instant case, an accused cannot possibly know, but may only suspect, that particular information exists which meets [*Brady*'s] requirements, he is not required, in order to invoke the right, to make a particular showing of the exact information sought and how it is material and favorable." (*Love v. Johnson* (4th Cir. 1995) 57 F.3d 1305, 1313 (*Love*); see also *United States v. White* (6th Cir. 2007) 492 F.3d 380, 410

["once a defendant 'establish[es] a basis for his claim that [the records sought] contain [ ] material evidence,' even though he cannot articulate with specificity the materiality of those records, remand for in camera review may be appropriate"].)[5]

Respondent argues that the court of appeal's decision in *Abatti* supports its position that the moving party must know the contents of the files to make the requisite threshold showing. (Return at pp. 7-8.) Respondent is wrong. The defendant, Abatti, sought records of complaints against a former officer, Torres, whom the prosecution intended to call as a witness to testify that Abatti made certain admissions to him concerning his presence at the crime scene. Abatti denied having made those admissions and denied having been present at the crime scene, leading defense counsel to allege in the motion that Torres had lied in his statements to police or prosecution investigators. The defense sought evidence of a propensity to engage in such acts. (*Abatti*, *supra*, 112 Cal. App.4th at pp. 44-45, 58.)

At the hearing on the initial motion, the police department's custodian of records stated that there were no complaints against Torres, but acknowledged that there were "counseling memos ... addressing deficiencies." (*Abatti*, *supra*, 112 Cal. App.4th at p. 46.) After the trial court denied the motion, the defendant filed another motion "tailored under *Brady*" seeking the counseling memos about which the police department's

[5] Although here there is no conflict between constitutional requirements and the showing mandated by Evidence Code section 1043, a trial court cannot avoid its obligation to review records in camera once the *Ritchie* standard has been met even if state law ordinarily demands a higher threshold showing. (*Love*, *supra*, 57 F.3d at p. 1315 ["Neither can the obligation of the judge, as final actor in the process, be avoided by drawing on state-law requirements of specificity of subpoenas which may be—and undoubtedly are—considerably more stringent than the merely 'plausible showing' which, under *Ritchie* suffices to require *in camera* inspection."].)

custodian of records had testified. (*Id.* at p. 47.) Defense counsel's declaration stated that he believed, based on interviews with current officers, that the counseling memos would bear on whether Torres is a truthful individual, and that he believed Torres was accused of acts of moral turpitude that may go to his credibility. (*Ibid.*)

Contrary to Respondent's assertion that defense counsel knew the contents of the files, the court of appeal observed that, since he did not have access to the counseling memos, "he was not in a position to know whether [the information in them] in fact established the custom, habit, intent, motive or plan which he alleged." (*Abatti, supra*, 112 Cal.App.4th at p. 59, fn. 7 [quoting *People v. Memro* (1985) 38 Cal.3d 658, 684].) But the court held that this lack of knowledge was not fatal: "To require specificity in this regard would place an accused in the Catch-22 position of having to allege with particularity the very information he is seeking." (*Ibid.* [quoting *Memro*, at p. 684].)

It is true that in *Abatti*, the impetus for the motion was the defendant's own assertion that he had not made the claimed admissions to Torres, leading the defense to question Torres's truthfulness and to interview several current officers about him. (*Abatti, supra*, 112 Cal.App.4th at pp. 44-45.) The defense motion did not result from the kind of prosecution-police procedure at issue in this case, which proactively identifies potential *Brady* material in peace officer personnel files and seeks in camera review when the officer will serve as a material witness in the prosecution's case. But a motion brought pursuant to such a procedure—which explains that the officer is an essential witness and that the Police Department's *Brady* Committee has identified material in the officer's personnel records "reflective of dishonesty, bias, or evidence of conduct of

moral turpitude" (1 App., tab 5, at pp. 115-116; tab 8, at p. 175)—makes a ***stronger*** threshold showing, and presents a more compelling case for in camera review, than one based on a defendant's suspicion that records of past misconduct may exist. (Cf. *Santa Cruz*, *supra*, 49 Cal.3d at p. 93; *Abatti*, *supra*, at pp. 44-45.)

Respondent places great emphasis on a sentence in a footnote in *Brandon*: "We do not suggest that trial courts must routinely review information that is contained in peace officer personnel files and is more than five years old to ascertain whether *Brady*, *supra*, 373 U.S. 83, requires its disclosure." (29 Cal.4th at p. 15, fn. 3.) But under the Bureau Order procedure, the "routine" review is conducted by the Police Department, not the trial court. The Department identifies any officers with potential *Brady* material in their personnel records, and culls the relevant records. The trial court is asked to review only specific records for a specific officer, and only when the prosecution determines that the officer's role in a specific case renders the existence of such information potentially material under *Brady*.

The requirement of a threshold showing ensures that the motion is based on something more than speculation, so that trial courts need not review confidential materials when there is no reasonable prospect of finding exculpatory information. (See, e.g., *Santa Cruz*, *supra*, 49 Cal.3d at p. 85 ["The information sought must, however, 'be requested with adequate specificity to preclude the possibility that defendant is engaging in a "fishing expedition"'"] [quoting *Pitchess*, *supra*, 11 Cal.3d at p. 538]; *United States v. Navarro* (7th Cir. 1984) 737 F.2d 625, 631; cf. *United States v. Brooks* (D.C. Cir. 1992) 966 F.2d 1500, 1503-1504 [no prosecutorial duty to search police personnel file when defendant offers only speculation, but a request for an examination of a specific file, where

there is a "non-trivial prospect" that it might yield exculpatory information, is sufficient to require search].)

The Bureau Order procedure, however, does not implicate a concern that the trial court's review is being sought based on no more than speculation. (See CCSF's OBM at pp. 38-39, 42-43.) The prosecution's motion in this case, like those granted by the Superior Court over the preceding three-year period, more than satisfies the showing required under *Ritchie* and this Court's decisions in *Brandon* and *Santa Cruz*, and provides the trial court with adequate information to make a *Brady* materiality determination. It sets forth the facts of the case and the charges against the defendant; it describes the role of the officers in the prosecution's case and explains why they are necessary and essential witnesses; and it reports the Police Department's representation that it has identified material in the officers' personnel files that may be subject to disclosure under *Brady*. Thus, the prosecutor explains that the information may be material under *Brady* because it could impeach a necessary witness or lead to evidence exonerating the defendant. (1 App., tab 5, at pp. 115-117; see *Abatti*, *supra*, 112 Cal.App.4th at p. 52 [impeachment of a prosecution witness can make the difference between acquittal and conviction].) And just as the trial court in *Abatti* was asked to review only the potentially relevant documents, under the Bureau Order procedure, only the potential *Brady* material in the personnel file is submitted to the trial court for review.

C. A Trial Court May Not Refuse to Review Documents In Camera on the Ground that It Imposes a Burden on the Court

Respondent objects to the Bureau Order procedure on the ground that in camera review places a burden on the court at a time of budget cuts and staffing reductions. (Return at pp. 2-4.) But as the Court of Appeal

explained, budgetary issues are not relevant to the legal issues presented by this case. (*Johnson*, *supra*, 228 Cal.App.4th at p. 1062, fn. 8.) Once the threshold showing has been met, the trial court's obligation to conduct the review is of constitutional dimension, and cannot be avoided on the ground that it consumes judicial resources. (*Love*, *supra*, 57 F.3d at p. 1315 ["The constitutional obligation imposed by *Ritchie* is one imposed upon the state, which means upon the judge as well as all other state actors involved in the process of insuring *in camera* inspection of evidence sufficiently shown, under *Ritchie*, to be subject to that inspection."].)

Trial courts are regularly called upon to review documents in camera that the Legislature has determined are entitled to confidential treatment, including in the context of *Brady* disclosure. Indeed, although the Court of Appeal incorrectly construed Section 832.7(a) to allow prosecutorial access for *Brady* purposes, it found that the statutory language clearly required in camera review before any disclosure may be made to the defendant. (*Johnson*, *supra*, 228 Cal.App.4th at pp. 1087-1091.) Reaching the same conclusion with respect to juvenile records—where the statute allows access by the district attorney without restriction (see Welf. & Inst. Code, § 827, subd. (a)(1)(B))—the court in *J.E.* held that the trial court should bypass the prosecutor and make the disclosure decision in the first instance. (*J.E.*, *supra*, 223 Cal.App.4th at pp. 1338-1339.)

Because disclosure through in camera review satisfies a defendant's constitutional right to receive exculpatory information, the Legislature's policy decision to protect a category of confidential records by requiring the oversight of a neutral arbiter is a legitimate exercise of its authority that must be respected by the courts. (See CCSF's OBM at pp. 34-35.) The proper forum for the trial court's concerns about the administrative burden

such review places on it is the legislative process, not this appellate proceeding.

III. THE POLICE DEPARTMENT TAKES NO POSITION ON JOHNSON'S PREFERENCE THAT THE PROSECUTION BRING THE MOTION

This Court asked the parties to address whether the prosecution may satisfy its *Brady* obligation by simply informing the defense of what the police department has informed it. In our opening brief, we answered that question in the affirmative, with the qualification that, if the defense otherwise lacks the information, the prosecution may also need to advise the defense that the officer in question will play an essential role in the prosecution's case. This answer follows from the general rule that there is no *Brady* suppression when the government furnishes the defense with notice of the existence of potential exculpatory information and an opportunity to seek it out. (See CCSF's OBM, at pp. 40-41.)

Johnson does not dispute this authority, but argues that the burden of filing the motion, as a matter of policy and fairness, should rest with the prosecution, largely on the grounds that compliance with *Brady* is the prosecution's obligation and that Johnson believes the district attorney and the police will work cooperatively to ensure the disclosure of material evidence. (AB at pp. 11-12.) Although a defendant would be entitled to in camera review upon a proper threshold showing, plainly the Police Department has no objection to the filing of the motion by the district attorney; the Bureau Order contemplates that the prosecution will file the motion.

Johnson objects to Petitioners' citation to *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, but his argument is principally that the court's distinction between the administrative and investigatory

capacities of the California Department of Corrections does not support a position that the prosecution has no *Brady* obligation with respect to information in peace officer personnel files. (AB at pp. 13-14.) That position is not asserted in the opening brief, however. Rather, the opening brief argued that the distinction drawn in *Barrett* supports a construction of Section 832.7(a) that protects peace officer personnel records against routine prosecutorial access: They are records maintained by the Police Department in its administrative capacity, and are not created in connection with the investigation of the defendant. Johnson does not dispute that construction of the statute, and he supports the Bureau Order procedure, which recognizes that the disclosure of *Brady* information in peace officer personnel records, like other kinds of confidential records, is properly obtained through a trial court's in camera review.

Whatever disagreements we may have with some of his arguments, however, ultimately the Police Department takes no position on Johnson's preference that the prosecution bring the motion, as contemplated by the Bureau Order procedure.

CONCLUSION

The Bureau Order procedure ensures the disclosure of *Brady* material to criminal defendants while at the same time protecting peace officers' privacy interests in their personnel records—a protection established by the Legislature almost four decades ago and repeatedly affirmed in the case law. The procedure has earned the support of the Police Department, the District Attorney, and the Public Defender. It should be upheld by this Court as a faithful implementation of Section 832.7(a) and the rights conferred by *Brady* and its progeny.

Dated: March 2, 2015

DENNIS J. HERRERA
City Attorney
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 5,352 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 2, 2015.

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PROOF OF SERVICE

I, HOLLY CHIN, declare as follows:

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

On March 2, 2015, I served the following document(s):

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

on the following persons at the locations specified:

[PLEASE SEE ATTACHED SERVICE LIST]

in the manner indicated below:

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

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

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

Executed March 2, 2015, at San Francisco, California.

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