TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 12-401
of	:	October 13, 2015
KAMALA D. HARRIS Attorney General	:	
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THE HONORABLE GREGORY D. TOTTEN, DISTRICT ATTORNEY OF VENTURA COUNTY, has requested an opinion on the following questions:

1. Does Penal Code section 832.7, subdivision (a), authorize a district attorney, for the purpose of complying with the United States Supreme Court's ruling in *Brady v. Maryland*, to directly review the personnel files of peace officers who will or are expected to be prosecution witnesses?

2. To facilitate compliance with *Brady v. Maryland*, may the California Highway Patrol lawfully release to the district attorney's office the names of officers against whom findings of dishonesty, moral turpitude, or bias have been sustained, and the dates of the earliest such conduct?

CONCLUSIONS

1. Penal Code section 832.7, subdivision (a), does not authorize a district attorney, for the purpose of complying with the United States Supreme Court's ruling in *Brady v. Maryland*, to directly review the personnel files of peace officers who will or are expected to be prosecution witnesses.

2. To facilitate compliance with *Brady v. Maryland*, the California Highway Patrol may lawfully release to the district attorney's office the names of officers against whom findings of dishonesty, moral turpitude, or bias have been sustained, and the dates of the earliest such conduct.

ANALYSIS

Introduction

In the landmark case of *Brady v. Maryland*,[1] the United States Supreme Court held that due process requires a prosecutor to disclose material evidence that is favorable to a defendant's case. The requester of this legal opinion and the California District Attorneys Association (CDAA) have proposed a policy to facilitate compliance with the prosecutor's *Brady* obligations when an officer of the California Highway Patrol (CHP) is expected to testify as a witness. The proposed policy calls for CHP to provide to the district attorney a list of names of officers who have sustained findings of misconduct against them that reflect moral turpitude, untruthfulness, or bias within the preceding five years (a "*Brady* list").[2] The CHP argues that the proposed policy is invalid under Penal Code section 832.7, subdivision (a), which provides that peace officer personnel records are confidential and may not be disclosed without a court order.[3]

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[1] *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

[2] Throughout this opinion, the phrase "*Brady* list" refers to the names of officers who have sustained findings of misconduct against them that reflect moral turpitude, untruthfulness, or bias within the preceding five years, and the dates of the earliest misconduct. The potential ramifications of other kinds of lists or policies are beyond the scope of this opinion.

[3] Penal Code section 832.7, subdivision (a) (hereafter 832.7(a)) provides:

> Peace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. This section shall not apply to investigations or proceedings concerning the conduct of peace

Since these questions were proffered to us, the California Supreme Court issued an opinion in *People v. Superior Court (Johnson)*,[4] which squarely considered and decided our first question. There, the Court held that "the prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases. Rather, it must follow the same procedures that apply to criminal defendants, i.e., make a *Pitchess*[5] motion, in order to seek information in those records."[6]

The issue raised in our second question was touched on, but not squarely decided, in the *Johnson* opinion. The Court plainly described,[7] and approved of,[8] a policy substantially similar to the one we consider here, but did not set out legal reasoning to support that approval. We believe the Supreme Court's approval of the policy was logically necessary to its decision, and we therefore regard the *Johnson* decision as good authority for the proposition that such a policy is legally valid. We now explicitly find that Penal Code section 832.7(a) does not preclude CHP from providing *Brady* list information to a district attorney for purposes of facilitating *Brady* compliance. We recognize, however, that this issue continues to be contentious both legally and as a policy matter. In the interest of bringing additional clarity to the situation, we explore the legal framework for this question, and explain the reasons for our conclusion in detail.

Brady v. Maryland

Brady v. Maryland holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[9] The Supreme Court later extended *Brady* to impose a duty on prosecutors

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officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office.

[4] *People v. Superior Court* (*Johnson*) (2015) 61 Cal.4th 696 (*Johnson*).

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

[6] *Id.* at p. 705.

[7] *Id.* at pp. 706-707, and Appendix.

[8] *Id.* at p. 721 ("In this case, the police department has laudably established procedures to streamline the *Pitchess/Brady* process.")

[9] *Brady*, *supra*, 373 U.S. 83 at p. 87. For purposes of the *Brady* rule, "suppression," "withholding," and "failure to disclose" all mean the same thing. (See *Benn v. Lambert* (9th Cir. 2002) 283 F.3d 1040, 1053.)

to volunteer exculpatory matter to the defense even when no request is made,[10] and that exculpatory matter includes impeachment evidence, such as evidence that bears on the credibility of a government witness.[11] Evidence is "material" for purposes of *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[12]

The *Brady* rule seeks to ensure that criminal proceedings are fair[13] and that prosecutors are faithful to the state's overriding interest that justice be done.[14] Whether intentional or inadvertent, *Brady* violations can have serious consequences, such as reversal of the criminal conviction and remand for a new trial,[15] or modification of the judgment.[16]

The prosecution's *Brady* obligation extends beyond evidence in the prosecutor's actual possession. Rather, the duty "applies to evidence the prosecutor, or the prosecution team, knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel."[17] Thus, "the

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[10] *United States v. Agurs* (1976) 427 U.S. 97, 107 (*Agurs*); accord, *Strickler v. Greene* (1999) 527 U.S. 263, 280; *In re Brown* (1998) 17 Cal.4th 873, 879 (*Brown*); *City of Los Angeles v. Superior Court* (*Brandon*) (2002) 29 Cal.4th 1, 8 (*Brandon*).

[11] *Giglio v. United States* (1972) 405 U.S. 150, 153-154 (*Giglio*); accord, *United States v. Bagley* (1985) 473 U.S. 667, 676 (*Bagley*); *In re Sassounian* (1995) 9 Cal.4th 535, 544 ("Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses"). Impeachment evidence is sometimes referred to as "*Giglio* evidence."

[12] *Bagley*, *supra*, 473 U.S. at p. 682.

[13] *Brady*, *supra*, 373 U.S. at p. 87.

[14] *Agurs*, *supra*, 427 U.S. at p. 111; accord, *In re Ferguson* (1971) 5 Cal.3d 525, 531-532 (*Ferguson*) (prosecutor's duty is not to obtain convictions, but to fully and fairly present material evidence); *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378 (prosecutors have special obligation to promote justice and ascertain truth).

[15] See, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 421-422, 454 (*Kyles*); *Giglio*, *supra*, 405 U.S. at pp. 154-155; *Ferguson*, *supra*, 5 Cal.3d at p. 535; *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1463, 1482-1483.

[16] See, e.g., *In re Bacigalupo* (2012) 55 Cal.4th 312, 336; *In re Miranda* (2008) 43 Cal.4th 541, 582; *Brown*, *supra*, 17 Cal.4th at p. 891.

[17] *People v. Jordan* (2003) 108 Cal.App.4th 349, 358 (*Jordan*); accord, *Brown*, *supra*, 17 Cal.4th at p. 879 (noting that courts have declined to distinguish between different agencies in same jurisdiction).

individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[18] Indeed, the prosecutor is held accountable for evidence "known *only* to police investigators and not to the prosecutor,"[19] and knowledge of such evidence is imputed to the prosecution.[20] As our state Supreme Court has observed, a contrary rule would enable the prosecutor to avoid the disclosure of exculpatory evidence simply by leaving the evidence in the hands of a fellow agency.[21] For this and other reasons, it may often be advisable for public agencies to establish procedures to facilitate the communication of material information to prosecutors.

Investigative and law enforcement officers frequently appear as prosecution witnesses in criminal trials—and, when they do, the defendant may seek to call their credibility into question. Impeachment material might arise, for example, from records of citizen complaints or internal investigations of conduct involving bias, excessive force, dishonesty, or moral turpitude.[22] In California, citizen complaints against a peace officer must usually be investigated, and any reports or findings relating to them retained for a period of at least five years either in the officer's general personnel file or in a separate file designated by the employing agency.[23] Records of this nature are generally of great interest to the defense, and may be subject to disclosure under *Brady*.[24] However, in California, peace officer personnel records are conditionally privileged, and their

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[18] *Kyles*, *supra*, 514 U.S. at p. 437; accord, *People v. Salazar* (2005) 35 Cal.4th 1031, 1042; *People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1315 (*Barrett*).

[19] *Kyles*, *supra*, 514 U.S. at p. 438, italics added; accord, *Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-870 (*Youngblood*) (*Brady* claim presented where state trooper read, and ordered destruction of, note written by victims that contradicted their testimony and supported defense); *Brown*, *supra*, 17 Cal.4th at p. 882 (finding *Brady* violation where favorable crime lab results not provided either to defense or to prosecutor; prosecutor had affirmative duty of inquiry).

[20] *Brown*, *supra*, 17 Cal.4th at p. 879 (prosecutor presumed to have knowledge of all information gathered in connection with investigation).

[21] *Ibid*.

[22] "Moral turpitude" is conduct that is contrary to justice, honesty, or morality (Black's Law Dict. (10th ed. 2014) p. 1163, col. 1), and may also refer to a general "readiness to do evil" (*People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24).

[23] Pen. Code, § 832.5, subds. (a)(1), (b).

[24] *People v. Gaines* (2009) 46 Cal.4th 172, 184 (*Gaines*) (*Brady* duty of disclosure extends to evidence that could impeach peace officers); *Jordan*, *supra*, 108 Cal.App.4th at p. 362 (sustained citizen complaints of officer misconduct should be disclosed under *Brady*).

discovery and disclosure is restricted under the state's *Pitchess* scheme, to which we now turn.

Pitchess v. Superior Court and the *Pitchess* statutory scheme

In the 1974 case of *Pitchess v. Superior Court*, the California Supreme Court held that a criminal defendant, upon a showing of good cause, has the right to discover citizens' complaints in a peace officer's personnel file in order to "facilitate the ascertainment of the facts and a fair trial."[25] However, the Court also concluded that the defendant's right to discovery is not absolute, and must be balanced against the "official information" privilege set out in Evidence Code section 1040, subdivision (b)(2), which permits a public entity to refuse to disclose information if the government's interest in keeping the information confidential outweighs the individual's interest in its disclosure.[26]

Four years after *Pitchess* was decided, the Legislature established a statutory scheme specifically governing the discovery of information from peace officers' personnel files. The provisions are set forth in Penal Code sections 832.5, 832.7, and 832.8, as well as Evidence Code sections 1043 through 1047.[27] The scheme codifies certain aspects of the *Pitchess* decision, but also supersedes that decision.[28] Motions brought under this statutory framework are still commonly referred to as "*Pitchess* motions."

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[25] *Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 536.

[26] *Id*. at pp. 538-540.

[27] The 1978 legislation added subdivision (b), the five-year retention requirement for complaints, to Penal Code section 832.5, and added Penal Code sections 832.7 and 832.8, and Evidence Code sections 1043-1045. (Stats. 1978, ch. 630, §§ 1-6, pp. 2081-2084.) The Legislature added Evidence Code sections 1046 and 1047 in 1985. (Stats. 1985, ch. 539, §§ 1-2, pp. 1917-1918.)

[28] In the aftermath of *Pitchess*, allegations arose that law enforcement agencies were shredding officer personnel files to prevent their discovery, and that defendants were engaging in unfocused "fishing expeditions" to find damaging information in the files. The Legislature enacted the statutory *Pitchess* scheme to prevent abuses on both sides, and to provide trial courts with uniform standards and procedures. (See Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1436 (1977-1978 Reg. Sess.) as amended Apr. 3, 1978, p. 7; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 93-94 (*City of Santa Cruz*); *San Francisco Police Officers' Assn. v. Superior Court* (1988) 202 Cal.App.3d 183, 189-190.)

The statutory *Pitchess* process reflects a strong policy interest in maintaining confidentiality for the personnel records of investigative and law enforcement officers.[29] In accordance with this policy, Penal Code section 832.7(a) provides that peace officer personnel records "are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."[30] The rule of confidentiality is not, however, absolute. In particular, it does not apply at all to "investigations or proceedings concerning the conduct of peace officers or custodial officers, or an agency or department that employs those officers, conducted by a grand jury, a district attorney's office, or the Attorney General's office."[31] Furthermore, when the confidentiality rule does apply, it must be balanced against countervailing interests, such as a criminal defendant's right and need to marshal a defense.

Evidence Code section 1043 outlines a process for the orderly balancing of these conflicting interests. It provides that a party seeking to obtain peace officer personnel information must file a written motion describing the type of information sought, and establishing "good cause" for the disclosure.[32] To show good cause, the defendant must

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[29] *People v. Mooc* (2001) 26 Cal.4th 1216, 1227 (*Mooc*).

[30] The term "personnel records" is broadly defined and includes personal data, employment history, records of discipline, investigations of complaints against the officer, and any other information the disclosure of which would constitute an invasion of the officer's privacy. (Pen. Code, § 832.8.) The privilege established by Penal Code section 832.7 is held jointly by the individual peace officer and his or her employing entity. (*Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401; *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 57 (*Abatti*).)

[31] Pen. Code, § 832.7(a).

[32] In full, Evidence Code section 1043 provides:

> (a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.
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> (b) The motion shall include all of the following:
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> (1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial

propose a defense to the charges, articulate how the information sought may lead to relevant evidence or itself be admissible evidence that would support the proposed defense, and describe a plausible factual scenario supporting the claim of officer misconduct.[33] The information sought must be requested with sufficient specificity to prevent the defendant from engaging in a "fishing expedition," but the affidavit may be made on information and belief and need not be based on personal knowledge.[34] The required showing of good cause has been termed a "relatively low threshold for discovery."[35]

If good cause is shown, the custodian of the records sought must bring to the trial court all documents potentially relevant to the defendant's motion.[36] Pursuant to Evidence Code section 1045, the court then reviews the information in camera, out of the presence of anyone but the privilege holder and any other persons the holder is willing to

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> officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.
>
> (2) A description of the type of records or information sought.
>
> (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.
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> (c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records.

[33] *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021, 1024-1025 (*Warrick*); *Gaines*, *supra*, 46 Cal.4th at p. 179. The required scenario is one "that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Warrick*, *supra*, 35 Cal.4th at p. 1026.)

[34] *City of Santa Cruz*, *supra*, 49 Cal.3d at pp. 85-86; accord, *Mooc*, *supra*, 26 Cal.4th at p. 1226.

[35] *City of Santa Cruz*, *supra*, 49 Cal.3d at p. 83; accord, *Warrick*, *supra*, 35 Cal.4th at p. 1019.

[36] *Mooc*, *supra*, 26 Cal.4th at p. 1226 (citation omitted).

have present.[37] The trial court should then permit disclosure to the defendant of the information relevant to the subject matter involved in the pending litigation,[38] and make any further orders that justice requires in order to protect the officer or agency from unnecessary annoyance, embarrassment, or oppression.[39] As "a further safeguard," courts generally need not order the disclosure of the actual copies of records from peace officer personnel files, but may order instead that the agency reveal particular information (such as names, addresses, and phone numbers of witnesses, and dates of incidents) sufficient to enable the defense to conduct its own investigation.[40]

The *Pitchess* scheme takes precedence over more general civil and criminal discovery provisions,[41] as well as the public disclosure provisions of the California Public Records Act.[42] A number of cases state that the *Pitchess* procedure is the sole means by which citizen complaints or other confidential information in peace officer personnel files may be obtained.[43] A *Pitchess* motion is typically filed by the defendant; however, the

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[37] Evid. Code, § 1045, subd. (b).

[38] Evid. Code, § 1045, subd. (a); *Mooc*, *supra*, 26 Cal.4th at p. 1226; *Warrick*, *supra*, 35 Cal.4th at p. 1019; *Gaines*, *supra*, 46 Cal.4th at p. 179.

[39] Evid. Code, § 1045, subd. (d). In addition, the court must order that the disclosed records may not be used for any purpose other than a court proceeding pursuant to applicable law. (Evid. Code, § 1045, subd. (e).) Our Supreme Court has interpreted this provision to restrict use of the disclosed information to the proceeding in which the information was sought. (See *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1042 (*Alford*).)

[40] *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1423 (good cause for disclosure of actual records does not exist if party seeking discovery can obtain desired information from witnesses). If the disclosed information proves insufficient, a supplemental motion may be filed. (*Rezek v. Superior Court* (2012) 206 Cal.App.4th 633, 641.)

[41] *Davis v. City of Sacramento*, *supra*, 24 Cal.App.4th at p. 400; *Albritton v. Superior Court* (1990) 225 Cal.App.3d 961, 963 (reciprocal discovery provisions enacted by Proposition 115 do not "abrogate or repeal the express statutory discovery authorized by Evidence Code sections 1043-1045" [citing Pen. Code, § 1054, subd. (e)]).

[42] Gov. Code, § 6254, subd. (k); *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 67-68.

[43] E.g., *Jordan*, *supra*, 108 Cal.App.4th at p. 360; *Brandon*, *supra*, 29 Cal.4th at p. 21; *Abatti*, *supra*, 112 Cal.App.4th at p. 57; *Garden Grove Police Dept. v. Superior Court* (2001) 89 Cal.App.4th 430, 432 (*Garden Grove Police Dept.*); *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1024; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1472 (*Gutierrez*).

prosecution may also "seek *Pitchess* disclosure by complying with the procedure set forth in Evidence Code sections 1043 and 1045."[44]

Interplay between *Brady* and *Pitchess*

There is plainly some overlap between *Brady* and *Pitchess* principles. For example, evidence that impeaches a peace officer-witness's credibility may be subject to disclosure under *Brady*,[45] while a *Pitchess* motion may be used to discover information to impeach a peace officer's credibility.[46] But *Brady* and *Pitchess* are not perfectly congruent. *Pitchess*, a state-created procedural mechanism for criminal defense discovery, must be viewed against the larger background of the People's *Brady* obligations, which have their foundation in the United States Constitution and cannot be defeated by state statutes.[47] The prosecution's constitutional obligation to disclose material exculpatory evidence is distinct and independent from the defendant's statutory right to obtain discovery from an officer's confidential files.[48]

In *City of Los Angeles v. Superior Court* (*Brandon*), the California Supreme Court noted that *Brady* and the *Pitchess* procedures employ different standards of materiality for disclosure:

> Unlike the [United State's Supreme Court's] constitutional materiality standard in *Brady*, which tests whether evidence is material to the fairness of trial, a defendant seeking *Pitchess* disclosure . . . need only show that the information sought is material "to the subject matter involved in the pending litigation." Because *Brady*'s constitutional materiality standard is narrower than the *Pitchess* requirements, any citizen complaint that meets *Brady*'s test of materiality necessarily meets the relevance standard for disclosure under *Pitchess*.[49]

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[44] *Alford*, *supra*, 29 Cal.4th at p. 1046.

[45] *Gaines*, *supra*, 46 Cal.4th at p. 184.

[46] *People v. Hustead* (1999) 74 Cal.App.4th 410, 417; accord, *Garden Grove Police Dept.*, *supra*, 89 Cal.App.4th at p. 433; *Gaines*, *supra*, 46 Cal.4th at p. 184.

[47] *Mooc*, *supra*, 26 Cal.4th at p. 1225.

[48] *People v.* Davis (2014) 226 Cal.App.4th 1353, 1366.

[49] *Brandon*, *supra*, 29 Cal.4th at p. 10 (quoting Evid. Code, § 1043, subd. (b)(3)). As the Court of Appeal has observed with regard to the range of *materials* covered, "*Brady* discovery is broader than *Pitchess* discovery . . . in the sense that the statutory *Pitchess* scheme applies only to peace and custodial officer records, whereas *Brady*'s mandates apply to all exculpatory or impeaching evidence, whether or not related to the conduct or

Conversely, statutory constraints on the *Pitchess* procedures should not be construed to prohibit the disclosure of *Brady* information.[50]

The Proposed Policy

The California Highway Patrol is the state agency primarily responsible for enforcing laws regulating the operation of motor vehicles on state highways, and for investigating traffic accidents on state highways.[51] Most members of the CHP are peace officers whose authority extends to any place in the state.[52] Testifying in criminal cases is a required function of CHP officers,[53] and a significant number of cases prosecuted by district attorneys involve CHP officers who are likely to be called as trial witnesses.

The California District Attorneys Association has proposed an "External Brady Policy" (the Policy) to govern the review of personnel files of CHP officer-witnesses for potential *Brady* information.[54] The Policy is modeled on policies already in use by a

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records of officers." (*Gutierrez*, *supra*, 112 Cal.App.4th at p. 1474, fn. 6.)

[50] For example, the *Pitchess* statutory scheme prohibits the disclosure of complaints concerning peace officer conduct that occurred more than five years before the event or transaction that is the subject of the litigation (Evid. Code, § 1045, subd. (b)(1)), whereas *Brady* disclosure is not so limited. Thus a citizen complaint older than five years may be subject to disclosure under *Brady*, notwithstanding the five-year statutory limitation. Some law enforcement agencies adopt a practice of routinely destroying citizen complaints after five years. *Brandon* held that such destruction does not violate a defendant's right to due process unless a complaint's exculpatory value to a particular criminal case is readily apparent before its destruction, and the agency acts in bad faith, but also held that if a prosecutor discovers facts underlying an old complaint of officer misconduct, the records of which have been destroyed, the prosecutor still has a duty under *Brady* to seek and assess such information and to disclose it if it is constitutionally material. (*Brandon*, *supra*, 29 Cal.4th at p. 11-12.) This office has previously noted that Penal Code section 832.5, subdivision (b), allows for a records retention period of longer than five years, and that, "[a]s a matter of prudent policy, a law enforcement agency may determine that a longer period would promote greater public confidence in its procedures and practices." (83 Ops.Cal.Atty.Gen. 103, 109 (2000).)

[51] Veh. Code, § 2400, subds. (b), (d), (e). The CHP also provides protection to state property and to state employees, officials, and judges. (Veh. Code § 2400, subds. (g)-(i).)

[52] Pen. Code, § 830.2, subd. (a); Veh. Code, § 2409.

[53] *Sullivan v. State Board of Control* (1985) 176 Cal.App.3d 1059, 1063.

[54] We here provide only an overview of the "Proposal for CHP/CDAA External Brady Policy," dated February 2, 2012, a full copy of which is on file with our office.

number of district attorneys' offices and law enforcement agencies.[55] Under the proposed Policy, a qualified representative of CHP would examine the files of CHP officers who have been the subject of internal investigations or complaints, and files of CHP officers who have been arrested, for the purpose of identifying (1) officers against whom there have been sustained findings of misconduct within the preceding five years that reflect moral turpitude, untruthfulness, or bias on the part of the officer; and (2) officers who have been convicted of a moral turpitude offense, or who are on probation for any offense, or have criminal charges pending against them.[56]

Based on these CHP file examinations, a secure database or list would be created containing the names of the officers who have sustained findings of misconduct against them that reflect moral turpitude, untruthfulness, or bias, and, for each officer, the earliest date of such misconduct.[57] The conduct itself would not be described. Prosecutors would have access to this *Brady* list[58] and could search it for the names of officers who have been subpoenaed to testify in upcoming criminal trials.[59] Officers whose names are placed on the *Brady* list would be so informed, and would have the opportunity to administratively appeal the inclusion of their names on the list.

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[55] Each district attorney would decide whether to implement a policy of the sort contemplated here, were CHP to agree to it. We are informed that some district attorneys have implemented, or may wish to implement, various kinds of *Brady* policies. An examination of other specific policies is beyond the scope of this opinion, nor do we endorse any specific policy in this opinion.

[56] The Policy states that "[f]urther discussion is appropriate on the issue of whether an arrest that does not lead to the filing of criminal charges or conviction must be disclosed."

[57] As explained by CDAA, the earliest date of misconduct would be used to identify which cases may be affected by the officer's misconduct. An officer's misconduct would not be considered relevant to the credibility of testimony given by the officer in cases that concluded before the conduct occurred. This is consistent with case law. (See *People v. Breaux* (1991) 1 Cal.4th 281, 312; *Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1068.)

[58] For purposes of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, §§ 3300-3313), a "*Brady* list" is defined as "any system, index, list, or other record containing the names of peace officers whose personnel files are likely to contain evidence of dishonesty or bias, which is maintained by a prosecutorial agency or office." (Gov. Code, § 3305.5, subd. (e).) These types of lists already exist in connection with some police departments.

[59] Under the Policy, only attorneys in a district attorney's office would have access to the *Brady* list, and only on an as-needed basis.

If an officer whose name was on the *Brady* list were expected to be a witness in a criminal case, the district attorney would file a so-called *Pitchess/Brady* motion under Evidence Code section 1043, with notice to both the CHP and defense counsel. A trial court would conduct an in camera review of the relevant records in order to determine what information should be disclosed and to issue any appropriate protective orders.[60] The requester describes this as a "modified" *Pitchess* procedure, in that CHP would be screening its officers' files, good cause for the section 1043 motion would be established by the prosecutor's declaration that the personnel file of a material officer-witness may contain *Brady* material, and the court would review the files with *Brady* standards in mind.

CHP maintains that it may not lawfully release to a district attorney the names of officers who have sustained findings of misconduct against them that reflect moral turpitude, untruthfulness, or bias, and offers a variety of arguments in support of its position. As a general proposition, CHP's argument is undermined by *Johnson*, which—although it did not spell out the bases for its assumption—plainly and necessarily approved a *Brady* procedure like this one.[61] The CHP also arrays a series of specific legal objections to the policy, which we address in turn.

The CHP's first argument is that it is not part of the "prosecution team" for *Brady* purposes. While acknowledging that individual officers who conduct investigative or enforcement activities in a particular criminal matter are members of the prosecution team for that matter, CHP argues that CHP as a whole has a "hybrid status," and as such is not in a position to collect information from its personnel files and provide that information to prosecutors on a generalized basis.

"Hybrid status" is a term that was used to describe the California Department of Corrections[62] in *People v. Superior Court* (*Barrett*). In *Barrett*, the defendant was a prisoner who was charged with the murder of his cellmate. Prison officials had interviewed witnesses, prepared reports, and performed other investigative tasks in connection with the homicide.[63] During pretrial discovery, the trial court ordered the district attorney to produce various kinds of documents maintained by the prison, which the district attorney's office contended it had no obligation to produce.[64] As the *Barrett*

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[60] See Evid. Code, § 1045, subds. (d), (e).

[61] *Johnson*, *supra*, 61 Cal.4th at pp. 706-707, 721, and Appendix.

[62] The name of the department has since been changed to California Department of Corrections and Rehabilitation. (See Pen. Code, § 5000.)

[63] *Barrett*, *supra*, 80 Cal.App.4th at p. 1317.

[64] *Id*. at pp. 1310-1311.

opinion noted, the Department of Corrections "first and foremost supervises, manages and controls the state prisons."[65] The opinion concluded that the department had a hybrid status: it was part of the prosecution team with respect to its officers' investigative functions, but it was a third party (and not part of the prosecution team) with respect to its general responsibilities in operating a prison.[66] Because California's criminal discovery statutes apply only to parties,[67] the prosecutor was required to produce prison investigators' records concerning the homicide, but not other records kept in the regular course of running the prison.[68]

The CHP argues that its maintenance of personnel files is like the Department of Corrections' maintenance of administrative prison files, and therefore that CHP is not a part of the prosecution team with respect to such files. We disagree. The CHP is, first and foremost, a law enforcement agency, and its officers routinely act in an investigative or law enforcement capacity in connection with criminal prosecutions. At issue here are not CHP's records regarding its general operations, but its records regarding those peace officers whose routine activities result in criminal prosecutions.[69] We conclude that, when its officers act on the government's behalf or assist the government's case, both the officers and CHP itself are part of the prosecution team.[70]

The CHP further argues that a policy such as the one proposed improperly delegates the prosecution's *Brady* duty to CHP. But, when its officers are part of a prosecution team, the law already imposes such a duty on CHP. Although the prosecutor must bear the consequences of "any negligence on the part of other agencies acting in its behalf,"[71] *Brady* and its progeny "impose obligations not only on the prosecutor, but on the government as a whole."[72]

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[65] *Id*. at p. 1317.

[66] *Ibid*.

[67] Pen. Code, § 1054.1 et seq.

[68] *Barrett*, *supra*, 80 Cal.App.4th at pp. 1317-1318.

[69] See *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1108-1110 (rejecting city's argument that city had hybrid status with respect to personnel records of its peace officers).

[70] In identifying the prosecution team, the "important determination is whether the person or agency has been 'acting on the government's behalf' [citation] or 'assisting the government's case' [citation]." (*Jordan*, *supra*, 108 Cal.App.4th at p. 358; accord, *Youngblood*, *supra*, 547 U.S. at pp. 869-870; *Kyles*, *supra*, 514 U.S. at p. 437; *People v. Superior Court* (*Meraz*) (2008) 163 Cal.App.4th 28, 47-48.)

[71] *Brown*, *supra*, 17 Cal.4th at p. 881; see also *Kyles*, *supra*, 514 U.S. at p. 438.

[72] *United States v. Blanco* (9th Cir. 2004) 392 F.3d 382, 394; see also *United States v.*

Relatedly, CHP asserts that it is not qualified to determine what material in its officers' files is relevant for *Brady* purposes, because it lacks the perspective on the case that such a determination requires. To be sure, some courts have expressed reservations about the wisdom of protocols that rely too heavily on individual officers or law enforcement agencies to identify *Brady* material.[73] In many cases the district attorney, who is in the best position to make *Brady* determinations in a particular case, will be able to tell a law enforcement agency specifically what types of documents to look for, but we do not believe that a policy would necessarily be unsound in asking a law enforcement agency to perform an initial review of its personnel files for the names of officers who have sustained findings of misconduct reflecting moral turpitude, untruthfulness, or bias. The initial review would consist only of a factual inquiry as to whether certain information exists, and would not require the law enforcement agency to make legal judgments about what to disclose to a defendant.

Screening procedures similar to the one proposed here have proved workable in other arenas. Most notably, of course, the *Johnson* decision approved a policy of this very type.[74] And, in *United States v. Jennings*, the Ninth Circuit Court of Appeals upheld a United States Department of Justice policy that called for federal law enforcement agencies to screen their officers' personnel files for potential *Brady* material.[75] We understand that a number of police departments employ policies similar to the one under consideration here. In light of these ongoing practices, it seems evident that a law enforcement agency can indeed be capable of facilitating compliance with *Brady* by screening its personnel files for certain categories of information, without putting the law enforcement agency in the untenable position of making legal judgments about what specific information to disclose to a defendant.

Finally, the CHP argues that the compilation and disclosure of *Brady* list information would violate officers' privacy rights under the Public Safety Officers Procedural Bill of Rights Act (POBRA),[76] a labor-relations law that provides certain protections for law enforcement officers who are the subjects of internal investigations.[77]

Zuno-Arce (9th Cir. 1995) 44 F.3d 1420, 1427 ("it is the government's, not just the prosecutor's, conduct which may give rise to a *Brady* violation").

[73] See, e.g., *United States v. Alvarez* (9th Cir. 1996) 86 F.3d 901, 905; *Jean v. Collins* (4th Cir. 2000) 221 F.3d 656, 660.

[74] *Johnson*, *supra*, 61 Cal.4th at pp. 706-707, and Appendix.

[75] *United States v. Jennings* (9th Cir. 1992) 960 F.2d 1488, 1492.

[76] Gov. Code, §§ 3300-3313.

[77] *Van Winkle v. County of Ventura* (2007) 158 Cal.App.4th 492, 494, 497; see also *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1305.

We disagree. While POBRA does contain some privacy protections,[78] it expressly contemplates that an officer's name may be placed on a *Brady* list or otherwise disclosed pursuant to *Brady*.[79] We conclude that, so long as CHP complies with POBRA's procedural requirements, a policy that asks the CHP to perform an initial file review and disclose *Brady* list information does not violate POBRA.[80]

Summary of Conclusions

Penal Code section 832.7, subdivision (a), does not authorize a district attorney, for the purpose of complying with *Brady v. Maryland*, to directly review the personnel files of peace officers who will or are expected to be prosecution witnesses

To facilitate compliance with *Brady v. Maryland*, the California Highway Patrol may lawfully release to the district attorney's office the names of officers against whom findings of dishonesty, moral turpitude, or bias have been sustained, along with the date of the earliest such conduct.

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[78] E.g., Gov. Code, § 3308 (personal financial information); Gov. Code, § 3303, subd. (e) (home address, photograph).

[79] See Gov. Code, § 3305.5, subds. (a)-(e).

[80] POBRA provides that a peace officer has the right to examine his or her personnel records, and to receive notice of, and the opportunity to respond to, adverse comments in those records. (Gov. Code, §§ 3305, 3306, 3306.5.)